

HOW TO REVIEW A CONSTRUCTION CONTRACT

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CONSTRUCTION NETWORK

Laurence P. Lubka

Hunt Ortman

Pasadena, California

WHAT IS A CONTRACT?

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- IT IS A DEVICE TO ALLOCATE AND ASSIGN RISK
 - IT ALLOCATES BOTH POSITIVE AND NEGATIVE RISK
 - WE ARE ALL FAMILIAR WITH NEGATIVE RISK
 - POSITIVE RISK IS USUALLY PROFIT OR OBTAINING AN ITEM IN AN ADVENTAGEOUS WAY
- THE WORDS MATTER
- PUNCTUATION MATTERS
 - “packing for shipment or distribution of perishable foods”
 - NO COMMA AFTER SHIPMENT
- THE ORDER OF WORDS MATTER
- THE PRECEDENCE OF DOCUMENTS MATTER

BOILERPLATE

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- WHAT IS BOILERPLATE
 - THERE IS NO FIXED DEFINITION
 - STANDARD TERMS THAT GET USED FOR EVERY CONTRACT
 - DISTINGUISHED FROM THE TERMS THAT ARE UNIQUE TO THAT CONTRACT, SUCH AS:
 - PLANS AND SPECIFICATIONS
 - PRICE TERMS
- WHO PREPARES THE BOILERPLATE
 - ORGANIZATIONS SUCH AS THE AMERICAN INSTITUTE OF ARCHITECTS
 - THE PARTY ISSUING THE CONTRACT
 - “WHO KNOWS, THIS HAS ALWAYS BEEN OUR CONTRACT”
 - MY COUSIN, A PERSONAL INJURY ATTORNEY, DRAFTED THE CONTRACT
- OUR LAWYER SAYS!

BOILERPLATE

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- CONTRACTS VS PURCHASE ORDERS
- FAIRNESS OF CONTRACTS
 - AIA, DBIA OR LARGE PUBLIC ENTITIES
 - OTHER ORGANIZATIONAL CONTRACTS
 - PROPRIETARY CONTRACTS
 - THE 3 PAGE FLOW DOWN CONTRACT
 - THE 2 PAGE CONTRACT
 - Use of attachments and riders

READING THE CONTRACT

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- READING THE CONTRACT
 - READING A CONTRACT CAN BE AWFULLY BORING
 - READ EACH SENTENCE UNTIL YOU KNOW WHAT IT MEANS; IF IT MEANS NOTHING - DELETE
 - THE BIGGER THE CONTRACT AMOUNT IS FOR YOU, THE EARLIER YOU SHOULD READ IT
 - READING IT A SECOND TIME IS EVEN MORE BORING, BUT YOU SEE MORE OF THE DETAILS
 - READ THE INTRODUCTION TO THE CONTRACT, SOME VERY KEY ITEMS ARE OFTEN IN THE FIRST PARAGRAPH OR THE RECITALS
 - READ THE TABLE OF CONTENTS - WERE SOME CLAUSES REMOVED?
 - MAKE SURE THE CONTRACT IS SIGNED AND DATED
 - MAKE SURE THE CORRECT PARTIES ARE SIGNING

INTEGRATED CONTRACTS

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- INTEGRATED CONTRACTS
 - WHAT IS AN INTEGRATION CLAUSE
 - YOU CAN ONLY LOOK TO WHAT IS IN THE CONTRACT
 - WHAT HAPPENED TO OUR BID?
 - PRESERVE THOSE EXCLUSIONS
 - EVERYONE KNOWS (BUT NOBODY CARES)
 - HOWEVER IF YOU KNEW OF A PROBLEM, BUT FAILED TO ADDRESS IT, IT WILL LIKELY BIT YOU LATER
 - AVOID ATTORNEYS LATER BY FACING PROBLEMS NOW
 - THE SOLICITATION
 - NON-REFERENCED REPORTS

REVIEWING THE CONTRACT

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- STARTING AT THE BACK OF THE CONTRACT
 - THOSE ATTACHMENTS ARE PART OF YOUR CONTRACT
 - MORE AND MORE OFTEN INSURANCE AND LABOR ISSUES ARE FINDING THEIR WAY INTO ATTACHMENTS
 - USE YOUR EXPERTISE
 - MAKE SURE YOUR BROKER GETS THE INSURANCE CLAUSES OR ATTACHMENT
 - MAKE SURE YOUR PERSONNEL PEOPLE SEE THE PREVAILING WAGE ITEMS
 - MAKE SURE YOUR BUYERS SEE SUPPLIER REQUIREMENTS
 - MAKE SURE THE APPROPRIATE TECH PERSON SEES REQUIREMENTS, APPS, PLANS AND SPECIFICATIONS
 - IF USE OF A PARTICULAR SOFTWARE IS CALLED OUT, SEE IF YOU HAVE THE SOFTWARE AND KNOWS HOW IT WORKS

- HANDY HINTS
 - LOOK UP WORDS YOU DON'T KNOW
 - I'M AMAZED HOW OFTEN WORDS ARE MADE UP
 - IF YOU CAN'T FIGURE OUT THE SIGNIFICANCE OF A CLAUSE, ASK YOURSELF SCENARIO QUESTIONS - WHAT HAPPENS IF?
 - DOES THE SENTENCE BELONG TO THE TOPIC
 - OFTEN CLAUSES BECOME MEANINGLESS WHEN A SUBJECT IS RAISED UNDER THE WRONG TOPIC
 - GENERAL ISSUES UNDER SPECIFIC TOPICS
 - BAD CLAUSES HIDDEN WITHIN SEEMINGLY MEANINGLESS PARAGRAPH
 - BE WARY OF RECITALS
 - READ WITH HIGHLIGHTERS AND COLORED PENS

MORE HANDY HINTS

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- NEVER SAY “I DON’T CARE ABOUT THIS TOPIC”
- NEVER SAY “I KNOW WHAT THEY MEAN EVEN THOUGH IT’S NOT CLEAR”
- A COMPLEX OR RUN ON SENTENCE OR PARAGRAPH WILL CREATE PROBLEMS LATER
- SHOULD YOU EVER USE “WARRANT”, “REPRESENT” OR AGREE TO THE USE OF AFFIDAVITS?
- WHAT IS THE POINT OF NOTARIZATION?

SOME WORDS AND PHRASES TO AVOID

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- “ALWAYS” AND “NEVER”
- “SOLE DISCRETION”
- “NOTWITHSTANDING”
- “WAIVER”
- “INCLUDED, BUT NOT LIMITED TO”
- “TRUST”
- “SOLELY RESPONSIBLE”
- “COORDINATION”
- “KNEW OR SHOULD HAVE KNOWN”

SOME MORE WORDS AND PHRASES TO AVOID

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- YOU INVESTIGATED AND UNDERSTAND THE PROJECT
- YOU INVESTIGATED AND UNDERSTAND ALL TERMS AND CONDITIONS
- YOU INVESTIGATED AND UNDERSTAND ALL PLANS AND SPECIFICATIONS
 - ENGINEER V CONTRACTOR
- YOU HAVE IDENTIFIED ALL CONFLICTS
- YOU HAVE INVESTIGATED THE SITE
 - YOU HAVE INVESTIGATED ADJOINING AREAS
- FORMS REQUIRED THAT YOU HAVE NEVER SEEN AND ARE NOT ATTACHED
- IF YOU DON'T DO THIS, YOU “WAIVE EVERY RIGHT ...”
- MUTUALLY DRAFTED

YET MORE PHRASES

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- STRICT COMPLIANCE
- INTENT OF THE CONTRACT
- BEWARE DEFINITION SECTIONS AND INITIAL CAPITALS
 - “You shall Coordinate and Investigate”

NOTICES

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- VERY SHORT NOTICE PERIODS HELP NO ONE
- WHEN DOES NOTICE TAKE PLACE?
- DON'T FORGET TO ADD NOTICE BY E-MAIL, IN ADDITION TO MAILED NOTICE
- WHAT IS NOTICE OF A CLAIM?
 - DOES IT HAVE TO BE FORMAL NOTICE
 - USE OF MEETING MINUTES, OTHER E-MAILS

INCORPORATED BY COEFERENCE

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- INCORPORATION BY REFERENCE MAKES IT PART OF YOUR CONTRACT, AS IF THE TYPED TERMS WERE IN FRONT OF YOU
- WHICH CONTRACT HAS PRECEDENCE
- IF YOU ARE A SUBCONTRACTOR AND THE PRIME CONTACT IS INCORPORATED BY REFERENCE, YOU MUST GET A COPY
 - DON'T ACCEPT "AVAILABLE FOR REVIEW"
 - THE INCORPORATED CONTRACT WILL CHANGE
 - ARE YOU SUBJECT TO CHANGE ORDERS ON THE PRIME CONTRACT
 - DETERMINE WHICH CLAUSES ARE BEING FLOWED DOWN TO SUBCONTRACTORS OF EVERY TIER

INCORPORATED BY REFERENCE (OR NOT)

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- IS YOUR BID INCORPORATED BY REFERENCE
 - IF NOT, MAKE SURE ALL KEY EXCLUSIONS AND CONDITIONS ARE ADDED AS AN EXHIBIT
- NOTE INCORPORATION OF DETAILED REFERENCE BOOKS
 - AAA DISPUTE RULES
 - INDUSTRY STANDARDS SUCH AS ASTM, ACI
 - DON'T USE VERSIONS THAT HAVE BEEN SUPERSEDED
 - DON'T USE VERSIONS THAT ARE NO LONGER AVAILABLE
 - YOU ARE ON NOTICE OF ALL INCORPORATED DOCUMENTS WHETHER YOU HAVE ACCESS OR NOT

ILLEGAL CLAUSES

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- STATE LAW (STATUTORY OR COMMON LAW) MAY BAN CERTAIN CLAUSES
- ITS BETTER TO ADDRESS THE ISSUE BEFORE YOU SIGN. EVEN IF THE CLAUSE IS ILLEGAL, THE OTHER SIDE MADE DECIDE A COSTLY LAW SUIT IS PREFERABLE
- CAN BE DIFFICULT TO ASCERTAIN - CLAUSE MAY NOT BE ILLEGAL ON ITS FACE BUT ONLY IN APPLICATION

THE BIG TOPICS

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- AUDIT CLAUSE
- PRICE AND TIME OF PAYMENT
- EXCUSES TO PAYMENT
- WITHHOLDING
- INSURANCE
- INDEMNITY & DEFENSE
- DAMAGES
- WARRANTY
- DISPUTE CLAUSES

Audit Clauses

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- WHAT DO THEY ASK FOR?
- WHAT SHOULD YOU ALLOW?
- COPYING
- NEED FOR AUDIT CLAUSES ON LABOR ISSUES FOR THE GENERAL CONTRACTOR - LABOR CODE 218.7
- INFORMATION RE: INDEPENDENT CONTRACTOR

PRICE AND TIME OF PAYMENT / EXCUSES

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- PAY WHEN PAID
- PAY IF PAID
- NUMBER OF DAYS FOR PAYMENT
 - STATUTORY
 - PRIME CONTRACT, SUBCONTRACT
- INTEREST
 - BEWARE HIGH AND LOW INTEREST RATES OR DIFFERENT RATES FOR DIFFERENT PARTIES
 - SAME RATE SHOULD APPLY TO ALL PARTIES

WITHHOLDING

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- BREACH OF CONTRACT
- THREATENED CLAIMS
- BELIEF THAT THE CONTRACT IS AT RISK
- “JUST BECAUSE”
- BE SURE TO REQUIRE NOTICE OF BASIS AND CALCULATION
- LIMITING AUDIT RIGHTS

INSURANCE

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- CHECK WITH YOUR BROKER?
- IS THE INSURANCE AVAILABLE?
- ARE THE REFERENCE FORMS AVAILABLE (ISO FORMS)?
- WILL THE INSURANCE COMPANY GIVE THE NOTICES YOU ASK FOR
- DO YOU WANT A COPY OF THE POLICY
 - EXCLUSIONS CAN EAT THE COVERAGE TO DEATH
- IF THERE IS A FLOW DOWN PROVISION, ARE YOU SURE SUBCONTACTORS CAN GET THE COVERAGE?

INDEMNITY & DEFENSE

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- INDEMNITY DEFINITION
- ORIGINALLY INDEMNITY WAS A REFLECTION OF WHAT WAS COVERED BY INSURANCE - INJURY AND DAMAGE TO OTHER PROPERTY
- “DEFENSE” / “OBLIGATION TO DEFEND” DEFINITION
 - CONFLICTS OF INTEREST
 - WHO PICKS ATTORNEY
- INDEMNITY OBLIGATIONS EXIST UNDER CALIFORNIA STATUTORY LAW
- STATE LAW MAY LIMIT INDEMNITY
 - CALIFORNIA LIMITS INDEMNITY OBLIGATIONS FOR SUBCONTRACTORS
- INDEMNITY AND DEFENSE MAY BE A MORE POWERFUL ISSUE THAN COURT DAMAGES

INDEMNITY CONTINUED

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- LAUNDRY LISTS OF INDEMNITY OBLIGATIONS
 - STATUTORY
 - TORT (ACCIDENTS)
 - BREACH OF CONTRACT
 - BEWARE, OVERREACHING ON INDEMNITY CAN KILL INSURANCE COVERAGE
 - PROBLEMS WITH LAUNDRY LIST CLAUSES
- INDEMNITY WHERE THERE IS NO ACTUAL CLAIM, BUT JUST A SERIOUS CONCERN
- CAN YOU ALLOCATE THE RISK TO THE “REAL” BAD GUYS

DAMAGES

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- CONSEQUENTIAL DAMAGES - MUTUAL WAIVER OF (NOT ONE PARTY)
- DELAY
 - IS DELAY JUST A CPM DELAY?
 - LIQUIDATED DAMAGES
- BUT, FORCE MAJEURE
- ESCALATION
- ADMINISTRATIVE SURCHARGES TO CLAIMS
- PASS-THROUGH CLAIMS
 - WHO PAYS
 - EITHER PASS-THROUGH OR DIRECT - DON'T ALLOW CLAIMS TO FALL IN A GAP

WARRANTY

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- HOW LONG IS THE WARRANTY
 - SPECIAL WARRANTY TERMS (E.G. 10 YEARS ON A ROOF)
 - ONE YEAR COME BACK
 - IS THAT A ONE YEAR WARRANTY OR IS IT THE CONTRACT STATUTE OF LIMITATIONS
- HOW LONG TO CURE
 - ARE YOU REALLY GOING TO FIX IT IN 3 DAYS? “TIME TO INITIATE CURE”.
- STATUTORY WARRANTIES
 - CALIFORNIA 10 YEAR STATUTE OF REPOSE
 - CALIFORNIA SPECIAL RESIDENTIAL WARRANTIES
- SHOULD YOU REQUIRE MAINTENANCE?

DISPUTE CLAUSES

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- LIEN WAIVERS
- BOND CLAIMS
- VENUE IS NOWHERE NEAR THE PROJECT
 - BUT SEE LIEN CLAIMS
 - STATUTE
- PERCENT WITHHOLDING FOR PROBLEM WORK
- RETENTION
- COMPENSATION FOR DELAY
- NOTICE OF A DISPUTE VS THE COMPLETE CLAIM

DISPUTE CLAUSES - 2

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- MEET AND CONFER
- MEDIATION / ADR
 - PICK A MEDIATOR
- ARBITRATION
 - PICK A FORUM
 - PICK AN ARBITRATOR
- TRIAL
 - PICK A VENUE
- ATTORNEY'S FEES CLAUSES
 - BY CONTRACT OR STATUTE
 - ACTUAL COSTS / EXPERT WITNESS FEES
 - BILATERAL

TERMINATION AND SUSPENSION CLAUSES

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- ANY BREACH VS. MATERIAL BREACH
 - NOTICE OF BREACH
- WRITTEN NOTICES ONLY
- CURE PERIODS
- MEET AND CONFER
- OBLIGATIONS IF YOU ARE TERMINATED FOR CONVENIENCE
- COMPENSATION IF YOU ARE TERMINATED FOR CONVENIENCE
- LENGTH OF SUSPENSION AND RIGHTS TO COMPENSATION AND ADDITIONAL TIME

OTHER

- INFINITE PUNCH LISTS
- WITHHOLDING FOR PUNCH LISTS
 - MULTIPLIER 1.25, 1.5, 200% OR WHO KNOWS

SOME FUN CLAUSES

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To the fullest extent permitted by applicable Law, Contractor agrees to indemnify, defend, and hold harmless Owner and Owner Indemnitees from and against any and all demands, claims for bodily injury or death and property damage, Losses, causes of action, fines, settlements and judgments, including court or arbitration costs, reasonable experts' fees and reasonable attorney's fees, whether arising in equity, at common law, or by statute, or under the law of contracts or torts (including negligence and strict liability) brought by any Governmental Authority or any other Person (collectively, the "Company Losses"), arising out of or related to liability for (i) the negligent or intentional or willful misconduct of Contractor its Subcontractors or their agents or employees, (ii) the release of any Hazardous Materials brought on Site or rights of way and easements for the Project by Contractor, any Subcontractor, or any other Person for whom Contractor may be responsible arising due to Contractor's or such Subcontractor's or Person's negligent use, handling or disposal of such Hazardous Materials, or the release of any Pre-Existing Hazardous Materials by Contractor, its Subcontractors or any Person for whom Contractor may be responsible arising due to the failure of such Person to perform its obligations in accordance with this Contract, (iii) failure by Contractor, any Subcontractor or any of their employees to comply with any applicable Law, (iv) breach of any term of this contract, (v) any cancellation or invalidation of any insurance policy or part thereof procured under Section 7 as a result of Contractor's failure to comply with any of the requirements set forth in such policy or any other act by Contractor or any Subcontractor, and (vi) any Liens other than those permitted by Section 5.

A Payment Clause

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- The Subcontract Price includes all taxes, licenses, and fees of any nature which may be imposed upon or charged by any governmental authority upon the labor, material, or other things used in the performance of the Work or upon the transaction between Contractor and Subcontractor. Subcontractor agrees to accept the price or prices set forth herein as full compensation for performing all Work and furnishing all materials contemplated by this Agreement; for all loss or damage arising out of the nature of the Work or from the action of natural elements or from any unforeseen difficulties or obstructions which may arise or be encountered in the prosecution of the Work until its acceptance by Owner; for all risk of every description connected with the Work; for all expense incurred by or in consequence of the suspension or discontinuance of the Work; and for faithfully completing the Work in the manner and according to the requirements of Contractor and Owner and the instructions of the Owner's Representative.

A Disputes Clause

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- Arbitration involving less than \$ _____ in dispute, and not involving the Owner or a third-party, shall be decided pursuant to the following rules: (1) each side will identify a single business person and a single lawyer, to handle its communications and attend each meeting. The business person shall have full authority to settle; (2) within 14 days of invoking these rules, a single decision maker will be agreed upon by the parties; (3) within 14 days of the decision maker agreeing to serve, the parties shall initially meeting with the decision-maker and the following will occur: (a) the parties will agree on the date the arbitration will occur. The arbitration must be within 60 days of the initial meeting; (b) the parties can ask the other for up to 10 things, for example, specific documents, precise, limited categories of emails, sales or accounting records or other business records. During the initial meeting, each party will agree to produce the requested items or object. Any objections, problems or uncertainties will be resolved by the decision-maker that day during the meeting, using the standard of whether the requested document is needed to evaluate the dispute. If the decision-maker decides the document should be produced and it is not produced, the decision-maker should resume that the document hurts the refusing party; (c) each party identifies no more than two people on the other side, by name, title or area of knowledge, that it wants to depose. Each deposition is limited to two hours and must take place within two weeks of the production of documents. (4) At the arbitration hearing: (a) each side has one hour to present its case to the decision-maker and the opposing party and each party has one-half hour to cross-exam; (b) one hour after the end of that process, each side provides the decision-maker only its proposal for resolution in a sealed envelope at which time outside counsel shall leave the building; (c) the decision-maker adjourns to make a decision, which is to accept one proposal. There is no middle ground available to the decision-maker. The decision-maker shall endorse one proposal and placed the accepted resolution in a sealed envelope; (d) regardless of the time the decision-maker returns its sealed decision to the parties, the envelope shall not be opened before 4:30 pm. The parties commit to spending a minimum of two hours negotiating. At 4:30 m, if the parties have not resolved the matter on their own, the sealed envelope is opened, and the endorsed proposal stands as the decision resolving the dispute. It is binding as non-appealable.

MORE FUN

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- “The mediator shall hold a hearing and the parties to the mediation will be bound to the determination of the mediator.”
- “The Owner may, in its sole discretion, require an increase in the insurance coverage of the contractor and subcontractors.”
- You will proceed with additional directions from the bank.
- “Contractor shall coordinate the design of the Project with its subcontractors and shall be solely responsible for all increased costs or delays resulting from Contractor’s failure to fully coordinate the design.”
- “Contractor shall comply with all requirements of the 33 industry standards referenced in Exhibit “D”, including the 2002 version of the DNX standards.”

ONE LAST BIT OF FUN

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- “Attendee is fully, wholly and unusually responsible for every single tiny, little bit of information provided at this Webinar, whether or not it is in the outline or precis. Attendee will, in his or her sole discretion, seek to cause to be Applied the lessons of this Webinar, since the failure to do so would not be synchrographic as to your company. Failure to synchrography the lessons is a waiver of any rights you may have.”

CONCLUSION

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- Q & A
- FINIS

- Laurence P. Lubka
- Lubka@huntortmann.com
- 626-440-5200
- Post seminar questions invited.