

Limiting Legal Exposure in the Construction Industry

The old adage about “best-laid plans” couldn’t be more relevant than in the construction industry. No matter how specific the “specs,” how detailed the baseline schedule, or how numerous the pre-construction meetings, it is virtually inevitable that unexpected obstacles, delays and disputes will arise—some of which may result in arbitration or litigation.

In an ideal world, owners, contractors and sub-contractors work through the myriad of issues that arise during a project and informally resolve their disputes. In reality, however, some issues are only resolved after utilizing formal dispute resolution procedures set out in the parties’ contract, which often includes mediation, arbitration or litigation. Given the complexity of construction projects, below is a list of actions those in the industry should undertake to limit the time and costs involved when formally resolving a dispute.

INVOLVE LEGAL COUNSEL EARLY

Once it seems unlikely the parties can work through a dispute, involving your attorney early on will often save time and expense by allowing the attorney to provide advice throughout, rather than reviewing numerous emails, letters and documents after a dispute escalates.

RECORD ALL PROJECT DISCUSSIONS

What may seem like a simple work-around can escalate into a major dispute. Thus, it is crucial to document all project discussions, whether regularly scheduled project meetings or one-off meetings at the jobsite, so that all parties understand what was discussed, and there is a record of all agreements and/or disagreements.

MEMORIALIZE ANY AGREEMENT ABOUT PAYMENT THAT DEVIATES FROM THE CONTRACT

Oftentimes, to simplify the payment process, owners will negotiate payment terms, such as paying a contractor under the units for out-of-scope work. It is especially important to document these alternative payment arrangements, as they are fodder for disputes about missing or inadequate payments.

ORGANIZE THE PROJECT FILE

A construction project generates volumes of data, such as drawings, .pdfs, letters, emails, Word documents, photographs and videos. Keeping the project file organized, and limiting the number of “temporary” folders, will greatly assist the attorneys should a dispute arise and will help to limit the cost of discovery in litigation.

KEEP AN ACCURATE LOG OF ALL CHANGE ORDERS

Accurately track any work performed out of scope and all submitted change orders, whether approved or not, to help support claims concerning these change orders and the work performed thereunder.

DOCUMENT ALL ITERATIONS OF, AND CHANGES TO, THE PROJECT SCHEDULE

It is almost inevitable that the project schedule will change multiple times. To support or limit any delay damages claims, it is imperative to document all schedule changes and updates.

While parties will often work through the issues that arise during a project informally without engaging counsel, it is likely some problems will require attorney assistance. Involving the attorney at the outset and keeping track of all the moving parts of a project on a daily basis will greatly assist in resolving disputes efficiently and economically.

If you have any questions regarding limiting legal exposure in the construction industry, please contact Erin C. Borek, Senior Associate, at (716) 847-7048, eborek@phillipslytle.com, or the Phillips Lytle attorney with whom you have a relationship. ■

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