

THE DO'S AND DON'TS OF CONSTRUCTION CONTRACTING

A Checklist for Staying Out of Trouble



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With the pace of construction slowing over the last several months, the competition for new work has become even more fierce. Now, more than ever, it is important for all parties involved in construction contracts to understand their responsibilities and protect their respective interests. From a contractor's perspective there are many ways to accomplish these goals, but seemingly, many more ways to get burned. The purpose of this article is to briefly discuss common pitfalls that contractors should avoid.

- First and foremost, all parties involved in a construction project need to *put their agreement in writing*. While it seems simple, many contractors, subcontractors, suppliers and owners have long-standing relationships and a customary way of dealing with each other. Often, these dealings involve "hand-shake" agreements and promises to agree on more specific terms later. It is in everyone's best interest to document those terms in an unambiguous written contract that sets forth the exact terms of the agreement including, but not limited to, scope of work, cost of work, claims procedures and timeframes for completion and payment. With a clear written agreement in place, the parties will know exactly what their respective responsibilities are and how they must achieve them. Without a good written contract, all parties are "left to figure it out as they go" which often leads to disputes and costly litigation.
 - Along the same lines, no significant construction project proceeds exactly as planned. Many sophisticated owners, contractors and subcontractors take this for granted and *neglect to document those changes in writing*. Often, because a project's schedule is dependent upon a rapid flow of work, the parties will "agree to agree" on the terms and conditions of any changes. The failure to properly document changes often results in a dispute at the conclusion of the project as to what actually constituted the change and how much should be added to (or deducted from) the contract price. Parties who work out a firm written schedule of additional costs, scope and timeframe before changes in the work are implemented are less likely to find themselves arguing over these essential terms at the end of the project.
 - Contractors should also ensure that their subs and suppliers are being paid and that the *appropriate releases are obtained in exchange for payment*. A contractor has to know what its obligations are with respect to the payment of its subcontractors and suppliers and whether any payment is due from those subs and suppliers to others who may have lien or bond rights. One way contractors can easily protect themselves from payment disputes is to ensure that the payment provisions in their contracts with the owners are incorporated and/or repeated in their contracts with their subcontractors and suppliers.
 - For example, if the contractor has a "pay when paid" clause in its contract with the owner, incorporating that exact provision into all of its downstream contracts will avoid disputes over any party's obligation to pay others before they have been paid. Additionally, a contractor must be aware of all entities that serve a Notice to Owner or Notice to Contractor, and serve its own if the contractor is not in privity with the owner, in order to properly preserve and understand the lien rights at play.
 - *Contractors must be aware of the very strict requirements of the Florida Lien Law and must strive to meet these requirements, without exception*. All contractors should, as a matter of course (unless in direct privity with the owner), serve a Notice to Owner before beginning any work. Do not wait. In fact, all non-privity contractors and suppliers should make serving a Notice to Owner (or Notice to Contractor if it is a bonded job) an automatic part of the contract signing process. This is the first step in preserving lien rights.
 - Also, a lienor *should not wait until the 89th day to record its lien*. Many contractors and suppliers wait until the last minute leaving themselves with no margin for error. If a lienor records its lien 91 days after last providing labor, materials or services, it will have forfeited its lien rights and all associated protections.
 - Contractors should *involve legal counsel in the contracting process*. Like most people, contractors cringe at the idea of spending money on lawyers when there is no dispute. However, the money spent on good legal counsel early in a project will often save a contractor even more money, not to mention aggravation.
- It might be impossible to avoid disputes entirely, but there are steps available, like those described in this article, that can help a contractor avoid many of the most common disputes.