

ProNetwork News

Risk Management Tools for the Design Professional

James R. Case



James R. Case is a Member of Kerr, Russell and Weber, PLC. Mr. Case's practice is primarily in construction law, design professional malpractice, fidelity and surety law, and commercial law. He routinely represents contractors, design professionals, owners and sureties. Mr. Case also serves as an arbitrator and mediator in commercial and construction matters.

Mr. Case is a member of the Detroit and American Bar Associations, State Bar of Michigan, Surety Claims Institute, National Bond Claims Association and International Association of Defense Counsel.

Mr. Case is a graduate of the St. Johns University Law School where he graduated with honors. He received his undergraduate degree from Colgate University.

Mr. Case can be contacted at: jrc@krwlaw.com



Eric A. Moore, CIC, LIC
Moore Insurance Services, Inc.
emoore@mooreinsuranceservices.com
www.mooreinsuranceservices.com

Practical Tips for Avoiding the Pitfalls Associated with Construction Administration and Site Observation

Excerpted from an article by James R. Case of Kerr, Russell and Weber, PLC

Now that it's time to start a project, how do you keep it on track and satisfy the client while keeping an eye on your firm's bottom line? Here are some simple and practical tips you can apply today.

1. Manage Risk By Managing Client Expectations

Administering the contract for construction provides the opportunity to reduce problems, but it can also create additional obligations, real or perceived.

- Don't warrant or guarantee that plans and specifications are free from errors and omissions.
- Explain your role in correcting them as promptly and inexpensively as possible, and discuss budget contingencies.
- Compare your obligations in owner-prepared contracts with standard industry documents.
- Inform the owner that you do not manage any contractors' operations, nor warrant nor guarantee their work.
- Coordinate the scope of work in the design professional-owner contract with that required of the design professional in the owner-contractor agreement.

2. Educate Project Personnel On Their Roles

Before work begins, make sure that the project manager and the resident engineers, architects and project representatives understand their contractual roles.

- Hold weekly team meetings without the owner or contractor to explain required functions and boundaries, and to answer questions.
- Ensure that more experienced professionals mentor and monitor the less experienced.



This information is provided as a service of a/e ProNet, an international association of independent insurance brokers dedicated to serving the design profession since 1988. We are dedicated to representing the best interests of our design clients as a trusted and impartial source of information on professional liability insurance, risk management, loss prevention and continuing education. Please visit our website www.aepro.net.org for additional information.

ProNetwork News

Risk Management Tools for the Design Professional

Practical Tips for Avoiding the Pitfalls Associated with Construction Administration and Site Observation *Continued*

3. Control What You Can Control

- Before a Notice to Proceed is issued, see that governmental approvals are readily available.
 - Before work begins, see that a contractor schedule is submitted and approved.
 - Avoid schedules indicating that the contractor owns the float time or that it is the contractor's intent to complete early. If the contractor insists that it will complete early, advise the owner to notify the contractor that failure to complete early will not give rise to the contractor's ability to submit a claim.
 - The contractor's shop drawing/sample schedule should be approved by the design professional. Allot sufficient time to perform your analysis in the final submittal schedule.
 - Do not review shop drawings or submittals not called for by the specifications.
 - Return shop drawings in the time allotted.
 - If the shop drawing/submittal is the subject of a *prescriptive* specification, return it when acceptable with the notation "Approved," "Approved as Noted," "No Exceptions Taken" or another notation allowed by the contract. If the shop drawing/submittal is the subject of a *performance* specification, it can be reviewed for general conformance with design intent, and should be returned "For Information Only."
 - Neither direct nor control the contractor's means, methods, techniques or sequences of construction.
 - If the contractor wishes to change specified means and methods, explain the risks and benefits to the owner.
 - Explain that failure to agree to the contractor's request may lead to a claim for more time and/or money
 - Owners can usually demand assurances from a contractor who proposes to change means and methods. Inform the owner if such rights exist.
 - If the client refuses to make decisions, require written agreement with those you have made.
 - Establish and stick to a time period for responding to Requests For Information to avoid claims for delay against the owner, and ultimately against the design professional. Engage the owner if you believe the contractor is utilizing RFIs as a ploy for establishing a claim.
- Continue to review contractor schedules throughout the project.
 - See that revisions reflect actual construction progress.
 - If necessary, request recovery schedules.
 - Engage the owner, who can take measures to bring the contractor back on schedule.
 - Notify the owner if you observe defective or potentially defective work, and allow the owner to make the decision how to handle the situation.
 - If you have concerns about site safety, notify the contractor's superintendent and owner's representatives immediately, both verbally and in writing. Since most contracts only allow the owner to stop the work, in situations deemed critical, suggest verbally and in writing to the contractor and owner that serious consideration should be given to this option.

"If the client refuses to make decisions, require written agreement with those you have made."

- Unless otherwise specified, the design professional is the "Initial Decision Maker" with respect to the validity of claims. Many courts have decided that design professionals making a claim decision in "good faith," cannot be sued.
 - Remain neutral.
 - Make timely requests for additional information.
 - Do not rely solely on technical notice of claim deficiencies as the basis for a decision.
 - Do not transmit drafts to the client for input prior to rendering your decision.
 - Render decisions at least within the time prescribed by the contract.
- Prior to approving the first pay application, determine whether required contractor submittals such as insurance certificates, surety bonds and schedules have been received.
 - Review and reconcile a pencil copy of the application with the contractor.

ProNetwork News

Risk Management Tools for the Design Professional

Practical Tips for Avoiding the Pitfalls Associated with Construction Administration and Site Observation *Continued*

- Examine the status of the project to determine the percentage of completion, and if materials stored off site for which payment is sought have been provided and are properly insured.
- Review sworn statements and lien waivers to confirm that, at least according to the contractor, previous payments have been properly distributed

4. Communicate, Communicate, Communicate

Constant communication can prevent the "you never told me about that" line from cropping up if disputes develop.

- Invite the owner's representative to join weekly project meetings with the contractor and key trade contractors, and keep minutes.
- Send meeting minutes to the owner with a letter that points out key issues and invites questions.
- Hold and document separate meetings only with the owner to discuss project status, budget issues, claims and questions.

It is impossible to predict every situation that can arise during construction, but these tips are some of the most basic measures the design professional can employ to protect the firm's bottom line. Manage expectations, educate, control and communicate. And put it in writing. Following these guidelines will not eliminate risks, but it can certainly help to minimize them.



Moore Insurance Services is a member of a/e ProNet - <http://www.aepronet.org>. A national group of insurance agents/brokers specializing in providing risk management and insurance services to the design professional community. These services included risk management publications, contract language review tools, seminar materials and other useful information to help design professionals manage their risks.

Moore Insurance Services offers many professional liability and property & casualty insurance programs. Many of these programs are endorsed or commended by the professional associations and organizations that we support including: The American Institute of Architects (AIA), National Society of Professional Engineers (NSPE), American Council of Engineering Companies (ACEC), Michigan Association of Environmental Professionals (MAEP).