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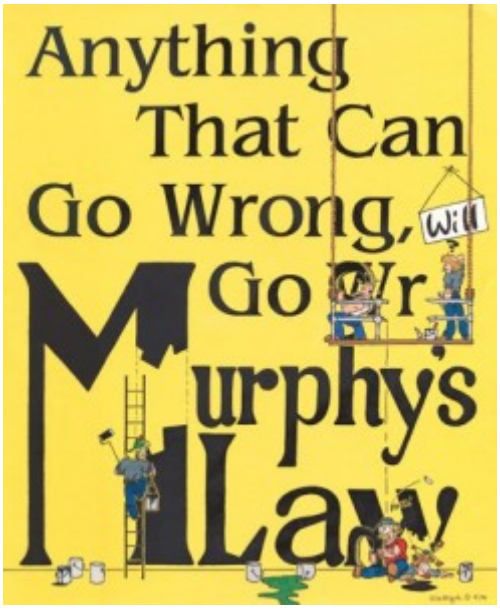
Murphy was an Optimist- How to Deal with this Truth on a Construction Site



Anyone who deals with construction on a daily basis will tell you that something will go wrong on the job site. I am constantly reminded of this fact (and also reminded that I may have a somewhat skewed perspective because I spend my time either dealing with problems, or anticipating them for my construction clients). A large construction project simply has too many moving parts for even the most conscientious contractors to avoid (hopefully minor) glitches.

Whether the problem is a minor one or becomes a catastrophe leading to litigation hinges very much on the way in which the Owner, General Contractor, and Subcontractors on the project (not to mention the Architect, LEED AP (where necessary), and suppliers), resolve the issue. If the problem is easily fixed and the party responsible fixes it without incident, construction lawyers don't even hear about it, much less become necessary. These aren't the issues that I am considering for this post, though I recommend daily that the parties deal with issues as best they can without legal action. For more on this last, check out my friend Vickie Pynchon's (@vpynchon on Twitter) guest post on how to get sued.

On to the more interesting (at least to a lawyer) disputes arising from construction projects. These disputes generally arise in a few areas, almost all involving the scope of work and/or money. One example is change orders. These generally arise when a subcontractor is ordered to perform work without a written change order that specifies the scope of the change and the additional compensation to be paid. These also occur because, in the heat of a time crunched project, a contractor and subcontractor are trying to meet deadlines for a demanding owner. I discussed some of the practical ways to run the job smoothly in past posts, so I won't belabor the point here.

From a legal and risk management perspective, your contract is king and good dispute resolution procedures, from the informal claims process, through formal dispute resolution through arbitration or litigation, will go a long way toward getting issues resolved early and efficiently. Having the steps for the resolution of claims laid out in the contract ahead of time both sets the expectations for the parties to the construction contract and warns them of what will happen should they fail to resolve the issues amicably (or at least without the involvement of the legal process).

While I am not a big fan of mandatory arbitration (or mandatory mediation for that matter), I do recommend that the contract lay out where and how a dispute will be resolved should it escalate to the point where a formal third party decision is needed. One way to do this is to give the parties (or at least one party) the choice of how the issue will be resolved. Another (with a hat tip to Ron White (@mediatoronwhite on Twitter)) is to carefully draft the *actual steps to be followed*. Virginia courts will enforce the letter of a contract, even to the point of allowing the parties to create the procedure for third party dispute resolution. The parties can agree to arbitration without lawyers or the amount of discovery allowed. They can decide that mediation is mandatory prior to any trial or arbitration. Construction attorneys can and should be creative in helping their construction clients draft such clauses to the advantage of all involved.

In short, "Murphy was an optimist so plan for the worst and hope for the best" is a credo I live by as a construction attorney. By making your contract documents clear (from scope of work to change orders to dispute resolution), construction projects will run more smoothly and disputes won't cause as much of a financial drain on construction professionals.

Please check out my Construction Law Musings Blog for more on Virginia construction law and other topics.