

### **III. Taking Action When You Have A Defective Bid**

#### **A. Potential Liability for Bid Errors**

A contractor's bid is an offer to construct a project for a price. The bid need not be in writing. In fact, many bids are not in writing. If the bid is submitted to an owner or a general contractor who then accepts the bid, a binding contract may then exist at that price. However, when there is an error in the bid, there may be trouble with a capital "T".

The analysis may change depending on when the bid error is discovered. Generally, the earlier the bid error is discovered, the more easily the contractor can correct or withdraw the bid. If the contractor wants relief from the bid error, he must notify the owner or architect/engineer as soon as the bid error is discovered, again, the earlier the better. Court cases which have granted relief do so only when the contractor is quick to discover and report the error.

Since time is important, there are discrete mile stones along the project path which help to define the periods at issue. The mile stones include the time (1) before the bid opening, (2) after the bid opening to before the contract award, (3) after the contract award but before construction has commenced, and (4) after commencement of construction.

For the bidder to be relieved from a bid error, the court will first determine the nature of the error. If the error is "remediable," the contractor is more likely to gain relief. The Texas Supreme Court has developed the following test for a "remediable error":

1. The mistake is of so great a consequence that to enforce the contract as made would be unconscionable;
2. The mistake relates to a material feature of the contract;
3. The mistake must have been made regardless of the exercise of ordinary care; and

4. The parties can be placed in status quo in the equity sense, i.e., rescission must not result in prejudice to the other party except for loss of his bargain.

*James T. Taylor & Son v. Arlington Independent School District*, 335 S.W.2d 371 (Tex. 1960).

The types of errors that courts construe as “remediable” and will normally remedy are of a clerical nature, such as a mistake in transcribing numbers from work sheets to the actual bid or in arithmetic. Other clerical mistakes include: “(1) obvious misplacement of a decimal point, (2) obviously incorrect discounts (for example, 1 percent 10 days, 2 percent 20 days, 5 percent 30 days), (3) obvious reversal of the price f.o.b. destination and the price f.o.b. origin, and (4) obvious mistake in designation of unit.” Federal Acquisition Regulations (“FAR”) 14.406-2.

Mistakes which are not readily apparent from the face of the bid may be correctable with the proper showing include: insertion of the wrong number of days in the bid acceptance block during transcription of long hand notes, and the entry of \$0 to mean base hourly rate of \$7.10. Mistakes of judgment, such as underestimating the cost of labor or materials, determining the capacity to perform the work at all, or making a prediction of site conditions, will not normally support relief. Other mistakes not readily forgiven include: failure to obtain a firm quote from a supplier who later raised its prices; failure to foresee the required manner of performance; failure to correctly estimate the length of performance; failure to anticipate overhead associated with operation of certain government-furnished equipment; making a judgment error on estimating probable costs; or maintaining an overly optimistic or improvident approach to performance of the contract.

In *James T. Taylor & Son v. Arlington Independent School District*, 335 S.W.2d 371 (Tex. 1960), a school district solicited competitive bids to construct a junior high school.

Taylor's estimator was rushed for time and made an arithmetic mistake of \$100,000 by failing to carry a digit in his addition. The school district accepted the bid after the estimator assured the district that the figure was correct. When the estimator discovered the error the next day, the contractor immediately notified the district. The contractor refused to sign the formal contract, and the district awarded the contract to the next lowest bidder. The only additional costs the district incurred were the difference in bids between the bidders. The district sued for the difference.

In *Taylor*, the Texas Supreme Court set out the standard for relieving a contractor from a bid mistake:

It seems to us to be well settled that even after acceptance of a bid, but before the execution of the contract contemplated by the parties, a bidder for a public contract who makes a remediable mistake in his bid may, by giving notice thereof before material change of position to the detriment of the offeree, obtain rescission of the bid or relief against its enforcement.

The key to relief is the determination that the contractor's mistake was remediable. If the mistake was so great that enforcement of the contract would be unconscionable, the mistake relates to a material term, the mistake would have been made regardless of the exercise of ordinary care, and the parties can be placed in status quo, the mistake can be "remediable." The *Taylor* court issued the following guidance for determining whether a mistake is remediable:

Generally it is only when negligence amounts to such carelessness or lack of good faith in calculation which violates a positive duty in making up a bid, taking into

consideration the nature of the transaction and the position of the opposite contracting party, that equitable relief will be denied.

The court acknowledged that the bidding process was hectic and pressure packed, and only required that the contractor exercise the minimum degree of care which the owners could reasonably expect of the bidders in light of the circumstances of the transaction and the practice of the trade.

Sometimes, the bidder makes an error and hopes that the owner will take full advantage of the error just so the bid is accepted. In *Associated General Contractors of Texas, Inc. v. City of Corpus Christi*, 694 S.W.2d 581 (Tex.App. -- Corpus Christi 1985), the apparent low bidder submitted a bid to a city with a discrepancy between the bid per square yard of paving and the total dollar amount bid for the paving work. The city advised the bidder of the error and the bidder agreed to be bound by the lower figure. The city then let the contract to the bidder at the lesser figure.

Taxpayers then filed suit to block the award. The court examined the city's charter and observed that the city had the right to select the bid most advantageous to the city, and to reject all other bids. The court then upheld the bidder's agreement to be bound by the lesser figure and the city's award to the bidder. *Id.* at 583.

### **1. Subcontractors and Vendors and Promissory Estoppel**

During the bidding phase of a project, prospective contractors, subcontractors, and vendors review some or all of the bid solicitations documents, including the plans and

specifications to prepare material takeoffs and cost estimates. When a subcontractor or vendor submits a bid to a general contractor, that initial bid may be written. As the bid opening approaches, the subcontractor or vendor may call the general contractor and orally cut the price. If the general contractor relies on that bid in pricing its own bid for the project, the general contractor can force the subcontractor or vendor to honor its price. Courts will enforce the bid based on a doctrine known as promissory estoppel.

Promissory estoppel is an equitable doctrine, which essentially compels a promisor to fulfill its promise, if the other person relied to his detriment on the promise. More specifically, if one person makes a promise to another, and the promise was one that reasonably should have induced action or inaction by the other person, and it did induce action or inaction by the other person, then courts will estop the promisor from reneging on his promise.

In the case, *Sipco Services Marine v. Wyatt Field Services*, 857 S.W.2d 602 (Tex.App. -- Houston [1<sup>st</sup> Dist.] 1993), a subcontractor submitted a bid to a general contractor, who used the subcontractor's bid to calculate its own bid for a project. The owner accepted the general contractor's bid and the parties signed a contract. The subcontractor attempted to renege on its bid to the general contractor arguing that its bid did not cover the actual project conditions. The general contractor successfully sued to have the subcontractor honor its bid, even though the subcontractor contended that the general had shopped the subcontractor's bid, and had tried to "chisel" the subcontractor's price.

In *Montgomery Industries International v. Thomas Construction Co.*, 620 F.2d 91 (5<sup>th</sup> Cir. 1980), a subcontractor provided a telephone bid to a general contractor, who used the bid in its own bid to the owner. The subcontractor then refused to honor its bid without an increase in

money. The general contractor agreed under pressure, but later refused to pay the increase after the work was complete. The subcontractor then sued the general contractor for the increased money, and lost. The United States Fifth Circuit Court of Appeals observed that “In Texas, a subcontractor who submits a bid offer to a general contractor, knowing that the general contractor is going to rely on its bid in submitting the general bid, is bound unless it is clearly shown that the subcontractor’s bid offer was not final.”

In *Preload Technology v. AB & J Construction Co.*, 696 F.2d 1080 (5<sup>th</sup> Cir. 1983), a general contractor solicited a bid from a subcontractor for earthwork and piping. After reviewing the bid, the general contractor asked the subcontractor to verify its bid. The subcontractor did so and submitted a new bid \$30,000 higher than its prior bid. The general contractor accepted the revised bid, which the subcontractor confirmed in writing. The subcontractor later refused to perform the work on the project arguing that its bid was not final because there were too many open terms, and that the parties intended to be bound only by a written subcontract which the subcontractor never signed. The court enforced the revised bid, and rejected the notion that the bid could not be binding simply because the parties intended later to sign a formal subcontract.

## **B. Correction of Bid Prior to Award**

Normally, a contractor may freely change, correct, or withdraw its bid prior to the bids being opened. Bids may have to be changed to reflect late cuts by suppliers or errors in calculation. The reasoning for free correction is that since the bid opening date has not yet arrived, the owner has not yet relied on the bid. All of the other bidders are similarly free to

change or withdraw their bids. This freedom may be overridden by the terms of the bid solicitation. The bid solicitation may set out a specific procedure which must be followed to correct or withdraw bids.

Correcting the bid after the bids are opened is another story, however. Allowing the free correction of opened bids would destroy the concept of sealed and competitive bids. As a result, bids are generally viewed as irrevocable after the bid opening, unless certain equitable circumstances exist.

### **1. Unilateral Vs. Mutual Mistake**

Often, a contractor wants to correct or withdraw his bid because he has made a mistake. Mistakes come in two flavors -- unilateral and mutual. A unilateral mistake is one made by one party, often an error in adding or omission of bid elements. The other party has no involvement or cause in a unilateral mistake.

A mutual mistake is one where both parties have erred about an important term or condition of the contract. Say for example, a farmer agrees to sell his field of wheat to a buyer for a certain price. Both parties were familiar with the wheat field and had the same expectations about the quality and amount of wheat. If the parties then went to the field to deliver the wheat and found that lightning had struck and burned the field, the parties would be mutually mistaken about the existence of the wheat. A court would allow the seller out of his agreement to sell the wheat.

As another example, say the owner and a contractor both believed that a house could be constructed in accordance with a certain set of architectural plans. Unfortunately, the plans were

in error and the house could not be constructed as shown. As a result, the parties were mutually mistaken about an essential part of the contract. In a similar case, the court did not require a contractor to build the house because both contractor and owner were mutually mistaken as to the feasibility of using the plans. Since both parties had the same misconception, the court held that it would be inequitable to require the contractor to spend the extra money it would take to construct a home which could not be built as per the agreed upon plans. See *Newell v. Mosley*, 469 S.W.2d 481 (Tex.Civ.App. -- Tyler 1971, writ ref'd n.r.e.).

Sometimes it is difficult to tell the difference between a unilateral mistake and a mutual mistake. This problem is especially difficult if one party, say the owner, knows about a certain condition but does not tell the contractor, and the contractor makes a reasonable but erroneous assumption about the condition. If the actual construction would be more expensive as a result of the condition, the parties may fight over what if any thing the owner knew, when the owner knew it, whether the contractor should have also known, and whether the mistake was unilateral or mutual.

In a partnership case, the parties disputed whether particular assets were partnership assets when the partnership agreement was unclear about them. The court ultimately allowed a rescission of the agreement, returning to each their respective contributions to the partnership. The court relied on the doctrine of mutual mistake. The court stated that due to the misconception of the parties, there was no objective meeting of the minds between them. As a result, the court declared that no contract ever existed. See *Volpe v. Schlobohm*, 614 S.W.2d 615 (Tex.Civ.App. -- Texarkana 1981, no writ).

The *Volpe* court explained that a mutual mistake can occur by misconception as to a



common fact where: (1) although the parties know the extent of their agreement, the common mistake prevents the agreement from accurately stating the understanding, and (2) when the contract is unclear and the parties have a difference of opinion as to a material matter not expressed. If the second requirement is not met and the terms of the agreement are unambiguous, the defense of mutual mistake has been ruled to be unavailable as a matter of law. The court further noted that a mutual mistake need not be identical for both sides. If, for example, the parties had a different understanding as to the subject matter, or as to the identity, character, or quantity of a material portion of the agreement, the contract might be rescinded.

Simply showing that certain agreed upon work has become more difficult due to some unforeseen reason may not be enough to allow a contractor to escape from an agreement or receive extra compensation, particularly where the essence of the contract can still be performed. Incorrectly predicting a future fact, such as the nature of subsoil conditions, that is known to be uncertain at the time of bidding, will not excuse a contractor from performance. Mistakenly predicting a future condition is viewed either as a unilateral mistake of judgment on the contractor's part or as not material enough to support relief under the mutual mistake doctrine.

If an owner makes representations to the contractor, which turn out to be incorrect, the owner may not be able to hold the contractor to its bid price. If the owner has an obligation to provide proper plans and specifications, and fails to do so and the plans or specifications turn out to be defective, the owner may again not be able to hold the contractor to its bid price.

In one case, a general contractor and subcontractor contracted to install ventilation equipment subject to an architect's approval. The subcontractor specifically told the general contractor that its bid was based on a particular kind of equipment, which the architect ultimately

rejected. Following the rejection, the subcontractor proposed to install different equipment at a higher price. When the owner refused the price increase, the subcontractor excused himself from the project. The general contractor secured another subcontractor for the work, and sued the original subcontractor for breach of subcontract. The court absolved the subcontractor since the subcontractor's specification of the equipment he intended to use overrode the requirement for architectural approval. *Brown v. McBryde*, 622 S.W.2d 596 (Tex. Civ.App. -- Tyler 1981, no writ).

## **2. Federal Contracts**

In federal contracts, the bidder may have two remedies for a bid mistake. He may be able to withdraw the bid or his price may be corrected to reflect the error. (In contrast, in Texas, bidders generally are only able to withdraw their bid.) However, the bidder has a stiff burden to escape from a bid mistake.

Under federal contracts, the contracting officer is required by regulation to examine all bids for mistakes. FAR 14.406-1. If the contracting officer has reason to believe that a bidder has made an error, the contracting officer must alert the bidder to the suspected error and request that the bidder verify its bid. The Court of Claims set out the error alerting standard as follows:

In the area of bid mistakes, if the contractor makes a mathematical error in preparing the bid, and there is such a disparity between that bid and the other bids or among the bidder's own figures that the government should reasonably be aware there was an error, then the government is obligated to so inform the contractor. The failure of the government to do so is overreaching under the law

of equity and justifies reformation.

*American Shipbuilding Co. v. United States*, 654 F.2d 75 (Ct.Cl. 1981).

Under federal law, the rationale underlying verification is based on the distinction between unilateral and mutual mistakes. A unilateral mistake is the problem of the mistaken party. However, since a mutual mistake is caused in some fashion by both parties, the contract which results does not reflect the actual agreement of the parties. When only one party makes a mistake, but the other party knows or should know of the mistake, then equitable relief, either reformation or rescission of the contract, may be available to the mistaken party. *Wender Presses v. United States*, 343 F.2d 961 (Ct.Cl. 1965).

When the contracting officer requires a bid verification, and the bidder then confirms its bid, the contracting officer's subsequent acceptance of the bid usually results in a binding inescapable contract. *Fadeley v. United States*, 15 Cl.Ct. 706 (1988)(contractor could not withdraw bid where contractor verified bid, the mistake was unilateral, and contractor was found to have been negligent in the estimation of materials).

The federal regulations list certain mistakes which the contracting officer is expected to find: obvious error in placing decimal point, obvious discount errors, obvious errors in designation of unit prices, and obvious reversal of price f.o.b. destination and f.o.b. factory. FAR 14.406-2.

A substantial disparity between the low and other bids is the most frequent indication of a possible mistake which gives rise to a government duty to seek verification. There are no hard rules as to when a contracting officer should suspect a mistake. The Comptroller General has held that a 35 percent difference between the low bidder and next low bidder gave constructive

notice to the contracting officer to suspect a mistake. On the other hand, a 10.5 percent disparity from low to next low bidder was not enough to alert the contracting officer to a possible mistake. However, while denying relief to a contractor, the Comptroller General referred to a 9 percent differential as “substantial.” *Prince Construction Co.*, B-196726, Jan 9, 1980, 80-1 CPD ¶29.

Other indications of a mistake in bid that may put the contracting officer on notice include: a dealer underbidding the manufacturer, a small business bidding considerable lower than a large business, or a low bid that is substantially out of line with the other bids, the government estimate, or past experience with similar procurements.

The contracting officer must consider all of the circumstances surrounding the acquisition to determine if verification is necessary. These circumstances include the full range of bids, as well as the government estimate. In *M.K.B Manufacturing Corp.*, 59 Comp. Gen. 195, 80-1 CPD ¶34 (1980), the Comptroller General discussed the circumstances that give rise to the government’s duty to request verification:

It is true that bid disparities ranging from 5 to 38 percent may be insufficient, *standing alone*, to charge a contracting officer with constructive notice of a possible mistake. Here, however, there are additional factors which when considered with the 25 percent difference, should have placed the contracting officer on notice of a possible error in MKB’s bid. Those factors include an approximately 42 percent difference between MKB’s bid and the average of the next three low bids which were within a very narrow range of less than 4 percent, and the second through fourth bids were in a range of less than 14 percent. (After the fourth bid there was a sharp departure from the reasonable progression of

bids.) We have recognized that such a bidding range is a factor in determining whether a contracting officer was on constructive notice of an error.

In addition, there was a significant disparity between the Government estimate and the prices bid, MKB's bid was 28 percent below the Government estimate while all other bids were within 5 percent of the estimate or exceeded it. This too is indicative of constructive notice.

A simple bid disparity, which does not cause the contracting officer to suspect a mistake, does not impose a duty to request verification. *Hankins Construction Co. v. United States*, 838 F.2d 1194 (Fed.Cir. 1988)(since for preceding two years, bidders bid well below government's estimate on other projects, contracting officer had no reason to suspect mistake and had no duty to verify the contractor's bid).

The contracting officer's duty to request bid verification is based on a standard of reasonableness and he is not required to be clairvoyant in discovering mistakes. This standard was firmly established in *Wender Presses v. United States*, 343 F.2d 961 (Ct.Cl. 1965):

The task of ascertaining what an official in charge of accepting bids "should" have known or suspected, is, of course, not always an easy one. Mistake-making contractors will naturally seek to impose upon such officials a rather high level of brilliance for the purpose of detecting the error. If, for instance, the knowledge of the government's "staff of experts" available to the contracting officer is imparted to such officer . . . then what the contracting officer "should" have known would

cover a very wide range indeed. However, the test . . . must be that of reasonableness, *i.e.*, whether under the facts and circumstances of the particular case there were any factors which reasonably should have raised the presumption of error in the mind of the contracting officer . . . without making it necessary for the agency's experts in every case to assume the burden of examining every . . . bid for possible error.

(Citations omitted.)

If the contracting officer seeks verification, the request for verification must be adequate.

The Federal Acquisition Regulations provide:

Suspected or alleged mistakes in bids shall be processed as follows. A mere statement by the administrative officials that they are satisfied that an error was made is insufficient.

(1) The contracting officer shall immediately request the bidder to verify the bid. Action taken to verify bids must be sufficient to reasonably assure the contracting officer that the bid as confirmed is without error, or to elicit the allegation of a mistake by the bidder. To assure that the bidder will be put on notice of a mistake suspected by the contracting officer, the bidder should be advised as appropriate --

- (i) That its bid is so much lower than the other bids or the Government's estimate as to indicate a possibility of error;
- (ii) Of important or unusual characteristics of the specifications;
- (iii) Of changes in requirements from previous purchases of a similar item;

or

(iv) Of any other information, proper for disclosure, that leads the contracting officer to believe that there is a mistake in bid.

FAR 14.406-3(g)(1).

There is no requirement that the verification be in writing; however, the contracting officer's request for verification must disclose the facts and circumstances that gave rise to the suspicion of possible mistake. *Electro Research*, B-194231, Mar. 29, 1979, 79-1 CPD ¶219 (contracting officer's telling bidder that his bid was "a little out of line with the other bids" was inadequate request for verification when the low bid was 37 percent below the next low bid and 56 percent below government's estimate).

The bidder must be given adequate time to check its bid papers and to respond to the verification request. FAR 14.406-3. Generally, a request for an on-the-spot verification at the bid opening does not allow a bidder a reasonable time to check its bid, and reformation or rescission of the contract may be appropriate. *Iberville Services, Inc.*, B-196543, Mar. 25, 1981, 81-1 CPD ¶221.

### **3. Duties of bidders**

If a bidder has made a mistake and wants to withdraw his bid prior to contract award, either on his own initiative or in response to a request for verification, the bidder must promptly submit a request for modification or withdrawal. This request should be submitted with evidence such as (1) sworn statements; (2) worksheets; (3) subcontractor quotations; (4) published price lists or other documents which tend to establish conclusively (a) the existence of a mistake, (b)

how it occurred, and (c) where correction is requested, for the intended bid. FAR 14.406-3.

If the bidder wants to correct his bid, he must submit evidence that is clear and convincing or, in other words, the evidence must be such that it leaves no substantial or serious doubt as to the result. *Vrooman Constructors, Inc.*, B-226965.2, June 17, 1987, 87-1 CPD ¶606 (bid may be corrected when work papers contain clear and convincing evidence that low bidder mistakenly omitted certain costs from its bid; bidder here allowed to correct bid upward to reflect costs mistakenly omitted; award proper since corrected bid remained low).

Prompt submission is a must. The request will be denied for unreasonable delay. When a bidder orally expressed doubt about the correctness of its bid two days after opening, yet failed to submit any evidence in support of its allegation, equitable relief was denied. Similarly, a contractor was denied correction or withdrawal of its bid when he waited five weeks to respond to the contracting officer's request for verification of the bid. The Comptroller General upheld the contracting officer's decision to accept the bid uncorrected.

The head of the procuring agency has ample discretion to decide whether to allow correction or withdrawal. Any interested party who disagrees with the procuring agency's decision may appeal the matter to the Comptroller General or file suit in the Court of Federal Claims.

#### **4. No Displacement of Bids**

If correcting one bid displaces another low acceptable bid, correction may not be permitted unless the value of bid actually intended is clear from the face of the bid itself. If, however, third parties outside the bidder's control have certain types of evidence, the bidder may



submit such evidence to support reformation or rescission or correction. See *OTKM Construction Co.*, B-219619, Sept. 5, 1985, 85-2 CPD ¶273 (where bidder made a mistake in adding five subtotals on bid form, and the intended, correct amount could be determined from face of bid itself, bidder allowed to correct its mistake and displace apparent low bidder); *Wilkinson & Jenkins Construction Co.*, B-182687, Feb. 4, 1975, 75-1 CPD ¶77 (where bidder entered unit price and extended price based on incorrect estimated quantity; contracting officer could not correct bid and displace low bidder because it was not clear from face of bid that bidder would not have bid a higher unit price for lower quantity).

### **C. Correction of Bid After Award**

The stakes are different if the bidder first discovers and announces a bid mistake after contract award. To be eligible for correction or rescission, the contractor must show either: (1) the contracting officer was on actual notice that a mistake had occurred, or (2) that the contracting officer was on constructive notice of mistake at the time of award, *i.e.*, that the contracting officer, by the facts and circumstances of the bidding documents should have known that a mistake in bid existed.

Where the contracting officer has actual notice, the situation is relatively clear-cut. If the contracting officer has actual notice of the mistake and awards the contract anyway, the contractor is usually entitled to equitable relief, since no valid contract can exist. For the contracting officer to be on actual notice of the mistake, the contracting officer, personally, must have received notice before he or she makes the award. Simply showing that notice was sent before the award is not sufficient. *Robert McMullan & Son, Inc.*, B-185032, Aug. 3, 1976, 76-2

CPD ¶115 (contracting officer did not receive notice of mistake until after award, even though government installation received notice before award).

Most mistake cases involve the sufficiency of constructive notice. The Comptroller General has defined constructive notice as: “when the contracting officer, considering all the facts and circumstances of a case, should have known of the possibility of an error in a bid.” If the contracting officer knew or should have known of the possibility of an error in a bid, but failed to request bid verification and awarded the contract, there can be no valid, binding contract. *Wender Presses v. United States*, 343 F.2d 961 (Ct.Cl. 1965).

If the contracting officer had actual or constructive notice of a bid error but failed to obtain proper verification, the contract may either be reformed to correct the price or rescinded. The choice of remedy depends on the extent of contract performance. If the intended bid price cannot be readily ascertained and performance has not begun, the contract will in all likelihood be canceled with no liability to either party. *Crimson Enterprises*, B-213229, May 8, 1984, 84-1 CPD ¶513. When the intended bid price as corrected, is the low, responsible bid, the contract will probably be reformed, regardless of the status of performance. 46 Comp.Gen. 77 (1966).

#### **D. Correction of Bid After Commencement of Construction**

The burden to correct a bid after construction commences is even more difficult. If the contractor has not noticed a bid error up till this point, the contractor’s options become limited. The contractor can always plead a mutual mistake. The United States Supreme Court in *Moffett, Hodgkins & Clarke Co., v. City of Rochester*, 178 U.S. 373 (1899), announced the rule for mutual mistake:

Where the agreement as reduced to writing omits or contains items or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred.

The party alleging the mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no doubt upon the mind of the court as to either of these points. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended.

In *Moffett*, an extremely nearsighted engineer prepared a bid for construction of a sewer conduit and understated his bid because of erroneous unit prices and misplaced decimal points. The court held that since the mistake was not mutual, the contract could not be reformed, but could be rescinded.

The contractor also has the option of seeking an equitable adjustment to its contract for the mistaken bid item.

## **IV. Managing Contract Changes**

### **A. The Purpose of the “Changes” Clause**

Many contracts contain a “Changes” clause, which permits the owner to change the scope of work under the contract. The AIA Document A201 General Conditions (1976 edition) has a typical changes clause:

12.1.2 The Owner, without invalidating the Contract, may order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and the Contract Time being adjusted accordingly. All such changes in the Work shall be authorized by Change Order, and shall be executed under the applicable conditions of the Contract Documents.

The 1987 edition of the AIA A201 General Conditions states:

7.1.1 Changes in the Work may be accomplished after execution of the Contract and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

### **B. Constructive Changes**

A defect in the plans and specifications may be viewed as a constructive change to the contractor’s scope of work. The change was not readily apparent at the beginning of the project, and only became noticeable when the contractor reached that stage of the project. “Constructive” is a legal word of art. “Constructive” in this context means that you must pretend that something is when it isn’t. A “constructive change” is a change to the scope of work which

generally only one side recognizes. For example, say that the plans and specifications envision that the owner will provide a right of way for the contractor. Without a right of way, the contractor cannot readily work on a particular site. (If the contractor tries to work on that site without the right of way, he may face shotgun justice from the resident.) The contractor may be able to work the site, but not without extraordinary effort or means, at a considerably increased cost. Under these circumstances, the contract has been constructively changed and the owner would owe more money for the extra cost.

### **C. Cardinal Changes**

Sometimes a change to a contract is so far removed from the scope of the original work that the change has nothing what ever to do with the initial scope. For example, if a landscaper bids on and receives a contract for tree planting, but is issued a change for air conditioning work, the change may viewed as a cardinal change, which the landscaper has no obligation to perform. Put another way, the difference between a contract modification and a change order so drastic as to become a new contract is controlled by the rule of cardinal changes. A cardinal change is a change or series of changes which go far beyond the scope of the original contract documents. Courts define this work as a substantially different undertaking not provided for in the writing.

In *Wunderlich Contracting Co. v. United States*, 351 F.2d 956 (Ct.Cl. 1965), the court discussed the distinction between a contract modification and a new contract between the general contractor and the United States. There, the contract allowed the contracting officer, as the authorized agent of the United States, to make unilateral changes in the contract. The contract price would then be equitably adjusted to compensate the contractor for these changes. Using

this authority, the contracting officer issued a total of 35 change orders which lengthened the project by 318 days. The contractor argued that the multitude of changes were far beyond the scope of the original contract.

The court began its opinion by noting that the United States could not “be held liable for the exercise of [the] contractual privilege [to make unilateral changes] unless it exceeded the permissible limits of its discretion under the Changes article and ordered changes which were cardinal in nature.”

Although the court did not find the changes ordered by the contracting officer had the combined effect of exceeding the scope of the contract, the court did delineate a test to determine whether changes are cardinal. The court stated:

There is no exact formula for determining the point at which a single change or series of changes must be considered to be beyond the scope of the contract and necessarily in breach of it. 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. The contractor cannot claim a breach of the contract if the project it ultimately constructed is essentially the same as the one it agreed in the contract to erect.

*Id.* at 966 (citations omitted).

A contractor need not perform a cardinal change. *Fuller Co. v. Brown Minneapolis Tank & Fabricating Co.*, 678 F.Supp. 506 (E.D. Pa. 1987). If one party alters the scope of the other party’s performance to such an extent that the alterations could not have been within the realm of

the party's contemplation, as evidenced by the parties' written agreement, the other party may elect not to perform and hold the party making the alteration liable for breach of contract. This right to cease performance may be waived by the contractor continuing to perform in the face of a cardinal change to the contract. In that situation, the contractor is limited to a claim for monetary damages even though the change was so drastic and would have originally allowed the contractor to terminate its performance and sue for breach of contract. Note that the simple fact that the owner has ordered a substantial change is not a sufficient excuse for the contractor to cease work. *C.F. Bolster Co. v. J.C. Boespflug Construction Co.*, 334 P.2d 247 (Cal. 1959). Most change order clauses require the contractor to perform the changes and to continue contract duties even though the amount of compensation is unresolved at the time for performance. If the contractor refuses to perform the change order, he may be precluded from recovering on the contract itself. *Wernerek Building v. Melrose Lumber*, 241 N.Y.S.2d 83 (App.Div. 1963).

#### **D. Authority to Issue Change Order**

Under most contracts, the owner or its agents (such as the architect/engineer) have the authority to issue change orders to the contract. The changes clause entitles the owner to change the contract within the general scope of the contract.

The 1987 edition of the AIA A201 General Conditions added the Construction Change Directive as a new way of changing the contract. Paragraph 7.3.1 of the A201 General Conditions defines a Construction Change Directive as follows:

7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work

and stating a proposed basis for adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

The 1987 edition of the AIA A201 General Conditions defines a change order as:

7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:

- .1 a change in the Work
- .2 the amount of the adjustment in the Contract Sum, if any; and
- .3 the extent of the adjustment

7.2.2 Methods used in determining adjustment to the Contract Sum may include those listed in Subparagraph 7.3.3.

The major difference between a Change Order and a Construction Change Directive is that a Change Order must fix a definite price and time period during which the change is to be accomplished. A Construction Change Directive provides an alternative method to change the contract in situations where the price and time frame for the requested change are difficult or impossible to determine. A Construction Change Directive only requires that a proposed method for determining the price and time frame be suggested by the Architect.



### **E. Waiver of Formal Requirements**

If the owner has breached the construction contract, the owner may be hard pressed to enforce procedural steps that the contractor may have missed or overlooked in pursuing its claim. In *Board of Regents of North Texas State University v. Denton Construction Co.*, 652 SW2d 588, 593 (TexApp -- Ft.Worth 1983), the University asserted that the contractor was not entitled to damages for the delays and breach of contract by the University because the contractor did not comply with and the University did not waive compliance with specific contractual provisions relating to extra work and delay. Specifically, the University contended that the contractor failed to give the required notice to the project architect for any claim for increased compensation and that the contractor also failed to acquire from the University any change orders for extra and unexpected work before the contractor could be entitled to extra compensation.

The appellate court noted at the outset that the University did not contest nor allege as error the jury's findings that the University delayed the contractor's completion of either of the projects at issue and that the delays did cause damage and extra expense to the contractor. The appellate court stated that the University's allegations of error in the points of error under discussion, complaining of failure of strict compliance with the terms and conditions of the contract, are virtually identical to and are answered by two other college construction cases: *North Harris, Etc. v. Fleetwood Const. Co.*, 604 S.W.2d 247 (Tex.Civ.App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.); *Board of Regents, University of Texas v. S & G Const. Co.*, 529 S.W.2d 90 (Tex.Civ.App.--Austin 1975, writ ref'd n.r.e.).

The appellate court observed that in both of these cases it was held that since the college had originally breached the contract, requiring changes in the work and extra work and expense,

it relinquished its procedural rights concerning change orders and claims for additional costs. The *Denton Construction* court found that the following language in the *Fleetwood Construction* case was applicable to the University's appellate arguments:

We hold that the College breached the contract and thereby relinquished its procedural rights concerning change orders and claims for additional costs when it refused to acknowledge the "concealed condition." Fleetwood was not required to wait for an adjudication on the question of whether a concealed condition existed before resuming work on the contract. At the point of breach, when the College failed to change its specifications to conform to the actual soil condition, Fleetwood was given the choice of stopping work and recovering under the contract or continuing to work and claiming damages caused by the breach. Fleetwood chose to continue and sue for damages, and the College cannot now insist on enforcement of the claims provision. See *Board of Regents of the University of Texas v. S & G Construction Co.*, 529 S.W.2d 90, 96 (Tex.Civ.App.--Austin 1975, writ ref'd n.r.e.).

In *Argee Corp. v. Solis*, 932 S.W.2d 39 (TexApp -- Beaumont 1995), the court held that when a party breaches a construction contract, that party relinquishes its contractual procedural rights concerning claims for additional costs. The court noted that the plaintiff was a general contractor on three prison projects. The defendant was a subcontractor on these projects for the labor for steel erection and a portion of the concrete work. The court observed that the defendant was forced to abandon two projects when the plaintiff failed to make timely payments. A jury

verdict favored the defendant on its counterclaim. On appeal, the plaintiff requested a strict legal interpretation of the subcontracts that plaintiff had allegedly breached. The court noted that under Texas law, when a party breaches a construction contract, that party relinquishes its contractual procedural rights concerning claims for additional costs. The court held that the plaintiff's breach of the subcontracts excused further performance by defendant.

#### **F. Oral Change Orders**

Most contracts require change orders to be written. If the contract does require written change orders, the contractor will normally not be able to recover for extra work without written approval. *Uhlhorn v. Reid*, 398 S.W.2d 169 (Tex.Civ.App. -- San Antonio 1975, writ ref'd n.r.e.). However, the requirement for a written change order may be waived by the parties. In *Board of Regents of the University of Texas v. S&G Construction Co.*, 529 S.W.2d 90 (Tex.Civ.App. -- Austin 1975, writ ref'd n.r.e.), the owner instructed the contractor to do extra work and to keep track of the costs. The owner consistently assured the contractor that, after the project was complete, he would be paid for this extra work. The owner also promised to provide corrected plans and specifications and additional information on how to construct the project. The court held that the contractor was entitled to recover the cost of the changes the owner required because the original plans and specifications were defective, and the owner failed to provide the promised corrected plans and specifications and additional information.

As a practical matter, the owner or its architect/engineer will often request change order work with the written change to follow. With public owners, the written change order may not be issued for many months after the work has been done. The delay between instruction to do

the work and issuance of the formal change order poses a huge problem for the contractor. If the contractor waits for the formal change order, the project will be substantially delayed. If the contractor performs the work as orally instructed, the contractor risks not being paid for it.

To avoid trapping the unwary contractor, courts have held that despite a contractual requirement that all requests for extras be written, when the owner or his agent orally requests an extra, and the extra is accepted, the owner waives any objection and cannot rely on the written change order stipulation as a defense to a claim for additional compensation. In this situation, the contractor has the burden of proving that the owner or his authorized agent ordered the work.

For example, in *Winger v. Noblack*, 53 Ill.App.3d 287 (1978), the original agreement between the owner and the contractor called for the installation of cedar siding and replacement of a redwood deck. During the course of the siding work, the owners requested construction of a room addition instead of the deck. The court held that it was clear that the extras (the room addition) were outside the scope of the original agreement, were requested by the owner and were not voluntarily added by the contractor. Since the owner permitted the construction to proceed on his home, “under his very eyes,” the owner impliedly agreed to pay a reasonable price for the extras.

To recover for extras, the contractor must clearly prove that the items alleged as extras are extras, and that the owner ordered them as extras, agreed to pay an additional sum for them, and waived the necessity for a written stipulation. *Castle Concrete Co. v. Fleetwood Associates, Inc.*, 131 Ill.App.2d 289 (1971).

## **G. Notice**

If the contractor believes that he has been asked to perform extra work or the contract has been changed, the contractor must give the owner notice. The 1976 edition AIA A201 General Conditions provide a typical notice provision:

### 12.3 Claims for Additional Cost

12.3.1 If the Contractor wishes to make a claim for an increase in the Contract Sum, he shall give the Architect written notice thereof within twenty days after the occurrence of the event giving rise to such claim. This notice shall be given by the Contractor before proceeding to execute the Work, except in an emergency endangering life or property in which case the Contractor shall proceed in accordance with Paragraph 10.3. No such claim shall be valid unless so made. If the Owner and the Contractor cannot agree on the amount of the adjustment in the Contract Sum, it shall be determined by the Architect. Any change in the Contract Sum resulting from such claim shall be authorized by Change Order.

12.3.2 If the Contractor claims that additional cost is involved because of, but not limited to, (1) any written interpretation pursuant to Subparagraph 2.2.8, (2) any order by the Owner to stop the Work pursuant to Paragraph 3.3 where the Contractor was not at fault, (3) any written order for a minor change in the Work issued pursuant to Paragraph 12.4, or (4) failure of payment by the Owner pursuant to Paragraph 9.7, the Contractor shall make such claim as provided in Subparagraph 12.3.1.

Subparagraphs 12.3.1 and 12.3.2 of the 1976 version of AIA A201 are replaced in the 1987 version by Subparagraph 4.3.7 which states:

4.3.7 Claims for Additional Cost. If the contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.3. If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with the procedure established herein.

Many contracts have a short time fuse for notice of a claim. For example, the AIA A201 General Conditions Paragraph 12.3.1, above, requires notice within 20 days. However, Texas law invalidates any notice period shorter than 90 days. See Texas Civil Practice and Remedies Code Section 16.071, which states in part:

A contract stipulation that requires a claimant to give notice of a claim for damages as a condition precedent to the right to sue on the contract is not valid unless the stipulation is reasonable. A stipulation that requires notification within less than 90 days is void.

## **V. Handling Changes to Job Site Conditions**

### **A. The Purpose of “Changed Conditions” Clause**

If a contractor agrees to construct a project and encounters unforeseen difficulties, he will not be excused from his contract or entitled to extra money unless there is fraud, misrepresentation, or mutual mistake. For example, say a contractor bids to build a foundation, with a personal expectation that he will have to excavate sand. If he instead encounters rock, and the digging is more expensive, he will not be entitled to extra money, unless there is a changed conditions clause in the contract. The 1987 edition AIA A201 General Conditions Subparagraph 4.3.6 has the following changed conditions clause:

If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor’s cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both.

Changed conditions are often known as differing site conditions. Changed conditions or differing site conditions are essentially conditions which differ in some degree from that which the parties expected. One way of managing differing site conditions is to include a differing site conditions clause in the contract. Differing site conditions clauses seek to allocate equitably an unknown risk between the owner and the contractor. In theory, this equitable apportionment should minimize costs to the owner because it allows the contractor to remove this contingency from its bid. The owner avoids overpayment on the majority of projects and is required to pay for differing site conditions only when they occur.

Despite the theory supporting inclusion, there are good reasons not to include a differing site conditions clause in the contract. Those owners who do not often build may not generate the experience sufficient to realize the cost savings of contractor's removal of the differing site conditions risk. An owner who rarely engages in construction may be more concerned with the potential for a catastrophic cost overrun than the incrementally higher construction cost that the differing site conditions clause may cause. Second, some owners, particularly public owners, have limited funds for the construction of a project. Substantially increasing the project budget to accommodate a changed condition may be impractical. Third, placing the risk on the contractor provides the contractor with an incentive to minimize the financial effect of the discovered condition. If the contract has a differing site conditions clause, the contractor may see the changed condition as an opportunity to recoup other losses on the project at the owner's expense. Finally, in a competitive market, empirical evidence indicates that contractors do not quantify the risk of differing site conditions and may undervalue the risk. Under these conditions, elimination of the differing site conditions clause benefits the owner at little or no



cost.

Federal Government contracts contain a standard provision relating to differing site conditions, which takes precedence over any contrary language in the contract. These standard provisions are often included in federally funded work for states and local governments. The federal provision recognizes two types of differing site conditions. A Type I claim provides for an equitable adjustment if the conditions encountered differ materially from those indicated in the contract. Although the representation of the conditions need not be explicit, the contract documents must provide sufficient grounds to justify a bidder's expectation of latent conditions materially different from those actually encountered.

When the contract documents do not contain affirmative misrepresentations as to anticipated conditions, a contractor's right to a contract adjustment may nonetheless arise from unusual physical conditions differing materially from those ordinarily encountered in work of the character provided in the contract. These claims are generally referred to as Type II claims.

The federal differing site conditions clause is listed in the Code of Federal Regulations, 48 C.F.R. §52.236-2 (1991), as follows:

(a) The Contractor shall promptly, and before such conditions are disturbed, give a written notice to the Contracting Officer of: (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the written notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or of the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed unless the Contractor has given the written notice required; provided, however, the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

#### **B. Contractor's Right to Rely**

Having a changed conditions or differing site conditions clause in the contract does not exempt the contractor from inspecting the site. Courts have found an implied obligation that a contractor make at least a minimal inspection of the site to familiarize itself with the property. Most contracts today include an express "site inspection clause" obligating the contractor to inspect and familiarize itself with the conditions at the site. The AIA A201 General Conditions have such an inspection provision, and direct the contractor to verify field conditions and

measurements before commencing construction.

When the contract has a site inspection clause, and the contractor unreasonably fails to inspect the site, the contractor may be foreclosed from invoking the terms of the differing site conditions clause. If, however, the contractor makes a reasonable inspection of the site, yet fails to discover the differing site condition, the two clauses may conflict.

The courts have resolved the conflict by applying a standard of reasonableness. The contractor is obligated to discover conditions apparent through a reasonable investigation. The contractor is not obligated to discover hidden conditions, which do not surface through a reasonable investigation. The contractor is also not required to perform burdensome, extensive, or detailed tests or analyses. If the investigation is constrained by weather conditions, site conditions, or time in the contracting process, the contractor will be only required to perform an investigation that is reasonable under the circumstances.

A disclaimer or reliance clause may limit the effectiveness of a differing site conditions clause. These clauses typically state that information received from the project owner is provided solely for informational purposes and that the owner does not warrant the accuracy or sufficiency of the information provided. The objective of the provision is to render unreasonable any reliance by the contractor on owner-provided information which characterizes the condition of the property.

Courts have reached a variety of results on the effect of disclaimer provisions. Some courts have held that a disclaimer effectively precluded a contractor from arguing that reliance on the owner-provided information was reasonable. See, *J.E. Brenneman Co. v. Commonwealth Department of Transportation*, 56 Pa. 210, 424 A.2d 592 (1981); *Zurn Engineers v. State of*

*California*, 69 Cal.App.3d 798, 138 Cal.Rptr. 478, *cert. denied*, 434 U.S. 985 (1977). In order to be effective, such clauses should provide that the information was not warranted and that the contractor has not relied on the information. These provisions are most effective when combined with a site inspection clause.

In *Brown-McKee, Inc. v. Western Beep, Inc.*, 538 S.W.2d 840 (Tex.Civ.App. -- Amarillo 1976, writ ref'd n.r.e.), the contractor had no notice of a hard rock formation immediately below the ground surface. However, the contractor's claim for a differing site condition was denied due to a broad disclaimer of subsurface conditions in the contract. The court held that with that clause, the contractor would have to prove deception or bad faith on the part of the owner or show that the owner had withheld material information that it had a duty to disclose.

In *Millgard Corp. v. McKee/Mays*, 49 F.3d 1070 (5<sup>th</sup> Cir. 1995), the contract disclaimed a particular soil borings report. Although the contract also contained a differing site conditions provision, the court held that the subcontractor could not rely on the soil borings report to support its claim since the report had been specifically disclaimed.

Other courts have held that disclaimer clauses do not preclude reliance on information received from the owner. The situations in which courts have allowed contractors to rely on information received from the owner despite a disclaimer clause may be grouped in three categories. First, cases hold that reliance was permissible because the contractor performed a reasonable investigation that confirmed or supported the information received from the owner. Second, cases hold that reliance was justified because the owner intended that the contractor rely on the information in preparing a bid. Third, cases hold that reliance was justified because the circumstances did not allow sufficient time for the contractor to conduct an adequate

independent investigation. The cumulative effect of these limitations is that a contractor may rely on information received from the owner except when relatively simple inquiries might have revealed contrary conditions.

### **C. Notice**

The contractor must provide prompt notice of a changed condition. Theoretically, the owner or architect/engineer could redesign the project to avoid the changed condition. Say, for example, the contractor encountered extremely hard rock not shown in the contract documents. If the contractor simply excavates the rock at a greatly increased cost, and then attempts to bill the owner for the extra cost, the owner could justifiably complain about a lack of notice. With the notice, the owner could have moved the project to avoid the offending rock. The owner could have also redesigned the project for shallower footings or just eliminated that portion of the project.

### **D. Contractual Remedies**

If the contractor encounters a changed condition, he must first read the fine print in his contract to see what, if any, provision exists to handle the problem. The owner may have fully and effectively disclaimed any changed condition. The owner may have the contractor effectively assume the risk of the changed condition. The owner may not have given any sort of indication as to what conditions the contractor could expect. With no conditions to serve as a benchmark, the contractor will have nothing against which to measure the conditions actually encountered. If there is a changed conditions clause, like the ones discussed above, the

contractor will likely have to provide notice before conditions are disturbed.

## **VI. Tackling Contract Performance Delays**

### **A. Excusable Delay**

Excusable delay is delay which excuses the contractor's obligation to complete on time by extending the time for contractual performance. A contractor who fails to perform within the contract time, when the contract specifies that time is of the essence, may be liable to the owner for resulting damages and for the contractor's own increased costs of performance. The contractor may be liable for unforeseen delays without any of its own fault unless the delays result from a legal impossibility or commercial impracticability. "It is well-established . . . that supervening circumstances making the performance of a promise more difficult and expensive than originally anticipated is not enough to excuse the promisor." *Barnard-Curtiss Co. v. United States*, 301 F.2d 909, 912 (Ct.Cl. 1962).

The construction contract may by its own terms absolve the contractor of responsibility to the owner for certain kinds of delay. Excusable delay may arise from causes not expressly addressed in the contract. For a delay not specifically contemplated in the contract to be excused, it normally will fall within one or both of the following categories: (1) the delay to the contractor was caused by the owner or one for whom the owner is responsible; or (2) the risk of the delay was not expressly or impliedly assumed by either party to the contract.

Owner interference is the usual culprit for compensable delays as well as excusable delays. With a compensable delay, the contractor may recover its resulting increased costs from the owner. All compensable delays are also excusable delays. However, not all excusable

delays are also compensable delays.

**(a) Acts of God**

Typical acts of God which will excuse resulting delay include earthquakes, tornadoes, hurricanes, and floods. Fire may also be an act of God as long as the fire did not result from the contractor's negligence.

**(b) Labor Problems**

Delays caused by labor disputes are normally excusable. However, such delays may not be excused if the dispute was foreseeable, or if it was brought about by the contractor's own bad faith labor negotiations. Delays from a general labor shortages or the unavailability of skilled personnel are generally not excusable. Likewise, delays from the loss or unavailability of key supervisory or administrative personnel are not excusable unless they were caused by the owner.

**(c) Acts of the Government**

Delays caused by wartime or other emergency restrictions, priority allocations, supervening legislation, or other regulations are excusable. A court order which delays the project is likewise an act of the government which excuses late completion.

**(d) Acts of the Public Enemy**

Acts of foreign powers which result in wartime restrictions are a valid basis for excusable delays. Criminal acts may also prompt excusable delays.

### **(e) Other Excusable Delays**

Other circumstances may give rise to excusable delays. If the contractor encounters an unforeseen subsurface condition, the contractor may be entitled to a time extension even where it is not entitled to additional compensation.

### **B. Owner-Caused Delays**

Most contractor claims for delay are based on the common law principle that the parties to a contract have a mutual obligation not to hinder or interfere with the other's performance. Events beyond the owner's control, however, and for which the owner has neither expressly nor impliedly assumed responsibility, will not support a claim for delay damages. For example, in *Banks Construction Co. v. United States*, 364 F.2d 357 (Ct.Cl. 1966), the contractor was delayed due to a flooded job site. The owner controlled drainage ditches which were inadequate to carry away the extraordinary rainfall. The court held that the owner had no obligation to upgrade the ditches, since the owner could not anticipate and was not at fault for the extraordinary rainfall.

The time is of the essence clause imposes on the owner an obligation not to hinder or interfere with the contractor's performance, and entitles the contractor to expect that the owner will cooperate fully with the contractor's efforts to complete on time.

#### **1. Delayed or Restricted Site Access**

Construction contracts usually require that the contractor commence performance on a specified date or promptly on issuance of a notice to proceed. Courts hold that the specification of a starting date or the issuance of a notice to proceed constitutes an implied warranty that the



project site is prepared and available for performance of the work in accordance with the contract documents, and that the owner is liable to the contractor for damages resulting from a breach of this warranty. See *Plymouth Housing Authority v. Town of Plymouth*, 401 Mass. 503, 517 N.E.2d 470 (1988)(where housing authority contracted for new building, authority was liable for delay where documents selling the parcel were silent as to when old buildings were to be removed). But compare *M.J. Sheridan & Son v. Seminole Pipeline*, 731 S.W.2d 620 (Tex.App. - - 1987)(because hiring company did not represent that it had obtained or would obtain rights of way, hiring company did not breach its contract for failing to provide construction company with a pipeline easement in reasonable time).

## **2. Failure to Coordinate**

If the owner reserves the right to retain separate prime contractors for the site, the owner may be liable for failing to properly coordinate the additional prime contractors. In the absence of an agreement to the contrary, the party in the best position to reduce a risk of loss should bear that risk. For this reason, the owner on a multi-prime project normally has an obligation to coordinate and control the operations of all contractors to avoid unreasonable disruption of, or interference with, the operations of any one contractor. The prime contractor owes the same duty to its subcontractors. *Guerini Stone Co. v. P.J. Carlin Construction Co.*, 248 U.S. 334, 39 S.Ct. 102, 63 L.Ed. 275 (1919).

## **3. Defective Plans and Specifications**

*United States v. Spearin*, 248 U.S. 132 (1918), held that when an owner supplies a contractor with detailed plans and specifications, and requires that the contractor follow the plans

and specifications, the owner impliedly warrants that those plans are suitable for the intended purpose. If the court finds that such a warranty exists, delays resulting from a breach of this warranty are compensable delays. (See the discussion above in Section II (A) on the confused state of Texas law on an owner's implied warranties for plans and specifications.)

#### **4. Changes in the Work**

If the owner makes changes in the work, the contractor can request additional time for such work. If the work does not affect the critical path, the contractor may not be entitled to an extension of contract time. The owner may be responsible for compensating the contractor for its loss of float if such damages can be quantified. If the owner refuses to pay for the contractor's loss of float, the contractor can reserve its rights to additional compensation for delay or impact costs from the owner-directed change. If the owner has directed an excessive number of changes, the contractor may also request damages for the resulting delays and disruptions. *H.T.C. Corp. v. Olds*, 486 P.2d 463 ( Colo.App. 1971).

#### **5. Delays in Shop Drawing Approvals or in Making Changes**

The contractor usually must submit for the owner's review shop drawings detailing the specifics of what or how the contractor plans to build particular components of the project. The owner or its design professional usually has to approve, disapprove, or comment on the shop drawings before the contractor is authorized to proceed with the work. If the owner or its design professional do not timely review and respond to the shop drawings, the contractor may have a claim for an unreasonable delay in shop drawing review.

Similarly, if the owner delays in making changes or selections, the contractor may have a claim for the unreasonable length of time.

## **6. Failure to Make Timely Progress Payments**

An unjustified refusal to make timely progress payments warrants abandonment of the contract by the aggrieved party. A contractor who justifiably terminates performance before completion because of the owner's wrongful refusal to make payment is not entitled to recover lost profits on uncompleted work, unless the owner also prevented completion of the work. If the contractor continues working despite the owner's wrongful failure to make timely payments, the contractor will be entitled to recover delay damages which proximately result from the delays in payment.

### **C. Contractor-Caused Delay**

The contractor is liable for delay damages for unexcused delays. The contractor should be given time extensions for all excusable delays before calculating days of delay. If the contractor abandons the project or is terminated, the amount of chargeable delay is calculated by estimating the reasonable period of time for the work to be completed after the contractor left the project. If the contract does not contain a liquidated damages provision, the owner may recover actual damages resulting from the delay. The measure of damages may be the value of loss of use of the project for the duration of the delay, or some other expenses caused by the delay. Loss of use may be lost income from rental or profits from the use of the project. The owner may recover the additional interest payments it made on construction financing during the delay.

## 1. Liquidated Damages

Construction contracts often provide for a fixed sum of dollars per day that the contractor must pay for each day of delay. This liquidated damages provision is enforceable only if the stipulated amount is a reasonable approximation of the probable loss that will be caused by delayed performance and if the damage caused by the delay is difficult or impossible to determine. *Stewart v. Basey*, 245 S.W.2d 484 (Tex. 1952). This test of enforceability is applied by viewing the circumstances as the parties perceived them at the time the contract was made, not when the contract was completed or the damages occurred.

In *Loggins Construction Co. v. Stephen F. Austin State University*, 543 S.W.2d 682 (Tex.Civ.App. -- Tyler 1976, writ ref'd n.r.e.), the contractor agreed to construct a stadium within a certain time. The contract listed liquidated damages of \$250 for each day of delay beyond the completion date. The owner stipulated that the purpose of the clause was to entice the contractor to complete the stadium as quickly as possible under pain of paying the liquidated sum of money. The court held that the liquidated damages provision was an unenforceable penalty. There was no showing that the liquidated damage provision was intended by the parties to constitute any sort of an estimate of losses that could actually be sustained by the owner in case of delayed performance. Even if the intention of the parties was considered, the court found that the liquidated amount bore no reasonable relationship to the harm actually caused by the delayed performance. While the owner's actual damages did not exceed \$6,500, the owner withheld \$39,500 in liquidated damages.

#### **D. Acceleration**

Acceleration is the act of requiring the contractor to finish his work in less time than the contractor had planned, or to perform more work in the same amount of time. For example, a Pennsylvania court ruled that a contractor could recover for the owner's constructive acceleration of the schedule. The owner had made errors in the plans, which delayed the contractor. The owner did not extend the milestones, which defined the deadline dates for the contractor's penalty and bonus payments. The contractor had to work overtime to achieve the early completion date so that he could maximize the bonus payment. The owner never complained about the contractor working overtime, and by not extending the milestones, the owner constructively accelerated the work. The contractor was allowed to prove its acceleration costs using a reconstructed bid estimate, since it had lost its original bid estimate. *Department of Transportation v. Anjo Construction Co.*, 666 A.2d 753 (Pa. Cmwlth. 1995).

A Utah court ruled that a project owner accelerated the work when it constructively changed the contract and refused to grant an extension of time. The contractor was compensated for overtime labor it incurred in an attempt to avoid liquidated damages. *Procon Corp. v. Utah Department of Transportation*, 876 P.2d 890 (Utah App. 1994).

A Wisconsin court allowed a subcontractor whose performance schedule was constructively accelerated to recover lost profit on other projects from which resources were diverted. *Downey, Inc. v. Bradley Center Corp.*, 524 N.W.2d 915 (Wis.App. 1994).

### **E. Concurrent Delays**

The term “concurrent delays” can have more than one meaning in connection with a construction project. Both the contractor and the owner can be causing the same delay. Or, a particular delay may have more than one cause. In the latter instance, the contractor would be only entitled to his actual delay, no matter how many factors join to cause the delay. In *Housing Authority of City of Dallas v. Hubbell*, 325 S.W.2d 880, 889 (Tex.Civ.App. – Dallas 1959), the court observed about concurrent delay:

Further, the delays and causes which would justify extensions of time for performance should not be concurrent. For example, and speaking hypothetically, if one delay of 10 days time should be found to have resulted from 100 different causes, Contractors would not be entitled to a time extension of 1,000 days.

*Id.* at 889.

If both the owner and the contractor contribute to delay, but in different ways, the delay could be considered concurrent. If the contractor is behind schedule, but the owner requests additional work, the owner is obligated to provide the contractor with sufficient time to complete the extra work. In *Connell Construction Co. v. Phil Dor Plaza Corp.*, 158 Tex. 262, 310 S.W.2d 311, 313 (1958), the Texas Supreme Court held that where extra work not contemplated or covered in the original contract was performed by the contractor, the contractor was entitled to reasonable time in which to complete such extra work, and assessment of liquidated damages for delay in completion of contract was improper when such damages were computed on basis of time requirement within the original contract.

In *Vogt v. Jones*, 396 SW2d 539 (TexApp - Ft. Worth 1965), the court held that where

the owner itself is responsible for a delay in completion of a construction contract, it cannot impose liquidated damages for the delay.

#### **F. Architect/Engineer Liability**

An architect can be liable to a contractor or an owner for delays on a project. The theory for liability to the owner is simple: the architect has breached the owner - architect agreement, and owes the owner the value of the owner's delay damages. The theory for liability to the contractor is more complicated, since the contractor usually does not sign a contract with the architect.

To sue successfully for breach of contract, a plaintiff generally must have a contractual relationship with the defendant. The contractual relationship does not have to be direct. The defendant can promise another party to do something which will directly benefit the plaintiff. If the defendant does not comply as promised, the plaintiff as a third party beneficiary of the defendant's promise may sue the defendant for the breach of promise. Proving that the plaintiff is a third party beneficiary, however, may not be easy since the law has a presumption against third party beneficiary agreements. For example, without evidence to the contrary, a property owner is not a third party beneficiary of a contract between a general contractor and a subcontractor. *Thomson v. Espey Huston & Associates, Inc.*, 899 S.W.2d 415 (Tex.App. -- Austin 1995, no writ). As a result, general contractors and subcontractors are usually unsuccessful in proving that they are third party beneficiaries of the owner - architect agreement.

If an architect is to be liable to a contractor, then, it will probably be for the architect's negligence. Most other jurisdictions impose a duty of care on an architect toward the general

contractor and hold the architect liable for its breach of that duty. For example, if the architect negligently prepares plans and specifications, the architect can be liable to the general contractor or subcontractors for resultant delays. *Owen v. Dodd*, 431 F.Supp. 1239 (D. Miss. 1977).

One court aptly described the architect's power over the contractor as follows:

Altogether too much control over the contractor necessarily rests in the hands of the supervising architect for him not to be placed under a duty imposed by law to perform without negligence his functions as they affect the contractor. The power of the architect to stop work alone is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility.

*United States v. Rogers & Rogers*, 161 F.Supp. 132, 136 (S.D. Cal. 1958).

In Texas, however, the answer is not quite so clear. One court has held that an architect owes no general duty to a general contractor without some express agreement to do so. *Bernard Johnson Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365 (Tex.App. -- Austin 1982, writ ref'd n.r.e.). However, other courts have appeared to impose a duty on an architect to use the skill and care in the performance of his duties commensurate with the requirements of his profession and liability for a breach of that duty. *I.O.I. Sys., Inc. v. City of Cleveland*, 615 S.W.2d 786, 790 (Tex.Civ.App. -- Houston [1<sup>st</sup> Dist.] 1980, writ ref'd n.r.e.). *Ryan v. Morgan Spear Assoc.*, 546 S.W.2d 678 (Tex.Civ.App. -- Corpus Christi 1977, writ ref'd n.r.e.). Whatever the architect's duty, it will likely be limited to the contracting parties on the project and the architect's agreement with the owner. *Compton v. Polonski*, 567 S.W.2d 835 (Tex.Civ.App. -- Corpus Christi 1978).



To prevail against the architect, the contractor or owner will have to show a causal nexus between the alleged negligence of the architect and specific delay damages that the claimant sustains. In other words, the claimant “must show and connect these delays and hindrances to some act of omission or commission or breach on the individual defendant’s part. The damages, if any caused by each defendant must be proved.” *City of Beaumont v. Excavators & Constructors, Inc.*, 870 S.W.2d 123, 132 (Tex.App. -- Beaumont 1993)(contractor unable to attribute specific days of delay to a particular defendant, and lost at trial). The burden rests on the contractor to establish by competent evidence the duration of the delay, the fact of such delay, and that there was no greater fault of the contractor involved, and that there was a causal relationship between such delay and the necessity and reasonableness of additional cost. *Id.*

### **G. Preserving Delay Claims**

The first rule for preserving a delay claim is to provide notice to the party causing the delay of not only the delay but also that damages are being sustained. This notice must be in writing. The importance of providing the written notice cannot be emphasized enough. Without the notice, the delaying party may claim that he did not know he was causing a delay, and if told, would have rectified the situation. For example, if the owner has been asked to make a color selection and has not done so, the contractor should advise the owner in writing that the owner’s failure to select color is delaying the job, and inflicting costs on the contractor. Otherwise, the owner could defend against the claim by simply stating that he had no idea that the contractor needed the selection as the contractor was busy doing so many other things.

Issuing a notice of delay allows the culpable party to shorten the delay or deny

responsibility for the delay. If the culpable party does not deny responsibility for the delay, then he arguably tacitly admits it, which means that proving the fact of the delay will be easier. Issuing notice also allows the claimant to take the high road in negotiations. The claimant can always stress that the culpable party did nothing in the face of a notice of delay and dire consequences. This helps to establish a causal nexus between the delay and the culpable party's conduct or lack thereof.

The claimant must also quantify the costs as they are being incurred. The claimant should develop a cost coding system, preferably by computer, to track the costs incurred. This will usually involve setting up a separate cost code for any delay associated costs. Not all costs incurred will be part of the claim -- only those directly associated with the delay.

The claimant should track all of the other costs being incurred so that they can be segregated from the delay costs. The claimant should carefully track the duration of the delay, and take steps to minimize the financial impact of the delay. This may involve writing to the culpable party to ask how long the delay may be, and whether the claimant should demobilize from the project or take some other steps to minimize costs.