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 3—Project Controls*

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Kurt L. Dettman, Constructive Dispute Resolutions

1. Pre-Project Planning
   1. Setting Attitude Crucial for Project Success
      1. Project First Thinking – develop an understanding about expectations
      2. The importance of collaboration
      3. Examples of older approaches toward others on the project, divisions of responsibility with disputes over the allocation of responsibility
   2. Establishing and fixing goals with a shared vision
      1. Early, thorough, and mutually agreed upon definition of success
      2. Consequences of midstream changes – Owner’s representative role to reality test Owner’s expectations and requirements.
   3. Structuring Owners’ Project Control System
      1. Examples of Project Controls
         1. Need to ensure reliability of budget, schedule, quality and safety
         2. Communication protocol requirements to reveal actual conditions early
      2. Structure to ensure transparency and enable communications
      3. Internal reporting, upstream Owner access to project information
         1. Jobsite/project website
         2. Schedule and cost reporting to Owner decision makers at regular and frequent milestones and for early notice of problems
      4. Contract terms for job site communication practices
         1. Format and content of written notice: to whom, by when
         2. Define the back-up that must accompany the various types of submissions, requests, proposals, etc.
   4. Managing Controls; Duties of Project Controllers Owner’s Representatives
      1. Weekly meetings for look ahead planning: putting problems on the table, on the record, and identifying ball in court assignments, deliverables and outstanding commitments
      2. Schedule Monitoring to address discrepancies early, to devise recovery plans and to mitigate the harm.
      3. Monthly Requisition Applications for Payment
         1. Written basis for withholding disputed payments and payment of undisputed amounts (keep problems small)
         2. Contractor will seek to front load cost
      4. Quality control and verification of percent complete
2. Scope Changes and Delay Claim Management
   1. Recognizing events that prompt change claims
      1. Details omitted in planning or construction documents
      2. Differing site conditions (DSC)
      3. Building systems that inadvertently clash
      4. Owner’s priorities change
   2. Addressing scope
      1. Contractor’s duty to complete the scope of work shown on the plans including work “reasonably inferable” from what is shown.
   3. Focusing on pricing of changes
      1. Timing
      2. Methods
      3. Assessment: some proposed changes might not be worth it
   4. Documenting changes
      1. Paperwork in support of change costs bears scrutiny
3. Dispute Prevention and Resolution
   1. Dispute/ Claim Risk Profile
   2. Dispute System Design – matched to the magnitude of the problem
   3. Dispute Prevention Options
      1. Partnering / Facilitation
      2. Standing Neutral
      3. Early Neutral Evaluation/ Jointly hired Expert(s)
      4. Executive level involvement- tiered notification system
   4. Dispute Resolution
      1. Mediation
      2. Dispute Review Board
      3. Standing Neutral
   5. Arbitration/litigation
      1. Contractor claims
         1. Administrative requirements
            1. Federal Contract Disputes Act, 41 U.S.C. 601-613, and Disputes Clause, FAR 52.233-1
            2. California Government Code §910
         2. Court remedies
         3. Subcontractor pass-through claims
4. Some jurisdictions allow: N.C. Gen. Stat. § 143-134.2
5. Others do not: *Kay and Kay Contracting, LLC v. Tennessee Dep't of Transportation*, 2010 Tenn. App. LEXIS 405 (June 25, 2010)
6. Severin doctrine: *Severin v. U.S*., 99 Ct. Cl. 435 (1943); Dep’t of the Navy v. Floor-Pro, Inc., 570 F.3d 1367 (Fed. Cir. 2009)
   * 1. Government claims
        1. Backcharges and withholding retention
        2. Acceptance and effect of
7. FAR 52.246-12(i)
   * 1. Authorization and policy re use of ADR
        1. FAR 33.204
        2. Governmental Dispute Resolution Act, Chapter 2009, Tex. Gov't Code
     2. Sample provisions
        1. AIA Document A201-2007, § 15.2
        2. ConsensusDOCS 240 §§ 9.3.1, 9.5