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A Construction Law Primer

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CONTRACTING FOR REMEDIAL WORK Different Issues or Just a Different Slant

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CONTRACTING FOR REMEDIAL WORK Different Issues or Just a Different Slant?

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The following are observations about some of the differences between new construction, and remedial construction contracting. I have drawn on my experience as counsel to a specialty contractor with a national business concentrating on concrete and masonry restoration work, with a somewhat lesser involvement in roofing and waterproofing for both the new and remedial construction markets. My point of view will certainly show, but I have tried to also consider the point of view of other parties.¹

Much of the work performed by the construction industry does not involve building new structures. Structures are constantly in need of "remedial" work variously described as repair, restoration, remodeling or renovation. The exercise of preparing and reviewing a "construction contract" that involves remedial work may require a different view of issues, or in some cases different issues. If you look at a standard construction contract, from the remedial point of view, you will probably find several round holes into which you need to cram square, or other shaped pegs.

Remedial construction covers most if not all of the major components of the building trades. Anything that is built, needs to be maintained, restored, upgraded, retrofitted or repaired from time to time. If the new construction project starts with an owner's dream, the remedial project often starts with the owner's problem. This may range from just fixing a leaky roof to restoring an aged and decaying structure to new life with a different use and purpose. The latter, of course, will have many of the aspects of new construction. The more extensive the work, the more similarity to new Construction. Setting aside the somewhat more exciting world of historic preservation and what might be generally referred to as "remodeling", the realm of remedial contracting has several other differences that are worth noting. These differences can be perceived when it comes to drafting, or as is more often the case from the contractor's point of view, reviewing the draft someone else has handed you to sign.

Specialty contractors, who do remedial work as large part of their business, come to the project with a different view than do their counterparts in new construction. The remedial contractor is more likely to be dealing directly with the owner on the project than if the same contractor were doing the same specialty on a new construction job. The main contact may be a property manager instead of a developer. This may also bring a closer working relationship with the design professional. Much or all of the work may be done by the contractors own forces, rather than subcontracted out by one contractor who sells primarily the coordination services.

Basic Differences

The Project: The Scope of Work is the hub of the wheel. It is the written expression of what the contractor has agreed to do. Most of the other terms of the contract will revolve around the Scope of Work, or at least be strongly influenced by it. Contractors who do remedial work get a lot of business from phone calls that start “we have this problem.” It doesn’t matter whether it is a problem with the building itself, or the owner’s need to alter its facilities, to the contractor’s customer there is a problem that needs solving.

Who determines what needs to be done? Often some work is needed just to diagnose the problem. If a design professional is needed, one should be consulted to diagnose the problem, and design the repair. Destructive or invasive testing may be necessary. This will usually involve a contractor who has the tools, equipment and personnel to assist. You may need a separate contract for this aspect of the project. This involves a contractor at an earlier stage than might otherwise be the case. The final description of the work can then be agreed upon. It is very difficult to write a contract for repair if you don’t know what the problem is. Many owners are disappointed with the result, when too little time is spent figuring out what needs to be done. Diagnosis and design comes up in various ways. The contractor may be the only one involved. Many owners do not call an architect when they

have a leaky roof; they call a roofing contractor. If the leak can be found and repaired easily, no others are needed. But in the case of a more complicated roofing system, more forensic work may be necessary. If engineers, architects and consultants are involved, they have been known to draw upon the experience of the contractor to help analyze the problem, and have input into specifications. If this team approach gives way to the mutual second guess approach, one must wonder if the owner, who is the customer of both contractor and design professional is getting the best or worst of both disciplines?

The Hot Topics

Construction contracts cover many issues. Many are similar in both new and remedial work, but the impact on the parties may differ and risks be distributed differently when remedial work is involved. What follows is a discussion of some examples.

Scope of Work Issues: Once you determine what needs to be done, the work must be described in the contract. How specific should the description of the work be? The owner may be perfectly happy with scope that says “repair my problem” for a lump sum price. This “do the necessary” type of scope can lead to dissatisfaction all around. It looks only to a result, not what is to be done. Contractors want to understand what they are expected to do for their price, and owners want to know what they are getting for their money. Much remedial work is not visible when it is finished, and will not change the overall look of the structure. If there is agreement on what is to be done, it is easier to price the work, and easier to understand what the price goes for. The contractor is better able to give a firm price if it is bidding or estimating against a very specific scope of work. The owner understandably wants predictability, no claims at the end, or changes that cost more money as the job progresses. On the other side, the contractor does not want to end up losing money because things that were not anticipated get forced into a vague scope of work. Some drafters of contracts for owners have used the phrase “including but not limited to” when describing the scope of work. This phrase serves no purpose except to shift risk. The contractor could legitimately ask, what else do you want done? The specific scope of work can work for

both parties, if their approach is doing a good job at a fair price, and not just shifting all the risk of perceived problems.

Changes and Extras: On any construction project there are likely to be changes needed as the project progresses. The project Owner does not want these changes to cause increases in the overall price of the project. They want protection from the contractor who may try to use changes to get more money to make up what was left on the table in the bidding process. However, the contractor does not want to absorb all of the cost, of changes necessitated by causes beyond its control. Just because the owner changes his or her mind half way through the project, the contractor does not want to be stuck paying for the increases, or have to perform work at rates that lose money. Much of the language in form contracts is directly or indirectly focused on this issue.

The well, and fairly, drafted Scope of Work can avoid many disputes here. One provision that appears frequently is the representation of completeness asked of the contractor. The contractor is asked to “represent and warrant” that it has had all the opportunity it deems necessary to evaluate the work. This leads into a waiver of all claims for extras arising from circumstances that should have been discovered. This takes on new meaning when the site is a high rise building that can only be thoroughly inspected a comprehensive review of the whole building including rigging scaffolding on the building and looking closely at its higher reaches. This is different than looking at open ground to evaluate logistical needs. Sometimes the extent of structural repairs cannot be determined without some demolition or destructive testing. Such representations should be commensurate with the time and opportunity to review the project. On new construction projects this is usually an issue for the excavation contractor. In a remedial contract the “digging” takes place on the building instead of in the ground, and may involve many trades.

Another more straightforward provision is the customary section on changes. Often it says that no changes will be paid for which are not approved in writing, in advance. This is easy to understand and both parties should be able to live with it. However, often an

additional provision is added that says the contractor will perform whatever changes are requested, immediately, and the price adjustment for those changes will be negotiated later. Is this a balanced approach? Contractors don't think so. Why not agreement on changes no matter who requests it? Perhaps a compromise position that allows the work that is not affected by the change to progress, while a careful approach to resolving the new condition is designed, priced and agreed to.

Remedial projects are often based upon estimated quantities. The final numbers will be determined as the work progresses. You may not be able to tell how deep or wide the deteriorated material is until you start tearing it out. Unit pricing can help this from that contractor's point of view, but the owner will want some protection from unlimited cost. One option is a "guaranteed maximum price". This is an issue that is best solved by consideration of possibilities and frequent communication during the project, not just by risk shifting provisions.

Indemnification: The list of reasons why owners want indemnification is usually topped by the fear of claims from injured workers. One big difference between new and remedial work is probably that in remedial work, the contractor is more often working on occupied buildings that are in use while the work is going on. Except in total rehabilitation, the contractor is not likely to be fencing the work in and controlling who goes in or out. Where the building is in use, there is also concern for injury or property damage claimed by third parties legitimately on the premises. The contractor has no control over the owner's employees who come to work in the building, and disregard yellow tape, barricades, signs etc. The owner may have its own maintenance personnel working in proximity to the contractor's employees? Who should be responsible for the actions of those owner employees? Boilerplate language written from a new construction view often does not differentiate, or even acknowledge that there is a difference. However, some of the standard printed forms use a standard that incorporates comparative fault.² These are better suited to the job site where no one party has complete control of the site and its attendant risks.

Insurance: Even if you get the indemnification set up in a reasonable manner, the question remains whose insurance should cover the negligence of the contractor, the owner, the architect, or engineer, and perhaps even a property manager who is acting as the agent for the owner? What in fact the impact of being named as an additional insured is the subject of debate at mediations, settlement conferences, and trials of coverage cases. This issue is unsettled enough to be the subject of its own seminar. However, to the restoration contractor, who has to work around the day to day operations of an owner, where the site is not under its control, the issue can be the difference between a reasonable insurance risk, and one which will spell disaster if there is a claim. While adding someone as an additional insured on your liability policy might not bring a bill for an extra premium, it increases risk, and this ultimately leads to increases in the cost of doing business.

Separate property insurance takes on a lesser significance when all you are insuring is one small part of the building. While a typical Builders Risk Policy is important when a new structure is under construction, the “Work” of the contractor that would be covered by such a policy is much less in many remedial projects. It is a cost that could be significantly reduced or eliminated. Examine the risk that for instance, a fire, or windstorm will only destroy the New Tuckpointing, leaving the rest of the building intact. Since most buildings on which remedial work is being done will already have property insurance, the whole issue of Builders Risk is reduced.

Completion: When is a project complete? The standard AIA contract definition of “substantial completion” defines it in terms of when the owner can occupy a building or use the structure for its intended purpose.³ Substantial completion when the owner already occupies the building, or has never stopped using the facility needs a different standard. It is easier when some part of the building will be out of normal use for a time, but some attention needs to be paid to what a fair definition should be. Even a total facade restoration may never disrupt what goes on inside the building in a way that can be used for substantial completion under the standard language. If the contract calls for some sort of testing, there

may be some reasonably objective standard to use. Some design professionals can be used to inspect and certify that work is finished. Where neither of these options is present, consider letting the contractor serve notice of completion subject to an inspection, and “punch list” to be agreed on after a mutual walk through. A little bit of trust, and tailoring the contract to fit the job makes for a better working relationship.

These examples suggest why some attention to the real nature of the job is different with remedial work. While the new construction forms can deal with some of the issues, risk allocation where the contractor does not have control of the site is not one of them.

So What Difference Does it Make?

If the reason for lawyers getting involved in drafting or reviewing contracts, is to memorialize the agreement that the parties intend, understanding the transaction and the agreement is necessary. Unfortunately too many lawyers are asked by clients just to give them the toughest, most protective contract they can, or are asked, in the abstract, if a certain provision is good or bad. More understanding makes for better contracts.

¹ This material is intended to supplement discussions at the 1999 Annual meeting of the American Corporate Counsel Association, and is not an exhaustive treatment of the subject.

² See for example, American Institute of Architects, form A201, 1997 edition, Paragraph 3.18.1

³ AIA form A201, 1997 edition Paragraph 9.8.1