

Legal Scope

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Documenting Construction Claims and Disputes

When litigating construction disputes and claims, a common flaw for either the claimant (or the defendant) is the failure to properly document the claim and place the other party on notice. This issue rears its ugly head in various forms. Here are some of the common ones.

1. Contractual clause requiring notification. Some contracts require claims to be raised in a timely manner. For example, it is common to require change order work to be notified within a specified time period. Some contracts also require disputes or claims to be raised within a specified time period. By failing to satisfy the contract terms, it could be a fatal flaw to your claim or defense.

2. Interpretation of the contract. Sometimes the core issue in dispute is the interpretation of the contract. For example, under the contract, was the per unit price for excavation a classified or unclassified unit price? If you intend to argue that the contract required a certain type of pricing, then you should have acted in accord with that belief while the Project was ongoing; or you better have an explanation for the discrepancy. Accordingly, all notifications and records on the Project should be in accord with the stated belief as to the contract interpretation.

3. Common sense notifications. Even if a contract term does not require notice on an issue, the failure to give notice could undermine your claim or defense. From a common sense point-of-view, the judge or jury might ask themselves: “If this issue was so important and resulted in so much hardship and costs, then how come nobody mentioned it via email or in writing?” Point being, if there is a pending claim, best to identify it and document it in writing.

4. You will need evidence to prove your case. To prove your case in court, you need evidence. People (and lawyers) often get confused on what is “admissible evidence” versus “inadmissible evidence.” There are law school courses and entire library sections on that topic. But put that issue aside; common sense dictates that evidence is necessary for proving your case, and a lack of evidence weakens your case. If the facts can be photographed or videotaped, then do so. If your business has a regular course of recordkeeping for its Projects, then, include any notations, reports, meeting minutes, etc., on the Project and make sure that these documents identify any issues of importance.

5. Notifications may be required to preserve evidence. Occasionally, the evidence at issue is scheduled to be destroyed. For example, deficient work might be scheduled for repair in the future. Or perhaps the deficient work is going to be covered by other trades, and therefore rendered inaccessible. If there is a problem with the work, it is best to document and evidence the problem before it is destroyed or covered. This means not only documenting it for your own purposes, *but also notifying the other party of the issue.* And when you notify the other party, do it in writing. Even if the contract does not require it, by putting it in writing, even a simple email, it creates a record trail—i.e. documenting the claim.

Documenting and proving claims and defenses are an important aspect of project administration—usually the need to document is prior to construction litigation. The documentation then becomes the crucial evidence for negotiating or litigating the dispute. It is wise to seek advice from your attorney and, potentially, your insurance broker/agent when determining the best methods for documenting evidence of a claim or defense.

The Numbers:

577 Billion

- Year-to-date total construction in the U.S. through June 2017.
- This is a 4.8% increase compared to 2016.
- Private construction is leading the way. Total private construction is up 8% compared to 2016.
- Total public construction is down 5.4% compared to 2016.

Source(s): U.S. Census Bureau, Monthly Construction Spending, Release No. CB17-125 (8/1/17).



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Legal Scope is written by Jeffrey Bright, an attorney licensed in Pennsylvania and Maryland. For more information, contact Bright Law Firm. This newsletter is not legal advice. Unlike this newsletter, legal advice is specifically tailored to the facts, law and objectives unique to each circumstance. **To join or remove yourself from this subscription list, email jbright@bright-lawfirm.com.**