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Risk Management Tools for the Design Professional

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November 2024 | Vol. XIX No. 109



Don Neff is President/CEO, LJP Construction Services. LJP provides comprehensive QA services on projects coast to coast across the US for all building types. LJP created “CaptureQA” to assist project owners/ developers, GCs, and the architectural/ engineering industries to facilitate documentation and close-out of critical project details. For more information, please visit: www.ljpltd.com.

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How to Minimize or Prevent the Manifestation of Construction Defect Litigation (CDL)

By Don Neff

Designing and Implementing a Comprehensive QA Program

The primary objective for all architectural and engineering design professionals, developers, general contractors, and trade contractors, is to create well designed structures and communities that are beautiful and functional for the occupants and uses intended, environmentally sustainable, durable and enhance their surroundings. Typically, the primary focus of project deliveries are schedules and budgets. Quality Assurance (QA) is the third leg of the project planning and implementation process.

A major challenge is construction defect litigation (CDL) for not only for the professionals identified above but also the end users—owners of the homes or condominiums, or tenants and building occupants, in how to minimize or prevent its manifestation. CDL issues can be found in foundations, framing, weatherproofing, fire, acoustical and MEP systems, balconies, terraces, and lanais. Public areas owned by the HOA are also subject to litigation which can be costly and affect entire communities. The need for comprehensive records, archives...and “right-to-repair” laws state by state are even more important.

One of the CDL processes used by plaintiff attorneys and their experts is to apply an “extrapolation theory,” taking a few allegedly failed assemblies, and applying to all, which then lead to large, estimated costs to repair. These are rarely realistic, and negotiated out of court settlements are common with a handsome contingency fee paid to the plaintiff attorney. These settlements may be awarded even though the issues could be the result of deferred maintenance rather than original construction defects. One leaky window, roof or wall assembly could be worth millions in settlement dollars, even though only one or two windows failed in the field from a poorly installed flashing system. The author has seen this firsthand.

Pre-construction

Designing and implementing a comprehensive QA program requires a deep understanding of the building design and construction process, including the roles and responsibilities of the various participants. Participants in the “Pre-construction” phase include architects and various engineers—primarily civil, structural, and geo-technical. The project owners or developers routinely engage these engineers. Electrical and mechanical engineers are typically sub-consultants on the Architect’s consultant team. Architects have well developed stages for completion of their work from initial conceptual designs, through design development and construction documents (working plans with details—at 90% plan completion). An Architect’s Professional Liability (Errors & Omissions) Insurance typically addresses the front-end design and engineering phase.

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Specification manuals and peer reviews of the design details are also an important part of the process though frequently completed by firms outside the Architect of Record. Architectural peer reviews focus on the details first. The value engineering process can undermine quality construction through substitution of materials and design shortcuts. This can create a conflict between the owner and GC, since the latter still carries the litigation risk burden over time, even though the owner may have selected lower quality materials.

During-construction

The “During-construction” phase of mobilization, construction, inspections, and documentation are where the site work gets underway. Actual construction is the critical aspect of creating a building as the process orchestrates many trade contractors providing labor and materials, and testing/documentation consultants. The choice of construction “means and methods” is the GC’s domain and addressed by Commercial General Liability (CGL) Insurance, Builder’s Risk Insurance, and other related policies. Trade contractors also carry CGL insurance policies for their workmanship and typically provide Additional Insured endorsements to protect the upstream GC and sometimes owners/developers. This is the traditional non-wrap insurance solution. An alternative is to provide OCIPs or CCIPS (owner-controlled Insurance policies or contractor-controlled insurance policies). These wrap up all the trade contractors and the GC together, providing one policy to cover everyone together. In the world of construction defect litigation, the OCIPs and CCIPS have proven more efficient in settling claims given one set of attorneys working across the table from the plaintiff attorneys. Otherwise, trade contractors are fighting with each other—each with their own attorneys, and separate policies which may leave coverage gaps.

Clearly defined contract scopes of work for each trade, together with precise performance criteria, are necessary to establish workmanship expectations, and affect budget, schedule, and quality. Inspections and documentation to ensure quality standards are met, require a system in place to track and report any non-conformances and documentation of correction along with on-going training are all necessary and part of a comprehensive quality program.

Typical industry standard PEER Reviews include those items which carry large financial exposures, such as waterproofing and weatherproofing details (these are different), acoustical details, A&E plan reviews, and Geo-tech report reviews. On-site inspections vary by project type, size, and use, yet typically include assemblies such as below grade waterproofing, windows, walls, roofs, interiors (ie, MEPS and Fire blocking). Some will also include interior Fit & Finish elements.

Six building types are typically recognized by the industry:

Type I—High-rises of concrete and steel with pressurized corridors. These are the highest density.

Type II—Mid-rise steel framed but without pressurized corridors.

Type III—Non-combustible exterior walls only.

Type IV—Heavy timber construction such as mountain lodges.

Type V-1 Hour—Four story wood-framed (with sprinklers) on podiums for below grade parking (4/1, 4/2 or “Texas wraps”) free standing parking garages with wrap around wood framed units—this includes condominiums and rentals.

Type V-non-rated—One to three story (wood, light gauge steel, or concrete block construction over slabs on grade (Single Family Dwellings, Duplexes and Townhomes). These are the lowest density.

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A key question is, “In which of these building types do you find more CDL risk?” Building densities, locations, price points, construction materials, building designs, and quality of trade contractors all play a part. In our experience as national QA consultants on many projects coast to coast, wood-framed condominiums (Type V-one hour) carry the most CDL risk for several reasons. They tend to be constructed by more residential trades than commercial trades and have more potential weak points. Fire and acoustical weak points in wood-framed projects tend to be at specific locations—1-hr walls, 2-hr walls, area separations, and internal wall fire blocks/draft stops, and in the following areas —house to garage, townhome unit to unit, condo unit to unit and condo unit to corridors. High rise condominium towers are primarily constructed of concrete/steel offering better fire protection and acoustical performance, commercial mechanical and conveyance systems, and tested building skins, among other, more robust assemblies.

Nothing is perfect in construction and standards vary by region of the country, price points, densities, and type of use. Deficiencies will occur and must be clearly documented and tracked by type, location, date/time, root cause, and must be closed-out before walls are closed-up. Based on the author’s experience, smaller privately held homebuilding companies are more responsive to these issues than large publicly traded companies.

Post-construction

The “Post-construction” QA component is equally important to those elements outlined above. Turn-over and maintenance are significant steps for project deliveries in educating building owners and end users in the system operations and service requirements of the structures and their internal systems. O&M Manuals, HOA Maintenance Manuals, and Annual Maintenance Reviews all work together to help ensure deferred maintenance will not occur which may lead to catastrophic disasters such as the Surfside, Florida condominium tower collapse. Something as simple as maintaining integrity of waterproofing systems on decks and balconies, is a critical preventative measure particularly when conditioned living spaces are located below. For HOA communities, it is important that the CC&Rs have protective language integrated, with budgets and inspection forms completed and retained. These forms include short-term and long-term maintenance needs addressing buildings, systems, and landscapes as well. Service maintenance agreements followed by annual maintenance reviews will confirm whether vendors are providing the proper care for the property.

Finally, the record keeping requirements for a QA system are extensive and crucial for all participants in the process. The project owner/developer and GC both share this responsibility. Archives and project documents need to be organized and protected for at least 12 years. Most state statutes of limitations for bringing a CD lawsuit are 10 years. There is wisdom in realizing that the project with the most comprehensive set of archives evidencing and documenting quality design, quality construction, and ongoing, initiative-taking preventative maintenance will be protective armor in the face of construction defect litigation. What’s in your toolbox?