Legal Risk Mitigation 101:
The Legal Tools To Always Have In The Toolbox

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All members of a construction organization must have knowledge of basic legal terms for a construction company to thrive and successfully avoid legal mishaps. Along these lines, all construction organizations need to ensure that all employees understand basic legal terms and concepts. Understanding can prevent many basic legal concepts from resulting in potentially devastating losses.

This article is an overview of several basic legal concepts that construction personnel must know. While construction personnel do not need to fully understand and remember the meaning of all of these terms and concepts, they must recognize that these legal terms and concepts carry a great amount of legal weight, require up-the-chain reporting, and must be carefully addressed.

1. Indemnification

Indemnification, also referred to as "indemnity" and "to indemnify," is the requirement of one party to cover the loss of another—some say it is an obligation to step into the shoes of another party when a claim occurs. When indemnification is requested, there typically also is a request for a "defense," which is an agreement to pay for another party's legal defense costs (including attorneys' fees), if a claim is asserted against a company who obtains indemnification.

Without basic knowledge of indemnification, construction personnel may unwittingly agree to indemnification or a defense, resulting in a substantial liability for their company. All construction personnel must, at a minimum, recognize that indemnification is an important legal term and contact a superior and/or an attorney prior to agreement to provide indemnification, including up-front contractual indemnity.

Indemnification can appear when it is least expected. For example, upon receipt of a delivery, the acknowledgement of receipt form may include small-print terms and conditions on the back-side of the form. Often there is a sentence or paragraph in which the recipient agrees to "defend and indemnify" the shipper or delivery service. Unless a company understands and allows its construction personnel to accept such terms to "defend and indemnify" as stated on the back of a form, it is advisable to either refuse to sign such a document without management/legal approval, or to strike out the indemnification language and note the strike out with initials from both parties to the transaction.

2. Document Everything

While it may sound basic, there is no better legal protection for an agreement than to "put it in writing." Handshake agreements, or simply taking someone "for their word," are things of the past and likely are unenforceable in a court of law. Construction personnel at all levels must be required to document everything, particularly any agreements that attempt to modify a written contract that governs a construction project.

Signed Agreement By Both Parties. Nearly all written contracts governing construction projects require any modifications to the contract to be in writing and signed by authorized representatives of both parties. This is the gold standard that will hold up in court and should be the practice of all personnel on a construction project.

Email Agreements. There are times when the parties may not have time to execute a signed written agreement to modify a contract. Will an email agreement suffice? It depends. There are circumstances in which an email agreement is an enforceable contract. As a result, if the parties are not able to both sign a document modifying the original contract, the next best alternative is to send an email with particularity, addressing all material terms of the agreement, and to require an affirmative acceptance email in response from all parties to the agreement.

Memorandum to the File. It is a best practice for all personnel to draft a "memorandum to the file," which is a detailed journal entry to a daily log, or create a report to capture the present recollection of a significant event on a construction project. This can be as simple as drafting a two paragraph email to yourself after a verbal dispute on a project. The memorandum, daily log, report or email should be written as soon as possible after the dispute to capture the best recollection of events at that present moment. If there is a dispute months, or years, down the line as to what was discussed, the document can be pulled back up to recall the events of the day.

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3. Notice Requirements

All construction personnel must be intimately familiar with the notice provisions in the prime contract that governs a construction project. The failure to meet a notice deadline can result in a waiver of important legal rights. Notice requirements include, but are not limited to, claims, responses to Requests for Information (RFIs), differing site conditions, and termination of the contract. Notice provisions usually work in days, not months. As a result, construction personnel should not sit back and hope that a problem "works itself out." The risk of ruffling a few feathers with the notice of a potential claim pales in comparison to the risk of delaying notice and waiving potential legal remedies when a problem is not timely resolved.

Importantly, the obligations relating to notice requirements are not limited to contractors; there also are many notice requirements for owners. For example, an owner must timely respond to notices relating to claims, RFIs, change orders and the like. It is a common practice of Saul Ewing attorneys to provide their clients with a one page "cheat sheet" of all the contractual notice requirements—sometimes laminated!

Practice Tip: At the outset of every project, a one-page chart should be prepared and distributed to all personnel providing all of the notice deadlines and requirements contained in the governing contract. This chart should also be laminated and posted in a conspicuous location on the project to remind all personnel of the tight notice deadlines. It is also recommended to include "potential notice issues" as a discussion item during internal weekly job meetings to ensure that all notice requirements are met.

4. Unknown / Unforeseen Conditions

The handling of unknown and/or unforeseen conditions can make or break a project. The conditions must carefully be disclosed, investigated, and addressed prior to and during the entire performance of a project. At the contract drafting stage, the owner will look to shift all of the risk of unknown and unforeseen conditions to the contractor. Any astute contractor will not accept unlimited risk, and therefore a compromise likely will be reached on each project.

However, defining, with great specificity, at the onset what constitutes known/unknown and foreseeable/unforeseen conditions is critically important to determining whether the contractor actually encounters unknown or unforeseen conditions on a project. These types of conditions may be covered by law as to who shall bear the risk. Be careful that contractually you cover the risk even if you think the law is protective of your company.

Applying the concepts discussed above, any resolution of unknown or unforeseen conditions will need to be documented, either by written agreement by both parties, or by a written notice of claim.

5. Certificates of Insurance

While insurance issues typically are handled by insurance or risk management experts, there are areas of insurance that can arise during the day-to-day work on a project. For example, certificates of insurance often are exchanged and accepted by construction personnel as evidence of a contractor's insurance, or as evidence of an owner's or general contractor's status as an "additional insured" on a general contractor or subcontractor's insurance policy. However, a certificate of insurance is not definitive evidence of an owner's or general contractor's status as an additional insured. It is important to understand that an insurance certificate does not provide a binding contract as between your company and the insurer.

Certificates of insurance often contain incorrect representations regarding an owner's or general contractor's status as an additional insured. A certificate of insurance typically is prepared by an insurance agency, not the insurance company providing the insurance. As a result, insurers are not bound by the terms stated in a certificate of insurance. In order to properly confirm that the insured has all contractually-required coverages (i.e., such as "additional insured" status for an owner or general contractor), there must be written confirmation from the insurer, or a review of the actual insurance policy, or its endorsements. Key words to identify include: additional insured endorsements, primary coverage endorsements, waivers of subrogation, and alternate employer endorsements. ●

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