Scribbles Squibs #4 (March 3, 2013): *One* letter prevents two lawsuits, avoids a huge amount of unwanted extra work and collects 150k plus interest.

By Attorney Jonathan Sauer

For many generals (and subcontractors), the following scenarios may be all too familiar: not getting paid; trying to avoid undesired extra work after the job is done; trying to stay out of court; protecting one's performance bond; and, getting some interest for late payments. One very hard-working letter just addressed all of those issues. Perhaps you might benefit from the story.

The Problem: A general contractor performed a several million dollar mechanical modernization for a certain public housing authority. The work was substantially completed nearly one year ago. However, the local building inspector wouldn't accept the electrical work (as designed and installed, following that design) for certain technical reasons and the Authority wanted that and other work done to the tune of one-half million dollars. However, it wanted the work done on a unit-price basis that would have been difficult if the job were ongoing, worse that it now wasn't. And, originally, this Authority had insisted that the general include in its contract about 150k worth of asbestos work, which was not part of the original project as bid, using a contractor the Authority already had obtained as a subcontractor, who was to work for the general as a subcontractor. The work was done and the authority hadn't paid for even a single dollar's worth of that work. One infers that the holding of this money might have been leverage to get the general to perform the additional work, which it didn't want to do. The asbestos guy was understandably upset that it hadn't been paid anything. Its natural recourse would be against the general's payment bond, which could even make the general liable for this 'subcontractor's' legal fees. The general's payment bond was at risk and his patience was long gone. The problem was: how to get the asbestos guy paid and avoid doing the rest of this work, while avoiding a claim against the general's performance bond for *not* doing it?

How to Proceed: No absolutely clear answer with this type of problem. From a legal standpoint, the judicial vehicle to determine the housing authority's ability to require significant new work would be through an 'action for declaratory judgment' in which a judge interprets a contract measured against legal principles to determine who owes whom what in terms of performance. But, necessarily, this would have committed our client to years of litigation, expense and uncertainty. And, we were concerned that the asbestos guy (not subject to a pay-when-paid clause) might sue any day and we would be looking at the asbestos guy's being awarded 150k against our payment bond, interest at 12% per year for the several years of litigation that would be involved along with an award of reasonable attorneys' fees. And the Authority really wanted this work done: a claim against our performance bond might have been made. All unpleasant (and expensive) prospects.

The Letter: I have found that in many instances the *threat* of doing something exceeds the actual value of doing the act threatened. For, once one has sued, the matter is packed off to legal and the legal process 'does its thing'. A great many lawyers are not good at settling things, particularly when a matter is new and not as much is known about the case as will later be the case. So, it seemed prudent to try a letter. If I were to write the letter *myself*, however, then it

would go to the housing authority's legal department and my own experience with this particular agency has been it handles almost nothing well. Also, what commonly happens is that the two lawyers start lobbing court cases over the net (to that tune in *Deliverance)* and nothing much gets accomplished. The key thing is to keep the operations people 'in the problem' and 'on the hook' and try to force them to deal with it while it is still their problem before it gets buried in legal process, something that might actually give them relief (as the resolution will now be someone else's fault and headache.) So, I wrote up some ideas for a letter to be sent by my client in his own words making the following points. The project's handbook says a project is accepted (except for punch list) when a certificate of substantial completion has been issued. In this case, a certificate of *final* completion had been issued many months ago. So, the letter went, there was no basis for asking for extra work because the work was done, the job *finished*. The letter said that for the Authority to attempt to give our client one-half million dollars' worth of work at least one-half year after the job was completed was an attempt to thwart (and avoid) the public bid laws and that if we had to write even one more letter, we would contact the Attorney General's Office (which administers various aspects of the public bid laws, including conducting bid protests.) Moreover, since the job was complete, the Authority couldn't have work done on a 'unit price' basis. Rather, if this *were* to be done, it would have to be priced as a completely new job with mobilization, general conditions, site supervision, tenant coordinators and overhead and profit and ultimate demobilization. The letter mentioned that if the asbestos guy sued the general, we would *immediately* file a third party action over against the Authority and refuse to settle without payment of all interest and attorneys' fees (both to the subcontractor as well as our own). Moreover, the letter said that if we didn't get paid by the Authority within thirty days from the date of the letter, we would be suing the Authority in any event, whether the asbestos guy sued or not. The letter also went into the 'late payment' provisions of the bid laws, which are quite clear and *mandatory*, which require late payers to pay interest, which we demanded.

As the result of the letter, the Authority has withdrawn its request for more work, has paid for the asbestos guy's work and our client is expecting a check for the payment of interest for late payment, which could be substantial. All of this for the price of *one letter!*

Lessons to be Learned*:* It is only someone new to the process who thinks that the filing of a suit causes much consternation to those who are sued often. For those used to the process: 'been there, done that'. In a certain sense, if the general were to simply have filed suit, the Authority might have said (to itself): 'if this is how they want to resolve this, then we're ok with that.' Moreover, this can be an actual helpful thing for the operations people, as they would now be taken out of the loop. (The same logic applies in certain kinds of payment bond claims in keeping a claim that arguably has been mishandled at the claims' stage because once a bad faith claim is filed, that claim almost universally goes to another bond claims representative.) I infer the Authority did not want anyone from the AG looking into the Authority's giving out one-half million dollars' worth of work and in so doing completely ignoring and avoiding the bid process. After all, how could they have defended this action? And, it was definitely 'iffy' from a bid law standpoint their forcing us to take one hundred fifty thousand dollars' worth of work that was not part of the procurement, as it was not 'emergency work', which usually is the *only* legitimate reason one has for avoiding the bid process. *If* the general received an award of interest and/or attorneys' fees against the Authority for refusing to pay for the work they had ordered – literally, cramming it down the general's throat - how would whoever did this justify such action?

Certainly, contractors get angry and sometimes the idea of immediately filing a suit has a certain immediate emotional appeal. But, here is where our near slavish devotion to *The Food Channel* helped to mold the result. For, as is taught, revenge is a dish best served *cold*! (Short ribs should be hot and savory but Borscht is often served cold, as is the vodka used to wash it down!) Some lawyers think that 'holding back' one's best legal arguments until a lot later in the game – i.e. trial – is a good thing (but, possibly, more for the lawyers than for the clients, as it keeps the case open.) But, almost no court cases of this nature actually get completely tried: the process is simply too expensive. And, sooner or later, the other side will be learning what your thinking is, in any event. Why withhold that if it can do the client some good *now?* Anyone who has read ***Scribbles*** over the last twenty years or has looked at our website –www.sauerconstructionlaw.com – knows that this is what Sauer & Sauer is all about: service at the highest level to our industry and clients. Here's where experience matters.

In another case I had a town was attempting to hold an electrical contractor liable for very expensive audio visual and communications equipment not carried in its bid based on the fact that *some* of the equipment was merely 'ghosted' in on the electrical drawings and there were no specifications of any kind for the equipment. Since this was potentially an architect screw-up or a miscommunication between the owner and architect, we did go with the action for declaratory judgment right away (rather than the letter) and the matter was concluded within ninety days or less from the date the action was filed. (In this type of case, it was unlikely that an architect would easily agree that it should have included this work in the procurement but didn't.) Adding both the town and its architect in as defendants put them in a position where their interests were essentially adversarial (thus, making it a lot more difficult for one to support the other in the litigation and dispute.) As we all know, experience cannot be taught: it has to be learned (earned)! I distinctly remember discussing this with a gentleman named Abe while we were in line waiting for the Illinois bar examination to be administered. A tall, dignified man. His full beard fit his face comfortably! I understand that later in life he may have gone into public service of one kind or another.

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