



Practical Tips for Avoiding the Pitfalls Associated with Construction Administration and Site Observation

James R. Case at Kerr, Russell and Weber, PLC

The design work has been completed (just in time), the contractor has been selected, and everyone is anxious for work to commence. Optimism abounds that the project will be performed on time, within budget and in accordance with the plans and specifications. This paper is meant to address some very simple ways to keep the project on track, complete the work to the satisfaction of the client, and to accomplish the task without impacting your firm's bottom line.

1. Managing Risk Begins With Attempting to Control Client Expectations and Educating the Client Regarding Your Role During Construction.

It might seem that the best way to avoid the pitfalls associated with administering the contract for construction would be to avoid the task entirely. However, this is not an advisable course of action. The problems associated with a third party interpreting your plans and specifications are obvious. Since no set of plans and specifications is perfect, why would a design professional not want an opportunity to fine tune, coordinate, and clarify the plans and specifications? Administering the contract for construction provides the design professional with an opportunity to nip problems in the bud. However, administering the contract has its own perils and can create additional obligations (or perceived obligations) that without proper thought or execution give rise to additional liability.

With the current economic climate, budgets are tighter than ever. The design professional cannot allow the owner to position him/her in an uninsurable position as a warrantor or guarantor or that plans and specifications will be free of errors and omissions. Administering the Contract for Construction is part of the means by which the design professional can provide greater assurance to the owner that errors or omissions which will inevitably exist in any documents can be corrected promptly and inexpensively, or at least within a budget contingency established for such a purpose. Carefully negotiating and informing the owner about the role you will play is part of this process. When presented with owner prepared contracts, compare the obligations that you are being requested to assume with standard form industry documents (AIA, ConsensusDOCS, EJCDC). Educating the owner that you do not manage the contractor's operations or warrant or guarantee the outcome of the contractor's work is critical to your ability to successfully administer the contract for construction.

Controlling and managing the client's expectations can also be managed by coordinating the contract administration scope of work required in the design professional/owner contract with the scope of work required of the design professional in the owner/contractor agreement. When things get dicey during the construction process, the owner is going to attempt to require the design professional to perform each and every obligation that the owner believes is required in any of the contracts applicable to the construction (and probably others not in the documents at all). Making sure that the documents are coordinated limits the possibility that there will be unrealistic expectations and/or demands by the owner.

2. Project Personnel Must Know and Understand Their Roles During Construction.

Just as important is to make sure that the project manager, resident engineers/architects and resident project representatives have read and understand the roles they are to perform during the construction process before the work begins. Too many times these individuals overstep their bounds or fail to perform a function required of them as set forth in the contract documents. Holding a team meeting before work begins to explain roles and answer questions to attempt to make sure that roles and obligations are understood can go a long way towards preventing problems later on.

While everyone has to start somewhere, if an inexperienced resident project representative is placed on the project, counter-act their inexperience with an experienced resident engineer/architect or project manager. The inexperienced resident engineer/architect can be offset by assigning an experienced resident project representative to the project and making sure that individual is monitored by an experienced project manager. The experienced people must make themselves available to those that are inexperienced. Weekly meetings outside the presence of the owner and contractor can be helpful to make sure that issues are being addressed and problems are not falling through the cracks, at least until all of the project participants are comfortable in the roles they are expected to perform.

3. Control What You Can Control.

It is not uncommon for the desire to get the project moving quickly to have disastrous results. Before a Notice to Proceed is issued, make sure that governmental approvals that you, as the owner's representative, are required to secure are readily available (right-of-way permits, environmental permits). Obviously a delay claim by the contractor is no way to begin a project.

An acceptable contractor schedule should be submitted and approved before work begins. Avoid schedules indicating that the contractor owns the float or that indicate that it is the contractor's intent to complete early. If the contractor insists that it will complete early, advise the owner to notify the contractor that the contractor's failure to complete early will not give rise to the contractor's ability to submit a claim.

An acceptable shop drawing/sample schedule should be submitted by the contractor and approved by the design professional. Consider the complexity, or possible complexity, of the submittals that will be reviewed and allot sufficient time to perform your analysis in the final submittal schedule that is agreed upon.

Do not review shop drawings or submittals not called for by the specifications. Return shop drawings in the time allotted in the submittal schedule. If the shop drawing/submittal is the subject of a prescriptive specification return it once it is acceptable with the notation "Approved," "Approved as Noted," "No Exceptions Taken" or another notation allowed by the contract documents. If the shop drawing/submittal is the subject of a performance specification, it can be reviewed for general conformance with the design intent of the project, and should be returned "For Information Only."

Generally, it is inadvisable and by contract the design professional is typically precluded from directing or controlling the contractor's means, methods, techniques or sequences of construction. This can become a very tricky issue when specific means, methods or sequencing are prescribed in the contract documents but the contractor argues that these specified means and methods are not the means and methods that



GUEST ESSAYS

were contemplated in the bid or means and methods which the contractor believes constitute standard industry practice. When this type of issue arises, engage the owner early on about the issue in a factual versus inciteful manner. Explain what you believe to be the pros and cons, risks and benefits of the prescribed means versus the contractor's proposed means. Standard form owner/contractor agreements typically allow owners the ability to demand additional assurances from a contractor that proposes to substitute means and methods that differ from what has been prescribed in the plans and specifications. Inform the owner if such rights exist. Explain that failure to succumb to the contractor's request may lead to a claim from the contractor for more time and/or money, and the risk of a claim versus the technical risks of proceeding in the manner suggested by the contractor. Engage the client in the decision making process. If the client refuses to make the actual decision, at least confirm in writing that you believe that the client is in agreement with the ultimate decision that you have made.

Requests for Information can lead to major issues, in particular to claims for delay by the contractor against the owner and correspondingly claims by the owner against the design professional. Establish a time period for responding to RFIs before the project begins and respond within the allotted time limit. If you believe that the contractor is utilizing RFIs as a ploy for establishing a claim, engage the owner. Take time to meet with the owner, objectively explain what is occurring, and allow the owner to become part of the process.

Continue to review contractor schedules during the performance of the work. Schedule revisions should reflect actual construction progress and be logical. The client should be kept informed in a factual manner of the status of the schedule, good or bad. If the contractor is challenged by keeping the project on schedule, request recovery schedules and engage the owner in a neutral versus inciteful fashion. Keep in mind that it is the owner that can take measures to bring the contractor back on schedule (withholding payments, supplementing the work force, notification to the surety, threatening termination), not the design professional.

Observations of defective or potentially defective work should be handled in a similar fashion. Since most contract documents allow the owner to accept defective work in exchange for a reduction in payment, immediately notify the owner about the issue, inform the owner objectively about the facts, and allow the owner to make the decision about the manner in which the owner wants the situation to be handled.

Site safety is an issue that is a topic unto itself. However, simple rules of thumb are that if the contractor's operation raises a concern about safety, the contractor's superintendent and owner's representatives should be notified immediately both verbally and in writing. Since most contract documents only allow the owner to stop the work (design professionals should not undertake this responsibility), in situations deemed critical, it should be suggested verbally and in writing to the contractor and owner that serious consideration should be given to this option.

Although the inclusion of an "Initial Decision Maker" in the AIA standard documents may change the role of the architect as the initial decision maker regarding claims, recall that even when utilizing the AIA documents that if an "Initial Decision Maker" is not appointed then by default that task falls upon the shoulders of the architect. At any rate, if the contract documents task the design professional with initially deciding the validity of a claim, recognize that although your client is paying for this service it is imperative for the design professional to remain neutral during the decision making process. Many courts have bestowed the benefit of quasi-judicial immunity on design professionals as a defense to claims by an owner or contractor that the design professional has made an incorrect decision that has harmed the aggrieved claimant (courts have held that as long as the decision is made in "good faith," the design

professional, like a judge or arbitrator, cannot be sued for decisions made in regard to claims). Render decisions timely and at the very least within the time prescribed by the contract documents. Make timely requests for additional information if that is what is needed. Do not be too quick to rely on technical notice of claim deficiencies as the sole basis for rendering a decision (many courts have held that failure to comply with technical notice requirements does not constitute a waiver of the claim unless the party to whom notice was not provided can demonstrate that it was prejudiced by the lack of notice). Do not transmit drafts to the client for their input prior to rendering your decision on the claim. The decision on a claim should be thorough and reasoned to the greatest extent possible.

The contractor pay application process is another area that can cause problems during the administration of the contract for construction. Timely review is critical. Prior to approval of the first pay application, determine whether contractor submittals required by the contract documents such as insurance certificates, surety bonds, schedules and the like, have been received. Requiring that the contractor provide a pencil copy of the application which is reviewed/ reconciled with the contractor can be extremely helpful. In order to avoid claims by the owner or a surety that the contractor was overpaid, examine the status of the project as thoroughly as possible to determine the percentage of completion, to determine if materials stored off site for which payment is sought have been provided and are properly insured, and review sworn statements and lien waivers to reconcile that, at least according to the contractor, previous payments have been distributed to the proper entities.

4. Communicate, Communicate, Communicate!

Although the design professional prepares the plans and specifications and typically administers the contract for construction, a fact that is often lost sight of is that the project is the client's project, not the design professional's project. Invite the owner's representative to the weekly/bi-weekly project meetings with the contractor and key trade contractors. The design professional should keep minutes of those meetings (do not rely on the contractor to keep minutes). Whether or not owner's representative attends these meetings, timely copies of the minutes should be provided to the owner with a cover letter pointing out key issues and conveying that if the minutes generate any questions that the owner should let you know and you will do your best to provide a prompt response. Separate meetings where the discussions are documented should also be held only with the owner in which matters such as project status, budget, issues and claims are discussed and questions can be answered.

Conclusion

Although every situation that can arise during construction cannot be predicted, this article was intended to be a primer and reminder regarding some of the simplest things that can be done to avoid problems during the administration of the contract for construction. Managing client expectations and educating the client about the process gets the project started off in the right direction. Making sure that project personnel know and understand their roles is critical. The project can be kept on course by controlling what can be controlled. Constant communication can forestall issues and prevent the "you never told me about that" line from cropping up if disputes develop. Following these guidelines may not eliminate risk, but it can certainly minimize the significant risks that exist in today's construction market.