

# IS IT TIME FOR AN OLD DOG (AND NEW) TO RELEARN OLD TRICKS?



Current economic conditions are forcing many companies to tighten their belts and think creatively to remain competitive or even afloat. Waiting for the trickle down of stimulus funds to rejuvenate the industry may be too little too late. Thinking outside the box may be helpful but too risky. Relearning old tricks, actually not tricks, but sound protocols for doing business may be just the thing. The protocols may be a new way to do business or may merely be minor adjustments to current procedures.

One major device is sometimes referred to as “teaming agreement” or most recently “lean project delivery”, which are delivery systems that may be worth revisiting, in the current economic climate. Although around for several years both the ConsensusDOCS and the American Institute of Architects have developed standardized tri-party agreements for construction projects involving the owner, designer and contractor as equals.

Treating these entities as equals focus each party on reliably meeting individual commitments on the project allowing better overall project delivery. It avoids a singular focus on individual productivity at the expense of another stakeholder, with a goal of increasing overall productivity. It also allows the team members to share the financial risk and rewards by providing incentive to meet overall goals of cost and schedule for the overall project.

For the participants, the team approach might be a means of getting that project off the ground by revealing hidden efficiencies that each individual may not have otherwise realized. Team consensus allows all parties to work efficiently with an underlying goal of saving money and time. Associated with cost savings is also a means for understanding and spreading risk to all project participants on a more equitable basis.

Of course the system requires open communication and a commitment to the process. Imagine a project where request for information (“RFI’s) are a thing of the past. Allowing information to flow freely and timely allowing for smooth construction and overall planning.

This delivery method even flows down to major subcontractors and major material suppliers who also have a significant stake in the outcome of the project.

Of course like any endeavor, understanding and commitment are imperative. If the right team is on-board, this collaborative method may be just the trick.

Assuming that the project is not appropriate for lean project delivery, there are still a number of protocols to consider in building an understanding from the client that timely payment makes for a more efficient project. Most in the industry acknowledge that controlling the purse strings is key. In most instances the owner is holding the purse. What mechanisms can be employed in an agreement to keep the purse open?

One method is to incentivize timely payment by inserting a provision that allows for a discount when payments are made within a certain period of time. Usually these incentives are on a percentage basis of payment. Another method is to insist on interest for late payments along with a penalty. While the recovery of attorneys’ fees is provided by statute in Pennsylvania, in the public sector, recovery is only allowed if there is a showing of bad faith. A specific reference in the contract would eliminate the obligation to show bad faith.

Contractors could also request that the construction funds held by the owner are “in trust” for payment

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of obligations relating to the project. Such a reference creates an additional obligation on the part of the owner to only distribute the available funds for the project. If these “trust” funds are diverted the contractor has a greater ability to recover the funds from the owner. Alternatively, a contractor could request a letter of credit which can be called upon in the event that the owner fails to meet its payment obligations. This type of letter of credit should be drafted carefully to allow the contractor to call on the letter only when payments have been certified for payment by the administering design professional.

Contract payment terms can also be written in a manner in which payment is conditioned on receipt of payment from the owner. These clauses are sometimes call “paid-if-paid” clauses and are different from “paid-when-paid” clauses. Care must be taken in drafting these clauses because the Courts are more apt to interpret payment clauses as timing devises rather than prohibiting payment until a condition is met.

Another means is to simply enforce the terms and conditions of payment from the beginning of a project. Most standard form agreements provide the contractor the ability to stop work upon non-payment. Remember the squeaky wheel usually gets oiled first.

Another tool, generally overlooked by contractors is the simple enforcement of standard contract provisions which allow a contractor to request the owner to verify that sufficient funding for the project exists. Many contractors are apt not to make such a request early in the project for fear of getting off on the wrong foot. Better to find out that the shoe is too small before starting the race? Institute new internal procedures that require checking contract fund availability from projects over a certain limit, and then the owner can be notified that this is your normal operating

procedure and is not specific to them but only to satisfy internal procedures.

If payment is not forthcoming, there are legal protections available to contractors to place liens on the property. Pennsylvania allows for the filing of a mechanics lien. While the lien will not guarantee payment, it does place a lien on the property that must be satisfied before the property can be transferred. A mechanics’ lien relates back to the first date of the visible commencement of work at the project site, which in some instances also prohibits permanent financing from going forward until the lien is satisfied.

Other payment protections include payment bonds. Payment bonds are not just limited to protecting the owner and can be requested by any entity. For example, contractors may require their subcontractors to obtain payment bonds to guarantee that when the subcontractor is paid they pay their creditors on the project and do not misdirect funds. The cost of these bonds will need to be weighed against the protections they provide.

The preceding suggestions of doing business are not intended to pull a fast-one but are to open communication between parties involved in the construction process allowing each entity to understand and share risk when appropriate leading the overall success of the construction process.

David Raves serves as Principal and Construction Practice Group Lead with the law firm of Maiello Brungo & Maiello LLP, which has offices in Pittsburgh East, Wexford and South Side. Mr. Raves is also a registered architect in the Commonwealth of Pennsylvania. Your questions are welcome at [dr@mbm-law.net](mailto:dr@mbm-law.net) or call 412.242.4400.