

Contracts, Collections, Escalation Clauses, Fees and Legal Obligations for Contractors

Presented by Scott J. Hertz, Esq.

P: 239-791-7950

1222 SE 47th Street Suite 116 Cape Coral, FL 33901

2222 Second Street Fort Myers, FL 33901

LawDefined.com

Be Properly Licensed

- I'm sure everyone is
- Unlicensed contractors cannot enforce
- Clients can enforce
- No lien rights
 - Know your timelines for liens
 - NTO within 45 days of commencement
 - Claim of Lien 90 days of completion



Importance of Good Contracts

- Clarifying the scope of work and costs
 - Identify contract documents/plans
 - detailed specifications for all aspects of the work, including materials.
- Being clear avoids disputes
- American Rule
- Clause for attorney fees
 - All efforts to resolve disputes or collect monies, not just litigation
- Monetary penalties for non-payment (interest)



Pricing Structure

• Fixed Price or lump sum

- Allowances (should be reasonable)

- Unit Prices
- Cost of work plus a fee (fixed or variable)
- Cost of work plus a guaranteed maximum price (GMP)



Current Situation

- When was contract signed?
- What were current conditions at time?
- What knowledge did you have of future price increases/material & labor issues?
- Impact of COVID on construction
 - Time
 - Pricing



Common Law Arguments

• Frustration of purpose

- Primary purpose for entering into the contract is substantially frustrated by the occurrence of an event, that the parties assumed would not occur at the time they made the contract
- Most common example is renting a room for an event and the event is cancelled or prohibited
 - COVID gathering restrictions



Common Law Arguments

- Impracticability of performance
 - It is still possible to perform but its not reasonable to do so
 - When the duty to be performed becomes unfeasibly difficult or expensive for a party who was to perform
 - Must not have been foreseeable
 - Severe shortages of materials or labor
 - Quarantined due to COVID causes delays



Impracticability of Performance Con't

- Does not apply based on:
 - The financial condition of the parties
 - A change in circumstances that makes the contract less profitable; or
 - If there's an alternate way to perform the contract



Escalation Clause Options

- Specifying a baseline cost for specific materials where prices have been fluctuating
- Specifying an index to be used to establish the price for specific materials at the time of purchase
- Identify a specific estimate provide notice period
- Price then adjusted to match actual costs without markup



Escalation Clause Best Practices

- Have a written estimate for the cost of the project
- Have bids/proposals from subcontractors/suppliers that estimate is based on
 - Review how long prices are valid for
- Be able to show price change based on documents from same provider
- Have a % of change to trigger escalation
- Consider milestone/exit points such as permit issuance
- Be sure that you are diligent delays/escalations not caused by your actions
- Provide timely notice



Force Majeure

 Contractor shall not be liable for failure or delay in delivery occasioned by labor disputes, war, riots, insurrection, epidemic, pandemic (including delays caused by the current Covid-19 pandemic), force majeure, or other causes beyond contractor's control, or for incidental or consequential damages arising from failure to complete the project within the time provided.



General Clauses

- Construction Industries Recovery Fund § 489.1425
- § 713.015 on NTOs 12-point, capitalized, and boldfaced
- Contractor's Right to Notice and Opportunity to Repair Act – §558.005
- Express Warranty
- Residential contracts
 - deposit escrow (10%)
 - Contractor's Right to Repair Act Notice Chap. 558
 - Waiver of permit application and start date if more than 10% received § 489.126
 - Home solicitation sale
- Require written change orders fee/time required



Clauses Con't

- Who pays permits fees
- Who pays site work, other things not determinable
- Risk for unknowns soil conditions
- Builder's Risk Insurance
- Allowances
- Acceptable sources of materials
- Non-interference (owner can't tell workers what to do)
- Mediation



Subcontractors

- Just using their proposal not in your best interest
- Clarify scope of work and responsibilities
- Job site requirements broom clean, no smoking
- Warranties
- Payment terms
- Liability/workers comp ins.
- Allowing or disallowing sub-sub-contractors
- Atty fees (again)



Courts

- Small Claims up to \$8,000
 - Represent yourself
 - Informal
 - Starts with mediation
- County up to \$30,000
- Circuit over \$30,000
- Arbitration



Who We Are

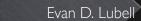
With two locations, one in the heart of downtown Fort Myers and one in the South Cape, Aloia, Roland, Lubell & Morgan, PLLC upholds the highest standards in the practice of law. Led by an experienced team of trial attorneys, we function as a full-service law office. From business and real estate law to personal injury and family law, and a wide array of civil and commercial litigation, we cater to clients' needs and advocate in their best interest.

Meet our Attorneys:



Frank J. Aloia, Jr.







Jack C. Morgan, III



Danielle Levy Seitz



Scott J. Hertz



Mark J. Joseph



Stephen W. Dommerich



Edwin C. Cisneros

What We Do

- Business Law
 - Litigation
 - Transactional/Sales
- Construction/Lien Law
- Partnership disputes
- DBPR Issues
- Family Law
- Guardianships
- Personal Injury

- Mass Torts
- Real Estate Law
- Real Estate Closings/Title Insurance
- Will, Trusts & Estates





QUESTIONS or COMMENTS?







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shertz@lawdefined.com

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