BC
THE BROWARD COALITION CONNECTION
BrowardCoalition.org
SOUTH FLORIDA'S PREMIER COMMUNITY ASSOCIATION LIFESTYLE PUBLICATION
April 2016 VOL. 048

If Your Association is planning a Maintenance, Repair or Restoration Project,

READ THIS FIRST

CONTRACTOR AND ENGINEER LIABILITY
HOW TO BETTER PROTECT YOUR ASSOCIATION

At some point in time, every association is faced with a major maintenance and repair undertaking, whether it be concrete restoration, elevator refurbishment, new roofs or a similar monumental task, which requires the association to place their trust, and a large sum of their money, in the hands of contractors, engineers and architects.

The bid process begins, and all of the prospective contractors, engineers and architects tout their skills and expertise in the hopes that the association selects them for the work at hand. More and more, despite the professional's desire to win the job, the professional contractor does not want to take on the liability for their own work. This is evidenced by broad waivers of liability, disclaimer of warranties and terribly one-sided indemnity provisions that are set out in the contractor's contract that is given to the association for review.

As a community association attorney who regularly reviews contracts for community associations, I have seen enough of these broad waivers and disclaimers of liability and one-sided indemnity provisions to last a lifetime. One such example of an attempt to limit liability follows:

In recognition of the relative risks, rewards and benefits of the project to both the Client and the Contractor, the risks have been allocated so that the Client agrees that, to the fullest extent permitted by law, the Contractor's liability to the Client, for any and all injuries, claims, losses, expenses, damages or claims expenses arising out of this Agreement, from any cause or causes, shall not exceed $20,000.00 or the amount of the Contractor's fee, whichever is greater. Such causes include, but are not limited to, the Contractor's negligence, errors, omissions, strict liability or breach of contract.

The association is hiring the contractor, engineer and architect because of their professional expertise, yet the professional is, in essence, saying "I'm great, but I'm not responsible to the association if a make any errors." This is absolutely absurd and an abhorrent practice. Sure there need to be a relative balance so that the professional is not sued by the client association for such matters beyond the control of the professional but to call yourself a professional and run from your own liability is insulting, at best.

Depending on the scope of the association's maintenance, restoration or repair project, this limit on the contractor's liability could be egregious. To put this language in a real-world context, let me provide you with an example of the application of this provision to a hypothetical scenario. An association undertakes a concrete restoration project for its entire building which is going to cost the association about $500,000.00. The professional makes a mistake in the waterproofing of the envelope of the building, exposing the building to water intrusion. Months after the project has been completed, residents begin to complain about the smell of the building. Tests are conducted and, sure enough, the condominium is riddled with mold which the association is responsible to repair to the tune of $250,000.00. The association's insurance carrier is, no doubt, fighting them for coverage, and meanwhile the association is stuck with the bill. So, the association turns to the professional who did the work for answers. Pursuant to the language above, the contractor is only liable to the association for $20,000.00, or the contractor's fee, whichever is greater. So the association has to come up with difference! Even though the contractor was clearly at fault, the contractor cannot be held liable for its own negligence, errors, omissions, strict liability or breach of contract above the limits as set out in the contract.

Provisions like this could be devastating to an association! While the details of the maintenance project itself, such as the time of the project and the materials used, are important, it is also important for the association to properly protect itself and its members in the event something goes wrong, which happens more often than I prefer. Contractor prepared agreements tend to be a minefield for associations because there are many liability related provisions which must be considered and re-drafted in order to protect the association.

While protecting the association, and its members and residents, is of the utmost importance, it is also important to consider the potential liability of the contractor because, realistically, no deals would be made if the association was fully protected, while the contractor is left completely exposed. There is a balance between protections for the association and protections for the contractor that must be struck in order for associations and contractors to have a mutually beneficial relationship. Finding that balance is easier said than done in many cases, but is entirely possible.

The simplest way to plan for your association's maintenance, repair and restoration project, and avoid such pitfalls, is for the association to provide the requisite professional with the association's own draft contract as a part of the bidding process. In that way you can hopefully avoid wasting countless hours in selecting the right professional only to have the deal fall apart because they refuse to stand behind their own work.

Any reputable professional, be it a contractor, engineer, or architect, should stand behind their work. If they won't, then find one who will!

Jeffrey Rembaum, Esq. is a community association lawyer with the law firm Kaye Bender Rembaum, in its Palm Beach Gardens office. His law practice consists of representing condominium, homeowners, and cooperative associations, developers and unit owners throughout Florida. He can be reached by email at JRembaum@KBRLegal.com or by calling 561-241-4462 or toll free: 1-800-974-0680.