Fundamentals of Construction Contracts:

Understanding the Issues

This manual was originally created for the seminar
Fundamentals of Construction Contracts: Understanding the Issues
in Kansas City, Missouri, on December 7, 2011.

MAIL: P.O. Box 509 Eau Claire, WI 54702-0509 • TELEPHONE: 866-352-9539 • FAX: 715-833-3953
EMAIL: customerservice@lorman.com • WEBSITE: www.lorman.com • SEMINAR ID: 382810

Fundamentals of Construction Contracts:

Understanding the Issues

Prepared By:

Gregory S. Gerstner, *Seigfreid, Bingham, Levy, Selzer & Gee, P.C.*
J. Drew Marriott, *Miller Schirger LLC*
Stephen R. Miller, *Miller Schirger LLC*
Christopher J. Mohart, *Polsinelli Shughart PC*
Heather F. Shore, *Brown & Ruprecht, PC*
Daniel R. Zmijewski, *Miller Schirger LLC*

MAIL: P.O. Box 509 Eau Claire, WI 54702-0509 • TELEPHONE: 866-352-9539 • FAX: 715-833-3953
EMAIL: customerservice@lorman.com • WEBSITE: www.lorman.com • SEMINAR ID: 382810
Kansas City, MO • December 7, 2011

LORMAN EDUCATION SERVICES:

A Company With a REPUTATION for SUCCESS

Are you looking for additional ways to receive training and continuing education?

LIVE AUDIO CONFERENCES:

90-minute live audio conference from the convenience of your own home or office. Receive up-to-date information on the latest industry issues that affect your business. A complete listing of upcoming live audio conferences Is available at www.lorman.com/audio-conference.

MEMBERSHIPS:

Lorman has created a collection of industry-specific websites dedicated to the enhancement of the business professionals we serve. These membership websites, collectively called the Lorman Business Education Network (LBEN), benefit professionals by providing the most up-to-date information pertinent to their careers. Bronze Membership includes access to expert advice through newsletters, articles, white papers, forms, tools and affiliate discounts. In addition to these free benefits, several of the LBEN sites have Silver and Gold Memberships available that allow members to receive free and discounted training. Visit www.lorman.com/membership for more information.

INDUSTRY ARTICLES:

Each of Lorman's industry-specific websites publishes articles from leading experts who report on law changes, updates, news and industry trends. Create your Bronze Membership Account today to access all of these great resources (see the Memberships section)! If you would like to become an author visit www.lorman.com/author for more information.

PARTNERSHIPS:

Do you belong to a state or local bar, society or association? Become a Lorman partner and your organization could earn commission and discounted training and products. Visit www.lorman.com/contact/associations.php for more information.

CERTIFICATES:

Earn your Human Resources Professional Development™ certificate, Construction Compliance™ certificate, or Certificate of Banking Compliance™ by attending a Lorman-sponsored seminar or live audio conference. Our professional certificates were developed in conjunction with leading experts in their respective industries. for complete information on these certificates, please visit www.lorman.com/certification/hrpd, www.lorman.com/certification/cc or www.lorman.com/certification/cbc.

ON DEMAND:

Looking for a convenient way to fulfill all of your continuing education needs? OnDemand webinars allow you to view 90-minute programs From the comfort and convenience of your home or office. All you need Is an Internet connection. Accessible 24 hours a day, 7 days a week – you can view, pause, rewind and replay at your convenience. Visit the OnDemand library at www.lorman.com/ondemand.

BOOKSTORE:

Can't find the seminar you are looking for? Search Lorman's extensive resource library containing thousands of audio recordings, books and reference manuals. Visit www.lorman.com/bookstore.

"The ability to learn faster than your competitors may be the only sustainable competitive advantage."

— Arie de Geus

Table of Contents

Fundamentals of Construction Contracts: Understanding the Issues

Table of Contents

Table of Contents

Professional Biographies

Gregory S. Gerstner

- Attorney with Seigfreid, Bingham, Levy, Selzer & Gee, P.C.
- Practices in contract drafting and review, and handling all types of construction-related disputes
- Faculty member of AAPA's Institute for Facilities Management
- Written and lectured on numerous articles related to construction law
- J.D. degree, with distinction, The University of Iowa College of Law; B.S. degree, The University of Iowa
- Can be contacted at 816-421-4460 or ggerstner@sblsg.com

J. Drew Marriott

- Attorney with Miller Schirger LLC
- Focuses practice on business litigation, construction law and construction litigation, representing all parties involved in the construction process
- Active member in the Kansas City Metropolitan Bar Association, Missouri Bar Association, Kansas Bar Association and the American Bar Association
- J.D. degree, Saint Louis University School of Law; B.A. degree, with honors, University of Chicago
- Can be contacted at 816-561-6500 or dmarriott@millerschirger.com

Stephen R. Miller

- Attorney with Miller Schirger, LLC
- Represents contractors, subcontractors, owners and design professionals
- Counsels clients on all aspects of the construction process, including design and preconstruction issues, contract negotiation and formation, construction administration, claim presentation, affirmative action programs, surety relationships and dispute avoidance
- Chosen as Best of the Bar and Missouri/Kansas Super Lawyer for construction law
- Undergraduate and law degrees, University of Notre Dame
- Can be contacted at 816-561-6500 or smiller@millerschirger.com

Christopher J. Mohart

- Attorney with Polsinelli Shughart PC
- Concentrates on construction litigation
- Substantial experience in both state and federal courts handling all phases of litigation and has successfully tried several lawsuits
- Member of The Missouri Bar, the Kansas Bar Association and the Illinois State Bar Association
- J.D. degree, cum laude, Boston College, and was a member of the national moot court team; B.S. degree, magna cum laude and Phi Beta Kappa, American University
- Can be contacted at 816-360-4394 or cmohart@polsinelli.com

Heather F. Shore

- Shareholder with the law firm of Brown & Ruprecht, PC
- Practices in the areas of construction litigation, surety law and commercial litigation
- Selected to Corporate Counsel Edition – Super Lawyers; Super Lawyers - Construction; Top 50 Women Lawyers in Missouri and Kansas; The Best Lawyers in America® for construction litigation
- Wrote "Design-Build on Government Projects," Chapter 8 in The Architect's Guide to Design-Build Services (G. William Quatman, II, et al. eds., 2003), as well as a number of published articles for the American Subcontractors Association's Greater Kansas City Chapter and the National Association of Women in Construction's Greater Kansas City Chapter
- Co-wrote General Construction Contracts with Delegated or Shared Design, in SHARED DESIGN 7-1 to 7-38 (Michael T. Callahan, ed., 2011)
- Frequently teaches construction-related courses
- J.D. degree, Loyola University Chicago School of Law; B.S. degree, University of Colorado at Boulder
- Can be contacted at 816-292-7086 or hshore@brlawkc.com

Professional Biographies

Daniel R. Zmijewski

- Attorney with Miller Schirger LLC
- Practices in the area of complex and construction litigation
- Writer of “Recent Developments in Products, General, and Consumer Liability Insurance,” Tort Trial & Insurance Practice Law Journal, Winter 2011
- J.D. degree, University of Kansas School of Law; B.A. degree, The George Washington University
- Can be contacted at 816-561-6500 or dzmijewski@millerschirger.com

Lorman Education Services is a registered provider with The American Institute of Architects Continuing Education Systems (AIA/CES). Credit(s) earned upon completion of this program will be reported to AIA/CES for AIA members. Certificates of Completion for both members and non-AIA members are available upon request.

This program is registered with the AIA/CES for continuing professional education. As such, it does not include content that may be deemed or construed to be an approval or endorsement by the AIA of any material of construction or any method or manner of handling, using, distributing, or dealing in any material or product.

Questions related to specific materials, methods, and services will be addressed at the conclusion of this presentation.

Learning Objectives

At the end of this program, participants will be able to:

- You will be able to describe the recent developments in the arbitration of construction disputes.
- You will be able to explain delay, disruption and differing site condition claims.
- You will be able to identify risk management issues.
- You will be able to review bonds.

Review of Basic Contract Principles

Prepared and Presented by:

Heather F. Shore
Brown & Ruprecht, PC

CONTRACT FORMATION AND INTERPRETATION: *UNDERSTANDING THE ISSUES*

I. Review of Basic Contract Principles:

A. Contracts.

1. Definitions.

A contract is formed when one party makes an offer to do something and the other party accepts that offer. The "something" can be an agreement, obligation, or legal tie by which a party binds itself, or becomes bound, expressly or impliedly, to pay a sum of money or to perform or omit to do some certain act or thing. Courts enforce contracts in accordance with state law.

2. Contract Types.

There are two basic types of contracts; express and implied. An express contract specifically sets forth offer, acceptance, and the consideration. It may be either oral or in writing. An implied contract is implied in fact by the words and conduct of the parties, or implied in law. An implied in fact contract exists if the court finds that the parties intended to contract as based on their actions, where there are circumstances which, according to the ordinary course of dealing of the parties, establishes a common understanding. *Kosher Zion Sausage Co. of Chicago v. Roodman's, Inc.*, 442 S.W.2d 543 (Mo. App. 1969). An implied in law contract is one made for the parties by the courts to assure that one party to an obligation receives what his actions merit and the other party to the obligation is not unjustly enriched. Express or implied, every contract must contain all requirements of a valid contract. The omission of a material element from a contract renders the contract unenforceable because there has been no meeting of the minds of the parties.

3. The Five Requirements of a Valid Contract.

(a) The Necessary Elements.

The elements of a valid contract are: (1) parties competent to contract, (2) a proper or lawful subject matter, (3) the exchange of consideration, (4) the mutuality of agreement or assent on both sides, and (5) the mutuality of obligation.

A contract is made at the time the last act necessary to its formation is done. It is usually completed at the place where the offer is accepted. Thus, if a contract is made by telephone, it is made where the acceptor speaks. While the existence of a contract is question of fact, whether a certain or undisputed state of facts establishes a contract is a question of law for the courts.

(b) Competent Parties and Lawful Subject Matter.

To form a contract it is necessary that there is a party capable of contracting and a party capable of being contracted with on the other side. In other words, to enter into a valid, legal agreement, the parties must have the capacity to do so. An individual who does not have legal capacity to incur at least voidable contractual duties cannot be bound by a contract. Each case involving competency to contract must be decided on its own facts. *Brown v. United Mo. Bank, N.A.*, 78 F.3d 382 (8th Cir. 1996) (applying Missouri law).

Although not a consideration when determining whether a party is competent to enter into a contract, it is also beneficial to know the form of the contracting party's business. That is, whether the outfit is a sole proprietorship, a partnership, a corporation, a limited liability company, or another form. The form of the other party's corporation can be a clue as to whether the other party sought legal advice in forming the business, or

whether the party may have the capacity to financially stand behind the contract.

(c) Consideration.

No contract exists without sufficient consideration. Consideration may be a benefit to the promisor or a loss or detriment to the promisee. It may take the form of a right, an interest, or profit accruing to one party, or some forbearance, detriment, or responsibility given, suffered, or undertaken by the other party. It may also consist of the creation, modification, or destruction of a legal relationship. Consideration is, in effect, the price of the bargain and the price paid for a promise. It is something given in exchange for a promise. Consideration is what distinguishes a contract from a gift.

(d) Mutual Assent.

There must be mutual assent or a meeting of the minds on all negotiated terms between the parties and on all the essential elements in terms of the contract to form a binding contract. *Dougan v. Rossville Drainage Dist.*, 15 P.3d 338 (Kan. 2000). In some jurisdictions, the parties must also have a present intent to be bound by their agreements. It is not necessary that the assent of both parties be given at the same time, but ultimately the manifestation of mutual assent to the bargained for exchange is necessary.

For example, a subcontractor may supply pricing to a general contractor for the general contractors' bid to the owner. The general contractor then advises the subcontractor that he is the low bidder. The general contractor asks for a bond and a liquidated damage provision. The subcontractor attends the preconstruction conference, submits a schedule of values and obtains an insurance certificate. However, the subcontractor does not commence work. The general contractor and subcontractor thereafter cannot agree on whether the subcontractor will provide a bond or agree to a liquidated damage provision. One might argue that these are material elements to the

contract and, therefore, no agreement has been formed.

4. The Requirements of Offer and Acceptance.

(a) Offer.

A valid offer identifies the bargained-for exchange between the parties and creates a power of acceptance in the party to whom the offer is made. The formation of a contract generally requires both an offer and an acceptance. *Hyken v. Travelers Ins. Co.*, 678 S.W.2d 454 (Mo. App. 1984). The primary importance of the words used by parties negotiating a contract is derived from the standpoint of whether they express and achieve mutual assent, rather than whether they constitute an offer and acceptance. Although manifestation of mutual assent ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party, a manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even if the moment of formation of the contract cannot be determined.

(i) Price Quotes.

Generally, a price quotation or proposal is not an offer to contract, but is an invitation to enter into negotiations or a preliminary solicitation of an offer. *Nordyne, Inc. v. Int'l Controls & Measurements Corp.*, 262 F.3d 843 (8th Cir. 2001) (applying Missouri law); *Christenson v. Ohrman*, 159 Kan. 565, 571 (Kan. 1945). However, if detailed enough, a price quotation can constitute an offer to contract. A contract is created in this manner if it reasonably appears that assent to the price quote is all that is needed to ripen the offer into a contract. *Nordyne, Inc*, 262 F.3d 843. Whether a communication naming a price is a quotation or an offer to contract depends on the intention of the parties, considering the facts and circumstances of each particular case. Factors relevant to determining whether a price quotation is an offer include the extent of

prior inquiry, the completeness of the terms of the suggested bargain, and the number of persons to whom the price quotation is communicated. *Id.*

(b) Acceptance.

To form a contract there must be an acceptance of the offer. Until the offer is accepted, there is no mutual assent to the terms. In language used often by the courts, there is no meeting of the minds. *Bldg. Erection Services Co. v. Plastic Sales & Mfg. Co., Inc.*, 163 S.W.3d 472, 478 (Mo. App. W.D. 2005).

Acceptance is defined as a manifestation of assent to the terms of the offer made by the offeree in a manner invited or required by the offer. Whether an offer has been accepted is a question of fact. The effect of acceptance is to convert the offer into a binding contract. *Tebeau v. Ridge*, 170 S.W. 871 (Mo. 1914).

(c) Delivery.

Delivery on a condition is ordinarily essential to the validity and operation of a contract. However, neither manual transfer nor any particular form of ceremony is necessary to constitute good delivery. Good delivery may be made by acts without words, words without acts, or by both words and acts. *Wilkie v. Elmore*, 395 S.W.2d 168 (Mo. 1965); *Smith v. Dolman*, 243 P. 323, 324 (Kan. 1926). Although parties frequently designate physical delivery as the only method by which acceptance is to be expressed, it is not an absolute necessity unless so intended. If the parties understand that the contract has been executed and is in operation, delivery will be considered to have occurred. In the absence of direct evidence, the delivery of a contract is presumed where the concurrent acts of the parties recognize the contract's obligations. Delivery of a contract is largely a matter of intention of the parties, and such delivery may be actual or constructive. *Meredith v. Brock*, 322 Mo. 869, 17 S.W.2d 345 (1929).

5. Formal Requisites.

(a) Oral Contracts.

An oral contract is ordinarily no less binding than one that is reduced to writing. However, a statute may require certain contracts to be in writing, and an oral or parol contract is unenforceable where a statute so requires. Nonetheless, problems can arise quickly if the contract is not in writing. Without a written document, the terms of the contract are not clear. And if problems develop, the parties' memories on the material terms of the agreement will inevitably vary.

(b) Written Contracts.

The "statute of frauds" specifies the types of contracts which must be in writing. Specifically, contracts that must be reduced to writing that may be applicable to construction scenarios include: contracts which cannot be performed within one year, contracts for the transfer of an interest in land, contracts for the sale of goods involving a purchase price of $500 or more, and contracts in which one party becomes a surety for another party's debt or obligation. For example, R.S.Mo. 432.010 *et seq.* (assignment of wages and certain leases); and R.S.Mo. 400.2-201 (sale of goods for greater than $500.00); and K.S.A. § 33-101, *et seq.* (*i.e.,* land leases exceeding one year in length); and K.S.A. § 84-2-201 (sale of goods over $500.00). When the contract involves these subjects or circumstances—absent a writing—no contract will be found to exist.

Some contracts require a particular form to create a promise or covenant. For these types of contract the form may be closely regulated by statute. For all other types of contract, no specific form is necessary. However, it is essential that, from a fair interpretation of the language, it appears the parties have agreed to do or refrain from doing certain acts in question.

(c) Multiple Writings.

A contract may be stated upon several different writings which are construed together. Even if the terms of the contract are not found together in one document, a complete contract may be formed from considering together letters, writings, telegrams, and, presumably, e-mails between the parties, where they in fact relate to the subject matter of the contract and are so connected with each other that they may be fairly said to constitute one document relating to the contract.

(d) Partly Written and Partly Oral Contracts.

In the absence of statute requiring that a contract be in writing or evidenced by a writing, a partly written and partly oral contract may be valid. For example, a verbal acceptance of a written offer will form a valid contract. Importantly, however, the general rule is that all preliminary negotiations and agreements are deemed merged into the final settled instrument executed by the parties. However, this does not necessarily prevent a contract from being partly oral and partly in writing. This rule does not apply, however, where it appears from an inspection of the documents themselves that it was intended to express the full and complete agreement and intention of the parties. This issue most often arises when one party claims that the parties orally modified their written contract.

6. Definiteness and Certainty.

To be enforceable, an agreement or contract must be "definite and certain" as to its terms and requirements. Or, it must contain provisions which are capable in themselves of being reduced to certainty, even if there are some formal imperfections in the contract. More simply stated, to be binding, a contract must be sufficiently definite to permit a determination by a court of a breach and the application of a remedy.

All terms of a contract should be definitely agreed upon, for the failure to agree to even one essential term means there is no agreement to be enforced. The test for the enforceability of an agreement is whether both parties have manifested an intention to be bound by its terms and whether the terms are sufficiently definite to be specifically enforced by a court. Mutual expressions of agreement may fail to consummate a contract for the reason that they are not complete, due to some essential term or terms not being agreed upon. *Wilkinson v. Shoney's, Inc.*, 4 P.3d 1149 (Kan. 2000). Nonetheless, an agreement to the essential terms of a contract does not mean that the terms must be set out in the plainest language.

Generally, an agreement to agree is unenforceable. This is because the agreement's terms are so indefinite that it fails to show a mutual intent to create an enforceable obligation. The parties' obligations must be identified so that the adequacy of performance can be ascertained. Letters of intent, for example, often run afoul of this rule. A letter of intent or an agreement to enter into a contract in the future is also not sufficient to establish a contract. Even if the parties agree that there will definitely be a contract at a later date, the preliminary agreements in a letter of intent will not be binding if the agreement therein has not progressed beyond the stage of imperfect negotiation. *See Conolly v. Clark*, 457 F.3d 872 (8th Cir. 2006). If the parties have reserved the essential terms of the contract for future determination, there can be no valid agreement. *Fedynich v. Massood*, 342 S.W.3d 887, 891-92 (Mo. App. W.D. 2011).

7. Ambiguities.

Whether a contract is ambiguous affects the court's interpretation of a contract. The fundamental rule in the construction or interpretation of a contract is that the intention of the parties is to be ascertained by the fact finder. *Berman v. Berman*, 701

S.W.2d 781 (Mo. App. 1985). *See also Liggatt v. Employers Mut. Cas. Co.*, 46 P.3d 1120 (Kan. 2002). In such cases, the court will attempt to determine the intention of the parties from the "four corners" of the contract. The fact finder is to construe the contract liberally in order to give effect to the parties' intention if it can be done consistently with legal principles. *Berman supra,* 701 S.W.2d 781. *See also McBride Elec., Inc. v. Putt's Tuff, Inc.*, 685 P.2d 316 (Kan. App. 1984). If only one reasonable meaning can be ascribed to the contract when viewed in context, that meaning necessarily reflects the parties' intent.

If the language used by the parties to the contract is plain, complete and unambiguous, then the intention of the parties must be gathered from that language, and not from any source outside the four corners of the contract. *Liggatt,* 46 P.3d 1120; *Needles v. Kansas City*, 371 S.W.2d 300 (Mo. 1963). This is true no matter what the actual or secret intentions of the parties may have been. Presumptively, the intent of the parties to a contract is expressed by the natural and ordinary meaning of the language used, and such meaning cannot be perverted or destroyed by the courts through construction for the parties are presumed to have intended what the terms say. Only when the contract language is ambiguous may a court turn to extrinsic evidence of the contracting parties' intent.

Ambiguity exists if a contract is reasonably susceptible to more than one meaning. Even if a contract is ambiguous, it may not be held void for uncertainty if there is a possibility of giving meaning to the agreement. *Lindsey v. Jewels by Park Lane, Inc.*, 205 F.3d 1087 (8th Cir. 2000). A contract may be ambiguous if it is missing terms or if it contains inconsistent or conflicting terms.

If a contract is missing terms, that is, it fails to specify all obligations to be

assumed by the parties, the law may imply an agreement to perform those obligations in accordance with the rules of contract interpretation. However, the court may nullify the entire contract if the missing terms are essential to the contract. If the contract is ambiguous because terms of the contract are inconsistent or conflicting, the court will also look to the rules of contract construction and interpretation to determine the most reasonable construction to carry out the intention of the parties. To determine the intentions of the parties to a contract, the court will look to the written contract and to any extrinsic evidence regarding the parties' intent at the time the contract was made. In resolving conflicts, the court will construe the terms of the contract against the drafter.

8. Mistakes Between the Parties.

Mistake can also render a contract unenforceable if the mistake is material. A mistake is a belief that is not in accord with the actual facts, such as an unintentional act or omission arising from ignorance, surprise or a misplaced confidence. To determine whether the mistake has a material effect on the agreed exchange of performances, the court takes account of any relief by way of reformation, restitution, or otherwise.

Mutual mistake is a defense to contract formation, however unilateral mistake is not. Mutual mistake results when both parties to a contract share a common assumption about a vital existing fact upon which they based their bargain or agreement and that assumption turns out to be false. Because of the mistake, a different exchange of values occurs from the exchange the parties contemplated. The doctrine of mutual mistake is limited to cases in which both parties were reasonable in their inconsistent interpretations of the contract and in which neither party is more at fault than the other. Also, the mutual mistake must concern past or present facts, not unexpected facts that occur after the contract is executed.

Under the doctrine of mutual mistake, a contract can be reformed (altered) or rendered voidable. It will be voidable if it can be shown that the parties were both mistaken about a basic fact which is material to the agreement. A contract will be reformed only if it is just and reasonable and will not unfairly prejudice the rights of an innocent third party. Reformation is the appropriate remedy when the mistake is one as to expression, while voidance is the proper remedy where a mistake goes to a basic assumption on which the contract was made and has a material effect on the agreed exchange of performances.

If partial performance has occurred on one side, the mutual mistake doctrine does not cancel all remaining obligations. The nonperforming party is not allowed to retain the benefit conferred by the partial performance. On the contrary, the doctrine permits the court to grant relief only on such terms as justice requires.

If only one of the contracting parties was mistaken, then the mistake is unilateral. The presence of unilateral mistake alone is not an adequate base for a reformation decree. *Sheinbein v. First Boston Corp.*, 670 S.W.2d 872, 876 (Mo. App. E.D. 1984)

9. Changes or Modifications.

Parties to a contract are not forever locked into its terms. Rather, by mutual assent, they may modify the contract's terms, provided that the modification does not violate law or public policy. There must also be sufficient consideration for the new agreement or the new agreement must satisfy a statute or circumstances making consideration unnecessary. Accordingly, parties to contract may modify or waive their rights under the original contract and engraft new terms. *Holyfield v. Harrington,* 115 P. 546 (Kan. 1911); *Shutt v. Chris Kaye Plastics Corp.*, 962 S.W.2d 887 (Mo. 1998). Further, parties are ordinarily as free to change the contract as they were to enter into it in

the first instance, notwithstanding contractual provisions to the contrary. *Twin River Constr. Co., Inc. v Pub. Water Dist. No. 6,* 653 S.W.2d 682 (Mo. App. 1983). The court may also modify the contract if one party's performance is impracticable because of the occurrence of an unforeseen event.

A valid modification of a contract must satisfy all the criteria essential for a valid contract, including offer, acceptance and consideration. *Zumwinkel v. Leggett,* 345 S.W.2d 89 (Mo. 1961). Modification of a contract requires the mutual assent of both parties to the contract. One party to a contract may not unilaterally alter its terms. *Fast v. Kahan,* 481 P.2d 958 (Kan. 1971); *Rimer v. Hubbert,* 439 S.W.2d 5 (Mo. App. 1969). Mutual assent is a requisite element in the modification of a contract, just as it is in the contract's initial creation. *Meyer v. Diesel Equip. Co., Inc.*, 570 P.2d 1374 (Kan. App. 1977). A request, suggestion, or proposal for an alteration or modification to a contract that is made after an unconditional acceptance of an offer does not affect the contract if the modification is not accepted by the other party. The minds of the parties must meet as to any proposed modification.

The original contract may provide for methods and procedures for modification; this is not unusual. The contract's method of modification is not an exclusive method, as the parties may waive the method of modifying the contract (and may waive any other right under a contract).

There is some confusion in the cases as to the necessity of consideration for the modification of a contract and some authority dispensing with it, at least under certain circumstances. *Holyfield v. Harrington,* 115 P. 546 (Kan. 1911). Many courts support the general principle that a contract modification must be supported by valid consideration. *Parkhurst v. Investors Syndicate,* 23 P.2d 589 (Kan. 1933). This is

generally true unless: (1) the modification can be supported on principles of estoppel or waiver, such as where it has been acted upon by the parties until it would work a fraud or injury to refuse to carry it out, or (2) a statute makes the consideration unnecessary.

Although a simple contract completely reduced to writing cannot be contradicted, changed, or modified by parol or oral evidence of what was said and done either prior to or at the time it was made, the parties may add written provisions (prior to any breach of the contract) to waive, dissolve, or abandon the contract or to add to it, change it, or modify it, or any of its terms. *Coonrod & Walz Constr. Co, Inc. v. Motel Enters., Inc.*, 535 P.2d 971 (Kan. 1975); *George F. Robertson Plastering Co. v. Magidson*, 271 S.W.2d 538 (Mo. 1954). In those situations, extrinsic evidence may be relied on to establish that the parties modified their agreement after its execution. Generally, however, a contract required to be in writing by the statute of frauds cannot be validly changed or modified as to any material condition therein by subsequent oral agreement so as to make the original written agreement as modified by the oral one an enforceable obligation.

If the contract is not controlled by the statute of frauds, the contract may be modified either in writing or orally by agreement of both parties. This is true even if the contract provides that it can only be modified in writing. Such a stipulation in the original contract may also become inoperative because of modification or rescission, waiver or estoppel, or an independent contract. It should be noted that some jurisdictions have statutes providing that a written contract containing a provision against oral modification cannot be changed or altered by an executory agreement unless it is in writing.

Course of dealing may also sufficient to establish modification of a contract if the circumstances surrounding the parties' conduct are sufficient to support a finding of a

mutual intention that the modification be effective and if such intention is shown by clear, unequivocal, and convincing evidence (either direct or implied).

Finally, where possible, a modification agreement should be construed in connection with the original contract. All circumstances surrounding the negotiations held prior to the execution of the modification should be examined. The modification of a contract results in the establishment of a new agreement between the parties which pro tanto supplants the affected provisions of the original agreement, while leaving the balance of the agreement intact. Although the effect of the modification is the production of a new contract, it consists not only of the new terms agreed upon, but of as many of the terms of the original contract as the parties have not abrogated by their modification agreement.

BROWN & RUPRECHT PC
ATTORNEYS AT LAW

Heather F. Shore, Esq.
911 Main Street, Suite 2300
Kansas City, MO 64105-5319
Phone: 816-292-7000
hshore@brlawkc.com
www.brlawkc.com

Public Procurement

Prepared and Presented by:

Heather F. Shore
Brown & Ruprecht, PC

CONTRACT FORMATION AND INTERPRETATION:
PUBLIC PROCUREMENT

I. Public Procurement:

A. Competitive Bidding

Many—but not all—municipalities or agencies such as states, counties, and cities require competitive bidding on public construction projects.

1. Purpose of Competitive Bidding:

The purpose of competitive bidding is to maintain integrity of the public bidding process by ensuring that the owner awards the contract to the "lowest responsible bidder" or the "lowest and best bidder" based upon the plans and specifications prepared for the project and approved by the governing administration or agencies of the state, county or local agency concerned.

2. What is "competitive bidding"?

Competitive bidding means the agency does not have discretion to pick any contractor it chooses for a public construction project. Rather, the agency must follow statutory guidelines governing State, County, or Local Government/Agency contracting. The agency cannot simply select its "favorite" contractor.

3. Missouri Statutes and Ordinances

Missouri has numerous statutes that govern competitively bid public projects. Pursuant to R.S.Mo. § 34.040, all state projects and departments must solicit competitive bids for projects that are $3,000 or more. From those bids, the department must select the "lowest and best bidder." If the project is in excess of $25,000, the department must advertise the project in accordance with special advertising requirements set forth in the

statute. There are several exceptions to the requirements of R.S.Mo. § 34.040, namely for competitive proposals, emergencies, and single source procurements.

Projects on public recreational facilities, parks and public recreational grounds in metropolitan districts are also subject to the "lowest and best bid" standard of R.S.Mo. § 34.040, as set forth in R.S.Mo. § 67.1769. Such restrictions apply to all purchases in excess of $10,000.00 used in the construction or maintenance of the facilities. Likewise, R.S.Mo. § 67.2555 governs Jackson County Missouri projects. Any county project in excess of $25,000.00 must be competitively bid.

Additionally, many cities have enacted their own local ordinances requiring competitive bidding for public projects. Some cities and municipalities now employ alternative delivery systems. Kansas City, Missouri has ordinances that no longer require the city to use the traditional "design-bid-build' model. Rather, the city can also employ design-build, competitive sealed proposals, cooperative agreements with a public or private entity, construction management services, or "any other alternative procurement method." The Kansas City code also permits the City Manager to award contracts without soliciting bids or requesting proposals "when it is in the best interest of the city."

4. Bid Selection Standards

(a) "Best" Bidder and "Blacklisting"

When a statute allows a department or agency to award the contract to the "best" bidder, the agency or department then has discretion to factor past performance into its analysis of which contractor is the "best" bidder. "Best" allows the agency to consider qualitative considerations about the bidder, and the degree to which the bid conforms to the solicitation. Factors a department or agency may consider in determining which

contractor is the "best" includes, but is not limited to the contractor's: (1) ability to perform the work, (2) bonding capacity, (3) financial condition, (4) references, (5) pre-qualification, and (6) successful prior experience on similar projects. Accordingly, the "best bid" standard gives the department or agency considerable latitude to select the contractor it is to work with among bids in relative compliance with the specifications in the solicitation. Poor performance on past public projects can result in a contractor not being selected on future projects. This can essentially result in the contractor being "blacklisted."

(b) Lowest Bidder Standards

Different public entities may be required to select contractors based on different standards. "Lowest responsible bidder," "lowest best bidder," and "lowest responsible, responsive bidder" may be the standard, depending on the applicable statute. Qualifying the "lowest bidder" allows the public entity to exercise some discretion when awarding the contract. Projects seeking the "lowest responsible, responsive bidder" looks to the price of the bid, and also to the quality of the bidder and the responsiveness of the bid. For example, the department or agency awarding the project may review the bids to determine whether any deviations in the bids give a bidder a substantial advantage or benefit, and whether there are any material variances from the bidding requirements.

However, with all of these standards, the rejection of the lowest bid must not be made fraudulently, corruptly, capriciously or without reason. Officials awarding bids must exercise and observe good faith and accord all bidders just consideration, avoiding favoritism and corruption. *La Mar Const. Co. v. Holt County, R-II School Dist.*, 542 S.W.2d 568 (Mo. App. 1976).

5. Project Checklist

In preparing to bid a public project, there are numerous considerations that should be taken into account. These considerations include:

- Pre-Qualification Requirements
- State Statutes – All Projects
- City or County Websites
- Other Special Bidding Requirements of Municipalities
- Federal Contracting Standards
- Contract's "Special Conditions" and All Bidding Instructions
- Bonding Requirements

Failing to fully investigate all of these factors may cause problems later on.

B. Problems in Competitive Bidding

1. Mistakes in Submitted Bids

Occasionally, a contractor will make a mistake in its bid for a public project. These mistakes typically fall into one or more of the following categories: clerical mistakes, mutual mistakes, and judgment mistakes. While clerical mistakes and mutual mistakes may be corrected in some situations, judgment errors may not.

A clerical mistake occurs when a contractor inadvertently makes an error in its submitted bid. This would include typographical errors. Oftentimes, the submitting contractor may correct clerical errors if the mistake was not obvious, the agreement is entirely executory, the mistake is clerical, or due to computational error or a misunderstanding of the specifications. In these situations, the contractor may withdraw its bid or rescind the contract. Conversely, if a contractor misjudges its costs, or makes

another error of judgment, the contract will likely remain in force and the contractor will not be able to withdraw its bid or rescind the contract.

2. Length of Time and Offer is Open

After a bid (*i.e.*, an offer) is made, the contractor's bid remains open for a certain period of time. The length of time that a bid remains open is determined by the bid documents. The bid documents should also indicate the manner in which a contractor will be notified if its bid is accepted. If the winning bidder is not notified of the award of the bid within the time set forth in the bidding documents, it may withdraw its bid after being awarded the contract. *J.H. Berra Cons. Co., Inc. v. City of Ballwin*, 786 S.W.2d 908 (Mo. App. E.D. 1990). If the bid documents are silent as to the length of time a bid remains open, the bid remains open a "reasonable time period" after it is submitted.

3. Increase in Price after Bid is Submitted

Sometimes prices will increase between the time a bid is submitted and when it is accepted. When this happens, contractors often do not want to honor their original bid. Although the government cannot generally force a contractor to perform the work in the contract, it can pursue other remedies including: suing the contractor, suing the bonding company, or blacklisting the company from future projects. All of these consequences should be considered before refusing to honor a bid.

4. Subcontractor Bids

In many cases, contractors bidding on a public project will subcontract portions of the work to others. In these cases, contractors generally rely on bids from the subcontractor when forming its bid to the project owner. Problems can arise if subcontractors seek to change their bids.

If a contractor uses a subcontractor's bid in calculating its bid, the contractor can sometimes hold the subcontractor to its bid under the theory of promissory estoppel. A promise which the promisor should reasonably expect to include action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. RESTATEMENT SECOND OF CONTRACTS § 90.

Considerations when determining whether the contractor can hold the subcontractor to its bid include: whether the contractor accepted the subcontractor's bid, whether the subcontractor withdrew its bid, whether the subcontractor was told that it would be required to sign the contractor's written contract, and whether the contractor suffered damages. If the subcontractor wishes to withdraw its bid made to the general contractor, the subcontractor should consider whether the general contractor relied on its bid, whether the general contractor "bid shop," and whether the subcontractor agreed to sign the general contractor's written contract.

(a) "Bid Shopping"

It must be noted, however, that a general or prime contractor's use of a subcontractor's bid in its overall bid to the public project does not constitute acceptance of that particular subcontractor's bid. "Bid shopping" occurs when the general contractor or prime contractor continues to solicit bids from subcontractors after its initial bid for the project has been selected. Although generally not illegal, bid shopping is considered unethical. Some states are passing laws requiring prime contractors to submit a list of its significant subcontractors shortly after the prime contractor's bid is accepted. Once the

prime contractor has submitted this list, there may be conditions that must be met before the prime contractor is allowed to substitute a different contractor.

5. Disqualification and Debarment

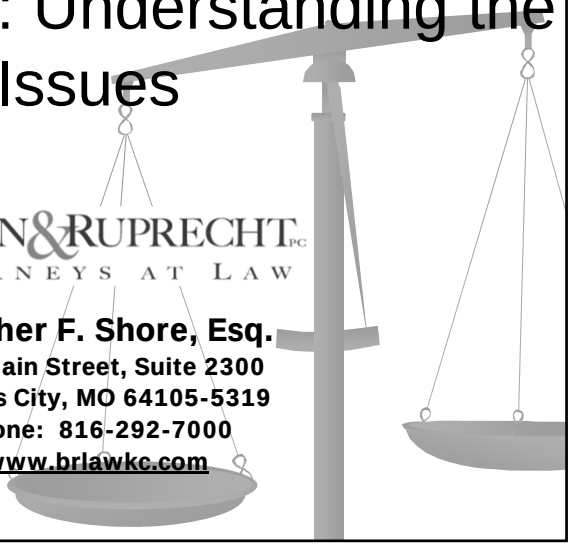
All contractors should try to avoid disqualification from public project bidding opportunities. For instance, bids should not be made conditional or qualified, and contractors should try to avoid getting on the government—or an architect's—"blacklist." All information should be accurately and completely filled out, and all necessary data and paperwork should be attached. Contractors should take time to avoid mistakes when submitting bids. Finally, contractors should pay taxes and maintain all licensing requirements.

Contractors can be excluded from public works construction projects, or "debarred," in Missouri for failing to pay prevailing wage rates as published by the Missouri Department of Labor. If convicted of failing to pay the prevailing wage, the contractor is prohibited from performing any work on any public construction project for a set period of time, typically one year. The Missouri Department of Labor maintains a public list of currently and formerly debarred contractors on its website.

6. Bid Protests

If a contractor believes that a bid was improperly awarded, it may file a bid protest. All bidders and potential bidders have standing to challenge an award of a public project. The remedy for a successful bid protest is a judicial injunction, which is when the court orders the awarding agency or department to refrain from awarding the contract. Contractors should consider the impact that a bid protest may have on future bidding opportunities.

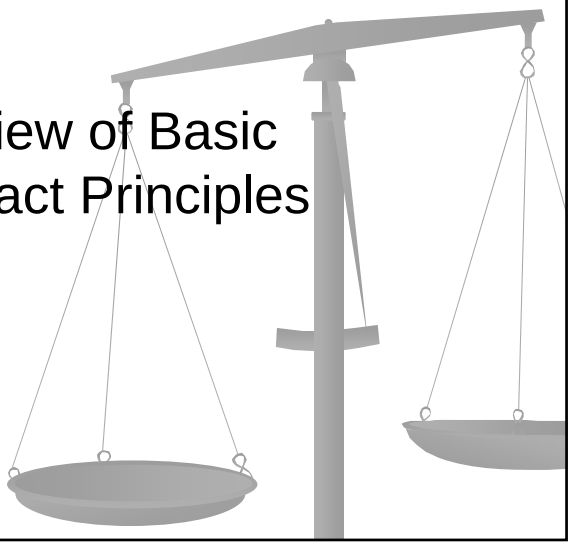
Contract Formation and Interpretation: Understanding the Issues



BROWN & RUPRECHT PC
ATTORNEYS AT LAW

Heather F. Shore, Esq.
911 Main Street, Suite 2300
Kansas City, MO 64105-5319
Phone: 816-292-7000
www.brlawkc.com

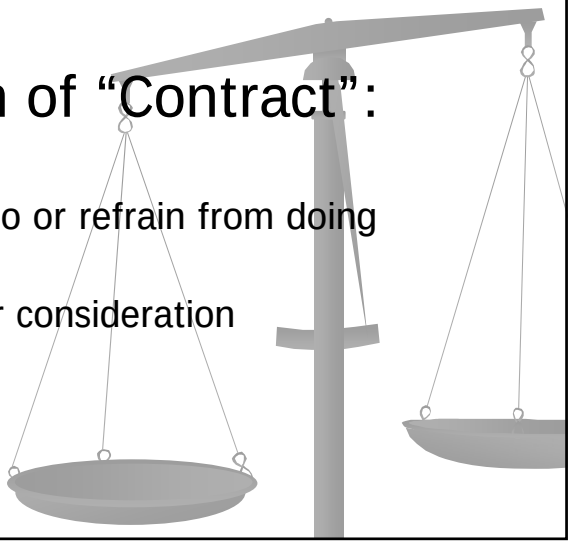
Review of Basic Contract Principles



Fundamentals of Contract

Definition of "Contract":

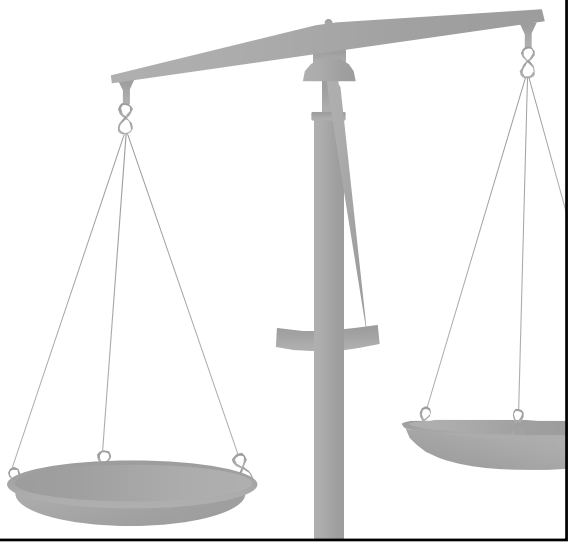
- Agreement to do or refrain from doing something
- In exchange for consideration



Fundamentals of Contract

<u>Contract Types</u>:

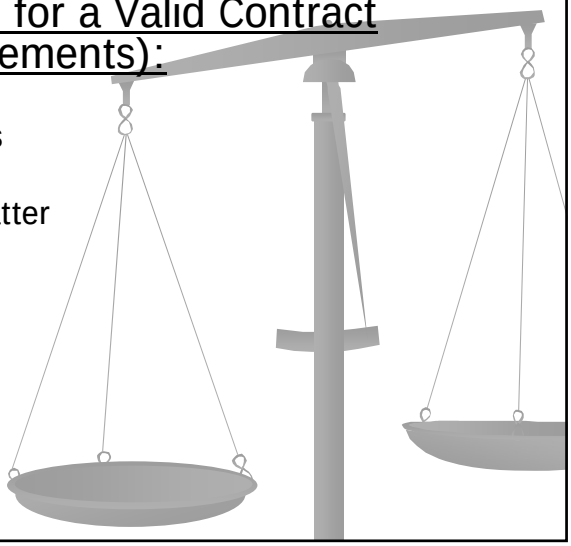
- Express
  - Oral
  - Written
- Implied
  - By Conduct
  - By Words
  - By Law



Fundamentals of Contract

Requirements for a Valid Contract (Necessary Elements):

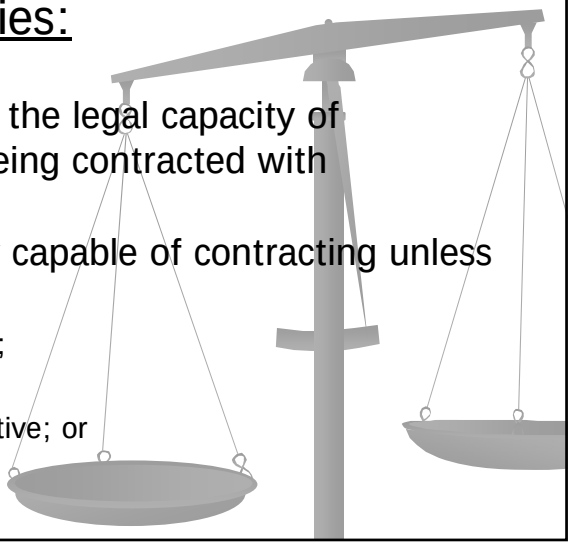
- Competent parties
- Lawful subject matter
- Consideration
- Mutual assent
- Mutual obligation



Fundamentals of Contract

Competent parties:

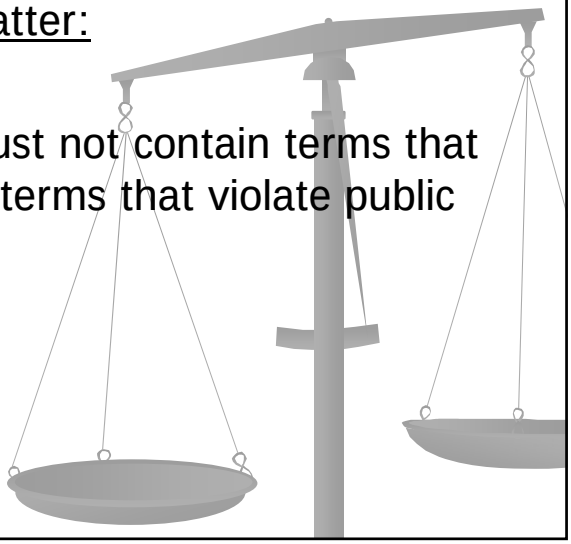
- Parties must have the legal capacity of contracting and being contracted with
- A person is legally capable of contracting unless she is:
  - Under guardianship;
  - An infant;
  - Mentally ill or defective; or
  - intoxicated



Fundamentals of Contract

Lawful Subject Matter:

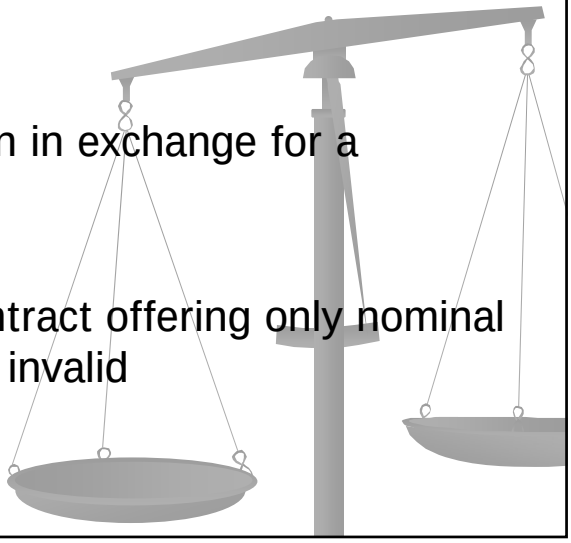
- The contract must not contain terms that are unlawful or terms that violate public policy



Fundamentals of Contract

Consideration:

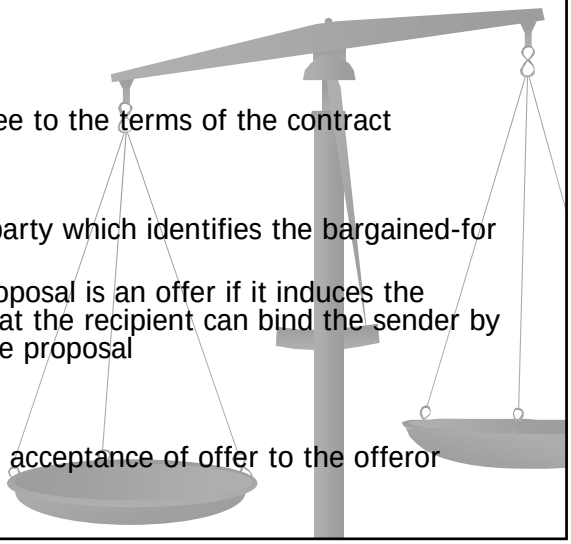
- Something given in exchange for a promise
- Generally, a contract offering only nominal consideration is invalid



Fundamentals of Contract

<u>Mutual Assent:</u>

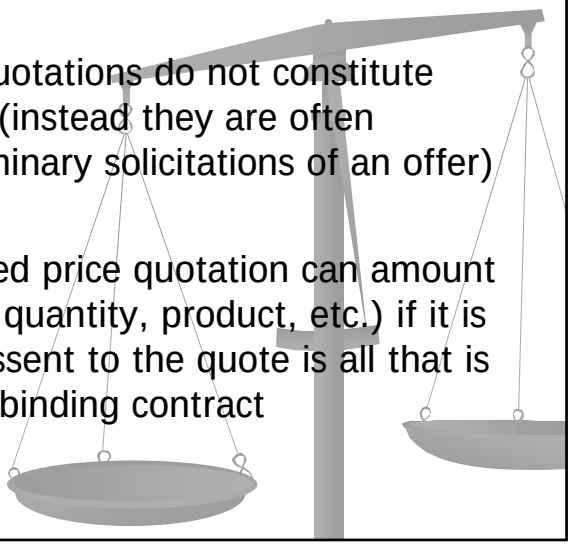
- Meeting of the minds
  - all parties must agree to the terms of the contract
- Offer:
  - A proposal by one party which identifies the bargained-for exchange
  - Objective test: a proposal is an offer if it induces the reasonable belief that the recipient can bind the sender by merely accepting the proposal
- Acceptance:
  - A communication of acceptance of offer to the offeror



Fundamentals of Contract

<u>Offers:</u>

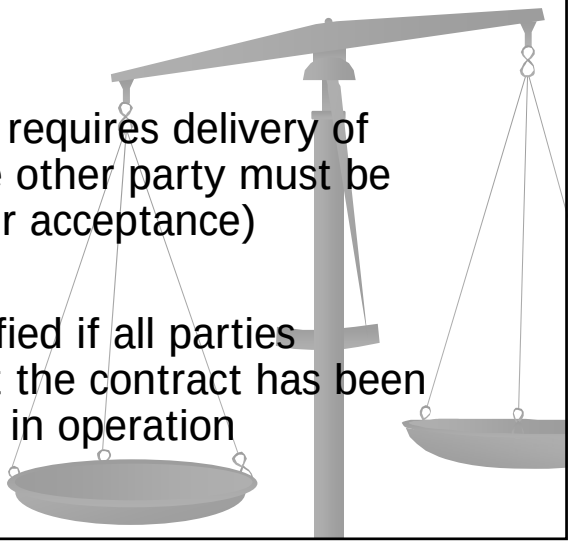
- Generally, price quotations do not constitute offers to contract (instead they are often regarded as preliminary solicitations of an offer)
- However, a detailed price quotation can amount to an offer (price, quantity, product, etc.) if it is reasonable that assent to the quote is all that is needed to form a binding contract



Fundamentals of Contract

Acceptance:

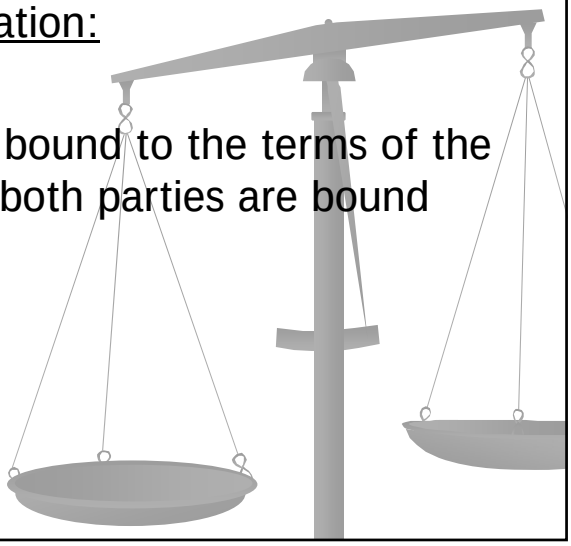
- A valid contract requires delivery of acceptance (the other party must be informed of your acceptance)
- Delivery is satisfied if all parties understand that the contract has been executed and is in operation



Fundamentals of Contract

Mutuality of obligation:

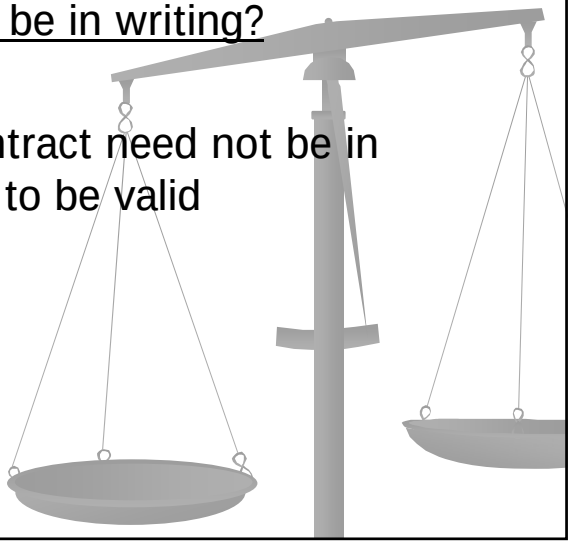
- Neither party is bound to the terms of the contract unless both parties are bound



Fundamentals of Contract

Must the contract be in writing?

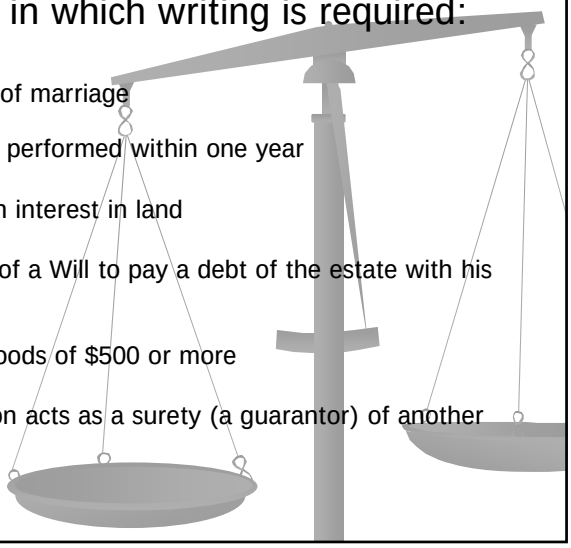
- Generally, a contract need not be in writing in order to be valid



Fundamentals of Contract

Common exceptions in which writing is required:

- Contracts in consideration of marriage
- Contracts which cannot be performed within one year
- Contracts for the sale of an interest in land
- Contracts by the executor of a Will to pay a debt of the estate with his own money
- Contracts for the sale of goods of $500 or more
- Contracts where one person acts as a surety (a guarantor) of another person's debt or obligation



Fundamentals of Contract

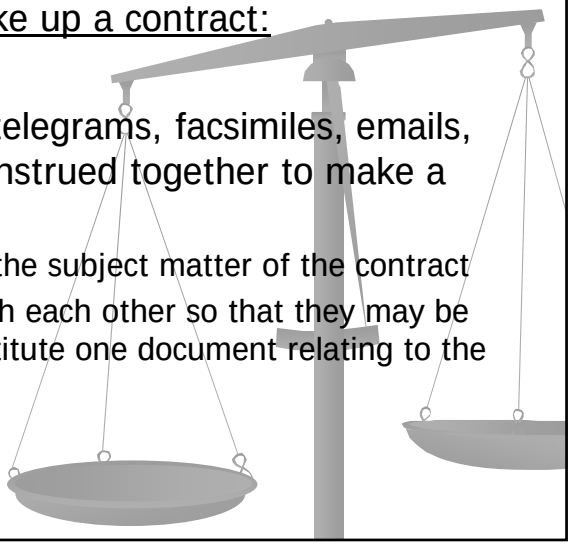
Partly Written and Partly Oral Contracts:

- Unless writing is required, a contract may be partly written and partly oral
  - E.g. a verbal acceptance of a written offer
- Oral provisions to the contract will not be allowed if the contract appears to express the full and complete agreement and intention of the parties

Fundamentals of Contract

Documents that make up a contract:

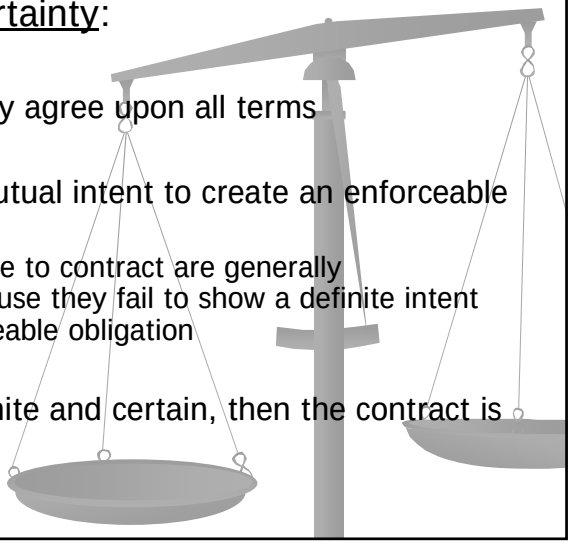
- Letters, writings, telegrams, facsimiles, emails, etc. may all be construed together to make a contract if:
  - They all relate to the subject matter of the contract
  - Are connected with each other so that they may be fairly said to constitute one document relating to the contract



Fundamentals of Contract

Definiteness and Certainty:

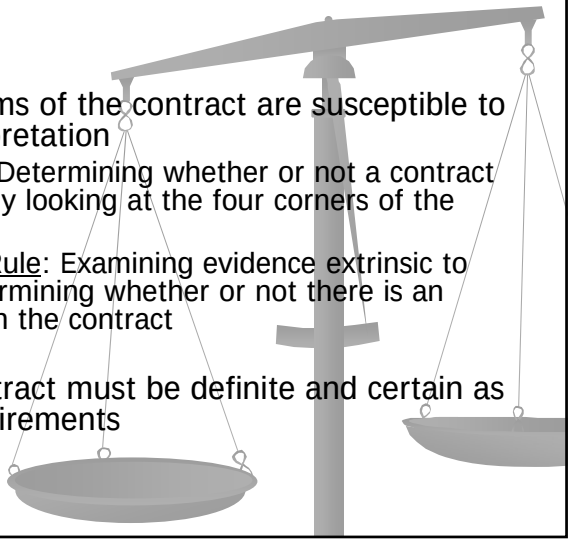
- Parties must definitely agree upon all terms
- Must be a definite mutual intent to create an enforceable obligation
  - Agreements to agree to contract are generally unenforceable because they fail to show a definite intent to create an enforceable obligation
- If terms are not definite and certain, then the contract is ambiguous



Fundamentals of Contract

Ambiguity:

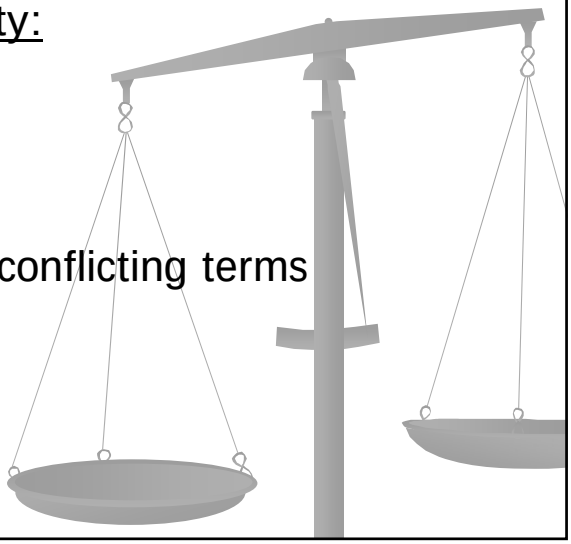
- Occurs when the terms of the contract are susceptible to more than one interpretation
  - Four Corners Rule: Determining whether or not a contract is ambiguous by only looking at the four corners of the contract
  - Extrinsic Evidence Rule: Examining evidence extrinsic to the contract in determining whether or not there is an ambiguity present in the contract
- To be binding, a contract must be definite and certain as to its terms and requirements



Fundamentals of Contract

Types of Ambiguity:

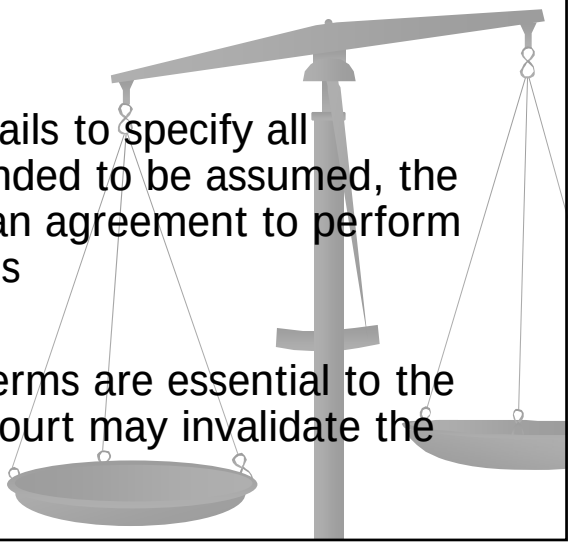
- Missing terms
- Inconsistent or conflicting terms



Fundamentals of Contract

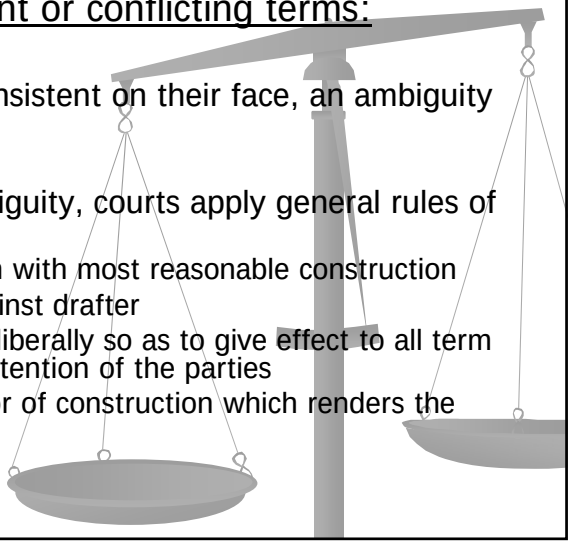
Missing terms:

- If the contract fails to specify all obligations intended to be assumed, the law may imply an agreement to perform those obligations
- If the missing terms are essential to the contract, then court may invalidate the entire contract



Fundamentals of Contract

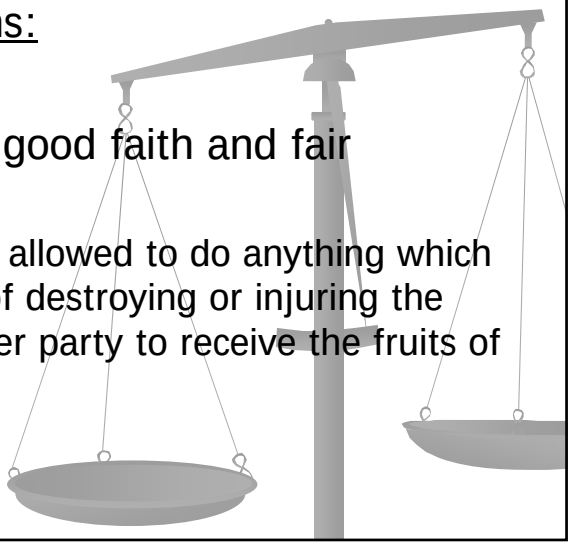
Resolving inconsistent or conflicting terms:



- If the terms are inconsistent on their face, an ambiguity exists
- Upon finding an ambiguity, courts apply general rules of construction:
  - Adopt interpretation with most reasonable construction
  - Construe terms against drafter
  - Construe contracts liberally so as to give effect to all term and carry out the intention of the parties
  - Presumption in favor of construction which renders the contract valid

Fundamentals of Contract

Implied obligations:



- Implied duty of good faith and fair dealing:
  - Neither party is allowed to do anything which has the effect of destroying or injuring the right of the other party to receive the fruits of the contract

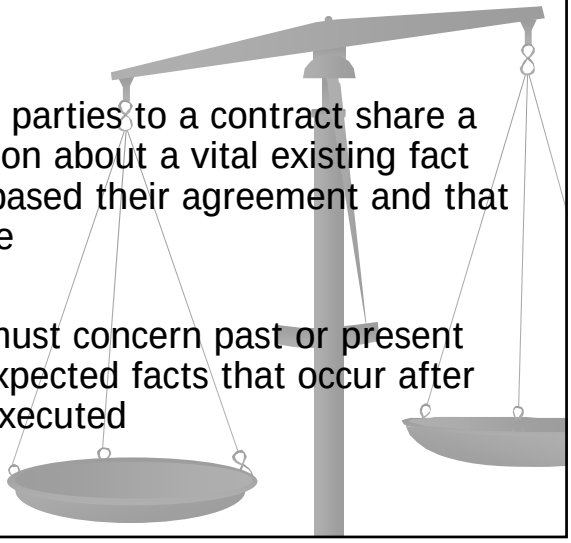
Fundamentals of Contract

Mistake:

- A mistake is an unintentional act or omission arising from ignorance, surprise or a misplaced confidence
- Mutual mistake is a defense to contract formation while unilateral mistake is not

Fundamentals of Contract

Mutual Mistake:

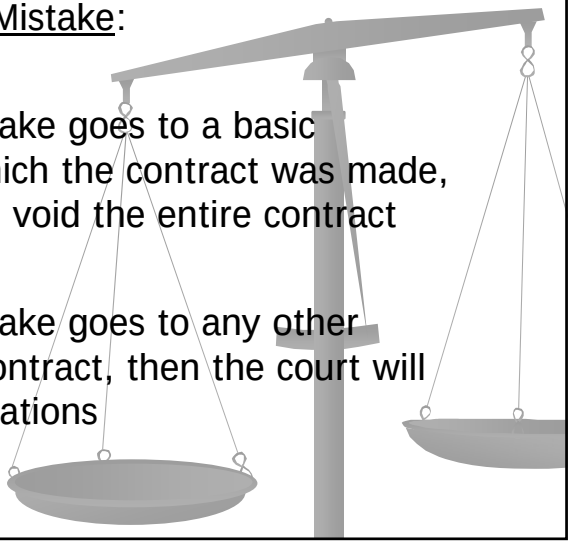


- Occurs when both parties to a contract share a common assumption about a vital existing fact upon which they based their agreement and that assumption is false
- Mutual mistakes must concern past or present facts and not unexpected facts that occur after the document is executed

Fundamentals of Contract

Remedy for Mutual Mistake:

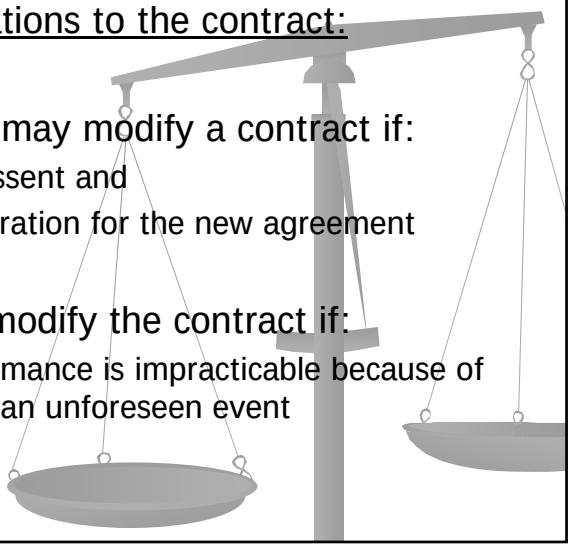
- If the mutual mistake goes to a basic assumption on which the contract was made, then the court will void the entire contract
- If the mutual mistake goes to any other provision of the contract, then the court will merely make alterations



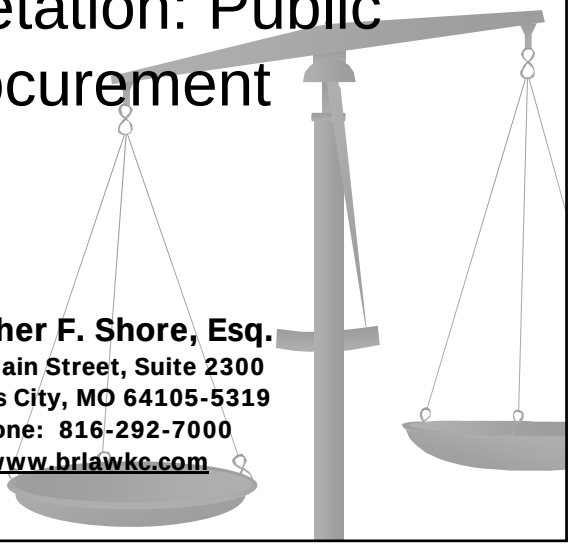
Fundamentals of Contract

Changes or modifications to the contract:

- Generally, parties may modify a contract if:
  - There is mutual assent and
  - Additional consideration for the new agreement
- Judges may also modify the contract if:
  - One party's performance is impracticable because of the occurrence of an unforeseen event



Contract Formation and Interpretation: Public Procurement

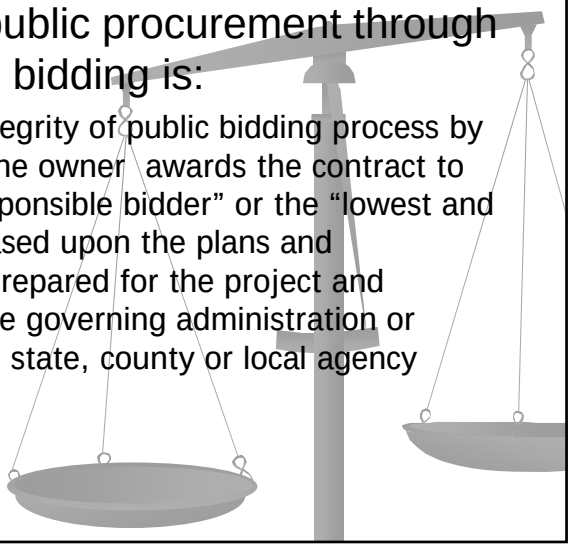


Heather F. Shore, Esq.
911 Main Street, Suite 2300
Kansas City, MO 64105-5319
Phone: 816-292-7000
www.brlawkc.com

Public Procurement

Purpose of public procurement through competitive bidding is:

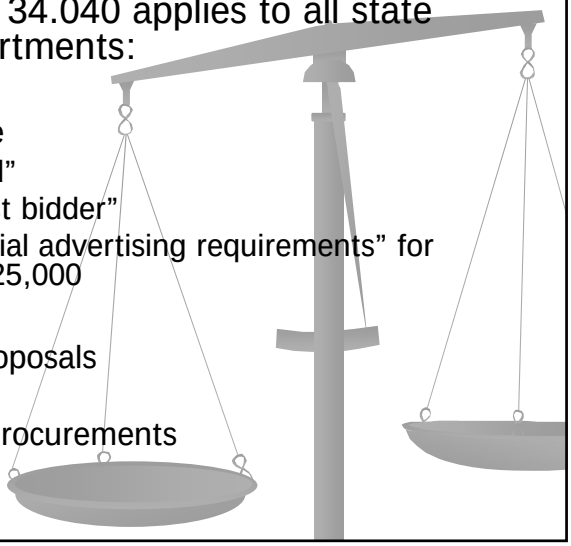
- To maintain integrity of public bidding process by ensuring that the owner awards the contract to the "lowest responsible bidder" or the "lowest and best bidder" based upon the plans and specifications prepared for the project and approved by the governing administration or agencies of the state, county or local agency concerned.



Public Procurement

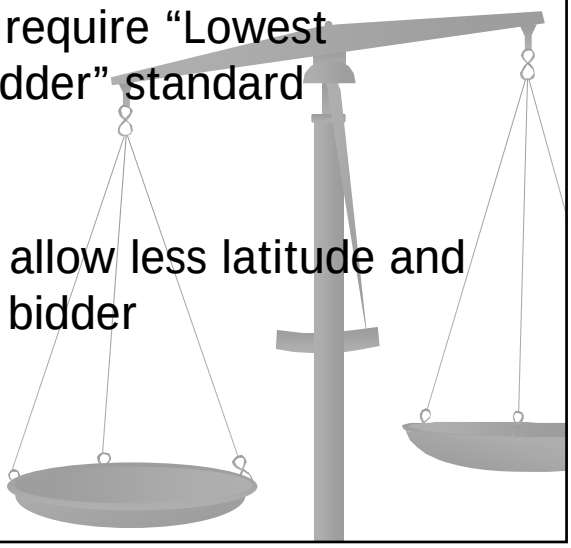
In Missouri, R.S.Mo. 34.040 applies to all state projects and departments:

- Requirements
  - $3,000 or more
  - "competitively bid"
  - "lowest and best bidder"
  - adhere to "special advertising requirements" for projects over $25,000
- Exceptions
  - Competitive Proposals
  - Emergencies
  - Single source Procurements



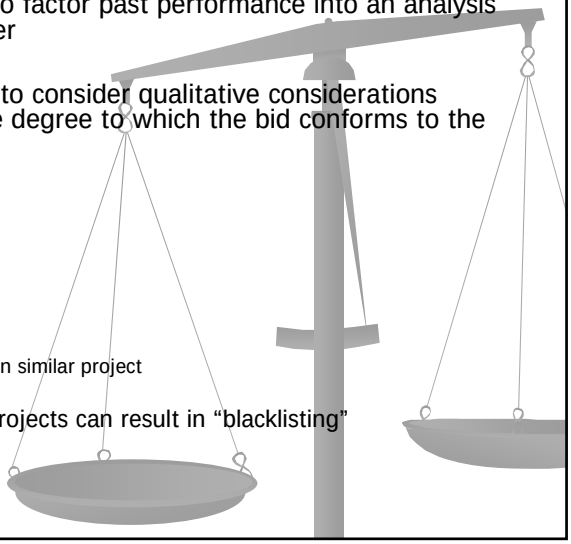
Public Procurement

- Many projects require "Lowest Responsible Bidder" standard
  - Lowest price
  - Best bidder
- Some projects allow less latitude and require lowest bidder



Public Procurement

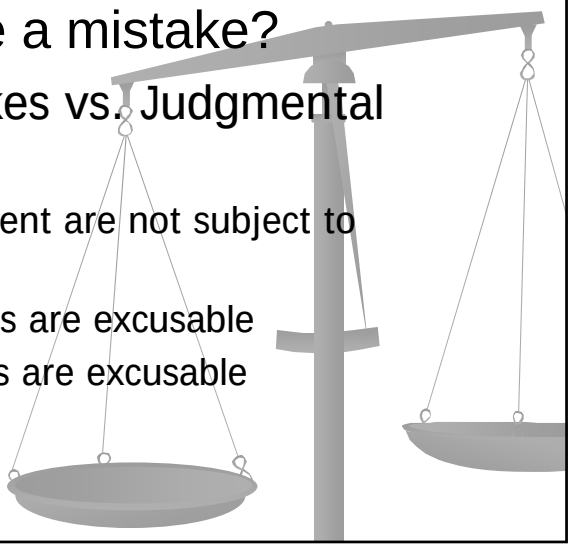
- The state has discretion to factor past performance into an analysis of who is the "best" bidder
- "Best" allows the agency to consider qualitative considerations about the bidder, and the degree to which the bid conforms to the solicitation.
- Considerations
  - Ability to perform the work
  - Bonding Capacity
  - Financial Condition
  - References
  - Pre-qualification
  - Successful prior experience on similar project
- Poor performance on past projects can result in "blacklisting"



Public Procurement

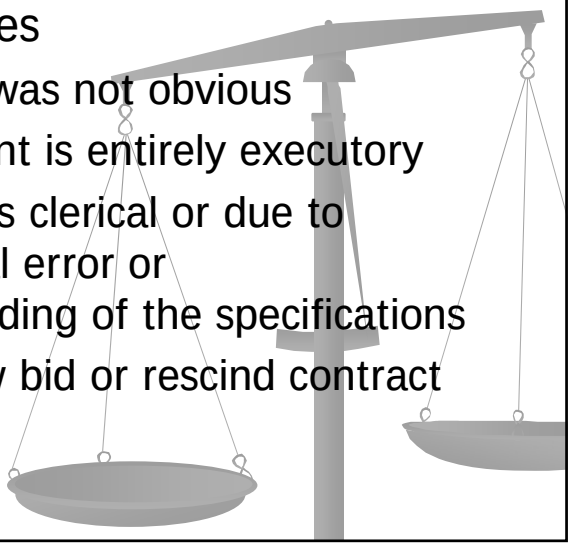
What if I make a mistake?

- Clerical Mistakes vs. Judgmental Errors
  - Errors in judgment are not subject to correction
  - Clerical mistakes are excusable
  - Mutual mistakes are excusable



Public Procurement

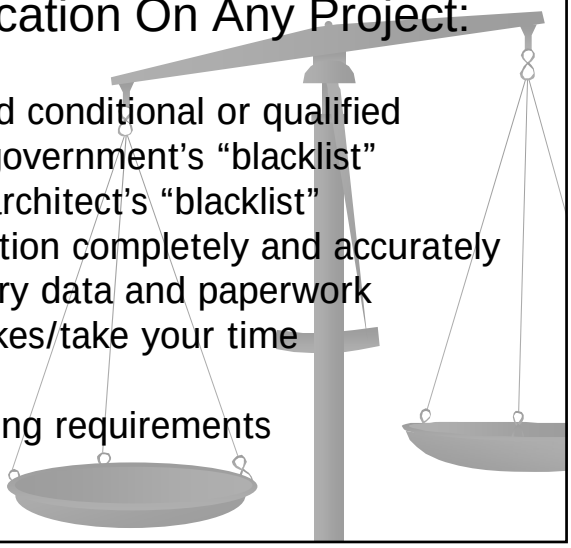
- Clerical Mistakes
  - The mistake was not obvious
  - The agreement is entirely executory
  - The mistake is clerical or due to computational error or misunderstanding of the specifications
  - May withdraw bid or rescind contract



Public Procurement

Avoid Disqualification On Any Project:

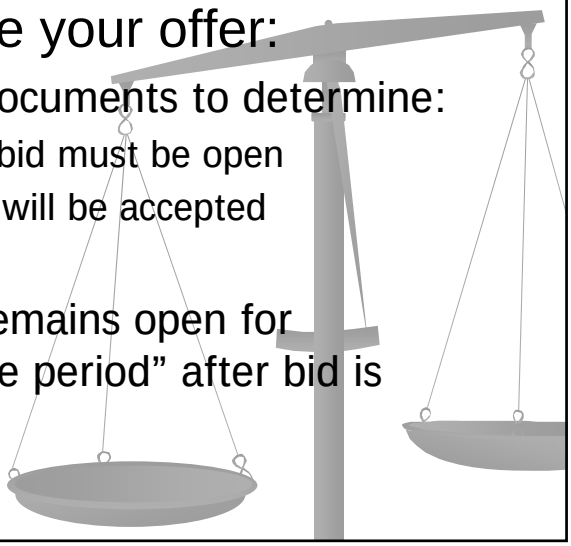
- Don't make the bid conditional or qualified
- Don't get on the government's "blacklist"
- Don't get on the architect's "blacklist"
- Fill out all information completely and accurately
- Attach all necessary data and paperwork
- Don't make mistakes/take your time
- Pay your taxes
- Maintain all licensing requirements



Public Procurement

After you make your offer:

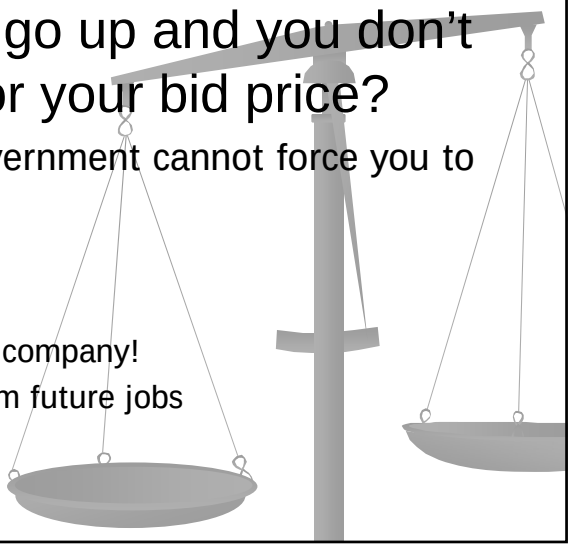
- Check the bid documents to determine:
  - How long your bid must be open
  - How your offer will be accepted
- If silent, offer remains open for "reasonable time period" after bid is submitted



Public Procurement

What if prices go up and you don't want to honor your bid price?

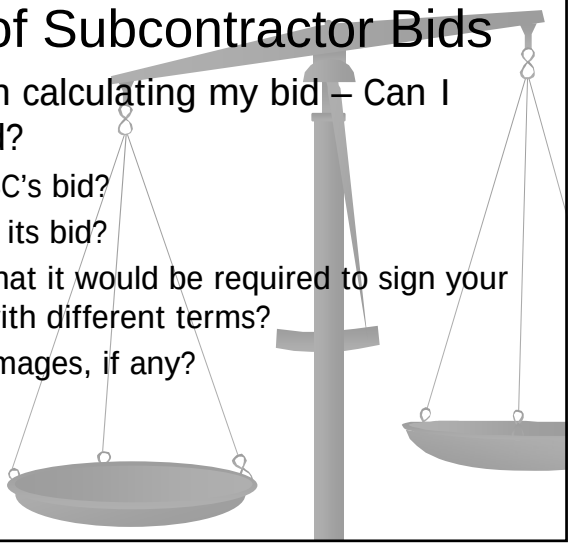
- Generally, the government cannot force you to perform the work.
- But it can:
  - Sue you!
  - Sue your bonding company!
  - "Blacklist" you from future jobs



Public Procurement

Enforcement of Subcontractor Bids

- I used ABC's bid in calculating my bid – Can I hold ABC to its bid?
  - Did you accept ABC's bid?
  - Did ABC withdraw its bid?
  - Did you tell ABC that it would be required to sign your written contract with different terms?
  - What are your damages, if any?

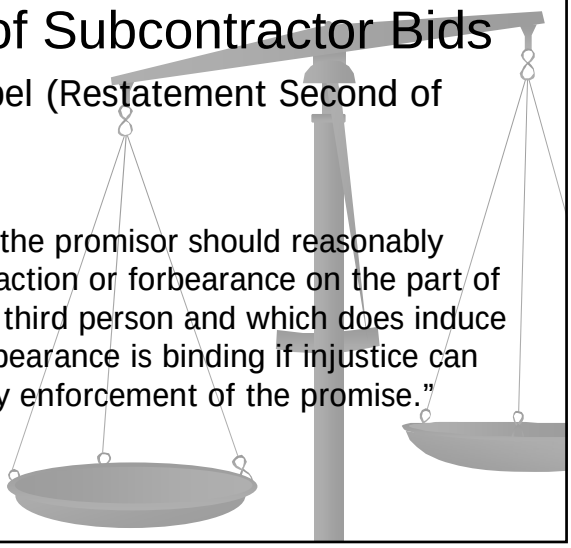


Public Procurement

Enforcement of Subcontractor Bids

- Promissory Estoppel (Restatement Second of Contracts § 90)

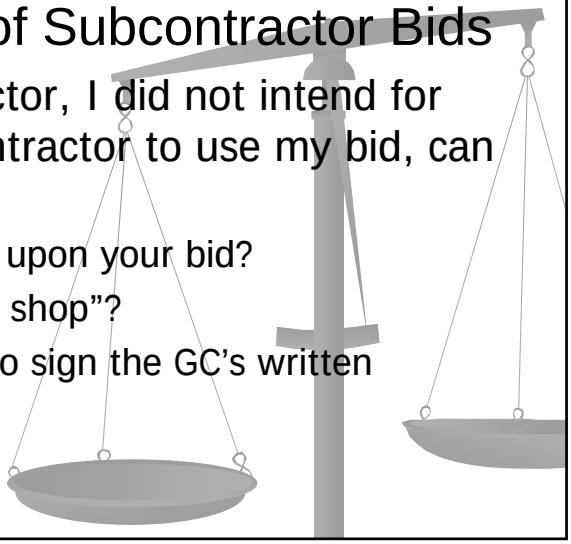
  "A promise which the promisor should reasonably expect to include action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."



Public Procurement

Enforcement of Subcontractor Bids

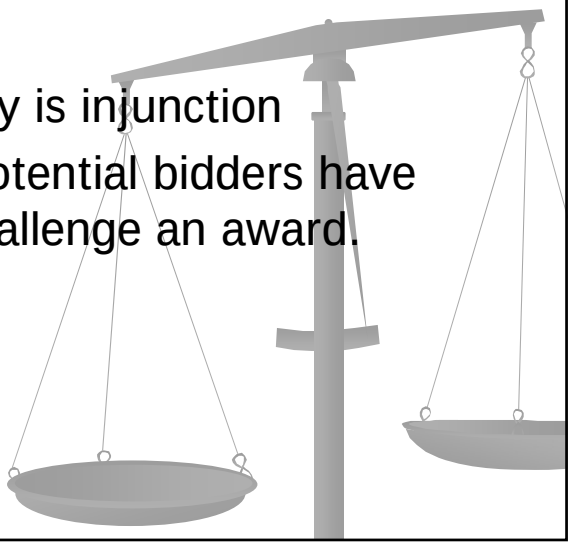
- As a Subcontractor, I did not intend for the General Contractor to use my bid, can I get relief?
  - Did the GC rely upon your bid?
  - Did the GC "bid shop"?
  - Did you agree to sign the GC's written contract?



Public Procurement

Bid Protests

- Judicial remedy is injunction
- Bidders and potential bidders have standing to challenge an award.



PROJECT DELIVERY SYSTEMS

Fundamentals of Construction Contracts: Understanding the Issues in Missouri

Presented by:
Gregory S. Gerstner, Esq.
Seigfreid, Bingham, Levy, Selzer & Gee, P.C.
2800 Commerce Tower
911 Main Street
Kansas City, MO 64105

PROJECT DELIVERY SYSTEM

Gregory S. Gerstner
Seigfreid, Bingham, Levy, Selzer & Gee, P.C.
2800 Commerce Tower
911 Main Street
Kansas City, MO 64105

I. INTRODUCTION

A process for the delivery of the design and construction of the Project must be selected immediately. The process will affect the selection of the project team, the project schedule and the cost of the Project. Each type of project delivery system has its advantages and disadvantages, and the most appropriate choice is governed by the characteristics of the project, the resources of the Owner, the goals of the Owner and any applicable regulatory requirements or limitations.

II. PHASES OF DESIGN AND CONSTRUCTION

A. Three Phases

In order to analyze the above-stated issues, it is important to review the basic phases of a project. A project can be divided into three phases: project definition, design, and construction. The phases can be overlapped, subdivided or regrouped, but none can be eliminated. If one phase is performed poorly, the following phase(s) will be impaired.

1. **Project definition**. Project definition can be subdivided into the following activities:

   a. **Discovery**. The identification and analysis of project requirements and constraints; and

   b. **Integration**. The description of the project and the plan (including an estimate of cost and time for delivering it).

2. **Design**. Typically, design is divided into three phases:

   a. **Schematic design**. The basic appearance and plan;

   b. **Design development.** An evolution of design that defines the functional and aesthetic aspects of the project and the building systems that satisfy them; and

   c. **Construction drawings and specifications**. The details of assembly and construction technology.

3. **Construction**. Construction can also be divided into several basic activities:

   a. **Procurement**. The purchasing, negotiation or bid and award of contracts for construction. This activity occurs at many levels. The way the Owner buys construction affects the methods that may be used by construction managers, general contractors, subcontractors and suppliers;

   b. **Shop drawings**. The final fabrication drawings for building systems. One could easily argue that the submittal of shop drawings is really the last phase of design. They are included in the construction phase only because they are done by contractors after the selection of contractors;

   c. **Fabrication**. Delivery and assembly, the manufacture and installation of the building components; and

   d. **Site construction**. The labor-intensive field construction and the installation of systems and equipment.

III. SELECTING A PROJECT DELIVERY SYSTEM

A. Three Basic Factors

There are three basic factors in selecting a project delivery system: Selection criteria, Number of contracts, and Terms of payment.

1. **Selection Criteria.** With respect to a public project, the selection of the Architect and the entities performing actual construction work is governed by applicable statutes and the applicable ordinances. Accordingly, the selection criteria is limited to the criteria allowed by those statutes and ordinances.

2. **Number of Contracts.**

   a. **Project contract**. A project may be awarded with one contract, as in a design-build scenario. In the traditional process, or in a construction manager at risk process, there are two contracts: one with an Architect and one with a construction contractor. There are three contracts if the Owner chooses to engage a program manager.

   b. **Multiple contracts**. If a construction manager is utilized, an Owner will enter into contracts with multiple prime contractors, and/or the Owner may purchase building materials and equipment and arrange multiple labor contracts.

(1) **Pros**. With multiple contracts, an Owner can more freely fast-track a project (overlap design and construction). Direct purchase of labor and materials eliminates overhead markups by a general contractor. Unbundling design allows selection of specialists, and unbundling construction allows careful selection of specific manufacturers and trade contractors. Accordingly, as the number of contracts increases, the opportunity to save time, money and improve quality also increase.

(2) **Cons**. As the number of contracts increases, so does the risk. An Owner who chooses to utilize multiple contracts must manage the contracts well or take the responsibility for management failures and associated delays and increased costs. Consequently, where an Owner chooses to utilize multiple construction contracts, it usually engages a very experienced and qualified construction manager to manage such multiple contracts.

3. Terms of Payment. A contractor may be paid based on the contractor's costs. At the other end of the spectrum is a fixed price. Contracts tend to be cost-plus when the scope is unknown, and fixed price when the requirements are well defined. There are variations between cost-plus and fixed price. The common arrangements are:

a. Cost-plus. Contractor is paid actual costs plus a fixed or a percentage fee. This is usually not advantageous to the Owner because there is no enforceable limit for the cost of the Project.

b. Cost-plus with a guaranteed maximum price ("GMP"). Contractor is paid actual costs plus a fee. However, a maximum price is set, and the contractor may or may not share in the savings but will pay all of the overruns. The GMP is modified by change orders. Many people use the term GMP synonymously with fixed price, which is incorrect. A GMP is a lid on a cost-plus contract with a defined scope. It is one of the most difficult of all contracts to manage, as it is more susceptible to change orders than a fixed price because it is typically given before construction drawings are complete. There will also be many issues over the definition of "cost," *e.g.*, rental costs on contractor-owned equipment or ownership of workman's compensation refunds or penalties.

c. Unit price. Contractor is paid a predetermined amount for each unit of material put in place (or removed).

d. Fixed price. Contractor is paid a fixed sum for the work.

These payment terms may be combined in one contract. For instance, many contracts are fixed price with unit price provisions for rock removal during excavation, or tenant work during lease-up. Change orders may be based on a cost-plus arrangement.

IV. TYPICAL PROJECT DELIVERY METHODS

The most common project delivery methods are as follows:

A. Traditional Process

Most U.S. projects are design-bid-build. An Architect defines the Owner's needs, designs the building, prepares construction drawings and specifications, and administers construction. Drawings and specifications serve two purposes. They are guidelines for construction, and they are the contractual definition of what the contractor is to build. Typically, a bid for the construction work is not obtained until the design is complete and the low bidder is awarded the work, especially on a public project.

1. **Pros**. The process is easy to manage. Roles are clear, the process is universally understood. Since the Owner has a defined requirement and a fixed price, it appears prudent.

2. **Cons**. Construction does not typically start until design is fully complete. If bids are over the budget, more time and money are lost for redesigns. Design suffers from a lack of input from contractors and subcontractors during the design phase. Procurement of subcontractors by the general contractor during the bid period is typically un-businesslike.

B. Traditional Process With a Project Manager

Owners often add project or construction management companies to the traditional process to mitigate the traditional flaws. The idea is to select an organization with experience in construction to improve cost, schedule and quality control; improve the constructability of the design; develop risk management and claims protection programs; improve other management controls to smooth the process; and improve field management.

C. Construction Management / At Risk

This method is simply a variation of the traditional method in which the general contractor provides design phase assistance in evaluating the constructability of alternative designs and cost and schedule implications of such designs. The "Construction Manager at Risk" usually does not provide any price assurances through the submission of a GMP until at least fifty percent (50%) of the overall design is complete. However, the GMP usually contains a contingency and the amount of contingency is relative to the completion of design, *i.e.*, the less complete the design, the greater the contingency built into the price. The use of this method on a public project is problematic.

1. **Pros**. The process works for developers or experienced private sector clients who can select contractors on the basis of qualifications and integrity, reward them with repeat work, and manage them vigorously. The process also works for simple office buildings that are well understood by all (the Owner, the Architect and the contractor).

2. **Cons.** The contract is difficult to enforce. The guaranteed maximum price is for work that isn't completely defined. As design progresses, there is opportunity for a contentious or inept contractor to make claims for changes which the contractor claims are "out of the guaranteed scope." The GMP is a defined price for an undefined product. Furthermore, Owners with complex buildings, the public sector or large corporate or institutional clients should be circumspect about a cost-plus contract with a GMP. These Owners are particularly vulnerable to claims and change orders. Awarding a contract with incomplete documents increases vulnerability to claims, particularly for Owners with deep pockets. This method on public projects in Missouri is problematic.

D. Construction Management With Multiple Prime Contracts (Agency)

The general contractor is eliminated and replaced with a construction manager who manages the project in an agency (fiduciary) capacity. The construction manager, on behalf of the Owner, bids construction to trade contractors just as a general contractor would, beginning with items critical to the schedule. One common strategy to avoid downstream overruns is to award only the shop drawing phase of the first trade contracts. The construction manager delays final notice to proceed with construction until most of the work is bid and the project cost is certain. The Owner directly enters into contracts with the trade contractors performing each phase of the work. This method is normally used when a public entity desires to fast-track a project.

1. **Pros.** Owners have a professional construction manager on their side. The multiple trade construction contracts are fixed-price and completely bid-based on complete documents with little room for change orders. The Owner has some assurance that it is obtaining the lowest price for each contract.

2. **Cons.** Multiple contracts can make for administrative difficulty. If one prime trade contractor damages another by delay, the Owner can get caught up in the fight. There is no overall cost guaranty.

E. Fast-Tracking a Project

Many Owners look for ways to accelerate schedules. Fast-tracking a project – commencing construction before finishing design – is a common technique. A fast-track approach is not an independent project delivery system, but rather is a timing approach that can be successfully utilized with several of the delivery methods discussed herein. On a public works project, the Owner usually retains a construction manager who performs professional or agency-type services, and the Owner solicits bids and contracts for construction in stages with complete contract documents for each stage. The contracts for each stage are typically bid to trade contractors, thus eliminating the need for a general contractor. A successful fast-track project can only be achieved through good management. Therefore, the selection of the construction manager and the personnel that is assigned to the Project is critical.

1. **Pros**. The process saves time.

2. **Cons**. The problem with fast-track is inherent in its advantage. Since construction commences before design is complete, the Owner lacks the security of a fixed price based on complete construction documents. There is no contractual assurance that the project will be completed within the budget. To mitigate this disadvantage, the Owner engages a professional construction manager of the Owner's choosing that manages the multiple contracts so that the Project budget and schedule are satisfied.

F. Design-Build

With design-build, one company provides both design and construction. Design-build contracts are typically negotiated before or immediately following project definition. In these cases, the Architect is a subcontractor to a general contractor or a design-build contractor.

1. **Pros**. There is a single point of responsibility for both design and construction. Design-build contractors add construction practicality to design imagination. Owners get an enforceable price for construction sooner and can fast-track the projects. The contractor can negotiate subcontracts methodically so the Owner can benefit from good prices, reliable subcontractors, better technology and tighter contracts.

2. **Cons**. More projects would be design-build if they could be bid. But it is difficult to formulate an enforceable price before design begins. The paradox: it is hard to define the work to be done for an agreed-upon price without design. If design is done, then it is not design-build. Since on a public project the construction work must be competitively bid, the true design-build method is not available because the work is not sufficiently defined to obtain "competitive bids."

G. Bridging

1. **A design-build process**. Bridging is the U.S. name for a design-build process common in Europe and Japan, and in the petrochemical industry.

2. **Two Architects and bid documents**. In the bridging process, there are two architects. The first Architect is under contract with the Owner. Bid documents define the functional and aesthetic characteristics of the project. They include drawings similar to design development in the traditional process. There is a combination of performance and traditional specifications. These documents define the parts of the building that the Owner wants to control, typically the functional and aesthetic aspects. But the documents leave considerable latitude for contractors to look for economies in construction technology.

3. **How it works**. The project is bid (or negotiated) by design-build contractors or by a general contractor with an Architect as a subcontractor.

The contractor's Architect (the second Architect) does the final construction drawings and specifications, and is the Architect of Record. Typically, construction does not begin until the final construction drawings are complete and it is clear that there are no misunderstandings about what was intended by the bid documents. If there is disagreement, the Owner owns the plans and may use them to take competitive bids. Further, this is a design-build method which can be used by public entities since there is enough project definition to allow the work to be competitively bid.

4. **Pros**. Bridging has the beneficial attributes of the traditional process: an enforceable lump-sum contract and complete contractual documentation before construction starts. It also has the beneficial attributes of design-build: centralization of responsibility, integration of practical construction knowledge into final design and reduction of the time and cost required to obtain an enforceable lump-sum price for construction. By centralizing responsibilities during construction, bridging minimizes the opportunity for contractor claims based on errors or omissions in the drawings or specifications. It also centralizes the responsibility for correction of post-construction faults in the design or construction.

5. **Cons**. The biggest problem with bridging is that it is new in the U.S. The construction industry is large and replete with contractors, architects, consultants, subcontractors, manufacturers and suppliers unfamiliar with the concept. Tradition is the great facilitator. Because these organizations do not all understand bridging, they may not perform well without careful management.

H. Use of a Program Manager

1. **General**. A competent in-house construction department, fully acquainted with the Owner's business and facilities and loyal to the Owner's interests, can best provide the information and assistance required to develop an Owner's project. Unfortunately, unless there is a repetitive need for construction services, the cost of employing qualified personnel on a full-time basis can outweigh the benefit. When an Owner needs either renovation or new construction, the Owner must initiate the construction process. The first step is to analyze the Owner's organization and facilities to determine and document the Owner's needs. This self-analysis should enable the Owner to develop a document which will embody the Owner's construction requirements. This document is known as the Owner's "program." If the Owner does not have in-house construction expertise, it is difficult for the Owner to prepare a program without outside help. Program management has evolved as an approach for providing an Owner with the information and assistance necessary to develop a program and to oversee the translation of this program into the project design. The person or entity who performs program management

services is referred to as the "program manager." The program manager can also perform services in the construction phase to determine if the Project team is implementing the Project in accordance with the developed program and assist the Owner in making decisions during the construction phase (i.e., changes) so that the program is satisfied. It is important that the program manager not assume the role and responsibilities of the general contractor or the construction manager during the construction process. If the program manager assumes such a role, the Owner wastes resources and potentially releases the construction manager from responsibility. Program management has many variations and takes on many forms. Much like construction management, program management is a creature of the contract entered into between the Owner and the program manager.

2. **Definition**. Program management is a centralized approach to providing the information and systems necessary for an Owner to develop a program for either one or a series of construction projects. The two main functions of program management are the development of the Owner's program and oversight of the translation of this program into the project design. The program manager may continue to represent the Owner's interest during the construction phase of the project. A critical aspect of the program manager's work is the oversight of the translation of the Owner's program into the project during the schematic design phase. Subsequent preparation of design development drawings and construction drawings should largely be refinements of the schematic design, not of the Owner's program. If a program is still undergoing significant development or modification after the schematic design phase, existing work is being redone and project progress is being impeded. This is symptomatic of a project that has not been well defined in the conceptual or schematic phase. This problem represents an argument in favor of program management. Program management should not be considered a method or approach to having a project constructed, i.e., a project delivery system. Program management is intended to prepare the Owner for selecting and making the best use of a project delivery system. However, program management is best identified with the traditional design, bid, build process, but can be used in connection with any project delivery system. Program management provides a separate focus to the development of the program, project budget and project schedule. The result of this separate focus is that the program is better developed prior to significant design work. This allows the Owner to better detail the scope of services required from his design professional. Because the project budget and project schedule are more refined, the Owner can better describe the applicable time and dollar constraints. The program manager can be used to supplement the design process and to improve existing documentation. The program manager can also work to verify existing information. For example, investigation of the accuracy and comprehensiveness of existing as-built drawings. This work will result in better design drawings. A list

of possible program management services and anticipated deliverables are included in **Exhibit A** attached hereto. None of the services included in **Exhibit A** is in and of itself, new or different. The services have always been performed by someone in every project of significant scope and complexity. With respect to most of the services, that "someone" has been the Owner, with the assistance of design professionals and/or construction managers.

3. **Appropriate Use of a Program Manager**. Program management is not appropriate for all types of projects. The need for a program manager must be reflective of the project under construction. The Owner should analyze the size and anticipated complexity of the project. As the dollar amount, complexity and need for coordination increases, the Owner has an increased need for a dedicated person or entity to manage the development and implementation of the Owner's program. This may exceed the capabilities of the Owner's in-house staff. An Owner should review the capabilities of its in-house staff to determine what level of project can be handled in-house. Staff must be analyzed with respect to both expertise and capacity. An Owner should be realistic in assessing the burden a project will place on its in-house staff. However, on projects where an agent construction manager is utilized, the need for a program manager is reduced. The agent construction manager, particularly during construction, to a great extent satisfies the need for a professional loyal to the Owner. However, this kind of service needs to be outlined in the agent construction manager's contract. The most valuable assistance that a program manager can provide on an agent construction manager project is during the project definition and design stage where the Owner's program is developed and implemented. Accordingly, the program manager should have significant stadium design and use experience.

EXHIBIT A

POSSIBLE PROGRAM MANAGEMENT SERVICES AND ANTICIPATED DELIVERABLES

I. Program Management Services. Possible program management services could include the following:

a. Program development services consisting of consultations to develop the Owner's project objections and criteria, budget, schedule, gross building area requirements, space relationships, special equipment and facility needs, security criteria, site requirements, and utility requirements;

b. Develop flow diagrams and reports detailing human flow patterns, space allocations, special facilities and equipment, and flexibility and expandability;

c. Existing conditions surveys and assembling and analyzing existing data regarding existing facilities;

d. Program analysis services;

e. Development of project management plan;

f. Project budget development;

g. Project budget management;

h. Project schedule management;

i. Manage public/community relations program for the Project;

j. Assist in developing an insurance plan for the Project;

k. Develop design criteria, drawing and CAD requirements and specification formats;

l. Assist in constructability review;

m. Assist in value engineering;

n. Information management;

o. Project cost management;

p. Site analysis;

q. Local and state agency approvals;

r. Conduct construction market survey;

s. Participate in the selection of project delivery system;

t. Assist in design professional selection;

u. Construction contract monitoring;

v. Space planning;

w. Assist in purchasing of equipment, furniture and fixtures;

x. Assist in identifying and ordering long lead time items;

y. Oversight of design professional;

z. Design and manage a system of job meetings, communications, document flow, and recordkeeping;

aa. Develop and update project budgets, administer project accounting and reporting systems, prepare or procure cost estimates, and manage cost control efforts; and

bb. Assist in enforcing applicable MBE, WBE, and affirmative action programs.

II. Deliverables. Examples of anticipated deliverables from the program manager would be:

a. A report detailing the options regarding overall project organization;

b. A formal documents which embodies the Owner's program;

c. Development or updating of a master plan which identifies both the Owner's long range construction goals and the manner in which the present project(s) fits into this master plan;

d. User group statements which reflect their stated needs regarding space, support, quality and logistics;

e. Project schedules which include:

(1) Schedule for development of the Owner's program;

(2) Schedule for design services;

(3) Schedule for both the hiring of consultants and for the performance of their work;

(4) Construction schedule; and

(5) Overall Project schedule.

f. Project budget;

g. Written review of sub-consultant reports;

h. Site analysis report;

i. Written review of testing reports;

j. Report detailing the options regarding project delivery systems;

k. Preparation or written review of the design contract;

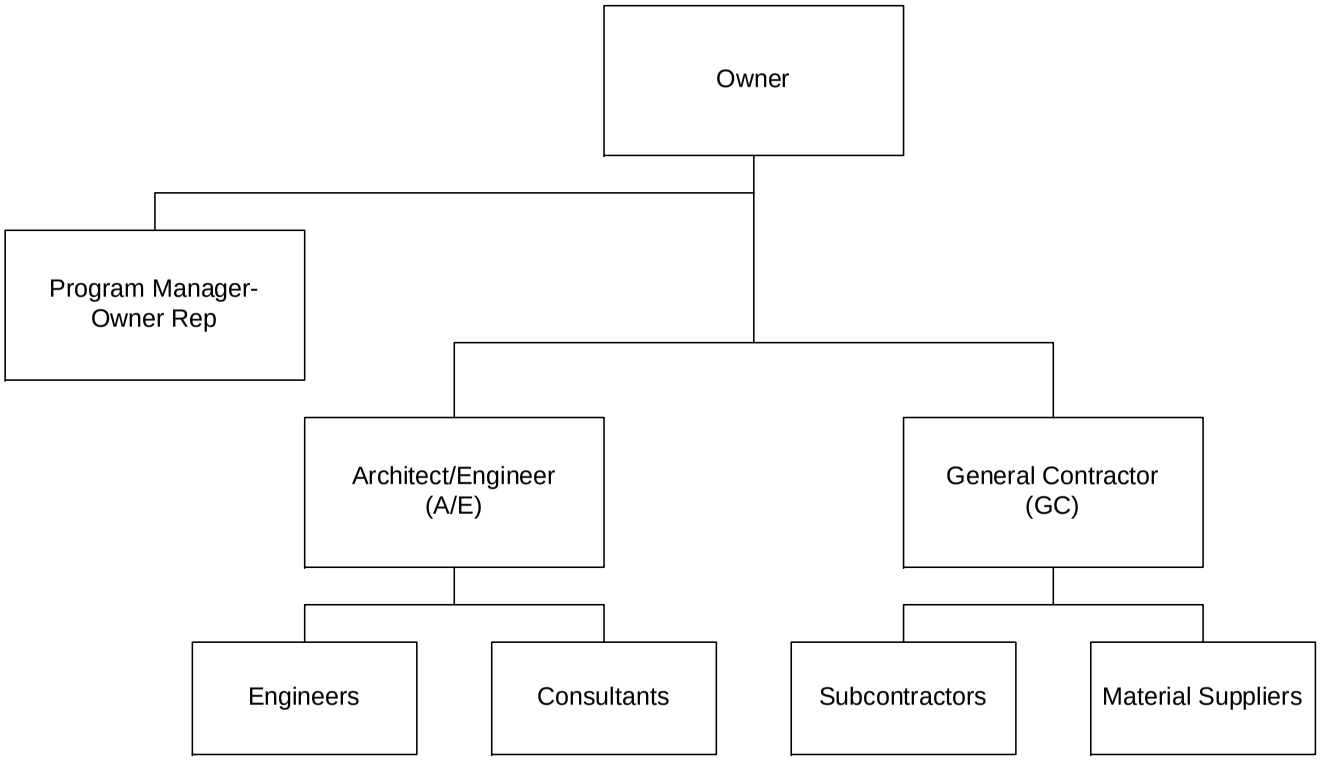
l. Preparation or written review of the construction contract(s);

m. Preparation or written review of consultant contracts;

n. Space planning report; and

o. List of long lead-time items and a purchase schedule.

GENERAL CONTRACTOR LUMP SUM BID (GC-LS)



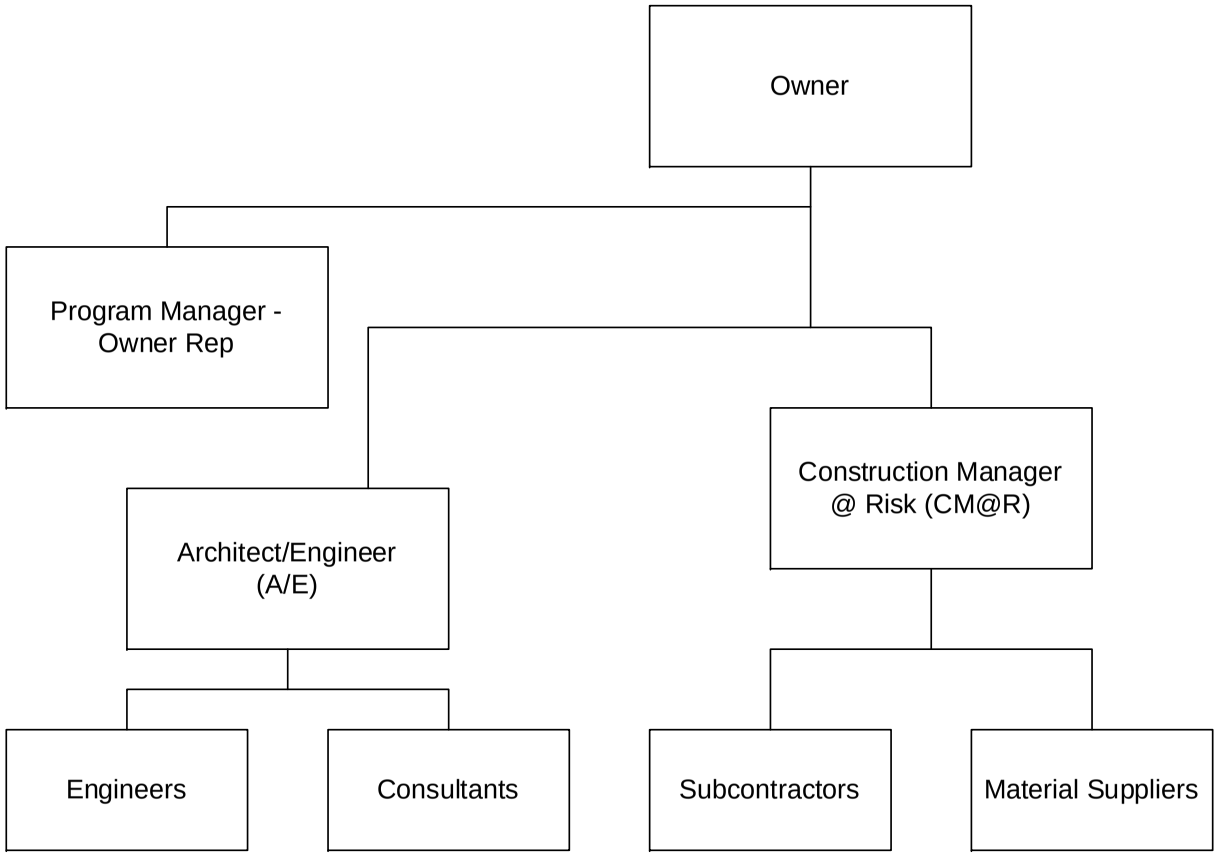
ADVANTAGES

1. Process Easy To Manage
2. Roles Are Clear And Process Universally Understood With Extensive History
3. Bids Are Taken On Defined Requirements (If Design Properly Completed) Which Should Obtain Initial Lowest Price
4. Owner Has An Initial Overall Price Before Construction Begins
5. Single Construction Contract With Single Bond

DISADVANTAGES

1. Construction Does Not Begin Until Design Is Fully Complete (Longest Project Delivery)
2. Public Selection Process May Produce A Contractor That Owner Is Not Entirely Comfortable With
3. Adversarial Relationship Is Inherent And Results In High Risk Of Claims
4. No Design Phase Review By A Builder
5. Procurement Of Subcontractors By A General Contractor During Bid Process Is Typically Unbusinesslike

CONSTRUCTION MANAGEMENT - AT RISK (CM@R)



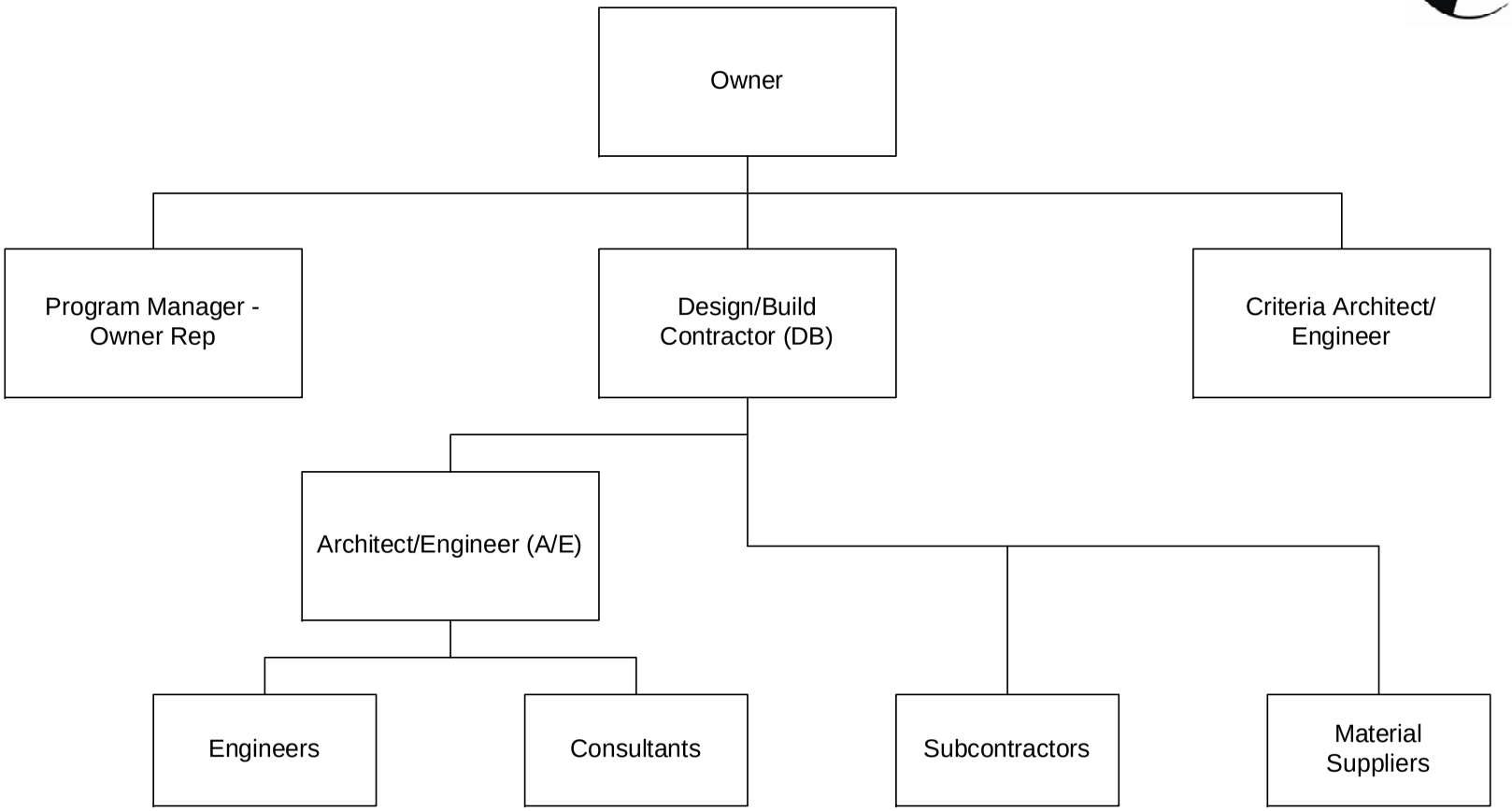
ADVANTAGES

1. Early Input To Cost/Value Engineering
2. Early Input To Constructability
3. Early Input To Schedule
4. Some Ability To Fast Track
5. At Some Point CM Is At Risk for Cost And Schedule

DISADVANTAGES

1. Public Selection Process May Produce CM That Owner Is Not Entirely Comfortable With
2. GMP Is For Work Not Entirely Defined and Produces “Out Of GMP”’ Claims
3. Difficult To Obtain Real GMP on Public Projects Until Later In Process Given The Fast-Track Nature Of Most Projects And Competitive Bid Requirements For Construction Work
4. Cost-Plus Contract Requires Intensive Administration

DESIGN/BUILD (D/B) - BRIDGING



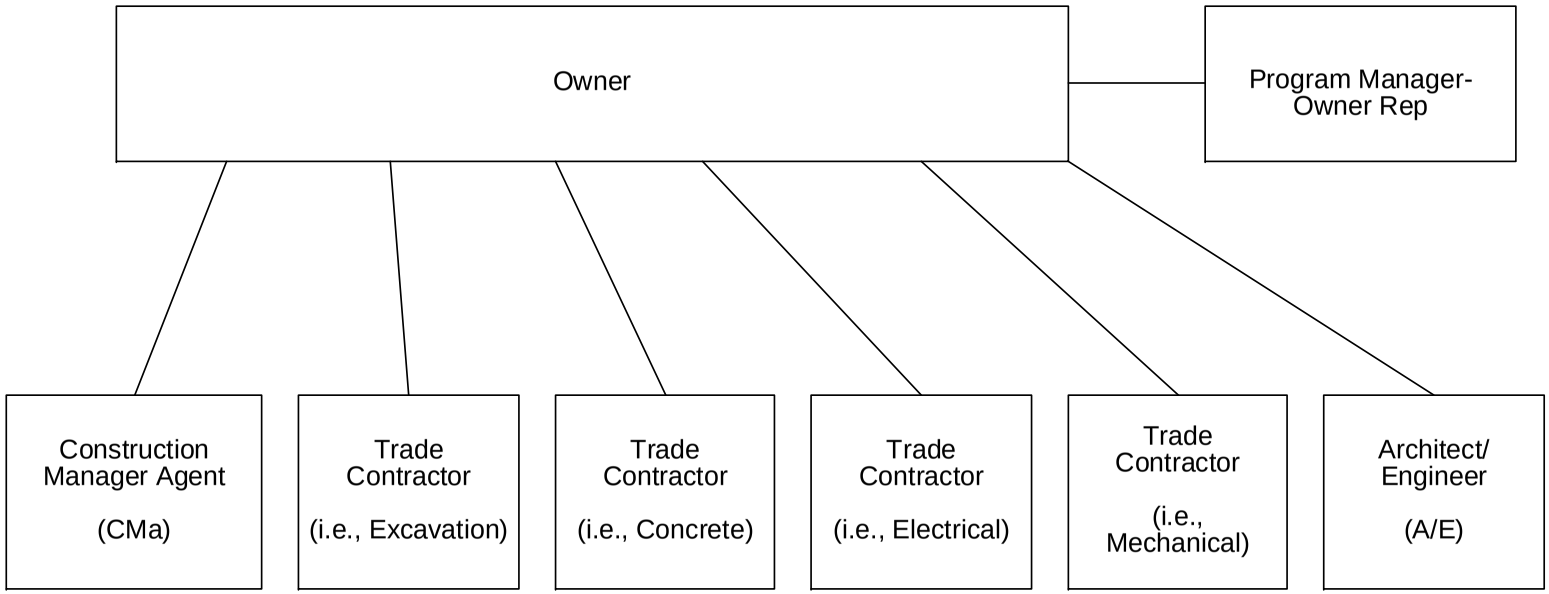
ADVANTAGES

1. Centralization Of Design And Construction Responsibility
2. Minimizes Risk Of Claims
3. Input Of Construction Professional Into Final Design
4. Bonded GMP Or Lump Sum Obtained Once Design Development Documents Completed
5. Bridging Specifically Allowed By Certain Public Owners

DISADVANTAGES

1. Two Architects Are Required To Be Involved Which Affects Continuity Of Design
2. Significant Time Required to Create Criteria Design
3. Public Selection Process May Produce A Design/Builder Owner Is Not Entirely Comfortable With
4. Process Creates Potential Claims Surrounding Whether Final Design Satisfies Design Criteria
5. Design/Builder Has Incentive To Develop Low Cost Solution To Maximize Profit
6. Intensive Administration Required Of Owner During Construction (i.e., Quality Control, Changes, Payments)

CONSTRUCTION MANAGEMENT - AGENCY (CMa)



ADVANTAGES

1. Early Input By Construction Professional In Pre-Design and Design Phases
2. Reduces Markups Typically Charged By GC
3. CM Selected Based Upon Qualifications As Determined By Owner
4. Trade Contracts Are Fixed-Price Based Upon Complete Documents With Less Potential For Changes
5. Less Administration Required From Owner's Staff. Both Architect And CM Are Owner's Agent During Construction
6. Fast-Track Easily Contractually Accommodated

DISADVANTAGES

1. CM Does Not Guarantee Price Or Schedule
2. No Single Point Of Responsibility
3. Multiple Bonds
4. Multiple Contracts Creates Risk Of Disruption/Delay Claims
5. Construction Administration Is By "Committee" (CM/Architect/Owner)

Payment

Prepared and Presented by:

Christopher J. Mohart
Polsinelli Shughart PC

Polsinelli Shughart PC

CHRISTOPHER J. MOHART
Construction Law Practice Group
Polsinelli Shughart PC

PAYMENT METHODS

- Lump Sum
  - A lump sum contract, sometimes called stipulated sum, is the most basic form of agreement between a supplier of services and a customer. The supplier agrees to provide specified services for a specific price. The receiver agrees to pay the price upon completion of the work or according to a negotiated payment schedule. In developing a lump sum bid, the builder will estimate the costs of labor and materials and add to it a standard amount for overhead and the desired amount of profit.

PAYMENT METHODS

- Unit Price
  - In a unit price contract, the work to be performed is broken into various parts, usually by construction trade, and a fixed price is established for each unit of work. For example, painting is typically done on a square foot basis. Unit price contracts are seldom used for an entire major construction project, but they are frequently used for agreements with subcontractors. They are used for maintenance and repair work. In a unit price contract, like a lump sum contract, the contractor is paid the agreed upon price, regardless of the actual cost to do the work.

PAYMENT METHODS

- Cost-Plus-Fee
  - In a cost-plus-fee contract, the owner pays the construction manager the actual cost of the construction (based on competitive bids for each trade subcontract) plus certain reimbursable expenses without any profit markup, and is charged a fixed fee by the construction manager for the services provided.

PAYMENT METHODS

- Guaranteed Maximum Price (GMP)
  - In this contract, the construction manager agrees beforehand that the cost of the work will not exceed a specified figure, known as the GMP. The GMP is based on competitive bids for each trade subcontract, but the construction manager charges an additional fee for taking on the risk of the guarantee. The construction manager is also allocated some contingency to pay for construction changes that are within the design intent of the project. Changes beyond the design intent require approval by all stakeholders.

MISSOURI AND FEDERAL PROMPT PAY STATUTES AND RETAINAGE STATUTES

MISSOURI PROMPT PAY AND RETAINAGE STATUTES

- Missouri Timeline
  - 1990 - Missouri Prompt Pay Act - *Public* Jobs R.S. Mo. Section 34.057
  - 1995 - Missouri Prompt Pay Act - *Private* Jobs R.S. Mo. Section 431.180
  - 2002 - Missouri Retainage Act - *Private* Jobs R.S. Mo. Section 436.300

1990 MISSOURI *PUBLIC* CONSTRUCTION PROMPT PAY ACT - R.S.MO. 34.057

- KEY POINTS
  - 1. Applies to *Public Works* Contracts
  - 2. Owner Pays Within 30 Days
  - 3. Retainage Shall Not Exceed 5%
    - Unless Owner and Architect/Engineer Determine Higher Rate (Not To Exceed 10%) Is Required To Ensure Performance
  - 4. Owner May Reduce Or Eliminate Retainage Early if Contractor's Work Is Proceeding Satisfactorily
    - Less 200% of Value Of Minor Incomplete Work

1990 MISSOURI *PUBLIC* CONSTRUCTION PROMPT PAY ACT R.S.MO. 34.057

- KEY POINTS
  - 5. Owner To Pay Retainage 30 Days After Substantial Completion And Acceptance
    - Less 200% Value of Minor Work Incomplete
  - 6. Owner Has To Pay 18% Interest To Contractor On Late Payments
    - Payment Must Be "Due" Contractor
  - 7. Contractor To Pay Subcontractors and Suppliers Within 15 Days Of Receipt Of Payment from Owner
    - When Owner Does Not Pay Application in Full, Pro Rata Pay to Subcontractors/Suppliers or Withhold from Breaching Subcontractors/Suppliers and Pay Other Subcontractors/Suppliers in Full

1990 MISSOURI *PUBLIC* CONSTRUCTION PROMPT PAY ACT R.S.MO. 34.057

- KEY POINTS
  - 8. Contractor Has To Pay 18% Interest On Late Payments To Subcontractors
    - Payment Must be "Due" to Subcontractors/Suppliers
    - Also Applies to Lower-Tier Subcontractors And Suppliers
  - 9. Owner May Withhold Pay To Contractor - Only In "Good Faith"
    - LDs - Unsatisfactory Progress - Defective Work - Disputed Work - Contract Noncompliance - Reasonable Evidence of Third Party Claims - Failure Timely to Pay for Labor/Materials - Damages - Violation of the Law - Reasonable Evidence that Cannot Complete for Unpaid Contract Balance
    - In Such Case, No 18% Interest Owed

1990 MISSOURI *PUBLIC* CONSTRUCTION PROMPT PAY ACT R.S.MO. 34.057

- KEY POINTS
  - 10. Contractor May Withhold Pay from Subcontractors/ Suppliers or Not Include Their Work in Contractor's Pay Application - Only in "Good Faith"
    - See 9. Above
    - In Such Case, No 18% Interest Owed
  - 11. If Payments "Not Withheld In Good Faith for Reasonable Cause" Court May also Assess Reasonable Attorney Fees Against Owner or Contractor that Withheld Funds

1990 MISSOURI *PUBLIC* CONSTRUCTION PROMPT PAY ACT R.S.MO. 34.057

- KEY POINTS
  - 12. Court May Award Attorney Fees if Plaintiff or Defendant Asserted Claims or Defenses Under Missouri Prompt Pay Act "Frivolously or in Bad Faith"
  - 13. R.S. Mo 34.058 – Invalidates "no damage for delay clause" in public works contracts (excludes MoDOT)

Five Years Later …..

1995 MISSOURI *PRIVATE* CONSTRUCTION PROMPT PAY ACT R.S.MO. 431.180

- KEY POINTS
  - 1. Applies to *Private* Design and Construction Contracts
  - 2. Parties Must "Make All Scheduled Payments Pursuant to the Terms of the Contract"
  - 3. Court may Assess 18% Interest and Reasonable Attorney Fees if Party Fails to Pay as Scheduled
  - 4. An Arbitrator is also Entitled to Make Such an Interest and Attorney Fees Award
  - 5. R.S. Mo 431.183 – pay when paid clause no defense to mechanic's lien claim

Seven Years Later….

2002 MISSOURI *PRIVATE* CONSTRUCTION RETAINAGE LEGISLATION - R.S.MO. 36.300

- KEY POINTS
  - 1. Applies Only to *Private* Construction Contracts
  - 2. Effective for All Private Construction Contracts Entered into After August 28, 2002
  - 3. Applies to All Owner, Contractors and Subcontractors and Suppliers at All Lower Tiers
  - 4. Establishes New Provisions and Restrictions on the Withholding of Retainage
    - Owner must release retainage within 30 days after substantial completion less 150% of cost to complete punchlist items

2002 MISSOURI *PRIVATE* CONSTRUCTION RETAINAGE LEGISLATION - R.S.MO. 436.300

- KEY POINTS
  - 5. Retainage Shall Not Exceed 10%
    - Owner Can Withhold More if Contractor's Performance is Unsatisfactory
  - 6. Retainage Held "In Trust" for Benefit of Subcontractors and Suppliers Who are not in Default
  - 7. Establishes Contractor's Right to Escrow "Acceptable Security" In Lieu of Owner Withholding Retainage
    - Only if Contractor Not in Default
    - Upon Contractor's Written Request

2002 MISSOURI *PRIVATE* CONSTRUCTION RETAINAGE LEGISLATION - R.S.MO. 436.300

- KEY POINTS
  - 8. Escrow Tender May be Made Before or After Retainage Withheld
    - If Before, Owner Releases Retainage to Extent of Security
    - If After, Owner Releases Retainage Within 5 Days of Tender
  - 9. Contractor is Entitled to Receive Interest or Income Earned on Security Deposited In Lieu of Owner Withholding Retainage
  - 10. Subs Have Like Right to Tender Security into Escrow in Exchange for Contractor's Release of Retainage

2002 MISSOURI *PRIVATE* CONSTRUCTION RETAINAGE LEGISLATION - R.S.MO. 436.300

- KEY POINTS
  - 11. "Acceptable Security" Which May be Escrowed in Lieu of Owner Withholding Retainage Includes:
    - CDs Issued by National Banking Association or Banking Corporation In Missouri
    - Retainage Bond Issued by Surety Authorized to Issue Surety Bonds in Missouri
    - Irrevocable and Unconditional Letter of Credit Issued by National Banking Association or Banking Corporation in Missouri

2002 MISSOURI *PRIVATE* CONSTRUCTION RETAINAGE LEGISLATION- R.S.MO. 436.300

- KEY POINTS
  - 12. 18% interest and Attorney Fees May be Awarded by Court if Retainage is Improperly Withheld
  - 13. An Arbitrator is also Entitled to Make Such an Interest and Attorney Fees Award
  - How Have other States Handled This in the *Public* Arena? Is the Missouri Legislature Likely to Extend This Legislation into the *Public* Sector?

OTHER JURISDICTIONS THAT HAVE ENACTED *PUBLIC* WORKS ESCROW RETENTION LEGISLATION

- 33 STATES IN THE USA HAVE PASSED STATUTES PERMITTING CONTRACTORS TO ESCROW "ACCEPTABLE SECURITIES" IN LIEU OF THE *PUBLIC* OWNER WITHHOLDING RETAINAGE
  - Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, Wyoming.

FEDERAL PROMPT PAY STATUTES

- Federal Timeline
  - 1982 – Federal Prompt Pay Act – Public Jobs 31 USC 3901, *et seq.*
  - 1988 – Federal Prompt Pay act was amended to regulate the manner in which prime contractors paid subcontractors and vendors

1982 Federal Prompt Pay Act

- Key Points
  - 1. Applies to public contracts for "property or service"
    - Congress; courts; territories; District of Columbia; and military authority in time of war or occupied territory are exempted
  - 2. Owner pays on the date payment is due as specified in the contract or, if the contract does not provide a date for payment, "30 days after a proper invoice for the amount due is received by the agency."
    - For general contractors, a different time period is applicable. Specifically, the agency is required to limit payment in response to an approved progress payment request received or a longer period as may be established in the contract.
  - 3. A payment due date is tolled if a dispute exists between the agency and the business concern "over the amount of payment or compliance with the contract."

1982 Federal Prompt Pay Act

- 4. Proper Invoice
  - Identity of the contract number or other authorization that provides for the delivery of property or services
  - A description of the property and services actually delivered or rendered, including price and quantity
  - Description of the payment terms
  - Identity of the contractor's taxpayer identification number
  - Additional substantiating documentation as may be required by the contract
  - The name, title, telephone number, and complete mailing address of the responsible contract representative to whom payment is to be sent

1982 Federal Prompt Pay Act

- 5. Proper Request for a Progress Payment
  - a statement of the specific amounts requested and an itemization of line items of work that are the subject of the request
  - identification of the work provided by the subcontractor
  - identification of the total amount of each subcontract
  - identification of amounts previously paid to each subcontractor
  - any other information or documentation required by the contracting officer
  - a contractor certification
  - an invoice or request for a progress payment will not be considered "proper" if it includes an adjusted total contract sum that has not been approved by the agency with an executed notification

1982 Federal Prompt Pay Act

- 6. Notification By Agency in Event of Improper Invoice/Pay Request
  - Assuming an invoice or request for payment is "received" by the agency, the Federal Prompt Pay Act requires the agency to review the invoice or request for payment quickly and to notify the contractor of any defects. Specifically, the agency must return the "improper" invoice or request for payment within seven days after receipt and must specify the reasons that support the agency's conclusion the invoice is improper.
- 7. A payment is deemed made on the "date" a check for payment is dated or an electronic funds transfer is made.

KEY POINTS

- 8. If the agency receives a proper invoice or request for progress payment and is late in issuing payment, the Federal Prompt Pay Act mandates that the agency shall pay an interest penalty to the business concern on the amount of the payment due.
  - The interest penalty is computed at the daily rate in effect at the time the agency accrues the obligation.
  - The interest is computed every 30 days and accrues until the payment is made by the agency or a claim for interest is submitted under the Contract Disputes Act of 1978 but in no event for longer than one year.
  - The rate of interest is established by the Secretary of Treasury for claims under the Contracts Disputes Act of 1978 and is published semiannually in the Federal Register.
  - The agency, when it finally remits the late payment, is also expected to tender the interest penalty.
  - If an agency fails or refuses to pay the interest penalty, the contractor's only recourse is to file a claim pursuant to the Contract Disputes Act of 1978.

1982 Federal Prompt Pay Act

- Once the appropriate payment is issued by the agency, the prime contractor is subject to certain requirements and obligations under the Federal Prompt Pay Act, which include notification of defective work and payment to subcontractors.
  - The Federal Prompt Pay Act requires the prime contractor to notify the agency if it discovers any defective work that had been the subject of a previously certified pay request.
- In such event, the prime contractor is required to pay the agency an interest penalty on the "unearned amount."

Six years later . . . .

1988 Amendments to the Federal Prompt Pay Act

- The Federal Prompt Pay Act requires prime contractors to include in every subcontract payment provisions that are virtually identical to the prime contract provisions.
  - Each subcontract must contain a payment clause that requires the prime contractor to pay subcontractors "for satisfactory performance under its subcontract within seven days out of such amounts as are paid to the prime contractor by the agency.
- The Federal Prompt Pay Act requires the prime contractor to include an interest penalty clause in the subcontract that obligates the prime contractor to pay interest on late payments.

1988 Amendments to the Federal Prompt Pay Act

- Each subcontract must include a "flow down" clause that provides that each subcontractor will include a "payment clause" and an "interest clause" in all subcontracts with lower tier subcontractors or suppliers.
- The prime contractor's obligation of payment to subcontractors includes the right to withhold payment without incurring liability for interest. But, the circumstances for withholding must be specifically reserved in the subcontract; for example: retention, defective performance, and nonpayment by the subcontractor.

1988 Amendments to the Federal Prompt Pay Act

- The Federal Prompt Pay Act does not expressly limit retention, but typically, retention is five to ten percent of the progress payment (but see Federal Acquisition Regulations).
  - The prime contractor may not request payment from the agency of any retained amount until the contractor has certified to the agency that the subcontractor is entitled to the retainage.

1988 Amendments to the Federal Prompt Pay Act

- A prime contractor that discovers defective work and elects to withhold may withhold an appropriate sum from the next progress payment to the subcontractor. In that event, the prime contractor must notify the subcontractor of the basis of withholding as soon as is practicable. The notice must be given before the payment would have been due. In addition, the prime contractor must send the notice to the agency of the withholding for the defective work.
  - When the defective work is corrected, the prime contractor must remit payment to the subcontractor within seven days after the correction, or it will be subject to the interest penalty.

1988 Amendments to the Federal Prompt Pay Act

- A prime contractor that discovers a subcontractor is not making payments to lower tier subcontractors or suppliers has the right to withhold payment. To do so, the prime contractor must provide a notice to the subcontractor specifying the following: the amount withheld, the reason for withholding, and the remedial actions the subcontractor must take for payment.
  - A copy of the notice to the subcontractor must also be provided to the agency.

CONTINGENT PAYMENT CLAUSES

- "Pay-When-Paid" Clause
  - A prime contractor is obligated to pay its subcontractor within a stated number of days after the prime contractor has received payment from the owner. Such a clause merely fixes the time when payment is due and does not establish a condition precedent to payment.
- "Pay-If-Paid" Clause
  - A prime contractor is not obligated to pay its subcontractor until the owner remits payment to the contractor. Such a clause shifts the risk of owner nonpayment from the general contractor to the subcontractor.
- Defenses to "Pay-If-Paid" Clauses
  - Ambiguity in the "Pay-If-Paid" Clause
  - The "Pay-If-Paid" Clause Has Been Waived

Questions & Answers

INSURANCE, INDEMNITY and CONTRIBUTION

Fundamentals of Construction Contracts: Understanding the Issues in Missouri

Presented by:
Gregory S. Gerstner, Esq.
Seigfreid, Bingham, Levy, Selzer & Gee, P.C.
2800 Commerce Tower
911 Main Street
Kansas City, MO 64105

Insurance and Indemnity issues are usually the most important risk management or risk allocation vehicles arising out of a construction project. Whether preparing or negotiating a construction contract or litigating a defect claim, insurance and indemnity are often important considerations.

I. TYPICAL INSURANCE COVERAGES

Most construction contracts require the purchase and maintenance of insurance by some or all of the parties. The risk of loss on a construction project is substantial. Most construction projects require sizeable commitments of labor, equipment and materials. Many players come together over a period of time to produce completed facilities. In these circumstances, the risk of loss to the equipment, materials, completed and to workers and the public is significant. Thus, it is important that each participant in a project maintains appropriate insurance to cover such risks.

Typically, proof of insurance coverage is provided by a "Certificate of Insurance," document obtained from a party's insurance broker describing the nature and amount of insurance coverages maintained by the insured, as well as any entities holding status as an "additional insured" under those policies. However for various reasons, the scope of coverage actually provided can only be determined from the policies themselves.

Standard form contracts such as the AIA A-201 (2007 Edition) (the "A201") set forth the contracting parties' obligations with respect to the purchase of insurance. Under Section 11.1.1 of the A201, a contractor is required to purchase and maintain insurance that will cover:

- claims under the worker's or workmen's compensation, disability benefit or other similar employee benefits acts which are applicable to the work to be performed.
- claims for damages because of bodily injury, occupational sickness or disease or death of the contractor's employees;
- claims for damages because of bodily injury, sickness or disease, or death of any person other than the contractor's employees;
- claims for damages insured by usual personal injury liability coverage which are sustained by a person as a result of an offense directly or indirectly related to employment of such person by the contractor, or by another person;
- claims for damages, other than to the work itself, because of injury to or destruction of tangible property, including the loss of use resulting therefrom;
- claims for damages because of bodily injury, death of a person, or property damage arising out of ownership, maintenance or use of a motor vehicle; and
- claims involving contractual liability insurance applicable to the contractor's obligations under Section 3.18 (providing indemnity).

Most of the coverages required under the A201 are provided under policies known as commercial general liability ("CGL") policies. The other required coverages are generally provided under worker's compensation and motor vehicle insurance.

A. Commercial General Liability Insurance

The first issue regarding CGL insurance is what coverage is afforded by the CGL policy.

1. Coverage

a. "Bodily" or "Property Damage"

CGL policies provide very broad coverage for damages arising from "bodily injury" or "property damage." While policy forms may differ somewhat between companies, they typically provide, under "Coverage A – Bodily Injury and Property Damage Liability," that the insurer will agree to pay those sums the insured is *legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence*.

The coverage for third-party property damage is broad. Most limitations on coverage are found elsewhere in the policy, primarily in the Exclusions section.

The definition of "property damage" in most CGL coverage forms includes some version of the following:

- Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

- Loss of use of tangible property that is not physically impaired. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

The key concepts within this definition are *"physical injury"* – the property must have sustained some type of physical harm or damage; and *"tangible property."* Most carriers argue that economic losses are not covered. However, if economic losses occur *because of* property damage, the losses may be covered. If there is property damage beyond the cost of completing the work or replacing any defective work, those damages most likely it will be covered.

b. ". . . Caused by an Occurrence."

The other important prerequisite to coverage under the insuring agreement is an "occurrence." Most policies define an "occurrence" as some version of the following: ". . . an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Many "occurrences" are easily identified, *e.g.*, the collapse of a wall. The more difficult cases are those that involve "continuous or repeated exposure to substantially the same general harmful conditions." In some cases, carriers have argued that defective construction does not constitute an "occurrence." A few courts have accepted the companies' position, with one stating that "construction defects . . . are natural and ordinary consequences of improper construction techniques . . . and, thus, do not constitute an occurrence within the definition of the CGL policy."

Most courts, however, reject such a narrow interpretation of the coverage grant, and hold that defective construction can result in an "occurrence," so long as the damage was "unexpected and unintended." Where defects in construction result in "continuous or repeated exposure" to harmful conditions, coverage should be triggered. Cases where water has entered into a building structure over time are examples of this type of "occurrence."

The question of when an "occurrence" triggers coverage is usually very complicated. However, courts have viewed the time of occurrence very differently. Some take the position that the occurrence is when the property was exposed to the condition, and others have held that the coverage happens when the damage can be seen or manifests itself.

2. Exclusions

a. Typical Exclusions to Property Coverage

Typical applicable exclusions relating to property coverage are as follows:

(1) "Business Risk" exclusions. There are a number of "business risk" exclusions. These are intended to bar coverage for "normal, frequent, or predictable consequences of doing business, and which business management can and should control and manage." However, these exclusions do not apply to any claims arising after the insured has completed its work.

(2) "Performing operations." This exclusion denies coverage for damage to that particular part of property on which the insured in performing its operations, if the damage arises out of those operations. This exclusion bars coverage for the property on which the insured or any contractors or subcontractors working directly or indirectly on the insured's behalf are performing operations, if the "property damage" arises out of those operations.

(3) "Faulty workmanship." This exclusion bars coverage for the cost to repair or replace an insured's own fault or defective work. The exclusion typically states, ". . . coverage is excluded for that particular party of any property that must be restored, repaired or replaced because your work was incorrectly performed on it."

It is important to note that these exclusions do not apply to "property damage" included in the "products-completed operations hazard." "Products-completed operations hazard" is defined as: Products-completed operations hazard includes all "bodily injury" and "property damage" occurring away from premises the insured owns or rents and arising out of "your product" or "your work" except: (1) products that are still in the insured's physical possession; or (2) work that has not yet been completed or abandoned arising out of "your product" or "your work" except products that are still in the insured's physical possession or work that has not yet been completed or abandoned. Accordingly, the exclusion does not apply to faulty workmanship if the property damage occurs after the insured has completed its work.

(4) "Your Work" Exclusions. CGL policies will contain exclusions for the insured's "Work" or "Product."

The Work or Product exclusion differs from the "faulty workmanship" exclusion in that it relates to completed work, excluding: Property damage to your work arising out of it or any part of it and included in the products-completed operation hazard. This exclusion does not apply, however, if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

B. BUILDER'S RISK INSURANCE

Builder's risk insurance is a specialized form of property insurance for projects under construction. Under the standard provisions in the A201 family of documents, the Owner is to purchase Builder's Risk Insurance. Such projects are not covered under standard property policies. Builder's risk policies are designed to insure against the accidental destruction or damage to the uncompleted construction project or the materials stored on site. Builder's risk insurance is similar to standard property insurance to the extent that both forms insure for damage to a loss of property; regardless of fault.

Most builder's risk policies only provide coverage while the construction is ongoing; once construction is "completed," builder's risk insurance terminates. Coverage is typically provided for the "completed value" of the insured structure and should include all permanent fixtures and interior improvements that will be part of the completed structure. Note that the construction contract price will typically not equate to the full "completed value" of the project.

The "covered property" under the standard builder's risk form also differs from that addressed by standard property coverage. The standard form covers the building under construction and its foundation, fixtures and machinery; equipment used to service the building, and the insured building materials and supplies used in construction.

Typical ISO builder's risk policies are issued with one of three "cause of loss" forms; the "basic" (or "named perils") form, the "broad" form or the "special" (or "open perils") form. The "open perils" form offers the broadest possible protection.

II. INDEMNITY

Construction contracts often contain indemnification provisions, the most common of which relates to the allocation between the parties of one or more risks of potential loss, cost, and expense resulting from bodily injury or property damage. Indemnity agreements can take other forms as well, including indemnification for lien claims, copyright and patent infringement, and hazardous material. Indemnity is the shifting of a loss from one party to another party. Every state recognizes this legal right, and the duty to indemnify can arise due to a statute, the common law, or by virtue of a contractual provision. Common law and statutory indemnities may transfer liability from a party that has little or no responsibility for a loss to the party that has more or all of the responsibility. By contract, the parties can agree to shift responsibility differently from how it might otherwise be handled by statute or common law. However, many states have anti-indemnity statutes that affect the parties' ability to shift certain risks through indemnity provisions.

A. Indemnity Clauses

Indemnity clauses generally take three forms: limited form, intermediate form, and broad form. Under the limited form, the indemnitor (the party giving the indemnity) agrees to hold the indemnitee (the party getting the indemnity) harmless for damages or liability caused by the indemnitor's fault. The intermediate form of indemnity goes beyond simply protecting the owner from the contractor's negligence and shifts liability for the owner's partial negligence to the contractor. Finally, the broad form, as the name implies, is the broadest of all. Under the broad form, the indemnitor assumes an unqualified obligation to hold the indemnitee harmless from any and all liabilities arising out of the project, even those caused by the sole fault or negligence of the owner. If a broad form indemnity is not limited to bodily injury and property damage claims, a contractor will be exposed to liability for economic losses that arise from the project such as lost income and extended financing costs (that is, consequential damages).

In drafting indemnification agreements, the focus should be on which party is best able to control the risk involved, such as avoiding bodily injury or defective workmanship, or best able to procure insurance to cover the risk. In most cases, the ultimate objective of an indemnity agreement should be to shift the risk of loss to an insurance company, which is the party in the business of covering the costs of such losses. Two factors may affect the parties' ability to achieve this ultimate objective: (a) insistence by an upper-tier party on a broader indemnity and (b) changes in the terms, conditions, and interpretations of the applicable insurance policies.

B. Role of Insurance

Indemnity agreements also affect the industry that charges premiums for spreading the risk of financial loss in the event of a loss — the insurance industry. This industry is continually shifting the coverages offered under its standard policies, making it difficult for someone outside of the industry to fully understand the coverages available.

Drafting or reviewing indemnity agreements in construction contracts requires expertise in insurance coverage issues under the law of the state governing the contract of construction. Frequently insurance coverage questions are relegated to the client's insurance broker who,

hopefully, has sufficient knowledge of the construction industry and the client to provide sound advice. The party that owes the duty to indemnify seeks to negotiate a clause to be covered by the contractual liability coverage generally afforded by that party's CGL policy. Contractual liability coverage has been a standard component of CGL policy forms promulgated by the Insurance Services Office, Inc. (ISO) since 1986. CGL insurance policies are generally written in terms of coverage provided, exclusions from that coverage, and exceptions to the exclusions. Standard form policies exclude coverage for "bodily injury or property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." The exclusion then contains two exceptions that leave coverage under the policy in place for (1) liability assumed in an "insured contract," and (2) liability the insured would have in the absence of a contract or agreement. An "insured contract" is defined in the policy as, among other things, "[t]hat part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement."

C. Policy Exclusions

There are other limitations in standard policies One such limitation, important in the construction context, is that an "insured contract" does not include indemnification of an architect, engineer or surveyor for injury or damage arising out of (1) preparing, approving, or failing to prepare or approve maps, shop drawings, opinions, the preparation or approval of, or the failure to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; or (2) giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage.

Further, if the indemnitor does not have coverage for the occurrence under its policy, then neither does the other party under the contractual liability provision. An indemnitee would not be covered under the indemnitor's CCL policy for an asbestos problem if the indemnitor's policy did not provide pollution coverage, for example. The indemnitee would still have rights against the indemnitor under the indemnity agreement, but no insurance policy would be available to provide the financial backing for the indemnity.

D. Anti-Indemnity Statutes

Many statues have statutes that affect the ability of parties to shift roles through indemnity clauses, including Missouri. R.S.Mo §434.100, applicable to both public and private construction contracts (and subcontracts) made after August 28, 1999, limits the ability to enforce indemnity provisions requiring a party to defend and indemnify another person from the other person's own negligence.

The statute does not affect a contractor's or subcontractor's agreement to indemnify an owner for the contractor's or subcontractor's negligence, or for the negligence of lower-tier subcontractors or suppliers. It applies only to agreements to indemnify another person from that person's own negligence.

Before R.S. Mo. §434.100, the courts held that as long as an agreement to indemnify another person for that person's own negligence is stated clearly and unequivocally, the agreement is enforceable. See *Buchanan v. Rentenbach Constructors, Inc.*, 922 S. W. 2d 467 (Mo. App. 1996). Kansas law is similar. *Bartlett v. Davis Corp.*, 547 P. 2d 800 (Kan. 1976).

Section 1 of R.S. Mo. §434.100 states broadly that "in any contract or agreement for public or private construction work, a party's covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence or wrongdoing is void as against public policy and wholly unenforceable."

The statute then tempers that prohibition by stating that it does not apply to "An agreement containing a party's promise to indemnify, defend or hold harmless another person, if the agreement also requires the party to obtain specified limits of insurance to insure the indemnity obligation and the party had the opportunity to recover the cost of the required insurance in its contract price; provided, however, that in such case the party's liability under the indemnity obligation shall be limited to the coverage and limits of the required insurance . . ..

In other words, a provision in a construction contract requiring a party to indemnify another person for the other person's own negligence is enforceable only if:

- the contract also requires the party to obtain contractual liability insurance with specified limits to insure the indemnity obligations; and
- the party had the opportunity to include the cost of the required insurance in the contract price; and in any event, the party's indemnity liability will be limited to the insurance required in the contract.

III. DRAFTING INDEMNITY CLAUSES

Many project participants and their representatives overlook the complexity of drafting indemnity clauses. Generally, industry form documents, such as those produced by the American Institute of Architects, may not address issues important to the parties. As noted above, the complexity of drafting an indemnity clause is similar to drafting a liability insurance policy. In addition to the scope of the indemnity clause, the following list includes certain issues that should be addressed:

- Which claims are covered?
- How is the nature of the claim to be determined?
- Is the duty to defend broader than the duty to indemnify?
- Must the indemnitor still pay the cost of defense if the defense is successful?
- What items are included in defense costs if they are to be reimbursed by the indemnitor?

- Must the promise to defend and indemnify be backed up by liability insurance?
- Must the indemnitor indemnify any settlement made by the indemnitee?
- Does the indemnitor have both a right to participate in the settlement process and a measure of control over any settlement made?
- Does the presence of an express indemnity clause in a contract preempt or bar any claim for equitable indemnity not based upon a contract?
- If indemnity as to the loss is comparative, does the fault comparison control the cost of defense?

Dispute Resolution Provisions

Prepared and Presented by:

Heather F. Shore
Brown & Ruprecht, PC

VII. Dispute Resolution Provisions

A. Alternative Dispute Resolution ("ADR")

What is ADR?

ADR is an all-encompassing and somewhat imprecise term that embraces every method and means possible to resolve a dispute short of a final courtroom determination. At virtually any stage of the process, ADR can be used separate and apart from litigation or in conjunction with litigation.

The common forms of ADR are:

- Negotiation
- Early Neutral Evaluation
- Mediation
- Moderated Settlement Conference
- Arbitration
- Mini Trial
- Summary Jury Trial
- Rent a Judge

The principal feature of ADR is that the parties have a great deal of control in fashioning the method and means for resolving their dispute.

Negotiation for Settlement

Negotiation is very simple. The parties sit down and discuss their problem and try to arrive at an agreed solution. Success depends in large part on the good faith of both parties involved. One advantage of negotiation is that it is the least costly of all ADR techniques. It requires some preparation, but not as much as some of the other

alternatives. There is no special setting in which the negotiation must be held. Some disadvantages of negotiation are that the parties often assume passive roles while the lawyers take more active roles, it is non-binding, and it is often adversarial.

Early Neutral Evaluation

This procedure involves a non-binding case evaluation conference. Both the parties and the attorneys involved in the dispute attend the conference, which is presided over by an expert in litigation selected by the parties.

Again, the advantage is low cost. It is similar to mediation but may have more steps involved once the neutral evaluator begins the process. The idea here is to send the parties off by themselves to settle their dispute.

There are very few disadvantages.

Mediation

Mediation is a forum in which an impartial person, known as the mediator, facilitates communication between the parties to promote reconciliation, settlement or understanding among them. It is often used as a settlement tool and the parties--rather than the lawyers--assume more active roles. Generally, the procedure begins with a simple introductory session during which the ground rules are explained, then statements are made and the parties try to find areas of agreement and dispute. The parties are then separated and they communicate offers and counteroffers to each other with the mediator acting as a communicator of information and a buffer to the parties' emotions.

Some of the principal advantages of mediation are that it is simple and economical and may obtain a quick result. Mediation also may force the parties to

realistically evaluate their cases earlier in the process. The parties are also allowed to maintain an on-going business relationship while they keep their dispute both private and confidential.

Some of the disadvantages are that mediation is non-binding and no judgment or ruling is reached. There may be little benefit to mediation if a novel question of law is involved, if credibility of witnesses is important, or if the opposing party or counsel is untrustworthy or unlikely to compromise.

Moderated Settlement Conference

This is a forum for a structured negotiation between attorneys and clients often presided over by a judge. When it is used in connection with litigation under the authority of a judge, it generally requires the parties to appear at the conference with settlement authority. The attorneys make oral case presentations to the judge stating the relevant facts and law involved in the dispute. The moderator then assists in trying to foster a settlement. It is similar to mediation, but generally held at the courthouse in connection with litigation.

The advantages are similar to those of mediation in that the costs are low and it forces the parties to evaluate their case early.

The disadvantages are that it is non-binding and the parties, who are already engaged in litigation, may be compelled to reveal facts that they may wish to keep private for a while longer.

Mini Trial

This is a procedure by which each party summarily presents its position through lawyers and experts, either to an impartial third party or a selected representative knowledgeable in the field of the dispute. The parties may use witnesses to develop their positions followed by rebuttal and questions concerning the presentations.

Some of the advantages are that it is quick, it will maintain the relations of the parties private and confidential, it is flexible, and it involves key personnel of the parties in active roles.

The disadvantages of mini trials include that it can be more expensive to prepare for than other methods of ADR and it is non-binding.

When mini trials are used, there is often disagreement between the parties whether some or all of the discovery in the case should be concluded prior to the mini trial. Also, questions arise as to whether the impartial third party or "advisor" should express his or her opinion to the parties about what he or she thinks about the case. Again there is that desire to conceal information which might be harmful.

Summary Jury Trial

A summary jury trial is simply an abbreviated presentation of the facts of the case before a selected and agreed jury. Usually no witnesses are used in a summary jury trial, rather the statements of the parties suffice. At the conclusion, an advisory opinion is rendered. The technique generally is used after the parties complete discovery when the case is ready for trial.

Some of the advantages are is that it allows for the evaluation of a case before multiple unsophisticated neutrals, much like a jury, and may serve as a basis to settle the case when the advisory opinion is rendered. If there is no settlement, the case proceeds to trial.

The disadvantages are obvious. There are costs involved and the result is nonbinding.

Rent a Judge

In this instance the parties hire a third party to act as a judge. The party might be a retired judge or some other individual with knowledge of the area of law. The parties present the facts, the law, witnesses and experts and expert testimony but in an abbreviated form. It is similar to a mini trial or a summary jury trial, but slightly more formal.

Many of the advantages and disadvantages are the same as a mini trial and summary jury trial.

Summary of ADR Procedures

From an "advantage" standpoint, the idea of ADR is to bypass the overwhelmed, understaffed and overcrowded courts so as to proceed to the resolution of a problem in less time and for a lower cost. At the same time, the parties may be able to preserve their relationships without full-blown litigation. ADR is designed to be flexible, confidential and either binding or non-binding depending on the wishes of the parties. It allows for the use of specialized expertise in the resolution of disputes and a certain amount of autonomy and control by the parties.

"Disadvantages" to ADR include that there usually is no discovery involved in the process, or discovery is severely curtailed so that the development of facts is hampered. Also, judicial control is limited and there are few controls on the neutral evaluators, unless placed on them by the parties. Oftentimes the quality of justice can suffer in that legal principles may be subsumed and precedent ignored under these outcome-driven procedures. Justice and fair play may take a back seat to "bright line" technical legal principles. Also, unanticipated remedies may be applied for which there may be no judicial review. Unless ADR is carefully controlled, there may be a higher degree of unacceptable results.

When to Use ADR

Clearly, a party might use ADR when the advantages outweigh the disadvantages. There are several important things to consider, including the dollar value of the claim. Certainly ADR would be more valuable in smaller disputes due to the lower cost. This is not to say that it could not be equally valuable in the larger disputes. Another rule of thumb is to evaluate opposing party and its counsel. If the opposing party and its counsel are reasonable people who tend to be objective about the situation, ADR will certainly work to your advantage.

Parties should also determine the complexity of the facts and the law. As noted above, legal principles may take a back seat to facts in ADR. Certainly if your facts are extremely complex, it makes more sense to consider ADR rather than to put those facts in the hands of an unsophisticated judge or jury.

What is Submitted to ADR Generally?

In the construction industry, the most prevalent disputes submitted are defective work, payment disputes, project delays and changes. The least prevalent disputes submitted are jobsite administration questions, differing site condition issues and personal injury and property damage issues for which a courtroom forum may be more appropriate.

What are Appropriate Qualities of an ADR Advisor or Facilitator?

An ADR advisor or facilitator should be impartial, possess managerial skills, personal discretion, listening ability, ability to understand complex issues, patience, creativity, ability to explain issues, persuasiveness, and, in construction disputes, possess some design and/or construction experience, have personal prestige and legal expertise. All of these qualities make for a good advisor.

Preventive ADR

Preventive ADR goes by many names, including:

1. Partnering
2. Step Negotiations; and
3. The Standing Neutral Concept:
    (a) Dispute Resolution Panels
    (b) Standing Arbitration Panels

Partnering - Most disputes that go to litigation involve breakdowns in communication. Recognizing this fact, the U.S. Corps of Engineers and others in the private sector have developed a technique called "partnering" to prevent disputes from

interfering with construction projects. The experience with partnering, particularly in sealed bid fixed price contracts, has reduced disputes in litigation sharply, according to a number of commentators.

The idea of partnering is to build a team mentally among all those who have to work together on the project. This includes contractors, subcontractors, engineers, architects, owners, representatives, lawyers and others.

Initially, the parties schedule a preconstruction conference or retreat that might last for an extended period of time at a neutral location. The parties appoint a facilitator who encourages that all significant parties be invited. The facilitator may schedule personality tests of the participants to share with each other, foster team building exercises conducted in smaller groups, and arrange a general session at which hard issues likely to arise on a project are discussed.

While meeting together, the parties who are going to engage in partnering may design dispute resolution techniques or procedures that can be invoked in the future in the event of disagreements. The parties try to formulate and sign a partnership agreement indicating what their goals and aspirations are for the project.

Step Negotiations - Another technique is called step negotiations. In method of resolution, representatives of each party who are intimately involved in the problem and who are not able to resolve it at their level, pass the problem on to their immediate superiors who are asked to confer and try to resolve the problem. If they are, in turn, unable to solve the problem, the problem is then passed on to the next higher management level in both organizations. The thought is that because intermediate

managers have an incentive to keep difficult problems from bothering higher management, and also to demonstrate their dispute resolution skills, there is an incentive for those parties to resolve disputes before they escalate to a higher level.

The Standing Neutral Concept - The standing neutral concept involves the selection of a neutral to serve as a dispute resolver throughout the project. This independent neutral or neutrals are called a "Dispute Review Board" or a "Standing Arbitrator." The parties may select one or more industry experts to serve and be available as a standing board or panel throughout the project. The concept is that they are available to act immediately to resolve any dispute that the parties cannot resolve themselves. There are several steps to the procedure.

1. At the beginning of the project the parties make the selection of persons they trust and have confidence in to serve on the panel.

2. The selection of the panel may be patterned after American Arbitration Association procedures.

3. The neutral can be given authority to act on disputes by rendering either a non-binding evaluation or recommendation or a binding decision, whatever the parties decide.

4. The neutral may be given a basic introduction to the project, its nature, extent, scope and even may be favored with a basic set of contract documents for review before any problem arises.

5. The neutral may meet periodically at the project site with key personnel for review of progress even without disputes having arisen.

6. When a dispute does arise, it is referred to the neutral for prompt decision.

7. If the neutral only makes a recommendation and not a binding decision, then the parties can determine what to do with the recommendation and whether to proceed on to a later binding resolution.

8. The expenses of the neutral are generally absorbed equally by the parties who engage in securing one.

Dispute Review Board - The dispute review board consists of one member selected by the owner and approved by the contractor and one member selected by the contractor and approved by the owner. The first two members select and agree on a third member and the third member usually acts as the chairperson.

The board makes its own rules of operation and the members are kept informed of the construction project progress by receiving weekly reports, making regular visits, visiting representatives, etc. Disputes are resolved as quickly as possible between the parties without involving the board. However, if the parties cannot resolve it, an appeal is then submitted to the board within a set period of time. The parties are given an informal opportunity to present evidence to the board. They may have representatives at the proceeding. The board is then allowed to ask questions of the witnesses, but should not express opinions concerning the merits of any facet of the case during the hearing. Afterwards, the board deliberates and renders a decision. The parties can either accept the decision, or reject it and move on to other methods of alternative dispute resolution such as binding arbitration or litigation.

Standing Arbitration Panel - The selection and function of the standing arbitrator or panel is similar to the dispute review board or adjudicator except that the neutral acts as an arbitrator who makes decisions that are final and binding on the parties just as in conventional arbitration.

Conclusion

While ADR and preventive ADR certainly are not the answer to all problems, they are an avenue to be considered on every project or, at the very least, when any dispute arises. Given the expense of litigation, the time involved and the uncertainty of the ultimate result, ADR provides some increased measure of certainty ill a very uncertain world.

Changes

Prepared and Presented by:

Daniel R. Zmijewski
Miller Schirger LLC

Changes
By
Daniel R. Zmijewski

I. What are changes and what can they do?

a. Changes were created out of a recognition that construction rarely proceeds as planned and there is a need to streamline the typical “offer” and “acceptance” for a flexible approach

b. Changes typically:

i. Authorized owners to change contract plans and specifications unilaterally by issuing "change orders";

ii. Obligated owners to compensate contractors for ordered changes by making appropriate adjustments to contract price and time;

iii. Obligated contractors to give timely notice of alleged “changed” or “extra” work;

iv. Substituted contractual "equitable adjustment" relief in lieu of common-law breach of contract remedies;

v. Required both parties to perform the contract as changed, pending adjustment to the contract;

vi. Required approval of the change by design professionals of record; and

vii. Established "claims" procedures to address disputed changes.

II. Examples of change clauses

a. Federal Acquisition Regulation (“FAR”) Change Clause – 52.243-4

i. FAR mandates all federal fixed price construction contracts exceeding $100,000 must include a changes clause. Authority to enter into and bind the government to change orders is limited to federal contracting officers or, when authority is properly delegated, to administrative contracting officers.

ii. Change orders are to be issued in written form, but contractors routinely recover compensation for (1) changes made orally by an authorized representative, and (2) changes which should have been issued under the circumstances and which are known as "constructive changes."

iii. Changes which should have been issued but were not, because of disputed contract interpretation or allocation of risk, are cognizable under the "changes" clause so long as the contractor presents written notice of claim for changed work.

iv. Change orders may only change work "within the general scope of the contract," a crucial phrase interpreted to exclude application of the "changes" clause to "cardinal" changes beyond the contract's scope.

v. Recognized changes entitle a contractor to compensation by way of an "equitable adjustment." Pending administrative determination of entitlement to or amount of an equitable adjustment, or resolution of any other contract dispute, the contractor is required to proceed with the work in accordance with the contracting officer's direction.

b. AIA – Document A201 Article 7 – classification of changes

i. Change order

1. Based upon agreement by Owner, Contractor and Architect

2. Agreed upon by all and includes an agreed upon amount.

ii. Construction Change Directives (“CCD”)

1. Based upon agreement by Owner and Architect prior to agreement on change in contract time or contract price

2. Changes must be within the “general scope” of the contract

3. Contractor must proceed with change and advise Architect of any agreement or disagreement with time and sum adjustment

iii. Minor changes

1. Issued by Architect alone

2. Changes do not involve adjustments in contract sum or contract time

3. Contractor is obligated to carry out the written order promptly

III. Extra Work v. Additional Work

a. Missouri cases distinguish extra work from additional work.

i. Extra work is:

1. Work that is entirely independent of the contract and that was not contemplated by the parties at the time of contracting. Kaiser v. Lyon Metal Prods., Inc., 461 S.W.2d 893 (Mo.App. 1970).

2. Compensable over and above the contract sum. Am. Drilling Serv. Co. v. City of Springfield, Mo., 614 S.W.2d 266, 274 (Mo.App. 1981)

ii. Additional work is:

1. Work that is necessarily required in the performance of the contract even if the contractor encounters unforeseen conditions. Waddington v. Wick, 652 S.W.2d 147, 150 (Mo.App. 1983)

2. Although not anticipated by the contractor, not compensable.

b. A jury or fact-finder must determine whether extra work was required by changed conditions rather than whether the contractor simply had to perform unanticipated, additional work necessary to complete its contractual obligations. Envtl. Prot., Inspections, & Consulting, Inc. v. City of Kansas City, 37 S.W.3d 360 (Mo.App. 2000).

IV. Written Change Order Requirements

a. In the absence of a waiver or modification of the construction contract, the procedures for obtaining a written change order must be followed to recover additional compensation.

b. Herbert & Brooner Construction Co. v. Golden, 499 S.W.2d 541 (Mo.App. 1973)

V. Avoiding the Written Change Order Requirements

a. Quantum Meruit

i. Legal theory based upon the principle of unjust enrichment

ii. Under Missouri law, a contractor may recover in quantum meruit for extra work or, alternatively, may recover under the contract – Steinberg v. Fleischer, 706 S.W.2d 901, 907 (Mo.App. 1986).

iii. If a party can establish the work performed was "extra work," outside of the scope of the contract, the contractual notice provisions do not apply and the party is entitled to recover in quantum meruit. Husar Industries, Inc., v. A.L. Huber & Son, Inc., 674 S.W.2d 565 (Mo.App. 1984).

b. Oral agreements, course of conduct and estoppel

i. Under Missouri law, parties to a construction contract may orally agree to compensation for extra work and waive any requirement for a written change order – Winn-Senter Constr. Co. v. Katie Franks, Inc., 816 S.W.2d 943 (Mo.App. 1991).

ii. Parties cannot bind themselves to an agreement that would prohibit them from making a subsequent oral agreement to waive the requirement of only written amendment in the prior agreement – Doss v. Syntex Agribusiness, Inc., 901 S.W.2d 293, 299 (Mo.App. 1995).

c. Waiver by Course of Conduct or Silence

i. An owner's silent acceptance of extra work will waive the requirement of a written change order. Acceptance of the work without objection constitutes a waiver of the requirement for a change order – Markway Construction, Co. v. Krichenbauer, 769 S.W.2d 836 (Mo.App. 1989).

ii. Habitual acceptance of extra work performed in accordance with oral orders amounts to a waiver of written change order requirement – Julian v. Keifer, 382 S.W.2d 723 (Mo.App. 1964).

iii. But repeated protest to undocumented changes can amount to the denial of additional payments – Dave Kold Grading, Inc. v. Terra Venture Bridgeton Project Joint Venrue, 85 F.3d 351 (8th Cir. 1996).

d. Claiming Cardinal Change

i. Cardinal changes amount to an abandonment of the contract.

ii. Missouri recognizes the right to compensation for cardinal changes.

1. Gill Const., Inc. v. 18th & Vine Authority, 157 S.W.3d 699 (Mo.App. 2004) – 80% of work over original amount contemplated amounts to cardinal change

2. Uhle v. Tarlton Corp., 938 S.W.2d 594 (Mo.App. 1997) – 23 change orders included work "controlled by the contract" so did not amount to cardinal change

VI. Public Works Projects

a. The issue of waiver or modification is precluded in public wrks projects

b. § 432.070 bars recovery for

i. Services performed for public entities, unless a written agreement exists authorizing payment for the services – Duckett Creek Sewer Dist. Of St. Charles County v. Golden Triangle Dev. Corp., 32 S.W.3d 178 (Mo.App. 1976).

ii. Quantum meruit or implied contract claims – Goodyear v. Junior Coll. Dist. Of St. Louis, 540 S.W.2d 621 (Mo.App. 1976).

iii. Oral agreements to waive or modify the terms of a written contract.

VII. Typical Types of Changes Encountered

a. Contract interpretation dispute during performance – typically the owner's erroneous interpretation of the contract that compels the contractor to perform work above and beyond that required by the plans and specificaitons.

b. Interference or failure to cooperate – owner is required to effectively manage the project and provide timely responses to plans and site access while always dealing in good faith. If a contractor encounters problems, these claims may be raised.

c. Defective specifications – refusal to promptly recognize the impracticability of contract performance based upon defective specifications can result in constructive change.

d. Misrepresentation or non-disclosure of information – the owner has an impled duty of cooperation and a duty of full disclosure – the doctrine of "superior knowledge."

e. Acceleration - "Constructive" acceleration of contract performance typically begins with a dispute between the parties over causes of delay to the construction schedule's critical path and whether and to what extent the contractor is entitled to an extension of contract time.

VIII. Change order authority?

a. When an agreement effecting a waiver is alleged, the authority must be sufficient

b. Rufkahr Const. Co. v. Weber, 658 S.W.2d 489 (Mo.App. 1983) – architect has authority to interpret, but not modify contract documents. – Remember, no changes in public contracts.

IX. Settlement and release

a. Article 4 of AIA Doc. A201-1997 addresses dispute resolution

b. Partial releases for claims for prior work are valid

Design Defects

Prepared and Presented by:

J. Drew Marriott
Miller Schirger LLC

Design Defects

Fundamentals of Construction Contracts: Understanding the Issues in Missouri.

Prepared and Presented by:

J. Drew Marriott
Miller Schirger, LLC
816.561.6500
dmarriott@millerschirger.com

Miller Schirger
INTELLIGENT DIRECTION

Design Defects- General Roadmap

1. Design Professionals
2. Design Defects- Generally
   a) Realm of Contract and Tort
   b) Case/hypothetical
3. Standard of Care (SOC)
4. Theories of Liability…
   a) Tort
   b) Strict
   c) Contract
   d) Misc.

Roadmap continued

5) Defective Plans and Specifications
6) Conclusions

1. Design Professionals

- Architects
- History
- Multifaceted roles of Architect and Designers
  - Independent Designer (agent of the owner)
  - Administrator of the Project (agent of the owner)
  - Arbitrator (connotes some neutrality
- Discussion related to their role as an Independent designer and the liability that may attach to their work.

2. Defects- Generally

- Discovery of defect
- Claims against Contractors and/or Architects.
  - Claims against architects are typically incidental to claims against contractors
  - Can be Contractual or Tort based
- Contract protections/Obligations
- Design Professional/ Architect responsibilities

Dirty Little Word- Defect

- What is a defect
- How do construction contracts deal with defects that arise.
- Where does responsibility fall?
- What's the measure of damages?
- Apart from Contractual liability are there other risks…TORTS.

Defects

- An imperfection or shortcoming in a part that is essential to the operation or safety of a product.
  - Black's Law Dictionary, 3d Edition.
- When plans or specifications are faulty or defective
  - Unsafe structures (injuries)
  - Economic loss for negligent designs
  - Requires reasonable care in preparation of architectural designs (standards of care).

1979 Kemper Arena Roof Collapse

Facts :

- June 4, 1979
- Storm with winds in excess of 70 mph
- Portions of the roof collapse

- Factors
  - Release of rain water
  - Miscalculation as to strength of bolds and hangars
- Chubb Case- Discussion

Hyatt walkway collapse- resulting litigation

- Facts
- Litigation
- Design
- Civil Suits
  - Personal Injury and wrongful death
- Architect convictions
- Architectural licensing

3. Standard of Care

- Duty of Care
- Duty to client, contract group (workers, contractors, bonding company, etc.), and to the public.
- Standard of Care comes from:
  - Contract
  - Common law
  - Statutes and building codes

Continued

- Stated another way:
  - The architect/designer is required to perform her duties according to the terms laid out in the contract, according to what the law requires, and according to statutes, regulations and codes.
  - Failure to abide by those three standards can result in liability
- Fashioning cause of action in contract or tort- may have consequences (Statutes of Limitation and Repose)

4. Theories of Liability

- Tort
- Contract
- Strict
- Warranty
- Misc

a. Tort Approach

- Focus is on foreseeable harm
- Negligence
- Comparative Fault
  - Notions of Contribution and Joint and Several Liability
- Strict Liability

i. Negligence (tantamount to malpractice)

- Kemper Arena (Chubb Group of Insurance Companies, 656 S.W.2d 766 (Mo. App. 1983)).
- Negligence
  - Requires the existence of
    - A duty
    - A breach of that duty
    - And an injury resulting from that breach
      - Proximate cause and
      - Injury

Negligence

- [a]n architect is not a guarantor or an insurer **but as a member of a learned and skilled profession he is under a duty to exercise the ordinary, reasonable technical skill, ability and competence that is required of an architect in a similar situation**; and *if by reason of a failure to use due care under the circumstances, a foreseeable injury results, liability accrues.* (Emphasis added.) Citing in *Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472 (8th Cir.1968)

Negligence continued

- "We find that architects and contractors owe a duty to exercise the care required of their professions to persons with whom they are not in privity when the injury to those third parties is foreseeable."

Duty

- Thus, designers have the duty under the law to exercise
  - **the ordinary,**
  - **reasonable technical skill,**
  - **ability and**
  - **competence that is required of an architect in a similar situation**
- **Failure to do so= breach of that duty**

Kemper Arena Roof Collapse

- *Chubb Group of Ins. Companies v. C.F. Murphy & Associates et al.*, 656 S.W.2d 766 (Mo. App. 1983).
  - "Injury—both personal and property—to parties presenting entertainment in Kemper Arena was or should have been foreseeable by these defendants as a likely result of negligent performance of their duty to design and build a safe structure in which entertainment may be presented."

Injury

- Thus, Designer is going to be responsible for
  - Economically foreseeable injuries
  - Foreseeable Personal Injuries
- Emphasis is on foreseeability
  - where one under contract with another assumes responsibility for property or instrumentalities and agrees under his contract to do certain things ... which, if left undone, would likely injure third persons, 'there seems to be no good reason why [he] should not be held liable to third persons injured thereby . 656 S.W.2d 766 .

Cases

- Kemper Arena
- Hyatt
- Good Samaritan Designer?

Negligence-Comparative Fault

- Missouri is pure comparative fault
- This means that an apportionment of fault can be divided among a number of parties deemed liable.
- Assume that a jury finds that an architect is 30% at fault, a bolt manufacturer is 30% at fault, and the contractor is 40% at fault, the damages will be apportioned pursuant to those percentages.
- Joint and Several liability

ii. Experts

- Both sides will march out their experts to say that the designers services met or did not meet the standard of care.
- Experts will inform, therefore, what the standard of care is determined to be.
- Discussion

b. Strict Liability

- Defined
- Good news- few decisions hold architects and engineers strictly liable.
- However- strict liability has gained traction in the area of home developers.
  - Schipper v. Levitt & Sons, Inc, 207 A.2d 314 (N.J. 1965)- sparked a trend that is still continuing.

c. Contract Standards of Care

- Most claims against designer will be asserted by the owner, i.e. someone in contractual privity with the design professional.
- Liability here is for breach of contract (designer can still be liable for negligence)
- This can present a great deal of exposure for a designer.
- Check your Errors and Omissions coverage, often doesn't cover common breach of contract claims (while it typically does cover third party injuries.

Standard form agreements

- American Institute of Architects (AIA)
- Engineers' Joint Contract Documents Committee (EJCDC)
- Associated General Contractors of America (AGC)

- All of these place protections for design professionals

Contractual Standards of Care

- AIA, AGC
- AIA- B101-2007 Agreement between owner and Architect
  - Standard of Care Section 2.2
    - The Architect shall perform services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances.
    - Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project

While the AIA tends to protect its own… BEWARE

- An owner can contract for higher standards of care, thus where the AIA section above limits exposure to that of the common law, a contract may create a standard of care higher than that of the common law. (Harder to contract for a lower standard of care- still going to have common law duty).
- This is problematic if you are a designer.
- Some contracts state: "the highest standard of the profession." What does that mean?

d. Violation of Building Codes

- Design professionals are presumed to know the building code.
- Claimant will plead this and seek a presumption of a breach of the standard of care.
- Often will show that work was performed negligently
- Corollary, designers often claim that their work meets regulations and codes as defense to a negligence claim.

5. Defective Plans

- Liability for designers stemming from inadequate or inaccurate plans and specifications.
  - Common law does not require perfection, just reasonable care- which can be argued.
  - Factual scenarios

6. Conclusions

MECHANIC'S LIENS

Fundamentals of Construction Contracts: Understanding the Issues in Missouri

Prepared and Presented by:

J. Drew Marriott

Miller Schirger
INTELLIGENT DIRECTION

816.561.6500

dmarriott@millerschirger.com

1. Liens Generally/History

a. British Common Law

b. American Statutory Creation (the liens we have today)

   i. Thomas Jefferson and Washington D.C.

2. Who is Entitled to a Lien (Generally)

a. RSMo. 429.012 (Original Contractors) (See Section 4)

b. RSMo. 429.013 (Subcontractor Lien Rights) (See Section 5)

c. RSMo. 429.020

d. RSMo. 429.015 (Architects, Professional Engineers, land surveyors…) (See Section 6)

e. RSMo. 429.560 (Landscape and Nursery Work)

f. Cannot Lien Government/Public Property

g. RSMo. 429.010 (General Statute for Mechanic's and Materialmen's Liens)

   i. Any person who shall do or perform any work or labor upon land,

   ii. rent any machinery or equipment, or

   iii. use any rental machinery or equipment, or

   iv. furnish any material, fixtures, engine, boiler or machinery for any building, erection or

   v. improvements upon land, or

   vi. for repairing, grading, excavating, or filling of the same, or

   vii. furnish and plant trees, shrubs, bushes or other plants or

   viii. provides any type of landscaping goods or services or

   ix. who installs outdoor irrigation systems under or by virtue of any contract with the owner or proprietor thereof, or

   x. his or her agent, trustee, contractor or subcontractor, or

   xi. without a contract if ordered by a city, town, village or county having a charter form of government to abate the conditions that caused a structure on that property to be deemed a dangerous building under local ordinances pursuant to section 67.410, RSMo, upon complying with the provisions of sections 429.010 to 429.340, shall have for his or her work or labor done, machinery or

equipment rented or materials, fixtures, engine, boiler, machinery, trees, shrubs, bushes or other plants furnished, or any type of landscaping goods or services provided, a lien upon such building, erection or improvements, and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of three acres; or if such building, erection or improvements be upon any lot of land in any town, city or village, or

xii. if such building, erection or improvements be for manufacturing, industrial or commercial purposes and not within any city, town or village, then such lien shall be upon such building, erection or improvements, and the lot, tract or parcel of land upon which the same are situated, and not limited to the extent of three acres, to secure the payment of such work or labor done, machinery or equipment rented, or

xiii. materials, fixtures, engine, boiler, machinery, trees, shrubs, bushes or other plants or any type of landscaping goods or services furnished,

xiv. or outdoor irrigation systems installed; except that if such building, erection or improvements be not within the limits of any city, town or village, then such lien shall be also upon the land to the extent necessary to provide a roadway for ingress to and egress from the lot, tract or parcel of land upon which such building, erection or improvements are situated, not to exceed forty feet in width, to the nearest public road or highway.

Such lien shall be enforceable only against the property of the original purchaser of such plants unless the lien is filed against the property prior to the conveyance of such property to a third person.

h. (NOTE- RENTAL OF MACHINERY) For claims involving the rental of machinery or equipment to others who use the rental machinery or equipment, the lien shall be for the reasonable rental value of the machinery or equipment during the period of actual use and any periods of nonuse taken into account in the rental contract, while the machinery or equipment is on the property in question.

i. (2) There shall be no lien involving the rental of machinery or equipment unless:

(1) The improvements are made on commercial property;

(2) The amount of the claim exceeds five thousand dollars; and

(3) The party claiming the lien provides written notice within five business days of the commencement of the use of the rental machinery or equipment to the property owner that rental machinery or equipment is being used upon their property. Such notice shall identify the name of the entity that rented the machinery or equipment, the machinery or equipment being rented, and the rental rate.

Nothing contained in this subsection shall apply to persons who use rented machinery or equipment in performing the work or labor described in subsection 1 of this section.

3. General Contractor Liens (RSMo. 429.012)

a. Notice (Important)
   i. Shall provide to the person to whom contract is made (or owner)- (disjunctive test)
      1. At either the time of the execution of the contract;
      2. When the materials are delivered;
      3. When the work is commenced; or
      4. Delivered with first invoice, a written notice which shall include (the above disclosure)

b. Timing Requirements
   i. File a just and true account of amount owed within 6 months of indebtedness accruing
   ii. Indebtedness accrues on completing of the last work, furnishing of last materials, whichever is later.
      1. The last day of labor or materials is critical.
   iii. You then have another 6 months in which to foreclose on your lien.

c. Just and True Account
   i. Lesser requirement for General/Original Contractor

ii. Does not need to be itemized, can be lump sum (must have fixed price)

iii. If quantum meruit- must itemize

iv. Can include Subcontractors work

v. Naming owner (name owner and contractor if known)

vi. Description of Property- true description (call your favorite title search company)

d. Strict or Substantial Compliance?

i. *In re Trilogy Development Co*., 437 B.R. 683 (W.D. Mo. 2010).

1. Bankruptcy case in federal court, however provides a synthesis of Missouri substantial compliance.
2. Held that under Missouri Law, strict compliance with the lien notice statute is not required, and substantial compliance satisfies the requirement.
3. Strict Compliance
    a. *Overberg Decorating Center, Inc. v. Selbah Properties,* 741 S.W.2d 879 (Mo.Ct.App.1987).
    b. *MECO Systems, Inc. v. Dancing Bear Entertainment, Inc.,* 42 S.W.3d 794 (Mo.Ct.App.2001);
    c. *Bledsoe Plumbing and Heating, Inc. v. Brown,* 66 S.W.3d 169 (Mo.Ct.App.2002);
    d. *Landmark Systems, Inc. v. Delmar Redevelopment Corp.,* 900 S.W.2d 258 (Mo.Ct.App.1995);
    e. *Morgan Wightman Supply Co. v. Smith,* 764 S.W.2d 485 (Mo.Ct.App.1989).
4. Substantial Compliance
    a. *Gauzy Excavating and Grading Co. v. Kersten Homes, Inc.,* 934 S.W.2d 303 (Mo. banc 1996);
    b. *In re Trilogy Development Co*., 437 B.R. 683 (W.D. Mo. 2010).

e. Statute 429.012

1. Every original contractor, who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler or machinery for any building, erection or improvements upon land, or for repairing the same, under or by virtue of any contract, or without a contract if ordered by a city, town, village or county having a charter form of government to abate the conditions that caused a structure on that property to be deemed a dangerous building under local ordinances pursuant to section 67.410, shall provide to the person with whom the contract is made or to the owner if there is no contract, prior to receiving payment in any form of any kind from such person, (a) either at the time of the execution of the contract, (b) when the materials are delivered, (c) when the work is commenced, or (d) delivered with first invoice, a written notice which shall include the following disclosure language in ten-point bold type: NOTICE TO OWNER

FAILURE OF THIS CONTRACTOR TO PAY THOSE PERSONS SUPPLYING MATERIAL OR SERVICES TO COMPLETE THIS CONTRACT CAN RESULT IN THE FILING OF A MECHANIC'S LIEN ON THE PROPERTY WHICH IS THE SUBJECT OF THIS CONTRACT PURSUANT TO CHAPTER 429, RSMO. TO AVOID THIS RESULT YOU MAY ASK THIS CONTRACTOR FOR "LIEN WAIVERS" FROM ALL PERSONS SUPPLYING MATERIAL OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT. FAILURE TO SECURE LIEN WAIVERS MAY RESULT IN YOUR PAYING FOR LABOR AND MATERIAL TWICE.

2. Compliance with subsection 1 of this section shall be a condition precedent to the creation, existence or validity of any mechanic's lien in favor of such original contractor.

3. Any original contractor who fails to provide the written notice set out in subsection 1 of this section, with intent to defraud, shall be guilty of a class B misdemeanor and any contractor who knowingly issues a fraudulent lien waiver or a false affidavit shall be guilty of a class C felony.

4. The provisions of subsections 1 and 2 of this section shall not apply to new residences for which the buyer has been furnished mechanics' and suppliers'

lien protection through a title insurance company registered in the state of Missouri.

5. Any settlement agent, including but not limited to any title insurance company, title insurance agency, title insurance agent or escrow agent who knowingly accepts, with intent to defraud, a fraudulent lien waiver or a false affidavit shall be guilty of a class C felony if the acceptance of the fraudulent lien waiver or false affidavit results in a matter of financial gain to:

(1) The settlement agent or to its officer, director or employee other than a financial gain from the charges regularly made in the course of its business;

(2) A person related as closely as the fourth degree of consanguinity to the settlement agent or to an officer, director or employee of the settlement agent;

(3) A spouse of the settlement agent, officer, director or employee of the settlement agent; or

(4) A person related as closely as the fourth degree of consanguinity to the spouse of the settlement agent, officer, director or employee of the settlement agent.

4. Subcontractor Liens (RSMo. 429.013)

a. Every person, except the original contractor, must give ten days' notice before filing a lien.

b. Timing

   i. File a just and true account of amount owed within 6 months of indebtedness accruing

   ii. Indebtedness accrues on completing of the last work, furnishing of last materials, whichever is later.

      1. The last day of labor or materials is critical.

   iii. You then have another 6 months in which to foreclose on your lien.

c. Just and True Account

i. Missouri requires that a lien statement must contain a just and true account, which is determined on a case-by-case, factual basis. *S & R Builders & Suppliers, Inc. v. Marler*, 610 S.W.2d 690, 697 (Mo. Ct. App.1980).

ii. The purpose of the "just and true" account requirement for filing of mechanic's liens is to inform the owner and other parties interested of information sufficient to permit an investigation to determine whether the materials were furnished in the construction, whether they were lienable items, and whether the amount charged is proper. *Norman v. Ballentine*, 627 S.W.2d 83, 86 (Mo. Ct. App.1981). Merely including nonlienable items in a statement will not render it deficient. American Property Maintenance v. Monia, 59 S.W.3d 640 (Mo. Ct. App. 2001).

iii. Lien claimant must show that the materials and labor actually entered into the construction or improvement- they don't have to show every individuals item went into the building (pragmatically impossible without tearing the building down)- showing that materials delivered should suffice.

iv. Labor- best shown through attaching certified payroll

1. Name of Laborer
2. Date work provided
3. General description of the work

v. Materials

1. Attach material invoices
2. Need to describe in such a way that someone could literally go out and find the material.
3. Attach an exact description of what material was provided, quantity, amount, dates- best done through shipping lists and purchase orders.

d. Statue 429.013

1. The provisions of this section shall apply only to the repair or remodeling of or addition to owner-occupied residential property of four units or less. The term "owner" means the owner of record at the time any contractor, laborer

or materialman agrees or is requested to furnish any work, labor, material, fixture, engine, boiler or machinery. The term "owner-occupied" means that property which the owner currently occupies, or intends to occupy and does occupy as a residence within a reasonable time after the completion of the repair, remodeling or addition which is the basis for the lien sought, pursuant to this section. The term "residential property" means property consisting of four or less existing units to which repairs, remodeling or additions are undertaken. This section shall not apply to the building, construction or erection of any improvements constituting the initial or original residential unit or units or other improvements or appurtenances forming a part of the original development of the property. The provisions added to this subsection in 1990 are intended to clarify the scope and meaning of this section as originally enacted.

2. No person, other than an original contractor, who performs any work or labor or furnishes any material, fixtures, engine, boiler or machinery for any building or structure shall have a lien under this section on such building or structure for any work or labor performed or for any material, fixtures, engine, boiler, or machinery furnished unless an owner of the building or structure pursuant to a written contract has agreed to be liable for such costs in the event that the costs are not paid. Such consent shall be printed in ten point bold type and signed separately from the notice required by section 429.012 and shall contain the following words: CONSENT OF OWNER

CONSENT IS HEREBY GIVEN FOR FILING OF MECHANIC'S LIENS BY ANY PERSON WHO SUPPLIES MATERIALS OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT ON THE PROPERTY ON WHICH IT IS LOCATED IF HE IS NOT PAID.

3. In addition to complying with the provisions of section 429.012, every original contractor shall retain a copy of the notice required by that section

and any consent signed by an owner and shall furnish a copy to any person performing work or labor or furnishing material, fixtures, engines, boilers or machinery upon his request for such copy of the notice or consent. It shall be a condition precedent to the creation, existence or validity of any lien by anyone other than an original contractor that a copy of a consent in the form prescribed in subsection 2 of this section, signed by an owner, be attached to the recording of a claim of lien. The signature of one or more of the owners shall be binding upon all owners. Nothing in this section shall relieve the requirements of any original contractor under sections 429.010 and 429.012.

4. In the absence of a consent described in subsection 2 of this section, full payment of the amount due under a contract to the contractor shall be a complete defense to all liens filed by any person performing work or labor or furnishing material, fixtures, engines, boilers or machinery. Partial payment to the contractor shall only act as an offset to the extent of such payment.

5. Any person falsifying the signature of an owner, with intent to defraud, in the consent of owner provided in subsection 2 of this section shall be guilty of a class C felony. Any original contractor who knowingly issues a fraudulent consent of owner shall be guilty of a class C felony.

5. Architectural/Engineering Liens (RSMo. 429.015)

a. Applies to:

i. Every registered architect or corporation registered to practice architecture,

ii. every registered professional engineer or corporation registered to practice professional engineering,

iii. every registered landscape architect or corporation registered to practice landscape architecture, and

iv. every registered land surveyor or corporation registered to practice land surveying, who does any landscape architectural, architectural, engineering or

land surveying work upon or performs any landscape architectural, architectural, engineering or land surveying service directly connected with the erection or repair of any building or other improvement upon land under or by virtue of any contract with the owner or lessee thereof, or such owner's or lessee's agent, trustee, contractor or subcontractor, or without a contract if ordered by a city, town, village or county having a charter form of government to abate the conditions that caused a structure on that property to be deemed a dangerous building under local ordinances pursuant to section 67.410,

b. upon complying with the provisions of this chapter, shall have for such person's landscape architectural, architectural, engineering or land surveying work or service so done or performed, a lien upon the building or other improvements and upon the land belonging to the owner or lessee on which the building or improvements are situated, to the extent of one acre.

c. If the building or other improvement is upon any lot of land in any town, city or village, then the lien shall be upon such building or other improvements, and the lot or land upon which the building or other improvements are situated, to secure the payment for the landscape architectural, architectural, engineering or land surveying work or service so done or performed.

d. For purposes of this section, a corporation engaged in the practice of architecture, engineering, landscape architecture, or land surveying, shall be deemed to be registered if the corporation itself is registered under the laws of this state to practice architecture, engineering or land surveying.

e. Priority between a design professional or corporation lien claimant and any other mechanic's lien claimant shall be determined pursuant to the provisions of section 429.260 on a pro rata basis.

6. First Spade Rule

a. West Edge Case (*Trilogy Development v. BB Syndication Services, Inc., et al*.)

   i. Issue: What if work stops or is delayed, and recommences? Is one lien sufficient? Can you have one lien covering two contractual periods?

ii. First Spade Rule Generally:

1. Mechanic's lien attaches with the delivery of the material or commencement of the work. *Butler Supply, Inc. v. Coon's Creek, Inc.*, 999 S.W.2d 748 (Mo. App. 1999).
2. First spade means that a properly filed mechanic's lien in Missouri dates from the visible commencement of actual operations performed on ground for the erecting of a building or making of improvement with the intention of continuing the work until completed. H.B. Deal Const. Co. v. Labor Discount Center, Inc. 418 S.W.2d 940 (Mo. 1967)

iii. Argument-

1. Missouri Courts have specifically held that work under separate proposals but intended for a single purpose or as part of the same general improvement of the property could include both accounts in a single mechanic's lien. *Midwest Floor Co. v. Miceli Development Co.* 304 S.W.3d 243, 249 (Mo. Ct. App. E.D. 2009) (citing *Badger Lumber Co. v. W.F. Lyons Ice & Power Co*., 174 Mo.App. 414, 160 S.W. 49, 52 (1913)).
2. *Midwest Floor* stands for the proposition that, regardless of the number of contracts, if work that is subject to the lien is all performed for the same general purpose, a contractor's lien applies to the entire project.
3. In *Midwest Floor*, the court upheld the mechanic's lien and noted that:

> where work done or material furnished all go to the same general purpose, as the building of a house or block of houses and buildings appurtenant thereto, though such work done or materials furnished were not contracted for on the same day or at the same time, yet if they were done and furnished as parts of a general improvement of the property, all such work and materials may be regarded within the meaning of the mechanic's lien statute as done and furnished under one contract and may be included in one lien

account. Midwest Floor, 304 S.W. 3d at 249 (quoting *Flanagan Bros. v. O'Connell*, 88 Mo.App. 1, 4 (Mo.App. 1901)).

d. The court further noted that, though provided pursuant to two separate proposals, all the materials and work were provided to build a retaining wall base for the property owners' rear entry garage and, therefore, the labor under both proposals was furnished as part of the same general improvement to the property. Id.

e. Quoting *Page v. Bettes*, 17 Mo.App. 366 (Mo.App.1885), the court went on to state that, "'if the several parts form an entire whole, or are so connected together as to show that the parties had it in contemplation that the whole should form but one, and not distinct matters of settlement, the whole account must be considered as a unit, or as being a single contract.'" Id.

7. Government/Public Property

a. The Missouri legislature does not allow a mechanic's lien to be created against government property.

b. What constitutes Public Property?

   i. Utilities- quasi governmental/ where do they fall?

      1. Discussion

c. Missouri has separate statutory frameworks (bond requirements) to cover such areas; bond claims, thus are meant to replace lien rights.

d. As a note of interest, some states have "lien" statutes where a party liens the bond on public projects.

   i. *Collins & Herman v. TM2 Const. Co., Inc.*, 263 S.W.3d 793 (Mo. App. 2008) Electric utility company was considered public entity whose substations were public works within the meaning of statute that imposed duty on public entities to require public works contractors to post bond.

1. As public entity, utility company was exempt from the imposition of mechanic's liens, and, thus, was liable for failure to require contractor to post bond.
2. This was despite the fact that the company was an investor-owned utility company.
3. The company was subject to regulation by Public Service Commission (PSC), and its authority to provide utility services was derived solely from its regulation by the PSC, a state agency. V.A.M.S. §§ 107.170, 429.010.

8. What you actually Gain from Liening

a. Liens attach to the extent of the ownership right, title, and interest of the person seeking and authorizing improvements to the property.
b. Is construed to the lien claimant as favorably as terms will permit.

9. Enforcement

a. File suit to foreclose on lien
    i. RSMo. 429.170: All actions under sections 429.010 to 429.340 shall be commenced within six months after filing the lien, and prosecuted without unnecessary delay to final judgment; and no lien shall continue to exist by virtue of the provisions of said sections, for more than six months after the lien shall be filed, unless within that time an action shall be instituted thereon, as herein prescribed.

10. Priorities

a. Attachment
    i. First Spade Rule:
        1. Mechanic's lien attaches with the delivery of the material or commencement of the work. *Butler Supply, Inc. v. Coon's Creek, Inc.*, 999 S.W.2d 748 (Mo. App. 1999).
b. Between Mechanic's Liens
    i. Equal footing, divide prorata shares
c. Between Mechanic's Liens and other liens (429.050 and 429.060)

i. Deeds of Trust

ii. Purchase Money Deeds of Trust

iii. After acquired property

iv. Repairs and Additions (to existing structures)

v. 429.050

1. The lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements for which they were furnished or the work was done, in preference to any prior lien or encumbrance or mortgage upon the land upon which said buildings, erections, improvements or machinery have been erected or put; and any person enforcing such lien may have such buildings, erections or improvements sold under execution, and the purchaser may remove the same within a reasonable time thereafter; provided, that nothing contained in this section shall be so construed as to allow any such sidewalk as is mentioned in sections 429.010 to 429.340 to be so sold under execution or so removed.

vi. 429.060

1. The lien for work and materials as aforesaid shall be preferred to all other encumbrances which may be attached to or upon such buildings, bridges or other improvements, or the ground, or either of them, subsequent to the commencement of such buildings or improvements.

11. The Threat of Bankruptcy

a. Automatic Stay

b. Adversary proceedings

c. Perfecting your Interest Under 11 U.S.C. §546(b) of the Bankruptcy Code

The language of §546(b) specifically provides:

(b)(2) If--

(A) a law described in paragraph (1) requires seizure of such property or commencement of an action to accomplish such perfection, or

maintenance or continuation of perfection of an interest in property; and

(B) such property has not been seized or such an action has not been commenced before the date of the filing of the petition;

such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement.

d. *In re Baldwin Builders,* 232 B.R. 406 (B.A.P. 9th Cir. 1999)

i. *"[s]ection 546(b) unambiguously mandates that, if commencement of an action is required to maintain or continue perfection," and such action has not been commenced before the filing of the petition, "notice shall be given instead." Baldwin, 232 B.R. at 411.*

ii. *The court also noted that other courts interpreting state mechanic's lien laws that predicate perfection on the filing of an enforcement action had addressed post-petition perfection, and stated that in order to perfect post-petition, "[s]ection 546(b) compels a creditor to perfect an interest in the post-petition period by providing notice." Id. at 412 (citing In re Coated Sales, Inc., 147 B.R. 842 (S.D.N.Y.1992)) (emphasis in original) (alteration added).*

iii. *The Baldwin court concluded that, since lien foreclosure actions were stayed as enforcement actions, and since the creditors had not filed to foreclose pre-petition, they were required to provide notice pursuant to § 546(b). Id. at 413.*

12. Risks- Slander of Title/ Lien Fraud

a. Slander of Title (this is a Civil Action)

i. Elements

1. Plaintiff has title to a specific piece of real or personal property;
2. The words used by the defendant to encumber that property must be false;
3. Words are maliciously published by defendant (filing a lien with Recorder of Deeds is publishing);

a. Proof of falsity is not proof of malice (*Bechtle v. Adbar Co., L.C.*, 14 S.W.3d 725, 729 (Mo. App. 2000).

b. Malice requires evidence of representation was without legal justification or excuse, and was not innocently or ignorantly made. (see *Tongay v. Franklin County Mercantile Bank*, 735 S.W.2d 766 (Mo. App. 1987).

4. The use of those words causes a pecuniary loss or injury to plaintiff.

b. Lien Fraud (this is a mixed Civil and Criminal Action)

429.014. 1. Any original contractor, subcontractor or supplier who fails or refuses to pay any subcontractor, materialman, supplier or laborer for any services or materials provided pursuant to any contract referred to in section 429.010, 429.012 or 429.013 for which the original contractor, subcontractor or supplier has been paid, with the intent to defraud, commits the crime of lien fraud, regardless of whether the lien was perfected or filed within the time allowed by law.

2. A property owner or lessee who pays a subcontractor, materialman, supplier or laborer for the services or goods claimed pursuant to a lien, for which the original contractor, subcontractor or supplier has been paid, shall have a claim against the original contractor, subcontractor or supplier who failed or refused to pay the subcontractor, materialman, supplier or laborer.

3. Lien fraud is a class C felony if the amount of the lien filed or the aggregate amount of all liens filed on the subject property as a result of the conduct described in subsection 1 of this section is in excess of five hundred dollars, otherwise lien fraud is a class A misdemeanor. If no liens are filed, lien fraud is a class A misdemeanor.

13. The idiosyncrasies of Missouri Residential liens RSMo. 429.016

a. Statutes present a number of new concepts to Missouri's approach to liens.

b. From the language of the statute the law appears to only apply to new residential projects, and not remodeling, repairs, or renovations.

i. It applies to condominiums, but not apartments, and can be interpreted to apply to mixed-use projects.

c. Most importantly, two new documents were invented by this statute, and with it, two new doctrines have been introduced to Missouri residential lien law-

i. The first document, Notice of Intended Sale, is a document that owners must complete. The owner has to file and record "not less than forty-five calendar days prior to the earliest calendar date the owner intends to close on the sale of such property to such purchaser (see subsection 11). Failure to file this document affects the Notice of Rights process (discussed below).

ii. The second document is the Notice of Rights, mentioned in subsections 3 and 8. In order to complete this step, one must know about the recorded Notice of Intended Sale. Contractors, for lack of judicial interpretation, are filing Notice of Rights immediately upon commencement of the job. Subsection 8 details what should be included in the Notice of Rights. This document must be notarized. This also has a just and true account requirement, but it is a different system than what Missouri law has required: it's not as onerous, requiring a list of what to attach. It seems safest, however, to attach the documentation of labor and materials as support.

d. Another item created through this statute is that it allows substitution bonding around the mechanic's lien- this is a new concept under Missouri law, and now applies specifically (and only) to new residential properties. Subsection 27 also lays out a new form of lien waiver for such projects, and allows for unconditional lien waivers for new residential projects.

e. The general consensus is that the new statute mostly benefits developers and banks, and makes the residential lien process more difficult to navigate for contractors. Many commentators have acknowledged that the statute is ripe for appeal, as it is poorly drafted and a noticeable departure from past Missouri law.

f. It is uncertain how courts will interpret the statute, as it is awkward and piecemeal in its construction.

Payment and Performance Bonds

Prepared and Presented by:

Daniel R. Zmijewski
Miller Schirger LLC

Payment and Performance Bonds
By
Daniel R. Zmijewski

A. Insurance – Suretyship Distinguished from Insurance

1. An insurance policy is a two party contract—a bond involves three parties (principal, obligee, and surety). An insurance contract indemnifies the insured for a covered loss, and thus "protects" the insured.

2. The premiums of a surety bond are based in part on the surety's right to recover from its principal the losses it incurs as a result of issuing the bond, unlike insurance where the insurer's only recovery may be from third parties.

3. Liability insurance policies usually provide a duty on the part of the carrier not only to indemnify for a covered loss, but to defend the insured against a covered claim whether or not the insured is liable. Bonds contain no duty to defend the principal. Rather, it is customary for the principal to agree (in a separate indemnity agreement) not only to pay the amount of the claim or cost to complete, but also to pay for the expenses (including attorneys' fees) the surety incurs in defending the claim.

B. When bonds are required – by Statute and by Contract

1. By Statute – Public Works Bonds

   a) Federal Projects - Miller Act U.S.C. 3133, *et seq*., which is required for projects in the amount of $100,000.00 or more.

      i. Before any prime contractor is awarded a construction contract with the United States, it is required to furnish the United States with a performance bond "with a surety satisfactory to the office awarding the contract, and in an amount the officer considers adequate for the protection of the Government."

      ii. Before any prime contractor is awarded a construction contract with the United States, it must furnish the United States with a payment bond with a surety satisfactory to the officer for the protection of all persons supplying labor and material." Please note that, in general, the bond must be equal to the total amount payable under the terms of the contract.

   b) Missouri Projects – § 107.170(2)

i. § 107.170(2) – Public projects -"It is hereby made the duty of all public entities in this state, in making contracts for public works, the cost of which is estimated to exceed twenty-five thousand dollars, to be performed for the public entity, to require every contractor for such work to furnish to the public entity, a bond with good and sufficient sureties, in an amount fixed by the public entity, and such bond, among other conditions, shall be conditioned for the payment of any and all materials, incorporated, consumed or used in connection with the construction of such work, and all insurance premiums, both for compensation, and for all other kinds of insurance, said work, and for all labor performed in such work whether by subcontractor or otherwise."

ii. § 229.050 – requires the furnishing of a bid bond, or a deposit in lieu, for contract for the construction of roads, bridges or culverst when the engineer's estimate of cost exceeds $500.

2. By Contract – Private Bonds.

C. Types and Terms

1. General Principles

a) Who are the Parties to a Bond?

i. Principal - The principal agrees to perform the duties of the bonded contract, and has the principal obligation to fulfill those duties. The principal may be the prime or general contractor (when the obligee is the owner) or a subcontractor or material supplier (when the obligee is a contractor).

ii. Surety - Within the conditions of the bond, the surety agrees to perform its obligations (be it provide payment, performance or bid ensurance) if the principal fails to perform the bonded contract.

iii. Obligee - The obligee is the entity for whose benefit the bond was executed. The obligee has the right to require the principal to perform the bonded contract. If the principal fails, and the obligee satisfies the conditions of the bond (e.g., notice), the obligee has the right to require the surety to perform its bond obligations. The obligee may be the owner when the principal is the prime or general contractor. The obligee may be a prime or general contractor when the principal is a subcontractor or materialman. Typically, only the obligee has a right to make a claim on a bid or performance bond.

iv. Claimant - The claimant is the third party beneficiary of a payment bond. The claimant is generally identified in the bond as a person or entity who has the right to make a claim on the bond. The claimant may be a subcontractor or supplier of labor or materials to the project. The bond may further define who may (and thus who may not) make a claim against the payment bond.

b) How are Bonds Interpreted?

i. Terms of Bond - The rights and duties of the surety, obligee, principal, and claimants are determined initially by the provisions of the bond.

Incorporation of Construction Contract - Most bonds incorporate the underlying contract between the principal and the obligee. If so, the construction contract and obligations included in the construction contract (e.g., plans, specifications, and general conditions), determine the scope of the bond. Bolivar Reorganized Sch. Dist. No. 1, Polk County v. Am. Sur. Co. of N.Y., 307 S.W.2d 405, 410 (Mo. 1957) (obligation of the surety is measured and limited by the principal's contract and obligation).

ii. Also, note that where a bond is required by statute, the statutory terms and conditions become part of the bond and those provisions are to be read into the bond as its terms and conditions. Fogarty v. Davis, 264 S.W. 879 (Mo. 1924).

2. Bid Bonds

a) Purpose:

The purpose of a bid bond is to ensure, that the principal enters into a construction contract with the obligee in accordance with the terms of the principal's bid. Generally, any liability on a bid bond is extinguished when a construction contract is executed. But, if a principal refuses to enter into a construction contract or is unable to provide the required insurance or payment/performance bonds, the obligee may recover on the bid bond.

b) Coverage:

The damages recoverable on a bid bond are limited to the obligee's actual damages (usually measured by the difference between the principal's bid and the next lowest bid the obligee is able to accept), not to exceed the penal sum of the bond. However, the bond language may provide that the penal amount of the bond constitutes liquidated damages, regardless of the actual damage suffered, and the surety will be obligated for that amount.

c) Claimants:

Generally, the named obligee is the only viable claimant under a bid bond.

3. Payments Bonds

a) Purpose:

The purpose of a payment bond is to ensure that persons supplying labor and material to a construction project are paid in full and to protect the obligee from mechanic's liens or similar claims by subcontractors or suppliers.

b) Coverage:

A payment bond claimant may recover from the surety whatever damages are provided for in the bond. The rights of a surety are measured by those of the principal, absent an agreement to the contrary. City of Independence ex rel. Briggs v. Kerr Constr. Paving Co., 957 S.W.2d 315

(Mo.App. 1997). Generally, a payment bond will cover at a minimum labor and material actually used on the project.

Quick Kansas Note - The "Rule of Presumptive Use," which holds that proof of delivery of materials to the construction site constitutes *prima facie* evidence and creates a presumption of their use in the improvement, has been applied to payment bonds as well as mechanics' liens. Cedar Vale CO-OP Exchange, Inc. v. Allen Utilities, Inc., 10 Kan. App.2d 129 (1985); Missouri adopt the "every stick" rule for liens – where there is evidence that the materials forming the basis of the lien were delivered to the respective construction sites pursuant to a contract, the materialman will be entitled to a lien for those materials consumed in the erection of the structure. Dave Kolb Grading, Inc. v. Lieberman Corp., 837 S.W.2d 924 (Mo.App. 1992)

c) Claimants

Generally, suppliers of labor and materials to a construction project are viable claimants on a payment bond as third party beneficiaries. Also, in the case of private construction, a payment bond may also protect the obligee from the filing of mechanic's liens against the property.

4. Performance Bonds

a) Purpose

The purpose of a performance bond is to protect the named obligee from the failure of the principal to perform the construction contract according to its terms. If a principal defaults, the surety can pay damages to remedy the principal's default, perform the construction contract, or solicit bids from other contractors to complete the construction contract.

b) Coverage:

As with payment bonds, the penal sum of the performance bond is the limit of the surety's liability.

c) Claimants

Because a performance bond is intended for the protection of the named obligee, ordinarily the obligee is the sole party entitled to recover under the bond. Stahlhut v. Sirloin Stockade, Inc., 568 S.W.2d 2698 (Mo. App. 1978).

D. Amount of Liability

1. Defined by Contract:

The surety's liability arises upon the principal's default. The surety's exposure is coextensive with that of the principal. City of Independence ex rel. Briggs v. Kerr Constr. Paving Co., 957 S.W.2d 315 (Mo.App. 1997). In Missouri, prejudgment interest will not be assessed absent a provision in the underlying contract or applicable statutory authority. Gen. Ins. Co. of Am. V. Hercules Constr. Co., 385 F.2d 13 (8th Cir. 1967).

Once the bond obligations are triggered, the surety's liability is primary along with that of the principal. An action may be brought against either the surety or the principal, or both. Under § 433.010, a surety may require an obligee to sue the principal in the same action.

2. Extra-Contractual Liability

The liability of the surety is determined by the terms of the bond, and hence, is governed by the law of contracts. However, a court may impose vexatious refusal penalties and attorney fees on the surety based on its own conduct under §375.296.

E. Defenses to Liability

1. Bid Bonds

As with other bonds, the surety's liability is based on that of its principal—if the principal has no liability on the underlying bonded contract, neither does the surety. A bid bond surety is released from liability if the owner materially changes the terms of the contract after the principal fails to execute a contract according to the bid. Examples of material changes between the "as bid" and "as let" contract include substantial delay in awarding the contract, changes in the plans and specifications, and site conditions which could not have been reasonably anticipated prior to bidding. As with any contract, it is a defense under a bid bond if the underlying contract would have been impossible to perform.

2. Payment Bonds

The surety may utilize any contract or common law defense the principal has against a payment bond claimant, such as the principal's setoff rights against the claimant for defective work, defective materials, or delays. The surety may have other defenses under the bond not available to the principal. For example, the bond may limit who is a claimant so that remote suppliers and subcontractors do not qualify.

Obligee has a right to set-off against a surety under a payment bond. Miller-Stauch Const., Co. v. Williams-Bungart Elec., Inc., 959 S.W.2d 490 (Mo.App. 1998) (the rule of Munsey.)

3. Performance Bonds

A party may not recover under a surety bond if it fails to fulfill the stated conditions for recovery under the bond. Many bonds set forth conditions precedent which must be satisfied before the surety's obligations are triggered. Of particular importance is the declaration of the principal's default and the termination of the principal's right to complete the contract.

Examples of other performance bond defenses include: substantially increasing the scope of work to be performed; prepayments or overpayments by the oblige; failure to make reasonable and prompt inspections; extensions of time; and failure to mitigate damages. Notice provisions can preclude claims - Frank Powell Lumber Co. v. Federal Ins. Co., 817 S.W.2d 648 (Mo.App. 1991).

F. Statute of Limitations

1. 10 year Statute Applies

§ 516.110 is the ten-year statute of limitation that applies to actions on surety bonds. Frank Powell Lumber Co. v. Federal Ins. Co., 817 S.W.2d 648 (Mo.App. 1991).

G. Typical Bond Forms

1. AIA – A310 – Bid Bond
2. AIA - A312 - Payment and Performance Bond

Differing Site Conditions

Prepared and Presented by:

Stephen R. Miller
Miller Schirger LLC

Differing Site Conditions[1]

Stephen R. Miller
Miller Schirger, LLC
4520 Main Street, Suite 1570
Kansas City, MO 64111
816-561-6500
smiller@millerschirger.com

1. Types of Subsurface Conditions

a. Soil bearing capacity
b. Soil composition
c. Rock strength, elevation, and quantity
d. Ground water elevation, flow, and quantity
e. Soil moisture content and swelling and shrinking characteristics
f. Unsuitable fill
g. Man-made obstructions
h. Survey inaccuracies concerning::
   - Site elevation,
   - Site drainage, and
   - Estimated quantities of excavation and fill

i. Subsurface water resulting from excessive rains, hurricanes and high rivers
j. River elevations
k. High tides, and heavy current
l. Environmental hazards
   - Buried hazardous waste
   - Concealed asbestos
   - Contaminated groundwater
   - Endangered flora and fauna
   - Lead paint

2. Contractor Risk Under Common Law - "Sanctity of Contract"

a. Risk allocated to Contractor unless Contract provides otherwise
b. Inherent in a promise to construct a completed project

> "This covenant [to complete the building is "ready for use and occupation."] was his duty to fulfill, and he was bound to do whatever was necessary for its performance.
>
> * * *
>
> [This principle] rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss

[1] The author gratefully acknowledges the multi-volume treatise by Philip L. Bruner and Patrick O'Connor, *Bruner & O'Connor on Construction Law* which served as the primary source for this outline presentation.

where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated." *Dermott v. Jones*, 69 U.S.1, 7-8 (1864)

c. Missouri Law

"If a party desires to be excused from performance in the event of contingencies arising after the formation of a contract, it is that party's duty to provide therefore in the contract." *Werner v. Ashcraft Bloomquist Inc.*, 10 SW 3d 575, 577 (Mo.App. 2000)

d. Rationale: Contractor should have:
   - Included contingency in its price;
   - Insured the risk;
   - Passed the risk to others;
   - Explicitly limited its undertaking

3. Owners Risk under Common Law of Work Outside Scope of Contract

a. Contractor's obligation limited exclusively to risks within agreed scope of work

b. If work required by site condition was different than work described in the contract, it could be characterized as "changed" or "extra" work.
   - General performance specification includes all work necessary to achieve intended result
   - Detailed specifications precisely defining scope of work exclude all work not included
   - Extra work clause is much broader than the modern differing site condition clause
   - Extra work is an argument used in the absence of a differing site condition clause
   - Finder of fact left to determine the scope of work intended by the parties

c. To limit potential ambiguity regarding scope and extra work, owners have used unit price provisions
   - Payment based on actual quantities of units of work completed;
   - Allows no increase in the unit price unless quantities overrun estimated quantities;
   - Usually include all work "incidental" to performance of the work. For example, unit price for excavation described as "unclassified" or "general"
   - Still requires finder of fact to determine the scope of work anticipated in the unit price

d. Issues arise where contract does not contain a "variation in estimated quantities" clause.
   - e.g. If actual quantities are plus or minus 20% of estimated quantities, either party may request renegotiation of unit price.
   - Where owner clearly disclaims accuracy of estimated quantities claims to adjust unit price have been denied

- Where owner is negligent in preparing estimate readjustment in unit price or claim for extra work has been allowed.

4. Owner's Risk under Common Law of Design Defect

a. In the late 19th and early 20th century courts questioned wisdom of sanctity of contract. Focus on:
   - Issue of control;
     - Contractor did not prepare design and did not select site;
     - Contractor had no obligation to assure suitability of owner's design or suitability of the site;
     - Unsuitable soils incompatible with the owner's design were determined to be a risk impliedly assumed by the owner
   - Impossibility of performance – an exception to sanctity of contract

b. **Spearin Doctrine**
   - "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. Thus, one who understands to erect a structure upon a particular site assumes ordinarily the risk of subsidence of the soil. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirement of the work. . ." *U.S. v. Spearin*, 248 U.S. 132 (1918), at 135-136

5. Owner's Risk under Common Law of Affirmative Misrepresentation

a. Recognized in early common law as limitation on sanctity of contract:
   - In breach of contract, which makes the contract voidable;
   - In tort permits, an independence cause of action for recovery of damages
   - Elements (in contract or tort)
     - Facts misrepresented by expression or action;
     - Misrepresentation was fraudulent and material;
     - Misrepresentation induced the contractor to enter into the contract (contract theory); or was intended to be relied upon and was relied upon (tort theory)
     - Contractor's reliance upon misrepresentation was justified;
     - Contractor suffered harm as a result of misrepresentation.

       Restatement Second, Contracts §§ 159-173
   - Owners frequently made positive representations in the contract;
     - Expressly in soils reports or boring logs;

    - Implicitly in design specifications that indicated the existence of assumed site conditions or dictated construction methods and materials compatible with only certain soil conditions.
- Owners responded by expressly disclaiming the right of bidders to rely upon soils information provided.
- The Supreme Court significantly limited the application of such disclaimers.

b. *Hollerbach v. U.S.*, 233 U.S. 165 (1914)
    - The government represented in dam repair that contractor would encounter broken stone, saw dust, and sediment to a height of 2-3 feet and directed bidders to examine the maps and drawings, visit the locality, and make its own estimates of the difficulties of the work, including local conditions and other contingencies.
    - Contractor actually found the dam was backed by materials much more difficult to remove – soft, slushy sediment from the height of 2 feet to a depth of 7 feet, and crib work filled with stones."
    - The Supreme Court rejected government's defense stating: "We think this positive statement of the specifications must be taken as true and binding upon the government and that, upon it, rather than upon the [contractor] must follow the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the government as the basis of the contract left in no doubt. . . . In its positive assertion of the nature of this much of the work, it made a representation upon which the [contractor] had a right to rely without an investigation to prove its falsity."

c. *Christy v. U.S.*, 237 U.S. 234 (1915)
    - Soil conditions were represented on the drawings as gravel, sand, and clay; the contractor actually encountered stumps, buried logs, cement, sand, and gravel.
    - The U.S. Court of Claims denied relief on the grounds the bid documents cautioned bidders to "inform and satisfy themselves as to the nature of the material" to be excavated and the general knowledge about the alluvial character of the river.
    - The Supreme Court reversed, stating: "There was a deceptive representation of the material and it misled. In opposition . . . it is contended that the river was alluvial and its character warned claimants of the possible conditions which existed . . . . But inferences from such facts can only be general and indefinite and were not considered by the government as superseding the necessity of special investigations and special report. It assumed both were necessary for its own purpose and, subsequently, would be to those whom it

invited to deal with it."

d. *U.S. v. Atlantic Dredging*, 253 U.S. 1 (1920)
   - Specifications represented soils to be dredged as mainly mud except in the lower end, "where firm mud, sand, and gravel or cobbles" could be found
   - Contained the following disclaimer:
     > "Although test borings have been made in the areas to be dredged and the results could be seen by bidders at the government's office, no guarantee is given as to the correctness of these borings as representing the character of the bottom of the entire vicinity in which they were taken, although the general information given thereby is believed to be trustworthy."
   - Contractor, in fact, encountered soils that were "heavy and refractory material, consisting mainly of compacted sand and gravel, with a small percentage of cobbles."
   - The Supreme Court held: "There was not only a clear declaration of the belief of the government that its representation was true, but the foundation of it was asserted to be the test of actual borings, and the reference of maps as evidence of what the borings had disclosed . . . . There was a further assertion of belief through its contracting officer by approval of the company's plan."

e. Supreme Court cases have defined the legal elements for proof of affirmative misrepresentation:
   - A positive misrepresentation through:
   - A material fact
   - That induced the contractor to enter the contract
   - Under which the contractor reasonably relied, and
   - Resulting in damages.

f. *Ideker, Inc. v. Missouri State Highway and Transportation Commission*, 654 SW 2d 617 (Mo.App. 1983)
   - Plans indicated that excavation was a "balanced" job
   - Contained a boilerplate disclaimer as to the accuracy of site conditions shown on the plans and specifications
   - The Court established six elements for breach of warranty ex contractu
     - Positive representation by a governmental entity
     - Of a material fact related to a site condition
     - That is false or incorrect
     - Lack of knowledge by a contractor that the representation is false or incorrect
     - Reliance by the contractor on the representation; and
     - Damages sustained by contractor as a direct result.
   - The Court held that disclaimer did not negate "positive representations" of fact, but might negate "implied or suggestive" representations.

g. *Sanders Co. Plumbing & Heating v. City of Independence, MO*, 694 SW 2d 841 (Mo.App. 1984)

- Auger boring logs failed to accurately represent the actual underground conditions encountered by the contractor.

h. *Murphy v. City of Springfield*, 738 SW 2d, 521 (Mo.App. 1987)
   - Comparative fault as judicially enacted in Gustafson v. Benda, 661 SW 2d 11 (Mo en banc. 1983) did not apply because liability is not based upon negligence or fault.

i. *Massman Const. Co. v. Missouri Highways & Transportation Commission*, 31 SW 3d 109 (Mo.App. 2002)
   - Representation that no interference was in the river was sufficient to negate the fact that the contractor had constructed a rock abutment in the same area 10 years earlier

j. No cases in Missouri in the private construction context.
   - Presumably an action could be maintained under traditional theories of intentional or negligent misrepresentation.

6. Disclaimers

a. Specific affirmative representations should generally prevail over general disclaimers
b. Disclaimers of interpretive opinions will more likely be enforced than disclaimers of factual information
c. A general site examination requirement
   - Typically does not require the contractor to do anything more than visually view the site
   - The contractor is not required to undertake detailed site explorations such as:
     - Drilling test borings;
     - Conducting laboratory tests;
     - Reviewing scientific literature;
     - Detailed subsurface investigation;
     - Verification of the owner's site survey;
d. Reasonableness of site investigation will be judged based upon:
   - Time available;
   - Seasonal conditions existing during site inspection;
   - Access to the site
e. A contractor's general knowledge about a particular locale will not absolve an owner of responsibility for specific misrepresentations regarding site conditions.
   - Rationale: If general knowledge were allowed to negate an owner's liability for positive misrepresentations, it would be impossible to ensure an even playing field among bidders.
f. Disclaimers that exclude soils information from contract documents are generally not effective;
     - Owners have sought to avoid liability for misrepresentation by furnishing soil information by specifying that it is "not part of the contract".
     - Even if successful in preventing the contract from being voided due to breach of contract, a misrepresentation, even if made outside of the

contract, may nonetheless serve as the basis for liability for the tort of misrepresentation.
    - Whether furnished as part of the contract or outside of the contract may form the basis for common law misrepresentation under tort of breach of contract theories.

g. Specific disclaimers of fact are disfavored, but may be enforced if allocation of risk is clear.
    - *Interstate Contracting Corp. v. City of Dallas, Texas*, 407 F.3d 708 (Fifth Circuit 2005) The Court reversed a $3 million jury award for misrepresented soil conditions because:
        - Contract expressly shifted all risk of differing subsurface conditions to the contractor by disclaiming the liability of soils information
        - By deleting the differing site condition clause from the contract;
        - By expressly and clearly transferring the soils risk to the contractor;
        - By instructing the contractor to conduct its own soils exploration.

7. Owner Risk under Common Law of Non-Disclosure

a. A contracting party may not mislead another by withholding information material to contract performance.
b. This principle is expressed in a number of different theories:
    - Misrepresentation under contract
    - Misrepresentation in tort
    - Breach of implied contractual duties of
        - Cooperation;
        - Full disclosure;
        - Good faith and fair dealing.
c. Also referred to as "superior knowledge"
d. Failure to disclose results when:
    - Owner makes representations without disclosing information that would qualify the facts;
    - Owner fails to disclose facts known only to the owner with knowledge that an owner knows that contractor is unlikely to know such facts or
    - Owner actively conceals discovery of concealed facts on contractor
e. If information is readily available to the contractor, contractor may have no recourse

8. Owner's Risk Under Common Law of Mistake

a. Mutual mistake - must be proven by clear and convincing evidence:
    - A mistake related to a material part of the contract
    - The mistake is of such consequence that the enforcement would be unconscionable;
    - The mistake occurred notwithstanding the exercise of reasonable care;
    - The other party can be placed in any status quo.
    - *John Burns Const. Co. v. Interlake, Inc.*, 433 NE 2d 1126 (IL 1982) Impossible to place the owner in status quo, the Court found that the owner had nonetheless received a benefit by reasons the circumstances were not the fault of the contractor and should pay for the benefit in quantum meruit.

b. Unilateral mistake
    - May be available if the government knew or should have known of a mistake in a bid

9. **Owner's Risk Under of Common Law of Impossibility**
    a. Impossibility is a recognized common law excuse for contractual non-performance
    b. Doctrine of Impossibility has been extended in recent jurisprudence to include that which is commercially impractical
        - Impractical contract may still not be excused if the contractor is found to affirmatively assume the risk that contract performance might be impractical
        - In most cases, the incompatibility of design specifications with encountered conditions has been a significant fact

10. Contractual Clauses Allocating Risk of Differing Site Conditions
    a. Evolution of Contractual Clauses
        - If risk is shifted to Contractor, then Contractor must place a large contingency in its price.
        - In the past century, Owners recognized it might be in their best economic interest to accept the risk of subsurface conditions in order to avoid large contingencies and obtain more competitive pricing.
        - In 1926 federal government added a "Changed Conditions" clause to its Standard Form of General Conditions to address misrepresented site conditions
        - In 1935 the Changes Clause was broadened to cover unknown conditions differing material from those ordinarily encountered.
        - In 1937 the AIA adopted a similar provision for private construction contracts.

    b. **Federal Acquisition Regulations**

F.A.R. § 36.236-2 DIFFERING SITE CONDITIONS (APR 1984)
(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.
(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.
(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required;

provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.
(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

F.A.R § 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984)
(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.
(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

c. **American Institute of Architects**
AIA Document A201-2007, General Conditions ¶3.7.4
Concealed or Unknown Conditions. If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inherent in construction activities of the character provided for in the contract Documents, the Contractor shall promptly provide notice to the Owner and Architect before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are

not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may proceed as provided in Article 15 [the Claims and Disputes article].

d. **Engineering Joint Counsel and Construction Documents (EJCDC)**

EJCDC Document No. 700, Standard General Conditions (2007AVAILABILITY OF LANDS; SUBSURFACE AND PHYSICAL CONDITIONS; HAZARDOUS ENVIRONMENTAL CONDITIONS; REFERENCE POINTS

Availability of Lands

Owner shall furnish the Site. Owner shall notify Contractor of any encumbrances or restrictions not of general application but specifically related to use of the Site with which Contractor must comply in performing the Work. Owner will obtain in a timely manner and pay for easements for permanent structures or permanent changes in existing facilities. If Contractor and Owner are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, or both, as a result of any delay in Owner's furnishing the Site or a part thereof, Contractor may make a Claim therefor as provided in Paragraph 10.05.

Upon reasonable written request, Owner shall furnish Contractor with a current statement of record legal title and legal description of the lands upon which the Work is to be performed and Owner's interest therein as necessary for giving notice of or filing a mechanic's or construction lien against such lands in accordance with applicable Laws and Regulations.

Contractor shall provide for all additional lands and access thereto that may be required for temporary construction facilities or storage of materials and equipment.

Subsurface and Physical Conditions

Reports and Drawings: The Supplementary Conditions identify:

those reports known to Owner of explorations and tests of subsurface conditions at or contiguous to the Site; and those drawings known to Owner of physical conditions relating to existing surface or subsurface structures at the Site (except Underground Facilities).

Limited Reliance by Contractor on Technical Data Authorized: Contractor may rely upon the accuracy of the “technical data” contained in such reports and drawings, but such reports and drawings are not Contract Documents. Such “technical data” is identified in the Supplementary Conditions. Except for such reliance on such “technical data,” Contractor may not rely upon or make any claim against Owner or Engineer, or any of their officers, directors, members, partners, employees, agents, consultants, or subcontractors with respect to:

the completeness of such reports and drawings for Contractor's purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor, and safety precautions and programs incident thereto; or

other data, interpretations, opinions, and information contained in such reports or shown or indicated in such drawings; or

any Contractor interpretation of or conclusion drawn from any “technical data” or any such other data, interpretations, opinions, or information.

Differing Subsurface or Physical Conditions

Notice: If Contractor believes that any subsurface or physical condition that is uncovered or revealed either:

is of such a nature as to establish that any “technical data” on which Contractor is entitled to rely as provided in Paragraph 4.02 is materially inaccurate; or

is of such a nature as to require a change in the Contract Documents; or

differs materially from that shown or indicated in the Contract Documents; or

is of an unusual nature, and differs materially from conditions ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract Documents;

then Contractor shall, promptly after becoming aware thereof and before further disturbing the subsurface or physical conditions or performing any Work in connection therewith (except in an emergency as required by Paragraph 6.16.A), notify Owner and Engineer in writing about such condition. Contractor shall not further disturb such condition or perform any Work in connection therewith (except as aforesaid) until receipt of written order to do so.

Engineer's Review: After receipt of written notice as required by Paragraph 4.03.A, Engineer will promptly review the pertinent condition, determine the necessity of Owner's obtaining additional exploration or tests with respect thereto, and advise Owner in writing (with a copy to Contractor) of Engineer's findings and conclusions.

Possible Price and Times Adjustments:

The Contract Price or the Contract Times, or both, will be equitably adjusted to the extent that the existence of such differing subsurface or physical condition causes an increase or decrease in Contractor's cost of, or time required for, performance of the Work; subject, however, to the following:

such condition must meet any one or more of the categories described in Paragraph 4.03.A; and

with respect to Work that is paid for on a unit price basis, any adjustment in Contract Price will be subject to the provisions of Paragraphs 9.07 and 11.03.

Contractor shall not be entitled to any adjustment in the Contract Price or Contract Times if:

Contractor knew of the existence of such conditions at the time Contractor made a final commitment to Owner with respect to Contract Price and Contract Times by the submission of a Bid or becoming bound under a negotiated contract; or

the existence of such condition could reasonably have been discovered or revealed as a result of any examination, investigation, exploration, test, or study of the Site and contiguous areas required by the Bidding Requirements or Contract Documents to be conducted by or for Contractor prior to Contractor's making such final commitment; or

Contractor failed to give the written notice as required by Paragraph 4.03.A.

If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, or both, a Claim may be made therefor as provided in Paragraph 10.05. However, neither Owner or Engineer, or any of their officers, directors, members, partners, employees, agents, consultants, or subcontractors shall be liable to Contractor for any claims, costs, losses, or damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) sustained by Contractor on or in connection with any other project or anticipated project.

Underground Facilities

Shown or Indicated: The information and data shown or indicated in the Contract Documents with respect to existing Underground Facilities at or contiguous to the Site is based on information and data furnished to Owner or Engineer by the owners of such Underground Facilities, including Owner, or by others. Unless it is otherwise expressly provided in the Supplementary Conditions:

Owner and Engineer shall not be responsible for the accuracy or completeness of any such information or data provided by others; and

the cost of all of the following will be included in the Contract Price, and Contractor shall have full responsibility for:

reviewing and checking all such information and data;

locating all Underground Facilities shown or indicated in the Contract Documents;

coordination of the Work with the owners of such Underground Facilities, including Owner, during construction; and

the safety and protection of all such Underground Facilities and repairing any damage thereto resulting from the Work.

Not Shown or Indicated:

If an Underground Facility is uncovered or revealed at or contiguous to the Site which was not shown or indicated, or not shown or indicated with reasonable accuracy in the Contract Documents, Contractor shall, promptly after becoming aware thereof and before further disturbing conditions affected thereby or performing any Work in connection therewith (except in an emergency as required by Paragraph 6.16.A), identify the owner of such Underground Facility and give written notice to that owner and to Owner and Engineer. Engineer will promptly review the Underground Facility and determine the extent, if any, to which a change is required in the Contract Documents to reflect and document the consequences of the existence or location of the Underground Facility. During such time, Contractor shall be responsible for the safety and protection of such Underground Facility.

If Engineer concludes that a change in the Contract Documents is required, a Work Change Directive or a Change Order will be issued to reflect and document such consequences. An equitable adjustment shall be made in the Contract Price or Contract Times, or both, to the extent that they are attributable to the existence or location of any Underground Facility that was not shown or indicated or not shown or indicated with reasonable accuracy in the Contract Documents and that Contractor did not know of and could not reasonably have been expected to be aware of or to have anticipated. If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any such adjustment in Contract Price or Contract Times, Owner or Contractor may make a Claim therefor as provided in Paragraph 10.05.

e. **Consensus Docs**

ConsensusDOCS 200, Standard Agreement and General Conditions Between Owner and Contractor, paragraph 3.16.2, which reads:

3.16.2 CONCEALED OR UNKNOWN SITE CONDITIONS. If the conditions at the Worksite are (a) subsurface or other physical conditions which are materially different from those indicated in the Contract Documents, or (b) unusual or unknown physical conditions which are materially different from conditions ordinarily encountered and generally recognized as inherent in Work provided for in the Contract Documents, the Contractor shall stop Work and give immediate written notice of the condition to the Owner and the architect/Engineer. The Contractor shall not be required to perform any work relating to the unknown condition without the written mutual agreement of the Parties. Any change in the contract Price or the Contract Time as a result of the unknown condition shall be determined as provided in Article 8. The Contractor shall provide the Owner with written notice of any claim as a result of unknown conditions with the time period set forth in Paragraph 8.4.

11. **Common Law still has application today where:**

- Differing site condition clause has been deleted from standard industry contract;
- Contract requires more than a visual site inspection
- Contract disclaims any owner liability for subsurface conditions;
- Contract uses broad unit price pay categories, where most extra work is incidental;
- Common law finding that impossibility of performance is different from mere hardship.

Delay, Suspension, Acceleration and Disruption

Prepared and Presented by:

Stephen R. Miller
Miller Schirger LLC

Delay, Suspension, Acceleration and Disruption[1]

Stephen R. Miller
Miller Schirger, LLC
4520 Main Street, Suite 1570
Kansas City, MO 64111
816-561-6500
smiller@millerschirger.com

1. Understanding Delay

a. What is the Event that Caused the Delay?
b. Which party had control of the event?
c. Did the event affect the critical path of the project?
d. If so, how much?

2. Types of Delay: Principle of Control used to distinguish types of delay

a. Inexcusable delay
   - Within control of the contractor and beyond the control of the owner

b. Excusable delay
   - Events beyond the control of both the owner and the contractor

c. Compensable delay
   - Within the control of the owner and beyond the control of the contractor

d. Concurrent delay
   - Two or more delaying events of differing type

e. Apportioned delay
   - Two or more delaying events occurring sequentially rather than concurrently

3. Inexcusable Delay

a. Owner entitled to:
   - Require schedule recovery
   - Declare default and termination
   - Recover damages for delayed contract completion

b. Contractor:
   - Is not entitled to extension of contract time or additional compensation
   - Required to accelerate work
   - May have to pay damages

[1] The author gratefully acknowledges the multi-volume treatise by Philip L. Bruner and Patrick O'Connor, *Bruner & O'Connor on Construction Law* which served as the primary source for this outline presentation and directs the participant to this treatise for a more in depth treatment of the topics addressed herein.

c. Examples:
    - Site conditions – readily ascertainable from reasonable inspection
    - Patent design defects
    - Failure to execute construction plan
        - Financial difficulties
        - Inadequate size of workforce
        - Lack of skilled workforce
        - Inadequate supervision
        - Deficient or untimely equipment
        - Deficient or untimely materials
    - Inexcusable delay of subcontractors or suppliers
    - Failure to coordinate subcontractors and suppliers
    - Delays in commencing work
    - Foreseeable normal weather
    - Foreseeable labor problems
    - Defective or non-conforming work
    - Untimely equipment
    - Untimely materials
    - Untimely or defective contractor design
        - Primary design on design/build contracts
        - Shop drawing or layout drawing on design/bid/build contracts

4. Excusable Delay - Outside the control of both parties

a. Both parties:
    - Grant time extensions to each other
    - Bear their respective costs

b. Examples:
    - "Abnormal" weather
        - Temperature
        - Humidity
        - Precipitation
        - Wind
        - What is abnormal? See US Army Corps of Engineers 10-year weather average method
    - Unforeseeable labor problems
    - Acts of God
    - Unavailability of materials

5. Compensable Delay

a. Within the control of the owner
b. Based upon implied duty to:
    - Act in good faith
    - Cooperate with the contractor
    - Do nothing to delay, hinder, or interfere

c. Examples:
    - Untimely or restricted site access
    - Untimely Notice to Proceed
    - Failure to properly administer contract
        - Untimely payment
        - Inadequate payment
        - Failure to timely prepare and issue change orders
        - Furnishing inaccurate information
        - Untimely or defective materials and equipment
        - Untimely response to Request for Information
        - Delayed inspections
        - Delayed approvals
        - Defective Plans and Specifications
    - Delay caused by untimely delivery of conforming owner-furnished materials or equipment
    - Failure to coordinate multiple prime contractors
    - Failure to coordinate with utilities with respect to relocation
    - Failure to coordinate with land owners or acquisition of easements
    - Failure to provide adequate direction in a timely manner
    - Untimely or inadequate response to shop drawings and submittals
    - Unreasonable inspection or rejection
    - Failure to furnish adequate design
    - Failure to timely correct deficiencies in design
    - Interference with contractor's work
        - Workforce
        - Work plan
    - Failure to manage change order process
    - Differing site condition
    - Non-compensable delays that would not have been encountered but for an earlier compensable delay

6. Concurrent Delay

a. Nature and Effect of Concurrency:
    - An inexcusable delay overlaps with an excusable or compensable delay
    - Neither party benefits monetarily
    - Sole remedy is an extension of contract time
    - Compensable rights offset each other
    - Delay is treated as an excusable delay beyond the control of the parties
    - Frequently raised as a defense by parties seeking to avoid liability for delay damages

b. Determining Concurrency
    - Delay of a non-critical activity cannot be a concurrent cause of project delay
    - No liability results from non-critical delays

7. Apportioned Delay

a. If multiple delaying events can be isolated and segregated, then liability may be separately apportioned
b. Traditionally a party was barred from recovery if they contributed all to a delay
c. Courts determined this was too harsh a rule
d. Fashioned apportionment in the same manner as the Courts fashioned comparative negligence standards
e. Example:
    - 20-day delay: 10 days excusable; 6 days inexcusable; 4 days compensable
        - Results in an extension of 14 days (10 days excusable + 4 days compensable)
        - Owner recovers damages for 6 days of inexcusable delay
        - Contractor recovers damages for 4 days of compensable delay

8. Notice

a. Purpose
    - Give the owner opportunity to investigate
    - Allow owner to cure or mitigate the delay
b. Strict compliance
    - Produces harsh result
    - May increase costs in the long run to the owner resulting from contingencies or reduction in competitive bidding
c. Substantial compliance
    - Owner needs to prove prejudice caused by timely notice

9. Contractual Terms

a. What would be an inexcusable delay under the common law may be treated as an excusable delay
    - A delay foreseeable at the time is treated by the contract as being beyond the control of the contractor.
    - Example: working day contract treats weather that may have been foreseeable as an excusable delay by not counting it as day under the contract time
b. Excusable delay treated as a compensable delay
    - Payment of contract provides payment will be made for what would traditionally be an inexcusable delay
    - Contract provides for compensation for delays beyond the contractor's control, including weather
c. A traditionally compensable delay is treated as an excusable delay – "no damage for delay" provisions
    - Broad and general clause
    - Generally disfavored by the courts
        - Courts provide strict scrutiny and only enforce if the intent is clear;

- If ambiguous, would be construed against the drafter
- To avoid harsh affect, contractors may characterize such claims as "acceleration" or "disruption".
- Statutory exceptions:
  - RSMo 34.058(2) Any clause in a public works contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages, or obtain an equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void and unenforceable.
- Judicial exceptions
  - Fraud, misrepresentation or other bad faith
    Example:
    - Failure to make timely payment;
    - Grossly inflated back charges.
  - Active interference
    - More than a simple mistake, error in judgment, or lack of effort
    - Usually must be a willful or knowing delay or job progress
    - Example:
      i. Premature issuance of Notice to Proceed with knowledge that work cannot go forward
  - Unreasonable delay
    - Owner delay so lengthy that it constitutes abandonment of the Contract
  - Beyond the contemplation of the parties
    - Focuses on the intent of the parties at the time of contracting – *Hadley v. Baxendale*
    - Exceptions vary from state to state
    - Missouri: [need to research Missouri law regarding which exceptions are available]

d. Limitations on delay damages:
- Contract defines exactly the type of damages may be recovered and those that are not recoverable.
- Because it is not an outright forfeiture, it may receive greater judicial acceptance.
- Examples:
  - Compensation for changed work and delay impact is limited to the direct cost of labor, material, and equipment, plus 10% for overhead and profit.
  - Pay-if-Paid provisions act as a limitation on delay damage; e.g. subcontractor will not be paid for delay unless owner pays general contractor for such delay. Roy A. Elam Masonry, Inc. v. Fru-Con Corp. (masonry subcontractor delayed for 14 months was denied recovery)

        - Mutual waiver of consequential damages may act as a limitation on delay damages
            - But not entirely mutual as it leaves in place any liquidated damage provision triggered by contractor's delay

e. Liquidated Damages
    - Stipulated damages based on reasonable pre-contract estimates of actual damage likely to be sustained are upheld
    - Over-reaching damages that bear no reasonable relationship to actual damages are unenforceable as a penalty
    - Often found in public construction contracts where delays result in:
        - Intangible public inconvenience
        - Unspecified and unsegregated additional costs of contracting agency
        - Constitutes the owner's exclusive remedy for delay
        - Where a liquidated damage clause is determined to be an illegal penalty, reducing the amount will not render it enforceable
    - Assessment of liquidated damages ceases its substantial completion unless a contract clause specifically allows its assessment up to final completion
    - Party assessing liquidated damages has burden to show that the delay was inexcusable.

10. **Suspension of Work**
    a. Common Law
        - Suspension of work for an unreasonable or indefinite duration caused by events within the owner's control is a material breach of contract
        - The remedy was abandonment of work and recovery of damages for costs incurred and anticipated profit
    b. Contract Terms
        - Give owner the right to unilaterally suspend work
        - Convert a claim for breach of contract into a claim under the contract, eliminating common law right to abandon job and recover profits
        - Timely Notice of Claim
        - Limit damages to those defined in the contract
        - AIA Document 201-1997, Article 14.3; EJCDC Document C-700, Par. 15.01 and 15.04; FAR § 52.242.14
    c. Directed Suspension
        - Written order
        - Oral direction by an authorized person
        - Contractor required to respond immediately
        - Unless directed to demobilize and leave the site
        - Contractor may maintain his crew and equipment on "standby" at the site
    d. Constructive Suspension

- A compensable delay under a contract with a "suspension of work clause" that is not acknowledged as such created by federal courts and Board of Contract Appeals
- Not recognized in all jurisdictions
- Treats all suspensions as arising under the contract and not as a breach of contract

e. Voluntary Suspension
- Any work stoppage done by the contractor for its own benefit or caused by an inexcusable delay
- Treated as an inexcusable delay

11. Acceleration

a. Cause
- Ordered to complete the work earlier than originally required – directed (compensable)
- Refusal to extend the contract time for "compensable" or "excusable" delay – constructive (compensable)
- Voluntary effort to complete early or to overcome "inexcusable" delay – compression (non-compensable)

b. Directed
- Done by unilateral change order or by informal demand to complete work ahead of schedule.
- Construction contracts may authorize a party to unilaterally change the contract completion date
  - May waive right for directed acceleration
  - Contract will grant to the contractor the right to direct the sequence of the general progress of the work without obligation to pay for any extras
  - Will be narrowly construed
  - Will not protect a contractor from its own mismanagement or unreasonable or arbitrary scheduling

c. Constructive
- Often begins with a dispute regarding whether the contractor is entitled to an extension of time for an excusable or compensable delay
- Contractor is faced with a dilemma
  - Accelerating to meet the original schedule and then pursuing an acceleration claim; or
  - Not accelerating and contesting delay damages and possible default termination
- If no notice and reservation of the claim is given, then acceleration may be deemed voluntary or construed as acquiescence to the owner's position.
  - Contractor encountered in "excusable" or "compensable" delay
  - Contractor gave notice pursuant to the provisions of the contract
  - A request for extension of time is made but refused
  - Express or implied direction to accelerate
- Implied direction can be shown when:

        - Owner pressures a contractor to complete by the original date;
        - Owner fails to respond to request for direction
    - Contractor refuses to pass on to subcontractor extensions granted by the owner
    - Notice is given that owner's failure to grant extension is deemed in order to accelerate.
    - Actual acceleration and damages caused thereby
d. Compression of Contract Time
    - Implied duty – sometimes express in the contract – to avoid or mitigate its own "inexcusable delay
    - Voluntary acceleration is non-compensable
    - Voluntary acceleration may also result from a "bonus" for early completion
e. Evidence of Acceleration
    - Working overtime
    - Working multiple shifts
    - Working during adverse weather
    - Increasing the number of workers/crews on-site.
    - Performing work out of the planned sequence
f. Damages
    - Premium time for over work
    - Loss of productivity due to longer work hours
    - Loss of productivity due to out-of-sequence work
    - Increased administrative costs for additional supervision

12. Disruption

a. Reduction in expected productivity of labor and equipment
    - Compensable when proven to be:
        - Beyond the "normal" range of disruptions inherent in the work; and
        - Caused solely by compensable event(s) within the control of the other party.
    - No basis for compensation for disruption caused by:
        - Excusable events outside the control of both parties;
        - Inexcusable events within the control of the contractor.
b. Abnormal disruption
    - Did the disruption exceed a "normal" range, reasonably foreseeable at the time of contracting
c. Distinguishable from delay, suspension, and acceleration
    - Irrelevant whether impacted activities are on the critical path
    - Normal disruption is apparent in the construction process
    - Abnormal disruption is unexpected and unpriced loss of efficiency
d. Productivity is the measure of output (work produced) per unit of input (labor, equipment, and materials)
e. Productivity can be expressed in various units

- Cubic yards of earth excavated;
- Amount of concrete placed;
- Results in loss of efficiency to both critical and non-critical work activities
- May also result in delay to the contract end date.
- A disruption claim may be maintained even where a contractor completes its contract on time.
- A disruption is frequently caused by acceleration
    - For example, resequencing of work to "recover schedule" may result in a less efficient prosecution of the work.

f. Proving abnormal disruption
- Must prove that "but for" the occurrence of a compensable event within the owner's control, loss of productivity would not have occurred.
- Disruption claims are difficult to prove, because loss of productivity can be caused by multiple events
- Baseline normal productivity, estimated labor hours for individual work activities that usually becomes the labor budget by which profit and loss are measured
- The reasonableness of the estimate must be proved by:
    - Actual productivity experience
    - Proof of the reasonableness of the estimate

g. Methods of Measurement
- Measured mile
    - Most readily accepted method
    - Productivity during normal periods are compared with activity during disrupted periods
    - Assumes that a direct comparison can be made between work activities performed during different periods of time.
    - Challenge is excluding the effect of non-compensable disrupting events that may affect the compared periods
    - It is rare that compared periods are exactly identical in all respects
    - Very important to separate compensable from non-compensable disruption

h. Other methods
- "Would have cost" analysis provide a reasonable after the fact estimate based on performance history of the productivity the contractor would have achieved "but for" the impacting event(s).

- "Normal productivity on other work" analysis seeks to validate measured mile baseline by reference to normal activity on other projects by the same contractor

- Time and motion studies dissects individual elements of work during normal conditions and compares to impacted activities

- Industry studies analyzing effect of overtime, weather, learning curves

i. Determining whether disrupting events were within the control of contractor

- Were these events foreseeable at the time of contracting?
- Were the events within the contractor's express or implied legal duty to control?
- Were the events within the contractor's negligent acts or omissions?
- Could the contractor have avoided or mitigated the events?

13. **Proving Time Impacts**
    a. Three elements of proof
        - Causation
        - Duration
        - Control
    b. Project's critical path is necessary to prove:
        - Causation
        - Duration of time impacting events
    c. Bar chart schedules
        - Easy to prepare and use
        - Very limited information
        - Minimizes its value
        - Identifying critical path and improving impact
    d. Critical path method
        - Many complex projects require a CPM schedule to manage the project
        - As-planned CPM schedule must be updated to reflect actual events on the project that may have changed the critical path
        - Even if the project is not managed by CPM schedule, it may be possible to reconstruct a CPM schedule after the fact
            - Will require the review of daily logs, diaries, meeting notes, correspondence, emails, photos, inspection reports, weather records, pay applications, change orders, etc.
    e. Float
        - The excess time contained on side path activities, not on the critical path
        - Float is not owned by any party
        - Use of float in a non-critical activity provides no claim or defense to either party
        - Float is available to all parties on a first-come basis until exhausted
        - May be complex to determine at times
        - Example:
            - Activity with 20 days of float
            - Delayed 30 days
            - Entire project will be delayed 10 days
            - 30 day delay includes:
                - 10 inexcusable days
                - 10 days excusable delay
                - 10 days compensable owner delay
            - Where the compensable delay occurs third, recovery is likely

    - Where contractor delay occurs last recovery is not likely
  - May be created during performance
    - e.g., contractor resequencing or accelerating work, achieving better labor productivity or working around impacts

f. Pacing – adjusting work activities to concurrent delay
  - Delay to critical path may create additional float in non-critical activities
  - Allow contractor to reallocate resources for non-critical activities to address delay in critical activity
  - Why hurry up to wait?
  - Contractor's failure to complete a critical path activity because there is a concurrent owner-caused delay runs the risk that the contractor will be charged with a concurrent delay
  - Reasonable not to charge the contractor with concurrent delay, provided a contractor can prove it has met its performance obligation
  - If owner paces its performance of duties (e.g., return of shop drawings) because of contractor of delay, the owner should not be charged with a concurrent delay

g. Methods of Proof
  - Impacted as-planned method –
    - not favored because it adjusts as-planned baseline schedule for delays attributed by opposing party and fails to rule out other causes of delay
  - As-built but/for analysis –
    - removes the delays of the owner to show when the contract would have been completed but/for those delays
    - May not, however, give perfect consideration to contractor pacing – whether concurrent impacts were involuntary events or voluntary pacing
  - "Total time method" -
    - merely compares the as-planned baseline schedule with the as-built schedule, attributing the total time difference to the other party
    - greatly disfavored just like a total cost method of recovering costs because it assumes all delaying events were the responsibility of the owner.
  - Contemporaneous analysis method:
    - Based on contemporaneous records prepared at or near the time of the impacting events
    - Has the advantage of allowing all parties the opportunity at the time to agree upon or document the effect of delay
    - Conducted at regular intervals as the CPM is updated
    - Very difficult to achieve in the real world
  - Historical analysis records
    - If contemporary analysis was not done, then it is often necessary to resort to historical analysis
    - As-planned vs. as-built analysis

        - Extent of accuracy depends upon the extent of detail of the job records

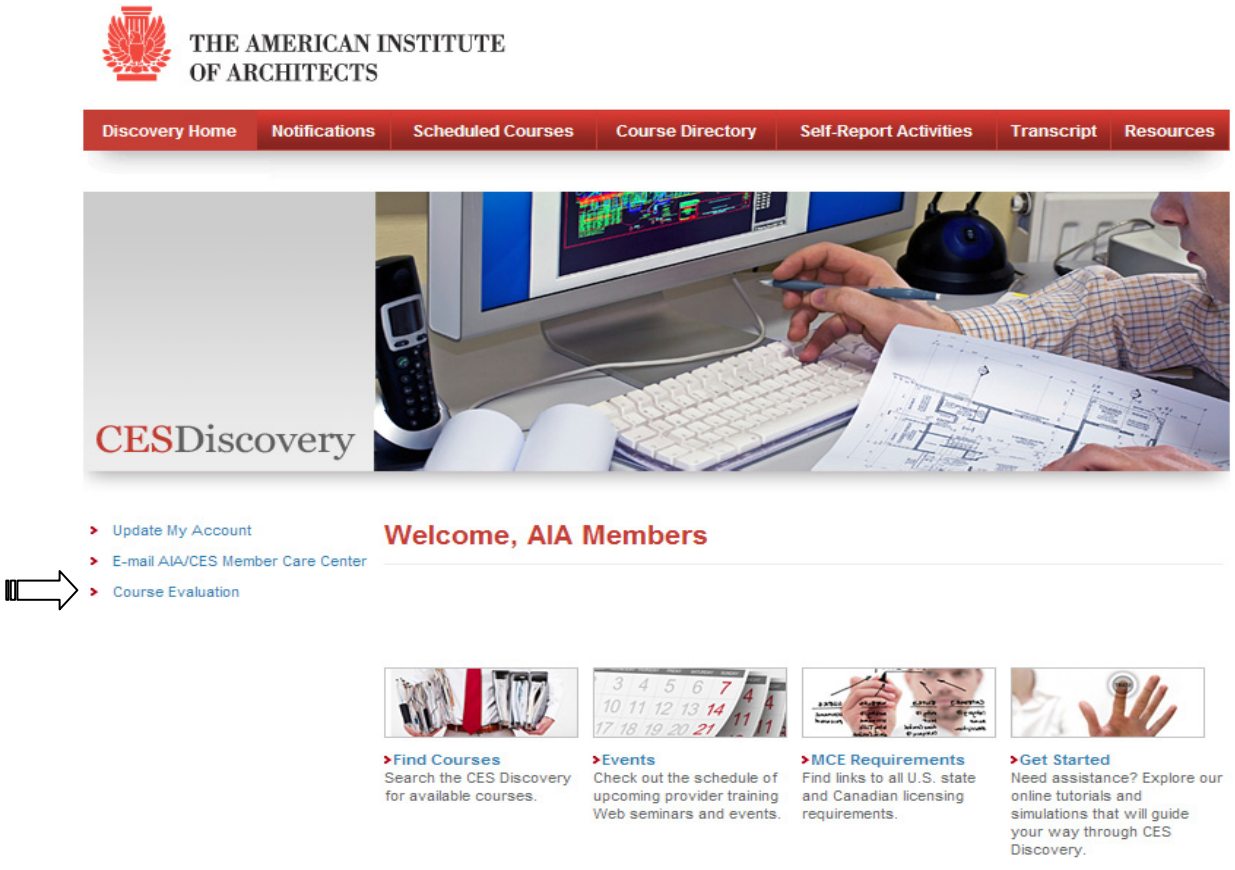
h. Impacted as-planned or "what if" method:
    - Theoretical approach
    - Tries to show how excusable or compensable events impacted progress.
    - Analyses only the owner's delays to the CPM without regard to any contractor delays

i. Collapsed as-built method
    - Begins with as-built schedule
    - Contemporaneously updated during construction or reconstructed from contemporaneous records after the fact
    - Time impacts to critical path in the control of the owner are removed from the schedule, resulting in a collapsed as-built schedule showing when the project would have been completed "but for" any delays of the owner
    - Accuracy dependent upon clear identification of concurrent causes of delay
    - Attractive because it focuses only on the time impact that is outside the contractor's control
    - Vulnerable to attack for failure to adequately account for concurrent causes of delay

j. Window analysis method
    - Uses a contemporaneous schedule that is either updated during performance or after the fact by viewing a "window" of time in which an event occurred
    - Usually accomplished by analyzing the time period between two monthly schedule updates to focus on delaying events within that time period.

Course Evaluations

In order to maintain high-quality learning experiences, please access the evaluation for this course by logging into CES Discovery and clicking on the Course Evaluation link on the left side of the page.



This concludes the American Institute of Architects
Continuing Education Systems program.

Feel free to approach today's speakers if you have additional questions or would like clarification on a topic covered in today's program.

Thank your for choosing Lorman Education Services
for your continuing education needs.

LORMAN®
EDUCATION SERVICES
A DIVISION OF LORMAN BUSINESS CENTER, INC.
Keeping You Current. Helping You Succeed.®

Notes