

The Perfect Storm: Managing and Surviving Concurrent Threats to Budgets and Schedules

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Supply chain. Labor shortages and interruptions. Inflation. All of this and more is challenging the traditional construction industry drivers of schedules and budgets in ways not seen in a generation. It is the “perfect storm”. As a result, many design and construction professionals are constantly fearing and facing revenue and liability threats in new and unprecedented ways.

Of course, none of these issues are any “fault” of the architect or engineer. However, the threat remains real and is exacerbated by a natural tendency of other project participants to seek to “share the pain” – and especially so with “well insured” architects, engineers, and construction managers. To manage and respond to these combined concerns, design and construction professionals should re-focus on and revisit four elements of their professional services agreements and project delivery protocols:

1. Schedule Accountability
2. Compensated Durations
3. Specified Component Lead Time
4. Budget Accountability

Each is addressed below.

1. Schedule Accountability

Over the last three years, project schedules could be aptly described as “chaotic.” Literally overnight the industry went from “overheated” to “shutdown” to sporadic “restarts.” Theoretically, the AIA B101 accounts for that context by including in the standard of care clause in Paragraph 2.2:

The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

The AGC ConsensusDocs 240 appears to be harsher as it provides in Paragraph 5.1:

Time is of the essence. Design Professional shall provide the Services required by this Agreement in a timely manner and in conformance with the most recent Project Schedule approved by Owner. Time limits established by this schedule shall not, except for reasonable cause, be exceeded by the Design Professional or Owner.

However, even that is linked to “reasonable cause” which is open to interpretation. The ConsensusDocs at least seek to provide some exemplars of such reasonable cause by providing:

Examples of causes beyond the control of Design Professional include, but are not limited to, the following: (a) acts or omissions of Owner, or Others; (b) changes in the Work or the sequencing of

the Work ordered by Owner, or arising from decisions of Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by Owner pending dispute resolution or suspension by Owner under §12.1; (e) transportation delays not reasonably foreseeable; (f) labor disputes not involving Construction Manager; (g) general labor disputes impacting the Project but not specifically related to the Worksite; (h) fire; (i) Terrorism; (j) epidemics and pandemics; (k) adverse governmental actions; (l) unavoidable accidents or circumstances; (m) adverse weather conditions not reasonably anticipated.

Missing from the foregoing are at least two elements of the current perfect storm which are supply chain issues and labor shortages. To address those, at least two small “enhancements” to the exemplar list are appropriate: the words “material and product availability and” should be added to the beginning of section e and in section g after “general labor”, the words “availability, supply, and”. However, the real key is to directly and indirectly contain those schedule issues which could go toward design responsibility. Ideally and directly in this clause, the AGC, AIA, or any similar clause would close with language such as “Design Professional shall not be responsible for any delay except those caused solely by Design Professional’s fault or breach of contract.” There are also indirect clauses such as the waiver of consequential damages which could also help contain this risk.

2. Compensated Durations

The foregoing addresses the liability component of such delays. The other side of that equation is compensation to the design or construction professional for such extended duration. The inevitable reality is that fees for continuing attention to and management of a project will expand with time. Since the perfect storm of events is beyond the design or construction professional’s control, their compensation should and must be protected. Here, the AIA B101, Paragraph 4.2.5 simply provides:

If the services covered by this Agreement have not been completed within () months of the date of this Agreement, through no fault of the Architect, extension of the Architect’s services beyond that time shall be compensated as Additional Services.

The potential problem with that language is that it begs the question and opens up the challenge where the “delay” is alleged to arise from multiple sources. Accordingly, it would be better if the design and construction professional were to be compensated for all schedule delays and extensions except only to the extent solely caused by that professional. Under that approach, the AIA clause would be modified to read:

*If the services covered by this Agreement have not been completed within () months of the date of this Agreement, **except to the extent caused by the sole** fault of the Architect, extension of the Architect’s services beyond that time shall be compensated as Additional Services.*

The caveat to the foregoing is that the design team as a whole should maintain a shared and united front with respect to such external delays such that all design team members will look solely to sources external to the design team for remedies and such clauses relate solely to them.

3. Specified Component Lead Time

The current lead time for delivery of materials and products for any and all projects has become even less predictable than before. This has had two frequently repeated impacts. First, it has been the project schedule impacts from such delays. The secondary impact has been the “substitution solution” whereby unintended, but available products and materials are used in lieu of the intended material or product.

The first issue as to elongated or delayed deliveries would be reasonably addressed by the schedule provisions in Section 1 above. However, execution becomes just as important in terms of managing and documenting client awareness and approvals as well as contractor, subcontractor, and supplier input. In that later regard, contractor/subcontractor acknowledgment is the key. Such a note in the contractor agreements or bids may be as follows:

Contractor has reviewed the Contract Documents including the specified materials and products and confirms it can and will deliver the Project as set forth herein.

This closely mirrors similar, comment commitments by contractors. However, even with that assurance and acknowledgement, under the current global challenges, there will still be delays. When that happens, “alternatives” will naturally arise as a solution. Again, this is not the design professional’s responsibility and it is proffered as a “solution” for the benefit of the owner and contractor. Accordingly, the design agreements should provide:

Upon the written request or direction of Client, Consultant shall evaluate and advise Client with respect to proposed or requested changes in materials, products, or equipment. Consultant shall be entitled to rely on the accuracy and completeness of the information provided in conjunction with the requested substitution. Consultant shall not be responsible for errors, omissions, or inconsistencies in information by others or in any way resulting from incorporating such substitution into the Project.

The concurrent project documentation should be consistent with those caveats and limitations.

4. Budget Accountability

Finally, as a result of inflation along as well as a derivative of the supply chain issues, project costs have escalated dramatically and have pushed many projects “out of budget” and “out of funding.” There is also often a “lag time” in the recognition of the inflation impacts. For the design team, this often drives re-design, value engineering, and substitutions. Each can adversely impact the design process and incur significant additional design fees. To begin with, the design team responsibility should be very clearly described and limited. For example, it may provide:

Consultant shall advise Client as requested with respect to probable construction costs and budgets based on and limited to Consultant’s experience and qualifications. Such services are only Consultant’s professional opinion and judgment and shall not be construed or relied upon as a guarantee or warranty as Consultant has no control over and is not responsible for variations in the cost of labor, materials, or equipment, the means, methods, or sequencing of construction, or market conditions.

In addition, the design team should be very clear that any such re-design services are to be compensated. Such a provision may provide:

Except to the extent caused solely by Consultant's negligence or breach of contract, any professional services to evaluate project scope and design changes following client approvals of the prior phase of services shall be compensated by the Client as additional services. Consultant shall not be obligated to provide such services until such time as such additional services have been agreed to in writing or directed on a time and material basis.

The obvious key to the foregoing is then to document the sequential client approvals of the design and the contemporaneous for cost-based evaluations and re-design services.

ABOUT THE AUTHOR

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