

# Between the Lines

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Insights From a Career Claims Professional



## The Perils of Payment Certification

Payment certification may not generally be considered a dangerous aspect of the performance of your design contract, but that can change quickly if the project schedule begins to slip, or the costs increase unusually.

The most serious peril occurs when the owner terminates the contractor because they are not performing properly. Payment certification may suddenly be put under a microscope by both the owner and the bonding company, and the exposure may be significant. There are situations where either the owner, the bonding company, or both will look to the design firm to pick up the difference between the contract price that has been certified and paid and the projected price to complete the project. This can be a significant number.

Generally, you are attesting to when you certify a payment that you have reviewed the application and it is in keeping with the progress of the project. The typical language reads, "In accordance with the Contract Documents, based on-site observations and the date comprising ARCHITECT: the above application, the Architect certifies to the best of the Architect's knowledge, information, and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED."

If Contract Administration is in your contract, a few things should be considered. The most important tool you must possess to perform Contract Administration is the Construction Contract. The contract documents to which you are certifying progress include the contract, which is the document that spells out the roles and responsibilities.

This may sound like a simple concept, but a surprisingly high percentage of the time a claim is made and is being investigated, we find that the designer does not have a copy of the Construction Contract.

Often the designer has asked for the contract but never received it. Other times, they didn't feel comfortable asking for it if it wasn't provided. We have also found situations where the principal receives a copy, but the people physically performing the Contract Administration have never seen it. It is impossible to administer a contract that has never been seen or read. A lawyer can easily illustrate a breach of the standard of care in this situation. This can create a great deal of exposure, as no fact finder will find that proceeding in this manner meets the standard of care.

If you have asked for the contract but have not received it, continue to ask. In the requests, make sure you outline exactly why you need it and the risks associated with allowing the project to proceed without it in your possession. Make certain there is a written follow-up to the requests. It is the owner's project, and they can move forward in whatever manner they choose, but it's your obligation to remind them of the obligations that the contractor has agreed to, and what your contract includes, and advise them of the risks involved if they decide to waive obligations. Suppose the owner becomes an obstacle to completing your obligations and continues to resist providing the Construction Contract. In that case, documentation should demonstrate that they are voluntarily waiving some responsibilities that would otherwise be required.

We know there are times the owner is reticent to turn over the Construction Contract. If they are uncomfortable with providing some portion of the contract, such as the financials, you may suggest that they redact portions that they believe are private.

At a minimum, you need to have the scope and the schedule information in order to perform Contract Administration, which includes both the project schedule and the submittal schedule. The owner should be informed if the redactions affect your ability to perform. It is their project and their risk to take, so ensure that that risk is appropriately shouldered by them and not transferred to you.

Remember that even if the line items in a payment application appear correct, if the contractor is behind schedule, or has not submitted either schedule, the owner under the contract has the right to withhold money from the payment until those things are brought up to date.

Once you have the Construction Contract and are able to perform the terms of your contract professionally, based on the status of the construction, you will be able to provide the owner the appropriate advice so that they will be able to make informed decisions as to what course of action they want to take.

We recognize that this may be a stressful exchange at a time the ground is breaking, and everyone is excited that the project has begun. We also recognize that contractors may become aggressive or confrontational when these requests are made, as many have often become accustomed to not being required to perform much of what they've agreed to do. We have found that if the requests to comply begin early in the construction process, it can lead to better relationships in the long run and that when responsibilities are enforced early, the project often proceeds smoothly.

Remember, the contractor agreed to the terms of their contract, likely knowing the terms of your contract, so it should not surprise anyone when they are asked to meet their obligations. A minor discomfort at the beginning of the project's construction phase can alleviate the potential of a major discomfort should things go off track as construction proceeds. Mutual respect can be developed that will enable smoother sailing until the project is completed.

*Ames & Gough, as your insurance and risk management advisor, is providing this update to assist you in your risk management efforts. While insurance is a critical component of any risk management and risk financing plan, the most important thing your organization can do is to work to prevent or minimize losses before they occur. If you have any questions or need further information about this topic and related issues, please contact your Ames & Gough client executive.*

**About the Author:** Lauren Rhodes Martin is a risk management and claims specialist focusing on the firm's architect and engineer accounts. In her role, Lauren, who is based in the Ames & Gough Washington, DC office, works directly with the firm's partners and client executives on all aspects of design firm clients' risk management, including contract reviews, claims advocacy, loss prevention training and advice. Prior to joining Ames & Gough, Lauren had a distinguished career of nearly 35 years at CNA, where she held positions of increasing responsibility in claims and client management, culminating with her appointment in 2018 as A/E Platinum Accounts Director. For more than three decades she was directly responsible for handling architect and engineer errors and omissions (E&O) claims.

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