

Good morning, everybody. Dennis Engelbrecht, Digging Deeper.

I regularly get the AGC Law in Brief, and when that comes, they're often highlighting law cases that happened in construction. And it occurred to me as I was reading through the last law brief that I saw, there were three very consequential cases that really became very high dollar issues. And of course, in each case there was a winner and a loser. And in each case, I'm sure each side thought they were in the right as they approached that. So, you know, the whole idea there is dispute resolution is critically important in construction, and staying out of court should always be one of your premier goals in construction.

But how do you stay out of court? And how do you make sure that your interests are protected? You know, it occurred to me along the way how little most project managers and superintendents really know about construction law or how underexposed they would be to these three cases, which were very consequential that I mentioned, but then, you know, how frequently the actions of your project managers and your superintendents are what lead to something getting out of control and ending up in the legal system or ending up in dispute. So, I think, you know, first of all, our people need to be much more educated on construction law. I mean, how frequently does the contract actually go unread? Or is it misunderstood and misapplied by those frontline people? How often do they actually execute the notice, the warnings, or more drastically holding somebody in default, or refusing to proceed, or walking off a job against what the contract calls for? I think the most important thing to remember about dispute resolution is there's little need for the law until there's substantial damage.

And thinking back to these three cases, again, these were substantial damage, the kind that could put you out of business or be make or break kind of things involving certainly a year full of profit, but, you know, you don't really need dispute resolution until there's damage. And once there's a lot of damage, that's where unfortunately things tend to go legal. Second most important thing to remember is once somebody takes a default to action, the costs escalate and escalate dramatically. So that raises the stakes. Now, taking a position contrary to your contract failure to follow the process in the contract, doing something that's counter to generally agreed construction law puts you in a bad position to prevail in the end. And I see people doing that all the time. And once you get in the legal system, by the way, it's not about right or wrong or fairness and unfairness. A lot of these disputes start because somebody feels like something's not fair. That's not fair to expect me to do that. Well, fairness and unfairness and right and wrong really do not apply.

And we have to keep from being too emotional about that. It's about what's contracted or not contracted, what's legal or not legal, what's provable or not provable. These are the things that actually determine the outcome of these cases. So the failure to follow your contract or follow the law, that's where you get the dollar cost and the distress that comes with these fights. So, keep in mind, anytime there's a delay of the job or somebody needs to be supplemented or replaced, again, those are situations where the damages start to mount. And then once the damages mount, it's harder to come to agreement and more things end up in the legal side. So, it's incumbent upon everybody to perform, perform to the contract, perform to the schedule, and if you have a failure for some reason, and certainly we get lots of failures as we go along, make sure that you have a solid recovery plan. A solid recovery plan is essential so that once minor damages start to accrue, we keep them minor so that you don't have to end up in a legal situation.

It's also important that you show good faith as your company. So as long as the other party feels like you're operating in good faith, again, the tensions don't escalate, the tempers don't flare, and that helps to keep things solvable while the dollars are still manageable. So, make sure you're showing good faith to keep the thing from going nuclear. If you get into these situations, the cost is much bigger than just the dollars. And the reason for that is the time, talent, and possibly in the end, the reputation that you lose. But almost in every case where something goes legal and now has a significant cost, a senior person in your construction department is going to be devoted, almost full-time, doing this and sometimes doing this for two or three years. And that's very disruptive to your company and it's going to cost you a lot of profit down the

road from work that you don't get or cannot do. So that's even probably a bigger reason than the money to stay out of court.

So, understand your contract. Make sure that your key personnel are reading your contract, reading your bond, reading every contractual aspect, which includes, of course, the plan and specs. Make sure they have a thorough understanding of that. One good process, by the way, is in your launch or turnover meeting, make sure that the contract and at least all of the items for notice and all of that are covered in that meeting because at least that requires people to look at it and make sure that you know that they've looked at the contract and requirements that are in the contract documents. Then as I mentioned, perform. Number three, cooperate and always have more proactive communication. If you get in a situation where there's some dispute on how to move forward, try to be proactive. Try to come toward the win-win. Negotiate first before you threaten, before you walk off, before you put somebody in default. Negotiate first. It's going to be a lot cheaper to negotiate this and even have a little give than it is to fight it out over a year or longer.

When you do get in a dispute situation, do get a good construction attorney involved, not to litigate, but to keep you out of litigation, to advise you on how difficult it's going to be to prevail on some of these items. And to make sure, you know, if you need a scheduled consultant or something like that to track to make sure that you're keeping all the information that you need to fight, should you fight, making sure you're keeping all of that up to date and those things. But most importantly, stay out of court. Be a contractor. That's what you're best at.

Dennis Engelbrecht, Digging Deeper.