

February 28, 2019

Seeing a Project From the Owner's Side



Richard Reizen

Construction

By Richard S. Reizen

Co-Chair, Construction Practice

We have all heard the old axiom: A lawyer who represents himself has a fool for a client. More truth than not in that statement, probably. But I recently learned an often unrepeatable corollary: Being a client can make you a better lawyer.

My career as a construction lawyer spans nearly 40 years. During that time, I have represented owners and contractors in public and private projects of every nature and scope, including sports stadiums, power plants, manufacturing facilities, schools, theaters, water treatment plants, office buildings and just about any type of building project that involved swinging a hammer, except maybe a tree house! I have also been involved in hiring contractors for small projects on my own house.

For the past year or so, though, my role in these types of projects was reversed as I served on my own law firm's building committee. Our task was to plan and supervise the build-out of a new 37,000-square-foot office within a certain budget range, with a move-in date of about a year from the day we hired our architects.

At the beginning, we interviewed and retained a project manager, an architect, a general contractor and several consultants. As the construction lawyer on the committee, I drafted the construction agreements. Meanwhile, the real estate lawyers on the committee negotiated and drafted the lease documents, and we all spent countless hours attending weekly OAC meetings, looking at designs, carpet, furniture, finishes and budgets. I am pleased to report that we were thrilled with the team we hired, as well as the completed project. We moved in on time and finished under budget!

The process of being the "owner" on the project, and not just a lawyer, both taught and reinforced some simple yet important lessons that I will carry forward in representing my clients. They are also tips that all owners should consider:

Building a Project Is Not Just Another Matter

As any busy professional knows, it's easy to fall into a rhythm where your client engagements can get to be routine, or "just another matter." Although I have tried to remember throughout my career that matters are far from routine for an owner, architect or contractor, the demands of a busy law practice can enable forgetting such an important point. But no more!

Even though we were doing the legal work ourselves for the new office, it was not just another matter: It was our new office, the place where we would be spending the majority of our waking hours. It had to be something our partners and employees loved, as well as something our clients found comfortable and impressive. It had to reflect our 77-year history as a firm and yet be forward-looking. Of equal importance to the office's impact was the need for the buildout to be within budget. To the design and construction teams, this aspect of the project was a source of genuine pride.

Balancing the importance of the money spent with the need for us and our clients to love the space took serious and specific attention to detail. Whether it is a factory, office, home or any other type of project, it is crucial that the owner understands they only

get once chance to build their project to meet their needs and desires.

Assemble Your Project Team Carefully and Early

Our firm's project also reinforced my standard advice that an owner should put together its internal and external project teams as early as possible. With respect to your internal team, having different types of expertise involved from the start is crucial. Our team consisted of our chief administrative officer, our chief financial officer, two lawyers with significant experience in lease and real estate issues and a construction lawyer (me). We also had a managing partner participate.

Each committee member's particular areas of expertise were tapped at various times, and the internal team was able to speak with one voice and make recommendations to management and the partners. Additionally, it is imperative that each important function within the company – including administration/operations, IT, legal and even marketing – contributes and collaborates in the design concept of the space. Obviously, having a voice in the design makes the project "yours." That input also makes for a better product as good ideas come from all different people in all different areas.

Equally important is having a single contact point for your team's day-to-day contacts. Our CAO did a fabulous job of obtaining daily information and disseminating it when necessary to the rest of the team. Having a single, reliable point of contact also avoids inconsistent or contradictory instructions from the internal team to the external team.

As for the external team, it is vital to retain a project manager first. An owner should interview as many project managers as necessary. Check references thoroughly and ask all the questions you need to ask. You must be comfortable with that part of the team, as they will play a crucial role in the selection of the rest of the team and the management of the project. That ability to manage the project is a necessity, since you probably have a day job. A project manager that understands collaboration but can also be strong enough to keep the team moving and staying within budget is crucial. As a client once said to me: "You need a project manager that can get along with people, but who can bring the thunder when necessary."

Retaining the design team requires similar diligence. Make sure the design team understands your vision for the space and is willing to work toward that and not their own vision. The design team needs to "get you." Early visioning sessions are crucial. While their suggestions should be taken seriously, it is ultimately your office. Our design team was clear about its suggestions but willing to listen to ours and implement them when it made sense. Make sure to find a design team that is willing to design to your budget. That often requires a give-and-take approach and a willingness of both the owner and the design team to be flexible.

In hiring a general contractor, we obviously focused on cost but, more importantly, also on experience in similar projects, as well as a willingness to work within the projected guaranteed maximum price (GMP). Familiarity with the actual building is also a plus. Make sure your team has worked together before without problems. Although it is time-consuming, I would also urge at least one member of the internal team be present for interviews with all GC candidates. It is also helpful to lock-in the project manager and superintendent you want. A general contractor is often only as good as the specific team members assigned to your project. Finally, if your first choice is a bit more expensive, contractors are often willing to get their prices in line with other bidders to get the work.

Collaboration Is More Than a Catch-Phrase

For our project, we were lucky to work in a truly collaborative environment. From the beginning, everyone worked toward a common goal. The team was sensitive to the concerns of each team member. When an issue arose, no one ran for cover. Instead, the issue was discussed without criticism and a solution was negotiated.

Sometimes, as owners, we had to understand that our request was too expensive or not practical. When that happened, the team worked towards the best alternative. Other times we had to spend more than planned for an item and find the money somewhere else. That would not have been possible without numerous collaborative but frank discussions. As an owner, it is also necessary to rely on the expertise of the design and construction teams, and understand you know less than they do about certain issues.

Having a Clear and Detailed Agreement Is Crucial

While no agreement can prevent a project from going bad if the design is flawed, the contractor does poor or slow work, or the owner refuses to pay, having clear and properly negotiated terms is every bit as important as I thought it was!

The parties in our project negotiated the terms of our agreement in good faith and over the span of several days. The exhibits were complete and agreed upon, the use and control of any contingencies were clear to all sides, certificates of insurance were required and submitted before work was done, the content of pay requests was spelled out in detail and enforced, the GMP was detailed and well thought out, and the performance criterion were clear and specific.

While we were lucky enough to not have to actually check the agreement during the project, the fact we had negotiated it in detail caused the parties to really understand what was expected. Most importantly, everyone understood the agreement and knew it would be enforced.

Silence Is Not Golden

This project also confirmed a piece of advice that I have shared with clients for years: Owners must speak up! It is your home, office or plant. As an owner, if there is something that you don't like, ask for an alternative. If you do not feel communications are going well, request a different communications method or a different person to address. If there are costs outlined in the GMP that you do not understand or do not believe are justified, ask for more detail.

As a contractor, if you foresee a change order coming, let the owner know as soon as possible so that the owner can determine if it dictates other deductive changes to stay within budget. Also, make your requests clear so it can be determined if there is a basis for the change.

As the project proceeds, say something if you see something. Nothing is easier to fix later in the process. No issue is best left for another time. If, as an owner, you feel the need to change something you previously approved, speak up as quickly as possible and work with the team to minimize the extra costs. Sometimes a little extra expense is better than living for years with something you don't like.

Do What Works

In the end, there is no single prescription for the perfect project. But after having served as project counsel for decades, and now having been an owner for the past year, these recommendations are a good place to start to get the most out of what you're building.