Controlling Costs (and Headaches) in Business Disputes:

*What You Can Do to Control Your Company’s Costs*

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Purpose of this Presentation:

• Legal disputes are expensive;
• But high legal bills not inevitable;
• Regardless of your role, there are things you can do (field engineer to CEO);
• Focus on steps at all phases;
We will discuss:

• Pre-Contract Phase;
• Contract Negotiation;
• Construction Phase;
• When a Dispute Arises;
• Litigation/ADR Phase;
Pre-Contract Phase:
Steps You Can Take
Pre-Contract Phase: Steps You Can Take

• Be selective about who you work with:
  • Problem subcontractors;
  • Problem GCs;
  • Problem owners;
Pre-Contract Phase: Steps You Can Take

• What types of projects you bid on:
  • Familiarity with type of work;
  • Project location;
  • Type of project:
    • Ex. Design-Build;
    • LAP (i.e., Is the owner experienced?);
Pre-Contract Phase: Steps You Can Take

• Maintain your own insurance to protect the company:
  • Consider types and amounts of insurance you carry;
  • Regardless of what contract requires;
  • Commercial General Liability (CGL), Officers & Directors, Professional Liability (aka Errors & Omissions);
Contract Negotiation: Provisions that Help Control Future Legal Costs
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• Insurance:
  • In addition to carrying your own insurance;
  • Contract provisions requiring you and other party to carry insurance related to the project;
  • Make sure you have the right types of insurance and sufficient limits;
    • Ex. E&O insurance on Design-Build projects;
    • Will required limits cover you for a catastrophic loss?
Contract Negotiation: Provisions that Help Control Future Legal Costs

• Indemnification, Hold Harmless, & Duty to Defend:
  • Related, but separate;
    • Indemnification: Reimbursing for a loss;
    • Hold Harmless: Releasing from liability for a loss;
    • Duty to Defend: Agreeing to assume other party’s defense;
  • Worthless if unenforceable;
  • Limits/restrictions on indemnity agreements:
    • VA & NC: No indemnity for personal injury or property damages caused by indemnitee’s own negligence;
  • Legal fees not automatically included – need to specify;
Contract Negotiation: Provisions that Help Control Future Legal Costs

• Attorneys’ Fees Provisions:
  • “American Rule”: Everybody pays own attorneys’ fees unless contract or statute says otherwise;
  • Very few statutes provide for this:
    • Ex. Virginia Code § 2.2-4335(C) re: recovery of costs related to delay claims;
  • So, need a contract provision:
    • Virginia: Can be one-sided (i.e., “If I win, you pay my fees, but if you win, I don’t have to pay yours”);
    • North Carolina: Must be mutual (i.e., “If I win, you pay my fees, and if you win, I pay your fees”);
  • Judge/arbitrator ultimately decides amount;
Contract Negotiation: Provisions that Help Control Future Legal Costs

• Notice Provisions:
  • Know what the notice requirements are & educate your team!
  • For contract with government, notice is statutory:
    • VDOT: “At the time of the occurrence” & prior to performing affected work;
    • NCDOT: “Before performing affected work”;
  • Don’t waste money fighting about whether you provided notice!
  • By contract, parties can agree to whatever notice requirement they want;
  • Strategy is:
    • Downstream: Make notice requirements short (to minimize claims);
    • Upstream: Make notice requirements longer (to preserve claims);
Contract Negotiation: Provisions that Help Control Future Legal Costs

• Shortened Statutes of Limitation (SOL):
  • SOL = how long you have to sue after breach;
  • By statute for written contracts:
    • VA = 5 years
    • NC = 3 years
  • Longer SOL = more risk/more cost;
  • Can’t agree to lengthen, but you can shorten;
  • Limit how long after project completion you can sue;
  • But GCs beware of *Hensel Phelps* situation;
Contract Negotiation: Provisions that Help Control Future Legal Costs

• Venue Provisions:
  • Venue is *where* you resolve a dispute (litigation, arbitration, mediation);
  • Why it matters/affects cost;
  • You can agree in contract where disputes will be resolved;
  • But, limits on these in VA and NC;
    • VA – Contracts for construction to be performed in VA, where one party located in VA;
    • NC – *Any* contract;
  • Can’t change venue for bond/Miller Act claims;
Contract Negotiation: Provisions that Help Control Future Legal Costs

• Alternative Dispute Resolution (ADR):
  • You can agree upfront to arbitrate instead of going to court;
    • Arbitration vs. litigation;
  • You can ALWAYS agree to mediate;
  • Cost considerations for type of ADR and who administers;
  • You can also agree upfront (before the dispute emerges) on terms of arbitration:
    • # Arbitrators;
    • # Experts;
    • Which rules to use;
    • Who administers (AAA or someone else);
  • Scope of discovery (i.e., how many depositions, document requests, etc.)
Contract Negotiation: Provisions that Help Control Future Legal Costs

• Waiver of Right to Jury Trial:
  • Jury trials are very expensive;
  • Juries are unpredictable;
  • By contract, you can agree to waive (judge decides):
  • Unenforceable in NC;
Contract Negotiation: Provisions that Help Control Future Legal Costs

• Get Your Lawyer Involved Early:
  • Form contracts are available; some are pretty good;
  • But they do not replace the need for legal review;
  • Every project is different;
  • Don’t use form contracts “out of the box”
    • Almost always require tailoring;
  • Involve your counsel early in the contract drafting and negotiation process;
  • Cost of having lawyer review is worth it if you get into even one dispute;
Construction Phase: Steps You Can Take
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• If you get a complex contract (Design-Build, P3, new Owner, etc.):
  • Make sure your people **read** the contract (more than once);  
  • Make sure they **understand** company’s obligations:
    • Notice, record-keeping, schedule, payment, etc.
  • Set up a project manual for key issues;
  • Consider having a lawyer review your contract to ID potential pitfalls;
Construction Phase: Steps You Can Take

• Project schedule:
  • Follow the contract requirements for schedule type, updates & submissions;
  • Not the same for every contract;
  • Keep the schedule current;
  • Cheaper to perform forensic analysis of existing schedule than to create one after the fact;
  • Consider creating CPM, even if not required;
Construction Phase: Steps You Can Take

• Watch Contractual Deadlines:
  • Pay attention to notice requirements: Don’t pay lawyers to fight about whether proper notice was given;
  • Watch triggers for notice to insurance carrier: What is an “occurrence”?
  • Don’t miss deadlines to file a mechanic’s lien or make a bond claim;
  • Follow procedures for making a claim under a bond (especially performance bonds);
Construction Phase: Steps You Can Take

• Other Considerations:
  • Keep accurate and organized records (minimum = what contract requires);
  • Maintain daily reports to record facts not opinions:
    • YES: “Subcontractor completed 1000 LF today.”
    • NO: “Lazy subcontractor is delaying the project.”
  • If payments to you are overdue: don’t let them get too far behind before you take action;
When a Dispute Arises
When a Dispute Arises:

- Know dispute resolution procedure for *this* project & *this* contract (see “Read Your Contract”);
- Know & meet filing deadlines (notice, claim submission, filing suit, appeal);
- Know & meet all submission requirements;
- Get help early:
  - Notify company management/get them involved;
  - Get lawyer involved early;
  - Trying to do it yourself can create problems that are costlier to resolve;
When a Dispute Arises: Hiring a Lawyer:

- Alternate fee arrangements:
  - Hourly billing is typical;
  - Flat fee;
  - Contingency (less common in commercial disputes);
  - Blended fee;
- Ask lawyer for an estimate/budget upfront;
- But, understand it can change;
Litigation/Arbitration Phase: Decisions You Can Make
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• Limiting Discovery:
  • Decide to focus on certain issues;
  • Accept risk you might be overlooking something;
  • Depositions – are they worth it?
• Electronic discovery:
  • Agree with opponent to limit/run search terms;
  • Maybe better to address in contract;
Litigation/Arbitration: Decisions You Can Make

• Do some of the legwork yourself:
  • Assign someone from your organization to help collect and review documents;
  • Send someone familiar with the project with the lawyer to review the other side’s documents;
  • Focus on what is important/cut down on requesting unnecessary documents;
Litigation/Arbitration: Decisions You Can Make

• Attempt Early Resolution:
  • Sometimes just sitting down with the other side can help;
  • Mediate early;
• Dispositive Motion:
  • Motion that resolves entire case or discrete issue without going to trial;
  • Can be expensive to file;
  • But narrows issues and/or entirely disposes of dispute;
  • Has an effect on parties’ willingness to negotiate;
Litigation/Arbitration: Decisions You Can Make

- Think about the costs of seeing a dispute through resolution:
  - What is the value of the time your people spend focused on the dispute rather than on generating income for your company?
  - Uncertainty of result;
  - Potential for appeal – How long do you have to wait?
  - Will they pay it voluntarily?
  - If you get a judgment – Can you even collect it?
Conclusion:

• Business disputes can be expensive;
• But there are things you can do at all phases to control costs;
• Earlier in the process = more control to affect outcome;
• Best time to resolve issues is on the front end;