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Contract Clean-up

Pay attention to these basic contract provisions

By Christopher R. Jones, Esq., Hellmuth & Johnson

As we head from 2020 into 2021 and as the weather changes along with the seasons, often comes downtime in the construction industry. When deciding how to use the relative quiet time of the winter months, contractors should include a thorough review of business practices geared toward improving efficiency, productivity and performance. Ensuring that you are running your business with as much protection and efficiency as possible will lead to better bottom line results at the end of the day, i.e., more leads, more work and more revenue.

While it should come as no surprise that having a *written* contract in place before undertaking any work on a project can avoid many problems down the road, many contractors do not pay enough attention to annual contract reviews and updates – winter is the perfect time to do this. Many contractors are forced to hire legal counsel to help *resolve* problems, rather than remembering that much of an attorney's worth is in helping to *avoid* problems in the first place. Preventing problems upfront can have a significant financial impact on a business by avoiding costly disputes and letting you spend more time on what you do best – creating for your customers. Having a solid and reliable contract can make your business more efficient, reduce potential future costs and generally make conducting business easier.

Spelling out the terms of an agreement in writing before any work commences provides the contractor and customer (or subcontractor) with clear expectations and sets the tone for the entire business relationship. The more issues that can be addressed in advance the better, and while that can be hard to anticipate, even some very basic language touching on standard contract principles may be enough to avoid future conflict with a customer or colleague.

Regardless of the complexity of the contract, there are a few key areas that should be addressed in any form of written contract:

- **Pre-lien notice:** One of the most important reasons to have a written contract, aside from the legal requirement to do so, is to preserve mechanic's lien rights or some statutory right to place a lien on a property for future recovery. Each state likely has different legal requirements, but in Minnesota, for instance, every contract should include the statutorily required language set forth in Minnesota Statutes Section 514.011 in order to ensure that a contractor has the right to pursue a mechanic's lien should the need arise. The language cited in that statute must be accurately stated in the contract, and in a very specific format. Failure to properly provide that *exact* language eliminates any right that a contractor would otherwise have to claim a mechanic's lien for work done. Losing your lien rights puts you at a significant disadvantage if the project ultimately turns bad. If your state has laws in place to preserve your right to place a lien

If additional work is requested, or original work plans are altered or revised, the changes should be documented by specific, *written* change orders.



- on non-paying customers' property (whether general contractor or subcontractor) you should take advantage of it.
- **Payment terms:** As most disputes that arise during or after a job relate to the amount or timing of payments, a payment timeline should be included in a contract. Payment dates are often based upon specific dates or completion of a certain portion of the work, reaching a certain stage. Payment amounts and timelines for payment should be clearly specified in every contract.
- **Estimated time of completion:** Many construction contract disputes arise because of a misunderstanding as to expectations of when a project will be completed. Every attempt should be made in the body of the contract to set a reasonable estimated date of completion on the project. This date should be set according to the contractor's best judgment to the extent possible, as the contractor is in the best position to determine how long the project should take to complete. Within that provision, obviously, exceptions should be set forth – including but not limited to weather delays, change orders, labor availability, materials problems or other circumstances outside of the contractor's control. If it looks like a delay in completion will occur, the change in the completion date should be documented and agreed via change order. Whether stated in terms of weeks/months to completion or by utilizing a specific date, setting the expectation for completion, and adjusting it if needed, can avoid a small problem turning into a larger issue.
- **Scope of work:** Disputes also arise from differing expectations as to what the contractor has actually been hired to do. The type, form and amount of work should be listed in the contract (or in an addendum of some type) as detailed as possible to avoid any dispute arising from whether a contractor completed all of the necessary work for final payment. If appropriate, the scope should indicate the materials to be used and specifications as to construction. The greater clarity regarding what is to be constructed – and how – can decrease the potential for a later dispute. If the project will allow it, separate, detailed specifications

may be made a part of the written contract, whether by exhibit or incorporation into the actual contract. If blueprints or other plans exist, those should be incorporated into the contract or referred to as an exhibit. Most projects involve changes in scope during the course of a project – if/when that happens, the changes should be documented.

- **Change orders:** Nearly every project will encounter a time where changes, additions or deletions are made to the previously agreed upon work. Having a system in place within the contract to account for change is imperative and, in many states, required by law. If additional work is requested, or original work plans are altered or revised, the changes should be documented by specific, *written* change orders. It can be both cumbersome and time-consuming to document each and every change over the course of a project but having a specific change order system in place to keep an accurate record is the best method to avoid problems later. It should be noted that “written” change order can potentially mean being done in different forms – traditional paper form, via email, through customer electronic portal or platform and potentially even via text message, though that option is less preferable.
- **Arbitration vs. litigation:** Many contractors choose to include provisions in their contracts requiring that any dispute be handled through arbitration. Others do not specify such a requirement. The pros and cons of specifying a specific alternative dispute resolution procedure such as arbitration should be discussed and contemplated with counsel. Choosing such a provision in a contract can be a legal strategy or just a matter of personal preference – but the implications are important, and this decision should not be made without consulting an attorney.

Each “forum” has unique characteristics and formalities that can be open to interpretation and should be weighed out.

- **Attorneys’ fees:** Any contract should include a provision that enables a contractor to recover any attorneys’ fees spent in pursuing collection of an unpaid account or enforcing the contract. This type of provision provides significant protection to the contractor and can often be a deterrent to a potentially nonpaying customer. If it is necessary to undergo the collection process, the contractor can know that there is also the potential to recover the costs spent to collect those unpaid amounts, which otherwise may not be recoverable.

These basic items form some of the most common provisions of any contract, but there are many other provisions that may be included in a contract, as there are many different situations (projects) that require different contract terms. Changes in applicable law also necessitate a review of existing contracts to ensure they comply with current law, and every contractor should make a habit of conducting an annual review of contracts for this purpose. ▼

Christopher R. Jones, Esq., a partner with Hellmuth & Johnson law firm in Edina, Minn. has significant experience in drafting everything from simple residential contracts to complex commercial contracts. Contractors of all sizes can benefit from establishing a standard form contract that can be adapted to specific situations as needed.

