

Claims Prevention Strategies for Subcontractors

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Introduction

Clients and insurance carriers often ask what can be done to prevent construction litigation? It is an unfortunate reality that no one can "prevent" a lawsuit, justified or unjustified. If a claimant is determined to make a claim or file suit, he or she will.

The more useful questions for us to ask are what can be done to discourage the filing of suits in the first instance and, if a claim is made, what preemptive steps can be taken to increase the likelihood of a defense result? The numbers of claims can be reduced and those that are made can be defended.

Responsibility for preventing claims initially falls squarely with the client. You and the insurance Underwriting and Loss Prevention departments can do a great deal, through personal contact, mailers and formal loss prevention programs to improve the clients' awareness of risks and the need to monitor and improve procedures and practices.

Pre-Claim Strategies

1. The client should work only for a licensed general contractor or the property owner directly. Accepting work for an unlicensed general invites litigation from the project owner, not to mention the all too likely prospect of money collection problems for work done.
2. The client should, of course, be familiar with the Contractors' License Law (Business & Professions Code, § 7000-7161) requirements, including contract requirements, mechanics liens, stops notices, etc., to insure he is proceeding legally in his relationships with the project owner, the general contractor and others.
3. All work should be done pursuant to a written contract or work-order and those form documents should be reviewed by an attorney. Verbal agreements inevitably lead to a "swearing contest" as to what was wanted or intended, when a dispute arises.
4. Where there is bargaining parity, the client should review contracts carefully beforehand and avoid inequitable and unfair indemnity agreements or other oppressive language.
5. Where possible, the client should reject work with any general contractor which is "marginal" economically, or in demonstrated skill or knowledge. Past experience shows that projects built by such contractors often have multiple construction problems and litigation is

almost assured. Litigation, in turn, means the subs will be brought in, either directly or via cross-action.

6. The client should reject work for any general which has a history of falling behind project schedules, leading to disruption, "fast tracking"/acceleration or out-of-sequence work.

7. Whenever possible, the client should reject work with any general contractor which does not maintain proper overall on-site course-of-construction job supervision. The lack of that supervision often leads to errors and short-cuts by other trades, which again raises the likelihood of a claim by the project owner(s).

8. Above all, the client must follow the plans & specifications. He must not substitute materials for those called for and he must not deviate from the design plans and specifications, based upon the oral instruction of anyone. Changes, including changes in "scope of work", should be made in writing and approved in advance. Preferably, a formal change order ("CO") and change estimate ("CE") system should be established. The client should not "fabricate" or use make-shift methods to get the job done.

9. Where other trades are interfering with or damaging the client's work, or causing him to fall behind schedule, it should be documented in writing to the general contractor and photographed if appropriate.

10. Work requiring progressive inspection should not be advanced without those required inspections.

11. Of first importance, the client must maintain orderly and complete contract, construction and job-progress files. The clearer the plans and specifications, the clearer the work proposals and the clearer the progress memos, etc. are throughout the project, the clearer the clients "scope of work" becomes, leaving less room for a claimant to "invent" claimed errors or omissions on the part of the client.

12. All clients should be conscientious about maintaining a written Daily Job Log, no matter how small the project may be. Preferably, the log would be maintained with chronological daily entries, hard bound or in a notebook, rather than individual loose pages. It should record not only "important" events (job-site accidents, disputes and delays, correction work, change order or other significant discussions, etc.) but also "non-events", which later could be of importance (weather conditions, numbers and names of work-crew members working on site, starting and ending work times, other subs working on site that day, the identity of the general contractor's superintendent and a brief description of the work completed that day). The log should be signed by the foreman or superintendent in charge of the client's work each day.

The log is invaluable in recreating what really happened and when from the client's viewpoint, when a conflict or dispute arises.

13. Where a dispute or problem arises during the work, the client should document his position in writing. He should not rely upon oral promises or representations from anyone. Where, for example, the general contractor gives a questionable order, the client should require that the general reduce it to writing. And where the instruction is clearly out of line, the instruction should be refused, in writing, with an explanation as to why.

14. It is good job practice to maintain job-progress photos periodically, particularly in problem areas where a dispute has or could arise.

15. A client should not be reluctant to seek legal advice during construction, if necessary.

16. Of course, all clients should abide by all Federal, State and other governmental Building Codes, OSHA regulations, and safety and inspection standards.

17. On all projects, a client should keep a qualified job superintendent on the job and overseeing the work being done (though not necessarily on-site at all times, depending upon the job size).

18. From a legal perspective, the client should make all efforts to preserve physical evidence if a problem arises, even if only by photograph. He should also keep track, insofar as possible, the whereabouts of potential witness employees who leave employment after an accident or problem on a job site.

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