WHAT TO DO BEFORE THE WHEELS COME OFF

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I -- INTRODUCTION

Construction of a project of any type brings together many people of different disciplines, with different perspectives, different interests and different characters. The developer, its lender, the general contractor (or construction manager), the design professionals, the varous levels of lower tiered subcontractors and suppliers, their various sureties and, in many cases, tenant build-out coordinators, all must work with a common vision of a common goal to keep a project on time, on budget and on task. A successful project requires the cooperation of these diverse entities in a manner that minimizes disagreement and disharmony. With a large number of people working together in furtherance of a common pursuit, misunderstandings, miscommunications, broken promises and problems are understandable. While is it not realistic to expect to entirely eliminate such disharmony, the success of the project is inversely proportional to the amount and degree of disharmony. It is incumbent, then, on the project's owners, to institute systems which will anticipate and minimize these problems and, when they do occur, provide a mechanism for their efficient resolution.

Disagreements among the project participants may also be viewed positively, as a means toward bettering the project, through the dynamic tension of the project participants. Contractors and their subs may have valid ideas that will improve a design, make it easier, cheaper or quicker to construct, easier to maintain, safer or more sensitive to the environment. Harnessing this creative tension, in a clear, hierarchical manner can serve the project.

There must be a process, then, that recognizes and foresees the types of issues that will arise during a project and allows for resolution of disparate views, while keeping the project moving toward completion. In the absence of such a process, the disputes and disagreements will escalate to a point where the project no longer becomes the focus. Rather, being "right" becomes more important. Resort to formal dispute resolution causes positions and postures to harden and cooperation "for the good of the project" plummets. At this point, the wheels fly off and the project will grind to a halt, mired in delay and cost overruns, unless the systems, put in place during times of cooperation and mutual respect, are sufficient to address and resolve the differences, while construction continues.

By the time formal dispute resolution is invoked, it is too late to begin planning or implementing the steps that will enhance your client's chances for a successful outcome. Rather, careful planning should begin even before any Project personnel are selected and should continue through expiration of all warranty periods. Cooperation is at a peak at the beginning of a project when all participants are committed to an identical vision of a successful project, generating profit and prestige for all involved. It is at this time of cooperation, that the owner has the best chance of securing agreement from all participants on how to deal with the inevitability of future disagreements. Installing systems for dealing with disagreements early may well deter many disputes entirely. Certainly, such planning will maximize the likelihood of relative success should disputes prove unavoidable. These systems will prove valuable in affording an informal dispute resolution mechanism and, even more so should formal dispute resolution procedures become necessary.

In designing the systems that will promote the most efficient execution of a construction project, the owner must not only negotiate agreements with most of the participants, but need also consider the

interaction of the participants in the process: Thus, the construction loan agreement, owner/design builder agreement, owner/contractor agreement, the various insurance policies and performance and payment bonds, not to mention the lower tiered subcontract agreements and material purchase orders, cannot be considered in isolation. Indeed, they are each a part of a coordinated whole.

This paper is provided in an effort to stimulate discussion on the interaction of the various project participants and achieving the optimal cooperation realistic in the uniquely creative, stressful, competitive and time sensitive endeavor that is every construction project.

II – CONTRACTUAL MECHANISMS FOR DISPUTE AVOIDANCE AND RESOLUTION

Winning in negotiating a construction contract does not mean getting your way on every point. Rather, winning means achieving an agreement that will get your project built, with a minimum of conflict, in the face of the inevitability of unanticipated circumstances.

In construction, only uncertainty is certain. Thus, a well negotiated construction contract will anticipate and resolve, in advance, as many circumstances as possible and, more importantly, set in place a fair and equitable process for resolving conflicts that occur from the unanticipated.

Fairness should be the hallmark of negotiation. Indeed, every contract contains implied covenants of good faith and fair dealing. Further, a one-sided agreement, far from being an accomplishment, may result in the project being abandoned at a critical time or force litigation to avoid an unconscionable result. A well negotiated agreement will help avoid ending up in court, as well as enhance the chances of success, should court prove unavoidable.

Negotiation, before construction begins, usually occurs in the most cooperative atmosphere to be encountered throughout the project. Everyone likes each other, everyone shares a vision of a successful, profitable project and no present actual conflict yet exists to require the staking out of adversarial territory. Once construction begins, and actual conflicts that must be addressed arise, the parties naturally become less cooperative. Their interests diverge and the disparity in positions becomes clearer. Compromise becomes proportionately more difficult.

Beyond establishing the “rules” of the game for dealing with unexpected situations, a well written construction agreement must clearly, unequivocally and fairly address three critically important areas: Scope, time of performance and price. With the fourth element of dispute resolution, nearly all recommended contract provisions can be addressed in one of these broad, but clearly inter-related categories. This “template” provides a useful means for negotiating and structuring all of the various construction agremeents.

However, even before addressing issues of scope, time, price and the mechanism for resolving disputes, the method by which the project is to be delivered must be considered. An owner’s preference for a particular type of representation of its interests during the process will influence whether the owner retains a construction manager, as agent, or a general contractor. The primary distinction between the two choices is the determination of who has the risk of non-performance of the entities actually charged with construction. A general contractor enters into subcontracts and purchase orders with lower tiered contractors and suppliers, assuming the risk of their non-performance toward the project owner and assuming payment responsibilities to the lower tiered contractors and suppliers. Thus, a general contractor’s interests may, at times, be adverse to those of the project owner.

An owner may, instead, hire a construction manager as its agent.[1] Under this arrangement, the owner directly enters into the various contracts with the entities performing the actual construction work and providing the materials for incorporation. The construction manager acts as the owner's agent and its interests are alligned with those of the owner. Under this scenario, however, the owner has direct liability for multiple contracts. For the purposes of the balance of this paper, the authors assume that the owner retains a general contractor for a fixed scope of work.

Another preliminary matter for the owner's consideration is the nature of its agreement with the design professionals. What type of agreement is best under the circumstances? Should the owner enter into a comprehensive, but somewhat more expensive agreement where the design professional is responsible for all the related design disciplines, such as HVAC, MEP, structural, landscape and low voltage? Under this arrangement, the owner has a single point of contact, and, thus, a single source of responsibility. Or, where the owner has the requisite in-house expertise, perhaps a cost savings is worthwhile, with the owner entering into separate agreements with the architect and vaious engineers? Under the later scenario, there are more "hand-offs" where fumbles may occur. Further, under this later scenario, a failure by one of the owner's multiple prime designers is not attributable to any of the others, but may result in the assertion of claims for additional compensation from the others. Next, should the owner invest in a "project policy" insuring all the design professionals for their negligent errors and omissions? The owner is the main beneficiary of the existence of such a policy, which comes in quite handy where there is otherwise no realistic source of recovery for design errors or omissions which result in delays, added expense and claims by the contractor against the owner.

An owner must also consider who it wishes to have represent its interests with respect to the general contractor. The AIA construction documents presume that the architect acts as the owner's representative. This designation is not without problems. For example, requests for change orders for time or money, resulting from a contractor's perceived inadquacy in the construction documents or a difference between the site as represented and actually encountered, would normally first be presented to the architect for determination. However, to the extent that the request for change order results from the architect's error or omission, the architect may be less than forthright in addressing the request. It may often be preferable for an owner to retain the services of a construction professional with no design or construction responsibility to act as its representative. The architect can be consulted by the owner's representative, but its views filtered of its own self interest toward a more balanced evaluation.

Next, should the owner require the general contractor to post a performance and payment bond for the project? The cost of the bond is typically passed on to the owner, but the cost depends, in part, on the contractor's "bondability", track record of performance and availability of assets to secure the contractor's indeminification obligation to the surety. Where the decision to bond the job is made, care must also be paid to the form of the bond. The owner will want an unconditional payment bond and a performance bond that covers not only completion and correction of the contractor's deficient performance, but damages, including delay, that likely will be incurred by the owner in the event of the contractor's failure of performance

Once the decisions as to the contractual framework, project delivery method and representation of the owner's interests are considered and determined, the project participants can address the four major areas for agreement necessary to minimize the likelihood of a dispute and its disruptive impact: Scope, time, price and dispute resolution mechanisms.

1. Scope: What exactly is the contractor or construction manager expected to build? While this may seem a simple straight forward concept, in practice it is anything but simple and straight forward. The scope is defined in the "Contract Documents." The Contract Documents typically include

the "For Construction Drawings" and Construction Specifications, as they are amended, changed and updated from time to time. A lower tiered subcontract may incorporate, by express reference, the prime contract. The performance bond typically incorporates the prime contract, but may introduce new obligations and requirements. Relevant statutory law is also deemed incorporated inferentially.

It is relatively simple to make sure that all incorporated documents are obtained and reviewed. However, where the various documents, taken as a whole, are contradictory, they must be reconciled by a supplement or, at the least, an order of precedence. This takes attention, care and, frequently, further negotiation.

More challenging, is the tension between an owner's lender and design professionals. Many problems, claims and requests for change orders derive from perceived deficiencies, inaccuracies or conflicts in the Construction Drawings. Often, the terms of a construction loan commitment require the commencement of construction by a date certain. As a result, drawings that have not been 100% completed, coordinated or checked for constructibility are issued for bid, or worse, for construction. To the extent the drawings must be completed at a later date, the scope is not fully defined and none of the project participants really knows what is expected. There is a disconnect from the very beginning. [2]
From legal counsel's point of view this disconnect sows the seeds of dispute, changes and claims more fertilely than nearly every other circumstance.

A less than 100% conplete set of construction drawings and specifications may appropriately be issued for bid, where the owner anticipates utilizing the bidding process to identify or narrow the field of candidates with whom the owner will negotiate. The bid drawings should be completed, though, before the negotiated contract can be finalized. The 100% complete, accurate, coordinated and constructible set of construction drawings and specifications will be the best indication of the scope the owner is buying and the construction manager or contractor is expected to provide. Of course, 100% Contract Documents should include specifications for materials, by manufacturer, model number, color, size, placement of all systems. In the event the project includes unique, specially fabricated features, mock ups, to set a standard for acceptable quality, should be required. The attention given at the beginning of a project to making sure the scope can be clearly discerned, communicated and understood will pay dividends through the avoidance of thorny disputes throughout the job.

Virtually no construction project is completed exactly according to the permitted set of plans that governed the start of construction. It is vitally important, both for future renovations and repairs to the project, as well as claim assertion and defense, that the contractor be required to submit as-built plans, detailing the changes from the original plans that were actually incorporated into the project. These as-builts are frequently required for inspection purposes and provide the most accurate record of what has actually been built.

2. Time: How long will the project take to complete? The time for performance will affect the price to be charged by the contractor and to be paid by the owner. In the absence of a contrary contract provision, the contractor is responsible for the means, methods, techniques and sequencing of construction and the owner is not fee to interfere. However, the owner needs a mechanism by which it can measure progress, without having to wait to see whether the project is completed on the scheduled completion date. Therefore, the owner should commit the contractor to a schedule that is prepared with the contractor's cooperation, so that activities, durations and sequences are realistic, achievable and meaningful. A schedule must begin with commencement of the work. The event by which contract time begins to run should be carefully thought through and negotiated. Should it be the issuance of the permit for construction? This may seem logical, but in a tight situation, demolition could conceivably begin before permitting. Should commencement be from the date of a formal, written Notice to

Proceed? This sets a clear standard for measurement, but may result in a last minute scramble to mobilize if it is issued suddenly after a period of some delay. Whenever, commencement is to begin contractually, it is good practice to immediately confirm the commencement in a letter which also establshes the date for substantial and final completion of the project.

The contract should require the contractor to periodically update the schedule, so that impacts can be identified early, responsibility assigned and addressed either through acceleration or extended time for completion. Concommitantly, the contract should obligate the contractor to timely notify the owner of events that will delay the work, impacting either substantial or final completion, so that appropriate action can be taken to minimize the impact of any such events, prompt investigation can be undertaken to assign responsibility for the events and systems activated to document and track the costs of such events. Further, since "substantial completion" and "final completion" are terms of art, with specific legal meaning, the stage of construction which will constitute substantial and final completion should be well defined in an objectively observable fashion.

Consequences of untimely performance must also be negotiated. Will there be an agreement on liquidating the owners delay damages? How is the strike point for liquidated damages to be calculated? If liquidated damages are not to be assessed what are the likely actual damages for delay? Will either the owner or contractor be expected to waive certain types of damages that result from delay?[3]

Typically, unless the contract expressly provides otherwise, an owner's entitlement to liquidated damages ceases upon substantial completion. Therefore, if damages are likely to continue during the period between substantial and final completion, albeit at a lesser rate, the contract should expressly provide for their imposition and an adjusted liquidated amount negotiated.

In certain instances, an owner may wish to liquidate, at a rate approved at the time of contract, the indirect damages a contractor will suffer and claim from a compensable delay or the indirect cost component of a change order. The parties should also consider the likelihood and impact of delay claims that flow up from lower tiered contractors

If the contractor anticipates completing early and ties an early completion bonus to the achievement of that earlier date, the owner should carefully evaluate the costs and benefits of early completion and the impacts of events throughout the project duration on both the early and contractual completion dates. The early completion bonus should bear some relationship to the liquidated damage figure for late completion, to avoid the argument that the provision is an unenforceable penalty.

3. Price: With a clearly defined scope and time for performance, the parties can negotiate a meaningful price that is not subject to an infinite variety of influences that will cause one project participant or another to expect an adjustment. However, the basis of compensation need not be a fixed price.[4] The price can be cost of the work, plus a fixed, but adjustable fee or cost of the work plus a percentage fee and either may be subject to a guaranteed maximum price, which is subject to adjustments only upon the occurrence of specifically defined events.

In a cost plus contract, care must be taken to define what is and is not includable in calculating the cost of the work.[5] Further, allowable elements, such as a contractor's general conditons, should be scrutinized before the contract. What is included in the contractor's general conditions? Will the scope of general conditions allow for the hiding of expenses that more appropriately should be borne by the contractor?[6] What percentage of the cost of the work should be allowed for overhead and proft? What

facilities are being committed as overhead allocable to the project within the overhead calculation? This may cut both ways: the owner must be assured that adequate resources are devoted, but the impact of a compensable delay will be larger, the more resources are allocated.

What events will allow an increase in the guaranteed maximum price? What contingencies are included in the GMP so that their occurrence will increase only the cost of the work, but not the GMP?

In both fixed price and cost plus contracts, provision should be made for pricing of change orders. What mark-up for overhead and profit will be allowed above the contractor's direct costs? What indirect costs will be includable? How are deductive change orders to be priced? Will the contractor be entitled to retain some portion of the original charge for the deducted work to cover its overhead in preparing, pricing and administering the change order? Contractor's mark-up on its lower tiered contractors' change orders should also be the subject of discussion. Mark-up on self performed work should be more than the mark-up on work that is subcontracted out to others.

4. Dispute Resolution Mechanisms: It is too late to negotiate the rules of engagement for resolving a dispute when one has already presented itself. While the purpose of negotiating and executing a balanced, comprehensive, coordinated set of construction agreements is to minimize disputes, it is unrealistic to think that they will be avoided entirely. Therefore, when all the project participants are friendly, with disputes only theoretical, care should be given to craft a mechanism that promotes resolution of disputes while minimizing the impact to the project and the time, cost and uncertainty of dispute resolution.

Generally, resolving disputes early helps minimize the cost and project impact and promotes healing of the damage to the relationship between the participants that necessarily results from the mere fact of the existence of a dispute. The first step for insuring an effective dispute resolution process is through the contract agreements. The existence of a dispute must be promptly brought to the attention of all impacted project participants by the aggrieved participant. The contract should define the kinds of events that are to be considered disputes and provide time limits for first notice and the provision of supporting documentation for both entitlement and quantum of the impact to the contract sum or contract time. There should be clear requirements for responding to the dispute and its submission to an objective person or entity for resolution.

Many problems on a construction project arise out of a real or perceived breakdown in the submittal process. During the course of construction, a contractor will always have questions and be in need of clarifications for the drawings and specfications. It will issue requests for information ("RFIs") to the desing professionals so that the design intent can be achieved. Similarly, contractors are required to submit shop drawings, cut sheets, mock-ups, change requests, substitution requests and the like to the design professionals for their review and comment. Conversely, when changes to the project are imposed on the contractor from the owner down through the design professionals, the architect may issue new drawings, bulletins containing a new group of drawings, architect's supplemental instructions ("ASIs"). In this situation, the owner needs the contractor to respond with comments, pricing and anticipated impacts to contract time that would result from any such information. Thus, the parties must cooperate in the effort to address and resolve these types of issues. If the submittal process is allowed to bog down, so too will the project. There should be strict, but realistic time periods allowed for the parties to respond to the various types of inquiry. Responses should be meaningful and not used to delay, obfuscate or shift responsibility. The process should not be used to complete designs in the guise of commenting on a shop drawing. The process should be efficient, allowing, as much as prudenty possible for the contractor to proceed when only minor changes to submittals are necessary.

One of the most important considerations in resolving disputes, is the manner in which the

dispute is allowed to affect the project during the pendency of the dispute. Typically, the architect is the arbiter of first resort for disputes. This seldom provides a satisfactory solution as the architect is usually not perceived as neutral and may have its own interests to protect. If the parties appoint a project neutral, that person would be on-call to issue binding, but temporary rulings in an efficient manner. However, the cost of maintaing such a project neutral, who must be familiar with the plans and the project as they progress, is not insubstantial. Once appointed, the project neutral can quickly address a dispute, with a solution that keeps construction moving forward. Presentations should be at the project site, to minimize disruption, and the project neutral should regularly attend project, scheduling and change order meetings, to keep abreast of developing issues and minimize the time needed to come up to speed to make recommendations on disputes.

The project participants must also consider, at the time the construction contracts are being negotiated, how they would like for disputes to be resolved. Will mediation, or a structured settlement conference, be required as a condition precedent to further steps in the dispute resolution process? The structured settlement conference may go a long way to minimizing areas of disagreement, so as to make resolution, without judicial or arbitral intervention, possible. Such a result always carries with it a substantial savings in time, money and relationships. There is little downside to the mediation process. Even where the dispute is not resolved, one would still benefit from the opportunity to see and hear the story from the other side of the table, if only to assist in trial preparation.

Mediation is certainly the quickest and least expensive formal means of resolving disputes. However, if the parties bog down in the selection of the mediator and scheduling mediation, its effectiveness is compromised. Therefore, it is prudent to establish strict and short triggers for invoking and completing the mediation process. Like the project neutral, the mediator can be named at any stage of the process, even in the construction contract documents themselves. The parties should establish particular rules for the mediation, such as the length of time for presentation and negotiation, who may attend and whether the proceeding should be deemed confidential, before the process is invoked, to avoid delaying the process while the rules are worked out.

When there is no project neutral, or its recommendation is unsatisfactory to either of the disputing parties, or where mediation fails, will next recourse in dispute resolution be through the court system or arbitral process? Many considerations enter into this decision and there is no clear right answer.

Arbitration is generally marketed as less expensive and somewhat quicker than litigation. However, this may not be entirely true in every case. For arbitrations before the American Arbitration Association, the filing fees escalate with the amount of the claim. There are case management fees charged periodically and the arbitrators' compensation, in a lengthy arbitration with a panel of three arbitrators can certainly be significant. The panel is generally familiar with construction and may bring an expertise to the decision making process that is lacking in a more generally trained and experienced judge in a court of general jurisdiction.

Importantly, though, in arbitration, the parties lose the right to a full legal review of an arbitral decision, have limitations on who may be brought before the arbitration panel[7] and may be limited on discovering the evidence marshaled by the other side.[8] Even if the determination is in favor of arbitration, there is no legal requirement that the arbitration be managed by the American Arbitration Association or even that the rules of the AAA apply. There is a statutory mechanism for convening and enforcing arbitration, independent of the AAA.[9] The parties are free to design their own private arbitration process, including a method for selecting the arbitrators. However, that agreement must be

set forth in the contract.

Arbitration, being consensual in nature, is subject to the rules agreed upon by the parties. Therefore, the number of arbitrators, the applicability of formal rules of evidence or procedure, limitations on joinder, the nature of discovery, and any other desired parameter can, to a large extent, become the rule of the arbitration, simply by incorporating these agreements into the construction contracts.

Where the parties are going to arbitrate disputes, it is respectfully suggested that the non-joinder provision of the AIA A201 General Conditions be modified in each of the construction contracts. It is important that all parties to a dispute be brought into one forum, to maximize the efficient resolution of the dispute and avoid the possibility of inconsistent results that could obtain were the parties addressing the same dispute in various different forum. Thus, the owner/design professional agreement must expressly provide for joinder of the design professionals in resolving disputes putatitvely between the owner and general contractor. Similarly, the owner/general contractor contract should require the incorporation, into the general contractor's subcontracts, a requirement that subcontractors participate in resolution of disputes nominally involving the owner and general contractor. In this way, a single proceeding results in the appropriate assessment of responsibility among the project participants.

Since arbitration is consensual, no party can be compelled, in the absence of agreement, to arbitrate. Agreement is far less likely once a dispte arises. Therefore, if arbitration is the preferred method of dipsute resolution, consent must be established in the construction agreements, in advance of a dispute.

If, on the other hand, the parties choose litigation over arbitration, yet another choice is presented. Generally disputes involving contracts are triable, at the request of either party, to a jury. In the absence of a contractual waiver of that right, either party to the contract may request and receive trial by jury. Therefore, if the parties want to try their dispute to a judge rather than a jury, the contract must expressly waive the right to trial by jury. All parties to the contract must agree on the waiver. At the time the dispute arises, one party cannot unilaterally require the other party to waive a jury trial.[10] If the construction contracts with the various participants contain joinder provisions, but do not uniformly address arbitration or jury/non-jury trial, the joinder may be defeated. The party with a right to trial, whether or not before a jury, could not be compelled to arbitrate. Similarly, a party with a right to a jury could not be compelled to join in a non-jury trial. Accordingly, great care should be exercised in coordinating the various contracts with the project participants to avoid conflicts that would defeat important procedural efficiencies.

The construction contract should also designate the venue for dispute resolution if the site of the project is not the only available choice. The parties may wish to require dispute resolution in a location other than where the project is located, although lien considerations may limit this option.

5. Other Important Provisions and Considerations:

Disputes leading to termination of the contractor have far more dire consequences than do disputes that do not interrupt or halt construction. The construction contract should certainly require the contractor to continue performance, with appropriate manpower, equipment, materials and resources, during the pendency of a dispute. However, where the dispute escalates to a point where the owner is compelled to terminate the contractor, a strong contract can limit the owner's exposure should its actions ultimately be deemed wrongful and can serve to minimize the consequences of having to replace the contractor in the middle of a project. Notice requirements leading to termination, including

provision of an appropriate opportunity to commence and continue cure, should be carefully thought through and incorporated into the contract.

Every construction contract should permit the owner to terminate the continued performance of the contractor for the owner's "convenience." Thus, in the event of a financial downturn, death of a partner, or other unforeseen event, the project can be stopped, temporarily or permanently, without unlimited exposure to the contractor. The termination for convenience provision should establish the compensation to which the contractor would be entitled in such event. Typically it calls for payment for work and materials furnished to the project, less payments made, payment for uncancellable materials already on order, demobilization costs and, in some instances, some portion of the contractor's unearned profit. Keep in mind that in most jurisdictions, an owner's obligation for damages to a wrongfully terminated contractor are determined by the unpaid contract balance plus the unearned profit on the remaining portion of the project. Negotiating a termination for convenience payment provision should result then in some lesser number.[11]

Additionally, the contract should provide that in the event a termination for cause is ultimately deemed to have been wrongful, it will be considered a termination for convenience. In such event, the same payment provision will limit the owner's exposure.

Many general contractors do not self perform much of the actual bricks and mortar work on a project. Others may construct the shell and leave all systems and finishes to subcontractors. Termination of a general contractor may be the result, in reality, of the failure of one or more of the subcontractors. Since the owner will need to contnue the project after termination, either by its own forces or with a successor general contractor, In such case, when an owner terminates a contractor, it need make arrangement to have the satisfactorily performing subcontractors continue their work. This will minimizes the impact of termination, by allowing work to resume more promptly and by avoiding the need for a new trade contractor to first become familiar with its predecessor's work. It will also avoid some thorny warranty issues that would arise if a subcontractor's work were completed by another. Having the subcontractors continue their work after termination of the general contractor, with whom they are in privity, is not automatic, though. Thus, it is advisable to have a conditional assignment of the subcontracts included in the prime contract and to require the general contractor to include, in its subcontracts, a similar conditional assignment, by which the subcontractors agree to accept the owner or the successor contractor as its privity. In this manner, the owner steps into the shoes of the general contractor with respect to the subcontracts.

Similarly, the construction contract should contain a conditional assignment of permts, or at the very least a consent to tranfer of permits, both for the general contractor and trade contractors. Often, termination of a general contractor creates difficulties with the governmental agencies having jurisdiction over the construction project. In order to transfer permits to a succeeding contractor, sometimes the outgoing permit holder would need to consent. Such consent is, by far, easier to negotiate into the contract in the beginning than it is when it actually becomes necessary.

Construction of tenant improvements raises concerns and issues that are entirely different from those arising out of construction for a fee owner of property. The tenant may not have the right to encumber the fee with liens and statututes may prohibit a lien from attaching to the fee interest, upon compliance with certain statutory notice requirements. In such situation, the contractor will be limited, in terms of security for payment, to a lien against a leasehold. Tenant improvements also may require additional coordination within the property as a whole and other contiguous tenants sharing common utilities. The absence of security and coordination issues should be addressed during contract negotiations, either through a price reflection, more frequent pay cycles or other creative solution.

III – DISPUTE AVOIDANCE AND RESOLUTION DURING CONSTRUCTION

Having negotiated a fair, balanced, comprehensive and coordinated set of construction contracts does not insure a peaceful construction process. There are steps and systems that should be incorporated into the project that will minimize disputes, detect them early and provide for their resolution with a minimum of discord and adverse impact on the project.

The project participants should conduct regular meetings to discuss progress, events impacting the schedule, sequencing and the submittal process. Minutes of the meetings should be neutrally prepared, with follow up and responsibility assigned. The minutes should be updated regularly, to track resolution of issues from one meeting to the next. The minutes should be circulated and followed up, when necessary with stronger measures. Regular aerial photographs should taken and videos, when appropriate. Photographs should be used regularly to document events, interferences and conditions. Manpower logs should be required of the general contractor and its subcontractors and they should be compared with the projected manpower requirements submitted with the bids.

A large complicated project might consider documentation on the internet, through a secure site. All participants can have access and communication is promoted, to the benefit of the project and all its participants.

The owner should be cognizant of the progress of the submittal process. Are shop drawings and RFI's being reviewed promptly? Are meaningful fair responses being provided? Are the design professionals seeking to complete or reconcile an incomplete design or deflect design responsibility onto the general contractor through inappropriate rejections of shop drawings? Monitoring comments on shop drawings will be worthwhile. Where a number of shop drawings are marked with minor comments, but rejected for resubmission, instead of "approved as noted", an owner should be on guard that the design professionals may not be meeting their obligation to the project. The owner should monitor the relationship among the project participants to make sure it is functioning smoothly. The owner is typically the common denominator with whom all participants are in privity and to whom they are answerable.

Similarly, the owner should be pro-active when events or conditions arise that will impact the contract sum or contract time. The well drafted contract will require prompt notice from the general contractor of not only its claim, but any flow up claims that its subcontractors intend to assert. When notice is received, realize that legitimate requests for change orders must be acted upon promptly enough to allow for the uninterrupted progress of the work. A request for change order, addressing work that is a precursor to other contract work will delay the contract work, if not promptly resolved. Of course, the contractor must submit adequate documentation to support both entitlement and quantum. However, an owner should avoid putting a contractor in a position where it must either do extra work without a written change order or hold up contract work.

For example, a contractor who claims entitlement to a change order and who does not wish to proceed with the work it considers to be an extra to the contract, may be required to perform the disputed work, through the issuance of a construction change directive, where it is necessary to avoid interrupting the flow of the project. However, since the contractor typically is not permitted to bill for work that is not within the contract and not the subject of an executed change order, a prudent owner will either issue a negotiated change order in a timely fashion, or issue a construction change directive that will allow the contractor to proceed, bill an undipsuted portion of its claim and reserve its rights to

additional time or money without delaying the project progress. It is unrealistic for an owner to expect a contractor to absorb the cost of extra work while waiting for its claim for additional compensation to be addressed in the distant future.

Where an owner is to provide materials or will be performing a portion of the work through multiple prime contracts or its own forces, it must take care to timely coordinate its efforts with those of the general contractor. Delay in delivery of owner supplied materials will often justify a time extension and, perhaps, a claim for additional indirect costs associated with the delay.

The life of a construction project is protracted and complicated. At the earliest indication that claims are likely to be asserted, an owner is well counseled to seek the assistance of professional claim and schedule consultants and, where appropriate, special construction counsel. The consultants should be provided with (or assemble) the project history (the record of schedules, updates, meeting minutes, change orders, pay requisitions and as-built drawings) in order to objectively review the contentions underlying any claim or threatened claim. Construction litigation is not like normal commercial litigation and appropriate counsel should be experienced in addressing litigations or arbitrations that must resolve a myriad of small issues, rather than one or two overriding issues. Such counsel should normally be facile in handling matters involving the mountain of paper (and electronic record) that results from a well-documented construction project. There are also special considerations directed to the presentation of such cases to fact finders that are peculiar to construction litigation. No fact finder can reasonably be expected to understand specialized engineering issues or pore over mountains of paper and scores of issues. The fact finder must be assisted through summaries, recaps and overviews, supported by competent testimony and documentation.

IV – FORMAL DISPUTE RESOLUTION

A carefully negotiated set of construction contracts, followed by diligent project management and documentation will go a long way toward prevailing in formal dispute resolution proceedings. Payment of amounts not in dispute, granting time extensions that are clearly warranted and carving out only those areas of genuine disagreement will serve well in establishing credibility with the fact finder. Credibility, once lost, is difficult to regain. The manner in which a construction dispute is presented will also serve to establish credibility. Presentation of a set of well organized pertinent exhibits, calculated to focus inquiry on the dispute, separated from the balance of the project record, will make the fact finders job easier and, thus, buttress your credibility. Sloppy, disjointed or scattered presentations may yield the feeling that the truth is being obscured purposefully.

It is best to address the issues fairly, taking responsibility for problems and shortcomings in your case and explaining how appropriate adjustments in your position have been incorporated. This tactic will take the sting out of a presentation of those same shortcomings through cross examination. It will, again, serve to buttress credibility, by demonstrating that you are not fighting over something to which you are clearly not entitled, rather you are fighting only over issues that are either clearly in your favor (which will undermine your adversary's credibility) or fairly debatable.

In presentations to a jury, great effort should be invested in "teaching" the case to a group of strangers that are trained neither in law nor construction. This teaching process requires patience and "small bites" frequently summarized. Indeed, this process works well with even more sophisticated fact finders, tailored for their particular experience.

Construction liens must be enforced by action within a statutorily prescribed time or they are deemed to lapse by operation of law. Commencement of arbitration, without more, will not be

considered enforcement that will perpetuate the efficacy of the lien. Thus, a contractor will be forced to file a lawsuit to protect the lien. Further, prudent practice will mandate recordation of a lis pendens, so that subsequent takers of the property take with knowledge of and subject to the lien and the pending foreclosure action. When a construction contract contains an arbitration provision, however, filing a lawsuit, by itself may be deemed a waiver of the right to arbitrate. Therefore, often, the demand for arbitration will be filed and served and, shortly thereafter, a lawsuit, accompanied by a motion to stay the litigation pending the outcome of the arbitration and a lis pendens, will be filed. In this manner, the right to arbitrate and the validity of the lien are both preserved.

The presence of performance and payment bonds, while serving as security for the owner, introduce complications into the dispute resolution process. The bonds will typically incorporate the contract between the owner and general contractor. Therefore, if there is an arbitration provision in the contract, the surety can be compelled to participate in the arbitration, through vouching in. A surety will be bound by the outcome of arbitration between its principal and the owner if it knowingly refuses to participate in an arbitration based on an incorporated contract. Still the bond may require action on the bond within a specified time period for the action to survive a shortened statute of limitations. Again, action should be instituted with a contemporaneous motion to stay the action pending arbitration.

Enforcement of the arbitration action may require litigation to reduce any award to an enforceable final judgment. If litigation had previously been instituted and stayed, that forum provides the platform for enforcement. Typically, that forum will also adjudicate the quantum of recoverable attorneys' fees and costs, where the arbitration is limited to a determination of entitlement based upon a finding of prevailing party.

V -- CONCLUSION

The receipt of a claim or summons to answer a lawsuit or the end of a construction project is not the time to begin planning for their resolution. Effective claim resolution requires planning from before the first drawing is prepared, adherence to carefully designed systems for minimizing and managing conflicts during construction, through final inspections, project close out and warranty compliance. A construction project completed on time and on budget to the design anticipated by the owner is not an accidental accomplishment. Time spent preparing and monitoring will be well spent when it serves to protect against inappropriate claims, prevent delay and allow for the timeliest, most cost effective completion of any construction project.

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[1] A construction manager as agent differs from a construction manager at risk, in that the manager as agent does not directly enter into any contracts other than with the owner and has no contractual liability to the entities actually performing the work or supplying the materials. The manager as agent has only the owner's interests to consider.

[2] The authors recognize that, at times, project practicalities, constraints and disparaties in bargaining positions, sometimes these "disconnects" are unavoidable. Nevertheless, from a dispute avoidance point of view, premature issuance of drawings is to be strongly discouraged.

[3] The mutual waiver of consequential damages, institutionalized in the 1997 iteration of the AIA A201 General Conditions generally should be avoided by Owners. The claims waived by Owners typically are far more likely to occur and far greater in magnitude than the type of damages the contractor waives

in return.

[4]

Nor must the scope of work need not necessarily be a fixed scope. Under certain circumstances, beyond the scope of this paper, a design build agreement, by which the design/builder undertakes to design and then build the project from a set of design criteria, but not construction drawings, may be more appropriate. This paper presumes project delivery to be through a fixed scope with limited design responsibility on the contractor.

[5]

Some standard agreements have rather surprising items included in the cost of the work. For example, AIA A111-1997 includes among costs to be reimbursed by the owner to the contractor: "costs of repairing or correcting damaged or nonconforming Work executed by the Contractor, Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by the negligence…of the Contractor…." §7.7.3 and legal fees and costs incurred by the Contractor (for example in fighting with a subcontractor or supplier). §7.6.8.

[6]

Project staffing, salaries, benefits and expenses all must be addressed to avoid the inclusion of what should be overhead items into a general condition calculation.

[7]

See AIA A201 §4.6.4 (1997)

[8]

To the extent discovery is permitted, the time for resolution of the arbitration expands, more closely approaching that of a court proceeding. Further, the cost saving anticipated by choosing arbitration over litigation diminishes.

[9]

See, for example, 9 USC §9; Chapter 682, Florida Statutes.

[10]

Whether to try the case to a jury or the court, sitting without a jury is beyond the scope of this paper and is the subject of voluminous discussion. The author's experience, however, is such that one should not reject the idea of trying a construction case to a jury, out of hand. A jury verdict is rendered immediately after the end of the presentation of evidence and argument, rather than at some undefined, unlimited time in the future, when the court issues its ruling. A well selected jury is educatable and sincerely tries to do what is right.

[11]

In the event of a termination for convenience, close scrutiny of a contractor's project records and financial statements must be undertaken. Often, a front end loaded job will not leave much profit for the contractor on the back end of a job. Therefore, this component of the termination for convenience damages will be minimal.