

## SPRING CLEANING – REVIEW YOUR CONTRACTS!

by Christopher R. Jones

Spring is upon us and with it comes the tradition of "spring cleaning." With an increase in workload and new projects as the weather turns warm, spring cleaning for contractors should include a thorough review of business practices geared towards improving efficiency and performance especially in this difficult economy.

While it certainly comes as no surprise that having a written contract in place before undertaking work can avoid many problems down the road, many contractors do not pay enough attention to annual contract reviews and updates. As such, they 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. Going down that road can have a significant financial impact on a business.

Spelling out the terms of an agreement in writing before any work is commenced provides the contractor and customer (or subcontractor) with clear expectations, and sets the tone for the entire business relationship. The more issues that are addressed in advance the better, but

even some very basic language touching on standard principles may be enough to avoid future conflict. 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 contract is to preserve mechanic's lien rights. 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 language eliminates any right that a contractor would otherwise have to claim a mechanic's lien for work provided. Thus, including that language in a contract is paramount and the form must comply exactly with the statute.

- **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 points are often based upon specific dates or completion of a certain portion of the work. Payment amounts and timelines for payment should be clearly specified in the 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.

- **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 and can serve 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, 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 definitely be incorporated into the contract or referred to as an exhibit.

- **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. If additional work is requested, or original work plans are altered or cancelled, the changes should be documented by specific, written change orders. Granted, 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 significant problems later.


- **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.

- **Statutory Warranties.** For residential projects, new construction or significant residential remodeling work will normally fall under the statutory warranties provided by Minnesota law. In such cases, mention should be made in the contract of the statutory warranties called for under Minnesota Statutes Section 327A.01 et. seq. Furthermore, if a contractor provides its own separate warranty in addition to the legally required statutory warranty, that warranty language should be included in the contract as well. Oftentimes, this is done by way of an exhibit attached to the contract reciting the terms and conditions of the contractor's separate warranty.

- **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.

Hellmuth & Johnson, PLLC has significant experience in drafting everything from simple residential contracts to extremely complex commercial contracts. Contractors of all sizes can benefit from establishing a standard form contract which can be adapted to specific situations as needed. In addition, our firm can assist in drafting contracts for specific purposes or projects, or reviewing existing contracts on behalf of general contractors, subcontractors and owners/customers. 

## WHEN DO I NEED A MECHANIC'S LIEN?

If you own a business or perform services for someone, you expect to be paid, unless previous arrangements have been made for the donation of your time and materials. In order for your business to continue in a profitable manner, you have to rely on customers to pay their bills on time. However, in many cases, this simply doesn't happen. When you first start any type of job for a client, you should have a simple contract, which states the cost of materials and labor, and a payment schedule for the job. But, what if the customer decides they are not going to honor that contract and simply don't give you any money. Even if you do not have a formal contract (which is never a good idea), you still have a remedy for payment.

A mechanic's lien is given to certain builders, artisans, material providers, and service workers as a statutory

protection that grants a lien on the building and land improved by such persons. Any unpaid contractor may utilize this form with the courts to represent the money they are owed for labor and materials. Since it is very unusual for the contractor and the customer to have agreed in advance that the contractor will have a vested interest in the business, a mechanic's lien is a nonconsensual arrangement that will arise as a consequence of the parties' status of non-payment. The mechanic's lien is not by mutual consent, but the court will usually grant the contractor this allowance until he or she is fully reimbursed for their time, materials, and often interest, which has been lost up until the date of payment. This is an excellent remedy for the small contractor as well as large vendors in the event their invoices are ignored for an extended period of time. 

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