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NUCA Construction Law Committee

By Tom Olson

As the chairman of the Construction Law Committee, I have worked in the construction industry for more than 30 years. The biggest problem I now see for the industry is under-designed projects. That is the new normal. The challenge for both contractors and suppliers is how to respond.

Our mission on the Construction Law Committee is to educate members on what that response should be. Specifically, we work together to devise best practices to minimize risk and maximize profit. We accomplish this by examining real world under-design problems. That is critical: members get advice on their own pending problems. In doing so, committee members are then able to learn:

- What their substantive rights are for additional time and compensation;
- How they can and must exercise these rights to satisfy the contract's procedural requirements; and
- How and when they should communicate this to cooperatively and equitably resolve the under-design issues on the jobsite, rather than doing nothing or otherwise arbitrating or litigating.

The Construction Law Committee meets twice a year. At each meeting, I provide a legal and/or technical written analysis that addresses these issues on a macro level (e.g. DOT specifications flowchart) or a micro level (e.g. differing site conditions, contractor's site investigation obligations).

One important example of what we have addressed is "What to do when a contractor encounters differing site conditions." Insofar as engineers regularly fail to properly investigate subgrade conditions, it is commonplace that contractors encounter subgrade conditions different than what the soil borings indicate. This causes both extra time and costs. Contractors, however, often have difficulty obtaining a change order. There are two principal reasons for this.



Tom Olson and the Construction Law Committee meet twice per year, here during the 2018 NUCA Convention in San Antonio.

- The first one is substantive: contracts typically contain disclaimers which maintain that the contractor cannot rely upon the soil borings. I have taught contractors that they still have valid differing site condition claims notwithstanding disclaimers. I have also taught contractors how to quantify the impact in time and dollars of differing site condition claims.
- The second one is procedural: all contracts contain procedural requirements that must be met or the contractor forfeits its right to receive extra time and money for differing site condition claims. Members now know what they must do when they encounter differing site conditions. This begins with stopping work and immediately providing written notice to the engineer. We have had many conversations on this: the last thing contractors want to do is stop working. Nobody knows better than contractors that "time is money." What I have taught contractors, however, is that the cost of not stopping normally always results in the contractor either receiving no change order, some greatly reduced amount, or otherwise paying attorneys like me a bunch of money to

fight it out in court. The cost of that is a lot more than what is costs to stop work as required under every construction contract so the engineer can perform its required investigation. And besides, as I have taught, many if not most contracts provide the contractor the right to be reimbursed for its idle resources.

I am proud to say that we have already heard of contractor success stories using what they have learned!

Our mission will remain the same as we move forward. The only thing we hope will change is that we get more members to attend. Insofar as all members have a vested interest in learning how to better minimize risk and maximize profit, attendance at the Construction Law Committee meetings provides a value opportunity. It also provides members the opportunity to have the committee address their own pending problems. We believe the education we provide in our committee and others is one of the most valuable benefits of being a NUCA member.

Tom Olson is the founding partner of Olson Construction Law, based in St. Paul, Minnesota.