

Build the project

Why your construction contract matters

By Michael Bosse

No construction project goes perfectly. Not a single one. Yet, there are best practices that those in the industry can follow during the course of a project to enhance the quality of the work, create a harmonious working environment, and avoid conflicts and disputes that all too often can lead to litigation, a result that no one desires.

The Construction Contract

The worst thing that anyone can do on a project is to execute the construction contract, and then put it on the shelf to gather dust. The construction contract allocates the risks the parties to that contract expected to encounter, whether the topic is scope of work, quality of work, price or something else.

As those identified risks occur during the course of a project, the parties have to understand how the contract deals with that particular risk so that they can act appropriately. The contract is written, now you have to live it during the progress of the work.

Notice Provisions

Hopefully, reasonable notice provisions were negotiated in the contract, but in any case, now that they exist in the executed contract, they must be followed. For every case that a court decides concluding that a notice provision should not be enforced because the late notice did not prejudice the other side, another court will bounce a claimant out of court because it failed to meet a specific notice deadline even in the absence of a lack of prejudice. The best way to avoid this is to know and meet whatever notice provisions exist.

Contemporaneous Documentation

In my almost two decades of being a construction lawyer, I have seen this done very well by contractors, and also very poorly. Making a real-time written record of things that happen on a project matters because those documents may end up as evidence in a trial or arbitration years from now.

Creating a written record of conversations that occur that are important during a project is much more credible to a fact-finder

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than simply testifying that the conversation occurred. Worse, do not expect that your colleague, who now is your adversary in litigation, is not going to shade his or her memory of the conversation to suit them, or outright lie about it.

Parties that timely document claims and responses to claims, changed work or unforeseen conditions, and the like, fare much better in court and arbitration than those who are sloppy record-keepers or rely on verbal evidence.

Peace and Harmony

Can't we all just get along? Seriously, one large intangible on every project is the people who are working on it. Try to identify problems as they happen, and deal with them quickly and decisively. Is there a lack of coordination because of a subcontractor that is in over its head on a project? Is a project super constantly at odds with the clerk of the works or the design-

er? Is an owner constantly changing his mind about what it he wants?

The best practice is to confront the situation, learn the facts, and then resolve it quickly. Very rarely will avoiding the situation result in it going away. Kicking the can down the road will, more often than not, turn a small problem into a larger one that affects the progress of the work, results in a claim, or quite possibly in litigation.

There is no perfect construction project, but that doesn't mean you can't try to achieve perfection. I certainly have seen examples of projects where everyone worked together toward a common goal (the completed project), avoided the mines in the minefield, and watched people happily move on to the next job. Implementing some of the best practices will help to increase the number of positive projects, and ward away the bad ones. <CCR



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