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The Importance of a Written Construction Contract

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He authored West Virginia's design-build legislation, which authorizes the use of design-build services in the state. Because of his experience and knowledge of the process, Monteleone was appointed chair of the West Virginia Design-Build Review Board by former Governor Cecil Underwood and served in that capacity until 2018.

Monteleone was elected President of the Independent Oil & Gas Association of West Virginia for the 2017-2018 term. He currently serves as in-house counsel to a large independent oil and gas producer, where his duties include overseeing Marcellus Shale exploration, negotiation of gas sales contracts and supervising mineral acquisitions.

Monteleone received his bachelor's in business administration, *summa cum laude*, with an emphasis in accounting, from West Virginia University. He earned his law degree from West Virginia University and his masters of law in taxation from New York University.

Remember the old Fram Oil Filter commercial that said *you can pay me now... or pay me later?* The theory behind the commercial was that you can pay a little up front in the form of preventive maintenance in order to avoid a major catastrophe down the road that could cost you a fortune. The same theory exists when entering into a construction project. A well written construction contract can save the parties a lot of time, aggravation and money down the road in the event a dispute arises.

Contractors are notoriously bad when it comes to contract drafting. Many do not use written contracts and perform their work under oral contracts or a series of purchase orders. Others simply use a standard form (The American Institute of Architects or Associated General Contractors of America) and use the stock language set forth in the form. While these contracts are better than an oral contract or purchase order, when the forms are not tailored to a particular project, the form ends up void of critical deal terms negotiated and agreed to between the parties.

If the parties are going to use a form contract, it is critical that they choose the correct form that matches the delivery method for the project. There are many forms to choose from and the parties need to determine if the project will be completed as a design-bid-build, design-build, guaranteed maximum price, time and materials, etc. If the wrong form is used, the project is destined for failure. Therefore, choosing the correct form and then editing it to match the expectations and agreements between the parties is critical.

A well written contract is one that clearly: (i) identifies the parties, (ii) sets forth the expectations and requirements of each party, (iii) establishes the performance obligations and risks assigned to each party, (iv) determines the price or method for calculation of the contract amount, (v) creates the payment system and requirements for each application of payment, (vi) includes a claim process and dispute resolution process, and (vii) provides a termination process together with each party's duties and obligations in the event of such





termination. Many of these items are not contemplated by the parties at the outset of a project, but they can evolve into major issues once a project is underway. That is why each of these items should be discussed with all parties and included in the final written contract.

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written contract should contain a process to resolve differences in a manner that keeps the project on schedule while the parties work on the issue. A well written contract will force the parties to work together to resolve all disputes in a previously agreed to process that saves the parties time and money.

Some of the key terms to consider when drafting a construction contract include the following:

- Price
- Schedule
- Definition of the Work
- Change Orders
- Delays and/or Liquidated Damages
- Insurance/Bonding Requirements
- Warranties for Work
- Communication Channels
- Dispute Resolution Procedures
- Payment Process and Lien Rules
- Termination

Every construction project should have a written contract in place prior to the start of construction or even pre-construction services. You should consult with a legal professional that works in the construction industry and prepare a written contract for your next project. After all, you can pay a little now, or risk paying a lot later. ▾