Good Intentions Gone Bad…Case Studies in Unintended Consequences on Construction Projects
Introduction

• Our Premise
• Our Panel
• Three Scenes
• Otherwise intelligent, well meaning people are creating huge headaches for themselves when it comes to contract risk management.
Our Panel...

• Christopher Payne, PE, CCM – Moderator

• Blake Peck, PE, CCM, FCMAA

• Christopher Brasco, Esq.

• Christopher Anzidei, Esq

• Fred Schneader, CCM
Hypothetical Scenario – “Orlando Land”

BASIC INFORMATION

• Owner/Developer
• Mixed-use Condominium Project
• Agency CM
• Multiple Contracts
Hypothetical Scenario – “Orlando Land”

DETAILS

• Project involves construction of two Disney-themed condo buildings
• 12-story brick buildings with common area between buildings
• Owner engages two general contractors to construct portions of the project and Agency CM to administer project
• First General Contractor responsible for buildings
• Second General Contractor responsible for parking garage, site work and utilities
• Project delivery method is design-bid-build
Our Presentation in Three Acts:

• Scene 1: CM Role – Contract Risk
• Scene 2: Contractor Scheduling Requirements
• Scene 3: Reliance on Standard Disclaimers
• Other Topics (time permitting)…
Scene 1:
CM Role – Contract Risk
Scene 1: CM Contract Risks

• Our Owner/Developer has been burned in the past by underperforming CM and is taking steps to avoid these problems on this project.

• Our CM is anxious to start work with this important new client and can’t wait to see the contract.
Scene 1: CM Contract Risks

Owner perspective…

- Owner wants:
  - Accountability
  - Performance
  - Reduction in Risk

- Owner introduces strong contract terms regarding risk and performance
CM Liable for Delay

- CM shall not be entitled to be compensated for any delay caused or contributed to by CM’s fault or failure to properly perform under this Agreement. On the contrary, CM shall be liable to the Owner for any and all extra costs, damages, liability or losses incurred by the Owner as a direct or indirect, result of delays caused, in whole or in part, by CM’s fault, neglect, or breach of this Agreement.
Restrictions on Fees

• Compensation for Additional Services will be capped at 1.9 times actual salary (inclusive of customary payroll burdens and benefits) for CM staff and cost-plus 5% for Additional Services performed by Subconsultants. Compensation for Extended Services will be capped at 1.6 times actual salary (inclusive of customary payroll burdens and benefits) for CM staff, and cost-plus 5% for Extended Services performed by Subconsultants.
Withholding of Payment

• In addition to any other right to withhold payments under this Agreement or Applicable Laws, the Owner shall have the right to withhold from payments due CM such sums as necessary to protect the Owner against any loss or damage or liability which, directly or indirectly may result, or has in fact resulted, by reason of reasonable evidence that CM, inexcusably, will not complete the Services required by this Agreement within the Term of this Agreement; and CM’s inexcusable inability or failure to competently complete any Services required by this Agreement. Further, the Owner shall have the right to set off against a CM invoice any out-of-pocket expense or loss incurred on account of any negligent performance of CM’s obligations hereunder, CM’s intentional misconduct or CM’s breach of this Agreement.
Indemnification and Insurance Requirements

• The Contractor agrees to defend, indemnify and hold harmless the Owner, its officers, agents, and employees (collectively the “Owner”) from and against any and all claims, losses, liabilities, penalties, fines, forfeitures, demands, causes of action, suits, costs and expenses incidental thereto (including cost of defense and attorneys’ fees), resulting from, arising out of, or in any way connected to activities or work performed by the CM, CM’s officers, employees, agents, servants, subcontractors, or any other person acting for or by permission of the CM in performance of this Contract.
Indemnification and Insurance Requirements (continued)

- CM's indemnification obligation is not limited by, but is in addition to, the insurance obligations contained in this Agreement.

- By executing this Agreement, CM expressly agrees that any insurance protection required herein or by the Construction Contract shall in no way limit CM's obligations under this Agreement and shall not be construed to relieve CM from liability in excess of such coverage, nor shall it preclude the Owner from taking such other actions as are available to it under other provisions of this Agreement or otherwise in law or equity.
Owner Automatically Owns Work Product

• Ownership of all Work Product by the Owner shall commence immediately upon the Effective Date of this Agreement regardless of payment by the Owner of any compensation to CM therefore and regardless of the delivery of any of the Work Product to the Owner.
Scene 1: CM Contract Risks

CM perspective…

• CM Signs deal
• Wants with owner
• Wants the work
Discussion Topics

• Should the CM accept this contract?
• Are the fee limitations consistent with responsibilities outlined?
• How do you think the CM will operate if the project falls behind? Is there alignment with the owner?
Key Points from Scene 1

• Risk at appropriate level
• CM Agency a service not a product
• Pricing model incompatible with risk
• Owner should pick what they want and pay accordingly
Scene 2: Contractor Scheduling Requirements
Scene 2: The Schedule Discussion

- Schedule requirements
Scene 2: The Schedule Discussion

- The Project is underway and three weeks behind schedule. The Contractor has revised its schedule to make up time on exterior skin and is prepared to present to the Owner.

- The Owner, for sales and marketing reasons, wants the Contractor to finish to 11\textsuperscript{th} and 12\textsuperscript{th} floors first to meet sales delivery dates. The Owner also wants to place the 10\textsuperscript{th} floor “on hold” to redesign these floors to accommodate larger, more saleable units.

- The monthly Owner scheduling meeting is about to begin.
Scene 2: The Schedule Discussion

Owner and CM Perspective…

• Want a good, predictable schedule
• A say-so in changes (to monitor progress and keep Contractor from “manipulating” the schedule or disguising poor performance)
• Evaluate impact of changes
• To use schedule as tool to resolve delay
• Retain flexibility—eye on ultimate objective
Scene 2: The Schedule Discussion

Contractor perspective…

• Schedule used to plan work
• Maintain flexibility and preserve time contingency
• Evaluate impact of changes
• To use schedule as tool to resolve delay
Schedule Provisions

- Negative float conditions shall not be allowed. If any of the Monthly CPM Project schedule updates indicate negative float, the contractor shall submit either a Recovery Plan or a Time Impact Analysis.
Update requirement

• The detailed CPM Project schedule shall be updated on a monthly. The Contractor shall submit an updated CPM Project schedule, which reflects the actual progress for the month added to the cumulative progress achieved prior to that month. Additionally, the Contractor shall identify and justify the reasons for the Work being behind schedule as planned.
Recovery Plan Required

- If the monthly CPM schedule update reflects any activity whose early completion date is scheduled to occur after its late completion date, the contractor shall submit for the Owner’s review and written acceptance a recovery plan.
Owner approval required for logic changes

- Prior to the monthly payment date the Contractor shall submit to the Owner a list of all logic revisions that were submitted and accepted in writing by the Owner and that will be incorporated in the Monthly CPM schedule updates. Each month CPM schedule updates shall only incorporate Owner-approved Modifications to activity durations, logic or descriptions.
Importance of Overall and Partial Delivery

• Time is of the essence. The parties recognize that timely completion of the project and performance to ensure time completion of all project milestones and deadlines is essential.

• Preliminary milestone delivery dates for each completed residential floor is included in Appendix B of this agreement, and these delivery dates shall be incorporated in the Contractor’s schedule. The Owner may adjust these delivery dates during the course of the Project and will notify the Contractor of any changes as they arise.
Discussion Topics

• Who has seen this combination of…
  – Owner wishing to retain flexibility
  – Limitations on contractor flexibility

• Do you think the contractor will produce a useful (real) schedule?
What Often Happens

- Contractor behind schedule
- Wants to revise logic
- Believes same delay is Owner’s
- Needs owner approval first
- Owner disputes reasons Contractor is behind
- Owner refuses to accept logic changes
- Owner still wants job done on time
- Owner wants benefit of contingency time
Result

• 1) No approved or approval schedule (plus payment withheld)

-OR-

• 2) Contractor develops “accelerated schedule” and files notice of constructive acceleration
Key Points from Scene 2

• Negative float need not invalidate schedule
• Does Owner really want to approve all logic changes?
• Backward measurement vs. forward planning
• Balance of flexibility and control…fair allocation.
Scene 3: Reliance on Standard Disclaimers
Scene 3: Multi-Contractor Complications

- The condo building structure is underway and the adjacent garage work is just starting.
- The CM is dealing with complications between the two aspects of the project.
Scene 3: Multi-Contractor Complications

- **Delay Event 1 (Parking Garage Location Change/Delays to Condo Excavation):**

  - After NTP, parking garage location moved 5 feet closer to buildings due to offset required by local building codes not shown on plans.

  - The condo contractor began excavation for foundation grade beams and contractor required to stop work and perform additional excavation because planned grade beam locations were too close to new footprint for parking garage foundation.

  - Work delayed by 40 days awaiting new design (20 days spent on original work and re-work; 20 days awaiting new design)
Scene 3: Multi-Contractor Complications

Delay Event 2 (Delays to Condo Foundations):

• The site/garage contractor is required to perform additional excavation to remove contaminated soils; owner disputes whether soil conditions were anticipated by contract documents.

• Citing OSHA rules, local public inspector will not allow condo contractor to perform work adjacent to site/garage excavation; Condo has completed excavation and foundation formwork and critical path runs through pouring of new foundation walls.
Scene 3: Multi-Contractor Complications

Delay Event 2 (Delays to Condo 2 Foundations) continued:

• Condo contractor’s foundation subcontractor refuses to perform concrete pours “in piecemeal” and cancels any further pours until full access available.

• Condo Contractor presents schedule at weekly progress meeting showing additional 30 days of negative float (70 days total project delay) and requesting time extension and additional money.
Pertinent Contract Provisions:

- “Existing Conditions” Clause: Contractor shall be responsible for verifying existing conditions and notifying Owner of any discrepancies with the plans and specifications. Actual site conditions may require modifications to construction schedule or details, and Contractor shall perform its work in accordance with actual site conditions.
Pertinent Contract Provisions:

- “Coordination With Other Contractors” Clause: Owner intends to award other contracts at or near the work site and the Contractor shall fully cooperate and coordinate with any other contractors in scheduling and performing the work and shall not assert any claim for delays or additional costs arising from alleged delays, disruptions, or interferences arising from the work performed by any other contractors on site.
Pertinent Contract Provisions:

• "Responsibility for Permits and Compliance with Law" Clause: Contractor shall be solely responsible for obtaining any necessary licenses or permits and for complying with any applicable Federal, State, or Local laws, codes, or regulations at its own cost.

• "Superintendence of the Work" Clause: Contractor shall at all times directly superintend the work performed by its own forces and its subcontractors and shall be solely responsible for scheduling, coordinating, and performing the work.
Discussion Topics

- Can the Owner rely upon the existing conditions clause to avoid liability for the grade beam delay?
- Is it appropriate for the Owner to rely upon the clause requiring coordination between contractors to dispute liability for the condo concrete pour delays?
Key Points Scene 3:

• Standard disclaimers are widely applicable, but may not work as intended.
• Over-reliance on contract phrasing not a substitute for active resolution of issues.
Additional Topics for Discussion

• No damages for delay
• Odd indemnity provisions
• Disclaimers on subsurface data
• Definition of completion
• Liability/Ownership BIM or Project Management Systems
• GMP contingency
Overall Conclusions

• Assign risk to party best able to manage it
• Owners – be clear what you’re trying accomplish
• All decisions have cost and practical considerations
• Tailor contracts to current circumstances.
• Tradeoffs do exist – you can’t solve everything!
• Be willing to evaluate performance and select accordingly.