

When To Avoid Costly Conflicts

There was a conflict between a building contractor and an owner we'd like to tell you about, but not because we want to explain who was right or wrong. We want to show you how they kept the issue from ending up in a courtroom. The owner was a regular client of the contractor and he had finished a building project worth several million dollars. The client's attorney put the contractor on notice that a third party had damaged the building, and about \$130,000 worth of repairs were needed. Although the damage was caused by a third party, the owner bluntly told the contractor that he was expected to correct the problem—the contractor's guarantees still applied—or a lawsuit would follow.



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Compromise was not an option, and attorneys for the project owner's representative and the designer advised their clients not to discuss the issue. The contractor was particularly distressed because he had prided himself on never having been involved in a lawsuit, a fact that the company used in its marketing material.

Because of the complexity of the problem, the contractor learned from his attorney, the resolution would likely result in a drawn-out "battle of the experts" that could cost \$200,000 or more if the claim went all the way to trial. In addition, the contractor would have to spend much time and energy on the case, as would members of his staff.

The contractor's attorney recommended that he explain to the owner that while the damage was not a result of anything the contractor did, he would comply with the demand and repair the damage at his own ex-

pense. He said he would ask for written authority to enter the site.

A day after receiving this information, the owner called the contractor personally and said that in light of the contractor's offer, he had decided that he and the designer would each pay one third of the cost of repairs. And without admitting anything, the owner declared the case was closed. This type of goodwill, especially following such a tough initial claim, is unusual. We interpret the lesson here to be that contractors should resolve their own disputes if possible because involving too many others, including attorneys eager to win for their clients, can be counterproductive.

The Owner's Reaction

Too often these days, a dispute of any kind is viewed as the domain of an attorney. Instead, we say, use good business judgment about how to manage disagreements, misunderstandings or disputes. While there have been huge advances in dispute resolution, particularly for the larger, more sophisticated construction enterprises, many small to midsize contractors have limited experience with claims and, as such, little experience resolving claims.

Contractor failures typically occur when small or midsize contractors have disagreements on a larger project that they should have never taken on. They become entangled in a fight they could never win, or quit

the project, or are thrown off and run up staggering legal fees. And that puts them out of business.

Unfortunately, neither the contractors nor their advisers know there is a minimum size threshold below which you can't afford to engage in lengthy disputes. Discovery and experts can cost as much as \$500,000 for a \$5-million claim and can take a long time to resolve. We believe the minimum threshold is between \$500,000 and \$1 million, depending on the nature of the dispute.

Part of the risk involves the separate agreements between the owner and the designer and the owner and the contractor. Designers often end up with authority over design and, to some extent, over the contractor, but with little or no responsibility for the finished product. As the owner's "representative," they often find themselves united with the owner and at odds with the contractor. This is complicated in itself, but when you add personalities to the mix, it can become a formula for disaster.

An attorney without construction experience may be an expert in the process rather than the facts, whereby a disagreement over A and B grows into C, D, E, F—and if it goes on long enough, the entire alphabet. Successful contractors know that profitable projects are those where disagreements are avoided, managed and compromised, and not allowed to fester into disputes that add another party to an already complicated mix. When the cost of the dispute exceeds the original amount in question, everyone loses. ■

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