Make Claim Preparedness the Standard, not the Exception

Executive Summary: More and more construction jobs year after year go to litigation – or at least go "legal" as I say, by requiring the services of a lawyer. Don't make preparing for a claim a monstrous duty towards the end of the job, prepare as you go with good documentation habits.

Prepare for the worst, hope for the best. Most construction projects start off in the honeymoon stage where all parties like each other and are nice to one another. Then, as always, there's a problem - the drawings are flawed, there's a differing site condition, communication between you, the Contractor, and the Owner is protracted, it's always something.

Here's what I recommend on most jobs at day zero (at execution of contract):

- Attorney contract review – have your *construction* attorney review your contract before you sign it. Most contracts are heavily written against you and with large companies you may have near-zero negotiation power, but use your attorney to at least advise on where your position is weak on project matters.
- Attorney contract brief – the same attorney who reviewed your contract should provide a brief to you on what your contract says about notification of changes (to whom and by when), liquidated damages, definition of completion dates and what they mean, avenues of relief (allowance of extended performance, time versus compensation, time and material versus lump sum, progress payment rules, and claim submission guidelines), and other pertinent items.
- Post it! – take the brief provided in the preceding bullet and have the project manager tack it to his wall next to his desk.

Log and collect documentation as you go. Then, once the job starts, make sure you have a PCO log. Whatever acronym you use ("PCO" in this case stands for Potential Change Order), we must generate a log of events that possibly are out of scope and have impacted our project in time and/or cost. The log should collect the following information:

- PCO Number – select a sequential number, say, start with PCO 0001.
- Date – the date you encountered the changed condition.
- Notification date* – the date you notified the owner, in writing or in accordance with your contract, of the change.
- Documentation
    - Photos – photos of original versus changed condition if possible

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- Daily reports – your reports, or those of your subcontractors, explaining how this is different from the scope of work described in your contract
- Standard documents – letters, RFIs, submittals, telephone records, emails
- Other pertinent information – pretend that you have to explain this change to a layperson – someone not familiar with your trade. Do the notes and pictures describe adequately, and simply, what the change is?

*There may be nothing more important in this article than notification. Many contracts negate your ability to collect time and/or money if you do not notify your client of a changed condition in accordance with the contract. You must notify the proper *who* of *when* and *what*.

My story. Two come to mind. The first is related to having your attorney tell you who to write the letter to. I was doing a project for a large municipality and addressing all of the letters to the on-site construction manager (this firm was hired by the City to represent the Owner). Each day this person was at their desk and each day he spoke with the City and, presumably, informed the City directly on project issues. When we got to mediation, the opposing counsel turned and said, "all along you never notified my client, in writing, of this issue." I responded with "what are you talking about, we have 300 letters on this project!?" Their lawyer stated, "that may be, but none of them were addressed to the appropriate party as defined by the contract." Justice is blind as they say and since these were not addressed to the right person, even though I'm sure he received each and every one of these letters, we had an uphill battle on proving the City knew about the issue.

He was right (the opposing attorney). We got around it, and it seems like a silly technicality, but one that can render your hard work useless if you fail to address or deliver your correspondence to the right party.

Secondly was a waterline job we did for a Utility Agency. We did a great job pre-bid talking to the correct party about how we were going to shut down all of the City streets on our project. We actually got all of our traffic control plans approved by the Traffic Department before we started the job.

When we arrived on site, the inspector who took pride in breaking contractors, disallowed the road closures already permitted by his Traffic Department. When we took this documentation to mediation, we got killed. None of it mattered. We did not send a single letter of notification of our impacts to the owner, and my attorney did his best to get what he could based upon our failure to write letters. Little to no notification equated to little to no money in the settlement.

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