



WHYNOT LAW FIRM



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Construction Consulting • Owner Representation
Project Management • Envelope Evaluations

VENDOR CONTRACT NEGOTIATION AND PROJECT MANGEMENT



FIDUCIARY DUTY

Duty of Care

- Discharge duties in good faith, with the care of a reasonably prudent person in a similar position, and in the best interest of the corporation.

Duty of Loyalty

- Director must not “self-deal”, must avoid/disclose conflicts, and maintain confidentiality.

"It is well established in Florida that absent fraud, self-dealing and betrayal of trust, directors of condominium associations are not personally liable for the decisions they make in their capacity as directors of condominium associations."

Sonny Boy, LLC v. Asnani, 879 So.2d 25 (Fla. 5th DCA 2004)

CONTRACTS

- **Mutual Agreement** (*meeting of the minds*)
- **Capacity**
 - Age
 - Mental State
- **Consideration**
 - Actual Detriment, does NOT have to be “fair”
 - Money, Service, Object, Promised Action or In-action
- **Legality**
 - Purpose must be lawful



CONTRACTS (cont...)

➤ Authority

- Agency
 - Actual
 - Apparent

➤ Leverage

- Identify the *quid* and the *quo* and determine whether the *pro* is worth it.
- You truly do not know the answer if you do not ask.
- Adhesion contracts.

➤ Goods, Services, does it matter?

- Florida UCC – Rarely comes in to play
- Real estate, services, and employment contracts.



CONTRACTS (cont...)

➤ Oral:

- Does it need to be in writing? Not always...*(see below)*
- **SHOULD** it be in writing? **YES**

➤ Written:

- Statute of Frauds (Chapter 725)
 - Contract to pay the debt of another.
 - Contracts for the sale of goods/services over \$500.
 - Contracts that can not be performed within 1 year.
 - Contracts concerning real estate.
 - Contracts concerning various medical procedures.
- Requirements of Chapter 718 and Chapter 720
 - ❖ **EVERYTHING SHOULD BE IN WRITING!!!!**



CONTRACT TERMS

➤ Business Terms (MATERIAL TERMS)

- Parties
- Scope / Subject Matter
- Term
- Quantity
- Price
- Payment

➤ “Business Judgment Rule” & Due Diligence

❖ **Business Judgment Rule**

Favorable to the board – Corporate governance, hiring/firing, investment.

❖ **Reasonableness Standard**

Tends to favor the owner – Application of rental restrictions, ARC guidelines, covenant enforcement.



CONTRACT TERMS (cont...)

➤ Legal Terms (BOILERPLATE)

- Default
 - Termination
 - Indemnification
 - Venue
 - Notice
 - Modification
 - Assignment
 - Acceleration
 - Waiver & Non-Waiver
 - General Release
- Arbitration and Mediation
 - Confidentiality & Non-Disclosure
 - Force Majeure



One size does NOT fit all!!

General Release Clause

The Parties, on behalf of themselves, their predecessors, successors, direct and indirect parent companies, direct and indirect subsidiary companies, companies under common control with any of the foregoing, affiliates and assigns, and its and their past, present, and future officers, directors, shareholders, interest holders, members, partners, attorneys, agents, employees, managers, representatives, assigns and successors in interest, and all persons acting by, through, under, or in concert with them, hereby release, defend, indemnify and hold the other Party, together with their predecessors, successors, direct and indirect parent companies, direct and indirect subsidiary companies, and its and their past, present, and future officers, directors, shareholders, interest holders, members, partners, attorneys, agents, employees, managers, representatives, assigns and successors in interest, under or in concert with them, harmless from all claims, liabilities, obligations, damages, losses, costs, expenses, including, mental anguish, emotional distress, expenses (including attorneys' fees and costs actually incurred), and punitive damages, of any nature whatsoever, known or unknown, which either Party has, may have, or may have had, against the other Party, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions related to or arising from any dispute, litigation, agreement between the Parties, any other matter between the Parties, and/or any claims under federal, state, or local law, rule or regulation.

General Release Clause

The Parties, on behalf of themselves, their predecessors, successors, direct and indirect parent companies, direct and indirect subsidiary companies, companies under common control with any of the foregoing, affiliates and assigns, and its and their past, present, and future officers, directors, shareholders, interest holders, members, partners, attorneys, agents, employees, managers, representatives, assigns, and successors in interest, and all persons acting by, through, under, or in concert with them, and each of them, hereby release and discharge the other Party, together with their predecessors, successors, direct and indirect parent companies, direct and indirect subsidiary companies, companies under common control with any of the foregoing, affiliates and assigns and its and their past, present, and future officers, directors, shareholders, interest holders, members, partners, attorneys, agents, employees, managers, representatives, assigns and successors in interest, and all persons acting by, through, under or in concert with them, from all known and unknown charges, complaints, claims, grievances, demands, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, claims, demands, costs, fees, debts, penalties, fees, wages, medical costs, pain and suffering, mental and emotional distress, expenses (including attorneys' fees and costs actually incurred), and punitive damages of any nature whatsoever, known or unknown, which either Party has may have or may have had, against the other Party, whether or not apparent or yet to be determined, and which may hereafter develop, for any acts or omissions related to or arising from any dispute, litigation, agreement between the Parties, any other matter between the Parties, and/or any claims under federal, state, or local law, rule or regulation.

CONTRACT TERMS (cont...)

- **Letter of Intent, Proposals, and Construction Contracts**
- **Construction Contract Types:**
 - Fixed-Fee (Lump Sum)
 - Cost-Plus
 - Unit Price
 - Time and Materials
 - Design Build
- **Self-Created versus Industry Contracts**
 - AIA Contract Documents and Forms (A101, 201, 104, 105)
- **Insurance? Licenses? Other Exhibits? MUST HAVES**

PROOF OF INSURANCE

*Whenever someone steps foot on your property,
request an insurance certificate*

- General Liability
- Workers Compensation
- Umbrella or Excess Liability
- Business Auto Policy
- Contract Bond
 - “*Additional Insured*” Provision
 - Subrogation Waiver & Non-Contributory Provisions
 - Specialty provisions and riders depending on the vendor
 - Consider the carrier rating
 - Consider effective coverage date



THE LAW

➤ The dreaded **AMBIGUITY**

- Read against the drafter

➤ Quasi Contract

- Obligation imposed by law where no agreement exists

REMEDY: Unjust Enrichment (*Quantum Meruit*)

- Nothing is free...

➤ Interlineation & Novation

- Change in the agreement for clarification
- Substantial re-write of the agreement (material change)

➤ 3rd Party Beneficiary

- Intended
 - Specifically identified in the agreement
- Unintended
 - Benefits as a consequence of the agreement



CONDO & HOA SPECIFIC CONSIDERATIONS

➤ **Condominium Associations**

(LOOK YOUR DOCUMENTS)

Authority	(§718.114, §718.3026)
Conflict of Interest	(§617.0832, §718.3026)
Competitive Bidding	(§718.3026)
Hurricane Shutters & Solar Power	(§718.113)

➤ **Homeowner Associations**

(LOOK TO YOUR DOCUMENTS)

Authority	(§720.303)
Conflict of Interest	(§617.0832, §720.3033)
Competitive Bidding	(§720.3055)
Renewable Resource Devices	(§163.04)
Recreational Leaseholds	(§720.31)



MORE LAWS...

➤ Construction Lien Laws

Chapter 713, Florida Statutes

- Notice of Commencement
 - ✓ Start of project
- Notice to Owner
 - ✓ Notice of Contractor providing work or services for project.
- Progress Payment Application
 - ✓ Certification of work completed and payment owed.
- Partial Lien Release
 - ✓ Recognition of payment
- Final Contractors Affidavit
 - ✓ Certification of substantial completion and request for final payment.



WHAT ARE YOU DOING?

➤ **Infrastructural**

- Building envelope
- Electrical
- Plumbing

➤ **Open and Obvious**

- Roof
- Roads
- Painting
- Stucco

➤ **Unit Specific Projects**

➤ **MATERIAL ALTERATIONS**

➤ **“Rehabilitation Construction” vs “New Construction”**

- Three Critical Differences
- Holding Contractors to Account
- Residential Life Impacts and Inclement Weather
- Who’s Going to Pay For This?

WHAT ARE YOU DOING?(cont...)

➤ Construction Defect Related

- Pre-suit investigation
 - Preliminary Inspections
 - Destructive Testing
 - Remedial measures while suit is pending
 - Opportunity to inspect prior to fix (*spoliation issues*)

➤ Post-suit remedial matters

- Scope of work
- Vendor Selection



COMMON DEFECT TYPES

- **Folding, wrinkling and/or delamination of stucco**
- **Translation of horizontal surfaces**
- **Warping and rotting (wood)**
- **Spalling (concrete)**



BACK TO BASICS!

➤ OPEN or CLOSED board meeting?

- retain attorney
- hire consultant/engineer
- retain insurance agent

➤ **Membership Voice**

- Straw polls
- Online polls
- Town Hall meetings



THE CONSTRUCTION LIFECYCLE

- Inspection Results
- Scope of Repair / Scope of Work Creation
- Budgetary Consultation
- Request for Proposal/Quote Creation
- Bidder Selection Process
- Pre-Construction Process and Contract Negotiation
- Community Readiness and Communication
- Construction Commencement and Monitoring
- Construction Close-Out and Warranty Operations



DO YOU NEED A PROJECT CONSULTANT?

- ✓ Project
- ✓ Project duration
- ✓ What do you want/need them to do?
 - Consulting (*engineer, architect, attorney, etc.*), project oversight
- ✓ How will they be paid – **flat fee/hourly/percentage**
- ✓ Charge the consultant with defining the scope of the project
- ✓ Specifically state consultant authority
- ✓ Define what they need to submit to you and when

DO YOU NEED A PROJECT CONSULTANT? (cont...)

➤ Define what they need to submit to you and when

- AIA Documents?
- **Work Plan** –
 - How they will complete the work
- **Project Schedule** – *Phased work* –
 - Property inspection; RFP Production; Project Oversight; Substantial Completion Inspection
- Disclose ALL subcontractors and all workers who are NOT covered under the contractor's workers comp policy.
- Staffing plan through project completion
- Insurance Certificates for contractors and any subcontractor performing work related to the project.
- Specifically defined change order policy and payment approval requirements

YOUR EXPERTS



Consultant/Engineer



Attorney



Insurance Agent

YOUR EXPERTS (cont...)

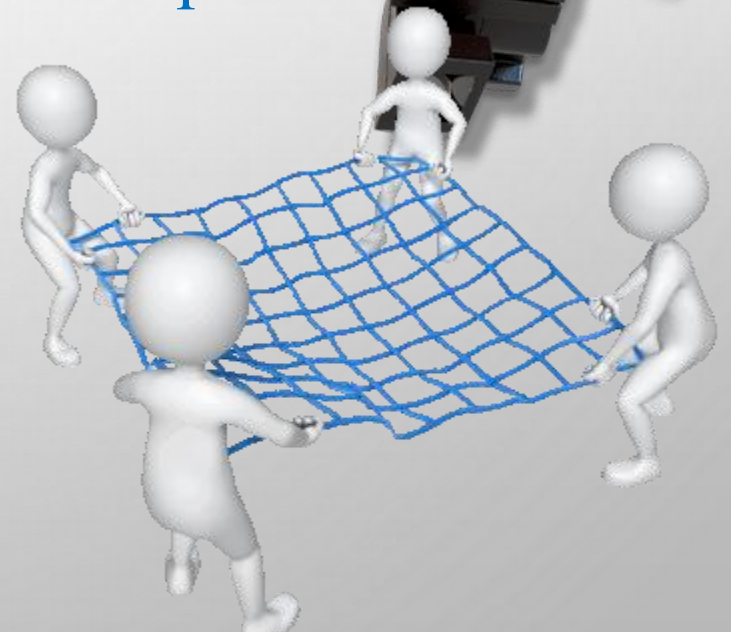
Consultant: The Board's eyes and ears



Attorney: The Board's sword and proverbial “bad cop”



Insurance Agent: The Board's safety net



DATA ACQUISITION & SELECTION OF PROFESSIONALS

➤ Forensic Investigations Tools:

- **SUPERFICIAL** – Topical Observation and Testing
 - Moisture Readings
 - Infrared Analysis
 - Voltage Testing
 - AAMA Testing of Fenestrations
 - Sourcing “Hollows”
- **SUBSURFACE** –
 - Destructive Testing
 - Laboratory Analysis

➤ Don't Destroy the Crime Scene!

- Managing Within and Outside of Construction Defect Lawsuits

DATA ACQUISITION & SELECTION OF PROFESSIONALS

- AIA Forms
 - Form 305 (*A CAM's Best Friend*)
- Call the Contractor References and Ask Questions
- Interview the Contractor (*Pay more attention to the supervision team than the Owner*)
- What is a “General Contractor”? (*Do you know what you're paying for?*)

Document A305
Contractor's Qualification Statement

The Undersigned certifies under oath that the information provided herein is true and sufficiently complete so as not to be misleading.

SUBMITTED TO:

ADDRESS:

SUBMITTED BY:

NAME:

ADDRESS:

PRINCIPAL OFFICE:

☐ Corporation
☐ Partnership
☐ Individual
☐ Joint Venture
☐ Other

NAME OF PROJECT (if applicable):

TYPE OF WORK (file separate form for each Classification of Work):

☐ General Construction
☐ HVAC
☐ Electrical
☐ Plumbing
☐ Other (please specify)

§ 1. ORGANIZATION
§ 1.1 How many years has your organization been in business as a Contractor?

§ 1.2 How many years has your organization been in business under its present business name?

§ 1.2.1 Under what other or former names has your organization operated?

§ 1.3 If your organization is a corporation, answer the following:
§ 1.3.1 Date of incorporation:
§ 1.3.2 State of incorporation:
§ 1.3.3 President's name:
§ 1.3.4 Vice-president's name(s):

SCOPE OF WORK / REQUEST FOR PROPOSAL / QUOTE CREATION

- Purpose of Scope of Work
- Differences Between Request for Proposal and Request for Quote
 - “BAD IN, BAD OUT”
- Internet and A.I. Pitfalls
- Prescribing Areas? Prescribing Means/Methods? Prescribing Materials? *(You better be qualified...)*
- How to Ensure *Apples to Apples to Apples*

PROJECT OVERSIGHT

- How often should consultant advise the Board?
 - Primary contact
- Change order review and approval
- Payment application review and recommendation
 - Should the board approve all payments?
- Substantial Completion, Punch List review and fixes
- Lien releases
- Final contractor's affidavit
- Release of retainage

MANAGEMENT OF CONSTRUCTION FINANCES

- Payment via INVOICE -vs- Payment via PAYMENT APPLICATION
 - Phased Projects
- Contractor Downpayment
 - What is it?
- Retainage
 - Why is it necessary?
- Line-Item Accounting -vs- Variable Cost Accounting



MANAGEMENT OF CONSTRUCTION FINANCES

CONTRACTOR INVOICE

Winter Park, FL 32789-378
Phone: (407) 607-915
Date 08/05/2024
July Inv 004V2

Bill To: Townhome Owners Association Inc

Amount Due: \$500,269.06
Balance due upon receipt

Townhome Owners Association Inc: July 2024 Invoice

July 2024 Invoice Description

General Conditions - \$53079.21 less 20% deposit - \$42463.37

*Contract cost was originally spread over 8 months. This was reduced to 6 months in July increasing the General Conditions monthly cost.

Roofing - \$366569.60 less 20% deposit - \$293255.68

Building 09 - 25% completed in July; All Roofing 100% complete - \$ 25920.66 less 20% - \$20736.53
Building 16 - 100% completed in July; All Roofing 100% complete - \$ 69319.64 less 20% - \$55455.71
Building 20 - 100% completed in July; All Roofing 100% complete - \$101004.84 less 20% - \$80803.87
Building 21 - 100% completed in July; All Roofing 100% complete - \$ 69319.64 less 20% - \$55455.71
Building 22 - 50% completed in July; 50% remaining - \$ 50502.42 less 20% - \$40401.93
Building 23 - 50% completed in July; 50% remaining - \$ 50502.42 less 20% - \$40401.93

Painting - \$99295.71 less 20% deposit - \$79436.57

Building 03 - 90% completed in July; 10% remaining - \$12269.95 less 20% - \$9815.96

Building 04 - 90% completed in July; 10% remaining - \$12269.95 less 20% - \$9815.96

MANAGEMENT OF CONSTRUCTION FINANCES

APPLICATION AND CERTIFICATION FOR PAYMENT		AIA DOCUMENT G702		PAGE 1 OF 2 PAGES	
TO OWNER:	PROJECT:	APPLICATION NO: 27	Distribution to:		
			<input checked="" type="checkbox"/> OWNER		
			<input type="checkbox"/> ENGINEER		
			<input type="checkbox"/> CONTRACTOR		
			<input type="checkbox"/>		
			<input type="checkbox"/>		
FROM CONTRACTOR:	OWNERS REP:	PERIOD TO: 9/27/24	INVOICE NO: FP240927		
	Vigilant Services LLC				
	12531 Westfield Lakes Circle				
	Winter Garden, FL 34787				
CONTRACT FOR: Exterior Renovation	CONTRACT DATE: 12/15/21				
CONTRACTOR'S APPLICATION FOR PAYMENT					
Application is made for payment, as shown below, in connection with the Contract.					
Continuation Sheet, AIA Document G703, is attached.					
The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.					
CONTRACTOR:					
By: _____ Date: 9/27/2024					
State of: FL County of: Orange					
Subscribed and sworn to before me this 9/27/2024					
Notary Public:					
My Commission expires: <i>JH 1. cut</i>					
MANAGER'S CERTIFICATE FOR PAYMENT					
In accordance with the Contract Documents, based on on-site observations and the data comprising the application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.					
AMOUNT CERTIFIED \$ 133,688.00					
(Attach explanation if amount certified differs from the amount applied. Initial all figures on this Application and on the Continuation Sheet that are changed to conform with the amount certified.)					
ARCHITECT: <i>J Leffler</i> Jeremy Leffler Project Manager Date: 10/4/2024					
By: _____					
This Certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Issuance, payment and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract.					

CHANGE ORDER SUMMARY	ADDITIONS	DEDUCTIONS
Total changes approved in previous months by Owner	\$42,050.00	
Total approved this Month		
TOTALS	\$42,050.00	\$0.00
NET CHANGES by Change Order	\$42,050.00	

1. ORIGINAL CONTRACT SUM	\$ 16,700,000.00
2. Net change by Change Orders	\$ 42,050.00
3. CONTRACT SUM TO DATE (Line 1 + 2)	\$ 16,742,050.00
4. TOTAL COMPLETED & STORED TO DATE (Column G on G703)	\$ 16,610,171.25
5. RETAINAGE:	
a. 5% until 50% Completed Work (Column D + E on G703)	\$ 418,551.00
b. % of Stored Material (Column F on G703)	\$ 0
Total Retainage (Lines 5a + 5b or Total in Column I of G703)	\$ 418,551.00
6. TOTAL EARNED LESS RETAINAGE (Line 4 Less Line 5 Total)	\$ 16,191,620.25
7. LESS PREVIOUS CERTIFICATES FOR PAYMENT (Line 6 from prior Certificate)	\$ 16,057,932.25
8. CURRENT PAYMENT DUE	\$ 133,688.00
9. BALANCE TO FINISH, INCLUDING RETAINAGE (Line 3 less Line 6)	\$ 550,429.75

MANAGEMENT OF CONSTRUCTION FINANCES

CONTINUATION SHEET

AIA DOCUMENT G703

PAGE 2 OF 2 PAGES

AIA Document G702, APPLICATION AND CERTIFICATION FOR PAYMENT, containing Contractor's signed certification is attached.

In tabulations below, amounts are stated to the nearest dollar.

Use Column I on Contracts where variable retainage for line items may apply.

APPLICATION NO: 27

APPLICATION DATE: 9/27/24

PERIOD TO: 9/27/24

ARCHITECT'S PROJECT NO: FP240927

ITEM NO.	DESCRIPTION OF WORK	SCHEDULED VALUE	WORK COMPLETED		MATERIALS PRESENTLY STORED (NOT IN D OR E)	G		BALANCE TO FINISH (C - G)	RETAINAGE (IF VARIABLE RATE)
			FROM PREVIOUS APPLICATION (D + E)	THIS PERIOD		TOTAL COMPLETED AND STORED TO DATE (D+E+F)	% (G ÷ C)		
1	Fountain Parke - Phase II Renovations								
2	Mobilization	\$89,500.00	\$89,500.00	\$0.00		\$89,500.00	100%		\$2,237.50
3	Scaffolding	\$1,675,000.00	\$1,675,000.00	\$0.00		\$1,675,000.00	100%		\$41,875.00
4	Demolition/Removal/Salvage Store & Reinstal	\$802,300.00	\$802,300.00	\$0.00		\$802,300.00	100%		\$20,057.50
5	Carpentry / Miscellaneous	\$530,400.00	\$530,400.00	\$0.00		\$530,400.00	100%		\$13,260.00
6	Framing/Allowances (see unit costs sheets)	\$2,114,300.00	\$2,004,459.00	\$10,432.00		\$2,014,891.00	95%	\$99,409.00	\$52,857.50
7	Dry in / Flashings / Tile	\$1,997,410.00	\$1,975,841.00	\$21,569.00		\$1,997,410.00	100%		\$49,935.25
8	Windows - Window Flashings	\$1,271,390.00	\$1,271,390.00	\$0.00		\$1,271,390.00	100%		\$31,784.75
9	Stucco Systems	\$4,596,300.00	\$4,531,953.00	\$57,914.00		\$4,589,867.00	100%	\$6,433.00	\$114,907.50
10	Prime and Sealants	\$340,000.00	\$329,664.00	\$9,384.00		\$339,048.00	100%	\$952.00	\$8,500.00
11	Paints and Finishes	\$345,600.00	\$332,604.00	\$8,156.00		\$340,760.00	99%	\$4,840.00	\$8,640.00
12	Electrical / Mechanical / Site	\$253,000.00	\$249,459.00	\$2,833.00		\$252,292.00	100%	\$708.00	\$6,325.00
13	General Conditions	\$1,354,800.00	\$1,333,425.00	\$11,900.00		\$1,345,325.00	99.3%	\$9,475.00	\$33,870.00
14	Builders Overhead and Fee	\$1,330,000.00	\$1,309,270.00	\$11,500.00		\$1,320,770.00	99.3%	\$9,230.00	\$33,250.00
15									
16	Change Order 01 - Added Paint Items	\$42,050.00	\$41,218.25	\$0.00		\$41,218.25	98.0%	\$831.75	\$1,051.25
17									
18									
19									
20									
21									
22									
23									
24									
25									
26									
27									
28									
29									
	GRAND TOTALS	\$16,742,050.00	\$16,476,483.25	\$133,688.00	\$0.00	\$16,610,171.25	99.2%	\$131,878.75	\$418,551.25

Payment
Application
Continuation
Sheet

ASSOCIATION SPECIFIC VENDORS

➤ **Management Company**

Term, Termination, “Extras”

➤ **Cable Company**

Term, Asset Ownership, Door Fee, Comp. Services, Technology

➤ **CPA** *(C.A. Specific)*

➤ **Law Firm** *(C.A. Specific)*

➤ **Ins. Agent** *(C.A. Specific)*

➤ **Landscaper**

Scope, “Extras”

➤ **Security Company**

Camera monitoring and hardware ownership

➤ **Towing Company**

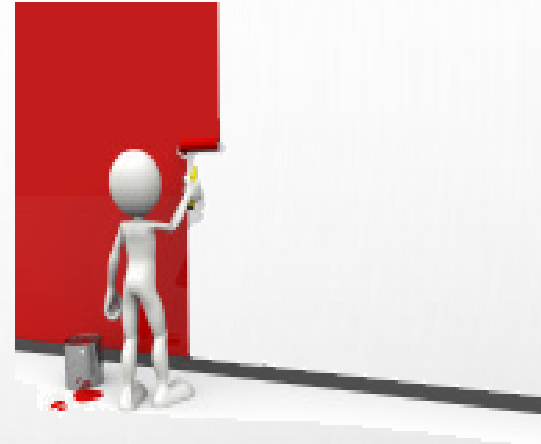
Compliance with Section 715.07, *Florida Statutes*, & applicable local ordinances



Association Specific Vendors (cont...)

➤ Maintenance & Repair Specific (AIA Forms)

- Painter
- Roofer
- Paving
- Pool
- Elevators
- Plumber
- Electrical
- Engineer



❖ Authority, Scope, Insurance, Payment, Retainage, Indemnification, Warranty

SCOPE, SCOPE, SCOPE!!!

CONSTRUCTION CLOSE-OUT PROCEDURE & METHOD

➤ When Are We Done?

- Substantial Completion
- Project Close-Out and Final Completion

➤ Payments Made Versus Payments Received

➤ What Did We Pay For? What Did We Receive, Though NOT Pay For?

➤ How Do We Maintain The Work?

➤ How Do We Justify A Warranty Issue?



THANK
YOU



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