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Five Tips to Reduce Litigation Risks on Major Construction Projects

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Construction litigation can be painful. You can expect to recount, in painstaking detail, the whole project. Some documents are downright embarrassing. Things can get messy and expensive quickly. But it doesn't have to be this way. Whether you're a project owner, contractor or subcontractor, these five steps can help reduce litigation risks.

1. Expect disputes

A retired PM told us that the first thing he did on a project was open a change order file. Nobody should be surprised when a project results in claims. You should educate (and periodically remind) all management-level personnel about litigation risks such as the content of emails, failure to maintain records or to comply with record retention policies, waiver of contractual notice requirements and poor understanding of contract terms. Recognize, however, that project morale can deteriorate if each side treats the other suspiciously. Our advice: cooperate in the field and work toward common goals, but never let your guard down.

2. Know how you will handle issues

Every piece of the contract is important, but common scenarios (e.g., delays, force majeure) deserve special attention. Identify these sections and discuss them with field management. Ask senior leaders how major disputes they've had on prior projects would have played out under this contract. Have a litigator review the proposed contract. Although you cannot eliminate all risks, you can consciously decide whether to take them. After contract execution, hold training sessions led by project managers and the legal department, explaining:

- Change order process
- Main contract points
- Do's and don'ts on documentation and communications
- Unusual procedures
- What to do if problems arise

3. Know your local Prompt Payment Act

Many jurisdictions have "Prompt Payment Acts" that impose interest, penalties and attorneys' fees for improperly withholding payment. These statutes can give contractors major settlement leverage during disputes. Know what your statute says, and research whether contracting parties can agree to other terms.

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4. Understand the LDs clause

When a project is late, liquidated damages provide huge negotiating leverage and are usually an owner's best weapon. Whether you're a project owner or a contractor (or sub), you should know the strengths and weaknesses of the LDs provision and use them to your advantage in negotiating claims. Also consider renegotiating the LDs clause, as a sort of reset button, if the two sides are at loggerheads in the middle of a project.

5. Don't let documents ruin your case

Although email is useful, it can wreck your case. Thus, email is better for some uses than others. Use email to provide directions to, or document an agreement among, a group. Do not use it to express anything you wouldn't want to share in a courtroom.

Similarly, once a project ends, it is common to discuss "lessons learned" to determine what went right and wrong. While these sessions can be productive, they are dangerous. Before soliciting any such opinions, consult with counsel about how to keep these communications privileged.

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