FUNDAMENTALS OF CONSTRUCTION LAW

November 1, 2006

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AGC of Washington
Education Foundation
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JOHN P. AHLERS

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Chapter I

CONTRACT FORMATION
I. CONTRACT FORMATION

An essential prerequisite to the formation of a contract (formal or informal) is an agreement. The formation of a contract requires what is known as a "meeting of the minds" or a mutual manifestation of assent to the same terms. \(^1\) Mutual manifestation of assent is generally established by a process of offer, acceptance and consideration. \(^2\) An owner's invitation to bid is not an offer. The bid itself is simply an offer to contract and provides the owner an ability to communicate an acceptance of that offer and thereby create a contract. \(^3\) The owner is generally free to reject all bids. Thus, until the bid is accepted, a binding contract is not formed.

Offers at common law are freely revocable prior to acceptance, unless supported by special consideration. Therefore, until the owner accepts the general contractor's bid, the contractor may withdraw its bid at any time prior to acceptance. Exceptions to this general rule are (1) bid advertisements which provide that bids are irrevocable; and (2) if the owner can show that it has relied on the contractor's bid to its detriment by releasing the other bidders to the solicitation.

A. ENFORCING SUBCONTRACTOR BIDS

If a subcontractor's bid is an offer, and offers are freely revocable prior to acceptance, it follows that subcontractor bids should be freely revocable any time before the general contractor accepts the subcontractor's bid. Subcontractor bids, however, are treated differently than general contractor bids. Subcontractors may not withdraw their bids for a reasonable period of time after the owner awards the contract to the general contractor (provided the general contractor used the subcontractor's bid in its bid to the owner).

The doctrine of Promissory Estoppel is applied by the courts to circumvent the common law rule in the general/subcontractor context. Under "Promissory Estoppel" the general contractor receives limited protection if the general contractor uses the subcontractor's bid to compute its own bid to the Owner. The Promissory Estoppel doctrine protects only the general contractor. Although a subcontractor is bound once the general contractor uses the subcontractor's bid, the general contractor has the choice to reopen negotiations with other subcontractors. This allows the general contractor to use the low bid as leverage to deflate bids from other subcontractors (bid shopping), and encourages other subcontractors to undercut the low bidder (bid peddling) after the prime contract has been awarded by the Owner.

As indicated, a contract is created by an offer, an acceptance and consideration. The subcontractor's bid (an offer) must include material terms necessary to make a contract, such as the time, place or manner of performance, and the amount of consideration. For a contract to form, the general contractor's acceptance must be unconditional. The rule of Promissory Estoppel prevents the subcontractor from withdrawing its bid for a limited time, allowing the general contractor to convey acceptance, and thereby form the contract. The prerequisite for an

action based on Promissory Estoppel, a doctrine well-recognized in Washington, has been stated as follows:

(1) A promise (2) which the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.4

In Ferre v. Taft Structurals,5 the Washington Court of Appeals recognized that promissory estoppel can be applied readily to the unique situation where a subcontractor has provided a bid to a general contractor. The general contractor solicited bids from various subcontractors to formulate a bid for a construction project. The owner was the City of Seattle. The general contractor incorporated the subcontractor bid into its own bid to the City. The general contractor was awarded the project and notified the subcontractor. The subcontractor performed, but insisted it was due more money than the original bid. The general contractor refused to pay any additional money over and above the subcontractor's bid amount.

The trial court found that the subcontractor's initial bid (the bid that was used by the general contractor in compiling its bid to the City) was relied upon by the general contractor, but was never formally accepted because it was never reduced to writing. The general contractor appealed, arguing that the subcontractor's initial bid constituted an irrevocable offer for a reasonable time and the general contractor's subsequent letting of the subcontract to the subcontractor constituted adequate acceptance. The Court of Appeals held that a subcontractor's bid upon which the general contractor has relied, is deemed irrevocable for a reasonable time pursuant to the doctrine of promissory estoppel.6 The subcontractor submits a bid to the general contractor, knowing that the general contractor cannot accept the bid as an offer immediately, but must first incorporate it into the general contractor's offer to the owner.7 The general contractor incorporates the subcontractor's bid in reliance that the subcontractor will perform as promised.8 The elements of predictable and justifiable reliance and change of position are thus satisfied and a breach of contract action based on the subcontractor's original bid is appropriate.9

Similarly, in Arango Construction v. Success Roofing,10 the subcontractor discovered a mistake in its price after its bid had been incorporated into the general contractor's bid to the owner, and argued that its bid to the prime contractor was conditioned upon a written confirmation. Since the subcontractor's bid was never confirmed in writing, it asserted there was no subcontract. The Court of Appeals recognized that construction bidding is treated as a "unique category";11 since construction bidding deadlines make the drafting of written agreements impossible, general contractors must rely on subcontractor's oral bids.12 The Court held that as a matter of law "a subcontractor's bid is considered an irrevocable offer until the

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7 Id. at 835.
8 Id.
9 Id.
11 Id. at 321.
12 Id.
award of the prime contract; then, the general contractor's acceptance of the bid results in a bilateral contract.\textsuperscript{13}

B. MISTAKES IN BIDS

After a contractor has submitted an erroneous bid, the most often asserted defense by general contractors or subcontractors is that a mistake was made. The nature of the competitive bid process forces contractors to hurriedly prepare bids to meet submissions deadlines. A contractor rarely has the opportunity to ensure that its final bid conforms to all the estimates and calculations contained in its working papers and includes all of the subcontractor and supplier quotes. Consequently, it is generally after bids are submitted that a contractor discovers errors in its bid. A contractor's ability to withdraw its bid without incurring liability depends upon the nature of the mistake. Mistake defenses fall into two categories: unilateral mistakes, in which the prime contractor (subcontractor) typically claims the owner (prime contractor) knew or should have known that the bid contained an error; and mutual mistake, in which the prime contractor (subcontractor) claims that both the prime contractor (subcontractor) and owner (prime contractor) made a mistake in the bidding process concerning a basic assumption upon which the subcontract was to be based.

In Peter Kiewit Sons' Co. v. Dept. of Transp.,\textsuperscript{14} the court stated the law of unilateral mistake, as follows:

The courts have come to recognize that numerous mistakes, besides simple mathematical errors, can result in the contractor submitting a bid which does not embody his intent and thereby prevent a true meeting of the minds. Many mistakes involve mixed errors of fact and judgment in drawing too fine a line between the two can produce harsh and unnecessary results. The modern trends is to accord equitable relief to mistakes which render the bid incompatible with the true intent of the bidder and which can be clearly and convincingly demonstrated by objective proof.

Even under this more liberal standard there are certain types of mistakes, such as underestimating the cost of labor and materials, which are purely judgmental and never entitle a bidder to equitable relief. Mistakes of this type are inherent business risks assumed by contractors in all bidding situations. The proof as to whether a mistake of this type has occurred is so completely within the control and power of the contractor that the public body is helpless to refute it.\textsuperscript{15}

The rule is contra if the other party knows of the mistake or is charged with knowledge of it: a mutual mistake. For the contractor (subcontractor) to get relief from a mistake, the mistake must be one of fact, not of judgment or of law.\textsuperscript{16} Mistake of fact results from such things as faulty

\textsuperscript{13} Id. at 323.
addition, misplaced decimals, typographical errors, transposition of numbers, and multiplication errors. The Washington Court of Appeals, however, allowed a bidder to escape an erroneous bid where the error involved an interpretation of the specifications -- presumably an error in judgment.

1. Unilateral Mistakes

In Puget Sound Painters, the general contractor submitted the low bid to repaint the main towers of the Tacoma Narrows Bridge for the State of Washington Highway Commission. The bid was accompanied by a bid bond. The contractor discovered a significant disparity between its bid and the next low bid and promptly advised the Highway Commission that a mistake had been made. The subcontractor (whose price had been incorporated in the general bid) had multiplied measurements by two rather than four in computing the area of the four legs of each tower. The State Highway Department refused to release the contractor from its bid bond and the contractor sued to prevent forfeiture of its bid deposit. This case established requirements for obtaining relief from an erroneous bid in Washington as: (1) the mistaken party must be reasonably prompt in giving notice of its error; (2) the party receiving the bid must not have changed its status so significantly that relief or forfeiture will work a hardship on it; (3) the bidder acted in good faith; and (4) the bidder acted without gross negligence. The notice of the mistake was provided to the Highway Commission the day before the State of Washington formally acted to award the contract to the contractor. The court held that the basic purpose of the bid bond was to afford protection against a change of status involving substantial damages, loss, or detriment by a party soliciting bids. Since the Highway Department was able to award the contract to the second bidder, and the mistake was not knowing or willful, but instead one of gross neglect or negligence, the court held that the Highway Department did not suffer a substantial detriment and therefore the bid bond was not forfeited.

The Court of Appeals in Clover Park Sch. Dist. #400 v. Consol. Dairy Prods. Co. stated in dictum:

At this point we wish to parenthetically state our view that sound public policy requires us to closely scrutinize a bidder's contention that it intended to rescind its bid on a contract with an agency of the government. It should be difficult for bidders to claim an error in computation as a basis for escaping from a bid noticeably lower than the competition's. This is the "bad faith element" of the test quoted above.

Subcontractor unilateral mistake arguments are generally unsuccessful. Where a general contractor has reasonably and substantially changed its position in reliance upon a

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23 Puget Sound Painters, supra, at 822-823.
24 Id. at 823.
26 Id., at 434-35 (emphasis added).
27 Puget Sound Painters, supra, at 822.
subcontractor's bid, the Washington courts generally do not rescind a contract.\textsuperscript{28} In a subcontractor mistake situation, where notice of the mistake is given after the general contractor submits its bid to the owner, the general contractor's price is locked in and the general contractor will be able to show a change in status. That is, the general contractor will no longer be able to merely increase its price to account for the error made by the mistaken subcontractor, thus making relief from a mistake much more difficult.

Where the accepting party knows, or should have known, of the mistake, the offeror will be provided relief from a unilateral mistake of fact.\textsuperscript{29} "The offeree who has reason to know of a unilateral mistake will not be permitted to "snap up" such an offer and profit thereby."\textsuperscript{30}

A low bid, without further evidence of a mistake, is not sufficient to constitute constructive knowledge of an error justifying rescission.\textsuperscript{31} The \textit{Drennan v. Star Paving}\textsuperscript{32} court found that an accepting party would have no reason to know of a mistake based on a bid disparity, since the high and low bids on paving contracts usually varied by as much as 60%. In \textit{Heifetz Metal Crafts, Inc. v. Peter Kiewit Sons' Co.},\textsuperscript{33} the low bidder's offer to perform subcontracting work for $99,500 was $52,000 less than the next lowest bid (52% low). The court denied Heifetz's (subcontractor) prayer for rescission, granting Kiewit's (general contractor) counterclaim for $50,000. Even though Heifetz's bid was 52% less than estimates submitted by its closest competitor, the court determined that since Kiewit had no familiarity with estimates on this particular subcontract it was not unreasonable to assume that such bids would be relied upon, particularly after receiving verification from the president of Heifetz.\textsuperscript{34}

In other cases involving bid mistakes from other jurisdictions, disparity between the low and the next low bids of: (1) 20%;\textsuperscript{35} (2) 35%;\textsuperscript{36} and (3) 50%\textsuperscript{37} has been found not to be so obviously erroneous so as to preclude enforcement of bids. However, in \textit{Tolboe Constr. v. Staker Paving & Constr. Co.},\textsuperscript{38} the general contractor's reliance on a subcontractor's bid was deemed unreasonable where the bid was 300% lower than the next bid.\textsuperscript{39}

\section*{2. Mutual Mistakes}

Only where the mistake concerning contract obligations is mutual, so that the mistake is made by the prime contractor and owner (prime contractor and subcontractor) will rescission of the subcontract be available to the party seeking to avoid performance.

\begin{thebibliography}{99}
\bibitem{28} Puget Sound Painters v. State, 45 Wn.2d 819, 278 P.2d 302 (1954); 
\bibitem{29} Ferrer v. Taft Structural, 21 Wn. App. 832, 587 P.2d 177 (1978); 
\bibitem{34} Id.
\bibitem{35} 264 F.2d 435 (8th Cir. 1959).
\bibitem{36} Id. at 437-438.
\bibitem{37} Janke Constr. Co. v. Vulcan Materials Co., 527 F.2d 772 (7th Cir. 1976).
\bibitem{38} Richards Constr. Co. v. Air Conditioning Co. of Hawaii, 318 F.2d 410 (9th Cir. 1963).
\bibitem{40} 682 P.2d 843 (Utah 1984).
\bibitem{41} Id. at 847.
\end{thebibliography}
Reformation may also be granted on grounds of mistake, where the mistake was mutual to the parties to the transaction. A mistake on the part of one party alone is not enough. To obtain reformation of a contract based on mutual mistake, the mistake must be clear, cogent and convincing. The party seeking reformation has the burden of proving the mutual mistake and must show that the parties to the transaction had an identical intention regarding the terms to be embodied in the contract, and that the contract instrument is materially at variance with that identical intention. When this is proven, a writing may be reformed to truly express the original intention of the parties to the transaction. The mistake must be proved by clear, cogent and convincing evidence, and if doubts exist as to the parties' intent, reformation is not appropriate.

In *Crown Northwest Equipment v. Donald M. Drake Co.*, both the prime contractor and subcontractor were mistaken as to the method and timing of obtaining equipment approval by the owner. The prime contract specifications required pre-bid approval of "substitute" items, not of "or equal" items, and both the prime and subcontractor assumed that the sub's two equipment submissions (under separate subcontracts) were "equal" submissions. The owner, however, interpreted both equipment submissions as "substitutes" that had to be approved before bidding. As a result, the prime canceled both subcontracts and the subcontractor sued the prime. The court ruled that since the owner's architect had wrongly interpreted the "or equal" process as not applying to the equipment submission, under one of the subcontracts, the prime had improperly canceled that subcontract. The court reasoned that the prime had failed to discharge its duty to obtain approval of the "or equal" system. However, the court held that the architect had properly rejected the submission under the second subcontract. Since both the prime contractor and subcontractor had mistakenly interpreted the approval procedure to be followed for the second subcontract, the cancellation of that subcontract had been justified.

3. Failure to Reach a "Meeting of the Minds"

One Washington case suggests that a possible defense for a subcontractor, in a bid mistake situation, is that the parties never reached a "meeting of the minds" on the essential elements of contract. In *Lakeside Pump v. Austin Constr. Co.*, a pump supplier was granted relief from a mistake in an oral telephone bid where the court found that the parties had not agreed on the scope of the work. However, the court did not discuss the promissory estoppel doctrine, which was apparently not raised by the general contractor.

4. Suppliers/UCC

The promissory estoppel doctrine does not bind suppliers because unlike subcontractors, suppliers' obligations and duties are governed by the Uniform Commercial Code, RCW 62A.-2 et seq. In *Lige Dickson Co. v. Union Oil Co.*, the court held that promissory estoppel could not

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43 Id. at 716.
be used to overcome the statute of frauds in a case which involved the sale of goods. The statute of frauds contained in RCW 62A.2-201 applies to all sales of goods in excess of $500.00. To satisfy the statute of frauds, contractors should request written quotations from major suppliers and confirm their suppliers' bids in writing as soon as practicable after bid opening.48

5. Relief from Mistake

Assuming that the subcontractor's mistake meets the legal tests outlined above, relief (depending on the circumstances) may take the form of reformation of the subcontract, permission to withdraw the bid, permission to correct the bid, or if the contract has already been signed, permission to cancel the bid.

- **Bid withdrawal** releases the subcontractor from its obligations of the bid and results in the return of the bid security.49 It is available as relief for both unilateral and mutual mistakes, prior to award. A mistake in a bid in a public contract which is purely judgmental in character does not warrant rescission of the bid.50

- **Contract cancellation** relieves the subcontractor from the obligations of the awarded subcontract. It is available after award to remedy mutual mistakes and unilateral mistakes where they are induced by or known to the general contractor prior to the acceptance of the subcontractor's bid.51

- **Reformation of a subcontract** may be available where the contract entered into does not reflect the true intentions of the parties.52 Subcontract reformation results in obtaining an increase in the subcontract price equal to the amount of the mistake.53

- **Reformation cannot be used to correct the unilateral mistake of which the owner is innocent (in terms of inducement or knowledge) because it would force the owner into a new and unintended bargain.**54 Bids on public projects cannot be reformed because the competitive bidding laws allow the public owner to accept the bids only as submitted.55

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49 Puget Sound Painters v. State, supra.


51 Restatement of Contracts § 502 (1932).


53 J.J. Welcome & Sons Constr. Co. v. State, 6 Wn. App. 985, 988, 497 P.2d 953 (1972) (aReformation is an equitable remedy which permits the court to correct errors and thereby make an instrument truly express the real intention of the parties thereto,). See also Keierleber v. Botting, 77 Wn.2d 711, 466 P.2d 141 (1970).


55 J.J. Welcome, 6 Wn. App. at 989.
C. SUBCONTRACTORS' ATTEMPTS TO ENFORCE THEIR BIDS

The Washington courts have generally rejected subcontractors' contentions that use of their bids by the contractor constitutes an acceptance. In *Plumbing Shop, Inc. v. Pitts*, a mechanical subcontractor commenced an action for breach of an alleged implied contract against a general contractor after the general contractor had confirmed the subcontractor's bid. The general contractor was deemed the low bidder by the owner. The general contractor thereafter requested a cost breakdown and various submittals from the subcontractor (whose price it had used in its bid to the owner), but hired another subcontractor to perform the mechanical work. The original subcontractor sued the general contractor for the profits it had anticipated making on the project. The court held that in the absence of an agreement to essential terms, such as bonding, penalty provisions, manner of payment, and work progress completion dates, it was readily apparent the general contractor and subcontractor must have intended to set those particulars and others out in a written contract which was to be executed at a later date.

The subcontractor also argued that the implied in fact contract between it and the general contractor was complete -- despite the lack of writing -- since custom and usage of trade may be called upon to fix the time upon which the contract would be performed and any other terms not agreed upon. The court disagreed, holding that business practice and custom may be used in the implication process as well as in the interpretation of existing contracts, but its role is not to fill in all essential terms of an incomplete agreement. The alleged implied in fact contract before the court was complete only in one term only: the agreed upon price. To imply the remaining essentials by way of custom and usage would violate the elementary principle that courts will not make a contract for the parties. The Supreme Court affirmed the dismissal of the subcontractor's action.

In *Milone & Tucci, Inc. v. Bona Fide Builders*, the general contractor used a subcontractor's bid in its proposal but later discovered that the subcontractor was not the lowest bid. After being awarded the general contract, the general gave the subcontract to another subcontractor. Although the trial court had found that construction industry usage dictated that an implied contract was created by the general's use of the sub's bid in this situation, the Supreme Court reversed on the ground that there had been no return promise. The court stated that the mere use of a subcontractor's bid figure by the general contractor in preparing its bid does not constitute an acceptance of the subcontractor's offer. With respect to custom and usage in implied contracts, the court stated:

Usage and custom are admissible in evidence to explain the terms of an express or implied contract once the contract is established. The fallacy of the trial court's second theory is that an implied contract cannot arise from proof of usage and custom. The effect of custom or usage upon contractual obligations is dependent

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56 67 Wn.2d 514, 408 P.2d 382 (1965).
57 Id. at 520.
58 Id. at 522.
59 Id.
60 49 Wn.2d 363, 301 P.2d 759 (1956).
61 Id. at 366. See also *Plumbing Shop, Inc. v. Pitts*, supra, at 520
upon the existence of an actual contract between the parties. Where there is no contract, proof of usage and custom will not make one.  

Where a contractor uses a subcontractor's or supplier's bid but in no way communicates any commitment to the subcontractor, the mere use of the subcontractor's bid is insufficient to create a contract. However, where the general contractor uses a sub's bid and expresses an intent to use the subcontractor, a contract may be found. In Industrial Elec., Inc. v. Bosko, the general contractor received the subcontractor's quotation for electrical work and said, "Okay, I will go ahead and bid this job," and "Okay, I will see; I will let you know how we make out." The contractor used the subcontractor's quotation. The court found that these communications, together with the custom of awarding a subcontract to the party whose quotation is used, were sufficient to create a contract.

For a valid subcontract to be created, the test established by Plumbing Shop, Milone & Tucci, and Industrial Electric is that the subcontractor must demonstrate that (1) the subject matter of the contract has been clearly agreed upon between subcontractor and general contractor; (2) all the essential terms of the subcontract were defined in the prebid communications; (3) the parties understood that the final writing would contain the terms agreed to and no others; and (4) the parties intended a contract to be formed prior to the actual signing and delivery of the formal contract document.

D. BID SHOPPING

Once an owner issues an Invitation For Bids to prospective general contractors, those contractors must calculate their bids to the owner based in part on the bids received from potential subcontractors. Once a contractor has incorporated a particular subcontractor's bid (usually the lowest) into its own bid, the general contractor may attempt to inform other subcontractors of the amount of the "incorporated" bid and try to get them to reduce their bids below the "incorporated" sub-bid. If the general contractor is unsuccessful, it is no worse off because it feels it still has the original low bidder "locked in" to its bid amount under the promissory estoppel doctrine.

Another way bids are shopped is for the subcontractor to induce the general contractor to divulge information about other bidding subcontractors so that the subcontractor may undercut the law subcontractor bid. Bids may also be shopped by changing non-price items. For example, the general contractor may refuse to execute a subcontract with the low bidding subcontractor unless the subcontractor agrees to onerous subcontract clauses. To avoid the practice by general contractors of shopping the subcontractor's bid, subcontractors will virtually always submit their bids at the last possible moment -- sometimes literally minutes before the deadline for submitting bids.

The bid shopping defense to a promissory estoppel claim is based on the argument that since the prime contractor stands to gain substantial savings in shopping the prices of various subcontractors there can be no reliance on the subcontractor's bid, thus defeating an essential
element of the promissory estoppel doctrine. This defense to promissory estoppel was unsuccessfully argued in *Saliba-Kringlen Corp. v. Allen Eng'g Co.* The court noted that if the prime contractor had tried to "shop" the low subcontractor's price, then "that offer would have amounted to a counteroffer and its effect would have been to terminate the general contractor's power to accept the original bid." No reported Washington cases address bid shopping as a defense to promissory estoppel.

**E. SUBCONTRACTOR LISTING REQUIREMENT**

Under the "Subcontractor Listing Statute", RCW 39.30.060, all general contractors bidding on public works projects of $1,000,000 or more must submit the names of the plumbing, electrical and HVAC (heating, ventilating and air conditioning) subcontractors with whom the prime contractor will contract. The general contractor must submit the subcontractors' names either at the time the bid is submitted or within one (1) hour of the published bid submittal time. If the general fails to list the plumbing, electrical or HVAC subcontractors, its bid will be considered non-responsive, and it will be rejected. As pointed out above, the mere use of the subcontractor's price in the general contractor's bid does not indicate acceptance by the general contractor. In the recent case of *McCandlish v. Will Constr. Co.*, the court ruled that RCW 39.30.060 did not create a private cause of action for subcontractors.

Will Construction Company submitted a bid to the City of Leavenworth for a public works project. Will listed McCandlish as its electrical contractor. After the bids were open, Will substituted Calvert Technologies (another electrical subcontractor) for McCandlish. McCandlish filed suit against Will for violation of the bid listing statute.

During the trial, McCandlish proved that Will had engaged in "bid shopping." The Court held, bid shopping notwithstanding, that RCW 39.30.060 did not create a private action for McCandlish. The Court of Appeals held since the public bidding statutes are designed to protect the Public Treasury, allowing a private cause of action would violate the public interest by subjecting tax payers to further penalties, by paying too high a price for a public work contracting. The Court of Appeals did not disagree that Will's bid shopping was unprofessional or unethical but held that no private cause of action exited for listed subcontractor who is later substituted.

In June of 2002, RCW 39.30.60 was revised (see attached). As a result of the revised statute, a subcontractor has a cause of action against a general contractor and the substituted subcontractor if it can prove that the substitution was in the furtherance of bid shopping. (McCandlish would have won under the revised statute since the court determined that the substitution was prompted by "bid shopping") The revised statute leaves a number of questions unanswered:

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66 92 Cal. Rptr. 799, 802, (1971); *see also Sipco Serv. Marine, Inc. v. Wyatt Field Serv. Co.*, 857 S.W.2d 602 (Tex.App. 1993) (Prime contractor was successful in holding a subcontractor to its bid, because subcontractor failed to prove bid shopping® or other conduct indicating the prime contractor®s lack of reliance).

67 Id. at 805 n.2.

• The legislature did not define "bid shopping" or "bid peddling". Assuming that those terms will be given their ordinary meaning, a prime contractor is precluded from substituting a subcontractor solely to achieve a windfall profit. Presumably however, the prime contractor can substitute for any other reason, although as indicated below, the statute does contain five specific grounds for substitution. As to the meaning of the words "bid shopping or bid peddling", construction lawyers will undoubtedly have a field day arguing the nuances of these terms.

• Presumably, lost anticipatory profits are the upper limit of recoverable damages. It is difficult to anticipate what damages the listed subcontractor would have against the substituted subcontractor, but the statute creates a new cause of action against the substituted subcontractor. The statute does not provide for an award of attorneys' fees or costs. In many instances, the burden of having to prove the lost anticipatory profits without the opportunity to recover of attorneys' fees and costs will dissuade subcontractors from pursuing this remedy.

• There are five specific reasons cited in the statute for substitution. There is no indication that these five reasons are exclusive. Presumably, substitution would be allowed on any ground as long as the substitution is not prompted by the prime contractor's bid shopping or bid peddling.

The five grounds for substitution raise further questions:

• Subcontractor's refusal to sign a contract. Can the prime contractor force a one-sided subcontract on the subcontractor? If the subcontractor refuses to sign an overreaching subcontract is the prime contractor free to substitute? Can the subcontractor insist that the prime contractor sign a subcontract favorable to the subcontractor?

• Bankruptcy/Insolvency of the Subcontractor. This substitution and basis is logical and not subject to much dispute.

• Inability of the subcontractor to perform. The subcontractor may not be bankrupt or insolvent but if financially unable to perform presumably, substitution is allowed.

• Inability of the subcontractor to obtain necessary license, bonding, insurance or other statutory requirements.

• What are the "necessary" bonding requirements for the project? Is the bond "necessary" because this prime contractor wants to "bond" the subcontractor?

• Listed subcontractors barred from participating in the project as a result of a court order or summary judgment. What about an administrative finding that the subcontractors' operations are unsafe? (e.g. there is no court order of summary judgment to that effect but the subcontractor has been repeatedly cited for WISHA violations").
Many questions will likely be answered in bid protests and court proceedings over the next few years. In the meantime, prime contractors will have to do their best to negotiate their way through this statutory maze. Subcontractors, on the other hand, still have an uphill battle with enforcing bids when they are listed by general contractors. Unless the subcontractor can show outright bid shopping or bid peddling, it is a difficult cause of action to prove.
Chapter II

CONSTRUCTION CHANGES
II. CONSTRUCTION CHANGES

A. CHANGES CLAUSE

The majority of construction contracts include a "changes" clause giving the project owner the unilateral right to order changes in the contract work during the course of performance. Absent a changes clause, a modification of the contract must be agreed to by both parties and cannot be done unilaterally. In exchange for the owner's right to order unilateral changes, the contractor is promised a price adjustment if the change increases the cost or time of performance.

1. Typical Changes Clauses

It is customary for such clauses to provide that for the contractor to be entitled to payment for the performance of such "changed work," the contractor must obtain a written change order signed by the owner and/or the architect prior to performance. One common problem is whether the contractor may recover for extra work performed where it failed to obtain a written change order. A second problem is, after a change order is approved, can the contractor use that change as a basis for an impact claim? Some common changes clauses include:

(1) AIA 201 (1997) Article 7.1.1, 7.1.3, Changes in the Work
(2) Federal Acquisition Regulation (F.A.R.) 52.243-5 Changes and Changed Conditions (APR 1984)
(3) Standard Specifications for Road, Bridge and Municipal Construction, Washington State Department of Transportation Article 1-04.4 Changes (2000)

2. Purpose of the Changes Clause.

The four major purposes served by changes clauses are (1) to provide operating flexibility by giving the owner the unilateral right to order changes in the work to accommodate advances in technology and changes in the owner's needs and requirements (this flexibility is advantageous to the owner in a procurement environment in which rapid advances in applicable technologies might make agreed-upon methods of performance unduly costly, time consuming, or burdensome to the owner); (2) to provide the contractor a means of proposing changes to the work, thereby facilitating more efficient performance and improving the quality of contract end products; (3) to furnish procurement authority to the contracting officer to order additional work within the general scope of the contract without issuing the procedures required for "new procurement" or utilizing new funds; and (4) to provide the legal means by which the contractor may process claims through the contract disputes process.

B. LIMITATIONS ON THE OWNER'S RIGHT TO ORDER CHANGES

There are limitations on the power of the owner to order changes. The person or persons ordering the change must have the requisite authority to issue the change order and the change
clause, which usually limits such orders to those "within the general scope of the contract. In public contracts, the use of the clause is further limited as a result of competitive bidding.

1. Authority to Issue Change Orders

The contract documents generally delineate the authority to issue change orders. AIA Article 7.1.2 requires that the owner, contractor, and architect all execute a change order. In U.S. government contracts, the contracting officer may unilaterally order a contract change. Also, under WSDOT contracts, the "contracting agency" may at any time change the work; presumably this includes the WSDOT project engineer.

It is essential, from the contractor's perspective, to make sure that the person issuing the change order has the requisite authority under the contract to do so. Courts have enforced provisions restricting authority to order changes.

Determination of an agency relationship is not controlled by the manner in which the parties contractually described their relationship. It can also be implied from the parties' actions. As stated in Rho Co. v. Dept. of Revenue:69

An agency relationship, of course, may arise without an express understanding between the principal and the agent that it be created. It does not depend upon an express undertaking between them that the relationship exists. [Citations omitted]

If, under the circumstances, the parties by their conduct have created an agency in fact, then it exists in law.

In this regard, agency is a legal concept that depends on the manifest conduct of the parties; it "does not depend upon the intent of the parties to create it".... [Citations omitted] [A]gency can be implied, if the facts so warrant, not only if the contracts are silent as to agency, but even if the parties execute contracts expressly disavowing the creation of an agency relationship.

Where the contract is silent, an architect and its subconsultants are not general agents of his or her employer and have no implied authority to make a new contract or alter an existing one for the employer.

2. Cardinal Changes

A potential problem with the grant of such broad authority under the changes clause is that the unscrupulous owner could order substantial changes to the construction project and still compel the contractor to perform. The law provides the contractor with relief in such situations. Federal and state courts have developed the "cardinal change doctrine", which prohibits the owner from ordering changes outside the general scope of the contract. Where the work ordered is outside the scope of the contract, it is not legally a change but is extra work, and the contractor is justified in declining to perform it, as this work was not contemplated by the parties when they executed the contract.

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Faced with a cardinal change, a contractor has two options. It may perform the change and seek breach of contract damages after completing the work, or it may refuse to perform and claim breach of contract. If the contractor performs the changed work, it can suffer severe financial hardship until it proves and recovers breach of contract damages. If the contractor opts not to perform, and the change is ultimately found not to be cardinal, the contractor will have breached the contract because it was obligated by the disputes clause to perform all of the original scope of work and all non-cardinal changes.

Though the elements of the cardinal change doctrine have not always been clearly expressed, courts have uniformly accepted the following statement of the doctrine:

The basic standard . . . is whether the modified job was essentially the same work as the parties bargained for when the contract was awarded. Plaintiff has no right to complain if the project it ultimately constructed was essentially the same as the one it contracted to construct. Conversely, there is a cardinal change if the ordered deviations "altered the nature of the thing to be constructed." Our opinions have cautioned that the problem is "a matter of degree varying from one contract to another" and can be resolved only "by considering the totality of the change and this requires recourse to its magnitude as well as to its quality." "There is no exact formula ... each case must be analyzed on its own facts and in light of its own circumstances, giving just consideration to the magnitude and quality of the changes ordered and their cumulative effect upon the project as a whole." In emphasizing there is no mechanical or arithmetical answer, we have repeated that "[t]he number of changes is not, in and of itself, the test" . . . .

A contractor is entitled to recover for extra work and additional costs on the theory of quantum meruit where conditions causing the damages are such that they could not reasonably have been anticipated by either party to the contract (the conditions are so substantially altered that they amount to an abandonment or a cardinal change). Thus, when an express contract is abandoned, courts will imply an agreement that the contractor is to be paid the reasonable value of its work.

[Quantum meruit] may be used in building and construction contract cases when substantial changes occur which are not covered by the contract or within the contemplation of the parties and which are not such that the contractor should have anticipated or discovered them.

Because the change is outside the scope of the contract, it is, by definition, not redressable by way of an equitable adjustment under the contract. In C.W. Bignold v. King County, the contractor was hired to construct a county road. The contract called for an embankment to be built with excavated material, but the material contemplated in the parties' contract proved to be unsuitable, forcing Bignold to procure other material at greater expense. At trial, the county claimed that the additional expenses were covered by the contract (changes clause), but the court held otherwise. On appeal, the county argued that the application of

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72 65 Wn.2d 817, 399 P.2d 611 (1965).
"quantum meruit" was inappropriate, but the Washington Supreme Court upheld the trial court's decision, noting:

[Quantum meruit] provides an appropriate basis for recovery when substantial changes occurred which are not covered by the contract and were not within the contemplation of the parties if the effect is to require extra work and materials or to cause substantial loss to the contractor.

In *V.C. Edwards Contracting Co., Inc. v. Port of Tacoma*,\(^{73}\) the contractor Edwards brought suit against the project owner for damages incurred as a result of delays caused by the owner's failure to furnish materials, properly manage the job, and appropriately direct the contractor's extra work. Edwards was awarded damages based on its reasonable costs (including profit) of performing the work as changed by circumstances unanticipated at the time the job was bid and the contract executed. The court rejected the Port's argument that the proper measure of damages was the bid price plus additional costs shown to be caused by Defendant's breach of contract:

This is not the ordinary breach of contract case. The court in its oral opinion stated, "I find it [the delay] demolished his intended cost structure as well as his time structure." The delays of the Port were so substantial as to remove the written contract of the parties as a practical basis for computing damages.

Authority from other jurisdictions supports the principle that where a quantum meruit claim for services performed is justified, the contract amount will not provide a ceiling for the contractor's recovery.

In *Hensel Phelps Constr. Co. v. King County*,\(^{74}\) the Washington Court of Appeals rejected recovery in quantum meruit for disruptions, inefficiencies, and delays caused by trade stacking, changed work and out-of-sequence work where the contract provisions clearly anticipated those claims and damages. Hensel Phelps involved the claims of a painter (Phoenix) for massive disruption during the performance of its contract to paint the King County Jail. Phoenix's work was to be performed late in the schedule, and thus was subject to disruptions in the schedules of subcontractors preceding it on the job. Phoenix's work was accelerated, resulting in stacking of trades and a "chaotic" work place which impacted the efficiency and productivity of Phoenix's workers. Instead of working straight through, Phoenix was forced to pull out and wait for sections of the building to be built before it could paint. In addition, Phoenix had to change its intended manner of painting because of trade stacking. Despite the difficulties encountered, the subcontractor never asked for time extensions or change orders. Rather, Phoenix presented claims for extra compensation almost daily, as permitted under the subcontract, and received payment for practically every request.

The basis for Phoenix's claims was that it had "huge" labor cost overruns, expending more than three times the original estimated number of hours. Phoenix presented written claims for extras, for which it was paid, but did not submit claims for other changes or conditions until

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after the project was completed. The basis of Phoenix's claim was that the changed schedule and out-of-sequence work abrogated Phoenix's contract as a matter of law.

The *Hensel Phelps* court severely restricted the use of the cardinal change doctrine. In *Hensel Phelps*, the court framed the cardinal change inquiry as:

[w]hether the modified job is essentially the same work as the parties bargained for when the contract was awarded. A Plaintiff will have no right to recover if the project that is ultimately constructed is essentially the same one as it contracted to construct.

The court found that Phoenix's changes in the schedule, redoing work, and continuous stacking of trades did not reflect a fundamental alteration of the project because "there was not the slightest change in the shape or square footage of the surface painted." The inquiry was not whether the magnitude of the delay was sufficient to allow recovery off contract (in quantum meruit), but whether the types or nature of the delay were covered by the contract. The degree or number of variations from what the subcontractor expected was found to be "irrelevant" so long as the variations were contemplated by the contract. Thus, the court focused on the type or nature of the delay and not the extent of the delay to determine there was no cardinal change.

In the later case of *Douglas Northwest v. Bill O'Brien & Sons Constr., Inc.*\(^{75}\) the Court of Appeals allowed a contractor to recover in quantum meruit holding that quantum meruit is not a legal obligation but a remedy. The court distinguished *Hensel Phelps* finding that no particular portion of the contract provided a remedy for the delays and interruptions that the contractor suffered. Therefore, quantum meruit was an available remedy.

3. **Quantum Meruit/Total Cost**

If the contractor can establish a cardinal change, it is allowed recovery in quantum meruit. A total cost claim is simply what the name implies. This claim seeks to convert a standard fixed price construction contract into a cost reimbursable arrangement. The contractor's total out-of-pocket costs of performance are tallied and marked up with overhead and profit. Payments already made to the contractor are deducted from that amount to arrive at the total cost price.

The total cost/quantum meruit approach is not favored by courts and is only permitted under limited circumstances. In *S.L. Rowland Constr. Co. v. Beall Pipe & Tank Corp.*,\(^{76}\) the court discussed its attitude regarding this manner of proving damages:

The total cost basis for proving damages is not favored in law and is generally upheld only when no better proof is available. (Citations omitted). The criticisms leveled against it include that it assumes the contractor's costs are reasonable and that the contractor was not responsible for any increases in such costs. (Citation omitted).

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The court in Rowland further stated:

In this state, the total cost basis of establishing damages can be used, but only in a limited category of cases. It may be used in building and construction contract cases when substantial changes occur which are not covered by the contract or within the contemplation of the parties and which are not such that the contractor should have anticipated or discovered them. In such cases, the contractor is permitted to show damages on a total cost basis and to recover in quantum meruit for the extra work and materials required and including a profit factor on such amount. (Emphasis added.)

To calculate the damages using total cost, the contractor must establish:

- That its bid was reasonable;
- That the costs incurred were reasonable;
- That none of the incurred costs were caused by the contractor's acts or failures to act;
- That the job was so disrupted by the owner's breaches that the contractor could not segregate and prove its damages on a "cause and effect" basis.

The total cost calculation of damages is deceptively easy, and is appealing to most contractors. The best advice is to avoid it, if possible, and if you have to calculate the damages using total cost, be well prepared to establish that a cardinal change occurred, and that the elements justifying its use are present.

4. **Modified Total Cost/Jury Verdict Method**

The modified total cost approach is sometimes referred to as the "jury verdict method." That is a confusion of terms. "Modified Total Cost" is a method of calculating damages, i.e., a less severe and more realistic version of total cost. "Jury Verdict" is a description of how the trier of fact can calculate the reasonable damages due the contractor under appropriate circumstances.

The modified total cost approach involves deducting from the total cost minuend whatever additional costs the contractor or its subcontractors may have caused. This method of calculating damages, while not favored, is widely accepted in actual practice.

C. **DUTY TO PROCEED**

Most state and private changes clauses, as well as the federal disputes clause, explicitly require the contractor to proceed with the work upon receipt of a change order. A similar provision is found in AIA Document A201 (1987), Article 7.3.4, where the contractor is directed to proceed promptly with changed work. The consequences of a failure to proceed after receipt
of a change order are harsh. In Max M. Stoeckert v. United States, the court affirmed the government's right to terminate the contractor for default under such circumstances. The contractor refused to demolish work and, at no expense to the government, replace the work. The court held that the contractor's remedy should have been to litigate the issue of compensation, not refuse to perform as directed.

In F.S. Jones Constr. v. Duncan Crane, the owner (the U.S. Government) made a change in the precast concrete panel design on a border patrol station construction which increased the number of panels by 16 pieces from a job total of 96. The subcontractor (Duncan) claimed that this change would be more work and demanded extra compensation. The general contractor, Jones, took the position that the increase was minor and cost savings would balance the cost increase. Ultimately, Jones was required to hire another subcontractor on a time and materials basis which exceeded Duncan's original contract price. The general contractor sued the subcontractor for breach of contract. The Court of Appeals held that a provision in a construction contract authorizing changes in the design and specifications of the structure permits the owner to make changes unilaterally without additional consideration or the consent of the contractor. Duncan's failure to proceed according to the changed plans was a breach of contract so long as the changes were within the general scope of the original contract. Duncan was bound to perform the contract as changed and then pursue the contract remedy for the resolution of the disputes. The reduction in panel size was within the purview of the contract and Duncan's failure to perform was deemed a breach of contract. The court concluded that only where the work ordered is outside the scope of the contract, is it not a change but extra work, and the contractor is justified in declining to perform it as this work was not contemplated by the parties when they executed the contract. Conversely, if the directed extra work is within the scope of the contract, it is a legal change and the contractor must perform it, or be in breach of contract.

Because of the harsh consequences, there are exceptions to the duty to proceed. Where the government requires that changes be performed outside the general scope of the contract, there is no duty to proceed. But recognize the contractor's gamble in such a situation. If the refused work is later found to be within the general scope of the contract, liability will follow.

D. CHANGE ORDER IMPACT COSTS

Another problem which arises with respect to change orders concerns the nature and amounts of the compensation which the change order payment is intended to provide. While the contract documents will commonly set forth specific methods for determining the cost of extra work, they generally do not address the issue of whether impact costs are to be included in the change order. It is important to ascertain if the extra work provisions provide for such coverage, especially in preparing an impact claim after the extra work price has been accepted.

1. The Change Order Provisions are Silent as to Impact Damages

If the change order provisions of the contract do not address the issue of impact damages, then the failure by the contractor to include its impact costs or to make an express reservation of

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77 391 F.2d 639 (Ct.Cl. 1968).
the right to later assert such costs likely will not foreclose later claims for the impact of changes. The consistent interpretation of government contracts has been that where the contract does not provide for such costs and nothing in the negotiation of the change order or adjustment indicates that any claims for such costs were intended to be resolved, the contractor is not prevented from proceeding with a later claim for such costs.

2. **The Contract Documents Provide that all Costs Shall be Included in the Change Order**

If on the other hand the contract provides that all impact costs are to be included in the change order or they will be considered waived, failure to include those costs or to make an express reservation may prevent a later claim for impact.

3. **Reservation of Rights**

Generally, a contractor can determine the direct impacts of the change order, but not the indirect impacts. In such instances, the contractor should expressly reserve the rights in the change order to claim additional compensation and performance time if and when the necessity for such compensation and time becomes determinable.
Chapter III

DIFFERING SITE CONDITIONS
III. DIFFERING SITE CONDITIONS

A differing site condition is a physical condition other than weather, climate, or other act of God, discovered on or affecting a construction site and differing in some material respect from what reasonably was anticipated. The condition must be physical; changes in political conditions, economic conditions, or labor issues are not differing site conditions.

In the absence of a contract clause providing otherwise, the risk of any cost or difficulty associated with unexpected subsurface site conditions is generally borne by the construction contractor.

A. COMMON LAW GENERAL RULE: RISK OF UNFORESEEN DIFFICULTIES DURING PERFORMANCE FALLS UPON THE CONTRACTOR

As a general matter, under the common law, a mere unanticipated condition which renders contract performance more difficult, burdensome, or more expensive provides no excuse for nonperformance and no basis for modification of the contract.

Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. Thus, one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. [Citations omitted.]

Thus, absent a differing site conditions or changed conditions clause, contractors must increase the amount of their bids or proposals to cover the contingency of encountering unexpected difficulties, make their own subsurface investigation, bear the risk of uninvestigated, unknown conditions without price contingencies, or choose not to bid at all. Some courts take into account the contractor’s dilemma in undertaking “tremendous[ly] expensive core boring tests not knowing whether or not he [will] get the contract.” Courts have recognized some exceptions to the general rule where the contractor is able to prove:

1. Fraud or Negligent Misrepresentation of Conditions.

In Douglas Northwest, Inc. v. Bill O’Brien & Sons Construction, Inc., the Washington Court of Appeals ruled that a subcontractor reasonably relied upon a general

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contractor’s representation of soil conditions notwithstanding the subcontractor’s familiarity with the general area. The subcontractor at bid time had asked the general contractor’s project manager if there was a soils report. The project manager indicated there was no soils report, but advised that he (the project manager had an ownership interest in the property) had owned the property for years, the soils were “excellent”, and only on-site material would be needed for the project. 88 When work started, the characteristics of the native soil made it impossible to meet the compaction specifications. The subcontractor was forced to bring material from off site. The subcontractor then learned that the general contractor possessed a soils report identifying the precise conditions that had been encountered by the subcontractor. The subcontractor completed the work and sued for delay and intentional misrepresentation of the site conditions (the subcontract did not contain a differing site condition clause). The court held that since the project manager had made affirmative, unequivocal representations on which the subcontractor relied and had willfully withheld material information of which it had superior knowledge, the subcontractor was entitled to recover the increased costs incurred as a result of those misrepresentations. 89

2. Breach of Implied Warranty of the Sufficiency and Adequacy of the Plans and Specifications.

The owner of a construction project impliedly warrants the adequacy and sufficiency of project plans and specifications. 90 Where the plans and specifications do not adequately depict the actual conditions on the site, courts may employ the breach of the implied warranty theory to allow a contractor to recover additional expenses in overcoming a site condition. To recover on a breach of warranty theory the contractor must be able to show reliance on the owner’s warranty. The burden of showing a breach of the implied warranty is less stringent than the proof required to maintain an action based on misrepresentation. 91

3. Constructive Change.

Where as a result of government misinterpretation of a contract provision a contractor is required to perform more or different work, or work to higher standards, not called for by the contract’s terms, the contractor may be entitled to an equitable adjustment under the changes article. 92 The constructive change theory has been used to establish compensation where the contract lacked a differing site conditions clause. 93

4. Failure to Disclose Superior Information.

The United States Court of Claims (predecessor to the United States Court of Federal Claims), in interpreting federal construction contracts, has developed what is commonly

88 Id. at 665.
89 Id.; similar holdings are found in other jurisdictions.
referred to as the “doctrine of superior knowledge.” The doctrine holds that the government must disclose vital information in its possession not otherwise available to the contractor at the time of bidding. The government’s failure to disclose superior knowledge constitutes a breach of contract. Some states follow the federal rule, others provide that silence is not actionable misrepresentation.

5. Impossibility and Commercial Impracticability.

Generally where a contractor’s performance is rendered impossible or commercially impracticable, contractor may argue that its duty to perform is excused. Where the contractor seeks excuse of performance due to the impossibility or commercial impracticability, the contractor must show that the work cannot proceed and that the contractor did not assume the risk (of the unforeseen subsurface condition) as a matter of contract. The doctrine of commercial impracticability involves excuse of the contractor’s performance where circumstances beyond the contractor’s control caused the work to be more expensive and that it would be unjust or commercially senseless to require performance under the circumstances.

6. Cardinal Change

Where the differing site condition dramatically and cardinally changes the scope of the work, the contractor may treat the contract as having been abandoned and recovered in quantum meruit.

B. DIFFERING SITE CONDITIONS CLAUSE

Many construction contracts contain language which purports to set forth the rights and obligations of the parties when conditions encountered during the performance of the work differ from those which were expected. The three most common contractual provisions are the "differing site conditions" clause, which creates a right to claim; the "site investigation" clause which limits the right to claim; and the "disclaimer clause" which attempts to prevent any claims.

The differing site conditions clause expressly recognizes the possibility of a claim for the costs which arise from such conditions, addresses the question of who pays for the extra costs incurred, and typically also sets forth procedures for resolution of any disputes. Illustrative differing site conditions clauses are:

- AIA 201 (1997), Article 4.3.4 Claims For Concealed Or Unknown Conditions. (attached)
- F.A.R. 52.236-2 Differing Site Conditions (Apr 1984) (attached)

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94 Hardeman-Monier Hutcherson v. United States, 458 F.2d 1364 (Ct.Cl. 1972); Helene Curtis Indus., Inc. v. United States, 312 F.2d 774 (Ct.Cl. 1963).
It is noteworthy that while the federal, WSDOT and AIA clauses all require notice to be given before conditions are disturbed, the AIA clause also places an outside limit of 21 days on notice. The purpose behind the notice provision is to prevent prejudice by allowing the owner to investigate the site before it is disturbed.

C. PURPOSE OF THE "DIFFERING SITE CONDITIONS" CLAUSE.

The federal government long ago recognized that one of the greatest risks in a fixed-price construction contract was encountering unforeseen subsurface conditions during performance. A prudent contractor would include a contingency in its bid to protect itself from such potential disasters. Where the reason for the contingency did not occur, the owner incurred an unnecessary expense by paying more than actually necessary for the contract work. On the other hand, if the contingency was insufficient to cover the contractor's costs, the construction of the project might be disrupted and delayed while the contractor sought instructions, filed claims, or halted work for lack of funds. Also, soils investigations by bidders can disrupt the owner's operations.

To avoid these problems, the federal government developed a risk-shifting clause which minimizes the contractor's risk and relieves it from unexpected and unfavorable conditions that cannot be ascertained by a reasonable site investigation.

D. SCOPE OF THE RISK SHIFTING CLAUSE.

The differing site conditions clause promises a contractor an equitable adjustment in contract price when unforeseen subsurface conditions are encountered. This adjustment is not automatic; the contractor must still prove that conditions encountered vary materially from the conditions indicated (referred to as Type I condition) or from the conditions ordinarily encountered (referred to as Type II condition). The contractor does not have to show culpability as it would in a breach of contract action. Courts have generally found that differing site conditions clauses cover only conditions existing at the time the contract was entered into and not one occurring thereafter. Even though the court in Arundel v. United States\textsuperscript{99} offered no rationale for its conclusion, subsequent federal decisions have rejected contractors' attempts to invoke the differing sites condition clause as a method for obtaining relief for unexpected physical conditions that develop after contract award.

When weather creates a change in the site conditions, the court will evaluate whether the changed site condition was created by weather or acts of God, and determine when the weather created the changed site condition. Generally weather or acts of God which create a differing site condition during contract performance are excluded from coverage of the differing site conditions clause. Thus, where flooding caused by heavy rains overwhelmed an allegedly defectively designed culvert, it was not covered by the differing site conditions clause.

\textsuperscript{99} 515 F.2d 1116, 96 Ct.Cl. 77 (1975).
1. **Type I Conditions.**

Relief for a Type I differing site condition under the differing site conditions clause is dependent upon whether the contractor has encountered a subsurface or latent physical condition differing materially from the conditions which are indicated in the contract documents or which may be implied from other language in the contract documents.

Recovery under the differing site conditions clause is limited to those instances where the "condition complained of could not reasonably have been anticipated by either party to the contract."\(^{100}\) In *Bignold* the court specifically stated "[A] finding that the contractor should have anticipated the condition will bar recovery." In *Basin Paving v. Mike Johnson*,\(^{101}\) the contractor sought recovery for the presence of rock along a pipeline route. The contract contemplated that rock may be encountered during the construction. The court held: "In sum, a contractor cannot recover additional compensation for a "changed condition" if the complained of condition was foreseeable." No changed condition occurred because the court found that the presence of rock was foreseeable based upon the contract's language and boring tests, that the contractor admitted the presence of more sub-surface rock than was indicated in the test data was foreseeable and the contract made complete reliance on the test boring data unreasonable.

- Contract Documents
- Subsurface or Latent
- Express or Implied
- Induced Reliance

2. **Type II Conditions.**

To recover for a Type II condition, a contractor must generally demonstrate that the condition was "unknown and of an unusual nature, differing materially from those ordinarily encountered and recognized as inhering in [such] work." F.A.R. 52-236-2.

- Unknown
- Unusual
- Nondisclosure

E. L**IMITATIONS OF THE DIFFERING SITE CONDITIONS CLAUSE.**

Construction contracts may also contain site investigation or disclaimer clauses which may severely limit the operation of the differing site condition provisions.

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1. Site Investigation Clauses.

A site investigation clause provides that the contractor has investigated the site and has familiarized itself with the site conditions.

A site investigation clause does not in and of itself negate a differing site conditions clause in the contract. Instead, it merely narrows the field of differing site conditions to which a reasonable investigation would not reveal. It is effective insofar as it may prevent a contractor from contending that actual conditions differed from what he anticipated, if the actual conditions are ones which a reasonable investigation would have disclosed. A reasonable investigation does not require the contractor to be a trained geologist or other specialized expert, nor does it require that a contractor hire such experts or conduct technical investigations. However, the contractor will not be able to make a claim for what it should have discovered acting as a reasonable contractor viewing the site. A contractor's failure to investigate does not preclude a claim under the differing site conditions clause. Rather, a contractor who fails to inspect or perform an inadequate inspection bears the risk of any condition that could have been discovered by a reasonable site investigation.

In *C.W. Bignold v. King County*,102 for example, a road construction contractor successfully recovered damages under a differing site conditions clause despite a contract provision requiring careful site investigation. The contract specifications called for 8,900 cubic yards of borrow-pit material to supplement the contractor's excavation material. A substantial portion of the excavated material proved to be too wet for embankment purposes and included large boulders which were also unsuitable. The court noted under the site survey and changed conditions clauses, the critical issue was whether the contractor should have discovered the presence of wet subsurface material containing large boulders. The court concluded that the latent subsurface conditions were neither apparent from the physical examination of the ground prior to construction, nor disclosed from an examination of the plans, and were materially different from the conditions indicated in the contract documents.

2. Disclaimer/Exculpatory Clauses.

Both public and private owners have succumbed at times to the temptation to retrieve that which they have given to a contractor through a differing site conditions clause by including disclaimers in the contract as to site condition information supplied in the bidding documents. These might be specific statements that "no claims for differing site conditions will be recognized regarding the absence or presence of subsurface rock, unstable rock conditions, etc." or general statements that "the contractors should not rely upon any contract indications or owner-furnished information, but should make their own soils analysis." The effectiveness of these disclaimers depends upon the specific language employed and the jurisdiction where the attempt is being made to enforce the disclaimer.

- Implied Warranties
- Misrepresentation
- Constructive Changes

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102 65 Wn.2d 817, 399 P.2d 611 (1965).
Chapter IV

WRITTEN NOTICE REQUIREMENTS
IV. WRITTEN NOTICE REQUIREMENTS

All of the various differing site conditions clauses require the contractor to give notice of the differing subsurface condition. The notice is to be given promptly and before conditions are disturbed. The current AIA clause requires that notice be given within 21 days.\textsuperscript{103}

Typical change order clauses provide that a contractor's failure to obtain a written change order before proceeding with the changed work may jeopardize or entirely foreclose recovery of the extra costs. The purpose of the requirement that the extra or changed work not proceed without a written change order is to avoid later disputes wherein the owner claims that the alleged extra work was part of the original contract and, further, that had the owner known that the contractor believed otherwise, the owner would not have ordered the performance of the alleged change, or would have ordered that the work be performed in a different or less expensive manner.

A. PURPOSE OF THE NOTICE PROVISION

The purpose behind the requirement of prompt notice is to give the owner the opportunity to investigate and verify the existence of the differing site condition, and to possibly alter the work so as to avoid excessive cost increases. The notice should be in writing to avoid any question about its having been given. It requires no particular form. A letter is sufficient.

B. NOTICE PROVISIONS STRICTLY ENFORCED

A contractor on a public project may be unpleasantly surprised to learn that the architect's/engineer's promise may not be enforceable; as a general matter, in the public contract field, no oral waiver of the written change order requirement is permitted, despite evidence by the contractor of promises and representations by the owner or by the owner's representative.

A Washington contractor learned this lesson the hard way. In Donald B. Murphy Contractors \textit{v. State},\textsuperscript{104} the contractor unsuccessfully claimed that the State's employees verbally ordered changes, entitling it to added compensation. The contract explicitly provided that any changes must be set forth in a written change order. The court upheld this provision, noting that the written change orders alone embody the parties' agreement as to additional compensation.

In \textit{Absher Const. v. Kent School Distr.},\textsuperscript{105} Emerald Aire was a subtier HVAC subcontractor to Chapman Mechanical, subcontractor to Absher, the general contractor on an elementary school. Emerald claimed that the School District had breached its contract with Absher by providing overwhelmingly defective plans. Pursuant to the general contract with the School District, Absher was required to give the District prompt and detailed written notice of any claims within fourteen (14) days after events giving rise to claims, and then enter into a contractually mandated dispute resolution procedure before any lawsuit could be commenced. The contract contained provisions that failure to provide complete written notification was an

\textsuperscript{103} \text{AIA A201 Article 4.3.4 (1997).}
\textsuperscript{104} 40 Wn. App. 98, 109, 696 P.2d 1270 (1985).
absolute waiver of any claims arising from, or caused by, delay. After the project was substantially complete, and less than one (1) month before final acceptance of the project, Emerald submitted a claim to Absher. Absher forwarded a copy of Emerald's claim to the owner and indicated that it was "not notified of this claim prior to this letter." Two (2) months after final acceptance, Emerald filed a suit against the District in Absher's name. The court held that since the District had made no written waiver to the contract notice requirement, and since the contract expressly provided that notice by third parties to the architect shall not be deemed notice to the District, that the summary dismissal of Emerald's claim for failure to comply with the contract notice requirements was proper.

C. CONSTRUCTIVE NOTICE/ORAL CHANGE ORDERS

If the owner's representative at the site is aware of the differing site condition when first encountered by the contractor, the formalities of the notice requirements are waived. The owner is deemed to have constructive notice of the condition encountered. Mere observation of the condition by the owner's inspector, however, does not itself constitute constructive notice. In such cases, the owner's representative may not be aware of the reason for the change in construction method or that the condition encountered is materially different from that which was anticipated. In *C.W. Bignold v. King County*, the contractor did not give written notice of the differing site conditions as required by the contract. This failure, however, did not prevent the contractor's recovery for the cost of extra work required by the conditions which had not been anticipated by the contracting parties. King County (the owner) representatives had become immediately aware of the differing site conditions, and had ordered the contractor to perform the extra work involved.

As a general rule, Washington law requires contractors to follow contractual notice provisions unless those provisions are waived. Either party to a contract may waive any contract provision that is made for its benefit. Such a waiver generally need not be expressly declared but may be implied from a parties conduct. Waiver by conduct, however, requires unequivocal acts evidencing an intent to relinquish known rights.

As might be expected courts are willing to find oral waivers and modifications of the notice provision.

1. Actual Knowledge.

Where the owner actually knows of the condition constituting the change, the courts will not literally apply the notice provision. In *Lindbrook Constr., Inc. v. Mukilteo Sch. Dist.*, the court found that the notice requirement had been waived because the contractor had notified the owner's agent (architect/engineer) of changed conditions (and of extra work that would be

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106 65 Wn.2d 817, 822-23 (1965).
107 Swenson v. Lowe, 5 Wn. App. 186, 188-189, 486 P.2d 1120 (1971) (the owner made payments without objection and indicated approval of the work); Hoel-Steffen Constr. Co. v. United States, 456 F.2d 760 (Cl.Ct. 1972); Joseph Morton Co., GSBCA 4815, 81 BCA 14,980 (1981); G.C. Indus., Inc., ASBCA 22890, 79-1 BCA 13,721 (1979). *State of Alaska v. Eastwind, Inc.*, 851 P.2d 1348 (Alaska 1993) (where the owner knowingly received and accepted benefits of the extra work, the general contract's requirement of a written change order request was deemed waived). *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991) (where the owner failed to supply adequate drawings to the contractor and failed to cooperate with the contractor to prevent completion of the project, extras were awarded although the contractor failed to submit timely change order requests).
required), but the School District had nevertheless directed the contractor to continue work. In addition, the architect clearly knew of the entire sequence of events on which the claim was based, and the architect was designated by contract to receive written notice as the owner's authorized agent.

In *Morango v. Phillips*, the court found a waiver of the written notice requirement:

Proof was offered with reference to extra work, labor and materials not provided for by the plans referred in the written contract, to which objection was made on ground that there were no written orders for same as required by the contract. The contract contained a provision requiring written orders with reference to alterations or deviations from the specifications involving extra cost of labor and material. The appellants contend that the extras were requested by respondent. If the extras were furnished at the express request of the respondent, recovery can be had therefor, and such request would amount to a waiver of the contractual provision. [Citations omitted.]

In *Mike Johnson v. Spokane County*, the owner (Spokane County) received written notice from the contractor throughout the construction of a sewer project, albeit not in the specific format required by the contract. The County obtained a summary judgment ruling at the trial court level that the contractor had failed to comply with the strict requirements of the contract notice procedures. The evidence indicated that the County directed and demanded the contractor's compliance with various change orders under the threat of termination and non-payment. The County continued to negotiate with the contractor regarding final payment for disputed change order work several months after the project was completed. Based on these facts, the Court of Appeals found that genuine issues of material fact existed concerning actual notice and that factual issues should have precluded an award of summary. The Washington Court of Appeals found that the County's actual notice precluded the County from enforcing the contract notice provisions.

(2) The Failure to Give Notice is Induced by Actions or Statements of the Government.

In *J.A. LaPorte, Inc.*, the Board explained that its non-enforcement of the 20-day notice provision (in the U.S. government contract change clause) was based upon the fact that there was no single, identifiable event upon which the claim was based which could be used to measure the beginning of the notice period.

(3) Notice to the Contracting Officer Would Have Been Useless.

(4) The Contracting Officer Considered the Claim on its Merits.

(5) The Owner Can Show No Prejudice that Might Have Been Avoided if the Contractor Gave Timely Notice.

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109 33 Wn.2d 351, 357-58, 205 P.2d 892 (1949).
111 IBCA 1014-12-73, 75-2 BCA 11,486.
Even where no notice was given and the owner's representative had no knowledge of the condition prior to the work being performed, a contractor may still recover if it can be shown that the owner suffered no prejudice by the lack of notice. The owner has the burden of showing that prejudice resulted from the contractor's failure to notify. The owner may also successfully claim prejudice when the lack of notice prevents the owner from concurrently verifying the contractor's data regarding the alleged differing site condition. However, Washington does not require an element of prejudice to enforce contractual notice provisions. 112

Since the basic reason for the requirement of timely notice is to avoid prejudice to the owner arising out of an inability to investigate, if prejudice is shown the rule will be strictly applied. In government contracts, the Government has to prove that the delay in giving notice somehow operated to the detriment and prejudice of the Government before the delay will operate as a waiver of the contractor's right to recover. Where the Government is unable to show that it was prejudiced by the contractor's failure to strictly comply with the written notice provisions, the claim will be decided on its merits. If, however, the owner has not been injured by the contractor's failure to give that notice, it will not be applied. Washington does not require an element of prejudice to enforce the contractual notice provisions.

112 Absher Const. Co. v. Kent School Dist., 77 Wn. App. 137, 145, 890 P.2d 1071 (1995), quoting Sime Constr. Co. v. WPPSS, 28 Wn. App. 10, 16, 621 P.2d 1299 (1980), review denied, 95 Wn.2d 1012 (1981); However, in Sime Constr. the Court denied Simes' claim stating that the Owner (WPPSS) was prejudiced by the failure of Sime to comply with the fifteen (15) day notice requirement; the Owner lost the opportunity to balance the desirability of the design improvement against the increased cost, and, therefore, the notice provision was strictly enforced. Id. at 16. Other Washington cases appear to also require a showing of prejudice before strict enforcement of the notice provision. See Swenson v. Lowe, 5 Wn. App. 186, 190, 146 P.2d 1120 (1971); American Sheet Metal Works v. Haynes, 67 Wn.2d 157, 159, 470 P.2d 429 (1965); Bignold v. King County, 65 Wn.2d 817, 822, 300 P.2d 611 (1965); Morango v. Phillips, 33 Wn.2d 351, 357, 295 P.2d 892 (1949). See also, Ahlers, Notice in Washington Construction Contracts: Is Prejudice the Issue?., 54 Washington State Bar News 4, p. 41 (1998).
Chapter V

TIME DELAYS
V. TIME/DELAYS

A delay represents the time which some part of the construction project has been extended due to unanticipated circumstances.

A. TYPES OF DELAYS

Delays generally fall into one of three categories: (1) the contractor bears the risk of both time and cost for delays that it causes or that are within its control (non-excusable, noncompensable); (2) the owner is responsible for both the time and cost effect of delays attributable to it, under its control, or for which it has agreed to assume responsibility (excusable and compensable); and (3) neither party is responsible to the other for those delays falling outside of the first two categories (these are termed “excusable” delays), i.e., those events beyond either party's control or assumption of responsibility (e.g., abnormal weather).

1. Non-Excusable Delays

Non-excusable delays are those caused by the fault or negligence of the contractor, or those delays for which the contractor assumes the risk. Non-excusable delays include subcontractors' delays, delay caused by ordinary and foreseeable weather conditions, delay in obtaining materials, the contractor's financing problems, poor workmanship, contractor inefficiencies, and contractor's failure to mobilize. A contractor that encounters non-excusable delay is still obligated to perform by the original contract date. The contractor is not entitled to an adjustment to the contract completion date because the contractor is responsible for the delay.

2. Excusable Delays

An excusable delay is one justifying an extension of time. These excuse the contractor from meeting the contract deadline. The contractor is protected from default termination, liquidated damages, and actual delay damages to the extent it has been excusably delayed. Excusable delays may also lead to recovery of additional compensation if the delay caused the contractor to constructively accelerate performance (see below).

Whether a delay is viewed as excusable depends upon the language of the particular contract provision in question. See AIA General Conditions A201 Article 8.3.1 (1997) (attached), for typical excusable delay provisions.

3. Foreseeability

The standard delay clause found in federal contracts requires that the excusable delay arise from unforeseeable causes, and be beyond the control of the contractor. In addition, the delay cannot be caused by the contractor's fault or negligence. Whether a cause of delay is foreseeable is generally equated with knowledge or whether the contractor had reason to know of the foreseeable cause of delay prior to bidding. However, the mere possibility that an event might occur does not establish foreseeability. Foreseeability can be a high barrier to overcome.
4. **Beyond the Contractor's Control**

The second requirement for a delay to be deemed excusable under typical time extension clauses related to control: If a contractor cannot prevent an event from occurring, that event is beyond the contractor's control. The most difficult application of the "beyond the control" rule arises in cases where the owner contends that the contractor should have overcome the delay, for instance, where the owner insists that the contractor should have expected to take action to overcome strike delays.

a. **Weather**

Virtually all construction contracts recognize that critical path delays caused by unusually severe weather may be "excusable." Both the federal provision and AIA General Conditions recognize abnormally severe weather as a cause for excusable delay under appropriate circumstances. There is no bright line test for determining when adverse weather becomes abnormally severe giving rise to an excusable delay. Bad weather falling within the range of "normal" is deemed reasonably foreseeable and will not give rise to an excusable delay allowing a contract extension. Generally, "excusable" adverse weather is abnormal in comparison to previous weather patterns at the same location for the same time of year. Normally, proof that weather is unusually severe is accomplished through comparison of U.S. weather statistics for past periods in the area with those recorded during the period of performance. Even if the weather does not attain the requisite statistical level of severity, a contractor may succeed in its claim if it can prove that the impact on the work was unusually severe.

Where the contractor is able to show that the weather produced an excusable delay, simply obtaining a contract extension of time is often a hollow victory. Excusable weather delays generally are deemed to be "non-compensable," by traditional allocation of contract risk. Thus, the contractor is entitled to an extension of time to complete the construction and protection from liquidated damages, but is not entitled to money damages for any of the additional costs attributable to the weather delay. The contractor must demonstrate a high burden to obtain money damages for unusually severe weather, including that the construction delay was both excusable and compensable. Thus, for a weather-related delay to be compensable, it must be directly or indirectly caused by the owner. There are a number of legal theories under which adverse weather may form a basis of a contractor's claim for compensable damages:

- Prior Owner Caused Delays Causes the Contractor to Encounter Adverse Weather
- Excusable Weather Delays Cause Accelerated Performance to Stay on Schedule
- Weather Interacting with Physical Site Characteristics Causing Differing Site Conditions
b. Time Extensions

A contractor is not entitled to relief upon the mere occurrence of an event which qualifies as an excusable delay. The contractor must show that the event caused delay to the overall completion of the contract and must establish the number of days of relief to which it is entitled (in other words, the delay must affect the project's critical path; that is, extend the actual completion of the project).

Once the contractor shows that it was actually delayed by an excusable cause the contractor must still establish the length of the time extension to which it is entitled. Generally, the duration of the time extension is governed by the extent to which the excusable cause of delay either increases the amount of time required for performance of the contract work as a whole, or is determined by the date by which the contractor will be reasonably capable of completing the work. The contractor has the burden of proving the excusability of a delay.

5. Compensable Delays

Performance delays that have significant financial impact on contractors occur frequently in construction contracts. A contractor's ability to recover increased costs resulting from such delays will be affected by the cause of the delay, the contract provisions which bear either directly or indirectly on the circumstances for which the adjustment is claimed, and the magnitude and nature of the impact on the contractor. Both federal contracts and AIA contract documents contain suspension provisions. Two types of compensable suspensions may occur: (1) express suspensions, which are those ordered directly by the owner, and (2) constructive suspensions, which are not expressly ordered but are caused by some act, or failure to act, of the owner.

a. Express Suspensions

Where the government expressly suspends the work and causes an "unreasonable delay" to the work or a portion of the work, that delay is compensable under the terms of the suspension of work clause.

b. Constructive Suspensions

Constructive suspensions occur when the work (either in its entirety or in part) is stopped without an express order by the owner, or owner's representative, but the owner is nevertheless found to be responsible for the work stoppage. Examples of constructive suspensions are:

- Delays Caused by Defective Drawings and Specifications Supplied by Owner or its Architect/Engineer
- Delay Caused by Improper Site Preparation
- Delay in Issuing Notice to Proceed
• Delay in Availability of Site.

• The issuance of the notice to proceed in the face of non-availability of the site will not relieve the government of its obligation to compensate the contractor.

• Delay Because of Interference with Contractor's Work.

The Washington Supreme Court has held that in every construction contract there is an implied term that the owner will not delay or hinder the contractor, and such delays entitle the contractor to extra compensation.113 Other acts giving rise to owner liability include:

• Failure to Coordinate the Work of Multiple Prime Contractors.

• Suspension of Work by the Owner Absent Valid Contractual Authorization.

• Delays Caused by Wrongful Acts or Omissions of the Architect and/or Engineer.

• Delays Caused by Excessive Change Orders/Defective Drawings and Specifications.

• Delay in Providing Funding.

• Delay in Inspection of Work.

B. NO DAMAGE FOR DELAY CLAUSES

There is a line of cases in effect that address contract clauses that provide there will be no damages for delay. These decisions strictly construe contract provisions granting a time extension without mention of delay compensation. An example of such a clause is found in the AIA General Conditions A201 (1987), Article 8.3.1, cited above. Article 8.3.1 makes it clear that a contractor's only recourse for owner-caused delay is to obtain a time extension (no damage for delay). Washington courts struggled with no pay for delay clauses in Goss v. Northern Pac. Hosp. Assn, City of Seattle v. Dyad Constr. Inc.,114 Nelse Mortensen Co. v. Group Health,115 and Christiansen Bros. v. State116, before enacting RCW 4.24.360 in 1979, which provides as follows:

Any clause in a construction contract, as defined in RCW 4.24.270, which purports to waive, release or extinguish the rights of a contractor, subcontractor, or supplier to damages or an equitable adjustment arising out of unreasonable delay in performance which delay is caused by the acts or omissions of the contractee [owner, general contractor] or persons acting for the contractee is against public policy and unenforceable. This section shall not be construed to

113 C.W. Bignold v. King County, 65 Wn.2d 817, 399 P.2d 611 (1965).
avoid any provision in a construction contract, as defined in RCW 4.24.370 which (1) requires notice of delays, (2) provides for arbitration or other procedures for settlement, or (3) provides for reasonable liquidated damages.

No reported cases have applied this statute. The full impact of this statute remains unknown. The courts may have some leeway in interpreting the phrases such as "unreasonable delay" which could preclude full recovery for "reasonable" owner-caused delays.

Where parties to the contract provide for a remedy in the event of an owner-caused delay, that delay may be construed to be reasonable under RCW 4.24.360. When a condition arises which was expressly foreseen and provided for in the parties' contract the presumption is the parties intended the prescribed remedy as the sole remedy for the condition.

A number of School Districts in the general King County area utilize contract with, provisions specifying the amount of delay/impact damages in the event of owner-caused interference with the project. The parties simply "agree" that in the event of delays due to changes or differing conditions, the full and exclusive equitable adjustment for delays will be the amount of money set forth in the school district contract (generally a certain amount to be paid per day for delay impact damages). This provision does not extinguish the right to damages for delay but instead guarantees an "equitable adjustment" according to an agreed-upon formula.

C. ACCELERATION

Acceleration occurs when the contractor performs its work at a faster rate than required by the original contract. Compensable acceleration occurs when the owner requires the contractor to complete construction as originally scheduled rather than within the extended time the contractor is entitled to as a result of excusable delays. Where a contractor accelerates its performance voluntarily for its own purposes, it will not receive additional compensation from the owner. Acceleration may be either directed or constructive.

6. Directed Acceleration

The elements of directed acceleration are:

- the contractor establishes that its breach of its performance deadline was excusable;
- the contractor was entitled to a time extension;
- the contractor requested a time extension from the owner;
- the owner refused to grant a time extension and ordered the contractor to complete the work, including the changed work, by the original performance deadline;
- the contractor incurred additional cost as a result of such acceleration; and
• the contractor gave the owner or its representative proper and timely notice of its acceleration claim.

7. Constructive Acceleration

Even though an owner may not expressly order acceleration, statements or conduct to the effect that the original schedule should be maintained, despite the excusable delay, equate to an affirmative directive. Such an implied order is called "constructive acceleration." Generally it has been held that a request to accelerate, as opposed to a directive, is sufficient to constitute an acceleration order. In situations in which the owner exerts a variety of pressures on the contractor, so as to deprive it of its bargained for time to complete the project, the courts will often find an implied order to accelerate.

D. CONCURRENT DELAY

Concurrent delay occurs when there are two or more independently-caused delays during the same time period. Courts determine the legal impact of concurrency by examining the responsibility for the concurrent delays and whether the parties are seeking compensation or a time extension. If a period of delay can be attributed simultaneously to the actions of two or more parties, they are said to be concurrent and the result is an excusable but perhaps not compensable delay.

1. No Apportionment

Some cases hold that if the concurrent delay consists of delays attributable to both the owner and the contractor, neither can recover from the other. This is particularly true where the finder of fact cannot "determine a reasonable basis for such an apportionment" and therefore cannot attribute any responsibility.

2. Apportionment

The preferred solution is to determine which event or entity is actually causing the delay and apportion it accordingly. It is error for a court to rule that neither party is liable for delay simply because there is concurrent delay for which each party is partly responsible. In allocating responsibility for delay, the trial court or jury may make reasonable approximations.

The contractor bears the burden of proving the extent of the delays and of apportioning the damages. In a concurrent delay situation, Washington courts are likely to award damages based on an estimated allocation of fault even though the precise allocation of responsibility for the delay is not made.

3. Relief from Liquidated Damages

Where the owner is unable to clearly distinguish the contractor's responsibility for the delay from its own responsibility, the owner may not collect liquidated damages. The Superior
Court of New Jersey stated the general rule in *Buckley & Co. v. State*,\(^\text{117}\) that because neither the contractor nor the state could prove how much of the delay was attributed to either party, neither was entitled to recover from the other the losses resulting from the concurrent delay.

An older Washington Supreme Court case, *Patnude v. Pettifer*,\(^\text{118}\) tacitly acknowledges the rule that a party to a contract whose acts or omissions contribute to the delay generally cannot assess the liquidated damages for the delay. In *Patnude*, the court held that a prime contractor on a school project could not recover liquidated damages for delay from a plastering subcontractor, even though the plasterer's performance was not completed until after the completion date called for by the subcontract. The prime contractor admitted that the subcontractor could not possibly have completed the project on time, given the late date on which the work was ready for the plasterer. Since the prime contractor's site preparation contributed to the subcontractor's delay, the prime contractor did not recover any liquidated damages for the delay.

Other courts have held that regardless of whether the contract provides for the granting of an extension of time, the owner is not entitled to rely on a liquidated damage provision if the owner caused all or any part of the delay. When delayed completion has been caused by the act of both the contractor and the owner (concurrent delay), liquidated damages can be assessed for portions of the delay that can be shown to have been caused by the contractor and not the owner. However, if the owner cannot segregate the contractor-caused delays from the owner-caused delays, liquidated damages cannot be assessed.

### E. WHO OWNS THE FLOAT?

Generally, only delays which extend the critical path and the contract completion date, justify time extensions. The critical path is the planned sequence of interrelated activity elements comprising a project; delay of an element on the critical path will affect the completion date. However, contractors often argue that a delay to a non-critical activity should also support a delay claim.

The difference between the time available for performance and the necessary performance time is called the "total float." Float represents the amount of extra time potentially available for an activity if all preceding activities started as early as possible, and all subsequent activities start as late as possible. This definition presumes that the management of float is as important to the project completion as the management of critical activities. The issue of ownership of float may be rendered moot by the terms of the contractor's agreement with the owner. The first place to look when attempting to determine who is entitled to the benefit of the float is the contract. Where provisions addressing float are absent, several positions have been advanced by commentators in the area of construction scheduling and claims which should be considered in any dispute over the use of float time.

\(^\text{117}\) 356 A.2d 56 (N.J. 1975).
\(^\text{118}\) 135 Wash. 254, 237 Pac. 289 (1925).
1. **The Float Belongs to the Contractor**

   If the contractor makes a sequence of work critical by use of float time, and the owner causes a delay which may not have been critical but for the contractor's prior delay, the contractor would still be entitled to a time extension. The basis for this position is that time -- like labor, material and equipment -- is a resource which the contractor must use in managing the project to the best of its ability.

2. **The Float Belongs to the Party Who "Gets to the Float First"**

   Typically, no extensions are allowed until the float has been exhausted by the activity in question. If the owner delays a particular activity during a period when the float is available so that only five days of float remain and thereafter the contractor delays the activity for 60 days, the contractor is responsible for 55 days of delay to the project. Of course, if the contractor uses the float first and the owner then delays the activity to the point where it impacts the critical path and the project is delayed, the owner becomes responsible for the delays and the damages.

3. **Float Belongs to Either Party as Long as it is Reasonably Utilized**

   This position is somewhat of a compromise between position 1 and position 2. An activity is allocated a percentage of the float available based on the individual activity's duration. If an activity is delayed beyond its allocated float, then a time extension may be justified to preserve the allocated float of other activities in the approved schedule.

F. **EARLY COMPLETION**

   From the contractor's point of view, when it completes its work within the agreed contract completion date, but later than it would have completed but for delays caused by the owner, the contractor's costs would have been lower and its profits higher. Thus, it follows that the increased cost and lost profits should be compensable as part of the contractor's delay damages. From the owner's perspective, on the other hand, the contractor should not be able to claim delay damages until the agreed contract time has been exceeded. The fact that a contractor is able to complete the project on time or ahead of schedule, notwithstanding the complained-of delay, will not provide any defense to the owner against suspension of work or breach of implied duty claims. "An owner may not prevent a contractor's early completion of his assignment with impunity." Based on the duty not to hinder or delay the contractor, Washington courts have recognized the right of a contractor to complete early.

   To prevail in its claim for early completion, the contractor must demonstrate that its planned schedule for early completion was both reasonable and attainable. However, it is not necessary to the contractor's recovery that the contractor communicate its intent to finish early to the owner.
G. COMPUTATION OF UNABSORBED OVERHEAD/EICHLEAY FORMULA

Controversies relating to delays, disruptions, and suspensions of contract performance involve two major elements, entitlement and quantum. To recover increased costs beyond what was contemplated, the contractor must establish (1) that the delays were indeed attributable to the owner (entitlement), and (2) the amount of additional costs caused by the delays (quantum).

Additional costs arising from delays frequently include direct material, direct labor, other direct costs, and, one of the most complex items, overhead. When a project is delayed the amount of the contractor's overhead is allocated disproportionately to the delayed project.

1. Golf Landscaping

Undoubtedly the best known and most widely used method of computing unabsorbed overhead is the Eichleay formula set forth in Eichleay Corp., a 1960 Board of Contract Appeals decision.

In Golf Landscaping v. Century Co., the Washington Court of Appeals held that overhead expenses may be a legitimate component of delay damages and allowed the subcontractor recovery under the Eichleay formula.

Despite many commentators hailing the Golf decision as Washington's stamp of approval of the Eichleay formula, there are a number of significant inquiries which must be made before the Eichleay formula can be utilized for computation of unabsorbed overhead. Specifically, the Golf case involved a subcontractor's claim for unabsorbed overhead, which by definition is based on the alleged continuation of fixed expenses through the delay period:

In a claim for unabsorbed overhead, the relevant inquiry is if the delay prevented the contractor from obtaining contracts during the delay period that would have "absorbed" the ongoing overhead expense.

### Definition of Unabsorbed Overhead:

\[
\text{Delayed Contract Billings} \times \frac{\text{Contractor's Total Billings}}{\text{Total Home Office Overhead}} = \text{Allocable Home Office Overhead}
\]

\[
\frac{\text{Allowable Home Office Overhead}}{\text{Days Required to Perform the Delayed Contract}} = \text{Daily Overhead Rate for the Delayed Contract}
\]

Daily Overhead Rate x Number of Days of Delay = Overhead Damages

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119 ASBCA No. 5183, 60-2 BCA § 2,688 (1960); 61-1 BCA § 2,894 (1960).
121 COMPUTATION OF UNABSORBED OVERHEAD/EICHLEAY FORMULA
The contractor in *Golf* opposing the Eichleay claim never questioned if, in fact, Golf's overhead expenses were unabsorbed by other contracts. The contractor in *Golf* instead attacked the subcontractor's accuracy in computing the amount of damages. Unless the contractor can show that the delay prevented it from obtaining contracts during the overhead period, the Eichleay formula should not be used as a method of calculating unabsorbed overhead.

2. Federal Precedent

In *Wickham Contracting Co. v. Denis J. Fisher*,

the contractor argued that since approximately 80% of its home office activity was devoted to the delayed project, the Eichleay calculation was unfair. The Eichleay formula resulted in only 34% of the contractor's overhead expense being allocated to the delayed project. The contractor insisted that the Eichleay formula should be used only when overhead costs cannot be otherwise accurately determined. The court disagreed and unequivocally stated that the Eichleay formula is *"the only proper method"* for calculating unabsorbed overhead when a contractor otherwise satisfies the Eichleay requirements. These requirements are (1) a government-caused suspension of, or delay in, contract performance, (2) a sufficient degree of uncertainty regarding the period of delay, coupled with a requirement by the government to remain ready to resume performance on short notice (the "standby test"), and (3) the unavailability of additional work during the period of delay or suspension that would have supported the overhead otherwise allocable to the delay contract. Thus, if a contractor is able to show that any period of government-caused suspension or delay was sufficiently uncertain in duration, that the contractor was required to resume performance immediately upon its completion, and that the contractor did not take on new work to "fill the gap" caused by the suspension or delay, it would satisfy the Eichleay requirements as framed in the *Wickham* decision.

Second, the *Wickham* opinion focuses on the concept of "unabsorbed" home office overhead as opposed to "extended" home office overhead, the latter of which has been the term most often used in construction contract cases. This difference in terminology is more than semantics. Some commentators have argued that it is inappropriate to use the term "unabsorbed" overhead in the construction context because of a construction contractor's -- unlike a manufacturing contractor -- ability to obtain new work without the restriction of a limited plant capacity.

The Federal Circuit in *Mech-Con Corp. v. West*,

reaffirmed the three elements necessary to establish Eichleay, but shifted the burden of the third element to the government. Thus, if the contractor establishes a prima facie case to Eichleay relief by proving a government caused delay and "standby," at that point the government can rebut the *prima facie* case by showing that the contractor was able to take on additional work during the delay period.

Despite the shift in the burden of proof, the burden remains on the contractor to prove all elements, including that it was unable to obtain other work. In *Satellite Elec. Co. v. Dalton*,

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122 No. 93-1146 (Fed.Cir. January 6, 1994).
123 61 F.3d 883 (Fed.Cir. 1995).
124 105 F.3d 1418 (Fed. Cir. 1997).
the Federal Circuit ruled that the government failed to rebut the contractor's prima facie case by showing that it began bidding on other projects at the end of the delay period, but succeeded in rebutting the prima facie case where the contractor aggressively bid on other projects throughout the delay period. The Satellite case can be read to hold that if a contractor bids on, receives and/or is capable of obtaining additional work during the delay period, it is not entitled to use the Eichleay formula.


To recover Eichleay damages, the contractor must prove (1) there was a government caused delayed to contract performance, (2) the original time for performance of the contract was thereby extended, (3) contractor was required to remain on standby during the delay. If the contractor proves these three elements the contractor established a prima facie case of entitlement and the burden of production shifts to the government to show that it was not impractical for the contractor to take on replacement work and thereby mitigate its damages. (See *Marine Inc. v. U.S.* 187 1370 at 1376 (Fed. Cir. 1999)). If the government meets its burden of production, the contractor then bears the burden of persuasion that it was impractical for it to obtain sufficient replacement work. This third element, the "standby" requirement has led to rampant confusion and puzzlement as to how to prove Eichleay recovery.
b. **The Standby Requirement.**

1. If the contracting officer is issued a written order that suspends all work on the contract for an uncertain duration and requires the contractor to remain ready to resume work immediately or on short notice, the contractor need not offer further proof of standby. See, *Interstate Gen. Gov't Contractors, Inc. v. West* 12 F.3rd 1053, 1055, 1057 N.4 (Fed. Cir. 1993).

2. In cases where the contracting officer does not issue such a written order (which is most of the time) the contractor must then prove standby by indirect evidence. The contractor must show the following three elements of the standby rule when no such order is issued.

   - Contractor must show that the government caused delay was not only substantial but was of an **indefinite duration** (for example where the government suspends all work on the contract but tells the contractor work will begin again at a date certain. The contractor cannot be on standby.

   - The contractor must show that during the delay it was required to be ready to resume work on the contract at full speed as well as immediately.

   - The contractor must show effective suspension of much if not all of the work on the contract.

*P.J. Dick* seems to make it clear there is little chance for a contractor to recover unabsorbed overhead under this standby rule. The elements of the rule are simply too severe. It is unlikely that a contracting officer will issue a suspension order containing a requirement that the contractor be ready to immediately resume full scale work with no re-mobilization. Without such an order, the standby test is almost impossible to satisfy.

Many commentators have criticized the Eichleay formula as a means of computing damages for an absorbed overhead. It seems the court's standby rule has buried Eichleay. Now, instead of relying on the Eichleay formula to prove unabsorbed overhead recovery can still be had by "normal" accounting analysis.
Chapter VI

PAYMENT ISSUES
V.  PAYMENT ISSUES

A.  CONTINGENT PAYMENT

A common practice is to include "contingent" payment clauses in subcontract documents. The contingent payment clauses provide that subcontractors will not be paid until the general contractor is paid by the owner or until the architect approves the work. Under a contingent payment clause, the general contractor seeks to shift the risk of nonpayment by the owner from the general contractor to the subcontractor. "Pay When Paid" and "Pay If Paid" clauses are common methods of risk shifting in contraction contracts.

1.  Pay When Paid

A "Pay When Paid" clause provides that payment to the subcontractor will be made within a certain period of time after the contractor has been paid by the owner, rather than within a period of time after the subcontractor has performed its work. Generally, "Pay When Paid" clauses are interpreted merely to postpone payment for a reasonable time. They do not excuse an unpaid prime contractor from all obligations to pay the valid invoices of subcontractors and suppliers. An example of Pay When Paid" clause is:

Payment Not Contingent on Owner Payment.  It is agreed that payment by Contractor to Subcontractor hereunder is not due until 10 days after payment has been received by Contractor from Owner, or until after the passage of a reasonable time from when payment from Owner is due, whichever is sooner. "Reasonable time" as used herein shall not exceed 90 days.125

In Amelco v. Drake, Co126. the owner terminated its contract (the King Dome Contract) with the general contractor; the general contractor in turn terminated the subcontractor. The subcontract provided:

Contract Cancellation:  If the Contract between the Owner and Contractor is cancelled in whole or in part through no fault of the Contractor, this Subcontract may be cancelled by Contractor in whole or in part without liability for damages and Contractor shall be liable to Subcontractor only for the reasonable value of Subcontractor's work completed to the extent Contractor has received payment for said work from Owner.

(Emphasis added.)

The general contractor argued that this provision provided that payment by the owner to the general contractor was a condition precedent to the general contractor's liability for payment to the subcontractor. The Subcontractor in turn took the stance that the language "to the extent Contractor has received payment . . . from Owner" was designed only to delay payment for a

reasonable time and did not otherwise affect the obligation to pay as provided in the subcontract. The court, after finding that the contract language was ambiguous, noted a split on the question among other jurisdictions which have considered similar provisions and held that the clause did not create a condition precedent to payment. 127

2. Pay if Paid

By contrast, a "Pay If Paid" clause establishes payment by the owner to the contractor as a condition precedent to the contractor's duty to pay its subcontractors and suppliers. To be enforceable, the assignment of the risk of nonpayment must be clear and unambiguous; any doubt will be construed against the prime contractor. 128

Payment Contingent on Owner Payment. It is agreed that as a condition to any payment by Contractor to Subcontractor hereunder the Contractor must first receive payment from the Owner for the work of Subcontractor for which payment is sought. Subcontractor specifically agrees that it is relying upon the Owner's credit (not the Contractor's) for payment, and Subcontractor specifically accepts the risk of nonpayment by the Owner. At the reasonable request of Subcontractor, Contractor agrees to furnish such information as is reasonably available to Contractor from Owner regarding Owner's financial ability to pay for performance under the Main Contract. The parties agree Contractor does not warrant the accuracy or completeness of information provided by Owner. 129

a. Conditional Payment Clauses

Conditional payment clauses are not favored by courts or legislatures. The New York Court of Appeals refused to enforce a "Pay If Paid" clause on public policy grounds. 130 The court reached its result by noting first that a subcontractor's lien right depended upon its contract rights. 131 It then observed that a "Pay If Paid" clause could indefinitely suspend a subcontractor's contractual right to payment. It therefore concluded that a "Pay If Paid" clause amounted to a forfeiture of the subcontractor's lien right. Courts in California and Florida have reached similar conclusions. 132 Other states have addressed the conditional payment provision by way of legislation. Payment by an owner to a contractor is not a condition precedent for payment to a subcontractor. 133 States of Wisconsin, 134 Maryland 135, Illinois 136 and Missouri 137 have similar statutes. Finally where the general contractor's own actions contribute to the nonoccurrence of the condition precedent, that is if the general contractor is at fault for the nonpayment from the owner and thus, prevents or hinders the fulfillment of the condition (the

127 Id. at 903.
137 Mo. Stat. § 431-183.
payment by the owner) the pay if paid condition in the subcontract may be waived or excused.

B. PROMPT PAY ACT (RCW 39.76.010)

The public works general contractor in Washington still does not enjoy the secure position that private lien rights provides on a private project. The Prompt Pay Act, however, requires that the public body make prompt progress payments and retainage payments, or at least to inform the general contractor promptly if all or part of any payment is not forthcoming. Similarly, general contractors who decide to withhold progress payments from subcontractors and suppliers are required to give written notice to those subcontractors and suppliers of the reason for such withholding and the remedial action necessary to receive payment.

1. General Contractor Payment Rights

The public works general contractor is entitled to be paid within thirty (30) calendar days after submitting an invoice to the public body. If the public body intends to withhold the payment for unsatisfactory performance or a defective payment application, the public body must notify the contractor, in writing, within eight (8) days after receipt of the invoice stating (1) specifically why part or all of the payment request is being withheld; and (2) what remedial actions must be taken by the general contractor to receive the withheld amount. The public body may not withhold an amount greater than one hundred fifty percent (150%) of the amount in dispute which is the cost of correction of the disputed work or material. Failure to comply with these requirements will entitle the contractor to interest at one percent (1%) per month until payment is received.

a. Payment of Retainage

The retainage statute requires an unpaid subcontractor or material supplier to file a claim within forty-five (45) days after completion of the contract work. Assuming no claims are filed, the public body must pay retainage (or the balance of the retainage not covered by claims against the retainage) within sixty (60) days following completion of the contract work.

b. Attorney's Fees

Attorney's fees are to be awarded the prevailing party if there is a dispute between the prime contractor and the public body over unpaid sums.

139 RCW 39.76.011(2)(a).
140 RCW 39.76.011(1)(b).
141 RCW 39.04.250(2).
143 RCW 60.28.011.
144 RCW 60.28.011(1).
145 RCW 39.04.250.
2. Subcontractor/Supplier Payment Rights

The Prompt Pay Act requires that general contractors make payment to subcontractors not later than ten (10) work days after payment is received by the general contractor. 146 The maximum amount that can be withheld in case of a good faith dispute is one hundred fifty percent (150%) of the amount in dispute. 147 If the general contractor decides to withhold progress payments from subcontractors, it must give written notice to those subcontractors and suppliers of the reasons for such withholding and the remedial action necessary to receive payment. Copy of this notice must also be given to the public body. 148 The general contractor must pay withheld funds within eight (8) working days once the subcontractor or supplier has performed the remedial action specified in the general contractor's notice. If the general contractor fails to pay within the required time, it must pay the subcontractor interest at one percent (1%) per month on the withheld sums. 149 This may be little solace to the subcontractors and material suppliers who are already may be entitled to interest under the Bond Claim (RCW 60.28) and Retainage (RCW 39.08) statutes.

3. Retainage

The contractor or subcontractor may withhold payment of not more than five percent (5%) of sums earned by a subcontractor or sub-tier subcontractor. RCW 39.76.011 If such retainage is held, the contractor or subcontractor must pay interest on those sums at an interest rate equal to the rate it is making on the retained sums. If the general contractor is permitted by the public body to submit a bond to gain release of retention, the general contractor in turn must accept a bond from subcontractors and release retainage.

C. NON PAYMENT: WALKING OFF THE JOB

The right of the contractor to walk off the job for non-payment by the prime contractor is related to the common law principle of "failure of consideration." Under this doctrine, a party may be discharged from rendering further performance when the breach by the other contracting party is so material as to constitute a failure of consideration. Whether a particular failure is sufficiently material may depend on subcontract clauses (and prime contract clauses to the extent the subcontract incorporates provisions of the owner's contract). 150 Additionally, the common law recognizes a distinction between total and partial breach in determining whether a party may stop performance. Thus, it is said that a total breach usually terminates the duty of another party to perform. Despite a partial breach however, the non-breaching party may have a duty to continue performance. 151

The Supreme Court has recognized the right of a contractor to discontinue performance upon non-payment. In Guerini, 152 the Supreme Court stated:

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146 RCW 39.04.250(1).
147 RCW 60.28.020 and 39.04.250(2).
148 RCW 29.76.011(2)(e)(i).
149 See RCW 39.76.010(1)(a)(ii).
150 See RCW 39.76.010(1)(a)(ii).
The Circuit Court of Appeals very properly held that in a building or construction contract, like the one in question, . . . calling for the furnishing of materials covering a long period of time and involving large expenditures, a stipulation for payments on account to be made from time to time during the progress of the work must be deemed so material that a substantial failure to pay would justify the contractor in declining to proceed.

A breach of contract can be material or immaterial. A material breach of contract without justifiable excuse releases the non-breaching party from further performance.\(^{153}\) A material breach is cause for repudiation of a contract\(^ {154}\) -- it "will justify the other party in refusing to further perform."\(^ {155}\) Nonpayment may amount to a material breach, depending on the circumstances of the particular situation.\(^ {156}\)

In *CKP, Inc. v. GRS Constr.*,\(^ {157}\) CKP entered into a subcontract with GRS, the prime contractor, to perform site work and utility installation for the construction of an apartment complex. GRS threatened to withhold payment on grounds that the subcontractor refused to agree to a contract modification. The subcontractor never agreed to the proposed modification, walked off the job, filed a claim of lien, and brought a foreclosure suit.

On the issue of whether the threatened withholding of payment amounted to repudiation of contract justifying the subcontractor's walkout, the court stated:

Reputation of a contract by one party may be treated by the other as a breach which will excuse the other's performance.

* * *

The overwhelming evidence in the record is that GRS repeatedly threatened to withhold payment from CKP unless it signed Contract Modification 2. That was a repudiation by GRS of its contract and an anticipatory breach thereof. We therefore conclude that CKP was justified in walking off the job.\(^ {158}\)

Walking off the job or stopping the work should be a remedy of last resort, because whether or not the nonpayment amounts to a material breach is a fact determination weighed by the court, taking into consideration the circumstances of the particular case. Not all failures to make payment will be considered a material breach. If the contractor guesses wrong and the nonpayment did not amount to a material breach, stopping work can be financially disastrous.

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\(^{154}\) *Cartozian v. Ostruske-Murphy, Inc.*, 64 Wn.2d at 5-6.


\(^{156}\) *Anderson v. MacDonald*, 31 Wash. 274, 71 Pac. 1037 (1903) (failure to make a progress payment is a substantial breach of a building contract); *Jacks v. Blazer*, 39 Wn.2d 277, 385, 235 P.2d 187 (1951).


\(^{158}\) Id. at 620.
Chapter VII

AMBIGUITIES IN CONTRACT DOCUMENTS
VI. AMBIGUITIES IN CONTRACT DOCUMENTS

A. IMPLIED WARRANTY OF PLANS AND SPECIFICATIONS

A basic principle of construction law is that one who furnishes plans and specifications for a project impliedly warrants that the plans and specifications are workable and sufficient. A long line of Washington cases recognizes this rule.\footnote{Weston v. New Bethel Baptist Church, 23 Wn. App. 747, 753, 598 P.2d 411 (1978); Seattle v. Dyad Construction, 17 Wn. App. 501, 519, 565 P.2d 423 (1977), review denied, 91 Wn.2nd 1007 (1978).} In Dyad Construction the owner originally designed a sewer line to cut through tide flats skirting the base of a shoreline bluff. The design caused such severe problems that the contractor's work was stopped. Construction, according to the design was impractical, dangerous and expensive. The State safety inspector corroborated the contractor's position when he determined the design to be unsafe. Completion was delayed by four (4) months because of the need to redesign the project. Because the owner's first design was inadequate, it took nearly eight months for the owner to develop constructible plans. The appellant court ruled:

\[\text{[T]he factual situation in this case dictates that the contractor be awarded damages, as well as being permitted to an extension of time for performance. The delay was not contemplated by the parties at the time of entering the contract, the delay was unreasonable in duration, its results, in part, from act of interference of the owner, [breach of the implied warranty of adequacy and sufficiency of the plans and specifications] with the work of the contractor.}\]

In Hoye v. Century Bldrs.,\footnote{52 Wn.2d 830, 833, 329 P.2d 474 (1958).} the Washington State Supreme Court stated:

\[\text{[I]f a party furnishes specifications and plans for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purpose in view.}\]

The Supreme Court of Alaska concisely defined the owner's implied warranty of the design:

\[\text{Unlike design professionals, project owners owe purely contractual duties as to the accuracy of the designs. When providing plans and specifications to a contractor, an owner makes an implied warranty that they will be sufficient for the particular purpose. If defective specifications cause the contractor to incur extra costs in performing the contract, then the contractor may recover those costs that result from breach of the implied warranty. The implied}\]

\footnote{Dyad Construction, 17 Wn. App. at 519.}
warranty is part of the bargain between the owner and independent contractor and does not exist outside the contract.\textsuperscript{162}

The leading case for the implied warranty of the plans and specifications is \textit{United States v. Spearin}.\textsuperscript{163} This rule is often referred to as the "Spearin Doctrine." Under this doctrine, the contractor's recovery under the implied warranty of the specifications is dependent upon proof that the defective specifications caused the performance difficulties and that the contractor reasonably relied upon the specifications. These factors are determined by analyzing the information available to the contractor and the contractor's activities during the bidding and performance periods of the project. Claims based upon breach of the implied warranty of the specifications will not be successful if the contractor had actual or constructive knowledge of the defects prior to award. A contractor will also not recover under the theory of implied warranty of the specifications, if it does not adhere to the specifications, if it uses the specifications after having learned of their deficiencies, or if its increased costs are not caused by the defective specifications.

\textbf{B. \hspace{0.5em} DEFICIENT CONTRACT DOCUMENTS}

\textbf{1. Ambiguity Defined}

To paraphrase Justice Holmes, words are not crystal immutable objects but are rather the skin of living thoughts that vary greatly in color and content according to circumstances.\textsuperscript{164} An ambiguity exists where the contract language, taken as a whole, is fairly susceptible to two opposing interpretations, both of which are reasonable.\textsuperscript{165} "Ambiguity" is distinct from "indefiniteness" When language is indefinite or vague, it is not possible to reach even one reasonable meaning of the language.\textsuperscript{166} Where a provision, taken as a whole, is readily subject to different reasonable interpretations, the provision is considered "ambiguous." To prove an ambiguity, it is not necessary that the contractor prove that its interpretation is the only reasonable one or even the best one; but rather that the language is reasonably susceptible of the understanding that the contractor urges.

True ambiguity is a relatively rare. Most often what passes for an ambiguity is in reality a conflict in contract provisions. This is particularly so in the case of construction contracts. Construction contracts often consist of numerous documents, including the principal agreement, the general conditions, supplementary conditions, specifications and drawings. Of course, as the number of contract documents and contractual provisions increases so does this possibility that contractual language will conflict. The situation becomes even more complex when subsequent contract modifications such as change orders are thrown into the mix. Generally what is termed in ambiguity is in fact a conflict.

\textsuperscript{162} State of Alaska, Department of Natural Resources v. Transamerica Premier Insurance Co., 856 P.2d 766 (Alaska 1993).
\textsuperscript{163} 248 U.S. 132 (1918).
\textsuperscript{165} Community Heating & Plumbing Co., Inc. v. Kelso, 987 F.2d 1575, 1579 (Fed. Cir. 1993) ("A latent ambiguity exists where a contract is susceptible of two different and reasonable interpretations, each of which is found to be consistent with the contract language.").
\textsuperscript{166} See Burden v. Thomas, 104 Ga. App. 300, 121 SE 2nd 684 (1961) (Discussing the difference between "ambiguity" and indefiniteness").
2. General Rule: Interpretation Against the Drafter

Unless the nondrafting party knew or should have known of an ambiguity, the risk of ambiguities in contract language is generally allocated to the party responsible for drafting the contract document. The rule of construing conflicting provisions against the drafter of the documents is used when all of the means of resolving an ambiguity prove unsuccessful.

The basic rationale for construing ambiguities against the drafter was stated in Peter Kiewit Sons' Co. v. U.S.

When the government draws specifications, which are fairly susceptible of certain construction and the contractor actually and reasonably so construes them, justice and equity require that that construction be adopted. Where one of the parties to a contract draws the document and uses therein language which is susceptible of more than one meaning, and the intention of the parties does not otherwise appear, that meaning will be given the document which is more favorable to the party who did not draw it. This rule is especially applicable to government contracts where the contractor has nothing to say as to its provisions.

Contractors' natural inclination is to submit the lowest possible bid. Contractors tend to resolve ambiguities in their own favor when competing with other contractors. Federal Court of Appeals has recognized this tendency:

[C]ontractors are businessmen, and in the business of bidding on government contracts they are usually pressed for time and are consciously seeking to underbid a number of competitors. Consequently, they estimate only those acts, which they feel the contract terms will permit the government to insist upon in the way of performance. They are obligated to bring to the government's attention major discrepancies or errors which they detect in the specifications or drawings, or else they fail to do so at their peril. But they are not expected to exercise clairvoyance in spotting hidden ambiguities in the bid documents, and they are protected if they innocently construe an ambiguity equally susceptible to another construction.

In most public and private contract, before a contractor may rely upon the doctrine of construing ambiguous specifications against the drafter, a contractor must establish that the ambiguity is latent rather than patent or that a contractor has sought clarification of the patently ambiguous specification. The practical effect of this rule creates an affirmative obligation among prospective bidders: they must discover patently ambiguous specifications and seek

167 Sofarell & Assoc., Inc. v. United States, 1 Ct.Cl. 241 (1982); WFC Enters., Inc. v. United States, 223 F.2d 874 (Ct.Cl. 1963).
168 5 Corbin on Contracts Section 24.27.
169 109 Ct.Cl. 390 (1947) at 418.
clarification from the owner before bidding. A failure to discharge this error-detection obligation will result in a harsh rule: ambiguities will be strictly construed against the nondrafter.

3. **Latent Ambiguities**

A contract requirement is latently ambiguous if it is subject to more than one reasonable interpretation and the ambiguity is sufficiently subtle so that an experienced contractor would not be expected to detect the problem prior to bid submittal.\(^{171}\) If the contractor relied upon its reasonable interpretation when pricing the work and the owner imposes a contrary interpretation, the contractor may recover for a constructive change.

4. **Patent Ambiguities**

An ambiguity is patent if it is so obvious that an experienced contractor should detect it prior to bid submittal. This does not mean an irrevocable conflict exists within the contract documents. As with latent ambiguities, patently ambiguous contract requirements are subject to more than one reasonable interpretation. The conflict must be so obvious that the contractor is expected to notify the project owner prior to bid submittal and seek clarification.

The courts and boards have used a number of objective criteria in determining obviousness:

- The ratio the contractor sought recovery compared to the total price. The court found no duty to inquire when the claim was $19,764 compared to a contract price of $4,918,600.\(^{172}\)

- The conduct of all bidders during the bidding period. All five bidders failed to discover a conflict that existed in the solicitation.\(^{173}\)

- The importance of the disputed work to the entire contract requirement.\(^{174}\)

In *Newsom v. United States*, 230 Ct.Cl. 301, 676 F.2d 647 (1982), where the specifications required construction on the second floor of buildings 81, 82 and 85, whereas the drawings required the construction on the second floor of building 85 only, the Court found an obvious conflict between the drawings and specifications, and thus, construed the ambiguity against the contractor.

Placement of sprinkler heads in the center of ceiling tiles was a latent ambiguity where the specification required sprinklers to be located where shown drawings and the drawings stated that the sprinkler locations are “suggested” and for “design intent only”.\(^{175}\)

\(^{171}\) *L.B. Samford, Inc.*, ASBCA 19138, 76-1 BCA ¶11,684.


\(^{173}\) *Robert L. Guyler Co.*, ASBCA 20371, 76-1 BCA ¶11,690.

\(^{174}\) *L.B. Samford, Inc.*, ASBCA 19138, 76-1 BCA ¶11,684.

C. ORDER OF PRECEDENCE CLAUSE

An order of precedence clause identifies the controlling contract language. If the conflict in the contract drawings can be resolved by reference to the order of precedence clause, no ambiguity exists.

A standard order of precedence clause will instruct the order that documents should be considered to resolve or discrepancies among the Contract Documents. Interpretations are also based on the following order of priority:

- Any Amendments to the Construction Contract and any Change Orders executed by Owner and Contractor, and any Construction Change Directives executed by Owner, with those of later date having precedence over those of earlier date;
- The Agreement;
- The Special Conditions, if any;
- The General Conditions;
- The Specifications and Drawings; and
- Those other Bid Documents not specified above.