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Construction Law - Avoiding Protracted Litigation: "It's All In The Preparation And Presentation"

When our contractor client came to us, he was hemorrhaging money on a multi-prime project where several contractors were all working directly for a large Midwestern university that was constructing a new student athletic center. The project was running very late, and it was not at all clear to what degree the delays were caused by the university and its design team, and/or by other trade contractors. Further, because the contract documents made the contractors third-party beneficiaries of one another with no right to claim through the university for contractor-caused delays, it was unclear to what degree any sort of delay claim would need to be directed towards the contractors as opposed to the university and its designers. Finally, most of the major contractors on the job had complaints similar to ours, further complicating issues. Sorting through the morass of claims and cross-claims would likely have taken years of litigation and enormous sums of money, and it was anybody's guess as to what the final outcome would be in the distant future.

With these concerns in mind, working closely with the client we came up with a plan. It was driven, in large part, by a belief that the university knew that it had some liability for failing to coordinate the large number of contractors working on the job. We believed that if that story could be told in a compelling manner, we could get the university to come to the table and negotiate. We also believed that the owner's "settlement pot of money" was anything but bottomless, and that the faster we could get our claim before the decision makers, the more likely we were to reach a reasonable settlement. However, at the same time, we wanted the owner to know that "fair is fair", and that we were fully prepared to litigate if needed. To that end, we aggressively pushed an Open Records Act request under state law in order to see what we could find that would assist us with our claim. When the claim was submitted, we advised the university that we would only negotiate through a date certain, after which we would go to court.

The combination of a well-developed claim and a clearly delivered message that we would not negotiate forever had the desired effect. The claim was settled for a significant amount of money and for a fraction of the legal fees that would have been incurred had we been forced to litigate. Of course, we'll never know whether we might have been awarded more than the settlement sum had the claim been litigated to judgment. Certainly the risks inherent in litigation, the cost of litigation, the time value of money and the inevitable interference litigation causes with the client's ongoing business operations makes such an analysis wholly unpredictable. What we do know is that we had a happy client who thought that he had been treated fairly by the university and achieved a very solid result. Most importantly, he was no longer hemorrhaging money on what turned out to be a very good job.