

Construction

EXECUTIVE

THE MAGAZINE FOR THE BUSINESS OF CONSTRUCTION

"What insurance issues arise when construction defects occur, and what advice can you give contractors to protect their businesses against these types of claims?"



JIM ARCHIBALD
Partner and Chair,
Construction and
Procurement Practice Group
Bradley Arant Boult
Cummings LLP

A contractor should take prompt action to protect its rights upon receiving notice of a construction defect from the owner, including inspection of the defect, notice to subcontractors and suppliers, and notice to insurance carriers.

The contractor should try to travel to the site to investigate and photograph the alleged defect immediately, before the owner performs any repair or replacement work. If remedial work by the owner appears imminent, the contractor should demand in writing an opportunity to see the alleged defect before the remedial work begins.

The owner's failure to give the contractor an opportunity to inspect the alleged defect, or participate in efforts to repair it, may compromise the owner's right to recover damages from the contractor. Of course, the contractor may agree that its work was defective and undertake efforts to correct it, and it usually is much less expensive for the contractor, or one of its subcontractors, to perform the work than for the owner to arrange for repairs.

In addition, the contractor should notify in writing any subcontractors and suppliers that may be responsible for causing the defect. The contractor should review its subcontracts and purchase orders to make sure it follows any contractually mandated procedures for making warranty or indem-

nity claims. If appropriate, the subcontractors and suppliers also should inspect the alleged defect.

Finally, the contractor should notify in writing its own general liability carrier, along with any carriers under policies provided by subcontractors and suppliers that name the contractor as an additional insured. Additional insured policies are sometimes overlooked or forgotten by contractors, but they can be a valuable source of insurance protection when a defect claim arises. The contractor should keep the certificates of insurance provided by its subcontractors and suppliers in a convenient, safe location to ensure it can identify the right carriers and give notice under the right policies.

Coverage for construction defects is often disputed by the insurance carrier. Each carrier that receives notice from the contractor of the defective work claim usually responds by requesting additional information about the claim so the carrier can make a more informed decision about its obligations under the policy. The contractor should respond promptly to reasonable requests for information from a carrier. Ultimately, each carrier writes a

letter that states a formal position about whether it will cover the claim, cover the claim under a reservation of rights to dispute coverage later, or reject the claim as not covered by the policy.

While most general liability policies are based on the same Insurance Service Office (ISO) forms, states interpret these policies differently, and the contractor's rights to obtain coverage for defective construction may vary from state to state. General liability policies provide coverage for "property damage" caused by an "occurrence," provided that this coverage is not circumscribed by one or more exclusions listed under the policy. For example, general liability policies usually exclude coverage for damage to "your work," but many state supreme courts have held that "your work" does not include work performed by subcontractors or suppliers to the contractor.

It is often difficult to predict whether coverage will be available for a particular claim in a particular jurisdiction. Nonetheless, promptly taking the actions described above should help maximize a contractor's ability to defend itself and deflect liability to subcontractors, suppliers or insurers to the maximum extent possible.

Executive Insights

FROM LEADERS IN INSURANCE AND BONDING

BY DONALD BERRY