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OWNERS: HERE ARE FIVE WAYS TO ENSURE PROJECT FAILURE

BY TIMOTHY R. HUGHES, ESQUIRE



Owners and owners' representatives often fail to follow certain basics that can lead to major problems with their projects. If you are interested in making sure your project is a disaster, here are five sure fire techniques.

1. Mistake Price for Value

In today's economy, margins are clearly tight and price is a major factor. Still, simply picking the cheapest contractor or consultant without regards to quality, experience and talent is a mistake. Low bids often hide mistakes or are a harbinger of aggressive change orders coming. Hiring the cheapest civil engineer may save a little bit of money initially but ultimately could end up costing you during a rocky entitlement process. The cheapest architect may expose you to more claims and lack of coordination. Focusing on value across the entirety of the project as opposed to strictly price will translate to greater success and less risk.

2. Have Poor/Uncoordinated/Unexecuted Contracts

Having weak contracts, or contracts that are not coordinated with each other, invites disputes and risk. Having no signed contracts is even worse. It sounds hard to believe, but I have had many cases where the actual contracts were never signed leading to major fights over what the terms actually were. Starting work without signed agreements happens with some frequency, as does litigation on those projects. It is better by far to understand that contract negotiations are an important element in setting expectations and talking through potential snags before work starts.

3. Thoughtlessly Sign Boilerplate

Thoughtlessly signing the other side's boilerplate contract forms is an invitation to disaster. This is not to say it is always wrong to sign the other side's contract, but it should be reviewed and understood in detail. For example, if you are agreeing to limitations of liability in design contracts, you should know and understand what that means practically. It is equally risky to sign other boilerplate forms without considering the details. This extends to change orders, acceptance of work, releases and other

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documents.

4. Take Your Hands off the Wheel

Even with project management or design professionals involved, the owner can and should stay engaged. Adhering to best practices and having processes established helps reduce risk. This is even more true when the owner is more actively managing the trades or the project. If you get disengaged and there is a problem, you can expect a difficult time unraveling what happened. Far better to stay organized and on top of the project and thus reduce risk. It is worth the time.

5. Fail to Document

This is the mother of all unforced errors. The complexity of construction projects, the schedule pressures, and the many moving parts mean there are many communications. You need to have a process to ensure orderly communication, prompt and accurate decision making and clear documentation of all decisions. I cannot count how many cases have involved a critical decision that is purely verbal and thus left to chance in litigation. More importantly, timely documentation ensures everyone is on the same page to avoid problems.

Conclusion

As basic as these points seems to be, they directly flow from 20 years of construction litigation practice. I often get a file and say, "I have seen this movie before," purely because the case involves one of the failures above. If you avoid these top five issues, you will eliminate some of the most basic points of failure of construction projects.

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The upcoming presidential election has dominated the headlines. As a nation, our attention has been focused on the state of current laws, the prospect of future laws, and even the need for certain laws. As an industry, construction is no less affected by and subject to a myriad of laws that can and do impact the way developers, builders and other construction professionals operate on a daily basis. Knowledge of the various codes is not only essential to operating a successful construction project, it is the foundation for a contractor to ensure improved communications with clients, other professionals and the enforcers of the various regulations by which the construction industry is governed.

What is the "Code?"

Depending upon the jurisdiction in which a construction project is located, construction professionals will be subject to at least one, and more likely, several codes. Most projects in the Commonwealth are subject to the Virginia Uniform Statewide Building Code, referred to as the USBC, Virginia Code §§ 36-97 et seq. The USBC prescribes building regulations that are to be complied with in the construction and the rehabilitation of buildings and structures, and the equipment used in construction. The USBC also adopts and incorporates the International Building Code. Local jurisdictions may also have building codes that are specific to a geographic area.

The Code is a Living Document

Just like the governing documents for the United States and the Commonwealth of Virginia, construction codes are not static documents. They are subject to revisions and often, the impetus for the change is input received from those subject to and affected by the various code provisions. The Virginia Building and Code Officials Association communicates the concerns and the desires of building safety professionals to the appropriate state legislative bodies regarding the USBC, which includes the Virginia Construction Code, the

Virginia Rehabilitation Code, and the Virginia Maintenance Code. The Associated Builders and Contractors (“ABC”) is a national organization that acts as a political advocate for the interests of its members, which includes general contractors, subcontractors, developers, and others working in the construction industry. ABC advocates for changes to laws that affect chapter members on both statewide and local levels. The Associated General Contractors of America is a trade organization that educates general contractors and also acts as a proponent for change of those laws that are incongruous with the completion of construction projects. All of these organizations have local chapters to encourage participation in the local communities where construction occurs.

Ignorance of the Law is No Excuse

The average construction professional working on a project in the Commonwealth has a basic understanding of the USBC. And while knowledge of its provisions is equally important, less contractors are aware of the Virginia Administrative Code (“VAC”), Va. Code §§ 54.1-1100 through 54.1-1143. The Department of Professional and Occupational Regulation (“DPOR”) is a governmental agency of the Commonwealth established to enforce the VAC. DPOR governs everything from oversight of licensing of contractors, to review of complaints from consumers, to authority to require contractors to participate in remedial education, fine violators, or revoke or suspend licenses. Despite the reach that the agency has to impact contractors’ ability to work not only in the Commonwealth, but also in other cities and states in the United States, it is surprising that so many large and small contractors do not have an appreciation of the need to be in full compliance with the VAC. The likely reason for that is many consumers in the Commonwealth also do not appreciate, or even know, that DPOR exists to make sure that their construction interests are a concern of the Commonwealth.

Just a few of the violations for which a contractor’s license may be subject to suspension or revocation include:

- Failing to comply with DPOR regulations;
- Furnishing incomplete information in obtaining/renewing license;
- Failing to report suspension/revocation in another jurisdiction;
- False advertising;
- Negligence in contracting;
- Misconduct in contracting;
- Failing to use a legible contract for residential projects;
- Failing to include business name, address, and license number on contracts;
- Failure to provide residents with Regulation Statement of Protection for door-to-door solicitations;
- Allowing license to be used by another contractor;
- Failing to disclose cancellation rights of parties;
- Statement that any contract changes must be in writing;
- Failing to retain contract documents for a period of five years;
- Practicing in a classification in which contractor not licensed;
- Failing to satisfy any judgments; and
- Contracting with unlicensed/improperly licensed contractor.

Some of the violations are obvious (negligence) while others are less evident (failing to satisfy judgments). In any event, it is imperative that contractors have a grasp of the existing laws as well as any proposed changes so their business operations are not unduly interrupted.

Construction codes are driven by past practices, the need for increased safety, and the advocacy of stakeholders in

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the construction process. Understanding the laws will hopefully decrease the likelihood that construction professionals are actually in violation of the laws. Irrespective of corporate or individual political affiliation, it makes good business sense for construction professionals to make their concerns known about construction codes – it is a dialogue that more likely than not will produce positive outcomes.

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