



FIGHTING THE UPHILL BATTLE ***Defending a Contractor's Never-Ending Liability***

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Securing and performing jobs in the construction industry is a highly competitive process. Contractors and subcontractors who provide bids and get accepted to perform work on a construction project will of course feel good about getting the job. However, most contractors often do not realize that, through the signing of contract and subcontract agreements and performance of the work, they face a host of potential liabilities that they never anticipated or envisioned.

Frequently, in most residential and commercial construction projects, a contractor or subcontractor is provided with a set of plans and specifications to follow in connection with the performance of the work. The assumption by the contractor is that the plans are proper and sufficient, and are hopefully approved by the applicable building department. However, as many contractors have learned over time, even approved plans can contain deficiencies that need to be addressed and resolved. Such a process usually occurs in the form of Requests for Information ("RFIs") or less formal methods to resolve discrepancies or deficiencies in the plans and specifications.

Where contractors can run into trouble is on smaller, less formal projects (typically on residential projects), where certain formalities are often not observed. Similarly, on smaller projects, contractors will sometimes directly hire an engineer and architect to assist in the designs, rather than have the owners hire such parties. Both are problematic and can create unanticipated liabilities when problems with the construction arise.

Put It In Writing

Observing simple formalities on a construction project, including small projects, can be a lifesaver to the contractor's potential liability when things go south. Even if formal RFIs are not utilized, a contractor should document everything on a project by creating a writing that shows it was provided to all involved. E-mails are particularly useful in this regard. Directions by an owner (or design professional) to change something in the construction, regardless of whether it results in a formal change order requiring an adjustment in the price, should always be documented. Verbal directions in the field, particularly those that involve changes to the plans or intended design, must

be confirmed in writing. If litigation ensues during or after the project is completed, that documentation could prove to be the contractor's saving grace in avoiding or minimizing liability.

One of the first things the contractor's attorney will request from his or her client when defending a claim, is copies of all project documentation, including all communications related to the project. If a change implemented by the contractor is not confirmed in writing and turns out to be the subject of a complaint, the contractor will bear responsibility. If it is not in writing, the owner or design professional can, and likely will, deny ever giving that instruction which led to the problem. The documentation of what occurs in the field during construction is also helpful to create a timeline of the events that unfolded, showing when, how and who was involved.

Who Works For Whom?

When a contractor brings in an architect or engineer (and contracts with that design professional), that design professional is now operating under the contractor's direction rather than the owner, which can potentially result in the design professional's errors becoming the responsibility of the contractor. It is always far more preferable to have the owner retain the design professionals independent of the contractor, even if it is based on the contractor's recommendation.

That layer of insulation by having the owner contract with design professionals can save the contractor from becoming embroiled in what can become a costly dispute over some aspect of the design that the owner is now complaining about. If that complaint ultimately leads to a lawsuit, whether the contractor hired the design professional directly, could make a significant difference in the contractor's ultimate liability.

What's In The Plan?

Even on projects where the plans and specifications are provided by the owner, or the owner retained design professionals, a contractor can still face liability if there are deficiencies in the plans. A deficiency that is determined to be so obvious that a contractor should have recognized it, and suggested an alternative (or refused to perform the work), can become a basis for imposing liability on the contractor.

For example, in a recent lawsuit, I was defending a contractor who submitted a bid in response to a bid package sent out by a local government agency. This was for the construction of a post and cable fence and gates on desert conservation land. A detailed set of plans and specifications was provided by the government agency as part of the bid package, and our client's bid was accepted. He constructed the fence and gates, his work was inspected and approved, and he was paid in full for the job. Four years later, a man on a dirt bike riding through the native desert, rode into the cable fence and severely injured himself. He filed a lawsuit against the contractor who built the fence as well as the government agency that owns and manages that conservation land.

In defending the contractor, we filed a motion for summary judgment on the grounds that the contractor complied with the plans and specifications, including presentation of the testimony from the representative of the government agency confirming that the fence was built in accordance with their plans and specifications. However, the Court, in assessing the contractor's liability, expressed that a contractor cannot blindly follow the plans to escape liability. Thus, the Court declined to find that the contractor was not negligent as a matter of law since he should have questioned whether the plans were appropriate or created a hazard, suggested an alternative, or refused to perform the work. This is a serious problem with relying on the Courts, who do not understand the reality of the construction industry.

Assuming the contractor had duty to either raise a problem with the design or seek an agreement to build the fence differently, there was no evidence that the government agency would have agreed to it. Had he refused to do the work, it would just be someone else getting sued. In the context of this contractor's efforts to bid and obtain construction work, no such considerations of rejecting work that was part of the government project or telling the government they need to change their fence, when very specific designs were given to the contractor, even occurred to him, nor should they have. Nevertheless, this case presents an example of the unexpected liability that can occur, which in this case, was several years after the contractor completed the work.

The question remains however, that, had the contractor sent a written communication to the government agency pointing out some deficiency in the plans for the fence (such as making the cable more visible or posting additional signs), and his suggestions were rejected by the government agency, would that have insulated the contractor from liability? One would hope so, but then some Courts will decide that under such circumstances, the contractor should have refused to do the work, creating a never-ending cycle of liability for a contractor.

On any construction project, contractors need to undertake very simple measures that will provide some measure of insulation from the nearly infinite ways that liability can arise from a construction project. The best measures that can be taken by the contractor are to create documentation related to what occurs on the project and what directions he or she is given. While it may not prevent the contractor from getting sued, it will certainly assist the contractor's lawyer in defending the lawsuit and eliminating or minimizing the contractor's liability, by demonstrating that everything was done reasonably by the contractor in the performance of the work to avoid any injuries or damages that could arise from the performance of the work. As an attorney defending contractors, I am always pleased when I see a well-documented project file.

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