

Publication

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Client Alert: Twelve Things to Consider When Negotiating a Demolition Contract

With so many big box retailers closing stores and going out of business, shopping center owners are faced with what to do with the vacated stores. Often times, given the age of the vacated store, the only option for the owner is to demolish the current building and then, in connection with a new lease, construct a building more suitable for the new use. The following are twelve things to consider when negotiating a demolition contract (a "Contract"):

1. Contractor. The "Contractor" should be an experienced demolition contractor, licensed in the applicable jurisdiction of the subject property, and employing applicable environmental, health and safety standards. Before entering into the Contract, the Contractor should visit the project site in order to fully understand the scope of the required work (the "Work"). They should agree to provide, at their cost, all equipment necessary for carrying out the Work. The Contractor should only have access to such portions of the project site as are necessary for completion of the Work. The Contractor should be prohibited from assigning the Contract or sub-contracting any portion of the Work without the prior written approval of the owner of the subject property (the "Owner").
2. Dates of Commencement and Completion of the Work. The Work should not commence until all required

permits and other approvals have been obtained, any required notices of demolition given and, if applicable, all hazardous materials have been properly removed from the project site. Required approvals and notices may require those from or to REA parties or remaining anchor tenants, as well as Owner's mortgage lender. The Work should be fully completed (as opposed to substantially completed) within an agreed upon number of days, subject to limited force majeure events (e.g., severe inclement weather, labor disputes, etc.).

3. Contract Documents. Will there be any additional conditions of the Contract not covered in the Contract itself and/or described below (e.g., how will change orders, if any, be handled, a further description of the insurance required of the Contractor, what condition is the project site to be left in at the end of each day and upon completion of the Work, etc.); any Drawings (e.g., depicting any additional improvements to be removed), Specifications (what is to be demolished, are utilities to be relocated, are sub-surface improvements to be removed or filled-in, etc.), or any other Addenda?

4. Contract Sum. What is the total cost of the Work to be performed pursuant to the Contract Documents? What is not included (e.g., environmental remediation, relocation of utilities, payment and/or performance bonds, etc.)?

5. Payments. Will there be monthly progress payments (with retainage) or one payment upon completion of the Work and delivery of all required documents (e.g., unconditional final lien waivers, sworn statements and, if applicable, disposal permits, etc.).

6. Dispute Resolution. Arbitration (more typical) or litigation?

7. Insurance and Bonds. What insurance will be required of the Contractor? The Owner and its

partners/shareholders/members, as well as Owner's mortgage lender and property manager and their respective officers/directors/managers, employees and affiliates should be named as additional insureds on Contractor's Commercial General Liability and Excess Liability (umbrella) policies (in some states you are required to specifically name these parties in the Contract as well as in the Certificate of Insurance) and any other requirements of Owner's mortgage lender will also need to be met. Will payment and/or performance bonds be required?

8. Indemnification. The Contractor should indemnify, hold harmless and defend the Owner, its partners/shareholders/members, Owner's mortgage lender and property manager and their respective officers/directors/managers, employees and affiliates for all claims, damages, etc. caused or occasioned by Contractor or anyone acting on Contractor's behalf (e.g., its subcontractors).

9. Termination Rights. What rights do the Owner and Contractor have to terminate the Contract (e.g., failure to perform as required, disregard for applicable laws, etc.)? Upon how much notice? Can Owner terminate for no reason and pay for only the work completed, if any? What other remedies should Owner require if Contractor defaults under the Contract (e.g., right to complete the Work using the Contractor's equipment, charging Contractor for any additional costs incurred, etc.)?

10. Contractor's Warranty. For what and for how long? What are Owner's remedies?

11. Safety Compliance. The Contractor and all subcontractors must comply with all applicable laws regarding health and safety. Before any Work is commenced, and during the course of such Work, all necessary steps must be undertaken to prevent danger

from collapsing improvements and from fire and/or explosion through leakage or accumulation of gas or vapor. The Contractor must ascertain the location of all potentially dangerous facilities (e.g., live power cables) before commencing the Work. The Contractor must be responsible for the safety of its own personnel and those of its sub-contractors and for their respective equipment.

12. Disposal of Debris. What controls and requirements should be imposed regarding the storage, removal and disposal of the demolition debris (e.g., smoke/odor controls, noise controls, dust and air pollution controls, how will hazardous materials and other demolition debris be disposed of, etc.)? In addition to federal and state regulations regarding the removal and disposal of hazardous materials, note that some counties and municipalities have their own notice, testing, remediation and disposal regulations or permitting requirements. Accordingly, it is imperative that a knowledgeable, licensed abatement contractor, agreeing to comply with all applicable laws be engaged for any such portion of the Work. Will there be a recycling requirement? How will landscaping be protected and restored? Upon completion, will the site be graded and backfilled? Will any road damage be repaired? Who gets the benefit of the salvage value of the building materials being removed?

If you have any questions concerning this or any other issue concerning your business's contracts, do not hesitate to contact Mark Horne or another member of Neal Gerber Eisenberg's Real Estate group.