

## CONSTRUCTION

# RFIs – USE & ABUSE

## INTRODUCTION

Project designs have become considerably more complex over the past several decades. Increased project complexity results in a greater likelihood that errors, conflicts, omissions and ambiguities will survive project quality control review processes. Further, experience indicates that the more engineering and architecture are treated as “commodities,” the less complete designs are at the time of bid. Contractors need to review working drawings, specifications, addenda, amendments, and other contract documents very thoroughly; more thoroughly now than in the past. Unfortunately, it seems that this review is most often performed after bidding, not before. If contractors find conflicts, errors, or omissions, they typically are required to notify the owner or the owner’s representative to seek clarification or interpretation. Such inquiries and their responses need to be documented in the project records. Such requests for clarification or interpretation are most often transmitted to owners in the form of a Request for Information (“RFI”). RFIs are a tool in the construction industry intended to identify problems, ask questions and seek solutions. However, a trend of a different sort has developed concerning RFIs. The purpose of this article is to identify current problems with the use of the RFI process and outline a potential solution.

## ABUSE OF RFIs

The RFI process has been subverted. Contractors bent on making claims have discovered a new use for RFIs. Rather than using RFIs to seek information, some contractors use the RFI process for all project communications. RFIs are routinely used in place of submittals, for substitution requests, to respond to notices of nonconformance, to transmit safety plans and schedule submittals, and to substitute for both routine project correspondence and even document telephone conversations. By using RFIs this way, some contractors later claim that the project was not fully designed at the time of bidding. Thus, soft cost claims arise based on increased project staffing, delay impact and decreased labor productivity. The concept seems to be that if a contractor can show a judge, jury, or arbitration panel that there were more than 4,000 RFIs on the project, then these triers of fact will conclude that the project was “not fully designed” and more likely to award such damages to the claimant. We have all seen the “measles” charts used in claim situations. In the past when a contractor asserted a claim of negligent design, the courtroom became a battlefield between opposing expert witnesses. This is expensive and the outcome uncertain.

Why has this statistical approach to proving inadequate design been so much more successful than claiming negligent design? The construction industry has always used terms like hard dollar contract, fully designed projects, lump sum contract, etc. The industry has left the public (which term includes jurists and jurors as well as less-experienced arbitrators and mediators) with the impression that every detail of a construction project has been thought out and addressed before the project was put out for bid. The public frequently equates project bidding with purchasing a new car. Everything is supposed to work without a flaw. Then, when they find out that there were more than 4,000 RFIs on this project they assume that something must have been



wrong. As a result, they easily side with a contractor making the claim that “I bid a fully designed project. The additional field office staffing cost, all project delays and the decreased labor productivity suffered on the project were all a result of an incomplete design. Since the owner is responsible for the design, the owner owes me.”

The argument is simple and logical on its face. Try the argument on anyone who is not familiar with the construction industry and one is likely to find 90 percent or more of the people tested would agree with the claimant. So what’s wrong with the argument? A number of things. If all 4,000 documents were truly RFIs, that is, requests for interpretation or clarification concerning apparent problems found within the contract documents, then one would tend to agree that the project was not fully designed. But, what if the situation turns out to be like the following —

- 500 of the supposed RFIs were submittals of some sort or another;
- 1,700 were actually project correspondence;
- 150 were really substitution requests;
- 400 were responses or objections to non-conformance notices; and
- 800 were the same RFIs asked more than once (i.e., fishing expeditions)
- And, 300 of the remaining 450 RFIs were answered the same day they were received and with a one line response directing the contractor to look at this specification section or that detail on a drawing?

Would one still agree that the project was not fully designed? It is doubtful. And yet, this is what the authors have encountered when faced with the claim that all loss of productivity and all delay was purely the result of multiple RFIs.

Notwithstanding this sort of analysis, the argument that a large number of RFIs somehow demonstrates that the owner is liable for additional time and cost continues to be very successful. So successful, in fact, that some claim seminars present sessions on how to profit through the use of RFIs. It is the author contention that this technique will continue to grow unless owners take positive action to put an end to abuse of the RFI process.

## **OWNERS ARE PART OF THE PROBLEM**

So, how are owners responsible for the paperwork games played by contractors? Simple. Owners rarely define terms like RFI, Plan Clarification, Substitution, Non-Conformance Notice, etc., in contract documents. Even fewer take the time to establish an RFI process in the contract documents. Thus, while owners complain about paperwork games they make little effort to

defend themselves. Owners need to do more than complain. Owners should examine their internal processes to determine that they are reasonable and describe these processes in the contract documents.

## **A POTENTIAL SOLUTION**

It is the authors’ belief that most owners would be well-advised to add definitions to their contract documents. Owners ought to draft a specification dealing specifically with the issue of RFIs — when and how they are to be used, what is the owner’s minimum response time, etc.

## **DEFINITIONS**

The authors contend there are numerous terms and procedures that exist in owner organizations that are not identified in contract documents. While owners and their representatives are cognizant of these processes, contractors are not. Despite this, owners frequently assert that contractors ought to know how they operate. After all, some say, “The Department has been doing it this way for more than 20 years.” This statement may well be true. In reality, however, contractors are held to what is set forth in the contract.

To prevent misunderstanding between owners and contractors over project procedures, it is recommended that the following be considered for inclusion in contracts. If these definitions and processes are clearly specified in contracts, this will help defeat the paperwork games played with RFIs.

### **Drawing Clarification/Plan Clarification**

- Describe the intent of drawing or plan clarification systems that actually exist on most projects that are rarely described in contracts.
- Define what a clarification is and establish that it is used only to make a design issue clearer.
- Provide a minimum owner response time in order to forestall delay claims due to clarification response time.

### **Nonconformance Notice**

- Establish a system for notifying the contractor when the owner determines some portion of the work does not conform to contract requirements. The contractor is required to provide a specific Response to Nonconformance Notice (not an RFI) within a specific timeframe.
- The owner reserves a specific timeframe within which to withdraw the notice or order a correction to the work. The contractor is then given a specific timeframe in which to correct the work. The contractor may, of course, make a claim concerning such direction but under this system the work will have been corrected, thus mitigating project delay.

## Project Communications

- Draw a distinction between routine project memos and letters and RFIs, submittals, substitution requests, etc.
- Allow the owner to reject RFIs that are routine project communications

## Requests for Information

- Establish that an RFI shall only be used to seek interpretation of an issue requiring that the contractor details the issue in need of clarification and why.
- Require the contractor to set forth their understanding of the requirement so the owner can take that into consideration when providing a response.

## Substitution, Shop Drawing and Schedule Submittals

- Draw a distinction between an RFI and a request for substitution submittals, shop drawing submittals, and scheduling related submittals

The authors contend that the primary reason contractors are able to play games with the RFI process is that owners lack the ability under their contract documents to reject documents that are not truly RFIs or keep phony RFIs out of the RFI log. Definitions such as those set forth above will give the owner a mechanism to help stop the games played with RFIs.

## THE RFI CLAUSE

As noted above, definitions will not put an end to this game, absent further contract language. A clause needs to be incorporated into the General Conditions that establishes the process and the timing concerning RFIs and their responses. The authors believe the following guidelines and provisions will help owners defend against this type of claim.

- Only the prime contractor may submit an RFI.
- All RFIs shall be in writing (not via e-mail) and be submitted only on the owner's RFI form.
- Require the contractor to clearly identify the issue and set forth their own interpretation in writing. In the event that the owner finds the contractor's interpretation reasonable, the owner can advise the contractor to proceed. It is less likely that a constructive change claim can arise.
- The owner, using past experience, predicts an approximate number of RFIs likely to occur. This serves the purpose of putting bidders on notice concerning the complexity of the project and should help prevent the contractor from claiming they did not bid sufficient field staffing to support the number of RFIs on the project.

- Establish the owner's right to review all RFIs to determine if they are RFIs as that term is defined in the contract. If it is determined that the contractor is trying to abuse the RFI process, the owner can return the alleged RFI document unreviewed. This language helps prevent large numbers of phony RFIs from entering the RFI log.
- Establish the owner review time. If the owner determines it will take longer than established time to provide the requested information, then the owner is obligated, within an established time frame, to tell the contractor what date they can expect to receive a response. If the contractor submits an RFI concerning a schedule activity that the established review days or less float on the schedule, then the contractor is not entitled to a time extension due to the time it takes the owner to respond. This provision should cause contractors to review issues early enough so as not to cause any delay to the project.
- Establish the position that RFIs provide interpretations or clarifications and should not give rise to change orders. Owners may initiate a change to the contract by noting in the RFI response that the response will require a change order. Provide that if an RFI response is considered by the contractor to be a change, the contractor must notify the owner in writing within a specified timeframe. This language is intended to give the owner the opportunity to reconsider the response and avoid a claim of constructive change. Finally, the language should state that failure to provide the required written notice of change will cause the contractor to forfeit their right to make a claim.

## THE RFI REVIEW SYSTEM

To complete the owner's defense against misuse of RFIs the owner needs to establish a formal in-house RFI review processing system. To complete the process it is recommended that the owner assign a single individual to take charge of the RFI review process. This individual should personally receive all documents labeled RFI and review them the same day they are received to determine if the document truly is an RFI. If the document is actually an RFI, this individual should enter the document into the RFI log and process it for a response. This individual should also track all RFIs in process to determine that timely and accurate responses are made.

It is also advised that the owner establish a system to categorize or classify RFIs. Possible classifications could be A/E error or omission; change made by owner; answer in contract documents; RFI previously asked and answered; etc. Such a system of categorizing RFIs will provide a further defense later on, especially with respect to RFIs with responses clearly set forth in the documents or RFIs asked more than once.

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If, on the other hand, it is determined that the document submitted is not an RFI, then the document should be returned to the contractor the same day it is received. A standard form cover letter should be developed to ease the paperwork involved with such responses. The essence of the cover letter is that, "This document is not an RFI within the meaning of the Contract Documents and therefore is being returned to you without a response. This document has not been entered into the project's RFI log. It is a \_\_\_\_\_. Please resubmit the document on the proper form for timely processing."

## CONCLUSION

The RFI process is intended to be a project communication process, but has been turned into a claims game. The game has been effective because owners have not taken the time to modify their contract documents to include appropriate definitions of terms. Nor have many owners established a process in the contract documents concerning RFI reviews and responses. Finally, few owners have established an aggressive internal RFI review system to defend themselves against such claims games. As illustrated above, it is possible to include language in contract documents and establish a good internal system that will defeat such games.

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