

The LePatner Report

Fall 1997

A Quarterly for the Design, Construction and Real Estate Industries

Volume 17, Issue 3

Negotiations: The Professional's Test

The following is an excerpt from the presentation of Barry B. LePatner, Esq., at the North Carolina AIA Awards ceremony on July 25, 1997, at Hilton Head, South Carolina where he served as a Design Juror with A. Eugene Kohn of Kohn Pedersen Fox Associates, P.C.

By Barry B. LePatner, Esq.

Today, to successfully negotiate your contracts, you need to know what provisions are important and which ones are not; you need to know how to limit your liability and how to avoid the kinds of problems that architects experience all too often on their projects.

But, most of all, I submit that you must know how to turn contract negotiation from the often dreaded process it has become for some, into a positive, exciting opportunity to advance the interests of your firm. I would like to get you to see that a well thought-out negotiation with your client can enhance the stature of your firm in the mind of the client, lead to higher fees, and position you for more work from that client than you previously thought possible.

Before getting your blood pressure up too fast, let's stop and give ourselves a good ol' fashioned test to see where your firm stands on the Jurassic Architect Park Test (that's the genetic test to see whether your firm is about to become extinct in the near future).

Test

This test will help you determine if your firm ranks high or low on the scale of firms that are proactively implementing effective management and loss control measures in today's new economy. Each of the ten questions should be answered Yes or No.

Question #1: Does my office regularly start on a project without a contract?

Question #2: For a major sized project, does my office spend more than ten hours negotiating with the owner on our contract?

Question #3: Before entering fee discussions with a client, does my firm regularly perform an analysis of anticipated project costs for medium to large size projects?

Question #4a: Does my firm know when and how much of a profit it has made for each project?

Question #4b: Does my firm know what its annual profit percentage is for all of its work by building type?

Question #5: Is there a formal procedure in my office for identifying and triggering additional services fees on a project?

Question #6: Do we include customized provisions in our contracts to reflect the special nature of projects that involve renovation or other higher risk services?

Question #7: Do we know the value of and thus, generally retain ownership, use and copyright of our drawings and specifications?

Question #8: Do we regularly negotiate the indemnification provisions which clients ask us to add to our contracts.

Continued On Page 4

Thinking of Starting A New Construction Project? Try This Formula For

By Timothy F. Hegarty, Esq.

With the nation's economy humming steadily along, e.g., low interest rates, low inflation - if not deflation, declining joblessness, and strong economic growth not seen since the 1960s, many corporate and institutional clients are either expanding existing facilities or thinking about it. While many projects are popping up across the nation's landscape, how many of these owners, who have recently completed their projects, can honestly say whether their projects should be classified as a success? Isn't it far more common to hear complaints about projects coming in over budget, excessive delays, excessive

Selection
Understanding
Costs
Contracts
Execution
Specifications
Strength

change orders ("COs"), excessive requests for information ("RFIs"), failure to make payments, mechanic's liens, bankruptcies, and the like? Your project needn't fall into that category. Instead, consider the following guidelines to ensure a successful project: *Selection; Understanding; Costs; Contracts; Execution; Specifications; and Strength.*



Selection of the right team members is the first step towards ensuring a successful project. Your team should be comprised of the following members: independent owner's representative, construction counsel, design professionals, construction manager or general contractor, sub-contractors, and suppliers. Projects that usually fail typically do not have an independent owner's representative and construction counsel as part of the owner's team. For whatever reason, an owner may choose to attempt to reduce costs by using in-house personnel to act as the owner's representative and may use non-specialized in-

house or general counsel. As will be discussed below, the retention of an independent owner's representative and construction counsel is the best investment an owner can make at the beginning of a project.

TABLE OF CONTENTS

Negotiations: The Professional's Test	1
Thinking of Starting A New Construction Project?	1
An Owner's Contract May Be The Instrument	2
In Luminæ The Quiz	3
Quote of the Quarter	4
Firm News	4

Continued On Page 3

An Owner's Contract May Be the Instrument to Protect an Owner Against Third-Party Claims Arising out of Construction Projects

By: Ronald B. Feingold, Esq.

Frequently, our owner-clients who undertake construction projects discover, either during the project or sometime thereafter, that a third party, with whom the owner has had no contractual relationship, has filed a lawsuit against the owner, seeking damages for personal injuries suffered during the construction project. Typically, the owner has hired a contractor to provide construction services for the project. If an employee of the contractor or one of the subcontractors sustains a physical injury during construction, the employee commences a lawsuit for damages. Under the New York State Workmen's Compensation Laws, an employee is prohibited from suing his or her own employer. The employee generally brings a lawsuit against the owner of the property, the project's architect or engineer, and, if the employee is employed by a subcontractor, against the project's general contractor.

There may be another instance as follows: Years after the completion of the construction project, a passerby or invitee slips and falls on the owner's premises and sustains personal injuries. The passerby may commence an action against the owner, the project's architect, engineer, contractor, and/or subcontractors, seeking the recovery of damages.

In either situation, the owner is named as a defendant in a lawsuit for which it may have little or no liability. Unless the owner committed some kind of act, error or omission contributing to the injury, the owner is not liable for the

accident on its property. What is an owner to do in order to avoid incurring unnecessary costs, expenses and attorney's fees in connection with defending such lawsuits?

The owner-contractor agreement (the "Agreement") may be the instrument to protect owners from encountering claims such as those described above. Provisions dealing with both insurance and indemnification may be included in the Agreement which can afford protection against these kinds of third party claims. This article will discuss some of the provi-

and liability resulting from lawsuits which are brought by third parties and arise out of the project. The obligation to defend and indemnify requires the contractor, generally through its insurer, to step into the lawsuit and defend and hold the owner harmless against such liability, judgments, etc.

A second provision, more potent and more protective, is one which requires the contractor to obtain general liability insurance for the owner, i.e., to name the owner as an additional insured under the contractor's comprehensive general liability ("CGL") policy. The contractor's liability insurer must

the owner as an additional insured under the contractor's CGL policy. Merely naming the owner as a "certificate holder" on the certificate is extraneous and pointless. It simply means that the owner has the contractor's insurance certificate in its possession. It is imperative that the owner be listed on the certificate as an additional insured.

It is also crucial that the Agreement requires the contractor to provide the owner with renewal certificates on an annual basis during the project, demonstrating continued coverage of the owner under the contractor's CGL policy. The Agreement should also require the contractor to notify

The obligation to defend and indemnify requires the contractor, generally through its counsel, to step into the lawsuit and defend the owner and hold the owner harmless against such liability, judgments, etc.



'Indemnity' by Ira Kustin

sions which may be included in the Agreement which may help reduce the owner's exposure to damages, legal fees and expenses resulting from such claims.

The key provision to include in the Agreement is one which requires the contractor to defend, indemnify and hold the owner harmless from and against claims, damages, judgments

and come in to defend and indemnify the owner.

Securing the contractor's obligation to name the owner as additional insured is more formidable since this duty is absolute, whereas the duty to indemnify is unlimited. An owner may not be indemnified for its own negligence, in whole or in

part. The obligation to insure the owner, on the other hand, is not limited. The contractor's insurer is required to provide a full defense and full insurance coverage, regardless of fault or liability.

It is prudent to include a provision in the Agreement which requires the contractor to deliver to the owner, prior to the commencement of the project a certificate of insurance, which lists

the owner in the event of the cancellation of the CGL policy, or the cancellation of coverage for the owner (as an additional insured), if either occurs during the project.

In situations where a contractor is required to defend and indemnify the owner and name the owner as additional insured, and a lawsuit is brought against an owner by a third party, the owner is advised to "tender the defense" to the contractor; i.e., request that the contractor defend the owner's interests in the lawsuit by having counsel appointed and provide full insurance coverage. In the event the contractor refuses to accept the tender, the owner is advised to have its counsel file a motion for summary judgment with the court, seeking full indemnification against the contractor, and requesting that the contractor take over the owner's defense and provide full insurance coverage for the claims; i.e., pay all damages that may be awarded against the owner in the lawsuit. In effect, the contractor's CGL insurer takes over the case and appoints counsel.

Continued on following page.

Both the duty to indemnify, as well as the obligation to name the owner as an insured under the contractor's CGL policy, helps insulate our owner-clients from defending against third party actions, thereby reducing the owner's legal fees and expenses. In addition, by including these provisions in its agreement with the contractor, an owner will reduce the likelihood of having to pay money damages to the third party plaintiff. ■

Ronald Feingold, Esq. is a partner at BBL & A. His practice areas include: Construction; Contract Law; Surety Law; Litigation; Corporate and Partnership Law.



IN LUMINAE The Quiz

1 What is obtained by the owner that is equal in amount to the value of construction and is used to protect against loss due to fire, vandalism and machinery malfunctions during construction?

2 When does Construction Insurance become invalid ?

3 True or False:
It is prudent to include a provision in the owner-contractor agreement which requires the contractor to deliver to the owner, prior to the commencement of the project a certificate of insurance, which lists the owner as an additional insured under the contractor's comprehensive general liability policy.

Answers below.

Answers to In Luminæ Questions :
1. Property Insurance (Also referred to as Builders Risk Insurance).
2. When the Certificate of Substantial Completion has been signed by the owner, the architect, and the contractor and the owner begins to occupy the project.
3. TRUE

Understanding the construction process from soup to nuts is obviously an important ingredient for preventing problems from arising on a project. But does that mean that the owner must know the difference between a grade beam and a footing or a curtain wall and a retaining wall? No. The owner need only retain a construction savvy independent owner's representative and counsel who have the knowledge and know-how to get the job done on time and within budget. Indeed, the best case scenario is where the owner is in the background and does not correspond or meet directly with any members of the team other than the independent owner's representative and construction counsel.

Costs are always a major factor on every project, but they should not dictate every decision. For example, it is far too easy for an owner to enter an agreement with the low bidder solely based on price. For every dollar saved during the bidding stage, multiple dollars may be lost later as a result of change orders and/or delays. This applies not only to the design professional and construction manager or general contractor, but also to subcontractors and suppliers. In that regard, be sure to draft a provision in your agreement that requires the owner's approval of all subcontractors or suppliers. There's an old construction axiom: A low bid often means someone made a mistake. Either they have the wrong prices, failed to estimate the quantity correctly, failed to consider labor uncertainty, failed to estimate the time needed to perform the work, failed to allow enough lead time to secure the proper materials, and the list goes on. Instead, ask your independent owner's representative and construction counsel to provide appropriate due diligence to ascertain the best one based upon price, scope and qualifications.

Everyone knows that time is money and another way to ensure timely completion is to draft a realistic liquidated damages provision. Often a dollar figure is chosen as the monetary daily penalty without much logic. For example, if you want to construct a hotel, you should retain a consultant to prepare an analysis of the estimated actual impact for

each day that the opening of the hotel is delayed. By the same token, perform a second analysis to determine if there is any benefit to the owner for an accelerated opening. If there is, include a realistic bonus provision in everyone's agreement.

Contracts determine the rights and obligations of all the players for the project. Creating the right contract begins by preparing a customized Request for Proposal ("RFP") and related bidding documents. Your independent owner's representative and construction counsel should be asked to review all RFPs and make recommendations. With respect to the actual agreement for the work, while the AIA documents are relatively popular, they have a number of shortcomings and will not send the appropriate message to the other team members that the owner is in control of the project. Instead, a custom agreement for each team member should be prepared by construction counsel. This should not mean that the contract is draconian. Rather, it should be fair but comprehensive. The best contracts are often agreements in which both sides fully understand all the provisions and are generally satisfied with their agreements.

Execution is the hallmark of a successful project. Selecting the right team members and having the right documents in place is only half the battle. By execution, I am primarily referring to contract administration. No one should be so naive that they do not believe problems will arise on a project. Problems will undoubtedly rear their ugly heads, but their impact can be minimized if you are prepared to handle them fairly and in a timely manner. Contract administration is premised upon supervision of the design professionals, construction manager or general contractor, subcontractors, and suppliers from the beginning of the project until the certificate of occupancy is obtained. The independent owner's representative and construction counsel should be active participants and involved during each phase of the project. They should be granted authority by the owner to make the necessary decisions to keep the project on schedule and on budget.

Specifications and drawings are the map for all team members to follow. Why list specifications before drawings? Isn't it usually referred to as

"drawings and specifications"? Yes, however, "specifications" begins with an "S". Seriously though, specifications come first because they often are considered only as an afterthought. So, it is not surprising that many consider specifications to be the ugly sister. But it's time for Cinderella to come to the ball. Specifications should be custom-designed for every project. While that does not sound revolutionary, practically speaking, often the design professional will simply pull a set of specifications off the shelf and tailor them for each project. A boiler plate set of specifications often leads to creating more problems than they are intended to solve. Again, the owner should ask his independent owner's representative and construction counsel to review the specifications and make appropriate recommendations.

Strength must manifest itself during the course of the project or the project will suffer. The old cliché about the golden rule, he who has the gold rules, simply cannot be used to solve all the potential problems that can arise on a project. As set forth above, the owner must be perceived as being in control. Ignorance is a sure sign of weakness. An owner who is not construction savvy and who decides against retaining the proper consultants assumes the risk that the design professional and contractors will perceive the owner as weak and seek to take control of the project. In short, the perception of strength will become a reality for an owner who retains the right professionals to represent and protect his interests. Ultimately, such an owner will more likely have a project that can truly be called a "SUCCESS". ■

Editor's Email

A reader from Paris, France writes: Regarding "...the moonlighting story (Summer issue-Volume 17, Issue 2) it is mentioned that the roots go back to the Ecole de Beaux Arts in Paris - This is true, but it was in the mid-nineteenth century, not eighteenth. Indeed it was only created in 1817, having been preceded by the Academie Royale d'Architecture (begun in 1665)."

Negotiations - The Professional's Test

Continued From Page One

Question #9: Do we insist that the Owner require the contractor to include the architect as an additional insured on its general liability coverage for the project so that we are protected in the event of contractor personal injury and property damage claims?

Question #10: Do we assign the principal in charge of the project or the project architect to be responsible for addressing with the client all contract issues arising during the project?

If you answered 'Yes' to six or more of these questions you are well on your way to understanding the value of

spending the time negotiating these and other issues to fairly balance the risk of designing and constructing a modern facility for fees that fairly reflect that risk.

If you answered 'Yes' to more than four questions you need to survey whether your firm is afraid to confront these issues because of lack of training or whether there is a lack of concern for business issues within the mindset of your firm.

If you answered 'Yes' to three or less questions, you are probably more interested in design pointers of significance for you to take back to your offices.

There is more to the art of negotiating contracts than limiting liability or deciding whether arbitration is the right forum for disputes. The contract process is an excellent opportunity to show your client that your firm is highly professional in every aspect; that by negotiating firmly for your own fair entitlement you will fight just as hard for the rights of the owner in any dispute with the contractor; and finally, your negotiation provides a further opportunity to explain the process of how your services will return value to the client in dif-

ferent ways. This opportunity to address the project with their clients in a forum other than the design arena is used by savvy firms.

As principals of your fine firms, you must use every contact with your clients to promote the qualities of your firm's professionalism. And, by today's business standards, professionalism includes high-caliber business acumen — a trait which is highly valued by clients in their accountants, marketing experts, their lawyers and, fortunately for you, their architects. No other moment in the architect-owner relationship can form the basis for a long term relationship as the contract negotiation process because it touches upon every aspect of the business relationship you will encounter. It permits you to ask a myriad of questions of your client and to divert the discussion into

important issues relating to the client's entire business operations, its competition and the challenges it faces in the years ahead.

To review your services with a client who has only recently selected you from all other candidates for a project, is an opportunistic time to emphasize the services that will shape your relationship as well as highlight anticipated or potential problems that the project may face in the months ahead. It is a natural opportunity for you to enquire as to the client's upcoming project initiatives and possibly get a leg up on garnering the next project for your firm.

Finally, it is a chance to show your leadership qualities both to your firm and your client. By developing the talent of a skilled negotiator you assume a role of critical importance to everyone in your firm. There is that old line, "Someone's got to do it". Well, this is one of the most important tasks within a firm. Why shouldn't you work to acquire the skills needed to play the role of a leader in an exciting, dynamic firm that is working on important projects in your community? ■

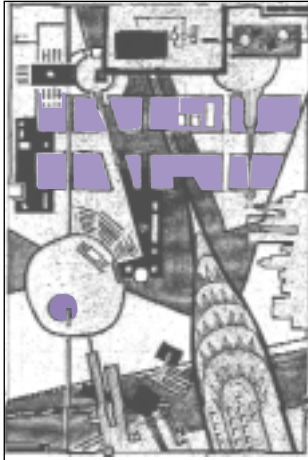


Illustration by Ira Kustin

BBL & A is proud to announce that *Timothy F. Hegarty* has been appointed to serve as a member of the Construction Law Committee of The Association of the Bar of The City of New York for a three-year term beginning this September. Among the purposes of the Construction Law Committee are to study existing state laws affecting construction and to advocate changes. Thus, we encourage our readers to share their suggestions, questions or thoughts with Mr. Hegarty and he will do his best to have your concerns addressed.

BBL & A welcomes *Victoria R. Drogin, Esq.* Ms. Drogin earned her J.D. from Hofstra University School of Law School in 1990 and received a B.A., cum laude, from Wellesley



College. Prior to joining BBL & A, Ms. Drogin was Of Counsel at L'Abbate, Balkan, Colavita & Contini, LLP, where she specialized in Contract and Insurance Law, Professional Malpractice Liability Law and Litigation. Currently Ms. Drogin specializes in construction, real estate and contract law, including both transactional and litigation work. She is admitted to the bar in New York and New Jersey.

The firm recently completed the design/build construction documents on Phase III for The Osborn Retirement Community's \$100 million "Gateway 2000" expansion program in Rye, New York.

The LePatner Report

is a quarterly publication
of the Law Offices of

Barry B. LePatner & Associates LLP

375 Park Avenue
New York, New York 10152
(212) 935-4400

E-mail: bblesq@ix.netcom.com
Website: <http://www.bblesq.com>

© 1997, Barry B. LePatner, Esq.
All Rights Reserved

Barry B. LePatner, Esq., has recently returned from the 3-day summer seminar at Harvard

University's Graduate School of Design. The seminar, "Marketing Strategies and Presentation Skills," attracts design professionals from around the world. This year's speech, entitled "The Design Professional's Dilemma: Valuable or Vulnerable?" was well received and will soon be published in a major, international publication. The presentation was assisted by Roy R. Pachecano, the firm's design consultant, whose multimedia presentation complemented Mr. LePatner's speech.

On July 7, 1997, BBL & A attorneys were taken on a construction tour of the \$100 million renovation/expansion of 55 Water Street, dubbed the "Tower of Power" for its innovative redundant power system designed to supply energy to office interiors in the event of a catastrophic black-out or similar disaster. The tour was led by Roger Robison, AIA, project architect at Kohn Pedersen Fox Associates, P.C. Pictured below are: *Ira Kustin*, Summer Associate (right), and *Roy R. Pachecano, AIA* (left).



Quote of the Quarter

"Hire people who are better than you are, then leave them to get on with it. Look for people who will aim for the remarkable, who will not settle for the routine."

-David Ogilvy