

The Dotted Line: How to effectively manage an underperforming sub, Construction Dive, ft. Elizabeth Marchionni

Elizabeth Marchionni, partner at Kaufman Dolowich & Voluck LLP in Woodbury, NY, was quoted in a Construction Dive article written by Kim Slowey.

This feature is a part of "The Dotted Line" series, which takes an in-depth look at the complex legal landscape of the construction industry.

When a subcontractor doesn't perform according to the terms of its contract, it can often turn a general contractor's or owner's experience of a great project from dream to nightmare.

In the execution of many construction projects, subs provide the bulk of the labor and materials. The entire job can be impacted if any one sub fails to meet the schedule or provides a substandard product —? whether it's the utilities contractor that can't provide enough workers to complete its scope of work or the drywall company that leaves a mile-long punch list of cosmetic repairs.

Fortunately, general contractors can help keep a bad situation from getting worse through a well-worded subcontract and sound procedures.

Obviously, it's in the best interest of subs, said attorney Elizabeth Marchionni with Kaufman Dolowich Voluck LLP in Woodbury, New York, to request that liquidated damages provisions be struck from their subcontracts.

Conversely, keeping the Termination for Convenience clause might be critical for general contractors dealing with a problem sub that hasn't yet breached the contract. However, such a termination would likely result in the general contractor having to pay the sub's demobilization costs and perhaps a termination fee in addition to what it owes the sub for properly executed work at the time of departure.

Termination is the final step that, even under the best circumstances, could eat into the project schedule and budget. So it's best for the general contractor to try to mitigate the situation before that point.

Specify short remediation times

The general contractor can also protect its interests through payment terms, Marchionni said, that ensure enough retainage will be held to cover potential back charges.

Define protection for subcontractors

In a sort of end run around the traditional subcontracting process, a smart sub, Marchionni said, might have its own contract, and, depending on how vital the sub's services are, the general contractor might be inclined to sign it. "Subs often think they don't have a chance," she said, "but this is not always true. My advice to subcontractors is don't keep your contract in a drawer. Know what it says. Engage in contract negotiations even if you don't think you have the bargaining power. You never know."