Construction Law Newsletter

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THE WASHINGTON LEGISLATURE HAS INCREASED THE AMOUNT OF CONTRACTOR REGISTRATION BONDS, AFTER OVER 22 YEARS OF NO INCREASE

Curtis A. Welch
Sussman Shank LLP

In May 2001, the Washington legislature amended RCW 18.27.040 by increasing the registration bond amount for general contractors to $12,000. *Laws of 2001, ch. 159, sec. 3*. That bond amount has remained the same since that time, as has the $6,000 bond amount for specialty contractors.

As many practitioners have experienced, those amounts have not been nearly enough to compensate claimants for their losses.

Curtis

The Washington legislature addressed this matter this past legislative session, passing HB 1534, which was signed into law by Governor Inslee on May 1, 2023. Among other amendments, the new law amends RCW 18.27.040(1) by increasing the bond amount for general contractors to $30,000 and increasing the bond amount for specialty contractors to $15,000.

These increased bond amounts take effect as of July 1, 2024. Thus, for initial contractor registrations and for renewal registrations occurring on or after July 1, 2024, the amount of contractor registration bonds must be in those increased amounts.

These increases are encouraging news for suppliers, subcontractors, and equipment rental companies, whose claims are a large percentage of claims filed against contractors' registration bonds. Recovery for these types of claimants have been limited not only by the relatively small amount of the bonds, but also by RCW 18.27.040(5). Under RCW 18.27.040(5), the amount paid from a contractor's registration bond to those other than residential homeowners is limited to one-half of the bond.

Recoveries are even more limited if there are competing claims against the contractor's bond. *See* RCW 18.27.040(4).

Accordingly, claims against a contractor's bond have often been viewed as not entirely effective, particularly in relation to larger claims, but even as to smaller or moderately-sized amounts owed, claims against registration bonds are seen as just one avenue of recovery.

Claims against a contractor's registration bond in Washington are initiated by filing an action in Superior Court of the county in which the work was done, or the Superior Court of any county in which jurisdiction of the contractor may be had. RCW 18.27.040(3). Suit must be filed within one year by all claimants other than residential homeowners, and must be filed within two years for residential homeowners. *Id.* The one-year period for claimants other than residential homeowners runs from the "date the claimed labor was performed and benefits accrued, taxes and contributions owing the state of Washington became due, materials and equipment were furnished, or the claimed contract work was completed or abandoned, whichever occurred first." *Id*.

Service of the complaint and summons is done by service of three copies of the complaint and summons, along with the required fee (currently $55.00) to the Department of Labor & Industries' Contractors Section. Service on the Department is by certified mail or by delivery service requiring notice of receipt. *Id.*

It is important to note that service on the Department of Labor & Industries only effects service on the surety, and effects service on the contractor only to the extent of the bond. *Subcontractors and Suppliers Construction Services v. McConnachie*, 106 Wash. App. 738, 743 (2001); *Ahten v. Barnes*, 158 Wn. App. 343, 359 (2010); *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wash. App. 480, 484-85 (1984).

Thus, in all cases, the claimant should also personally serve the contractor in addition to service on the Department of Labor & Industries because of the fact that personal service on the contractor is required for jurisdiction over the contractor for amounts not covered by the contractor's registration bond.

In contrast to the procedure regarding claims against a contractor's registration bond in Oregon and the forms and notices that need to be sent to the CCB, the primary notice to the Washington Department of Labor & Industries is service of the summons and complaint at the outset of the case. In addition, a claimant also must deliver to the Department a certified copy of the judgment once judgment has been entered against the contractor.

Residential homeowner claims

Among the other important provisions of HB 1534 are the increased protections to homeowners. The new law establishes a Homeowner Recovery Program ("HRP"). These provisions are codified in new sections added to RCW 18.27.040.

Under the HRP, a Homeowner Recovery Account will be established. Revenues from all fines and penalties collected by the Department of Labor & Industries under the Contractor Registration Act must be transferred into the Homeowner Recovery Account. Under the new law, fines against unregistered contractors are increased, to a range from $1,200 to $6,000.

The Homeowner Recovery Account is solely for the payment of homeowner claims under the HRP.

A homeowner claim is eligible for payment from the Homeowner Recovery Account once the following conditions are met: 1. The claimant has a final judgment in court against a registered contractor in relation to work on the claimant's primary residence; 2. The judgment specifies the actual damages as a consequence of the claim; 3. The claimant has proceeded against any existing bond covering the contractor; 4. The judgment has not been satisfied in full; and 5. The claim for recovery under the HRP is made within 90 days after the conclusion of any civil action brought under RCW 18.27.040(3).

Payment to a homeowner is limited to the homeowner's actual damages awarded in a final judgment after recovery against the contractor's bond. Payments cannot exceed $25,000 per contractor per parcel, or the amount unpaid on the judgment, whichever is less. There is also a provision in the new law for a wait list for eligible claims not yet paid and awaiting further State funding into the Homeowner Recovery Account.

Conclusion

The increases in bond amounts are a welcome change. Even though the new bond amounts may still not be sufficient to pay an entire claim, the increases are beneficial in another respect. Since contractors are required to repay to their bonding company under indemnity agreements all amounts the bonding company has paid to claimants, a contractor (including a corporate contractor's principals who signed the indemnity agreement) faced with having to repay up to $30,000 to their bonding company, instead of $12,000 under the current law, will have added incentive to resolve matters with subcontractors, suppliers, equipment rental companies, and homeowners before a claim is made.

As noted above, claims against contractor's registration bonds are just one of the tools for recovery, but soon will be a tool with increased effectiveness.

Contact Curtis at 503.972.2529 or cwelch@sussmanshank.com

BEYOND THE CLAUSE: NAVIGATING THE SHIFTING PARADIGM OF NON-COMPETE DYNAMICS

Matthew Juhren
Sokol Larkin LLP

In the ever-evolving landscape of employment practices and regulations, few topics have garnered as much attention and debate as non-compete agreements. These contractual clauses, designed to limit employees' mobility and potential competition after leaving a company, have stirred discussions about their impact on workforce dynamics, innovation, and economic growth. Within the span of a few months, two significant players, the Federal Trade Commission (FTC) and the National Labor Relations Board

(NLRB), have taken notable strides in shaping the discourse around non-compete agreements.


Matthew

On background, non-compete agreements have become a prevailing practice across the nation. Their purpose is to restrict employees from utilizing knowledge gained at one company to benefit a competing entity. Remarkably, around 20% of the current U.S. workforce is bound by these agreements, painting a clear picture of their ubiquity. Moreover, over a third of employees have encountered these agreements at some juncture in their professional journey, solidifying their status as a norm in employment relationships. While these clauses were traditionally linked with higher-paid managerial positions, they have made their way into the lives of lower-wage workers as well. This means that construction professionals like tradesmen and women, mechanics, and even heavy haul truck drivers—individuals who might not have access to sensitive information—have not been spared from their grasp.

The FTC projects a substantial boost in employee earnings, as much as $296 billion annually, if non-compete agreements were to be abolished.[1] This staggering figure underscores the profound impact of these agreements on workers' financial prospects and the economy at large.
For better or worse, when examining the intricacies beyond the attention-grabbing headlines, it's evident that non-compete agreements are here to stay in our foreseeable future.

The FTC's Bold Proposal

In a significant stride that has sent ripples across the business and employment domains, the FTC unveiled a proposal in January 2023 that could fundamentally reshape the landscape of non-compete agreements.[2] With a resounding call against what it deems "widespread and often exploitative" practices, the FTC's stance on non-competes is unequivocal: these agreements suppress wages, impede innovation, and stifle entrepreneurial ambitions. The proposed rule stands as a testament to the FTC's commitment to rectifying what it sees as a detrimental practice.

Central to the FTC's argument is the assertion that non-compete agreements run afoul of Section 5 of the Federal Trade Commission Act, constituting an unfair mode of competition. Expansive in its scope, the proposal casts its net beyond traditional employees, enveloping independent contractors and volunteers within its ambit. Should the rule come into effect, employers would be barred from initiating, sustaining, or even implying the existence of a non-compete arrangement with any worker. However, it's important to note that while the FTC acknowledges the legitimacy of certain employment constraints, such as non-solicitation and confidentiality clauses, it also warns that if these clauses operate in a way that mirrors non-competes, they too would fall under the prohibition.

Nonetheless, this is just the opening chapter in a lengthy process. The proposed rule is slated for a vote by the FTC in April 2024, with a path forward laden with complexities. The proposal has sparked an influx of public comments, demanding

careful scrutiny before any implementation can take root. As voices from diverse sectors contribute to the discourse, the repercussions of this potential shift in non-compete regulations extend far beyond individual employment agreements, potentially influencing wages, competition, and the entrepreneurial landscape at large.

But wait, there's more... The NLRB Flex.

Not to be outdone by the FTC, in May 2023, the NLRB chimed in with a memo of its own, adding to the talk about these non-competes.[3] Now, hold on a second – the NLRB General Counsel isn't the one who sets the rules, but they do have a say in prosecuting the National Labor Relations Act (NLRA). This means that their words can have some weight in shaping the law.

In the memo, the NLRB throws its hat into the ring, saying that non-compete agreements can step on the toes of employees' rights under the NLRA. They're pointing fingers at Section 7 of the NLRA, which protects the right to join labor organizations and speak up for better working conditions. Mess with these rights, and you're crossing the line, according to the NLRB.

Their argument goes like this: non-compete clauses can put a hitch in employees' plans to switch jobs for better conditions or even work for a competitor. It's like telling someone they can't have that slice of the job pie they've been eyeing. Plus, these clauses can stop employees from rallying their buddies to join them in a new workplace adventure.

Now, the NLRB does give a nod to some exceptions. They're saying there might be cases where a legit business reason could justify a non-compete. But they're not pulling any punches – they're pretty clear that these exceptions aren't just a free pass. If a company's trying to avoid competition, hold onto employees, or shield their special training investments, that's not going to fly.

This NLRB memo is sort of in sync with the FTC's position, especially for regular employees. Some states are even tightening the leash on these agreements, and others are thinking about it.

Speaking of, here's where Oregon Stands.

The legal framework for non-compete agreements in Oregon is outlined in Oregon Revised Statute (ORS) 653.295. For a clearer grasp, let's consider an example: An ex-employee is constrained from reaching out to potential clients they had interacted with during their tenure. This scenario embodies a non-compete agreement, the enforceability of which is regulated by ORS 653.295.

Judicial precedent sheds light on the interpretation and enforceability of these agreements. In the case of *Naegeli Reporting Corp. v. Petersen*, 2011 U.S. Dist. LEXIS 140246, 2011 WL 11785484, the court scrutinized the breadth of a non-compete. The court found that if a non-compete goes beyond restricting former employees from directly connecting with past clients, and instead prohibits activities that indirectly divert potential customers, it may be deemed unreasonable.

Another case, *Actuant Corp. v. Huffman*, 2005 U.S. Dist. LEXIS 49629, 2005 WL 396610, underscored the importance of reasonableness in non-competes. The court ruled against a non-compete that unduly restricted an employee from engaging in a similar role, irrespective of the employee's potential misuse of proprietary information or expertise to favor competitors. ORS 653.295, which has been in effect since 1977, has witnessed amendments aimed at curbing the reach of non-compete agreements. Senate Bill 169, which came into effect in January 2022, introduced further limitations.

1. **Transparency and Recognition:** The legislation sheds light on disguised non-competes. Cases like Naegli underscore that courts can discern the underlying nature of

agreements, even when masquerading under different titles.

2. **Temporal Limitations:** The temporal component of non-competes is now bound by a 12-month threshold, as opposed to the prior 18-month span. This reduction in the enforceable period aims to strike a harmonious balance between employee mobility and employer protection.

3. **Notice Compliance:** Senate Bill 169 emphasizes transparency through mandatory notice provision. Employers are required to furnish comprehensive written disclosure of non-compete terms before an employee's initiation of service and within 30 days of termination.

4. **Contextual Entry:** The principle of "subsequent bona fide advancement" has emerged as a pivotal criterion. Non-competes must be entered into at the inception of employment or in tandem with material advancements, such as promotions or salary escalations.

5. **Financial Threshold:** The bar for enforceable non-competes has been elevated. The employee's gross salary and commissions must now surpass $100,533 annually (subject to inflation adjustments), effective from January 1, 2022.

Notably, the law also takes a stringent stance by rendering non-competes that do not adhere to these parameters void. Senate Bill 169 has undeniably reconfigured the dynamics of non-competes in Oregon. The recalibration of temporal duration, augmented transparency, and the imposition of higher financial prerequisites all contribute to a redefined equilibrium between the interests of employees and employers.

This recent shift is noteworthy, as it places the onus on employers to demonstrate the enforceability of non-competes that deviate from the stipulated criteria. Previously, employees were required to take action to challenge the agreement's validity.

So, what is an employer left to do?

Above all, prevention is the best defense. Employers should prioritize employee retention strategies to reduce the need for non-competes. If you are going to implement or continue the use of non-competes be sure they are narrowly tailored and used sparingly, focusing on managerial or higher level employees. Non-compete limitations will likely target overbroad usage. Additionally, be cautious of disguising them as other clauses. Courts can see through this tactic, as seen in cases like *Naegli*.

The better approach is through narrowly tailored non-solicitation clauses, especially for critical clients. Precise drafting ensures protection without undue constraints. Oregon's exemption of non-solicitation agreements from non-compete restrictions provides a strategic advantage for protecting against talent loss. Employers can also safeguard proprietary information using well-crafted nondisclosure agreements aligned with the Uniform Trade Secrets Act.

In the world of non-compete agreements, staying informed is paramount. Collaborating with legal experts to fine-tune restrictive covenant agreements ensures a solid footing in a shifting landscape. Employers can strategically tailor agreements to higher earners, aligning with distinct business interests. With a keen understanding of legal dynamics and expert guidance, employers can effectively balance protecting their interests and adhering to evolving regulations.

[1] https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition

[2] https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking

[3] https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national

Contact Matthew at 503.548.2150 or mjuhren@sokol-larkin.com

ARTIFICIAL INTELLIGENCE AND CONSTRUCTION LAW: SHOULD CONSTRUCTION ATTORNEYS SEARCH FOR NEW CAREERS?

Mario R. Nicholas
Stoel Rives LLP

A recent New York Times article regarding the use of artificial intelligence (AI) on construction projects led with reference to a billboard at a construction site in Antwerp, Belgium, which read "Hey ChatGPT, finish this building...." Despite the ever-growing promise of AI in the field of construction law, a similar tongue-and-cheek advertisement could apply to the use of AI chatbots, ChatGPT or otherwise, to draft construction contracts or analyze construction law issues. Even ChatGPT recognizes its limitations, as if you ask ChatGPT if you should rely on it to draft a construction contract, it responds that it is "highly recommended to hire a construction attorney rather than relying solely on ChatGPT or any AI model to draft a construction contract." The subheader for the billboard in Antwerp states, "Your skills are irreplaceable," and while we don't know what tomorrow's AI holds, a similar mantra currently applies to construction attorneys.

Expanding on its recommendation that users hire a construction attorney to draft a construction contract, ChatGPT provides the following reasons construction attorneys haven't gone the way of the dodo:

Legal Expertise

While there may come a day when AI provides accurate legal advice, we are not yet in that reality. For now, many AI models include disclaimers such as, "I am an AI language model and not a legal professional." While AI is quite good at brainstorming or flagging potential issues, and at times exceptionally good when jargon is used to ask the right questions, growing pains show when you ask AI to craft legal documents that align with applicable laws and regulations. For example, ask ChatGPT to draft a mechanic's lien waiver form for use on a project in California and it will spit out a form that appears to check all the right boxes. The form may even include a reference to an on-point California statute, which makes it look even more legitimate to the untrained eye. The problem is that some states, including California, set out a required lien waiver form by statute and the AI-generated form misses the mark (despite my multiple attempts to prompt the model to get the form right). While the use of AI may be tempting to clients to avoid incurring legal expenses, it is fair for counsel to recommend that their clients think twice before signing on the dotted line if their new "attorney" is a free robot.

Customization

This article is in no way a condemnation of AI. There are many ways AI can enhance what lawyers already do and improve efficiency for owners, contractors, and attorneys. But when it's time to customize a contract to address a particular project's unique requirements, specifications, and risks, that's when the experience and creativity of counsel can be invaluable. Many construction projects also rely on customization of template contract forms, such as those generated by the American Institute of Architects, DBIA, or ConsensusDocs. Such forms are protected by copyright, and AI models generally can't provide the full text of the documents—leaving AI software unable to customize many standard industry forms. Attempts to ingest AIA or other commercial forms into AI systems can also lead to

unknown legal risk, and several AI systems are already colliding with copyright law and facing copyright infringement lawsuits.


Mario

Risk Assessment and Mitigation

Dovetailing with the need to customize each contract to a particular project's needs and applicable legal requirements, reliance on AI to generate the significant risk-shifting provisions is rife with problems. For example, prompting ChatGPT to generate an "EPC [Engineering, Procurement, and Construction] contract for a complex construction project in Oregon" results in an EPC contract drafted from scratch within seconds. Like the mechanic's lien waiver form example above, the resulting contract looks decent from a high level, with sections on project description, responsibilities of the contractor and owner, compensation, warranties and guarantees, indemnification, limitation of liability, and termination. But the whole AI-generated EPC contract is shorter than two pages—whereas real-world EPC contracts are typically much longer—and addresses each of the listed topics in a superficial manner. Knowing the right questions to ask, you can prompt AI software to customize and expand each of the particular contract provisions and add missing provisions, but doing so results in a Frankenstein contract. Attempting to create a state-specific contract can also produce anomalies with real-world consequences, such as an EPC contract for a project in Oregon that is subject to dispute resolution under arbitration rules made up, or "hallucinated" in AI speak, by the AI software. (As a further cautionary tale of "hallucinations," an experienced lawyer made international news this year by submitting a court filing he later admitted was generated by ChatGPT and included "bogus judicial decisions with bogus quotes and bogus internal citations," as the judge pointed out in response to the court filing.)

Negotiations

Unless clients are comfortable negotiating contracts generated by AI alone, they will continue to need an attorney to assist with contract negotiations. Even crafting the document is somewhat of a one-way negotiation with the computer as users must prompt the AI software to add provisions A and B; make provisions C and D more owner (or contractor or architect) friendly; make provisions X, Y, and Z apply to Oregon law; and so on. And once the one-way negotiation with the computer ends, the real work starts to negotiate the contract with the other side.

Peace of Mind

The final reason given by ChatGPT for why users shouldn't rely solely on AI to generate a construction contract is a sound one and fair reminder to counsel. Many emerging technologies, be it AI, self-driving cars, or others, carry with them an unease for much of the population while folks adjust to the change and the technology works out the kinks. AI is no different. Similar to the benefit of having a driver behind the wheel while self-driving cars gradually improve, clients benefit from having an attorney at

the helm when working through construction contracts and issues.

In summary, it seems inevitable that construction attorneys will continue to encounter AI in their practices, as construction-specific AI resources seem to hatch seemingly every day. If you or your clients are experimenting with the use of AI on your next construction contract or project, don't necessarily stop, because it can be an amazing tool. But keep your shingle on the door in the meantime.

Contact Mario at 503.294.9510 or mario.nicholas@stoel.com

FANNIE MAE CONTRACTS IN RESIDENTIAL CONSTRUCTION

Douglas Gallagher
Douglas Gallagher Law Office PC

Oregon law requires most residential construction agreements between an owner and a contractor to be written and contain various required terms and notices. *See e.g.*, ORS 701.305, 701.315-.320 and 701.330. The Oregon Construction Contractors Board's website provides a sample contract with the required terms and notices. Sometimes, however, if the residential owner obtains construction financing through a traditional bank, the owner's bank will seek to control the construction contract terms as a condition of extending the loan. Such terms include a firm fixed price for the work (as opposed to cost-plus pricing), a completion deadline, the bank's involvement in the change order procedure, and assignment of risks to the contractor. Often, the bank will provide a sample form. These forms contain terms that some contractors may find objectionable or challenging depending on the nature of work to be performed (particularly if the contractor is accustomed to pricing work on a cost-plus basis or using their own form of contract). Usually, the bank's form will be a modified multi-state model form required by the Federal National Mortgage Association, which is commonly known by its nickname "Fannie Mae."

What is Fannie Mae?

As part of Franklin D. Roosevelt's 1938 New Deal legislation, the federal government created Fannie Mae, a government sponsored but privately owned entity, to provide a stable lending environment for home loans. [1] Prior to the creation of Fannie Mae, "mortgages typically had fifty percent (50%) down-payment requirements, short durations, and high interest rates" - conditions that put homeownership out of reach for most Americans.[2] Fannie Mae helped create stability and ease bank lending requirements by assuming the risk of the borrower's default. Conceptually, once a traditional bank makes a loan, so long as the loan conforms to Fannie Mae requirements, Fannie Mae purchases the loan. As a result, the traditional bank has a ready source of funding for new loans to new borrowers. If the borrower defaults, Fannie Mae bears the loss (which explains why Fannie Mae has been under Federal receivership since 2008).[3] It is estimated that quasi-governmental entities like Fannie Mae provide backing for around seventy percent (70%) of the United States home mortgage market.[4]

Where Can You Find the Fannie Mae Forms?

The multistate model forms and instructions can be found on the following webpage: https://singlefamily.fanniemae.com/fannie-mae-legal-documents. The two basic forms are Form 3734 "Construction Agreement" for new construction and Form 3730 "Renovation Contract." These forms were last updated July 2021.

What Are Some Important Terms to Review?

Both the new construction and renovation model contract forms must be modified to conform to the requirements of Oregon law. For example, both forms must be modified to strike ten percent (10%) retainage (or at least limit retainage to five

percent (5%)) (ORS 701.420(1)); the indemnity provision must be evaluated in light of ORS 30.140; the language required by ORS 701.305 (delegated to the CCB and set forth in OAR 812-012-0110) must be added; and the various required consumer notices must be added - Information Notice to Owner, Consumer Notice, and Notice of Procedure. Form 3734 Construction Agreement must also be modified to include some form of offer of warranty against defects in materials and workmanship as required by ORS 701.320 and to include the maintenance schedule described by OAR 812-012-0120 and found on the CCB website. Other modifications or notices may be required depending on the circumstances. Beyond modifications required to conform to Oregon law, each Fannie Mae form contains requirements that may shift greater risk to the contractor than the contractor is typically willing to assume. Such terms may influence how the contractor prices the work to be performed (that is, the contractor increases the price for the work to reflect the increase in risks assumed). Some provisions to review (numbered the same in both forms) include:

Article 2 - Contract Time provides for a fixed completion date which can be no later than twelve (12) months after the loan closing date. Because many small homebuilders are not experienced in construction scheduling or tracking delays or impacts, such as owner changes and indecision, such a requirement may involve the contractor assuming greater liability than anticipated.

Articles 2 and 3 regarding price and change orders. The forms contemplate a fixed price that may only be modified by a change order that is signed by the owner and contractor and has the further requirement that the change must be "approved by the Lender." The forms do not permit cost-plus pricing, and do not provide any provision for "allowance" pricing, which can be critical in situations where major decisions are left to be made during construction (such as selection of finishes, fixtures, equipment) or there are significant unknowns (such as the condition of framing when remodeling an old house).

Articles 5.1 and 7 regarding progress payments. The forms provide no due date for disbursement of payment and provide past due payments do not accrue interest.

Article 9.9 regarding "record documents." Small homebuilders do not typically create "as-built" drawings as contemplated by the model forms.

Article 9.11 prohibits suspension of work during any dispute or disagreement.

Article 9.12 regarding third party damage to work. The forms place the risk of third-party vandalism or damage upon the contractor (only damage where owner's negligence is the "sole cause" is excepted).

Article 9.14 regarding indemnity and hold harmless. The indemnity provided is extraordinarily broad, such that no negligence or wrongdoing is required, and the contractor is arguably responsible for more damages than would be limited by the foreseeability rule generally applicable to contract damages. This indemnity clause covers "economic detriment of any kind whatsoever that arises out of or results from performance of the Work" to the extent caused "in whole or in part" by the acts or omissions of the contractor.

Article 9.15 regarding owner's other contractors. The forms allow the owner to engage her own contractors at the same time contractor is performing the work, which may allow unwelcome interference and delay. Also, the forms require the contractor perform "all cutting, fitting and patching of the Work that may be required to make the several parts together," which may assign more risk or work to the contractor than anticipated. For example, if the owner's separately hired electrician penetrates the roof or exterior walls, absent clarification in the scope of work documents, the contractor will be

responsible for properly sealing penetrations (or the failure to do so).

Article 10 Insurance. Among other requirements, the contractor is required to purchase a "builders all risk policy (with a mortgagee's loss payable clause in favor of Lender)* * * in an amount not less than one hundred percent (100%) of the replacement cost of the Work."

Article 11 Termination. Both owner and contractor are purportedly entitled to terminate the agreement after seven (7) calendar days' notice if the specified breach is not cured (or the party fails to "diligently prosecute cure to completion"). Termination rights are not equal, however, as Article 12.1 requires the contractor to also provide the lender notice of the owner's breach, and further provides that if lender or owner "cures such default within a reasonable period and continues to pay * ** all amounts due" the contractor will continue to perform (emphasis added).

Can These Terms Be Negotiated?

The instructions for the Form 3734 "Construction Agreement" provide the contractor "must" modify the model document to comply with applicable law, but otherwise may only make the limited modifications described further in the instructions. The Form 3730 "Renovation Contract" instructions generally track the instructions for the "Construction Agreement," with the added option of using "another form of Renovation Contract that satisfies our requirements for HomeStyle Renovation transactions." The instructions state those requirements are found in the Fannie Mae Selling Guide.[5] In practice, this author has observed that the construction lender's legal department will likely have made some modifications to the model forms before presentation to the owner-borrower and contractor.

[1] About Us- History, Fannie Mae website, downloaded July 13, 2023, https://www.fanniemae.com/about-us/who-we-are/history; Segal, Troy, updated November 18, 2022, Government-Sponsored Enterprise (GSE): Definition and Examples, downloaded August 31, 2023, https://www.investopedia.com

[2] Griffith, John, September 6, 2021, 7 Things You Need to Know about Fannie Mae and Freddie Mac, downloaded July 14, 2023, https://www.americanprogress.org/article/7-things-you-need-to-know-about-fannie-mae-and-freddie-mac

[3] History of Fannie Mae and Freddie Mac Conservatorships, Federal Housing Finance Agency website, downloaded July 14, 2023, https://www.fhfa.gov/Conservatorship/Pages/History-of-Fannie-Mae-Freddie-Conservatorships.aspx

[4] Fannie Mae & Freddie Mac (GSEs), National Association of Realtors website, downloaded July 13, 2023, https://www.nar.realtor/fannie-mae-freddie-mac-gses

[5] The requirements are found starting on page 726 of the SELLING GUIDE – FANNIE MAE SINGLE FAMILY (JULY 5, 2023), available for download in .pdf form at https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing

Contact Douglas at 541.357.4021 or doug@dglawoffice.com

STRENGTHENING CULTURAL COMPETENCY IN CONSTRUCTION ATTORNEYS: THE RIGHT THING AND THE SMART THING

Alex Naito
Tarlow Naito & Summers, LLP

Many members of the Oregon Construction Law Section actively promote, or at least strongly support, diversity, equity and inclusion (DEI) initiatives. Those efforts and that support should rightfully be applauded. DEI initiatives typically

center around hiring, mentoring, and otherwise creating an equitable and inclusive environment in the industry as a whole. For example, the OSB Construction Law Section's upcoming CLE will focus on the intersection of diversity, equity and inclusion and the construction industry. (As one a member of the CLE committee, I will use this opportunity to encourage our readers to attend).

But there is another side to the DEI coin that is sometimes get forgotten: cultural competency.

What is Cultural Competency?

Experts on the subject define cultural competency in slightly different ways, but the general concept is this: cultural competency is the ability of someone who provides a service to interact with and effectively serve people from a different cultural background. For legal professionals, cultural competency has been described as "the ability to adapt, work and manage successfully in new and unfamiliar cultural settings." Sylvia Sevens, Cultural Competency: Is There an Ethical Duty, Oregon State Bar Bull. (Jan. 2009) (https://www.osbar.org/publications/bulletin/09jan/barcounsel.html).

Said another way, where DEI focuses on developing a more inclusive industry for minority or historically disadvantaged groups, cultural competency focuses on the individual's ability to provide a service to clients with diverse backgrounds. As a result, culture competency is more than simply being accepting and welcoming of diverse communities, it requires efforts to understand those different communities and how to best serve them.

Why is Cultural Competency Important to Lawyers?

Let's start with the fact that being "culturally competent" is ethically required. RCP 1.1 requires that we provide "competent representation." This rule does not limit "competency" as having solely to do with one's knowledge of a certain area of law. Competency means being able to effectively represent a client, which includes understanding the client's objectives and the ability to effectively communicate with the client.

But aside from the rules, cultural competency just makes good business sense. At the end of the day, the legal profession is a service-based industry. Developing and strengthening cultural competency serves to improve an attorney's effectiveness. The better one understands his or her clients, the better he or she can represent them. It can also help grow an attorney's base of potential clients by opening new doors.

Alex

Why is Cultural Competency Important to Construction Lawyers?

Cultural competency is something all attorneys should strive for. Undoubtably, however, the practical need for cultural competency in one's practice certainly correlates to the type of practice. It's no secret the legal profession in general, and Oregon's legal community in particular, has predominately consisted of white males. As a result, someone with a practice focused on an industry that is also dominated by white males will

have less business-need for cultural competency. And it's not that those attorneys don't believe in the importance of cultural competency, it is simply the fact that they don't need it to serve their clients because their clients come from a culture similar to their own.

For many years, construction lawyers may have considered themselves to be in this type of category, where cultural competency may be all well and good, but not necessary to serve construction clients. To be sure, construction clients reflect the construction industry, which has historically been dominated by white males. But that is changing quickly.

According to the U.S. Bureau of Labor Statistics, in 2020, individuals identifying as Hispanic accounted for 30 percent of those employed in the construction industry, an increase of 10 percent since 2003. And while a substantial portion of minorities employed in the industry classify as working in "construction and extraction" (*i.e.* laborers), roughly 50 percent of those employed in the "management, business, and financial operations" of construction identify as a racial minority. https://www.bls.gov/spotlight/2022/the-construction-industry-labor-force-2003-to-2020/home.htm

The point is that the cultural background of the decision makers for construction companies is changing rapidly. It therefore makes good business sense to develop the skills necessary to effectively represent clients with diverse background.

How Does One Develop Cultural Competency?

There is no one right way to go about strengthening cultural competency. Many common DEI programs overlap or reinforce the general principals of cultural competency. For example, numerous DEI programs are designed to help one understanding one's own implicit biases. That type of self-reflection is critical to working toward better serving clients with diverse backgrounds.

Formal education or training, however, is not the only way. Getting involved in organizations designed to support minority businesses, especially minority construction businesses, can be just as valuable. For example, the National Association of Minority Contractors – Oregon Chapters, advocates and supports minority-owned construction companies (https://www.namc-oregon.org/). The Oregon Association of Minority Entrepreneurs is another organization focused on supporting minority businesses through education, financial support, and mentorship (https://oame.org/oame-history-and-mission/). By engaging directly with business owners who have different backgrounds or cultures, one can begin to better understand their unique needs and communication style. This ultimately allows for more effective representation.

Cultural competency is also an ongoing process. Despite its name, one does not suddenly become culturally "competent." As with any other area of law, one must always stay informed and continue to develop the knowledge and skills necessary to provide competent legal services.

Supporting diversity, equity and inclusion within the construction industry is unquestionably the right things. But with industry growing more diverse by the day, proactively developing the skills and connections necessary to best serve individuals with different cultural experiences is also the smart thing.

Contact Alex at 503.968.9000 or alex.naito@tnslaw.net

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