

## Contracting mistakes are best avoided early

Project owners not uncommonly make major mistakes contracting with the architects, contractors and others involved in their construction projects.

If the projects are completed without major problems, these mistakes may not make much difference or matter at all.

But if there are complications or claims, or if there is a major design or construction failure on a project, contract deficiencies can make all the difference in how well the project owner is protected in the dispute resolution process that follows.

Failure to properly address the following aspects of contracting can have significant consequences for project owners.

### Alternative approaches to contracting

Design-bid-build, construction manager as agent, construction manager/general contractor and design-build are just four examples of alternative approaches to contracting for design, construction and construction management services. There are pluses and minuses to each approach. Many owners do not evaluate which approach is best for them and their projects but rather follow the approach used in the past or used by another company.

### Number of contracts

Project owners commonly end up with more than one contract for design services such as architecture and engineering and with several contracts for construction services such as general contracting and special-

ty contracting. If delay or defect issues develop on the project, the first thing all those multiple parties typically do is point at



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each other. Minimizing the number of contracts helps diminish that problem.

### Alternative approaches to compensation

Architects can be paid a lump sum, an hourly rate subject to a maximum or a sum based on construction cost. Contractors can be paid a lump sum or a sum based on cost plus fee subject to a guaranteed maximum price.

Many owners do not evaluate which approach makes sense for their projects. Rather, they do what they've done previously or accept whatever form of compensation their architects or contractors suggest.

### Coordinating contracts

Design, construction and project management contracts have many overlapping terms that need to be coordinated, similar to the sheet music to be followed by the players in an instrumental ensemble.

Especially with regard to the role of the architect during construction and the agreed approach for how disputes will be resolved, failure to coordinate contracts can significantly jeopardize the rights of the project owner.

### Specificity, clarity regarding what, when, how much

It is amazing how frequently draft contracts are not specific, clear or consistent in how they describe what services and construction are to be performed, by when and in exchange for how much money.

Some project owners never read the most basic provisions of the contracts that their design professionals and contractors prepare. The practice of attaching an architect's or contractor's proposal letter as an exhibit to the contract is a complicating factor in this regard.

### Damages for delay

Many contracts contain "waiver of consequential damages" clauses that bar the project owner from seeking damages for a design professional's or contractor's delayed completion of its services or work. Even in contracts without such clauses, the project owner's damages for delay in some circumstances may not be recoverable in the absence of a liquidated damages clause in the contract. Many project owners are not attuned to these issues.

### Changes in services, construction

Project owners do not have a legal right to require their design professionals or contractors to make changes in projects unless their contracts say so. Project owners often end up paying substantial sums when such changes do occur unless they have been careful to spell out in their contracts how compensa-

tion is to be modified when changes take place.

### Blind agreement to form contracts

American Institute of Architects and other standard-form contracts are widely used in the industry. Some design professionals and contractors suggest or outright state that such contracts should be used without modification.

Agreeing to this approach is a major error for project owners.

AIA contracts, for example, include many provisions that are contrary to the project owner's interests. Most provisions are subtle, but several are blatant – such as those providing for waiver of consequential damages, no consolidated arbitration or an early commencement of the statute of limitations on claims.

Omission of certain provisions in standard-form contracts also is a significant problem – such as those addressing design-build subcontracting, insurance, the forum for dispute resolution and the owner's right to terminate the contract for its convenience.

Savvy project owners start the contracting process well before design or construction is to commence and are thoughtful and careful in addressing basic contracting issues. In these ways, project owners can minimize the likelihood of problems during design and construction and better protect themselves should complications occur.

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