

## **AN OWNER'S REPRESENTATIVE PROTECTS THE OWNER'S INTEREST AND PROMOTES TEAMWORK AMONG THE CONTRACTORS ON A MAJOR CONSTRUCTION PROJECT**

The other day while lecturing at the University of Wisconsin-Madison to repeat owners of major construction projects, I found that those attending were very interested in learning about the desirable background and responsibility of an owner's representative on a construction project. Apparently, many of the owners had made an unwise choice or were facing the need to make a decision on an owner's representative for the first time. The subject arose initially in discussing the owner's responsibility for coordinating the work of several prime contractors.

Design professionals who have experience in actual construction are excellent candidates to fill the important position of owner's representative on a construction project. All too often owners reach into their own employment ranks and select an executive or administrator who has limited experience, if any, in the design professions or in construction projects. Owners often express the view that the owner's representative is of no particular importance since they have retained a responsible architectural or engineering firm to handle those responsibilities.

Design professionals know that the normal contract between owner and design professional does not call for the design professional coordinating the work of contractors.

There are many reported court decisions holding that the owner who controls the power of the purse has the legal responsibility of coordinating construction among contractors. Contracts between owners and contractors may contain provisions where the owner has delegated that responsibility to a single contractor. Often that contractor is the prime contractor on the project performing the general construction, who has subcontracted with and coordinates subcontractors. Since a prime contractor who has contracted with subcontractors has the power of the purse, such delegation of coordination responsibility is sufficient to protect the owner.

However, where an owner awards several prime contracts, there is no single prime contractor to accept the delegation of the responsibility to coordinate the work of the several subcontractors. In those instances, the owner has an implied responsibility to coordinate the work of the contractors. In instances of multiple prime contractors, some owners will attempt to delegate the responsibility of coordinating the work of the several prime contractors to one of the prime contractors. Such a delegation may not be legally sufficient because of the lack of sufficient authority granted with the delegation. One of several prime contractors may be given the general duty to coordinate work but that prime contractor may have no power to force coordination and cooperation among and between the other prime contractors. If an owner is confronted with a poorly coordinated job, it is quite likely that one or more of the prime contractors will complain about poor coordination and eventually file a claim in arbitration or a lawsuit with the courts alleging that the owner's failure to coordinate the project has resulted in economic losses to the aggrieved contractor. It therefore becomes important to discern where an owner can safely delegate the responsibility of coordinating the efforts of several prime contractors.

It is a basic rule of law that absent an adequate delegation of authority and responsibility to coordinate the work of contractors, the owner retains that obligation and must meet it or suffer the economic consequences. Even where each of the prime contracts contain language requiring the contractors to cooperate among themselves or where one of the contractors has been delegated the responsibility of coordination and the other prime contractors have agreed to adhere to that delegation, courts have held that the owner may not have satisfied its obligation to coordinate the work of the several contractors. One court held:

"It would be contrary to common sense and reasonableness to assume that one who has hired four prime contractors under four separate contracts could completely absolve itself of all responsibility for coordination of their efforts."

Where the owner has delegated the duty and authority to compel cooperation among contractors, the owner has the legal responsibility of ensuring that cooperation. In other words, the owner must by

necessity retain some supervisory responsibility to compel coordination when the contractor delegated that responsibility fails to perform. Other aggrieved contractors whose work is impeded and made more costly would otherwise have a claim of action back against the owner who failed to adequately supervise or compel the coordination responsibility delegated to one of the prime contractors. In addition, unless the delegation of responsibility and authority to coordinate several prime contractors is accompanied by sufficient authority, such as the authority to withhold payments, it may be ineffectual. Since the owner generally reserves to itself the discretion to make payments, a delegation to coordinate to one contractor who has no power to withhold payments may be ineffectual.

This danger that the owner may remain liable for an inadequately coordinated job site even though one of the prime contractors has been delegated the responsibility of coordination and is being paid for it is of great concern to owners, and that explains the abiding interest that owners have in retaining a qualified owner's representative.

The ideal owner's representative will be a design professional with extensive construction experience who has a solid understanding of the construction documents and the techniques being employed to accomplish the construction project. That owner's representative should be expected to detect coordination problems even when they have already been delegated to one of the prime contractors and to take action to rectify them. The owner's representative may be an individual or a construction management firm. Where a construction management firm is retained, the power of the purse may also be transferred by the owner to the construction manager, although this is seldom done by the owner who retains an individual to function as the owner's representative. A construction management contract may call for services far beyond the services rendered by the owner's representative during the construction of the project.

Where the owner's representative detects a failure of cooperation among several prime contractors and an unwillingness to cooperate, the question arises as to whether the owner should take specific action to enforce compliance. With the power of the purse the owner can hold up payments, but the owner will be reluctant to cancel the contract with the nonperforming contractor because of the danger of becoming a breacher rather than a breachee. Non-payment under a construction contract is a material breach by the owner. A failure to efficiently perform on the job site or avoid interfering with the work of other prime contractors may not constitute a material breach. If the owner decides to exercise the power of the purse to persuade the uncooperative contractor to improve its act, the owner may find itself exposed to substantial liability.

No rule of law nor courtroom of talented lawyers will be as successful in protecting an owner's interest as a well-selected owner's representative of a major construction project. The object is to get the job done on time and within budget, but not to finish a job with pending claims and lawsuits. A talented owner's representative will protect the owner's interest while at the same time enhancing the sense of team work among the contractors.

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