# CONSTRUCTION AGREEMENTS AND DISPUTES: KNOWING WHAT TO KNOW, AND WHAT TO DO WITH THAT KNOWLEDGE

ABC Construction Business School Inslee Best Doezie & Ryder, P.S. February 27, 2020 Presenter: Todd Henry



#### Who Are You, Anyway?

#### **Todd Henry**

- Lawyer/Shareholder, IBDR
- Construction Law Practice, 19+ years
- Former Career: 20 years as a Contractor
- 4th Generation Mechanical Contractor
- Owner, Design/Build Mechanical Contractor, '92-'97
- Former Specialist in Learning "the hard lesson"





#### Stevens Court, 1990

# We are called CONTRACTORS for a Reason. Snappy Story #1





## The Absolute Basics What/Why a Contract?

A contract is allocation of risk—a contract offers the chance to obtain some reward for an agreement to be responsible for some portion of the overall risk included in a venture.







## The Absolute Basics Risk v. Reward

Deciding to enter into a contract is an exercise in the analysis of risk v. reward. Considerations include:

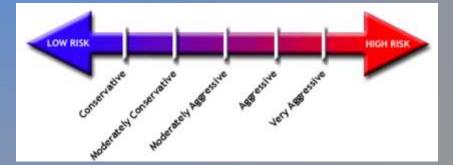
- How much reward is possible?
- How much risk exists with the work? How risk averse are we?
- How much risk exists with the customer?
- How much risk can be mitigated by us or allocated to others?
- How badly to do we need this job?
- What is a worst scenario for taking this job/these risks?

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#### **Risk v. Reward**



# **Contracting 101: Elements of a Contract**

- Offer
- Acceptance (Assent)
- Consideration
- Capacity
- Legality

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## **Contracting 101: The Offer**

In what form is the Offer?

 Request for **Qualifications?** 

 Request for **Proposal?** 

Invitation to Bid?

#### LIBERTY COUNTY SCHOOL BOARD **Facilities & Construction Department Request for Qualifications** Architectural Consultation Professional Services Pursuant to FS 287.005, the School Board of Liberty County,

Florida invites gualified firms to submit a letter of interest and supporting documentation relating to professional services for:

#### Architectural Consultant Services for a New High School

Mandatory documents shall include the following: Letter of interest · Examples of similar projects completed by the firm Resumes of proposed staff Copy of license Proof of insurance and references

Four packets clearly marked, "New High School" must be submitted before 5 p.m. on Thursday, July 3, 2014 to Kevin Williams, Facilities Directory, Liberty County Schools, 12926 NW County Road 12, Bristol, FL 32321, All documents submitted shall become property of the Liberty County School District.

#### REQUEST FOR 8405 August 13, 2008

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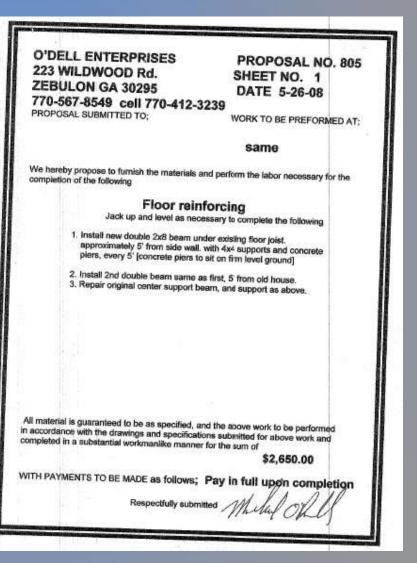


## Contracting 101: The Offer

**Bid Proposal:** 

- Sets out the Scope of Work for which the price is offered
- Acknowledges the bases of the bid

   Plans (version/date)
   Addenda (nos./dates)
   Additional information (reports, pre-bid meetings, etc.)
- Provides any clarifying information
- States any exclusions from the Work proposed
- States any conditions to the price
- States the price for which a contract for the Work will be accepted.



## Contracting 101: The Offer, Our Proposal

- Be precise: provide a list of exactly what you propose to do
- Be comprehensive: provide a list of all exclusions to your proposed scope, and any conditions placed on your proposed work



Apollo		WA Reg. No. APOLLSM187MK OR CCB No. 56241 CO Plumbing Lic :PC.0003009 MT CRN: 149670	www.apollomech.com
PR	OPOSA	L	
Date: March 3, 2014			
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From: Ken Phillips Randy Van Leuven			
To Bret Boyer:			
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## Contracting 101: Our Proposal, Exclusions

Be clear, so there is no misunderstanding. Include exceptions to any scope or term in the solicitation. Other hot items:

- Insurance
- Bonds
- Taxes
- Permits

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Lines, grades and elevations **Performance and payment bonds Permits and special inspections** Off-shift or overtime work Cut, patch and roofing Temporary power, water, utilities Washington State Sales Tax Hoisting Builder's Risk/ Course of Construction Insurance Mortuary Equipment Flagpoles

Contracting 101: Acceptance

With Conditions?
W/o Conditions?
Gounteroffer?
Substantial Change in Terms

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Contracting 101: Consideration

"Consideration" is the "value" attached to a contract:

- In most instances it's money in exchange for something else
- However, "a mere peppercorn" can be adequate consideration
- "Bargained-for exchange"
- Agreed exchange of value for performance
- Can even be "forbearance", an agreement <u>not</u> to do something in exchange for something else







# Contracting 101: Capacity

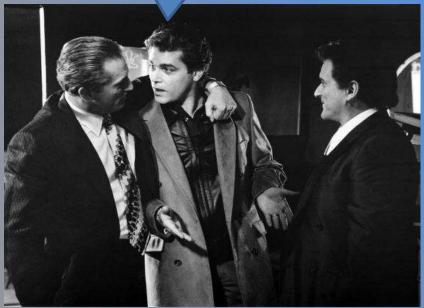
The following classes of persons may lack the capacity (legal standing) to enter into binding contracts:

- Minors
- Incompetent Persons
- Incapacitated Persons
- Bankrupts
- Foreign Agents/Enemies of the State
- Unauthorized Agents (Business Entities)



## **Contracting 101: Legality**

So, let me get this straight. You offered to cut me in on the deal, and I agreed. My services have value, so there's consideration. But, I can't sue youse two because it's a flippin' robbery?



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To be enforceable a contract must be "legal":

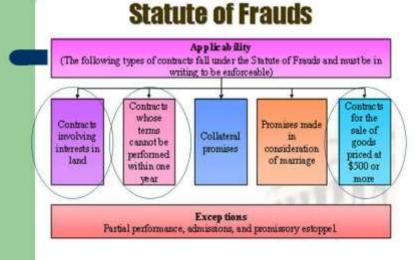
Contracts that violate the law are void -if object is illegal (contract to commit a crime)
-if purpose is legal but method to achieve the purpose is illegal
(transport goods, but do it in a stolen truck, collect a debt via assault)

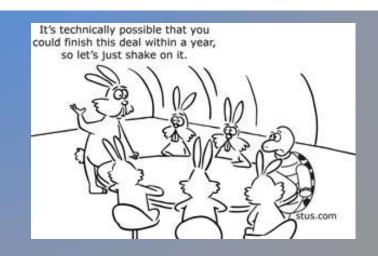
I wonder if this agreement is enforceable?

# Contracting 101: The Statute of Frauds

Agreements are void unless they are in writing:

- Contracts not able to be performed within one year
- Contracts to answer for the debts of another
- Promises made in exchange for an agreement to marry, except mutual promises to marry
- Agreements for the purchase and sale of real property
- Agreements to employ an agent or broker for the purchase and sale of real property
- Purchase and sale of goods with value over \$500





# Standard Construction Industry Contract Forms

- Architects Institute of America (AIA)
- Associated General Contractors (AGC)
- ConsensusDocs
- Government Contracts
- Other Trade Organizations

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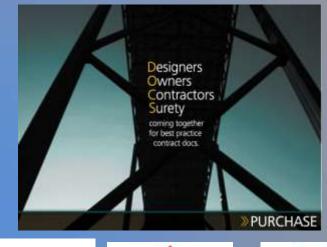


# The (Still) New Kid on the Block: ConsensusDocs

AGC invited 23 parties, including owners, sureties, insurers, general contractors, subs, etc. to draft a standard set of "neutral documents."

- Three year effort
- Published in September 2007
- All groups voiced their "problems" with existing AGC documents
- Decisions on changes decided by "consensus"
- Not all yet ratified by the participating drafters
- Aimed at encouraging more trust in the process, and less adherence to strict legal language
- Subcontractors received some concession
- in indemnity language
- See, www.consensusdocs.org.





















America's National Subcontractors Alliance



Construction Owners

Association of America



of America

ical Contractors Associat



### Vital Construction Contract Clauses

- Scope of Work
- "Contract Documents"
- Time
- Schedule
- Insurance
- Payment
- Changes in the Work
- Claims/Disputes
- Indemnification
- Standard Provisions







# **Scope of Work**

#### **Construction Dictionary Definition:**

 "An accurate, detailed, and concise description of the work to be performed by the contractor, the owner, and third parties in a construction contract."















## **Typical Scope Description**

To provide all supervision, materials, labor, supplies, and equipment for a complete installation of the \_\_\_\_\_ work as set out in the Contract **Documents**, subject to the Terms and **Conditions herein...** 

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#### **Agreement on Scope**

Does the Contract Scope match the Proposal Scope?

- Inclusions
- Exclusions
- Clarifications
- Conditions
- Contract
   Documents
- Schedule







## Inclusions

## Be aware of Added Scope (Subcontractors):

- Duties added not included in the Proposal
- No recognition of exclusions
- Changes in allowable work hours
- Changes in the scheduled start/completion dates
- Prohibitions regarding employees (i.e., parking)
- Restrictions to help (i.e., hoisting)





## Inclusions

Generals: Poor inclusions lead to "Scope Creep"

- "Yeah, we didn't have that in our number."
- "Oh, if you wanted that, you should have said so. We'll get you a revised price."
- "Scope Creep" is a hole in the schedule of values that gets filled in with the GC's fee.



#### **Exclusions**

**Critically important to preserve** potential for profit.

- Permits
- Lines, Grades, Elevations or other layout
- Temporary Facilities (for Subs)
- Temporary Power (For Subs)
- Off-shift work
- Storage
- Staging Area/Assembly Area
- Hoisting (For Subs)
- Bonds and Special Insurance
- Precedential Work
- Fees and Taxes (WSST)





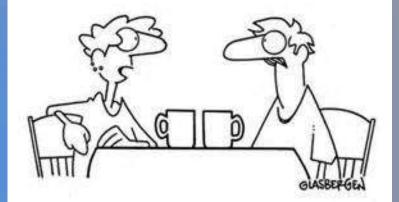


#### Scope of Work: Trying to Sneak One In--Snappy Story #2

Lesson:

- Read the Contract <u>carefully</u>
- Be Prepared to negotiate
- Weigh the risks vs. reward

Copyright 2006 by Randy Glasbergen. www.glasbergen.com



"Let's compromise. You do everything I say and I'll say everything you do."





#### **Contract Documents**

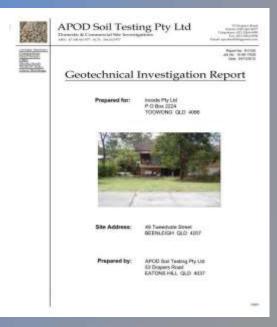
The written (or drawn) documents that describe the work and are specified in the Contract.

- Prime Contract
- Plans
- Specifications
- Special Conditions
- Schedule
- Reports
- Standards
- Guarantees



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## **Incorporations by Reference**

A duty in a Contract created by a document not included with the bid package, or which is separate from the plans and specifications, but which is included in the contract by way of a reference.

- The Prime Contract
- Outside documents impacting design (i.e., soils report)
- Specific established standards
- Public documents
- Surveys
- Utilities locates





#### **Edifice Const. v. Sak & Patch, Inc.: The Latest on Incorporation by Reference** Division I Court of Appeals Case, Released on February 18

Background Facts: Edifice, the GC, sought to compel two subcontractors to arbitrate pursuant to the Disputes provisions of the project's Main Contract, which Edifice asserted had been incorporated into the subcontracts by reference, and that the subcontract required disputes to be resolved in the way mandated in the Main Contract, arbitration. The GC sued the subs in order to compel them to arbitrate the allegations of defects in the work asserted by the project owner. The trial court ruled that despite the facial incorporation of the Main Contract by reference, there was no evidence that the subs actually knew the terms and conditions of the Main Contract.



#### Edifice Const. v. Sak & Patch, Inc.

The Rules: "Where the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract." "The parties do not need to physically attach a document to a contract to incorporate it by reference." "Still, it must be clear that the parties had knowledge of and assented to the incorporated terms." "The party claiming incorporation by reference bears the burden of proving it."

#### Edifice Const. v. Sak & Patch, Inc.

The Issue Seems to be Knowledge, Awareness, Understanding....

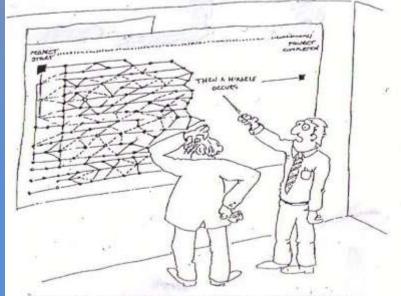
The Ruling: "[Subcontractors] correctly assert that Edifice has not offered any evidence that they knew of or assented to the terms of the main contracts. Edifice...argue[s] that it did not need to attach the main contracts to the subcontracts to incorporate them. Yet Edifice still needed to meet its burden of demonstrating that Respondents knew of and assented to the incorporated terms. In *Ferrellgas*, the party met this burden by showing that, though it did not attach the incorporated contract, the opposing party knew the incorporated contract was an AIA Document A201 form and that [the incorporated contract] was "a standard form used by owners and contractors." Based on this evidence, the [Ferrellgas] court determined that the other party was aware of the general conditions of the incorporated contract. By contrast, Edifice presents no evidence that [the Subcontractors] saw the main contracts, knew what AIA forms the main contracts involved, or that the AIA forms used were standard in the industry. Indeed, based on the record, [Subcontractors] were not aware of the AIA forms used in the main contracts until Edifice sent the Notices of Intent to Arbitrate.

## **Time and Schedule**

**Contract Time: the period** allowed for performance of the Contract Work.

- "Time is of the Essence"
- Often established in the Prime Contract (i.e. 400 days)
- Subject to adjustment via the Change Order Process
- Measured by the Project Schedule
  - --Often a Contract Document --Updated
- Often tied to Liquidated Damages

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Good work, but I think we need a little more detail right here.

#### Time is of the Essence.

A phrase in a contract that means that performance by one party at or within the period specified in the contract is necessary to enable that party to require performance by the other party. Failure to act within the time required may constitute a breach of contract.

## EXPECT DELAYS

### **Adjustments to Time**

Issues impacting Adjustments to Time:

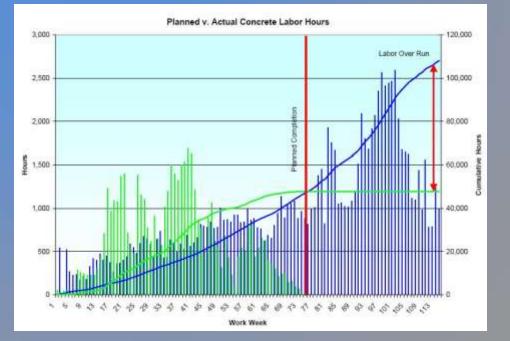
- Delays
- Re-sequencing
- Acceleration
- Fragmentation
- Stacking
- Notice

All time adjustment issues ought to be the subject to a written Change Order





Guess What? We've changed the design!



## **Schedule Changes**

Understanding basic CPM scheduling concepts:

- "Float"—The "extra" time any one activity has to be completed.
- "Critical Path"—The shortest path through the activities from beginning to end. "Critical" activities have no float.
- "Delay"—An incident that would not allow a critical activity to complete on time, and therefore requires additional time to complete the whole project

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## **Insurance and Bonding**

Confirm the requirements and the ability to meet them. Consult agent or broker with all questions before signing

- Liability Insurance
- Auto Coverage
- Additional Insured Endorsements
- Labor & Industries
- Waiver of Subrogation
- Builder's Risk
- Registration Bonds
- Performance and Payment Bonds



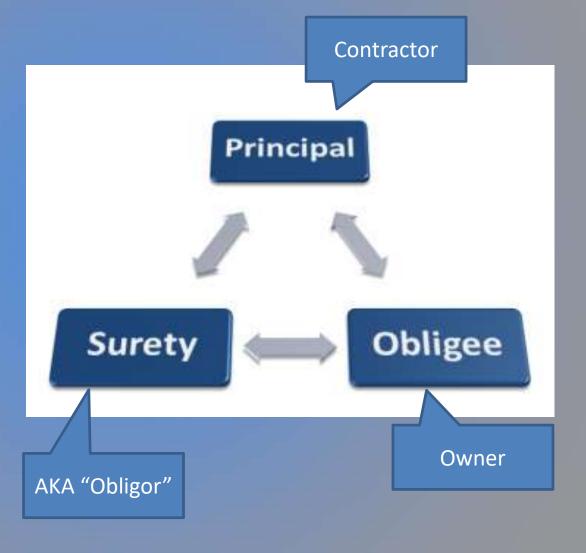


### What's a Bond?

...a promise by a surety or guarantor to pay one party (the obligee) a certain amount if a second party (the principal) fails to meet some obligation, such as fulfilling the terms of a contract. The surety bond protects the obligee against losses resulting from the principal's failure to meet the obligation.

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## Washington Law Re Bonds

#### RCW 39.08, et seq.

- Public Works Projects Require Performance and Payment Bonds
   RCW 18.27, et seq.
- The Contractor Registration Act requires a registration bond (\$12,000 for general contractors, \$6,000 for specialty contractors)

NYSDOT PERM 44 (rev. 9/10)	
West	ern Surety Company
	경험에 가지 못 했다. 이 것 같은 것은 것은 것은 것을 많이 있는 것은 것은 것을 잘 하는 것 수밖에서 가지 않는 것이 없다.
The N	SURETY BOND (PERFORMANCE) For the benefit of reasportation connection with work affecting state highways BOND NO. AMOUNT: 5
KNOWN ALL BY THESE P	RESENTS, That we
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businese at	
P.O. Box 5077, Sieux Falls, Sc	URETY COMPANY, as Surety, having an office and usual place of business auth Dakota 57117-5077 are held and firmly bound unto the NEW YO TRANSPORTATION ("NYSDOT"), in the full and just sum
	DOLLARS (8
	nd truly to be made, we bind ourselves, our heirs, executors, administrate y and severally, firmly by these presents.
	will submit and has submitted plans and specifications for work, within ry by the Commissioner of Transportation, or his duly authorized delege
constructing or maintaining dr street intersections, curb, sidew	has reactived and will apply from time to time for permits for the purpose tive entrances, sewer lines, water mains, gas mains, utility lines and po- calk, drainage and excavating for miscellaneous structures, etc., on or with der the jurisdiction of the State of New York, Department of Transportation
	is for the purpose of insuring and guaranteeing the timely and workmand ensonably determined by the Commissioner of Transportation or his d
such work is not being timely po by said Principal, the Commis Surety to promptly complete a Transportation or his duly auth Commissioner, the costs of which	stood among the parties heretu that upon the reasonable determination il orformad or is not being or has not been parformed in a workmanlike man asioner of Transportation or his daly authorized delegate may require a said work in a timoly unu workmaslike manner, or the Commissioner period delegate may direct completion of said work with forces chosen by ch work will be reinfoursed by said Surety up the amount designated alu hall be within the sole and exclusive discretion of the Commissioner priorited delegate.
State of New York, Department and nature, resulting directly or bicense or permit, and shall we	that said Principal and said Surety shall indemnify and save harmless tof Transportation, from all liability, damages and expenses of svery k indirectly to persons or property and arising from and is consequence of all, trady and finithfully perform the duties and periologies pertaining to a one such State highways to their original conditions.
Fors FBH19-10-2011	Page 1 of 2

# What's a Bond?: The General Indemnity Agreement

The agreement by which generally the human beings behind a principal guarantee (indemnify) any losses of the surety relating to the bond...can and often does put the personal assets of company principals on the line.

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CHUBB GROUP OF INSURANCE COMPANIES

Exhibit 10.51

15 Mountain View Road, P. O. Box 1615, Warner, NJ 07061-1615

#### GENERAL INDEMNITY AGREEMENT

THIS AGREEMENT is made by the Undersigned in favor of Sarety (as hereinafter defined) for the purpose of, among other things, indemnifying Surety from all loss and expense in connection with any and all Bonds executed by the Surety on behalf of a Principal (as hereinafter defined) prior to, simultaneously with or after the execution of this Agreement.

In consideration of the execution of any such Bonds and as an Inducement to such execution by Surety, the Undersigned for themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, hereby coverant and agree as follows:

A - DEFINITIONS. Where they appear in this agreement, the following terms shall have the meaning set forth in this paragraph:

Principal: Any one, or combination of, the individuals, corporations or other business associations of any nature whatswever in which any me or a combination of the Undersigned shall have a beneficial interest as owner, subsidiary, affiliate, co-venturer, sposes of any of the foregoing, or otherwise.

Bond: Any and all bonds, undertakings or instruments of guarantee and any renewals or extensions thereof executed by the Survey prior to simultaneously with or after the execution of this Agreement.

Surveys: Eederal Insurance Company, Pacific Indemnity Company, Vigilian Insurance Company, any of their subsidiary or allitiated insurers, and any person or company Johning It in executing any Bond, executing any Bond at its request, or providing reinsurance with respect to any Bond.

Construct: Any agreement between Principal and a third party, the performance of which is guaranteed by any Bond for which Surety is surety.

Default: Principal shall be deemed to be in default (Default) in the event:

- 1) It is declared to be in default by the Obligee of any Bond.
- 2) It breaches or abundons any Contract;
- It fails to pay, when due, anyone who has supplied labor, material or supplies used in the performance of a Contract;
- It becomes the subject of any agreement or proceeding of liquidation, receivership, trusteeship or bankruptcy, or otherwise becomes insolvent;
- An individual indemnitor dies, is adjudged mentally incompetent, is convicted of a folony, becomes a fogitive from justice or disappears and cannot be found by Surety after reasonably diligent inquiry;
- 6) It breaches any provision of this agreement.
- B INDEMNITY TO SURETY: Undersigned agree to pay to Surety upon demand:
- All loss and expense, including attorney fees, incurred by Sarety by reason of having executed any Bond, or incurred by it on account of any breach of this agreement by any of the Undersigned or in enforcing any of the

# **Getting Paid**

# What we need to know:

- Billing Requirements
- "Pay When Paid"
- "Pay If Paid"
- Retainage
- Lien Waivers

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# **Billing Requirements**

What must we do to get paid timely and completely? We must KNOW what to do to take away any excuse not to pay

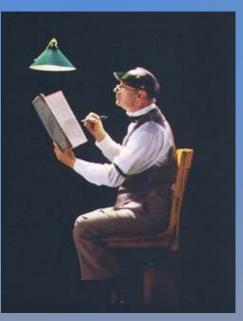
- Timing (By when request must be made)
- Content (What must accompany the request)
- Format (In what form)
- What else (i.e., for Stored Materials)
- Reconciliation of Current
   Contract Value

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- Conditional Waiver(s) of Lien
- Unconditional Waiver(s) of Lien







# **Pay When Paid**

"We hold that paragraph 7(c) of the subcontract did not create a condition precedent by which Amelco's right to receive payment for work completed was dependent upon Drake first being paid by King County. Rather, it postponed payment for a reasonable period of time after the work was completed, during which Drake was afforded an opportunity to obtain from King County the funds necessary to pay Amelco. The trial court could properly find that such reasonable time had expired." Amelco Electric v. Donald M. Drake Co., 20 Wn. App. 899 (1978)

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# **Pay When Paid**

"It is agreed that payment by **Contractor to Subcontractor** hereunder is not due until 10 days after payment has been received by Contractor from Owner, or until after the passage of a reasonable time from when payment from **Owner is due, whichever is** sooner. 'Reasonable time' as used herein shall not exceed 90 days."

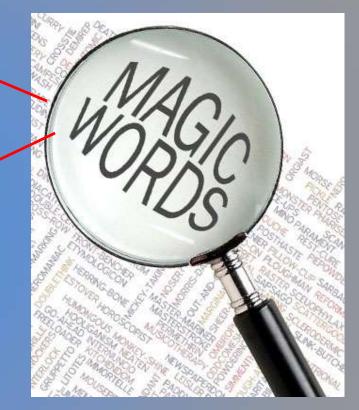
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50 STATE GUIDE CONTINGENT PAYMENT PROVISIONS

alien

# Pay <u>If</u> Paid: Requires the "Magic Words"

It is agreed that as *a condition precedent* to any payment by Contractor to Subcontractor hereunder the Contractor must first receive payment from the **Owner for the work of Subcontractor for which** payment is sought. Subcontractor specifically agrees that it is relying upon the Owner's credit (not the Contractor's) for payment, and Subcontractor specifically accepts the risk of nonpayment by the owner. At the reasonable request of Subcontractor, Contractor agrees to furnish such information as is reasonably available to Contractor from Owner regarding Owner's financial ability to pay for performance under the Main Contract. The parties agree Contractor does not warrant the accuracy or completeness of information provided by Owner.



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# **Changes in the Work**

Important Issues re Change Orders:

- Notice Requirements
- Documentation
- Added Scope
- Added Costs

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Schedule Delay



# **Notice Provisions**

Notice Provisions: When And How a Contractor Must Inform The Owner of a Change Impacting Time or Cost of the Work

- Must Be Precisely Complied With Unless Waived
- Absher v. Kent School District
- Mike M. Johnson v. Spokane County
- American Safety v. Olympia (the death of implied waiver?)
- Top Line v. Bovenkamp (the return of implied waiver?)





Dear Owner: Gonna Need Some More Time and Dough to Get the Job Done. Things Have Changed! XXOXO, Your Contractor

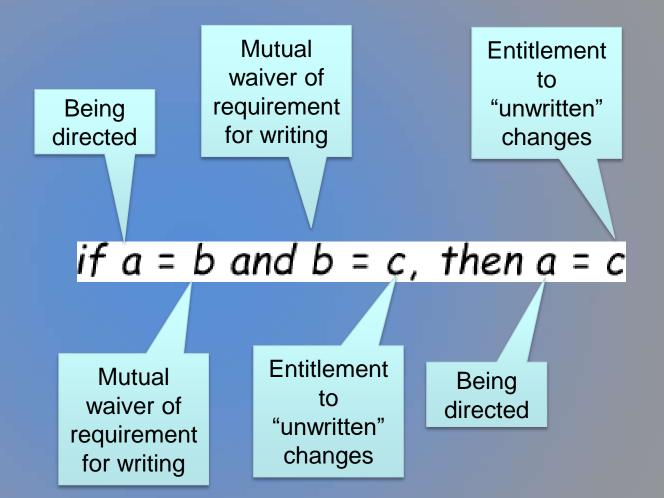
Hey, Dude! Where's my Change Order?



# **Playing the Top Line Logic Out**

The counter of the logic set out in MMJ, in which despite a determination that the **Contractor had** been "directed," it was still held to strict compliance with the notice provisions.....

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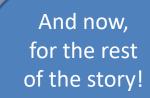
# Notice and its Intersection with Bonding: Snappy Story #3

*Travelers v. Mike M. Johnson*: a 2008 case, ostensibly about a relatively small debt (\$12,000). But look closer:

- MMJ/Mr. Johnson the indemnitor under the GIA on the Spokane County payment bonds
- Dispute with County meant subs did not get paid
- MMJ transfers assets to new LLCs and declares bankruptcy
- MMJ fails to pay rent to a banklienholder on a property it is forfeiting under the GIA
- Mr. Johnson loses essentially everything...

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# Changes in the Work: Documentation

**Entitlement to a Change Order Proven By:** 

- Daily Reports/Job Diary
- Meeting Minutes
- Schedules
- RFIs/DCVRs/Field Questions
- Inspection or Laboratory Reports
- Other Written Direction or Notice
- Other Historic Records (i.e. Weather Service)









# Changes in the Work: Scope Changes

Work Must Be Additional To/Deletion From Contract Scope

- Changes Made to Contract Documents
- Impacts Quantity of Work
- Revisions to Drawings
- Revisions to Specifications
- Unforeseen Conditions
- Changed Conditions
- Deviation from original (estimated) quantities included in Contract







# Changes in the Work: Adjustments to Time

Entitlement to Time Extensions Must Be Demonstrated and <u>Timely</u> <u>Noticed</u>:

- Scope Change(s)' Impact to Schedule's Critical Path
- Delays by Others (Owner, A/E, other Contractors)
- Weather Related Delays
- Other Compensable Delays—i.e., Force Majuere Issues (Strikes, Acts of War, Natural Disaster, etc.)





#### URE

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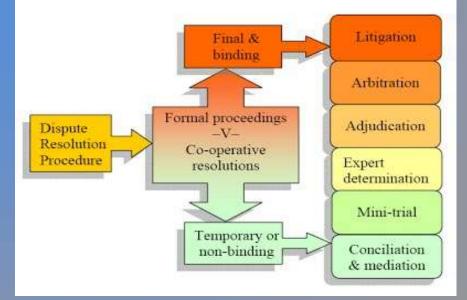


# Disputes

#### Understanding the Disputes Provisions:

- When does a Dispute Exist?
- What are the Agreed Remedies?
- What Conditions Precedent?
- What Forum(s) for Resolution?
- Costs Borne by Whom?
- Any Waiver?





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# **Disputes: Conditions Precedent**

Contracts Often Require the Parties to Engage in Cooperative Steps Before a Claim/Dispute can be Submitted for Adjudication

<u>Mediation First Model</u>: "Any dispute...arising out of this agreement...shall be subject to mediation as **a condition precedent** to arbitration."

<u>Negotiations First Model</u>: "The Parties shall attempt to resolve any Subcontractor Claim through direct negotiation..."

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<u>AIA Model, Architect Decision-Maker</u>: "Claims, including those alleging an error or omission by the Architect ...shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as **a condition precedent** to mediation, arbitration or litigation of all Claims between the Contractor and Owner."

<u>DRB Model</u>: "All disputes arising out of or in connection with the present Contract shall be submitted, in the first instance, to the DRB in accordance with the Rules. For any given dispute, the DRB shall issue a Recommendation in accordance with the Rules. If any Party fails to comply with a Recommendation, when required to do so pursuant to the Rules, the other Party may refer the failure itself, without having to refer it to the DRB first, to arbitration ..."

# Disputes: Resolution Methodologies

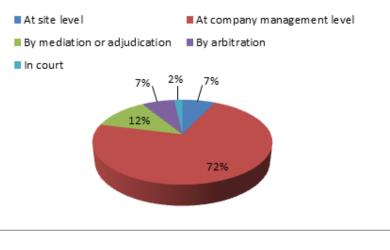
A Salad Bar of Resolution Methodologies:

- Direct Negotiation
- Third-Party Advisory
   Decision
  - Architect
  - DRB
  - Expert
- Mediation
- Med/Arb
- Arbitration
- Litigation





#### **Resolution of major disputes**



# **Disputes: Mediation**

Formal Negotiations Facilitated by a Neutral Party:

- Non-Confrontational Attempt to Compromise
- No "Day in Court"
- No Decisions as to Right or Wrong
- A Business-Decision Making Exercise
- No Winners—Only Those Who Might Lose Less
- Generally Results in a Formal Settlement and Release of All Claims

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Mediation is voluntary. Mediation is inexpensive. The parties decide the outcome. Cordial & win-win situation.



# **Disputes: Arbitration**

An informal "trial" in which the arbitrators are neutrals experienced in the area of dispute.

- Governed by agreed rules, usually with relaxed rules of Evidence and Procedure
- Arbitrator determines the extent of discovery
- Evidence presented; testimony is under oath
- Arbitrator has discretion to make interim rulings
- Final Award is binding, not subject to appeal
- Awards only subject to vacation for big errors

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#### ARBITRATION PROCESS



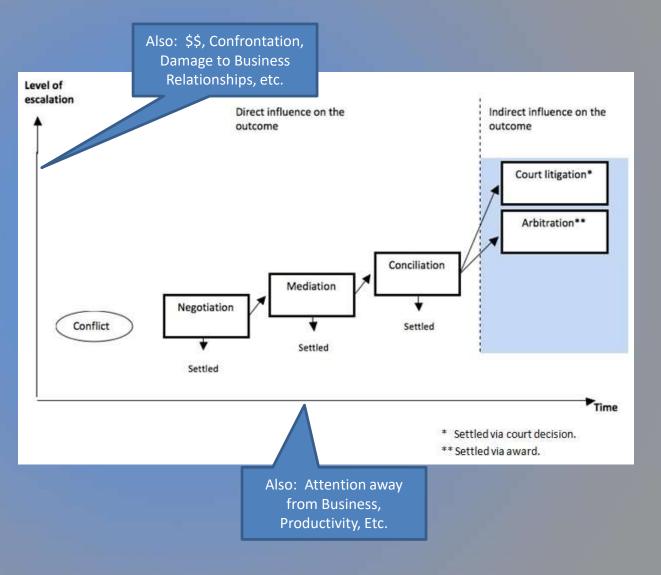
# **Disputes: Advantages of ADR**

#### Pre-Litigation Alternate Dispute Resolution:

- Parties Control the Outcome
- Generally, Faster to Resolution
- Generally, Less
   Expensive to
   Resolution
- Finality in Resolution
- Less Confrontational, More Businesslike
- Less Structured, Less "Legal"

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# Indemnity

Often Misunderstood Concept in Which One Party Holds Others Harmless for Damages to Persons or Property

- Limited in Washington to for acts of One's own Negligence
- Includes Duties to Defend for Claims Brought by Third Parties
- Often Extends to <u>all</u> Damages, Losses, Claims...can be a BIG Burden
- Damages are to Persons or Property are Generally Insurable

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#### "To the greatest extent allowed by law,

Subcontractor agrees to indemnify and hold Contractor harmless for and from any loss, claim, suit, damage or liability from injury or death of any person, including employees of Subcontractor, or the damage to property, as a result of Subcontractor's or employees of Subcontractor's work or negligence. Subcontractor does not assume liability for the sole negligence Of Contractor or Owner, and **is** responsible for the indemnity to be provided hereunder only to the extent of its negligence in cases in which Subcontractor's negligence is concurrent or comparative with the negligence of Contractor or Owner."

# Waiver of RCW Title 51 Immunity

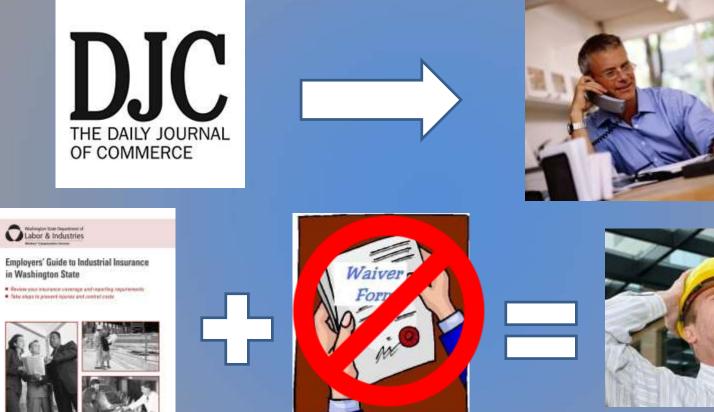
The Industrial Insurance Act Generally Shields an Employer from Suit by its Injured Employee

- Employees Often Don't Like Settling for what L&I Pays
- In Seeking Additional Recovery, Injured Workers Will Sue "Up the Ladder"
- The Waiver of Title 51 Immunity Designed to Make the Employer Responsible for its Own Negligence
- Waiver Must be Specifically Negotiated and Agreed

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Subcontractor specifically and expressly waives any immunity that may be granted it under the Washington State Industrial Insurance Act, Title 51 RCW. Further, the indemnification obligation under this Subcontract shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable to or for any third party under workers' compensation acts, disability benefits acts, or other employee benefits acts; PROVIDED Subcontractor's waiver of immunity by the provisions of this paragraph extends only to claims against Subcontractor by Contractor and does not include, or extend to, any claims by Subcontractor' employees directly against Subcontractor.

# Title 51 Waiver Snappy Story #4



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# **Misc. General Provisions**

- Jurisdiction
  - Where a dispute will be decided
- Choice of Law
  - What Law will interpret the Agreement
- Merger/Integration
  - Agreement supersedes all prior negotiations
- Severability
  - An unenforceable portion does not invalidate the whole Agreement
- Authority
  - Person who executes binds that Party

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I don't care what you say you intended <u>now</u>! The contract you signed has a merger clause in it! You agreed it was your only agreement with the Plaintiff!



### **Questions?**

Let me get this straight: you read court cases for <u>fun</u>?

So, I take it that Washington's Bar Exam is *really* easy, huh?

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You talk faster than I can hear.

Is there a Rosetta Stone for this talk?

# **Thank You!**

Interview with potential client, 1977







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Todd Henry thenry@insleebest.com (425) 455-1234