

Workshop T7

Tuesday, October 30, 1:30–3:00 p.m. and 3:30–5:00 p.m.

CONSTRUCTION PHASE STRATEGIES FOR DESIGN PROFESSIONALS

Presented by



Bob Gillcrist
Senior Vice President
Director of
Project Management
HOK



James Schwartz
A&E Underwriter—
Specialty Lines
Beazley Group



Edward V. McNeill
Senior Vice President
Turner Construction
Company

Design professionals face some of the most challenging aspects of their services during the contract administration (construction) phase of the project, where competing interests and other undercurrents are often at play. Unlike the design phase, where many issues are black and white, the construction phase is a dynamic process with great propensity for conflict. This workshop will help project participants minimize the potential for disputes and keep the project running smoothly.

- Examines the most common sources of construction disputes and how they develop during the project.
- Discusses the responsibilities of design professionals during the course of construction.
- Provides proactive strategies for mitigating and resolving conflict among project participants.



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Bob Gillcrist
Senior Vice President, Director of Project Management
HOK

Mr. Gillcrist is one of the presenters for Workshop T7, "Construction Phase Strategies for Design Professionals," on Tuesday afternoon. He joined HOK in 1994. With more than 26 years of experience, most of which are in project management and administration, his responsibilities include the establishment and maintenance of a construction administration program for HOK. In this role, he develops and promotes processes, procedures, training, and leadership for the Construction Phase services provided by the firm. Mr. Gillcrist also develops tools for use in project management throughout HOK, including Web-based tools that allow clients, consultants, and contractors to interact more collaboratively with HOK on their projects.

Mr. Gillcrist participates in the development of training programs for project managers and works directly with them to implement this knowledge for the benefit of projects and clients.

In addition, Mr. Gillcrist has served as project manager for many significant projects.

James Schwartz
A&E Underwriter—Specialty Lines
Beazley Group

Mr. Schwartz is one of the presenters for Workshop T7, "Construction Phase Strategies for Design Professionals," on Tuesday afternoon. He is an Architects and Engineers E&O underwriter and risk management resource for the Beazley A&E team.

Prior to joining Beazley, he was a partner in the Boston law firm Donovan Hatem LLP, where he specialized in representing architects and engineers in the context of professional liability claims. He also provided risk management services to architects and engineers on a nationwide basis.

Mr. Schwartz is a frequent presenter on A&E professional liability issues, speaking at more than 40 engagements in the last 6 years for various A&E firms, AIA events, ACEC events, Build Boston conventions, broker events, and insurance company events. He also produces and presents quarterly risk management Web-based seminars for Beazley insureds, and is the editor and author of the quarterly *Beazley A&E Reporter*. Mr. Schwartz was also a contributing editor, *State by State Guide to Construction Contracts and Claims*, Aspen Publishing.

Mr. Schwartz graduated from Brooklyn Law School and the University of Michigan. He sits on the ACEC Legal Counsel Forum and is a former Board member of the ACEC Massachusetts and Design-Build Institute of America, New England chapter.

Edward V. McNeill
Senior Vice President
Turner Construction Company

Mr. McNeill is one of the presenters for Workshop T7 on Tuesday afternoon. He is a 28-year Turner veteran serving as Senior Vice President of Construction Operations, is responsible for operational quality, consistency, and risk management in Turner's 44 regional offices. He works closely with the Operations Managers and Senior Leadership of Turner on the complex challenges of and unique solutions to numerous projects undertaken worldwide every day. Mr. McNeill's career progression from Field Engineer and Chief of Party through OM and GM in a Business Unit help in the understanding of business pressures and execution of effective teamwork.

Mr. McNeill has acquired his operational skills in Boston, Pennsylvania, New York, Chicago, and Florida and on a variety of notable health care, pharmaceutical, hotel, stadiums, and other commercial buildings.

He is a 1979 graduate of Penn State's Architectural Engineering College.



Construction Phase Strategies for Design Professionals

Presented By:

Bob Gillcrist
Sr. VP, Director of Project Management
HOK
Kansas City, MO

James Schwartz
Specialty Lines, A&E Underwriter
Beazley Group
Boston, MA

The Architect's View

2

The CA Phase cannot be treated as the stepchild phase of a project that gets little or no attention or respect. A company must apply some basic level of guidelines in the following areas:

- Complete and consistent company process
- Contract language
- Defined procedures for delivering the contracted obligations

3

Construction Administration: Company Process

- CA manual of how your company approaches CA services
- Training of staff that will be involved in the CA phase
- Selection of appropriate staff to serve in the CA role
- Kickoff meeting for the Design Team, Owner, and Contractor on how your company and your entire team will perform CA services
- Monitor basic project metrics (numbers of RFIs, performance on turnaround of information, quality of Field Reporting)
- Plan for the closeout phase of CA with the Design Team, Owner and Contractor

4

Construction Administration: Contract Language

- Language must define your responsibilities
 - Specific number or frequency of site visits
 - Limit review of submittals
 - Specific number of visits for Punchlist
 - Can't stop work
 - Not responsible for means, methods, etc.
 - Don't perform inspections
 - Don't perform continuous site observations
 - Define the Construction Delivery Method

5

Construction Administration: CA Procedures: Team Approach

- It is imperative that all parties approach this phase with:
 - The understanding that this is a team effort. It only takes one member to be a “non-team-player” to ruin it for all
 - A common goal for a success
 - An understanding of and respect for each party’s roles and responsibilities
 - Agreement that the first priority for a problem is its **SOLUTION**, not blame
 - A willingness to share, communicate and collaborate

6

Construction Administration: CA Procedures: Endeavor to Guard Client

There is a concept common in most Owner/Architect agreements that guides our role in CA:

“...architect shall endeavor to guard the owner...”

What this entails:

- Identify problems/discrepancies
- Follow through on these discoveries

7

Construction Administration: CA Procedures: Site Observations

- Regardless of the level of site observation required by contract (full-time, 1/wk, 1/mth, etc.), our purpose is the same:
 - Identify progress of work
 - Identify nonconforming work observed
 - Communicate findings
- Responsible observation and reporting are necessary to guard the Owner against defects and deficiencies in the work.
- Per AIA GC 4.2.2 we are not "...required to make exhaustive and continuous onsite inspections to check quality or quantity of the Work."

8

Construction Administration: CA Procedures: Site Observations (continued)

- Identify any observations which you believe do not conform to the requirements of the contract:
- Follow up on such observations
- Communicate observations to the Contractor timely
- Items must be definite. Do not say "I think that wall should be 4" CMU." If you are not sure, then research the issue before reporting on it.

9

**Construction Administration: CA Procedures: Site Observations
(continued)**

Equally important is identifying work that is in conformance:
“Progress of Work”

- ❑ Provide detail of the work in progress. For example, don’t just report that “curtain wall is being installed” but provide details of the installation.
- ❑ If simply reporting that “curtain wall is being installed” and you don’t see, or report, that pieces of drywall were used for shims, then you will have some explaining to do when that curtain wall begins to fail. While we are not required to “make continuous and exhaustive” observations, we are expected to provide competent and thorough observation of those pieces of the work that we do review!

10

Construction Administration: CA Procedures: Applications for Payment

- ❑ This is the means by which contractors get paid for work completed. If **under paid** they could go out of business, if **over paid** the owner is at risk if they do go out of business:
 - Review based on % complete, not on dollars spent
 - Consultants must review and comment on their aspects of the work
 - If client wishes to approve payment contrary to our advice, approve the payment amount, but submit our position in writing to the client

11

Construction Administration: CA Procedures: RFIs

- It is important to understand that because a Request for Information (RFI) might pose a legitimate question, does not mean that the Design Team has done something wrong. ALL RFIs must be dealt with equally:
 - Read and understand what each RFI entails as soon as received
 - Respond as quickly as possible
 - Understand the reason for an RFI (categorize)
 - **DO NOT** recreate existing, or generate new, information when the documents already provide sufficient information
 - Do not contradict information in the documents

12

Construction Administration: CA Procedures: Submittals

- It is imperative that you treat submittals with the utmost urgency and respect. The Design Team's input is a necessary element of the Construction Team's ability to deliver the work.
To this end:
 - Upon receipt determine what each submittal entails
 - If a submittal cannot be reviewed, return it immediately
 - Review and return ASAP; do not wait until the end of the allotted time to complete, or worse, begin your review
 - Track dates that contractor is scheduled to submit, in addition to the actual date that you receive a submittal
 - Enter in the log reasons that a submittal cannot be returned in the allotted time

13

Construction Administration: CA Procedures: Modifications

- Modifications include any change to the construction documents after the start of construction. These changes can be initiated by the Owner or Contractor, or can be the result of necessary changes to the Design Team's documents.
- To the extent possible, or permitted/required by contract, you shall participate in the review of ALL cost issues, as you may need to defend such extra project costs at a later date and won't be in a position to do so if not familiar with the decisions that led to the acceptance of such costs.

14

Construction Administration: CA Procedures: Closeout

The closeout phase of construction is often the most hectic and least controlled. Long before closeout activities begin facilitate a meeting with the Owner and Contractor to plan all aspects, and roles & responsibilities of achieving SC and Final Completion.

- Define Substantial Completion
- Define punchlist
- Begin discussion of schedule of turnover
- Define Final Completion

15

Why Do CA Phase Services?

The Legal Viewpoint

16

Why Do CA Phase Services?

Shield

- Pick up errors and omissions that occur during design.
- Minimize the impact of coordination issues.

Sword

- Be a player at the table.
- Real time response to problems, criticisms, allegations.

17

The Standard of Care

- **“WHAT AN AVERAGE DESIGN PROFESSIONAL ON A SIMILAR PROJECT IN A SIMILAR LOCALE AT A SIMILAR TIME WOULD DO.....”**

18

That's Not All....

- Specific Contract Requirements
- Codes, Laws and Municipal Ordinances
- Whatever Else the Opposing Expert Cooks Up

19

Specific Contract Requirements

- Clearly define your responsibilities
 - Clarity
 - › Avoid ambiguous language
 - › Consider the client's level of sophistication
 - Definition
 - › Write a detailed scope that can help manage expectations and avoid disappointments.
 - › Clearly define limits of your basic services.
 - › Clearly define – by inclusion– the services you will provide.
 - › Avoid open-ended scope
 - Competency
 - › Scope falls within your traditional role.
 - › Manpower and skill set to carry out scope.
 - › Use consultants as necessary.

20

Contract Administration: Other Contracting Considerations

- Retain right to review and approve the contractor's general conditions for:
 - Consistency with your agreement
 - Responsibility for safety of workers
 - Submittal schedules and timing of services
 - Requests for information
 - Substitutions/"Or-Equal"
 - Indemnity from contractor
 - Waiver of subrogation
 - Additional insured status

21

Jobsite Safety Issues

Bases of Responsibility

- Specific Contract Duties
- Assumption of Noncontractual Duties
- OSHA

22

Jobsite Safety Issues – Contractual Duties

- Scope of Services
- Means and Methods; Site Safety
- Authority to Stop Work
- Review of Submittals
- Purpose, role and extent of site presence

23

Jobsite Safety Issues – Assumed Duties

- Do not act outside of contractual scope
 - Assumption of duties through conduct
 - Actual involvement vs. contractual requirements

24

Jobsite Safety Issues – OSHA

- Must perform actual construction work or *exercise substantial supervision over actual construction.*
- Review commission will consider:
 - Extent to which party was involved in multitude of different sorts of activities that are necessary for completion of project; and
 - Degree to which party is empowered to direct or control the actions of trade contractors.

25

CLAIM SCENARIOS

26

Case Overview No. 1

- Project involved construction of outfalls to two wastewater treatment plants.
- Engineer provided design and CA services.
- No responsibility for site safety or means and methods of construction.
- No authority to stop the work.
- During construction, the Contractor discovered methane in a tunnel, constituting a differing site condition.

27

Case Overview No. 1

Engineer proposed four possible contract modifications:

- Increasing ventilation in the tunnel
- Eliminating sources of ignition on machinery
- Providing additional methane monitoring
- Making personal safety equipment available.

28

Case Overview No. 1

- An explosion in the tunnel killed three employees of the Contractor.
- OSHA investigation ensued.

29

Case Overview No. 1

OSHA Review Commission findings:

- Acknowledged Contractor's responsibility for safety but rejected Engineer's argument that it lacked contractual authority over means and methods.
- Noted that contract modifications relating to methane were specifically related to elimination of a substantial safety hazard.
- Concluded that Engineer was "the nerve center through which means were developed and implemented for allowing work to be conducted in light of a major safety hazard."

30

Case Overview No. 1

The Problem:

- Through its conduct, Engineer put itself in the midst of a construction means and methods/jobsite safety issue.

The Result:

- Drawn out OSHA process costing hundreds of thousands of dollars.

The Lesson Learned:

- When it comes to safety, do not go beyond contractual or ethical obligations.

31

Case Overview No. 2

- Architect was retained to design a gymnasium addition to a church.
- Design depicted wall padding and specified installation per manufacturer's instructions, which indicated to install 3 inches above floor.
- Contractor submitted shop drawing indicating intent to install pads 12 inches above floor.
- Architect approved shop drawing.
- Several years later, plaintiff slides headfirst into wall and sustains catastrophic injury.

32

Case Overview No. 2

- The Problem:
Approval of shop drawing despite deviation from instructions
- The Result:
Policy limits loss
- The Lesson Learned:
Pay particular attention to known and/or delineated changes to plans and specifications

33

Case Overview No. 3

- Architect was retained to provide full scope on residential development. Project financed through lender.
- Architect rejected certain Work performed by the Contractor but approved a payment application containing the cost of the rejected work.
- After payment pursuant to the approved application but before the rejected Work was remedied, the Contractor went out of business.
- Developer had to pay another contractor to re-do the work at additional cost.

34

Case Overview No. 3

- The Problem:
Approval of a payment application despite rejection of Work contained in the application.
- The Result:
\$50,000 settlement
- The Lesson Learned:
Processing of payment application is not just ministerial in nature; there is a substantive aspect.

35

Case Overview No. 4

- Project involved the design and construction of a new public high school.
- Project fell behind schedule almost from the start.
- Contractor reformulated the schedule and accelerated the work to meet contractual completion date.
- At the end of the project, Contractor made a claim seeking damages for schedule impacts caused by Architect's errors and omissions.

36

Case Overview No. 4

- Contractor's "proof" of Architect's breach of standard of care:
 - Excessive number of RFIs
 - Slow turnaround time on RFI responses
 - Slow turnaround time on shop drawing review
- Architect's defense:
 - Many RFIs were unnecessary and inappropriate
 - Turnaround time was consistent with industry practice and Contractor's logs were inaccurate.

37

Case Overview No. 4

- The Problem:
Architect did not keep its own submittal logs and did not reject unnecessary RFIs.

- The Result:
Expensive litigation culminating in \$150,000 settlement.

- The Lessons Learned:
 - Documentation is key. The Architect needs its own project documentation.
 - Hold the Contractor to its contractual obligations. Seek additional services if noncompliance results in extra work.

38

No. 2 Pencils Ready?

The Quiz



39

True or False

- **All potential claims for malpractice stem from the project contract.**

40

True or False

- **It is impossible to determine if an owner or a contractor is litigious prior to their signing a contract.**

41

True or False

- **Subconsultants, under standard AIA documents, are only required to perform Contract Administration when requested by the Prime Design professional.**

42

TRUE OR FALSE

- **A design professional should never have the power or authority to stop the work, even if the work does not substantially conform to the plans and/or specifications.**

43

TRUE OR FALSE

- **A design professional can never be liable for means and methods.**

44

TRUE OR FALSE

- **Under standard AIA General Conditions, an architect is not required to review shop drawings that have not been approved by the contractor.**

45

TRUE OR FALSE

- **It is OK to admit liability when it is obvious that you have made a mistake.**

46

IN SUMMARY....

- Draft a scope that is unambiguous, clearly defined and considers the sophistication of the client.
- Understand and execute the agreed upon scope.
- Resist the assumption of extra-contractual duties.
- Require compliance with the contract documents by all parties.

47

QUESTIONS?

48

