

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.
May 20, 2021
Presenter: Todd Henry

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 **BEST**

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”



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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

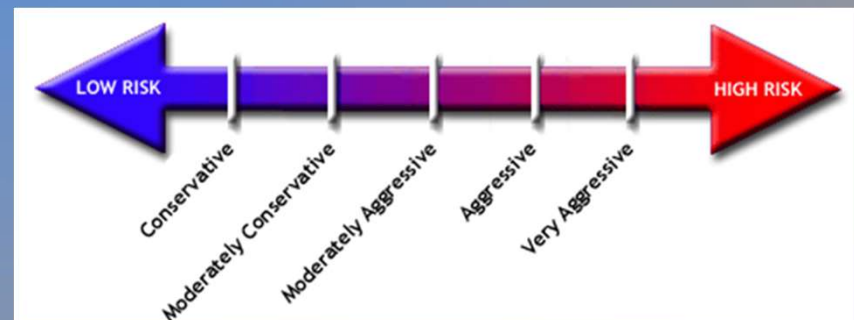
Risk v. Reward

Deciding to enter into a contract is an exercise in the analysis of risk versus 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?



Risk v. Reward



Contracting 101: Elements of a Contract

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



Contracting 101: The Offer

In what form is
the Offer?

- Direct Solicitation
- Request for Qualifications?
- Request for Proposal?
- Invitation to Bid?

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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 qualified 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 Director, Liberty County Schools, 12926 NW County Road 12, Bristol, FL 32321. *All documents submitted shall become property of the Liberty County School District.*

Sellen

REQUEST FOR BIDS August 13, 2008

Your firm is invited to submit a bid for the following project:

University of Washington,
Foster School of Business, PACCAR Hall

PROJECT DESCRIPTION:

Construction consists of a new 5 Story, 135,000 sq. ft. academic building for the Business School on the University of Washington Seattle Campus. The building will contain a main lecture hall, classrooms, and offices. Break out areas and a student lounge are also provided.

Project to meet LEED Silver Certification.

BID DUE DATE PRIME SUBCONTRACTORS:

Scaled proposals will be received by Sellen Construction Co., Inc., at the Main Office, 227 Westlake Avenue North, Seattle, WA 98109-0970, for construction subcontracts to the OGC/M contract agreement between Sellen Construction and the University of Washington up to the times and dates listed below:

Bid Package #	Title	Bid Date	Bid Time
BP #1	Demolition	09/04/08	1:00 PM
BP #2	Mass Excavation	09/04/08	1:00 PM
BP #3	Shoring and Piers	09/04/08	1:00 PM
BP #4	Site Utilities	09/04/08	1:00 PM
BP #5	Concrete	09/03/08	3:00 PM
BP #8	Structural & Misc. Steel	09/03/08	3:00 PM
BP #10	Waterproofing	09/04/08	2:00 PM
BP #14	Curtainwall, Glass, and Glazing	09/04/08	2:00 PM
BP #15	Skylights	09/04/08	2:00 PM
BP #25	Elevators and Lifts	09/04/08	2:00 PM
BP #26	Plumbing	09/04/08	3:00 PM
BP #27	Fire Protection	09/04/08	3:00 PM
BP #28	HVAC Controls	09/04/08	3:00 PM
BP #29	Electrical	09/04/08	3:00 PM

Proposals received after the dates and hours stated above will not receive consideration. **For the bid packages listed above, only original proposals will be considered.** Faxed proposals will be declared non-responsive.

BID DUE DATE LOWER TIER SUBCONTRACTORS/SUPPLIERS:

Sellen Construction intends to bid as a prime subcontractor on Bid Package #6 - Concrete, and Bid Package #8 - Steel. Sellen is requesting bids for the work listed below associated with these bid packages.

Bid Package #	Specification/Description	Bid Date	Bid Time
BP #6	03 11 00 Concrete Floor Repair (Underlayment Supply Only)	08/28/08	3:00 PM
BP #6	03 11 00 Concrete Formwork (Supply Only)	08/28/08	3:00 PM
BP #6	03 15 33 Underlayment Vapor Retarder (Supply Only)	08/28/08	3:00 PM
BP #6	03 21 00 Rebar/Mesh (Supply)	08/28/08	3:00 PM
BP #6	03 21 00 Rebar/Mesh (Install)	08/28/08	3:00 PM

SELEN CONSTRUCTION

227 Westlake Ave. N.
PO Box 9970
Seattle, WA 98108

Tel (206) 882-7770
Fax (206) 433-8264
www.sellen.com

GENERAL CONTRACTING
CONSTRUCTION MANAGEMENT
CUSTOMER SERVICE GROUP



**REQUEST FOR
PROPOSAL**

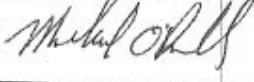
Contracting 101:

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.

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O'DELL ENTERPRISES 223 WILDWOOD Rd. ZEBULON GA 30295 770-567-8549 cell 770-412-3239 PROPOSAL SUBMITTED TO;	PROPOSAL NO. 805 SHEET NO. 1 DATE 5-26-08 WORK TO BE PERFORMED AT: same We hereby propose to furnish the materials and perform the labor necessary for the completion of the following 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 
--	---

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 to your proposed work



WA Reg. No. APOLLSM187MK
OR CCB No. 56241
CO Plumbing Lic. 3PC.0003009
MT CRN: 149670

20452 84th Ave. S.
Kent, WA 98032
www.apolomech.com
253-873-5151 phone
253-872-5930 fax

PROPOSAL

Date: March 3, 2014

To: Clements General Construction

Re: UW Phi Delta Theta

From: Ken Phillips
Randy Van Leuven

To Bret Boyer:

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, and 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 exiting 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 Revisions other than mentioned
- Controls and or Low Voltage Wiring
- Roofing, Flashing, Patch or Repair

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

Page 1 of 2

Contracting 101:

Our Proposal, Exclusions

Be clear, so there is no misunderstanding.

Be precise re exception taken 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

Contracting 101: Acceptance

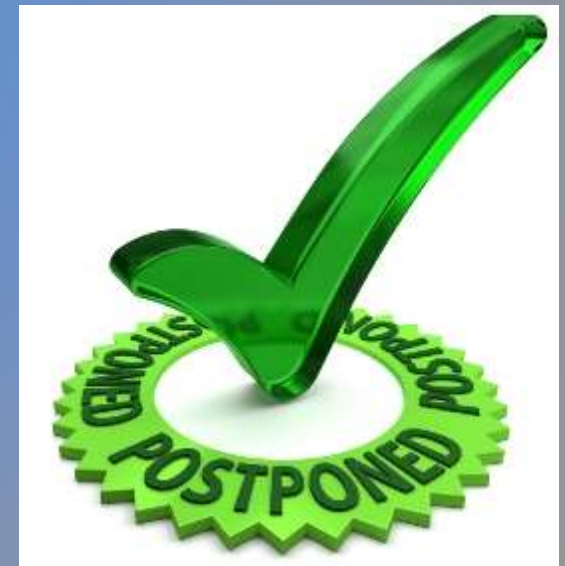
- With Conditions?
- W/o Conditions?
- Counteroffer?
 - Substantial
Change in Terms



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 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

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?



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?



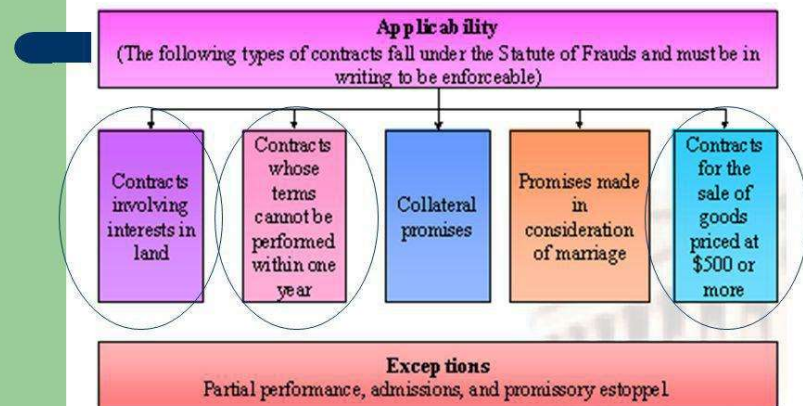
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Contracting 101: The Statute of Frauds

Agreements are void unless they are in writing:

- Contracts unable 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

Statute of Frauds



Standard Construction Industry Contract Forms

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

AIA Contract Documents

AGC *Associated General Contractors of Washington*

 **ConsensusDOCS**



Of course it's a standard contract document . . . what else?

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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.consensudocs.org.



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Vital Construction Contract Clauses

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


**KEEP
CALM**
AND ALWAYS
**READ THE
FINE PRINT**



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):

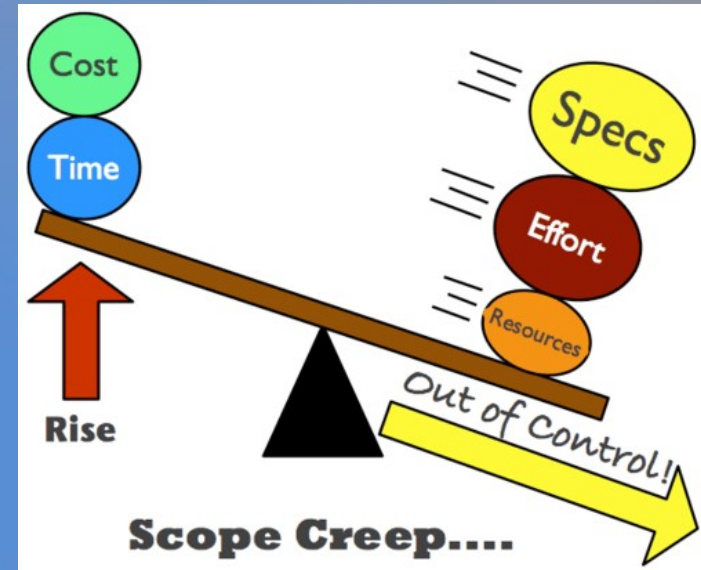
- Duties added not included in the Proposal
- No recognition of exclusions
- Changes in allowable work hours
- Changes in the scheduled start or completion dates
- Prohibitions regarding employees (i.e., parking)
- Restrictions to help (i.e., hoisting)



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)
- **2021—COVID-related costs**



Scope of Work:

Trying to Sneak One In--Snappy Story #2

Lesson:

- Read the Contract carefully, ask for clarification/explanation
- Be Prepared to negotiate
- Weigh the risks vs. reward



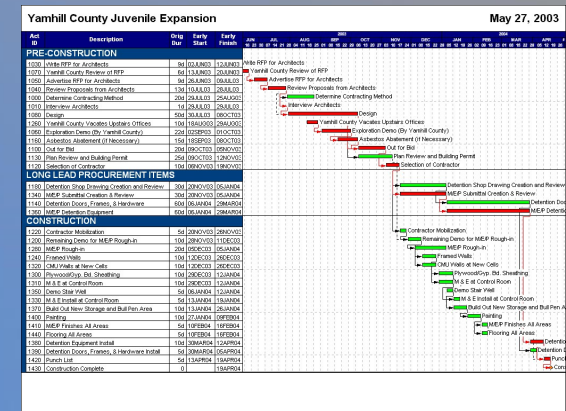
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Contract Documents

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

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






APOD Soil Testing Pty Ltd
Domestic & Commercial Site Investigations
ABN: 87 198 610 977 ACN: 106 610 977

53 Drapers Road
Eaton's Hill QLD 4037
Telephone: 07 5324 6966
Fax: 07 5324 6994
Email: apod@apodsoiltesting.com.au

Report No: R-0126
Job No: 10-09-17050
Date: 04/10/2010

Geotechnical Investigation Report

Prepared for: Incode Pty Ltd
P O Box 2224
TOOWONG QLD 4066



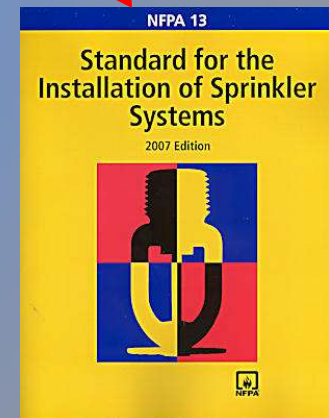
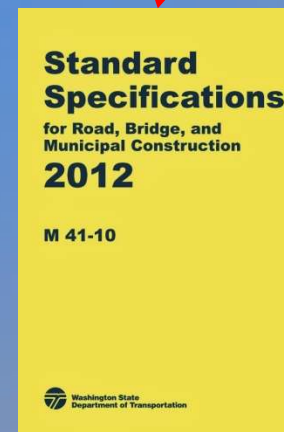
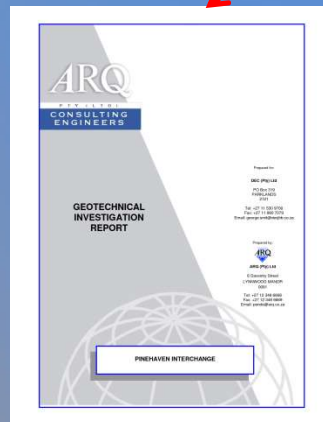
Site Address: 49 Tweedvale Street
BEENLEIGH QLD 4207

Prepared by: APOD Soil Testing Pty Ltd
53 Drapers Road
EATONS HILL QLD 4037

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

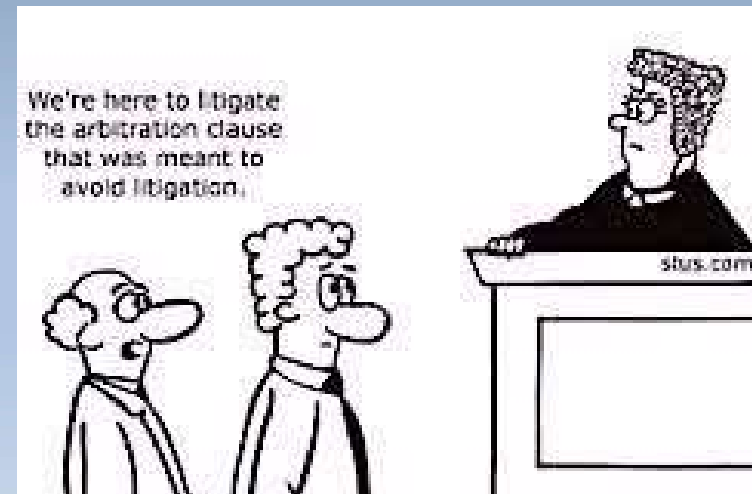


Edifice Const. v. Sak & Patch, Inc.:

The Latest on Incorporation by Reference

Division I Court of Appeals Case, February 18, 2020

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.

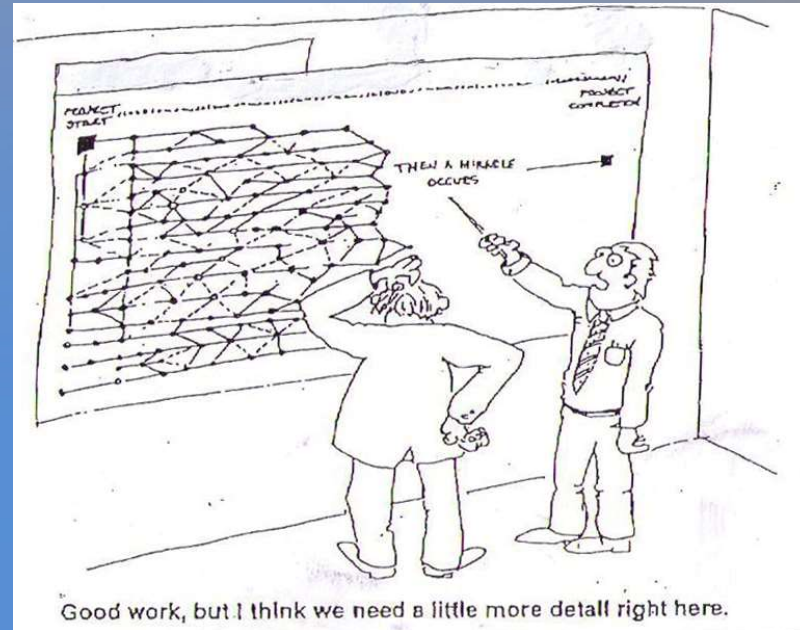
The Issue Seems to be Knowledge, Awareness, Understanding....

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



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.

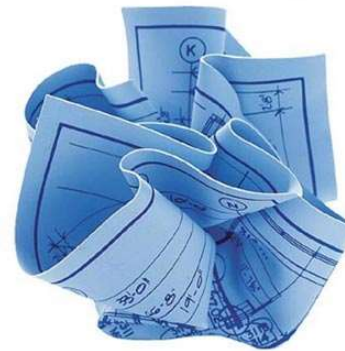
**EXPECT
DELAYS**

Adjustments to Time

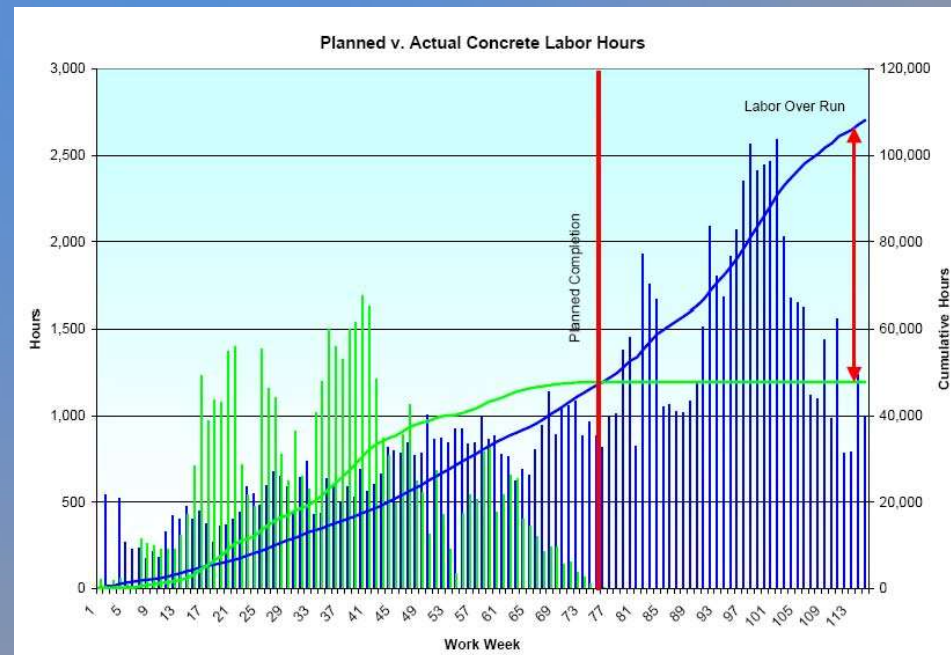
Issues impacting
Adjustments to Time:

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

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



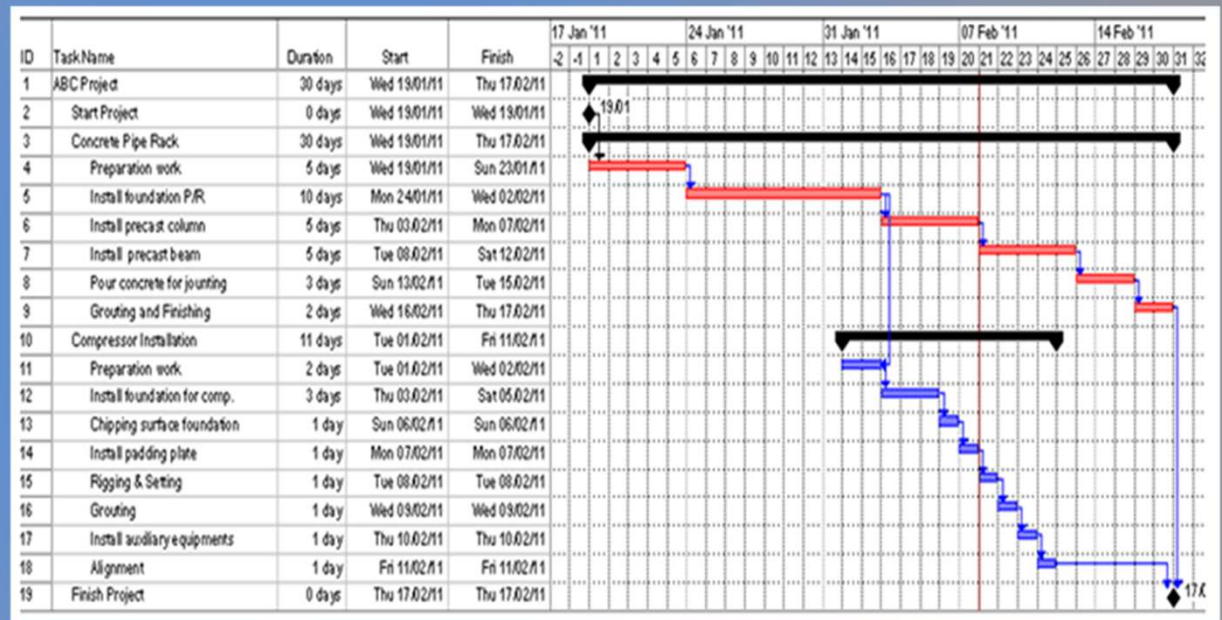
Guess What? We've changed the design!



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



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

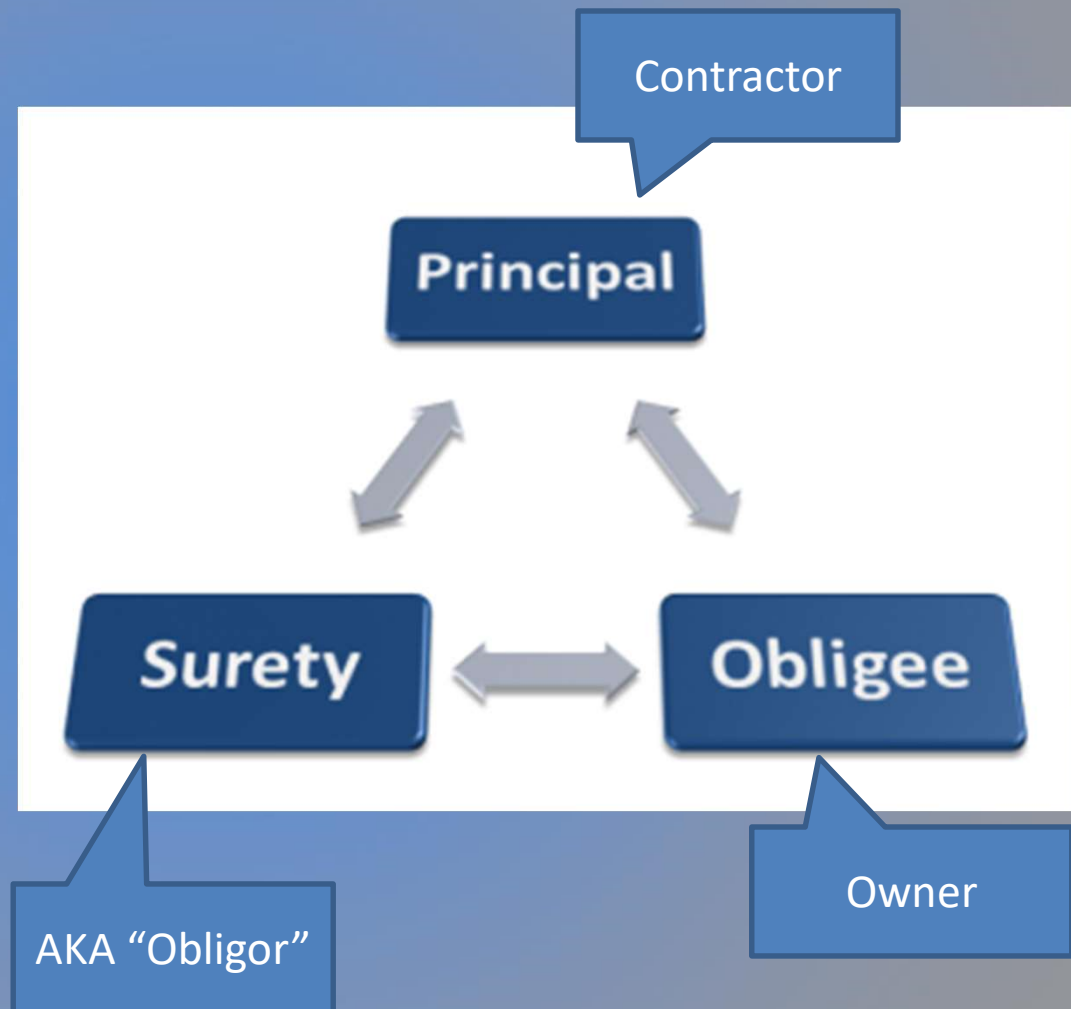


The St Paul
Consider it done

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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.



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)

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NYSDOT PERM 44 (rev. 9/10)



Western Surety Company
SURETY BOND (PERFORMANCE)
For the benefit of
The New York State Department of Transportation
In connection with work affecting state highways

BOND NO. _____
AMOUNT: \$ _____

KNOWN ALL BY THESE PRESENTS, That we, _____, having its principal place of business at _____, as Principal, and WESTERN SURETY COMPANY, as Surety, having an office and usual place of business at P.O. Box 5077, Sioux Falls, South Dakota 57117-5077 are held and firmly bound unto the NEW YORK STATE DEPARTMENT OF TRANSPORTATION ("NYSDOT"), in the full and just sum of _____ DOLLARS (\$ _____) to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, to jointly and severally, firmly by these presents.

WHEREAS, said Principal will submit and has submitted plans and specifications for work, within a State highway, deemed necessary by the Commissioner of Transportation, or his duly authorized delegate, and

WHEREAS, said Principal has received and will apply from time to time for permits for the purpose of constructing or maintaining drive entrances, sewer lines, water mains, gas mains, utility lines and poles, street intersections, curb, sidewalk, drainage and excavating for miscellaneous structures, etc., on or within the right of way of highways under the jurisdiction of the State of New York, Department of Transportation,

WHEREAS, this obligation is for the purpose of insuring and guaranteeing the timely and workmanlike completion of such work as reasonably determined by the Commissioner of Transportation or his duly authorized delegate,

IT IS AGREED and understood among the parties hereto that upon the reasonable determination that such work is not being timely performed or is not being or has not been performed in a workmanlike manner by said Principal, the Commissioner of Transportation or his duly authorized delegate may require said Surety to promptly complete said work in a timely and workmanlike manner, or the Commissioner of Transportation or his duly authorized delegate may direct completion of said work with forces chosen by the Commissioner, the costs of which work will be reimbursed by said Surety up the amount designated above, all of which determinations shall be within the sole and exclusive discretion of the Commissioner of Transportation or his duly authorized delegate.

IT IS FURTHER AGREED that said Principal and said Surety shall indemnify and save harmless the State of New York, Department of Transportation, from all liability, damages and expenses of every kind and nature, resulting directly or indirectly to persons or property and arising from and in consequence of any license or permit, and shall well, truly and faithfully perform the duties and privileges pertaining to any license or permit and shall restore such State highways to their original conditions.

Form F6119-10-2011 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.

**INSLEE
BEST**

Exhibit 10.51



CHUBB GROUP OF INSURANCE COMPANIES

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

GENERAL INDEMNITY AGREEMENT

THIS AGREEMENT is made by the Undersigned in favor of Surety (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 covenant 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 whatsoever in which any one or a combination of the Undersigned shall have a beneficial interest as owner, subsidiary, affiliate, co-venturer, spouse 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 Surety prior to, simultaneously with or after the execution of this Agreement.

Surety: Federal Insurance Company, Pacific Indemnity Company, Vigilant Insurance Company, any of their subsidiary or affiliated insurers, and any person or company joining it in executing any Bond, executing any Bond at its request, or providing reinsurance with respect to any Bond.

Contract: 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 Obligor of any Bond;
- 2) It breaches or abandons any Contract;
- 3) It fails to pay, when due, anyone who has supplied labor, material or supplies used in the performance of a Contract;
- 4) It becomes the subject of any agreement or proceeding of liquidation, receivership, trusteeship or bankruptcy, or otherwise becomes insolvent;
- 5) An individual indemnitor dies, is adjudged mentally incompetent, is convicted of a felony, becomes a fugitive 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:

- 1) All loss and expense, including attorney fees, incurred by Surety 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

APPLICATION AND CERTIFICATE FOR PAYMENT			
TO OWNER:		PROJECT:	APPLICATION NO.:
FROM CONTRACTOR: Roush Construction Co. 3471A Palm City School Ave. Palm City, FL 34990		VIA ARCHITECT:	PERIOD TO:
			PROJECT NOS.:
			CONTRACT DATE:
CONTRACT FOR:		Distribution to: ____ OWNER ____ ARCHITECT ____ CONTRACTOR	
CONTRACTOR'S APPLICATION FOR PAYMENT <small>Application is made for payment, as shown below, in connection with the Contract. Continuation Sheets are attached.</small>		<small>The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.</small>	
1. ORIGINAL CONTRACT SUM	\$	By: _____ Date: _____	
2. Net change by Change Orders	\$		
3. CONTRACT SUM TO DATE (Line 1 + 2)	\$	0.00	
4. TOTAL COMPLETED & STORED TO DATE <small>(Columns G on Continuation Sheets)</small>	\$		
5. RETAINAGE	\$	State of: _____ County of: _____ Subscribed and sworn to before me this _____ day of _____	
a. _____ % of Completed Work <small>(Columns D + E on Continuation Sheets)</small>	\$	Notary Public	
b. _____ % of Stored Material <small>(Columns F on Continuation Sheets)</small>	\$	My Commission Expires: _____	
Total Retainage (Line 5a + 5b or Total in Column I of Continuation Sheet)	\$	0.00	
6. TOTAL EARNED LESS RETAINAGE <small>(Line 4 less Line 5 Total)</small>	\$	0.00	
7. LESS PREVIOUS CERTIFICATES FOR PAYMENT <small>(Line 6 from prior Certificate or payments received)</small>	\$	0.00	
8. CURRENT PAYMENT DUE	\$	0.00	
9. BALANCE TO FINISH, INCLUDING RETAINAGE <small>(Line 3 less Line 6)</small>	\$	-	
CHANGE ORDER SUMMARY		ADDITIONS	DEDUCTIONS
Total changes approved in previous months by Owner			
Total Approved this Month			
TOTALS			
NET CHANGES by Change Order			
ARCHITECT'S CERTIFICATE FOR PAYMENT <small>In accordance with the Contract Documents, based on on-site observations and data comprising this application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.</small>			
AMOUNT CERTIFIED:\$ _____			
<small>(Attach explanation if amount certified differs from the amount applied for. Initial all figures on this Application and on the Continuation Sheet that are changed to conform to the amount certified.)</small>			
ARCHITECT			
By: _____ Date: _____			
<small>This certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Issuance, payment and acceptance of payment are without prejudice to any right of the Owner or Contractor under this Contract.</small>			

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

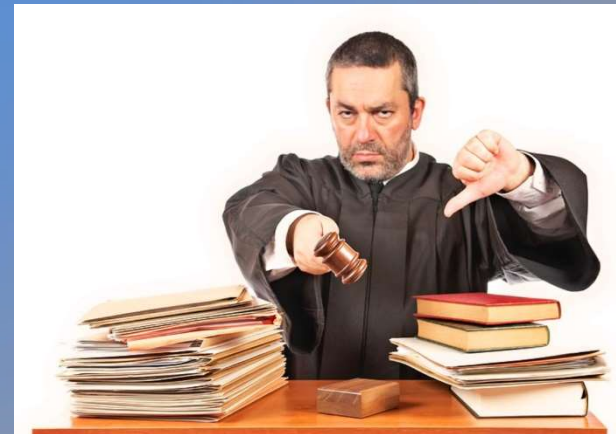
- Timing (By when request must be made)
- Content (What must accompany the request)
- Format (In what form)
- What else (i.e., for Stored Materials)
- Reconciliation of Current Contract Value
- Conditional Waiver(s) of Lien
- Unconditional Waiver(s) of Lien



KNOW THE RULES!

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)



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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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

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?)*

NOTICE

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

XXOXO,

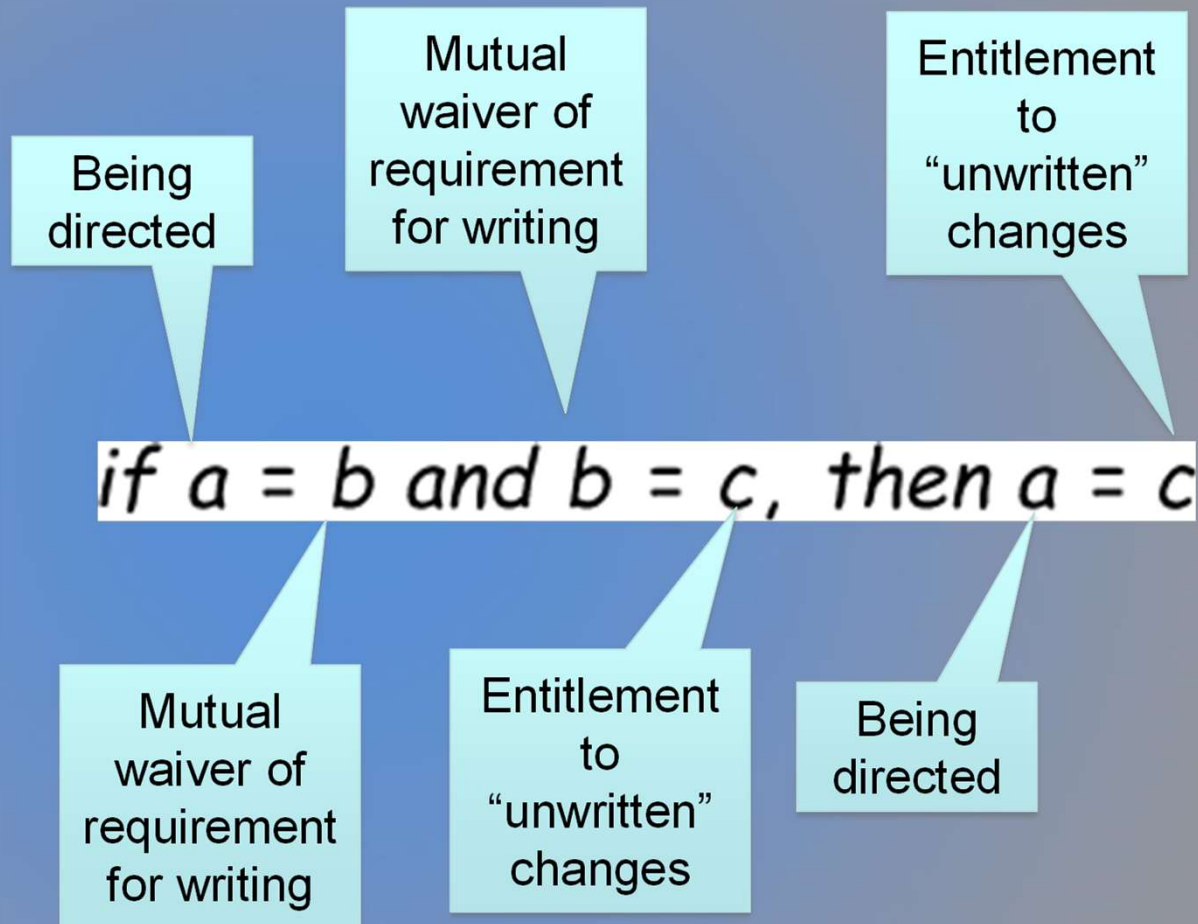
Your Contractor

Hey, Dude!
Where's my
Change
Order?



Playing the *Top Line* Logic Out

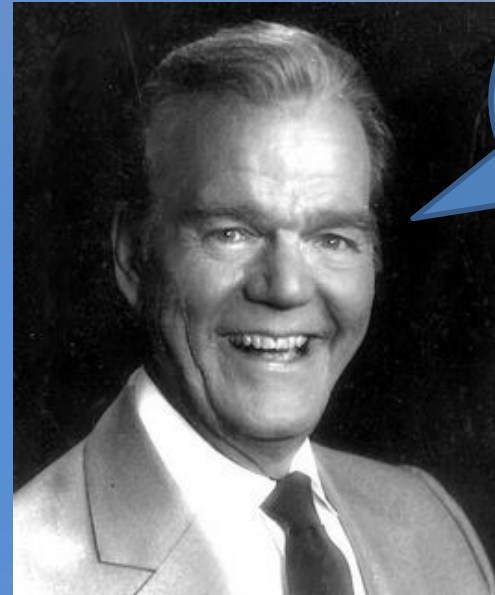
The counter of the logic set out in MMJ, in which despite a determination that the Contractor had been “directed,” it was still held to strict compliance with the notice provisions.....



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 bank-lienholder on a property it is forfeiting under the GIA
- Mr. Johnson loses essentially everything...



And now,
for the rest
of the story!

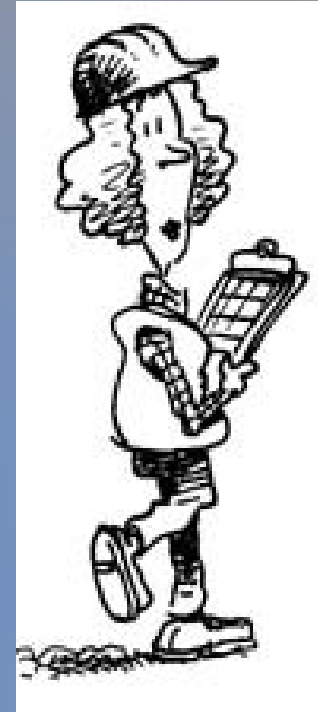


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Changes in the Work: Documentation

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)



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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



EXPECTATIONS
— VS. —
REALITY

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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 Majeure Issues (Strikes, Acts of War, Natural Disaster, etc.)
- **Pandemic?**



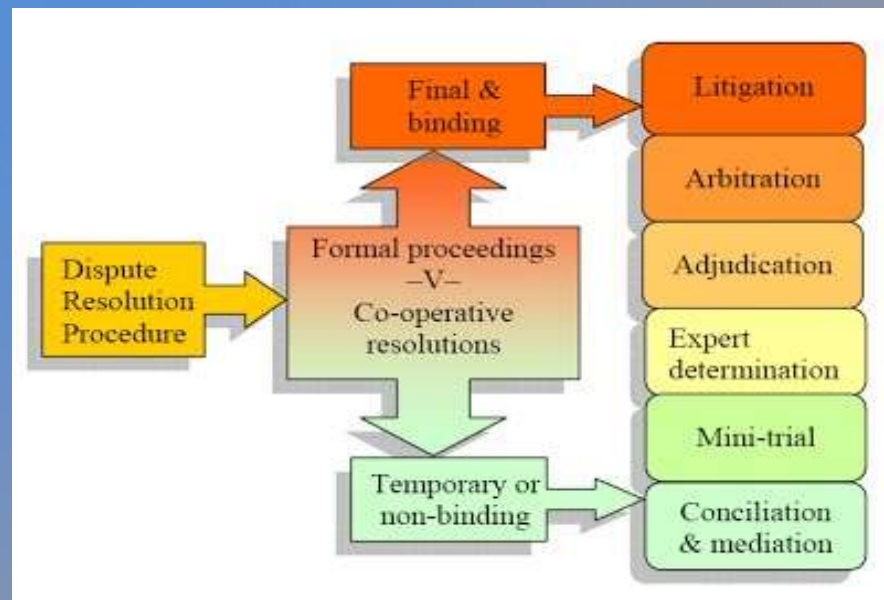
URE
contract, **force majeure** shall be automatically extended for the period of **force majeure** occurrence. In the event of **force majeure**, it being agreed that no penalty shall be assessed for the period of **force majeure**.



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

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..."

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."

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 ..."

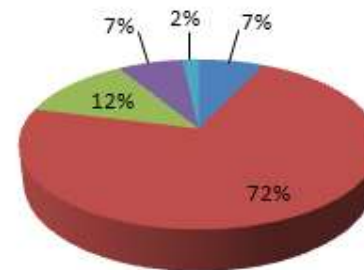
Disputes: Resolution Methodologies

A Salad Bar of Resolution Methodologies:

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



Resolution of major disputes



Disputes: Mediation

Formal Negotiations
Facilitated by a Neutral
Party:

- Non-Confrontational
Attempt to Compromise
- Not a “Day in Court”
- No Decisions as to Right
or Wrong
- A Business-Decision
Making Exercise
- No Winners—Only Those
Who Might Lose Best
- 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.

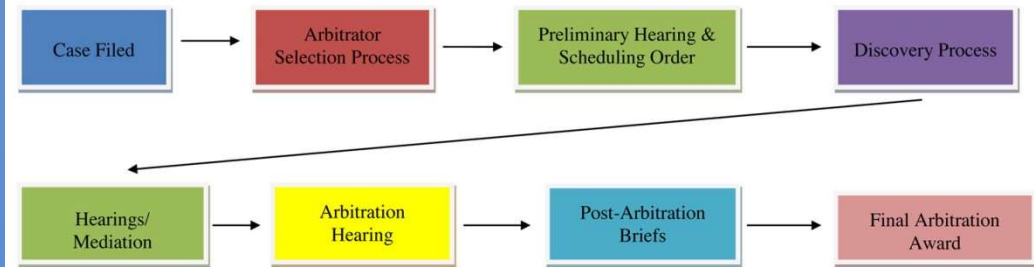


Disputes: Arbitration

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

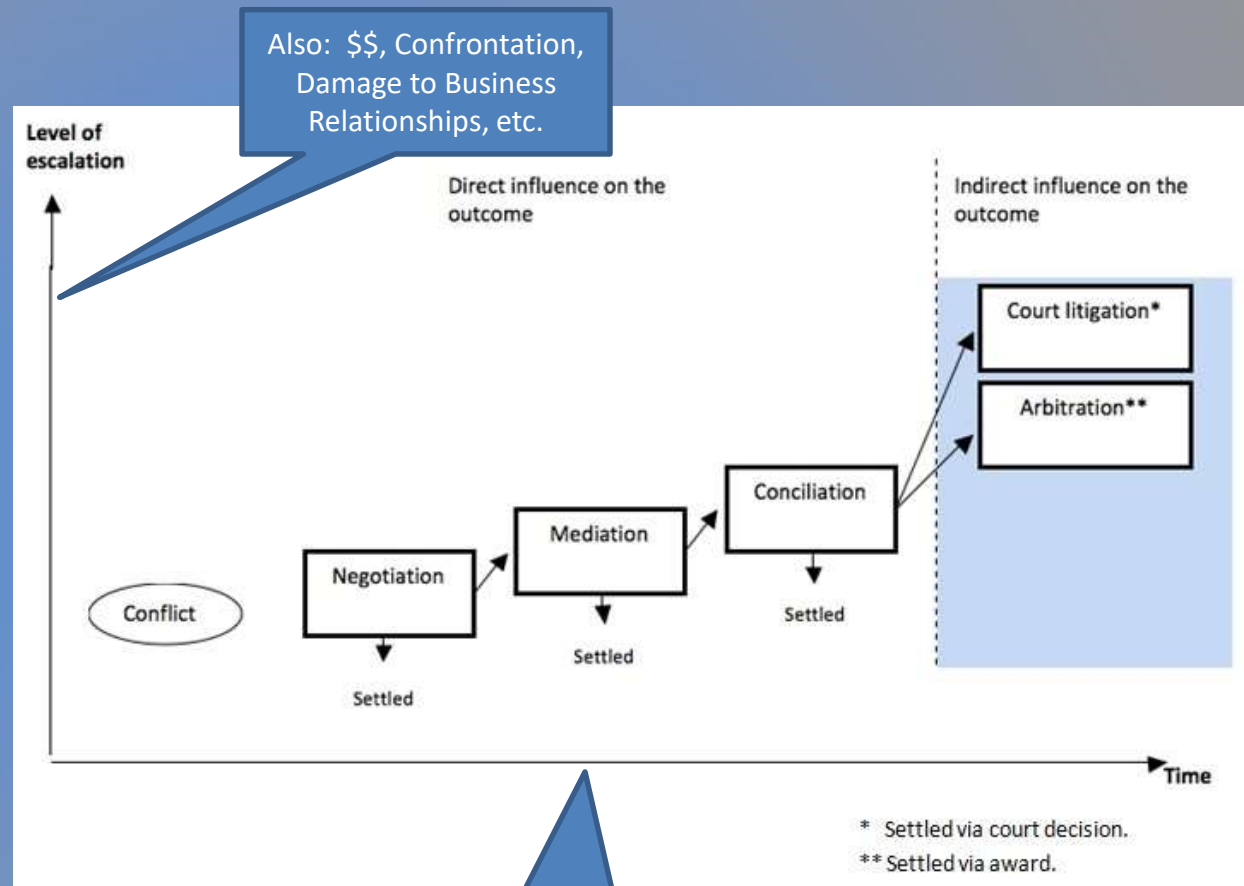
ARBITRATION PROCESS



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”



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."

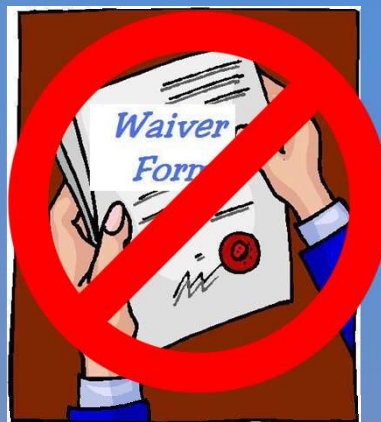
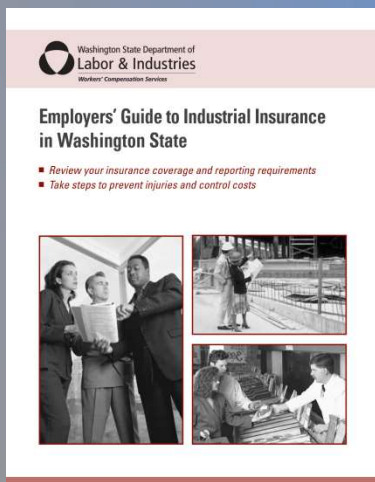
Waiver of RCW Title 51 Immunity

**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**

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's 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

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?

You talk faster than I can hear.

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

Is there a Rosetta Stone for this talk?



Thank You!

Interview with potential client, 1977



Questionable Judgment 2005



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