

For Immediate Release

For more information
or an interview with Barry LePatner,
please contact Dottie DeHart,
DeHart & Company Public Relations,
at (828) 325-4966 or DSDeHart@aol.com.

A “Fixed” Fight: A Peek Inside One Construction Expert’s Campaign to Make Fixed-Price Contracts and Cost Containment the Industry’s New Normal

Huge cost overruns and missed deadlines have long been the accepted norm for construction project operations. But as the economy struggles to fully recover, construction expert Barry LePatner stresses that these precepts can no longer define the nation’s most inefficient industry. He provides a proposal for hardwiring construction cost containment into future projects.

New York, NY (December 2009)—Cost overruns have long been the norm in the construction industry. Just consider the litany of projects across our nation that have been plagued by cost overruns. For example, Boston’s \$22-billion-dollar Big Dig, which continues to drain Massachusetts’ economy, or the sports arenas and stadiums such as the newly built stadiums for New York’s Mets and Yankees, both of which have exceeded projected costs by hundreds of millions. Not to mention the smaller projects such as the schools, hospitals, and office and residential projects going up around the nation, which encounter overruns on a daily basis.

No one has ever been happy about the cost overruns or the missed deadlines that accompany projects like those mentioned above, but most have accepted them as a necessary evil. But in our stagnant economy, faced with the stark reality of dried-up financing, and a construction industry that has lost over 1.5 million workers, tightly budgeted developers and project owners are facing a budgetary quagmire from contractors who bid at or below cost to secure contracts that will inevitably result in massive cost overruns.

However, a new paradigm is on the horizon that promises to alleviate these problems—and Barry LePatner says construction cost containment is the number one goal of developers, corporations, lenders, and public owners alike.

“Construction cost overruns have run rampant for decades,” says LePatner, author of *Broken Buildings, Busted Budgets: How to Fix America’s Trillion-Dollar Construction Industry* and the upcoming book *Roadblock: America’s Failing Infrastructure and the Way Forward*.

“It’s hard to believe that the construction industry was allowed to waste upwards of \$120 billion each year even in the best of times. It is an industry that has seen per-worker productivity fall by nearly 25 percent over the past 40 years. But in these difficult times, the status quo can no longer stand.”

The problem, well-known to most people who deal with the construction industry, is that the low-bid process allows contractors to win projects—followed, of course, by change orders and delay claims that gradually escalate the final price and enable them to make a profit.

LePatner’s solution? Over the past two years, his law firm has developed *The LePatner C³ Model*[™], a new fixed-price approach to designing and building complex capital projects that enables all project team members to operate with confidence that their project will be completed on time and on budget. It does this while also assuring a fair profit to the construction team without the need for unwarranted claims and delays. **NOTE: For details, see LePatner’s new white paper, *The LePatner C³ Model: Construction Cost Certainty*, which is available for download at www.BarryLePatner.com.**

“If you’re scoffing at the mention of a ‘fixed-price approach,’ you’re certainly not alone,” admits LePatner. “Many in the construction industry believe fixed-priced contracts simply aren’t possible. And given the way the industry currently operates, they are correct.

“But when you ensure that contracts are based on fully complete and coordinated drawings, perform a proper risk allocation to adjust for anticipatable problems during the construction process, and involve intermediaries to act on the owner’s behalf in the negotiation process—as *The LePatner C³ Model* does on all accounts—you create a world in which owners—public and private—can, for the first time, feel secure that cost certainty will be achieved.”

And as seen by the results of FMI and CMAA’s recent 2009 *Tenth Annual Survey of Owners*, LePatner’s fixed-price model is coming at just the right time. As we move into the next decade, owners, too, are expecting change.

According to the survey’s findings, owners want to see more claims avoidance, better project leadership, and better alignment of “project delivery system selection to project characteristics and conditions.”

The survey also found that from 2009-2014, owners will place greater importance on the following factors. Here they are as excerpted from the survey:

- Selecting the most effective project delivery system
- Maintenance management support in both processes and technologies
- Proactive strategies to avoid claims and disputes
- Development and use of a construction management plan
- Effective documentation and processes designed to support facility commissioning or turnover

LePatner has been proposing this kind of change within the industry since the release of his book *Broken Buildings, Busted Budgets* in 2007, which sparked a long-overdue debate among owners, design professionals, and contractors on the mutual benefits of construction industry reform, specifically the need for widespread adoption of true fixed-price contracts.

The LePatner C³ Model, which makes fixed-price contracts a prerequisite for new construction, ensures that borrowers and their lenders will no longer be held captive to the well-documented inefficiencies of the U.S. construction industry. And stakeholders will no longer be exposed to existing construction methodologies that allow all risks of completion to be passed along to owners and lenders.

Here's a look at the construction industry inefficiencies LePatner hopes to end for good with the use of *The LePatner C³ Model*:

Incomplete drawings. Incomplete drawings allow contractors to bid low in order to win projects, and also prevent them from providing an owner with a true fixed price for all work required to complete the project. Here's what happens: To "expedite" construction, construction managers routinely require the owner's architects and engineers to issue incomplete drawings and specifications to contractors as the basis for the project contract. Lacking complete scope information, the contractors must infer and make cost assumptions on the "missing" design elements since they are not provided with detailed information on the project design.

"What results are agreements that ultimately allow for myriad exclusions, allowances, and pricing assumptions based upon the incomplete design," says LePatner. "It is no surprise that these pricing and scope assumptions rarely bear out once construction starts, the final design is completed, and actual costs are determined. And once a project is under construction, owners have very few good options to dispute these charges because delaying the project to settle these problems will only lead to more delays and costs. *The LePatner C³ Model* ends this problem because it requires contracts to be based on fully completed designs.

"In addition, *The LePatner C³ Model* also ensures that the owner has, for the first time, accurate pricing information on the actual costs reflected on the design drawings. Owner representatives and their cost estimators will be valuing the design as it proceeds so that, by the time bids from prospective contractors arrive, the owner will know if they are truly competitive and can ensure a fair profit for the construction team to reflect the risks they will take to complete the project on time and on budget."

Change orders. Change orders are the major reason so many projects go over budget and run behind schedule. They occur because the design documents on every “fast track” project are incomplete. This practice sets in motion all that is wrong with the current methodology of construction and underscores the failure of standard-form industry contracts to protect owners. As previously mentioned, contractors use change orders to profit from their low bids.

“Low bids and the change orders that come with them will only be exacerbated by the slow and recovering economy, subsequently driving up project budgets by 20 to 50 percent or more,” says LePatner. “In the past, when cost overruns arose, owners could borrow to meet a shortfall from a mezzanine lender to cover these costs. But in the years ahead, industry leaders expect that few, if any, mezzanine lenders will cover the increased cost of completing such projects. *The LePatner C³ Model* puts an end to the need for unnecessary change orders because it ensures a built-in, fair profit for contractors when a project is completed on time and on budget.”

Ineffective design and construction agreements. A central problem is that standard design and construction agreements fail to recognize the low-bid process and the known inefficiencies of the construction industry. These form-based agreements are silent on the critical issue of contractor bids based upon incomplete designs and fail to offer any mechanism to anticipate and price “unexpected” conditions. These are precisely the circumstances in which cost overruns and change order claims run rampant through the construction industry, busting owners’ budgets at every turn. The backbone of *The LePatner C³ Model* is a set of seamless agreements for the design and construction teams that ensure a true fixed price based on fully completed project designs. It also includes a risk allocation process that helps factor in “unexpected” conditions that are priced during the contracting process and eliminate costly and time-consuming delays.

“As it stands today, on construction projects big and small, project cost is a huge wild card,” says LePatner. “Public and private owners should demand certainty for their capital project costs. In the years ahead, if you are a developer and you do not have a plan in place for cost containment, you will not be able to get the loans you need to build. If you are lucky enough to get the initial loan, you will run the risk of having to pay millions more to cover costs that have soared over budget. For example, if you are a school district and must build 10 new schools with a \$40 million budget, cost overruns will prevent you from constructing as many as 20 percent of the intended number of schools.

“*The LePatner C³ Model* offers reassurance on cost certainty where there currently is none,” he adds. “For lenders, it provides a proven strategy that reduces construction loan risk. And, thanks to the cost certainty it provides, borrowers receive a new level of assurance that actual project costs will not exceed the contract price.

“Having something like *The LePatner C³ Model* in place is a necessity now,” concludes LePatner. “Our nation will rebound from the current financial downturn. We are in the process of adding 100 million new citizens in the next 30 years, a level of growth that will require our nation to spend over \$25 trillion to build new hospitals, schools, offices, roads, and bridges. *The LePatner C³ Model* will become a new paradigm that will help transform America’s most inefficient industry into one that helps us build our nation’s future efficiently and cost effectively, while protecting owners from that same inefficiency.”

###

About the Author:

Barry B. LePatner is the founder of the New York City-based law firm LePatner & Associates LLP. For three decades, he has been prominent as an advisor on business and legal issues affecting the real estate, design, and construction industries. He is head of the law firm that has grown to become widely recognized as one of the nation’s leading advisors to corporate and institutional clients, real estate owners, and design professionals.

Mr. LePatner is widely recognized as a thought leader in the construction industry. A November 2007 *Governing Magazine* article stated, “If there’s a guru of construction industry reform, it’s LePatner.” In an article entitled “Building a New WPA,” appearing in the November 24, 2008, issue of *New York* magazine, he was referred to as “a Cassandra of infrastructure.” And an article on *Infrastructurist.com* entitled “Trillion-Dollar Barry: One Man’s Quest to Keep America Solvent” states that Mr. LePatner has been hailed as “a leading expert on the construction industry.”

His latest book, *Broken Buildings, Busted Budgets: How to Fix America’s Trillion-Dollar Construction Industry* (The University of Chicago Press), which was reviewed in the *Wall Street Journal*, has created a national debate among owners, designers, and other key stakeholders. Mr. LePatner has been featured in *BusinessWeek*, the *Boston Globe*, the *New York Times*, *Crain’s New York Business*, the *Chicago Tribune*, and other prestigious publications. His articles and speeches on the perilous state of our nation’s infrastructure have garnered him widespread attention. He has appeared on many television and radio broadcasts, including a CNBC appearance and several National Public Radio segments.

A nationally recognized speaker, Mr. LePatner has addressed audiences on topics central to trends affecting the real estate and construction industry at events throughout the country for audiences including contractors, architects, engineers, construction technology experts, economic experts, and other construction industry thought leaders.

Mr. LePatner has written extensively and is widely quoted in the media on the subject of construction law. He previously co-authored the legal sections of the *Interior Design Handbook*, McGraw-Hill 2001, and *Structural & Foundation Failures: A Casebook for Architects, Engineers & Lawyers*, McGraw-Hill 1982, co-authored with Sidney M. Johnson, P.E. Mr. LePatner is currently writing a new book, *Roadblock: America’s Failing Infrastructure and the*

Way Forward, that takes a look at the perilous state of the nation's infrastructure. To be published early in 2010, it will address our decades-old failure to redress our deteriorating roads and bridges and will offer insightful recommendations on how to finance and build this critical part of our nation's backbone.

In 2002, Mr. LePatner received an honorary AIA membership. He is also currently on the Board of Trustees of the Design Industries Foundation Fighting Aids (DIFFA). He has also served on numerous advisory committees including: the Advisory Board, Society for Marketing Professional Services; the Board of the New York Building Congress; Board of Advisors, Legal Briefs for the Construction Industry; American Institute of Architects Advisory Committee; and the National Academy of Sciences.

About the Book:

Broken Buildings, Busted Budgets: How to Fix America's Trillion-Dollar Construction Industry (The University of Chicago Press, 2007, ISBN-13: 978-0-226-47267-6, ISBN-10: 0-226-47267-1, \$25.00) is available at bookstores nationwide, from major online booksellers, and direct from the publisher at www.press.uchicago.edu.

For more information, please visit www.BrokenBuildings.com or www.BarryLePatner.com.