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ISSUE How does a board avoid a construction dispute regarding the performance of a major capital improvement project. The short answer: due diligence.

BACKSTORY The board selected an engineer to prepare specifications and perform oversight for a major capital improvement project. He was, unfortunately, unfamiliar with municipal requirements and/or local guidelines mandating certain approvals for the performance of the project from both the Department of Buildings (DOB) and the Board of Health (BOH). The project had to be stopped midway through for the submission of revised plans and approvals since the original specifications failed to properly address BOH requirements (though it was DOB code compliant). To obtain BOH approval, the building needed large-scale corrective remedial repairs. The process incurred unnecessary expenses that resulted in extensive delays. The contractor claimed not to be at fault since he followed the engineer's specifications, and received payment approvals; the engineer asserted that the corrective repairs were simply added value items required for the project and the board would have incurred these expenses if the specifica-

tions had been correct. The board threatened litigation against the engineer and contractor and negotiated significant reductions in both the engineering fee and the cost of the repairs.

COMMENT First, the board needs to perform due diligence with its manager in identifying the specific scope of work, establishing a budget, and engaging a construction expert, either an engineer or

architect, for preparing specifications for the major capital improvement project. This should be done in conjunction with the selection of a contractor. Just as there are doctors and attorneys with designated medical specialties or areas of legal concentration, the same is true for engineers and architects. These are the professionals who have an expertise and/or area of specialization; who are more familiar with the particular construction problem, [such as the heating plant, masonry facade, electrical upgrade, or swimming pool], and/or who have more experience or knowledge with the requirements of the municipality or DOB.

Therefore, the board needs to choose wisely and conduct interviews with both the prospective experts and contractors, as well as check references and experience. The scope of work designated in the specifications is critical to the success and performance of the major capital improvement project, including the scheduling time of start and finish; progress payments, retainage and penalty provision; amount of insurance, workers compensation, umbrella coverage and deductible limit; and the type and length of guaranty/warranty.

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The use of the standard American Institute of Architects (AIA) construction agreement presents certain issues since the AIA General Conditions require significant revisions in order to properly protect the owner building. Accordingly, it is recommended that the

attorney revise same and/or prepare a rider or an entire separate agreement that does not incorporate the general conditions, which are not necessarily owner-friendly. The utilization of the expert and/or the manager to perform oversight and supervision of critical stages of the project and approve payments is both necessary and essential to

the success of a Project, since it enables the expert to confirm compliance by the contractor with the specifications and adherence with manufacturer's requirements, in conjunction with the issuance of the manufacturer's warranty. The lesson: proper, prior preparation prevents poor performance.

—Ronald A. Sher

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