



Dealing with Difficult Parties on a Project

By Aman Kahlon

If you have been involved in the construction industry for any substantial amount of time, you have likely encountered an individual or an entity on a project who appears to be completely unreasonable or irrational. You may have experienced an owner who repeatedly withholds progress payments without basis, creating unforeseen financial pressure on your company, or a subcontractor who might refuse to perform valid change order work critical to the project schedule. Whether that party is a subcontractor, contractor, or owner, their behavior can impact your ability to complete a project on time and within budget.

Even companies with robust legal departments that carefully negotiate their contracts and manage their commercial risks can be the victim of malicious conduct by a counterparty. The key in such situations is not to panic. Instead, be cautious but deliberate in dealing with such an entity. Obviously, no company ever wants to end up in a legal dispute, but, in certain situations, that outcome may be unavoidable. That prospect can be scary and often results in companies initially ignoring a brewing controversy—an approach which can exacerbate the problem. Instead of turning away, “steer into the skid” and use the below tips as a starting point to tackle your project’s problem-party.

PRESERVE YOUR RIGHTS

If you are a downstream party dealing with a contractor or owner who is withholding payment inappropriately or imposing unsupported back charges, make sure to preserve

your legal rights in the event the dispute escalates. For example, a lot of states impose fairly strict compliance requirements to secure and enforce lien rights. Make sure that you are aware of and comply with those requirements, including using the right forms and meeting all applicable deadlines. A valid lien may provide the necessary incentive to get a previously unreasonable party to make good on a payment obligation.

Similarly, consider what rights you may have against a counterparty’s surety or insurer, and remember to provide adequate notice to preserve claims under any applicable bonds or policies. If a subcontractor has a performance bond and it suspends work without cause, make sure you satisfy any notice requirements under the bond, so you have recourse against the surety for any potential delay or other damages. If a contractor damages another contractor’s work and, as the owner, you are listed as an additional insured under the contractor’s insurance policy, remember to put the insurer on notice. The more you can do to secure your potential claims the better off you will be if you end up in litigation.

ADDITIONAL RESOURCES

A particularly difficult party may make life miserable for your project team. For instance, your team may be overwhelmed by a constant barrage of formal notices and complaints from a non-performing subcontractor, while they are scrambling to appease a frustrated owner who

ABOUT THE AUTHOR

Aman Kahlon is an associate in the Construction Practice Group at Bradley Arant Boult Cummings (www.bradley.com) in Birmingham, Alabama. He represents owners, general contractors, and subcontractors in construction and government contracts matters. His litigation experience covers a wide variety of disputes, including substantial experience in power and energy matters. He also advises clients on delay, interference, defective design, and negligence claims. He can be reached at akahlon@bradley.com.

sees the schedule slipping. While responding to every notice may not always be necessary if they are simply repetitive, responding at least once—and clearly—is necessary. You should ensure your position is formally documented in the project records. Consider whether it is worthwhile to bring a claims administrator onto your team to help draft responses and track costs, or seek outside help from a lawyer to advise on how and when to respond. If your disagreement ends up in court or arbitration one day, clear, concise and contemporaneous project records will be invaluable in supporting your claim and helping to fill in gaps in the recollections of witnesses whose memories will likely wane over time.

If you are a project manager, do not be afraid to ask for help in such circumstances. Problems on a construction site tend to compound over time, so you want to address them promptly and early on before things start to unravel. You can also pursue alternative means for documenting project issues to avoid some of the abrasiveness of formal correspondence. Consider documenting your position in published meeting minutes or daily reports or keeping notes of conversations with personnel on the other side.

DOCUMENT AND TRACK

If a party has been unreasonable throughout the course of the project, you should expect the same conduct in any future negotiation or litigation over damages caused by that party. If you are going to get that party to reimburse you, you will want to have substantial support for your damages. Ensure you keep accurate cost records and that your employees track their time appropriately. If you are seeking damages for delay, try to publish schedule updates or impacted schedules consistently during the project that can later be used to recreate and demonstrate delays incurred against the project baseline.

Letting your recordkeeping slip because you are focused on remedying or overcoming the problems caused by the other party may make it commensurately more burdensome to recover from that party when you attempt to escalate a disagreement after the project is complete. Indeed, for many bad actors that is the express

hope and intention behind their seemingly irrational behavior during performance of the work.

CONCLUSION

Fortunately for the construction industry, the type of contracting relationship described in this article is rare. The majority of construction

projects you participate in will be collaborative efforts that are completed without issue. However, in those rare circumstances when you do encounter a wholly uncooperative entity, you can protect yourself from or mitigate your loss by taking some of the proactive steps described above. ■

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