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A Balanced Approach to Construction Law.

# Working Through Contractor Default

Tips and Tools from  
Lessons Learned on  
Tough Projects

# Project Management Tools for Public Owners

Considerations, Tools, and  
Techniques for Effective  
Oversight and Management  
of Public Works

# Preventing Contractor Default

- Consider Likelihood of Default at Outset
- Identify Project Challenges
  - Right-of-Way Restrictions
  - Complexity of Construction
  - Schedule Pressure
  - Public Scrutiny
- Evaluate Market Factors



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# Project Delivery Methods

- Which Method Best Serves the Project and the Owner's Concerns
  - Vertical or Horizontal
  - Uniqueness of Project Components
  - Avoidance of Mistakes of the Past
    - Guard Against Events of Prior Default



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# Procurement Considerations

- Availability and Sourcing of Labor
- Risk of hiring “Whatever Contracting”
- Design/Performance Capability
- Stability/Performance History
- Pre-Qualify Bidders
- Price no longer Be All/End All



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# The Contract Documents

Understanding, Familiarity, and Reliance



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# Contract Risk Allocation

- Equitable Allocation
  - Party Best Suited to Accept Risk Should Bear



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# Key Contract Clauses

- Contract Time
  - Notice to Proceed
  - Calendar Day
  - Schedules
- Underground or Unforeseen Conditions
- Adequacy of Design
- Delays - Weather, Compensable , Excused
- Liquidated Damages
- Consequential Damages Waiver
- No Damages for Delay



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# Key Contract Clauses

- Bonds & Insurance
- Payment – Time
- Changes
  - Changed Conditions
  - Design Modifications
- Default
  - Events, Notice
  - Available Remedies
- Acceptance
- Substantial Completion
- Suspension & Termination
- Warranty
- Notice/Presentment
- Dispute Resolution



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# Project Management

Best Practices to Prevent Contractor Default



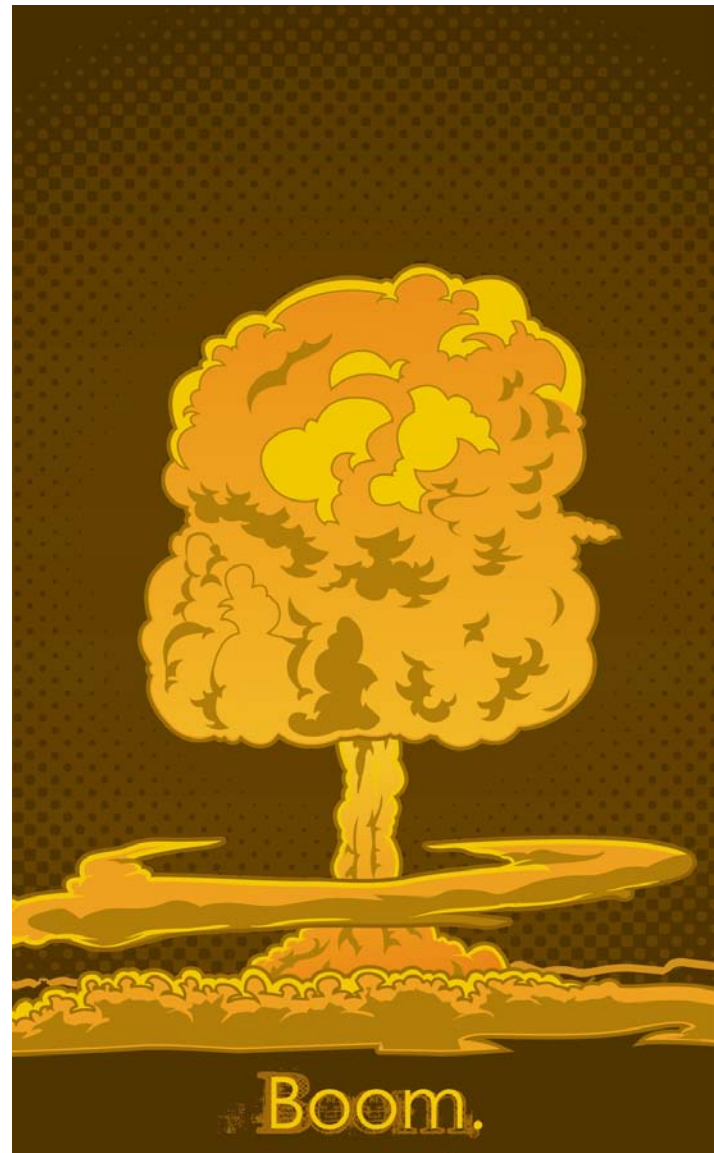
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# Owner Considerations

- Prior to Design
  - Coordination amongst Stakeholders
    - City Manager/Finance, Public Works, City Attorney, etc.
- Identify & Address Potential Pitfalls
- Partnership
- Consideration of Goals and Project Risks
- Determination of Delivery Method



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## War Stories

Lessons Learned  
From Tough Projects

# Types of Contractor Default

- Nonpayment
  - Misallocation of Funds
  - Labor Availability
- Performance Delays
  - Labor Resources
  - Materials & Supplies
- Failure to Complete
- Failure to Correct Defective Work
- Scope Disputes
  - Refusal to Perform



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# Working Through Contractor Default

- 1) Engage the Contractor
- 2) Provide Demand and Notice to Cure
- 3) Request Surety Involvement
- 4) Use Contract Tools
  - Leverage Payment
  - Use Supplementation/Owner Performance
  - Termination as Last Option



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# Process-Dealing with Default

- Ultimately – Save the Project
- Protect Public Funds & Trust
- Delivery Best Quality Project then Available



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# Tough Project #1

- New Jail Project
- County Owned
- Replacement of Existing Facility
- Design/Bid/Build Competitive Sealed Proposal Method



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# Default By Nonpayment

- Payments not Flowing Downstream
  - Payment Bond Notices
  - Work stoppage
- Owner Actions
  - Declaration of Default
  - Recapitalize Project by Contractor



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# Default - Delay

- Delays to Completion
  - Schedule Slippage Increased
  - Failure to Supply Supervision
  - Failure to Supply & Direct Labor
- Owner Actions
  - Demand on Performance Bond
  - Assess, but not Withhold LDs
  - Require Ownership Meetings & Additional Superintendent



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# Tough Project #2

- Water Treatment Plant
- City Owned Project
  - TWDB Funding
- Traditional Design/Bid/Build Best Value Award



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# Delay – Supply Issues

- Material Shortage
  - Suppliers of Component Parts Delay in manufacturing
- Owner Action
  - Worked with Engineer to Revise Specs
  - Substitute Equipment
  - Accelerate Labor & Performance



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# Default - Delay

- Significant Delay in Completion
  - Mismanagement of Resources
  - Refusal to Perform without Change Order
  - Attempt to Recover Time through Scope Dispute
- Owner Actions
  - Assess LDs
  - Remove Scope – Negotiate Credit
  - Hire Supplemental Contractor



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# Tough Project #3

- Athletic Complex
- Multi-Scope Design Contract
- Traditional Design/Bid/Build Best Value
  - Design & Construction Issues



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# Default – Failure to Complete

- Contractor Achieved Substantial Completion
- Within Weeks of Substantial, Defects Began to Appear
- Contractor Refused to Repair & Complete
  - Demand on Performance Bond
  - Suit Against Designer, Contractor & Surety
  - Settlement Provided funds for Repair



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# Tough Projects #s 4&5

- Police Station & Detention Center
  - Post-Completion Defects
  - Warranty Repair
  - Contractor Out of Business
- Fire Station
  - Substantial Completion
  - Warranty Repair



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# Failure to Honor Warranty

- Both Contractors Refused to Honor Warranty
  - Retainage Paid
  - Notice of Default to Surety
  - Negotiated Payment & Settlement
    - Police Station – Contractor Not Allowed to Return
      - Monetary Settlement Based on Bid to Correct
    - Fire Station – Contractor Perform



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# Tough Project #6

- Water Infrastructure & Road Reconstruction
- Traditional Design/Bid/Build
- Contractor Delay
- Failure to Correct & Perform



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# Failure to Correct & Complete

- Contractor Delay
  - Time Sensitive Project
  - Owner Withhold LDs & Demand Acceleration
- Contractor Failure to Complete
  - Owner Noticed Defects
  - Contractor Refused Performance
- Owner Action
  - Termination & Retain Contract Balance



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# Tough Project #7

- Water Treatment Plant & Associated Infrastructure
- City Owner
- CMAR Award
- Highly Sophisticated Contractor
- Delays
- Overbudget



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# Project Scope & Budget Concerns

- Project Price Increase
  - Poor Oversight & Management
- Owner Actions
  - Audit Provisions Invoked
  - Transparent Performance
- Owner Negotiate & Recapture Costs
- Deductive Change Order
  - Brought Project Closer to Budget



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# Tools For Project Management

- Engage Contractor in Discussions
  - Escalate to Ownership
- Engage Surety
  - Pressure Contractor Because of Bond Capacity
  - Use Surety as Mediator
- Actively Manage & Control Project
- Use Contract Tools



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# Questions?

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