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KEY PRACTICE TIPS FOR SMALL CONTRACTORS

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Most small contractors are asked to sign contracts that favor the other party. If you are a small contractor on a Project, you should take certain steps to protect your rights in the event the unexpected should happen. Remember—an ounce of prevention is worth a pound of cure!

Negotiating the Written Contract

Often, contracts will not address what happens when the parties operate apart from the contractual terms. If you decide to waive a portion of the contract requirements, you should make it clear that you are not waiving any other requirements. One way to accomplish this is to have a phrase within the contract itself which states: “Any waiver of a breach shall not constitute waiver of any later breach.” If the contract is already executed, simply email or otherwise document that while a waiver has occurred, you are not waiving any future rights you may have.

Consider pros and cons of arbitration vs. litigation

Before you sign any contract, you should understand exactly what rights you are preserving, what rights you may be foregoing, and what responsibilities you have. As a general rule of thumb, arbitration is faster and more economical for large projects. However, arbitrators rarely consider purely legal defense theories like statutes of limitations, and often “split the baby” in their decisions. Moreover, if the arbitration is an formal one, such as the AAA, costs may not be any cheaper than state court action. It is especially important to consider the claims resolution terms and whether you would have better success in arbitration or litigation if a dispute were to arise on the project. That is often a project-specific or jurisdiction-specific question which you should address with your legal counsel before entering into the contract itself.

Requesting Time Extensions:

Always request extra time in writing. While case law suggests that as a contractor you may not need to make a written request for each time extension if those requests are being ignored, it is better practice to always do so. Memories fade, and people suddenly forget their promises once a project is over budget.

Changes in Scope:

If you encounter a changed condition, it should be documented immediately. Any oral directions to proceed with work after encountering such a changed condition should immediately be confirmed in writing to establish a written record of the authorization in case of later disputes. The writing should include a statement that you will expect a change to the contract price to reflect the changed condition work which was authorized. If it is impossible or impractical to document field changes and requests daily, at least once every few days you should document that situation in an email to owner, architect, construction manager, and anyone else who may be a decision maker.

Handling Threats of Contract Termination:

If you are being threatened with termination for cause, it makes economic sense to demonstrate to the owner or general contractor your commitment to correct any problems, including working overtime, doubling forces, etc. The acceleration costs will usually be less than costs of actual termination, lost cash flow, and legal expenses. This is because if a contractor is terminated for cause, he risks paying for delays to the owner for completion. Completing a terminated scope of work with a different contractor is almost always more expensive. Further, if a performance bond is in place, it will be called on immediately, and most such bonds require indemnity agreements from the principals of the contracting firm.

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