



Aloia | Roland
ATTORNEYS AT LAW

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

Presented by
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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.



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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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