Who Bears the Blame?

A study finds U.S. contractors aren’t always judged the culprit, but design-build doesn’t help them prevail

When Fluor Intercontinental, a unit of the big engineering and construction services company, won a $74.4-million contract in early 2005 to build a new U.S. embassy compound in Haiti’s capital, Port-au-Prince, it ran into trouble with soil conditions that differed from what Fluor believed would be present. Fluor had sought a full 51% of the original contract value—$38 million—for extra costs that included additional security. In 2013, the Civilian Board of Contract Appeals seemed to recognize Fluor’s point about extra costs, but in contract disputes, winning on principal can still leave a company with empty pockets: The board awarded Fluor only $1.2 million.

Fluor is one of a number of contractors that wound up either losing cases or coming up short in damage awards in contract disputes with government agencies, according to a new study by the Construction Financial Management Association of 107 disputes. Design-build contracts, surprisingly, provided no measurable protection to the contractors when disputes arose, the study found.

Initiated by the Princeton, N.J.-based association as a way to determine where the fault in troubled federal public-works projects belonged, the study provided a more textured picture of controversial projects than can be gathered from anecdotes and news stories.

While contractors were at least partially vindicated just under half the time, they were far less likely to win in the larger cases with more money at stake, the CFMA study found. The average damages as a percentage of contract value came to only 6.9%—placing Fluor’s embassy claim outside the average.

Contractors succeed in winning claims more often when federal agencies change specifications midway in a project. Misunderstandings on specifications often trigger disputes, too. What surprised the study’s principal author most is that design-build provided no real advantage in positioning contractors to prevail in front of the Civilian Board of Contract Disputes. “One would have thought that contractors might have a better chance of winning with design-build because there is more up-front documentation,” notes Anirban Basu, chief executive of Sage Policy Group, which conducted the CFMA study.

Contractors who inked design-build contracts prevailed or won a split decision in court or in front of an agency administrative panel just 32% of the time. That percentage compares to a 45% success rate among contractors that used the traditional design-bid-build process.

The issues that eventually wound up in court often happened after the initial design process, with construction already underway, the CFMA study found.

Such was the case with Fluor, which won Port-au-Prince embassy work in 2005 under a design-build contract but, later, ran into serious difficulties after work began on the embassy.

While government agencies can’t be
totally absolved from the responsibility to disclose “superior knowledge” about changed project conditions, contractors that take on fixed-priced contracts, a hallmark of design-build, “assume a significant amount of risk,” the CFMA study notes.

Fluor altogether exited the embassy construction business in late 2006, reporting $133 million in losses during the third quarter that year on government projects across the world. One danger of design-build is that it may make contractors overconfident about the state of communications with the government agency with which they are dealing, with efforts easing off after the design is complete and work begins, notes J. Brad Robinson, CFMA’s chairman.

“It may be [that], having communicated so much before the project begins, the project manager may become a bit lax communicating during the project,” Robinson says, adding, “That may be the most important time to communicate.”

Beyond the design-build controversy, the CFMA study highlights other problems dogging contractors when they wind up in court—chief among them, poor documentation.

Too often, disputes between contractors and government agencies degenerate into a battle over whose memory of the event is the most accurate, a project manager for the contractor or the agency official overseeing the work, Basu says.

A common trigger for disputes is a change in a specification that is “either not properly articulated/communicated or that requires some level of countervailing financial consideration that is not offered,” the report states.

To prevail in court, “persistent documentation is crucial” for contractors, the CFMA study recommends. “Our review of cases indicates that many construction firms lose their appeals because of a lack of adequate evidence regarding the basis of their claims/defenses.”

A case cited in the study in which documentation paid off involves Columbia Construction Co., which the General Services Administration (GSA) hired to modernize an Internal Revenue Service complex in Andover, Mass.

Columbia suddenly found itself in a tight spot when the GSA insisted that cables for a new security system be “concealed or in conduit.” That was a major change from the initial contract, which called for the cables to be installed in cable trays under the raised access flooring system and above the drop ceilings.

But Columbia walked away with the compensation it had sought—$491,450—in part due to the fact it had the documentation to show the original installation plan agreed upon by the GSA.

For contractors in the field, “persistent documentation” can be as simple as creating an email trail, Basu says. Contractors need to clarify on a regular basis with the government agency what has been agreed upon.

Just simply hashing things out over the phone leaves too much open to interpretations. The contractor, among other things, should follow up a phone conversation with an email reiterating what was said and the plan of action agreed upon, Basu says.

Winning Record

Contractors had a winning record in legal showdowns with the GSA, either winning outright or winning a split decision in the majority of cases, according to the CFMA study.

Documentation isn’t always enough. For example, Rockville, Md.-based Grunley Construction Co. filed a claim for $758,000 against the Architect of the Capitol over work it performed fabricating and replacing windows on the Supreme Court. Grunley’s subcontractor “was required to redesign” windows and window trims because, claimed Grunley, the trapezoidal shape of the windows differed from what appeared on the initial drawings. But the contract appeals board said the errors were minor and didn’t rise to the level of different site conditions.

But government agencies were more likely to prevail in disputes over infrastructure projects with more than $18.3 million at stake.

And one prime reason for this strong government win record in bigger disputes is that the U.S. Army Corps of Engineers controls many of these larger infrastructure deals. Army engineers have proven to be the most formidable court opponent contractors are likely to come up against.

Overall, the U.S. Army Corps of Engineers won 21 cases outright, compared to just four decisions that favored contractors, the CFMA study observes. The meticulous engineering mind-set of the Army’s bridge and levee builders may make it a formidable opponent in court, Robinson notes.

“These are engineers. The Army Corps of Engineers is all about engineering,” he says. “There is great specificity. If contractors are going to pursue claims against that agency, they are going to come up against all of that retail specificity.”

By Scott Van Voorhis