

Practice Update

Essentials for Your Hurricane Repair Construction Contract Toolbox

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In September of 2022, Hurricane Ian struck Florida with a force and onslaught of rain and flooding of biblical proportion that some say has not been seen in the last 1,000 years. Yet, once again, Floridians must pick up the pieces and rebuild. In the aftermath of a disaster like Hurricane Ian, property owners want their properties repaired as soon as possible, and potential contractors often swarm to the site hoping for a piece of the cleanup and recovery effort. This process can be stressful, chaotic and confusing, particularly for owners that have not dealt with such a scenario in the past. One way to eliminate some of the stress, chaos and confusion is for owners to ensure that their repair contracts contain, at minimum, the following essential items.

Basic Contract Terms

In order to be enforceable, every contract should include a full description of the scope of the repair work required, a clearly defined contract sum (and how and when that contract sum is to be paid), a deadline by which the work is to be completed, and the remedies available to the owner in the event that the deadline is not met or the work is not performed correctly. In certain circumstances, the scope of the repair should be prepared by a licensed design professional and include drawings and specifications for every element of the anticipated work. Owners should be wary of contractors who

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request large, up front, deposits. In most cases, deposits should not exceed the actual, reasonable costs the contractor will incur for materials that must be ordered in advance of the commencement of the work. The contract should include not only a “substantial completion” date by which all work (other than incidental or punch list items) must be completed, but also a “final completion” date by which the punch list items must be completed before final payment is made. With respect to remedies for delay, owners should consider including a provision that either gives them: (a) the right to recover all damages incurred for the contractor’s failure to complete the repair on time, including any consequential damages caused by such delay (such as additional carrying costs, storage costs, design professional costs, taxes, insurance costs, lost rents and/or lost profits, and other costs incurred due to the delay); or (b) if the parties agree to waive consequential damages (such as set forth in the AIA forms of agreement), then the owner should include a liquidated damages for delay provision – whereby the owner preserves its right to a financial remedy for all the types of damages it will incur due to the contractor’s delay.

Standard of Care

Many standard form contracts do not specifically and sufficiently state any “standard of care” to be applied to contractors. Without an express standard of care provided in the construction contract, the law will imply one (which may not be what the parties intended). Hence, owners should ensure their construction contracts include a standard of care that specifies the applicable laws, codes, and rules that apply to the project, and confirm that certain provisions required by law to be contained in the contract are complied with and expressly included. For example, if the project being repaired is LEED certified, then the construction agreement should require that the repair work comply with the applicable LEED requirements so as not to void the project’s certification. If the repair work involves a hotel and the hotel has certain “brand standards” for

items such as fixtures and equipment, then the agreement should include an express requirement that the contractor comply with such standards in its repair work.

Compliance with Applicable Laws

Owners should require that their contractor is familiar with all federal, state, and local rules, regulations, codes, and laws applicable to their specific project, and fully complies with all such requirements. Considering that some or all of the repair work may be performed during the “hurricane season,” even in the absence of a legal requirement, the repair contract should contain provisions requiring that contractors fully secure the project site during any future hurricane threats, which may or may not include moving materials and equipment completely off the site. Agreeing to and enforcing a comprehensive written hurricane protocol can prove invaluable when a hurricane threatens. Hurricane preparedness protocols, written into or made express parts of the contract for construction, should cover all aspects of a hurricane threat or strike, such as communication and coordination of the hurricane plan among project subcontractors and suppliers, protection of the site, securing and removal of equipment and materials, emergency contacts for before, during, and after a hurricane, and restoration of work and cleanup after a hurricane strikes.

Insurance and Indemnity Requirements

It is essential that the repair contractor have and maintain adequate types and amounts of insurance for the project at issue. Contractors should have in place, at a minimum, commercial general liability insurance, business automobile insurance, and workers compensation insurance, and owners should also consider requiring other types of coverage such as excess/umbrella insurance, employer’s liability insurance, contractor’s pollution liability insurance and, if the contractor is responsible for any aspect of the design of the repair,

professional liability insurance against errors or omissions in such services. The owner, and any other applicable entities having any ownership interests in the project site, and their respective lenders, employees, agents, successors and assigns should be expressly named as additional insureds (on all policies except for the workers compensation and professional liability policies), and such insurance should be primary and non-contributory to the policies maintained by the additional insureds. The commercial general liability insurance policy, and any applicable excess/umbrella policy and professional liability policy should remain in place through the statute of repose in the State of Florida. While the foregoing is a good guide, it is best for an owner to check with its insurance advisor/risk manager as to the exact insurance requirements to include in its contract. The contractor should also agree to indemnify, defend and hold harmless the same entities that are named as “additional insureds” against claims, damages, costs and expenses (including reasonable attorneys’ fees) arising out of the contractor’s (or any of its subcontractors’, suppliers’ or other lower tiers’) acts or omissions in the performance of the work.

Substantial / Final Completion

Although some standard form construction contracts may generally include basic requirements for substantial completion and final completion of the construction work, such as the owner’s receipt of beneficial occupancy of the project, it is advisable to include additional requirements with which the contractor must comply before it is entitled to receive payment of retainage and/or final payment. Some examples of the items that the contractor should provide to the owner include:

- a final contractor’s affidavit in which the contractor certifies, in accordance with Chapter 713, Florida Statutes, that all work has been completed and all of the subcontractors, suppliers and other lower tiers who have provided labor,

materials or equipment for the project have been paid in full;

- a temporary and/or final certificate of occupancy or certificate of completion with respect to the repair work from the governmental authority having jurisdiction over the project;
- as-built drawings of the repair work;
- if a payment and performance bond was issued for the work, the written consent of the contractor's surety to final payment;
- lien releases from the contractor and each of the subcontractors, suppliers and other lower tiers who have provided labor, materials or equipment for the project have been paid in full, in accordance with the requirements of Chapter 713, Florida Statutes; and
- copies of all subcontractor and manufacturer warranties and other related close-out documents.

Licensure and Permits

If a permit is required for the work at issue, an owner should never allow a contractor to do work on their project site without first obtaining such permit. Similarly, owners should ask for a copy of the contractor's license to perform the repair work at issue and never hire an unlicensed contractor. If an owner is not sure whether a permit or licensure is required, it is best to seek legal guidance on the issue.

By including the above essential terms in its hurricane repair contract, a property owner can reduce the stress and uncertainty related to its hurricane repair during an already stressful and chaotic time.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and

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