American Bar Association Forum on the Construction Industry

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CONSTRUCTION COUNSELING

Pulling together for a Winning Strategy

**CONSTRUCTION LAW PROGRAM FOR STATE AND LOCAL GOVERNMENT**

**ATTORNEYS AND UNIVERSITY COUNSEL**

*Segment 1—Project Delivery/Form of Agreement*

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# First Principles

## Communications

### Importance of open communications among all players during the entire design and construction process

### Impact of open communications on:

#### Change control

#### Cost control

#### Delay control

#### Dispute control

### Formal structures to aid communications

#### Partnering

#### Big room

#### DRB

## Selection of Project Delivery Method

### Project Delivery method may be limited by statute. For example, in Pennsylvania, in general, publicly-funded projects must be performed on a multiple prime basis. Similar statutes are in place in New Jersey, New York, Ohio, Wisconsin.

### Different project delivery systems tend to maximize different areas of owner concern with regard to

#### cost /cost predictability

#### time

#### design quality

#### claims/dispute frequency

#### other concerns including safety, minimizing the administrative burden on Owner personnel

### Subject to the statutory limitations in some jurisdictions regarding permissible project delivery methods, most common methods are:

#### design-bid-construct

##### owner contracts with architect to design and when design complete, contracts with a contractor to build, usually for a fixed price

##### advantages: design is (should be) complete, so high(er) cost certainty and few(er) disputes; checks and balances between architect and contractor; familiarity

##### risks: not as much of an opportunity for constructability reviews, value engineering, etc.; longer delivery timetable; claims experience;

#### multiple primes (variant of design-bid-build)

##### instead of a single Owner-Contractor agreement, Owner contracts with multiple trades as “prime contractors”

##### advantages: increased cost competitiveness

##### disadvantages: increased coordination responsibility (and contractual risk) on Owner; no single point of responsibility to owner for performance and completion of construciton

#### construction management – agency

##### CM becomes consultant to owner

##### essentially a variant of multiple primes, with the owner adding an advisor (the agent construction manager) to its team

##### but Owner can retain construction manager earlier in the design process and thereby get CM input on constructability, value engineering, etc.

#### construction management – at risk

##### many commercial variants here – fixed price, cost plus a fee, cost plus a fee subject to a GMP

##### major other difference from design-bid-build is owner can/should retain the construction manager earlier in the process (i.e., before design completed) for constructability review, cost estimating, scheduling and value engineering

#### design-build

##### owner retains a single firm to both design and build project

##### advantages: single point of responsibility for project; faster project delivery

##### disadvantages: owner cedes control over project; greater responsibility for owner to accurately describe and define the desired project outcome early in the process; less cost predictability

# Design Issues and Considerations

## Defining designer’s relationship with owner and its scope of services

### Dependent on Project Delivery Method – examine critical differences

#### Traditional design-bid-build

#### Design-Build

#### Construction Manager

#### Private Public Partnership

### Based on type of project delivery method:

#### Will designer be agent of owner?

#### Will designer be agent of contractor?

### Identify scope of services required from design team

## Defining project scope

### Importance of accurately and thoroughly defining the scope of work included within the construction contract – including all timing and occupancy constraints

## Defining project budget

### Understanding relationship between time and money

### Owner responsibility and impact on budget?

### Designer responsibility and impact on budget?

### Owner’s obligation to pay for work once at negotiated price

## Impact of owner’s responsiveness to requests for decisions from design team

### Time and dollar considerations

### Contract terms will require timely response by owner

## Intellectual property issues related to the instruments of service

### Defining instruments of service

### What format are the plans to be in upon delivery?

### What format will the plans be shared with:

#### the design team internally

#### the contractor

#### the owner for maintenance and operations

### Who owns the copyright to the instruments of service?

#### History of copyright for architectural works

##### *Baker v. Seldon*, 101 U.S. 99 (1879)

##### Schotz Homes, Inc. v. Maddox, 379 F.2d 84 (6th Cir. 1967)

#### Current national standard - Architectural Works Copyright Protection Act – AWCPA, 17 U.S.C. § 101 et seq.

### Alternate ways of gaining access to and use of the instruments of service:

#### Licenses

#### AIA forms

### Implications of BIM

#### Financial implications of construction model

#### Financial implications of owner’s model for maintenance/operations

#### Management issues:

##### Who controls and manages the model?

##### Who is responsible for the coordination of the model?

##### Who is liable for the model – from design perspective?

##### Who is liable for the model – tech/hardware perspective?

## Defining authority of designer during construction phase

### Defining “construction administration”

#### Defining scope of services available during construction phase

### Specifying role designer will play

### Understanding financial and practical implications to owner of contracting for design services through construction administration

### Evaluator of project disputes?

# Owner’s Project Controls and Project Management

## Project Controls

### impact schedule, change management, payment applications and documentation and pricing of changes and documentation of changes

#### e.g., claims releases need included from contractors with each payment application

#### what kind of reporting does the constructor owe to the owner and on what basis (weekly, monthly?, bi-monthly?)

### Owner needs to make sure that Owner’s internal project controls process has been thought through/established and that everyone within the Owner organization (or on the Owner team) understands and can operate within the project controls

#### Contract provisions must support/conform with owner’s intended project controls procedure

#### Make sure that owner personnel adhere to the project controls procedures – and demand that the constructor(s) do so too – in the construction phase

## Project Management

### For a project of any significant size/scope, Owner needs to have internal construction management expertise or have contracted “owner’s rep/project management.” Principle responsibilities include:

#### representing owner in regular job meetings, in translating owner requests and requirements into the work itself (and working within the owner organization to “reality-test” owner expectations and requirements

#### review and approval (or rejection) of payment applications (in consultation/coordination with the project controls folks)

##### this sometimes is the role of the design professional here?)

#### estimation or confirmation of % progress on Project, and satisfactory (or not) nature of the work

#### cash flow – Owner must pay for undisputed work

#### does contractor have the right to walk for non-payment?

#### deal with disagreements and disputes as promptly as possible (but certainly at least as promptly as required by the contract documents)

# Allocation of Risk

## Issues of frequent concern arising between owner/contractor

### Constructability of plans – *U.S. v. Spearin*, 248 U.S. 132 (1918)

#### Owner warrants constructability of plans when it or its agent designer presents plans for construction

#### Contractor not liable for design issues

#### Owner’s practical considerations in view of this obligation