

Construction Contracts: Avoiding Clashes and Irreconcilable Differences



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When the phrase “irreconcilable differences” is invoked, images of a feuding couple, and not parties to a construction contract, come to mind. However, in the case of *Suleyman Ciliv, d/b/a 77 Construction Contracting and Trading Company v. UXB International, Inc.* that was the case. In this instance, the United States District Court for the Western District of Virginia ruled that a *quantum meruit* action cannot be pursued at the same time as a breach of contract action, and that the alternative theories of recovery were in fact, irreconcilable.

In *Suleyman*, the defendant, a prime contractor, entered into an agreement with the U.S. Government to build an Air Force Base in Afghanistan. Part of that agreement was that the defendant would enter into an agreement with the plaintiff, a subcontractor for construction services. A term of the subcontract was that the contractor would submit purchase orders to the subcontractor for the scope of work and upon completing the work, the subcontractor would submit invoices to the prime contractor who would submit them to the federal government.

Over time, a dispute arose between the parties and the defendant withheld payment from the plaintiff, citing the plaintiff’s failure to keep timesheets and receipts of purchases. The plaintiff sued the prime contractor for breach of contract and quantum meruit, i.e. the actual value of services performed. In response to the prime contractor’s motion to dismiss, the court ruled that there could be no recovery in quantum meruit where a valid contract between the parties exists.

It is a reality that parties to a construction contract may sometimes be at odds over the validity or the terms of a contract. However, under Virginia law, if a valid, express contract exists, then the parties are entitled to have their rights and duties adjudicated *solely* by its terms. So how can a contractor avoid irreconcilable differences and having to risk pursuing a quantum meruit action that could be dismissed?

1. **Cut and paste in moderation.** It is not uncommon for a contractor to have a general contract that covers its needs for maybe 80 percent of its projects. So what happens with the other 20 percent of contracts to which it is a party? The contractor may cut and paste provisions from other contracts to make the general contract that is most often used “fit” for the particular contract. A dispute arises and the parties differ over the interpretation of a contract. The contractor now has to face the choice of filing a quantum meruit action if the contract is unclear
2. **Limit your use of e-mails to address contract changes.** Parties sign a contract and then a flurry of communication occurs over the internet. If more

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than three or four e-mails occur about a proposed change, make a change order. It is a lot easier to establish that the parties agree to a contractual term with a signed change order than relying on strings of e-mails to prove a change. While it may be considered to be in writing, unless it is included in or referred to in the main contract, a party risks that an e-mail is a substitute for a contract or a written change order.

3. **Avoid clashes.** The term “clash” refers to a conflict that is discovered in a building information model, which is used to support owners, designers, and builders in planning construction work. For example, one building component may physically, yet unintentionally, penetrate another building component and thereby create a “clash.” Clashes tend to be fleeting and therefore, permanent records are seldom made of their occurrences. Take a proactive approach and avoid clashes in your contracts. For example, if your contract is subject to regulatory oversight, routinely perform an audit of your paperwork to ensure that a third party reviewing the contract would find it to be in compliance with applicable statutes and codes.

Various websites and portals either offer contract documents at a cost or free of charge. A standard-bearer in the industry for contract documents is the collection authored and maintained by the American Institute of Architects (“AIA”). The AIA has designed a library of contracts and documents that anticipates virtually every scenario that could arise in a construction project. Whether the issue relates to scope of work, means of dispute resolution or ability to cure, relevant and comprehensive construction contract documents are the key to minimizing the likelihood of having to rely on a theory of quantum meruit to seek payment for a construction project. No contract is perfect. It just needs to be good enough to encompass all potential sources of recovery.