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MALCOLM L. MORRIS, ESQ., Editor

Illinois Institute for Local Government Law
Center for Governmental Studies
Northern Illinois University
DeKalb, IL 60115
NEW*Phone: 815/752-6925 Fax: 815/753-2305**
NEW*Email: ilgl@niu.edu www.ilgl.us**

Affiliated with the Illinois State Bar Association

BUILDING A SOLID FUTURE: A PRIMER FOR THE CONSTRUCTION OF PUBLIC BUILDINGS

By **DEAN FRIEDERS,** Esq.
Mickey Wilson Weiler Renzi & Andersson
Aurora, Illinois

One of the issues which public agencies face on a regular basis is the construction of public buildings. After the tentative decision to proceed with a construction project is made, a series of important decisions follow. Often, the fate of a construction project will be determined before the first design is prepared; the selection and hiring of a team of consultants to work on the construction project, and the relationship built between those consultants and the public agency, determine whether a project will be a successful collaboration that comes in on time and on budget, or whether a building project plants the seeds for years of dispute and litigation.

This article provides a basic overview of some of the different consultant relationships that can be built to ensure a successful construction project. It also provides a brief overview of possible responses to crises that may arise during the course of a construction project, and some innovative ideas for controlling cost, timeframes and liability issues arising out of the course of a building project.

One of the most critical decisions in any construction project occurs before the first drawing is ever prepared: the selection of the construction team. The construction team should consist of one or more decision makers from the public body, its legal counsel, a representative of those who will be using the finished building (e.g. for a public works building, the head of that department), and the construction professionals that are hired for the project.

Before the construction professionals are selected, it is important to ensure that the public body has legal representation in place familiar with the nuances of public construction projects. The task of facing a draft AIA contract for the first time and attempting to draft changes necessary to protect a client's interests is a daunting one. Many proposed changes to AIA contracts evolve from experience with difficulties arising out of previous projects, and time tested solutions to difficult problems. Also, having prior experience negotiating contracts with construction professionals gives your legal counsel credibility in responding to construction professionals who may say that a particular provision is industry standard and cannot be changed. When your attorneys can point to three other architectural firms who have agreed, on other projects, to change the language in their form contract, it goes a long way towards convincing a potential candidate for your construction project that a change is acceptable. Your legal counsel also needs to appreciate that AIA documents, as the name implies, are prepared by the Architects Institute of America; in other words, while they generally address all of the required elements of a construction project, they are drafted from the perspective of the architect and construction professional, and wherever possible are prepared to protect *their* interests over your interests. The advantage of using AIA documents are that: 1) they are readily available; 2) they generally cover a majority of the subjects which need to be addressed in construction contracts; 3) architects, engineers and contractors are familiar with them and comfortable working with them; and, 4) there is a body of case law interpretations of the AIA documents, which makes it easier to predict how potential conflicts will be resolved.

In lieu of using standard AIA documents, it may be possible to use a professional services agreement or another similar agreement that is

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prepared on terms and conditions acceptable (and favorable) to the public agency. Instead of using the often quite verbose 'standard' form agreements, a professional services agreement can be clear, succinct, and easy to use. They can also be modified to easily address unique situations in a way that form contracts cannot.

In selecting the professionals to work with your team, public agencies can use a wide array of potential agents, including architects, general contractors, construction managers, and other specialists. A few of the more common scenarios are discussed below, along with some pros and cons to each.

One alternative that most public agencies have become accustomed to using is the combination of an architect and a general contractor. The architect is paid a design fee and designs the building, while the general contractor holds the prime contract with the public agency, and holds the subcontracts with all other contractors and suppliers working on the project. Typical basic design fees for projects performed in this fashion range from 6-7% of the gross cost of the project, depending on the nature of the work and size of the project, with other additional costs added on.

Many public agencies are using this setup less frequently now than in the past, as architects typically will only agree to supervise the project for general conformity to the design documents, but will not supervise the manner or method of construction. That type of supervision falls to the general contractor, who is then in the position of supervising his own work product. The criticism is that he has no incentive not to approve the work and complete the project, which can result in poor oversight and latent (hidden) defects. During one of the most critical aspects of the project (actual construction), the public body will frequently be without a dedicated consultant to advise them on the progress being made. For that reason, many agencies are now utilizing construction managers as a component of their building process.

Construction managers are third parties hired to oversee the construction process. They work in all phases of the construction, in a variety of roles. In the pre-construction phase, they work with the architects and design professionals in preparing cost estimates and determining the project's scope and constructability. When using multiple consultants, however, careful preparation of the contracts for each consultant involved is necessary, especially as additional consultants are brought in. For example, architectural contracts frequently permit architects to charge an extra for preparing certain aspects of the cost estimates. When using a construction manager to perform that role, the architect's contract should be suitably modified to avoid paying two consultants for the same work.

Construction managers also typically have expertise in the field of construction. They should be involved in plan review to ensure that the architect's plans are actually buildable. Once plans are prepared and are determined to be 'constructable,' the construction managers are involved in the preparation of the construction timeline (which they will ultimately enforce) and in the bidding of the project and acquisition of contractors and subcontractors.

During the term of the contract, the construction managers serve as the eyes and ears of the owner on the project site; they review the performance of work, identify defects or areas where plan deviations occur, and can coordinate the resolution of disputes arising between the owner, contractors and/or architect. They also often are valuable in cost engineering an aspect of construction. While construction managers do bring an extra cost to the project, which is typically in the area of three percent of the gross project cost, they can provide additional security to the public agency that the project will be properly completed.

Two emerging issues regarding construction managers are use of combined firms for architecture and construction management, and self-performing construction managers. With regard to the first issue, some larger architectural firms now offer in-house construction management services, in lieu of firms offering

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stand-alone construction management. An advantage of in-house construction management services is the potential to reduce cost and streamline the project. The disadvantage is the loss of the 'independent' construction manager's perspective. When a dispute arises between a contractor and the architect about whether a particular design is feasible to construct, or over who is responsible for a given building flaw, having an independent construction manager that is able to provide the public agency with guidance can be invaluable.

As indicated above, most construction managers are firms with extensive experience in the construction industry; some are firms that also provide general contractor or other similar building services. For that reason, some construction managers offer to self-perform certain aspects of the building project and give the public agency an opportunity to take advantage of the construction manager's skills in the trades. This can carry with it cost savings for the public agency and can be useful in certain circumstances. For example, if a subcontractor fails to perform, having the construction manager step in to finish a project may be the fastest solution. The obvious risk inherent in self-performing construction managers is the 'fox guarding the henhouse' issue; again, the public agency loses the informed, neutral perspective of a third party observing those who are actually building the structure.

Construction managers can also be used in some circumstances on guaranteed or fixed price contracts. In guaranteed price contracts, the construction manager provides a guarantee to the public agency that the cost of constructing a building will not exceed the guaranteed max price. This puts the construction manager, rather than the public agency, at risk. The projects are then bonded and insured to protect the public agency's interests.

The primary difficulties with such fixed price contracts are twofold. First, the agency seeking to construct a building has to carefully identify when the fixed price aspect of the contract starts. For example, the agency will have a proposed budget (often based on needs studies and related pre-contract research), which it will want to utilize as the foundation for the fixed fee agreement. However, the construction manager will not want to establish the fixed fee until the project has been bid and known contract prices are in hand (which can diminish some of the potential value to the agency in the fixed fee proposition).

The second difficulty with fixed fee agreements is that the construction managers will undoubtedly insist upon a large contingency fund to cover changes in conditions—and thus fixed price contracts may result in *increased* costs, rather than reduced costs. One innovative solution is to consider the use of two construction management firms: the first firm participates in pre-construction work and the preparation of reasonable cost estimates, and a second firm is hired to manage the construction work at a (hopefully reasonable) fixed cost, with more limited contingency funds. However, it again bears noting that any time the interests of your consultants are to complete a project subject to a limitation such as a fixed cost; their interests can become adverse to your interests. A construction manager on a fixed cost contract has an incentive to get a project done quickly and cheaply—but perhaps not at the quality that the public body desires.

Similar to the fixed price concept is the idea of using a 'design build' system, whereby one firm is retained to provide a finished product. For example, when a design build firm is contracted, they provide a design for a facility, and then construct the facility, delivering a turn-key product. The public agency's involvement in the project is far less intensive than in other forms of construction. Design build projects can be faster and cheaper than other forms of construction, require less staff time for the public agency, and can eliminate many subcontractor issues (by shifting responsibility to the one hired party responsible for delivering the finished building).

However, design build also means that any control exerted by the public body is only exerted in the pre-construction phase. There is very limited ability to change plans once the initial

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concept is approved. The large scope and potential risk in such projects may result in fewer bids being submitted, and because of their complexity, fewer companies offer comprehensive design build services. Design build requires reliance on one contractor to complete the project, and creates a need for the public agency to very carefully evaluate the security, insurance and bonding provided. Also, the 'product' that is approved must be carefully evaluated to ensure that the finished building matches the design that the public body believes it contracted for. In addition, the schedule of payments to the contractor needs to be carefully considered, as the public body will have limited information upon which to base judgments as to whether or not progress payments are appropriate. Despite the efficiencies which can be achieved in design build programs, they may be best suited to limited circumstances where projects can be relatively repetitive (e.g. wells, school buildings, etc.).

Many other professionals are becoming involved in public building construction. For example, when building police facilities, it is very common to hire an outside public safety consultant to advise in certain design aspects regarding issues such as prisoner control and housing, security measures, and suitable construction materials. On any project, any consultants being utilized need to integrate their work with the other professionals involved, including civil engineers and any other specialists. Again, careful contract preparation is necessary. For example, as the project is ongoing, a question may arise regarding the suitability of a material being used (e.g. is the concrete of adequate hardness to meet the design specification?). Under a standard AIA contract, the architect may be entitled to charge an extra fee to provide such testing. But if a construction manager, engineer or other professional is involved, the public body may be able to save costs by having someone other than the architect arrange for the materials testing.

Another specialty that is becoming increasingly popular to integrate into public building construction is an efficiency expert or a LEED (leadership in energy and efficient design) consultant. A number of options are available if energy efficiency or environmentally friendly construction is a goal of a public body. When seeking LEED certification as a 'green building', typically the architect is involved in the efficient design, and a third party commissioning agent is utilized to oversee the project and make suggestions for additional green design options. Even where a LEED commissioning agent is utilized, it is important to recognize that, for a building to be LEED certified, the US Green Building Council must approve of the project, after a lengthy submission. Using green design standards and paying for a LEED commissioning agent is not a guarantee that any particular LEED standard will be achieved. In fact, the contracts relating to LEED issues typically indicate that no particular efficiency or result is guaranteed. Accordingly, some public bodies have taken to directing their architects and design professionals to incorporate energy efficient design protocols, without actually paying for separate LEED consultants. In this way, you can gain the benefits of efficient design without incurring all of the associated certification costs. However, designing to LEED standards and having a building certified carries with it not only the intrinsic value of green building, but may also provide significant cost savings over the useful life of the building. If energy efficient design is a goal of your agency, that goal should be identified early and should be a key criterion in the selection of construction consultants.

When the project is being designed and the timeline is under consideration, a wide array of other contractors needs to be integrated into the process. Once constructed, modern public facilities need landscaping, low voltage wiring (internet and computer networking and connectivity, phone systems, alarm systems, etc.), and FF&E (furniture, fixtures and equipment). The completion of these tasks can add significant amounts of time to a building's construction phase, delaying when the building is ready to be used. Also, as buildings become more wired, it is necessary to involve low voltage contractors much earlier in the project. While phone lines

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may be capable of being installed after the fact in most buildings, a well-designed public facility will have such a great deal of technology integrated that it is necessary to incorporate much of the work before finishing projects are completed. It makes more sense to install wiring and similar hardware before drywall and drop ceilings are installed, than it does to have contractors charge additional amounts to undo work which has already been performed by another contractor. Again—having knowledgeable consultants can ensure that the project goes smoothly and on schedule.

Where AIA or other 'standard form' contracts are used, it is vital that the public body carefully review the general conditions for the project. The general conditions govern almost the entire project, and the other contracts on the project (architect, construction manager, etc.) frequently refer to and incorporate provisions of the general conditions. The 'standard form' general conditions that usually form the starting point for contract negotiations with architects typically contain exceptions that allow additional work to be done on a time and materials basis, or that include extra allowances for conditions that should be identified and accounted for in the budget in advance. These provisions allow for extra charges due to weather conditions (that can frequently be planned for), utility connections (that should be identified and included in the cost estimates from the project's inception), construction of haul roads or other temporary improvements that will not benefit the ultimate project, and other similar issues. The public body needs to be forewarned of the potential for these expenses, and can frequently identify less-costly alternatives, or trim the extras from the general conditions altogether.

The general conditions also frequently attempt to make certain exceptions for costs that need to be paid in addition to the agreed upon construction fee percentage for construction professionals. For example, your design professionals may attempt to charge hourly costs for support and administrative fees, cell phone and computer acquisition or use, renting or leasing construction trailers, the provision of temporary phone or internet services at the construction site, and other similar costs, in addition to their fixed percentage construction fee. Form general conditions often permit such 'additional costs' to be billed on a time and materials basis, after addition of an 'administration fee' to the consultant. These costs need to be identified, quantified, and where possible, eliminated from the general conditions.

The contracts also need to identify any additional consultants who are necessary, and specify who will bear the cost of those consultants. LEED certification issues are discussed above, but a wide array of consultants may be necessary to complete a project, including wetland consultants, soil engineers, landscaping consultants, etc. Even with known consultant costs, the scope of work to be performed must be considered. For example, will the civil engineering component of the project only cover the building footprint and related engineering, or will it cover the entire site plan (with drainage, utility connections, and related planning)? These items need to be evaluated and carefully considered before the contracts are finalized.

Your construction contracts need to also be carefully evaluated for any limitations that they may impose on your rights as the building's owner. For example, many agreements attempt to impose mandatory arbitration of any disputes arising out of the building's construction. While arbitration may provide advantages in some cases, it usually makes sense to impose a limit on the types of claims that will be arbitrated, to permit more significant claims to be litigated in court if necessary.

Another frequent area of concern in construction contracts are provisions addressing what is referred to as the limitations period for claims. The limitations period is the period of time during which your agency can institute a claim against parties involved in the construction of a building. Often, contracts attempt to base the limitations period on when work is completed, rather than on when a defect is discovered. For example, if a contract indicates that any claims

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must be brought within two years of the date on which work is completed, and a hidden defect is not discovered for three years, your agency may not be able to bring a claim to recover for the hidden defect. This sort of issue needs to be carefully evaluated by your counsel when the contracts are initially prepared. Careful preparation of the construction documents can place a public agency in the best possible position for handling unexpected occurrences during the construction project. When these issues are discussed, a common response from the design professionals involved in the work is that extending claims periods adversely impacts their insurance costs, and they demand an additional fee to cover the additional premiums. Issues such as this need to be addressed early in the project, and the agency constructing the building needs to make its expectations about the claims period known while the contracts are being prepared.

The construction documents may be able to provide the public body with additional assurances that bidders are capable of performing their obligations, as well. In some circumstances, the contracts can require bidders to be prequalified to provide certain services. For example, some public bodies require contractors submitting bids on public paving jobs to be prequalified with the State Department of Transportation; such requirements can increase the quality and competency of bidders. If the prequalification requirements are not rationally related to the nature of the work to be performed, however, it can reduce the number of potential bidders or lead to unnecessary litigation.

Another emerging issue with the bidding process is the potential to limit claims of unsuccessful bidders. For example, some public bodies have included in their bid packages a requirement that unsuccessful bidders waive any claim which they may have, or submit claims regarding unsuccessful bids to mandatory, binding arbitration. Given the nature of the public's interest in ensuring that the bid process is completed in a transparent and lawful fashion, requiring waiver of unsuccessful bidders' claims is not a theory which is likely to be productive. However, requiring arbitration of unsuccessful bidders' claims may be a way to avoid unnecessary delay of the construction project, and could be a strategy for ensuring that projects can begin on time.

Once the contracts are signed and construction begins, the role of the public agency is not over. Vigilance is demanded in all phases of construction. Owners are well-advised to maintain comprehensive documentation of the project's progress, and ensure that any notices provided to contractors or others involved in the project are sent in accordance with any contractual notice requirements. Warranties and bonds affecting the project must be tracked to ensure that they are in place in the required amounts, and covering the appropriate contractors. Construction consultants must be monitored to avoid incurring unexpected additional charges.

In addition, numerous other issues must be identified and dealt with appropriately. Issues such as insurance and risk of loss need to be followed carefully. Typically, the contractors will be responsible for their construction materials *until they are incorporated into the building.* So if copper pipe is stolen from a contractor's supply trailer, the contractor will likely be responsible for the loss. But if the copper pipe is stolen from a partially completed building, the building's owner may be responsible. As the project begins, it is a good idea to review your potential risk and your insurance coverage to ensure that you are adequately protected for all stages of design, construction and occupancy. It is typical in both the architect's contract and the CM's contract to stipulate what insurance, and the limits, each party will carry. Such contracts should also include language addressing additional insureds, such as the agency constructing the building, and may incorporate a requirement that certificates of insurance be provided, or that the insurance in place cannot be terminated except after the provision of notice to the additional insureds. Language such as this protects the interests of the agency and ensures that the coverage specified remains in place for the duration of the project (and any required coverage period thereafter).

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One innovative approach to public construction risk management issues is the growing use of owner controlled insurance policies (OCIP). For OCIP programs, the owner contracts with a single insurer to provide coverage for the entirety of the job. As a condition of bidding, all contractors are required to utilize this single insurer policy as part of their bid and to subtract from the bid price the cost of any insurance. The single insurer covers the job site risk of the owner, the construction manager, architect, contractors, subcontractors, etc. Typically, OCIP programs involve a single policy to cover general liability, excess liability, and builder's risk issues, and individual workers' compensation policies to cover each independent employer. The advantages of OCIP programs are that there is uniformity of coverage and insurance terms for the entire project, the owner can select a reputable insurer, issues of competing coverages between different insurers are eliminated, and costs can be controlled (as the contractors do not pass along their insurance cost as a component of their bid price).

OCIP does carry some risk, however. If, for example, a subcontractor is not identified or known to the own Polach Appraisal Group .....

er, the subcontractor may not be insured. Because of the large number of contractors and employers affected, the policy limits need to be very high to cover potential claims. Contractors who are unaccustomed to OCIP projects may have difficulty understanding the concept or submitting accurate bids that exclude insurance costs. Typical cost savings are expected to be in the area of two percent for subcontractors, and slightly higher for general contractors. To test the potential savings which could be achieved with OCIP projects, a public body can require two bids to be submitted (one with standard insurance and one with OCIP), and price out the alternatives to determine what will be most advantageous.

If problems with the project occur during construction, immediate responses are frequently necessary. Having an on-site supervisor, such as a construction manager, can simplify this process greatly. Construction managers can not only help public agencies identify defects early, they can also help determine if a given error is due to a contractor's mistake, or due to errors in the plans for the building. With this sort of information, a public agency is better able to keep costs in line, and ensure that mistakes are charged back to the party responsible for them.

If change orders are processed during a project, they must be responded to in a timely manner. Each construction project should have a clear chain of command in place to evaluate and approve or reject change orders. It is critical that change orders be approved or rejected within a reasonable time after being submitted, and that such issues not be reserved until construction is complete. Reserving a decision on change orders, or failing to clearly document a rejection of a change order, is a certain way to end your construction project with litigation.

When contractors default on their obligations, some of the most intricate work is necessary. Performance and payment bonds are required on public construction projects, but their terms are strictly enforced and their timelines and notice requirements are always very rigid. Taking steps to inform a contractor that it is in default of its obligations is a process that should only be completed after reviewing the appropriate bonding documents. Where possible, the bonding companies should be involved in any disputes early, to avoid the potential for a claim that the public agency failed to satisfy the conditions precedent to being granted relief under a bond. In addition, if there are disputes with the payment of contractors or subcontractors, immediate action must be taken to ensure that the applicable statutes governing the public funds in question are adhered to; in all such circumstances, consulting with your legal counsel is appropriate.

As an alternative to traditional bonding, in some instances, public bodies can utilize letters of credit or other similar instruments to secure a contractor's obligations. Letters of credit typically involve additional cost for the contractor, as compared to a 'traditional' bond form of security, but drawing on a letter of credit is generally far easier than obtaining relief from a bonding company if a default arises. Letters of credit may also be

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required as a bid bond, to insure that parties submitting bids are capable of performing if their bid should be accepted.

Even if the project's actual construction progresses without significant issue, careful planning in the pre-construction phases can prevent headaches down the line. For example, when preparing contracts for construction, it is important to clearly identify the protocols to be used for follow-up on training and warranty service issues for mechanical systems. The AIA contracts do *not* require that contractors train the owner's representative in how to operate the systems; the contract can be amended to require all contractors to prepare operating manuals for all systems, and to provide on-site training to your maintenance personnel as a component of their construction cost (and not as an extra). For detailed systems, contractors can be required to prepare electronic versions of operators' manuals, and to provide videos showing how the systems are operated. This can reduce operating costs for the building over time.

Similarly, AIA contracts typically require any applicable warranties to be assigned to the building's owner upon installation, but they do not specify minimum requirements for the warranties. In preparing bid specifications and cost estimates, the public body can insist that all systems have a specified warranty (e.g. all HVAC systems shall have a minimum 10 year warranty on parts and labor, etc.). The contract can also require contractors to provide some limited post-installation service, such as a limited number of service calls to balance the HVAC system or address initial issues with its operation.

Many times, the contract will indicate that any post-construction work is an extra for the architect. It is important to address this issue, and to obtain at least a minimum level of work included in the base design fee. For example, the contract can require the architect to complete a post-construction walkthrough and punch list, and to assist in the transfer of warranties, resolution of claims, and post-construction corrections as a component of the basic fee (and not as a time and materials extra).

As can be seen, the process of constructing a public building can be a daunting task. However, with careful planning and diligence in the preparation of the construction contracts and agreements, many of the potential challenges facing public agencies can be prevented, or their damages mitigated, by the requirements of the agreements. The construction contract, when properly drafted, prepares all parties for the construction project and gives each party a solid expectation of how the entire construction process will be handled. The foundation of any construction project is the agreement that frames the process—and this agreement must be completed thoughtfully and comprehensively.