



An attorney discusses litigating construction disputes: Part II

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In my last article "An Attorney Discusses Litigating Construction Disputes: Part I," I discussed disputes with neighboring properties on construction projects. This article will discuss disputes within the construction team on a project. First let's talk about who is on the team. On very large construction projects, it is not unusual for a new entity to be formed by the owner/developer just for a particular project. This new entity is actually an LLC and is "related" to a large development company. A new trend is for that developer to also form a construction company, which again is "related" to the developer. The construction company may function more like a construction manager and will subcontract out almost all of its work.

In the more common construction projects going on every day on commercial and residential properties, the team is comprised of all unrelated parties who have been brought together for purposes of working on a project and who may never have worked together before and may never work together again. The owner may obtain bids from a variety of contractors, then select one to work with.

Given the fact that all the members of the team are somewhat unknown, it becomes that much more important to delve into who they are, their track records and how they are organized. For example, you may have a team member who is supposed to be the project architect. You find out that the entity is a corporation, which is not the way architects are organized and that the owner of the company is an architect. That situation needs to be examined more closely, since there may be liability issues which are not covered.

The general contractor is usually selecting the subcontractors he will work with on the project. While the owner may have gone to great lengths to select a well-qualified general contractor, the owner will not know much about the subcontractors and the contractor's arrangements with them, since the owner has no legal relationship with them. However, the owner can have provisions in its contract with the general contractor requiring the general contractor to ensure that its subcontractors have appropriate insurance coverage and indemnification.

Why should the owner care if he has made sure that the general contractor has these things, you might ask? Assume that the subcontractor is the party who caused some damage on the project. The general contractor's policy may not cover it, because it was caused by a sub and relates to work done much earlier on the project. That may leave the owner without insurance coverage for the problem. The owner may or may not have a separate policy to cover the claim and the owner learns that the subcontractor, for some reason, has no insurance. This will lead to a very messy, complex lawsuit.

Other than insurance coverage issues, the other big area for disputes is anything to do with money. The owner and the general contractor agree to a price, but the general contractor and his subcontractors agree to different prices, usually much lower prices. That works until something

happens which causes the need for more work to be done. If it was arguably caused by something the general contractor did, he may have to pay more money out of his pocket, even though he will not be receiving more money from the owner. It can create a "back up jam," where the general contractor is holding out as long as possible from paying his subcontractors, but they are owed money. It can all come to a head with the subcontractor filing a mechanic's lien. This is why I encourage clients to obtain partial waivers of mechanic's liens with each payment made to the general contractor.

The organization and management of the team can also be a big issue. Everyone has heard of projects where the workmen do not show up for days or no one knows who is running things. All of that should be discussed and worked out before the project starts. This is why it is best when clients consult with me before they sign any contracts. We can go over these things and hopefully tighten up the arrangements before the project gets underway.

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