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PinnacleOne is a national construction consulting firm that provides sound advice, strategic solutions and peace of mind to its clients. Its diverse, highly trained professionals guide its clients through every step of the design, construction and contract closeout process to help them achieve their goals, and at the same time, avoid and manage risk. PinnacleOne's unimpeachable

**DEFUSING CLAIMS**  
**STRATEGIES FOR DESIGN PROFESSIONALS**

The design and construction of capital projects, both small and large, have been likened to minefields. Navigating through this minefield can be perilous for the untrained and uninitiated and challenging even for the battle seasoned veteran. On many projects, the dangers are few and far between. Some can be very explosive.

Having analyzed scores of these bad projects, we have witnessed how very experienced but unwary architects and engineers let small problems become large claims or have been set up by crafty, opportunistic owners and contractors. Far too often, we have also seen how these design professionals struggle to show that they met the industry standard of care. How can architects and engineers guide themselves safely through the perilous minefield of capital construction and defuse explosive, damaging claims? Consider the following:

**Fight the RFI Fight**

Despite what many people think, most contractors are not crooks. That said, nearly all successful contractors, like winning business men and women in every profession, are opportunists that strive always to make the most of the cards dealt them even when those cards may not be what they wanted. This includes trying to take maximum advantage of design errors or omissions by architects and engineers. Some less-professionally managed contractors attempt to use design mistakes to excuse their poor performance. A select few see money to be made by using Requests for Information (RFIs) to stack the deck, exaggerate either the



[Lee Schumacher](#)

Lee Schumacher, P.E., Vice President, leads the PinnacleOne's Dispute Avoidance and Resolution practice in the eastern United States. In his 25 year career, Mr. Schumacher has worked as a consultant to design professionals, owners, contractors, insurance companies, and sureties on a wide variety of project types throughout the United States and Canada. Mr. Schumacher graduated with Honors with a Bachelor of Science in Civil Engineering from the University of Kansas in 1975 and he is a registered Professional Engineer in Connecticut and Colorado. Mr. Schumacher is an Arbitrator for the American Arbitration Association and the Alternative Dispute Resolution Center. He

objectivity, along with a proven approach to planning and attention to detail, has earned the company a reputation as one of the finest consultants in the construction industry.

Headquartered in Phoenix, PinnacleOne regional operations are located in Irvine, Los Angeles, Sacramento, and Hartford.

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extent or impact of design errors and omissions, or both, and to set up the owner or design professional for a claim. To best position themselves on the battlefield in the RFI war, architects, engineers, and owners alike are well-advised to remember the famous motto of the Boy Scouts, "*Be Prepared.*"

### **Address RFIs in the Contract**

Because no design is perfect, RFIs are a necessary and valuable communication tool on construction projects. Unfortunately, it is not uncommon for some contractors to use them as one of their primary weapons in the "paper war" on difficult projects. These contractors, instead of properly using RFIs to seek design clarifications or address unanticipated as-built conditions, attempt to overwhelm the design professional and create the impression of a poor quality design by abusing the RFI process and deliberately producing an excessive number of RFIs, far exceeding the number of genuine inquiries about conflicts, omissions, the intent of the plans and specifications or other design questions.

Connecticut's Department of Public Works (CTDPW) is using its contract to prevent the misuse of RFIs on their projects, by including a special section in its Supplemental Provisions of its construction contracts that deals specifically with RFIs. CTDPW uses the following contract provision to define RFIs:

*"In the event that the contractor or subcontractor, at any tier, determines that some portion of the drawings, specifications, or other contract documents requires clarification or interpretation by the Architect, the contractor shall submit a "Request for Information" in writing to the Architect via Construction Administrator." (Project No. B1-JD 282, Section 01035, Paragraph 1.5.A)*

CTDPW provides an RFI form to the contractor and its Supplemental Provisions specifies that the contractor must use this form when submitting RFIs. In this way, CTDPW is assured that the RFI is complete with the information needed to properly answer the question and assess its impact, if any, on other work. CTDPW's form requires that the contractor's question be specific, indicate the work affected by the RFI and identify the specific drawing or specification

has provided expert testimony in court and arbitration, lectured extensively and is widely published.

Mr. Schumacher is located in PinnacleOne's Hartford, CT, office at (860)704-6100.

section being questioned.

To provide teeth to these provisions, CTDPW's Supplemental Provisions go on to give CTDPW the ability to reject the contractor's RFI if it does not meet the definition in the contract or it is submitted without the necessary, contractually specified information. CTDPW's contract language reads as follows:

*"The Architect will review all 'Requests for Information' to determine whether they are 'Requests for Information' within the meaning of this term. If it is determined that the document is not a 'Request for Information,' it will be returned to the contractor, unreviewed as to content, for resubmittal on the proper form and in the proper manner." (Project No. B1-JD 282, Section 01035, Paragraph 1.5.A4)*

CTDPW's contract recognizes the contractor's need for timely responses to their questions. CTDPW does this by committing to an RFI response time in the contract with the qualification that more time may be needed in some cases: CTDPW's Supplemental Provisions read as follows:

*"A 'Request for Information Response' shall be issued within seven (7) Calendar Days of receipt of the request from the contractor unless the owner determines that a longer time is necessary to provide an adequate response. If a longer time is determined necessary by the owner, the owner will, within seven (7) Calendar Days of receipt of the request, notify the contractor of the anticipated response time." (Project No. B1-JD 282, Section 01035, Paragraph 1.5.A.5)*

While placing this burden on itself and its design professionals, CTDPW's contract places a similar burden on its contractors. Specifically, CTDPW uses the following specification language to force its contractors to look ahead and ask their questions early enough so that the design professional has a reasonable time to review and respond to the RFI without impacting the project schedule:

*"If the contractor submits a 'Request for Information' on an activity*

*with seven (7) Calendar Days or less of float on the current project schedule, the contractor shall not be entitled to any time extension due to the time it takes the Architect to respond to the request provided that the Architect responds within the seven (7) Calendar Days set forth above." (Project No. B1-JD 282, Section 01035, Paragraph 1.5.A.5)*

CTDPW's contract provisions cited above, or ones like them, will not lessen the number of RFIs resulting from poor quality plans and specifications or unanticipated as-built conditions nor will they decrease the burden of answering RFIs in a timely and professional manner. They will, however, provide a first line of defense in those cases when poor performing or opportunistic claims-savvy contractors look to RFIs and the abuse of the RFI process to excuse their deficient performance or support inflated impact claims.

#### **Take All RFIs Very Serious**

If owners, architects, and engineers do not take RFIs serious, they can create significant financial exposure to themselves and the owner. Why? Because usually it is late responses to RFIs, not the RFIs themselves, that the contractor will use to justify their delay and productivity claims. As a consequence, when the construction drawings and specifications are unclear or incomplete for whatever reason, resulting in a large number of legitimate RFIs, it is very important that the resources be assigned to answer them completely and on time. Whether this effort is paid for by the owner or its design professional, it is money well spent. If necessary, the question of who pays for it should be deferred until after the project is over.

When faced with a contractor clearly focused on creating an illusion of a deficient design or overwhelming the design professional by generating an excessive number of unnecessary RFIs, many architects and engineers react negatively and are tempted to either ignore the RFIs or use their responses to the RFIs to vent their frustration. Design professionals beware -- the entire written record including the RFI responses could ultimately be interpreted by an independent third party many years hence to judge you. Build a record of professional and constructive responses, *not* glibness and unreasonableness. Make the written record reflect that you are the "white knight." If the owner or

an independent third party is asked to consider your responses as evidence against you in an arbitration or lawsuit, you will want their sympathies with you.

Given the technology available today, RFI logs should be electronically sortable and searchable and preferably linked to the other project documentation such as the project's CPM schedule, supplemental sketch and drawing logs, proposed change orders and change order logs. There are several software vendors providing this capability with detailed preformatted templates for use in managing the vast amount of documentation on construction projects. These days, all architects and engineers should consider using project management software with either standard database software, custom formatted databases, or both, to address the specific needs of their projects.

### ***Is There a Bigger Problem?***

The misuse of RFIs can be an early indication of a contractor that is intent on creating a project record to help excuse its deficient performance or to position for a claim. On these projects, RFIs are usually only one of the weapons employed by the non-performing or difficult contractor. Architects and engineers are often out-gunned by claims-savvy contractors in these situations and they can create significant additional financial exposure for themselves and the owner.

Why? Most design professionals have very little experience or expertise in construction claims or the dynamics of construction claim resolution. Just as owners do not expect their design firms to deal with special issues on the project outside their expertise such as unanticipated soils conditions, they should not look to their architects and engineers to address special challenges inherent with poor performing or claims-conscious contractors. Similarly architects and engineers should be wary of shouldering this additional burden and realize the risks inherent in their doing it.

Design professionals and owners be smart -- recognize that dealing with difficult contractors in potential claim situations is the special expertise of construction claims consulting firms such as PinnacleOne. Getting these experts involved early on a troubled project will better position the owner for the fight and will

typically result in significant savings in the overall costs of resolving the claims.

Win the RFI fight. Do not let RFIs be misused as weapons against you. Answer all RFIs professionally, completely, and on time. Arm yourself for this fight, as you should for all battles against unjustified claims, with your contract, proper documentation, and when appropriate, outside expert help. As they say in the Boy Scouts, "*Be Prepared.*"

*Authors' Note - This series of articles is adapted from a paper presented by Ernest Holmes, AIA, NCARB, NRCA and Lee Schumacher, P.E. at the Design Professional Risk Control Group (DPRCG)s 2001 Annual Convocation in Palm Springs, California. The authors express our thanks to Bob Camilleri, Camilleri & Clarke (Wethersfield, CT) for promoting PinnacleOne's participation in the program and his enthusiasm for the themes of this paper.*

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