

Construction Projects: Outside Construction Counsel's Role In Representing The Owner – Legal And Practical Strategies For Success

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Construction counsel's traditional role is in handling construction contract litigation or arbitration after project completion; after the damage has already been done.

Making construction counsel part of the planning process has been effective and has demonstrated value. In instances where the owner retains outside construction counsel early, a few things have been clear: there are fewer claims and virtually never an impasse due to contract interpretation issues.

Early involvement of construction counsel adds expertise and the ability to add a sense of urgency. Analyzing complex facts and turning out an action plan on a short deadline is something at which attorneys excel. This is especially true of those attorneys with litigation experience and substantive knowledge of the construction process.

In the capital planning process, the owner relies on many participants with varying degrees of expertise, loyalty, focus and experience. The involvement of experienced construction counsel from project inception creates an advantage: the construction counsel will invariably see early signs of a problem on the project in time to head off disaster. Perhaps the most distinct advantage is that counsel, to a greater degree than other construction project participants, is used to demonstrating undivided loyalty to the client.

Over time, it has become clear that the large project benefits from the dispute resolution experience of construction counsel that can be folded into the owner's project strategy. In examining an extensive array of litigation and project problem solving assignments our law firm has undertaken, the problems have been recurring and the ability to reach solutions has been consistent.

The types of projects have been wide ranging: healthcare institutions, hotels, K-12 schools, universities, wastewater plants, commercial and residential real estate, restaurants and mixed use facilities. Over and over, the same lessons have been learned from cost overruns, delays, construction defects and design errors and omissions. In each instance, significant legal expense is required to address the issues, when they arise. It is far better to prevent the problems at the outset by engaging construction counsel from the project's inception. Almost invariably, if construction counsel is involved from the beginning, litigation can be headed off. In short, significant and expensive problems may be avoided all together with a sound strategy which integrates legal protections.

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Specifically, construction counsel will offer advice and assistance in the following areas:

1. *Selection of the Architect and Construction Manager:* Assist the owner in selecting the architect and construction manager. There are many questions which can uniquely be posed by construction counsel: for example: what is the architect's or construction manager's track record on dispute resolution, meeting project completion deadlines, living within project budgets, working collaboratively with project teams, understanding environmental issues, solving project problems, knowing and solving insurance and risk management issues during construction?

2. *Assemble the Bid Package:* Assist the owner in setting the strategy for and assembling the bid package used in selecting contractors; deciding on whether to provide for bid alternates or to provide for a process to negotiate with the low bidder, pre award.

3. *Choose the Project Delivery Method:* Facilitate the selection of the best method of project delivery: construction management, traditional design-bid-build, or design build. A broad range of practical experience with the various methods of project delivery is important.

4. *Prepare the Design and Construction Contracts:* Prepare each of the contracts for the project with the contractor, architect and the construction manager, each with consistent terms and with consistent methods of dispute resolution; it is not unusual to find that the method of dispute resolution may vary for the contractor and the architect: without strategic advice from construction counsel, the owner may be required to arbitrate all disputes with the architect, while being required to go to court with the contractor, separately.

5. *Facilitate the Setting of the Environmental Strategy:* In building from the ground up, a strategy for addressing potential site contamination, underground tanks, wetlands, hydrology and storm water and erosion control issues are frequently overlooked. In renovating, asbestos, lead-based paint, PCBs and

mold issues are not adequately addressed. Construction counsel with an environmental background can save the owner from expensive and embarrassing environmental impasses which stop the project midstream at devastating additional cost to the owner.

6. *Establish Responsibility for Project Cost:* Assist the owner in understanding that there must be "bottom line" responsibility for the project cost. A prevalent owner, architect, construction manager stalemate is the issue of who is responsible for accurately assessing what it will cost to build the project. Standard industry contract forms most often leave this up in the air, thereby leaving the owner with more project than is in the budget. Early engagement among the owner, architect and construction manager on these issues is essential. It is our experience that it is often the construction attorney who has effectively "held the architect's and construction manager's feet to the fire" to force them to take ownership on this issue to arrive at solid construction cost numbers prior to finalizing the design and prior to bid.

7. *Assure Compliance with Government Requirements:* Dealing effectively with government regulations, laws and industry standards and guidelines is essential to a successful project. Some troubling examples are the requirements relating to façade maintenance and repair and those relating to the noise limitations on rooftop mechanical equipment. In many large cities throughout the United States, local government has imposed detailed requirements which mandate periodic inspection of facades to assure that masonry or other material does not fall onto the street below. The owner must have knowledge of the industry standard of care and the local laws. With regard to noise code limitations, frequently, when large (and expensive) mechanical equipment is placed on a rooftop, very little attention is paid to the noise levels of the equipment being placed. It is essential that the design professional on the project review the level of noise which will be generated by the equipment, before the equipment is ordered. Once the equipment is already installed, it will often be too late to solve noise issues and replacement of the equipment with a quieter solution is often expensive and disruptive, as efforts to mitigate the noise level of the existing equipment may not be effective to meet code. To additionally complicate matters, it is not unusual for the owner to order the equipment directly from the manufacturer to save money. When this is done, the design professional is "out of the loop" and often off the hook, in terms of malpractice, if the unit is not within legal noise tolerances.

8. *Facilitate the Development of a Realistic Project Schedule:* Developing a realistic and credible schedule is often neglected. The construction attorney is in an excellent position to effectively urge focus and accuracy on this issue. There is

a clear motive for falling short in the creating of a true schedule: financial projections are better served by a short schedule. The owner who can report that the project will be delivered for its intended use in 2 years (instead of 2 1/2 years) will be able to develop better projections to attract investors and lenders and with a short schedule, the owner can project lower general conditions expenses. In the long run, though, setting an overly ambitious schedule can lead to project failure.

9. *Project Team Realignment:* Creating strategic realignments of project participants and sometimes even changing contractors or design professionals during the project is almost impossible without a well thought out legal strategy. It is clear that once a project is off track, it is difficult to effect change. Construction counsel is in the position to know the details of the contractual relationships and have a critical view of the culpability for delays, cost overruns, design errors and omissions and defective construction. In putting the troubled or failed project back on track, it is most often clear that "it is all about the people" and a carefully negotiated realignment of project personnel orchestrated by construction counsel can be effective.

10. *Establish Responsibility for Project Close Out:* Project close out is too often neglected by the design and construction team and the owner is left with a project which does not function effectively. The duration and scope of the warranties on equipment and construction are often disputed by contractors and vendors and the construction and design team tend not to be successful in protecting the owner's rights. Developing a legal strategy for close out, at the very outset of the project, assures focus and establishes the individuals within the design, construction and owner team who will be monitoring compliance with close out, warranty and training obligations. Construction counsel's technical knowledge, tenacity, sense of urgency and attention to detail can be instrumental in getting the job done.

Conclusion

When it comes down to it, construction contract litigation has established benchmarks for the standards to which design professionals, contractors and owners will be held. Once things go wrong, experienced construction counsel can project the owner's likelihood of success for obtaining or avoiding a judgment for monetary damages. What is remarkable is that although there is increasing sophistication relating to litigation process, there is not a corresponding growth of understanding that with the right team work, the damages may be avoided in the first place. Placing experienced construction litigation counsel on the project team allows the owner the benefit of the hard learned and expensive lessons from those who have previously "experienced the pain," thereby creating the hope that a strategy can be developed to avoid having to experience the same lessons again.

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