BUILDING THE IMPENETRABLE BRICK WALL OF PROJECT DOCUMENTATION

By Eugene J. Heady, © Smith, Currie & Hancock LLP

"Little pig, little pig, let me come in. No, no, not by the hair of my chinny chinny. Then I'll huff, and I'll puff, and I'll blow your house in."

Joseph Jacobs, English Fairy Tales, Oxford University (1890)

Early in my career as a project manager, years before becoming a lawyer, my manager called me into his office and assigned me to a large new project. He explained that the project owner had a reputation for being very litigious, and he needed me to aggressively manage the project to avoid costly litigation. As he explained my assignment, the conversation was reminiscent of The Story of the Three Little Pigs. Recall that the big bad wolf was able to blow down the first two little pigs' houses of straw and wood but was unable to destroy the third little pig's house made of bricks.

My manager sat me down and explained, "For the next three years, your job is to build the impenetrable brick wall."

"How do I build the impenetrable brick wall?" I asked. The answer was obvious.

"Just like the third little pig, you build it one brick at a time," he replied.

"Why a brick wall?" I asked.

"So when that litigious wolf of an owner comes huffing and puffing, threatening to blow our house down, he moves on to the job trailer next door and leaves us alone," he explained. "When everything comes crashing down on this project—as it surely will—I want our 'house' to remain intact and standing," he continued.

Of course, what my manager wanted was an impenetrable brick wall of project documentation to manage and limit risks; to avoid disputes, if possible; and, to successfully prosecute or defend claims, if and when necessary. He was focused on properly organizing and maintaining the project "paperwork" and timely responding to any issues that may arise over the course of the project.

While organizing and maintaining the project paperwork can sometimes be burdensome, once you have been awarded a contract on a construction project, it is essential that you maintain a complete, accurate and organized project record. Consistent, complete and accurate project documentation should not be reserved for "problem" jobs. Carefully, consistently and meticulously organizing and maintaining a complete and accurate project record is the key to managing risks, avoiding disputes, and successfully asserting or defending against claims. If you fail to maintain adequate documentation from the start to finish of the project, the circumstances giving rise to a dispute often will go unrecorded and perhaps even unnoticed.

At the inception of any new project, you should evaluate the adequacy of the project's documentation system. If your company already has an established "standard" project documentation system, it should be reevaluated in light of the specific requirements and needs of each project. When
reevaluating your company’s project documentation system, you should do the following:

- Identify and review every document that will be part of the contract.
- Review the contract to determine if modifications to your “standard” project documentation system are required.
- Determine if the contract imposes specific cost accounting requirements.
- Determine if the contract defines recoverable direct or indirect costs and make sure that you have a system in place to accurately track such costs.
- Identify all notice and claim deadlines.
- Determine whether the contract contains any special notice requirements.
- Identify any special procedures or cost limitations imposed on change order work.
- Determine whether the contract contains any unusual risk-shifting clauses that your project documentation system should consider.
- Determine whether you need the input of legal counsel on documentation practices in light of any contract risk-shifting provisions.

Based on the reevaluation of your company’s project documentation system, your documentation system can then be adapted to the particular project’s requirements. Standard forms and procedures can be adopted and modified as necessary. You should prepare notice checklists and standard form letters, specifically tailored for use on the new project.

In particular, it is essential to identify all notice requirements using a checklist approach. Your project-specific notice checklist should list and address each contract provision containing any notice requirement. The checklist should identify the specific contract clause containing the notice requirement, the subject matter of the required notice, the time requirements, the form of notice including whether the notice must be in writing, and the stated consequences for failing to give notice. Company management should not simply draft the notice checklist and then hand it to the project staff. Instead, the notice checklist should be prepared by those project staff members responsible for giving timely notice. Having the responsible project staff prepare the notice checklist will force the project staff to review carefully the contract documents so that the project staff become intimately familiar with the critical contractual notice requirements. Once completed, it is also a good idea to keep copies of the notice checklist in convenient locations such as on your computer’s electronic desktop and at the front of the project manual.

The system and procedures to be followed for project documentation must be in writing. While the length and level of detail of the written procedures will vary with the size and complexity of the project, it is important that the required procedures be clear and specific. Once your standard and project-specific documentation system is in place, it must be followed rigorously. Avoid selective enforcement of the written procedures and do not allow your project staff to use their own personal recordkeeping and filing systems. Review and discuss the written procedures with all levels of personnel who will be responsible for implementation to ensure that the procedures are understood, used, and enforced. Throughout the life of the project, continue to emphasize the critical importance of complete and accurate project documentation. Periodically audit the project record to confirm that your project staff are implementing and rigorously following the project-specific documentation system.

Your standard procedures and project-specific documentation system should require that certain basic information be maintained and organized in separate files, including the following:

- The contract, including all its component contract documents, and all change orders or amendments;
- A bid or original set of project plans and specifications;
- All documents, worksheets, and forms associated with the original bid estimate and subsequent revisions;
- Subcontractor, material supplier, equipment supplier, and vendor files, including bids, quotes, subcontracts, or
purchase orders, together with changes and correspondence;

- Project schedules, including the original ("baseline") schedule, progress reports, all schedule updates, and near-term, look-ahead schedules;
- Insurance requirements and information related to your contract; and
- Insurance requirements and information related to all subcontracts and supplier or vendor purchase orders.

Your standard procedures and project-specific documentation system should also address the creation, maintenance, and orientation of certain specific types of documentation, including correspondence, email, meeting notes, meeting minutes, job-site logs or daily reports, standard forms, status logs, project photographs and project videotapes. Your standard procedures and project-specific documentation system must include the means for providing, eliciting, recording, and tracking the massive amount of project data so that it can be used during the course of the job and efficiently retrieved if later needed to assert or defend a claim.

By carefully and meticulously documenting your work on the project, “one brick at a time,” you will help to effectively prepare for and successfully deal with disputes when they cannot be avoided. For an in-depth discussion of project documentation and the critical importance of maintaining a complete and accurate project record, I suggest that you refer to the construction law textbook, which publisher Wiley touts as “the bestselling guide to the laws that govern construction,” entitled Smith, Currie & Hancock’s Common Sense Construction Law – A Practical Guide for the Construction Professional.

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