

A/E RISK REVIEW

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Proceed Slowly and Surely with Fast-Track Projects

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances. We would like to thank XL Insurance for contributing to this article.

When it comes to designing and constructing a project, speed kills. If meeting a tight schedule is the overriding factor of getting a project completed, quality and detail are sure to suffer. For architects and engineers, that typically means added risk, added costs, lower profits and the potential for expensive litigation. For these reasons, the term “fast track” should send up warning flags for all design firms.

Fast track projects – those in which construction begins prior to the completion of the entire project design – have a single purpose: to save the client time and money by compressing the project schedule. Also known as “phased construction,” this project delivery method typically consists of a series of bid packages managed by the client or its construction manager. Fast track is often combined with the multi-prime concept in which different design consultants serve as the prime for different segments or phases of the overall project.

Rewards and Risks

When everything goes according to plan, fast tracking can expedite projects and result in cost savings to the client. Materials can be purchased in advance, locking in lower prices. Labor costs can be minimized as construction is completed more quickly -- and the client

can move into or lease the property sooner, accelerating income.

As with any shortcut, however, there are substantial risks – especially to the architect and engineers involved in the fast-track project. Consider, for example:

- The cushion of time between design and construction is lost, eliminating opportunities to identify and correct errors or omissions before construction begins.
- Extra time is spent spinning off separate construction documents for each of the bid packages.
- It is difficult to maintain consistency in design and detailing when work is performed rapidly or out of sequence – or by multiple primes.
- Multi-tasking is needed to administer the bidding and construction administration phases while simultaneously completing the design and construction documents. In smaller firms, this typically means designers have to repeatedly suspend design efforts in order to focus on the bidding and early construction.
- Fast-track projects usually have many change orders. Therefore, you spend more time in coordination and construction administration activities.
- Consultants may not have time to work as closely with municipal building officials to anticipate requirements and design according to code. An adverse code interpretation could mean costly modifications.
- Late design changes mean some of the construction work itself will need to be modified or deconstructed.

Perhaps the biggest challenge designers face, however, is the inexperienced or unrealistic client who sees the expected time and cost savings of fast track as guaranteed. Many clients believe the fast-track construction documents prepared for each bid package will be as accurate and complete as those prepared for traditionally phased projects. Unless you educate the client, he or she will not anticipate the increased design changes and change orders associated with fast track. The client may think those additional costs are due to your errors, omissions and incompetence, rather than being inherent in the fast-track project delivery method.

Unless your client clearly understands the fast-track process and its pitfalls, and acknowledges that fast tracking increases the likelihood of design revisions and change orders – with their resulting delays and costs – expectations will be much too high. And unrealistic expectations are the harbingers of disputes and claims.

Reducing the Risks of Fast Tracking

The only sure way to avoid fast-track problems is to avoid fast-track projects altogether. But in today's rapid-paced construction environment, that may be nearly impossible. There, are, however, several steps designers can take to lower the risks associated with fast track.

Your first prevention tool is education to bring the client's expectations in line with reality. When considering a fast-track project, find out why the client has opted for this project delivery method. Identify precisely what he or she expects to achieve. Then make sure the client understands and acknowledges the risks and potential liabilities he or she must bear by choosing fast track.

Get your client to acknowledge that modifications to the fast-track construction documents are to be expected, and that these changes are not the result of your errors or omissions. Modifications to design documents are part and parcel to the fast-track process and should be budgeted for. The client should also understand that previously constructed portions of the project might have to be modified or reconstructed. There should be an understanding that changes, delays and extra costs are the norm, not the exception.

Contingency Fund

On any project, clients tend to expect plans and specifications to be perfect. Such expectations are a bigger problem than usual on fast-track projects, where there is the likelihood that construction documents will require design changes and modifications. You can confront this difficulty head-on by establishing realistic expectations in your contract. Recommend that the added costs associated with fast tracking be anticipated in the project budget and that a larger than usual contingency fund be established to include both design and construction changes.

A contingency fund allocates a percentage of the project budget to cover the costs of changes and rework. Your contract should include an agreement that your client will not sue you for the extra design and construction costs that are within the contingency amount. Here is a sample provision from XL Insurance:

Contingency

The Client and the Consultant agree that certain increased costs and changes may be required because of possible omissions, ambiguities or inconsistencies in plans, drawings and specifications prepared by the Consultant and, therefore, that the final construction cost of the Project may exceed the estimated construction cost. The owner agrees to set aside a reserve in the amount of __ percent of the Project construction costs as a contingency to be used, as required, to pay for any such increased costs and changes. The Client further agrees to make no claim by way of direct or third-party action against the Consultant or its subconsultants with respect to any increased costs within the contingency because of such changes or because of any claims made by the Contractor relating to such changes.

A Fast Track Clause

In addition to establishing a contingency fund, the contract should address the added liability risks and costs associated with the fast-track delivery method. The agreement should describe the potential risks of the fast-track process to both the consultant and client and allocate these risks fairly. Consultants need a sufficient scope of services to provide the additional services necessary on a fast-track project, and they need to be adequately compensated for performing those added

services. Have your legal counsel consider the following sample clause from XL Insurance:

Fast-Track Design and Construction

In consideration of the benefits to the Client of employing the fast-track process (in which some of the Consultant's design services overlap the construction work and are out of sequence with the traditional project delivery method), and in recognition of the inherent risks of fast tracking to the Consultant, the Client agrees to waive all claims against the Consultant for design changes and modification of portions of the Work already constructed due to the Client's decision to employ the fast-track process.

In addition, the Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant, its officers, directors, employees and subconsultants (collectively, Consultant) against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, arising out of or in any way connected with this Project, excepting only those damages, liabilities or costs attributable to the sole negligence or willful misconduct by the Consultant.

The Client further agrees to compensate the Consultant for all Additional Services required to modify, correct or adjust the Construction Documents and coordinate them in order to meet the Client's scheduling requirements because of the Client's decision to construct the Project in a fast-track manner.

Unauthorized Changes

You will also want to establish the client's responsibility when authorizing changes from your plans and specifications. On fast-track projects, the client may be tempted to directly authorize changes in the construction documents without your approval and, sometimes, even without your knowledge.

Your best bet is to add a provision in your contract that absolves you of responsibility and protects you if changes are made without your authorization. You also want the owner to include a provision in the contractor's contract (to be passed on to the contractor's subcontractors) prohibiting anyone from making

document changes without your knowledge and consent. Such a clause might read:

Unauthorized Changes

In the event the Client, the Client's contractors or subcontractors, or anyone for whom the Client is legally liable makes or permits to be made any changes to any reports, plans, specifications or other construction documents prepared by the Consultant without obtaining the Consultant's prior written consent, the Client shall assume full responsibility for the results of such changes. Therefore the Client agrees to waive any claim against the Consultant and to release the Consultant from any liability arising directly or indirectly from such changes.

In addition, the Client agrees to the fullest extent permitted by law, to indemnify and hold harmless the Consultant from any damages, liabilities or costs, including reasonable attorneys' fees and costs of defense, arising from such changes.

In addition, the Client agrees to include in any contracts for construction appropriate language that prohibits the Contractor or any subcontractors of any tier from making any changes or modifications to the Consultant's construction documents without the prior written approval of the Consultant and that further requires the Contractor to indemnify both the Consultant and the Client from any liability or cost arising from such changes made without such proper authorization.

Raise Caution Flag to Fast Track

No matter how strongly your agreement is worded, you should go to extraordinary lengths to document every step of your involvement in a fast-track project. Keep detailed notes on what changes were made, why decisions were made, why some tasks were done out of sequence, who made the decisions, and under what set of assumptions. Make every reasonable effort to document your actions and protect yourself.

The decision to participate in a fast-track project should start with careful client selection. You should proceed only if you have a sophisticated client, a quality project, a strong contract, an adequate fee, experienced contractors and good working relationships all around.

To encourage teamwork and cooperation, consider suggesting a partnering agreement between the owner, contractors and all major consultants on the project.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventatives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.