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FIVE MAJOR TERMS CONSTRUCTION CONTRACTORS NEED TO WORRY ABOUT

BY TIMOTHY HUGHES, ESQUIRE

Most contract negotiations boil down to several key terms. For construction contractors, these are five critical items that you need to carefully consider and negotiate in each of your agreements.

I. What is the Scope?

The starting place of a construction contract is the work to be performed. Remarkably, this is often poorly or inconsistently defined. Contractors should strive for a clear definition of what are the "contract documents" and what portion of the work is the responsibility of that contractor.

II. What are the Terms of Payment?

The definition of expected compensation should be clear. Construction contracts are often clear on a total amount, but the agreements can become opaque in practice. What are the triggers for draw payments? What is the process for review of payment applications? Who has the right to review the quality and progress of the work? What are the grounds for withholding payment? In practice, these terms can often lead to a tug of war during construction. Starting a contract with poorly defined terms on payment can be a recipe for disputes.

III. What are the Indemnity Terms Under the Contract?

Indemnification provisions are perhaps the greatest risk shifting terms in construction agreements. Adding "in whole or in part" by itself to an indemnity clause can shift almost the entirety of a loss onto a barely responsible party. Contractors are typically not tuned into the risks involved with these terms. Subcontractors, in particular, are under pressure to sign even onerous terms that can have huge consequences. Construction contractors should resist the temptation to sign anything to get the work and become educated in how to say no to what may be a highly damaging project.

IV. What are the Standards of Performance?

The "contract documents" often contain a multitude of applicable performance standards. Sloppy specifications and plans can incorporate a legion of contractual yardsticks with which to measure the contractor's performance. These can include incorporated codes, industry standards, local or municipal regulations or other materials. Often, the terms of performance are actually inconsistent and even

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conflicting. Contractors can and should carefully analyze the plans and specifications and ask applicable questions before contracting to ensure that the yardstick governing performance is clear and mutually understood.

V. What if there is a Dispute?

Boilerplate terms can dramatically impact the risk of a contract. Is there a one way or two way attorney's fee recovery clause? Or is there no attorney fee recovery at all? Is mediation required prior to other dispute resolution? Will the case be arbitrated or litigated? Is a jury trial waived? These terms, while innocent on their face, can tilt the playing field significantly in the context of a specific case. You can and should know the rules prior to signing the deal.

Conclusion

Construction contracts are central to a contractor's work. Contractors must understand and define the basic terms of engagement on a project and then ensure those basic terms are well defined in their agreements. Failure to establish and understand these basic terms is an invitation to potential disaster and easily avoided by savvy contractors.

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HANDSHAKES TO HASHTAGS: THE EVOLUTION OF DEAL-MAKING IN THE CONSTRUCTION INDUSTRY

BY JUANITA FERGUSON, ESQUIRE

Ask anyone who has several years of experience in construction if they ever engaged in a handshake deal and the answer will be a resounding "yes." For those unfamiliar with the term, a handshake deal is essentially a verbal commitment that is sealed with a handshake between the contracting parties. Handshake deals were not just limited to transactions between a contractor and an individual. It was, and sometimes still is, common for businesses to engage in sophisticated deals with a simple handshake between business owners. The moment the parties shook hands, reputations were at stake and promises were meant to be kept. While the handshake did not obviate the need for documentation, the value of the handshake was understood to be the cornerstone of what the parties intended to occur for a construction project.

Fast forward to 2013 and the handshake deal still exists, but it has become replaced increasingly by a hashtag. A hashtag is a word or a phrase that has no spaces between the words and is prefixed with a # symbol. The hashtag is seen often on Twitter, Instagram, Google+, Facebook and other social media websites and represents a means for individuals to communicate on particular topics of discussion. In fact, the credit card industry has embraced the concept of hashtags for purchasing goods online. Customers can synchronize their credit cards with Twitter and take advantage of offers by tweeting and receiving response tweets from the seller of the goods.

With all of the technology available to "seal a deal," it is essential that contractors understand the framework within which transactions occur and deals are made in the age of social media. If you have ever tried to defend against a customer's claims by performing a search of every e-mail that your business has sent, then you understand that written documentation not only complements, but precedes the technological concepts that allow for construction professionals to reach business deals. To avoid having to defend your deal on the basis of social media alone, consider the following:

1. No deal exists until a contract is signed. All parties to an agreement need to know who the other parties are to the agreement, the amount of the agreement, the start and stop dates of the agreement, and the work to be performed under the agreement. Otherwise, you are inviting extended litigation to decipher what each party intended.

2. Money is still the most effective medium of exchange. Unless you intend to barter goods for services, money is the clearest indicator of the construction professional's intent to do business with another construction professional. Don't be in a hurry to enter into an agreement if the monetary components are unclear. Resist pressure to not address whether

the agreement is a cost-plus, a guaranteed maximum price or a hybrid that allows for cost overruns or other exigent circumstances. For subcontractors committing to honor all existing monetary agreements between a general contractor and an owner, ensure that you know the terms in advance of entering into an agreement with the general contractor.

3. Customer first, friend second. It is acceptable to friend your customers on Facebook, but avoid having conversations on social media as a substitute for written change orders or contract amendments. Think ahead when engaging in communications with a client or customer. It lessens the likelihood of having to interpret extensive communications "between friends" about whether or not terms of your agreement were modified by your actions on social media.

4. Plan for an uneventful termination of the agreement. Construction professionals don hardhats and steel toed shoes to avoid injury at the construction site but sometimes neglect to protect against the injury that is often associated with an inartfully drawn agreement. Pay extra attention to those provisions that may appear to be the least interesting. For example, if the agreement terminates unexpectedly or a party fails to fulfill its duties under an agreement, know your recourse prior to having to initiate a lawsuit. Many construction agreements have detailed dispute resolution clauses that are either one-sided or provide for relief in jurisdictions that are far removed from where the possible breach of an agreement may occur. Don't be afraid to negotiate unfavorable terms for the sake of getting the business. If you do, the costs may very well outweigh the expected benefits of the agreement.

Social media has changed the way that we communicate. The advantages are evident in the speed with which we relate to one another. But ensure speed does not jettison basic principles in contract negotiation. Whether you shake hands or send hashtags, a signed agreement and a cleared check are universal symbols of the ultimate deal.

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SEARCHING FOR THE ESCAPE HATCH: THE VARIANCE

BY MATTHEW ROBERTS, ESQUIRE

Although it is a familiar term in the zoning lexicon, the variance is one of the least understood devices in the zoning toolbox. Known to dirt lawyers as the "escape hatch," the variance gives relief to property owners from zoning requirements where the strict application of the zoning ordinance would be unconstitutional as to a particular property, often because of a unique characteristic of the site.

While simple in theory, getting to the "escape hatch" has proved more elusive in actual practice. In Virginia, local boards of zoning appeals (BZA) have authority to grant variances, subject to the statutory standards in Virginia code section 15.2-2309.

Prior to 2009, a BZA could only grant a variance if, among other things, it was necessary to alleviate a hardship "approaching confiscation" of the property. Virginia courts had interpreted section 15.2-2309's requirements to mean that the hardship inflicted on a property owner must approach a taking of the property. The Virginia General Assembly eliminated the "approaching confiscation" language in 2009, but left the remainder of the statute unchanged. The question became, what affect did this have on the BZA's ability to grant a variance?

Enter *Martin v. City of Alexandria*, where the Virginia Supreme Court provided some clarification. In *Martin*, homeowners in Alexandria's historic Old Town applied for and received side and rear yard variances to build their home on an undeveloped lot. Although city staff had opposed similar requests submitted by the homeowners in years past, staff supported their 2011 application based partly on the perceived "relaxed" standard in section 15.2-2309.

The Supreme Court held that the BZA should not have granted the variances, because the homeowners failed to show they were subject to a unique hardship requiring relief. The Supreme Court reiterated that homeowners must meet

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all of the statutory requirements for granting a variance.

Thus, Virginia property owners still face significant statutory hurdles to obtain a variance, despite the General Assembly's 2009 statutory changes, and a property owner will likely have to show that the application of the zoning ordinance to their property would render it effectively useless.

By statute, a property owner seeking a variance must show that, due to unique property characteristics or adjacent development, (a) a strict application of the local zoning ordinance will effectively prohibit or unreasonably restrict the use of the property or (b) the variance is necessary to relieve a "clearly demonstrable hardship." Further, the BZA must find that (i) strict application of the zoning ordinance will result in undue hardship to the property owner, (ii) the hardship is not shared by similar properties in the same area, and (iii) granting the variance will not be detrimental to adjacent property owners or change the character of the given zone. Finally, the BZA cannot grant a variance even if all these criteria are met, unless the BZA also finds that the property characteristic creating the hardship is not so general to the area that the local government could address it with a new zoning regulation.

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