
William R. Joseph  |  January 10, 2018  |  Portland, Oregon
Business Formation
Sole Proprietorship / DBA

- Easy
- But provides no protection against personal liability
- No separation of personal versus business finances or assets
- Typically requires registration to protect trade name
Inc. / LLC

- Separates personal and business finances and assets
- Provides protection from personal liability (other than tort liability)
- Requires registration and adherence to certain formalities
  - No commingling of funds
  - Maintenance of corporate formalities
Marketing & Bidding
Marketing

- Identify your market niche
- Establish criteria for your desired client
- Direct marketing efforts accordingly
- Make only assertions you can substantiate with reliable evidence
- Retain supporting information
- Keep up on developing technology and trends
Bidding

• Under-promise and over-deliver
• Don’t bid on projects where you cannot perform the work, meet the performance criteria or other contractual obligations
Subcontractors and Suppliers

- Work only with experienced and licensed subcontractors and suppliers
- Check references
- Offer training
- Rely on product suppliers to provide training regarding product installation and operation
Trust Your Gut & Look For Red Flags

• “No shirt, no shoes, no service”
• Establish vetting processes for potential clients, projects, subcontractors and suppliers
• Look for red flags
  o Do they have proper credit and financing?
  o Do they have experience, training, proper licensure?
  o Do they ask for extras, freebies, etc?
Contracting
Contract Considerations

• A written contract is preferred because it clearly sets forth the parties’ agreement
• One form will not work for all situations
• Tailor the contract to the particular type of agreement
• When possible, use your own contract as opposed to accepting another party’s
No Fine Print (aka “Boilerplate”)

- Contracts should be clear, use words of common understanding, be legible, and written in dark ink.
No Proposal/Contracts or Double-Sided Documents

- Proposals, quotes and estimates often do not include all necessary provisions
- Double-sided proposals, quotes and estimates often do not get communicated when copied, faxed or emailed
Simple and Objective Payment Provisions Help Avoid Disputes

- Attempt to limit or prohibit the retention of funds
- Specify that the Final Payment is due when any of the following occurs:
  - The project is fit to be used for its intended purpose
  - The project passes a final inspection or receives a certificate of occupancy
  - The owner takes possession of the project
- Final payment should not be contingent on completion of a punch list
Exclusions

- Price increases that are out of your control
- Delays that are out of the builder’s control
- Hazardous materials
- Design services
- Owner-supplied materials and/or labor
- Existing finishes and mechanical systems
- Underground or concealed conditions
- Plans and specifications prepared by others
- Reliance on third-party information
Integration Clause

• Contracts should include a “merger or integration clause”
• This avoids plaintiffs being able to rely on outside promises to establish liability
• However, merger clauses are not effective against misrepresentations
Non-Waiver Clause

• Contracts should include a “non-waiver clause” stating that a no-time waiver of a provision does not constitute future waiver of that provision.
Indemnity Provisions

- Indemnity provisions should be included in contracts between general contractors and subcontractors or suppliers.
- But they do not typically make sense in contracts between a contractor and an owner.
- A contractor may only indemnify others for its own fault in a construction contract.
Insurance
Insurance Coverage

• Make sure you have the proper type and amount of insurance coverage
• Work with an experienced, non-captive insurance broker
• Consider types of coverage:
  o Ongoing versus completed operations coverage
  o Occurrence versus claims made policies
  o Builder’s risk, professional liability and “tail” insurance
• Explore available bonding
Additional Insured Provisions

• Contracts between general contractors and subcontractors should contain insurance provisions that:
  o Specify the general contractor be added as an additional insured on the subcontractor’s CGL policy
  o Specify there is coverage for both ongoing and completed operations
  o Specify the coverage limits
  o Require the subcontractor provide the general contractor with certificates of insurance
  o Require the subcontractor provide the general contractor with AI endorsement and schedules
• An AI endorsement only provides coverage to the extent of the subcontractor’s fault
Waiver of Subrogation Provisions

• Eliminating subrogation rights promotes prompt dispute resolution, as insurers do not have the right to pursue recovery of insurance proceeds paid out to resolve such disputes

• But eliminating subrogation rights can violate your insurance policy

• Check with our insurer prior to agreeing to a contract containing a waiver of subrogation
Project Administration
Properly Administer Your Contracts

• The contract should be the playbook for the entire construction process
• Refer to it accurately and often
• Avoid patterns and practices different from what is set forth in the contract or otherwise waiving contractual requirements
Communications

• Communicate with your clients and subcontractors
  o Less is not more
  o Take notes and keep minutes of meetings
  o Remind owners of their obligations and responsibilities
  o Learn to say “NO”
  o Establish strong relationships with your subcontractors and suppliers
  o Establish clear lines communications between the owner, general contractor, subcontractors and suppliers
Change Orders

• Document all changes in writing (e.g., via a change order)
• Get change orders for extensions of time
• Get change orders for modifications even if there’s no charge
Record Keeping

- If it’s not in writing, it didn’t happen
- If it was in writing but you lost the writing, it still didn’t happen
- Keeping good, well-organized records is as important as creating the records in the first place
- Documentation does not end with the contract
- Keep project files for at least 10 years or the applicable statute of ultimate repose for construction claims if longer
Responsibility for Plans and Specifications

- The owner should contract directly with architect, engineer and other design professionals.
- The general contractor should not contract design professionals but should be entitled to rely on the accuracy of the information provided by them.
- The design professionals should be responsible for any errors and omissions in the plans and specifications.
Plan Considerations

• Do the plans accurately depict the parties’ goals and obligations?
• Do the plans contain sufficient details?
• Do the plans incorporate code, manufacturer and/or certification requirements?
• Are the plans readable and buildable?
• Are the design professionals accessible for questions (RFIs)?
Products & Components

- Avoid new or untested products
- Avoid unfamiliar products or work with an experienced subcontractor or supplier
- Consider:
  - Past record of performance
  - Climatic performance issues
  - Certifications
  - Engineered / recycled materials
  - Warranty issues
Project Delivery
Owner Orientation

• Walk the owner through the project upon completion
• Explain the project’s features, equipment and operation
• Detail the owner’s maintenance obligations
• Explain warranty coverage and administration
• Create a punch list of items to be addressed
• Have the owner acknowledge completion of the punch list items
Owner’s Manual

- Provide an owner’s manual
- Include your and manufacturers’ operating instructions and warranties
- Include any third-party warranties
- Include a maintenance schedule
One Year Walk Through

• Walk the owner through the project again one year after completion
• Remind the owner of maintenance obligations and warranty coverage
• Create a punch list of items to be addressed
• Handle repair of the punch list items as warranty items
• Have the owner acknowledge completion of punch list items
Warranty Coverage & Administration
Warranty Coverage & Length

- Provide a warranty for repair of defects in materials and workmanship
- The length of the warranty (typically at least one year) depends on the type of project and any applicable statutory requirements
- Require the owner to accept the warranty and any contractual right to repair as a condition of the contract
- Pass through any manufacture warranties
- Apply objective performance standards
- Specify available remedies
Objective v. Subjective Standards

• Objective standards are based on specifically defined criteria:
  o “Substantial compliance with the plans and specifications”
  o “In compliance with applicable building codes”
  o “In compliance with the performance standards in the warranty”

• Subjective standards are premised on third-party determinations (e.g., expert witnesses and/or arbitrators):
  o “In a good and workmanlike manner”
  o “First class” or “expeditious”
  o Per owner’s “satisfaction” or “approval”
What Should a Warranty Exclude?

- Specific exclusions
  - Implied warranties
  - Warranties on manufactured and consumer products
  - Warranties on owner-supplied labor or materials or pre-existing conditions
  - Conditions caused by lack of owner maintenance
  - Claims made outside the warranty period
Warranty Service

- Have dedicated staff to address warranty issues
- Have a system for submission of warranty items (phone, email or web-based)
- Rely on your subcontractors to perform warranty work on their work
- Have backup third-party warranty service provider
- Have owners acknowledge completion of warranty items
- Maintain written records of warranty requests, repairs made and owner acknowledgments
Statutory Right to Repair

• Some states require an owner to provide contractors with advanced written notice of alleged construction defects prior to filing a claim.

• Contractors usually have the right to inspect and make offers to repair or otherwise compensate the owner.

• Contractors can provide potentially liable subcontractors with secondary notices so they can participate in the cure process.
Contractual Right to Repair

• Contractors may include a written contractual right to repair
• Such provisions may include mandatory notice, inspection and repair protocols that must be complied with in order to trigger warranty coverage or liability
Mediation, Arbitration & Bench Trials

- Contracts should contain a jury trial waiver and other ADR provisions
- The general consensus is that ADR can reduce litigation and litigation expenses
- Mediation is like a settlement conference, but the parties meet with a paid private mediator, as opposed to a judge
- Arbitration is similar to a trial, except that the dispute is decided by one or more paid private arbitrators, as opposed to a judge or jury
- Bench trials are held in a court of law, but only before a judge, not a jury
Attorneys’ Fees Provisions

• Prevailing party attorney fees can be allowed by statute and by contract

• An attorney fee provision in a contract between a contractor and an owner may increase the likelihood of litigation, because the owner is more confident of its ability to recover fees

• A contractor’s risk of loss is typically limited to the contract price, which risk can be reduced by a draw schedule

• A contractor may also obtain attorney fees via the lien foreclosure process

• An attorney fee provision makes more sense in subcontracts
Limitation of Liability Provisions

- Contracts can include limitation of liability provisions, limiting the parties’ liability for specific types or amounts of damages.
- Contractors should consider limiting their liability to the total project cost, available insurance, or repair or replacement.
Waiver of Consequential Damages?

- Waiver of the right to collect damages no directly caused by a breach (e.g., loss of use and/or lost profits)
- Such damages are typically better handled via liquidated damages provisions
- If one party has the right to collect consequential damages, so typically would the other party
Liquidated Damages Provisions

• Liquidated damages are a predetermined money award
• They represent a reasonable estimate of actual damages when a specified condition occurs (e.g., a delay of work)
• They eliminate plaintiff’s burden of proving actual damages
• They make the amount of potential exposure more certain
• You cannot typically recover both liquidated and actual damages
Contractual Limitations Period

Statute of Limitations v. Statute of Ultimate Repose?

- A statute of limitations limits a cause of action
- A statute of ultimate repose takes away a cause of action
- After expiration of a statute of repose, there is no cause of action
- Contracts can also impose specific contractual periods of limitations and ultimate repose, barring claims after a certain period of time
Questions?

Bill Joseph
Dunn Carney LLP
bjoseph@dunncarney.com
503.417.5376