Scribbles Squibs # 14 (June 21, 2013): Take These Seven Steps To Protect Your Claims and Change Order Proposals

By Attorney Jonathan Sauer

Problem: A key element in construction is that there will be claims for changed conditions, for delays (and their kissing cousin, acceleration) and for differing site conditions. Recouping the cost of claims may make the difference between a successful job and an unprofitable one. Too many jobs where they have not been well-handled can lead to disaster. There are any number of reasons for mishandling claims. Key people in the company may not be fully aware of them. Operational people in the field have not read the contract. The business lacks sufficient systems so that claims are handled the same way irrespective of which project manager is involved: your best one or your worst one. As a chain is only as strong as its weakest link, all procedures should be understood and capable of being followed by your least talented project managers and superintendents. By the time a claim ripens into a legal matter, inattention to the earlier steps of your claims may doom the claim to failure.

There are (at least) seven things you can do to give your claims a better chance of success. And, they're not very complicated. These things and procedures may be helpful to subcontractors and general contractors in states other than Massachusetts, although a certain amount of Massachusetts law is referenced.

Here goes!

The Seven Things:

1. Have a designated lien waiver reader in your company who knows what they are doing and have this person review all 'lien waivers'. It makes sense that the first thing you can do to protect and pursue claims is not to kill them before they have even been presented. Frequently, some client will come to our offices with what they think is a great claim only to find out that by not really understanding lien waivers, the claim no longer exists. A lien waiver that is really a release – as most of them are – typically forces you to certify that through a certain time period the signing party has no claims (unless you take exceptions.) Knowing what exceptions to these documents should be taken – some examples given below - and then *making* such exceptions to the forms in writing may be necessary to preserve change order proposals and claims. Also, such forms should always state the amount of the 'consideration' to be paid in exchange for your executing these documents. In other words, what is the current amount due. This makes the document conditional and makes it look more 'partial' than does a document which simply has you giving up rights without identifying the current amount due.

A lien waiver, strictly speaking, is an agreement not to pursue a mechanic's lien through a certain period of time. What that may mean is that a party has given up its rights for just this one 'remedy'. This is the kind of language that accomplishes that: "Upon the receipt of X dollars, the undersigned waives and relinquishes any lien which against certain property and the improvements thereon the undersigned has for all labor, material, machinery, services furnished

through and including June 21, 2013." However, even if you have to give up an ability to file a mechanic's lien, with a true lien waiver your other remedies are preserved. You can still sue in contract, in tort, in *quantum meruit*, for unfair and deceptive trade practices, declaratory judgments and actions seeking various attachments (bank accounts, real estate, reach and apply another job to pay the debt on this one.) Since one can't lien public work in Massachusetts as a matter of law, the lien waivers you might sign on public jobs *strictly limited to this* are meaningless. In those circumstances, your contracting party is almost always looking for a release.

In a release, you are actually agreeing to "sell" the claim to the party paying you, meaning that the claim may no longer exist. Gonzo! Language that sets this up can be as follows: "Upon the receipt of X dollars, the undersigned releases any and all rights, interests and claims (including, but not limited to, all claims arising in contract, tort, *quantum meruit* or otherwise) which the undersigned has for all labor, material, machinery and services furnished through and including June 21, 2013". It is important to understand that since sureties have all of a principal's factual and legal defenses, if you have released the principal on the bond (the general contractor, if you are a subcontractor), you may very well have released its surety, as well.

The problem is that almost all lien waivers are not *only* lien waivers. In varying degrees, a good part of the time, they are also releases. Even if the document only says on its top 'lien waiver', in court the content of a document contains and explains its meaning, not its title. The fact that the document might say 'partial' up top doesn't mean that it is not final, below.

When reading a lien waiver and/or release, be mindful of the fact that you can (and should) take exceptions to it, reserving out and excluding from the document, where applicable, things such as the following: retainage earned but not paid; monies due as to previously-submitted requisitions; work that you performed which is not yet an actual change order; claims that you have as to any condition existing as of the effective date of the release, which, here, would be June 21, 2013. Keep in mind, this can (possibly, must) include 'secret' claims, those claims you don't want to submit early for fear of their interfering with your receipt of requisition monies. In such cases, hard business decisions may have to be made as to what level of information is given as to secret claims. More on lien waivers and releases to be found at www.sauerconstructionlaw.com.

2. Comply with all 'notice' provisions in your contract. For first tier subcontractors and lower, keep in mind that if your contract includes references to the general conditions and supplementary and special conditions of the contract documents as 'contract documents' for your contract, in all likelihood, they are included in your contract as well by the doctrine of 'incorporation by reference'. In other words, you might have to give to the general contractor, the same kind of notice the general contractor would have to give to the owner on a similar claim. Generally speaking, a 'notice' provision requires you to advise your contracting party of a changed or differing site condition or delay before you begin to incur costs or fairly quickly thereafter.

There are three basic ideas underlying the need for notice, at least as per judicial decisions. The first is that you should not have the right to incur costs unilaterally which are not included in

your contract sum without your contracting party's knowing about this. For, if your contracting party knows about this, this might give it the opportunity to observe and measure things such as differing site conditions. Secondly, this might give it an opportunity to suggest other methods of handling the changed condition so that fewer additional costs would be incurred or even no additional costs would be incurred. For example, your contracting party might decide to simply delete this item of work from your contract, if this is possible, particularly where it is likely to be disproportionately expensive or is something that is not correctly designed or is in conflict with other parts of the job. Thirdly, your contracting party may need to give notice to *its* contracting party to protect its rights in a pass-through situation.

Massachusetts is a really tough state on notice. In the majority of circumstances, if you do not comply with notice provisions in your contract, you may lose the extra, even if it is otherwise justified. Now, because I graduated high school and watched all 271 Perry Mason episodes, they tell me I am supposed to tell you to 'do what your contract says.' But, I am an iconoclast. I can't be dictated to just like that. I march to the beat of my *own* drummer! So, I'll express this puppy on my *own* terms: 'do what your contract says.'

There are some very limited exceptions to having to provide notice. They include as follows. (1) This might be excused if you can prove that the giving of notice would be meaningless. In other words, your contracting party has essentially denied your claim before you made it by not recognizing the conditions which lead to it. (2) This might be excused if you can prove that your contracting party waived the giving of notice. A 'waiver' is a relinquishment of a known legal right. In other words, this might occur if you can show that you and your contracting party – especially, your contracting party – agreed that complying with contractual provisions such as this one wouldn't work for your job or for this extra or group of extras, possibly because of the rapid pace of construction. (3) This might be excused if you can prove that your contracting party already knows about the changed condition or delay. Being able to prove such knowledge probably would mean that you should be able to do it through their own documents. (4) This might be excused if the situation in question is an emergency, where work has to be performed immediately to avoid property damage or personal injury. In those circumstances, give the notice as quickly as you can. (5) Where you have a unit price contract or a fixed price contract with some unit price items, you probably don't have to provide notices as to small variations in unit price items because such variations are not really change orders. Large variations may be a different story and might be seen as a changed condition. (6) The changed condition originates with or from your contracting party. (7) The 'custom or usage' as to how change orders and claims are handled for this contract can be demonstrated to be not in accordance with the changes clause with regard to notice.

3. Be familiar with your claims and disputes clauses in your contracts from the get-go.
Someone in your office – whether a project manager or a corporate officer – should be familiar with the claims and disputes clauses in your contracts. Subcontractors, you may often *not* have claims and disputes procedures directly in your subcontracts. That doesn't mean, however, that you are not *subject* to them. In the majority of instances, when your subcontract 'incorporates by reference' the general conditions, special conditions, supplementary general conditions and the general contract, you are subject to what is contained therein. Therefore, such procedures as are in those documents which the general contractor has to follow, may impose on you certain

obligations to act. Most (better) contract documents have *some* procedures and time limits for the submission of claims. Some procedures provide for the submission of notice of a claim within a certain time limit and *then* the further submission of cost data within so many days thereafter. For some contracts, a subcontractor or a general contractor's claim may not be 'finally' decided unless and until someone requests a final decision. Other contracts state that once a final decision has been issued, the subcontractor or general contractor must give notice of appeal in some format within a certain period of time to certain designated people.

Many subcontractors and general contractors, even their lawyers, condense down to *one* activity what is, in reality, *two* activities. Namely, these folks may primarily be concerned with when they must file for mediation, for arbitration or sue in court. Some of these provisions may be set forth in your contract. Others may be contained within the law. For example, in Massachusetts, a party has six years to sue on an unsealed contract, twenty years to sue on a sealed contract. Usually, one has only one year to sue on a payment bond. We could define these types of requirements loosely as 'statutes of limitation'.

The problem becomes that focusing on that activity may cause one not to consider an *intermediate* activity, such as requesting a final decision (when required) or of advising the owner or the architect or engineer of an intention to appeal (when required). These requirements – or notices – are not to be confused with the *first* notices in which you are required to advise *someone* that you have (or may have) a claim.

This may seem like a lot of things to check and keep track of. After the first several contract reviews, however, you'll start to get the hang of it. There's a kind of sequence or rhythm to this a good deal of the time, although not every step will apply to every contract. What notice do I have to give *initially* and when to whom with regard to a claim or change order proposal? Is there a further requirement as to when such a claim must have a *further* submission as to cost data? (In other words, something *other* than just the first notice.) At some point, am I required to file a request for a final decision? After the final decision has been received (or, after the expiration of the period of time someone has to make that final decision), do I have to take exception to that decision and/or indicate to someone that I will appeal? Before suing or filing for mediation or arbitration or litigation, are there any *other* notices or written advices that have to be given to *someone?* I have seen any number of claims be simply lost due to someone's failure to take one of these intermediate steps. Contractors expect – or, at least, *hope* – that the lawyer can clean up their messes. Sometimes – and, as to certain issues - they *can*. But, if there was a preliminary or intermediate step to be taken by the contractor before the lawyer was involved that wasn't taken, fixing this may simply not be possible. One can't pull a rabbit out of a hat unless there is a rabbit *in* the hat.

Reading a contract carefully for these things only *after* something has hit the fan may be like applying suntan lotion when you can feel your skin burning at the beach. It may already be too late to do much good. Therefore, particularly for what is a larger (dollar amount) or complex contract for you, read your contract for these things *before* claims and change order proposals arise. Which, as we all know, they frequently will.

4. Keep accurate and complete daily reports on all of your jobs. You need to do this for a number of reasons. First, you have to *consistently* do this as when you do, the daily reports are business records (in Massachusetts). As such, virtually everything in that report goes into evidence at a trial without further ado, which saves a lot of time and effort and also may prove something incapable of being proved otherwise. Statements and 'facts' contained in the daily report which would not otherwise be admissible – hearsay evidence, for example – can come into evidence under the business records exception. Folks, smaller construction cases (district court) may not come to trial for two or more years. Larger construction cases (superior court) may not come to trial for five or more years. By then, your super may no longer be in the jurisdiction (or still friendly to you). Memories fade, particularly as to finite, specific items (as opposed to general impressions and themes.)

What do you keep track of? Temperature readings several times a day may be helpful. Depending on what they are, you can 'prove' that it was too cold to paint (or not too cold to paint) based on stated temperatures that had to be met in your contract. You can prove that you were entitled to temporary heat (or not) based on what temperature it was and based on the fact that some items – such as the curing of concrete in winter – are going to need higher temperatures. How many people did you have on the job? Who were they? How many hours did they work and roughly what were they doing? What progress – or, *lack* of progress – did you have that day? What materials were delivered to the job? Were there any important visitors or meetings on site? What was said in the meetings or by the visitors? Are you being delayed by the actions or inactions of another contractor or of the owner? Having these things on your form causes the *form itself* to be evidence of the contents in many cases and litigations, which can literally save the day when you have no other acceptable way of proving a necessary point. So, if the super isn't available to you (or friendly to you) for trial, you have his or her records. Some supers like to keep their own logs in books that they may keep themselves. It doesn't do you any good to have such records because, unless keeping such logs is uniform throughout your company, they may not be business records. (The uniformity of the record is key for a kind of document to be a business record.) Also, the logs may disappear, the super claiming that they are his own property.

So many times have I had business owners tell me: 'I can't get my supers to prepare daily reports'. Two ideas suggest themselves. There are a lot of unemployed construction workers out there right now, many of whom would be only too happy to prepare daily reports. And, uh, someone at your business *does* prepare and sign their checks. Why not say if payday is on Friday that the super doesn't get paid unless he turns in an entire week's worth of forms? They call you the boss because you are supposed to be the *boss!*

5. Keep separate records as to differing site conditions, changes and delays. You can track these on your daily reports. But, do this consistently and also separately from contract work. Possibly, you might assign separate cost codes to these items so that someone reading your form can tell which work you did you claim was contract work and which work you did you claim was a differing site condition, change or delay. In other words, it is important to segregate the potential claim or change order from contract work. This should be done as to labor, materials and equipment, keeping, for example, separate hours as to contract work and separate hours for items of work that may become claims or change order proposals.

6. Take copious pictures and videos. A picture isn't worth a thousand words. It may be worth a *million* words. If you hang drywall, pictures of the building not being weather tight might help defeat a delay claim against you for claimed lack of production. Similarly, in delay situations, a mechanical subcontractor can sometimes protect itself against delay claims against it by demonstrating the concurrent progress – or, lack of progress – by other mechanical subcontractors, all of whom are generally working at the same time. If a variety of subcontractors are affected by 'concurrent delay', this may be enough to defeat or at least reduce a delay backcharge. And, other than for the purposes of defending against claims *against* you from your contracting party, the same group of pictures and videos may tend to support your *affirmative* claims against your contracting party. For example, your delay and acceleration claims can be supported by your being able to demonstrate through pictures and videos that a preceding critical path item was not done, either delaying you and/or causing the need for future acceleration.

We are a *visual* generation. To be able to demonstrate something visually – show and tell – may help sell your fact-finder (judge, arbitrator) on your claim or defense. After all, don't a lot of people think that what is on TV is true simply because it is on TV? Make sure that they are dated pictures and videos. Also, make sure that they are 'fair and accurate depictions' of what they purport to show. The language in quotes has to be demonstrated before the pictures go into evidence. Just make sure the pictures show what is there, warts and all. Excessively gilding of the lily by having pictures exaggerate something may prevent their use or more effective use at trial.

7. Confirm key changes in the job by at least an email. Common sense suggests that key changes in scope and price and in job conditions and circumstances should be confirmed, even minimally, by something in writing. I have found, however, that in an alarming number of situations people tend to not do this. Maybe this is because they 'trust' their contracting party. Frankly, this is because they are lazy and/or find doing this to be drudgery. All that I can say is years down the road, your case *will* be tried on the written file it generates. If something you think to be significant happened on the job that is not confirmed by a writing, a fact-finder is likely to conclude that the item was *not* significant. For, if it *was* significant, there would be some written evidence of it. The laws that require certain kinds of transactions to be evidenced by a writing are called 'statutes of fraud'. In other words, not having the writing – such as documents evidencing transfers of real estate – could cause a party to the transaction to be untruthful. People's statements in oral testimony quite simply might be lies or mischaracterizations or exaggerations. Or, their recollections may simply be incorrect or convenient.

You work to make money. Protect the right to collect it by creating written evidence as to key events. Enough said?

CONCLUSION: Other things may be useful to protect and develop claims and change order proposals. There are a lot of articles on our website – www.sauerconstructionlaw.com – providing further information on these topics. The above are some of the principal 'first things'

and basic things a company can do to protect its present and future claims and change order proposals.

*(These materials are intended as general information only, not specific legal advice. When confronted with a legal problem you don't understand, seek the assistance of legal counsel. Construction law is something that most 'general' lawyers don't do a lot of. At Sauer & Sauer, we **only** practice construction law.)*

SEVEN QUICK THINGS ABOUT OUR FIRM:

1. No charge to non-clients for quick answers to *general* Massachusetts construction law questions.

2. We guarantee our billing rate for five years in writing for all new clients through the end of this year who mention this offer at engagement.

3. As trials can be expensive, take a great deal of management time and the result of which is uncertain, we make our best efforts towards seeing whether something short of a trial – such as mediation – might be possible for resolving the matter. If a trial is necessary, we have a lot of experience trying cases.

4. We endeavor to maintain, wherever possible, future business relationships with your contracting party by emphasizing a fair and reasonable approach to disputes, which often helps promote earlier (and cheaper) case resolutions than does 'mean and angry'. And, while you might say now 'I'd never work for that guy again', a lot of experience over the years suggests otherwise. Given the right job, he'd be given another chance, particularly if it was a good job!

5. We try to defer until later in the case the more expensive elements of discovery – i.e. depositions – in order to try less expensive discovery first. We recently obtained a 1.5 million dollar settlement for a subcontractor against a bankrupt general contractor's payment bond surety on three projects without a single deposition ever being taken and without our client's even having to answer interrogatories.

6. Being a smaller firm, our attention is focused *solely* on our clients and their problems, not on feeding the overhead of a fancy office and many partners, associates and support staff. We only have to feed our five dogs, most of which, however, are *quite large!* (If you ever meet The Worm, be respectful and, perhaps, a bit wary. After all, Rotties *can* be difficult! Especially around meal times. For big dogs like this, it is almost *always* around meal times! Or, close enough.)

7. Satellite offices in Boston and Worcester for more convenient meetings.

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