

Engineers Face Liability

The attached advisory from CEO to its members continues to show the lengths owners are trying to go to avoid their own responsibility.

Contractors are not new to such attempts, but it is spreading.

For those of you employing engineering firms on some projects, this may be an issue. It certainly is an issue for any engineer.

Can such language for architects be much further behind?

The owner in this case is one the OGCA has received concerns with for some time - Waterloo Region.

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Advisory to Members No. 08/001:

Consultant liability for costs resulting from Change Orders

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Issue:

There have been recent attempts by some owners to hold consultants liable for the costs of change orders by deeming the costs to be the result of design errors. We are now seeing cases where owners are refusing to process change orders prepared by the consultant unless they include a statement to the effect of "*this change is a result of a design error and cost of this change order will be recovered from (the consultant).*"

CEO Position:

Owners have no authority to impose such requirements on consultants unless it is explicitly permitted under the agreement. This type of "penalty" has significant implications and would clearly be beyond the scope of a procedural policy and cannot be simply implemented into the agreement retroactively.

Also, such provisions can be uninsurable if the consultant is coerced into admitting design error without due process. As a basic principle, an insurance policy does not permit an insured party to admit liability. A liability policy operates under the premise that a plaintiff must be prepared and able to prove liability on part of a defendant, if necessary through dispute resolution or in a court of law.

In order for insurance to be provided, fault must be established under a legitimate due process. As a result, any system of change order approval that requires a party(s) to admit liability is uninsurable. In order for a firm to claim the cost of a change order through its insurance policies, a legally valid resolution to the problem would need to be achieved before the change order is submitted. Given time constraints on a construction project or any other job requiring professional services, such a process would be totally impractical.

Problems arising out of professional services are often complex and culpability for such problems are rarely clear cut or obvious. Owners, who try to implement a requirement that consultants admit liability for change orders, are therefore effectively circumventing standard dispute resolution procedures and in the process are invalidating insurance coverage.

Recommendation:

It is CEO's position that firms are not liable for costs resulting from change orders unless explicitly permitted under the engineering services agreement.

Further, CEO recommends that firms not enter into any agreement that allows an owner to assign liability for change order costs without due process (particularly if insurance protection is required by the consultant - or required by the client). Firms should consult with their insurers and legal counsel to assess whether such provisions are insurable.