



MINNESOTA CONSTRUCTION ASSOCIATION

2023 Negotiation Exercise

Negotiation Exercise:

You will participate in this event in groups of 4 and will be randomly assigned one of the following roles: **Owner** - a private developer new to developments in the region, and the company is what's known as a "serial builder" – i.e. it usually has one or more projects under construction and several more in the offing.

Structural Engineer - is the local choice for the Owner, although the Owner operates nationally and has access to and has used other Structural Engineers for other projects.

Contractor - has never worked for this Owner before.

Subcontractor - has recently begun to use negotiated Cost Plus GMP contracts for its work with the GMP determined later as the design is developed, and the GMP is added to the contract by an amendment.

****It is important that you take time to prepare to represent the interests of all of these roles since you could be called upon to play any 1 of them.**

The current Project was on a tight schedule and like many fast track projects, the design was not fully developed when the GMP was signed. The design documents were about 60% complete, and GMP amendment stated that the Contractor's price included all design development that was reasonably inferable from the state of the design documents at the time the GMP amendment was executed.

The Contractor's Framing Subcontractor was responsible for the construction of the balconies on the building. The Subcontractor had completed the balconies when initial inspections revealed concerns about the structural integrity and code compliance of the already completed balconies. The Structural Engineer issued a revision to the Owner that was subsequently sent to the Contractor and Subcontractor for pricing. The completed pricing was sent to the Owner, via the Contractor, in the form of a change order request. Despite the fact that the change order request was never formally approved and written direction to proceed was not formally given by the Owner, the Contractor/Subcontractor proceeded with the revision to the balconies. This work resulted in a delay to the project schedule of four months and cost \$800,000. When the Contractor submitted its first pay application for the change order costs, requesting the corresponding extension of time of four months, the Owner rejected the pay application. The Owner then notified the Contractor that it was the Owner's position that the balcony revision had been necessitated by defective construction of the balconies originally and suggested that the Contractor seek recovery from the Subcontractor. Because Contractor refused to remove the change order work from its pay application, Owner continued to reject its pay applications, issuing no further payment to Contractor for work completed.

Although the Contractor sent the Owner a notice of intent to stop work for non-payment, the change order work continued unfettered to completion. Upon completion of the change order work, the follow up inspection revealed additional concerns about the structural integrity of the balconies. The Structural Engineer issued another revision, and this time the Owner hired a separate contractor to come onto the site and complete the balcony work, seeking recovery from the Structural Engineer via their professional liability insurance policy.

The project is now completed, and the Contractor's payments have continued to be withheld by the Owner, leaving an outstanding contract balance of \$5,000,000. Subcontractor continues to insist that it is entitled to the \$800,000 in change order work, with both the Contractor and Subcontractor taking the position that the completion of the third revision to the engineering design amounted to an admission of design defect rather than construction defect.

The Structural Engineer continues to take the position that the revisions were necessitated by the original construction defect issues and that the revisions were simply a more cost-effective way to remedy the construction defect.

In addition to the allegations of construction defect, the Owner now asserts that it is entitled to Liquidated Damages for the four-month delay caused by the change order work. The Contractor contends that because the Owner hired a separate contractor to complete a third revision to the balconies, there was, at best, a concurrent delay that negates the assessment of Liquidated Damages. The Contractor files a lien on the project to protect its rights, but before the Contractor files for foreclosure of the lien, it schedules a negotiation session with the Owner, Structural Engineer and Subcontractor to see if the claim can be resolved.

Role play your assigned role:

CEO of the Owner
Structural Engineer
Contractor
Subcontractor

Can you negotiate a resolution of the claim?