

CONSTRUCTION SUPERCONFERENCE

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ARTBA American Road & Transportation Builders Association

MANAGING THE DISPUTE RESOLUTION PROCESS

How do experienced in-house counsel manage their clients through the dispute resolution process in a complex, protracted construction dispute?

- Best practices.
- How can outside counsel help?

THE HYPOTHETICAL CASE

- Potential exposure in excess of \$50M.
- Issues: alleged product failure/construction defect and delay/disruption/change of scope.
- Contract-based, but plaintiff also alleges extra-contractual claims for negligence and fraudulent misrepresentation.
- You anticipate significant document discovery – roughly 1 million documents.

SELECTION OF COUNSEL

- To RFP or not to RFP?
- Propose a template or leave form and content of proposals to bidding firms?
 - Is an apples-to-apples comparison possible without a template?
- What are you looking for?
 - Case-specific thoughts on proposed strategy?
 - Is marketing information about firm experience and personnel helpful at this point?
- How important is geography?
- How important is size of firm?
- Beauty contest?
 - What impresses and what doesn't?

COST CONTROL AT THE PROPOSAL STAGE

- Part of the selection process, or topic #1 post-selection?
- Do you always want an alternative fee proposal, or only when you ask for it?
- How much do you trust a proposal-stage budget?
- Fixed-fee for investigation followed by a budget –
 - Will you have lost your bargaining power by the time a budget is prepared because you are locked-in to counsel?

COST CONTROL DURING THE CASE

- What level of detail is useful, and what is overkill?
 - What don't you believe?
- How do you use the budget internally?
- Frequency of updates?
- Is access to Firm's WIP report helpful?
- Document management and pricing.

Alternative Dispute Resolution

- Arbitrate or Litigate?
- Mediation
 - Early – if so, what are effective practices
 - Involvement of experts
 - Analysis of Best Case and Worst Case
 - Preparation of Client

REPORTING TOOLS: SEARCHING FOR GOLDDILOCKS

- The Tool Kit:
 - Legal Project Management
 - LPM draws on many of the processes and tools that are used to deliver more traditional types of projects, but modified so that they are suitable for the delivery of legal matters.

THE TOOL KIT

- Win Strategy:
 - The shorter the better.

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WIN STRATEGY LITIGATION

- I. OVERALL STRATEGY
 - A. Define victory
 - B. Substance
 - C. Procedure
- II. KEY THEMES
- III. KEY CONTRACT PROVISIONS
- IV. MOTION PRACTICE
 - A. Procedural Issues
 - B. Substantive Issues
- V. KEY FACT DEVELOPMENT
- VI. DISCOVERY STRATEGY
 - A. Manage/Limit Breadth of Discovery
 - B. Potential Disputes, Protective Orders or Motions to Compel
 - C. Strategy to Develop Key Facts
- VII. KEY EXPERT ISSUES
- VIII. DAMAGES

THE TOOL KIT

- Early case analysis:
 - Goals:
 - Identify threshold issues:
 - Insurance/indemnity possibilities
 - Procedural issues/defenses
 - Define success.
 - Use of Expert early to identify strengths and weaknesses.
 - Scope of Analysis:
 - Review key documents?
 - Interview key project personnel?
 - Preliminary consultation with necessary expert(s)?
 - Deliverable:
 - Detailed claim analysis with supporting documents for use as backbone of preparation throughout all litigation phases.

THE TOOL KIT

- **“One page” claim analysis:**

US/THEM ANALYSIS

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Claim Description	Claim Amount	Likely Recovery		Notes/ Comments
		High	Low	
Change Orders				
Change Orders				
Change Orders				
Pipeline re-route				
Additional tie-in welds				
Additional environmental crew				
Additional rock ditch work				
Premium labor due to acceleration				
Inefficiency due to prolonged overtime				
Additional overhead and supervision				
Additional tie-in costs				
Earthen slip repair				
Balance of 47 Change Orders				
Total				

Likely Recovery		Notes/ Comments
High	Low	



THE TOOL KIT

■ Preliminary Summary and Status

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US v. THEM

— *Preliminary Summary and Status* —

State court lawsuit for \$50M plus other unspecified amounts & punitive damages.

Background:

- US sold THEM equipment and other construction services for \$15M. US issued separate warranty to THEM for equipment performance.
- LoL caps LDs at 10% of contract amount; Backstop purchase price LoL of \$15M.
- THEM alleges (i) product failure/construction defects; (ii) late equipment and (iii) other backcharges.

Claims:

- THEM's claims include (i) breach of contract; (ii) breach of warranty; (iii) negligence; and (iv) fraudulent misrepresentation.
- US asserts a counterclaim to recover for delay and disruption (\$5M) and unpaid change orders (\$4M).

Preliminary Legal Comments:

- US contends (i) equipment and services comply with specifications; (ii) warranty satisfied; (iii) THEM delayed site access and was not ready to receive the equipment at schedule delivery date; and (iv) no fraud or other attempt to deceive.
- Contract caps total liability at \$15M and THEM cannot recover more than \$1.5M for LDs.
- Economic Loss bars negligence claim.

Next Steps:

- Evaluate possible motion to dismiss.
- Review key project personnel and key documents.

THE TOOL KIT

- Task List

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US v. THEM TASK LIST

#	Category	Action	Lead	Others	When Due	When Completed	Status/Comments
1	Case Mgmt	Weekly conference	ABG	SWG			9 am each Monday
2	Case Mgmt	Update task list	TLM	RWG			Weekly
3	Court Deadline	Their Brief in opposition to MTD	RAK	TLM	12/19/16		
4	Court Deadline	Our Reply to MTD	AKM	TLM	12/29/16		
5	Court Deadline	Joint Discovery Plan	RAK	ABG	1/5/17		
6	Fact Development	Completion of reconciliation efforts tracked by spreadsheet sent by J. Smith on 9/18/16	RWG		12/10/16		
7	Order of Proof	Order of Proof - Establish Outline	TLM				
8	Client documents	Collection of hard drives	TLM		12/14/16		List of custodian targets developed
8	Client documents	Cull Documents	AKM		1/14/16		Search terms and/or application

THE TOOL KIT

- Cast of Characters/
a/k/a People Chart

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US v. THEM
CAST OF CHARACTERS

US	
John Doe	Environmental Scientist. Often dealt with DEP regarding environmental penalties and E&S controls. Relayed these issues to personnel, and often directed us to address issues. Often communicated with us and land teams re land restrictions. Works under K. Doe
John Doe	Engineer Along with Doe, responsible for approval/review of engineering drawings
John Doe	Vice President - Eastern Region Exec who was charge of directing construction
John Doe	Land Acquisition Responsible for acquisition; negotiated with landowners and handled landowner relationships
John Doe	Environmental inspector; Submitted daily inspection reports
THEM	
Jane Doe	Environmental inspector; Submitted daily inspection reports
Jane Doe	Vice President of Engineering Engineering exec who oversaw the Project. During the early stages, he frequently provided project specs, negotiated costs and contract terms.
Jane Doe	Chief Inspector Inspector responsible for signing off on field reports

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