

Knowledge partner

How construction counsel helps developers, owners navigate project risks

INTERVIEWED BY ADAM BURROUGHS

Construction counsel can represent every player on a construction project — from the owner or developer down through contractors, design team, subcontractors, and material suppliers. They get involved before shovels are in the ground on projects as diverse as plant expansions, hospital and school construction, highways and bridges, or the construction of a multi-tenant residential complex or a subdivision. Counsel is there to help stakeholders iron out the fine contract details and manage any disputes that happen along the way.

While some project owners believe they can mitigate these issues on their own, it's a huge gamble that can lead to serious losses if even a single aspect is overlooked.

"When something does go wrong on a project, the legal fallout could be devastating. It is critical to get counsel involved as early as possible to identify and mitigate those risks," says John Swansinger, head of Buckingham, Doolittle & Burroughs, LLC construction area and the partner-in-charge of its Cleveland office.

Smart Business spoke with Swansinger about the role of construction counsel on a project and how to effectively leverage their experience.

WHY GET CONSTRUCTION COUNSEL INVOLVED ON A PROJECT?

Disputes are common on a construction project. Disputes arise regarding the scope of work, the rate or amount of pay for aspects of a project, change orders, damages for scheduling delays, disputes over the right to payment, quality of the work, and substantial completion. Construction counsel is there to assure that its client assumes only appropriate risk and, when the inevitable issue arises, manages that

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risk efficiently so the client is free to move forward. A great risk management strategy includes layers of protections that begins with due diligence in assembling your team, fully engaged and attentive leaders in the field, informed and well-funded project ownership that demands excellence on the project, seasoned counsel negotiating contract terms and advising along the way, reputable contracting partners and a comprehensive insurance program.

Change order disputes, for example, are very common. To avoid long-term ongoing arbitration or litigation, the parties should always agree to a change order process up front and strictly observe the procedures. It's important that field personnel contemporaneously document the circumstances leading to the dispute. Doing so will assure that their side of the story is preserved and the dispute may be resolved with the best credible evidence possible.

Ongoing projects require strict attention to workplace safety. Counsel should be engaged early with the client's safety representatives in the process if accountability for an injury is in question.

While some larger companies have in-house counsel and might look to have their oversight and guidance on projects, often in-house counsel will reach out to engage construction counsel because they recognize the process necessitates a unique skill set.

WHAT'S THE BEST WAY TO INVOLVE COUNSEL IN A PROJECT?

Construction counsel should be brought in at the pre-planning stages so that the delivery method chosen for the project is suited to the documents being drafted. It is only by being involved early that counsel will be able to fully assist in dealing with the project risks. Even one change in a contract or one item noticed during negotiation can make the entire project successful or not. A successful project will most likely involve counsel from early documentation, through the issues and conflicts that arise during the various stages of the project, through post-completion disputes.

Those embarking on a project should develop a scope of work with counsel early and then keep them involved and informed through regular engagement throughout the project. That way, when an issue needs addressed, it can happen immediately. Getting construction counsel engaged early and allowing them to work side by side with the developer or owner throughout the project can help projects run smoothly. The complexities of construction projects and the risk management they necessitate make engaging with construction counsel prudent. Their industry expertise and experience, having managed through myriad scenarios over their years, can help project owners and developers avoid a devastating outcome. ●