



## Don't Proceed Too Fast For Conditions

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The advantage of design-build methods of project delivery to which owners most frequently cite is the increased speed with which the project is delivered. Because the designer and constructor are the same entity or on the same team, preliminary construction can begin based on preliminary plans before the architectural details have been completed. The savings in time are often quite substantial, and without the number or size of change orders that plagues fast-track construction not performed in a design-build manner.

In the recent case of *Marshall Contractors, Inc. v. Brown University*, the Supreme Court of Rhode Island was faced with the problem of deciding what the parties' contract was when the design-build project proceeded more quickly than the contract negotiations. The dispute arose over the construction of the Paul Bailey Pizzitola Memorial Sports Facility for Brown University in Providence, Rhode Island. Brown had selected Marshall Contractors from three other contractors to submit a design-build proposal for a new gymnasium. Marshall's original estimate of the building's cost was \$4.5 million, and Marshall shortly thereafter submitted a design-build proposal to Brown with a construction cost of \$4,627,134.

Because of very tight schedule constraints, Brown authorized Marshall to proceed with the site work and construction while a formal contract was being negotiated. However, the scope of the project was not clear, and the parties never fully reached agreement on it. The court's opinion describes letters sent from Brown to Marshall at various times during the project identifying a construction price of \$6,988,114 and subsequently a construction price of \$7,157,051.

Ultimately, Brown refused to pay any more than \$7,157,051. Marshall continued to perform the construction while various letters and other communications were exchanged between the parties trying to define the scope of the project. All attempts to agree on a definition of project scope were unsuccessful. At one point, Marshall sent Brown a standard form design-build agreement defining what Marshall believed to be the scope of the project, and Brown rejected the contract, proposing changes to it that would transform various categories of extra work into work that was within the scope of the lump sum agreement. Ultimately, Marshall completed the project for a final cost of \$8,674,811. The parties disagreed with regard to whether \$881,499 of disputed work was included or not within the original scope of the project.

A preliminary question submitted to the trial judge was whether there had ever been a binding contract between the parties. The judge held that although no contract had

ever been signed, an "implied in fact" contract had been created by the various communications concerning the project. An implied in fact contract is a form of an express contract in which the key elements can be found in or inferred from the communications between the parties, rather than finding that a contract did exist, the judge then ordered the case to go to trial so that a jury could determine what the critical terms of the contract were: namely, what the price was, and what work was included within its scope. The jury ruled in favor of Brown, finding that the contract price was \$7,157,051, and that the disputed \$881,499 was included within the lump sum. Thus, Marshall was not awarded any extra compensation.

The Rhode Island Supreme Court reversed the trial judge and vacated the result. It held that the judge was wrong to find that an implied in fact contract existed. According to the Supreme Court, "The inability of the parties to ever reach mutual agreement on what the scope of the project was intended to include certainly constituted the very heart and vital essence of their ongoing contract negotiations and prevented the emergence and the existence of any implied in fact contract." The court believed "that the parties at no time ever reached mutual understanding and agreement upon the most vital of the intended contract terms, namely, the scope of the work that Marshall was required to perform in light of the cost of the project as envisioned and set by Brown."

The Supreme Court remanded the case for a new trial. The new trial will presumably be based on the legal doctrine of *quantum meruit*, which allows, in the absence of a contract, a contractor to be paid the reasonable value of its work by the party whom that work benefited. Thus, in the retrial, if Marshall is able to prove that the benefit which its work conferred upon Brown was \$8,674,811, the final cost of the project, then Brown would likely be responsible for paying the additional sum.

There are several lessons to be learned from this unfortunate incident. First and most important, an owner and design-builder must reach an agreement on both price and the scope of the work included in that price in order to have a binding agreement. Second, an owner cannot protect itself from cost overruns simply by refusing to agree to pay more than a given sum, particularly if it has authorized construction work which is outside the scope of the project that the design-builder had described for the owner's fixed or maximum price. Finally, if an owner allows a design-build project to proceed in the absence of a contract, the owner will probably be ultimately liable for whatever project costs the design-builder reasonably incurs in following the owner's directions with regard to the design and scope of the project.

Although Brown University enjoyed the schedule benefits of design-build delivery methods by receiving its gymnasium more quickly than would be possible with traditional construction methods, it paid a greater price than it desired because it was not prepared to nail down the details of the project and the contract before committing fully to the project.

## About the Author

Mark C. Friedlander is a partner in the Construction Law Group at the law firm of Schiff Hardin LLP. He obtained his B.A. from the University of Michigan in 1978 and his J.D. from Harvard Law School in 1981. He is currently an adjunct professor at the University of Illinois at Chicago School of Architecture and a lecturer at Northwestern University's Engineering School, and had lectured at the Illinois Institute of Technology School of Civil Engineering from 1987-89, at the Engineering School of the University of Wisconsin in 1988 and 1990, and the Architecture School of the Georgia Institute of Technology in 1997-98. Mr. Friedlander concentrates his practice in construction law and litigation with particular emphasis on design-build methods of project delivery.

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