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Building Outrage: Why So Many Tax Dollars Are Wasted on Construction Projects—and What *You* Can Do About It

America's \$1.23-trillion-a-year construction industry wastes over \$120 billion annually, much of it from taxpayers' pockets. Construction attorney and author Barry B. LePatner says that's inexcusable—and his upcoming book reveals the solution.

New York, NY (May 2007)—“That’s the way it’s always been done . . . whaddaya gonna do?” Call it The Great Construction Excuse. It’s usually deployed, accompanied by a helpless shrug, when *yet another* cost overrun is announced, *yet another* change order is shoved across the desk, and *yet another* deadline is missed. When you consider the countless construction debacles that crop up across the country—from the almost \$12-billion-over-budget Big Dig in Boston to the overpriced and overdue school, transit system, or other project in your hometown—it’s clear something is wrong. *Seriously* wrong.

So here’s what construction attorney Barry B. LePatner wants to know: why aren’t you furious about it?

“If you are a public official, construction cost overruns cost you politically,” asserts LePatner, author of the upcoming book *Broken Buildings, Busted Budgets: How to Fix America’s Trillion-Dollar Construction Industry* (The University of Chicago Press, October 2007, ISBN-13: 978-0-226-47267-6, ISBN-10: 0-226-47267-1, \$25.00). “And if you are Joe or Jane Taxpayer, your pocket is being picked. America’s \$1.23-trillion-a-year construction industry is badly broken, and we’re all its victims—but it’s time we stood up and said, ‘Enough! We’re sick of excuses . . . and we’re sick of being ripped off!’”

If these seem like strong words, it’s because LePatner is a man on a mission. He wants industry reform and he wants it *now*. If you wonder why, just visit his Web site www.brokenbuildings.com. One page features an ever-increasing menu of links to recent

newspaper and magazine articles from across the country—links that, together, paint a dismal picture of an industry out of control.

“The unbelievable truth is that America’s construction industry wastes more than \$120 billion annually,” says LePatner. “Google ‘construction cost overruns’ and you’ll see almost 1.2 million entries about countless projects that are over budget and behind schedule. It’s bad enough that this happens in private industry, but the fact that taxpayers regularly pay for this level of waste and mismanagement is truly inexcusable.

“As a recent Brookings Institution report highlights, our nation will spend \$25 trillion on construction by 2030 and create as much new building stock as currently exists,” he adds. “If we don’t want to waste billions more than necessary on these projects, we simply can’t wait any longer to reform this antiquated industry.”

Broken Buildings, Busted Budgets exposes the inherent problems in what the author calls “the nation’s last major ‘mom and pop’ industry”—an industry in which contractors operate as monopolists controlling all information related to the cost of a project, abrogate risk, and are unchecked by fear of being easily replaced. He pinpoints two main issues that underlie the industry’s woes: the lack of a true fixed-price contract and the absence of effective intermediaries to aggressively represent the interests of all construction project owners.

LePatner expects his book will jolt people out of their complacency and spark a national debate on the subject of construction industry reform. Workable solutions, he believes, can grow out of that dialogue. But what about the government officials who must sign off on construction plans and budgets for new schools, highways, and bridges *right now*? And what about the citizens—yes, that means *you*—who often can do little but wring their hands while promises are broken, taxes rise, and the increasingly expensive civic center *still* sits unfinished?

In short, what’s the immediate answer to “whaddaya gonna do?”

If you’re a government official in charge of a building project, or a corporate executive in charge of the new headquarters, or the facilities manager responsible for building the new hospital wing or assisted living center, LePatner provides some tips you can start using right away:

Secure a fixed-price contract. Quite simply, most construction contracts contain loopholes that allow contractors to drive up the cost. Standard contracts devised by members of the industry are generally insufficient as they a) fail to properly allocate risk among the parties and b) provide proven loopholes for contractors to make claims for additional costs. “The right contract for any owner going into a project is going to be one that offers a true fixed price,” says LePatner. “Their absence in today’s industry is a huge reason contractors don’t mind soaring over budget—there is often little recourse for an owner facing that situation. Securing a true fixed-price contract for your project will require your architect and engineers to deliver to you a set of construction documents for bidding that are fully detailed, complete in all respects, and coordinated with each other.”

Retain an on-site owner’s representative. A qualified owner’s representative serves as a knowledgeable arbiter of the conflicts that may arise on the site. The rep’s counsel is invaluable and should not be overlooked. “You may also want to consider enhancing the role of your architect,” says LePatner. “If the architect has extensive experience overseeing construction, then retaining his or her services for daily oversight to ensure compliance with the approved design documents is worth every penny. The hands-on involvement of the architect can keep your project moving effectively forward. And the incremental fee increase for such services is often a fraction of what increased construction costs typically entail.”

Learn how to win the change order game. Change orders are the major reason so many projects go over budget and run behind schedule. Here’s what often happens: contractors submit a low bid in order to win the project, even at a potential cost of losing money on the base bid. Then they try to make up the lost profit by seeking every opportunity to submit change orders. One option for owners is to insist that all change orders be supported with documentation that demonstrates the change order was not part of the base bid, what the full cost proposed by each change order will be, as well as any impact on the completion schedule. This will enable the owner to discuss with the owner’s rep and the architect any possible alternatives to be pursued to minimize cost.

Don’t allow the contractor to hold your project hostage. “Under no circumstances should a contractor be allowed to hold the project hostage by stopping work because of a dispute over the cost of a change order,” asserts LePatner, noting that AIA standard agreements are often vague on this point, leaving owners with no recourse. “Provisions should be inserted that require the contractor to proceed with change order work disputed in good faith and provide recourse to a brief arbitration, if the amounts are small, or litigation, if the dispute is large in scale.”

Ensure that there are milestone dates for substantial completion and final completion. At a minimum, these are the key dates that must be achieved by the construction team to enable the owner to plan accordingly—for instance, a school beginning its new semester. Any revision to these dates must be accompanied by written notice from the contractor along with a detailed reason for the extension request. If the contractor, through its own actions, falls behind in the schedule, the contract should

provide that the owner can demand that the delay period be overcome by overtime or weekend work at the expense of the contractor.

Stand firm. “This is how it’s always been done” is no excuse. By following the rules set forth here and in LePatner’s book, you may be able to save 5, 10, perhaps 15 percent or more over what a less knowledgeable owner would pay in a comparable situation. “Do not be intimidated by an architect, contractor, or construction manager who challenges these suggestions,” advises LePatner. “Do not accept the standard retort, ‘This is how it’s always been done.’ Remember, these companies want your business and have much room to be flexible.”

Of course, these suggestions are aimed at taxpaying members of a school board, hospital administrators and corporate executives, as well as government officials serving as project owners. But they are also meant to educate the taxpaying public that this problem can be solved.

“Hold your elected officials accountable for project cost overruns,” urges LePatner. “When they allow contractors to run rough-shod over you and your wallet, let them know you’re done with the excuses. Vote them out of office. *You* are paying for this irresponsibility and you should be angry about it. No, construction projects *don’t* have to be inefficient and wasteful, and yes, there *is* something you can do about it. Start exercising your rights, in your hometown, and you can be part of the reform that changes the entire construction industry for the better.”

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About the Author:

Barry B. LePatner, Esq., 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.

A nationally recognized speaker, Mr. LePatner has addressed audiences on topics central to trends affecting the real estate industry at recent events including: “Real Estate Outlook,” an annual seminar series for corporate and real estate executives; “Protecting the Owner from Pitfalls in Today’s Construction Projects,” a series of Continuing Legal Education lectures given to law firms and their in-house real estate departments; “Protection, Survival, Readiness: Project Strategy in the Post 9/11 World,” a seminar presented to institutional, developer and corporate real estate executives; “Secure Space,”

a building security seminar for corporate owners and developers; and “Marketing for Design Professionals” at the Harvard Graduate School of Design’s Summer Program, with A. Eugene Kohn from 1990-2004.

He has written extensively and is widely quoted in the media on the subject of construction law. Mr. LePatner has previously coauthored the legal sections of the *Interior Design Handbook*, McGraw Hill, 2001, and *Structural & Foundation Failures: A Casebook for Architects, Engineers & Lawyers*, McGraw Hill, 1982, coauthored with Sidney M. Johnson, P.E.

Recently published articles include “Construction Cost Increases: Owners Should Know the Difference Between the Myths and Realities,” *New York Real Estate Journal*, October 2006; and “Are You Prepared—Disaster Management Plans Help Owners Protect Their Investments” in the March/April 2006 issue of *Commercial Investment Real Estate* magazine. Articles published in the *New York Law Journal* include: “Caveat Advocatus—Drafting Construction Agreements for Your Client’s New Construction Project Ain’t What It Used to Be,” March 27, 2006. Since 1980, he has edited and published the *LePatner Report*, a quarterly newsletter on business and legal issues for the firm’s design, real estate, and construction clients.

About the Book:

Broken Buildings, Busted Budgets: How to Fix America’s Trillion-Dollar Construction Industry (The University of Chicago Press, October 2007, ISBN-13: 978-0-226-47267-6, ISBN-10: 0-226-47267-1, \$25.00) will be 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.