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JUNE 2011

# CONSTRUCTION

TODAY

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# Giving Its Best

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## Keeping Wise Counsel

For widely varying reasons, most construction organizations consider the hiring of a lawyer to be a necessary evil and do not seek legal advice, even during those portions of a project most likely to impact profitability.

Although some firms maintain an in-house legal staff, they are in the minority.

The majority of firms contact a lawyer only after a dire situation arises that threatens immediate and significant economic impact, such as the need to file or defend a lawsuit.

Such an approach is the functional equivalent of skydiving without making certain that the most skilled individual available has packed your parachute. The landing can be unpleasant, especially in today's less-than-booming marketplace, with smaller-than-ever profit margins.

The psychology that motivates contractors to minimize legal counsel involvement in a project is entrenched. Lawyers are expensive. During the course of a project, if the specter of a possible claim arises, dealing with it can be delayed. Disputed change-orders and pay applications can be allowed to gracefully age until substantial completion, at which time, hopefully, cooler heads will prevail and problems can be amicably resolved with profit left in the project.

### A New Model

Most construction entities are so accustomed to proceeding in this manner that it amounts to an institutional failure to fully appreciate that, in today's economy, there simply is less excess profit from other projects to cover the loss or the ongoing legal expenses on even a single large project unnecessarily gone wrong.

For some market participants, enough such projects can and

have led to the death sentence of loss of credit resources and/or destruction of bonding capacity.

However, the construction industry, like most other American industries, has the benefit of talented, forward-thinking leaders who have adapted their business models to assure that their firms can weather difficult economic times. Most are now familiar with the basics of resource-maximization innovations such as integrated project delivery and joint venturing. Alongside these tools, there has evolved a new model of using legal counsel, loosely referred to as integrated project management and enterprise value teaming, among others.

Regardless of the designation, with many variations in structure, these paradigms focus on the effective use of legal talent as an integrated part of project selection, contract negotiation, project management and project delivery. Rather than viewing lawyer project involvement as a last alternative, these legal services models recognize that many attorneys fully understand the theoretical and common law underpinnings of typical contract provisions.

### Integrated Teams

Legal counsel cannot perform a truly effective, full-contract negotiation without the assistance of other players on an integrated team. Other team participants, particularly on large projects, may include client financial personnel, bid preparation experts, and a plan and specification interpretation staff, as well as client project development or marketing personnel most familiar with the needs and expectations of the customer or other contracting entity.

These teams are dedicated to three goals:

- No. 1, front-end project profitability pursuit by integrating the attorney into contract negotiations and project pricing analysis through cooperation with lead negotiators and bid preparation personnel;
- No. 2, project progress continuity by consulting the attorney regarding significant changes, delays, unanticipated conditions, problematic pay requests, among the universe of other common but pivotal project developments; and
- No. 3, project close-out facilitation by having previously narrowed the issues to be dealt with at project completion, assisting or leading negotiation of disputed close-out issues, and using legal negotiation skills tempered by the overriding need to obtain a profitable outcome for the company by balancing risk factors.



# IN THIS SECTION



The lawyer who is most effective in the above role will understand that the goal of such a team approach is not to “win” each and every contract negotiation point, project progress disagreement or close-out issue, but rather to facilitate customer satisfaction and client profit.

Such lawyers are not single-purpose “hired guns” focused upon legal victory at the cost of scorched earth. Rather, they are long-term facilitators who are able to anticipate the risks inherent in a project, ensure that such risks are contractually well balanced, help maintain that balance during project progress and assist the company in resolving end-of-project issues in a way that maintains customer good will.

## Contract Modifications

In a construction project of any level of complexity, neither party will expect that contract documents such as those promulgated by the American Institute of Architects or the Associated General Contractors will be used with no modification.

Inevitably, such contracts are perceived to be skewed in favor of the membership that dominates the drafting organization. Therefore, counsel entering into a “teaming” arrangement will normally find that, in an existing contracting relationship, the other contracting party will expect certain modifications to contracts as a matter of course.

However, counsel, in consultation with other contracting team members, may determine changes are not consistent with the client’s risk allocation needs for a particular project. In such situations, counsel can explain, with understandable risk-distribution rationale, the reason for departures from previously used contract clauses, thereby helping to avoid an unnecessary misunderstanding.

## Making the Transition

The transition from a purely adversarial role on behalf of a client to a “big picture” project-success facilitator is difficult for some counsel. Attorneys with extensive construction contract litigation experience often make the best fit for such multifaceted teams. Litigation counsel are experienced negotiators and understand that the risk allocation acceptable to both their client and the opposing party is a key element in any successful negotiation. Reaching this level of understanding often requires increased sensitivity to the psychology of the opposing party, which is an inherent ability of successful litigation attorneys. Lawyers who have litigated construction contracts have spent much more time and effort exploring the real-life impact of contract clauses, thereby allowing for superior project risk analysis.

For the counsel with less understanding of how various contract clauses and adjustments made during contract administration impact contract risk, integration into a client’s project delivery team is not advisable. For instance, during contract negotiations, a team lawyer for the prime engineer on a project would be ill-advised to seek on behalf of the owner an overbearing liquidated damages provision, which is a departure from that normally sought on such a project. First, although possession of such a strong clause may seem like a victory, potentially harmful concessions may have been made to obtain it and a sour beginning relationship may have been engendered with the contractor.

## Meritage Homes Colorado Division

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Green building is a major part of Meritage’s work.



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Second, although the clause is present and grounds may develop which theoretically justify its use, it may not be realistic to obtain its full benefit, short of arbitration or litigation. Third, it may be equally unrealistic to seek what, when viewed objectively, is an unearned windfall and expect repeat business with the contractor in question. Fourth, commonly implied equitable legal principles may limit the reach of an unreasonable contract clause, which would render the clause itself potentially meaningless.

## The Team Approach

The advantages of the above-described team project delivery approach are not simply theoretical, but are already being realized by forward-thinking construction industry participants. Such an approach assures superior risk allocation and conserves attorney expense resources through a reduction in the frequency and intensity of litigation.

These advantages benefit the team approach user in any economic environment, but can mean the difference between survival and economic devastation in today’s climate of narrow profit margins. ♦

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