



HOW CONTRACTORS HELP THEIR ATTORNEYS WIN THEIR CASE

The first question every attorney should ask a contractor who is contemplating filing a lawsuit is: "Is there no way to settle this?" Most of the time there is. But on occasion, there is a situation where the parties are so far apart, filing suit and going to trial is inevitable. While assistance of legal counsel is almost always required, contractors can do much to achieve a successful resolution to the dispute. This was especially true in a recent lawsuit involving a general contractor and a large school district.

In 2006, Mepco Services, Inc., was hired by Saddleback Valley Unified School District to renovate a school intended for children with developmental disabilities. The contract was for \$1.4 million. The work was to be done within the 3-month summer school break. Almost immediately after the project began, the District's architect began issuing major bulletins which revised the plans extensively. The bulletins significantly expanded the original scope of work and inevitably delayed construction. In the end, nearly 50 change orders were issued. The District refused to pay for any of them. In summary, a 3-month project evolved into a 9-month nightmare.

In June of 2007, despite multiple meetings to try to settle the matter, Mepco had no choice but to file suit to collect the approximate \$681,000 sum owed to it by the District for its final progress payment, retention, change order work, and delay claim. In response, the District filed a cross-complaint against Mepco and its performance bond surety

claiming that Mepco owed it \$1.2 million. In short, both parties claimed the other breached the contract and was the sole cause of delay. The parties were so far apart in their positions that trial was inevitable. In the end, Mepco won everything, and a \$1.4 million judgment



was rendered against the District.

At trial, Mepco argued it was entitled to recover for its change order work based on severe defects in the plans and specifications provided by the District

for the project. It relied on California law which holds that a public works contractor who is misled by incorrect plans and specifications issued by a public agency (and therefore submits a bid which is lower than he otherwise would have), may recover for extra work or expenses necessitated by the conditions being other than what was represented in the initial plans and specifications. *Souza & McCue Constr. Co. v. Superior Court of San Benito County* (1962) 57 Cal. 2d 508, 511: "This rule is mainly based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness."

Mepco contributed to the overwhelming successful outcome of its trial in three ways: its documents, its witnesses, and its presentation of the two.

THE PARTY WITH THE MOST DOCUMENTS WINS

Mepco helped its legal team tremendously by the documents it kept during the course of the project. Items such as Mepco's Daily Log, e-mails, letters, and written change orders accomplished two goals: they served as critical evidence and they increased Mepco's credibility in the eyes of the jury.

For example, though the District claimed that Mepco had delayed completion, and went so far as to hire an expert to present an intricate "delay analysis" at trial, it could not, and did not, present one single solitary note or letter sent to Mepco prior to litigation which gave notice that Mepco was

ABOUT the AUTHOR

Anna Carno is the managing partner with Laguna Hills, California-based law firm, Carno & Carlton, LLP. Her practice focuses on construction contracts and disputes. If you have any questions or require legal assistance, please contact Anna at 949.540.0320 or acarno@CarnoCarltonLaw.com. This article is only provided as general background information. The article is not intended to be used as a basis for any particular course of action or as a substitute for legal advice.

delaying the project. The jury had to ask itself: if Mepco was not performing timely, why didn't the District "write them up"? Mepco, on the other hand, presented multiple e-mails it sent to the District advising it that its work was being impeded for one reason or another. Mepco's version of the story was clearly more credible because it had supportive documents.

WHO CAN BEST TELL THE STORY?

The common expression: "It's not what you say, but how you say it" takes on its own meaning in the courtroom. By the time trial is underway, though most litigators will know the facts of the case almost as well as their client, the attorney cannot "tell the story." Rather, the contractor attempting to collect money has to be the one to explain why he/she is entitled to the damages they seek. Contractors are instrumental in helping their attorneys decide which company employees should serve as witnesses at trial.

Contractors often assume that their story is best told by the company executives or management because they are the ones in charge of handling the company's finances and thus the assumption is that those individuals are best suited to discuss how much is owed and how the sum was calculated. The deficiency in that analysis is that at trial, evidence of what is owed never gets presented until there is evidence of why the sums are owed. Often, the best witnesses (especially in a collection matter) are those individuals who were actually on the job working in the field and can explain what work was done.

TAKE A PICTURE, WIN THE CASE

The third, and oftentimes most powerful, way a contractor can help its attorney win the case is to have pictures available to show the jury what happened on the jobsite. A digital camera should be standard equipment provided to all superintendents on the project. During the Mepco trial, Mepco's attorneys used a simple Power Point presentation to display one to two photographs for each change order request. Thus, when a witness was describing the work performed for each change order, the jury was able to see a few pictures taken of the actual work. Using this simple process even shortened the length of the trial because less oral testimony was needed to explain

the work performed. Consequently, the photographs decreased the contractor's expenses (due to a shortened trial) and increased its credibility. They also kept the jury's interest during what is normally a very boring process. Having been provided both a visual aid and an oral explanation, it was easy for the jurors to understand Mepco's case and ultimately rule in its favor.

In summary, an attorney can only work with the facts given by the client. In the event that a dispute results in litigation, the contractor can help achieve a successful outcome if the attorney is provided with some basic necessities: documents to support its claim, photographs to help tell the story, and witnesses who can explain the issues to the jury in a simple matter. ■



The poster features a dark blue background with a pattern of white stars of various sizes. A large red star in the upper right corner contains the text "Register by July 20 to save \$50". In the center, a red circular graphic with a white border contains the year "2009" in yellow, with the text "The Best Show In Public Works" below it. The APWA logo is positioned to the right of the "2009" graphic. Below these elements, the text "2009 APWA International PUBLIC WORKS Congress & Exposition" is displayed in yellow, with "PUBLIC WORKS" in a larger, bold font. Further down, the dates "September 13-16, 2009" and the location "Greater Columbus Convention Center Columbus, Ohio" are listed in yellow. At the bottom, the website "www.apwa.net/congress" is provided in white. The bottom edge of the poster has a yellow and white decorative border.