

Moving to Closure: How to Navigate Project Closeout in Troubled Situations

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This paper is presented in the format of a hypothetical case study based on a guaranteed maximum price project (GMP) that went from proceeding smoothly to becoming severely challenged on the turn of a dime. The authors' objectives in creating this collaborative case study were to provide lawyers and architect/engineering firms (A/E) with strategies, planning options, procedures, and risk mitigation strategies that can be implemented to minimize your client's downstream risks and exposure as a project approaches substantial completion and final project close-out. Often, we see a lack of affirmative action by the A/E when presented with the constant tension between the owner and contractor as project delays mount or cost increases spiral out of control. However, these events constitute clear signals demanding more action, not less, through the implementation of a decisive plan. Through this case study approach, it is our intent to illustrate the proper approach and tools the A/E can use to close-out a challenging project. This paper will include concepts premised upon a swift change in project management philosophy and project close-out tools.²

Representative Project Background

Your law firm received "the call" from an A/E informing you that their \$70 million Class A multi-use development was now facing significant delays and unanticipated increased project costs, although no formal claim for damages had been submitted or was pending. At the time of the call the project was approximately 60% complete. The A/E received a copy of a distressing letter from the construction manager-as-constructor (CMc) directed to the owner only. The CMc alleged, based on errors and omissions attributable to the A/E, that the project faced various impact issues that will certainly delay substantial completion and will result in a substantive increase to the GMP price for which the CMc assumes no responsibility. The owner immediately contacted the A/E for assistance in responding to the threatening letter, which for the first time expressed concerns regarding the A/E's performance. There was no doubt that the project was headed south quickly! It was obvious that a variety of claims will ensue.

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The CMc's letter included statements such as:

- Until a revised scope or direction from the owner has been fully integrated into the project schedule, the full impact of the changes and resulting costs to the owner cannot be quantified. The CMc threatens to immediately cease work until further direction is provided.
- As a result of continual delays associated with slow response times by the A/E to RFIs, bulletins, and submittals, the CMc threatens to compress the schedule, which will result in inefficient productivity claims and an increase to the GMP.
- The working critical path schedule is now worthless.

After concluding an initial client interview and reviewing the CMc's letter, the A/E's E&O insurer was immediately notified of these recent events and new concerns. In response, the insurer conducted an internal risk benefit analysis with the limited available information and determined to formally assign legal counsel. The insurer opened a "circumstance file" pending receipt of any formal demand triggering insurance coverage afforded to the A/E pursuant to the terms and conditions of the E&O insurance policy. As noted above, neither the owner nor the CMc submitted a formal claim for monetary damages or invoked any contractual right to terminate the A/E. As such, the A/E's insurance coverage was likely not triggered, nor was the deductible obligation invoked.

After opening the circumstance file, and at its own expense, the insurer assigned counsel to conduct a preliminary review of the pertinent issues that represented potential claim exposure to the insured while awaiting additional information to change the classification of the matter to a formal claim. A limited budget was created to facilitate a preliminary claim review. This strategy allowed the A/E, their E&O insurer, and assigned counsel to develop a joint strategy with an immediate action plan to navigate the project towards final completion while mitigating potential exposure to both the A/E and insurer. The strategy outlined herein—to investigate potential exposure before the submission of a formal claim—has proven time and time again to reduce overall claim expenses and indemnity payments.

Now it is triage time. You need to act quickly to assess the project's status and implement a practical and comprehensive action plan designed to mitigate the A/E's downstream exposure to **MILLIONS** of dollars in potential damages and delay claims that likely will be asserted by the CMc, the owner, or both. As we see so often, the sophistication of the design professional's management staff necessitates that an experienced construction management firm be involved to assess the current status of the project and create a risk assessment program with a defined action plan. Without this often-overlooked consideration, it is problematic for the A/E and insurer to fully comprehend the issues that typically only become clear after litigation has been filed and discovery has commenced.

The balance of this paper will discuss how the newly-formed triage team (A/E, attorney, consultant, and insurance claims professional) implemented a risk assessment and mitigation program to close-out an at-risk project.

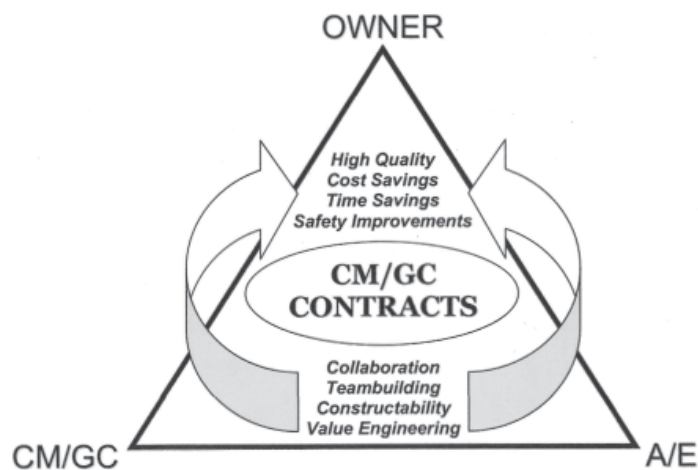
Understanding the Guaranteed Maximum Price

Surprisingly, the A/E team often does not fully comprehend all of the components of the then-existing GMP. This is due, in large part, to the nature of the GMP contracting process. There is a unique segregation of duties and responsibilities among the parties specific to the GMP project delivery program. The A/E is often intentionally left out of the contract negotiations between

the owner and the chosen CMc. Unfortunately, separately negotiated GMP contracts often lack integration among all the contracts and result in conflicting duties among the parties involved.

The GMP project delivery program evolved in large part to address risks and short-comings associated with traditional construction procurement programs, including, most notably, fixed-priced contracts based on the design-bid-build template and time and material contracts. The genesis of GMP-styled procurement processes afforded public agencies and owners the ability to avoid traditional litigation and claim risks associated with design-bid-build, low-bid award contracts. GMP procurement has developed into an industry standard for the majority of mid- and large-scale construction projects.

GMP programs afford the owner the opportunity to make an informed decision to contract with a preferred contractor/builder (who will be the construction manager) that is both properly pre-qualified and financially solvent. During the GMP project's development, design, and construction phases, the CMc provides expertise, knowledge, and resources to the A/E team and owner. The benefits of a properly managed GMP process are illustrated in the following diagram:



During a GMP project's development and design phases, the CMc will typically provide the following services:

- Cost estimating;
- Project scheduling;
- Means and methods input;
- Constructability analysis and recommendations;
- Value analysis proposals;
- Specification development and review;
- Development of subcontractor bid packages; and
- Review and feedback of project cost and budget estimates based on the A/E's progress of the project design.

Once the construction document phase of the design ensues, and assuming the project's design and estimated project cost meet the owner's objectives and economic model, the owner will issue a GMP addendum to the GMP agreement. The GMP addendum: sets the guaranteed maximum price for the project; establishes the project schedule; lists and details the value

analysis substitutions incorporated into the GMP; and contains additional terms and conditions that further define the GMP while setting the CMC's fee.

As we discuss in the following sections of this paper, the benefits envisioned by the GMP process were not achieved. The owner's failure to properly manage and integrate the GMP process became problematic for the A/E.

Critical Review of the Contract Documents

The initial task for the triage team was to perform a critical review of the GMP project contract documents. The project's contract documents were comprised of:

- AIA document 133-2009, *Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price*;
- *Guaranteed Maximum Price Amendment to the Agreement Between Owner and Construction Manager (GMP)*;
- AIA document A201-2007, *General Conditions of the Contract for Construction*;
- AIA document B101-2007, *Standard Form of Agreement Between Owner and Architect*;
- Project manual (specifications); and
- Project plans and drawings.

Almost immediately, the triage team determined that the owner failed to provide the A/E with copies of the CMC's AIA 133 agreement and the GMP. The nondisclosure of these documents typically occurs because the owner seeks to maintain maximum control over the GMP processes. For example, many sophisticated owners will deal separately with the CMC without involving the A/E on matters that relate to the GMP scope of work or value analysis options. Accordingly, the A/E made a formal request of the owner to immediately provide the omitted GMP contract and GMP addendum.

While reviewing the comprehensive set of AIA standard forms, which contained the majority of the contractual duties and obligations among the GMP parties, the triage team noted each AIA standard form was replete with project-specific modifications impacting the critical path and assigned duties of all parties.

The AIA standard forms contained the following notification on the right-hand margin of the first page of the document:

ADDITIONS AND DELETIONS: The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An Additions and Deletions Report that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A "**vertical line in the left margin**" of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text. [emphasis added]

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

Experienced A/E counsel understand the potential for conflicts and omissions of significant contractual terms between the contract documents when the AIA form documents include nonstandard modifications, deletions, or additions to the provisions and language developed by the AIA.

The triage team devoted special attention to those areas when reviewing the contract documents, including a focus on those modifications negotiated without the knowledge and input of the A/E. Failure of the owner to provide the GMP contract and GMP addendum, both of which were effectively incorporated into the A/E's AIA B101 agreement, was a prejudicial action by the CMC and owner against the A/E. The A/E was barred from reviewing, commenting on, and negotiating changes to either the CMC's contract agreements or the A/E's AIA B101 agreement. As presented later in this paper, significant conflicts existed with respect to the respective duties and obligations of the project participants, due in large part to the owner's failure to allow all parties to review the GMP contract documents prior to their finalization.

The triage team developed a matrix to track significant contract document provisions. The matrix included: contract document references, descriptions, extracts of key provisions, requirements, cross-references, notations of responsible parties, comments, and assignment of issue or matter tags, if relevant. Special focus was devoted to identify all contract document provisions and A/E time requirements relating to critical construction management functions, including:

- Requests for information (RFIs);
- Submittals;
- Change order requests;
- CMC's *Application and Certificate for Payment* (AIA document G702);
- *Certificate of Substantial Completion* (AIA document G704); and
- Certification of CMC's final applications and certificates for payment.

The triage team's unique expertise and knowledge gained while developing the contract document matrix led to improved understanding of the respective contractual responsibilities of the A/E, CMC, and owner. These efforts facilitated the identification of conflicts, inconsistencies, and areas of potential omissions not previously fully understood by the A/E. Therefore, the triage team identified conflicting responsibilities among the GMP parties and CMC and owner duties and responsibilities previously withheld or unknown by the A/E. Insights gained during this process served to more adequately assess the A/E's risk while providing a foundation to develop mitigation strategies. These inconsistencies all too often form the basis of the most hotly disputed issues in the ensuing litigation. A proper understanding of these problematic provisions before proceeding forward to substantial completion allows the triage team to implement new strategies to mitigate the A/E's exposure to the inevitable claims.

Legal analysis of the contract document conflicts, inconsistencies, and omissions was required before the triage team could move forward in creating a successful strategy to protect the A/E. Without advice of legal counsel at this early stage regarding priority of conflicting contract responsibilities, the A/E and retained consultant were unable to effectively create new contract administration procedures to fulfill the A/E's defined role.

Guaranteed Maximum Price: Pitfalls, Shortcomings, and Challenges

The owner retained design and engineering consultants under separate contracts to save on overall project design fees. The owner's directly retained design consultants included landscape architecture, interior design, geotechnical engineering, and civil design and engineering. The A/E's AIA B101 agreement included the following provisions applicable to owner-retained consultants:

Owner shall coordinate the services of its own consultants with those of the A/E, and upon request Owner shall provide copies of the scope of services in the contracts between Owner & Owner's Consultants.

The contract also stated that the A/E shall coordinate the A/E's services with those provided by the owner and owner's consultants. The A/E shall be entitled to rely on the accuracy and completeness of the services and information furnished by the owner and owner's consultants.

Investigation by the triage team established that although the A/E requested copies of the owner's consultants' contracts, the owner continually refused to provide the requested contracts. Knowing this fact, the CMc pitted the owner's design consultants against the A/E for the purpose of driving a wedge between the owner and A/E and to implement a contemporaneous document trail intended to substantiate the CMc's inevitable claim for damages. This was a significant revelation, one that would have been impossible to discover without development of the contract matrix. Further, the CMc knew of the owner's failure to assure coordination of the GMP project design, drawings, and specifications among the full design team—the A/E and the owner's retained designers and engineers. This knowledge only served to further embolden the CMc's strategy to play the respective design parties against one another in an attempt to recover increased costs and support schedule extension delay requests.

The triage team developed project-specific mitigation actions to bring the owner's separately retained design and engineering consultants to the table. First, the A/E segregated CMc delay issues by design and engineering discipline. Next, the A/E team assigned responsibility and risk to each of the CMc's specific elements of delay and assigned a correlation to the applicable design discipline. For risk issues linked to the owner's consultants, tables and supporting data were provided to the owner with a demand for action on the part of the owner or its consultants. By placing the owner on notice that specific CMc claims for increased cost and schedule impact were linked and ran solely to the account of the owner or its design consultants, the A/E received increased cooperation from the owner's design consultants.

This strategy and plan effectively prevented the CMc from playing one party against another as a strategy to recover its alleged cost increases and schedule impacts. Thereafter, both the A/E and owner design consultants continued working in a cooperative, timely manner. The ability of the CMc to control the overall tone of the owner, A/E, and CMc meetings was changed; the expectations of all project participants were clarified.

Value Analysis

During the course of developing the project design, the CMc provided specific recommendations for building systems based on project cost or value analysis savings. Remember, selection of the CMc was based in large part upon its representation of knowledge, skills, resources, systems, and overall ability to provide tangible value to the owner and project. The CMc was paid a separate fee to be an active participant, along with the owner and A/E, from the project's inception through the construction design phase. The A/E team relied upon the CMc's knowledge and unique expertise as the project evolved.³

Specific and unique conditions or qualifications are often associated with each proposed value analysis element included in the GMP addendum. Issues arise when the CMc seeks modification of a value analysis after the addendum has been adopted. Typically, the A/E team may have limited, if any, involvement in reviewing the value analyses prior to their incorporation into the addendum. Often, the CMc will issue an RFI seeking clarification for a value analysis scope of work. This may present the first opportunity to involve the A/E in integrating the CMc's value analyses into the overall project design.

Upon receipt of the A/E's RFI response, the CMc generated a change order request that presented the CMc's position that clarification of the value analysis was a change to the design intent.⁴ Failure by the owner to include the A/E in vetting integral aspects of the value analysis substitutions prior to incorporation into the addendum was not a justifiable basis to claim that the A/E's design was insufficient or incomplete. In many instances, when a CMc claims design intent issues or omissions associated with value analysis, the root cause is the CMc's failure to adequately coordinate and integrate the value analysis among the various affected trade subcontractors, a responsibility assumed solely by the CMc. For example, a value analysis to substitute materials used in a project's trellis proved unconstructable after review by the specialty metals subcontractor—the CMc failed to vet the value analysis with the associated trade subcontractor to assure compatibility of different building elements.

A systemic risk to the A/E team was the CMc's recommendation for specific value analysis substitutions without adequate information. This often manifested itself through failure of the CMc to obtain adequate details and pricing from trade subcontractors and vendors prior to establishing the GMP and value analysis pricing. In such a case, any increase should have been charged to the CMc's contingency. Some value analysis requires submittal of engineered shop drawings, a cost that is often overlooked in pricing value analysis savings. Here, the CMc could have taken the position that its failure to include engineered shop drawings was a design omission that was the A/E's responsibility, thus creating potential exposure to the design team.

The triage team mined the contract documents matrix to identify the key value analysis-related contract provisions. This process quickly revealed substantive contract issues associated with the CMc's value analysis. The following are a few key value analysis provisions contained in the CMc's contract and addendum (please note that all key value analysis provisions in the AIA standard form were preceded by a track-change indicator):

§ 2.1.1.3 Construction Manager (CMc) has and will continue to provide recommendations and value engineering input regarding material, systems, schedule, labor and other conditions affecting construction and contracting. It is agreed that Construction Manager is not a designer or engineer, and does not and has not held itself out to be a designer or engineer. **It is agreed that any recommendations and value engineering input provided by the Construction Manager are just that, recommendations and input. Construction Manager's recommendations and value engineering input shall be independently reviewed, evaluated** and, if accepted by Owner after review and evaluation, approved by Owner, Architect and other engineers and consultants of Owner. **Construction Manager makes no representations or warranties relating to its recommendations or input relating to design, engineering, ultimate suitability for use or compatibility with existing or proposed systems, compliance with laws or codes, or compatibility with Owner or its Architect's design or design intent** [emphasis added].

Unbeknownst to the A/E, the owner had incorporated the CMc's value analysis into the addendum based solely on the CMc's representations that each of the discreet value analysis elements would not impact the integrity of the overall project development while providing cost savings compatible with the project's economic model. In conducting its analysis, the triage team found various risks impacting the constructability of the project relating to the value analysis. In short, it became clear that the owner had failed to consider the substantive risks, limitations, and lack of warranties associated with the CMc's non-standard value analysis contract provisions. Another key factor was the exclusion by the owner of the A/E team from any contemporaneous independent review or evaluation of the value analysis prior to inclusion in the addendum. This

confirmed that the CMc's efforts to conceal the design changes were allowed by the owner without the CMc accepting any exposure for errors and without the input of the appropriate design professional. Essentially, the owner ignored important safeguards intended to protect the integrity of the original design intent through inadequate contracts and the A/E suffered as a result.

Yet another example of the burden placed on the A/E team was to proceed to the construction phase without the existence of fully integrated contract documents. This decision by the owner effectively resulted in barring both the A/E team and the owner's design consultants from reviewing, evaluating, and, if appropriate, incorporating the value analysis clarifications into the project contract documents prior to commencement of construction. The addendum included a list of qualifications and clarification providing:

The GMP is based on pricing contingent on the A/E finalizing documents (CDs) per our clarifications lists. **The CMc reserves rights to request modifications to the final documents to coordinate listed and/or adjust the GMP amount to accommodate the difference in scope** [emphasis added].

The triage team finally understood the CMc's rationale for submitting countless requests for design clarifications relating to the value analysis as there was no risk of exposure to the CMc. If the value analysis failed in any manner to comply with the A/E's design intent, the CMc bore no risk. Indeed, the CMc was motivated to pursue change orders to remedy any of their non-compliant value analyses included in the addendum to recover increased costs or extended general conditions.

Segregation of the GMP participants from the contemporaneous value analysis processes by the owner ultimately became the root cause for the majority of the CMc's allegations for project delays and liquidated damages. At the time of receipt of the CMc's contract and addendum, the project was approximately 60% - 65% complete. In this instance, the owner's failures led to significant change order requests and were contributory to the inevitable delay claims from the CMc.

The triage team established a change order and project schedule tracking matrix. It was critical to affix dates, key project milestones, and the respective stages of the project's completion to the change orders and elements of the delay claims asserted by the CMc. This process involved significant time and coordination among the triage team members, particularly relying upon the expertise of a qualified consultant in the fields of construction management and claims analysis. The matrix included a key matter timeline complete with hyperlinks to supporting contemporaneous project records. The timeline matrix was also used to track and link other CMc issues and concerns raised by the owner. This process provided invaluable information that served in developing risk mitigation strategies to obtain the successful closeout of the project. Only through the creation of the tracking matrix could legal counsel quantify potential exposure faced by the A/E and report assessment of the risk of exposure relating to any resulting litigation.

To obtain the owner's and CMc's commitments for resolution, the A/E escalated action on value analysis matters during weekly meetings with the owner, A/E, and CMc. After the A/E's recommendations regarding corrective measures required to address nonconforming value analysis workmanship were ignored, the A/E focused additional firm resources towards informing the owner of the numerous nonconforming value analysis items. This created a clear record of discharging the A/E's contractual duties and compliance with the applicable standard of care. Based upon recommendations of the retained consultant, the A/E team used emails to accurately document the proceedings during meetings with demands that matters in dispute be elevated to the owner's upper management for resolution. For the first time since the inception of the project, the record was clear and the framework laid for a viable defense in the ensuing litigation.

Contingency

Typically, a GMP delivery program includes one or more contingencies⁵ to cover price risks assumed by the CMc's development of the estimate for the project. Normally, the owner is not responsible for any increased costs associated with the CMc's failure to properly project pricing stated in the GMP addendum. Therefore, the risk for project cost increases incurred in performing the work falls to the account of the CMc and is charged to the affected scope of work or the contingency account(s).

There is no definitive study or authoritative source discussing what is a reasonable or approximate contingency percentage(s) or allowance(s) for GMP contracts. This element of the GMP is a hotly negotiated subject between the owner and CMc and one fraught with challenges over the course of the project. One key factor in determining a subjective level of comfort with GMP contingency values is the stage of the contract documents as of the date of the addendum. Award of a GMP addendum at the 75% contract document phase should find a higher percentage contingency value in relationship to the overall GMP. Correspondingly, an award of the GMP at the 90% contract document phase should result in a lower percentage of contingency value relative to the overall GMP. An inadequate contingency is a prime signal that a GMP project is ripe for dispute.

The CMc's contract and the incorporated AIA 201 document afforded only three provisions to adjust the GMP: 1) an owner-directed change order or changes associated with incomplete contract documents; 2) unclear or conflicting contract documents; and 3) unforeseen conditions. The GMP addendum's provisions provided that in the event of a conflict among the contract documents and the addendum, the provisions of the addendum governed. Late receipt of the CMc's contract documents affected the A/E's understanding of the CMc's contract qualifications and their potential ramifications on the project. This was an example of the benefit to the client and the insurer in involving outside counsel and consultants when the collaborative efforts between the parties broke down.

Change Orders and Potential Change Items

Responsibility for GMP changes was initially administered by the owner's designated project manager (PM). The CMc prepared change order requests (or potential change items (PCIs)), which were transmitted to the owner and PM for evaluation, review, and approval or rejection. Initially, the PM conducted or performed the evaluation and review processes for the CMc's submitted PCIs. The PM forwarded its approval, denial, or modification of the PCIs to the owner for final action. Approved PCIs were periodically rolled up into change orders, which were in turn added to the CMc's pay application.

During the triage process, the team learned from the PM that the owner had assumed all responsibilities for review and evaluation of PCIs submitted by the CMc, which effectively removed any independent overview or vetting. Copies of the submitted PCIs were requested from the owner and CMc. Upon receipt of the requested PCIs, the consultant developed a matrix (PCI change order log) to facilitate tracking and analysis of the PCIs by the A/E and its subconsultants to provide input regarding design discipline responsibility, if applicable, for the PCIs. Additionally, comments and links to RFIs and bulletins were added as applicable to the PCIs.

Concurrent with the CMc's reallocations, changes, and modifications to the schedule of values contained in its pay applications, the CMc also started to add reservation language to both the PCIs and its latest change orders. Extracts of the CMc's typical reservation language included:

Delays to the project are being handled independently and not included, if any, in this change.

Price does not include cost for any “out of sequence” work that will need to be performed. Delays to the project are being handled independently and not included, if any, in this change.

The triage team mined and searched the contract documents matrix to further their understanding of the GMP project claim and dispute provisions. They found that the owner and CMc had modified the claims and disputes provisions of the contract documents:

Claims by a party must be initiated within 21 days after occurrence of the event giving rise to such claim or within 21 days after the claimant first recognizes the condition giving rise to the claim, whichever is later.⁶

Contractor shall not be charged with having recognized, observed, or discovered any error, omission, or inconsistency in the contract documents, and any failure of the contract documents to comply with all laws, regulations, codes, or rules, unless and until the contractor receives actual knowledge of such error, inconsistency, omission, or noncompliance.

If the contractor wishes to make a claim for increased additional cost in the contract sum, written notices provided herein shall be given before proceeding to execute the work.

If the contractor wishes to make a claim for an increase in the contract time, written notice provided herein shall be given. The contractor’s claim shall include an estimate of the cost and probable effect of the delay on the progress of the work. **In the case of continuing delay only one claim is necessary** [emphasis added].

If the critical path of the project is delayed by the actions or negligence of the owner or architect (including but not limited to the failure of the architect to timely deliver design packages or services), a contractor shall be entitled to a change order increasing the contract time by the number of days by which the critical path to substantial completion of the project has been delayed by the event giving the rise to the right of an extension.

It was clear to the triage team that the CMc’s modifications to the standard AIA dispute resolution provisions were to its benefit in the mechanism, timing, and forum to bring suit.

AIA Document G702, *Application and Certificate for Payment*: Schedule of Values, Contingency, and Fee

During the triage review, the team found that the CMc, in apparent collusion with the owner, had modified or “reallocated” the schedule of values contained in the CMc’s *Application and Certificate for Payment*, AIA document G702 (pay application).⁷ Commencing with pay application No. 14, the CMc’s schedule of values reflected the following:

- Schedule of values (used to determine the work completed by associated description of work) was changed or modified;
- CMc’s contingency and fee both reflected **negative** values; and
- Project manager for the CMc ceased tracking change orders as separate additions to the schedule of values in an effort to manipulate overall project costs subject to pay application approval.

The consultant developed a detailed and linked matrix for all CMc-submitted pay applications. Further analysis found the CMc continued to make unsupported modifications to previously agreed upon values for work performed on the project. Additionally, **negative** values for the CMc's contingency and fee continued to increase. When the triage team reviewed these findings with the A/E team, they learned that the A/E previously expressed concerns (orally, not in writing) regarding the **negative** fee and contingency as well as undocumented changes to the schedule of values for the work being performed. The owner also questioned the basis for such a significant negative fee and contingency, but nevertheless directed the A/E to continue doing its job, which included signing the CMc-submitted pay applications. The following is an example of the expansion of the negative fee and contingency values, as presented to the A/E:

Illustrative Overview of CMc's Reallocations of Contingency & Fee per Submitted Pay Applications						
		Schedule of Values				Variance from GMP Addendum
		GMP Addendum	Pay App No. 10	Pay App No. 13	Pay App No. 16	
Item No.	Description	Cur. Amount	Cur. Amount	Cur. Amount	Cur. Amount	
30200	Contingency	\$400,000	\$7,000	(\$200,000)	(\$750,125)	(\$1,150,125)
50000	Fee	\$1,650,000	\$65,200	(\$430,000)	(\$1,135,275)	(\$2,785,275)

Architect's Certification for Payment

AIA document G702 contained the A/E's certificate for payment, which stated:

In accordance with the Contract Documents, based on on-site observations and the data comprising the above application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

The A/E's obligations for certificate of payment to the CMc per the AIA B101 agreement provided, in part:

The Architect's certification for payment shall constitute a representation to the Owner, based on the Architect's evaluation of the Work...and on the data comprising the Contractor's Application for Payment...the Work has progressed to the point indicated...

The project manual/specifications provided specific, detailed requirements for submission of the CMc's project pay applications. Using the project manual/specifications, a control template and checklist was developed. Thereafter, each submitted pay application was then entered into the template and checklist. Any omitted or required pay application supporting data was also recorded and irregularities noted. This process provided the A/E's project manager with a verifiable method to make an informed review of the pay application as expeditiously as possible. Equally important, it created consistency in the approval process and a system to track deviations among the 40+ categories of work included in the schedule of values as discreet line items from one pay application to the next; thus, saving countless hours of tedious review by the A/E's project manager.

The A/E sent the owner formal notice discussing the team's concerns and presenting

the CMc's noncompliance with the applicable contract conditions associated with the CMc's unjustified reallocations, changes, and omissions associated with each category of work included in the schedule of values in recent pay applications. Attached to the notice letter were supporting schedules prepared from the analyses conducted by the triage team, including:

- Undocumented changes, reallocations, and modifications to schedule of values amounts;
- Omission of change orders from schedule of values;
- Changes to CMc fee and contingency values;
- Listing of omitted pay application supporting documents and schedules; and
- Summary of contract document requirements for submission of the CMc's pay application.

The notice also contained a request for an explanation of changes, modifications, and reallocations made to the categories of work in the schedule of values. The purpose was to fulfill the A/E's contractual obligation to only certify pay applications that conformed to the contract documents. The owner was also requested to provide full and complete reconciliation of the changes in values to the CMc's fee and contingency. The A/E requested that the owner provide adequate explanation for any legitimate basis to approve the CMc's fee going from a positive value to a negative value. This was a clear signal to any third party of an artfully crafted manipulation of the actual financial status of the project. To allow this practice to continue without objection would have constituted common law and statutory fraud. Proceeding forward without submitting this information would have shifted the risk and exposure to the A/E. The A/E informed the owner that they would be unwilling to review and process future nonconforming pay applications absent receipt of the requested information.

The A/E implemented use of the pay application checklist to assist in evaluating conformance of the CMc's subsequent pay application requests to the contract requirements. To assist in evaluating the pay application after preliminary review by the A/E using the template, a detailed listing of pay application deficiencies was sent to the owner and CMc for correction and resubmission.

In the interim, the A/E qualified the certification for payment language by adding language noting the A/E's approval of the pay application was "based strictly on the Owner's direction" to do so. Eventually, the owner provided the A/E with a copy of its internally generated financial data used to formulate the reallocations of the schedule of value categories and documenting the basis for increases in the **negative** value adjustments to the CMc's fee and contingency line items.

The owner's financial data contained statements and representations by the owner that the reallocations and increases in negative values for the CMc fee and contingency were justified and appropriate. In particular, the owner assigned responsibility to the CMc for the losses associated with the negative values included in the fee and contingency line items. To this point, the owner had yet to disseminate any information, financial data, or opinion that the CMc was the sole party responsible for likely claims. Absent the extensive risk management procedures implemented by the triage team, the A/E and insurer would have been left speculating as to the primary responsible party targeted by the owner in the inevitable claim. This was a significant milestone in protecting the A/E's interest.

The triage team's analysis confirmed that the misallocation of values among the schedule of values categories was an interim plan by the owner and CMc to assure cash flowed to cover the CMc's ever-increasing general site and field conditions through the delayed completion of the project. Upon substantial completion, the only available option to the owner would be a final

reallocation to clear the negative contingency and fee, thereby reducing the final remaining schedule of values in such a manner as to zero out the balances and leave the final retention with the owner.

At the inception of the project, the A/E had executed an “architect’s consent” (consent) in favor of the project lender. The document required the A/E to acknowledge the lender’s full reliance on the representations of the A/E in making the lending commitment and was a third-party beneficiary to the A/E agreement. The consent contained the following provision:

If Owner defaults in making any payment or in performing any other obligation under the Agreement (AIA B101 Agreement)...(the) Architect will give Lender written notice of the default....

Based on this provision, and after receipt of the owner’s financial data documenting how and why the owner reallocated categories in the schedule of values, the A/E placed the owner on notice that pursuant to the terms and conditions of the lender consent, the A/E required verification from the owner that the project lender did not object to the reallocations, the **negative** contingency, and fee modifications made by the owner to the schedule of values. The owner responded that the lender was not only aware of the reallocations, but approved the accuracy of the owner’s financial data and economic model. After demanding direct confirmation, the owner provided a copy of the lender’s position statement.

The triage team then turned their attention to the conditional lien releases submitted by the project’s key subcontractors and material suppliers in support of each of the CMc’s pay application requests. A lien waiver database designed to track claims, delays, and outstanding PCIs listed by the subcontractors or material suppliers was added to the pay application matrix. Analysis found that none of the key project subcontractors or material suppliers made claims for increased costs or claimed schedule extension delay requests. The results of this effort found that the CMc was the only party claiming delays for extension of time and recovery of associated extension costs. Without the confirmation provided by this process the A/E had no ability to assess the risk of potential third-party claims.

In response to the triage team’s findings, qualifying language was developed and added to future change orders and associated PCIs containing reservation of rights by the CMc. A conspicuous statement was incorporated into all future PCIs and change orders containing the reservation language. The subcontractors were, therefore, on notice that payments were not approved by the A/E and signed only at the owner’s direction.

Requests for Information

Requests for information (RFIs) are intended to obtain legitimate clarifications or further information pertaining to the A/E’s design intent. Appropriate RFIs represent legitimate requests to obtain direction for issues associated with incomplete, inconsistent, or incorrect design information contained in the project contract documents. A request for clarification on contractor means and methods is not a valid basis to submit an RFI. On this project, the CMc primarily used RFIs to bolster claims for delaying completion of the project past the original project substantial completion date, thereby seeking to procure payment for extended general conditions to offset other economic losses.

Initial review of the existing RFI log by the triage team found the CMc had done the following:

- After receipt of the A/E’s RFI response, submitted another RFI on the same topic/inquiry, meaning two requests versus one;

- Submitted another RFI claiming that the A/E's response was insufficient, leading to three requests versus one;
- Submitted RFIs related to the CMc's means and methods, seeking instruction to assist in installation of a project's system or element of the work;
- Submitted RFIs requesting clarification of drawings for work which was directly associated with the CMc's construction means and methods; and
- Stacked or stuffed RFIs together in a deliberate attempt to delay the A/E's ability to respond in a timely fashion.

RFI logs prepared by the CMc reflected late response time by the A/E to submitted RFIs as well as incomplete and inaccurate replies. The CMc asserted that the growing number of RFIs established the incomplete and error-filled design by the A/E team. Despite this assertion, the CMc failed to add RFIs to the project schedule to establish causal link associated with the response time in delaying the project.

The triage team, using an exported file version of the A/E's RFI log, began coding RFIs by cause codes:

- 1 = Informational request only;
- 2 = CMc means and methods;
- 3 = Design inconsistency, error, or omission;
- 4 = Owner-caused (RFIs associated with owner changes issued after the start of the project);
- 5 = Resubmitted or duplicative RFI; or
- 6 = Coordination only.

Undertaking and completing this process allowed the triage team to analyze RFIs by root cause. Almost immediately it became clear that less than 20% of the outstanding RFIs related to legitimate matters requiring immediate responses. At this point in time, the A/E was redirected to prioritize resources to address legitimate open or unanswered RFIs.⁸

Schedule

In our opinion, the most critical resource implemented on a project is the schedule program. The CMc developed and repeatedly modified the project schedule throughout project development and construction phases without counsel or notification to the A/E. A final or master project schedule was incorporated into the GMP addendum, establishing overall project duration and key milestone phases and dates.

A liquidated damages provision was included in the GMP addendum. In summary, it stated that if the CMc failed to attain the substantial completion date stated in the addendum, liquidated damages at the rate of \$20,000 per calendar day would be charged commencing on the 31st day after the substantial completion date and continuing every calendar day thereafter until the work was substantially complete. However, in no event was the CMc liable to the owner for liquidated damages in excess of the CMc fee; once again, the CMc had won the negotiation battle. This meant that if the CMc was late in attaining substantial completion by more than 150 calendar days, it would no longer bear any responsibility for liquidated damages; there was no financial risk for failing to obtain substantial completion. In fact, the CMc finally attained substantial completion nearly one year past the initial phased date for substantial completion per the GMP contract.

The CMc updated the schedule for the first 13 months of the project. Unfortunately, the updated schedules the CMc submitted were incomplete and non-compliant with contract

document scheduling program requirements. Schedule review and evaluation were handled by the owner and its PM. The A/E's role in reviewing and analyzing the CMC's schedule was limited to schedules required to be submitted in support of the CMC's pay applications.

Schedule slippage was noted in the owner's PM monthly progress reports. The A/E expressed concerns that the CMC's schedule updates and look-ahead schedules failed to conform to the contract document scheduling program requirements. Some of the requirements omitted by the CMC included: critical path analysis; change orders; key submittal milestone dates; and supporting information such as start date, end date, predecessor activity, and successor activity. In summary, the CMC's schedules provided little, if any, useful information to evaluate the actual events associated with the progress of the project.

There was no common method to track and evaluate the CMC's progress. Pleas for electronic file copies of the CMC's project schedule fell upon deaf ears. Using hardcopies of the CMC's baseline or MPS and subsequent updates, the triage team created a database of project schedule: tasks, activity IDs, planned start/stop, actual start/stop, and planned durations. Analysis revealed the CMC voided logical relationships among the schedule tasks, changed tasks and attendant data, and otherwise failed to conduct schedule tracking and monitoring in accordance with industry standards and contract document schedule program requirements. For the first time, the team now fully understood why the CMC continually sought to reserve schedule delay claim analysis until the completion of the project. The data provided lacked the basic foundation to prepare compliant delay impact claim analysis in support of any claim for schedule delay.

As part of the mitigation plan, the A/E project manager repeatedly demanded the CMC provide updated schedules, adequate look-ahead schedules, and recovery schedules. Despite the earnest efforts of the A/E's project manager to obtain project scheduling information and related information, the owner, for reasons unknown, directed the A/E to cease continuing with its schedule requests and to focus on getting the project to completion. These efforts showed the A/E's attempts to protect the interests of its client and discharge its contractual obligations. Shortly thereafter, the project schedule was abandoned in its entirety. Therefore, there was no basis to track, monitor, and evaluate the CMC's continuing performance of the work on the project.

Submittal Log and Submittals

The CMC failed to provide the contractually required submittal log from the commencement of work on the project. Eventually, an incomplete submittal log was developed and used by the CMC. The triage team investigated the contract document submittal requirements using the contract document matrix. This effort verified the fact that the CMC had failed to provide, update, and maintain the project submittal log as required by the contract documents. The team found that submittals were made in a non-integrated, haphazard manner and not in a format to support the logical flow of the work occurring and planned in the near-term. Additionally, the team verified that numerous project submittals were incomplete and failed to comply with the associated project specifications. The project submittal log was not updated and provided during meetings. The consequence of the CMC's failures herein and newly implemented procedures of the A/E to attain coordinated and timely submittal packages negatively impacted the already tenuous relationship between all parties involved, including the owner. While unpleasant, the new reality and recently implemented measures were desperately needed for the project to ever reach substantial completion.

A notable example of the dysfunctional submittal process was illustrated through the value analysis process to alter the original design intent for the exterior building envelope system

(EBES). The project specifications required various third-party testing of elements of the EBES to be implemented by the owner. EBES submittals were either incomplete or noncompliant with specification requirements, yet this fact failed to stop the CMc from proceeding with its installation. The A/E repeatedly notified the owner and CMc of significant defective and noncompliant workmanship associated with the EBES. In an attempt to remedy the non-compliant EBES, the CMc revised the original submittal. The revised submittal was rejected and returned. This was the start of a continuing cycle: submit, then reject, all due to the failure of the CMc to provide a compliant submittal package for the EBES.

The project was located in a sub-tropical area known to experience severe tropical storms and an occasional hurricane. The A/E became increasingly concerned about the ability of the EBES to properly protect the development from water intrusion given the defective installation, workmanship, and failed testing. The A/E faced potential claim exposure for defective design in the likely event of water intrusion occurring well after completion of the project.

The A/E increased its field site observations, reporting its detailed findings in field observation reports, which were provided to the owner and CMc. A detailed letter was sent to the owner documenting the A/E's near-term concerns associated with the non-compliant EBES, its delays to the project schedule, and the long-term risk: EBES failure and water intrusion. The A/E requested additional testing per the specifications; the owner rejected this request.

The CMc provided another resubmittal after completion of the EBES scope of work. The A/E acknowledged the EBES resubmittal, ultimately stamping it "For Record Purposes Only." This was done only to assure the as-built condition of the EBES be in the project record.

Owner-Generated Notice of Potential A/E Responsibility for PCIs

As the project approached its original scheduled substantial completion date, the owner unexpectedly sent the A/E notice that financial risk was being attributed to the A/E for PCI costs and changes that, in the owner's opinion, were incurred as a result of: the A/E's design errors and omissions; failure to coordinate drawings with the owner's consultants; and late or delayed responses to the CMc's RFIs or submittals. The sole support for the owner's allocation of PCI costs to the A/E was a matrix listing the PCIs, PCI no., date, amount, and A/E responsibility.

Fortunately, the triage team had already developed a matrix of the PCIs, including a quantifiable analysis supporting the A/E's position and defense of alleged responsibility(ies) for costs associated with the PCIs. The cost and time involved in creating this matrix was more than offset through the value involved in maintaining the strained relationship with the owner and uncovering any further project deficiencies potentially attributable to the A/E prior to the date of substantial completion. This process also assisted in securing the proactive involvement of the A/E's subconsultants in the A/E's risk mitigation program.

Closing-out the Project

All of the measures outlined in this paper were done to achieve the A/E's overall objective of delivering to the owner a completed building ready for its intended use. Ultimately, that meant achieving substantial completion and closing-out the project. Even on a project that progresses on schedule and without unexpected economic hurdles, substantial completion can be a challenging process and requires time well beyond that contractually required to complete the project. On a troubled project, the process can be even more challenging, and implementing the strategies, planning options, procedures, and risk mitigation strategies discussed in this paper can lead to a smoother closeout process. The steps above provided the necessary information for the team to address critical issues in the substantial completion process, including addressing issues related

to non-conforming work, testing and certification of equipment, punch-list items, and warranty items.

Certificate of Substantial Completion

A critical component necessary to attain the team's overall objective was to achieve substantial completion in spite of the risks and challenges present with the GMP project. One key hurdle the A/E would need to address once the owner and CMc believed the project was ready for occupancy was the statement contained in AIA document G704 -2000, *Certificate of Substantial Completion*:

The Work performed under this Contract has been reviewed and found, to the Architect's best knowledge, information and belief, to be substantially complete. Substantial Completion is the stage in the progress of the Work when the Work...is sufficiently complete **in accordance with the Contract Documents...** (emphasis added).

Despite focused efforts by the CMc, the A/E still had significant concerns regarding the EBES as well as with other work yet to be completed. The project was already over six months past the contractual date for issuance of the initial certificate of substantial completion. The owner stated it would not tolerate any further delays and continued pressuring the A/E to issue the certificate.

Earlier in the project, and with an eye towards substantial completion, the team developed a non-conforming report. The A/E detailed all the significant exceptions, omissions, and various nonconforming conditions present on the project. This information was sent to the owner and CMc for review, comment, and correction. Based on the CMc's progress in making corrections, revisions were made to the non-conforming report and the updated information was again transmitted to the owner and CMc. When it came time to begin the process of substantial completion and making a punchlist, the non-conforming report and the owner's punchlist exceeded 4,000 distinct items and defects.

When the updated non-conforming report and punchlist were sent to the owner, the owner and CMc informed the A/E that they simply wanted the issues to go away: close the non-conforming work out regardless of the CMc's failure to test, install, and provide specified systems as documented in the non-conforming report. The owner made veiled threats that it would team-up with the CMc in the ensuing litigation unless the A/E relented and signed the certificate of substantial completion. In addition, the owner notified the A/E that it would withhold payments due for services rendered and reject all additional service authorizations.

The A/E and triage team needed to decide whether or not to it was in the A/E's best interest to terminate their agreement with the owner or implement additional procedures to protect the A/E's exposure while closing-out the project. The first action taken was to update the legal review of the AIA B101 agreement, specially focusing on the termination provisions. Then, the triage team developed an agreed-upon action plan to determine which course of action would be taken.

The first step was for the A/E to send a notification letter to the owner. Key provisions of the letter included:

- Failure of the owner to make payment to the A/E for services rendered per the agreement was cause for termination of the agreement by the A/E;
- Failure of the owner to coordinate and furnish copies of the owner-retained consultant contracts; and
- Non-conforming workmanship by the CMc.

After the owner's review of the A/E's notice letter, a meeting was held to discuss the issues in an attempt to reach a mutual settlement for the A/E to continue performing its basic services and to closeout the project. During the meeting, the owner and A/E reached the following understandings:

- The owner would pay the A/E for basic services due per the agreement;
- Additional service requests would be discussed after final completion of the project with full reservation of the A/E's rights to pursue resolution of the additional service requests thereafter if they failed to reach a mutual agreement upon settlement;
- The owner would assure its separately retained consultants provide support and assistance to the A/E as requested. However, the A/E would not be provided copies of the owner's agreements with its retained consultants;
- The owner would determine whether or not to accept the CMc's non-compliant workmanship contained in the non-conforming report. The A/E's position regarding deficiencies associated with the non-conforming scope of work would remain on the record;
- The owner would verify and attest receipt of the CMc's required project warranties and training; and
- The CMc would provide final lien releases for all subcontractors and suppliers in the form required by the project specifications with the CMc's final payment application.

The triage team developed procedures to assure the project record documents conformed to the understandings reached between the A/E and owner.

AIA document G704 was modified to conform to the understandings of the A/E and owner as follows:

The Work performed under this Contract has been reviewed and found, **subject to conditions noted on Attachment A – NCR and based on Attachment B – Owner's Acknowledgement of Receipt of CMc GMP Required Warranties and Training**, to the Architect's best knowledge, information and belief, to be substantially complete. Substantial Completion is the stage in the progress of the Work when the Work or designated portion is sufficiently complete in accordance with the Contract Documents **and based on the Owner's directives** so that the Owner can occupy or utilize the Work for its intended use (emphasis added).

This approach preserved the A/E's position and concern relating to unfinished and non-conforming work present on the project at substantial completion, including, in particular, the potentially defective EBES.

Attachment B—Owner's Acknowledgement of Receipt of CMc GMP Required Warranties and Training contained the following statement: "The Owner represents and warrants to the A/E that the CMc has provided all contractually required GMP warranties and training."

Once the owner agreed to the changes in the G704, the A/E was able to execute it knowing it had taken the necessary steps to protect itself moving forward. The CMc continued correcting punchlist items, provided the necessary final lien waivers, and provided some warranties, including warranties for the roof and windows. After the G704 was executed, the A/E moved forward with obtaining the final payment application. The final payment application contained the following:

- Minor punchlist to be completed without cost/retention holdback;
- **FINAL** payment (as to payment of retention or final amount due) due GMP contractor;
- Final lien waivers for all subcontractors and suppliers (covered as part of the efforts discussed in attaining substantial completion);
- All remaining warranties not already provided during substantial completion;
- Preparation and certification of as-builts; and
- Operations and maintenance manuals not required as part of substantial completion.

By implementing strategies, planning options, procedures, and risk mitigation strategies after learning of the troubles and challenges on the project, the A/E and triage team were able to more easily navigate the substantial completion and close-out process.

Overview of the Triage Process

Navigation of a troubled project towards successful completion is a challenging and constantly evolving process. Successful resolution requires adroit, integrated actions by all parties involved: client, counsel, consultant, and insurer. Time is of the essence once it is clear that the collaborative process amongst the project participants is failing.

Remember, after you receive “the call” from your client, successful project closure is dependent on:

- Providing notice to inform the insurer of situations or events that may give rise to a claim against the client and obtain a circumstance file;
- Establishing a triage team with skill sets appropriate to the nature and scope of the troubled project;
- Developing a thorough understanding of the project’s contract documents—specific and conflicting responsibilities and processes contained therein;
- Implementing use of integrated databases and intelligent tools to facilitate research and analysis as part of the program to support proactive planning strategies;
- Completing review and critical analysis of:
 - RFIs—develop key codes to assign root causes to RFIs and links to supporting details like drawings, specifications, submittals, and the like;
 - ASIs—develop key codes to assign root causes for ASI and related supporting information; and
 - PCIs (change order requests)—review, analyze, and assign potential responsibilities for CMc PCIs; assure process includes consideration for owner’s retained design consultants and the A/E’s subconsultants;
- Developing a project-specific risk assessment and mitigation program incorporating safeguards, such as:
 - Including specific plans to protect the A/E from open-end risk components, such as delays or schedule extensions, when the owner fails to hold the CMc to contractual provisions;
 - Implementing a non-conforming work log to document the CMc’s failures to comply with the contract documents;
 - Involving the A/E’s subconsultants;
 - Assuring that the A/E notifies the owner of the CMc’s failure to comply with contract document provisions that place the project at near and long-term risk;
 - Modifying contract documents that require A/E certification or approval in

- conformance with the strategies implemented as part of the risk assessment and mitigation program; and
- Requesting additional service authorizations for the A/E's scope of work that is excluded from the definition of basic CM services;
- Monitoring progress and modifying action plans accordingly;
- Communicating and reporting of progress with key participants in a timely and adequate fashion;
- Dedicating efforts that focus on attaining substantial completion while reducing risk to any ensuing litigation; and
- Supporting the client and insured.

A/E's Cultural Environment

A/E firms define their uniqueness with mission statements that include: innovation, vision, intelligent design, intrinsic values, collaborative processes, sustainability, and efficiency. The A/E firm's existence is largely predicated upon fulfilling a client's vision of a project, design, improvement, or flow. Design processes are collective, collaborative, and dynamic. A final agreed-upon model or design rendering of the project is the start of the journey to fulfill the vision. Confrontation is antithetical to the design process. Risk assessment as it relates to the A/E is typically omitted from the design process. So an A/E starts a project, such as the composite GMP project presented in this paper, assuming the synergy gained throughout the design process will continue through completion of the project.

To avoid or minimize the illustrative claims and disputes presented in this paper, recommend that your client implement the tools and processes presented herein **PRIOR** to proceeding to building the vision. By doing so, risks inherent in the GMP project process can be addressed proactively and the A/E's exposure minimized and contained early in the construction process.

Conclusion

At the end of the day, through the efforts of the triage team, the project achieved successful completion, thus attaining one of the prime objectives of the team. Although the project ended up in litigation, steps taken by the triage team during the project were successful in:

- mitigating the exposure to the A/E and insurer for the CMc's cost increases and delay claims;
- mitigating the exposure to the A/E and insurer for future claims related to the construction of the building; and
- obtaining additional fees for the A/E for work for which the owner had previously refused to pay.

Development of the timeline and other databases allowed the A/E to provide the owner with documentation and support for its position that the delay claims were largely caused by the acts and omissions of the CMc.

By adopting a non-conforming list and giving constant updates to the owner of the A/E's concerns regarding the construction of the project, the triage team put in place the necessary documentation and evidence to shield the A/E and insurer from exposure to future claims, including potential water penetration issues through the EBES, which were inevitable.

Finally, the combined work of the triage team resulted in the client obtaining additional fees for added services for which the owner had previously refused to pay. The triage team's work showed that the A/E had committed four times the resources to the project than it had originally contracted for with the owner, all as the result of the actions of the owner and CMc. Without the work done by the triage team in obtaining payment for those additional services, the A/E would have been left in dire financial straits. ≈

Endnotes

¹ This paper is the result of a collaborative process between an experienced construction attorney and consultant, combining their respective knowledge and experience in closing out projects in varying stages of dispute.

² Mr. Timothy Nebel, Esq., of Hartline Hartline Dacus Barger Dreyer LLP and Mr. Jimmy Shastid, CPA, of Clark Consulting Group contributed to the development of this paper.

³ See p.88, “Understanding the Guaranteed Maximum Price.”

⁴ Change order requests may also be referred to as potential change items (PCI) or a change order proposal.

⁵ Examples of multiple contingency categories can include: material escalation, increased labor costs, material price increases for structural steel, concrete, or similar material that is not purchased prior to issuance of the GMP addendum and cannot be reasonably anticipated at project inception, subcontract pricing when estimated by the CMc, and general contingency.

⁶ Enforcement of strict delay claim language varies from state to state.

⁷ Refer to www.aia.org/contractdocs/AIAS076752 for more information and explanation of the use of AIA document G702, Application and Certificate for Payment.

⁸ Refer to, *Impact & Control of RFIs on Construction Projects, A Research Perspective*, issued by The Navigant Construction Forum, April 2013 for discussion of RFIs—cause, effect, and relationship to project price.