

# Build to Suit?

## Lawsuit, that is. And this recent ENR editorial suggests two ways to avoid litigation.

**T**HE AWFUL LITIGIOUS NATURE OF THIS industry can be eased. Disputes that can't be avoided can be resolved without taking them to court. The time may be ripe for recapturing the control of construction from lawyers and judges.

Seen by CEOs as a top problem, litigiousness has been on the agendas of the first two meetings of the Construction Industry Presidents Forum, an organization of CEOs of large design, construction and construction management firms sponsored by ENR and the Tecton Group Inc. What follows is the collective wisdom of those executives. The ways to avoid litigation are varied, but if they were implemented the plague could be ameliorated.

### **First, avoid disputes.**

The number-one cause of conflict is insufficient funds. The owner is too thinly financed; the contractor or subcontractors take on the job too cheaply; the design professionals' fees are inadequate for developing plans and specs to the necessary degree. Clients who want cheap will get cheap. Incomplete designs and performance specs can blur designer and constructor responsibilities, leading to questions about substitutions and details. The owner should have more than enough money to finance the job as estimated.

Steer clear of clients who lack integrity, say the executives. Prequalify owners based on the quality of their organizations, just as owners should select design professionals on the basis of qualifications, not price, and contractors should be prequalified, even on public work, to the extent the law allows. Don't go after a job beyond your capability to assign competent people. There are few problems on jobs to which owner, designer and constructor dedicate their top people.

Owners often are unsophisticated and need education, the group says. They need help translating their expectations (not their needs alone) into a design. Then they need help understanding plans and specs. They need to be told that there is no such thing as a perfect set of plans. Ways of dealing with omissions, additions and other changes must be worked out in advance. Owners must understand that there will be remedial work. They need to be shown the balance between risk and cost; they can't have both low risk and low cost. Risks can be shifted, but their price must be paid. Successful projects don't just happen, they have to be made to happen.

Work at team building, the CEOs recommend. Work at communication among team members. Adversarial relationships need to be avoided from the start. Establish an understanding of roles, goals and procedures. Set a frequency for reports on progress, a continuous flow of information to keep team members aware of what's going on. Have a warning system that calls senior people together if things go

wrong. Keep designers involved during construction, just as contractors should be involved in constructibility reviews during design. Establish in the contract the times and organizational levels for reports throughout the project's duration.

The contract itself has to be fair to both parties. Responsibilities should be stated in a concise, explicit manner rather than left loose and loopholed. Ideally, parties should agree to limit their rights to sue for damages, as if no-fault insurance covered the team as an entity. Negotiate unacceptable language out of the contract rather than assume problems won't arise. They will. Learn to say no to objectionable terms, or to the whole deal.


### **Second, resolve disputes intelligently.**

Dispute review boards (DRBs) get high marks from the Presidents Forum for resolving and even forestalling disagreements on major construction projects. Typically, three persons selected for their industry expertise—one by the owner, one by the contractor and the third by the other two—visit a job regularly to render non-binding decisions based on observations of work in progress. They can assign responsibility on the spot as disputes arise. Since one was first used on a tunnel job in 1975, DRBs on all completed jobs have successfully resolved all disputes, or so it is claimed.

The group suggests that project participants also can agree in their contract on a sole mediator, available immediately to help resolve developing problems. Arbitrators also can be named in the contract. "Three arbitrators, no more than one of them a lawyer. We want disputes resolved by our peers," says one contractor.

An engineer-lawyer suggests the creation of a new body of eminent fact-finders or dispute-resolvers, called in to decide issues while they are live rather than having to reestablish them at great cost in a courtroom years later. Parties can abide by nonbinding decisions and get on with the work, still free to arbitrate, or sue, if they are not satisfied. Then there are "mini-trials." Without going to a courtroom, the two best judges might be the CEOs of the firms involved, meeting privately in an attempt to settle.

Executives who have grappled with the subject of litigiousness over much of the year identified the major friction point—change orders, out-of-scope work, manner of inspection, promptness of pay and attitudes. One has identified "deadly sins" that include guaranteeing a price on preliminary documents, accepting unbonded subs and revising the schedule. There is unanimity on the need to stay out of court.

Litigation, says one CEO, is better than dueling, but it's more expensive. 

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