

RHarper Consulting Update

Post – Completion Costs: Let's Avoid Them



Many owners, developers and contractors end up in protracted disputes after a project is finished, due to claims which occur after completion. Those claims usually result from the Contractor "catching up" on previously unsubmitted change order requests, undiscovered costs from subcontractors or suppliers, or schedule-related issues. Owners are unpleasantly surprised by these claims, as project contingency (if there ever was any) has been spent, loan funds are depleted, and no more equity is available. Both parties may simply put off resolving these matters, hoping things will all just work out in the end, but the situation will become much more serious (and expensive) once the dispute moves to litigation.

As the economy begins to recover and building activity picks up, Owners, Contractors and Architects should give serious thought to revising, planning and managing their projects, documents and construction administration to effectively minimize post-completion claims and costs. Some suggestions for managing post-completion costs and claims:

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Define and Assign Close-out Responsibilities – As-built surveys, building commissioning, systems training, release of municipality-required completion bonds, and final occupancy certificates would often benefit from better definition on the construction documents, including assignment of responsibility and time frames for completion. This seems simple, but without accountability, these items often linger for months or, worse yet, are completely overlooked and present significant issues later when the property is sold or refinanced.

Use an Embedded Neutral – Utilizing an objective third party such as an Initial Decision Maker, or Dispute Review Board is a proven method to effectively manage the claims process. It eliminates much of the "tit-for-tat" that often develops between the parties over the course of a project, provides a timely determination on the validity of claims (usually non-binding), and overall provides, as one member of a Dispute Review Board put it, "adult supervision."

Effective Claims Management – When we are drafting and executing contracts at the beginning of a project, often the issues of dispute resolution seem so unlikely or far off that we pay only cursory attention to them. This lack of foresight becomes very costly if there are legitimate matters of dispute requiring further resolution. Some suggestions to better manage the process to minimize resolution costs:

Provide for ADR in the Contract Documents – The parties should focus on ways in which to expedite dispute resolution, such as mediation, fast-track arbitration, and other thresholds before arbitration or litigation is necessary, defining/limiting discovery in the process.

Prevent "Stockpiling" Claims – Parties may get in the habit of holding claims until the end of the job, hoping that there will be enough offset between parties to minimize the impact to the "overall" loser. This practice often creates a "super" claim at completion, in which all of the claims, both major and minor, get wrapped into one large litigation or arbitration. The parties then spend large sums in legal costs, discovery, and litigation of claims, many of which could have been resolved much earlier and much more cheaply.

Collect Documents Now – Access to documents and involved parties weakens once the project is complete. Key personnel leave or are assigned to projects far away, critical documents are lost or misplaced, memories become cloudy, and the cost of resolving each claim only increases. Be proactive and organized in collecting and assembling all data and documentation related to the project. If possible, maintain contact information with all project-critical personnel, and retain copies of all daily journals.

No one ever enters into a project with the intent of ending it years later with a huge lawsuit. Just as we do cost/benefit analysis on buildings and designs, we should practice the discipline on claims. An objective analysis of the responsibilities, pursuit costs, and likely awards should always be the first step in the process. Once litigation starts, somewhere along the way, the parties will always ask "is this really worth it?" The time to ask that is before the claim ever gets out of the job site trailer, not in the hearing room.

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RHarper Consulting Group provides development consulting, program management, and owner representation services focused on the senior living and mixed use sectors. In addition, Mr. Harper is also a listed mediator and arbitrator providing dispute resolution services for the construction and real estate industries.