

Community Association Vendor Contracts - A Primer

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The key to any successful community association construction project is a written agreement setting forth the parties' rights, obligations and expectations, not necessarily to make sure the project goes right but to protect the association when things go wrong. A clear and detailed contract is the association's best protection. Here are a few essential contract provisions that will help keep your association project on track and within budget.

CONTRACT SCOPE OF WORK AND BID PROCESS

A Well-Defined Scope of Work

Multiple bids are essential. To compare "apples to apples," all contractors must bid based upon the same scope, allowing the board to focus in on the contractor offering the most competitive bid. A detailed scope also documents the parties' expectations about what is included in the project and what the successful contractor will be held accountable for. After the contractor is selected, the scope of work should be attached to and incorporated into the contract to serve as a reference in the event of a dispute.

A detailed scope of work prepared by an independent construction consultant reduces the likelihood of mid-project additions to the scope or cost (change orders). The time and money spent on the scope of work before the job begins means less change orders and cost overruns to address items that were overlooked.

Pre-bid Inspection

A pre-bid project inspection is another way to reduce change orders. Require the bidding contractors to inspect the project for known conditions before bidding, and to incorporate those observed conditions into the contract to avoid attractively low bids that result in high change orders. Any bid submitted should include the contractor's assurance that it is based upon the contractor's reasonable inspection of the job site for conditions capable of observation upon reasonable inspection.

Expect the Unexpected

Things happen. The scope of work should reflect the anticipated cost of your project. Whether your project is funded by reserve funds, a special assessment or a loan, build a contingency fund into your contract scope in order to be financially prepared for unexpected change orders.

CONTRACT PAYMENTS: APPROVAL, RETENTION, SUBCONTRACTORS

Construction Consultants

Boards are called upon to make many important decisions throughout the project including whether to approve a construction progress payment. The proper exercise of sound business judgment, however, may require reliance upon an independent construction consultant prior to issuing payment. This is money well spent and may save the association in the long run. The consultant verifies: 1) that the payment request covers work that was completed; 2) that the work was completed in accordance with the applicable codes and industry standards; and 3) in the case of a change order, that the work was in fact outside the original scope of work.

Never Pay it Forward

All too often we hear of associations that paid their contractor for poor workmanship or work not completed properly, or at all, only to be left holding the bag when the contractor walks off the job or is terminated. For this reason, your contract should expressly condition payment on the satisfactory completion of the work per the association's expectations. You never want your payments to get ahead of the work completed and approved. Pay only for work that is completed and approved by the board or construction consultant and retain from each progress payment an agreed upon percentage to be paid at final completion and approval of the project.

This is especially important at job completion. A well-written contract and the incentive of final payment ensures that the contractor will provide applicable permits, warranties, waivers and releases at completion. Require the project construction to independently determine whether the project was completed per the scope of work and the parties' expectations. Once the contractor receives final payment it's much more difficult to get unfinished or incomplete items resolved. By conditioning final payment on completion, you are increasing the likelihood that your project will be complete.

Stopping Work for Nonpayment

Just as important is allowing the association to withhold payment for improper work or failure to comply with contract terms, without allowing the contractor to stop work. Disputes occur on any job. But jobs delayed because of disputes can increase costs. The contract should prevent the contractor from stopping work when the nonpayment is due to unacceptable work or contract breach. This allows the remaining work to proceed while the parties resolve their differences over the items in dispute. Also, it is wise to include a dispute resolution procedure in the contract so dispute delays can be minimized.

Monitor Subcontractor Payments

Another potential area of concern is payment to subcontractors. A contractor that fails to pay its subcontractors leaves the association having to pay the subcontractor directly, or risk a subcontractor's lien on the property for nonpayment. Failing to monitor the general contractor's subcontractor payments can leave the association paying twice for the same work. The contract should expressly require that the contractor pay its subcontractors out of progress payments. Alternatively, request the option of the association paying subcontractors directly or issuing payment jointly to cover subcontractors' work.

Keep the Change

The change order presents the greatest threat to your project budget. Beware of the low-bidding contractor. Without a specific change order protocol, it can be deceptively attractive to accept a low bid only to end up paying more for the entire project due to excessive change orders.

- The more specific the scope of work, the less change orders to fill in for items missed in the bid process.
- Require regular reports or meetings with the contractor throughout the project so that all parties are on the same page and can anticipate scope changes or scheduling delays in advance.
- Insist that no additional work be performed and no payment made for additional work unless and until approved by the Board, in writing. A change order presented for work completed without approval should be rejected.
- Have your construction consultant review and approve all change orders before Board approval to verify that the work 1) is necessary; and 2) is outside the contract scope of work.

PERFORMANCE, COMPLETION AND DELAY

There are some additional contract provisions that add an additional layer of protection to the construction contract. If it's essential that a project be completed by a certain date, ensure timely performance by providing an incentive for early completion and a penalty for delay. Further, depending on the size and scope of your project, consider requiring a completion bond to ensure completion of your project's remaining work at the stated contract price. This is helpful in the event of a mid-project dispute when the contractor walks off the job for nonpayment.