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Mistakes Owners and Developers Make - But Shouldn't

Claims and disputes have become an almost accepted by-product of most construction projects, and Owners are more often finding themselves on the losing side, or with a less equitable outcome than they believe they deserve. One of the reasons for this inequity is that the design and construction lobby and professional organizations have become more aggressive in achieving significant advantages in the form contracts (AIA and AGC documents) commonly in use today, as well as more comprehensive and contractor-friendly prompt payment and lien statutes, while individual owners and their counsel are left to defend their interests with patchwork language and amendments to the form contracts.

The goal of this article is to point out typical mistakes Owners make in negotiating their respective design and construction contracts, and provide some helpful advice to avoid these same mistakes in your next project. Let's start with the basics:

The Owner concedes the contract drafting to the parties – Often Owners will, in the interest of time or expense, allow the Architect or Contractor to provide the respective agreements. Often this is accompanied



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by a verbal disclaimer like “Don’t worry, it’s just a standard AIA (AGC) form, we just filled in the blanks.” The sophisticated Owner will, first of all, select a qualified attorney who specializes in construction law to lead the way in drafting amendments and modifications to the form agreements that better balance the form agreements. Providing these modified agreements as a condition of engagement for the design and construction professionals allows the Owner much better leverage in negotiating contract terms.

Dispute resolution is never addressed until there is a dispute – When drafting and negotiating the contracts, one area often overlooked is dispute resolution. Regardless of your preference for the type of dispute resolution to be employed, establish the procedures and processes in the contract rather than making them part of the dispute. Give strong consideration to employing mediation as the primary means of dispute resolution, with arbitration as an option for disputes requiring further litigation. Coordinate the dispute resolution clauses contracts with all parties, including designers, contractors, vendors, and subcontractors; this will significantly reduce resolution costs and time spent by resolving the dispute in a single hearing, rather than repeated hearings for each party.

Termination provisions are ignored – While it may be the furthest thing from your mind when negotiating a contract at the onset of a project, pay particular attention to your rights and obligations with respect to termination. The form contracts as written, often require payment of the Contractor’s total profit for the project in the event of early termination – You will be paying profit on work not yet started, and perhaps paying a second time if another contractor takes over and completes the project.

Failure to adequately describe the project program and features – Many projects get lost at “hello.” The Owner loosely describes what they would like as a finished product, and by the time the Owner realizes the project is missing the mark, costly redesign and schedule delays are the only likely outcomes. Sophisticated Owners will provide not only graphic examples to their design team at inception; they will also provide a space program, schedule of room sizes and finishes, outline specifications, target budget, and preliminary overall project schedule. These items are incorporated into the design and pre-construction agreements, and become the benchmark by which the project team is measured and which must be met before proceeding to the next stage of design.

Why pay an Owners Rep – Isn’t the Architect supposed to do that? – In short, don’t bring a knife to a gunfight. The Architect has a construction administration team, and the Contractor has project managers, superintendents, clerks, and other field staff ; their sole goal is to complete the project while minimizing the risk to the their respective organizations, while not incurring any costs over the agreed-upon scope without adequate compensation. Owners place themselves at a tremendous disadvantage by failing to provide qualified representation early in the process

representation early in the process. The mistakes, examples, and suggestions above are provided to demonstrate the knowledge and care required to successfully manage a project's development. Clearly, as the scale of the project varies, so do the risks and resources available to manage those risks - but the principles expressed are the same, and apply essentially to projects of any scale. Fortunately, the Owner is not left on his or her own to navigate the treacherous waters; many competent, qualified advisors and attorneys are available to assist in the endeavor .

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RHarper Consulting Group provides development consulting, program management, and owner representation services focused on the senior living and mixed use sectors. In addition, Mr. Harper is also a listed mediator and arbitrator providing dispute resolution services for the construction and real estate industries.

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