


Between a Rock and a Harder Place: Balancing and Surviving Prime/Subconsultant Challenges

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San Francisco - Orange County

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### Agenda

- It Starts With a Story
- What team(s) are you on?
- Lines of Communication
- Scope Creep
- Additional Services
- Payments



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## Lots of Roles Lots of Holes

- Public University Residential Project
- Five Living Structures/Parking Structure/Infrastructure
- In-Fill Project
- Local and State Oversight and Standards
- Overall Project Design/Build
- Some Subcontractors Design/Build, Some Not



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## The Players

- Project awarded after three finalists compete on program, process, and budget.
- National design builder wins project.
- Architect and its subconsultants part of competition, subcontractors to D/B are not.
- Architect retains civil and structural alone.
- "Process" part of proposal is contractor centric.
- All retained by DBIA agreements incorporating proposal.



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## The Challenges

- Architect to receive % of \$1.7M contingency if not spent.
- Civil pre-contract "budget" is 45% of actual.
- Owner program has elements/allowances which meet local, but not State Codes.
- Owner separates incremental design reviews.
- Subcontractor designs "late" and behind civil.
- BIM in contractor portion of proposal, but not design – and run by D/B.
- Owner repeatedly fails to provide data which D/B goes directly to civil to provide.



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## Contract Conundrums

- Repeated obligations of “good faith”.
- Requirement of advance approval of any added services by subconsultants.
- Subconsultants agreements incorporate obligation to “design to budget.”
- No contractual link between architect and design-build subcontractors.



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## The Claims (All Months After Incurred)

- Cost to design elements to comply with State (not local) Codes.
- Cost for “separate” incremental design reviews.
- Cost for BIM, late coordination, and V/E.
- Cost to provide information which was to be owner obligation.
- Architect rejects seven days later after “talking” to Design-Builder PM with minor suggestions for fractional entitlement.



8

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## Complications

- Design-builder seeks to join dispute, but AAA rejects. Refuses to pay to resolve.
- Owner cannot be joined to dispute.
- Engineer is local and effectively blocks any local expert witnesses.



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## The Issues

- ❑ Teaming, Communications, & Conflicts of Interest
- ❑ Impacts of Collateral Failures
- ❑ Scope Creep
- ❑ Payment Processing & Entitlement



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## Commitments of Trust & Good Faith

1.5.1 Designer and Design commit at all times to cooperate fully with each other, and proceed on the basis of trust and good faith, to permit each party to realize the benefits afforded under the Contract Documents. Designer and Design Consultant shall perform their respective responsibilities, obligations and services in a timely manner to facilitate the other's timely and efficient performance and so as not to delay or interfere with the other's performance of its obligations under the Contract Documents.



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## Communication

2.1.4 Design Consultant shall only communicate with Owner, Subcontractor(s), or Sub-Subcontractors through Designer unless the parties agree otherwise.



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## Communication

3.3.6 Design-Builder shall provide administration of the Design-Build Agreement, and promptly forward any communications to Owner from Design Consultant that may impact the Services.



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## Claims

11.2.1 The parties are fully committed to working with each other throughout the Project and agree to communicate regularly with each other at all times so as to avoid or minimize disputes or disagreements. If disputes or disagreements do arise, Design Consultant and Designer each commit to resolving such disputes or disagreements in an amicable, professional and expeditious manner so as to avoid unnecessary losses, delays and disruptions to the Services.



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## Teaming, Communications, & Conflicts of Interest

- Teaming:
  - Where are your duties?
  - Where are you dependent?
- Communications Escalation
  - Standard
  - Elevated Go Around
- Conflicts of Interest
  - Identify it.
  - Share with all?



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## Coordination

2.1.3 If Designer, Design-Builder or Owner performs other work on the Project with separate design professionals under Designer, Design-Builder's or Owner's control, Design Consultant agrees to reasonably cooperate and coordinate its activities with those of such separate design professionals so that the Project can be completed in an orderly and coordinated manner and without disruption.



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## Impacts of Collateral Failures

- Where are you dependent on others?
- What is your remedy?
- Consequences:
  - Allocated
  - Shared
  - Transferred
  - Enforced with economic reality



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## Scope Changes

11.1.1 If either Design Consultant or Designer believes that it is entitled to relief against the other for any event arising out of or related to the Services or the Project, such party shall provide written notice to the other party of the basis for its claim for relief. Such notice shall be in accordance with specific notice requirements contained in applicable sections of the Contract Documents and, if possible, be made prior to incurring any cost or expense. Design Consultant shall provide Designer notice of claims for which Owner or Design-Builder may be responsible in sufficient time for Designer to meet its notice requirements to Design-Builder. Owner set forth in the Contract Documents. In the absence of any specific notice requirement, written notice shall be given within a reasonable time, not to exceed ten (10) days, after the occurrence giving rise to the claim for relief or after the claiming party reasonably should have recognized the event or condition giving rise to the request, whichever is later. Such notice shall be in



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## Code

2.3.1 Design Consultant agrees to perform the Services in accordance with all applicable Legal Requirements.



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## Budget/Value Engineering

mistakes or omissions. Design Consultant shall also, if requested by Designer or if required by the Design-Build Agreement, design to a fixed budget and, at its own cost, make such revisions as are required to achieve such budget. Such revisions



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## Scope Creep

- Contract Issue
  - Advance approval?
  - Contract coverage?
- Timing & Notice
  - Incurred? Aware?
  - Written?
- Resolution
  - Immediate vs. deferred.
  - Process and ongoing obligations.



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## Pay When Paid

### 6.6 Pay When Paid

6.6.1 Design Consultant agrees that all payments to Design Consultant hereunder, whether progress or final payment, or for changes or delays to the Services, shall not be due until after Designer actually receives payment on account of same from Owner.



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## Right to Suspend

7.3.1 If (i) Owner fails to pay amounts due Designer under the Design-Build Agreement for Services performed by Design Consultant, such failure is not due to the fault of Design Consultant, and Design Consultant has not been paid such amounts due, or (ii) Designer fails to pay any amounts due Design Consultant under this Agreement, Design Consultant may, in addition to any other rights afforded under the Contract Documents or at law, stop work in accordance with Section 7.3.2 below.



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## Hostage Performance

### 11.6 Duty to Continue Performance

11.6.1 Unless provided to the contrary in the Contract Documents, Design Consultant shall continue to perform the Services and Designer shall continue to satisfy its payment obligations to Design Consultant, pending the final resolution of any dispute or disagreement between Designer and Design Consultant.



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## Third Party Remedy

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**11.3.2** Notwithstanding any other provisions herein to the contrary, Designer and Design Consultant each agree to accept the relief as to a time extension or additional compensation obtained from Owner, if any, as well as all other aspects of the final decision following appeal or the expiration of the time for appeal, as full and final resolution of any Owner Dispute.

  
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## Payment Entitlement & Processing

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- Pay when paid? Pay if paid?
- Collaboration toward payment?
- Communication and documentation.

  
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## The Soft Solution

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**11.2.1** The parties are fully committed to working with each other throughout the Project and agree to communicate regularly with each other at all times so as to avoid or minimize disputes or disagreements. If disputes or disagreements do arise, Design Consultant and Designer each commit to resolving such disputes or disagreements in an amicable, professional and expeditious manner so as to avoid unnecessary losses, delays and disruptions to the Services.

  
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## Your Questions & Comments

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