



Choosing the Best
Project Delivery
Method..... Page 1



Contract Clauses
To Protect the
OwnerPage 2

JOHN E. OSBORN, P.C.
ATTORNEYS & COUNSELORS AT LAW

Construction *Law*

Spring/Summer 2008

Focus on Higher Education

Capital Planning & Higher Education in 2008

By now we have all heard real estate and development news that the housing crisis has made it harder for developers to secure loans and new development is slowing down dramatically. However, in the higher education world this is not true at all.

As of April 30, 2008, the State University Construction Fund of New York reports there are presently 110 projects under construction with contract values of \$485 million.

Higher Education's private sector in New York is continuing its growth as Columbia University moves forward with a 17-acre redevelopment in Harlem which features a multiuse center for teaching, academic research and the arts and will include new retail, cultural and community facilities.

Fordham University's redevelopment plan for the Lincoln Center Campus provides about 2.36 million feet of additional floor area; including approximately 1.08 million square feet of academic space, another 539,000 square feet of new dormitory space and about 742,500 square feet of new non-Fordham residential space.

Clearly the real estate development, capital planning, design and construction taking place on college and university campuses throughout the country, gets in the way of concentrating on the core business of academics, research and education.

In spite of the hundreds of millions of dollars being spent on campuses throughout the country, higher education institutions are often at a great disadvantage in carrying out mammoth capital projects. Quite often they do not have a depth of

in house staff with knowledge and experience in real estate, capital planning, design and construction. At the same time, colleges and universities are not always effective in selecting, communicating with, and managing architects, construction managers, and construction contractors. As a result, colleges and universities tend to spend more and get less for their money, while suffering through project delays, construction defects and design errors, which are not caught on time to hold appropriate project participants accountable.

This newsletter focuses on key questions, of concern to colleges and universities as they embark upon carrying out major capital planning endeavors.

DISPUTE RESOLUTION

The three basic methods for resolving construction disputes are mediation, arbitration and litigation. Both litigation and arbitration are binding, while mediation is non-binding. When it comes down to it, mediation has a lot to commend it: over 90% of cases which go into mediation, settle, it allows the parties, and especially the owner, to control the outcome, and it limits attorney and expert costs and cuts down on 'hard ball' tactics which are often associated with a court proceeding.

Choosing the Best Method of Project Delivery for a College or University

According to Dana Peterson, Director of Architecture for the University of New Hampshire, "It is clear that no one delivery method suits all institutions, for all projects, under all conditions, and each method has its pro's and con's, strengths and weaknesses."



John E. Osborn PC, from the perspective as university construction counsel, participated in the ERAPPA Education Committee's "Project Delivery System Rationale Program" examined the critical parameters an institution of higher education should appropriate analyze when selecting a project delivery method.

It is clear that the choice of an appropriate method of project delivery goes a long way towards defining construction or renovation project success. Higher education institutions have recently brought innovation to the traditional design, bid, build method, under which the owner chooses an architect to capture the project concept, design the project and prepare a bid package to be bid out to the lowest construction contractor bidder.

Design – Build has become an important option where the owner chooses a contractor-architect team to design and build for a negotiated price. Under this method, the design build entity takes the risk of cost overruns, design or construction defects. In some circumstances, this method has been heralded as a method to provide stability in price and certainty that the design and construction participants will not be at odds. Critics complain of instances of inferior workmanship and of a diminishment of the architect's role as design

Construction Law

Page 2

Focus on Higher Education

considerations become subservient to a concern for project costs on the project.

Many universities have favored a method under which the university hires a construction manager at the outset of the planning process at the same time the architect is engaged. Under this method, the construction manager works during the pre-construction phase of the project as a consultant to the institution, is known as "a construction manager as agent for the owner," and works with the architect in reviewing the buildability and cost of the construction. Quite often, the construction manager provides "value engineering" suggestions to the owner and architect.

Following the role as a pre-con consultant to the owner, the construction manager may enter a contract to continue as a consultant and advisor to the owner during the construction phase and assist the owner and architect in assembling the bid package and selecting construction trade contractors to carry out the project. Another alternative is that the construction manager may be asked to provide the owner with an overall bid to complete the whole project for a guaranteed maximum price ("GMP"). Once this role is taken on, the construction manager is in a role analogous to a general contractor, and the construction manager is called "a construction manager at risk."



Protect Yourself with the Right Construction Contract Clauses

The role of providing strategic legal advice in achieving success in college and university capital planning is clear: upfront legal planning provides the institution great advantages from the outset as the most appropriate project delivery method and the most appropriate design professional and contractor are chosen and design and construction contracts incorporate protections for the owner.

When it comes to running a long term capital program, the contract terms can make all of the difference, the following a few of the most important clauses in the architect contract:

The description of pre-existing conditions must be clear; existing owner-furnished information such as 'as built' drawings must be spelled out.

What are the most important considerations in entering the owner-architect contract?

- The architect's role in making decisions and resolving disputes with contractors during the project, must be spelled out clearly.
- Timing of architect action during the project must be clearly delineated; time limits must be set for the architect's review of shop drawings, revisions and RFI responses.

When it comes to running a long term capital program, the contract terms can make all of the difference....

- Spelling out the architect's role in reaching an estimate of the construction cost is important to avoid suffering overruns from the outset.
- The architect's errors and omissions insurance requirements must be spelled out and compliance verified.
- Clear delineation of responsibilities for each phase of the project must be made; spelling out the architect's role for planning, design and construction administration is essential.
- If a construction manager is being utilized, spell out the distinction in roles between architect and construction manager.

What are the essential clauses which must be included in the contractor's agreement to protect the owner?

- ✓ Spell out the schedule and the method and criterion for adjusting the schedule.
- ✓ Include a clause which precludes the contractor for recovering delay damages.
- ✓ Provide that the owner has the right to take away work from the contractor in the event of contractor default.
- ✓ Provide that the owner can terminate the contractor for convenience.
- ✓ Spell out a mold prevention and management plan to satisfy practical concerns and insurance requirements.
- ✓ Set a method for resolving changed conditions (i.e. conditions not anticipated by the parties when the contract was signed).
- ✓ Allow for the owner to terminate, suspend or accelerate without paying a significant price to do so.
- ✓ Clearly set out insurance requirements to eliminate gaps and overlaps.

ATTORNEY SPOTLIGHT: Christopher J. Platt, Esq.

Christopher J. Platt, Esq. drafts and negotiates contracts on significant construction projects for school districts, hotels, universities and commercial and residential real estate owners. Mr. Platt has been instrumental in resolving real estate development and construction disputes on a broad variety of projects. In an effort to achieve successful close-outs and avoid litigation and he has also been highly successful in trouble-shooting during projects. He has a well established track record in representing owners on large construction projects experiencing design errors and omissions and construction failures and .

Mr. Platt has presented "Lesson from Troubled School Construction Projects," in October 2004 and "School Construction Projects, A Formula for Success," in October 2005 at the New York State School Boards Association. He co-authored the articles "Limitations of Liability in Construction Site Safety and Construction Contract Claims," The Metropolitan Corporate Counsel, April 2000 and "Use of Non-Binding ADR in Environmental and Construction Disputes Through Teamwork with Outside Counsel," The Metropolitan Corporate Counsel, August 1999.

Mr. Platt received his JD from Widener University School of Law in 1998 and is admitted to the New York State Bar.