

Managing Once-in-a-Generation Construction Problems

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Being a successful contractor, much like being a successful lawyer, boils down to customer service. Clients must remain happy throughout the duration of the relationship, knowing that their chosen professional has their interests at heart, minimized surprises and maintained communication and transparency from start to finish. Even further, most owners and developers, just like those in need of legal services, are unaware of the road that lies ahead, the proverbial “good, bad, and ugly” – certainly during their first few forays. Accordingly, the professional relationship in both respects is extremely fragile, especially when you have to navigate clients through uncertain, unfamiliar, expensive, and sometimes choppy waters, where any misstep can irreconcilably damage the trust and confidence on which that relationship so heavily depends.

This dynamic exists during the best of times but is most demanding during highly volatile periods, such as the current global landscape, with a multitude of factors impacting supply and demand, labor, costs, inflation, and the political and economic climates in general. For the benefit of all key project players who are now tasked with building during uncertain times and managing once-in-a-generation construction problems, this two-part series is meant to promote outside-the-box thinking while also providing best practices toward successful project delivery and customer satisfaction.

Alternative Project Delivery Methods (PDM)



The overwhelming majority of construction work, including public and private projects, is performed utilizing a design-bid-build (DBB) PDM. This method involves an owner, developer, or government entity first engaging a design professional to design a project. Next, contractors provide bids to build the project as designed. Then, the preferred contractor is hired to build the project. Most projects under this method are completed, but not without some pain, and with a significant percentage of projects experiencing too much pain.

This method, though most often used, has several major flaws. Collaboration and innovation are discouraged, especially during the most critical time for such efforts, as early on in the project as possible for purposes of planning, designing, and budgeting. Even further, incentives among the key project

participants – ownership, the design and construction teams, including major lower tiers – are misaligned. Indeed, the parties are placed in an adversarial position with most design and construction agreements that govern these construction projects.

One alternative PDM to consider for your next large project is integrated project delivery (IPD). IPD utilizes a single construction agreement between ownership, design, and construction with guaranteed costs, waivers/limitations of liability, dispute resolution processes/boards, and a shared loss/profit model for all signatories, while encouraging and facilitating collaboration, transparency, and a project-first mentality. The project sum usually includes costs for design and construction as well as a contingency fund, while the signatories also fix their respective profits at the time of contract execution. Timing for completion and the overall construction costs as-budgeted versus as-built directly impacts the financial outcomes for the project participants. Last, but not least, the IPD contract promotes joint management of the project by a team consisting of individuals from the key project players.

Another alternative PDM is design-build. While more prevalent than IPD, design-build projects are still few and far between. There is certainly a presumed comfort between an owner and architect when designing a project without the involvement of a contractor, let alone *the* contractor. Likewise, architects prefer to stay away from the means and methods of construction, just as contractors prefer to avoid any design responsibility, with each pointing the finger at the other as soon as circumstances permit. This dynamic is baked into the cake, after decades and centuries of doing the same thing over and over again. However, a tremendous benefit of design-build, similar to IPD, is the elimination of these barriers and adversarial positions. Indeed, the contractor and design professional must collaborate and innovate from the very first stage of a project and onward, while being aligned on the successful delivery of a project and taking into account design, construction, schedule, and budget.

Just as owners and developers have historically been comfortable with DBB, rest assured that contractors also welcome the avoidance of responsibility for design and even further, being able to blame design. However, common sense

dictates a positive correlation between chances of project success, including customer satisfaction, and the levels of communication, collaboration, innovation, and transparency for the project. Risks between a contractor and design professional can be adequately accounted for in their separate agreement. Imagine the day, in the hopefully not so distant future, when architects and contractors can recommend and seek to work with each other, having successfully delivered projects together in a collaborative fashion from inception through completion for their mutual customer.

Change Orders Remain the Bane of the Construction Industry's Experience

Change orders are written amendments to a construction agreement that can be additive or deductive, and usually include adjustments for cost and/or time. Though change orders can arise for many different reasons, a customer's displeasure having to pay more for something remains constant and unchanged, no pun intended. Not surprisingly, change orders requested by an owner or developer are typically paid for without dispute. Instead, it is those contractor-/subcontractor-requested change orders that are rejected by an owner or developer, and thus may escalate to claims and disputes.


Despite this fundamental and unrelenting dynamic between ownership and a contractor, and despite construction lawyers, insurance carriers, and sureties alike, along with key project participants, experiencing an endless number of disputes involving change orders, the same mistakes are repeated project by project without ever seeking to evolve and regardless of whether building in certain or uncertain times! The most impactful and common mistake is failing to communicate with a customer regarding design completion, or the lack thereof, when negotiating a construction contract. Contractors must understand that when bidding upon a project with an incomplete design, the customer will rely upon that budget, usually in the form of a schedule of values, and will not be happy when confronted with additional costs later on during the project premised upon design being incomplete when bid upon.

It is simply better to confront this reality early on. Give your customer the opportunity to decide whether to proceed with the work and an incomplete design, while expecting change orders accordingly as design concludes. Or, perhaps ownership wishes to push for a complete design in furtherance of obtaining a “final” number for the construction. Another alternative is a productive discussion about costs and fees for the work, including if a customer wishes to proceed with an incomplete design while seeking to minimize change orders or total change order exposure in some fashion. Though difficult, these conversations should be welcomed, and the successful delivery of a project, including a happy customer, is dependent on such transparency and communication.

Rising Costs, Inflationary Pressures, and Payment Structure Considerations

The industry has dealt with a labor shortage for decades before having to weather the pandemic over the last three years – in addition to supply-chain disruptions, rising costs, and inflation. These global factors are also creating tremendous political and economic uncertainty for the foreseeable future. However, and critically, a few years ago, the industry was able to rely upon the unforeseeable nature of the pandemic, supply-chain woes, and rising costs. Today, contractors are well aware of potential pandemic impacts, supply-chain delays, and volatile costs. It is fool’s gold to rely upon the same arguments that were raised back in 2020 without making sure to have candid discussions with ownership and negotiating the construction agreement governing the project accordingly to properly deal with each of these factors.

Completion of design, along with volatility factors, is an important consideration when negotiating a construction contract, including the payment structure – i.e., stipulated sum, cost plus fee, cost plus fee with a GMP. While cost backup has less relevancy in a stipulated sum arrangement, backup remains absolutely critical for any cost-plus-fee project. Just as an incomplete design provides fertile ground for change-order disputes, it does the same when a contractor commits to a GMP without a full set of design documents. Contractors also must be wary when providing a GMP despite anticipating cost increases and/or supply-chain delays. Even further, many contractors, fearful of losing or not signing work, provide a GMP in the amount of the initial budget, again expecting cost increases but hesitant to quote a GMP number that truly reflects the potential maximum project sum.

A lack of transparency, misaligned incentives, and poor collaboration, coupled with a failure to properly and adequately negotiate all facets of the construction agreement, will inevitably increase the risk for claims as a project proceeds, such as change-order disputes, placing a contractor’s profits and a customer’s satisfaction in jeopardy. During these uncertain times, legal counsel specializing in construction contracts and disputes can help contractors think outside the box, evolve, encourage difficult conversations, and focus on successful relationships and projects from the onset. 



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