ZETLIN & DE CHIARA LLP
COUNSELORS AT LAW

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Affecting the Design, Construction
and Real Estate Industries

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INSIDE THIS ISSUE

Initial Reactions To Web Site Liability Issues

By: Michael K. De Chiara, Esq.

My introduction to a project-dedicated web site was almost two years ago in connection with the Mohegan Sun Casino and Hotel expansion. That project has been an approximately $1 billion expansion of an existing casino to include an addition of the existing casino facility as well as the addition of a major hotel, convention center, sports complex and a multi-story parking facility. Our clients included the lead architect, Kohn Pedersen Fox Associates, P.C., the MEPS engineers, Flack + Kurtz Inc. and the structural engineer, DeSimone Engineering PLLC. Two years ago, as the design phase of the project was beginning, I was literally amazed to learn that all of the design documents for the project were being e-mailed to a dedicated web site location where the designers, the construction manager, the owner's representatives and the contractors for the various trades could have virtual (i.e., small to minute timing differentials between downloading and accessibility) access to plans as they were being completed.

Having spent several minutes being duly impressed by this new application of the existing technology, several questions immediately came to mind.

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Offense Is the Best Defense – Or Is It? The Benefit of Joint Defense and Prosecution Agreements

By: Carol J. Patterson

As the construction of a new fully pre-leased office tower reaches final completion, the owner files a lawsuit against members of the design and construction team. If all goes as planned, the defendants will attack one another with a barrage of cross-claims while the owner sits back and waits in hopes that the members of the design and construction team will succeed in establishing the owner's claims that deficiencies in the design and construction of the project resulted in defects, delays and increased project costs. With liability established by the construction team itself, the owner's counsel can concentrate on the "damages" portion of the case. Before heading down this familiar path, it is worthwhile for the members of the project team to first consider whether there is a better approach. Often there is.

The parties can agree to collaborate on a joint defense of the action. Instead of devoting their attention to defenses which are essentially claims against each other, they can jointly turn their attention to the common elements of their defenses to the owner's claims, such as the inaccuracy of the survey furnished by the owner or the numerous design changes demanded by the owner after construction had commenced. The parties participating in the joint defense effort can agree to delay the resolution of the claims among themselves until the action commenced by the owner has been resolved. By reaching as favorable a result as possible against the plaintiff, the other parties may be able to minimize the costs of their mutual defense by sharing expenses and avoiding duplicative efforts and, if the effort is successful, by reducing the liability they may ultimately have to share.

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Legal Updates

Ratcliff Architects v. Vanir Construction Management, Inc., 88 Cal. App. 4th 595 (Cal. Ct. App. 2001).
Architect brought cross-action for negligence against construction manager for cost overruns at school rebuilding project. The court rejected the architect's negligence claim because the construction manager's contractual duty was to the school district and to impose upon the construction manager a duty to the architect, absent contractual language, would create a conflict of loyalty.

O'Hare v. City of New York, 720 N.Y.S.2d 523 (2d Dept 2001).
A construction company employee who was injured while servicing a pedestal crane at a construction site was engaged in activity protected under the New York Labor Law since his work was part of the ongoing construction at the worksite.

Cullum Mechanical Construction, Inc. v. South Carolina Baptist Hospital, 344 S.E.2d 838 (S.C. 2001).
In South Carolina, courts have held that a special relationship exists between design professionals and contractors and that design professional owe a duty to the contractor separate and distinct from any contractual duties between the parties or with third-parties.

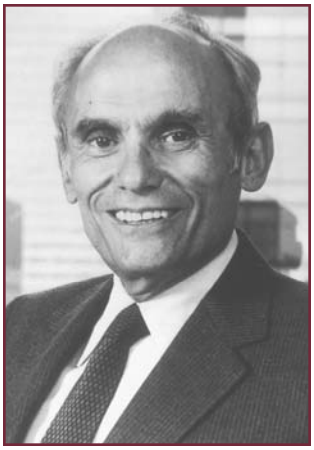
Conversation with John Tishman *Part II*

This is the first in a new series of features in which leaders of the Design and Construction industries will engage in conversations for the benefit of our communities. In this first "conversation," John Tishman, Chairman and CEO of Tishman Realty & Construction Co., Inc., graciously agreed to spend several hours with Michael De Chiara. We hope you will enjoy reading this as much as Michael enjoyed the conversation itself.

Part I of the interview appeared in the Winter 2001 Zetlin & De Chiara Quarterly Review.

Question by Michael De Chiara:
The building we are in now, one that you built – 666 Fifth Avenue – has an aluminum-clad surface, doesn't it?

Answer by John Tishman: Yes. This was our third aluminum-clad building. The first one we built is 99 Park Avenue where it took only six days to clad the entire building. It is now almost 45 years old. The second building was a twin, but much smaller at 460 Park Avenue on 57th Street, where we put up the facade (all 22 stories in just 13 hours), including both street fronts. It caused a big buzz and actually in the end it was very cost effective because of the time and ability to get a very watertight building very quickly.


JOHN TISHMAN

Michael: Are people still using aluminum facades today?

John: They are using aluminum with glass. That's a matter of aesthetics. There is more metal used today, obviously, than many years ago. For a lot of reasons, the metal layout invited new methodologies of installation.

Michael: Again switching gears – the better owners, from your perspective, are the owners that allow you to do what?

John: From our experience we have found that the better situations are where the Owner, Architect and Tishman start from the very beginning as a team. We can be much more effective if we're working with the Owner either before the Architect is hired or at the same time the Architect is hired because our particular experience goes well beyond construction. For instance, it goes into development if it's a commercial building. We know how important proper planning, budgets and timing are. Also, we know how important the interior portion of a project is to an Owner. Too many people start work from the exterior and then fit the interior into it. So, the best projects we've had are the ones with sophisticated, experienced owners who also understand how we can really help them. The best clients have tended to be the larger ones who have previously built a significant project with us and have experience owning and operating their own projects. We've done those types of projects for ourselves for years. Historically, we first concentrated on apartment buildings, then office buildings. We now are also very experienced in hotels and related mixed-use projects. Our experience comes from working on all aspects of construction from operating, renting and development as well as construction. So we can look at the whole project, not only construction, to the end of satisfying the totality of what the client needs as well as what the client would want if he had our level of knowledge and experience.

> *"The better Architects are not covetous of their design and accept even welcome input from their engineers and the construction manager..."*

Michael: John, a fair number of Architects will be reading this interview and I'm going to go out on a limb and say that the architectural profession is in a lot of trouble today and it seems to me, and I have many major architectural clients, that they have trouble realizing profits as a firm or as an industry and they seem to have lost some credibility as construction professionals. You know, we talked about the Architect as the master builder pre-World War II, and they seem, again in my experience, to have become somewhat marginalized in the construction process. Is there any advice, based upon your experience with Architects in your career, that you could offer the profession on ways they might improve what they do?

John: Some Architects look at themselves from the point of view of designing a building that is very user friendly to meet the Owner's program and then shaping the building aesthetically around its required functions. Then there are other Architects who are great sales people who start from the outside with the aesthetics and then attempt to fit in the required functions after the fact. I had one experience where the Architect was talking about the colors in the main areas and made a big presentation focused mainly on the colors of the project. He literally ignored the other aspects of the building in his presentation. There was a lot of snickering when he left.

Michael: How can Architects improve their services?

John: In my view, the better Architects understand that design and construction is a joint process. The better Architects are not covetous of their design and accept even welcome input from their engineers and the construction manager so that they can create a more efficient design and construction process. Really good team effort starts at the beginning of design with the structural and mechanical engineers, the Architect and builder with experience. Unfortunately, what can happen is that the Architects start out too fast on the aesthetic solution and ignore or don't pay enough attention to other cost and construction issues early in the process. If they can bring others in and welcome their input in the early design phases, we may end up with better planned and designed projects which will be easier and cheaper to construct and may be more innovative from a construction point of view. I believe that the structural engineer all too often just accommodates an Architect's desires and is sort of afraid, certainly in front of the client, to tell the Architect to put one more of this here or do that and work around it even though small changes could create significant savings for the Owner. Since engineers are typically retained by Architects they are reluctant to make suggestions which might affect the Architect's design, no matter how minimally, in front of the client. The better Architects are not so insecure and welcome such discussions.

Michael: In terms of the construction business, or the construction profession over the last fifty years, I guess from what you've said, it's fair to say that your view is that it has increased in quality. Would that be an accurate statement?

John: Well it has certainly become more complex. And it's gone up and down in quality, depending on what product you're talking about. It tends to go up and down by the demands of the user. There was a period where everybody was building elaborate exteriors regardless of the location or ultimate users of the building. The emphasis on posh exteriors was coupled with a certain disinterest in overall utility. Also, quality can be measured in many different ways. Technologically, buildings have certainly improved. However, depending on the budgets and objectives of the Owners, Architects and builders, quality will fluctuate. In years past we had incredibly skilled craftsmen who did amazing work. Generally, they don't exist today. With fast-tracking and mismanaged value engineering, quality has suffered. On the other hand, with new materials and green buildings and the like, buildings are becoming more environmentally sensitive.

Michael: It sounds like we've come a long way from Mies van der Rohe's admonition that "form follows function."

John: Unfortunately, some of the strongest sales-oriented Architects have survived and have gotten big names by going the other way. The result is that all too often function follows form and exterior. I have never seen architectural tempers and emotions flare as when some of the leading names in architecture are asked to actually talk about the utilitarian aspects of their designs. Now, as far as I'm concerned, it's great to have a very, very good exterior and love it. But design must fit its intended use. Buildings that are highly designed are usually not economically beneficial for the first user. Though they're better economically for the next user.

Michael: As you look forward – this is an interesting industry and you are in a unique position as you sit at the helm of your family-run empire – from your perspective and it looks like this will be passed along for at least two more generations that I can see–what do you think are going to be some of the problems facing the construction industry that either your children or your grandchildren or their progeny may be looking at?

"This brain drain will continue to pull many of the most talented engineers into other areas and will limit the innovation in the construction industry."

John: One thing we're facing right now is we're not developing as many technically-oriented and well-trained people in the architectural, engineering or the other construction disciplines because of a tremendous need for engineers and designers of all kinds of communications and high technology industries. It used to be aerospace, then computers and now, the internet. This brain drain will continue to pull many of the most talented engineers into other areas and will limit the innovation in the construction industry. With the globalization of the world's economy, there will be economic challenges we can't fathom today. Also, given the continuing downward spiral of fees and increases in risks and litigation, there will be an acceleration of consolidation on a multinational scale which could affect how we do construction in the future.

Michael: All computers and internet? So you think the best and brightest are no longer coming in to the study of architecture and construction-related sciences?

John: I think the pay scale has gone out of kilter. So I think that's a challenge for the design and construction industries. Of course, the computer and internet technologies, on the other hand, can also benefit construction.

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Conversation with John Tishman *Part II*

Michael: Speaking against my profession, it's been my view, and I'd like to get your view on it, that lawyers have done more to mess up the construction process than any other force and by that I mean people are more reluctant to be innovative because if they fail there inevitably will be litigation. We seem to be far more litigious today than we were 30 or 40 years ago and I think that's dampened people's innovative spirit to some extent. Do you agree?

John: I agree that lawyers in so many fields have unnecessarily complicated those fields and it will only get worse. When the lawyer was practical and knowledgeable and was familiar with the entire construction process or real estate process the deals were structured with more logic, thought and consistency. They were also easier to understand. Today, most lawyers are so concerned with representing only one side of a transaction and the contracts, whether for construction or real estate, they have become convoluted documents barely comprehensible to the lawyers who drafted them. Often they can't even understand what the deal was about when they're through. This, coupled with the increasing costs, risks and fears of litigation have created a real problem. However, it's in every industry today so something's got to be done about limiting liability, which is now stifling creativity.

Michael: Just a few more questions and then we will wrap it up and I do thank you for being gracious with your time. These are going to be more general questions, but they will be of general interest. Professionally, of what projects are you most proud?

John: Well, obviously I'm proud of having started the construction management field on some of the largest projects ever built, such as three 100-story buildings, the Hancock Building and the Twin Towers of the World Trade Center here in New York. For a while, we were the only ones who built any 100-story buildings. I'm very proud of the landmark buildings that we worked on. I've often said that I am very proud of the restoration work, particularly, Carnegie Hall and the Weill Theater, where I was very honored to faithfully restore the old while incorporating new technologies. I am very proud of our own development projects such as our hotels which are highly regarded. For instance, our new hotel in Chicago is probably the most successful new hotel anywhere in terms of size, shape and utility. And the work we're doing here in New York. I'm proud of the J.P. Morgan headquarters building. But I'm more proud of doing that at the same time as we're doing the Carnegie Hall restoration. I'm very proud of the work we've done down in Orlando for Disney and the work we've done for ourselves simultaneously and on Disney property which is very innovative but practical and has worked out wonderfully. I get more of a kick out of that. I think spiritually I get the biggest kick out of landmark restoration.

> *"A lot of people are afraid to follow intuitive thinking and they look for sources of support..."*

Michael: John, a very personal question – do you think you could have worked for anybody else?

John: Well, Michael, in the beginning I worked for my uncle so of course I could have. If things hadn't just fallen the way they did, I probably would be a school teacher and I still have a passion for education. I spend much more time now with education, a lot more time.

Michael: But even teaching is an independent profession. I mean there you would be teaching, but you would be John Tishman teaching maybe not the great builder but…

John: I know your question, but I don't know. I wasn't brought up, nor have I ever been satisfied with purely doing what I'm told, you know, with a structured hierarchy. I've always felt independent.

Michael: Just two more questions. First, in your non-professional life, is there anything that comes to mind of lessons that you've learned that's really carried over into your professional life?

John: One thing is that I respect people for what they do rather than what their position is. I've always had that feeling. I thought that in school when we called our teachers by their first name, we had no respect for them. Respect is something you earn from what you do and who you really are, not from having a title, rank or some position. I've applied that to people in my company, my colleagues and my clients. Respect and value people for who or what they really are.

Michael: In parting, are there any thoughts that you would like to share with people who may be reading this within the next few months or some years from now?

John: No, I think life is full of opportunities that just fall in a way and you have to recognize them and as far as I'm concerned I never worry about making a wrong decision. I am very easily persuaded to turn 180 degrees in the other direction. I think it is important to make decisions and move forward and to follow intuitive thinking. A lot of people are afraid to follow intuitive thinking and they look for sources of support even though they're always following intuition anyway. Think about it. They select the sources of their information and

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Offense Is the Best Defense – Or Is It?
The Benefit of Joint Defense and Prosecution Agreements

Joint defense arrangements can be especially effective in complex construction cases. The benefits can be maximized when a joint effort is considered at the beginning of a case. The key to success often lies in the co-defendants' ability to develop and adopt a coordinated defense theory before the litigation enters the discovery phase. An effective joint defense arrangement provides a working framework for evaluating alternative theories and developing a mutually beneficial strategy.

The same principles apply to joint prosecution efforts. For example, the architect, the MEP engineer and the structural engineer on a project may benefit from jointly pursuing their fee claims against the same client. Alternatively, an owner may enlist the cooperation of the design team in pursuing claims against a landlord who has failed to honor its obligations under a work letter. To secure such assistance, the owner may agree to waive or delay pursuit of claims it may have against the design professionals.

Confidentiality: The Applicable Privileges

The strength of a joint arrangement is the sharing of information and resources. Each co-party shares with the other co-parties information that normally falls within the confines of the attorney-client privilege and/or attorney work product doctrine, without fear that the confidentiality of this information is compromised. Access to more complete information early in a dispute can enable participants to formulate a more effective trial strategy. Such non-adversarial pooling of information may result in significant cost savings to each co-party including sharing the costs of experts, databases, exhibits and legal resources. Maintaining the confidentiality of such communications is essential to the success of any joint defense or prosecution arrangement.

Participants in a joint defense or prosecution agreement must be mindful of the factors that establish and maintain the joint defense or common interest privileges. First, the communications must have been confidential and made in the course of a joint defense or prosecution effort. Second, the statements and/or confidential information shared must be for the purpose of mounting a common defense or prosecution, and/or designed to further the joint effort. Communications concerning matters of conflicting interest or which do not further the common interests of the co-parties are not deemed protected by the privilege. Finally, the privilege must have not been waived by one or more of the parties to the joint effort.

Since waiver destroys the joint defense privilege, parties should consult with counsel to learn the types of circumstances that may be construed by the courts as a waiver. For instance, communications between a party and a co-party's attorney outside the presence of his own lawyer may be privileged, but a discussion between two co-parties outside the presence of any lawyers is probably not privileged. Another concern is whether one member of the group may disclose information and in so doing waive the attorney-client privilege on behalf of the others. Generally, voluntary waiver of the joint defense privilege requires unanimous consent of all participating members. To avoid inadvertent waiver of the applicable privileges, all participating parties must know what to expect at the outset.

Ethical Considerations: Be Aware of Actual and Potential Conflicts of Interest

Before entering into a joint defense or prosecution agreement, clients should be aware of the special ethical considerations such arrangements raise for the attorneys involved. First, joint arrangements appear to pose an inherent conflict between an attorney's duty to zealously represent the interests of his client and the obligation to maintain the confidentiality of the privileged communications received from other participants in the joint defense or prosecution group. Such conflicts may arise even when a joint effort appears at the outset to be completely harmonious.

In the event that the parties agree that their interests would be best served by representation by a single firm, it is especially important to confirm that each party is aware of potential conflicts that could arise. The parties may agree that withdrawal of one party from the joint defense or prosecution group does not require joint counsel to withdraw.

Participation of independent counsel for each collaborating party, however, does not eliminate the risk of potential conflicts. For example, what happens if one participant in the joint defense or prosecution settles prior to trial and threatens to give testimony contrary to statements its representatives previously made in joint defense meetings? Can counsel for the remaining joint defense members use these inconsistent statements to question the "turn coat" at trial? While it is impossible to foresee all of the ethical dilemmas and conflicts that may arise in the course of a particular dispute, it is essential for counsel and all parties to give careful consideration to various possibilities and discuss them openly.

Get it in Writing: Confirm the Parties' Understanding in a Written Agreement

The first question to be asked is who will participate in the joint arrangement. It is not necessary that all of the participants in the joint defense or prosecution have identical positions, but they must be able to develop a joint discovery and litigation strategy. For example, if an architect is convinced that the owner's design-related claims have merit solely because of errors in the structural engineering documents prepared by the owner's engineer, a joint defense including the architect and structural engineer will

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The Benefit of Joint Defense and Prosecution Agreements

not be possible. All interested insurance carriers must be consulted to avoid coverage issues. It may be advisable for the carriers to be parties to the agreement.

Once parties have agreed to a joint effort, the terms of their cooperation should be documented in an agreement signed by all participants and counsel. The written agreement will confirm the applicability of the attorney-client and work product privileges and avoid future misunderstandings regarding a variety of critical issues, including the extent of the parties' cooperation in sharing information and costs. A joint defense or prosecution agreement should specifically address the obligations of counsel and the parties during and after the resolution of the dispute. It is important to discuss with counsel each of the elements of the joint defense or prosecution agreement including the following:

- *The collaboration will focus on mutually beneficial strategies to further the parties' common interest and may not advance all arguments which may benefit each party. If a party has a clear winning defense which is unavailable to others, participation in a joint defense makes little sense.*
- *Cross-claims among the participants are held in abeyance to benefit all parties in pursuing their joint defense or claims.*
- *The parties may provide rules for opting out of the group by settling or otherwise and specify what notice is required and what the parties' respective obligations are with respect to the privileged information after such withdrawal.*
- *In cases where the parties have separate counsel, confirm whether joint counsel have an attorney-client relationship only with their respective clients.*
- *Parties are obligated to maintain the confidentiality of joint defense or prosecution information after a matter is resolved. Often the parties agree to mutually oppose any third party attempt to obtain confidential information.*
- *What type of information will be exchanged? Will there be a uniform exchange procedure which will be strictly adhered to during the entire joint defense arrangement?*
- *Will information shared with one participant be shared with all?*

Since the parties to a joint defense agreement are agreeing to put aside their differences until the resolution of the claims which they are banding together to defend, they may run the risk that by the time the main action has been tried and appealed, the applicable statute of limitations on their claims against each other has run. If the parties have agreed to resolve such claims later, the details of this resolution process must be spelled out clearly. Since many parties will have pulled their punches during the main action, reliance on the ultimate verdict may not be fair. Typically, the parties have sufficient information to enable them to resolve any remaining claims among themselves expeditiously. To avoid the expense of a second litigation, parties often agree to resort to alternative dispute resolution procedures such as mediation or mini-trials to resolve any remaining disagreements regarding the allocation of a settlement or an adverse judgment.

Conclusion

Clearly, the potential risks and benefits of such joint efforts must be carefully evaluated on a case by case basis. In many situations, individual parties may be better off on their own. Often, however, joint defense and prosecution agreements can be very effective. In promoting the unified strategy consistent with the interests of all participants and/or sharing the rising expense of expert witnesses or consultants, a joint defense or prosecution can facilitate the conduct of a joint litigation effort that benefits all of the individual parties.

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Conversation with John Tishman *Part II*

they select the people they talk to. Usually not from a plan but from a feeling or inclination – an instinct. So, I drive people crazy when they say, "Why do you think that would work?" and I say, "I feel it would work because feeling is the basis of all decision-making." I've been with people who say they will get the facts from "here" (pointing to his head) and I say but why don't you get them from "there" (pointing to his stomach). I think and feel this source is better (pointing to his stomach). So in a way they've put in their intuition but they aren't willing to say it's an intuitive decision.

Michael: John, thank you very much for your time and I look forward to having this put into a form where others can share what you've shared with me today.

Thank You.

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Initial Reactions To Web Site Liability Issues

First, will all the information intended to be transported, in fact be transported without errors in the transmission? I was assured by my clients that there were no transmission issues. Though I was trained as an engineer, and schooled as an architect, I maintain to this day a healthy suspicion regarding technology generally, and new technology, in particular. This probably explains my well known ambivalence towards flying. My natural skepticism lead me to remind my clients that on a billion dollar project, a small transmission error or mistake might be their last professional error or mistake. This led to a flurry of discussions regarding the issue of liability for transmission errors should they occur.

Our best answers then and now regarding potential liability for transmission errors in connection with project web sites, consistent with long established legal doctrine, is that "it depends." It depends on such factors as who is responsible for setting up the web site. Who is responsible for the transmission in question? Who is maintaining the web site? What protocols have been established to monitor and maintain quality controls? What did the contracts say regarding web site liability? What did your particular firm do under the unique circumstances of your web site and your project to check or otherwise monitor that the electronic information they conveyed was, in fact, received in the form intended?

"It depends" sounds simple, but as we all know, it never is. The simple truth is that at present, the liability issues regarding faulty transmissions to project web sites is an area with no established law. We can probably predict where the cases will end up, but you do not want to be the test case. Therefore, your best protection is strong contract language which limits your liability for web site transmission errors.

The second question which immediately came to mind had to do with information tampering. Perhaps only lawyers think like this. But if just a few lines could be changed on a few drawings out of hundreds which are stored electronically on a dedicated web site, the results could be catastrophic for some, and present an extraordinary opportunity for chicanery and profit for others. Again, I have been assured that this could not happen. However, in a world where a 15-year old boy in the Philippines was able to cause massive damage to a stunningly large percentage of this country's commercial P.C.'s, my natural skepticism leads me to conclude that this is a very real risk.

The standard answer given by lawyers in this situation is that the prudent designer should keep record hard copy sets to establish what the actual electronic transmissions were at specific points in time. However, if you are dealing with a truly "real time" web site, there may be numerous iterations of drawings in electronic format and thus there may, in practice, be transmissions between "record sets" which are not memorialized by hard copies. I am told that the current technology could, at significant cost, permit a forensic computer/web expert to reconstruct all transmissions to determine whether the designer's transmissions ever included the changed data. However, the costs of this type of investigation may be prohibitive and the ability of an expert to reconstruct these transmissions is not an absolute certainty. The answer regarding liability for tampering is another "it depends."

Finally, my last initial reaction to this new web site-based technology was somewhat philosophical and somewhat borrowed. I began practicing law almost eighteen years ago. Virtually prehistoric times relative to the current web and electronic technologies. At that time, one of the country's top municipal finance lawyers (George Boyle) was my mentor. He was, at that ancient time, lamenting the new technologies of the day, the dreaded fax machine and the more dreaded word processor. I thought my mentor to be archaic and anachronistic in his views; with the advent of those two innovations, the "real time" that thoughtful professionals had to evaluate, consider, weigh, discuss and analyze facts and issues had been unacceptably reduced from weeks to days. This, in my mentor's view, was leading to much more sloppy, ill conceived and poorly planned analysis of the pressing legal issues and problems of the day. Well, what does George think of a business environment that has web-based, nearly instantaneous electronic transmissions? On projects which are becoming more and more complex, what are we losing with a technology that may change response times from days to hours? From a legal perspective, what liabilities do you create for yourselves if you don't build into your "real time" technologies, the adequate time for analysis and review? In the end, the risk of loss of proper and thoughtful analysis and review of issues and implications relative to your designs may be the greatest legal and practical risk of this unstoppable new technology.

Overview of Cumulative Impact and Equitable Adjustment Claims

By: Scott K. Winikow

During the course of a construction project, it is quite common for an owner to request numerous changes to the project. These changes have both a direct and indirect impact upon the contractor's costs. A change order typically resolves the direct impact upon the contractor's cost, i.e., the cost for the labor and materials of the extra work. In order to accomplish the extra work, the contractor may reallocate its resources impacting portions of the work that are otherwise unrelated to the change. The extra work may also affect the productivity of the contractor's laborers or change the project's working conditions. Because these indirect impacts are often unforeseen or unknown at the time the change order is executed, the change order may not reflect these costs.

"A fully-executed change order is often the most significant hurdle that a contractor must overcome when seeking to recover on a cumulative impact claim."

By a cumulative impact or equitable adjustment claim, the contractor seeks to recover its loss of productivity that resulted from a series of owner-requested changes. Cumulative impact claims have been found viable when the changes requested by an owner reach such a magnitude that the changes are deemed to affect the contractor's performance. Although more then a single change order is necessary, there is no bright line rule concerning the number of change orders an owner must request, or a percentage change in contract price, that is needed in order to substantiate a cumulative impact claim. Furthermore, a contractor is only entitled to recover damages for the impact caused by owner-directed changes. Any delays or disruptions caused by the contractor or other contractors must be eliminated from the cumulative impact claim.

In order to prove a cumulative impact claim, the contractor must be able to show that the changes disrupted its performance and that it incurred additional costs as a result of this disruption. A general unsupported statement that the contractor suffered an impact because of changes to the project is insufficient to sustain this burden.

A fully-executed change order is often the most significant hurdle that a contractor must overcome when seeking to recover on a cumulative impact claim. Typically, the owner will argue that the change order incorporated the claimed costs or that the contractor should be precluded from asserting any claims for these costs, because the claimed costs were known, or should have been known, to the contractor at the time the change order was negotiated.

Federal Board of Contract Appeals ("BCA") and the United States Court of Claims do not automatically reject cumulative impact claims because of the existence of fully executed change orders. Instead, the federal BCAs and United States Court of Claims examine the totality of the circumstances surrounding the negotiations over the change orders. If it is determined that the contractor failed to incorporate known costs, or if these costs should have been known to the contractor at the time the change order was negotiated, the contractor will probably be prohibited from recovering these costs at a later time. On the other hand, contractors have been found to reserve their claim if they are unable to accurately estimate the impact until after the completion of the project.

Another obstacle that a contractor must overcome in seeking recovery of a cumulative impact claim is a contractual notice provision contained within its contract, which requires a contractor to notify the owner within a certain amount of time after receipt of the executed change order of any claim for equitable adjustment. Federal BCAs and courts construe these notice provisions more liberally then several state courts. For instance, New York courts require strict compliance with notice provisions. In connection with a New York State public contract, the failure of a contractor to notify the municipality of the increased costs resulting from a change order and/or provide an itemization of these costs in a timely manner may result in a forfeiture of an equitable adjustment claim.

Lastly, a cumulative impact claim can be defeated by a release from the contractor running in favor of the owner. In New York, a release will be given full force and effect according to its terms. Thus, if the contractor provides a release to the owner, or if the contract provides that acceptance of final payment is deemed a release and the contractor accepts such payment, the contractor may be barred from pursuing its claim for cumulative impact loss or equitable adjustment.

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