

Minimizing Construction Disputes

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It seems inevitable that construction projects come with delays and disputes, which are disruptive to the efficient progression of the project, and costly to all parties.

In any well-functioning relationship, it is important for the participants to be aware of the interests and incentives of the other parties to the relationship. In a construction project, the owner seeks value for money, and a project that is on-time and on-budget. The contractor wants to run its operations efficiently, make a profit, and obtain a good reference for future work. In order to obtain these objectives, it is in the interests of all parties to minimize disputes during a construction project.

This article will identify some of the common causes of delays and disputes, and provide some tips about the tools and strategies available to secure the effective delivery of a construction project.

Tip 1: Use Construction Contract Drafting as a Risk Management Tool

The purpose of the construction contract is to set expectations between the parties to ensure that the objectives of each party are met, address how anticipated issues will be handled, and properly allocate risk. Parties to a construction project have an opportunity at the outset of their relationship to minimize potential disputes if they take proactive steps at the time the contract is drafted.

There exists a suite of standard form contracts in construction that are an excellent and cost-effective starting point. However, they may not be the best end point. It is worth the investment of time and effort at the outset of the relationship to select the appropriate template, and then draft supplemental conditions to customize the template to suit the situation.

An issue that arises at the contract stage that often leads to later disputes is the drafting of contractual provisions without the assistance of, or review by, a legal professional. All too often, contract interpretation disputes arise because clauses were cut and pasted from other previously used contracts, and do not work properly together. Legal review at the outset may seem expensive, but it is a deal compared to the potential delays and costs that arise if there is a later dispute.

Tip 2: Clearly Define Scope

Many construction disputes are related to claims that work is outside scope. Changes, extra work and delay determinations are based on the agreed upon scope of work set out in the contract. Therefore, care should be taken at the outset to ensure that the parties have clearly documented in the contract the agreed upon scope of work, and what are the “contract documents.”



Consistency throughout the contract is important to avoid interpretation disputes later.

Tip 3: Communicate Frequently

Misunderstandings are a common symptom of a lack of effective communication. One area where this has a large impact is in relation to the construction schedule. Disputes related to delay in construction have occurred because the completion date is not clearly defined in the contract¹. It is important to ensure that the contract requires the provision of a schedule with critical dates at the outset, as well as regular updates. It is equally important that the schedule and regular updates actually are prepared and circulated. The schedule is used as the basis to ascertain delays and their causes. Regularly updated schedules are needed by all parties to support or defend delay claims.

Tip 4: Follow Processes Set Out in the Contract

There have been many occasions in a construction dispute where it's discovered that all of the parties have been conducting themselves without regard for the requirements and processes set out in the contract. While this may be fine when the parties are able to quickly resolve the issues, if the dispute is not resolved, this practice increases the complexity for finding resolution. Therefore, it is recommended that a copy of the contract be provided to all key players and a copy should be kept on site throughout construction. The key players should review the contract at the outset and periodically throughout construction.

It is important to be aware of and comply with contractual notice requirements. When a dispute arises, make use of the tools and remedies

contained in the contract. Early legal advice to address issues as they arise during construction can avoid a costly lawsuit later.

Tip 5: Keep Records

Keeping clear and complete contemporaneous records of communications and events may not avoid a dispute, but will reduce the costs of the dispute, as those documents are the strongest evidence to prove one's version of events, and will reduce time spent by the lawyers.

Conclusion

Some common themes seen in construction disputes include:

- Lack of clarity in the contract language;
- Parties acting without reference to the contract language;
- Lack of clear communications between the parties; and
- Lack of complete/accurate records of communications or events.

These issues are preventable through the proper drafting and use of the provisions in the construction contract, as well as effective communication between the parties and record keeping throughout the project. **CB**

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[1] For example, where the contract states that the completion date is so many months after the issuance of the Notice to Proceed, there may be a dispute as to the completion date where there is no evidence that the Notice to Proceed was issued.