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## Checklist 26: How Owners Can Avoid Litigation on Construction Projects

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While it is impossible to completely avoid litigation on construction projects, certain steps can be taken to minimize the potential for litigation. The following checklist addresses these steps.

\_\_\_ 1. **General Advice.**

- \_\_\_ (a) Make sure all contracts for design, project supervision, or construction services are written, as opposed to oral or implied.
- \_\_\_ (b) Do not sign the contract until you understand all of its terms.
- \_\_\_ (c) Read all exhibits and warranties to a contract before you sign it.
- \_\_\_ (d) Review all documents incorporated by reference into the contract before signing it.

\_\_\_ 2. **Pre-Construction Phase.**

- \_\_\_ (a) Determine what permits and approvals are required.
- \_\_\_ (b) Meet building officials and other authorities with jurisdiction to clarify code, land use, and zoning issues particular to the state, county, municipality, or city regulations and other local rules.
- \_\_\_ (c) Engage in peer review or retain an expert to do the following:
  - \_\_\_ (i) Identify potential design issues that could result in delays.
  - \_\_\_ (ii) Identify, avoid, or mitigate construction defects both before and during the project until its completion.

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- \_\_\_ (iii) Make sure the project plans comply with all applicable federal, state, and local laws, rules, codes, ordinances, or regulations.
- \_\_\_ (iv) Make sure that the construction complies with approved design plans, drawings and specifications as well as all applicable federal, state, and local laws, rules, codes, ordinances, or regulations.
- \_\_\_ (d) Determine whether the Americans with Disabilities Act (ADA), environmental laws, and any other federal or state regulations apply.
- \_\_\_ (e) Retain any necessary consultants: land planners, architect, landscape architect, surveyor, engineer, etc.
- \_\_\_ (f) Determine which project delivery method would best benefit the owner for the particular project (for example, fast track, multiple prime, design-build).
  - \_\_\_ (i) **Fast track.** Design and construction phases overlap, so excavation and foundation work commences with period when design professionals are finalizing plans and specifications.
  - \_\_\_ (ii) **Multiple prime.** Owner enters into several contracts directly with various vendors (for example, direct contracts with electrical, mechanical, plumbing, roofing, or other assorted contractors).
  - \_\_\_ (iii) **Design-build.** Owner directly contracts with a single entity that performs all architectural, engineering, and construction functions.
- \_\_\_ (g) Disclose material information to prospective bidders.
- \_\_\_ (h) Notify the contractor if there is a suspicion that an error in the bidding process has occurred.
- \_\_\_ (i) Furnish the contractor with material information that may have a bearing on the contractor's work during the actual performance of the project.
- \_\_\_ (j) "Come clean" with the contractor by disclosing any information that may mislead the contractor in performing its work.
- \_\_\_ (k) Provide accurate plans, specifications, and site information.
- \_\_\_ (l) Document those instances in which the contractor deviates from the plans and specifications to assist in defeating the contractor's claim for additional time and money.
- \_\_\_ (m) Highlight performance specifications in the contract documents and at pre-bid and pre-construction meetings to assist the owner in later defeating claims by the contractor that the specifications are design, and not performance, specifications.

- \_\_\_ (n) Shift the risk of loss onto the contractor through the use of express and specific disclaimers or contractual language making the contractor the explicit guarantor of the adequacy of the plans and specifications.
- \_\_\_ (o) Include a “verification” clause in contracts, which typically requires the contractor to verify the project specifications for accuracy and completeness and serves as a warning to contractors that the drawings and specifications must be reviewed with reasonable thoroughness.
- \_\_\_ (p) Disclose differing site conditions, including geotechnical and other soils reports by consultants or other material information pertaining to subsurface conditions at adjacent sites.
- \_\_\_ (q) Limit the owner’s liability for differing or changed site conditions by including a site inspection or investigation disclaimer clause in its contract with the contractor, to shift the burden of risk away from the owner by requiring the contractor to investigate the site prior to submitting a bid for a project. Make sure that general disclaimer clauses are cross-referenced to specific representations elsewhere in the contract documents about the condition of the site.
- \_\_\_ (r) Depending on the project delivery system selected, retain an expert (licensed design professional or general contractor) to act as owner’s project representative or construction manager to coordinate each phase and scope of construction directly with the owner.
  - \_\_\_ (i) Have a design professional prepare all bid specifications, plans, and other documents upon which a contractor would reply when submitting bids for the owner’s project.
  - \_\_\_ (ii) Have a design professional administer the contract until the project’s completion (for example, issuance of final approval of work and tendering final payment).
  - \_\_\_ (iii) Have construction managers assist the owner in obtaining bids.
- \_\_\_ (s) Perform your “due diligence” when selecting a design professional, construction manager, or contractor.
  - \_\_\_ (i) Check with applicable state and local authorities (for example, state licensing board, secretary of state, better business bureau, applicable building department, department of consumer affairs, etc.).
  - \_\_\_ (ii) Verify that design professionals and contractors are licensed for the types of work they will be performing under the contract.

- \_\_\_ (iii) Determine whether any administrative or legal action was taken against design professional or contractor.
- \_\_\_ (iv) Determine past performance of contractor bonding capacity.
  - \_\_\_ a. Financial solvency.
  - \_\_\_ b. Litigation, lien, and default history.
  - \_\_\_ c. Ability to obtain necessary types and amounts of insurance for the project.
- \_\_\_ (t) Make sure the owner's construction contracts do the following:
  - \_\_\_ (i) Expressly define who is acting as the owner's project representative.
  - \_\_\_ (ii) Define the project representative's obligations, duties to the owner for the project, as well as the scope of authority to act on behalf of the owner.
- \_\_\_ (u) Make sure that the owner's contracts with the design professionals are consistent with contracts with owner's general contractor and other parties.
- \_\_\_ (v) Expressly state whether the parties agree to the following:
  - \_\_\_ (i) Mediation or arbitration.
  - \_\_\_ (ii) Waiver of their right to jury trial (should be conspicuous type and font).
  - \_\_\_ (iii) Consolidation.
  - \_\_\_ (iv) Indemnification.
- \_\_\_ **3. Construction Phase.**
  - \_\_\_ (a) Avoid creating conditions that may result in project delays.
    - \_\_\_ (i) Provide contractor with access to the work site and timely acquire all permits and easements, etc.
    - \_\_\_ (ii) Coordinate work among multiple prime contractors to prevent unreasonable project delays.
    - \_\_\_ (iii) Use risk-shifting clauses to avoid liability for delays that occur on multiple prime contractor projects.
    - \_\_\_ (iv) If furnishing materials or equipment, owners should deliver such materials and equipment in both a timely manner and in a sequence that would reasonably permit the contractor to finish the work on schedule and prevent delays.
  - \_\_\_ (b) Avoid ordering fixtures, furnishing, and equipment directly from suppliers.

- \_\_\_ (c) Order materials with enough lead time to mitigate impact of possible delays.
  - \_\_\_ (d) Have a list of backup suppliers to contact if materials are delayed due to unforeseen events or if the supplier suddenly goes out of business.
  - \_\_\_ (e) Review contractor submittals, change orders, and requests within a reasonable time.
  - \_\_\_ (f) Promptly respond to valid requests for time extensions.
  - \_\_\_ (g) Make timely inspections.
  - \_\_\_ (h) Coordinate with owner-retained inspectors, construction managers, and jurisdictional authorities to avoid project delays.
  - \_\_\_ (i) Avoid actions that could be construed as hindering, delaying, or interfering with the timely completion of work.
    - \_\_\_ (i) Overzealously inspecting work.
    - \_\_\_ (ii) Improperly issuing stop work orders.
    - \_\_\_ (iii) Prematurely issuing a notice to proceed.
    - \_\_\_ (iv) Inundating the contractor with change orders and clarifications that modify the scope of the original contract.
    - \_\_\_ (v) Failing to keep the jobsite clear of obstructions.
    - \_\_\_ (vi) Failing to disclose material information to the contractor.
    - \_\_\_ (vii) Occupying and using the building prior to completion of the work.
    - \_\_\_ (viii) Failing to furnish necessary revisions to plans and specifications, coupled with the failure to make progress payments.
    - \_\_\_ (ix) Failing to obtain necessary city approvals.
- \_\_\_ **4. Time.**
- \_\_\_ (a) Include clear project commencement and completion dates in the contract.
  - \_\_\_ (b) Require detailed schedules and updated schedules with each application for payment.
  - \_\_\_ (c) Make updated schedules a condition precedent to receiving payment.
  - \_\_\_ (d) Be realistic when defining project commence and completion dates.
  - \_\_\_ (e) Require inclusion of “time is of the essence” clauses and other contractually mandated time frames.
- \_\_\_ **5. Payment and Releases.**
- \_\_\_ (a) Make sure contract includes clear payment terms or an objective basis by which to determine payment to ensure contract is legally enforceable.

- \_\_\_ (b) Determine in advance whether the owner should have ability to pay suppliers or subcontractors directly by contract or state law.
  - \_\_\_ (c) Include contract terms that allow the owner to withhold retainage for the project.
  - \_\_\_ (d) Consider escrowing any funds withheld for project retainage.
  - \_\_\_ (e) Make timely payments to contractors to avoid being subjected to a claim of lien or a claim for breach of contract or unjust enrichment.
  - \_\_\_ (f) Determine in advance who will pay for escalation costs to avoid disputes with contractor or suppliers.
  - \_\_\_ (g) Have the owner or the owner's representative review all payment requests, confirm work is completed, and approve work performed and materials used before issuing payment.
  - \_\_\_ (h) Acquire partial lien waivers from all potential lienors for each payment made by the owner.
  - \_\_\_ (i) Require a consent of surety to final payment when a payment bond exists.
  - \_\_\_ (j) Determine in advance who will cover the costs of permits, government fees, taxes, etc., to avoid disputes with contractor about these costs.
  - \_\_\_ (k) Determine in advance which payment methods would work best for the owner.
  - \_\_\_ (l) **Fixed sum.** Designate specific amount the owner will pay the contractor for all work described in bid specifications.
    - \_\_\_ (i) **Cost plus.** Owner pays contractor an unspecified sum computed as all actual costs incurred by contractor plus a previously agreed upon markup amount of each cost to cover the contractor's overhead and profits.
    - \_\_\_ (ii) **Unit price.** Owner pays lump sum directly to the contractor for each unit of work performed where the project entails repetition of largely identical activities (for example, restoration of balconies at a condominium complex).
- \_\_\_ 6. **Bonds and Insurance.**
- \_\_\_ (a) Require the contractor to obtain payment bond to protect the owner's property from being liened in the event the contractor fails to pay potential lienors.
  - \_\_\_ (b) Require the contractor to procure performance bond to ensure the contractor complies with the terms of the contract and any change orders or amendments.

- \_\_\_ (c) Review actual bonds before executing contract to make sure that limiting language is considered.
  - \_\_\_ (d) Procure builder's risk insurance.
  - \_\_\_ (e) Obtain premises liability insurance.
  - \_\_\_ (f) Require contractor to obtain worker's compensation, commercial general liability, automobile liability, and umbrella insurance policies.
  - \_\_\_ (g) Require the contractor to name the owner as an "additional named insured" on its liability policies for the project.
- \_\_\_ **7. Dispute Resolution.**
- \_\_\_ (a) Clearly define the person or entity that will be the "final arbiter" of contract disputes (for example, the owner's project representative).
  - \_\_\_ (b) Include provisions for use of notice and right to cure laws in applicable jurisdictions to resolve disputes regarding owner's construction/design defect claims against contractors, subcontractors, design professionals, and other potentially culpable parties.
  - \_\_\_ (c) Include provisions for mediation or other forms of alternate dispute resolution (ADR) to resolve claims promptly during construction before they evolve into larger, more complex problems.
  - \_\_\_ (d) ADR offers owners the advantage of resolving disputes without the time or expense often associated with traditional litigation.
  - \_\_\_ (e) ADR may provide owners with a means to gauge the strengths and weaknesses of their claims or defenses before engaging in formal litigation.
- \_\_\_ **8. No Damage for Delay and Liquidated Damages.**
- \_\_\_ (a) Require the contractor to give the owner copies of all work schedules to track progress of work and avoid or mitigate delays.
  - \_\_\_ (b) Depending on whether the project is located in a state that enforces them, include a "no damages for delay" clause in contracts to shift responsibility of delays caused by the owner onto the contractor.
  - \_\_\_ (c) Include liquidated damages clauses that:
    - \_\_\_ (i) Charge the contractor a specific sum for each day the project exceeds the anticipated completion date;
    - \_\_\_ (ii) Bear a reasonable relationship to anticipated actual damages a nonbreaching party could incur as a result of contemplated delays; and

\_\_\_ (iii) Are neither arbitrary nor excessive and unenforceable.

\_\_\_ **9. Changes to Scope of Work.**

\_\_\_ (a) Specify all items of work the contractor must perform to avoid change order disputes by requiring the following:

\_\_\_ (i) All change orders, field orders, and stop orders must be in writing, and signed by the owner and/or its project representative and the contractor, as a condition precedent to payment for any work or materials not covered in the contract.

\_\_\_ (ii) All change orders or field orders must provide a detailed description of the type of additional work to be performed, the types and quantities of additional or alternate materials to be used, and the costs for the extra labor or materials furnished.

\_\_\_ **10. Warranties.**

\_\_\_ (a) Negotiate with contractors for express written warranties for both labor and materials.

\_\_\_ (b) Make sure the owner's contract spells out any types of notice or other requirements the owner must comply with to trigger warranty protection.

\_\_\_ (c) Review jurisdiction and venue for resolution for all disputes that arise out of warranty claims.

\_\_\_ **11. Project Wind Up.**

\_\_\_ (a) Release retainage following final payment, pending completions, and approval of all work, including punchlist items.

\_\_\_ (b) Acquire final releases of lien from all potential lienors.

\_\_\_ (c) Obtain copies of all warranties from the contractor, any subcontractors, and all manufacturers contemporaneous with issuing final payment.

\_\_\_ (d) Make sure the contract requires the contractor to provide the owner with copies of close-out documents such as final releases of lien, as-built drawings, express warranties, and related items.

\_\_\_ (e) Make sure the contract includes a provision that states that the owner's final payment or occupation of the property does not automatically constitute an acceptance of the work or materials furnished or operate as a waiver of all the owner's claims against the contractor or others for any latent or patent construction or design defects, change to express or implied warranty claims, or claims for violation of any applicable federal, state, or local ordinances or building codes.