FEELIN' LUCKY? ARE YA?

If this firm was a police station rather than a law office, the following events/problems would be in the desk sergeant's daily blotter. These issues all came up in the last month.

Perhaps look at it this way - there is a certain repetition of theme in both police stations and law practices. Especially after 35 years.

AIA Contracts. Most contractors (and subcontractors) have their own custom remodel contract and don't use AIA documents. The reasons are often stated – the AIA contracts are still too long, and they don't comply with California statutory requirements for home improvements. However, the bigger the project the more likely an architect is involved, and it is likely the architect will push for the use of an AIA contract.

I repeat the conventional wisdom. As a general proposition AIA contracts **are** too long - and that includes the current 2007 editions. They are also (in this writer's opinion) more solicitous of the architect's rights than the typical renovation contract. Mais oui.

Perhaps most importantly, they lack the required statutory notices and disclosures one must include in California residential improvement contracts. (The majority of these damn things are found in California Business and Professions Code §7159.)

What To Do? If the contractor loses the battle to use its own agreement, it can propose that the parties continue to use the contractor's agreement (with all of its necessary notices) but simply attach those AIA provisions that the architect thinks are necessary. Sometimes these are sufficiently few in number that a simple incorporation of these terms as an exhibit works.

Also be sure to inform the client what the problem is, because it becomes an extra cost. I think the general contractor is well within its rights to charge more for the extra work of modifying/conforming an otherwise perfectly good contract.

The Unintended Perils of Liens. It is not only what you don't know that can hurt you. It's also what others don't know that can hurt you.

The recurring scenario that recently presented this issue is when there is a contractor/client dispute and a subcontractor threatens a Mechanic's Lien, **even though the subcontractor has not sent the required preliminary 20-day notice**.

With all respect to the subcontractors of the world, there are a number of them who are not aware of this necessity as a prerequisite for later filing a Mechanic's Lien, or the strict timing in complying with this necessity.

This situation can result in great embarrassment for the general contractor who already has his hands full. It also can create a problem for the subcontractor who improperly files the Mechanic's Lien. Properly filed or not, such a Lien remains in the record of title of the property after it has become "stale" (is not perfected)-and in some circumstances could be viewed as a cloud on the title of the property. If that sounds like a problem, it certainly can be.

What To Do? Watch out for this. The subcontractor will generally inform the general contractor as well as the homeowner of his intent to record the Lien. If you are the general contractor, as part of your diligence you need to see if a preliminary 20-day notice was properly sent. If not, warn off the subcontractor.

Waiver/Limitation of Liability. If they wish (and they usually do), by statute engineers can contractually limit their liability, almost to the point of a full waiver. Architects can do the same. But, it is my opinion that contractors cannot.

Why the discrepancy? The best that I can ascertain is that the engineers and the architects have better lobbyists than the contractors.

Be that as it may, I still occasionally see a contractor trying to contractually limit its liability. I have two suggestions for these folk.

What To Do. First, put in a severability clause in your contract. A typical one of these is as follows:

In the event that any part of this Agreement is held to be void, invalid, illegal or unenforceable, such provision shall be severed from this Agreement, and the remaining provisions of this Agreement shall remain in full force and effect, as fully as if such severed provision had never been part of this Agreement.

That means even if in fact the limitation/waiver is not valid the rest of your contract probably survives.

Second, include a "right to repair" term in the contract. This right is part of the so-called SB800 law (also called the "Right to Repair Law") which applies to new California home construction. Thus, before there can be an action on a construction defect claim, the homeowner must contact the contractor and give it the opportunity to repair.

How might a right to repair work in a remodel project contract? Well, if you have the right to fix the problem and you do, then the whole sticky issue of whether you could properly waive liability becomes moot.

Of course, this is somewhat of a Rube Goldberg construct to get around the problem - but it might work. And as usual before jumping off the roof, tell your mother that you love her and check with your attorney.

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