

OWNER AND CONTRACTOR REVIEW TO REDUCE CLAIMS

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ABSTRACT: The owner's role and responsibility for design and review are examined. The scope of the owner's review is outlined, together with his options for executing the review. A novel approach is suggested in using the contractor to review the design after award. Legal implications are explored.

INTRODUCTION

Findings of design deficiencies are being reported with greater frequency in professional publications and local newspapers. When these design deficiencies make headlines, it is usually because of catastrophic failure or death. The design deficiencies that do not make headlines usually end up in contract claims, accompanied by delays and significantly higher costs.

CAUSES

Design deficiencies are occurring more frequently because of the complexity of the work, new and different relationships among the professionals in design and construction, and haste to get the projects completed and in operation as soon as possible. These deficiencies are a major cause of contract disputes. The following examples are indicative of how these deficiencies are generated.

A structural engineer recently recalled, "Thirty years ago our deadline for structural work was two weeks or more before the architect went out for bids, so there was time for checking plans. Today you really can't check plans. Never during the structural design process does everything stop to permit checking."

He also pointed out that peer review was done in those days. An individual or group within the firm who had nothing to do with the original design would carefully check it (9).

The manager of a specifications department noted that timing is very critical. If information from the disciplines comes late, there is very little or no time to analyze or evaluate the impact on the total specifications, thus causing a conflict or ambiguity. Many times, the design is behind schedule and many last-minute decisions have to be made in order to complete the specifications. One of the problems is that you are the last one on the totem pole and you do not have enough time (1).

The president of a construction management firm specializing in claims noted that it is not uncommon for an architect/engineer to prepare con-

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struction contract documents simply by adding to or deleting from a set of previous contract documents. While this cut-and-paste method may save time in preparing the construction contract, it often leads to problems, in that the documents are not read and prepared as a whole for the specific contract (16).

RESPONSIBILITY

The owner is responsible (12,14). He contracts with the architect-engineer for the design. He sets the time constraints and deadlines, and he establishes the criteria for determining the acceptability of the design, plans, and specifications. The general rule of law is that the owner impliedly warrants the adequacy of the plans and specifications for construction (4). This means that when the owner requests bids for construction, the contractor can assume that the owner has: (1) Checked the design, plans, and specifications; and (2) determined that the design is adequate, constructible, and can be built within the time frame set forth in the contract.

The contractor can also assume that he can rely on any representations made in contract documents. If the design is defective, or if there are mistakes, omissions, or ambiguities, the owner is responsible. The owner cannot look to the contractor if there are deficiencies in the design, plans, or specifications.

CURES

Conferees at an Engineering Foundation-sponsored conference and at the ASCE workshop on "Quality in the Constructed Project" recommended that "... on projects over \$5,000,000 in value owners engage an oversight review of the work and the procedures beginning at 30% completion of design. . . ." Moreover, many in attendance stressed the importance of bringing field people in to check designs for constructibility (17).

SCOPE OF OWNER REVIEW

Clearly, one of the measures owners must undertake to protect themselves is to conduct a thorough review of the design, plans, and specifications prepared by his staff, or by the architect-engineer (A-E) firm that he engaged to perform the design. The scope of the owner's review must encompass two areas: (1) Constructability; and (2) construction document deficiencies.

The constructability review examines whether the project can be built as designed; and whether the design could be improved so that it would be easier, safer, and possibly less costly to construct.

To be most effective, the constructibility review must be conducted before the design is completed. The analysis is intended to identify better means of constructing the project, as opposed to reviewing the contract documents for deficiencies. A constructibility review could and should be coupled with a contract document deficiency review to maximize the contractor's contribution to the review effort.

The construction contract document deficiency review would address whether the contract documents are free of mistakes, omissions, and ambiguities.

OWNER'S TEAM: MATCHING STRENGTHS WITH RESPONSIBILITIES

Construction is a team effort. The owner's team consists of the designer, the contractor, and the owner's staff. As in any team effort, it is best to utilize the strengths of the team members and to overcome their weaknesses.

The strength of the designer is in developing a design and preparing plans and specifications. Once the designer has performed this function, it is up to the owner's staff to evaluate the effectiveness of the design. If they are not technically able to evaluate whether the design will do what they want, they can question the designer, or in the extreme, seek out the assistance of another A-E firm to evaluate the design. The owner should recognize, however, that this raises ethical problems in that the codes of Ethics of both ASCE (2) and the National Society of Professional Engineers (3) consider it unethical for an engineer to undertake the review of another engineer's work without that engineer's permission. The intent is to prevent the undercutting of fellow members of the profession, much as medical doctors are reluctant to criticize the work of other doctors. But, as in the case of medicine, a second opinion may be most beneficial.

The contractor's strengths are in his knowledge of construction techniques, task durations, and costs. The contractor can be used to good advantage in two review areas: value engineering and constructibility. The time to use the contractor to best advantage for both of these strengths is during design. Specifically, he should be brought in after the design is about 30% complete, and preferably not later than when the design is about 60% complete. The later the contractor is brought into the process, the less he can contribute in the way of significant cost savings (6,10). This is because the longer the design is set in concrete, the harder, costlier, and more time consuming it is to make changes. In terms of value engineering, as a part of a value engineering team, he may be able to suggest different ways to do the same thing, at a significant savings in cost. In terms of constructibility, he can assess whether the design can be built as planned, whether proposed time schedules are feasible, and possibly he can suggest minor changes that may have major impacts on safety and ease of construction. The author of an article on prevention and resolution of claims indicated that it is extremely important that the construction contract documents be prepared and reviewed by an individual knowledgeable in construction field procedures and totally familiar with the objectives of the particular project for which the documents are being developed (16).

In this regard, it should be recalled that many of the participants in the ASCE workshop were in favor of bringing in field people to conduct such a review.

This leaves us with the question of who should perform the contract document review. Preparation of the construction contract documents is normally the responsibility of the architect-engineer. However, if all ar-

chitect-engineer reviews were adequate, we would not be asking what the owner should do to eliminate or avoid claims resulting from deficiencies in plans and specifications. Better quality control over the design work by the architect-engineer is necessary, but the responsibility of checking on whether the plans and specifications are free of major design deficiencies must ultimately rest with the owner.

There are those who argue that the architect-engineer is responsible for the adequacy of the plans and specifications and that a review by others is not necessary. Would the architect-engineer accept the contractor's work as complete without an inspection? Why, then, should the owner accept the architect-engineer's work without an adequate review?

The owner must review the construction documents. The only question is how he should accomplish this review. The owner can either undertake to review the plans and specifications himself, or he can select from two other available alternatives. These are to have another A-E firm review the plans and specifications, before going out for bids, to find any design deficiencies, and then have the original A-E firm make the changes; or he can ask the contractor to review the plans and specifications to find the mistakes, omissions, and ambiguities. This is not as radical an alternative as it sounds. After all, the contractor is the one who finds most of the mistakes, omissions, and ambiguities that result in claims now. The difference is that he is being asked to find the deficiencies before he starts work. By finding the deficiencies before starting work, a significant amount of time, money, and needless litigation can be avoided. The cost of claims are greatest when the errors are discovered during the actual construction of the project. For example, when the contractor discovers a discrepancy between plans and specifications and has craftsmen standing around waiting to get a decision on what to do, or when he discovers that two or more contractors are scheduled to work in the same place at the same time, costly delays, which result in claims, occur.

The advantage of this approach, giving the responsibility for review to the construction contractor, is that the contractor would be able to start work with a clear understanding of what is required, and the knowledge that any mistakes, omissions, and ambiguities—the construction document deficiencies—have been found and corrected. The owner would be even more certain that claims would be reduced if he could get the contractor to agree that if other mistakes, omissions, and ambiguities arise that escaped his review, that he will remain silent as to any claims against the owner for the cost or additional time to complete the work.

This procedure will not eliminate all claims. Claims also arise from requests for additional work, changes in the work, and impact and ripple claims associated with such changes. These claims can only be eliminated if the owner knows what he is doing, does not frequently change his mind and lets all parties know well in advance the conditions under which the project will be constructed.

LEGAL ASPECTS OF CONTRACTOR REVIEW

The owner cannot blithely place the responsibility for the construction document deficiency review on the contractor. The contractor must agree

to accept this responsibility, and in return for his acceptance, he must be given good and valuable consideration.

The reason for this is that it is settled law in the United States that the contractor cannot be held accountable for the adequacy of plans and specifications (4,5,8), because owners are considered to have impliedly warranted the adequacy of the plans and specifications. This is so, even with risk-avoiding clauses in the contract disclaiming the accuracy of the information provided in the contract, or requiring the contractor to visit the site, and make inspections (15).

While the law clearly states that the contractor cannot be held responsible for the adequacy of the plans and specifications, nothing prevents the contractor from agreeing, for a fee, to conduct a review of the plans and specifications and to agree that he will make no claims for additional costs or additional time because of any errors that escape his review (12).

NEED FOR FAIRNESS

The reason that the contractor should agree to accept the responsibility is to insure that the contract is a fair one. Many cases have been decided in favor of the contractor where boiler plate clauses sought to direct responsibility and liability to the contractor. The touchstone of these decisions was a finding by the courts that the contract was inherently unfair and that the other party would unjustly benefit by enforcement of the contract.

There is a saying in law that "hard cases make for bad law." The courts have avoided enforcement of unfair contracts by use of innovative and imaginative interpretations of contracts, the law, and the intent of the parties. The use of statutory construction and rules of interpretation to avoid enforcement of contract clauses resulted in uncertainty as to whether a contract clause would be enforced from contract to contract or case to case (7).

The concept of unconscionability was introduced into the law in an attempt to remove this uncertainty. Judges were to be able to use the doctrine of unconscionability to explicitly deny enforcement of a contract provision that was unfair rather than having them distort existing legal doctrines to find that the contract provision was inapplicable (7).

An adhesion contract is a standard contract that has been prepared solely by one party, with the other party having the sole option of taking it or leaving it (7). Courts look upon adhesion contracts as being inherently unfair. A construction contract is considered to be an adhesion contract, since the owner prepares the contract and the contractor has the option of taking it or leaving it. The owner, in seeking to obtain an enforceable contract, must show that the contract requirement is fair and not an unconscionable effort to enrich himself at the expense of the contractor. A contract clause in the boiler plate (the general or special conditions) may not be enforceable if it appears that it was not something that the contractor really agreed to do, but was merely something he had to accept if he wanted to get the contract and hence it would be unfair to enforce the contract clause. The contractor must explicitly agree to accept the responsibility.

One solution to the problem is to put a line item in the contract, whereby the owner pays the contractor to perform the review and to agree not to raise additional claims. In this way, the adhesion defense of unfairness is avoided, since the contractor has agreed, for a price, to find the faults, help correct them, and then to forego any claims resulting from deficiencies found after his review; and the owner has significantly reduced his risk of litigation.

After the contractor has identified the contract document deficiencies, and the owner has had them corrected, an equitable adjustment to the contract must be negotiated. This adjustment is to reflect the cost of the work without the deficiencies.

The negotiation of an equitable adjustment to the contract may be troublesome. In the public sector, a contractor may try to get as much as he possibly can from the owner, knowing that there is little the owner can do but settle. This is not so much of a problem in the private sector. The owner in the private sector has the economic power to compel the contractor to agree to terms. This economic power lies in the ability of the owner to tell the contractor that if he wants to do any more work for this company he should not try to hold the owner up for a lot of money. Moreover, the contractor may be concerned that other companies in the industry will hear about this and not be interested in doing business with him anymore.

An alternative to avoid the problem of negotiating an equitable settlement is to hire a contractor to review the contract documents prior to seeking bids, with the understanding that he would not be permitted to bid the work. The owner would have no assurance that claims would not result if new deficiencies are found, but he would be able to advertise for bids with a relatively defect-free set of plans and specifications.

It will take time to conduct the review, because of the mechanics of selecting an A-E firm or nonbidding contractor, letting them familiarize themselves with the job requirements, and negotiating with them.

REASONABLE TIME FOR REVIEW

It is imperative that the time allotted to the contractor to perform his review of the contract documents be adequate and reasonable. Courts have sometimes concluded that a contract provision did not mean what it literally said if someone was not given a reasonable amount of time to perform an act or respond to a contract requirement to which a penalty or a forfeiture of rights was attached (7). If an owner does not give the contractor adequate time to perform the review, then the contractor may discover additional deficiencies later. If the contractor seeks additional funds or additional time as a result, the courts may well ignore the contractor's agreement not to raise additional claims and require the owner to reimburse the contractor. The time it takes for the contractor to perform his review may be saved many times over if delays and claims are avoided as a result.

The owner's decision on which alternative to select must be made on the basis of net benefits, both tangible and intangible. Net benefits is the difference between benefits and costs. This is more easily said than figured out. It is not easy to estimate benefits, since "accountants have

yet to devise a means to measure money that you do not have to spend." What is the savings from avoiding a two-week delay? (11) How much is saved if something newly installed does not have to be removed and reinstalled because another component should have been installed first? What is the savings if craftsmen do not have to wait for decisions in the middle of a project? What is the savings if productivity is not diminished by lowered morale after several instances of indecisiveness?

Costs are a little easier to estimate, but design deficiencies create two types of costs:

1. Visible costs reflected by higher project cost, costs of litigation, and delays.

2. Less visible costs, e.g., lost sales, profits, and opportunities because of an inability of the owner to get his product to market due to the delays and lost profits because the project cost more than was originally estimated.

CONCLUSIONS

Neither owner nor contractor benefit from claims and delay. The beneficiaries are, by and large, those engaged in helping litigants through the legal process. Society does not benefit from litigation and delay. Litigation and delay make projects cost much more than they should. If an owner cannot build a facility at a low enough cost to compete, he should not build the facility. Contractors and their workers would become unemployed, and the economy would suffer. A partnership between contractor and owner will produce better projects at lower costs, with more satisfaction to both parties.

The solution to the problem of high costs, project delays, and contractor claims lies in the establishment of a partnership between owner and contractor. The adversarial attitude that owners take in their dealings with contractors must be changed to one of team work. The contractor should be invited to work as a member of the owner's team—as an arm of the owner's company—to utilize the contractor's strengths to identify deficiencies in the plans and specifications, and to help eliminate claims.

APPENDIX.—REFERENCES

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