

MANAGING RISK ON CONSTRUCTION PROJECTS

Bradley Arant Boult Cummings Highlights Must Know Contract Law in Annual Seminar
by PAIGE TOWNLEY



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LAST MONTH, BRADLEY ARANT BOULT CUMMINGS kicked off the 2014 version of its annual construction law seminar, the firm's concerted effort to ensure construction industry clients have the latest, "must-know" information when it comes to managing risks on a construction project.

This year marks the fourth year Bradley Arant has hosted the seminar, which is free of charge for its clients and select construction industry professionals. "A few years ago we noticed that so many continuing professional education events were charging higher and higher fees to attend," said David Pugh, a partner at the firm. "We just thought as a service specifically to our clients and generally to the construction industry as a whole we should start the course, which is directed primarily at the younger construction professionals and covers basic construction law concepts.

It's very hard hitting on many of the fundamental construction law concepts and is a great training tool for younger professionals. It also serves as a great 'refresher course' for the more seasoned professional."

The half-day course—which is held at the firm's offices all around the southeast—offers attendees the opportunity to hear from a panel of lawyers regarding various contract concepts. "It's an opportunity for young construction professionals to ask legal questions on various topics off the clock," Pugh said. "It's hard to learn about contract law in pressure-filled situations on the job. This is an opportunity for them to slow down with no pressure and ask the questions they may have about fundamental legal concepts and contract terms and techniques."

The 2014 seminar focuses on five general topics: issues arising

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from construction drawings and specifications; changes and change order disputes; defective work claims; the "contractual toolbox," a discussion of common contract provisions; and warranties and post-completion issues.

DEALING WITH THE DRAWINGS/SPECIFICATIONS

One important topic of consideration involves the contract obligations represented in the formal drawings and specifications. Typical questions that arise regarding drawings and specifications include conflicts between two or more drawings, as well as conflicts between the drawings or specifications and other provisions of the contract. Knowledge of the way contract provisions are intended to address such conflicts as well as the way courts and arbitrators typically address such conflicts is essential to effective construction management. The main factor, Pugh explained, is understanding the scope of work the contractor agreed to perform. "Any construction contract will at least reference a formal set of construction drawings and written specifications describing how the building is to be built," Pugh said. "We talk about how to do that properly and what different kinds of legal implications arise as a result of conflicts and ambiguities between various portions of a typical construction contract."

HANDLING CHANGES

Numerous issues can arise with change orders to a contract. Typical

changes that can occur in a project include differing site conditions and late revisions to the plans and specifications. There are many impacts to consider, including additional direct costs, as well as

any schedule impacts including delays, disruption or acceleration. One goal of the seminar is to ensure attendees understand how a change is defined, what contract provisions specify the procedures for addressing changes, who has the authority to make a change to the contract and the importance of effective notice of a change. "The failure to follow the procedures for addressing a change specified in a contract can result in the advertent waiver of a party's right to be paid or receive an extension of time," Pugh said.

When changes do occur, it's important to gather proper evidence and create multiple sources of information by which the contractor can both recall the situation that brought about the change and prove the effects of the change, such as the additional costs or time incurred to address it. Added Pugh, "Good record-keeping and clear communication to the owner in the case of a general contractor, or the general contractor in the case of a subcontractor, are essential in preserving one's right to a change order and proving the amount to be recovered for the change."

DEFECTIVE WORK ISSUES

Large or small, essentially every project will have some sort of defective work issue. It's critical for the project team to understand how to conclude whether work is, in fact, defective or simply something with which the owner is not happy. The former will likely require

remediation work. The latter probably not, at least not without the payment of additional compensation. Parties need to know and understand the provisions of the contract addressing the right to inspect the work, the right to declare work defective and the right to require remediation. Equally important is the knowledge of what type of insurance coverage there may be for payment for the remediation of defective work and any damage that may have been caused by it.

THE CONTRACTUAL TOOLBOX

There are several unique types of provisions that are commonly included in a typical construction contract, such as how to terminate a defaulting party, how to limit one's liability or what one's warranty obligations may be. The legal implications of such provisions may not be apparent or intuitive to the young construction professional. If situations arise that may be addressed by these provisions, it's important to know what such contract provisions mean and how to manage the contract consistent with these provisions.

POST-COMPLETION MANAGEMENT

When a project is officially completed, that doesn't mean the management of the project is done as well. Allegedly defective work may give rise to warranty claims, or worse, claims of damage to other property caused by the allegedly defective work. Knowing the limits of your potential liability and any sources of recovery for damages arising from such situations, including applicable insurance provisions and coverage, is essential in making sure warranty and other post-completion claims are handled appropriately.