



Lawsuits: Prepare for the Worst, Hope for the Best



BY GARRETT J. SULLIVAN

It's late afternoon. You and your staff are celebrating your long-awaited "big job" contract. Champagne corks (or beer caps) are popping. You're looking forward to the new job, prestige, and financial rewards ahead.

Unfortunately, this jubilation is short lived. Why? A great job is akin to a cluster of stars lining up in perfect fashion. It's easy to lose alignment because they all depend on one another. A successful job requires each of the following "stars" to be positioned exactly right – the owner, estimate, field superintendent, sub-contractors, inspector and even the weather. When aligned, you've got a homerun. When misaligned, your dream job can become a lawsuit – an all-too-often scenario in our industry. Most claims are tied to your administration – schedule, delay, impact disruption, or acceleration issues. As a general contractor (GC) working for an owner, or subcontractor by a GC, never underestimate the importance of your contract administration. Everyone must fully understand the terms and conditions of your agreement – and be able to identify and document when asked to deviate from it. This is a pivotal first ingredient to avoiding a lawsuit. Give an unannounced pop quiz to your team at your next meeting. Call out scenarios and ask them if they constitute a significant change to the contract – and how they should be managed.

While you should always maintain a healthy working relationship with the owner or GC, don't be overly accommodating and thus end up being responsible for cost

overruns and delays. Focus on notice and documentation.

When changes are requested, I recommend the following documentation methods:

- superintendent journals
- written daily reports
- pictures and videos
- letters
- e-mail correspondence; and, most effectively
- requests for information (or "RFIs")

RFIs are extremely effective. They document the owner's response (and clarify timeframe for them to respond) as well as cost/schedule impacts. Pictures also can be attached. In your RFI, ask the owner to respond in writing with a clear directive. Most importantly, if necessary, begin the change order negotiation. This shows that you're serious about the ultimate cost and schedule of the job.

Another underused method is to supplement the project meeting with a schedule narrative. This is useful, even if you're only reviewing a three to four-week schedule look ahead. It's a convenient place for the GC to document delays or interferences that are beyond the GC's (or subcontractor's) control and have not been addressed by the owner (and affect the schedule). It also helps pave the way for additional compensation, especially when there is construction acceleration to the completion date (should the owner refuse to alter it).

Bearing in mind that your team is doing all it can to maintain a positive and clear line of communication with the owner, always document changes, especially

when you feel the owner is not hearing you. Key words can include interference, late approvals, no access, discrepancies in the plans and specifications, idle labor and equipment, labor inefficiencies, wage and material escalations, extended field and job supervision costs and home office overhead.

As you well know, contractors are oftentimes forced to adhere to the set completion date without receiving a deserved time extension and/or cost adjustment when changes are directed. In these situations – which are more common than not – your written documentation will literally save you. When you use phrases such as overtime, longer day/work week, schedule changes, denial of time extensions and/or early completion date, you are sending the right message.

Occasionally, a contractor will be involved in constructive change(s) that need to be documented vigilantly in order to be fairly paid. In these circumstances, key words should include unwritten requests, additional work, exceptional or rigid inspections, change in method or sequence of work, and interference.

While prevention is the best cure for lawsuits, prudent contractors have systems and procedures to document work and ensure compliance. As they say in football, "the best defense is a good offense." Accordingly, your best offense is to earnestly attempt in good faith to mediate or arbitrate the claim. If you fail, and it comes to a lawsuit, you will be fully prepared to go out and "shoot bear" in order to win your case. **BI**

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