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How to Review Contracts and Specifications LIKE an ATTORNEY and WITHOUT an ATTORNEY

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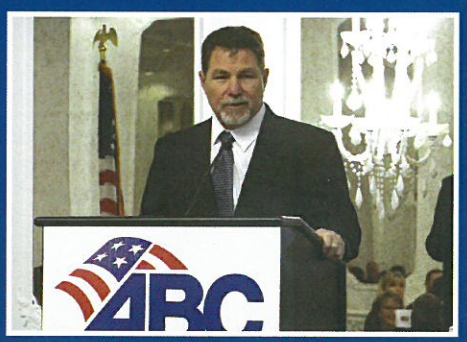

How to Review Contracts and Specifications LIKE an ATTORNEY and WITHOUT an ATTORNEY

By Justin R. Zinzow, Zinzow Law, LLC

If lawyers are being honest with themselves, they will acknowledge that contractors can often be successful without attorneys in their back pocket on every issue and project. These successful contractors have learned from bad experiences and from their attorneys, how to approach a contract and specification review like an attorney and without an attorney. This brief article is designed to outline a few tips and tricks that, if used correctly, will leave you looking like a wise old sage. Is there a role, then, for attorneys? Absolutely! We would no more pretend to know how to build every component of a building from the ground up, than you would profess to know several hundred years of legal precedent that must be considered when reviewing contract documents. So let us just start with some basics.

Read the entire contract and all specifications, not just those sections you believe are applicable to your trade or work. Sure, this can be a great deal of material. But experienced construction lawyers can tell you that the unsuspected is often hidden in unexpected places. You may be charged with knowing and be bound by those provisions which were hidden, even intentionally, in obscure places. You can use a lawyer to fight over the issue later, but would you not rather know about it and deal with it up front? Sure you would.

Pay particular attention to incorporations and flow down provisions. The prime contractor and the owner have a contract. Oftentimes, subcontracts and material supply contracts will incorporate the prime contract by reference, or otherwise "flow down" portions of the prime contract. Why should you care? Because your duties and rights may be governed by contract language that you will be completely unaware of if you speed read over these provisions. Be on the look-out for buzz words such as "incorporated herein," "incorporated by reference," "made a part hereof," "contract documents," "assume toward ... ," "benefit of all rights, remedies, and redress that the contractor has against the owner," "mutually bound by or to," and other similar words. You have a right to request the prime contract or other contracts and documents which are incorporated by reference or which flow down provisions into your contract documents. Request and review them. Make sure you understand how they impact your contract and determine whether you must or should include similar flow down or incorporation provisions in any sub-subcontracts or material supply contracts you may enter into for the project.

Know what form lien releases are required. This may seem innocuous at first blush, but overlooking this type of contract requirement can cost you. Experienced contractors know that Florida Law prescribes the form and content of lien releases (conditional and unconditional progress and final). Many contractors do not know that they can be contractually required to provide something different or more enhanced than what Florida Law prescribes. Typical contract provisions require lien releases to include affidavit language, under penalty of perjury, concerning the payment of sub-

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subcontractors and material suppliers, completion of work, and other items. If you are required to provide more than the statutorily required forms, you will need to think about whether to require the same in your sub-subcontracts and material supply contracts. Failure to provide contractually required forms is a common reason to delay or deny release of a progress or final payment.

Look for pay if paid provisions. Not all conditional payment clauses are alike. Keep your eye out for buzz words like "pay . . . only after . . . first received payment from ... ," "acceptance of work and payment to ... are a condition precedent to the obligation to pay," or clauses of similar import. Some mean you do not get paid if your customer does not get paid. Others merely control the timing of payment. Know what yours means, but even more importantly, make sure you have appropriate conditional payment provisions in your sub-subcontracts and material supply contracts so you are not stuck advancing large sums of money you have not yet received.

Do not overlook termination for convenience provisions. Why? Because if your customer terminates you for convenience, your right to payment is not the balance of your contract. Your right to payment is governed by that convenience provision, and is often merely payment for work already performed plus a pre-determined profit percentage on that work. Upon termination for convenience you stop work and receive your nominal termination for convenience payment. You notify your sub-subcontractors and material suppliers that they can stop work too. But if you do not have your-own appropriate termination for convenience provision in your sub-subcontracts and material supply contracts you are at risk for breaching those agreements and may have to pay those sub-subcontractors and material suppliers the balance of their contracts, not some limited termination for convenience price.

Do not let your eyes glaze over what you might consider "legal boilerplate." Not all "boilerplate" is made alike. Boilerplate, also known as a standard legal form, is supposedly ready-made or all-purpose language that is not negotiated. In this author's firm we refer to forms as the "F Word." We do so to avoid complacency and because such provisions are very important. Following are just a few oft overlooked "boilerplate" provisions that have real consequences. Notice provisions. How does the contract require notices to be delivered? Via certified mail, return receipt requested, overnight courier, or something else? In the electronic age most communications are exchanged via email. But this may be legally insufficient to preserve or assert rights. To whom must these communications go? To a project manager? Your customer's owner? Many provisions require that notices be sent to numerous companies and individuals. Failure to send notices to all required parties at the correct location can cause a loss of rights, be they to change orders, schedule, conflicts, or something else. In the event of an unresolvable dispute, does the contract mandate arbitration or litigation? While no contractor wants to think about such things, you will kick yourself for not spending a few minutes on it if you receive a demand for arbitration from your customer, only to realize that your subcontractor is to blame for the problem, and you never took the time to include in your subcontract a similar arbitration requirement. Now you cannot bring your subcontractor into the arbitration with you, and must fight in two different forums, essentially doubling your legal costs.

Provide your insurance agent with a copy of the contract documents, or at least those provisions which discuss insurance and indemnity obligations. Why? Because not all insurance is made alike. Further, even the best policy for a particular job may not be the best policy for other jobs. Your insurance agent can explain what riders, endorsements, or other policies may be helpful for a particular project. Your agent can also explain what your policy covers and what it does not. For example, you can learn about what the "your work" exclusion in your present commercial general liability policy means for a particular project (Surprise, many standard form insurance policies or endorsements provide no insurance for your-own allegedly defective work, and possibly even the defective work of your subcontractors) and whether you need a different

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policy or endorsement to provide more enhanced coverage. Further, you can learn whether your insurance policy contains an "insured contracts" provision, and whether that provision insures one or more of your indemnity obligations under the contract. Your agent can also inform you whether your insurer will consent to a waiver of subrogation (a requirement of many construction contracts) or whether the policy already expressly allows the insured to unilaterally waive subrogation on behalf of its insurer. Your agent can also discuss with you whether notice to third parties (such as the general contractor or project owner) of cancellation or modification of insurance is actually achievable with the standard form policy you have. Understanding how contract language dovetails with insurance is important for insurance coverage and risk mitigation reasons, but also to make sure your customer does not declare you in breach or otherwise use an insurance problem or requirement not met to hold up a progress or final payment. These things happen every day.

Applying these concepts will pay big dividends. Over time and with experience, you can come to learn more about these issues and many others, and become that wise old sage who looks like a pro.

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