

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

- I. Pre-Project Planning
  - A. 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
  - B. 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.
  - C. Structuring Owners’ Project Control System
    - 1. Examples of Project Controls
      - a. Need to ensure reliability of budget, schedule, quality and safety
      - b. 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
      - a. Jobsite/project website

- b. 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
  - a. Format and content of written notice: to whom, by when
  - b. Define the back-up that must accompany the various types of submissions, requests, proposals, etc.

D. 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
  - a. Written basis for withholding disputed payments and payment of undisputed amounts (keep problems small)
  - b. Contractor will seek to front load cost
- 4. Quality control and verification of percent complete

II. Scope Changes and Delay Claim Management

A. 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

B. Addressing scope

- 1. Contractor's duty to complete the scope of work shown on the plans including work "reasonably inferable" from what is shown.

- C. Focusing on pricing of changes
  - 1. Timing
  - 2. Methods
  - 3. Assessment: some proposed changes might not be worth it
- D. Documenting changes
  - 1. Paperwork in support of change costs bears scrutiny

### III. Dispute Prevention and Resolution

- A. Dispute/ Claim Risk Profile
- B. Dispute System Design – matched to the magnitude of the problem
- C. Dispute Prevention Options
  - 1. Partnering / Facilitation
  - 2. Standing Neutral
  - 3. Early Neutral Evaluation/ Jointly hired Expert(s)
  - 4. Executive level involvement- tiered notification system
- D. Dispute Resolution
  - 1. Mediation
  - 2. Dispute Review Board
  - 3. Standing Neutral
- E. Arbitration/litigation
  - 1. Contractor claims
    - a. Administrative requirements
      - i. Federal Contract Disputes Act, 41 U.S.C. 601-613, and Disputes Clause, FAR 52.233-1
      - ii. California Government Code §910

- b. Court remedies
  - c. Subcontractor pass-through claims
    - i. Some jurisdictions allow: N.C. Gen. Stat. § 143-134.2
    - ii. Others do not: *Kay and Kay Contracting, LLC v. Tennessee Dep't of Transportation*, 2010 Tenn. App. LEXIS 405 (June 25, 2010)
    - iii. 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)
2. Government claims
- a. Backcharges and withholding retention
  - b. Acceptance and effect of
    - i. FAR 52.246-12(i)
3. Authorization and policy re use of ADR
- a. FAR 33.204
  - b. Governmental Dispute Resolution Act, Chapter 2009, Tex. Gov't Code
4. Sample provisions
- a. AIA Document A201-2007, § 15.2
  - b. ConsensusDOCS 240 §§ 9.3.1, 9.5