



2022 CLM Construction Conference

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Riding the Construction Wave: Emerging Trends and Risks in a Volatile Construction Market

I. Topic Overview

In 2020 and 2021, a global pandemic was an unknown risk that the construction industry could never anticipate. But in 2022, that risk won't stop the industry from moving confidently into the future. So, what is the most urgent issue impeding progress? In a word; "shortages." Specifically involving materials and labor. News footage showing container ships anchored right off the coast depict the supply chain woes. Additionally, consider that January 2022 started off with a net loss of 5,000 jobs in construction; with gains between 3,000 and 8,000 in residential and architectural/engineering, respectively, while losing 9,500 in heavy and civil engineering jobs, those that largely support infrastructure. Not having the materials or the personnel to complete a project on time kills revenue and the bottom line. Because of such volatility, there's substantial risk management and insurance challenges, balanced by opportunities. Subcontractor performance and default, cyber exposure and site security continue to bedevil the construction business. The prize ahead, of course, is the red-hot North American construction market, which looks to take advantage of the U.S. infrastructure bill. That makes resilience, in managing supply chain risk and labor shortages, perhaps the most important issue for the construction industry in 2022.

The How, Where, and Whys, and Pivoting to Rectification

Many analysts credit the 2008 recession with a significant shrinkage in the construction workforce. CBS News estimated that 1.5 million residential construction workers left the industry during the recession. The shrinking of the workforce coupled with less money being invested in construction resulted in lifelong and qualified laborers losing their jobs, and ultimately leaving the field. Many of these workers changed careers or never reentered the workforce after the economy started to recover. In 2020 and 2021 were obviously game changers for a reduction in the work force.

The construction industry added approximately 210,000 new construction jobs in 2017. The rapid job growth contrasted with the available labor market has resulted in backfilling positions with insufficient and unqualified labor. The influx of unqualified labor presents unique considerations for the insurance, legal, and forensics markets. Although these professionals generally concede that the presence of defects and construction-related issues increases overall costs, each professional can also take proactive steps to identify and assist in mitigating and

resolving downstream impacts. The affected and interested post-loss markets have an obligation to educate and collectively can attempt to minimize/end this problem by walking through the emerging issues, patterns that exist, better approaches to common problems, all of which roll into a lesson learned.

II. Underlying Risks

Underwriters & Brokers

Smart decisions must be based on the best available information – and the frontlines of the unqualified workforce issues are often the underwriters for insurance companies. Underwriters review applications for coverage and accept or reject an applicant based on risk analysis – the information relied upon in their risk analysis is partly based on what is submitted by the applicant but also based upon information contained within the underwriter’s database. Often working in tandem to an underwriter is an insurance broker who submits insurance applications on behalf of their clients, with the insurance underwriters reviewing the application and deciding whether to offer insurance coverage. Collectively, insurance underwriters advise on risk management issues, determine available coverage for specific individuals, and review existing clients for continued coverage analysis. Pertinent analysis for underwriters includes review of financials, identifying project teams and key personnel, evaluating the experience of their teams, and obtaining a birds-eye view of the entity in general. For instance, has this potential insured spread themselves too thin or seen a recent spike in revenue? A rapid expansion in the workforce? What are the training policies and procedures in place for new employees? Simple questions can raise the red flag or prompt additional investigation. Regardless of whether insurance is provided or not, documentation of the risk analysis (i.e., financial information, staffing qualifications, claims history, etc.) for the future, whether your own risk analysis or a colleague, documentation can aid in the completion of future evaluations.

Risk Transfer during Construction Jobs

Through any construction job there is risk transfer. While the general contractor may hold the greatest burden of risk, the subcontractors performing work on the project also maintain risk. Standard contract provisions require that subcontractors provide defense and indemnity to general contractors for damages arising out of or related to the subcontractor performance of work. As the general contractor oversees the job from start to finish, they are involved throughout, whereas subcontractors are often only involved for short periods of time; for instance, subcontractor A cannot start work until subcontractor B completes their scope, while subcontractor B is waiting to start their work after subcontractors C and D finish their work. The contractors’ adjacent scoped work links the contractors together, with construction milestones reliant upon each one doing their contracted piece of the puzzle. Contracts often include liquidated damages provisions related to failure to maintain the agreed-upon contract schedule. Unqualified labor problems or workforce shortages can impact the project schedule and completion. Questions then arise as to the nature of the critical path milestones, and whether the subcontractor work impacted the overall project completion. Delay claims are also often associated with claims of defective construction. Risk transfer also occurs through performance bonding requirements, and unqualified workforce issues can then impact the issuing surety.

Related to this topic – Anti-Indemnity Statutes/Additional Insured – discussed later

III. Highlighted Construction Projects

Infrastructure Projects

Infrastructure spending and construction is a hot topic. The current administration's infrastructure plan is to overhaul how infrastructure is handled through a reduction of Federal rules, regulations, oversight, and mandates on such projects. The Key Principle in the plan is to: Make more targeted federal investments solely to projects that are regional or national in nature; Encourage state and local governments to make their own decisions about infrastructure; Shift certain infrastructure functions to non-federal and private entities; and leverage the private sector for public-private partnerships. Investment is penned for construction and for maintenance.

Due diligence in preparing for large scale infrastructure projects by design professionals, contractors, risk managers, and insurers can be tools used to minimize the inherent liability claims that will soon appear and help wade through the nonsense that follows. Historically, government has traditionally been responsible for claims made relating to infrastructure failures. What type of claims can be brought against governmental entities varies greatly by whether the claims are being made against a federal, state, or local entity based on what level of governmental, discretionary, or statutory immunity exists in that jurisdiction. While the federal government allows for liability of its employees based on the Federal Tort Claims Act, many states have much more restrictive immunity statutes. If discretionary functions such as oversight, engineering or inspection/maintenance are passed to private entities, however, the claims and exposure for private companies will differ greatly when not protected by governmental immunity.

From a fiscal standpoint, as American infrastructure degrades, can we, as a country, rely on states and localities to be able to fund, inspect and maintain projects? There are many core concerns with providing minimum commitment in American infrastructure, evidenced by historic RFPs and contract awards. Contracts are presented by state and local jurisdictions on infrastructure projects; engineering firms bid to inspect and assess bridges, roads, dams, etc., while contractors bid to complete maintenance and repairs to the same. The inexperienced segment can extend beyond construction/laborers into the claims professionals. An example would be a state requesting proposals from engineering firms to inspect over 6,500 bridges, located across the state with various spans, structural configurations, and details, typically absent of any construction drawings with minimal historic maintenance records. The contract is awarded to a firm on the scale of \$1.3M; of note, this equates to less than \$200 per bridge. Typical standard of care to inspect and assess an average bridge structure would more time, effort, and investment.

IV. Receiving a Claim (from the Claims Perspective)

From a claim's professional's perspective, there is a right way and a wrong way to initiate the receipt of a new claim. Best practices include requesting a standard set of information (Request for Information (RFI)) to the insured making the claim.

Talking point – the group shall provide a suggested RFI for discussion/interaction with the group; during the review of this document with the attendees, the following will be discussed/explained:

- The importance of such a document.
- Explanation of typical requests (i.e., financials, scope, etc.).
- Document review and necessity of project documents.
- Qualifications of contractor, subcontractor, etc.
- Evaluation of the claim based on provided information.
- When to retain legal counsel
- When to retain an expert.

V. Construction Projects & Insurance

Anti-Indemnity Statutes

Owners and general contractors have historically insisted on subcontractors and suppliers agreeing to indemnity clauses in contracts a precursor to awarding work to subcontractors. Indemnity clauses built within insurance contracts shift the responsibility to pay damages, which can include legal fees, from one party to another. Many times, the shift comes without regard to who is responsible for the loss. A boiler plate clause from an insurance contract reads as follows: *“Subcontractor shall indemnify and hold harmless the Owner, Architect, General Contractor, and agents and employees of any of them from and against claims, damages, losses and expenses, including, but not limited to, attorneys’ fees, arising out of or resulting from performance of the Work.”*

The exemplar above includes the clause known as *“hold harmless”* which one or both parties agree to absolve the other party and not hold it responsible for any loss, damage, or legal liability – the inclusion of *“hold harmless”* and similar clauses are often buried within the contract and unrecognizable or hidden. A separate duty to defend is often included in the contract language, requiring that the subcontractor be responsible for the defense costs of the indemnified parties, commencing at the time of the initial allegations of fault. Anti-indemnity legislation has been written in 45 states that limits or prohibits enforcing indemnification agreements in construction settings. This type of legislation is rooted in preventing the owner or general contractor from exerting unethical bargaining powers over subcontractors. It is also intended to improve the availability of insurance to subcontractors, by ensuring that subcontractors may only be held responsible for their own negligence, and not the fault of others. For example, the Colorado provision provides that *“any provision in a construction agreement that requires a person to indemnify, insure, or defend in litigation another person against liability for damage arising out of death or bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitee is void as against public policy and unenforceable.”* C.R.S. § 13-21-111.5 (West)

Talking point – there are three types of indemnity agreements: limited, intermediate (full or partial indemnity), and broad.

Additional Insureds

In addition to the previously discussed “hold harmless” clause found within subcontract agreements, there are agreements that include “additional insured” provisions. These clauses require the subcontractor to amend its liability policy to make the owner or general contractor (notably the superior bargaining entity) as an insured under the policy. These clauses are problematic to subcontractors because they may unfairly shift the financial responsibility for claims to the subcontractor or its insurance company.

The problem with additional insureds arises from the language and understanding of the insured’s contract. Furthermore, when a subcontractor is required to purchase insurance naming the contractor, owner, or others as an “*additional insured*,” it is the subcontractor who will pay the higher insurance premium when a loss is covered under the policy, even when the subcontractor was not negligent. For example, a general contractor or owner that is indemnified by the subcontractor may use less care to perform work to a satisfactory standard, avoid injury, or complete scoped work properly given the general contractor or owner (the indemnified party) is not liable for its own actions. The party who is truly responsible for the loss suffers no increased cost, while the subcontractor bears all the burden. As a result, carelessness and negligence may result in increased construction defects, scheduling delays, or accidents – subcontractors, general contractors, and/or owners may conceal details in the post-loss scenario to avoid increased premiums, etc.

VI. Construction Site Management

Construction site safety, accidents, and other concerns related to construction site management are emerging as the workforce expands with inexperienced laborers. According to Zurich Insurance Company data tallied across a 10-year span ending in 2013, “*...employees that have been on the job less than one year have a disproportionate number and cost of lost time injuries. The percentage of lost time claims for the construction industry is 51 percent during the first year of tenure compared to 37 percent for all other industry types. Some assumptions can be made about the higher percentage of injury when compared to other industries:*

- *Construction work is more dangerous than most jobs in general.*
- *New, inexperienced workers are more likely to get injured because they lack experience working in dangerous environments.*
- *New workers may not have the physical conditioning needed to perform heavy work.*
- *Experienced workers are aging, which can contribute to cumulative muscle wear and tear.*
- *Experienced workers are coming back from layoff and/or reentering the job market again, and some could be physically deconditioned.”*

The Zurich data could be considered representative given the issues identified appear unilaterally throughout the insurance industry. It is anticipated that as the economy continues to rebound, unqualified and inexperienced workers will continue to inundate the workforce all while experienced workers balance them out. The risk of injuries or worksite accidents can

occur with the inexperienced operating without proper training or because of negligence. Contrarily, the aging workforce may have the experience; however, data suggests that nearly half of lost time claims arise from experienced workers in the age group between 41 and 60 years.

Talking point – discussion related to the balance of construction accidents with inexperienced versus experienced workers.

VII. Standard of Care

Standard of care/practice can be black and white, but often can be black and white with shades of gray. Expert witness evaluation, assessment, and testimony is generally required to identify and evaluate standard of care/practice – the precursor to defining negligence. Negligence, a cause of action in Tort that must consist of three elements namely: a Duty of Care; a breach or contravention of that duty; and a measurable loss or material damage flowing from or because of the breach of the duty. Commonly accepted definitions of standard of care for construction professionals includes the following: Contractors: The standard of practice for contractors and subcontractors includes the obligation to understand and comply with applicable law, code provisions, regulations and industry standards of care, and contract, plans and specifications.

Why does the standard of care/practice matter when it relates to the inexperienced and unqualified workforce? Fundamentally, based on the definitions above, the “standard” is a function of the quality of the workforce. The workforce ability to understand and implement the “applicable law, code provisions, regulations and industry standards of care, and contract, plans and specifications,” is often a function of experience. With younger and less qualified workers, employers arguably have an increased burden to provide education and training to ensure that workers have the tools available to comply with the standard. Often, plaintiff or claimant experts seek to use the most stringent, or prescriptive, available instruction or code provision as the “standard” which applies to work on a project. An interesting question is whether the standard is lowered when contractors don’t have the fundamental knowledge to understand the project in front of them. Effectively, negligence is increasing while the experience of the workforce decreases.

VIII. Project Documents

Do Contractors Actually Read the Project Documents? The answer more and more are no. Construction mirrors life – individuals feel like they are experts at everything and need no guidance – its bravado. Thorough reading and full comprehension of what is in contracts and project documents is crucial to the success of any construction project, specifically with new and emerging technologies demanding due diligence and the litigious state of the industry, evidenced best by bad faith laws. Best practices for subcontractors and contractors involve careful reading of project documents to understand the full scope of the risk transfer, as well as the potential expanded scope of the project that can occur when additional reports, prime contracts, or other agreements are incorporated as project documents. As can be seen throughout this topic discussion, the inexperience and unqualified workforce is overwhelming the industry and is a root cause in the increasingly savvy plaintiff counsels or lobbying for bad

faith. Oftentimes the project manual, drawing packages, and specification books are merely glanced at during the project rather than comprehensively read and understood – there is a risk transfer that occurs between designers, contractors, subcontractors, risk managers, and more – but clearly the risk is not understood. This is not understood at the underwriting level (i.e., vetting contractors properly) or at the construction level (i.e., contractors ensuring proper construction).

While some contractors avoid construction defect litigation while others, specifically in litigious states, find themselves dealing with such litigation job after job. From a claims perspective, the fact that contractors and subcontractors aren't properly qualified for projects compounds the issue and can be readily apparent upon the notice of claim. The receipt of a claim was discussed previously; however, there is an educational component at this stage that can aide both the insured and the insurer for the future. Emphasizing the importance of document retention, proper documentation during a project, and outlying risks of improper project handling to the insureds will increase project deliverables. For the post-loss side of claims, proper project handling will aide in evaluating the claim from start to finish.

IX. What's next to affect this topic?

Technology in Construction

Technologically advanced and efficient building design, as well as accelerated construction methods, appear to be the wave of the future. Technology dependency has created a demand for implementation into building design and has flipped conventional construction on its head. The pace of technological innovation in our cars, phones, and entertainment drives a similar expectation for construction means and methods. Examples are widely visible with advanced construction methods including:

- Computer-driven construction; notably 3D printing technology using conventional (i.e., concrete) and other (i.e., plastics) materials.
- Expedited construction; notable reference to the south Florida bridge collapse that used off-site construction, drop-in placement, and fine-tuned (in-place) installation.
- Autonomous construction equipment: examples are wide-reaching including robotic pot-hole repairs.
- Solar technology: solar is not a new category, but widespread mandatory implementation does pose a problem. Most new units built after January 1, 2020, are required to include solar systems as part of the standards adopted by the California Energy Commission. California and requirements of solar panels on residences. Anticipated problems with this mandatory implementation are anticipated given similar legislation passed in Canada resulted in installation defects caused by the inexperience with the workforce related to solar technology.

Technology in Claims/Litigation Management

These innovations, combined with increased global awareness of the impacts of technology, have prompted consumer demand for products promoting alternative energy, conservation, and self-dependency solutions. Together, technology and advanced design create heightened expectations of design and construction professionals in new and existing construction. Design

professionals may also be willing to implement new technology and approaches in arenas in which construction professionals are not yet educated. Education and communication are keys to success in these environments. Discussion shall also include known and potential claims related to failures to meet projected goals, including functionality and scalability of technology, and how the industry is managing risk transfer for these claims.

Technology in construction and design also extends into the post-loss, claims/litigation side; specifically, claims handlers and litigators require electronic document management systems for document retrieval and review.

Talking point – the legal perspective and document management, review, and retention.

X. Lessons Learned / Takeaways

The following can summarize the discussion:

- Sufficient documentation from in-house claims professionals (i.e., adjusters, examiners, managers) can provide valuable insight to a contractor's past performance and claims history. The more information provided can aide in insurance carrier's underwriting procedures.
- Proper questioning from the initial receipt of a claim can be used to value the claim properly; interviewing and document requests are most important from day one.
- The construction and insurance industries must work together to solve this emerging problem to reduce impairing the upward trajectory of the construction industry.
- Educating the construction industry (the insureds) through the claims/litigation process is a tool to aide in future claims/litigation; instill the value of proper selection of qualified project managers, the importance of site safety and management, documentation throughout the life of a project, and utilizing experienced workforce.
- Stay within your sandbox – if the experienced workforce is not available for a new project, work to train those entering the industry. Instill this on prospective and current insureds.