

By Mark J. Rice, Esq.

EFFECTIVE EARLY MANAGEMENT OF LEGAL RISKS FOR THE PILE DRIVING CONTRACTOR

How to Stay Out of Court by Early, Pro-Active Risk Management Systems – Yours

When a pile driving contractor bids a large project, often it literally “bets the company.” The contract, financial, and safety risks are potentially high. Against these steep risks, the contract forms, work procedures, insurance, and business relationships only provide so much comfort if something goes really wrong. Whether a differing site condition that triples the shifts, a specification that does not work, a tough owner or prime contractor, project delays, a crane accident or utility obstruction, somehow the finger pointing often seems to aim at the pile driving contractor, the one who is just doing his job, because at the bottom of the project “food chain.”

At yet, in this or any economy, there is little realistic opportunity to turn down a business opportunity to bid a risky job. Pile Drivers are known for “can do” attitude of “never give up” that reminds one of the Navy Team 6 that took out Osama Bin Laden. No failure is permitted. We will “get r’ done” as the famous Comedian Larry the Cable Guy is fond of saying.

So, what can the pile driver do to get the work and not get burned?

Here are a few bullet points to consider:



Carquinez Bridge – Foggy morning.

HAVE A SYSTEM IN PLACE FOR REVIEWING THE PROJECT SPECIFICATIONS BEFORE YOU BID.

In the “old days” before so much bidding was done online and plans available in AutoCad, prime contractors would send out select sections of the project plans and specifications for the pile driver to bid from. This made it the prime’s role to decipher the plans for you. Not so nowadays. Now, prime contractors rely on subcontractors to decide what applies to their scope of work. I have a recent example where the excavation specification section contained access requirements precluding use of a temporary trestle for a

marine dock construction for environmental reasons. The pile driver did not realize that access had that limit, and bid anticipating using a trestle, only to learn the hard way later. Oops. So, the take away, is have a checklist of your expectations in your bid, present it to the prime, get the full specifications, and do not assume all the project requirements affecting pile driving are all contained within the piling specifications 2300, and general conditions alone.

More generally, have a process during bid review. Pass out highlighters and post its, and have a bid team review to cross check all critical bid assumptions. Have someone summarize the key specifications, into a cut and

paste document for ease of use. Make sure your project superintendent and foreman have that on site, and in their hand held personal digital device or I phone. Too often, the onsite folks do not have the game plan from the bid team. Instead, be like an NFL team — the QB has the plays written onto his wrist guard, and between plays he gets photographs taken from the coach's booth to examine the field conditions. Integrate your execution, planning, bidding and financial teams, or lose money, time, or both. Use those techniques to have your team on the same page at all times.

KNOW WHO YOU ARE DEALING WITH – THE PRIME CONTRACTOR AND THE OWNER. THINK LIKE A LENDER – YOU ARE ONE.

Construction is a business populated by “can do” folks who have deep and deserved pride in what they build. There is a deep, and intuitive sense of teamwork on a successful project, that like the great Kevin Costner Movie “Field of Dreams”, “if you build it, *they will pay.*” But let’s remember, that was just a movie. Unlike that movie, you are in the real world of shrinking bank accounts, fewer projects, insolvent state and local governments, and a growing number of defunct or near comatose contractors without capital or cash flow, and who underbid just to stay alive. They may not want to pay you. They may not be able to pay you even if they want to.

This is where a bit of old fashion, Tony Soprano underwriting comes in. Tony knew daily where everyone was at financially. His credit check might be having lunch in your restaurant and seeing if you were busy. Not that much different that the former Federal Reserve Chairman Alan Greenspan would do, by looking at trucking in Des Moines, or imports of high tech goods, he could predict the direction of the economy months out. Pay attention to your gut, and follow up.

Some ideas to think like a lender, and check out the finances and litigation history of the prime contractor and owner — even someone you have worked with for years, as they go belly

up, and can leave you stranded and unpaid. One, get on an online database to check litigation activity, unpaid tax liens and judgments. Find out their workers compensation modification rate and whether you can expect a loose or tight ship onsite in terms of safety — be fore-armed. Do not guess. You are betting the company that the prime and owner are square shooters, but also a gang that can shoot straight. Meet them in person, and be sure to use a Pre-Job checklist for all critical information about who the players are, owner, property address and Tax Assessor’s Parcel Number (APN), surety name and number, bond copy, and the like. Be quick to put a Scarlet Letter in Red on the billing file, and make it a “watch list” file, just like banks do with troubled credit relationships. Manage it. Make sure lines of communication remain open.

HAVE A BID FORM REVIEWED BY YOUR ATTORNEY, YOUR INSURANCE BROKER, AND YOUR BID TEAM TO INCLUDE KEY TERMS AND EXCLUSIONS TO SET YOUR EXPECTATIONS.

It is easy to get cynical as a subcontractor, facing “the battle of the forms.” You use a tried and true bid form, get the job by pricing it thin, praying that the job goes perfect and you do not lose your shirt, and then you get the job. Only then, you have shoved under your nose a telephone book thick subcontract that requires you to save the world, insure everyone, and agree to wait until 2025 to get paid, or when the polar ice caps have fully melted. It begs the question, why even bother negotiating select exclusions, like limiting scope of indemnity and insurance, exclusion of vibration risk damage, getting retention paid on acceptance of piling not the end of the project two years later, exclusion of utility location and protection, access terms, number of mobilizations or extra moves, traffic control, consent in writing to the project schedule, or language that “in cases of conflict or ambiguity our bid form controls”?

The simple answer is that by engaging in a dialogue, you are setting your project expectations about payment, safety, project quality control, and risk management. Some prime contractors may refuse to yield, for whatever reason. In such a case, eyes wide open you make a business decision to proceed or withdraw from contracting with that prime. If you proceed you plan accordingly. And, in the event of a blow up on an issue, you can remind the prime of the negotiation — not for “I told you so” bragging rights, but to underscore these are issues you see as their responsibility in terms of project management.

For pile driving clients, we develop a taut negotiating language that says, “we will pay for what we break, but we do not want to pay for what you break.” That, “we will control our risk, we expect you to control your risk and not ask us to absorb your QC. Deal?” Folks on the phone will “man up” to this. The contracting community respects “owning up” and “responsibility” even if later, when a dispute erupts, the lawyers and insurance companies adjusting a loss seem to just point fingers willy nilly — never my fault, dog ate my homework, etc. A good paper trail of the “college try” effort often works wonders in close out negotiations, inter-insurance adjustments, claims, and disputes. The concept is, be armed with good arguments and willing to walk from too much risk, and know where that is. If you buy off on extra risk, then treat the job like a NASA launch — with great care, and respect when the red lights go on.

UTILITY LOCATION – DIG ALERT OR CALL USA STATUTES – THE BIG “GOTCHA.”

Most states have a “Dig Alert” or “Call USA” statute that places onto the “excavator” to call the Underground Service Alert (USA) dispatch center and timely identify that there will be excavation, so a technician can mark the utilities with flags or paint, and the contractor can pothole to verify location. So often, this is done wrong. When done wrong, it’s invariably your fault, or so the utility whose \$3 million

fiber optic cable was ruptured by your pile, along with the 300 businesses who found a class action attorney to sue you, the prime and the public agency over three-days lost telephone use. I have listened to tape recordings of the intake conversations between the contractor and Call USA and they sound like the old Abbott and Costello comedy routine, “Whose on First” — impossible to make sense out of. Thread this needle, or get caught facing a fat claim that you cannot believe is legally yours to absorb.

Train your staff, study the applicable statutes, identify high value utilities and risks. Make this a “measure three times, cut once” operation. There is no margin for error — especially if a live gas line or electrical cable, where a mistake means death. Make it your business to be safe here.

SAFETY FIRST MENTALITY – LIFT PLANS – ELIMINATE FIELD IMPROVISATION.

I have seen instances where seasoned, and confident senior crew leaders make a mistake; too used to risk. Rather than focus on the crane load chart the operator and foreman looked at the track treads, figuring that the crane would not quickly tip until the treads got light. Guess again, after the crane cartwheeled into the water, with the operator jumping to safety, and the equipment insurance company paying out \$500,000, or worse, if there is an injury to the crew or others. The injuries can be catastrophic, and life changing, and the increased cost of insurance impact the bottom line for years. Do not let that be you. Have lift plans for all major lifts, and ensure your team knows not to improvise. Be sure the cranes are maintained, records in good shape, and a “Safety First” mentality in place.

Safety is a function of training, doing the same thing the right way each time, not veering from an agreed plan, stopping when unexpected things are presented, and “buffer” and “recovery” space. It’s a bit like fishing at an overbooked fishing derby — someone is bound to get a hook in the ear. Insist that the prime and owner give you the space

and time you need to work safely, and level firm ground. Stand your ground.

SCHEDULE, DESIGN AND SOILS RISK, SUBMITTALS AND KEEPING PROJECT CHEMISTRY POSITIVE.

It is often said, a contract is something you look to when the parties no longer get along. While certainly true, know the claims, change order, notice and schedule terms of the contract documents as you go into the project. Be wary of submittal specifications that make it sound as if the pile fabricator is the pile designer. Beware of specifications that try to shift differing site condition risks to the contractor, and insulate the owner from owner controlled design risks. Most of all, be pro-active; professional, yet pro-active. Note and comment if the schedule has slipped, and why, and re-act and respond. Cut offs, depth, WEAP, set up, be in a dialogue with the engineer, and gain his or her respect that your team is more than just, “ours is to do and die, and not to wonder why.”

A comment about the danger of emails. The email is useful to communicate, yet, it is often resorted to when folks are “done talking.” It is anti-communication. If you sense that toxicity taking hold, pick up the phone and ask for a team meeting, the way folks used to. Use the beginning and end of the meeting to team build, and avoid accusatory language, contempt, or innuendo. Consider bringing in experts early to help convince project engineers as peers how to do it better. Turn the dialogue technical and away from the personal. It will get you the next job, and probably save you on this one.

OK, TIME TO GET PAID.

It often seems like root canal surgery is easier than getting paid your progress payments, retention and change orders amidst project controversy, or even disputes unrelated to your scope of work. The prolonged recession, and insolvent public agencies, and undercapitalized prime contractors all make it worse. Getting paid can be a nightmare if not prepared with a game plan.

Be sure you have complied with the preliminary notices to perfect your lien, stop notice and bond rights. Two, manage your billings tightly — call the day after due if not received, every time, be the nicely squeaky wheel, so they know they will get your call on day 31 after invoice. Three, stay on it, and on it, and on it, until paid. Finally, involve your legal counsel in designing a collection system and strategy to preserve your rights and your business relationships. Make all your charitable contributions *voluntary ones* — no free work due to failed follow up, losing lien rights, not reading the contract, or fear of making waves. Make waves.

CONCLUSION

In the Pile Buck Magazine’s editions to follow, this author will in later articles focus on select topics, rather than this cafeteria tray of issues facing the pile driving contractor. If you want a specific topic covered, just let me know, at markjrice@msrwlaw.com. Until then, keep driving them home. ■

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of their business, from collections, claims, differing site conditions and specification claims, delay claims, crane accident resolution, insurance, bid and contract forms, and corporate advising. Mr. Rice is a member of the California Associated General Contractors Legal Advisory Committee, and a member of trade associations serving the deep foundation and pile driving industries. Mr. Rice is a frequent lecturer on liens, stop notices, Miller Act and other bond claims, construction management and project delivery.

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