

THE DO'S AND DON'TS OF CONSTRUCTION CONTRACTS

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For most of us, involvement in any construction project may occur only once or twice in a lifetime, usually when their own personal residence is being built. However, many board members and property managers are involved in residential or commercial construction on a daily or weekly basis. In either case, one thing is clear. Absent a carefully drafted construction contract, you may be facing a financial disaster. To guard against the potential risks associated with construction, it is essential to have a well prepared construction contract in place before the project begins.

This article will provide the reader with practical advice to avoid complications that typically arise during the construction process.

What is a contract? What appears to be a fairly simple question can often be somewhat complicated. Simply stated, a contract is an agreement between two or more people. It requires an offer by one person (in the construction setting it is oftentimes presented in the form of a bid), and an acceptance by the other.

Whether you are the owner hiring a contractor to renovate your kitchen, a manager hired to renovate a building, an architect or engineer retained to design or inspect a building or a general contractor that employs a roofer or plumber to install a roof or plumbing system, each participant to this process assumes certain rights and responsibilities on a project. Regardless of the role you serve in the construction process, your obligations will be governed by the contract you enter into between the parties. The construction contract serves as the bible and governs how you will conduct yourself on that project. The provisions of the construction contract will determine how and when you will be paid, the standards for the quality of work to be performed, as well as who will bear the risks of injury or damages that occur during the performance of the work.

The rules governing the construction contract can be summarized in a series of DO's and DO NOT's, as discussed below.

I. DO KNOW THE PARTY WHOM YOU ARE ENTERING INTO THE CONTRACT WITH.

It is important to know whether you are entering into the contract with an individual or group of individuals, a corporation, a general or limited partnership, or other entity. The rights of the parties involved and their respective abilities to enforce their contractual obligations will be directly affected by whom the contracting parties are. The contract should be clear in this regard. In addition, you should make sure that the individual signatories to the contract have authority to bind the entity where the contracting party is a corporation, partnership, etc. You should obtain verification of licenses, corporate reports or other documentation showing the party is able to perform the obligations set forth in the contract. It is also advisable to obtain references, personal guarantees when appropriate and certificates of insurance.

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2. DO NOT BID PROPOSALS OR STANDARDIZED FORM CONTRACTS FOR YOUR CONSTRUCTION PROJECT.

Many people in the construction industry use a simplified bid proposal form for their construction contract and have both parties sign it. Typically, essential terms of the contract have been omitted with the exception of the work or materials supplied and the price. As a result, critical aspects of the agreement, such as time requirements, insurance, lien rights, change orders, etc. are ignored and left to the imagination of all parties. By failing to address these significant factors, disputes often arise as to the rights and obligations of each party.

Standardized form contracts, such as those published by the American Institute of Architects, Associated General Contractors of America, should be avoided. Although these form contracts address many of the terms of the agreement, serious shortcomings exist. First, they are written on a national basis and fail to take into account the peculiarities of the laws or practices of particular states. These contracts contain provisions that are unenforceable under Florida law. In addition, certain terms designed to protect the parties have been omitted. Finally, many have been criticized because they are written in a way which is generally more favorable to the constituency of the organization who has published the form contract.

Moreover, the phrase “standard form contracts” is a bit of an anomaly, as contracting entities are free to use whichever forms they desire and, in the construction industry, many forms are used. However, the closest to a standard form contract the construction industry has are those developed by the American Institute of Architects, or AIA. AIA contracts are usually revised every 10 years. AIA contracts are most beneficial on a construction project when every entity from the owner to design professionals to contractor to subcontractors all use the AIA contracts developed in the same year as the other agreements used on the project. The most frequently used AIA contracts are:

- a. A101 – an owner/contractor agreement for a fixed price.
- b. A201 – general conditions of the contract for construction. This form is incorporated by reference into all other AIA documents on the project and operates as the “bible” or “project manual”.
- c. A401 – standard form of agreement between contractor and subcontractor.
- d. G701 – standard form for change orders.
- e. G702 – standard form for payment requisitions, including a schedule of values called a “continuation sheet” designated as Form G703.
- g. G714 – a construction change directive, which can be used to expedite changes in the scope of work when there is not enough time to develop a formal change order.

In addition to these forms, there are also AIA contracts for design/build agreements, construction management agreements, and other specialized forms of construction arrangements. There are various types of pricing arrangements for construction contracts. They include lump sum contracts, cost plus contracts, and unit price contracts.

Beware of the person who does not care about the wording of his or her contract. Oftentimes, the contractor or subcontractor who quickly signs any contract requested of them without reviewing it are *Becker & Poliakoff, P.A.*; www.becker-poliakoff.com; www.hurricane-recovery.com; (954) 987-7550; This article is for informational purposes only and should not be construed as legal advice. This information may not reflect recent developments in the law. *Becker & Poliakoff, P.A.* is not responsible for any errors or omissions in this material. Readers should not act or refrain from acting based on this information. If you have any questions, please consult with an attorney licensed by the Florida Bar.

the same entities that lack any understanding or familiarity with their contract requirements. This more often than not will result in a breakdown on a construction job and potential litigation.

3. DO A THOROUGH REVIEW OF THE PLANS, SPECIFICATIONS AND OTHER DOCUMENTS RELATING TO THE CONTRACT.

Many construction contracts require that the construction be performed in accordance with a set of plans, drawings, specifications or other construction documents. It is not unusual for the contract to reference or incorporate the terms of these other documents. Although this procedure is legally binding, certain precautions must be exercised before utilizing this procedure.

First, review all of the plans, drawings, specifications, and other documents very closely to evaluate the nature and extent of your rights and responsibilities. Focus upon whether the documents sufficiently define specifically what is expected relative to the construction. Similarly, this review should be conducted to eliminate conflicts in the plans, drawings and/or specifications and ensure that these documents are consistent internally and with each other. Each of these documents incorporated by reference into your agreement is as equally binding on you as if it were included verbatim in your contract. Many contractors ignore documents incorporated by reference, believing “if they can’t see them, then they can’t be hurt by them”. However, it is imperative that you obtain copies of all documents incorporated into your contract so you may ascertain the parameters of the requirements you are undertaking. In many instances, disputes have arise because each party to a construction contract has a different expectation about what was to be installed or constructed. These problems arise because the construction documents are vague or ambiguous. If this occurs, modify the construction document involved and/or clarify in writing which documents will take precedence in the event of a conflict.

Once the construction documents and all potential problems have been reviewed, specify in the contract what documents are being incorporated by reference into the contract, including the latest revision dates of any plans, drawings and specifications.

4. DON’T FORGET TO INCLUDE ALL OF THE TERMS IN THE WRITTEN CONTRACT.

For a contract to be binding upon the parties, all “essential” terms must be established.

In the construction setting, it is in the interest of all concerned to spell out, in writing, all of the terms of the contract. There is simply nothing to be gained by failing to address terms, as it will ultimately create a dispute once such terms are left to the imagination of the parties. The significant issues that must be addressed in the contract include, but are not limited to: (1) price; (2) payment terms; (3) scope of work; (4) terms of performance; (5) insurance and bonds; (6) indemnification; (6) warranties; (7) lien rights; (9) change orders; and (10) termination.

5. DO A THOROUGH INVESTIGATION OF THE PROJECT.

Before entering into a construction contract, make sure you have thoroughly researched the nature of your particular work in the project. In addition to review of the construction documents as discussed above, it is very important to thoroughly inspect the site and/or improvements where the construction is going to take place. Concealed conditions can disrupt, and sometimes even destroy, an otherwise smooth running construction project. Problems with a concealed condition will often times be avoided by a comprehensive inspection.

Whether such an investigation is conducted or not, the construction contract should address what happens if a concealed condition is encountered and who will be responsible for the additional expenses and delays associated with that condition. In this way, the parties will understand their respective risks, rights and obligations.

6. DON'T OVERLOOK THE POSSIBILITY OF A DISPUTE.

Although one always hopes the project will be completed without a problem, it is not unusual for disputes to occur. A properly prepared construction contract can alleviate some of the displeasure and expense associated with resolution of the dispute. The contract can provide for arbitration, recovery of costs and attorney's fees and preservation of records and evidence so that you are protected in the event a party defaults on its obligations. Failure to include such provisions can result in a waiver of the right to arbitrate rather than litigate a dispute, and losing your right to recover attorney's fees. It is better to address these issues in the contract rather than at the time a dispute arises.

Chapter 558, Florida Statutes, which requires pre-suit dispute resolution procedures for construction defect claims, has changed almost every year since it was enacted in 2003. One such change was the statute's scope being expanded from only residential structures, to now being applicable to both residential and commercial structures. The statute, which is applicable to claims which arise after "completion of a building or improvement," now provides a definition for that phrase to include the issuance of a Certificate of Occupancy or equivalent, or substantial completion.

Another change clarifies that when a party initiates the Chapter 558 process by serving a "Notice of Claim" ("Notice") on the parties believed to be responsible for the alleged defects, the Notice must be served by certified mail, hand-delivery or courier with evidence of delivery. The Notice is no longer required, however, for an incomplete project; an important point for contractors to appreciate. Therefore, if a project is ongoing and disputes arise between the owner and the contractor as to alleged defects, the statute does not apply and the owner may proceed with the dispute resolution process in the contract between them and/or, if allowed, immediately file suit against the contractor.

The legislature has also made calculating the relevant response deadlines easier by starting them from the date the Notice was served rather than the date the Notice was received. This allows an owner to begin counting the response time with more confidence because the owner will know when the Notice was served, but might not know when the Notice was received. However, this makes it crucially important for contractors to note the date the Notice was mailed to make sure the contractor's response is timely.

Next, Chapter 558 now makes clear that when a Notice recipient hires someone to perform destructive testing to investigate the defect allegations, the person performing the destructive testing does not have any lien rights, unless the owner contracts for the work. Also investigation-related, while Chapter 558 previously allowed for the exchange of discoverable information upon demand by any party, it provided no time frame within which the exchange was to occur. It now does; within 30 days. Further, Chapter 558 also now clarifies what is "discoverable information" to specifically include specifications, as-built plans, photographs and expert reports.

Finally, Chapter 558 now applies to all contracts for improvements entered into after October 1, 2009, unless the parties mutually agree and indicate in their contract that Chapter 558 will not apply.

7. DO A THOROUGH REVIEW OF THE WRITTEN CONTRACT.

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When presented with the written contract for signature, carefully examine all of the terms, including the price, time of completion, etc. If you make a mistake and sign a contract that has incorrect provisions, most likely you have bound yourself to its terms. Although courts have granted relief to a person who has made a mistake, in few instances, usually, the courts have held that unilateral mistakes will not relieve a person of their contractual obligation. It may be harsh, but the message the courts are sending is clear; CAREFULLY READ THE CONTRACT.

In conclusion, completing a successful construction project is a very difficult task under the best of circumstances. Many people, even those experienced in construction, find themselves involved in a project which is having problems. In many instances, all or most of those problems could have been avoided if those involved had spelled out the rights and obligations of each party in the written construction contract. By not doing so, the parties will often times find themselves in a situation where the cost and aggravation of curing the problem is much greater than if it had been dealt with in advance in the contract.

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