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DIVISION 1 OF THE FORUM:

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A View from the Field: Project Execution/Contracting Strategies Large and Complex Industrial Projects

By George T. McLaughlin, PMP

This article presents George T. McLaughlin's "View from the Field" formed throughout the course of his 30+ year career in the industrial marketplace. His article is broken into four parts. [Part 1](#), published in *The Dispute Resolver* in April 2013, describes the evolution of the delivery systems in large and complex industrial projects (oil and gas, process, power, chemical and pharmaceutical). This Part 2 frames the issues facing the engineering and construction industry and lawyers that service those groups. The remaining sections, which we will publish in our next two newsletters, will discuss the impact on claims, disputes, and resolutions (Part 3), and prevention and corrective processes (Part 4).

Part 2 of 4: Definition of the Issues with Legal Implications

As discussed in Part 1, the strategy for planning and executing large and complex projects is undergoing major changes. From the discussion of emerging trends, this Part 2 outlines the practical issues that arise when the changed strategies are implemented. For the construction attorney seeking to represent clients in this evolving landscape, it is important to anticipate both the issues facing each of the stakeholders. Table 1 provides a relationship mapping between the issues and the key stakeholders.



Topic / Issue	Stakeholder					
	Owner	PMT / CM	Prime – EP	Construction Contractor	Construction Support	Completion
1. Asset Performance	XX	XX	XX	XX		XX
2. Completion Management	XX	XX				XX
3. Contracting Strategy Plan	XX	XX	XX			
4. Deliverable Quality, Completeness, and Timing	XX	XX	XX	XX		XX
5. Free Issue Equipment & Material	XX	XX	XX	XX		
6. Interface Challenges	XX	XX	XX	XX	XX	XX
7. Multi-Contract Strategy	XX	XX				
8. Owner Project Management Teams	XX	XX				
9. Scope of Work	XX	XX	XX	XX	XX	XX
10. Time Management / Schedule	XX	XX	XX	XX		XX

Table 1: Stakeholder to Issue Relevance

1. Asset Performance

An Owner ultimately cares about the proper performance of its plant and facilities. Under Engineer, Procure, Construct (EPC) strategies, performance guarantees are generally obtainable from Prime Contractors because they are in a position to assume and manage risk. Under the multi-interface strategies, responsibilities and resulting liabilities become so diffused that performance guarantees are difficult (if not impossible) to obtain and enforce.

2. Completion Management

With multiple parties and interfaces, the sequence and timing of commissioning and startup is challenging. Lack of competence in this process is a constant and pervasive problem throughout the industries. By default, completion responsibility tends to fall upon the Owner. If in-house services are limited, an Owner should consider hiring a contractor that specializes in startup and commissioning. There are some skilled contractors and firms in the marketplace that specialize in this challenging phase of a project.

Regardless of execution (Owner or contractor), the related responsibilities and risks reside with the Owner. Of course, problems that prevent or delay completion must be promptly resolved. Problem resolution actions and related responsibilities may be difficult to

identify. This dilemma conflicts with the compulsion to achieve an operating plant in a timely manner. Often, the financial demands associated with operating a plant understudy prevails and the work is performed without clarification of responsibility thereby absolutely increasing the risk of disputes and budget overruns.

3. Contracting Strategy Plan

It is imperative that the parties define, review and accept the contracting strategy for the entire project before the contracts are drafted and executed. The contract documents need to reflect the integrated thinking and conform to the established baseline. Contract administration or management needs realistic approaches to address changes to scope and time. Good contract management and administration is increasingly important (Kerzner). With the many interfaces and the sequential nature of the contracting, preceding contracts need to be administered on a timely basis. Otherwise, the basis for subsequent or successor contracts is not stable. Deferring resolution until years later will present problems for the owners, construction managers and all successor contractors / parties (Reed Smith).

4. Deliverables Quality, Completeness, and Timing

Deliverables (e.g. technical documents, materials, equipment, lists, and models) must be defined in terms of quantities, timing and quality. The quality of the deliverables can impact the labor and related work necessary for the Construction Contractor in fabrication and erection work. Since these deliverables are typically the output of a predecessor contractor and defined by the related contract, the precision with which they are defined can have a large impact on the successor contractor.

For example, consider a project where a prime contractor was to receive owner-furnished / free-issue equipment that was complex and required factory-acceptance testing. The equipment was to be shipped to the site in many assembled modules. When the prime contractor received the shipments, they contained numerous unassembled parts and pieces that required modifications in order to assemble the entire equipment train. The mistakes with this owner-furnished equipment deliverable in every instance impacted erection time and cost. They invited a slurry of claims for the Owner and the Owner's vendor (who will likely disclaim commercial responsibility) to handle. Unlike a mixed project-delivery system, had it been an EPC contract, the contractor would be liable and centrally responsible to mitigate the damages.

The timing of deliverables must be carefully defined. The timing of the successor contractor's receipt of deliverables influences the successor contractor's ability to perform effectively and efficiently. The sequence of these deliverables further exacerbates this influence. Equipment and materials that are delivered earlier than scheduled can be just as disruptive as late deliveries. If deliverable timing is not planned, workforce planning and construction-support equipment (e.g. cranes, lifting equipment and installation

equipment) can be disrupted, with costly impacts.

5. Free-Issue Equipment and Material

Consider the potential complexities created by "mixed contracting strategies" (Scenario A) versus an EPC delivery method (Scenario B) through the following hypothetical. Suppose a heavy wall vessel that had been fabricated in Europe is dropped during offloading in the United States.



To make things more complex, the vessel delivery to the final location requires a facility shutdown that was on the critical path. Finally, commissioning and startup issues centered on the vessel emerge. Under Scenario B (EPC method), the liabilities resulting from this event would be fully within the scope of the EPC contract. The contractor is responsible and it would bear the risk and cost. Under Scenario A, there would be separate contracts (e.g. heavy lift, marine transport, fabrication, mechanical erection, and piping) between the Owner and the associated contractors. The Owner is the common denominator and will have to build consensus among the numerous stakeholders to get the different contractors/vendors to perform. Claims will most certainly pop up from various parties.



6. Interface Challenges

The number and complexity of the interfaces have increased dramatically. These interfaces are at Owner-Prime Contractor (Engineer and Procurement), Owner-Construction Manager (if any), Owner-Construction Contractors, Construction Contractors-Prime Contractor, Construction Contractors-Construction Support Contractors and possibly others (Downey). (See Part 1, Figure 2). Owner approvals, inspections, reviews and other actions will number in the thousands. The potential for managerial system breakdowns, delays and gaps is enormous.

7. Multi-Contract Strategy

As the contracting strategy transitions from a single EPC contract to multiple contracts for various phases of the project, risks that once resided in one contract with one contractor are now scattered amongst many and risk is assumed heavily by the Owner. Major risks include additional costs, schedule expansions (delays), technical, performance, and many others. These risks must be allocated and shared within the parties on a realistic and predictable basis. Interface risks will likely

reside with the Owner. Equipment risks will likely reside with the supplier or vendor. The suite of contract documents may include as many as 10 or more major contracts or procurement documents. There is a need for integration and consistency of the key provisions such that these contracts function together.

8. Owner Project Management Teams (PMT)

Owner project executives have been identified as a major variable in the success of large and complex projects (Merrow). With new strategies, the matter has a potential for a more direct impact on major stakeholders.

Owner PMT staffing requirements are more extensive and skill sets are more demanding to manage or interface (quality, quantity, complicated) (Cabano). Newly hired personnel (or limited/temporary contract personnel or individual contracted resources) often lack skills to manage interfaces. Further, since these are Owner teams, the processes, procedures and ways of working may not be in place or already implemented. Owner standards, specifications, quality baselines and other technical documentation become increasingly important. Unfortunately, planning and scheduling/programming protocols and expertise are often inadequate (Downey).

9. Scope of Work

The project scope of work is developed, elaborated and detailed in a progressive manner. The scope for successor contractors and contracts is a deliverable from a predecessor contractor (or internal from the Owner).

The basis of the contract scope definition may be unstable (changing, incomplete). Changes will be the basis for claims for additional compensation and time if not resolved on a contemporaneous basis.

Under the EPC strategies, the concept of “scope wrap” (a controlling contract provision that makes the Contractor responsible of all scope necessary to complete the work) is routine. With the “mixed contracting strategy,” this becomes increasingly complex, if not impractical. Quantity variances have highly significant impacts on multiple parties. Liabilities can be more difficult to determine and resolve. Effective techniques for scope-of-work management are needed.

10. Time Management / Schedule

The parties/stakeholders take on new roles, responsibilities and risks (Downey). The project duration and delay to individual parties/stakeholders are decoupled and the cause and effect is difficult to isolate. The collection, status, controls, and management of progress is highly complex. Different parties use different and incompatible standards. Successor organizations need reasonably accurate progress data from predecessor parties for planning and management of their work. Resolution of typical issues, such as force majeure, is more complex. A force majeure delay to the EP may (or may not) impact some or all of the Construction Contractors. Again, the risk with a mixed contracting strategy resides with the Owner.

The EP contractor’s critical path may not be individual Construction Contractors’ critical path. Time management issues present themselves later (time and degree/percent of completion) in the overall project.



Conclusions

The Law of “Untended Consequences” is alive and well. This foregone discussion has identified some of the issues. The challenge is to determine how legal professionals can be proactive or react thoughtfully.

The impacts of these contracting dynamics heavily fall upon the backs of the Owners and Construction Contractors (subcontractors).

Owners and Construction Contractors need major assistance with these challenges. Construction attorneys should view these challenges as services extensions that they can offer to the engineering and construction marketplace. It is in all parties’ best interests to minimize confrontation and resolve disputes effectively, timely, and fairly.

In the next Part 3, we will discuss impacts on claims, disputes and resolutions.

Endnotes:

Since the early 1980’s, Mr. McLaughlin has worked worldwide in this industrial marketplace. He serves Owners, Prime Contractors, and Subcontractors. Mr. McLaughlin was president and COO of a \$35 million engineering and construction (mechanical, controls and electrical) contractor for five years. For the most part, Mr. McLaughlin’s work is performed on-location where the relevant work is being performed hence the title “view from the field.” Mr. McLaughlin is a principal of McLaughlin & McLaughlin out of Austin, Texas. In this role, he provides program and project management services as well as litigation support services. His contact information can be accessed at his website (www.mclaughlinandmclaughlin.com) and blog (<http://projectprofessionals.org/>).

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Recent Developments in Construction Law and Dispute Resolution

***Harris Builders, LLC v. URS Corporation*, [861 F.Supp.2d 746](#) (E.D. La. 2012).**

Interpreting Louisiana law, a federal district court held that a general contractor on a public contract to build a warehouse could maintain an action against the owner's project engineer/construction manager for negligence based on allegations that the construction manager's actions delayed and hindered the contractor's ability to perform its obligations. The contractor complained of the construction manager's alleged "failure to develop good quality specifications, insistence on performance of unnecessary work that delayed the construction project, and failure to approve certain payments by the Owner." Recognizing that Louisiana permits an action for negligent professional undertaking, the court explained that the construction manager's construction plan preparations and instructions to the contractor to redo certain work were acts that the construction manager had to have known would directly affect the contractor. Further, the court concluded it was foreseeable and fairly certain the contractor would suffer economic harm if the construction manager managed the project poorly, and the construction manager's development of project specifications directly affected the work the contractor performed.

***Nippo Corp./Int'l Bridge Corp. v. AMEC Earth & Env'tl., Inc.*, [Civil Action No. 09-0956](#), 2013 WL 1311094 (E.D. Pa. Apr. 1, 2013).**

A federal district court found a subcontractor on a federal government construction project was not required to comply strictly with contractual notice provisions to seek a modification of the subcontract or an adjustment in the subcontract price. The court explained that Nevada law, which governed the subcontract, does not require strict compliance with contractual notice provisions. Rather, it requires notice sufficient under the circumstances to make the contracting entity aware of the difficulties and to permit it to remedy the situation to avoid excess costs. Even if the value of the claim cannot be determined with reasonable accuracy at the outset, it will be permitted so long as a sufficiently detailed claim follows. The court held the subcontractor had presented evidence demonstrating numerous timely communications with the general contractor regarding the difficulties the subcontractor encountered, notice that it was incurring damages and, in many cases, notice that it intended to seek an equitable adjustment to the subcontract. The court found this evidence sufficient for a reasonable jury to conclude the subcontractor provided sufficient notice to the general contractor regarding the problems it was encountering and the damages it was sustaining.

DIVISION 1 MEMBER SPOTLIGHT

Tony Lehman



For nearly fifteen years, Tony Lehman has been a construction lawyer and litigator, dealing with such wide ranging issues as professional liability claims, construction defect lawsuits, ADA deficiencies, and local planning and zoning issues. Tony has spoken frequently at the local level on everything from bidding and differing site conditions to dispute resolution and trial strategy, and he was named a *Super Lawyers Rising Star* in Construction Litigation in 2010. In Division 1, Tony is a member of the Division I Steering Committee, serving both as co-editor of this newsletter and as the Division 1 liaison to the Publications Committee of the Forum.

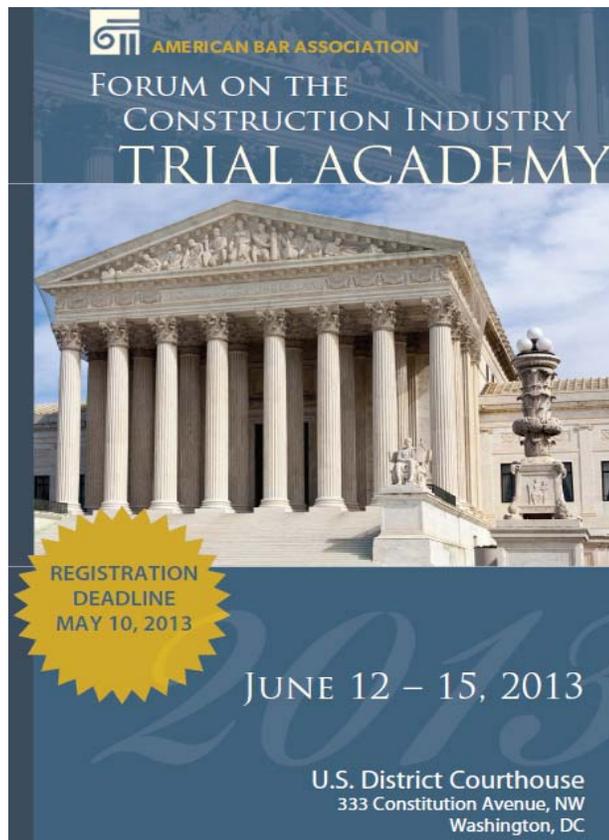
Tony practices now with DLA Piper, the world's largest law firm according to the *American Lawyer*. His position now is a long way from tiny Slinger, Wisconsin, the small town in Wisconsin about 30 miles from Milwaukee where Tony grew up. Despite the small-town upbringing, Tony always wanted to be in big cities and jumped at the opportunity to move to Nashville, Tennessee, for college at Vanderbilt University. After graduating from Vanderbilt *cum laude*, Tony worked in Milwaukee for a year before heading back to the South to the University of Georgia. UGA opened the door for Tony to practice law in Atlanta, where he has practiced ever since.

All work and no play would make Tony a dull boy, as the old saying goes. While the practice of law is an intriguing occupation and career, Tony really enjoys watching and attending sporting events. Tony has attended English Premier League soccer games, the NCAA Final Four, college football regular season and bowl games around the country, a NASCAR race at Talladega Superspeedway, the Indianapolis 500, major league baseball games at 10 different venues, several NHL games, and multiple NFL games — including one game at historic Lambeau Field in Green Bay — just to name a few. Nothing, however, tops going to Sanford Stadium in Athens, Georgia, to watch the Georgia Bulldogs play football — especially against the Auburn Tigers, the school where Tony's wife Beth graduated college.



When Tony isn't going to sporting events, he is likely to be traveling somewhere fun in the world. When Tony and Beth got married, they went on their honeymoon to Spain, where Tony insisted they visit the noted construction site known as La Sagrada Família, Antoni Gaudi's masterpiece.

There are times that Tony stays home. When that happens, Tony enjoys reading, cooking, and gardening. Whether it is travelling somewhere fun, going to a game, or whipping up an interesting meal, life is always interesting for Tony Lehman.



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