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

Take Your Son to Work Day, 1999
Stevens Court, 1990
WA Supreme Court, 2007
Stevens Court, 1990
We are called CONTRACTORS for a Reason. Snappy Story #1

This guy thinks he should get a job with us!

Ha!

Ho!

Hee!

Snort!

Chuckle!
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.
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 do we need this job?
• What is a worst scenario for taking this job/these risks?
Contracting 101: Elements of a Contract

- Offer
- Acceptance (Assent)
- Consideration
- Capacity
- Legality
Contracting 101: The Offer

In what form is the Offer?

• Request for Qualifications?
• Request for Proposal?
• Invitation to Bid?
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.

O’DELL ENTERPRISES
223 WILDWOOD Rd.
ZEBULON GA 30295
770-567-8549 cell 770-412-3239

PROPOSAL NO. 805
SHEET NO. 1
DATE 5-26-08

WORK TO BE PREFORMED AT:
same

Floor reinforcing
Jack up and level as necessary to complete the following
1. Install new double 2x8 beam under existing floor joist, approximately 5’ from side wall, with 4x4 supports and concrete piers, every 5’ [concrete piers to sit on firm level ground]
2. Install 2nd double beam same as first, 5’ from old house.
3. Repair original center support beam, and support as above.

All material is guaranteed to be as specified, and the above work to be performed in accordance with the drawings and specifications submitted for above work and completed in a substantial workmanlike manner for the sum of

$2,650.00

WITH PAYMENTS TO BE MADE as follows: Pay in full upon completion

Respectfully submitted, [Signature]
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

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Apollo Mechanical Contractors is pleased to offer the following ROM’s for budgeting purposes:

**To include:**
- New Dishwasher Hood Utility Set Roof Exhaust Fan (Lead Time 6 weeks) to include new sheet metal duct ran up to roof inside existing chimney liner, sheet metal chimney cap, demolition of abandoned grease duct for access to chimney, remove/reinstall dining room return air for chimney access. $12,495.00
- New dryer venting from existing dryers to include demolition of existing dryer venting, (2) new Dryer Booster Fans (Lead Time 2 weeks), (2) new Lint Traps, new individual vents installed up to the roof inside existing chimney liner and terminated at chimney cap in a common plenum with backdraft dampers. $9,315.00
- For cleaning of dryer lint from existing duct systems and chimney liner, by Mechanical Maintenance Professional Cleaners. $3,220.00

**The following exclusions are incorporated in this proposal:**
- Payment and Performance bonds (we can bond)
- Washington State Sales Tax
- Kitchen Equipment Replacement
- Plumbing or Piping Installations other than mentioned
- Controls and or Low Voltage Wiring
- Roofing, Flashing, Patch or Repair

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Date: March 3, 2014

To: Clements General Construction  
Re: UW Phi Delta Theta  

From: Ken Phillips  
Randy Van Lueven  

To Brett Boyer:

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Apollo...Building People Who Build Great Things.  
An equal opportunity employer  

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

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
Hoisting
Washington State Sales Tax
Builder’s Risk/ Course of Construction Insurance
Flagpoles
Mortuary Equipment

INSLEE BEST
Contracting 101:
Acceptance

- With Conditions?
- W/o Conditions?
- Counteroffer?
  - Substantial Change in Terms
“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 not 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)

OK, I’m ready. Where’s the pen?

I’m in! Just show me where to sign! Hee hee!
Contracting 101: Legality

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)

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?

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

INSLEE BEST

Of course it’s a standard contract document . . . what else?
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
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.”
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...
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 carefully
• Be Prepared to negotiate
• Weigh the risks vs. reward
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
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.
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.”
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


- "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
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
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.
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.
Public Works Projects Require Performance and Payment Bonds

The Contractor Registration Act requires a registration bond ($12,000 for general contractors, $6,000 for specialty contractors)
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.
Getting Paid

What we need to know:

- Billing Requirements
- “Pay When Paid”
- “Pay If Paid”
- Retainage
- Lien Waivers
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
• Conditional Waiver(s) of Lien
• Unconditional Waiver(s) of Lien
“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)
“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.”
Pay *If* 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.
Changes in the Work

Important Issues re Change Orders:
• Notice Requirements
• Documentation
• Added Scope
• Added Costs
• Schedule Delay
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?

INSLEE BEST
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.....

\[ \text{if } a = b \text{ and } b = c, \text{ then } a = c \]
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 bank-lienholder on a property it is forfeiting under the GIA
- Mr. Johnson loses essentially everything...

And now, for the rest of the story!
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 Timely Noticed:
• 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.)
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?
Disputes: Conditions Precedent

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

AIA Model, Architect Decision-Maker: “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.”

Mediation First Model: “Any dispute...arising out of this agreement...shall be subject to mediation as a condition precedent to arbitration.”

Negotiations First Model: “The Parties shall attempt to resolve any Subcontractor Claim through direct negotiation...”

DRB Model: “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
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

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
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”

Also: $$, Confrontation, Damage to Business Relationships, etc.

Also: Attention away from Business, Productivity, Etc.
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 all
Damages, Losses,
Claims...can be a BIG
Burden
• Damages are to Persons
or Property are
Generally Insurable

“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.”
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
• 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

I don’t care what you say you intended now! 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 fun?

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

You talk faster than I can hear.

Is there a Rosetta Stone for this talk?