Construction Law Newsletter

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CAN THIS PROJECT BE SAVED?[1]

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From a construction perspective, there was nothing remarkable about a recent construction project in Eugene, Ore.—a high-rise apartment building with a garage underneath. Project ownership, however, was thoroughly modern: the city would own the public parking garage, a $9 million project, while the apartments above it were to be owned by a private developer.

The problem. In July 1998, the parking garage, well into its second construction season, was only 70 percent complete. The owner was threatening liquidated damages for project delay, while the general contractor was considering substantial claims based upon problems it had encountered with the concrete slabs and block walls.

In hopes of moving the project forward, an executive team consisting of city representatives, the general contractor, subcontractors, the private developer, and the project designers met with partnering facilitators to begin a process of intervention partnering known as project realignment.

The executive team and project management teams identified specific actions to give the project a fresh start, from improving communications between all parties to changes in quality control procedures. The goal was to resolve all outstanding claims and disputes without litigation. All issues were to be addressed through the change order provisions of the existing construction contract.

Project teams performed the specific actions identified in the initial two-day meeting. The teams were built across organizational lines at the field, project-manager, and executive levels, including representatives from the general contractor, the designer, key subcontractors, and the owners, both public and private.

The partnering facilitators began holding regular meetings with project executives, project managers, and field personnel regularly. They also put partnering processes in place directly on the jobsite, bypassing the traditional workshop. The facilitators instead met with small groups to lead them in the look-ahead, risk assessment, and issue resolution processes.

A single claims consultant. Facilitators led the effort to design and implement an issue resolution process that would meet the goals of fairness, speed, and cost-effectiveness. Executives and project managers decided to hire a single claims consulting firm to objectively assess all claims and issues, with consulting costs shared by all.

The claims consultant (Pinnell-Busch, Portland, Ore.) used sub-consultants, as necessary, to analyze highly technical engineering issues. They interviewed personnel from all the organizations involved in the project and reviewed project records. Time was of the essence, and the executives agreed that the process of issue and claims resolution must be completed within six

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[1] Reprinted from the November 1999 issue of CONSTRUCTOR, the national magazine of the Associated General Contractors of America (AGC). For more information, visit AGC on the web at www.agc.org. The article was brought to the section's attention by Howard Carsman, one of the facilitators on the project, who is now at Bullivant Houser Bailey.

weeks. After approximately six weeks of investigation, the claims consultants issued a confidential report containing their opinions on responsibility and damages, or entitlement and quantum.

Confidentiality: the key to success. Confidentiality was the key to success of the claims resolution process. All parties signed a confidentiality agreement to preclude any from later using the report or the claims consultant against one another if the project realignment failed.

The claims consultant's report was thus nonbinding—but it helped the executive team to understand the claims and positions of each party. After the report was made, the executive teams and project management teams spent three days in facilitated negotiations. All outstanding disputes and claims were resolved, and the settlements were transformed into change orders and paid through the ordinary course of contract administration.

The parking garage project went on to a successful completion. It proved that a construction project gone bad could be saved through full and open communication and commitment to a win-win solution.

EFFECTIVE SUBCONTRACTOR REPRESENTATION IN COMPLEX CONSTRUCTION CASES

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I. Introduction.

Representation of subcontractors and materialmen in complex construction cases presents special challenges to practitioners due to complexity of the cases, relative vulnerability of a subcontractor compared to the well-financed owner and general contractor.

This article focuses on defining the types of challenges presented in representing these types of entities, with a primary focus on the benefits of a cooperative effort. The take-home message of this article is that subcontractors or materialmen will only succeed in complex construction litigation by participating in a well-thought-out, cooperative effort involving the subcontractors.

2. Benefits of Cooperative Effort

There are a number of benefits to subcontractors or materialmen who participate in a cooperative effort to pursue their claims on a large, complex construction project. A partial listing of these benefits follows:

- Small claims versus big dollars
- Economic need/minimizing financial impact for client
- Improved negotiating position:
  - Power of numbers
  - Understanding/sharper focus on value of common claims
  - Minimizes scapegoating by upstream parties
- Better claim analysis
- Better legal research on significant issues
- Leveling the playing field by creating a team of highly qualified attorneys.

3. Characteristics of typical complex construction disputes.

A complex construction dispute often involves projects that have a budget of greater than $150 million. The project may involve some type of high tolerance specification or requirement, e.g., innovative design and construction requirements, specific application or finish work with high visibility impact, high tech components, etc.

Further, the project will normally involve detailed specifications prepared by an architect and engineering company that remain involved in

the construction process. Often, at least some parties feel the plans were inadequate or defective.

Of course, time will be an issue (as it always is): job completion will often be delayed, the start-up may have been delayed, and subcontractors have usually been on the job longer than expected.

Another aspect is that the subcontracts will normally be standardized forms prepared by the general contractor. These standardized forms will be used with most subcontractors, but not all. Some subcontractors may have modified their subcontracts, while others have not.

The subcontracts may include at least the following significant clauses of common importance:

- Change orders/notice requirements;
- Pay when paid;
- No damages for delay;
- Arbitration/mediation; and/or
- Indemnity.

Sample client: For purposes of this article, the following hypothetical client has appeared in your office: The client is an HVAC contractor who is responsible for installation of the entire HVAC system for a commercial building. The HVAC system includes a complex electrical control system specified by the architects. Initially, the installation and operation of the electronic control system was problematic, but is properly working now.

The HVAC work was scheduled to take 10 months. Instead, the subcontractor was on the job for 21 months. The subcontractor now has a claim of $1.3 million in change order work, including written change orders, verbal directives, and others in the form of informal written directives.

The contractor knows he has lost money and estimates his losses to be about $2 million. Like many subcontractors, the client's records are very good in some respects and very weak in some respects. The client has filed a lien, without your involvement, which states a lump sum claim of $2 million. A lawsuit is already pending.

There are over 30 parties involved; including the general contractor and the property owner, and other lien claimants are also defendants, but the construction manager/architect have not been included as parties.

What do you do? The evaluation of your client's role in the construction job is part of analyzing how best to represent a subcontractor or materialman in the litigation. Was your client in the critical path in connection with performance of the job? What kind of problems did your client cause on the project, if any? Who did your client have problems with in prosecuting its work? It is possible that your client will be "seriously blamed" for delays or major project problems.

1. Your Client's Role in Job Problems is the Acid Test.

Delay claims are invariably involved in complex construction project disputes. The general rule is that everyone is going to be blamed for delay in a complex construction case. Understanding your client's position with respect to the construction delay is critical in determining the role you and your client can play in "cooperative prosecution" of the case with other subcontractors.

The client's involvement with the specific delay issues will help determine the client's involvement in any cooperative efforts.

For example, if there is a high likelihood that the client was involved with the issues giving rise to the delay claims, then this client will be very interested in establishing and protecting the enforceability of a no damages for delay clause. Thus, a given party's involvement with any delay claims may impact how that party is involved with the "cooperative prosecution" of the case with other subcontractors.

High likelihood of culpability in delay claims.

This client will be very interested in establishing and protecting the enforceability of a no damages for delay clause. The client may be

involved in some parts of the cooperative efforts but must be screened from other efforts.

Probably some responsibility in delay claims.

This client will not want enforcement of the no damages for delay clause. The client will likely be a central player in cooperative efforts.

Clean as a whistle in regard to delay claims.

This client will be very interested in establishing the unenforceability of a no damages for delay clause. The client may or may not want to be part of cooperative efforts.

Indemnity/Contribution Issues

Another issue is your client's exposure to claims by other subcontractors in the form of indemnity and contribution or types of direct claims. In these situations, you need to address four points:

1. Analyze contract issues for the client, i.e., modification, waivers, change order language and the like, and identify unique issues for your client.

2. Assess the client's ability to prove its claim without the assistance of other subcontractors and the like.

3. Examine lien issues vis a vis your individual client, i.e., validity, enforceability, scope of lien.

4. Identify defendants with respect to your client's claim, including sureties, other subcontractors, architects, engineers and, specifically, the availability of negligence claims against those defendants.

Goals of the Collaborative Effort:

Developing a successful collaborative effort requires careful focusing on collective goals. General meetings may not be very productive because they involve large groups of people and proper agenda identification is critical to success of a collaborative effort. Collective goals of the group efforts should be:

1. Develop a cohesive theory of the case regarding upstream responsibility for delays, job problems and the like. (Upstream liability includes owners, architects, construction managers, general contractors, and, "early on the job," subcontractors, such as earthworkers, or fabricators.)

2. Identify common questions of fact and law and allocate responsibility for coordination of review and briefing.

3. Establish a discovery committee and discuss discovery issues relating to document production, deposition scheduling and the like.

4. Review problems associated with potential cross-claims, third-party claims and conflict issues.

5. Develop a joint prosecution agreement, to the extent appropriate.

6. Identify procedural issues that require coordination between all parties, including owners, general contractors and similarly situated parties, and identify a liaison person to deal with joint issues relating to discovery and related matters.

7. Review issues associated with the need for hiring a single expert on collective issues, such as delay damages, architectural specification defects, owner interference, etc.

8. Begin discussion of mediation timing issues and related matters, investigating potential mediators.

9. Develop timetable for prosecution of the case, mediation, and filing dispositive motions. This is a particularly critical factor in the overall process as it will be the starting point for developing an approach to the litigation that will minimize fees incurred by the individual subcontractors, which is the linchpin for cost effective representation.

Risks of Collaboration:

There can be no doubt that there are potential risks associated with collaborative efforts between subcontractors. These risks include:

- Tail wagging the dog. (The "little" claimant obstructing resolution of other claims.)

- Dog biting off tail. (Single claimant left out of major settlement late in the case.)

- Loss of momentum.
- Poor coordination.
- Failure to properly time and coordinate efforts.
- Hardening of subcontractor positions, making settlement difficult.
- Failure to follow through by others.

As construction projects become more complex and the dollar values increase, the likelihood of disputes also grows. As a result, the claim of an individual subcontractors or suppliers becomes less meaningful as part of the overall dispute, but more significant to the claimant. In order to ensure that the subcontractors and suppliers can effectively cooperate with the large stakeholders in complex litigation, they must work together in a cooperative fashion.

Subcontractor cooperative efforts in complex litigation also benefit other parties. When common procedural and substantive issues are approached uniformly, resolution is simpler and less expensive.

Finally, unified subcontractor action in complex cases facilitates settlement by reducing the likelihood that one party can overpower the other through litigation. This approach to complex litigation is merely an extension of partnering concepts which continue to emerge as the best solution to construction project problems.

ALTERNATE DISPUTE RESOLUTION AT THE CCB

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A couple shows up in your office at their appointed time and walk out 20 minutes later, frustrated that you can't help them in a legal dispute with their contractor. They have a $6,000 claim for breach of contract and negligence as a result of a botched bathroom remodeling job. A lawsuit is likely to cost them $3,000. They have a good case and you'd like to help, but they can't afford the risk of taking the matter to court. Is there an alternative to a lawsuit for your clients?

The Construction Contractors Board (CCB) may be able to help. The CCB is a state agency charged with regulating Oregon's construction industry. One of its goals is to resolve construction disputes through the Board's mediation, claims and arbitration processes—a one-of-a-kind service in the country.

Property owners, prime contractors, subcontractors, material suppliers and employees may file claims with the CCB against registered contractors. Owner and prime contractor claims must be for negligent or improper work or breach of contract. ORS 701.140. Generally a claim must be filed within one year of substantial completion of the work. See ORS 701.145 and OAR chapter 812, divisions 2 and 4 for the jurisdictional requirements to file a claim and related definitions. A properly filed claim gives access to the contractor's surety bond, which may be as much as $15,000. A final order by the CCB requiring a contractor to pay may be filed with the court and has the same effect as a court judgment. ORS 701.150; see also ORS 205:125-.126.

After a homeowner claim is filed, the CCB usually sends an investigator to the site of the construction to meet with the homeowner and the contractor. The investigator attempts to facilitate a settlement of the claim and if this effort fails, he or she investigates the claim and prepares recommendations. Well over half of the on-site investigations that are attended by the contractor lead to a settlement.

If the parties to the claim do not enter into a settlement, the investigator makes observations and prepares a report. The investigator may recommend that the claim be dismissed, damages be paid or repairs or other work be done. If the investigator recommends that work be done, the contractor may be given an opportunity to do that work. If the contractor will not or cannot do the work or if the contractor breaches a settlement agreement to do repair or other work, the claimant

will be asked to obtain estimates and other proof of the cost to do the work. Based on all of the information in the claim file, the CCB may issue a proposed order. A proposed order is a trial balloon floated by the CCB to see if the parties will agree to the proposed resolution of the claim. If no one objects, the proposed order becomes a final order.

Either party may object to the investigator's recommendations or the proposed order and request a hearing. If the CCB claims examiner is unable to issue a proposed order due to conflicting evidence in the file, he or she may send the matter to a hearing. Hearings are held before a Administrative Law Judge (ALJ) from the Hearing Officer Panel who specializes in resolving construction disputes. Hearings are contested cases under state law and are governed by CCB rules in OAR chapter 812, division 9 and the provisions of ORS chapter 183 and OAR 137-003-501 to 137-003-0700. Decisions by the ALJ may be appealed to the CCB Appeal Committee, a three-person subcommittee of the Board and ultimately to the Court of Appeals.

If both parties agree, a claim may be submitted to arbitration before a CCB arbitrator, who is usually one of ALJs who hears CCB cases. Arbitration may be a better forum for some parties. It is usually quicker, it allows equitable solutions that are not available in a contested case and it may be possible to bring in parties with their consent that could not be part of a CCB contested case. In fact, the arbitrator is permitted to grant a party "any relief or remedy" that the arbitrator deems just and equitable. OAR 812-010-0420(3).

Contractor registration fees fund the agency's claims services. A party does not have to be represented by an attorney to participate, although representation may be advisable. For a copy of a claims packet, CCB statutes and administrative rules, or an agency publication order form, call 503-378-4621 ext. 4974 or visit the CCB web site at www.ccb.state.or.us. For general claims questions, call ext. 4910. To determine if a contractor is licensed, call ext. 4900 (CCB staff during regular business hours) or view the web page at www.ccb.or.us. The manager of the CCB Claims Resolution section is OSB member Bill Boyd. His phone extension is 4028.

INTERACTIVE MARKETING

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Many of us are taught to market our practices using tried and true techniques. Some of those techniques include personal contact, community involvement, articles and seminars. Although still excellent techniques, technology has allowed us to communicate with clients and potential clients in new ways. Recently, I had the opportunity to use interactive technology in lieu of a traditional seminar. So far the feedback has been positive. The purpose of this article is to briefly share with you some of my experiences with this interactive seminar.

Many of us have performed or witnessed seminars conducted with slides. I wanted to conduct a similar type seminar but struggled with the realization that many contractors are used to such seminars. I wanted to keep people engaged. As many of you know, that is not always an easy task.

Eventually, we created a competitive question-and-answer session. We created PowerPoint slides of multiple choice questions that were projected onto a screen for the contractors. To engage the contractors, I divided them into teams. Each team picked a representative to answer questions that appeared on the screen. The more questions they answered correctly the more points were allocated to that team. This created an atmosphere of good-natured competition among teams. The contractors also enjoyed matching their wits against the attorney. This was a more subtle competition that I believe made the event more enjoyable.

The competition truly had contractors engaged. They were more boisterous and

enthusiastic than I had expected. People were not only willing to answer questions but were willing to challenge the questions and answers. This created plenty of opportunity for jokes and some heckling from the back row.

For the points they accumulated they were allowed to pick miscellaneous minor prizes. The prizes were appreciated, but I believe the competition was the main reason why the contractors stayed so involved.

After the seminar I received nothing but positive feedback and compliments from the contractors and the organizers of the event at Associated General Contractors ("AGC"). I received compliments for the content but also for the originality of the event. Others also appreciated an attorney stepping outside the "box" and taking a little bit of a risk. I felt a little bit like a game show host and in many respects I was on stage. I think the contractors appreciated the kind of risk involved in those kinds of endeavors, and they certainly let me know.

I would encourage my fellow members of the bar to think about whether or not there are any topics from their particular area of practice that they would like to discuss in such a forum. For me it was a worthwhile experience.

CCB Practice Tips

Alan L. Mitchell
Furrer & Scott LLC

1. Licensing of New Entities.

If a contractor is licensed with the Construction Contractors Board as a sole proprietor and then changes to a corporation or an LLC, does the new entity have a new CCB license number?

Not necessarily. Although the CCB OARs require that a new entity must "register anew," the rules do not specify that the new entity must have a new CCB license number. See OAR 812-003-0000(3). In response to contractor interest, the CCB takes a position that there is no bar to giving the new entity the same license number as the sole proprietor.

This means that you could pull up the CCB license information on an entity that was formed in 1998 and learn that it had been "continuously licensed since 1992."

As such, it is advisable to always call the Oregon Corporation Division to obtain its information about any entity (503-986-2200). By cross-checking the information, you should obtain a fairly good snapshot of the licensing information for the entity. The telephone number for the CCB is 503-378-4621.

In addition, be sure to verify both the name of the entity and its business form (for example, sole proprietor or corporation) before contacting either the CCB or the Corporation Division.

Of course, if you need further information, you may want to send a public records request to the CCB for the entire registration file for the specific CCB number. Note that the CCB accepts only written requests but will accept requests via facsimile (503-373-2007).

2. License Number versus Licensed.

Just because someone has a CCB license number does not mean they are currently licensed.

Recently, in checking on a company that has a CCB license number, I found that the entity's license status was "Refused." This means that the entity has never actually been licensed as a contractor in Oregon.

In following up with the CCB, I found that a license number is issued to applicants before the license is approved as a "tracking" number. It is not until the agency actually approves the license application that the entity is actually a currently-licensed construction business.

Again, until you determine that an entity's license is current and valid, you should never assume that the existence of a CCB license number means that the entity is currently licensed or that it ever has been licensed. In fact, parties can become unlicensed at any time for a number of different reasons (loss of insurance or cancellation of bond). Thus, it is important to verify the entity's license status at the time of entering into the contract.

UPCOMING CLEs

October 23, 2000: "Emerging Issues in Construction Arbitration"

This CLE will address some of the issues that arose during the recent Hyundai litigation, including the impact of the Federal Arbitration Act on construction contract arbitration clauses.

The Honorable David V. Brewer is a planned speaker, among others. For details, contact Roger A. Lenneberg at (503) 227-1111. The CLE is scheduled from noon to 1:30 at the Downtown Deli. The price is $10 for section members and $15 for non-members.

December, 2000: "Practitioner's Guide to the Construction Contractors Board"

This CLE will address the CCB's claims process, its hearings process and enforcement actions by the CCB, as well as some proposed legislative changes. It is planned as a half-day CLE to be held in the Portland area on either December 6, 7, or 8.

Presenters will include CCB managers and staff as well as private practitioners. For details, contact Alan L. Mitchell at (503) 620-4540.

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