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The importance of proper documentation – what contractors should document during a project and how

A fastidiously kept construction log and accurate documentation can be decisive factors in any potential dispute between a contractor and a developer. In the final article of our four-part series, we list and discuss the fundamental principles that should be followed in the preparation of construction documentation and that can greatly help contractors manage risks successfully: avoid avoidable disputes and prepare for unavoidable lawsuits.

General principles

[1] **The documentation is often reviewed by people who do not have engineering expertise.** If construction documentation is not prepared at all or not prepared in sufficient detail, it is often because it includes information about facts that are mostly undisputed and self-evident for the stakeholders (developer, contractor, site inspector, etc.). This is problematic because the documentation might later be examined by people who do not have firsthand knowledge of the project (experts) or who probably do not have any engineering expertise at all (judges and lawyers), and who will only rely on information that is expressly stated in the documentation.

[2] **Any agreement that is reached with regard to a problematic issue must be recorded in writing.** If the parties reach an agreement in connection with a disputed matter, they often assume that a fact identified jointly or a position shared by both of them will not be questioned by any of them later. Alas, this happens quite often. This is explained by the fact that once a case gets to the dispute resolution phase, the decisions are made with a different approach and by different people (lawyers),

who will question any unfavourable fact that is not written down or otherwise proven, even if the parties reached an agreement with regard to it orally.

[3] **Opposing positions must also recorded in writing.** If the parties do not reach an agreement with regard to a problem, it is advisable to state each party's position and the reason for the disagreement in the documentation. The disagreement, the parties' contrary opinions, and the arguments made in favour of them may have strong relevance in a future dispute.

[4] **Information only counts if documented.** The contractor's position or the information provided by it is often not documented simply because declarations made orally and informally by the contractor are apparently acknowledged by the developer. However, this does not mean that the developer or its lawyers will not dispute that such unprovable declarations were made if their interests so dictate. Even if the contractor has no reason to assume that the developer would lie about not receiving a piece of information (although that is never guaranteed), the developer may recollect certain details differently – potentially a few years later – and this may also have relevance in a dispute.

[5] **Documenting all this during the project is so much cheaper, requires less time and offers a significantly better chance of success than trying to prove the same after the completion of the project.** Skimping on documenting the relevant information to save time and money will cost more in the long run, particularly since the people who will have to face the issues arising from shortcomings in the documentation and the related problems of evidence are usually the same who should have prepared the documentation in the first place during the completion of the project (project managers and engineers).

[6] **Any specific amount claimed by the developer must be disputed within 20 days.** The notice disputing the claim must state whether the contractor disputes the full amount or only a part of it (and if so, what percentage), and it is also advisable to explain why. It is important to keep in mind that if the contractor fails to dispute the claim, it may end up in liquidation, and then it will only be able to avoid a compulsory liquidation if it pays the developer's claim.

Typical cases where a declaration is required

[7] In the following paragraphs, we describe a few typical situations where a contractor is really well advised to a make a declaration to the developer and prepare adequate documentation in order to protect its rights and interests.

Technical specifications

[8] **If the contractor discovers a design flaw or any uncertain interpretation in the technical documentation.** The contractor is required to point out design flaws to the developer, whereas noting uncertainties of interpretation is highly advisable. If there is a design flaw, the contractor should ask the developer to provide guidance and/or carry out the necessary modifications. If there is any uncertainty concerning the interpretation of anything in the technical documentation, it is also advisable to request the developer's guidance and record the contractor's own interpretation. If

the developer does not provide guidance or the guidance it provides is not in line with the contractor's position, the contractor has to inform the developer about this and the related consequences (e.g. extra work / disruption caused by the developer). Even if the contractor proactively starts to correct a flaw (which, incidentally, can entail many risks and is therefore not always advised), it is still advisable to proceed as described above, and, in particular, to record any design flaws and the contractor's interpretation of uncertain provisions.

[9] **If the developer wants the contractor to perform extra work without a formal order.** If the developer gives an instruction that requires the contractor to perform work that is not included in the technical specifications, the contractor has to inform the developer that it can only perform the relevant work as extra work, which means that the developer will have to pay an extra fee. The relevant notice should preferably also inform the developer about the specific cost of the extra work. Providing such a notice to the developer is even more advisable if the instruction resulting in extra work is not received directly from the developer but from one of its contributors, such as the designer or the contractor's technical representative. The notice should be given regardless of any dispute between the parties concerning the nature of the work as extra work, the financial compensation for it or any other matter. The contractor is required to perform the extra work if this does not impose disproportionate hardship on it, and it will be entitled to claim the relevant fees from the developer regardless of any complaint or disagreement by the contractor.

[10] **If the developer instructs the contractor to deviate from the designs.** If the developer instructs the contractor to deviate from the designs and this generates extra workload and costs for the contractor, it is advisable to treat the instruction as an order for extra work. If the deviation from the original designs and technical specifications does not mean a larger workload for the contractor, it is still important to state in writing that the deviation is made at the developer's instruction. In the case of a dispute, the absence of written evidence will be held against the contractor by experts and the courts.

[11] **If the developer gives ill-advised or unfeasible instructions.** The contractor must warn the developer if it gives ill-advised or unfeasible instructions (including their potential consequences). If the developer insists on an instruction despite the warning, the contractor may rescind or terminate the contract, or perform the relevant task in accordance with the developer's instruction and at the developer's risk. The contractor must refuse to perform an instruction if it would result in the violation of a statute or a regulatory resolution, or jeopardise any third party's life, limb or property.

Delays and disruptions

[12] **If the developer instructs the contractor to reschedule works or reorganise its activities.** The developer may not give instructions with regard to how the contractor's activities should be organised and may not make the contractor's performance more burdensome. Consequently, unless the developer gives such an instruction due to a breach of contract on the contractor's part (such as a delay), the contractor may refuse to perform the instruction or state that it will only perform the instruction if the developer pays its related costs. As mentioned above, the contractor

is required to perform an instruction if it results in extra work, but it may demand extra fees for its performance.

[13] **If the developer's failure to provide a service or to hand over the worksite disrupts performance.** If the contractor is unable to proceed with the work because the developer does not provide a required service (e.g. allow the use of a crane or an infrastructural element) or does not provide access to the worksite, the contractor should point out this omission to the developer, together with its potential consequences. It is also advisable to state the date when the contractor expected these services and on what grounds (schedules / coordination meetings).

[14] **If work is disrupted by another contractor employed by the developer.** The developer will be held liable for situations where work is not disrupted by the developer but by another contractor, and therefore it is advisable to proceed as described above in such cases as well. The developer should also be requested to ensure that work by different contractors on the site is coordinated properly. It is also advisable to list the coordination problems and make proposals on how the disruption could be resolved.

[15] **If work is disrupted by an event that is unrelated to the developer.** The developer should be notified about the disruption as soon and as accurately as possible, including information about: i) the nature of the disruption, ii) its expected effects, iii) response measures planned in order to limit the effects (reorganisation of work processes, use of additional resources), iv) any delay that appears unavoidable despite the response. It might also be advisable to involve the developer in the planning of the response measures and the reorganisation of work processes.

[16] **If the developer acknowledges some of the disruptions but does not agree to an appropriate additional deadline / time extension.** It is important to keep in mind that if the parties agree on the modification of the project deadline, the contractor may not rely on disruptions that occurred before such agreement to obtain exemption from liability. Therefore, if the developer only acknowledges some of the disruptions and does not agree to an adequate time extension, the contractor will not necessarily have an interest in the time extension – particularly if it has good reason to believe on the basis of the available evidence that the disruptions entitle it to a longer extension. In such a case, it is advisable to record the length of the disruptions acknowledged by the developer, or to agree to the additional deadline proposed by it, with the reservation of rights with regard to the rest of the disruptions. However, extra care must be taken in the drafting of the declaration on the reservation of rights, which should also include a list and a detailed description of the disruptions that are not acknowledged by the developer.

[17] **If the developer does not agree to practical completion on the grounds of defects preventing fitness for purpose.** If the contractor, after careful consideration, has determined that it has performed its obligations under the contract and there are no defects that would prevent the building from being used for the purpose intended, it is advisable to report practical completion even if the legitimacy of this is disputed by the developer. If there is a dispute, it is good idea to prepare a list, with detailed descriptions, of the defects and flaws that the developer cited to dispute the building's fitness for purpose. Once the defects and flaws are repaired and such

a list is not available, the contractor will be hard pressed to prove that the defects and flaws could not in fact prevent the building from being used for the purpose intended. If the developer does not issue a certificate of performance, another option that is available for the contractor is to file for a procedure by the Certificate of Performance Expert Board (CPEB). Before this step is taken, however, the situation should be carefully assessed in the light of the characteristics of the project and the related legal and engineering issues.

Warranties and guarantees

[18] **If the developer or another contractor uses completed parts wrongly or improperly, or damages them.** Wrong or improper use of parts and actions that damage them should be documented with photos and video footage, and the developer should be informed about the situation and its potential consequences.

[19] **If the developer cites defective performance in connection with parts that are to be covered up.** When this is the case, it is advisable to inspect the relevant parts carefully and to document them with photos and video footage, and to respond to the developer's complaint on the basis of such inspection. Depending on the severity of the situation, it can be a good idea to invite a public notary to prepare a statement of facts or hire an expert so that evidence is available in a potential dispute later.

[20] **Reviewing warranty / guarantee claims.** It is also advisable to thoroughly document the review of any warranty / guarantee claims made by the developer as well as the outcome of such review, preferably with photos and video footage. If the contractor is unable to determine the exact cause of a defect (e.g. water damage), its position may be strengthened in the case of a *warranty* claim if it can list a number of potential factors for which it is not liable and may have caused the damage. In the case of a *guarantee* claim, burden of proof rules are stricter and the listing of alternative causes in not the right strategy. In that case, the contractor will have to prove that the defect is not attributable to its performance but to a cause that arose later.

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