



RHarper Consulting Update

When Things Go Bad With Your Contractor - Part II

In last month's newsletter, we discussed the warning signs of a Project in trouble and how Owners might reduce and manage the risks. This article will address measures an Owner can take when a Project has gone off the rails – beginning with the immediate engagement of competent construction counsel at the first sign trouble might be brewing.

The most important advice for an Owner: prioritize and focus on the most important issues. Don't get distracted, don't waste time dealing with lesser problems until the basic problem is resolved. Completion of the Project and achievement of beneficial occupancy is almost always the primary consideration., but Owners sometimes become preoccupied with other concerns and turn their attention towards trying to extract concessions from the Contractor, or trying to "win" while the Project continues to flounder. Keeping the team focused on completion should be the overriding concern.

Here are some things Owners can do to minimize risks and do "damage control":

- Adjust expectations - a underperforming Contractor is not likely to magically become a superstar overnight. Push for incremental improvements, particularly where those improvements are focused on recovery and completion are important.
- Documentation - Owners lose most claims because they fail to adequately document problems as they occur. Photographic evidence and clear, concise communications with the Contractor are essential. Good documentation, though, does not necessarily mean that there is effective communication between the parties. Too often, Project communications deteriorate into email and letter-writing battles. Make sure the communication channels remain open.
- Count the money - Provided the Owner has audit rights, it is good practice to commission an audit at approximately 50% completion. Verifying that the amounts requested and paid by the Owner are making it to the appropriate subcontractors and suppliers is one of the best risk management practices an Owner can employ.
- Liens - The Owner should not release payments unless appropriate lien waivers are provided with the applications for payment. Further, if the Owner is receiving notices of liens from subcontractors and suppliers, further corrective action such as issuance of joint checks on future payments is warranted.
- Claims - Once a Project gets in trouble, the frequency of claims for cost changes and time extensions seem to multiply and the Owner can quickly get overwhelmed and defensive. The best advice is to follow the Contract and utilize the resources available, including the Initial Decision Maker or experts. A dispute review board or other embedded neutral can reduce the nuisance claims with early and binding reviews and decisions.

Another trap Owners and Contractors fall into is to start holding disputed claims until the end of the Project. This can be alluring, but it is usually fool's gold. The Owner has the leverage when the claim is settled early, and the Contractor typically has the leverage once the Project is complete. There should be no reason to delay settling the claim unless the value cannot be determined.

Projects in trouble almost never have a winner. The sooner the team becomes focused on completion and taking steps to achieve that goal without extraordinary cost impacts, the more likely the Project can be completed without costly lingering claims and litigation.

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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.