Working with Owner Representatives
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It is increasingly common for owners to hire an individual or firm to act as an owner representative (OR, owner rep). But while the practice is increasing, so are reports from architects and engineers who have experienced difficulties on projects with owner reps. Using information from interviews with architecture and engineering firms, XL Catlin Design Professional claims staff and practicing owner representatives, this paper outlines some of the issues surrounding working with owner reps, and it offers some thoughts on related risk and practice management.

The scope of services for owner reps varies widely. Some ORs simply act as a single point of contact for the owner, while others do much more. They may help define the owner’s program or objectives and select the design team. They may hire the construction manager and coordinate the designers. They may be empowered to make cost decisions and schedule changes, and approve change orders. A few ORs even assist in obtaining funding for their clients.

For architects and engineers (A/Es), working with owner representatives can be a positive or negative experience, depending largely on the knowledge and attitude of the OR. Several design professionals reported very positive experiences, noting that the right owner rep can bring much-needed know-how to a project. A/Es pointed out that a good owner rep can facilitate communication and help resolve issues between the owner and the design and construction team.

The most common complaint about working with owner reps is the loss of a direct line of communication with the owner. Many design professionals also object to the increased time and effort required of the design team when working with ORs as well as a tendency of the OR to second-guess design decisions. Lack of qualified people on the staff of some ORs is another concern, as well as the potential for adversarial relationships—both of which increase the likelihood of disputes.

There are some steps A/E firms can take to address many of these issues. The steps include educating owners on the risks and benefits of working with ORs; practicing careful project selection; understanding the importance of a team approach and enhanced communication and documentation; and coordinating contracts and workscopes with those of the OR. This paper also offers some contract language that may be helpful.

“Depending on their abilities and interpersonal skills, an owner rep can greatly impede or enhance a project.”
Introduction

As construction projects and design and construction team relationships have grown in complexity, it is increasingly common for owners to hire a third-party professional to act as an owner representative. But as the practice is on the rise, so are reports from architects and engineers (A/Es) who have experienced difficulties on projects with owner reps.

XL Catlin felt it was a subject that merited further exploration and spoke with a number of policyholders, claims staff and even a few owner representatives to learn more.

In this updated paper, we review the issues surrounding working with owner representatives and offer some thoughts on related risk and practice management.

What is an owner representative?

Because people tend to define the terms differently, it can be difficult to make a distinction between the jobs of owner representative, construction manager, project manager and program manager. And since A/Es and construction managers occasionally take on variations of any or all of these roles, the lines between these disciplines blur even more.

The AIA defines owner representative as the official representative of the owner in connection with a project. This individual’s name is inserted into the contract to clarify communication links and convey authority from the owner team.\(^1\)

There are, however, as many variations of this role as there are owner representatives. Some are simply employees of the owner who are designated to represent the owner. Some are construction managers who assume the role. And some are third-party architects, engineers, contractors or attorneys who offer OR services. The ConsensusDocs® 810, Agreement Between Owner and Owner’s Representative, sets forth more of an agency relationship for the owner rep, charging the OR with “the authority to bind the Owner without the Owner’s prior approval in all Project matters” up to a set dollar amount.

For purposes of this paper, we define owner representative as an individual or firm retained by an owner to assume part of the owner’s duties. In hiring an OR, the owner delegates a part of his or her role to another person or entity. As one architect put it, “It’s basically outsourcing the job of being an owner.”

Quite often the owner representative brings a wealth of experience to the project and can provide an equally helpful, fresh look at a particular situation.

The function of the third-party owner representative likely evolved to its current status and prevalence for two reasons. First, construction projects are far more sophisticated these days, and owners need a high level of construction knowledge and capability to manage these projects. Years ago, an owner who intended to build a new facility might have looked within his or her own organization for someone who understood construction or had solid project management skills. Perhaps that person was the facilities manager or the individual in charge of administrative functions. But as the challenges of construction grew, some owners realized that their staff didn’t have the sophistication or expertise to oversee a large and complex project. In the end, it made more sense to outsource.

At the same time, because good marketing sometimes means creating a market, some A/Es and contractors realized that there was a need for people with this expertise and stepped in to fill the void. And it’s an attractive market. For one thing, the business is fairly lucrative. For another—and assuming the owner’s contract terms don’t transfer liability to the OR—the owner rep typically assumes little or no liability.

There are many reasons why owners would look outside their own organization for an OR. Owners with less experience, or those who lack in-house capabilities, may benefit from the services of an owner rep. An owner rep can reduce the management burden on the owner’s staff. A competent owner rep can steer the owner through the process and help identify when key decisions need to be made, while making certain decisions on their own.

Consider, for example, a city that wants to build a large convention center. Its current staff can manage small and medium-size projects, but a $100 million project is another thing entirely. The city decides that it needs expert help with the horsepower to work at this new, higher level.

Or perhaps a school district has been funded $200 million to refurbish six schools. Absent the necessary staff on hand, the district elects to bring someone in to manage the process.

The scope of services for ORs varies from project to project, from client to client and from OR to OR. A few simply act as a single point of contact for the owner—a sort of information manager. Other owner representatives view themselves, and act, as virtual extensions of the owner. They may help define the owner’s program or objectives, and select the design team. They may hire the construction manager and coordinate the designers. They may be empowered to make cost decisions and schedule changes, and approve change orders. A few owner reps even assist in obtaining funding for their clients.

Others offer even broader services. For example, we talked with one successful architect who offers comprehensive owner representative services. “We only do hospitals,” he said. His firm “manages the entire project from soup to nuts.” He described his services as encompassing “everything that surrounds program management.” The firm does the front-end preliminary planning work and assists the owner with the business plan, market and demographic analysis, volume projections and space programming. Then they translate that into a master plan for a project. Once the project is approved, the firm assumes the role of owner representative, where “we assist in soliciting and approving the project architect, specialty consultants and general contractor.”

The list of services each OR offers is likely influenced by his or her background. There are contractor and attorney ORs; some have real estate backgrounds. And others are licensed architects or professional engineers.

Many ORs are hired before the design team is selected. “In the optimum scenario,” an OR told us, “the owner rep is involved early on. In that way the OR can help define not only the design team’s scope, but the owner’s responsibilities.”

The contractual relationships of the owner representative, owner and design and construction team also vary. To date, there are a few standard agreements for owner reps from the professional organizations. For example, the 800 Series of Program Management documents published by ConsensusDocs has agreements (the 800, 810 and 840) that provide a template for owner rep services, and the AIA C172-2014 sets forth an agreement between the Owner and Program Manager, which details a host of OR services.

In most—but not all—instances, the project design professional or contractor is not party to the owner’s agreement with the OR. But one design architect told us that his contract was directly with the owner representative.

Fees for owner representatives also vary widely, depending on the level of service provided. One OR told us, “The fee is based on the scope of services required... Typically, we set [the] fee up as a percentage of project cost and convert it to a lump sum after all costs are identified (total project budget) and accepted by the owner.” The billing, he added, was based on the progress of their work. An engineer pointed out that in some instances, fees could equal or even exceed the designers’ fees.

To date, there are no professional organizations exclusively for owner representatives, and thus no specific OR certification or accreditation available.
What are the advantages of working with owner representatives?

From the viewpoint of the project engineer or architect, working with owner representatives can be a positive or negative experience. A great deal depends on the knowledge and attitude of the owner rep. Said one engineer, “depending on his or her abilities and interpersonal skills, an owner rep can greatly impede or enhance a project.”

Several design professionals we talked to reported very positive experiences, noting that the right owner rep can bring much-needed know-how to a project. They told us that an OR can provide experience and a fresh outlook to a situation.

“We had an experience where it was terrific,” an architect told us. “We had a dedicated individual who gave 120 percent to the project. He was bright, experienced and capable. And the project was very successful and ran beautifully.”

A/Es pointed out that a good owner rep can facilitate communication and help resolve issues between the owner and the design and construction team. “If you have an unsophisticated owner and an owner rep who takes a team approach, great.”

Other design professionals told us that the addition of construction expertise during the design phase is often beneficial, and some felt that increased supervision of the construction phase can reduce miscommunication and errors in the construction process.

An architect/OR pointed out that a good owner rep can take a tremendous burden off of the design team. If the OR is intimately involved in the development of the project, he or she can prove invaluable in translating the owner’s program into “architect-ese.” “The rep,” he said, “will be proactive in defining scope and, thus, the fee structure.” And the OR can ensure that the owner complies with his or her responsibilities. “You can’t have a good job unless the owner is sophisticated enough to fulfill its duties.” He tells architects that his firm “wants to empower you to do the best work you can do.”

Firms report that the most effective ORs recognize that true project success results when the project is successful for all parties involved. They become champions of the owner’s program and, rather than merely criticize the design/construction team, help the team focus on achieving the project goals.

Finally, competent owner representatives reduce the chances of project disputes. “I haven’t had a single claim against an architect on any of my projects,” an owner representative said.

What are the disadvantages?

When asked about negative experiences, design professionals were more vocal.

Lack of direct communication

The most common complaint was the loss of a direct line of communication with the owner. “We couldn’t build a relationship with the client. To us, that’s very important.” This becomes especially significant when problems arise. If the architect or engineer has developed a relationship with the owner, he or she can usually work with the owner to resolve the problem. When the owner rep was in the middle, however, the A/Es felt that dispute resolution was more difficult. “Some of the issues had to do with the owner rep, and he could bring his side of things to the client. You become the bad guy. It created all kinds of problems.”

“When there are issues,” another A/E said, “the situation is always in favor of the one telling the story. When you’re removed from the communication line by another step; suddenly you’re defending yourself.”

Yet another design professional suggested that some owners retain owner representatives precisely because they don’t want to be in the position of saying no to the architect or engineer.

Some design professionals worried that the lack of a direct relationship with the owner also hindered repeat business. “We’re always trying to build long-term relationships. Repeat business is the least expensive way to gain new business. But with owner reps, we’re always going through another party. We still interact with the owner, but not in the same way. We’re one step removed. We never know what’s being said to the owner. It’s a very big deal to us.”
Second-guessing the A/E

Many design professionals complained about a tendency of the owner rep to second-guess design decisions. Some representatives approach their jobs “in a reactive manner,” in which they bring up opportunities and issues after the fact. A/Es felt that this “Monday morning quarterbacking” resulted in adversarial relationships that negatively impacted the project.

The heightened scrutiny of the OR, who then reports to the owner, can be counterproductive from the architect’s and contractor’s point of view. For example, the architect may have to justify aspects of the design that the OR decides aren’t cost effective. “We had a situation where there were additional services. We felt they were legitimate, but the owner rep was telling the owner something else.”

Increased time and effort

Another common complaint was the increased time and effort required of the design team when working with owner representatives. “When we do a project involving an owner rep, it takes more time and a lot more work,” one design firm CEO said. “Suddenly there are all these hurdles, checks and balances, which create more work and more documentation.” And sometimes that extra work is not contemplated in the design fee—especially if the owner has not disclosed his or her intention of employing an OR beforehand.

“They generate tasks. They have to do something, so they write lots of reports and have lots of meetings in order to justify their existence,“ a CFO of an architectural firm said.

One large firm in the Midwest tells of an unpleasant experience working with an owner rep. At the height of the red-hot economy, a university was building a new $30 million student union. The owner rep ignored the design firm’s repeated warnings and misled the university as to costs, but the bids all came in 20 percent higher than the OR promised. The OR tried to force the design firm to redesign at no extra cost, but the firm refused and negotiated an exit out of the project. The project ultimately cost $40 million and a one-year delay. “If the owner rep had been doing his or her job, this wouldn’t have happened,” the firm’s president said. The university later apologized to the design firm.

Promise of cost savings

Then there’s the matter of owner rep fees. Some ORs tell owners that they will recoup their fees in project savings. In the most egregious instances, the rep induces the design/construction team to “contribute” to the project through reduced fees and payment for owner claims. “One of the things owner reps will try to do is convince the owner that they will save money on the project. But they’ll take it out of your pocket,” one design professional complained.

One A/E interviewed said that the use of owner reps to administer contracts on school projects had raised the level of conflict on these projects, as the owners sought to have problems paid for by the designers, the contractors or anyone else—so long as it doesn’t come out of the change order contingency fund.

Other A/Es worried about the impact on the overall quality of the project. They felt that some owner representatives depend on an adversarial relationship to justify their fees. The A/Es suggested that owners may not understand that when design services are reduced to lower fees, quality will suffer and the project may be more expensive in the long run.

Unclear roles and inefficiency

Added levels of coordination and overlapping areas of authority can confuse traditional roles, complicate the traditional processes of design and construction, and increase the time and paperwork required to complete the project. “In the final analysis, most of the problems come from poorly defined scopes and/or failure to adhere to reporting protocols,” an XL Catlin Design Professional claims supervisor said.

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Confusion in the decision-making process may also contribute to delays. Since typically there is no contractual relationship between the contractor and the OR, responsibility for problems in scheduling or coordination of certain aspects of construction may be difficult to determine. Disputes may arise that only the owner is able to resolve.

Still another issue is the timeliness of decisions. The A/E is looking for guidance or direction, and if the owner rep is not experienced or empowered enough, they “frequently simply relay questions between the design team and the owner. The process just bogs down.”

Lack of experience

Lack of qualified people on the staffs of some owner reps was another concern. “Their abilities aren’t up to the job,” an architect said. “They may hire someone off the street—whoever is out there and available.” An XL Catlin Design Professional claims manager agreed: “Problems often stem from the fact that the owner representatives are not qualified or experienced enough for the project.”

Redundant services

Finally, some owner representative firms may be characterized by a cumbersome structure, especially those who bring on a “mirror image” of the design or construction team. “You suddenly find yourself with a counterpart in the owner rep organization,” a design professional explained, likening it to a government organization. “At the least, you have double entities and terrifically high fees.”

What can I do?

There are some steps you can take to address these issues:

Educate owners

The reality is that owner reps are typically hired before the rest of the project team is selected. If given the chance, you can provide names of competent ORs with whom you’ve had positive experiences.

Over the long-term, though, look for opportunities to help owners understand the issues, and explain the importance of finding qualified, experienced and proactive owner reps who emphasize a team approach and bring a sense of fair play to the project. Unsophisticated owners may also need help understanding that saving money in front-end costs may cost more in the long run.

More than one A/E warned of the importance of treading lightly, to avoid “bad mouthing” reps. There are ORs who have made a name for themselves, and A/Ers don’t want to alienate those who are in the position to feed work to them… or to their competitors.

Select projects with care

If you’re considering a project that will have a third-party owner rep, you need to do some research. Talk to architects, engineers and contractors who have worked with the OR. You’ll want to learn as much as possible about the OR, his or her qualifications and skills and experience with similar projects. Does the OR have a history of claims and litigation? How will the OR’s fee be determined? What is his or her approach to resolving disputes? Remember, a good relationship is unlikely if you have fundamental disagreements about the way a building gets built. If you sense that the OR doesn’t measure up on the important issues, consider declining the project.

Stress a team approach

To a person, the A/Ers we talked with underscored the need for a team approach on projects. While many hesitated using the “P” word, hinting that project partnering was a trend whose time had come and gone, others felt that the process was still valuable: “If not partnering,” an architect said, “maybe the spirit of partnering.”

Successful projects are team driven—and the strongest teams are composed of individuals who understand their role and the roles of other team members, and who work collaboratively. Anticipating problems, establishing communication channels, clarifying responsibilities and areas of authority, as well as the criteria for project success go a long way toward avoiding adversarial relationships on a project.

“You have to keep them happy, just like you keep a client happy... Deal with them no differently than if they were the client.”
Communicate, communicate and communicate

Good communication is essential among all of a project’s constituents: internal team members at every level, consultants, contractors and other outside vendors hired to work on the project, the community, the end-users of the finished building, and anyone else who will be affected by the new project at any point. It’s important to establish and follow rigid communications policies and procedures to ensure that the right people get the right information at the right time.

It’s also important that the design team be able to communicate with the owner. At a minimum, consider requiring by contract that the owner (not his or her representative) attend a minimum number of meetings. You might also require that the owner be involved in any dispute between you and the OR.

Develop a clear, detailed scope of services

This one’s a deal-maker. The addition of an owner rep to the project team typically results in more design documentation, meetings, reviews, correspondence and other project administration. Gaps, overlapping responsibilities, unwanted duplication of services, and scope ambiguities can have an impact on the time, cost, quality and scope of the project. These factors can also impact the performance of the parties involved—whether or not they are a party to the agreements in question.

Clearly define your duties, authority and limitations. Then make sure these are coordinated with those of the owner representative and are carefully described in your agreement.

Anticipate the issues in your contract

If the client has hired—or may hire—an owner rep, you’ll need to address some of these issues in your contract. The following language could be adapted for your agreement with the owner:

If the Owner chooses to retain an Owner Representative (“OR”) for the Project, the Owner shall provide to the Consultant, in writing, a list of duties, responsibilities and authority (“DR&A list”) the OR has been assigned by the Owner. In the event the Owner makes any changes to the OR DR&A list, the Owner shall notify the Consultant, in writing, in a timely manner. The Consultant shall be entitled to rely solely upon the OR’s decisions and directions as to all items listed in the DR&A list.

The Consultant shall be entitled to rely upon the proper performance by the OR of the items on the DR&A list and shall bear no responsibility to the Owner or its representative(s) for any opinions, directions or decisions given by the Owner and OR that are in conflict with the DR&A.

If any owner-directed changes to the OR’s DR&A list result in additional time or expense in order for the Consultant to prepare, coordinate or respond to changes to the plans or specifications, the Consultant shall be entitled to an equitable adjustment in fees and schedule for the performance of these additional services.
Know what’s in the owner rep contract

Key terms in the owner/OR contract can directly impact you in the event of a claim. Since the owner rep is routinely hired before the design and construction team members, the OR has a greater chance of persuading a less sophisticated owner to sign an agreement that favors the owner rep. By the time the owner gets around to signing a contract with the A/E, he or she may have little appetite for one-sided agreements that favor the other party. As an example of something to be wary of, ConsensusDocs 800 contains language that provides for corrective work by the owner rep as the exclusive remedy in the event of a claim. This clause, buried in the standard of care provision, acts as a back-door limitation of liability. When it comes to resolving disputes, the less money the owner rep has to contribute to settling a claim, the more pressure it places on the design and construction team members.

Be on the lookout for any incongruous dispute resolution provisions. For example, ConsensusDocs 800 calls for mandatory arbitration if a dispute fails to resolve at mediation, while ConsensusDocs 810 gives the owner and OR the option of electing arbitration or litigation. If the owner rep’s contract is the only contract with an arbitration provision, you can bet that the owner rep will not be interested in helping to resolve the owner’s lawsuit against the design and construction team, since the OR will likely be able to delay any arbitration proceeding pending the outcome of the underlying lawsuit. In practice, this dynamic means that the owner—who may not have the fortitude to litigate a case more than once—will extract the owner rep’s share of liability from the design and construction team.

Conversely, the same contracting issues that plague the A/E can also present problems for the OR. For example, some non-industry OR agreements mandate an elevated standard of care for the OR, and set forth a fiduciary relationship—the highest level of trust and confidence owed to the client. Similar to the fiduciary pressures that homeowners’ association board members face when deciding to file a construction defect lawsuit, an owner rep with a fiduciary obligation to its client could face personal liability if the project is anything short of a perfect success. This type of duty to the owner can create an adversarial and combative environment whereby the owner rep is looking for the slightest mistake in the plans and specifications out of fear of personal liability if he or she misses something. Knowing if the owner rep has a heightened duty of care before you sign an agreement could help you properly evaluate (and manage) your risk and set your fee accordingly.

Coordinate those contracts

The owner/OR contract must be coordinated with the contracts of all the parties involved in the project—not only to eliminate gaps, unwanted duplication of services and scope ambiguities, but to resolve risk allocation discrepancies, dispute resolution issues and any conflicts in the general terms and conditions.

Consider adjusting your fee

When calculating your fee, remember the extra meetings, reporting, documentation and other tasks that working with an owner rep might entail.

Check all egos at the door

Work to establish and maintain good relationships. Owner representatives are a fact of construction life today, so you have to make the best of it. “You have to learn to deal with them,” said an engineer. “You have to keep them happy, just like you keep a client happy. Look at them as the client, deal with them no differently than if they were the client.”

Trust… but document

While you should document decisions that come up during the normal course of business, it’s also important to document any decisions that take place outside of the meeting environment. A simple memorandum or meeting minutes can be sufficient to document a change. At other times, you might want a more formal letter to describe the change and its impact—and to request the client’s signed approval.

Finally, consider offering owner representative services yourself

Some design firms are responding directly to owners’ demands for services that extend well beyond traditional design services. Who better, these firms reason, than architects or engineers—born problem solvers—to serve as the client’s trusted advisor from the initial concept to design review, financing, real estate evaluation and programming?
A Call to Action

As the number of projects with third-party owner representatives increases, so will the need for real-world practice and risk management measures that will help architects and engineers improve their chances for a successful project. Toward that end, we need your help and input.

Has your firm worked on projects with third-party owner representatives? If so, we’d like to hear about it. Please email us at DPEducUSA@xlcatin.com to share your experience.