

Burns White

ATTORNEYS AT LAW

HOW TO SURVIVE CONSTRUCTION PROJECTS DURING TIMES OF ECONOMIC INSANITY

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Convergence of Events Mean Significant Changes to Construction Projects

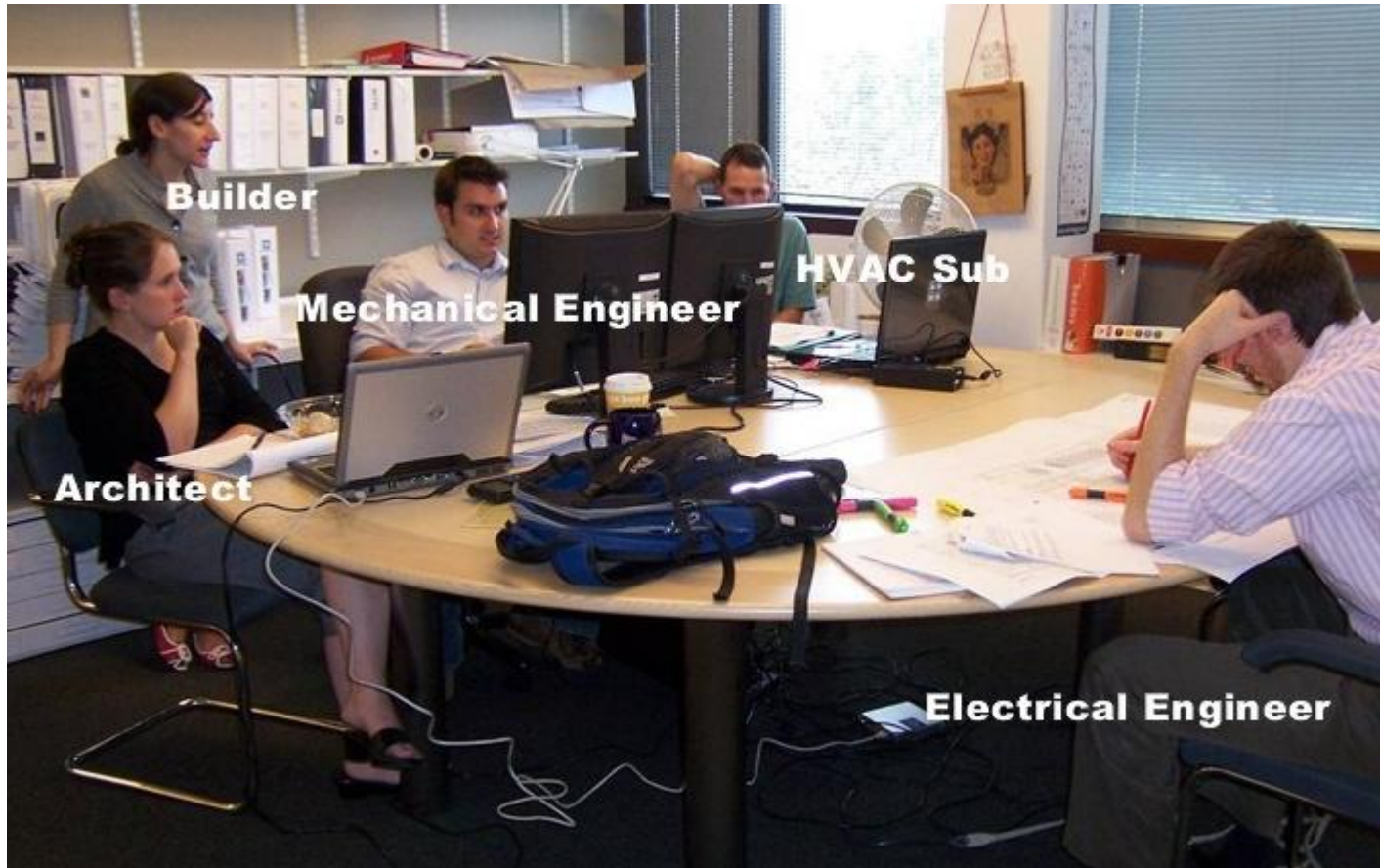
- Market Allowing Owners to Push for Reduction in Costs/Profits from Contractors, Designers, Design/Build Firms and Suppliers
- Market Creating Opportunities for Owners to Slant Contracts Against all Parties
- Technology Simultaneously Raising Expectations in Terms of Quality, Cost and Scheduling Precision

Given All of This – Can We Get Here?

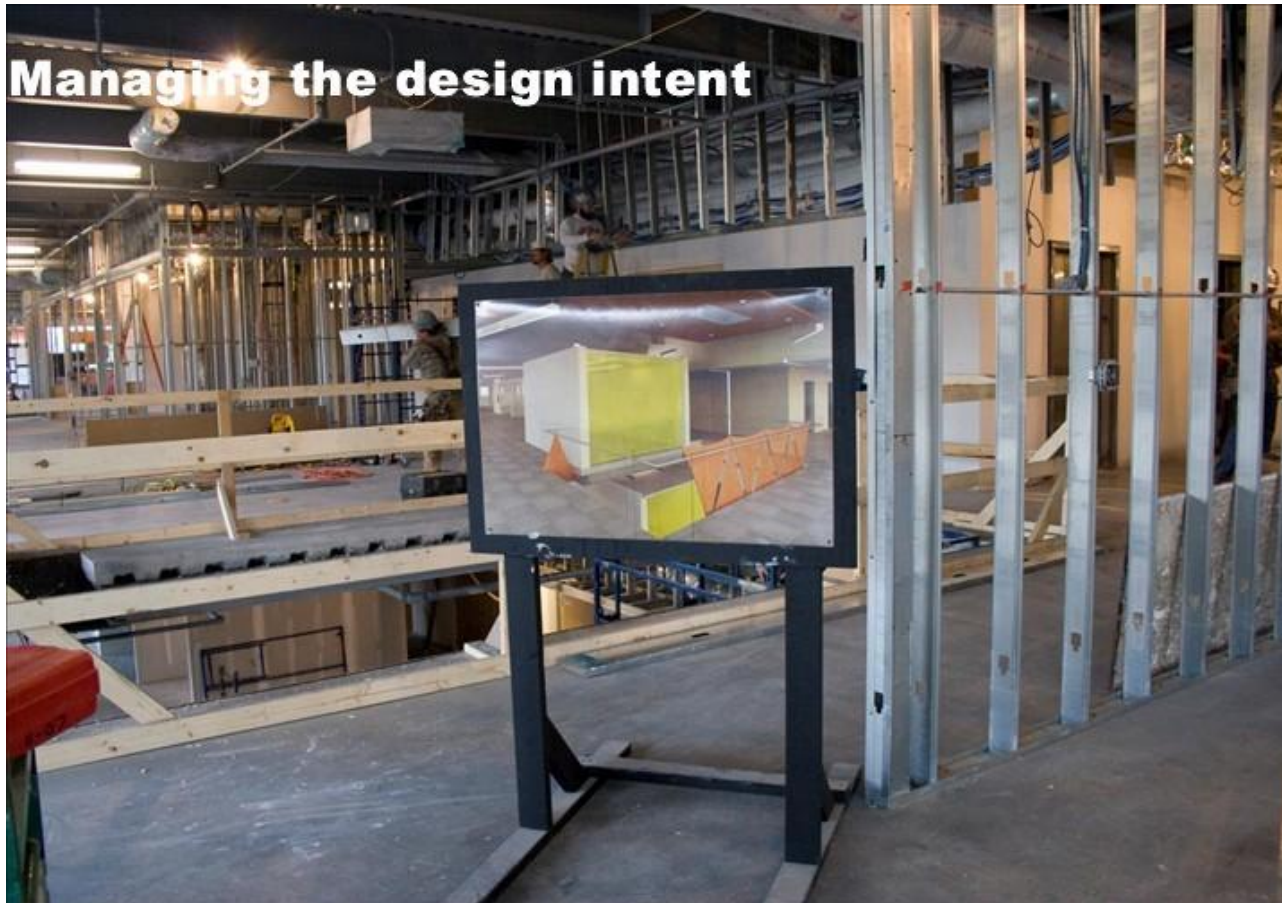


Use of Technology Like This All But Requires Better Cooperation





Are You Preparing Your People to Handle This?



The More Things Change....

- “The potential risk... is that the original design may somehow be changed before or during the construction phase of the project, either intentionally or inadvertently, by someone on the client’s or contractor’s staff. If the change is responsible for a failure, or if it results in some construction phase claim, how does one prove that the changes were made and the errors introduced subsequently to the former delivery...

– of the CADD files.”

The More Things Stay the Same

- When new technology changes traditional practices, or when the economy becomes particularly challenging, focus must be on non-technical risk management...
- Same reason the most successful CEO's are able to "hop" industries – they do the basic things phenomenally well. **Hire the best people, engage in proper risk-management, negotiate best terms they can get on any particular deal, and have the sense of when to walk away from "opportunity," etc.**

Non-Technical Risk Management

- **Non-Technical Risk Management**
 - Focus on Communication/Documentation
 - Form Capable Team, including consultant selection/contracts
 - Monitor Junior Team Members
 - Select Quality Clients
 - Negotiate Contracts
- It works during lean economic times to prevent loss; it will work for the next technology change as well; It needs to work now for you.

Documentation

- Documentation, including appropriate emails, meeting minute entries, photographs and video are more important now than ever.
- Controlling the devices your people is also becoming critically important for non-construction related losses [think sexual harassment, etc.].
- If you are going to operate at lower profit margins, and seek to minimize claims experience/loss history, you must be able to explain and, if necessary, defend future allegations.

Documentation of Delay Caused by Owner Indecision

Rise Franks & Struss Mr. Edward Maier - 2 - October 15, 1999 Mr. Edward Maier - 3 - October 15, 1999

The first meeting was on Wednesday, June 18th.

The summary of the meeting was that the committee (of two), preferred a cherry wood chair frame and balcony fronts, and a warm red-brown (called "raisin") for seat fabric. Green walls were preferred, with dark green acoustical curtains.

I was surprised by our telephone conversations suggest that there is some dissatisfaction with the results thereof, so far. I feel that considering the context of a large committee, and review with you the minor identifying perceived problems in reaching

The original, independent committees for Lobby Interiors were, respectively:

- David Giltman Jr., Chair
- Ann Benedict
- Betsy Chilton
- Lakin Cook
- Tom Neal

- Nancy Thomas, Chair
- Clelia Jones
- Susan Hardesty
- Jean Stamp
- Rosa McGuire
- Pat Bond
- Brenda Tilson

After these committees were appointed, Sharon Wehrle was added to the Main Entrance and Lobby Committee, and John McClaugherty was added to the Hall Committee. New Thomas, Sue Serp and you have been regular observers at the meetings, and most recently others have attended and freely expressed their views, including Tom Caslin, Paul Helfrich and Monica Baffington from the Symphony. When the two committees, already far larger than I had requested to work with, were combined, the new committee numbered fourteen people. If you review the minutes

The second meeting was on July 8th, attendees said they disliked what had been done, and that they preferred a red/burgundy color scheme with dark wood, and light walls, like "every elegant hall" they had seen. A new ball game.

The last meeting of the combined committees, on September 30th, involved yet another permutation of attendees.

Red won. The KSK team was charged with returning with two fully realized schemes based upon red/burgundy palette. We are in the process of doing this right now.

By the following meeting, on August 20th,

McClaugherty's preferences for "red" or "a warm, vibrant concert hall," and some preference (new) being expressed for a green color palette. KSK was charged with

color, with some preference still expressed for "raisin", discussion of John McClaugherty's preferences for "red" or "a warm, vibrant concert hall," and some preference (new) being expressed for a green color palette. KSK was charged with

Order was breaking down, as attendance fluctuated and new opinions were expressed. Yet another new ballgame.

The last meeting of the combined committees, on September 30th, involved yet another permutation of attendees. Only six of the six Hall Committee members were present: Lakin Cook, John McClaugherty. It was their first meeting together. On the Lobby side, only three of eight members were present. That made only five of fourteen members in attendance. Making up for this small turnout were a number of guests and stand-ins, along with the usual CAS attendees. The guests seemed not to be bashful about expressing their opinions, and were not requested to refrain from doing so. So, a fourth version of the committee. KSK did exactly what it was previously asked to do, and more. We presented a number of alternative schemes based on the red, green and original main color families, including both seating replicated ball lighting. KSK also presented computer plus alternative colors for walls and other surfaces. None of s in favor of a green scheme were present, so that was the original raisin scheme. Red won. The KSK team was with two fully realized schemes based upon red/burgundy ocess of doing this right now.

to make it that there has not been enough consistency in anyone to have a full picture of the design process that we the details of discussions regarding design issues, materials, details and colors. "Therefore it is hard for me to understand how there can be it. I can, however, the process and the structure. This has

lop the schemes we we has finally been ossibly with a small ultimate conclusion. n, plus encourage, of And we do not need

Additionally, I request that you refer to the progress made for the Donor's Lounge. The Donor's Lounge Committee is a model for how to succeed in client-architect collaborations. Although the space is small, it is a highly refined space with a lot of detailing and fine finishes. It has required as much attention as the Hall and Lobbies. The committee is small and well managed. Attendance is perfect. Members

Considerable discussion ensued about

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Documentation of Actual v. Represented Job Progress

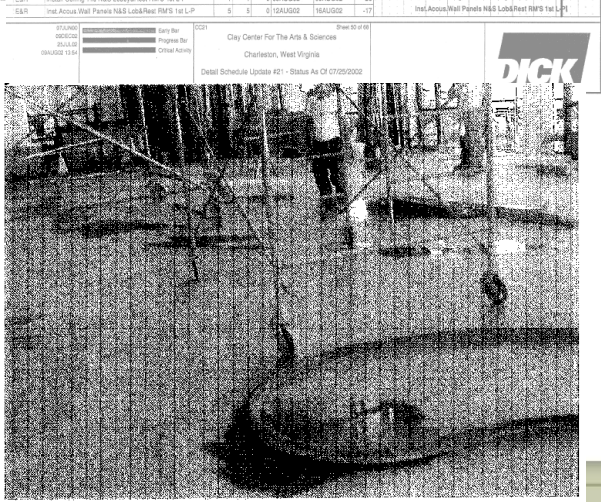
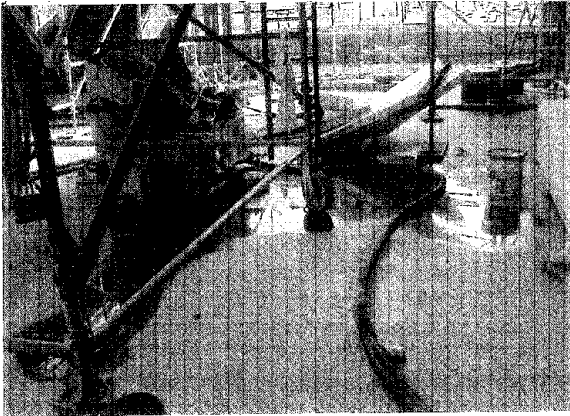
- PAC Lobby**

July 25, 2002 Schedule
Narrative & Run Date
August 9, 2002

| Activity ID | RESP | Activity Description | Orig Dur | Revised Dur | % | Early Start | Early Finish | Total Float |
|--|--------|--|----------|-------------|-----|-------------|--------------|-------------|
| 30833 | WALK | Install Signage Drive RevDock 1st L-P | 2 | 0 | 0 | 04OCT02 | 08OCT02 | -14 |
| 30840 | CLAN | Install Curtains Drive RevDock 1st L-P | 3 | 3 | 0 | 04OCT02 | 08OCT02 | -15 |
| 30850 | | Clean Up & Punch List Drive RevDock 1st L-P | 5 | 5 | 0 | 01NOV02 | 01NOV02 | -25 |
| Warm & South Lobbies & Rest Rooms 1st L-P | | | | | | | | |
| 314010 | OMN | Spray on Fireproofing N&S Lobby&Rest Rm'S 1st L-P | 6 | 0 | 100 | 06APR02 | 21JUN02 | |
| 314050 | ROST | 501 Conduct N&S Lobby&Rest Rm'S 1st L-P | 20 | 0 | 100 | 06APR02 | 16APR02 | |
| 314030 | SCALIS | HVAC OHN Street Mac Rv N&S Lobby&Rest Rm'S 1st L-P | 8 | 2 | 100 | 06APR02 | 14APR02 | |
| 314050 | LMB | Install Hangers N&S Lobby&Rest Rm'S 1st L-P | 1 | 0 | 100 | 06JUL02 | 17JUL02 | |
| 314070 | LMB | Punching Rv N&S Lobby&Rest Rm'S 1st L-P | 14 | 0 | 100 | 11SEP02 | 17JAN02 | |
| 314130 | ROST | 501 Rv @ Metal Studs N&S Lobby&Rest Rm'S 1st L-P | 10 | 0 | 100 | 06OCT02 | 07APR02 | |
| 314050 | BRWV | Remove OHN Rv N&S Lobby&Rest Rm'S 1st L-P | 3 | 0 | 100 | 06OCT02 | 01NOV02 | |
| 314100 | EAR | Lay-Out Set Door Frame N&S Lobby&Rest Rm'S 1st L-P | 3 | 0 | 100 | 01NOV02 | 07DEC02 | |
| 314110 | EAR | Install Metal Studs N&S Lobby&Rest Rm'S 1st L-P | 10 | 0 | 100 | 01NOV02 | 08DEC02 | |
| 314130 | ROST | Install Masonry Walls N&S Lobby&Rest Rm'S 1st L-P | 10 | 0 | 100 | 02NOV02 | 09MAR02 | |
| 314140 | LMB | Verify/Install/Punch Lines N&S Lobby&Rest Rm'S 1st L-P | 7 | 0 | 100 | 02NOV02 | 09FEB02 | |
| 314120 | LMB | 501 Rv @ Metal Studs N&S Lobby&Rest Rm'S 1st L-P | 5 | 0 | 100 | 07JAN02 | 04JAN02 | |
| 314150 | EAR | Hang Drywall @ Walls N&S Lobby&Rest Rm'S 1st L-P | 10 | 0 | 100 | 04JAN02 | 10JUL02 | |
| 314080 | LMB | HVAC Piping N&S Lobby&Rest Rm'S 1st L-P | 5 | 0 | 100 | 01FEB02 | 09FEB02 | |
| 314050 | ROST | Install Capable Rv N&S Lobby&Rest Rm'S 1st L-P | 10 | 0 | 100 | 04FEB02 | 09JUL02 | |
| 314200 | ROMAN | Inst Trace N&S Lobby&Rest Rm'S 1st L-P (Delayed) | 0 | 0 | 100 | 02MAR02 | 02MAR02 | |
| 314340 | ROST | Install Fire Alarm N&S Lobby&Rest Rm'S 1st L-P | 6 | 1 | 80 | 06APR02 | 26JUL02 | 6 |
| 314140 | EAR | Framing @ Dup. Br. Cnl N&S Lobby&Rest 1st L-P | 6 | 0 | 100 | 06APR02 | 10JUL02 | |
| 314100 | SCALIS | Verify/Install/Confirm N&S Lobby&Rest Rm'S 1st L-P | 4 | 0 | 100 | 06APR02 | 09MAY02 | |
| 314160 | EAR | Tapoff/Finish @ Walls N&S Lobby&Rest Rm'S 1st L-P | 7 | 4 | 80 | 06JUN02 | 06JUL02 | -20 |
| 314260 | ROST | Install Elect. Gear N&S Lobby&Rest Rm'S 1st L-P | 4 | 0 | 100 | 06JUN02 | 06JUN02 | |

| | | | | | | | | | |
|------|-----|--|---|---|---|---------|---------|----|--|
| 4350 | AIC | Install Flooring N&S Lobby&Rest Rm'S 1st L-P | 8 | 8 | 0 | 26JUL02 | 06AUG02 | 15 | Install Flooring N&S Lobby&Rest Rm'S 1st L-P |
|------|-----|--|---|---|---|---------|---------|----|--|

**PAC Lobby
on August 6
2002**



Educate Owners on What Can, and Can't, be Reasonably Accomplished

Kiss Franks & Strain
Architects and Planners

JDS
7/22/97

CAS Executive Committee Meeting - 7/18/97 - page 2

CAS Executive Committee Meeting - 7/18/97 - page 3

22 July 1997

MINU

Date:
Time:
Place:
Subject:

MINUTES OF MEETING

Attendees:

| | |
|-------------------------|------------------------|
| CAS EXECUTIVE COMMITTEE | |
| L. Newton Thomas, Jr. | Chairman, Board of CAS |
| Ted Ambrecht | CAS |
| Chuck Avanzano | CAS |
| Fred Baser II | CAS |
| Robert F. Barwasser | CAS |
| Thad Eggs | CAS |
| Ed Meier | CAS |
| Thomas E. Potter | CAS |
| John McClaugherty, Esq. | CAS |
| Jim Thomas | CAS |
| Sue Serpi | CAS |
| CONSULTANTS | |
| Cathy Byrd | DCI |
| Doug Fleckmore | KFS |
| Bob Bryan | KFS |

The meeting was opened and chaired by Newton Thomas. The purpose of the meeting was to respond to the 7/11/97 directive from the Executive Committee to reduce \$400,000 from the museum construction budget, as well as save other expenses that

Cost Reductions in 7/18/97 Report

Items 1 and 2. Represent revisions to take off.

- Item 3. Ross McGuire had previously agreed to deleting the projection screen surface in the atrium. Tom Tiedler would like to check an alternative material.
- Item 4. Reduce cost of ceiling in planetarium projection room. FB and TT would like to find an alternative.

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It was questioned if one even needed to have partitions at classrooms. It was agreed to substitute manual for electrically operated partitions.

TT wants ceiling as was drawn. CB stated that the cost as drawn is \$10/sf vs. a savings of \$4/sf. for an alternative "look-a-like".

but DCI was not maintaining the same measuring methodology as that used hence, comparison to SDCP could not be made. CB refused this. The true comparison is reflected in DDCP.

TE questioned why there were more mechanical savings in the PAC site than the Museum. CB answered: economics of design and location of mechanical rooms

CB stated that the cost for the Museum lighting seemed high.

In response to a query where did the building area increase, CB responded the following:

a. **Mechanical Rooms:** Now that the rooms have actual equipment in them, in contrast to area allocations in schematic design, the rooms are larger. This is normal and there has always been a design contingency to cover this growth.

b. **Offices:** The preliminary design take-off was based on area allocations for the Museum and the extra residual office space were carried by PAC. Now that there is a plan with partitions, the distribution is realistically apportioned.

has grown 700 sf, attributed to side of dome curvature.

Cost reduction items, with the in be made.

Approved:

Additional Potential Savings

ITEMS 1, 2, & 4 WERE APPROVED FOR A SAVINGS OF \$1,220,000, WITH A REQUIRING CONTINUED collaboration between designers and interior design consultants. An additional \$50,000 was considered to upgrade the minimal skylights (not the \$275,000 roof monitors). TT will study this in collaboration with KFS. This addition of \$50,000 has not yet been approved.

Enhancement Options

Enhancement Options

This area was valued at approximately \$825,000. The Committee wants the space to be usable (i.e. exit stairs, fire separations), not necessarily finished, and allowed a budget of \$500,000, including fees. The difference must be made up by other savings from the Museum side of the Center.

The above described work is an extra service, and KFS will solicit bids from relevant consultants for this work. In the interim all design work in this area will be logged under a separate work number.

No other enhancement was deemed necessary at this time, with the exception of increasing the site lighting budget \$45,000 for underground conduit as part of an enhanced site lighting layout. Fixture selection and related additional costs to be reviewed at a later date.

Other

KFS will verify if there is an alternative orchestra shell towers and ceiling possibility from the acoustical consultant. At subsequent design team meeting on 7/23/97, JHS ascertained that this number of towers was required. During further detailing of the towers, they will be again submitted to DCI for costing.

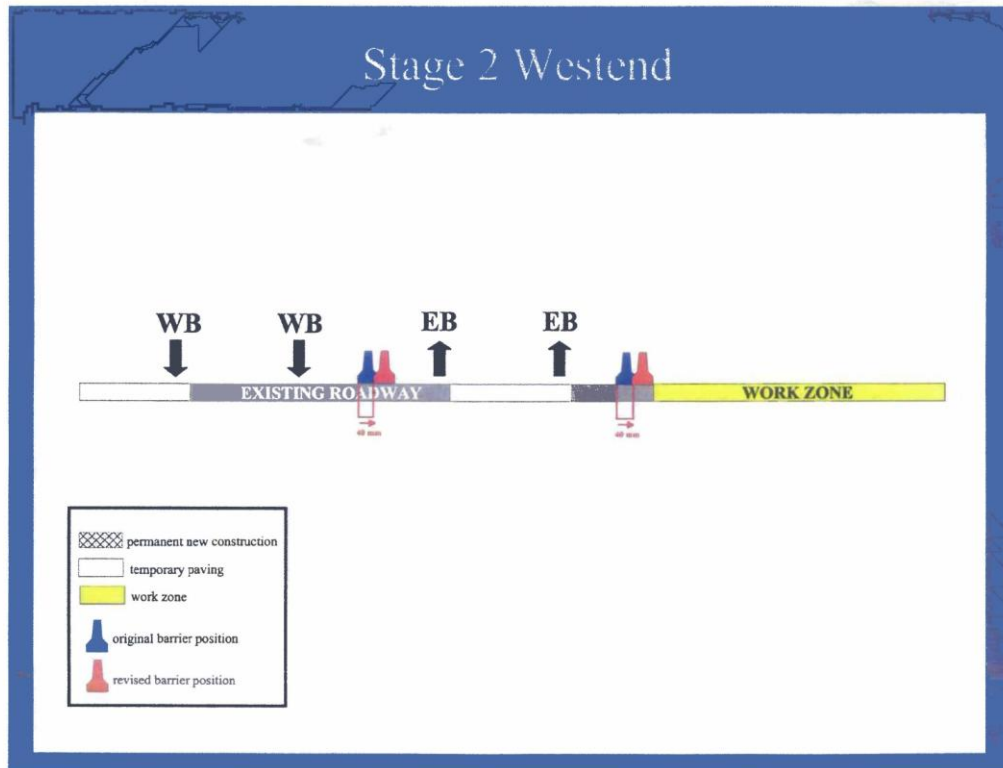
It was queried if the orchestra pit has use on 2 lifts. Later FDA verified 2 pit lifts. Also, FDA verified that 3 lifts are carried in the budget.

the facade should not deviate from the effect of made by Mr. Flemming. Mr. Tiedler asked if the saving cost savings to the facade. Newton Thomas

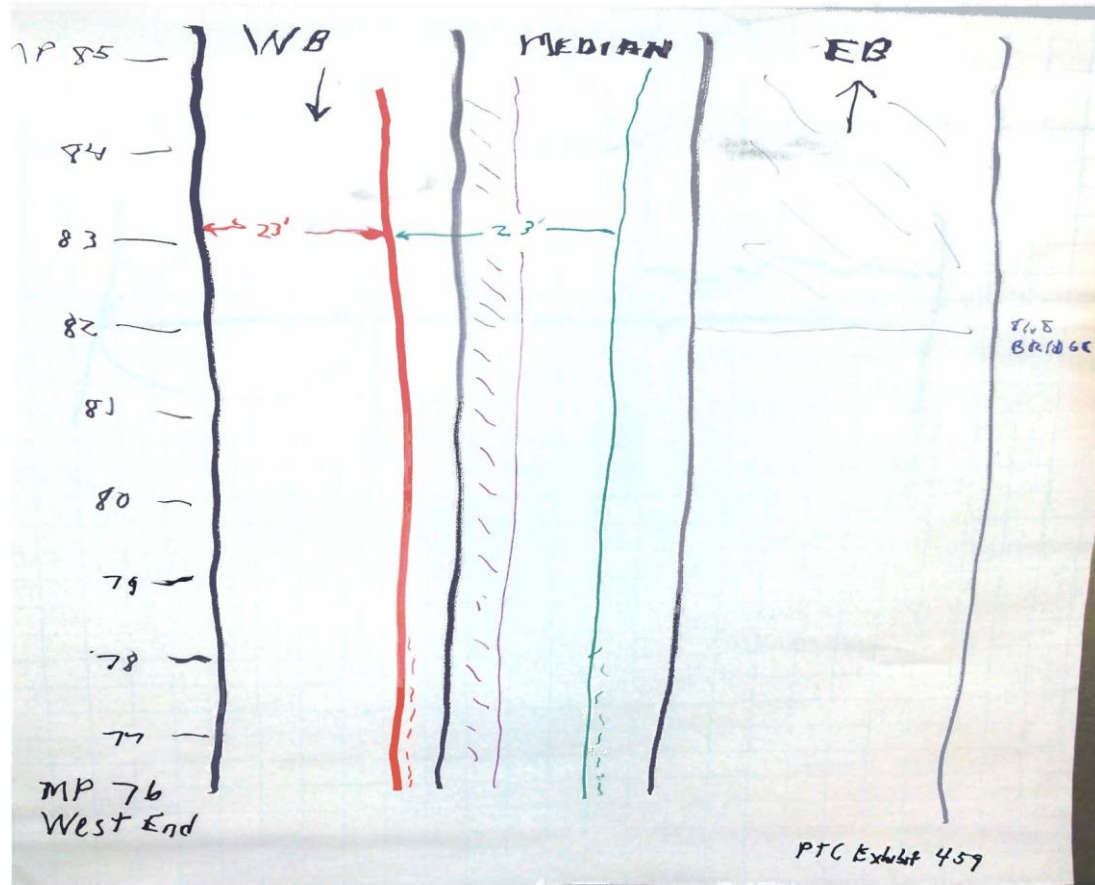
agrees to this.

The meeting ended at approximately 4:30 PM.

In a Perfect World



But, This Will Get the Job Done!



Consultants

- Have SIGNED contracts in place, including insurance limits.
- Work with reputable firms/people. Now isn't the time to experiment.
- Be wary of, or at least protect yourself against, Owner's designated consultants, or people "put upon you" in exchange for getting work....

Protecting Yourself from Owner's Consultants

- Should the owner contract separately for any [design services] related to this Project, those services shall be performed by licensed professional consultants, who shall affix their seals on the appropriate documents prepared by them. The contracts between the Owner and the Owner's consultants shall require the consultants to coordinate their drawings and other instruments of service with those of the [Architect] and to advise the [Architect] of any potential conflict. The [Architect] shall be entitled to rely on the technical accuracy and sufficiency and timely delivery of documents and services furnished by the Owner's consultants.

*The Owner shall indemnify and hold harmless the [Architect, Architect's consultants], and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of the services performed by the other consultants of the Owner.

Proper Fee Setting

- The vanguard of loss prevention is adequate compensation. Increasingly important with expanded scopes of work – BIM/IPD modeling is just one example. Does a transit Owner need this for political purposes? Will private Owner use it for fundraising?
 - Can you capture these activities as “additional services” entitling you to more compensation?
- Is it possible to maintain adequate levels of compensation with Owners soliciting RFPs from dozens of other parties?
- Can you perform adequately while being asked to low quote over numerous other firms?
 - How are your firms handling?
 - Reducing fees?
 - Passing on work?

Demanding Owners Taking Advantage of Competition

- Increasingly harsh contract terms, often presented as “non-negotiable,” are becoming normal.
- Owners frequently require representations as part of RFP response that parties will accept contracts “without modification.”
- Personally seeing more provisions that place various insurance coverages at risk – though Owners think they are protecting themselves with ironclad agreements.
 - “First Class Work.”
 - “Guaranty % of C.O.’s, or language not to exhaust contingency.”
 - Increase in “non-standard” ROR letters as a result.

What About Purchase Orders?

- Many owners take the position that these documents, “approved by corporate,” are simply “non-negotiable.”
 - So, what of a provision requiring that work “be performed in strict accordance with ... said specifications and all other documents and schedules incorporated into this purchase order.”
 - Are you actually reviewing the attachments???
 - Or what of a seemingly innocuous request that every company with a presence on-site appoint a “Safety Director?”

What About Purchase Orders?

- What of a provision indicating that “Seller warrants that, for a period of two (2) years from the date a Product is delivered to Buyer, such product will be **free from any defects in design**, material and workmanship...?”
 - Is this acceptable if you aren’t manufacturing the item provided? Do you have contracts in place with the supplier/sub passing this along to them?
- Are you on the hook if the Owner is making long lead time items directly through subs?

By Way of Example -- Designer Penalty Clauses

- § 1.1.9 (OPTIONAL) Adherence to Time Schedule.

...

If the Owner determines that the delay is due to the fault of the Professional, the Owner may amend the schedule and direct the Professional to expeditiously proceed with the design of the project, in which case the Owner may hold the Professional responsible for any costs attributable to the delay, or terminate the Agreement for default of the Professional, in accordance with the provisions of this Agreement.

This provision guarantees that certain claimed damages will be uninsurable....

So What Did I Mean by Monitor Junior Team Members?

- Businesses have discovered that social network sites are an effective way to reach new clients and to build loyalty with specific individuals employed by good clients.
- Social network sites offer the possibility of not only delivering marketing messages, but also of learning about new projects, RFPs, etc.

...However!

- Social network sites have significant liability potential – exposing companies to risks as diverse as copyright infringement, negligent misrepresentation, and discrimination.
- The risks are compounded because employers can be held liable for the unsupervised activities of their employees on social network sites.

Respondeat Superior

- Employers can be held liable for the activities of employees under the common law doctrine of agency – *respondeat superior*. The doctrine states that the superior is held responsible for the acts of its subordinate.
- A company can be held liable for the actions of its employees and others deemed agents of the company, even if the agents are acting independently. This is vicarious liability.

How the Doctrine Impacts Companies

- Statements about co-workers, consultants and clients could lead to lawsuits alleging defamation, trademark infringement or unfair trade practices.
- Perhaps less noticeable, but potentially even more damaging, are the ways comments can be used against you in litigation....

Critical Comments Made in Passing

- A member of a social network site that merely lists an employer in his or her profile, for example, may create trouble for the employer by criticizing a client, consultant, a former employer, even a former colleague who might now be looking for a job.
- If you haven't, to quote a John McCain, "made a google lately," you should check out your name....

One Example

- Employers are only now coming to grips with “textual harassment,” where harassment and bullying takes place through inappropriate text messages, emails or internet postings, which the employer usually is not aware of and has little control over.
- Even if the harassment takes place outside of work in a social networking context, employers can be held liable, especially if the employer becomes aware of the activity and takes inadequate steps to stop it.

Loss Prevention

- Risk management practices, such as clearly written social media use policies, can help reduce exposure.
 - Always obtain written consent to abide by the policy!
- Various forms of specialized insurance coverage are available.

LOL Clauses

- A limitation-of-liability clause in your contract sets the maximum dollar amount that you can be held responsible for [value of fee? Policy limits?]
- Are legal and enforceable in many states, but must be carefully written to cover all potential claims. An LOL regarding delay claims will not cover an acceleration claim, or an inefficiency claim [trade stacking], by way of example, unless each is particularly spelled out.

The Case Studies

- One project recently completed contained numerous red flags before design ever began, and resulted in legal/expert fees of \$200k, and payment of significant policy sums to settle after just one deposition.....
- The other heralded as a model of success, despite numerous difficult circumstances during design and construction.
- What caused the difference in outcomes? The manner in which leaders of certain firms handled the non-technical risk management issues.

Petroleum Refinery

- On November 9, 2007, Engineer entered into a contract to provide engineering services for the expansion of a WWTP at a major gulf coast refinery for a new client known to be exceptionally difficult in the industry (proverbial 800 pound gorilla).
- The work included the engineering services for the Process, Mechanical, Piping, Fire Protection, Civil-Structural, Electrical, and Instrumentation and Control systems. Work was complex – it added to existing piping layered into the plant over decades, much of which was not properly recorded with accurate elevations/as-builts. Steel had been added “willy nilly” as hurricanes came and went to reinforce pipe racks, etc. Work was fast-tracked – Owner under EPA mandate.

Two Major Obstacles to Defense

- Contract's standard of care clause had been modified to promise that "first class" engineering services would be provided.
- It further stated that Engineer would be responsible for "all" delays and damages that flowed from "any" error or omission committed by it. Contract was presented as non-negotiable – response to RFP required consent to sign as drafted.
- These clauses allowed Owner to state a \$4.8M Counterclaim against the Engineer's \$450k fee claim.

What Were the Red Flags Here?

- Owner new to client, but had known difficult reputation.
- Non-negotiable contract included terms that were potentially uninsurable, and couldn't be met by even the most sophisticated engineering firms.
- Very demanding project on exceptionally tight timeline, without financial safeguards.

The Alternative – Bagby Case Study

- Project Started with significant complications.
- But ended a model of success.
- Why?

Project Description

- Adaptive reuse of 100 year old furniture factory into commercial offices.
- Within city limits of Baltimore, in an area targeted for revitalization efforts.
- Four story solid brick building allowed little room for major changes.

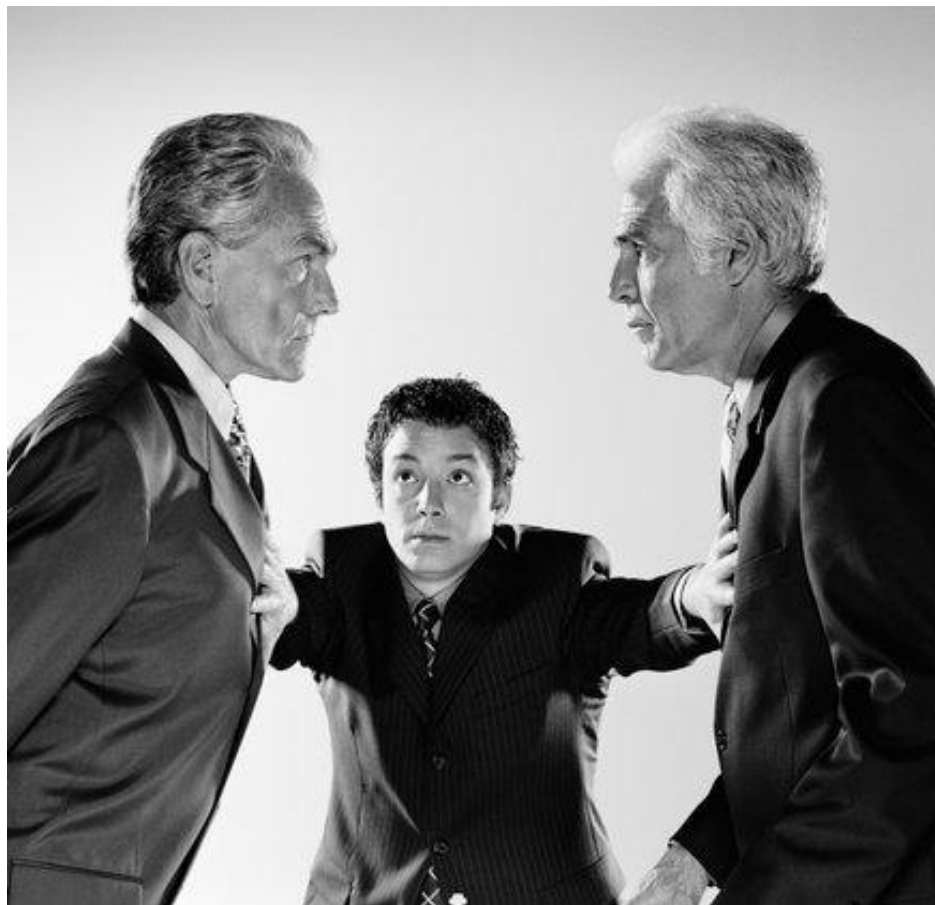
The Challenges – Multiple Owners During Design

- Anchor Tenant, Eisner Communications, first attempted to acquire building, but financing fell through....
 - A/E contract was originally directly with Eisner.
- Building then purchased by Baltimore businessman.
- Then flipped to local Developer.
- Secondary Tenant also took ownership piece.
 - So the “Owner” for the designer and lead contractor changed four times....

Historical Building

- Need for tax credits, etc., permitted no major exterior alterations.
- Also required political maneuvering among various governmental and community groups.

Successfully Avoided This....



Success ... Because Parties Applied all Key Non-Technical Elements of Risk Management!

- Contractor and Design firm demonstrated significant **communication skills** with all interested parties, including its multiple clients and diverse end users, community groups, throughout the project.
- Contractor and Design firm designated **experienced team members** to take charge of key facets of work, and retained those people through project completion.
 - Had them traveling from geographically remote offices rather than Baltimore, to make certain proper individuals were working on the project.

Success ... Because it Applied all Key Non- Technical Elements of Risk Management!

- Contractor and Design Firm regularly updated **contract** to account for new owners, updated financial information, etc.
- Although Contractor and Design Firm didn't have say in who the ultimate **client** was, it did make great efforts to transition work as ownership changes occurred, to allow fully informed decisions regarding cost to be made in advance of construction, etc.

So What To Do in the Short Term?

- Don't Panic.
- Don't accept work you know has "red flags."
- Approach non-negotiable contracts cautiously. Seek input when you do, and make other risk management decisions when you must [focus on best talent for that project, etc.].
- Be careful if you do make concessions to NOT jeopardize your coverage.
 - Consult your broker. Consult counsel.

What Else Will Help?

- Look for ways to negotiate payment for additional services.
- Don't be afraid to ask for meetings to explain difficult problems. Getting out in front might keep it small!
 - Consider creating a deductible “slush” fund to dispense with small problems. Negotiate “separate events” issues with carrier when you do.
- Look for ways to intelligently cut costs.
- Look for logical expansions of your practice – but don't overstep.

Questions?