

Appendix H

**LEGAL ASPECTS OF
CONSTRUCTION ADMINISTRATION**

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SUPPLEMENT REGARDING LEGAL ASPECTS OF CONSTRUCTION ADMINISTRATION

I. INTRODUCTION AND OVERVIEW

A. Objectives of Contract Administration.

The purpose of this discussion is to address some of the legal issues confronted on construction projects from the perspective of those working in the industry, insofar as that is possible. These materials are presented from the perspective of a general contractor. We will refer to an imaginary Company (a contractor) as we proceed in our discussion. The discussion will also address the concerns of subcontractors and suppliers.

It is helpful to review the objectives of construction administration from the perspective of those responsible for the project. Those objectives can be summarized as follows:

1. Generate appropriate project or development opportunities for the Company, consistent with its capabilities.
2. Define the fundamental goals and objectives of the Company and work cooperatively with all involved to timely and profitably complete the Company's projects.
3. Understand and implement the requirements and objectives for each construction project, to the best of the Company's ability, while at all times addressing and documenting significant issues which arise concerning the Company's ability to timely and profitably complete a project.
4. Ensure that the Company's subcontractors perform their work in a timely manner in accordance with the applicable construction schedules, agreements, plans and specifications.
5. Identify and resolve claims and disputes promptly when they arise, hopefully without the need for litigation, arbitration or other time consuming, risky and costly legal measures.
6. If a dispute must be litigated, insure that the Company will have the necessary records and evidence to effectively present its case, and prevail.

An appropriate approach to achieve these objectives is to implement an aggressive program of project administration, including an effort to do each of the following:

1. Understand, in detail, the contents of the relevant contract documents;
2. Make certain that all contract documents are properly completed and signed;
3. Follow established procedures for preparation and implementation of each of the contract documents (i.e., follow the rules for formation and completion of the contract requirements);
4. Avoid unwritten agreements, "side deals" and other informal practices which lead to misunderstandings and disputes; and
5. Be thoroughly familiar with and understand the subcontracts relating to the project, maintain solid communication with all the parties engaged in the project, and keep a well-documented file regarding the project.

In construction disputes, the single most common problem is the absence of contract documentation to support your position. In any construction dispute which goes to litigation, the party with the superior documentary record to support its position will be in a better position to win. Careful contract administration can save the Company thousands of dollars in unnecessary legal fees and discourage subcontractors, suppliers and other third parties from pursuing meritless claims and litigation.

B. When a Lawyer is Needed.

As with most other things in life, there is a right time and wrong time to consult a lawyer. The following is a nonexclusive listing of criteria as to when the Company ought to consider consulting its lawyer, and when it shouldn't:

1. When the Company receives a communication from a lawyer indicating that he/she represents a party involved in one of the Company's projects, is frequently a time when the Company should consult its lawyer before proceeding.
2. If the Company is presented with documents appearing to be new, unusual or unforeseen contract forms, additions, modifications or change orders, then consultation with the Company's lawyer might be advised.
3. If the Company encounters conduct by another party on a project which appears to be quite inconsistent with its previous experience, and the circumstances carry a substantial risk factor for the Company, then consideration should be given to consulting the Company's lawyer.
4. If claims (in the several thousands of dollars) are made against the Company by anyone, consult the Company's lawyer.
5. If the Company believes it should consider terminating a contractor or pulling off of a project, because of circumstances or conduct which jeopardize a project or the Company's position, then consideration should be given to consulting the Company's lawyer.
6. If the Company confronts circumstances which tend to raise substantial doubt in management's mind as to whether the Company will receive payment for any portion of its work on a project, then the Company probably needs to consider its options, in consultation with its lawyer.
7. Day-to-day ups and downs in conduct of a project, which are not unusual, normally do not require the attention of the Company's lawyer.
8. If management runs into personality problems with specific representatives of another party on a project, consultation with the Company's lawyer is usually not indicated. Interpersonal relationship problems should not generally be misinterpreted as a legal difficulty.
9. If difficulties persist, after the Company has made repeated efforts to resolve a problem by informal consultation, then consideration should be given to asking the Company's lawyer to undertake an appropriate strategy to deal with the situation, particularly if there is a significant risk of a potential claim situation.
10. If a party takes some action to either place a lien on the project, stop the flow of construction funds, or contact the Company's surety or insurer, such circumstances usually require the involvement of the Company's lawyer.
11. Injuries or loss of property on a project, normally require consultation with the Company's lawyer (and insurer) at some point.

12. If there is financial instability (of any owner or subcontractor) or disputes persist impacting upon the potential profitability of the project for the Company, then consultation with the Company's lawyer normally is important in addressing the situation.

C. Goal - Maximize Legal Position.

An important consideration with reference to the legal aspects of the Company's projects, is how at all times to maximize the Company's legal position.

II. LEGAL ASPECTS OF ESTIMATION AND BIDDING

A. Bids and Quotes By the Company and Its Subcontractors.

The bid and negotiation process is often the beginning of the Company's involvement in a project (i) as a contractor or (ii) with its subcontractors.

Invitations to bid are frequently published in local construction industry trade papers. Bidding documents include the invitation (advertisement), instruction to bidders, bid forms, contract documents and addenda affecting the bidding documents. All of these documents could have legal implications and need to be examined and understood in that light.

Frequently, bid documents require that the bidder represent that it has read and understood the documents, visited the site and familiarized itself with the conditions that may affect the project. All of those representations have legal implications, should the Company or one of its subcontractors later determine that it was misled by the plans and specifications, or that it got into a contract which proved unprofitable. Every representation and statement made by the Company during the bidding process could come back to haunt it. Accordingly, the approach to any bidding process should be carefully undertaken.

The instructions to bidders should be read very carefully by the Company and designated subcontractors from the standpoint that the instructions set out the rules with reference to conducting the bidding operation, and with reference to possible interpretation of the contract (once it is entered into by the successful bidder). Frequently, the instructions state that requests from bidders for interpretations or corrections in bidding documents should be addressed to a design professional who is designated to be the final arbiter in such matters. Instructions also normally state that there can be no substitution of material or equipment unless a written request is made within a specified number of days before receipt of bids. Usually, such a request must contain a complete description of the substitution so that the substituted equipment or material can be evaluated.

Furthermore, instructions quite typically require that the bidder give the design professional representing the owner the estimated cost for each major item of work in his/her bid, the work to be done by the bidder's personnel, the names of his/her subcontractors, and the names of the material and equipment suppliers within a set period of time. Such statements and representations can have significant legal representations later on.

The long and the short of it is that the Company should carefully approach the bidding process. The handling of the bidding process could create substantial business difficulties for the Company, which could have significant legal implications.

Not infrequently, the Company engages in a process of negotiation (in addition to or instead of bidding) in the formation of subcontracts. The success of contract negotiations, whether involving construction contracts or otherwise, depends upon many variables, most of which ultimately bear upon the relative strengths and weaknesses of the parties.

The basic goal in construction contract negotiations is an allocation of the risks between the parties. The ability to identify and appraise these risks can move the parties closer toward an equality of bargaining power, notwithstanding the above variables. Intelligent negotiation requires a thorough understanding of the basis of construction contracting. This basic principle can be reduced to several key issues which are invariably a part of every construction contract, including:

1. In determining which party should bear a particular risk, certain questions should be answered:
 - a. Who is better able to recognize and assess the risk?
 - b. Who is better able to control the risk?
 - c. Who is better able to bear the consequences of the risk?
2. If the Company participates in a project as a potential subcontractor and provides an oral quote for a particular contract, it can have significant legal implications.
3. Before submitting its bid to the owner the Company must know (to a high level of certainty) what its costs will be to perform the work. To accomplish this, the Company solicits and receives bid proposals from subcontractors for certain assigned portions of the work and undertakes to estimate and perform other portions of the work itself. The Company should always strive to assure that a subcontractor's bid proposal is in fact a definite offer to perform. This bid will become an enforceable contract if the bid is accepted, as opposed to a naked price quotation which courts have frequently viewed as preliminary negotiations.

Without contrary language appearing in the bid or invitation to bid (or some other enforceable type of reliance by the contractor upon a subcontractor's bid) the subcontractor may, under traditional contract formation rules, withdraw its bid at any time before a communication of acceptance by the contractor. The amount of the subcontractor's proposal, the scope of his/her work and other conditions to which the subcontractor commits, are critically important. Therefore, when the Company receives and acts upon subcontractor quotations and proposals, it is in a predicament: It has no need or desire to accept the proposal until it knows whether its own bid is accepted by the owner. This time lapse between submission and owner acceptance or nonacceptance creates the risk, under traditional contract law principles, that the subcontractor will withdraw its bid in the interim.

In an effort to deal with this risk and avoid disputes when a subcontractor withdraws its bid in such a manner, contractors frequently require subcontractor offers to be firm or irrevocable for a definite period of time after submittal.

A firm, irrevocable offer by a subcontractor has been found by courts to be a commitment which is contractual in nature and legally enforceable as such. A subcontractor who fails to perform or honor such a bid may be liable to the contractor for resulting damages incurred by the contractor.

B. When Is the Contractor Legally Bound?

Normally, when the Company receives a bid from a subcontractor, the subcontractor is legally bound to perform the work as indicated in the bid documents, upon acceptance of the bid pursuant to its procedures. Reliance by the Company upon the subcontractor's bid, in the form of acceptance or some other conduct, is the point at which the subcontractor normally becomes legally bound. Acceptance of the subcontractor's bid or any other form of reliance by the Company, is the point at which the subcontractor's legal obligations under the contract become fixed.

It is extremely important, therefore, that the Company know from the outset what the bidding and negotiation rules are, both formal and informal, and who will be conducting the bidding process for the awarding authority. Appropriate business determinations should be made as to whether the Company should bid the project. Risky contract circumstances should be clearly identified and understood. To be aware of the potential problems, the Company should analyze any potential contract, during the bid estimation stage to determine whether:

1. The time frame for performance of the construction is reasonable;
2. Time extensions are specified in the contract for excusable delays;
3. Time extension clauses are restricted to time or also provide for compensation;
4. No damages for delay provisions exist;
5. Scheduling and milestone requirements are reasonable;
6. Specifications appear to be adequately prepared so that reasonable bids can be prepared and Construction undertaken based thereon;
7. Design appears to be adequate;
8. The guarantee provisions are reasonable; and
9. The owner bears the risk of sub-surface conditions.

As a part of such a review, the Company should also determine what risk allocation or equitable adjustment clauses appear in the contract which are for the Company's benefit, and what procedures for their enforcement exist.

Understanding of the current legal interpretations given to key clauses is also important. But exceptions always exist in enforcement of "no damages for delay" clauses, and determination of what types of work are subject to a "change order" clause.

C. Mistakes and Miscommunications In the Bid Process.

Under some circumstances, a mistake in preparing a subcontractor's bid can result in the subcontractor being relieved of its obligations under a contract. A unilateral mistake, or one having to do with an error in judgment, is less likely to result in the subcontractor being relieved of its responsibilities once a bid is accepted and a contract formed with the awarding authority.

The right to terminate the contract is available to the subcontractor where there are instances of mutual mistake; that is, both the subcontractor and the Company are mistaken on some point. Such relief is also available for some forms of unilateral mistake.

It has been the law in California for quite some time that a bidder can withdraw his/her bid for a unilateral clerical mistake which is not the result of neglect by the subcontractor, where prompt notice was given to the awarding authority and the awarding authority suffered no damage, despite inclusion in the invitation to bid of a statement that bidders "will not be released on account of errors". *Elsinore Union Elementary School Dist. v. Kastorff*, (1960), 54 Cal.2d 380, 388-389.

A unilateral mistake by the Company, in most instances, cannot be the basis for a change in the contract for the benefit of the Company. Mistakes in reading plans and specifications are normally not the basis for relieving subcontractors from contract responsibilities. California law also provides that no change shall be made in a bid because of a mistake.

D. Prudent Practices In Taking Subcontractor Quotes.

Subcontractor quotes should be conducted pursuant to applicable law and the bid specifications. Subcontractor quotes should be memorialized in writing. A complete file of the circumstances surrounding receipt of a quote should be kept. The name of the party representing the subcontractor providing the quote should be noted as well as the date and time of the conversation. Quotes should be accepted only from subcontractors with whom the Company is familiar and as to whom there exists a responsible track record. As always, the Company should work very hard to maintain an accurate file of its subcontractor quote discussions, so that appropriate reference later on can be made, should the need arise.

III. CONTRACT DOCUMENTS

A. What Is the "Contract", And What Isn't?

The orderly performance of complex construction contracts requires that fair and practical methods of interpretation be available. This is necessary so that construction can proceed without undue hardship upon the participants.

All of the elements which are included in the construction contract are pretty well known in the construction industry as the "contract documents." According to the American Institute of Architects, the contract documents consist of the owner-contractor agreement, the conditions of the contract, the drawings, specifications, all addenda issued prior to execution and all modifications issued after execution of the contract. These materials comprise the complete "Contract" for the construction of a project.

The construction contract sets out the rights, responsibilities, relationships and liabilities of the parties involved. The rules of interpretation of contracts, generally, apply to construction contracts requiring that effect be given to the intention of the parties as gathered from the plain reading of the entire contract, with ambiguities normally construed against the drafter. Clarity in drafting is a primary tool by which to avoid litigation and disputes in connection with a contract.

A contractor's responsibility and liability is fixed by the terms of the contract. He/she is obligated to perform according to those terms. The contractor cannot be burdened with obligations to perform for which he/she did not originally contract. Questions obviously arise in great numbers as to what the contractor agreed to do by his/her contract and what kinds of things are covered under the provisions which call for changes in the work. The change order provision is an attempt to incorporate a flexible provision in a fixed agreement to take into consideration unforeseen conditions which are likely to present themselves during the course of work.

Field authorizations, letters, memoranda, communications from the owner's engineer, field notes, diaries and other such documents, normally are not considered a part of the contract documents, unless specifically incorporated within the construction contract itself. (In most government contracts, the bid package, invitation to bidders, the bid, the contract, government regulations regarding labor and equal employment opportunity, the standard specifications and the plans are normally incorporated in the "contract.")

Detailed specifications, the most commonly used, describe the materials, dimensions and locations of all elements of the final product. Those specifications attempt to represent the completed construction project in such detail that the owner, contractor, architect and other interested parties all agree on the exact physical properties of the final product, e.g., the exact formula to be followed in mixing concrete, specific equipment to be utilized for the air conditioning system, and so on.

Outline specifications, as opposed to detailed specifications, are used by contractors to meet the needs of the customer, usually an industrial owner, who needs warehouse or manufacturing facilities or a combination of both, and would like to handle the entire program through a single contractor who will design and build the facility on a cost-plus basis, or sometimes with a guaranteed maximum price. The outline specifications merely designate broad features, such as major construction or types of walls, type of electrical circuitry, and the type of air conditioning.

B. Specific Examples Of What Is Or Is Not Incorporated In The Contract.

Incorporated within every contract and subcontract, by operation of law, is an implied covenant of good faith and fair dealing. *Gray v. Bekins*, (1921), 186 Cal 389, 394-395. That covenant requires that neither party to the contract do anything which would hinder or interfere with the other party's right to obtain the benefits of the contract. The implied covenant of good faith and fair dealing is not a frequently used device in government work, but could be more frequently utilized where agency representatives are acting in an arbitrary and unreasonable fashion.

If the Company is to "make its case" of being treated unfairly by a subcontractor, the Company will do so by introducing correspondence and other documents, which support the proposition that the subcontractor is behaving in bad faith and violating the implied covenant of good faith and fair dealing. A "record" must be made of the conduct to succeed.

One of the first things the Company should do in reviewing a subcontract document is to check it for completeness. Check the drawings against the drawing index. Check the specifications against the specifications index. Before submitting a bid, ascertain that all addenda have been received. On the occasion of signing a contract, the Company should follow the procedure generally accepted and have all the contract documents executed in triplicate. Thereafter, the Company should attempt to formalize all modifications to the contract by use of written change orders. Following all of these procedures will eliminate the necessity for interpretation of what constitutes the contract documents on any particular project.

A common practice among general contractors and owners, which can and does occasionally lead to disastrous results, is the disassembling of the drawings and specifications for distribution to subcontractors (such as electrical and mechanical). Architects and engineers expect that all of the subcontractors will have reference to all of the drawings and specifications and be somewhat conversant with them. Sometimes, information very important to the preparation of the subcontractor's bid is on the architectural or structural drawings which they have not seen. While the Company normally does not use all that many subcontractors on its typical projects, the Company should make an effort, as a part of its plan to coordinate the work by subcontractors, to make certain that all subcontractors have a complete set of the plans and specifications available for any project.

C. Change Orders And Field Authorizations.

Field authorizations, not executed by authorized officers of both the awarding authority and the Company, are frequently ineffective documents. Yet, they can be construed as admissions against the Company where field authorizations are issued to subcontractors, who rely thereon and perform services. Field authorizations should be carefully utilized.

Probably the most frequently invoked clause in the standard form of construction contract is the change order clause. This clause basically provides that the owner may order changes in the work, after the basic contract is executed and demand specific performance without invalidating the contract. This clause permits a job to continue toward completion under the basic contract while the owner and contractor deal with new ideas or changed conditions. The changes may consist of additions or deletions within the general scope of the work. The clause also provides for adjustment of contract time and price based on the effects of the changes ordered. The change order is generally required to be in writing and must be signed by the owner and/or the architect.

Construction contracts often involve changes within the general scope of the work:

- (1) In the specifications;
- (2) In the method or manner of performance of the work;
- (3) In the government-furnished facilities, equipment, material, services or site; and
- (4) Directing acceleration in performance of the work.

In private work projects, changes most frequently arise over:

- (1) Changed or concealed conditions on the job, such as work below ground;
- (2) Increased costs due to changed conditions;
- (3) Delays, stop work orders, etc.; and
- (4) Extensions of time.

The most important factor in successfully negotiating a change order is to have a clear and complete working knowledge and understanding of all resulting contract requirements with reference to the scope of work and methods of performance.

Extra work is the most common type of change order. As used in connection with a construction contract, it means work of a character arising outside, and entirely independent of, the contract—something not required in its performance, not contemplated by the parties and not controlled by the contract. *Frank T. Hickey, Inc. v. L.A.J.C. Council* (1954) 128 Cal.App. 676, 683.

Where extras are of a different character from the work called for in the contract and no price is agreed upon for the extra work, the contractor is entitled to recover the entire "reasonable value" of the extra work. The extra work ordered by the owner constitutes a change to the contract under the scope of the work provisions of the contract. Also, the arbitrary deletion of a major portion of work by the owner may entitle the contractor to his/her "loss of profits" in connection with the deleted work.

A contractor, who acting reasonably, is misled by incorrect plans and specifications issued by the owner during the bid-process and who as a result, submits a bid which is lower than he/she would otherwise have made, may recover damages for work necessitated by the incorrect plans and specifications.

Another type of change commonly encountered by contractors is a demand on behalf of the owner that the contractor perform the work by a method different from that specified in the contract or, if no method is specified in the contract, different than that planned by the contractor in bidding the project. This constitutes a change to the contract for which the contractor may be entitled to recover the "reasonable value" of the extra costs attributable to such change. The theory of this recovery is the same as extra work recovery discussed above.

"Constructive changes" broadly encompass all changes to the contract where the owner refuses to acknowledge the change and therefore also refuses to issue a formal change order. For example, the law is well established that the owner's unreasonable action, abusive discretion, overly strict interpretation of the contract, or erroneous interpretation of the contract may constitute a "constructive change" for which the contractor is entitled to extra compensation.

Most construction contracts contain a notice requirement to the effect that, as a condition precedent to the contractor's right to recover on any claim against the owner, the contractor must give prior written notice to the owner of the claim within a designated period time after the contractor learns of the facts giving rise to the claim. Such notice provisions are generally applicable to claims for extra compensation due to changes to the contracts. Inexcusable failure of the contractor to give the requisite written notice of claim may be asserted by the owner in certain cases as a bar to the claim. It is therefore strongly recommended that the Company routinely give the awarding authority or owner written notice of claim or potential claim immediately upon becoming aware of factual circumstances which may constitute the basis for a claim of extra compensation due to a change in the contract.

The notice provisions of a contract quite often purport to impose upon the contractor an impossible burden of including in the notice of claim infinite details as to the factual basis and amount of the claim. It is often impossible for the contractor to provide those factual details to the owner within the time period designated by the notice of the claim requirements. The courts have therefore held that substantial compliance with these notice requirements is adequate. Strict compliance with such written notice requirements will not be required. There are certain exceptions to this rule, having to do with the actual knowledge of the contractor, the contractor's breach of contract, and conduct by the contractor constituting a waiver of the substantial compliance doctrine. However, failure to give

notice may not be imposed as a bar to a change order where it is shown that the awarding authority is not prejudiced by the failure to give notice.

It is sometimes impractical to await the conclusion of the change order negotiations prior to commencement of the extra work involved in the change to the contract. Therefore, as an alternative to strict compliance with the written change order requirements, the contractor prior to commencing extra work, should insist upon a written directive from the owner to proceed with the extra work. Also, prior to or simultaneously with commencement of the extra work, the contractor should give the owner written notice of the claim for extra compensation in connection with the extra work. The contractor's written notice of claim should also include a confirmation of the owner's agreement to waive the written change order requirements of the contract. In this manner, the owner will be deemed to have waived the written change order requirements of the contract, and the contractor's extra work claim will be preserved for a later pursuit against the owner.

The written change order provisions of a contract may be waived by the owner, if a course of conduct on the project is adopted between the owner and the contractor inconsistent with the owner's reliance upon a strict compliance with such written change order requirements. *Howard J. White, Inc. v. Varian Assoc.*, (1960), 178 Cal.App.2d 348, 353.

California law is well settled that a contractor is entitled to recover the entire reasonable value of extra work performed for the owner, where the extras are of a different character from contract work and no price is agreed upon for the extra work in the contract. Such major items recoverable under an extra work claim include direct extra costs, including labor, equipment, materials, insurance premiums, bond premiums and direct overhead. In addition, indirect extra costs, including home office overhead are sometimes recoverable in the absence of a specific contractual provision to the contrary. In the absence of a specific contractual provision to the contrary, the contractor is also entitled to recover from the owner a reasonable percentage markup for profit attributable to the extra work claim. Finally, deletion of a major portion of the work by the owner may entitle the contractor to recover his/her "loss of profits" in connection with the deleted work.

If a change order is in an item of work covered by a contract unit price, and such change does not involve a substantial change in the character of the work as that shown on the plans or included in the specifications, an adjustment in payment will be made in accordance with an agreement between the contractor and the Owner. If they cannot agree, the contractor shall proceed on the basis of extra work based upon the actual costs incurred, and a specified provision with percentages as markup for all overhead.

Frequently a contractor will sustain consequential damages and impact costs as a result of contract changes by the owner. These damages are in addition to the extra compensation normally paid to the contractor under the change order. If the owner demands that the contractor accelerate his/her work because of changes to the contract, or the wrongful refusal of the owner to grant extensions of time because of excusable delays in connection with the changes to the contract, such circumstances may entitle the contractor to recover from the owner the extra costs attributable to the acceleration. Furthermore, a contract change order by the owner may have the effect of severely delaying, disrupting and hindering the operations and performance of the contractor on the project, entitling the contractor to recover from the owner the extra costs and damages approximately caused by the delay, disruption and hindrance. The delay, disruption and hindrance costs and damages can include equipment, labor, escalation, material escalation, extended direct and indirect overhead, extended insurance premiums, interest on retention, extended maintenance costs, consequential inclement weather damages, and other items. Moreover, a change may lose efficiency for the contractor, which itself may be compensable in the form of extra costs and damages attributable to the loss of time and efficiency.

D. Shop Drawings.

The Company may encounter circumstances where shop drawings are used with some frequency on a project. Shop drawings are most normally used on building projects with reference to construction activities concerning construction of a structure of the building. Shop drawings constitute a contractor's recitation to the owner and the owner's architect of the contractor's understanding of what is to be built. Shop drawings are a checking device by which the interpretation on the plans by the subcontractor or contractor are reviewed by the owner and the architect.

IV. CONTRACT LEGAL ISSUES FOR CONTRACTORS

A. What Parts Of The "Contract Are Given Priority Over Other Parts?"

There is no clear rule that can be safely relied upon to determine which of the contract documents shall take priority in case of conflict or ambiguity within or among the documents. Often the subject is resolved by an appropriate position being derived from the general conditions, standard of specifications and/or other outlined specifications for conduct of the work.

As a matter of custom, but not invariably, architects who provide a specific solution for resolution of conflict in their documents, prefer to have the specifications govern rather than the drawings. Some architects provide that the most stringent or most costly, condition would govern.

In the complete absence of a precedence clause, the architect could settle this issue by written interpretation in accordance with the procedures set forth and the general conditions of a contract.

Many of the inconsistencies, ambiguities and omissions in the plans and specifications are discovered by estimators of the general contractor, various subcontractors and suppliers. The contractor is required by the general conditions to report any errors which he/she may discover, although he/she will not be responsible for damages resulting from such errors. During the bidding period, however, he/she is not yet legally bound to the requirements of the general conditions. Accordingly, a contractor's motivation in reporting errors is to obtain more accurate bidding information.

Of serious potential concern are areas where inconsistencies are discovered during the construction period. Often the area of concern will become apparent during the preparation of shop drawings or in the field layout of dimensions. Any additional drawings or specification which will have to be issued at this time to clarify such problems will be considered as modifications to the contract and will often give rise to additional work charges to the owner. A contractor has the duty to seek clarification of clear ambiguities, without which he/she is not entitled to the benefit of the rule that ambiguities are to be resolved against the drafter.

Most contract provisions which are typed and not part of the forms, are in most instances given precedence over the boilerplate form portions of the contract. In short, very special conditions written by the awarding authority with reference to a specific project, are given precedence and priority over the printed forms of standard specifications, such as the Green Book.

"What kind of information belongs on the drawings" and "What should be in the specifications?" Are questions which frequently arise. As a general rule, information most effectively or most easily conveyed in graphic or diagram form should be on the drawings, while material more efficiently or conveniently transmitted by words, should be in the specifications. Drawings are very useful for transmitting data relating to the arrangement, location, dimensions, and interrelationships, while specifications are more suitable for describing quality, gauges, standards, guarantees, procedures and manufacturers' names.

A general concept pretty well recognized among building contractors is that the general contractor shall be solely responsible for all construction procedures and for coordinating all portions of the work under the contract. He/she is also responsible for maintaining and supervising all safety precautions and programs. Drawings and specifications prepared under the latest state of the art will not violate that principle.

B. Ambiguity - Whose Problem?

Where a contract provision written by one of the parties is ambiguous, it normally will be resolved against the party who drafted it. (A major exception to this is contracts drafted by governmental entities. Such contracts are not interpreted by specific statutory requirements against the government entity who drafted it.) In its practical application, the general rule that ambiguous contracts are interpreted against their drafter, means that a contractor may rely upon his/her interpretation of an ambiguous provision if his/her interpretation is reasonable, he/she did not participate in the drafting of the particular contract clause and the clause is not so obviously or patently ambiguous as to have imposed on the contractor a duty to seek clarification.

A contractor has the duty to seek clarification of patent ambiguities, failing which he/she is not entitled to the benefit of the rule that ambiguities are to be resolved against the drafter.

The Parol Evidence Rule is a substantive rule of contract interpretation. It provides that where two parties have reduced their agreement to a writing, which sets forth their complete agreement, all prior negotiations and understandings whether written or oral are merged into the contract and cannot be used to vary, contradict or add to the terms of the contract. The Parol Evidence Rule does not, however, have any application to subsequent agreements or modifications of the contract. Also, there are substantial exceptions to the rule, which indicate that the parties may submit to the court evidence of their intentions and understandings at the time they entered into the contract.

C. Representatives Of The Company Should Be Aware of What's In the Contracts They Are Signing And Use The Contracts To Their Maximum Benefit.

Not much legal insight or analysis is required to support the conclusion that the Company's project managers should be thoroughly familiar with all contract documents, and be prepared to engage representatives of the owner or awarding authority in discussions regarding contract interpretation, based upon that detailed background knowledge. An understanding of the contract should be undertaken as soon as possible, certainly before the first job or project meeting.

D. Scope Of Work Provisions.

Particular attention should be given at all times, particularly during bidding and during contract administration, to what the scope of the work is under the agreement. This is a principle which need not be restated.

The importance of this principle from a legal standpoint, has to do with the contractor's reaction to extra work requests where contract additions or deletions substantially impact upon the scope of work of the project.

Normally a contractor bids a job on the assumption that for the bid price he/she will perform only the work called for by the contract. If additional work is added, he/she expects to be paid a sum in addition to his/her bid price, regardless of whether the additional work is due to the architect's error, the owner's oversight, or a desire to change and improve the project.

It is not uncommon for the owner to decide during construction of a project that he/she wishes to add features not included in the original drawings and specifications or decide to delete items from the drawings. If the contract reserves the right to the owner to make such changes and if the magnitude of the changes is not excessive (i.e., does not exceed the scope of the work) the contractor will be obligated to comply with the change request. If the change is major, the contractor may contend that the scope of the change is beyond what could have been contemplated by the parties at the time the contract was signed, thus excusing him from the performance of the requested extras. Even if the contractor is required to comply with the change, the amount by which the contract price is to be increased or reduced, as a result of the change, may be disputed.

If a dispute occurs, either over price or whether the work is extra, the parties first have an obligation to bargain in good faith. In many instances a contractor will elect to proceed with the work under protest after taking into account the extent of the claimed extra and the consequences of not proceeding. If the dispute involves some aspect of the work that could not be performed later, such as a request to wrap conduit before placing underground, the alternative to proceeding under protest may be to shut down the job. That is a significant and difficult decision which must be carefully considered.

If owner-requested changes are of such a magnitude as to change the scope of the work, the awarding authority may be considered to have abandoned the original contract. In such a situation the contractor will be entitled to recover the reasonable value of the work performed in a civil action. Excessive change orders may also constitute a breach of contract.

E. Time Extensions - Delay.

Most public and private construction contract disputes touch on the issue of delay. It is even an issue in disputes centering on injury or extra work claims. Causes of delay are numerous and may be the fault of the contractor, the awarding authority, both parties, or neither of them. When delays are caused by natural conditions over which neither party has control, such as the weather, labor relations problems and the like, neither party is at fault. The contractor is at fault when delay is due to the failure to order materials on time, failure to make timely submittals of equipment to be used on the project, inadequate coordination of subcontractors, and inadequate staffing of the job. Among delays caused by the awarding authority are failure to give prompt inspection, delay in processing of submittals, ordering extra work that delays the job, delay in processing extra work orders, and delay in furnishing access to the job site.

Construction delays are frequently injurious to all parties. Injury to the contractor includes direct job expenses, indirect costs (such as office expenses, salaries of home office personnel and the like) and adverse impacts on profitability of the job for the contractor. Frequently damages for delay to a awarding authority are very difficult to measure. The standard procedure is to determine damages to be awarded to the awarding authority by application of a "liquidated damages clause".

When delay occurs, it is usually due to a combination of factors. Part of the delay may be due to the fault of the contractor, part to the awarding authority, and part to weather, strikes or other events that are not the direct responsibility of either party. Thus, there is a problem of apportionment of damages for delay. Another part of the problem is determining the amount by which the delay in one portion of the job contributed to the delay in the completion of the entire project. For example, the contractor may claim the job was delayed by the architects failure to make a prompt selection of colors. Architects, on the other hand, can argue that the delay in selecting colors did not prevent the contractor from installing the roof.

One way to approach this type of problem is to determine whether the item of work is critical to the progress of the project. For example, installation of anchor bolts may be a prerequisite to pouring of a concrete slab. The slab must be poured before the job can proceed. Thus, a delay centering on anchor bolts worth a few cents a piece can stop a project worth millions of dollars. On the other hand, installation of the major component might not be very critical to the project's completion. For example, a delay of 30 days (not due to rain) in installing a roof might not interfere with any other trade and thus might not delay completion.

Given the supposition that a particular item of work is not on the critical path, accumulation of delay for a number of such items is bound to affect the job's organization and efficiency, and thus, ultimately delay completion of the entire project. If damages for delay are liquidated, calculation of the amount is eased. It is then necessary to specify the day on which the project is to be completed, calculate the total number of days of delay, minus the number of days for which the contractor is excused for delay by rain, and other excusable reasons, and finally multiply the remaining days by the liquidated damages figure.

The typical construction contract contains a provision that if the contractor is delayed by rain, and other excusable events he/she will be entitled to an extension of time, if he/she files a request within a certain number of days after commencement of the delay. The courts have held that if delay is in part caused by the awarding authority, the contractor is entitled to an extension of time even if he/she fails to request the extension in writing.

There is a division of legal authority in this state as to whether liquidated damages may be apportioned when the delay is caused by both the contractor and the awarding authority. The only California Supreme Court case on the issue stated, in language which was not material to the decision, that a awarding authority is precluded from claiming liquidated damages when it caused a part of the delay, even though the contractor may have caused most of the delay. Yet, there is a lower court decision which indicated that liquidated damages may be apportioned and distinguishes the earlier cases not allowing apportionment as involving those circumstances where there was not a contractual provision for extension of time and those circumstances dealing with private contracts.

F. Interpretation And Reconciliation of Contract Provisions.

There are certain principles of contract interpretation which are of note. Ambiguous provisions are interpreted against the drafter, except when the drafter is a public entity.

A basic rule of contract interpretation is that contracts are to be construed in accordance with the objective intent of the parties. The objective, as opposed to subjective intent, is that intent which one would infer from reading the contract. Subjective intent is the true intent or actual state of mind of the party who drafted the particular contract provisions.

Courts frequently rely on various miscellaneous rules of contract interpretation. In many instances such rules can be found to support several different and inconsistent results. For this reason, it is often said that courts first determine the result and then determine the rule of interpretation which supports it. Some of the miscellaneous rules frequently referred to in construction cases are:

1. Reasonable logical interpretation.
2. Normal meaning of words.
3. Look for the whole agreement, and not just parts of it.
4. Look for the order of precedence of a contract, and find those provisions of the contract which are given clear preference over others, such as specifically typed provisions over printed provisions.
5. Look for the principal purpose of the contract and follow that purpose.
6. Look for the usual custom and usage in the particular trade in question.
7. Examine what the course of dealing has been between the contractor and the awarding authority in the past on the issue.

G. Termination And Quitting The Job.

Termination from a project is a very difficult decision. It is one invariably based upon a calculation of what the impact of your decision will be when continuing with the project would be unfair or impossible. Invariably, the awarding authority will accuse the Company of breaching the contract, and will seek damages in the millions of dollars.

Several circumstances could result in a conclusion by a contractor that he/she should not proceed. One such circumstance has to do with a situation in which the specifications are said to be defective when they called for performance which is not possible.

Actual impossibility exists when the contract cannot be performed according to the specifications by the contractor or anyone else, because the specifications are erroneous or because performance requirements cannot be achieved, or because requirements, although conceivably attainable, cannot be attained without going beyond the existing state of the art. Aside from actual impossibility there is a practical impossibility, which exists when the contract requirements are impractical "because of extreme and unreasonable difficulty or expense in meeting them." Practical impossibility exists when: (1) the work is not possible within the basic contract objective contemplated by the parties; and (2) the cost and difficulty of performing the work renders completion commercially senseless.

When performance is impossible, the risk of impossibility is allocated to one of the parties in accordance with the various rules designed to impose the risk on the party which assumed that risk, either expressly or otherwise. In some contracts, the risk of impossibility is expressly allocated to one of the parties. As a general rule, the risk is allocated to the owner unless some special circumstance indicates that the risk should be allocated to the contractor. The risk may be allocated to the contractor where it is obvious, where the contractor warrants his/her ability to achieve a particular performance requirement, where the contractor had superior knowledge respecting the possibility of performance, or where the impossibility resulted from a shop design prepared by the contractor.

If the risk of impossibility is allocated to the owner, the contractor is entitled to recover the fair value of the services performed prior to the termination of work, but is limited to a ratable portion of the contract price. That is one situation in which termination of the contract by the contractor is permissible.

One of the most important implied provisions in a contract is the warranty that the project can be satisfactorily completed by following the specifications. Where that proves not to be true, the contractor may be justified in terminating.

There are provisions implied by law in a contract which are "indispensable to effectuate the intention of the parties" arising from the language of the contract and the circumstances under which it was made. The intent of the contract must be obtained from the entire document, including consideration of its subject matter and the purpose of its execution. The circumstances of the parties when they made the contract, must prevail over the recitals therein, unless the intent so gathered runs counter to the plain sense of the words in the agreement.

In every building contract, which contains no express covenants on the subject, there are also implied covenants to the effect that the contractor shall be permitted to proceed with the construction of the project in accordance with the other terms of the contract, without interference by the owner. Such terms are necessarily implied from the very nature of the contract. A failure to observe them not consented to by the contractor, constitutes a breach of the contract on the part of the owner, justifying termination by the contractor. The foregoing circumstances arising from impossible to perform conditions and breach of implied covenants of cooperation. Notwithstanding such, a decision to terminate a contract by the contractor is one which should not be taken lightly.

When a owner orders a contractor to proceed with work that the contractor claims is not included in the contract price, the contractor has a choice of abandoning the job, rescinding the contract and suing for damages or proceeding under protest and later filing suit to recover for the cost of extra work. A contractor can proceed under protest and not waive its claim for extra work compensation. When the contract documents require a written protest specifying in detail the work performed and the resulting cost, a protest letter that fails to comply with the contract requirements is ineffective.

Related to the performance under the protest theory is the theory of economic duress which is possibly subject to the doctrine of government immunity. Although no case has been found where the theory has been successfully applied in a construction case, it may be useful to keep that theory in mind, if a particularly difficult situation is confronted. Practically speaking, performance under protest is normally preferred over termination of the contract.

If circumstances become very difficult, it is always a very good idea to have a documentary record of the efforts to correct the situation and warnings to the owner.

In California, the failure of the awarding authority or owner to make progress payments under the contract to the contractor will entitle the contractor to rescind the contract unless the failure is only a minor deviation from the terms of the contract.

In determining whether the contractor would be justified in ceasing work and shutting down the job, consideration must be given to whether the owner or awarding authority is justified under the contract in ordering the contractor to do the work without additional compensation and, if not, whether the order constitutes a breach of contract sufficiently material to excuse further performance by the contractor. While the general rule is that a material breach of contract on one side excuses further performance on the other side, there is very little legal authority to guide one in distinguishing between a material breach and a minor breach. The safest course appears to be that when in doubt, proceed under protest, unless the owner's alleged breach is so material that to follow the owner's instructions would risk financial disaster to the contractor.

One case has held that, under the circumstances there, the contractor was justified in refusing to proceed if the changes are of such great magnitude. Otherwise, the contractor must perform and obtain subsequent judicial determination regarding his/her damages. If the changes are of great magnitude, as requested by the awarding authority, the contractor is obligated to negotiate in good faith for a satisfactory price and, having done so, is not required to continue performance of the basic contract when there is no agreement.

Similarly, when a subcontractor fails to adequately perform, the Company should make every effort to document its difficulties with the subcontractor, including providing substantial compliance with the notice requirements under the provisions of the subcontract. The subcontractor provisions regarding termination should be followed very closely, and only after substantial breach of a subcontract, should the Company elect to terminate a subcontractor.

H. Keeping An Accurate Job File Is Very Important To Successful Administration Of A Project.

In order to maximize the Company's rights, a complete and accurate job file must be maintained. Appropriate diaries must be kept by the appropriate employees, and frequent communication should be engaged in with the owner where difficulties arise. When difficulties arise the communication should begin in a timely fashion, both orally and in writing. Any arrangements reached with the owner or awarding authority should be immediately documented in writing, if by no other means than a letter directed to the awarding authority's representative.

Efforts to keep in contact with the owner's representatives, including outside engineers, and to document that contact in writing, may assist the Company in obtaining payment for its services, at some later date. Efforts to completely document the file, at an early date, may prevent the need for substantial expenditures of money to prove-up the Company's position after the fact.

I. It Is Important That The Company Understand The Awarding Authority's Application Of The Contract Provisions And Where Appropriate Challenge Misapplication Of the Contract Provisions By The Awarding Authority.

In keeping with the recommendation that the Company remain aware of the contract provisions, project managers should work to understand the awarding authority's interpretation of the contract documents. Project Managers should also be sure to document misapplication of the contract provisions by the awarding authority, so that those misapplications can be addressed by informal negotiation. If an awarding authority has a misunderstanding of the 25 Percent rule, or if it disagrees regarding time delays, an immediate effort should be made to document those difficulties and an effort should also be made to resolve them by informal negotiation, protest and/or documentation of the dispute. Efforts to mediate differences of opinion should be made, including utilization of the American Arbitration Mediation procedures, where applicable.

J. Bond Requirements.

The subcontractor will be frequently required to put up performance and labor and material bonds concerning its work.

The two most common types of bonds encountered in the construction industry are the performance bond and the labor and material bond (also referred to as the payment bond). The performance bond guarantees that the subcontractor will perform its contract. The "principal" may be a subcontractor and the "obligee" the Company. Often the construction lender is also an obligee on a performance bond, with reference to private work. A performance bond is often combined with a labor and material bond at no additional premium.

Unlike a labor and material bond, a performance bond on which the subcontractor is the principal, usually runs only in favor only of the Company.

The most common labor and material bond used in California is the payment bond. When an owner of real property and a contractor enter into a fixed-price contract for construction, this price is the monetary limit of the owner's obligation to the contractor regardless of the actual costs of the improvement. The owner's obligation to supplier of labor, services, equipment or material is not limited to the prime contract price. The mechanic's lien law does provide a means by which the property owner may avoid paying more than the agreed contract price because of liens by unpaid suppliers. To obtain the benefit of the statute, the owner must file the original contract and record a bond in the office of the county recorder where the property is located before the work of improvement is commenced.

K. Indemnity And Insurance.

A subcontractor may be asked by the Company to indemnify the Company for the subcontractor's negligence in performing the project. Unless the indemnity provision specifically provides for indemnification for the awarding authority's negligence, the indemnification runs only in situations where the subcontractor is negligent, or if the Company and third parties are both negligent (perhaps including the awarding authority as well).

It is often required in the Company's construction contracts that the subcontractor have suitable liability insurance, builders' risk insurance and workmen's compensation insurance. The purpose is to cover any injuries which are suffered by workmen on the project, and the affects of any damage caused by the subcontractor or the Company's defective workmanship. Such insurance normally does not provide coverage for damage to the Company's own work, but such coverage can be approached by obtaining "completed operations" and "products liability" insurance. Such insurance is very expensive. The Company can obtain insurance providing coverage for defective work by its subcontractors, but not as to its own defective workmanship.

V. CONTRACT ADMINISTRATION

A. Follow The Contract Or Get Permission Not To Do So.

Whenever the Company confronts a situation where performance of a contract is difficult or impossible, it should immediately communicate with the awarding authority or its agents in order to obtain an appropriate change. Under no circumstance should the Company go forward with a change of the proposed work without authorization, or least an effort to communicate with the awarding authority in some follow-up form of protest. (See discussion above.)

Efforts should be made to ascertain from the awarding authority and its representatives, their understanding of the way the work should proceed. If the Company believes that the awarding authority and its representatives are in error, or if the awarding authority is improperly interfering with the Company's performance, then appropriate communication should be had with the awarding authority, and an appropriate protest lodged.

B. The Company's Project File Should Be Kept Complete.

The Company's time records, job diaries and job files should be kept up to date. All events and developments should be memorialized in writing, particularly with reference to interaction with the awarding authority and its agents. Any changes in the work should be documented. If changes cannot be executed and entered into in a timely fashion before performing the work, the Company should at least confirm in writing to the awarding authority requests for changes in the work.

C. Processing Payment Requests.

From a legal standpoint, the Company should make every effort to fully document all of its payment requests. Complete copies of invoices, lien releases and other documentation should be gathered together by the Company and presented with all payment requests. All time records, subcontractors submittals, change order requests and other documents necessary to provide complete documentation of the payment requests should be gathered together and presented with a payment request. A complete file should be kept in chronological order of such payment requests, for ready use should the Company determine it will need to pursue a claim in order to obtain payment.

D. Documentation Of Time Delays.

Project managers should make every effort to document each and every non-work day which the Company confronts on a project. Each non-work day should be explained by some form of reasonable excuse such as poor weather, owner interference or some other event outside of the control of the Company. These events should be documented on a daily basis and summarized periodically. Furthermore, the Company should make clear as soon as it can that it will be pursuing extra time to finish the project due to excusable time delays.

E. Problems With Coordination.

The single word which best describes the role of the general contractor during construction is that of the coordinator. Even if the Company only utilizes (in addition to its work force) a grading subcontractor, framer, plumber, roofer, storm drain subcontractor, landscaper and electrical subcontractor, the work of those subcontractors should be carefully scheduled, so that no time is lost because of a lack of coordination. Proper coordination of the various groups involved in a construction project occurs when the Company completes its construction tasks efficiently and expeditiously.

Successful coordination, involves the Company's reaction to the perceived need to continue to introduce and master new methods and techniques of construction in order to conduct operations more efficiently. The coordination process involves the need to directly coordinate performance of highly specialized and technical processes.

The central aspect of providing efficient coordination is having sufficient supervisory staff to coordinate and provide general direction and supervision of the work and of the progress of the subcontractors on the project. Appropriate procedures for implementing coordination among the various interested parties should be undertaken. In that regard, the Company should maintain proper records and prepare appropriate progress reports.

Construction pre-planning meetings and preparation of a detailed work schedule are tools for the proper coordination of work. Prior to starting work, it is important for the estimators to meet with the Company's project team for review of the estimates, drawings and specifications. The more preplanning done by all elements of the Company's staff on a project, the better the coordination and the less difficult are the potential claims by the awarding authority that the Company failed to adequately coordinate the project, and thus delayed the project (thus subjecting the Company to liquidated damages). Also, the Company can avoid claims for improperly constructive work, as a result of failure to obtain appropriate coordination.

F. Efforts Should Be Made To Communicate With The Subcontractor's Representatives With Reference To Their Authority to Act, Extra Work and Time Extension Requests.

The Company's project manager should begin with the concept that communication with the subcontractor is a high priority item. Such communication will help identify any misunderstandings and potential disputes at an early stage, and hopefully generate a means for defusing those disputes.

Furthermore, a detailed understanding of contract provisions and aggressive interpretation of those provisions (plus documentation of the positions taken by the Company), will assist the Company in successful administration of the project. Also, there will be a minimization of delay and maximization of the potential for recovery of compensation for extra work.

If the Company determines that a representative of the subcontractor, or one of its consultant, is abusing his/her authority, every effort should be made to set the record straight, orally and in writing, especially regarding the agent's misinterpretation of the plans and specification. Furthermore, efforts should be made to at least create a record of that difficulty, should it be necessary to get into a dispute later on.

Because of the implied covenant of cooperation and a potential exposure of third party consultants for interference, a diplomatic but firm approach should be adopted where the Company believes that representatives of the subcontractor are interfering with the Company's performance of the work.

As always, project managers for the Company will be looking for areas of compromise and ways to maximize cooperation with all other parties involved in a project, including the awarding authority's consultants. An image of being a problem solver, and of delivering that which is promised, will assist the Company in reaching its objectives. When the awarding authority's agents refuse to cooperate, the Company should consider utilizing the above referenced techniques of controlling such parties.

Use of the pre-job conference to size up the specific individuals representing subcontractors, and thereafter formulating a strategy based on those initial impressions, may help the Company appreciate at an early time exactly what problems its can anticipate in its dealings with representatives of the subcontractors.

VI. SUBCONTRACT INFORMATION AND ADMINISTRATION

A. The Subcontract Agreement.

The typical subcontract form is based in part upon the AGC subcontract form.

The form retains the Company's right to terminate a subcontractor at any time, with or without cause. If the termination is with cause, the Company stands to have far less exposure to the subcontractor for termination payments.

An effort should be made in the subcontract to specifically state the scope of work for the subcontractor and make clear the subcontractor's area of responsibility, particularly with reference to preparatory work, temporary utilities and clean-up.

The subcontract form incorporates the provisions of the contract between the Company and the awarding authority or owner so that the subcontractor is bound to the Company's agreement with the awarding authority. It is wise to either use a separate dispute clause in the subcontract or specifically provide that the dispute procedure of the prime contract is incorporated into subcontract. The form specifically provides for an option that it may resolve disputes with the subcontractor by a process of judicial reference procedures, thereby seeking expedited resolution of disputes before a retired judge of the superior court.

The subcontract agreement form is effectively utilized, however, only if it is fully filled out and signed. When signing up a subcontractor, by utilizing the subcontract agreement form, one should make certain of the following:

1. Each of the blank spaces in the subcontract agreement relating to the specific details concerning any project should be fully filled in. If any of the spaces are left blank, a dispute could later arise regarding the parties' intent with respect to the information not provided.
2. One should make certain that each of the attachments referred to in the subcontract agreement is, in effect, attached to the subcontract agreement.
3. One should also make certain that the subcontractor's initials appear on each page of the subcontract agreement.
4. It is also important that the Company and subcontractor sign and fully fill out the signature blocks at the end of the subcontract agreement.

There are usually many important features in the subcontract agreement, and project managers should make an effort to be familiar with all of the them. A subcontract agreement will typically provide answers to most of the issues which arise during construction.

Extras are only authorized when in writing under the subcontract. Also, the subcontractor is required to provide full labor and material releases before receiving any progress payment from the Company. The Company has the right under the form to terminate the right of the subcontractors. In addition, the Company's subcontract form contains extensive indemnification provisions, essentially requiring the subcontractor to indemnify the Company against any claim, as it may arise on the job site, except those arising from the Company's own negligence. Also, the Company has extensive insurance requirements for subcontractors, which should be vigorously enforced.

B. Processing Progress Payment and Final Payment Requests.

Payment processing is often the most important phase of subcontract administration. The overriding objectives are:

1. To ensure that, by acceptance of payment, the subcontractor releases all claims for work done to date, minus retention; and
2. To ensure that there are no third party lien or stop notice claimants who might retain a claim against the property or against the Company after the subcontractor has been fully paid.

Before releasing a progress payment to the subcontractor, the Company should ensure that all of the following have been done:

1. One should consult the list of preliminary notices that the Company has received; and the subcontractor should be prepared to deliver a conditional release from each party which has served a preliminary notice.
2. One should keep a record of any parties other than those serving preliminary notices who have registered any kind of a claim regarding the project. A progress payment should not be released until one is satisfied that these claims have been extinguished or waived, or that the subcontractor will be solely responsible for them.
3. If any subcontractor is unionized, the Company should be certain that it knows the identify of every union trust fund to which he/she is obligated to make contributions on behalf of his/her workmen. Note that union trust funds are not obligated to serve a preliminary notice; nevertheless, they have mechanic's lien rights. It is not unusual for a contractor to pay off a lower tier contractor, only to discover that a union trust fund is asserting a mechanic's lien claim on the property.

4. The typical subcontract agreement gives the right to issue joint checks, payable to the subcontractor and any unsatisfied claimants. One should not hesitate to use this device if there is any doubt about the subcontractor's willingness to fairly pay his/her sub-contractors and materialmen. (Note: To be effective, a joint check must be endorsed and payment in full for material and labor covered by the check must be acknowledged by each of the endorsing parties. Thus, it is critical that the joint check include an adequate recitation, prior to the endorsement, waiving all lien and stop notice rights for labor and materials covered.)

It is possible to issue a joint check payable to more than two subcontractors and/or materialmen. Post Bros. Construction Co. v. Yoder, (1977) 141 Cal. Rptr. 28. However, this practice can lead to confusion regarding the respective entitlement of each joint payee to a portion of the proceeds.

5. To preserve the Company's status as a general contractor, checks to subcontractors should be issued on its own bank account. One should avoid paying subcontractors and materialmen on accounts which bear the name of any other related entity to the Company.
6. As an additional precaution, there generally should be a release paragraph on the back of each check issued to subcontractors and materialmen. One form of release, which could be rubber-stamped on the back of checks, would be as follows:

" The payee of this check, by endorsement hereon, acknowledges receipt of payment in full for all work performed and material provided on Tract Nos. through and including (date) and hereby releases and relinquishes all mechanic's lien, stop notice, and labor and material bond rights it may possess for the performance of work and provision of materials thereon. This release is for the benefit of, and may be relied upon by, the owner, the prime contractor, the construction lender, and the principal and surety on any labor and material bond.

(Endorsement)

7. Workmen who provide labor on a construction project are entitled to a mechanic's lien to secure their claim for unpaid wages. They are not required to file a preliminary notice, and the Company is usually not aware of their identities unless they audit the payroll records of the subcontractor. Usually, it is impractical to require the subcontractor to provide lien releases from all of its workmen. However, if there is any doubt about the solvency or reliability of the subcontractor, one may wish to require such releases on particular construction projects.
8. In reviewing lien releases provided by the subcontractor, it is advisable to conduct a spot check to verify the validity of the releases provided. It is not unheard of for a subcontractor to forge the names of materialmen and of subsubcontractors in order to obtain a progress payment. Spot checks can be done by telephone.
9. Generally, it is desirable to require the subcontractor to use release forms provided by the developer or general contractor. However, in certain instances, the subcontractor may have obtained releases on other forms provided by his/her materialmen and sub-subcontractors. Following is a checklist one can use to determine whether an alternative form of release is valid:
 - a. Does the title of the document contain the words "waiver" and "release"?
 - b. Does the form show the exact amount received?
 - c. Does the form show that the amount was received from the payor?
 - d. Does the form show the payee of the check?
 - e. Does the release specifically refer to the job on which work was performed or material provided, and specifically name the owner?
 - f. Does the release form specifically state the date through which full payment is acknowledged?

- g. Does the form specifically state that the payee releases (whether conditionally or unconditionally) pro tanto any mechanic's lien, stop notice, or bond right the payee has on the referenced job?
- h. Is the form dated?
- i. Is the Company name of the releasor clearly shown in the signature block?
- j. Is the release form executed by an authorized person, whose title appears on the form?

If the release contains all of these items, it is generally valid. California Civil Code Section 3262.

C. Testing Lien and Stop Notice Claims.

Despite careful adherence to the payment procedures discussed above, the Company will receive some lien and stop notice claims. Of course, not all such claims are valid; a significant percentage of all lien and stop notice claims are procedurally defective in some way. Many lien claims are filed in the hope that the Company will pay the claim just to get rid of the claim, without scrutinizing its sufficiency.

The following points should assist one in evaluating lien and stop notice claims:

1. To be eligible for lien rights, the claimant must prove that it contributed to a reasonably permanent work of improvement on the property. Services of a purely transitory nature, such as trimming shrubs and mowing lawns, are insufficient to confer lien rights. *Young v. Shriver*, (1922), 56 Cal.App. 653. By contrast, the installation of landscaping is sufficient to confer a lien right. *California Portland Cement Co. v. Wentworth Hotel Co.*, (1911), 16 Cal.App. 692.
2. The most important prerequisite to assertion of a lien right is that the material or labor provided must have been used or consumed in the course of constructing a work of improvement. California Civil Code Section 3110. If lumber is delivered to a jobsite, but is subsequently removed by the owner or general contractor without being used in a work of improvement on the site, the materialman has no lien right, even though he/she provided lumber in good faith. *California Portland Cement Co. v. Wentworth Hotel Co.*, (1911), 16 Cal.App. 692.
3. No lien rights attach when work on a planned project does not actually commence. For example, a lumber dealer may not assert a lien for lumber which was milled to the order of a prime contractor, where the work of improvement was never begun; similarly, an architect cannot assert a lien for preparation of plans and specifications when the project was never undertaken. *MacDonald v. Filice*, (1967), 252 Cal.App.2d 613.
4. Every mechanic's lien and stop notice claimant is required to prepare and serve a Preliminary Notice before any lien or stop notice rights may be asserted. For claims against the owner, the only exceptions are: (1) the prime contractor; (2) other contractors who deal directly with the owner; (3) individual workmen who have a claim for unpaid wages; and (4) union trust funds. For claims against the construction lender, the only exceptions are: (1) the prime contractor; (2) individual workmen who have a claim for unpaid wages; and (3) union trust funds. If the claim does not fit within these categories of exceptions, the failure to serve a properly executed Preliminary Notice will render the mechanic's lien or stop notice unenforceable. California Civil Code Section 3097.
5. The Preliminary Notice must be given no later than twenty days after the claimant has first furnished labor, services, equipment, or materials to the jobsite. California Civil Code Section 3097(c). The service of a late Preliminary Notice will not completely destroy the claimant's right to recovery, however. If a late notice is given, the notice will only give the claimant the right to assert a lien for a period commencing twenty days prior to the service of the Preliminary Notice. California Civil Code Section 3097(d).

6. The Preliminary Notice must contain the following information:
 - a. A general description of the labor, services, equipment, or materials furnished, or to be furnished;
 - b. If there is a construction lender, there must be an estimate of the total price of the labor, services, etc., to be furnished;
 - c. The name and address of the person furnishing the labor, services, etc.;
 - d. The name of the person who contracted for purchases of the labor, services, etc.;
 - e. A description of the jobsite sufficient for identification; and
 - f. The following statement must appear in bold face type:

NOTICE TO PROPERTY OWNER

"If bills are not paid in full for the labor, services, equipment or materials furnished or to be furnished, a mechanic's lien leading to the loss, through court foreclosure proceedings, of all or part of your property being so improved may be placed against the property even though you have paid your contractor in full. You may wish to protect yourself against this consequence by (1) requiring your contractor to furnish a signed release by the person or firm giving you this notice before making payment to your contractor or (2) any other method or device which is appropriate under the circumstances."

California Civil Code, Section 3097(c).

7. The requirements for the preparation of the Preliminary Notice are strictly construed. For example, a Preliminary Notice was invalidated, and lien rights were lost, because the "Notice to Property Owner" was not in bold face type; James v. Five Points Ranch, (1984), 202 Cal.Rptr. 494.
8. The claimant need give only one Preliminary Notice to the owner and general contractor, even though he/she may later furnish additional materials, services, labor, or equipment not within the scope of those generally described in his/her notice. However, if the claimant furnishes materials, services, etc. to more than one subcontractor, he/she must file a Preliminary Notice as to each. California Civil Code, Section 3097 (g).
9. Many materialmen and subcontractors use printed forms available at builders supply stores for preparing Preliminary Notices. These printed forms generally comply with the requirements of California law (unless they are outdated forms -- many contractors retain a supply of obsolete legal forms). However, the mere fact that the form is sufficient does not end the inquiry. You must read the Preliminary Notice to make certain that the claimant has filled in all of the required information.
10. The current Preliminary Notice form contains a declaration of service, which is designed to simplify service of the form. Currently, a Preliminary Notice may be served in California by (1) personal delivery at the place of address of the persons to be notified; or (2) by first class registered or certified mail. This requirement is often ignored by suppliers, subcontractors, and others. Ordinary mail, first class or otherwise, is not sufficient. Mail delivery must be registered or certified, and the receipt of certification or registration must be attached to the affidavit of service. California Civil Code Section 3097(f).

11. The contractor is required to permit any subcontractor or other claimant to view a copy of the original contract between the owner or developer and prime contractor; this contract must contain the owner's name and address and place of business. If the prime contractor gives the subcontractor or his/her claimants incorrect information about the owner or construction lender, his/her lien may be valid despite incorrectly identifying these parties. *Brown v. Superior Court*, (1983), 148 Cal.App.3d 891.
12. Like the Preliminary Notice, the mechanic's lien itself must contain a number of required elements. California Civil Code Section 3084 sets out the requirements as follows:
 - a. The lien must be signed and verified by the claimant. It need not be notarized, however.
 - b. The lien must contain a statement of the demand, after deducting all just credits and offsets.
 - c. The name of the owner or reputed owner, if known, must be stated.
 - d. There must be a general statement of the type of labor, services, equipment, or materials furnished by the claimant.
 - e. The lien must show the name of the person or entity by whom the claimant was employed or to whom he/she furnished the labor, services, etc.
 - f. There must be a description of the site to be liened sufficient for identification. The lien need not contain a full legal description, including metes and bounds of the property. If the description is completely inadequate, however, the lien may be invalid.
13. A lien claimant need not wait until a project is completed before recording a mechanic's lien, so long as his/her contribution to the work of improvement has been completed. However, once the work of improvement is "completed" the time for recording a lien begins to run as to all claimants as follows:
 - a. If a Notice of Completion was recorded, laborers, materialmen, and subcontractors have only thirty days thereafter to record a mechanic's lien; the general contractor has sixty days. California Civil Code Sections 3115 and 3116. Note that the Notice of Completion must be filed within ten days after completion to be effective. California Civil Code Section 3093.
 - b. If, after a cessation of work for a continuous period of thirty days or more, a Notice of Cessation as defined by California Civil Code Section 3092 is recorded by the owner, the lien times are limited to those discussed in the preceding paragraph.
 - c. If no Notice of Cessation or Notice of Completion has been recorded, all persons have a period of ninety days after "completion" of the work of improvement in which to file their claims of lien. California Civil Code Sections 3115 and 3116.
 - d. The time for recording the lien is computed by excluding the first day and including the last, unless the last day is a holiday (including Saturdays and Sundays). When the deadline falls on a Saturday, Sunday or holiday, the lien is timely recorded on the next business day on which the County Recorder's Office is open.

14. The "date of completion" of a project is a term of art and is often the subject of hot dispute. California Civil Code Section 3086. The following events are considered to constitute "completion" and will start the running of the ninety-day limitation period for recording liens:
 - a. Occupation or use of the work of improvement by the owner or his/her agent, when accompanied by the cessation of labor;
 - b. Cessation of labor for a continuous period of sixty days;
 - c. Acceptance of the work by the owner or his/her agent.
15. If a work of improvement consists of two or more separate residential units, each unit is ordinarily considered a separate "work of improvement" and the time for filing a lien against each such unit commences upon the completion of each unit. California Civil Code, Section 3131. However, courts have held that this requirement is inapplicable to condominiums.
16. When a lien is placed upon an entire tract and/or where the claimant's work or materials were supplied for more than one residential unit or other work of improvement, the lien will be "postponed" to other liens unless the notice and claim designates the amount due on each of the buildings or other improvements. The claimant may estimate the proportionate amount due on each building.
17. No mechanic's lien binds property for a period longer than ninety days unless a lawsuit to foreclose the lien is commenced in a proper court within that time. The sole exception is when a "Notice of Credit" is recorded, which may extend the period for up to one year. California Civil Code Section 3144.
18. The mechanic's lien remedy is not exclusive. A claimant may invoke any other remedies he/she may have, including a suit against the subcontractor, the service of a stop notice, a claim against any applicable bond, or any other available relief.
19. There is no relative priority among mechanic's liens, provided that the liens are all recorded within the prescribed statutory time limit. However, all mechanic's liens enjoy priority over any other type of lien encumbrance, deed of trust, or other claim to title which has attached subsequent to the commencement of the work.
20. The function of a stop notice is slightly different than that of a mechanic's lien. A stop notice is a device used to place a "hold" on undisbursed construction loan funds. Any person entitled to a mechanic's lien other than a union trust fund may serve a stop notice. California Civil Code Section 3158-3159.
21. The stop notice is ordinarily served on the owner and construction lender. It must be served prior to the expiration of the claimant's time period to record a mechanic's lien against the property as defined in California Civil Code Sections 3115-3117. California Civil Code Section 3160.
22. A stop notice claimant must furnish the same Preliminary Notice as a mechanic's lien claimant. Otherwise, the stop notice is unenforceable. California Civil Code Section 3160(a).
23. California Civil Code Section 3103 provides that the stop notice must contain the following information:
 - a. A general description of labor, materials, and/or services furnished;
 - b. The name of the person for whom the labor, materials and/or services was furnished;
 - c. The value of the work or material already furnished and the value of the entire amount of work or material to be furnished;
 - d. A verification.

24. Unless a stop notice is accompanied by a bond issued by a recognized surety, it need not be honored by a construction lender. California Civil Code Section 3083. However, some lenders voluntarily honor unbonded stop notices.
25. To be valid, a stop notice must be served on the owner or construction lender within the time permitted for recording mechanic's liens. California Civil Code Section 3160(b). The stop notice must be served personally or by registered or certified mail. California Civil Code Section 3103.
26. An action to enforce a stop notice may be filed no sooner than 10 days after the stop notice has been served, and no later than 90 days after the expiration of the period during which mechanic's liens may be recorded. California Civil Code Section 3172.
27. The Company should avoid dealing directly with materialmen and sub-subcontractors with which they have no direct contractual relationship. If the Company begins dealing with these parties directly, they may later claim a direct contractual agreement, which can confer lien rights they would otherwise not enjoy.

D. Claims on Payment and Labor and Material Bonds.

1. In some cases, the Company may require its subcontractors to provide payment and labor and material bonds to secure their performance on construction projects. The value of such bonds depends, in large degree, on the timing of the steps taken to enforce the rights provided by the bond.
2. The most critical thing to remember about bonds is the importance of notice to the surety. Generally, bond rights arise from the contractor's failure to perform pursuant to the provisions of his/her contract. Therefore, if it appears that the contractor is not going to be able to perform his/her contractual obligations, notice should be given to the surety immediately.
3. The three defenses sureties typically raise are: (1) lack of timely notice; (2) lack of opportunity to rectify the problem; and (3) a material change in the obligations imposed on the bonded contractor, without notice to the surety. These defenses can be easily overcome when you can show that the surety has been kept on full notice of the problems encountered with the contractor's performance and has been given the opportunity to consult with you and/or remedy any problem, consistent with timely performance of the job.
4. In some instances, it may be completely impractical to involve the surety in rectifying a jobsite problem. For example, if the contractor simply quits the job, and work must be continued through the immediate employment of another contractor, there may not be time to rectify the situation. Nevertheless, you should build the best paper record possible to show that the surety was (1) notified; and (2) was not willing to act in the limited time available.

VII. ADMINISTRATION OF CLAIMS

A. Right of Way Problems.

Frequently, the first "claims" experience of the Company on a project will be its obtaining the right of access to various portions of the project. Section 2-8 of the Green Book provides:

"Rights of Way, Easements or Rights of Entry for the work will be provided by the agency. Unless otherwise provided, the contractor shall make arrangements, pay for, and assume all responsibility for requiring, using and disposing of additional work areas and facilities temporarily required. The contractor shall indemnify and hold the agency.

Appended hereto as Appendix "A" is a chart from a CEB publication setting forth the relevant time limitation periods which govern the processing of construction lien and bond claims.

Appended hereto as Appendix "B" are various sample construction lien forms from the same CEB publication. harmless from all claims for damages caused by such actions."

At Section 8-1.09 of the Standard Specifications of the Department of Transportation, it is provided:

"If, through the failure of the state to acquire or clear right of way, the contractor sustains loss which could not have been avoided by the judicious handling of forces, equipment and plant, there shall be paid to the contractors such amount as the engineer may find to be a fair and reasonable compensation for such part of the contractors actual loss, as, in the opinion of the engineer was unavoidable.

* * *

"Actual loss shall be understood to include no item of expense other than idle time of equipment and necessary payments for idle time of men, cost of extra moving of equipment, and cost of longer hauls. Compensation for idle time of equipment will be determined as provided in this section . . . and compensation for idle time of men, will be determined as provided in Section . . . "labor", and no mark-up will be added in either case for overhead and profit. The cost of extra moving of equipment and the cost of longer hauls will be paid for as extra work as provided in Section 4-1.03D.

If performance of the contractors work is delayed as the result of the failure of the Department to require or clear right of way, an extension of time determined pursuant to the provisions of Section 8-1.07 . . . will be granted . . ."

B. Documentation and Proof of Claim.

The Company will encounter events and increased costs which may be identifiable as claims. Essential steps in the evaluation, preparation and proof of claims include:

- 1. Fact Finding**, including investigations at the project site and elsewhere of the events of the performance considering plans, specifications, drawings and other terms of the contract. This process includes not only the reading of all documentation (job logs, quality control and field reports, correspondence, contract and modification documents, etc.) but also the interviewing of persons familiar with the project conditions. Timeliness of inquiry is obviously essential, including the taking of photographs, preservation of soils data and other physical evidence, and the need to coordinate with subcontractors, consultants and others. The investigation should include not only the technical tasks of the performance, but also the costs associated with the potential claims.
- 2. Analysis** of the events and costs, with consideration to the sequence of the work as originally scheduled, changes in the sequencing caused by delays, the source of the delay, changes directed or necessitated by deficient design, comparison of original contract work with work actually being performed, the use of scheduling techniques, such as the critical task method, and the need for timely notice of claims (in writing to the appropriate agency representative), the evaluation of estimates used in the bidding with the cost being incurred in performance, including an estimate of costs to complete, etc.
- 3. Identification of Contract and Legal Bases Upon Which a Claim May Be Presented.** The various contract clauses, specifications and other provisions such as the changes, different site conditions (changed conditions) suspension of work, time extension and other provisions, including the need for conferring timely written notice to representatives of the agency, have to be implemented.
- 4. The Preparation of a Draft of the Claims Narrative** and exhibits for review by persons knowledgeable on events and costs followed by a finalization of the draft to a well documented claims package. This is an important step in the entire claims recovery process. It is a significant tool in the evaluation of the claim by Company personnel and frequently is the basis for a successful or unsuccessful resolution of claims.

5. Establishment of a Timetable for the Pursuit of the Claim allowing adequate time for preparation, presentation, audit, fact finding discussions, settlement negotiations and the disputes or litigation procedures.

To optimize the recovery of claims, the Company, having conducted actual investigations and study of the terms and legal principals, has to use care in the documentation and presentation of the claim to establish credibility. This process begins with realistic assessments of the "good and bad" and a willingness to present fairly the data to the agency for evaluation. Not only must there be a factual presentation of events but also of costs dependent upon the use of estimates, projections and/or incurred costs.

C. Anticipate Claims and Claim Avoidance.

The Company is most frequently benefitted by its representatives in anticipating the potential for claims. If you observe circumstances which tend to indicate that there may be a dispute later on, involving cost, time extensions or some other important factor, than it is probably appropriate to actively consider the potential of the claim situation, and prepare for it. Likewise, if at all possible, the potential claim situation should be avoided by taking whatever appropriate action, if that action is no more than simply giving oral or written communications.

D. Communicate to Solve Problems.

A constant theme of these materials is the need to communicate with the agency or owner representatives and with your subcontractors. Likewise the need to communicate internally at the Company, is clear, particularly with reference to efforts to identify and avoid potential claim situations. In addition to anticipating problems, communication of information to resolve or avoid the problems is critical.

E. Identify Problem Representatives of the Owner or Agency And React Accordingly.

As early as the first job meeting, you can make an evaluation as to whether a particular job is a candidate for a claims situation. Is the agency's outside engineer or inside engineer a person who seems to like to engage in debates or is somehow not cooperative? If there is anything wrong in your initial impression of agency representatives, or engineers, than perhaps you should anticipate the need to carefully document the companies position and to frequently communicate with the agency in question, in order to avoid claims situations. The same is true of your initial encounters with subcontractors on any given job. The efforts should be to identify particular problems as soon as possible, whether they be with representatives of the agency or subcontractors or some other circumstances and provide an appropriate Company response even if that is no more than a written communication to preserve the record.

F. Examples of Constructive Change Orders Resulting In Claim Situations.

In addition to the entitlement to a constructive change order for the deficiencies in design for which the owner is responsible, the Company may be entitled to the application of the constructive change order doctrine if:

1. There is an increase in the level of inspection over that which was originally required under the contract.
2. There is a limitation on the Company's work method which precludes the Company from options otherwise available under the contract with regard to sequencing and other aspects of the work.
3. There is an impossibility or impracticability of performance for which the owner has undertaken the risk.

4. There is an acceleration or delay in the work for which the owner is responsible.
5. There is an erroneous interpretation of the design or specifications for which the owner is responsible and an owner's directive causes extra work.
6. There is an erroneous rejection of the work by the government.

G. Dealing With Unforeseen Conditions On the Job.

The "Changed Conditions clause" typically provides that in the event the physical conditions at the site of the project varying materially from those represented or reasonably anticipated and in a manner which increases the time or the cost of performance, the Company is entitled to additional compensation or an extension of time.

One purpose of the clause is to secure a lower contract price by inducing bidders to refrain from including in their bids contingencies for such things as unknown subservice conditions. Some clauses may provide for an increase in the contract price in the event the conditions differ in some manner as to reduce the cost of performance.

Most contracts contain a provision requiring bidders to examine the site of the work prior to submitting a bid. The contractor is charged in such a case with knowledge of all conditions which would have been discovered in the course of a reasonable site investigation. In the absence of such a clause, bidders generally are not required to conduct an investigation of the site and are not charged with knowledge of conditions which could have been discovered only by inspecting the site.

The knowledge charged to a contractor under these circumstances is that which would have been discovered only by a reasonable site investigation and an intelligent contractor. Thus, the contractor is not charged with knowledge of conditions which could not have been discovered without the assistance of an expert in some field of science such as geology.

Notwithstanding his/her duty to investigate, the contractor is entitled to rely on any specific representations by the owner respecting the condition of the site. Such representations may be construed as warranties which are breached if the conditions are materially different. A contractor's right to recover on this theory may require proof of reliance by the contractor.

The contractor is required to furnish notice of any changed condition. The giving of such notice within a specified period is a condition precedent to the right of any relief which might be due. Failure to give notice within the required time may not operate as a waiver of rights if the existence of the changed condition is known to the contracting agency.

H. Time Extensions.

As soon as you become aware of time problems with reference to completing a project, those time problems should be documented in an appropriate request for a time extension under the contractor and directed to the awarding authority. A standard clause in contracts for construction provides for an extension of time in the event completion is delayed by certain kinds of events beyond the control of the contractor. Such clauses frequently provide also that the contractor's sole remedy for certain delays is an extension of time of performance, thus precluding any right to recover additional costs occasioned by the delay. Typically, delays which permit an extension of time are those caused by such things as acts of God, weather, action by government, and delays by failure to act attributable to other contractors.

I. Identify and Communicate Extra Work Requests Before They Are Needed.

If at all possible, it is a good idea to identify and communicate to the awarding authority the needs for extra compensation, e.g. change orders, before they are needed. In short, if you anticipate that extra work is going to be required that situation should be communicated to the awarding authority and appropriate change order requested, or at least a written communication of direction from the agency requested.

J. Where The Project is Reduced In Scope As to Certain Work Items Below Which Is Economically Feasible.

There may be circumstances where the amount of work in question is less than originally anticipated, so much so that the unit price put in the bid is no longer realistic. The Green Book has a 25% rule where if a unit of work is reduced by change order more than 25% of the work, than the pricing schedule for the work is changed to a time and materials basis. The Company should identify as soon as possible the need to rely on such provisions where the work is reduced, and takes steps to document a request for such compensation before undertaking the work if at all possible.

K. Set Up and Document Claim Book.

The claims documentation as the central basis for settlement of claims requires organization and substance. The essential questions of entitlement to recovery, the legal basis therefore, the amount of monies claimed and/or the time for which the claimant asserts a right have to be addressed, including the use of suitable exhibits. The narrative should include a brief beginning summary of the nature of the claim. It should also include a complete statement of the facts, a detailed chronology of events, and references to applicable legal rules including contract provisions, specifications and other terms. The narrative should also include a presentation of costs which are directly related to the claims and time associated. For example, a narrative may seek the recovery of extended overhead and adverse effects to the project as a whole due to a multiplicity of changes and other events for which the awarding authorities is responsible.

Such claim documentation has to be correlated to include computation of labor inefficiencies, extended overhead and other costs as applicable. Also, the Company should consider suggesting to the awarding authority the Company's willingness to have its costs audited.

L. Consult With A Lawyer.

In many instances, Company management will probably want to consult with its counsel, particularly as to major claims, in order to coordinate preparation of a persuasive claims presentation, to prepare an appropriate negotiation strategy, and for pursuit of the claim in litigation.

M. Define Goals of Claim Administration.

Very early on, Company representatives should ascertain what their goals are based upon a full evaluation of all the facts and circumstances. In short, how much money do you want from the claim, how much of a time extension, and how much are you prepared to settle for? Once you have determined the answer to these questions, then the Company can ascertain an appropriate claims strategy, which can be implemented.

N. Prepare Claim Chronology and Documentation.

It is essential to prepare as a part of the claim documentation, a detailed chronology of the events, concerning the claim, backed up by a chronological set of documents, including correspondence on the subject claim. This helps document the Company's position, aids communication with the agency, and assists the Company and its lawyers in presenting the Company's position in litigation.

O. Bite the Bullet and Settle.

In general, it is quite appropriate for a Company to identify its goals, document its position and arrive at a strategy for obtaining the best possible result under the circumstances in the claim. Once the Company has ascertained the awarding authority attitude, the Company should determine the best amount that it is able to obtain through settlement and agree to settle if that appears to be the most appropriate way to proceed.

P. Use Arbitration Rights.

Wherever the Company has given rights to litigate its claims expeditiously, it should initiate those rights, generally arbitrate as soon as possible, and be prepared to move the arbitration proceeding along as quickly as possible. The Company should form an appropriate negotiation team, including its attorneys for pursuit of the claim, formulate and implement an appropriate strategy for settling the claim expeditiously.

Q. No Damages For Delay Clauses.

One of the most common express contractual limitations on remedies used in construction contracts, particularly those with governments, is a provision which purports to deny the contractor the right to recover damages for delay against the owner. Normally such provisions are quite broad, and are, as a general rule, upheld by the courts. No damages for delay clauses are considered to be in the public interest when used as a means of protecting public agencies against inappropriate claims. Some clauses have at times been read literally so as to preclude recovery for any delay. But there are several exceptions to the general rule that the clause is a legitimate vehicle. The courts will first look to the language of the clause and to other relevant circumstances to see if it is appropriate to enforce the clause.

R. Pursuit of Third Parties.

If the outside engineers retained by an awarding authority or other third parties are inappropriately interfering with the Company's handling of the contract, appropriate communications could be addressed to those parties informing them that their conduct could be actionable. In short, the Company can pursue claims against those third parties because of their interference. It is appropriate to communicate with those third parties, diplomatically, to inform them of their erroneous position, and to inform them that they face of their erroneous position, and to inform them that they face liability exposure. The goal should be to work harmoniously with such parties at all times, but if necessary, they should be placed on notice of their liability exposure.
