

## No substitution for preparation

Owners will fare better if they head into projects believing litigation is a possibility

There's no getting around it — litigation is a messy, costly business. And the last thing any owner wants to think about at the start of a project is the number of ways that project can go wrong. But many lawsuits are avoided — or won — through careful preparation. Here are five ways to prepare for litigation.



**CONSTRUCTIVE  
ADVICE**

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**“By addressing the scope before the project begins, the owner decreases the chances for confusion, error or disagreement while the dirt is flying.”**

### • Sign a good contract

The construction and design contracts should protect the owner. To that end, the owner should consider some basic questions about the contracts. Are the terms clear? Do they reflect the business deal agreed to by the parties? Do they provide practical and effective remedies if the architect or contractor fails to perform?

Although all terms are important, a few are critical when there's a dispute. The owner should make sure the forum for resolving disputes, whether in court or arbitration, is favorable and convenient. The owner should consider including a provision in each contract that awards attorneys' fees to the party that prevails in the case — without this provision, parties usually have to pay their own fees. The owner should avoid any artificial limits on how long it has to bring claims — some contracts drastically reduce the time the owner would otherwise have under state law to file a lawsuit. And the owner should avoid any terms that limit the liability of either the contractor or the architect. The American Institute of Architects' contract forms, for example, include waivers of consequential damages that prevent the owner from bringing claims for loss of use if a project isn't delivered on time. The owner should make sure the construction and design contracts contain the tools the owner needs to protect itself.

### • Make sure the scope of work is clear

The contractor's work should of course be clearly described in the construction contract, and the best approach is to incorporate the architect's design documents in the contract. But an owner should avoid attaching stray documents to the contract that change the architect's design, because these stray documents create opportunities for confusion, error and disagreement.

Contractors, for example, often include assumptions, clarifications and exclusions in their proposals or submit questions about the design before the construction begins. The owner should carefully consider the contractor's input and make sure the architect determines that the contractor's assumptions, clarifications, exclusions and questions are clearly addressed in the design documents.

In the best situation, the architect's design documents are clear and complete enough to stand on their own, and no other documents referencing the contractor's work need to be included in the construction contract. By taking care of the scope before the project begins,

the owner decreases the chances for confusion, error or disagreement while the dirt is flying.

### • Follow the contract

Even the most advantageous contract terms are of no help if they're not followed. The owner's personnel should read and become familiar with the contract's terms — and follow them.

When bringing a claim against a contractor or architect, the owner should expect counterclaims, the root of which is often the owner's failure to follow the contract. For example, when facing a claim for delay, a contractor may assert that the delay was caused by the owner or other parties hired by the owner (such as the architect, the owner's consultants or other contractors). Understanding what the contract requires of an owner, and complying with those requirements, will allow the owner to be in the best position to handle a dispute.

### • Write as if your words will be read back to you — in court

During every project, hundreds — if not thousands — of e-mails, letters, and other documents are passed back and forth between parties, and each document is part of the project record. Except for the very few that are protected by such rights as the attorney-client privilege, all documents are potential evidence in litigation.

E-mail, with its easy interface and freewheeling nature, is a particularly dangerous trap for informal, carefree writing. Before hitting the “send” button, ask yourself: Would I be comfortable having this e-mail read back to me in court?

### • Document, document, document

With so much paper, e-mails, phone calls and meetings consuming a busy construction project, an owner can't document everything — there aren't enough hours in the day. But the owner should make reasonable efforts to document the progress of the project, the decisions of the parties, and any errors or omissions made by the architect and contractor.

The owner should be certain the project record accurately reflects what happened. Even the best testimony from the most stalwart member of your team will be weakened by a document that contradicts the testimony — for example, meeting minutes that don't accurately capture a change-order decision.

Hopefully, these documents will gather dust in the file cabinet, never to be looked at again. But by taking time to record the project, an owner will be prepared for the worst.

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