

# Talk to Me About A&E: Episode 10

BOB STANTON: With the CA services, your responsibility should end at the design phase. Anything that happens, any changes that are made, any occurrences on the job site, you should have nothing to do with you period.

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SPEAKER: to Talk to Me About A&E, a podcast series focused on risk management for architects and engineers. Host, Dan Buelow, managing director of Willis A&E, will engage experts across the A&E spectrum on topics ranging from contract details to the broadest trends impacting design professionals in North America.

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DAN BUELOW: Well, Hello, and thank you for joining us for another episode of Talk to Me About A&E, I'm Dan Buelow, managing director of Willis A&E, and my guest today is Bob Stanton, head of our Willis A&E claims division. Hey Bob, how are you doing today?

BOB STANTON: Good, yourself?

DAN BUELOW: I'm doing OK, it's great to have you back. So many of you know Bob, and I'll give you a little intro here. But before I do, just want to recap kind of what we're going to be talking about today. Our topic is on the role of the design professional and construction administration, which we'll refer to as CA. And this is actually part two of our CYA with CA series.

Part one was with Jeff Colman, from the common law firm, and where we talked to Jeff about the standard of care of the design professional in the performance of their CA services. Bob and I will continue this discussion and focus on what I would say are the critical basics, when it comes to administering and managing the risk from the perspective of the design professional. Many of Bob as he's been part of our Willis A&E team for well over 10 years, overseeing our contract review for our client's education and claims advocacy.

Bob has over 30 years of experience managing complex claims for design professionals. And in fact, Bob and I met back in 1997 when we both worked with DPIC companies, where I headed up the underwriting for the Midwest. And Bob was senior claim manager out of the Midwest. So, we're lucky to have Bob. Bob's a wealth of information here.

And this is really an important topic given the fact that CA construction administration is an area where firms can take on considerable risk. And we've in fact seen an increase over the recent years in CA related claims against

design firms. What I think complicates this is not only the significant exposures in this area, but the fact that there are both technical and non-technical contributors that the design firm must consider and manage.

Important to note that we want the consultant on the job site providing CA services. In fact, most professional liability carriers in their applications will ask what percentage of your projects are you providing CA services or are you observing? They want to see a high percentage typically. Because they have a very good actuarial data around this, that if the design professional is on the site observing that things are progressing in general conformance with their plans and specs, the likelihood of that project being on time and on budget is-- and less claims is much greater than if they are not present.

We discussed this in our last podcast with Jeff Coleman. If the design professional isn't on that site, guess who they're all talking about? Bob, let's start off here getting your perspective about what would you say is the first step in the process that every design professional must take in managing this risk?

**BOB STANTON:** I think that the first step is actually in the construction of the contract itself. I believe that the design professional needs to establish realistic expectations, as to the duties and obligations of the consultant on the job site. And therefore, construction of the contract is essential in making sure that both sides have a clear understanding and that the expectations are reasonable.

Expectations can become a little bit hazy in the areas of frequency of visits and the scope of the work that's done, the role of the designer on the job site. As far as when a consultant should be in attendance at the job site, a lot of owner drafted contracts call for as necessary or all necessary, which is entirely too ambiguous. Because what's necessary from the contractors or the designers or the owner's perspective may be completely different.

Most association contracts such as the AAA or the EJC, CDC called for at appropriate intervals in the stage of construction. That's a nice start, but I don't think it really gets all the way to where you really want to be. A lot of times the at appropriate intervals is followed by things like but not less than weekly, monthly, etc. However, again, I think there's a better alternative.

The alternative is that you have specifically described milestones. And these milestones are phases in the project where it's believed that the design professionals' attendance on the site is most beneficial. It might be something like when the slab is poured or when the steel erection is complete, those type of things. That way everybody knows when the design professional is intended to be on the job site, not by a date but by a status in the construction.

And therefore, the work will be done when they get out there so that they haven't wasted a trip. And the work won't be covered up since everybody knows when they're supposed to be out there. The contractor won't progress beyond that to cover it up, so that the design professional would have to make assumptions as to how the work was done underneath.

We believe that this is the best way to handle the construction from when to be on the job site. I also think that it avoids the assumptions, which I believe are risks for the design profession, even if they're expressed as assumptions. As far as the scope, we'll talk about that as we go further down the road here.

DAN BUELOW: Yeah, that's a great point. I mean you'll see the word you know periodic often won't you, and you know that implies perhaps regular intervals. And if you happen not to be there when they're pouring that slab, and so forth that could create some issues. So, I think that's great advice.

And I think also where you're going with this too is recognizing you have association agreements, you have owner drafted agreements, regardless, you really have to use that contract as a vehicle to establish. And then use that contract to manage these expectations around CA. So, I think those are some great points. Bob, what is the purpose for a consultant to attend on a job site?

BOB STANTON: It's funny because I believe that this is one of the areas where there's the biggest confusion on the part of owners. The role of a consultant on a job site is basically to determine that when completing the project was built in general conformance with the contract documents. There are a couple of operative phrases which need to be further explained in that description.

The first is when completed, the significance of this is that the consultants focus should be on the permanent aspects of the project, not the temporary conditions, and which should remain the sole responsibility of the contractor. Permanent aspects of the project are basically when the contractor picks up its equipment and materials and leaves a site, whatever is left behind is what the consultant should have been focusing on. And when completed means that you're not looking at something in progress, because there are many ways of performing a task.

So, you're avoiding getting involved in the means and methods by which work is going to be done. The next general phrase is general conformance, it doesn't say specific or strict. As a matter of fact, when I review contracts, I usually try to get specific or strict, stricken from the contract because that's not really the role of the designer.

For instance, if a wall is supposed to be 15 feet high and 35 feet long, the consultant doesn't have to take field measurements to verify the dimensions of the wall. They can eyeball it, if it looks like it's 15 feet high, if it looks like it's 36 and it's a concrete block wall, that's enough. They don't have to give every specific tolerance.

So general compliance or conformance is what's essential. The thing that the consultant is not out there to do is inspect, supervise, monitor. They're there to observe. Why do we not inspect, supervise, and monitor? Because those words connote authority that the consultant does not have over the contractor, and that gets into means and methods.

And as we said, I said before, with means and methods and safety precautions, those should be the sole responsibility of a contractor. So, you're not out there to do that as well. You're not out there to guard against defects and deficiencies. You're not out there to endeavor to guard against defects and deficiencies.

If you have to have a caveat on that I would say that you guard against observed deficiencies. But if you're out there at milestones or you're not out there every single day, how do you possibly guard against defects and deficiencies? And a lot of contracts call for the guarding to be against all defects and deficiencies, and that's not really feasible for a consultant under the circumstances.

DAN BUELOW: Again, very good points. And then we need to keep in mind, again, the standard of care of the design professional out on the site. And also, what you have insurance for and what you don't have insurance for. And so, at the end of the day, we want to avoid taking on assuming certain contractual, and by your actions, anything that would be construed at risk responsibility.

That is the domain of the contractor, and it's really important to understand the standard of care of the design professional. We also recognize that there are certain clients and project types where they might kind of nudge you over that line, if not clearly nudge you over that line. And you mentioned the word inspect, for example.

Bob, it's not unusual, it's seen in public agreements, and so forth. When they want to use and throw a band around that word inspect, and I would say I want to get your view on this as well. But that's a good place for us to try to clarify in the scope of services how we're defining inspection. I mean, it's really what is your role when it comes to that?

BOB STANTON: Be safe, use the word observe period.

DAN BUELOW: Period, or define what inspect is, which is observed. So, while we want the design professional out on the site, we want them to provide these services and staying in their lane, if you will. They really need to be prepared when they have this process in place. And so, prior to attending these site visits, is there any prep work or consultants should perform an agenda, objectives, et, Bob that you would suggest?

BOB STANTON: I truly believe that having an agenda for the visit is vitally important. Determine what it is that you want to accomplish on that particular visit. Because I believe that a well drafted site report can be a site from the professional services contract. One of the most effective risk management tools for the consultant, and possibly the most effective risk management tool against delay claims.

Given the fact that the architect and engineers underwriting insurance community has pretty much indicated there have been significant spikes in claims for construction phase services, taking the time to prepare an agenda is probably becoming a must prior to attending a site. The agenda should be based on the construction schedule and a schedule of values, if you have them. If not, you might have to do an evaluation based on where you are in the project, and basically, taking a ballpark as far as where you believe the current status should be based on the beginning and end of the construction phase.

The agenda would be set up based on where the project should be, not where the project is. That way you can evaluate whether or not the contractor is falling behind schedule. The main benefit of the site visit agenda it keeps

you on task. Because what usually happens is, there are issues that are brought up while on the job site, especially if a contractor is behind.

And if you get something that's unanticipated that occurs during your visit, you have a list of things that you need to accomplish. And you can go back and make sure that you get the list completed versus possibly missing something and creating an exposure for yourself. The site report agenda gives you the ability to track the contractor's progress, as we said. If the contractor is behind schedule, you can note for the record that they are behind schedule and that report goes to the owner and to the contractor. So, everybody knows that they're behind schedule.

And I believe that this is a great tool in assisting you in defending against design or delay claims. Because if there's a later allegation of a delay claim, you've already demonstrated that the contractor is behind schedule. And therefore, you can show that two things. First of all, whatever they're accusing you of delaying them, didn't necessarily create the delay in the first place because they were already behind schedule. And the second thing is that if they say that it was at a critical point in their construction work, you could argue that they were already behind schedule and that would mitigate the damages.

If nothing else, I believe that a site report that's done with an agenda so that you're looking at the project from the perspective of where the project should be, and that word is provide you with a way of challenging the veracity of the contractors delay claim. Given the fact that it's communicated with everybody, there are no surprises when that happens.

DAN BUELOW: Yeah, great point. I mean critical document for-- again, important documentation practices is what we're talking about here specific to CA. And since we're talking about these site reports, what are some of the other issues that should be raised in this report?

BOB STANTON: You know I wanted to say something. You just brought up something that brought a thought to mind. I think one of the reasons that construction administration phase services are where you can be potentially vulnerable to claims is the fact that you are expressing opinions and/or you're making observations that can be called into question. If there is an error by the contractor on the job site, the allegation from the owner would be were you doing enough on the site? That's why I think you're vulnerable. And that's why these site reports become so important.

So as far as say reports themselves, if you're on a big project, if you're on a horizontal project like a roadway, you might want to note the mile marker you're at. If it's a large vertical project, what floor. If you're only attending at the trailer that day, those are the things that you write.

To whom you spoke, what did you talk about? Was it interpretations of a document? What are the weather conditions? That may help with the consultant's force majeure defense.

Work that was rejected, you might want to mention what was rejected and why, include the photographs. We'll discuss photographs in a little bit. Any request for scope creep or reduction. Scope creep, I'm going to go back. Again, you have the document clearly that if you're asked for a scope creep and you decide to do it as a firm. You want to make sure that you tie it back to the fact that it's outside the original scope of services, that it would also be subject to the terms and conditions of the contract.

Because if you do have a limitation liability, some courts have interpreted scope creep as being outside the original scope, and therefore, not subject to the limitation of liability. Another thing that you might want to address in the site report is any request a substitution of materials and components, and if there's anything that's unusual that happened on the work site. And I'm not just talking about job site safety but anything that may have happened.

You might find out that the contractor is waiting for materials or components to be delivered and that they're behind schedule because of that. Those are the kind of things that you might want to put on your report. Because those are things, again if the delay is by somebody else and the contractor turns around and tries to point the finger at you, you've got a document that says something completely different. And I will tell you that an effective site report, I have had claims wherein those kind of changes or those kind of additions in the report have saved firms from significant claims. So, it's important to remember that.

DAN BUELOW: And it's a formal document, isn't it? I mean these are the-- how would you recommend that these site reports should be written?

BOB STANTON: I believe that every communication on a project should be formally written, even if it's an intra office message. Because they may be viewed from the outside. But given the importance of this site report, in the context of risk management, I believe that they should always be formally presented. No slaying, don't be overly technical, don't use too many acronyms, if you can avoid it.

It should be objectively presented and do not editorialize anything. It should be timely in the file because if not, we believe that any kind of challenge to the report would be considered as revisionist history type of thing. So, make sure it's timely filed. It's verifiable, and one of the things that I think people often forget is you want to make sure it's locatable. And if you have notes, if you're keeping your separate log, and then you're doing these kind of site reports, make sure that the log notes are also locatable.

DAN BUELOW: OK, so Bob, we've discussed in our first CYA with CA podcast, with Jeff Coleman, we talked about the standard of care of the design professional and CA services, and the important distinctions in the standard care of the responsibilities on the site versus that of the contractor or the professional versus the contractor. And you've offered some great advice here when it comes to reports and documentations in addition to other thoughts around CA and managing that risk. Let's talk now a little bit about contracts. You see a lot of contracts, and have you seen any contract trends when it comes to describing the scope of services for CA services?

BOB STANTON: Yes, I have but let me say one thing. I have noticed that has been going on for a long time, is that with owner drafted contracts the scope of services is often provided with blurry parameters, using words such as but not limited to, without limitation, reasonably enforceable, usual customary, all things necessary, all design work. And I think you have to be very careful. First of all, negotiate a contract with clear parameters on your scope. But also, make sure that all your follow up documents actually reinforce the parameters.

The last two that I mentioned all things necessary, and all design work are especially important if the owner is going to separately retain consultants. You want to make sure that you're not responsible for all design work, if you're not doing all design work. So that's what I've seen for a long time.

As far as current trends, we always tell you that every contract you should have something that stipulates that the consultant is not responsible for the means, methods, installation techniques, sequencing, or scheduling of the work. We would prefer also that you would add to that, not only are you not responsible for it but it's the sole responsibility of the contractor. However, in the contracts I've been reviewing over the last like six months or so, I've noticed that everyone's putting conditions on that saying that, but should you see work that is being done incorrectly, you should do something about it.

You really don't want to have any contractual obligation noting exceptions to an absolute. Because that's kind of a backdoor way of getting you back involved in means and methods. And I would argue that given the fact that the courts are usually plaintiff oriented, the judge would interpret it that way as well. Obviously, what we would like to see you do is if possible, you want to delete that language. Or if you have to, try to modify it so that refers to something definitely observed.

But let's talk really quickly, I want to just touch base really quickly. Let's say you run into something where somebody is doing something incorrectly. You always want to make sure that you're talking about the final product and that the process, whenever you're making observations about some work being done on the project, which means that instead of saying you're not doing that right, you would say if the work is done that way it will not comply with the contract documents. Another trend, and this is one that's really starting to get frightening is there's a concerted effort to remove what used to be a standard or traditional clause in the contract, that indicated that the consultant is not responsible for conducting exhaustive inspections of the site, in like the AIA documents, for instance, that's found in the payment certification section.

And we believe that if you have an owner drafted contract and it's been taken out, you need to put it back in, or if it's not in there, you need to put in. The reason being is that you do not have a duty to closely inspect a site. As we said before, it's for general compliance with the contract documents. And I know there'll be an argument, I believe we discussed this earlier about the ethical obligation to protect the general public.

If you have that general obligation and you remove this section, this clause for exhaustive inspections then you are responsible, are much more responsible for the overall work that's being done in the project, beyond what you're intending to do, beyond what would be considered open and obvious hazards. So, you have to make sure that you're not responsible for exhaustive inspections of this site, and that's really an essential issue for you.

DAN BUELOW: Great points, Bob. And in the previous podcast on CA, we talked about the fact that insurance carriers are asking in the application process, what percentage of your work are you out there observing the work? They want the design professional out there because they have good actuarial data, again, that if the design professionals out there observing that things are progressing, in general conformance with the plans of specs, the likelihood of that project being a success is much greater.

What from a contractual, again back on contracts here, what if the owner attempts to reduce the scope of services specific around CA? What is your advice?

BOB STANTON: Well, any reduction in the scope of services, first of all should be identified and handled as if it's a material change in the contract itself. It needs a separate document, that might be a time when I would actually go so far as to use a certified letter to get it across to the owner, the importance of this reduction in scope. It should be handled as a change order, if possible.

DAN BUELOW: If you had a contract that you had initially, some services identified and there is a change to that, that's when you would certainly want to make note of it, right?

BOB STANTON: Yeah, and what I'm saying is let's take the easy one. You've got a project that provides a full spectrum of services, all of a sudden at the end of the design phase, the owner says, wait a second, we don't need you for the construction phase. Well, what we would do in that circumstances, we would actually write back to the owner and say we're uniquely qualified to both interpret and to evaluate changes to the design since we're the ones that drafted it.

You need to definitely make sure that you are noting back that this is a material change. And I would submit a change order, if the owner doesn't necessarily bring it up. But you also have to make sure that you explain that your pricing was based on the full spectrum of services. Your scope is being truncated, that impacts your fees as well.

The final part I think really is you have to make sure that if they've reduced your scope, whatever the scope reduction is you are not responsible for any delays or additional costs that arise out of those services. So, for instance with the CA services, your responsibility should end at the design phase. Anything that happens, any changes that are made, any occurrences on the job site, you should have nothing to do with you period.

DAN BUELOW: And the other scenario that I was thinking about too is that if they want to reduce those CA services on the front end, despite knowing that it's best to have the design professional there. They're going to want to work with their attorney to get some language in there to hold them harmless, in the event they want to bring in that third party CM. Or just save some money and reduce those services. So, you're talking about hey, if there is a change with scope of what have you, you definitely want to memorialize that. If they're going to reduce that role on the front end, you're going to want to have some language to hold you harmless.



BOB STANTON: But I still think you want to tell them, you always want to make sure that you tell the client that they say no CA services, you have to stress the fact you are uniquely qualified to interpret the documents, and that having a third party or actually nobody do it could increase the likelihood of delays and additional costs. You not only tell them that you're not responsible, but you tell them that there's an enhanced risk. I think that would help you even more should something come up at a later time.

Because you have told them I wouldn't do this if I were you because, but if you're doing it, we're not responsible for it. I think that gives you a better document trail to work off of.

DAN BUELOW: Yeah, no I agree, that sounds like a very good idea. So, Bob, let's wrap this up with the claims story. You're always good with a good claim story. With your 30 plus years of working with architects and engineers, professional liability claims, do you have any stories here where the contractor requests the consultant provide direction on means or methods, for example?

BOB STANTON: Oh, Yeah, the one that I think is the most interesting is I was involved in an office building in Tulsa, Oklahoma. They had a curtain wall consultant. And the curtain wall consultant designed the curtain wall with the windows via window curtain wall. And the windows were supposed to be hooked in their loops and all four corners of the brackets. And they were supposed to be hooked in because they wanted a very flexible curtain wall.

Because in Oklahoma, they have a lot of issues with tornadoes and microbursts. And the contractor reached out to the curtain wall consultant and indicated that they couldn't construct it as it was drawn up, so did they have any recommendations in how to do the work? And for some reason, the consultant must have kind of had a vapor lock in their brain, they said you can glue them into place.

Well, that made it more rigid and there was a microburst in the area, and there was glass all over the downtown area, from the rigid curtain wall. At one point, I walked into a mediation and there were 26 attorneys sitting in the room, and I said I don't think we'll even be able to agree on what time we want to break for lunch. And sure, enough after two days, we had gotten nothing done. Believe me, once you step into the realm of providing direction on how to do the work, you're in for a pound as if you were a contractor.

DAN BUELOW: Good way to wrap this up and kind of illustrate here what we're talking about with real life claim. And everybody likes a good claim story, Bob, and you're the right person for that. So, I want to thank you, Bob Stanton for helping us out with this discussion on CA. Thank you Bob.

BOB STANTON: Sure.

DAN BUELOW: And this again, is part two of our Willis A&E podcast series on CA. And thank you for listening to another episode of Talk to Me About A&E.

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