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The Risk Management Committee is pleased to provide this risk management article for the members of CDBI. The following article discusses the importance of "contract" and property contract management in the environment of design, construction or design-build.

The Risk Management Committee of the Canadian Design-Build Institute will continue to circulate articles of this nature to members as they become available. We trust this will be found to be of interest and beneficial to the members.

When Is a Contract a Contract?

By John R. Singleton, Q.C

The lack of proper contracting practices has always been a concern in the construction industry, particularly for professional consultants, but also for builders, trades and developers. Although there has been a marked improvement in understanding the need for a proper contract with one's client, the ability to manifest that need is still lacking in many corners. Understanding what a contract is and why it is so important will hopefully encourage design- builders to pay closer attention to this aspect of their practices.

A proper contract should include, at minimum, the following terms and conditions:

- descriptions of the responsibilities of you and your client
- the basis upon which you will be paid
- the consequences if you are not paid
- the consequences if you do not perform your contractual obligations
- the manner in which disputes will be resolved
- the limitations on your liability
- the time during which you might be exposed to claims by your client.

All standard forms of contracts contain provisions dealing with these subjects. Some manuscript forms, however, only cover most of these subjects and many off-the-shelf contracts make little mention of them. Using these latter forms often creates more risks than it manages.

Dealing with these subject matters in a clear, concise and balanced manner in a written contract is one of the most valuable assets of any professional practice.

A contract need not be in writing. It should be but it does not have to be. A handshake, a telephone conversation or mere performance by two parties can lead to a contractual relationship.

If a client says to you “If you design my building and provide field services, I will pay you $100” and you say “Okay” you have a contract. You also have a contract if you and your client discuss a project over a glass of wine during which time you provide the client with a sketch design and the client pays for your wine and dinner in return.

However, in either of these cases, it is a mystery as to what the terms and conditions of the contract are beyond your obligation to provide services in return for payment. What you have done by entering into contracts of this nature is to leave it to chance—or to a judge in a courtroom—to determine what the other critical terms and conditions of your contract are.

The common law will imply, or a court will impose, a number of terms into such contractual relationships, including these obligations:

- providing services in accordance with the standard prevalent in the design-build profession at the time
- performing services in a diligent and timely manner so as not to not delay other aspects of the project
- warning the client and the public of any substantial risks to human health and safety associated with the project
- making full and accurate disclosure of all aspects of your design so as to not cause financial harm to your client.

Although obligations of this nature will be implied or imposed, there will be no implied limitation of liability, no agreed upon manner of resolving disputes, no mechanism for terminating the relationship and no boundary to the liability to which you might be exposed if things go wrong. Needless to say, the absence of a written contract delivers you into a very perilous world but its existence will save you in most instances from falling into that pit.

A contract can be partly oral and partly written. If a written contract is incomplete in its treatment of the subjects mentioned above, a court may still imply terms into the contract. In doing so it may rely upon oral representations between the parties prior to the creation of the written contract, particularly where terms or conditions of the written contract are ambiguous.

Terms may be implied as a matter of business efficacy or to clarify what otherwise would be an ambiguous term or condition of the contract you entered into. So it is very important for a written contract to have terms and conditions which are clear, concise and a comprehensive treatment of the subject matter in question.

A written contract, believe it or not, should be signed. It never ceases to amaze the legal world why so often one or more of the parties does not sign a contract which has been either stipulated or negotiated between the parties. An unsigned contract, whether not signed by one party or both parties, presents challenging legal problems when one seeks to enforce its terms and conditions.

It is not uncommon for a consultant, or for that matter a client, to forward a negotiated contract to the other after its execution with a request that the other party sign the contract and return a copy—but the latter fails to do so. Similarly, it is not unusual for parties to enter into a contractual relationship based on terms and conditions forwarded by one party to the other without either party signing or acknowledging agreement with the terms and conditions. Or parties sometimes agree to enter into a contractual relationship, exchange conflicting terms and conditions, and never sit down to iron out the differences.

In all of these cases, the parties have a contract but, because of the failure to properly conclude the contractual arrangement, they can end up spending more money on legal fees than they earn on the project as they attempt to enforce a term or condition of the contract they wish to rely upon. The term in question is often a limitation of liability clause in one or the other sets of terms and conditions.

In cases like this, a court will look to the actual performance of the parties and to oral evidence surrounding the creation of the contract when determining what terms and conditions the parties agreed to. In other words, the failure to conclude a negotiated contract by mutual execution of the final form can still place you in the hands of a judge to decide what it is you actually consented to. Not a satisfactory practice.

This is a brief overview of some of the problems you can be faced with for a failure to invoke proper contracting practices. There really is no good excuse for failing to do so. There are multiple standard-form contracts available in the marketplace from both your professional and national construction associations, all of which cover the topics first mentioned above. Professional liability insurers also offer excellent contracting practices advice on their websites and even suggested wording for short-form contracts. And, of course, there is another profession—the legal profession, which can offer you proper guidance in this area when you are in doubt.

Yes, a handshake, a phone call or mere performance can lead to contractual relations—but it is very risky conduct.

For more information, contact:

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Singleton Urquhart is a firm of 40 lawyers whose practice is largely focused on the construction industry in the areas of contracts, insurance, builders' liens, risk management, dispute resolution and environmental issues. To learn more about the firm visit their website at www.singleton.com