

LEGAL

Contract documents

- The contract should specifically identify additional documents which make up the contract (i.e. types date, and number)

Differences between documents

- The architect may choose the more expensive alternative or the contract may require the more expensive alternative to be chosen

Plans and specifications

- It is a general legal principle that the owner implicitly warrants to the contractor the fitness of the plans and specifications for the purpose intended
 - Except when patent defects (obvious to a prudent bidder) and contractual undertaking of risk of defective design

Remedy clauses

- Compensation for extra work
- Limit of legal remedies (for example, requiring arbitration)
- Notice provisions are common

Exculpatory provisions

- Excuses the owner and architect from responsibility for increased costs due to unforeseen circumstances
- Typically passed to subs
- Indemnification ("hold harmless") clauses are related
- State law may void certain clauses

Course of performance (performing work), course of dealing (previous contracts), and usage of trade (how a particular industry deals with the disputed language)

- Apply to ambiguous language
- Actions, rather than words, determine intent of parties
- In order of precedence
- UCC for materials (or jobs where the services are incidental to materials)

A decision by the architect is a condition precedent to arbitration or litigation of any dispute between the owner and contractor

If the contract is silent, the state having the most significant relationship to the contract will govern

- Place negotiated
- Location of parties
- Location of project

National Labor Relations Act sanctions two types of agreements not allowed in other industries

- Prehire (agree to only hire a particular union's employees for a particular function)
- Hot cargo (agree to hire only union subs)

Invitation for bids ("IFB's) typically contain language which allows the soliciting party to select the "lowest responsible and responsive bidder"

- Non-responsive can simply be an incomplete RFP

Home-Owner Warranty (HOW) program

- Registration fee for each home registered
- Faulty workmanship/materials year 1, plumbing/heating/electrical/cooling and major structural defects year 2, major structural defects year 3 through 10

Implied warranties

- Fitness (all sellers, particular purpose) – paint manufacturer examines plans & specs and gives the wrong paint, the manufacturer has an implied warranty
- Merchantability (just merchants, ordinary purpose) – twisted or buckled lumber causes an implied warranty; may be excluded with expressions "as is", "with all faults," etc.

Federal government contracts

- FAR – everything from procurement to allocability of costs
- Cardinal change (beyond the general scope of the contract) – requires applicable competitive procedures
- Since a lien cannot be attached to a government property, the Miller Act establishes bonding requirements

Non-excusable delays and excusable delays (compensable or non-compensable)

- Excusable – potential for owner to assess liquidated damages or not
- Compensable – potential for contractor to receive equitable adjustment or not

Material vs. minor breach

- Owner has right to terminate, as well as monetary damages under material breach
- Typically defined in the contract, otherwise look at: timing of breach (earlier more likely material), if breach was willful, quantitative extent of work performed compared with work remaining

Actual damages

- Flow naturally from the breach (repairing or replacing deficient work)

Consequential damages

- Do not ordinarily flow from a breach (only recoverable if contractor knew or should have reasonably anticipated suffering)

Punitive damages

- For especially egregious conduct

Know ★ Alternative Dispute Resolution

- Arbitration (expensive and time consuming) is one of the few forums where the parties themselves aren't reaching the dispute resolution
- In mediation (mediator is the focus) and mini-trial (facilitator is an adviser to the procedure), third party mediates (no binding opinion)

- Mini-trial – present to each other, mediator steps in, adviser renders advisory opinion if necessary
- DRB's are put in place before construction starts
- Private trial is only different from a regular trial in the judge(s) selected
- Summary jury trial is while trial is about to start or is in progress (under supervision of a presiding judge)

Government Contracts – know your acronyms!

- FAR, CAS, TINA
- Costs must be reasonable, allocable, in accordance with CAS/GAAP, allowable (part 31 of FAR)
- CAS contracts are typically only negotiated contracts
- Disclosure statement provides the government with a detailed written description of a contractor's cost accounting practices

Eichleay Formula

Billings 1/1/08 – 10/31/08: \$500,000

Billings 1/1/08 – 12/31/08: \$600,000

Contract #1 billings: \$100,000

Contract start date: 1/1/08

Original completion date: 10/31/08

Home office overhead 1/1/08 – 10/31/08: \$40,000

Home office overhead 1/1/08 – 12/31/08: \$60,000

of delay days: 60

Eichleay Formula

Contract billings		100,000
Total billings	+	<u>600,000</u>
		16.67%

Total overhead	x	<u>60,000</u>
Total allocable overhead		10,000

# of performance days	+	<u>365</u>
daily home office o/h rate		\$ 27.40

# of delay days	x	<u>60</u>
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Total delay damages \$1,643.84

Most courts prefer the basic formula, but another base such as labor may be used in place of billings