Should You Pursue a Construction Claim?

By Gordon H. Curtis and Richard Merkhofer

Five Questions to Help You Make the Right Decision
When something has gone wrong on the construction job, it’s easy to decide to pursue legal action. But the reality is that not every claim should be pursued. If you make the wrong decision, the case may end up costing you more to win than any award you might receive.

For the contractor or owner who’s contemplating filing a claim, it helps to step back and objectively review all the materials and circumstances to determine if it makes sense to go forward. As you review Are you dealing with an “empty pockets” situation? Suppose you have a viable claim. Do you go to court and win? Will the defendant be able to pay? The time to do careful credit checks is before you start the work. The question is: “Even if you had a valid claim and won your case, would you ever see a penny?” If the answer is “no,” does it make sense to pursue the claim just to make you feel better?

Were there problems on the jobsite? As much as everyone tries to avoid them, problems do arise on the job. Failure to grant access to the contractor may result in lost days and dollars. Less-than-perfect work by the contractor prompts complaints from the owner and costs to correct. Try and hold amicable discussions with the parties concerned. This equitable review of the facts can sometimes resolve the problem. Recognize that both parties may share in the blame. Due consideration of such field conditions and their relative costs may result in a “wash” as each side absorbs its own cost, at no cost to the other.

Who’s responsible for those involved on the job? The owner or contractor may not directly be culpable for any disputes or delays, but either side is responsible for other people they’ve hired. The owner may be responsible for the poor performance of the designers, architects and

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your claim, here are five questions that will help you to make the right decision.

Is there significant financial damage? If not, you may have no basis for a claim. Not every construction dispute translates into hard dollars lost. Real losses can occur on all sides. As an owner, production delays and lost-time days may have cost you unanticipated losses in the form of negative rental cash flow or additional interest payments. As a contractor, procrastination by the owner in the decision-making process may have delayed contract completion, resulting in escalated labor, material and equipment costs. As an attorney, representing these situations may not be the best use of your firm’s resources. Take a hard look at these factors and be honest in your appraisal of the circumstances, especially as an objective third party would view them.
exercise control over subcontractors, superintendents and engineers. So if liabil-
ity can be assigned to a representative, you may have a claim.

**Do you have sufficient documentation or evidence to support a claim?** From the first handshake between owner and contractor, you need a paper trail. The project’s history should be fully docu-
mented with names, dates, people, places, estimates, take-offs, computa-
tions, drawings and meeting minutes. Change orders, with prerequisite back-
up data, must be noted, filed, tracked and processed. Delays, changed work conditions, lost time days, weather con-
ditions—all must be noted in official documents. Daily logs, time and mate-
rial accounts, daily work reports—these must be accurately maintained and updated. If you have the documentation, you will be in an excellent position to pursue your claim; without it, you may not have a case.

If after answering these questions you decide to go forward, there are four options open to you before turning to litigation:

Capitulate. If you’re honest, you’ll admit when you don’t have a case or an ade-
quate defense. Face the facts; it will save you money in the long run.

Try and arrange to meet face-to-face and engage in the give-and-take of amicable negotiation.

Take the facts to a neutral party and see
Can current documentation support a claim?

If you can reach an acceptable settlement via mediation.

Both parties can submit to arbitration. This impartial method of dispute resolution frequently work when the magnitude of the problem is significant and all other avenues have been exhausted.

If all else fails, there may be no alternative than to consider litigation. Remember, as the dispute escalates, it will take more time to resolve the claim, there will be more people involved, there will be higher financial costs, and there will be increasingly entrenched expectations.

Before you go down that path, ask yourself the five questions above, they will give you a clearer picture of whether the costs involved to pursue a claim are going to be worth the effort and final judgment.

**About the Author**

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