

Advising the Renovating Client

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Introduction

When a homeowner consults their lawyer for advice with respect to a home renovation contract the lawyer is often placed in a difficult position. In an ideal scenario, the lawyer would be granted the time to develop a proper framework for the project by working with the client to determine the appropriate delivery model and then developing a contract that would be accepted by the contractors. However, the reality is that the homeowner client is often unwilling or unable to afford comprehensive legal counsel and contractors may be unwilling to accept a contract that deviates from what they are accustomed to or provides significant home owner protection.

This paper is intended to assist the lawyer faced with a limited scope retainer who is trying to best prepare the homeowner for their renovation project by providing practical tips on what a homeowner should be aware of when entering a renovation contract.

1. The Project Delivery Model

The appropriate project model will vary depending on the size and complexity of the project, as well as the level of homeowner knowledge and desired involvement. The delivery model will ultimately impact all aspects of the project and the lawyer should advise the homeowner of the general structure and characteristics of each. The principal delivery models are described below.

a) Design-Bid-Build

In the design-bid-build model the homeowner would first engage an architect or engineer to design the project and then this design would be tendered to several contractors for competitive bidding.

The advantage of the design-bid-build model is that technical aspects of the project are determined in advance by an independent consultant and the competitive bidding process should yield a lower construction cost. However, a potential drawback is that a homeowner unfamiliar with tendering may find it difficult to manage the bidding process and be unfamiliar with their potential liability for mismanaging this process. One method for mitigating the tendering risk is for the homeowner to retain the consultant for the managing of the tender, but this approach represents an additional cost for the process.

The design-bid-build model is best suited for larger projects where the tender related cost savings will be large enough to offset the additional cost of retaining a separate consultant to prepare the initial design. This is particularly the case for relatively complex projects where the design will eliminate ambiguities for the contractor that would otherwise have resulted in an increased fixed fee price to address the risk of unknowns.

b) Design Build

In the design-build model the homeowner retains a general contractor to complete all required design and construction work. Under this approach, the homeowner would describe the requirements for the finished project to the contractor at the outset and then the general contractor would take care of all aspects of the project from commencement until completion. This “turn-key” model offers the advantage of requiring the lowest level of involvement by the homeowner, but there are increased costs associated with downloading all responsibility on the general contractor and not employing a competitive tender process.

The design-build model can be applied to construction projects of any size and represent a suitable approach for the homeowner that does not have the knowledge, time, or desire to be involved in the minutiae of the project.

c) Construction Management

In the construction management model the homeowner essentially assumes the role of the general contractor and retains several contractors independent of one another. These contractors (typically the trades-people) would otherwise have been subcontractors if the owner had retained a general contractor.

The construction management model can result in project cost savings by eliminating the role of the general contractor. However, a homeowner inexperienced with renovation projects may not appreciate the significant effort required to manage even a medium sized construction project. Furthermore, there are important health and safety considerations that arise if the homeowner is the “constructor”¹ for the project as is typically the case in a construction management scenario,

¹ The *Occupational Health and Safety Act*, RSO 1990 c O.1 at s. 1(1) defines the “constructor” as “a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer”.

as this role entails significant responsibility and potential liability (discussed further in Section 5(f)).

The homeowner should be advised that the construction management model carries the most risk for the homeowner and should not be undertaken unless the homeowner has relevant construction and project management experience and can dedicate the time required for the management of the project.

2. Contractor Qualifications

Prior to entering into a contract the homeowner should perform due diligence to ascertain that a contractor is appropriately qualified. This preliminary investigation should include independent investigation by the homeowner through the following resources:

- Consumer Protection Ontario's online Consumer Beware List² for any registered complaints
- Service Ontario's online listing of recent convictions³
- Online customer reviews

The homeowner should also require that the contractor provide:

- Workplace Safety and Insurance Board (WSIB) clearance number
- Proof of any required licensing (eg. Electrician, Plumber, etc.)
- References of previous customers

² Accessible online at: <http://www.ontario.ca/consumers/search-consumer-beware-list>.

³ Accessible online at: <http://search.news.ontario.ca/en/?keywords=MCS-convictions>.

3. The Form of the Contract

a) *Contract Provided by the Contractor*

Contractors often develop their own contracts, which is an approach recommended to contractors by the Canadian Home Builders' Association⁴ and it is therefore likely that a homeowner will be presented with a contractor supplied contract.

The advantage of a contractor supplied contract is primarily that it is a form that the contractor is accustomed to and is most likely tailored to the type of project under consideration. Further, in the event of litigation in relation to the contract any ambiguities would be construed against the contractor as the drafter.⁵ However, the disadvantages of a contractor supplied contract can be significant, and areas of concern include the contract being (1) biased in favour of the contractor; (2) silent with respect to material issues; or (3) containing ambiguities that make practical application of the contract difficult.

The homeowner who is considering entering into a contractor supplied contract should be advised to have the contract reviewed by a lawyer prior to signing. Although there is an additional cost associated with this approach, it is the best procedure when dealing with a class of contracts that can vary significantly in their sophistication and balancing of rights between the parties. In the event that the homeowner does not intend to proceed with a proper legal review, then they should be made aware of the potential risks of declining this review and the lawyer should document that a legal review was recommended.

⁴ *A Guide to Residential Renovation Contracts*, 2nd ed by Canadian Home Builders' Association (August 2010) at 2, online: <<http://www.chba.ca/uploads/Tools%20for%20Builders/RenovationContracts2ndEd-Aug10.pdf>>.

⁵ In accordance with the common law principle of *contra proferentum*. This is statutorily codified by s. 11 of the *Consumer Protection Act, 2002*, SO 2002 c 30, Schedule A [CPA], which provides that any ambiguity of a consumer agreement is to be interpreted to the benefit of the consumer. The protection under the CPA is broader in that it applies regardless of which party drafted the agreement.

In the pages that follow, we discuss various risks that can be addressed. Lawyers should consider adding a schedule to any contractor-supplied contract, adding a few supplementary clauses dealing with those risks most important to the homeowner.

b) Standard Form Contracts

The homeowner and contractor may elect to use a standard form contract. These documents are valuable in that they provide a framework that addresses many of the main issues, though they may also direct the parties to address and fill-in material terms. The disadvantage of a standard form contract stems from it being a standard form, which means that factors unique to the project in question may not be included, and significant detail may need to be populated by the parties, which leaves room for error in the drafting of this content.

For small projects the appropriate standard form contract may be relatively short and informal. These documents are available online and can often be used by the homeowner free of charge.⁶ When working with these documents the homeowner should be advised to include a supplement containing additional terms and conditions not otherwise addressed within the form.

For medium or large projects the homeowner may seek to use a more sophisticated standard form contract such as those developed by the Canadian Construction Documents Committee. The Committee was formed in 1974 and has developed a number of standard form construction contracts that are prevalent throughout the construction industry, with approximately 50,000 copies of its contracts sold annually.⁷ These documents were developed through consultations with industry associations, which helps ensure that the rights between the parties are appropriately balanced.

⁶ For example, a one page standard form contract that is available through OntarioContractors.com provides a one page standard form contract, which is accessible online at: <<http://www.ontariocontractors.com/links/genericcontract1.pdf>>. A lengthier contract provided through buyingahouseinontario.com is accessible at <<http://buyingahouseinontario.com/samplerenovationcontract.php>>.

⁷ Online: Canadian Construction Documents Committee <<http://www.ccdc.org/about/index.html>>.

For a fixed-price renovation contract the most appropriate CCDC document would be the CCDC 2 – 2008 Stipulated Price Contract or the CCDC 14 – Design-Build Stipulated Price Contract, depending on the project delivery model. These contracts set out a comprehensive agreement in an industry recognized form that can be tailored to the project by including supplementary conditions. To use a CCDC contract the homeowner must purchase the document and copyright seals from an authorized document outlet.⁸

c) Custom Contract

For large and complex projects the homeowner should be advised that a custom contract should be developed by legal counsel. This approach involves more cost, but a higher project value may merit the investment in developing a comprehensive contract that is tailored to the project.

4. The Cost of Risk Allocation

The lawyer should explain to the homeowner the cost of risk allocation and the value of a balanced contract. Although there may be a desire to draft the contract to protect the homeowner from any and all risks, there will be a cost associated with this approach that represents the risk premium. The downside of a risk premium is that it can result in the homeowner paying for the contractor to assume risk unnecessarily, thereby increasing the project cost.

The allocation of risk influences not only the terms and conditions of the contract, but also the selection of the appropriate project delivery model. Ultimately, the appropriate balance should be based on the homeowners' own risk tolerance and the lawyer should help the homeowner understand the risks associated with various decisions so that the homeowner can make an informed allocation decision.

⁸ A list of CCDC document outlets is accessible online at: Canadian Construction Documents Committee <<http://www.ccdc.org/documents/ccdcoutlets.pdf>>.

A practical point with respect to risk allocation is that not every risk must be allocated. In some instances a risk can be eliminated or mitigated through additional information, such as the performance of a geotechnical investigation to determine the bearing capacity of the soil. Although in this example there is a cost to retain a third party, it is likely far less than if either the homeowner or the contractor were to assume the risk of unknown soil conditions at the time the contract was entered into. Prudent advice to a homeowner would be to eliminate or mitigate the risks that can be settled through the gathering of additional information at a cost less than what the assuming party would value the risk at. Although this approach may require more time and expense at the initial stage of the project, it should reduce the overall project cost.

5. Important Contract Considerations

Regardless of the project delivery model or form of contract selected, there are essential elements that should be addressed in the contract between the homeowner and contractor. The following subsections outline these elements and include commentary on their relevance to a successful project.

a) Scope of Work

A properly defined scope of work is critical to a successful project and significant care should be taken in developing this section of the contract. The scope of work should clearly articulate what work is to be performed by the contractor and also what is excluded from the scope, thereby eliminating ambiguity. Particular care should be given to the demarcation of the work, especially when different contractors will be engaged and their respective work will be integrated in the finished project.

An important area with respect to the scope of work is the allocation of responsibility for all required permits and approvals. Any specific permits that are known to be required should be listed in the contract and if there is doubt whether a particular permit is required the homeowner

should speak with the local municipal development officer. The homeowner should also be cautioned that even if the responsibility for acquiring the permit is delegated to the contractor it is the homeowner who is ultimately responsible.⁹

To cross-check the validity of the scope of work prior to finalization of a contract the homeowner should verify that for the project as a whole:

- (1) the supply of all required materials has been allocated to one or more of the parties;
- (2) the supply of all required labour has been allocated to one or more of the parties;
- (3) the responsibility for obtaining all required permits and approvals has been allocated to one or more of the parties;
- (4) management of the project has been allocated to one of the parties; and
- (5) the interconnection and coordination between the parties has been addressed.

b) Cost

The cost may be expressed as a fixed fee or may be calculated based on a prescribed mechanism, such as unit rates or cost and an applicable percentage mark-up for profit. The fixed cost or the mechanism for calculating the cost should be included in the contract and it should be specified whether the figures include applicable taxes.

When the cost is calculated by a mechanism it is common for the contractor to have also provided an estimate of the total project cost. Any contractor provided estimate should be included in the contract.

⁹ Only the owner of the property or the owner's authorized agent is permitted to apply for a building permit, as per the Application for a Permit to Construct or Demolish available online: Ontario Ministry of Municipal Affairs and Housing < <http://www.mah.gov.on.ca/Page8491.aspx>>.

c) Schedule

The contract should include a schedule for the work to be performed, which should include a start date on which the premises will be made available to the contractor, as well as a completion date for the project. For projects that are large and will extend over a significant period of time, it is also advisable to include interim schedule targets, which will aid in assessing progress during the construction period.

If adherence to the schedule is critical to the homeowner, then they may seek to incorporate liquidated damages for failure to meet the targeted completion date. The quantum of the liquidated damages must be a reasonable estimate of the losses that would be sustained as a result of the delay, or there is a risk that the provision will be unenforceable on the basis that it is in substance a penalty. From a practical perspective, if a contractor is willing to accept liquidated damages there will likely be an increase to the overall project cost in the form of a risk premium.

d) Dealing with Change

As the size and complexity of a project increase, so does the likelihood that changes to the originally agreed upon contract terms will be required and the contract should include the process by which changes will be managed. Normally no change should be permitted unless the contractor submits a formal change request to the homeowner outlining the reasons for the change and any related impact on the cost or schedule. The contract should specify that any work outside of the original scope should not be performed and will not be reimbursed unless approved by the homeowner through the change order process.

e) Payment Milestones

The payment schedule should be structured to protect the homeowner by ensuring that work is paid for only as completed, thereby safeguarding against the possibility of a contractor receiving payment and then not performing the work. This approach places the risk of non-payment on the

contractor, but the contractor's risk exposure is minimized by payments being made at set intervals during the project, referred to as payment milestones.

The payment milestones should be associated with activities that can be easily verified by the homeowner (eg. demolition complete; excavation complete; foundations poured; building closed-in; drywall complete; landscaping and overall project complete). While it may be difficult for a homeowner to quantify overall progress in the form of a percentage, it is easier to determine when a specific activity has been completed. On large or complex projects that involve a consultant, the contract should make each progress payment contingent on certification by the consultant that the milestone has in fact been achieved.

The key risk is to avoid homeowners' payments getting "ahead of the work." Payments should only be made for completed work (subject to the initial deposit for the acquisition of materials).

f) Holdbacks

The homeowner must be advised that they are required to retain a holdback of 10% on all payments under the contract in accordance with the *Construction Lien Act* (the "Act").¹⁰ Failure to retain this amount can result in the homeowner being liable a second time for the holdback, if there are subcontractors or suppliers who are not paid by the contractor.¹¹ The holdback amount should only be released after the time period for potential lien claims in relation to the holdback has expired, and a title search conducted showing no liens on title.¹²

Contractors may resist the homeowner retaining holdbacks under the *Construction Lien Act*. If the homeowner elects to provide full payment, they should be informed that they are not relieved of their potential double liability for holdback by any provision in the contract with the

¹⁰ *Construction Lien Act*, RSO 1990, c C.30, s. 22(1)

¹¹ *Ibid* at s. 23(1).

¹² *Ibid* at s. 26.

contractor¹³ or by any waiver of lien rights provided by any subcontractor or supplier.¹⁴ Rights and obligations under the Act cannot be limited by contract.

g) Health & Safety

Under the *Occupational Health and Safety Act*¹⁵ the ultimate responsibility for the protection of the health and safety of workers and compliance with the OHSA lies with the “constructor” for the project.¹⁶ The constructor is defined as “a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer”.¹⁷

The homeowner should be advised that they should avoid assuming the role of the constructor for the project unless they are well versed with the requirements of the OHSA. The contract should specifically allocate this role to the contractor and the homeowner should ensure that they do not assume control of the project through their direct participation or by hiring and managing the individual trades directly.

h) Insurance

The contract should specify the types of insurance and associated limits that the contractor is required to have in place for the project. Copies of all policies should be provided to the homeowner and may be attached to the contract as a schedule. The typical forms of insurance are

¹³ *Ibid* at s. 5(1).

¹⁴ *Ibid* at s. 4.

¹⁵ RSO 1990, c O.1 [OHSA].

¹⁶ *Ibid* at s. 23(1).

¹⁷ *Ibid* at s. 1(1).

listed below, but the homeowner should be cautioned that special additional forms of insurance may be required depending on the nature of the project.¹⁸

- Commercial General Liability Insurance
 - This coverage protects against contractor caused damage to the homeowner's premises or to any third party.
- Workplace Safety and Insurance Board
 - The contractor should provide a WSIB clearance number to demonstrate that they are registered with the Workplace Safety and Insurance Board and are in good standing.
- Builders' Risk Insurance
 - This coverage protects against damage or loss to the construction work.
- Automobile Liability Insurance
- Aircraft or Watercraft Liability Insurance (if applicable)

The homeowner should also consult the insurer of their home to inform them of the proposed renovations and determine whether the work will have any impact on their existing coverage.

i) Acceptance of the Work

There should be a process for the homeowner's acceptance of the contractor's work. This acceptance procedure should be applied for each payment milestone and at substantial performance and final completion. The formality will vary depending on the nature of the project, but in all cases it should involve a written sign-off that the work has been approved or the reasons that it has not been approved. On larger or complex projects for which the homeowner has engaged a consultant it would be appropriate to have the consultant certify that the work has been accepted.

¹⁸ One example would be boiler and machinery insurance.

j) Warranty

The contract should set out the obligations of the contractor with respect to any warranty on completed work. It is customary to provide a warranty of one year, but the term and conditions of the warranty are dependent on what the parties agree to in the contract.

If there are manufacturers' warranties in relation to components installed by the contractor then the contract should require that these be assigned to the homeowner at the completion of the project.

k) Dispute Resolution

The contract should include a dispute resolution mechanism to address disagreements that the homeowner and contractor cannot resolve between themselves. The dispute resolution mechanism typically provides for facilitation or resolution by a third party.

Disputes are typically either technical in nature (e.g. whether the joist installed is structurally adequate) or contractual in nature (e.g. whether certain work completed was within the scope of work). For technical issues it may be appropriate to have the matter determined by the consultant, if applicable, or by an independent technical expert. For contractual issues the contract should provide for mediation or arbitration. Regardless of the mechanism, it is advisable that the contract address how work should continue during the resolution process to prevent a complete stoppage of work.

The homeowner should also be aware of the practical value of having an efficient mechanism for resolving disputes. The reality is that if a dispute does arise the homeowner will often be in a relatively vulnerable position, as they may lack the knowledge to negotiate effectively with the contractor and will also be midway through a construction project that they wish to see completed, often making it impractical to have a lengthy period for decision making or to engage

another party to assist at the time of the dispute. A predetermined method of resolving disputes and allowing work to continue during the interim is vital to ensuring that the homeowner avoids being placed in a position where they feel that they have no choice but to agree with the contractor or risk being left being with an incomplete project.

l) Default

The contract should specify what events constitute a default by either party. This should include a general statement that any material non-compliance with the terms of the contract constitutes default, but should also include specific metrics regarding certain contractual requirements. Examples would include specifying the number of days after which the contractor would be in default for failing to meet a milestone date, or after which the homeowner would be in default for failing to pay an invoice.

Some events of default can be remedied and may have occurred merely through the inadvertence of one of the parties. To allow for a well-intentioned party to recover it is advisable to specify a cure period which will commence when the non-defaulting party gives notice of the default and provides a period of time for the defaulting party to remedy the default.

m) Termination

The contract should address the termination rights, if any, for each of the parties. Termination rights would typically be for cause (e.g. the right of the non-defaulting party when there has been a default) or for convenience. The contract should identify the conditions under which a party may terminate, notice requirements, and the entitlement of the non-terminating party.

n) Special Project Requirements

The homeowner should include provisions in the contract that deal with any unique issues related to the work in question that are not otherwise part of the scope of work or related to the

mechanics of the contract. Examples would include things such as the contractor minimizing noise to avoid disrupting neighbours, limiting or modifying the hours of work, or providing containment to prevent debris or dust from escaping the work area and migrating to other areas of the residence.

6. Cooling-Off Period

After signing the contract the homeowner may be entitled to cancel the agreement without any adverse consequences during a prescribed period of time, which is known as the “cooling-off period”. Under the *Consumer Protection Act* the homeowner is statutorily entitled to cancel a contract within ten days after receiving a written copy of the agreement.¹⁹ This ability of a homeowner to cancel a contract during the cooling-off period is subject to certain restrictions²⁰ and the homeowner should be further advised about the mechanics of its operation if it is possible that they would rely on it.

Summary

When faced with the challenge of a homeowner client and a limited scope retainer a lawyer can still provide meaningful and valuable advice by ensuring that the homeowner understands the key considerations that should be taken into account before entering into a renovation contract.

When these practical tips are distilled, they reveal a framework that is focused on understanding the homeowner’s desires, knowledge level and risk tolerance. Considerations of these factors will allow the lawyer to explain how these characteristics align with the various options for the structuring of the project delivery model and the contract form. Ultimately, the details will be addressed between the homeowner and the contractor, so the balance of the lawyer’s advice

¹⁹ *Consumer Protection Act* at s. 43(1).

²⁰ One example is that the cooling-off period does not apply to a contract negotiated or signed at the contractor’s place of business, as this would not constitute a “direct agreement”, as per the definition of that term in s. 20(1) of the CPA.

should focus on increasing the homeowner's understanding of the key issues to help facilitate the parties reaching a final contract that contains the relevant terms and conditions and appropriately balances the risks and rights between the parties.

The homeowner client should always be advised that it would be prudent to consult with a lawyer whenever confronted with issues that they are unfamiliar with and for a final review of the contract prior to signing. Although they may view this additional review as unnecessary, it is more advisable than the alternative of entering into a binding agreement that they do not fully understand or that may be adverse to their interests, as the subsequent legal advice will likely cost significantly more and may be of limited utility if a disagreement between the parties has arisen.