Effective Negotiation of Construction Claims

Claims and disputes in the construction industry are commonplace and often result in protracted and contentious litigation. The reality, however, is that most construction lawsuits settle before trial. Regrettably, settlement usually comes after much pain, suffering and expense. A prolonged and expensive legal battle is not likely to change the outcome; it will merely delay it. So, when a significant construction claim cannot be avoided, consider negotiating an acceptable settlement of the dispute before litigation ensues. If the parties can successfully negotiate a settlement of the dispute, then the parties remain in control of the result. How you approach the negotiation of a construction claim will determine your effectiveness in achieving a good or acceptable result. In developing your approach, consider the following points.

Develop your claim position early. Once you decide to attempt to negotiate a settlement, your foremost consideration should be the preparation and presentation of the factual and legal support for the claim. While the "art" of negotiation will always be subject to the individual style and experience of the participants and the primary negotiators, the claim must deal in facts, not generalities. The facts underlying the claim should be nonnegotiable. If the parties can come to an agreement on the existence or absence of the relevant and operative facts, their disputed viewpoints will be more quickly and easily reconciled. Attempting to resolve a claim without taking the time to establish and support the underlying facts will at best delay the settlement process and at worst completely derail the settlement negotiations.

Prepare a persuasive claim document. Preparing a claim document is perhaps the best way to ensure that you have the required familiarity with your claim position and is a good starting point and reference for settlement discussions. A well-prepared claim document suggests to your opponent that you have done your homework and that you are serious about the pursuit of your claim. I suggest that you read the article: Basic Components of a Well-Prepared Claim Document. Send me an email, and I will send you a copy. If the settlement negotiations are unsuccessful, the claim document gives you a starting point, or blueprint, for pursuing a more formal dispute resolution process such as litigation or arbitration. Typically, a claim document consists of: a factual narrative referencing significant project correspondence as well as relevant contract specifications; a discussion of the applicable contract provisions, legal principles and legal theories that support the claim; a cost breakdown detailing and summarizing the specific damages you are seeking to recover; and demonstrative evidence such as charts, graphs, drawings and photographs. Including expert reports as part of the claim document can also be helpful, persuasive and effective in conveying your position.

Understand your opponent’s position. While it is essential that a negotiating party be intimately familiar with its own case, it is equally important to anticipate the arguments that you are likely to hear from your opponent. Whether you or your attorney does the actual negotiating, the negotiator must be well-versed in the facts and anticipated arguments. Your negotiation also has a greater chance
for success if you appreciate the motivations, goals, hidden
agendas, prejudices and fears of your opponent. An appreciation for
what is truly important to your opponent is the starting point for the
development of creative solutions to the dispute.

Test the strengths and weaknesses of your position and set
your goals. After you have invested the time necessary to establish
the factual basis for your claim position, test the strengths and
weaknesses of your position. Ask a third-party in your organization,
or your construction attorney, to give you an independent evaluation
of the strengths and weaknesses of your position. Prior to your
negotiations, determine a realistic settlement goal in light of the
strengths and weaknesses of your position. In addition to
considering the legal and factual realities of the dispute, make
certain that your goal accounts for the many intangibles which may
influence your decision to settle, including the potential
consequences of a failure to settle. Such consequences include
delay in recouping claim losses, fees and expenses of litigation or
arbitration, lost project management time, damaged business
relationships, the danger that a successful money judgment may not
be collectible, and the risk that a judge, jury, arbitrator or arbitration
panel may simply make the “wrong” decision. During this early stage
in the process, it is critically important to develop and understand
your BATNA—your Best Alternative To a Negotiated Agreement.
Developing and understanding your BATNA will help you determine
the point at which the risk of taking a claim all the way through trial
outweighs any concessions you are willing to make in order to settle
the dispute early. I suggest that you read the article: *Don’t Roll the Dice! Use Decision Tree Analysis When Calculating Your BATNA*.
Send me an email, and I will send you a copy. After developing your
BATNA and arriving at a realistic settlement goal, establish a
negotiation strategy for reaching that goal.

Evaluate your opponent’s strengths. Although your approach to
settlement negotiations should convey a sense of strength and
confidence, it is always unwise to underestimate or ignore your
opponent’s strengths. Similarly, you should never underestimate the
tenacity in which your opponent may maintain its settlement
position. Your negotiation strategy should include reasonable
responses, without apology, to each of your opponent’s strengths.
Where you must acknowledge the correctness of some aspect of
your opponent’s argument, look for the opportunity to limit the impact
of any such admission. As you evaluate the factual and legal
strengths of your opponent, consider also the “intangibles” which
should influence your opponent’s approach to the settlement
negotiations. Be prepared to attack your opponent’s strengths and
point out any flaws in legal arguments or inaccuracies in your
opponent’s recitation of the facts. If your opponent has a strong
legal position, then emphasize the fairness and equity of your factual
position.

Bargain in good faith. The object of settlement negotiations is to
arrive at a solution or resolution of the dispute that is satisfactory to
both parties. An environment of hostility and mistrust will destroy a
good negotiator’s chances of effectively resolving the dispute and
will leave your opponent with something far short of a mind that is
open to the prospect of an amicable settlement. If one or both
parties concede nothing, but instead doggedly insist upon every
detail of their position, then there is no room for settlement. Not only
must you be willing to negotiate in good faith, that commitment must
be evident to your opponent. Without such an understanding,
negotiations are pointless. This does not mean that you should not present your case in the best possible light. When negotiating in good faith, you should emphasize your strong points while recognizing your weaknesses and remaining flexible in your settlement position. Taking this approach, together with an air of self-confidence, should allow you to effectively negotiate a mutually desirable settlement.

**Consider the timing of negotiations.** A construction dispute which is settled early will extract less in pain, suffering, expense and legal fees from its participants. Although early settlement negotiations can be beneficial for all parties, it is frequently difficult to successfully reach a negotiated settlement before parties have been reminded of the costly consequences of not settling a construction dispute. Pre-litigation discovery can be slow, time-consuming and expensive. Often, parties and their attorneys are not sufficiently versed in the facts or the law at an early stage, in order to make meaningful settlement negotiations possible. Don’t procrastinate. Make an early investment in the time and resources necessary to evaluate the strengths and weaknesses of your position. Then look for an early opportunity to engage your opponent in meaningful settlement negotiations.

**Find someone willing to negotiate on the merits.** Often construction disputes linger and fester because the responsible individuals are too personally involved in the dispute or emotionally invested in the outcome. To advance the negotiation, you should attempt to separate the people from the problem and focus everyone’s efforts and attention on objectively evaluating the relative merits of the claim and the merits of the parties’ respective positions. If, however, you find yourself negotiating with someone whose actions are driven by their feelings or controlled by their emotions, instead of being driven by the strengths and weaknesses of their position, it may be time to look for another representative of the opposing party with whom you can truly negotiate. Within every organization, there should be some responsible member of the organization’s leadership who is willing and able to say “yes” to a properly supported settlement position.

**Choose a seasoned and skillful negotiator.** The spokesperson for your position must bring to the negotiation many of the skills of successful negotiators. Those skills include a willingness to become immersed in the legal and factual basis of your claim position; knowledge of the contracts involved and the correct legal interpretation of those contracts; an ability to succinctly and accurately convey the strengths of your claim position, without apologizing for its weaknesses; an ability to read the reactions of the opposing party; an ability to contain and manage conflict and avoid escalating the dispute; an appreciation for when to lay your cards on the table; an unwavering patience and commitment to the negotiation process; a creative approach to problem solving and finding solutions; and the courage to agree. If you do not possess the necessary negotiating skills, then find someone who does.

© Smith, Currie & Hancock LLP

Gene invites you to connect with him on LinkedIn at: http://www.linkedin.com/in/constructionlawgeneheady

Eugene (“Gene”) J. Heady is a Partner in Smith, Currie & Hancock’s Atlanta office. He is rated AV® Preeminent™ by Martindale-Hubbell. Smith, Currie & Hancock is a national law firm focusing on
construction law, government contracts, environmental law, and commercial litigation. Gene is also a mediator and arbitrator and is a member of the American Arbitration Association’s national Panel of Construction Arbitrators. Gene is a regular contributor to the Construction Connection Newsletter. He has over 30 years of experience as a problem solver in the construction industry. Following a successful career in the construction business, Gene began practicing law in 1996. He represents and assists owners, general contractors, builders, subcontractors, suppliers, architects, engineers, designers, sureties, real estate developers, and manufacturers in avoiding and resolving disputes related to construction projects throughout the continental United States, Alaska and the Caribbean. His work involves private, local, state and federal government contracts and commercial, industrial and institutional construction projects. Gene literally grew up in the construction industry; his father was a successful electrical contractor. Unlike most construction attorneys, Gene has hands-on experience. Gene has worked with the tools, at the drafting table and at the helm of a construction company. In 1981, Gene earned a B.S. degree in Engineering from the University of Hartford, majoring in Electrical Contracting. Before law school, he worked in the electrical construction business as a project engineer, project manager, and construction business owner. Gene is a prolific writer and has published numerous works related to the construction industry and alternative dispute resolution. He is also a frequent lecturer on construction law topics.

Contact Gene at gjheady@smithcurrie.com or directly at 404-582-8055.