

# Anderson Kill & Olick, P.C.

# Hospital Construction

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## Finding The Right Contractor

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*This article is the second of a two-part series on finding the right contractor. In the previous Newsletter we discussed the importance of matching the experience level and financial capacity of the contractor with the proposed project, as well as factors that bear on formulation of construction manager's guaranteed maximum price.*

Another important element in the selection evaluation is the Construction Manager ("CM") or contractor's litigation profile. Litigious contractors will drive up project costs beyond any normal budget variation. Owners should try to screen out contractors whose experience is principally in the public sector because litigation is unfortunately part of the culture in public contracting. It is common practice for public sector contractors to bid low and make up their revenues and profit on change orders and claims. The owner is at a distinct economic disadvantage with change orders. No competition exists when change orders arise as the owner is already contractually or practically bound to the contractor. Changes, which are almost inevitable in any healthcare facility project, are typically paid on a time and material basis and are not readily subject to negotiation. Other payment methods for changes are available but design documents and the pressure to execute contracts quickly rarely allow for change-order cost containment alternatives.

The owner can also expect that the public sector contractor may bring significant claims at the conclusion of the job. Even with some contractual protections, the owner may still face expensive litigation at the end of the job. The public contractor expects to make his real profit through claims and litigation. After more than 34 years in the construction field (both as a construction lawyer and as a real estate owner), I believe that the best way to protect against this budget-busting business philosophy is to screen out litigious and public sector contractors at the beginning of the selection process.

What about watching the contractor during construction? The more money that is at stake, the more resources the owner should devote to "watching." In a very large job, the owner should hire another fox to protect the hen house. Bring in a second firm with relevant experience and hire them as consultants to watch the contractor who is doing the job. They will often be competitors. On medium-sized jobs, the owner is well advised to hire someone in-house specifically to oversee the contractor's work for the term of the job. Architectural firms will sometimes offer (at a significant markup and with many qualifications) to provide project representatives to observe the work on a more systematic basis than the routine architect's agreement requires. Even smaller projects should require someone from the healthcare



## who's who

**Jim Cullen** has practiced in the real estate and construction law

fields for more than 34 years. Prior to joining DeForest & Duer where he headed the construction and real estate department for many years before joining Anderson Kill & Olick, P.C., Mr. Cullen was Assistant Counsel to the New York City Educational Construction Fund. He is a partner or director of numerous real estate entities.

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facility's engineering/facilities department to have specific responsibility (in addition to the architect) for checking on job progress, workmanship, and conformity of materials to design specifications. The representative should also be available to respond to questions that require owner input and should be available to approve requisitions.

Continuity is an important element in the effectiveness of any owner representative arrangement. The individual or senior representative ideally stays with the project from beginning to end, marshals all project files for the owner, and is available as the principal owner's witness in the event of litigation. The representative ideally should have a "muddy boot" background, i.e., possess actual field experience supervising projects similar in type, if not size, to the planned project. The representative should be equally comfortable and capable of responding in a timely manner to correspondence from the CM, especially when the correspondence is a predicate to claims.

Since schedule discipline can affect construction costs and, more significantly, new bed income, a healthcare owner should make close inquiry into the schedule software system utilized by any prospective construction manager. That system should be accessible to the owner in any significant project. The owner should promptly and carefully require explanation of any variation between the planned schedule and the "as-built" schedule. To make monitoring meaningful, the CM's schedule software should accommodate considerable detail, tracking of critical path relationships, and coordination with the healthcare owner's own related project schedule. The construction schedule should also mesh with the payment requisition system that will be used for the project. The ability to follow the schedule's progress and monitor payment against the project budget will help avoid "front loading" of payment requisitions, which leaves an owner vulnerable in the event of a contractor dispute or bankruptcy.

Choosing a contractor with the right level of experience and capacity for a project, and one that is empowered by good management tools while unencumbered by a litigious profile, increases the likelihood of an "on-time" and "on-budget" project. ■

## Mark Your Calendar

### Modernization and Construction of Healthcare Facilities Seminar: Part I

**Date:** November 17, 2004

**Place:** Harvard Club of NYC, 27 West 44th Street, NYC

**Time:** 4:15 - 6:00 (Cocktails 6:00 - 7:00 pm)

**Cost:** Free

We cordially invite you to a seminar featuring discussions of the legal and related issues associated with the modernization of existing healthcare facilities and the construction of new ones—including hospitals, nursing homes and related facilities. Healthcare institutions not only face challenges common to any construction project. They also must deal with the many issues that are unique to healthcare. This seminar is the first of a two-part series that will explore many facets of the construction process, from the planning to project completion. Topics to be discussed at the first seminar include: HHS Evaluation of the Project, Land Use Issues, Dealing with Contractors and Architects, and Project Finance.

Part II—January 19, 2005

[Seminar topics to be announced.]

For more information or to register for either or both of these seminars, please visit our website at [www.andersonkill.com](http://www.andersonkill.com) or contact Michele Elie at (212) 278-1318.