



ZETLIN & DE CHIARA LLP

QUARTERLY REVIEW

CURRENT LEGAL AND BUSINESS DEVELOPMENTS AFFECTING
THE DESIGN, CONSTRUCTION, AND REAL ESTATE INDUSTRIES

2008 VOL. 14 NO. 2

THE OWNER'S PERSPECTIVE WHEN THE CRANE COLLAPSES

By Michael K. De Chiara, Esq.

You have worked extremely hard for a long time to be in the position you are in now: a successful developer/owner who is in the middle of a major residential project in the City of New York. As is your habit, you have carefully planned this project, you timed the market properly, you hired a renowned architect and the best consultants for a high-rise residential project in Manhattan. You have negotiated tough but fair contracts with your construction manager and your design professionals and you have met with your insurance brokers and with your owner's representatives. Your team has put together an insurance program for your project including what you believe to be a very conservative \$25,000,000 owner-controlled insurance program for your \$850,000,000 project.

As you are finishing your second meeting of the day and walking from your conference room to your office, your assistant hands you a cup of coffee. At that moment, you are startled and your head snaps to attention as one of your colleagues comes running towards you and in a half-choked voice stammers that a crane has collapsed on your project. Your colleague,



CONTINUED ON PG 4

ISSUE FOCUS:

With increasing numbers of accidents reported across the country, real estate and construction professionals should implement sound plans to reduce liability. This issue provides an overview of steps to take to reduce your exposure 'when the crane collapses.'

CONTENTS

- **WHEN THE CRANE COLLAPSES FROM THE OWNER'S PERSPECTIVE**
by Michael K. De Chiara, Esq.
- **CATASTROPHIC EVENTS AND DESIGN PROFESSIONAL RISK MANAGEMENT**
by Louis J. Dennis, Esq. & Calvin Lee
- **SAVE THE DATE**
- **LEGISLATIVE UPDATE**
New Crane Regulations
by Tara B. Mulrooney, Esq.
- **FROM THE INSURER'S PERSPECTIVE: ON TIME & UNDER BUDGET**
by Michael M. Feigin

CATASTROPHIC EVENTS AND DESIGN PROFESSIONAL RISK MANAGEMENT

By Louis J. Dennis, Esq. & Calvin Lee

A catastrophic event on a construction project, such as a crane collapse, while rare, is frequently deadly and costly. While all project participants must make every effort to prevent a disaster, they should also be prepared when such an event does



CONTINUED ON PG 6

SAVE THE DATE — INDUSTRY EVENTS

NOVEMBER

3

AIA/ACEC Special Advisory Committee Meetings

Michael K. De Chiara, Patricia A. Harris, Michael J. Vardaro and Lina G. Telese to address topics of interest concerning firm management, risk management and contracts.

NOVEMBER

12

Economic Impact of the Recent Financial Crisis on Construction and Development

Zetlin & De Chiara LLP, McGraw-Hill and New York Construction present a forum on **The Current Economic Crisis Affecting the Tri-State Region**. Michael K. De Chiara, Michael S. Zetlin and leading insurance and construction industry professionals will address the implications of the current economic crisis for construction and development in the region. Hear from Richard Ravitch, Timur Galen, Managing Director, Corporate Services and Real Estate, Goldman Sachs & Co, Deputy Mayor Robert Leiber, MTA President & CEO Elliot Sander and others.

NOVEMBER

13

BIM Symposium with McGraw-Hill Construction: Chicago

Michael S. Zetlin participates as a panelist to discuss the concept of BIM and the industry's concerns on the current systems' legal and security issues.

NOVEMBER

17

Your Brand and Your Bottom Line — Are You Ready for 2009?

McGraw-Hill Construction business forum features Patricia A. Harris and leading industry experts who explore strategies for improving your bottom line in a changing economic market and what you need to do to plan for 2009.

DECEMBER

1

The State of the Insurance Industry

Zetlin & De Chiara LLP and McGraw-Hill Construction present the 2008 Annual Joint Session on Current Insurance Issues for Real Estate, Design and Construction Professionals. Michael K. De Chiara and leading industry experts will discuss the implications of the changes in the financial services and insurance industry and how it will affect a firm's ability to build its projects, manage its risks and control costs.

For more information, contact Whitney Murray, Marketing Manager, at 212.682.6800 or via email at wmurray@zdlaw.com.

LEGISLATIVE UPDATE: NEW CRANE REGULATIONS

New York Passes Additional Training and Safety Measures for Crane Operations

by Tara B. Mulrooney, Esq.

In the wake of several deadly crane accidents this past year, legislators on both federal and local levels have pushed for the passage of legislation aimed at improving the safety of crane operations. The following is a brief synopsis of recent legislation passed to amend the Administrative Code of the City of New York as well proposed regulations released by the United States Department of Labor requiring crane operators nationwide to pass certification tests.

New York Mayor Michael Bloomberg has signed into effect three new pieces of legislation, Introductory Number 794-A, 795-A and 796-A, intended to improve the safety of crane operations.

Introductory Number 794-A requires training for tower and climber crane

workers and riggers and strengthens the requirements for persons applying for a rigger's license. Pursuant to 794-A, workers engaged in the erection, jumping, climbing, rigging or dismantling of a tower crane or climber crane are required to complete a 30 hour course approved by the Buildings Department and an eight hour refresher course every three years. The terms climbing and jumping are defined to mean the raising or lowering of a tower or climber crane to different floors or levels of a building or structure.

Introductory Number 795-A is aimed at ensuring the proper use of nylon slings at construction sites. This legislation requires that nylon slings be used only in conjunction with climber or tower crane erection, jumping, climbing, and dismantling if the manufacturer's manual specifically states or

recommends the use of nylon slings and if softening mechanisms have been applied to all sharp edges. In addition, 795-A prohibits the use of discarded rope as a sling.

Introductory Number 796-A mandates that general contractors hold a safety coordination meeting with all responsible parties to review the rigging to be used and the sequence of operations and procedures that will be followed during the installation and dismantling (including jumping) of tower cranes. In addition, the legislation requires that safety meetings be held before each subsequent jump to inspect the equipment, verify the training of all workers, and confirm the procedures and practices that will be followed. Notification of the safety coordination meeting and all safety meetings must be made to the Buildings Department at least 48 hours in advance of the meetings

CONTINUED ON PG. 8

THE INSURER'S PERSPECTIVE

ON TIME & UNDER BUDGET: IS IT POSSIBLE ON LARGE CAPITAL PROJECTS?

by Michael M. Feigin, Marsh Global Construction Practice Leader

Delivering a large capital project on time and within budget is difficult, but not impossible. For those involved in capital projects, this is hardly news.



However, given today's challenging economic conditions, there is little, if any, tolerance for delays, cost overruns and other risks. Today's market underscores the need for a capital project risk management program that can address the increasing risks associated with the diminishing supply of readily available capital. In short, robust and formal approaches to risk management have now moved beyond initiatives that are merely nice to have, to best practices that are essential for stakeholders to succeed.

Stakeholders must make it a priority to devote the appropriate amount of time early on to evaluate and quantify risks, and then determine the best method for managing them. As financial rating criteria become more comprehensive, project owners will compete for limited market capital. As a consequence, lenders and equity holders will have greater input in how a project is managed and how project risk is addressed will increase. The emphasis will become greater on risk management techniques to eliminate, mitigate and transfer project risks just as stakeholders must provide clarity on what to do should risks materialize.

A capital project risk management strategy should be focused on providing meaningful risk information and solutions that support executive decisions, thereby providing the highest level of capital investment certainty to all project stakeholders. It should be process-driven and include tools to allow project stakeholders to make informed business decisions around protecting and preserving project capital. A project risk system must follow a defined approach

that includes: risk identification and prioritization, risk mitigation, risk framework implementation, and program audit and support. Understanding the challenges to these fundamentals leads to risk management precision.

Vulnerabilities in project risk management may occur when owners do not achieve the full benefit of the tools and processes that are implemented or in cases where those systems are flawed. The reasons this can occur include:

1. Absence of risk-centered decisions: risk management information is not fully integrated into management decision making;
2. Ineffective project governance: the project controls, planning and execution processes that derive the inputs to project risk management are inadequate;
3. Undefined project success goals: the project risk system fails to keep track of key objectives for success, such as completion dates and budgets;
4. Improper implementation and execution: the project risk management process is not implemented early and updated often, which means that key project development decisions are made without considering project risk;
5. Lack of customization: the techniques used to identify risk are not specific to the conditions of an individual project.

Risk-centered decision making starts with the project-planning and execution process. Successful implementation occurs when properly validated risk management information is integrated into the management and decision-making process. All risk management processes should be "integrated" with the project management processes, meaning the information flowing between these components becomes central in the decision-making process that drives the subsequent project management planning and execution.

Project governance goes hand-in-hand with risk-centred decision making. Successful project governance can be

measured by the ability of management to have a positive influence on the project's outcome. In its absence, projects may produce returns below expectations, encounter chronic disputes for cost overruns and delays, or result in surprise outcomes that impact the bottom line.

Successful governance includes consistency in project procedures, accountability where all parties understand their responsibilities, and transparency in how and why key risks decisions were made. The accuracy and effectiveness of the project control and of the project planning and execution processes is directly related to how well critical (properly validated) risk management information is integrated into the management and decision-making process.

Vigilant focus on the goals of a project is critical to successful risk management. The business case for funding large capital projects entails several goals such as those related to time, budget and quality. Achieving these goals is tantamount to what stakeholders require for the project to be defined as a "success." Carefully identifying the project success goals and systematically prioritizing them after considering the needs of key project stakeholders can provide a critical tool to evaluate each project development decision. This list of prioritized project success goals can be used to "score" feasibility study options, evaluate the project delivery method chosen, determine contractor criteria, and be incorporated into the project risk management system so that risks to achieving the more critical project success goals are identified.

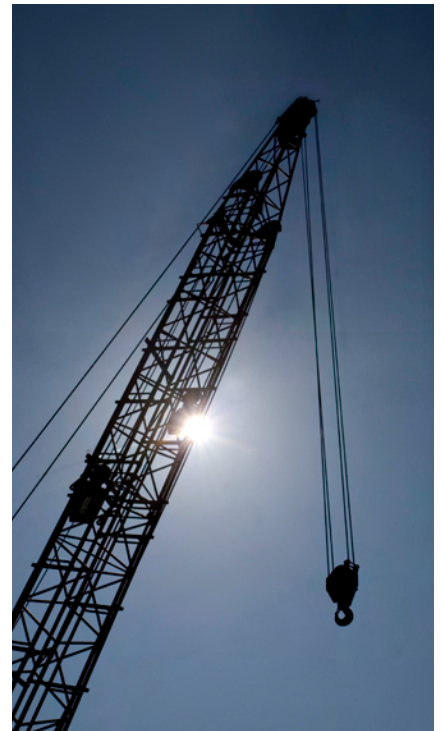
Proper implementation and execution of a risk management program sounds simple, especially when the core tools and processes exist. However, just like wiring a DVD player to the TV and cable box, improper installation of the correct parts leads to the wrong picture. Although there is no "one size fits all" for each project, here are some general guidelines:

CONTINUED ON PG. 5

THE OWNER'S PERSPECTIVE

CONTINUED FROM PG. 1

obviously in shock, tells you the early damage assessment and instinctively your body reacts to this mortal threat at a cellular level. You feel tightness in your chest, your breathing becomes short, your head becomes dizzy and a wave of fear passes over your body. In that split instant, you have visions of your entire world collapsing, and everything you have spent your life working for is now in peril. Over the next minutes, various thoughts race through your brain. How many people are dead, hurt and suffering? How could this happen? How could I have any responsibility for this? Why me? Then, you worry: Will I lose the project? If I lose this project, will I lose my business? How will my family react? How will my life change? This is the real scenario you never hope to find yourself in. In the world of 20/10 hindsight, what could you have done as a prudent owner to protect yourself from this scenario?



THE 20/10 ANALYSIS

First, you must ensure that your construction contractors provide adequate insurance at all levels so that if a catastrophic event like this occurs, you will have the benefit of the \$100,000,000 or more of insurance necessary, at a minimum, to cover the event. The single biggest mistake owners and developers make far too often in proceeding with large construction projects in urban environments is that they do not have adequate insurance to cover catastrophic risks.

In addition to the insurance that you should require your Construction Manager (CM) and your major subcontractors to carry, as a prudent owner, you also must carry significant coverage through, at a minimum, the erection of the superstructure and the major cladding elements of your building.

Next, in order to give yourself some type of credible defense and preserve your business and reputation should calamity strike, you must have established a reasonable risk prevention program for your project in which your CM, your Owner's Representative and all of the major subcontractors on the project participate.

"Your first priority must be to respond to the personal tragedies resulting from the accident and be available to offer assistance to those families of the individuals who have been the victims."

Fortunately, catastrophes, such as a crane collapse, are rare. Further, when they occur, they are usually the result of multiple failures by several project participants. Therefore, in setting up the construction and design teams for your project, you must provide redundancies for critical elements of your project and have multiple construction and design participants involved in reviewing, observing and inspecting those critical elements. Today, given the recent problems with cranes, it would be advisable to insist that your CM retain an independent firm solely to inspect the crane installations.

FIRST RESPONSE

Assuming adequate risk and other protections are in place, what do you do in the minutes after you have been informed of the shocking news and your heart beat returns from 175 beats per minute back to the ten beats over normal where it will probably remain for the next month?

You must quickly put together an emergency team of lawyers and advisors and you must control the public statements they will make on behalf of your firm because these statements will be critical in the days, months and years of damage control that will follow the event.

First and foremost, you must immediately retain counsel experienced in managing construction catastrophies. There are very few lawyers who are qualified by both experience and judgment to help you respond promptly in the aftermath of a catastrophic event such as a crane collapse. A mistake in the hours and days that follow such an event can amount to a second catastrophe for you in the years of litigation that will follow. In addition to hiring the right lawyers, they and not you, must as soon as practicable but no more than within a few hours, reach out and

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- Consistent risk identification means all participants are provided the same project background information focused on risk issues. Risk identification is not limited to the “personal experience” of one or two participants;
- Risks identified in early stages of project development and execution are considered and incorporated as appropriate in the present project stage; and
- Project assumptions made and constraints identified that have limited risk mitigation options are tracked during the project risk-management process. Assumptions that cannot be validated must be treated as “risk.”

Since no two projects are alike, customization of the risk management system is essential. Even armed with sophisticated commercially available electronic tools to measure and track project risk, stakeholders will not fully

benefit from these tools without factoring in the needs and goals of each project. Common processes for customization include:

- Establish pre-determined risk metrics that measure performance (i.e., quality, schedule, cost, etc.) against construction and operational performance plans to serve as an early warning mechanism to management that “this needs your attention;”
- Conduct ongoing 30-, 60-, or 90-day risk forecasting of the project’s performance in terms of potential cost overruns, delays and emerging risks; and
- Incorporate a risk registry and risk watch list for recording and reporting risk reductions as well as current conditions.

A risk-centered decision-making process that is built upon solid project controls and the business case for the project is core to the success of a risk-

management program. Early start for project risk management and a project-specific risk-identification framework coupled with a quantitative capital project risk management strategy will place stakeholders in a better position to achieve their project success goals. In the event risks become reality, a plan will already be in place for mitigation and recovery. A project that incorporates these concepts is more likely to be on time and within budget, can compete more successfully for scarcer project capital, can present a better case to insurance underwriters, and will have more transparency of risk across the project overall. In today’s economic environment, this will allow large project sponsors to differentiate their projects in the financial marketplace. ■

Michael Feigin would like to acknowledge and thank our Marsh Capital Project Risk Management Services & FACS Construction Consulting Practice colleagues, specifically Gregory Sinnott, Capital Project Risk Management Practice Leader, and Colin Daigle, FACS Construction Consulting Practice Leader, for their contributions to the creation of this article.

retain structural experts and mechanical experts who deal with these types of situations and who have experience with dynamic collapses. The retention of the appropriate experts as quickly as possible is another critical element to your defense.

Your first priority must be to respond to the personal tragedies resulting from the accident and be available to offer assistance to the families of those affected. To this end, you must be proactive with your insurance carriers so that they can help you funnel assistance immediately to those in need.

Next, you must retain appropriate consultants, or engage your current consultants if they are familiar with emergency response operations, to stabilize and address the immediate situation. As the owner of the project, you are ultimately responsible for the problem (though you will look to offset your liability on to others) and you must act quickly and effectively to stabilize the situation.

Finally, you must surround yourself with individuals from your organization

who are able to keep cool heads and focus dispassionately on the immediate situation. It is generally a good idea to appoint someone in the organization who is senior and whose judgment you trust and who is not involved in the project, if possible, to participate actively in managing the tragedy. Those who are too close to the project may be unable to act effectively in the immediate aftermath of an accident due to a combination of hope, shock, second-guessing, regret and remorse that will naturally affect most people under these circumstances, whether or not they were at fault. In the days that follow, having assembled the proper team of lawyers and consultants, having stabilized the project and having rendered aid to those in need, you will now be in a position to assess the economic realities of the disaster you are confronting.

FIVE DAYS LATER

Skipping to day five after the tragic event, assuming you were the prudent owner who had acted with 20/10 foresight and had more or less followed the outline above, you now have a good chance of retaining your interest in the project

and successfully navigating through the storm of litigation and accusations that accompany these tragedies.

Hopefully, you and your construction team will never be faced with this type of situation. However, due to factors beyond your control, should something like this ever happen, however unlikely that is, you will of course react with surprise and anger and perhaps other emotions that you feel when confronted with a severe problem not of your creation. But you will not react with that overwhelming confusion and fear that your world has suddenly collapsed along with that crane. You will react with the calmness of someone who has planned appropriately for the unlikely yet severe risks that will always be a part of major construction projects. And you will know that whatever the cause of the problem, you have acted in an appropriate manner before the event, and have acted prudently to minimize its effects.

This relative comfort at a time of extreme stress and turbulence is, as they say on Madison Avenue, *priceless*. ■

CATASTROPHIC EVENTS CONTINUED FROM PG. 1

occur. Even though a design professional may appear to have little potential liability for events that most typically arise from issues with the contractor's means and methods, there are still risks that must be recognized and addressed before a project is undertaken.

"The most important steps for dealing with a catastrophic event should be taken long before the event occurs."

When a catastrophe occurs on a project, members of the design team are likely to be brought into the litigation that ensues, even if they have no direct responsibility. Because the cost of litigation can be extremely high, avoiding or minimizing these costs is sufficient reason for every firm to develop a risk management plan that prepares for such an event and carefully controls the firm's response.

THE NEED FOR A FIRM-WIDE PLAN

The most important steps for dealing with a catastrophic event should be taken long before the event occurs. The firm should develop a comprehensive, firm-wide risk management plan that includes the approach to negotiating contract terms, insurance and a comprehensive document retention policy, and identifies the actions that will be taken immediately after notice of such an event is received, including handling public and internal communications.

Risk management usually starts with the contract. The project team should have a thorough understanding of the terms of the project services agreements and be educated about the potential implications of various contract provisions and insurance issues should a catastrophic event occur. The services agreement with the client should clearly define the firm's responsibilities and obligations.

For example, Chapter 17 of the International Building Code requires as part of the permit process that stamped drawings detail the manner in which tower cranes will be tied to the building. The agreements should designate which party is responsible for designing these details. Absent contract provisions to the contrary, it may be implied that the engineer had this responsibility.

The issue of indemnification should also be looked at closely. If not, certain indemnity language may require the design professional to defend the owner or other parties even in circumstances where there is no realistic possibility of design responsibility. Additionally, the design professional's duties on site during construction should be clearly defined, and actual on-site involvement should be limited to the contract-specified scope.

The design firm also needs to be sure it is properly insured and that the insurance policy and limits are sufficient for each particular project. As a starting point, the coverage should be reviewed in connection with each new project to ensure compliance with the particular contractual requirements. Most

"Communication and document retention protocols are also essential elements of a risk management plan."

significantly, the firm must be aware of the insurance carriers' notice requirements. While recent legislation in New York will make it more difficult after January 1, 2009 for a carrier to deny claims based on a lack of notice, these requirements vary from state to state and notice of any potential claim should still be given as soon as possible. Often, taking an early, proactive approach and developing a legal strategy with the firm's attorney and insurer can result in a significant



savings in both time and money. With a catastrophic event, this approach can be instrumental in avoiding or minimizing future liability.

COMMUNICATION BASICS

Communication and document retention protocols are also essential elements of a risk management plan. Most, if not all, project correspondence, including emails, will likely be produced to third parties in any litigation. All employees, particularly the design professionals, should be aware that every project communication will be presented by the attorneys for other parties to a dispute in the worst possible light. As such, all written communications, especially email, should be sent with that in mind – particularly after an accident or other catastrophe has occurred.

Of course, all direct communications with the firm's attorneys, and analysis done at the attorney's request, should be filed and maintained separate from project files, not shared with third parties, and if forwarded within the firm, should be clearly marked as privileged attorney/client communications.

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It is also important that team members are trained to retain hardcopy documents and electronic data habitually, in an organized manner and in accordance with the firm's retention policy. All personnel should know that certain events, including a catastrophic accident or litigation, will trigger a "litigation hold" and all project records must then be maintained, regardless of whether the

"At the earliest possible opportunity after an accident or similar event, the project team should be debriefed under the direction of the firm's attorney."

firm's internal retention policy would call for a record's destruction. If, for example, electronic documents would typically be overwritten in the system after a given date, a litigation hold would require those electronic files to be preserved. The organization of document and data storage can help prevent the inadvertent disclosure of privileged documents.

Once the preparatory measures have been put in place, if a catastrophic event occurs, the foundation will be laid to confront it. Immediately following the event, all firm employees should be instructed to avoid public comments to prevent any inadvertent disclosure, misstatement or miscommunication. Early statements, whether official or unofficial, made by the firm or a firm employee can radically alter the public's perception and the mindsets of parties involved.

Accordingly, the firm should designate a spokesperson to make an official statement, to address the media and to deal with any contacts from outsiders. Ideally, the spokesperson would be an articulate member of the design firm, but not a member of the project team. This will allow the spokesperson to be less emotionally attached to the situation and help control the amount of direct project-related information that is discussed. Generally, the spokesperson should not be a lawyer or a public relations specialist as this may cause undue misconceptions of the firm's own view of the circumstances surrounding the accident or other event.

Public statements and communications are not the only concern. All employees should be reminded that any informal, internal discussions will likely be discoverable during litigation and any statements made can affect the firm's potential exposure. Further,

communications with the owner and other project participants must be dealt with in a manner that will protect the firm from unwarranted finger-pointing.

At the earliest possible opportunity after an accident or similar event, the project team should be debriefed under the direction of the firm's attorney. By involving an attorney, the communications will remain confidential and the firm can develop a full and truthful understanding of the situation quickly and any potential problems can be identified and fully investigated. This early effort to gain a full understanding of the circumstances surrounding an event will allow the firm to be available to the client and responsive to any administrative or government agencies that may be conducting investigations. A design professional's cooperation in these processes will likely be perceived favorably and will help maintain the professional relationship and build goodwill among all parties. Having the client as an ally and being forthcoming with government agencies may also help eliminate any misconception that the design professional is responsible for the catastrophic event.

Every design professional should have a comprehensive risk management plan regardless of the size and type of project with which it is typically involved. The plan should be evaluated regularly and tailored as necessary for each individual project, always applying lessons learned from previous experiences.

Above all, principals of the firm must follow the plan to maximize its effectiveness and they must realize that in some cases, not following a firm policy can have more profound effects than the absence of a policy in the first place. A well-conceived risk management plan will allow the firm to respond to a catastrophic event in a calm and collected manner. A well-executed risk management plan will protect the firm's standing and reputation, and ultimately minimize the potential for liability. ■





LEGISLATIVE UPDATE: NEW CRANE REGULATIONS

New York Passes Additional Training and Safety Measures for Crane Operations CONTINUED FROM PG. 2

and a log of all meetings must be kept on site and available to the Buildings Department at all times. The crane engineer is also required to: submit plans and specifications to the Buildings Department prior to the erection, dismantling or jumping of a tower crane; inspect the crane installation prior to each jump; and certify to the Buildings Department that the crane is installed in accordance with the approved plans and there are no hazardous conditions present.

The legislation is part of a larger effort focusing on improved safety and follows a move earlier this summer that added \$5.3 million to the Buildings Department budget to fund 63 new positions dedicated to enhancing oversight and enforcing construction safety requirements. Mayor Bloomberg says the legislation builds upon recent efforts to reform the Buildings Department and strengthen oversight and enforcement in the construction industry.

PROPOSED FEDERAL REGULATIONS

The United States Department of Labor has responded to the recent crane collapses by proposing its first update of crane regulations in nearly four decades. The yet to be released draft regulations will require crane operators to pass written and practical

tests in all 50 states and will require crane operators to undergo more training. The new standards are also aimed at toughening requirements on inspecting ground conditions, the assembly and disassembly of cranes, the operation of cranes near power lines and the use of safety devices and the inspection of cranes.

With respect to certifications, crane operators would have four options under the new requirements: certification through an accredited third-party testing organization, qualification through an audited employer testing program, a United States military-issued qualification, or qualification by a state or local licensing authority. Currently only 15 states and six cities (including New York State and New York City) require certification tests.

These proposed regulations would cover a vast majority of the 96,000 cranes, including 2,000 tower cranes across the nation. Officials calling for the imposition of uniform standards have pushed the government to act quicker to update these standards, which have not been updated since 1971. A final approval process is anticipated to take more than a year. ■

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