

## Loss Control

# Bulletin

## Architects and Engineers

### Professional Liability Insurance

#### The Design Consultant's Liability for Field Services — Part II

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Loss Control Bulletin No.68 dealt with the onerous burden of liability towards the owner which falls upon the shoulders of the design consultant and which emanates from the construction phase of the consultant's mandate. The employees delegated by the architectural or engineering firm to the construction site to provide the field review services defined in the consultant's contract should all be aware of their liability for failure, to detect bad workmanship or materials. As stated in Loss Control Bulletin No. 68, that liability should be defined as accurately as possible in the contract document between the consulting firm and the owner.

The consultant's or his representative's presence in the field will lead to close interaction with the contractor. Usually, there is no contractual relationship whatsoever between the architect or engineer and the contractor. In the so-called "triangular relationship," the consultant's contract is between himself and the owner and similarly the contractor's contract is with the owner. There are no contractual arrangements between the consultant and the contractor. Inevitably, however, in the process of rendering field services, the consultant will be in constant contact with the contractor and with many of the subcontractors or trade contractors. It has been explained in previous bulletins that professionals are liable towards all those whom they knew, or should have known,

would rely on their professional advice. Contractors certainly fall within that category of individuals or organizations whom consultants are aware are relying upon their professional advice. In their dealings with contractors during the construction process, architects and engineers should therefore recognize their exposure to allegations of negligence in the nature of the professional advice they have given.

How can the design consultant provide the level of field services he has defined in his contract with the owner, while doing everything possible to reduce the chances of claims emanating from the contractor?

#### Construction Methods

The consultant's representatives or employees on site should be aware of the fact that the dual role of the design consultant is first, to design the project for the owner and, second, to review the construction process to determine that the project is being built in general conformity with the design. It is the contractor who is responsible for the ultimate delivery of a project which is in conformity with the design. It is the contractor who determines how he will go about it.

Contractors themselves recognize that they are responsible for construction methods. In fact, Standard Construction Document No. CCDC2 Article GC3.3 reads as follows:

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# Architects and Engineers

## The Design Consultant's Liability for Field Services — Part II

“The Consultant will not be responsible for and will not have control or charge of construction means, methods, techniques, sequences or procedures, or for safety precautions and programs required for the Work in accordance with the applicable construction safety legislation, other regulations or general construction practice. The Consultant will not be responsible for or have control or charge over the acts or omissions of the Contractor, his Subcontractors or their agents, employees or other persons performing any of the Work.”

CCDC Document No. 2 was prepared by the Canadian Construction Documents Committee, which is a joint committee composed of representatives appointed by various associations of the construction industry and including the Canadian Construction Association. Therefore, the national association representing contractors has participated in the preparation of CCDC Document No. 2, wherein the contractor, in his contract with the owner, recognizes that he is the one responsible for construction means, methods, techniques, sequences or procedures.

Many times during the construction process, the contractor will seek the advice of the consultant's field representatives, usually to obtain clarifications or explanations as to the design intent. The consultant's field representatives should remember that they are not responsible for construction methods and their advice to contractors should therefore be very carefully worded to ensure that they help the contractor in determining what he should do, but not how he should do it.

All meetings and discussions between the consultant and the contractor and all decisions emanating therefrom should be documented in writing and these records should be kept indefinitely. The consultant's field representatives should keep a diary wherein they log daily notes as to what is going on on the construction site and also they should make sure that someone is appointed to prepare minutes of all site meetings. These minutes must then be distributed to all meeting participants. It should be made clear to the consultant's employees that these

notes, minutes and diaries are the property of the consulting firm and not of the employees themselves, who should not take these documents with them if and when they ever leave the firm. These records must be kept by the consulting firm with the project file, as they could become key documents in the defence of possible future professional liability claims, sometimes many years after completion of the project.

### Construction Site Safety

Article GC3.3 of CCDC Document No. 2, which is quoted above, also states quite clearly that it is the contractor who is responsible for site safety and not the consultant. It is a good idea to incorporate a similar clause in the owner/consultant agreement firstly, to make sure that the owner/consultant and the owner/contractor agreements are compatible and secondly, to stress the fact that site safety is the responsibility of the contractor.

Contractual agreements making contractors responsible for site safety do not totally relieve consultants of their responsibility for the safety of construction workers and members of the public. As professionals, architects and engineers have a responsibility to the world at large for making sure that blatant violations of safety codes and procedures are not tolerated. The courts would not look kindly upon the design consultant who has ignored a dangerous situation simply because his contract with the owner states that it is the contractor who is responsible for site safety. When the consultant's field representatives notice violations of safety standards, they should immediately point the problem out to the contractor and ask him to correct the situation. In the absence of co-operation on the part of the contractor, the consultant should then call in the proper authorities who will, undoubtedly, either make sure that the contractor rectifies the problem or close down the site. Contract clauses which state that the contractor is responsible for site safety are useful in determining who is responsible for doing what. They are not a license for consultants to ignore obvious dangers to life and limb.

## Informed Consent

Often during the construction process, the contractor will make suggestions to the consultant proposing certain design changes or substitutions of material with a view to providing an economy to the owner. Some of these suggestions may be perfectly acceptable to the consultant, who may feel that the alternate design or material will fit perfectly well the intended purpose while indeed reducing the owner's costs. In a spirit of co-operation with the contractor, the consultant may well approve the alternative.

In other cases, however, the consultant may feel that the suggested change is a compromise which may save the owner money immediately but work to the owner's disadvantage in the long run. For example, the contractor might suggest an alternate roofing system which would reduce construction costs but which would ultimately increase the owner's maintenance costs. Under such circumstances, we suggest that it is not the consultant's responsibility to make the decision to either accept or reject the contractor's suggestion.

Our courts in Canada have upheld many times in recent years what is known as the "theory of informed consent." According to this theory, it is not the responsibility of any professional, be he a lawyer, a doctor, an architect, an accountant or an engineer, to make decisions on behalf of his clients. The responsibility of the professional is to investigate the pros and cons of a given course of action, to weigh the facts and to give a professional opinion to the client allowing the latter to make what is known as "an informed decision." The professional who makes the decision himself will, undoubtedly, be held liable for any additional costs ultimately incurred by the client arising out of a decision which was made in his name and without his input. Perhaps the owner will prefer the cheaper of two roofing systems, in spite of the fact that it may require a more expensive snow-removal program. If that is so, the consultant's role is to describe the alternatives to the owner and to let him make the choice. It is, of course, a good idea to confirm the client's choice in writing.

The theory of informed consent applies for all phases of a professional's mandate from the feasibility study, to the design, to the field services. We note, however, that it is generally during the actual construction process and during the simultaneous rendering of field services that design consultants are inclined to make decisions on behalf of their clients, rather than to allow them to make an informed decision.

## Conclusion

It is not suggested here that design consultants refuse to co-operate with contractors because they are neither responsible for construction methods nor for site safety. The smooth running of the construction site and the ultimate delivery of an acceptable project to the owner require close co-operation between design consultants and contractors. The purpose of this Bulletin is to remind consultants of the delineation of duties and responsibilities, as between contractors and consultants, and to encourage architects and engineers to pass this information along to their field staff. These site representatives or inspectors should arrive on site with a complete understanding of the consultant's mandate for field services and should be made aware that they should not accept responsibilities, and the liabilities ensuing therefrom, which properly belong to the contractor.



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