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# Don't Be Caught Off Guard: Using Your Contract to Prove or Defend Against Damages

**GRSM's Women in Construction Tuesday Talk Series**

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# Speakers

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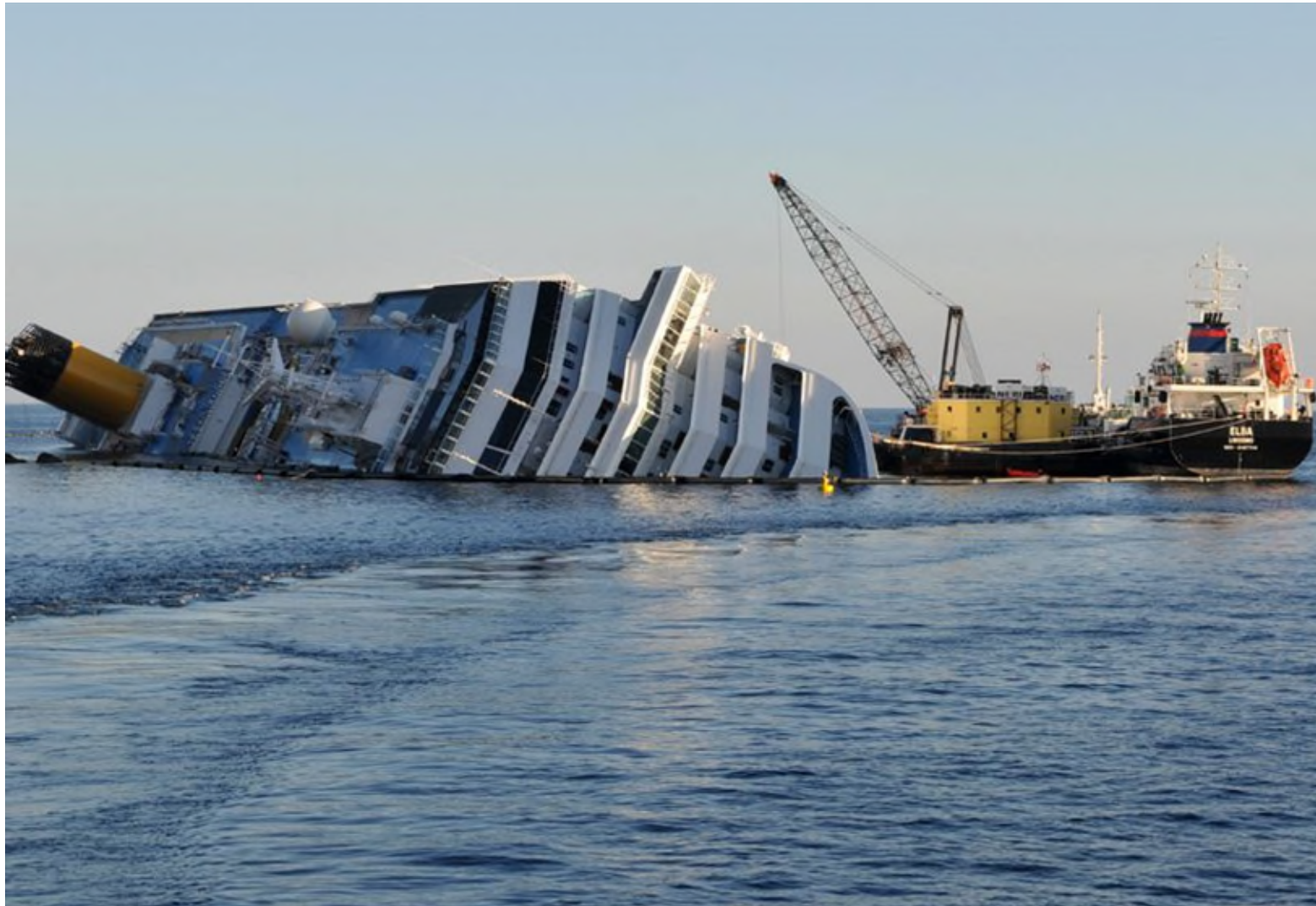


# Overview of Discussion

- Overarching Legal Principles
  - When is a contract formed?
- Key Contract Terms
  - Why are contract terms so important?
- Proving Entitlement



# When lawyers typically get a call...



# Conduct Due Diligence in Advance

- Who is running the entity with which you would contract?
- Who would be managing the project?
- Quality and experience of all project participants



# Essentials of Contract Formation

- Offer
  - Proposal/Bid
- Acceptance
  - Award
  - Notice to Proceed
  - Beware of delays before the start of work



# Damages Considerations

- Breach of contract damages
- Mitigation of damages
- Contract provisions that specify recoverable costs

# Why are Contract Terms Important?

- Contract terms govern
- Notice
- Entitlement
- Proof





# Key Payment Terms

- Pay-if-Paid/Pay-when-Paid
- Retainage
- Prompt Payment
- Liens
- Waiver



# Escalation Clauses

- Significant Cost Increase
  - An equitable adjustment in an amount reasonably necessary to cover any increase
- Unavailable Materials
  - An acceptable substitute and an adjustment in the contract price and extension of time for any resulting delay



# Escalation

- Example Clause:

7.5 ESCALATION. Seller's Contract Sum (including but not limited to labor, material, transportation prices) are based on current prices at the time of the Proposal.

Any significant price increases (meaning a price increase exceeding 10% of the price at time of contracting) in materials, transportation, labor, or other services necessary to perform the Work that occur during the period of time between the date of the Proposal and substantial completion of the Project, shall cause the Contract Sum to be equitably adjusted by an amount reasonably necessary to cover any such increase.

# Escalation

## Another Example Clause:

Subcontractor's material prices, including construction materials, are based on current prices at the time of the Proposal. Any significant price increases (meaning a price increase exceeding (10%) in materials necessary to perform the work, that occur during the period of time between the date of this Proposal and Substantial Completion of the Project, shall cause the Subcontract price to be equitably adjusted by an amount reasonably necessary to cover any increase. **Further, if material or equipment, which the Subcontractor is required to supply are not available due to shortage or unavailability or if the price to procure such material or equipment increases a set forth in this provision, then an acceptable substitute shall be found and an adjustment in the contract price shall be made accordingly.** Subcontractor shall be entitled to an extension of time for any delay in obtaining delivery of the item necessary for completion of the Work.

# Other Escalation Arguments

- Commercial Impracticability
  - Great unanticipated costs renders performance impracticable
  - Occurrence of an event which was a basic assumption on which the contract was made
  - Party cannot perform without extreme unreasonable expense
  - Party did not assume the risk
- Force Majeure
  - Typically Time only

# Force Majeure

- COVID-19
- Supply chain issues
- Example clause:

§ 8.3.3 Any failure or omission by Owner or Contractor in performance of its obligation shall not be deemed a breach or create any liability for damages or other relief (other than additional time) **if it arises from any cause beyond the reasonable control of such party**, including, without limitation, **acts of God**, floods, fire, explosions, storms, earthquakes, acts of public enemy, war, terrorism, rebellion, insurrection, riot, sabotage, invasion, **epidemic, quarantine**, strikes, lockouts, labor disputes or **other industrial disturbances**, or **any order or action by any governmental agency**, or **causes of similar nature**.



# Force Majeure

- Another example clause:

6.2 FORCE MAJEURE. If the performance of the Contract by Contractor is interrupted by any cause beyond the reasonable control of Contractor, ... Contractor shall be excused from the performance of this Contract while and to the extent it is prevented from so performing by any one or more of such causes:

- (1) labor shortages, ..., or other inability to obtain necessary labor;
- (2) acts of God, including, but not limited to, epidemic, ...;
- (3) changes in laws, proclamations, acts, regulations, ...;
- (4) explosions, accidents...;
- (5) lack of or failure of or other inability to obtain necessary transportation, supplies, fuel, power, materials, machinery, equipment or facilities, delays caused by other contractors, subcontractors or their subcontractors of any tier, or any materialmen or suppliers.

Additional costs incurred to complete, repair and/or replace any portion of the work due to a force majeure event shall be compensable to Seller, whether or not a change order for this work has been issued.

# Differing Site Conditions

- Who bears the risk of conditions encountered underground that differ materially from what is indicated in the contract documents
  - Lower bids without contingencies
  - Contractor equitable adjustment
- Clause required in most California local public agency contracts involving excavations deeper than 4 feet (Cal. Pub. Con. Code, Section 7104.)

# Limitation of Damages

- No Damages for Delay
  - Owners and contractors frequently use “no damages for delay” provisions in contracts to push down the risk of delay costs.
  - Check governing law – “no damages for delay” provision may not be enforceable. Not uniformly enforced across 50 jurisdictions.

# Limitation of Damages

Example “No Damages for Delay” provision:

“The Owner shall not be liable to the Contractor and/or Subcontractor for claims or damages as a result of delays. The sole remedy against the Owner shall be an extension of time to complete the Work in accordance with the claims procedures of the Contract Documents.”

# Limitation of Damages

## Waiver of Consequential Damages

3.4 LIMITATION OF REMEDIES. Corrections of non-conformities in the manner and for the period of time provided above shall constitute fulfillment of all liabilities of Seller to Buyer, whether based on warranty, contract, strict liability, negligence, willfulness or any other legal theory. IN NO EVENT SHALL SELLER BE LIABLE TO BUYER OR OTHER THIRD PARTIES FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES OR LOST PROFIT ARISING OUT OF OR IN ANY WAY CONNCETED WITH SELLER'S WORK UNDER THIS AGREEMENT.

# Indemnity

## AIA Indemnity Provision

### § 4.6 INDEMNIFICATION

§ 4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect . . . from and against claims . . . **arising out of or resulting from performance of the Subcontractor's Work** under this Subcontract, provided that any such claim . . . is attributable to bodily injury . . . or to injury to or destruction of tangible property (other than the Work itself), but **only to the extent caused by the negligent acts or omissions of the Subcontractor . . . .**



# Change Order Clauses

- Notice
- Strict Compliance
- Who can Authorize a Change
- Entitlement
- Track Costs
- Duty to Proceed with Work



# Proving Entitlement

## NEDD

- Notice
- Entitlement
- Damages
- Don't Waive Claims

# Notice

- Time Requirements
- Supporting Documentation Requirements
- Delivery Requirements
  
- Be aware of jurisdictional notice requirements
  - Strict enforcement varies by state
  - Potential Defenses
    - Actual knowledge
    - Waiver
    - Substantial compliance

# Legal Entitlement – Contract Terms

- Changes Clause
  - Outside scope?
  - Special proof required?
  - Most contracts silent

# Proving Entitlement – Factual Record

- Schedule
  - As-Planned/Baseline
  - Schedule Updates
  - As-Built
- Project logs, RFIs, correspondence, daily reports, etc.
- Detailed job cost records (labor, materials, equipment)
- Owned equipment usage logs and rates
- Vendor invoices
- Financial statements (extended home office overhead)

# Proving Damages

- Change in Quantity or Scope
- Change in Time
  - Delay
  - Acceleration
  - Suspension of Work



# Proving Damages – Liquidated Damages

- Liquidated Damages –
  - Used when a determination of actual damages would be difficult if not impossible to ascertain.
  - Amount expressly provided for in the contract, usually at a daily or weekly rate. For example, \$10,000 per day, with a not to exceed amount, as represented as a dollar amount or percentage of total contract value (i.e., no more than 10% of contract value).
- LD provisions are generally enforceable if not deemed a penalty.
  - *Preibe & Sons v. United States*, 332 U.S. 407 (1947) (holding liquidated damages clause constituted a penalty, and was not enforceable)
  - *Miami Valley Contractors, Inc. v. Town of Sunman*, 960 F. Supp. 1366 (S.D. Ind. 1997) (holding liquidated damages clause enforceable despite contract reference to a “penalty”)
- If no LD provision in the contract, actual costs are awarded for delay (to the extent proven).

# Proving Damages

- **Example Delay Damages Provision:**

- “For any delay resulting from any act or neglect by the Owner or its employees, agents or representatives or by another contractor employed by the Owner, and which delay is not otherwise specifically provided for in the Contract Documents, the Contractor shall recover from the Owner any damages incurred as a result of such delay in accordance with the claims procedures set forth in the Contract Documents.”
- “For any delay resulting from any act or neglect of the Contractor, any Subcontractor, or those under the control of either, the Contractor shall pay to the Owner the sum specified as liquidated damages for each day of such delay, not as a penalty, but because the actual damages for such delay are uncertain and would be impracticable or extremely difficult to ascertain.”

# Proving Damages

- Follow any contract specified recoverable costs or methodology for determining recovery
  - Lump Sum
  - Time & Material
  - Time Impact Analysis
- Track actual costs
  - Breakdown by location or phase

# Don't Waive Your Claims



## D = Don't Waive Your Claims

- Accept payment =waiver?
- Fail to modify lien waivers = waived claims?
- Missed deadlines for lien and bond claims
- Failed to timely start dispute resolution procedures

### RETAIN Rights to:

1. Unpaid contract amount
2. Retainage
3. Unpaid change orders

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