



Know Your Contractual Role: Why An Owner Must Be Mindful Of Contractual Relationships

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Oftentimes, in the context of a construction contract, there are three primary parties: **(1)** the owner of the project; **(2)** the architect, who is responsible for drawing up the various plans and blueprints necessary for the construction of the project; and **(3)** the general contractor, who is responsible for overseeing and supervising the project's actual construction. While these three parties are fundamental to a properly functioning construction project, their motivations, loyalties, and interests may not always be aligned. As such, an owner must be mindful of the various contractual relationships among the primary parties to the construction contract.

On most construction projects, the architect has one contract with the owner while there is a separate contract between the owner and contractor. These separate contractual relationships create issues relating to “privity of contract.” In laymen’s terms, “privity of contract” describes the direct relationship between parties to a contract. For example, if Owner contracts with Architect to design a building, Owner and Architect are in “privity of contract”. While the concept seems simple enough, it is heavily litigated. It has also been used as barrier to recovery for third parties who are not in “privity of contract.” “Privity of contract” can be used to insulate oneself from liability to outside parties. However, in the construction setting, it is often responsible for creating duplicative proceedings and inconsistent results.

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Duplicative Proceedings

For example, a contractor may have a complaint regarding the performance of the architect. However, as there is no contract between the contractor and architect, the contractor must sue the owner instead. The contractor cannot make the architect a party to that dispute unless the architect agrees to participate as a party (which almost never happens). In such a case, the contractor usually argues that the owner is liable for damages caused by its agent, the architect.

If the owner were to lose to the contractor, he or she would likely wish to receive reimbursement from the architect. The owner would argue that the architect's faulty performance led to the original judgment. Therefore, the owner would have to proceed against the architect in a separate proceeding.

Such a circumstance creates duplicative proceedings. Instead of resolving the issue between the architect and the contractor directly, the owner must be involved in two separate actions involving the same dispute. Such duplicative proceedings are costly, inefficient, and result in an overall loss to the owner.

Inconsistent Results

Additionally, there is no guarantee that the owner will even win in an action against the architect. Differences in contractual and professional duties and differing personalities can create inconsistent results.

A judgment against an owner for damages caused by its architect may not equate to a judgment against the architect. This leaves owners in a precarious

position. They may have to pay out a judgment to the contractor, but may not be reimbursed by the architect. This is despite the fact that, arguably, the architect is the chief cause of the dispute in the first place.

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With that in mind, owners should be careful when drafting contracts between themselves, their contractors, and their architects. Inserting provisions which allow for alternative dispute resolution, mandatory collaboration, and indemnification are all items that an owner should consider. Additionally, an owner may try to persuade the contractor and architect to sign a “tri-party agreement” or any other similar agreement. Such an agreement would make the owner, architect, and general contractor all parties to one contract. This circumvents the duplicative proceedings and inconsistent results associated with a lack of contractual “privity.”