

An Article Every Land Owner Should Read to Avoid Getting Sideways With Their Contractor

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AN ARTICLE EVERY LAND OWNER SHOULD READ TO AVOID GETTING SIDWAYS WITH THEIR CONTRACTOR

Written Charles B. Jimerson, Esq. and Evan Reid, JD Candidate – 4/3/18

The last place land owners who have hired contractors want to end up is in court. Fortunately, most construction projects do not result in litigation. However, for the ones that do, it can be a costly and stressful ordeal. What follows are ten points that all Florida land owners should keep in mind to avoid getting sideways with their contractor.

1. Read all documents carefully. Once you've read, then negotiate.

Land owners often just want to get started with construction, so they skimp on reviewing contracts. This can prove to be a costly mistake later. Taking the time upfront to make sure that they understand what they are agreeing to can help property owners ensure a smooth transaction with contractors. In addition, all agreements should be made in writing, as opposed to orally, to avoid a "hesaid, she said" situation later. Do not sign the contract until you understand all of its terms and have your contractor explain to you the application of any provision you may not understand. And don't just limit your review to the contract itself- read the exhibits, warranties, corporate policies, subcontracts or any other document that is incorporated into the contract and carries the same weight as the contract itself. The construction contract proffered by a contractor is only a first offer. There are many changes that a sophisticated owner can make to a contract to ensure that the owner is well postured. For example, as it

relates to design of the project, owners can shift the risk of loss onto the contractor through the use of express and specific disclaimers or contractual language making the contractor the explicit guarantor of the adequacy of the plans and specifications. Including a “verification” clause in contracts, which typically requires the contractor to verify the project specifications for accuracy and completeness, serves as a warning to contractors that the drawings and specifications must be reviewed with reasonable thoroughness. As another example, owners can disclose differing site conditions, including geotechnical and other soils reports by consultants, or other material information pertaining to subsurface conditions at adjacent sites in order to limit the owner’s liability for differing or changed site conditions by including a site inspection or investigation. A disclaimer clause in the contract with the contractor as to these issues will shift the burden of risk away from the owner by requiring the contractor to investigate the site prior to submitting a bid for a project. Naturally, care should be given to ensure that general disclaimer clauses are cross-referenced to specific representations elsewhere in the contract documents (or disclosures otherwise incorporated into the contract). There are many contractor friendly provisions in a contract that should be scrutinized to balance the scales equitably.

2. *Include specific performance metrics in the contract.*

Setting expectations from the beginning is the best way to make sure that a project is successful. This is a two-way street—key metrics, specifications and deadlines for construction, project administration and payment should be included. Having clear, written metrics or deadlines helps later in any ensuing litigation to determine fault. Each party needs to know what it is agreeing to. Any owner who takes the time to

understand the design process enough to contribute to the details of the project specifications will be in a better position to enjoy the final construction product. One particular area where specific performance metrics can be clarified to avoid litigation are terms pertaining to payment. First, owners need to determine in advance which payment methods would work best for the owner. Is the project going to be a fixed fee, wherein some designated specific amount will be paid by the owner to the contractor for all work described in bid specifications? Or will it be a "cost plus," wherein the owner pays contractor an unspecified sum computed as all actual costs incurred by contractor, plus a previously agreed upon markup amount of each cost to cover the contractor's overhead and profits? Or will it be a "unit price" arrangement, wherein the owner pays lump sum directly to the contractor for each unit of work performed where the project entails repetition of largely identical activities (for example, construction of all parking lots)? The pricing method determines which type of contract forms are used in the industry and will dictate the requirement of the parties. Whatever the payment method is, the owner needs to always know what its rights and responsibilities are in payment. For example, does the owner have ability to pay suppliers or subcontractors directly by contract or state law? Can the owner withhold retainage on the project (hint: you probably should if you are an owner)? What are the lien waiver administration and loan administration protocols? Owners need to have agreed upon processes whereby they, or the owner's representative review all payment requests, confirm work is completed, acquire lien waivers, and approve work performed and materials used before issuing payment.

3. *Make sure all required permits are obtained on time.*

State and local officials can be a wealth of information in helping land owners understand what permits are required before construction can begin. Conferring with these officials to discuss zoning, land use, and code requirements can help streamline the construction project and avoid unnecessary red tape. Once a contract is in place, while much the permitting process is likely a contractor's exclusive obligation, owner engagement can help streamline the process and establish expectations for when the project will get started.

4. *Verify that regulatory requirements are met.*

A range of regulations including environmental requirements, accessible design rules, and other federal and state rules may apply to any given project. Depending on the project, there may be dozens of rules that must be satisfied. An experienced contractor will know what actions trigger additional rules and can help property owners navigate the compliance process. Assessing these issues in the pre-contract phase will help owners understand if the project is even viable, and if it is, what barriers must be broken through.

5. *Seek a second opinion and consider engaging complimentary professionals.*

Particularly when it comes to designs, a second opinion can identify issues that may delay the project or result in unanticipated expense. Throughout the construction project, another set of eyes at the construction site can help spot issues that others may overlook. There is a whole set of construction professionals who are able to assist at any point in the contracting or construction process. Depending on the project delivery system selected, owners of large projects often retain an expert (licensed design professional or general contractor) to act as

owner's project representative or construction manager to coordinate each phase and scope of construction directly with the owner. It is quite common on a large project to have a design professional prepare all bid specifications, plans, and other documents upon which a contractor would reply when submitting bids for the owner's project. Thereafter, the design professional administers the contract until the project's completion (for example, issuance of final approval of work and tendering final payment). At the bid phase, construction managers or owners representatives often assist the owner in obtaining and evaluating bids. Once a project is underway, a savvy owner or its representative can manage the project to avoid delays by providing the contractor with access to the work site, assisting with timely acquisition of all permits and easements, coordinating work among multiple prime contractors if applicable, and timely furnishing any owner procured materials or equipment in a way that does not impede the contractor's schedule or sequencing.

6. *Maintain open channels of communication and avoid owner caused delay.*

Just as contractors should be responsive and forthcoming with information, property owners should be approachable and available to speak with their contractors frequently. Establishing a working relationship early will help defuse problems that may arise later and will give parties a clearer understanding of the ultimate goals for the project. If land owners know of something that may hinder a contractor's performance, then they should voluntarily share that information. There comes a point in every project where a contractor will provide supplemental submittals, change orders, and requests. Owners need to review those requests within a reasonable time, promptly

respond to them, make timely inspections, and coordinate with owner-retained inspectors, construction managers, and jurisdictional authorities to avoid project delays. Owners should avoid any actions that could be construed as hindering, delaying, or interfering with the timely completion of work. This means avoiding the temptation to: overzealously inspect the work; issue unnecessary stop work orders; prematurely issue notices to proceed; inundating the contractor with change orders and clarifications that modify the scope of the original contract; keep a jobsite clear from obstructions; neglect disclosure of material information which affects contractor performance; occupy the premise or use the structure prior to completion of the work; or failing to furnish necessary revisions to plans and specifications, coupled with the failure to make progress payments.

7. *Require bonds and insurance from the contractor.*

Land owners can reduce their risk exposure by requiring contractual language that shifts the risk of adverse consequences to the contractor. This provides peace of mind to the land owner and motivates contractors to be conscientious during construction. If a guarantee is made up front, then contractors know that their performance must meet the agreed standards or else it will be up to them to pay for damages. Payment bonds and performance bonds protect the property from being subject to a lien in the event contractors do not meet all their obligations and require the contractors to follow the contractual terms. Land owners should obtain builder's risk and premises liability insurance in addition to requiring the contractors to provide proof of worker's compensation and commercial general liability coverage. Other policies, depending on the project, may be needed such as automobile insurance or an umbrella policy.

8. *Require that contractor name the owner as an additional insured.*

General contractors and subcontractors can often designate land owners as “additional insureds” on their insurance policies. This means that coverage under the policy is extended to the land owner. This is a common industry practice on most commercial general liability policies. Both individuals and entities can be given additional insured status, but their protection is more limited than the policyholder’s. The specifics depend on the policy, but additional insured status typically affords some crucial protection, such as: Defense coverage (when a third party sues the additional insured, the policy can address the claim in a way that legal defense fees, court fees, and settlement or judgment costs don’t come out of the additional insured’s pocket); Coverage for certain third-party lawsuits (often including claims of bodily injuries, property damage, and advertising injuries. Most often, additional insureds are added to general liability insurance policies, but in certain situations they may be added to property insurance policies.

9. *Think about including an alternative dispute resolution provision.*

Personally, I don’t care for arbitration provisions, but you may like to have your dispute out of the public eye. I do like mandatory pre-filing mediation requirements and would advise nearly all clients to include such requirement in their construction contracts. Arbitration may provide faster and cheaper resolution of disputes. However, rules of evidence generally do not apply, and the availability of appeals is significantly limited. If a land owner decides to include such a provision, then the contract should define the person who will resolve the dispute

or a method of selecting the person and should articulate any additional procedural requirements that may be appropriate.

10. *Wind up the project with care.*

Upon completion of the construction, land owners should collect all warranties and guarantees from contractors, subcontractors, and manufacturers. A best practice is to make digital copies and store the originals in a secure place. The contract should contain language stating that final payment or occupation of the land does not constitute approval of the work or bar the owner from bringing any future claims against a party to the construction. This way, property owners are not barred from seeking recourse for problems that may arise later. As part of project closeout and prior to releasing retainage, all work should be completed and all punch list items should be accomplished. This requires obtaining final releases of lien from all potential lienors and all as-built drawings. Construction contracts should include a provision that states that the owner's final payment or occupation of the property does not automatically constitute an acceptance of the work or materials furnished or operate as a waiver of all the owner's claims against the contractor or others for any latent or patent construction or design defects, change to express or implied warranty claims, or claims for violation of any applicable federal, state, or local ordinances or building codes.

With these tips in mind, a land owner should feel more confident in beginning a construction project. Ultimately, if things do not work out as planned, then a land owner should not hesitate to seek legal assistance. An experienced attorney can provide peace of mind and help protect a land owner's interests.

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