



# BIM: CHANGE IS COMING

## BUT WHAT ARE THE LEGAL RISKS?

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In 1963, addressing a crowd in Frankfurt, Germany, President John F. Kennedy spoke of the need to change or be left behind. He said: “Change is the law of life. And those who look only to the past or present are certain to miss the future.”

The construction industry is no different from the rest of the world regarding the need to adapt and change. And in this world of exploding technological advances demanding instantaneous response to changing conditions, it is more important than ever for those in the construction industry to adapt their business practices or risk being left behind by their competitors.

One of the most promising (but daunting) developments regarding the use of technology in the construction industry is Building Information Modeling (or “BIM”). Depending on its use, BIM either refers to: 1) a process where owners and AEC (architecture, engineering and construction)

personnel can access, review, share and modify pertinent information regarding a building project, using computer-automated technology to develop a model of the physical and functional aspects of the project; or 2) the actual three-dimensional, real-time construction modeling software program used to increase productivity in building design and construction.

Although BIM has been slower to catch on in West Michigan than in other areas of the U.S. and around the world, its expanded use – like the change referenced by President Kennedy – is inevitable. Therefore, regardless of whether one is referring to the process or the programming software, construction professionals

need to understand that the increased use of BIM changes not only the manner in which they go about their business, but also could give rise to legal issues different than what occur in a more traditional project.

BIM is such a relatively new process that there have been very few lawsuits filed or legal opinions issued shedding light on how courts might address the shifting rights and responsibilities given its emphasis on sharing and collaboration. Until there have been more court opinions to review, it is difficult to identify or anticipate how courts may rule when BIM issues come before them. However, among the issues of which BIM participants need to be aware and consider are the following.

## HOW IS PRIVACY OF CONTRACT IMPACTED BY BIM?

“Privacy of contract” refers to the relationship between parties to a contract that allows them to sue each other but prevents anyone who is not a party to that contract from doing so. In the construction context, designers sometimes argue that they are only liable to the person with whom they contracted (usually the owner) and no one else, because no one else was a party to their contract.

Under BIM’s collaborative model, though, it will likely be much easier for third parties (parties that did not sign the contract between the owner and design professional) to argue that they, as a party known to be collaborating on the project, had a right to rely on the design professional’s accuracy. For this reason, contractors and subcontractors who rely on plans shared through BIM will likely be able to successfully raise claims based on the designer’s negligence that might be barred in more traditional construction contract scenarios.

## WHO OWNS THE BIM MODEL AND DATA?

One of BIM’s greatest strengths is its reliance on collaboration among the design professionals, contractors, subs and suppliers working on a project to assure its smooth and efficient construction and completion. A central aspect of BIM is for each participant to share with the others information that might otherwise be confidential.

For instance, assume that a specialty plumbing contractor designs a unique faucet system for a project. Its plans are put into the BIM software and model to help coordinate the building plans and schedule. Because they are in the BIM software system, they are available to all of the construction

team. What happens when the project is complete? Who owns that unique design? And what happens if one of the other “team members” uses the information gleaned from the BIM system on a different project, with a different plumber?

## WHO IS RESPONSIBLE FOR WHAT RISKS?

Historically, the law in the United States assumes that while a construction team (architect, engineer, general contractor, sub and suppliers) may all be working “together” on the same project, they all have their own clearly defined roles, responsibilities, and liability should they fail to perform their role according to their contract or standard industry practices. BIM’s focus on collaboration can be seen as substantially altering these traditional relationships – requiring careful consideration of how to allocate risks between the parties who participate in the BIM process. Common sense says that since the parties’ respective job functions will essentially remain the same, their job responsibilities should likewise stay roughly the same ... but wisdom says that the parties should address how best to allocate the risks and responsibilities for job responsibilities in the contract documents.

## HOW WILL THE *SPEARIN* AND “MEANS AND METHODS” DOCTRINES APPLY TO BIM PROJECTS?

In *United States v Spearin*, a 1918 decision, the U.S. Supreme Court issued an opinion that for the past century has insulated



contractors who can show that they built the project in accordance with the designer's plans and specifications from liability for claims of defective or non-conforming work. When a BIM project is involved, though, and the parties are deemed to have been working collaboratively, it is unclear whether contractors will still be protected by *Spearin*, since they may be found to have helped create the plans and specifications themselves.

Similarly, design professionals have for years been able to defend against a negligent design claim by arguing that they are not responsible for a contractor's defective means and methods used to complete the work. But if they are deemed to have collaborated with the contractor in choosing those means and methods, that defense may be lost.

### **AIA AND CONSENSUSDOCS HAVE BOTH ISSUED BIM DOCUMENTS**

In an effort to clear up as much confusion as possible before issues arise, both AIA (Document E203-2013) and ConsensusDocs (ConsensusDocs301) have issued standard

With the advent of technology and its widespread use within the construction industry, it is inevitable that the use of BIM software and contract documents will become more prevalent in West Michigan. Those who accept and prepare for this reality will likely adapt quickly and succeed in the years to come; those who look only to the past or

present are certain to be left behind.

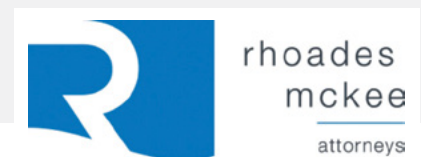
Jimmy Dean (the actor and sausage maker) reportedly once said: "I can't change the direction of the wind, but I can adjust my sails to always reach my destination." Instead of fighting the winds of change, members of the construction industry need to adapt when faced with working on BIM projects. In this regard, your best bet

is to consult with an attorney well versed in the construction industry. Just as you would not hire an ear doctor to perform back surgery, asking someone who is not familiar with the construction industry to review and understand interrelated construction documents is neither wise nor likely to lead to good results for you or your company. •



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forms to be used on BIM projects. Samples of these forms are readily available online. However, even with these standard forms issued by well-respected industry leaders, no one in the construction field should simply sign off on a BIM project (or any project) without understanding fully their rights, duties and responsibilities. And because both AIA and ConsensusDocs forms often incorporate by reference other forms created by the respective organizations, it is critically important: a) not to sign any document without reading all other documents incorporated, adopted or ratified by reference; and b) never to change any terms of that document without making sure that any such change is made in all related, incorporated, adopted or ratified documents.



*Bruce Courtade is an attorney with the Grand Rapids-based law firm of Rhoades McKee, PC, whose practice involves all aspects of construction law. He is a frequent speaker at the Builders Exchange, offering a series of free "Lunch and Learn" sessions on topics such as construction liens, surety bonds, key contractual terms and other areas of law impacting the construction industry. Check the Builders Exchange website, <https://home.grbx.com/>, to learn more about and register for Bruce's upcoming seminars.*