

Navigating Construction Disputes

The inevitable construction disputes can be navigated with a combination of knowledge, preparation, and outside guidance.

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Not all construction projects go smoothly. Conflicts arise, tensions grow, and sometimes dialogue breaks down.

Disputes will arise and should be treated as an expectation of the construction process. A simple window replacement can lead to a contentious debate with the installation contractor. Construction disputes could be brought on by scope-of-work changes during construction, unforeseen conditions being discovered, errors in plans or specifications, or disagreements over the actual cost of work versus the amount owed as part of the bid.

No construction project is perfect nor is any team member. The key is to stay calm, accept this as part of the

process, and recognize that it is in everyone's best interest to move forward as quickly and as painlessly as possible.

The Settlement Process and Its Cost

Disputes are settled through negotiation and may ultimately involve a change order requiring approval by the school board. One of the most important aspects of settling disputes is preparing the board to review the dispute. That begins with apprising the superintendent of an impending dispute that may involve additional costs. The superintendent or school business official can then inform the school board of the "potential" for a cost overrun.

Most boards react more positively to construction disputes if they are prepared for them. Regular construction updates are critical so that the board members are kept informed—especially about potential disputes.

The amount of money involved in a construction dispute varies widely depending on the specifics. It's important for school districts to budget contingency money to resolve potential disputes, as the district can be financially responsible for resolving them.

The most important consideration for any board is having enough money to fully fund and close the project. All budget discussions with the school board should include an explanation of the contingency fund and its usage and assurance that any monetary settlement will not cause a loss of resources. Having a solid financial plan allows the superintendent to assure the board of timely project completion and educational outcomes despite claims.

Litigation and Resolution

Litigation should be considered when all other avenues for resolution have been exhausted and it's in the best interest of the school district to pursue legal action. However, litigation can be time-consuming and costly, so it's often best to try to settle disputes out of court if possible. Reputable contractors understand the risk and will want to reach an amicable settlement. Litigating disputes is not always a means to enhance profit.

Claims or disputes that are more than \$100,000 need the involvement of legal counsel. An attorney should review the information compiled by the consultants to ensure a fair interpretation and advise a settlement that will avoid litigation if possible.

Contractors are more likely to settle earlier in the process rather than at the end of the project when they know their profit margin at completion and are more likely to “fight” for more money. Time is of the essence with settlements.

Districts must rely on the expertise of the consultants hired to review and process claims. The architect is the first line of defense. The architect should provide the “facts” surrounding the circumstances of the claim that are supported by the contract documents.

The contract documents and construction manager's scope of work should clearly state what the contractor owes. An architect or construction manager who appears to vacillate or to give a “fuzzy” interpretation should be challenged immediately. Make sure that the interpretation and the facts align.

Sometimes, claims can be outright dismissed as lacking merit. Most claims fall into gray areas that will lead to a settlement so the project can be closed. Settling a claim should not be considered a loss so much as the district's return to the prime objective of education.



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Varieties and Examples of Construction Disputes

Construction disputes can take many forms, such as unresolved change orders, unresolved extras claims, delay claims, failure to complete on time, claims of defects, and warranty claims. For a better understanding, let's explore some of these.

Change orders. A change order is a formal amendment to the original construction contract. It represents a change to the original agreement that could affect the cost, schedule, or other contract terms.

Example: Change orders can arise for various reasons, such as owner-added scope, unforeseen conditions, or errors in plans or specifications.

Unresolved extras claim. An unresolved extras claim is a request for additional compensation for work or materials that were not included in the original contract but have since been provided. The matter is most likely initiated through a claim and was unresolved by a change order. These types of claims can involve the bond company, insurance company, owner, architect, contractor, or construction manager. Attorneys may also need to be involved in extras claims that will approach 10% of the contract values.

Example: A contractor may dispute but be required to complete a project for the contract price without being paid additional money for excavation work needed to address poor soil quality.

Errors and omissions claims. Change orders typically arise when a contractor needs additional resources—time or money—to finish the project. They can also occur because of changes in the project’s scope, unexpected conditions discovered during construction, or discrepancies or missing information in the plans or specifications.

Example: Marker boards were not included in the contract documents for the classrooms in the new addition. Who pays for them? The school district is responsible for purchasing any enhancement that would have been required to complete the project. The contractor could be entitled to both additional costs and time. The district may claim that the marker boards are now a premium and negotiate a “donation” from the consultant.

Delay claims. Delay claims typically arise from unforeseen circumstances or administrative delays, such as weather, labor issues, or late deliveries, leading to increased costs for the contractor.

Example: Hidden conditions caused structural analysis or redesign. The contractor could be entitled to both additional cost and time.

Weather-related claims. Adverse weather conditions like heavy rain, snow, or extreme heat can delay construction projects. Proper planning can mitigate such situations, but unpredictable weather events can still cause unexpected delays and increased costs.

Example: The National Oceanic and Atmospheric Administration documented rain in excess of local averages. The contractor could be entitled to both additional costs and time. If the claim is denied, the district could demand recovery of the lost time.

Industry or economic force majeure. Force majeure refers to unforeseeable circumstances that prevent a party from fulfilling a contract. In construction, this could include industry strikes, drastic economic changes, or global events like a pandemic. These are generally beyond the control of any parties involved, and navigating such disputes requires expert legal and financial advice. The event must be sudden and so catastrophic that the contractor cannot overcome it.

Example: Materials source factory is destroyed by a tornado or other acts or events affecting supply chains. The contractor could be entitled to both additional costs and time.

Owner-added extra scope. The project’s scope may be modestly expanded by the owner once construction has begun, adding minor new features or

making minor changes to the construction project. Although this can lead to improved results, it can also cause delays and cost overruns, potentially leading to disputes.

Example: The district decides to include the gym and cafeteria in a classroom painting project. This is a minor scope change that is germane to the base scope but does not significantly affect the overall cost of the project. The contractor could be entitled to both additional costs and time.

How to Prevent Disputes

Preventing construction disputes involves thorough planning, clear communication, and diligent contract management. It’s crucial to have accurate and detailed construction contracts, to maintain good relationships with all parties involved, and to manage changes effectively. It’s also important to hire strong consultants and have a responsible gatekeeper to review, approve, and report changes.

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School business officials should challenge their consultants with questions such as: Do we need to perform destructive investigation? What allowances do you recommend based on the design and age of the building? Do you need additional time for field investigation? In your experience, what can go wrong?

Consultants and attorneys are paid professionals. You won’t offend them by probing their level of expertise. A team approach to solving disputes is best.

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