CONTRACTS– Rules of Interpretation – Duties and Liabilities – Risk Shifting

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GENERAL. This section relates to the responsibilities and liabilities of parties and rules which help you interpret the contract and its scope. It discusses risk shifting and different types of contractual arrangements. The following only represent guidelines and overviews and is not intended to be of an advisory nature.

Laws and statutes vary state to state, as well as interpretation of contract documents. And construction contracts are not always identical and variances may exist from contract to contract, even in dealing with AIA Documents, the Federal Government or a customer of long standing.

My only advice is to obtain the services of a construction attorney committed to assisting you in managing your risk, and who is not a litigation hound.(These articles are not written with the view of encouraging disputes or litigation.) In selecting a construction attorney, you may pay a few extra dollars, but get an experienced one. And experienced in your needs**. For example, there are lawyers who handle payment and surety issues, or design issues but have no experience in complex acceleration and labor impact claims. (Many lawyers who handle construction related cases have engineering or construction management undergraduate degrees and this is a plus.) Handling the complexities of a DCAA audit requires expertise and experience which most attorneys do not have. Ascertain that your attorney has been there, done that! Many large construction claims I have handled are what I call "net worth" claims. That is, the size of the claim may equal or come close to equaling the net worth of the company. If the company loses the claim, it loses the company. So make sure you are dealing with an attorney who has a successful track record in your kind of claim category.**

READ THE CONTRACT (RTC) I was recently called upon to assist in a construction claim in one of the Caribbean Islands (a British Colony where the residents know how to speak the language but drive on the wrong side of the road!). One of the issues was defective installation of duct work which came to light during the testing of the smoke evacuation system. The ductwork installed had been fabricated to a 2 inch water gauge criteria. The designer stated that it should have been fabricated to a 4 inch water gauge criteria and that was so stated in the ductwork specification. And so it was. However, upon review, it turns out that the ductwork specification had been inadvertently omitted from the contract documents. The designer had not caught the omission, nor had the construction manager nor the general contractor who had just subcontracted our the installation of the mechanical system and the smoke evacuation system to a mechanical contractor who just farmed out the ductwork to a fabricator just based on the drawings which had no specification criteria on them at all. The fabricator used the industry standard in the area, a two inch water gauge criteria. And no one had caught the omission of the duct work specification. Which meant no one had read or at least thoroughly read the contract documents.

In a huge number of disputes, it comes to light that someone simply just did not read the contract. Let alone comply with it! And there are no statistics on this, but a major complaint by designers and owners is that the answers to many of the RFIs or RFCs by contractors are in the contract documents

which the contractor simply did not research. So, it may not be rocket science, but this is the bumper sticker that should be attached to all the parties' pick-ups, and over their desks: **READ THE CONTRACT! And comply with it.** *Or pay the price for failing to do so*.

And to the designer: if you are going to cut and paste from another project, at least make sure that the documents you are borrowing are relevant. In a coliseum project in South Carolina, it was determined that some of the technical specifications had been lifted from a similar but not identical project in North Carolina, and were not at all applicable to the requirements of the South Carolina project. So it might help if even the designers read their own documents. Including the referenced ones. And the local codes. Too often, some of the great tools by AIA are not followed. I might suggest that one of those tools is *AIA Document D200, Project Checklist* and The Architect's Handbook of Professional *Practice*. Too frequently the basics set forth in these documents are not followed, and too often the owner provides inadequate time and funding for the design team. And too often inadequate attention is given to properly funding and performing a really adequate soils investigation. In a study some years ago by the National Research Council, it was determined that about 25% of cost growth of government construction contracts was due to changed conditions.

And something else to the Owner and the Designer: Use the design phase to design the project, not the construction phase where specifications are continually being cleaned up through the RFI process, and submittals are being marked up by the designer because he now has a toy to play with . . .and so it goes. **Built in quality should begin with the design documents**.

SCOPE OF THIS ARTICLE: This article will cover:

- Formation of contracts
- The role of the contract
- Types of specifications (prescription, performance and design build, bridging specifications, partially completed specifications)
- Types of Delivery systems (fixed price, cost reimbursement arrangements)
- Private and Federal
- Right and Duties Under the Various Contracts
- Risk Transference

FORMATION OF CONTRACTS . Contracts are **agreements** which result from an **Offer and Acceptance**. The process by which an agreement is reached is intended to assure that the parties have a **meeting of the minds**. The essence of an agreement is to make **abundantly clear** what the parties can **expect** of each other. Ambiguity and confusion are the arch enemies of an effective working relationship between two parties to do anything, but especially to build a structure, which involves so many parts and pieces, and so many entities and under such extreme time pressures *The owner or the party preparing the contract documents has an obligation to prepare them in such a manner as to be without conflict to the maximum extent possible*. In negotiated procurement process, both parties have every duty to work together to try to assure the documents contain rights and duties which are expressed with definiteness and certainty. Scope letters from subcontractors should be for this purpose, to assure a **meeting of the minds** as to what each party is to do in order for there to be successful performance. In addition, most contracts provide mechanisms for attempting to clarify any ambiguity in a contract. For example:

1. **Pre-bid**. The contractor has a duty to examine the documents to determine if there are any **patent** or **obvious** conflicts or ambiguities and bring those to the attention of the owner's representative to obtain clarification. And the Pre-bid conference is another venue for asking questions about the documents and their meaning.
2. **Post Contract**:
    a. Pre-construction conference
    b. Request for Information Process
    c. Submittal Process
    d. Requirement to try to find problems in the office and not in the field
    e. The three step quality program by reviewing the specifications in the Preparatory Phase

ACCORD AND SATISFACTION An accord and satisfaction is a separate little agreement, normally flowing from the performance of the basic contract. A change order, agreed upon by both parties, is an accord and satisfaction, resulting from an offer and acceptance. **The meeting of the minds standard is applicable to the change order as well.** *It should be clearly stated whether the new agreement covers all the bases, for example, schedule impact, delay damages, loss of productivity*. If not, it should be clearly expressed in the change order so that there is a meeting of the minds as to what is covered and *what is not covered*. Does it cover schedule extensions, labor impact? So many disputes occur because the contractor prices a change as to only its scope and does not evaluate impact on other work or schedule consequences, and executes a change order (an accord and satisfaction) and then later, realizing that the change actually affected the schedule or other work, submits a claim. The article on Scope Changes will cover this issue in more detail.

THE CONTRACT AS A MANAGEMENT TOOL . Although it is a legal document, the role of the construction contract is really as a management tool to get something done within a given time frame, for a given price, and to establish rights and duties of the parties in achieving the goals of the contract. "Management" of anything is process oriented. A way of doing something, from cooking to placing concrete, is established. This is what a contract does: It lays out the final product, and the roadmap for getting to the final product. It is simply a way of establishing, performing, and monitoring:

The roles and authority of the parties

What is to be done

By Whom it is to be done – Which party has what risk

For What Price and What Terms of Payment (Check Payment Statutes in your state)

Within what time frame

How Risks are to be allocated

At what level of quality

How to make changes

Processes for getting things done (like the change or submittal process)

How to cause the parties to perform within their duties

The consequences of the failure to perform

Each party has a right to demand the contractual performance of the other party and each has remedies for non-performance. We have a concept called ***finger in the chest management.*** To motivate another party to perform, we simply remind that party of its contractual duty, respectfully of course, and that there are consequences of failing to perform on a proper and timely basis. But think first of the contract as a commercial tool for getting something done, a game plan for both parties to use in achieving project success and not as a legal document which is prepared and administered by a legal staff. Recently we were involved in a mediation in which the owner's attorney had modified every article, yes, *every article* of the AIA Document A201. And was it a surprise that there the project would end up in a claim situation. A project with such a contract should be built by the bar association, not tradesmen.

And we all understand the **"rule of law**" in this country. The contract is like that: it is a "law" created and agreed to by the parties for the governance of the project (a project is like a little island and the contract establishes how the people are to live and get along on that island), and no party is above it. If the contract spells out a requirement such as written notice, you don't disregard it because you have a superintendent who doesn't like to write. If the owner directs additional scope, he cannot decline payment to the contractor simply because he is running low on funds.

THE CONTRACT AS A RISK ALLOCATION DOCUMENT. As stated previously, each contract should set forth clearly the duties of the parties. ***Duties is another work for "risk".*** If one has a duty of performance, then that party has the financial liability that accompanies that duty or risk. Obviously, the contractor has the risk of performing a scope of work within a given time frame. The Owner in certain types of contracts, has the risk of the design set forth in the specifications being adequate and the risk of performing its decision making duties on a timely basis to not interfere with the prosecution of the contractor's work. The relation of the nature of the specifications and contract type are set forth herein. And the trend to risk shifting through various disclaimers and exculpatory clauses follows as well. At the outset it can be said that the trend is to shift as much risk as possible from the Owner and the designer to the general contractor who then "flows down" to subcontractors that risk to the lower members of the food chain.

SCOPE OF WORK – TYPES OF SPECIFICATONS. AND LIABILITY FOR EACH. There are three types of specifications**:**

a. Prescription Specifications

Prescription. Prescription specifications set forth all of the details of how something is to be constructed. It lays out what and how the work is to be done. If the Owner has provided through its design team prescription specifications to the contractor, then generally, the owner is warranting the adequacy and completeness of those specifications. The **Spearin Doctrine** was a federal case but has established a pretty universal doctrine that in such cases the owner impliedly warrants the adequacy,

completeness and accuracy of the prescription documents. (Note, this is a **contractual warranty** – the contractor need not prove negligence or error and omission, only that the contract specification was not adequate or was incorrect or would not produce the proper result) The rule of interpretation known as ***contra proferentem*** applies to prescription specifications, which is that if a clause in the contract appears to be ambiguous, then it should **be interpreted against the party who inserted it into the contract**. Thus, in the case of **prescription specifications**, the Owner is responsible for (and in effect warrants against):

Ambiguities in the documents

Conflicts and inconsistencies

Errors and omissions

Constructibility discrepancies

If the contractor follows the details in the prescription specifications, it generally has no liability for a failure of the final product or installation. If it is impossible to achieve the specified results by compliance with the Owner furnished prescription specifications, the financial liability falls with the owner and not the contractor. However, just because work is more difficult or will be most costly than the contractor anticipated does not meet the test of impossibility. If the contractor simply failed to estimate degree of difficulty, that is a risk belonging to the contractor, not to the owner. *Degree of difficulty* is normally a contractor risk as long as it is possible to comply with the prescription specifications although you will want to talk to your attorney about the ***concept of commercial impracticability***.

Another element of this doctrine has to do with ***any contractual representation made by the owner.*** **Remember this concept**: In any type of contract, **if the owner makes a representation** which is of a contractual nature, express or implied, the owner is bound by that representation unless there is some enforceable disclaimer or waiver. As an example, if the owner provides that it has removed all asbestos and toxic material from a building that is to be renovated, that is an express representation upon which the contractor can rely. And a contractor can rely on the representations about subsurface conditions set forth in a soils report that is made a **contract document** (this can be an area of grey so read the article on Differing Site Conditions. Note the operative words here were "contract document", for if the soils report is only referenced and not included as a contractual document, the result may be different.) *But remember also that many owners and their attorneys do everything possible to attempt to avoid being accountable for contractual representations, which is a subject to be discussed in the section on Risk Shifting.*

But what about contracts containing prescription specifications which have been **negotiated** with the contractor, in which he has had the opportunity to review the documents and perhaps make Value Engineering Proposals? In those cases, the contractor will be held to the knowledge a reasonably prudent contractor should have in finding ambiguities and conflicts in the documents. If the contractor has helped prepared or at least had influence over the documents, then the owner is not the sole drafter and is not held rigidly to the standard of ***contra proferentum***. We enter into a gray zone, even in some instances with design issues (if an electrical contractor participates in the constructability review of the drawings which shows four 90 degree turns in the conduit in a given space, and that is a

code violation, to what extent should the contractor have been aware that this was an improper design and to what extent does the owner have liability for correcting the layout during construction. One would argue that the contractor should have been aware of such an obvious code violation and brought it to the attention of the design team.) In a negotiated contract, the contractor should be careful to clarify its understanding of the scope of work and any issues which have arisen during the negotiation phase in its proposal letter and in the subsequent contract.

b. Partially Complete Documents

Partially Complete Documents. In many instances, the owner will need to get started and enter into an arrangement with the contractor even though the specifications are not 100% complete. This can be an issue on both fixed price and cost reimbursement with guaranteed maximum contracts. The language in the contract may be as follows:

> "Contractor acknowledges that the plans and specifications are not 100% complete. Contractor also acknowledges that the Owner is relying upon Contractor's representation that it has sufficient experience and expertise with this type of work to be performed for this project to provide the Owner with GMP for a complete and functioning facility, notwithstanding that the plans are not 100% complete."

How does a contractor protect himself from such a pig in the poke? A number of ways:

> A proposal letter incorporated into the contract that this provision only relates to furtherance of existing design and not additional scope to the contract, systems, kinds and qualities of material all of which would be incorporated by change order; further that any changes will be incorporated in such a manner as to not extend the duration of the project or unreasonably affect the work flow.
>
> The contractor should have a contingency item in its estimate to demonstrate that it took into consideration the incompleteness of the documents and attempt to identify the basis of that contingency.
>
> If possible, the parties should negotiate a contingency or allowance in the contract document to fund the items necessary to complete the design.
>
> o And the general contractor must assure that its subcontractors and major suppliers are on board to the risks and are properly taking them into consideration.

c. Performance and Mixed Specifications

As to **performance specifications**,(design and build contracts will be discussed later.) the owner makes no such warranty. The Spearin Doctrine (at least as to the doctrine that a contract is interpreted against the party who drafted it) does not apply to performance specifications. In these specifications, the owner states an end result it wants and leaves the details up to the contractor to figure out. The Owner could simply specify a desired strength for a concrete slab and it would be up to the contractor to figure out the details of how to achieve that goal. Or the owner could specify a given function such as air conditioning of a facility and it would be up to the contractor to come up with the equipment, duct

work and layout necessary to achieve that function. Or require that the contractor provide seismic loading calculations or design the hangars for an installation. In steel construction, the connections are generally left to the fabricator, for example.) In those cases, the Spearin doctrine does not apply and the Owner is only responsible if it provided data to the contractor which was inaccurate.

However, it is sometimes confusing as to what is and what is not a performance specification. If the owner specifies an end result and all of the details that one would expect to find in a prescription specification, and concludes the specification by stating: "The contractor shall be responsible for the performance hereof", that probably is not a real transfer of risk of performance to the contractor. If the details are specified, and if the contractor has no control to change those details, a statement attempting to shift the risk of the adequacy of the specifications will normally fail. However, in **mixed specifications**, the owner may shift some of the risk of performance. For example, the owner may specify certain equipment for a hospital ER and then require the contractor to provide the seismic calculations for an installation which meets local code. So, often there is a mix of all three types of specifications and the contractor must be aware of them and its rights and duties as to each. **However, even in a performance specification, if the owner makes a representation which is contractual (including a soils report which represents the characteristics of certain subsurface conditions, or setting forth the specific gravity of waste material to be disposed of, for example), then the owner is bound by that representation unless there has been some enforceable waiver, disclaimer or exculpatory clause. And generally, it is pretty difficult for an owner to squirm out of a representation if in fact it is contractual or the basis of the contract. Bridging specifications will be discussed below.**

d. Bridging Specifications

Often in design build contracts, the owner will provide certain data upon which the contractor is to formulate its design. As mentioned, this could be loads data, or the density of sludge, or the size of a facility. Sometimes, the owner will engage another designer to prepare schematic design documents. Now I want to be careful in this next statement because of the various clauses and disclaimers used, and because this is so fact driven, but as a general rule the design build contractor can rely upon the information and criteria that is provided in those documents, which are termed "bridging specifications". Yet, in so many cases, the owner will state that these documents are for information and guidance only and the contractor is to perform its own studies to determine the correct information. Again, not an easy call, but if information is provided with a caveat that simply attempts to shield the owner from liability, it may not work. But if the information is provided and then a specific duty is imposed upon the contractor to perform its own investigation, such a provision may well be enforceable. The greater level of communication and collaboration between the design build contractor and the owner, the fewer the conflicts. Sometimes a working relationship between the contractor and the designer is the best approach to such issues. *Dave Kaufman, a mechanical estimator, tells me that by having a close, cooperative working relationship with the engineer, his company can handle these issues in a win-win situation almost every time.*

SCOPE OF WORK – WHAT IS INCLUDED in the CONTRACTOR'S SCOPE. In addition to the work set forth in the plans and specifications, the scope of work may include other duties of the contractor:

Risks associated with performing the work such as access, heights, safety issues, congestion and crowding conditions, material handling, traffic and transportation, foreseeable weather, work force availability, tightness of the schedule, temperament of the owner or its representative, and so on These risks of performance and their degree of difficulty go with the territory and managing them is within the scope of the contractor's contract, unless otherwise excluded from the document.

Requirements imposed by law such as OSHA, etc

Building Codes. Under AIA Document A201, the owner is responsible for the design set forth in the specifications being in compliance with building codes, and not the contractor (although this duty could be shifted to the contractor in the bid documents). However, if the contractor is aware that the design is not in compliance with a building code and thereby knowingly installs the work in violation of the code, then the contractor may bear the full cost of this error. Normally a contractor should be aware of such discrepancies during the bid phase and bring this to the attention of the owner in writing and obtain an addendum. If not, the contractor should ***discover the discrepancy prior to installation*** and notify the owner, requesting a change order for the revised work.

LEEDS requirements if specified. What if there is a requirement that no moisture sensitive materials or equipment will be installed until the building is "dried in"? Meaning that the building will be sealed before walls are installed for example on the lower floors of a building. The requirement will affect scheduling and as we all know, time is money. So, the effect on means and methods, work flow and the schedule must be taken into consideration, not just the products or materials specified In a green building.

Means and Methods are normally the responsibility of the contractor unless otherwise specified by the owner. So the tools and equipment and methods for installation are a part of the scope of work of the contractor. Layout is sometimes specified as the contractor's responsibility or is considered an inherent duty, unless it infringes upon design. However, on occasion the designer will specify means and methods and the contractor is entitled to rely on the implied representation that complying with them will produce satisfactory results. (If the specifications describe machine excavation for a sewer line, the inference is that the soils are such that they can be excavated by machines and not by drill and shoot, for example.) And the contractor is responsible for what is **reasonably inferred** from the contract documents. Is that inspection plate reasonably inferred to have a complete and operable system in a health care facility, for example.

MANUFACTURER'S INSTRUCTIONS. Often those instructions are vital to a successful installation and the contractor is bound to follow them. And how very often

manufacturer's instructions are disregarded. In large part, the sad story of water intrusion on hotel and condominium structures in the Southeast was due to the failure of the contractor (and sometimes the design team) even reading the manufacturer's instructions, let alone complying with them. Suppliers of EIFS, for example, warned that there would need to be some outlet for water that accumulated in wall cavities, and also that certain coverings of interior walls should not be used. Yet these warnings were disregarded, resulting in both exterior and interior wall damages, mold and mildew and other damage, and made more than a few lawyers rich.

SUPERIOR OR PRIOR KNOWLEDGE OF THE CONTRACTOR. If the contractor has previously worked on a given site and is familiar with subsurface or other physical conditions which will affect performance, the contractor may be charged with that knowledge. So knowledge from a previous experience could actually be a part of the contractor's scope of work. And this is a tough situation for a contractor bidding on work on a site with which he has prior knowledge: he theoretically should take that knowledge in consideration which may make him the high bidder. So often it is worthwhile asking the designer to issue an addendum to incorporate the facts upon which his experience is based to assure that all the bidders are on the same footing.

PATENT DISCREPANCIES AND AMBIGUITIES. The contractor has a duty to spot patent or obvious conflicts and ambiguities during the estimating phase and bring these to the attention of the owner seeking clarification. If the contractor fails to do so, then it cannot later claim an extra. It now assumes the risk of performing that work. The contractor "need not use clairvoyance to discover hidden meanings and discrepancies" as the courts say at least as to advertised contracts and prescription specifications. It takes a pretty obvious conflict for the court to find against the contractor in these matters. In negotiated contracts, as indicated, the contractor has a much higher duty to examine the documents for ambiguities, conflicts and ambiguities.

DISCREPANCIES THAT SHOULD BE DISCOVERED IN DESK TOP REVIEWS PRIOR TO CONSTRUCTION. The contractor has a duty to study the contract drawings prior to installation of the work and if there are conflicts or errors, to obtain written clarification and a change order if appropriate. (We say, find it in the office and not in the field; at least reasonable efforts to do so.) If the contractor fails to do so, then the contractor will be responsible for any impact of performing the work, although not for the changed work. In other words, if the contractor fails to spot a conflict between the dimensions of the duct work and the ceiling space where it is to be installed, and if the contractor lays out and installs some of the duct work before determining that there is a discrepancy (in other words, finding the conflict in the field and not in the office), any

change to dimensions of duct or other structural members to correct the problem is still a change for which contractors should be compensated. But the tear out of the equipment that would not fit and the schedule and labor impact associated therewith is the liability of the contractor. This is the reason **COORDINATION DRAWINGS** are so important and should be prepared early on in the project, so that drawing conflicts can be spotted prior to having an impact on the sequence of the work and productivity. So, even though in a prescription specification the owner warrants the adequacy and accuracy of them, the contractor has a duty to use reasonable efforts to discover discrepancies before they become field problems. A failure to use reasonable efforts to do so places a liability for the impact thereof squarely on the contractor. The owner remains responsible for the adequacy of design but the contractor is responsible for using prudence in detecting constructability problems in advance of performing the work.

OUT OF SCOPE WORK WHICH IS NOT CONTESTED BY THE CONTRACTOR. If the contractor fails to provide timely written notice that work it is doing or has been directed to do is considered out of scope and a change order is requested, then the contractor may be considered **a volunteer** and could bear the financial responsibility for performing work that was not originally in its scope.

YOU'RE A BIG BOY. **YOU SHOULDA KNOWN THAT YOU HAD TO DO THIS.** How often does the contractor hear the owner or designer make this statement in reference to a request for an extra. "You're a big boy – you shoulda known". What, that is NOT a rule of contract interpretation, **except** that the statement does have some merit, as shall be seen. What is a rule of interpretation is that a contractor should know that which a reasonably prudent contractor under same or similar circumstance should have known. If the contractor has worked on this site before and should have been aware of risks associated with subsurface conditions, or that the site was very limited and therefore material handling would be restricted or other things that would need to be done that are inherent in doing the work, then yes, the contractor is a "big boy and shoulda known" that that its price should have covered it. But this is not a grease trap for the owner adding to the scope of work. If the schedule is very tight and the owner has made it clear that the completion date must be met, the owner may deny the contractor's claim for additional time due to a change which impacted the critical path: "Well, you knew this was a tight schedule and the completion date was absolutely critical. You also know that there will be changes to the contract and you should have contemplated that." To the extent that any changes do not affect the critical path, and to the extent that the contract, through using good practice could not have mitigated the impact to the schedule, this may be true. But again, the "big boy" argument has its limitations and is not a grease trap. Beware of its use and learn how to deal with it.

SCOPE OF WORK –MANAGEMENT RESPONSIBILITIES- THE OWNER. The Owner has management responsibilities which are owed to the contractor. Among these may be:

The duty to grant timely access to the site and work areas

The duty to make decisions reasonably and timely (this relates to the issuance of responses to requests for information, change orders, direction regarding differing site conditions, response to submittals.) *Note: One of the most frequent and damaging failures by owners relates to untimely decision making.*

The duty to perform inspections and other duties on a timely basis.

The duty to not unreasonably interfere with the contractor's prosecution of the work.

The duty to make justifiable payments on a timely basis. Check State laws regarding Prompt Payment Statutes.

The duty to grant justified time extension requests on a timely basis. (*Note:This is emphasized because the failure to grant a justified time extension on a timely basis often results in one of the most costly and contentious of claims, the constructive acceleration, which should be avoided at all costs. And it is one of the frequent failures of owners and their representatives)*

The duty to treat the contractor fairly and in good faith. The concept of fairness and good faith is central to effective project management by all the parties and as shall be seen, is the basis of an exception to the No Damages for Delay Clause.

The duty to be accountable for the discharge of its duties.

The failure to perform these duties properly and timely may open up the owner to financial liability which may range from an equitable adjustment for changes to interest for late payments, or even in very severe cases consequential damages due to breach of contract.

BUT BEWARE OF RISK SHIFTING CLAUSES, SUCH AS NO DAMAGES FOR DELAY, DISCLAIMERS, INDEMNITY AND OTHERS TO BE DISCUSSED LATER IN THIS ARTICLE. A CONTRACT IS SOMETIMES LIKE A TENNIS MATCH: THE BALL IS IN THE OWNER'S COURT BUT HE RETURNS IT WITH A NO DAMAGES FOR DELAY SERVE BACK INTO THE CONTRACTOR'S COURT. BE VERY AWARE OF THIS TENNIS MATCH IN UNDERSTANDING THE ALLOCATION OF RISKS.

SCOPE OF WORK – MANAGEMENT RESPONSIBILITIES – CONTRACTOR. The general contractor is usually employed for a primary reason: to manage the work. Management includes the duties to:

Foreseeable risks under the contract (weather, strikes, degree of difficulty, site conditions observable from reasonable site investigations; labor and supplies availability)

Schedule

Update the schedule

Maintain such progress as to attain the schedule

Plan (such as short interval planning)

Coordinate the craft contractors (Often to prepare **coordination drawings**)

Provide competent management and supervision

Provide competent and adequate work force

Manage submittals

Manage changes on a timely and reasonable basis. Price changes fairly. *And support with adequate documentation any claim for an extra or time extension*. Often the reason for failure by the owner to respond on a timely basis is that he has not been given adequate data upon which to make a decision. This is especially true in time extension and labor impact claims.

Comply with the quality standards. Note that many contracts require the contractor to provide total quality control, with a qualified and certified quality control officer. And to have a three step quality program (Preparatory – Interim – Final). Do not take these duties lightly. A contractor may try to get approval for his superintendent to be the quality guy and this is like getting the fox to guard the henhouse.

Schedule inspections as required

The failure to comply with these obligations may cause profit erosion (profit fade) or financial liability to the owner or others and even result in a termination for default of the contractor, or the imposition of liquidated or actual damages.

RULES OF INTERPRETATION OF CONTRACTS: The operative term is i***nterpretation***. Both reasonable and unreasonable people may understand the written word in different manners. The test is an objective one, though, and not a subjective one.

Contra proferentem. If prescription specifications, the rule of "**contra proferentem**" applies: interpret ambiguities against the drafter of the contract. ***However, if this is a NEGOTIATED contract, even if those the specifications are prescription, and the contractor had opportunity to review and discuss the specifications prior to entering into a contract, the duty of the contractor to spot deficiencies and conflicts has risen to a very high level and this rule of interpretation may not be applied.***

NOTE: Even in the case of advertised procurement with prescription specifications, the contractor is not compelled to accept a contract; if the provisions are too risky for the contractor, or too onerous, the contractor can just not bid on the project. But if he does bid it and is awarded the contract, even if this is a bad bargain for the contractor, the courts will basically say if you complain: "Hey, you are a big guy. That is how contracts work. You have the free will to accept or reject, or price high to deal with the risks. But don't get a contract and then whine because you think the provisions were too tough." And don't accept a contract with very strict tolerances or standards and then complain later that they were tougher than what you usually did in

your industry. In the case of a project involving the installation of equipment, the specifications required a zero tolerance; that is, there could be no deviations as to "level". In turns out that such a tight tolerance was required for the equipment to properly function and the millright contractor eventually had to meet the criteria as specified, even though it was extremely difficult. He went into the contract with his eyes open and accepted the terms of it.

Pre-existing Duty: A self-evident rule is that if a contractor has a duty to perform that is set forth in the basic contract, the contractor cannot claim additional compensation for performing that duty just because he may have omitted the price from his bid, or because the owner mistakenly agrees to a change order agreeing to reimbursement for the same work previously set forth in the contract documents. It is called the pre-existing duty rule. Yet so often contractors adversely affect their trust relationship with owners by making such claims.

Read the contract as a whole (e.g. the general contractor would have responsibility for the electrical hook up of mechanical equipment even if that requirement is not in the electrical specifications but in the equipment specifications.) A technique used to really get this concept across regarding an issue in dispute is to cut and paste all the applicable specification sections to a composite drawing as though the contract was on one page. This provides a visual of the "contract as a whole".

Read It reasonably. Playing lawyer with strained interpretations not only fails for the most part but takes away from your credibility in future dealings. And the contract should be read in the context of the party which will be implementing it: the contractor is not an engineering firm or a scientist and so the document should be read in light of a "contractor's language and experience". And so often engineers will state in opposing a contractor's interpretation: "Well, that is not what I intended, or what I had in mind". A contract is not interpreted based on what the author wanted or had in mind, but objectively and reasonably. What the designer wanted and a nickel gets him a five cent cigar unless it is expressed clearly in language which is understood by contractors.

> **Example**: In an outfall project, the soils report stated that there was **water at a given elevation**. In fact, there was artesian water (water under head or pressure) which was basically uncontrollable through any conventional means. The contractor stated that "water at" meant static water, in other words, that the water level was not under pressure and could be controlled through pumping or other means. The designer said that to soils engineers, water **at** would indicate rising or artesian water (water under pressure). The contractor countered with evidence that to contractors, water **to** would indicate water under pressure, not water **at**. The contractor prevailed because he was entitled to interpret the contract in the vernacular of construction contractors, not scientists.

The doctrine of fairness. Although quite subjective, the concept of fairness is inherent in all contracts as well. But this one is also difficult to apply. The contractor may say in regard to the equipment installation example above: well, installing that equipment at

such an incredibly tight tolerance is unfairly cost me money trying to achieve it. The Owner may reasonably reply: It is attainable, though difficult and was clearly a responsibility under the contract. On the other hand, the owner may have issued tons of changes, interfered with the contractor's progress and still tried to duck financial responsibility due to a no damages for delay in the contract. That is flat unfair.

Read it in light of industry practice. This is a slippery one. The contract speaks for itself and if it contains requirements different from that which is normally done in the industry, or standards and tolerances greater than industry standard, and those are clearly set forth, then suck it up and do what the contract says to do. If in fact there is an ambiguity in the document, then you can go outside for the purpose of clarifying, but not changing, the specification. So often the contractor will argue with the owner's representative over a workmanship issue: "But this is what we have always done before" whereas the owner representative's very valid response may be: "But this contract very clearly establishes the tolerance for this job and that is what we go by."

What is the manifest intent of the contract documents? This is what the standard grease trap language in most contracts is all about: If it is obvious that some detail is required, like a face plate on the switches in the ball room, or perhaps an inspection plate, then it is just flat obvious that this should be included to have a complete installation. The owner is counting on the fact that the contractor is experienced enough to know the requirement for these sort of details and if not, maybe he hired the wrong contractor. In prescription specifications, these type of disputes are common place and one of the reasons for the trend toward design and build, construction management at risk and other delivery systems aimed at preventing such conflicts.

Specific takes precedence over the general.

The interpretation placed on the contract by their conduct. *This is a powerful one*. If the contractor has dewatered the site without protest for six months, and then suddenly decides that it is out of his scope, the argument is that he must have reasonably believed that it was within his scope or he would not have expended such resources for so long a period. On a government project, the mechanical contractor did all of the core drilling for three buildings before someone read the contractor and determined that core drilling was the responsibility of others. Obviously, his claim for additional compensation was not looked upon favorably by the general contractor. Thus, read your contract, provide timely written notice when you reasonably believe that work is beyond its scope. *One of the advantages of the three step quality approach (Preparatory, Interim, Final) is for the team which will perform a given task to review the plans and specifications, hopefully with an owner's representative present, to make sure that the team fully understands the scope of the task.*

And a word about the **parole evidence rule.** This rule applies to anything either *oral or written* that has gone on prior to the contract being executed. If it isn't in the contract, well, it just isn't in the contract. . If your scope letter stating that the owner would furnish a crane is not included as a contract

document, then guess who probably furnishes the crane. So such documents must be integrated into the contract at least by reference. However, often the owner will wish to use your estimate against you, although it is not a contractual document. If you are claiming that it was not your responsibility to provide temporary drainage, and you have a line item in your estimate for temporary drainage, you are chopped liver. On the other hand, if you try to use your estimate to show that you didn't include temporary drainage, it may not be admissible, unless the scope issue is sufficiently gray or unclear that the estimate can be used to explain your intent.

> The issue of the parole evidence rule comes up so often when one of the parties in a conflict says: "Yeah, but when we negotiated this contract, you said that you would do so and so." And there are no notes or memoranda of the negotiation. Or even if there are notes, and this statement is not included in the contract documents, it may not be admissible in court because of the parole evidence rule. If there is a legitimate ambiguity or issue of interpretation, it may be used to ***clarify*** that issue, however.

And a word about ***promissory estoppel***. Most legal principles are pretty simply. It is the application of the facts that make it difficult and the reason you need a very experienced construction lawyer to be at your side from time to time. Hopefully on the preventive side where he or she (some great female construction lawyers out there, by the way) can do the most good. Promissory estoppel is an equitable doctrine which basically holds that if you make a promise that another person has relied on to that person's detriment (meaning damage), then you may be held for the financial consequences of that promise even if was not contractual. **For example:** subcontractor Friggles gives a quote to the general contractor who uses it in his bid. The general contractor is awarded the contract and then sends an agreement for signature to the subcontractor who refuses because he has now discovered he was too low or just doesn't want the job. The general contractor then gets another sub at a higher price and then sues Subcontractor Friggles for the difference. Friggles defends on the grounds that this was just a quote and there is not contract between the two. On the basis of the doctrine of promissory estoppel, the general contractor just may very well win that law suit because he relied on the implied promise that Friggles would honor a forthcoming contract and perform the work as bid, and that the general contractor actually was harmed by having to pay another subcontractor a higher price to perform the same work.

TYPES OF CONTRACTS AND ALLOCATION OF RISKS. The spread of risks is a function of the type of delivery system and the level of risk transferring clauses set forth in the contract documents. A cursory examination of the nature of the delivery systems and various risk shifting clauses is set forth below. The subcontract agreement will also be discussed.

a. Fixed Price, Advertised Contract

The fixed price, advertised contract is a product of the *design-bid-build approach*. The process obviously will take longer up front than other types of delivery systems, such as design and build, and their durations are normally longer as well. In addition, these delivery systems tend to be far more conflict laden and adversarial, with more changes and often a higher total cost and longer duration. As previously indicated, in the fixed priced advertised delivery system, the specifications are generally of a **prescription nature** and prepared by the design team. The adequacy of the specifications and issues of interpretation with accompanying delays in responses abound, resulting in impact to the project and adversarialness among the parties. Techniques such as *Effective Partnering* (unfortunately, too many partnering sessions are just social get togethers and not effective collaborative sessions) can help overcome these issues. See the Article entitled *the Clark County Story*. The Owner has the following risks and duties as we have seen (This may be a bit of a rehash of previous information but it is important rehash):

Warranting the adequacy of the plans and specifications

Living up to all representations which are contractual

Performing its administrative and decision making duties timely and reasonably

Not interfering with the prosecution of the contractor's work

Prompt payment for justified pay requests

Prompt granting of justified time extension requests.

Granting reasonable equitable adjustments for changes and justified delays (and not to overuse the changes to create a "multiplicity of changes" or "cardinal change" problem)

But now as we have also seen, in the financial tennis match where the Owner wants to remove itself from as much of the financial risk of its duties as possible or at least to share in some manner those risks, it will almost always insert clauses which makes the contractor something of an editor of the documents to try to determine if there are discrepancies or conflicts before the contractor begins work and runs into problems. So he tries to hit the ball of liability from his court to the contractors. **These "tennis match" clauses** where the owner is transferring some of its risk to the contractor often are:

Pre-bid to discover patent conflicts and discrepancies and seek clarification

To conduct pre-bid site investigations so that it understands the site risk (Differing site conditions will be discussed later)

To use prudence to discover problems in desk top reviews prior to finding them in the field. If not, the risk of labor impact in the field is transferred to the contractor.

To use coordination drawings and the three step quality process to find conflicts before finding conflicts in the field. If not the risk of labor impact will be shifted to the contractor.

And although the owner is responsible for changes to scope, if the contractor fails to provide required written notice on a timely basis, the risk of that work may befall the

contractor. And although the owner is responsible for providing timely response to justified time extension requests, if the contractor fails to properly update its schedule and with field documentation support its request for additional time and money, the financial risk of that impact to the schedule may very well be owned by the contractor.

So there remains a bilateralness in these delivery systems, the owner saying: "Look, I will do my part, but I am human. I may not be perfect, so I am transferring to you, Mister Contractor, a duty to help me be more perfect, to use your experience and judgment in this process. Not to do my job but to look over my shoulder and find what a reasonably competent contractor such as yourself can find and help me resolve before it becomes a field problem. If you don't fulfill this obligation and one of my goofs does become a field problem, I will correct the design issue on my dime, but the field labor impact belongs to you." These are not disclaimer clauses and specifically impose a duty of investigation on the contractor. General disclaimers, as shall be seen, generally do not trump the owners specific duties or warranties under the contract whereas specific investigatory duties are enforceable.

And some owners **use other devices to attempt to get out their responsibilities**. Among these are:

- **Disclaimer and exculpatory clauses.** (See the section on Differing Site Conditions for discussion of such clauses relating to site conditions.) Setting aside DSC clauses, the Owner may provide certain information such as dimensions of windows on a renovation project and then state: "This project was constructed fifty years ago and the dimensions set forth regarding the windows cannot be guaranteed as accurate. The contractor must do its own measurements and verifications." Or the contractor has a duty to verify that the plenum or the overhead as the case may be is adequate for the installation of the duct and all the other junk that goes in there. Do these clauses get the owner off the hook? On the one hand the owner has provided information , and on the other has said "don't rely on what I just told you and if you do, it is your liability and not mine." Tennis match in all its glory. And not clear cut, obviously. As a rule of thumb, if the owner is responsible for design, it cannot duck that responsibility by some general disclaimer. (For example, on a multi-segment piling project, the owner specified every detail of the fabrication and delivery of the piles, the method of installation of the attachment of the piles to each other, even the equipment to be used for pile driving, and then the last sentence of the specification was "but the contractor shall be totally responsible for the design and integrity of the piles." Obviously, this was an absurd and totally irresponsible method of trying to duck responsibility and the clause was not enforced against the contractor.) Let's evaluate these scenarios:

    - As seen, the owner usually must stand behind a contractual representation. However, in the case of the windows, the owner is actually alerting the contractor to the condition of the building, that it is old and that the dimensions may not be precise, so take that into account in estimating and managing the project. And don't order all one size window because that will get you in trouble. Check the dimensions for one area before you order, and if there are irregular windows that must be order, the owner may pay for the material price differential of that window, but not for having to redo windows that you

ordered that were the wrong fit. In other words, in this instance, the owner has imposed a duty on the contractor to check the dimensions of the openings and the contractor must comply with that duty. This is not a disclaimer or exculpatory clause but a clear explanation of the risk and the imposition of a duty on the contractor to examine that risk before making a financial commitment. CONFUSED A LITTLE? GOOD, YOU UNDERSTAND THE PROBLEM. It is obviously best to try to clarify these issues before you enter into the contract and document your position in your estimate.

- In the case of the piles, the owner dictated the entire process, including means and methods. It cannot then say: "okay, you did exactly what I told you to do, you had no discretion, and it didn't work but you are screwed because I want you to have the liability and not me."
- In the case of the sludge incinerator, where the owner provides information concerning the density et al of the sludge, and has possession of the data upon which that information was provided, to then state: "Oh, by the way, I gave you data which I alone had available but then I told you not to rely on it" is probably an unenforceable disclaimer. But if the owner provides the information, and access to the basis of the information and for verification, and then states that the contractor has the duty to verify and design accordingly, the risk for the adequacy of the design would certainly shift to the contractor.
- **Rule of thumb: if an affirmative duty is placed on the contractor, it is generally enforceable and the contractor may not be able to claim this is simply an unenforceable disclaimer clause. But see your local construction attorney.**

- **NO DAMAGES FOR DELAY CLAUSES**. These clauses stink so bad that some states have held them illegal. Basically they say that the owner and its design team can delay your work, extend the duration, but that it will not pay you for your damages. Some clauses extend beyond schedule impact to labor productivity impact. Yet, the clauses have been held to be valid in many states, and they are inserted in many state and municipal as well as private contracts and flow down to subcontracts. (***WHY DO THESE CLAUSES STINK: BECAUSE THE PARTY INSERTING THEM INTO THE CONTRACT IS SAYING TO THE OTHER PARTY: I CAN SCREW UP AND CAUSE YOU SO MUCH DAMAGE THAT YOU MIGHT BE CRIPPLED FOR LIFE AND I WON'T OWE YOU A DIME! I CAN TURN OUT CRAPPY DRAWINGS AND NOT BE HELD ACCOUNTABLE. I CAN DELAY ISSUING A RESPONSE TO AN RFI OR CHANGE ORDER AND TOUGH! I WON'T BE RESPONSIBLE. In a 2005 study by Michael Cook of the University of Florida, it was reported that "the cost for most contractors of the NDD clause is in the 1%-5% range. From a non quantifiable perspective, 79% of the contractors believe the NDD clause is an obstacle to team building and partnering. This obstacle does not seem to serve the public's best interest."*** So tell me that is fair when we know that cooperation, collaboration and trust are the hallmarks of successful projects, why do we insert clauses that day one say in big bold letters that it is "do as I say and not as I do". Every state should ban these clauses.

(If this is an advertised project, you cannot take exception to the clause as you will be held non responsive and your bid will not be considered (the federal government does not use such a clause, by the way). In negotiated procurement the contractor should always seek to have the clause removed or not bid the project (nope, few contractors take this advice and sign contracts with no damages and other unreasonable risk shifting without batting an eye. And many of those contractors suffer severe losses as a result.) The courts are not always happy about having to enforce a no damages clause and a number of exceptions have found their way around. Not all states are the same, so check the jurisprudence in your state with your attorney. One of the concepts we suggest is to perhaps have in your estimate a contingency for general conditions of say, one month, being an approximate amount of time that would not be unreasonable to expect a project to be delayed. At least you have something in your estimate to support an interpretation that unreasonable delays should not be barred by the no damages for delay clause. But some of the concepts that I have found to be tenable to break the back of the no damages clauses are:

- **Bad faith** seems to be an underlying concept across the board. When an owner whiplashes a contractor with multiple changes, is dilatory in all of its duties to the contractor and then cavalierly says to the contractor it damaged: "Sorry cowboy, I can do what I want to and you have to pay the price", the odds are that the courts (and mediators and arbitrators) will find that is beyond the pale of what was intended by the no damages clause.
- **Intentional interference** (which is obviously under the umbrella of bad faith), such as denying access to the site or a work area, refusing to grant reasonable and justified time extensions, for example.
- **Breach of contract or abandonment** (such as multiplicity of changes, or delays of such a nature as to constitute schedule abandonment. Failing to perform one's contractual duties is certainly not good faith – see, in the no damages clause scenario the enforceability is under the umbrella of "faith" – good faith or bad faith. An owner who stated in the contract that the building be renovated was free of toxic material and it turned out that it was loaded with it, has breached the contract and delay damages by the contractor would certainly not be barred by the NDD clause. In a complex, multi-project project, the general contractor never updated the construction schedule as required by the general contractor to show the effect of various delays and changes and the subcontractors were told to disregard the monthly schedule used for billing purposes and instead rely solely on direction by the on site general superintendent. This was considered an egregious breach of contract amounting to an abandonment of the general contractor's scheduling and managing responsibilities and thus a defense against a no damages for delay clause.
- In some jurisdiction, the word "unreasonable" crops up such as unreasonable delay in performing inspections. However, if an act of the owner is unreasonable, it probably rises to the level of contract breach.

- The concept of "**unforeseeable"** has been accepted in some states, but that is probably not a concept that is as successful as the ones listed above. Where the concept is accepted, I have taken the approach that any delay caused by the owner which impacts the critical path is by definition unreasonable. In one case where the project was delayed substantially, the general contractor had failed to issue updated schedules and conduct planning meetings, this was considered unforeseeable that a general contractor would fail to perform its scheduling and managing function – but this then really boiled down again to breach of contract.

- **Waivers.** Many contracts and accompanying pay estimates will contain a clause that a pay estimate constitutes the full amount owed the contractor and that all claims of any kind are waived through its submission. In some states such as Florida and Georgia, this very harsh provision is pretty well enforced so check your contract and make a reservation of rights to any potential claims for delay or impact or other issues in your pay estimate or at least an express reservation in the letter of transmittal. Again READ THE CONTRACT at the outset and assure that you have no conflicts at the end of the project because you signed pay requests with a release of any and all claims.
- **Indemnity clauses** are used to protect the owner from third party claims that arise out of the general contractor's performance of the work. These are okay as the general contractor is responsible for damages caused to the work or the owner for acts over which is has control and is responsible. But often indemnity clauses are very broad: some go so far as to make the contractor responsible for damages which are actually the responsibility of the owner himself, or other third parties for which the general contractor has no control or responsibility. So the owner is simply trying to push over to the general contractor a duty to shield him from any and all claims, whether or not the general contractor is actually liable for the problem which caused the damage. In many states, such clauses are not valid, but in some they are. In addition to your attorney, your insurance agent should review these clauses on your behalf before you accept them in your contract. **General contractors also often try to insert clauses into the subcontract agreement making the subcontractor responsible for damages over which it had no control and for which it is not responsible. Subcontractors should follow the same advice as above: check with your attorney and insurance agent.** Note: if you have an excellent agent who handles your insurance and surety bonds, don't just use it to write bonds and insurance policies. This agent has probably "been there, done that" and has wisdom and insight that comes from years of experience in the industry, so pick his brain and take advantage of his counsel.
- **Written and Timely Notice**. All contracts require written notice of an intent to file for compensation whether for changes or other claims. Many basically state that the failure to comply is a waiver, and I have seen some that state that it is a forfeiture of the contractor's right to pursue a claim. In many jurisdictions such clauses are not looked upon with great favor but why test it? Those are clauses you should comply with.
- **Venue**. Often a contract will provide that the state of the owner's home office will be the jurisdiction for both any litigation and the laws which are applicable to the resolution of any issues arising under the contract. A ridiculous clause for the

contractor to sign if the home office is a thousand miles away. The laws in the state where the work is being performed should apply and the venue or forum for the resolution of any disputes should also be in the state of the work performance. **Subcontractors should be very wary of subcontract agreements from out of state general contractors which have such provisions, making litigation very inconvenient and costly.** For example, a mechanical contractor executed a subcontract agreement which specified that the laws of a different state than his home base or the location of the project would apply. The mechanical contractor executed pay requests month after month which contained a release of all claims that were not listed on the pay request, and the subcontractor listed none. The contractor had, however, submitted some claims during the course of the project and felt protected. At the conclusion of the project, the general contractor denied the subcontractor's claim on the basis of the release in the monthly payment requests and the subcontractor was forced to file a claim in a distant state as specified by the subcontract agreement. It turns out that the state in which the claim had to be filed had a very specific statute barring claims which had not been included the in the payment request. A double whammy, the expense of litigation in a foreign forum and a very stringent state law of which the subcontractor, of course, was unknowledgeable when he signed the subcontract.

b. Negotiated Fixed Price Contracts

In **negotiated fixed price contracts,** the contractor at least has the right as well as the obligation to return the tennis ball hit in his court (in an advertised fixed price any modifications proposed by the contractor would be considered non-responsive and the owner serves the ball with no return; but in a negotiated procurement, the parties can trade proposals and counterproposals). So the contractor should take advantage of the negotiation process to get the fairest deal possible and protect its position through a scope letter to be integrated into the contract. The difference between the advertised and the negotiated contract is the ability of the contractor to make input to the specifications and the contract documents. In a negotiated contract and the contractor had an opportunity to *horse trade, to bargain* on the various terms and conditions, which opens up the door to greater risk exposure. In the event a dispute ends up in a legal venue for resolution, , the triers of the dispute are likely to say: "Look, you are a big boy, you had legal representation, you have been in this business a long time. You had a shot at negotiation and when it was all over, of your own free consent, you agreed to these terms. Sorry, but don't come whining to us now that you didn't understand them or they were unfair"). What you could have done was to:

- Oppose certain unreasonable risk shifting clauses
- List any proposed exclusions
- Establish clarification to the scope of work

- Establish duties that it expects of the owner for the project to be completed successfully. Often the specifications will provide, for example, that the designer will have a specified number of days to respond to a Request for Information (RFI) and that may be reasonable for the bulk of RFIs but for others the schedule cannot tolerate such a delay. So the contractor might require responses to RFIs on such a timely basis as to support and not impact the schedule, for example, that would require less than the time specified in the contract documents. The contractor's proposal for the contract should set forth that all actions and decisions will be based on having a minimum if any impact on the critical path or the work flow, and in some cases that may mean expedited effort on the part of the team.

c.Liability of the Designer to the Contractor for Damages Caused by Negligence,

Under the doctrine of privity of contract, the contractor could not sue the designer for the consequences of its negligence (error and omissions) preparation of drawings. The only recourse was against the party with which it had a contract, i.e., the owner. In many states, the wall of privy has been penetrated and the contractor may bring a suit directly against the designer for its negligence acts. Several Points: First, you need a skilled attorney as has been emphasized. Second, the bar of proof against the designer is much higher than against the owner. The claims against the owner are based on contract: that is the owner had a duty, he breached it, collect. You do not need to prove that he was negligent, only that he breached the duty. In claims against the designer, the bar is much higher, for you must prove negligence (which means a deviation from due care in the community in which the work is being performed and that normally takes a local professional to take the stand on your behalf and against a professional brother. You may find it difficult to locate a local designer to testify against a contemporary.)Third, this is exactly what we need in a fractured adversarial industry . . .more litigation. There are circumstances where suing the designer directly is appropriately, but this remedy should be a last resort. An article further detailing the liability of designers and construction managers is forthcoming. As to my own prejudice, I do not like the idea of contractor suing designers for a variety of reasons, one of which is the frequent defense of the Owner who wants to accept no accountability or risk at all who says about a contractor claim: "Well, I hired a designer who said he would take care of me. I hired a contractor team which was supposed to take care of me. I wash my hands of any claim because I am just this guy caught in the middle and I didn't have anything to do with these problems.!"

c. Design and Build Delivery Systems

Design build contracts might come in many different flavors. For example, in the Federal sector they may come by way of the two step approach used by the Federal Government (a separate article on Two Step will be forthcoming) or in the commercial sector by way of the owner simply setting forth its requirements and requesting proposals from contractor for their design approaches to meeting the owner's requirements. They may be fixed price or cost

reimbursement with a fixed fee or a sharing provision. This section is primarily concerned with the process of the design build arrangement from a risk allocation point of view. Suffice it to say for now that the design build delivery system is a major trend in both the federal and private sectors, and that the measured results seems to be consistent reductions in cost and schedule and improvement in quality and the relationship of the parties. Simply presented, the **design build process is set forth below:**

- ✓ The owner develops its needs.
- ✓ The design build contractor submits its proposal setting forth its qualifications, team members, and design approach.
- ✓ Sometimes this is a two step approach, with the second step being the pricing.
- ✓ The contract is awarded. Generally, of course, the designer is on the contractor's team.
- ✓ The design build contractor prepares plans and specifications which are then submitted to the owner for review and approval.
- ✓ Once this step has occurred, the documents now constitute the baseline and any changes ordered by the owner would be an increase in scope with an equitable adjustment due the contractor, **EXCEPT (and this is a big EXCEPT):**
    - The Spearing Doctrine, and the rule that ambiguities are decided against the drafter do NOT apply. After all, the contractor is now the drafter so he loses the benefit of these rules.
    - **The change ordered by the owner is due to a design error or omission by the design builder. Remember, the contractor is the designer so it remains responsible for the design even after the drawings and specifications have been reviewed by the owner and incorporated into the contract. Only changes to quality and increased scope will be compensable, not errors in the documents or design.**
- ✓ The Owner still must perform any duties its has on a **timely and objective basis.** Depending on the particular contract, it may not have the duty to review and approve submittals or perform quality assurance and control functions. Often these are the responsibility of the contractor. So, one must examine each contract to determine what traditional duties have now been transferred to the design build contractor and which have been retained by the owner. To the extent that some of those duties remain with the Owner (such as granting access, approving the plans and specifications on a timely basis, approving any changes on a timely basis, payment as an example), the owner must perform them prudently and timely.
- ✓ The contractor still has the responsibility of meeting the contractual schedule, but self initiated changes or changes directed to correct design conflicts or deficiencies will not be the basis for a time extension. The contractor is responsible for the quality and tolerances established in its documents, so

nothing has changed where workmanship is concerned. The real difference in a design and build is that the liability for any impact flowing from the plans and specifications which he has prepared and is responsible belong to the contractor now. **With these possible exceptions:**

- **Bridging specifications. If the owner has had bridging specifications prepared, normally the design build contractor can rely upon any representations contained therein. If that information is in error, the owner may very well be responsible for the consequences.**
- **Differing site conditions. If the owner has prepared the soils report and it is made a contract document, the owner will normally be responsible for the financial consequences of changed conditions.**

✓ Let's examine **subcontractors** role in the design build process. Those roles may be all over the place. Some, such as MEP contractors, may actually perform all the functions of a design build contractor for their disciplines and the rules above will apply. Others may be what is termed **design/assist** subcontractors whose job is really that of constructability reviews, possibly equipment selection and value engineering suggestions. Some, such as perhaps the concrete or painting contractors, may have absolutely no input in the design process at all, and bid plans and specifications provided to them, as any other project; yet often their subcontract agreements may have language that they acknowledge that the contract with the owner is a design build arrangement and they agree their cost includes any cost necessary for a complete installation. All of these issues are discussed in the article on Subcontract Management but suffice it to say now that the **subcontractors have a duty to clarify the extent of their scope responsibilities and limitations in their proposal letters and subcontract agreements and failure to do so may result in them buying into a pig in a poke scenario.**General contractors attempt to transfer risk down the food chain, as with the no damages clause. They also do so by clauses which unfairly attempt to shift the consequences of design issues over which subcontractors have no control to those subcontractors.

CAVEAT TO ALL THE PARTIES: Having clarity in the scope of work, responsibilities and risk should be a first line responsibility. Remember our old friend, "the meeting of the minds". The parties themselves should work together to make sure these issues are discussed and well understood rather than putting heads in the sand where these landmines of ambiguity, unreasonable, unclear clauses are planted, surely to explode and create damage to the project. The purpose of a contract is to clearly delineate the responsibilities and expectations of the project rather than cloud with disclaimer, exculpatory and confusing attempts at risk shifting.

d. Guaranteed Maximum Cost

The purpose of this section is limited to a general discussion of how to determine scope and a change at the time of the execution of the contract. Indeed, because the project was not capable of being firm priced due to incompleteness, how then can a contractor price the work and then protect itself after contract award as the plans and specifications are still being complete. This has been discussed in the section above dealing with ***partially complete documents.*** As each contract is different, it is difficult to make sweeping generalizations, but first begin with AIA Document A102, Section 5.2.5 which provides:

> "To the extent that the Drawings and Specifications are anticipated to require further development by the Architect, the Contractor has provided in the Guaranteed Maximum Price for such further development consistent with the Contract Documents and reasonable inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and qualities of materials, all of which, if required, shall be incorporated by Change Order."

Suggestions on how to handle these delivery systems have been set forth above but the following are important to note:

- First, in a Cost Plus Guarantee Maximum with a Fixed Fee, remember the consequences of the "Guaranteed Maximum". It is like a fixed price in that any unauthorized cost over the cap is on the contractor. Thus, if it underestimates its cost by failing to consider what might be "further development or reasonable inferences", that is the cost overrun is out of his pocket. Red dollars as we say.
- For this reason, the contractor's estimate delineating with as much specificity as possible the basis of its bid, equipment it used in its estimate, quality standards, quantities. And exclusions and estimates for allowances and contingencies, set forth some quantification of what the allowances and contingencies cover. A ranking general contractor in the Southeast actually negotiates a contingency to cover the architect for errors and omissions, and another for rework.
- Second, the contractor must then protect the scope of work in a Cost Reimbursement with a Maximum Price the same as a Fixed Price contract. If the scope of work is changed, the contractor must submit a request for a change to increase the maximum cost and to adjust the fixed fee as well.
    - If there is a schedule of values, then alter it accordingly once the change order is approved.
- Although this will be detailed further in the Pricing Article, it is important to address in the contractor's proposal many of the cost reimbursement issues that may arise. The contract sets forth *allowable and unallowable*

items of cost, but try to remove ambiguity upfront with certain specific issues, such as:

- Equipment costs (using the contractor's rate or a standard such as AGC or COE)
- Project Management and Supervisory Rates
- Labor rates for straight time and premium time
- General Conditions Items of Allowable Costs (Home office overhead may not be an AIC but perhaps there are circumstances in which home office resources are required and should be costed to the project.

CAVEAT: Too often contractors are very lax in contract administration of cost reimbursement contracts both as to scope and allowable costs. As someone has said, use an accountant or CPA who has experience in GMP accounting which may be very different than the application of GAAP (Generally Accepted Accounting Principles). The same is true for Federal Government audits. Use an accountant who has been there done that. under the contract ***Almost all cost reimbursement contracts contain an audit clause, so make sure your claimed costs meet the test of allowability***.

CLAUSES IN SUBCONTRACT AGREEMENTS WHICH SHIFT RISK General contractors have become expert at risk shifting, especially as so many do not self-perform work and basically broker out the work to craft contractors. So the idea for them is to transfer as much of the risk to the subcontractor as possible, with no or little residual risk to themselves. Some of the risk shifting mechanisms for the which the subcontractor should be wary are:

- **Grease trap scope of work**. That is, scopes of work which go beyond the plans and specifications and attempt to impose upon the subcontractor responsibility for performing at their expense any potentially grey or ambiguous areas, especially in **design assist and construction documents not completed scenarios**; and often even if the subcontractor has not actually participated in the design. As previously indicated, it is up to the subcontractor to attempt to clarify its scope of work, and limitations and exclusions, to the maximum extent in its scope letter which is then integrated into its subcontract agreement.
- **Flow down**. The provisions of the general contract under this provision flow down or pass on to the subcontract agreement. But how about examining the general contract for the following before just cavalierly accepting this provision:
  - The amount of liquidated damages. If your part of the work is only 10% of the project, should you accept full measure of LDs that may be in the thousands of dollars daily?
  - The no damages for delay clause. Are you willing to buy into this clause

- Broad form indemnity agreements
- **Venue and choice of law clauses outside your jurisdiction.** Please pay attention – if you are a South Carolina contractor doing work for a Indiana General Contractor, and you agree that all disputes will be resolved in an Indiana Court under Indiana Law, do you understand the enormous burden this would put on you?
- Warranty provisions which cover design for which you had no responsibility. And how do you protect yourself on when warranty begins? If you have delivered and installed equipment and then the project is delayed six months, make sure you do not have the duty to pick up the tab for any additional warranty time.

- **Pay when paid clauses for progress payments**. Object to such clauses and refer to the local Prompt Payments Act.
- **Pay when paid clause for final payments**. Object and refer to Prompt Payments Act.
- **More limited notice requirements** than the general contract. The proposal letter should state that the subcontractor is entitled to a reasonable period for providing notice of changes and other acts which are the responsibility of others.
- **Lien waivers** (Waivers of claims agreement to not file a lien on the project) on pay request as a condition of payment
- **Scheduling**. It is not unusual for the subcontract to require the subcontractor to perform **"as directed**" by the general contractor and to work overtime to make up any delays. The subcontractor should limit this in it proposal by stating that such direction shall be consistent with work flow and the critical path schedule, which the subcontractor has a right to participate in both the formation and its updating. And that to the subcontractor is entitled to an equitable adjustment to the extent any delay or lack of progress is not the responsibility of the subcontractor.
- **Backcharges**. The general contractor may attempt to apportion backcharges against the subcontractor even if not at fault. Require proof that backcharge was caused by the subcontractor.
- **Hold Harmless clauses**. A hold harmless clause is one which requires the contractor to hold the owner harmless from any claims made against the owner due to any wrongful act under the contract. The issue becomes intolerable and unacceptable when the owner attempts to include in the hold harmless clause acts for which the contractor is not responsible and for which the owner or others are liable. Review those clauses and have your insurance agent do the same.Though the clause may actually be unenforceable in your state, it is nevertheless a cause of needless conflict and potential litigation.
- **We Will Carry the Mail for You Clauses**. The subcontract agreement may have a clause which is basically a liquidating agreement, whereby the subcontractor

agrees that the general contractor will prosecute any claims against the owner and make all decisions relating thereto and charging the subcontractor legal and consulting fees for that service. The polite response is: "Thanks but you are much too kind. We will take care of our own claims."

SUPPLEMENT - CONTRACTS FOR DUMMIES AND DISCUSSION PROBLEMS

Some Simple Guidelines About Contract Issues. The following is, as indicated, a supplement to the foregoing, and sets forth again a few of the key principles of construction contracts. It can be used as just a primer on some of the basics of understanding contracts, never to supplement the advice and wisdom of counsel. It is in large part a summation of the foregoing but can be used as a simple, stand alone primer for young superintendents. As previously noted, the language of the contract may appear to be simple, or a given law may not appear to be complicated, it is always the application of the facts to the contract language or to the law that becomes confusing and sometimes quite complex. And a very old saw is that reasonable men may differ . . .and often do. And for that reason, please realize that these guidelines are just that . . .Adams ribs which must be fleshed out with the circumstances of each contract and each individual issue involved in each individual contract. This is where your experienced construction attorney and/or consultant comes into play – helping in understanding how the particular contract provision(s) or precept of law applies to this particular **set of facts**. Operative term is "facts". Don't try to change them, play games with them, alter documents or cost reports. Where the **"facts**" are concerned, be like Caesar's wife, **above reproach**. Or as we say in the South, **our credibility should be as clean as a hound's tooth**. It is okay for you to have a different understanding of or conclusion of the facts, but the facts should be accurate and not in dispute. ***Senator Daniel Moynihan said "Everyone is entitled to his own opinion.*** But not their own facts." The following are just a few of the contract issues that arise frequently.

FORMATION OF CONTRACTS

A contract is an **AGREEMENT** between at least two parties. It is the consequence of and offer and acceptance (with the intention that there will be ***a meeting of the minds of the parties***):

An **OFFER** (or it may be called a bid, or a tender). Remember, an Invitation to Bid or an RFP is not an offer. Those are simply asking the contractor to make an offer. The IFB or RFP can control or dictate the terms of an offer (such as the statement of work, terms and conditions, how long it will remain open for acceptance), but it is not an offer itself. It can even provide that if the offeror does not meet the specified terms the bid or offer must meet, it will be considered non-responsive and not acceptable.

- In ***design-bid-build*** federal and state advertised procurements, there are no negotiations involved. The owner puts out a set of bid documents and the contractor fills out the required forms and sends in with a price. If the contractor doesn't like the terms and conditions, that's just tough. There is no room to negotiate or to submit a bid with conditions. These contractual arrangements are often called "contracts of adhesion" or power contracts, because it is a "take it or leave it" scenario. If the contractor does not like the terms and conditions, tough! And if his offer varies from the terms of the invitation to bid, it will probably be considered to be non-responsive and rejected. He either accepts them or doesn't make an offer. And the contractor has not been a party to preparing the design and other documents so has no depth in what the intent of the designer or owner may have been in the various provisions. It is these procurements to which the Spearin Doctrine applies. In some cases, the contractor may be allowed to submit equipment substitutions in advance of the bid (follow the rules strictly) and in most can make value engineering proposals post contract.

- In ***negotiated procurement*** and some ***federal two step programs***, there is usually room for give and take between the owner and the contractor, and often the contractor's offer only comes after some lengthy discussions between the parties concerning design and other issues. So in these type contracts the contractor has some power, if not equal at least the power of influence, over the terms and conditions and other elements of the contract.

An **ACCEPTANCE** of that Offer. The acceptance must equal the offer, meaning that the offeree can accept no more than was offered, or accept on different conditions than contained in the offer. This attempt would be a rejection of the offer and constitute a counteroffer. In negotiated contracts, as indicated above, often there have been numerous discussions between the parties and the offer is a result of those discussions. It is for this reason that the Spearin Doctrine

normally does not apply to these arrangements as the contractor has the opportunity to discuss the design and terms and to seek clarification and have changes made. The negotiated arrangements are the result of BARGAINING and just because one party got the better deal does not invalidate a contract.

- **Bid protests**. In both advertised design-bid-build and Two Step Procurements, the contractor must comply with certain criteria as to responsiveness, responsibility or other criteria, and a failure to do so would make it non-responsive. This has become a fertile field for legal contests of the compliance of a contractor's bid (offer) with the criteria set forth in the advertisement or request for bids.
  The government does not have the right to accept a non-conforming bid or proposal, so don't even give it a try. On the other hand, be sensitive to the fact that a lot of contractors do try to sneak by as non-compliance may be the secret to a lower bid. So, in these procurements, if you are not the low bidder, you may wish to do a little checking to see if the low bidder or the successful offeror in a two step procurement was perhaps non-compliant and therefore non-responsive.

MEETING OF THE MINDS So this is what offer and acceptance is all about. It is about the meeting of the minds of the parties so they know what is to be done, when and by whom, and what the basis of acceptance is, the conditions of payment. A meeting of the minds – *clarity of the documents, clarity of the scope of work, clarity of risks* – is a leg on the stool of successful projects. It is about reasonable expectations: each party should have a clear understanding of the enforceable expectations under the contract. Often, especially in subcontracting, a scope letter helps to provide that clarity: a scope letter is not some craftily written legal document to escape liability but to make sure the parties clearly, lucidly and unequivocally understand who does what, and when – and sometimes what a party is not to do. There are several *opportunities to seek clarification* or have understanding of the meaning of the documents so there can be a meeting of the minds:

- The estimate phase where the estimator has a duty to seek clarification of obvious deficiencies or ambiguities in advertised bid procurements.
- Work Sessions in Negotiated Procurement
- Pre-bid conferences
- Scope letters by the estimator clarifying and setting forth various responsibilities

- Turnover meetings between the estimator and field supervisory personnel
- Pre-construction conferences
- Routine partnering meetings
- The Preparatory phases in the three step quality program
- Progress meetings
- Desk top reviews before installation work begins

ILLUSTRATIONS and DISCUSSION PROBLEMS

1. **Non-Responsive Offer.** The Federal Government issues an Invitation for Bids for the renovation of the barracks at a local post. This advertised procurement calls for the demolition of the existing central HVAC system and replacement of all ducts and equipment per a specified (or equal) central HVAC system. Contractor Friggles submits the low bid, which is based on a ductless and split duct system. Friggles explains that the system will have lower initial installation and operating and maintenance costs than the traditional HVAC systems. If you were a competing contractor, do you believe you have the basis of challenging (protesting) Friggles bid and if so, on what grounds. What would Friggles defense be? How could Friggles have handled this differently?
    a. **Note:** In competitive bidding, the concept is for the documents to be of such a nature that all the bidders are competing on an equal basis, each having a clear picture of what is required and bidding on that. If Friggles bids on a different system he would be considered non-responsive. Friggles might contend that his system is equal to or superior to that specified.
    b. **Friggles** could have submitted its system in advance of the bids and asked for an addendum to permit it to be considered. Friggles might have bid on the specified system and then offered the ductless system as a value engineering proposal.

2. **Counter Offer.** Assume the same scenario as above except that this is a design and build project, and the contractor submits a proposal which includes a central HVAC system. The Owner accepts the proposal stating: "Your proposal and price are accepted; however, the contractor will install a split duct system in lieu of the central system." Is there now a contract between the parties?

a. Instead of the Owner changing the DUCT system, assume that the contractor's proposal did not contain a no damages for delay clause. The Owner accepts the contractor's proposal but adds its own general conditions which contains a No Damages for Delay Clause. Is this a counteroffer? How would you handle? What if you sign the contract with the no damages for delay clause? Are you bound by it?

3. **Promissory Estoppel** Assume that Subcontractor DiddlyDeeDum submitted its proposal to do the mechanical work to the General Contractor, Friggles. Friggles used Diddly's price in formulating its winning proposal. Now Friggles issues a subcontract agreement to Diddly which Diddly refuses to sign because of a variety of reasons, forcing Friggles to procure the mechanical work from another contractor at a much higher price. Does Friggles have a cause of action against Diddly? How could each party handle this scenario to prevent such a financial catastrophe?

4. **Accord and Satisfaction.** Friggles, a General Contractor, has a contract with the local hospital for the construction of a new (greenfield) research facility. The hospital issues an RFP for the addition of a live animal section. Friggles submits a price of $2,675,989 which is negotiated and subsequently a change order is issued pursuant to the negotiations in the amount of $2,567,996. Friggles and the Hospital both execute the change order. As work on the change progresses, Friggles begins to realize that the rest of the project is being affected very negatively and the schedule is going to slip by months. Production is going to hell because the change order work is draining off manpower from the basic contract work, and the sequence of work has been changed. Friggles submits a claim for additional compensation due to the impact of the changed work. Please discuss the issues involved, and your recommendations for how Friggles should have handled this situation.

    a. What is the accord and satisfaction? Did it include time? If it did not include schedule impact, was there an accord and satisfaction as to schedule or impact?
    b. Is the contractor ever able to reprice a change order because he made a bad deal?

THE CONTRACT SPEAKS FOR ITSELF

So what are the rules of interpretation of a contract? The first one is that **"the contract speaks for itself".** And it normally **means what it says.** If the contractor is asked: so what did you believe was meant by the requirement for 90% compaction and his response is: "Well, I figured in that area that anywhere around 87% up was okay." The Owner or the engineer will respond by saying: "The contract speaks for itself. It said 90%. It did not say 87%. So 90% it is."

If the contractor says: “Well, I didn’t give written notice but I told their engineer that I was going to file a claim one day.” The owner will respond as follows: “The contract speaks for itself. The contract specifies written notice that will be given within 7 days of the event giving rise to the claim.” If the contractor’s proposal to substitute equipment comes a couple of months after NTP and is rejected because it was made late, and the contractor says: “Well, it took a lot of time to put together my request for substitution and I figured it wouldn’t hurt if it was late”, the owner will respond: “The contract speaks for itself. It states that such requests shall be made not later than ten days after Notice to Proceed.”

As everything, there may be exceptions, and certainly there are other rules of interpretation which may be used in clarifying the meaning of contract language. But begin always with getting a good handle on what the contract actually says, not what you what it to say.

Let’s consider the exceptions for a moment and the concept of project management. If the goal of project management is a successful job, both for the owner and the contractor, then that goal should be translated into performance and that translates into contract compliance. So, take the issue of Written Notifications. In the Federal changes clause, it may be that a notification before final payment will be honored. And the same could possibly be true in the commercial sector. But is that good project management? Does that build trust? Does that get you mileage at a negotiation or is that likely to put you in a legal dispute process? More likely the latter. Or quality where the installation doesn’t fully meet the specification requirements, but you argue that it is “close enough”. You might get by the inspection but is this consistent with your mission statement of performing in such a manner that you will always be the preferential contractor for this customer?

The point is that often there are conflicts between what one might be able to get away with and business considerations that relate to values and principles. In so many instances, when a contractor discovers it is losing money on an activity, he starts scrambling Of course, the contractor is entitled to rely on the rules of contract interpretation previously discussed but playing games with those rules to try to slip by without fully honoring contract obligations is highly discouraged. So, at least begin with the rule that the contract speaks for itself. Then of course, you have the right to read it reasonably, as a whole, in light of industry practice in given instances and against the drafter if a prescription specification.

THE DOCTRINE OF FAIRNESS

At least implied in every contract is the duty to be fair. Under the concept of freedom of contract, the parties are entitled to negotiate pretty much any terms they wish, even if the terms are overbalanced in favor of one of the parties, assuming such terms are not in violation of local or federal law. For example:

- In some states no damages for delay clauses are not acceptable
- And in some states, indemnity clauses which attempt to shift the burden of damages caused by others than the contractor are also considered unenforceable.
- Liquidated damages which are clearly excessive amounting to a penalty are unenforceable
- Concealment of material information is considered a breach of fairness.

And **during the course of performance** of the contract, the parties should treat each other with fairness. For example:

- The exceptions to the No Damage for Delay Clause are based on principles of fairness and good faith: it is in good faith for an owner to unreasonably interfere with the contractor's prosecution of the work without compensating him for resultant damage. In fact, the owner has an implied covenant to not unreasonably interfere with the contractor's prosecution of the work.
- It is unfair to charge the owner excessive costs for changes or to bring a claim which absolutely has no)merit (in federal law and some states this is a criminal act). On the other hand, for an owner to unreasonably deny the contractor's justified time extension requests is unfair for it is a violation of the implied covenant to not unreasonably interfere with the contractor's prosecution of the work.
- It is unfair for the owner to unreasonably withhold funds from the general contractor and the same for the general to without unreasonably from the subcontractor. These can be violations of the contract, the state's Prompt Payment Act, and in some cases depending upon the circumstances be a deceptive trade practice.
- The duty to mitigate damages is based on the duty to treat the other party with fairness. It would be unfair for a contractor to hold onto resources when there is a delay on a project when the contractor has the ability to use those resources on other projects with no significant financial impact to him. It would be unfair for an owner to withhold access to a work site for an unreasonable period of time.
- Bottom line: the duty of fairness is to exercise your rights and duties in such a manner to facilitate, not impede, the performance of others.
- Assume the contractor has the duty to provide a fireproof electrical panel at a barracks facility. The contractor can not locate one on the market which meets specifications and requests instructions from the owner as to how to meet this requirement and the acceptance requirements for it. The Owner responds that this is the contractor's responsibility and refuses to provide clarification or instruction. This process goes on for a few months and finally the contractor obtains a design which he implements and then installs the panel. The

contractor requests a time extension which is denied by the owner. The contractor's position is: "I had the duty to provide a fireproofed panel. I know that. I needed help on the design that would work since the manufacturers did not provide such a panel and I needed to know the criteria for acceptance. Mister Owner, you had that information and could have provided it to me and didn't." This would be bad faith on the part of the owner, the same as when the owner does not provide direction, as required by the contract, in how to handle a differing site condition discovered by the contractor.

THE DOCTRINE OF REASONABLENESS

Another implied obligation of the parties is to perform their functions in a reasonable manner. "Reasonable" is one of those apparently non-quantitative terms that lawyers love to play with. Lawyers would give a definition that goes like this: what would a reasonably prudent owner (or contractor) do under the same or similar circumstances. Now do you understand that definition? I don't. So, let's take some illustrations and see what we come up with:

- A contractor submits an RFI to the owner's representative with a note that it requires a response within 24 hours. The owner's representative responds that it will take him several weeks. What is reasonable from a contractual point of view and how do we make that determination?
  - Begin with the construction schedule. What activity is affected by this RFI? Once it is answered, how long will it take to implement, including any procurement cycle? At what point in time, in not answered, will work sequence or critical path be affected? In other words, the contractor can and should define through this kind of research what is a reasonable time and thus what is unreasonable.
  - On the other hand, the engineer may say that this is a very complex issue and it will reasonably take that long to research and come up with a redesign. And that may be very reasonable. But the test is not how long it will take him reasonably to come up with the answer, but what is a reasonable duration without impacting the schedule and flow of work. The test is governed by project conditions and not the workload of the engineer.
  - However, what if the contractor should have found this problem during a desk top review weeks before, instead of in the field when he discovered a drawing conflict. There is then another duration of "reasonableness" and that is the reasonable time it took for the contractor to discover the problem and then bring it to the attention of the engineer.

- Or what if the contractor's equipment submittal is rejected because the engineer's preference for one brand over another, instead of any contract compliance reasons. On a project with the Navy at Beaufort, the engineer turned down an "or equal" submittal only because the manufacturer was not favored by him, not because of any non-conformity. Is this unreasonable? The contractor again can quantify the term. If his research demonstrates that the equipment is in compliance and the contractor had the right to submit an or equal, then a rejection would be unreasonable.

- Often there is disagreement between the contractor and the owner regarding substantial completion, the definition of which is the facility is complete to the point of purpose intended. If it is and the owner refuses to grant a certificate of substantial completion, it would be unreasonable, as long as the contractor can prove that he had indeed completed to the point that the owner can actually use the facility as originally intended. If a ball room, and the mechanical equipment is performing in such a manner as to keep it cool or warm, but making so much noise that the guests can't hear themselves talk, then the facility is not ready for the purpose intended. In this situation failing to grant a certificate would be reasonable, but on the other hand, if the facility was ready except for repainting a couple of walls in the storage room, a refusal to grant a certificate would be unreasonable.

"Reasonable" and "fair" are both implied obligations, and both seem to be subjective and fuzzy. But both can be quantified to some measureable extent. They are not subjective or personal ("You are just the most unreasonable owner I have ever met!".) and the more they are fleshed out in some measurable terms as indicated above, the closer we come to understanding their meaning and how we can use those terms in project management. For example, instead of saying to the engineer: "It would be unreasonable or unfair for you to take two weeks to respond to the RFI", you can quantify the reasons that an answer is needed more urgently and demonstrate factually those reasons and normally have a greater degree of success in getting the answers you need when you need them. The same for "fairness". Instead of accusing the owner of being unfair, by quantifying the impact of a dilatory decision or some action which interferes with the prosecution of the work you have a much better shot at being successful in managing the actions and decisions of the owner.

The contractor should accept that if it is to be successful, it must continue throughout the project to manage for as much clarity as possible, always mindful that a "meeting of the minds" is the essence of contract law.

AUTHORIZED REPRESENTATIVE

Federal and AIA contracts alike provide that only "authorized representatives" can bind the government contractually. But that word "authority" can be broken down into several components:

- **Actual Authority**. Means what it says. The contracting officer has a warrant giving him the authority to issue change orders up to $50,000. He has the actual authority to do just that, and not a dime more. And he has the actual authority to administer the contract within the parameters of laws and regulations (for example, he does not have the authority to permit a deviation from the contract with a credit for the deleted work) A resident engineer may have the actual authority to review submittals or perform inspections but no authority to change the contract. **So, there is actual authority and limitations of actual authority.**

- **Implied Authority**. The resident engineer who has the actual authority to inspect installations has the implied authority to reject defective work. If there is actual authority, there goes along with it the implied authority to carry out the functions set forth in the actual authority. But one cannot push that boundary too far, as shall be seen below.

- **Apparent Authority**. In the private sector, if a resident engineer with only the actual authority to conduct inspections, directs the contractor to perform extra work, he has done so without authority and if the contractor does the extra work he does so at his peril. But if the engineer has been directing the contractor to perform extra work throughout the project, the contractor may assume that he has the actual authority to do so as his actions are always approved by the owner. This is known as "apparent authority" which normally results from the owner's actions which seem to hold out the representative as having the actual authority to bind the owner. This concept is based on the concept of reasonable reliance and fairness , in that the contractor has relied on the actions of the owner who has held out the representative as having authority to issue changes. **However**, the doctrine of apparent authority **does not** apply to **Federal contracts** and may not in institutional procurements in your state. If the government representative does not have actual authority, then case closed. So, the contractor should always seek out the limitations of authority of all the representatives of the owner on the project to remove all doubt.

    - But what if the federal resident engineer rejects wrongfully work the contractor has performed resulting in rework and additional cost. Isn't this the same as ordering extra work? And the approach by the contractor is simple: When a resident engineer or inspector rejects work the contractor feels was installed

properly, the contractor provides notice to the contracting officer or authorized representative of the owner stating the circumstances and requesting that a change or construction change directive be issued. If there is no response, a last resort to protect the contractor would be another letter stating the circumstances, objecting to the rejection, but stating that the so called corrective work will be done for the sake of the schedule but that it is being done under protest.

INSPECTIONS AND ACCEPTANCE OF WORK

So, the owner's representative inspects the installation and does not take issue with it, and the work is paid for on the next pay application. Now at Commissioning or TAB, the engineer notices that the work is non-compliant. The contractor protests saying: "Hey, you inspected and found no problems I was paid and there were no withholdings. What is it with you guys anyway!" What it is with those guys is that the federal and AIA contracts largely provide that "it ain't over until it's over", meaning that if prior to final a defect is found, the contractor still has the burden of correcting the deficiency and if after Substantial, then it may be a warranty item. The concept is that the contractor is responsible for contract and quality compliance and the owner is given until the last tick on the clock to make sure those obligations are fulfilled. And as one inspector said who had okayed an installation months before and then rejected it at the final inspection: "Because I was dumb six months ago doesn't mean I have to stay dumb." Please note that if the owner requests the contractor to uncover work for a re-inspection, if it turns out that the work was properly installed, the owner is responsible for the extra cost incurred by the contractor. Otherwise, the contractor bears that cost.

The same concept applies to submittals today, which the contract provides are reviewed "for information". However, if there are deviations from the contract documents and if the contractor calls out those deviations very clearly and the submittals are not disapproved, the contractor may have a strong argument that there has been an approval of the drawings, even with their deviations. Even so, the owner, especially if this is a federal project, could ask for a credit if the product is in any way inferior to that specified.

SUBSTANTIAL COMPLETION: A certificate of substantial completion is basically stating that the project is completed to the point it can be used for the purpose intended; a fertile ground for disputes. If there is a significant noise in the air conditioning in the ball room but every other room in the facility is spot on, no problems. Is the project completed to the point of "purpose intended" if the noise in the ball room would be disruptive to the people who would use it? If there is some water intrusion from several windows? What about most of the windows? What if the water intrusion is very slight and only during major storms? Is the building

completed to the point of being used for the purpose intended? These issues create a tug of war between the owner/owner's representative and the contractor. And there may be a lot at stake: substantial liquidated or actual damages. The loss of revenue by the owner because the ball room can't be used or would create some anguish on the part of the attendees from the noise if it were used. These are great questions for the attorneys to try to resolve.

But for the contractors and owners, legal issues don't build buildings and achieve purpose intended. The parties should simply realize that such issues may arise and emphasize a preventive approach, best implemented by the three step quality program (Preparatory, Interim, Final) to assure that each phase of the project is performed in accordance with the contract documents, periodic testing is performed and corrections made as required.

Thomas Frisby III 9/23/15 12:51 PM
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