Techniques to Avoid Litigation Claims

A Wall and Ceiling Contractor Should Practice Some “Self-Analysis” To Avoid Claims and Litigation Problems

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If contractors ask themselves certain questions NOW, they could very well avoid answering questions . . . in court . . . later!

That’s the joint opinion of Dr. William Y.L. Ma, Ph.D., P.E. and Gary Greenberg, P.E., who believe one of the best ways for contractors to avoid construction disputes and possible subsequent litigation cases is to “self-analyze” the firm’s own organizational and “on-site” strengths and weaknesses. This examination can be completed by asking a series of questions relative to the contractor’s understanding of the construction contract and how well prepared the firm is to carry out the provisions of the contract.

Messrs. Ma and Greenberg are the principals of Ma & Greenberg, Inc. (M & G), a prominent Construction Claims Management and Construction Consulting firm based in Jericho, NY. With more than 40 years of engineering and construction experience (15 years of which have been devoted to the technical analysis of construction claims), M & G has successfully managed over 100 construction claims projects representing more than $1.2 billion worth of construction. In addition to working closely with many major law offices, M & G has worked with contractors, building owners and design professionals from Alaska to Florida and internationally as well.

To help the contractor understand where a construction claims and litigation case may be “hiding” in the office or at the job site, Messrs. Ma & Greenberg have formulated 8 guideline questions, designed to identify these problems before they are discovered by the building owner or other building team members. If the contractor’s answer to any one of these questions is “No,” steps should be taken immediately to rectify the situation or a claims and litigation case may be on the horizon.

1. Do I clearly understand the job specifications and requirements?

“Of course, contractors understand the technical aspects of construction,” Ma stated, “but all too many are less knowledgeable of the ‘front end’ general and special conditions that accompany the specific job.”

For example, Ma cited unfamiliarity with notification requirements as one
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of the reasons why disputes arise during even the early stages of a project. If the sub is unable to purchase certain building materials specified in the contract, the contractor, in most cases, has a number of days to notify the owner that these particular materials will not be used and other brands will be substituted. If the contract stipulates that other ‘alternative brands’ can be supplied to do the construction, provided that adequate notification requirements are met, the contractor is entitled to use these materials.

“Because the contractor doesn’t understand or is not aware of these notification requirements, the time limit for notifying the owner will lapse and, in many cases, the contractor loses the right to provide readily available material,” Mr. Greenberg explained. “If the general or sub was cognizant of the notification requirements of the contract, the situation could probably be resolved quickly and easily.”

The sad truth of the matter, Mr. Greenberg said, is that many contract stipulations are not understood by the contractor(s), because they were never read in the first place! Take the time to make a careful review of the seemingly complex and voluminous requirements and stipulations and you’ll often find they can be clearly understood.

Many contractors simply won’t make the time to do this . . . and pay for it dearly later in the construction process, warns Greenberg. In addition, a contractor must have an excellent contract document classification, storage and retrieval system. (Discussed in more detail later in this article.) Such a system won’t necessarily help you understand the stipulations, but it will be invaluable as a reference tool-source as questions arise during the course of construction.

2. Have the quantities taken off been doubled checked for accuracy?

“If a general is awarded a contract that specifies some of the material components are to be fulfilled on a lump-sum basis,” Mr. Greenberg commented, “Keep this question one of the foremost in your mind.”

After the bid/proposal is submitted and won by the contractor . . . and if the original cost estimate for concrete, for example, is not sufficient . . . the contractor normally will try to make up the increased cost by attempting to save money in another area of the contract. If “cutting back” on other material requirements is impossible, however, the contractor should notify the owner as soon as possible that there is a problem with the estimate.

“The majority of contractors choose to ‘eat’ increased estimate costs,” Mr. Ma remarked, “and others will notify the owner immediately if an estimate is low. This particular problem of notification becomes acute with a public works job or an inexperienced private owner (i.e. a church group). In the case of the public works project, a public agency can only permit an adjustment of a bid price if an arithmetic
error is the cause. If the error was judgemental on the contractor’s part, the original bid stands and the firm is committed to it.

In the case of an inexperienced private owner, the contractor’s honest error severely damages his credibility before a shovel ever gets into the ground, because the owner doesn’t understand the construction process and how such a mistake can be made. He may begin to wonder how many other additional costs will crop up when the contractor is mid-way through the building.

A real danger under either circumstance is that if costs suddenly start to climb before construction even begins, either type of owner is liable to decide to re-bid the entire project and an otherwise good job might well be lost.

Check your quantities take-off carefully!

3. Do I have the latest prices for material and labor for the proposed work?

“The President or CEO of a contracting firm must make sure that the estimating department stays up-to-date regarding the cost of labor and materials,” Mr. Ma emphasized.

Contractors who begin to make excuses about labor and material costs during the course of the job may well be on their way to a claims and litigation case, because sooner or later their costs will exceed their revenue and a claim may be their only chance to recover their losses.

“A lackadaisical attitude on the part of the estimating staff will be discovered only if the President, CEO or someone outside that department monitors cost reports over a period of time,” Mr. Greenberg explained. “For example, if the ‘in place’ cost of concrete has been under budget on a number of jobs, the contractor may have a real problem on the latest job.”

4. Have I checked whether the work can be completed within the stipulated time-frame of the contract?

“In the heat of competing for a construction contract,” Ma observed, “a contractor many times will agree to any time frame to get the contract. The result is that the contractor gets locked into a schedule that cannot possibly be achieved for the contract price.”

The contractor should prepare a
‘rough schedule’ based on the owner’s completion demands. If it is then discovered that the owner’s finish dates are unrealistic or unreasonable, the contractor should seek an opportunity to discuss alternative deadlines with the owner.

“When the job inevitably falls behind schedule, the owner is going to become upset and disputes may begin to surface,” Greenberg remarked, “and the contractor has no one to blame but himself.”

5. Do I have a realistic and comprehensive work schedule, with due consideration of the available time, money, labor, equipment and material?

The job may require the preparation of flexible management and scheduling programs, such as Critical Path Method Scheduling (CPM), Bar Charts and Program Evaluation Review Techniques (PERT) Systems if it is to be completed on time and within budget,” Ma noted.

Through these different management systems, the contractor can develop a project schedule that is truly reflective of the best alternatives for sequencing construction activities.

6. Have the needed materials and equipment been ordered as scheduled and properly tracked?

“If the contracting firm does not own heavy equipment, make sure that large cranes, steamrollers, etc. can be rented or obtained by the time they are needed on the job site,” Greenberg advised. “The same holds true for steel shipments, concrete and other building materials.”

Ordering the materials/equipment is only the first step, the consultant warns. Constant tracking-expediting of the order must also be done to identify budding delay problems before they become big ones.

If the contractor doesn’t have the equipment and material on the site at the proper time, construction will stop and disputes will begin, says Greenberg. By tracking and knowing that there may be delays in the delivery of the equipment and materials (due to unforeseen circumstances), the contractor can ask for time extensions in advance and not anger the owner.

7. Do I have adequate construction equipment for the work?

“In addition to knowing when heavy or specialized equipment will be needed,” Ma said, “it is also important for the contractor to know what type of equipment is necessary for building.”

Not having the proper equipment to complete a portion of the construction work can lead to major delays (if the equipment is not immediately available) and could throw the whole building schedule awry. This oversight can also be extremely embarrassing for the contractor.

“The owner is going to think ‘does this man really know what he’s doing?’ and will have second thoughts about hiring you again,” Greenberg added.

8. Do I have a contingency plan in case one of the major pieces of construction equipment breaks down?

“If the contractor does not have a contingency program to replace equipment that becomes inoperative, one should be prepared immediately,” Ma said.