

## Being forewarned is being forearmed

Some timely reminders for contractors as the sluggish economy creates challenges

With alarming speed, the economic slowdown and credit crisis have impacted the construction industry. Even for those fortunate enough to have good backlogs for the moment, there are persistent fears that this downturn may be a prolonged one.



### CONSTRUCTIVE ADVICE

Guy Randles

It has been awhile since the industry has faced economic challenges as significant as those at present. Past experience shows that economic slowdowns bring with them an increased incidence of bid protests, liens, claims and litigation. Unfortunately, though, some of the lessons of the past are a distant memory, if they are remembered at all. Here are some reminders to reduce the risks of the times ahead.

- Obtaining assurances of the owner's financing and ability to pay is often an afterthought when times are good. Recently, though, there has been a rash of projects with owners who have run out of money or failed to get promised financing, leaving contractors scrambling for payment. With the prevalent use of single-project owner entities, contractors can be left without any recourse. At the outset, contractors should be careful to get reliable commitments of payments, with the right to obtain updated financial information as the project proceeds. At the first suggestion of trouble, contractors should consider their options to withhold performance until payment can be assured.

- Contractors are squeezed between the risk of the owner's failure to pay and the possibility that their subcontractors may falter financially. As the competition for limited work increases, contractors may be tempted to accept low bids from subcontractors with whom they have no track record. Financial circumstances may have changed even for subcontractors with whom contractors have established relationships. Managing subcontractor relationships increasingly requires tracking their accounts and payments to their employees, suppliers and benefit trust funds. It's critical to obtain proper lien releases and inserting proper subcontract provisions allowing for conditional payments, setoffs, joint checks and defaults for financial missteps.

- When private work dries up, contractors often look to public-sector projects to pick up the slack. This is even more likely given the recently proposed economic stimulus packages emphasizing public infrastructure work. For those inexperienced in the public arena, the public bidding requirements carry pitfalls that competitors are willing to exploit to file bid protests. Care, and maybe legal assistance, is necessary for those unfamiliar with the ins and outs of public bidding.

- In addition, clients who have migrated from private to public work often say that they were unprepared for the differences between privately negotiated work and hard-bid public projects. On public projects, contractual notices and claims procedures are much more likely to be enforced, and statutory requirements on public projects may come as welcome surprises to the uninitiated. Those venturing into familiar areas of types of work should make sure to perform their due diligence in advance so that they know the rules of the game.

- With the risk of claims increasing, it is important for contractors to carefully review the contracts they are offered. Contractual terms are central in avoiding and resolving the disputes that become more prevalent in tougher times. When work is scarce, there is a natural reluctance to raise objections to contractual provisions lest one jeopardize getting the project. However, a blind acceptance of unreasonable allocations of risk can lead to disastrous results later. While restraint for marketing reasons may be appropriate, few owners would ever reject a contractor who bargains reasonably about reasonable risk allocation.

- As problems or claims arise, resist the temptation to defer discussions or resolution until the end of a job. Issues rarely get easier to resolve as time passes; more likely, problems will worsen. Even a marginally acceptable settlement reached early is superior to a "better" settlement reached after delay, conflict and increased legal fees.

- Get agreements, commitments and understandings in writing. Informality and handshake deals work better when margins are good. Reduced margins and tight money tend to cause memory loss in some people. Expect the best of people but prepare for the worst.

- Be sure to leave procedures in place to make timely bond and lien notices and claims, particularly when pre-construction notices are required. Be sure to have the required information for bond and lien filings before problems arise so that there is no last-minute scrambling as deadlines approach. While lien claims, in particular, are no panacea to nonpayment – particularly when multiple claimants may be claiming on the same property – they are often the only avenue of recovery in this day of single-purpose owner entities.

Contractors fortunate enough to be busy are swimming in shark-infested waters. Those who keep their guards up will be best able to fend off any attacks.

*Guy A. Randles is a partner in the construction and design group of Stael Rives LLP and a member of the Washington and Oregon bars. He can be reached at 503-294-9288 or [garandles@stoel.com](mailto:garandles@stoel.com).*