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Maintaining Project Records Could Be The Deciding Factor For Successful Litigation, author Andrew Richards, Esq., New York Real Estate Journal

All too often parties to a construction project do not commence an action concerning issues that developed during construction until a few years after the project is completed. By that time project managers and superintendents have left the company and may be hostile to the company. Even worse, paperwork disappears, and any information kept on the project manager's or superintendent's computer doesn't get saved. When these things happen, the party's position is compromised with the prospect of a lack of evidence. In addition, lawyers have a much harder time proving their client's case or have to spend much more time and money getting the information and documents needed to win the case.

This becomes extremely problematic because when it comes to construction litigation, courts often heavily rely on documentary evidence rather than uncorroborated oral testimony to determine the credibility of witnesses and assess the facts of the case. It is very hard to convince a judge that the judge should consider testimony of a witness who was involved in a construction project several years prior rather than a contemporaneous record which was created during the project. Memories do not improve over time; they get worse. However, a document created during the project does not change. In order to maintain a strong litigation position, a company must have protocols for record creation and record keeping. Each company should prepare written protocols for their project managers and site superintendents explaining when and how documents should be prepared when an issue arises and how to store those documents so that they are readily accessible when needed. Creating discipline within the ranks of the project personnel will often be the key in winning a litigation.

Record retention is critically important for the additional reason that the client must assume that the project manager or site superintendent will not be with the company when a lawsuit is commenced. And if the employee leaves on bad terms, the company may not be able to locate the relevant documents or may not be able to get the employee to cooperate with the factual investigation of the dispute. Even worse, the employee may not have been following protocols during the project resulting in the failure to document the disputes during construction or respond to opposing correspondence stating facts regarding the dispute.

There are ways to reduce the risk of inadequate record keeping. There should be written protocols for all employees involved in the project which explains items such as who they report to, information that needs to be sent upstream, the records they are required to prepare themselves and the records they are to review which were prepared by others (e.g., manpower reports, employee time records, etc.). Specific attention should be given to record keeping involving extra work and delays to the project. Someone in the company must be the point person to make sure all notices and other contractually required documents are timely sent and fully prepared. The company needs to maintain electronic files of all pertinent extra work documents with sub files for each different claim. All documents such as bulletins, notice documents, directives to proceed and responses to such directives preserving the claim for extra work must be segregated and checked to make sure all the documents make their way into the file. When it comes to delay claims, make sure you have the baseline schedule and all revisions. Your scheduler or expert witness will need them to analyze concurrent delays. Notices of delay and statements of claim must be sent in a timely manner.

In addition, presentations should be given to field personnel and project managers going through the protocols to make sure everyone knows their job. Little things like when and how to respond to communications when a dispute arises. For example, the employees should be advised not to respond to an email by calling the other party on the telephone or by text. Any response by phone never happened when it comes to litigation. All responses should be by letter or email. Texts are not retained for a long time and people do not make print outs of their texts. The old axiom is true; if you did not respond in writing (or email), you never responded.

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