BY MICHAEL S. SIMON

Lessen Your Litigation and Increase Your Bottom Line

Failure to consider basic principles of law can be dangerous to your wealth. The less knowledge you have will result in your increasing your disputes and the need for a litigator. This article is based on seeing so many self-inflicted wounds. Legal consultation should be by choice. Knowledge of day-to-day legal principles is mandatory and will lessen the chance that a third party (judge, jury or arbitrator) will determine your future. Several legal concepts are as follows:

1. The Judge or Arbitrator does not redraft an existing one-sided contract into a mutually fair and equitable document. Rather, the principle of law is that your rights and obligations will be found within the four corners of your contract. Oral "promises" made during negotiations do not take precedence over clear language in the written contract. Reliance upon prior oral "don't you trust me" statements, in the face of contrary written contract provisions, can lead you down the wrong path. Memorialize the oral promises made during your negotiations in the final contract. Say what you mean in clear concise statements in the written contract.

2. Because your contract form is written in clear concise language does not mean it will be enforced. This is so even if written by your attorney five years ago. Many contract forms have provisions, which might have been valid five years ago, or in the state where the author's home office is located, or it might be valid for public contracts, but it might not be enforceable on this project. Laws change. The existence of new statutes or regulations, or the issuance of a new court decision can result in existing contract provisions becoming unenforceable or add new obligations that were not included in your form.

Is the contract that governs your project in accord with the New Jersey Prompt Payment Act (or is your project in Pennsylvania), the Construction Lien Law, the Consumer Fraud Act, etc.? In today's electronic age, have your contract form project specific and then have your personnel aware of what it says and, in general, what it means. Be aware that every contract has an implied covenant of good faith and fair dealing.

3. "Of course I didn't write them or protest, since [a] that would have sent the wrong signal, [b] we didn't have time, [c] my project manager was on vacation, or [d] she doesn't write so well." This approach has been the paving block for many disastrous roads. Communications don't have to be adversarial. Communications should be intelligent, to the point and project—friendly. An important principle of law is that the parties' interpretation of an event or contract, prior to the time the dispute arose, will be given great weight in determining the meaning of that provision and how it will be enforced. Well-written communications, during the project, can avoid a dispute from arising. In addition, many claim provisions require written notice [a] "prior to disturbing" the condition, or [b] prior to incurring additional costs. If you don't protect your rights, who will? Further, you must read and respond to whatever written and contentious oral communications you receive, including job minutes, field memos, etc. Douse the embers, before you are burnt.

4. What evidentiary value is the vice-president of field operations statements about the defaults of the other entity, i.e., lack of manpower, refusal to obey directions, interferences, etc., which are solely based upon your ex-project manager's daily oral complaints? The simple answer is: "none". You need business records. Business records should be generated at or near the time the event occurred, by the person whose function it is to generate same, and which are based upon personal knowledge. Without this documentary support you will probably lose. Proper documentation will support an amicable resolution and avoid litigation/arbitration.

The war stories can go on for pages. The bottom line is that the path to avoiding adversarial relationships is found in being pro-active and obtaining the input of your construction lawyer, both as your counselor and as an educator. Continuing education is mandatory for your entire organization. Your field superintendent should not be a lawyer, but s/he should have knowledge of the documents that will govern their acts and omissions. They should be aware of when to contact the person whose responsibility it is to determine the next course of action and that person must know how and when to act. Education will lessen or avoid disputes and, if you must fight, will have you prepared. The choice is yours.

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