HOW CONTRACTORS HELP THEIR ATTORNEYS WIN THEIR CASE

The first question every attorney should ask a contractor contemplating a lawsuit is: "Is there no way to settle this?" Most of the time there is. But rarely, there are situations where filing suit and going to trial is inevitable. While assistance of legal counsel is almost always required, contractors can do much to help in achieving a successful resolution to the dispute.

In 2006, Mepco Services, Inc ("Mepco") was hired by Saddleback Valley Unified School District ("District") to renovate a school. After the project began, the District's architect began issuing bulletins which revised the plans extensively. The bulletins significantly expanded the original scope of work and inevitably delayed construction. In the end, more than 50 change orders were issued. The District refused to pay for any of them.

In June of 2007, after attempting to settle the matter, Mepco had no choice but to file suit to collect the approximate $681,000 sum owed to it by the District for its final progress payment, retention, change order work and delay claim. In response, the District filed a cross-complaint against Mepco and its performance bond surety claiming that Mepco owed *it* $1.2 million. In short, both parties claimed the other breached the contract and was the sole cause of delay. Trial was inevitable.

At trial Mepco argued it was entitled to recover for its change order work based on severe defects in the plans and specifications provided by the District. It relied on California law which holds that a public works contractor who is misled by incorrect plans and specifications issued by a public agency (and therefore submits a bid lower than he otherwise would have), may recover for extra work or expenses necessitated by the conditions being other than what was represented in the initial plans and specifications. In the end, Mepco won everything. A $1.4 million judgment was rendered against the District.

Mepco contributed to the overwhelming successful outcome of its trial in three ways: its documents, its witnesses and its presentation of the two.

The Party with the Most Documents Wins

It's been said that in the end, the man with the most toys, wins. Mepco helped its legal team tremendously by the documents it kept during the project. Items such as Mepco's Daily Log, e-mails, letters and written change orders accomplished two goals: they served as critical evidence and they increased Mepco's credibility in the eyes of the jury.

For example, though the District claimed that Mepco had delayed completion, it could not, and did not, present one single solitary note or letter sent to Mepco prior to litigation which gave notice that Mepco was delaying the project. The jury had to ask itself: if Mepco wasn't performing timely, why didn't the District "write them up"? Mepco, on the other hand, presented multiple e-mails it sent to the District advising it that its work was being impeded. Ultimately, Mepco's version of the story was more credible because it had the documents to support it.

Simply put, if a contractor is going to allege a delay claim it must have some, and preferably, many, written notices that its work is being held up. The notice does not have to be sent in any special format or use specific "buzz" words. It can be a letter, a note included in the contractor's Daily Report, or e-mails. In Mepco's case, the brief e-mails that only took seconds to write, helped convince the jury to award over a million dollars.

Who Can Best Tell the Story?

The expression: "It's not what you say, but how you say it" takes on its own meaning in the courtroom. By the time trial is underway, though litigators know the facts of the case almost as well as their client, the attorney cannot "tell the story." Rather, the contractor has to be the one to explain why they are entitled to the damages they seek.

Contractors often think that their "story" is best told by company executives or management under the assumption that those individuals are best suited to discuss how much is owed and how the sum was calculated. The deficiency in that analysis is that at trial, evidence of *what* is owed never gets presented until there is evidence of *why* the sums are owed. Often, the best witnesses are those individuals who were actually "on the job" "working in the field" and can explain what work was done. Said another way, before any juror will consider what dollars amounts apply, they need to understand *what* work was done, *how* it was done and by *whom*. The contractor is in the best position to discern which of its employees can explain the construction process in simple terms and in a logical fashion to enable the jury to comprehend the case.

Take a Picture, Win the Case

The third way a contractor can help its attorney is to have pictures available to "show" the jury "what happened". A digital camera should be standard equipment provided to all superintendents on the project. During the Mepco trial, Mepco's attorneys used a simple PowerPoint presentation to display photographs for each change order request. Thus, when a witness was describing the work performed for each change order, the jury was able to see pictures of the work. Using this simple process even shortened the length of the trial because less testimony was needed to explain the work performed. Consequently, the photographs decreased the contractor's expenses (due to a shortened trial) and increased his credibility. They also kept the jury's interest during what is normally a very boring process. Having been provided both a visual aid and an oral explanation, it was easy for the jurors to understand Mepco's case and ultimately rule in its favor.

An attorney can only work with the facts provided by the client. In the event that a dispute results in litigation, the contractor can help achieve a successful outcome if it provides its attorney with basic necessities: documents to support its claim, photographs to help tell the story and witness(es) to explain the issues to the jury in a simple matter.

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