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Workshop 25

You Agreed to What? Critical Provisions in Construction Contracts

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Few endeavors in human existence require the coming together of the shared vision of so many disparate disciplines as does today's complex construction project. The developer surely has an idea of exactly what she would like to have built. Absent effective communication, though, that vision can become garbled, like a modern-day game of "telephone". The developer describes the project to her architect. The architect retains structural, MEP, geo-tech and other systems engineers who undertake to reduce the vision of the project, communicated to them by the developer to 2 or 3 dimensional plans. Those plans are then shared with the developer's contractor who, in turn, shares them with a dozen or so subcontracting disciplines. Unless each of the project participants shares a common understanding, the outcome of the construction project may bear little resemblance to the original vision – the original message delivered by the first telephone call becomes hopelessly distorted, leaving the last recipients to guess what was actually communicated or intended to be conveyed.¹

Putting aside the potential for simple carelessness or incompetence, of which there is an abundance in modern design and construction, there are any number of opportunities for mis-communication, misunderstanding and disagreements. It is a wonder that anything can actually be built. Delays, cost overruns, design compromises are commonplace, but no less disruptive. Given this reality, it is not a wonder that construction projects frequently lead to disputes which are only unraveled in a courtroom or arbitration hearing.

Because of the need for the various disciplines to work together in accomplishing the common goal, it becomes essential for the developer to choose her teammates carefully. Not just for their individual skills, but for their ability to understand the shared vision and to interact with other project participants. Much of this depends on human nature, competence, experience and cooperation. Effectively communicating the vision, avoiding disputes, whenever possible and efficiently managing disputes that could not be avoided, both during design and during and after construction, are of paramount importance in realizing a successful project.

The documents which govern the respective rights and obligations of the project participants can play a large part creating an environment that fosters effective communication. Minimizing, managing and resolving disputes early and fairly will maximize the likelihood that the developer's expectations will be met. Design and construction contracts are often a compilation of separate but inter-related documents, all of which must be carefully correlated to avoid gaps that lead to misunderstandings, disappointed expectations, and disputes. Accordingly, it

¹ Reminiscent of the definition of a camel: a horse, designed by committee.

is important for the developer to pay close attention and give thought to the form, content and interaction of the various contract documents.² It is not unusual for a developer to enter into separate agreements with a number of design professionals (or have her lead design professional enter into sub-consultant agreements with various specialty disciplines), a general contractor and perhaps an owner's representative. The contractor, in turn, unless self-performing (which is becoming exceedingly more rare), will enter into a number of subcontracts with specialty contractors for the various systems required in the structure. While each agreement stands alone in defining rights and obligations of the parties to the particular contract, care must be taken to coordinate the various agreements so that a cohesive, consistent contractual landscape is set for the project.

By way of example, a developer may provide in her contract with the general contractor for the architect of record to serve as the initial decision maker. It is vital, in that circumstance, then, for the developer to assure that the developer/architect agreement obligate the architect to serve the project in that capacity. Moreover, where the developer promises a contractor that submittals will be reviewed and returned within a given period of time, the developer/architect or architect/sub-consulting engineer agreements must obligate the architect and responsible engineers to honor that review commitment. Where the agreement between the developer and contractor is based on drawings that are not permitted or issued for construction, provision must be made for the time and expense that will result when permitted, issued for construction drawings are ultimately issued and are incorporated into the scope of the contractor's and subcontractors' scopes.

Each of the contracts with which a developer must contend often runs 50 pages or longer. They each deal with fundamental areas of agreement to be coordinated. The purpose of this paper is to address fundamental provisions found in most contracts, the purposes each provision is intended to serve, how such provisions come into play in avoiding or resolving disputes and suggestions for reconciling similar provisions in the various contract documents. It is important, especially for the non-lawyer, to understand what is in the written contracts, the circumstances under which a particular contract provision will come into play and how the provision will impact the respective rights and obligations of the parties. Good contracts are those which are understood by laymen. Typically construction professionals are not lawyers and the contract documents should be written for those folks whose relationships will be governed by them – not for the lawyers who write them.

Experience has taught that the paramount touchstone for construction contracting is a *fair allocation of risk*. Contracts are collections of promises each party makes to the other, to be applied to foreseen and foreseeably unforeseen circumstances. Where the promises are heavily biased in favor or against one of the project participants, a circumstance may dictate that one party simply cannot keep a promise, forcing litigation that might have been avoided with a less onerous set of promises. Therefore, the contract documents governing the rights and obligations of the project participants must address key points of contention in a fair, balanced manner. Defining the key points and establishing the fair allocation of risks pertaining to those points must be done at the inception of the project, to maximize the chances for success.

In the experience of the authors, even the lengthiest, most turgid contract really only addresses six (6) fundamentals of agreement:

1. Scope – what is to be built (or designed)
2. Price – what is the price to be paid for what is to be built (or designed)
3. Time – how long will it take to build or design what is being purchased

It has often been said that there can only be negotiation on two of these three components. One can build anything desired for a price desired, but not within a negotiated time. Or, one can build what is desired, within a desired time, but not for the desired price. Or time and price can be achieved, but not for the delivery of the desired project. One must expect to give on one of these criteria in order to achieve satisfactory agreement on the other two.

4. Changes and Claims – how will changes in scope, price or time be addressed and to what adjustments will the respective parties be entitled when changes or claims arise

² The Developer is well advised to retain a construction law specialist, distinct from real estate counsel, as the disciplines have different foci.

5. Insurance/Bonding – what risks are to be insured, how are known, anticipatable risks allocated and how are unanticipated risks to be addressed. Should the payment and performance obligations of the contractor be bonded for the protection of the developer
6. Disputes – how will disputes be addressed and what remedies will be available.

Of course, contracts cover more than these six (6) fundamentals, but most litigation over construction contracts seems, inevitably, to center on these areas. Form agreements from various trade organizations (American Institute of Architects (AIA), Association of General Contractors AGC) and Engineers Joint Contract Documents Committee (EJCDC)) all provide terrific starting points for contracts. But, just as every project is unique, so should the contract documents governing the project be customized and tailored.

ADDRESSING DISPUTES IN THE CONTRACT DOCUMENTS

Taking the last point first, good contract documents anticipate that disputes will arise – and arise during construction, not being polite enough to await completion. How are they to be addressed? Depending on the size of the project, one might consider naming a person in the contracts, whose responsibility will be to stay abreast of the design and construction and be available to provide binding, temporarily binding or advisory decisions on disputes – *as they arise*.

Disputes during design or construction carry the threat that design or construction will be interrupted or shut down entirely, if only temporarily. Having a built-in mechanism for resolution of such disputes minimizes this risk. There is a cost involved, as the dispute resolver will likely serve the project best by attending owner-architect-contractor meetings and change order meetings regularly – importantly before disputes arise. The designated dispute resolver should also be kept abreast of the pay requisition and payment process, including monitoring releases. Investing in this person allows for him to be quickly brought up to speed on a particular dispute, which might otherwise bog down the project. For example, a dispute over whether work is within the contractual scope or a legitimate change can be addressed and resolved, without disrupting follow-on work. Conflicts in design can also be resolved through this process. Under some agreements, the architect is the “Initial Decision Maker” as to disputes between the developer and contractor. However, the architect often is not disinterested in the dispute. Where a change is sought by a contractor due to what the contractor perceives to be a design conflict, error or omission, the architect, in her capacity as Initial Decision Maker, may lean against the contractor – because acknowledging the change carries with it the potential exposure of the architect to the developer.

Where the project does not warrant the expense of a real-time dispute resolver, or the parties cannot agree on the person to fill that role at the time of contracting, a well-coordinated set of contract documents should still anticipate and address disputes arising during the job. Disputes do not limit themselves to fights over final payment. If the architect is to be the Initial Decision Maker under the Developer/Contractor agreement, the contract by which the architect is retained must include that role among the architect’s responsibilities. It should not be designated as “an additional service” because that could lead to a second layer of dispute: the architect’s charges for resolving disputes between developer and contractor.

Next, should the real time dispute resolver’s decision be binding, binding during construction, but reviewable in court or arbitration or advisory only? There are advantages and disadvantages to each approach. When binding, the dispute is resolved fully and finally, not to be revisited. However, the process to reach a final and binding resolution may require a more robust presentation which may, in and of itself, cause some disruption. An interim decision allows for the project to continue, the contractor to bill and developer pay for scope changes during the project (so that the contractor is not choked by cash flow), yet allows for the decision to be revisited, at leisure, once the project is completed. The specific circumstances of the project will help dictate the best way to address this.

Presuming disputes persist through construction that are not resolved through a designated dispute resolution officer, a number of well-developed mechanisms for dispute resolution have become common in construction. Many contracts have stepped dispute processes: disputes are discussed with project personnel for the parties involved in the dispute. Absent resolution, the dispute is escalated to higher and higher levels of management of the disputants, sometimes resulting in a mandatory pre-suit mediation. Mediations are simply structured settlement conferences facilitated by a trained construction professional where the dispute is aired and settlement scenarios explored. Mediation, even when unsuccessful pre-suit, is usually repeated at various stages throughout formal dispute resolution.

Formal dispute resolution can take the form of binding arbitration, usually private, where the finders of fact are construction professionals and their decision final and binding. Rules of evidence are not usually rigidly followed and appellate rights are significantly curtailed. Arbitration can be before a single arbitrator or a panel of three.³

Where the parties to a dispute want to preserve appellate rights and require rules of evidence, resolution of disputes must take place in the courts. Even where court is the desired forum for resolution, the parties must also determine – at the time of contracting, not the time of the dispute – whether their dispute will be resolved by a jury or by a judge sitting without a jury. The respective advantages and disadvantages of the various options for dispute resolution are beyond the scope of this paper, but should, nevertheless, be carefully considered when contract documents are negotiated.

SCOPE – WHAT IS TO BE BUILT

The first step in translating a developer's vision into a brick and mortar reality requires that the developer translate her mental vision into an articulated description of what the finished project should look like and how it should function. When this is well and completely done, the architect and its team of design professionals can reduce that vision to written (or, these days, digital) form. The more the plans and specifications capture the intention of the developer, the more likely the contractors will be able to execute that vision. The more detail included in the plans and specifications, especially performance specifications for certain systems, the better able the project participants will be to accomplish the desired work.

All too frequently, however, project financing, permitting and other considerations require that ground be broken based on an incomplete set of plans and specifications. Contracts for construction which are based on documents issued for bid, rather than permitted plans issued for construction must anticipate and provide for the inevitable differences between the bid and construction documents – and resulting disruptions. Constructability reviews done on bid docs should be redone once final documents are issued, to address new conflicts, new sequencing and scheduling of the work – and new pricing. Uncertainty breeds disputes in construction, so the more certainty that can be established early on, the fewer areas for misunderstanding, miscommunication and dispute will be left.

Through today's technology (CADD, BIM modeling and even more advanced techniques), designs can be more complete, conflicts identified early and plans and specifications more detailed. The plans and specifications are incorporated into the contract documents and are relied upon by the parties to such contract. In keeping with the benefits of early, frequent and comprehensive communication, it has proven worthwhile to involve the contractor in the design process. After all, it is the contractor who will be called upon to bring the plans and specifications to life. If tolerances or systems are extraordinarily difficult to achieve, modifications – or cost concessions – are better accomplished early.

Even assuming a set of plans and specifications that accurately captures the developer's vision, that has been reviewed for constructability, those plans are really only the assembly instructions – which must faithfully be followed by the contractor and its subcontractors. Specially fabricated materials, especially with long lead times or those which will be ready before needed – and therefore stored off-site must be considered and addressed. How and under what circumstances will the contractor be paid for materials needed for the project, but not yet installed? Once they are billed and paid for, who carries the risk of loss (for insurance purposes)? Does title pass? Comprehensive contract documents address these issues. It is important to understand the circumstances to which they apply and make sure that the risk allocation is comfortable.

A terrific set of plans and comprehensive set of specifications, setting forth exactly what is to be installed, by way of finishes, fixtures, lighting, etc., still requires that the developer consider how it will monitor the construction, including changes and tweaks to the design as conflicts or desires evolve. Is the developer sufficiently sophisticated and knowledgeable about design and construction standards and standards of care so as to be able to directly supervise the work of her designers and contractors? Who will represent the developer's interests during the work – to determine that the work is being properly prosecuted, on schedule? When a response to a Request for Information (RFI) or an Architect's Supplemental Instruction (ASI) results in a change – or proposed change – who,

³ Adrian Bastianelli, certainly one of the foremost construction lawyers, mediators and arbitrators in the United States, today, has put forth a suggestion for a panel of two arbitrators. Deadlocks are broken by having one arbitrator, secretly designated in advance, as having the tie-breaking vote. Although not yet common-place, the suggestion carries significant scheduling and cost efficiencies. See ABA *Under Construction*, Winter 2020, Volume 22– Issue No. 2

on behalf of the Developer will determine whether they are necessary, appropriate, costed properly and impacts to schedule recognized? Who will review and approve or modify periodic pay requisitions? Who will consider and resolve change order requests? Who will monitor quality and cost control and releases? If the developer does not have this expertise or capacity in-house, perhaps the developer will want to consider the retention of an Owner's Representative. The Owner's Representative, like the entire project team, must be carefully vetted and selected. For it is the Owner's Representative who will serve only one master – the developer. Unlike the architect, who may find himself torn between the developer and contractor or the contractor, who may find herself torn between the developer and the subcontractors, an owner's representative owes a fiduciary duty to the owner.

PRICE

Construction contracts are often signed based on estimates or bids. Prices can change as plans are further developed, changes are mandated, schedule constraints recognized and such. However, the basis of the price is normally established at inception and does not change – even though the price itself changes. The price can be a fixed price for a fixed scope. It can be the cost of the work with or without a guaranteed maximum price (GMP). It may even establish different pricing mechanisms for different phases of the project. Which pricing mechanism is best depends upon the stage of the drawings at the time the price is negotiated.

In the fixed price, fixed scope scenario, changes in the scope necessarily affect the price, as will changes in the schedule. As such, care should be taken to make sure that the plans and specifications which will define the scope of work are sufficiently developed to minimize the opportunity for changes. The argument often heard is that the contractor is ultimately called upon to build something significantly different than that which was priced.

Cost-plus contracts, on the other hand, are built to address the evolution of plans and specifications. Key in agreeing to such a contract is identifying what "costs" are to be considered allowable. Normally, direct costs, such as the cost of labor, materials, equipment and services necessary to accomplish the work are allowed. But, costs can get murky (The old joke notes that there are three types of lies: Lies, pernicious lies and construction accounting). A contractor legitimately incurs costs that are not as directly traceable to what ultimately winds up in the physical building. For example, the contractor's trailer, port-a-potty, disposable tools and such are truly necessary, and legitimately charged. They are typically grouped among a category of expense known as "general conditions" – that is costs specific to your particular project, but which are not actually incorporated into the physical building. General conditions, as a direct cost, should be scheduled as part of the contract documents, so that it is clear from the outside, what is or is not included. For time related items of overhead (trailer may be rented monthly), the cost should be reflected for the anticipated duration of the contractor's presence at the job site. Here, the more detail, the better. It will allow for appropriate adjustments if the job duration changes – because of changes in scope, delays, force majeure or other factors.

A second type of indirect costs, legitimately incurred, but not incorporated into the physical project – and not even specific to your project – is called overhead. Overhead may include that portion of the home office expenses, insurances and management personnel that are spread over a number of jobs.

It is therefore important, in a cost-plus contract, to define what "costs" are includable in the calculation and which are not. Moreover, the "plus" in a "cost plus" contract typically refers to overhead and profit to be paid to the contractor and is normally expressed as a percentage of allowable cost. It may also be a fixed amount, even where costs are not.

Should there be a Guaranteed Maximum Price on your cost-plus contract? As with virtually every question presented in this paper, the answer is: "it depends". Locking the contractor into a maximum price (adjustable under limited circumstances), may lead the contractor to "hedge his bet" and include a higher price than might otherwise be the case without his guarantee. There is normally some play between the expected cost of the work and the price the contractor would guarantee, but the amount of play may be greater as a protection for the contractor. Where the plans are well developed and changes unlikely, it is reasonable to expect pricing estimates to bear close resemblance to actual costs – in which case a guarantee may provide some comfort. Where it is not reasonable to tie the contractor to a maximum – because the plans have gaps, holes and conflicts that have not yet been filled, it may prove a better bargain to avoid the GMP, but budget for cost increases.

An issue closely related to pricing is whether the developer will have rights to audit the contractor's costs. That right is recognized in typical GMP contract, clearly necessary to make sure that only allowable costs are included. It is also advisable, though, to be able to audit the general conditions. More problematic is whether to audit overhead. Since it is expressed as a percentage of cost, it is not typically expected or intended to be actual

– or subject to audit. By way of example, a contractor’s workers compensation insurance is company-wide, not job specific. Even if one were to assign a percentage to the cost of insurance that matched the percentage that the particular project represented in the contractor’s overall revenue, insurance itself is subject to post-project adjustments, making an audit of such costs difficult, imprecise and disruptive. Most of the time, when not agreeing to a fixed price, it is better to agree on the percentage mark-up over costs for both overhead and profit.

When the contract calls for a GMP, the developer must understand that she is not automatically obligated to pay the maximum price. The guarantee is an upper limit. If, by some fortuitous combination of circumstances, the allowable cost of the work plus the mark up for overhead and profit is less than the GMP, it is the lesser amount which the developer is obligated to pay – and the contractor obligated to receive. The audit is important for this very reason. Where the allowable cost plus mark-up exceeds the GMP, then the contractor must bear responsibility for the overrun, since the developer’s exposure is limited by the GMP.

The concept of initial GMP (“IGMP”) is important in this analysis, too. The cost of the work is not compared to the IGMP to determine the maximum amount to which the contractor would be entitled. Rather, one must compare the final GMP (“FGMP”) to the marked up allowable costs. The difference between the IGMP and the FGMP are adjustments resulting from increases to the scope of work (inclusion of additional materials, expansion of undertaking, or time-related adjustments due to developer delays). If none of these circumstances present, then the IGMP will be the same as the FGMP for calculating and comparing to marked up allowable costs.

Whether fixed price or cost plus, with or without a GMP, the manner in which changes to the work are to be priced must also be considered.

With design, the developer may pay for a certain number of hours, covering a certain scope of work, agreeing to pay for “additional services” at a prescribed rate, as needed. Alternatively, the Developer can purchase a defined deliverable – such as permitted plans that follow conceptual, schematic, bidding iterations. Attention should be paid, in the Developer/Design Professional agreements to provisions which limit the design professional’s liability to a specific dollar amount, the amount of the contract or the amount of available insurance. Thought should also be given to purchasing a project-specific insurance policy for the design professional, to assure the project of sufficient coverage, regardless of other projects in which the architect might be involved. The architect’s liability is typically limited to exclude “betterment” (the cost of construction that would have been required absent the design professional’s error or omission). A Developer usually can only recover the additional costs which could have been avoided had the error not occurred. For example, a design calling for 4 lights in a room where the building code required 6 lights may be an error for which the architect is liable. However, the damage would not include the two extra lights. They make the project “better”. The liability would be limited to the cost of opening up the ceiling after it had already had the four lights installed, re-closing, re-painting and the like. Moreover, in many states, the individual licensee may be personally liable (in addition to the company for whom he or she works) for errors or omissions in sealed drawings. Some contracts contain provisions which avoid this individual liability.

TIME

The adage time is money is particularly true in construction. The longer it takes to bring a project on-line, the larger the carry costs and the longer the Developer must wait before an income stream from the project can begin. The market for which the project is targeted may be missed as a result of delays in design, permitting or construction. For these reasons, very careful attention must be given to the time anticipated for design and construction. Scheduling of all phases of a project must begin at the earliest possible time. Schedules should be realistic and regularly updated. The critical path of construction – the shortest path through construction activities to accomplish the construction should be identified, monitored and modified throughout construction. Moreover, to the extent the project warrants the expense, schedules of the contractor should be tested and verified against the developer’s own scheduling efforts.

Scheduling, though, just keeps track of the time. It does not control or manage the time a project actually takes. Scheduling allows for at least two important tasks: monitoring the progress for projecting completion and identifying delaying events – so that they can be accommodated, corrected (through acceleration or otherwise) and so that responsibility can be assessed.

Where the contractor is delayed by the developer, depending on the particular contractual provisions, the contractor may be entitled to an extension of time to complete construction, additional general conditions and home office overhead for being on the project longer than expected or additional costs incurred by accelerating to overcome delay. Often a developer attempts to limit a contractor’s remedies for owner-caused delays by providing

that a time extension is the only relief to which a contractor will be entitled. Although described differently depending on the locality, many states recognize that such provisions limiting remedies for owner-caused delays to time extensions are not equitably applied where there is “active owner interference”. Where the developer interferes with the contractor’s performance – and thereby extends the time of performance without contractor fault, typically the contractor can recover its delay-related costs even in the face of a “no-damage-for-delay” clause.

Delays must also be analyzed for issues of concurrency, in which case a contractor may be entitled to a time extension, but no money. Concurrency occurs where a delay results from two or more factors acting at the same time. For example, a contractor might be responsible for late delivery of material expected to be installed during a period of time, but, at the same time period, a weather event or other force majeure event acts in concert with the late delivery. Either would have caused the delay without the other, so neither benefits by compensation. Such a delay may be characterized as “excusable/non-compensable”.

Delays to the critical path that are the result of a failing of the contractor may entitle the developer to recover damages from the contractor. Often these damages are certain to occur, but difficult to quantify. As a compromise, at the time of contracting the parties may “liquidate” the owner’s recoverable delay damages, by a per diem that should bear some resemblance to the actual damages that would occur.

Developers should also be aware that many construction contracts include “mutual waivers of consequential damages” for delay. Consequential damages are more accurately described as “indirect” damages. Where additional costs of construction flow directly from delay (through price escalation, acceleration costs, etc.) delay may also impact carry costs (such as builders’ risk insurance, interest, lost profit). By provisions waiving consequential damages, a contractor may forego profit it would have realized on other projects, had it been freed up to pursue them, but does not forego the direct damages it may suffer. The developer, on the other hand, typically *only* suffers consequential damages from delay. So, by waiving consequential damages, the developer may actually be depriving itself of the right to recover any damages – hence the importance of a fair completion date and liquidated damages for delay.

CHANGES AND CLAIMS

Changes to scope or schedule during construction give rise to additional costs. Circumstances beyond changes to scope or schedule – such as the impacts on a construction site of COVID-19 protocols, give rise to additional costs, as well. The well-drafted set of construction documents will address how such events should be addressed.

Contracts involve notice provisions – deadlines for notice by one party to the others of an event giving rise to a change or claim. Many states strictly enforce contractual language that construes absent or untimely notice as a waiver of the change or claim altogether. Others required a showing of prejudice to enforce a waiver. However, it is always in the project participant’s best interest to give early notice of events which may give rise to a change order or claim. Notice may or may not require simultaneous submission of supporting documentation of both entitlement and quantum of a particular change.

For scope changes, the change order process is likely familiar to most construction participants. It behooves all involved to document them fully and address them promptly. Change order requests, left unaddressed, threaten to disrupt projects. Without resolution, does the contractor perform a change – necessary to maintain work flow according to schedule or, at risk to the project, stand down until the change is resolved? Since the contractor typically cannot bill for extra work that is not the subject of an issued change order, proceeding with the work puts the contractor at risk to its subcontractors, while awaiting resolution with the developer. Such is a recipe for disruption, disagreement and disaster.

Regular meetings where change orders and claims are discussed and resolved benefits the project – and goes a long way toward avoiding post-construction disputes. Where there is a dispute resolution officer involved during the project, these meetings also serve as a convenient forum for real-time resolution.

INSURANCE AND BONDING

A construction project should be protected by any number of insurance and surety products. Insurance and surety, while often available from different divisions of large insurance companies, are distinct products and serve distinct purposes.

Surety, typically in the form of performance and payment bonds, provides the credit of the surety as support for the credit of the contractor. Thus, a performance bond is an undertaking by the surety and the contractor that,

in a defined default by the contractor, the surety will step in to complete the project. A payment bond is an undertaking by the surety and the contractor that, in a defined failure of the contractor to pay lienors (subcontractors, suppliers and laborers), the surety will step in to pay them – keeping the developer's property free from construction liens.

These bonds require compliance with a number of obligations before the surety will perform and provide the surety with a number of options for performance. For example, a performance bond surety may have the right to bring in another contractor to complete the project, but may also be entitled to retain the very same contractor who was in default in the first place, to come back to complete (with the surety funding the completing contractor). Or the surety could choose to right a check for its determination of the remaining cost of completion (less contract balance).

Many times, subcontract agreements condition a subcontractor's right to be paid by the contractor upon the contractor's receipt of payment from the developer for that particular work (conditional payment or pay-when-paid provisions). It is important to be aware that a payment bond surety will not be able to rely on such conditional payment language as a defense to a claim under the bond, as the bond constitutes an obligation to the subcontractor, independent of the subcontract. Thus, while bonds typically incorporate the prime contract (contract between developer and contractor), they do not typically incorporate the conditional payment provision of the subcontract.

Insurance, distinct from surety, indemnifies the policy holder from loss from specified causes. Typically, a developer will procure a "builder's risk" policy of insurance that protects the construction project from specified causes of loss, such as damage from defective work, vandalism, weather related losses and such. The extent of insured risks and the allocation of them among the project participants should be carefully considered. There are also property policies, workers compensation and liability policies, all of which have a place in a construction project.

Subcontractor default insurance protects the employing contractor from loss due to a default in performance by one of the subcontractors. This type of insurance only indirectly benefits the developer – who is typically not a named insured (but, in certain circumstances, may be an additional insured).

In larger projects, controlled insurance programs, sponsored either by the developer (Owner Controlled Insurance Program – or OCIP) or the contractor (Contractor Controlled Insurance Program – or CCIP) may provide significant benefits, both in terms of coverage and cost. In controlled insurance programs, the sponsor (either the Developer or Contractor) procures comprehensive insurance, covering builders risk, workers comp and product risks and enrolls each subcontractor on the project, so that the subcontractors benefit – for this project from this coverage – in lieu of each subcontractor's own insurance. In turn, each subcontractor, through a deductive change order, credits the contractor with the cost the subcontractor would have incurred had its own insurance been implicated in the project. The various credits realized through these deductive change orders, in turn, defray the costs of the controlled insurance program. Through these programs, since all subcontractors are covered, cross-claims and subrogation claims can be eliminated.

CONCLUSION

Construction is complicated and requires cooperation among many disciplines, over a protracted period, through challenging and, often, unforeseeable circumstances. A comprehensive, coordinated set of contract documents, including design agreements, construction agreements, plans and specifications are essential to the successful completion of a modern project.