

## PRO-FORM INSURANCE SERVICES

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### Fast-Track Projects Continue to Gain Speed

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Design firms that have the ability to deliver projects with speed and efficiently have a decided competitive advantage. The growth of alternative delivery systems such as BIM, design-build and fast-tracking are testaments to the value clients place on speedy delivery of their projects. "Time is money," is today's client's adage, and a shortened delivery schedule can be a deciding factor in selecting the best design firm for the job.

When it comes to designing and constructing a project, however, speed can also kill. When meeting a tight schedule is the client's overriding concern, quality and detail are likely to suffer. For architects and engineers, that almost certainly means added risk, added cost, 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. Design and construction documents are delivered via these distinct packages. 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 architects and engineers involved in the fast-track project. Consider, for example:

- The time cushion between design and construction is lost, eliminating opportunities to identify and correct design errors or omissions before construction begins.
- Extra time is spent spinning off separate construction documents for each of the bid packages.
- It's 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 are apt to have modifications and expensive change orders the client does not understand nor anticipate.
- With project changes, you spend more time on construction administration activities.
- You may not have time to work 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 think additional costs from modifications and change orders are due to your errors, omissions and incompetence, rather than being inherent risks 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 you 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. 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 some changes, delays and extra costs are the norm, not the exception.

## **Contingency Fund**

Recommend to your client that the added costs associated with fast tracking be anticipated in the project budget and that an ample contingency fund be established to include both design and construction changes. Work with your attorney to draft a “Contingency Fund” contract clause that includes:

- Acknowledgement by the client that certain changes may be required because of possible omissions, ambiguities or inconsistencies in your plans, drawings and specifications.
- Acknowledgement that the final construction cost of the project may exceed the estimated construction cost.
- Agreement by the client to set aside a reasonable reserve as a contingency to be used, as required, to pay for any such increased costs and changes.
- Agreement by the client to make no claim against you or your subconsultants with respect to any increased costs within the contingency because of changes in plans, drawings or specifications.

The amount of a “reasonable” reserve will depend upon many factors, including the complexity of the project, the project delivery method and your and the client’s experience with this type of project. Typically, a contingency fund of 10% of estimated costs is reasonable for a low-risk project. Try to negotiate a higher amount for a fast-track project to reflect the increased chances of changes and rework.

## **A Fast-Track Contract Clause**

Your contract should also 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 equitably. You need a sufficient scope of services to provide any additional services necessary on a fast-track project, and you need to be adequately compensated for performing those added services. Have your legal counsel draft a “Fast-Track” contract clause that includes:

- Recognition that the fast-track method provides benefits solely to the client.
- Acknowledgement that employing the fast-track process requires you to provide design services that overlap with construction and are out of sequence with your traditional project-delivery method.
- Recognition that providing your design services concurrently with construction and out of sequence entails inherent risks.
- Agreement by the client to waive all claims against you for design changes and modification of work already constructed due to the client’s decision to employ the fast-track process.
- Agreement by the client to indemnify you and hold you harmless to the fullest extent permitted by law against all damages, liabilities or costs rising out of or in any way connected with the project, except for those damages, liabilities or costs attributable to your sole negligence or willful misconduct.

- Agreement by the client to compensate you for all additional services required to modify, correct, coordinate or adjust the construction documents 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. In an attempt to stay on a fast-track schedule, the client may directly authorize changes in the construction documents without your approval or 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 client 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. Work with your attorney to draft an "Unauthorized Changes" contract clause that includes:

- Acknowledgement that if 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 reports, plans, specifications or other construction documents prepared by you or your subconsultants without obtaining your prior written consent, the client shall assume full responsibility for the results of such changes.
- Agreement by the client to waive any claim against you and to release you from any liability arising directly or indirectly from such unauthorized changes.
- Agreement by the client to indemnify you and hold you harmless to the fullest extent permitted by law against all damages, liabilities or costs rising out of or in any way connected with unauthorized changes to your plans.
- Agreement by the client to include in any construction contracts appropriate language that prohibits the contractor or any subcontractors from making changes or modifications to your documents without your prior written approval and further requires the contractor to indemnify both you and your client from any liability or cost arising from such unauthorized changes.

## **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, who made them, why they were made, what the ramifications were on previously designed or constructed work and why some tasks were done out of sequence.

The decision to participate in a fast-track project should start with careful client selection. 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. Then make a commitment to open communications and frequent exchanges of information. Teamwork with clearly aligned and defined goals and objectives is crucial to a successful project completed on time and within budget.

## **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 preventives, 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.*