BIM and Legal Risk

Dirk Haire Partner Holland + Knight t. 202-419-2483 dirk.haire@hklaw.com



Traditional Design Risk

- United States v. Spearin, 248 U.S. 132 (1918)
 - Design-Bid-Build
 - Implied warranty of design adequacy
 - Plans and specifications must be defective for contractor to recover
 - Contractor must accurately follow and rely upon the defective plans and specifications

Traditional Design Risk

- Risk where contractor participates in drafting the specifications/constructability reviews, etc.
 - Key factors may include: Does contractor have "superior knowledge about" specification? Did contractor have "significant participation" in development of specification? Did contractor suggest a "constructability" change which alters design?
 - Performance versus Prescriptive specifications
- Does Owner (through its designer) or Contractor have "control" of the design?
 With BIM, these risks may be harder to assess

What does BIM Not Change?

 Design is still provided by licensed design professionals
 Contractor is still responsible for constructability, means and methods of construction and shop drawings

What does BIM Not Change?

- But there has been growing concern in the industry about shifting legal risks
- BIM properly implemented does not shift risks
 - BIM may result in decreased risk to all participants
 - But issues must be addressed up front

Why Are There Concerns About Legal Risks?

 Contractors implementing BIM will suggest changes

- BIM tools increase likelihood of this scenario
- Clash detection will require design modification
- Designers may feel less in control of design
- Owners may wonder about performance of designer

Allocating Risks of BIM

Two Approaches

- Rely on case law interpreting traditional design risk
- Include specific BIM risk allocation up front in contracts

Allocating Risks of BIM

Case Law

- None yet
- Probably becomes a contest over traditional Spearin warranty
- Unpredictable and potential inconsistent results

Allocation Risks of BIM

Contract Approach

- ConsensusDocs 200.2, Electronic Communications Protocol Addendum
- Draft BIM Rider
 - Defines
 - Parties
 - Definitions
 - BIM Scope of Work
 - Risk Allocation
 - Ownership Rights

Key Risk Topics to Address

Logistics
Design Control
Ownership of Model
Risk Management Tools
Other Considerations

Parties should agree up front on protocol
Protocol should be in writing

- All parties who may participate in the process should join in
 - Owner
 - Architect
 - Engineers
 - Contractor
 - Subcontractors who may be involved in BIM applications
 - Vendors

Must address:

- Security and verification requirements
- Electronic data storage
- Logistics of exchanging electronic data
- Who has access to files
- Limitations on access

Security and verification
 Who will maintain
 What type of system

 Web-based
 Internet access to company's files

 Verification required

Electronic data storage

- Interoperability
- Common platform required
- Understanding of software required
- Ensure that all parties know the parameters
- Logistics of exchange
 - Who is transmitting?
 - What is being transmitted?
 - What rights does transferee obtain?
 - Who is tracking data exchange?

Structure of files

- Format
- Naming
- Models
- Documenting revisions or changes to files

Agree on purpose of using BIM Agree on roles of the parties Relative to "traditional" elements of the project Relative to use of BIM Important concept: no one can change another party's product

To what extent can others rely on the design details?

- Will dimensions be accurate?
- Will quantities be accurate?
- Will detail be adequate to provide for clash detection?

Identify building systems and components to be modeled

- Specific elements
- Specific trades
- Specific purposes or uses
- Identify limits on use
 - e.g. can't be used for critical details

 Establish hierarchy of communications (similar to traditional models)

Establish means of communicating design issues identified by others back to the designers
 Will changes in design impact designer's fee (more on this later)

Ownership of Model

 Traditional treatment of design ownership in contracts

- Standard industry contracts
- Supplementary conditions
- Types of projects using BIM
- Owners' views
 - Large/sophisticated
 - Medium-to-small/occasional
- Engineers versus Architects
- Contractors

Risk Management Tools

- Specific products are not yet developed
- Will depend on how risk allocation is developed through protocols/MOUs/contracts/case law
- Insurance and surety considerations
 - CGL
 - Professional Liability
 - Surety
- Indemnification