

## Lawyer Insights

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### 5 Ways You Can Proactively Protect Your Business

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Finally, your major construction project is complete. Unfortunately, a week after completion, you receive a claim letter from the other side. Annoyed, you draft a denial. They file suit. You now face years of litigation in which you will recount, in painstaking detail, every single contested aspect of the project. Some documents may be downright embarrassing to you or your colleagues. Things are about to get messy and expensive, but it didn't have to be this way. Read below for measures that both contractors and project owners can take to reduce litigation risks.

#### 1. Prepare for the Worst

Always assume that your project will result in claims and possible litigation. A retired project manager once told us that the first thing he did on a project was open a change order file. Whether you are an owner, a contractor or a subcontractor, you should not be surprised when a major project results in claims. At the beginning of the project, you should educate all management-level personnel about litigation risks, such as those within composition of email communications, failure to maintain adequate records, failure to comply with record-retention policies, waiver of contract requirements, lack of understanding of contract terms and the like. Repeatedly remind your team about these risks throughout the project. Recognize, however, that the mood on a project can deteriorate quickly if each side is treating the other suspiciously. Cooperate in the field and work toward achieving common goals, but never let your guard down.

Ensure that roles and responsibilities of all contracting parties and stakeholders are clearly defined and understood. Are you relying on a government agency to approve plans or issue permits? Are you contracting separately with an original equipment manufacturer to deliver key components? What happens if the permits or the components are late? Who is on the hook? Consider whether your contract provides appropriate contingency for these scenarios.

Every piece of the contract is important, but even common scenarios (delays, force majeure) deserve special attention. Identify these and discuss them with field management. Ask senior leaders how major disputes on prior projects have played out under certain contracts. 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 the change order process, main contract points, dos and don'ts on documentation and communications, unusual procedures and what to do when problems arise.

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Manage for success. Dedicate a full-time individual to the project who is responsible for managing its success. Contractors almost always have a dedicated project manager, and project owners should as well. For all individuals working on the project, make sure to identify roles and responsibilities from the very beginning. If those roles and responsibilities change, the changes should be documented and discussed openly.

At the outset of the project, define, understand and communicate clearly the levels of authority in the field, including the ability to authorize additional costs or work. Minimize duplication of roles to eliminate conflict and ambiguity in how the project is managed.

## **2. Be Informed**

Know your local Prompt Payment Act. Most jurisdictions have enacted prompt payment acts imposing interest, penalties and sometimes attorney fees against owners for improperly withholding payment to contractors. If a dispute arises, these statutes can give contractors leverage in settlement negotiations. Research whether your jurisdiction allows contracting parties to agree to terms other than those set out in the statute.

Know your liquidated damages (LD) clause. When a project is late, liquidated damages can be an owner's best defense against a contractor's claims. Knowing this, contractors and their counsel will be looking for ways to invalidate the clause. Whether you're a project owner, a contractor or subcontractor, you should know the strengths and weaknesses of the LD's provisions and use them to your advantage in negotiating claims. Also, consider renegotiating the LD clause, as a sort of reset button, if the two sides are at loggerheads in the middle of a project.

## **3. Keep Accurate Documents**

Reconcile contract documents to ensure consistency with one another. A typical construction contract is made up of terms and conditions, as well as numerous exhibits and attachments. Different groups usually draft the document. Lawyers draft the terms and conditions; project managers draft the scope of work; and engineers draft the technical specifications. This greatly increases the potential for discrepancies. What you once thought was clear can become muddled, perhaps to your detriment. Be sure to review and consider how all parts of the contract work together. Keep the contract and related documents updated and handy. How will you respond when your lawyers ask you to show them the contract? Because of the complexity of construction contracts, amendments and change orders are typical. Be sure to keep current, complete, agreed-upon versions of all contract documents readily accessible to appropriate project personnel. Also, maintain a system that clearly tracks change orders and amendments.

## **4. Remain Consistent**

If you want to enforce a contract provision in litigation, enforce it in the field. Litigants often argue that the other side has waived a contractual requirement. For instance, if the contract requires notice of items potentially warranting a change order within 24 hours of the event's occurrence, but the owner has not

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enforced that requirement consistently, the contractor will argue (perhaps successfully) that it has been waived. If circumstances dictate that you occasionally not adhere strictly to a particular contract provision, tell your counterpart in writing that you expect the requirement to be adhered to in the future and you are not waiving your right to rely on it.

Keep an accurate and current schedule. The project schedule will be key to determining responsibility for delays should a claim result. If maintaining the schedule is the contractor's responsibility, then the project owner should consider retaining a consultant to periodically check the schedule. Due to their complexity, schedules can be manipulated, making regular, detailed reviews important. If you can, get periodic agreement from the other side that the current schedule is correct and updated appropriately. This will help prevent the other side from rewriting history in the case of litigation.

Use email effectively, not destructively. Always remember that email can become part of the permanent project record. That makes it both potentially valuable and potentially hazardous in the litigation environment. Consequently, email is better suited for some uses than others. Use email to provide clear directions or to document an agreement among a group. Do not use email to express ideas that you would not want to be shared in a courtroom. For example, do not use email to vent frustrations, as it almost always looks bad later.

## 5. Move Forward

Learn from mistakes instead of letting them wreck your cause. At the conclusion of major construction projects, it is useful to bring the team together to discuss lessons learned on the project. While these candid sessions can be productive, they can be dangerous. Before soliciting opinions on project successes and failures, consult with counsel about how you might keep these communications privileged so they do not burn you later.

The first step in avoiding risk is understanding it. Undoubtedly, issues will eventually arise. However, using these recommendations, you can draft a tighter contract and manage a better project.

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