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We encourage you to approach each lesson with curiosity and enthusiasm as you pave your way

Chapter

11

The Legal World We Live In: Claims and Disputes

Flip through the Yellow Pages of your phone directory, and you'll find something like this, as the writer did when glancing through the Yellow Pages of the Baltimore city phone directory—6 pages listing contractors and 57 pages for lawyers. An AIA Standard Contract Form for a Stipulated Sum contract, 1939 version, would fit on three 8½ × 11 inch pages. Today's AIA Document A101, Stipulated Sum, requires five pages of paper not including numerous exhibits, addenda, and various other modifications to the standard agreement. There is no need to remind anyone that our world has gotten more complex in the last six decades or so.

At some time or another, chances are that a project superintendent may have to deal with a dispute that escalates to a claim requiring litigation or arbitration proceedings to resolve. The purpose of this chapter is not to create "guard house" lawyers, but to familiarize project superintendents with the more common types of disputes and claims and better prepare them to deal with them, or better yet to avoid them.

Tort versus Criminal Law

Legal matters fall into two broad categories, criminal law and tort law. Criminal law needs little introduction to any TV viewer; it deals with offenses against the public for which the state brings action in the form of criminal prosecution and prison terms for the offender. Tort law may be best described as dealing with a civil, private wrong, one in which the court will hand down a verdict involving monetary penalties rather than jail sentences. Tort law concerns itself with three areas of citizen protection:

1. Protection of personal effects
2. Protection of property
3. Protection from economic loss

The type of conduct defining these personal wrongs can be summed up as follows:

1. *Intentional.* The wrongful person intended to do harm and realized that his or her action would most certainly cause harm.
2. *Negligent.* The wrongful person "failed to live up the standard prescribed by law."
3. *Nonculpable*. The wrongful person committing the wrong did not intend the action to be intentional or negligent.

So it would appear that most legal issues involving construction would fall into the category of tort law, but that doesn't preclude action where violation of the law results in a criminal act, such as a job site fatality where sheer negligence has been displayed.

Although the law is the law, each case presented to a judge and jury must stand on its own merits, and previous decisions in a similar matter can weigh heavily on the decision of the current dispute before the court. For example, in one court case, the judge ruled that a contract stipulating that all earthwork was classified as *unclassified* (in other words, "Mr. Contractor you own all the bad stuff encountered during excavation") voided the contractor's claim for costs associated with unanticipated rock removal. In another similar case involving another contractor, the court ruled in the contractor's favor, stating that the discovery of rock in an unclassified site was cause for reimbursement because the contractor was "misled" by ambiguous language in the bid documents.

How would you rule in this case involving a paving contractor? A paving contractor signed a contract to resurface an existing parking lot based upon bid documents that made no mention of work required on the subbase. When the paving contractor began the work, the weight of the paving equipment caused portions of the subbase to crack. The contractor stopped work and advised the owner that the contractor was not responsible for any damage to the subbase because the bid documents failed to include any mention of subbase responsibility. The owner sued. Can you determine who was right and who was wrong?

The judge sided with the owner stating that the paving contractor failed to use her or his expert experience and knowledge and should have advised the owner that subbase failure may occur during the resurfacing operation. So go figure!

These court decisions cut both ways. Don't assume that the cause is lost because a similar case was not decided in the contractor's favor. And don't assume that a win in a previous case ensures a win in this current dispute. Each claim stands on its own.

What Triggers Claims and Disputes?

Misunderstandings leading to disputes and claims will most likely be triggered by one or more of the following conditions:

1. Plans and specifications that contain errors, omissions, or ambiguities or that lack the proper degree of coordination
2. Incomplete or inaccurate responses or nonresponses to questions or resolutions of problems presented by one party to the contract to another party to the contract
3. Inadequate administration of responsibilities by the owner, architect/engineer, *general contractor,* subcontractors, or vendors
4. Unwillingness or inability to comply with the intent of the contract or to adhere to industry standards in the performance of work
5. Site conditions which differ materially from those described in the contract documents
6. Unforeseen subsurface conditions
7. The uncovering of existing building conditions which differ materially from those reflected in the contract drawings when rehabilitation or renovation work is being undertaken
8. Extra work or change order work
9. Breaches of contract by any party to the contract
10. Disruptions, delays, or acceleration to the work which creates deviation from the initial baseline schedule
11. Inadequate financial strength on the part of the owner, contractor, or subcontractor
12. Inability to meet the performance or quality standards contained in the contract documents

If and when any of these misunderstandings occur, every reasonable effort should be made to resolve them with the normal give-and-take that ought to be expected from all parties to the contract—the essence of negotiation.

Only when efforts of resolution fail is there a need to consult a claims expert and/or the company attorney. If this is done at an early stage, the strengths and weaknesses in both parties' claims may become apparent, and the decision to pursue or dismiss the claim made somewhat more easily.

If the occasion arises and a meeting is scheduled with either a claims consultant or an attorney, the project superintendent must assemble, or have readily available, the following documents as they relate to the dispute or disagreement:

1. Correspondence from and to all parties involved in the dispute—both letters and faxes
2. Daily reports, daily logs, and daily diaries containing entries germane to the issue
3. Appropriate inspection and test reports

4. Any and all requests for payments from all parties and list of payments received
5. Job progress schedules—both baseline and updates
6. Time sheets for all labor expended on the site
7. Shop drawing logs and transmittals attesting to the transfer of these drawings to and from the architect and to and from the subcontractor or vendor
8. Extra work or change order work
9. Interoffice memos, field memos, and telephone conversation memos
10. Estimates, bids, and quotations, either written or confirming telephone bids
11. Change order requests, change order proposals, change order estimates, and all backup data for these proposals
12. Job progress photos
13. Copies of all contracts issued or in progress, and all purchase orders issued or in progress
14. Any as-built drawings, either completed or interim

These are the documents that will be needed if further action is required, either in the process of working with a claims consultant or the company attorney or in preparing for arbitration. If all these documents have been prepared properly as the job progressed, the consultant's or lawyer's job will be much easier and she or he will be able to readily grasp the problem and determine to what extent the proposed claim is creditable. Quite often when the opposition is merely made aware of the depth and completeness of the documentation to be presented to them, resolution of the matter can be achieved quickly.

The Bid Proposal Process

Disputes can often arise even before a contract is awarded. In fact, a dispute can occur before a sealed bid proposal is submitted at a formal bid opening. In private and public construction work, a formal bid procedure is often established. Bids are to be submitted on a preissued bid proposal form; the form is to be completed and signed by an officer of the construction company, sealed in an envelope, and presented to the owner's representative as a predetermined place, time, and date. At times a bid bond is required with the proposal, or a certified check or letter of credit may also be acceptable if presented in the proper amount.

The purpose of the bid bond, certified check, or letter of credit is to ensure the owner that if the contractor's bid is accepted, the owner will be protected if that low bidder is unable or unwilling to accept a contract when offered. Other requirements may also accompany the bid proposal, and in strict accordance with the bidding instructions, any deviations may be cause for rejection of the bid.

In the public sector, strict compliance with all aspects of the bid proposal is standard in order to avoid formal protests that may be lodged by other bidders protesting acceptance of a bid that fails to meet all required criteria.

In the private sector, compliance is not so strict, and the owner may waive any or all requirements in the selection of an acceptable bidder, if it appears to be in the owner's best interest to do so. This option in public bidding is not totally impossible, but it is usually narrowly construed.

Do late bids count?

How many times has the general contractor's representative dashed from the office with an incomplete bid form, several pens, and a cellular phone on the way to the place where sealed bids are to be deposited. The scenario generally is as follows: arrival at the office where the bid will be received, looking for a spot away from the crowd; a call back to the office made for final instructions and late-breaking price adjustments to the bid. With a nearly blank bid form, time is running out, and only a minute or two are left, but many items have to be filled in before that mad dash to the bid opening. And a thought occurs: "What will happen if I make a mistake on this form or enter the wrong number in the wrong place—or worse yet, the battery in my cell phone dies before I'm finished with the office?" The bid form will then be completed as quickly as possible and presented to the bid clerk so it can be date/time-stamped. But the fact that a bid is received after the specified time on a public works project does not mean it will automatically be disqualified.

In private bid situations, the owner is free to waive many prebid qualifications; but in public bid situations, the courts have ruled that the public bidding requirements are there for the public's benefit. If a bid is received a few minutes late and there is no evidence of fraud, collusion, or intent to deceive, not all is lost. If the local authority *refuses* to accept the late bid, an immediate protest must be filed. It can be voiced in the presence of the official refusing to accept the bid and in the presence of witnesses. As quickly as possible, upon return to the office, a written protest should be filed, citing the circumstances involved in the late submission—all other portions of the bid have been met with strict compliance but the bid was delivered at, say, 2:05 p.m. instead of 2:00 p.m. as required.

Whoever delivered this bid, be it a project manager, project superintendent, or administrative assistant, should remain during the entire bid-opening process and keep detailed notes of the other bidders' proposals, noting their competitive bids and any exceptions that they may have taken to the bidding instructions.

If it is deemed in the public interest to accept a bid having minor deviations from the bid documents, the agency may honor the bid. For example, suppose four bidders submitted prices as follows: bidder 1, $500,000; bidder 2, $525,000; bidder 3, $515,000; bidder 4, $485,000. All bidding conditions were met except bidder 4 was 10 minutes late in submitting the bid, or failed to insert a date on page 3. The public agency may waive these two minor discrepancies and award the project to bidder 4.

When one contract requirement contradicts another

Looking at the General Conditions of the Contract for Construction as outlined in AIA A201, the contractor is directed to refer all questions concerning interpretation of the contract documents to the architect, and that is the correct procedure to follow. In some cases, the contract will stipulate which drawing or which detail takes precedence over another. In some cases the contract language will remain silent in this regard.

Quite often ambiguities in the contract documents are resolved by reasonable parties to the contract taking a reasonable approach. At times reasonableness does not prevail, and one party will take a hard-line approach as far as the interpretation of scope of work is concerned. There are no tried and true procedures for contract interpretation, and each case seems to stand on its own. What documents have priority over others? Do the plans or the specifications take precedence? Will the specifications take precedence over full-scale drawings? Some contract requirements will specifically establish an order of precedence, such as contract requirements are first precedence, schedules are second, drawings are third, and so forth. Typical contract language, when there is a conflict between the plans and specifications, will be

> In the case of conflict between drawings and specifications as to extent of work, or location of materials and/or work, the following order of precedence will govern:
>
> 1. Large-scale drawings
> 2. Small-scale drawings
> 3. Schedules (door, finish, equipment, etc.)
> 4. Technical specifications
>
> In case of conflict as to the type of quality of materials, the specifications will govern.

If the contract does include an order of precedence, this will weigh heavily on the final outcome of the dispute. However, the courts view these questions independently. A *specific* statement will take precedence over a *general* statement. The courts may look for the intended purpose of a specification section relating to the drawing requirements before arriving at a decision. The point is that there are no hard-and-fast rules that apply to interpretation of which document has priority over another, unless, as stated above, a contract order of precedence exists.

Dealing with inadequate drawings

A common phrase which architects insert into the contract requires the contractor to advise the architect of a discrepancy, error, or omission before the contractor can submit a cost proposal to correct the discrepancy, error, or omission; and that is, at least, the first step to take when you are dealing with these types of problems.

The construction process is often difficult enough when the project superintendent is presented with a carefully prepared set of plans and specifications. The

job becomes frustrating and difficult when the plans lack sufficient detail of key elements of construction or there are omissions of important details, or there is an indication that things just won't fit together. The first order of business is to bring these inadequacies to the attention of the owner and architect/engineer as quickly as possible. A verbal notification can alert them as soon as the problem is discovered, but a detailed written response is required as soon as possible afterward with a response date included.

Although the superintendent and the architect may differ in their opinions of what constitutes a *complete* set of plans and specifications, the courts have made their views known with respect to what is deemed acceptable. In a court case identified as *John McShain v. United States,* 412F.2d 1218 (1969), the contractor stated that the true condition of the drawings was not known at the time of bidding and that, after being awarded the contract for construction, the contractor found that some of the drawings which were illegible at bid time were not replaced with legible ones. The addenda drawings, furthermore, did not correct many of the coordination errors in the bid documents. The general contractor sued to recover damages incurred by the company and its subcontractors because of the inadequate drawings. The U.S. Court of Claims said that although the plans furnished by the owner need not be perfect, *they must be adequate for the purpose for which they were intended.* The court went on to state that the contractor was under no legal or contractual obligation to inspect the drawings to determine their adequacy for construction prior to a contract award. The documents were to be used for estimating purposes only, and it had not been shown that McShain knew or should have known how defective the drawings were.

This court decision amplifies the owner and the architect's responsibility to present the general contractor (GC) with drawings and specifications that are adequate and reasonably accurate. The GC has a right to expect that. If there are considerable problems relating to deficiencies in the documents, the general contractor also has a right to expect compensation for any delays that the substandard or deficient drawings might have caused. The court ruled that if faulty specifications prevent or delay completion of the contract, the contractor is entitled to recover delay damages from the defendant's breach of implied warranty. This breach cannot be cured by the simple expedient of merely extending the time and performance.

Contractor's guarantee as to design

When an architect specifies a certain component design and the installation results in poor performance, which party is responsible? In a case brought before the courts in the state of Washington, an architect had modified a curtain wall design. The contract specifications contained a standard clause requiring the general contractor to notify the architect if any materials, methods of construction, or workmanship changes were needed to ensure compliance with the contract documents. The GC did not notify the architect of any changes the GC felt were necessary relating to this curtain wall design.

Once the curtain wall was in place and the building was completed and signed off, a number of leaks appeared in the curtain wall system. The GC refused to correct the leaks, and the owner sued. The court concluded that the leaks were caused by design error. The owner had claimed that the specifications called for the curtain walls to be fabricated and installed by a manufacturer regularly engaged in the manufacture of this type of system, and that the work be first-class and done in a manner so as not to allow any weather infiltration. The court's ruling was that the curtain wall was modified by the architect and was not suited to its use and the leaks were not caused by faulty materials or poor workmanship but were the result of a design defect.

The Spearin doctrine

A landmark court decision rendered in 1918 still has applicability today. It is the *Spearin case,* sometimes referred to as the *Spearin doctrine*. Spearin, a contractor, bid on a U.S. Navy drydock project which included replacing a 6-foot section of storm sewer pipe, which the contractor did. The replacement sewer proved to be inadequate to carry the volume of water runoff, and it broke due to internal pressure. The Navy held Spearin responsible and told Spearin to replace it. Spearin refused, and the lawsuit went all the way to the Supreme Court.

The resulting "Spearin doctrine" stated that

> If the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of the defects in the plans and specifications.

The court continued:

> The responsibility of the owner is not overcome by the usual clauses requiring bidders to visit the site, to check the plans and to inform themselves of the requirements of the work.

Today, the 1997 edition of AIA Document A201, General Conditions, in Article 3 recognizes that the "contractor's review (of the plans and specifications) is made in the contractor's capacity as a contractor and not as a licensed design professional," a further affirmation of the Spearin doctrine.

Dealing with exculpatory statements in the contract

Most contracts include statements inserted to defuse any claims the contractor may present when encountering unforeseen site conditions. They can take one of several forms:

1. The contractor may be required to visit the site prior to submitting the bid, and any condition visually observed or reasonably assumed by this prebid visit will be interpreted by the owner as being *disclosed*.

   If that is the case, a close and careful inspection of a site is necessary to document not only that all existing conditions were observed, but also the

extent to which other hidden conditions could not be observed and therefore not anticipated.

2. The "no damages for delay" clause will prevent the contractor from claiming additional costs beyond direct costs if unforeseen conditions are encountered and delays occur.

   If this clause cannot be stricken from the contract, it must be passed through to all subcontractors, thereby eliminating any potential for subcontractor delay claims if the project is delayed when unforeseen subsurface conditions are encountered.

3. A clause that requires the contractor to examine the contract documents and report, in writing, any obvious errors, omissions, and ambiguities within a specific time period, or else a claim will not be considered. Although it may be difficult to uncover all the "errors and omissions" as soon as the project commences, every effort ought to be made to review the plans and specifications promptly, to search out obvious problem areas. Ask all subcontractors to quickly review their particular plan and specification sections with an eye to uncovering deficiencies.

4. Geotechnical reports included in the bid documents that state that they "are not be to relied on" since the contractor must draw his or her own conclusions as to the representation of the information contained in these geotechnical reports.

   The general contractor has to rely on the information presented by the geotechnical engineer in order to prepare the site work estimate, which will include a contingency of some sort for unknown or unanticipated conditions. If the contractor can show that the information in the bid documents was misleading or insufficient and therefore affected the amount of a *reasonably assumed* contingency, the contractor may be able to overcome this exculpatory contract statement.

5. Disclaimers in the specifications or on the drawings such as "groundwater may vary" or "subsurface information is not to be relied on" or "test borings are for information only."

   The contractor must be able to show that he or she prepared an estimate that, based upon the contractor's experience in site work and the information presented in the bid documents along with a site visit, included these reasonable assumptions.

Claims Due to Scheduling Problems

AIA Document A201, General Conditions, as it relates to the contractor's schedule has changed over the years. The 1970 edition required the contractor to submit the schedule for the architect's *approval*; the 1976 version required submission for the architect's *information*; and the 1987 edition of A210 requires the contractor to prepare and submit the schedule *promptly.* The current 1997

version of A201 requires the contractor to submit a schedule that complies with the contract completion date.

Schedules are dynamic and change quite frequently. The latest architect requirement per AIA A201 provides the general contractor with greater flexibility in modifying the schedule without being held accountable for changing sequences or time frames for various work tasks, as long as the completion date is not extended.

The use of the *critical path method* (*CPM*) schedule permits the representation of the relationship of one work task to another. These CPM schedules, easily created by many software programs, play a key role in any delay claim presented by the contractor. The baseline schedule—the initial schedule prepared at the beginning of the project—ought to have been assembled with a great deal of input from subcontractors and vendors with the project manager and project superintendent acting as coordinators for this critical task.

Once published, the baseline schedule becomes the "official" road map, and any changes to the sequence or time allotment for selected activities will affect the baseline and either retain the contract completion schedule or extend it. Depending upon the reasons for the extension of a project completion date, a request for a time extension or, in the case of a nonexcusable delay, a recovery plan ought to be prepared to ensure a timely completion.

When a contractor prepares a delay claim and *consequential damages* are mentioned, the term *Eichleay formula* is often heard. Although AIA Document A201 does not permit the contractor to submit a claim for consequential damages (Article 4), there may come a time when this document is not a part of the contract and consequential damages are allowed. *Consequential damages* are damages (costs) beyond the easily recognizable bricks and mortar costs. The project superintendent should be at least aware of this term and the concept of Eichleay.

The Eichleay Formula

Back in 1954, Eichleay Corporation, a general contracting firm, filed a claim against the federal government that included a significant delay in completing the project. Eichleay said that during the year in which this delayed project was being constructed, the company had estimated its corporate overhead costs for that year based upon completing that project, as scheduled, during that year. When completion of the project was delayed and it was not completed until the following year, Eichleay claimed that the company did not have enough sales volume to absorb all the corporate overhead, and therefore the company requested the government to reimburse it for this "underabsorbed" overhead. The company won its case and collected these costs. Eichleay created a formula to show the government how this delayed completion affected its corporate overhead. For decades after, the Eichleay formula was used by hundreds of contractors in putting together delay claims in both the public and private sectors.

The CPM schedule becomes a two-edged sword. Once published, it will be accepted by both owner and subcontractor as the time frame for the completion

of individual tasks within the overall framework of the entire project's schedule for completion. Delays created by one subcontractor may affect other subcontractors as well as the overall project completion date. The other affected subcontractors will certainly look to the general contractor for assistance and possibly additional compensation to complete their work on time in spite of the delays caused by others.

If a delay claim to the owner is being considered, a well-documented series of CPM schedules graphically showing one delay or a series of delays and the impact on the overall completion date will be strong evidence to support the claim.

One mistake many project superintendents make is to assume that somehow a minor delay will continue to remain minor and therefore no request for a time extension is necessary.

A good rule of thumb to follow is this: *Whenever a delay occurs, document either in the daily log or in a memo to file the reasons for the delay, the circumstances surrounding the delay, the person or persons responsible for the delay, any actions taken to make up for lost time, and person(s) notified of the delay, either verbally or in writing.*

Claims against Professionals

Architects and engineers, when presented with claims for design deficiencies, turn to their standard professional liability for malpractice insurance that refers to *errors of commission* and *errors of omission*. The development of a set of error-free plans and specifications for a major project is nearly an impossible task. It is certainly understandable that the complexity involved in creating the construction documents may result in a lack of a few minor details, dimensions, or less than perfect coordination.

Most of the problems that involve architects, engineers, and contractors seem to be due to the following shortfalls:

- Drawings are not coordinated properly among mechanical, electrical, fire protection, structural, and architectural trades.
- There are conflicts between small and large details and between written specifications and graphic drawings.
- Boilerplate requirements on the drawings or in the specifications are often lifted from other projects and therefore don't apply to the project at hand.
- There is a lack of communication between the various design consultants, so that a change made by one is not transmitted to the others to determine whether it has any impact on their design.
- Consultation with owners is insufficient to afford them the opportunity to participate in decisions that ultimately affect the way in which their program is being developed.
- There is insufficient time for proper and thorough review of all contract documents because the owner has demanded an unrealistically compressed time

> frame for drawing production and submission for bidding purposes. (Only once did the writer hear an engineer tell the owner, "You can have accuracy or you can have expediency, but you can't have both—which do you want?" The owner, backing down on the demand for drawings as soon as possible, replied, "Accuracy," thereby giving the design engineers the time required to prepare, and check, a proper set of drawings.)

Incidentally, this list was paraphrased from one prepared by a design professional who was expressing concern over the growing cost of malpractice insurance. The professional was making the point that problems are not being created by what the professionals are *doing*; they are being created by what professionals are *not doing*.

Preparing a claim against a design professional is extremely difficult and certainly limited as far as most general contractors are concerned. First, the GC's contract is with the *owner* and not the architect, so there is no contractual relationship to be breached between architect and contractor. But such a lawsuit can be instituted in some cases and would be known as a third-party claim. One such lawsuit that comes to mind originated when the architect failed to process shop drawings within a reasonable period of time.

In *Peter Kiewits Sons Co. v. Iowa Utility Co.,* 355 F. Supp. 376, 392, S.S.Iowa (1973), a claim was made to collect damages because the contractor suffered losses due to an unjustified delay in the architect's processing of shop drawings.

In another case a general contractor sued an architect, claiming that the architect prepared erroneous design drawings and erroneous design documents, knowing that the owner would furnish them to the successful bidder and fully aware of the injury that would be caused to that contractor. The appellate court held that the allegations were sufficient to establish a special relationship between the parties, even though there was no direct contract between the contractor and architect.

Legal Complications of an Unclassified Site

When the contract with an owner stipulates that the site is "unclassified," does that mean that the contractor is responsible for any and all conditions uncovered during excavation?

Typical contract or specification language generally will read like this:

> Excavation shall be unclassified and shall comprise and include the satisfactory removal and disposal of all materials encountered regardless of the nature of the materials and shall be understood to include rock, shall, earth, hardpan, fill, foundations, pavements, curbs, piping, and debris.

Other language may be more succinct:

> Unclassified excavation: Shall consist of the material excavation and placement, regardless of its nature.

But a more defensible definition, at least from the contractor's standpoint, is the following:

> Excavation is unclassified and includes excavation to subgrade elevations indicated, regardless of the character of materials and obstructions encountered.

A "reasonable" evaluation of unclassified soils disputes or claims often rests on the contractor's responsibility ending at the design subgrade elevation. The author experienced such a situation years ago when working on a 54-acre site where unsuitable soils were found below the design subgrade elevation for some of the building's footings.

Although we, as the builder, were willing to excavate somewhat lower than the design footings to obtain proper soil bearing capacity on a no-cost basis, the owner, stating the unclassified soils designation in the specifications, said, "Oh, no, you have to keep digging until you reach acceptable bearing capacities." This seemed like an unreasonable position.

The author drew a circle to represent the globe and a large V with its opening at the top (where the project site was located) and the narrow part of the V at the bottom of the circle. The author said, pointing to the bottom of the V, "So you're saying that our contract calls for us to continue digging all the way to China to reach suitable soils? Isn't that unreasonable?"

The "reasonable" approach worked, and a suitable compromise was reached, which avoided a formal claim and potential lengthy and costly legal action.

The Legal Implications of Electronic Records

The electronic transmission and storage of documents, both written and verbal, daily logs, requests for information, and the like, raise the question of what is considered to be legal evidence in the event of a claim or lawsuit.

Three basic types of electronic documents may be required to substantiate one's claim or defense:

1. Project documents generated through the normal process of construction such as correspondence, construction schedules, requests for information, requests for clarification, submittals, proposed change orders, and so forth.
2. Electronic mail—both incoming and outgoing.
3. Information or data obtained from the Internet.

In the legal community, these types of records and correspondence are referred to as "out-of-court statements" and sometimes interpreted as "hearsay evidence." However, one exception to "hearsay evidence" is what is called the business record, when offered in the court with sufficient foundation.

The definition of a business record is:

> Records of Regularly Conducted Activity—A memorandum, report or data compilation, in any form, of acts, events, conditions, opinions or diagnoses made at or near the time, by, or from information transmitted by a person with knowledge, if kept

> in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report or record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), rule 902(12) or a statute permitting certification, unless the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind whether or not conducted for profit.

It would then appear that much of the documentation generated by a general contractor during the course of construction would fit this "business record" criteria. With the advice of the company attorney to ensure that a proper foundation is created for the production of these records, this information can be presented if necessary.

Discoverable records

When lawyers begin to develop their case, they request records in the other party's possession. This is called the discovery process. Although years ago, all or the majority of these types of records were written or printed, now many of these "records" and documents are stored electronically in someone's computer or on a CD.

As of 2001, 93 percent of all business documents in this country were digitally created and about one-third of all of these documents were never printed but instead were stored in a company's database.

Not only do companies preserve their records electronically, but also individuals within those companies usually maintain their own sets of documentation: backup for change orders, estimates, RFIs, RFQs, and so forth. These might never get into the company database but nonetheless create "discoverable" records.

Companies recognize the fact that some systems can fail and some files can be accidentally wiped, and therefore archival records with backup sources are created. In the case of a construction company, there is an obvious need to preserve all kinds of records to support potential future claims, warranty issues, and other liability related matters. For publicly held construction companies, the passage of the Sarbanes-Oxley Act of July 2002 imposed criminal penalties on publicly traded companies that destroy or alter corporate documents with the intent to influence or obstruct a U.S. agency investigation or action or a bankruptcy under Chap. 11.

But are electronic records considered discoverable?

Back in 1985, the courts noted that electronically generated records were recoverable under Rule 34 of the Federal Rules of Civil Procedure Act. Since then, more legal foundations have been created by the courts to accept other forms of electronic records. Courts usually accept computer printouts as electronic evidence. In the state of California, their Evidence Code, which became effective on January 1, 1999, recognizes computer printouts as an accurate representation of the computer information or computer program it purports to represent.

Prosecutions of a few high-profile individuals in the financial community over the past several years, based on presentation of electronic data, including e-mails that were apparently erased, is evidence of the acceptability of this form of discoverable records.

The entire subject of electronic transmission, storage, and retrieval will be an evolving legal topic for years to come, and both project superintendent and project manager must be diligent in creating these electronic files and maintaining them properly.

Special Legal Concerns of the Design-Builder

The ever-growing participation in the design-build process by contractors raises a number of legal issues that require the services of an attorney familiar with this project delivery system.

- Business Decisions
  What type of legal entity will be used to create the design-build team, who will furnish insurance, bonds if required, additional capital when needed? When will the design-build team be dissolved and how will dissolution take place? The entire gamut of business/legal type decisions required in any start-up business will need to be considered when either contractor-led or architect-led design-build teams are formed.
- Liability Issues
  This new design-build entity will assume liability for both construction and design and an owner will consider this amalgamation of liability as one of the attractions of design-build. Both insurance companies and bonding companies have formulated different policies to deal with design-build and these need to be investigated carefully before forming the builder-architect partnership.
- Latent Defect Issues
  Which party, the architect or the builder, bears responsibility for serious design or construction defects after the contract warranty period ends? This is a new concern for the design-builder. Each state government may have a different latent defect statute, but whatever it is, assignment of responsibility, which means financial responsibility, must be spelled out in the agreement between the architect and the builder.
- Licensing Issues
  Some states have specific licensing agreements for design-builders, whereas others require an architect to be licensed and contractors to be licensed separately. In one state, the Commonwealth of Pennsylvania, contractor-led design-build teams were illegal before the passage of an 1982 law. In Arizona, a design-build team does not have to be licensed as long as the contractor is properly licensed.

  Licensing issues and requirements need to be investigated before the formulation of a design-build team to ensure compliance with the state laws and statutes where the design-build team will be operating.

- Ownership of Documentation
  Who owns the construction documents when the project is underway and who owns those documents when the project has been completed? Both of these issues must be addressed in the contract with the owner. Ownership of documents raises a number of questions. If the owner owns the drawings, can the design-build team repeat that design on another project, or can they only use the design with the owner's approval, or not use it at all? If the project aborts either before construction starts or during construction, who owns the drawings, and can they be used by either owner or design-builder on another project? These are some of the questions that ought to be resolved in the contract with the owner.
- The Uniform Commercial Code (UCC)
  The UCC is generally thought to apply only to the sale of a product; just look on the back of a bill of sale from any appliance manufacturer and you will see the provisions of the Uniform Commercial Code. Some courts have considered a design-builder as a "merchant of goods" and, as such, applied the provisions of the UCC to their "product."
- American with Disabilities Act (ADA)
  Design-builders may find themselves being sued by owners for violations of the ADA if these provisions were not incorporated in their design. The courts have ruled that architects and contractors are liable under ADA.
- Green Buildings
  With the movement toward environmentally sensitive construction and energy-saving products, some manufacturers may rush products to market that may not produce the energy savings that they claim. The design-builders of green buildings may be on safer legal ground if they have the owner sign off on a new product in recognition of the fact that a manufacturer's performance claims may not be fully tested. Design-builders also have been cautioned to explore a waiver of liability for use of a new product. Payback on energy savings may not occur as initially touted by the design-builder; any claims of, say, 5 to 10 percent should be avoided or at least couched in language suggesting that savings may kick in later in the life of the project, or be less than initially stated.

What Is a Mechanic's Lien?

A *mechanic's lien* is a charge against the property that effectively notifies the property owner that some portion of the labor and/or materials and equipment costs installed in the building have not been paid. A mechanic's lien can be filed only against work in connection with contracts in the private sector; the filing of a mechanic's lien against unpaid goods and services in a public works project is not allowed by law.

The Miller and Little Miller acts

The Miller act, passed by the federal government years ago, does not permit liens to be placed against property of the U.S. government. Similar acts passed by

most state governments, known as "Little Miller acts," prevent liens from being placed against state and local government property. The remedy for claims against unpaid labor and materials costs by subcontractors and vendors in government projects rests with the obligation of the general contractor to provide payment and performance bonds for those types of projects. Claimants for monies owed but unpaid by the general contractor can file a claim with the appropriate federal, state, or local agency and *call the bond.*

Mechanic's liens in the private sector

When a mechanic's lien is filed, the title to the property is "clouded" and the property can't be sold until that lien is "satisfied." The unpaid sum creating the lien can be either paid or *bonded,* in effect requiring the bonding or insurance company to guarantee payment if the claim remains unresolved.

The normal expiration date of a lien may vary from state to state; but if the lien remains unsatisfied, the issuer of the lien can institute foreclosure proceedings. Lien proceedings are started when the company attorney files a claim stating that a valid lien has been placed upon the property and that certain sum is due their client. Proof of the amount owed is necessary, as is proof that the lien was properly filed against the correct owner of the property, the property was correctly identified, and the lien was filed within the time frame established by law.

In theory, when foreclosure takes place, the property is sold and the lien holder receives payment from the proceeds of the sale. In practice, the sale of the property rarely occurs, and the lien is eventually satisfied by being paid in full or bonded.

The rules and regulations governing the filing of liens also vary with the state, but generally a lien must be filed within 90 days of the last date on which work was performed on the project in question. When the filing of a lien is contemplated, there are certain pitfalls to look out for and to avoid:

1. *Make certain the lien is filed within the filing limit time.* If the filing time is within 90 days after the last date that work was performed on the job, make certain that filing is done before the deadline. If it is not, the right to file a lien is lost. The court is aware of some tricks that can be played to comply with the 90-day requirement. The date of last work must be the last date of *meaningful work.* For example, a contractor realizing that the lien rights will expire, say, tomorrow, cannot send a mechanic back to the site to replace a filter in HVAC equipment or adjust a door or replace a broken light fixture lens. The courts will interpret this as a means to circumvent the *intent* of the lien rights, and the lien will probably be declared invalid.
2. *Make certain the lien is filed against the correct property.* Although this might seem rather simple, when urban property is involved, it can get complicated, particularly in subdivisions or projects composed of a number of different parcels. If the wrong property is described, the lien will be invalid.

   The writer was involved with a large senior living community several years ago, and the concrete subcontractor had not paid its ready-mix concrete

supplier (although the subcontractor signed monthly lien waivers indicating that the supplier had been paid!). The irate owner of the property notified the writer's company that the current requisition would not be honored until "the enclosed lien is satisfied and proof of removal of the lien is furnished." The only problem was that the lien was filed improperly against *another* property also owned by that owner for which the writer's company was not involved. Payment of the requisition could not be denied.

3. *Is the lien filed against the proper owner?* The proper owner can sometimes be found on the land records in the tax assessor's office, but quite often defining legal ownership is difficult. When a project involves a limited liability corporation (LLC), a joint venture between corporations or individuals, a syndication or a "shell" corporation, it may be difficult to identify the proper owner of record.

A word about lien waivers submitted by subcontractors

As mentioned above, not all subcontractors will faithfully and honestly complete their lien waivers. On more than one occasion a subcontractor has been known to falsify a lien waiver. Although the subcontractor may sign the lien waiver, indicating payment for all labor and materials placed in the building during the period covered by the waiver, either knowingly or unknowingly the information may be false. Some subcontractors may not be aware that their subcontractors have not paid *their* bills, for example, the mechanical subcontractor who engages a pipe insulator and never requests a lien waiver from that company or never questions whether the company has paid its suppliers. There are other subcontractors who just plain lie because they need the money to pay for other materials and equipment, and more than likely, its materials and equipment for other projects.

So don't assume that the submission of a lien waiver from subcontractors ensures that no liens will be filed.

Most subcontract agreements include a clause stipulating that the subcontractor cannot hire a second-tier subcontractor without approval from the GC. It may be difficult to determine if all lien waivers have been submitted if the identification of all second- and third-tier subcontractors is unknown.

The project superintendent can help in these matters by maintaining a list of all subcontractors working on the project, so the project manager can be aware of the need to obtain lien waivers from those companies. Last, when a false lien waiver is discovered, along with a threat of legal action, that subcontractor should be advised that from that time forth, joint checks may be issued to all the subcontractor's suppliers and subcontractors.

Arbitration and Mediation

Look once again at that key contract document, AIA A201, General Conditions. Article 4.6 requires mediation and arbitration as the initial and secondary methods to resolve disputes. This clause is actually helpful to the general contractor

since it eliminates the costly process of litigation as a means of instituting and resolving claims of less than monumental proportions.

If a contractor, for example, has had a $10,000 claim denied by the architect and owner, the time and costs to litigate may be such that, economically speaking, this claim may not be pursued through legal action. With the lower costs associated with the mediation and arbitration process, pursuit of such a claim would be economically feasible.

Article 4.6 of AIA Document A201 sets forth the procedure for commencement of the dispute resolution process and requires mediation (Article 4.6.1) as the first step in that process.

Mediation

Mediation is *nonbinding*. This means that if it is employed as a first step in resolving a dispute, either party to the process, at any time, may decide to withdraw from the proceedings. When the mediation sessions have been concluded, the parties are under no legal obligation to accept and abide by the conclusions. However, many of the facts "discovered" during the process could be used against that party in either arbitration or litigation proceedings at a later date.

This process involves engaging a professional mediator to review the facts surrounding the dispute and to attempt to get each party to give a little, or sometimes more than a little, to resolve a dispute.

Typically the mediator will start the proceeding by announcing to both parties the steps he or she plans to take to bring about resolution. The mediator discusses the strong and weak points of each party's claim, and if there is a genuine desire by both parties to negotiate a settlement, the mediator will act as the go-between to do so.

The mediator will separate each party, assigning one group to one room and the other group to a second room. By shuttling back and forth and presenting the mediator's opinion of the strong and weak points of each party, the mediator will attempt to negotiate a settlement.

As of the old saying goes, a successful negotiation session is one in which each party feels he or she did not win. But resolving a dispute usually means giving up something, and the mediator's job is to attempt to make each party reduce its initial demand and resolve the dispute so they can get on with their business as usual.

Mediators can be located by thumbing through the Yellow Pages, or the American Arbitration Association (AAA) can also be contacted to provide a list of mediators. If mediation fails, then each party can ratchet the dispute up one further notch and request arbitration.

There again, the contract documents will set forth the notification required to demand arbitration, and the American Arbitration Association can provide all the details and fees regarding the arbitration process.

Although the arbitration process was initially established to reduce or eliminate participation by lawyers, nowadays many law firms have developed specific departments that specialize in arbitration hearings. In most cases, attorneys

not only will assist in the development of the facts and documentation required for the arbitration process, but also will attend all hearings.

Partnering—A 1990's Buzzword?

In 1988, the U.S. Army Corp of Engineers sought to find a better way to settle claims quickly and more economically and, in the process, attempt to develop a less adversarial environment when working with contractors. The partnering process that evolved out of this effort was based upon the realization that when all parties better understood the goals and aspirations of the other parties to the contract, they would find that they all share common goals, albeit in different ways.

By defining these common goals before the project starts, developing a means of attacking problems *as they occur,* and resolving them *quickly and equitably,* successful completion of the project would be achievable.

Since the introduction of the formal process known as *partnering*, any number of public agencies and private firms have embraced the process, and many have included the process of partnering as a contract requirement.

Common to all such projects is the use of a *facilitato*, a trained professional whose responsibility it is to guide all participants through the process.

How partnering works

All parties to the construction process attend one or more partnering sessions—the owner, the architect/engineer, general contractor, subcontractors, and vendors will be invited and urged to attend these sessions. When the facilitator assembles all these seemingly disparate groups and requests that they express their project goals and aspirations in writing, it becomes clear, when all these statements are combined, that each party has the same basic goals.

- Make a fair profit
- Receive prompt payment for work performed
- Reduce or eliminate change orders which often create problems
- Produce a high-quality project
- Achieve rapid construction and complete the project on time or ahead of time
- Eliminate or substantially reduce any disputes

One of the more important procedures created during the initial partnering sessions is the mechanism to resolve disputes quickly. The process that usually emerges includes

- A resolve to settle simple problems at the lowest management level possible. This generally means the general contractor's project superintendent and the owner's representative on the site.

- Preparation of a structured process for escalating an unresolved issue to the next-highest management level, which might mean involvement on the first level between the project superintendent and the owner's on-site representative, escalating to the next-higher level of the contractor's project manager and the owner's project manager. A still higher level may be at the project executive level or divisional manager and the level above that the general manager and possibly the construction company's owner.
- Agreement to adhere to a rigid time frame for the resolution of any disagreement or dispute. For example, at the field supervisory level, problems *must* be resolved within 24 hours; problems escalated to the project management level for resolution must be concluded within 2 working days; problems at the executive level *must* be resolved within one week.

This dispute-solving procedure may be one of the most important contributions of the partnering process. After all, who wants the boss to see that employees are incapable of resolving disputes without relying on their superiors to do so?

Summary

Just remember that the construction industry is an industry of contracts. To deal with the inevitable conflicts that occur through misunderstandings of one's contract obligations, first and foremost, a thorough understanding of one's rights and obligations under the contract is essential. So, project superintendent, carefully read the contract and the specifications, and review the drawings in detail.

Second, it is important to pay prompt attention to an impending dispute, most of which does not disappear if not resolved. Third, not all disagreements can be resolved quickly, but attempts to do so are greatly enhanced when complete and accurate documentation relating to the dispute has been prepared and assembled along the way. And, most important, many disputes can be resolved by viewing them from the other party's perspective and approaching resolution with an open mind and an attitude of reasonableness.

End of Lesson Wrap-Up

Congratulations on completing this lesson! You've taken another important step in your journey to becoming a certified professional in the construction industry.

Up Next: Quiz Time

Before we move forward, there's a short quiz waiting for you. Remember, this quiz isn't designed to trip you up but to reinforce your understanding of the concepts we've covered. It's a way to ensure that you have grasped the essential elements of the lesson and are ready to build on this knowledge in subsequent modules.

You're Doing Great!

You're doing an excellent job so far, and we encourage you to keep up the momentum. Every quiz and lesson is a building block towards your ultimate goal of certification and professional advancement.

See You in the Next Lesson!

We are excited to continue this journey with you and look forward to seeing you in the next lesson. Keep up the great work and stay motivated—your future in construction management looks promising!

Keep learning, keep growing, and remember, we are here to support you every step of the way. See you soon for more learning and development

Contact Information:

Construction Management Certification
Website: www.ConstructionManagementCertification.com
Email: support@ConstructionManagementCertification.com