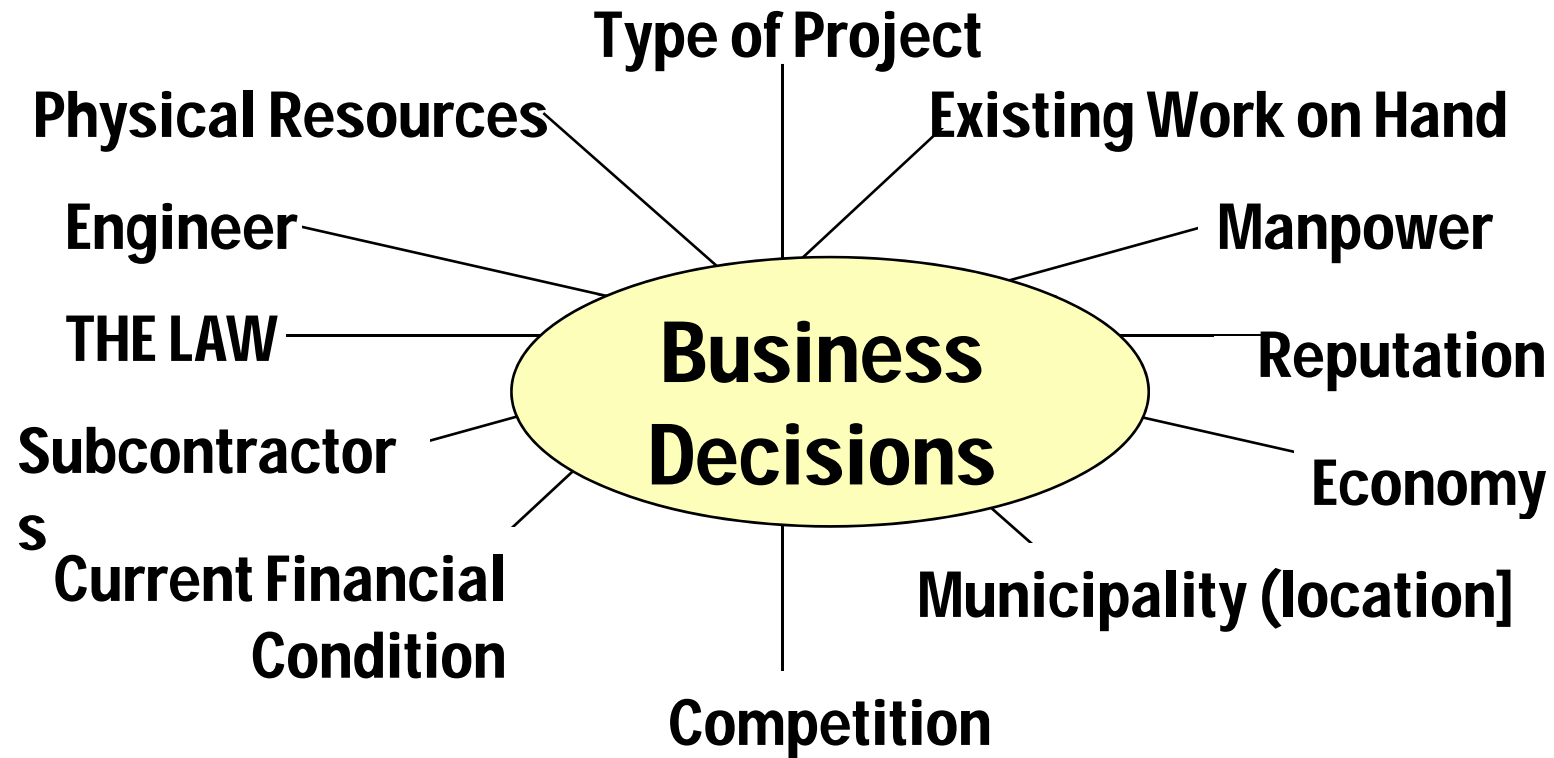


# *Construction Law and Contract Claims*



# Construction Law & Contract Claims

## Objectives of This Session

- Understand the meaning of contract terms used in Private Contracts, and the VDOT Standard Specifications
- Put in place a system to identify changes that occur on a project
- Develop documentation skills
- Be able to gather the information needed to prepare a claim

# Construction Law & Contract Claims

## Topics

### The Construction Prime Contract

- ↓ Rules of Contract Interpretation
- ↓ Significant Provisions
- ↓ Significant VDOT Provisions
- ↓ Significant Federal Provisions

# Construction Law & Contract Claims

## Topics

### Subcontracting

↓ Concepts

↓ Significant Provisions

# Construction Law & Contract Claims

## Topics

### Types of Claims Under the Significant Contract Provisions

# Construction Law & Contract Claims

## Topics

Controlling the Work

Play Books and Crew Plans

Field and PM Documentation

Legal Evidentiary Concepts

# Construction Law & Contract Claims

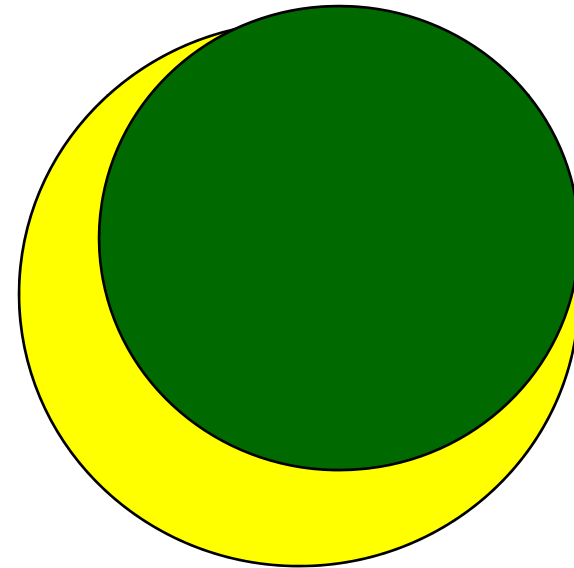
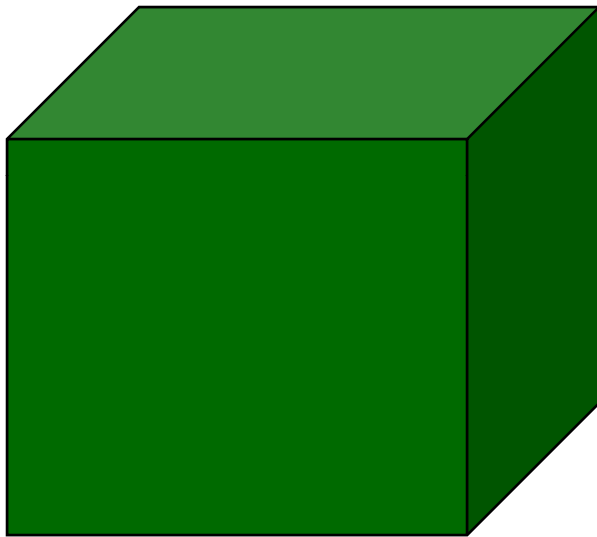
## Topics

- Calculating Damages
- Damages
- How We Prepare a Claim
- Mechanic's Liens
- Payment & Performance Bonds



# Construction Law & Contract Claims

## The Contract

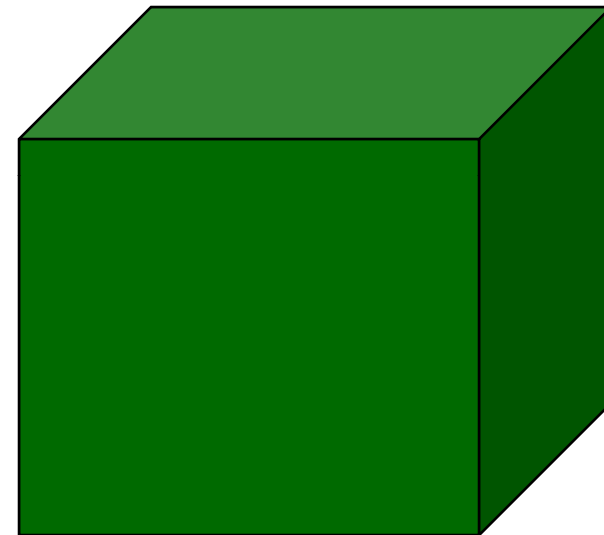


# Construction Law & Contract Claims

## The Contract

### Types of Contracts

- “Take it or leave it”
- “Take it or leave it” *modified*
- 100% Contractor proposed



# Construction Law & Contract Claims

## The Contract

### **The Contract Consists of:**

- The Written Agreement
- Addenda
- Plans (and plan addenda/amendments)
- Specifications (and references)
- General Conditions/Provisions

# Construction Law & Contract Claims

## The Contract

### **The Contract Consists of:**

- Special Provisions
- Change Orders (contract modifications)
- Municipal Specifications and Standards

# Construction Law & Contract Claims

## The Contract

### Rules of Contract Interpretation

- Parol Evidence Rule
- One part of agreement is examined with reference to all others
- Incorporation by reference
- “Expressio Unius”

# Construction Law & Contract Claims

## The Contract

### **Rules of Contract Interpretation**

- Reasonable, logical meaning presumed
- Construe Language Against Drafter
- Order of Precedence Provisions
- Course of Dealing
- Custom and Usage

# Construction Law & Contract Claims

## The Contract

### Significant Prime Contract Provisions

- No damage for delay
- Differing site conditions
- Liquidated damages & incentive/disincentive
- Termination for convenience
- Waiver of claims/liens

# Construction Law & Contract Claims

## The Contract

### Significant Prime Contract Provisions

- Resolution of claims
- Indemnity
- Bonds, fees, and permits
- Decision of architect/engineer on claims
- Limitation of consolidation or joinder



# Construction Law & Contract Claims

## The Contract

### Implied Contract Terms

- Duty to cooperate
- Duty not to hinder or delay
- Assignment of contract
- “Spearin Doctrine” – Design Specifications vs. Performance Specifications

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 104.02*

### *Alteration of Quantities or Character of Work*

#### Definition of Significant Change

- Character of work differs materially in kind or nature (subjective)
- Major item increase in excess of 125% or below 75% (objective)
- Caveat: No significant changes in quantity to minor item

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 104.02*

### *Alteration of Quantities or Character of Work*

## Application

“If the alternations or changes in quantities significantly change the character of the work under the Contract, **whether or not changed** by any such different quantities or alterations. . . .”

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 104.02*

### *Alteration of Quantities or Character of Work*

#### Adjustment in Price

- Excludes loss of anticipated profits (applies to reduction in work)
- Attempts should be made to agree upon prior to performance of the work
- At the option of the Engineer, work may be performed on force account

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 104.03 Differing Site Conditions*

- Applies to subsurface or latent physical conditions encountered at the site differing materially from those indicated in the Contract (**Type I**); or
- Unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract (**Type II**)

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 104.03* *Differing Site Conditions* Procedure

- Party discovering such conditions shall promptly notify the other party
- Upon written notification, the Engineer will investigate and if the Engineer finds the conditions materially differ and cause an increase or decrease in the cost or time required for performance of any work under the Contract, an adjustment, excluding anticipated profits, will be made

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 104.03* *Differing Site Conditions*

### Procedure

- No adjustment will be made unless the Contractor provides written notice

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 105.05*

### *Coordination of Plans and Specifications, etc.*

*The Contractor shall take no advantage of any apparent error or omission in the plans or specifications. If the Contractor discovers an error or omission, he shall immediately notify the Engineer. The Engineer will then be permitted to make such corrections and interpretations as may be deemed necessary for fulfilling the intent of the Contract.*



# Construction Law & Contract Claims

## VDOT Provisions

### *Section 108.10*

### *Suspensions of Work Ordered by Engineer*

- Engineer may require partial or complete suspension of operations
- Must be in writing
- No additional compensation or time allowed except if work suspended or delayed for unreasonable period of time (Contractor required to submit a request for adjustment within 7 calendar days of receipt of the notice to resume work)

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 108.10*

### *Suspensions of Work Ordered by Engineer*

- No contract adjustment will be allowed to the extent performance would have been suspended or delayed by any other cause, or for which an adjustment is provided for or excluded under any other term or condition of the Contract

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 108.09*

### *Determination & Extension of Contract Time Limit*

Contract time may be extended:

- On the basis of Contract Change Orders involving increases in quantities: (1) # days agreed upon in change order; or (2) ratio of additional revenue from change to original contract price
- For causes beyond the control of the Contractor which Contractor identifies in a timely manner and in no event later than 60 days after Department pays final estimate

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 109.05 Extra and Force Account Work*

Payment made as follows:

- Agreed lump sum basis
- Agreed unit prices
- Force account basis

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 109.05*

### *Extra and Force Account Work*

- Cost of labor + 45%
- Labor adder for insurance and taxes + 25%
- Cost of materials + 15%
- Equipment – paid hourly at rates not to exceed Blue Book - (1/176) times monthly rate. *Hourly rates for equipment held in ready will be at 50% of the rate paid for equipment in use. Equipment in use + equipment held in ready shall not exceed 40 hours.*

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 109.05*

### *Extra and Force Account Work*

- Subcontractor-performed work – Add 10% to subcontractor’s “costs” before mark-ups.

# Construction Law & Contract Claims

## VDOT Provisions

### Existing Utilities!!!

- Section 107.17 -- Contractor's Responsibility for Utility Property and Services
- vs.
- Section 105.07 -- Cooperation With Regard to Utilities

# Construction Law & Contract Claims

## VDOT Provisions

### Section 107.17

## Contractor's Responsibility for Utility Property and Services

*The Contractor shall cooperate with owners of utility lines so that removal and adjustment operations may progress in a reasonable manner. . . . The Contractor shall be responsible for any damage to utilities that is attributable to his neglect or methods of performing work.*



# Construction Law & Contract Claims

## VDOT Provisions

### Section 105.07 Cooperation With Regard to Utilities

*Existing utilities at the design stage of the project will be indicated on the plans. Preliminary arrangements for adjusting these utilities will be made by the Department prior to project construction. Existing private and public utilities that require adjustment will be adjusted by the utility owner or shall be adjusted by the Contractor as a contract item. The new location of such utilities will not normally be shown on the plans. Some utilities may remain or to be adjusted within the construction limits simultaneously with project construction operations.*

# Construction Law & Contract Claims

## VDOT Provisions

### Section 105.07 Cooperation With Regard to Utilities

*Prior to preparing a bid, the bidder shall contact known utility owners to determine the nature, extent, and location of existing, adjusted, or new utility facilities.*

# Construction Law & Contract Claims

## VDOT Provisions

### Section 105.07

### Cooperation With Regard to Utilities

*Except as otherwise specified herein, the Department will not be responsible for any claims for additional compensation from the Contractor resulting from delays, inconvenience, or damage sustained by him attributable to interference by utility appurtenances, or the operation of moving the same, other than a consideration of an extension of time.*

# Construction Law & Contract Claims

## VDOT Provisions

### Section 105.07

#### Cooperation With Regard to Utilities

*If it is determined that interference by utility appurtenances caused a delay of such magnitude or otherwise altered project operations so as to increase significantly the Contractor's cost of performing the work, the Engineer may consider additional compensation limited to the actual costs incurred by the Contractor. The determination of the severity of the interference, its impact on the Contractor's cost, and the amount, if any, of compensation shall be at the sole discretion of the Engineer.*

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 105.16*

### *Submission and Disposition of Claims*

- Written statement describing nature of claim and nature of damages must be submitted to the Department at the occurrence or beginning of work upon which the claim is based
- Notice provides Department with the opportunity to act and/or to keep track of impacts/damages to Contractor - STRICTLY APPLIED! Failure to provide notice constitutes waiver of claim
- **Actual notice**
- Contractor must furnish at time of occurrence or prior to beginning the work itemized list of material, equipment, and labor for which compensation is sought
- Contractor recovery subject to audit

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 105.16*

### *Submission and Disposition of Claims*

- Formal written claim setting forth facts upon which claim is based and detailed costs must be submitted to Department within 60 days from time Department pays the final estimate (fixed by letter)
- Only actual costs will be considered for payment
- Department must decide claim within 90 days
- If dissatisfied with Department's decision, Contractor may notify Commissioner in writing within 30 days of receipt of Department's decision and may request to appear to present arguments and/or additional facts in support of claim

# Construction Law & Contract Claims

## VDOT Provisions

### *Section 105.16*

### *Submission and Disposition of Claims*

- Commissioner must schedule meeting within 30 days
- Commissioner must notify Contractor of decision within 45 days after meeting
- Negotiation possible pursuant to Va. Code §2.1-127
- Appeal to Circuit Court within one year

# Construction Law & Contract Claims

## VDOT Provisions

### *Notable Va. Public Contract Cases*

*Main v. Dept. of Trans. -- employee cannot waive contractual or statutory requirements AND estoppel does not apply against the Commonwealth;*

*R.J. Crowley v. Fairfax County -- Subcontractor notice of intent does not suffice for contractor notice;*

*General Excavation v. Fairfax County -- No constructive or actual notice as substitute for written statutory notice;*



# Construction Law & Contract Claims

## *Non-VDOT Public Contract Notes*

- All non-VDOT contracts covered by Va. Public Procurement Act
- Claims submitted within 60 days of final payment (however written notice of intent shall have been given at time of the occurrence or before);
- Pendency of claims shall not delay payment of funds not in dispute;
- Public body must incorporate into contract a procedure for considering claims (beware of incorporation by reference!)
- Must file suit within 6 months after receiving final decision;
- Locality MAY establish an administrative appeals process (not mandatory to use);
- Contractor has 6 months to file suit after decision under administrative appeal.

# Construction Law & Contract Claims

## *Non-VDOT Public Contract Notes*

- Current belief is that a prime cannot file suit on a pass-through claim unless it has been damaged (*APAC v. VDOT*);
- Prime on public project should include limitation provision in its subcontracts regarding claims for which owner may be responsible;
- Notice is required concerning a claim even if no notice provision is contained in the contract;
- Maximum 5% retainage
- No Damage for Unreasonable Delay Provision null and void -- (quid pro quo - claims found to be false or having no basis in law or fact)

# Construction Law & Contract Claims

## *Non-VDOT Public Contract Notes*

- Prompt Payment Act -- Must pay on payment due date (specified in contract/30 days after receipt of invoice/45 days after agent's receipt of invoice);
- Interest accrues at legal or contract-stated rates beginning on the 8th day after payment due date;
- Prime payment to Subs -- must pay within seven (7) days of receipt of payment or provide written notice to both sub and agency of intention to withhold and state reasons why;
- Prime must pay interest to sub beyond seven (7) days;
- Prime must include in its subcontracts a provision requiring subs to pay sub-subs and vendors in like fashion;

# Construction Law & Contract Claims

## *Non-VDOT Public Contract Notes*

- Bidder Responsibility vs. Responsiveness
- If determined “initially” that low bidder is not responsible;
  - Written notice of initial finding with pertinent information and provide low bidder with opportunity to review documents if requested within 5 days of notice;
  - Low bidder has 10 business days from receipt of notice to submit supplemental information pertinent to issues;
  - Locality issues written finding within 5 business days of receipt of information from low bidder;
  - Determination is final unless appealed within 10 business days of receipt of final determination (admin process or litigation);

# Construction Law & Contract Claims

## *Non-VDOT Public Contract Notes*

To Win Against Locality on Non-Responsibility Determination

*Court must find that the decision of the public body was not an honest exercise of discretion, but rather was arbitrary or capricious **or** not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid.*

# Construction Law & Contract Claims

## *Non-VDOT Public Contract Notes*

- If award has not been made to another bidder, the public body shall either award to the low bidder or re-bid/cancel the proposed award;
- If award has been made to the second bidder, the award may be enjoined;
- If award has been made to second bidder and performance has begun, the public body MAY cancel the contract and pay to the contractor compensation for work performed (only).

# Construction Law & Contract Claims

## *Non-VDOT Public Contract Notes*

### **Determination of Non-responsiveness**

- Must file protest in writing to public body within 10 days (calendar) after public notice of the award or the announcement of decision to award (tricky);
- Public notice or announcement must occur in accordance with terms of Invitation to Bid (new);
- Exception to 10 day period -- if inspection of public records has been made, then 10 days after records made available;
- Cannot protest the “responsibility” of another bidder, only responsiveness;
- Protest decision must be rendered within 10 days;
- Decision binding unless appealed within 10 days;

# Construction Law & Contract Claims

## *Non-VDOT Public Contract Notes*

### **To Win Against Locality on Non-Responsive Issue**

*Court must find that the decision of the public body was not an honest exercise of discretion, but rather was arbitrary or capricious **or** not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid.*



# Construction Law & Contract Claims

## *Non-VDOT Public Contract Notes*

### **Alternative Dispute Resolution**

- Mediation and arbitration are allowed generally;
- State entities may not participate in binding arbitration;
- School boards cannot participate in binding arbitration!

# Construction Law & Contract Claims

## Subcontracting

- The prime contractor's choice
- Prime still responsible to Owner for Subcontractor's work
- Only prime contractor is in “privity of contract” with owner

# Construction Law & Contract Claims

## Subcontracting -- Privity

- Subcontractor has no right to assert a claim against the owner
- Subcontractor has no obligation to owner (incorporation)
- Owner vs. Prime vs. Subcontractor
- Severin Doctrine and state equivalent

# Construction Law & Contract Claims

## Subcontracting - Bids/Quotes

- Offer & Acceptance
- Withdrawal of Offer before acceptance
- Promise to hold offer open
- “Implied promise” -- Promissory Estoppel

# Construction Law & Contract Claims

## Subcontracting - Bids/Quotes

### Bid Shopping Defense

- Shopped bid on particular project
- Reputation for bid shopping

# Construction Law & Contract Claims

## Subcontracting vs. Vendors

- Services/goods vs. Pure Goods
- Uniform Commercial Code

## Subcontract Terms

### Incorporation by Reference

- ❑ An attempt to “flow down” prime contract requirements to the subcontract
- ❑ Technical specifications in prime contract are usually deemed applicable to sub through the “flow down” clause
- ❑ General requirements are not always; especially where subcontract expressly addresses an issue (Ex: dispute resolution)
- ❑ Exculpatory clauses rarely flow down

# Construction Law & Contract Claims

## Subcontract Terms

***Obtain A Copy of  
All Subcontract  
Documents!!!***



## Subcontract Terms

### Adherence to Schedule

- Baseline?
- Baseline and all revisions?
- Baseline and reasonable revisions?
- Subcontractor input to baseline?

*Before Bid or after?*

# Construction Law & Contract Claims

## Subcontract Terms

*Pay When Paid*

*or*

*Pay If Paid*

# Construction Law & Contract Claims

## Subcontract Terms

- *Waiver of mechanic's lien rights;*
- *Waiver of bond claim rights;*
- *No damage for delay (unless pass through);*
- *Limitations of recovery for pass through claims;*
- *No recovery for claims for which contractor may be responsible;*
- *Changes -- stated time in subcontract OR that provided in prime contract if more stringent;*

# Construction Law & Contract Claims

## Subcontract Terms

- Dispute Resolution
  - Arbitration
  - Arbitration-mediation
  - Litigation
  - Disputes Review Board
  - Owner's Architect (final arbiter)
  - Contractor elects

# Construction Law & Contract Claims

## Subcontract Terms

- Permits and Fees
- Bonds -- to be provided if requested (no time provisions)
- Bonds -- to be in force for one year after completion or warranty period
- Insurance
- Exclusion of scope in quotation and replacement with citation to specific technical spec sections;
- Payment for contractor-caused delays or extra work limited to costs only.

## Subcontract Terms

- Requirement that Subcontractor continue work despite existence of dispute;
- Termination for convenience;
- Wrongful termination to convenient termination conversion clause.

# Construction Law & Contract Claims

## Subcontract Terms

### Indemnity Provisions

In the event the prime contractor (owner, engineer) is sued for sub's negligence and judgment is entered for payment of damages

# Construction Law & Contract Claims

## Subcontract Terms

### Indemnity Provisions

**Option 1:** Sub pays for all damages regardless of whether others are also partially at fault;

**Option 2:** Sub pays for damages in a ratio equal to the percentage of fault attributable to sub; or

**Option 3:** Sub pays for all damages only if it is totally at fault.



# Construction Law & Contract Claims

## **FAULCONER** CONSTRUCTION COMPANY

### STANDARD SUBCONTRACT

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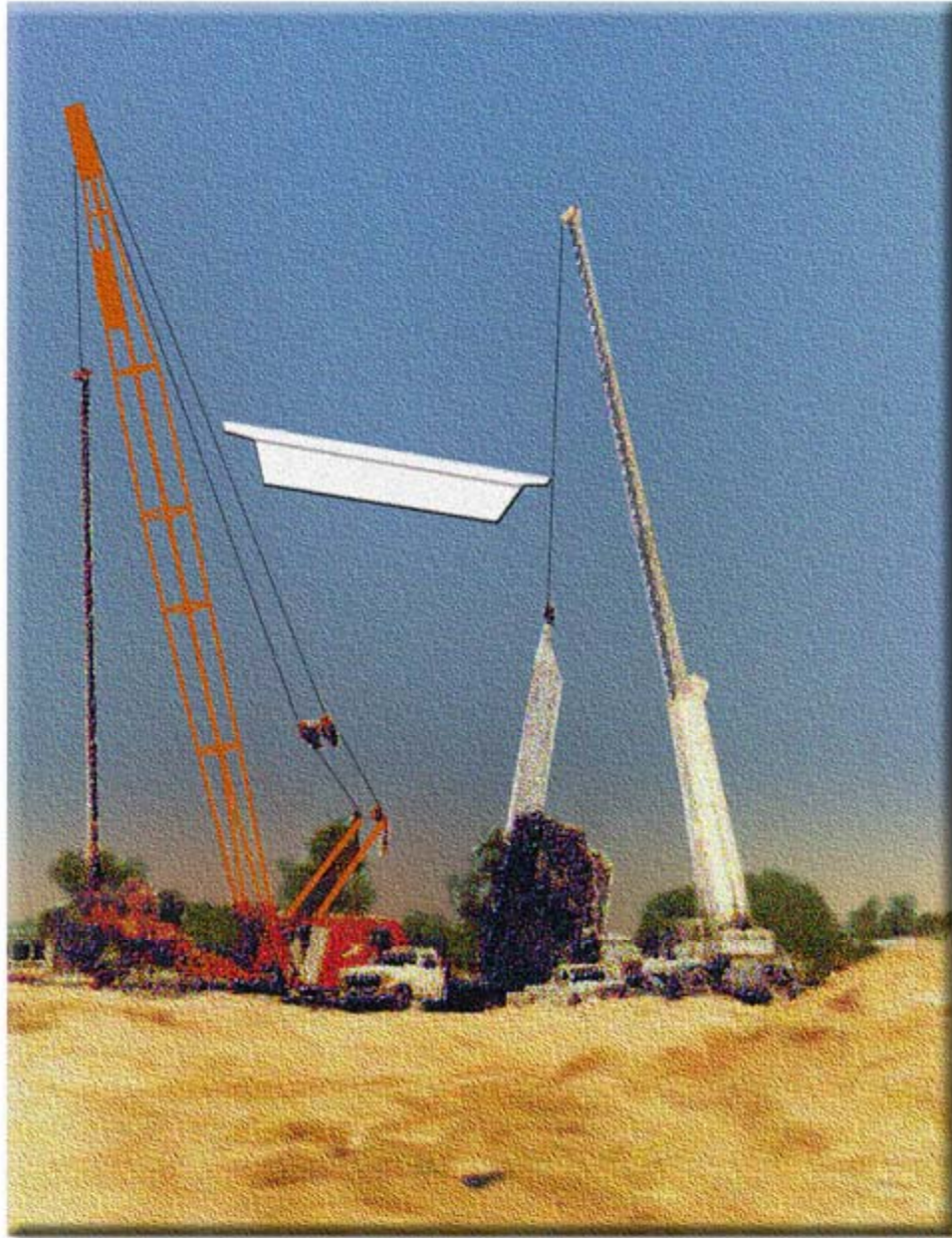
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# Construction Law & Contract Claims

## Types of Claims

- Changes, Alterations, and Extra Work
- Cardinal Changes
- Defective Plans & Specs (Spearin Doctrine)
- Impossibility of Performance
- Commercial Impracticability
- Differing Site Conditions
- Superior Knowledge
- Misrepresentation



## Types of Claims

### □ Delay

- *Excusable*
  - Compensable (Time + \$)
  - Non-compensable (Time only)
- *Non-excusable* (No Time or \$)

# Construction Law & Contract Claims

## Excusable Delays

- Work interruptions
- Acts of God (FAR 52.249-8) or public enemy
- Acts of Government
- Fire, floods, epidemics, quarantine restrictions
- Strikes
- Freight embargoes
- Unusually severe weather

# Construction Law & Contract Claims

## Excusable Delays

- Must show “causation” between event and extension of the contract
- Critical Path work must be impacted!

# Construction Law & Contract Claims

## Compensable Delays

- No Damage for Delay Provision?
- General Rule -- no compensation unless (a) specifically allowed in contract; (b) result of government fault; or (c) results from breach of owner warranty

# Construction Law & Contract Claims

## Compensable Delays

- Suspension of Work (unreasonable time)
- Gov't failure to provide information or act on an issue
- Failure to issue Notice to Proceed w/i specified time
- Gov't failure to timely review submittals
- Delay in issuing changes and change orders
- Failure to make site available
- Delay in inspection
- Delay in furnishing gov't-supplied equipment



# Construction Law & Contract Claims

## Compensable Delays

- Permits (supplied by owner)
- Gov't funding difficulties (deceleration)
- Arising from changes

# Construction Law & Contract Claims

## Compensable Delay Concepts

- Concurrent Owner and Contractor Delays (time only)
- Contractor has a right to finish the project early

# Construction Law & Contract Claims

## Types of Claims (continued)

- Disruption/Interference
- Acceleration/Constructive Acceleration
- Constructive Changes

# Construction Law & Contract Claims

## Types of Constructive Changes

- Directive to perform work not in contract
- Defective Specifications
- Improper Inspections
- Superior Knowledge
- Constructive Acceleration
- Interference with work
- Improper contract interpretation
- Defective of late government-furnished property

# Construction Law & Contract Claims

## Notice

- Virginia -- inexcusable!!!
- Federal -- sometimes excusable

# Construction Law & Contract Claims

## Notice Under Federal Contracts

- (1) Written notice;
- (2) Government has actual or implied notice of facts giving rise to claim;
- (3) Notice to government would have been useless;
- (4) Contracting Officer frustrated the giving of notice; and
- (5) Contracting Officer considered the claim on its merits.

# Construction Law & Contract Claims

Managing the Work

## The Internal Scope Sheet

- Special Contract Provisions/Conditions
- Quantities of work for various bids items
- Detailed narrative of scope for each bid item
- List of specific exclusions
- Means & Methods planned by estimation
- Production rates
- Owner contacts and telephone numbers

# Construction Law & Contract Claims

Managing the Work

## The Internal Scope Sheet

- Job cost codes and special reporting instructions
- Time constraints and scheduling information (preliminary schedules)
- Major material quantities, vendor lists, and purchase orders
- Submittal Schedule



# Construction Law & Contract Claims

Managing the Work

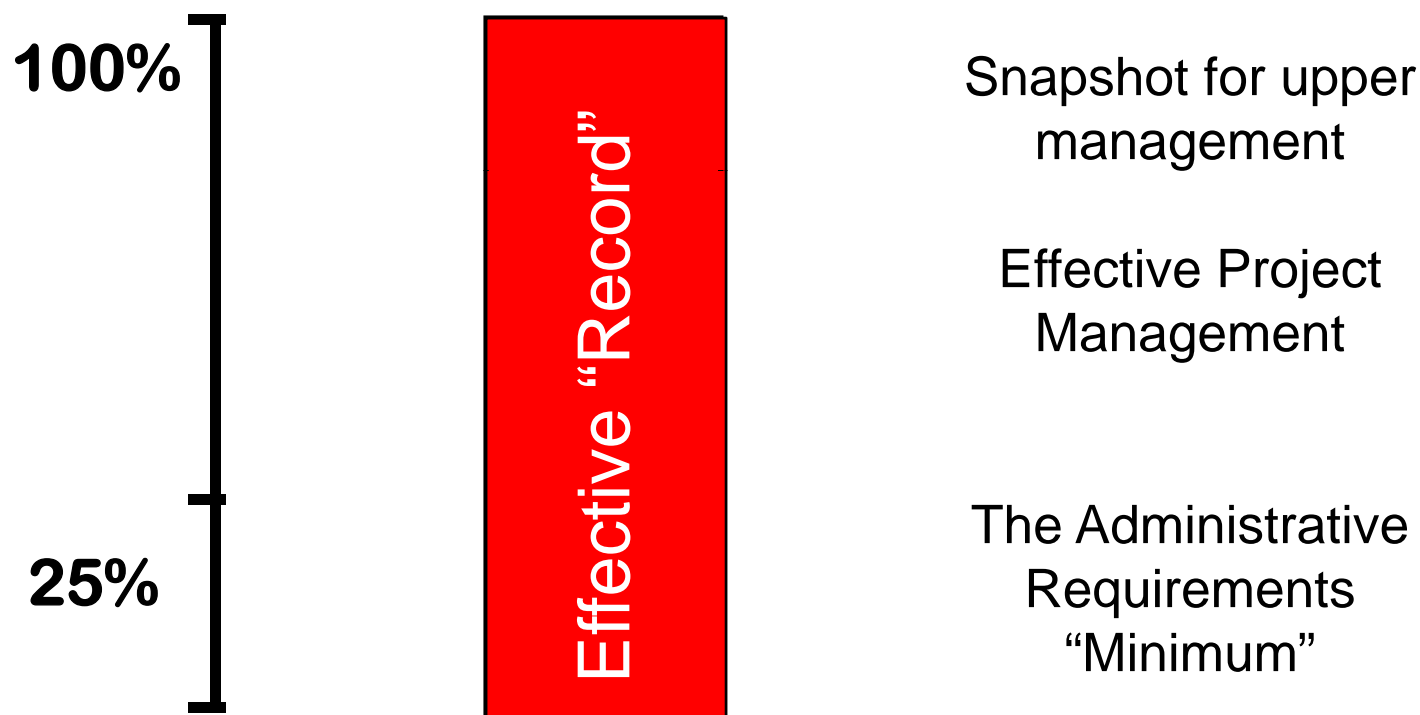
## 4 Reasons to Document Field Activities

1. Administrative Requirement  
(Payroll, A/P, A/R)
2. Mechanism for effective project management
3. Provides “snapshot” to upper management
4. Establish a “record” in the event of a claim or dispute

# Construction Law & Contract Claims

Managing the Work

## Effective Documentation



# Construction Law & Contract Claims

Managing the Work

## Prepare & Maintain The Following Records

- Correspondence File
- Minutes of Meetings
- Plans & Specs
- Change/Work Order File
- Schedules

# Construction Law & Contract Claims

Managing the Work

## Prepare & Maintain The Following Records

- Job Photos & Videos
- Sub and/or Supplier File
- Job Cost Records
- Submittal Log
- Request for Information (RFI Log)

# Construction Law & Contract Claims

Managing the Work

## Project Documents as Evidence

- ❑ Discovery
- ❑ Evidentiary Rules and Concepts
  - Hearsay
  - Recorded recollection
  - Records created in normal course of business

# Construction Law & Contract Claims

Managing the Work

## Documents Frequently Requested in Discovery

- Plans & Specifications
- Estimate file (Protective Order)
- Contract and Change Orders
- Proposal / Bid Forms
- Schedules
- Scope Sheets
- Job Cost Reports (computer files & hard copies)

# Construction Law & Contract Claims

Managing the Work

## Documents Frequently Requested in Discovery

- Correspondence
- Memoranda
- Daily Reports / Time Sheets
- Purchase Orders and Subcontracts
- Telephone Message Slips (While You Were Out)
- Diaries & Field Books

# Construction Law & Contract Claims

Managing the Work

## Documents Frequently Requested in Discovery

- Testing Reports (Quality Control & Quality Assurance)
- Cut sheets and Submittals
- Equipment Utilization Reports (masters)
- Canceled Checks
- Internal Worksheets for Cost-to-Complete
- Meeting Minutes



# Construction Law & Contract Claims

Managing the Work

## Documents Frequently Requested in Discovery

- Company Financial Statements (audited and automated)
- Video Tapes
- Photos

# Construction Law & Contract Claims

Managing the Work

## Daily Field Report / Progress Report

- Project information
- Date and day of week
- Labor and equipment have distribution to cost codes
- Location of work performed
- Material and rental equipment received

# Construction Law & Contract Claims

Managing the Work

## Daily Field Report / Progress Report

- Material usage
- Production specifics
- Comment section
- Supervisor signature

# Construction Law & Contract Claims

Managing the Work

## Daily Field Report / Progress Report

- Section for down time or inefficiency
- If possible, consolidate Time Cards and Daily Reports into one document
- Require reports from field “daily”
- Demand Perfection !!**

# Construction Law & Contract Claims

Managing the Work

## Checklist Of Potential Additional Costs

- ① Labor
- ② Supervision
- ③ Materials
- ④ Supplies
- ⑤ Equipment
- ⑥ Field office overhead

# Construction Law & Contract Claims

Managing the Work

## Checklist Of Potential Additional Costs

- ⑦ Home office overhead (general and administrative expenses)
- ⑧ Financing expenses
- ⑨ Additional bond costs
- ⑩ Extended builders risk insurance coverage

# Construction Law & Contract Claims

Managing the Work

## Labor

- Labor inefficiencies (lost productivity).
- Labor escalations (including acceleration costs such as overtime).
- Cost of additional labor.
- Payroll taxes, workmen's compensation, insurance benefits.
- Fringe benefits

# Construction Law & Contract Claims

Managing the Work

## Supervision

- Extended supervision
- Extra supervisory personnel
- Increased salaries and related benefits



# Construction Law & Contract Claims

Managing the Work

## Materials

- Additional materials
- Materials escalation costs
- Transportation costs
- Storage costs
- Reasonable estimate for deterioration
- Substitution costs

# Construction Law & Contract Claims

Managing the Work

## Supplies

- Extra supplies
- Increased costs
- Small tools
- Field office supplies
- Replacement costs
- Storage

# Construction Law & Contract Claims

Managing the Work

## Equipment

- Extended equipment use
- Idle equipment
- Extra equipment
- Allocation of depreciation expenses and repair costs
- Actual costs of leased equipment
- Equipment insurance

# Construction Law & Contract Claims

Managing the Work

## Field Office Overhead

- Added field office costs
- Extended field office overhead
- Utilities
- Weather protection
- Office supplies

# Construction Law & Contract Claims

Managing the Work

## Field Office Overhead

- Leased space
- Field office trailer
- Temporary heat, light, and water
- Miscellaneous

# Construction Law & Contract Claims

Managing the Work

## Home Office Overhead (General and Administrative Expenses)

- Excess overhead expense
- Extended or unabsorbed home office overhead

# Construction Law & Contract Claims

Managing the Work

## Financing Expenses

- Interest on retainage
- Interest and excess interest paid because of unapproved change orders
- Additional Bond Costs
- Extended Builders Risk Insurance Coverage

# Construction Law & Contract Claims

## How We Prepare Claims

1. Executive Summary
2. Project Summary
3. Contract Representations
4. Contractor's Plan based upon Contract Representations
5. Actual Events and Their Effects Upon Original Plan
6. Schedule Analysis
7. Quantification



# Construction Law & Contract Claims

## How We Prepare Claims

### Executive Summary

- ❑ Targeted reader is person making decision
- ❑ Tells the story in summary form
- ❑ Includes description of Project, what happened, what we want (time and money) and why we are entitled to it.

# Construction Law & Contract Claims

## How We Prepare Claims

### Project Description/Introduction

- Background information including Bid and Project
- Description of how claim organized

# Construction Law & Contract Claims

## How We Prepare Claims

### Contract Representations

- ❑ Statement of section purpose (to establish express and/or implied contract representations relied upon)
- ❑ Summary of representations (bullet points)
- ❑ Detailed description, including references to Contract Provisions

# Construction Law & Contract Claims

## How We Prepare Claims

### Contractor's Plan

- ❑ Statement of Purpose - to explain how Contractor prepared plan to construct work in reliance on Contract Representations
- ❑ Summary of Plan - means and methods, schedule and budget (bullet points)
- ❑ Detailed description of Plan, including means and method, schedule and budget

# Construction Law & Contract Claims

## How We Prepare Claims

### Actual Conditions and Their Effects

- ❑ Statement of Purpose - to show how the actual conditions encountered varied from the contract representations
- ❑ Summary of Actual Conditions - each bullet point showing difference with Contract Representations
- ❑ Detailed Description of Actual Conditions - usually done by issue with time line narrative (include pictures and graphics)

# Construction Law & Contract Claims

## How We Prepare Claims

### Actual Conditions and Their Effects

- ❑ Summary of Effects - each bullet point showing difference with Plan
- ❑ Detailed Description of Effects - including comparisons of means and methods, schedule analysis, productivity analysis

# Construction Law & Contract Claims

## How We Prepare Claims

### Schedule Analysis

- ❑ Performed by an independent third party who might appear as an expert if the matter is not settled
- ❑ Follows an industry-accepted method of quantifying the impact of all delays or uncontrollable events upon the critical path of the project;
- ❑ Includes a detailed narrative explaining how the analysis was performed and what the conclusions are.

# Construction Law & Contract Claims

## How We Prepare Claims

### Quantification/Damages

- ❑ Provides an in-depth narrative explaining each type of cost/damage and how they were calculated.



# Construction Law & Contract Claims

## Mechanic's Liens

*All persons performing labor or furnishing materials of the value of fifty dollars or more, for construction, removal, repair or improvement of any building or structure permanently annexed to land . . shall have a lien, if perfected, upon such building or structure . . . .*

# Construction Law & Contract Claims

## Mechanic's Liens

- ❑ *Existence of a lien does not depend upon the terms of the underlying contract*
- ❑ *BUT, to recover, a lienor must eventually prove the value of the improvements, which is usually based upon the terms of an underlying contract*
- ❑ *Owner defending lien action may assert defenses under contract (setoff, defective work, etc.)*

# Construction Law & Contract Claims

## Mechanic's Liens

- ❑ *No liens on public property -- Miller Act and Little Miller Act;*
- ❑ *Although site-related work does not fit squarely into definition of “structure,” such work is covered (clearing & grubbing to final seeding);*
- ❑ *Design work by itself not “lienable” but if design work is combined with physical improvements (design-build), the design component is likely covered.*

# Construction Law & Contract Claims

## Mechanic's Liens

- ❑ CREATION of Lien -- Automatic upon furnishing labor or materials.
- ❑ EXTINGUISHMENT of Lien -- Automatic upon payment by owner/contractor or upon expiration of time **UNLESS** you file Memorandum of Mechanic's Lien
- ❑ PERFECTION of Lien -- File Memorandum of Mechanic's Lien with court (w/i prescribed time)
- ❑ ENFORCEMENT of Lien -- Sue to enforce properly filed memorandum within six (6) months

# Construction Law & Contract Claims

## Mechanic's Liens

### *Memorandum of Mechanic's Lien*

- *Filed after work is commenced, but no later than 90 days after the last day of the month in which claimant last provided labor or furnished materials;*
- *Notwithstanding the above, no MML will be effective if filed later than 90 days after the project is completed or all work is otherwise terminated;*
- *“Work” does not generally included punch list work*

# Construction Law & Contract Claims

## Mechanic's Liens

### *Memorandum of Mechanic's Lien*

#### *150-day reach back rule*

*No MML shall include sums due for labor performed or materials supplied more than 150 days prior to the last day on which labor was performed or materials were furnished to the job preceding the filing of such MML.*

*Retainage not subject to 150 reach back rule*

# Construction Law & Contract Claims

## Mechanic's Liens

*Memorandum of Mechanic's Lien*

*150-day reach back rule*

*Penalty for inadvertent inclusion of one day's worth of labor or materials in an MML -- FORFEITURE OF LIEN!*

# Construction Law & Contract Claims

## Mechanic's Liens

### *Special Consideration for Subdivisions*

- ❑ *Infrastructure work benefits all lots equally;*
- ❑ *None of the work is performed on lots (right-of-way and easements);*
- ❑ *Lien arises on each lot within the development for that fractional part of the total cost of the labor and materials as is obtained by using “one” as the numerator and the total number of lots as the denominator (Ex:  $\$1,000,000 \times 1/100 = \$10,000$  per lot);*



# Construction Law & Contract Claims

## Mechanic's Liens

### *Special Consideration for Subdivisions*

- ❑ *In addition to notice to owner of developer, lienor must provide notice to potential buyers by filing against individual lots;*
- ❑ *Problems for contractor develop when some or all of the lots are sold before a MML is filed (which is nearly always the case);*
- ❑ *Example: Contractor files lien for \$500,000 on a 50-lot subdivision. But developer has already sold 10 lots to home builder as of the date the lien is filed: Value of lien per lot = \$500,000 X (1/50) or \$10,000 per lot*

*Total Value of Liens = 40 lots remaining X \$10k each!!!*

# Construction Law & Contract Claims

## Mechanic's Liens

### Memorandum of Mechanic's Lien Contents (TRICKY!)

- *Name of Landowner*
- *Name of Lienholder*
- *Amount of lien*
- *The time at which payment is due or was due*
- *Signature of claimant under oath*
- *Statement of intent to claim benefit of lien*
- *Brief description of property on which lien is asserted*
- *Notice to owner (if not prime contractor)*

# Construction Law & Contract Claims

## Performance and Payment Bonds

- ❑ *Required on all public projects in Virginia exceeding \$100,000 (Little Miller Act) and on Federal contracts exceeding \$10,000 (Miller Act);*
- ❑ *Performance Bond -- a guarantee by a third party insurance company (surety) that contractor will complete its obligations under the prime contract;*
- ❑ *Payment Bond -- guarantees payment to subcontractors and vendors that provide labor and materials to the project pursuant to agreements with prime contractor (only second tiered subs/vendors are covered);*
- ❑ *No second tiers to vendors are covered.*

# Construction Law & Contract Claims

## Payment Bonds

- ❑ *Terms of bond comes from bond instrument itself and from the statute;*
- ❑ *Bond cannot provide for more restrictive terms than statute, but can provide more lenient terms (read both bond and statute to determine rights);*
- ❑ *1 year statute of limitations on payment bond;*
- ❑ *No claim before 90 days has expired since work was performed;*
- ❑ *No suit unless filed within one year of last performing work*

# Construction Law & Contract Claims

## Payment Bonds

- ❑ *Any claimant who has a direct contractual relationship with any subcontractor from whom the contractor has not required a subcontractor payment bond . . . may bring an action on the contractor's payment bond only if he has given written notice to the contractor within 180 days from the day on which claimant last performed work.*
- ❑ *Any claimant who has a direct contractual relationship with a subcontractor from whom the contractor has required a payment bond may bring an action on the subcontractor's payment bond (no notice required).*
- ❑ *Written notice to contractor -- registered or certified mail*

# Construction Law & Contract Claims

## Payment Bonds

- ❑ *Payment bonds on private projects are subject to whatever terms are provided in the bond -- statutes does not apply;*
- ❑ *Suit on a payment bond against the surety is usually combined with suit against contract for breach of contract;*
- ❑ *On private project, claimant may proceed against bond and mechanic's lien concurrently;*
- ❑ *A contractor may waive its bond rights in Virginia just as it may waive its mechanic's lien rights.*

# *Construction Law and Contract Claims*