

Helpful Suggestions to Avoid Construction Contracting Mistakes

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I have been fortunate to represent common interest developments for close to thirty-eight years. At the onset of my career I became involved in assisting associations with contracting for repairs, including major renovations and many post litigation reconstruction projects in the millions of dollars. The basic rules of contracting for this type of work have not changed much over the years. What has changed is the complexity of the work and the insurance issues.

Our cottage industry has expanded over the years from cookie cutter “stick-built” homes constructed over hundreds of acres to much smaller foot prints and to more vertical construction with complex and ever-changing construction methodologies integrated with construction materials that oftentimes equally complex to install and repair.

To assist community managers and boards of directors through the contracting process I have put together some issues for the Board to consider which address problems I have encountered over the years. These issues are not exhaustive but touch upon the obvious issues which are often over-looked and can result in even a simple project failing. Not every project will go well no matter how much work is put into the selection of the contractor. The goal is to minimize risk and when things aren’t going well have a good exit strategy or resolution process in the construction contract.

Here is an analogy. I grew up working on boats in San Diego. I learned that the process of painting a boat is a monumental task. But, it’s not spraying the paint on the hull that is difficult, rather it is preparing the hull for the paint that takes the most work. Planning and preparation for your construction project is the difficult part of the project not necessarily the actual work being performed.

One of the most common mistakes is not defining the scope of work in enough detail. The absolute key to a good contract is a solid definition of the scope of work. By way of example, it is prudent to have an arborist define the scope of tree trimming while it may be prudent to have an architect define the scope of a roof repair or replacement. Attorneys do not define scopes of work. The scope should be defined by the professional in the discipline. For you do-it-yourselfers there are resources on the web that contain plans and specifications for work (e.g.

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asphalt paving, painting, landscaping and irrigation). No matter what methodology you undertake to arrive at the scope of work you must always have a clearly defined scope of work in the contract.

I recently had a contractor argue successfully that their scope did not include painting the siding after the siding installation. He understood when bidding that the association was painting the siding. He referred back to the scope of work and while not specifically excluded, painting was not specified in the contract. Spend time understanding the scope, read and re-read the scope and incorporate all the scope documents (plans and specifications) into the contract and consider incorporating illustrative diagrams or photographs into the scope that show the site conditions. The scope needs to clearly define what is being repaired, the locations, the means and methods of repair and the material specifications, including warranties.

A very basic and old school approach to contracting is to interview contractors prior to selecting a contractor to perform work. This basic rule can bring out a lot of issues and calm nervous board members concerns. That said, interview with a purpose. Just recently, I suggested to a board they interview a plumbing contractor. I was not asked to attend. I called the manager the next day and asked how the interview went and she replied, the board only had two questions and they weren't even sure what to ask. Take interviewing the contractor seriously.

- A list of questions should be developed so you are always comparing apples to apples when interviewing a contractor for the job.
- Check out their references.
- Speak to other association boards of directors of similar sized communities the contractor has performed similar work for in the past.

I have found that a board interviewing contractors and taking the time to speak to other communities who used the same contractor(s) yields good information to make informed decisions. Do not just speak with the associations on the contractor's reference list. They have typically been chosen because they will give the contractor a glowing review. Use your industry contacts to see if there are other projects not on the contractor's list and get their input too. For example, when a problem arose on the project did the contractor deny responsibility or did it acknowledge the issue and work with the association to find a solution.

Many of us have to visually observe things to understand them. For me, it is no different with construction. By way of example, I need to see the paint colors, how the flashing will lay up against the fascia, and how the new windows compare to the windows that remain in place. I encourage my clients when possible, to have the contractor perform prototype repairs or illustrative mock-ups. Mock-ups and prototype repairs allow the board to better understand the work, adjust the work prior to formally committing to it and use the prototype or mock-up

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to explain the work to the owners or other contractors who may have to integrate their work with others.

Prior to starting work it is important to communicate with the owners and residents about what they can expect. Ideally, the contractor will assign a liaison to assist management and the board with communications with the residents and owners. Good communication leads to a successful project. Regular communications between the contractor and the board is also important. Consider inviting the contractor to your regular board meetings to answer owners' questions and address the board on the progress of the work.

Your Community Association Manager is your consultant, but do not assume the manager has the time and/or expertise to handle a construction project. These projects can be time consuming and can take away from day to day association issues that need to be addressed. Always discuss with your manager their role in any construction project; set expectations early. It is possible you may need to hire a third party to administer the work. If the management of the work is being delegated to a committee make sure the members are knowledgeable in construction or willing to learn about the work to be performed - don't take the first volunteer who raises their hand.

I am often asked, does an attorney need to review the construction contract? Answering, yes, appears self-serving, but in fact oftentimes these contracts are fraught with poison pills such as antiquated insurance provisions, indemnity language and limitation of liability provisions. Those provisions need to be reviewed by counsel and understood by the board. Another key consultant is your association's insurance agent. Make sure your agent reviews the insurance provisions in the construction contract.

It's difficult for me to conclude this article when I have so much more to say! Let me leave you with some closing thoughts.

- Take the time you need to get the contract that gets the work done properly.
- Don't overly complicate or delay the process.
- Use professionals, and board members remember, what you may do if you were the contracting party is not necessarily what the association should do (e.g. offering cash incentives to a contractor).
- And lastly, always keep in mind that price variances in bids are a signal that bidders may not be bidding the same scope.