

Avoiding, Resolving, and Winning Construction Litigation

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INTRODUCTION

I. My background

II. Course overview

- A. Avoiding Construction Litigation
- B. Resolving Construction Disputes
- C. Winning Construction Litigation

AVOIDING CONSTRUCTION LITIGATION

I. Avoiding Litigation

- A. Why avoid litigation
 - 1. Cost
 - 2. Time
 - 3. Emotional toll
 - 4. Relationships

II. Contracts

- A. Importance of Strong Contracts for Avoiding Litigation
- B. Purpose of Contract
 - 1. Risk shifting
 - a. Nonpayment
 - b. Defects
 - c. Injury/Property Damage
 - 2. Project nuts and bolts
 - a. Payment
 - b. Timing
 - c. Documentation
 - 3. Dispute resolution
 - a. Disputes
 - b. Insurance
- C. Contract Provisions that are Must-Have, Nice-to-Have, and Avoid
 - 1. Description of Type of Contract
 - a. Fixed Price
 - i. Contractor assuming liability for unknown risks
 - 1. *Spearin* Doctrine
 - b. Cost-Plus
 - i. Importance of definition of costs
 - c. Time and Materials

- d. Other
- 2. Description of Work and Completion Date
 - a. Importance of scope in fixed price contract
- 3. Payment Terms
 - a. Pay-when-paid
- 4. Change Orders
- 5. Right to Withhold Payments
- 6. Dispute Resolution
 - a. Arbitration
 - b. Litigation
- 7. Indemnification
- 8. Lien Release Requirement
- 9. Liquidated Damages
- 10. Escalation Clause for Material Increases
- 11. Insurance
- 12. Notice to Cure
- 13. Attorney fee provision
- 14. Limitations on liability
 - a. Limitations for recovery based on owner deficiencies;
plan deficiencies
- 15. Pass-through provisions
- 16. Equitable adjustment for unforeseen circumstances

III. Lien Releases

- A. Utah lien laws
 - 1. Preliminary Notice
 - 2. Notice of Lien
 - 3. Foreclosure lawsuit
- B. Liens as leverage
- C. Preventing lien claims
 - 1. Releases/Waivers
 - a. Preliminary vs. final

b. Scope

i. Mechanics liens

ii. Claims

IV. Common causes of construction litigation

A. Change Orders

1. Importance of documented change orders

2. Possibility of waiving change order requirement

B. Replacing substandard contractors

C. Increase in material or labor pricing on fixed price contract

D. Deficiencies or errors in design

E. Client not understanding pricing structure, impact of changes

F. Failure to finish on time

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RESOLVING CONSTRUCTION DISPUTES

- I. Importance of Communication throughout Project
 - A. PMs
 - B. Clients
 - C. Subs
- II. Important of Documentation
 - A. Identify and document problems early
 - B. Documents will form the basis of potential subsequent legal case
 - C. Use of emails and text messages in future litigation
- III. Notice Requirements
 - A. Ensure all notice requirements are being met as disputes arise
- IV. Dealing with Liens
- V. Getting Lawyers Involved.
 - A. When not to get a lawyer involved
 - B. When to get a lawyer involved
- VI. Value of early resolution.
 - A. Cost of litigation
 - B. Time to resolution in litigation
- VII. Strategies for early resolution
 - A. Components of settlement offer.
 - B. When to draft a complaint.
 - C. When to get a mediator involved.

WINNING CONSTRUCTION LITIGATION

- I. Overview of litigation
 - A. Complaint
 - B. Discovery
 - 1. Written discovery
 - 2. Depositions (Fact Depositions; 30b6 Depositions)
 - C. Summary Judgment
 - D. Trial
 - E. Appeal
- II. Importance of preserving documents
- III. Important of identifying good witnesses
 - A. Fact Witnesses
 - B. 30b6 Witnesses
- IV. Importance of identifying good documents
- V. Common issues in litigation
 - A. Whether work was within scope
 - B. Who should pay for changes to original plans
 - C. Who should bear the burden of unexpected occurrences
 - D. Whether subcontractors performed deficiently
 - E. Delay of project
- VI. Summary Judgment
 - A. What disputes can be resolved on summary judgment?
 - B. What are some strategies for winning on summary judgment?
- VII. Trial
 - A. What disputes must go to trial?
 - B. Jury trial vs. bench trial
- VIII. Appeal
- IX. Judgment
 - A. Collecting judgments
- X. Questions about avoiding, settling, or litigating construction law claims?