



School Construction: The Mistake of Being a Passive Owner

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Who is responsible for resolving disputes on your construction projects?

The planning of school construction projects is a lengthy process involving a host of participants – school board, school officials, educators, lawyers, investment bankers, owner's representatives, architects and engineers. It has probably taken years to complete the planning for your project and it is with a sense of relief for the school board that construction has finally started. Now the work is in the hands of the architect and the contractor and the school board can rely upon them to complete the project in a timely manner. Or can they?

Construction is a complex process that is accomplished under stressful and often adversarial conditions. The plans and specifications that are prepared for a project must possess a degree of adequacy and, if followed, they will result in the intended structure. However, they cannot possibly contain every detail and element of the construction, as to do so would be both prohibitively expensive and require an unreasonable period of design time. Instead, designers rely upon standards and procedures that are referenced in the contract documents. From the contractor's perspective, a fixed price bid has been prepared for the owner, in this case the school board, and the price has been based upon providing precisely that which is required by the contract documents. The contractor will not make allowances for items of work that are not shown or required because to do so may cause the bid to be non-competitive.

There are, however, times when a dispute arises relating to the work that is required or the quality of the work furnished. How do these disputes get resolved and should the school officials get involved? It is important to remember that the construction contract is between the school board and the contractor and that the plans and specifications are part of the contract. It also must be noted that the school board, as the owner, warrants the adequacy of the plans and specifications. Should there be a deficiency that results in increased costs to the contractor, the school board must initially resolve the issue with the contractor. Timely completion of the project is often at stake.

How can the school board implement a procedure to ensure that they are adequately monitoring and managing the construction of their new or renovated facility? A senior official should be designated to be the liaison between the school board and the architect and contractor. If the project has warranted the engaging of a construction manager or an "Owner's Representative", they should report to the designated official. Through the use of accepted methods of "project controls", the manager in charge can



monitor the project and understand the early warning signs of a dispute that could jeopardize both the budget and timely completion of the project.

Early Warning Signals

Some of the indicators of a potential problem are discussed below. They include:

- An excessive number of Requests for Information (RFI's)
- An excessive amount of Change Order Requests (COR's)
- Numerous revisions to the contract documents and the issuance of Field Directives
- Projected delays to the completion schedule
- Payments lagging original projections
- Contractor correspondence claiming delays and disruptions

Requests for Information, or RFI's, are a method of communication between the contractor and the owner's representative that allows for the timely transmission of answers to questions relating to the construction. They provide information that may have been omitted from the contract documents that is necessary in order for the contractor to make progress. Often there is no cost to the owner as the work is foreseeable for the contractor and the response provides a minor clarification. For example, the contractor has estimated constructing a facility of a certain size and is unable to determine a particular dimension. Plans and specifications are of a nature that information relating to aspects of the work may be indicated in more than one part of the documents. Drafting discrepancies may result in conflicting or inconsistent information. A time answer resolves the matter with no adverse impact to the owner. It is the untimely response, or a failure to respond, that can lead to serious consequences. In the following example mistakes by the architect, contractor and the owner had a profound impact on the project:

The contract for the construction of a major addition to a high school was awarded in March with completion of the project required by August of the following year. The school board had worked closely with the architect and was pleased with the final design. It was a unique design that included several smaller buildings linked together to enclose exterior program areas. The contractor was eager to start the project and began working immediately upon receipt of the notice to proceed. The school board had contracted with the architect for the construction administration.

Shortly after clearing the construction area, the contractor issued several RFI's to the architect requesting dimensional clarification in order to lay out the footings for the foundation. Apparently the architect's budget was not sufficient to provide on-site representation and there was no first-hand insight into the problem. The architect did not respond directly and accused the contractor of not understanding the plans. The contractor continued to issue correspondence and RFI's and attempted to work around the problem. The owner relied upon the



architect's representations that the drawings were indeed correct and that he would provide the contractor with the assistance needed.

After two months the contractor, acting out of frustration, made an assumption regarding the intent of the drawings and proceeded to install the footings. Several weeks later, when it was not possible to complete the foundation work, the architect visited the site and discovered that the omission of several dimensions precluded the contractor from laying out the foundations. To make matters worse, the assumptions made by the contractor were also wrong, leading to the removal of concrete footings and further delays to the project. As the footings for the project were a "critical" activity, the overall project completion date was delayed.

While this example is a rare case where the omission in the design drawings was a clear mistake, all of the parties exacerbated the situation rather than coming together to understand and solve the problem. The contractor, in an effort to make progress, made a mistake in assuming certain dimensions rather than insisting that the architect provide an adequate drawing before proceeding further. The owner failed to see that little progress was being made a fact that was evident by the smaller than anticipated payment requests. The number of RFI's relating to this issue should have been another signal to the owner. However, by relying solely on the architect's representations, the owner took no action to ensure that the dispute between the architect and the contractor was resolved in a timely manner. For the school official charged with the responsibility of ensuring that the facility is available on time, this proved to be a costly mistake.

Another mistake that is made often is the withholding of all payments in order to ensure that a deficiency in the work is corrected. The construction of a school building requires the efforts of many specialty contractors and vendors. Local procurement requirements often mandate the use of separate prime contracts for the general construction, plumbing, mechanical and electrical work. For each of the four major contracts, and particularly the general construction contract, specialty subcontractors are utilized. For example, while the general contractor may perform the concrete work with their own forces, the structural steel could be subcontracted to a separate company.

Consider a situation where the steel subcontractor interpreted the provisions of the applicable specification in a manner that did not require the prime painting of the structural steel. The misplacement of a comma in a sentence resulted in the possibility of more than one interpretation. It was not an insignificant matter, as the cost of the work in dispute was \$65,000. The architect directed that the work be accomplished and the subcontractor submitted a Change Order Request (COR) through the prime contractor and refused to proceed unless the change was authorized. The dispute was delaying the work and the owner's representative recommended the withholding of payments to the general contractor. The consequences of this approach were such that the general contractor was unable to pay those subcontractors who were performing their work. In short order, all work was delayed and the subcontractors filed mechanics liens against the property.



Regrettably the advice provided by the owner's representative was inappropriate. The signals that the work had failed to progress as planned should have been evident to the school officials. Failure to make payment for the work that was acceptable, in addition to being a material breach of the contract, is yet another warning signal – the payments are lagging the as-planned amounts – that an underlying problem exists. Once it was apparent that the individuals charged with the responsibility of managing the project were not able to resolve the issue, the school board should have obtained the services of an independent construction consultant.

The dilemma that every school board official faces is that of knowing which advice is correct. The general inclination is to rely upon the professionals that have been engaged to design and administer the project. Deficiencies in the contract documents occur infrequently but if allowed to continue uncorrected, they can be costly. It is also risky to generalize regarding the reputation of contractors. By far, contractors engaged in public works contracts are serious professionals who are interested in completing the project as quickly as possible. Their profits are directly linked to the overall performance time. One method of helping the owner to evaluate what is happening and who should be believed is to look at the early warning signs discussed herein. If the results are unsatisfactory, the owner should seek the advice of a neutral construction consultant.