

Advisor



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The Vision of CMAA is that all owners will realize project and program success by using professionally qualified construction managers.



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FROM THE CHAIR

Talent Shortage and Development

I'm continually asked by our Owners and Providers how we can overcome the current shortage of qualified project and construction managers. With today's booming construction economy in most regions across the U.S., the challenge is even greater. Recently, I was listening to an audio recording of a talk by Don Russell, FCMAA, from a conference 10 years ago, and he was saying the same thing. The question hasn't changed.

In the last five years, I've spent more of my time recruiting and training than I have in any other aspect of an organization. The challenge starts with recruiting. We can't recruit only when we have a position. We need to be recruiting constantly for staff at all levels. That means interviewing for prospects well ahead of the need. When we identify candidates, we need to hire them immediately, if we can. If we can't, we need to speak with them regularly to let them know their value and our hiring timeline. Once we hire a candidate, he/she should be assigned a mentor and we need to follow through with all the commitments we made during the hiring process.

For early career professionals (ECP), this is the crucial time for training and developing commitment to your company. We should be careful not to pigeonhole new hires into one position or on a single project. A plan should be developed for "rotation training" with top managers in order for ECPs to gain exposure to a wide variety of the business, such as scheduling, estimating, project planning, pre-construction, and all phases of construction. With this rotation, the ECP learns his/her value early on, and understands the importance of personal career development to the company. The company gains a well-rounded ECP, who can be flexibly assigned to different projects in the future. For all new hires, the process should be the same. This ensures employees are on their desired career paths and are developing the necessary skills.

It is the responsibility of the mentor and managers to ensure they are making room for ECPs on future projects, which includes selling the types of projects they want to work on. If ECPs have made it known they want to work on hospitals and all we are placing them on is office buildings, they're not going to stay with your company. There are too many other opportunities out there.

There are many other aspects to solving the talent shortage, but experience has proven that the early hiring and mentoring process creates the best return.



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GOAL SETTING

FOR
CONSTRUCTION
MANAGERS

By Susan Stewart, CCM, Parsons

For entry level employees setting career goals, the sky is the limit. Their career path is wide open, and if their managers allow for it, entry level construction managers can enjoy the flexibility to try out different functions on the team to find what they like best and where their skills lie. Senior construction managers may find it easy to help early career professionals develop one- and five-year goals because they have already traveled that path and have their own experiences to provide advice on what milestone steps help advance a career.

As we mature in our professional lives, it can become more challenging to set career-related goals for several reasons. Many professionals have numerous family-related commitments and activities outside of the workplace that are a higher priority than moving up the corporate ladder. For others, involvement in sports and clubs, plus managing their social calendar, is most important. Entrepreneurs may be interested in starting their own business while trying to make time to stay connected with other professionals in their field to seek mentorship. Some may strive to attain it all, and they will try to balance family life and personal life with working toward a position in the C-suite with their employer. These choices are all great, however they are personal. It's not unusual for priorities to change as we get older and move through life.

The purpose of this article is to provide goal-setters with a big picture re-examination of preparing realistic and meaningful goals as an early career, mid-career, and senior level professional in the construction management field.

GENERAL GOAL SETTING GUIDANCE

When setting goals, my approach is to establish personal, professional, and community-related initiatives each year. I typically begin drafting my goal ideas in the last quarter of the calendar year and finalize them around January 1.

Personal goals include those for yourself and your family; anything non-work related. Professional goals are 100% career-related and may be a combination of goals set for you by your employer, as well as those developed on your own. A community-related goal is a selfless goal that rounds out the other two goal categories and provides the third leg of your stool of overall personal growth.

As you begin developing your goals, consider setting initiatives that can be accomplished in one year, five years, and 10 years for the personal and professional categories. More generally, these can be thought of as ongoing, short-term, and long-term goals. Putting time constraints on your community-related goal(s) may not be appropriate. To keep from getting overwhelmed, it's advised to set no



Performance goals are another type of professional goal and are directly related to your function in the workplace. These goals can include initiatives like increasing sales by 10% in the next year. Personal and professional goals can focus on soft skills like becoming a better listener, or hard skills like learning Primavera 6.

Community-related initiatives result in improving your immediate locality. Examples of this could be volunteering to mentor local high school students on the Science, Technology, Engineering, Mathematics (STEM) fields or helping build a Habitat for Humanity house. When doing good in your community, using the skills from your profession as well as those from your interests and hobbies, will benefit both you as the goal-setter and the recipient.

Goal-setting can be reflective; it should be stimulating. In the best case, it's fun. Spending time looking inside yourself searching can help you determine what is most important to you.

more than three to five goals each, in the personal and professional categories. For some, the exercise of goal-setting can create feelings of optimism, which could lead to pie-in-the-sky ambitions. Feelings of optimism can be good, as your long-term goals should be stretch goals that are 10-20% beyond your current capabilities. In planning them, you are establishing a vision of your future self.

A tried and true practice of goal setting includes the SMART principal, where a well-developed goal is specific, measurable, achievable, relevant, and time-constrained. To make seemingly lofty or long-term goals attainable, plan them in realistic steps. Set ongoing and short-term goals that build to the ultimate outcome. Starting with the end-result in mind will help you plan the steps backward.

Another tip I offer, based on personal experience, is to plan to do 80% of the goals in your mind at one time, as life can get in the way. Setting a limit for yourself helps minimize feelings of defeat when you have overcommitted and can't complete all that you've set out to do. This does not mean you should stifle your goal setting muscle completely. Think of it as saving some initiatives for another time. That other time might turn out to be four months from now when you realize goal number one does not suit you after getting 25% into it, or a year from now when you have an experience that leads you to explore a new passion.

GOALS... FOR ALL

When it comes to developing professional goals, a useful strategy is to set goals that align with your supervisor's initiatives, so you will make each other successful. Professional goals should be aligned with your job description and your organization's overall mission.

EARLY CAREER GOAL SETTING

For early career professionals, goals should be created jointly with a supervisor and should focus on skill building. Check-in meetings can begin on a monthly basis, and then change to quarterly as the employee gains experience and comfort in understanding his/her role in the workplace. Suggested goals include CMAA's Construction Manager-In-Training, or if the employee is an engineer, the Engineer-in-Training is an option. Setting soft skill goals, like developing good organizational skills, improving competency in technical writing skills, and getting over fears related to public speaking, are great goals for individuals at this experience level.

There are no bad experiences at this stage of a career, so look for opportunities to take a construction observation assignment, help out the procurement group, or participate on a proposal team. A human resources manager teaching a leadership course that I was enrolled in early in my career encouraged the group to "lead something, anything." He recommended young professionals raise their hand to work with the office manager to do such things as plan the summer picnic, managing logistics for the event, as well as the budget. While this may seem a trivial task, in my view it is good experience for an employee one to two years out of school.

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MID-CAREER GOAL SETTING

Mid-career goals should focus on project diversity and professional growth. Good mid-career goals include CMAA's Certified Construction Manager (CCM), Professional Engineer (PE), or Registered Architect (RA), all depending on the employee's education and experience. As we mature professionally, we tend to uncover different career paths available to us and how that translates to the company or organization we're with currently.

When it comes to pursuing a professional license or certification, it's important to strongly contemplate the experience that led you to the mid-career stage and where your strengths lie. For employees who focused on a project management track, they might not have enough design experience to make the PE or RA attainable. The construction and program management focus of

the CCM makes it a resume-boosting target for those with a strong design background, as well as those pursuing a career in project management. Studying for licenses and certifications is a great way to challenge yourself, resulting in a solid acknowledgement of your achievement when passing the test. However, I'd recommend you don't seek more than one professional certification per year due to the cost and necessary time to prepare.

Another suggestion is to get involved in organizations and company functions that will help you expand your network. Interfacing with your peers is a perfect avenue to sharing your talents and experiences, as well as gain insight into growth opportunities and potential stretch assignments.

SENIOR LEVEL PROFESSIONAL GOAL SETTING

Senior level employees may have met their professional goals or are otherwise satisfied with the level they have attained in their career. Therefore, their aspirations might not include goals that are as wide ranging as those of earlier in their career. Employees in this category might consider goals that pass on their knowledge and best practices to teach others. Legacy-related goals or sharing your successes and failures with those who are interested in guidance, positively influences younger generations. Also, consider working with management to develop the team succession plan into a true blueprint for the future.

STAYING INTERESTED

Once you have your goals identified, post them in appropriate places where you can be reminded of them often. The aim here is not to turn them into another to-do list, but rather to reignite the energy that caused you to set the goal in the first place. Family members and colleagues can become great supporters, if you decide to share your goals. Similar to New Year's resolutions, the shine of a great idea can wear down in a short time, so keeping your goal list

with you will hopefully re-spark your interest. A mentor and long-time friend of mine phrases the moment well when you begin to feel overwhelmed. "It was a good idea at the time" is what she and her husband find themselves saying to each other when they are reminded of an initiative they set but don't necessarily have time for.

A suggestion I find particularly helpful in staying interested in my goals

and encouraging creativity in daily living is to keep a notebook with me at all times. This is a place to record ideas, inspirations, and to keep your goal list. Innovative and creative ideas can arise at random moments and having a small journal with you provides a way to remember them for later. The purpose of this notebook is only to record your thoughts, not to write reminders or make to-do lists.

CONCLUSION

Goal-setting can be reflective; it should be stimulating. In the best case, it's fun. Spending time looking inside yourself soul searching can help you determine what is most important to you. Making the time for these deep thoughts can be difficult due to our busy lifestyles, plus the focus it takes to examine your life. Dedicating a portion of your day to meditating or taking pause to reflect, whether it is two minutes or 20 minutes, can help you to turn off the ongoing scroll of a to-do list in your mind to think about absolutely nothing. Clearing your mental desk can be refreshing and settling, and a great jumping off point for setting goals. Regardless of the heights of your aspirations, goal setting is one of the ways to help you define, and redefine, yourself throughout your life.

Susan Stewart, CCM, is a Senior Project Manager with Parsons on the Enterprise Construction Management Services contract with NNSA. Mindful living, wellness, and goal setting are some of her personal passions. She can be reached at susan.stewart@parsons.com.

To make seemingly lofty or long-term goals attainable, plan them in realistic steps using the SMART principal.



PROJECT SURVIVAL DURING A MAJOR STORM DEPENDS ON PREPAREDNESS

By : Andrew Keirn
Department of Veterans Affairs

The Department of Veterans Affairs (VA) operates one of the largest and busiest hospitals in San Juan on the island of Puerto Rico. That hospital is in the midst of a large seismic upgrade construction project for which the main component is the dismantling and deconstruction of the top six floors of the existing nine-story tower. The project was awarded to Walsh Construction Company and is overseen by VA's Office of Construction & Facilities Management (CFM). Construction operations, which also include seismic bracing within the lower two floors, commenced in February 2016.

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No one expected the construction to be interrupted by a major hurricane. However, at approximately 0630 hours local time on September 20, 2017, Hurricane Maria, a Category 4 storm, made landfall on the island of Puerto Rico. Hurricane Maria was the second major hurricane to hit the island in a month, striking just 15 days after Hurricane Irma. During both storms, the under-construction VA Hospital experienced damage. However, due to proactive planning and execution, the impact of the major construction activity on operations resulted in minimal impact to the hospital, compared to other infrastructure components across the island. Throughout recovery, the VA hospital was able to remain self-sustaining and operational until major utilities were re-energized. How was that accomplished? Through a proactive process.

PROACTIVE PROCESS

A proactive process, including representation from the medical center, the contractor, and CFM staff, was put into place. This proactive process included early and intense involvement from all VA organizational safety representatives. The primary concern was securing all construction-related material and equipment, along with protecting patients, staff, visitors and construction personnel from the impact of the impending hurricane, and then mitigating that impact as much as possible.

SAFETY EFFORTS

Seventy-two hours prior to the forecasted storm landfall, safety efforts commenced, beginning with a review and implementation of a detailed checklist. This checklist accounted for both personnel and construction activity and included: personnel emergency contact information, erosion and sediment control, storage and tie-down requirements, validation of pumps and emergency generator operation, and availability of supplies. Meetings were conducted to ensure proper coordination, understanding, and delegation of responsibilities. Each responsible group then commenced their independent preparation. Within this 72-hour window, continual cross reference checks with each of the other groups were performed, and any deficiencies corrected to ensure total coverage and management of risks.

Work commenced to dismantle the existing tower crane to a safe level. Trailers and containers were either anchored or removed from the site. Scaffolding surrounding the tower structure was reinforced and planking removed. Fuel for required equipment was topped off. Loose debris

around and inside the structure was removed and secured. If unable to be removed, stored materials were secured. All fencing and screening were either removed or reinforced. Lastly, computer data backups were performed and verified.

EARLY PREPARATION IS CRITICAL.

Anticipate every possible scenario and coordinate to manage the risk.

Throughout the process, hurricane preparedness plans were constantly reviewed and amended as necessary. Reporting procedures were put into place and attention was focused on maintaining a safe environment for all personnel. As the storms closed in on the island, the 24- and 12-hour checklists were validated and put into action. This included shutting off all non-essential utilities, validating personnel safety, and preparing to evacuate. Also, reassurance of emergency contacts and responsible parties were verified. The last task to check-off was to document existing conditions through reports and photos.

Once all possible actions were taken at the hospital, employees started to evacuate the construction site in order to ensure the safety of their families and personal belongings. Employees not only had to focus on preparing the project site for the storms, but also needed to turn more attention to their personal lives, homesteads, and families, as well. Emergency evacuation routes were identified, and plans made to either stay in place or leave the island, depending on each individual's decision.

Whether on site or off, continuous accountability was important. This required an understanding of power conservation since no one knew how long they would be without electricity or when cell phone service would return. Creativity was necessary to employ the least power invasive means of communication possible. This entailed brief text messages at predetermined times to ensure the status of each employee while still conserving power.

Because of the proactive measures taken by the contractor, VA Medical Center, and VA CFM staff, the hospital sustained limited damage and project recovery from both storms was enhanced. Work resumed within a reasonable time and support was given to the medical center to expedite normal operations. The efforts were supported by the local utility supplier's priority of getting all major medical center operations back in full operation as soon as practical throughout the island.

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Lessons learned from the planning, execution, and recovery from the hurricane include:

- » **Cooperation is paramount to success.** Each group needs awareness of the actions of others involved so time is not wasted duplicating efforts.
- » **Responsibility.** Each group needs to identify and accept its responsibilities and where the expertise of its members may present the best approach.
- » **Service Impacts.** Identify services and suppliers that will be most affected by possible prolonged utility outages both on and off site.
- » **Personnel.** Personal lives will be affected – some more than others. Ensure ample opportunities are given to accommodate all circumstances. Plan to shelter in place and have supplies on hand.
- » **Transportation.** Plan for roads to be impassible or debris-ridden.
- » **Equipment preparedness.** Maintain heavy equipment capabilities on site to support clearing after the storm.
- » **Debris clean-up.** Remove waste and debris prior to the storm. You don't know how long it will take service to resume.
- » **Cost impact.** Anticipate and discuss upfront any potential cost impacts.
- » **Labor.** Anticipate impacts to the labor force due to other recovery efforts throughout the storm's impacted area.
- » **Be patient.** Remain proactive - recovery can be slow and affects every person on your workforce differently.
- » **Recovery.** The time anticipated for a return to “normal” conditions on Puerto Rico was greatly underestimated. The effects were still being felt long after the storm with limited number of traffic signals, frequent power outages, and frequent loss of communications/internet service.
- » **Planning for anticipated damage beyond your primary building or responsibility.** Nobody anticipated the extent of damage to the medical center property and infrastructure, or the long-term impact to personnel. Being without water or power for a few days is inconvenient. Being without water, power, access to food, fuel, etc. for months takes a significant toll. Returning to work when you have no running water or power at home and limited access to food and fuel creates a new set of issues and priorities with which to deal.

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- » **Progress.** Loss of some construction progress on the project was anticipated as the result of the hurricane. Consideration should be given to shutdowns of extended durations due to infrastructure issues – these conditions could leave employees without an income source. Employees may seek other income opportunities either on or off island.
- » **Communication.** Prepare for an efficient means to maintain communications with the workforce with anticipated loss of phone and internet service. At times, the only means of functional communication was one individual’s personal cell phone and that was dependent on the availability of a signal.

The successful planning and effort of a partnered solution allowed the VA major construction effort in San Juan to resume operations within a reasonable time after the effects of two devastating hurricanes. This is

and more than 20 inches of rain pummeled the city, the 300-plus patients and 400-plus employees who rode out the storm inside remained unharmed thanks to a successful planning operation by a dedicated team.

During both storms, the under-construction VA Hospital experienced damage. However, due to proactive planning and execution, the impact of the major construction activity on operations resulted in minimal impact to the hospital, compared to other infrastructure components across the island.

a testament to those involved in the planning and their efforts to create and ensure a safe site. Although the effects of the hurricanes are still felt, progress continues to be made and construction continues.

The San Juan center is the hub for medical care for more than 93,000 veterans spread throughout the Caribbean. The building sits less than four miles from the island’s northern coast. While 150-mile-an-hour winds

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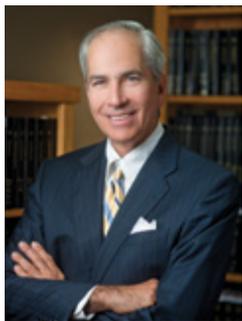
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LEGAL CORNER



The Relevance of the *Spearin* Doctrine in a Design-Build World

By: Henry L. Goldberg, Esq. and Robert J. Fryman, Esq.



Henry L. Goldberg, Esq.

Prior to the U.S. Supreme Court's decision in *United States v. Spearin*, 248 U.S. 132 (1918), virtually all construction risk was borne by the contractor, except for (i) express carve-outs set

forth in a contract or (ii) performance rendered impossible by acts of God or nature.

In *Spearin*, the Supreme Court ruled that "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, to inform themselves of the requirements of the work...and to assume responsibility for the work until completion and acceptance."

With the relatively recent advent of the design-build delivery method, many assumed that the *Spearin* doctrine would be circumvented and the risk of additional design-related cost would be borne by the design-build contractor. A review of recent cases indicates, however, that *Spearin* is, in fact, relevant in the design-build context, if not more so.

1. OWNER INVOLVEMENT DURING THE SOLICITATION PHASE FOR A "DESIGN-BUILD" PROJECT MAY TRIGGER CLASSIC *SPEARIN* LIABILITY FOR THE OWNER.

In *Drennon Constr. & Consulting, Inc., v. Department of the Interior* (CBCA 2013), Owner contracted with an engineering firm to provide project documents, drawings and

specifications for a road widening project. The engineer's design required that the hillside be excavated and an "approximate" nine-foot gabion (a rock-filled basket or cage) wall be constructed to prevent the excavated hillside from falling onto the road. Contractor, as the design-builder of the gabion wall, was responsible for the survey, design, layout, and construction of the wall.

Engineer had used a digital terrain model based on photogrammetric mapping provided by Owner and notified Owner that the mapping was inaccurate at certain points. Due to limited funding, Owner attempted to shift risk to the contractor by requiring a site survey prior to commencing work.

Contractor reviewed and relied on the project documents to submit its bid. However, due to snow cover, no site survey could be performed prior to bidding. Based on the geotechnical report provided, Contractor believed that the hill would stand despite an increased slope condition.

Following award, Contractor was able to survey the site and found that the road could not be built as indicated on the contract drawings. A 15-foot gabion wall would be required rather than the "approximate" nine-foot wall described in the RFP, necessitating significant excavation to widen the road into the hillside. Due to the site conditions, Engineer approved Contractor's 15-foot wall design, Contractor subsequently sought recovery for the significant additional costs incurred due to delay and design of the required larger wall.

The board noted that *Spearin* liability attaches to design specifications and held that general disclaimers

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are insufficient to shift this implied warranty from the owner to the contractor. The contract's statement that a contractor site survey would be required (which the CBCA termed "weasel words") "alerted bidders to the possibility that the design might have required a bit of tweaking, but cannot reasonably be read to impose on the contractor an obligation to construct the project in a manner significantly different from that envisioned in the contract."

Thus, even in a design-build project, a contractor may recover based on the *Spearin* doctrine's implied warranty of plans and specifications and the owner's control over elements of the design.

2. OWNER INVOLVEMENT IN DESIGN PHASE, BY MERELY PROVIDING SITE SURVEY REPORTS AS "PRELIMINARY INFORMATION", MAY BE SUFFICIENT FOR *SPEARIN* LIABILITY TO ATTACH.

In *Metcalf Construction Co. v. United States*, 742 F.3d 984 (Fed. Cir. Feb. 11, 2014), a contract was awarded to Metcalf (Contractor) for the design-build construction of housing units at a Marine facility in Hawaii. In its bid package, the Government had furnished a soil report with a disclaimer that it was "for preliminary information only" and the contract required Contractor to perform its own independent investigation of the soil conditions at the site. The Contractor did so and determined that the soil conditions were materially different from the Government's soil report.

The Contractor recommended that the project's foundations required a completely different design and construction approach from the specifications. The Government, however,

rejected the recommendations and directed the Contractor to proceed as set forth in the contract documents. Ultimately, the Government granted a contract modification for the design, but rejected the claim that the soil conditions were materially different. When construction was complete, the Contractor sought \$25 million in additional costs. The trial court ruled in favor of the Government.

The Federal Circuit Court of Appeals rejected the Trial Court's holding, that because Contractor was on notice that it would need to perform more investigation of the site conditions, it was also "on notice that it could not rely on the [Government's] '[preliminary] information only' report." The Federal Circuit ruled that the lower court "treated the contract as placing on [Contractor] the risk and costs of dealing with newly discovered conditions different from those stated by the Government before the contract became binding....Nothing in the contract's general requirements that [Contractor] check the site as part of designing and building the housing units, **after the contract was entered into**, expressly or impliedly warned [Contractor] that it could not rely on, and that it instead bore the risk of error in, the Government's affirmative representations about the soil conditions."(Emphasis added)

The Federal Circuit also specifically referenced the "for preliminary information only" disclaimer that the Government had applied to its inaccurate soils report. "That statement merely signals that the information might change (i.e. it is 'preliminary'). It does not say that [Contractor] bears the risk if the 'preliminary' information turns out to be inaccurate. We do not think that the language can fairly be taken to shift that risk to [Contractor], especially when read

together with the other Government pronouncements, much less when read against the longstanding background presumption against finding broad [Government] disclaimers of liability for changed conditions."



3. USE OF THE *SPEARIN* DOCTRINE BY LOWER TIER DESIGN-BUILD SUBCONTRACTOR POSSIBLE, TO HOLD DESIGN-BUILD CM OR CONTRACTOR RESPONSIBLE FOR DESIGN DEFECTS.

In *United States ex rel. Bonita Pipeline, Inc. v. Balfour Beatty Construction, LLC*, No. 3:16-CV-00983-H-AGS, 2017 WL 2869721, Balfour Beatty was awarded a \$35-million, design-build contract to design and construct a hangar replacement at Camp Pendleton. Balfour Beatty provided Bonita, its subcontractor, with design documents so that Bonita could prepare its subcontract bid. The design documents provided to Bonita specifically noted that they were

“incomplete”, which is, of course, common in design-build projects.

Bonita and Balfour Beatty later entered into a \$4.7 million subcontract by which Bonita agreed to design-build the structural steel,

incomplete when the subcontract was entered into. “Thus, according to [Balfour Beatty], the *Spearin* doctrine cannot be applied to the Subcontract because, by the very nature of the contract, the plans were not complete when the parties reached

Co., 36 N.E.3d 505 (Mass. 2015) (applying *Spearin* to a construction manager at risk project).

However, on the facts before it, the Court was not able to determine on a motion for summary judgment whether Bonita’s extra work was due to errors in the plans and specifications or whether the extra work was due to expected design refinements as set forth in the parties’ subcontract. Although this required that the motion for summary judgment be denied, it is clear that the *Spearin* doctrine may be used by a lower tier design-build subcontractor, as a sword or shield, seeking to hold a design-build CM/contractor responsible for design defects.



Design-build contracts may require another layer of analysis... but it is clear the *Spearin* principles are alive and well and can give the CM community its desired relief from design responsibilities.

metal decking and other work for the project. The subcontract expressly provided that due to the design-build nature of the project, the plans and specifications were subject to further “refinement”. Numerous disputes arose during the course of the project, and a lawsuit was commenced by Bonita seeking additional compensation due to alleged design errors and changes.

Bonita filed a motion for summary judgment, seeking a determination from the court that under the *Spearin* doctrine, Balfour Beatty, as contractor, could not shift legal responsibility for defective plans and specifications onto its subcontractor.

Balfour Beatty argued that *Spearin* did not apply because the subcontract explicitly indicated that it was a design-build project, and the plans and specifications were expressly

agreement.” *Bonita Pipeline*, 2017 WL 2869721, at *3.

Bonita responded by arguing that it assumed the risk that the plans and specifications would be refined – but not the risk that they would be defective. Bonita argued that the *Spearin* doctrine addresses whether plans are correct; not whether they are complete. *Bonita Pipeline*, 2017 WL 2869721, at *3.

The Court noted that as a general proposition, *Spearin* may apply to design-build projects, stating, “[u]nder *Spearin*, the responsibility to provide correct plans and specifications ‘is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work.’” *Bonita Pipeline*, 2017 WL 2869721, at *4; see also *Coghlin Elec. Contractors, Inc. v. Gilbane Bldg.*

4. SHIFTING SOME DESIGN RESPONSIBILITY TO THE CM/CONTRACTOR DOES NOT INSULATE OWNER FROM *SPEARIN*-BASED CLAIMS FOR ADDITIONAL COMPENSATION.

In *Coghlin Electr. Contractors, Inc. v. Gilbane Bldg. Co.*, 36 N.E.3d 505 (2015), the highest court in Massachusetts considered, for the first time, whether a Construction Manager At-Risk (“CMAR”) who participates to some extent in the pre-construction design phase could rely upon the *Spearin* doctrine to recover costs from the public owner as a result of its design errors.

Massachusetts law was amended in 2005, so that state agencies could utilize design-build and construction management at-risk delivery methods for certain construction projects. The amended law authorized CMAR projects for “construction, reconstruction, installation, demolition,

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maintenance or repair of any building estimated to cost not less than \$5,000,000.”

Gilbane was a CMAR sued by Coghlin, its electrical contractor, alleging that various design discrepancies and changes affected Coghlin’s performance, causing it to incur substantially greater labor costs. Gilbane brought the public owner into the lawsuit, seeking to pass through Coghlin’s claim.

In dismissing the CM’s claims against the public owner, the trial court held that the *Spearin* implied warranty of design should not apply in a CMAR contract. However, Massachusetts’ Supreme Judicial Court reversed the lower court, finding the public owner liable because the CMAR did not have control of and responsibility for the design.

The court found that while the CMAR under the Massachusetts statute may consult in the design phase to some degree, the owner and its designer ultimately controlled the design and did not have an obligation to accept the CM’s input regarding design-related matters, unless the contract between the parties expressly provided otherwise. Thus, the court concluded that the CM’s **participation** in the design phase, **but not as the designer**, did not operate to shift the risk of a design defect from the owner (and its third-party designer).

MHH COMMENTARY:

Given that the earliest of the foregoing four cases is barely five years old, and most are more recent, the *Spearin* doctrine appears to be very much alive and relevant to modern, design-build project delivery.

The cited cases provide up-to-date guidance on the application of *Spearin* principles by courts today, for both conventional and design-build

projects, and for both contractors and CMARs alike. It is clear from these decisions that any contract, like any legal analysis, must be fact-specific. General disclaimers, such as those in *Metcalfe, Drennon and Balfour Beatty* that “alerted” bidders of potential “design inaccuracies” or “forthcoming changes,” will likely not relieve the responsible party (e.g., owner or design-build CM) of *Spearin* liability. Care must be taken to analyze contractual provisions for various aspects of project design, including preliminary reports, surveys and design concepts.

Well-drafted site inspection clauses and contract language **specifically** disclaiming problematic information may help transfer or avoid liability under *Spearin*. With a carefully worded contract, the design-build delivery method can still provide an avenue for a CM to avoid or mitigate *Spearin* liability e.g., an owner may give up design control while still remaining liable for design defects. A case-by-case assessment is required. “Weasel words” as referred to by the CBCA in *Drennon* will not carry the day, but fair and specific risk shifting may.

Finally, design-build contracts may require another layer of analysis (e.g., subcontractor/CMAR), but it is clear the *Spearin* principles are alive and well and can give the CM community its desired relief from design responsibilities.

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CMAA FOUNDATION BEGINS ITS WORK ANEW

A proposal to reinstate the CMAA Foundation was approved by the CMAA Board of Directors at the December meeting. The next steps are to revise the Foundation’s Bylaws and elect a new Foundation Board of Directors. This means the Foundation will be looking for CMAA members interested in serving and developing the Foundation’s new programs. The Foundation’s scope of work now includes three areas of focus: workforce development, research, and scholarships.

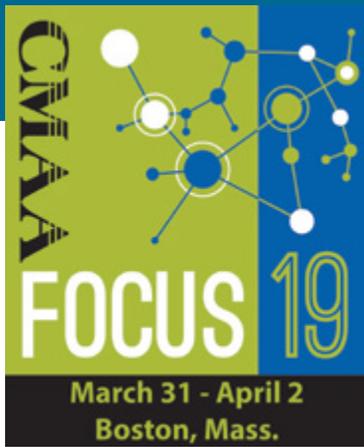
Keep your eye out for information coming this summer on ways to get involved with the CMAA Foundation.



CMAA ACCEPTING NOMINATIONS FOR COLLEGE OF FELLOWS

Do you know a CMAA member who has made a significant contribution to the CM profession, the industry, and the Association? Someone who is a current industry leader or whose influence may be apparent into the future? He or she may be a good candidate for the CMAA College of Fellows.

Selection to the College of Fellows is given in recognition to CMAA members who are true industry leaders. The Fellows designation is one of the highest honors that CMAA can bestow on an individual member. Since CMAA’s inception in 1982, just



CMAA FOCUS19 – AN EXPERIENCE YOU DON'T WANT TO MISS

Have you registered for CMAA Focus19 yet? Our spring conference is just around the corner on March 31 – April 2, 2019 in Boston. You won't want to miss any of the exciting experiences that are planned. Experiences like ▶



77 individuals have received the designation.

CMAA Fellows are known as pioneers of the construction project management profession and the Association itself. These individuals have all played a key role in advancing the profession and propelling the Association to where it is today.

Nominations to the Fellowship are being accepted and can be made by CMAA members, Regional Chapter officers, members of the CMAA Board of Directors, or Fellows in good standing. Learn more about how to make a nomination on our website at www.cmaanet.org.

▶ **The Connections Hub.** The place from which all other conference activities emanate, The Hub is the place to meet up with colleagues, find new project partners, and meet sponsors. You can also update your member profile, record a short video about your career in CM, or even get a cup of coffee.

▶ **Plenary Session Speakers.** Known as the “technology translator,” **Crystal Washington** takes complex social media, app, and web topics and makes them easy to understand and accessible for everyone. **Ken Schmidt's** role in transforming Harley-Davidson Motor Company led business leaders all over the world to seek his guidance.

▶ **Education Sessions.** The educational program will bring attendees intriguing, timely, useful information from the most engaging, knowledgeable and inspirational speakers in the industry. Topics will focus on communication skills, decision-making, and problem-solving.

▶ **Quickfire Session.** “Stories from the CM Profession” will answer two primary questions: How are organizations and people positioning themselves for the future? What industry career paths are trending? CMAA Quickfire is four presentations in one, highlighting the perspectives, research, and approaches being taken to make a positive impact on our industry.

▶ **Town Hall.** CMAA Focus19 will close with a Town Hall session so attendees and speakers can share insights learned.

If you are a leader, or want to expand your leadership knowledge, we hope you will join us. Register today on our website at www.cmaanet.org.

Participate in the Future of Construction Management Excellence at the 2019 National Conference & Trade Show

Innovate. Collaborate. Succeed. Deliver. This is the future of construction management excellence and the basis of the 2019 National Conference & Trade Show set for September 22-24, 2019 in Orlando, FL.

The CMAA National Conference & Trade Show is the premier event for the construction/program management industry. The conference will focus on improving owner outcomes, building teams, enhancing skills, and innovating construction management. Industry leaders are continuously exploring and developing new and innovative approaches to deliver projects.

Share your insights and innovations in the profession by submitting an education session proposal. Proposals can address the topics from any perspective: early-career, mid-career, or post-certification. Recommended topics include, relationship building and the human factor, structural leadership vs. influential leadership, how to incentivize employees to become leaders and mentors, what the CM industry can learn from other industry innovations, or improving owner outcomes through team building and enhancing skills.

Session proposal submissions are due April 12, 2019. Visit our website at www.cmaanet.org to learn more and download RFP guidelines and a template.

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