

Recommendations for Future Work Avoiding End-of-Contract Claims

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I. Introduction

- A. How does an owner exercise effective project control?
- B. How does he effectively integrate the services of designers, material suppliers and contractors to construct his facility on time and within budget?
- C. What authority and responsibility can an owner delegate to his construction manager?
- D. What risks can he shift to other parties?
- E. What risks must he retain?
- F. And, how does he deal with these risks?
- G. Traditionally,
 - 1. The architect/engineer bears the risk of preparing a complete set of plans and specifications
 - 2. The general contractor bears the risk of constructing the facility according to these plans and specs
- H. With construction management, fast-tracking and multiple prime contracts,
 - 1. Risks, normally assumed by the general contractor, often fall squarely on the owner
 - 2. Frequently, the owner first becomes aware of these risks when it receives a million dollar plus end-of-contract claim

II. Four Simple Rules

- A. The contract with pending addenda must always reflect agreement of the parties involved as to cost
- B. The latest revised schedule must always reflect agreement of the parties involved as to time
- C. The contractor must agree, when submitting each invoice, that the amount billed to date is fair and adequate compensation for the work performed, and the current contract amount is fair and adequate compensation to perform the current scope of work by the current contract completion date
- D. If the contractor cannot agree with (C), he must take exception in writing so that

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the owner can attempt to negotiate a change order incorporating the contractor's exception(s) before the next invoice

III. Scheduling

- A. The heart of almost every end-of-contract claim
- B. The benchmark against which delays and acceleration are measured
- C. Must continually represent an agreement between the contractor and the owner as to:
 - 1. The work accomplished to date
 - 2. The plan for performing the remaining work
- D. In order to demonstrate entitlement to delay damages,
 - 1. A contractor must be able to show
 - a) His original schedule
 - b) The controlling events preventing him from performing according to that schedule
- E. The importance of the project schedule in resolving end of project disputes requires that:
 - 1. The owner exercise a great deal of care in:
 - a) Schedule approval and monitoring
 - b) Assuring that the contractor properly maintains the schedule

IV. The Scheduling Specification

- A. Float or slack is not time for the exclusive use or benefit of either the owner or the contractor
- B. Time extensions will be granted only to the extent that equitable time adjustments for the affected activities exceed the total float or slack available at the time notice to proceed is issued for the change

V. Schedule Approval

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A. By requiring a time-scaled network diagram with the initial schedule submission, the contractor:

1. Recognizes and eliminates many logic and duration errors that would otherwise go undetected
2. Identifies areas where preferential logic is needed to eliminate concurrent activities needing the same resource
3. Can understand the schedule, together with the owner, and intelligently discuss alternatives during review and approval

B. Regardless of whether the contractor or the owner prepares and maintains the detailed schedule for performing the project, the owner is always responsible for:

1. Schedule approval and
2. Monitoring progress against the plan

C. When specifying a CPM schedule on your project

1. Make the required level of detail clear to the contractor
2. Review the schedule submissions carefully for logic and activity durations, and
3. Tie progress payments to schedule approval to insure compliance

D. Question unusually long or short activity durations. For example: Will it really take four months to install roofing?

E. Make sure that there are sufficient ties between buildings

1. Otherwise, the schedule may show the contractor on schedule six weeks prior to completion
 - a) When there are still six weeks of work remaining in each building
 - b) All to be performed with the same limited crews

F. Remember that, when the contractor is responsible for preparing the schedule,

1. Cooperate with the contractor in resolving problems with schedule logic or presentation
2. Encourage joint review meetings to insure that the schedule meets the contract requirements

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VI. Monitoring Schedule Performance

- A. Monitor the schedule monthly, utilizing computerized update reports, and,
- B. When a contractor falls behind schedule on the critical path
 - 1. Put him on notice in writing of the potential liability for damages
 - a) With an estimate of the dollar amount

VII. Schedule Maintenance

- A. Keep the schedule up to date
- B. At each monthly update
 - 1. Determine the impact of change orders on the schedule
 - 2. Incorporate excusable delays for weather, strikes, etc.
 - 3. Make sure that the contractor inputs accurate actual start and finish dates
- C. If possible, withhold progress payments when the contractor does not maintain the schedule

VIII. Acceleration

- A. Definition
 - 1. Expediting a project to complete ahead of a properly adjusted schedule
- B. The Two Types
- C. Directed
 - 1. Constructive
 - 2. Requiring the contractor to meet an improperly adjusted contract completion date

IX. Perfecting a Constructive Acceleration Claim

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- A. Experience an excusable delay
- B. Request a time extension
- C. Either have the time extension denied or not granted in a timely manner
- D. Be required to complete all work prior to a properly adjusted completion date
- E. Give the owner notice of a claim before starting to accelerate
- F. Suffer a loss from accelerating

X. Contract Provisions

- A. Make sure that contract language is specific regarding scope of work, responsibility for and extent of general conditions, and dates when services will be available
 - 1. Estimate available dates where uncertainty exists, and request a unit price for the contractor to perform services beyond these dates
 - 2. Do not use the words “later” or “if available”
 - B. Remember that any time there is more than one reasonable interpretation of a contract clause, the contractor may rely on his reasonable interpretation
 - 1. Make sure that contract language permits only one reasonable interpretation, **yours**.
 - C. When contracting for construction or renovation of multiple buildings, specify a separate completion date for each building at two to four week intervals to:
 - 1. Establish priorities for the contractor
 - 2. Allow a more orderly punch list and turnover, and
 - 3. Insure a more reasonable initial schedule
 - D. Require the contractor to submit a narrative progress report
 - 1. With each schedule update
 - 2. Identifying problem areas and proposed corrective actions
 - E. Enforce all contract requirements
 - F. As an owner, comply strictly with all contract requirements demanding your
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action

G. Be sure to review and approve vendor drawing submittals within the specified timeframe

H. Before soliciting proposals, make certain that:

1. The contract includes the necessary clauses to protect the owner's interest, and
2. All superfluous contract language is removed

XI. Change Orders

A. Require the contractor to submit revised network logic for each change

B. Determine the schedule impact of the change to the critical path

C. Note in the change order that

1. The revised logic has been incorporated in the project schedule and
 - a) Has no impact on contract completion or
 - b) Requires a time extension of 'x' days
 - (1) If a time extension is required, incorporate the schedule analysis in the change order

D. Remember the reasonable interpretation rule, and be specific in drafting change orders

XII. Risk

A. Keep risk with the contractor

1. Define contract packages to minimize risk
2. Prepurchase equipment only when necessary to meet the schedule
3. Avoid prepurchasing materials such as rebar, structural steel, piping, etc.
4. When negotiating change orders, use language which includes all costs of the change

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XIII. Construction Management

- A. An owner can delegate authority and responsibility to a construction manager, but can't delegate risk
 - B. The construction manager is an agent of the owner and
 - 1. The owner is responsible for the acts of his agent
 - C. Risks increase with:
 - 1. Fast-tracking
 - a) Design is only partially complete
 - (1) Holds
 - (2) Scope additions
 - (3) Design revisions
 - 2. Multiple prime contracts
 - a) An early contractor fails to perform
 - D. Insist on competent personnel with a proven track record
 - E. Watch out when a construction manager also performs lump sum work
 - 1. There may be considerable financial pressure to use the best people on the hard dollar contracts
 - F. When fast-tracking
 - 1. Wait to issue complete bid packages
 - a) Design deficiencies and interferences can cause too many delays and claims for extras
 - b) Not only will construction proceed more smoothly without the change orders and rework, but the project will usually finish earlier as well
 - G. As an alternative, consider a turnkey contract with a design-builder to maintain the advantages of fast tracking and delegation of authority, responsibility, and *risk*.
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XIV. Record Keeping

- A. As-planned schedule
- B. Accurate monthly schedule updates
- C. Foreman's time records
- D. Daily logs
- E. Inspection reports
- F. Purchase orders and shipping memos
- G. Diaries
- H. Pay requests
- I. Correspondence
- J. Meeting minutes
- K. Daily or weekly cost reports
- L. Telephone conversation records
- M. Shop drawings
- N. Original contract and all change orders
- O. Bid set of drawings and subsequent revisions
- P. Cost estimates
- Q. Minutes of negotiations
- R. Progress photographs
 - 1. Take progress photos weekly, and in color, for a permanent record of the project
 - a) For overall pictures, stand in the same locations week after week until no further progress can be seen
 - b) Photos should be dated and include a description of the picture and the camera location
- S. Include accurate notice to proceed dates in change orders
- T. Stamp the date received on each shop drawing
- U. Maintain logs to record a complete history of drawings, purchase orders, etc., not

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just the most recent issue

XV. Communication

- A. Make sure to establish good rapport between the contractor's project superintendent and the owner's site representative
- B. If it becomes apparent to either the contractor or the owner that friendly communication at the site no longer exists, top management must step in immediately
- C. Anyone with direct owner-contractor contact is a candidate for replacement if they are unable to communicate effectively
- D. It's easy to sabotage rapport
 - 1. On the first major concrete placement, just
 - a) Create several cold joints in a critical equipment foundation, or
 - b) Place a grade slab with enough peaks and valleys to need extensive grinding and patching before installing the finished floor
- E. Or for the owner, just
 - 1. Don't release drawings for construction in the timeframe promised in the contract
 - 2. Don't approve vendor drawings in the prescribed timeframe, or
 - 3. Refuse to agree on an equitable adjustment for an owner-initiated scope change

XVI. Conclusions

- A. Claims impose significant additional costs on projects
- B. The contractor is best-equipped to deal with risk
- C. Establish friendly communication
- D. Try to resolve all disputes as they arise
 - 1. It's easier, fairer, and cheaper
- E. A Promising Approach

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1. “The amount billed to date is fair and adequate compensation for the work performed, and the current contract amount is fair and adequate compensation to perform the current scope of work by the current contract completion date”