The Road to Calamity

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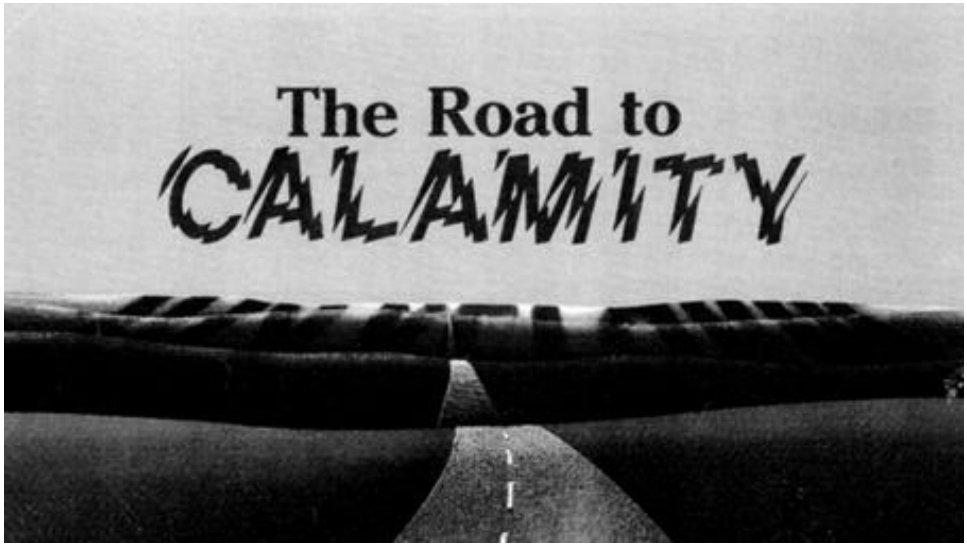

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In the spirit of Crosby and Hope, the comments which follow provide a road map for contractors seeking the route to an unsuccessful project - i.e., one where delays, cost overrun, and protracted disputes are the end result. Given current trends, some might argue that this direction is not necessary, as the path is seemingly well known, for it is frequently travelled.

The abundance of traffic along this path has, in fact, overwhelmed our normally efficient, just and speedy legal system. Consequently, in true North American style, a new industry centred on the buzz words "alternative dispute resolutions mechanisms" has been developed.

Nevertheless, notwithstanding the popularity of this travel, the author is seeking through this article to provide further guidance for the following reasons:

- There is a general assumption that authors are conversant with the subject about which they are writing. This impression would be of benefit to the author.
- As a participant in the aforementioned new industry, it is of personal advantage to encourage claims.

Hence, with this understanding, the following guidelines (or golden rules, if based on the author's bias) are provided for those seeking to join the aforementioned prevalent trend on construction site - i.e., protracted disputes, delays and cost overruns.

1. Never familiarize yourself with the contract.

In reviewing a contract, one should always assume that:

- all contracts are the same;
- because it is a "contract," it must be fair;
- it represents discussion leading to the formal agreement; and,
- it was prepared by competent individuals.

In accepting these assumptions, it becomes clear that one should ignore contract sections titled "Special and/ or Supplementary Conditions." Articles in the general conditions dealing with the following matters should also be avoided:

- Changes/Extras
- Disputes
- Authority /Roles/Definitions
- Soil/Site Conditions
- Delays
- Payment
- Notice Provisions

As a proviso, it is acceptable if one reads the articles dealing with notice provisions as long as they are thereafter ignored. In recommending this policy, one must pay no heed to the Federal Court decision in the case of Corpex (1977) Inc. v. La Reine as well as several British Columbia decisions wherein the contractor's lack of notice resulted in adverse decisions denying claims for additional compensation.

In assuming that all contracts must be fair, one must ignore numerous decisions including Catre Industries Ltd. v. Her Majesty The Queen in right of Alberta wherein the Court of Appeal decision states, in part (10 1/2 years after completion of the work):

> "It is clear from the evidence that Catre was an experienced and fully qualified road builder, although lacking experience under conditions existing in north central Alberta. I do not find any evidence of the existence of unequal bargaining power between it and the department. The evidence indicates that, in the performance of the contract, Catre had access to and utilized expert and professional assistance where needed. That, along with the record of experience enjoyed by Catre, indicates a level of sophistication in its dealings that denies inequality in its bargaining power, even with a department of government.
>
> With respect to the conditions existing at or about the time of tendering, it is clear that Catre was anxious to enter into the road building market in Alberta and had available to it resources which it undoubtedly considered fully able to compete successfully for this particular job and complete it. As a company, it was experienced with dealing with invitations to tender and contract documents. It is not reasonable to conclude that its people did not fully comprehend and accept the stringent terms of the contract including the shortness of the time given to respond to the invitation. If this court should interfere in circumstances of this case and find the said exculpatory clauses to be unenforceable and thus restructure the contract, the resulting impact on contract law would, in my view, be chaotic and, in any event, not justified in law."

As misunderstandings obviously do not occur between buyers and providers of construction services, there is no need to comment on the assumption that the formal contract always reflects prior discussion.

It is here necessary to applaud the construction industry's attitude that contract documents should not be prepared and/or vetted by members of the legal profession. It is far better to have an experienced engineer preparing these documents as the job experience will be invaluable, particularly the repercussions.

Equally, one must encourage architectural and engineering firms to continue the practice of having their least experienced people preparing those mind-numbing specifications. As these are invariably ignored by all, it would be pointless to waste real talent on them. In this regard, one should ignore the efforts of Construction Specifications .Canada, which is, inter alia, seeking to promote professionalism among specifiers.

2. Never identify the time impact of changes/ extras to the work.

In the unlikely event a change or extra work is issued, the contractor is frequently requested to advise schedule effects. The following choices are available:

- Silence.
- Allow two days for every change.
- Indicate that effect will be provided upon completion of the work or on overall completion.
- Indicate no effect if authorized to proceed by a predetermined date.

This last alternative should be avoided as it may (nothing is certain in law) satisfy notice provisions and, as discussed above, this should be avoided.

Silence has the benefit of being easy and is unlikely to upset anyone save for possibly the owner(s) of the contracting firm when the discovery is made that the silence will likely preclude recovery for a delay claim. As most construction managers move from firm to firm, this should not be a problem.

Allowing two days for each change is an equally good approach. There may exist a credibility problem when, at the end of the project, the requested days of extension are significantly more than the period of delay. However, since owners and/or their representatives don't believe anything contractors say, this credibility problem should be easily overcome.

Providing effect on completion of the work is both practical and fair, and should therefore be avoided as it requires analysis. It is far easier to provide effect on completion of the work as the required response is really ascertainable. Contractors must be encouraged to find owners who will accept this latter approach.

3. Never qualify the change order price.

Contractors must always let owners assume the price quoted for the change includes:

- time impact cost;
- impact on contract work;
- cumulative effect of previous changes.

Contractors should not leave themselves the opportunity of addressing these issues down the road. Therefore, contractors should not indicate that their quotation is only for the direct cost of effecting the work and that it specifically excludes consideration for the above-listed factors.

If there exists a desire to include such a qualification, it should be introduced near the end of the job so that the owner can assume (probably legally) that the qualification does not apply to all previous non-qualified quotations.

The worst-case scenario is for the contractor to discuss this and other issues addressed herein with the owner and/ or its representative at the commencement of work. These issues are best discussed once the adversarial process and animosity have set in.

In discussing them up front at project meetings, there is the fear of reducing the joy and excitement of working on construction sites. Equally, the consequence for doctors making a living on stress-related health issues might be devastating. This discussion, therefore, should be avoided.

4. Never identify productivity impact

This rule should be applied particularly when discussing such issues as acceleration, inclement weather, and extensive changes.

Everyone knows that productivity is too difficult to quantify and, thus, should be ignored. After all, it would require tracking and measuring variations in unit cost and/or schedule durations. This is not desired for it will invariably result in one being side-tracked from the route to an unsuccessful project.

When faced with a potential acceleration situation (extended work hours, shifts, congestion, over-manning), one should always proceed if it is desired by the owner. This will considerably enhance the relationship between owner and contractor, especially if the contractor does not mention cost. In such instances, the owner is given the opportunity of deciding on the value received, which gives him/her immeasurable pleasure for which he/she will be forever grateful.

If the contractor must mention cost, he must be careful not to mention impact and/or cite the extensive research which concludes that inefficiency losses are an invariable result of acceleration. In particular, one should not refer to the Business Roundtable's report Scheduled Overtime Effect on Construction Projects, which is available without charge from The Business Roundtable at 200 Park Avenue, New York 10166 or (212) 682-6370. This particular report concludes that because of productivity losses with extended overtime (6 weeks or more), production will actually decrease over what was achieved with a regular work week.

This publication (one of 23 separate reports), which was produced through the efforts of some 250 people representing some 125 companies and universities in the United States, fortunately has no relevance in Canada.

5. Never wait for authorization before proceeding with changes/ extras

This rule or guideline needs little comment as it is generally accepted and applied, much to the appreciation of owners who consequently enjoy the luxury of choosing which extras/changes they will pay for.

Any contractor worth his salt is quite conversant with the fact that if it satisfied a changes clause which required written authorization before proceeding, the job would never get done.

Contractors must be applauded, for they willingly take on the risk of not being paid for the changes as opposed to dealing with the impracticality of that clause "up front" at a project meeting.

Some contractors foolishly attempt to achieve some protection by advising the owner of their actions - i.e., proceeding with changed/extra work for which compensation will be sought. Such attempts at protection should be avoided as they prevent the owner from having complete control over the contractor's destiny.

6. Never maintain proper job records

Proper job records must be avoided at all cost as they might allow one to justify and quantify (without the use of a consultant) requests for changes in the contract price. This is definitely a no-no.

Realistically, to achieve proper records one must monitor and control scope, time, cost and quality and this is much too time-consuming and expensive for the average contractor. Furthermore, such records are simply of no use if the project has been successful - a frequent and embarrassing by-product of monitoring these four factors.

Consequently, why should one expend effort and money on a busy construction site churning out paper which will likely be of little value at the end of the project? It is far better to produce very little job data as this will likely lead to an unsuccessful project, thereby causing that paper to take on tremendous importance and value after the job is completed.

Remember, there is never enough time to do it right, but always time to do it over!

7. Never seek clarification on issues that are potentially disputable

This rule is generally accepted throughout the construction industry. There are a few hardened contractors who perceive themselves as business persons signing contracts that contain liabilities and obligations which cannot be ignored. These few will invariably strive to resolve disputes before they fester into claims which require the assistance of a consultant. This is quite clearly an illogical approach.

Contractors are, first and foremost, builders of structures and friendships. After all, the golden rule on most construction sites is "don't get the engineer or architect mad by suggesting that there might be an error in the drawings or specifications."

Notwithstanding the financing costs which may be incurred, such suggestions can create disharmony which must be avoided until the job is over. Once memories become vague and the need for a consultant is increased, then and only then should one seek to clarify disputes.

There are some owners who would suggest that contractors who only deal with claims at the end of a job are inept, as it is only at that time that they realize they have lost money. As owners are generally not to be believed, this opinion can be ignored.

It is common knowledge that everyone loves a surprise. That surely must include owners who suddenly discover at the end of a job that the true cost of construction may be considerably more than was reported to superiors and shareholders.

8. Never strive for informative (useful) project cost control

To successfully apply this rule, one need only consider project cost control to be the recording of expenditures in the same manner as would an accountant. To unsuccessfully apply this rule would mean maintaining a formal procedure for tracking cost against progress.

The extent to which this is unsuccessful depends on the level to which costs and progress are tracked. It is continually comforting to find contractors who track cost in great detail without the vaguest idea as to what was achieved for the cost expended. Consequently, it is not until the end of the job that the contractor knows whether or not a profit was achieved. These contractors also share with owners the benefit of surprise at the end of the project.

A second level of comfort is generated by those contractors who immediately disavow themselves from the accuracy of their records once the dreaded term "analysis" is used. There are many who keep cost records. There are few who believe in them. This consistent and logical approach is to be encouraged.

9. Never price changes/ extras appropriately

The construction industry has a simple way of dealing with the indirect costs of changes/extras - i.e.:

- change order preparation
- field overheads
- home office overheads

What has been decided is that owners (i.e., buyer of construction services) will arbitrarily establish these costs to be equivalent to a fixed percentage of the value of the change. Although simple, this situation can be problematic on those rare occasions when that percentage does not cover all of these costs. In such cases, there are three alternative courses of action:

- inflate the direct cost of the change, thereby increasing the fee portion and the potential for dispute;
- where possible, isolate and treat the above indirect costs as direct costs, thereby more correctly identifying the true cost;
- deal with this problem up front so that disputes are avoided down the road.

The first alternative is obviously favoured as it creates an interesting scenario. The architect and engineer will invariably ascertain that the cost of direct work is inflated. New prices will therefore be requested. The contractor on the other hand will disagree as he rightfully believes the quoted total price of the change to be correct.

Confrontation is the only possible result, unless, of course, the contractor prefers (as has been suggested earlier) to deal with such issues at project completion.

The second alternative is to be avoided as it may result in the contractor being aware of the cost of quoting extra work. This would prevent an owner from utilizing a contractor, as occasionally occurs, as a free estimating service.

No comment is required on the third alternative.

10. Always follow the above rules

Rule No. 10 is only provided because everyone from God to David Letterman believes rules must come in groups of 10.

To conclude, two comments are necessary. The first is that statements which bear resemblance to legal opinion should be ignored until professional legal advice is sought. The author is not a lawyer nor does he profess to have legal training.

The second comment deals with the author's concern that such a tongue-in-cheek presentation as this might imply that the foregoing matters should be taken lightly. Quite the contrary. This must be avoided as the author has simply seen too many families, careers, and/ or firms ruined as a result of the application of one or more of the above "rules." What is in fact being suggested are the following guidelines:

1. Familiarize yourself with the contract.
2. Identify the time impact of changes/extras to the work.
3. Qualify the change order price.
4. Identify productivity impact.
5. Wait for authorization before proceeding with changes/ extras.
6. Maintain proper job records.
7. Seek clarification on issues that are potentially disputable.
8. Strive for informative (useful) project cost control.
9. Price any changes/ extras appropriately.
10. Always follow these rules.

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