

# ACEC INSIGHTS

American Council of Engineering Companies of Massachusetts

June 2009

## The Dirty Dozen of Project Financial Management

By Lee James, CPA, CMC, CBI, Lee James & Associates, Inc.



Through work with many geotechnical and other engineering professionals for over 25 years, I have gained immense respect for their willingness and enthusiasm to literally get into the dirt and do whatever is needed to address their clients' technical problems. My experience also continually confirms that, if ever challenged by someone, there is no end to the level of detail researched and resources uncovered by engineers to support a position.

In my work as a business professional supporting the engineering profession I often wish the same level of resolve and tenacity occurred when someone challenges the engineering professional on pricing, contract terms, changes and other business aspects. To fully obtain what is deserved in the engineering business one must be willing to get into the dirty basics and accept that 'the devil is in the details' of completing the business aspects of your projects.

This article is intended to arm the engineering professional in obtaining what is deserved in all project assignments. In accomplishing this clients and peers must be held accountable in implementing disciplines that assure increased success. By getting actively involved, engaged and mixing it up with clients and fellow professionals many positive outcomes result. The dirty dozen is as follows:

**1. Client Selection**—Every client is not a good client. Select clients that fit with your culture and business strategy. If you are a relationship based firm, do not work for clients who only select based on lowest price. Spend your time and energy with prospective and present clients who value relationships and select based upon wanting present and lasting relationships. At times, and particularly at the beginning of a relationship, you may need to lower your price to win work but after that the relationship basis can enable an edge in understanding what is specifically needed and/or sole source work.

### Recommended Action:

- *Leadership*—Institute a formal documented Go/No Go evaluation process;
- *Project Managers*—Document decisions for all new clients.

**2. Pricing**—Do you believe in your rates? If not, how can you possibly address an objection stating you are too highly priced? Become comfortable with your pricing so that you are prepared to address objections that you are too expensive. There will always be someone who will price their services lower than you. Accept this and be prepared to differentiate yourself, your services and your firm. Consider pricing your services on other than an hourly basis then learn to sell total price commitments and the benefits of this to your clients.

### Recommended Action:

- *Leadership*—Share 'lessons learned' about pricing objections and how successfully overcome;
- *Project Managers*—Understand how your pricing compares with competitors and establish an approach to support and sell.

**3. Communicate Well Defined Scopes of Work**—Two circumstances often cause difficulty in developing a well defined scope. The first one is, "I don't have time to do this!" When the need to begin work immediately exits the well defined scope should be developed as soon as possible after starting the work and should be communicated both verbally and in writing.

Circumstance two occurs when it is difficult to define the scope because of the ill defined nature of the work to be performed. As the engineering professional, it is important to define what it is you will and will not do for a specific price. How can you possibly make commitments to your client if you do not develop a well defined scope of work? Assure that your client and your people working on the project understand the scope of work. Also assure that your professionals understand the expected budget to complete assigned responsibilities. Without this changes to projects are difficult or impossible to properly define and obtain.

➔ [continued p. 7](#)

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## TABLE OF CONTENTS

**ACEC/MA Government Affairs Committee—FY2009: The Year in Review**  
[PAGE 2](#)

**Managing Risks to Design Professionals in an Economic Downturn**  
[PAGE 3](#)

**The Green Team: Learning and Leading**  
[PAGE 4](#)

**A SEAT AT THE TABLE: The Leadership Education Committee**  
[PAGE 5](#)

**Annual State Markets Conference**  
[PAGE 5](#)

**Non-Compete/Non-Solicitation Agreements: Are They the Wave of the Future?**  
[PAGE 6](#)

**Upcoming Events**  
[PAGE 10](#)

**New Members**  
[PAGE 11](#)

Select a title for a  
**QuickLink** to your  
favorite article.

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# ACEC/MA Government Affairs Committee— FY2009: The Year in Review

By David F. Young, PE, Vice President, CDM



The Government Affairs Committee (GAC) had a very active FY2009 tracking and advocating on key legislation that affects our member firms and the consulting engineering industry. We met on the first Wednesday of every month to discuss pending legislative issues, to review our legislation tracking report and to plan for related events we held throughout the year. This year, the GAC focused on the following key legislation:

**2007–2008 Legislative Session:**

- A bill was filed with the Board of Registration that passed and became Chapter 439 of the Acts of 2008 at the end of the session. This law permanently adds two professional land surveyor seats to the Massachusetts Board of Registration. We had successfully worked for the addition of these positions in earlier legislation but due to technical issues the positions had a sunset clause. This law makes these positions permanent, and it clarifies the authority of the Board of Registration to issue regulations for mandatory continuing education for license renewal, if the Board of Registration decides to take that step. The law does not mandate continuing education;

- A Qualifications Based Selection (QBS) Bill was filed at the beginning of the session. This bill would have mandated the use of QBS for specific state agencies when selecting design consultants on horizontal type projects. QBS is already required for vertical building projects under existing law. Representative Joe Driscoll (D-Braintree) sponsored the Bill for us and clearly supports QBS. The Massachusetts Municipal Association supports QBS in concept but did not support mandating its use to municipalities. Working with the ACEC/MA QBS Committee and several other coalition partners we made good progress in educating some legislators about the benefits of this Bill, but ultimately the Bill remained in Committee and did not pass;

- We filed the Water Infrastructure Finance Commission Bill sponsored by Representative Jeff Sanchez (D-Jamaica Plain). The bill's intent was to form a special commission made up of over 14 appointees to develop a

comprehensive, long-range water infrastructure finance plan for the Commonwealth and its municipalities. Recommendations for enhancing existing revenue streams, develop-

The Government Affairs Committee (GAC) had a very active FY2009 tracking and advocating on key legislation that affects our member firms and the consulting engineering industry.

ing new sources of revenue streams and evaluating alternative implementation methods would be just some of the goals of this commission. We worked to attach this legislation to the Environmental Bond Bill, which passed,

but the Governor line item vetoed the commission language as he believed the work of this commission was already being done by several state agencies;

- The GAC advocated for several other Bills including bonding for transportation and bridge programs;
- We worked in coalition with Our Transportation Future by advocating for an increase in the state gas tax and for other funding streams for infrastructure.

**2009–2010 Legislative Session:**

- Representative Joe Driscoll refiled the QBS Bill (HB2978) at the beginning of the new legislative session. The education efforts of the previous few years seem to have paid off because as of this writing the legislation is attached to the Senate version of a transportation reform bill. The QBS language did not make it into the House version of the Bill, but we are working feverishly to educate representatives in the hope that this language will survive in the Senate and House Conference Committee. This Committee is responsible for combining the two versions of the bill prior to sending it on to the Governor for signature. Stay tuned on this on;

- Representative Jeff Sanchez re-filed the Water Infrastructure Finance Commission Bill

➔ **continued p. 8**

# Managing Risks to Design Professionals in an Economic Downturn

By David J. Hatem, Esq. and Daniel C. Poteet, Esq., Donovan Hatem LLP



The current economic downturn, needless to say, has resulted in a challenging and tight business climate across all industries and disciplines.

The design and construction industry is certainly among the markets significantly impacted by the current credit breakdown. The stagnating lending climate has made it difficult for private entities to finance projects, while many institutional owners have also scaled back construction projects because of significantly diminished endowments or other cash flow concern.

One effect to the design profession is that several key areas of risk intensify for the work that is available. With funding difficult to come by, clients and third parties are considerably more cost-conscious and are at a greater risk of finding themselves unable to fully fund the project. This tends to result in design professionals' fees being reduced by both the increased competition for projects and owners' added emphasis on keeping project costs down. The heightened cost-sensitivity intensifies a number of risks to design professionals, yet there are ways to manage and account for such risks ranging from increased fast-track projects, to more design-build projects, to issues associates with suspension and termination of projects.

## Third-Party Claims

Third-party claims are always a risk to design professionals. There is some room for debate, but typically third party claims make up about one third of total claims against design professionals. In down economies, this tends to rise to approximately half of all claims. Often, this is because other project participants have failed, so the designer is among the last parties standing. Third-party claims are generally more challenging to resolve for two reasons. First, there is no contractual relationship, which makes it more difficult to define any duty the design professional may owe the third party. The contract with the design professional's client is not irrelevant, but does not carry the force that it does in a dispute with the client directly. Secondly, there is often no

anticipated future opportunity to work with the third party, resulting in a reduced incentive to reach an amicable resolution.

Design professionals should minimize contact with third parties during projects to try to reduce third-party claims. Where the designer's services involve studies, reports or affidavits,

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it is especially important to limit the scope of reliance. Design professionals should include language in their client agreements that limit who may rely and for what purposes on the material. These documents are also typically suitable for

limitation of liability provisions. In addition, including the specific limits and assumptions in the report or study itself can provide additional protection against third party claims.

## Public Projects

In the public sphere there is likely to be an increase in False Claims Act prosecution and similar state-level statutes. Design professionals will want to be aware of claims arising from inaccurate cost estimates or budget certifications.

## Transparency

There is some precedent for design professional liability to the entities financing the client's project. In one case, a designer was found liable to the developer-client's lender for failing to report budget and cost irregularities. In this case the designer was aware that the client was underrepresenting costs and the project budget to the lender. Despite the fact that the client assured the designer that it was taking care of the issues, the court found against the designer because it knew of the improper requisitions and inadequate budget yet still signed requisitions to the lender. Where design professionals have contractual responsibility for cost estimating and budget evaluations and updates, they should be aware of the potential for exposure to the client's lender, even without a contractual obligation to the lender.

## Client Intake and Internal Accountability

Particularly for firms with multi-branch offices, a down economy may increase the temptation to deviate from standard contract terms and conditions. An internal measure available to design professionals is to implement or continue risk management practices for all offices, including branch offices. These practices should confirm that all offices review and revise contracts, sign only acceptable standard terms and conditions, and clear any contract deviations through the main office.

In evaluating how a project is progressing it is important to bear in mind the potential for a biased internal assessment. A project manager may be reluctant, perhaps unconsciously, to give an objective assessment of project problems. The designer may want to have a separate staff member monitoring the project for payment timeliness and issues that arise.

## Assignment

Because the same contractual arrangement between different entities can result in a very different working relationship, design professionals may consider emphasizing mutual anti-assignment clauses. While it is common for agreements to contain a one-way assignment limitation that prevents the design professional from assigning the agreement, adding a provision that limits the client's right to assign the agreement is recommended. This provision would be subject only to assignment to the client's lender, provided the lender agrees to assume the client's rights and obligations.

## Fee Claims and E&O Counterclaims

With financing tedious, the design professional faces a greater likelihood of delinquent payment from its client. Given that it is more likely now than under normal conditions that a fee claim will trigger a substantial Error and Omission (E & O) based counterclaim through the client's desire to avoid paying, it is important to carefully weigh bringing a fee claim. As mentioned above, internal bias as to the strength of the claim is one factor, and design professionals should endeavor

➔ [continued p. 9](#)

# The Green Team: Learning and Leading

By Alison Smith, Stantec, Consulting Services, Inc.



Engineers, long at the forefront in seeking sustainable design solutions, are expected by clients and other design team members to step forward as sustainability leaders like never before. Those firms that have been incorporating sustainability practices into their own operations have been able to demonstrate their commitment to 'green' and discover valuable insights in the process.

The ACEC/MA Private Sector Committee (PSC) wanted to get a pulse on the kinds of sustainability initiatives that member firms were pursuing and conducted a member survey last fall. A key survey finding was that members wanted ACEC/MA to provide a forum to share information on what firms are doing. Thus, an in-depth roundtable discussion was held on March 11 at The Engineering Center to review the results.

Representatives from 14 member firms openly discussed their own firms' sustainability initiatives including everything from simple changes like recycling, turning off lights and computers and switching from paper cups to ceramic mugs, to use of electronic filing and billing systems and encouraging carpooling, telecommuting or alternative modes of transportation. Many firms reported adopting such practices as minimizing staff travel with conference calls or web conferences, educating staff on green design issues and establishing internal sustainability plans. Companies have also been engaging project teams to find more sustainable project approaches. One firm, for instance, described a scheme staff devised to exchange equipment with vendors on-site to reduce the waste and emissions of driving them back and forth to project sites.

All participants agreed that these tactics are exciting steps in the right direction, and the group wanted to dig into the 'big picture' responsibilities engineers have not only in moving sustainable solutions forward within their own companies but also with our clients and our communities. Participants broke into smaller groups to discuss the challenges and possibilities of three different aspects of sustainability—internal policies, client relations and the social, or human, element.

Internally many member firms have made impressive strides incorporating sustainable practices into day-to-day operations and some progress towards setting more wide-reaching goals. Other firms have adopted sustainability plans that measure their progress using the 'triple bottom line' standards of 3P (People, Planet, People) reporting and disseminating

information to stakeholders in formal reports or on their firms' websites. Many others reported hiring more LEED accredited professionals or establishing dedicated sustainability service groups and even divisions.

The director of sustainability at one large firm explained the development of his company's sustainability program as an evolution from the technical services they already offered. "We were providing sustainability services for our clients and saw the need to better coordinate these activities across our markets and provide improved linkages with our internal office operations," he said. "That required an interdisciplinary approach and pulling people together to work on the complex issues of sustainability in a systematic manner."

While internal sustainability programs are making it easier for firms to institute, quantify and measure their own performance as a sustainable

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company, participating firms said they run into challenges to feasibly implementing some of the changes they would like to make. One issue several multi-office firms noted is the difficulty in updating their facilities to meet LEED for Commercial Interiors (CI) criteria and

working with landlords during lease negotiations. "In some cases, building owners and managers may have heard about LEED but may not know much about the specific requirements or the benefits of conforming to the criteria," said one participant. "In one of our offices, we discussed our guidelines with the building owner and, as a result, were asked to submit a proposal to design a green roof for the building."

Similarly, some participants also experienced some challenges convincing clients to fully embrace sustainability. In addition to the pervasive perception that sustainable design means higher costs, many clients are concerned about the risks of trying innovative approaches that may not have a long history of performance data. "Money is the biggest road block for many clients right now," one firm representative stated. "But as engineers we need to find ways to help our clients get beyond liability concerns to evolve new, more sustainable initiatives."

Most in the group agreed that the engineering community needs to help create a shared

understanding of what sustainability means, enabling us to better educate our clients, the public and ourselves while we advance our capacity to lead in this arena. Ideas on how to accomplish that goal included developing educational programs on sustainability for clients, promoting activities our clients have already undertaken to be greener and expanding the ways sustainability principles can be applied to a wider range of engineering projects that go beyond the LEED standards' focus on buildings. For example, transportation agencies in some states have started to develop sustainable design standards for roadways such as the New York State 'Green Lights' program.

The group also discussed some of the social factors surrounding sustainability and sustainable design. A recurring theme involved the importance of listening to people and engaging them in building solutions. Some firms have responded to staff enthusiasm by engaging them in reviewing internal company processes and systems as a prelude to generating new, more sustainable practice standards that enhance perceived employee and client value. These changes help create an awareness and understanding of sustainability that spans across the company and impacts employees, clients, projects and the larger community.

ACEC/MA member firms can be of help here by assisting employees to step forward as leading thinkers, actors and planners for sustainable issues. The group's ideas ranged from better communicating engineering as a green career choice to promoting social responsibility through pro bono work such as Engineers Without Borders or their own conservation commissions. "We're all in this together," says PSC co-chair, Sylvia Wheeler. "Engineers' sound technical knowledge and passion for finding solutions can be mobilized to make sustainability goals real, contributing to our global society in unparalleled ways."

ACEC/MA's PSC committee intends to continue the sustainability discussion and further explore a role for ACEC/MA in this movement. One concept is to form a Sustainability Resource Group within ACEC/MA to encourage sustainability officers and professionals to exchange their companies' experiences more regularly. For more information or to help, please contact PSC co-chairs Sylvia Wheeler at [swheeler@HaleyAldrich.com](mailto:swheeler@HaleyAldrich.com) or Chris Nowak at [cnowak@vhb.com](mailto:cnowak@vhb.com).

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## A SEAT AT THE TABLE

“A Seat at the Table” is designed to provide our ACEC/MA membership with direct insight into the wide range of endeavors, accomplishments and special activities undertaken by the many committees and task forces of ACEC/MA on its behalf. Remember, ACEC focuses on advocating laws, policies and regulations that improve the business environment and on helping member firms improve their business acumen, and can only be successful in this regard through an active membership. So come take “A Seat at the Table!”

### The Leadership Education Committee

By Joseph Cormier, PE, S E A Consultants and Babur Mian, Mian Adam & Associates, LLC



Have you heard of the ACEC/MA Leadership Education Committee? If you haven't don't think you're out of touch. Formerly named the Emerging Leaders Program Committee, the Leadership Education Committee (LEC) was renamed at the June 2008 Strategic Planning Session with the intent to broaden the Committee's scope. The LEC was originally formed over ten years ago to plan and execute the Emerging Leaders Program. However, in the past year the Committee has introduced two new programs designed to augment our very successful “Emerging Leaders” program. Since all three programs focus on leadership a new committee name seemed appropriate.

The LEC celebrated the 10th anniversary of our first leadership education program, “Emerging

Leaders,” earlier this year. As always, the 2009 class was full to capacity with 25 attendees, and it continues to receive high praise from those who have participated. The program consists of six sessions on topics of significant value to engineers on a leadership track. Topics include People Management, Strategic Planning, Government Affairs, Risk Management, Marketing and Finances. The intent of each session is to expose the ‘tip of the iceberg’ on these topics as a means to raise individual awareness while providing an introductory level of instruction. After completing the program, our attendees often comment that “Emerging Leaders” was excellent yet left them wanting more extensive information. That's partly why we now sponsor three programs.

The LEC launched its second leadership program, titled “Everest,” in the fall of 2008. This program was the vision of several senior ACEC/MA directors who sought a forum that allowed leaders to discuss issues facing our Massachu-

setts engineering companies. They believe it is critical in a program such as “Everest” to provide an environment conducive to open and honest discussion. After all, we are competitors at times. To create the desired environment, Hugh Hochberg of the Cox Group was brought in to moderate the meeting and he did a great job establishing the desired trust. Initially the LEC intended to hold the “Everest” program every other year. However we received such positive feedback on the 2008 program that it was decided to hold a second “Everest” event in the Fall of 2009. Details are currently being finalized so watch for further information coming soon.

The Committee also spent considerable effort in 2008 and 2009 finalizing details for another leadership program called “Odyssey.” This program is designed to fill the gap between the Emerging Leaders program and the ACEC

➔ [continued p. 10](#)

### Annual State Markets Conference

By Natasha Velickovic, PE, VHB/Vanasse Hangen Brustlin, Inc.

Over the past seven years ACEC/MA has hosted an annual State Markets Conference that brings together a core group of state and local officials to present their vision, goals, procurement process and upcoming projects. Given the state of the economy and the topic of stimulus money at the forefront of many meetings, conferences and general water-cooler discussion, this year's State Markets Conference brought a refreshing reminder that there is still much work within the Commonwealth and its agencies. Conference attendees heard from senior leaders at several public agencies and had the opportunity to ask questions regarding upcoming state projects and funding.

This year's conference, which attracted 135 ACEC/MA members, was held at the Westin in Waltham on Wednesday, April 15th. Featured speakers included:

- Frank Tramontozzi, P.E., Chief Engineer, Massachusetts Highway Department
- Jae Kim, P.E., Director of Water Engineering, Massachusetts Water Resources Authority
- Stephen Shea, P.E., Director of Engineering Design, Boston Water & Sewer Commission
- Sam Sleiman, P.E., Director of Capital Programs and Environmental Affairs, Massachusetts Port Authority
- Philip Giudice, Commissioner, Massachusetts Division of Energy Resources
- Michael Williams, AIA, Director of Programming, Division of Capital Asset Management
- Charlie O'Reilly, P.E., Assistant General Manager of Design and Construction, Massachusetts Bay Transportation Authority
- Jonathan Gulliver, Director of Innovative Project Delivery, Department of Conservation and Recreation

The program was a huge success, particularly for the individuals left standing at the end of Frank Tramontozzi's short and amusing game with the program attendees; the individuals who had not worked with MassHighway in the past year got to share their business cards with Mr. Tramontozzi. Considering only a handful of folks shared their business cards there was indeed great optimism in the room.

We look forward to hosting the 8th Annual ACEC/MA State Markets Conference in 2010 and hope to see you there.

*Natasha Velickovic is an Engineer/Transit Planner with VHB's Transit & Rail group and has over 10 years of transportation engineering experience at the company. Natasha joined ACEC/MA's Program Committee one year ago and the State Markets Conference is the first event she has co-chaired. She can be reached at 617/728-7777 x1157 or [nvelickovic@vhb.com](mailto:nvelickovic@vhb.com).*

# Non-Compete/Non-Solicitation Agreements: Are They the Wave of the Future?

By David A. Chappell, PE, President, Chappell Engineering Associates, LLC and Cheryl A. Waterhouse, Managing Partner, Donovan Hatem LLP



Employee turnover among upper management is prevalent in today's increasingly competitive consulting engineering market. Departing employees who leave a firm to join another, or to start their own firms, are frequently in direct competition with their former employers. While an employee adds value to a new firm in various ways, in addition to his or her professional skills, the employee's relationships with clients and knowledge of particular practices developed over his or her career can be invaluable. An employer who loses a key employee to a competitor will want to make sure it preserves the firm's confidential information, business opportunities and client relationships. The high level employee leaving needs to take care not to violate any duty he or she may have to the company. Both the departing employee and the former employer have specific responsibilities to conduct themselves in an ethical and lawful manner both before and following the employee's departure.

Many employers have turned to Confidentiality, Non-Compete and Non-Solicitation agreements that spell out post-employment restrictions on using confidential information, soliciting work from or competing for work with former clients and soliciting other employees to leave the firm. These agreements are generally signed by the employee prior to or on their date of employment, or when the employee has been promoted to a management position. These agreements remain in effect for a specified time period following the individual's employment termination. For such agreements to be enforceable the employer needs to provide consideration, such as employment or promotion or other change in status for the better, in exchange for the employee's promise not to compete, disclose confidential information or solicit company employees. In addition, when an employee's job changes a new non-compete agreement should be entered into with the employee as any prior such agreement may no longer be considered valid. The extent to which such agreements are enforceable in general is governed by state law and can vary greatly state by state.

Because of an individual's right to pursue gainful employment, overly restrictive clauses in non-complete and non-solicitation agreements can be interpreted by the courts as constituting

"restraint of trade" and may be deemed invalid. Non-compete and non-solicitation agreements must be reasonable with respect to scope, time frame and geographic area, and the agreement must be necessary to protect a legitimate business interest, not simply based on a firm's desire to limit competition. Non-compete agreements are most often used by engineering firms to protect a firm's goodwill, defined as the firm's reputation, client relationships and the value of that business over and above 'book,'

Non-compete and non-solicitation agreements must be reasonable with respect to scope, time frame and geographic area, and the agreement must be necessary to protect a legitimate business interest...

or assets minus liabilities. To enforce a non-compete/non-solicitation agreement, an employer must be prepared to demonstrate that a former employee is now in a position, with the new employer, to appropriate the former employer's goodwill in such a manner that the intrinsic value of the firm is reduced. The language of these agreements can be important for employees, and employers; the agreement may state what is confidential and proprietary information, what actions are prohibited and what harm might occur upon breach, which can lay the groundwork for injunctive relief

In the absence of restrictive covenants, an individual's employment is considered 'at-will' meaning the employee or the employer can end the relationship at any time and for any reason. The rights of an at-will employee are covered under tort law which generally allows for an individual's right to 'free and fair competition.' In general, an employee is free to actively pursue opportunities in direct competition with their present employer while still an employee, and has no obligation to disclose these activities. A former employer cannot prevent a departed employee from utilizing their normal skills of trade to the benefit of the employee's new employer.

However, employees do have certain obligations to their employers. This is referred to as the, "employee duty of loyalty." Employees cannot disclose trade secrets or confidential business information to their new employer. Confidential business information may include client lists, pricing information, proposals or fi-

nancial information. The general financial information of a publicly traded company may be considered 'public' or 'routine.' However, detailed financial information that discloses pricing policies or profitability of certain clients can be considered confidential. An employee cannot use his or her employer's funds or assets (including computers) to pursue future gain, to harm the current employer or to solicit other individuals to work for a competitor until they have also departed the firm.

Engineers, particularly those in management positions, spend a considerable amount of time and effort cultivating client relationships. To what extent may a departed employee compete for work with his or her former clients? Employees who are not subject to non-solicitation or non-compete clauses and agreements generally may freely pursue any normal business activities that constitute reasonable competition. They have the right to compete for the same client dollars that their former employer pursues, including marketing a former employer's clients, as long as their behavior does not use the confidential information they obtained at their prior firm to hurt that former employer. Prohibited behavior includes disclosing trade secrets or using knowledge of their former employer's confidential pricing information to offer a better deal. Badmouthing one's former employer is also prohibited to the extent it constitutes false or defamatory statements used to induce a client to sever a contract or business relationship. Conversely, employers can be subject to damages for defamation of former employees in the context of termination.

Here are some general guidelines for conduct during employment transitions:

## For Employers:

- Determine if a prospective employee has a non-compete agreement with his or her prior employer and review any such agreement;
- Consider having non-compete and non-solicitation agreements for all high-level employees and any employees with access to highly sensitive information;
- When promoting an individual check whether any non-compete agreement should be renewed; and
- Document what information is confidential and proprietary and, therefore, cannot be disclosed.

 [continued p. 10](#)

# The Dirty Dozen of Project Financial Management

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## Recommended Action:

- *Leadership*—Implement a discipline/policy that no significant (\$ limit defined by you) work will be performed without a well defined scope of work;
- *Project Managers*—Take time to define and communicate scope to the client and all assigned project people.

## 4. Written Contractual Commitments—

Assure that executed contracts are obtained. If work must begin without a signed contract either ask for a deposit on the amount and/or communicate the limited amount that will be performed before a written signed contract is obtained. Eliminate or limit 'pay when paid' and 'retainage' provisions in client contracts.

## Recommended Action:

- *Leadership*—Establish an initial at risk amount to enable projects to begin. Enforce this and hold people accountable;
- *Project Managers*—Understand the general purpose and meaning of clauses. Work actively, internally and externally, to complete process.

**5. Project Setup**—Assure that all necessary project information is included. Garbage-in equals garbage-out. This data serves as the brains of the computer. Doing this correctly and completely is important in obtaining meaningful data to manage the project and report progress to clients.

## Recommended Action:

- *Leadership*—Facilitate and streamline the Project Set-up process through use of technology;
- *Project Managers*—Take time to do it right the first time.

**6. Kick-off Meetings**—Complete this process with clients and all staff working on the project. This is your last opportunity to establish a full understanding with everyone involved on the project, and this is the best time to determine the good, bad and possible ugly aspects of the project. Assure that the What, When, Where, Who and How of the project are understood by all involved. For small projects a telephone conference call may suffice. For large projects the involvement of your entire team and the client's team may be needed at a face to face meeting. Follow-up with an email and/or formal one page document summarizing conclusions of the meetings. Time spent doing these meetings will pay huge dividends throughout the life of the project.

## Recommended Action:

- *Leadership*—Promote and support the kick-off meeting process;
- *Project Managers*—Plan time for such meetings and complete for all projects.

**7. Recording Time**—If time sheets are completed judiciously daily one additional chargeable hour per person per week will appear in most firms. Record all quality project work time. Stop eating time! If the time worked is not charged you and your firm will never have the opportunity to obtain what is deserved.

## Recommended Action:

- *Leadership*—Provide tools to enable easy daily completion of time sheets;
- *Project Staff*—Take five minutes at the end of each day to complete recording of time worked.

**8. Track Project Progress**—Staying on time and on budget is often the most important factor in client satisfaction. Learn and utilize your job costing accounting system. Review what is included and excluded. Conduct this weekly or as frequently as your system will allow. Waiting until invoicing is too long a period for most project members to remember accurately and efficiently the specifics of project activity.

## Recommended Action:

- *Leadership*—Provide timely and easy access to information;
- *Project Managers*—Commit one to two hours a week to the review of your project cost and schedule compared to budget expectations.

**9. Invoicing and Collecting**—From a business perspective, the three most important items companies (particularly privately owned companies) need to manage and control are (1) Cash (2) Cash and (3) Cash. Usually the only way to obtain cash from your clients is to invoice. Invoice as frequently as allowed by your client. Communicate and obtain agreements regarding your invoicing format, when to do invoicing, where to send the completed invoice, who to send it to and include the supporting documentation required. Share with your client the format that your system produces and obtain an agreement that this is acceptable. Track collections and call, or have someone else call, clients to determine payment plans and status. Monitor aging of your accounts. Consider stopping work if payment is not obtained in a timely manner.

## Recommended Action:

- *Leadership*—Establish and communicate your invoicing process including standardized methods and formats;
- *Project Managers*—Commit time to invoicing and collecting in the same manner you commit time meeting your technical commitments.

**10. Managing Changes**—In the environment of cost reduction and wanting more for less, clients frequently demand the minimum scopes of work. Then, after projects begin, changes are requested by clients or recognized as necessary by the project professionals doing the work. Clients are not bashful in requesting changes, but they are sometimes reticent in accepting cost and/or schedule changes. Timely communication and obtaining client approval *before* change work is started is hugely important in positively addressing changes. Communicate at the start of a project regarding how the change process will work and again when change results occur. Updates on changes should be a part of any progress reporting provided to clients. Properly doing and managing change is hugely important to the success of projects and to your relationship with your client and project personnel.

## Recommended Action:

- *Leadership*—Establish and communicate your company's approach to the change process;
- *Project Managers*—Follow the change process, communicate this process at the start of projects and implement when changes occur.

**11. Understanding Financial/Operational Performance**—Whether you are managing small or large projects, a department, division or an entire company, understanding your company's reporting of financial/operational performance is crucial to your professional success. Learn the economics of the industry and of your company. Understand the ratios used and how you compare with industry averages. Use this analysis to reward and hold people accountable.

## Recommended Action:

- *Leadership*—Train your employees on your company metrics and their related responsibilities;
- *Professional Staff*—Invest time to learn financial and operational ratios which will enable you to better understand performance results.

**12. Negotiate Professionally**—Almost everything in our professional and personal life is directly or indirectly a negotiation. We negotiate

 [continued p. 8](#)

# The Dirty Dozen of Project Financial Management

*continued from page 7*

something several times each day. And our clients are trained to negotiate. Yet many times the engineering professional takes little to no time to understanding the benefits of positive negotiating or to plan for such an experience. Negotiating is viewed as a losing proposition where one has to give up more and get nothing in return. The result is a losing experience and further engrains the desire to avoid negotiating.

It is possible to gain more by negotiating while having a fulfilling experience for all parties involved if the negotiation process is planned and implemented appropriately. This will result in

a better understanding of each other, improves scopes, allows for fairer pricing, and enables you to better serve and meet your client's needs. Clients will better understand your professionalism, the reason for your needs, your willingness to share positions and they will respect you for this. In the end, each party obtains a better overall solution.

### Recommended Actions:

- *Leadership*—Support a negotiation process and develop this as part of your culture;
- *Project Managers*—Read a book on the art of negotiation, attend a negotiating training pro-

gram, share 'lessons learned,' and practice, practice, practice—personally and professionally.

Mastering this dirty dozen will enable you to positively differentiate yourself and your company. As you develop a comfort level with these practices the process is not nearly as dirty as you may think. In properly dealing with this dirt you will position yourself for greater future success while you more frequently obtain what you deserve. Throughout this process, stronger client relationships will result, employees will experience greater professional fulfillment and your company will prosper.

## The Year in Review

*continued from page 2*

(HB 825) for the GAC, and we picked up another sponsor in Senator Jamie Eldridge (D-Acton) (SB-401). As of this writing the language from this bill is in the Senate version of the FY2010 budget and we are working to have the House and Senate Conference Committee on the FY2010 budget accept this language;

- Representative Joe Driscoll sponsored a bill (HB3200) at our request to address public safety and fair practices in procurement specifically relating to the Commonwealth of Massachusetts selection of land surveyors;
- Representative Joe Wagner (D-Chicopee) sponsored a bill (HB 3355) to address investment in our infrastructure. Known as the State Infrastructure Bank (SIB) Bill, this legislation would create a program to help leverage federal funds by lending money for projects that had a revenue stream in place to help pay back the loans. SIBs are used in 30 other states;
- ACEC/MA worked closely with the Boston Society of Architects (BSA) to help file Legislation (HB-1769) amending the Mechanics

Lien Law to apply to design professionals as well as its current focus on contractors and subcontractors.

The GAC also meets with key legislators on a regular basis by inviting them to certain GAC meetings.

The GAC also meets with key legislators on a regular basis by inviting them to certain GAC meetings. Representatives Joe Driscoll, Hank Naughton and Jeff

Sanchez met with us this past year, as did Lt. Governor Tim Murray. We also held a Freshmen Legislators Breakfast on February 4, 2009; six representatives or their aides came to the meeting to learn more about ACEC/MA and the consulting engineering community.

The GAC's annual Design Professionals Day at the State House was held on May 12, 2009. Over 50 professionals attended appointments with their State Representative and/or Senator (or their aides) to discuss our key 2010 legislative issues as noted above. The Engineering Center (TEC) staff did a wonderful job organizing the fact sheets, holding briefing sessions with attendees and setting up the appointments.

In addition, the GAC is all about advocacy for our members, and much of what we do and successfully accomplish would not happen without the guidance from Abbie Goodman, ACEC/MA Executive Director and her staff, and Dee Dee Edmondson, Jeff Terrey and George Cronin from Rasky Baerlein Strategic Communications. There are literally tens of thousands of legislative bills filed each session and these folks help us track which ones impact our ACEC/MA members and guide the ones we file through the process. Without their ongoing help and counsel we could not have been as successful.

Looking into the future, with all the talk on Beacon Hill about transportation reform, about new or increased revenue sources including raising the sales tax and the questionable economy, FY2010 promises to be an exciting legislative year. Come join us.

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# Managing Risks to Design Professionals in an Economic Downturn

*continued from page 3*

to avoid making emotional decisions. Even if the claim is strong, the designer should be sure to consider whether the risk of paying an insurance deductible in the event of a counterclaim, and the possibility that the client will have no ability to pay if the fee claim is successful, outweigh the benefits of bringing the claim.

## Contract Provisions More Rigidly Enforced

Design Professionals should be aware that their clients are more likely to aggressively enforce contract provisions. This is particularly likely to be true concerning provisions that require 'design to cost' and 'redesign at no cost' in the case of bids that exceed the budget. The redesign requirement is a business risk for the design professional and is difficult to account for in flow-down provisions with respect to sub-consultants. In evaluating whether to accept these provisions, it is important to bear in mind that an unfavorable contract will, in all likelihood, outlast the down economy.

## Design-Build Projects

Design-build project delivery methods are likely to be more frequent as design-build provides for greater opportunity for the owner to shift risk to the design-builder than in the traditional design-bid-build method. The majority of claims against design professionals in a design-build arrangement are based on activity that occurred before construction starts. The root of the risk is the designer loses the opportunity to go through the design development phase before a construction bid emerges. As a result, the builder will often claim that the designer failed to account for various conditions that resulted in cost increases and would ordinarily be discovered during design development.

## Fast-Track Projects

Projects are more apt to be fast-tracked in a down economy to either take advantage of limited funds by compressing the schedules or to comply with legislative requirements. Because construction starts before the design is complete and design coordination issues will be discovered during construction, there is a greater

risk for construction cost increases because of coordination difficulties and the need for redesign. Design professionals can attempt to

...a down economy may increase the temptation to deviate from standard contract terms and conditions.

account for this by including contractual language that recognizes the inherent coordination and redesign issues in the fast-track process and obligates the owner to either maintain a contingency fund or waive claims against the designer for those related costs.

## Project Suspension and Termination

As projects may more frequently be suspended or terminated, design professionals should be aware of risks associated with both receiving payment and taking over on or disengaging from the project.

Design professionals can act to protect their fees through contractual provisions that give the designer the right to suspend services if payment is not received in accordance with a set deadline. A second provision conditioning the client's right to use the designer's documents upon making payments in accordance with the contract terms can also provide greater security of payment. Finally, design professionals should consider including provisions that require full payment for services performed, plus termination and suspension expenses.

In instances where a design professional takes over from a predecessor the successor should be careful about liability arising from pre-existing materials and the ownership of existing documents. It is important to obtain written permission from the predecessor: even though it may be possible to obtain an indemnification agreement from the client, such a provision would be of no help if the predecessor firm complained to the applicable licensure board. The successor designer should also attempt to obtain an indemnification agreement whereby the client acknowledges the circumstances under which the designer enters the

project, and agrees to indemnify the successor against all claims and damages arising out of services from the predecessor designer.

For terminated design professionals the key risks arise from how the designer's documents are used and modified after their departure. This can be accounted for with contract provisions conditioning the right to use the documents on full payment for the designer's services performed, a statement that the designer makes no representations as to the suitability or fitness of its documents for any purpose, and an agreement from the client to indemnify the terminated designer from any liability or damages relating to the use or modification of the documents and to remove any marks of authorship by the terminated designer from the documents.

Although the down economy presents challenges and risks for everyone, design professionals can take measures to reduce their risk both through contract and increased awareness of pitfalls.

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## A SEAT AT THE TABLE: The Leadership Education Committee

*continued from page 5*

National Senior Executive Institute (SEI) Program. Odyssey will consist of a comprehensive nine session program that includes an individual one-on-one session with the instructors. Most sessions will be held at the Babson Executive Conference Center, and we anticipate this new program will run from September 2009 to May 2010.

“Odyssey” is a leadership skills development program designed to change the way managers motivate, inspire, lead and grow their staff. The skills participants learn can be readily applied to their employees to inspire more motivated, productive and loyal professionals. When the practices learned are applied externally to clients these skills can build trust and confidence while creating a competitive edge in the market.

The “Odyssey” program will be taught by Olin and Laura Jennings of the Jennings Group, and the content of the program is modeled after the Leadership Institute offered by ACEC/NY. This program has been highly successful over the last ten years in developing leadership skills and emotional intelligence as a practical skill set for over 600 technical managers. The program was designed specifically for engineering managers and has become the standard for leadership training at ACEC/NY, the American Society of Civil Engineers, and for the Society of Professional Engineers (NJ). Past participants have included technical managers from over 60 engineering and technical services firms and 11 government agencies. And these participants have given the program rave reviews making comments such as, “It is unlike any management or

leadership program that I have experienced in the past.” One hundred percent of participants recommend this program to others. Look for details in June on registering for the program.

The LEC is very excited about the opportunity to provide the Emerging Leaders, Everest and Odyssey programs, and we feel these will provide great value for our ACEC/MA membership.

*Joseph Cormier and Babur Mian are Co-Chairs of the ACEC/MA Emerging Leadership Committee. Joe is a structural engineer and manages the Architectural/Structural Group in S E A's Cambridge, MA Office. Babur is the President/CEO of Mian Adam and Associates, LLC., specializing in providing value engineering and management consulting services to clients in the infrastructure market. Joe can be reached at [joseph.cormier@seacon.com](mailto:joseph.cormier@seacon.com) and Babur can be reached at [bmian@mianadam.com](mailto:bmian@mianadam.com).*

## Non-Compete/Non-Solicitation Agreements: Are They the Wave of the Future?

*continued from page 6*

### For Employees:

- Take care to understand what you are signing on commencement of employment and what you signed with your last employer;
- Never solicit customers on company time while still with your employer, and don't use company assets for future personal gain. Only after you have left the firm should you feel free to call on former clients, and be careful not to interfere with your former employer's contractual or business relationships when you do so;
- Do not take or disclose a former employer's confidential business information.

### For Both:

- Be professional. Although employers and employees will prefer to part on good terms, occasionally there is resentment. An employee or employer should refrain from any activities which go beyond the concept of free and fair competition and are solely designed to hurt the other party;
- Appeal to clients in a positive manner. Bad-mouthing a former employer or employee may be viewed by a client as unprofessional and unethical; and
- Seek legal guidance when preparing or being asked to sign non-disclosure, non-compete and/or non-solicitation agreements.

In summary, although it can be a difficult process, turnover among key employees must be managed in a professional manner. Maintaining an awareness of the legal, professional, ethical and simple common-sense standards required during these transitions will make the process much smoother and benefit both the professional and the firm.

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## UPCOMING EVENTS—SAVE THE DATE

**ACEC/MA Odyssey Program**  
**Babson Executive Conference Center**  
 Wellesley, MA (except for Session 3)  
 Monthly from September 10, 2009 – May 6, 2010

**ACEC/MA Dinner Program**  
 Speaker David J. Hatem, PC  
 The Westin Waltham, Waltham, MA  
 September 30, 2009

**ACEC National 2009 Fall Conference**  
 La Quinta Golf Resort, Palm Springs, CA  
 October 7–10, 2009

**ACEC/MA Everest Program**  
 Wequassett Inn, Chatham, MA  
 November 6–8, 2009  
 Details to be announced

**ACEC/MA Engineering Excellence Gala**  
 Details and location to be announced  
 March 24, 2010

Check out [www.engineers.org](http://www.engineers.org) for more information on events and to register.

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