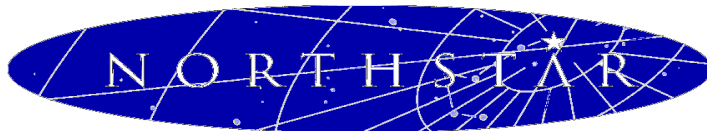


The PDC Process - Application and Legal Considerations

Presented by
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Insanity

- ‘Doing the same thing over and over and expecting different results’

Albert Einstein

Hypothetical Scenario Board Meeting Douglas Memorial Hospital

CEO – We need to stop talking about a major renovation project and get started on building it. St. Joe's across town is already designing their improvements

Hypothetical Scenario Board Meeting Douglas Memorial Hospital

Trustee – I agree. I've been talking with the folks at ACME Construction and they believe we can start building in only a few months while we finish design details

Hypothetical Scenario Board Meeting Douglas Memorial Hospital

CEO – I recommend we call Dale, our architect, and get this going.

If you were Dale, how would you respond?

The PDC Process

- What is the right process?
- What do the Guidelines say regarding the PDC process?
- What does your contract say about your role and responsibility during the PDC process?

The PDC Process

1.1 Introduction

1.2.1 Uses of this document

These Guidelines . . . include . . . the promotion of safe practices and methods in planning, design, and construction for various types of health care facilities.

Guidelines are developed . . .

- Through a consensus process
- By experts representing varied viewpoints and interests in the PDC process
- Considering public review and input
- Considering a variety of facility (project) types

Description of PDC Requirements/Practices

- General (Part 1)
- Facility Type Chapter (Parts 2, 3, 4)
- Appendix Material

PDC Activities Shall . . .

- Include considerations regarding (1.5 – 1.2) . . .
 - Operations
 - Function/Space
 - Infection Control
 - Life Safety
 - Protection of Occupants During Construction

Part 1 - General

1.1 Introduction

1.2 Environment of Care

1.3 Site

1.4 Equipment

1.5 Planning, Design and Construction

1.6 Common Requirements

Planning Phase

1.1 Introduction

- Identify/verify applicable codes/standards/publications
- Design concept, standards, criteria to be used
- Provisions for disasters
- Policies/procedures that limit access to personal information

Planning Phase

1.2 Environment of Care

- Identify components and requirements that influence patient . . .
 - Outcomes and satisfaction
 - Dignity, privacy, confidentiality
 - Safety
 - Incidence of medical errors
- As well as . . .
 - Patient and staff stress
 - Facility operations

Planning Phase

1.2 Environment of Care – 2.1 Requirements

The health care provider shall supply for each project a functional program for the facility that describes . . .

Planning Phase

Functional Program

- Purpose of Project
- Institution's Objectives (Basic)
 - Utilization/Demand
 - Staffing Patterns
 - Department Relationships
- Functional Requirements
- Environment of Care/Physical Components

Planning Phase

Functional Program Not Required When . . .

- Only Equipment Replacement
- Only Fire Safety Upgrades
- Only Minor Renovations

Planning Phase

1.3 Site

- Requirements/Issues of Location/Access
 - Transportation
 - Roads/Parking Facilities
 - Utilities
- Environmental Pollution Considerations

Planning Phase

1.4 Equipment

- Building Service Equipment
- Fixed Equipment
- Movable Equipment

. . . Will require careful planning

Planning Phase

1.5 PDC

- Infection Control Risk Assessment (ICRA)
- Design Process and Implementation
- Assumptions/Expectations Regarding Phasing, Commissioning, Project Documentation

. . . Shall apply to all health facility projects

Planning Phase

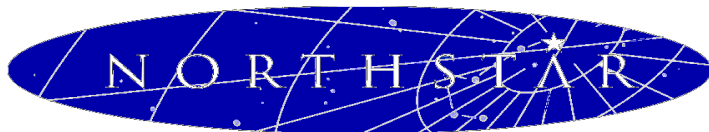
1.6 Common Requirements

- Plumbing
- HVAC
- Electrical-Lighting

Planning Phase Documentation

- Applicable Codes/Standards/Criteria
- Functional Program Information
- Considerations/Assumptions Regarding
 - Site
 - Equipment
 - PDC Process
 - Materials and Systems
- ICRA

What About Cost and Schedule?



Planning Phase Components

- Applicable Codes/Standards/Criteria
- Functional Program Information
- Consideration/Assumptions Regarding
 - Site
 - Equipment
 - PDC Process
 - Materials and Systems
- ICRA
- Project Cost and Schedule

Design Phase Requirements/Practices

- General (Part 1, 1.2, 1.4 and 1.5)
- Facility Type Chapters (Parts 2, 3, 4)
- Appendix Material

Design Phase Components

- Continue Development of Planning Phase Information
- Design Project Elements
- Compliance/Approvals of Authorities Having Jurisdiction
- Monitoring of Policies and Procedures (Privacy, ICRA, etc.)
- Create Project Documents
- Validate/Update Scope, Cost, Schedule Information

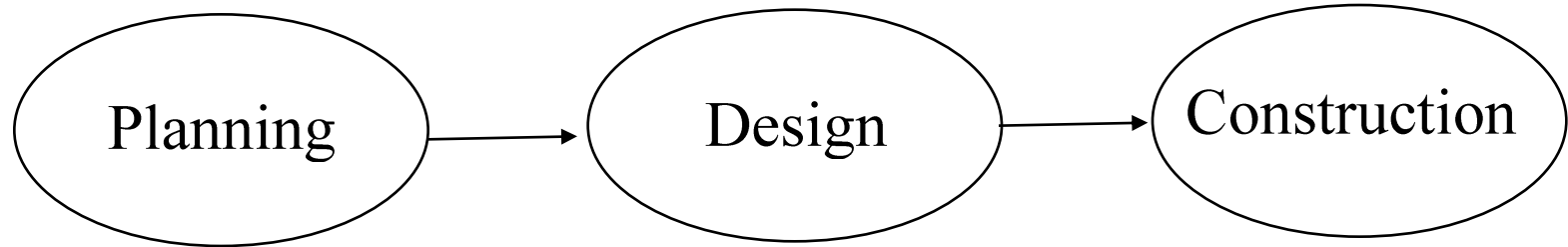
Construction Phase Requirements/Practices

- General (Part 1, 1.5 – ICRA, Commissioning)
- Facility Type Chapters (Parts 2, 3, 4)
- Appendix Material

Construction Phase Components

- Physically Build Project
- Compliance/Approvals of Authorities Having Jurisdiction
- Monitoring of Policies and Procedures (Privacy, ICRA, etc.)
- Maintain Scope, Cost, Schedule Expectations
- Occupy Facility
- Update PDC Process Based on Lessons Learned

The Planning, Design and Construction Process At-A-Glance Diagram



Planning

- Applicable Codes/Standards/Criteria
- Functional Program Information
- Considerations/Assumptions Regarding
 - Site
 - Equipment
 - PDC Process
 - Materials & Systems
- ICRA
- Project Cost and Schedule

Design

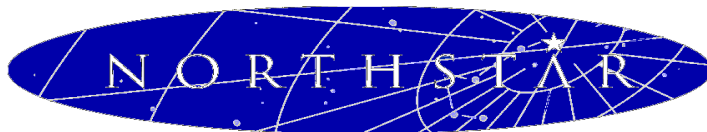
- Continue Development of Planning Phase Information
- Design Project Elements
- Compliance/Approvals of AHJ's
- Monitor Policies & Procedures (Privacy, ICRA, etc.)
- Create Project Documents
- Validate/Update Scope, Cost, Schedule Information

Construction

- Physically Build Project
- Compliance/Approvals of AHJ's
- Monitor Policies & Procedures (Privacy, ICRA, etc.)
- Maintain Scope, Cost, Schedule Expectations
- Occupy Facility
- Update PDC Process Based on Lessons Learned

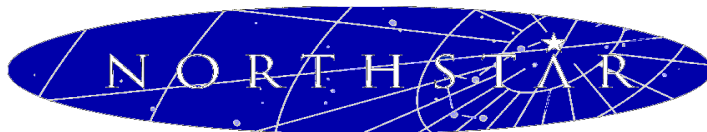
Compliance With Codes and Standards:

Responsibility and Planning



Compliance With Codes and Standards

Who has the responsibility?



Sources of Compliance Responsibility

1. Statutory Enactments (What does the law require you to do?)
 - A. Building Codes and Adopted Standards
 - Which version applies?
 - B. Licensing Regulations
 - C. Other Legislative Enactments
 - These may apply based on method/sources of funding
 - D. “Minimum” Requirements
 - There are no “Maximums”
 - E. Mandatory vs. Optional (the meaning of “shall”)
 - Waivers and Variances
 - F. Resolving Conflicts Among Different Sections
 - G. Who has the Compliance Responsibility?

Sources of Compliance Responsibility

2. Contracts (What does your contract obligate you to do?)
 - A. The General Rule of Enforceability
 - If you assume an obligation by contract, you must discharge it, subject only to statutory “restrictions” and the “void against public policy” rule
 - B. The four corners doctrine and the parol evidence rule
 - C. The consequence of saying nothing
 - Experts are presumed to be just that
 - D. Indemnification

Sources of Compliance Responsibility

3. The law of Negligence (What the law says you should know and do?)
 - A. The ordinary standard of care
 - B. Elevated standards of care
 - Can be expressed or implied
 - C. Privity of contract and the foreseeable beneficiaries of the duty of care
 - Economic loss
 - Personal/bodily injury
 - Property damage
 - D. Custom and Practice

Sources of Compliance Responsibility

4. Warranties and Representations (What did you say you would do or know?)
 - A. Express Statements
 - B. Implied Warranties
 - C. Marketing Materials, Expressions of Expertise and the Law of Reliance
 - D. Disclaimers and Limitations of Liability
 - E. The Implications of Professional Licensure

Sources of Claims and Liability

1. Statutes and Regulations
 - A. Applies to the “Regulated” Entity or Activity
 - Government Funding
 - B. Operators and Owners
 - Required Standards
 - C. Licensed Persons
 - Restriction, Suspension and Revocation
 - D. Criminal v. Civil Penalties
 - Defined by the Applicable Law
 - The Requirement for a “knowing” violation
 - The Consequence of “Reasonable Reliance” on an Expert Consultant
 - E. Enforced by the Government

Sources of Claims and Liability

2. Contracts

A. Defined by Breach of Contractual Obligations

- Foreseeable Damages Proximately Caused by the Breach are Recoverable
- The “Betterment Rule”

B. Can Shift the “Cost” of Statutory Violations

C. Enforced by the “Other” Party to the Contract

D. Privity of Contract and Others Who Can Claim It

- Assignments
- Intended Third Party Beneficiary Clauses

Sources of Claims and Liability

3. Third Party Claims

A. Can be a Function of Contract Liability

- Indemnification
- “Pass Through” Liability

B. Can be a Function of Statute/Regulation

C. Can be a Function of Negligence

D. Enforced by the Injured Party

E. May be Insured

- Negligence vs. Breach of Contract

Delivery Methodology and the Matrix of Responsibility/Liability

- Design-Bid-Build
 - Separates responsibility for design and construction
 - Contractor has a “right to rely” on the design
 - The Owner is in the middle and all claims “pass through” the Owner

Delivery Methodology and the Matrix of Responsibility/Liability

- Design-Build
 - Single Source Of Responsibility And Liability To Owner For All Actions And Activities—Design And Construction
 - Contract Responsibility
 - Joint Ventures—Joint And Several Liability (The Joint Venture Team Members Are In This Together)
 - License Regulations As A Source Of Liability
 - Need To Define Program/Parameter Requirements and Related Codes and Standards Issues
 - Issues Of Inclusion And Exclusion
 - Need To Address Evolution Of Design During Production
 - There Is No “Independent” Review By The Contractor

Delivery Methodology and the Matrix of Responsibility/Liability

- Pure CM
 - The CM Is The Owner’s “Agent”
 - General Vs. Limited Agency
 - CM Responsibility To Owner Based On Contractual Duties Of Coordination And Management
 - Negligence Standard—Professional Services Baseline
 - Owner Directly Responsible To Trade Contractors For Coordination And Management
 - Need To Define Pre-Construction Services Including Codes and Standards Issues

Delivery Methodology and the Matrix of Responsibility/Liability

- CM/GC
 - Integrated Responsibility For Construction Price, Schedule And Quality
 - CM Responsible To Owner For Trade Contractors
 - CM Responsible To Trade Contractors For Coordination And Management
 - Owner Responsible to CM/GC for Acts and Omissions of Design Team
 - Traditional “CA” Role For “Checks And Balances”
 - Duty To Notify of “Discovered” Problems
 - Knowledge and Pre-construction Activities can be a Source of Responsibility

Question: True or False?

- The Project Manager's job is to manage and oversee the project to be certain that it is completed properly and on schedule

Reality

- The Project Manager's job is to manage the paperwork on the project so that a person reading the paperwork (long after the job is finished) will conclude that the project was completed properly and on schedule (or if it was not that the fault did not lie with the Project Manager and his company)

How To Deal With Reality?

- Contemporaneous, written recordation of events and agreements

Why Is Written Documentation Important?

- Law favors written documentation over oral testimony
 - If writing is clear and signed by both parties, no oral testimony will be allowed at all (the Parol Evidence Rule and the Four Corners Doctrine)
 - Writings can be used to refresh recollection and to cross-examine (the Hearsay Rule)
 - Business records can be used and relied on even without supporting testimony (the Business Records Exception)

Why Is Written Documentation Important?

- Prompt written documentation generally triggers a quicker, more serious response – and hopefully a quicker/better resolution
 - Particularly in bureaucratic organizations

Why Is Written Documentation Important?

- Written documentation may be required by the contract terms
 - And the failure to provide written documentation can result in waiver
- The law imposes a duty to mitigate damages and also requires foreseeability of damages for recovery
 - Therefore “notice” of consequences is important

Why Is Written Documentation Important?

- Contemporaneous (or nearly so) recording of issues/resolutions is easier/better than trying to “piece things together” after the fact . . .

Because . . .

Why Is Written Documentation Important?

- The law of human nature is that people LIE
 - It is harder to lie later if the truth is documented NOW

Checklist

1. Are the standards you seek to enforce/utilize a part of the law?
 - A. There must be a current, applicable statutory enactment for this to be true
 - “Standards” alone are not enough
 - Guidelines, rather than requirements don’t result in a direct legal obligation
(But they can still trigger “negligence”)
 - B. If the standards are not the law, should they be a part of your contract?
 - The danger of “silence” is that responsibility will not be the consequence of agreement, but the result of a later liability assessment

Checklist

2. Does your contract clearly identify who is responsible for compliance?
 - A. The contract can change the statutory “target”
 - B. For “buyers,” silence can result in an assumption in the risk
 - C. For “sellers,” the level of expertise may mean that silence transfers responsibility even without a contract clause

Checklist

3. If compliance is a “team effort” be as detailed as possible with respect to each team member’s obligations
 - A. If you are expecting to rely on someone else’s analysis, say so
 - B. This applies “downstream” among separate team members
 - Architect/Code Consultant
 - Owner/Separate Consultant
 - Design/Build Joint Venture Members

Checklist

4. If you want your responsibility to be “limited” the contract should say so
 - A. Disclaimers and waivers are generally enforceable
 - B. Silence will not act as a limitation and “non-contract” documents may not be admissible under the parol evidence rule

Checklist

5. Document all decisions, discussions and assessments
 - A. Regularly maintained records are the “best evidence.”
 - B. Difficult decisions and/or subtle distinctions are best made in writing
 - C. “Management” and direction are sources of responsibility

Checklist

6. Representations should be written and precise
 - A. Expertise is a responsibility, not a reward