

# 2022 Surety Bonding and Construction Risk Management Conference

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## 10 Risk Management Maxims that Will Change Your Approach to Project Delivery



THIS PAPER WAS WRITTEN IN CONJUNCTION WITH A BREAKOUT SESSION AT AGC'S 2022 SURETY BONDING AND CONSTRUCTION RISK MANAGEMENT CONFERENCE.

**Paper Title: 10 Risk Management Maxims that Will Change Your Approach to Project Delivery**

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**Session Title: 10 Risk Management Maxims that Will Change Your Approach to Project Delivery**

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# 10 Risk Management Maxims that Will Change Your Approach to Project Delivery<sup>1</sup>

By: Christopher J. Brasco, Esq. and Matthew D. Baker, Esq.

The construction industry is rife with unique risks which are encountered on every project. These risks, if not appreciated and properly managed, can quickly lead to project failure. As litigators in the construction industry, we seem to experience more than our fair share of troubled projects. For those of us who have overcome the perils that arise on troubled projects, our lived experience represents a treasure trove of wisdom to guide future conduct. As the demands of modern projects require our increasing cooperation and more efficient adaptation to change, it is imperative for practitioners to draw on the past to avoid similar results. The promise hidden within every good war story (and the reason we love them so much) is that the struggle was not for naught and that there are lessons to be learned from those hard-fought battles.

With the hope that our collective experiences may be of some help to others, we have gathered ten maxims of practice to be used as guideposts for industry professionals when handling project changes and potential disputes:

## 1. **THERE IS NO SUCH THING AS RISK AVOIDANCE, ONLY RISK MANAGEMENT**

This seminal principle seeks to reorient one's perspective when addressing project risks. As a substitute for counterfeit attempts at shifting risks to others (risk avoidance), this principle emphasizes identifying risks and developing mitigation alternatives (risk management). In an industry that gave rise to the changes clause, a successful approach to risk must be forward-looking. Effective risk management requires the identification of risks particular to a project, followed by the creative consideration of various problem-solving alternatives.

## 2. **PROJECT SUCCESS IS EITHER SHARED OR FORFEITED**

Perhaps in no other industry is effective collaboration, teamwork, and partnering more critical to project success than in construction. As one Court has noted:

We note ... that, except in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project .... Even the most painstaking planning frequently turns out to be mere conjecture and accommodation to changes must necessarily be of the rough, quick and *ad*

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<sup>1</sup> Note this paper represents an adaption of written materials previously presented and circulated by the authors. Many thanks to our panelists for their contribution to this work.

*hoc* sort, analogous to ever-changing commands on the battlefield.<sup>2</sup>

On every project, the inevitability of the unexpected creates either an opportunity to team for success or to fall into a quagmire of mutual blame and failure. Successful construction projects are rarely, if ever, attributable solely to the outstanding contributions of any singular player on the project team. Rather they are the product of the project team as a whole collectively working to achieve defined objectives and to overcome unexpected obstacles.

A mentality which approaches obstacles and difficulties arising during the course of a project with the objective of burying responsibility and attributing blame to others leads straight to project failure. There is an often used construction industry adage of unknown origin which adeptly summarizes the six phases of an unsuccessful project as follows:

1. Exultation
2. Disenchantment
3. Confusion
4. Search for the Guilty
5. Punishment for the Innocent
6. Distinction for the Uninvolved

This cycle of failure is not inevitable. Rather, parties who are willing to view project obstacles and disputes as opportunities for collaboration and dialogue are more likely to generate the types of solutions and outcomes which lead to project success.

### **3. BUILD A TEAM OF PROBLEM SOLVERS, NOT PROBLEM FINDERS**

This maxim comes from an internal document prepared by the opposition critiquing their team on a case we handled. Needless to say, it was of great value to our cause. At the center of most construction disputes, toxic personalities can be found. In each case, it is appropriate to consider whether or not the people who are representing your interests on the project are a constructive or destructive influence when attempting to resolve changes. Realigning a troubled project requires people capable of creative problem solving. All parties must consider whether they are interested in building a project or a lawsuit. Building a project after a significant dispute arises requires solution-oriented contributors, not impasse players.

### **4. THE WORST DECISION IS INDECISION**

High stakes litigation rarely, if ever, involves pricing direct cost changes. Rather, such litigation generally involves complex delay, acceleration, and inefficiency

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<sup>2</sup> *Blake Const. Co., Inc. v. C. J. Coakley Co., Inc.*, 431 A.2d 569, 575 (D.C. App. 1981)

claims. Complex delay, acceleration and inefficiency claims are the cumulative result of failing to adapt to change as it occurs. As unresolved changes mount, the schedule and budgets lose value as reporting tools and project costs become harder to manage. Costs spiral and parties' positions harden when changes are not constructively tackled when they arise.

## **5. TECHNOLOGY ALLOWS EASE OF COMMUNICATION AND EASIER MISCOMMUNICATION**

The last thirty years have ushered in a new era of simultaneous and effortless communication which has transformed not just the construction industry but our world. The benefits of such technologies are clear. Project communications can now be exchanged instantaneously, meetings can be held remotely via video conferencing software, and project metrics can be tracked in real time. However, these same tools also pose unique and serious risks. For example, communications can be sent spontaneously without adequate reflection, ease of communication can foster inadvisable informality, and every action is now documented with a digital trail.

Effective project communications are factual, accurate, and timely. Communications that are factual as opposed to opinion-based help create a record that can be subsequently reviewed to determine what transpired, accurate communications create credibility, and timely communications are necessary to permit effective action. These same principals are just as important in the context of today's electronic communications as they have always been with "traditional" forms of communications.

## **6. SHRINK A PROBLEM TO SOLVE A PROBLEM**

Complex problems do not always lend themselves to immediate resolution. The temptation to throw one's hands up when a global solution is not immediately attainable must be avoided. Identifying smaller issues that can be segregated and resolved builds important momentum toward even greater compromise. Similarly, never neglect exploring a less costly third alternative to resolving a construction impasse. Developing less costly construction solutions can often facilitate smaller agreements which build momentum toward solving a once intractable problem.

## **7. SET YOUR NEGOTIATION TABLE**

Our goal should always be to discern our opponent's bottom line settlement position before we commit to the expense and risk of a trial. While all will readily agree with this straightforward proposition, many will differ in their approach toward obtaining this valuable information. As an overarching concept, it is important to be mindful that a commitment to a winning process is the precursor to a successful settlement outcome. While many factors contributing to a successful process depend on the dynamics of the particular negotiation, a few fundamental

points are worth considering. Successful negotiations are attended by decision-makers with authority. When possible, the decision-makers should be individuals with some emotional distance from the project. As Albert Einstein recognized in a different context, “you can never solve a problem on the level on which it was created.” Engage decision-makers with corporate responsibility beyond the particular process so that benefits of compromise can be viewed with greater perspective. Effort must also be directed at having the parties make a commitment to a process. At least a day should be set aside for the meeting. Identify leaders in their respective organizations and have them attend. Successful people want to be connected with successful efforts and will invest themselves in a solution. Put some thought into how difficult personalities will be neutralized. Make certain the parties are aware you will be presenting your understanding of the case which supports your present position. Simply put, if your goal is to understand your opponent’s bottom line settlement position, you have to build a process conducive to discovering the sought-after information.

## **8. KNOW THYSELF**

Effective decision-making in the context of a construction disputes requires an accurate assessment of the merits of one’s own position. As the ancient Greek admonition attributed by Plato to Socrates reminds us, “Know thyself.”

Inflated case assessments result from a number of factors including but not limited to bias arising from personal involvement in the circumstances of a dispute, greater familiarity with your side’s information and documents, and an echo chamber generated by the witnesses and advocates working to support your position. However, such inflated case assessments block successful negotiations multiplying legal costs, exposure, and the diversion of organizational resources from productive endeavors. To avoid these pitfalls, decision-makers must be dedicated to critically examining their own case assessments and be willing to engage in the types of opportunities that permit the exchange and consideration of alternative perspectives.

## **9. YOU CAN’T STOP STUPID**

This adage was explained to us by a savvy professional in the surety industry. He used this phrase as a way of describing the difficulty in reaching a negotiated outcome when one party is unable or unwilling to rationally appreciate the risks attendant to the circumstance. Colorfully elaborating, he would further explain that the same principle is at work in the need to place warning stickers on lawn mower decks advising users not to place their hands under the mower. In this instance, it is important to be mindful, while you can’t stop stupid, you can sometimes avoid its impact by involving others in the education process. One technique for overcoming an impasse is to elevate the dispute to stakeholders that are senior to the individual behaving unreasonably. Alternatively, a mediator endorsed by the

party causing the impasse may be able to shed the light of reason on an ill-informed position.

## **10. PREPAREDNESS IS REALITY**

This principle reminds us that the facts which can be demonstrated with authority during a negotiation are those that become instrumental in the resolution of the dispute. The “truths” that resolve a matter are those that can be packaged and delivered to the decision-makers. Provable facts are the building blocks of the credibility that wins disputes. This principle is a controlling dynamic in settlement meetings and parties should not draw on facts they are unable to prove unless they are certain the other side is unprepared to establish an alternative finding.

Much to the chagrin of the people that lived the job, “what everybody out there understood” will not win the day if it cannot be proven as part of a winning theory of the case. While we firmly believe there are objective truths to be intuited in the universe, they will not break your opponent at the next settlement meeting. However, well-prepared themes with supporting documentation will win the day, no matter what the opposing side claims to have happened.