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Association Construction Contracts Require Deft Negotiation by Legal Counsel

By **Jeffrey S. Respler** | July 12, 2019



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Major renovation projects are par for the course for condominium associations of South Florida buildings completed more than 25 years ago. For these properties to remain competitive in a market with a plethora of newer options, they must renovate and restore their common areas and amenities to ensure they remain in top form.

Construction contracts often represent some of the costliest expenses that condominium associations will ever approve, yet many associations fail to utilize the necessary legal resources and expertise to craft and execute the most effective terms and agreements. Instead,

they focus merely on obtaining competitive bids, as most associations are required to do for projects exceeding 5% of their total annual budget (10% for HOAs), and often neglect to consult with highly qualified and experienced legal counsel to negotiate and finalize every aspect of their agreement with a general contractor.

Without a lawyer involved, a poorly negotiated and written construction contract can have serious consequences. Having a qualified and experienced attorney draft or review an association's contract can help avoid risks and expensive disputes. Dealing with the aftereffects of a poorly negotiated or poorly written contract can be far more expensive than paying a lawyer to do it correctly in the first place. An experienced attorney can draft and negotiate a contract that will protect an association's interests and be legally sound.

Attorneys write contracts in ways that favor their clients. Attorneys with experience in the construction industry will know the customary contract terms, and they will draft a contract in their client's favor. If the contractor is drafting the contract, its lawyer will be doing exactly that.

Associations need lawyers who can review the contract and advise boards of directors on reasonable terms, as well as negotiating strategies, which could help save them significant sums of money.

Experienced attorneys will know the terms that are needed to protect an association's rights. Attorneys will verify the correct name of the legal entity of the selected contractor and confirm that it is properly licensed to perform the work. They can also search for any complaints that have been filed against the contractor.

It is critical for association attorneys to stipulate that the contractor must maintain proper insurance coverage and limits, including worker's compensation and commercial general liability insurance. The association will need to be named in the original certificates of insurance reflecting that it is an additional insured and not merely a certificate holder. Association attorneys and insurance professionals can verify that the proper insurance

provisions are included in the contract and the contractor has the proper coverage.

Furthermore, associations should review with their attorneys the possibility of obtaining payment and performance bonds.

The payment schedule provided in the contract should be commensurate with the percentage of the work that is completed, and it should include a retainage of 10% that is held back for each payment. The contractor should provide releases of liens and progress payment affidavits for all partial payments as well as releases from all the subcontractors and suppliers.

Qualified attorneys will verify that indemnity clauses are included in the contract to protect the association and property manager from liability, and they will also ensure that it specifies a beginning date and completion date. These dates should account for possible delays, so it is generally recommended to establish a daily penalty for late completion.

The terms of labor and material warranties should always be clear in any contract, and they should include the warranty's timespan and covered items. Warranty provisions can help an association determine and assign liability should a material be defective or require repair. Roofing contractor warranties, for example, should specify the period during which a leak would be covered as well as the covered causes for leaks.

Association attorneys should require that the contractor produce the necessary building department permits for the project and provide all the materials, supervision, labor, tools and equipment needed to complete the work in strict accordance with the contract documents and as required by all applicable laws, ordinances, and the rules and regulations of any governing authority. The contractor must also represent that it has enough qualified personnel to assure timely performance as well as the proper tools and equipment to perform the work, and that it is financially capable of performing the agreement. The contractor must have visited the site of the work and examined the actual job conditions, and it must be familiar with local conditions and every matter that will have a bearing on the performance of the work. It must also ensure

that all materials incorporated in the work will be new (unless otherwise specified), and that any of its work that does not meet these standards may be considered defective.

The termination terms should include a clause permitting the association to terminate without cause as well as for a material breach of contract, which can be difficult to prove.

Prior to the issuance of the final payment, the terms should call for the association's engineer or design professional to conduct inspections to verify that everything has been completed and all the building permits have been closed.

Finally, it is also recommended for associations to include language that permits them to recover attorney's fees and costs, including those for expert witnesses, if they prevail in any ensuing litigation.

With the proper due diligence by qualified legal counsel and professionals, associations can avoid mistakes and omissions in their contracts for construction and remodeling projects that could potentially lead to disastrous financial repercussions. Contracts negotiated and prepared by experienced attorneys reduce the chances that associations will end up in litigation. Plus, if a court battle proves unavoidable, a good contract can dramatically limit its length and complexity while also greatly enhancing an association's chances for success.

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