

# Practical Insights: What You Need to Know

## Hiding in Plain Sight: Specifications as a Source of Risk



BY UJJVAL VYAS

IN 2013, THE Construction Specifications Institute (CSI) engaged a company to undertake a study of the current and future state of specifications and that distinct sub-category of the design profession, specifiers. If the term “specifier” denotes a breed unknown to most in the surety industry, this is understandable. Contractors, subcontractors, owners, insurers, and others in the construction industry

are largely unaware of the role that specifiers play in the production of the key information that rules the construction project. Most are also unaware that poorly prepared or incomplete specifications are a source of risk that’s hiding in plain sight.

The instruments of service are the “drawings and specs” produced by the licensed design professional or firm during the construction documents phase of the underlying contract between the owner and the architect (generally speaking). The drawings and specs provide the visual and non-visual information the constructor needs to estimate, bid, schedule, and deliver the project. In the event of a default, the surety is responsible for assuring fulfillment of the performance of the contract through the information provided in these instruments of service and is held to a certain standard for completing what is in these documents.

It is commonly known that drawings are used primarily for parametrics, space planning, and aesthetic composition and are not warranted to provide exact dimensions or full descriptions of the products, assemblies, systems, and other requirements for compliance by the contractor. In fact, no significant estimation (either for general conditions or for construction services), bid packages, or scheduling can be done with the drawings alone. Contractual performance for contractors and subcontractors is determined by adherence to the non-visual information in the project manual.

Poor instruments of service produced by the design professional will negatively impact the whole process. Two CFMA/FMI studies show this to be the case, and there is no sign that the trend will reverse any time soon.<sup>1</sup> The

result of improper, ambiguous, contradictory, or unclear specifications can be felt throughout the process, causing major problems for the constructor and eventually costing the owner substantial sums. Constructors have known this for a long time, but the magnitude of the impact on owners has come to light as a result of CSI’s study.

The common problem of poor specifications raises several issues for constructors. Estimating, which is often done in the context of severe time constraints, becomes an exercise in guesswork. This increases the likelihood of contractor non-performance and can also put pressure on the contractor’s performance for other projects in progress, which raises the specter of default.

Poor specifications also create circumstances that encourage opportunistic behavior by constructors during bidding, which ends up being detrimental to the owner. A contractor may understand that the specification is improper or ambiguous and will submit a bid knowing that change orders will ensue. This creates an apparent lower bid masking the true higher cost. Another reaction to poor specifications, especially in those areas that can have large disparities in pricing, is for the contractor to add some increased percentage of contingency in a bid. This makes it impossible for the owner to acquire robustly comparable bids for selection. Unfortunately, this type of gamesmanship has become all too common.

Unbeknown to most owners, insurers, and bond providers, specifiers are directly involved in the Division 01 portions of the specifications, which determine contractual compliance with the General Conditions of the contract. What, when, and how submittals are to be prepared, submitted, and approved is just one area that is outlined in the specifications; and insurance provisions also can be altered and amended by specifications. However, specifiers rarely have access to the underlying contracts between the owner and the design professional or the owner and the general contractor.

Furthermore, specifiers are not versed in the legal or risk issues associated with contract or insurance provisions and even less so with surety issues. The fact that the specifier — not legal, insurance, or risk management personnel — creates the requirements for fulfillment of the underlying contracts makes for a dangerous situation.

Even more troublesome for the surety industry, it is common, under the well-intentioned theory of protecting

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the owner's interests, for the specifier to make changes to the warranty time periods or other attributes that can significantly change the underlying risks of the bond. For example, the specifier might change the general conditions so that the contractor is made a co-guarantor of equipment and materials for the full term of the warranties offered by the supplier and/or manufacturer. In a more common scenario, a specifier will simply fill in the blank for warranty requirements with what he or she believes is a suitably high number to protect the owner. In other circumstances, the specifier might alter liquidated damages or consequential damages provisions as well.

Research shows that many of these risk issues are exacerbated by the low prestige in which specifiers are held by the architectural profession. This low prestige, combined with the predilection of designers to use a disproportionate amount of the design fee for visual work alone, leaves specifiers with unreasonably short time frames to do their work. This increases the likelihood of errors that can create heightened risk for the project.

The fact that an unrecognized core node of risk is now in the open means that it can be productively addressed

to benefit all parties on the project. Given the rapid expansion of new mechanisms for information acquisition in the construction industry, it is crucial that sureties pay attention to the quality of specifications to help ensure project success. ●

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### Reference

<sup>1</sup> See “Seventy-four percent of the owners polled ...” and following paragraph in 2004 FMI/CMMA Owners’ Survey, p. 7, available at <http://www.cmaafoundation.org/files/surveys/2004-survey.pdf>. These surveys indicate that there has been a concern with design document quality for quite some time. Anecdotally, there has been an even longer period of decline. See also “The 2010 FMI/CMAA Owners’ Survey indicated ...” in 2010 FMI/CMAA Owners’ Survey, p. 5, found at <http://www.cmaafoundation.org/files/surveys/2010-survey.pdf>.

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