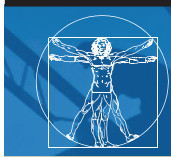


Should You Pursue a Construction Claim?



6 Tips to Making the Right Decision

When something has gone wrong on the construction job, it is easy to decide to pursue legal action. But the reality is that not every claim should be pursued. If you make the wrong decision, the case may end up costing you more to win than any award you might receive.

For the contractor or owner who is contemplating filing a claim, it helps to step back and objectively review all the materials and circumstances questions that will help you to make the right decision.

1. Is there significant financial damage?

If there is no significant financial damage, you may have no basis for a claim. Not every construction dispute translates into hard dollars losses. Real losses can occur on all sides. For owners, production delays and lost-time days may have cost unanticipated losses in the form of negative rental cash flow or additional interest payments. For contractors, procrastination by the owner in the decision-making process may have delayed contract completion, resulting in escalated labor, material, and equipment costs. For attorneys, pursuing a claim may not be in your client's best interests. Take a hard look at these factors and be honest in your appraisal of the circumstances; consider how an objective third party would view them.

2. Are you dealing with an “empty pockets” situation?

Suppose you have a viable claim, and you go to court and win. Will the losing party be able to pay? The time to do careful credit checks is before you start the work. The question to consider is even if you had a valid claim and you won your case, would you ever see a penny? If the answer is no, ask yourself if it makes sense to pursue the claim just to make yourself feel better.

3. Were there problems on the jobsite?

As much as everyone tries to avoid them, problems do arise on the job. Failure to grant access to the contractor may result in lost days and dollars. Less-than-perfect work by the contractor prompts complaints by the owner and is costly to correct. Try to hold amicable discussions with the parties concerned. This equitable review of the facts can sometimes resolve the problem. Recognize that both parties may share in the blame. A reasonable assessment of problems may result in a “wash” as each side absorbs its own cost, at no cost to the other.



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4. Who is responsible for those involved on the job?

The owner or contractor may not be directly culpable for any disputes or delays, but both sides are responsible for the people they have hired. The owner may be responsible for the poor performance of the designers, architects, and inspectors. Likewise, the contractor must exercise control over subcontractors, vendors, superintendents, and engineers. If liability can be assigned to the other party's representative, you may have a claim.

5. Do you have sufficient documentation or evidence to support a claim?

From the first handshake between owner and contractor, a paper trail is necessary. The project's history should be fully documented with names, dates, people, places, estimates, take-offs, computations, drawings, and meeting minutes. Change orders (with requisite backup data) must be noted, filed, tracked, and processed. Delays, changed work conditions, lost-time days, and weather conditions must all be documented. Daily logs, time and material accounts, and daily work reports must be accurately maintained and updated. If you have the documentation, you will be in an excellent position to pursue your claim; without it, you may not have a case.

6. Do you have the resources to pursue a claim?

Although the use of experienced attorneys and experts can prove to be of great value, their services are not inexpensive. Depositions, motions, hearings and/or trial days have a tendency to multiply exponentially. To get caught up at the end with a win-at-all-costs attitude escalates the costs to such a degree that oftentimes the transactional costs are greater than the *realistic* value of the claim. Obtain a budget from your team members and be sure to include your time in the cost to pursue your claim.

If after answering these questions you decide to go forward with your claim, there are four options open to you before turning to litigation.

- *Capitulate.* If you're honest, you will admit when you don't have a case or an adequate defense. Face the facts; it will save you money in the long run.
- Try to meet face-to-face with the other party and engage in the give-and-take of amicable *negotiation.*
- Take the facts to a neutral party and see if you can reach an acceptable settlement via *mediation.*
- Both parties can submit to *arbitration.* This impartial method of dispute resolution frequently works when the magnitude of the problem is significant, and all other avenues have been exhausted.

If all else fails, there may be no alternative than to consider litigation. Remember, as the dispute escalates, it will take more time to resolve the claim, there will be more people involved, there will be higher financial costs, and there will be increasingly entrenched expectations. Before you go down that path, ask yourself the six questions above. They will give you a clearer picture of whether it will be cost-effective to pursue your claim.

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