TOP THREE CONSTRUCTION CONTRACT MYTHS

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If you've ever been involved in a lawsuit about the interpretation of a contract, you may have learned the hard way not to sign an important document based on bad information. As a commercial trial lawyer, I am at the worst-case-scenario end of what happens when misinformation leads to arguments. Myths about contracts are all too often the genesis of time-consuming, costly legal battles that could have been avoided. While their full scope is beyond this article, being familiar with these top three troublemakers is a great start.

Myth 1: Written contracts are sacred.

Is your written contract the holy grail of everything within your legal rights? It's not, and at the top of the many reasons why are oral understandings. Verbal agreements are often thought of as not legally binding, but this is not true. Even after you enter into a written agreement, the parties can still agree to modify the contract verbally. That verbal agreement is legally binding, and it overrides the applicable portion of the written contract.

Here's a typical example: you're at an onsite client meeting and a solution to a problem is created on the spot. You and the client (or subcontractor) agree to use a different material than outlined in the contract. At this point, there is no addendum to the written contract, but there is a verbal agreement, and you go forward. The verbal agreement, or oral modification, is now the legally binding agreement.

As counterintuitive as it may sound, I've argued this point for many clients and have won. Verbal agreements can be upheld through witnesses, follow-up email correspondence, and other evidence that substantiate the oral understandings. In a judge's eyes, an oral modification can be legally binding if it includes the essential elements of a contract.

Some attempt to circumvent this issue with contractual language such as, "This

contract may not be modified in writing except signed by both parties." If you think that protects you, you're still out of luck because such provisions are unenforceable. I've litigated against language like that and have won as well. It's simply not upheld in court. You see, the parties can orally agree to eliminate that provision and then orally modify the contract.

In fact, contractual changes cause a host of troubles. Which leads me to:

Myth 2: An integration clause is rock-solid.

The first debunked myth illustrates how contracts are fluid. Integration clauses shake your moving target even more.

An integration clause or provision supposedly merges all prior oral agreements and understandings into the written agreement. But what if the agreement is inconsistent with the parties' intent? A common problem occurs when contract provisions are inconsistent with the actual agreement. When this is the case, the court may ignore the integration clause and enforce what was intended. Therefore, you must be thorough when it comes to integration clauses. Do not be complacent.

Myth 3: We all speak the same language.

What is a Miller Act job? How about a no-lien job? Before you sign your next contract, be 100 percent certain that you know the meaning of the terms. A full comprehension of the contractual language is crucial. Your understanding of a term may not mean the same as the other parties. Differences can occur because of misunderstood industry jargon (also known as terms of art) if two parties have different understandings.

Perhaps the contract says that the building will be built "of wood." Does "of wood" have the same meaning as "with wood"? Does either term indicate that wood is the main structural material when the building will obviously also involve the use of steel and concrete masonry unit (CMUs), or does "with wood" mean wood requiring no steel or CMUs?

What is obvious to you may not be so obvious to others. When it comes to terms of art, don't assume because the other side will be bound by the meaning of that term as you understand it. Run over jargon with a fine comb before you sign. As you've learned, because of terms of art, integration clauses, and written contracts, nothing can be taken for granted when it comes to construction contracts.

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