

The National Business Institute Presents

Texas Construction Law

What Do You Do When . . . ?

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What Do You Do With A Defective Bid?

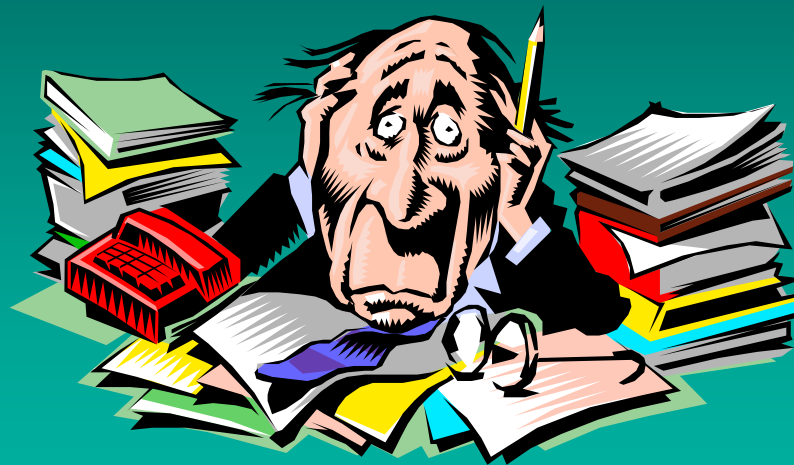
- Potential Liability for Bid Errors
- Announcement of Error -- Timing
- Remediable Error



What Do You Do With A Defective Bid?

■ Remediable Error

- Mistake of great consequence
- Materiality
- Mistake despite ordinary care
- Rescission without prejudice



What Do You Do With A Defective Bid?

■ Remediable Error

- Clerical errors
- Not mistakes in judgment
- Not failures to obtain bids
- Not shortcomings in bid estimate process

$$1 + 1 = 3$$

What Do You Do With A Defective Bid?

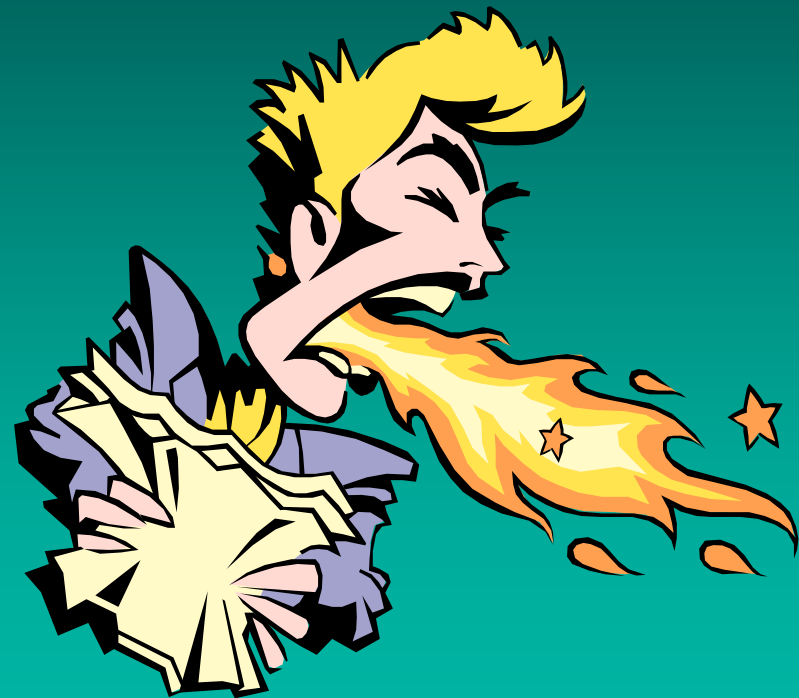
- Texas Supreme Court's *Taylor* case
 - Remediable mistake
 - With notice to owner, without material change by owner, equals rescission



What Do You Do With A Defective Bid?

■ Bid Discrepancies

- Waiver of irregularities
 - The good, the bad and the ugly



What Do You Do With A Defective Bid?

- **Promissory Estoppel**
 - Subcontractors and vendors
 - General contractor's reliance on bid



What Do You Do With A Defective Bid?



- **Correction of Bid Prior to Award**
 - **Probably freely correctable prior to bid opening**
 - **But read bid solicitation**

What Do You Do With A Defective Bid?

■ Correction of Bid Prior to Award

– Unilateral vs. mutual mistake

- Mutual mistake where misconception as to common fact and contract unclear
- Mutual mistake need not be identical
- Merely more difficult not enough



What Do You Do With A Defective Bid?



- **Correction of Bid Prior to Award**
 - Owner misrepresentations
 - Defective plans and specifications

What Do You Do With A Defective Bid?

- **Correction of Bid Prior to Award**
 - **Federal contracts**
 - **Withdrawal of bid**
 - **Correction of bid**
 - **Contracting Officer duty to check bids for mistakes**
 - **Bid Verification**



What Do You Do With A Defective Bid?

■ Correction of Bid Prior to Award

– Federal contracts

■ Obvious errors

- Decimal points
- Discount errors
- Unit prices
- Reversal of f.o.b. destination and f.o.b. factory



What Do You Do With A Defective Bid?

- **Correction of Bid Prior to Award**
 - **Federal contracts**
 - **Substantial disparity from 2d low bidder**
 - **Comparison to Government estimate**



What Do You Do With A Defective Bid?

- **Correction of Bid Prior to Award**
 - **Federal contracts**
 - **Adequacy of request for verification**
 - **Need not be written**
 - **Adequate time**



What Do You Do With A Defective Bid?

■ Correction of Bid Prior to Award

– Duties of Bidder

■ Prompt notice

- Sworn statements
- Worksheets
- Subcontractor quotes
- Documents to show:
 - » Mistake
 - » How occurred
 - » Correction requested



What Do You Do With A Defective Bid?

■ Displacement of Bids Not Automatic

- Need for third party support
- Need for clear error on face of bid



What Do You Do With A Defective Bid?

- **Correction of Bid After Award**
 - **For rescission or correction, contractor must show:**
 - **Owner on notice of mistake, or**
 - **Owner on constructive notice of mistake at time of award**



What Do You Do With A Defective Bid?

- **Correction of Bid After Start of Construction**
 - **Trouble**
 - For relief, contractor must show mutual mistake
 - Equitable adjustment

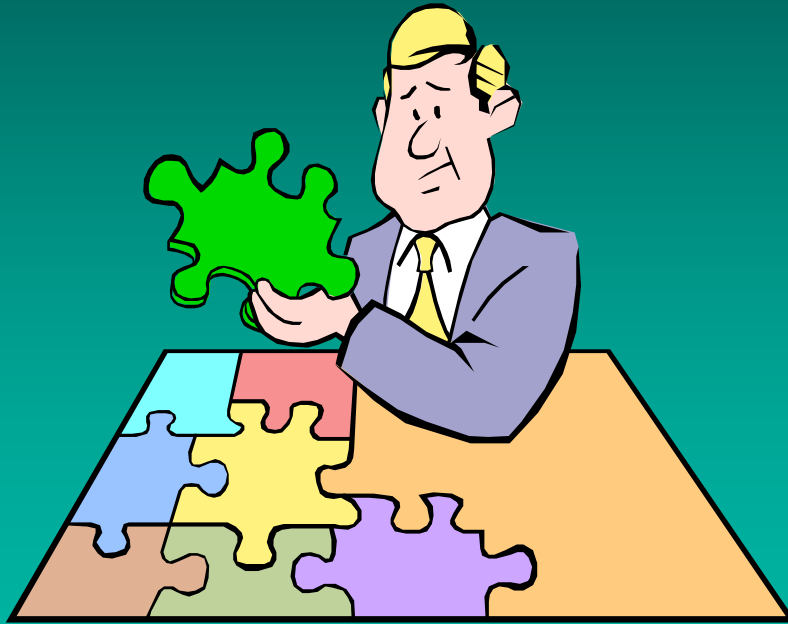


What Do You Do When the Plans and Specifications Are Deficient?

- **Owner Warranty**
 - Common law rule -- contractor without suspicions can rely
 - Texas rule in flux
 - *Longeran* -- No
 - *Emerald Forest* -- No
 - *Shintech* -- Yes
 - *North Harris* -- Yes



What Do You Do When the Plans and Specifications Are Deficient?



■ Errors Discovered Prior to Bidding

- Duty to Seek Clarification

- AIA A701 Instructions to Bidders

- Bidders must become familiar with bidding documents

What Do You Do When the Plans and Specifications Are Deficient?

■ Errors Discovered Prior to Bidding

– Independent Investigation into Errors

- Bidder charged with knowledge from reasonable investigation
- Moral: Advise owner of errors
- Errors addressed by Addendum



What Do You Do When the Plans and Specifications Are Deficient?

- **Defects Discovered During Construction**
 - Constructive Changes
 - “Constructive” -- Pretending that something is when it isn't
 - Change only one side recognizes



What Do You Do When the Contract Is Changed?

- **The Purpose of the Changes Clause**
 - Allows the owner to change the scope of contract work



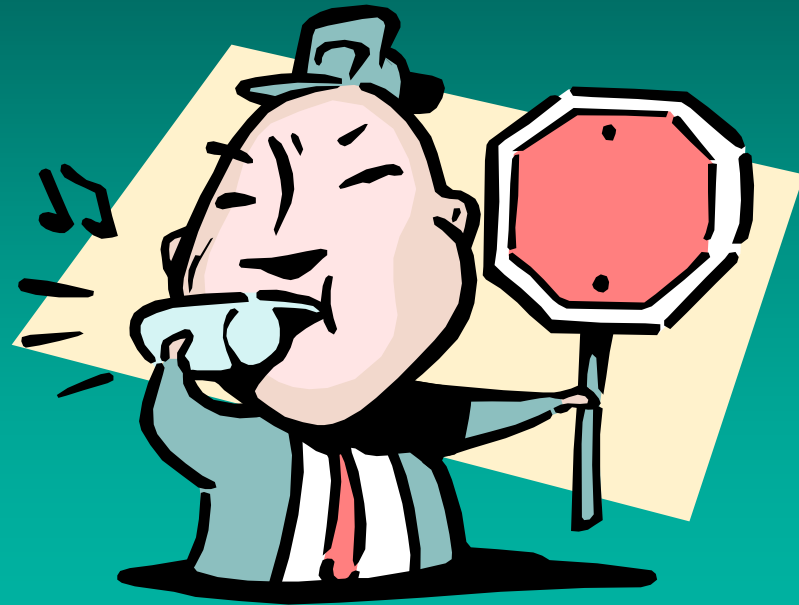
What Do You Do When the Contract Is Changed?

- **Authority to Issue Change Order**
 - **Owner or A/E usually have authority to issue change orders**
 - **Within contract scope**
 - **Change order**
 - **Construction Change Directive**



What Do You Do When the Contract Is Changed?

- **Authority to Issue Change Order**
 - **Cardinal changes**
 - **Substantially different undertaking from contract work**
 - **Contractor need not perform**



What Do You Do When the Contract Is Changed?

■ Oral Change Orders

- Usually required to be written
- Writing may be waived
 - Avoids trap for unwary contractor



What Do You Do When the Contract Is Changed?

■ Notice

- Contractor must provide owner notice of extra work
- Timing of notice
 - Requirement of notice in less than 90 days is void
 - Texas Civil Practices & Remedies Code Section 16.071



What Do You Do When Conditions on the Job Change?

- Purpose of “Changed Conditions” Clause
 - Allows contractor relief from unforeseen difficulties
 - See AIA A201 General Conditions (1987) Subparagraph 4.3.6



What Do You Do When Conditions on the Job Change?

■ Changed Conditions Clause

- Equitable allocation of unknown risk
- Pros and cons of inclusion



What Do You Do When Conditions on the Job Change?

- “Changed Conditions”
 - Two types
 - Type I - Subsurface or concealed conditions materially different from contract documents
 - Type II - Unknown physical conditions of unusual nature, materially different from that inherent in construction at issue



What Do You Do When Conditions on the Job Change?

- **Contractor's Right to Rely on Changed Conditions Clause**
 - Contractor has at least implied obligation to inspect site
 - Contractor required to discover conditions apparent through reasonable investigation



What Do You Do When Conditions on the Job Change?

- **Changed Conditions**
 - **Disclaimer or Reliance Clause**
 - **Broad disclaimer may be effective**



What Do You Do When Conditions on the Job Change?

■ Notice of Changed Conditions

- Prompt notice required
 - Owner may avoid extra costs



What Do You Do When Conditions on the Job Change?

- **Contractual Remedies for Changed Conditions**
 - Read contract fine print
 - Changed conditions may be disclaimed



What Do You Do When Contract Performance Is Delayed?

■ Excusable Delay

– Types

- Acts of God
- Labor problems
- Acts of the Government
- Acts of the public enemy
- Other excusable delays



What Do You Do When Contract Performance Is Delayed?

■ Owner-Caused Delays

- Delayed or Restricted Site Access
- Failure to Coordinate
- Defective Plans and Specifications
- Changes in the Work
- Delays in Shop Drawing Approvals
- Failure to Make Timely Progress Payments



What Do You Do When Contract Performance Is Delayed?

■ Contractor-Caused Delay

– Liquidated Damages

- Enforceable if amount is reasonable approximation of probable loss caused by delayed performance and actual damage difficult or impossible to determine



What Do You Do When Contract Performance Is Delayed?

■ Acceleration

- Requiring contractor to finish work in less time than contractor had planned, or to perform more work in same amount of time



What Do You Do When Contract Performance Is Delayed?

■ Architect/Engineer Liability

- Liability to Owner
- Liability to Contractor
 - Contractor not third party beneficiary
 - Professional negligence
 - Texas law in flux



What Do You Do When Contract Performance Is Delayed?



■ Architect/Engineer Liability

- Owner or contractor must show causal connection between A/E negligence and specific delay damages

What Do You Do When Contract Performance Is Delayed?

■ Preserving Delay Claims

- Provide written notice to party causing delay
- Quantify costs
- Segregate all other costs from delay costs
- Minimize delay costs



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