### BASIC DO’S AND DON’TS OF CONSTRUCTION CONTRACTS

Article submitted by: Richard Johnson (Phelps Dunbar LLP) Continued on page 6

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<th><strong>DO</strong></th>
<th><strong>DON’T</strong></th>
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<td><strong>SCOPE AND STANDARD OF CARE</strong></td>
<td>Sign any contracts with the owner and/or contractor where the owner and/or contractor has included open-ended, vague scope-of-work clauses such as contractor (and/or subcontractor) will “provide any and all services required to complete the project.”</td>
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<td>The scope section of your contract should describe the precise services and/or products your company will provide to the owner and/or contractor. It is important that all services and responsibilities undertaken by your company be described in as much detail as possible, so there is no “gray” area. You should ideally attach an exhibit to the contract with bullet points of these details.</td>
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<td><strong>PAYMENT</strong></td>
<td>If you are able to, don’t accept provisions that state the owner and/or contractor only have the obligation to pay you after it has been paid. Such “pay-when-paid” clauses often allow the owner and/or contractor to withhold payment for an undetermined amount of time.</td>
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<td>Your payment provision should also be as precise as possible re: the payment-application process and/or timing and precise amount of each payment. You should also include provisions related to penalties, late payments, and/or any costs, including attorneys’ fees associated with any collection efforts. This provision should also include the consequences of non-payment such as your ability to terminate work on the project and seek immediate recovery or suspend services until payment is made. This provision should also include a statement of your ability to immediately lien the project after a certain time frame if payment is not received. You can also include provisions in your contract withholding a certification, warranty, and/or lien waiver until such time as you have been paid in full.</td>
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<td><strong>WARRANTIES</strong></td>
<td>Don’t sign contracts with broad and open-ended warranty requirements. If you are a contractor, you should be careful not to warranty the work of your subcontractors without receiving an identical warranty from the subcontractor and/or supplier. Additionally, as a contractor/subcontractor you need to pay careful attention to the limitation of warranties contained in purchase orders or from other contracting parties. Additionally, never agree to a warranty that contains specific statutory or industry standards without identifying exactly what those statutory or industry standard requirements are prior to signing the contract.</td>
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<td>Your warranty should be as specific and limited as possible and for a definite and limited time frame. If you do not intend to warranty the work of others who have provided products and/or work in regards to or related to your scope of work, then your warranty should specifically state that you are not warranting products and/or work of any others involved in the project.</td>
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### ALTERNATIVE DISPUTE RESOLUTION

Contractors should require that all parties be required to mediate a dispute prior to filing litigation and/or a claim in arbitration. Mediation is a voluntary process where the dispute is resolved only if both sides agree and sign a binding agreement. A mediator is usually mutually selected by both sides to attempt to resolve a dispute between two or parties. If the mediator is unable to resolve the dispute, then the parties can proceed with litigation or arbitration.

The parties can also waive their right to litigate any dispute through the courts and agree to arbitrate all disputes arising out of their contract and/or business dealings. Arbitration isn’t necessarily a less expensive option, but it can often provide a preferred venue and sometimes offer quicker resolution. Arbitration clauses need to address a number of details and should be carefully considered and crafted. As with many areas of any significant contract, input from counsel on these issues is beneficial.

Don’t sign any contracts whereby you agree to arbitrate any dispute but only if filed within a shortened time period such as six (6) months or one (1) year. Under Alabama law, you generally have six (6) years to present any breach-of-contract claims.

Do not agree to waive your right to a jury trial without careful consideration (whether through an arbitration agreement or by a simple jury waiver for any litigation). While this can sometimes be a preferred option depending on your role in any given project (owner v. contractor v. subcontractor) and the potential venue for any dispute (federal v. state court and/or local v. distant forum), advice of counsel should is recommended on this issue.

### LIMITATION OR WAIVER OF DAMAGES AND LIABILITY

If possible, your contract should include a provision in which the other side agrees to waive any and all indirect damages associated with a breach of the contract. These indirect damages, often called “consequential” damages can include anything from lost opportunity, lost profit, unanticipated third-party expenses, decrease in the market value of a project or property before resale in the event of any construction delay, and attorneys’ fees.

Ideally, your contract should also include a limitation-of-liability provision. A limitation-of-liability provision is a device whereby the parties can agree on the front end to the maximum exposure both parties will have in the event of a breach of contract. Any such provision should contain a specific dollar amount which will put a cap on your monetary exposure in the event the other party claims a breach.

Carefully review your contract to assure that you are not accepting any provisions that will make you responsible for any indirect/consequential damages.

Additionally, do not accept any provisions whereby you agree to pay any attorneys’ fees or punitive damages in the event of default. Remember that if your contract is silent as to whether you are responsible for any indirect/consequential damages, then the other side can still claim these damages in arbitration and/or litigation.

Don’t accept any contracts and/or provision that leave your company’s potential liability open ended.
DEFAULT/TERRMINATION

Every contract entered into by a contractor or subcontractor should contain a provision that precisely explains under what circumstances it can terminate its performance under the contract. As discussed above, the number one cause of termination should be non-payment. However, this needs to be specifically spelled out in the contract. The termination provision should also define the procedure for termination and explain the rights and duties of each party after termination. For example, the provision should include responsibility of payment upon termination, the ability to remove materials and supplies, and any loss of profits any party is entitled to upon termination.

Do not accept any contract without a fully defined termination provision. Additionally, don’t accept any contract provision that allows only the other side to terminate. Both sides should have the right to terminate the contract and the provision should fully explain under what circumstances each party can terminate and the duties, consequences, and rights of each party upon termination.

ENVIRONMENTAL CONDITIONS/PROJECT SAFETY

Your contract should contain a provision defining which party is responsible for any environmental or hazardous conditions or impact. Likewise, your contract should contain a provision that explains in detail which party is responsible for safety-related issues on site.

You should never execute a contract that makes you responsible for the overall safety of the job site. Additionally, you should never execute a contract that makes you responsible for any unknown site conditions, including unknown environmental issues and/or other hazardous substances.

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With offices from Texas to Florida and throughout the Gulf Coast, Phelps Dunbar’s construction practice serves a diverse clientele involved in all phases of private and public projects, including international, national, regional, and local design and construction contract negotiation/drafting, bid protests, claims, litigation, and alternative dispute resolution. Richard B. Johnson and A. Grady “Bo” Williams IV work out of the firm’s Alabama office and are also licensed in Mississippi and Florida. Mr. Johnson and Mr. Williams have experience handling a wide range of construction-related matters for developers, general contractors, subcontractors, manufacturers and suppliers in almost every aspect of construction projects, including the initial bid phase, disputes arising during construction, and post-construction issues. For further information, Mr. Johnson and Mr. Williams may be reached at richard.johnson@phelps.com or bo.williams@phelps.com.