



Breakfast Briefing: Constructing Your Construction Project

Legal Issues in the Planning, Structuring and Implementation of Your Next Construction Project

October 21, 2014

Speakers:

Caryn G. Pass, Partner, Venable LLP

Peter S. Britell, Partner, Venable LLP

Suzanne St. Pierre, Partner, Venable LLP

Ashley A. Dunn, Associate, Venable LLP

Topics to be Covered (1)

- Type of Project
- Governance –Roles of Board and Building Committee
- Budget, Program, Design Concept
- Project Schedule and Academic Schedule
- Initial Funding and “Naming” Gifts
- Roles of Owner’s Rep, Architect, Construction Manager
- Contract “Structuring” Issues



Topics to Be Covered (2)

- Good Practice in Team Selection
- Types and Sources of Funding/Financing
- Importance of “Pre-Construction”; “Budget Busts”
- Types of Construction Issues/Problems
- Insurance and Bonds
- Construction-Period Administration
- Key Contract Issues
- “Closing Out” the Project



Type of Project

- Type of project defines the approach
- New campus
- New building
- Renovation of old (historic?) building
- Systems renovation



Governance – Roles of Board and Building Committee

- Large vs. small board
- “Working” vs. “funding” board
- Construction experience on the board?
- Creation of Project (“Building”) Committee
 - Role
 - Authority
- By-law and Certificate of Incorporation Issues
 - Authority
 - Special Voting Requirements
 - Restrictions
- Not-For-Profit Legal Issues
 - Outside Approvals or Reviews



Budget, Program, Design Concept

- Which comes first?
- Program defines the uses and need
- Budget defines financial parameters
- Design concept must follow program and fit budget – problems of starting first with design
- Key point
 - regular testing of budget during pre-construction – avoiding “budget busts” (see below)



Project Schedule and Academic Schedule

- Will project require work which affects academic year?
- Answer impacts budget, design, logistics
- “Reality testing”
- Stand-alone project (e.g., new campus, separate building) vs. work in or around existing campus or renovation



Initial Funding and “Naming” Gifts

- Affects budget and sometimes governance
- Naming gifts often key to project – set the spirit
 - Donation agreements can be complex
 - How far into the planning to announce a naming gift?
 - Importance of legally enforceable (and “bankable”) pledge letters



Roles of Owner's Rep, Architect, Construction Manager

- Role of Owner's Representative
 - Issue: In-House Project Manager?
 - Avoid straining in-house team
- Role of Architect
 - What the architect is 'not'
- Role of Construction Manager
 - Pre-construction
 - Construction



Contract “Structuring” Issues

- Architect/Engineering Agreements
 - “Umbrella” vs. ‘Side-by-Side’ structure
- Construction Agreements
 - CM “at risk” (lump sum, GMP)
 - CM “as agent”
 - Design/Build Contract
 - Benefits and Detriments



Key Contract Issues (1)

- Architect Agreement
 - Fee structure (relevant factors)
 - Ownership of drawings
 - Insurance and indemnity
 - Limitation (or not) of liability
 - Consequential damages



Key Contract Issues (2)

- Construction Contract –
 - Business terms
 - How price is determined – lump sum, guaranteed maximum price (GMP), CM agent fee
 - Assumptions/exclusions upon which the price is based
 - Allowances – estimated amounts for certain elements of work
 - Alternates – pre-negotiated optional additions and substitutions (at owner’s election)
 - What constitutes ‘extra work’?



Key Contract Issues (3)

- Construction Contract
 - Pricing of change orders
 - “No damage for delay”
 - Contractor liquidated damages/consequential damages



Good Practice in Team Selection

- Use competitive process to get best agreements from architect and construction manager
 - Do not award before contracts completed
- Use clear contracts drafted for your project – not AIA or other form contracts
 - Issues in using other parties' forms



Types and Sources of Funding/Financing

- Donations
- Pledge Financing
- Mortgage Loans
- Tax-Exempt Bonds
- Use of Endowment



Importance of “Pre-Construction” – “Budget Busts”

- Pre-construction disciplines
 - Cost estimating
 - Constructability analysis
 - “Value engineering”
 - Scheduling
 - Project site due diligence
 - Logistics planning

- “Budget Busts”
 - Faulty estimating
 - Architect error or omission
 - Market changes
 - Owner changes



Types of Construction Issues/Problems (1)

- Delayed start
 - Land-use permits, building permits, EIS delays, other issues
 - ‘Neighbor’ issues – need to access adjacent properties for monitoring, support, or means and methods
- Change Orders – architect error; ‘scope creep’; unforeseen conditions; owner discretionary changes
- Construction delays – fault and no-fault
- Remedies for contractor defaults
 - Right to terminate for convenience/for cause
 - Acceleration of the work



Types of Construction Issues/Problems (2)

- Remedies for contractor defaults
 - Actual and consequential damages
 - Liquidated damages
 - Negotiated settlements



Insurance and Bonds

- Different insurance structures for different projects
 - Owner controlled insurance programs (OCIP) and contractor controlled insurance programs (CCIP)
 - Conventional insurance structure
- Bonding
 - To bond or not to bond?
 - Required for government-funded projects
 - Adds to project cost



Construction-Period Administration

- Archiving documents
- Careful attention to monthly requisitions, claims, other documents – including email
- Prompt response to contractor and other claims
- Monitoring cash flow and budget variances
- Attention to insurance documents
- Regular reporting to Building Committee and Board



“Closing-Out” the Project

- Define “Substantial Completion” and “Final Completion” for particular project
- “Punch List”
- Start of guarantee/warranty periods
- Obtaining all necessary permits and sign-offs
- Resolution of pending claims and back-charges
- Use of ‘close-out’ agreement

