

SELECTING THE CONTRACTOR TO BUILD YOUR COMMERCIAL CONSTRUCTION

By Willis L. Kirk and Guy A. Power*

Oftentimes, the most challenging undertaking by a client organization or ministry is the construction of a new building. Unfortunately, many well-intentioned building committees are unaware of the various types of construction contracts available, including the benefits or pitfalls of each. This article is intended to inform pastors and client organization leaders on some of the options available to them and give good counsel for selecting the correct builder and also the correct contract to ensure the building program is the best it can be.

This article will address three important considerations for any CEO or pastor (nonprofit organization) and building committee about to undertake the stewardship responsibilities of building new facilities. There are two primary methods of design and construction: The Traditional Method and the Design-Build Method. We shall explore both here and give direction as to what generally works best for most congregations. We shall then explore the various “types” of contracts that are available and even address specific provisions that should be included and avoided in client organization construction. Finally, we shall consider important factors when selecting the proper construction company to price and build the new amenities on behalf of the client organization or ministry organization.

Two Primary Methods of Design and Construction

The traditional method is more commonly called the “Competitive Bid

Method”. The common perception is that the competitive bid method will always assure the best value for the client organization. This method typically moves through a series of phases from interviewing the architects, to a preliminary design, to working drawings, to the bidding process, to value engineering and redesign.

Under the traditional method, selecting a competent architect with client organization design experience is an important and time-consuming process. Finding an architect who has an understanding of the company or ministry philosophy of the client organization, who can work well with the building committee, and has a track record of designing functional buildings that meet the needs and budget of the client organization, is considerably more rare. A discussion of the criteria for hiring a design professional follows later in this section.

Once the architect is selected by the committee and approved by the client organization leadership, the architect meets with the building committee on several occasions to establish the design and space requirements for the construction project. Some degree of budgetary constraints is generally established. After the preliminary design is approved the architect begins the “working drawings”.

At the next stage, the “working drawings” stage, the architect secures the services of the professional engineers such as civil, structural, mechanical, and electrical, to produce working drawings and specifications that will meet all structural and code considerations.

Once the committee approves the working drawings, a bidding process is undertaken to select the general contractor. Generally, the bidding process commences any contractor who wishes to bid may do so. Some client

organizations permit bids by “invitation only”. It is not until the various bids are received and reviewed that the building committee and client organization leadership discover what the project will actually cost to complete! The contract usually is awarded to the “lowest bidder”. If all of the bids exceed the budget of the client organization, it is likely that all bids will be rejected and negotiations commence with the lowest bidder.

The various contractors often identify errors or omissions in the working drawings. These errors and omissions necessarily generate change orders after the construction is begun that can significantly alter the cost of the project as originally bid and accepted. It is not so uncommon a practice that the “lowest bidder” may have identified errors or omissions in such quantities to justify bidding at cost knowing that the change orders will generate normal or even above normal profits to his firm. If this negotiation process is begun, the contractor will seek to negotiate changes to the design with the architect to bring the cost of the building within budget. This process is called “Value Engineering and Redesign”. If successful, the building process can commence, but if they cannot accomplish the goal of bringing the project into budget, the building program may have to be abandoned.

If the building project is abandoned at this stage, the client organization leadership and building committee will face some negative consequences that often result in severe damage to the credibility of the client organization leaders. Some of those consequences often include:

- The funds spent on the architect are lost
- The time spent over the process is lost

- The congregation may become discouraged with the building program
- There may be a period of “fault-finding” and seeking to place the blame on someone (ultimately reaching the CEO or pulpit)
- Client organization leadership credibility will be severely and sometimes irreversibly damaged

Another method of design and construction is often called the “Design-Build Method”. This approach is established on a team approach among the client organization, the general contractor, and the design professionals from the onset of the building project. The objective is to ensure input from a variety of disciplines when developing a design achieving the criteria of space needs and budget restraints.

It is important for the client organization building committee to become familiar with the standard contract documents used between the client organization and the general contractor. The standard contract form will be either AIA (which stands for the “American Institute of Architects”) Design-Build Agreement Between the Owner and the Contractor or the AAGC (which stands for the “American Association of General Contractors”) Design-Build Agreement between the Owner and the Contractor. The latter is a two-part agreement.

Next, the committee will need to interview and select a general contractor. Several areas that should be considered include the following:

- Reputation
- Staff capabilities
- Costs and results
- Litigation history

Part I of the Design-Build Agreement sets forth the responsibilities of the client organization and the general contractor in establishing the criteria for

the design of the building to be constructed. It is essential that that client organization presents the contractor with a realistic budget and an assessment of the space needs if this process is to work properly.

Once the client organization and the general contractor have fully evaluated the budget, the costs, and the space needs, together the client organization and the builder select a compatible architect to add onto the team. The builder will provide detailed cost information and the architect will take the cost information and design the building. Together, the builder and the architect must produce a preliminary design from which the general contractor can guarantee a price before Part II of the agreement is executed. The client organization customarily risks no more than two percent of the entire budget up to this point and the amount spent is credited against the guaranteed price of construction. As stated, the price of construction must include the cost of all architecture and engineering expenses, with the exception of the civil engineering.

Prior to signing Part II of the agreement, the design team consisting of the builder, architect and engineers must provide the following documentation to the client organization under the terms and conditions of Part I of the agreement.

- Master site plan
- Complete wall section
- Perspective elevation
- Qualitative and quantitative scope of work
- Guaranteed price including all architecture and engineering fees.

The signing of Part II of the Design-Build agreement starts the process of completing working drawings and construction of the facility.

Comparative building contracts

If the traditional method is used, a contract or agreement between the client organization and the builder is signed at the time the bids are taken and a contract is awarded. If the negotiated bid method is used, the agreement is signed at the time all requirements of Part I of the contract have been fulfilled. The terms of Part II are negotiated at that point. When signing Part I of the agreement, it should be done so by the client organization with the intention that Part II will be executed if the Design-Build team has reached the objectives of the design with the parameters of space requirements and budget.

We strongly recommend that before signing any agreement with a builder or architect, have it reviewed by an attorney familiar with construction documents. It is imperative that the contractor presents you with a standard AIA or AAGC agreement. Many contractors produce self-drafted agreements that may not contain critical provisions for the client organization's protection and may limit or completely absolve the builder of responsibility in important aspects along the building process.

Three Types of Construction Contracts

There are three basic types of construction contracts used by builders: Lump Sum Firm Price (turn-key); Cost Plus a Fixed Fee with Guaranteed Minimum Price; and Cost Plus a Fee. In the Lump Sum Firm Price, the general contractor assumes 100% of the risk and gets 100% of the savings. The contractor works for his account.

- This approach is the typical contract used by general contractors when submitting a contract to the client organization. This format may be used whether the client organization used the traditional

competitive bid method or the design-build method of contracting.

- The contractor takes total responsibility for the cost of the project. The contractor enters into agreements with all material supplies and subcontractors, insurance and taxes required to complete the project.
- The contractor is solely responsible for paying all of the bills and providing the client organization with lien waivers ensuring that all bills have been paid.

The Cost Plus a Fixed Fee with Guaranteed Maximum Price approach requires the contractor assumes 100% of the risk by guaranteeing the price, but also permits the builder to be rewarded if the cost of the work is less than the guaranteed price. He is working for the client organization's account. Under the terms of this contract, the contractor assumes the same risk as under the Lump Sum Firm Price, except

- The work is performed at cost to the client organization
- The contractor's profit (fee) is a stipulated amount
- The contractor will assume the risk of a guaranteed maximum price
- The contractor will participate in any savings that result in the project be completed at a price less than the guaranteed maximum price
- The contractor will be required to verify to actual cost of the construction at the request of the client organization

The Cost Plus a Fee contract assumes no risk for the price of the project and the client organization is to receive 100% of the savings, if any. Unless the client organization has experienced construction professionals who are

familiar with calculating job costs and are competent to handle all of the paperwork on cost control, this approach is patently dangerous and costly for the client organization.

Please take note of this very important warning: There are people in the industry who are not licensed as contractors who call themselves "Construction Managers". Usually the contract that is presented to the client organization is not on a standard form (as discussed earlier), requires the client organization to serve as the contractor, and places all liability for construction on the client organization. In reality, this is nothing more than an agency arrangement whereby the construction manager will negotiate on behalf of the client organization with subcontractors and material suppliers. All subcontractor agreements are directly with the client organization. Oftentimes, the construction manager will provide an onsite job superintendent, but that individual is also placed on the client organization's payroll during the pendency of the project.

Although a project manager may provide an opportunity for substantial savings on the cost of the building project, there are substantial risks of cost overruns and other liabilities that the client organization assumes although it may not be prepared to accept. This is a risky approach for the client organization.

Qualifying Design Professionals and Contractors

Qualifying the design professionals and contractors is an absolute necessity. Approach this effort in a very businesslike manner. The client organization will be entering into contractual agreements that will have a tremendous impact on the future and ministry of the client organization. It is important that you have the most

qualified people to perform the services and work required for a successful building program.

Ask the following qualifying questions

- Who are some of your recent customers?
- How many projects have you completed in the past 3 years?
- How many of them have been similar to ours in terms of size and budget?
- Have any of your projects gone over budget and beyond schedule?
- How will you determine our needs?
- Who within your company will work on our project?
- How can you assure that we will get the best value for our investment?
- Are all professionals involved in the early planning stages?
- Do you provide a Lump Sum Firm Price or a Guaranteed Maximum Price?
- Does your firm comply with all of the necessary licensing requirements of the state, county or city?
- Are you familiar with the local building codes and requirements?
- How do you control the construction process and the paperwork?
- How do you provide for safety and security during construction?
- How do you charge for change orders?
- Can you guarantee a completion date?
- What is the financial stability of your company?

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