

Important Construction Law Issues

Designer Limitation on Liability

Fla. Stat. § 558.0035 – Design Professionals

- Contract between business entity and claimant
- Contract does not name as a party an individual employee who will perform professional services
- Prominent statement: 5 points size larger than rest of text “Pursuant to FS 558.0035, an individual employee or agent may not be held individually liable for negligence.”
- Business entity maintains professional liability insurance required under the contract
- Any damages are solely economic in nature and not damages for personal injury or property not subject to the contract.

Designer – Big Risks

- Improper termination of contract
- Design-Build projects – contractor will be tracking costs for design errors
- Value Engineering

Contractor – Big Risk

- *Fla. Stat. § 725.06* – Limitation on Indemnification
- Indemnification provision void in many standard forms - monetary limit
- Public works – limit which parties can be indemnified

Public Private Partnerships

- Payment risk - cannot lien public land
- Public works prompt payment laws may not apply
- Ensure within privity of payment bond (proximity to bonded principal)
- Ensure acceptable dispute resolution process

Indemnify, Defend, Hold Harmless

Indemnify – agree to pay for loss (*FS 725.06*)

Defend – agree to pay their attorney fees

Hold Harmless – agree not to sue

Severance Provision – remove illegal terms, remainder of contract is enforceable

Florida Construction Liens

- Owner can be required to pay twice (*FS 713.06*)
- Do not inflate lien – horrible damages
- Lien rights cannot be waived prior to their existence, but can be waived after.

Contractor

- Timely Notice to Owner (*FS 713.06*) - within 45 days of commencing
- Timely Contractor’s Final Payment Affidavit (*FS 713.06*)

- Timely Respond to Requests For Sworn Statement of Account (*FS 713.16*) – 30 days
- Timely Respond to Requests for List of Subcontractors and Suppliers (*FS 713.165*) – 10 days
- Timely Claim of Lien (*FS 713.08*) - 90 days of final furnishing

- Track subcontractor notices

Owner

- Track all notices
- Ensure collect lien releases

Claims

- Comply with contract notice requirements (additional compensation and time)
- Document costs
- Prefer Change Order

Litigation vs Arbitration

Litigation refers to use of the court system.

Arbitration is the use of a private proceeding to resolve a dispute, where the decision of the arbitrator(s) is final. Arbitration is only by mutual agreement.

Arbitration vs Mediation

Arbitration has an arbitrator that reaches a final decision known as an award.

Mediation is a process, where a mediator helps to facilitate a resolution. The parties still maintain full control on whether to reach an agreement.

Arbitration Best Practices

- Contract requires the arbitrator(s) be impartial
- Use a large ADR organization to administer – ensure arbitrator is impartial
- All parties have arbitration, so that all parties can be joined
- A convenient venue for witnesses

Venue

Venue is the location of a legal dispute. *Fla. Stat. § 47.025* voids venue provisions for construction in Florida. Can waive after a dispute arises. Arbitration provisions affecting interstate commerce can override *Fla. Stat. § 47.025*.

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