

Ineffective Communication: Common Cause of Construction Disputes

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In our practice, we handle numerous construction disputes that arise largely through miscommunication between the various parties in a design/construction effort. Usually, these disputes occur even though the parties involved all are well intended. This often happens because someone “drops the ball” by failing to communicate effectively with another concerning design issues, compensation and payment issues, scope change issues and the like, leading to legal disputes.

Listed below are some common problems that we have noticed in our practice. A review of these disputes shows that many, if not all, can be avoided through better communication — whether through more effective contract writing, oral presentation and/or people communication skills

Issues Arising During the Design Phase

- Design and specification oversights, and errors or omissions resulting from uncoordinated civil, structural, architectural, mechanical and electrical designs can result in unexpected change orders, wholesale scope changes, and project delays. They may ultimately lead to inadvertently ill-constructed projects filled with construction defects due to bad project documentation.

- The design professional’s failure to remain within an owner’s project budget and design objectives, while not as frequent an occurrence as ill-coordinated documents, nonetheless can result in the project “growing its own legs” when the designer follows his own vision of what he perceived the owner desired. This leads to dissatisfied owners and to design professional liability. An owner should become well-versed in the documents presented by the design team and should not blindly “trust” that his-her interests are the same as those of the designer.

- A similar dispute may occur when an owners design vision of a project is not communicated effectively to the design team. Perhaps due to an owner’s inexperience, this breakdown may result in an unrealistic project square footage, unnecessary architectural features, and/or finishes that cannot be achieved within budget. Over-design is a predictable cause of disputes, particularly when an owner turns to third-party consultants for input that is not coordinated effectively with the design team while the overall design is evolving and maturing.

- The design team’s failure to understand its responsibilities under the design team contract will lead to problems. For example, serious implications arise when the designer handles contractor time extension requests and delay claims without having performed either its own CPM-based schedule analysis, or required the contractor to produce its source CPM schedule with supporting documentation evidencing the legitimacy of delay claims. Owners and contractors should conduct regular meetings with the design team to review and fully understand schedule compliance and change order requests.

- The owner’s failure to contract with the architect for construction administration/construction observation services can lead to poor coordination of the project, especially in cases involving absentee or inexperienced owners. The owner should make a determination at the outset whether this service will be provided by the design team or a third party such as a construction manager, and then engage this party for those services.

Design phase issues like these can be avoided by addressing them up front and providing for them in properly drawn construction documents.

Bid and Contract Award Disputes

- Project problems will undoubtedly arise if there is any lack of understanding and agreement between the owner and contractor as to whether the contract is a lump-sum, cost-reimbursable (time and materials), cost-plus fixed fee, or guaranteed maximum price contract arrangement.

- Other issues that arise during contract formation include: (1) the basis for the contractor's fee; (2) defining what is included in a budget breakdown, particularly when predictable items based upon the design intent remain ~un-scoped" and result in a contractor providing the owner an "allowance;" (3) defining what costs are allowable and reimbursable; (4) the budget breakdown and schedule of values for pay items that are essential in controlling billed costs, progress and earned revenue; and (5) the allocation of change orders to budget or pay items relative to billing practices and progress measurement.

These issues can be avoided by seeking assistance of counsel or another third party if the terms of the contract or of the delivery method are unfamiliar or the contract scope; terms and other related project issues need clarification.

Issues Arising During the Construction Phase

- Starting construction of a project prior to design completion is a recipe for trouble. A complete, fully coordinated set of project documents is critical to realizing a successful project from all parties' perspectives. Without fully coordinated drawings and specifications, the project will most assuredly be faced with budget issues, disputes arising from bid allowances due to undefined scopes, and ultimately in changes and cost increases.

- Construction disputes due to lack of access to utilities, unanticipated site conditions and/or inclement weather impacts on working conditions, can result in claims for inefficiency and delay-related costs. It is important that all parties to the project realize that on occasion, some delay may be inevitable. Delay claim disputes can be avoided if the owner is timely notified by the contractor and the scope of the delay, impact or change order is provided pursuant to the terms of the contract, particularly for Lump-Sum and Guaranteed Maximum Price contracts. You should anticipate claims of this nature and actively coordinate meetings with the design team and contractor to evaluate these impacts and take prompt corrective measures.

- The contractor's failure to coordinate its subcontractors' work through effective and timely exchange of shop drawings, failure to provide timely responses to RH's and ASI's, and purchasing and schedule mismanagement that may impact the work of others, are all factors that also result in delays, inefficiency, rework, defects and cost overruns that

lead to claims and disputes. These failures can be avoided by meeting regularly with the design team to review design information requests and ensure that contractor questions are being timely addressed.

- Contractor over-billings often are the result of a fundamental misunderstanding of what is allowable under the terms of the contract. This includes unsupported costs, disallowed costs under the construction contract, or costs for non-compensable delays, inefficiency, rework and mismanagement. You should specify in the contract documents exactly how payment applications should be submitted to avoid unnecessary confusion and lack of required supporting documentation.

- Disputes can arise from the architect's failure in its contractual administrative duties for such things as field observations and reporting with regard to construction defects, quality, progress, and conformance of the work with the contract documents; and the evaluation of contractor change orders and pay applications. You should ensure that enough money was allocated to cover all services required throughout the course of the project, as complaints by the design team often arise after more service is required than originally anticipated due to on-going changes by the owner.

- Cost overruns often lead to disputes because of an owner's unwillingness or inability to pay, even when they are the result of legitimate scope changes and/or project upgrades. The owner's contribution to these cost overruns also typically causes contractor delays, acceleration and inefficiency. Do not allow issues of owner non-payment to go un-addressed without being proactive and seeking immediate resolution. Consult an attorney to protect payment rights and contractual issues to ensure that the contractor's right to stop work does not constitute a breach of contract.

Most of these construction phase issues can be avoided by diligent construction administration, including observation and inspection, by the design team or construction manager charged with those duties. Again, this goes back to the need for properly drawn contract documents spelling out these duties.

Final Project Closeout Issues

- The notorious “never-ending” punchlist issue can easily be avoided during construction contract negotiation by making clear who is responsible for punchlist generation, when the punchlist items are identified (upon substantial completion or at a pre-determined percentage completion), and how many punchlist revisions may be made. Include in the contract when the first punchlist should be generated (e.g., one month prior to anticipated substantial completion) and how many revisions are allowed. This forces the design team to be more accurate and protects the contractor from punchlist “creep” that expands its work.
- The construction contract closeout requires attention to the details with respect to warranties, manuals, maintenance items and control of the project until it has been turned over to the owner. Contract closeout concerns include, but are not limited to, final budget audit, final pay applications, particularly for

cost reimbursable (time and material) or cost-plus fixed fee contracts which may be overstated and excessive because the final billings include (1) contractually disallowed costs; (2) undocumented and unsupported costs; (3) over budget line item amounts; and (4) contractor attempts to recover costs that are excessive and/or imprudently incurred due to contractor caused rework, mismanagement, delay and inefficiency. Address close-out issues with individual subcontractors prior to authorizing final payments and ensure that all documentation is obtained and approved by the design team and transmitted to the owner prior to making final payment to the subcontractors.

In examining these common disputes, it is obvious that many problems can be avoided at the early stages of the project and in the preparation of the contract documents. Better communication between all parties, from contract the completion of construction is the ounce of prevention that is worth a pound of cure.

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