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BIM Technology: Assessing Your Legal Risks

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As economic conditions tighten, the construction industry faces pressure to deliver projects even more efficiently. To stay competitive, the general contractor must employ faster, less expensive, and better building methods. To meet the ever-increasing need for cost-effective building procedures, owners, general contractors, and design professionals are looking to technology to improve efficiency in project delivery. One of the most widely publicized building technologies is Building Information Modeling (BIM).

BIM is a technology that enables a collaborative construction process between the owner, design professional, general contractor, and trade contractors. BIM has the potential to reduce construction costs, increase productivity, and lower project risk for the various project participants. While the construction industry has embraced this new technology, many in the legal and insurance industries have lagged behind the technology curve by being slow to develop standardized contracts or policy language to cover unique BIM technology risks.

BIM blurs the distinction between the traditional design and construction roles performed by design professionals and contractors. In a BIM project, the contractor's involvement in the design process creates new risks, which are not adequately covered by the standard commercial general liability policy. Conversely, from a design professional's perspective, collaboration with the general contractor could mean he or she assumes the risks that are normally associated with general contractors, such as risks related to means, methods, and sequences of the construction process.

While some of the risks associated with a BIM project may be obvious—for example, who will assume responsibility for corruption of the design model caused by faulty information provided by other con-



tributing participants—other risks may not be so evident. In a BIM project, the general contractor may assume an increased role in the design process. This heightened participation can create potential liability for the contractor if it is later alleged that there were problems with the design. Standard commercial general liability policies are often accompanied by exclusionary endorsements, which do not afford the general contractor coverage for liability arising out of certain professional design services.

A common endorsement that often accompanies a general contractor's commercial general liability policy is ISO endorsement CG 22 79, which excludes coverage for professional services that are defined within the endorsement as:

...preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; supervisory or inspection activities performed as part of any related architectural or engineering activities.

Endorsement CG 22 79 provides some coverage for professional services related to 'construction means, methods, techniques, sequences, and procedures' employed in connection with the general contractor's operations. However, as previously noted, in a project using BIM technology the line

between professional design services and 'means, methods, techniques, sequences, and procedures' is often blurred. Therefore, the general contractor would need to address potential design liability with the insurance broker before starting a project using BIM technology. Many major market insurers now offer contractors professional liability (CPrL) policies. For projects using BIM technology, it may be advisable for the general contractor to carry professional liability insurance that specifically covers potential professional design liability. In addition, if a trade contractor is providing significant input into the design process, the general contractor may want to consider requiring the trade contractor to carry professional liability insurance as well.

Insurance professionals can address potential contractor design liability arising from a BIM project on a national level; however, other methods of risk allocation must be specifically tailored to fit state law. Traditionally, the general contractor manages risks associated with a construction project through the implementation of 'contractual risk transfer' provisions contained in the subcontract. The general contractor requires each subcontractor to indemnify the general contractor from "any and all" liability "arising out of" the subcontractor's work. An effective indemnity clause does not require that the general contractor prove the subcontractor was negligent to trigger the indemnity protection; it only requires that the liability "arise out of" the subcontractor's work.

The Georgia courts have interpreted the phrase "arising out of" very broadly. In *BBL-McCarthy, LLC v. Baldwin Paving Co.*, 285 Ga. App. 494, 646 S.E.2d 682 (2007), the Georgia Court of Appeals explained its interpretation of the "arising out of" language in an indemnity agreement as follows: "We construe this phrase in an indemnity clause to mean 'had its origins in' or 'grew out of and to encompass almost any causal connection or relation-

ship.” The court further explained that “arising out of” “does not mean proximate cause in the strict legal sense, nor require a finding that the injury was directly and proximately caused by [the indemnitee’s] actions. Almost any causal connection or relationship will do.” The BBL-McCarthy decision, bolstered by a properly written indemnity provision, provides an effective method for the general contractor to control project risks. However, the collaborative nature of the BIM process may make it difficult to determine whether a loss arose out of any particular subcontractor’s work.

The collaborative process is also one of the benefits to using a BIM project model. Involving the trade contractors in the BIM process enables the general contractor to identify potential collisions or clashes between various structural and mechanical systems within the building design. The systems conflicts can be addressed in the design and development phase rather than in the field. This saves not only time, but also money. However, because the trade contractor’s input is now consolidated with the overall design, it makes it difficult for the general contractor to argue that a potential loss “arises out of” the trade contractor’s work. The general contractor will need to address this potential impediment to the contractual risk transfer in the subcontract. The general contractor may want to consider extending the indemnity to include the data provided by the subcontractor to be used in the model.

There are very few cases nationally that have dealt with unique BIM technology risks. Georgia has yet to decide any case dealing with issues related to a BIM project.

In addition to the potential design liability and contractual risk transfer issues previously identified, the general contractor should consider several other issues unique to a BIM project. For example, the general contractor should consider who owns the BIM model

and any copyright issues related to the use of the model. The general contractor should avoid providing any express or implied warranties of the model, as any such warranty may not be insurable under traditional liability policies. In addition, careful consideration should be given to the construction agreement. The general contractor should consider whether to include a provision in the agreement stating that collaboration with the design professional shall not render the general contractor responsible for any design defects. Finally, the general contractor will want to clearly identify each project participant’s duties regarding the BIM process and delineate them in the construction agreement.

Comprehensive insurance coverage for BIM projects continues to evolve and is slowly being tested and shaped as the courts issue legal opinions and guidance on potential BIM contractual and tort liability. While the time and cost savings of using a BIM model are alluring, until BIM projects become more commonplace and a better legal framework exists to buffer against any potential hazards, general contractors would be well served to spend time discussing the possible risks with insurance professionals and legal counsel. ❖

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