

Professional Liability Update



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A/E Risk Review

Fast-Track Projects: Full Speed Ahead

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

Faster is better. That's the new mantra in today's I-want-it-now, instant-gratification world. Patience seems to be the lost virtue of the 21st Century.

The design and construction industry is certainly not immune to this trend. With the emergence of BIM and other advanced computer-aided design tools, architects and engineers are expected to deliver projects with greater speed and efficiency. Being able to commit to a shortened delivery schedule can be a deciding factor in getting a job or being one of the also-rans.

When it comes to designing and constructing a project, however, excess speed can kill. When meeting a shortened project delivery schedule is the client's overriding concern, quality is likely to suffer or costs to meet deadlines can soar. For architects and engineers, that often means added risk, added liability, lower profits and a greater potential for claims and litigation. For these reasons, "fast-track" projects should send up warning flags for all design professionals.

With fast-track projects, construction begins prior to the completion of project design. In specifying a fast-track project, clients typically have a single purpose: to save 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 may be combined with the multi-prime concept. Here, different design consultants serve as the prime for different segments or phases of the overall project.

Risky Business

When everything goes according to plan, fast tracking can expedite projects and result in cost savings to the client. As with any shortcut, however, there are substantial risks – especially to the architects and engineers involved in the fast-track project. Consider, for example:

- Designers and contractors must often abandon their standard design and construction procedures because of the time constraints imposed by the client.
- Processes that are normally carried out in sequence must be performed concurrently, increasing the chances of miscommunication and errors.
- The opportunity to identify and correct design errors or omissions before construction begins is lost.
- Extra time (and money) is spent spinning off construction documents when dealing with multiple bid packages.
- It's difficult to maintain consistency and quality of design and detailing when work is performed rapidly or out of sequence – or by multiple primes.
- Architects and engineers must administer the bidding and construction administration phases while simultaneously completing the design and construction documents. Designers at smaller firms often have to repeatedly interrupt their design work in order to focus on construction administration.
- Fast-track projects are more apt to lack a fixed final budget when the project commences and then have unexpected modifications and expensive change orders the client does not anticipate.
- Designers may not have sufficient time to work with government officials to identify all regulatory requirements and design according to code. An adverse code interpretation could mean costly and lengthy rework in order to get final reviews and approvals.
- Late design changes, often made in the field, mean some of the construction work itself will need to be deconstructed.
- Policies are written on a *claims-made* or a *claims-made and reported* policy form. Both of these policies cover claims made against a design firm during the policy term, and require that the claims be reported to the insurance carrier in accordance with policy terms.

Perhaps the biggest challenge designers face is the unrealistic client who perceives the expected time and cost savings of fast track as virtually guaranteed. They will think any additional costs or delays 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 client expectations are the harbingers of disputes and claims.

Reducing the Risks of Fast Tracking

The only way to completely avoid fast-track problems is to avoid fast-track projects altogether. But today, that may be nearly impossible. For some clients, fast track is the new norm. It's either deliver on a fast track, or don't deliver at all.

While you may not be able to avoid fast track, there are steps you can take to lower the risks associated with this project delivery method.

Your first prevention tool is to educate your clients and bring their 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. Clients must understand that changes to design documents are part and parcel to the fast-track process and should be budgeted. The client should also acknowledge 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.

Get It in Writing

Your client contract should 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'll need a sufficient scope of services to provide additional services necessary on a fast-track project, and you'll 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 the construction phase 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 costs and 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.

Address Unauthorized Changes

In an attempt to stay on a fast-track schedule, a client may directly authorize changes in the construction documents without your approval or knowledge. You'll want to establish the client's full responsibility for any and all of the ramifications of such changes unauthorized by you.

Your best bet is to add a provision in your contract that absolves you of responsibility and protects you if changes are made to construction documents without your authorization. You'll 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.

Push for a Contingency Fund

Recommend to your clients that they anticipate the added costs associated with fast tracking in their project budgets. Suggest that they establish a contingency fund to cover both design and construction changes.

In fact, it's a good idea to have a Contingency Fund contract clause in your client contract 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 due to the fast-track schedule.
- 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. On a low risk traditional project, a contingency fund of 10% of estimated costs is reasonable. Try to negotiate a higher amount for a fast-track project – perhaps 15% to 20% – to reflect the increased chances of changes and rework.

Go or No Go

The decision to participate in a fast-track project must start with careful client and project selection. Proceed only if you have a sophisticated client with fast-track experience. Look for standard project types as opposed to one-off, customized buildings. Insist on a strong contract, an adequate fee, experienced contractors and project managers, and good working relationships all around. Then make a commitment to have well defined lines of communication 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.

***STUCKEY INSURANCE** is the leading provider of Professional Liability to design professionals in Arizona. Please call us if you like to schedule a consultation for your insurance needs.*



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