

The Anatomy of a Construction Defect Claim

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Deal With Issues Promptly

Take as many issues off
the table as possible.



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Your Approach to Construction Issues

Your response must be:

1. Timely
2. Documented
3. Specific

Timely

- Issues must be addressed timely.
- If they are not:
 - Contractor will argue waiver.
 - Court may find waiver (regardless of the contract language)
 - Contractor will argue fairness.
 - Project will be in danger of being delayed.

Documented

You must have timely and full documentation of (1) the issue and (2) the attempts to resolve the issue.

If there is no documentation, it didn't happen.

- Even if no one is intentionally lying, memories are fragile. Especially when one is motivated to “remember” something a particular way.

Specific

Identify the specific issue and the specific remedy the district wants based on the Contract Documents.

- You want to eliminate any argument over what the district's stated position was and whether it was communicated to the contractor.
- Here is where you may consider the reasonableness of your request.
 - Even so, is it ever "unreasonable" to insist on compliance with the written contract?
 - NO-\$\$ for performance. If the performance is lacking, why should someone get all the \$\$?

What is a Construction Defect?

- Defective work typically includes failure to construct the Project in accordance with the contract requirements.

What is a Construction Defect?

- This applies to all of the construction project delivery methods where the Contractor or CM is responsible for constructing the Project (so, excluding Construction Manager-Agent)
- Competitive Bid/Sealed Competitive Proposals
 - The successful bidder/proposer is responsible for constructing the Project.
- Construction Manager at Risk
 - The successful proposer is responsible for constructing the Project if the parties accept the GMP Amendment establishing the GMP.
- Design/Build
 - The successful proposer is responsible for designing and constructing the Project.

The Contract Requirements

- The A201 states, at section 3.5, that Contractor “warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective.”

Defective or Nonconforming Work

- Nonconforming Work
 - Easier to identify
 - Objective (Did the contractor put on the ground what the plans call for?)
 - May be a little easier for the contractor
 - No stigma arising from “construction defects”.
 - Fairly straightforward to compute replacement costs

Defective or Nonconforming Work

- Defects in the Work
 - Is there a possibility the defect(s) pose a safety risk?
 - If so, take immediate action. No one is going to blame the District for protecting students and staff
 - Contractor will push back.
 - District will need to have an expert.
 - “Defective”—having a defect or flaw; faulty; imperfect.
 - “Defect”—a shortcoming, fault, or imperfection; lack or want, especially of something essential to perfection or completeness.
 - Someone in the same field will need to be able to opine that the work either: (a) has some shortcoming, fault, or imperfection; or (b) is missing something essential.

Making The Claim - Compliance

- Comply With Any Contract Requirements
 - Is the District required to make a “Claim” under the contract?
 - Is the District required to request mediation?
 - Is there a deadline for the District to take any action regarding the issue?

Making The Claim - Statute

- Comply With Chapter 2272, Texas Government Code
 - Sections 2272.003 and 2272.004 establish a “notice and opportunity to cure” regime wherein the governmental entity is required to provide notice of the defects to the contractor and the contractor is allowed an opportunity to correct the defects.

Making The Claim - Statutory Notice

The notice must be in the form of a "written report," sent by certified mail, return receipt requested.

Making The Claim - Statutory Notice

The notice must:

1. identify the specific construction defect on which the claim is based;
2. describe the present physical condition of the affected structure; and
3. describe any modification, maintenance, or repairs to the affected structure made by the governmental entity or others since the affected structure was initially occupied or used.

Making The Claim - Statutory Notice

1. The District must give the contractor
 - “a reasonable opportunity to inspect any construction defect or related condition identified in the report for a period of 30 days after sending the report”; and
 - at least 120 days after the inspection to:
 - correct any construction defect or related condition identified in the report; or
 - enter into a separate agreement with the governmental entity to correct any construction defect or related condition identified in the report.

Making The Claim - Statutory Notice

- Failure to comply with the statute requires dismissal of the action asserting a construction defect.
- If the claim is brought a second time without complying with the statute, the dismissal shall be with prejudice.
- If the report provided by the governmental entity under section 2272.003 identifies a construction defect for which the governmental entity recovers damages, the party responsible for that defect “shall pay the reasonable amounts incurred by the governmental entity to obtain the report with respect to identification of that construction defect.”

Making The Claim - Go Above and Beyond

- Give the contractor and any potentially liable subcontractors or suppliers access to the work. Let them review the work to their heart's content.
 - Document the site visit
 - Make them sign in so you know who was there
 - Get an agreement up front for them to provide you with all photos and videos taken during the site visit.

Making The Claim - Go Above and Beyond

- Provide whatever information the District has on the work to the contractor and any potentially liable subcontractor.
 - You have to provide it in discovery anyway.

Fixing the Work

- Use the report as the basis for determining what repair work needs to be done.
- Be transparent about who you hired, what they were hired to do, and how much you had to pay them to do the work.
 - Remember—the District is the one being reasonable
 - Prove that by documenting the procurement process

Make demand on the contractor and/or subcontractor for payment.

- Might be able to negotiate a resolution without filing a lawsuit.
- Presuit demand for recovery of attorney's fees under Chapter 38, CPRC.

File the Lawsuit

- In the appropriate court
 - Venue is typically addressed in the contract and is usually the county where the Project is located or the county in which the District has its main administrative offices.
 - County courts typically have a limit on the amount in controversy, so you will probably be suing in district court.

File the Lawsuit

- Prepare your suit with an eye toward insurance coverage
 - Bonds—insure contract performance
 - Insurance—protects against negligence and damage to other property

File the Lawsuit

What types of claims arise from a construction defect?

1. Against the contractor
2. Against a subcontractor

File the Lawsuit

What types of claims arise against the contractor?

- Breach of contract
- Negligence
- Breach of implied warranty of good and workmanlike performance
- Breach of express warranty (based on the contract)
- Liquidated damages
- Attorney's fees

File the Lawsuit

What types of claims arise against the subcontractor?

- Breach of warranty
- Negligence
- Attorney's fees

Diligently prosecute the lawsuit

- Any delay in prosecuting the suit benefits the defendant(s)
- Get the defendants' insurance policies through initial disclosure
 - Determine whether to amend your suit based upon the insurance coverage disclosed in the initial disclosure
- Prepare and serve discovery at your earliest opportunity.
 - There is a significant cost to responding to discovery. Therefore, there is a significant benefit to the defendants in resolving the case prior to having to respond to discovery requests.

Press Every Opportunity to Resolve the Case

- Mediation
- Attorney to attorney discussions
- Private discussions among the parties with no attorneys present

Press Every Opportunity to Resolve the Case

- Propose a mediator who is experienced and skilled in construction litigation.
 - Litigation over construction is very specialized. Without a mediator who understands that, the attorneys may not take what the mediator says very seriously.

Settling the Case

- Any potential settlement will have to be contingent upon approval by the board of trustees in an open meeting.
- Make sure the scope of the settlement is as agreed.
 - Carve outs–latent defects, etc.
 - Contractor and subcontractor counterclaims

Making sure the District gets paid

- Many insurance companies still want to send a physical check.
 - Is it going to be delivered to the District or to your attorney?

Make sure the suit is dismissed once the funds are collected.

- Most settlement agreements required dismissal within a certain time period.

The information in this handout was prepared by Eichelbaum Wardell Hansen Powell & Muñoz, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If special legal advice is sought, consult an attorney.



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