

## Avoiding Legal Land Mines Contractors Must Learn to Manage Legal Issues Before They Arise

**Five things firms can do to cut their legal exposure and court costs**

**B**OOM! ANOTHER LEGAL LAND mine explodes, and another contractor finds itself in the middle of a costly lawsuit.

Each project, from the largest to the smallest, is a complex undertaking requiring the coordination of hundreds of interdependent participants—suppliers, designers, architects, engineers, accountants, bankers, project managers, insurance companies, and, of course, the contractors.

Every other group is concerned with describing, planning, measuring or financing the project. The contractor is the one in the middle that literally puts it all together. All too often, under this pressure, contractors can overlook legal land mines that detonate long after the battle is over.

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As litigators, we see this all the time. We often become involved after an issue has blown up and landed in court.

While no one can prevent lawsuits altogether, the damage can be minimized by being aware of five legal mine fields in the construction arena—areas where contractors should walk carefully.

### **Jobsite Conduct and Responsibility Issues**

In construction-related litigation, a case often can turn on what work the contractor was—and was not—responsible for. But “responsibility” as defined in the contract can be significantly altered by the “custom and practice” of the jobsite. As such, it is crucial for contractors to ensure that any significant issues or changes in responsibility, work or practices on the job

are carefully documented and clearly communicated.

In many jurisdictions, the general contractor cannot be held liable to employees of other subcontractors if the general contractor does not “affirmatively control” the manner in which the work is performed in such a way as to result in the injury. Therefore, it is critical to keep close, written track of all work and safety practices on a given project.

### **Indemnity Issues**

Indemnity clauses are a vehicle for shifting the risk on a job from the general contractor to a subcontractor. Typically, the general contractor also will require that the sub add the general contractor to its insurance policy as an “additional insured.” The insurance company then is required to defend and indemnify the subcontractor as well as the general contractor in a lawsuit.

That is all well and good until a suit is filed years or decades after the project is complete and the subcontractor is bankrupt or nonexistent. Suddenly, the general contractor is liable for everything. Even worse, if the contractor has lost or destroyed the indemnity agreement or can't produce the additional insured endorsement, there's no insurance coverage.

The lesson here is that any time there is an indemnity clause with an additional insured endorsement, get the evidence—usually a certificate of insurance and an additional insured endorsement—from the subcontractor. Then keep it forever.

### **Which State's Law Will Apply If There Is a Dispute?**

Most construction contracts contain a “choice-of-law” provision. This paragraph sets out which state's law will apply if a dispute arises over the contract. The choice, interestingly, often is New York.

Legal counsel and construction financing often is based in New York, particularly for big projects, so a contract provision may specify that any litigation or arbitration over a contract

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must apply New York law.

But all too often, contractors are not aware of this provision or assume it's unimportant. It is extremely important. New York's statutes and case law may differ substantially from those in your jurisdiction. The time to find this out is when you review the contract, not when you get sued years or decades later.

#### Limitations and Repose

In law, the statute of limitations is the time period within which a suit can be filed. The statute of repose is the period of time after which a suit cannot be filed. Increasingly, contractors can inadvertently extend the time during which they are vulnerable to a suit by attempting repairs or assisting another party doing repair work.

All too often, contractors assume the limitations period has run out when it has not and have lost or destroyed critical documents. Assume there is no such thing as a limitations

period and retain all critical documents indefinitely.

#### Arbitration

The best way to prevail in court is never to go there. An arbitration clause ensures this. A full-blown lawsuit is expensive, unpleasant and can take a long time. An arbitration clause in a construction contract prevents this. Arbitration—dispute resolution through a private proceeding, typically overseen by retired judges—is usually faster, simpler, cheaper and much less painful than a trial. It also eliminates the risk of a runaway jury returning an emotionally driven, exorbitant judgment. Make sure every construction contract provides for arbitration.

Perhaps the most famous construction adage is: "Measure twice, cut once." There's a similar maxim that applies to litigation, and it can save you time, money and energy: "Handle issues when they show up—not when they blow up." ■