



Legal Articles

OP-ED: Beware of Tackling Remedial Work Without Consideration of Legal Impacts

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For those of us in the dispute resolution world in construction, one cultural trait that is seen with nearly all contractors is a strong sense to do the job right. Most businesses are small, and closely held. And most contractors carry significant pride in their work product and in keeping their clients happy. That character extends not only to work in progress, but also to resolution of issues related to the work after it is complete.

Fixing problems before they turn into formal disputes has many important business positives. The contractor will make its client happy, and in turn will endear itself to future work with the client. The contractor likely will make its insurance providers happy too, by minimizing and mitigating insurance claims, claims administration and claims resolution. The contractor also likely will save the cost of having someone else mitigate the problem. It is no secret that it generally is an easier path for someone familiar with the project and project players to execute the remedial work, often in the process avoiding markup for profit and overhead for the remedial work. And

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Darien S. Loiseau

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the contractor oftentimes can avoid the litigation transactional costs associated with resolving the problem, even in scenarios where responsibility is disputed. The risk/benefit analysis associated with “fixing” rather than “litigating” often weighs in favor of “getting it done.”

But this very strong work ethic and trait can have its downside if remedial work is not executed thoughtfully. The following is not an exclusive list of concerns. For starters, the contractor often needs to consider whether other members of its team, especially its subcontractor group, really should be executing some or all of the remedial work. Jumping in to complete the work without considering the effect this remedial effort might have on contract and indemnity rights with others could discharge responsibilities from others. Many have seen situations where what appeared to be a fairly modest repair explodes into a huge endeavor. Attacking the problem without notice to potentially responsible parties very well could waive contract rights later. Ouch!

Another problem with jumping in early without thoughtful consideration of the legal consequences relates to insurance coverage(s). Those insurance policies require notice of claim(s) and an opportunity to investigate the issue. If that right is missed, an insurance carrier might deny the claim. Like the expanding scope scenario discussed immediately above, asking an insurance carrier to weigh in after the building is torn up (and the scope deemed much larger than originally anticipated) could very well lead to coverage issues later. Not all remedial issues require this level of analysis, but it nevertheless is a consideration to worry about “what happens” if the problem is larger than anticipated.

Another problem might relate to extending risk exposures beyond the statute of limitations. Like all states, Oregon limits the amount of time a contractor is legally and financially responsible for its work after the work is complete. Executing a remedial work request informally and without agreement on the effect to these time limitations could very well (and inadvertently) start this clock all over again. Yes, in some instances, the remedial work might be deemed a “new contract” and retrigger the time period for risk and exposure on the project. That is fine if that is what the parties intend to do, but it comes as a shock to many if a gracious effort to complete remedial work inadvertently extends risk far beyond the consideration originally negotiated on the deal. To make this circumstance even more grim, that remedial effort very well could affect insurance coverage for the problem(s). It is important to define the work being performed, and to define how this work will be administered in relation to the contract and statutory time periods that affect responsibility for the project.

It is not suggested that contractors avoid self-help options; but that very character trait to get the job done right should be balanced against making informed decisions before executing the remedial work. Walking through a repair scenario with your insurance broker and/or legal counsel before moving forward often is a low-expense measure that will pay dividends down the road.

This article summarizes aspects of the law, it does not constitute legal advice. For legal advice for your situation, you should contact an attorney.

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