

## Introduction

By Katherine Molly, Managing Partner

In the role of construction claims consultant, my involvement in construction projects occurs when issues arise with contracts, schedule delays or cost overruns. Each project has its own uniqueness, but they all tend to share at least a few of the same root causes. For one, contractors are concerned with winning the bid and then completing the project as quickly as possible to achieve their planned margin. As sophisticated as contractors can be, they are busy on the construction site trying to manage its complexity. On the owner's side, managing a construction project is usually not its core competency. Owners refine petrochemicals, manage hotels, or operate pipelines, not construct a facility. Moreover, construction projects are trending toward more costly and complicated capital expenditures. This added complexity increases the probability for disputes.

Planning for and managing cost and schedule uncertainty is essential to avoiding disputes.

The only thing certain with a construction project is that cost and schedule are uncertain. Not adequately planning and managing those uncertainties or risks can cause significant problems.

Below is a top five list of behaviors that can lead to project trouble.

## IDENTIFY CONTRACT RISKS

### 1. Not evaluating the risks of the project prior to bidding

Prior to an owner developing the bid proposal or a contractor bidding on the project, the parties should thoroughly analyze the potential project risks. One of the most important first steps is to thoroughly review and understand the project scope, responsibilities, and proposed contract documents prior to bidding. By understanding the project delivery methods, the project managers and other supervisory personnel can evaluate project execution risks, such as reimbursement for scope changes or additional time, coordination issues, liquidated damages, changed site conditions, notice requirements and claim/dispute provisions. Secondly, how developed is the scope, and are there contingencies in place to manage an evolving scope? Each party should also look for potential delay and disruption issues that are outside of their direct control, such as equipment delivery delays, work coordination issues leading to productivity losses and labor/material price escalations.

Identify and calculate project risks prior to bidding and contract execution.

## KNOW THE CONTRACT

### 2. Ignoring the contract after it is signed

Rather than relegate the contract to a shelf in the job trailer gathering dust, the parties should thoroughly review the contract during the project and when issues arise, such as drawing revisions, differing site conditions or project disruptions. In order to properly and timely handle problems, the parties need to know the rules of the contract. These rules include what is considered a compensable change or schedule extension, provisions regarding document or site discrepancies, and proper procedures for processing changes or disputes. One of the most common problems on a project is the contractor's, owner's, or owner's

Project managers and other key personnel need to know the contract rules to accurately identify changes and to appropriately follow notification procedures.

representative's failure to recognize a conflict when it occurs. Prompt notice is generally a contract requirement; however, if it is not, contractors should still promptly notify the owner of any conditions encountered. Lack of notice can be a strong defense for owners, and owners should be given the opportunity to seek the most economical course of action in response to a conflict or change. Timely notice in accordance with the contract and exchange of information promotes early equitable resolution.

## TRACK THE PROJECT

### 3. Not continuously tracking schedule and cost changes

The only way to know how a project is financially doing is to have up-to-date cost reports and schedules. This may seem logical and unnecessary to point out, but troubled projects typically share poor reporting and documentation of cost overruns and delays. Is the project schedule being used as a picture or an interactive management tool? It is critical to have regularly updated schedules at various intervals to identify and quantify schedule effects of a disruption or change. Too often after the project starts, only two-week look aheads are utilized, and the original schedule is not updated to show critical path changes. Furthermore, the contractor is not taking advantage of scheduling software tools to manage manpower utilization and other planning measurements.

Keep up-to-date schedules and cost reports to know when a project is entering distress and to quantify the impact.

The importance of accurate cost records cannot be overemphasized, as contractors are generally required to demonstrate that they actually incurred the cost because of extra work, delays, or disruptions. When extra work is identified and separable, the associated costs, including labor and material costs, as well as equipment use, should be recorded under separate cost codes established specifically to quantify them. Scope changes need to be qualified and quantified as they are occurring, not years later during litigation or arbitration.

## TIMELY COMMUNICATION

### 4. Not communicating concerns in written form to the appropriate person

Documentation is a vital construction management function. Documents should specifically cite if planned operations are delayed, prevented, or changed in nature. The most important point about documentation is that it needs to be created in a timely manner. The parties should not wait until a detailed delay or analysis is complete before providing proper notification. Verbal discussions need to be followed up in written form, and if a party disagrees with something written, the party needs to address that conflict in writing as well.

Treating the owner or contractor as a team player versus an adversary is critical in effective communications. Remember that you want to keep the project running smoothly, which means quickly resolving issues. Also, make sure the correspondence is going through the appropriate channels. While it may seem tempting to first send a disgruntled letter to the president of the company, the result does not generally work in your favor.

## RESOLVE ISSUES EARLY

### 5. Waiting until the project is completed to settle outstanding damages and delays

The majority of problems might surface during the mid to end of construction, but they are usually a result of something that took place much earlier, such as during the contract development, design, or procurement stages of a project. However, this is usually the “honeymoon” period of a project, and parties are generally more willing to overlook potential risks. When these risks become issues during construction, for cost benefits, both parties should strive to resolve disputes quickly during construction, as arbitration and litigation are expensive and time consuming. In addition, once the project is completed, both sides can lose some of their negotiation advantages.

Resolve issues early, and keep a team approach attitude to getting the project done.

In the majority of arbitration and litigation cases, the parties did not expend enough effort during the project to settle any disputes. For one, the parties did not spend adequate time constructing change requests that accurately link party entitlement to the resultant damages. Secondly, the parties waited until litigation or arbitration to assess their legal status and damage liability. It is difficult to settle a dispute if a party is unaware of its standing.

## CONCLUSION

In summary, those projects that have constant, active participation in mitigating project risks and in resolving discrepancies and disputes when the issues arise, generally stay out of trouble.

*Katherine Molly is a Managing Partner at Blue Marble Risk Solutions  
For more information, call (713) 974-888 or email [kkmolly@bluemarblerisk.com](mailto:kkmolly@bluemarblerisk.com).*

Blue Marble Risk Solutions is a professional advisory firm based in Houston, Texas that focuses on helping clients manage the significant commercial risks associated with planning and executing capital projects and portfolios. In addition, should construction claims or disputes arise, Blue Marble provides a reactive suite of services that helps clients achieve an equitable resolution.