

CONSTRUCTION PROJECTS: COMMON DISPUTES & CLAIMS

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PRESENTER



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AGENDA

- Changes in the work
- Delays
- Cost increases
- Workmanship / Warranties
- Non-payment / Liens / Bond Claims
- Dispute Resolution




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CHANGES IN THE WORK

- Work not included in original scope or bid package
 - Reasonably inferable?
 - Minor changes?
- Approval Process for Change Orders
 - Notice requirements
 - Must do work, keep working, and agree on price later

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CHANGES IN THE WORK

- How requested?
 - Architectural Supplemental Instructions (ASI)
 - Request for Information (RFI)
 - Proposal Request (PR)
 - New issue of design drawings
 - Construction Change Directive (CCD)
 - On the fly in the field

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CHANGES IN THE WORK

- How approved?
 - Hand signatures
 - E-signatures
 - Email
 - Verbal
 - By performance - course of dealing

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CHANGES IN THE WORK

- Design Issues
 - The party hiring the architect or other design professional is financially responsible for their errors.
 - Some contracts shift design errors to one party or the other.
 - If you will perform no design work, make sure design risk is on someone else.
 - Watch for insurance provisions requiring you to have professional liability coverage.

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CHANGES IN THE WORK

- TIPS
 - Include language in contract stating changes in the work may be approved by 1) email, 2) verbally with written follow up and no objection, and/or 3) by the other party allowing the work to occur.
 - Strike contract language stating the GC is only liable for changes if Owner approves them later.
 - Consider including a contingency for extras.
 - If the design is clearly incomplete, state this in your bid and your contract, and that extra work related to design issues (or lack of design) or is excluded and will warrant a change order.

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DELAYS

- Carefully review and follow all written notice requirements.
- Duty to continue working.
- Claims limited to extension of time.
- Liquidated damages.
- Uncontrollable events.

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DELAYS

- Uncontrollable Events - sometimes called "Force Majeure"
 - But "force majeure events" are "unforeseeable"
 - "No one thought this would happen."
- In construction, we expect delays and cost increases
- The question is who will bear the risk of those uncontrollable events?

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DELAYS

- **TIPS**
 - When negotiating the contract:
 - Do not agree that more time is your only remedy. You should also have a claim for increased costs.
 - Eliminate liquidated damages, or state they only apply if the delay was clearly as result of your fault.
 - During the project:
 - Keep summary of deadlines handy for quick reference
 - When in doubt give written notice of a delay claim.

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COST INCREASES

- Not a change in the scope of work.
- Could be an increase in material or labor costs or due to delays.
- Closely tied to the rules regarding change orders.
- Cost increases can rarely be called "unforeseen."
- Fixed price contract = no increase in price if your original costs go up unless contract states a procedure for that type of claim.
- **TIP:** Strike any language in contract stating you waive claims for extra costs for any reason (commonly related to delays).

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WORKMANSHIP/WARRANTIES

- Warranties
 - Residential work has statutory warranties.
 - Commercial work does not have statutory warranties.
 - Pay attention to the length of warranty you are being asked to provide.
 - Make sure your subs agree to the same terms
 - Owner's or customer's claims are not necessarily limited by the length of your warranty.

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WORKMANSHIP/ WARRANTIES

- Workmanship /correction of work during project
 - Pay attention to length of time to correct work - often very short (i.e. 48 hours).
 - If you fail to comply, often the other party is entitled to terminate you, hire another contractor to correct the work, and back charge you.
 - Often required to make the corrections regardless of who is at fault.
- **TIPS:**
 - When negotiating the contract seek as much time as you can get to correct work and require that any notice to correct work contain a detailed description of the issues.
 - Keep summary of deadlines handy for quick reference.

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NON-PAYMENT / LIENS / BOND CLAIMS

- Common Reasons for non-payment
 - Defective work
 - Delays in the work
 - Pay-if-paid clause
 - Retainage
 - Failure to comply with certified payroll / prevailing wages
 - Lapse of or failure to provide insurance info

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NON-PAYMENT / LIENS / BOND CLAIMS

- **Mechanic's Liens - private projects**
- Three basic steps in Minnesota
 - Serve pre-lien notice if required.
 - Serve and file a mechanic's lien statement within 120 days of the last date of labor or materials.
 - Commence a mechanic's lien foreclosure action within one year of the last date of labor or materials.
 - No extensions possible.
- Every state has a unique lien law.

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NON-PAYMENT / LIENS / BOND CLAIMS

- **Payment Bond Claims - Public Projects**
- State or Federal Project?
 - State (MN): Serve Notice of Bond Claim within 120 days of the last date of labor or materials.
 - Federal: within 90 days of the last date of labor or materials.
- Commence a lawsuit to enforce the claim within one year after the last date of labor or materials
 - Extensions are possible.
- Every state has a unique bond claim law.

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DISPUTE RESOLUTION

- Where will disputes be heard?
 - In Minnesota you cannot be required to litigate or arbitrate in another state.
 - Each states laws are different.
- What is the dispute resolution method?
 - Litigation or Arbitration?
- Required to keep working pending dispute resolution later?
- Liens and bond claims cannot be pursued in arbitration, only in district court.
- Attorneys' fees

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STATE CONSTRUCTION LAW SUMMARY

- A summary of the laws in each state regarding five common topics is included as part of today's materials.
 - Maximum retainage allowed
 - Pre-lien notice requirement
 - Are pay-if-paid clauses enforceable?
 - Can a party be required to resolve disputes in other states?
 - May a subcontractor recover attorneys' fees for non-payment.

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QUESTIONS?

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