

# CONSTRUCTION CONTRACTS



**Crawford & Bangs, LLP**

*[www.builderslaw.com](http://www.builderslaw.com)*

*[sholbrook@builderslaw.com](mailto:sholbrook@builderslaw.com)*

# FUNDAMENTALS OF CONSTRUCTION CONTRACTS

- I. Overview – What is a Contract?
- II. Do I have a binding contract? – Elements of a Contract
- III. Tools for Negotiation?
- IV. What are the critical (“deadly”) contract clauses?
- V. Apply to Your Company – Questions?

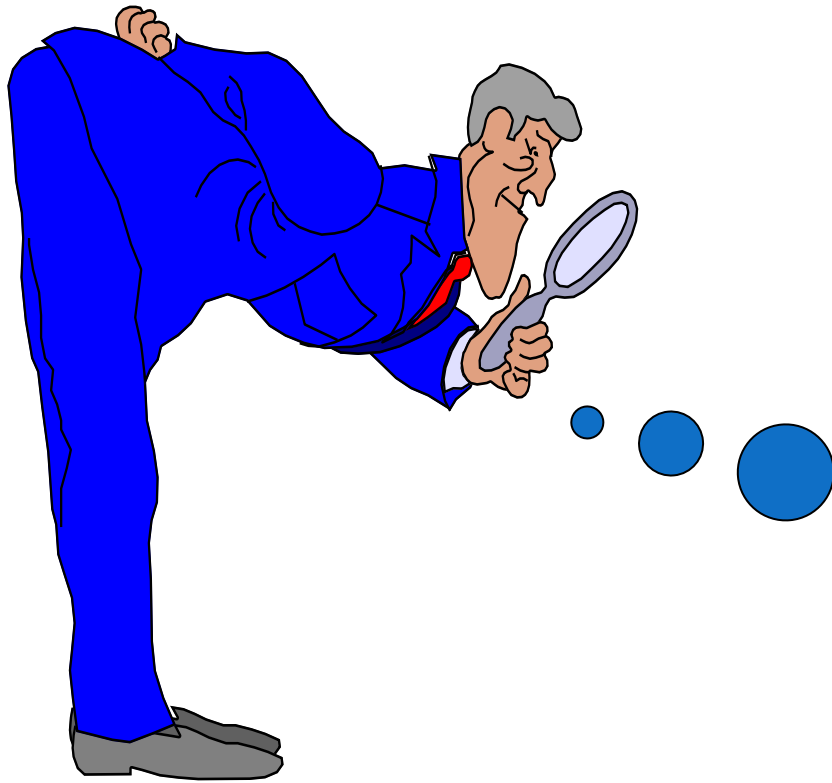


# Deadly Contract Clauses

Indemnity  
Insurance - Additional Insured  
Scope of Work  
Conduit Clause  
Changes  
Protection of Work  
Safety  
Labor  
Temporary Facilities  
Liquidated Damages  
Schedule – Delay Damages  
Termination  
Payment - Pay-if-Paid & Retention  
Warranty  
Forum -Jurisdiction  
Attorney's Fees  
Personal Guarantees



# What is a Contract ?



CONTR

THIS AGREEMENT made  
by  
and between  
and

WITNESSETH: That  
kept and performed on

L. Said party of

and  
as he

and said party of the second

RISK!



# RISK CAN BE:

- Controlled
- Retained
- Insured
- Transferred



# Elements of a Contract

- Common Law
  - Offer
  - Acceptance
  - Intention/Capacity
  - Consideration
- Specific to Construction
  - Bid = offer
  - Acceptance = letter of intent/start work/signed contract
  - Consideration = Reliance
- Do we have a binding contract?
  - Verbal Agreements are binding



# Elements of a Contract



- Price (Consideration)
  - Risk shifting mechanism – methods:
    - Fixed price/lump sum/bid or stipulated
    - Cost plus (time and materials)
  - Increased material costs?
    - Price escalation must be spelled out:
      - “A change in the price of an item of material of more than 5 percent between the date of the subcontractor’s bid proposal and the date of installation shall warrant an equitable adjustment in the subcontract price.”
- Payment Cycles -
  - What steps must occur to get paid: Sub files pay app – gc files pay app – architect certificates – title co reviews – lender reviews – owner reviews – owner pays – gc gets paid – sub gets paid



# Tools for Contract Negotiation

- Go/No-Go Decisions
- Pricing Out Contractual Risk
- Conditions to Bid Proposal
- Use form contracts that divide liability fairly between the parties – [www.consensusdocs.org](http://www.consensusdocs.org)
  - Subcontractors use an Addendum
- Contracts should memorialize business relationships (not declare war)
- Project success is a win for all
  - Project failure is a loss for all



# Bid Conditions

- How long is your price good? Specify the duration, and deal with price escalations or fluctuations in the bid.
- Specify rates and mark-ups for extras.
- Specify responsibility for sales taxes, or requirements for extended warranties (like purchase of a maintenance plan).
- If not specified, could lead to unanticipated costs.



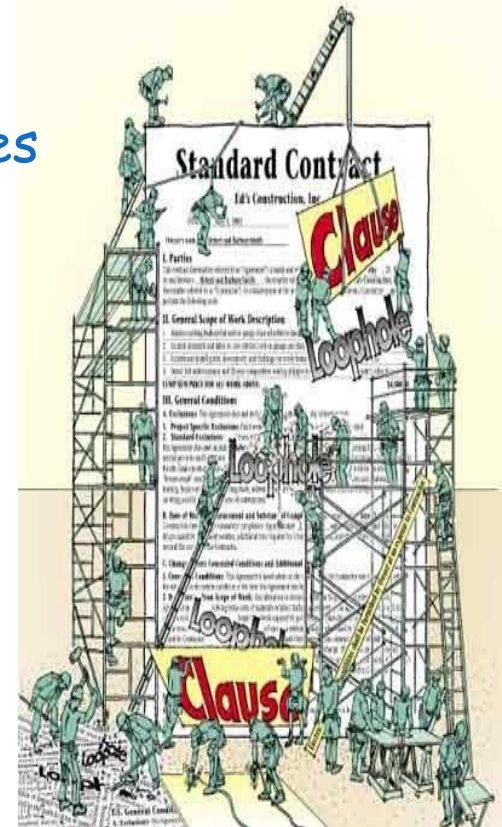
# Bid Conditions

- Payment Schedule
  - Use Contractor or Subcontract Schedule of Values
  - Unpaid sums earns 1 ½ % monthly interest
  - Right to attorney's fees
  - Provide venue for court action to be location of project.
- Changes in Job Conditions
  - Cost adjustments for changes in schedule, delays, acceleration, or disruptions
  - Right to terminate contract if work delayed by 90 days



# ADDENDUM TO SUBCONTRACT

- Impossible to find all problems with contract
- Attempt to use Addendum for major murder clauses including indemnity
- See Crawford & Bangs sample Addendum form (or [ASAOnline.com](http://ASAOnline.com) for alternative form)



# INDEMNIFICATION



**Indemnification**

**A POTENTIALLY DEADLY CLAUSE**

# INDEMNIFICATION

is an agreement to



- ▶ Transfer the risk to another party
- ▶ Sometimes referred to as

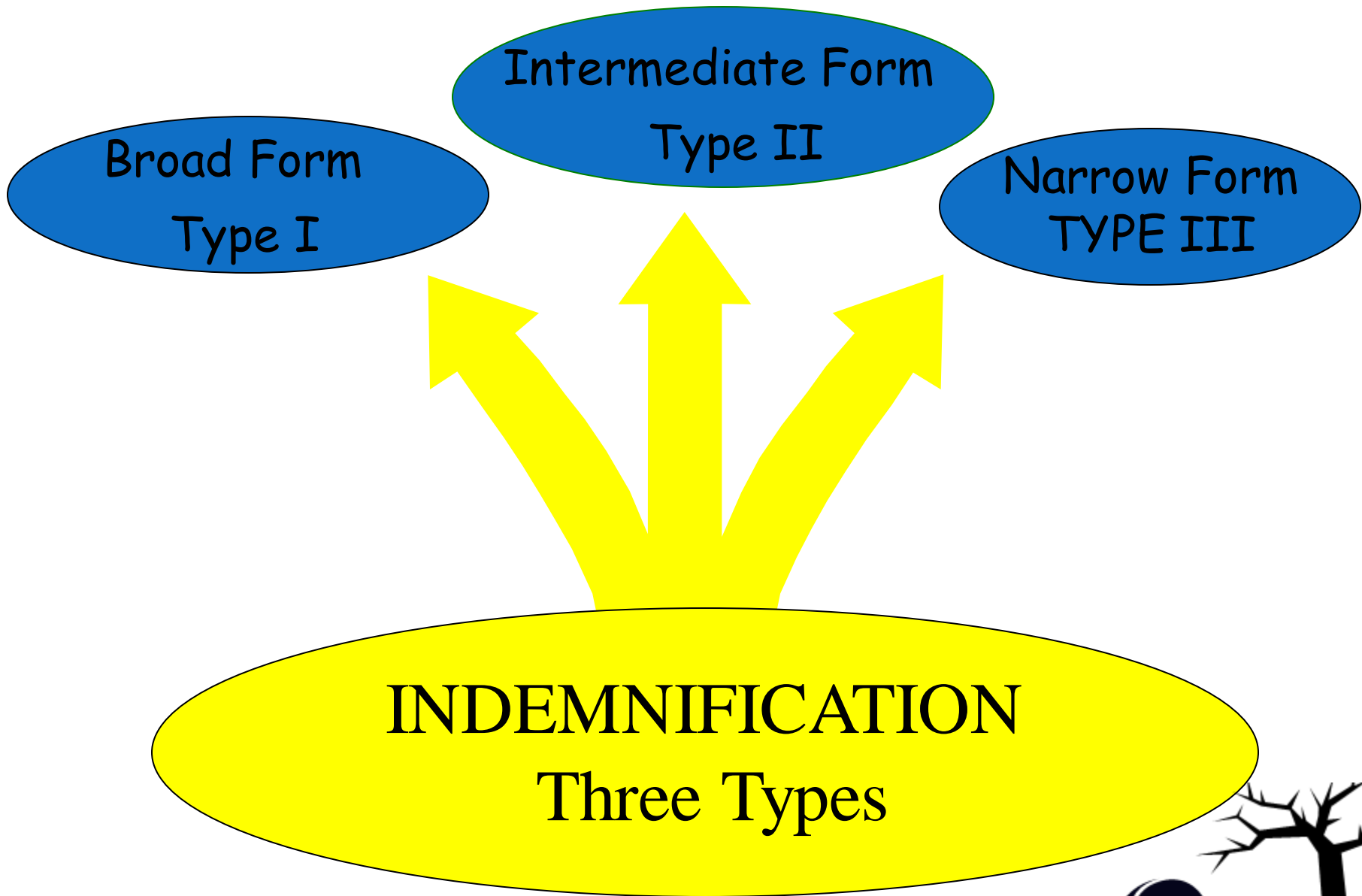
**HOLDHARMLESS**



# WHERE DOES THE DANGER LIE FOR CONTRACTORS?

- Indemnity
- Additional Insured Endorsement







# TYPE I – EXAMPLE

## (BROAD FORM)

To the fullest extent permitted by law, **excluding Contractor's sole negligence or willful misconduct**, Subcontractor agrees to indemnify and save harmless, Contractor and Owner from and against any claim, (including attorney's fees), arising out of, resulting from, or occurring in connection with the performance of the work by Subcontractor, its sub-subcontractors and suppliers, or their agents, servants or employees, whether or not caused in part by the active or passive negligence or fault of a party indemnified hereunder.

# TYPE II – EXAMPLE

## (INTERMEDIATE FORM)

Indemnitee is indemnified against its own acts of passive negligence but not against its own acts of active negligence.

# TYPE III – EXAMPLE

## (LIMITED FORM)

Indemnity only for damages caused by the indemnitor, only to the extent of such damages, but does not provide indemnity for such damages caused by someone else.

Each agree to Indemnify the other for the direct cost of losses due to bodily injury or property damage to the extent caused by indemnitor during the performance of its work on the project.

# ADDITIONAL INSURED ENDORSEMENTS



- ✓ Often return Indemnity victory with Additional Insured Endorsements, "Arising out of your work" language - 20-10 11 85 and 20-10 10 93 - "arising out of our ongoing operations"
- ✓ Even though no indemnity obligation, - insurance would have to pick up claim because of such language.
- ✓ Negligence finding not needed with this endorsement (although not necessary for defense obligation on Type I indemnity).

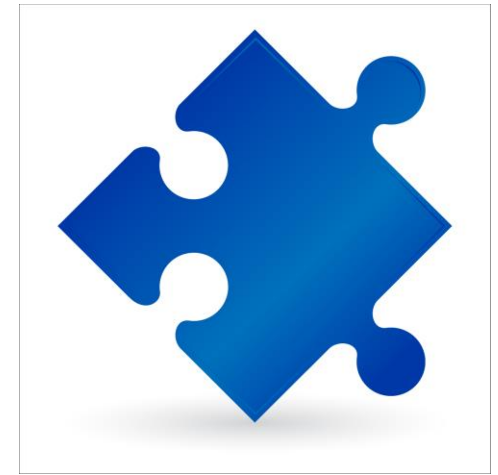
# Insurance

- Insurance Types
  - Builder's risk (Owner)
  - General Liability (Contractor)
  - Property damage
  - Workers comp
  - Vehicles
  - Errors & Omissions – design professional liability
  - Business Interruption Insurance (COVID)
  - Wrap Insurance – Owner or General Contractor Controlled
- Key elements
  - Additional insured/certificates of insurance
  - Waivers of subrogation
  - Waiving claims covered by insurance



# SCOPE OF WORK – CLEARLY DEFINED

- ▶ Know exactly what is expected of you
- ▶ Broad “dragnet clause”?
- ▶ Are duties “work” or “performance” driven
  - ▶ Build as shown or make it work
  - ▶ ConsensusDocs 750 § 3.3 – review of drawings is solely for facilitating work and contractor is not responsible for design
- ▶ Are there design responsibilities?
  - ▶ Do you have insurance for those?



# Scope of Work – Site Conditions



- Site Inspection and Unforeseen Conditions
  - Who is on the hook
  - Contractor representations
  - Greater burden under AIA than ConsensusDocs
- Duties upon discovery of unforeseen conditions
  - Notice requirements
- ConsensusDocs – 750 § 7.3 specifically allows time/cost changes due to latent, concealed or subsurface conditions

# CONDUIT CLAUSE

- Flow Down - Incorporation by Reference
  - Upstream parties benefit/downstream parties burden
- Does Subcontractor have the same rights against the Prime Contractor that Prime has against the owner?
- *Check for, and review:*
  - Prime Contract and its contract documents
  - Issued prime contract modifications
  - Entire set of plans & specifications





# CHANGES



- Amendment to Contract - Writing Required
- Unilateral unlimited power to make changes?
- What are payment terms for change?
- What notices are required?
  - Timing - How many days to present claim?
- Is payment for changes contingent?
  - What about where changes are not the fault of the Owner?
  - What mark-up is allowed for overhead and profit?  
ConsensusDocs 750 § 7.6 - blank to be filled in

# CHANGES – BACKCHARGES



- Right to issue backcharges unilateral
- Notice and opportunity to cure
- ConsensusDocs 750 § 3.14.2 – cleanup requires 2 business days notice
- 750 § 3.22.2.2 – reasonable time to cure after notice for correction work
- 750 § 10.1.1 – requires 3 business days notice for right to cure for failure to perform

# PROTECTION OF PERSONS & PROPERTY

- Promptly remedy property damage - regardless of fault
- Protect and Insure work until accepted by owner.
- Responsible for personal safety of others.



# SAFETY REQUIREMENTS

- Jobsite safety obligations -
  - Detailed in Contract
- Indemnification of OSHA violations?
  - OSHA penalties based on past violations



# LABOR



- Is Subcontractor bound to Prime Contractor's labor agreement?
- Can Prime Contractor terminate if another Sub refuses to work?
- Is Subcontractor or Prime Contractor liable for damages caused from picketing?

# TEMPORARY FACILITIES

- Who provides?
- Who pays?
- Whose risk?
- What happens after termination?
- Payment for stored materials -  
ConsensusDocs 750 § 8.2.4 (if allowed by  
owner)



# Schedule - Delay



- Project Timing
  - Published schedule attached to contract
    - Critical in Times of Extreme Price Escalation!
  - GC unilaterally impose or alter sub schedule – ConsensusDocs 750 § 5.2 – changes increasing time and costs shall be equitably adjusted
- Start date
  - specific date or based on conditions
  - Confirm actual date in writing
- Milestones for incentive bonus or liquidated damages, release retainage
- Substantial Completion & Final Completion

# SCHEDULE – NO \$ FOR DELAY



- No Damage for Delay Clauses
  - Prevents Contractor from claiming damage for delays caused by owner
- Contractors sole remedy is an extension of time
- ConsensusDocs 750 § 5.3 & 200 § 6.3
  - Contractor entitled to equitable adjustment in time and money



# TERMINATION

- Termination for Convenience -
  - Unquestioned right to cancel?
  - Who pays
  - How much
  - What about specially manufactured materials that have been ordered?
  
- Termination for Default
  - Sole discretion or opinion?
  - Notice and opportunity to cure



# PAYMENT: PAY-IF-PAID

- Pay-if-Paid: Prime Contractor pays Subcontractor
  - If paid by Owner
  - **If** prime doesn't get paid doesn't pay Subcontractor
- Illegal and unenforceable in some states, incl. CA, IL, NY
- Pay -When-Paid clauses may be enforceable
  - How does contract define timing for payment if Contractor not paid by Owner?
- ConsensusDocs 750 § 8.2.5 - payment reasonable time and 7 days following receipt



# PAYMENT: PAY-IF-PAID

- Pay-if-Paid: Prime Contractor pays Subcontractor
  - If paid by Owner
  - **If** prime doesn't get paid doesn't pay Subcontractor
- Illegal and unenforceable in some states, CA Wm. Clarke v. Safeco (1997) Pay-if-Paid Void
- Pay -When-Paid clauses
  - How does contract define timing for payment if Contractor not paid by Owner?



# PAYMENT: PAY-IF-PAID

- Pay if/When Paid
  - Why GCs like them & Subs don't
- Solutions for Pay When Paid
  - Define time – “reasonable” time cannot exceed i.e., 90 days after actual completion
- Payment assurances from Owner
- Open communications from Owner when paying GC
- Joint checks



# PAYMENT: PAY- WHEN PAID

- *Crosno Construction, Inc. v. Travelers Casualty and Surety Co. of America (2020) 47 Cal.App.5th 940*
- ASA amicus brief and argued at the Appeal Court on behalf of ASA.
- Pay When Paid clauses now have limited enforceability in California
  - Waiting for conclusion of GC litigation was an unreasonable time frame.
  - “When” cannot be past the time to enforce a mechanics lien claim.



# PAYMENT: CONSTRUCTION LIENS

- Construction Liens
  - Owner Pays GC – GC skips town
  - Sub did all its work
  - Both Sub & Owner are “innocent” – so who should pay?  
Can you make the owner pay twice?
  - Lien Waivers – ConsensusDocs 750 § 8.8 – unconditional waivers strictly prohibited
- Interest on late payment (ConsensusDocs 750 § 8.4 – statutory interest rate)



# PAYMENT: RETENTION

- Limit retention to same as percentage held upstream (ConsensusDocs 750 § 8.2.2)
- Reduce % as job progresses
- Place absolute \$ cap
- Why 10% and not 5%? 3%? 2%?
- When do you get it - is Completion clearly defined?



# WARRANTY

- When does it begin?
  - Your completion
  - Job completion
  - Acceptance by: General, Owner, Architect?
    - Public Owner not accepting project for 1 year to extend warranty deadline.
  
- Is it brought in by Conduit Clause?





# FORUM – JURISDICTION

- Dispute Resolution
  - Mediation
  - Arbitration
  - Litigation
- Who is the decision-maker
- Appeal rights
- Speed, costs, rules, discovery
- Each choice has advantages & disadvantages



# FORUM – JURISDICTION

- Out of State Jurisdiction
- Arbitration - Where & Parties
  - Sole opinion/discretion owner/contractor (biased third party)
  - ConsensusDocs 750 Article 11 - detailed dispute resolution - direct discussions, mediation, binding dispute resolution
  - AIA A201 § 15 - Initial decision (architect), mediation, arbitration



# FORUM – JURISDICTION



- Whose Law Applies?
  - Lien rights
  - Enforceability
  - Licensing
  - Taxation
  - Employment – Worker’s Compensation
- Choice of Law and Jurisdiction provision just recently upheld in construction contract before the U.S. Supreme Court

# ATTORNEY'S FEES



- Can you afford to pay?
  - Who pays if no clause?
- Gives contractor negotiation advantage
  - Reduces the incentive to hold your money

# APPLY TO YOUR BUSINESS

- Take these tools and apply them to your company:
  - List key contract issues for your business
  - Understand how industry contracts address those issues
  - Develop your preferred language for each issue
- Talk to insurance agent/attorney/trade associations
  - Use construction resources effectively



***E. Scott Holbrook, Jr.***

***Crawford & Bangs***

***[sholbrook@builderslaw.com](mailto:sholbrook@builderslaw.com)***

***[www.builderslaw.com](http://www.builderslaw.com)***

***626-858-4207 (direct)***



***Smart  
Contractors  
Finish Profitable***

