CONSTRUCTION LAW FOR ATTORNEYS IN FLORIDA

SEMINAR LECTURE MATERIALS

by

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I. OVERVIEW

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A. CONTESTED CONTRACT ISSUES

The contract, and the applicable statutes which are implicitly incorporated into every contract, provide the road map of rights and obligations of the players in a construction project. Any dispute will be resolved through reference to what was agreed. Therefore, the more situations that can be anticipated at the beginning, and addressed clearly in the contract, the less likely the project will end up in the quagmire of dispute and disagreement.

A.1. PAYMENT

Payment is, from the Contractor's perspective, the most

important aspect of any construction project. From the Owner's perspective, payment is the ultimate leverage to compel a Contractor's performance. Many factors impact a Contractor's right to payment, and an Owner's right to withhold payment, both during and after a job is complete. Careful attention to these areas will maximize your client's chances of receiving all or paying only that which is appropriate.

A.1a. CONDITIONAL PAYMENT CLAUSES

The "pay when paid" or conditional payment clause shifts the risk of Owner non-payment from the Contractor to the Contractor's subs and material suppliers. A typical clause provides that the subcontractor does not get paid unless the Owner has paid the Contractor. Although many states have legislated that such clauses are contrary to public policy, presently, Florida will allow enforcement for a valid conditional payment clause. To be enforceable, however, the language of the provision must be clear and unambiguous. Any ambiguity will result in the clause being disregarded. OBS Company v. Pace Constr. Corp., 558 So.2d 404 (Fla. 1990); Peacock Constr. Co. v. Modern Air Conditioning, Inc. 343 So.2d 840 (Fla. 1977); and DEC Electric, Inc. v. Raphael Constr. Corp., 558 So.2d 427 (Fla. 1990).

These clauses shift the burden of the Owner's nonpayment from the Contractor to the subcontractor. The critical factor in determining whether such clauses are enforceable is whether the clause sets up a condition precedent to the Contractor's responsibility to pay or merely fixes the time for payment to the subcontractor. Unless the language sets up a

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clear and unambiguous condition precedent, the clause will be interpreted as merely fixing the time for payment. Peacock Constr. Co., Inc. v. Modern Air Conditioning, Inc., 353 So.2d 840 (Fla. 1977)

Examples of clauses setting up a condition precedent include: 1) "Payment shall not be due unless and until the Contractor receives payment from the Owner";

2) "Payment to Subcontractor is wholly contingent upon Contractor's receipt of payment from Owner"; or

3) "As a condition precedent to payment to Subcontractor, Contractor must be paid in full by Owner..."

Even where the provision is valid and otherwise, enforceable, the Contractor must still seek payment from the Owner in good faith and with due diligence. Bently Constr. Dev. & Eng., Inc. v. All-Phase Electric & Maintenance, Inc., 562 So.2d 800 (Fla. 2d DCA 1990).

These provisions must be carefully negotiated in all subcontracts where they appear. Subcontractors, in the face of valid conditional payment language in their subcontract, must take extra care to perfect their lien rights against the Owner's property.

A.1b. PROGRESS PAYMENTS

In the absence of contract language to the contrary, performance is required prior to payment, according to English common law. This system protected the Owner, but created various problems for the Contractor (such as financing the total project and assuming the risk of non-payment by the Owner either because of financial inability or because of the Contractor's deviation (even minimal) from the plans and specifications. Progress payments were developed to ameliorate these problems.

Under a lump-sum or cost-plus contract, the Contractor and Owner generally allocate the contract price among various, readily identifiable categories. This schedule of values will control progress payments, which correlate to the percentage of completion of each category on the schedule. Under a unit-price contract, no schedule is needed, since progress payments are generally made based upon completion of a certain number of units.

At agreed upon intervals during construction (usually monthly), an Application for Payment is presented by the Contractor to the Owner (or Owner's representative, including the architect). Along with the Application, the Contractor will submit supporting documentation, before the payment is actually due. Application for payment for materials or equipment requires additional documentation such as bills of sales and proof of

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insurance. See A.I.A. Document A-201, s. 9.3.2.

Though not required by A.I.A. general conditions (AIA A201), contracts may require, as a condition of progress payments, partial waivers of lien rights from subcontractors to protect the Owners from double payment under the Florida Construction Lien Law. See Fla.Stat. 713.01, et seq. (1991). When drafting a construction contract from the Owner's perspective, periodic lien releases, serves to minimize the risk that the Contractor is falling behind with its subs. Early on in the project, the Owner should request copies of subcontracts (§713.16 F.S.) and periodically during the course of

construction, the Owner would do well to request sworn statements of account from the subcontractors (§713.16 F.S.) to make sure that the Contractor is keeping current with those subs.

Contracts which forego these requirements may have other protections, such as payment bonds (§713.23 F.S.) or the right of the Owner to withhold final payment to the Contractor until the Contractor has paid (and provided final lien releases from) all subcontractors and suppliers. However, by the time of final payment it might be too late to demand that all lienor have been paid; the Contractor may owe more than it is entitled to receive from the Owner, subs may have walked off the job or stopped supplying material because of nonpayment from the Contractor. Under Florida's lien law, the Contractor must provide the Owner with a Contractor's final affidavit certifying that all lienors have been paid, except those listed therein, before final payment is received (and certainly before filing suit to foreclose a lien). See Fla.Stat. 713.06(3)(c)(5) (1991).

If the Owner determines that the progress payment application is proper, the design professional (i.e., engineer, architect) will verify that the work is in conformity with the application for payment and the contract documents. The amount sought should be equivalent to the percentage of work completed, and the work must reasonably comply. Payment will be subject to a retainage (or percentage withheld to provide the Owner with security for completion and correction of punch list work).

Certification for payment may be refused by the design professional or architect if the payment misstates the stage of completion or the work does not comply with contract documents. In such a case, the design professional must notify the Contractor within seven (7) days, providing reasons for the disallowance of payment. Also, the architect may nullify certification for payment based on subsequently discovered evidence or observations. See A.I.A. Document A-201, ss. 9.4.1 and 9.5.1 (1987). In addition, the contract should provide for payment adjustments to protect to Owner from losses such as

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from non-conforming work, nonpayment of subcontractor or suppliers, or claims of third parties. Although progress payments do not necessarily operate as a waiver of defects, such waiver may result if the Owner makes payment with knowledge of a defect. See A.I.A. Document A-201, s. 9.5.1 (1987).

Once a progress payment is proper, the question is who to pay. The contract may provide for payment to the Contractor, the Contractor's lender (through assignment), the Contractor/ subcontractor jointly (Florida law requires both parties to endorse the check. See Fla.Stat. 673.1161 (1993); First Independent Bank, N.A. v. Stottlemyer and Shoemaker Lumber Co., 384 So.2d 952 [Fla. 2d DCA 1980]), the subcontractors and suppliers (without the required 10 days notice if the Owner has ensured that the Contractor has not made payment, see Fla.Stat. 713.06(3)(g) (1991)), the Contractor's surety (if the Contractor has failed to pay a subcontractor or supplier).

Upon completion of the project, the Contractor submits a notice and application for

final payment to the design professional, who verifies compliance with contract documents. Under an A.I.A. form contract, final payment operates as a waiver by the Owner of all claims except those from unsettled liens, nonconforming work, and warranties. See A.I.A. A-201, ss. 4.3.5 and 9.10.3 (1987).

A.1c. SUBSTANTIAL COMPLETION

Under common law, strict performance of a contract would be a prerequisite to the Owner's payment to the Contractor. However, the law recognizes that there is no such thing as a perfect construction project. Accordingly, the doctrine of substantial, rather than full, performance applies to construction contracts. Under the doctrine of substantial performance (also known as substantial completion), strict and literal compliance with the terms and specifications of the contract documents in not essential for recovery under the contract. Upon substantial completion of the contract, the Contractor is entitled to recover the full contract price less the Owner's reasonable costs of correction and completion. Lockhart v. Worsham, 508 So.2d 411 (Fla. 1st DCA 1987). One test for determining substantial performance assesses the percentage of completion and the degree to which the building meets the basic purpose for which it is constructed. If the Owner can use the structure for its intended purpose, the Contractor has substantially performed and is entitled to payment. J.M. Beeson Co. v. Sartori, 335 So.2d 180 (Fla. 4th DCA 1989), *rev'd on other grounds*, 584 So.2d 572 (Fla. 4th DCA 1991). Substantial performance has been described as performance so nearly equivalent to what was

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bargained for that it would be unreasonable to deny the full contract price less offsetting damages. Ocean Ridge Dev. Corp. v. Quality Plastering, Inc., 247 So.2d 72 (Fla. 4th DCA 1971). Mere "punch list" work under a contract will not prevent a finding of substantial performance. Id. Also, substantial performance may be found despite minor instances of inferior workmanship or the substitution of inferior materials, where the Owner fails to give the Contractor the opportunity to correct such deficiencies. Owen Dev. Corp. v. Molinsky, 278 So.2d 298 (Fla. 1st DCA 1973).

The doctrine of substantial performance serves to prevent unjust enrichment by the Owner. An Owner should not be permitted to avoid payment of the contract because of minor items that must be corrected or completed.

A.2 CONDITIONAL PAYMENT BONDS

In 1991, Fla.Stat. 713.245, which covers conditional payment bonds, became effective. It has been amended twice, once in 1992 and again in 1995. The statute prescribes the duty of the surety to pay under the bond, and such duty to pay is co-extensive with the Contractor's duty to pay lienors, but *only* if the Contractor's written contractual obligation to pay lienors is expressly conditioned upon and limited to the payments made by the Owner to the Contractor. Furthermore, the bond must contain

mandatory language on at least 10-point type.

In 1998, the Fourth District Court of Appeal held, in North American Specialty Ins. Co. v. Hughes Supply, Inc., 705 So.2d 616 (Fla. 4th DCA 1998)(the only reported appellate decision construing the statute) that a payment bond containing the conditional payment language and legend required by the statute would, nevertheless, be considered an unconditional payment bond (under Fla.Stat. 713.23) where the underlying subcontract did not have a conditional payment provision. The court stated, "the Contractor's written contractual obligation to pay lienors must be expressly conditioned upon and limited to the payments made by the Owner to the Contractor." Id. at 618. Where there is no such conditional payment language, the bond is construed as a 713.23 unconditional payment bond, and will be enforceable as such. North American at 618.

Under Section 713.245(3), a subcontractor must perfect both a claim of lien against the Owner's property and a claim against the Conditional Payment Bond. If the written subcontract contains the necessary conditional payment provision, then the surety will only be responsible for paying lienors to the extent that the Contractor has been paid by the Owner, and to that extent, the Owner's property is exempt from liens. However, where

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the Owner does not pay the Contractor for the lienor's work, the surety is under no obligation to pay under the Conditional Payment Bond, and the Owner's property would not be exempt from liens. In such a case, the lienor would have to foreclose on the property lien, having no recourse against the bond. See Fla.Stat. 713.245(11).

In order to perfect a 713.245 claim, the notice requirements are different than a 713.23 claim, so it is best to satisfy the notice requirements for both sections as a precautionary measure. Otherwise, an otherwise valid claim may be defeated. North American at 616. The statute spells out the procedure, which must be timely followed, for perfecting a 713.245 claim. Fla.Stat. 713.245(4)-(13).

A.3 LIEN RELEASES

As discussed earlier, when progress payments are made, the Contractor is generally required to submit partial or final waivers of lien from its subcontractors and suppliers establishing that the Contractor has paid them. This protects the Owner from liens brought under Florida Construction Lien Law. See Fla.Stat. 713.01, et seq. (1991).

A fundamental issue that should be addressed and agreed upon at the beginning of the project is whether releases lead or trail payment. In other words, will the Contractor be obligated to pay its subs and obtain their partial releases as a condition precedent to the Owner's obligation to make a progress payment (leading releases)? Or will the Owner be obligated to make a payment which is then used by the Contractor to pay subs and materialmen? In the latter situation (trailing releases), the Contractor receives a payment, uses the payment to pay its subs and provides partial releases as a condition precedent to Owner's obligation to fund the next payment.

Subcontractors and suppliers should carefully read these waivers, as well as the relevant provision of the subcontract, to determine what rights they are waiving. Is the release for dollars or work through a specific date? If, for example, there is work in progress at the time the waiver is signed, which is not keyed into dollars, but is keyed through a particular date, the subcontractor may be deemed to have waived his lien rights with respect to such work.

Waivers of lien apply only retrospectively. Under Florida law, a lienor may not waive its lien rights in advance of furnishing labor, services, or materials. The right to lien may only be waived to the extent of labor, services, or materials furnished. See Fla.Stat. 713.20(2). Thus, a lien waiver or lien release in advance of labor, services, or furnishing materials is unenforceable. Id. at 713.02(2)(the amended section also

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provides a statutory Partial Release of Lien). However, a lien waiver or lien release given in advance of payment, but subsequent to performance of labor or services, or furnishing materials, is enforceable. See American Casualty Co. v. Coastal Caisson Drill Co., 542 So.2d 957 (Fla. 1989)(holding that it is against public policy for a claimant to waive its right to make claim against a Payment Bond furnished pursuant to Fla.Stat. 255.05).

A.4 CHANGE ORDERS

Often, as a result of field conditions, changes of design, conflicts in plans, governmental directive or other reasons, modifications to the original scope of work in a construction project occur. While the precise nature of the changes is unforeseeable at the time of contract, the fact that there will be changes is entirely foreseeable. The contract must anticipate this certainty.

The modifications may be initiated either by the Contractor (through an RCO, or Request for Change Order, which is provided to the Owner for execution prior to additional work being done) or initiated by the Owner (through a CCD, or Contract Change Directive--discussed in more detail below), both of which may result in a change order being issued and executed. Such modifications cannot occur unilaterally, and require offer, acceptance, and new consideration.

Modifications do not need to be in writing unless required by the Statute of Frauds or the original contract. However, construction contracts often have a provision requiring that "all modifications, changes, or extras shall be enforceable only if in writing." Notwithstanding, these type of provisions may be avoided through findings of waiver (through course of dealing) or detrimental reliance. See Broderick v. Overhead Door Co. Of Ft. Laud., Inc., 117 So.2d 240 (Fla. 2d DCA 1959).

Although changes are slightly different than extras, contract provisions dealing with one should apply to the other. A change is a modification to something already contemplated under the contract, whereas an extra is work or materials beyond the

original scope of the contract. There are four (4) types of changes that a Contractor may be required to make:

1) A change in the time for completion;

2) A change in the amount of work to be done;

3) A change in the nature of the work to be done; and

4) A change in the method of performance.

Each of these changes may impact the cost and/or time for performance. Whether a court will strictly enforce a provision requiring written change orders documenting the impact on time or cost turns on the facts of each case. One factor is whether the contract is public or private. Courts are more reluctant to find waiver with public contracts, even where there were oral promises made to the Contractor. Phillips & Jordon , Inc. v. Department of Transp., 602 So.2d 1310 (Fla. 1st DCA 1992); Tuttle/White Constructors, Inc. v. State of Fla. Dept. Of Gen. Services, 371 So.2d 1096 (Fla. 1st DCA 1979). Further, sovereign immunity will impact on the enforceability of a verbal change in a government contract (See the discussion of this issue in the Construction Law Chronicle provided separately).

Where private contracts are involved, courts are far more willing to excuse the written requirement on the basis of waiver or detrimental reliance. Doral Country Club, Inc. v. Curcie Bros., Inc., 174 So.2d 749 (Fla. 3d DCA, *cert. denied*, 180 So.2d 656 (Fla. 1965). Similarly, payment for extra work will be allowed if the work was necessitated by another error. James A. Cummings, Inc. v. Young, 589 So.2d 950 (Fla. 3d DCA 1991); Acquisition Corp. of America v. American Cast Iron Pipe Co., 543 So.2d 878 (Fla. 4th DCA 1989).

Whether a change order is executed by a person with authority depends on the contract, and in the absence of a provision designating who has authority, common law principles of agency apply. Owner should be careful not to grant authority by their actions. For instance, where an Owner allowed increases and decreases in the contract price with just the architect's signature, the Owner was held to have given the architect apparent authority to execute change orders. Fletcher v. Laguna Vista Corp., 275 So.2d 579 (Fla. 1st DCA), *cert. denied*, 281 So.2d 213 (Fla. 1973).

Another important issue concerning changes in the work is arriving at a fair compensation for the change. This can be done by applying lump sum, cost plus, or unit price measures. The method should always be fixed in the contract documents.

Though changes in the original contract are often the case, the power to change is not unlimited. If the change exceeds the general scope of the contract, it may be considered a "cardinal change," which, in the absence of an agreement on price, may amount to a breach of the contract. This concept originates in federal procurement contracts, but its application should not be limited to such contracts. See Justin Sweet, *Legal Aspects of Architecture, Engineering and the Construction Process*, (3d Ed.) at 542.

A cardinal change occurs when a party effects an alteration in the work so drastic that it effectively requires the Contractor to perform duties material different from those originally bargained for. Allied Materials & Equipment Co. Inc. v. United States, 569 F.2d 562, 215 Ct. Cl. 406 (1978). The doctrine generally applies to modifications which are so fundamental that they cannot be redressed within the contact by an equitable adjustment to the contract price. Id. In the leading case of P.L. Saddler v. United States, 287 F.2d 411, 152 Ct. Cl. 557 (1961), the court looked at the totality of the change, focusing not only on the magnitude, but also the quality, of the change. Id. at 413. The court stated that "(t)he number of changes is not, in and of itself, the test by which it should be determined whether or not the alterations are outside the scope of the contract." Id. Ad previously mentioned, a cardinal change is a breach. Allied Materials & Equipment. Co., *supra.*(and cases cited therein). As the court stated in Air-A-Plane Corp. v. United States, 408 F.2d 1030, 1037, 187 Ct. Cl. 269 (1969), "a cardinal change is a breach of contract for which the Contractor can sue in the age-old way."

A.5 CONTRACT CHANGE DIRECTIVES

An RCO is made by the Contractor who is required to perform additional work on the project resulting from mandates of government inspectors or site conditions that differ from the plans and specifications. The Contractor submits the change to the Owner for approval. Once executed by the Owner, the Contractor can perform the additional work with the expectation of payment for the agreed upon price.

A CCD typically originates in the field, in a situation where the Owner or its representative wants to make a change in the work without interrupting its progress. In order to continue the work, the CCD is issued, directing the change, with an obligation price the work to follow. Pricing for this work should be on a basis that is specified in the contract, whether unit price or time and material plus an agreed upon percentage for overhead and profit.

A.6 TERMINATION

The contract, negotiated at a time where Owner and Contractor are on good terms, working together to accomplish the project on time and within budget, must anticipate a time when the relationship has soured. There may come a point where the Owner wishes to terminate the Contractor's performance or the Contractor wishes to cease performing. Therefore, the contract must address grounds and the manner for termination.

Termination, an extreme remedy, to be utilized under limited circumstances, when all

other actions, such as suspension, are unavailing, can be justified only by a material, uncured breach. Often, the right to terminate a contract will be contested. The decision to terminate that is later held to have been improper, will prove costly. Therefore, the "T" word should be used sparingly in correspondence and only invoked in practice under the most dire circumstance.

Generally, conditions for termination will be expressed in the contract. Typically, grounds for termination of a Contractor's performance include persistent refusal to supply enough properly skilled workers or proper material, uncured defective work or failure to pay subs. AIA A201 §14.2 (1987). After notice, termination may follow.

A Contractor may terminate performance for non-payment of a material sum, or repeated job suspensions, again after notice. AIA A201 §14.1 (1987).

Another type of breach that may justify termination is an anticipatory breach, which occurs when a party either appears to be unable to meet a future obligation or repudiates, giving notice that it cannot or will not perform a future act. However, mere prospective inability to perform, without some present breach, does not give rise to a right to terminate. Again, these grounds must constitute a material breach, that is, a breach having a significant impact and likelihood of future breaches. A material breach justifying termination may be waived, however, by continued performance. Consequently, a Contractor, for example, must be very cautious about continuing work after a breach, such as nonpayment.

Under Florida contract law, cause will not exist absent a material breach, Orlando v. Murphy, 94 F.2d 426 (5th Cir. 1938); Beefy Trail, Inc. v. Beefy King Int'l., Inc., 267 So.2d 853 (Fla. 4th DCA 1972), such as delays and difficulties caused by the Owner, or failure to adequately prepare the work site, which delayed completion, see e.g., Cement Roofing Ind., Inc. v. Morgan Constr. Co. of Tampa, 276 So.2d 57 (Fla. 2d DCA 1973)(failure by Owner to obtain permit); Gesco, Inc. v. Edward L. Nezelek, Inc., 414 So.2d 535 (Fla. 4th DCA 1982), or failure to deliver final drawings at the required times, Jamison Co. v. Westvaco Corp., 526 F.2d 922 (5th Cir). Good faith must also be present. Termination may not be arbitrary or unreasonable. For instance, where a Contractor is afforded no reasonable opportunity to complete the work, termination provisions will not be invoked against the Contractor. Where an Owner terminates without sufficient legal justification, she will be able to recover only the cost of making work already performed conform to the contract. She will not be able to recover the reasonable cost to complete the job. See

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Reitano v. Peninsular Building Supply Co., 262 So.2d 710 (Fla. 2d DCA 1972).

Another area of termination which has been spawned by federal procurement regulations is "termination for convenience." See C.F.R. s. 1-8.703. An Owner that

determines it to be "convenient" (i.e., economical) to terminate the project may, if permitted by the contract, do so, without prior determination of fault justifying termination. Depending on the contractual agreement regarding compensation in a "T for C", a Contractor may receive payment for work performed, unavoidable losses, and expenditures to preserve and protect the Owner's property, plus "fair and reasonable" profit on work performed. If provided by contract, the Contractor may also receive overhead and profit on work not performed, but within the scope of the contract. Although the power to terminate for convenience is very broad, it is not limitless, and such termination may be set aside if done in bad faith or by an abuse of discretion. The typical AIA General Conditions (A201 §14.3 [1987]), provides only for suspension for convenience, not termination.

B. NEGOTIATION STRATEGIES

As with any contract, negotiation depends on the relative strengths and weaknesses, motivations and desires of the parties. Price, although an important term to be negotiated, is not the only important term. In fact, price can be rendered meaningless if change orders run rampant. Therefore, a starting point for a strong contract that protects both parties, must always be a comprehensive, consistent set of buildable plans and specifications.

Payment terms, release methods (trailing or leading), events which will result in adjustments to price and time are all intertwined and must be addressed. Once the parties know what they want to accomplish, give and take will generally result in a fair contract (ie: one which thrills nor scares either side).

C. BIDDING PROCESS

Competitive bidding gives everyone a chance to bid; it fosters honest competition and ensures that a contract will be let to the lowest bidder. Today the competitive bidding system is a major method of construction contracting in both the public and private sectors.

In most bidding situations there will first be an *Invitation to Bidders*. In federal procurement this is called a *Request for Bids*. Many states, including Florida, require construction work to be performed by pre-qualified persons.

After the invitation, the bidder obtains bidding information, which includes all the

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"rules" for the acceptance of the bid, the drawings, the specification of the job, the parties, involved, the bid bond, the proposed contract, the bid proposal form, as well as many other documents. This, along with the invitation to bidders, constitutes the *Bid Documents*.

After a bidder receive the bid documents, he will submit a *Bid Proposal*. The bid proposal is an "offer" that, with limited exceptions, is irrevocable for a certain stipulated period of time. All bid proposals will be opened a the *Bid Opening* at a time and place specified in the Bid Documents.

At the bid opening, the Owner or public body will determine who will be awarded the contract. Generally speaking, the Contractor that will be selected will be the one who is the *Lowest Responsible Bidder* (discussed below). After the lowest responsible bidder is selected, the Owner or public body must go through the process of a formal award. This is often accomplished through written formal notification. At this point the bidder is invited to sign the formal contract documents that he had agreed to sign in his bid proposal. Private Owners and governments usually reserve the right to reject all bidders. Even without specific statutory permission, a public authority has the power to reject all bids as long as it does not act unreasonably, arbitrarily, capriciously, or in bad faith. See 43 Am.Jur. Public Works, s. 45; Wood-Hopkins v. Roger J. Au & Son, Inc., 354 So.2d 446 (Fla. 1st DCA 1978).

Problems may arise in the bidding process due to certain practices such as splitting invoices. Such practices are not allowed. See Mayes Printing Co. v. Flowers, 154 So.2d 859 (Fla. 1st DCA 1963)(public body could not split the contract into many separate contracts in order to avoid the statutory monetary minimum). The courts have carved exceptions to competitive bidding requirements. An example is work that is unique or requires personal skills. City of Pensacola v. Kirby, 47 So.2d 533 (Fla. 1950). However, a public body may not stretch or alter the original contract "materially" without rebidding. Liberty County v. Baxter Asphalt & Concrete Co., 421 So.2d 505 (Fla. 1981); Hillsborough County Aviation Auth. v. Taller & Cooper, Inc., 245 So.2d 100 (Fla. 2d DCA 1971); Robert G. Lassiter & Co. v. Taylor, 99 Fla. 819, 128 So. 14 (Fla. 1930). Also, though a public body has broad discretion in soliciting and accepting bids, Brasfield v. Ajax, 627 So.2d 200 (Fla. 1993), a public body will not be permitted to draft its bid documents in such a way that only one bidder could possibly qualify, Mayes Printing Co., *supra.* (noting a violation of the statute where "specifications are drawn in such a manner

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that it would permit only one bidder to qualify").

In certain situations, the government may waive "technicalities" in awarding a contract. However, the government may not "find" a technicality in its own bidding system in order to reject a bid. See City of Homestead v. Raney Constr., Inc., 357 So.2d 749 (Fla. 3d DCA 1979)(city not permitted to rescind contract on grounds that it was not executed, after formal acceptance). On the other hand, where a county lacks statutory authority to enter a particular contract, the contract is void, and a Contractor cannot recover for the work performed. In such a case, the Contractor is deemed to have entered the public contract at his own peril. See Ramsey v. City of Kissimmee, 190 So.2d 474 (Fla. 1939).

As mentioned previously, the *Lowest Responsible Bidder* receives an award in public contracting. This is done to discourage unqualified bidders and to assure proper performance of contracts. Such is the case with public educational facilities in Florida. See Chapter 235, Fla.Stat. (1995). To determine the lowest responsible bidder, inquiry

will be made into financial ability, reputation for performance, honesty and integrity, possession of facilities for carrying out the contract, ability to perform the contract in a timely fashion and skill and expertise. Couch Constr. Co. v. Department of Transp., 361 So.2d 184 (Fla. 1st DCA 1978); W. Paynter Sharp & Son, Inc. v. Heller, 280 A.2d 748 (Del.Ch. 1971).

Where a bidder challenges the award, due process requires that the awarding authority show its decision was based upon a thorough investigation of the facts and that an opportunity was offered to the lowest bidder to present his qualifications. Couch Constr. Co., *supra.* at note 11.

The bidder must also be qualified to bid on a particular job. See Pool & Kent Co. v. Capeletti Bros., Inc., 192 So.2d 70 (Fla. 3d DCA 1966)(upholding award to the second lowest bidder where lowest bidder did not have a general Contractor's license at the time bids were opened). In addition to being low, qualified, and responsible, the bid must conform in all material respects to the bid invitation. The question is one of materiality, whether the deviation gives the low bidder a competitive advantage. Harry Pepper & Assocs., Inc. v. City of Cape Coral, 352 So.2d 1190 (Fla. 1977); Liberty County, *supra.*

Sometimes a bidder makes an honest mistake in submitting its bid. When this happens, the bidder makes a request to withdraw or amend its bid. Although early decisions dealing

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with this issue would not relieve mistakes, courts are now more liberal in permitting bid withdrawal, since it would be unfair to hold a bidder who has made an honest mistake as long as the next lowest bidder can still be accepted. See Santucci Constr. Co. v. County of Cook, 211 Ill.App.3d 527, 315 N.E.2d 565 (1974). This is so when the mistake is apparent from either the bid amount itself or from facts and circumstances that the awarding authority knew or should have known at the bid opening.

Generally, courts will consider the following matters in determining whether to grant relief: whether the mistake was clerical or an error in judgment, whether the error was demonstrable so that the awarding authority should have known of the mistake, was the bidder guilty of any culpable or gross negligence, was the mistake so substantial that it was reasonably certain that the parties would not have entered into the contract if they had known of the existence of the error, would enforcement be unconscionable, was it an honest mistake, can the status quo be preserved without harm to the public and is the offending party willing to comply with reasonable requirements that may be deemed necessary to protect the interest of the public?

Once the bid mistake is discovered, the bidder must act promptly to notify the awarding body, demonstrating the absence of culpable negligence on his part and his good faith in preparing the bid. In addition, he should explain the nature of his mistake and attempt to forestall the formal acceptance of his bid.

If the bidder is not granted relief from the mistake, he will either forfeit his bid security or be liable for the difference between his bid and that of the next lowest bidder. Courts, however, have granted recission of the contract for clerical or mathematical errors made by an employee of the bidder, Fraser Public Schools Dist. v. Kolon, 35 Mich.App. 441, 193 N.W.2d 64 (1971); State Bd. Of Control v. Clutter Constr. Corp., 139 So.2d 153 (Fla. 1st DCA 1962), though they have refused relief for errors of judgment, Wil-Fred's, Inc. v. Metropolitan Sanitary Distr., 57 Ill.App.3d 16, 372 N.E.2d 946 (1978); Graham v. Clyde, 61 So.2d 656 (Fla. 1952), or errors made by the bidder himself, Lassiter Constr. Co. v. School Board of Palm Beach County, 395 So.2d 567 (Fla. 4th DCA 1981).

Where a prime Contractor's bid is accepted, and thereafter, a subcontractor or supplier withdraws its bid, the prime Contractor may, under the circumstances indicated above, be able to obtain relief if the withdrawal was due to a mistake. However, a prime Contractor may hold the subcontractor or supplier to his bid where the Contractor

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detrimentally relied on the subcontractor's bid. See Bumby & Stimpson, Inc. v. Southern Reinforcing Steel Co., Inc., 348 So.2d 1216 (Fla. 4th DCA 1977). On the other hand, a subcontractor or supplier, though generally not entitled to obligate the prime Contractor when it uses the former's bid, can do so where there was an agreement to that effect.

Improperly withdrawn bids may implicate the bidder's bond, pledged as security to assure the Owner that the bidder will follow through with a contract.

When a bid is wrongfully rejected, an aggrieved party may bring an action either for mandamus or declaratory or injunctive relief. However, certain governmental agencies require the exhaustion of available administrative remedies prior to judicial intervention. See e.g., DAR, 32 C.F.R. s. 2-407.8 (1979); F.P.R., 41 C.F.R. s. 1-2.407-8 (1979). Injunctive relief is the most successful form of action, in which the aggrieved bidder seeks to enjoin the awarding authority from proceeding with the contract with the accepted bidder and preserving the "status quo" pending the outcome of the entire action. He will also seek to compel the authority to either rebid the job or to accept another bidder. Marriott Corp. v. Metropolitan Dade County, 383 So.2d 662 (Fla. 3d DCA 1980). If the contract was already awarded and completed by the time action is finally decided, the Contractor will be limited to damages, consisting of his out-of-pocket expenditures and attorney's fees, but usually not lost profits. Liberty County, *supra.*

C.1. SITE INSPECTIONS

Many contracts impose upon the Contractor an obligation to satisfy itself with the condition of the site, even to the extent of soils testing and the like. Unforeseen site

conditions may increase the cost of performance. Therefore, responsibility for these unforeseen conditions should be addressed by contract, and attended to before bidding. The Contractor should request and review relevant testing performed by the Owner and should limit its obligation to perform tests or to anticipate conditions that are not readily observable.

C.2. INCORPORATED BID DOCUMENTS

Frequently, a contract for construction will incorporate other documents. Typically, plans and specifications are incorporated by reference and are considered part of the contract for all purposes. Each page of the plans (with the date of last revision) should be set forth. In the event of later revisions, misunderstandings can be avoided. If additional expense or time results from later revisions, the basis for the claim will be clear.

General and supplementary conditions may also be referred to in the main agreement. In such event, it is critical to make sure that both parties understand what documents comprise the entire agreement and obtain a full set of contract documents.

Subcontracts may incorporate all or part of the prime contract, including provisions for bonds, alternate dispute resolution, conditions precedent to litigation, and the like. Again, the key is to make sure that all parties understand and possess all contract documents.

D. DISPUTE RESOLUTION

With the abundance of litigation impacting the court system, and the increasing costs of litigation, potential litigants are faced with seeking alternative means of resolving their disputes. The construction industry is at the forefront of promoting alternative dispute resolution.

D.1. MEDIATION

Either by contract, or later agreement, the parties may recognize that their dispute is not irreconcilable. The expense, uncertainty and aggravation of formal dispute resolution might be avoided if the parties could meet, in a structured setting to discuss their differences in the presence of a trained "facilitator," one whose job it is to get the parties talking, with a view toward compromise and resolution. There is very little downside to mediation. Even where it is unsuccessful in resolving the dispute, the positions of the parties can be crystallized and understood.

D.2. ON-SITE DISPUTE RESOLUTION

An off-shoot of mediation is on-site dispute resolution. The parties may agree in their contract to a person to whom disputes will be brought, during construction. That person's decision may be binding or merely advisory. Where the dispute resolver is recognized as fair and knowledgeable by both sides, her decision, when binding will avoid interruption and litigation. On sizeable projects, the investment in such a person

(and the nomination of a particular individual before any dispute arises) often proves wise. **D.3. ARBITRATION**

Florida has ratified the Uniform Arbitration Act, which is codified as the Florida Arbitration Code, at sections 682.01-682.22, of the Florida Statutes. Additionally, the American Arbitration Association has adopted Construction Industry Arbitration Rules that define the standards of the arbitration proceeding as applied to the construction industry.

Public policy strongly favors arbitration. Lapidus v. Arlen Beach Condo. Assoc., 394 So.2d 1102 (Fla. 3d DCA 1981). Florida courts have ruled that arbitration is the favored means of dispute resolution as a litigation alternative, and courts will indulge every reasonable presumption to uphold an agreement to arbitrate, resolving any doubts about the scope of arbitration in favor of arbitration. See Roe v. Amica Mutual Ins. Co., 533 So.2d 279 (Fla. 1988). Because arbitration is voluntary, it cannot be invoked unilaterally, and parties cannot be compelled to arbitrate. See Ojus Industries, Inc. v. Mann, 221 So.2d 780 (Fla. 3d DCA 1969)(failure to include a provision for arbitration in an agreement may preclude that remedy in the future). Written agreements to arbitrate disputes, however, including those that might arise in the future, are valid, irrevocable, and enforceable. See Fla.Stat. 682.02 (1967). Whether an issue is arbitrable depends entirely on the language of the agreement. The "jurisdiction" of the arbitration panel, therefore, is conferred through the breadth and scope of the arbitration clause. Florida Dept. Of Ins. v. World Re, Inc., 615 So.2d 267 (Fla. 5th DCA 1993); Stinson-Head, Inc. v. City of Sanibel, 661 so.2s 119 (Fla. 1995).

An example of a widely used "broad form" arbitration clause reads as follows:

Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or thirty (30) days after submission of the Claim to the Architect, be subject to arbitration...

See A.I.A. Document A-201, s 4.6.1 (1987).

Construction disputes often involve a number of parties, with similar factual issues. However, all the parties are not in privity with one another. The question becomes whether the disputes can be consolidated into one proceeding. Courts are of diverse opinion on this subject. *Compare* Karlen v. Gulf & Western Industr., Inc., 336 So.2d 461 (Fla. 3d DCA 1976) *with* Simpson v. Robinson, 376 So.2d 415 (Fla. 1st DCA 1979). In order to avoid this problem, the following arbitration provision might be used:

In the event that any dispute, for which demand for arbitration is made, relates to the work or responsibility of the Owner, professional, other Contractor, or any subcontractor on this project, the parties hereto agree to a joint arbitration with said Owner, other Contractor or subcontractor.

Without such a clause, a party may be forced to litigate the question. The clause must

appear in all agreements, in order that all parties can be compelled to arbitrate in one, consolidated proceeding.

Current A.I.A. documents commonly used do not permit consolidation of arbitrations between architect/Owner and Owner/Contractor without the written consent of all parties. See A.I.A. Document A-201 s. 4.6.4 (1997). However, consolidation of separate arbitrations between Owner/Contractor and Contractor/subcontractor is permitted where there are common questions of law or fact. Id.

A related problem is where not all the contracts between the various parties include an arbitration agreement, or where there are two parties with multiple contracts which do not all contain such agreements. See: Lee v. All Florida Constr. Co., 662 So.2d 365 (Fla. 3d DCA 1995)(only disputes pertaining to contracts which contain an agreement to arbitrate are properly submitted to arbitration). Since arbitration clauses are read broadly, claims and parties often come within the ambit of such clauses, though at first blush they appear not to. In a situation where some claims are properly arbitrable while others are not, the latter may be stayed pending outcome of the arbitration, unless they are not dependent on the outcome, in which case they may proceed to litigation. See e.g., Post Tensioned Engineering Corp. v. Fairways Plaza Assocs., 429 So.2d 1212 (Fla. 3d DCA 1983).

The right to arbitrate may be waived by participation in litigation or by taking action inconsistent with the intention to arbitrate. See Lapidus v. Arlen Beach Condo. Assoc., 394 So.2d 1102 (Fla. 1981); Bonner v. RCC, 679 So.2d 794 (Fla. 3d DCA 1996). Thus, where a defendant answered a complaint and participated in discovery before filing a motion to compel arbitration, the court held that the right to arbitrate had been waived. Winter v. Arvida Corp., 494 So.2d 829 (Fla. 3d DCA 1981). See also, Preferred Mutual Ins. Co. v. Matrix Constr., Inc., 662 So.2d 432 (Fla. 3d DCA 1995) (waiver found where party initiated discovery before seeking arbitration). *Compare* Concrete Design Structures, Inc. v. P. L. Dodge Foundation, Inc., 532 So.2d 1334 (Fla. 3d DCA 1988)(refusing to find that arbitration had been waived where defendant's counterclaim and motion to dismiss accompanied the motion to compel arbitration, and there was no participation in discovery).

If a plaintiff wishes to arbitrate, but must file an action to preserve statutory rights, such as a lis pendens, the safer practice is to incorporate a motion to stay litigation and compel arbitration in the Complaint. Initiating or participating in a lawsuit, without first seeking arbitration may be construed as an affirmative selection of litigation over arbitration. Beverly Hills Dev. Corp. v. George Wimpy of Fla., Inc., 654 So.2d 1241 (Fla. 3d DCA 1995); Bonner v. RCC, *supra.* Filing the lawsuit without first or

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simultaneously seeking arbitration, and thereafter, filing responsive pleadings amounts to a waiver of arbitration. Hough v. J.K.P. Dev., Inc., 654 So.2d 1241 (Fla. 3d DCA 1995); see also, Coral 97 Assoc., Ltd. v. Chino Electric, Inc., 501 So.2d 69 (Fla. 3d DCA 1987)(implementing discovery, following the filing of a Motion to Compel Arbitration, was held to be a waiver). A court may also find waiver where a party sits on its right to arbitrate, without a timely assertion. See Hardin Internat., Inc. v. Firepak, 567 So.2d 1019 (Fla. 3d DCA 1990); Rolls v. Bliss Nyitray, Inc., 408 So.2d 229 (Fla. 3d DCA 1981).

As previously mentioned, arbitration is voluntary, and can only be obtained through the agreement of the parties. In deciding whether or not include an arbitration provision, the parties should understand the strengths and weaknesses of arbitration versus litigation.

Arbitration is generally considered to be faster and less expensive than traditional litigation. While the parties can avoid the expense of full discovery, the filing fees, arbitrators' compensation and arbitration expenses can be substantial, and may in fact equal or exceed the cost of full discovery.

Since there is no discovery as of right in arbitration, surprise and uncertainty are part of the process. Further, there is no mechanism for court-ordered mediation, as there is with litigation. Therefore, a party who might otherwise settle after full disclosure of the strengths and weaknesses of her case through discovery and discussion in mediation, may not have that opportunity in arbitration. Instead, she may be forced to endure what might otherwise have been avoidable.

An advantage of arbitration is that once the arbitrator or panel or arbitrators is selected, the matter is scheduled promptly for hearing. There are not hundreds of cases "in the system" to deal with, as with litigation. Furthermore, the panel must render its decision within thirty (30) days after closing the hearing, See A.A.A., Construction Industry Arbitration Rules, Nov. 1, 1993, Rule 41, or within fourteen (14) days under the expedited procedures used for claims involving less than $50,000, see Id. at Rule 57.

Because of the absence of discovery in arbitration (except where there is agreement, or application to and approval by the arbitrator(s), see Fla.Stat. 682.08(2)), arbitration proceeds much more quickly than a trial.

By agreeing to arbitrate, parties keep their dispute private, but in doing so, give up some important safeguards enjoyed in open court. In addition, the parties are held to have waived their right to have evidence weighed in accordance with legal principles,

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Affiliated Marketing, Inc. v. Dyco Chemicals & Coatings, Inc., 340 So.2d 1240 (Fla. 2d DCA 1976), or to full appellate review of the arbitration award, see Fla.Stat. 682.12 (1967). However, parties to arbitration do retain their right to counsel. Id. at 682.07.

There are other notable difference between arbitration and litigation. Arbitration is less

formal than a trial. See A.A.A. Construction Industry Arbitration Rules 29, 30, and 31. Though subpoenas may be issued compelling attendance of witnesses, enforcement of subpoenas is more difficult since the court is not directly involved. Furthermore, review of an arbitration award is severely limited by statute and may only be vacated upon a showing that the award was procured through corruption, fraud or undue means, or that the award exceeded the jurisdiction of the arbitrators, or was on a subject not properly submitted to arbitration, or a postponement or arbitration was wrongfully denied. See Fla.Stat. 682.13 (1967). The award can be modified only where there is an apparent miscalculation of figures, the form of the award is imperfect, or includes an award on a matter not submitted for determination, which can be corrected without affecting the merits of the decision of properly submitted issues. Id. at 682.14. In addition, an award may not be vacated or modified on account of mistake of law or where the award is contrary to the manifest weight of the evidence, and will not be redressed on appeal. Schnurmacher Holding, Inc. v. Noriega, 542 So.2d 1327 (Fla. 1989); City of Miami Beach v. Turchin/CRS, 641 So.2d 471 (Fla. 3d DCA 1994); Lozano v. Maryland Casualty Co., 850 F.2d 1470 (11th Cir. 1988).

Perhaps the most important difference between arbitration and litigation in the construction industry is the background of the factfinder. A judge see a myriad of cases, while arbitrators (who are selected from a panel of qualified candidates) will have substantial construction experience.

There are advantages and disadvantages to choosing arbitration as a means of dispute resolution. A carefully drafted agreement can minimize the disadvantages. However, because of the trade-off between procedural safeguards present in litigation, and the speed and relative informality of arbitration, parties should carefully review their options in order to make an informed choice.

Once a party has decided to pursue arbitration,[1] the appropriate arbitration provision should be drafted, designating which disputes or parts of disputes will be submitted, the method of selection of the arbitrator(s), whether discovery will be permitted, and the scope of the award.

Parties may, by their agreement, confer on the arbitrators whatever jurisdiction the parties choose. Kintzele v. J. B. & Sons, Inc., 658 So.2d 130 (Fla. 1st DCA 1995). They are free to structure the agreement however they deem appropriate. Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381 (11th Cir. 1995).

Once an arbitrator or panel has been chosen, the question of venue must be decided. This aspect, like choosing an arbitrator, is determined by the arbitration agreement. See Kintzele v. J. B. & Sons, Inc., 658 So.2d 130 (Fla. 1st DCA 1995). If venue is not indicated, then the party initiating arbitration requests a particular locale for the hearings. See A.A.A. Construction Industry Arbitration Rules, s. 6(b)(1993). If the responding party objects, then the Arbitration Association makes the determination.[2]

Where a party to a dispute must apply to a court to either compel or enjoin arbitration, or rule on a matter reserved to the courts by the Florida Arbitration Code, the initial application must be brought in a county where the non-moving party resides or has a place of business. If the non-moving party does not maintain a residence or place of business in the state, the application may be brought in any county in Florida. See Fla.Stat.682.19 (1967). All future applications must then be brought in the court hearing the first application, unless the court orders otherwise. Id.

After resolution of a dispute through arbitration, the panel is empowered to award a party any damages that are a consequence of the issues being decided. Arbitrators have broader discretion than courts do in fashioning remedies. Kintzele, *supra.* As long as the award falls within the scope of delegation of authority contained in the agreement to arbitrate, the award may "grant any remedy or relief that the arbitrator deems just or equitable." This includes direct and consequential damages, specific performance or a contract, and liquidated damages, so long as they bear some relationship to actual damages awarded. See A.A.A. Construction Industry Rule, s. 43 (1993). Even punitive damages may be awarded. Kintzele, *supra.*

The award must be by majority vote, in writing and rendered within the time fixed in the arbitration agreement (rarely beyond thirty (30) days after the hearing). See Fla.Stat. 682.09 (1967); A.A.A. Construction Industry Arbitration Rules, s. 42 (1993). The award should also include an assessment of arbitration fees, expenses and arbitrators' compensation. Id. at s. 43. Regarind attorney fees, until recently, arbitrators were, pursuant to Fla.Stat. 682.11, prohibited from awarding attorneys' fees, which was reserved to the court. However, the prohibition may be expressly waived by agreement. See

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Turnberry Assoc. v. Service Station Aid, Inc., 651 So.2d 1173 (Fla. 1995).

An application to vacate or modify the award must be brought within ninety (90) days after delivery of the award, or constructive discovery of the grounds supporting the motion, where the motion is based on fraud or corruption. See Fla.Stat. 682.09 Where clarification of the award is required, the court will remand the matter to the arbitrators. Dade County Police Benevolent Ass'n v. City of Homestead, 642 So.2d 24 (Fla. 3d DCA 1994).

D.4 JURY VS. NON-JURY

If the parties to a construction dispute do not arbitrate and proceed, instead, to litigate, a decision whether to present the case to a judge or jury must be made no later than ten (10) days after the last pleadings directed to the issue. Fla.R.Civ.P. 1.430(b). The determination is not subject to rule. It depends on factors such as the identity of the trial judge, the nature of the dispute, the personalities of the litigants and key witnesses and time constraints. Usually, jury trials are more costly and are harder to

schedule. Of course the jury verdict immediately follows the trial, whereas a judge may consider her ruling for some time after receiving the evidence and argument.

E. ETHICAL CONSIDERATIONS

Almost every action in a construction project will impact

several other participants in the process. A change order issued by the Owner to the Contractor will impact the subcontractor whose scope of work is effected. A delay caused by a problem with delivery of materials will impact not only the material supplier, but the subcontractor charged with installing the material, the general contractor who faces liquidated damages for a late completion and, of course the Owner, who will incur expenses from carrying the project beyond its anticipated completion.

Reactions to the inevitable problems similarly impacts everyone along the chain. The Owner's direction to accelerate performance will require an allocation of responsibility for the cost of acceleration.

One must remember that the law provides a framework for conduct in the workplace. Cooperation is far more efficient, in terms of time, effort and expense, than enforced behavior. The law serves only to provide an enforcement mechanism to help persuade the parties to voluntarily conform their conduct to appropriate divisions of responsibility. Ideally, once the construction contract is signed, the parties could put it in a drawer, never to look at it again. Instead, their conduct would be guided by a cooperative spirit

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of shared responsibility toward a common goal. When a problem surfaced, it would be promptly noted, addressed and attended to, with a fair apportionment of expense.

Now back to the real world. Ethics and personal responsibility go hand in hand. Merely having a right to do something does not require exercise of that right. The decision of when and how to exercise one's rights involves higher, more difficult questions of ethics and a view of the big picture. Should a contractor who can afford to pay a struggling subcontractor withhold payment simply because there is a pay when paid clause in the subcontract and the owner has not yet paid the contractor for that work? Certainly the contractor has the right to withhold payment. Should she? Does she value the relationship with that particular sub? Is the quality of work being performed high? Will there be other jobs together? Has the sub answered the general's calls for help in the past? All of these questions must be answered in order to do the right thing. In a round world, it is possible that the day after the general makes an unforced payment to the sub, the sub has the opportunity to return the favor through accelerated work, correction of a mistake by the general, or a hundred other unanticipated ways.

The process of construction is cooperative. The same analysis that applies to a decision to make an unforced payment to a sub maintains when a general, doing a good job, needs funds from the owner, or when a general has a right to walk off the job, or when lien rights are ripe, but not cold, and the lien will put an owner in trouble with its landlord. In viewing the big picture, over the longer run, can a right be held in

abeyance without prejudice, in order to accommodate another participant in the process? If so, one should think very hard before asserting that right simply because one can.

II. SCHEDULING DIFFICULTIES

A. SCHEDULING

Time is a very important aspect of any construction arrangement. However, time is not "of the essence" in a construction contract in the absence o of an express provision in the contract. Westcorp Gov't Securities, Inc. v. Homestead Air Force Base Fed. Credit Union, 697 F.2d 911 (11th Cir. 1983); Singer Island Civic Assoc. v. Casetta, Ltd., 527 So.2d 861 (Fla. 4th DCA 1988); Pitch Pine Lumber Co. v. George E. Wood Lumber Co., 48 So. 993 (Fla. 1909). Therefore, a schedule providing for commencement, progression, and completion of the project should be incorporated into the construction contract. If a delay occurs during the "critical path" of the schedule, the entire project will be

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delayed. On the other hand, a delay on the noncritical path (or a "float") will not affect the entire project. Possession of the "float" by the Owner or Contractor will determine whether delay is excusable or not.

In order to make time of the essence, a party needs to make a demand for performance, and thereafter give reasonable time for the other party's performance. Henry v. Ecker, 415 So.2d 137 (5th DCA 1982). Thus, the Contractor would then assume liability for delayed completion. The parties should agree in advance on the length of time within which the Contractor must perform. If no time for performance is specified, the law will imply that the contract be performed within a reasonable time. Doolittle v. Fruehauf Corp., 332 So.2d 107 (Fla. 1st DCA 1976); Tyner v. Woodruff, 206 So.2d 684 (Fla. 4th DCA 1968).

A schedule is only as accurate as the date upon which it is based. The participants in a construction project should include in the schedule criteria which form the basis for the logic that will guide the project. The basic criteria in every schedule provide for a determination of the longest length of time to complete each part of the work and identify the order of activities and resources available to accomplish the job. Care should be given to assign reasonable time for specified tasks.

There are many different kinds of schedules that can be used to indicate the progress of the work. These schedules will all indicate the critical path of the project (or the longest chain of activity on the schedule). If a delay occurs on the critical path, the entire project will be delayed and will result in compensable costs. Concurrent delays, even those on the critical path, must be addressed, so as to avoid double counting. As previously discussed, where the delay occurs on the noncritical path (called a "float"), this will not affect the entire project, and may or may not be compensable, depending on whether or not the delay was excusable.

A float provides for scheduling flexibility. For example: Tasks A and B can be done concurrently, but both must be completed before work on task C begins. A takes three months, and B takes 2 months to complete. The three-month period between A and C is the critical path. The one-month difference between B and C is the float time. During that one-month period, the Contractor can move workers elsewhere on the project, and then complete A and B simultaneously; or begin A and B together, finish B, then work elsewhere for the month. If A is behind schedule, the Contractor, having finished B, can move his workers to the A delay, and do so without falling behind on the entire project. Thus, the critical path will not be affected.

There are number of scheduling techniques which have gained acceptance in the construction industry. The simplest device for time scheduling is the bar chart, which plots the time requirements for various elements of work in a parallel manner against a linear time calendar. At best, the bar chart indicates the starting date, the completion date, and periods of significant overlap, which may be particularly vulnerable to delay. A more useful scheduling device for large jobs is the Critical Path Method (CPM). See e.g., USF&G v. Orlando Utilities Commission, 564 F.Supp. 962 (M.D. Fla. 1983); Marriot Corp. v. Dasta Constr. Co., 26 F.3d 1057 (11th Cir. 1994).

The CPM plots the paths of various elements of work from the beginning of the job through completion. The resulting graphic schedule consists of a network of nodes and arrows. The nodes represent significant events; the arrows represent time. This network is plotted along a time scale. Associated with the event nodes are the earliest completion time and the latest completion time for each particular event. The arrangement of the network of events and time is the "critical path," which is the earliest path to completion, and can be demonstrated on the diagram with an arrow. Events and time elements which are subordinate to this path are displayed above and below the major horizontal axis at their determined locations in the sequence of work. "Dummy" arrows are used to connect related events when there is no time factor involved. In assessing delay damages, comparison of an "as built" CPM with the contract CPM can be of great evidentiary value.

The following example will illustrate the logic of the CPM. The CPM schedule shows diagrammatically the interdependent relationships among the activities necessary to complete the construction project. The roof is started only when the structural work is completed. The drywall work can be performed at the same time as the plumbing work. Where the plumbing takes three months to perform and the drywall takes only two, the one-month excess time is the "float." Therefore, the drywall can be started late without delaying the entire project. Of course a delay in finishing the drywall on time will interrupt the critical path, causing the entire project to be delayed.

The CPM system is not inflexible. This system permits changes to the schedule and helps to avoid or compensate for delays as they occur. When the critical path changes, the reason for the change should be documented through a change order

extending the time for completion. If the Contractor feels that the change will increase its overhead or general conditions, the change order must also address the dollars.

The construction contract should specify whether the float belongs to the Contractor, the Owner or is shared for the benefit of the project, as this will determine whether an delay is excusable, and thus, not compensable. The Owner should recognize that possession of the float may be a bid inflater. Where the Contractor holds the float, there is more flexibility, which translates into lower costs, and ultimately, a lower bid.

As discussed above, another method of scheduling a project is the bar chart. The bar chart shows the interrelated and sequential activity of the work. Like the CPM, the bar chart divides the work into an intended starting date, progress, and an intended completion date. The chart can also be analyzed for a critical path. The critical path is shown on the bar chart by matching the bars with a double arrow. Work, such as the drywall in the previous example, which has a float time would not be on the critical path.

Like the CPM, the bar chart should be changed or updated as to reflect the actual progress of the project. Peter Kiewit Sons' Co. v. Iowa Southern Utilities, 355 F.Supp. 376 (S.D. Iowa 1973). A schedule should not be inflexible, but rather it should provide leeway to that periodic updates will insure that deficiencies are corrected. The involvement, at this point, of the Contractor, subcontractors, or other personnel involved with the construction project, is crucial. Meetings should be called, change orders issued, and all personnel informed of any change in schedule.

It is imperative that any schedule be incorporated into the construction contract so that the Owner, Contractor, and subcontractors are contractually tied to the same schedule. If the subcontractor has not *expressly* agreed to be bound by a schedule, the subcontractor may not be held responsible for subcontractor delay. United States, ex. rel., R.W. Vaught Co. v. F.D. Rich Co., Inc. 439 F.2d 895 (8th Cir. 1971). If, however, the subcontractors are bound to the schedule, they will be obligated to perform according to schedule. Illinois Structural Steel Corp. v. Pathman Constr. Co., 23 Ill.App.3d 1, 318 N.E.2d 232 (1974). Similarly, the Contractor's claim will be easier to prove when the Owner is bound to the schedule. Peter Kiewit Sons' Co., *supra.*

Once the parties agree on a schedule, any departure should be only where departure is excusable and promptly documented. The party that abandons the schedule may be in a difficult position afterward. See Natkin & Co. v. George A. Fuller Co., 347 F.Supp. 17 (W.D. Mo. 1972). Notwithstanding an abandonment, or the passing of time for performance, the parties may reinstate a time schedule by written notification providing for new completion dates, which must be reasonable. See Chabot v. Winter Park Co., 34 Fla. 258,

15 So. 756 (1894); Am.Jur.2d, *Vendor and Purchaser*, s. 77, at 263.

B. DOCUMENTING DIFFICULTIES

Whenever a circumstance arises that will affect the schedule,

the entity whose performance is effected should promptly document the circumstance. Change orders do not exist merely to adjust the contract price. They are appropriately utilized to adjust the contract time. Documenting and addressing schedule slippage will force resolution of the issue during a time when adjustments are most available, and minimize the likelihood of a dispute later. Many contracts require that the impact be documented within three days of its occurrence, in order for it to be the basis for a time adjustment.

By timely documenting schedule impacts as they occur, informed decisions are best made. For example, an Owner, promptly informed of a circumstance not caused by the Contractor, may decide to pay for the Contractor to accelerate performance, in order to restore the schedule, rather than extend the time for performance. Additionally, a Contractor who is delayed for reasons beyond its control, would be better able to document a claim for extended general conditions and extended main office overhead occasioned by additional time on the project, if the facts giving rise to the delay are brought to the Owner's attention as they occur.

C. IMPACTS

A delay will have direct impacts, as well as indirect impacts on both cost and time. Often the words *direct* and *indirect* are simply ways of expressing how a circumstance can have an impact on a construction project. Damages that result from delay in the field are simply called direct damages. Damages that result off the field, or at a home office that may be monitoring several projects simultaneously, are simply called indirect damages. Indirect damages can recovered in the proportion that they bear to the amount of the project in question.

Direct costs consist of job-site or field expense increases, such as labor, payroll taxes, insurance, bonding, subcontractors, material costs, and equipment rental. A change of plan may require additional labor and materials, which directly result from the change. Similarly the change may require re-sequencing of the job tasks, additional management or coordination, travel expense or other overhead costs. These impacts are indirect, but are real, nonetheless. Similarly, adverse weather conditions or adverse, unforeseen site conditions give rise to additional expense or time requirements.

D. CLAIMS

Most Contractors are familiar with the documentation and presentation of direct costs resulting from changes, through Requests for Change Orders. The method of making claim for indirect costs, adverse weather and unforeseen site conditions, is somewhat different. It must be accompanied by supporting documentation. A claim for such expense or time extension must be made within the period allowed by contract, typically 21 days after first observance of the condition giving rise to the claim. AIA A201 §4.3 (1987).

III. DAMAGES

A. CONTRACT PROVISIONS

Damages resulting from a breach of a construction contract follow general contract law. Three general types of contractual damage provisions are frequently encountered: actual damages clauses, liquidated damages clauses, and no damage for delay clauses.

The first treats delay as a breach of the contract entitling the nonbreaching party to the actual damages sustained. This rule also applies if the contract is silent about delay damages, or if a liquidated damages provision is absent or deemed unenforceable.

The second type, liquidated damages provisions, set an agreed-upon amount as damages for delay. They are generally enforceable as long as: they are not disproportionate to the damage, actual damages are not readily ascertainable at the time of contracting, and the damages do not constitute a "penalty." Southern Menhaden Co. v. How, 71 Fla. 128, 70 So. 1000 (1916); P & C Thompson Bros. Constr. Co. v. Rowe, 433 So.2d 1388 (Fla. 5th DCA 1980).

The third type of provision entitles the nonbreaching party to no damages for delay**.** Through this provision, the parties to the contract contractually limit their liability for delay. Although this kind of provision is strictly construed, it is generally held to be enforceable in Florida. U. S. f/u/b/o Seminole Sheet Metal v. SCI, Inc., 828 F.2d 671 (11th Cir. 1987).

In a claim for delay damages, whether actual or liquidated, the burden is on the claiming party to establish the existence of a contract, the action constituting a breach, and the damages flowing from the breach. When the provision calls for liquidated damages, the third element is satisfied by introduction of the provision. It must still be proven, however, that the delay actually caused damages. Tuttle/White Constructors, Inc. v.

Montgomery Elevator Co. 385 So.2d 98 (Fla. 5th DCA 1980). Determining the relative merits of the various provisions involves several considerations.

Actual damages are often difficult to ascertain. They must be proven with reasonable certainty and must bear a reasonable relationship to the delay. On the other hand, if they can be proven, the represent the most complete way to compensate a party.

Logically, some courts are requiring that the size of the contract be considered in awarding damages to avoid a result where the damages awarded are disproportionately large to the contractual undertaking.

Liquidated damages are both valuable and valid when it appears that a calculation of actual damages would be too difficult or speculative. If damages appear easily calculable, however, or if the liquidated damages are grossly disproportionate to the probable loss, the liquidated damages provision may be construed as a penalty and disallowed.

As to no-damages-for-delay clauses, though they are generally enforceable, they are not absolute; certain exceptions must be noted. First, if the Owner willfully interferes with the Contractor's timely performance, damages will be assessed despite the existence of a no-damages-for-delay clause. Metropolitan Dade County v. Frank J. Rooney, Inc., 627 So.2d 1248 (Fla. 3d DCA 1993); Newberry Square Dev. Corp. v. Southern Landmark, Inc., 578 So.2d 750 (Fla. 1st DCA 1991); Southern Gulf Utilities, Inc. v. Boca Ciega Sanitary Dist., 238 So.2d 458 (Fla. 2d DCA 1976). Also, if delay is caused by the willful concealment of foreseeable circumstances, the Contractor will recover despite the existence of a no-damages provision. See McIntire v. Green-Tree Communities, Inc., 318 So.2d 197 (Fla. 2d DCA 1975). Damage is generally allowed under a fraud or misrepresentation theory.

The above-mentioned provisions can impact harshly on subcontractors. Sometimes, subcontracts include a liquidated damages provision. Although not part of the A.I.A. form contract, this provision may be inserted as an addendum. A liquidated damages provision provides for a set sum to be assessed against the general contractor for delay, and which is arbitrarily divided among *all* the subcontractors on the project, even though some may not be at fault. These provisions should be extracted from a subcontract whenever possible, even if the provision includes a "bonus" if the project is completed on time. Not only are such provisions harmful to subcontractors, but they tend to result in shoddy work on the project as a result of subcontractors speeding up performance, fearful of not completing their work by the specified date. Obviously, this leaves subcontractors

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exposed for damages caused by sloppy workmanship.

Where a Contractor finds himself with a contract containing a liquidated damage provision, the courts have found ways to protect such Contractors from unfair results. For example, where the Owner cannot prove that Contractors' delay was a substantial factor in the delay of the project, the Owner will not recover. See Tuttle/White, *supra.* Additionally, Florida courts will not enforce a liquidated damages provision if the provision is conditional, and the condition does not occur. U. S. f/u/b/o Pertun Constr. Co., *supra.*

B. REMEDIES

The measure of damages for breach of contract differs for an Owner and a Contractor and depends on the stage of construction at the time of breach. When a Contractor breaches the contract, the Owner is entitled to damages--the cost of completion, cost of correction, or diminution in value. When the Owner breaches the contract, the Contractor's damages are the cost of performance plus anticipated profit.

An Owner's recovery of damages for breach of the construction contract is based on either incomplete performance or defective performance. Where there has been only part performance by the Contractor prior to his breach, the measure of damages will be the cost of correction of defective completed work plus any amount by which the cost of completion exceeds the unpaid contract balance. Incomplete performance occurs when performance of contractual obligation is partial and for some reason, has ceased. Abandonment and default by the Contractor are two examples. The Owner, in this situation, has a reasonable expectation that the contract will be performed for the contract price. Thus, the cost of completion, in excess of the unpaid contract balance is the appropriate measure of damages. The Owner may also be entitled to consequential damages that the Owner can prove were within the reasonable contemplation of the parties at the time the contract was entered into.

In determining the measure of damages to complete the work, great weight is afforded *actual expenditures*, made in good faith, that are necessary to complete the job covered by the original contract. The breaching Contractor has the burden of proving that such expenditures were unreasonable. R. K. Cooper Builders, Inc. v. Free-Lock Ceilings, Inc., 219 So.2d 87 (Fla. 3d DCA 1969).

Where there is defective performance, the measure of damages is cost of correction. Defective performance generally occurs when the Contractor has not complied with the

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technical provisions of the construction contract set forth in the drawings and specifications. This measure of damages is the general rule, prior to substantial performance. In Florida, damages for defective performance is tempered by the doctrine of economic waste. Thus, an Owner is entitled to "what he contracts for or its equivalent. Edgar v. Hosea, 210 So.2d 233 (Fla. 3d DCA 1968). Accordingly, the cost of correction is to be based on the reasonable cost of remedying the defective work, but not necessarily the cost of conforming to the plans and specifications with exacting precision. In other words, the Owner cannot insist that a Contractor tear down good, although non-conforming, work where the design intent can be reasonably satisfied through an equivalent installation. Grossman Holdings, Ltd. v. Hourihan, 414 So.2d 1037 (Fla. 1982); Pinellas County v. Lee Constr. Co. of Sanford, 375 So.2d 293 (Fla. 2d DCA 1979).

Where there has been substantial performance, the cost of correction theory for defective work may be displaced by the diminution in value theory, or the difference in the value of the work as contracted and the value as constructed. However, damages for the cost of correcting a defective condition may be granted if economic waste will not result. See Robinson v. Albanese, 636 So.2d 831 (Fla. 5th DCA 1994)(Owner of

home built as mirror image not entitled to the cost of reconstructing the entire home to make it conform totally to the plans).

After the date of substantial completion, the Owner may not be entitled to delay damages, Fred Howland, Inc. v. Gore, 13 So.2d 303 (Fla. 1942), or be able to enforce a liquidated damages provision, J. M. Beeson Co. v. Sartori, 553 So.2d 180 (Fla. 4th DCA 1989).

Where the Owner breaches the contract, the measure of damages varies with the status of the work performed. Prior to substantial completion, recovery is based on the cost of the work plus anticipated profit on the remaining work, less payments to date. Marshall Constr., Ltd. v. Coastal Sheet Metal & Roofing, Inc., 569 So.2d 845 (Fla. 1st DCA 1990)(subcontractor entitled to either quantum meruit or lost profit plus reasonable costs incurred); Brooks v. Holsombach, 525 So.2d 910 (Fla. 4th DCA 1988). This theory of recovery parallels recovery under traditional contract principles, that is, the theory of expectation damages, which place the nonbreaching party in the position that would have existed had the breach not occurred.

Three possible formulas have been suggested by one commentator for proving a Contractor's damages. See Justin Sweet, *Legal Aspects of Architecture, Engineering and*

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the Construction Process (5th Ed.) at 584-585.

1) Start with contract price and deduct the estimated cost of completion, and progress payments already received by the Contractor;

2) Omit the contract price from the calculation, and instead begin with the amount expended by the Contractor in part performance and combine that figure with the anticipated profit (or loss) on the contract, and finally, deduct progress payments already received;

3) Calculate the proportion of the contract price that the cost of the completed work bears to the entire cost of performance, plus profit that would have been made on the uncompleted portion of the work.[3]

After substantial completion, the Contractor is entitled to be paid the full contract price, less such damages as the Owner may have suffered as a result of breaches by the Contractor (costs to complete and correct). Fleming v. Urdl's Waterfall Creations, Inc., 549 So.2d 1057 (Fla. 4th DCA 1989). An Owner who is held to have wilfully breached the contract, may only be entitled to recover costs of correction of defective work, but not costs to complete the work that remained, at the time Owner's breach excused the Contractor from further performance.

In order for a Contractor to properly establish her damages, she may not simply

provide a mere percentage estimate of the balance due on the uncompleted project. Rather, she must use the actual costs plus the anticipated profit. Brooks v. Holsombach, *supra.* (percentage of completion not the proper method to prove damages). Proof of lost profit, in turn, requires subtracting the reasonable cost necessary to complete the contract from the remaining contract sum. Robert A. Huggins Gen'l Contractor, Inc. v. Willoughby, 595 So.2d 1003 (Fla. 5th DCA 1992). Bid figures are probative of this claim.

Under traditional contract theory, consequential damages are limited to those within the reasonable contemplation of the parties at the time the contract was executed. Hadley v. Baxendale, 156 Eng.Rep. 145 (1854). This differs from tort law, under the diminution in value measure, where damages include those that are proximately caused by the wrong, regardless of the intentions of the parties.

In noncontract actions for recovery for work performed, such as an action for extras, which may arise in a quasi-contractual sense, recovery is available in quantum meruit. Under this form of recovery, a Contractor would be entitled to the reasonable value of the construction performed, less payments previously made. See Moore v. Spanish River Land

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Co., 159 So.2d 673 (Fla. 1935); Ballard v. Krause, 248 So.2d 233 (Fla. 4th DCA 1971).

It should be mentioned that when money damages can be adequately assessed, specific performance will not be awarded, since there would be an adequate remedy at law. Generally speaking, money damages are an adequate remedy in construction cases, and therefore, specific performance would not be available. From a practical standpoint, because of the complex nature of a construction project, a court's administration of specific performance would be difficult, and would greatly burden the judicial system.

As will be more fully developed by other materials, while a lien claim may not include work that was not approved or claims for delay damages, the contract count in the lawsuit should include all sums due a contractor.

C. ASPECTS OF DAMAGE CLAIMS

C.1. CLAIM PREPARATION COSTS

These costs are not recoverable under federal procuring agency contracts, unless the Contractor's claim is directly related to work performance or administration. Singer Co., Librascope Div. v. United States, 568 F.2d 695 (Ct. Cl. 1977).

C.2. ATTORNEY'S FEES.

In private claims, attorneys' fees are not generally recoverable absent statutory authority or an express contract provision. Stockman v. Downs, 573 So.2d 835 (Fla. 1991). Attorneys' fees may not be awarded for claims against the United States, unless a statute provides otherwise. 28 U.S.C. 2412 (1982); F.D. Rich Co. v. Industrial

Lumber Co., 417 U.S. 116 (1974).

C.3. PUNITIVE DAMAGES.

Such damages will not be allowed in a breach of contract action unless the breach constitutes a separate, independent, malicious tort. MacDonald v. Penn Mutual Life Ins. Co., 276 So.2d 232 (Fla. 2d DCA 1973); Nicolas v. Miami Burglar Alarm Co., 339 So.2d 175 (Fla. 1976); Grossman Holdings, Ltd. v. Hourihan, 414 So.2d 1037 (Fla. 1982).

C.3. SUBCONTRACTOR'S CLAIMS.

A subcontractor that incurs costs due to Contractor delay can recover these costs against the Contractor. Jennings v. Real Constr. Co., 176 Conn. 16, 392 A.2d 969 (1978). The Contractor, who in turn, incurred these costs due to Owner delay, can pass them up the line to the Owner.

C.5. PROFIT

Many construction contracts include a percentage markup for overhead and profit. See Manshul Constr. Corp. v. Dormitory Auth., 79 A.D.2d 383, 436 N.Y.S.2d 724 (1981).

D. DELAY CLAIMS

Delay occurs when a construction project or some part of it is not completed on the date originally agreed to by the parties. Claims for delay may be made by the Owner even where extensions of time have been granted. See Broome Constr. Inc. v. United States, 492 F.2d 829 (Ct. Cl. 1974); Herbert & Brooner Constr. Co. v. Golden, 499 S.W.2d 541 (Mo. Ct. App. 1973). The Contractor has a non delegable duty to timely perform, and will not be relieved of this obligation because of delays caused by subcontractors. See Hawaiian Inn of Daytona Beach, Inc. v. Rober Myers Painting, Inc., 363 So.2d 125 (Fla. 1st DCA 1978). Of course, a Contractor can recover delay damages from a subcontractor, and vice-versa.

Delay claims can also be made by a Contractor against an Owner. For example a Contractor who is capable of finishing a job on time is entitled to delay damages if the Owner's interference slows the Contractor's performance. See Sun Shipbuilding & Dry Dock Co. v. United States Lines, Inc., 439 F.Supp. 671 (E.D. Pa. 1977); Grow Constr. Co. v. State, 56 A.D.2d 95, 391 N.Y.S. 726 (1977). A Contractor may also recover from an Owner where the subcontractor claims additional compensation from the Contractor because of delay caused by the Owner. Generally to recover, privity is required. Non-privity subcontractors cannot claim against the Owner, and their claims are of a pass through nature, made against the Contractor who then claims against the Owner, Newberry Square Development Corp. v. Southern Landmark, Inc., 578 So.2d 750 (Fla. 1st DCA 1991); Tuttle/White Constructors, Inc. v. Montgomery Elevator Co., 385 So.2d 98 (Fla. 5th DCA 1980), or the Contractor, see generally, E.C. Ernst, Inc. v. Manhattan Constr. Co., 551 F.2d 1026 (5th Cir. 1977). Privity cannot be established by incorporation of the prime contract into the subcontract. W. Wright, Inc. v. Korshoj Corp., 197 Neb. 692, 250 N.W.2d 894 (1977). Delay claims by

non-privity subcontractors can be recovered, if at all, under a third party beneficiary theory if the subcontractor is an intended beneficiary of the prime contract. See Flintkote Co. v. Brewer Co. of Florida, 221 So.2d 784 (Fla. 3d DCA 1969).

Delays may be categorized as: non-excusable, excusable, and

concurrent. Willet Constr. Corp. v. Tetreault, 537 So.2d 716 (Fla. 2d DCA 1989). The legal obligations and rights associated with the concept of excuse arise from the implied duty in the construction contract that one party will not delay, hinder, or interfere with performance of the other party. Newberry Square Development Corp. v. Southern Landmark, Inc., 578 So.2d 750 (Fla. 1st DCA 1991). This implied duty prevents one party from availing itself of its own wrongdoing. Pitt Constr. Co. v. City Dayton, 237 F. 305 (6th Cir. 1916).

Non excusable delays occur due to a party's fault. White Constr. Co. v. State Dept. of Transp., 535 So.2d 684 (Fla. 1st DCA 1989). Where a Contractor is at fault, the Owner may require acceleration of the work schedule, with the added costs borne by the Contractor. Additionally, the Contractor may be responsible for actual or liquidated damages (discussed *infra.)*, or both. Hillsborough County Aviation Auth. v. Cone Bros. Contracting Co., 285 So.2d 619 (Fla. 2d DCA 1979).

Owners may also delay a Contractor's performance. Examples of such delays include: failure of the Owner to provide site access, Southern Gulf Utilities, Inc. v. Boca Ciega Sanitary Dist., 238 So.2d 458 (Fla. 2d DCA 1970), failure of the Owner to supply correct plans or specifications, United States v. Spearin, 248 U.S. 132 (1918); Laburnim Constr. Corp. v. United States, 325 F.2d 451, 163 Ct.Cl. 339 (1963); J.D Hedin Constr. Co. v. United States, 347 F.2d 235, 171 Ct.Cl. 70 (1965), failure to provide necessary rights of way, Southern Utilities, Inc. v. Boca Ciega Sanitary District, 238 So.2d 458 (Fla. 2d DCA 1970), untimely relocation of undisclosed utility facilities by Owner or other prime Contractor, State Dept. Of Transp. v. Southern Bell Tel. & Tel., 635 So.2d 74 (Fla. 1st DCA 1994), failure to deliver materials as provided for in the contract, Brown v. East Carolina R. Co., 70 S.E. 625 (N.C. 1911), failure to coordinate multiple prime Contractors, and failure of the Owner to pay the Contractor promptly, Seretto v. Rockland, S.T. & O. H. Ry., 101 Me. 140, 63 A. 651 (1906).

Excusable delays are not based upon fault, but upon some unforseen occurrence. United States v. Brooks-Calloway Co., 318 U.S. 120 (1943). Since neither party is at fault, no breach of the implied duty of cooperation in the contract results, and, therefore, no damages are recoverable. Under such circumstances, an extension of time is appropriate. For example, an unforseen cement shortage would entitle the Contractor to a time extension, J. D. Hedin Constr. Co. v. United States, 408 F.2d 424 (Ct. Cl. 1969), as would an injunction obtained by a third party which temporarily shuts down the project, Franklin Contracting Co. v. State, 134 N.J.Super 198, 338 A.2d 875 (1975); Byrnes v. Metz, 53 Wis.2d 627, 193 N.W.2d 675 (Wis. 1972). A strike or labor dispute may constitute an excusable delay. Contracting & Material Co. v. City of Chicago, 20 Ill.App.3d 684, 314 N.E.2d 598 (1974); 161 Misc. 934, 293 N.Y.S. 436 (Ct. Cl. 1937). *Contra* Fritz-Rumer-Cooke Co. v. United States, 279 F.2d 200 (6th Cir.

1960). Also, an act of God, known as *force majeure*, may excuse delay. It must result from natural causes without human intervention, and be such that it could not have been prevented by the exercise of reasonable care and foresight. Enid Corp. v. Mills, 101 So.2d 906 (Fla. 3d DCA 1958); Middaught v. United States, 293 F.Supp. 977 (D.Wyo. 1968). Examples include heart attack, Camacho Enterprises,

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Inc. v. Better Constr., Inc., 343 So.2d 1296 (Fla. 3d DCA 1977), unusually severe weather (like a hurricane, but not merely poor weather, which is an assumed risk), Hardeman-Monier-Hutcherson v. United States, 458 F.2d 1364 (Ct.Cl. 1972); DeSombre v. Bickel, 18 Wis.2d 390, 118 N.W.2d 868 (1963); Marriot Corp. v. Norfolk & Western Ry. Co., 319 F.Supp. 647 (E.D. Mo. 1970).

Concurrent delays involve the premise that where both parties to a litigation caused delay, then neither party can recover damages for that period of time when both parties were at fault. Broward County v. Russell, Inc., 589 So.2d 983 (Fla. 4th DCA 1991). The burden rests with the party claiming damages to apportion and show entitlement to damages. Gesco, Inc. v. Edward L. Nezelek, Inc., 414 So.2d 535 (Fla. 4th DCA 1982); United States ex. rel. Gray-Bar Elec. Co. v. J. H. Copeland & Sons, 568 F.2d 1159 (5th Cir. 1978). However, where there are several factors attributable to the delay, of which the defendant's breach is a substantial one, the court may not burden the plaintiff with the duty to apportion. Tuttle/White Constructors, Inc. v. Montgomery Elevator Co., 385 So.2d 98 (Fla. 5th DCA 1980). Once the defendant is shown to be a substantial factor in causing the plaintiff's damages, then the defendant must show that other causes (i.e., other Contractors) are responsible for the damages. The party claiming damages has the burden of proving they are reasonable, and once this is established, the adverse party must persuade the court that they are not. Tuttle/White, *supra.*

E. DELAY DAMAGES

Although delay damages must be proven with reasonable certainty, Peter Kiewit Sons' Co. v. Summit Constr. Co., 422 F.2d 242 (8th Cir. 1969); Travelers Indemnity Co. v. Peacock Constr. Co., 423 F.2d 1153 (1970), mathematical certainty is not required, since a wrongdoer should not be allowed to avoid damages merely because precise proof is not possible, Gesco, Inc. v. Edward L. Nezelek, Inc., 414 So.2d 535 (Fla. 4th DCA 1982); Raymond Constructors of Africa, Ltd. v. United States, 411 F.2d 1227 (Ct. Cl. 1969); Comfort Homes, Inc. v. Peterson, 549 P.2d 1087 (Colo. Ct.App. 1976); Southern New England Contracting Co. v. State, 165 Conn. 644, 345 A.2d 550 (1974); Lou-Con, Inc. V. Gulf Bldg. Servs., Inc., 287 So.2d 192 (La.Ct.App. 1973); Peru Assoc., Inc. v. State, 70 Misc.2d 775, 334 N.Y.S.2d 772 (1971); Pebble Bldg. Co. v. G.J. Hopkins, Inc., 288 S.E.2e 437 (Va. 1982). Once the injured party establishes damages with reasonable certainty, a causal relationship between the damage and the delay must be established. Siefford v. Housing Auth., 192 Neb. 643, 223 N.W.2d 816 (1974); Zook Bros. Constr. Co. v. State, 556 P.2d 911 (Mont. 1976). Expert testimony may be used to substantiate the nature of the claim and its accuracy.

The opposing party has the burden of proving that the damages sought are

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unreasonable. Tuttle/White, *supra.*; Watson Lumber Co. v. Guennewig, 79 Ill.App.2d 377, 226 N.E.2d 270 (1967).

Where a party is entitled to delay damages, the party must, nonetheless, mitigate its damages. Holland v. Green Mountain Swim Club, Inc., 470 P.2d 61 (Col.App. 1970). The burden of proving the injured party's waste, extravagance, or failure to mitigate damages is upon the party who has breached the contract. Tuttle/White, *supra.*; T.C. Bateson Constr. Co. v. United States, 319 F.2d 135 (Ct. Cl. 1963). However, mitigation calls for reasonable care, Halliburton Oil Well Cementing Co. v. Millican, 171 F.2d 426 (5th Cir. 1948), and therefore, when the injured party does not actually mitigate damages, recovery will not be denied. Holland, *supra.*

E.1 OWNER'S DAMAGES

An Owner who does not receive a completed structure on time through the fault of the Contractor can recover damages for the delay. These damages may include increased finance costs, where the Owner has had to finance the construction project. For example, the interest rate on a loan may increase due to delay. Tuttle/White, *supra.*; Lynch v. Florida Mining & Materials Corp., 384 So.2d 325 (Fla. 2d DCA 1980). In order to recover the increased interest expense, an Owner must prove that the added finance costs have been incurred due to the Contractor delay. A claim based on increases in the interest rate may be denied when the increase is not a direct result of Contractor delay. Roanoke Hosp. Ass'n. v. Doyle & Russell, Inc., 214 S.E.2d 155 (Va. 1975); but see, Hemenway Co. v. Bartex, Inc., 363 So.2d 1356 (La.Ct.App. 1979). Nevertheless, an Owner may recover for delay damages that do not flow directly from a breach so long as they are reasonably foreseeable. Spang Indus., Inc. v. Aetna Casualty & Sur. Co., 512 F.2d 365 (2d Cir. 1975). In order for these consequential damages to be foreseeable, they must have been within the reasonable contemplation (though not actually discussed) of the parties at the time that they entered into their contract.

Other damages may result when an Owner does not receive the completed building without delay. He may be forced to remain in older premises, which might otherwise have been sold, or if sold, he may incur relocation costs. New leases may have to be signed. The Owner may be put into the precarious situation of having to simultaneously finance the delayed project and absorb costs for relocation or extended leaseholds. The delay in opening the new building may result in lost rentals, Russo v. Heil Constr., 549 So.2d 676 (Fla. 5th DCA 1989); Vanater v. Tom Lilly Constr., 483 So.2d 506 (Fla. 4th DCA 1986);

Marshall v. Karl E. Shultz, Inc., 438 So.2d 533 (Fla. 2d DCA 1983); Miami Heart Institute, Inc. v. Heery Architects and Engineers, Inc., 765 F.Supp 1083 (S.D. Fla. 1991); Ryan v. Thurmond, 481 S.W.2d 199 (Tex.Civ.App. 1972), or additional overhead and maintenance expenses, Burgess Constr. Co. v. M. Morrin & Son Co., 526 F.2d 108 (10th Cir. 1975). The loss of rents or profits may be recovered if the Owner can prove that they were anticipated by some fixed standard, such as past profitability or signed rental agreements. Otherwise, recovery may be denied. Hyatt Cheek Builders-Engineers Co. v. Board of Regents, 607 S.W.2d 258 (Tex.Civ.App. 1980); Hungerford Constr. Co. v. Florida Citrus Exposition, Inc. , 410 F.2d 1229 (5th Cir.), *cert. denied*, 396 U.S. 928 (1969); Innkeepers Int'l, Inc. v. McCoy Motels, Ltd., 324 So.2d 676 (Fla. 4th DCA 1975).

E.2 CONTRACTOR'S DAMAGES

When the Contractor claims damages from a delay for which the Owner is responsible, the Contractor has the burden of proving that increased costs of construction were due to the delay or fault of the Owner. Thus, there must be a causal relationship between the Owner-caused delay and the Contractor's increased costs. Siefford v. Housing Auth., 223 N.W.2d 816 (Neb. 1974). Just like the Owner who may have to borrow additional money because of delay, the Contractor may be required to borrow money to finance added costs caused by Owner delay. The Contractor must prove that this was necessitated by Owner delay. There are several common expenses that a Contractor may incur when an Owner delays the work.

E2a. EXTENDED HOME OFFICE OVERHEAD

When a Contractor mobilizes for a job, she typically does not close down her main office. In fact, a portion of the home office resources are dedicated to the project. When the project is delayed, the cost of the main office, attributable to the project, increases. When the delay is the Owner's fault, the Contractor may recover to the extent she can establish the amount by which the delay in this project increased home office overhead.

Extended home office overhead includes those costs associated with the operation of an office, such as management personnel not assigned to a particular project, rent, lights, air conditioning or heat, telephones, payroll associated with those office personnel necessary to run the particular construction project, stationary costs, records of costs, review submittals from subcontractors, weekly and monthly program reports, photocopying, travel expenses, taxes, and insurance. See generally, Capital Elec. Co. v.

United States, 729 F.2d 743 (D.C. Cir. 1984); W.G. Cornell Co. v. Ceramic Coating Co., 626 F.2d 990 (D.D.C. 1980); Doyle Elec. Co. v. Matthews Corp., 263 So.2d 621 (Fla. 2d DCA 1972). The claimed damages must be directly related to actual delay, and may not, for example, include payroll to employees actually performing work on

behalf of the Contractor for other projects during the period of delay. Houdaille-Duval-Wright Co. v. Charldon Constr. Co., 266 So.2d 106 (Fla. 3d DCA 1972).

Since the home office may be involved in monitoring several construction projects, the total home office overhead must be allocated among the various projects, so that only that portion attributable to the project at issue is included in a delay claim. The difficulty in judging whether an apportionment of home office expenses is fair or appropriate has led to the creation of formulas that approximate impact costs in relation to delay. Although these costs are indirect, they are still recoverable as damages. See Berley Indus., Inc. v. City of New York, 45 N.Y.2d 683, 412 N.Y.S.2d 589 (1978).

The most commonly used formed for delay damages is known as the *Eichleay* Formula, which derives its named from the case that approved its use. See Eichleay Corp., ASBCA No. 5183, 60-2 BCA 2688 (1960), *aff'd on recon.*, 61-1 BCA 2894 (1961). Although this formula is somewhat imprecise, and for that reason has been criticized or rejected, see Berley Indus., Inc., *supra.*, mathematical imprecision is justified by the courts on the principle that one who is at fault should not be allowed to avoid damages because the proof of damages is not entirely precise, Raymond Constructors of Africa, Ltd. v. United States, 411 F.2d 1227 (Ct. Cl. 1969); Comfort Homes, Inc. v. Peterson, 549 P.2d 1087 (Colo.Ct.App. 1976); Southern New England Contracting Co. v. State, 165 Conn. 644, 345 A.2d 550 (1974); Lou-Con, Inc. v. Guld Bldg. Sers., Inc., 287 So.2d 192 (La.Ct.App. 1973); Peru Associates, Inc. v. State, 70 Misc.2d 775, 334 N.Y.S.2d 772 (1971); Pebble Bldg. Co. v. G.J. Hopkins, Inc., 288 S.E.2d 437 (Va. 1982). The *Eichleay* Formula has been submitted to a jury, Mars Associates, Inc. v. Board of Ed., 53 A.2d 532, 383 N.Y.S.2d 889 (1976). The formula generally allocates to a particular contract, increased main office overhead allocable to the project, in proportion to the ratio of contract revenue to total company revenue. Capital Elec. Co., *supra.*, General Federal Constr., Inc. v. P.R. Thomas Inc., 451 A.2d 1250 (Md.App. 1982).

E2b. INCREASES IN MATERIAL COSTS

An increase in the cost of material that occurs during an Owner's delay, is compensable. Gardner Displays Co. v. United States, 346 F.2d 585 (Ct. Cl. 1965).

Accordingly, some contracts provide for a sudden rise in material costs by including an escalation provision that limits the Contractor's right to recover the full cost increase. Cf. John Grace & Co. v. State Univ. Constr. Fund, 375 N.E.2d 377 (N.Y. 1978). Ordinarily, however, if the Owner causes a work delay that results in higher material costs to the Contractor, the Contractor is entitled to these costs, so long as the Owner's delay is without contractual excuse. In addition, any unusual transportation costs should be included in the Contractor's claim for excess material costs.

E2c INEFFICIENCY - LOSS OF PRODUCTIVITY

Inefficiency costs, while compensable, are difficult to prove. For example, loss of productivity can result because Owner-caused delay has forced the Contractor to extend working hours or to work under adverse weather conditions, possibly resulting in worker fatigue, absenteeism, or the training of new personnel. Luria Bros. & Co. v. United States, 369 F.2d 701 (Ct. Cl. 1966). Proving inefficiency, therefore, usually requires expert analysis with documented supporting data. Id. Average or standard productivity costs during a normal period may be established by actual cost records or by estimates, if corroborated. Therm-Air Mfg. Corp., ASBCA 15842, 74-2 BCA 10,818. Coley Properties Corp., PSBCA 276, 77-1 BCA 12,422 (1977); Dravo Corp., ENG BCA 3800, 79-1 BCA 13,575. Once determined, these costs may then be compared to the delay situation. Since inefficiency or loss of production is so difficult to prove, alternative methods of calculation should be used. Further comparisons to similar jobs attempted in the past or present may be helpful.

Inefficiency, particularly the loss of productivity, has received extensive comment. See e.g., I. Richter & J. Kozek, *Proving Damages in Arbitration*, 79-4 CONSTR. BRIEFINGS (Fed. Pub. 1979); Wilkinson, *How Schedule Changes Affect Construction Costs - The NECA/MCAA Study*, 4 CONSTR. CLAIMS MONTHLY NO. 8 (AUG. 1982); NAT'S ELEC. CONTRACTORS ASS'N, 3 GUIDE TO ELECT. CONTRACTORS CLAIMS MANAGEMENT, Index N. 40063 (1980); ASSOCIATED GEN. CONTRACTORS OF AMERICA, Owner'S GUIDE ON CONSTRUCTION COSTS & PRODUCTIVITY, Index No. 2141 (1979); Academy of Elec. Contracting of National Elec. Contractor's Ass'n, Inc., *Cost Factors & Other Elements Affecting Change Order Estimating,* CHANGE ORDERS IN ELEC. CONSTR. (Washington, D.C. 1970); Mechanical Contractors Ass'n of America, Inc., *Factors Affecting Productivity*, MANAGEMENT METHODS COMMITTEE BULLETIN (Jan. 1976); Mechanical Contractors Ass'n of America, Inc., *Change Orders in the Mechanical Contractor Ind.*, MANAGEMENT METHODS COMMITTEE BULLETIN NO. 32 (Rev. Dec. 1972); Mechanical Contractors Ass'n of

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America, Inc., *How Much Does Overtime Really Cost*, MANAGEMENT METHODS COMMITTEE BULLETIN NO. 18; U.S. DEPT. OF LABOR, HOURS OR WORK & OUTPUT, *Learning & Experience Curves* (ASCE Nat'l Structural Meeting App. 19-23) (1971); Diehmann, et al., *Utilization of Learning Curves in Damages for Delay Claim*, PROJ. MANAGEMENT QUARTERLY 67 (Dec. 1982).

E.2d TOTAL COST METHOD FOR CALCULATING DAMAGES

The total cost method of calculating damages resulting from lost labor productivity and delay involves a comparison of the actual costs incurred with Contractor's original budgeted costs. This method is disfavored, and is reluctantly allowed only where the Contractor can prove that: 1) the pre-bid estimate was reasonable; 2) the amounts expended were reasonable; 3) any excess amounts were attributable to the Owner; and 4) the nature of the increased cost makes it highly impracticable to measure the cost with a reasonable degree of accuracy. See e.g., Department of Transp. V. Hawkins Bridge Co., 457 So.2d 525 (Fla. 1st DCA 1984); McDevitt & Street Co. v.

Department of Gen'l Services, 377 So.2d 191 (Fla. 1st DCA 1979); Houdaille-Duval-Wright Co. v. Charldon Constr. Co., 266 So.2d 106 (Fla. 3d DCA 1972). Concrete Placing Co. v. United States, 24 Cl.Ct. 369 (1992). It is best applied where the Contractor has only a small number of projects at one time.

This meassure may allow a Contractor relief from a bad bid, based on an Owner's later breach of contract. Where a bid or estimate is found to be unreasonable, a modified total cost method of recovery may be implemented by adjusting the bid to a more accurate number. Servdone Constr. Corp. v. United States, 19 Ct. Cl. 346 (1990). However, the reasonableness of the original bid may be established sufficiently through evidence of expertise, past accurate bidding, explanation by experts on bid calculation, and closeness of the bid to other bids. McDevitt & Street Co., *supra.*

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[1] It should be reiterated that where a party needs to institute a court action in order to preserve statutory rights, he must take steps not to waive an otherwise enforceable arbitration provision. For example, an action to enforce a construction lien on property must be "commenced" within one year of recording a claim of lien. See Fla.Stat. 713.22 (1967). Commencement does not include invoking arbitration. In addition, a Contractor, in order to have priority against creditors or subsequent purchasers of the property, must record a notice of lis pendens. Id. at 713.22. However the recordation of a lis pendens requires the existence of a claim in litigation. Id. at 48.23; see also, Bowers v.

Pearson, 135 So.2d 562 (Fla. 1931). Therefore, a party seeking to preserve its lien rights, while not waiving its right to arbitration, should file a complaint, record its lis pendens, and include in the complaint a prayer for stay of litigation pending arbitration. Certainly, the party could file a demand for arbitration first, or simultaneously with the litigation. See Beverly Hills Dev. Corp. v. George Wimpy of Florida, Inc., 661 So.2d 969 (Fla. 5th DCA 1995). Of course, a motion to stay litigation and to compel arbitration should be promptly raised as well.

[2] The section of the arbitration code determining venue pre-emits the general venue provision of Fla.Stat. 47.051. Hebron Constr. Co. v. Board of Trustees of Brevard Community College, 420 So.2d 393 (Fla. 5th DCA 1982).

[3] This formula is rarely used.