

## The Risks of Construction Phase Services

By Dennis D. Ray, P.E.

Construction Phase Services (CPS) pose significant risks that must be recognized in order to provide appropriate controls. Often these services are provided by a firm acting as the agent of the owner with a limited scope of authority.

As defined in typical standard industry agreements, CPS usually include:

- Administration of construction contracts
- Observation services of the contractors' progress and quality of work
- Contractor progress payment review/approval
- Authority to reject work
- Coordination of the review/approval on shop drawings and contractor submittals
- Preparation of change orders
- Determination of substantial completion

In essence, CPS require the use and application of professional opinion, judgment and diplomacy.

### UNDERSTANDING THE ROLE

It is critically important that all project parties understand their roles, including scope, responsibilities, authority, and limits of authority, as well as the roles of the other project participants. It is equally critical that contracts with defined scopes and responsibilities are consistent and coordinated, including contractor agreements with provisions that identify, address, and are consistent with the scope, responsibility, and authority of the CPS firm. Well-qualified construction phase representatives are a necessity. Misunderstanding of the responsibilities, and/or authority by any of the project participants cause a deterioration of relationships and lead to possible litigation unless corrected.

### OBSERVATION VS. INSPECTION

There has been substantial litigation over the definition of the words "observation" vs. "inspection." Because of legal precedents in certain states, the term "inspection" has come to connote an expectation of more detailed review than observation. In New Jersey, courts have ruled that inspection carries a greater burden of responsibility than observation. In contrast, Pennsylvania courts have ruled that inspection essentially is observation. This divergence of expectation and interpretation places much greater potential liability on the CPS provider. In the absence of contract language defining observation or inspection services, a CPS firm may seriously underperform its duties as expected by the owner and courts. Educating the owner about the services provided reduces misunderstandings. Regardless, services should be performed in an informed, objective, technical, and responsive manner.

### MEANS AND METHODS

The selection of the means and methods for construction are almost invariably at the discretion of the construction contractor. Industry standard agreements contain provisions in which the CPS firm is *not* responsible for means and methods of construction. Sometimes client-generated agreements do not contain substantially similar provisions or do not address means and methods at all. Clearly, the control of means and methods is best left the responsibility of the contractor. When others assume some control, however slight, the lines of distinction between parties blur, and responsibility for construction becomes an issue.

## JOB SITE SAFETY

Owners may desire to give the CPS firm the authority to stop work for the correction of safety issues. This creates a much greater degree of responsibility and liability that should be avoided. Firms providing CPS should carefully review any proposed agreement for this aspect and reject and revise terms that give them the authority to stop work for jobsite safety. The CPS representative's role should remain passive with regard to site safety by informing superintendents of perceived concerns and documenting such. The CPS representative should not actively require actions be taken except in cases of imminent danger.

## CONSTRUCTION DEFECTS – IDENTIFICATION AND NOTIFICATION

Often there is a fine line between work in conformance with the design intent and defective work. When defective work is identified, it may result in substantive adverse impact to the contractor. Owners often want to give the CPS firm the “duty” to reject work. This requirement can be interpreted as creating a duty to identify and correct any and all defects, thereby creating a higher standard of care. In any case, when defects are identified and known, it is the duty of the CPS representative to act promptly, impartially, and with professionalism to notify the client and/or contractor for economic correction.

## FIELD CHANGE ORDERS

Large projects often provide for field change orders, up to specified limits, to be handled and processed by the on-site CPS representatives. It is extremely important that the process is documented, communicated to all appropriate parties, and controlled in an accountable and auditable fashion.

## CONCLUSIONS

Risk management during the construction phase begins with clear contract agreements and documents that allocate each source of risk to the party that is best able to control it.

The dynamics and uncertainties of the construction process demand informed, objective, and responsive administration of the contract duties by all parties. When one party has a problem on the construction phase, usually all parties have a problem. It is critically important that the risks of CPS be understood to ensure that correct and professional administration of the services is conducted and the risks are controlled.

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