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Tips for Healthy Projects:
Common Legal Issues on Health Care Construction Projects

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Washington State Society of Healthcare Attorneys

Spring Health Law Conference | University of Washington School of Law

May 1, 2026

Agenda – Top 10* Legal Issues

1. Hidden Assumptions and Clarifications
2. Consequential Damages and Liquidated Damages
3. Design Errors
4. Delays and Force Majeure
5. Changes and Claims
6. Notice and Dispute Resolution
7. Warranty
8. Liens
9. BONUS: Failure to Require or Procure Insurance
10. BONUS: Cumulative Impact Claims

Introduction

- Common health care construction projects
- Private construction vs. public works
- Roles
  - Owner
  - Contractors/subcontractors
  - Designers/consultants
- How and when do we get involved?

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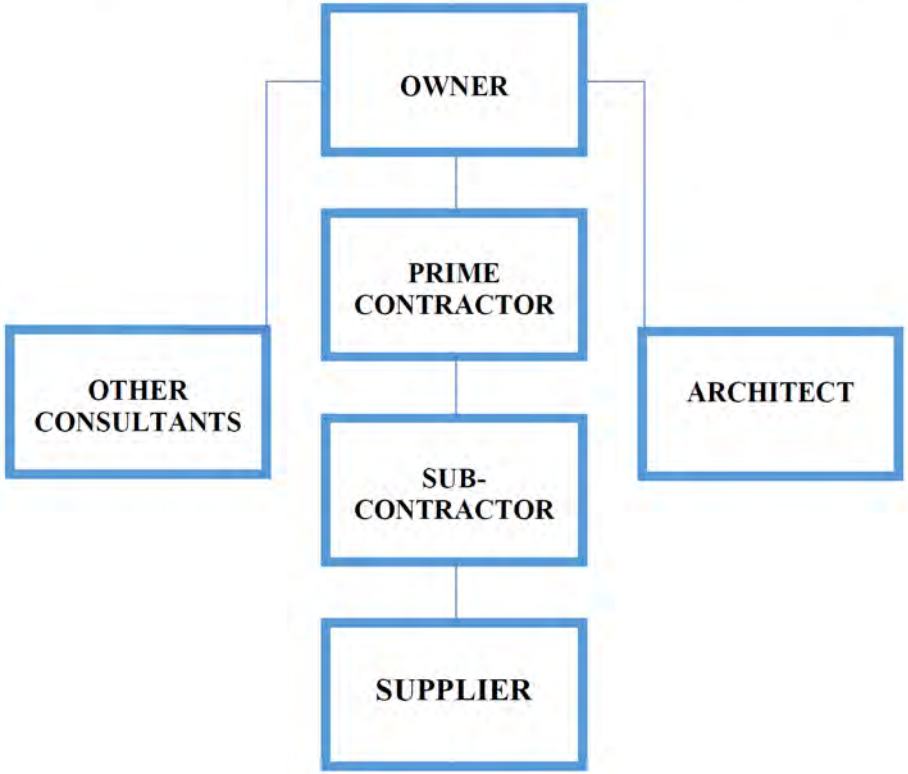
Construction Project Relationship/Risk Allocation



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PHASES OF A CONSTRUCTION PROJECT

Source: https://basiccivilengineering.com/2024/04/fascinating-facts-about-construction-project-lifecycles-the-7-stages.html

Assumptions and Clarifications

- Typically provided by the contractor/ subcontractor with a bid or proposal
- Sometimes called “clarifications and exclusions” or “bid exclusions”

Assumptions and Clarifications: The Setup

- Contractor may ask that they be included as an exhibit to the Contract.
- Typically, these are incorporated by reference.
- Depending on the language of the Contract, they may then supersede contrary terms in the main contract documents.

Assumptions and Clarifications: The Risks

- Allowances
  - Everything is an allowance
  - Key items are allowances
- Changes to permit responsibility
  - Owner responsible for all permits
- Differing site conditions
  - Groundwater / dewatering responsibility
  - Sanitary sewer discharge permit
- Subcontract scope gaps

Assumptions and Clarifications

How can you protect the project?

- Have **development team** (including owner's rep) ***carefully* review** assumptions and clarifications as early as possible.
- **Do not incorporate** into the contract:
  - Consider making it a non-binding reference document rather than a contract document.
- If incorporated:
  - Make sure **order of precedence** matches intent.
  - Make sure other terms are amended as needed.

Consequential and Liquidated Damages

- Consequential damages
  - Baseline: Recoverable, if foreseeable
  - Frequently waived (mutually) in construction contracts
- Liquidated damages
  - Enforceable, if not a penalty
  - Frequently coupled with consequential damages waiver

Consequential and Liquidated Damages

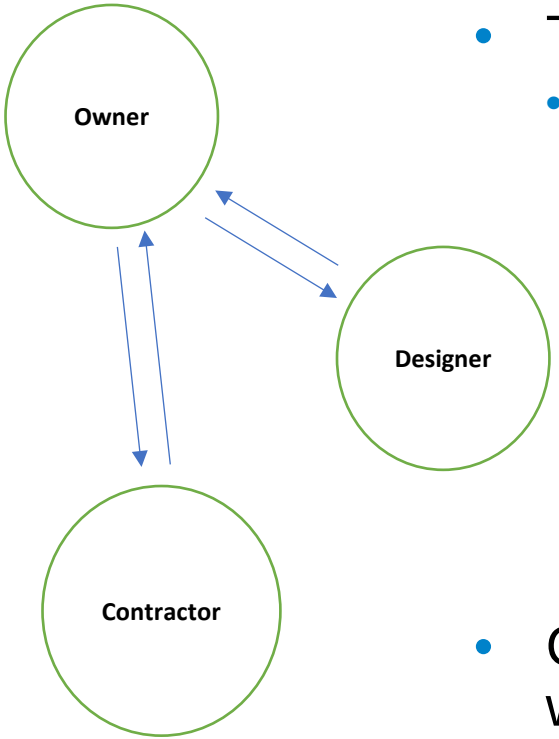
- Owner's consequential damages
  - Loss of use/rent
  - Financing
  - Tenant relocation
- Contractor's consequential damages
  - Lost revenue/profit
  - Home office
- Consider carve-outs
  - Insurance
  - Gross negligence/willful misconduct
  - Indemnity

Consequential and Liquidated Damages

How can you protect the project?

- Think about the consequential damages at issue for likely disputes and problems.
- Don’t agree to form language without careful review and negotiation.
- Carefully draft liquidated damages provisions.
- Be sure you have an adequate remedy!

Designer Errors



- The ***Spearin* Doctrine**:
  - "Succinctly stated, the doctrine holds that where '[A] contractor is required to build in accordance with plans and specifications furnished by the owner, the [owner] impliedly guarantees that the plans are workable and sufficient.' " *King Cnty. v. Walsh Constr. Co. II, LLC*, 27 Wn. App. 2d 156, 160, 532 P.3d 182 (2023).
- Contractor must **actually comply** with the plans and specifications to invoke the doctrine.

Designer Errors

Consider that you may end up fighting a "**two-front war**."

Designer Errors

- **Design gaps**

Designer Errors

How can you protect the project?

- Watch for **liability limitation language**.
- Review **insurance requirements**, including limits and additional insured designations, for all design agreements.
- Consider **tolling agreements** early in the dispute process for any potential claims against designer(s).
- Make sure **owner's representations/warranties** do not go beyond the *Spearin* doctrine.

Force Majeure

- Virtually all construction contracts include some sort of “force majeure” provision.

§ 8.3 DELAYS AND EXTENSIONS OF TIME

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control; or by delay authorized by the Owner pending mediation and arbitration; or by other causes that the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

Force Majeure

- Virtually all construction contracts include some sort of “force majeure” provision.

6.3 DELAYS AND EXTENSIONS OF TIME

6.3.1 If the Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of the Constructor, the Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of the Constructor include, but are not limited to, the following: (a) acts or omissions of the Owner, the Design Professional, or Others; (b) changes in the Work or the sequencing of the Work ordered by the Owner, or arising from decisions of the Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by the Owner pending dispute resolution or suspension by the Owner under section 11.1; (e) transportation delays not reasonably foreseeable; (f) labor disputes not involving the Constructor; (g) general labor disputes impacting the Project but not specifically related to the Worksite; (h) fire; (i) Terrorism; (j) epidemics; (k) adverse governmental actions; (l) unavoidable accidents or circumstances; (m) adverse weather conditions not reasonably anticipated. The Constructor shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8.

6.3.2 In addition, if the Constructor incurs additional costs as a result of a delay that is caused by items (a) through (d) immediately above, the Constructor shall be entitled to an equitable adjustment in the Contract Price subject to section 6.6.

Force Majeure: Recent Issues

- **COVID-19** pandemic
  - Manpower / shutdown
  - Supply chain issues
- Steel **tariffs**
  - Price escalation
  - Availability
- **War** in Ukraine
- Concrete **strike**
- Strait of Hormuz?

Force Majeure

How can you protect the project?

- **Time, not money**: Negotiate force majeure provisions that give a time extension, not additional compensation.
- Review and negotiate **specified force majeure events** to avoid ambiguity.
- **Enforce** contract claims notice procedures.
- Use **preconstruction** to identify **long-lead** items.

Changes and Equitable Adjustments

- A common feature of construction contracts that is not common in other industries is the ability to issue **change orders** and **construction change directives**.
- These allow for changes to the work, schedule, and other contract terms.
- These typically require an **equitable adjustment** to the contract price or time of performance.

Changes and Equitable Adjustments

- **Change Order**: Agreed contract modification implementing changes.
- **Construction Change Directive:** Directive to the contractor to perform additional work or make other changes.
  - Typically subject to later equitable adjustment.
- **Minor Change:** Change to the work that does not impact price or time.
  - Often can be directed by the architect.
  - Typically not subject to later equitable adjustment.

Changes and Equitable Adjustments

ARTICLE 7 CHANGES IN THE WORK

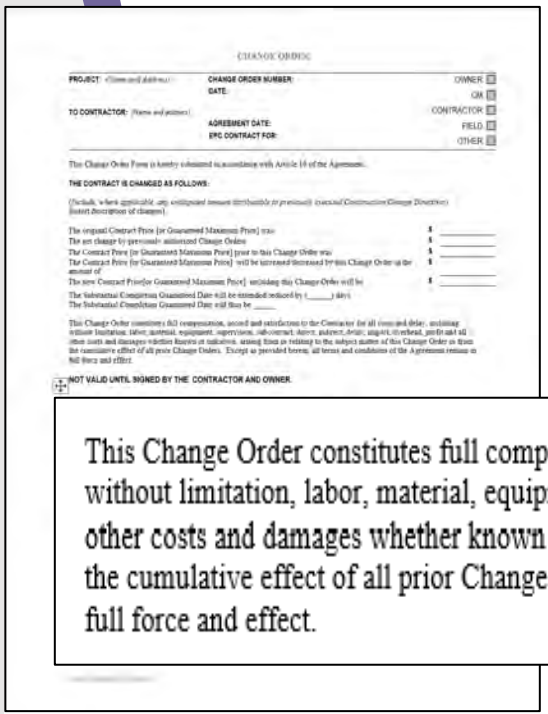
§ 7.1 General

§ 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

§ 7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor, and Architect. A Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor. An order for a minor change in the Work may be issued by the Architect alone.

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents. The Contractor shall proceed promptly with changes in the Work, unless otherwise provided in the Change Order, Construction Change Directive, or order for a minor change in the Work.

Changes and Equitable Adjustments



CHANGE ORDER

PROJECT: (Name and address):

CHANGE ORDER NUMBER:
DATE:

OWNER
CM
CONTRACTOR
FIELD
OTHER

TO CONTRACTOR: (Name and address):

AGREEMENT DATE:
EPC CONTRACT FOR:

The Change Order Form is hereby submitted in accordance with Article 14 of the Agreement.

THE CONTRACT IS CHANGED AS FOLLOWS:

(Include, where applicable, any anticipated amount attributable to previously executed Construction Change Directives)
(Insert description of changes)

The original Contract Price [or Guaranteed Maximum Price] was: $ _____
The net change by previously authorized Change Orders: $ _____
The Contract Price [or Guaranteed Maximum Price] prior to this Change Order was: $ _____
The Contract Price [or Guaranteed Maximum Price] will be increased/decreased by this Change Order in the amount of: $ _____
The new Contract Price[or Guaranteed Maximum Price] including this Change Order will be: $ _____

The Substantial Completion Guaranteed Date will be extended/reduced by (_____) days.
The Substantial Completion Guaranteed Date will thus be _____.

This Change Order constitutes full compensation, accord and satisfaction to the Contractor for all costs and delay, including without limitation, labor, material, equipment, supervision, subcontract, direct, indirect, delay, impact, overhead, profit and all other costs and damages whether known or unknown, arising from or relating to the subject matter of this Change Order or from the cumulative effect of all prior Change Orders. Except as provided herein, all terms and conditions of the Agreement remain in full force and effect.

NOT VALID UNTIL SIGNED BY THE CONTRACTOR AND OWNER.

Change Orders can have the effect of accord and satisfaction, which often is addressed specifically in the contract.

This Change Order constitutes full compensation, accord and satisfaction to the Contractor for all costs and delay, including without limitation, labor, material, equipment, supervision, subcontract, direct, indirect, delay, impact, overhead, profit and all other costs and damages whether known or unknown, arising from or relating to the subject matter of this Change Order or from the cumulative effect of all prior Change Orders. Except as provided herein, all terms and conditions of the Agreement remain in full force and effect.

Changes and Equitable Adjustments

How can you protect the project?

- When negotiating the contract, **negotiate the method(s)** for equitable adjustment.
- Work to **reach agreement** in advance on changes and adjustments where possible.
- Be ready for the **possibility of disputes**, claims, and work performed under protest.
- Make sure the contractor is **required to proceed with work** despite the pendency of a claim or dispute.

Contractual Notice Requirements

Contractual Notice Requirements

§ 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

§ 15.2.5 The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.

Contractual Notice Requirements

§ 15.1.5 Claims for Additional Cost

If the Contractor wishes to make a Claim for an increase in the Contract Sum, notice as provided in Section 15.1.3 shall be given before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

§ 15.1.6 Claims for Additional Time

§ 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section 15.1.3 shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

§ 15.1.6.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction.

Contractual Notice Requirements

Can be more simplified, if appropriate:

4. **Claims**. If Contractor claims entitlement to extra compensation or time for any reason whatsoever, notice of any such claim shall be submitted to Client in writing by Contractor within five (5) days of Contractor's knowledge of the basis for the claim or the date on which Contractor reasonably should have known of the basis for the claim; otherwise the claim shall be absolutely and unconditionally waived and released. Any Work performed by Contractor, except that described in and reasonably inferable from **Exhibit A**, performed without Client's advance written approval is at Contractor's risk and expense.

(a) Concealed or Unknown Conditions. If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in Exhibit A or (2) unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Agreement, the Contractor shall promptly provide notice to the Client before conditions are disturbed and in no event later than fourteen (14) days after first observance of the conditions and may make a claim for additional compensation and time for such conditions.

Contractual Notice Requirements

- *Mike M. Johnson, Inc. v. Cnty. of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003).
- Issue: If the other party has actual notice of grounds for a claim, does failure to following notice requirements still bar the claim?
- Contractor did not submit Section 1.04.5 protest.
- Owner had actual notice of changed conditions.
- Court held that contractor waived the right to claim additional compensation.

Contractual Notice Requirements

"This court, as well as the state appellate courts, has historically upheld the principle that **procedural contract requirements must be enforced** absent either a waiver by the benefiting party or an agreement between the parties to modify the contract." 150 Wn.2d at 386-87.

"[A] party to a contract **may waive a contract provision** meant for its benefit, but waiver by conduct 'requires **unequivocal** acts of conduct evidencing an intent to waive.' " 150 Wn.2d at 391 (quoting *Absher, 77* Wn. App. at 143).

Contractual Notice Requirements

How can you protect the project?

- Consider potential issues and claims and what notice will be needed to adequately address.
- Draft notice provisions carefully.
- Keep the notice requirements in mind during the project, and avoid inadvertent waiver.
  - Insist on proper notice.
  - If deviating, ensure intent is express and limited.

Warranty

- Construction contracts typically involve various types of warranties on the work.
  - General warranty
  - Specific warranty
  - Product warranties
- Warranties may have time limits and claim requirements.
- Construction contracts sometimes also separately require correction of defects.
  - This may have a different time limit than applicable warranties.

Warranty

§ 3.5 Warranty

§ 3.5.1 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 3.5.2 All material, equipment, or other special warranties required by the Contract Documents shall be issued in the name of the Owner, or shall be transferable to the Owner, and shall commence in accordance with Section 9.8.4.

Warranty

§ 12.2 Correction of Work

§ 12.2.1 Before Substantial Completion

The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, discovered before Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense.

§ 12.2.2 After Substantial Completion

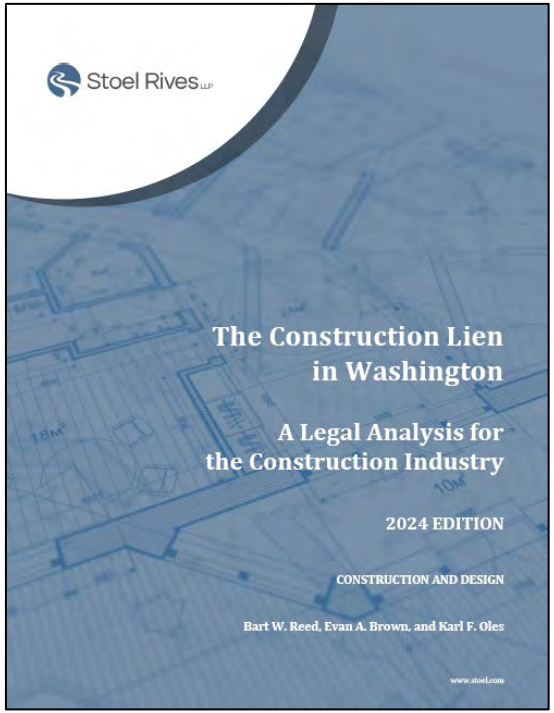
§ 12.2.2.1 In addition to the Contractor's obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of any applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of notice from the Owner to do so, unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.5.

Warranty

How can you protect the project?

- **Negotiate** warranty terms in the contracts.
- Consider **flow-down** of warranty requirements to subcontractors.
- Require all **warranty assignment** and **documentation** for project close-out.
  - As a part of “the work”! *See* RCW 60.30.010.
- Be aware of claims **processes** and **timelines**.

Liens

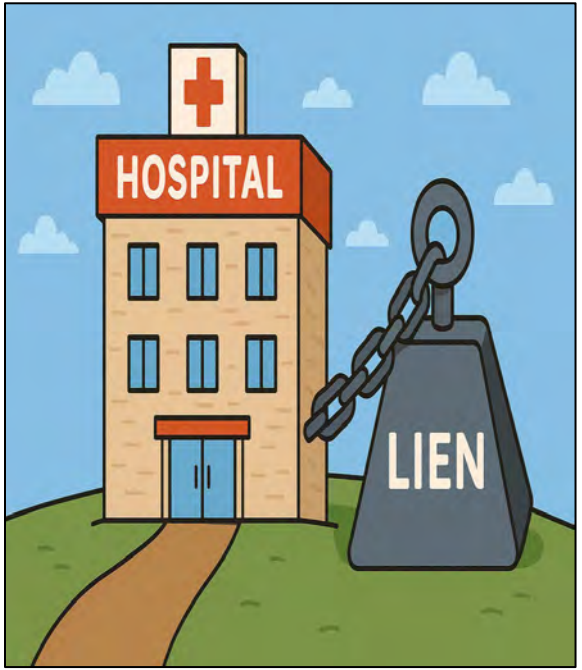


Treatise on Construction Liens in Washington (Free Online)

https://www.stoel.com/insights/reports/Construction-Lien-Law-In-Washington/The-Construction-Lien-in-Washington

Liens

- Contractors, subcontractors, laborers, and even designers can have liens on a project. Ch. 60.04 RCW.
- Intended as security for payment on construction projects.



Liens

- Contractors', laborers', and designers' rights of lien can balloon into lien claims and potential for foreclosure in the event of, e.g., payment disputes or contractor insolvency.
- Liens can complicate project closeout and financing.
- Liens can produce costly legal disputes.
  - Statute provides for attorneys' fees to the prevailing party in a foreclosure action. RCW 60.04.181(3).
  - But this only applies if a foreclosure lawsuit is actually commenced.

Frivolous Lien Actions

- Washington's lien statutes include an expedited process meant to protect owners from frivolous and clearly excessive liens. RCW 60.04.081.
- Provides for attorneys' fees to prevailing party. RCW 60.04.081(4).

Frivolous Lien Actions

- "[T]hat the lien was improperly filed must be clear and **beyond legitimate dispute**." *W.R.P. Lake Union Ltd. P'ship v. Exterior Servs., Inc.*, 85 Wn. App. 744, 752, 934 P.2d 722 (1997)
- "Even if a lien is **invalid**, it may not be frivolous." *Woodley v. Style Corp.*, 7 Wn. App. 2d 543, 552, 453 P.3d 739 (2019).

Frivolous Lien Actions

How can you protect the project?

- Make sure lien waivers are both:
  - Required by the contract with each payment application.
    - Not in common AIA forms!
  - Actually provided by the contractor with each payment application.
- Joint checks option for paying subcontractors/suppliers
- Consider quiet title action for invalid liens.

Failure to Procure Insurance

Failure to Procure Insurance

Builder's risk :

- "Under an all risk policy, any risk that is not specifically excluded is an insured peril." *Frank Coluccio*, 136 Wn. App. at 767.
- "The purpose of such insurance is to shift the risk of loss away from the contractor and the owner and to place it upon an insurer." *Id*.

Failure to Procure Insurance

Failure to procure required insurance leads to liability for losses that would have been covered by the required policy. *Frank Coluccio Const. Co. v. King Cnty.*, 136 Wn. App. 751, 767, 150 P.3d 1147 (2007).

Failure to Procure Insurance

May be specifically addressed by contract.

§ 11.2.2 Failure to Purchase Required Property Insurance. If the Owner fails to purchase and maintain the required property insurance, with all of the coverages and in the amounts described in the Agreement or elsewhere in the Contract Documents, the Owner shall inform the Contractor in writing prior to commencement of the Work. Upon receipt of notice from the Owner, the Contractor may delay commencement of the Work and may obtain insurance that will protect the interests of the Contractor, Subcontractors, and Sub-Subcontractors in the Work. When the failure to provide coverage has been cured or resolved, the Contract Sum and Contract Time shall be equitably adjusted. In the event the Owner fails to procure coverage, the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent the loss to the Owner would have been covered by the insurance to have been procured by the Owner. The cost of the insurance shall be charged to the Owner by a Change Order. If the Owner does not provide written notice, and the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain the required insurance, the Owner shall reimburse the Contractor for all reasonable costs and damages attributable thereto.

Failure to Procure Insurance

- Waivers of subrogation

§ 11.3 Waivers of Subrogation

§ 11.3.1 The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents, and employees, each of the other; (2) the Architect and Architect's consultants; and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees, for damages caused by fire, or other causes of loss, to the extent those losses are covered by property insurance required by the Agreement or other property insurance applicable to the Project, except such rights as they have to proceeds of such insurance. The Owner or Contractor, as appropriate, shall require similar written waivers in favor of the individuals and entities identified above from the Architect, Architect's consultants, Separate Contractors, subcontractors, and sub-subcontractors. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this section 11.3.1 shall not prohibit this waiver of subrogation. This waiver of subrogation shall be effective as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the damaged property.

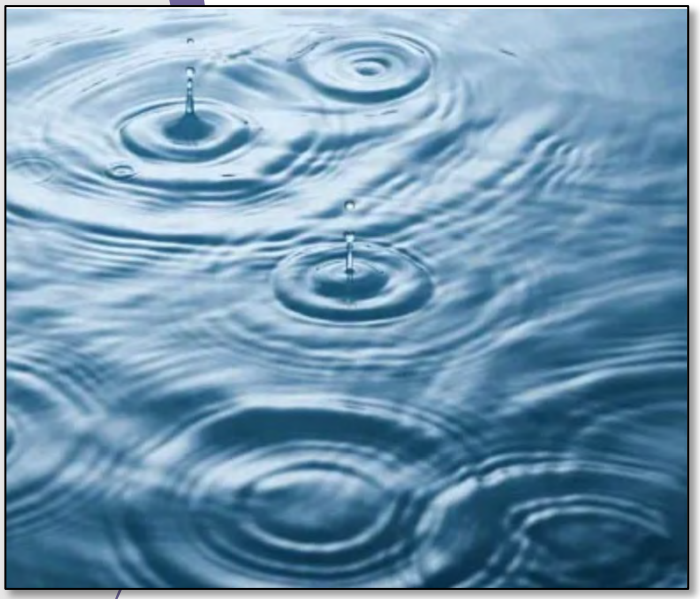
§ 11.3.2 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, to the extent permissible by such policies, the Owner waives all rights in accordance with the terms of Section 11.3.1 for damages caused by fire or other causes of loss covered by this separate property insurance.

Failure to Procure Insurance

How can you protect the project?

- Talk to your insurance broker BEFORE negotiating insurance requirements.
  - Send construction contract to the broker.
  - Find out what is commercially available and realistic.
- Follow up with your broker/insurers to make sure that they have procured all policies.
- Review certificates and policy documents for compliance pre-construction.

Cumulative Impact



"Cumulative impact is the unforeseeable disruption of productivity resulting from the 'synergistic' effect of an undifferentiated group of changes. Cumulative impact is referred to as the 'ripple effect' of changes on unchanged work that causes a decrease in productivity and is not analyzed in terms of spatial or temporal relationships." *Appeal of Centex Bateson Const. Co., Inc.*, VABCA No. 4613, 99-1 B.C.A. (CCH) ¶ 30153 (Dec. 3, 1998).

Cumulative Impact

- At base, the claim is one for **lost efficiency and productivity**.
- Can take the form of a **delay** or **disruption** claim.
- But the vague nature of the claim makes it susceptible to abuse.

Cumulative Impact

How can you protect the project?

- **Include waiver language** in change orders / contract and **avoid reservation language**

§ 7.2.2 The Owner and the Contractor agree that the adjustments to the Contract Sum and Contract Time, if any, provided by a Change Order are the total and complete compensation and remedy for a change in the Work. The intention of the parties is that the Contractor will have thought through all anticipated Contract Sum and Contract Time effects (including any effect of the individual change and any effects of prior changes in the Work as a whole, and all direct and indirect costs of any kind or nature, including without limitation overhead, extended overhead, profit, impact costs, ripple costs, delay costs, inefficiency costs, and all other cost or damages of any kind), and that such will have been accounted for in the Change Order and not be subject to any later "cumulative" change order. By submitting change requests/cost proposals as part of any request to Owner, the Contractor warrants to the Owner that Contractor has fully evaluated and negotiated and determined such to be fair and reasonable and proper under the Contract Documents before including them in any proposal for adjustment of the Contract. General reservations of rights in a Change Order by Contractor shall be deemed waived and void. The requirements of this section shall not be modified or waived except by a writing signed by an officer of the Owner expressly referring to this section and expressly modifying or waiving the requirements of this section.

Cumulative Impact

How can you protect the project?

- Have an **owner's representative**
- Review **preconstruction** efforts
- Review and monitor project **staffing** and **manpower**
- Attend **weekly meetings** / stay engaged throughout the project

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Questions?

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