

# Birmingham BUSINESS JOURNAL

## The construction project – from beginning, middle to end

Whether from the perspective of an owner, general contractor or subcontractor, engaging in any new construction project brings emotions of both excited anticipation and fear of the unknown. Having a precise and complete plan as to how the project will be handled at each phase will help to make it more successful and enjoyable.

Having an early snapshot of potential issues that could arise can bring to the forefront the expectations of all parties involved and work to alleviate future disagreements as the project progresses. The construction contract documents the expectations of the parties prior to work beginning and is essential for any construction job. It is like insurance in many ways as it provides help, guidance and assurance when disputes do arise.

After agreeing on the price, the first issues to consider in the contract relate to the time of completion of the project. In addition to the completion date, the parties should address how delays that inevitably arise will be handled.

Both the contractor and the owner want an early completion time. The owner wants to get the project finished so that the building or structure can start earning revenue or serve its intended purpose. The contractor wants to earn its compensation as quickly as possible and move on to other jobs.

Delays cost money to both sides. Things such as bad weather, changes in the work, labor strikes, changes in the plans and unforeseen conditions can all cause delays. The parties should set out in the contract what changes will allow for an extension of completion time and whether the delay will provide for additional compensation to the contractor.

Along this line, another issue is whether, and to what extent, the contract will allow for liquidated damages to be imposed if the work is not finished on time.

Next, a contract typically also will



### My View

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address how often payments are to be made, when payment must be made in relation to when it is requested, how much retainage should be withheld and when retainage should be released.

The contract likely also will address what conditions must be satisfied before payment is made. These conditions can include things such as the approval of the work by an architect or the submission of lien releases.

Also, in a contract between a contractor and subcontractor is a “pay when paid” or “pay if paid” provision that makes payment to the subcontractor by the contractor conditional upon payment by the owner to the contractor.

The parties also should consider how they will handle conditions that occur on the project that are different from what might have been expected.

Typically, this involves conditions that are either not what was apparent from the plans and specifications or not what was indicated by a visual review of the site. This could include things such as hidden rocks or unexpected soil conditions. Other miscellaneous provisions of the contract are: the types of warranties that will be provided by the contractor and the limitations to those; the conditions that allow for, and the ramifications of, terminating the contract; the required types and amounts of insurance and bonding; and whether disputes will be handled in arbitration or in court.

### Documentation of the project

As the project begins it is critical that all

parties have detailed documentation of what takes place on the job. Many times disputes over construction do not reach trial or arbitration until long after the events about which the parties disagree have passed. Because of that, both the contractor and owner should have a daily diary of the project to support their side.

This documentation should include things such as daily weather conditions; a narrative and pictures showing site conditions; who was (and was not) on the job and when they were there; what supplies or materials were on the project; the stage of the project; a summary of discussions and agreements that took place; problems that occurred; and a description of change orders and change directives.

In cases where the work is delayed or potentially delayed the parties should keep up with all events surrounding the delay and all costs attributable to those events.

Correspondence between the parties also is necessary and in cases required under notice and other provisions of the contract.

Change orders and change directives should be in writing and signed by both parties.

Written notice should be given of any events that can cause delay or potentially allow for additional compensation. Correspondence should be sent confirming important conversations. Notification should be given of defective work.

Finally, correspondence should be sent in response to correspondence that is received but disputed. Perhaps nowhere is this more important than when disputed pay requests are received, as many states have “prompt payment” statutes and these can include provisions for disputing the request for payment in writing within a certain number of days when they are received.

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As the project comes to a close, if problems are to arise it is not uncommon for them to be centered around either non-payment by the owner or the discovery of a contractor's defective work.

### **Non-payment options**

As to non-payment, the contractor has several tools that can be utilized to obtain amounts that are owed. First, Alabama and many other states, have adopted prompt payment acts that set out requirements for paying amounts that are due. These statutes, when applicable, can have provisions for when payment must be made and allow for the recovery of attorneys' fees and interest in instances of non-payment.

Next, a lien can be filed and if ultimately perfected can allow the lien holder to have a type of security in the property to the extent of the amount they are owed. It should be noted that the proper perfection of a lien may require that the party claiming the lien comply with various

specific notices prior to the filing of the lien.

Also, lien statutes impose strict and rigid deadlines on the timing of the lien filing and the initiation of the lawsuit to perfect the lien. The lien statutes also contain precise form requirements on the substance what must be contained in the lien and the location of filing. Finally, in instances where a job is bonded, a subcontractor may have claims against not only the contractor that owes money but also against a bonding company.

From the owners perspective, the close of the job may reveal problems with work done by the contractor. The owner should do all that they can to diagnose and document the nature and extent of the problem and notify the contractor of its existence. Many contracts also contain provisions requiring the owner to give the contractor an opportunity to cure the problem.

In connection with issues of non-payment from the contractor's perspective or from the owner's standpoint, the contractor's failure to timely and properly

complete the work there may be considerations of whether the contract should be terminated. If a decision is made to terminate, both the contractor and the owner should carefully document all events supporting that termination and ensure that they are in compliance with all notices and prerequisites to termination set out in the contract.

What is listed above is only an attempt to give a very general overview of what should be considered in any construction project.

Following all the needed steps may seem tedious but knowing your rights can pay tremendous dividends.

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