

HOW TO KEEP YOUR CHURCH OUT OF COURT DURING A CONSTRUCTION PROJECT

Someone has well said that the terms “church” and “construction project” are nearly synonymous. While this may be true, the terms “church” and “construction lawsuit” should NEVER be used together!

Regrettably, churches sometimes find themselves involved in lawsuits with their contractors. The best way to avoid a lawsuit is to PLAN not to be involved in one PRIOR to starting the construction project. Use of a Biblical Mediation and Arbitration Clause in the construction contract will ensure no lawsuit will ever be filed by or against the church. [Bruce: make this a link to “Biblical Mediation and Arbitration Clause” section of web site]

DILIGENTLY CHECK CONTRACTOR’S REFERENCES

The single biggest mistake made by churches is hiring the wrong contractor. The first choice should be to hire a local contractor with a good reputation in the community for successful projects and a strong list of references. The contractor must have a valid contractor’s license and maintain adequate insurance limits to cover the size of projects it handles on a regular basis. If this is not possible, then a church must be diligent to learn all they possibly can about the proposed contractor. A wise investment of time and money is to search the State Contractor’s License Board for any complaints. Also, a local law firm can easily search the contractor’s name and learn about prior lawsuits and whether the contractor is in good standing with the Secretary of State. Both prudence and good stewardship require that a church spend the time investigating the reputation of its contractor.

HIRE A KNOWLEDGABLE “OWNER’S REPRESENTATIVE”

One way to minimize delays and problems during construction is to hire an Owner’s Representative to be on-site during regular intervals to observe and verify construction is proceeding as planned. Sometimes the Owner’s Representative is the architect, but it can also be someone who is knowledgeable about construction. The Owner’s Representative’s job is to communicate with the contractor and subcontractor about problems they are having during the project. If a problem occurs, the Owner’s Representative immediately notifies the owner and a meeting is scheduled with the contractor and subcontractor to resolve the issue in a timely manner.

USE A DISPUTE REVIEW BOARD DURING CONSTRUCTION

A Dispute Review Board (DRB) consists of three to five members and its function is to resolve disputes during construction. Typically the owner will select

one member of the DRB, the contractor will select one member of the DRB, and a third member of the DRB will be selected by the owner's and contractor's DRB member. Additional members of the DRB may include the Owner's Representative and the contractor's superintendent. However, the Owner's Representative and contractor's superintendent are non-voting members of the DRB and do not participate in issuing advisory opinions to the owner and contractor. All disputes during construction are brought first to the DRB. The DRB is empowered to issue advisory opinions to the owner and contractor. In most cases, this resolves the dispute without further effort. If the dispute is not resolved by the DRB, then the parties are free to pursue either mediation or binding arbitration.

USE A FUND CONTROL OR OTHER MECHANISM TO CONTROL PAYMENTS

Most problems during construction can be avoided through careful review of contractor's requests for payment and verification of percentage of completion prior to payment. A fund control is a mechanism whereby the contractor must prove through written documentation work has been completed prior to requesting payment for such work. Failure to accurately monitor the contractor's progress towards completion can result in the contractor walking off the job prior to completion because he has been paid in full. The owner must make sure there is sufficient retention after the job is completed to motivate the contractor to return for any punch list or other unsatisfactory work that is discovered after the owner occupies the project. The final payment to the contractor should be made only after some significant period of time has passed after the contractor has completed its work and no further problems are anticipated.

USE MECHANIC'S LIEN RELEASES AND WAIVERS

Each time a contractor makes a request for payment, the contractor must provide the owner with an UNCONDITIONAL mechanic's lien release and waiver. This means that the contractor is giving up the right to file a mechanic's lien for the amount of the payment covered by the Release and Waiver. One of the most frustrating and difficult situations for owners to deal with is filing of mechanic's liens by contractors who performed work on their property. This is particularly true when contractors file mechanic's liens for amounts that have already been paid to them. Owners can protect themselves from these unjustified mechanic's liens (i.e. mechanic's liens that cover amounts already paid to the contractor) by simply requiring the contractor to sign an UNCONDITIONAL mechanic's lien release and waiver.

CONCLUSIONS ABOUT AVOIDING CONSTRUCTION LAWSUITS

A lawsuit over a construction project is the last place a church wants to find itself. However, due to the lack of sophistication of the church in construction combined with the difficulties inherent in any construction project, it is nearly miraculous if the church does not end up in a lawsuit with its contractor. Several biblical admonitions come to mind immediately: (1) there is safety in a multitude of counselors (Prov. 11:14); therefore, hiring an Owner's Representative and carefully monitoring the construction work is well worth the investment; and (2) believers are strongly encouraged to count the cost (Luke 14:28) before starting any project; therefore, the overall cost of the project should be carefully scrutinized, including the budget and guaranteed maximum price, and funds should not be disbursed without UNCONDITIONAL mechanic's lien releases and waivers and approval by a fund control. If these safeguards are followed and combined with a biblical conciliation clause for dispute resolution, the church is guaranteed not to end up in a construction lawsuit!

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