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2016: What Are the Opportunities? What Are the Risks?

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Thursday, December 17, 2015 1:30- 3:00 pm ET

Brett Stewart, JD – XL Catlin Design Professional David Burstein, PE – PSMJ Resources

Provider Number: J174 Course Number: hotmarketsweb

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Webinar leaders



David Burstein, P.E.

Director of Client Services PSMJ Resources, Inc.

- 35+ years of experience in the management of engineering companies
- Provides consultant and training services
- Topics of expertise:
 - 1. Strategic Planning
 - 2. Project Management
 - 3. Financial Management

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Brett Stewart, J.D.

Risk manager for XL Catlin Design

Professional

- Develops education and loss prevention materials for architects and engineers
- 18 years in the industry handling claims and litigating design and construction cases as an attorney
- Actively involved in industry organizations to advocate on behalf of the A/E community
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8

About XL Catlin's Design Professional unit

Specially designed risk management for today's A/E firms

40+ years of providing tailored risk management solutions that protect the assets of design firms.

Our mission is simple: to bring policyholders the resources and protection they need to run a successful business.

- Innovative professional liability insurance programs
- Industry-leading educational programs
- We work with you to reduce the cost of loss and preserve valuable business relationships



About PSMJ

- World's leading authority, publisher and consultant in the A/E/C Industry for over 40 years
- Provide content and training on a variety of topics (see below)

	Newsletters	Surveys & Books	Seminars & Conferences	Consulting
Strategy	\checkmark	\checkmark	\checkmark	\checkmark
Marketing	\checkmark	\checkmark	\checkmark	\checkmark
Project Delivery	\checkmark	\checkmark	\checkmark	\checkmark
Finance	\checkmark	\checkmark	\checkmark	\checkmark
Human Resources	\checkmark	\checkmark	\checkmark	\checkmark
Transition	\checkmark	\checkmark	\checkmark	\checkmark

Learning objectives

After attending this webinar, you will have valuable strategies and tactics to:

- Understand developing trends for the overall North American A/E/C market
- Benefit from regional market breakdowns for US and Canada
- Recognize professional liability risks associated with each of those markets
- Know how to be proactive in managing liability exposure and delivering successful projects



How do the A/E/C markets look in 2016 and beyond?

- Trends in the overall economy
- Which markets will be up?
- Which will be down?
- What are the risks inherent in each market sector?
- What should you do?



A lot of anger about our economy



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Initial Jobless Claims: Share of US Labor Force



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Household assets are much bigger than debt



Our prediction for the U.S. Economy in 2016 is...



When planning your firm's strategy...

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"Don't skate to where the puck is. Skate to where it's going to be." -- Wayne Gretzky



A/E proposal opportunities are the most leading indicator



A/E Proposal opportunities continue their upward trend

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Proposal Opportunities Plus/Minus Trends

All regions are showing substantial increases



Which A/E markets are...



The Changing Energy/Utility Picture

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US CRUDE PRODUCTION, NET OIL IMPORTS



The overall effect is very positive







1¢ Drop in Gas Prices = **\$1** Billion in Purchasing Power

But there is a down side



This dip has already affected employment in oil-rich states

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Oil intensive states: AK, CO, KS, LA, ND, NM, OK, TX, WV, WY Source: Haver Analytics, Renaissance Macro Research

Low energy prices will reduce future investments

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Source: IHS 2013

But renewables are increasing

Projected Renewable Energy Development from State Renewable Electricity Standards*



© Union of Concerned Scientists 2013; www.ucsusa.org/RESbenefits

Let's look at A/E proposal activity



Energy/Utilities market remains strong

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Energy/Utilities Plus/Minus Trends

Energy/Utilities Plus/Minus Trends by Geographic Areas



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Energy/Utilities submarkets



5 years ago we predicted a manufacturing renaissance in the U.S.



China is losing its low-cost labor advantage

Per bour \$30 \$25 United States (2% growth) \$20 Estimate \$15 US/China \$10 Ratio = 10XRatio = 5XRatio = 22XChina \$5 (17% growth) \mathbf{O} 2005 2010 2015 2020 2025

Manufacturing Wages U.S. vs. China 2002 to 2025

Source: Yankee Group 2010

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But the strong dollar...



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Has hurt U.S. manufacturers



Let's look at A/E proposal activity


The heavy industry market **PSMJ** Resources, Inc. . is slowing

Heavy Industry Plus/Minus Trends



Especially in Canada



Light Industry looks better

Light Industry Plus/Minus Trends



In all regions



Industrial Submarkets



- Mining and resource extraction (including oil) Primary materials manufacturing Petroleum facilities
- Pharmaceutical manufacturing
- **Chemical plants**
- Component assembly (including telecom)
- Warehouse/distribution facilities
- Repair/service facilities

In 2010 we predicted a strong housing market

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U.S. housing starts are now nearing sustainable levels

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UNITED STATES HOUSING STARTS

But there are regional variations



44

Let's look at A/E proposal activity

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The housing market is very strong

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Housing Plus/Minus Trends



All regions are strong

Opportunities for Housing by Geographic Areas



The housing subdivision submarket drives most other A/E/C markets

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The subdivision market is very strong

Single family development (Subdivisions)



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Other housing submarkets

Condominiums



- Multi-family housing (apartments)
- Single family homes



Senior and assisted living



Claim trends

- Construction defect litigation remains strong
 - Plaintiff attorneys make money based on economies of scale
 - Search public records for building permits and canvass communities with fliers near the end of the statute of repose
 - "Luxury" condos and high end condos present unique risks
 - Long tail exposure
 - Traditionally shoddy construction
 - Lack of homeowner maintenance
 - Developers underfunding reserves





Claim trends

- HOA board members with fiduciary obligations concerned about personal liability if they do not recommend litigation
- Sole purpose LLC developer entities are gone and dissolved when lawsuit is filed
- Joint and several liability exposure in most states
- Right to repair laws are not as effective as intended
- Stealth condos / apartment conversions
 - Fewer missed market claims now that economy is rebounding
 - XL Catlin white paper Confronting Condominium Risks



Risk management considerations

- Focus on your contract
 - Defense and indemnity
 - Standard of care
 - Negligence v. breach of contract
 - Limitation of liability (or seek a higher fee)
- Insist on providing full construction phase services
- If involved early in the project, have CC&Rs or Declaration of Condominium:
 - Require super majority in order to file suit
 - Mediation as a condition precedent to a claim / waiver of jury trial





Risk management considerations

- Create maintenance and repair manual as part of scope of services
- Document all changes to schedule, cost, scope and poor construction
 - Don't create incriminating documents; i.e., admissions of liability
 - Maintain your documents for 2 years longer than the statute of repose
- Expect litigation



The commercial markets have fully recovered



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Commercial Developers Plus/Minus Trends



Commercial Users Plus/Minus Trends



Opportunities for Commerical Developers by Geographic Areas



Opportunities for Commerical Users by Geographic Areas



Commercial Submarkets

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Office Buildings

Retail Buildings (for lease)

Warehouse & Distribution Facilities



Restaurants



Hotels/motels



Retail Buildings

Call Centers & Data Facilities



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Claim trends

- Data facilities continue to be high exposure
 - Mechanical / HVAC failure to adequately cool server rooms
 - Huge consequential damages
- Retail, restaurant and commercial delay driven claims
 - Who pays for delay?





Risk management considerations

- Contracting safeguards
 - Waiver of consequential damages
 - Limitation of liability
 - Appropriate standard of care
 - Scope of services
 - Prevailing party fee clauses do not agree



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Environmental markets may be slowing

100% 80% 60% 40% 20% 0%

Environmental Plus/Minus Trends

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All regions are still strong

Opportunities for Environmental by Geographic Areas



Environmental Submarkets



Waste disposal (landfills, etc.)



Wetlands delineation



Site characterization



Site cleanup



Environmental permitting



Resource management



Air pollution

Claim trends

- Asbestos litigation industry is strong despite exhausting funds and bankrupting first tier companies
- What does this mean?
 - More emphasis placed on peripheral parties to fund large settlements
 - Asbestosis
 - Mesothelioma
 - Very sympathetic plaintiffs
 - Stay off the spreadsheet
- Renovation projects
 - Hospitals
 - Urban infill / warehouse
 - Lack of historical records





Risk management considerations

- Emphasis on scope of services and documentation
 - Exclude asbestos identification and surveying
 - · Get trained in identifying it anyway
 - Especially if you have CA services
 - When in doubt, notify your client of possible asbestos containing material and reiterate excluded from your contract
 - Similar protocol to safety incidents
 - Document
- Consider having client defend and indemnify you for any asbestos related claims





The healthcare market remains strong

100% 80% 60% 40% 20% 0%

Healthcare Plus/Minus Trends

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All regions are strong





Healthcare submarkets







Medical offices



Medical laboratories

Continuing care facilities
But the profit premium for health care **PSMJ** Resources, Inc. firms is gone



Profit Premium/Deficit*

* Based on median profitability of A/E firms with >50% of revenue in health care

- Very complicated projects
 - Mechanical, electrical, and plumbing requirements
 - Problems fitting components and cooling operating rooms
 - Technology driven
 - Specific life safety and accessibility requirements





- Delays and added costs due to permitting and approval agencies
 - Example: OSHPD in California or fire marshal requirements
 - Managing client expectations is paramount
 - Expensive delay cases in general
 - Think how much a hospital or surgery center makes in a day
 - Who pays for this?
 - No contractor GL coverage
 - Performance bonds very punitive
 - A&E policy covers delay





- Public / university clients
 - Decision by committee and/or not extremely savvy
 - Scope creep
 - Little understanding of the design and construction process
 - Why would there ever be a mistake in the plans?
 - Inability to fully understand delay v. delay to the critical path





- Contractor controlling the narrative from the outset
 - Building a claim from day one with unsophisticated client
 - You are not on site to defend your good name
- Client alternative: owner's representative
 - Pros and cons
 - XL Catlin DPRCG white paper



Risk management considerations

- Contractual safeguards
 - Waiver of consequential damages
 - Be mindful of delay
 - Avoid elevated standard of care provisions
- Require additional communication and documentation
 - E.g., why additional costs due to fire marshal requirements even though designed and built to code is not a breach of the SOC





Public sector markets

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The recession hit the public sector hard



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Recovery has begun

Employment in Local Government Utilities



The transportation market is improving

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Transportation Plus/Minus Trends

Every U.S. region is moderately **PSMJ** Resources, Inc. strong



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Transportation submarkets





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- Crumbling infrastructure
 and poor maintenance
- Despite recovery transportation funding remains an issue
 - MAP-21 issues and need for long term funding
 - Issues concerning unindexed gas tax and fuel efficient cars

- Do more for less and push off on to the states
 - Value engineering eGuide
- Colorado DOT
 - Putting dollar amounts out to bid
- Minnesota DOT
 - Best-value procurement
- Problem with low bid public projects
- Expect delay and bodily injury



- Focus on low bid contractors shifts emphasis to solid project documentation
 - Document changes to the schedule, scope and cost
 - Train staff on property documentation protocols
 - Consider: Virtually *everything* is discoverable!
 - Don't make "bad" documents; e.g., admissions of fault
 - E-mail, text and instant messaging are all discoverable even after being erased





Risk management considerations



- Avoid "inspecting" unless you were specifically hired to do so
- Inspection + bad indemnity + poor maintenance = potential disaster
- The A/E firms that do well are building solid relationships and helping to solve problems.



The education market is growing

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Education Plus/Minus Trends



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All regions are strong

Opportunities for Education





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Education Submarkets



Laboratories

Support facilities (gyms, dorms, libraries, etc.)

Higher education



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- Low bid contractors intentionally underbidding projects
 - RFI trap for unwary A&E
 - Cost overruns and delay
 - When is a bid too low?
 - When does something impact the critical path?
- Unsophisticated clients when it comes to design and construction
- Surprisingly little accountability for litigation spending



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- In a jury trial, the "kids" always win
 - Anything life safety; i.e., fire rated assemblies, structural, etc.
- Intentionally non-compliant NCAA collegiate sports facilities
 - Recreation centers designed so teams can't use them
 - Be mindful of compromising safety; e.g., shorter run off distances for basketball courts







Risk management considerations

- Solid contracting discipline and proper risk evaluation
 - Your contract is one consideration of whether to take a project
 - If you are going to bet the company, at least know you are doing it!
 - Client contracts continue to have onerous indemnity provisions, elevated standards of care, prevailing party fee clauses and arbitration provisions
 - Client contract managers with little experience and no authority to negotiate





Risk management considerations

- Evaluation of contractor selection
 - Counsel client on how to deal with low bids
 - What is the reputation of this contractor?
- Increase CA services and plan accordingly
- Proper documentation





Water/Wastewater continues strong

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Water/Wastewater Plus/Minus Trends

All regions are strong

Opportunities for Water/Wastewater



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Water/Wastewater Submarkets





- Water distribution
- Water treatment



Wastewater collection



- Wastewater treatment
- Wastewater reuse

- Water storage and delivery projects in the arid West as drought continues
 - Existing infrastructure
 - New projects
- Engineering opportunities (some new technology)
 - Water recycling
 - Ground water banking
 - Desalination





- Tight budgets and schedules
 - Cost overruns and delay are big factors
 - Contractors with liquidated damage provisions
- Inability to meet project performance requirements





Risk management considerations

- Managing client expectations
 - Innovative design and technologies eGuide
 - Importance of spelling out in your contract the inherent risks
 - Conducting reasonable level of investigation and analysis
 - Client decision to proceed
- Value engineering concerns eGuide
- Contract discipline





Other government buildings are (finally) beginning to recover

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Except in Canada

100%

Opportunities for Other Govt. Buildings by Geographic Areas

80% 60% 40% 20% 0% -20% Overall Results canada Northeast South Midwest couthwest Mountain Nest

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Other government buildings submarkets







Public Recreation



Justice Facilities



Sports Facilities

- Government contracts with onerous terms
- Low bid contractors
- Sports facilities extremely deadline driven
 - Think of the disruption and lost profits if an NFL stadium does not open on time
 - But I don't do stadiums
 - The GC might pull workers off your project to complete a more deadline driven project





- Playgrounds and recreational facilities
 - Bodily injury, misuse, product liability, accessibility
- Government can change the laws to benefit it
 - Minnesota bridge collapse statute of repose extended





Risk management considerations

- Federal sovereign immunity
 - United States government has sovereign immunity and cannot be sued unless it waives immunity
 - Old concept of "rex non potest peccare," meaning "the king can do no wrong"
 - These concepts are eroding
 - Federal Tort Claims Act where tortious act (i.e., negligence) of federal employee causes harm
 - Tucker Act claims arising out of breach of contract
- Tribal immunity
 - Native American Tribes cannot be sued without consent
 - Individual members can be sued




Risk management considerations

- State immunity
 - Cannot be sued in federal court without consent – 11th Amendment
 - State tort claims acts where state sued in tort
 - State claims acts separate mechanisms for resolving disputes against the state
 - Administrative courts
 - Shortened statute of limitations; e.g., 6 months v. 2 years
 - Limit on damages
- Local governments, districts and agency
 - Can have similar administrative and procedural mechanisms





Risk management considerations

- Why should you care?
 - If a target defendant; i.e., the government, is not in the lawsuit or has limited exposure, the emphasis will shift to you!
- Where does this apply?
 - Examples:
 - bodily injury / wrongful death case on federal land; i.e., National Park
 - Slip and fall at a Tribal casino
 - Plaintiff commits procedural error or misses statute of limitations in administrative action





- How can this get worse?
 - Onerous contracts
 - Defense and indemnity, heightened standard of care provisions, everyone in charge of safety, "inspection" duties, warranties and guarantees



Summary of Proposal Plus/Minus Index

▲ Q3 2015



The Hottest Submarkets



113

Market Sector	Profitability vs. A/E Industry Median				
	2015	2014	2013	2012	2011
Transportation	-3.9%	-1.5%	-0.8%	-1.3%	-2.8%
Government (Buildings)	+2.3%	+2.3%	-2.2%	+0.1%	+2.6%
Water/Wastewater	+0.1%	-1.6%	+4.8%	+1.9%	+4.6%
Industrial	+4.3%	+0.6%	+1.5%	+14.0%	+5.1%
Energy-Utilities	-2.4%	+3.7%	+5.3%	+10.5%	-1.4%
Commercial (Users)	+5.9%	-7.6%	0%	+3.4%	-0.6%
Commercial (Developers)	+9.1%	+20.6%	-5.8%	+6.1%	NR
Housing	-1.5%	+6.2%	+11.3%	-3.7%	-10.1%
Healthcare	-4.1%	-4.5%	+2.3%	+3.0%	0%

Our latest prioritization

Markets	Short-Term Prospects (-2 to +2)	Long-Term Prospects (-2 to +2)	Relative Profitability (-2 to +2)	Total Points (-6 to +6)
Housing	+2.0	+2.0	+0.5	+4.5
Commercial	+1.5	+1.5	+1.0	+4.0
Water/Wastewater	+1.5	+1.0	-	+2.5
Govt. Buildings	+0.5	+1.0	+1.0	+2.5
Environmental	+1.0	+1.0	-	+2.0
Education	+1.5	+1.5	-	+2.0
Industrial	-0.5	+1.0	+1.5	+2.0
Transportation	+1.0	+1.5	-1.0	+1.5
Health Care	+1.5	+1.5	-1.5	+1.5
Energy/Utilities	+1.0	-1.0	-0.5	-0.5

Markets	Short-Term	Long-Term	Relative	Total
	Prospects	Prospects	Profitability	Points
	(-2 to +2)	(-2 to +2)	(-2 to +2)	(-6 to +6)
Energy/Utilities	+2.0	+2.0	+2.0	+6.0
Industrial	+1.0	+2.0	+1.5	+4.5
Housing	+1.0	+2.0	+0.5	+3.5
Water/Wastewater	+1.0	+1.0	+1.0	+3.0
Environmental	+1.0	+1.0	+1.0	+3.0
Health Care	+1.0	+1.0	0.0	+2.0
Commercial	+1.0	+1.5	-1.0	+1.5
Transportation	+1.0	+1.0	-1.0	+1.0
Education	0.0	-1.0	0.0	-1.0
Govt. Buildings	-2.0	-2.0	+1.0	-3.0

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The complimentary download will be provided to you in the follow up e-mail.

https://www.surveymonkey.co

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QUARTERLY MARKET FORECAST REPORT 11.-.... DELIVERED AS A .PD









Get More.

XL Catlin's Contract eGuide for Design Professionals



Test drive our *Contract eGuide*—

copy/paste recommended contract language directly into your documents.

xlgroup.com/dp/eGuide



Learn More. You'll be receiving...



10 Do's and Don'ts for A/Es

Based on our 40+ years of experience helping A/E firms develop strategies to manage their risk and ward off claims, XL Catlin developed this list of the top 10 do's and don'ts that every design professional should know. Some of these you may recognize from past articles, and some have been developed specifically for this list.

1. Select projects and clients carefully.

Certain projects (such as condominiums) and certain clients (such as developers) are higher risks than others. Check into the client's track record and finances before

DON'T accept projects without an adequate fee for your services, less than credible scope of services or that are outside of your firm's area of expertise. Also, be wary of projects without a contingency. This may place the client in a position to ask you to value-engineer the project to account for unforeseen issues that would have otherwise been taken care of by the contingency.

Always have a fair and balanced contract

Your contract is the document that sets forth the mutual obligations of the parties and will serve to manage expectations throughout the project. Your contract should precisely state the intent of the parties in order to prevent misunderstandings, and has terms that can be easily understood by a mediator, judge or jury.

DON'T agree to an elevated standard of care by providing guarantees and warrantees. You cannot reasonably be expected to guarantee or warrant. that construction-something over which you have no control and very little observation—is completed in strict conformance to the plans and specifications. Providing guarantees and warrantees not only create a potential uninsurable exposure for you, it sets an unreasonable expectation for your client.



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Insurance Desian Professional

Top 10 Ways for **Design Professionals** to Manage Risk and Prevent Losses

1. Eliminate liability illiteracy

Make sure all employees learn how everyday business practices affect your exposure to risk. All must understand that claims not only arise from technical mistakes but from non-technical issues such as client selection, contracts, project team selection and communication issues. Make sure your employee training and risk management programs support your commitment to quality and address these critical practice management issues.

2. Select project and clients carefully

Certain projects (such as condominiums) and certain clients (such as developers) are higher risks than others. Check into the client's track record and finances before accepting any assignment. Don't accept projects that do not provide adequate fees for your services, that restrict your scope of services to an unacceptable level or that are outside of your firm's area of expertise.

3. Set realistic expectations

Make sure the client understands that error-free projects simply don't exist. Discuss potential problem areas and changes that may be needed. Strive for a commitment from the owner and the contractor to identify and address the inevitable problems at the earliest opportunity and to work together to achieve win-win resolutions.

4. Always have a written contract

A fair, well-defined professional services agreement that precisely states the intent of both parties helps prevent misunderstandings and has terms easily understood by a mediator, judge or jury. This alone may discourage a plaintiff from asserting an otherwise marginal claim.

5. Offer comprehensive design services

A full scope of services that includes construction observation provides the design professional with the best opportunity to ensure a quality, claim-free project. You should also list in your contract those services you have explained and offered to the client, but that the client has declined.

Continued

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