

The Ties That Bind Step 2: Alternatives to the Traditional Written Contract

—by Alison Mullins

Last month we took the first step in understanding the basics of contract formation. This month we will take a look at alternative ways that a contract can be formed – besides the traditional written contract signed by both parties. The alternatives this article will highlight include oral contracts and unsigned written contracts.

Oral Contracts

In all but a few instances, a valid oral contract can exist between parties. The elements needed to create an oral contract are no different from those of a written contract. There must be a “meeting of the minds” as to the material terms, an agreement to be bound to the terms, and the agreement must be supported by consideration. Oral contracts are more commonly known as “handshake” deals.

It is important to note that a valid oral contract may be found by a court to already exist even if the parties intend to later enter into a written contract. Under certain facts, courts in the District of Columbia have found that the contractual requirements of intent and completeness existed despite the fact that the oral agreement had not yet been memorialized in a complete and signed writing. However, the courts will not find an enforceable preliminary agreement unless the facts of the individual circumstances clearly indicate that (1) the parties intended to be bound at that early point by their verbal communications, and (2) the parties agreed to all material terms (e.g. price, quantity, quality, duration, etc.).

To evaluate whether an oral agreement in contemplation of a written contract is enforceable, District of Columbia courts have adopted a five part test. First, the

court evaluates where the contract is one that is typically put in writing. Second, the court assesses whether the agreement involves few or many details. Third, the court looks at the dollar value of the agreement – is it small or large? Fourth, the court analyzes whether a formal writing is required in order to fully articulate the covenants and promises of the agreement. Finally, the court considers whether the negotiations themselves specify that a written document is contemplated in order to finalize the negotiation.

Unsigned Written Contracts

A written contract may be accepted by performance, even if the document itself is unsigned. The signature of a party on a contract is intended to denote acceptance of the terms stated in that document. However, unless the document requires acceptance by signature only, a party could be deemed to have accepted the contract by his or her actions.

One way a written contract may be accepted by performance is when a party begins to perform a contract according to its terms. The absence of a signature on the written agreement may not defeat the existence of the contract. An example of acceptance by performance is if an owner sends you a written agreement for architectural or design services. You do not express to the owner that you have any issues with the written agreement, you begin your design services, submit invoices, and attend project meetings - all in accordance with the terms of the written, but unsigned, agreement. Your actions may result in acceptance by performance, and the written contract, although unsigned, may

be enforceable as if your signature was on the dotted line.

A second way a written contract may be accepted by performance can sometimes be found in the language of the written agreement itself. Some agreements now contain language that if the party providing services begins work on the project without a fully executed contract, the contract shall be deemed accepted. This can be either beneficial to the architect, if it is the architect’s standard form agreement, or detrimental to the architect, if it is the owner’s standard form agreement. Keep a lookout for this provision, which is enforceable in some jurisdictions.

Conclusion

The moral of the story is that the best way to protect your interests is to get your agreements in writing, review and understand the terms and conditions of the written agreement, and get signatures from both parties. However, if you do not have a signed agreement, you are not totally out of luck as there may be an alternative theory by which a valid contract may be found to exist and your interests protected.

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This article is not intended to provide specific legal advice, but instead as general commentary regarding legal matters. You should consult with an attorney regarding your legal issues, as the advice you may receive will depend upon your facts and the laws of your jurisdiction.

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