

TRISTAN & CERVANTES

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CONTRACTS AND
RELATED
DOCUMENTATION IN
THE CONSTRUCTION
INDUSTRY

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Tristan & Cervantes is dedicated to providing legal solutions for your business.

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Who We Are

- Pedro Cervantes Managing Partner
- Homero Tristan Founding Partner
- Norma Manjarrez Associate
- Mario Treto, Jr. Associate
- Karen Vanderwarren Of Counsel

Areas of Practice

- Construction Law
- Commercial and Business Law
- Labor & Employment Law
- Landlord-Tenant Law
- Corporate Law
- Real Estate and Zoning matters
- Business Licensing
- Government Relations

Today's Discussion

- What is a Contract?
- The other general terms of the contract including; the work, payment terms, start and completion dates.
- Types of Insurance related to construction projects that can be required by the Contract.
- Lien Waivers and Mechanics Liens

WHAT IS A CONTRACT?

- Essential terms of a contract: 1. Offer; 2. Acceptance; and 3. Consideration.
- In general a Contract can be verbal or written but some types of Contracts must be in writing such as Contracts for the purchase of Real Estate, Contracts where services are not to be performed within 1 year, etc.

Examples

- Contract: A offers to paint B's house for \$200 and B accepts the offer and agrees to pay the \$200.
- Generally not a Contract: A promises to paint B's house but says nothing else. (Be careful to avoid claim for equitable estoppel)

Duty and Breach

- What is a Duty? In general a duty is an obligation to either do or not do something.
 - Ex. Duty to complete work in workmanlike manner.
- What is “Breach”? In general a failure to fulfill an obligation (duty) or taking some action that you had a duty (or obligation) not to take.

How do contracts relate to me?

- Purchase and sale of materials, equipment, etc. (often governed by Uniform Commercial Code which requires such things as that a contract be in writing if it relates to the sale of goods over \$500.00.)
- Entry into construction contracts to complete work between Owner and Contractor or Contractor and Sub-Contractor.

Why do I need a contract

- Because construction is a complex business and there are a lot of variables involved including the personalities of contractors and owners.
- A contract is a way to define the duties and responsibilities between the Contractor and Owner or between Contractor and Sub-Contractor.
- A contract is also a way to distribute the risk between the contracting parties.

Construction Contracts

- Unlike other types of contracts, construction contracts often consists of more than one document. A common group of documents that make up a construction contract include;
 1. Agreement between the owner and contractor
 2. General and Special conditions
 3. Plans and specifications
 4. Subsequent addendum or modifications (change orders)

THE “AGREEMENT”

- The general terms of the Agreement include:
 1. The “WORK” to be completed by contractor may explained in more detail in the general and special conditions document)
 2. The “PAYMENT TERMS”
 3. The “START AND COMPLETION DATES

The “WORK”

- These terms are important because they describe the work that the contractor is obligated (or has a duty) to complete.
- These terms often come into dispute when the Owner and Contractor disagree on whether certain work was or was not to be completed or whether work was “extra.”
 - Ex. I’ll put new drywall in house for \$1,000 but doesn’t say how much, in what rooms, what type, etc.

The Payment Terms

- Schedule for payment should be clearly defined to avoid unnecessary disputes.
 - Ex. Payment to contractor of 50% of contract price up front 25% upon completion of half of the work and 25% upon completion of the job.
- Requirements for payment should also be set.
 - Ex. If you are a general contractor and require lien waivers to be submitted by subs at time of payment than this should be defined in the contract.

Start and Completion Dates

- Important terms as many disputes arise over delays in the completion of work. (often described in more details in the Special and General conditions)

TERMS AND CONDITIONS

- Will often include a more detailed description of the scope of the work, the payment terms, and the start and completion dates.
- Will also include many other more detailed terms.

Additional terms for Scope of Work

- May lay out more specific terms such as what type of material is to be used, etc.
- Particular measurements for rooms, etc.

Detailed terms regarding Start and Completion

- The Terms and Conditions documents often lay out such things as;
 1. Obligations of each respective party for delays.

ex. Contractor not obligated for delays due to concealed conditions but is obligated for delays due to lack of qualified workers to timely complete the work.

Additional Payment Terms

- The Special and General conditions may lay out such additional terms such as;
 - Whether there will be any retainage;
 - Whether approval by architect or other third party is required prior to payment being made;

Terms and Conditions, cont.

- Other more detailed terms may include
 1. Indemnity and Insurance obligations
 2. Terms regulating the termination of contract (When worked can be stopped by the Owner/Contractor/Sub-contractor;
 3. Terms governing correction of work;

What is INDEMNITY?

- General definition: An agreement whereby one party agrees to secure another party against a loss or damage.
- How does it relate to you?
 - As a GC you may want the Subs to agree to indemnify you for any losses that are caused by the negligence or intentional acts or omissions of such subs and vice versa, for lien claims of their suppliers, etc.

Can I be indemnified for my attorney's fees?

- You can contract to be indemnified for attorney's fees. However, this does not generally force the other party to pay your attorney's fees as a dispute or lawsuit is pending.

INSURANCE

- These terms are important as they define such things as what types of insurance each respective party is obligated to obtain may also require one party to name another party as an additional insured.

Types of Insurance

- The general types of insurance at issue in a construction contract include;
 1. General Liability Insurance
 2. Builder's Risk Insurance
 3. Workers Compensation Insurance
 4. Performance and Payment Bonds

What is General Liability Insurance?

- General Liability Insurance is insurance which primarily covers losses caused by negligent acts or omissions that result in bodily injury or property damages.
 - Ex. One of your workers leaves an extension cord going across a hallway one inch from the ground and a worker from another contractor trips and is injured.
 - This type of insurance will generally not cover defects related to your “work.” But it may cover the loss due to defective work if it was work of a sub-contractor. If Design Professional; may cover repair of work completed based on faulty design and other damage.
 - What if your defective work leads to damage to personal property?

Do I need Liability Insurance?

- If you want to survive as a business, YES.
- The premium for \$1,000,000.00 may be \$10,000 but if you get sued, rightly or wrongly, defense costs alone can be tens of thousands of dollars.
 - Costs of a lawyer will generally be covered if the claim fits within the coverage provided by the liability insurance policy.

What Is Builder's Risk Insurance

- Builder's Risk Insurance is insurance that may cover losses involving damages to the building or property during construction. It may also cover damage to equipment and materials that are related to the construction.
- Is similar to the liability insurance policy but may provide broader "all risk" coverage.
 - "all risk coverage" is different than the requirement of general liability that the damage be as a result of an "occurrence"

Workers Compensation Insurance

- Workers Compensation is required by Illinois law.
- It covers injury to your employees while they are in the process of “work” for your company.
 - Covers medical costs, a percentage of wages, and any potential payment for permanent injury or loss of use.
 - If fail to have coverage could be subject to civil penalties and have to pay all costs for medical care, etc.

Performance and Payment Bonds

- A Performance Bond guarantees that that contractual obligations will be carried out if they are not completed by the contractor.
- A Payment Bond certifies that the sub-contractors and suppliers will be paid.

Terms Regulating Termination of Contract

- Such terms, including required notice, should be made clear in the contract terms.
 - Exs. Contractor can terminate contract for non-payment after it provides written notice and five days during which the dispute can be remedied. Or; Owner can terminate contract for excessive delay by Contractor after written notice and five days to remedy the delays.

PLANS & SPECIFICATIONS

- These items often include the architectural drawings, plans, sketches, and other specifications.
- Are part of the contract in that these are “terms” that the contractor is obligated to follow. (Must complete the work according to the Plans and Specifications)

CHANGE ORDERS

- These are important documents for both the Owner and Contractor.
- Change Orders should generally be required to be in writing so that there is no basis for an Owner or Contractor to dispute payment for extra work.
- Written Change Orders become a part of the contract.

Claims for Extra Work

- What happens if you do “Extra Work” but do not have a written change order?
- If the Owner or General doesn’t want to pay you you’ll have a headache.
- You’ll have to prove that you are due payment for such extra work.

Claim for payment for extra work

- To be paid for work you claim is extra you will have to establish that;
 1. The work was outside of the scope of your contractual promise;
 2. the extra items were ordered by the owner or GC;
 3. The Owner or GC agreed to pay extra;
 4. The extras were not voluntarily provided; and
 5. It was not your fault that the extra work was needed

Burden of Proof (Extra Work)

- Although it seems that it would not be too difficult to establish that you are due payment for Extra Work, the Burden of Proof before a judge or jury is higher than in a normal situation in civil litigation
- General Civil Standard is “More Likely than Not.”
- The Burden of Proof Where there is no signed Change Order is; **“Clear and Convincing Evidence”**

Lien Waivers (Partial and Final)

- Important that prior to receiving payment and to protect lien rights that you provide a Lien Waiver.
- Do not have to provide signed lien waiver until you or your company is paid.

Mechanics Liens

- Methods to preserve lien are different depending on whether you are a contractor or sub-contractor

Mechanics Liens, cont.

- Definition of Contractor: Person or entity that has contract directly with the Owner of the property.
- Definition of Sub-contractor: Person or entity that has contract with any other person or entity that is not the Owner. Ex. Contractor – Owner- sub – supplier

Mechanics Liens for Contractors

- To perfect a lien an original contractor on a private project must file a claim for lien with the Recorder of Deeds office within four (4) months of the completion of the work.

Sub-Contractor mechanics liens

- To perfect its lien a sub-contractor who has worked on a private non-owner occupied project must serve a ninety (90) day notice on all contractors in the chain between themselves and the Owner and anyone with an interest in the property including the lender and then file the claim for lien within four months (4) months of the last date work was completed by it.

For Both Contractor and Subs

- Once the lien is perfected, both a Contractor and Sub-Contractor must file a lawsuit to foreclose on the lien within two years of the last day they did work.

Single Family Owner Occupied

- For Subs- Must provide notice within 60 days of the first day that you start work and then provide the 90 day notice and file claim for lien within 4 months of last day you did work.

Single Family Owner Occupied, Cont.

- IMPORTANT ADDITIONAL DISCLOSURES PRIOR TO CONTRACT BEING ENTERED
- Disclosures pursuant to Illinois Home Repair Remodeling Act (815 ILCS 513) for work over \$1,000
 - Contract must include term setting forth that the homeowner has 3 days to cancel the contract from the date it is signed.
 - Contractor must provide owner with the **Home Repair Know Your Rights Brochure** and have them sign acknowledgment of receipt of the brochure.

Claims for Lien for Public Projects

A Contractor cannot file a lien on a public property because public property cannot be sold in a foreclosure. But a Contractor and/or Subcontractor can issue a Notice of Claim for Lien to the public body that has contracted out the work and all entities in the chain between the public body and the Contractor and/or Sub-Contractor. If all money for the project has not been paid out by the public body, the public body will hold back 1 ½ times the amount of your claim for lien. Then a lawsuit must be filed within 90 days of the issuance of the Notice of Claim for Lien.

Mechanics Liens & Contracts

- Assuming you did everything you needed to do to perfect your lien, the issue becomes a breach of contract matter and a lawsuit to foreclose the on the lien and a breach of contract can be filed.

THANK YOU

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