

Construction Contracts: What You Need to Know

By Matthew DeVries

Noted author and business attorney Peter Siviglia once said, "In this world, there are two forms of writing: creative (e.g. novels, plays, and poetry) and expository (e.g., treatises, letters, memorandums, and briefs). I've tried both and prefer a third: Contracts, which do not entertain, do not convey information or ideas, and do not try to persuade."

In the world of commercial real estate and construction contracts, Siviglia hit the nail on the head. Here are a few items to think about when drafting contracts:

- A contract is about defining transactions and relationships. This is more than the definition of "contract" that lawyers learn in law school (i.e., "An agreement between or among two or more parties for the purpose of ..."). According to Siviglia, the contract will help define:
 - (1) a transaction, such as the purchase of real estate
 - (2) a relationship, such as a partnership, or
 - (3) a combination of both, such as a partnership to purchase and develop real estate
- A contract is a set of instructions. Just like how building plans and specifications instruct the contractor how to build the water treatment plant, commercial condo or new hospital, the written contract instructs the parties on their course of conduct in the transaction. And when problems arise — and they will — the written contract instructs the parties on how to perform in such circumstances. The contract defines due diligence issues on the front end; defines performance obligations during the contract performance period; and defines how disputes will be handled in the event of disagreement.
- A contract should include standard provisions. Although each contract is different, there are a number of terms and conditions that are part of the "A Player" list, including:
 1. Termination — defines the parties' rights to terminate the contract
 2. Assignment — outlines whether the parties are allowed to assign their rights to another party and the terms in which they are allowed to do so
 3. Governing law — defines the law (i.e., Tennessee,

Virginia, New York) that will apply to the parties' contract in terms of both substance and procedural issues

4. Disputes — defines whether the parties will litigate in court, mediate, or arbitrate
5. Notice — identifies where legal notice of disputes, claims, changes, etc. are directed
6. Modifications — outlines the procedures for modifying or amending the contract terms (not to be confused with a "changes" clause)
7. Changes — outlines the procedures for modifying or changing the scope of work by one of the parties (not to be confused with a "modification" or "amendment" clause)
8. Claims, Rights and Remedies — describes the method for submitting claims and may also include rights to recover or limit certain types of damages (i.e., consequential damages, liquidated damages for delays, attorneys' fees, interest)
9. Indemnification — describes the circumstance in which one party may have to indemnify, or pay the losses or claims, of the other party for some legal purpose

Of course, each transaction or relationship should have a written contract tailored to its own project or development needs. In other words, while standard form agreements can be used on successive and multiple transactions, each project should nonetheless be reviewed for the applicability of particular standard form provisions to the particular project. On occasion, circumstances dictate the necessity of revisions to your standard agreement.

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