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Exclusive

PROJECT DELIVERY INCLUDES RISK FACTORS

NOVEMBER 27, 2017 | BY [LISA BROWN](#)

Cox, Castle & Nicholson partner Robert Campbell discussed contractor obligations, common questions to ask and developers guaranteeing performance in the first of a two-part **EXCLUSIVE**.



Campbell says quality, price and time are the major risks to be managed on every project.

SAN FRANCISCO—[Cox, Castle & Nicholson](#) [LLP](#) partner Robert Campbell and his team routinely work through complex construction [disputes](#) that arise between a client and its

general contractors, subcontractors, etc. Campbell discussed these issues and other contractor obligations in the first of a two-part exclusive.

GlobeSt.com: How can developers guarantee the performance of their general **contractor's obligations under the general contractor's contract?**

Campbell: The traditional mechanism employed to guarantee the contractor's obligations is through performance and payment bonds. The [AIA](#) form of performance bond requires as a condition to the surety's obligation that the owner terminate the contractor. This creates a perverse incentive to terminate the contractor toward the end of a delayed job in order to recover LDs. An owner should not have to terminate the contractor to secure a guarantee of the contractor's post-completion obligations such as warranty performance or to secure recovery following a job cost audit. An owner should

want the surety to guarantee performance of all material defaults, regardless of whether the contractor has been terminated. Because sureties are not dependable when legitimate bond claims are tendered, rather than rely on them, it is better to hire a well-financed contractor with a solid project team (who are committed to staying on the project to the end) to avoid major disputes altogether.

GlobeSt.com: What are some common questions to ask your project partners (GCs, etc.) to identify if they have the right project delivery system for your project?

Campbell: In the private works arena, selection of a suitable project delivery system turns on a number of factors, including the project type, the experience of the project participants with the system under consideration, risk tolerances and preferred risk allocations. Quality, price and time are the major risks to be managed on every project. These risks may be weighed differently depending on the project type. For example, on casinos and professional sports stadiums, meeting the schedule is a paramount factor. However, quality control may be the paramount consideration for a museum. Each delivery system allocates risks differently and requires careful consideration. Similarly, selecting a delivery system which best allocates these and other risks requires careful consideration and contract drafting.

Under a guaranteed maximum price form of agreement, which contemplates further design development, the contractor warrants that it has sufficient information to deliver the project subject to a guaranteed maximum price. However, contractors and owners operating under a GMP Agreement routinely quarrel over whether further designs constitute mere design development for which no increase price is allowable, or constitutes a scope increase for which an arguable increase in the contract price is justified. Even good contract draftsmanship will not preclude these disputes.

Certain project types lend themselves to design-build in which the design-build contractor becomes a single source of responsibility for design and construction. Schools, energy and certain infrastructure projects are examples of project types which are amenable to design-build. Design-build theoretically shifts the risk of design errors to the design-builder and away from the owner. However, the owner may remain responsible for claims for unknown site conditions stemming from geotechnical conditions and for undisclosed underground utilities which interfere with the contractor's

work. On design-build projects, risks associated with design errors do not go away, they are merely shifted among project participants. In a traditional delivery system, contractors seek compensation from owners due to design errors, whereas in the design-build context, contractors seek relief from their design-build “partner.” Finally, regardless of which delivery system is chosen, changes by owners to project performance criteria or design may also lead to delays, cost overruns and disputes. No delivery system, including design-build, is a panacea for dispute avoidance. Whatever system is used, the contractor should be involved early during design development to ferret out constructability issues, understand site conditions and challenges, perform value engineering and refine cost estimating.