

DESIGN PROFESSIONAL LIABILITY

Presented By

Christopher M. Cobb, Esq.
ccobb@jimersoncobb.com



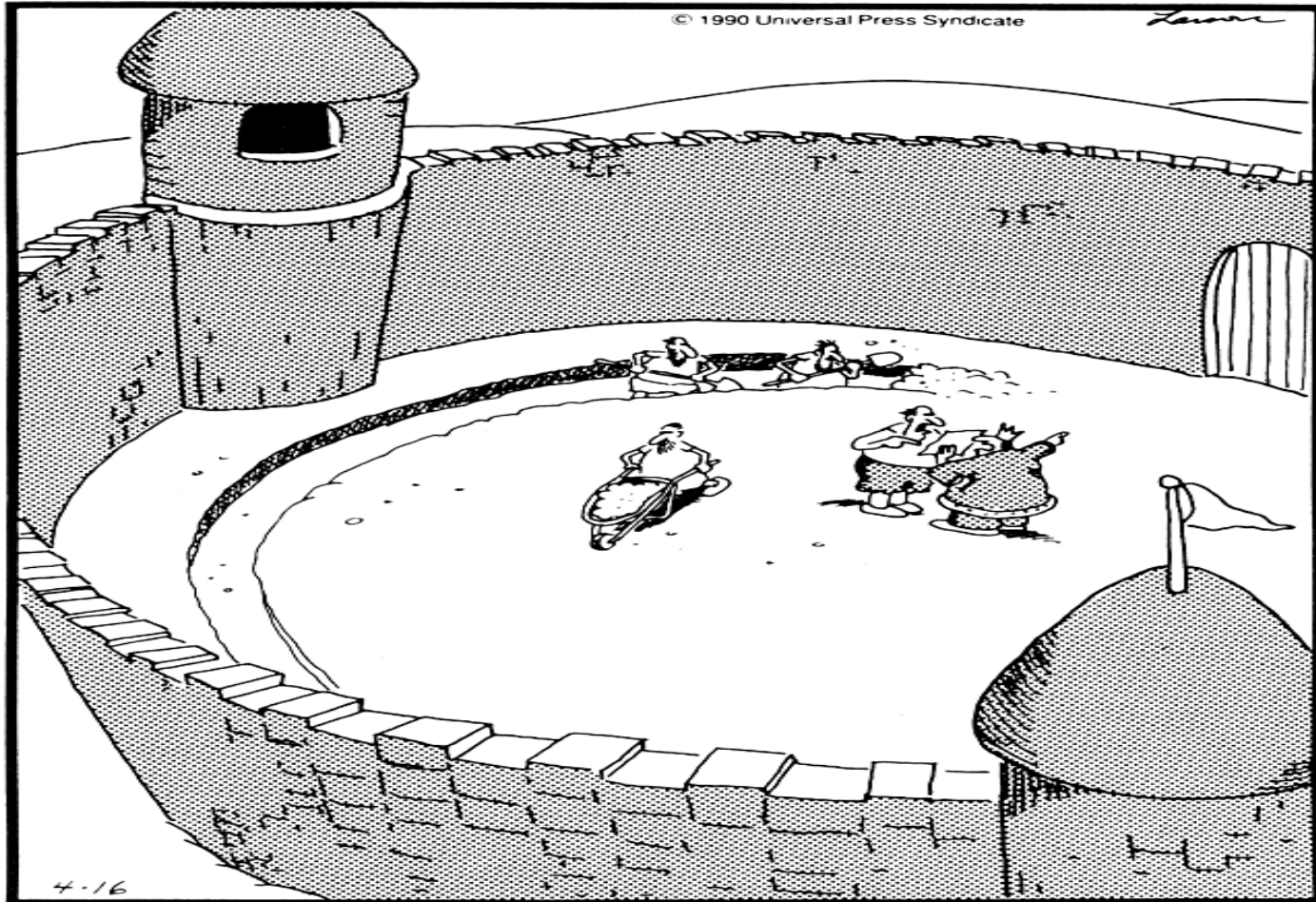
Design Liability

- Who is a Design Professional?
- Exemptions to Chapter 471 and 481
- Negligence / Contract Liability
- Florida Building Code Violation
- Limitation of Liability - Ch. 558
- Common Defenses



THE FAR SIDE

By GARY LARSON



**Suddenly, a heated exchange took place
between the king and the moat contractor.**



Design Liability

- Chapter 455 – All Professions
- Chapter 471 – Engineers
- Chapter 472 – Land Surveyors / Mapping
- Chapter 481 – Architects / Interior Designers
- Section 713.03 – Liens
- Section 558.0035 – Limitation of Liability
- Chapter 61G1, Fla Admin Code



Design Liability

“Architecture”

Means the rendering or offering to render services in connection with the design and construction of a structure or group of structures which have as their principal purpose human habitation or use, and the utilization of space within and surrounding such structures. These services include planning, providing preliminary study designs, drawings and specifications, job-site inspection, and administration of construction contracts. §481.203(6), Fla. Stat.



Design Liability

“Interior design”

Means designs, consultations, studies, drawings, specifications, and administration of design construction contracts relating to non-structural interior elements of a building or structure. Includes, but is not limited to, reflected ceiling plans, space planning, furnishings, and the fabrication of non-structural elements within and surrounding interior spaces of buildings.



Design Liability

“Landscape architecture”

Means professional services, including consultation, investigation, research, planning, design, preparation of drawings, specifications, contract documents and reports, responsible construction supervision, or landscape management in connection with the planning and development of land and incidental water areas, including the use of Florida- friendly landscaping as defined in s. 373.185.



Design Liability

“Engineering”

Means any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences....as consultation, investigation, evaluation, planning, and design of engineering works and systems, planning the use of land and water....and the inspection of construction for the purpose of determining in general if the work is proceeding in compliance with drawings and specifications, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products or equipment of a mechanical, electrical, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property.... §471.005(7), Fla. Stat.



ENGINEER
SOLVING PROBLEMS
YOU DIDN'T KNOW
YOU HAVE
IN WAYS YOU CAN'T
UNDERSTAND

Design Liability

Trikon Sunrise Assoc v. Brice Bldg Co., 41 So.3d 315 (4th DCA 2010) - stating that section 471.003(3), acknowledges there are times in a project where an engineer may be performing architectural services that are *purely incidental* to her or his engineering practice and times when an architect may be performing engineering services that are purely incidental to her or his architectural practice.



Exceptions - Architects

- Farm Buildings
- CGC – design/build – work performed by Architect
- Engineer – purely incidental work
- Manufacturer of commercial food equipment
- **Single/double family residence**
- Building under \$25,000 – not for public use



Exceptions - Engineer

- Owner improvements to property
- Fabrication of manufactured products
- Employee of Public Utility
- Surveyor or Mapper – incidental work
- CGC – design / build – work done by engineer
- Defense, space or aerospace company – aircraft, satellites, space launch vehicles



Negligence

- Duty requiring certain standard of conduct
- Failure / Breach of duty
- Causal Connection – Proximate Cause
- Actual loss or damage

Clay Electric Cooperative, Inc. v. Johnson, 873 So.2d 1182 (Fla. 2003)



Negligence – Jury Instr.

Negligence is the failure to use reasonable care. Reasonable care on the part of a (*identify professional*) is the care that a reasonably careful (*identify professional*) would use under like circumstances. Negligence is doing something that a reasonably careful (*identify professional*) would not do under like circumstances or failing to do something that a reasonably careful (*identify professional*) would do under like circumstances.

- Fla. Std. Jury Instr. (Civ.) 402.5 (2013)



Negligence - Statute

Section 481.221(8), Florida Statutes

Final construction documents or instruments of service which include plans, drawings, specifications, or other architectural documents prepared by a registered architect as part of her or his architectural practice shall be of a sufficiently high standard to clearly and accurately indicate or illustrate all essential parts of the work to which they refer.



Design Liability - Contract

§2.2 AIA Document B101-2007

The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.



Design Liability - Contract

§3.1.5 AIA Document B101-2007

In designing the Project, the Architect shall respond to the applicable design requirements imposed by such governmental authorities and by such entities providing utility services.



Design Liability - Contract

§3.2 AIA Document B101-2007

Schematic Design Phase is where the Architect prepares a preliminary evaluation of the schedule, budget, cost of the work, project site and project delivery method and any other initial information for the project. This includes environmentally responsible design approaches.



Design Liability - Contract

§3.3 AIA Document B101-2007

Design Development Phase where the Architect will further refine the schematic concepts and add information regarding structural, mechanical and electrical systems of the Project. Provide plans, elevations and construction details. Provide major material systems and establish quality levels.



Design Liability - Contract

§3.4 AIA Document B101-2007

Construction Documents Phase is when the Architect will prepare the construction drawings and specifications setting forth the detail and quality levels of materials and systems required for the work. From these the owner can bid the work to contractors. Contractor to add shop drawings, Product Data and other submittals.



Design Liability - Contract

§3.5 AIA Document B101-2007

Bidding or Negotiation Phase is when the Architect assists the owner in establishing a list of prospective contractors. When owner approves, the Architect will assist in obtaining bids or negotiated proposals, confirming responsiveness of bids; determining who the successful bidder is and awarding and *preparing* contracts for construction.



Design Liability - Contract

§3.6 AIA Document B101-2007

Construction Phase After the selection of the contractor and during this phase, the Architect can advise and consult with the owner and may even have authority to act on behalf of the owner in making certain decisions. Review and approve submittals and payment requests and perform general contract administration.



Design Liability - Contract

§3.6.4 AIA Document B101-2007

Submittals

The Architect shall review the submittal schedule and shall not unreasonably delay or withhold approval. Architect is to maintain the record of submittals and copies supplied by Contractor.



Design Liability - Contract

E201-2007 Digital Data Protocol Exhibit

Its purpose is to establish the procedures the parties agree to follow with respect to the transmission or exchange of digital data, including instruments of service. E201 does not create a separate license to use digital data, because AIA documents for design or construction, to which E201 would be attached, already include those provisions.



Design Liability - Contract

Supervision of Project

- Generally not required
- Can be contracted to supervise
- Additional Service
- Can increase liability for construction defects / code violations
- Can be liable for personal injuries. *See Geer v. Bennett 237 So.2d 311 (Fla. 4th DCA 1970)*



Moransais v. Heathman

- 744 So.2d 973 (Fla. 1999)
- Removed ELR defense to claims against design professionals
- Florida recognizes a common law cause of action against professionals based on their acts of negligence despite the lack of a direct contract between the professional and the aggrieved party



Negligence – Case Law

Hewett, 775 So.2d 373 (Fla. 4th DCA 2000)

A.R. Moyer, 285 So.2d 397 (Fla. 1973)

Navajo, 373 So.2d 689 (Fla. 2d DCA 1979)

Lochrane, 552 So.2d 228 (Fla. 5th DCA 1989)

Moransais, 744 So.2d 973 (Fla. 1999)

Shepard, 414 So.2d 1077 (Fla. 5th DCA 1981)



Restatement of Torts

Restatement (Second) of Torts § 552

Provides for a cause of action against one who, in the course of his business, profession or employment, supplies false information for the guidance of others in their business transaction.

Gilchrist Timber v. Rayonier, 696 So.2d 334 (Fla. 1997) – Negligent Misrepresentation



Building Code Violation

A direct cause of action for violation of building codes (§553.84, Fla. Stat.) can be asserted against design professionals.

Edward J. Seibert, A.I.A., v. Bayport Beach and Tennis Club Ass'n, Inc., 573 So.2d 889 (Fla. 2d DCA 1990)



Building Code Violation

Section 553.84, Florida Statutes

Statutory civil action.—Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this part or the Florida Building Code, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation....



553.781, Fla. Stat.

Penalty for finding that design professional has violated Florida Building Code.



553.781, Fla. Stat.

- Determination by Local Jurisdiction
- Material Violation of Building Code
- \$500/\$5000 per Material Violation
- Dispute Violation – Fine abated and conduct reported to DBPR
- DBPR – maintain reporting system
- Local and State – Split the fine paid
- Not pay fine – suspension of permits



553.781, Fla. Stat.

Material Code Violation

Defined as a violation that exists within a completed building, structure, or facility which may reasonably result, or has resulted, in physical harm to a person or significant damage to the performance of a building or its systems.



558.0035, Fla. Stat.

Starting July 1, 2013, a Florida Statute allows businesses to limit, by contract, their employee's liability for professional negligence claims.

HINT HINT - THIS IS A
RELATIVELY NEW LAW!



558.0035, Fla. Stat.

The new statute applies to business entities architects, interior designers, landscape architects, engineers, surveyors, and *geologists*.

Geologists?





GEOLOGY REPORT ASSESSING LIABILITY

558.0035, Fla. Stat.

- Contract between business entity / claimant
- Individual Professional not a party to contract
- Statement – 5 Font points larger - Uppercase
- Business maintains professional insurance
- Solely economic damages – no personal injuries
- Does not limit claims by parties who have no contract with the professional



Sample Language

CONTRACTUAL LIMITATION ON PERSONAL LIABILITY.

THE INDIVIDUAL EMPLOYEE OR AGENT WHO WILL PERFORM THE PROFESSIONAL SERVICES UNDER THIS CONTRACT IS NOT A PARTY TO THE CONTRACT. PURSUANT TO SECTION 558.0035, FLORIDA STATUTES (JULY 1, 2013), AN INDIVIDUAL EMPLOYEE OR AGENT MAY NOT BE HELD INDIVIDUALLY LIABLE FOR NEGLIGENCE.



Defenses

Slavin Doctrine

Under Slavin, a design professional may be not liable in negligence for injuries to third parties after the owner has accepted the patently deficient work, unless the defect at issue was latent and could not have been discovered by the owner.

Easterday v. Masiello, 518 So.2d 260 (Fla. 1988)

E.g. Tieder v. Little, 502 So.2d 923 (Fla. 3d DCA 1987)



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Defenses

Statute of Limitations

Four year

Limitations period set forth in Section 95.11(3)(c) for actions "founded on the design, planning, or construction of an improvement to real property".

Defenses

Statute of Limitations

Two year

An action for professional malpractice, other than medical malpractice, whether founded on contract or tort. Limited to persons in privity with the professional. Commences from the date of discovery or *should have been discovered*.

Defenses

Statute of Repose

Ten years from possession; issuance of certificate of occupancy; abandonment of construction; completion of contract, whichever is last. Depends on the facts of the case.

Absolute Bar to any Defect Claim

Defenses

Additional Design Defenses

- Lack of Maintenance
- Useful Life of Materials
- Betterment of Property
- All permits issued
- All Building Inspections Passed
- Fabre – Negligence of Others





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Spearin Doctrine

United States v. Spearin, 248 U.S. 132 (1918)

Doctrine of Constructability

Held that a contractor will not be liable to an owner for loss or damage that results solely from defects in the plan, design, or specifications provided to the contractor.



Spearin Doctrine

United States v. Spearin, 248 U.S. 132 (1918)

Today, the modern approach to Spearin assigns responsibility for defective construction according to whether the specification prescribing the construction is a performance or a design specification.



Spearin Doctrine

Performance specifications set forth an objective or general standard that is supposed to be achieved, and the contractor is “expected to exercise his ingenuity in achieving that objective or standard of performance, selecting the means and assuming a corresponding responsibility for the selection.



Spearin Doctrine

Design specifications precisely state how the work is to be performed. Design specifications describe in detail the materials to be used and the manner in which the work is to be executed. There is no flexibility allowed to a contractor's approach and the contractor is required to follow the specifications as one would a road map. The contractor does not warrant that the system will perform in any certain way.



Spearin Doctrine

Phillips & Jordon v. FDOT 602 So.2d 1310
(Fla. 1st DCA 1992)

Jacksonville Port Auth. V. Parkhill-Goodloe,
362 So.2d 1009 (Fla. 1st DCA 1978)

Spearin limited to only Government contracts?



Condominium Defects

Construction Defect Certification

718.301(7) Florida Statutes

In any claim against a developer by an association alleging a defect in design, structural elements, construction, or any mechanical, electrical, fire protection, plumbing, or other element that requires a licensed professional for design or installation under chapter 455, chapter 471, chapter 481, chapter 489, or chapter 633, such defect must be examined and certified by an appropriately licensed Florida engineer, design professional, contractor, or otherwise licensed Florida individual or entity.



Design Liens – 713.03

- Architect, Landscape, Interior, Engineer, Surveyor or Mapper
- No Notice to Owner
- No Contractor's Final Payment Affidavit
- No Notice of Commencement needed
- Lien priority as of date recorded
- Direct Contracts – no “improvement” required for lien to attach
- Interior Designers – 713.79, Fla. Stat.



Unlicensed Activity

- First Degree Misdemeanor
- Prevent or Disgorgement of Fees
- No Lien Rights
- Contract Void
- Design/Build – CGC Can Contract so long as licensed design professional performs the work.





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THE END

The logo for Carlton Fields is located in the upper left corner. It features the word "CARLTON" in red and "FIELDS" in white, both in a bold, sans-serif font. The text is set against a blue background with a white grid pattern. A yellow diagonal line runs across the logo. The overall design is modern and professional, with a focus on geometric shapes and a color palette of blue, red, white, and yellow.

**CARLTON
FIELDS**

CONSTRUCTION CONTRACTS

GEORGE J. MEYER
CARLTON FIELDS, P.A.
TAMPA, FLORIDA

The image features a logo for 'CARLTON FIELDS' in the top left corner. The word 'CARLTON' is in red and 'FIELDS' is in white, both in a bold, sans-serif font. The background consists of a blue geometric pattern of overlapping triangles and a yellow grid pattern that is partially obscured by a blue diagonal band.

**CARLTON
FIELDS**

RISK ALLOCATION

- ❖ INITIALLY ALL PROJECT RISK BELONGS TO OWNER
- ❖ BY CONTRACT OWNER ALLOCATES PORTIONS OF THAT RISK TO THIRD PARTIES



**CARLTON
FIELDS**

PROJECT DELIVERY SYSTEMS

1. DESIGN-BID-BUILD ("DBB")
2. CONSTRUCTION MANAGEMENT AT RISK ("CM@RISK")
3. CONSTRUCTION MANAGEMENT AGENCY ("CM AGENT")

PROJECT DELIVERY SYSTEMS (cont' d)

4. DESIGN-BUILD ("D/B")
5. INTEGRATED PROJECT DELIVERY
("IPD")
6. PUBLIC PRIVATE PARTNERSHIP
("P3")



**CARLTON
FIELDS**

RISK ANALYSIS

1. DBB – TRADITIONAL/WELL KNOWN/FIXED SCOPE/SILO/BID PROCESS (PRE-QUALIFICATION?)
2. CM@RISK – PRE-CONSTRUCTION SERVICES/QUALIFICATION BASE SELECTION/PRICING/ CAMEL'S NOSE

RISK ANALYSIS (cont'd)

3. CM AGENT – PRE-
CONSTRUCTION SERVICES/
INDEPENDENT ADVISOR/STAFF
SUPPLEMENTATION/
COORDINATION WITH
ARCHITECT

RISK ANALYSIS (cont'd)

4. D/B – SINGLE SOURCE/FAST TRACK/DESIGN CONTROL/CLEAR PROGRAM/DESIGN WARRANTY
5. IPD – TEAM APPROACH/MUTUAL WAIVER/DESIGNER & CONTACTOR ONLY HAVE PROFIT AT RISK/INCENTIVEIZED TO ACHIEVE PROJECT GOALS



**CARLTON
FIELDS**

RISK ANALYSIS (cont'd)

6. P3 – ALTERNATIVE FINANCE
DEVELOPMENT AGREEMENT/
DESIGN-BUILD-OPERATE-
MAINTAIN



**CARLTON
FIELDS**

INDUSTRY STANDARD FORMS

- ❖ AIA
- ❖ EJCDC
- ❖ CONSENSUS DOCS
- ❖ DBIA

The image features a graphic design on the left side. It includes a blue trapezoidal shape with a white grid pattern, a yellow diagonal line, and the text 'CARLTON FIELDS' in red and white. The background consists of various geometric shapes and grid patterns in shades of blue and yellow.

**CARLTON
FIELDS**

BENEFIT / RISK OF STANDARD FORMS

- ❖ COMMON KNOWLEDGE
- ❖ INTEGRATION
- ❖ CASE LAW
INTERPRETATION
- ❖ DOCUMENT BIAS

The image features a blue and white geometric pattern on the left side, with the text "CARLTON FIELDS" in red and white. The background is white with a faint grid pattern.

**CARLTON
FIELDS**

MAJOR CONSTRUCTION ISSUES

- ❖ INDEMNIFICATION
- ❖ WAIVER OF CONSEQUENTIAL DAMAGES
- ❖ CHANGED & CONCEALED CONDITIONS
- ❖ DELAY/LIQUIDATED DAMAGES/NO DAMAGE FOR DELAY

MAJOR ISSUES (Cont'd)

- ❖ BUILDER'S RISK PROPERTY INSURANCE
- ❖ WARRANTY VS. CALLBACK OBLIGATIONS
- ❖ DELEGATION OF DESIGN LIABILITY
- ❖ CONTINGENCY



QUESTIONS

Alternate Dispute Resolution for Construction Projects

Florida Construction Certification Review Course 2017

Deborah Bovarnick Mastin
Law Office of Deborah Mastin, PLLC

WHY ADR?

- Add value for your client
- Cheaper, quicker, more effective
- Input into selection of tribunal or facilitator
- Resolution options beyond money damages
- Is confidentiality of concern?

ADR Choices

- During the work:
 - Partnering
 - Dispute Boards
 - Standing Neutrals
- After claims:
 - Mediation (pre-suit or pre-trial)
 - Arbitration (binding or advisory)

Today's Discussion

- Mediation
- Arbitration
- Dispute Boards

Mediation

Mediation Attributes

- Voluntary
- Can agree pre-dispute or after dispute occurs
- No written agreement required
- Informal
- Party-directed
- Effective
- Can be repeated if needed

MEDIATION – Florida Statutes

- Chapter 44 FS, MEDIATION ALTERNATIVES TO JUDICIAL ACTION
- Encourages court-ordered mediation
- “...a neutral third person... acts to encourage and facilitate the resolution of a dispute...It is an informal and nonadversarial process with the objective of helping ...reach a mutually acceptable and voluntary agreement...”

Anyone can be a Mediator, but....

- Florida Supreme Court Dispute Resolution Center certification
- Florida Rules for Certified and Court-Appointed Mediators
 - County court mediator
 - Family mediator
 - Circuit court mediator
 - Dependency mediator
 - Appellate mediator

Florida DRC Website

- www.flcourts.org/gen_public/adr/brochure.shtml
- Mediation Ethics Advisory Committee
- Roster of certified mediators
- Applicable rules and procedures
 - Initial certification
 - Renewal of certification

Mediation - Stats. and Rules

- Chapter 44 FS - Mediation Alternatives to Judicial Action
- Sections 44.401-406, FS – Mediation Confidentiality and Privilege Act
- Rule **1.700** Fla. R. Civ. P. – Rules Common to Mediation and Arbitration
- Rule **1.710** Fla. R. Civ. P. – Mediation Rules
- Rule **1.720** Fla. R. Civ. P. – Mediation Procedures
- Rule **1.730** Fla. R. Civ. P. – Completion of Mediation

Mediation Confidentiality and Privilege Act, Secs. 44.401- 44.406 FS

- Mediation communications are confidential and not to be disclosed **except** to “mediation participant or a participant’s counsel.”
- Sanctions include costs, mediator fees and attorney fees
- Participant privilege to refuse to testify and to prevent another from testifying in a subsequent proceeding
- **Applies to mediation proceedings**
 - required by **statute, rule or order**
 - By **agreement of the parties**
 - By a **Certified Mediator unless parties agree otherwise**

No Mediation Confidentiality for:

- Unless parties agree otherwise, no confidentiality or privilege to
 - “signed written agreement reached during mediation”
 - Communication for which privilege is waived
 - Communication used to plan or conceal criminal activity
 - Offered to report, prove or disprove legal malpractice during mediation
 - Offered to void or to defend mediated settlement

Sec. 44.405 (4) FS

Pre-suit Mediation

- Mediator can
 - Offer safe forum for discussion
 - Provide a quicker path to resolution
 - Diffuse emotional or other barriers
 - Assist in structuring discovery to minimize costs
 - Suggest solutions not previously considered
 - Facilitate solutions not available in court (non-monetary contributions, trading matters of unequal value, i.e. future work, free labor, conversion of default to T for C)

Court Ordered Mediation

- Court may refer – Sec. 44.102 (2)(b) FS or on request of party, Court must refer (with exceptions) – Sec. 44.102 (2)(a) FS
- **Counsel must appear** at conference – Sec. 44.10 and Rule 1.720(b)(2) Fla. R. Civ. P.
- **Party with “full authority”** – Rule 1.720 (b)(1)
 - Without further consultation
 - Up to the amount of Plaintiff’s last demand
- Representative of **insurance carrier** – Rule 1.720 (b)(3)
 - **With authority to lesser of last demand or policy limits**
- **If no settlement, Mediator shall report w/out comment; with consent may report legal issues to be resolved to facilitate settlement**
- Mediator does not sign settlement agreement.
- Sanctions for breach of settlement include attorney fees

Preparing for Mediation

- Investigate the facts and objectives
- **Who has authority to settle?** How does your client make binding decisions?
- Who will attend the mediation conference with decision maker?
 - Field staff with knowledge?
 - Expert consultants?
- Agree that mediation will be conducted as if Court-ordered?

ARBITRATION

- Written agreement to arbitrate
 - Awards to be confirmed in court
- Statutory frameworks
 - Ch. 682 FS Revised **Florida Arbitration Code**
 - Ch. 684 FS **Florida International Commercial Arbitration Act**
 - Ch. 44 FS Florida Voluntary Binding and Court-Ordered Arbitrations
 - 9 USC Sec. 1 et seq. **Federal Arbitration Act**
- Ad hoc or administered

Revised Florida Arbitration Code - Ch. 682 FS

- Agreements executed after July 1, 2013 (and until June 30, 2016 to earlier agreements only with consent of parties)
- Effective for **arbitrations conducted in Florida**. Any person can be arbitrator.
- **Certain requirements not waivable pre-dispute** Sec. 682.014(2) and (3) FS
- **Other non-waivable provisions** Sec. 682.014(3) FS (includes grounds for vacating, modifying or enforcing arbitration award Sec. 682.13- 682.15 FS)

RFAC Grounds for Vacating Award

Sec. 682.13 FS

- Award procured by corruption, fraud, or other undue influence
- Evident partiality by a neutral arbitrator, arbitrator corruption, or arbitrator misconduct prejudicing a party
- Arbitrator refused to postpone hearing upon a showing of sufficient cause, refused to hear material evidence, or violated Sec.682.06 FS

RFAC Grounds for Vacating Award (2)

- Arbitrator exceeded the arbitrator's powers
- No agreement to arbitrate, unless challenger participated in the arbitration proceeding without objecting under Sec. 682.06(3) FS at or before beginning of hearing
- Arbitration conducted without proper notice of initiation per Sec. 682.032 FS prejudicing a party

Florida International Commercial Arbitration Act

- Chapter 684 FS

FICAA – Sec. 684.002 FS

- Applies to **international commercial arbitration**, subject to any agreement in force between the USA and any other country, **if the place of arbitration is in Florida**
- International = at conclusion of agreement, **parties to arbitration have places of business in different countries**, or place of arbitration is outside countries of parties, or **substantial part of the obligations** to be performed are outside countries of parties, or **parties expressly agree**

FICAA Grounds to Set Aside Award

Sec. 684.0046 FS

- Requested within 3 months after award, and
- A party was under some incapacity, or
- The arbitration agreement is not valid under the chosen law or under Florida law, or
- Proper notice not given, or
- Ability to present case compromised, or
- To the extent the award concerns dispute not contemplated or beyond matters submitted, or
- Composition of arbitral tribunal not proper, or
- Public policy is violated

Florida Voluntary Binding ARBITRATION

- Sec. 44.104 FS – parties may agree in writing to arbitrate prior to or after a lawsuit is filed, if no constitutional issue involved
- Decision within 10 days of hearing
- **Appeal** within 30 days of decision on grounds in Sec. 44.104(10) FS
 - (a) Alleged failure of the arbitrator to comply with rules of procedure or evidence
 - (b) alleged partiality or misconduct by arbitrator
 - (c) decision violates US or Florida Constitutions

Florida Non-Binding Arbitration – Sec. 44.103 FS

- Court ordered or agreed by parties
- Limited submissions of evidence and testimony and trial briefs
- Decision in writing
- Final if trial de novo not requested timely
- Trial judge does not see arbitration decision
- If trial result to Plaintiff 25% less (Defendant 25% more) than award, then **attorneys fees and costs** will be assessed. Sec. 44.103(6)FS

Federal Arbitration Act – 9 USC Sec. 1 et seq.

- Written arbitration agreement, involving maritime or **agreement in commerce**
 - Commerce = among States or with foreign nations
- Subpoenas allowed to compel attendance **at hearing** of persons or documents
- Award can be **confirmed in court within one year of entry unless vacated or modified** under 9 USC Sec. 10-12 (3 months to vacate)

FAA Grounds for Vacating Award

9 USC Sec. 10

- Corruption, fraud or undue influence
- Evident partiality or corruption in an arbitrator
- Arbitrator misconduct in **refusing to postpone** the hearing upon sufficient cause shown, or **in refusing to hear material evidence**, or other misbehaviour by which the rights of a party are **prejudiced**
- Arbitrators exceeded their powers, or so imperfectly executed them that a **mutual, final and definite award** was not made
- *Hall Street Assoc. LLC v. Mattel, Inc.* 552 U.S. 576 (2008)

FAA Grounds for Correcting Award

9 USC Sec. 11

- Evident miscalculation or material mistake in the description of any person or thing
- Award made on a matter not submitted to them, unless it is a matter not affecting the merits
- Award is imperfect in form not affecting the merits

Some ADR Providers and Standards

- American Arbitration Association (adr.org)
- International Centre for Dispute Resolution (adr.org)
- JAMS (jamsadr.com)
- International Institute for Conflict Prevention and Resolution (cpr.org)
- International Chamber of Commerce (iccwbo.org)
- Chartered Institute of Arbitrators (ciarb.org)
- United Nations Commission on International Trade Law (UNCITRAL)
- College of Commercial Arbitrators (www.theCCA.net)

Typical Provider Arbitration Rules

- Commercial rules (include mediation)
- Construction rules (include mediation)
- International rules
- Fast track or small dispute rules
- Regular rules
- Large complex case rules
- **Appellate** arbitration rules

Drafting Arbitration Clauses

- Ad hoc or administered? Which provider and rules?
- Qualifications of arbitral panel members? How many?
- Venue and choice of law?
- Limits on time to file demand?
- Scope of disputes to be arbitrated? **Confidentiality?**
- Submissions with demand?
- Joinder and consolidation? Mediation in parallel?
- Discovery and e-discovery? Language?
- Appeals?
- [PLEASE: Do NOT adopt Florida or Federal Rules of Evidence]

Dispute Boards

Who is Using Dispute Boards?

- Tunnel, road, bridge, port, dam and transit projects
- Complex building projects: airports, hospitals, power plants, and universities
- FDOT, Broward Aviation Department, Miami-Dade Aviation Department, Orlando Aviation Authority, UW, Caltrans, CDOT, Big Dig, NY MTA, WMATA, BART, DART, Toronto Transit Commission
- 2010 over 2200 projects > \$150 B in USA
- FIDIC and ConsensusDocs
- World Bank

Dispute Boards – Because Stuff Happens

- Provide opportunity to intervene and facilitate
 - Confidential discussion
 - Before money is spent on a solution
 - Before it's too late to improve the field conditions
- Avoidance of claims = primary goal
- Mitigation of impacts = secondary goal
- Dispute Resolution = Plan B

What is a Dispute Board?

Skilled, impartial industry professionals selected by both parties who:

- Visit the jobsite & meet with project team regularly to facilitate job progress
- Help avoid or mitigate impacts of unplanned events
- Help resolve disputes before claims arise, in real time, at project level
- **If needed**, issue recommendations or decisions

Why recommend a Dispute Board?

- Mitigates impacts of activities not yet performed for the best interest of the project
- Disputes don't aggregate or compound
- Helps reduce/prevent acrimony between project teams
- Allows project team members to focus on their responsibilities on the job
- Validates decisions to compromise
- Process cost dramatically lower

Dispute Boards – how?

- Process
 - Contract specification creating Dispute Board
 - Engagement agreements with Panel members
 - Professional, problem-solving, confidential
- People
 - Trust and respect for Dispute Board panel
 - Educate the project team

Creating the Dispute Board

- Local Regulation or procedures,
i.e. www.dot.state.fl.us/construction/CONSTADM/drb/DRBMain.shtm
- Specification in Contract Documents
 - Purpose, Member selection, relationship to bilateral mechanisms in the Contract, hearing procedures, post-decision actions by the Parties
- Engagement agreement between each Panel member, owner and contractor
 - Establish scope of services, responsibilities of members and parties, fees, release of liability

Objectives of Dispute Board

- Dispute avoidance
- Dispute mitigation
- Facilitation & communication
- **NOT** Technical Advisors
- **NOT** Mediation – NO EX PARTE communications!

Selection Criteria for Dispute Board Panel Members

- Experience appropriate for project
 - Engineers, contractors, construction lawyers
- Ethical – Disclose relationships
- Available and interested
- Neutral and unbiased
- Trained in Dispute Board practice, mediation and arbitration skills

Dispute Board Regular Periodic Meetings and Site Visits

- Regular monthly meetings
 - Discussion at monthly meeting pre-requisite to filing claim
- **Confidential** Facilitation - where the real value is gained
 - Review schedule and discuss potential disruptions
 - Review current RFI and claims logs and compare to prior logs
 - Invite all stakeholders

Dispute Board Informal Guidance Procedure

Before costs incurred

Limited presentations

Early “quick read” oral guidance by Panel

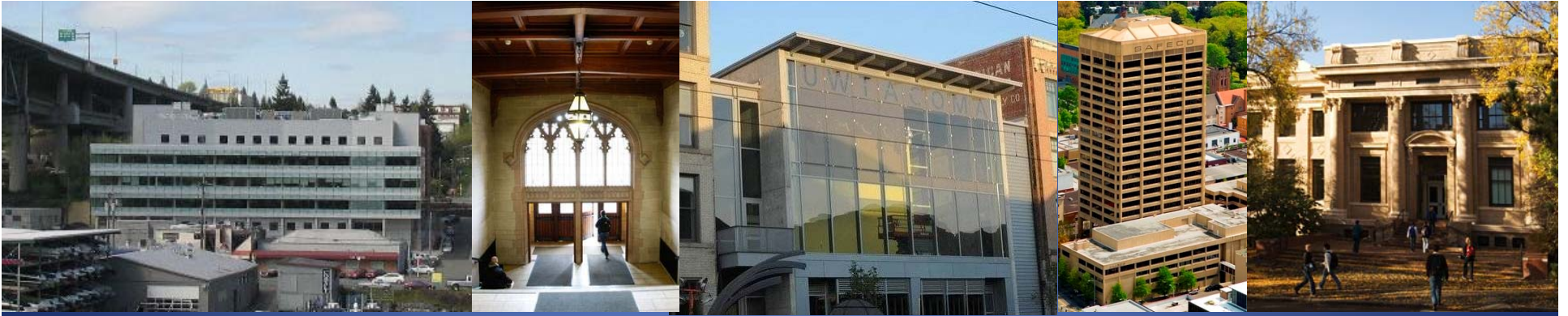
de novo “formal” proceeding if not accepted

Dispute Board Formal Proceedings can be:

- *De novo* or based on record
- Non-binding recommendation or binding written decision
- Admissible or inadmissible in subsequent arbitration or litigation

Dispute Board Formal Proceedings:

- Referral by either party, but *only after discussion at regular meeting*
- Prehearing written submissions
- Oral presentations - not sworn
- No cross-examination
- Panel questions presenters
- Reasoned report to persuade parties



University of Washington Experience:

- Since 1993 UW used Dispute Boards on
 - Over 40 contracts
 - totaling over \$4 Billion
 - only 2 formal hearings in 20 years

Deb's Dispute Board War Stories

- Arsht Center of Performing Arts, Miami
- Miami International Airport North Terminal Development Project
- Cost \$2K/person/day = \$75K/year*
- * **For smaller projects** - reduce cost with shorter meetings and smaller Board (not less frequent meetings)





Dispute Boards - Take-Aways

- How?
 - Pick good panel members
 - Get buy in from all parties
 - Start meetings and site visits early in the contract with no preconditions
 - Don't cancel or postpone meetings and site visits
 - Don't wait for a dispute to arise
 - Stay ahead of the game; be pro-active
- Why?
 - Brings value to your client

Dispute Boards -Reference Material

- Dispute Resolution Board Foundation: www.drb.org
- American Arbitration Association: www.adr.org
- International Chamber of Commerce: www.iccwbo.org
- International Institute of Conflict Prevention and Resolution: www.cpradr.org
- International Federation of Consulting Engineers (FIDIC): www.fidic.org
- ConsensusDocs (200.4 and 200.5): www.consensusdocs.org
- FDOT: www.dot.state.fl.us/default.shtm
- American Society of Consulting Engineers: www.ASCE.org Menassa & Peña Mora, “Analysis of Dispute Review Boards Application in US Construction Projects from 1975 to 2007” (Journal of Management in Eng’g April 2010)

Questions?

Thank you!

Deborah Bovarnick Mastin

deborahmastin@gmail.com

THEORIES OF RECOVERY & CAUSES OF ACTION

CONSTRUCTION LAW CERTIFICATION REVIEW COURSE

Presented by :

Elizabeth B. Ferguson

Board Certified Construction Lawyer



BOYD & JENERETTE P.A.

EST. 1952

JACKSONVILLE | COCONUT CREEK | SAVANNAH

ACCOUNT STATED

- *Elements:*
 - Parties had a series of transactions between them;
 - Statement of Account was given to Debtor;
 - No objection was made to Statement within reasonable time; and
 - Resulting balance is due.

ACCOUNT STATED

- *A copy of the account must be attached showing:*
 - Items
 - Time of accrual of each
 - Amount of each
- *There is a presumption of correctness of the account*
 - May be overcome by proof of:
 - Fraud
 - Mistake
 - Error
 - Duress

BREACH OF CONTRACT (EXPRESS OR IMPLIED)

- *Elements:*

- Valid Contract;
- Material Breach of Contract; and
- Resulting damages.

BREACH OF CONTRACT (EXPRESS OR IMPLIED)

- *Contractor liability is cut off after the owner has accepted the work performed if the alleged defect is “patent”:*
 - **Test for patent defect:**
 - Whether the dangerousness of the condition was obvious had the owner exercised reasonable care.
 - *Florida Dept. of Transportation v. Capelettie Bros., Inc.*, 743 So.2d 150, 152 (Fla. 3d DCA 1999), *rev. denied*, 760 So.2d 945 (Fla. 2000).
- *Anticipatory Repudiation*
 - Relieves non-breaching party of its duty to perform and creates an immediate cause of action for breach of contract.
 - *Twenty-Four Collection, Inc. v. M. Weinbaum Construction, Inc.*, 427 So.2d 1110, 1111 (Fla. 3d DCA 1983).

BREACH OF CONTRACT (EXPRESS OR IMPLIED)

- *Construction Contracts are usually not appropriate for Specific Performance.*
 - Levene v. Enchanted Lake Homes, Inc., 115 So.2d 89 (Fla. 3d DCA 1959).
 - Connell v. Mittendorf, 147 So.2d 169 (Fla. 2d DCA 1962).
- *However, Specific Performance may be ordered, if appropriate.*
 - Home America, Inc. v. Atkinson, 392 So.2d 268 (Fla. 2d DCA 1980).
Specific performance properly ordered on home construction contract following a finding contractor (although having substantially completed the home) had breached the contract by construction defects.

BREACH OF FIDUCIARY DUTY

- *Elements:*

- Creation of Fiduciary Duty on part of wrongdoer;
- Breach of duty; and
- Resulting damages.

BREACH OF FIDUCIARY DUTY

- *To establish a fiduciary relationship, you must allege:*

- Some degree of **dependency** on one side....

Some degree of undertaking on the other side to:

- **Advise,**
- **Counsel,** and
- **Protect**
the weaker party.

Taylor Woodrow Homes Fla., Inc. v. 4/46 A-Corp., 850 So.2d 536, 540 (Fla. 5th DCA 2003).

BREACH OF IMPLIED IN LAW CONTRACT / QUANTUM MERUIT / UNJUST ENRICHMENT (COMMON LAW *ASSUMPSIT*)

- *Elements:*

- Requested performance of labor, materials, or services;
- Reasonable value of labor, materials or services; and
- Nonpayment of the reasonable value.

BREACH OF IMPLIED IN LAW CONTRACT / QUANTUM MERUIT / UNJUST ENRICHMENT (COMMON LAW *ASSUMPSIT*)

- **Note:**

- This is an equitable cause of action.
- Implied in Law Contract may be shown where an express contract can't be proven.
- Defense:
 - An express contract.

BREACH OF THIRD PARTY BENEFICIARY CONTRACT

- *Elements:*

- **Existence of Contract;**
- **Clear or manifest intent of contracting parties that contract primarily and directly benefit third party;**
- **Breach of Contract by a contracting party; and**
- **Damage to the third party resulting from the breach.**

BREACH OF THIRD PARTY BENEFICIARY CONTRACT

- In Florida, it is necessary to show both parties to the contract intended the third party to benefit from the agreement:
 - Insufficient to show only one party unilaterally intended to benefit the third party.
 - *Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So.2d 1028, 1031 (Fla. 4th DCA 1994).

BREACH OF WARRANTY

- **Express Warranties:**

- **Contractual Warranty**

- **Statutory Warranty**

- **Ex:** §718.203, *Florida Statutes*--Warranty of Fitness of Construction of a Condominium

BREACH OF WARRANTY

- **Implied Warranties**

- *Fitness of Plans and Specifications*
- *Merchantable or Fit for Particular Purpose*
- *Compliance with a condominium's restrictive covenants*
- *Habitability of a residence*

BUILDING CODE VIOLATION FLA. STAT. §553.84

- Any person, individually or on behalf of a class, damaged as a result of a violation of §553.84 (the Florida Building Code) has a cause of action in any Court of competent jurisdiction against the person who committed the violation.

BUILDING CODE VIOLATION FLA. STAT. §553.84

- **Does not apply if:**
 - **The person obtains the required building permits;**
 - **Plans approved by proper entity;**
 - **Project passes all required inspections under the code; and**
 - **No personal injury or damage to property other than property that is the subject of the permits, plans, and inspections**

****Unless: the party knew, or should have known, that the violation existed.****

BUILDING CODE VIOLATION FLA. STAT. §553.84

- **Requires notice and opportunity to cure defects before legal action can be filed.**
- **Can you show a specific damage as a result of the a specific building code violation?**

CIVIL CONSPIRACY

- ***Elements:***

- **An agreement between two (2) or more parties;**
- **To do an unlawful act or to do a lawful act by unlawful means;**
- **The doing of some overt act in pursuance of the conspiracy; and**
- **Damage to Plaintiff as a result of the acts done under the conspiracy.**

CIVIL CONSPIRACY

- **There must be two types of intent:**
 - **Intent to enter into the agreement**
 - **Intent to achieve the objective of the agreement**
- **Plus an overt act**

CIVIL THEFT –

§812.014, *FLORIDA STATUTES*

- ***Elements:***

- **Knowingly;**
- **Obtaining or using, or endeavoring to obtain or use, Plaintiff's property;**
- **With felonious intent;**
- **To temporarily or permanently**
 - **Deprive Plaintiff of right to, or a benefit from, property or**
 - **Appropriate the property to Defendant's own use or the use of a person not entitled to the property.**

CIVIL THEFT –

§812.014, *FLORIDA STATUTES*

- **Before seeking treble damages, must make a written demand for return.**
 - Return within thirty (30) days of the demand absolves the claim for treble damages.
- **Existence of a contractual relationship does not preclude an action for civil theft:**
 - Where the property at issue is also the subject of a contract between the parties, a civil theft claim requires additional proof of an **intricate, sophisticated scheme of deceit and theft.**
 - *Gersh v. Cofman*, 769 So.2d 407, 409 (Fla. 4th DCA 2000); *Seymour v. Adams*, 638 So.2d 1044, 1049 (Fla. 5th DCA 1994).

CONSTRUCTION LIEN ENFORCEMENT – CHOICE OF REMEDIES

- §713.28, *Florida Statutes*:
 - If a Lienor shall fail, for any reason, to establish a Lien for the full amount to be due him or her in an action to enforce the same under the provisions of this part, he or she may, in addition to the Lien decreed in his or her favor, recover a judgment or decree in such action against any party liable therefor for such sums in excess of the Lien as are due him or her or which the Lienor might recover in an action on a Contract against any party to the action from which such sums are due him or her.

LIEN FORECLOSURE (IN CHANCERY)

- Privity - §85.011(2), *Florida Statutes*
- Non-Privity - §85.021, *Florida Statutes*

LIEN FORECLOSURE (IN CHANCERY)

- *Elements:*
 - Agreement/Contract to improve property;
 - Notice of Commencement, if Lien is within the effective period to establish relation back date;
 - Timely service of Notice to Owner or Contractor's Affidavit, as applicable;
 - Timely recording of Claim of Lien within 90 days of last work or delivery;
 - Performance of Contract;
 - Unpaid balance; and
 - List of Defendant(s) with liens, or interests that are inferior, seeking to foreclose those interests.

LIEN FORECLOSURE (IN CHANCERY)

- **Request Court:**

- Recognize Lien in amount found to be due, from date Lien attached to title of the property
- Enter judgment in that amount and Judgment against Lienor's customer;
- Order sale of Owner's interest in property;
 - Deficiency judgment - §713.28(3), *Florida Statutes*
- Attorneys' fees and interest, from date debt was due; and

- **Record a Notice of *Lis Pendens***

- *Written notice a lawsuit has been filed concerning real estate.*

ORDINARY ACTION AT LAW

- Privity - §85.011(3), *Florida Statutes*
- Non-Privity - §85.021, *Florida Statutes*

ORDINARY ACTION AT LAW

- ***Elements:***
 - **Agreement/Contract to improve property;**
 - **Timely service of Notice to Owner or Contractor's Affidavit, as applicable;**
 - **Timely recording of Claim of Lien within 90 days of last work or delivery;**
 - **Performance of Contract;**
 - **List of Defendant(s) with liens, or interests that are inferior, seeking to foreclose those interests;**

ORDINARY ACTION AT LAW

- **Request Court:**
 - Recognize Lien in amount found to be due, from date Lien attached to title of the property
 - Enter judgment in that amount and Judgment against Lienor's customer;
 - Order sale of Owner's interest in property;
 - Deficiency judgment - §713.28(3), *Florida Statutes*
 - Attorneys' fees and interest, from date debt was due; and
 - Request levy of execution on the lien property.
- **May be appropriate where Lien has been transferred to Bond.**

SPECIAL ACTION AT LAW

- Privity - §85.011(4), *Florida Statutes*
- Non-Privity - §85.021, *Florida Statutes*
 - Particularly good for Lien on Leasehold Interest

SPECIAL ACTION AT LAW

- *Elements:*

- Manner in which Lien arose;
- Amount of Lien;
- Description of property; and
- Demand that property be sold to satisfy Lien.

SPECIAL ACTION AT LAW

- **Judgment for Plaintiff is a personal judgment against Defendant, as well as a Lien on property.**
- **If non-privity Lien, also request Judgment against Contractor.**

LABORER'S SUMMARY ACTION

- Privity - §85.011(5), *Florida Statutes*
- Non-Privity - §85.021, *Florida Statutes*
- ***Elements:***
 - **Description of property; and**
 - **Facts which authorize or create Lien.**

REPOSSESSION / REPLEVIN – §713.16, *FLORIDA STATUTES*

- **Peaceable Repossession**
 - No action filed
- **Replevin**
 - Right of repossession and removal.
 - Extends only to materials whose purchase price does not exceed amount remaining due to the person repossessing.
 - Where materials have been partly paid for, person delivering them may repossess them if they refund the part of the purchase price which has been paid.
- **Materials retaken must be credited against any Lien at the original sales price (no restocking charges or reduced price).**

REPOSSESSION / REPLEVIN – §713.16, *FLORIDA STATUTES*

- ***Elements:***

- Improvement is abandoned or completed and materials not used;
- Claimant is a Lienor (within definition of §713.01, *Florida Statutes*);
- Claimant furnished the materials, and is the Owner of the materials;
 - Must describe the source of the title to the materials;
 - Attach a copy of any documents reflecting ownership.
- Claimant delivered materials to the project and the materials are uninstalled;
 - Describe the materials.
 - Attach a statement as to the value of the materials .

REPOSSESSION / REPLEVIN- §713.16, *FLORIDA STATUTES*

- *Elements (Continued):*
 - Statement that materials are wrongfully detained by Defendant and how Defendant came into possession of the materials;
 - Statement that materials have not been taken for a tax, assessment or fine, pursuant to law;
 - Statement that materials have not been taken under an execution or attachment against the property of Plaintiff; and
 - Request Writ of Replevin.

REPOSSESSION / REPLEVIN- §713.16, *FLORIDA STATUTES*

- **Objective of Replevin:**

- Plaintiff who prevails on the merits is entitled to:
 - Final judgment for recovery of the materials or their value, or the value of Plaintiff's lien or special interest, and damages sustained as a result of the wrongful taking/detention;
- Plaintiff may elect to seek a writ of replevin prior to the entry of final judgment in order to obtain possession of the property during the pendency of the replevin action and until the parties' claims are finally adjudicated
 - Pursuant to **§78.068**, *Florida Statutes*, the prejudgment writ may be issued without notice and a hearing, but the Plaintiff must post a bond.

REPOSSESSION / REPLEVIN - §713.16, *FLORIDA STATUTES*

- **§78.065(2), *Florida Statutes:***

- If Complaint makes requisite allegations, Court will enter an Order to Show Cause why materials should not be returned.

- **§713.15, *Florida Statutes:***

- “This right to repossess and remove or replevy the materials shall not be affected by their sale, encumbrance, attachment, or transfer from the site of improvement, except that if the materials have been so transferred, the right to repossess or replevy them shall not be effective as against a purchaser or encumbrancer thereof in good faith whose interest therein is acquired after such transfer from the site of the improvement or as against a creditor attaching after such transfer.”

FRAUDULENT LIEN – §713.31(2)(C), *FLORIDA STATUTES*

- **Claim may be made as a defense to Lien enforcement or as an affirmative claim by Owner, Contractor, Subcontractor, or Sub-subcontractor who has been damaged as a result of Fraudulent Lien.**

FRAUDULENT LIEN – §713.31(2)(C), *FLORIDA STATUTES*

- *Elements:*

- Lien has been recorded by Defendant;
- Plaintiff is Owner, Contractor, Subcontractor, or Sub-subcontractor who has been damaged by Lien;
- Lienor has willfully included a claim for work not performed or materials not furnished or Lienor has compiled claim with such willful and gross negligence as to amount to a willful exaggeration;
- Describe damages; and
- Attorneys' fees.

FRAUD/COLLUSION IN DEPRIVING LIENOR OF RIGHTS/BENEFITS - §713.31(1), *FLORIDA STATUTES*

- ***Elements:***

- Defendant has by fraud or collusion;
- Deprived or attempted to deprive, Owner or Lienor of benefits or rights;
- By giving false affidavits, releases, invoices, worthless checks, statements, or written instruments permitted or required under Lien law;
- To detriment of Lienor.

FRAUD/COLLUSION IN DEPRIVING LIENOR OF RIGHTS/BENEFITS - §713.31(1), *FLORIDA STATUTES*

- **Circuit Court - Action in chancery.**
- **Upon request, Court can:**
 - **Issue temporary and permanent Injunctions;**
 - **Order Accounting;**
 - **Grant discovery;**
 - **Utilize all remedies available under creditors' bills and proceedings supplementary to execution;**
 - **Marshal assets; and**
 - **Exercise any other appropriate legal or equitable remedies or procedures without regard to the adequacy of a remedy at law or whether or not irreparable damage has or will be done.**

SHORTEN LIEN WITH SUMMONS TO SHOW CAUSE - §713.21(4), *FLORIDA STATUTES*

- Where Plaintiff has interest in Defendant's Lien that has been recorded, Plaintiff can issue a special Summons that says:
 - "Pursuant to §713.21(4), *Florida Statutes*, Defendant is directed to show cause within twenty (20) days why Lien should not be enforced by action or vacated and canceled of record."
 - Allege any other facts that are critical of Lien.
 - If Defendant then fails to counterclaim to enforce the Lien, show cause (sworn to or affirmed) why Lien should be enforced in the action, or file a separate action to enforce Lien, the Court is duty bound to discharge Lien by order.

SHORTEN LIEN WITH SUMMONS TO SHOW CAUSE - §713.21(4), *FLORIDA STATUTES*

- Purpose is to bring Lien claim to a head, regardless of any lack of merit of Lien.
- May be filed by “any interested party.”

UNDISPUTED FUNDS - §713.346, *FLORIDA STATUTES*

- *Elements:*

- Existence of a Contract with Plaintiff “Lienor” (as defined in §713.01, *Florida Statutes*), to improve real property;
- Description of labor, services, or materials provided;
- Allegation that labor, services, or materials were provided in accordance with the Contract;
- Amount of Contract;
- Amount, if any, paid pursuant to Contract;

UNDISPUTED FUNDS - §713.346, *FLORIDA STATUTES*

- *Elements (Continued):*
 - Amount that remains unpaid pursuant to Contract, and amount that is undisputed;
 - Undisputed amount has remained due and payable pursuant to Contract for more than 30 days after date labor or services were accepted or materials were received;
 - Or Defendant received payment for the labor, services, or materials described in the Complaint more than 30 days prior to date Complaint was filed and has not paid the laborer/material supplier; and
 - Counsel has been retained, fees have been incurred, and fees are sought.

UNDISPUTED FUNDS - §713.346, *FLORIDA STATUTES*

- Court shall conduct an evidentiary hearing on Complaint, upon not less than 15 days written notice. The person providing labor, services, or materials is entitled to the following remedies, to the extent of the undisputed amount due, and upon proof of each allegation in the Complaint:
 - ✦ Accounting of use of any payment received such payment.
 - ✦ Temporary Injunction against person who received payment, subject to Bond requirements specified in the Florida Rules of Civil Procedure.
 - ✦ Prejudgment attachment against person who received payment, in accordance with requirements of Chapter 76.
 - ✦ Such other legal or equitable remedies as may be appropriate in accordance with the requirements of the law.

UNDISPUTED FUNDS - §713.346, *FLORIDA STATUTES*

- Remedies must be granted without regard to any other remedy at law and without regard to whether or not irreparable damage has occurred or will occur.
- Remedies do not apply:
 - To extent of *bona fide* dispute regarding any portion of Contract price.
 - In the event Plaintiff has committed a material breach of Contract which would relieve Defendant from the obligations under Contract.

LENDER RESPONSIBIITY – §713.3471, *FLORIDA STATUTES*

Failure to give notice of final decision to cease funding.

- **Claim by Contractor against Lender;**
- **For failure to provide notice to Contractor within five (5) business days of a final determination to cease funding under the Construction Loan;**
- **Prior to distribution of all funds available under the Construction Loan,**

LENDER RESPONSIBIITY – §713.3471, *FLORIDA STATUTES*

- **Contractor may sue Lender for the:**
 - **Actual value of the materials and direct labor costs;**
 - **Plus 15 percent for overhead, profit, and all other costs;**
 - **From the date on which notice of the Lender's decision should have been served on the Contractor and the date on which notice of the Lender's decision is served on the Contractor.**

LENDER RESPONSIBIITY - §713.3471, *FLORIDA STATUTES*

Failure to give notice of re-designated loan proceeds.

- If Lender and Borrower have designated a portion of construction loan proceeds;
- Borrower may not authorize Lender to disburse funds for any other purpose;
- Until Owner serves Contractor (and any other Lienor who has given the Owner a Notice to Owner) with written notice of that decision, including the amount of the loan proceeds to be disbursed.

CONVERSION

- *Elements:*

- Act of dominion
- Wrongfully asserted
- Over another's property

CONVERSION

- Damages are fair market value of property when converted, plus legal interest, *not replacement value*.
- Where parties are engaged in a contractual dispute over the amount owed and no fraud is involved, no conversion (or civil theft) can occur.
- Making a demand is necessary for a claim for conversion to survive in Florida.

FRAUD IN THE INDUCEMENT

- *Elements:*

- False statement concerning a material fact;
- Knowledge by the person making the statement that the statement is false;
- Intent by Defendant that statement will induce Plaintiff to act on it; and
- Reliance on the statement to the damage of the Plaintiff.

FRAUD IN THE INDUCEMENT

- In Florida, a claim for fraud in the inducement must be alleged with particularity, including:
 - Who made the false statement;
 - The substance of the false statement;
 - The time frame in which the false statement was made; and
 - The context in which the false statement statement was made.

FRAUDULENT MISREPRESENTATION

- *Elements:*

- False statement concerning a material fact;
- Knowledge by the person making the statement that the statement is false;
- Intent by Defendant that the statement will induce the Plaintiff to act on it;
- Reliance on the statement to the damage of the Plaintiff; and
- Resulting damages.

FRAUDULENT MISREPRESENTATION

- **An agent, even though acting for an acknowledged principal, is independently liable for fraudulent misrepresentation.**
- **The knowledge element of fraudulent misrepresentation is satisfied where a representation is made:**
 - **Without knowledge as to either truth or falsity or**
 - **Under circumstances in which the representor ought to have known, if he did not know, of the falsity of the representation**

FLORIDA DECEPTIVE UNFAIR TRADE PRACTICES ACT §501.201, *FLORIDA STATUTES*, ET SEQ.

- If consumer has been damaged by deceptive act or trade practice, consumer may maintain an action for actual damages, plus attorneys' fees and costs.
 - Attorneys' fees are discretionary with the Court.
- If there is a defense the claim is frivolous, Court shall conduct a hearing and may require posting of a Bond to maintain the action.
 - Bond is to indemnify Defendant for damages, plus costs and fees.

EQUITABLE LIEN

- **Stems from two possible sources:**
 - **Written Contract which shows an intent to charge some particular property with a debt or obligation;**
 - **Judgment by a Court of equity out of general consideration of right and justice, as applied to the relations of the parties and the circumstances of their dealings in the particular case.**
- **Arises at the time of the transaction from which it springs.**

EQUITABLE LIEN

- Complaint must allege ultimate facts that show there is no adequate remedy at law.
 - Conclusion is not enough.
- Defendant must own property on which Lien is sought to be enforced.
- Recording a Notice of *Lis Pendens* is discretionary.
 - If *Lis Pendens* is filed, there must be a Bond since the Equitable Lien is not based on a recorded instrument or Claim of Lien.
- Appropriate for unpaid improvements to a Leasehold where Lease prohibits liens against landlord's interest and landlord has been unjustly enriched.
- May be appropriate against a designated but undisbursed construction fund.

EQUITABLE SUBROGATION

- *Elements:*
 - Subrogee made payment to protect their own interest;
 - Subrogee did not act as a volunteer;
 - Subrogee was not primarily liable for the debt;
 - Subrogee paid off the entire debt;
 - Subrogation would not work any injustice to the rights of a third party; and
 - Amount of debt.

EQUITABLE SUBROGATION

- The policy behind equitable subrogation is to prevent unjust enrichment by assuring that the person who in equity, and good conscience, is responsible for the debt is ultimately answerable for its discharge.
- A subrogation suit is a separate, independent action against a subsequent tortfeasor by the initial tortfeasor. This spares the injured party from the subrogation action.

GOODS SOLD AND DELIVERED

- *Elements:*

- **Goods were sold and delivered to Defendant;**
 - **Sale can be proven by delivery, from which sale is presumed or implied.**
- **Agreed price or reasonable value.**

INDEMNITY – COMMON LAW

- *Elements:*

- Indemnity between tortfeasors is allowable only where whole fault is in one against whom indemnity is sought.
 - Indemnity shifts entire loss from one who, without active negligence or fault, has been obligated to pay another because of some vicarious, constructive, derivative or technical liability.
- Indemnification can come only from a party who is wholly at fault.
- Special relationship between parties is required for common law indemnification to exist in Florida.

INDEMNITY – CONTRACTUAL

- ***Elements:***

- Agreement by which the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party.

INDEMNITY – CONTRACTUAL

- Typically for personal injury or property damage, but may include economic losses.
- Agreement may allow party to indemnify others for negligence of others.
- In design and construction setting there are restrictions on contractual indemnity:
 - Must be commercially reasonable limit of not less than \$1,000,000.00; and
 - Limit must be part of project specifications or bid documents, if any.
 - Without the limit, agreement to indemnify another's negligence is void and unenforceable.

INDEMNITY – CONTRACTUAL

- **Raises a duty to defend**
- **Express contract not required:**
 - **Contractual Indemnity may arise out of implied contractual relations or liability imposed by law.**
- **Special relationship not required**

INDEMNITY - IMPLIED

- **Complaint must allege:**

- **Cause of action;**
- **Against Indemnatee;**
- **Based at least in part on imputed liability.**

- **Third Party Complaint must allege:**

- **Special relationship running from Indemnitor to Indemnatee;**
- **Indemnitor breached duty to Indemnatee;**
- **Plaintiff's injuries resulted from same actions that constitute breach of Indemnitor's duty to Indemnatee; and**
- **Indemnatee can be held liable to Plaintiff for injuries to Plaintiff resulting from Indemnitor's act.**

INJUNCTIONS

- *Elements:*
 - Equitable grounds;
 - Clear legal or equitable right in favor of party seeking Injunction; and
 - Inadequate remedy at law.

INJUNCTIONS

- There may be considerations of Public Interest.
- Court must specify reasons for entry of Injunction with findings of fact.
- Preliminary Injunction must provide for a Bond for damages.

NEGLIGENCE

- *Elements:*

- Defendant owed legal duty to Plaintiff;
- Defendant breached that duty;
- Plaintiff was injured as a result of Defendant's breach of duty; and
- Resulting damage.

OPEN ACCOUNT

- *Elements:*

- Sales Contract existed between Creditor and Debtor;
- Amount claimed by Creditor represents either agreed on sales price or reasonable value of services or goods delivered; and
- Services or goods were actually performed/delivered.

PAYMENT BOND CLAIM

- ***Elements:***

- Bond issued by Defendant;
- Claimant falls within permitted class under Bond;
- Claimant is unpaid for covered labor, services, or materials;
- Claimant has complied with Bond conditions, and any applicable statutory conditions;
- Suit has been timely filed; and
- Reasonable attorneys' fees incurred.

PERFORMANCE BOND CLAIM

- *Elements:*

- Defendant furnished Performance Bond;
- Claimant is an Obligee under the Bond;
- Bond Principal has breached the Contract or Bond obligations;
- Claimant has performed any conditions precedent to recovery under Bond, including any timely notices and/or filing of suit; and
- Claimant has suffered damages as a result of the breach.

PROFESSIONAL NEGLIGENCE

- *Elements:*

- **Breach by a professional of the standard of care of a like professional; and**
- **Resulting damage to any person who with reasonable certainty was intended to have been protected by the duty.**

PROMISSORY ESTOPPEL

- *Elements:*

- Promise;
- Which Promisor should reasonably expect to induce action or forbearance on the part of the Promisee or a third person;
- Which does induce such action or forbearance; and
- Injustice can be avoided only by enforcement of the promise.

PROMPT PAYMENT ACT – FEDERAL: 31 U.S.C. §3901 THROUGH 3907

- **31 USCA 3903(a)(6):**
 - Interest on construction contracts begins to accrue 14 days after a progress payment request is received, unless Contract provides for a longer period of time;
 - Interest accrues on unpaid retainage by a date specified in the Contract or, in the absence of such a specified date, by the 30th day after final acceptance;
- **31 USCA 3903(7):**
 - Defective invoices may be returned within seven (7) days of receipt for correction;

PROMPT PAYMENT ACT – FEDERAL: 31 U.S.C. §3901 THROUGH 3907

- **31 USCA 3905(a):**
 - Contractor owes interest to Owner for amounts overbilled;
- **31 USCA 3905(b):**
 - Contractor shall pay Subcontractors within seven (7) days of receipt of payment, and is liable for interest on late payments;
- **31 USCA 3907:**
 - Claims for interest may be filed under 41 USCA 7103;
 - Interest accrues until claim is filed or for up to one (1) year

PROMPT PAYMENT ACT – STATE: §255.072, *FLORIDA STATUTES*

- §§255.073 and 215.422, *Florida Statutes*:
 - Owner must pay undisputed amounts timely
 - Interest of 1% per month due on late payments
- If payment of an invoice is not issued within forty (40) days after receipt of the invoice and receipt, inspection, and approval of the goods and services, the agency or judicial branch shall pay the vendor, in addition to amount of invoice, interest at legal rate on the unpaid (undisputed) balance from the expiration of the 40-day period until such time as payment is issued to the vendor;
- Subcontractors must be paid within ten (10) days of receipt of payment by Contractor;

PROMPT PAYMENT ACT – STATE: §255.072, *FLORIDA STATUTES*

- **§255.075, *Florida Statutes*:**

- **Contract may not waive interest on late payments; and**
- **In an action to recover amounts due for construction services purchased by a public entity;**
- **Court shall award court costs and reasonable attorneys' fees, including fees incurred through any appeal, to prevailing party;**
- **If the Court finds the nonprevailing party withheld any portion of payment without any reasonable basis in law or fact.**

PROMPT PAYMENT ACT –FLORIDA LOCAL GOVERNMENT §§218.70 - 218.80, *FLORIDA STATUTES*

- Payment for construction services is due twenty (20) business days (25 days if an agent needs to approve) after delivery of invoice, unless rejected within ten (10) days after receipt of invoice.
 - Rejection must specify reasons, and undisputed portions of invoice must be paid.
- Subcontractors must be paid within ten (10) days after payment to prime.

PROMPT PAYMENT ACT – FLORIDA LOCAL GOVERNMENT §§218.70 - 218.80, *FLORIDA STATUTES*

- Local governments are required to have an informal dispute resolution procedure to resolve billing disputes within sixty (60) days after payment request was properly received.
 - Interest of 1% per month is due on late payments, unless contractual rate is higher.
 - Contract may not waive interest on late payments.
- Attorneys' fees and costs to be awarded to prevailing party for violation of this Act (Part).

PROMPT PAYMENT ACT – PRIVATE WORK: §715.12, *FLORIDA STATUTES*

- Interest is due on payments that are late, as defined in §715.12(4), and bear interest at no less than the legal rate, computed beginning on the 14th day after the payment is due. Obligor has fourteen (14) days to return incomplete payment requests.
- Unless Contract provides otherwise, dispute is not grounds to withhold payment for work not affected by the dispute.
- Retainage is due within fourteen (14) days of the earlier of:
 - substantial completion
 - beneficial occupancy or
 - issuance of a certificate of occupancy.
- Contractor may substitute specified security for a portion of retainage withheld.
- This is not a separate cause of action.

QUIA TIMET

- **Agreement where Surety is entitled to demand from Indemnitors an amount sufficient to discharge any claim made against the Bond;**
- **There must be a rational basis for the Surety's fear that the Bond is in jeopardy; and**
- **Surety must establish the nature and approximate amount of possible claims and liabilities it reasonably anticipates under the Bond.**

QUI TAM – FEDERAL 31 U.S.C. §3729

Any person who does the following is liable to the U.S. Government for a civil penalty of not less than \$5,000.00 and not more than \$10,000.00, plus three (3) times the amount of damages which the Government sustains because of the act:

- Knowingly presents, or causes to be presented, to an officer or employee of the U.S. Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
- Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
- Conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

QUI TAM – FEDERAL 31 U.S.C. §3729

- **Cont.**

- **Has possession, custody, or control of property or money used, or to be used, by the U.S. Government and, intending to defraud the U.S. Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;**
- **Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the U.S. Government and, intending to defraud the U.S. Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; and**
- **Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the U.S. Government.**

FALSE CLAIMS ACT – §68.082, *FLORIDA STATUTES*

- *Elements:*

Any person who does the following is liable to the state for a civil penalty of not less than \$5,500.00 and not more than \$11,000.00 and for treble the amount of damages the agency sustains because of the act or omission of that person:

- Knowingly presents or causes to be presented to an officer or employee of an agency a false or fraudulent claim for payment or approval;
- Knowingly makes, uses, or causes to be made or used a false record or statement in order to get a false or fraudulent claim paid or approved by an agency;
- Conspires to submit a false or fraudulent claim to an agency or to deceive an agency for the purpose of getting a false or fraudulent claim allowed or paid;

FALSE CLAIMS ACT – §68.082, *FLORIDA STATUTES*

- Has possession, custody, or control of property or money used or to be used by an agency and, intending to deceive the agency or knowingly conceal the property, delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt;
- Is authorized to make or deliver a document certifying receipt of property used or to be used by an agency and, intending to deceive the agency, makes or delivers the receipt without knowing that the information on the receipt is true; or
- Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to an agency.

FALSE CLAIMS ACT - §68.082, *FLORIDA* *STATUTES*

- A person may bring a civil action for a violation of §68.082 for the person and/or for the affected agency.
 - Civil actions instituted under this act shall be governed by the Florida Rules of Civil Procedure and shall be brought in the name of the State of Florida.
 - Prior to the Court unsealing the Complaint under subsection (3), the action may be voluntarily dismissed by the person bringing the action only if the department gives written consent to the dismissal and its reasons for such consent.
- The Complaint shall be identified on its face as a Qui Tam action and shall be filed in the Circuit Court of the Second Judicial Circuit, in and for Leon County.
 - Immediately upon the filing of the Complaint, a copy of the Complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Attorney General and the Chief Financial Officer, by registered mail, return receipt requested.
 - They may elect to intervene and proceed with the action, on behalf of the state, within 60 days after receiving the Complaint and the material evidence and information.

FALSE CLAIMS ORDINANCES – LOCAL GOVERNMENT

- **A municipality may have a false claims ordinance, e.g. Article XV, §§ 21-255 to 21-266, Metropolitan Dade County Code of Ordinances.**
- **Check for such an ordinance and then be mindful of its terms.**

STRICT LIABILITY

- *Elements:*

- The wrongdoer's relationship to the product or dangerous activity in question;
- The product or activity has a defective and unreasonably dangerous condition when used as intended;
- There is proximate cause between the condition of the produce or dangerous activity and Plaintiff's injuries or damages; and
- Resulting damages.

UNAUTHORIZED USE OF PLANS - COPYRIGHT

– 17 U.S.C. §§101-810

- *Elements:*

- Plaintiff is Owner of copyright;
- Defendant has published plans or built a building, which was copyrighted;
- Plan or building of Defendant is substantially similar to that of Plaintiff; and
- Plaintiff seeks damages and/or Injunction.

UNLICENSED CONTRACTOR

- **Statutory Action for Damages - §768.0425, *Florida Statutes*:**
 - “In any action against a Contractor for injuries sustained resulting from the Contractor’s negligence, malfeasance, or misfeasance, the consumer (person who contracts for the performance of any construction or building service which is regulated by any state or local law), shall be entitled to three times the actual compensatory damages sustained in addition to costs and attorneys’ fees if the Contractor is neither certified as a Contractor by the state nor licensed as a Contractor pursuant to the laws of the municipality or county within which she or he is conducting business.”

UNLICENSED CONTRACTOR

- **Contracts Entered Into by Unlicensed Contractors Are Unenforceable - §489.128, *Florida Statutes*:**
 - **“As a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed Contractor shall be unenforceable in law or in equity by the unlicensed Contractor.”**
 - **“[...]a Contractor shall be considered unlicensed only if the Contractor was unlicensed on the effective date of the original contract for the work, if stated therein, or, if not stated, the date the last party to the contract executed it, if stated therein. If the contract does not establish such a date, the Contractor shall be considered unlicensed only if the Contractor was unlicensed on the first date upon which the Contractor provided labor, services, or materials under the contract.”**

WORTHLESS CHECKS – §68.065, *FLORIDA STATUTES*

Elements:

- Check is given for materials or services furnished;
 - With intent to defraud;
 - Payee gave written notice (specified in the statute) of a worthless check; and
 - 30 days have gone by without payment.
-
- Holder of the check may sue the maker for the amount of the check, plus treble damages, and attorneys' fees and costs.

INTENTIONAL INTERFERENCE WITH CONTRACT OR BUSINESS RELATIONSHIP

- *Elements:*

- The existence of a business relationship, not necessarily evidenced by an enforceable Contract;
- Knowledge of relationship by Defendant;
- Intentional and unjustified interference with relationship by Defendant; and
- Damage to the Plaintiff as a result of breach of the relationship.

QUESTIONS FROM THE AUDIENCE?

Elizabeth B. Ferguson

eferguson@boydjen.com

(904)353-6241

www.boydjen.com

BOYD & JENERETTE P.A.
EST. 1952

JACKSONVILLE | COCONUT CREEK | SAVANNAH

Damages and Remedies in Construction Disputes

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Damages Concepts

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Proof of Damages

- Claimant has the burden of proof
- Claimant is not required to prove exact amount of damages
 - Estimates are acceptable
- Need to place claimant in reasonable “should-have-been” cost position
- Sufficient to have a reasonable basis of computation, even though the result may only be approximate
- Uncertainty that defeats recovery relates to whether damage occurred, rather than the amount of damage suffered

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Types of Damages Suffered by a Contractor

- Traditional terms: “Direct” and “Indirect Costs”
 - Direct costs: the labor, material and equipment expenses necessary to physically build the work
 - Indirect costs: overhead, often associated with delay (e.g., jobsite and home office overhead)
 - These classifications are overly broad and can be inaccurate

Types of Damages Suffered by a Contractor

- Contractors often incur increased overhead costs, direct costs and project-wide support costs performed in the field due to extended performance
- Creates confusion for classification
- Additionally, using contrasting terms like direct vs. indirect costs can create confusion and unnecessary debates regarding legal concepts that are not strictly limited to construction disputes
- Whether a particular set of claimed damages are direct, as opposed to consequential, in nature.
- “Activity-related” and “Time-related” costs are more accurate classifications

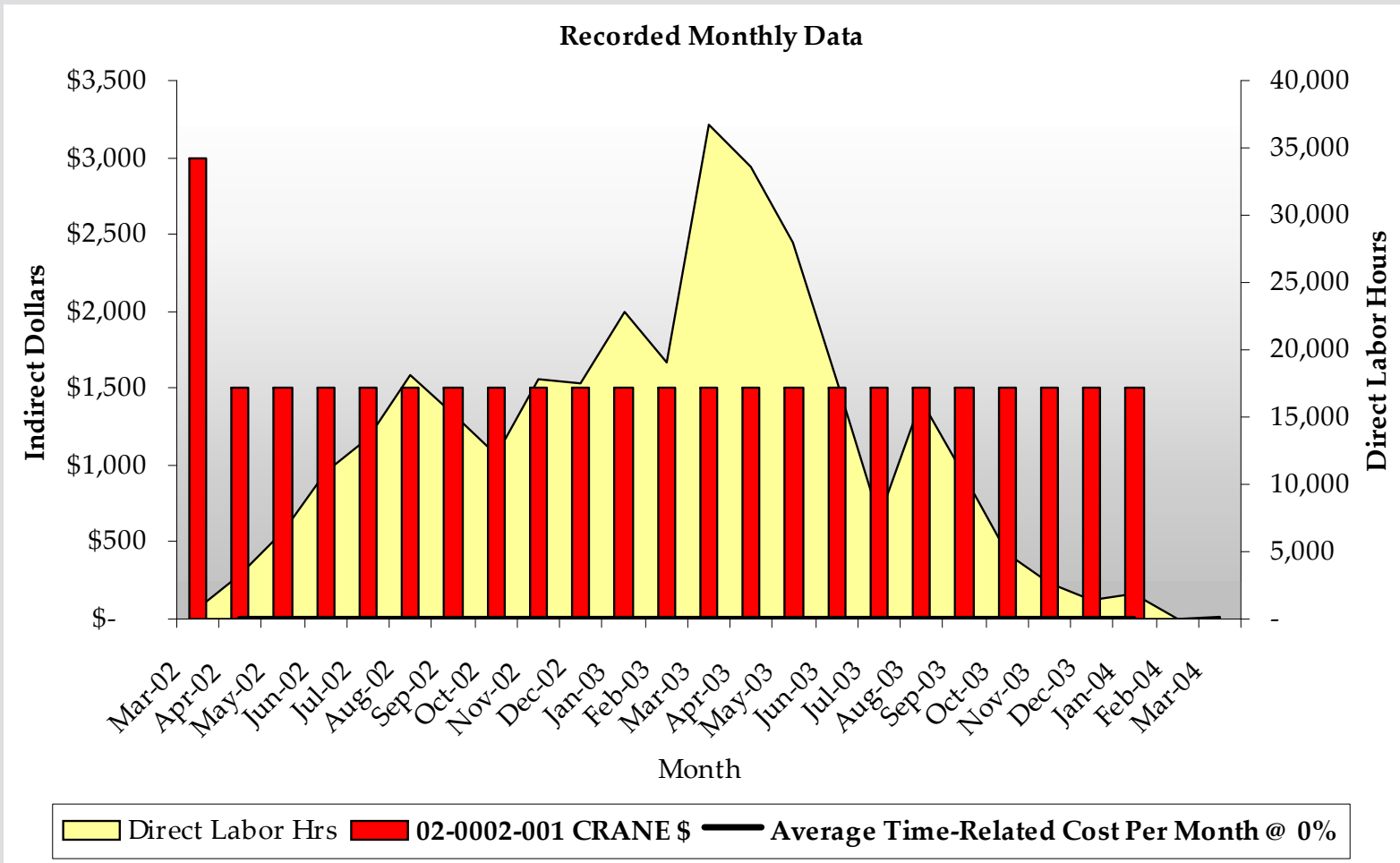
Types of Damages Suffered by a Contractor

- Activity-related costs vary with productive effort for performing construction or demolition work in the field, or design effort for design-build projects
 - Labor, materials, equipment, subcontractor and subconsultant
 - May also include items classically characterized as “indirect” costs, like fuel for onsite equipment
 - In practice, is often included as part of a contractor’s calculation of jobsite overhead or “general conditions” costs
 - *Example:* the costs of forming, pouring and placing a concrete slab

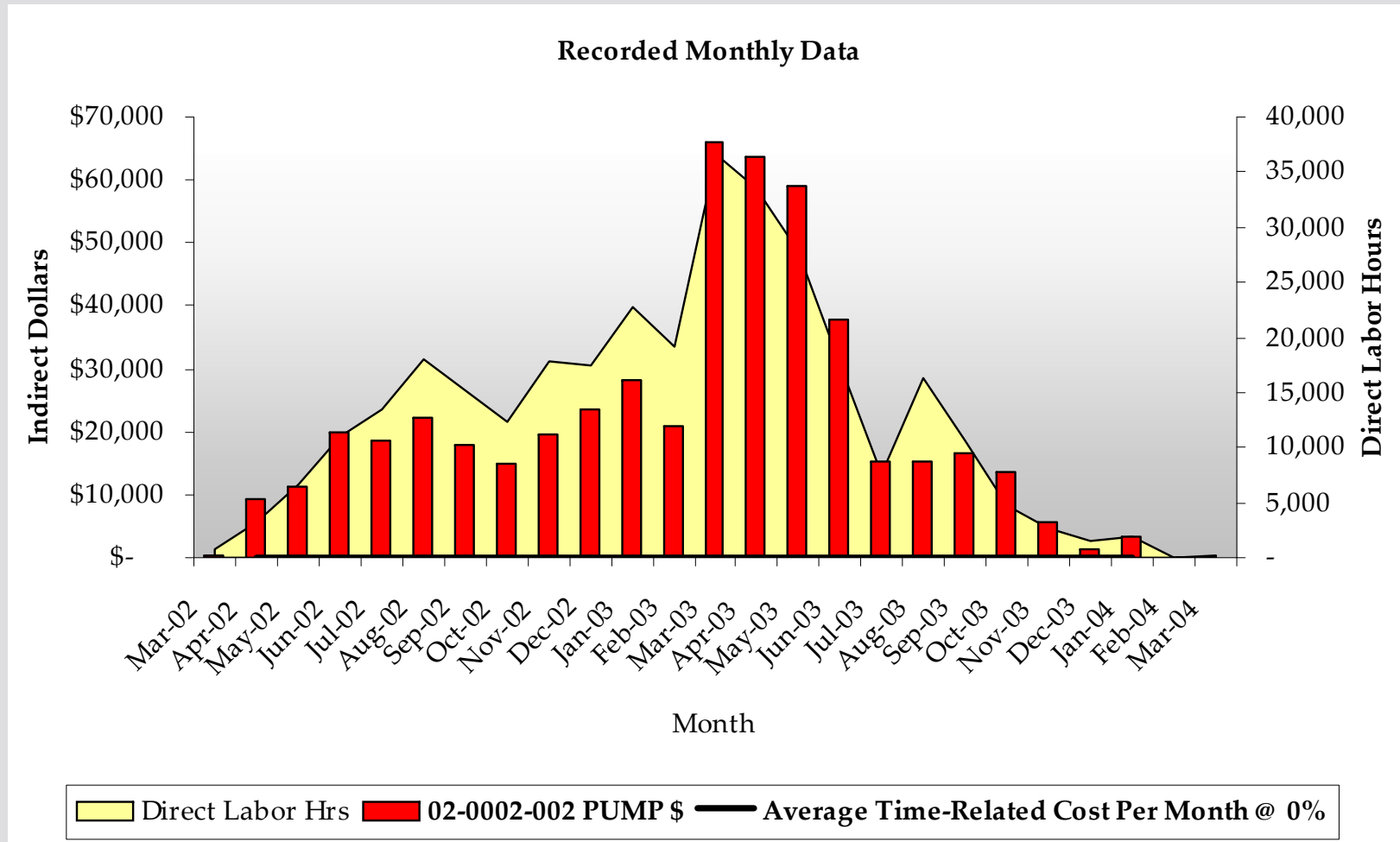
Types of Damages Suffered by a Contractor

- Time-related are driven by time
 - Time-related overhead
 - Classically labeled as “indirect” costs:
 - Jobsite overhead
 - District / regional office overhead
 - Extended / unabsorbed / under-absorbed home office overhead
 - Time-related direct costs
 - Labor, material (e.g., extended rental), equipment, subcontractor and subconsultant expenses that increase due to extended performance requirements
 - Project-wide support expenses (not limited to performing isolated work activities in the field):
 - Casting yard
 - Surveying
 - Maintenance & protection of traffic
 - Dewatering
 - Sedimentation / erosion control,
 - Quality control, quality assurance, and inspection, among others
 - *Example:* the costs of a mobile crane that supports an entire project rather than a specific activity

Time-related costs example

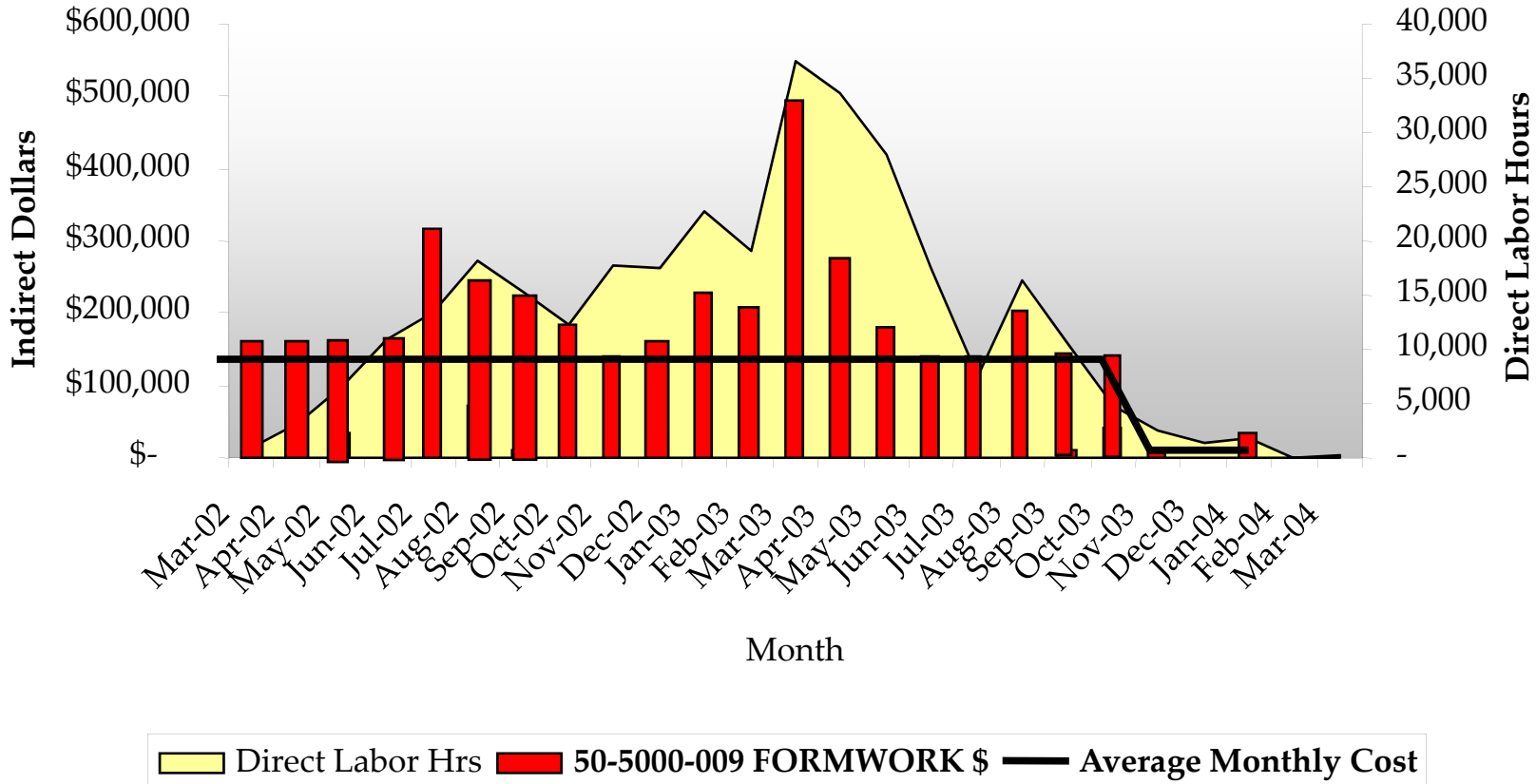


Activity-related example



Reality – Mixed Function Costs

Recorded Monthly Data



Agenda

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Extra or Additional Work

- Approaches:
 - Lump sum (forward-priced)
 - Unit price - to the extent the extra or additional work is within the scope of an established (or agreed) unit price
 - Time & materials, or “force account”
 - Standardized rates (e.g., Rental Rate Blue Book) for items like equipment may be specified
 - Contract provisions often include specified levels of markup (covering overhead, profit, insurance, bonds and/or supervision)

Extra Work Claims

- Costs may be effectively captured through separate cost codes
 - Provides contemporaneous documentation of increased costs
 - Need codes for all cost types
 - Must use codes properly
 - Only charge incremental increase of changed work

Extra Work Claims

Issues

- Common cost coding issues:
 - Open codes with no costs
 - New codes with exorbitant costs (“Dumping Grounds”)
 - Charges to codes outside time frame of issue
 - Subsequent shifting costs from one code to another
 - Difficulty matching cost code entries to source document (time cards or invoices)

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Disruption, Inefficiencies and Losses of Productivity

- Often intertwined with issues of delay
- Can be cause of delay or consequence of delay
- Should be evaluated separately from the delays
- Several approaches for pricing inefficiencies:
 - Measured mile
 - Industry studies
 - Planned vs. actual analysis
 - Total cost
 - Modified total cost

Measured Mile

- Preferred method, but can involve practical challenges
- Compares the productivity achieved during an un-impacted period with the productivity achieved for the same work during impacted period
- Important considerations:
 - Is the un-impacted period a representative sampling of performance?
 - Measured “mile or measured “inch”?
 - Is the work performed during both periods truly comparable
 - Or was the work was influenced by factors in addition to the specific, claimed impact?
 - Are there adequate, accurate records for identifying the productivity achieved during both periods?
- If a representative period of un-impacted work did not exist, may attempt to compare:
 - With productivities achieved on similar work activities on the same project, or
 - With the historical productivities achieved for the same work activities on prior projects

Industry Studies

- More generalized and more subjective than the measured mile method
- Uses industry studies to identify estimated percentage impacts by a variety of potential causes – the effect on productivity caused by:
 - Ambient temperatures
 - Weekly work shift structure/overtime
 - Stacking of trades
 - Other issues affecting efficiency
- Criticisms:
 - Generic nature of the data does not account for specific circumstances on a project
 - There is still a need to corroborate the use of studies with the data from the project

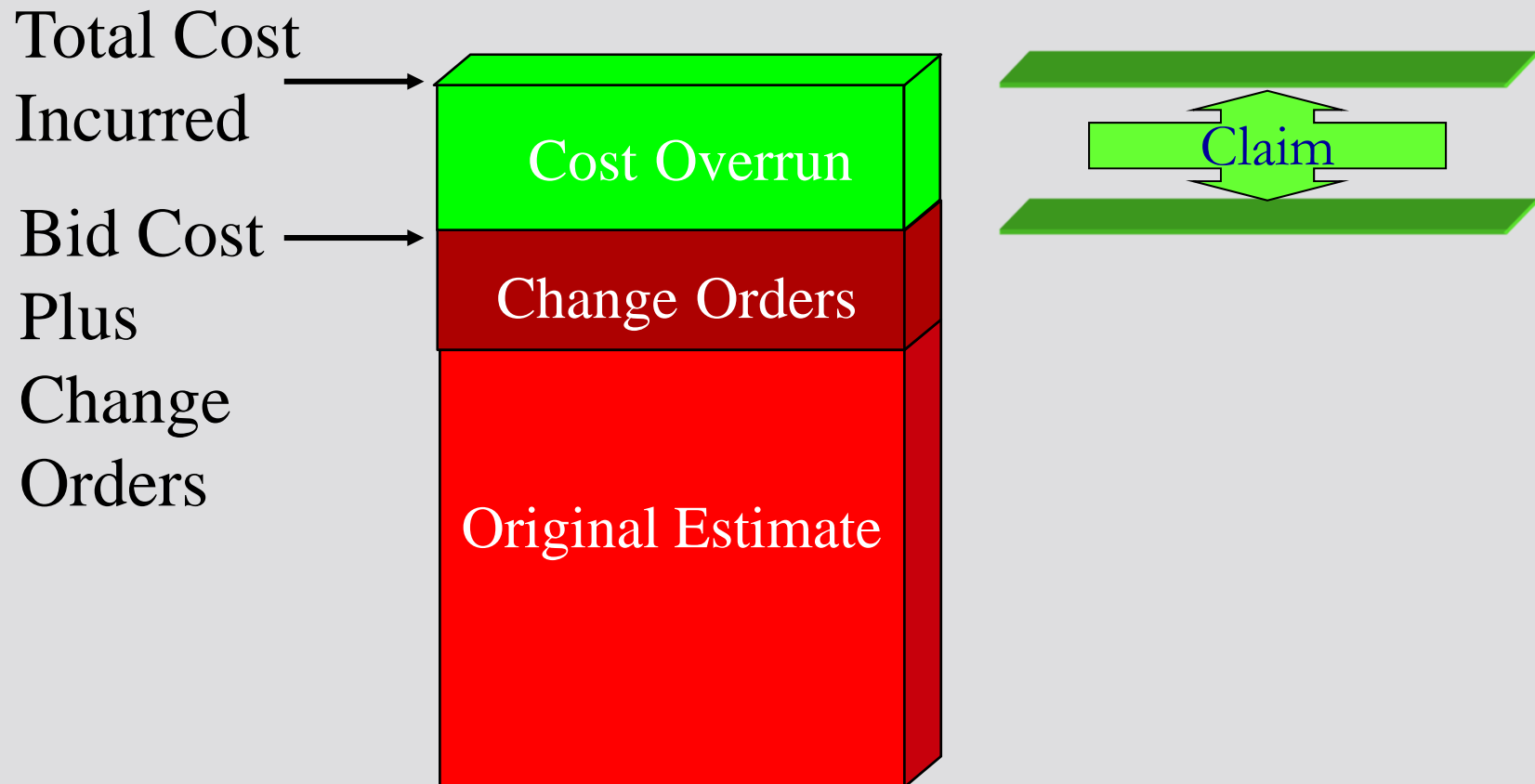
Planned v. Actual Analysis

- Compares the actual costs incurred to the planned costs *for a work activity*
- Alternative approaches:
 - Modify the estimated planned costs (to account for any “bid busts” on that item), and/or
 - Reduce the actual costs (to account for self-inflicted problems)
- Sometimes *erroneously* referred to as “total cost” or “modified total cost” methods
 - With corresponding reference to case law that courts heavily disfavor these approaches
- Criticisms and criteria:
 - Were the planned costs a reasonable reflection of the costs for performing the (un-impacted) work?
 - Were the actual costs incurred reasonable?
 - Was the contractor responsible for some (or all) of the additional costs?

Total Cost Method

- Highly disfavored by courts
- Requires:
 - Reasonable original bid
 - Reasonable actual costs
 - Additional costs not caused by contractor problems
 - No other method available to quantify claim

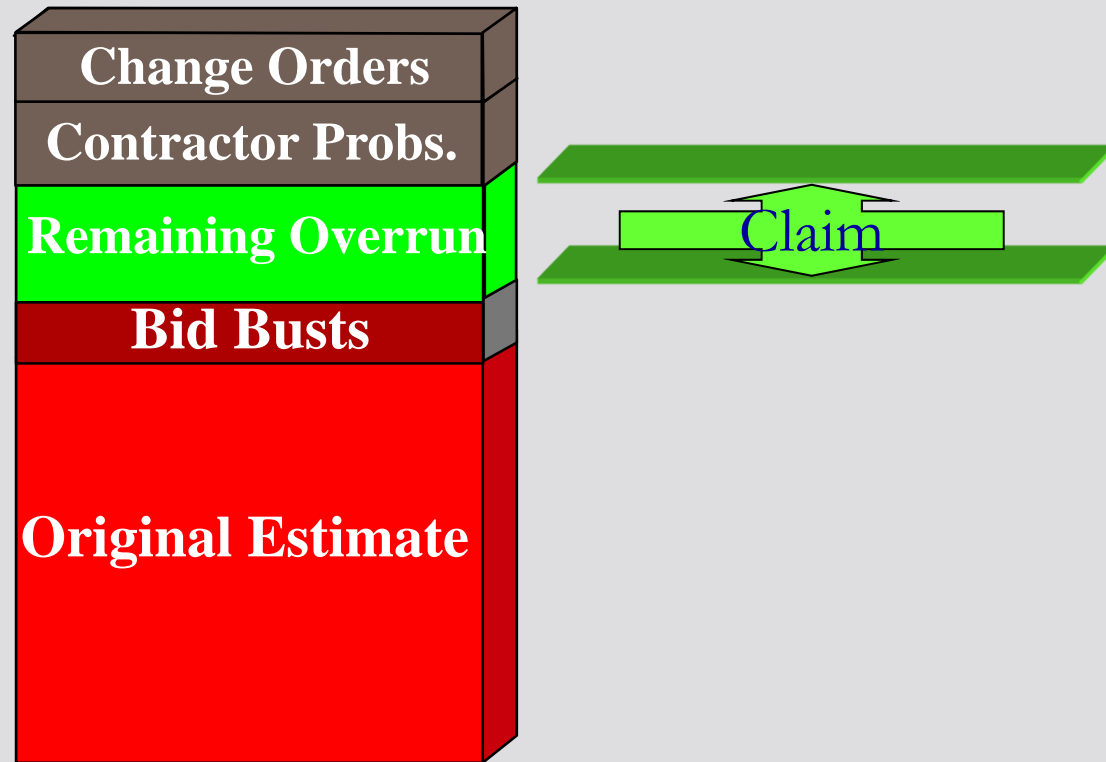
Total Cost Method



Modified Total Cost Method

- Modifies the total cost approach to compensate for:
 - Bid errors
 - Specific costs arising from the contractor's actions
 - Unclaimable costs
 - Specific costs arising from actions of other parties
- Claimant must prove that costs incurred in performing the original work and the extra work had become so co-mingled and inextricably intertwined that use of a segregated damage measure is impracticable.

Modified Total Cost Method



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Displaced Activity Costs and Escalation

- Related to delay
- May involve the deferral of activities
- Heavily-influenced by the contract
- Can compare quoted prices (at bid time) to the actual prices incurred
- Some purchase orders include provisions (*e.g.*, set annual or periodic increases) making quantification of the increased costs straightforward
- Some contracts (*e.g.*, FDOT or other institutional owners) recognize market volatility of certain products
 - Include indices for price adjustments associated with the same

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Delays

- Time-Related Direct Costs
- Time-Related Overhead
 - Jobsite Overhead
 - Home Office Overhead

Time-Related Direct Costs

- May include labor, material (e.g., extended rental), equipment, subcontractor and subconsultant expenses
- May also be incurred when an activity's performance has been moved or displaced to a later period than originally planned
- May include expenses for project-wide support (not limited to performing isolated work activities)
 - Casting yard
 - Surveying
 - Maintenance & protection of traffic
 - Dewatering
 - Sedimentation / erosion control
 - Quality control, quality assurance, and inspection

Time-Related Direct Costs

- Can be compiled utilizing a combination of:
 - Project schedules (for identifying affected activities' planned and actual durations)
 - Cost-accounting system (for quantifying the actual costs incurred during the extended or displaced time periods).
- It may be appropriate to identify a typical fleet of equipment on the project, or a grouping of key personnel for field operations, required for an extended duration
 - Then pricing the time-related cost of the same

Increased Equipment Costs

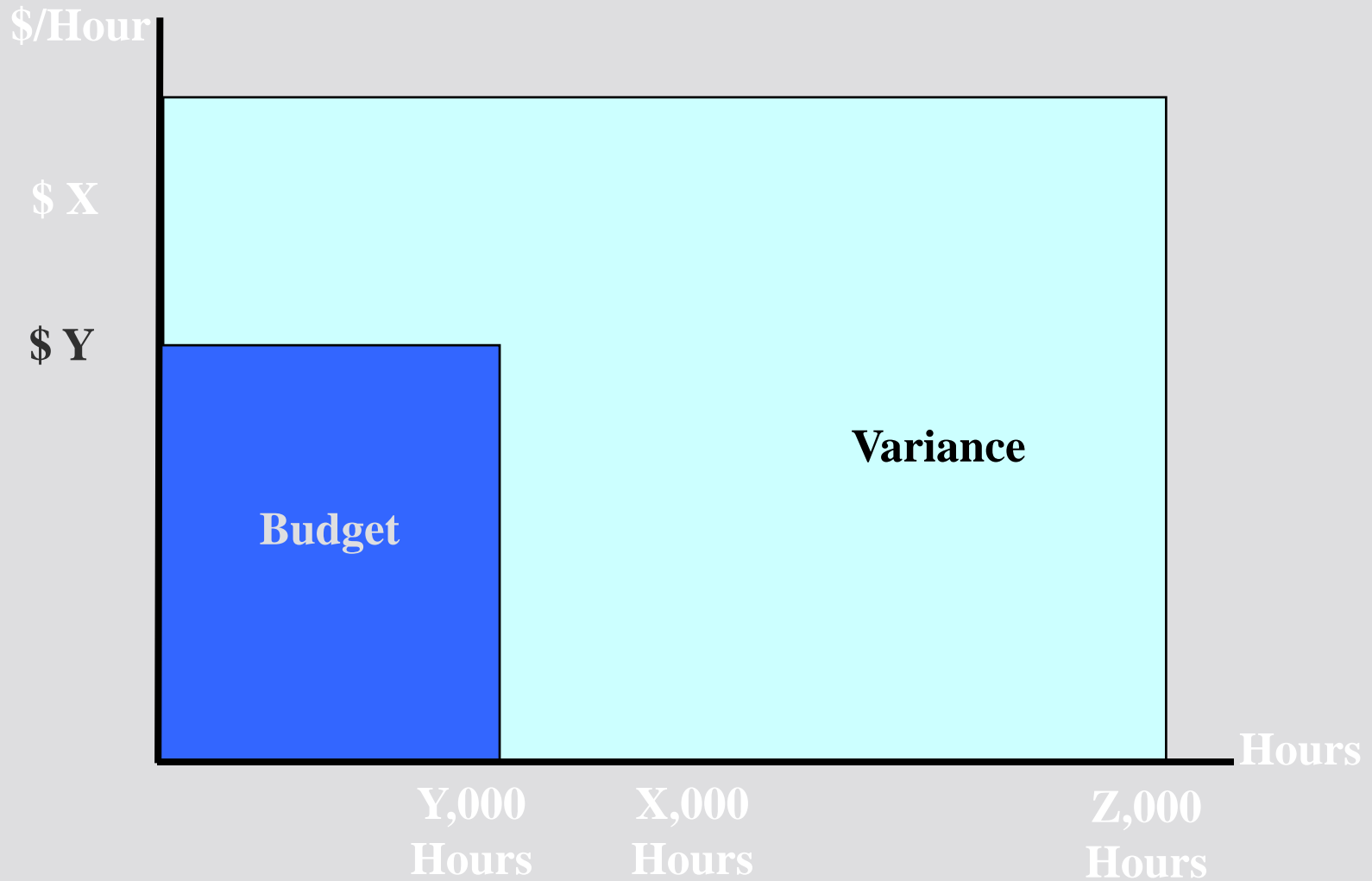
- Need detailed equipment plan
- Perform overrun analysis
 - More equipment
 - Increased use
 - Increased rates
- Determine liability for overrun
- Contract terms

Increased Labor Costs

- Perform detailed overrun analysis
 - Costs
 - Hours
 - Wage rate
 - Productivity rates
 - Quantities
 - Extra work
 - Others
- Decide on an approach

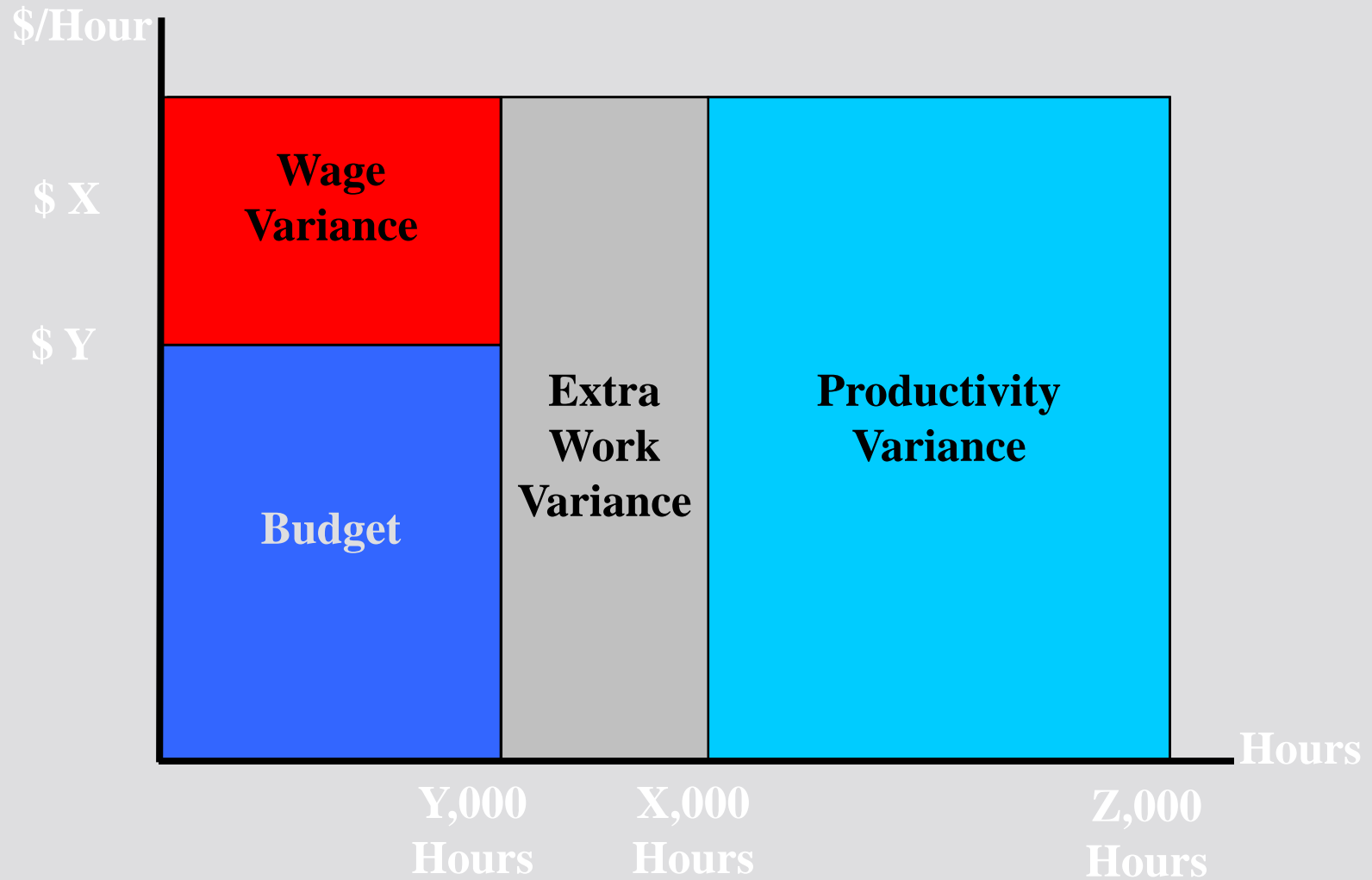
Increased Labor Costs

Labor Overrun Components



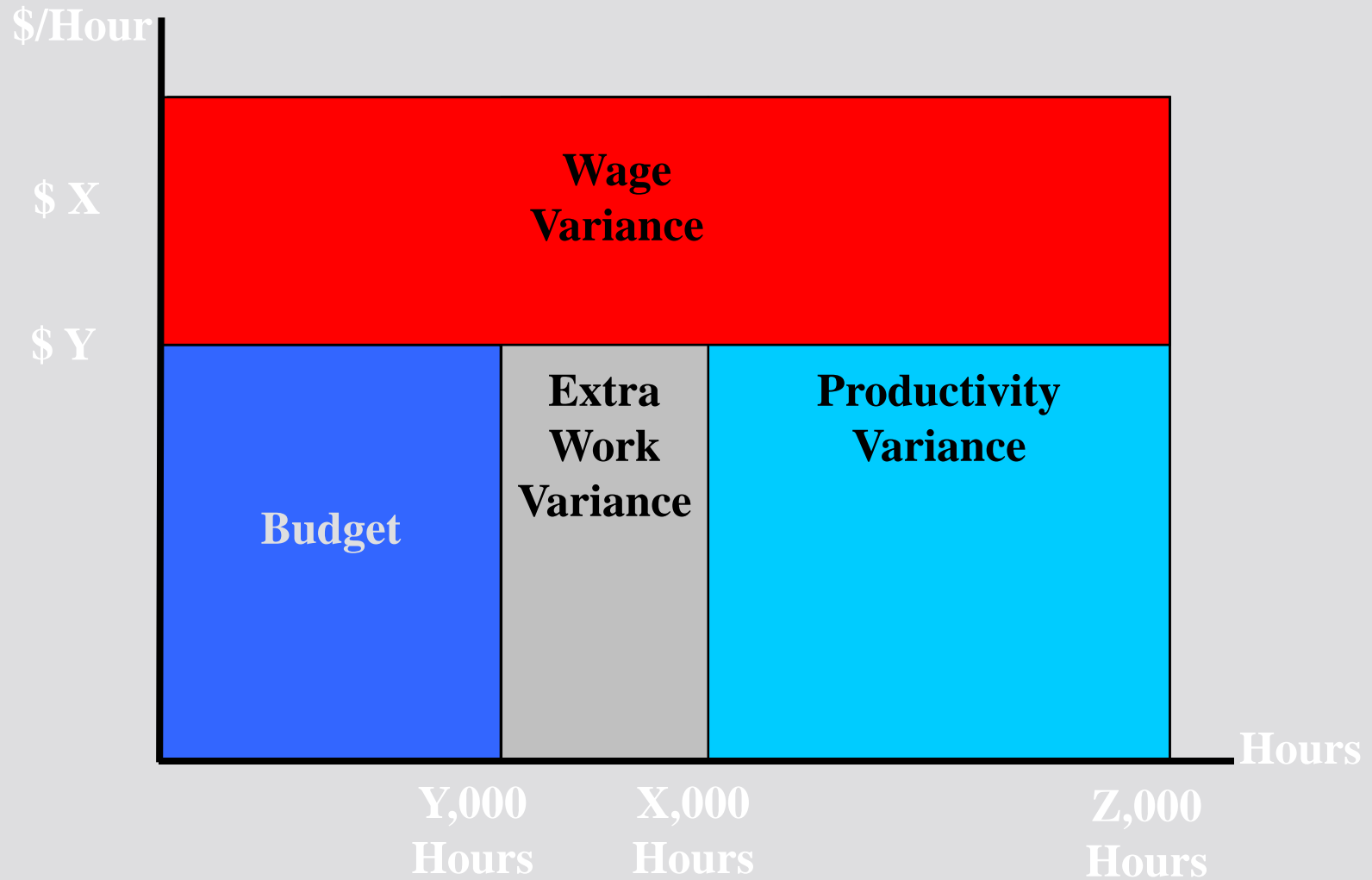
Increased Labor Costs

Labor Overrun Components



Increased Labor Costs

Labor Overrun Components



Jobsite Overhead

- Often called extended general conditions, jobsite overhead includes:
 - Facilities (office, trailer, utilities, furniture, computers, software, etc.)
 - Management and administrative staff
 - Cars / trucks for management / administrative staff
 - Insurance and bond costs (unless separately addressed by contract).
- Isolate the jobsite overhead (time-related) costs
 - Eliminate one-time expenses
- Select aggregate period of costs used to determine the daily rate
- Different approaches:
 - Averaging the costs over the entire project length
 - Selecting a reasonable time covering the period(s) in which the impact(s) occurred
 - Evaluating the costs incurred after the original contract completion date
- No one-size-fits-all approach

Jobsite Overhead

- Contracts may include provisions that stipulate (or liquidate) an amount the contractor will be paid
- For some projects, the Bid Form includes a line-item for the contractor to specify the daily overhead rate it will receive for a compensable delay
 - May be a consideration for determining the entity to whom the project will be awarded
 - Calculation, form and breadth of coverage may vary substantially as they are creatures of contract

Increased Field Overhead Costs

Time Related Costs Calculation

- Identify Cost Components Which Are Time Related
- Review Indirect / Field Office Overhead Costs Over Time To Aid In Determining Which Are Time Related
- Screen the Pool for One-Time Costs
- Calculate A Daily Or Monthly Rate For Time Related Costs

Jobsite Overhead Costs

Sample of Cost Classifications

<i>Time-related</i>	<i>Not Time-related</i>
Rent	Insurance based on Contract Price
Utilities	Consultant Fees
Office Supplies	Temporary Structures
Janitorial Services	Job Office Set Up
Project Management	Mobilization
Safety Department	

Jobsite Overhead Costs

- Small tools?
- Expanded general conditions?
- Equipment costs?

Home Office Overhead

- Costs that are expended for the benefit of the whole business
- Cannot be attributed or charged to any particular contract
- Fixed costs that are allocated on a pro-rata basis among various contracts

Home Office Overhead

- The *Eichleay* formula is most common method used for the calculation of home office overhead costs:

$$\begin{array}{l} 1. \quad \frac{\text{Delayed Contract Billings}}{\text{Contractor's Total Billings}} \times \text{Total Home Office Expenditures} = \text{Overhead Allocable to Contract} \\ \\ 2. \quad \frac{\text{Overhead Allocable to the Contract}}{\text{Days of Contract Performance}} = \text{Overhead Allocable Per Day} \\ \\ 3. \quad \text{Daily Overhead Rate} \times \text{Days of Delay} = \text{Extended / Unabsorbed Overhead} \end{array}$$

Home Office Overhead

- Three requirements for utilizing the *Eichleay* formula:
 - Owner-imposed delay occurred;
 - The owner required the contractor to ‘standby’ during the delay
 - While ‘standing by,’ the contractor was unable to take on additional work
- See *Broward County v. Brooks Builders, Inc.*, 908 So. 2d 536, 540 (Fla. 4th DCA 2005)
- See *Martin County v. Polivka Paving, Inc.*, 44 So. 3d 126, 131 (Fla. 4th DCA 2010)

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 - Other Damages Concepts

Expanded Jobsite Overhead

- Distinct from extended jobsite overhead
- Increase in the resources assigned to a project (facilities, equipment, management staff, administrative staff, supervisory staff, or otherwise)
- Typically intended to handle substantial amounts of extra work or to mitigate / overcome delays or impacts encountered on the project.
- Usually readily-identifiable for purposes of pricing
- Ensure that the costs have not been duplicated

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Acceleration

- Any action taken to increase the rate work is accomplished (compared with the planned rate)
- Normally implemented in an effort to mitigate / overcome delays or impacts
- Typical acceleration measures:
 - Re-sequencing the work
 - Extending work hours / paying premium time
 - Offering incentives / bonuses for increased productivity
 - Other creative solutions.

Acceleration

- Discretely added resources or changes to how the work is performed are, for the most part, readily-identifiable for purposes of pricing
 - However, disputes may arise as to whether the originally-provided resources were sufficient
- Debates sometimes arise when the acceleration measures were implemented, but were unsuccessful
- Working longer hours, crowding crews and other accelerative measures can have diminishing returns on the productivity achieved per worker or per crew
 - Segregating the inefficiency costs from the acceleration costs can be challenging
- Another challenging situation arises when acceleration measures are implemented (to overcome / mitigate delays), but new or further impacts occur, which delay the accelerated work
- Care must be taken to ensure that costs are not duplicated through pricing the discrete components of a claim.

Acceleration

- Contractor reasons:
 - Make up for contractor delays
 - Achieve bonus incentives
 - Avoid unfavorable weather
 - Coordinate with another project
- Owner reasons:
 - Need facility – political forces
 - Regulatory requirements
 - Mitigate impacts
- Debates often arise due to mixed responsibility for project impacts

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Consequential Damages

- Are separate from increased activity-related costs and time-related costs
- Generally, consequential damages are those that do not “naturally flow” from breach of a contract
- Specific to a contractor, examples may include:
 - Financing costs
 - Reputational damage
 - Loss of goodwill
 - Lost profits on other projects
 - Losses of or impaired bonding capacity
 - Lost bidding opportunities
 - Insolvency and bankruptcy

Consequential Damages

- Due to the inherent nature of consequential damages (not flowing directly from a breach), recovery is difficult
 - Typically only be available in limited circumstances.
- Claimant must prove that:
 - Any loss was (or should have been) within the reasonable contemplation of the parties
 - Loss was not remote, contingent or conjectural
 - Damages are reasonably certain
- Waivers of consequential damages are common in construction contracts
 - Valid and enforceable under FL law
 - Must be clearly and unambiguously drafted

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Types of Damages Suffered by an Owner

- Defective and/or incomplete work
 - Reasonable Costs of Construction
 - Economic Waste
- Delays/Liquidated Damages

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Defective and/or Incomplete Work

- The Florida Supreme Court case:
 - *Grossman Holdings Ltd. v. Hourihan*, 414 So. 2d 1037 (Fla. 1982)
 - Establishes the measure of an owner's damages where the contractor's breach involves defective or unfinished construction. Contractor infamously built a mirror image of the house purchased by the Hourihans
 - Hourihans sued for specific performance (i.e., tearing down and rebuilding the home facing the proper direction)
 - Trial court found that the contractor breached the contract, but refused to require specific performance.
 - It would be economically wasteful

Defective and/or Incomplete Work

- On review, the Florida Supreme Court adopted Subsection 346(1)(a) of the Restatement (First) of Contracts:
 - (1) For a breach by one who has contracted to construct a specified product, the other party can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows:
 - (a) For defective or unfinished construction he can get judgment for *either*
 - (i) the *reasonable cost of construction and completion* in accordance with the contract, if this is possible and *does not involve unreasonable economic waste; or*
 - (ii) the *difference between the value* that the product contracted for would have had and the value of the performance that has been received by the plaintiff, *if construction and completion* in accordance with the contract *would involve unreasonable economic waste*

Reasonable Costs of Construction

- “Reasonable cost[s] of construction” has been the subject of dispute in numerous Florida cases
- General rule:
 - Non-defaulting party must show actual expenditures incurred due to the breach
 - Defaulting party may present their evidence to prove waste, extravagance and lack of good faith
- Actual costs may include items reasonably necessary to accomplish the work, such as engineering and architectural fees, among other things.

Economic Waste

- Where the actual cost of correcting the work would result in economic waste (out of proportion to the good to be attained)...
 - Appropriate measure of damages is the difference between the value of the defective structure and that of the structure if properly completed
 - “Diminution in value” damages
- Florida Supreme Court expressly found that the doctrine of economic waste is not limited to commercial construction
 - Applies to residential construction as well
 - *See Grossman Holdings Ltd. v. Hourihan*, 414 So. 2d 1037 (Fla. 1982)

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Delays/Liquidated Damages

- Where a contractor fails to complete a project timely, the owner may be entitled to delay damages, including:
 - Out-of-pocket costs directly associated with the project (e.g., extended project office, administrative staff, architectural, engineering and/or inspection costs)
 - Owner may also suffer loss of use damages, which may take several forms:
 - Extended rental / lease costs for another facility until construction is complete;
 - Loss of income from the uncompleted project;
 - Loss of toll income;
 - Loss of income from a sports stadium / arena;
 - Loss of rental income for an office building or apartment complex; and
 - Increased financing costs
 - Extended construction loan period (at higher rate than permanent loan); or
 - Increased rate due to expiration of guaranteed rate period
 - Depending on the circumstances, the delay damages incurred may be consequential (rather than direct) damages

Delays/Liquidated Damages

- Due to the uncertainties with the types / amounts of delay damages, parties often agree to liquidated damages (LD) rate
- Florida law is well-settled –parties may agree in advance on an amount to be paid as LD's
- Two-part test for whether LD's clause will be upheld (or stricken as an unenforceable penalty):
 - The damages due to a breach must not be readily ascertainable.
 - The LD rate must not be so grossly disproportionate to any damages that might reasonably flow from a breach

Delays/Liquidated Damages

- LD's provisions are creatures of contract
 - May specify varying assessments of LD's for different types of failures
 - Distinct LD's can be set for failure to meet:
 - Specified interim milestones,
 - Substantial completion, and/or
 - Final completion
- A party cannot recover both LD's and actual damages for the same harm
 - However, an LD's provision may be designed to cover only certain categories of delay damages
 - And leave other categories to be assessed based on actual costs incurred
 - Example, a toll road owner could specify that contractor-caused delays would result in:
 - Assessment of actual damages for extended administrative, engineering and inspection costs, AND
 - LD's for the anticipated loss of toll income resulting from delayed completion
 - KEY: counsel drafting such provisions must ensure they are unambiguous

Damages Concepts Regarding Specific Causes of Action

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Breach of Contract

- Establish liability for a breach
- Injured party is entitled to compensatory damages
 - Sufficient to return to as good a position as he or she would have enjoyed had the breaching party fully performed
- Recoverable damages:
 - Flow naturally from the breach
 - Were foreseeable by the breaching party at the time the contract was entered
- Typically measure damages from the date of the breach

Breach of Contract

- Substantial Performance:
 - Not full performance, but nearly equivalent to what was agreed
 - Subject to recovery of damages caused by promisee's failure to render full performance
 - Ex: An Owner may deduct the reasonable costs of correction or completion, where contractor substantially (but not fully) performs
 - Normally a question of fact
 - Under appropriate circumstances, the issue of substantial performance can be withdrawn from the jury and determined as a matter of law

Breach of Contract

- Partial Performance:
 - A contract that has not been fully or substantially performed
 - Percentage of completion is not competent evidence to prove damages for partial performance
 - Measure of recovery is either in quantum meruit or the reasonable cost of partial performance plus lost profits
 - *Quantum Meruit*:
 - The reasonable value of the labor performed and materials supplied
 - Designed to restore the contractor to the same position he would have been in, prior to making the agreement
 - Lost Profits:
 - Lost profits plus the reasonable cost of labor and material expended in partial performance
 - Lost profit can be established by subtracting the total costs for services and materials necessary to complete the contract from the contract price
 - » Must also deduct the actual supervisory salary it paid and any other non-reimbursable operating expenses and costs (*e.g.*, home office expenses and overhead)
 - Must establish lost profit to a reasonable degree of certainty
 - Cannot be based on mere speculation or conjecture.

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Negligence

- Plaintiff must prove the extent of injuries, and that they were proximately caused by the Defendant's negligence
- Must generally allege a bodily injury or property damage
- Negligence claims for purely economic losses are recognized only in limited circumstances

Negligence

- **Economic Loss Rule:**
 - Judicially created
 - Stated with ease but applied with great difficulty
 - Prior to *Tiara*, there were three distinct forms of the economic loss rule:
 - *Products liability economic loss* rule: If a product physically damages **only itself**, causing additional economic loss, no recovery is permitted in tort.
 - *Contract economic loss* rule: If parties have entered into a contract, the contract's obligations cannot be used to establish a tort claim for the recovery of purely economic damages...
 - There must be a separate, 'independent tort.'
 - *Negligence economic loss* rule: Common law negligence will not be expanded to protect economic interests in the absence of personal injury or property damage...
 - Unless a strong public policy requires expansion of the common law to protect specific economic interests

Negligence

- In 2013, the Florida Supreme Court expressly limited the economic loss rule to products liability cases
- *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*, 110 So. 3d 399 (Fla. 2013).
- The Court reasoned that “[o]ur experience with the economic loss rule over time, which led to the creation of exceptions to the rule, now demonstrates that expansion of the rule beyond its origins [as only applying to product liability cases] was unwise and unworkable in practice.”

Negligence

- Concurring opinion (Justice Pariente)
 - Contrary to assertions otherwise, the *Tiara* decision was “neither a monumental upsetting of Florida law nor an expansion of tort law at the expense of contract principles.”
 - Trial courts can still dismiss tort claims interconnected with contract claims based on “basic contract principles”
 - Also, a party seeking to assert a valid tort claim “must demonstrate that all of the required elements for the cause of action are satisfied, including that the tort is independent of any breach of contract claim.”

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Professional Negligence

- Even before *Tiara*, claims for professional malpractice or professional negligence were not limited by the ELR, regardless of whether the parties were in privity
- An aggrieved party may file a tort action for professional malpractice *and* pursue a cause of action for breach of the contract pursuant to which the professional services were performed.
- The contract between an engineering firm and an aggrieved party does not eliminate the professional obligation of the employee-professional who actually renders the services
- The Florida Supreme Court declared that Florida law recognizes a cause of action against an individual for professional negligence whether or not the individual practices through a corporation
 - See *Moransais*, 744 So. 2d 973 at 977-982

Professional Negligence

- The Florida Supreme Court did not specifically address whether an individual professional may be insulated by a limitation of liability provision
 - A Third DCA opinion (*Witt v. La Gorce Country Club*) highlighted the extra-contractual nature of such a claim
 - Interpreted *Moransais* to mean that a cause of action in negligence exists irrespective, and “essentially independent,” of a professional services agreement.
 - Consequently, refused to enforce a limitation of liability provision in the professional services agreement in favor of an employee-professional.

Negligent Misrepresentation

- Restatement (Second) of Torts § 552B describes the damages recoverable for negligently supplying false information for the guidance of others
 - (1) The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause, including
 - (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
 - (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.
 - (2) the damages recoverable for a negligent misrepresentation do not include the benefit of the plaintiff's contract with the defendant.
- No Florida cases have specifically adopted section 552B
 - However, several Florida cases have cited section 552 with approval when discussing negligent misrepresentation generally

Quantum Meruit

- Quantum meruit claims are based on an implied contract
- The elements are:
 - the provision of goods or services of value by the plaintiff;
 - which are assented to and received by the defendant; and
 - where, in the ordinary course of events, a reasonable person would expect to pay for the benefit provided.
- Recoverable damages are to restore the contractor to the same position in which he would have been prior providing the benefit
 - Are based on the *reasonable value* of the labor, materials and services actually furnished
- An implied contract cannot be relied upon where an express contract governs the parties' rights and obligations

Unjust Enrichment

- Based on a legal fiction that implies a contract as a matter of law
 - Even though the parties never indicated by deed or words that an agreement existed between them
- The elements are:
 - a benefit conferred on the defendant by the plaintiff;
 - the defendant has knowledge of the benefit;
 - the defendant has accepted or retained the benefit; and
 - the circumstances are such that it would be inequitable to retain the benefit without paying fair value for it
- Damages are based on the value of the benefit conferred and accepted
 - Are not based on the costs incurred to provide

Implied Warranty

- A buyer is entitled to both incidental and consequential damages that are proximately caused by the breach of implied warranty

Open Account and Account Stated

- Open account is essentially an action to collect on a debt created by a series of credit transactions
 - Unlike an account stated, the debt remains unsettled as between the creditor and debtor
 - Plaintiff may recover the account balance resulting from the series of credit transactions
- In contrast, an account stated action involves an agreement between persons who have had previous transactions, fixing the amount and promising payment.
 - In the absence of an agreement, no recovery for an account stated theory is permitted
 - The balance, not the constituent items, constitutes the cause of action on the account.
 - The action is based upon the promise, express or implied, to pay the balance agreed upon
 - The agreed upon balance is the measure of damages.

Intentional Interference with Contract/Business Relationship

- Measure of damages is the loss of either property or personal benefit caused by the interference
- Objective is to put the plaintiff in the same economic position it would have been in had the contract not been interfered with
- Plaintiff is entitled to damages “reasonably flowing” from the interference

Fraud

- Damages are determined by the “benefit of the bargain” rule or the “out-of-pocket” rule
 - Benefit of bargain: awards the difference between the actual value of the property and its value had the alleged facts regarding it been true
 - Out-of-pocket rule: awards the difference between the purchase price and the real or actual value of the property
- Punitive damages may also be recoverable
- Fraud in the inducement claims provides two alternative remedies:
 - Rescind the contract (*if* the parties can be returned to the positions they previously occupied)
 - Ratify the contract and seek damages

Rescission

- Rescission is an equitable remedy devised by courts where monetary damages are inadequate or where one party, having a right, *elects* that remedy
- Concept is to restore the *status quo*
 - Placing the parties in the positions they occupied before contracting with each other
- Rescission extinguishes the contract for all purposes
 - Precludes the recovery of the contract price
 - Also prevents the recovery of damages for breach of the contract
- The party rescinding may, however, have a right to restitution for any performance on his part.
- A contracting party rescinding for a breach or other good cause can usually recover for his or her partial performance

Unfair and Deceptive Trade Practices

- FDUPTA establishes an action to *obtain a determination* that an act or practice violates the Act *and to enjoin* a person who has violated, is violating, or is otherwise likely to violate the Act.
- Plaintiff may recover actual damages, plus attorney's fees and court costs.
- The court may require the party instituting the action to post a bond
 - To indemnify the defendant for any damages incurred, including reasonable attorneys' fees
 - Motion requesting the posting of a bond must allege that the action:
 - is frivolous,
 - is without legal or factual merit, or
 - has been brought for purposes of harassment

Civil Theft

- Must prove by clear and convincing evidence injury caused by a defendant's theft
 - May recover treble actual damages and reasonable attorney's fees and court costs
 - Prejudgment interest is available only on the amount of actual damages (not on the treble damages)
- Punitive damages may not be awarded under the civil theft statute.
- Civil theft claims are not precluded merely because of the existence of a contract or the economic loss rule;
 - However, must prove elements of a civil theft *independent from* acts that breached the parties' contract, and damages that are *separate from* those suffered under the breach of contract

Civil Theft

- Additional civil remedies for theft are provided in the criminal statutes (§812.035)
- May seek injunctive relief from threatened loss or damage without having to show irreparable harm
- Court may enjoin a defendant's violation of criminal theft statutes by
 - Ordering the defendant to divest himself or herself of any interest in any enterprise;
 - Imposing restrictions on the defendant's future activities or investments;
 - Ordering the dissolution or reorganization of any enterprise;
 - Ordering the suspension or revocation of any license, permit, or prior approval granted to any enterprise by any department or agency of the state; and
 - Ordering the forfeiture of the charter of a Florida corporation and its dissolution,
 - Or the revocation of the certificate of authorization of a foreign corporation

Common Law Civil Conspiracy

- Common law civil conspiracy is predicated on an agreement to either perform an unlawful act or to perform a lawful act by unlawful means
- Each act done pursuing a conspiracy by one of several conspirators is an act for which each conspirator is jointly and severally liable
- It is not presumed that a mere conspiracy *per se* results in damages
- Punitive damages may be recoverable

Florida's Civil Remedies for Criminal Practices Act, the Florida RICO Act, and the Federal RICO Act

- **Civil Remedies for Criminal Practices Act**
 - Cause of action for treble actual damages, upon a showing by clear and convincing evidence that he or she was injured
 - by another person's using proceeds (directly or indirectly) derived from a pattern of criminal activity to acquire an interest in or to establish or operate an enterprise;
 - from acquiring an interest in or control of an enterprise through a pattern of criminal activity;
 - from being employed by or associated with an enterprise for the purpose of participating in a pattern of criminal activity; or
 - from conspiring to do any of these preceding acts.
 - Plaintiff is entitled to a minimum of \$200 in damages.
 - Punitive damages may not be
 - Reasonable attorneys' fees and court costs may be recovered

Florida's Civil Remedies for Criminal Practices Act, the Florida RICO Act, and the Federal RICO Act

- **Florida RICO Act**

- Additional civil remedies are provided in the “Florida RICO
- Any person aggrieved by a violation of section 895.03 may seek injunctive relief
- Courts may enjoin violations of Florida’s RICO statute by:
 - Ordering the defendant to divest himself or herself in any interest in any enterprise;
 - Imposing restrictions on the defendant’s future activities or investments;
 - Ordering the dissolution or reorganization of any enterprise;
 - Ordering the suspension or revocation of any license, permit, or prior approval granted to any enterprise by any agency of the state; and
 - Ordering the forfeiture of the charter of a Florida corporation and its dissolution (or revocation of the certificate of authorization of a foreign corporation)

Florida's Civil Remedies for Criminal Practices Act, the Florida RICO Act, and the Federal RICO Act

- **Federal RICO Act**

- Plaintiff may recover treble (actual) damages, reasonable attorney's fees and court costs
- Prejudgment interest is awardable at the discretion of the court on the amount of actual (not the treble) damages
- Federal courts may also provide the same injunctive relief as the state courts can provide under the Florida RICO Act
- Though Florida's RICO Act is patterned after the federal RICO Act, there are differences, including:
 - Statute of limitation, and
 - Burden of proof

Florida Uniform Trade Secrets Act

- Actual or threatened misappropriation of trade secrets may be enjoined
 - Except to the extent that a material prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable
- Damages can include *both*:
 - Actual loss caused by misappropriation
 - The unjust enrichment caused by misappropriation that is not taken into account in computing actual loss
- Alternatively, the damages may be measured by imposition of liability for a reasonable royalty
- If willful and malicious, the court may award statutorily-limited exemplary damages

Copyright Law

- Particularly relevant to design professionals
- A copyright owner may recover:
 - Actual damages, and
 - Any additional profits of a copyright infringer not taken into account in computing the actual damages; or
 - Statutory damages
- Copyright owner is required to present proof only of the infringer's gross revenue
 - Infringer must prove deductible expenses and the elements of profit attributable to factors other than the copyrighted work
- Instead of actual damages, the copyright owner may elect to recover an award of statutory damages for all infringements involved in the action with respect to any one work
 - Not less than \$750 to not more than \$30,000
 - Election may be made any time before final judgment is rendered

Copyright Law

- Factors to be considered in determining statutory damages:
 - Expenses saved and profits reaped by the defendant in connection with infringements
 - Revenues lost by the plaintiff as a result of the defendant's conduct
 - Infringer's state of mind, that is, whether willful, knowing, or merely innocent
- If the infringement was willful, the court, in its discretion, may increase the statutory damages to not more than \$150,000
- Where the infringer was not aware and had no reason to believe that his or her acts constituted an infringement, the court, in its discretion, may reduce the statutory damages to not less than \$200
- Other than against the United States or an officer thereof... , full costs (including reasonable attorneys' fees) may be recovered
- Punitive damages are not available

Interest

- Prejudgment interest is an element of compensatory damages
- The loss theory of prejudgment interest is the law in Florida
 - A plaintiff's loss of the use of funds is itself a wrongful deprivation
- As interest is merely another element of pecuniary damages, once determined that a defendant is liable for calculated damages, interest should follow as a matter of law
 - From the date of loss
- The State's CFO sets (quarterly) the rate of interest payable on judgments and decrees
 - On December 1, March 1, June 1 and September 1 for the following quarter
 - Does not affect the interest rates established by written contract
- Post-judgment interest: judgment shall bear, on its face, the rate of interest that is payable on the judgment
 - When a judgment is obtained, the interest rate is established
 - The interest rate is adjusted annually on January 1 to the interest rate in effect on that date as set by the State's CFO until the judgment is paid

Attorneys' Fees and Costs

- Attorneys' fees incurred prosecuting or defending a claim are not recoverable in the absence of a statute or contractual agreement authorizing recovery
- “[T]he party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney’s fees.”
 - Note, however, that the Florida Supreme Court has held, in the context of a lien-foreclosure action, that a court may determine that neither party prevailed (*Trytek*)
- The “prevailing party” standard is not the standard for cost awards.
 - Section 57.041(1), Florida Statutes, provides that the *party recovering judgment* must be awarded costs

Chapter 558

Notice and Opportunity to Cure Act

Florida Construction Certification Review Course 2017

Gregg E. Hutt
Trenam Law

Chapter 558

Notice and Opportunity to Cure Act

- Purpose of 558
- Application of 558
- Compliance with 558
- Proper 558 Notice
- Procedures of 558
- Tolling the SOL by 558
- Limitations of 558
- Limitation of Liability for Design Professionals

Purpose of 558

- Dispute resolution
“mechanism”
- 558 not a civil proceeding
- “Confidential settlement negotiations”

“Chapter 558 encourages settlement by providing a procedure to lead the parties to the waters of compromise; it does not make them drink.”

“The statute does not forfeit substantive rights as a penalty for noncompliance...”

-- *Hebden v. Roy Kunnerman Constr.*


Application of 558

- When does 558 apply?
 - Contract for construction
 - Construction defect
 - Completion of the improvement

558 does not apply to alleged personal injuries arising out of alleged construction defects

Application of 558 Contract for Construction

All contracts
unless parties
OPT OUT



A horizontal black line represents a timeline. A vertical red line intersects this black line at a point. From the top of this vertical red line, a horizontal red arrow points to the right, indicating the duration of the application of the 558 Contract for Construction.

Oct. 1,
2009

Application of 558

Contract for Construction

- After Oct. 1, 2009:
 - Written opt out agreement
 - Note use of “potential defendant”

All contracts for improvements made after Oct. 1, 2009, unless the claimant and *potential defendant* have agreed in writing to opt out of the requirements of Chapter 558

Application of 558

Contract for Construction

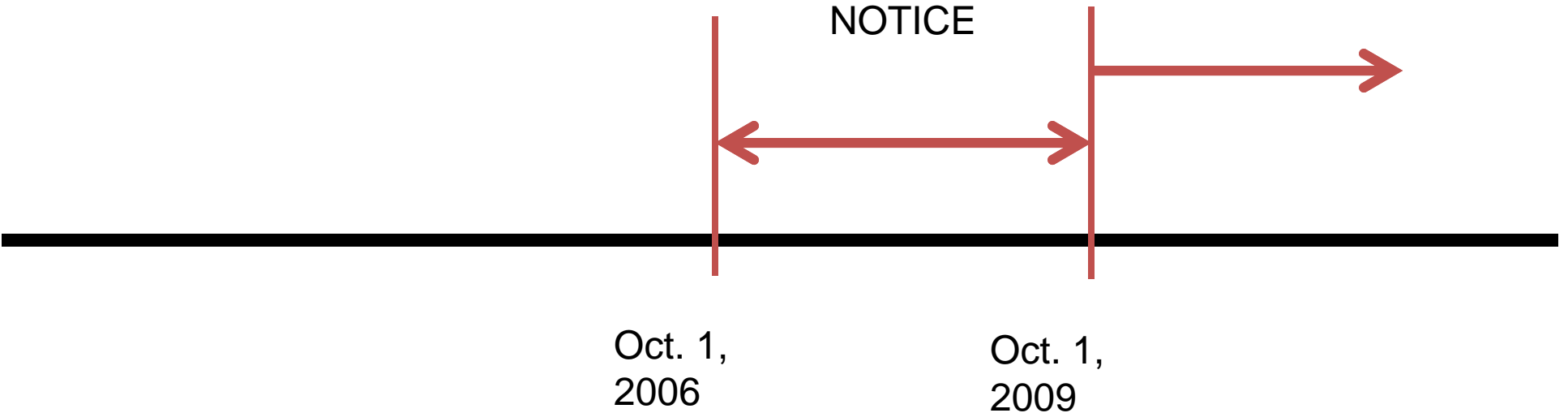
- After Oct. 1, 2009:
 - “Requirement” for contractual statutory notice, but...
 - No penalty for failure to include notice

**“ANY CLAIMS FOR
CONSTRUCTION DEFECTS
ARE SUBJECT TO THE
NOTICE AND CURE
PROVISIONS OF CHAPTER
558, FLORIDA STATUTES”**

Application of 558 Contract for Construction

All contracts
provided the
written agreement
includes
STATUTORY
NOTICE

All contracts
unless parties
OPT OUT



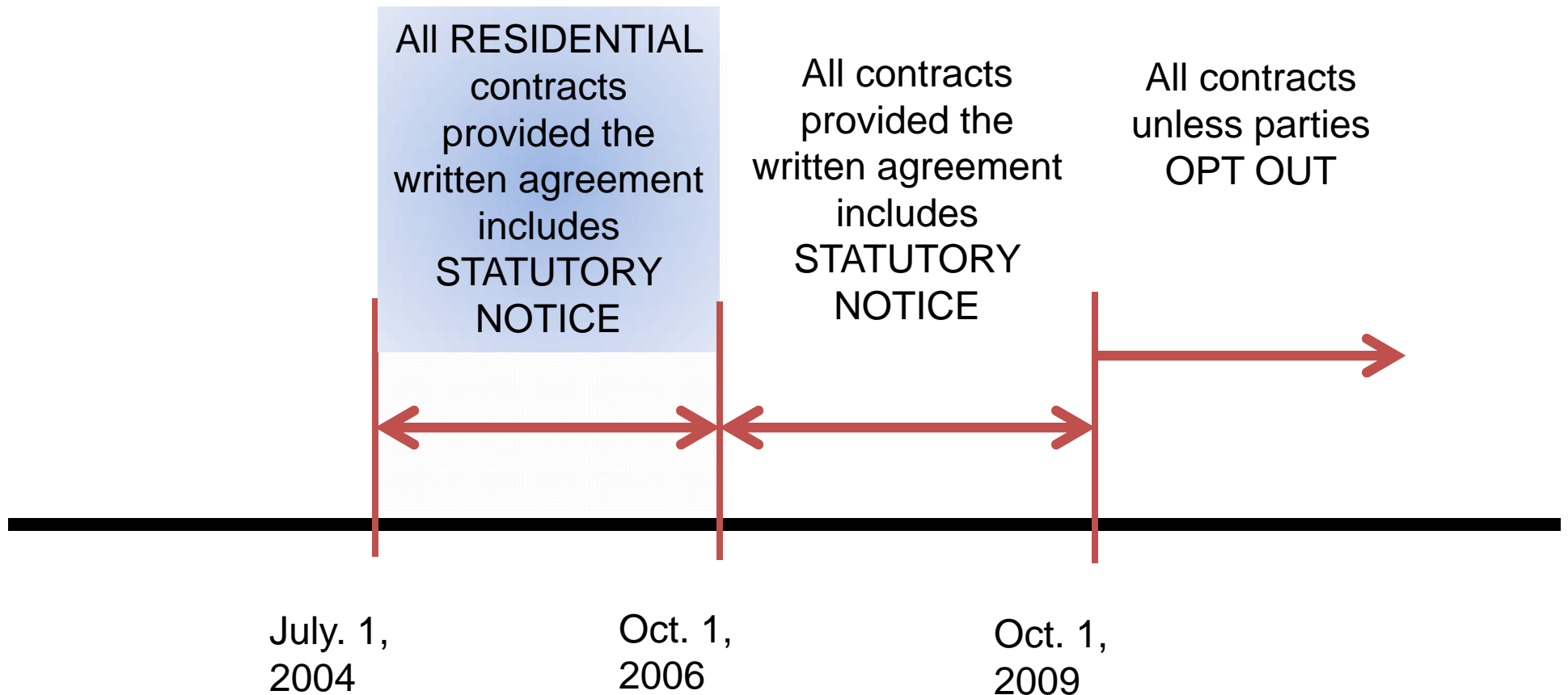
Application of 558

Contract for Construction

- Notice Between Oct. 1, 2006 and Sept. 30 2009:

CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE, REFERRING TO CHAPTER 558, OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.

Application of 558 Contract for Construction



Application of 558

Contract for Construction

Notice Between Oct. 1, 2006
and Sept. 30 2009:

CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE, REFERRING TO CHAPTER 558, OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.

Notice Between July 1, 2004
and Sept. 30, 2006:

CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT **IN YOUR HOME**. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE, REFERRING TO CHAPTER 558, OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.

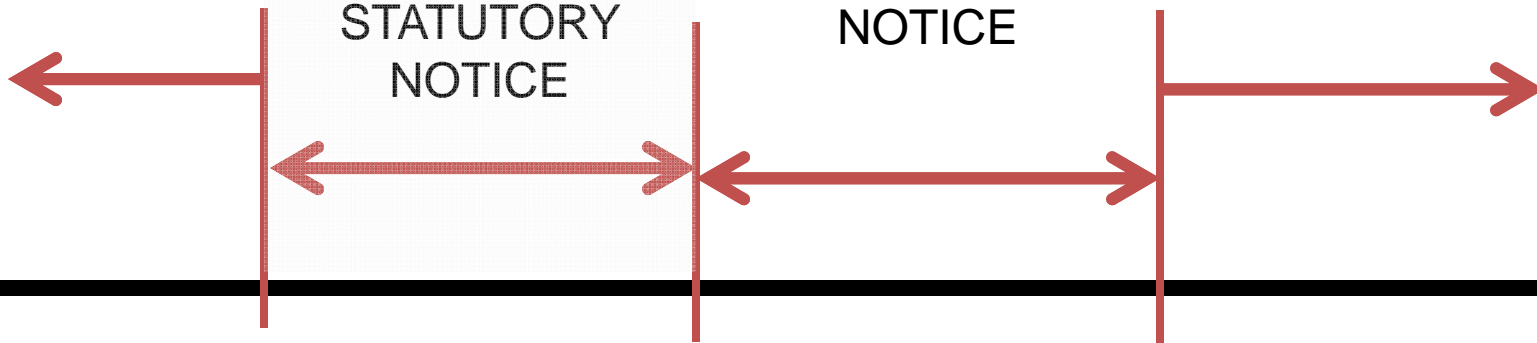
Application of 558 Contract for Construction

All contracts for which an action has accrued but not yet commenced

All RESIDENTIAL contracts provided the written agreement includes STATUTORY NOTICE

All contracts provided the written agreement includes STATUTORY NOTICE

All contracts unless parties OPT OUT



July. 1,
2004

Oct. 1,
2006

Oct. 1,
2009

Application of 558

Construction Defect

Construction Defect

- Design
- Specification
- Surveying
- Planning
- Supervision
- Observation
- Construction
- Repair
- Alteration
- Remodeling

On Real Property

- Improved land
- Improvements on the land
- Fixtures in the improvements
- Manufactured housing
- Mobile homes

Real property does not include public transportation projects

Resulting From

- Defective products
- Violation of code
- Design falling below S.O.C.
- Construction falling below accepted trade standards

Application of 558

Completion of Building or Improvement

- Defined to mean:

The governmental body having jurisdiction over the project issues a certificate that allows for occupancy or use of the entire building

OR

There is substantial completion of the building or improvement according to the plans and specifications, if the governmental body having jurisdiction over the project does not issue certificates of occupancy

Application of 558

Completion of Building or Improvement

- Where a certificate is issued:
 - Definition includes a temporary certificate of occupancy or use...
 - ...of the “entire building”
 - Note that temporary use is a 2015 change

What about a temporary certificate that allows partial use of a building in a phased project?

Compliance with 558

- Compliance not required if there is no completion of the building or improvement
- Claimant's action stayed until compliance
- Compliance not required with unlicensed contractors
- Compliance required for each and all defects

558 Notice not intended to interfere with owner's ability to complete a project that has not been substantially completed

Compliance with 558

- Multiple Claims
- Subsequent Claims
 - Initial list may be amended as defects become known

The court shall allow the action to proceed to trial only as to alleged defects that were noticed and for which the claimant has complied with 558 and as to defects reasonably related to, or caused by, the defects previously noticed

Proper 558 Notice

Form and Content



■ Previous Requirements

- Describe claim in reasonable detail sufficient to determine the general nature of each defect
- Describe damage or loss resulting from the defect, if known

Current Requirements

- Based on visual inspection
- Describe nature of each defect in reasonable detail
- Identify location of each defect sufficiently to locate it without undue burden

Proper 558 Notice

Form and Content

- Service Requirements
 - Certified mail
 - Hand delivery
 - Courier

Evidence of delivery is key

Procedures of 558

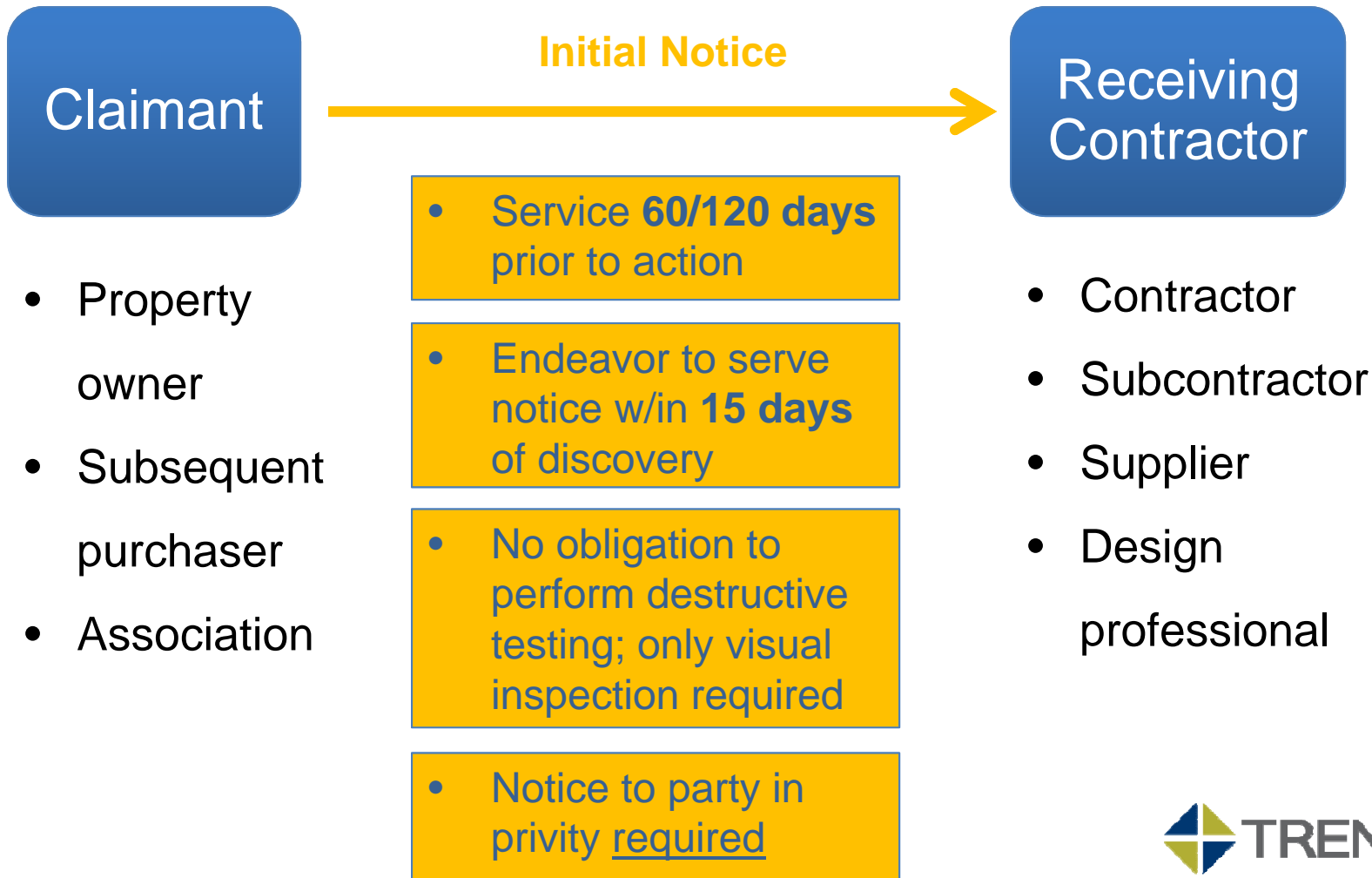
Overview

- 558 Notices
 - Initial Notice
 - Downstream Notice
- Inspection
 - Destructive Testing
- 558 Responses
- 558 Discovery

Note: 558 controls to the extent an arbitration clause in a contract for the sale, design, construction, or remodeling of real property conflicts with it

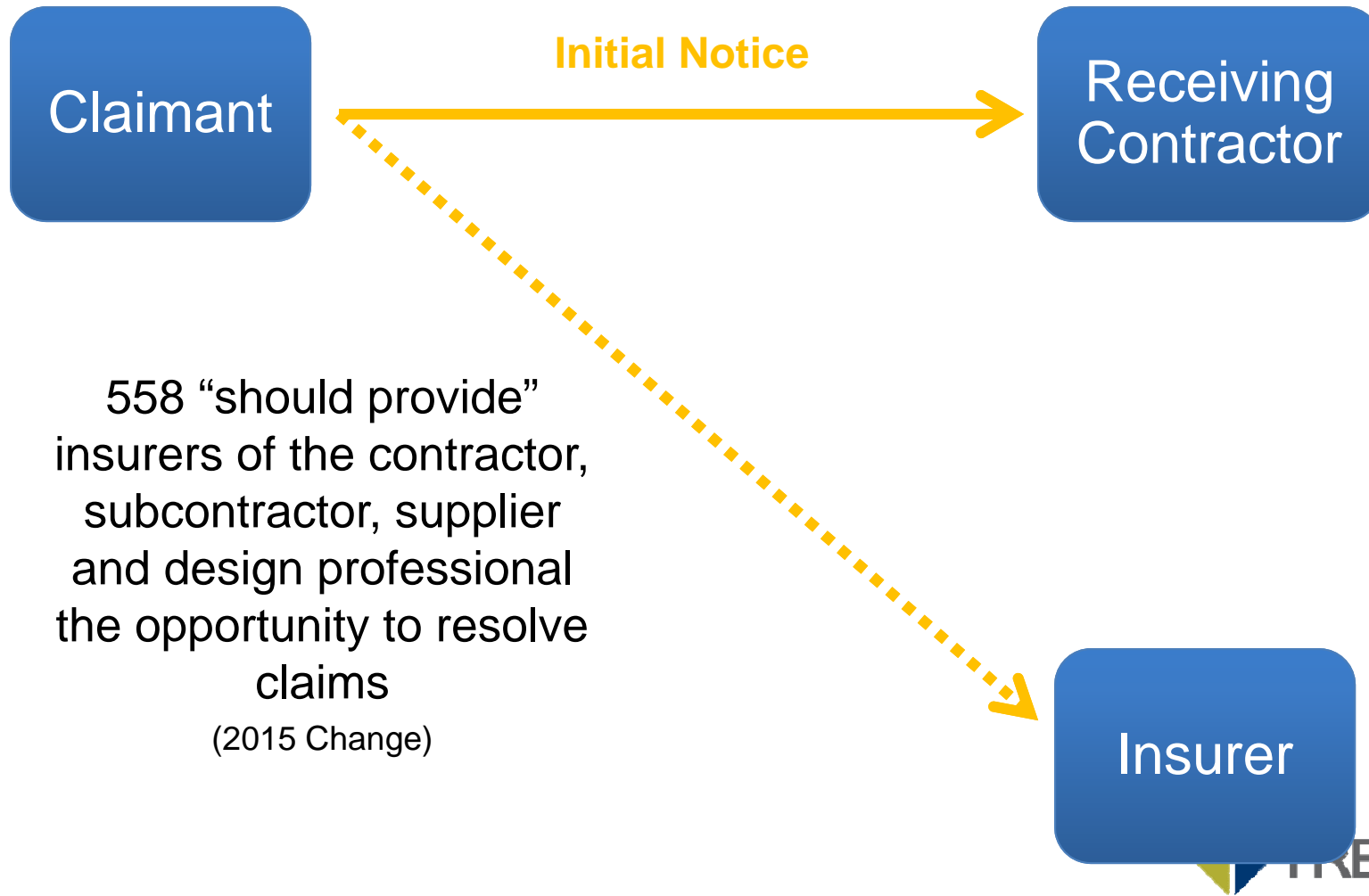
Procedures of 558

558 Notice of Claim



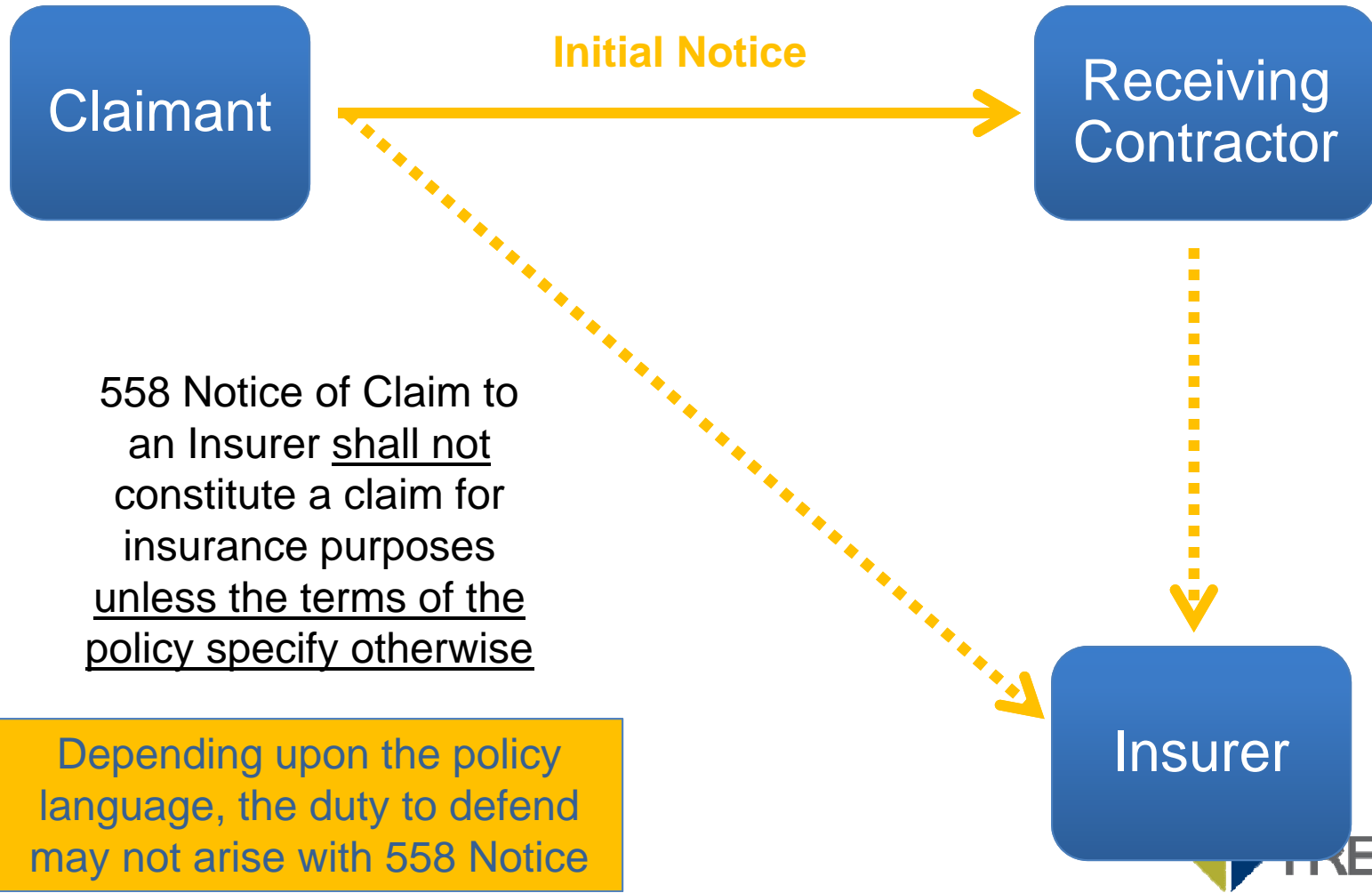
Procedures of 558

558 Notice of Claim

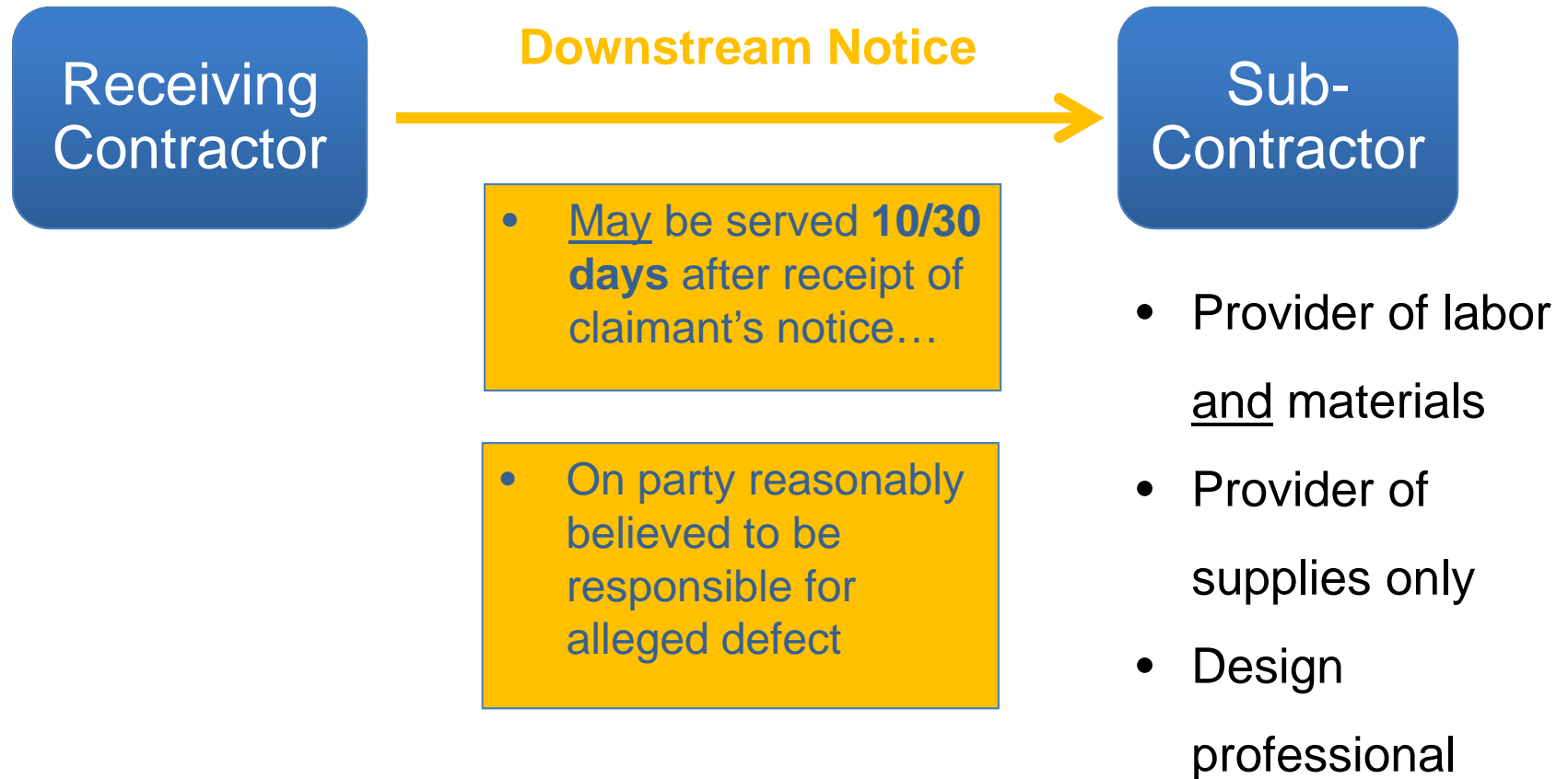


Procedures of 558

558 Notice of Claim

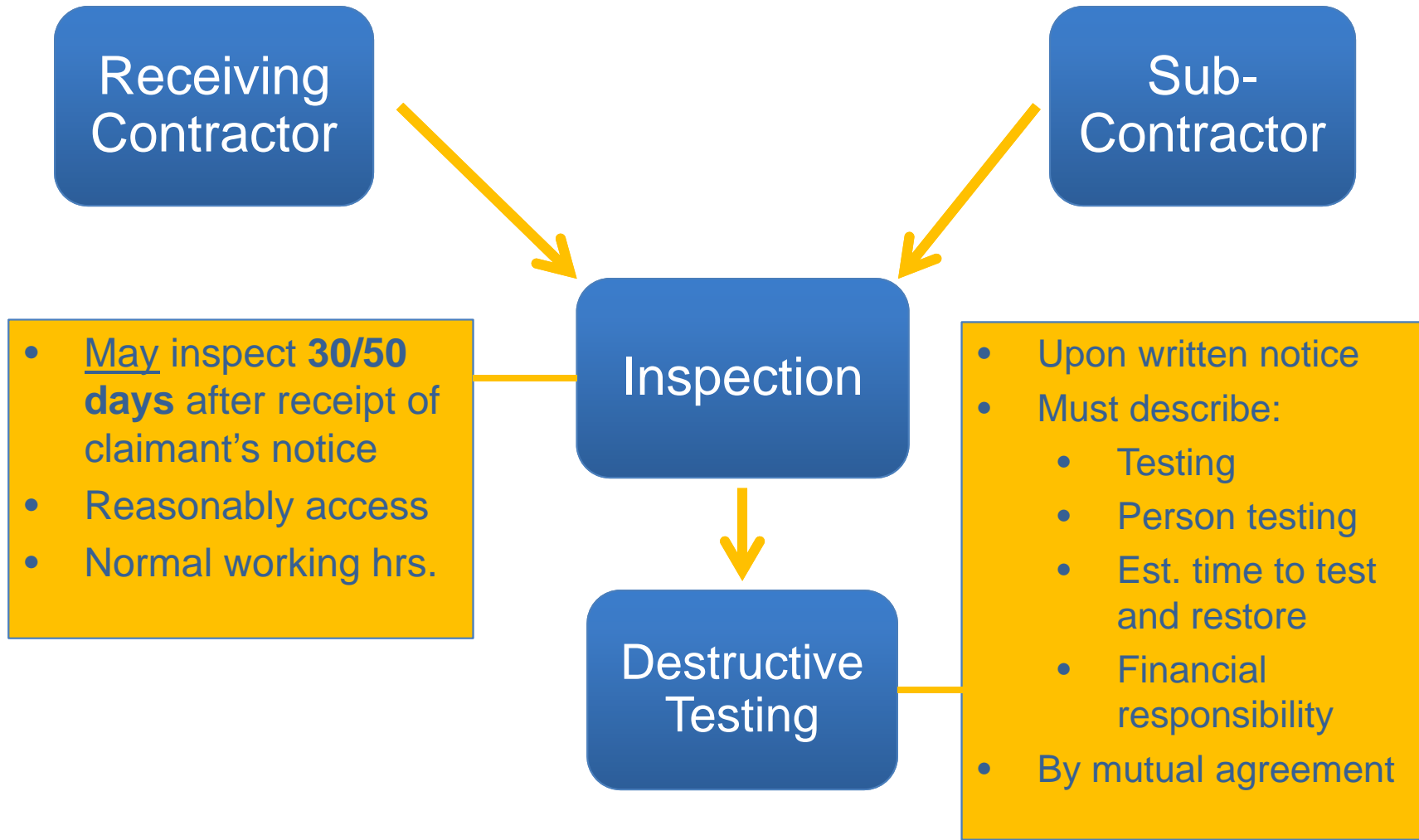


Procedures of 558 Downstream Notice



Procedures of 558

Inspection and Testing

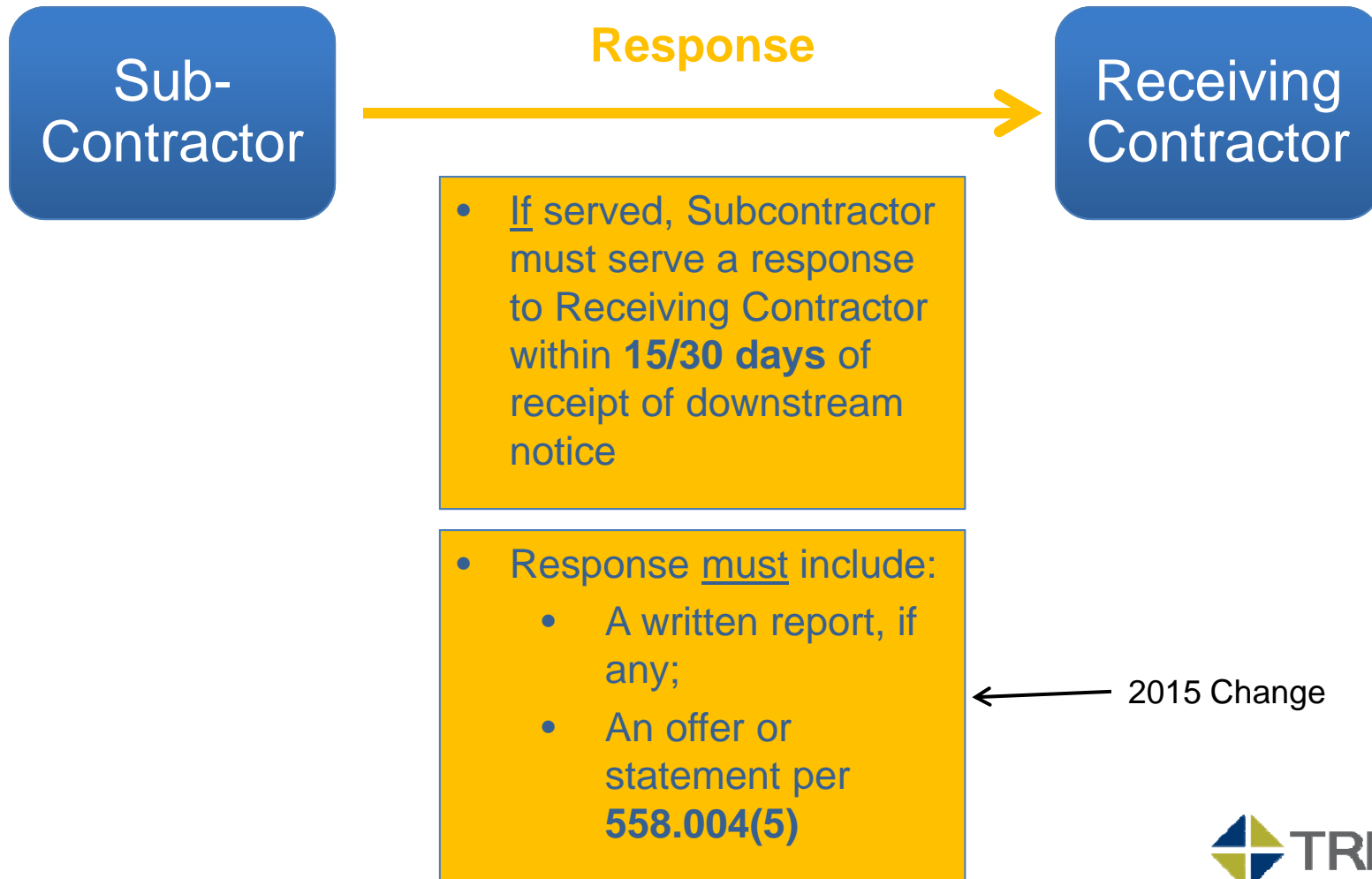


Procedures of 558

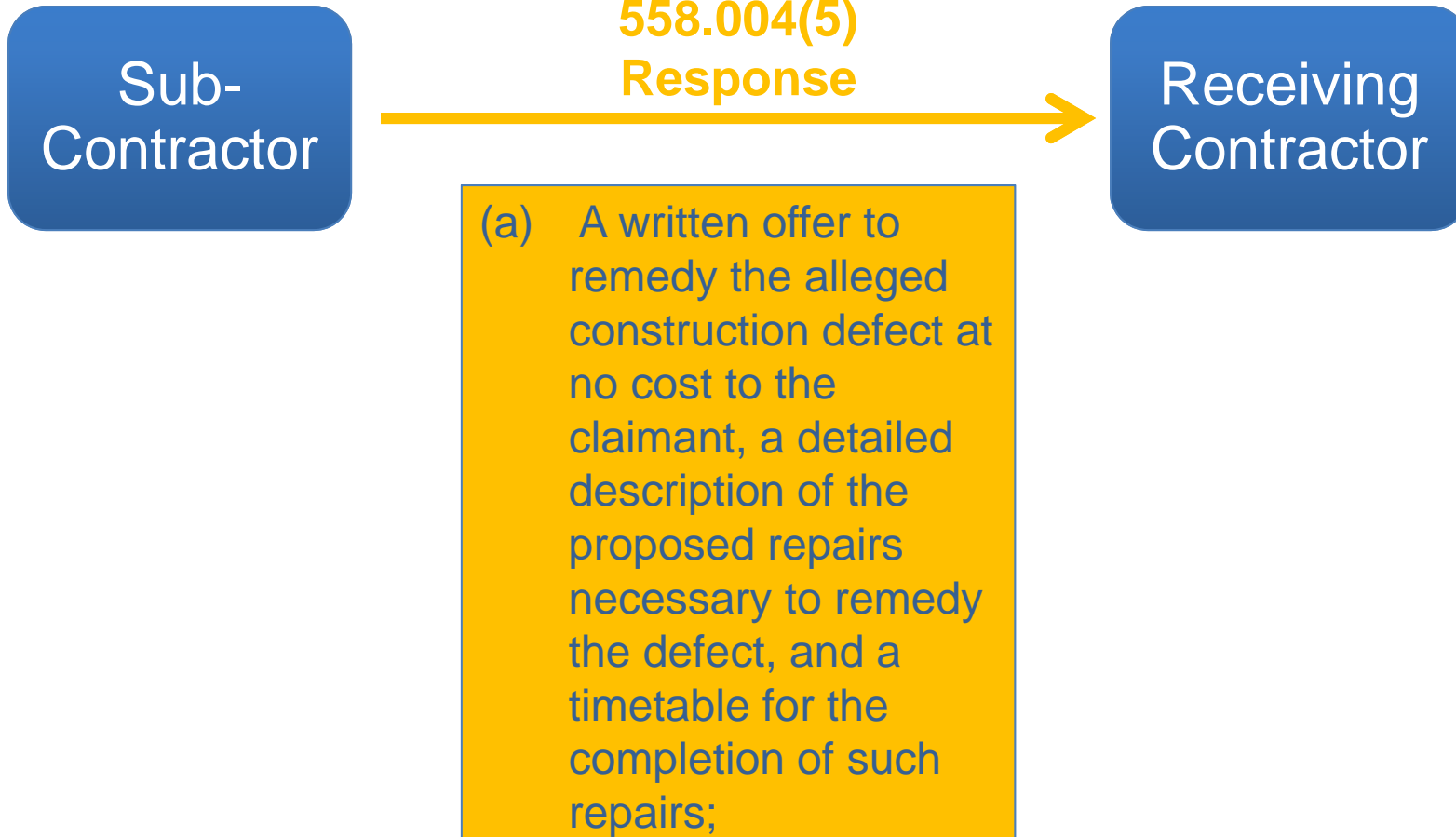
Inspection and Testing

- Destructive Testing
 - Shall not render property uninhabitable
 - Not subject to lien rights unless the owner contracts for testing or restoration
 - No damages to the extent destructive testing and remedy could have avoided or mitigated them

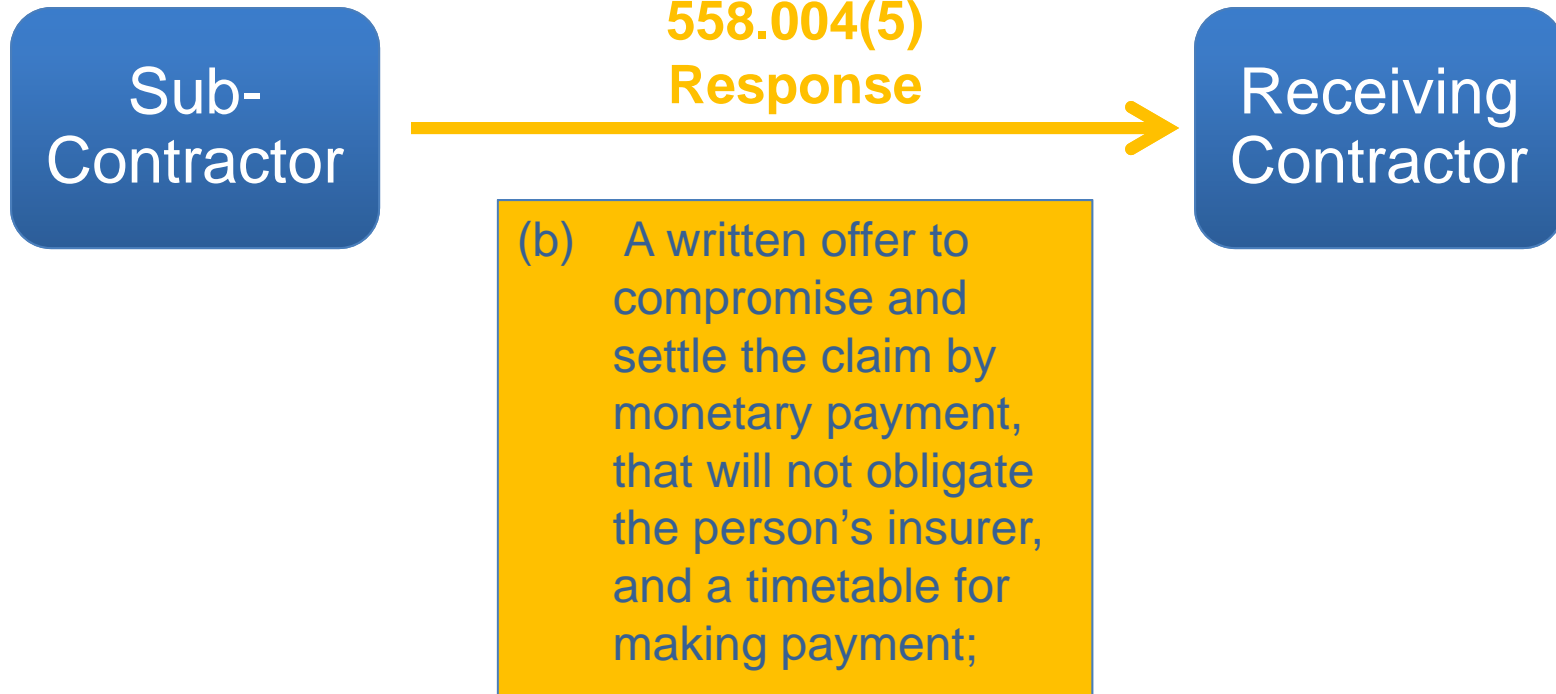
Procedures of 558 Downstream Response



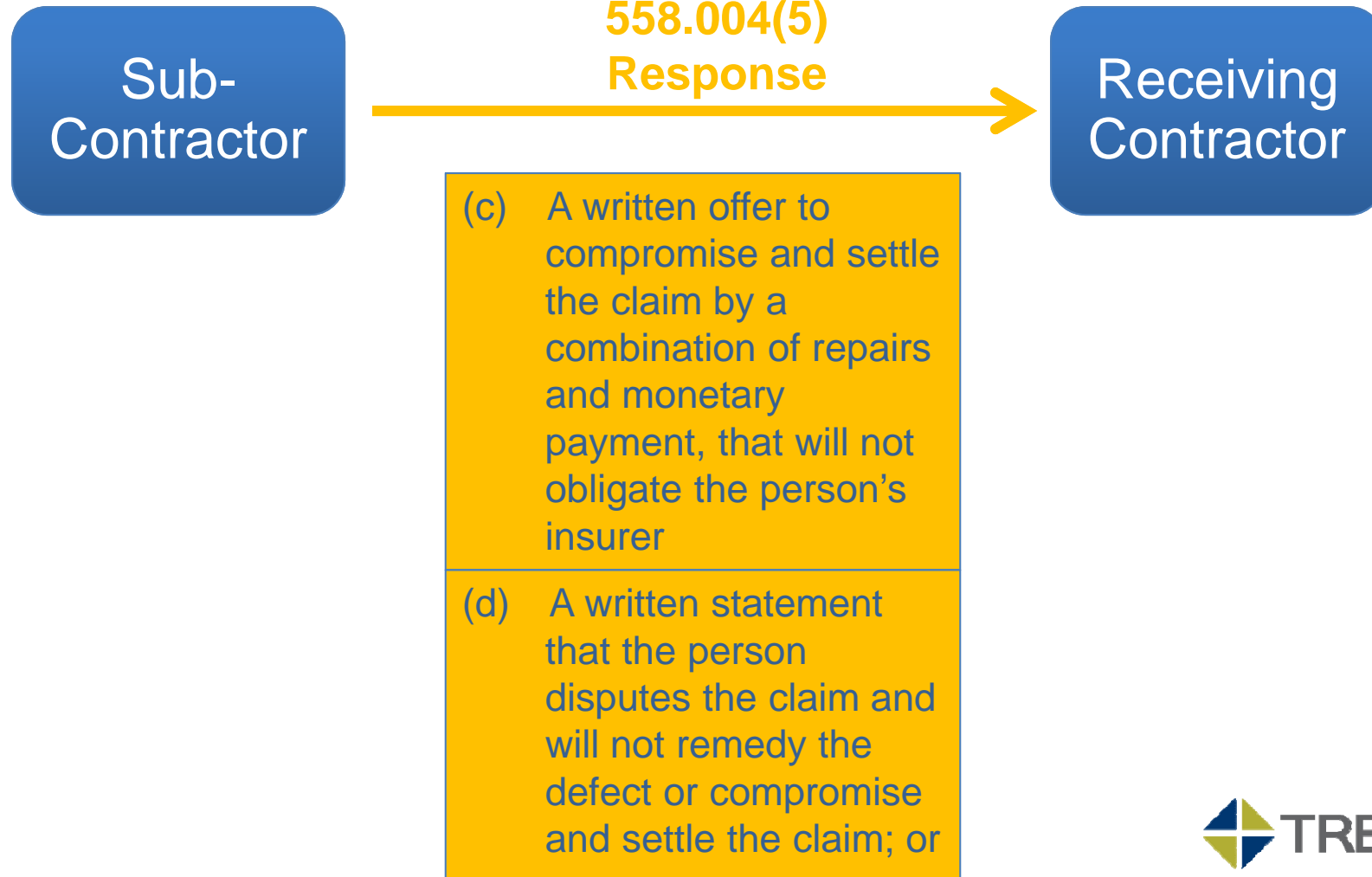
Procedures of 558 Downstream Response



Procedures of 558 Downstream Response



Procedures of 558 Downstream Response



Procedures of 558 Downstream Response

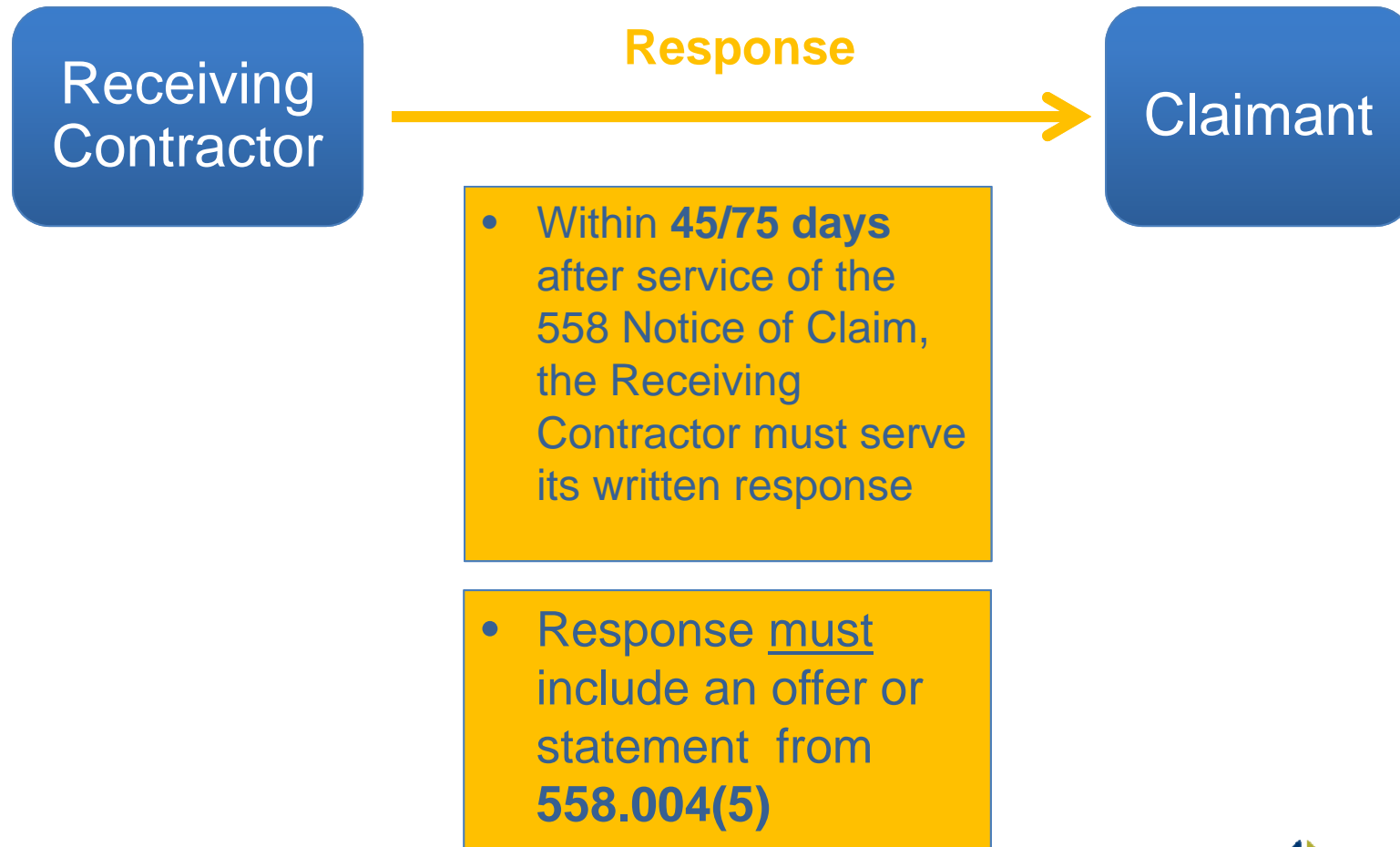


(e) A written statement that a monetary payment, including insurance proceeds, if any, will be determined by the person's insurer within 30 days after notification to the insurer...

A written statement under this paragraph may also include an offer under paragraph (c)...

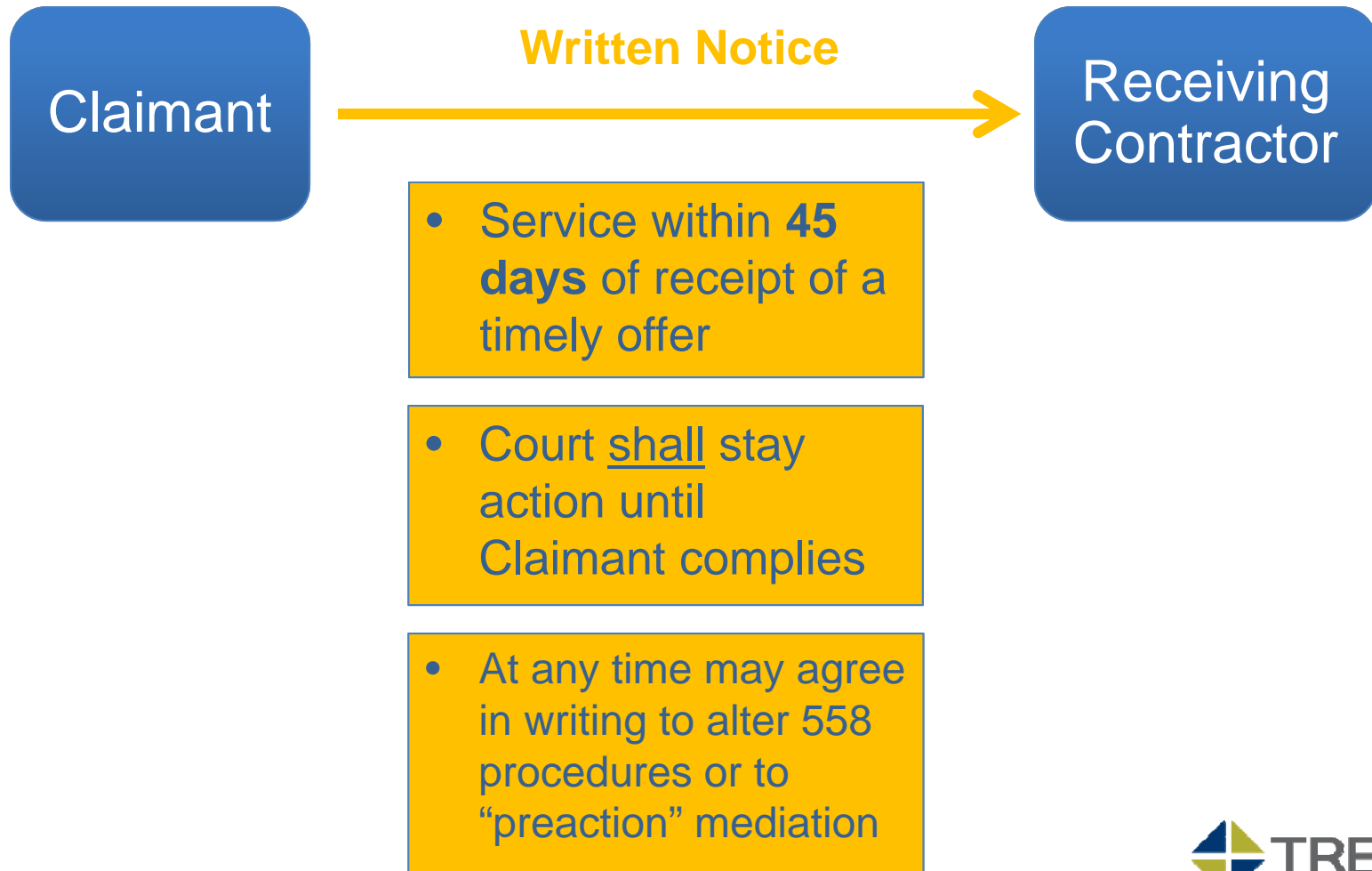
Procedures of 558

558 Response



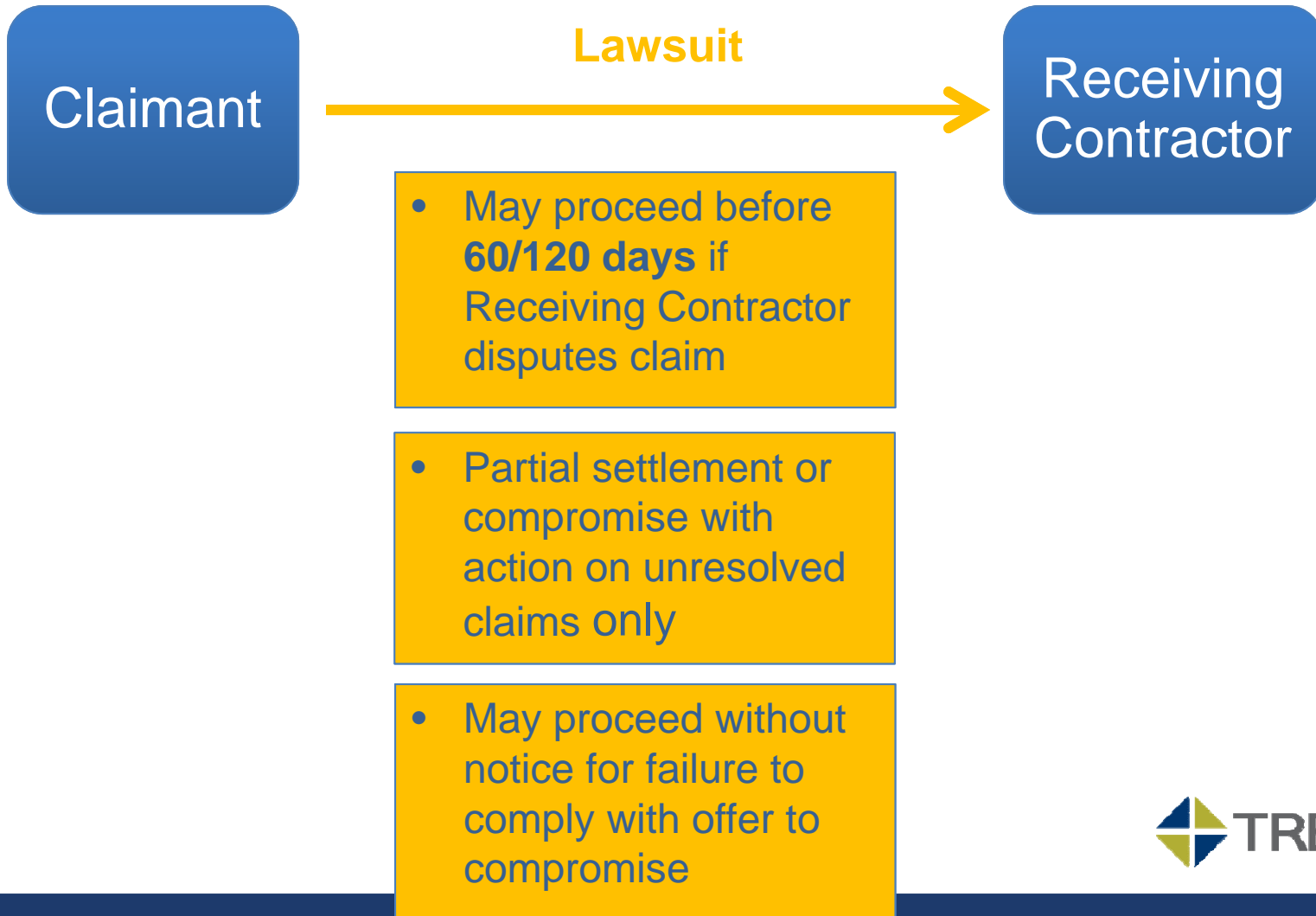
Procedures of 558

Notice of Acceptance or Rejection of Offer



Procedures of 558

Filing Suit



Procedures of 558 “Discovery”



- Mandatory upon request - **30 days**

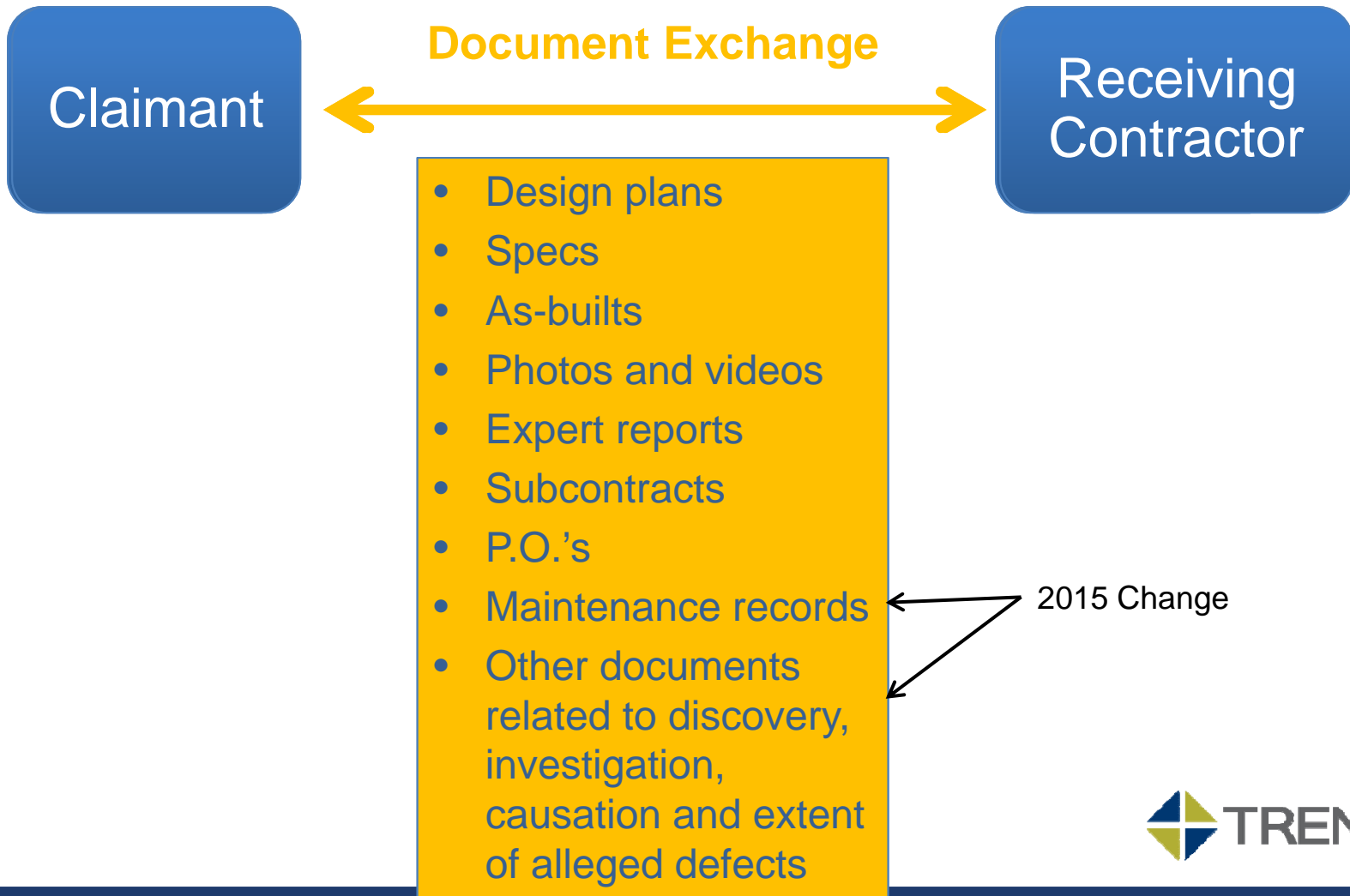
- Disclosure subject to claim of privilege

← 2015 Change

- Failure to disclose subject to sanctions

- Request must cite 558.004(15) and offer to pay for copies of:

Procedures of 558 “Discovery”



Tolling of Statute of Limitations

- Claimant's service of notice tolls applicable statutes of limitation until the later of:
 - 90 or 120 days from service; or
 - 30 days after end of repair or payment period; or
 - By stipulation of the parties

Limitations of 558

- Admissibility of 558 in Litigation
- Emergency Repairs
- Legal Rights and Defenses

Limitations of 558

Admissibility of 558 in Litigation

- Opportunity to resolve claims through confidential settlement negotiations
(558.001)
- Downstream notices are not admissions of liability
(558.004(3))
- Offers to remedy or pay to settle are not admissions and not admissible in an action brought under this chapter
(558.004(9))

Limitations of 558

Emergency Repairs

- 558 procedures do not prohibit or limit the claimant from making any necessary emergency repairs to the property required to protect the health safety and welfare of the claimant.

Limitations of 558

Legal Rights and Defenses

- 558 does not bar or limit:
 - Rights,
 - Causes of action, or
 - Theories of liability

- 558 does not:
 - Bar or limit defenses; or
 - Create new defenses except as provided in 558

Limitations of 558

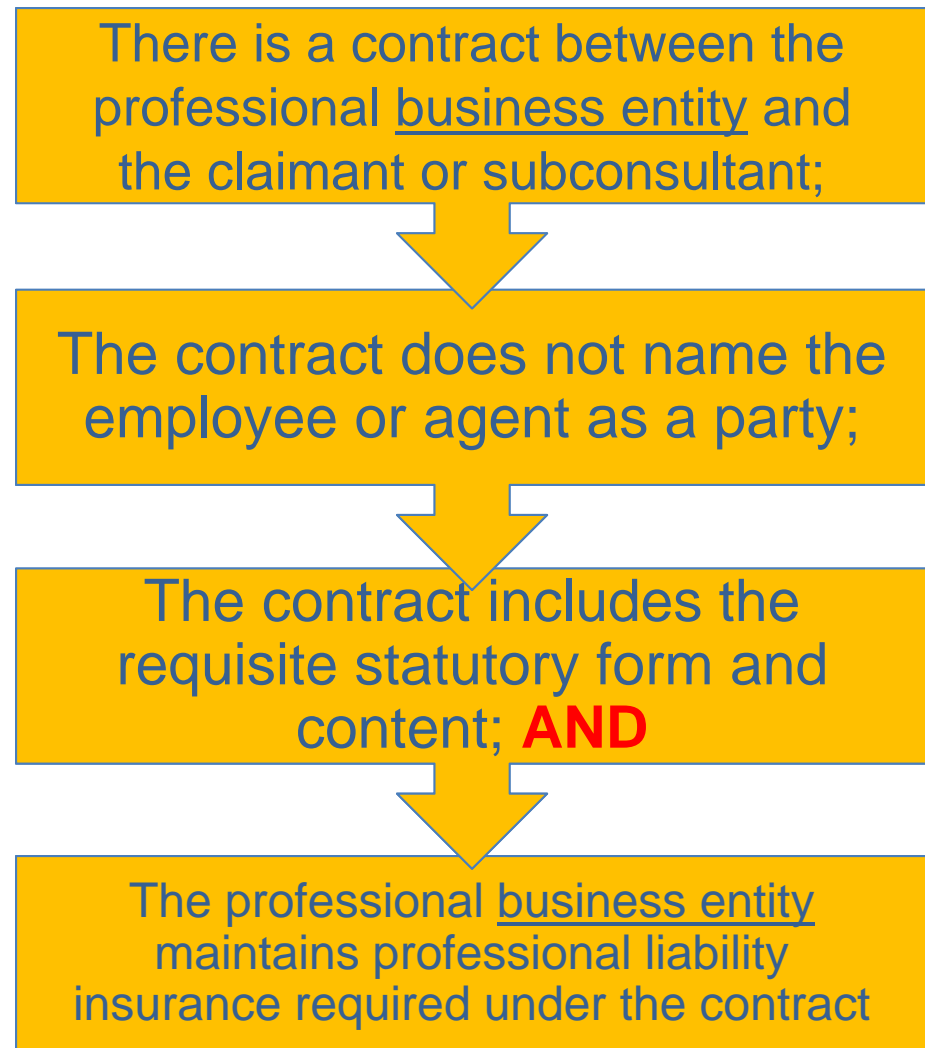
Legal Rights and Defenses

- 558 does not:
 - Create any new rights
 - Causes of action, or
 - Theories on which liability may be based

But what about... Offers to remedy or pay to settle are not admissions and not admissible in an action "brought under this chapter." See 558.004(9)

Limitation of Liability for Design Professionals

- Avoid individual liability for negligence
 - Applies to employee or agent of the professional
- IF**



Limitation of Liability for Design Professionals

- Avoid individual liability for negligence
- Applies to employee or agent of the professional

IF

The damages are solely economic in nature and the damages do not extend to personal injuries or property not subject to the contract.

Limitation of Liability for Design Professionals

- Requisite statutory form and content:
 - A prominent statement
 - All uppercase font
 - 5 pt. sizes larger than other text
 - State that pursuant to 558.035 the employee or agent cannot be held individual liable for negligence

Form is as important as substance.

Good Luck!

Chapter 558

-

Questions or Comments?

Gregg E. Hutt, BCS

Trenam Law

(813) 227-7482 / ghutt@trenam.com



Procurement Substance and Procedure

Construction Law Certification
Review Course
Orlando, Florida

Alexander J. Williams
Assistant County Attorney
Broward County, FL



Construction Law Certification Exam Specifications

- 17 Potential Subject Matters including:

Public Construction Contracts

(bidding, hearings, administration,
protests and appeals)

Goals of Public Procurement

- FS 287.001 Legislative Intent
 - Fair and open competition
 - Reduces appearance and opportunity for favoritism
 - Inspires public confidence
- Create a Uniform System for purchases

Statutes and Regulations

Three primary factors to consider:

1. What type of **Agency**
2. What type of **Goods or Services**
3. What type of **Solicitation**

Type of Public Entity/Agency

State Entities/Agencies:

Chapter 287, F.S. includes the primary statutory provisions for the general procurement of goods and services

Counties and Municipalities:

Statutorily authorized to procure goods and services, but the **method of procurement** is not prescribed.

Construction Services

For State agencies, construction procurements are governed by various sections within **Chapter 255, F.S.** and the rules adopted by agencies to implement those statutory provisions

For local government,* construction procurements are governed by **Section 255.20, F.S.**

* A county, municipality, special district (as defined in Chapter 189, F.S.) or other political subdivisions of the state

Construction Services

Section 255.20, F.S. requires a political subdivision of the State seeking to perform public construction work to award the work competitively for projects that cost more than **\$300,000**.

However, Section 255.20(1)(c), F.S. also provides for **eleven (11)** stated **exceptions** to the "**competition**" requirement.

“Competitively” means ...

- If based on price, submission of sealed bids
- Request for proposal or qualifications
- If subject to competitive negotiation, pursuant to 287.055

Professional Services

An important statute related to construction is the **Consultants' Competitive Negotiation Act** ("CCNA"). Section 287.055, F.S.

Although local government is generally not subject to Chapter 287, F.S. **This Act applies** to all State agencies, municipalities, political subdivisions, school districts, and school boards.

What is CCNA?

- In 1973, the Legislature adopted the Act after considerable lobbying from engineers and architects
- Identified a need to competitively select firms on **qualifications and not price** due to the “professional” nature of the services

What is CCNA?

The Act sets forth the following:

- **Who** it applies to
- **What** process to follow
- **How** to evaluate the firms

What type of professional services does it apply to ?

- Engineers
- Architects
- Landscape Architects
- Registered Surveyors and Mappers



Competitive Selection

An agency is required to:

- Evaluate the firms which have submitted qualifications
- Conduct discussions with no fewer than three
- May require public presentations by the firms
- Must select, in order of preference, **no fewer than three firms**

Evaluation Criteria

The factors that **must** be considered include:

- the **ability** of the professional personnel
- whether a firm is a certified minority business **enterprise***
- **past performance**
- willingness to meet **time and budget** requirements
- **location**
- recent, current and projected **workloads**
- the **volume of work previously awarded***

What “projects” does it apply to?

Pursuant to the 287.055(3)(a) of the Act, agencies must publicly announce, competitively select and negotiate professional services for a project when:

(1) **the basic construction cost** of which is estimated by the agency to **exceed** the threshold amount of **\$ 325,000**

or

(2) for a **planning or study activity** when the **fee** for professional services **exceeds** the threshold amount of **\$ 35,000**.

Are there any exceptions to these requirements?

- Continuing Contract

and

- “Project” as defined in 287.055(2)(f)(2)

Limitation when using a Continuing Contract

- (1) for projects in which **construction costs** do not exceed \$2 million,
- (2) for **study activity** when the fee for such professional service does not exceed \$200,000, or
- (3) for **work of a specified nature ...**, with no time limitation except that the contract must provide a termination clause.*

What does Project really mean

- 287.055 (2)(f)(2) Project means:
 - An activity under (3)(a) [thresholds] and:
 - 1) A grouping of minor construction, rehabilitation, or renovation activities, or
 - 2) A grouping of substantially similar construction, rehabilitation, or renovation activities.

CCNA

The CCNA also addresses the process and general requirements in soliciting design-build services.

The Act requires each local jurisdiction to adopt rules or ordinances for the award of design-build contracts.

Other Legal Authorities

- **Florida Administrative Code**
 - Chapter 60A-1 - DMS regulations that apply to all State procurements for commodities or contractual services
 - Chapter 60D-5 - DMS rules specific to construction contract bidding
- State agencies and Local governments have separate ordinances, resolutions or rules related to procurement.

Types of Procurement Solicitations

- Invitation to Bid
- Request for Proposals
- Invitation to Negotiate

Invitation to Bid

- **Most common** method for construction
- Rigid and identifies the resolution to the problem
- Defines scope and solicits bids to detailed plans and specifications
- Service/commodity easy to define, price is the sole determining factor
- The **lowest responsive, responsible bidder**

Request for Proposals

- Incapable of completely defining the scope of work required
- Service may be provided in several different ways
- **Qualifications and quality of service** are considered the primary factors instead of price

Request for Proposals

- Extensive evaluation which includes varied criteria:
 - Qualifications and Experience of principals and staff
 - Methodology and Management approach
 - Understanding of the project and agency's objectives
 - Technical superiority
 - Financial stability
 - References
- Award to the responsive and responsible offeror whose proposal is determined to be the most advantageous to the agency

Invitation to Negotiate

- Agency must determine ITB or RFP is not practicable.
- Used to determine **best method for achieving a specific goal or solving a particular problem**
- Identifies one or more responsive vendors with which the agency may **negotiate** in order to receive the best value.
- “**Best value**” is defined as the highest overall value based on objective factors that include, but are not limited to, price, quality, design, and workmanship.



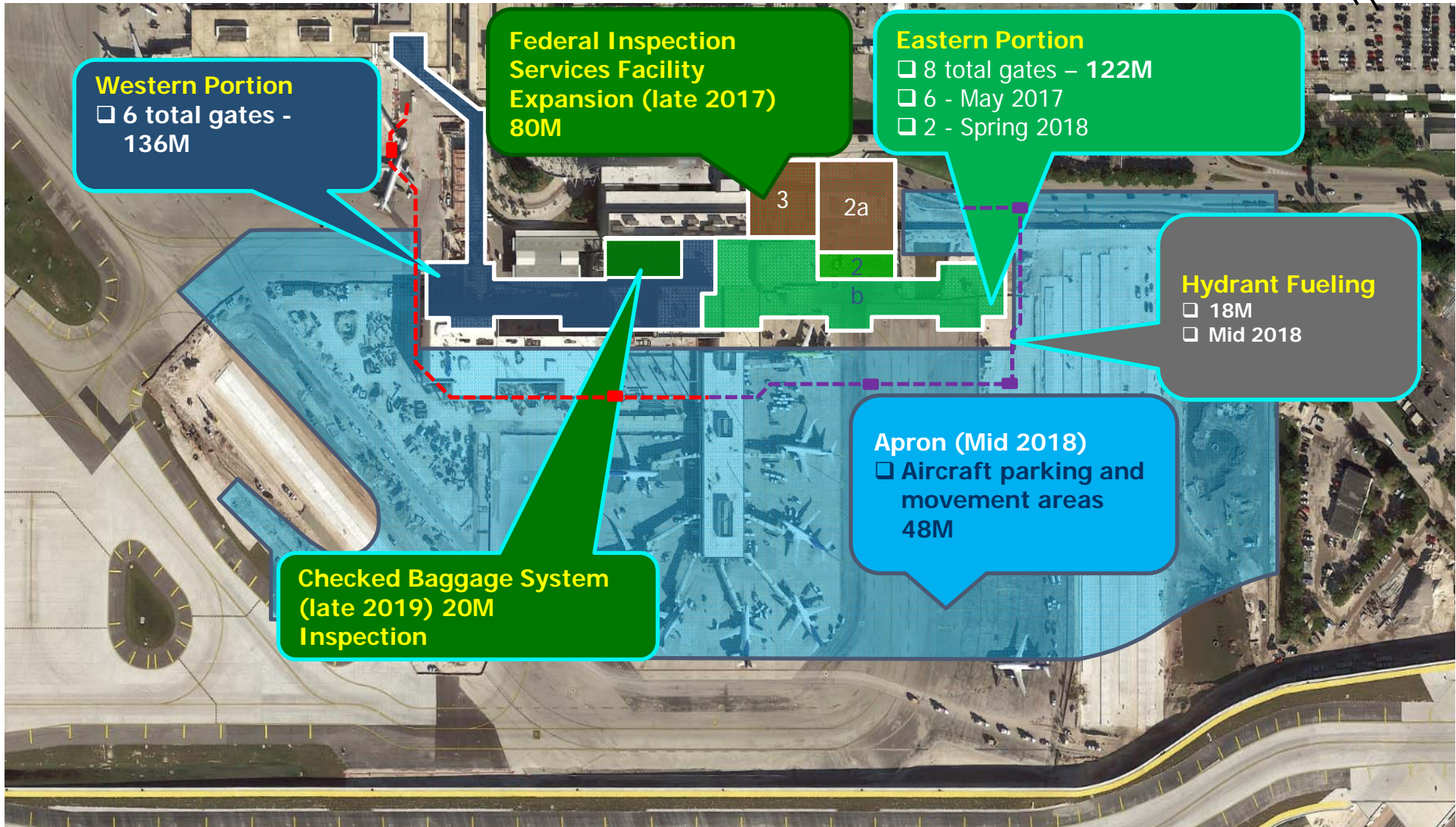
T2

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T3

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Pre-Solicitation Considerations

- Lobbying and Gift Regulations
- Solicitation Development

Lobbying and Gift Regulations

- Companies meet with agency staff to introduce the company and the products or services they sell.
- Companies should be mindful of lobbying and gift laws that may apply to the contractor's activities.

Lobbying Requirements

- Section 112.3215, F.S. contains registration and reporting requirements for lobbying before the Executive Branch of state government.
- The term "lobbies" is defined to mean seeking, on behalf of another person, to **influence ...** a decision of the agency in the area of policy **or procurement ...**
- Most **local governments** have lobbying regulations that should be reviewed prior to contacting the agencies.

Gift Regulations

- Be mindful of Florida's **gift law** found in FS112.3148.
- Prohibits a lobbyist from giving a gift in excess of **\$100** to an individual required file financial disclosures or to a "**procurement employee.**"
- Violation could lead to fine and ban.

Solicitation Development

Entities seeking to contract with the government also seek to try to influence the content of the solicitation.

This may result in disqualification of the contractor, or allegations of bias or improper influence.

Solicitation Development

Not eligible to contract with the agency for any contracts dealing with subject matter of a solicitation if:

- Performed **feasibility study** of implementation of a subsequent contract
- Participated in **drafting solicitation**
- **Develops a program** for future implementation

State Funding Considerations

- 255.099 - Preference to state residents, enacted 2010
- 255.0991 – Prohibits local government preferences, enacted 2015

255.099 Requires contract to include Florida preference

- Construction contract
- State funded, any amount
- Contractor must give preference to FL residents with substantially equal qualifications
- Federal funds exception

255.0991 - Prohibition of local preferences

- Construction services
- > 50 % State funded
- Prohibits preferences based on:
 - Office location
 - Employing locals
 - Local taxes

Solicitation Requirements

- Carefully read and understand the expectations
- Pay special attention to laws, regulations, ordinances, and policies that may be referenced or incorporated into the solicitation
- Failure to submit a response to the solicitation that complies with the requirements can render the bid **non-responsive** resulting in disqualification
- Not likely to have opportunity to change

Addenda

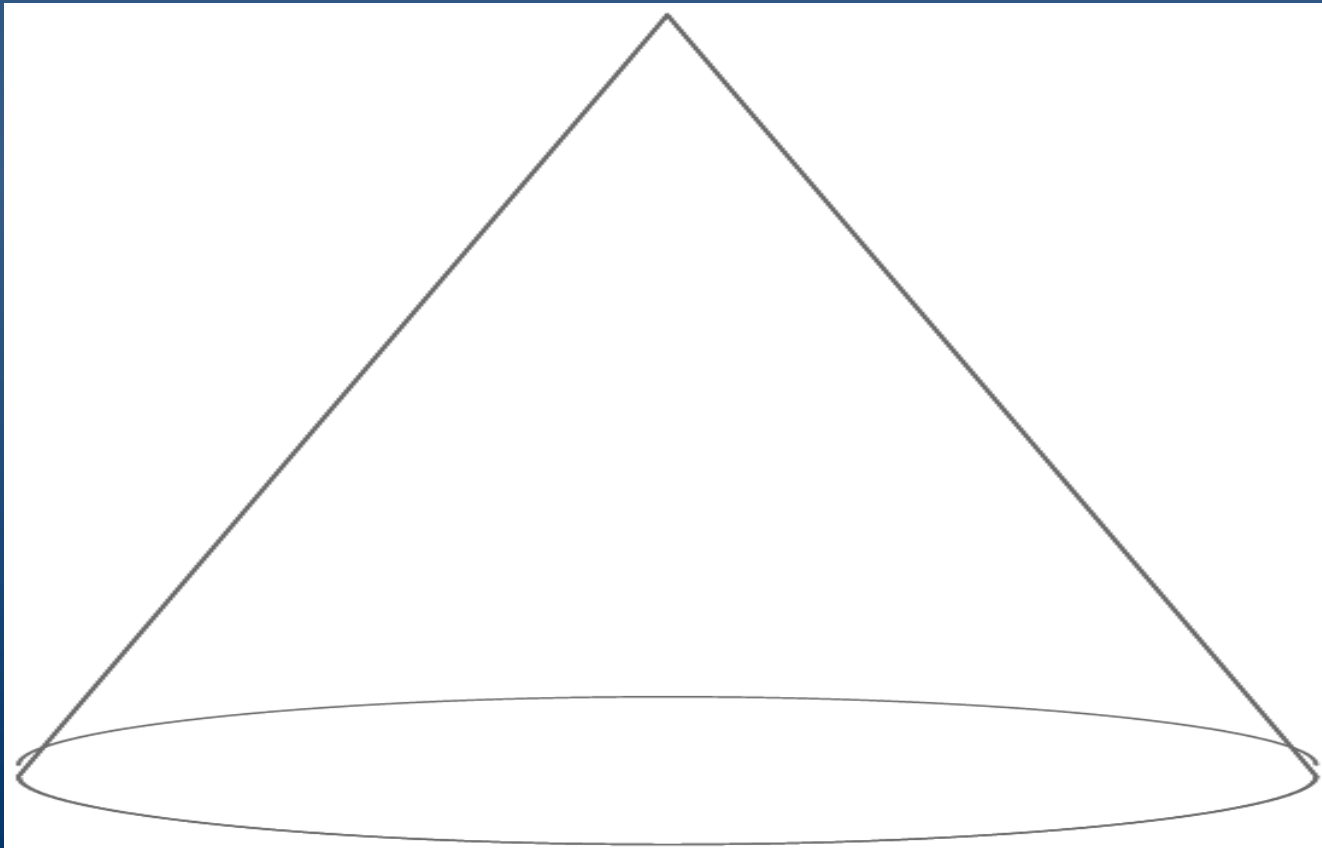
- Review all addenda to the solicitation
- Any material change to a solicitation will be provided to all bidders and incorporated
- Know and understand the addendum process

Other Solicitation Considerations

- Cone of Silence
- Public Records Act
- Sunshine Law
- Specification Challenges

Cone of Silence

What is it?



Cone of Silence

Over the years, it has changed...

- Different Agencies...
- Different Interpretations...
- Different Looks...

1960s



Evolved over time



Cone of Silence

What is it?

Period of time when prospective vendors are **prohibited from communicating** with representatives of the procuring agency

Cone of Silence

- All State procurements and many local governments subject to a cone of silence.
- Section 287.057(23), FS. provides communication must be in writing and limited to the procurement officer, or as provided in the solicitation documents.
- Violation may be grounds for rejecting a response.

Cone of Silence

Who does it apply to?

Cone of Silence

- Typically applies to **representatives involved** in the review and evaluation of submittals and/or the contract approval process
- Read the solicitation rules as to specifics
- Read the applicable legal authority

Public Records Act

- The Act applies to public procurements.
- Submissions pursuant to a competitive solicitation are only **exempt** until such time as the agency provides **notice of an intended decision or until 30 days after opening the bids**, whichever is earlier.

Public Records Act

- Absent a specific statutory exemption applies, **all documents** submitted by a contractor to a public entity **in response to a solicitation** will ultimately become public record.
- Simply marking a proposal "confidential" or "proprietary" **will not suffice** to keep bidding documents out of the public record.

Public Records Act

A vendor may have a need to review certain agency documents which are exempt from the public records law.

Example: Documents relating to building plans, including drafts, which depict the internal layout and structural elements of a building, arena, stadium, water treatment facility, or other structure owned or operated by an agency. FS119.071(3)(b)1

These documents may be confidential & exempt from disclosure based upon **security reasons** in response to the threat of terrorist attacks.

See also, FS281.301 (security systems) and 331.22 (Airport Security Plans).

Public Records

- Section 119.0701 created in 2013 mandated that the agency include a contract provision that **required the contractor comply** with public records laws, **as the public agency would.**
- **2016 amended** now requires agency to be point of contact
- Also requires pre-suit notice to contractor and agency

Sunshine Law

- Contractors should also be familiar with the requirements of Florida's **sunshine law**, particularly when a Selection Committee or Evaluation Committee is part of the competitive process.
- Unless an exemption exists, when individuals that comprise these committees meet or discuss the proposals, must do so in the sunshine.

Specification Challenges

Closely **study the solicitation** to determine if there are any specifications that cannot be complied with or that will preclude a response

Determine **what procedures apply** when challenging specifications.
Deadlines are short.

Solicitation Process

- Competition
- Advertisement
- Pre-Bid Conference
- Q&A Period
- Submission Deadline
- Bid Opening
- Evaluation of Bids

Competition

- Statutes requires a public body to award construction contracts only after competitive bidding
- Public body has wide discretion in accepting bids ... absent finding award arbitrary and capricious
- So long as the public agency acts in good faith, the courts will not generally interfere with agency judgment

Advertisement

- Agency may have its own policies and procedures for advertising solicitations.
- Advertisement may be by posting at the agency's offices, by website, in the Florida Administrative Weekly ("FAW"), or by newspaper.

Pre-Bid Conference

Procurement process may include a pre-bid conference

Opportunity to ask questions regarding the solicitation

Important-Provides opportunity for contractors to inspect facilities, plans, and other relevant documents

Submission Deadline

Solicitation will contain date and time for response.

To avoid unfair competition, agencies are **very strict** about rejecting a late bid.

Ensure the directions are followed in the solicitation and that its response is submitted by the deadline.

Bid Opening

The agency shall open sealed bids in a competitive solicitation at a publicly noticed meeting and announce the name of each bidder and price submitted in the bid.

Evaluation of Bids

Public competitive bidding
mandates award be made to the
lowest “responsive” and
“responsible” bidder

Evaluation of Bids

- Responsiveness
- Responsibility
- Bid Mistakes & Withdrawal
- Rejection of All

Responsiveness

A responsive bid - is a bid, proposal or reply that **conforms in all material respects** to a solicitation. Bid is submitted on the correct forms, contains all required information, signatures, and notarizations.

Responsiveness

Avoid unfairness to those who submitted a sealed bid on the understanding that all must comply with the specifications and conditions in the invitation.

Puts everyone on **equal footing** by not permitting variances from the solicitation.

Responsiveness

Bidder will not be permitted to alter its bid after opening, except to cure a **minor irregularity**.

A deviation or irregularity is minor if the bidder does **not obtain a competitive advantage** over the other bidders as a result of the deviation in its response.

Responsiveness

When does the law require an agency to reject a bid and prohibit it from waiving a deviation as a **minor irregularity**?

Case law provides a deviation is sufficiently **material** to destroy its competitive nature when the variation affects the bid amount by giving the bidder an advantage or benefit not enjoyed by others.

Responsibility

- In contrast to responsiveness, responsibility relates to the issue of performance by the contractor in terms of the **skill, experience, financial resources, and integrity** necessary to complete the requirements of the contract.
- Responsiveness - compare the bid to the specifications
- Responsibility focuses on the **qualifications and characteristics** of the bidder.

Responsibility

Generally, requirements pertaining to the responsibility of the bidder **may not be waived**.

Does the bidder does possess the required skill, experience, financial resources, and integrity necessary to complete the requirements of the contract, **AT THE TIME OF BID**.

Bid Mistakes

Given the nature of the bidding environment, not unusual for contractors to make mistakes:

- Mathematical errors
- Clerical mistakes
- Errors in judgment
- Failure to conduct a proper site investigation

A **material** mistake may deem the bid **nonresponsive**.

Bid Mistakes

A material error **cannot be corrected** even when it would suit the agency to do so.

Correction of a material error in a bid creates an **unfair advantage** and creates the **potential for collusion** and **abuse** of the competitive bidding process.

Bid Withdrawal

When a mistake is made, a bidder may request the bid be withdrawn.

Whether the agency should allow a bidder to withdraw its bid requires review of a number of considerations.

Bid Withdrawal

- Generally, owners **allow** a contractor to withdraw a bid, without recourse, if the **mistake is one of fact**.
- This encompasses **clerical errors** and **erroneous assumptions**.
- Specific situations have included **faulty math, misreading of plans, or transposition of numbers**.

Bid Withdrawal

Public owners **do not allow** withdrawal of bids when the "mistake" is based on:

- Mistakes in law
- Mistakes in personal judgments
- Wrongful assumptions of contract obligations

Rejection of All

An agency may desire to reject all bids:

- Ambiguous specifications
- Bids higher than budget
- Defect in the plan design

Agency has **wide**, but not unrestricted, **discretion**.
Arbitrary/capricious standard. The decision to reject
all bids must be grounded on a **legitimate basis**.

Conclusion

- Governmental entities in Florida routinely contract for construction services
- Different and often more lengthy process than private contracting
- Requires knowledge and understanding of various, overlapping laws, rules and policies

THANK YOU
ANY ???

How Public Projects Differ from Private Work

John S. Vento, Esquire



Government in the Sunshine

- Public elected body - decisions only at meetings that satisfy the Sunshine Act.
- Actions taken outside of a “sunshine” meeting are not binding on the public entity and are voidable.
- A proper “sunshine” meeting:
 - duly constituted quorum present, although this is not a requirement in the Sunshine Act itself;
 - held in a facility that is accessible to disabled individuals;
 - minutes taken;
 - advertised in advance; and
 - must afford the public a “reasonable” opportunity to speak.
- Two or more Board members may not discuss a matter that will be considered by the entire Board outside of a “sunshine meeting.”
- FLA. STAT. § 286.011 et. seq. (2016).

Government in the Sunshine

- Public bodies may delegate certain authority to their administrative staff, with limits.
- Actual delegation of authority granted to a particular individual may be found in the legislative records of the public body or in the administrative records of the project team members.
 - *See, e.g., Chrysler Corp. v. Florida Dept. of Highway Safety & Motor Vehicles*, 720 So. 2d 563 (Fla. 1st DCA 1998);
 - *Clarke v. Morgan*, 327 So. 2d 769 (Fla. 1975).

Public Records

- All records made or received in the conduct of public business are public records.
- Personal notes are not public records unless made or received in the official course of business.
- Public records may be on paper or may be electronic records, such as text messages, provided that the purpose of the record is:
 - (i) prepared in connection with official business;
 - (ii) and its purpose is to perpetrate, communicate or formalize knowledge.
- If it meets this test, the record is a public record regardless of whether or not it's in final form or the ultimate product of the agency. FLA. STAT. ch. 119.
- Mr. George Trovato, Fla. Att'y Gen. Informal Op., Fla. AG Lexis 364 (June 2, 2009).

Public Records

- Plans and schematics of public facilities are among the exceptions to the Public Records Act, and may only be disclosed to the contractors working on the project.
 - FLA. STAT. § 119.071.

Public Records

- The Public Records Act applies to private entities acting on behalf of a governmental body pursuant to a contract to the same extent as to the public body because public functions delegated to private entities remain public functions.
- Project records in the custody or control of a design professional or a contractor may be considered public records.
 - *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302 (Fla. 3d DCA 2001);
 - *B&S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 71 (Fla. 1st DCA 2008).

Public Records

- Public agency cannot avoid disclosure by delegating agency responsibility to a private entity.
- Case law establishes two general sets of circumstances in which documents in the possession of private entities must be produced as public records:
 - (i) When a public entity delegates a statutorily authorized function to a private entity, the records generated by the private entity's performance of that duty become public records.
 - (ii) when a public entity contracts with a private entity for the provision of certain goods or services to facilitate the public agency's performance of its duties.

Public Records

- Courts use “totality of the factors” test to indicate a significant level of involvement by the public agency.
 - *Weekly Planet, Inc. v Hillsborough County Aviation Authority*, 829 So. 2d 970 (Fla. 2d DCA 2002) (citing *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373 (Fla. 1999)).

Solicitation Requirements – Design Services

- The Florida Consultants Competitive Negotiation Act, FLA. STAT. § 287.055.
 - Sets out the procedures that are to be followed for the engagement of professional architectural, engineering, landscape architecture, surveying and mapping services and design-build services by a state agency and by most local government entities.

Solicitation Requirements – Design Services

- At a minimum, the CCNA requires:
 - (i) that the agency publicly announce each occasion when professional services must be purchased for a project the basic construction cost of which is estimated by the agency to exceed the threshold amount of \$325,000.00 or, if for planning or study activity, when the fee for professional services exceeds the threshold amount of \$35,000.00;

Solicitation Requirements – Design Services

- (ii) the agency shall evaluate current statements of qualifications and performance data on file, together with those that may be submitted by firms regarding the proposed project, and shall conduct discussions with, and may require public presentations by, no fewer than three firms regarding their qualifications, approach to the project and ability to furnish the required services; and the agency shall select, in order of preference, no fewer than three firms deemed to be the most highly qualified to perform the required services.

Solicitation Requirements – Design Services

- The agency shall negotiate a contract with the most qualified firm for professional services at compensation which the agency determines is fair, competitive, and reasonable.
 - Agency unable to negotiate a satisfactory contract with the firm considered to be the most qualified at a price the agency determines to be fair, competitive, and reasonable, negotiations with that firm must be formally terminated.
 - Agency shall then undertake negotiations with the second most qualified firm, and so on until the agency negotiates with the third most qualified firm.
 - If the agency is not able to negotiate a satisfactory contract with any of the three selected firms, the agency shall select additional firms in the order of their competence and qualification and continue negotiations until an agreement is reached.
 - Each contract entered into by the agency for professional services must contain a prohibition against contingent fees.

Solicitation Requirements – Construction Services

- Section 255.20 of the Florida Statutes requires that public construction contracts in excess of \$300,000 be competitively selected, unless the project falls within one of the specific exceptions listed:
 - Replacement, reconstruction or repair of an existing public building, structure or other public construction works damaged or destroyed by sudden unexpected turn of events such as an Act of God, riot, fire, flood, accident or other urgent circumstances;
 - Such damage or destruction creates an immediate danger to the public health or safety;
 - Other loss of public or private property which requires emergency governmental action;
 - Interruption of an essential governmental service.

Solicitation Requirements – Construction Services

- The solicitation may be on the basis of an Invitation For Bid, awarded to the lowest responsive and responsible bidder;
- or by a “best value” Request for Proposal, where cost is only one of the selection criteria, where award is based on an evaluation of several selection criteria, including price, qualifications of the proposers, and the proposers’ approach to the project.
- The selection criteria must be articulated in the solicitation documents, and may not be modified after the time for submitting proposals has passed.

Solicitation Requirements – Construction Services

- Waivers of competitive solicitations are allowed under only specified circumstances, and in accordance with statutorily defined procedures.
- This statute expressly allows contracts for construction management services, design/build contracts, continuation contracts based on unit prices, and any other contract arrangement with a private sector contractor permitted by any applicable municipal or county ordinance, by district resolution or by state law.
 - *See* FLA. STAT. §§ 255.20, 287.055.

Solicitation Requirements –

Limitations on Authority of Public Owner to Award a Contract

- In order for an award of a contract to be valid,
 - (i) the contract must be within the authority of the public body to accept, and
 - (ii), the process for awarding a contract must be consistent with those adopted by or imposed upon the public entity, as well as by the terms of the particular solicitation document.
 - *See Marriot Corp. v. Metropolitan Dade County*, 383 So. 2d 662 (Fla. 3d DCA 1980).

Solicitation Requirements –

Limitations on Authority of Public Owner to Award a Contract

- The broad discretion granted to a public body in the award of its contracts “must be exercised based upon clearly defined criteria, and may not be exercised arbitrarily or capriciously.”
 - *Liberty County v. Baxter’s Asphalt & Concrete, Inc.*, 421 So. 2d 505 (Fla. 1982).

Solicitation Requirements –

Limitations on Authority of Public Owner to Award a Contract

- *See Marriot v. Metropolitan Dade County, supra*, where the court voided an award that was based upon selection criteria not included in the solicitation documents.
- *See also City of Sweetwater v. Solo Construction Corp.*, 823 So. 2d 798 (Fla. 2d DCA 2002), where the court voided a contract award by a City Commission because it found that the Commission's award to the "most responsible" bidder (rather than to the lowest, responsive and responsible bidder) was arbitrary and capricious.

Solicitation Requirements –

Limitations on Authority of Public Owner to Award a Contract

- Solicitations for construction contracts based on price alone “must be awarded to the lowest qualified and responsive bidder in accordance with the applicable county or municipal ordinance or district resolution and in accordance with the applicable contract documents.”
 - FLA. STAT. § 255.20(1)(d).

Solicitation Requirements –

Limitations on Authority of Public Owner to Award a Contract

- “A responsible, or qualified, bidder is one ‘who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance.’” FLA. STAT. § 255.248(5).
- A responsive bidder is one “that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation.” FLA. STAT. § 255.248(7).
 - *American Engineering and Development Corp. v. Town of Highland Beach*, 20 So. 3d 1000 (Fla. 4th DCA 2009).

Solicitation Requirements – Licenses

- If the solicitation requires bidders to hold a Florida license or certification such as an architect, professional engineer or contractor, the license must be effective at the time of bid opening (and not at contract award).
- Single exception is bidders who are joint ventures containing at least one member which is a licensed contractor, pursuant to section 61G4-15.0022 of the Florida Administrative Code.
- Joint venture bidder need only furnish the public owner with a letter from the Department of Business and Professional Regulation indicating that the joint venture has applied for state licensure prior to bid opening.

Mandatory Contract Provisions -

Annual Contracts and Renewable Contracts

- An agreement entered into by a public owner for personal property and services is not a liability or obligation of the State “except from appropriated funds. All agreements, however, may be automatically renewable at the end of each fiscal year, subject to sufficient annual appropriations.”
 - FLA. STAT. § 287.0641.

Mandatory Contract Provisions -

Termination for Convenience for Multi-Year Contracts

- Public owners are prohibited from committing to expenditures that extend beyond one fiscal year.
- Contract for purchase of services or tangible personal property for a period in excess of one fiscal year must have the following statement included in the contract: "The State of Florida's performance and obligation to pay under this contract is contingent upon an annual appropriation by the Legislature."
- If contract contemplates that the public body will be making payments on the contract exceeding one fiscal year, the contract must contain provisions that give the public body an annual opportunity to terminate for convenience without penalty.

Mandatory Contract Provisions -

Termination for Convenience for Multi-Year Contracts

- *City of Miami v. Gioia*, 215 So. 2d 780 (Fla. 3d DCA 1969);
- *Betz v. Jacksonville Transportation Authority*, 277 So. 2d 769 (Fla. 1st DCA 1973);
- *Frankenmuth Mutual Ins. Co. v. Magaha*, 769 So. 2d. 1012 (Fla. 2000).
- *Fla. Stat. § 287.0582.*
- *Fla. Stat. § 725.06(3).*

Mandatory Contract Provisions -

Indemnification for Construction Contracts

- In a contract for the construction of a public facility the public owner may require the indemnification set out in section 725.06(2) of the Florida Statutes, which states:
 - “A construction contract for a public agency or in connection with a public agency’s project may require a party to that contract to indemnify and hold harmless the other party to the contract, their officers and employees, from liabilities, damages, losses and costs, including but not limited to, reasonable attorney’s fees, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of the indemnifying party and persons employed or utilized by the indemnifying party in the performance of the construction contract.”

Mandatory Contract Provisions - Indemnification for Design Contracts

- An agreement between a public owner and an architect or engineer may only contain the indemnification language set out in section 725.08(1) of the Florida Statutes , which states:
 - “Notwithstanding the provisions of s. 725.06, if a design professional provides professional services to or for a public agency, the agency may require in a professional services contract with the design professional that the design professional indemnify and hold harmless the agency, and its officers and employees, from liabilities, damages, losses, and costs, including but not limited to reasonable attorneys’ fees, to the extent caused by the negligence, recklessness, or intentionally wrongful conduct of the design professional and other persons employed or utilized by the design professional in the performance of the contract.”

Mandatory Contract Provisions -

Other Mandated Contract Provisions

- Other mandatory provisions mandated by state law can be found in Chapter 255 of the Florida Statutes, including requirements for xeriscaping, for life-cycle cost analysis, energy efficiency and LEED or other sustainable construction verification.
- The State of Florida and many local governments also have False Claim legislation, which typically provide for treble damages for false or inflated claims asserted against the government owner.
- *See, e.g.*, Florida False Claims Act, FLA. STAT. ch. 68.

Mandatory Contract Provisions -

Other Mandated Contract Provisions

- When a project is partially funded by a grant to the local government from a federal agency, the grant agreement will have mandatory provisions that will be required to be included in the contract between the local government and its contractor or designer. Each federal agency has its own particular grant requirements.

Local Government Prompt Payment

- The Local Government Prompt Payment law, most recently revised in 2010, FLA. STAT. §§ 218.70–218.80, applies to counties, municipalities, school boards, school districts, authorities, special taxing districts, other political subdivisions, or any office, board, bureau, commission, department, branch, division or institution thereof, or any project supported by county or municipal funds.

Local Government Prompt Payment

- If payment requests must be approved by an agent, architect or engineer, then payments are due within 25 business days after the date the payment request was received.
- If payment requests need not be approved by an agent, then payments are due within 20 business days after the date the payment request was received.

Local Government Prompt Payment

- Undisputed sums must be timely paid.
- For disputed sums, the governmental entity must establish a dispute resolution procedure (referenced in the contract) that requires the dispute resolution process to be commenced within 45 days after the date the payment request was received and concluded by final decision of the governmental entity within 60 days of receipt of the payment request.

Local Government Prompt Payment

- Prompt payment obligations flow downstream to subcontractors, sub-subcontractors and suppliers.
- Funds flowing downstream from a contractor to a subcontractor must be paid within 10 days of receipt of the funds.
- Contractors may withhold sums that may be due to another party, such as a vendor who has not furnished a release that is working under the subcontractor.
- Disputed funds may also be withheld.
- To avoid interest, notice of the dispute must be given along with actions required to cure the dispute.
- Subcontractors must pay sub-subcontractors and suppliers within 7 days after the subcontractor's receipt of payment.

Local Government Prompt Payment

- PPA also covers the withholding of retention.
- Except for contracts of \$200,000.00 or less, or projects which are federally funded, local governments may not hold retainage from progress payments to contractors of more than 10%, exclusive of any amounts based on the good faith dispute.
- The 10% may be withheld up to 50% completion of the project, after which retainage is not to exceed 5% of subsequent payments.
- A governmental entity is never required to withhold retainage.

Local Government Prompt Payment

- The local government Prompt Payment Act is to be contrasted with the private work Prompt Payment statute, FLA. STAT. § 715.12, which provides that where there is a written contract entered into for the work and for which a construction lien is authorized, all persons defined as lienors in section 713.01 of the Florida Statutes have a right to interest after 14 days from when payment is due under the Act.

Sovereign Immunity

- *See, e.g.,* FLA. STAT. ch. 129.
- All questions regarding a solicitation should be in writing and the Agency should post the questions and answers. In many cases an answer to a question results in an Addendum to the solicitation.

Sovereign Immunity

- The doctrine of sovereign immunity prevents a written document from being modified by a verbal comment, so reliance on verbal information not found in the written text of a public solicitation is unreasonable and legally irrelevant.
 - *County of Brevard v. Miorelli Engineering, Inc.*, 703 So. 2d 1049 (Fla. 1997).

Sovereign Immunity

- *See Financial Healthcare Associates, Inc. v. Public Health Trust of Miami-Dade County*, 488 F. Supp. 2d 1231 (S.D. Fla. 2007) (“[A]s a matter of law, any reliance on oral promises that contradict the terms of the parties' written agreement is unreasonable.”) (citing *Harris v. School Bd. of Duval County*, 921 So. 2d 725, 735 (Fla. 1st DCA 2006) (“Reliance on any promise to make payments not called for by the comprehensive, integrated written contracts . . . would not . . . be reasonable as a matter of law”)).
- *See also Dept. of Health & Rehabilitative Services v. Law Offices of Donald W. Belveal*, 663 So. 2d 650, 651 (Fla. 2d DCA 1995) (detrimental reliance on the verbal promise of an agency employee as to future extensions of the parties' contract was deemed unreasonable where the written contract only provided for a one year term).

Sovereign Immunity

- *Florida Department of Environmental Protection v. ContractPoint Florida Parks, LLC*, 986 So. 2d. 1260 (Fla. 2008) (“Under the principles announced in *Pan-Am*, a contract that grants one party the right to sue, but also affords the other party the right to declare that it has no legal obligation to pay, is void for lack of mutuality of remedy.”).
- An entity contracting with the State may be assured of receiving its demonstrated entitlement. When a judgment is entered, the public entity is required to pay, whether or not a specific appropriation is made for that amount. However, no lien will attach to specific public property to satisfy the judgment.
- FLA. STAT. § 55.11.

Sovereign Immunity – Limitations Regarding Claims to Public Property

- If the public owner breaches, contractor's remedy is limited to an action for money damages, and assuming the solvency of the public entity, public property may not be involuntarily sold to satisfy a public debt.
- It is for this reason that public projects are required to be bonded, both to protect laborers and subcontractors in the event of non-payment and to protect the public owner in the event of non-performance.
- See FLA. STAT. § 255.05.
- *Little River Bank & Trust Co. v. Johnson*, 141 So. 141 (Fla. 1932).

Sovereign Immunity – Limitations Regarding Claims to Public Property

- Despite some recent major State projects being labeled as “public-private partnerships,” a non-governmental entity cannot become a true partner with a Florida local governmental entity.
- Article VII, section 10 of the Florida Constitution restricts governmental entities from pledging credit, lending their taxing power or entering into partnerships with private entities.
- As a matter of law, a partnership is defined as a relationship where, among other attributes, the parties share in the profits as well as in the losses of an enterprise.
 - *Florida Tomato Packers, Inc. v. Wilson*, 296 So. 2d 536 (Fla. 3d DCA 1974).

Sovereign Immunity – Claims Against a Public Owner for Negligence or Intentional Torts

- Article X, section 13 of the Florida Constitution authorizes suits against the state only to the extent that sovereign immunity has been waived by general law. Pursuant to section 768.28 of the Florida Statutes, sovereign immunity has been waived up to the statutory limit (currently \$200,000), or up to the amount of liability insurance purchased, for tort claims seeking damages for personal injury, wrongful death, and loss or injury of property arising out of the negligent acts of public employees.
- *See Arnold v. Shumpert*, 217 So. 2d 116 (Fla. 1968).
- FLA. STAT. § 768.28(5).

Sovereign Immunity – Claims Against a Public Owner for Negligence or Intentional Torts

- Prior to March 2013, when the Florida Supreme Court decided *Tiara Condominium Assn., Inc. v. March & McLennan Companies, Inc.*, 110 So. 3d 399 (Fla. 2013), tort claims arising out of contract were barred by the Economic Loss Rule.
- The Economic Loss Rule was a legal principle that limited parties to a contract to the remedies provided by the contract. It prevented actions for negligence in the performance of the contract, leaving the parties to the terms of the agreement to provide remedies for the failure to perform any duty contemplated by the agreement. Exceptions to the ELR included fraud in the inducement to the contract and for professional services, such as engineering services.

Sovereign Immunity – Claims Against a Public Owner for Negligence or Intentional Torts

- The ELR was created by case law and removed by case law. In *Tiara* the Florida Supreme Court limited the ELR to product liability cases.
- However, in construction cases after *Tiara*, some courts have found that completed construction projects are “products”; therefore, even after *Tiara* the ELR often still applies.
 - *See Artisan Club Condo. Ass’n, Inc. v. The St. Joe Co.*, No. 2009-CA-10804, (Fla. 9th Cir. Ct. July 15, 2015) (“A building is a product and therefore even under *Tiara*, the economic loss rule applies.”);
 - *Central Park LV Condo. Ass’n, Inc. v. Summit Contractors, Inc.*, 2013 Fla. Cir. LEXIS 2569, 2013 WL 12161475 (Fla. 9th Cir. Ct. May 24, 2013) (*Tiara* did not overturn *Casa Clara*, and the ELR bars tort claims because only damages “are to the homes, that is, the products themselves”);
 - *Casa Clara Condo. Assn., Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993).

Sovereign Immunity – Claims Against a Public Owner for Negligence or Intentional Torts

- Further, the *Tiara* Court arguably left intact the independent-tort doctrine. Where the ELR restricts based on a type of damage, the independent-tort doctrine analyzes the underlying duty—in order to sue in tort for matters arising during a contract, actions for negligence must be grounded in a duty flowing from the alleged tortfeasor to the person claiming tort damages, and the breaches of duty alleged in the tort claims have to be “independent” of any contractual duty.
 - See, e.g., *Indem. Ins. Co. v. Am. Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004) (citing *Weimar v. Yacht Club Point Estates, Inc.*, 223 So. 2d 100, 103 (Fla. 4th DCA 1969));
 - *Casa Clara*, 620 So. 2d 1244.
 - But see *Epic Hotel, LLC v. Culligan Int’l Co.*, 159 So. 3d 1014 (Fla. 3d DCA 2015);
 - *2711 Hollywood Beach Condo. Ass’n, Inc. v. TRG Holiday Ltd.*, No. 2013-035751-CA-01 (Fla. 11th Cir. Ct. Sept. 2, 2015).

Sovereign Immunity – Claims Against a Public Owner for Negligence or Intentional Torts

- If a contractor is in privity with the public owner, its ability to assert a negligence claim will be tempered by the independent tort doctrine, and its damages may be limited to its breach of contract claims. *Casa Clara*, 620 So. 2d 1244.

Sovereign Immunity – Claims Against a Public Owner for Negligence or Intentional Torts

- A construction claim against the government sounding in negligence may only be made either:
 - (a) by a subcontractor, supplier, or laborer not in privity with the public owner; and/or
 - (b) if the negligent act is unrelated to a contract duty;
- Further, such an action will lie only if there is a negligent governmental act that causes personal injury, wrongful death, or property damage.
- If these are met, ensure that your client sends the mandatory pre-suit notices required by section 768.28 of the Florida Statutes to enable the public owner to investigate and possibly resolve your client's claim before suit is filed.

Sovereign Immunity – Claims Against a Public Owner for Negligence or Intentional Torts

- Sovereign immunity has not been waived for intentional torts.
- Thus, whether or not your client is in privity with the public owner, no claim for fraud, fraudulent misrepresentation, or fraud in the inducement will lie against the State of Florida or its agencies, instrumentalities or subdivisions.
 - FLA. STAT. § 768.28(9).
 - *See Manatee County v. Town of Longboat Key*, 365 So. 2d 143 (Fla. 1978).
 - *See Financial Healthcare Associates, Inc. v. Public Health Trust of Miami-Dade County*, 488 F. Supp. 2d 1231 (S.D. Fla. 2007).

Contract Administration and Changes

— Authority of the Public Owner's Representative to Modify a Contract

- An entity contracting with a public owner cannot rely on the authority of the owner's project team to approve a change order or otherwise to modify the terms of an agreement, unless the modification is expressly approved by the board.
 - *Frankenmuth Mutual Ins. Co.*, 769 So. 2d. 1012.

Contract Administration and Changes

— Authority of the Public Owner's Representative to Modify a Contract

- There are five major points to keep in mind regarding changes when the owner is a public entity:
 - (1) the authority of the public owner's representative to modify a contract;
 - (2) a delegation of authority by after-the-fact ratification;
 - (3) a delegation of authority by prior board action;
 - (4) limitations regarding claims to public property; and
 - (5) rights to recover for changes from the original contract terms.

Contract Administration and Changes

— Authority of the Public Owner's Representative to Modify a Contract

- *Frankenmuth Mutual, supra*, the Florida Supreme Court established that, in the absence of either an express delegation or a ratification, the administrative County staff had no authority to bind the County Commission to the terms of a lease-purchase agreement for computer equipment, even where the lease recited that appropriate approval of the governing body had been obtained but it had not been.

Contract Administration and Changes

– Delegation of Authority by After-the-Fact Ratification

- The three-pronged test established by the Florida Supreme Court to determine the validity of a ratification by a local governmental board is:
 - (i) the board of commissioners must have the power to approve the agreement in the first instance;
 - (ii) the ratification must be made in the same manner that an initial approval would have required (i.e. must be made in compliance with the Sunshine Law if such compliance was required for an initial approval); and
 - (iii) that the principal (the board) must be fully informed of the actions of the unauthorized agent (the staff) and must approve of them.
 - *Frankenmuth Mutual, supra.*

Contract Administration and Changes

– Right to Recover for Changes from the Original Contract Terms

- When the Legislature adopted statutory authorization for state agencies to enter into written contracts, “it must have intended such contracts to be valid and binding on both parties.”
- Florida Supreme Court established that a public entity waives sovereign immunity to the extent that it entered into an express written contract.
- When a public owner awards a contract or approves a change order, sovereign immunity is waived for breach of express provisions in written contracts, and their amendments if duly authorized as required by law.

Contract Administration and Changes

– Right to Recover for Changes from the Original Contract Terms

- *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984). The Court also emphasized that its holding “is applicable only to suits on express, written contracts into which the state agency has statutory authority to enter.” *Id.* at 6. See also *Southern Road Builders, Inc. v. Lee County*, 495 So. 2d 189 (Fla. 2d DCA 1986).

Contract Administration and Changes

– Right to Recover for Changes from the Original Contract Terms

- *See Southern Gulf Utilities Inc. v. Boca Ciega Sanitary Dist.*, 238 So. 2d 458 (Fla. 2d DCA 1970);
- *Artec Group, Inc. v. City of Tampa*, 1997 Fla. App LEXIS 11530 (Fla. 2d DCA 1997);
- *Ajax Paving Indus. Inc. v. Charlotte County*, 752 So. 2d 143 (Fla. 2d DCA 2000);
- *Hypower, Inc. v. Department of Transportation*, 839 So. 2d 856 (Fla. 1st DCA 2003);
- *Amec Civil, LLC v. State Dept of Transp.*, 878 So. 2d 468 (Fla. 1st DCA 2004);
- *City of Orlando v. W. Orange Country Club, Inc.*, 9 So. 3d 1268 (Fla. 5th DCA 2009).

Contract Administration and Changes

– Implied Obligations vs. Perceived Extra Work

- The distinction between implied covenants contained within a written contract (for example, the covenant to act in a reasonable manner) and perceived additional work not addressed in the written contract, is the source of considerable conflict between public owners and their contractors, much like the tension on a private project between base contract work and additional work.

Contract Administration and Changes

– Implied Obligations vs. Perceived Extra Work

- In the case of *County of Brevard v. Miorelli Engineering, Inc.*, the Florida Supreme Court distinguished between implied covenants within the scope of the contract (for which the contractor may recover additional compensation) and additional work “totally outside the terms of the contract.”
 - *Miorelli Engineering, Inc.*, 703 So. 2d at 1051.

Contract Administration and Changes

—Implied Obligations vs. Perceived Extra Work

- The Court stated that, “without a written change order, the doctrine of sovereign immunity precludes recovery of the cost of the extra work. . . . We decline to hold that the doctrines of waiver and estoppel can be used to defeat the express terms of the contract.” *Id.*

Contract Administration and Changes

– Implied Obligations vs. Perceived Extra Work

- Where the express written contract between the contractor and the public owner did not provide for reservations of future claims, the contractor's reservation of unknown future claims was found to be unenforceable.
 - *C.O.B.A.D. Construction Corp v. School Board of Broward County*, 765 So. 2d 844 (Fla. 4th DCA 2000).

Contract Administration and Changes

–Public Owner Can't Wrongfully Refuse to Issue Change Order

- *W & J Construction Corp. v. Fanning/Howey Associates, supra*, recognized that although sovereign immunity bars recovery for work not within authorized change orders, nonetheless, a contractor was entitled to demonstrate its assertion that the County wrongfully failed to issue a change order for additional extra work it had ordered.

Contract Administration and Changes

—Notice Provisions Strictly Enforced

- The doctrine of sovereign immunity supported a judicial decision that alleged constructive notice did not excuse the contractor from timely providing actual notice as required by the contract terms, that a contractor's failure to submit a portion of its claims within the time period provided within the contract barred recovery for that amount, and that a contractor seeking entitlement to recover home office overhead damages from the government could not rely on the idea that its damages foreseeably flowed from the government's breach, but must also prove that a government-imposed delay required the contractor to indefinitely stand by to the point that the contractor was effectively suspended and unable to take on additional work.

Contract Administration and Changes

—Notice Provisions Strictly Enforced

- Similarly, recovery has been denied for costs incurred by a contractor prior to the contract award because there was no contract in place at the time the services were rendered, and so the doctrine of sovereign immunity barred recovery against the city.
 - *Frenz Enterprises, Inc. v. Port Everglades*, 746 So. 2d 498 (Fla. 4th DCA 1999).
 - *Broward County v. Brooks Builders, Inc.*, 908 So. 2d 536 (Fla. 4th DCA 2005).
 - *Martin County v. Polivka Paving, Inc.*, 44 So. 3d 126 (Fla. 4th DCA 2010).
 - *City of Miami v. Tarafa Const., Inc.*, 696 So. 2d 1275 (Fla. 3d DCA 1997).

Contract Administration and Changes

– Doctrine of Apparent Authority Not Applicable to Public Entity

- A public officer or employee cannot bind the public entity—the doctrine of apparent authority does not apply to governmental entities or employees. One contracting with a public body has a duty to inquire as to limitations of authority of public officials.
- *Ramsey v. City of Kissimmee*, 139 Fla. 107, 190 So. 474 (Fla. 1939). (“Persons contracting with a municipality must at their peril inquire into the power of the municipality, and of its officers, to make the contract contemplated.”).
- See *Town of Madison v. Newsome*, 39 Fla. 149, 22 So. 270 (1897);
- *Jones v. Pinellas County*, 81 Fla. 613, 88 So. 388 (1921);
- *Fruchtl v. Foley*, 84 So. 2d 906 (Fla. 1956);
- *Town of Indian River Shores v. Coll*, 378 So. 2d 53 (Fla. 4th DCA 1979).

Disputes – Dispute Resolution Boards

- A DRB is an alternate dispute mechanism that is created by contract and is akin to a “structured mediation,” using expert neutrals and to make recommended resolutions of disputes. It is not mandated by legislation.
- *John Carlo, Inc. v. Greater Orlando Aviation Authority*, 2007 WL 430647 (M.D. Fla. 2007). For a detailed explanation of the DRB process, see John S. Vento, *The Admissibility of DRB Findings and Recommendations: Issues and Implications*, 5 J. AM. C. OF CONSTR. LAWS., No. 2, Summer 2011.

Disputes – FDOT Dispute Issues

- Section 337.19 of the Florida Statutes provides that an entity must commence suits against the Department of Transportation within 820 days of the final acceptance of the work.

Ethical Issues: Lobbying & Gifts

- Section 112.313(2) of the Florida Statutes prohibits public officers and employees from soliciting or accepting anything of value to the recipient based on any understanding that the vote, official action, or judgment of the official or employee would be influenced thereby.
- “Things of value” include gifts, loans, and rewards, promises of future employment, favors and services.
- “Gifts” are defined at section 112.312(12)(a) of the Florida Statutes and are subject to reporting if they exceed \$100 in value.

How Public Projects Differ From Private Work

John S. Vento, Esquire

Trenam Law

jvento@trenam.com

813-227-7482





Peckar & Abramson, P.C.

RESULTS FIRST

**FLORIDA BAR CONSTRUCTION LAW
CERTIFICATION REVIEW COURSE
March 16-18, 2017**

ETHICS

Melinda S. Gentile, Esq. and Monique S. Cardenas, Esq.
Peckar & Abramson

THE OATH

"I do solemnly swear:

"I will support the Constitution of the United States and the Constitution of the State of Florida;

"I will maintain the respect due to courts of justice and judicial officers;

"I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

"I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

"I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval;

"To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;

"I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

"I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God."

"The profession of the practice of law requires lawyers to be honest, competent, and diligent in their dealings with clients, other lawyers, and courts." *The Florida Bar v. Varner*, 992 So.2d 224, 231 (Fla. 2008).

"Practicing law is a privilege, not a right." *The Florida Bar re Jahn*, 559 So. 2d 1089, 1090 (Fla. 1990)(relying on *Petition of Wolf*, 257 So.2d 547 (Fla.1972)); and R. Regulating Fla. Bar 3-1.1. ("A license to practice law confers no vested right to the holder thereof but is a conditional privilege that is revocable for cause.").

"Lawyers are required to have high ethical standards because members of the public are asked to trust lawyers in their greatest hours of need; without such standards, the entire legal profession would be in jeopardy as public trust would dissipate." *The Florida Bar v. Valentine-Miller*, 974 So.2d 333, 338 (Fla. 2008).

STANDARDS OF CONDUCT

R. Regulating Fla. Bar 3-4.1.

"Every member of the Bar, and every attorney of another state or foreign country who provides or offers to provide any legal services in this state is within the jurisdiction and subject to the disciplinary authority of the Supreme Court of Florida and its agencies, and **is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by the court.** Jurisdiction over an attorney of another state who is not a member of the Florida Bar will be limited to conduct as an attorney in relation to the business for which the attorney was permitted to practice in Florida and the privilege in the future to practice law in Florida."

The Rules Regulating the Florida Bar are designed to guide members of the bar in their day-to-day practice and to address attorney discipline, and do not form the basis for private rights of action. *In re Kane*, 470 B.R. 902 (Bankr. S.D. Fla. 2012).

TYPES OF DISCIPLINE

R. Regulating Fla. Bar 3-5.1 - Discipline

The discipline that may be applied to a member found guilty of misconduct include: admonishment, probation, public reprimand, suspension, disbarment, disciplinary revocation, forfeiture of fees and restitution.

TYPES OF DISCIPLINE

In determining the appropriate sanction for lawyer misconduct, the Florida Supreme Court considers not only case law but also the Florida Standards for Imposing Lawyer Sanctions. Under the Florida Standards for Imposing Lawyer Sanctions, in imposing a sanction after a finding of lawyer misconduct, a court should consider:

- **The duties violated;**
- **The lawyer's mental state;**
- **The potential or actual injury caused by the lawyer's misconduct; and**
- **The existence of aggravating or mitigating circumstances**

The Florida Bar v. Forrester, 818 So.2d 477, 483 (Fla. 2002)(citing *Florida Bar v. Temmer*, 753 So.2d 555, 558 (Fla.1999)); and Fla. Stds. Imposing Law. Sancs. 3.0

PURPOSE OF DISCIPLINE

Sanctions imposed for unethical conduct by members of the Florida Bar must serve three (3) purposes:

(1) the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty;

(2) the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation; and

(3) the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The Florida Bar v. St. Louis, 967 So.2d 108 (Fla. 2007).

A LAWYER'S RESPONSIBILITIES

R. Regulating Fla. Bar 4-1.1 – Competence:

"A lawyer **must** provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

COMPETENCE

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include:

- **the relative complexity and specialized nature of the matter;**
- **the lawyer's general experience;**
- **the lawyer's training and experience in the field in question;**
- **the preparation and study the lawyer is able to give the matter; and**
- **whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.**

COMPETENCE – ESI Implication

Amendment to Comment to Rule 4-1.1 – Effective January 1, 2017

"Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question. Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications."

COMPETENCE – ESI Implication

Amendment to Comment to Rule 4-1.1 – Effective January 1, 2017

"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, including an understanding of the benefits and risks associated with the use of technology, and comply with all continuing legal education requirements to which the lawyer is subject."

CLIENT-LAWYER RELATIONSHIP

R. Regulating Fla. Bar 4-1.2, 4-1.3 and 4-1.4 – Scope of Representation, Diligence and Communication:

A lawyer must abide by a client's decisions concerning the objectives of representation and must explain matters to the client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. In addition to the foregoing, a lawyer shall act with reasonable diligence and promptness in representing the client.

CLIENT COMMUNICATION

- **Client's level of technical sophistication? email, telephone, facsimile, letters, text messaging**
- **Client's role? In-house counsel, project managers, technical staff**
- **Client updates – keep the client up-to-date on the status of the case.**

INITIAL CLAIMS ASSESSMENT

- Obtain information from the client – ask the right questions!
- **NO. 1 QUESTION: WHO ARE THE PARTIES?**
 - **POTENTIAL CONFLICTS**
- Obtain all the relevant documents, don't forget electronic records.
- Theories of liability
- Defenses
- Costs: experts, discovery, filing fees, etc.

CONFLICT OF INTEREST

R. Regulating Fla. Bar Rule 4-1.7. – Conflict of Interest; Current Clients:

Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if:

- (1) the representation of 1 client will be directly adverse to another client; or
- (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

CONFLICT OF INTEREST

R. Regulating Fla. Bar Rule 4-1.9. – Conflict of Interest; Former Clients:

A lawyer who has formerly represented a client in a matter must not afterwards:

- (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent;
- (b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or
- (c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

CONFLICT OF INTEREST

R. Regulating Fla. Bar Rule 4-1.9. – Conflict of Interest; Former Clients:

EXAMPLE

A lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

CONFLICT OF INTEREST

R. Regulating Fla. Bar Rule 4-1.7. – Conflict of Interest; Fee Disputes:

When a lawyer and client have become involved in a dispute over fees, the lawyer must assess whether the dispute creates a conflict of interest. R. Regulating Fla. Bar Rule 4-1.7(a)(2) states in relevant part that a lawyer shall not represent a client if the representation will be “materially limited . . . by a personal interest of the lawyer.” If the representation would be limited in such a way, a conflict exists. Unless the client's informed consent and waiver requirements of Rule 4-1.7(b) can be met, the lawyer must withdraw from representation. Notably, R. Regulating Fla. Bar Rule 4-1.7(b) requires that the lawyer reasonably believe that he or she “will be able to provide competent and diligent representation” to the client.

Rather than bring suit against an active client, the lawyer may: (1) continue to advocate for the client until the representation is concluded if the fee dispute will not adversely affect the lawyer's continued representation; and/or (2) promptly attempt to withdraw “if the client's failure to comply with the fee agreement has adversely affected the attorney's ability to zealously represent the client.” R. Regulating Fla. Bar Rule 4-1.7(a)(2) and (b).

BUSINESS TRANSACTIONS WITH CLIENT

R. Regulating Fla. Bar Rule 4-1.8(a). – Business Transactions With or Acquiring Interest Adverse to Client:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;**
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and**
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.**

BUSINESS TRANSACTIONS WITH CLIENT

RATIONALE: The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Official Comment to R. Regulating Fla. Bar 4-1.8.

BUSINESS TRANSACTIONS WITH CLIENT

HYPOTHETICAL

Developer client offers lawyer to become partner in future development project in exchange for legal services to purchase property. Ethical Violation?

NO. However, the requirements of R. Regulating Fla. Bar Rule 4-1.5 (Reasonable Fees and Costs) must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment for all or part of a fee

BUSINESS TRANSACTIONS WITH CLIENT

WHAT SHOULD YOU DO?

The lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 4-1.7 will preclude the lawyer from seeking the client's consent to the transaction.

If the client is independently represented in the transaction, subdivision (a)(2) of this rule is inapplicable, and the subdivision (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. **The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as subdivision (a)(1) further requires.**

SETTLEMENT OF CLAIMS FOR MULTIPLE CLIENTS

R. Regulating Fla. Bar Rule 4-1.8(g). – Settlement of Claims for Multiple Clients:

"A lawyer who represents 2 or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement."

NOTE: The clients' differences in the willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients and is one of the risks that should be discussed before undertaking the representation of multiple clients. Official Comment to R. Regulating Fla. Bar 4-1.8(g).

SETTLEMENT OF CLAIMS FOR MULTIPLE CLIENTS

HYPOTHETICAL

Lawyer represents two (2) subcontractors against ABC contractor. ABC contractor offers aggregate settlement of \$100,000.00. Lawyer only discloses ABC contractor settlement offer to one (1) subcontractor. Ethical Violation?

YES. The terms of the settlement agreement must be disclosed to each client and shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement. In fact, the attorney must disclose the process used in reaching the settlement, including the status of litigation, the lawyer's recommendations and the client's right to accept or reject the proposed settlement. **Prior to acceptance of settlement offer, lawyer MUST obtain informed consent by both clients.**

SETTLEMENT OF CLAIMS FOR MULTIPLE CLIENTS

WHAT SHOULD YOU DO?

Before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, **the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted.** See also terminology (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

SETTLEMENT OF CLAIMS FOR MULTIPLE CLIENTS

FOLLOW-UP

One (1) subcontractor rejects ABC contractor settlement offer and wants to vigorously pursue claim against ABC. Is there a conflict?

MAYBE. The continued representation of the subcontractor who wants to aggressively pursue claim against ABC contractor could be materially adverse to the interest of subcontractor who accepted settlement offer and no longer wants to pursue claims.

NOTE: Unless the clients validly consented in advance to continuing representation of one of them in the event of a conflict emerging, the attorney **NEEDS** to obtain informed consent of the former client after full disclosure.

REPRESENTATION OF INSURED

R. Regulating Fla. Bar 4-1.7(e) – Representation of Insureds

"Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation."

REPRESENTATION OF INSURED

RATIONALE: The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer.

REPRESENTATION OF INSURED

HYPOTHETICAL

Lawyer represents contractor insured under CGL policy and CGL insurer pays attorney's legal fees associated with prosecution of claim against CGL insurer. CGL insurer denies coverage. Must attorney withdraw representation of insured due to conflict of interest?

NO. If the attorney representing the insured was selected by the insured, but paid for by the insurer, after the insurer reserves its rights to deny coverage, the lawyer represents solely the insured, and any duty owed by that lawyer to the insurer does not make counsel vulnerable to disqualification on a conflict of interest ground at the instance of the insurer. *Employers Insurance of Wausau v. Albert D. Seeno Construction Co.*, 692 F.Supp. 1150 (N.D. Cal. 1988).

JOINT DEFENSE AGREEMENTS

- The advantages to the joint defense agreement are: (1) pooled resources and knowledge; (2) expedited discovery; and (3) appearance of a united front. However, a risk associated with such an agreement is the disclosure of confidential information to a potentially adverse party.
- The joint defense privilege extends specifically to information and documents that relate directly to the joint defense.

CAUTION: PARTIES TO A JOINT DEFENSE AGREEMENT CANNOT SHARE ANY AND ALL INFORMATION WITHOUT RISKING WAIVING THE PRIVILEGED (OR PROTECTED) NATURE OF THE INFORMATION.

LAWYER AS AN ADVOCATE

R. Regulating Fla. Bar 4-3 – Meritorious Claims and Contentions:

"A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. . . ."

NOTE: "In determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." Official Comment to R. Regulating Fla. Bar 4-3.

THREATENING LEGAL ACTION TO GAIN AN ADVANTAGE: DURESS OR NOT?

In addition to Rule 4-3, Rule 4-4.1 prohibits a lawyer from knowingly making a false statement of material fact or law to a third party. The Official Comments to R. Regulating Fla. Bar 4-4.1 clarify that while lawyers are required to be truthful when dealing with others, a lawyer generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur, however, if the lawyer incorporates or affirms the statement of another person that the lawyer knows is false. In addition, a misrepresentation could occur by a partially true but misleading statement or omission that is the equivalent of an affirmative false statement.

Notwithstanding R. Regulating Fla. Bar Rule 4-3 and 4-4.1, Rule 4-3.4(g) of the Rules Regulating the Florida Bar also prohibits an attorney from presenting, participating in presenting, or threatening to present criminal charges solely to obtain an advantage in a civil matter. Similarly, R. Regulating Fla. Bar Rule 4-3.4(h) prohibits an attorney from presenting, participating in presenting, or threatening to present disciplinary charges under the Rules Regulating the Florida Bar to obtain an advantage in a civil matter.

THREATENING LEGAL ACTION TO GAIN AN ADVANTAGE: DURESS OR NOT?

HYPOTHETICAL

Lawyer represents ABC contractor defending subcontractor lien claim. Subcontractor's Claim of Lien is fraudulent. May attorney threaten to report subcontractor to State Attorney?

NO. However, attorney may advise subcontractor of ABC contractor's claims and remedies associated with subcontractor fraudulent lien claim. **TREAD CAREFULLY.**



DUTIES TO PROSPECTIVE CLIENTS

R. Regulating Fla. Bar 4-1.18 – Duties to Prospective Client:

"Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as rule 4-1.9 would permit with respect to information of a former client." R. Regulating Fla. Bar 4-1.18(b).

A prospective client is defined as: "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." R. Regulating Fla. Bar 4-1.18(a).

DUTIES TO PROSPECTIVE CLIENTS

HYPOTHETICAL

Lawyer represents ABC contractor. Subcontractor calls lawyer seeking representation against ABC contractor for non-payment. What should you do?

DUTIES TO PROSPECTIVE CLIENTS

WHAT SHOULD YOU DO?

Official Comment to R. Regulating Fla. Bar 4-1.18 provides some guidance as to how an attorney may take steps to attempt to avoid a later challenge to representation of another party by a prospective client who does not end up retaining the attorney.

- **The lawyer should consider limiting the initial interview to only such information as reasonably necessary to determine whether to undertake the new matter;**
- **As soon as sufficient information has been received based on which the attorney may determine that she does not wish to represent the client, the interview should be concluded and no further information should be obtained from the prospective client;**
- **The lawyer may condition conversation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.**

NOTE: The lawyer is not prohibited from representing a client with interests to those adverse of the prospective client unless the lawyer has received from the prospective client information that could be used to the disadvantage of the prospective client in the matter.

INFORMATION ABOUT LEGAL SERVICES

R. Regulating Fla. Bar 6-24.1 1. - Specialization, Certification, and Communication of Practice Areas:

"A lawyer who is a member in good standing of The Florida Bar and who meets the standards prescribed below may be issued an appropriate certificate identifying the lawyer as a "Board Certified Construction Lawyer." The purpose of the standards is to identify those lawyers who practice construction law and have the special knowledge, skills, and proficiency, as well as the character, ethics, and reputation for professionalism, to be properly identified to the public as certified construction lawyers."

INFORMATION ABOUT LEGAL SERVICES

A lawyer is not permitted to state or imply that the lawyer is a specialist in a particular area unless the lawyer is "certified," a "specialist," or an "expert" in the actual area(s) of practice in which the lawyer is certified. To do so may be considered a misleading advertisement subject to discipline.

NOTE: A lawyer may indicate that the lawyer concentrates in, focuses on, or limits the lawyer's practice to particular areas of practice as long as the statements are true. Official Comment to R. Regulating Fla. Bar 4-7.14

INFORMATION ABOUT LEGAL SERVICES

HYPOTHETICAL

Lawyer obtains board certification in construction law. Lawyer advertises "Hard Hat Experts in Construction Law." Ethical Violation?

YES. Lawyer must state that she has been certified under the Florida Certification Plan as set forth in chapter 6 of the Rules Regulating the Florida Bar, must include the area of certification (construction law) and state that The Florida Bar is the certifying organization.

NOTE: In, *The Florida Bar v. Doane*, 43 So.3d 640 (Fla. 2010), Justice Pariente stated that the use of that trade name was misleading to the public while Justice Lewis objected to the labeling of lawyers as experts calling it a "nonsensical advertising farce."

INFORMATION ABOUT LEGAL SERVICES

R. Regulating Fla. Bar 4-7.18 - Direct Contact with Prospective Clients:

Generally, "a lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."

The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes: (1) any written form of communication directed to a specific recipient and not meeting the requirements relating to written communication; and (2) any electronic mail communication directed to a specific recipient and not meeting the requirements relating to computer-accessed communications. R. Regulating Fla. Bar 4-7.18(a)(1).

INFORMATION ABOUT LEGAL SERVICES

Note: Persons with whom the lawyer has a prior professional relationship are exempted from the general prohibition against direct, in-person solicitation. A "prior professional relationship" requires that the lawyer personally had a direct and continuing relationship with the person in the lawyer's capacity as a professional. Official Comment to R. Regulating Fla. Bar 4-7.18

MULTIJURISDICTIONAL PRACTICE OF LAW

Rule 4-5.5. - Unlicensed Practice of Law; Multijurisdictional Practice of Law:

"A lawyer shall not practice law in a jurisdiction other than the lawyer's home state, in violation of the regulation of the legal profession in that jurisdiction, or in violation of the regulation of the legal profession in the lawyer's home state or assist another in doing so." R. Regulating Fla. Bar 4-5.5(a).

In addition to R. Regulating Fla. Bar Rule 4-5.5, Florida Statute § 454.23 prohibits the unauthorized practice of law in the state of Florida. Specifically, Fla. Stat § 454.23 states in relevant part: "[a]ny person not licensed or otherwise authorized to practice law in this state who practices law in this state . . . commits a felony of the third degree."

MULTIJURISDICTIONAL PRACTICE OF LAW

The term “practice of law” is not clearly defined and is not confined to the language found in Fla. Stat. § 454.23 but rather is shaped by the decisional law and court rules as well as common understanding and practices. *State v. Foster*, 674 So.2d 747, 750-51 (Fla. 1st DCA 1996).

MULTIJURISDICTIONAL PRACTICE OF LAW

The Florida Supreme Court in [*The Florida Bar v. Savitt*, 363 So.2d 559 \(Fla. 1978\)](#), identified the following activities as constituting the unauthorized practice of law:

(1) allowing any member of the firm not admitted to the Florida Bar to engage in any professional activities in Florida, except for participation as co-counsel in court pursuant to rules of temporary admission, transitory activities incidental to out-of-state transactions, or "coordinating-supervisory" activities in essentially multistate transactions in which matters of Florida law are handled by members of the Florida bar;

(2) operating as an interstate law firm in Florida unless it remains a partnership that does not provide that profits and losses are shared among its members solely on the basis of the proportionate business either generated or handled by the Florida office;

MULTIJURISDICTIONAL PRACTICE OF LAW

(3) operating a Florida office without a partner of the firm who is a member of the Florida Bar assuming responsibility for its supervision;

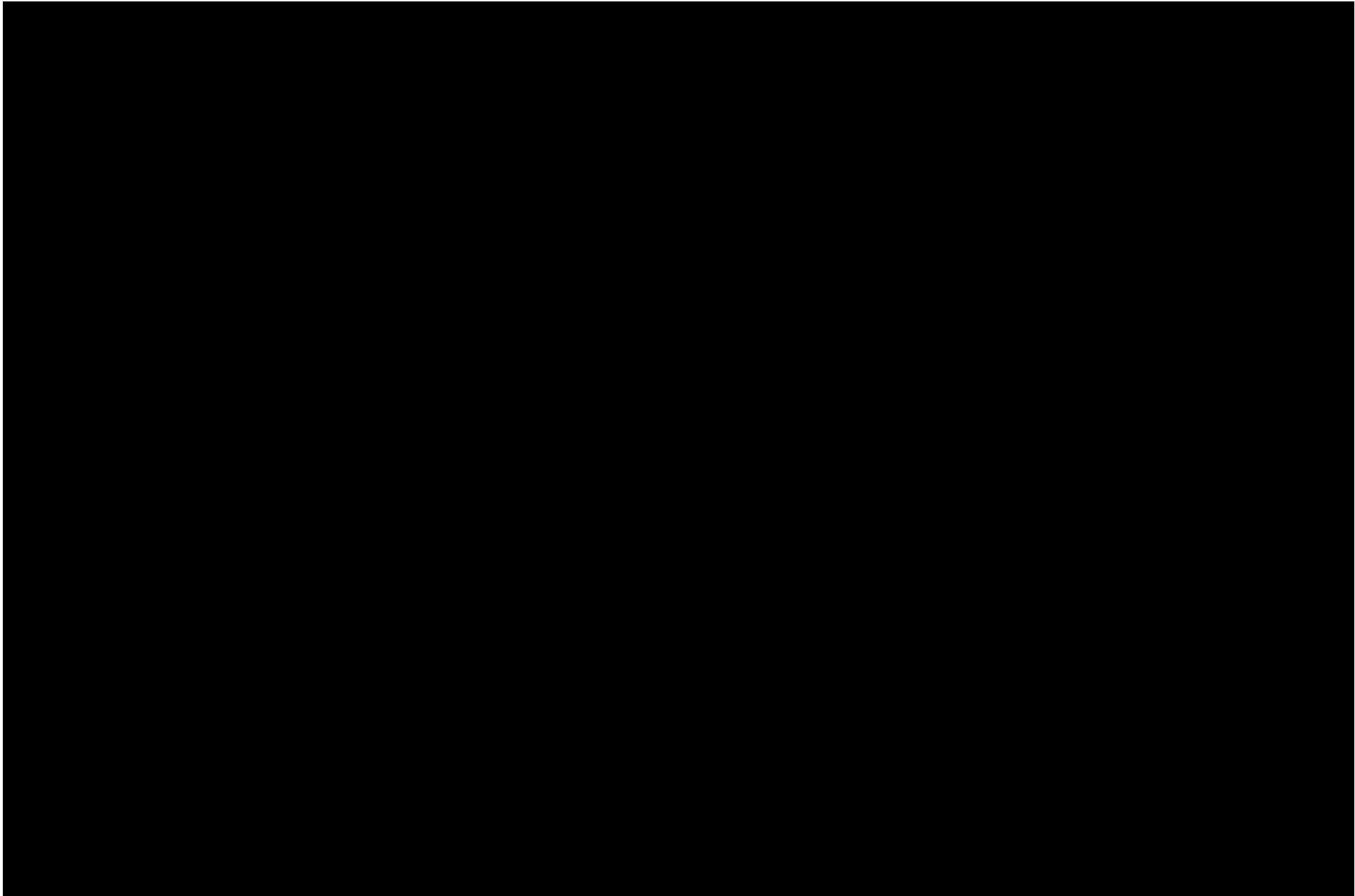
(4) allowing a member of the firm who is not a member of the Florida Bar to supervise a member of the firm who is a member of the Florida Bar and who practices in Florida; and

(5) allowing an applicant for admission to the Florida Bar to operate in the Florida office in any manner other than the traditional "law clerk" role.

MULTIJURISDICTIONAL PRACTICE OF LAW

Florida's safe harbor: out-of-state attorneys may temporarily practice in the state under a limited basis by filing a motion for *Pro Hac Vice* Admission.

- Rule 1-3.10 of the Rule Regulating the Florida Bar permits out-of-state attorneys (in good standing and currently eligible to practice) to make three (3) appearances in a one-year time period.
- The lawyer must first file a verified motion with the Court in the form provided in the Rule.
- Rule 1-3.11 allows the appearance by a non-Florida lawyer in up to 3 arbitrations within a one-year period. The lawyer must first file a verified statement with the Florida Bar (and serve it on opposing counsel) for leave to appear.



RESULTS FIRST

Payment and Performance Bonds in Florida

2017 Construction Law Certification Review Course

Bruce Charles King
(Carlton Fields, P.A. – Miami)

and

Gary M. Stein
(Peckar & Abramson, P.C. – Miami)

Surety Bonds Are Not Insurance

- Tri-Party relationship
- Indemnity expected from bonded principal
- No duty to defend
- No bad faith (Fla. Stat. §624.155)

Performance Bonds

- Designed to guarantee completion or correction of the work
- Not equivalent to comprehensive general liability coverage
- Bond language governs surety's liability
(American Home v. Larkin)
(National Fire v. Fortune)
- Ambiguities construed against surety
- Surety's liability limited to penal sum of the bond
(Allegheny Casualty v. Archer Western)

Performance Bond Surety Options

- Assist principal in completing project
- Take over project and complete with another contractor
- Tender a new contractor and bond to obligee
- “Buy back” bond and obtain release
- Allow obligee to complete and then pay for completion
- Deny liability
- Investigation

Performance Bond Forms

- No standard performance bond
- AIA 311
- AIA 312
- Indemnity bonds

Performance Bond Surety Defenses

- Surety not liable unless principal is liable
- Cardinal change to bonded contract
- Overpayment by obligee to principal
- Failure to declare bonded contractor in default
- Failure to terminate bonded contract
- Preemption of surety's rights
- Failure to pay contract balance to surety
- Statute of limitations

(Federal Ins. v. Southwest Florida Retirement)

(BDI v. Hartford)

Payment Bonds

- Required on public projects
- Optional on private projects
- Strict notice, recording, and filing requirements in Florida Statutes Section 713.23
- Subcontractor Bonds

Conditional Payment Bonds

(Fla. Stat. § 713.245)

- Necessary because of *OBS v. Pace*
- Preserves “pay when paid” language in bonded contract
- Complicated procedural rules

Transfer of Lien Bond

(Fla. Stat. § 713.24)

- Used when no payment bond is in effect
- Transfers lien on real property to the bond
- Can be increased, as necessary
- Notice of bond required

Miller Act Bonds

(40 U.S.C. § 3131, et seq.)

- Required on all federal projects exceeding \$100,000
- Performance and payment obligations imposed on surety
- Lawsuits must be filed in Federal court
- Consequential damages not recoverable
- Delay damages may be recoverable (*Perton v. Harvesters*)

Payment Bond Surety Defenses

- Strict compliance required by statute
- Release of claim by claimant
- Incomplete or defective work by claimant
- Overstatement of claim
- Supporting Documentation
- Joinder of Principal
- Last day of work

Right to Attorneys' Fees Against Surety

- Florida Statutes Sections 713.29 and 255.05(2)(a)2, prevailing party
- Florida Statutes Sections 627.428 and 627.756, claim against insurers
- Significant issues test
- Subcontractor bonds

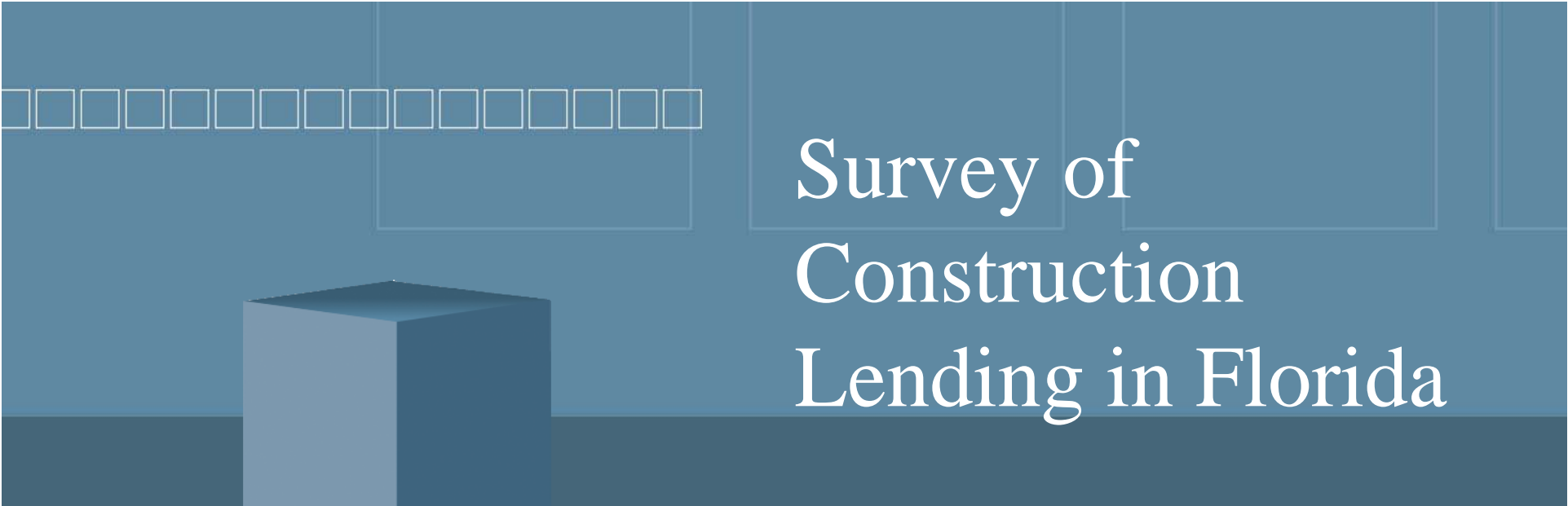
Surety's Right to Indemnity and Subrogation

- Common law right to indemnity
- Contractual right to indemnity
- Subrogation rights
- Assignments
- Collateral

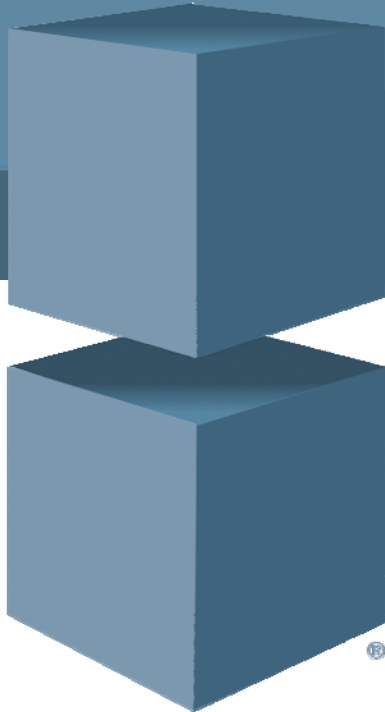
Liability of Surety

- Governed by language in bond
- Penal sum limitation
- No bad faith
- No liability for negligent underwriting

Conclusion



Survey of Construction Lending in Florida



Advanced Construction Law Certification
Review Course
March 16-18, 2017

Ralf R. Rodriguez, Esq.
Foley & Lardner LLP





Who is a construction lender?

A construction lender is defined as:

“any person who loans money to an owner for construction of an improvement to real property, who secures that loan by recording a mortgage on the real property, and who periodically disburses portions of the proceeds of that loan for the payment of the improvement.” Fla. Stat. §713.01(17).



A Construction Loan Agreement Must Be in Writing in Order to Be Enforced

- Requirements of Fla. Stat. § 687.0304
- In Florida, for a construction loan agreement, or any credit agreement, to be enforceable, the agreement to loan must be manifested in writing. *See Eboni Beauty Academy v. AmSouth Bank of Florida*, 761 So. 2d 481 (Fla. 5th DCA 2000); *Metro Building Materials Corp. v. Republic Nat. Bank of Miami*, 919 So. 2d 595 (Fla. 3d DCA 2006).



A Construction Loan Agreement Must Be in Writing in Order to Be Enforced

- Parol evidence is not admissible to contradict the unequivocal written terms of an otherwise unambiguous credit agreement. *See Silver v. Countrywide Home Loans, Inc.*, 760 F.Supp. 2d 1330 (S.D. Fla. 2011).
- Any subsequent modifications to a credit agreement must be supported by consideration. *See Coral Reef Drive Land Dev., LLC v. Duke Realty Ltd. P'ship*, 45 So. 3d 897 (Fla. 3d DCA 2010).



Lender Liability and Duties

- Failure of the lender to fund as required by the terms of the loan agreement may allow a claim for breach of contract against the lender.
- A lender's foreclosure action may be subject to an affirmative defense where the lender negligently disbursed and grossly mismanaged the construction loan funds. *See Schaeffer v. Gilmer*, 353 So. 2d 847 (Fla. 1st DCA 1977).



Lender Liability to the Contractor

- What happens if a contractor has direct dealings with the construction lender?
- A lender may have liability to a contractor for breach of contract.
- *Norin Mortg. Corp v. Wasco, Inc.*, 343 So. 2d 940 (Fla. 2d DCA 1977) (lender found liable to contractor where lender guaranteed to set aside specific funds from a construction loan to pay contractor).



Lender Liability For Construction Defects As a Developer

- A lender may be liable for construction defects where it assumes control of a construction project, completes portions of the construction work, and holds itself out as “the developer” by marketing and selling the improved property. *Chotka v. Fidelco Growth Investors*, 383 So. 2d 1169 (Fla. 2d DCA 1980).
- Generally, a lender who simply forecloses on a construction loan will not be liable for defects unrelated to the lender’s active construction on the property. *Port Sewall Harbor and Tennis Club Owners Ass’n, Inc. v. First Federal Savings and Loan Ass’n of Martin County*, 463 So. 2d 530 (Fla. 4th DCA 1985).



Lender Liability For Construction Defects As a Developer

- However, in 2013, the Florida Supreme Court disapproved of the holding in *Port Sewall* with respect to implied warranty obligations.
- In *Maronda Homes*, a HOA brought a civil action against the developer for breach of the implied warranties of fitness for a particular purpose, merchantability, and habitability arising out of alleged defective construction of private roads, drainage systems, retention ponds, and underground pipes in the subdivision. *Maronda Homes, Inc. v. Lakeview Reserve Homeowners Ass'n, Inc.*, 127 So. 3d 1258 (Fla. 2013).



Lender Liability For Construction Defects As a Developer

- The Florida Supreme Court held that, if the improvement provides an “essential service” to the habitability of a home, then the implied warranties of fitness and merchantability apply. *Maronda Homes, Inc. v. Lakeview Reserve Homeowners Ass’n, Inc.*, 127 So. 3d 1258 (Fla. 2013).
- Therefore, a lender that assumes control of a project may be responsible for implied warranties if a residence, or the improvements immediately supporting the residence, are not reasonably fit for the ordinary or general purpose intended.



Lender Liability For Failure to Disclose Latent Defects

- A lender must disclose known latent defects when it participates in the marketing and sale of a residential project to the public. *See Johnson v. Davis*, 480 So. 2d 625 (Fla. 1986).



Lender's Duty to Inspect, Audit, and Manage a Project

- Generally, a lender's responsibility with regard to a construction project is limited to lending money, and the lender will not have liability to a borrower or third parties for any inspections or audits it carries out in connection with protecting its loan interests.

See First Wisconsin National Bank of Milwaukee v. Roose, 348 So. 2d 610 (Fla. 4th DCA 1977) and *Sobi v. First South Bank, Inc.*, 946 So. 2d 615 (Fla. 2d DCA 2007).



Lender's Duty to Make Proper Payments

Who pays who?

- Fla. Stat. §713.06(2)(d): “[a]ny lender who, after receiving a notice [to owner], pays a contractor on behalf of the owner for an improvement shall make proper payments as provided in paragraph (3)(c) as to each such notice received by the lender.”
- Fla. Stat. §713.13(7): “[a] lender must, prior to the disbursement of any construction funds to the contractor, record the notice of commencement in the clerk’s office.”
See Napolitano v. Security First Federal Sav. and Loan Ass’n., 533 So. 2d 948 (Fla. 5th DCA 1998).



Lender and Final Payments

What if a contract is terminated before completion?

What are the final payment affidavit rules?

1. Contractor must provide lender with a Final Payment Affidavit. Fla. Stat. §713.06(3)(d)1.
2. Lender shall retain the final payment until the Final Payment Affidavit is furnished by the contractor (if not, lender may be liable to the owner for improper payment). Fla. Stat. §713.06(3)(d)5 and (d)6.
3. Lender must give a contractor ten (10) days' written notice (after receipt of Final Payment Affidavit from the contractor) before making payment directly to other lienors due money under any subcontracts. Fla. Stat. §713.06(3)(d)2.



Lender and Final Payments

- In the event the payment due in the contractor's Final Payment Affidavit will be insufficient to pay all lienors giving notice, the lender "shall pay no money to anyone until such time as the contractor has furnished him or her with the difference." Fla. Stat. §713.06(3)(d)3.
- If 10 days have passed since lender received the Final Payment Affidavit and the contractor has not furnished the difference, the lender can determine the amount due each lienor pursuant to the terms of the direct contract between the contractor and the owner. Fla. Stat. §713.06(3)(d)3.



Equitable Lien, Unjust Enrichment, and *Quantum Meruit* Claims

- The Equitable Lien Doctrine is firmly established in Florida.
- Equitable liens are employed to combat fraud and misrepresentation or other circumstances requiring special equity.
- In addition to an equitable lien claim, a *quantum meruit* claim may be asserted against a lender. *See Banks v. Steinhardt*, 427 So. 2d 1954 (Fla. 4th DCA 1983) (contractor's claim for *quantum meruit* could exist coextensively with equitable lien claim).



Equitable Lien, Unjust Enrichment, and *Quantum Meruit* Claims

- An equitable lien claim and/or an unjust enrichment claim against the lender requires completion of the project. *See J.G. Plumbing Service, Inc. v. Coastal Mortgage Co.*, 329 So. 2d 393 (Fla. 2d DCA 1976); *Giffen Industries of Jacksonville, Inc. v. Southeastern Associates, Inc.*, 357 So. 2d 217 (Fla. 1st DCA 1978).
- *See CTX Mortg. Co., LLC v. Advantage Builders of Am., Inc.*, 47 So. 3d 844, 846-847 (Fla. 2d DCA 2010) (holding that builder failed to establish that lender's retention of the undisbursed construction funds was inequitable and that the “rationale for awarding an equitable lien on undisbursed construction funds to a contractor who has completed construction is unjust enrichment”).



Equitable Lien, Unjust Enrichment, and *Quantum Meruit* Claims

- June 11, 2015 decision by 1st DCA: *Jax Utilities Management, Inc. v. Hancock Bank*, 164 So. 3d 1266 (Fla. 1st DCA 2015).
- Contractor sued construction lender in connection with failed housing development project, asserting common law equitable lien and unjust enrichment claims.
- Trial Court granted summary judgment for lender; contractor appealed.
- 1st DCA held that, as a matter of first impression, Fla. Stat. §713.3471(2) – governing responsibilities of construction lenders – precluded contractor's common law claims.



Equitable Lien, Unjust Enrichment, and *Quantum Meruit* Claims

- *Jax Utilities Management, Inc. v. Hancock Bank*, 164 So. 3d 1266 (Fla. 1st DCA 2015) – 1st DCA's rationale:
- Plain language of Fla. Stat. §713.3471(2)(b)-(c) evinces a legislative intent to displace common law remedies.
 - Lender is liable to contractor through a statutory cause of action.
 - Contractor's statutory claim may not interfere with any foreclosure action and "may not be the basis of any claim for an equitable lien or for equitable subordination of the mortgage lien."
- Statute "is so repugnant to the common law that the two cannot coexist."



Equitable Lien, Unjust Enrichment, and *Quantum Meruit* Claims

- *Jax Utilities Management, Inc. v. Hancock Bank*, 164 So. 3d 1266 (Fla. 1st DCA 2015).

- Takeaways:
 - 1st DCA failed to acknowledge that numerous cases after Fla. Stat. §713.3471 was enacted in 1992 continued to rely on common law theories of recovery.
 - Unless the Florida Supreme Court reverses the *Jax Utilities* decision, or other DCAs rule otherwise, contractors attempting to assert common law equitable lien and unjust enrichment claims should also assert a claim based on Fla. Stat. §713.3471.



Lender's Decision to Cease Disbursement of Construction Funds

- Where a borrower defaults on its loan obligations, a construction lender may decide to cease disbursements of construction loan funds.
- Lender must give proper notice as required by Fla. Stat. §713.3471(2)(a): Written notice to the contractor and all subcontractors (and any lienor who has previously given the lender notice) within 5 business days of making the decision to cease further advances under the construction loan.



Lender's Decision to Cease Disbursement of Construction Funds

- If the lender fails to give the required written notice, the lender is liable to the contractor to the extent of the actual value of the materials and direct labor costs furnished by the contractor plus 15 percent for overhead, profit, and all other costs from the date on which the notice of the lender's decision not to fund should have been served on the contractor and the date on which the notice of the lender's decision is served on the contractor. Fla. Stat. §713.3471(2)(b).
- *J.G. Plumbing Service, Inc. v. Coastal Mortgage Co.*, 329 So. 2d 393 (Fla. 2d DCA 1976) (construction lender should not be permitted to affirmatively mislead subcontractors and materialmen so as to induce them to continue to work upon and supply materials to the job to their detriment).



Lender's Liability Limited to Amount of Undisbursed Construction Funds

- The lender's liability for failure to provide written notice under Section 713.3471(2)(a) is not greater than the amount of the undisbursed construction loan funds at the time notice should have been given, unless the failure to give notice was done for the purpose of defrauding the contractor. Fla. Stat. §713.3471(2)(c).



Determining Priority Between Mechanic's Liens and Mortgages Attaching to Real Property

- Liens of persons in privity (contractor) and of persons not in privity with the owner (subcontractor) shall attach and take priority at the time of recordation of the Notice of Commencement. Fla. Stat. §713.07(2); Fla. Stat. §713.05; Fla. Stat. §713.06.
- In the event no Notice of Commencement is recorded, these liens shall attach and take priority as of the time the Claim of Lien is recorded. §713.07 (2).



Determining Priority Between Mechanic's Liens and Mortgages Attaching to Real Property

- Liens for Professional Services (architect, landscape architect, interior designer, engineer, or surveyor and mapper) and liens for Subdivision Improvements attach at the time of recordation of the Claim of Lien and take Priority as of that time. Fla. Stat. §713.07(1); Fla. Stat. §713.03; Fla. Stat. §713.04.
- For Professional Services in direct privity with the owner, no lien shall be acquired until a Claim of Lien is recorded. Fla. Stat. §713.03.



Determining Priority Between Mechanic's Liens and Mortgages Attaching to Real Property

- All liens shall take priority over any encumbrance, conveyance, or demand not recorded against the property prior to the time such liens attached. Fla. Stat. §713.07(3).
 - *Adamson v. First Federal Sav. and Loan Ass'n of Andalusia*, 519 So. 2d 1036 (Fla. 1st DCA 1998) (mechanic's lien had priority over purchase money mortgage that was recorded after the Notice of Commencement).



Determining Priority Between Mechanic's Liens and Mortgages Attaching to Real Property

- If construction ceases or the direct contract is terminated before completion and the owner desires to recommence construction, the owner may pay all lienors in full or pro rata share prior to recommencement, in which event all liens for the recommenced construction shall take priority from such recommencement. Fla. Stat. §713.07(4).



Determining Priority Between Mechanic's Liens and Mortgages Attaching to Real Property

- Fla. Stat. §713.06(4)(a): In determining the amounts to pay the lienors, the owner or court shall pay or allow such liens in the following order:
 - Liens of all laborers;
 - Liens of all persons other than the contractor;
 - Liens of the contractor. (A contractor must provide the Owner with a Final Payment Affidavit, pursuant to Fla. Stat. §713.06(3)(d), without which the contractor has no right of lien and no right to demand final payment.)



Notice of Termination

- Fla. Stat. §713.132: An owner may terminate the period of effectiveness of a notice of commencement by executing, swearing to, and recording a notice of termination that contains:
 - (a) The same information as the notice of commencement;
 - (b) The recording office document book and page reference numbers and date of the notice of commencement;
 - (c) A statement of the date as of which the notice of commencement is terminated, which date may not be earlier than 30 days after the notice of termination is recorded;
 - (d) A statement specifying that the notice applies to all the real property subject to the notice of commencement or specifying the portion of such real property to which it applies;



Notice of Termination

- Fla. Stat. §713.132 (cont'd): An owner may terminate the period of effectiveness of a notice of commencement by executing, swearing to, and recording a notice of termination that contains:
 - ...
 - (e) A statement that all lienors have been paid in full; and
 - (f) A statement that the owner has, before recording the notice of termination, served a copy of the notice of termination on the contractor and on each lienor who has a direct contract with the owner or who has served a notice to owner. The owner is not required to serve a copy of the notice of termination on any lienor who has executed a waiver and release of lien upon final payment in accordance with Fla. Stat. §713.20.



Enforcement of Subordination Clauses and Equitable Subrogation

- Subordination clauses are enforceable in Florida. Fla. Stat. §727.114(2).
 - *See Southern Floridabanc Federal Sav. and Loan Ass’n v. Buscemi*, 529 So. 2d 303 (Fla. 4th DCA 1998) (holding that subsequent mortgage took priority over prior mortgage, which contained subordination provision, even though no subordination agreement was executed in connection with subsequent mortgage and even though subsequent mortgagee was not party to prior mortgage).
- Subordination clauses can often work to a contractor’s detriment.
- A right to claim a lien may not be waived in advance. Fla. Stat. §713.20(2).



Equitable Subrogation

- Subrogee must make payment to protect its own interests.
- Subrogee has not voluntarily made the payment.
- Subrogee was not primarily liable for the debt.
- Subrogee paid the debt in full.
- Subrogation will not prejudice any third party.



Equitable Subrogation Cases

- *Suntrust Bank v. Riverside National Bank of Florida*, 792 So. 2d 1222 (Fla. 4th DCA 2001) (bank would be entitled to equitable subrogation unless such a finding would result in any injustice to the rights of other parties).
- *Wolf v. Spariosu*, 706 So. 2d 881 (Fla. 3d DCA 1998) (lender's lien was superior to intervening lienholder's lien, where the agreement under which lender discharged the first two mortgages provided that lender was subrogated to the rights of the first mortgagee).
- *Cf., Biscayne Inv. Group, Ltd. v. Guarantee Management Services, Inc.*, 903 So. 2d 251 (Fla. 3d DCA 2005) (developer's equitable subrogation claim could not stand because developer failed to allege that it was not primarily liable for the debt).



Recent Development Regarding Construction Lending

- The case of *CDC Builders, Inc. v. Biltmore-Sevilla Debt Investors, LLC; Brian McBride; Riviera Biltmore, LLC; and Riviera Sevilla, LLC* (Case No. 3D13-603), filed in the Third District Court of Appeal, was significant to the construction industry.

Facts of the Case:

- Developer formed a single-purpose entity (“Developer Company 1”), which took out a construction loan and hired Contractor to build single family residences. Developer Company 1 subsequently terminated Contractor for convenience, but instructed Contractor to complete in-progress homes.



Facts of *CDC Builders, Inc.* (cont.)

- Contractor brought suit for nonpayment and completed the in-progress homes. Contractor subsequently recorded a construction lien and amended its complaint to foreclose the lien.
- When the construction loan matured, Developer Company 1 received a loan extension and then formed a separate entity (Developer Company 2), which took out a separate loan to completely pay off and purchase the matured construction loan from the Lender.
- Developer Company 2 filed an action to foreclose on the construction loan against Developer Company 1.



Facts of *CDC Builders, Inc.* (cont.)

- The foreclosure action included the Contractor (as a lienor), who asserted affirmative defenses alleging (i) satisfaction of debt (i.e., merger through alter ego); and (ii) unclean hands. The Contractor also filed a counterclaim alleging fraudulent transfer of the subject property.
- Trial Court granted summary judgment in favor of Developer Company 2.
- Developer Company 2 subsequently purchased the property from Developer Company 1 at the foreclosure sale for a pittance, wiped out the Contractor's lien, and retained the improved property.



Facts of *CDC Builders, Inc.* (cont.)

- The Contractor argued that Developer Company 2 was an insider-controlled entity created for the sole purpose of enabling the debtors to avoid liability to the Contractor for its claims by transferring their primary assets through a sham foreclosure action.
- However, the Trial Court agreed with Developer Company 2 that there was no evidence of fraud, a fraudulent transfer, or of improper purpose in the record.
- The Appeal to the Third District followed.



Facts of *CDC Builders, Inc.* (cont.)

- The Third District Court of Appeal issued an Opinion on September 17, 2014, reversing the parts of the final judgment that adjudicated the Contractor's rights, noting that "persons cannot do indirectly what they are not permitted to do directly," and remanding for further proceedings regarding the Contractor's counterclaim and affirmative defenses.
- The Developer subsequently filed a Motion for Rehearing, Rehearing En Banc, Clarification, and/or Certification of Conflict and/or Questions to Florida Supreme Court, which was denied by the Third DCA in December 2014.



Facts of *CDC Builders, Inc.* (cont.)

- On March 4, 2015, the trial court issued an Order reopening the case, and on March 10, 2015 the trial court issued a Case Management Order setting trial in October 2015.
- On April 22, 2015, the trial court issued an Order reinstating the Contractor's construction liens and staying the case pending resolution of an earlier related case filed by the Contractor against the Developer Companies, which was set for trial in February 2016.
- In February 2016, the case proceeded to a non-jury trial with the trial court determining that CDC perfected its claim of lien in regards to at least one of the property sites in question and deferred ruling on the lien foreclosure issue as against Developer Co. 2 pending resolution of Developer Co. 2's mortgage foreclosure case and Contractor's counterclaims and cross-claims alleged therein.
- The Parties thereafter settled their claims.



Potential Implications

- If Developer Company 2 had prevailed, this case could have established an inequitable precedent (albeit under specific facts) allowing developers a method to avoid and extinguish statutory lien rights without having to pay contractors, materialmen, and/or laborers despite having obtained the benefit of work performed or materials provided to the project without payment pursuant to their contracts.



QUESTIONS?

**BECKER &
POLIAKOFF**

Legal and Business Strategists

CONSTRUCTION LIEN LAW

Lee A. Weintraub

Becker & Poliakoff, P.A.

One East Broward Blvd., Ste. 1800

Ft. Lauderdale, Florida 33301

(954) 985-4147

lweintraub@bplegal.com

PROPERTY INTERESTS SUBJECT TO LIEN

- Where the property is held in trust, so legal and equitable titles are separated, the interest of the party contracting for the improvement is subject to the lien
- A lienor working on public property as part of adjoining private construction job may lien the owner's private property for work performed on the public property

PROPERTY INTERESTS SUBJECT TO LIEN

- Singular contracting spouse is deemed the agent of the other to the extent of subjecting the other spouse's interest in property to liens
 - Only where contracting spouse is not separated and living apart
 - Unless spouse, within ten days after learning of contract, gives contractor notice and records objection in public records
 - Statute does not provide personal liability of non-contracting spouse for deficiency decree or on underlying construction contract

PROPERTY INTERESTS SUBJECT TO LIEN

- Lessee Improvements

- Leasehold interest is subject to liens
- No lien against lessor's fee interest unless lease requires lessee to construct improvements
 - Landlord's filing of notice of commencement or reimbursement to tenant of construction costs do not allow liens against landlord's interest, where landlord is not party to tenant's construction contract and notice of lien prohibition has been filed
- Lessor can limit its liability by 1) prohibiting liability for liens in lease; and 2) recording the lease, short form, or statutory notice in public records before NOC is recorded
- Duty on lessee to notify contractor of lien prohibition
 - knowing or willful failure renders contract between lessee and contractor voidable at contractor's option

PROPERTY INTERESTS SUBJECT TO LIEN

- Lessor not subject to liens when lessee is mobile home owner leasing mobile home lot in mobile home park
- Landlord's signature on Notice of Commencement or reimbursement to tenant of construction costs, without more, don't subject landlord's interest to liens

PROPERTY INTERESTS SUBJECT TO LIEN

- Lienor may serve written demand on landlord for copy of lease provision prohibiting liens
 - Written demand must be separate document from NTO & requires statutory warning
 - Landlord must comply under oath within 30 days
 - Failure to comply or serving false copy subjects landlord's interest to liens
 - Lienor's actual notice of lien prohibition precludes lien liability even if landlord fails to comply

PROPERTY INTERESTS SUBJECT TO LIEN

- When a party under contract to buy property contracts for an improvement before the party receives legal title, liens will attach to the extent the party subsequently acquires title.
 - Under Section 713.10, a lienor can reach the property interests of the person contracting for the improvement as they exist at the commencement of the improvement or are thereafter acquired

PROPERTY INTERESTS SUBJECT TO LIEN

- Liens Against Condominium Property Under Section 718.121
 - If lien attaches before declaration of condominium, may be enforced against entire property, including common elements
 - Liens attaching after declaration are enforced against all condominium parcels in proportions for which each are liable for common expenses
 - each individual is entitled to release the lien from unit by paying *pro rata* share
 - includes right to bond off proportionate share

PROPERTY INTERESTS SUBJECT TO LIEN

- May be enforced against individual parcels when unit owners expressly requested work or expressly consented
- Condominium association's lien for unpaid assessments relates back to date of original declaration of condominium

PROPERTY INTERESTS SUBJECT TO LIEN

- If Owner Lacks Property Interest, then No Lien Rights
 - Examples are evicted tenants or prospective purchasers who never bought property
 - Lien attaches to improvement if its removal is practicable
 - Cost for restoring land to its condition before the improvement is paid first out of sale proceeds

PERSONS WITH LIEN RIGHTS

- Contractors
- Subcontractors
- Subsubcontractors
- Laborers & suppliers contracting with any of the above
 - Laborers can't supply materials
 - Suppliers can't do installation

PERSONS WITH LIEN RIGHTS

- Professional Lienors
- Assignees
 - Lien rights are freely assignable other than labor liens
 - Assignments may, but are not required to, be recorded

PERSONS WITHOUT LIEN RIGHTS

- Sub-sub-subcontractor, including any one contracting with sub-sub-subcontractors
- Supplier to supplier
- Unlicensed contractor
 - exception where contractor complied with licensure prerequisites under Chapter 489, but DBPR misplaced or mishandled documents
 - subcontractors to unlicensed contractor retain their lien, contract and bond rights.
- Sale of goods not designated for any site but simply for customer's shelf
- Lienors working on government property

PERSONS WITHOUT LIEN RIGHTS

- Lienors working on jobs properly bonded under §713.23 other than the contractor
- Laborers other than architects, landscape architects, interior designers, engineers or land surveyors who did no work at the site
- Lienors not in privity with the Owner when direct contract is less than \$2,500.00
- Lienors performing services not permanently improving property
- Lienors performing destructive testing or restoring property from same pursuant to Chapter 558 unless contracting with the owner
- Liens arise from contracts implied in fact, but not contracts implied at law

DESIGN PROFESSIONAL LIENS

- Section 713.01(8) authorizes liens for design services rendered under design/build contract
- Need not serve contractor's final affidavit
- Liens don't relate back to Notice of Commencement

DESIGN PROFESSIONAL LIENS

- If design professional in privity with owner, then may lien property even if the property was not actually improved
 - If no privity with owner, then lien rights only if property is improved
 - Design professionals not engaging in construction activities need not serve a contractor's final affidavit
- Covers design and supervisory work
- Not available for expert witness services

DIRECT CONTRACTS ON RESIDENTIAL PROJECTS

- Contract greater than \$2500 between the owner and the contractor for single or multiple family dwellings up to and including four units
- First page of the contract or on a separate page signed by the owner and dated
- No less than 12 point capitalized, bold-faced type
- If contract is oral or implied, the notice must be provided in a document referencing the contract

DIRECT CONTRACTS ON RESIDENTIAL PROJECTS

- Failure to include statutory disclosure does not adversely affect rights of lienors lacking contract with owner
- Contractor may be barred from enforcing lien if owner was adversely affected by lack of notice
- Not required when owner is licensed contractor or in business of creating and offering parcels of property for sale or lease

NOTICE OF COMMENCEMENT

- Required to be signed by the project owner
 - Lienors have right to rely on accuracy
- Payments owner makes to its contractor after the Notice of Commencement expires are improper
- Permitting authority may not require NOC to be recorded as condition of obtaining permit
- Liens recorded during NOC's duration take effect as of NOC's recording date
- Construction must commence within 90 days of recorded NOC or NOC is void

NOTICE OF COMMENCEMENT

- May be amended within effective period to change erroneous information, add omitted information or extend effective period
 - Amended Notice of Commencement must identify recording book and page number of original and be served upon contractor and all lienors giving notice within 30 days after recording
 - To change contractors, new Notice of Commencement or Notice of Recommencement must be recorded

NOTICE TO OWNER

- Served to addresses on Notice of Commencement
- If no Notice of Commencement, use the addresses in building permit application
- Not required for subdivision site work
 - Any lienor serving Notice to Owner is entitled to protection of proper payments
- Notice to Owner is timely when claimant serves it:
 - before commencing to supply services or materials, or
 - after commencing to supply services or materials, but before one of the following events occurs:
 - 45 days elapse from first furnishing of work, or
 - contractor presents owner with final affidavit and owner disburses final payment

NOTICE TO OWNER

- After owner records new notice of commencement after terminating prior one, lienors must send new notices to owner to perfect their rights under recommenced construction
- Effective upon receipt by owner
- Also effective as of date on which it was mailed, provided it was placed in mail within 40 days of first day of work on the project
 - certified mail log or electronic tracking records must be retained
- Time for service begins running from commencement of special fabrication of materials
- Substantial compliance with statutory form, but mandatory warning language
 - Errors or omissions don't invalidate absent prejudice to owner

NOTICE TO OWNER

- After owner records new NOC following termination of prior one, lienors must send new notices to owner to perfect lien rights on recommenced construction
 - Project is deemed to have begun again

SERVICE REQUIREMENTS

- Personal delivery, certified mail, and overnight delivery
 - Posting on site only if other methods are unavailable
 - Service effective on date of mailing if served at correct address & returned unclaimed
- Serve upon owner with copy to all non-privity entities within chain of contracts
- Not required for:
 - Direct privity
 - Federal jobs
 - Common identity or agency between owner and contractor
 - Subdivision site work

CLAIMS OF LIEN

- Drafting Claim of Lien and Satisfaction of Lien would constitute unauthorized practice of law if accomplished by unlicensed third parties
 - §713.08(2) provides Claim of Lien may be prepared by the lienor or the lienor's employee or attorney
- Substantial compliance with statutory form, but mandatory warning language
 - Errors and omissions don't invalidate absent prejudice
- Lien may be amended only if time for filing initial Claim of Lien has not already expired
- Must separately identify unincorporated specially fabricated materials

CLAIMS OF LIEN

- Recorded during progress of work or within 90 days of final furnishing of material or labor (excluding remedial work)
- Exception to 90 day rule occurs when direct contract is terminated and owner desires to recommence construction
 - Recording period runs from date of recording affidavit of intention to recommence construction
 - Lien must be filed within 30 days of affidavit to preserve priority against others

CLAIMS OF LIEN

- Deed to subsequent purchaser recorded before lien takes priority
 - exception is if lien was recorded during duration of Notice of Commencement
- If mortgagee or other lienor records notice of lis pendens and commences foreclosure action, lienor must record lien and intervene in foreclosure action within 30 days of lis pendens or be barred
 - even if the lien would otherwise relate back to the Notice of Commencement

CLAIMS OF LIEN

- *Delta Fire Sprinklers, Inc. v. Onebeacon Ins. Co.*, 937 So. 2d 695 (Fla. 5th DCA 2006)
 - final inspection, testing of sprinkler system and completion of punch list did not constitute last day of work
 - lienor had previously submitted pay requisition for fully completed job
- For suppliers of rental equipment, delivery to job site is prima facie evidence of period of actual use
 - through time equipment is last available for use at site or two business days after lessor received written notice from owner or lessee to pick up equipment, whichever occurs first

CLAIMS OF LIEN

- Enforcement of lien requires substantial, rather than full, performance of work
 - Lienor is entitled to lien for contract price less all damages caused by failure to render full performance
 - Substantial Performance is defined in case law (nearly equivalent to what was bargained for)
 - Still requires strict compliance with Lien Law requirements
 - Failure to obtain required permits may be a defense

TIME FOR BRINGING ACTION

- One year from recording of lien
- Year duration of lien is not tolled by subsequent amendment to lien unless amended lien reflects later final day of work
- If the last day of the year is a weekend or holiday, the lawsuit can be filed the next day

TIME FOR BRINGING ACTION

- If Notice of Lis Pendens isn't recorded, owner may sell, or creditor may lien, property & take priority over lien
 - Even if lien is in timely foreclosure

TIME FOR BRINGING ACTION

Transfer Bond

- Same time limitations as for a lien foreclosure
 - However, where lien is bonded off after lien foreclosure is filed, lienor has one year in which to sue the surety
 - If transfer happens while lien foreclosure is pending, lienor must still sue surety within statutory time frame or lien is extinguished, even though foreclosure is still pending

TIME FOR BRINGING ACTION

Owner's Procedures For Shortening Time For Foreclosure

- Order to Show Cause
- Notice of Contest of Lien
 - Notices of Contest of Bond Claim are also available
 - Available on 255 bonds only after claimant has stopped performing work
 - Under 713, Notice of Contest may not be filed until after a Notice of Nonpayment has been served
- A discharge order entered in response to an Order to Show Cause cannot be vacated even if excusable neglect coupled with meritorious claim

TIME FOR BRINGING ACTION

- Lienor cannot move for an extension of time in which to foreclose in response to Order to Show Cause
 - However, owner can stipulate to extension of time
- Lienor in bankruptcy filed before lien expires gets two years in which to foreclose

TIME FOR BRINGING ACTION

Conditional Payment Bond

- Action against surety must be initiated not later than one year from date lien is transferred to bond
- To the extent bond does not provide coverage, lienor must file lien foreclosure within one year after the recordation of lien

TIME FOR BRINGING ACTION

Computing Duration of Lien

- Action is deemed commenced when filed in court of competent jurisdiction
 - Year is not tolled if claim is brought in court lacking jurisdiction
 - Must be affirmative judicial action. Affirmative defense in mortgage foreclosure raising lien validity isn't enough
 - Filing arbitration doesn't satisfy requirement of suing within year
 - Arbitration isn't brought in court of competent jurisdiction

Time for Bringing Action

- Contractor's final payment affidavit delivered to owner at least five days before instituting action
 - Not clear if required if owner shortened time for action by Notice of Contest or Order to Show Cause
 - There is case law on both sides of this issue
 - Unless type of direct contract is one that, under ordinary business practices, excludes services of subcontractor

PRIVATE BONDED JOBS

- Copy of bond must be attached to Notice of Commencement
 - If payment bond is recorded after work has already begun, it is effective only for lienors seeking payment after it was recorded
 - As to lienors seeking payment before bond was recorded, bond does not exempt project from liens
 - A bond not attached to NOC may be used as transfer bond
 - Notice requirements for bond claim still apply, but run from either time specified in § 713.23 or date Notice of Bond is served on lienor, at lienor's option

PRIVATE BONDED JOBS

- 45 days to serve notice to contractor
 - NTO timely served on contractor satisfies this requirement
- 90 days to serve contractor & surety with notice of non-payment
 - Non-payment of retainage in amount not exceeding 10% of contract price does not constitute non-payment requiring notice of non-payment

PRIVATE BONDED JOBS

- Suit within one year from last day of work
 - Even if lienor was unaware of bond's existence
- If lienor requested copy of bond from contractor or owner and didn't receive one, then lienor may have rights for failure to provide copy
 - Won't excuse failure to timely perfect claim

PRIVATE BONDED JOBS

Provisions in bonds issued after October 1, 2012 restricting class of claimants or venue, limiting or expanding effective duration or adding conditions precedent to claim are unenforceable

DEMANDING ACCOUNT DESIGNATION

- §713.14(2) requires that when any supplier, subcontractor or sub-subcontractor receives a payment for materials, a demand must be made upon the payor for designation of account to which payment must be applied
 - If lienor doesn't demand or fails to apply payment appropriately, lienor will lose lien to extent of misapplied payment
- §713.14(1) makes party making payments who fails to designate or falsely designates to which account payment is to be applied liable for resulting loss

SWORN STATEMENT OF ACCOUNT

- Request must be sent to attention of individual person designated in lienor's Notice to Owner, if any
- Request must include property description & names of owner, contractor & lienor's customer
- 30 days to respond or complete defense to lien
- Lienor not obligated to respond to second demand if second response would contain same information as first
- Failure to respond to demand served after lienor filed foreclosure doesn't give defense to lawsuit
- May only be served by owner
 - Unless § 713.23 bond, in which case served only by contractor and only when owner makes payment

SWORN STATEMENT OF ACCOUNT

Lienors may demand from owner statement under oath showing accounting of payments under direct contract

Failure to comply within 30 days deprives owner of attorney fee award

FRAUDULENT LIENS

Fraudulent lien is any lien in which lienor has:

- willfully exaggerated amount for which such lien is claimed;
- willfully included claim for work not performed or materials not furnished for property upon which lien is impressed;
- compiled claim with such willful and gross negligence as to amount to willful exaggeration
- Minor mistake or error in Lien or good faith dispute as to amount due doesn't constitute willful exaggeration
 - advice of counsel may be defense if lawyer told all details
 - Lien can still be fraudulent despite good faith if it includes items that are simply not lienable
 - Ex., work not permanently improving property or lost profits, even if money is due for these items

FRAUDULENT LIENS

Complete Defense to Enforcement of Lien

Statutory Action for Damages

- Owner or other party may recover:
 - Actual damages, including:
 - reasonable attorneys' fee for securing discharge of lien,
 - amount of bond premium or interest on money deposited to discharge lien, and
 - court costs and clerk's fees
 - Mandatory punitive damages in amount not exceeding difference between amount claimed by lienor and amount actually due
 - Prevailing party attorney's fees and costs

FRAUDULENT LIENS

Criminal prosecution

- Third degree felony, punishable by up to five years imprisonment and up to \$5,000 fine
- State attorney required to notify DBPR, who is required to investigate and, if probable cause, provide state attorney and owner with investigative report
- No personal liability for person who signed lien on behalf of corporate lienor

FAILURE TO APPORTION CLAIM OF LIEN

- §713.09 authorizes single Claim of Lien on separate lots when amount demanded is for work furnished under same direct contract
- Owner under direct contract must own all of them
- If more than one direct contract or owner, lienor must apportion lien amount

REQUEST FOR LIST OF SUBCONTRACTORS AND SUPPLIERS

- §713.165 entitles owner to request from contractor a list of all subs and suppliers
 - contractor must respond within ten days or risk forfeiture of lien to the extent owner was prejudiced

RELEASES OF LIEN

- Lien or bond claims cannot be waived in advance
 - Releases that provide otherwise are not enforceable
- Unconditional release exchanged for check that bounces is binding as to owner if owner relied thereon to its detriment
 - release lacks consideration and is non-binding as to customer

RELEASES OF LIEN

- § 713.20 contains only forms for releases that can be compelled against lienor's wishes
 - lienor may add provision that release is conditioned upon clearance of funds
 - in that case, owner may withhold payment from contractor in amount of unpaid check until condition is satisfied
 - releases apply to private & public bonded jobs
 - Although release language specifies only liens, sect. 713.23(5) provides it applies to unconditional bonds as well

RELEASES OF LIEN

- Criminal offense to furnish release of lien or other document containing false statement
 - representations that all lienors have been paid in full
 - False payment affidavits misrepresenting status of subcontractor payments don't invalidate lien rights

MISAPPROPRIATION OF CONSTRUCTION FUNDS

- Statutorily created permissive inference that person knowingly and intentionally misapplied construction funds whenever:
 - valid lien has been recorded against property
 - person who ordered work has received sufficient funds to pay for same
 - person failed for at least 45 days from receipt of funds to pay lienor
 - imposes criminal liability
 - Doesn't provide basis for invalidating lien

PAYMENTS BY CONSTRUCTION LENDER

- Before disbursement to owner on residential property, lender must give written notice to borrowers
 - Advising of importance of obtaining releases
 - Via mail, email, fax or personal delivery
 - Doesn't apply if borrower is not natural person, is licensed contractor, or creates or offers parcels for sale or lease in ordinary course of business

PAYMENTS BY CONSTRUCTION LENDER

- When bank ceases funding construction loan
- Diversion of construction funds to another purpose
 - Notice to contractor & lienors giving notice
 - Lender must serve notice if funding ceases / owner serves it if funds are diverted
 - Lender is liable in either scenario for lack of notice
 - Lack of notice creates liability of actual costs plus 15% for overhead & profit
 - From date on which notice was due to date on which it was finally served

CONDITIONAL PAYMENT BONDS

- Must be titled as conditional payment bond, have statutory language on first page in 10 point type, be identified as conditional in notice of commencement & recorded with NOC before commencement of project
- Incorporate “pay if paid” clause into bond
- Require “pay if paid” clause in lienor’s subcontract
 - If not, bond will be deemed unconditional bond under sect. 713.23

CONDITIONAL PAYMENT BOND

- Owner may record Notice of Bond within 90 days of recorded lien
 - Must include sworn Certificate of Payment to Contractor to extent of lienor's claim
 - Contractor has 15 days in which to record Notice of Contest of Payment
 - Otherwise, lien is transferred to bond
 - If contractor timely records Notice of Contest, then lien is subject to judicial determination

CONDITIONAL PAYMENT BOND

- After 90 day period following recorded lien, owner may transfer lien to bond only if contractor and surety sign Joinder in Certificate of Payment
- Part of Lien may be transferred to bond if owner paid contractor for only part of claim
 - remaining claim is secured by lien

CONDITIONAL PAYMENT BOND

- Third degree felony to materially misstate status of payments
- Owner won't be prevailing party for fee award if lien is transferred to bond after foreclosure is filed

PROPER PAYMENTS

- Owner's complete defense against lien claims
- Obtaining current releases from contractor and all lienors serving notice
 - Owner is under no obligation to pay or ensure payment to any non-privity lienor who did not serve notice to owner at time of payment to contractor
- Owner should require progress payment affidavit from contractor before any payment is made

PROPER PAYMENTS

- Owner must obtain contractor's final payment affidavit
 - contractor not entitled to final payment until affidavit is provided
 - required even if final payment is not due because of contract termination
 - must list lienors who served Notice to Owner or for whom service time has not yet run
 - owner may not rely on affidavit as to lienors serving timely Notice to Owner

PROPER PAYMENTS

- Owner may pay unpaid lienors directly
 - Owner must send 10 day Notice of Intent to Pay Lienors to contractor
 - Except with contractor's written consent
 - Owner may not pay any lienor whose Notice to Owner time has expired
- If insufficient final balance to distribute to lienors, then payment must be disbursed to: 1) laborers, 2) lienors serving timely Notices to Owner, 3) contractor
 - All entities within class of payees must be paid in full before second class receives payment
 - If insufficient funds to pay all claimants within a class, then claimants within that class paid *pro rata*
- Proper payments not required if project is properly bonded, unless bond is conditional

PROPER PAYMENTS

- Payments made after NOC expires are improper
- Payments made when NOC incorrectly describes property to detriment of lienor are improper
 - Except for clerical errors when description still covers property where improvements are located

ASSIGNMENTS OF LIEN

- Liens and prospective liens are freely assignable at any time before their discharge
 - Only exception is labor liens
 - Assignments may be recorded in the public records, but not mandatory

INTERPLEADER ACTIONS

- Must be dispute between lienors regarding amount due or to become due
- Liens are transferred away from property and over to interpled funds
- Interpleading party may still be liable for prevailing lienor's attorney's fees

TRANSFER BONDS

- May only be transferred by someone with interest in property or contract
 - Condo unit owners have right to pay or bond off lien in amount of owner's pro rata interest in overall units
- Bond amount is lien amount plus interest for three years plus greater of \$1,000 or 25% of lien amount
- Cash deposit in court registry is alternative
- Party with interest in security may move court to increase or reduce bond amount or change sureties

TRANSFER BONDS

- Mandatory for court to increase bond if insufficient to pay attorney's fees & costs
 - Case law dilutes enforceability of this
 - Applies only to fees incurred rather than future fees

INSURANCE PROCEEDS

- May be liened after owner or lienor have been reimbursed for paid premiums
- Recipient is deemed trustee & funds are trust funds for one year from receipt
- Doesn't apply to proceeds paid to mortgagee or lienholder perfected before NOC or Notice of Recommencement

ATTORNEY FEES

- Not awarded in every action since *Trytek*
- Voluntarily dismissed defendant without prejudice is entitled to award
 - Even where plaintiff subsequently refiled identical lawsuit & prevailed
 - 713.29 governs bond claims, rather than Chapter 627
 - Significant issues standard applies in 713, but not 627's net judgment rule

Advanced Construction Law Certification Review Course 2017



**Department of Business and Professional
Regulation
Construction Industry Licensing Board
Contractor Licensing**

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Florida's Construction Industry Licensing

- Regulated under Chapter 489, Florida Statutes
- Chapter 489, Florida Statutes, is divided into three parts
 - Part I: Construction Contracting
(ss. 489.101-489.146)
 - Part II: Electrical Contracting
(ss.489.501-489.538)
 - Part III: Septic Tank Contracting
(ss. 489.551-489.558)

CILB Licensing: What is Contracting?

- S. 489.105(3), F.S., defines Contractor as a person:
 - for compensation;
 - does himself or herself or by others;
 - construct, repair, alter, remodel, add to, demolish, subtract from, or improve;
 - any building or structure, including related improvements to real estate, for others or for resale to others; and
 - job scope is substantially similar to scope in (3)(a)-(p).
- Negotiation, bidding for or advertising for these services constitutes contracting.

Licensure Types

- Certified Contractors (State Wide)
 - Operate on a state wide basis.
 - Required to only exhibit their state license and comply with local occupational license and permitting requirements (489.113(4)(a), F.S.).
- Registered Contractors (Local)
 - Licensed by local jurisdiction (competency card)
 - Registered with the State of Florida: DBPR.
 - Only permitted to operate in the geographic area of the licensing jurisdiction.
 - May register multiple local competency cards.

CILB: Licensure Divisions

- DIVISION I
 - 3 classes of license
- Division II:
 - 13 classes of licensure
- Specialty Licenses:
 - Assigned to the Board Divisions based on scope of work.

CILB: Division I

- General contractor: unlimited as to the type of work which he or she may contract for, except as otherwise expressly provided in s. 489.113.
- Building contractor: commercial buildings, single and multi-family residential buildings not exceeding three stories, may perform non-structural work on any building.
- Residential contractor: Limited to one, two and three family residential not exceeding two stories or over uninhabitable story.

CILB Licensing: Division II

Categories of Licenses

- Commercial pool/spa contractor
- Residential pool/spa contractor
- Swimming pool/spa servicing contractor
- Roofing contractor
- Mechanical contractor
- Plumbing contractor
- Underground utility and excavation contractor
- Solar contractor
- Pollutant storage systems contractor
- Class A air-conditioning contractor
- Class B air-conditioning contractor
- Class C air-conditioning contractor
- Sheet metal contractor

CILB Licensing: Division II

Categories of Licenses

- You may find the scope of work for each of these contractors under s. 489.105(3)(d) – (p), F.S.

Specialty Licenses

- Specialty contractor:

a contractor whose scope of work and responsibility is limited to a particular phase of construction established in a category adopted by board rule and whose scope is limited to a subset of the activities described in one of the paragraphs of this subsection.

Specialty Licenses Types

- You can locate all specialty license types in Chapter 61G4-15, F.A.C.

CILB Licensing: Who needs a license?

- Only a person who is certified or registered as a contractor in the State of Florida can engage in the business of contracting. (489.113(2), F.S.)
- Numerous exemptions: including
 - Jim Walter
 - Owner Builder
 - Division I Sub-contractor exemption
 - Developer and Manufactured Housing

What about Business Organizations and Other Entities?

- Each business organization or entity must have a licensed contractor formally qualify their company with DBPR before it can engage in contracting!
- Businesses do not hold a separate license.
- Contractors are required to provide background/financial information for the business they are seeking to qualify.

Qualification of Business: 2 types

- Primary Qualifier (s.489.105(4), F.S.) must supervise, direct, manage, and control of both business (\$) activities and construction activities of the business.
- Secondary Qualifier (s. 489.105(5), F.S.) responsible to supervise construction activities only on jobs for which they have obtained a permit. No financial responsibility.

489.1195(1)(a), F.S. Financially Responsible Officer

- responsible for all financial aspects of the business organization and may not be designated as the primary qualifying agent.
- Relieves the primary qualifier of responsibility for the business organization.
- FRO is assigned a number in DBPR system. However, no requirement to renew or to take continuing education.
- Can be subject to disciplinary action.

Exemptions to Licensure: Employees

- Pursuant to s. 489.103(2): Employees of a licensed contractor or a qualified business entity are not required to have their own license
- “employee” is defined as a person who receives compensation from and is under the supervision and control of an employer who regularly deducts the F.I.C.A. and withholding tax and provides workers’ compensation.

Jim Walter Exemption

489.117(4)(d), F.S.

- An uncertified or registered contractor may perform contracting services for the construction, remodeling, repair, or improvement of single-family residences or single family townhouse, if supervised by a certified or registered general, building, or residential contractor.
- No direct contract is required between licensed contractor and the unlicensed person performing specialty contracting services.

Practice Note: Jim Walter Exemption

- Florida Home Builders Ass'n v. St. Johns County, 914 So. 2d 1035 (Fla. 5th DCA 2005)
- Jim Walter applied equally to both local and state licensure requirements.

Division I Sub-contractor 489.113(2), F.S.

- An unlicensed subcontractor may perform construction work under the supervision of a certified or registered contractor, provided that the work is within the scope of the supervisor's license.
- the person being supervised cannot be engaged in construction work requiring licensure under s. 489.105(3)(d)-(o).
- Local licensing may still be required.

Owner Builder Exemption

489.103(7), F.S.

- Owners of property when acting as their own contractor and providing direct, onsite supervision themselves of all work not performed by licensed contractors.
- Only farm outbuildings, one-family or two-family residences, or commercial improvements of less than \$75,000.
- May not be sold or leased within 1 year.
- does not exempt any person who is employed by or has a contract with such owner and who acts in the capacity of a contractor.

Demolition Exemption

- Pursuant to s. 489.105(3), F.S., the term demolition, as set forth in the contractor definition, does not include:
 - demolition of steel tanks 50 feet or less in height;
 - towers 50 feet or less in height; or
 - other structures 50 feet or less in height.

Developer Exemption

489.105(6), F.S.

- "contracting" shall not extend to an individual, partnership, corporation, trust, or other legal entity that offers to sell or sells completed residences on property on which the individual or business entity has any legal or equitable interest.
- A certified or registered contractor must construct the residence.

Manufactured Building exemption

489.105(6), F.S.

- Similar to developer exemption.
- may sell manufactured or factory-built buildings including final construction.
- property on which either party to a contract has any legal or equitable interest
- Licensed contractor must still complete the residence.

Manufactured Building exemption (cont.)

- Ch. 2012-13 s. 10, Laws of Florida, was passed to clarify that the manufactured building exemption above applies retroactively to any contract for the sale and installation of a manufactured or factory-built building, regardless if the contract was executed prior to the passage of the 2009 legislation.
- This may render contracts previously thought to be unenforceable enforceable despite the potential application of section 489.128, Florida Statutes, covered later in the presentation.

Effects of Non-Licensure?

- 489.128, F.S.- contracts entered by an unlicensed contractor are unenforceable in law or in equity by the unlicensed contractor.
- contract rendered unenforceable: no lien or bond claim shall exist in favor of the unlicensed contractor for any labor, services, or materials.

Effects of Non-Licensure?

Possible Criminal Sanctions!

- unlicensed contractor commits a first degree misdemeanor.
- found guilty of a second violation commits a third degree felony.
- during a declared state of emergency commits a third degree felony. (Applies even to first offenses)

Unlicensed? Yes or No?

- unlicensed if the individual does not have a license required by this part concerning the scope of the work to be performed under the contract.
- A business organization is unlicensed if it does not have a primary or secondary qualifying agent for the scope of the work to be performed under the contract.

License Required!
Now What?

Methods to start Contracting!

- Hire a licensed qualifier to qualify your business or entity.
- You obtain you own license by meeting licensure qualifications.

Licensure by Exam s. 489.111(2), F.S.

- Must meet one of the following criteria:
 - 4-year college degree in engineering, architecture, or building construction and has 1 year of proven experience accredited;
 - 4 years of active experience as a worker of which at least 1 year of active experience shall be as a foreman.
 - Combination of up to three (3) years of college credits and years of work experience. At least 1 year of experience must still be as a foreman

Note: All junior college or community college-level courses shall be considered accredited college-level courses.

Legislative Update

- In 2016, Senate Bill 184 was passed to give Military Veterans credit towards experience requirements for up to three years of military service, regardless of their duty assignments.
- The bill gave additional credit for military experience directly related to the practice of contracting.

Practice Tip!

- Pursuant to rules 61G4-16.005 and 61G4-16.009, Florida Administrative Code, test scores are only good for four (4) years.
- Application licensure process should be completed within 4 years of passing final portion of the examination in order to avoid re-examination.

Financial Responsibility

- Applicant must provide a current personal credit report and credit reports on the businesses they currently qualify and the business they intend to qualify.
- Credit report must not disclose any unpaid liens or judgments against the applicant or any of the businesses.
- Credit report must be less than 6 months old and indicate that records have been searched on a state, federal and local level.

Financial Stability

- Each applicant must establish a personal credit score which is 660 or above.
- The applicant may substitute a licensing bond or irrevocable letter of credit in lieu of credit score.
- Bond amounts
 - \$20,000.00 for Division I contractors
 - \$10,000.00 for Division II contractors
- Applicants may reduce the amount of the required bond by 50% if they complete a 14 hour board approved financial stability course.

Good Moral Character

489.111(3)(a), F.S.

- Applicant must establish they are of good moral character.
- Board must provide a written statement outlining the Board's finding of a lack of good moral character.
- Provide a complete record of evidence on which the denial was based.
- Written notice of hearing and appellate rights.

Criminal Background Check

- Required pursuant to sections 489.115(6) and (9), F.S.
- Completed by the Florida Department of Law Enforcement.
- Good for a period of one (1) year.
- Should be completed through the Live Scan vendor process.
- May be completed through a paper copy submission. Adds additional time to processing.

Application Process: Processing and Deficiencies

- A processing team assigned solely to construction applications.
- Processor reviews application within thirty (30) days of receipt to determine if it contains all necessary documents.
- If documents are missing, then a deficiency letter is mailed and emailed (if available) to the applicant detailing the missing items.

Application Process: Processing and Deficiencies

- Deficiency in applications must be corrected before the Department can continue processing the application.
- An applicant may request that an application be reviewed "as is" if they cannot correct the deficiency.
- Note: any request for "as is" will require referral to the CLB.

Application Process: Deadlines for Approval/Denial

- The Department must approve or deny applications for licensure within the greater of:
 - Ninety (90) days of receiving a complete application;
 - Fifteen (15) days after public hearing; or
 - Forty-five (45) days after a recommended order is issued by the Division of Administrative Hearings.

Application Process: Approval of Licensure

- The Construction Industry Licensing Board has delegated authority to the Department to approve certain applications without board review.
- However, many application require board review by the Board for approval or denial.

Application Process: Board Referral

- Common Grounds for referral:
 - Criminal history
 - Inadequate financial stability
 - Previous denial
 - Inadequate experience
 - Requesting to qualify more than one business.

Practice Tip!

- In the event of Board referral, the Board will review the entire application and may raise concerns not previously noted by the Department. Applicants should be prepared to address all aspects of the application in the event of Board review.

Application Process: Denial of Licensure

- Only the Board may deny a license application.
- Board must issue a written notice detailing the basis for denial.
- The Board's order is known as a "Notice of Intent to Deny" (NOID).
- The NOID will contain the applicants hearing rights.
- Applicant must respond within 21 days of service of the NOID to request a hearing otherwise the NOID becomes a final order of the Board.

Special Licensing: Joint Ventures

489.119(2)(e), Florida Statutes

- Joint venture (JV) is a separate business entity requiring its own qualification.
- Rule 61G4-15.0022(2), F.A.C., a JV may receive authorization to bid on a project prior being licensed if one of the JV members is already qualified by a licensed contractor and all members grant the licensed contractor full authority over the contracting business.
- Bid authority requests must be submitted in writing and include a copy of the joint venture agreement and signed authorizations from each member.
- If awarded the bid, the joint venture must complete the qualification process with ninety (90) days of award.

Special Licensing: Qualifier's Death

489.121, F.S.

- a qualified business organization whose qualifier has passed away may request an emergency authorization to complete current contracts.
- A person is not required to be a licensed contractor.
- The individual must notify the Board within 30 days
- List all pending contracts outlining the individual's knowledge and ability to complete those contracts.
- No time limit for completion.
- Individual requesting authorization must be owner, officer, or FRO.

Renewal of License:

- Must be renewed every 2 years.
- Submit renewal form to DBPR.
- Affirm compliance with public liability and workers compensation insurance.
- Complete 14 hours of CE as set forth in 489.115(4), F.S., and Rule 61G4-18.001, F.A.C.
- Submit renewal fee.

Renewal: Delinquency

- A license that is not renewed at the expiration of its biennial licensure cycle is set to a delinquent status.
- Licensee is not permitted to perform contracting work while delinquent.
- License may be renewed at any time in that biennial cycle by submitting the fees and continuing education courses.

Renewal: Null and Void!

- A license becomes null and void if not renewed for two consecutive biennial cycles
- must meet all current licensure requirements again to have his or her license re-issued.
- May petition the Department for reinstatement based on illness or economic hardship.

Common Disciplinary Grounds:

- 489.129(1)(g), F.S.- Financial Mismanagement
- Section 489.129(1)(q), F.S.-Failing to satisfy within a reasonable time
- 489.129(1)(j), F.S.- Abandonment
- 489.129(1)(o), F.S.- Failure to obtain proper permits and inspections.
- Section 489.129(1)(d), F.S., Aiding Unlicensed Activity.

Penalties for violations:

- Denial of issuance or renewal of license;
 - Revocation or suspension of a license;
 - Administrative fine of up to \$10,000.00 per count or separate offense;
 - Probation. Board sets conditions;
 - Reprimand of the license;
 - Assessment of costs associated with investigation;
 - Payment of restitution to consumer;
 - Completion of continuing education;
 - Restriction of the authorized scope of practice by the license.
- Penalty Guidelines: 61G4-17.001, F.A.C.

Declaratory Statements:

- A means for substantially affect persons to obtain a binding interpretation or opinion from the Florida Construction Industry Licensing Board (CILB) concerning the applicability of statutory provisions, rules or orders over which the CILB has authority.

Declaratory Statements

- Not for asking about the conduct of others. Complaint process is method for determining conduct of others.
- Asking about future conduct only.
- Section 120.565, Florida Statutes, and 28.105, Florida Administrative Code, set forth the

Declaratory Statements

www.myfloridalicense.com/dbpr/pro/cilb/declaratory_statements.html

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Drew Winters, Executive Director

Division of Professions
Construction Industry Licensing Board
1940 North Monroe Street
Tallahassee, FL 32399-0783

Phone: 850.487.1395

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CONSTRUCTION INDUSTRY LICENSING BOARD

Declaratory Statements

A declaratory statement is the sole means for obtaining a binding interpretation or opinion from the Florida Construction Industry Licensing Board (CILB) concerning the applicability of statutory provisions, rules or orders over which the CILB has authority (Chapters 455 and 489, Part I, Florida Statutes, and Chapter 61G4, Florida Administrative Code).

A petition for a declaratory statement may only be used to resolve questions or doubts as to how the statutes, rules or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from the CILB.

[Section 120.565, Florida Statutes](#), and **[28.105, Florida Administrative Code](#)**, set forth the requirements for filing a petition for declaratory statement from the CILB. Below is a list of previously issued declaratory statements dating back to 1994, indexed by year and by which license type was affected by the statement. Please note that some of the statements have since been affected by new statute amendments and rule changes so refer to the Statute/Rule cited to verify the information is still applicable. Please note the petitions which have been denied by the Board are not included.

[List of Declaratory Statements](#)

[Declaratory Statement Frequently Asked Questions](#)

DBPR Customer Contact Center

- Primary point of contact for the Department and the Central Intake Unit.
- Telephone (850)487-1395.
- www.myfloridalicense.com
- Customer Service Window: 1940 N. Monroe Street, Tallahassee, FL 32399.

Wrap Up and Questions



Condominium and Homeowner Associations



Barry B. Ansbacher
ANSBACHER LAW

**REAL ESTATE • CONSTRUCTION • PERSONAL INJURY
CONDOMINIUMS • HOMEOWNER ASSOCIATIONS**

Condominium Overview



Homeowner Association Overview



Unique Issues When Representing or Opposing an Association

Patent v. Latent

Tolling and Turnover

718.203
Warranties

Pre-judgment
Interest



Statute of Limitations

Pre-Suit Consideration

Statute of Repose

Implied Warranties

Mediation and Settlement

Attorney Client Relationship





Pre-Suit Requirements

- **558 Notice & Response Requirements**
- **Approvals by Association**
- **Common Elements**
- **718.1255 Mediation / Arbitration**
- **720.311 Mediation**

Statute of Limitations

Section 95.11(3)(c), Florida Statutes, sets forth the statute of limitations applicable to construction defect claims.

- **Scope**
- **Specification of Time Statute of Limitation and Repose Commences**
- **Tolling for Latent Defects**
- **Repose** (more on that in a minute)



Statute of Repose

Section 95.11(3)(c), Florida Statutes, also addresses statute of repose applicable to construction defect claims.



When is Contract Complete?

Cypress Fairway Condo v. Bergeron Construction Co. Inc., 164 So.3d 706 (Fla. 5th DCA 2015)

Statute of Limitations / Repose commences when the **contract** is completed not when the **construction** is completed.

Completion of the contract refers to performance by both owner and contractor, namely payment is an element of completion.

Tolling Until Turnover?

Sabal Chase Homeowners Association v. Walt Disney World Co., 726 So.2d 796 (Fla. 3d DCA 1999)

However, a statute of limitations is not the same as a statute of repose. The clearly stated purpose of Section 718.124 is to lengthen the statute of "limitations" period, see *Regency Wood Condo., Inc. v. Bessent, Hammack & Ruckman, Inc.*, 405 So. 2d 440 (Fla. 1st DCA 1981), not the "repose" period. The appellant's argument to the contrary ignores fundamental distinctions between ordinary statutes of limitations and statutes of repose.

In sum, we find no support for the appellants argument that a statute of repose, which establishes a reasonable time period to bring an action, can be artificially extended by a statute of limitations that has a tolling effect.

Lakeview Reserve Homeowners v. Maronda Homes, Inc.

Whether a homeowners association has a claim for breach of the common law implied warranties of fitness and merchantability, also referred to as a warranty of habitability, against a builder/developer for defects in the roadways, drainage systems, retention ponds and underground pipes in a residential subdivision.

Lakeview Reserve Homeowners v. Maronda Homes, Inc.

Oct. 2010 – 5th DCA says yes, reversing summary judgment by trial court. Certifies conflict with 4th DCA.

April 2011 – Fla. Supreme Court accepts jurisdiction.

Oct. 2011 – Fla. Supreme Court sets oral argument.

July 2012 – Legislature enacts s. 553.835 Fla. Statutes – abrogating ruling by 5th DCA.

July 2013 – Fla. Supreme Court finds new law unconstitutional as retroactively applied and holds that the implied warranties of fitness and merchantability apply to the improvements that provide essential services.

Nov. 2013 – Fla. Supreme Court corrects opinion.

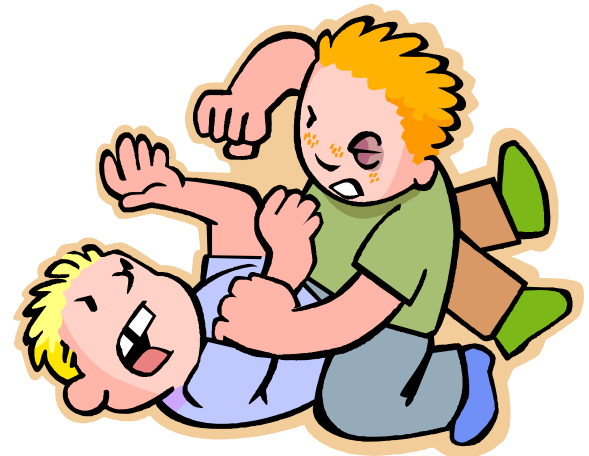
Mediation & Settlement

**Rule 1.720, Florida Rules of Civil Procedure
Condominium Associations:**

Section 718.1255, Florida Statutes

Homeowners' Associations:

Section 720.311, Florida Statutes



The End

Barry B. Ansbacher
ANSBACHER LAW

REAL ESTATE • CONSTRUCTION • PERSONAL INJURY
CONDOMINIUMS • HOMEOWNER ASSOCIATIONS

PROCEEDINGS UNDER THE ADMINISTRATIVE PROCEDURE ACT

Presented by
William J. Cea, Esq.

**2017 Construction Certification Review Course
The Florida Bar**

Florida Statutes, Chapter 120

- Known as the Administrative Procedure Act.
- Applies to public agencies as defined by F.S. 120.52(1).
- For example:
 - State Departments.
 - Board of Governors of the State University System.
 - A regional water supply authority.
 - The Governor.
 - State Officers.
 - The Dept. of Business and Professional Regulation (DBPR)

“Agency” does not include local governments – i.e. Cities and Counties.
Local construction regulation boards are covered by F.S., Section 489.113.

Applicability to Bid Protests and Disciplinary Proceedings

Bid Protests:

- As to the advertised terms of the solicitation (IFB, RFP, ITN).
- As to intended decisions to award or reject bidders.
- Proceedings are conducted pursuant to F.S., Section 120.57, and Chapter 28 of the Florida Administrative Code (“FAC”)



Applicability to Bid Protests and Disciplinary Proceedings

Disciplinary Proceedings:

- DBPR, and boards within its jurisdiction, may initiate disciplinary proceedings pursuant to F.S., Section 455.225.
- Proceedings are conducted pursuant to F.S., Sections 120.57(1) or (2) and Chapter 28 of the FAC.



Applicability to Bid Protests and Disciplinary Proceedings

Hearings Conducted by DOAH:

- Where there are disputed issues of material fact, the Division of Administrative Hearings (DOAH) conducts the proceedings.
- In such cases, DOAH has authority to issue *recommended orders*, and the agency retains the authority to enter final orders.



Bid Protests

What is a Bid Protest?

- **Specification Challenges:** to the terms, conditions, and specifications in an Invitation for Bids, Request for Proposals or Invitation to Negotiate.
- Such challenges may include protests as to the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, modifying or amending any contract.
- **Intended Decisions:** to award a contract or reject the bidders.

Bid Protests

Who can file a Bid Protest?

- A bidder or proposer must be “adversely affected” to have standing.
- A protesting party must demonstrate that its substantial interest will be affected by the proposed agency action.
- For example, the second ranked bidder would have standing to challenge an intended award to the top ranked bidder.

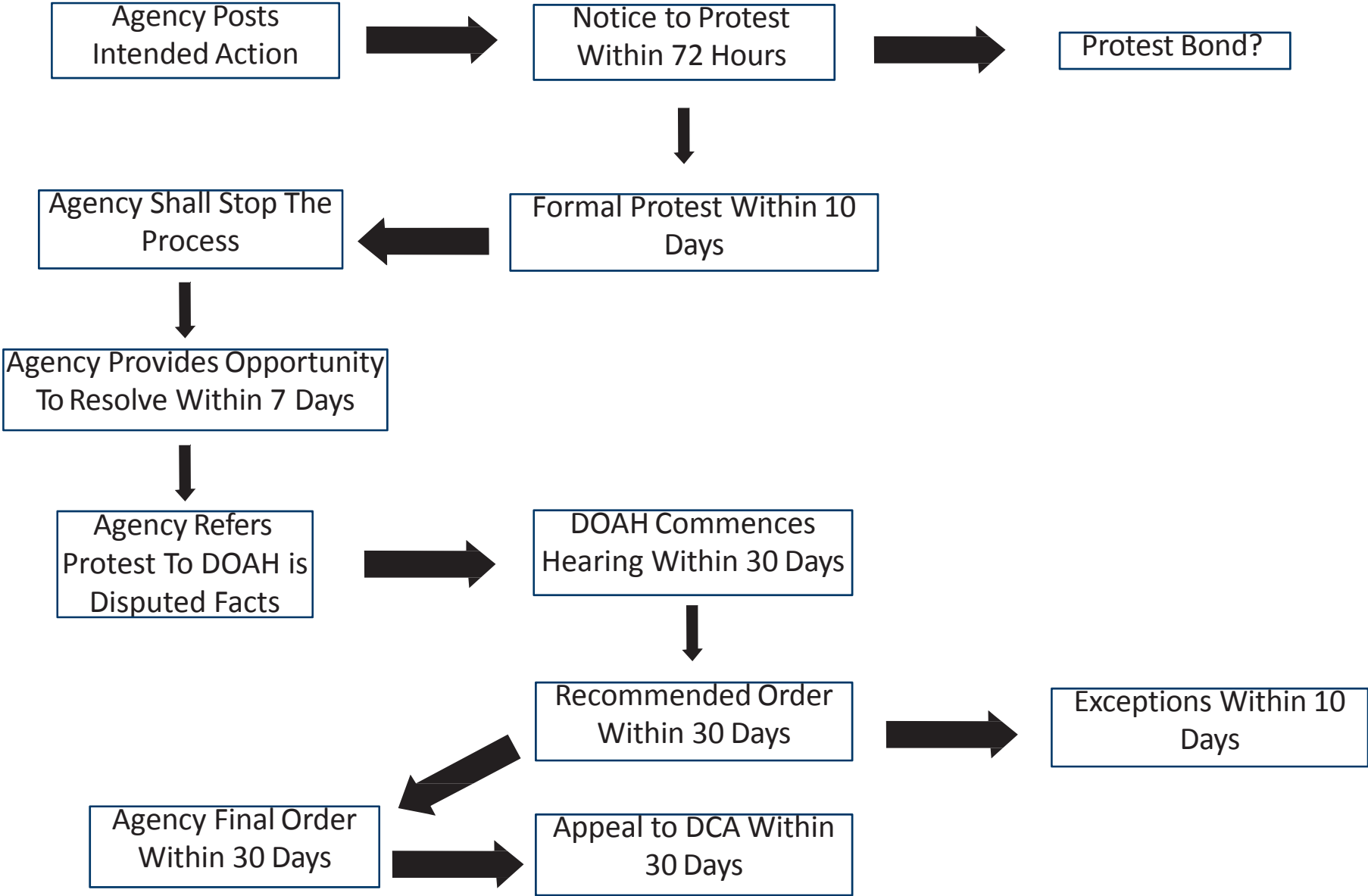
The Bid Protest Process

The Process may be explained in parts:

- Initiation of the Process
- Bid Protest Hearings
- Bid Protest Standards
- Post-Hearing Procedure



PROTEST PROCEEDINGS



Initiation of the Process

Strict Filing Deadlines Must be Adhered to!

a) A Notice of Protest due within 72 hours of:

- Posting of the solicitation for a specification challenge.
- Posting of the notice of decision or intended decision.
- The Notice of Protest is filed with the agency and is a short and plain statement.
- Sending by mail does not extend the 72 hour period.
- Saturdays, Sundays or state holidays not included in the computation.
- Note – *hours* not days

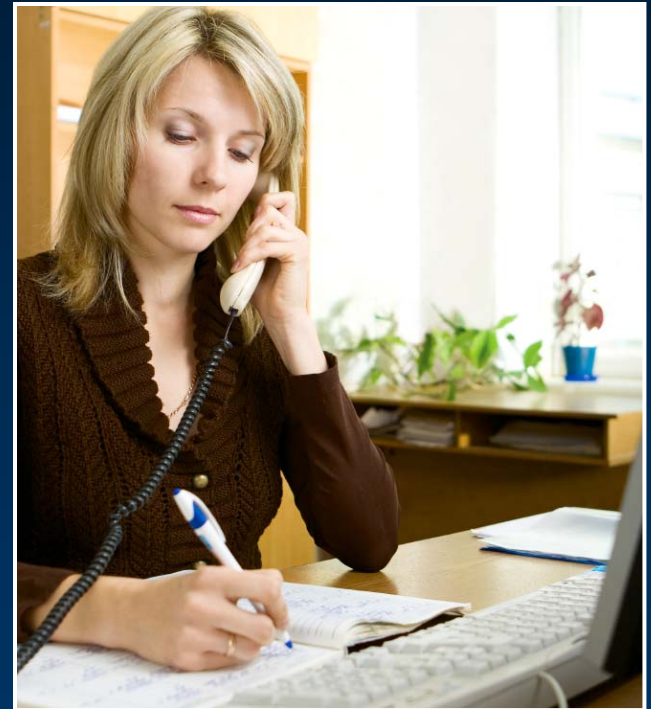
Initiation of the Process

- b) The formal written Protest must be filed with the agency within 10 days of the filing of the Notice of Protest.
- The formal written Protest or Petition must state with particularity the facts and law upon which the protest is based.
 - Section 28-110.004, FAC provides a form Petition.
 - Section 120.54(5)(b)4, F.S. and 28-106.201(2) FAC set forth the required information in detail.
 - For example, the information includes: how the substantial interests are affected, disputed material facts, if any, legal grounds for the challenge, and the relief sought.

Initiation of the Process

c) A Protest Bond may be required.

- Petitioner must determine whether the particular agency statutes or rules require a Protest Bond.
- Section 28-110.005, FAC sets forth the requirements and form for a Protest Bond.
- If a Protest Bond is required, must confirm when it is due (i.e. with the Notice of Protest or the formal Protest Petition)



Agency Action Upon Receipt of Protest

Upon Receipt of the Formal Protest:

- The agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action.
- Unless the agency head sets forth written facts and circumstances which require continuance of the solicitation contract award process in order to avoid an immediate and serious danger to the public health, safety, or welfare.

Agency Action Upon Receipt of Protest

Upon Receipt of the Formal Protest:

- The agency shall provide an opportunity to resolve the protest by mutual agreement between the parties within 7 days, excluding Saturdays, Sundays and state holidays.
- If the Protest is not resolved by mutual agreement, and if there is a disputed issue of material fact, the agency shall refer the protest to DOAH.
- If there is no disputed issue of material fact, then an informal proceeding is conducted by the agency pursuant to Section 120.57(2), Florida Statutes.



Bid Protest Hearings

Once the Protest is referred to DOAH, it shall:

- Assign an administrative law judge (ALJ).
- Within 30 days of the referral, the ALJ shall commence a hearing.
- Other bidders may intervene in the protest.
- Motions to Intervene must be filed at least 20 days before the final hearing.



Bid Protest Hearings (Cont.)

- Section 28-106.206, FAC permits the parties to obtain discovery as provided by the Florida Rules of Civil Procedure.
- Section 28-106.204, FAC permits parties to engage in motion practice.
- Hearings are less formal than Court proceedings, however, Section 120.57 and the FAC do provide guidelines and requirements.
- Proceedings are considered de novo, but not in the same sense as trial court actions.

Bid Protest Hearings (Cont.)

In the context of a Bid Protest Hearing, *de novo* has been interpreted to mean:

- The process by which an agency action is “evaluated, or a hybrid proceeding in which evidence is received, factual disputes are settled, legal conclusions made and prior agency action is reviewed for correctness”.

Bid Protest Hearings (Cont.)

The Protesting Party maintains the burden of proof by a preponderance of the evidence.

Section 120.57(1)(b), F.S. affords parties the opportunity to:

- Present evidence.
- Argue and rebut all issues.
- Conduct cross-examination.
- Submit proposed findings of fact and orders.

Bid Protest Hearings (Cont.)

- In a Protest concerning an Invitation to Bid or Request for Proposals, submissions made after the proposal or bid opening which amend or supplement the bid or proposal will not be considered.
- In a Protest concerning an Invitation to Negotiate, submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall not be considered.

Bid Protest Hearings (Cont.)

- The formal Rules of Evidence do not apply, and hearsay evidence may be presented.
- Hearsay evidence, however, may not be used by itself to support a finding unless it would be considered admissible in Court.

Bid Protest Standards

- The ALJ must determine whether the agency's proposed action is "contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications."
- The legal standard is whether the proposed agency action was "clearly erroneous, contrary to competition, arbitrary or capricious."

Bid Protest Standards (Cont.)

- In proceedings challenging an agency's decision to reject all bids, proposals or replies, the standard is whether the agency's intended action is "illegal, arbitrary, dishonest or fraudulent."
- Florida law provides that public agency's are afforded wide discretion in the interpretation of its own rules, and those statutes which the agency is responsible for administering.

Bid Protest Standards (Cont.)

- Such discretion, however, must be exercised based on clearly defined criteria in the bid specifications, rules or statutes.



Post-Hearing Procedure

- Following the hearing, the ALJ has 30 days in which to enter a recommended order.
- Once the written order is entered, the parties have 10 days to submit written exceptions to the order.
- Once the agency has received the recommended order, it has 30 days to enter a final order.
- The agency is not bound by the recommended order.

Post-Hearing Procedure (Cont.)

- If the agency rejects the ALJ's findings, it must state with particularity that the findings of fact were not based upon "competent substantial evidence" or that they did not comply with the essential requirements of law.
- Judicial review of the final order is permitted pursuant to Florida Statutes, Section 120.68.

Post-Hearing Procedure (Cont.)

- Review can be sought in the district court of appeal, and pursuant to the Florida Rules of Appellate Procedure.
- An appeal does not automatically stay enforcement of the agency's decision.

Post-Hearing Procedure (Cont.)

- Pursuant to Section 120.68, the court's decision may be mandatory, prohibitory, or declaratory in form, and it shall provide whatever relief is appropriate irrespective of the form of the petition.
- Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief, it shall affirm the agency's decision.

Disciplinary Proceedings: Preliminary Process

- Florida Statutes, Section 455.225 provides the DBPR, and Boards within its jurisdiction, with the authority to conduct disciplinary proceedings.
- Pursuant to Chapter 455, the DBPR shall cause to be investigated, any complaint made in writing, signed by the complainant, and legally sufficient.

Disciplinary Proceedings: Preliminary Process (Cont.)

Provided that probable cause is found pursuant to Section 455.225(4), and the probable cause panel directs DBPR to file a formal complaint, it shall then do so pursuant to the APA.

Similar to Bid Protests, the process can be broken out into phases:

- Initiation of the Process
- Pre-Hearing Phase
- Hearing Phase
- Post Hearing Phase

DICIPLINARY PROCEEDINGS

DBPR Complaint
After Probable Cause

Respondent Has 21 Days to
Request a Hearing

DBPR Refers Complaint
To DOAH is Disputed
Facts

DOAH Schedules Hearing
No Less than 14 Days
Notice

DOAH Issues
Recommended Order
Within 30 Days

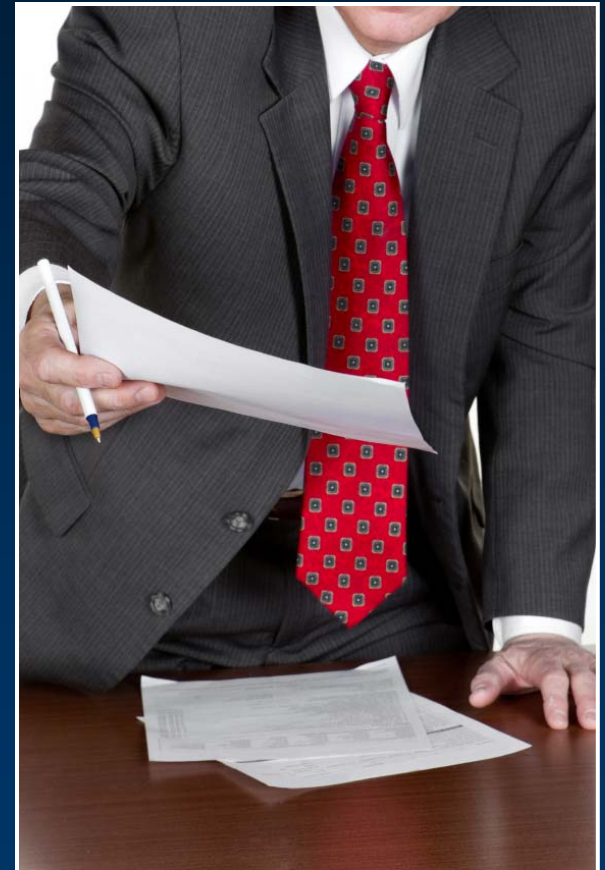
DBPR Enters Final Order

Exceptions Within 15 Days

Appeal to DCA Within
30 Days

Initiation of the Process

- Provided probable cause was found DBPR will issue an administrative complaint.
- Pursuant to Section 120.60(5), the administrative complaint must be served by personal service or certified mail on the licensee.
- The administrative complaint must afford reasonable notice of the facts or conduct which warrant the intended action, and an adequate opportunity to request a proceeding pursuant to F.S., Sections 120.569 and 120.57.



Initiation of the Process (Cont.)

- If personal service cannot be effectuated, then service by publication is permitted.
- Section 28-106.111, FAC provides that the licensee must file a written request for a hearing within 21 days, or the right to request a hearing is waived.

Initiation of the Process (Cont.)

- If there are disputed issues of material fact, the proceeding is referred to DOAH pursuant to F.S., Section 120.57(1).
- If there are no disputed issues of material fact, the agency will handle the hearing pursuant to F.S., Section 120.57(2), in which case DBPR may hear the matter and take final action.

Pre-Hearing Phase

- The pre-hearing phase is delineated at Section 28-106, FAC.
- If a hearing is requested and there are disputed issues of material fact, the matter will be referred to DOAH.
- DOAH will designate an ALJ, who shall rule on the request for a hearing within 15 days.

Pre-Hearing Phase (Cont.)

- On the request of DBPR, DOAH shall assign an ALJ with due regard to the expertise required for the particular matter.
- Upon referral of the administrative complaint to DOAH, DBPR shall take no further action with respect to the administrative complaint, except as a party litigant, and as long as DOAH retains jurisdiction.

Pre-Hearing Phase (Cont.)

- A licensee is not required to file an answer.
- The licensee may be represented by legal counsel, including a member of The Florida Bar or a law student certified pursuant to Chapter 11 of the rules regulating The Florida Bar, or a “qualified representative.”

Pre-Hearing Phase (Cont.)

- The ALJ shall decide whether a person is a “qualified representative”, and in accordance with factors set forth at Section 28-106.106, FAC.
- The ALJ may also consider motions for intervention, which must be filed at least 20 days prior to the final hearing.

Pre-Hearing Phase (Cont.)

Motion practice is permitted per Section 28-106.204, FAC, which provides:

- Motions shall be in writing unless made on the record during a hearing.
- Shall fully state the action requested and grounds relied upon.
- The original motion shall be filed with the ALJ.
- When time allows, other parties may respond to a motion within 7 days.

Pre-Hearing Phase (Cont.)

- Motions for Summary Final Order are not appropriate in disciplinary proceedings.
- Since DOAH only has authority to issue recommended orders in disciplinary proceedings, a party may file a motion for DOAH to relinquish jurisdiction whenever there is no genuine issue of material fact.

Pre-Hearing Phase (Cont.)

- Parties may also obtain discovery in the same manner as provided by The Florida Rules of Civil Procedure.
- The ALJ may issue orders to effectuate discovery and to prevent delay, including the imposition of sanctions except for contempt.

Pre-Hearing Phase (Cont.)

- The ALJ will determine the location of the hearing, and may direct the parties to confer for the purpose of clarifying and simplifying issues, discussing the possibilities of settlement, examining documents and other exhibits, exchanging the names and addresses of witnesses, resolving other procedural matters, and entering into a pre-hearing stipulation.

Pre-Hearing Phase (Cont.)

- Upon the request of any party, the ALJ may also enter an initial scheduling order.
- The ALJ may issue subpoenas for purposes of discovery as well as attendance of witnesses at the hearing.

Hearing Phase

- The requirements for the hearing are generally set forth at Sections 120.569(2) and 120.57(1), Florida Statutes, as well as Chapter 28-106, FAC.
- The ALJ shall set the time and place for the hearing, and shall serve written notice of at least 14 days, unless otherwise agreed by the parties or provided by law.
- Hearings are considered de novo proceedings.

Hearing Phase (Cont.)

- The DBPR has the obligation to preserve the testimony at hearings, which shall be recorded by a certified court reporter or by recording instruments.
- Any party may, at its own expense, provide a certified court reporter if the DBPR does not.
- The ALJ may grant a continuance of a hearing for good cause shown, which except for cases of emergency must be filed at least 5 days prior to the date of the hearing.

Hearing Phase (Cont.)

- The formal Rules of Evidence do not apply, and evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible.
- Hearsay may be used for the purpose of supplementing or explaining other evidence, but it shall not be admissible in itself to support a finding unless it would be admissible in a civil action.

Hearing Phase (Cont.)

Similar to Bid Protest hearings, parties have the right to:

- Respond, to present evidence and argument on all issues involved.
- Conduct cross-examination.
- Submit rebuttal evidence.
- Submit proposed findings of facts and orders.
- File exceptions to the ALJ's recommended order.

Hearing Phase (Cont.)

- When appropriate, the general public may be given an opportunity to present oral or written communications.
- If DBPR proposes to use such material, then all parties shall be given an opportunity to cross-examine, challenge or rebut the material.

Hearing Phase cont.

- Similar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact and issue, but is inadmissible when the evidence is relevant solely to prove bad character or propensity.



Hearing Phase cont.

- When DBPR intends to offer evidence of other acts or offense, it must furnish notice to the licensee no fewer than 10 days before commencement of the proceeding, including a statement of the acts or offenses it intends to offer, describing them and the evidence it intends to offer with particularity

Hearing Phase cont.

- No such notice is required if the evidence is to be used for impeachment or rebuttal.
- The DBPR has the burden of proof by a “clear and convincing” standard.
- Attorneys fees may be imposed as a sanction pursuant to Section 120.569, F.S.

Post-Hearing Phase

- Upon completion of the hearing, the parties may submit proposed findings of fact, conclusions of law, orders, and memoranda within a time designated by the ALJ.
- Proposed orders shall be limited to 40 pages, unless authorized by the ALJ.
- The ALJ shall issue a recommended order within 30 days after the hearing or the receipt of the hearing transcript, whichever is later.

Post-Hearing Phase (Cont.)

- The recommended order shall include a statement of the issues, findings of fact and conclusions of law, and a recommendation for final agency action.
- The parties may file exceptions to the recommended order with the DBPR and within 15 days of the entry of the recommended order.

Post-Hearing Phase (Cont.)

- Exceptions shall identify the disputed portion of the recommended order by page number and paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record.

Post-Hearing Phase (Cont.)

- Note that the failure to file exceptions may be considered a failure to preserve a legal ground for appeal.
- Responses to the exceptions may be filed by the parties within 10 days from the date the exceptions were filed with DBPR.

Post-Hearing Phase (Cont.)

- DBPR may adopt the recommended order as the final order.
- Alternatively, it may reject or modify the conclusions of law over which it has substantive jurisdiction.
- If such conclusions are rejected, DBPR must state with particularity its reasons for doing so.

Post-Hearing Phase (Cont.)

- DBPR may not reject a finding of fact unless it determines that the factual finding was not based upon competent substantial evidence or that the proceedings did not comply with the essential requirements of law.
- DBPR may also reduce or increase a recommended penalty if it states its reasons with particularity.

Post-Hearing Phase (Cont.)

- Final orders may be appealed in accordance with Florida Statutes, Section 120.68 and pursuant to the Florida Rules of Appellate Procedure.
- Note that preliminary, procedural or intermediate orders of the DBPR or ALJ are immediately reviewable if review of the final agency decision would not provide an adequate remedy.
- The filing of an appeal does not automatically stay enforcement.

Post-Hearing Phase (Cont.)

- The court shall grant a stay as a matter of right if the final order has the effect of suspending or revoking a license, unless the court determines that a stay would constitute a probable danger to health, safety, or welfare of the state.

Post-Hearing Phase (Cont.)

- The DBPR may also grant a stay.
- The reviewing court's decision may be mandatory, prohibitory, or declaratory in form, and shall provide whatever relief is appropriate, similar to Bid Protest appeals.

Conclusion and Questions and Answers

- The APA process is akin to truncated litigation, with strict time deadlines.
- Careful consideration must be given to the requirements of Chapter 120, as well as the regulations set forth at Chapter 28 of the Florida Administrative Code.
- Failure to file a Bid Protest or request an administrative hearing in the context of disciplinary proceedings may constitute a waiver of rights, and preclude further court intervention or review.

**BECKER &
POLIAKOFF**

Legal and Business Strategists

AIA CONTRACT DOCUMENTS

A101, A102 and A201

Sanjay Kurian

Becker & Poliakoff, P.A.

Forms of Documents

- AIA A101-2007 (Lump sum)
- AIA A102-2007 (Guaranteed Maximum Price)
- AIA A201-2007 (General Conditions)

What form is being used?

- Reasons to favor one or the other
- Intent of the parties
- What is your client trying to accomplish?
- What are the essential items for your client?

Who are the parties?

- Easy enough question?
- Who is the actual Owner?
- Who is the Contractor?
- Who are the members of the design team?

Consistency of Terms

- What are the obligations of the Architect?
- Are those obligations spelled out in Owner-Architect Agreement?
- Are those terms consistent with the Owner-General Contractor Agreement?
- What are the obligations of the sub-consultants?

§ 1.1 Basic Definitions

- Are the terms defined as the parties intend?
- Should any definitions be added?

§ 1.5 Ownership of Documents

- Instruments of Service
- “Solely and exclusively for execution of the Work”
- Written consent of Architect

§ 2.2 Owner's Information

- Reasonable evidence that Owner made financial arrangements to satisfy obligations
- At time of Contract and Post-Contract
- Condition precedent to continuation of the Work

§ 2.3 & § 2.4 Owner Stopping Work

- Contractor's failure to correct Work
- Owner's right to issue stop Work order
- Owner's right to carry out Work
- Subject to approval of Architect
- How does this Work in practice?

§ 3.2 Contractor's Review of Contract Documents

- Representation that he visited site
- Familiar with local conditions
- Correlated personal observations with Contract Documents
- Contractor must make known to Architect any errors, inconsistencies or omissions discovered
- Contractor has no obligations to discover errors

§ 3.3 Jobsite Supervision

- Contractor controls means and methods
- Unless Contract provides otherwise
- Contractor responsible for jobsite safety
- If dangerous condition discovered then cannot proceed without Architect's instructions
- Contractor responsible for subs

§ 3.4 Labor & Materials

- Contractor responsible for labor, materials, equipment, etc.
- Architect allowed to authorize minor changes in Work

§ 3.5 Warranty

- Warrant material and equipment are of good quality and new
- Work free from defects “except those inherent in the quality of Work”

§ § 3.6 & 3.7 Taxes & Permits

- Contractor pays all taxes
- Contractor pays and secures all permits
- Change the agreement if this is not the case

§ 3.7.4 Concealed Conditions

- Materially different conditions than set forth in Contract Documents
- Unknown conditions that differ materially from those inherent in the character of these construction activities
- Contractor must report within 21 days of discovery
- Human remains/burial markers

§ 3.9 Superintendent

- On site Superintendent
- Superintendent binds Contractor
- Reasonable objection to Superintendent by Owner or Architect

§ 3.12 Shop Drawings & Product Data

- Defined terms
- Not Contract Documents
- Architect approval of submittal
- Contractor remains responsible for deviation from Contract Documents

§ § 3.15 & 3.16 Clean up and Access

- Shall not allow accumulation of waste
- How often measured? Daily?
- Access to Work must be provided to Owner and Architect?
- Special requirements for access?

§ 3.17 Royalties & Patents

- Contractor pays royalties and license fees
- Contractor defends and holds harmless Owner from infringement claims
- UNLESS - Copyright violation in Drawings or infringement required by Contract Documents

§ 3.18 Indemnification

- Contractor indemnifies and holds harmless Owner and Architect (?) arising out of performance of Work
- Attorney's fees
- Limited to damages attributable to: bodily injury, sickness, disease, death, injury or destruction of tangible property (other than Work itself)

§ 3.18 & § 725.06, Fla. Stat.

- § 3.18 - “regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.”
- § 725.06
- Is this an indemnification for one’s own negligence?
- Impact?

Article 4 Architect

- Is there an Architect?
- What is his role at the project?
- Who does he deal with?
- What is the flow of communications?
- What is his authority?
- § 4.2 Contract Administration

Article 5 Subcontractors

- § 5.2 Written list of proposed subs
- Objection by Owner?
- § 5.3 Flow down clauses to subs
- § 5.4 Assignment of subcontracts on termination (14.2)

Article 6 Work by other Contractors

- Owner may have Work done by other forces, including its own
- Owner responsible for coordination
- Delay then Contractor makes a claim

Article 7 Changes in Work

- Change Order
- Construction Change Directive
- Order for a Minor Change in the Work
- Who is preparing each of the above?
- Who is approving?
- What is the process?
- Lack of documentation will lead to claims

Article 8 Time

- Time runs from commencement date
- § 8.2 - Contractor represents time is reasonable;
Time is of the essence
- § 8.3 Claims for time per Article 15

§ 9.1 Contract Sum

- Schedule of Values
- AIA G702 and G703
- Must be delivered before first Payment Application
- A102 – The inclusion of items in the cost of Work is very important (Article 7 and 8 of that document)

§ 9.3 Applications for Payment

- Supported by backup documentation as required by Owner and Architect
- Include authorized changes to Work
- Contractor warrants title to Work covered by Application will pass to Owner no later than payment
- Contractor warrants all previously applied for and paid Work is free of liens and claims

Payment Applications in Cost Plus

- In A102, Owner may want greater backup
- Receipts and timesheets
- Difference between GMP and lump sum

Lien Releases & Payment Applications

- Owner wants unconditional lien releases
- Contractor wants conditional lien releases
- § 713.20 (6)
- Was another form of lien release agreed to by the parties?

§ 9.4 Certificates for Payment

- Architect issues Certificate for amount owed within 7 days of Application
- Owners may want to change this provision to keep control
- Architect is representing that Work has progressed to the point indicated

§ 9.5 Withholding Certification

- Set forth reasons for withholding
- Previously issued Certificate can be nullified
- Protection of the Owner
- Unpaid sums not covering liquidated or actual damages
- Joint check option

§ 9.6 Progress Payments

- After issuance of Certificate, Owner must pay per Contract terms
- Contractor pays subs within 7 days of receipt of payment
- Payment or occupancy not acceptance of nonconforming Work
- Florida Prompt Pay Law
- § 713.06(3)(d)(2) – Direct payment to sub

§ 9.7 Failure to Pay

- Contractor may stop Work
- Must provide 7 days written notice
- Must not be fault of Contractor
- Contract sum will be adjusted for shut down/start up

§ 9.8 Substantial Completion

- Sufficiently complete in accordance with Contract Documents
- Contractor list of final items to complete
- Architect reviews list and requires completion of items on list, or not, before Certificate issued
- Issuance of Certificate is date of Substantial Completion

§ 9.10 Owner and Final Payment

- Punch list items
- Warranties
- Documentation (especially under A102)
- Lender's documentation requirements
- Waiver of all claims except those identified as unsettled
- 10 year period to make claim

§ 9.10 Final Payment

- Upon Application for Final Payment Architect makes inspection
- Architect issues Certificate for Payment
- Contractor supplies affidavits that bills are paid, insurance information, consent of surety
- Other documentation from Contractor as required by Contract Documents (A102)

§ 10.3.6 Hazardous Materials

- Types of Hazardous Materials
- Generally Owner indemnifies Contractor (unless brought on site by Contractor or Contractor negligent in handling hazardous materials in Contract Documents)
- Contractor must indemnify Owner for remediation where Contractor is negligent

Article 11 Insurance

- Contractor's Liability Insurance
- Owner's Liability Insurance
- Property Insurance – Owner must purchase and maintain builder's risk or equivalent
- Loss of Use Insurance – Owner's option; Waives claims against Contractor to extent of insurance coverage

§ 11.3.7 Waiver of Subrogation

- Notify carriers
- Special Endorsement may be required
- If a loss under property policy then Owner is fiduciary for insured

Article 11 Bonds

- Form of Bonds should be approved
- Conditional Payment Bond issue
- Specific language of Bonds to be issued
- Specific sureties

Article 12 Uncovering of Work

- Whose cost?
- In what circumstances?
- Owner's acceptance of nonconforming Work?

Article 13 Miscellaneous

- Governing Law
- Successors
- Notices
- Rights and remedies
- Interest
- Time limits on claims
- Project specific items

§ 14.1 Termination (Contractor)

- Situations to terminate:
 - Work stopped for 30 days (Not Contractor fault)
 - Court Order
 - Lack of payment
 - Repeated suspensions totaling more than 120 days in a 365 day period
- Only for cause not convenience
- Waiver of consequential damages (Art. 15)

§ 14.2 Termination (Owner - Cause)

- Cause:
 - Insufficient supply of skilled workers or materials
 - Disregard laws
 - In substantial breach under Contract Documents
- Contractor not entitled to further payment
- Notify surety

§ 14.3 Termination (Owner – Convenience)

- Terminated for Owner's convenience
- Contractor entitled to payment for Work executed and costs incurred by termination plus reasonable overhead and profit
- Contractors hate this provision

§ 15.1 Claims

- Claims initiated by written notice
- Who is the Independent Decision Maker (IDM)?
- Claims for additional cost
- Claims for additional time
- Claims for consequential damages

§ 15.2 IDM

- Defaults as the Architect
- If Architect is acting as IDM, has his role changed with regard to the Owner?
- Initial decision is final and binding but subject to mediation and binding dispute resolution
- Excludes hazardous materials, emergencies and insurance claims under property insurance

§ 15.3 Mediation

- Condition precedent to binding dispute resolution
- Administered by AAA (Parties can agree otherwise)
- Request for mediation can be concurrent with filing for binding dispute resolution

§ 15.4 Arbitration

- Administered by AAA
- Must assert all known claims
- Appeals rights limited in Florida
- Software defaults to this as the option
- § 15.4.4 Consolidation or joinder

Items not addressed by AIA

- Distinction between conditional and unconditional payment bonds
- Liquidated damages
- Damages for delays clause
- Contractor indemnifying Owner from subcontractor liens
- Supporting Documents needed to support claims for delays?
- Contractor right to share in any savings in a GMP setting?
- Owner's Controlled Insurance Program (OCIP) or Contractor's Controlled Insurance Program (CCIP)
- Subguard
- Applicability of Chapter 558
- Prevailing party attorney's fee provisions

AIA FORM DOCUMENTS:

B101 (2007)

A133 (2009)

AND

A312 BOND FORMS (2010)

Presented By:

Scott P. Pence

Carlton Fields, Tampa

AIA B101-2007

B101 – Article 1

Initial Information

- Construction Commencement
- Construction Completion
- Exhibit A

B101 – Article 2

Architect's Responsibilities

- Standard of Care
- Architect's Representative
- Compromise of Professional Judgment
- Insurance

B101 – Article 3

Scope of Architect's Basic Services

- Coordination with Owner's consultants
- Schedule of Architect's Services
- Schematic Design Phase Services
 - Based on Owner's Approval of Preliminary Design
- Design Development Phase Services
 - Based on Owner's Approval of Schematic Design
- Construction Documents Phase Services
 - Based on Owner's Approval of Design Development
- Bidding or Negotiation Phase Services
- Construction Phase Services
 - Administration of Construction Contract
 - Evaluations of Work
 - Certificates for Payment
 - Submittals
 - Changes
 - Project Completion

B101 – Article 4

Additional Services

- Predesignated
- Unforeseen Circumstances
 - After Owner’s Written Authorization
 - After Notice to Owner
- Limitations on Number of Reviews, Visits and Inspections as Part of Basic Services
- Timeframe for Providing basic Services

B101 – Article 5

Owner's Responsibilities

- Owner's Program
- Owner's Budget
- Owner's Representative
- Surveys
- Geotechnical Services
- Tests, Inspections and Reports
- Notice of Known Errors or Omissions
- Coordination of Architect's Responsibilities under Construction Contract
- Furnish to Architect Access to Project Site

B101 – Article 6

Cost of the Work

- Total Cost to Owner to Construct All Elements of Project Designed or Specified by Architect
- Architect Does Not Warrant Bids will be Consistent with Owner's Budget
- Architect's Guidelines for Preparing Estimates
- Bidding / Negotiation Phase to Commence Within 90 Days after Submission of Construction Documents
- Recommendations from Architect if Owner's Budget Exceeded
- Owner's Options if Owner's Budget Exceeded
- Modifications to Construction Documents by Architect

B101 – Article 7

Copyrights and Licenses

- Representations Regarding Copyrights
- Architect Retains ownership of Instruments of Service
- Owner is Granted Limited License to Use Instruments of Service
 - Solely for Constructing, Using, Maintaining, Altering and Adding to this Project
 - License Terminated if Agreement Terminated by Architect
- Architect Released if Owner Uses Instruments of Service Without Architect
- Assignment of License by Owner Requires Architect's Prior Written Agreement

B101 – Article 8

Claims and Disputes

- Check-the-Box (Arbitration/Litigation/Other)
- Waiver of Subrogation With Respect to Property Insurance
- Waiver of Consequential Damages
- Mediation
 - Non-Binding
 - Condition Precedent to Binding Dispute Resolution
- Arbitration
- Consolidation or Joinder
- Litigation (lack of terms)

B101 – Article 9

Termination or Suspension

- By Architect
 - Failure of Owner to Make Payments
 - Project Suspended
 - Failure of Owner to Substantially Perform
- By Owner
 - Failure of Architect to Substantially Perform
 - For Owner's Convenience
 - Compensation/Reimbursable Expenses/Termination Expenses

B101 – Article 10

Miscellaneous Provisions

- Governed by Law of Where Project is Located
- Successors and Assigns Bound
- No Assignment Without Written Consent of Other Party
- Lender Consents
- No Third Party Beneficiaries
- Architect Has No Responsibility for Haz/Mats
- Architect's Right to Use Photographs in Advertising
- Confidential Information

B101 – Article 11

Compensation

- Basic Services (Lump Sum or Formula)
- Additional Services (Lump Sum or Formula)
- Breakdown of Compensation Among Phases
- Architect's and Consultant's Hourly Billing Rates
- Reimbursable Expenses
- Mark-up
- Compensation for Use of Instruments of Service
- Payments
 - Initial Payment
 - Timeframe / Frequency
 - Owner's Right to Offset Sums Requested By or Paid to Contractor
 - Architect's Responsibility to Make Records Available for Owner's Review

B101 – Article 12

Special Terms and Conditions

- Parties Must Insert Special Terms and Conditions that Modify the Agreement

B101 – Article 13

Scope of the Agreement

- Entire Agreement
- No Amendment Unless in Writing Signed by Both Parties
- Identification of Documents Comprising Agreement
 - Exhibits
 - Addenda

B101 – Exhibit A

Initial Information

- Project Information
 - Owner’s Program
 - Physical Characteristics
 - Owner’s Budget
 - Owner’s Anticipated Scheduling Information
 - Procurement Method
- Project Team
 - Owner’s Representative(s)
 - Owner’s Consultants and Contractors
 - Architect’s Representative
 - Architect’s Consultants (Structural Engineer/Mechanical Engineer/Electrical Engineer)

AIA A133-2009

A133 – Preconstruction Phase Services

- CM's Responsibilities
- Owner's Responsibilities
- Compensation

CM's Precon Responsibilities

- Prior to GMP Proposal
 - Preliminary Evaluation of Owner's Program
 - Advise Owner on Various Issues
 - Prepare and Update Schedule
 - Provide Various Recommendations
 - Provide Preliminary Cost Estimates
 - Develop Bidder's Interest
 - Prepare Procurement Schedule
 - Standard of Care/Applicable Laws

CM's Precon Responsibilities

- Preparation of GMP Proposal
 - Estimated Cost of the Work
 - CM's Fee
 - Basis for GMP Proposal
 - Drawings and Specifications]
 - Clarifications and Assumptions
 - Proposed GMP
 - Estimated Date of Substantial Completion
 - Deadline for Acceptance by Owner
 - Contingency
 - GMP Amendment

Owner's Precon Responsibilities

- Owner's Information
- Owner's Financial Arrangements
- Tests, Surveys and Reports
- Owner's Designated Representative
- Architect

Compensation for Precon Phase Services

- Fill in Blank
 - Amount and Basis
 - Reimbursable Expenses
- Expiration Date for Preconstruction Phase Fee
- Direct Personnel Reimbursable Expenses
- Payments Monthly (in proportion to services performed)
- Payment Due Upon Receipt of CM's Invoice

A133 – Construction Phase Services

- CM's Responsibilities
- Owner's Responsibilities
- Compensation
- Cost of the Work
- Payment Terms

CM's Construction Responsibilities

- Commencement of Construction Phase
- Administration of Contract
 - Subcontractor Bids
 - Project Meetings
 - Construction Schedule
 - Submittal Schedule
 - Progress Reports / Daily Logs
 - Professional Services
 - Hazardous Materials

Owner's Construction Responsibilities

- Owner's Financial Arrangements
- Tests, Surveys and Reports
- Owner's Designated Representative
- Architect

Compensation for Construction Phase Services

- Contract Sum
- GMP
- Changes in the Work
- Adjustments to GMP

Cost of the Work

- Costs that are Reimbursable
 - Labor Costs
 - Materials and Equipment Costs
 - Subcontract Costs
 - Miscellaneous Costs
 - Emergency and Other Costs
- Costs that are not Reimbursable
- Discounts, Rebates and Refunds
- Related Party Transactions
- Accounting Records

Payment Terms

- Progress Payments
 - Architect's Certification
 - Timing / Frequency
 - Applications for Payment
 - Supporting Documentation
 - Schedule of Values
 - Stored Materials and Equipment
 - CM's Fee
 - Retainage
 - Owner's Right to Withhold
- Final Payment
 - Full Performance / Architect's Certification
 - Timing
 - Audit Procedures

A133 – Other Provisions

- General Provisions
- Insurance and Bonds
- Dispute Resolution
- Termination or Suspension
 - Prior to Establishing GMP
 - After Establishing GMP
- Miscellaneous
 - Defined Terms
 - Ownership and Use of Documents
 - Governing Law
 - Assignment
- Scope of Agreement / Incorporation of Documents

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Performance Bond

- Section 1 – Joint and Several Liability of Contractor and Surety
- Section 2 – Conditions of the Bond
- Section 3 – Events Triggering Surety's Obligations
 - Notice
 - Default Declared
 - Owner Agrees to Continue Making Payments to the Surety or Replacement Contractor

Performance Bond

- Section 4 – Failure of Owner to Provide Notice
- Section 5 – Surety's Options
 - Engage the Principal
 - Complete Construction Contract Itself
 - Hire Replacement Contractor
 - Waive its Rights and (1) Make Payment to Owner or (2) Deny Liability
- Section 6 – Surety Default

Performance Bond

- Section 7 – Surety’s Liability Under the Bond
- Section 8 – Limit to Surety’s Liability
- Section 9 – Extent of Surety’s Liability
- Section 10 – Waiver of Notice of Changes to Construction Contract
- Section 11 – Venue and Limitations
- Sections 12-13 – Notice Under Bond
- Section 14 – Definitions
- Section 15 – Subcontractor Bond
- Section 16 – Modifications to Bond

Payment Bond

- Section 1 – Joint and Several Liability of Contractor and Surety
- Section 2 – Conditions of the Bond
- Section 3 – Events Triggering Surety's Obligations
- Section 4 – Surety's Obligations to Owner
- Section 5 – Triggering Surety'

Payment Bond

- Section 6 – Notice of Nonpayment by Owner
- Section 7 – Surety's Obligations in Response to Claimant's Notice
- Section 8 – Limit of Surety's Liability
- Section 9 – Priority of Funds Owning under Construction Contract
- Section 10 – Disclaimers of Liability
- Section 11 – Waiver of Notice of Changes to Construction Contract

Payment Bond

- Section 12 – Venue and Limitations
- Section 13 – Notice Under Bond
- Section 14 – Statutory Bond / Savings Clause
- Section 15 – Copy of Bond
- Section 16 – Definitions
- Section 17 – Subcontractor Bond
- Section 18 – Modifications to Bond