

Construction Contracts 101

January 2021



NORTH RISK PARTNERS®



HELLMUTH
&
JOHNSON

Presenter



Blake R. Nelson

Attorney & Construction Law Group Chair
Hellmuth & Johnson



What is a Contract?

- Agreement of “Meeting of Minds”
- Between Two or More “Persons”
- That Describes a Relationship



Importance of Contracts

- Define terms in advance
- Avoid future disputes
- Ensure means of resolving disputes
- Pay up front, not at the end!



Must contracts be.....

WRITTEN?

Project Documents

- General Contract
- Subcontracts
- Drawing/Plans
- Change Orders
- Spec sheets
- Material lists



Yes, if residential. . .

- Minn. Stat. 326B.804

All agreements (proposals, bids, contracts, COs) must be in writing and contain:

1. Detailed summary of services to be provided
2. Description of specific materials/standard features
3. Total contract price (or calculation)



Commercial Jobs Technically don't require a written contract BUT...

- You should always have a written agreement, both with your customers and your subcontractors.
- Certain federal law suggests that any agreement for services over \$1000 must be in writing to be enforceable.

Contract Forms

- Form Documents
 - AIA
 - AGC
 - ConsensusDocs
- Large Company Documents

Project Documents

- What will be the order of priority among the project documents?
- Typical Order of Priority:
 - Change Orders
 - Primary Contract and General Conditions (if applicable)
 - Plans/Drawings
 - Specifications

Price Structure

- Fixed Price
- Cost-Plus
- Guaranteed Maximum Price (GMP)
- If Cost-Plus or GMP, be very detailed in what will included in the costs, the pricing (such as hourly rated) and excluded

Price Structure

- Contract Price
- General Conditions / General Requirements
 - Lump Sum?
 - Accounting/Tracking?
- Allowances
- Contingency
- Alternates

Payment Terms

- Down payment
- Progress Payments (frequency?)
- Pay Applications
 - What must be included
 - Who will review and approve? Owner? Architect? Title Company?

Retainage

- How much will be withheld from progress payment to make sure work is completed?
- 5% is the maximum allowed in Minnesota
- MN law requires General Contractor to pay retainage to subs within 10 days after receipt of retainage from Owner

Pay-if-Paid Clauses

- "It is specifically understood and agreed that payment to the Subcontractor is dependent, as a condition precedent, upon the Contractor's receipt of payment from the Owner. Subcontractor acknowledges that the risk of non-payment to the Contractor by the Owner which may result in non-payment to the Subcontractor by the Contractor."

Scope of Work

- What is included and excluded in the price or the scope of work to be covered by the GMP?
 - How do you handle in a cost plus, where it “costs what it costs”?
- Design/Build Work: will the contractor design any of the work?
 - If so, is that included in the price?
 - Subject to extra charges?
 - Subject to a separate agreement
- Be as specific as possible
- Refer to plans/drawings
- Include attachments if needed
- Review with owner(s) and any subs in detail

Project Design

- Is it a design/build project where the contractor is also designing it?
- Is there an architect and/or engineer involved?
 - If so, who is hiring them – the owner or the contractor?
 - Whoever hires the architect will be liable the other parties for the accuracy of the plans

Schedule

- When does the project start?
 - Set date?
 - Number of days after a certain event (i.e. permit issued)
- When is the completion date?
 - Set date?
 - Number days after commencement date?
 - What does “substantial completion” mean?
- Will there be extensions allowed for various events?
 - Weather
 - Delays in obtaining materials
 - Force Majeure/Issues beyond control
 - COVID-19?

Change Orders

- ALWAYS obtain them
- Must be written and signed
 - Scope
 - Materials
 - Price
 - Timing
- Be sure your Change Orders adjust the completion date if applicable
- Construction Change Directives



Insurance

- Additional Insured Provisions:
 - ISO CG 2037 (10/01): Coverage if arises out of work, even if you are not negligent
 - ISO CG 2037 (07/04): Coverage only if you are at least in part negligent
 - ECI v. LH Bolduc case
- Subcontractor Agreements: make sure the language matches what your insurer requires
- Have insurance agent review insurance language to confirm you have the right coverage
- Bond Required?



Other Important Terms

- **Terms of General Contract**
 - Contract with Owner
 - General Conditions
- Termination/Suspension for Convenience
- Liquidated Damages
- Leaving Materials and Equipment on Site

Other Important Terms

- Pre-lien Notice:
 - Primarily only needed on residential projects, but some cases were either required or useful on commercial project
- Attorney's Fees
 - Defense Obligation
 - Mutual/Prevailing Party
- Forum Selection & Choice of Law
- Flow down clauses for subcontracts

Arbitration Clauses

PROS

- Avoids hostility
- Can be cheaper than litigation (not always)
- Can be faster than litigation (not always)
- Flexible
- Simplified rules of evidence and procedure
- Private

CONS

- Limited recourse – no rights to appeal decision
- Uneven playing field
- Questionable objectivity
- Lack of transparency
- Rising costs

Only for Residential Contracts

- Three-Day Right to Cancel
 - As of 8/1/12, required for ALL contracts
 - VERY limited exceptions
 - “Home Solicitation Sales Act” revised to include “improvements to real property”
 - Generally covers most construction work
 - Include language AND Notice of Cancellation Form in contracts

Only for Residential Contracts

- Notice of Cancellation of RESIDENTIAL roofing (or siding) contracts involving insurance claims (Minn. Stat. 326B.811):
 - Homeowner may cancel within 72 hours if insurance claim is denied
 - Contractor **MUST** provide cancellation information in a contract prior to entering into the contract and 2 copies of the Notice of Cancellation
 - Notice of cancellation must be in writing from the homeowner
 - Contractor must refund any money paid unless emergency work completed
 - DOLI will enforce this provision & punish violations

Only for Residential Contracts

- Statutory Warranty (Minn. Stat. §327A)
 - Required for residential projects now
 - Requirements of Chapter 327A must be provided in writing to customers
 - Include entire statute in some format
 - Owners must be aware of warranties & procedure under statute

Only for Residential Contracts

- Written Performance Standards (326B)
 - Standards must be in writing provided with contract, determining which standard applies
 - No specific performance standard referenced
 - Rely on accepted industry standards
 - Provide own standards if desired
 - Serves as a guide for what is good/bad

Only for Residential Contracts

- **Acting as Public Adjuster**
- Bulletin 2010-4 dated September 17, 2010
- Contractors may not hold themselves out as the adjusters, i.e., the party hired by the insured for negotiating insurance claims
- Does not mean contractor may not ever speak to insurance adjuster
- Must “sanitize” your residential insurance contracts and advertising

Most Common Errors

- Cut and Paste
- Ignoring Boilerplate
- Creating Ambiguity
- Ignoring General Contract or General Conditions
- Ignoring Payment Terms and Being Vague
- Ignoring Insurance Terms
- Ignoring Delay/Scheduling Terms



Questions?

Contact Hellmuth & Johnson at:
(651) 379-7916
constructionlaw@northriskpartners.com



NORTH RISK PARTNERS®



HELLMUTH
&
JOHNSON