

Recognizing Risk Exposure Created By 9/11

By Bruce Demeter, Associate

The events of September 11, 2001, paralyzed significant sectors of the construction industry. Project owners, constructors, design professionals and the insurance industry have been forced to evaluate and allocate a risk of loss that was not previously considered. In short, the construction industry began an evolutionary period that represents new risks for all those involved in the industry.

PROJECT DEFINITION

The federal government estimates that \$15.5 billion of construction projects were either delayed or halted as a consequence of the catastrophic personal and property losses resulting from the 9/11 terrorist attacks. In response, the newly created Department of Homeland Security most likely will undertake to identify "target" structures that will require cutting edge design performance to meet terrorism loss possibilities. Target structures will likely include government facilities and buildings; transportation centers and arteries; high visibility or symbolic structures; high occu-

pancy structures such as sports arenas; high impact structures such as schools; and religious buildings. Additionally, buildings located within a certain distance of these target structures will also be considered high risk and therefore will require the application of increased design criteria. Design professionals and constructors working on, or near, designated target structures will have to know and apply new design criteria.

DESIGN CRITERIA

Construction criteria once reserved for military structures and rocket launch pads suddenly have become applicable to a wide range of public and private buildings. New methods of modeling and designing structures to meet increasing design requirements for blast resistance and prevention; fire protection and suppression; stairway and elevator encapsulation; security; air circulation and delivery systems; structural integrity; and building material composition are being developed, refined, altered, improved and implemented on a daily basis. To meet client needs and design requirements, design professionals and constructors involved in new construction and/or renovation projects for target or near target structures must be aware of the ongoing design

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criteria changes. Furthermore, these design requirements may exceed current code and regulatory requirements. Therefore, the design professional and constructor must be aware of these evolving changes and the potential legal obligations they may create.

LEGAL OBLIGATIONS

It is being suggested by leading construction counsel that, in the wake of 9/11, losses arising from terrorism are now a foreseeable event. This is important to recognize since courts consider the “foreseeability” of an incurred loss in determining a design professional’s standard of care or constructor’s sphere of responsibility. If a loss is foreseeable, the court likely will find that the steps necessary to address that loss are part of the basic standard of care for the design professional and obligation of the constructor. Accordingly, the design professional’s standard of care may soon include terrorism-caused losses where appropriate.

In support of this position, counsel highlights the developments in flood and earthquake design criteria that have previously occurred. Due to foreseeability of loss due to floods and earthquakes in certain geographic areas, design requirements to account for those potential

losses were developed and became a part of the design professional’s basic standard of care. The



“foreseeability” of terrorism losses created by 9/11 may develop into a similar basic legal standard as courts begin to rule on cases arising from 9/11. Design professionals may be required to incorporate terrorism design criteria in target and near target projects as part of their basic standard of care. Constructors may be required to employ special means and methods to accomplish the project’s specialized design requirements. At the second annual McGraw-Hill Security Summit, it was suggested that the above practices should be considered on every project.

Lastly, contracts are undergoing significant changes in an attempt to shift terrorism risks to

owners. Many design professionals are seeking provisions that base their design performance on the owner's performance of a vulnerability study. Reliance is placed upon the information generated by that study in an attempt to insulate the design professional from potential loss. In instances where a vulnerability study is not performed, design professionals are attempting to contractually disclaim liability for any terrorism losses. Disclaimers are also being used in an attempt to limit the design professional's liability exposure where the owner is requiring the use of cutting-edge design criteria that is not recognized by code. Standard contract language should be developed to equitably share risk.

INSURANCE REQUIREMENTS

Design professionals and constructors must also recognize the impact 9/11 has had on the availability of property and casualty insurance. Immediately after 9/11, the insurance industry inserted terrorism exclusions into insurance policies, or required additional terrorism premiums to cover potential property and casualty losses. In response, the federal government enacted the

Terrorism Insurance Act, which devotes significant funds to cover potential property and casualty losses that exceed a certain pre-determined insurance coverage threshold. Unfortunately, the Act does not appear to provide similar funds for design professional coverage.

Developments in the field are occurring on a daily basis. This will require the insurance industry, design professionals and constructors to consider many continually developing factors and responses to terror liability risks.

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