

CONSTRUCTION GLOSSARY AND NOTES WITH CAUTIONS PLAIN TALK

By: Herbert H. Fisher, Esq., and Mark Krason, Esq.
Chicago, Illinois Lansing, Illinois

It's inevitable. The ravages of time, and the natural elements, take their toll on buildings and their related common areas.

Sooner or later the buildings and surrounding improvements must be repaired or replaced.

Boards of Directors are prone to leave what appears to be a complex process to their management company, a retained construction manager, a general contractor and/or an architect, only to be disappointed when costly surprises pop up during or after the performance of the work.

One of the handicaps that housing cooperative officers and board members face is that they are confronted with terms they don't understand. Terms of art, words that have particular meaning to those familiar with the construction industry, may as well be Greek to the average layperson.

I often thought that if Board members had a glossary of construction terms available to them, how much simpler and less time consuming the contracting process would be. Moreover, communication between all the necessary parties would be less fraught with misunderstandings, some of which go undiscovered until after all the activities have been completed (and sometimes even after the applicable statutory or contracted statute of limitations have expired (here we go with the first "buzz" word of the trade)). See statute of limitations below.

So let's try our hand and see if my assumption is correct.

GLOSSORY OF TERMS

Approval An "OK" needed from the architect and/or owner, as required, for specific situations provided by Contract. There are no built in approvals unless provided for by Contract.

Architect: A person trained in the art of design and construction of physical structures.

Architect, Licensed An architect who has been licensed by the state or jurisdiction in which he does business, as required by state statute. Out of state architects may be permitted to do business in a state other than where licensed with regulatory limitations.

AIA American Institute of Architects. A voluntary membership trade association with industry-wide stature providing standardization and documentation to the practice of architecture.

Architecture The art of design and construction of physical structures.

Bids Responses from contractors on a Bid Form prepared by the Architect or Engineer seeking pricing for the Work described in the Plans and Specifications. Caution: Technically, once the owner accepts the bid without any other qualification, it can be construed as a binding contract enforceable against the owner. Although it is customary in the industry that the acceptance of bids are subject to the negotiation of a full contract, it is advisable that the Bid Form so state and that acceptance is conditioned upon a board resolution approving the bid..

Completion

Partial: Completion at a specified point in the Work defined by the Contract, usually in the provision governing payments; typically payment is due when a certain percentage of the total work is done, or a certain part of the project is done.

Substantial: When the Work required by the Contract has been done but for certain minor and insubstantial items which do not interfere with the use of the improvement. These minor and insubstantial items, revealed by on-site inspection performed by the contractor and the owner's representative, are referred to as "punch list items". The punch list items are corrected prior to final payment. At the point of Substantial Completion all funds have been paid, except retention.

Final: When the punch list has been completed and retention is paid.

Contract A written document providing the purpose, terms and consideration or price of the transaction.

Architectural: Between an owner and an architect to provide architectural services

Engineering: Between an owner or architect and an engineer to provide engineering services directly to the owner for owners use, or with an architect or another engineer in support of the first architect or engineer. Engineers fall into specialized categories like structural, mechanical, electrical, etc.

Construction Contract: Usually between an owner and a party to provide the material and do the work or provide the work to achieve the construction or rehabilitation (reconstruction in whole or part) of a structure or structures. Oft times just referred to as The Contract. May be a Rehab Contract, Repair Contract

Purchase Contract: A contract between an owner and materialman providing supplies, material or equipment. Sometimes an owner may buy these items directly and have the contractor do the installation where trades work is needed for installation or application, e.g., painting, siding, boilers

Draws: On a job of more than a month, generally the contractor is paid periodically on a monthly basis for work completed or completion of a segment of the job as specified in the Contract.

Drawings: The drawn description of the Work to be done, the location and dimensions of the Work to be done. Usually prepared by the Architect or Engineer. See plans and specifications below

Equipment: Either equipment to be installed as part of the Work or the equipment required to be used by the Contractor.

General: The contractor who assumes the responsibility for the entire project; may or may not provide any of the material or labor but subcontracts with the trades or materialmen who will supply the specific jobs which are part of the overall project

Job: The Work contracted to be done, including materials.

Materialman: The vendor of materials or supplies used in the project.

Plans and Specifications: The Plans or Drawings and Specifications prepared by Architect or Engineer. Plans are sometimes referred to as Drawings. The Plans are drawn picture of the area on which work will be done from the entire building or property down to each room or wall to the extent detail may be needed for the notations to be readable. The Specifications is the written compilation describing everything from the condition of the work place, how work is to be performed, the materials to be used and sometimes even the equipment to be used in the performance of the job.

Project: The specific job, group of specific work needed to achieve the owner's goals.

Rehabilitation: Where the Work is not for new construction, i.e., building of new structures but the repair of existing structures.

Retention: An amount of money withheld from each draw to protect the owner in event of difficulties on the job or the Contractor's default. Usually this amount is 10%. It is a common practice to reduce the percentage to 5% when 75% or so of the job is done. Caution: This reduction should be approached cautiously and be conditioned on there not having been any problems on the job, such as stop work orders, a pattern of defective work, etc., recognizing that if the owner has to pay for incomplete or corrective work, it will, in all likelihood, be more expensive than originally priced.

Specifications: The written description of the Work to be done, including detail as to how certain parts of the job are to be done, if not standardized, and what materials and equipment are to be used in doing the Work. Usually prepared by the Architect or Engineer

Statute of Limitations: Time period within which a law suit can be filed set by state law. This period can be shortened by contract.

Sub: The contractor, usually in a specific trade or phase of the project, who is hired by the General Contractor to provide labor and material for that particular part of the project.

Work: What is needed in way of labor, material and equipment to create the construction?

THE PROCESS

The process begins when the Cooperative determines it needs to have work done.

The Cooperative, or its agent, contacts a contractor to do the job, whereupon the contractor will visit the site, and some time thereafter, submit its proposal to perform the work contemplated. Very often the proposal contains only a broad statement of the work to be done and the price. Prudence, however, dictates that the agreement should also provide at a minimum:

a specific description of the work ;

a starting date and completion date;

warranties for material and workmanship;

insurance requirements;

a representation by the contractor that the work will be performed in a manner so as to minimize disturbances to the residents;

a representation by the contractor that he will not damage any part of the property not otherwise earmarked for demolition;

permits to be secured, if required; and

a schedule of payment, to include the number of installments, frequency and amount of each disbursement, and the conditions upon which payment will be made, usually inspection and approval by the Cooperative or its representative.

Alternatively, if the work contemplated is complex, or if it involves the basic structure of the building, the cooperative should hire an architect to analyze the problem and make recommendations as to scope of work needed; and upon owner's approval, draft plans and specifications. Once the plans and specifications have been completed, Contractors will bid on the job as described in the plans and specs. Thereupon the Cooperative, with the advice of the architect, will select a contractor to do the job and a contract will be drafted, based on the plans and specs, with terms to include the minimum conditions set out above.

Once the project commences, someone, acting on behalf of the Cooperative, needs to check on the execution of the work to confirm that the work has been performed in accordance with the contract. This job is best left to someone familiar with construction or repair techniques and materials, as well as any applicable building code requirements. If an architect is involved, the architect will inspect the work. Usually, the inspection takes place only when the contractor has notified the Cooperative that it has completed the work, or an agreed upon stage of the work, and that the contractor is thus entitled to payment.

Every State in the Union affords unpaid contractors and materialmen a claim enforceable against real estate whenever such persons have expended labor or supplied materials in connection with the improvement of the property. This claim is known as a mechanics lien.

In order to avoid problems arising out of any such claims, the Cooperative must insist that the contractor identify all subcontractors and materialmen involved in the work, detailing the amount owed to each. It is vital that this information is received by the Cooperative PRIOR to the issuance of any payment.

The disclosure usually takes the form of a sworn written statement or affidavit, and need to be accompanied by legally sufficient written waivers of lien, who provided labor or material or services or equipment to the job signed by everyone.

Before any payment is made someone, acting on behalf of the Cooperative, needs to check the contractor's sworn statements or affidavits and waivers to ensure that the Cooperative is protected against potential lien claims.

A lawyer, experienced with the state's mechanics lien statute, or a title insurance company, acting as an agent of the Cooperative for the limited purpose of paying the bills associated with the construction, are the only parties capable of evaluating sworn statements/affidavits and waivers to determine if they are legally sufficient. Although management agents, architects and oftentimes even lawyers profess experience in the process, it pays to inquire into the experience and knowledge of any such person before you entrust the job to them.

All contract work activity involves risk.

Will the contractor show up?

Will the work get done right?

Will the work get done in a timely fashion?

What if the contractor causes damage on the property?

What if the contractor injures or kills someone?

What if the contractor fails to pay employees, subcontractors or suppliers?

What if parties unknown to the Cooperative perform work at, or provide materials to, the property?

Risks can never be eliminated, only reduced and controlled.

However, a well drafted contract, properly administered and enforced on a day to day basis is your first line of defense against risk..

Do not be fooled.

Just because a document bears the name "Contract" do not assume that your interests are adequately protected.

The simple, pre-printed contract supplied by a contractor usually says nothing but "I will do the work and you pay me"

The more sophisticated AIA contract forms are better. However, in my opinion, and the opinion of other owners' lawyers, these documents strive to protect the architect and the contractor to the utmost, but not necessarily the Owner.

For example, while there is language in the AIA forms creating a principal - agent relationship between the architect and the Cooperative, the AIA documents make it clear that the Cooperative retains the architect in order to utilize his expertise in the design and construction of physical structures, and NOT to act as the eyes and ears of ownership in

the day to day supervision of the general contractor and the work. Simply put: the architect is not contractually bound to the Cooperative to be its agent for that specific purpose.

Are you now ready to take on that contract?

[fisher/articles/constructionglossary.../e/2012/12-4-12/mk/12-5-12/lw](#)