

HOA Contracts

“How to Avoid Getting
Stuck in the Fine Print”

Presented By:

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Overview

- What is a contract?
 - Oral / Written
- Types of contracts pertinent to HOAs
- Enforcement of contracts
 - Remedies
- Legal process
 - Arbitration
 - Mediation
 - Litigation
- Specific provisions pertinent to HOAs
- Q&A

What is a Contract?

- Definition
- Essential elements
- Written v. Oral

Types of Contracts Pertinent to HOAs

- Management contracts
- Maintenance contracts
- Professional services
 - Accounting
 - Legal
 - Consultant
- Construction

Tips for Contracting

- Do not simply sign the other side's contract
- Designate someone who is in charge of contracting (the same board member)
- Require your attorney to review
- make your contract terms reasonable and not too one-sided
 - Test: would the other party sign?

Enforcement of Contracts

- Breach of contract
- Tort
 - Negligence
 - Professional negligence / malpractice
- Equity
- Common law
- Warranties
- Retainage
- Damages

Legal Process in Event of a Breach

- What does contract provide?
- Alternative Dispute Resolution (ADR)
 - Arbitration
 - Mediation
- Litigation

Specific Contract Provisions Pertinent to Construction

- Warranties
- Indemnity / Hold Harmless
- Delay Clauses
- Third party insurance requirement
- Disclaimers
- Attorneys' fee provision
- Forum and dispute provisions

Warranties in the Construction Contract

- 3 types of warranties exist in WA
 - Express: created by agreement between the parties to the contract (can be verbal but usually written in the contract)
 - Implied: created by judges through the common law
 - Statutory: created by state or federal legislatures

Express Warranties

- express warranties should generally contain:
 - the standards of workmanship required
 - the length of the warranty period
 - the requirements for proper notice to the contractor
 - the contractor's responsibility and opportunity to correct the warranty item

Implied Warranties

- Even without an express warranty, the common law creates or implies a warranty in favor of the Owner
- Implied warranties change over time because they are created by judges as a result of issuing decisions in specific cases
- Implied warranty of habitability

Statutory Warranties

- Warranty protection for Condos

- WA Condo Act RCW 64.34.445

Purchasers of condos created after July 1, 1990 are subject to the WA Condo Act

- a declarant and dealer impliedly warrants that a unit and the common elements are suitable for the ordinary uses of real estate of its type and that any improvements are free from defects, constructed in accordance with all laws (UBC) and constructed according to sound engineering and construction standards and in a workmanlike manner.

Statutory Warranties (cont'd.)

- WA Product Liability Act RCW 7.72
 - Provides another statutory warranty against defective construction.
 - WPLA only applies if contractor meets statutory definition of a “product seller” or “manufacturer.”

Indemnification

- is a lay contract term that is frequently in the written contract and also implied.
- requires the indemnitor to defend, indemnify and hold harmless the indemnitee from claims made against the indemnitee by a third party whose claims were caused by the acts/omissions of the indemnitor.

Indemnity by [REDACTED], Inc.: [REDACTED], Inc., will indemnify, defend and hold harmless the Client from any and all claims, actions, liabilities, damages and expenses, including attorney's fees (collectively "Harms") arising out of [REDACTED], Inc's., negligence with respect to services performed in this agreement; provided that to the extent any Harms result from the concurrent negligence of the Client, its employees, agents or other contractors, Client and [REDACTED], Inc., shall bear the percentage of Harm which corresponds to its percentage fault.

Indemnity by Client: Client shall indemnify, defend and hold harmless [REDACTED], Inc., its owners, employees and agents, from any and all actions, liabilities, damages and expenses, including attorneys fees (collectively "Harms"), arising out of the negligence of Client, its employees or other contractors (provided that to the extent any such Harms result from concurrent negligence of Client and [REDACTED], Inc., each party shall bear the percentage of Harm which corresponds to its percentage of fault). To the fullest extent permitted by law, Client will defend, indemnify and hold harmless [REDACTED], Inc., its owners, employees, subcontractors and agents, from any future related claims or damage at the site, including potential claims from third parties that may name [REDACTED], Inc., as a claimant.

Liens: It is understood by the Client that should payment not be made in accordance with the provisions outlined in this agreement, [REDACTED], Inc., may, in addition to other remedies provided by law, lien the subject real property improved by the services described within this agreement as provided by RCW 60.04.

It is understood that [REDACTED], Inc., reserves the right to file pre-claim notice at commencement of the services described herein.

[REDACTED]

Delay Clauses

- 3 types of construction delays:
 - nonexcusable: caused by factors within the contractor's reasonable control. Contractor not entitled to time extension or add'l compensation due to delay.
 - excusable: caused by factors beyond contractor's reasonable control and not due to owner's actions/inactions. Can get time extension, but not compensated
 - compensable: delay attributed to owner. Entitles contractor to time extension and compensation for increased costs caused by delay.

Third-Party Insurance

- Require only for large construction projects or high-risk activities
- Obtain copy of policy to verify coverage
 - Provide to Association's insurance agent/broker for review
 - AI certificate not sufficient

ACORD

CERTIFICATE OF LIABILITY INSURANCE

FP ID JP MOSBR-1

DATE (MM/DD/YY) 04/04/00

PRODUCER

Redmond General Insurance Agcy
PO Box 847
Redmond WA 98073-0847
Phone: 425-885-2283 Fax: 425-885-6631

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURERS AFFORDING COVERAGE

INSURED

Mosbrucker Excavating, Inc.
PO Box 745
Bothell WA 98041

INSURER A: St. Paul Fire & Marine Ins. Co
INSURER B:
INSURER C:
INSURER D:
INSURER E:

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

Table with columns: INSR LTR, TYPE OF INSURANCE, POLICY NUMBER, POLICY EFFECTIVE DATE (MM/DD/YY), POLICY EXPIRATION DATE (MM/DD/YY), LIMITS. Rows include General Liability, Automobile Liability, Garage Liability, Excess Liability, Workers Compensation and Employers' Liability, and Other.

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS
All operations of insured subject to policy terms and conditions

CERTIFICATE HOLDER

N ADDITIONAL INSURED; INSURER LETTER:

CANCELLATION

GALLA03
[Redacted area]

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

Agency Account House

.8 Additional insurance coverage

[REDACTED] carries General Liability insurance and is adding Professional liability insurance at the request of [REDACTED].

[REDACTED] will obtain \$500,000 of coverage, for the DPIC premium quote of \$3,306 annually. [REDACTED] agrees to pay 50% of this premium, for all periods for which the contract between [REDACTED] and [REDACTED] is active, in one month increments of \$137.75 that will show up on our monthly billing as soon as the contract is activated. (e.g.: if the contract ran for 25 months, the payment would be for only one month of the third year.) [REDACTED] will provide the appropriate certificates of Insurance prior to billing for insurance.

Disclaimers

- Wide variety – can cover almost anything
- ALWAYS READ

9. Punch List. Customer shall prepare a punch list of items necessary to be addressed for the Contractor to have performed every obligation to be performed on its behalf under the Agreement. Contractor and Customer specifically agree that: ANY ITEM OR CONCERN NOT ADDRESSED ON THE PUNCH LIST SHALL BE DEEMED FULLY AND FINALLY ACCEPTED BY THE CUSTOMER AS HAVING BEEN PROVIDED BY THE CONTRACTOR IN STRICT COMPLIANCE WITH THE AGREEMENT; AND WHEN CONTRACTOR ADDRESSES THE PARTICULAR CONCERN WITH AN ITEM AS NOTED ON THE PUNCH LIST THAT ITEM SHALL BE DEEMED FULLY AND FINALLY ACCEPTED BY THE CUSTOMER AS HAVING BEEN PROVIDED BY THE CONTRACTOR IN STRICT COMPLIANCE WITH THE AGREEMENT.
10. Subcontracting: Contractor may, from time to time, subcontract any or all portions of the Work.
11. Contractor Access: Customer shall provide Contractor complete and uninhibited access to the project throughout the term of this contract during the hours from 7:00am to 5:00pm, Monday through Friday.
12. Dispute Resolution: Any claim or action by Customer related to or arising out of this Agreement must be commenced not later than one (1) year after substantial completion of this Agreement. All claims, disputes, and other matters in question arising out of, or relating to, this Agreement, or the breach thereof, shall be decided by arbitration that shall be conducted through and in accordance with the rules of the Arbitration Service of Vancouver. In addition to such other

Attorneys' Fee & Forum Clauses

- Common clauses in all contracts
- Choice of law

jurisdiction and venue as provided by law, Customer consents to the jurisdiction, at Contractor's sole option, of the courts of the State of Washington with venue in Clark County. No party shall be entitled to its attorney fees or costs related to any claim arising out of or related to this Agreement regardless of when or how such claim is commenced.

13. Full Integration: This contract contains the entire agreement between the parties related to the Work and the Project and cannot be changed orally. All previous oral and written agreements and contemporaneous oral agreements related to the Work and the Project are merged into this contract.
14. Severability: If any language in this contract is invalid, that language only shall be considered deleted from this contract, and all other language in this contract shall remain valid and enforceable.

Any party hereto may change the address by written notice in accordance with this Paragraph. Notices delivered in person will be deemed communicated as of actual receipt; notices delivered by overnight delivery service will be deemed communicated as of one (1) day after sending; mailed notices will be deemed communicated as of three (3) days after mailing.

12. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Washington without application of conflicts of law principles and all litigation arising under this Agreement shall be brought in the State courts of Clark County, Washington, and the United States District Court for the Western District of Washington, USA.. Client and [REDACTED] both agree that Vancouver, Washington is both the place of making and the place of performance of this Agreement.
13. **Attorney's Fees.** In any litigation or arbitration between the parties regarding this Agreement, the substantially prevailing party shall be entitled to recover its reasonable attorneys fees and all costs of proceedings, including costs of appeal. Costs shall be interpreted as broadly as allowed by law, and shall not be limited to costs awardable under Washington statutes.
14. **Non-waiver.** The failure of either party at any time to require performance by the other of any provision hereof shall not affect the right of such party to require performance at any time thereafter; nor shall the waiver of either party of a breach of any provision hereof be taken to be a waiver of any later breach of such provision or as a waiver of the provision itself.

subconsultants against any and all claims, losses, costs and/or

Standard Provisions (continued)

damages of any nature whatsoever or claims, or expenses from any cause or causes arising out of or related to this Agreement or construction related thereto. Such indemnity shall not include the acts or omissions committed solely by Consultant

14. LIMITATION OF LIABILITY. No warranty, either express or implied, is included or intended to be included, in Consultant's proposals, reports, or this Agreement. The liability of Consultant, its members, officers, employees and subconsultants to Client for all injuries, damages, claims and losses (including all attorney's fees, legal costs, and all other costs related thereto), from whatever cause, whether based in contract, tort, statute or any other theory of liability, shall not exceed the total fee paid to Consultant by Client under this Agreement. Such claims and causes include, but are not limited to negligence, professional errors and/or omissions, strict liability, breach of contract or warranty.

15. DISPUTES. Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration or commencement of legal or equitable proceedings by either party. If such matter relates to or is the subject or a lien arising out of Consultant's services, Consultant may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to the resolution of the matter. Unless the parties mutually agree otherwise, mediation shall be conducted in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing concurrently with the other party and with the American Arbitration Association. The parties agree that arbitration; legal or equitable proceedings shall be stayed pending completion of mediation. However, in no case shall such a stay extend more than thirty (30) days after commencement of mediation. The parties will share equally the mediator's fee and other filing fees related to mediation. Matters not resolved in mediation shall be decided by arbitration which

shall be conducted, unless the parties mutually agree otherwise, in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed concurrently in writing with the other party and with the American Arbitration Association. In no event shall a demand for arbitration be made by either party after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter would be barred by the applicable statute of limitations. No arbitration arising out of or relating to this Agreement shall include, by consolidation or joinder or in any other manner, any party or entity not a party to this Agreement, except by way of written consent of the parties to this Agreement.

16. ATTORNEY FEES. Excepting attorney's fees and costs directly related to mediation, the prevailing party in arbitration or other legal or equitable proceeding shall be entitled to recover from the other party its actual attorney's fees, costs, expert fees, court costs and any other costs related to the litigation.

17. SEVERABILITY AND SURVIVAL. Any provision of this Agreement later held to be unenforceable for any reason shall be deemed void, and all remaining provisions shall continue in full force and effect. All obligations arising prior to the termination of the Agreement and all provisions of this Agreement allocating responsibility or liability between the Client and Consultant shall survive the completion of the services hereunder and the termination of this Agreement.

18. THIRD PARTIES. Nothing Contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against Consultant or Client.

19. GOVERNING LAW. This Agreement shall be interpreted and construed in accordance with the laws of the State of Washington currently in effect as of the date of this Agreement.

Q & A

For more information please contact:

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