10 Often-Overlooked Legal Lessons

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THE REGULATIONS YOU SHOULD KNOW TO PROTECT YOUR BUSINESS

Construction business owners juggle heavy responsibilities. In addition to managing a business, owners need to be cognizant of the legal issues that impact their respective areas of the industry. This knowledge can protect a company and help to ensure projects run smoothly and successfully. Consider the following 10 legal reminders that construction professionals are sometimes unaware of or fail to consider.

1. CLAIM WAIVERS

Owners: Specify in the general conditions that general contractors will be required to sign claim waivers for every pay application and change order. For general contractors, be sure to include the same obligations in the terms required of your subcontractors and suppliers.

For general contractors, subcontractors, and suppliers, do not sign these waivers if you have claims. Do not hesitate to include on the waiver form all reserved claims. And, in appropriate circumstances, reserve rights for impacts and delays that may arise from events that occurred precedent of the pay period or that arose from, or that could arise from, the subject of the change order. All company controllers, billing clerks, and project personnel involved in the payment process should be schooled on this subject.

2. PAY-IF-PAID & PAY-WHEN-PAID CLAUSES

These clauses are not as absolute as they used to be. In many states, pay-when-paid clauses may not mean forever, as courts have construed such clauses to impose a reasonable time for payment. There is also legal authority which holds that such clauses may not be enforceable under the prevention doctrine if the general contractor's conduct, be it deliberate or inadvertent, caused the owner not to pay the general contractor. In such circumstances, the subcontractor or supplier may be able to overcome these clauses and obtain payment.

3. PERFORMANCE BONDS & EXTENDED WARRANTIES

Many construction contract warranties for discreet items, like roofing and mechanical systems, extend well beyond the standard one-year period from substantial completion. What

if the supplier of these items goes out of business or fails to respond? Can the owner claim under the performance bond? The answer is that it depends on the language of the bond and whether it incorporates the terms of the general contract, including the supplier warranties. Owners faced with a supplier who cannot or will not perform should review the contract, the bond, and the warranty to determine if there may be surety liability.

4. MILLER ACT CLAIMS ON PAYMENT BONDS

The Miller Act applies to all federally funded projects and governs payment bond claims. There is a growing body of law under the Miller Act that precludes sureties from defending subcontractor payment bond claims based on the defenses available to its principal, the general contractor. This is a potent weapon for subcontractors. Some states have what are known as "Little Miller Acts," which are comparable to the federal Miller Act, and under which the same argument may be tenable.

5. PERFORMANCE BOND CLAIMS

Owners should read the terms of the performance bond carefully and follow them to the letter, even if it delays a response from the surety. Many performance bonds require a meeting between the surety, contractor, and owner. This is a required step and should be requested, notwithstanding that the surety will likely not undertake any affirmative action under most performance bonds, unless and until there is a termination of the contractor's employment. Owners should take care not to terminate the contract but to terminate the employment of the contractor as the contractor under the construction contract.

6. INDEMNITY CLAUSES

These should be carefully read and, if need be, negotiated. General contractors and subcontractors should take care not to agree to indemnify a party against that other party's own negligence. General contractors and subcontractors should consult with their insurance brokers on indemnity clauses, because sometimes their insurance will not cover one-sided contractual indemnity obligations.

If the value of the job warrants agreeing to such a one-sided indemnity clause, there may be a project specific insurance rider to be purchased for an additional premium. Also, the indemnity term may be unenforceable based on what are known as "anti-indemnity" statutes that some states have enacted to prevent such risk shifting. It pays to check state law where the project is located.

7. CHANGE ORDERS

Many a valid claim for an extra has failed to follow the terms of the contract by giving notice of a change and advising the owner of the issue, even if the contractor is uncertain of whether it will be compensable or will impact the schedule. Often the contractor will not want to jeopardize the relationship with the owner by giving notice of a claim. The better practice, however, is to provide notice so the owner may adjust the work or the schedule to avoid the extra. It is better to be safe than sorry. And if the contractor is uncertain as to whether there will be an impact and they are not sure of the magnitude, the contractor should inform the owner of these circumstances in the notification.

8. MEDIATION

Successful mediations require parties factually and legally armed to cogently articulate their positions and a mutual intent to determine if there is a common ground. Parties should carefully vet potential mediators to determine that they have the requisite real-world construction law experience and the ability and willingness to work the parties hard and stick to it even after the mediation session has ended. No party should come to a mediation and announce to the other side that it will not settle for less than some amount or will not pay any more than some amount.

Such an approach may well poison the environment such that the possibility of the mediator working a settlement is greatly impaired, as a party will not want to seem as if it backed down or was weak. Parties should inform the mediator of expected outcomes and let him or her deal with it.

9. VENUE SELECTION CLAUSES

These should not be taken for granted, as oftentimes they require litigation in locations distant from the project site. There is a reason parties include such clauses in contracts: It

discourages the other party from seeking to enforce its rights by making litigation for the other side more expensive and providing the contract-drafting party the perception of having the home-field advantage. Many state law payment acts make these clauses unenforceable; however, some federal courts will not enforce state laws prohibiting venue-shifting clauses that shift venue from the state of the project site.

10. STATE LAW PAYMENT ACTS

The law of the state where the project is located should be consulted to determine if such an act is in place in that state. If so, the provisions of these acts should be consulted by the owner, general contractor, and subcontractor alike, as they will normally govern over contract terms. If not followed, they may provide for added interest, penalties, and the recovery of attorney fees for the prevailing party.

About the Author

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