

# Issues with Price Escalation, Delays, and Contract Clauses

## Dealing with Unprecedented Challenges in the Concrete Industry

Tri-State Summer Convention  
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**Presented by Larry S. Logsdon**



# Price Escalation Clauses

In the event of significant delay or price increase of material occurring during the performance of the contract through no fault of the contractor, the contract sum, time of performance, or contract requirements shall be equitably adjusted by change order in accordance with the procedures of the contract documents.



# Price Escalation Clauses

A change in price of an item of material shall be considered significant when the price of an item **increases 5%** between the date of this contract and the date of installation.



# Price Escalation Clauses

In the event of a **price increase** of in material, labor, equipment, overhead, contracting costs and other items occurring during the performance of the Contract through no fault of Contractor, the Contract Sum, Contract Time, or contract requirements shall be **equitably adjusted** by change order to account for the price increase.



# Price Escalation Clauses

-Requirement to list the potential materials that will increase.



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- Contractor will work to mitigate price increases.
- Contractor must take reasonable efforts to lock in prices in 30 days.
- Contractor must provide documentation of price increase.

# **COVID-19 Russian Ukraine Conflict and Construction Delays**

# COVID-19 and Construction Delays



Legal Alert

# Is Covid-19 a *Force Majeure* Event?

- Force majeure clauses address circumstances **beyond the parties' control**
- Making contractual performance too difficult or impossible.
- Allow possibilities for time extension and price increase.



# Determined by Contract Language

- **Federal Acquisition Regulations**

“*Excusable delays*” lists “**epidemics** [and] **quarantine restrictions** [as] an occurrence beyond the reasonable control of the Contractor and without its fault or negligence . . . .” FAR 52.212-4 (f); see *also*, FAR 52.249-14.

- **AIA A201**

“by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, **or other causes beyond the Contractor’s control.**”

# Other Requirements to Show COVID Delay

- **Did COVID-19...**
  - Actually cause a delay?
  - Impact the critical path?
- Was the delay not able to be reasonably mitigated?

# Types of Contracts



# Types of Contracts

Construction Contract



# Types of Contracts

-Construction Contract

-Purchase Order with Terms and Conditions



# Types of Contracts

-Whose Terms and Conditions Control?

# Rider or Clarifications

# Important Terms of a Contract

# Limitation of Liability

**Question:** *As a manufacturer are there any suggestions for limiting our liability when on a job and on our products are being installed.*

**Question:** *What are some instances of heavy liabilities that occurred but could have easily been avoided?*

# Limitation of Liability Clause

## Mutual Limitation of Liability

To the maximum extent permitted by applicable law, Contractor's entire liability to Company and Company's entire liability to Contractor under the Contract or any purchase order will be **limited to the price** for the Work under the applicable purchase order and the parties will not be liable to each other for, and the parties hereby release, remise, acquit, and forever discharge each other from, any other costs, fees, expenses, or other amounts arising pursuant to or in connection with this Contract including, without limitation, any such costs, fees, expenses, and other amounts arising from any breach of this Contract by Contractor or Company.

# Limitation of Liability Clause

## Contractual Limitations of Damages

- Common in design and specialty contractor agreements
- Limit damages to a capped amount

# Limiting Liability

## Waiver of Consequential Damages

Consequential Damages: Damages that do not flow directly or immediately from the act of the party, but only from some consequence or result of the act.

Examples: *loss of use, lost rent, maintenance costs*

# Limiting Liability

- Consequential Damages
  - Lost Profits (loss of use, rent, etc.)
  - Maintenance Costs

# Waiver of Consequential Damages

## Mutual Waiver of Indirect or Consequential Damages

In no event shall Contractor or Company be liable to each other for any indirect, special, incidental, consequential, or punitive damages, lost profits, lost business or lost revenue claims, arising out of or relating to this Contract or a purchase order, irrespective of whether such damages are foreseeable, Contractor and Company have been advised of the possibility of such damages.

# Important Terms of a Contract

No Damages for Delay

# No Damage for Delay Clauses

- **Generally Enforceable**
- **But Strictly Construed**

# No Damage for Delay Clauses: **Exceptions to Enforceability**

Delay Not Contemplated by the Parties.

# No Damage for Delay Clauses: Exceptions to Enforceability

## 1. Delay Not Contemplated by the Parties.

**Three Month Delay** - *Mississippi Transp. Com'n v. Ronald Adams Contractor, Inc.*, 753 So. 2d 1077 (Miss. 2000) (holding that a three-month delay due to untimely utility relocation was unreasonable and barred invocation of no damage for delay clause as a defense).



# No Damage for Delay Clauses: **Exceptions to Enforceability**

## 3. Time Extensions Not Granted.

- ("Because [delay Claimants'] contractual waiver of its damages remedy was limited by a condition precedent - the extension of time to complete performance - which was neither fulfilled nor excused, we hold that it cannot operate to preclude Pertun's recovery."). See *U.S. for Use and Benefit of Pertun Construction Co. v. Harvesters Group, Inc.*, 918 F.2d 915, 920 (11th Cir. 1990)

# Important Terms of a Contract

Attorneys' Fees if you Win.

# Important Terms of a Contract

City where dispute will be resolved.



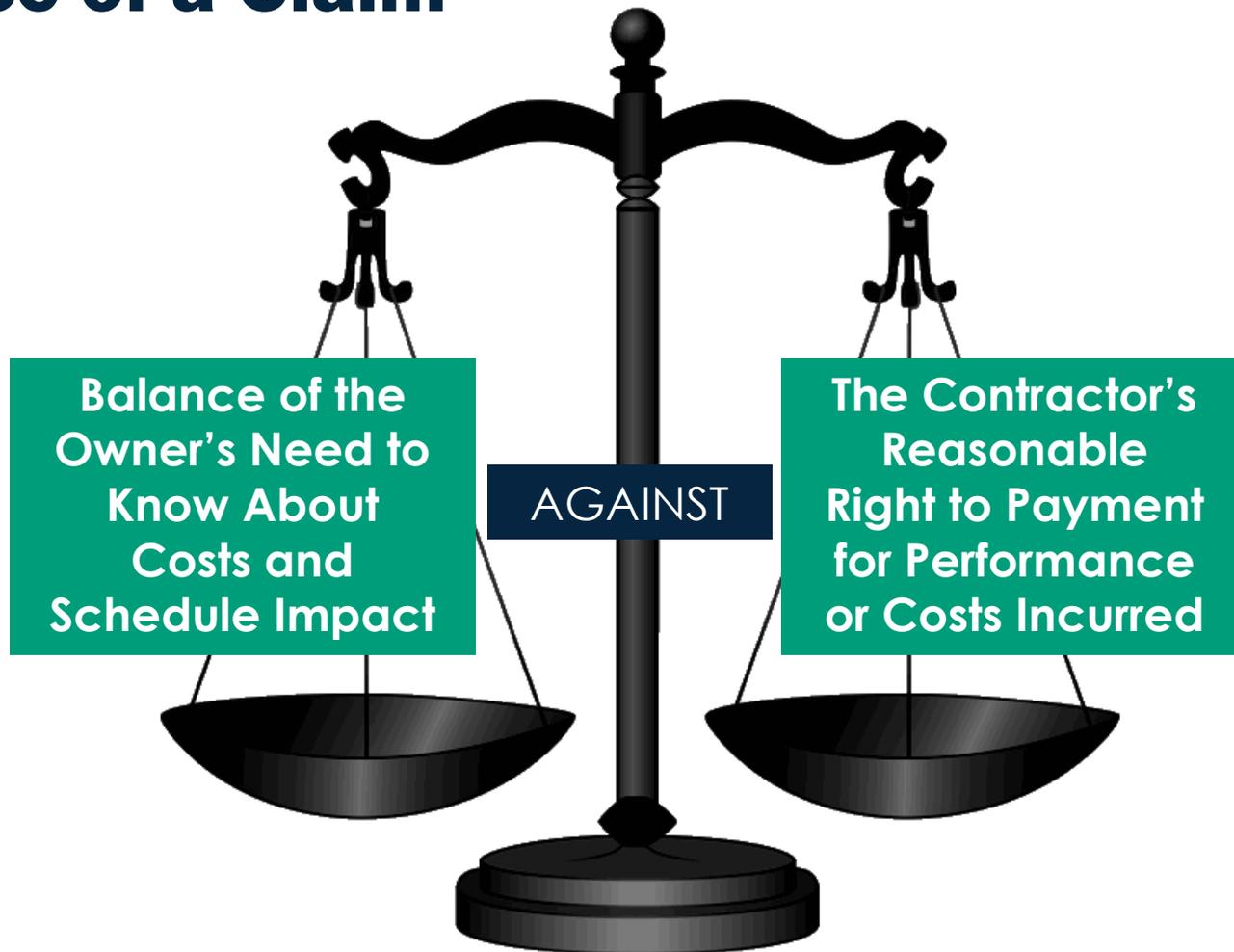
# Important Terms of a Contract

Indemnity.

# Important Terms of a Contract

## Notice of Claims

# Contractual Clauses Dealing with Timely Notice of a Claim



# Contractual Clauses Dealing with Timely Notice of a Claim

- **Notice of Claim and Information about the Claim must be Provided Timely or Claim is Waived.**

*Marriot Corp. v. Dasta Construction Co.*, 26 F.3d 1057 (11th Cir. 1994) (failure to provide required seven day notice).

# Contractual Clauses Dealing with Timely Notice of a Claim

- AIA 201 - “Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the Claimant first recognizes the condition giving rise to the Claim whichever is later.”

# Contractual Clauses Dealing with Timely Notice of a Claim

Notice of Claim Usually Requires at Least Some Specificity of Claim.



**FAR 52.243-4(b)** “written notice stating (1) the **date, circumstances, and source** of the order and (2) that the Contractor regards the order as a change order. . . .”

# Contractual Clauses on What Must Be Provided with Claim

- Detailed factual statement of the claim providing all necessary dates, locations and items of work affected by the claim.
- The date on which actions resulting in the claim occurred conditions resulting in the claim became evident.
- The specific portions of the Contract which support the claim, and a statement of the reasons why such provisions support the claim.
- The amount of additional compensation sought and a breakdown of the amount into the categories specified as payable under Article 110.05, Claim Compensation.

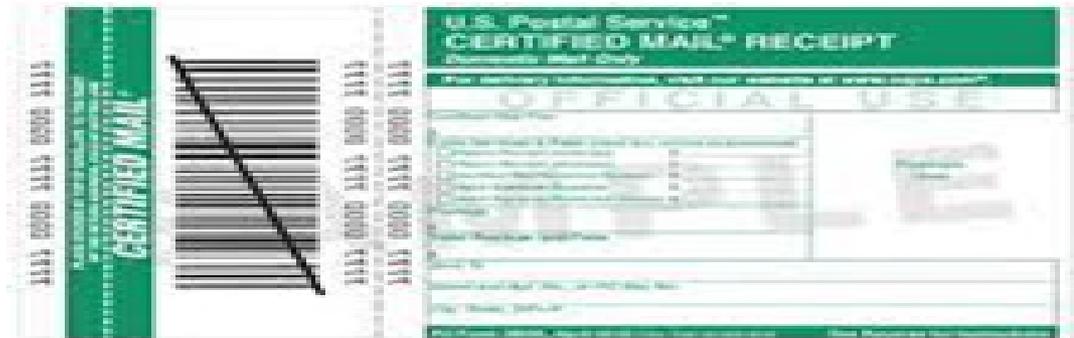
**(Alabama Department of Transportation Specifications at § 110.06)**

# Importance of Contemporaneous Documents in Documenting Delay Claim

- Daily Reports
- Correspondence (Email and Letters) in General – Timing and Content
- iPad, Smart Phones and Drones to Document the Project and Delay Claim
- Requests for Information
- Cost Information

# Notice

- Send Notice via Certified Mail
- Address in Contract
- Secretary of State Address



# Construction Defect Defenses

## *Spearin* Doctrine

### Compliance with Plans and Specifications

- Under the *Spearin* doctrine, if a contractor, or arguably subcontractor, establishes that it **followed plans and specifications** in a reasonable manner, then it is not responsible for a result unsuited to the owner's purpose.
- *United States v. Spearin*, 248 U.S. 132 (1918).



# Construction Defect Defenses

## *Spearin Doctrine*

### Cracks in Asphalt Paving

- *Woodsv. Amulco Products*, 235 P.2d 273 (Ok. 1951), an owner sued a contractor for cracks and flaws that developed in asphalt paving. The contractor, however, had not been responsible for compacting the subgrade; it merely laid the asphalt according to the owner's plans and specifications. Thus, the contractor was not liable for problems with the asphalt paving resulting from subgrade failures.

# Construction Defect Defenses

## *Spearin Doctrine*

### Cracking and failure of walls

- *Millner v. Mumby*, 599 N.E.2d 627 (Ind. Ct. App. 5th Dist. 1992), where the contractor constructed walls in accordance with the owner's specifications, it was relieved of liability for the cracking and eventual failure of the walls due to **insufficient rebar**.



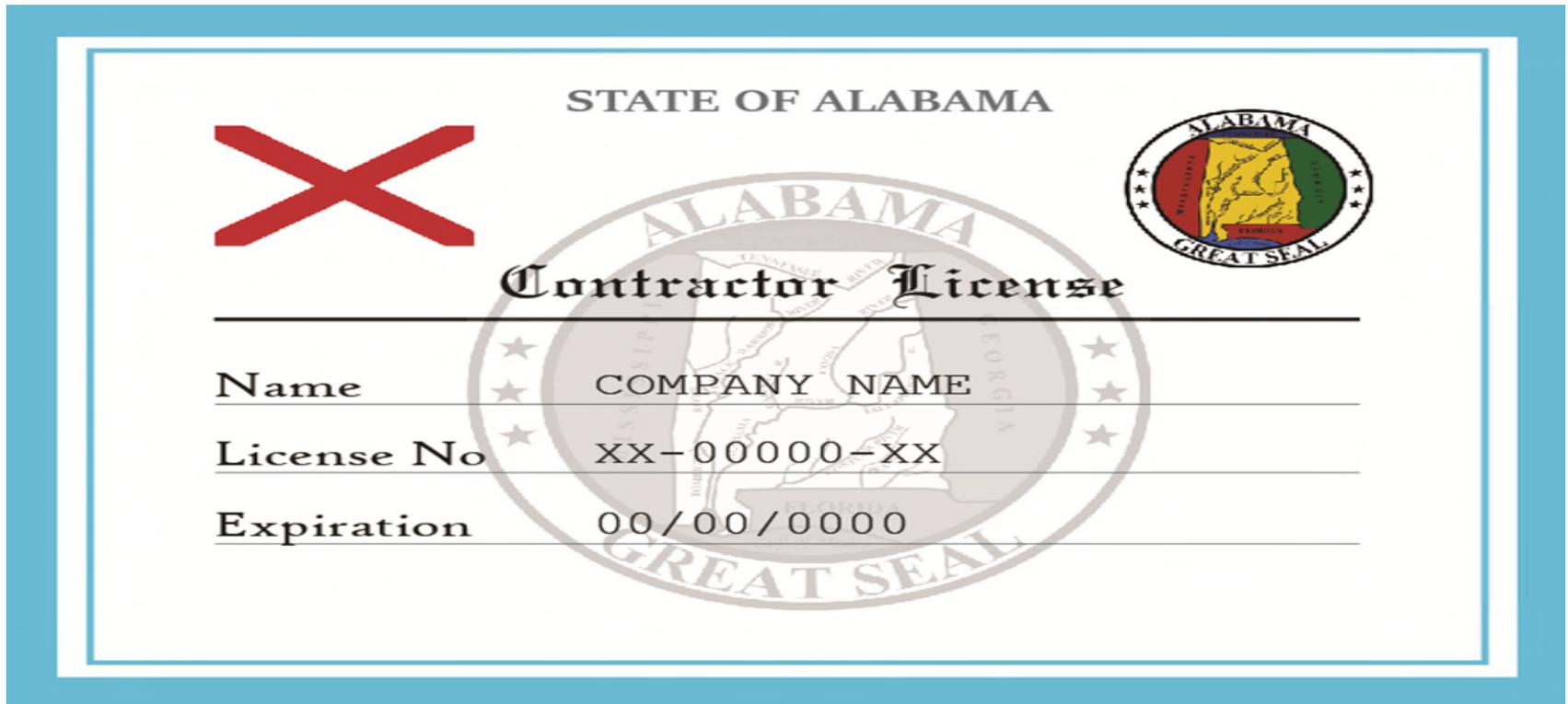
# Construction Defect Defenses

## Spoliation and Opportunity to Repair

Owner cannot “fix problem and spoil the evidence without giving notice.

- *Thompson v. Gardner*, 889 So.2d 596, 605 (Ala. Civ. App. 2004) (“[t]he spoliation of evidence doctrine mandates dismissal or summary judgment only when the “spoiled” evidence is necessary for the adequate defense of the claim.”)

# Unlicensed Contractors and Labor Brokers.



# Waiver of Delay Claims By Project Documentation

- In Pay Application Lien Waiver Language**

“Waiving all claims for delays prior to the date of this payment application.”

- Change Orders**

“Waiving all claims for delays for the claims that are the subject of the change order and up through the date of this change order.”

**AIA Document G702™ – 1992**  
**Application and Certificate for Payment**

TO OWNER: PROJECT: APPLICATION NO: Distribution to:  
 PERIOD TO: OWNER   
 CONTRACT FOR: ARCHITECT   
 CONTRACT DATE: CONTRACTOR   
 PROJECT NO.: FIELD   
 OTHER

FROM CONTRACTOR: VIA ARCHITECT: CONTRACTOR:

**CONTRACTOR'S APPLICATION FOR PAYMENT**  
 Application is made for payment as shown below, in connection with the Contract.  
 A true and correct copy of the Contract Documents is attached.

1. ORIGINAL CONTRACT SUM ..... \$ .....  
 2. NET CHANGE BY CHANGE ORDERS ..... \$ .....  
 3. CONTRACT SUM TO DATE (Less # 4 of 2) ..... \$ .....  
 4. TOTAL COMPLETED & STORED TO DATE (Column 3 less 4 of 2) ..... \$ .....  
 5. RETAINAGE:  
 a. % of Completed Work ..... %  
 b. (Column 4 of 2) ..... \$ .....  
 c. (Column 5 of 2) ..... \$ .....  
 Total Retainage (Lines 5a or 5b, or Total in Column 4 of 2) ..... \$ .....  
 6. TOTAL EARNED LESS RETAINAGE ..... \$ .....  
 7. LESS PREVIOUS CERTIFICATES FOR PAYMENT (Less of prior or current Certificates) ..... \$ .....  
 8. CURRENT PAYMENT DUE ..... \$ .....  
 9. BALANCE TO REMAIN INCLUDING RETAINAGE (If over 100% minus Line 8) ..... \$ .....

**CHANGE ORDER SUMMARY**

DESCRIPTION	ADDITIONS	DEDUCTIONS
Total changes approved on previous months for Owner	\$	\$
Total approved this month	\$	\$
<b>TOTAL</b>	\$	\$
NET CHANGES by Change Order	\$	\$

The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief, the Contract Documents have been completed in accordance with the Contract Documents and that the Application for Payment has been completed in accordance with the Contract Documents. The Payment Application and supporting documents are true and correct and the amount shown herein is true and correct.

**ARCHITECT'S CERTIFICATE FOR PAYMENT**  
 In accordance with the Contract Documents, based on the information and data comprising this application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief, the Contractor has completed the Contract Documents and the amount certified is correct.

**AMOUNT CERTIFIED** ..... \$ .....  
 (This Certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Issuance, payment and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract.)

By: \_\_\_\_\_ Date: \_\_\_\_\_  
 My commission expires: \_\_\_\_\_

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# Resolving Disputes

# Comparison of Arbitration to Court

- Filing Fees and Fees to Pay Arbitrator are Higher
- Fees May Have to Be Paid by Business if Consumer Case
- Arbitrators are Knowledgeable about Construction

# Comparison of Arbitration to Court

- Attorneys Fees Awards Less Likely in Arbitration
- Limited Discovery

# Comparison of Arbitration to Court

- Typically Faster to Final Resolution
- Less Likely to Settle
- Very Limited Appeal Rights for Arbitration

# Choice of Forum

- Judge
- Jury
- Arbitration

# Comparison of Arbitration to Court

- Summary Judgment Much Less Likely in Arbitration
- Technical Defenses May Be Less Likely to Be Followed
- Arbitrators are More Prone to Baby Split



Larry S. Logsdon  
llogsdon@wallacejordan.com  
(205) 874-0341  
[www.wallacejordan.com](http://www.wallacejordan.com)

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WALLACE JORDAN RATLIFF & BRANDT LLC