

Lessons Learned in Delaware

Resolving Construction Disputes in a Small State

My Perspective

- ▶ From the perspective of the District
- ▶ Deal with a lot of small to medium disputes
- ▶ Don't have the overhead to deal with them
- ▶ Talk about managing day to day issues in conflict resolution

Manage your effort

- ▶ Disputes are marathons, not sprints
- ▶ Have a plan and don't let people obsess
- ▶ As a Construction District, your biggest opponent may not be the contractor.
- ▶ Once a dispute grows large, everyone wants a say. Be ready to heard the cats, it's crucial.

Build a Narrative

- ▶ Letters to contractors should contain a common theme, tell a story
- ▶ The more the decision maker hears and reads your narrative, the better
- ▶ Contractors make the issues seem complicated, owners need to make the issues seem simple.
- ▶ Take time early in the dispute to start crafting the narrative. Contractors do this all the time, but we as owners seem more reluctant.

Writing Letters

- ▶ Take the time to prove facts carefully, but make your story the centerpiece.
- ▶ Make long letters easy to read with summaries and topic sentences
- ▶ Repeat your theme
- ▶ Don't "Strenuously Object!"

Focus

- ▶ (1) Entitlement, (2) Impact or Causation, (3) Damages
- ▶ We're taught to argue about entitlement and look at IDRs to calculate damages.
- ▶ Frequently, the real issue is causation and we don't see it, especially in smaller disputes.
- ▶ Even though it seems wrong to admit you are wrong, that's often the correct action.

Negotiating

- ▶ Know your reservation point
- ▶ If you hear something new and don't know what to do, STOP!
- ▶ If you don't know, audit!!!
- ▶ Write everything down when you negotiate, they do.

Settling

- ▶ When exchanging writings, make sure both sides acknowledge
- ▶ If you change the contract, make sure to consider all of the consequences
- ▶ If you settle now, will they want more later?
- ▶ Consider worst case scenarios. Your slam-dunk argument could fail

Delays

- ▶ Capturing all sources of delays is difficult
- ▶ Can't rely solely on forensic schedule analysis, the staff needs to see the issues and act on them
- ▶ TIA's are for prospective delays
- ▶ Don't fall into the trap of letting the contractor bundle delays

Day to Day Practices

- ▶ Be consistent and don't ruin your narrative
- ▶ Follow up all meetings with an email or minutes
 - ▶ This is hard when you are busy, but it's very important
 - ▶ Things that seem very obvious today will be quickly forgotten tomorrow
- ▶ Keep issue logs to help organize and apply the narrative

Manage the Field Staff

- ▶ Don't let field staff argue with the contractor's office
- ▶ You have to build the job, so try to build it
- ▶ Follow the contract, even when it isn't convenient
- ▶ Desire to reward good behavior and punish bad is human nature, but don't fall in that trap
- ▶ Be careful with electronic communications

Fighting Back

- ▶ Being patient is not the same as being passive
- ▶ Think about ways to fight back - Counterclaims
- ▶ Was the work substandard? If so, can I prove it? How do I value it?
- ▶ Did the contractor follow the contract? If not, did the contractor wrongfully benefit? If so, prove it.

Get Help

- ▶ Resist the temptation to think you know best
- ▶ Try to find people to proofread your letters
- ▶ Don't "pile on" arguments, get clearer heads to help you pick and choose
- ▶ Construction claims are not the forum to deal with bad egg contractors

Final Thought

- ▶ How do you recover after losing a big claim?

Lost Once? SO WHAT!!!

- ▶ You could be a Phillies Fan.
- ▶ Lost 10,232 games as of 2010. After that, we stopped counting.
- ▶ In 1961, had a 23 game losing streak
- ▶ Lost 100 games in a season 14 times
- ▶ 92 year span between championships