The Expansion of Potential Liability of Construction Managers and Consultants

By Scott D. Cessar | Thursday, October 10, 2019

Over the last decade or so, there has been far more judicial willingness to adopt legal theories that result in an increased risk of exposure to construction managers and consultants working on construction projects. This has resulted in a greater likelihood of lawsuits being filed that name construction managers and consultants as defendants and a greater likelihood of those lawsuits surviving efforts to have the lawsuits dismissed prior to trial. The consequence of more claims has led to increased costs for legal expenses, settlements and uncompensated personnel time devoted to the defense of the claims.

This expansion of potential liability may be broken into two sets:

1. claims for pure economic loss not arising from property damage or personal injury by parties not in a contractual relationship with a construction manager or consultant; and
2. claims for property damage or personal injury by a party not in a contractual relationship with a construction manager or consultant.

The first set concerns claims by a contractor against a construction manager or consultant that its breach of duties owed to the owner on a project and/or its provision of incomplete or inaccurate information on a project, which it knew, or should have reasonably anticipated, would be relied on by the contractor, resulted in damages to the contractor.

For many years, in the great majority of jurisdictions, construction managers and construction managers were insulated from such claims by the economic loss rule, which prohibited third parties from asserting negligence claims against parties to recover pure economic losses, not caused by personal injury or property damage, from parties to which they were not in privity of contract.

The economic loss rule, however, has been eroded significantly over the years by the growing judicial adoption of the Restatement (Second) of Torts §552(a)1, which states that entities in the business of supplying information that they know or should reasonably anticipate will be relied on by third parties may be held responsible for money damages if this information is proven to cause harm to a third party that relied on the information.

The great majority of states have now adopted the Restatement Second of Torts §552(a).
The consequence is that, for example, in Tennessee a court found that a construction manager could be held potentially liable to a concrete contractor for money damages based on its

allegation that the construction manager had incorrectly measured and set the benchmarks to which the concrete floors were poured. Similarly, in New York, a court held that a construction manager could be held potentially liable to a contractor for money damages for negligent misrepresentations based on its alleged failure to identify defects in the design documents because the construction manager had a duty to review those documents.

The second set concerns claims by injured workers or adjacent property owners against s or consultants for damages for personal injury or property damage. Following the Restatement Second of Torts §324(a), a construction manager or consultant may be held liable if it either "gratuitously or for consideration" renders services that it should recognize could cause physical harm and, in rendering such services, fails to exercise reasonable care, which results in harm.

Just about every state has either adopted Restatement Second of Torts §324(a) or recognizes the same cause of action based on the common-law doctrine of negligent undertaking.

The consequence is that, for example, in the District of Columbia an environmental consultant was held to be potentially responsible to a worker who claimed injuries due to exposure to contaminated soils, based on the fact that the consultant prepared the environmental assessment report and had an ongoing obligation to monitor air conditions. In another example, in Arizona, a CM was held to be potentially responsible for almost $4 million in property damages caused when a sprinkler system malfunctioned, based on the CM's obligation to supervise the system's installation.

In these cases, the language of the construction manager's and consultant's contracts are closely scrutinized by the courts as to the duties they agreed to undertake as well as their actual conduct on the project in determining whether they could be potentially liable such that the case should go to a jury.

A subset of this expansion of liability of construction managers and consultants is whether a party may claim that it is an intended third-party beneficiary of the owner's contract with the construction manager or consultant. Here, courts will scrutinize the owner's contract with the construction manager or consultant to determine if third parties were entitled to rely on the information provided by the construction manager or consultant. Thus, in the District of Columbia case discussed above, the environmental consultant was held to also be potentially responsible to the excavation subcontractor for any damages the injured worker might recover from the excavation subcontractor based on faulty air monitoring, under the theory that the excavation subcontractor was an intended third-party beneficiary of the owner-consultant contract.

In order to protect themselves as best as can be, construction managers and consultants should take care in the negotiation and drafting of contracts to not accept broad delegations of duties inconsistent with their actual scope of work. If possible, they should include disclaimers in their contracts as to who may rely on their work product and expressly state that third parties are not intended beneficiaries of those contracts. Although this will not preclude potential liability in all states, it will certainly be useful if the case goes to the jury. In addition, construction manager s and consultants should consult with their insurance broker to be sure that they have robust coverage in view of the magnitude of their potential liability exposure.