

Know and Follow the Rules of the Game

By Michael T. Hoppe



"Has anyone explained the rules of this game to you?"



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I once heard of a builder who explained to an arbitrator that a contract is something construction participants sign and then put away so they can do their work. As he told it, only if a project went poorly would the contract be relevant again, with lawyers using and twisting it after the fact to support their respective positions.

While this is a fairly cynical view of both contracts and the role of lawyers, it is insightful. In my experience, project participants often do sign and then “put away” the contract while they do their work. For the majority of projects – where everything goes relatively smoothly – this is fine. But for the rest, for those projects that experience significant problems, this approach can have real legal consequences, including the loss of claims or unexpected liability. Moreover, not understanding or following the contract can cause disputes that would otherwise be avoided.

On any project, the contract’s terms are the “rules of the game.” Oftentimes, the parties put forth significant effort negotiating and establishing those rules, only to set them aside and allow the course of the project and the personalities of their respective representatives to dictate how project developments are handled. Only when the participants come to serious ‘loggerheads’ do they dust off the rules and

evaluate in retrospect whether they have followed them.

As a lawyer, I obviously like to see my clients follow the contract to the letter. But I also understand that an application of the contract that is overly technical/strict can often be impractical, damage business relationships, and become counterproductive. In my experience, however, too loose of an adherence to the “rules of the game” can have a similar result.

This article offers a few practical suggestions to strike the proper balance between following the rules of the game, while avoiding a focus on the rules that interferes with getting the job done.

Whether you are a contractor, an owner or another project participant, familiarize yourself with the rules of the game – read and understand the contract!

First and foremost, whether you are a contractor, an owner or another project participant, familiarize yourself with the rules of the game – read and understand the contract. Implement a policy that requires

the significant project representatives in your organization to do so as well. Allow no exceptions, even for those with significant construction experience who may assume (rightly or wrongly) that they already know what the contract likely provides.

Second, in this process, pay particular attention to key contractual provisions that often become the focus of disputes. Examples of these include:

- **Notice Provisions.** Every construction contract includes provisions that dictate when and to whom notice of problems must be provided. These provisions are rarely followed, perhaps to avoid damaging relationships or escalating what seem like manageable issues, and often are even unknown until major disputes arise. But consistent and careful adherence to such provisions may actually improve relationships and allow project participants to resolve issues when they are still resolvable. Make sure your significant representatives know and consistently follow the contract’s notice requirements in a non-confrontational manner from the beginning of the project when relationships are good.

- **Change Order Provisions.** Changes to the project scope are another common source of contention. Once again, make sure your project representatives are familiar with provisions that govern this important area. Most construction contracts require written authorization before changed work can be performed. Oftentimes, these provisions are not strictly followed as the participants work to keep the project going. Resist these shortcuts. Contractors and owners both should insist on some form of written authorization that complies with the contract before moving forward with changed work.
- **Dispute Resolution.** Make sure you are at least generally familiar with dispute resolution provisions of the contract before a dispute develops. Failure to comply with those provisions can result in the loss or waiver of claims. Be open with other project participants when there are genuine disagreements and discuss ways to resolve those efficiently to avoid disruptions to the project. Just as in any relationship, if apparent disagreements are promptly and openly discussed, misunderstandings and damage to business relationships can often be avoided.

Finally, should the project participants intentionally deviate from the “rules of the game” as established by their contract, such deviations should be documented in writing. A simple email confirming the parties’ understanding of a deviation may be sufficient. Such deviations, of course, won’t be recognized unless the players are familiar with the rules, which takes us full circle – know the rules of the game. If you know the rules and put practices in place that follow those provisions consistently, you will not only be prepared to assert your rights if a formal dispute develops, but you also may successfully avoid such disputes in the first place. ■

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