

A Construction Lawyer's Advice: Be Proactive, Embrace Change

By James McCarthy | April 29, 2013

As chairman of the Construction Law Practice Group at Bernstein Shur in Portland, Michael Bosse leads a team of five lawyers specializing in issues that affect construction companies. Contractors, subcontractors, suppliers, developers and owners are among the group's clients, giving Bosse an A-to-Z perspective of the industry, from project inception and contract negotiation to claims and litigation.

Bosse says his team is the largest single-firm practice group of construction lawyers in New England. Litigation comes with the territory, he says, but being proactive in helping the group's business clients stay out of court has become increasingly important — in large part because the construction industry is changing so rapidly.

"From a legal perspective," he says, "I like nothing more than getting a phone call from a client saying, 'I've got this great new opportunity. Can you help me with it?' — as opposed to, 'I just got sued. Can I send you the complaint?'"

Bosse recently returned from a trade association meeting in Florida, where there was a lot of discussion about where the construction industry is heading. He shared those insights with Mainebiz. The following is an edited transcript.

Labor skills gap

Because baby boomers are getting older and retiring, we now have a labor skills gap. The construction industry is attempting to deal with it. That's especially true here in Maine, but it's important to note that the industry nationally is attempting to deal with it as well.

We are at the front end of the new economy. The developers, contractors and subcontractors that are more nimble, more flexible, work harder — who get more experienced people in or who get younger people and are willing to train them — they're going to be the more



By Tim Greenway

Michael Bosse of Bernstein Shur stands near the future home of Hyatt Place Portland. The developer, East Brown Cow, is a client of Bernstein Shur.

successful construction firms coming out of this recession. There's no question about that. Folks aren't going to be able to walk into a room and just make it happen. It's going to require a lot more work, but those opportunities are out there.

If a company doesn't have anybody on staff with LEED certification, they need to ask themselves why. And if they don't have someone who's certified, they'll need to go hire someone or they can pick someone in-house and tell them, "You're going to get LEED-certified."

That's a point we need to make about the new economy: Contractors have to decide if they are going to ask an employee who's been there for 20 years to take on a new assignment and acquire some new expertise, or are they going to hire someone fresh out of college who's raring to go at 115 miles per hour and have them go get those skills.

Green opportunities

'Sustainability,' for any level of sophisticated developer or owner, is pretty much a given. If you're putting up a new building now, folks need to be looking not just 10 years ahead in terms of its capabilities ... but 20, 30, 40, even 50 years ahead. And for a percentage of buildings that exist now, [they] are going to be functionally obsolete because of the fast pace of technological change. It's going to make more sense to tear them down and start from scratch than to renovate them. I think that's particularly true in some of our cities here in Maine ... in Portland or Augusta, for example.

When LEED first came out, my regular mantra to clients was, 'Do not under any circumstances guarantee you're going to get this owner the particular LEED certification that they want. And that's because there is so much that's out of your control.'

After a couple of years, that doesn't work anymore, because owners are saying, 'No, no. I WANT the guarantee. Tell me what I need to do ...' Now some clients have said, 'OK, I'm willing, but I'm going to charge more for it.' Or there are ways to do it where the owner and the contractor will monetarily share in the risk. It's not really insurable — although I wouldn't be surprised if the insurance market at some point in the future came out with a new product to deal with those situations.

That's a good example of how our legal advice has changed as the demands of the marketplace have changed.

If [a contractor hasn't] done a LEED project yet, they need to find somebody who will take a chance on them. And they better use that opportunity wisely, because there are a lot of folks out there in Maine who already can do LEED-certified projects. It's becoming more the rule, rather than the exception.

Hire smart ... invest in your workers

Contractors have to be willing to go out and make the hires ... and also hire smart. You can't afford to do otherwise.

Nobody is looking at limitless cash. But if people want to make a profit on a job, they have to balance that against:

- How much they're going to pay for training.
- How much they're going to pay the people they hire.
- What markets are they going to try to operate in?
- Are they going to go after a 'higher risk/higher return' market, or are they going to say to themselves, 'I'm just going to do residential markets and hope for the best?'

Every construction dispute [I work with] pretty much is either about an injury that's happened to someone, a disagreement as to the scope of work or a dispute about the quality of the work. If you aren't hiring people who know how to bid jobs adequately, then you're not going to get it right. If you're hiring people in project management jobs who let quality suffer, then you're going to have customers who are dissatisfied. And everyone hears about workplace safety: If you're not hiring an adequately skilled or trained work force, people are going to get hurt.

Competing in the new economy

I think — not just in construction, but in any industry — it's rough out there! There is a little bit of recession fatigue: People are not coming back as quickly as they did in previous recessions. It's supposed to be getting better, but it's taking longer.

But in every forecast I've seen, economists are very, very bullish on the long-term construction outlook.

Contractors, first of all, need to be paying attention to what's happening in the marketplace. They need to be looking forward and not backward.

Second, when an opportunity presents itself, they need to decide whether they can do it currently or whether they're willing to make the investments necessary in workers and training and equipment that will enable them to be in that market.

If you're someone who has never done any type of health care construction, then it might be difficult to enter that market. For those who are already in that market, there are probably going to be some very good opportunities ahead, because we're going to have many more health care facilities — and that's because everyone is living longer and the baby boomers are

getting to retirement age. So hospital construction nationally is going to be a huge area of opportunity ... not just hospitals but also satellite health facilities.

Integrated Project Delivery is definitely [the emerging trend] for hospitals – it was used on a large scale at the new MaineGeneral hospital being built in Augusta – but it's becoming much more an industry-wide phenomenon.

In generations past, almost everything was done with a design professional designing it, who was hired by the owner, and then it was put out to bid and negotiated with a contractor who built the building. Now there are so many different ways to put together a project team, and it is more collaborative than it's ever been. So in generations past, nobody knew how much the architect might be making for a project. Or how much more the owner could spend. Nobody knew how much the contractor was making for a profit. So when you are sharing all that information, it requires a lot more trust between the parties.

If done correctly, obviously it can lessen the possibility that a particular project ever ends up in the courtroom – and that's a good thing. Litigation is expensive: The outcome is uncertain and even if you win, it's costly.

I'm of the view that if someone wants to draft a contract that they think is going to be bullet-proof, then the other side is not going to want to sign it. I find, in contract negotiations, it's much better to simply put all the risks involved in the project on the table and then figure out how they are going to get allocated. And then assign a price for that. There isn't any reason it has to be a negative discussion.

It's much better for the potential success of the project to spend that time upfront, in order to make sure you're not missing something. You would be astonished how many times something comes in the door here and it's about to go into litigation and the parties aren't really sure, exactly, what constitutes a 'contract.' It's because they viewed it as boilerplate and they didn't read it.

At the beginning of a project, everybody is a 'friend.' Once something happens on a project, then these two can't be 'friends' anymore. I would much rather be drafting contracts and taking part in negotiations all day than being involved in litigation in court. Litigation takes time: If you have to spend two hours a day working on a lawsuit with your lawyer, then that's two hours a day you're not out there trying to make a profit.

New opportunities, new problems

Kaiser Industries is a client of mine: They just built, in a very collaborative way, a net-zero home that produces as much energy as it needs. They did newer things with the doors, they did newer things with the windows, they made a point of making sure there wasn't any loss of heat that's normally lost in older-style homes ...

Architects and engineers are able to do building modeling in a manner in which they were never able to do before, which ultimately is very healthy for the profession. It gets all those

potential issues for the project out on the table in the beginning. What's scary is how fast it happens.

We're still doing the same thing: We're designing projects, we're putting together contracts, and we're going out and doing the work. So, in that sense, what happens now is no different than when Rome was built. [But new approaches and practices introduce new problems.] There are different tests now of what constitutes intellectual property: i.e., who owns the design when it's done in a collaborative fast-paced manner? Thirty years ago, there was no question: It was the architect who drew out the plans and stamped them.

There are new issues that arise now with respect to record-keeping: In the old days you had project files, with paper, and they were filed in a file cabinet. Now it's all over the place, electronically. So you have a different set of problems that arise, which you need to consider and take care of: Are there internal computer systems that are set up in the right manner to make sure important data isn't deleted inadvertently?

Data privacy is something every business has to pay attention to, but it is impossible for any owner of a business to wade through the emerging regulatory environment, or to understand the different technologies. There needs to be a lawyer involved and there needs to be a consultant. And there are new insurance products that are emerging to cover for a data breach response or loss.

Regionalization

A lot of construction companies have had to regionalize. That's true, both in the sense of out-of-state contractors who are trying to get work here in Maine, and Maine contractors who are looking around New England to get more work. The regulations differ state to state. For example, what New Hampshire requires of an architect is not necessarily what Maine requires. That adds on a whole load of extra complexity.

There are other business issues involved: For example, what kinds of approval do you need — say, from the state of Connecticut — in order to do business there? Do you have to pay a fee? Do you have to have an office? It varies from state to state.

Then there are regulatory questions: Do you have to carry workers' compensation insurance? What kind of training do you have to provide before people can go out onto a project site? There's a whole other layer: What has to be in the contract? There are some specific statutes that exist in Massachusetts that don't exist in Maine. There are Maine statutes governing residential construction that don't exist in New Hampshire.

I think once they've become more of a regional contractor, if they've done it successfully, they're likely to keep doing it. On the other hand, I can imagine some companies that have had bad experiences in another state saying, 'Thank God, I have more work to do in Maine now.'

By and large — and I think it's true across the board for various industries, not just construction — regionalization is something you are going to see more of. We're becoming a smaller place ...

Looking ahead

I think we've now turned the corner. Unemployment is going down, we're adding more people to the work force, I think we're past [lamenting over] some jobs that are not coming back. So I think in 2013 there is a renewed optimism, despite all the regulations and gridlock in Washington and the fatigue that's out there from the prolonged recession.

The people who do their homework and gain the expertise that's necessary to compete in the new economy, and work hard at it, they're going to be the ones who are more successful when the construction industry takes off. I think that it's not happening as fast as we'd like it to happen, but it's going to happen. For the entrepreneurial, optimistic, hardworking people, it's going to be a very exciting decade.

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