

EFFECTIVE CONTRACT ADMINISTRATION FOR DESIGN PROFESSIONALS

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1. What is Contract Administration? The Process of increasing the probability that the Project will be constructed in Substantial Compliance with the Contract Documents.
2. 25-30% of Design Professional (“DP”) claims arise out of Contract Administration (“CA”).
 - a. What are the risks in CA?
 - i. Unqualified CA Administrator.
 - ii. CA Administrator lacks a thorough working knowledge of the contract documents.
 - iii. Inadequate coordination of CA’s consultants.
 - iv. Inadequate RFI and Submittal process.
 - b. One typical claim: The Contractor built it wrong, why didn’t the DP catch it? Why did the DP approve payment for the defective work?
 - i. It must be because the DP failed to perform adequate construction observation.
 - ii. Good evidence in support of the claim may consist of evidence that
 1. Irregular progress meetings were held;
 2. Inadequate documentation of construction process was made;
 3. There was inadequate and improper submittal review and approval; and
 4. Consider that incomplete, disorganized project records do not help the DP’s case.
 5. Consider also when the DP later goes to blame the Contractor for the problems on the job, why weren’t these problems contemporaneously documented by the DP?
 - c. Many design defect claims first surface during construction, and the CA process offers an opportunity to address the issue and hopefully resolve it before it spirals out of control.

3. Contractual Issues affecting Construction Administration.
 - a. The DP's obligations to perform Contract Administration arise out of the contract.
 - b. Highly recommended that DP use standard form agreements to define Contract Administration.
 - c. AIA and EJCDC forms identify critical tasks and provide a well defined scope of work for these tasks.
 - d. Avoid providing firm deadlines for responses to submittals, RFIs, Change Orders, etc. Timelines should always be within a reasonable time under the circumstances.
 - e. Establishing appropriate compensation for CA enables DP to provide adequate level of services. Avoid "front loading" contract which leaves insufficient money for CA. Remember, when the scope of work changes this will impact design AND CA fees.
 - f. It is always better to "observe" rather than "inspect" the Work.
 - g. It is always better to perform observation "at intervals appropriate to the ongoing work" than engaging in periodic inspections such as every 4 weeks. The time for observation should be triggered by activities on-site rather than the calendar.
4. Educate your Clients as to reasonable expectations for CA.
 - a. The Client should be educated that the construction process is unpredictable. There will be changes in the contract time, the scope of work, and the cost of the work.
 - b. Educate the Client as to construction contingencies.
 - c. Educate the Client about Change Orders, and the circumstances under the contract which enable the Contractor to obtain additional time and money for the Project.
 - d. Identify the appropriate manner of communication between the Project Participants. The Owner should communicate through the DP, not around the DP to the Contractor or its Subs.
 - e. Educate the Client as to the DP's role in CA.
 - i. Explain the scope of Construction Observation. You are visiting the site at intervals appropriate to the ongoing work to determine in general if the work, when finished, will conform to the Contract Documents. You are not "inspecting" to "ensure that the work complies with the Contract Documents."

- ii. Your inspections are visual, and do not address the Contractor's means and methods, only whether the work meets the design intent shown in the Contract Documents.
 - iii. An expectation that observation will prevent any and all problems is unrealistic; however, the risk in failing to perform these services can be even greater and result in increased cost to the Owner.
- f. Educate the Owner that perfection is an unreasonable standard in construction. The Project is unique. Construction is not assembly line production under pristine factory conditions. An Owner may expect that any deviation resulting in an unforeseen cost or loss is "negligence" on the part of the DP, and the DP should come out of pocket to address it. However, consider the following:
 - i. Reductions in the DP's scope of services minimize the opportunity to "catch issues."
 - ii. Reliance on incomplete or inaccurate data supplied by others may cause or contribute to project problems
 - iii. Unforeseen site conditions not detected through normal inspections create additional costs.
 - iv. Code and standards change between design and completion of construction.
 - v. Building official's "interpretations" of code requirements may be a moving target.

5. Should you accept a project without the right and obligation to perform contract observation?
 - a. No!
 - b. Contract observation services are the best insurance against problems on the job.
 - c. They provide an opportunity for you to spot and correct potential design errors.
6. The Pre-Construction Meeting.
 - a. Should be more than a discussion of the “paper work process”.
 - b. Review the drawings and specifications.
 - c. What is the Contractor concerned about? If the answer is nothing, he either doesn’t yet understand the project or isn’t telling the truth.
 - d. What is the sequence of the work?
 - e. What long lead items affect the schedule?
 - f. Explore Value Engineering changes. This may be the last opportunity for “no” or “low” cost changes
 - g. Have the “players” there.

7. Project Communication and Documentation. The Process of systematically establishing communications and documentation procedures, contemporaneously documenting circumstances and events, and objectively communicating facts or opinions.
 - a. Use forms (and require the Contractor to use forms) when appropriate for site visits, telephone conferences, meeting minutes, RFIs, Submittals.
 - b. Consistency counts. Missing documents show a lack of attention to detail, and make you look careless. If you document one visit or call, document them all.
 - c. Email is not a “privileged communication” and what is said (and left unsaid) will often come back to haunt the sender.
 - i. Emails should be treated with the same formality as any other form of written communication.
 - ii. Internal “chatter” about the difficult Clients, profanity, your pet nickname for the superintendent, internal office politics, etc. do not present well as “Exhibit A” in the court file in a subsequent lawsuit. See embarrassing email blunder for daily dose of lawyer humor, attached.
 - d. Document problems which will be important later. How do you know which? You don’t. Document all problems.
 - e. Time/Date Stamped digital photos are a cheap way to document the progress of the work.
8. Site Visits for Construction Observation.
 - a. Send someone with experience, who knows what they are looking for.
 - b. Know the contract requirements for observation and certification of payment applications.
 - c. Assess the stage and status of construction.
 - d. Assess the staffing of the job (are there an adequate number of workers/subcontractors on the jobsite?);
 - e. Assess whether there are any obvious problems with the progression of the job and timeliness of the work;
 - f. Identify ongoing work;

Email sent by summer associate at a large law firm:

Congrats on the CFA. I'm sure you're about to make VP any day now.

I'm busy doing jack sh*t. When to a nice 2hr sushi lunch today at Sushi Zen. Nice place. Spent the rest of the day typing emails and bulls****ing with people. Unfortunately, I actually have work to do – I'm on some corp finance deal, under the global head of corp finance, which means I should really peruse these materials and not be a ****up...

So yea, corporate love hasn't worn off yet...but just give me time.

JLB

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Summer Associate
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g. Identify whether workers have appropriate access to current plans for construction; and;

h. Identify the critical and key components of the work in place and ensure that your observations coincide with the implementation of this work. It is important to keep on top of the scheduling of inspections. If they are not properly scheduled, one-time opportunities can be missed to perform functions vital to the project's progress. A representative of your firm should attend all tests and inspections, and you should obtain copies of test results and include notes in your inspection reports regarding testing procedures.

i. What authority, if any, do you have over the Contractor?

i. Pay application review gives you the power of the purse. You have the authority to refuse to certify payment for bad work;

ii. Depending upon the terms of your contract, you have the authority to determine if work is non-conforming and reject it, or to report same to the Owner who has the power to stop the work;

iii. The authority to issue a certificate of substantial completion gives you authority;

iv. Even without an express authorization, an Engineer has an ethical duty to address conditions that pose a life/safety hazard.

The NC Rules of Professional Conduct for Engineers and Surveyors provide that: the licensee shall conduct the practice in order to protect the public health, safety and welfare. The licensee shall at all times recognize the primary obligation to protect the public in the performance of the professional duties. If the licensee's engineering or land surveying judgment is overruled under circumstances where the safety, health and welfare of the public are endangered, the licensee shall inform the employer, the Contractor and the appropriate regulatory agency of the possible consequences of the situation.

j. Your contract should make clear that means and methods, sequence, procedures, techniques, scheduling of contract work, and jobsite safety are the Contractor's responsibility. It has control of the job site and the construction workers and rightfully assumes full responsibility for the safety of workers.

- k. Courts have found professional designers liable for injuries that they had the opportunity and capacity to address. Train your own project representatives as to standard procedures to follow if they observe an unsafe condition on a project site. If dangerous conditions are observed on the job site that pose no immediate danger, inform the superintendent in writing as soon as possible, copy your Clients, and place a copy in your project file. If the condition is not remedied, or is more serious, your duty of care to protect the health and safety of the public requires that you take immediate action. Notify your Clients and appropriate regulatory agencies immediately, and confirm that you did so in writing.

Submittals.

- l. The submittal process provides the DP an opportunity to evaluate whether the Contractor understands the design intent and is prepared to fabricate and install to that intent.
 - m. See the 2007 AIA and EJCDC Contract Documents for definitions of the DP's role in submittal review. The DP is checking for conformance and the design concept expressed in the construction documents. The DP is not checking dimensional issues, quantities, etc.
 - n. The submittal schedule should be established at the beginning of the project. Review and respond to submittals promptly but consider adding a contract provision that the DP shall not be liable for delay damages caused by untimely submittal review unless separate notice is provided and the DP is given an additional number of days to respond.
 - o. Watch out for the use of submittals to “sneak” through unauthorized substitutions.
 - p. Regardless of what your submittal stamp says, if you review it, and do not reject it, and product approved is wrong, expect a claim when you call for the item to be removed from the structure.
 - q. Endeavor to approve portions of submittals which are correct rather than rejecting the entire submittal.
9. Applications for Payment.
- a. Review them promptly.
 - b. Certify only to those parties to whom you have a contractual obligation. Sureties and lenders may send forms regarding payments for you to complete. If you have no contractual obligation to do so, don't. You could be held liable to loss incurred by the requesting party for improper certification.
 - c. Reviewing and approving pay applications can create liability on the part of the design professional to the extent non-conforming work is approved, and disclaimer language should be employed to limit the approval to the best of the professional's knowledge rather than language indicating that approval constitutes a final acceptance of the work as performed. Use qualifying language such as “in my professional opinion” and “general” or “substantial” so that your role is not misconstrued in absolute terms. Again, the AIA and EJCDC contract forms are recommended here.
 - d. If the Owner pays against the certification of the DP, document that fact in writing.

10. RFIs. These should be used as an opportunity for the Contractor to clarify the DP's design intent as to a particular system. However, the opportunity for abuse by a Contractor laying a trap for a change order is always present in this process.
 - a. Review and respond to RFIs promptly.
 - b. The goal in responding to an RFI should be to (i) interpret the question as an inquiry into the "design intent" and (ii) should answer by clarifying what the design consists of, not how the Contractor should build the system.
 - c. Consider the RFI an opportunity to beat back a potential design defect claim, and consider referencing upfront specifications or provisions which require the Contractor to construct the system in question within the contract price.
 - d. The sheer number of RFIs can be used as a sword. A recent claim we defended contained allegations that "hundreds of RFIs were required" for each building to be constructed. If the RFI process is being abused, a letter to Contractor and Owner addressing the issue contemporaneously can be useful for a later defense. If the most recent set of plans never seems to be on site, this is useful to point out.

11. The Claims Process.
 - a. Under the AIA Contract Documents, the Architect traditionally wore 3 hats on the project—an independent Contractor, the Owner's representative and the referee. Under the new 2007 documents, the referee is referred to as an "Initial Decision Maker" ("IDM") who is selected by the Contractor and the Owner. The IDM may be the Architect or can be some other party.
 - b. Under the 2007 A201, the IDM has responsibility to initially decide claims excluding claims relating to hazardous materials, emergency conditions and the Owner's fiduciary responsibility to settle insurance claims on insured losses.
 - c. What is the Process?
 - i. A claim is a demand or assertion seeking as a matter of right, payment of money or other relief under the contract including disputes and matters in question between the Owner and the Contractor. AIA A201 Paragraph 15.1.1.
 - ii. Claims must be initiated by written notice within 21 days of the event giving rise thereto or within 21 days after the claimant first recognizes the condition giving rise to the claim, whichever is later. AIA A201 Paragraph 15.1.2.
 - iii. Both parties must continue to perform the contract after the claim is raised. AIA A201 Paragraph 15.1.3.
 - iv. The IDM must take action within 10 days receipt of the claim and either (1) request more information or a response from the other party; (2) reject the claim in whole or part; (3) approve the claim in whole or part; (4)

suggest a compromise; or (5) advise if unable to resolve the claim either because insufficient information exists or the IDM determines it is inappropriate to decide the claim. AIA A201 Paragraph 2.2.

- v. If the IDM fails to issue any decision after 30 days, the requirement for an initial decision is no longer required. AIA A201 Paragraph 15.2.1.
 - vi. The IDM shall render an initial decision approving or rejecting the claim which shall be in (1) writing; (2) state the reasons therefore; and (3) notify the parties. AIA A201 Paragraph 15.2.5.
 - vii. Either party may, within 30 days of the decision, demand in writing that the other party file for mediation within 60 days of the initial decision and a failure of that party to follow through causes both parties to waive any further right to adjudicate the claim.
 - viii. The Architect must make its interpretations consistent with the intent of the Contract Documents and owes both parties a duty to be impartial and shall not be liable to either party for decisions rendered in good faith. AIA A201 Paragraph 4.2.12.
- d. Who gets to decide whether a decision was made in “good faith” and what is “good faith”?
- i. *Ruffin Woody and Associates, Inc. v. Person County*, 92 N.C. App. 129 (1988) (holding that architect’s decision is final absent evidence of ‘such gross mistake as would necessarily imply bad faith or failure to exercise honest judgment’).
- e. EJCDC Claims Process
- i. EJCDC General Conditions, Paragraph 10.05.
 - ii. Engineer’s Decision:

Engineer will render a formal decision in writing within 30 days after receipt of the last submittal of the claimant or the last submittal of the opposing party, if any.

Engineer’s written decision on such claim, dispute, or other matter will be final and binding upon Owner and Contractor, unless:
 - 1. An appeal from Engineer’s decision is taken within the time limits and in accordance with the dispute resolution procedures set forth in Article 16; or
 - 2. if no such dispute resolution procedures have been set forth in Article 16, a written notice of intention to appeal from Engineer’s written decision is delivered by Owner or Contractor to the other and the Engineer within 30 days after the date of such decision, and

3. a formal proceeding is instituted by the appealing party in a forum of competent jurisdiction, within 60 days after the date of such decision or within 60 days after Substantial Completion, whichever is later (unless other agreed in writing by Owner and Contractor), to exercise such rights or remedies as the appealing party may have with respect to such claim, dispute, or other matter in accordance with applicable Laws and Regulations.
4. If Engineer does not render a formal decision in writing within the time stated in paragraph 10.05B, a decision denying the Claim in its entirety shall be deemed to have been issued 31 days after receipt of the last submittal of the claimant or the last submittal of the opposing party, if any.

12. Substantial Completion. The point at which the Owner can use the project for the purposes intended.
- a. The Contractor has the responsibility to notify you when it believes the job is complete;
 - b. Thereafter, the DP determines Substantial Completion;
 - i. Defined by the AIA as the stage in the progress of the work when the work or designated portion thereof is sufficiently complete in accordance with the contract documents so that the Owner can occupy or utilize the work for its intended use.
 - c. The DP's attitude on Substantial Completion should be that the work is not substantially complete until the work meets the intent of the design documents. A punch list is little cover for a project which still remains "incomplete."
 - d. Determine Final Completion;
 - i. When the Contractor provides notice that the work is ready for final inspection, and, upon inspection, it is determined that all items requiring correction or completion have been addressed, a certificate of final payment can be issued.
 - e. Completed and Accepted Doctrine;

"In North Carolina, the 'completed and accepted work' doctrine provides that 'an independent Contractor is not liable for injuries to third parties occurring after the Contractor has completed the work and it has been accepted by the Owner.'" Griggs v. Shamrock Bldg. Servs., 179 N.C. App. 543, 549 (N.C. Ct. App. 2006).
 - f. Statute of Repose.

No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement. N.C. General Statute § 1-50(5)(a).

The statute defines "substantial completion" as that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract, as modified by any change orders agreed to be the parties) upon attainment of which the Owner can use the same for the purpose for which it was intended. The date of substantial completion may be established by written agreement. N.C. General Statute § 1-50(5)(c).