

Public Construction Contracting: Perspectives of the Contractor

April 21, 2021



Join Carlton Fields attorney Joe McManus and Scott MacLeod of DPR Construction as they discuss the challenges and opportunities of public contracting, the intersection of public and private work, and advice on new trends in the government contracting arena.

Transcript:

Joe McManus: Hello, everyone. My name is Joe McManus. I'm a shareholder of Carlton Fields law firm in the Washington, DC office. I'm heading up our government contract practice and I am part of the construction practice group. I'm also the president of Centinel Consulting, LLC, which is one of now four Carlton Fields consultancies. Centinel is a consultancy of distinguished experts providing full service for the construction and real estate industries.

This is the second of a series of podcasts dealing with government contracts. There is a certain transition from the commercial world to the government world. As the commercial world shrinks as a result of Covid, contractors gravitating in the government contract arena find an arena which is full of benefits and potholes at the same time. For the first podcast, my guest was Judge Paul Williams, formerly the chief judge of the Armed Services Board of Contract Appeals. I am most pleased today to have my good friend Scott Macleod here with me. Scott and I met well over ten years ago in North Carolina while he was a construction executive with his feet in both the commercial and the government world. Scott, if you can, I'd love to have you introduce yourself to our guests out here.

Scott Macleod: Thanks Joe, I appreciate being able to participate in the podcast. My name is Scott Macleod. I work for DPR Construction. Into this podcast, I bring about 35 years of construction experience. I did a stint in the Air Force, I also did some graduate studies and research in construction at MIT, and I want to put in a plug for my undergraduate degree at the University of Massachusetts. The University of Massachusetts this past Saturday won the NCA men's hockey championship for their first NCA championship and I was pretty proud of that.

Joe McManus: Wonderful! I'll give you an overview of the podcast today. We're going to deal with challenges and opportunities of doing work in both arenas and the topics that we want to discuss fall into three categories. I guess the first one is public work uniqueness. What sets public work apart from the commercial world? Also, we want to talk about the intersection of public and private work. They seem to be moving closer and closer together at times. And we can end with some parting comments, some crystal ball thoughts from Scott as well as some advice as to how to deal with the trends that are out there today.

Scott, on the uniqueness of public works, we talked a couple of weeks ago about unilateral changes. Something that is unique to the government practice. Can you give us some of your thoughts on that and some examples of its challenges as well as its opportunities?

Scott Macleod: Yeah, well first off, I will hit on public work. Public work is a very large market and encompasses a lot of different contracting and delivery methods, types of work, and also different owners in a way. You work for the city, customers, county, state, federal. But I think the one common thing I see in public work is that all of them probably their number one priority is how to protect the US taxpayer and how to basically eliminate unethical or the perception of unethical behavior in that whole design, construction, and delivery process. And so, typically what you see is a lot more lump-

sum hard bid work. That's easy to segregate. You design it, you send out documents into the marketplace, you bid the work you open them up publicly, and then you just make sure everybody honors their contracts, and that way it's very transparent. The public work is been financed by individual companies or people and they're a little bit looser. Their number one priority is, it's their money and they want to deliver a value-adding asset as fast as possible. That's when they can start generating income. They're a little bit looser, they're a little more I would say innovative and creative in some of the mechanisms they use to expedite their work.

I can tell a quick story. The way I kind of look at the real difference is, I got out of the Air Force a number of years ago and ended up in Boston working on a very large mixed-use project called Rose Warf on the Boston Harbor. And I was the project manager doing a little bit of contract administration change orders. And I went to my boss and every week we'd kind of go through the different changes we're looking at with different suppliers. And I showed him a way that I had a supplier that put in a big change and I showed him a way by looking at their contract I looked for some, not loopholes, but I figured out ways that we didn't have to pay that claim or that change order. And the first question he asked me is, he said "Well, did you look at their proposal and what they included in their scope of work, and did they include that?"

And my first comment was, "Well, why is that even relevant? I got the contract; the contract says they don't get it."

And he said, "But is it the fair thing to do?" And it always struck me and so I walked back.

And I'm not saying that public work when you're working in public work projects that they're not fair, but what I will tell you is that the way they manage those projects is by contract. And so I always tell my teams that if you're doing public work, you read it, you understand it, and you follow the contract. And if the contract says get up every morning and run around the building five times, then do it and document it whether it adds value or not. So, I think that's the big difference I see sometimes is if you're doing public work you better know the contract and you better follow it. I would say the same thing for private work but sometimes there's a little more flexibility in private work.

Joe McManus: OK, those are some great perspectives. I mean, also was in the Air Force assigned to the Armed Services Board of Contract Appeals as a JAG captain years ago. We had one case - I'll never forget - it's called Kagie Dasha [SP] which is a Japanese air, it was an American base in Japan. And they called for stripping of the floors every couple of months. And the contractor said, "Look, that's nuts. I mean if you strip the floors every couple of months, you're not going to have a floor in like four years." But nonetheless, the contract was crystal clear. It wasn't about polishing the floors or stripping the floor. That's the way the case went on down. And likewise, you're dealing with contracting officers. They're the only ones who got authority. You think you're dealing with the

resident engineer with authority and you're not. So your comments on private versus public work and overviews were very helpful.

Scott Macleod: Now, you did ask quickly about the unilateral change orders or...

Joe McManus: Yeah.

Scott Macleod: ...what I call zero dollar change orders. After that project, I went out into the Boston Harbor Cleanup project. And we learned some valuable lessons at the time. We thought by taking some really bright young project managers doing big large commercial work in Boston, the market dies so we sent them all out to Deer Island, the Boston Harbor Cleanup project, which was a public works project. And what made that unique was for years Boston had been polluting the harbor and so they were under - actually, it was being enforced by the EPA that they had to clean it up and they had to clean it up in within a certain period of time or they would be fined. So, it was really important to get this thing built quickly, this big wastewater treatment plant. So they put into the contracts this mechanism to say that if we have a change order or a claim, and we went back and we submitted it and we could not come to an agreement, then the NWRA (who was the authority running the project) could give us a zero dollar change order, force us to do the work, and we would have to address this at a later date. And I always believe that they took that to the extreme because, as you could imagine, everybody ended up in court at the end of that job, but it was built, and it was built on time. And, it was a very painful project, and I believe that a lot of the contractors who did some really great work out there and for those efforts, they ended up in court for quite a while at the end.

Joe McManus: Yeah, I mean, I remember before the AIA changed or added the concept of the construction change directive, we had the old field changes which sort of put you in the same situation. The owner would order you to do some work [*laugh*], you do the work, and then he or she would contest whether or not it was a change to start off with, and you ended up funding it all. With the construction change directive, at least you're getting paid concurrently, you know, against [*simultaneous speaking*]...

Scott Macleod: Exactly.

Joe McManus: ...against an estimate that's set by the architect. Very different in the unilateral change arena where [*laugh*] you're not getting paid currently; you're getting paid hopefully downstream.

Scott Macleod: And it takes out the requirement to force the parties to sit down and resolve it upfront. That's the part that hurt.

Joe McManus: Well, let's talk about sit down and resolve things upfront. I mean, you know, in the commercial arena, you know, you have the ability to negotiate contract terms. But how do you find

living in the government arena where you're dealing with the issue of responsiveness to responding to solicitations?

Scott Macleod: Yeah, well the first two things is, well the first is it is very hard to negotiate government contracts. If you look at, for example, the state of North Carolina, I think the attorney general puts together the state contract. And so then all the different state organizations, whether it's universities or state entities, they have to use that contract. So when we try to negotiate those contracts, their first thing is, we're not authorized to negotiate it. It is what it is unless you want to go to the attorney general and then you have to have him change it and guess what, he's not going to do it. So what happens is, you try to make that determination is, 1) can I live with these terms; and 2) can I mitigate the terms and still be effective working for the customer? And unfortunately, in our industry, a lot of times contractors convince themselves that well, you know this is a good customer, they're not going to use that contract on us. And actually, sometimes state agencies will tell you that. They'll say "Oh, don't worry about it. We've never done that before." And we can fall into that trap. Now, sometimes I will tell you that they don't push certain things. They try to work with you, they try to negotiate with you but in other cases that's not the case. So, what I do tell our teams is, when you do public work the first thing I want you to do is to go through that whole contract and identify all the notification requirements because no matter, once again, this gets back to fair, no matter if you did a change and you're entitled to that change, if you didn't submit it at the right time, if you didn't document it correctly if you didn't put the owner on notice, you don't get paid for it. And so, it's very important to know what those notification procedures are.

Joe McManus: Yup. What about the cast of characters on government contracts as compared with the commercial arena? And who's got authority, who doesn't have authority, and who's got the ability to make a deal like you're talking about here to resolve something in a sort of civilized fashion?

Scott Macleod: Well, [*laugh*] it's really interesting. The public entities, like you said, it's really important to understand who is authorized to make the changes because what will happen is, when you're out in the field working with the clerk at the works or you're maybe even working with the program manager they hire, they're very eager to say "Oh, just take care of that," or "Hey, you go do that and then we'll deal with this later." And they kind of just wants to keep the job going. And our teams fall into that trap and then they do things.

I was involved in following up on a school we did in Florida and what had happened was the superintendent made some big changes to deal with changing demographics in the region. But the problem is if you open up the school a day late, you might as well open up a year late. So the superintendent worked with the CM at that time, got them to accelerate the work so she could get the students in on time. She retired before the job was over. Everything was documented. The CM had emails from her, meeting, minutes the whole thing. But when the new administration came in the

first thing, when the CM finished they went back with the change order, and they said "Well, what's this for?"

They said, "Well, we accelerated for it."

And they said, "Well, we're not going pay that. Do you have a change order?"

And they said, "Well, no."

"Why would you do that? That's not what your contract says."

They said, "Yeah, but we worked it through her." And the contractor never got paid. Whether they were entitled to it or not, the issue was they did not follow the contract because they took direction from somebody who would've honored it probably but was no longer there.

Joe McManus: Yeah, talking about the difference of characters that are on the job site you know what I mean. I remember Algernon Blair was a great contractor. They're out of Alabama and they did nothing but hard money jobs. I went to the Richmond airport, and I went to the trailer and there was a sign outside that that says "Don't come in here unless you smoke." [*laugh*]. I walked in and there was a guy who you would never see on a private job but he was huddled over a desk and he was pumping out notice letters on a daily basis. But that shows you the difference between the two characters.

Scott Macleod: It's a lot of wasted work. I had an attorney, we had a litigation a number of years ago and I was having dinner with him, and he was a very high-end attorney out of New York, probably charged more than you guys do Joe...

Joe McManus: I'm sure.

Scott Macleod: ...when we were talking [*laugh*] he said, "You know, Scott," he said, "when your industry embraced customer intimacy, customer focus, the customer is always right," he said, "it makes my business and probably many other lawyers because you guys walked into a trap." And so now, we're very clear with our teams: the customer's always right as long as they follow their contract. And if you stick with that you'll be OK. But too often we try to over-deliver to customers and our teams get themselves in trouble.

Joe McManus: But one positive about government contracting is your ability to protest a job. You didn't get it, you're disappointed. In the private arena, you're sort of disappointed. You may have spent \$100,000 putting together a proposal. What about protest? Do you all use them? What's your view on protesting government contracts?

Scott Macleod: You know, number one, we don't do as much with the new company I'm with, DPR Construction. We don't do quite as much government work. We do a lot of state and city work. We don't get into the federal work as much. We have been protesting on jobs ourselves. It's kind of interesting. In Florida, a lot of the state work they video the whole presentation and share it with all your competitors. So they share your proposals, they share the videos. And so you see a little bit more about in the protesting arena down there because people say, "Well, wait a second. They said they did X, Y, and Z, or they have a safety record." And people will go and research your proposals and things and then they will put in a protest. Typically, we don't see the protest work as much. You know, usually, it's a lot more work for everybody but typically the government doesn't overthrow a lot of the protests, or at least I don't see that happen as much for us.

Joe McManus: Yeah, and I imagine if you're a frequent protestor it affects your best value procurement record, which I thought maybe we could shift to that topic right here because I'm talking about delivery methods. You know, years ago it just used to be a lump sum. If you were going to do a contract job, whoever was low *[laugh]* gets the job, alright. And now they're into best value, which is negotiated. Can you give us your views on the current trend with regard to best value and how that is beneficial?

Scott Macleod: Well, so we say that when we bid work, lump sum, you bid exactly what the plans and specs show and what the documents in the bid packets ask for. You don't bid what it would cost to actually deliver a full complete building in many cases, you bid exactly...

Joe McManus: *[laugh]*

Scott Macleod: ...what they ask for.

Joe McManus: *[laugh]* Good point.

Scott Macleod: Because if you did, you wouldn't get the job. So we used to joke, if we want a job we'd go, OK, well we need to dig through that to find out where we made a mistake. So, it was the running joke that people who made mistakes won jobs. And the CM, which is what we're seeing a lot more in-state work, certainly city work, county work, and even federal government, that's more of a value-based selection. And that's a case where they want to look at the qualification of the contractors, they want to look at the team you're going to propose and their experience. And then there may be some type of price component, whether it's a preconstruction fee for a lump sum, maybe your construction fee.

The two benefits of that is the government now has more say on they're getting what they believe the right firm, the experienced firm, the firm that they think will deliver the best value. The second thing is by doing CM construction management whether that's at risk or not at risk is the builder

starts earlier in the process. So now they're engaged in the design and now they're bringing constructability ideas to the design. They're bringing their experience on similar projects, best practices, lessons learned. They help the designer pick more cost-effective systems, materials, components. So I think there is a big value to the owner to get their builders in earlier.

Now if you go to I guess the far extreme, that's integrated project delivery. That's where not only do you bring your designer in, you bring your builder in, and you bring your key trade partners in before you start the design. So now the owner has this program, their vision, and that team now is tasked with designing that to a budget the owner has directly. And that's a real open transparent, everybody's in the mix, everybody is incentivized the same way to get to *[inaudible]*. I don't see it in public. I haven't seen that in public work at all. That's more in, it started out in California. It's more in large hospitals and things like that.

Joe McManus: Yeah, that's pretty exciting that integrated project delivery method. But I agree with you with regard to the best value, you know. You're seeing more and more solicitations where they are not looking for lump sum contractors. They're looking for CMs, alright. And you know, as they rank the proposers, you know, price is often the least important function.

Scott Macleod: Right.

Joe McManus: You know, sometimes they don't even open the price proposal until you get through the technical proposal and they're only talking to people who had high enough grades on the technical side. So, I think that's here to stay. I don't know how you feel but seems to me I think the government likes it, you know like *[simultaneous speaking]* *[inaudible]*.

Scott Macleod: Yeah, and I like it also because it's very transparent. If you know what the rating system is in the criteria you can then compete on Apple's tablets. What happens on the other side on the commercial side, the private side is they will go through the whole process and they will open up the numbers and then they will come to the team they really like and they say, "Gee, we really like you but, you aren't the cheapest." And with so with private clients *[laughter]* they have the right to negotiate forever. So you do get into they don't have to follow certain rules and it's always a negotiation.

Joe McManus: Yeah, and you mentioned also there's safety records for example. That all is put into the process, and whether or not you're a claims person, has filed a number of claims or lawsuits. You're listing that. Best value really is in their minds the best value of contractors. *[simultaneous speaking]*

Scott Macleod: And they do we...*[simultaneous speaking]*

Joe McManus: What about safety?

Scott Macleod: Alright, I was just gonna say real quick, a couple of things. Safety, they look at diversity. How are you investing in the community, using small historically underutilized businesses? And they go through those types of things. And you're right. They will us to provide information on all the open lawsuits we have right now, litigation. And this is, as you know, a pretty litigious business. So, a lot of contractors struggle with how do I present that in a good way?

Joe McManus: You won [*laughs*] I guess is one way to present it. I guess a final thing there is terminations and the use of terminations for convenience and terminations for default. I remember in the Air Force we used to call them T for Cs and T for Ds. What's your view on that in the public arena and whether or not they're used?

Scott Macleod: Well, certainly as a company the last thing you want to do is be terminated for cause because that is another thing how they measure people. And we see that in commercial as well as private, is have you completed every job and if you didn't, what happened? It is very expensive to terminate a project for convenience or for the cause.

I was involved in a project in Miami where the company I was with at the time lost the job. The company that won it had a lot of friction with the owner. The owner came back to us and said, "Hey, we're thinking about terminating them."

Our response to them was, "You don't want to do that. It's going to cost a lot of money. There's no winner in that. You got to make it work."

So they still did. They terminated the other contractor, brought us in. And the way they understood that it was going to work was they were going to hand us the guaranteed maximum price, they were going to hand us the schedule, they were going to hand us the contract, all the trade parts. Basically, they were going to just dump everything on our desk and say, "OK, you just need to finish."

And that's where we stepped back and we said, "That's not quite how it works." We spent a lot of time and resources doing a full due diligence of the job. Where was the schedule really today? What is it really going to take to finish the job? And that's in cost, that's in general conditions. And we had to study the quality of the job. Is the quality effective? Is it good? We're going to own whatever we take over. And so what ultimately happens is, you put in a whole new proposal. It's very different and most likely more expensive to do it right because there's a lot of risk. So, my feeling is number one, we never want to be in a situation we're being terminated, whether it's for cause or convenience. And secondly, I would always recommend to owners it's got to be a last option, almost a nuclear option.

Joe McManus: Yeah, that's a great point, that last point about recommending to the owners this should be the last option because it really should be as a matter of logic. They could have instead made use of a deductive change order, for example, in the situation you brought up. And then it's an interesting pricing issue because he or she has probably got it front-end loaded to start off with. OK, what's the proper value of that deductive change order versus if you terminate for convenience, in comes the terminating contracting officer and you will have a contract for all his or her costs...

Scott Macleod: That's right.

Joe McManus: ...plus a reasonable profit thereon. You know? And so it's a way to talk the government out of taking a radical step. Nonetheless, they do it. When we got out of Iraq, for example, some wise contracting officers were issuing deductive change orders. Then they got into termination for convenience. And then finally as they ran out of money, they got into terminations for default figuring that it would be two or three years downstream until that termination for default gets converted to a termination for convenience, and then they would be paying off. So, it was a way of shifting the budget, kicking the can downstream for their costs. Completely unfair but it's a great point to bring up.

Well, let's talk about intersecting private and public work. There's some things going on here. For example, you mentioned construction managers at risk and construction manager's agents. What are your thoughts? Are you seeing similarities now in the government and the private arena there?

Scott Macleod: I think the government sometimes. Certainly, the states that I work with. They struggle with the *[inaudible]* at risk because they wonder what does that risk mean? I think what happens is it is still more of a team approach. The contractor goes to the market. They have the documents. They put together a guaranteed maximum price, which you hope is the worst price you'll ever see versus a lump sum job, which the number you get will be the least likely number you're going to pay.

Joe McManus: Yeah.

Scott Macleod: And so what happens, in that case, is that there still is risk in the project. There's still risk of unforeseen conditions underground. There may be design issues, unforeseen conditions. So typically in a GMP, you will carry some type of contingency to prevent against those types of risks. Maybe you had some bid issues. But still, as far as the state is concerned or even the county or city, to us that's the price. You should never, ever get anything more. And to a contractor, well that's the price based on what we know and what we anticipate, but it doesn't cover everything. And that's where sometimes you get into disconnect.

So an example would be we're involved in a job recently where we ran into a whole bunch of rock underground. And the borings didn't show it. And in the GMP, it was actually excluded. And the [inaudible] said, "Hey, we didn't see any rock based on our interpretation of borings, so it's not included."

Well, then you hit the rock and the first thing the owner says is, "Well, you should have known that was there. Why should I pay for that as a change order?"

And so those negotiations start and that's when they start saying things like well what does [inaudible] at risk mean? It doesn't seem like you're at risk for much because you're not paying for the rock. So part of that is just learning the process and different owners have different sophistication sometimes in these things. Or remember in the public environment, they have funding and they can't exceed the funding. So then they're under a cap, and that's where, depending on where you fit in that cap, the negotiations can be a lot harder.

Joe McManus: You know, in the private arena [inaudible] CM agents. I basically think of them as owners' reps.

Scott Macleod: Yes.

Joe McManus: Yeah, how often do you see that in the government arena? Do you see that happening very often?

Scott Macleod: I haven't. I do see the government sometimes bringing in program managers to help them, but usually, it's the GSA or the Core of Engineers when I was in the Air Force. They come in for all the big stuff. But I have not seen agency because it's almost cost [inaudible]. In the government, they would interpret that as not protecting taxpayer dollars. They want to lock you in.

Joe McManus: Excellent point, excellent point. And they like their own teams. Otherwise, they've got a substantial contracting team or, like you said, they bring in the Corp of Engineers. They don't need an owner's rep.

Scott Macleod: That's right.

Joe McManus: What about design-build? What's your thought on design-build in the government as compared with the commercial world? In the commercial world so much is, for example, like modular construction is a perfect place for design-build in that arena. But what about the government side?

Scott Macleod: I think what the government likes to see is they have one point of contact. When things go bad, there's a lot of finger-pointing. The contractor says, "Well, the designer didn't do it

right so I don't own it's a change."

The designer says, "They didn't build it right." And you get into a lot of finger-pointing and the owner gets caught in the middle a lot of times. And with design-build options, they feel that, hey I've got one point of contact. There's one person I get to blame and one person that has to solve things and I should get a complete usable facility because they're designing it and they're building it.

But when you get into really complex projects, that gets harder. You know, if you're building a standalone warehouse or you're building a standalone office building, when you put together a design-build proposal, there is a tremendous amount of detail in there about what is actually included. I think you and I talked earlier a couple days ago about what's included. Well, the government has volumes and volumes of requirements. I've been involved with a project that fell into that trap because it was design-build, we qualified everything, we designed it, we start building it, and all of a sudden somebody, a contracting officer walks out there and they look. I think it was for an FBI facility. And they said, "You can't put that type of carpet in."

And we said, "Well, sure. We put it in our proposal and we actually qualified it."

And they said, "Yeah, but that doesn't mean [*inaudible*] paragraph X, Y, Z in volume 16 of the Government Procurement Regulations on what you can and can't put in an FBI facility." And so that was a real surprise. And the design-build contractor had to eat that cost because sure enough, in the contract it says you will abide by government requirements. And even though they qualified it to get the price where it needed to be, they were accountable for that. So that's another thing to be very careful about when you sign these government contracts, especially in design-build, is what do you owe the government versus what you are selling them in your price.

Joe McManus: Yeah, I hadn't thought of that. That's a very good thought. And they have to identify what are the parameters of the design-build, give you some specifics. But, I mean, to be on the hook for something that you have to go research in the federal regulations, it's a scary proposition. Thank God, I don't see that many design-build jobs coming out these days, though. I remember when it first started with the federal bureau of prisons. They're the ones who started design-build, but it didn't seem to maintain the momentum. Maybe because contractors didn't want to bid them. [*laughs*] I don't know.

Scott Macleod: I agree. I don't see the momentum even in public work. I think the owners, whether it's a private agency or private, they want control of the design team. They want to be engaged in the design. They want to pick things. They want to make sure they understand how it looks. They don't want to turn that over to a builder. And I think still traditionally they want to separate the two to some extent.

Joe McManus: Good point. What about PPPs? What's your crystal ball view on private-public partnerships?

Scott Macleod: Yeah, so they were really big in the US. I mean, they were never really big, but they were big because it was a great way to finance new road constructions. Right? You could have somebody come in and build a road for you. And you put some tolls on it. And that company financed it for you, so the government gets money. And the only trade was, hey we're going to let you operate this thing for X amount of years. So those are very simple projects. Not as much risk. It started really in the UK and it might have been in Canada, but certainly, in the UK they started doing massive hospitals PPP. So, those are more complicated. Then in the US, you started seeing airports. Right? I think La Guardia airport is a PPP. The tunnel that's going out, it's over in your area.

Joe McManus: In Norfolk, you mean?

Scott Macleod: That's it, Norfolk. They're putting a new tunnel in. I think what the challenge is, is these projects are bigger, they're more complicated, and they take a long time. And the day you sign the contract, you absorb a lot of risk, especially in an incredibly volatile market right now where the materials are all over the price, escalation, you don't know where it's at, you're going underground. So I'm seeing a lot of the PPP contractors moving out of the US. They're just not comfortable with that risk profile anymore. [*simultaneous speaking*]

Joe McManus: Yeah, we lost the Purple Line here, the Purple Line contractors which was an above-ground metro system. Of course, Denver airport is, like, the biggest engineering news record story on PPP these days.

Scott Macleod: I don't know what the contracts say, but what's interesting is you look at La Guardia. OK? That's one of the largest PPPs in the country and Covid hits and nobody's flying anymore. Now, of course, the PPP, their revenues are based on concessions in the airport, ticket prices, all that stuff. So those are the types of things, you see. Well, how do you manage that risk when you do these large complex projects that take years to build? And I just think that risk profile has gotten too high for a lot of builders.

Joe McManus: Well, we're sort of getting to the end of our podcast here. How about some crystal ball thoughts from you, Scott, I mean, for example, what are you doing about, we talked about negotiation contracts. What do you do for the things like force majeure? OK? Where's that going?

Scott Macleod: I think one of the things we've learned is we have to invest more time in understanding our contracts, understanding where the risk is, and either negotiating out or mitigating that risk. So force majeure is interesting because we've learned a lot since Covid hit, right? Who would have expected a pandemic would hit? And that pandemic is impacting our projects. But

now you have to go back and reinterpret things like no damages for delay, force majeure. A lot of times sometimes the force majeure will provide you days but they will not provide you equitable compensation for the cost associated with that delay. So we've run into a couple clients that have said, "Oh, yeah. We know Covid has shut the job down. We know that it's impacting it. We'll give it the days."

And our argument would be, "Well, wait a second. We have a whole bunch of people that are working on this job that just can't go to another job. And so there's a cost to us." And trying to negotiate those costs and deal with those types of issues, how do you deal with the escalation that's happening into a volatile market right now because of Covid?

I saw a picture I think it was in the *Wall Street Journal* today that they're showing all these container ships all sitting out in the harbor in California because they can't get into the US. And it's probably part of this Suez Canal thing. But the issue is, the supply chain has really been impacted by the pandemic and shutting down factories and things like that. So that's driving the cost up in certain projects and the ability to get materials. So how do you deal with those types of issues when an owner just says, "Well, that's a force majeure. I'll give you time." So we have had to start being much more thoughtful about what are those key items in a contract? Like I said, damages for delay, force majeure, liability, exposure. Some of those types of things we've been spending a lot more attention looking at to protect against unforeseen things like the pandemic.

Joe McManus: Yeah. There's all sorts of legal heads coming together on the various clauses that you should be putting in there for force majeure. But in the private arena, it really is real. Just last week my private owner negotiated with a contractor. His cost for lumber went up 175%. And it's a very responsible contractor who said, "I got to walk off the job here and we're going to have a legal fight. So can you meet me somewhere?" So they were met somewhere. It wasn't quite the middle, but we resolved the issue. But it's very scary. What about, you mentioned no damage for delay. I take it when you negotiate contracts now in the commercial world, what's your read on no damages for delay and what needs to get done there or not done there?

Scott Macleod: Well, I think what happens a lot is it was added to contracts, especially state contracts we see it a lot, is because they think that builders when they get just delayed for anything, whether it's weather or something, they're always coming back with their hands out to make money off damages, general conditions, all those different types of things. And so they were saying, "Hey, we're not an open checkbook, right?" But what happens is, there are instances where we are delayed and it's delays beyond our cause. And maybe that's in Covid, right. Somebody gets infected and you have to shut the job down.

We were working on a job in Florida once again where it was for a city agency. And the building's going up and we noticed some reflected cracking in the slabs all around the columns. So, there's was

a red flag. We stopped, we notified the owner, the design team. And of course, at the point everyone starts pointing fingers and getting lawyers and getting consultants. So, the job shut down because it's a safety issue. We bring in the architect as their consultants. We have ours, the owners has theirs. We start posturing, documenting. We go through the whole process and it turns out it was the design issue. So then the owner says, "Well, you know, I have a no damages for delay so I'll pay you to make that fix but, I'm not going to pay you for the six to eight months that it took us to resolve it." That cost us as a contractor a lot of money because you just can't put people somewhere else for six months and then have them come back. We have to pay those costs. There was a lot of impact to us. So we try, especially in the public arenas to say we need equitable costs for those damages. And we'll prove the damages. I mean, it's one of these things where if it's a critical path we can show the delays, we can show the impact to our team, those types of things.

But, there are quite a few owners out there that not only don't want to put it out there but the other mitigating strategy could say, "OK, well I'm going to add three months to job and all the general conditions that includes. That at least mitigates some of the risks if I run into problems."

And the first thing an owner says is, "I'm not going to pay for that. I don't have enough money."

And then you say, "OK, well, how do we come in between. Because there is a cost and there is a risk and maybe if we shared the risk, we'd have a better outcome."

Joe McManus: You know, I think the owners can deal with that risk. I mean, for example, and deal with the potential impact to the contractor not only for general conditions costs but for impact by liquidating an amount. For example, if you show you got true critical path delay and we, the owner, are responsible for it, we will pay you a liquidated amount for, just a fix a general conditions amount that's fair and reasonable. So, there is a way to convince an owner to accept that reality because you mentioned a word that's near and dear to my heart, a "contingency." In other words, owner, I'm going to put a fat contingency in my contract to cover these things that you're taking this unreasonable stance on so, could you give me your views on contingencies in general, both in a federal arena and a private arena?

Scott Macleod: I think once again, there's a lot of risk in these projects. They're large, they're complicated. We typically like to see two types of contingencies. We like to see a design contingency because the design's evolving as you're going through the process and there is exposure there. And secondly, in the construction contingency, we do run into a lot of issues on a job site. So, we are very open with sharing that. I mean, typically, we put together a log and we go to the owner and say, "Hey, by the way, we want to use this contingency to address - maybe we have a bidding shortfall on some work where the bidder didn't include certain work." It still needed to be bought for the job and would've had to be paid for but, you know, we would go pay for that out of the contingency. Or maybe there's damage on the job that we can't get insurance to pay for but we can't identify who did the

damage so we got to fix these things. There's all sorts of reasons we would use the contingency. And we're a very open book about it. But what happens is, the owners see it and it's a way to pay for additional work, right. Additional scope.

Joe McManus: Yeah.

Scott Macleod: And a lot of owners will tell us - not as much in the government but more public will tell us - they will say, "We don't want the money back because if we get the money back we have to give it back into some till somewhere, you know, or it goes to some other job. We want to spend every penny." So we do get put in a situation where we're trying to portion out parts of that without taking on too much risk. So, the owner at the end of the day, they use all the money to get the product they want.

Joe McManus: Yeah, and you want to certainly define who owns the contingency and what is it going to be used for. One other thing here is, we talked about it the other day, is limited liability or limiting your liability. Can you give us some thoughts on that?

Scott Macleod: We used to joke that that's the put you out of business clause. I mean, at some point we don't make enough money on some of these lawsuits that come out or the liability for something that could cripple a company.

I was thinking that there were two recently that I thought were good examples is, the Bonner Bridge to the Outer Banks in North Carolina. They were building a new bridge. The contractor hit a power line going out to the Outer Banks and it shut down all the power to the Outer Banks in the middle of the summer. So, they had to evacuate, I think, like, 50,000 people, shut down things like hotels, restaurants, Air B&B, all that stuff. And the only thing I kept thinking about is, "Boy, I hope they had a limit to liability because that could be a tremendous burden."

The other one, I don't know if you saw, but they're building a new bridge down in Pensacola, Florida. And apparently, they were using these big barges to support construction and a hurricane hit. It was one recently. And the barges get dislodged. One of them took out a big portion of the bridge and the rest got thrown into the shore, like people's houses, restaurants, whatever. And had a huge economic impact to the panhandle of Florida. I think that's where that is. But either way, that's another example as to what is that contractor's liability and do they have a cap on it or are they going to be in court for a long time dealing with all these lawsuits for lost revenue, you know, certainly impacts. And so, we typically like to make sure we can cap that liability at a fee or somewhere that's more reasonable. And also, we have insurance and things, too. But the liabilities the thing we really have to be careful about.

Joe McManus: Yeah. Well, that brings us to the end. Scott, any other final comments that you would want to make here on our podcast?

Scott Macleod: Well, I really enjoyed talking with you as always, Joe. We've known each other for a long time. I just wanted to note that a lot of the stories I used are either with projects I've read about, projects I was engaged with, but I've worked for more than one firm. So I just want to make sure that people understand these are examples that were used through 35 years and those types of things. If anybody ever wants any information on DPR, you know, it's DPR Construction and we're on the internet. We're based out of Silicon Valley in California. We're a young company. We started in 1990 and we're now one of the - I think we're in the top 10 builders in the US. Done a lot of growth in the last few years and the market right now is volatile and we're kind of struggling through it.

Joe McManus: Well, I tell you. It's a pleasure to have you here and it's a pleasure to see you again as often as I can get away with it. We will get together. I want to thank all the audience for being with us today. What we've done is the podcast is recorded and also transcribed. And you can find them on Centinel's webpage which is: Centinel (that's with a C. That's the Elizabethan spelling of a centinal) centinelconsulting.com. You'll find the podcast, this one with Scott and also the first one with Judge Paul Williams. And I look forward to seeing you in the future. I think the next series of podcasts will be on the healthcare industry, one of the few industries which clearly everyone believes is going to be very active in the next year or two.

Thanks again for everybody showing up, and take care. Bye-bye.

Presented By



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