

American Bar Association Forum on the Construction Industry
2012 Fall Meeting

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

Kristine A. Kubes, Kubes Law Office, PLLC
Suzanne M. McSorley, Stevens & Lee, PA

- I. First Principles
 - A. Communications
 1. Importance of open communications among all players during the entire design and construction process
 2. Impact of open communications on:
 - a. Change control
 - b. Cost control
 - c. Delay control
 - d. Dispute control
 3. Formal structures to aid communications
 - a. Partnering
 - b. Big room
 - c. DRB
 - B. Selection of Project Delivery Method
 1. 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.

2. Different project delivery systems tend to maximize different areas of owner concern with regard to
 - a. cost /cost predictability
 - b. time
 - c. design quality
 - d. claims/dispute frequency
 - e. other concerns including safety, minimizing the administrative burden on Owner personnel

3. Subject to the statutory limitations in some jurisdictions regarding permissible project delivery methods, most common methods are:
 - a. design-bid-construct
 - i. owner contracts with architect to design and when design complete, contracts with a contractor to build, usually for a fixed price
 - ii. advantages: design is (should be) complete, so high(er) cost certainty and few(er) disputes; checks and balances between architect and contractor; familiarity
 - iii. risks: not as much of an opportunity for constructability reviews, value engineering, etc.; longer delivery timetable; claims experience;
 - b. multiple primes (variant of design-bid-build)
 - i. instead of a single Owner-Contractor agreement, Owner contracts with multiple trades as “prime contractors”
 - ii. advantages: increased cost competitiveness
 - iii. disadvantages: increased coordination responsibility (and contractual risk) on Owner; no single point of responsibility to owner for performance and completion of construction
 - c. construction management – agency
 - i. CM becomes consultant to owner
 - ii. essentially a variant of multiple primes, with the owner adding an advisor (the agent construction manager) to its team

- iii. but Owner can retain construction manager earlier in the design process and thereby get CM input on constructability, value engineering, etc.
 - d. construction management – at risk
 - i. many commercial variants here – fixed price, cost plus a fee, cost plus a fee subject to a GMP
 - ii. 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
 - e. design-build
 - i. owner retains a single firm to both design and build project
 - ii. advantages: single point of responsibility for project; faster project delivery
 - iii. 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

II. Design Issues and Considerations

A. Defining designer's relationship with owner and its scope of services

1. Dependent on Project Delivery Method – examine critical differences
 - a. Traditional design-bid-build
 - b. Design-Build
 - c. Construction Manager
 - d. Private Public Partnership
2. Based on type of project delivery method:
 - a. Will designer be agent of owner?
 - b. Will designer be agent of contractor?
3. Identify scope of services required from design team

- B. Defining project scope
 - 1. Importance of accurately and thoroughly defining the scope of work included within the construction contract – including all timing and occupancy constraints
- C. Defining project budget
 - 1. Understanding relationship between time and money
 - 2. Owner responsibility and impact on budget?
 - 3. Designer responsibility and impact on budget?
 - 4. Owner's obligation to pay for work once at negotiated price
- D. Impact of owner's responsiveness to requests for decisions from design team
 - 1. Time and dollar considerations
 - 2. Contract terms will require timely response by owner
- E. Intellectual property issues related to the instruments of service
 - 1. Defining instruments of service
 - 2. What format are the plans to be in upon delivery?
 - 3. What format will the plans be shared with:
 - a. the design team internally
 - b. the contractor
 - c. the owner for maintenance and operations
 - 4. Who owns the copyright to the instruments of service?
 - a. History of copyright for architectural works
 - i. *Baker v. Seldon*, 101 U.S. 99 (1879)
 - ii. *Schotz Homes, Inc. v. Maddox*, 379 F.2d 84 (6th Cir. 1967)
 - b. Current national standard - Architectural Works Copyright Protection Act – AWCOPA, 17 U.S.C. § 101 et seq.
 - 5. Alternate ways of gaining access to and use of the instruments of service:

- a. Licenses
 - b. AIA forms
- 6. Implications of BIM
 - a. Financial implications of construction model
 - b. Financial implications of owner's model for maintenance/operations
 - c. Management issues:
 - i. Who controls and manages the model?
 - ii. Who is responsible for the coordination of the model?
 - iii. Who is liable for the model – from design perspective?
 - iv. Who is liable for the model – tech/hardware perspective?
- F. Defining authority of designer during construction phase
 - 1. Defining “construction administration”
 - a. Defining scope of services available during construction phase
 - 2. Specifying role designer will play
 - 3. Understanding financial and practical implications to owner of contracting for design services through construction administration
 - 4. Evaluator of project disputes?

III. Owner's Project Controls and Project Management

A. Project Controls

- 1. impact schedule, change management, payment applications and documentation and pricing of changes and documentation of changes
 - a. e.g., claims releases need included from contractors with each payment application
 - b. what kind of reporting does the constructor owe to the owner and on what basis (weekly, monthly?, bi-monthly?)

2. 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
 - a. Contract provisions must support/conform with owner's intended project controls procedure
 - b. Make sure that owner personnel adhere to the project controls procedures – and demand that the constructor(s) do so too – in the construction phase

B. Project Management

1. 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:
 - a. 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
 - b. review and approval (or rejection) of payment applications (in consultation/coordination with the project controls folks)
 - i. this sometimes is the role of the design professional here?)
 - c. estimation or confirmation of % progress on Project, and satisfactory (or not) nature of the work
 - d. cash flow – Owner must pay for undisputed work
 - e. does contractor have the right to walk for non-payment?
 - f. deal with disagreements and disputes as promptly as possible (but certainly at least as promptly as required by the contract documents)

IV. Allocation of Risk

A. Issues of frequent concern arising between owner/contractor

1. Constructability of plans – *U.S. v. Spearin*, 248 U.S. 132 (1918)
 - a. Owner warrants constructability of plans when it or its agent designer presents plans for construction

- b. Contractor not liable for design issues
- c. Owner's practical considerations in view of this obligation