

OSBORN

GETTING BACK ON TRACK: TURNING AROUND THE CONSTRUCTION PROJECT "HEADING SOUTH" WHAT CORPORATE COUNSEL NEEDS TO KNOW

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Corporate owners and tenants who build in urban centers such as New York City are an "at risk" group. Getting everything "on line" quickly is expensive. Difficulties encountered during a failure in design or construction can be catastrophic if practical solutions are not developed promptly to get things back on track.

Our law firm's practice concentrates in representing commercial property owners and tenants, residential property owners and design professionals on construction and environmental law matters. Although we prefer to be retained by a client before trouble arises, very often our first introduction to a client is after a problem has already occurred. Quite often, in the case of construction or renovation, when we are called in, the project is already significantly off track. Basic problems which plague projects during construction and renovation are universal and the symptoms are common - whether the project involves a courthouse, hotel, hospital, school, university, bridge, roadway or wastewater plant.

Increased Focus On Upfront Planning

Corporate counsel serving companies whose core businesses are not construction or renovation are most at peril in choosing the original planning, design and construction team and solving problems as they arise because of lack of experience with the process. Upfront focus and advance planning leads to success. Inhouse counsel who lacks construction experience can, nonetheless, play a valuable role in setting the "vision" for the project. The owner must thoroughly know the project from inception, choose the right set of advisers, prepare the right contracts, set the right ground rules for dispute resolution, pick the right project team and establish good, candid communications.

Focus up front means that even before the architect is chosen, the owner's essential needs, budget and "vision" for the project must be committed to writing.

Our law firm participated in a seminar on March 2, 2000, at the Deutsche Bank headquarters in Manhattan, before the Greater New York Construction User Council (GNYCUC) on this subject with William Whistler, AIA, Partner & Director of Design of Brennan Beer Gorman Monk/Interiors; Bruce Bloch, Director, Corporate Real Estate Services, Deutsche Bank; and James Marino, Manager, PriceWaterhouseCoopers, LLP. The GNYCUC is a trade organization focused on owners and their concerns when undertaking construction, renovation and facilities management activities, whose members include, among others, Pfizer, IBM, GE

Capital, Con Edison, Citigroup, the Museum of Natural History, the Port Authority of New York & New Jersey and Deutsche Bank.

The intricate analysis which is required when a construction or renovation project goes off track was examined by each of the speakers. Analyzing what went wrong on a construction project is difficult; the factual issues are intertwined and there are many parties involved.

The Perspective of the Owner or Corporate Tenant

Bruce Bloch emphasized the importance of the due diligence process before making a decision on a site to purchase or lease. Mr. Bloch explained that when selecting the site, teamwork is essential among the architect, engineer, lawyer, space planner and lease transaction people. Early communication with the appropriate professionals on the tenant team is necessary to ensure that extraordinary and critically important building systems and infrastructure requirements are covered. He also recommended that the design and construction professionals be asked to lay out the project requirements in advance, in detail, and that meetings to brainstorm approaches and to troubleshoot problems be encouraged.

Bruce Bloch provided examples of some problems which he had encountered and which were, or could have been avoided with more upfront focus: (1) A pre-lease negotiation decision was made to order engineering reports on building systems; by doing so, a number of through roof air conditioning units were found to be beyond repair, despite the landlord's representations to the contrary. Because of upfront knowledge, the tenant negotiated a commitment that the landlord would replace, at the landlord's expense, inoperative units and all units which failed within one year of lease commencement. (2) A pre-lease decision ordering the inspection of below raised floors for asbestos containing material was not implemented. Because of the failure to inspect, the tenant build out was delayed when asbestos containing material was encountered and the tenant bore the cost of the removal. (3) Failure to detect that a building had inferior structural members which were made of wood was not discovered, and significant time and resources were devoted before this was later discovered and the development of the building abandoned. (4) Detailed engineering evaluation of cooling towers contradicted the landlord's representations and an arrangement was made for the owner to pay for major repairs.

The Perspective Of the Design Professional

William Whistler of Brennan Beer Gorman Monk/Interiors emphasized upfront planning and programming. Mr. Whistler described the process as one of problem-seeking operating on two levels: first, the pragmatic level in setting forth measurable data and, second, the inspirational level, involving the setting of business goals, operational goals and the dreams and desires for the company and the individuals.

Mr. Whistler emphasized the importance of preparing a performance statement which lays out the performance criteria for the project. Invariably, a project, a move, or a new facility is a major event in a company's business life, and the people involved in it may experience it only once in their business careers. In preparing the performance statement, the question of "What are you trying to accomplish with this move?" or "What problem are you trying to correct?" must be answered.

In his view, the program statement is comprised of three parts: (1) a performance statement which outlines what is sought; (2) a measure which must be achieved; and (3) a test or agreed upon approach in establishing the criteria.

The Perspective of The Analyst

When it comes to preparation before the project begins and analysis after the project has already gone off track, James Marino of PriceWaterhouseCoopers shares the views of the other 3 speakers; he would far rather be called in to plan up front rather than to be called in to clear up an emergency situation after a construction or renovation project has gone off track. Mr. Marino recommends the following approach: (1) get the appropriate team members together as soon as possible; (2) establish an atmosphere of trust and respect among the parties to encourage the best possible working relationship; and (3) resolve issues and problems as soon as possible and, on the project level, wherever possible.

The Perspective of Outside Construction Counsel

Our firm now spends the majority of its time solving problems during construction or renovation projects rather than in handling litigation or arbitration after the project has been built. Having a constructive role in planning and building a project is a much more satisfying role than figuring out "who did what to whom" after the fact.

Some of the "during the project" functions which we now take on as outside construction counsel are: (1) assist in the selection of architects, engineers, environmental consultants and contractors; (2) select the method of project delivery (lump sum, low bid, design/build, construction management, etc.); (3) assist in environmental due diligence (e.g., asbestos, lead, underground tanks, etc.); (4) draft design and construction contracts; (5) assist in setting bidding procedures; (5) set up dispute resolution procedures; and (6) participate in troubleshooting as issues arise.

In cases where contractors or design professionals are changed during the course of a project, we negotiate resolution of contractual and financial issues. Problem solving during a project needs to, and often does, become business-oriented. Business people simply will not tolerate protracted adversarial proceedings. Litigation or arbitration is a bad deal – it is imperative that resolution of a construction dispute is reached before a formal, binding dispute resolution process is entered.

When it comes to good lawyering, "standing in the way of the moving train" to get a construction case settled, before it gets into the arbitration or litigation mode, is not simply a good idea, it is what the client deserves. Outside counsel must be adept at (1) focusing the client on the details of the dispute in an objective way; (2) facilitating and encouraging detailed preparation of the case by the client before the decision to litigate is made; (3) getting executive level personnel involved in the decision making process; (4) educating the client on the detriments of undertaking a lengthy trial or arbitration, in terms of expense and in terms of disruption to the client's business; (5) being able to develop and execute on a "guerilla warfare" plan to get the dispute resolved before litigation or arbitration start; (6) being strategic; (7) being oriented to the details of the dispute so that you can keep the client on track.

CONCLUSION

Inhouse counsel who is well integrated into the business operations of the client and has the confidence of management serves a critical role in creating a climate in which to get a construction or renovation project off to a good start through coordinating the team from the very beginning and by working closely with outside counsel to get a project back on track when problems are encountered.

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