

# Severson & Werson

A Professional Corporation

David A. Ericksen  
Attorney at Law  
Direct Line: (415) 677-5637  
dae@severson.com

One Embarcadero Center, Suite 2600  
San Francisco, CA 94111  
Telephone: (415) 398-3344  
Facsimile: (415) 956-0439

## CHANGING COMBATANTS TO COLLABORATORS: BUILDING POSITIVE RELATIONSHIPS BETWEEN DESIGN PROFESSIONALS AND CONSTRUCTION MANAGERS

*David A. Ericksen*<sup>\*</sup>  
*Severson & Werson*<sup>\*\*</sup>  
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The modern evolution of the relationship between design professionals and construction managers defies any “one-size-fits-all” definition or philosophy. In fact, the wide ranging descriptive titles often claimed by or ascribed to “construction managers” (*i.e.*, program managers, owner’s representative, inspector of record, clerk of the works, etc.) make clear that there is no single or even dominant model. Construction management professionals assume many roles based on the project, the design team, and the owner’s actual and perceived needs. Similarly, design professionals play a wide-ranging assortment of roles during the construction phase based on capabilities, economics, and risk management philosophies. Ideally, the relative roles are effectively and efficiently synchronized for a valuable meshing of effort and talent toward the ultimate goal of a successful project and satisfied client. In the real world, this does happen. Unfortunately, it is not the universal experience or reality. All too often, design professionals and construction managers start a project with or quickly evolve to roles of critics, competitors, and combatants. Sometimes these roles are necessary. However, all too often they are to the ultimate detriment of participants and the project and often lead to frustration, expense, and missed opportunities and expectations (too often also known as “litigation”).

When the design professional/construction manager relationship goes wrong, it most often has its roots in a foundation of mistrust. Many design professionals instinctively regard construction managers as “interlopers” with lesser professional qualifications and standing. Too

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<sup>\*</sup> *David A. Ericksen is a member of the law firm of Severson & Werson. He has led the firm’s Construction Practice Group since 1997. Mr. Ericksen specializes in the representation of architects, engineers, construction managers, and design-builders in construction environmental litigation and transactional matters, as well as professional liability and insurance issues. He is a graduate of Boalt Hall School of Law, University of California, Berkeley, a former law clerk to the Washington State Supreme Court, and a member of numerous construction and environmental-related professional organizations.*

<sup>\*\*</sup> *Severson & Werson has provided legal services throughout California and the country for more than sixty years. The firm provides counseling and litigation support to all members of the construction process, including design professionals, construction managers, environmental professionals, owners, contractors, and insurance carriers.*

*Changing Combatants to Collaborators*

May 2005

Page 2

many construction managers seek to justify and even market their services to owners based on their ability to critique and control the design professionals and others. In either context, the result is seldom a productive working relationship directed to the ultimate success of the project. Instead, it often devolves into a destructive distraction.

The purpose of this paper is to identify the legal and practical realities of the relationship between construction managers and design professionals, the opportunities for a collaborative relationship, the frequent points of conflict and failure, and strategies to manage and avoid those points of conflict. The ultimate conclusion is that design professionals and construction managers can and should work together for the positive benefit of the mutual client and project, and that such an outcome is more than an imagined possibility. Ideally, the participants will come to regard one another as “resources” to better facilitate their services, rather than irritations or targets.

1. **The Relationship.**

The relationship between design professionals and construction managers exists on two very distinct levels:

- a. The relationship dictated by law and controlling documents such as contracts; and
- b. The relationship established by conduct.

The relationship dictated by law and contract is the base line. The subsequent conduct should recognize and respond to that foundation. Accordingly, the legal implications will be discussed first followed by a discussion of the resulting considerations of conduct.

**Duties**

“Duty” is the foundation of any legal obligation. Briefly stated, “duty” is a legally imposed or recognized obligation from one party to another. California Courts have specifically examined the relationship between design professionals and construction managers several times in recent years. The leading decision is *Vanir Construction Management v. Ratcliff Architects*. In that decision, the California Court of Appeal held that absent some commitment and conduct to the contrary, there is no “duty” between a design professional and a construction manager. The Court concluded that each typically has a direct obligation to the owner and that it would be in conflict with this direct relationship to also have a duty to one another as well. Inherent to this view is the recognition and implied endorsement that on some level, design professionals and construction managers are to “watch dog” one another for the benefit of the owner. The Court did not find the collaborative opportunities to be worthy of equal recognition.

*Changing Combatants to Collaborators*

May 2005

Page 3

Such an adversarial relationship is not always healthy and positive. Moreover, construction managers are often much more proactive than design professionals in fulfilling the adversarial portion of the relationship. This is most often to the financial and professional detriment of the design professional. The challenge for the participants is to transform this presumed adversarial relationship into a relationship of defined responsibilities and accountability which focuses on a successful and well-run project, and not a climate of criticism.

Absent a legally recognized "duty" between the construction manager and the design professional, construction managers and design professionals may not sue one another directly for professional negligence, errors, and omissions. For example, an architect may not sue a construction manager for costs incurred in redesigning a portion of the project not identified in the construction manager's constructability review. While a claim for negligence is not available, that does not mean there are not other legal exposures. Those are discussed below.

**2. The Contracts.**

The other means for a direct claim between a design professional and construction manager is most often based on a duty or obligation established by contract. A contractual obligation may overcome the legal presumption that there is no duty between a design professional and a construction manager. Such duties may be implied or express.

Implied obligations are inherently ambiguous, potentially unintended, and subject to the later interpretation of hindsight. Accordingly, they should be affirmatively avoided. To avoid any implied and unsuspected obligation, the design professionals and construction managers should always include a provision excluding third-party beneficiaries. It may provide:

*This Agreement and all related obligations and services are intended for the sole benefit of Owner and Consultant and are not intended to create any third party rights or benefits except as expressly set forth herein.*

Such a provision is generally easy to secure from the client and has benefits not limited to the design professional/construction manager relationship, but would extend to limit contractor and other third-party rights as well.

Similarly, the construction professionals' contracts should expressly set forth a detailed scope of work, an appropriate standard of care, obligations for Code compliance, constructability, means, methods, and safety, construction administration, and a disclaimer of implied warranties. Particular emphasis should be placed on any limitations on the services to be provided. Each of these apparently generic provisions, or the lack thereof, has been used by owners, contractors, third parties, and even the construction managers and design professionals

*Changing Combatants to Collaborators*

May 2005

Page 4

themselves to later cast unsuspected blame for a claim or cost against the construction professionals.

The provisions referenced above are common and should be included as a part of almost any service agreement related to a construction project. However, when a construction manager is involved, particular provisions often require special attention. The primary purpose of these provisions is to avoid confusion, duplication, and gaps in responsibility. Ideally, the result will be a project with clearly-defined responsibilities which best foster a strategic and collaborative approach to the project.

- First and foremost, if it is known at the time of contracting, the plan to use a construction manager (and even the identity of the construction manager) should be identified in the agreement. If possible, the anticipated functions of the construction manager and the design professionals should be identified in the Agreement along with a statement that one is not responsible for the functions or any failure on the part of the other.
- Similarly, the Agreement should provide that the design professional is not responsible for the erroneous interpretation of its documents by others and should be consulted with respect to any interpretation of the documents. Implicitly, this makes the construction manager responsible for any erroneous interpretation of the plans and specifications if it does not involve the design professional in that process. The hope then becomes that this will lead to more frequent communication to the mutual benefit of the parties.
- Many common provisions in Design Agreements may need to be modified in a situation where a construction manager is involved in the project. For example, a typical job site observation provision makes little sense if there will be a construction manager, or even an inspector of record, with a greater or even continuous presence on the site.
- Finally, provisions for shop drawings, submittals, RFIs, change orders, and project close-out may need to be modified, depending on the role of the construction manager.

Many of the provisions referenced above are plainly for the benefit of the project. They seek to avoid duplication and gaps in responsibility. This is generally to the benefit of the owner and the project. However, there is also certainly an element of "protection" for the design professional in these provisions. Obviously, the construction manager should be motivated to pursue similar protections for itself. Accordingly, a prudent design professional

will request a copy of the construction manager's agreement and will review it. The reverse is true as well. The purpose of this review is at least two-fold. First and foremost, it will educate each party as to the other's contractual role. In this way, each party knows what to expect, can avoid duplication, and can proactively "encourage" fulfillment of that role by the other party. The art of such encouragement is to do so in a constructive definition of roles and schedules rather than with a sense of condemnation. Equally important, such a review of the respective contracts allows each party an opportunity to coordinate its contract and work product with the other party's role. The greatest benefit here is to avoid any unwarranted or misdirected expectations by owners.

### **3. Implied Duties.**

In the absence of contractual duties and obligations between a design professional and construction manager, isolated or even broad duties may arise by conduct outside of the contract. For example, if one party reviews and provides input into the work product of the other and the other relies on that input for purposes of its final work product, a duty may be created with respect to the quality and accuracy of that input. Frequent targets of such duties involve change orders, RFIs, job site observations, and project meetings. Often such "extra-contractual" conduct can blur and expand carefully crafted contract provisions and thereby expand the potential for responsibility. Accordingly, each party should consistently follow its contractual duties without straying across lines clearly established by contract.

### **4. Joint and Several Liability.**

Even where there is no direct common law or contractual "duty" between the design professional and the construction manager, there can be claims between them and situations of shared liability exposure. Generally, two parties who lack a direct duty or obligation to one another may still be "joint tortfeasors" in that they may share in the liability to a third party, such as an owner or contractor. In this context, the injured party may often pursue just one of the parties for 100% of its damages. It then becomes the obligation of the party sued to seek contribution and indemnity from the other party so that each will share in the liability based on its respective contributions.

Within the last twelve months, the California Courts have been particularly active in curtailing these rights of contribution. Last year in the decision *BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc.*, the Court of Appeal held that such contribution is limited to situations based on property damage or personal injury. Contribution for purely "economic" damages such as change orders, delays, and cost overruns are not now generally subject to claims for contribution between design professionals and construction managers. For example, an architect sued by an owner for errors and omissions in its plans and specifications may now only join a construction manager to the litigation for the failure to identify those errors and

omissions in the constructability review only if there is property damage or specific contract obligation. Otherwise, the design professional would be exposed for the entire loss.

**5. Indemnities.**

Without question, the most common obligation between design professionals and construction managers has to do with indemnity clauses. Prudent construction managers and design professionals will often ask owners to require contractual indemnity from other parties as a part of their contracts with the owner. Such provisions may specifically identify the party or may generically refer to the owner's "agents" or "representatives".

It is not uncommon for reciprocal indemnity obligations to arise in this way. Indemnity provisions are among the most potent clauses in any contract. Generically, they should be limited to proportionate responsibility for actual negligence or breach of contract. Beyond that, the details matter greatly. Each word can make a dramatic and expensive difference. For example, under California law, an indemnity clause covering property damage and bodily injury would by law preclude any indemnity claim for all other types of losses. Accordingly, any non-standard indemnity clause should be reviewed with great care and, ideally, with an attorney knowledgeable in such areas.

**6. Division of Responsibility.**

Much of the discussion set forth in Section 2, above, is intended to establish a clear division of responsibility between the design professional and the construction manager. Strategically, this may be the single most important consideration for a design professional starting a project with a construction manager. There are many reasons for this. It seeks to limit joint and several responsibility. It allows for efficient project delivery in that there is limited duplication and no expectation of services which are not actually delivered. If these issues have been discussed prior to the contract and serve as a basis for the commitments in the contract, the relevant points in those discussions should be incorporated into the Agreement. Otherwise, the contractual integration clause and the parole evidence rule will make it as if the discussions never took place.

However, the contract is really just one method of establishing and maintaining the division of responsibility. It may be established or ratified by subsequent meetings, documentation, and/or correspondence. All measures to establish, maintain, and redefine the appropriate and actual division of responsibility should be pursued throughout the duration of the project. The more positive and collaborative this process can be, the less likely it is to devolve into a destructive dialogue and process.

7. **Communication.**

Communication is the final and by far the most important key to establishing a successful relationship between a construction manager and design team. Simply stated, more communication is better and the exclusion of parties from the communication process is generally not healthy for the project or the participants. Clear lines of communication with all interested parties should be identified and documented. This should include communications with the design team, construction manager, owner, contractor, subcontractor, building officials, and more. The parties should respect and adhere to these lines of communication. However, with respect to critical communications, the parties should not blindly assume that their communications are being relayed to all necessary parties. Where one party believes the information is critical in terms of substance or timing, they may and should either confirm the information has been relayed or bypass that necessity by including other essential parties as recipients of copies of the communication.

**Project Issues**

1. **Constructability Reviews.**

Constructability reviews are becoming some of the most common services promoted by construction managers. One construction management firm advertises such reviews as follows:

*Constructability reviews are a key to trouble-free projects. The focus is on the buildability, bidability and efficiency of construction. Our reviews bring to light problems in the following areas: reasonableness of the work sequence, comprehensive and completion of construction documents, coordination of the documents among the various engineering disciplines, adequacy of lead time for material and equipment procurement, site restrictions and adequacy of access.*

This is a tall order for any review. It suggests a thorough review of design issues. However, in reality, it is much more limited from the design team's perspective. First and foremost, absent a contractual provision to the contrary, the review is not intended for the design professional's benefit and is not something on which the design professional is legally entitled to rely. Moreover, it is seldom performed by an architect or engineer with technical expertise or experience in the subject under review. Accordingly, design professionals should not place inordinate reliance on this review. Nevertheless, it can be useful in identifying any unresolved issues in the plans and in defending any eventual claims from contractors or others. To secure maximum benefit and protection from the process, design professionals may wish to consider a contract provision discussing the process and their right to rely on it. Such a provision might read:

*During the course of design and as identified below, Owner's Consultant will review the plans and specifications for coordination, completeness, consistency, code compliance, and constructability. Designer shall receive written comments as a result of that review and may rely on comments received during that review as a part of its design process and the completion of the design.*

Alternatively, this may be accomplished in a more benign way by simply providing that the design professional may rely on the work product provided by other consultants retained directly by the Owner.

Some of the most important issues to be considered by a design professional whose work will be subject to a constructability review are as follows:

- The purpose of the review should be identified. Preferably, this will be in the contract, but may also be accomplished by subsequent communications and confirmation.
- The number and timing of the reviews should also be identified up front. The number and timing of the reviews will impact schedule, fees, and the extent to which they can be relied upon for going forward with the design.
- The design professional is not responsible for the content or quality of the review.
- Include face-to-face discussions as part of the process.

## **2. Contract Enforcement.**

Most often, enforcement of the contractor's obligations is the responsibility of the owner and construction manager. Typically, the construction manager will supplant any role the design professional might have otherwise had in administering the contractor's agreement. However, this is seldom ever documented and is even less often reflected in the contract documents. It **should** be, since the failure to do so is most often to the detriment of the project and the design team. Accordingly, the contract should provide:

*The design team has relied on the obligations set forth in the Owner/Contractor agreement as a material term of its performance under this Agreement. Except for technical design issues requiring the input of the architect or engineer, the Contractor's obligations under its Agreement with Owner shall be administered*

*and enforced solely by the Construction Manager. The design team shall have no responsibility for issues arising out of the failure to enforce that Agreement and shall be indemnified, defended, and held harmless from any claims arising out of such failures.*

Thereafter, the design team should perform consistently with this standard, and should remind the construction manager of failures by the contractor and its obligation to enforce the Agreement.

**3. RFIs.**

RFIs are a difficult issue in dealing with a construction manager. The first issue is the procedure. Will they be routed through the construction manager? If so, will the construction manager seek to answer any of the RFIs itself without the design team? These procedures need to be worked out in advance with the Agreements documented. Furthermore, the design agreement should provide that the design team will not be responsible for erroneous interpretations of its design documents by others.

**4. Change Orders.**

Change orders are fraught with potential liability issues in any context. They seem to be even more so when a construction manager is involved. These most often arise for two reasons:

- a. The construction manager is often responsible for the entitlement, schedule, and compensation issues, but the design professional is not clearly segregated from that process; and
- b. Many construction managers will often assign "responsibility" for the issue, and it most often weighs heavily against the design team and does not reflect any "standard of care" analysis.

Accordingly, the design team should expressly and consistently clarify that it is not responsible for schedule and compensation issues. This can and should be in the contract, related correspondence, and the change order itself. In addition, the design team should create and even provide its own contemporaneous allocation of the source of the change order. Absent such a contemporaneous record, the construction manager's record will become the owner's assumption as to the cause of the change and difficult to refute.

**5. Job Site Observations.**

Where there is a construction manager or inspector of record, it is simply not appropriate to have a typical job site observation responsibility for the design team. It should be more limited. Specifically, it should be limited to observation of technical design issues on a stated timetable and other issues as specifically addressed to it by the construction manager. It should not involve and should exclude responsibility for payment, schedule, material, and similar issues.

**-6. Project Documentation.**

Finally, a construction manager often becomes the primary source of project documentation. This may be appropriate if established in the contract documents. However, design professionals should rigorously avoid any temptation to rely solely on the construction manager for documentation of the construction process. Specifically, design professionals should:

- a. Fulfill their contractual obligations for project documentation;
- b. Review project documentation created by others to make certain it is balanced and accurate. Where it is inaccurate or slanted against the design professional, they must respond in writing to avoid a subsequent unbalanced record;
- c. Maintain their own history of the project through reports and memos. Absent such records, the records of others will be the only credible project history and will likely be slanted to the interests of others.