

## Professional Exposures

Professional exposure recognition starts with understanding the scope of services being provided on a project and how the Contractor is being defined by the project parties and the project agreement. The following are definitions of services and roles that should help determine the liability exposure a contractor may be viewed as assuming on a project.

### Definitions

#### General Contractor

A contractor that typically assumes responsibility for overseeing that all project work is performed and to whom subcontractors on the same project are responsible. General contractors typically seek to contract with project owners to perform all project work including but not limited to the construction, electrical, mechanical and plumbing. Accordingly, the general contractor may subcontract up to 95% of the work to other entities. The general contractor is not responsible for design of the project unless the general contractor assumes liability under a design/build contract or change order or advertises that it has design professionals on staff and proceeds to perform design, value engineering and/or constructability review services. This is the traditional role for a contractor and the performance of construction, scheduling, and subcontractor supervision are not generally viewed as professional in nature.

#### Construction Manager Agency

An entity that directs the process of construction as an agent of the owner. As an agent of the owner, the construction manager is on the project site to represent the interests of the project owner. The construction manager may or may not be responsible for coordinating or scheduling the work of the general contractor and/or other contractors in a prime contract situation. That responsibility, along with others is defined by the parties' agreement. In agency arrangements, it is unlikely that a general contractor, who is also performing project work, will assume this role. As an agent of the owner, the project owner wants an impartial construction manager. Therefore, agency construction managers are typically firms that are not performing any other work on the site.

#### Construction Manager – At Risk

Any entity that directs the process of construction and assumes responsibility for all work performed at the project site. In this relationship, the entity, generally a general contractor will assume full professional responsibility for all aspects of the project except design. The at-risk construction manager will contract with all subcontractors and will be responsible for coordinating, scheduling and completing the work on time and budget. The at-risk construction manager does not represent the interest of the owner against another entity, but assures the project owner that the project will be completed on time and budget. At-risk construction managers often will enter guaranteed maximum price contracts which fix the cost of the construction manager will be paid for constructing the project. Under those agreements, the Construction Manager is also provided with a fee for performing management services. That fee is based upon a percentage of the cost of construction. It is this fee and the fact that the CM advertises themselves to be expert in managing a construction project that increases the professional liability even though the services are similar in nature to that of a GC.

### Design/Build Project Delivery Method

A method of construction where the contractor provides both the design and construction services to the project owner. Under the design/build project delivery method, the contractor usually teams with a design firm to design and construct the project. Occasionally, a contractor will have its own designers that will provide for the project's design. This occurs primarily where the design and installation of the mechanical systems are involved. For design/build projects, the contractor usually needs to joint venture, partner, or subcontract with a design firm who designs the project from the design concept prepared by the project owner. The contractor then contracts with all necessary subcontractors and constructs the project.

### **Professional Risk Exposure**

Each role and service carries with it potential professional liability exposure. While general contractors and construction managers are perceived to have the highest exposure to professional claims, subcontractors cannot consider themselves to be free from exposure. The professional exposure for all Contractors and Construction Managers can include, but is not limited to the following:

- **Schedules**  
Scheduling and coordinating work as a construction manager is a professional exposure. These services create exposure for the Contractor who assumes construction management duties; holds themselves as an expert in this area; or enters a separate agreement with the project owner to provide these services. These services can be viewed by courts of law as being professional in nature under those circumstances.
- **Subcontractors**  
Professional liability claims can arise where the general contractor or construction manager process subcontractor payments and over pay a subcontractor or subcontractors or interfere with the performance of the contractors or subcontractors work. In addition, subcontractors hired to address environmental problems at a site, are a specialty subcontractor that have the potential to impact a project schedule.
- **Value Engineering**  
Performance of value engineering services creates a potential professional exposure. Proposing a change that results in a defect during construction or additional cost may also generate a claim.
- **Constructibility Reviews**  
The review of plans and specifications for constructability can be considered a professional service. The Contractor who reviews the plans and specifications can be held professionally liable for any design defects that it may not discover; or if any part of the plans and specifications are later to be determined to be not constructible.
- **Quality assurance**  
Quality assurance inspections during a project can result in professional liability. In performing quality assurance inspections, a Contractor is ensuring the proper construction of the work and any failure of that work.
- **Design**  
Design work typically performed by an architect or engineer becomes the responsibility of the contractor in a contractor-lead design/build delivery system. A contractor also becomes involved with design liability when

performing constructability reviews, value engineering, and when making field changes to a design.

### Professional Claim Scenarios

The following are a sampling of professional liability claims that have been alleged against Contractors and, in some instances, adjudicated by a court of law.

**Construction Management** – General Contractor was hired to act as a construction manager and general contractor on a casino residence tower. The tower was estimated to be able to produce a gross income of \$45,000 per floor per week from rental income. Additionally, gambling gains from the residents of the rooms was estimated to be \$400,000 per floor per week. The completion date was Memorial Day. Due to scheduling errors committed by the General Contractor/ Construction Manager, the tower was completed 4 months behind schedule. The General Contractor was determined to be professionally liable for the delay and damages of \$1,750,000.

**Construction Management/Developer** – General Contractor was contracted by an airport to develop a retail and transportation center adjacent to the existing airport. The General Contractor agreed to schedule, coordinate and quality inspect the project. The project began to fall behind schedule and in order to make up time the General Contractor investigated whether the curing time of a parking structures cast-in-place slabs could be shortened. The study suggested that the time could be safely reduced. Accordingly, curing braces were removed sooner than originally recommended. The study proved to be in error when the fourth floor slab collapsed onto the third floor slab “pancaking” the entire structure. One (1) worker was killed and many more were injured. The General Contractor was held liable for all losses, multi-millions of dollars, under professional liability arguments.

**Construction Management** – Contractor entered an agreement whereby it assumed responsibility for supervising the work of all contractors on an office building project as a construction manager. The contractor failed to properly manage the work of all contractors which resulted in project cost overruns for the contractors and project owner, including but not limited to delays, overpayment to defunct contractors, interferences with contracts and business interruption. The contractor was held to be professionally liable for all costs resulting from the aforementioned failures.

**Constructability Review/Value Engineering** – Contractor was retained by the project owner to review prepared plans and specifications for constructability and perform a value engineering analysis. The project was a school. The contractor determined from the review that the HVAC system was undersized. The contractor recommended changes to the system which the project owner rejected due to cost. The system turned out to be under designed which caused mold to develop in the school. The school alleged that the Contractor was responsible for the mold because it had failed to properly warn the owner of the consequences of an under designed system. The Contractor was held to be partial liable for failing to warn and to properly document the performance of their services.