Contract Language Is Key to Avoiding Litigation

by Christopher G. Hill

As an attorney specializing in construction issues, I can tell you that something goes wrong on most job sites. Construction projects simply have too many moving parts for even the most conscientious contractors to avoid occasional glitches.

Whether the problem remains a minor one or becomes a catastrophe leading to litigation hinges very much on how the builder, homeowner, and other affected parties approach the issue. When the responsible party fixes the problem without incident, I don't even hear about it, much less need to be involved. I recommend daily that the parties deal with their issues without legal action.

Many of the disputes I do get involved in surround the contract. From a legal and risk-management perspective, your contract is king. The contract sets the tone and the expectations for any construction project, large or small. Everything from the payment schedule, the method for dealing with changes in the work, and even the timing for certain work can and should be laid out in the contract.

Some of the larger disputes that I've dealt with center on unclear expectations; that is, when the homeowner has one idea as to how the project will be completed and the contractor has a different idea. Without specific — not necessarily complex — language in the contract detailing how the project will progress, disputes are almost inevitable. The resolution of those types of disputes falls to third parties such as judges or arbitrators who were not a part of the original bargain. All they have to go on is the testimony and documents presented to them; unclear language leaves room for argument, which may lead to a settlement that differs from what the original intent of the agreement was. At the least, this may leave a contractor with a large legal bill even if he or she prevails.

Three of the main areas to set expectations for in a contract are scope of work, changes to the work, and dispute resolution.

Scope of Work

That the scope of work must be defined with specificity seems obvious. However, I cannot count the times that I have gotten a call, particularly on a residential project, where it was clear that the owner and the contractor had different ideas of what was included in the original price quoted for the job. In short, "a 10-by-10 deck made from Trex" is not an adequate description of the scope of work. Even in this simple case, misunderstandings could occur over which type of Trex is used, how high the rails should be, whether lighting is included, and so on. Remember, you are working on someone's home and homeowners have emotions and high expectations. Laying out the scope of work specifically is the best way to avoid a train wreck at the end of the job.

Changes

Changes that are requested after the work has started are the bane of many construction jobs, particularly when the homeowners are inexperienced with construction. Most construction contracts contain a provision (and if they don't, they should) requiring any changes to the scope of work or price to be set forth in writing prior to performance of any of these changes. However, circumstances may arise where you are asked to perform work without a written change order. In the heat of a time-crunched project when you're trying to meet deadlines for a demanding owner, you may be tempted to give in. But stick to your guns and do not perform work without at least an email exchange setting forth what is to be done, when it will be completed, and how much it will cost. Having this in writing will go a long way toward resolving any disputes and "memory issues" at the end of a job.

Resolving Disputes

Good dispute-resolution procedures help ensure that if any issues do arise, they will be taken care of early and efficiently. Even the simplest of projects involving a person's home can lead to disputes, whether justified or otherwise. Having a dispute-resolution clause stating what notice to you, as a deck builder, is required, and where any lawsuit will be filed (a good location for this is where your attorney is located) will help you keep your costs of collection down in the event that going to court is necessary.

Also make sure that your contract specifies who, if anyone, can demand attorney fees. The most common of such clauses is a so-called "loser pays" or "prevailing party" provision, which specifies that the party who wins any legal dispute may obtain a judgment including attorney fees. Without such a clause, many jurisdictions won't allow either party to collect its fees.

To prepare for a situation where your

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discussions with the homeowner don't result in resolution, you may want to include mediation in your contract as a route to get the dispute resolved. Mediation (as opposed to arbitration or court) is essentially refereed negotiation, and it's often more palatable to both sides of a dispute, because everyone has a measure of control that doesn't exist when the outcome is in the hands of a judge or arbitrator.

Plan for the Worst

As a final note, always make sure that your contracts meet whatever requirements your state licensing board has. Many states require that certain terms be included in all residential construction contracts; without them, the contract may be unenforceable. Usually those terms are laid out in the regulations and can be added to your contract in a cut-and-paste manner.

"Murphy was an optimist, so plan for the worst and hope for the best" is a credo I live by as a construction attorney. While the above set of key provisions is far from exhaustive, concentrating on them should make getting paid easier at the end of a job. By making your contract documents clear (from scope of work to change orders to dispute resolution), your deck-building projects will run more smoothly, and disputes will not be as much of a financial drain. ❖

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