Fighting and Talking at Job Sites

It’s About Time Everyone Stopped Fighting and Started Talking on Construction Projects So the Business of Assembly Could Improve

By H. Murray Hohns

A construction project is a highly emotional place. It typically is a temporary gathering of an average of 200 people, who come together for varying parts of about 18 months to assemble and install the products of several hundred manufacturers. Those manufacturers are generally larger and often somewhat indifferent to the firms to which they are selling their products.

The on-site contractors that actually convert the plans and specifications into a finished project usually average 30 in number. Some will be the leaders in their trade, and some will be marginal, even insolvent.

Contrary to all the contract requirements in force on the project, communication at the job site is essentially done on an oral basis. The most successful jobs are those that are set up with as few tiers of vertical hierarchy as possible.

The job-site conversation will loop around the project. Discussions and directions will emanate from the person in charge of the field. Someone will leave the office and give a direc-

Editor’s Note: A construction site is often the last suitable place to resolve a dispute because of the highly charged atmosphere and the differing personalities of the participants in a project. The author of this article, H. Murray Hohns, has been there many times and his article has been reprinted a number of times. It is reprinted here from Preventive Legal Management newsletter, the publication of AWCI General Counsel McNeill Stokes.)
“No matter how complicated or technological the design may be, its installation must be first turned into spoken, instructional words to people who are not paper oriented.”

My brother-in-law, George, is a genius with carpentry tools. But too often he finds he simply does not know what the designer intended until his efforts have progressed far enough to see the end product. George, like all craftsmen, is results oriented. Twenty or thirty years with the tools have taught him how to brace a form, install casework, and so on, so that when he is done the end result will work.

George can read plans. He has become used to the fact that his ways of doing the job are usually better and certainly easier than the way envisioned by the draftsman. George has become a boss on the job site, and after 10 years he is one of the best. He regards inspectors as second rate in knowledge and cannot understand why he is so often told to do things that he knows will not work. He distrusts management but has become resigned to its existence.

Disorganized Conglomerate . . .

My definition of the job site is: a disorganized conglomerate of mutual interests, all of whom are convinced that their best economics are achieved by getting into the area first so they do not have to go around the other guy. Ethics and morals are far from the best on the job site. The collective environment is one filled with varying degrees of skills, ingenuity, fantastic equipment and is often tempered to some extent with rebellion, profanity, gambling, cheating, and plain goofing off.

One must consider that no one is in charge. The electrician journeyman cannot be ordered to do something by the carpenter crew. He takes orders from his foreman who reports to his boss who talks to the carpenter’s boss who talks to the architect, who talks to the electrical engineer who sometimes talks to the electrical foreman’s boss. No one understands it all, ever, and the bad news is always a secret.

By the way, George makes $50,000-$60,000 per year, owns his home, a truck, a car, all sorts of tools and goes home at 4:30 p.m. Consider now the draftsman who drew what George must build. I once was that young engineer draftsman. I used to check shop drawings, and I had no idea of how that rebar I was checking would be installed. I can remember being sent to the field to look at a problem on rebar installation where the workers were convinced it would not work.
When I saw the field conditions of laps and splices and space available, I too was convinced it would not work. When I reported that, it was the last time I was sent to the field.

The contractor was told to follow the plans and specifications; he did. I heard the concrete looked like caramel popcorn and the contractor was blamed for poor workmanship. That was 30 years ago; today there would be a construction claim, and the designer would no doubt lose the argument.

Judgment and Compromise . . .

The first point on avoiding claims is: the contract document cannot replace on-the-spot judgment and compromise. While this is not a universal rule, too often designers choose to rely on the contract documents instead of taking the personal risk of solving a problem. There is no personal risk in insisting that the contractor follow the contract.

I recall a convention center under construction in Southern California. The floor was a slab-on-grade placed on top of a compacted fill. Unsuitable material was to be first removed, and then a select material described in the specifications was to be spread and compacted. A problem arose when the earthwork subcontractor could not find a select material that met the specified gradation. The only solution was to blend a material and the earthwork subcontractor had not bid the job to do such.

The resident engineer insisted on the specifications being followed and wrote letters to cover himself. The general contractor transmitted the letters to the grader along with threats. The grader said, “I didn’t figure it, I won’t do it.” The grader had another job with the designer and two others with the same general. For two months while the job stood still, the grader half-heartedly looked for a select material fill which it already knew did not exist.

The result was that the excavator folded up the job, finally went out of business and was replaced by a new subcontractor who was hired on the basis of the fill it could supply, which the designer approved. The other jobs involving the original grader were impacted. A lawsuit was ultimately filed, and the designer paid out its $50,000 deductible and the contractor got $400,000. The contractor filed a delay claim claiming that the specification was defective, since the designer turned out to have copied a fill specification from its Kansas City office and had made no local investigation for fill availability or make-up.

Over the last 20 years, I have seen about 2000 contract disputes involving people who incorrectly assumed the position they were in was a secure one. The written contract may be wrong—written contracts must be interpreted with judgment. Judgment equals common sense.

Remember . . . a construction job is an emotional place. Unfortunately, truth and common sense are in too short supply within contract limits.

Agree With Custom . . .

It is suicide by means of slow death to your bankroll to kid yourself that you can write a contract that cuts across the grain of trade custom and force people to change. The only person you can ever change is yourself, no matter how cleverly your specification in written.

For example: An architect showed some major electrical work on the architectural site plans. The specification writer was up-to-date and included a disclaimer that said that the plans and specifications are divided into sections and divisions for the designer’s convenience, but the contractor is responsible for any inconsistencies in the architect’s documents and anything
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shown anywhere is to be furnished and installed by the trade responsible. The job captain was up-to-date and put similar language in the general notes. The architect had covered itself. The electrician did what practically all electrical subcontractors do and figured the job from the electrical drawings and specifications. There was no money to cover the electrical work shown on the architectural site plan in the general contract or subcontract.

When the professional liability insurance carrier was called into the picture, the specification writer’s attitude was that this was an ideal place to give a lesson to contractors who weasel their way out of contract language. He also allowed that his firm never had a claim in 20 years, and he had a reputation at stake (and a small deductible). The insuror could not settle without permission. Ultimately the arbitrators gave the contractor half of its claim from the owner; the owner never bothered to chase the designers. The spec writer was right (or was he?) but the deductible was gone either way.

Sooner or later construction disputes wind their way to lawyers and to triers of fact who often tend to judge the people and personalities rather than the scientific and technological arguments. Would it not have been far better to solve the missing money problem when the electrical subcontractor first lodged his woeful lament? A skillful designer could have made a friend and, in addition, probably made a good buy for the client. Perhaps the client would not pay; however, the only money being spent at the job site is the owner’s. Remember, that as soon as a contract dispute cannot be solved with the owner’s money, it will cost you some of yours. The contractor expects to leave the job with some money to take home.

There are owners who would deduct that cost from your fee; therefore you must put things where they belong on the drawings. If you cannot do that, tell the owner early that you cannot be responsible for the enforceability of certain grandfather clauses, and write the owner a letter so stating. If that does not work, you need to charge enough fee to cover your deductible. I know a national design firm that prices its deductible as the first line item of cost in its estimate of fee for Environmental Protection Agency work.

“Reasonably Inferable” . . .

What does reasonably inferable or consistent with the intent of the design really mean? Those are the words designers put in the contract documents so you can get some “little” things that everyone knows or should have known were included. My suggestion is that the best person to interpret what really was inferable is someone who might be called an experienced, prudent estimator. If the estimator really did not include it, chances are it was not “reasonably inferable.”

You see, estimators grow in stature by making good estimates. Their future depends on developing a fine-tuned sense of what must be included to meet the bid requirements, to have enough money to do the work, to be low bidder often enough to keep the
ship afloat, and to have enough profit to assure that he will receive continuous raises and bonuses.

Estimators are funny people. Deep down they believe their job is to price what is shown as the work scope. They simply do not have the training to interpret documents as the designer does while the job is under way. They believe if it was included the designer would take the time to draw it or describe it. They believe that if a designer leaves something out it will be added by change order.

Estimators add nothing to estimates for items omitted. You see that would require judgment, and estimators do not exercise judgment. They are used to hearing about their errors of leaving things out. When you leave something out, that is your error, not theirs, and when it is not reasonably inferable they do not put it in.

Project managers are even worse than estimators. Estimators are in short supply and can always get another job and probably a raise, but project managers, who often get a bonus on profit earned, simply believe that if it is not with the estimate, it is an extra, period. If you do not agree, they will add it to the next change order or you will have a claim.

Now I do not mean that you should blindly pay for an obvious contractor error in estimating. My experience is that contractors both expect and are willing to pay for their own errors. They do that every day, but they become obstinate about paying for yours. My thought on avoiding claims is to be reasonable in defining reasonably inferable items. Be willing to spend the owner’s money, or at least to try. Chances are if the owner says no, the contractor will consider you a friend.

The Only Sensible Solution . . .

The best buy can almost always be achieved at the start of the argument. Too many design professionals try to use the contractor’s money to solve problems. Certainly that is better than using designer money, but the best money to spend is the owner’s. Thus the way to talk yourself out of trouble is to negotiate the contractor down to where you can sell the owner and make sure the contractor knows you are trying.

A sore point for too many professionals is: be sure you get your own bill paid. If there is a universal weakness in professionals it is their failure to get their bills paid. Tell the owner you want your money. Do not let the balance build up. As soon as it does it often becomes too attractive to an owner to release, and it is here the design professional is often introduced to design defect arguments, real or imagined.

Construction problems and disputes involve all three parties in the project.
The designer must not believe for a minute that he is safe from loss in a dispute.

At one time a professional was proven by his qualifications alone. The measure of proof was his license, education, peer acceptance and experience. Results were not the standard.

Today the world, and particularly the insurance and legal segment, have begun to measure our performance. We need public relations to succeed and the best public relations expert you can put to work is you.

Recent changes in American Institute of Architect and National Society of Professional Engineers standard forms of contracts have now made the designer reluctant to supervise, direct, inspect the project, approve submittals or take management responsibilities. You no longer approve anything; now you review them for comments. Undoubtedly, if this movement continues the day will come when owners will find our involvement unnecessary.

I have found that the designer attacks change order pricing as if he were divinely ordained to judge contractors. I have heard designers tell owners that contractors overprice change orders. Years ago, contractors liked change orders and submitted only a few of them. Today contractors hate changes. Changes destroy jobs. Ninety percent of change orders come from the owner side of the table. Change orders require great effort to price and then take forever to get approved and processed.

In addition, change orders lead to soft costs resulting from the impact of each change. Reservation of rights letters are frequently written, ignored and sent back. Why not solve the problem? If there is an impact, pay it in the change order.

The best jobs are those where adversary relationships are placed with friendship. It is often said that those who are wise make friends by using money cleverly. The best way to talk yourself out of a troubled job site is to back up your conversation with the owner’s money. Smart owners know this too.

Be fair; recognize that time costs money and that contractors work so cheaply that they simply do not have a surplus to pay for errors. Approve, if you possibly can, that which you now are arguing against, and peace gradually will come to our field.

Perhaps then, my son, whom I encouraged to become a construction lawyer will encourage his children to become designers. It would seem to me that our own profession should be teaching itself how to avoid liability. Instead we let others do the teaching. It is time to stop fighting and start talking.