

Key Issues When Considering a Completion Project Opportunity

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The authors of this article provide a list of “Do’s and Don’ts” to use when considering taking on a completion project.

In today’s economic environment, contractor defaults are occurring with increased frequency. If the contractor is bonded, the owner will look to the surety to complete the project. Among other options, the surety may enter a Takeover Agreement with the owner and arrange for another contractor to complete the work.

When these opportunities present themselves, a contractor considering the takeover of a troubled project should carefully consider the risks and rewards before signing on to complete the project. Since a completion contractor may have a limited window of time to define the project and determine whether it wants to pursue the opportunity, and since the contractor may not get access to much of the information needed to fully define the risks, deciding to proceed with the opportunity may be based upon an educated guess. Adhere to the following rules when evaluating these opportunities to manage the risk and maximize the potential for a successful outcome.

The “Do’s and Don’ts” When Considering a Completion Project

- Stay within your core competency. Completion projects are inherently risky. One contractor has failed in the performance of the work and a new contractor is being asked to take over a partially performed project and to complete it. Do not add an unnecessary additional risk by taking on a type of project outside of your core competency. If the project is outside of your core competency, walk away.
- Carefully review the existing contract between the initial contractor and the owner, and pay close attention to how the completion contract is structured. Even though the completion contractor will be entering a contract with the surety, the completion contract will incorporate the terms and conditions of the initial contract.
- Determine whether the initial contract is clear as to the scope of work required from the contractor, and confirm that you have been provided with the latest set of contract documents, *i.e.* updated drawings, specifications, bulletins, etc. Identify any disputed issues (*e.g.* scope,

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disputes, etc.) that arose between the owner and the initial contractor, and identify all changes to the initial contractor's scope of work (both pending and approved).

- Determine a reasonable completion date for the work. The owner will be expecting the completion contractor to step into the shoes of the initial contractor and deliver the project as called for in the initial contract. Determine whether this is possible, and, if not, negotiate changes to the initial contract's requirements.
- Determine whether completion of the work is dependent upon separate contractors or the owner's self performance of work, or the timely furnishing of materials or equipment by the owner. It is one thing to take over a project and manage it to completion. It is quite another to condition your success on the performance of the owner's separate contractors or its self performance. Identify long lead time items that will need to be factored into your schedule, determine who is responsible for supplying these items and determine their status.
- Evaluate the trust and reliability of the owner and the surety, and the surety's reputation for working with completion contractors to solve problems. Completion of the work will be dependent upon teamwork and a willingness of all parties to work through unanticipated issues and problems.
- Visit the site and undertake other due diligence, as time permits. Recognize that this may need to occur in phases, *i.e.*, at the outset when the surety is

seeking proposals and again later if you decide to pursue the project. Due diligence should include meetings with the key project participants, such as the owner's representative, the architect of record, the lender's inspector, etc.

- Find out why the initial contractor defaulted. Try to meet with the defaulting contractor's project management team to obtain its perspective on the project. This may be difficult to accomplish if the defaulting contractor has disappeared or wants nothing further to do with the job, but most will be motivated to assist because it will reduce its potential liability to the surety. Even if such a meeting is not possible, view the project from the initial contractor's perspective to understand the problems that the initial contractor faced. Just because the initial contractor was not able to perform the work do not assume that all the problems were his or her fault.
- Determine the quality of the owner's team that you will be working with. Ask: Was the owner's team doing their jobs during the initial contractor's performance? Do you want to work with these people?
- Review key project documents, such as submittals, daily reports, inspection reports, meeting minutes, logs, and as-builts. This should provide you with a general sense of what happened on the job and the situation you will be facing. It may also be necessary to do this to determine what things have been processed and what things have not. This will require resources beyond what you may normally assign to a job.

- Define the status of the work performed by the initial contractor. This will be very important if an issue develops after the completion contractor starts work regarding the quality of the existing work or its compliance with the plans and specifications. Address how latent defects with the initial contractor's work will be handled.
- In developing your proposal, assume that there will be unknowns. Even with your best efforts, it will be impossible to identify all of the "hidden" problems. The surety is going to expect you to have identified all risks that should be apparent when entering the completion contract. If you identify a risk but are not able to quantify it at the time, you are required to sign the completion contract, consider putting a contingency in your price. The surety is not going to want a contingency, so you will need to justify why you need a contingency in your proposal. Alternatively, you may wish to use "alternates" for those risk items you cannot define.
- Assign your best project management team to the project, *i.e.* people who are able to be proactive in the management of problems. Make sure the project is adequately staffed for the specific challenges that are presented. These projects generally require a greater level of management oversight. If management sees an issue develop, deal with it in a timely manner.
- Establish a viable completion schedule as soon as possible. Make sure that you have the resources to develop a meaningful baseline schedule for your work at the start of the project and update the schedule as the work progresses.
- Because this is a "troubled project," even with a competent contractor completing the work, it may remain a "troubled project." As a result, your project management staff must understand that project documentation will be important. Ask the question: Have we assigned the staffing that is necessary to manage and document the project?
- Define the lines of communication. You will be working for the surety, and the surety will have a Takeover Agreement with the owner. The surety will want to be involved in the progress of the work, so attempt to identify the issues of import to the surety at the front end, and know the lines of communication to make sure you are able to have decisions made in a timely manner.
- Anticipate change orders. There will likely be change orders for which the surety is responsible, and traditional owner change orders. Set up your project documentation so you are able to segregate the two. Make sure that you have the proper authorization from one or the other (or both) before proceeding with a change. You do not want to later get caught in the trap of each party saying that you did not have authorization to proceed with a change. If you do not know whether it is an owner change or a surety change, seek authorization from both.
- Document the status of the initial contractor's work before taking it over. Video taping the status of the initial contractor's work prior to the start of your work may be worth the expense, as this will help protect against claims that your work (as opposed to the initial contractor's work) is non-compliant.

- Project relationships are crucial, and even more so on these types of projects. There is a history to the project that oftentimes has resulted in strained communications/relationships. Your first 60 days on the project will be critical to sending the message to all involved that things have turned around.

Conclusion

Each project presents unique challenges,

and completion projects can be some of the most challenging. Make sure that you have conducted adequate due diligence to thoroughly understand the risks associated with taking on the project. Evaluate and price these risks before signing the completion contract. After the contract is signed it is too late to determine that the risks associated with the project exceed the potential fees.