SITTING DUCKS:
A/E Liability Arising From Payment Certifications During Construction

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The construction phase pay certification process can be a minefield even with flawless and perfectly coordinated plans and specifications. As an A/E you are often at the center of a complex set of relationships. Your primary responsibility is to your client, usually the owner, but your role has an impact on others. Your duties include observing the work of the contractor and certification of payments to be made by the lender. You calculate amounts to be withheld or retained for the protection of the owner, the lender and the performance and payment bond surety. If you certify that more work has been completed than is actually in place, the owner, its lender and the contractor's bonding company can all be damaged. If you refuse to certify all of the work that has been completed, the contractor can be damaged. Hence, a common dilemma that you have probably experienced before. So you'd better be exactly right, right?

Common Claim Scenarios Arising Out of the Certification Process

The most common pay certification problems arise as claims for overcertification, under-certification and just plain negligent certification.

Over-certification. The general contractor submits a draw request for the month, claiming to be 75% complete. Some elements are 60% complete and some are 75%. So you certify the 75% draw. The contractor dies, goes bankrupt or simply leaves the country fleeing his creditors, all before paying any of his subs or suppliers. The cost to complete the work and pay the unpaid subs and suppliers turns out to be 50% of the contract. Based upon your certifications, the owner (and lender) has let go of 75% of the money, and the project is now under water by 25% of the total contract sum. The owner sues the defunct contractor for the repair costs, sues on the performance bond and sues you for letting the money out too quickly. The bonding company cross-claims against you for releasing the funds too quickly.

Under-certification. There is an unclear detail in your drawings and you argue with the mechanical contractor that certain hangers and masonry bolts are intended and reasonably inferable from the design, even if not completely detailed. The contractor refuses to put in the extra material at his own cost, installs the mechanical system without them, and you refuse to authorize the mechanical contractor's portion of the draw. The mechanical contractor quits, dies, goes bankrupt or just leaves the country, all before paying its subs and suppliers and the project is hit with liens exceeding the value of the mechanical contract. The mechanical contractor or its trustee in bankruptcy sues the owner for breach of contract and you for interference with the contract between the mechanical contractor and the general contractor.

Just Plain Negligent Certification. Negligent certification generally arises in two contexts. The first involves the failure to identify defective work or misjudging the percentage of completion. The second can

tactfully be described as a "math error," and more cynically is a failure to spot fraudulent over-billing by the contractor.

In the first context, something gets installed improperly and you are blamed for failure to discover it in the pay certification process. Invariably, the repair, retrofit or reconstruction costs (after the defective installation burned the building down) vastly exceeds the deductible on your professional liability policy. In a real life example, a backup generator was installed in a public building with a flue pipe operating temperature of 1400 degrees. The recommended and specified flue installation includes bolting the flue to the masonry block up and out of the building. A careless subcontractor installs the flue by bolting it to the wood roof trusses. One stormy day, the building loses power, the generator fires up and the flue pipe burns the roof off of the building. The owner's fire insurance carrier sued all of the contractors for improper installation and the architect for failing to discover the installation during the pay certification process.

In a more careless example, a complex steel roofing system is installed with insufficient anchors (both too few anchors and the wrong size). The architect's field rep never climbed to the roof to view the installation, before, during or after installation, but certified all of the payments for the roofing. To make matters worse, the architect did not use a standard form, wrote a letter to the owner, and stated unequivocally that the work in place complied with the plans and specifications.

In the second context, the contractor either commits a math error in a pay application or simply overcharges by using take-off or estimated quantities rather than actual quantities. We have seen both arise, with professed innocence by the offending contractor. An early draw request failed to reflect an initial down payment and overstated the contract balance. Subsequent draws carried the error forward through substantial completion. During the punch list preparation, the error is discovered and the owner turns out to have paid 110% of the contract balance, and effectively has no retention. A dispute arises and the contractor refuses to complete the punch list. The owner sues the contractor and the architect. The contractor sues the architect for interfering with the owner-general contractor agreement.

In another example, the drawings overstated the needed quantities of asphalt for a resurfacing project. The general contract required the contractor to bill by installed, actual quantities at a unit price. The design professional certifies all of the payments to the contractor as the job progresses. The owner audits the project and discovers that the contractor has billed the overstated quantities from its take-offs and not actual quantities. As such, the contractor has been overpaid by $200,000. The owner sues the contractor and the engineer.

The Sitting Duck Problem

In each of the above examples (all of which have really occurred, at least as alleged in lawsuits), the design professional was a sitting duck, with no one to blame, no one to sue and no way to "win" the lawsuit. Even when the matter involves a pure contractor error, a design professional owes an independent duty of reasonable care in the pay certification process, and is liable in damages for failing to meet that standard. The owner's expert will say that any design professional would have discovered the problem and your expert would say that no one would have caught it. Who will the jury believe?

The claim becomes a two front war when the contractor and the owner have both sued you. Contractors frequently try to assert claims for interference or defamation by virtue of your review of their work. The law recognizes that it is your job to review the contractor's work, but there are a number of cases in a

number of jurisdictions where contractors have successfully asserted some improper design professional motive to justify damage awards in these circumstances. Where the design professional covers up a design error by blaming contractor performance, for example, contractors have recovered damages from the design professionals over and above the owner's recovery for the design error.

Few claims are more frustrating than those with admitted contractor error, bankrupt and uninsured contractors and the sitting duck design professional looking at a policy limits claim. So even when you are right, you need to take precautions.

Your Contracts

Your first precaution comes long before you set foot on the project or receive the first pay application. The standard form pay applications say very little about what you are certifying. Everything looks back to your contract for definition. If you use standard form agreements, your certifications are limited to a representation that the work has progressed to the point indicated, and the quality of the work, in general, complies with the plans and specifications.

The representation is limited, however, by noting that you have not inspected means and methods of construction, have not continuously or exhaustively observed the work in progress, and you cannot certify what the contractor has done or will do with the money. In addition, although you have the right to reject work that does not conform to the contract documents, you are not liable to the contractor for decisions made in good faith. These provisions will go a long way in defending your actions upon discovery of a contractor error, and should be part of a comprehensive agreement. Don't forget limitation of liability clauses, disclaimers for means and methods or for contractor failures to follow the plans and specifications and other appropriate contract language.

The Draw Request Form

The draw requests should be on a form that relates to or reflects the limited nature of your certification. Even the standard form pay application is not terribly good in this respect because it repeats the representations without the disclaimers. (Note also that the 1997 amendments to the AIA documents eliminates the specific representation that the contractor is entitled to the amount certified, yet the pay request form, G-702 (1992) still contains this language). Ideally, you should repeat the disclaimer language contained in your contract before signing off on a pay request and make the certification mirror your contractual obligations. At a minimum, do not render an unequivocal certification that the work conforms to the plans and specifications or you may be guaranteeing that result. Remember that too much of the work is covered before you see it and you should not certify that which you cannot see with your own eyes. Moreover, express guarantees and warranties are not covered by your professional liability insurance policy.

Finally, do not send your youngest, greenest, most recent architecture school graduate to the site alone to do this important work. Contractors can bully, talk over or just "snow" an inexperienced site representative and there may not be anyone else to sue when the error is discovered. Train your site representatives to be wary of these pitfalls and send inexperienced architects to the site with a more seasoned member of the firm.

Liabilities arising from pay certifications can land on the unsuspecting design professional at any time. Watch for an increase in certification claims during economic downturns, when money is tight and contractor bankruptcies increase. You and your professional liability insurance may be all that is left. Carefully review the certification requirements of your agreements and do not commit to assume responsibilities that you are not in a position to assume. Check your math, use appropriate certification forms and train your site personnel to avoid the risk of being a sitting duck.

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NOTE: This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.