



Real Estate Development and Construction Management

Presented By:
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OVERVIEW

- I. **Drafting a Contract to Avoid Claims**
- II. **Key Points and Contract Terms to Consider When Drafting a Contract**
- III. **Damages and Delay Claims**
- IV. **Best Practices to Avoid Claims**
- V. **Best Practices to Follow When Litigation is Foreseeable**

Drafting a Contract to Avoid Construction Claims

Contracts

Well-Drafted Construction Contracts are Key to Achieving Project Goals

- Good project documents:
 - Capture the intent of the parties
 - Lock in type of work and price for work
 - Anticipate potential problems
 - Reduce risk for claims
 - Provide for the efficient resolution of disputes should they arise
 - Ensure that if client is faced with a claim, it will be in a forum of its choosing and subject to the most favorable laws



Contracts

Project Goals

- **Quality construction at a fair price**
- **Meet or exceed safety standards**
- **Meet regulatory or internal project deadlines**
- **Have a plan in place to resolve unexpected events**
 - Unforeseen site conditions
 - Material delivery delays
 - Weather delays
 - Force majeure
 - Errors/Omissions in plans or specifications
- **Reduce potential for claims by general contractor or third parties**

Contracts

Key Provisions

- Warrant work is good, workmanlike, and complies with industry standards and existing Codes
 - Include language stating contractor is not entitled to extra payment to correct work that is defective, incomplete, or fails to comply with industry standards or Codes
- Lien waiver and indemnity provisions
 - Require contractor to waive right to file liens
 - Require contractor to bond off liens filed by third parties
 - Require contractor to indemnify for damages, costs, expenses and attorneys' fees
- Choice of law / forum selection clause

Contracts

Key Provisions

- Clearly defined Change Order/Work Change Directive Provisions
 - Require prior written approval in the form of a change order signed by owner before commencing any work
 - Necessary to control cost and avoid surprise claims
- Clearly defined damages and extra payment provisions when a project extends beyond the original schedule
 - Owners can include separate liquidated damages clause with consequential damage provision in agreements in the event liquidated damages clause is found unenforceable

Contracts

Flow Down Clauses

- Ensures consistency in management of project and claim handling by requiring contractors to include provisions that incorporate the prime contract terms into their subcontract
- Ensures that no gaps exist between the obligations expressed in the prime contract and those expressed in the subcontracts – this protects both owners and contractors
- Flow down clauses bind subcontractors to the same obligations, liabilities, and procedures as the general contractor, such as:
 - Pay Provisions
 - Default and Termination Provisions
 - Suspension of Work Provisions
 - Scope of Work Provisions
 - Quality Standards
 - Special Damages Provisions (i.e. no damages for delay clause)
- Virginia courts recognize the benefits of flow down clauses from prime contracts to subcontracts.

– See *C. & P. Tel. v. Sisson and Ryan, Inc.*, 234 Va. 492, 494-95, 362 S.E.2d 723 (1998)

Contracts

Implied Duties of the Owner

- The rights and obligations in a construction contract are not determined solely by the written provisions of the contract, but can be modified or supplemented by implied obligations, implied by the Courts
- Implied duties commonly found to exist, in addition to those expressly provided by contract include:
 - Owner warrants the adequacy of its plan and specs - The “Spearin Doctrine”
 - *United States v. Spearin*, 248 U.S. 132 (1918)
 - The “Spearin Doctrine” has been adopted by the Supreme Court of Virginia
 - *Southgate v. Sanford & Brooks Co.*, 147 Va. 554, 137 S.E. 485 (1927)
 - Test for recovery based upon inaccurate plans and specifications is whether the contractor was misled by the errors in the plans and specs
 - *Robins Maint., Inc. v. United States*, 265 F.3d 1254 (Fed. Cir. 2001)

Contracts

Implied Duties of the Owner (Continued)

- Owner Has Duty to Disclose Any Superior Knowledge of “Material” Matters Regarding the Contract
 - *Bauunternehmung v. United States*, 10 Cl. Ct. 672
- Duty to Cooperate and Not Interfere With Contractor
 - *Whitt v. Godwin*, 205 Va. 797, 39 S.E.2d 841 (1965)
- Duty to Schedule and Coordinate Work in Certain Circumstances
 - In multi-prime work, owner assumes duty of coordination generally assigned to general contractor
 - *Shea-S&M Ball v. Massman-Kiewit-Early*, 606 F.2d 1245 (D.C. Cir. 1979)
- Duty Not to Impede Work
 - *Parrish v. Wightman*, 184 Va. 86, 34 S.E. 2d 229 (1945)

POINTS TO CONSIDER

Points to Consider

- **Be Wary of Outlier Bids**
 - Scrutinize bid proposals and bidder qualifications
 - The lowest bidder may not be the right contractor for the project
 - Require bidders to break out tasks and costs
- **Unclassified Representations**
 - If you intend to be unclassified, be careful not have inconsistent drawings, language or actions
- **Bonds Requirement**
 - Ensure bonds match length and complexity of project
 - Do not be afraid to use the bond!
 - Be familiar with bond terms and conditions

Points to Consider

Contract Administration

- **Hold pre-bid/ pre-construction meetings and review contract with owner’s representatives, contractors and engineers**
 - Document meeting, questions and clarifications and make exhibit to contract
 - Let contractors view the site and site conditions
- **Follow contractual provisions (e.g., notice and payment applications)**
 - Change Order—enforce and adhere to contractual notice provisions including time limitations for submission
 - Prevents arguments of oral modification and waiver
 - Prevents arguments of waiver and modified course of dealing
 - “[A] course of dealing by contracting parties, considered in light of all the circumstances, may evince mutual intent to modify the terms of [a] contract.” *Stanley’s Cafeteria, Inc. v. Abramson*, 226 Va. 68, 73 (1983).

Points to Consider

Change Orders

- Owner should require contractor to affirm that payment of change order releases all claims for additional work and is adequate and full payment for that work
- Contract should ensure the change order protocol is realistic given working conditions in the field
- Keep contemporaneous documentation concerning any request or approval of change orders
- Owner should insist on provisions that allow it to unilaterally modify the work:
 - Avoid “Cardinal” changes which breach the Contract. *Warren v. Goodrich*, 133 Va. 366, 112 S.E. 687 (1922). (A Cardinal change is one where the building is so materially changed that it cannot be reasonably recognized as the one in the original contract.) A broadly drafted scope of work clause will help to avoid this problem.
 - Owner directed change orders can create contractor claims – but aren’t necessarily cardinal changes. *Wunderlich Contr. Co. v. United States*, 351 F.2d 956, 173 S. Ct. 180 (1965).



Approving Change Orders That Fail To Comply With Notice and/or Time Provisions Sets Dangerous Precedent

- **Remember That Each Approved Change Order Can Establish Precedent as to How the Contractual Language Should be Interpreted**
 - Consider incorporating language stating that the change order does not establish precedent and confirming no waiver of contract provisions
- **“Death by a Thousand Cuts”**
 - Keep in mind the cumulative effect of hundreds of change orders and the impact on schedule
 - Consider a “no impact to schedule” stipulation
- **Consider Global Settlement Type Change Order**
 - Parties agree to disagree and compromise on the change order without arbitration
 - Incorporate broad release of any and all prior claims as part of change order
 - Failure to agree to release is a **red flag!**

Changes – Require Notice

Contractor Notification of Change Entitlement. If contractor believes that any act or omission of owner or any project circumstance, condition or event (including those arising under excusable delay), shall cause a change in work or otherwise entitle contractor to additional compensation or to a change in the contract time, and such extra work or time extension has not been authorized by owner, contractor:

- a) before incurring any additional costs and within five (5) days after any contractor first learns or should have learned of the first occurrence of the event giving rise to the claim, contractor shall provide owner with written notice describing the claim, including the basis of the claim
- b) Within ten (10) days after the notice described in Section XXX above, contractor shall provide owner written notice describing, in detail, an explanation of grounds for any contract adjustment and an estimate of the cost and time impacts of the adjustment
- c) Contractor's failure to timely provide the required notices for any claim for additional compensation or time extension shall result in a waiver of such claim

DAMAGES AND DELAY CLAIMS

Types of Damages

- **Compensatory damages**
 - Seek to make non-breaching party whole and require breaching party to pay for what was promised
- **Consequential damages**
 - Special losses, e.g., loss of operating revenue, loss of profits
 - Must be reasonably foreseeable
 - Typically requires proof that breaching party knew of special circumstances at time of breach
 - Should not be waived

Types of Damages

- **Liquidated damages**
 - Must be designated by parties in contract
 - Should function as compensation, NOT as a penalty
 - Enforceability
 - Include consequential damages clause as a backup
 - Practice Tip: Owner's failure to give notice of intent to enforce liquidated damages for delays can result in waiver.

Delays

- **Delays Are Money**

- **Significant Cause of Monetary Claims (Second Cause is Alleged Changes)**
 - **Scope of changes (real and imagined) are also a constant battle**
- **Excusable (Compensable) Delay**
 - Force Majeure
 - Delays caused by the owner
- **Non-Excusable (Contractor Caused or Contributed) Delay**
- **Contract Allocated**

Delays

Owner-Caused Delays

- Slow Turnaround on Approvals/Decisions
- Owner's Failure to Timely Respond is Common Allegation for Contractor Delay Claim
- Active Interference and Access Restriction
- Deliverables and Personnel for Testing and Startup
- Owner-Directed Changes
 - Written
 - Oral

Practice Tip: Include contract provision that entitles contractor to extension of time to owner caused delays.

Delays

Contractor-Caused Delays

- Late, Incomplete, Inaccurate Design (EPC)
- Scheduling Errors and Project Management
- Poor Productivity
 - *Trade Stacking*
 - *Lack of Skilled Labor*
 - *Absenteeism*
- Economic Choices by Contractor
- Material Deliveries/Expediting

Delays

Contract or Legal Allocated Delays

- Force majeure
- Weather
- Differing Conditions
- Labor Unrest/Strikes/Terrorism/Vandalism

Delays

FORCE MAJEURE (“Superior Force”)

- A species of excusable delay (“acts of God” – exclusively non-human)
- Should only excuse performance of the contract for the period of the “event”
- Should require *written notice* at onset and when the event is over
- The concept of *force majeure* exists at common law and most jurisdictions give relief even if the contract is silent, but
- Where a clause is present, a *force majeure* is defined by the contract
- Typically, delay must not be caused by or contributed to the party claiming delay and must be “unavoidable;” beyond the control of the claiming party
- 2-Part Test:
 - Demonstrate a *force majeure* condition (1) beyond reasonable control and (2) not resulting from negligence or fault of the claiming party

Delays

Differing Site Conditions

- **Differing Site Conditions**
 - **Relief Typically Granted in the Absence of a Contractual Provision**
 - **Two Prongs to the Analysis**
 - What is the baseline (what conditions were contracted for)?
 - What constitutes a deviation?
 - Most typically a geotechnical engineering difference (type of soils, existence of voids, quantity and hardness of rock, depth to bedrock)
 - Subsurface v. Transportation

Delays

Differing Site Conditions

- **Typically Do NOT Want to Shift All Risk to Contractor**
 - Results in inflated bids to build against unlikely contingency
 - May not be enforced
 - Can result in cost-cutting in a potential catastrophic portion of the project
- **Typical Provision**
 - Place the burden on the contractor coupled with an acknowledgment that contractor had access to the site and performed such studies and tests as were necessary to evaluate site conditions
 - Provide an “out” via a change (and/or owner abandonment of the project) if, despite the exercise of reasonable diligence, the site conditions encountered differ materially

Delays

Differing Site Conditions

- **Example from Govt. Contract**
 - The Contractor shall have visited . . . and is totally responsible for having ascertained pertinent local conditions . . . and the character and extent of existing conditions, improvements and work within or adjacent to the Site
 - Can request a change if “hidden physical conditions of a building being modified are exposed revealing unusual or materially different conditions from those ordinarily encountered or inherent in work of this nature, or if subsurface or latent conditions at the Site are found which are materially different from those frequently present in the locality or from those indicated in the Contract Documents....”
 - Example – Southwest Virginia Karst.

Monitor Progress – Project Controls

Schedule

- **Project Controls**
 - Scheduling is Everything
 - Scheduling Assumptions
 - *Durations*
 - *Preferential versus Logic Ties*
 - *Sequencing*

Monitor Progress – Project Controls

Must Periodically Walk Down Work

- With Schedule Updates
- Monthly for Progress Complete
- Do Not Rely on Contractor Reporting

Monitor Progress – Project Controls

Quality Controls/Quality Assurance

- Increased attention in trade stacking
- Increased attention on time-shortened activities

Be Wary of Delivery to Site as a Percentage of Complete

BEST PRACTICES TO AVOID CLAIMS

Practice Tips to Avoid Construction Claims

Failure to Strictly Follow Contract's Terms Give Rise to Arguments that Owner Waived Key Provisions

- Maryland, DC, Virginia and most other states permit contracts (including those with terms prohibiting oral modification) to be orally modified upon showing of consideration
- Key contract terms (e.g. change order, notice provisions, project completion deadlines) can be deemed waived and/or abandoned when evidence shows the parties routinely failed to follow the terms of the contract

Practice Tips to Avoid Construction Claims

Closely Follow Contract Terms

- Understand owner's responsibilities under the contract and communicate those responsibilities to all members of owner's internal and external teams



- Take time to understand all notice provisions!

Practice Tips to Avoid Construction Claims

Respond Timely to Questions and Notices

- Promptly respond to all Requests for Information
- Timely respond to Contractor's requests for payment by:
 - making the payment
 - immediately raising questions where necessary, OR
 - promptly rejecting requests for payment
- Adjust the payment when you believe payment is for all or a portion of the work



Practice Tips to Avoid Construction Claims

Respond Timely to Questions and Notices (continued)

- Promptly respond to questions regarding changed conditions
 - Evaluate the request and if warranted, grant the extension or acknowledge that you want the contractor to accelerate to make up for the work
 - If contractor is entitled to additional compensation for a change or differing site condition or for extra work added by owner, promptly acknowledge it, prepare and process the change order, and pay contractor

Practice Tips to Avoid Construction Claims

Timely Monitor and Respond to Contractor's Schedule Submittals and Adherence to the Schedule

- Enforce the project schedule
- Require schedule updates
- Document reasons for schedule changes
 - If the schedule narrative references delays and interferences allegedly beyond contractor's control, owner should promptly respond to the allegations
 - Contract should always maintain documentation supporting claims and approval for changes in work, extra payments, out-of-scope work, etc.
 - Number one rule for contractors is to ensure all claims are timely!



Practice Tips to Avoid Construction Claims

Maintain Clear and Contemporaneous Documentation

Real-time documentation tells the story of project events as they unfold and is credible evidence of what parties meant and understood

Important Documentation for Construction Projects

- Daily Logs
- Internal & External Correspondence
- Photographs and Video Recordings
- Cost Reports
- Payment Records
- Telephone Conversation Logs
- Cost Flow Schedules
- Job Cost Accounts Records
- Time Records
- Material Delivery and Receiving Records
- Meeting Minutes
- Change Orders – Requested, Pending & Approved
- Production & Job Cost Summaries
- Shop Drawing Logs
- Equipment Utilization Logs
- Schedules
- Status & Progress Reports
- Labor & Productivity Costs
- Bid Work Sheets
- Requests for Information

Types of Documentation – Contractually Required

Contractually Required Documents

- Notice to Proceed
- Certificates of Insurance
- Drawing Submittal Log
- Request for Change Order
- Change Order
- Owner-Directed Change Order
- Milestone Payments-Schedule of Values
- Schedule and Schedule Updates
- Look Ahead Schedules
- Expediting Reports

Types of Documentation – Contractually Required

Contractually Required Documents

- Monthly Progress Report
- Weekly Progress Report
- QC Records
 - » Daily Inspections, Draw Inspections, Building Inspections
- Accounting Records
- Certificate of Final Completion
- Certificate of Substantial Completion
- Contractor, Subcontractor and Supplier Waivers and Releases

BEST PRACTICES WHEN LITIGATION IS FORSEEABLE

What **Not** To Do When a Lawsuit Is Filed

- Panic
- Destroy documents
- Hide the truth
- Speak without thinking



Construction Claims Management: Handling Disputes

Analyze the Merits of a Construction Claim

- Understand the allegations in the claim
- Understand what was “promised” by the owner and what was “delivered” by the contractor
- Identify and review the relevant contract plans and specifications



Construction Claims Management: Handling Disputes

Enhance Your Opportunity For Success

- Identify and review available correspondence, reports, and memos
- Document which allegations and facts can be confirmed, refuted, or are at issue. Work through counsel to help protect privileged materials
- Construct a timeline
- Identify potential fact and expert witnesses
- Issue document retention notice



What Happens Before a Lawsuit: Documentation & Keeping Records

- **Which Records Should We Keep?**
- **The Importance of Documentation**
 - More credible than testimony
 - Stays with the fact-finder
 - Provides an aid for testimony
 - Absence can be as compelling as its existence
 - Often puts the onus of a response on the other side, but the reverse is true
 - Often required by contract or by law
 - **If everyone had a perfect memory and told the truth, I would be unemployed**

VA Code 8.01-379.2:1 Spoliation of Evidence of Documentation – E-Mail

- Effective July 1, 2019
- Codifies spoliation charge for failure to preserve evidence
- If party acts *recklessly* or *with intent* to deprive another party of evidence, court may:
 - Presume evidence was unfavorable to party
 - Dismiss the action
 - Enter default judgment

Reckless--conscious disregard for consequences. *Black's Law Dictionary* 1276 (7th ed. 1999).

E-Mail of Documentation – E-Mail

Treat Electronic Documents, E-Mail, and Social Media (Facebook) as a Permanent Record

- Not easily deleted
- Forensics
- The recipients
- Preservation of electronic records (litigation “holds” and spoliation)

Types of Documentation – E-Mail

Good Uses of E-Mail

- Sending documents
- Recording and transmitting objective information
- Requesting Information

Bad Uses of E-Mail

- Subjective and “colorful” language
- Intra-company gripes
- Self-evaluation and mea culpa
- Sarcasm

Types of Documentation – E-Mail

The Pitfalls of E-Mail

- Incredibly expensive in litigation
- Unnecessary in many cases
- Used too freely; removes social and psychological inhibitions; in short, things are said which would not otherwise be said; has become a substitute for speech

Bad E-Mails (Text Messages!) – Examples



- “X has been our worst subcontractor and has never met a schedule that they couldn’t be late on.”
- “No overall projects control system had been implemented. The result was that no one was really sure where they were in terms of schedule.”
- “This however (pipe installation) is not the only issue that is DESTROYING us.”
- “What kind of BS excuse is this – aren’t there weather forecasts over there? . . . The team didn’t know what day Christmas was when they did their scheduling?”
- “I want to develop a delay claim. If they want to play the negotiating game, I want to have some soft money to play with . . .”

“Clean up
your
Facebook
page.”

Twitter,
LinkedIn,
WhatsApp,
etc.

The screenshot shows a Facebook profile for a user named "The Master". The profile picture is a man with a wide, toothy grin. The page is cluttered with many posts. The top navigation bar includes "facebook", "Home", "Profile", "Friends", "Inbox", "The Master", "Settings", "Logout", and a search bar. The main content area shows a "What's on your mind?" post at the top, followed by a post from "Lord President of the Time Lords" and a "RECENT ACTIVITY" section. The "RECENT ACTIVITY" section contains several posts from "The Master" with humorous or meme-like content, such as "Breaking news! Im every!! lolz", "we're the MASTER RACE! geddit?", "lol", "Ha ha! LMAO!!", "FML", "is helping fix this giant sick bed", "can see his own skull. wtf?", "Please let me help! You're burning up you're own life force!", and "...whatevs. ooooh my hands are liek a jetpack!". Below this is another "RECENT ACTIVITY" section with posts like "The Master joined the group I was killed by the Doctor but now I'm alive again", "The Master is single.", "The Master became a fan of Resurrection", and "Lucy Saxon FAIL!". The left sidebar contains sections for "Information" (Prydon Academy '92, In a Relationship with The Master, etc.), "Friends" (6,454,567,501 friends), and "Create a Profile Badge". The right sidebar features "Create an Ad" options, including "Fancy an Upgrade?", "903 and STILL single?", and "1 Tip for Abdominal Fat".

Assume It Will Be Used Against You

Things That Seem Harmless Can Bite Taken Out of Context

- **Bill Gates Testimony:** E-mail to senior Microsoft executive
 - "Do we have a clear plan on what we want Apple to do to undermine Sun?"
- **Diet Drug Case Examples:**
 - E-Mail from employee of pharmaceutical company under siege for selling a diet drug that allegedly caused heart and lung problems: "Can I look forward to my waning years signing checks for fat people who are a little afraid of a silly lung problem?"

Points To Remember About E-mail, Texts and Social Media

- **E-mails, Texts and Social Media Posts Can NEVER be Truly Deleted**
 - Once sent or received, most will be stored on a server and will “live on” even if you delete them.
- **Even e-mails that are unrelated to the project may be discovered and reflect poorly on your professionalism**
- ***So write every text or e-mail with the assumption that you will one day see it again in a deposition!***

Privileged Communications

- **Confidentiality & Privilege, Which is Not Sacrosanct**
 - Attorney-Client Privilege
 - Work-Product Doctrine
- **Assume That There Will be a Dispute Down the Road and Every E-mail or Document is an Exhibit**

Types of Documentation – Photographs

Photographs

- “A picture is worth a thousand words” remains true
- Has impact with fact-finder
- Inexpensive and convenient
- Same angle view, time lapse compelling evidence of progress

Types of Documentation – Photographs



Questions or Comments?

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