

BUILDING BLOCKS

MATERIALS FOR CONSTRUCTION PROFESSIONALS

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PROTECTING YOUR PROFITS THROUGH PROJECT DOCUMENTATION

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INTRODUCTION

Comprehensive, detailed documents prepared in the ordinary course of constructing a project are extremely important in many respects, but most importantly, to protect your profits and defend against claims that seek to diminish them. That being said, in addition to having a decided advantage in any dispute-resolution proceeding, contractors that properly document a project will engender communication and trust between the project participants, thereby possibly avoiding disputes. Moreover, properly documenting a project may deter others from attempting to create disputes based on inaccurate or incomplete information. This program seeks to equip project personnel with tools for the proper documentation of a project, with the ultimate goal being protection of well-earned profits.

Part One examines “contract documents” – documents that describe the work to be performed and the relationship between the parties. Contract documents usually include an agreement containing the scope of work, the price, and the time for completion, as well as general and supplementary conditions, drawings, specifications, and addenda altering any of the other contract documents.

Part Two of this program addresses administrative documents or documents generated during performance of the contract work. There are a host of documents that fall within this category, including schedules, shop drawings, Requests for Information, Construction Change Directives, payment applications, and meeting minutes. Additionally, written correspondence between project participants can be the most important set of administrative documents. Hence, it is vital that project personnel recognize (1) when written correspondence should occur between project participants during construction, (2) to whom the correspondence should be directed, and (3) the level of detail required for the particular correspondence.

Part Three of this program discusses retention and preservation obligations in litigation and arbitration and the sanctions that could arise for failure to do so.

Without proper documentation, a contractor is at a severe disadvantage in terms of both job performance and resolving any dispute favorably. This program aims to furnish project personnel with the means and tools to document a project and, more importantly, to communicate the general circumstances under which personnel should document particular liability-related issues during construction because any of those circumstances might result in a claim or dispute that could diminish or eliminate a contractor’s hard-earned profit on a project.

PART ONE: CONTRACT DOCUMENTS

1.0 BID/PROPOSAL

Construction contracts are usually awarded through a bidding process or direct negotiation with pre-selected contractors. Once a contractor decides to bid or negotiate a project, a “responsive” bid or proposal is submitted. If the bid is made pursuant to a competitive bid process, careful attention should be paid to the bidding requirements in the bid documents, which often vary from project to project. The substance of the bid or proposal depends on a variety of factors, including the type of contract, and normally includes the contract price, scope of work and certain limitations and qualifications to protect the contractor. **An example template proposal is included in the Appendix to this program’s materials at page 2 (entitled Proposal/Confirmation).** Note that, although the template is for a subcontractor’s proposal to a general contractor, like many of the templates provided herein, the general template form can be revised as appropriate.

Bids for the project can come in higher than anticipated. Careful documentation should be created if value engineering takes place, *i.e.*, changes are made to building components to realize cost savings. Specifically, the contractor should have a complete understanding of the revised work and should re-issue its bid or proposal explicitly referencing the revised scope developed in the VE process.

Because the general contractor’s use of a subcontractor’s bid might prevent the subcontractor from prematurely withdrawing its bid without legal consequences, the subcontractor seeking protection in the bidding process might denominate its bid as a request for the general contractor to submit an offer. A subcontractor might also insert language in its bid that the general contractor must accept the bid if the bid is the lowest or if the general contractor uses the bid in the general contractor’s bid to the owner.

2.0 CONTRACT DOCUMENTS: COMPONENTS

The Contract Documents typically include the agreement between the owner and general contractor (or the subcontract between the general contractor and subcontractor), the general and supplemental conditions, the plans and specifications, modifications to the agreement or change orders and addenda. Particular care should be taken with respect to those provisions which are often the subject of disputes down the road: (1) notice provisions; (2) differing site condition clauses; (3) no-damage-for-delay clauses; (4) indemnity clauses; (5) termination clauses; (6) arbitration clauses; and (7) liquidated damage clauses. Typically, Louisiana courts will enforce such clauses. *See, e.g., Equitable Real Estate Co. v. National Surety Co.*, 63 So. 104, 107 (La. 1913) (holding that the terms of the contract bind the parties; if a written notice provision is clear and unambiguous, it will be enforced as written); *Freeman v. Dep. of Highways*, 217 So.2d 166, 170-71, 175-76 (La. 1968) (holding that no-damage-for-delay clauses are not against public

policy); *Pembroke v. Gulf Oil Corp.*, 454 F.2d 606, 611 (5th Cir. 1971) (“It is well settled under Louisiana law that parties to a contract generally have the unqualified right to stipulate for any amount of liquidated damages in the event of a breach. When the parties thus agree, Louisiana courts refuse to inquire into whether the actual damages suffered equaled or approximated the stipulated amount.”).

Pre-printed forms are especially prevalent in the construction industry and are published by a variety of industry groups, including AIA, AGC, DBIA, EJCDC and COAA. These standard forms, however, should only be used as a starting point, because (1) standard forms without modification cannot address all of the unique complexities of a particular construction project; and (2) standard forms are biased. And, if such forms are used, parties should ensure that, when possible, all contracts used are from the same industry group templates and sub-families therein, and that any revisions made to one contract are not inconsistent with provisions of other related contracts. Using different forms among the various project relationships can be a recipe for inconsistency and loss of some contractual rights.

2.1 AGREEMENT

The agreement sets forth the parameters governing the relationship between the parties. The agreement, at a minimum, contains the parties’ identity, the price, the scope of work, the completion date and a list of the Contract Documents. The scope of work, obviously, is a very important component of the agreement. Beware of (1) dragnet clauses that can seriously affect and enlarge the scope of work, *e.g.*, “all” or “other related;” and (2) inconsistent scopes of work between the bid or proposal and the agreement.

Subcontracts often contain critical provisions concerning the allocation of certain risks between the general contractor and the subcontractor, such as (1) pay-if-paid (or pay-when-paid) clauses; (2) “flow down” and “flow-up” provisions; (3) “incorporation by reference” provisions; and (4) lien waiver provisions. The presence of “flow down” and “incorporation by reference” provisions require a contractor to request additional documentation in order for the contractor to sufficiently evaluate the risks associated with a project. **A form letter requesting documents incorporated by reference is included in the Appendix to this program’s materials at page 3 (entitled Request of Contract Document Letter).**

2.2 SPECIFICATIONS

Specifications are written technical requirements for the work, materials, equipment and systems. Often within divisions of various categories of work there is a provision referencing a standard specification, such as an ASTM method, or product literature. An example of such a reference would be the following regarding soil compaction: “Perform field density tests in accordance with ASTM D 1556 (sand cone method) or ASTM D 2922 (nuclear method).” Contractors must be or become familiar with these references in their scope of work, which necessarily requires obtaining a copy of these references.

Omissions and inconsistencies in the specifications should also be guarded against, documented, and resolved, if possible, prior to executing the agreement and conditions. *See Bonomo Builders, Inc. v. Aztec Paving & Heavy Constr. Co.*, 867 So. 2d 935 (La. App. 2nd Cir.

2004) (rejecting a mutual mistake defense to a contractor's breach of contract claim when the subcontractor for the concrete foundation did not prove that the parties confected their agreement under the mistaken belief that the base upon which the concrete foundation was to be poured would be built of sand and not of dirt containing silt); *Appeal of Hoffman Const. Co., Inc.*, 1993 WL 195404 (Veterans Admin. B.C.A. 1993) (Contractor sought an equitable adjustment for waterproofing a tunnel, a stairway and an elevator hoistway. The court rejected the tunnel claims as there was a clear conflict between the tunnel and waterproofing specifications, so as to put the contractor on notice to seek a clarification, which it did not do.).

2.3 CHANGE ORDERS

A Change Order is a formal alternation of the contract, authorizing in terms of additional dollars and/or time a change in the work defined in the Contract Documents. **A form proposal in response to a request for Change Order is in the Appendix to this program's materials at page 4 (entitled Change Order Cost Proposal).**

Sometimes, disputes remain regarding extra work; therefore, a formal Change Order cannot be executed before work begins. Many contract documents, like the AIA contract documents, have a procedure for the issuance of a Construction Change Directive, or CCD, in such a circumstance, whereby an owner directs a contractor to perform the work, while the parties acknowledge that certain aspects of the work remain in dispute. However, without such a designated contractual procedure, when contractors are directed to perform work without an acceptable Change Order in place for that work, proper documentation is important. **A form letter responding to a change request is included in the Appendix to this program's materials at page 5 (entitled Request for Change Letter), which letter refuses to perform extra work without a Change Order in place. A form letter responding to a verbal request for change is in the Appendix to this program's materials at page 6 (entitled Verbal Orders Letter), which letter documents the terms for extra work to be performed pending the execution of an acceptable Change Order. Similarly, a Work Authorization form is in the Appendix to this program's materials at page 7.**

Disputes regarding whether work is "extra" or "changed" is a frequent subject of litigation. **A form letter agreeing under protest to perform the work in such circumstances is in the Appendix to this program's materials at page 8 (entitled Under Protest Letter).** If a contractor proceeds with work it considers "extra" despite the owner's contention that the work is within the contractor's original scope, then the circumstances under which the contractor will perform this work should be documented in correspondence to the owner. Even though the owner is not accepting liability for the costs associated with this work in these circumstances, the contractor should communicate in writing to the owner the payment terms under which the extra work will be performed.

If a contractor fails to communicate in writing to the owner the payment terms under which the extra work will be performed, then the contractor risks undercompensation even if the work is ultimately found to be "extra" in dispute resolution proceedings. In *Dubois Constr. Co. v. Moncla Constr. Co.*, 2005 La. App. LEXIS 1734 (La. App. 2nd Cir. 2005), a general contractor and its subcontractor failed to agree upon the amount of compensation due for the subcontractor's transportation of concrete slab debris, which transportation was outside the

subcontractor's scope of work on the project. The court supplied the missing price despite the subcontractor's failure to prove the reasonable value of its services and held that an hourly rate instead of a unit price was the appropriate measure of the amount of compensation due, given the subcontractor's past practice of charging hourly rates for "something extra." *Id.* at *7-9.

If a T & M basis is the contractor's desired payment method for the disputed extra work, it is advisable to use time and material tickets to keep accurate records of the work performed. (The same is true in the general contractor/subcontractor relationship.) **A form letter documenting the use of time and material tickets is in the Appendix to this program's materials at page 9 (entitled Sample Letter to the Owner Regarding Acknowledgement of Actual Work Performed).** This form letter also advises the owner:

1. That work is proceeding under protest, per the owner's direction, and, therefore, the contractor does not agree to take responsibility for the added costs;
2. That the contractor will be preparing daily T & M tickets that detail actual work performed; and
3. That the contractor expects the owner's on-site representatives to sign the daily tickets, only to acknowledge the actual work performed and the actual resources consumed, regardless of responsibility for the added costs.

The sample Time and Material Form at page 10 of the Appendix to this program's materials is one way to accomplish the documentation of the performance of disputed work. If the owner refuses to sign the tickets, prepare them anyway and present them daily to the owner's field representative for signature. Each time that the field representative refuses to sign, note the occurrence on the respective ticket. These kinds of records will go a long way in later displaying the good or bad faith nature of the owner. It will also demonstrate that you have made every effort to ensure the accuracy of the records on a daily basis. The owner's failure to acknowledge the fact that work was performed might actually help in dispute resolution proceedings. (Cost accounting records are also important in connection with documenting costs for extra work, but this area is a topic for another seminar altogether.)

PART TWO: ADMINISTRATIVE DOCUMENTATION

1.1 INTRODUCTION

Complete and accurate records of all significant project events are an absolute necessity in contemporary contracting. Today's issues are complex. They involve elaborate contract requirements, specific submittal and approval procedures, sophisticated interpretations, and detailed procedures for resolution of disagreements. And, as discussed above, Louisiana courts typically will enforce contract notice and procedure requirements. Beyond all this, commitments by dozens of subcontractors and suppliers, their timetables, and their performance requirements must be established, documented, and monitored. In any kind of hindsight analysis (as in defending or prosecuting a claim), good, comprehensive, and properly correlated records are

essential for setting forth the facts and your side of the story. In a dispute resolution situation, the best and most persuasive proof will be the written records.

Good Project Records:

1. Fully document historical facts, detailing all significant events and information;
2. Show the correlation between the issues and operative contract provisions so as to show the justification for specific actions;
3. Establish the chronology of and relationship among important events surrounding an issue;
4. Simplify complex relationships and interactions by highlighting and organizing significant information;
5. Arrange relevant information in each specific form and in every file location that requires or may require the information during the project period or afterwards;
6. Provide status summaries of key dates, transactions, decisions, and results. These summaries can function as checklists, to be sure that all items begun are finished, and can identify important trends;
7. Form the basis of correct and timely management action;
8. Ultimately provide organized, convincing proof to support arguments and substantiate claims.

The records systems themselves are designed to function in three capacities:

ACTIVE WORKING FILES

Active working files should consist of a system of documentation that correlates important information with all issues that may possibly be related to it – currently or in the future. Issues in process should be tracked and documentation should allow all issues to be researched quickly and on a continuing basis. A mechanism must be introduced to keep hot topics on the front burner. It is their *visibility* that will keep them in everyone's attention and bring them to their quickest resolution. Finally, in-process files should coordinate administrative activities (such as shop drawing submission) with project timetables as established by the construction schedule or by a change order.

COMPLETION AND CLOSE-OUT

Issues in construction can last from days to years before final resolution. Dispute resolution activities (mediation, arbitration, litigation) can occur during a project, immediately after, or well after project completion. Comprehensive files become the keystone of accurate issue reconstruction and substantiation of all contentions.

ARCHIVES

Subject to the circumstances discussed in Part Three, below, when a project is finally closed out, it may not be necessary to keep *everything* as history records. However, a good file storage system will allow fast future reference if the historical information later becomes necessary or desired. It bears noting that issues that did not seem important during or at the close of a job may become important during the course of claims resolution and if proper documents are archived, the information will be there.

Good records maximize your options, opportunities, management, capability, and protection. It will be the party with the best records which will consistently convince opponents, win arguments, and make money. It's been said that you don't even have to be right – just have the best records.

1.2 ESTABLISHING DATES IN THE DOCUMENTATION

The important point of this section is to clarify that it is not necessarily the date of the first written communication that qualifies as the notification date. Depending upon contractual terms and court interpretation, notification may be found when there is an understanding in the mind of the recipient. Written confirmation can be used to document earlier notification. The notification, then, can actually be said to occur in any number of different ways. Among these are:

- Telephone and face-to-face conversations.
- Job meetings.
- Other letters.
- Speed memos.
- Shop drawings.
- Design change drawings.
- Any document that either expressly or implicitly acknowledges an event.

Personal and telephone conversations are probably the most neglected forms of notice, perhaps because they do not have the appearance of a project record notification. Job meeting discussions are likewise too often underscored. Don't lose those valuable early dates. Indeed, particularly given today's technology and the prevalent use of smartphones, every communication can be immediately confirmed in writing, perhaps even by issuing a confirming e-mail simultaneous with the conversation. A few simple guidelines will help to ensure that your ultimate written notice will take every advantage available:

1. *Reference the earliest appropriate notification date.* Whether a telephone conversation, shop drawing, or whatever, refer back to it in the first part of the written notification. An opening remarks as simple as “Confirming our conversation of (date) ...” or “Per your direction of (date) ...” will tie the events together.
2. *Specifically name the people involved in the prior notification.* If, for example, the written notification refers back to a discussion with someone else of that organization, a “confirming my conversation with your office...” statement is too weak. Even if you had left a message with the party’s secretary, include the *name*: “Per my notification to your Mrs. (Ms.) _____ on (date)....”
3. *Confirm all significant discussions immediately.* Any piece of information, understanding, confirmation, promise, etc. that has or may have an effect on the work should at the very least be recorded on a daily report or job diary of some kind. Even if it begins only as a plain note in a file, it can form an important basis of a more formal notification if one becomes necessary. A speed memo or a short but clear note in the minutes of a job meeting is even better.
4. *Be concise, but be clear.* If a reference is made back to a prior correspondence, the reference itself is all that is needed. Elaborate descriptions of the referenced document that even move into details of the content unnecessarily add bulk and confusion. For example:

In response to your (date) letter regarding the subject, ...

Is better than:

In response to your (date) letter regarding the changes to the mezzanine concrete slab support wherein you directed the site work subcontractor to provide an additional twelve inches of bank run gravel under the north portion of the slab...

The reference in the first case is enough, if the referenced document is defined clearly enough so as to avoid any possible confusion with any other document. In this case, the recipient simply needs to find a copy of the referenced document to see exactly what it says in detail.

1.3 DAILY FIELD REPORTS

The Daily Field Report is the most fundamental and key document that records actual job progress, together with all conditions that affect the work. In addition to project correspondence, the Daily Field Reports tell the story behind claims and disputes. There is no magic form of the

document, but it should be kept regularly, in the ordinary course of business and contemporaneous!

DFRs begin an organization's standardization of reporting at the source of causes and effects – the point of production. If actually prepared daily, they are generally considered to be one, if not the best, sources of job information. This is because they presumably are prepared while the information is being generated, with no appreciable time lapse. In addition, DFRs are usually prepared by those with authority and responsibility for the work. They have an interest in the accuracy of the information and, therefore, have a significant incentive to maintain the report's accuracy and completeness. These are the people who actually witnessed the work and are, thus, recognized to be the most qualified to describe the facts.

Because, if properly kept, DFRs will be the most detailed, accurate, and complete records of jobsite events, the DFRs will become the cornerstone to support all contentions by presenting actual events. They are so valuable because of the wealth of information recorded in summary form. Such information should include:

- Work and activity descriptions, separated as to the physical location and extent.
- Labor force, broken down by subcontractor, locations, and major activities.
- Equipment used and stored by the various contractors and subcontractors.
- Site administrative staff and facilities.
- Weather conditions and temperatures at key times of each day.
- Change order work accomplished, with relevant details.
- Photographs taken during the day.
- Visitors to the jobsite.
- Meetings, discussions, commitments, and conversations.

Also, because it is difficult and sometimes impossible to tell in advance what will become important information, all categories must be diligently maintained. It is up to the project manager or central office project administration, whatever the exact authority structure in your organization, to regularly police the reports. They must be checked often to be certain that all required information is being properly recorded.

The requirement that the reports be completed *daily* cannot be overly stressed. If DFRs are allowed to be lumped together for completion, even weekly, the accuracy of the information quickly degenerates and the completeness of the data also is dramatically reduced. When on site,

project management should visibly refer to the reports often, during conversations, issue research, and so on. Let field personnel know that the information is important and used. It is even helpful for project management to come up with an excuse for looking at the reports. The minute the field staff begins to get the feeling that no one's looking at the information, the data will become very thin indeed. Unless handled electronically, have the reports printed on two-part carbon or NCR paper. The original is to be sent to the central office, with the copy left on the jobsite. Consider requiring the reports to be sent to the central office daily, as an additional incentive to complete them on time.

Finally, as hard as it is to believe, many sizable construction projects today are being constructed without any such daily recording efforts, however basic. Even if you're not interested in improving your project control methods, these litigious times mean that the lack of some kind of daily field reporting can only be a clear indication of irresponsible project management. If you have field reports, be sure that they are used as they are supposed to be. If you do not have field reports, turn immediately to Section 1.3.1, "Sample Daily Field Report Form," and begin using them *today*.

1.3.1 Sample Daily Field Report Form

Field reports like the Sample Daily Field Report Form included in the Appendix to these materials at pp. 11-12 is to be filled out every working day by the project superintendent and signed by the project manager if that is an on-site position. In the absence of an on-site superintendent on very small projects, the report must be filled out by the responsible project manager – every day.

The following recommendations will help with efficient completion of the report forms:

1. *Title box.* Indicate project name, company job number, project locations, and the name of the individual completing the report;
2. *Date/page.* Account for each page of the total report. Use as many report forms as is necessary for complete record of the day's events. *Never* use the back of a report to continue information; it becomes too easy to overlook during a review and if photocopying becomes necessary;
3. *Weather.* Include a short comment on the typical condition of the day (cloudy, rainy, snowing, etc.). Record the temperature at the beginning and the end of each day;
4. *Visitors/problems/comments.* List all visitors to the jobsite that day who are not part of the work force. Include a brief remark as to the reason for the visit. Note any special situations deserving immediate attention. Include references to appropriate documentation;
5. *Items received/sent.* List all materials and equipment received or sent that day only;

6. *Force.* Indicate the number of each type of employment classification for each type of labor involved. For example, if two minority electricians and three nonminority electricians are employed by the same contractor, indicate “2” in the “M” column and “3” in the “NM” columns, both beside the description “Electrician.” Separate the labor breakdowns by subcontractor;
7. *Equipment.* List all major pieces of equipment on the site, whether or not they had arrived on that day;
8. *Brief description of work performed and location.* Directly adjacent to the respective labor force information in item 6, include a short description of the type of work performed. Also provide the location of the work, with sufficient references to allow accurate location. For example, “Continue foundation wall forming along column line A, between lines 4 and 6”;
9. *C.O. No.* If the work described in item 8 applies to a change or a proposed change, insert the number of the change order or change estimate number in the column provided;
10. *Distribution.* Send the original to the central office on a daily basis. Retain the copy at the project site.

1.4 PAYROLL RECORDS

Reporting payroll as a project control method is one objective. The other is to allow substantiation of actual costs as they are applied to a project. The treatment of payroll costs is still between the field and home office administration. Even in the field, the work force is divided into the field labor and field office staff. As it is, the actual labor force is documented at least in a most basic manner, as a basis for the payroll itself. For those contractors with more sophisticated job cost systems, the field payroll report is broken down into the specific activities performed on a given day by a particular employee. A numbering system is assigned to the possible activities as determined by the work estimates. The cost report that identifies the exact labor cost applied to the individual job components. This kind of division provides a valuable comparison to the cost estimates for the respective activities. Actual costs can be tracked against the estimates as they occur to allow identification of potential problems before opportunities for correction have passed. **The kind of field payroll report form that can help to accomplish these objectives is included in the Appendix to this program at p. 13, “Field Payroll Report Form.”**

The actual field payroll provides an indisputable account of direct costs to be applied to a particular change. Administrative staff expenses can be quite different. While it is possible to track any hourly employee, whether home office or otherwise, with the same precision as the procedure used for the field force, most often the effort is simply not made. Therefore, contractors might consider also tracking those costs.

1.4.1 Sample Field Payroll Report Form

The Field Payroll Report Form that is included in the Appendix to this program at p. 13 is designed to accommodate the suggestions included in Section 1.4 for field reporting. Specifically, it provides the capability to separate each filed employee's daily hours into the major activities worked on. The key is the use of a job cost system that divides the estimated work into the individual activities and assigns separate numbers to each one. When the information is entered into the job cost system, the result will be separate reports. One applies the actual resources expended on the major items of work, and the other isolates those spent on the respective change orders.

1.5 PHOTOGRAPHS – WHAT, WHEN, AND HOW

The job photo record should begin with a preconstruction series. Before *any* work is begun on the site – including mobilization of temporary field offices – the entire site should be photographed in detail. All existing conditions should be included. Consider photographs of the same major areas from different directions and points of view. When in doubt, take a picture of it. Film is cheap and digital photography is even cheaper.

All that is needed for the photo record is a contact sheet of each roll of film, just to identify the date, the areas and views included, and perhaps the reason for the photograph. For digital photos, a record could be kept using the unique numerical numbers of the photographs or treat a disc as a roll of film. If evidence of the exact preconstruction condition of the site becomes necessary in a change order preparation, claim, or a defense against a claim of site damage, the contact sheets can be reviewed. The appropriate photographs can then be enlarged or printed as your needs require. The procedure is extremely inexpensive, but can save thousands of dollars by ending arguments or clarifying extra cost items in your change orders.

Ongoing construction photographs are divided between regular progress photos and those required in special situations. Even if progress photographs are not required by the owner, arrange for them anyway, at least in some minimal capacity. A procedure similar to that described for the preconstruction photographs will provide good coverage of the project at a minimal expense.

In situations involving change orders, claims, backcharges, possible insurance claims, and other special situations, before-and-after photographs are advisable. In these conditions, fast actions are necessary to gain the maximum possible advantage. A “precondition” photo or series of photos will be the best record to confirm the exact circumstances prior to a changed work sequence. If the duration of the activity of interest is long, progress photos showing the significant stages of its progress should be taken. The individual circumstance will determine the level of detail necessary to adequately fulfill the requirement.

Good-quality 35mm cameras are excellent in all project photograph situations, but digital cameras are better. When using a digital camera, make sure you use one with enough megapixels to allow the pictures to be enlarged to at least an 8” x 10” print. Resist the

temptation, however, to use wide-angle lenses. They do make it easier to get more into the picture, but they distort shapes and perspectives. Remember that the objective is to provide an accurate record. Use lenses with “normal” focal lengths, and your photographs will remain true representations of reality.

Also, like other documentation, dates of photographs are crucial. Yes, current technology might allow photograph dates or even GPS coordinates to be extracted from digital photographs, but again, the simpler the better. Almost all digital cameras allow a date and time stamp. But, again, like all other documentation, if that date and time stamp is incorrect, the information is not as useful, so if a date and time stamp is used on photographs, which we recommend, ensure that the date and time stamp information is accurate.

Finally, try to include some clear physical references in your photographs that will help to establish perspective. For example, a photograph of a wide crack in a concrete slab will be more meaningful if it includes an open ruler beside or spanning the gap. Similarly, common objects such as coins, pencils, and cars can be used to establish size and distance perspectives in different situations.

1.5.1 Photograph Layout Requirements

If progress photographs are required by the owner, the exact requirements will normally be described in the general conditions of the contract. In any event, a number of requirements should be complied with, to ensure the maximum information and use of each photograph. Included in each photo description is:

1. Name of the project;
2. Owner and company project numbers;
3. Direction of view;
4. Identification of the photographer;
5. Description of the photo subject;
6. References to any appropriate correspondence, or anything to tie it to the detailed project record; and
7. Date.

The use of “Sample Photograph Layout Form,” included in the Appendix to this program’s materials at p. 14, might provide a convenient mechanism for complying with these seemingly elaborate information requirements. If the form is used consistently, its application will quickly become a routine procedure.

1.5.2 Sample Photograph Layout Form

The Sample Photograph Layout Form included on p. 14 of this program’s materials is designed to accommodate the suggestions of Section 1.5.1, “Photograph Layout Requirements.” Specifically, it provides a convenient location to record:

1. Name of the project;
2. Owner and company project numbers;
3. Direction of view;
4. Identification of the photographer;
5. Description of the photo subject;
6. References to any appropriate correspondence or anything to tie it to the detailed project record; and
7. Date.

Note that its most significant feature is a key plan of the building. If the project is a high rise, the typical floors can be labeled. If the project has a simple layout, the key can be included at the bottom portion of the photo layout form. If this is done, the photo can be mounted on the form, with the precise location and photo direction indicated. If an 8” X 10” or even larger photo is used, simply attach the key plan to the photograph. The form is a sample. It is included to demonstrate the principles discussed. If you can fit the key plan of your specific project on the bottom of the form in a manner that will leave room for the actual photograph and the other required information, so be it. If not, use the balance of the form for the key plan, and use it in the manner described for large photographs.

And, as with other documentation strategies discussed above, the same information likely also can be documented through reliable, electronic methods. The substance is key, not the form.

1.6 CONSTRUCTION SCHEDULES

The primary objective of any construction schedule is to complete the project as designed, in a systematic, coordinated manner. All this must be accomplished in the shortest possible time consistent with material and personnel constraints, thereby maintaining a good profit. The contemporary contracting industry recognizes that changes are a normal part of the construction process. Every superintendent, project manager, and construction executive knows that in all probability, there will be changes occurring on the project that will affect the final duration. If they can be handled competently and in stride, the effects on the project might still be felt, but accountability for them will remain where it belongs. Construction schedules that are

constructed and updated in a clear, consistent manner with complete, thorough notes and references can accomplish this. If the schedules are managed so that the information in them can be easily assembled, categorized, and supported in the event of a worst case scenario – a claim – their strength will actually become a force to minimize serious disputes. A good schedule will easily provide significant, visible comparisons and convincing proof of damages, including delay, acceleration, suspension of work, inefficiencies, disruption, and interference.

Following the suggestions that form the basis for presentable evidence, it turns out, will establish the fundamentals of good records, clear accountability, and effective presentation:

1. *The schedule must be the one that was actually used to build the project.* Even if a schedule that is substantially different from the one under consideration had been formally submitted and approved by the owner and/or the design professionals, the schedule that was actually used and depended upon by the various trades will generally be considered to be the legitimate document.
2. *The schedule must be periodically revised.* It is generally recognized that construction scheduling, however exact or inexact that it may be, is nothing more than a plan to construct what can reasonably be construed from the contract documents, considering that there may be several ways to build the same project. Although contingencies may be included to allow for imprecisely defined variables, there probably never has been a schedule constructed that anticipated every problem, coordinated every piece, and required no modifications to make it work. Changes to, or corrections of, the plan are inevitable. The schedule, therefore, must be updated periodically to maintain a current and accurate representation of reality. The revisions must be founded on the project record.
3. *The periodic updates must show all positive and negative influences by all parties.* None must be singled out; none must be absent for convenience. If all updates, for example, only indicate delays caused by the owner and fail to delineate other known problems caused by other parties, it won't be very difficult for your opponent to demonstrate the bias that has been built into the document. Failing to recognize all significant events will bring into question the validity of the entire schedule presentation.
4. *The schedule must include realistic construction logic and activity durations to demonstrate the professional ability of the planning and scheduling team.*
5. *The schedule must fairly represent the actual method planned to build the project.* If, for example, the schedule had been prepared primarily to cater to progress payments, or was otherwise unrelated to actual construction of the project, it will become very clear that as a tool for managing the project, its value will be marginal.

6. *The schedule updates and analysis must be realistic and in perspective.*
An overly aggressive computation of damages may hurt the validity of the entire analysis. Direct cause-effect relationships must be shown.

In addition to the foregoing, be sure that all notes and references are correlated with the more detailed chronological project correspondence. Have all field notes, claims, commitments, deadlines, and promises detailed in the schedule documents. Include the dates and the names of the individuals in those organizations who supply the information. Pin it down.

1.7 USING JOB MEETING TO ESTABLISH DATES, SCOPES, AND RESPONSIBILITY

1.7.1 Introduction

Job meetings can be weekly, biweekly, or monthly throughout normal periods of construction activity. During problems periods, or through critical or accelerated work sequences, the schedule may be compressed to shorter periods between meetings. Depending upon the type of contract arrangements, any member of the project team may be responsible for presiding over the meetings and keeping the minutes. Regardless of who is technically responsible, don't just let the job meetings "happen." The job meeting records should be clearly recognized for what they are – critical documents that, if properly implemented, will:

- Record history of all significant (or potentially significant) events.
- Keep open items on the front burner until they are finally resolved, or filed for future reference.
- Force action.
- Clarify accountability.
- Provide a basis to identify where expedited action is needed.
- Support interpretations and serious actions.
- Facilitate fast, efficient research, both soon and long after the occurrence of an event.

Too often, job meetings are left to be generated by those without either a clear concept of their importance or the ability to use them properly. If so, job meetings and their minutes can consume large amounts of time and effort, but wind up providing few or none of these benefits.

Because they can be so critically important to the favorable and timely resolution of fully every issue that can impact a project, it follows that you should capitalize on every opportunity to assume the function either formally or as a practical matter. The manner in which such

important documentation is kept and distributed is too important to be left to chance. The extra work and expense involved in producing and distributing the meeting minutes is minuscule when compared with the advantages gained through control over the information content and presentation.

Become familiar with Section 1.7.2, “Job Meeting and Minutes Guidelines.” Even if you are not formally responsible for their production, make the most of every opportunity to impose *your* format and procedure on those who are. Keep the pressure on to ensure the distributed, official job records serve *you* the best. Finally, in the face of someone else’s minutes that do not follow the rules of good format, take the time to complete your own copy of the record *before* it gets filed into your own system. Develop the habit of complaint item identification and correcting cross-references when the information is freshest in your mind – the day that you receive your copy of the minutes. And, if the minutes do not accurately reflect the meeting, it is crucial that notice is sent immediately. **Included in the Appendix to this program at p.15 is a form “Letter Correcting Job Minutes”.**

1.7.2 Job Meeting and Minutes Guidelines

For the job meeting itself:

1. *Schedule morning meetings if at all possible.* A mid-morning start will leave a few precious minutes to complete last-minute preparations. It will also give meeting attendees time to get to the meeting without having to fight morning or noon-hour traffic. Most people are more energetic and effective in the morning. Also, the remainder of the day is left available to get the jump on new problems and to expedite solutions for old ones.
2. *Always start job meetings on time* – regardless of who is late. It is at the very least inconsiderate to those who have taken the trouble to arrange their schedules to meet their commitments. Common courtesy aside, meeting attendees will get the message that you’re serious. A few times of having to “sneak” into an ongoing meeting may be embarrassing enough to end the problem. Chronic offenders should be confronted with their lack of attention at the meeting. Let those who do get there on time know that you appreciate their efforts.
3. *Make meeting attendance mandatory.* All major subcontractors as well as all subcontractors doing or about to perform *any* work on the site *must* attend all job meetings for the period. They must be there to participate in all coordinating activities and discussions. Lack of attendance by any subcontractor affected by a discussion creates problems starting with excessive efforts necessary on *your* part to coordinate information. It must also be made clear that all subcontractors are responsible for all information contained in the job meeting minutes. **The “Sample Letter to Subcontractors Regarding Mandatory Job Meeting Attendance,”**

which is included at p. 16 of the Appendix to this program, will help to make your position clear.

4. *Confirm attendance prior to the meeting.* The day before the meeting, call or have your secretary call all subcontractors who you've determined are important to the meeting. Reaffirm your expectation of their attendance. If a specific issue critically requires a particular attendance, call again early on the morning of the meeting. Be clear that you expect complete attention.
5. *Notify absent parties **immediately after the meeting** – or even during the meeting, if necessary.* Despite all your efforts, some may persistently fail to attend job meetings – even after they've "confirmed" that they would. If the lack of attendance interferes with your ability to resolve an issue (or move on issue closer toward resolution), telephone that person immediately after the meeting. In some situations, it may be particularly effective to call him or her *during* the meeting. Be sure you let the person (and the meeting attendees) know just how conspicuous his or her absence is. Be clear about the inconvenience that you're forced to put those considerate enough to attend the meeting through just to discuss that subcontractor's problem. In the meeting minutes, for each item affected, note the reason for lack of resolution to be the subcontractor's failure to attend. Document the case, and bring such documentation to that person's (and that person's boss's) attention. If an item that affects a subcontractor has been decided in a certain way, so advise that party. Note your phone conversation in the meeting minutes item. **For all expected parties who failed to attend the meeting, send the "Sample Letter to Subcontractors Regarding Lack of Job Meeting Attendance", included in the Appendix to this program at p. 17.** Be clear as to your dissatisfaction of their lack of attention and concern.

In the meeting minutes themselves:

1. *Use outline format.* Keep the minutes in outline form to maintain clear, to-the-point representations. Number the meetings. Begin the minutes with the separation of "Old Business" (prior discussions) and "New Business." Number each successive item in each section. This will make all references to any job meeting discussion fast and accurate (such as "Reference Job Meeting 4, Item A.6). There's no question as to what you're talking about.
2. *Use a title for each item.* A summary description clarifies a paragraph's subject. They make research fast and correlation of topics easy. Use exactly that same wording in each meeting that the item is discussed. Issues that continue through multiple job meetings will be clearly tied together through their consistent title.

3. *Include all appropriate references in an item title.* If it involves a change order, include the change order number in the description. If it involves a change estimate, architect's bulletin, or whatever, note it as such. The inclusion of these numbers will relate the discussion to all the affected files. Research will become faster and more complete.
4. *Name names.* Avoid remarks such as "the architect stated ...". Instead, use "Mr. ___ stated ...".
5. *Use short but specific statements.* Be as concise but complete as possible. Read back the exact language at the meeting. Get agreement that the representation is entirely accurate and that everyone understands the implications, as well as the obvious.
6. *Require definite action.* Include the names and the precise dates by which action is required. Ask frank questions at the meetings. Firmly and persistently narrow complex or difficult issues down to the next step required in the resolution process. Confirm whose court the ball is in and write it down.
7. *Include safety, cleanup, and construction schedule as prominent items.* Place them high on the agendas of *every* meeting. Give these common but typically neglected issues the critical importance they deserve, and you'll deal with them more effectively.
8. *Notify all recipients of the meeting minutes to advise the writer of any errors or omissions in the representations.* Request acknowledgment of the accuracy of the "Old Business" at each meeting before proceeding to the "New Business." Include any resulting acknowledgments or corrections as the first item of the "New Business."

The "Sample Job Meeting Minutes Form," included in the Appendix to this program at pp. 18-19, follows through with the recommendations of this section.

1.7.3 Sample Letter to Subcontractors Regarding Mandatory Job Meeting Attendance

The Sample Letter to Subcontractors Regarding Mandatory Job Meeting Attendance at p. 16 of the Appendix is designed to accommodate the Section 1.7.2 job meeting guideline 3. Specifically, it notifies all subcontractors that:

1. Anyone performing or about to perform *any* work on the site is absolutely required to participate in all job meetings during the period. This is a mandatory requirement that will not be compromised.

2. Meetings will be held on the dates scheduled and will start *on time*. Attention is expected to be given to these requirements.
3. It is each subcontractor's responsibility to be aware of all information as it relates to their work and to make all necessary efforts to ensure proper coordination.
4. Each subcontractor is absolutely responsible for all information contained in the job meeting minutes. This includes completeness, accuracy of description, noted commitments, and timetables.

1.7.4 Sample Letter to Subcontractors Regarding Lack of Job Meeting Attendance

The Sample Letter to Subcontractors Regarding Lack of Job Meeting Attendance on p. 17 of the Appendix is designed to accommodate the Section 1.7.2 job meeting guideline 5. Specifically, it confirms your conversation with the subcontractor who despite your coordination efforts has failed to attend an important job meeting that:

1. The lack of attention is creating unnecessary interferences and inconveniences.
2. Interferences, delays, and additional costs resulting from the lack of attention will be entirely that subcontractor's responsibility.
3. It continues to be that subcontractor's responsibility to be aware of all project requirements as included in the meeting minutes, and to comply with them in every respect.
4. "Reminds" them of the next job meeting.

By copy of the letter, make certain that the field representative's boss is aware of the absence and your feelings toward it. If that doesn't get some reaction, then you've probably got other problems with that company.

1.7.5 Sample Job Meeting Minutes Form

The Sample Job Meeting Minutes Form at pp. 18-19 of the Appendix is arranged to comply procedurally with requirements that must be provided for in every job meeting. In addition, it is designed to accommodate Section 1.7.2, "Job Meeting and Minutes Guidelines" by:

1. Providing appropriate areas to prompt the inclusion of all relevant job meeting identification and distribution information.

2. Encouraging documentation in accordance with the “outline” recommendations.
3. Providing a convenient area for highlighting important action necessary, including person responsible and date action is required by.
4. Including the important notification to correct any errors or omissions in the noted discussions.

1.8 SHOP DRAWINGS AND APPROVAL SUBMITTALS

Shop drawings are detailed, large-scale representations that describe how a contractor intends to fabricate and/or install the various components that will make the project. They are prepared by subcontractors and suppliers (and the prime contractor for work that it performs itself). Their purpose is to describe how the work being provided meets the design criteria established by the architect and engineers via the plans and specifications.

1.8.1 Approval Responsibility

Under the prevailing arrangement in most contract documents, the general contractor (or construction manager) and the architect shares the responsibility for shop drawing review. The general contractor receives the shop drawings from its subcontractors, reviews them, stamps them with its approval, and forwards them to the architect and engineers for their processing. The design professional are likewise normally required to review and approve the shop drawings and return them to the general contractor. In so doing, the designers authorize the work to proceed in the manner detailed in these submissions, or as corrected. It is at this interface of contractor-designer reviews and actions that questions of responsibility interfere with the process and the outcome. If these contractor and designer responsibilities are not absolutely clear in both the contract documents and in the actions of the parties, the questions must be removed fast. If unclear requirements are allowed to remain, the shop drawing approval process will be delayed. Each party will be left to decide for themselves how they intend to shoulder their responsibilities. The contractor will include less information than the designers would otherwise prefer to see. The architect is then likely to return the submittals to the contractor for correction or without action pending the addition of information.

At the other extreme, many designers have had an increased awareness of their own professional liabilities. Although attitude and practice vary, designers’ attempts to narrowly define the scope of their shop drawing reviews have often led to increased confusion resulting in the opposite effect, that is, the assumption of even more liability. It cannot be argued that the roles of the designer and the contractor are in an evolution created by changing contract structures. The concern here, however, is that designer responses (that are becoming all too common) can compromise thoroughness and attention to detail. Contractors likewise too often try to place too much of the burden on the designers. The combination of effects is causing or contributing to substandard shop drawings. This ultimately creates dissatisfaction at every step of the process, increases the confusion and friction surrounding shop drawing review responsibilities, and may increase liabilities for the designer, the contractor, or both.

The architect is normally responsible for approving shop drawings, reviewing them for their “conformance with the original design concept” or some similarly obscure process. The difficulty lies in the fact that there seems to be no clear, consistent description of precisely what the designer’s responsibilities in the shop drawing review and approval process include. What work, for instance, does “conformance with the design concept” incorporate? Connection Details? Performance calculations? Sizing of structural members? At what point is design responsibility being side-stepped?

To make matters worse, certain design offices treat the shop drawing approval responsibility with less importance that it truly deserves. While it may be true that many designers do understand the criticality of information incorporated in shop drawings and treat it with respect and proper attention, some do not. Time and expense pressures in some design offices create a temptation to assign the shop drawing review task to a junior, or least experienced, person in the office. If this is allowed to happen, it increased the likelihood of errors sliding through undetected.

This lack of clear definition and assumption of approval responsibilities has left most design offices (and sometimes their professional liability insurance companies) practically determining for themselves what their responsibilities will include. In addition, many architects and engineers have attempted to limit their liabilities by avoiding the use of the word “approved” in the shop drawing remarks altogether. Phrases such as “No Exceptions Taken,” “Furnish as Submitted,” “Examined,” or one of our favorites, “Not Rejected” have now become the rule rather than the exception. Moreover, the shop drawing stamps have been supplemented with elaborate language explaining what is and is not being done, in an effort to define the review process and minimize legal exposure.

There is an argument, however, that supports the idea that the designers’ stamps may actually increase their liability, if their contract obligations for shop drawings review exceed the limits of the language included on the stamp. The owner and contractors rely on the designer’s approval responsibilities as defined in the contract. If a designer operates in a narrower view as defined in the loose language on a stamp, it is a clear admission that the designer is doing less than he or she is contractually obligated to do. This may prove to be a powerful argument, indeed.

1.8.2 Approval Response Time

Beyond basic approval responsibility, a contractor’s major concern is designer response *time*. Common language in construction agreements notes that a designer will “review and approve shop drawings with reasonable promptness so as not to cause a delay in the work” or something similar. “Reasonable response” is another term that lacks precision in its determination. “Reasonable” becomes defined by trade practice in the project’s geographic location. If nothing better is available in the existing contract language, establish the definition of “reasonable time” at the very first job meeting. Ten working days (except in unusual circumstances) will normally qualify. Pin it down early. To emphasize the precise requirement,

indicate on each submission transmittal the exact response date that approval of the respective item is required by before the project is impacted.

1.8.3 Treatment of Differing Conditions

Regardless of whether or not conditions are a result of a design error, it is the contractor's responsibility to highlight in an approval submission *all* differences from the requirements included in the contract. Even if the condition has not been addressed with specific contract language, it will generally be held that a contractor will remain responsible for changes (even those bearing an unwary designer's approval) if the differences from the contract requirements had not specifically been brought to the designer's attention for their direct consideration. In contrast, by properly highlighting the differences and detailing all justifications, you'll speed up their acceptance. Moreover, the ultimate approval *will* carry with it the designer's responsibility that might have been lost in the circumstances just described.

1.8.4 Absolute Contractor Responsibility

The key to fast action and correct treatment of contractor's responsibilities is the proper application of the pass-through principle. Once the "contractors" are defined, it is important to understand that those responsibilities as they relate to shop drawing preparation are the responsibility of the respective subcontractor or trade contractor being considered. For example, if the "contractor" is "responsible for dimensions ...," the pass-through application clarified that "the steel contractor is responsible for steel dimensions," "the concrete contractor is responsible for concrete dimensions," and so on. As a prime contractor, don't get trapped into the assumption of more responsibility than you should. If the architect is responsible for checking the work as it relates to "conformance with the design concept" and the "contractor" (each respective subcontractor) is responsible for specific shop drawing preparation criteria, it is important to understand the role the prime contractor (or construction manager) plays in the process. It amounts to:

- Policing the activities of both the subcontractors and the designers to ensure that their contract responsibilities are being met completely and on time.
- Coordinating all information and instructions in a timely manner as the information is required to pass in both directions.

1.9 REQUESTS FOR INFORMATION – RFIs

RFIs are submitted to clarify errors and ambiguities in the plans and specifications. RFIs must contain sufficient detail to enable the design professional to identify the error and/or ambiguity and provide clarification, *e.g.*, specification sections and drawing numbers. Careful attention to written follow up on an unanswered RFI is advisable when work on the critical path is affected by the unanswered RFI. Even when the affected work is not on the critical path, the cumulative effect of a large number of RFIs should be documented.

PART THREE: DISPUTE RESOLUTION CONSIDERATIONS

When dispute resolution is imminent, responsibility for maintaining and preserving documents, communications, information, and evidence – both electronic and otherwise – is heightened. Indeed, failure to preserve information could result in serious sanctions and adverse evidentiary presumptions.

In connection with any dispute resolution, whether arbitration or litigation, a party will be required to produce documents and electronically stored information relevant to the claims and disputes between the parties. Those parties, along with its officers, employees, members, managers, partners, shareholders, agents, representatives, and affiliates have a continuing duty to preserve all potentially relevant documents and electronically stored information (including traditional hard copy documents and electronic data, as further detailed below) related to the claims and disputes at issue.

The question remains, though, when are these responsibilities triggered? Courts typically define the triggering date as the date when litigation is reasonably anticipated, not simply the date when suit is filed, served, or even threatened. After all, nearly every change order request could be considered the start of a potential dispute from which litigation might be likely. Accordingly, because there is no bright line, best practices would suggest that, in conjunction with any project on which disputes might arise – and we suggest that disputes are reasonably anticipated on any project – contractors might consider preserving all project information for at least five to six years after project completion, which correlates to the peremptive period for filing suit on a construction project under Louisiana law. *See* La. R.S. 9:2772.

If not preserved as suggested above, when litigation is reasonably anticipated, parties must immediately suspend routine document retention/destruction policies for potentially relevant documents and data and must put in place a “litigation hold” to ensure the preservation of such documents and data and instructing all personnel not to alter, destroy, discard, annotate, remove, rearrange, or modify any documents or electronically stored information regarding the claims and disputes at issue.

By way of example, the following documents and electronically stored information should be safeguarded and preserved:

1. Information contained on computer systems, personal computers, laptops, tapes, discs, drives, cartridges, smart phones, personal digital assistants, thumb-drives, external hard drives, and other electronic storage media, servers, and other locations.
2. E-mails and other electronic communications, word processing documents, spreadsheets, databases, calendars, telephone logs, memoranda, reports, PowerPoint presentations, correspondence, graphics, animations, photographs and images, audio, video and audiovisual recordings, text messages, and the like.

3. All data storage backup files that might contain relevant information. Parties must retain and preserve all backup tapes or other storage media, whether on-line or off-line, and refrain from overwriting or deleting information contained thereon, which may contain pertinent electronic data.
4. All data from servers and networking equipment that log network access activity and system authentication.
5. Any and all other electronic data generated or received by employees or past employees who may have personal knowledge of the facts regarding the dispute, including all electronic data generated or received by employees or past employees who are or may have been custodians of any information regarding the claims and disputes at issue.

Because failure to preserve such documents and electronically stored information might result in severe prejudice and consequences, including various forms of punishment and sanctions imposed by a court of law, if you are unsure whether certain information or documentation is relevant, please err on the side of caution and preserve the information or documentation.

CONCLUSION

An effective, comprehensive system of keeping records and documents is an essential tool for managing a project and protecting your interests. When the project is completed, memories are dim, personnel move to other employment, and many a dollar can be lost. Arbitration and litigation are very costly and very time consuming. Well-kept records can greatly increase your chances of avoiding dispute resolution and recovering extras and claims at the end of a project. For your system to be of any use, it must be constantly maintained, updated regularly and revised for the duration of the project.

Some contractors and especially subcontractors are afraid of offending the other party by documenting claims. But professional, explicit communication can avoid disputes and claims, which only benefits all parties involved, and documentation of claims is merely the method for seeking fair compensation for unanticipated conditions or extra work.

About the Presenters:

Mark Frilot and Matt Emmons are attorneys with Baker, Donelson, Bearman, Caldwell & Berkowitz. Both are in the Firm's Mandeville office, and both represent owners, contractors, subcontractor and suppliers across the full spectrum of construction law. Mark is listed among The Best Lawyers in America ® for construction law, and is known for his experience in contractor licensing and design professional liability, as well as public and private works claims and bidding disputes. Matt generally handles contract negotiation and drafting, defective material disputes, contract disputes, delay claims, public bidding and procurement, Private Works Act claims and design professional liability.



BUILDING BLOCKS

MATERIALS FOR CONSTRUCTION PROFESSIONALS

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BEARMAN, CALDWELL & BERKOWITZ, PC

APPENDIX

PROTECTING YOUR PROFITS THROUGH PROJECT DOCUMENTATION

BY:

MARK W. FRILOT

MATTHEW R. EMMONS

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

**3 SANCTUARY BOULEVARD
SUITE 201
MANDEVILLE, LOUISIANA 70471
TELEPHONE: (985) 819-8400
FACSIMILE: (985) 819-8484**

ABC SUBCONTRACTOR
XYZ Street
Anywhere, USA
PROPOSAL/CONFIRMATION

General Contractor: _____ Date: _____
Address: _____ Job Name: _____
Fax No.: _____ Bid Date: _____
Bid Time: _____

Dear General Contractor:

We are pleased to submit/confirm our proposal on the above-referenced project.

We propose to provide the following material and/or perform the following work:

We exclude the following work:

Our price is:

We will add ___% for overhead and ___% for profit on all additional work and/or change order work. We will furnish the materials and/or complete the work during the following time period:

We do not include subcontractor performance, and payment bonds in our price. We will ____, will not __ provide bonds, issued on our insurer's standard forms, if requested by you within ten (10) days after our receipt of an acceptable subcontract. You must pay ____ for the bonds at the time of delivery.

We have received the following plans in preparing our proposal:

We have received the following section of the project specifications in preparing our proposal:

Any materials or work shown on any other plan or specified in any other specification sections are excluded from our bid. Any unusual terms and general conditions of the general contract also are excluded. American Institute of Architects documents are considered to have "usual terms."

Our proposal is contingent upon you tendering to us an AIA A401 "Standard Form of Agreement Between Contractor and Subcontractor" (2007 Edition) or other mutually acceptable subcontract. We reserve the right to withdraw this proposal if you do not provide us with adequate assurance, in the form of verified financial information, that the owner has the ability to pay for the project.

Our proposal will expire if we do not receive a letter of intent from you within ten (10) days after the project bid date and subcontract agreement within ten (10) days after you enter into a contract with the owner.

Submitted by:

ABC SUBCONTRACTOR

By: _____
Title: _____

REQUEST OF CONTRACT DOCUMENT LETTER

January 25, 2013

Mr. John Kidney
Bean Construction Co.
1234 First St.
Waterless, FL 10209

PROJECT – Flushing WWTP
SUBJECT – Request for contract documents

Dear Mr. Kidney:

We have reviewed the Subcontract for this project.

The Subcontract incorporates, by reference, other documents that contain obligations in addition to the terms of the Subcontract. If it is your intention that this company be bound by these documents, then we must have copies for our review.

Please send copies of all documents referred to in the Subcontract that you claim will bind this company.

Sincerely,

A.C. Current

cc: File
Jack Sparks
Ben Short

CHANGE ORDER COST PROPOSAL

To: _____

Attention: _____

Date: _____

No.: _____

Job: _____

Our Job No.: _____

Contract No.: _____

WE HAVE RECEIVED AND REVIEWED YOUR PROPOSED CHANGE
_____ PERTAINING TO _____ DATED
_____.

WE PROPOSE TO FURNISH ALL MATERIAL, LABOR AND SUPERVISION FOR THE
EXECUTION OF THE ____ WORK COVERED BY THIS CHANGE FOR THE LUMP SUM
OF \$ _____.

IN ORDER TO INCORPORATE THIS CHANGE, WE ESTIMATE THAT WE WILL
REQUIRE ADDITIONAL TIME FOR COMPLETION AND HAVE BASED OUR PROPOSAL
UPON RECEIVING ____ CALENDAR DAYS EXTENSION.

THIS PROPOSAL IS FIRM FOR ACCEPTANCE WITHIN ____ DAYS. WE CANNOT
PROCEED WITH WORK COVERED BY THE PROPOSED CHANGE UNTIL WE ARE SO
DIRECTED IN WRITING APPROVING COSTS, OR UNTIL WE RECEIVE YOUR CHANGE
AUTHORIZATION, WHICH MUST BE WITHIN THE ABOVE TIME LIMIT TO PREVENT
ADDITIONAL COSTS.

EXCEPTION TAKEN AND ITEMS OF DIRECT COSTS NOT INCLUDED ARE

_____.

THIS PROPOSAL IS BASED SOLELY ON THE USUAL COST ELEMENT SUCH AS
LABOR, MATERIAL, AND NORMAL MARKUPS AND DOES NOT INCLUDE ANY
AMOUNT FOR ADDITIONAL CHANGES IN THE SEQUENCE OF WORK. DELAYS,
DISRUPTION, RESCHEDULING, EXTENDED OVERHEAD, OVERTIME,
ACCELERATION AND/OR IMPACT COSTS, AND THE RIGHT IS EXPRESSLY
RESERVED TO MAKE CLAIM FOR ANY AND ALL OF THESE AND RELATED ITEMS
OF COSTS PRIOR TO ANY FINAL SETTLEMENT OF THIS CONTRACT.

ABC CONTRACTORS, INC. _____

REQUEST FOR CHANGE LETTER

January 25, 2013

Mr. John Kidney
Bean Construction Co.
1234 First St.
Waterless, FL 10209

PROJECT – Flushing WWTP
SUBJECT – Request for changes
DESCRIPTION OF CHANGES – Feeder to Panel A

Dear. Mr. Kidney:

We acknowledge receipt of the above change request. We are proceeding with pricing of this change and its impact on the schedule. This change may require additional time for submittal and acquiring materials.

We understand that we have been directed to proceed with this work at this time. We shall only proceed with the work when a change order has been received stating that this work is extra, that we are entitled to an adjustment in the subcontract price and/or time, and that we are to proceed with the extra work.

Sincerely,

A.C. Current

cc File
Jack Sparks
Ben Short

VERBAL ORDERS LETTERS

January 25, 2013

Mr. John Kidney
Bean Construction Co.
1234 First Street
Waterless, FL 10209

PROJECT – Flushing WWTP
SUBJECT – Verbal Orders to do Extra Work
DESCRIPTION OF WORK – Add Five (5) type A Fixtures

Dear Mr. Kidney:

This letter confirms that you have directed us to immediately proceed to perform the above described extra work. We will perform this extra work without a written change order in reliance upon your promise that we will be paid for this extra work. A formal change order submittal form will be sent when all pricing information is available.

We are proceeding with the work and expect payment in full. If this is not your understanding, please contact me immediately.

Sincerely,

A.C. Current

cc: File
Jack Sparks
Ben Short

ABC SUBCONTRACTOR
 XYZ Street
 Anywhere, USA

WORK AUTHORIZATION

Project: _____ Date: _____
 Subcontract Job No: _____ Work Authorized By: _____
 To: _____ Title: _____
 _____ Customer Order No.: _____

You have authorized __, directed __ us to perform the following additional work:

We have incurred the following job costs:

| Labor | | | | Material | |
|-------|-------|---------|------|-------------|----------|
| Name | Craft | # Hours | Rate | Description | Quantity |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |

| Equipment and Tools | | | |
|---------------------|------|-------------|------|
| Description | Time | Description | Time |
| | | | |
| | | | |
| | | | |

Note: Overhead and profit will be added to our bill to you.

Remarks: _____

Subcontractor
 By: _____

Contractor
 By: _____

Additional work is completed __ Yes __ No Work authorization not signed because:
 ___ Unable to contact representative
 ___ Authorized by phone
 ___ Form issued for record purposes only
 ___ Authorization in dispute

UNDER PROTEST LETTER

January 25, 2013

Mr. John Kidney
Bean Construction Co.
1234 First St.
Waterless, FL 10209

PROJECT – Flushing WWTP
SUBJECT – Proceeding with work under protest
DESCRIPTION OF CHANGE – Relocation of Panel A

Dear Mr. Kidney:

This is a confirmation of your direction for our company to complete the above described work. We consider this work to be an extra to our Subcontract.

Under protest, we are proceeding as directed. We expect full payment for this additional work and reserve our right to make a claim for future payment. We do not waive our rights to make a claim for this additional work by our acceptance of interim payments.

Sincerely,

A.C. Current

cc: File
Jack Sparks
Ben Short

**SAMPLE LETTER TO THE OWNER REGARDING
ACKNOWLEDGEMENT OF ACTUAL WORK PERFORMED**

January 25, 2013

To: (The Owner)

RE: Project No.:
Project Title:
(Change File No.)
Acknowledgement of actual work performed

Dear Mr. (Ms.):

Per your direction of (date), we are proceeding with the subject work under protest, in the interest of job progress.

We will be preparing Time and Material Tickets to document the actual work performed, along with all resources used. They will be presented each day to your on-site representative for signature. We recognize that the signature at this time will only acknowledge the facts of the information contained in the respective T & M tickets, and does *not* indicate acceptance by you of the responsibility for the work at this time.

Very truly yours,

Project Manager

Cc: Owner Field Representative
Architect
File: (Change File)

SAMPLE TIME AND MATERIAL FORM

Bill To: _____

Date _____
 Project _____
 Project No. _____

Description of Work _____

Location: _____
 Authorized by _____

LABOR

| Date | Employee | Work Performed | Hours | | Rate | Amount |
|------|----------|----------------|-------|----|------|--------|
| | | | REG | OT | | |
| | | | | | | |
| | | | | | | |
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| | | | | | | |
| | | | | | | |
| | | | | | | |

MATERIALS

| Date | Description | Quant. | Unit Price | Amount |
|------|-------------|--------|------------|--------|
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

EQUIPMENT

| Date | Quant. | Type/size | Work Performed | Hours | Rate | Amount |
|------|--------|-----------|----------------|-------|------|--------|
| | | | | | | |
| | | | | | | |
| | | | | | | |
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| | | | | | | |
| | | | | | | |

Total _____

Prepared by: _____

Accepted by: _____
 _____ Date _____

DAILY FIELD REPORT

Page 1 of ____

Project: _____ No: _____ Date: _____
 Location: _____ Weather: _____
 Superintendent: _____ Temp: 8AM ___ 1PM ___ 4PM ___

STAFF

| Name | Classification | Name | Classification |
|------|----------------|------|----------------|
| | | | |
| | | | |
| | | | |
| | | | |

EQUIPMENT

| Quant. | Type/Size | Work/Idle | Work Performed | Arrival | Departure |
|--------|-----------|-----------|----------------|---------|-----------|
| | | / | | | |
| | | / | | | |
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VISITORS / CONVERSATIONS / MEETINGS

REQUIRED MATERIALS / INFORMATION

| Item | Requested from | Company | Promised by |
|------|----------------|---------|-------------|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

Project Manager

Superintendent

FIELD PAYROLL REPORT FORM

Project: _____

No. _____

Week Ending _____

| Employee | Sun | | Mon | | Tue | | Wed | | Thur | | Fri | | Sat | | Total |
|----------|--------------|-----|--------------|-----|--------------|-----|--------------|-----|--------------|-----|--------------|-----|--------------|-----|-------|
| | Act. No | Hrs | Hours |
| | | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | | |
| | Total | | Total | | Total | | Total | | Total | | Total | | Total | | |
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| | | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | | |
| | Total | | Total | | Total | | Total | | Total | | Total | | Total | | |
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| | | | | | | | | | | | | | | | |
| | Total | | Total | | Total | | Total | | Total | | Total | | Total | | |
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| | | | | | | | | | | | | | | | |
| | Total | | Total | | Total | | Total | | Total | | Total | | Total | | |

PHOTOGRAPH LAYOUT FORM

Project _____ No. _____ Date _____
Taken by _____ Time _____
Location _____
Orientation (indicate on Key Plan) _____
Remarks _____

Place photo(s) here.
Assign identification numbers to multiple photos

Draft Key Plan here and
Photocopy supply of job forms

LETTER CORRECTING JOB MINUTES

ABC SUBCONTRACTOR
XYZ STREET
Anywhere, USA

January 25, 2013

Reasonable General Contractor
123 Steel Lane
Somewhere, USA

RE: Mega Project Phase I
Job Meeting Minutes of October 15, 1994

Dear General Contractor:

We have reviewed the above-referenced job meeting minutes and would like to note the following additions and corrections:

The Job Superintendent for ABC Subcontractor attended this meeting. During the meeting, he requested the location of the light fixtures in Mechanical Room 2. This information is necessary in order to verify that ABC's steam piping does not conflict with the light locations. ABC expects to begin installation of this steam piping on February 14, 2006. An answer must be received before February 14, 2006.

ABC also requested that Reasonable complete the rough grading at the west end of the building. ABC expects to begin installation of site utilities in this area on February 21, 2006. Since this work is on the critical path of the Mega Project Schedule, any delay by Reasonable in providing access to ABC in this area will result in delays to ABC and to the overall completion of the Project.

Please correct the above-referenced meeting minutes to reflect these discussions.

Sincerely,

Project Manager
ABC Subcontractor

**SAMPLE LETTER TO SUBCONTRACTORS
REGARDING MANDATORY JOB MEETING ATTENDANCE**

January 25, 2013

TO: (List all project subcontractors)

RE: (Project No.)
(Project Title)
Mandatory Job Meeting Attendance

Gentlemen:

Your subcontracts require your participation in regular job meetings. These meetings have been scheduled to begin on (date) and will be held on alternating (insert day of the week). During critical or problem periods, the meetings may be held weekly, as (insert the name of your company) may determine. It is your responsibility to be aware of the current job meeting schedule.

(Name major mechanical and electrical subcontractors) are required to attend all meetings. All other subcontractors performing or about to perform work on the site are required to attend *all* meetings throughout the period of their work.

Please note that this is not a request. Your attendance at these meetings is *mandatory*. Your failure to attend will result in excessive efforts by others to coordinate their work with yours. You will be held responsible for all information contained in the meeting minutes, including timetables, commitments, and determinations of responsibility as set forth.

Thank you for your cooperation.

Very truly yours,

Project Manager

**SAMPLE LETTER TO SUBCONTRACTORS
REGARDING LACK OF JOB MEETING ATTENDANCE**

January 25, 2013

To: (Subcontractor failing to attend a specific meeting)

RE: Project No.:
Project Title:
Lack of job meeting attendance

Dear Mr. (Ms.):

Per our conversation this date, your failure to attend today's job meeting as required is interfering with job coordination and completion. As you know, it continues to be your responsibility to be aware of all project requirements and to accommodate them completely and in a timely manner. Please be advised that you will be held responsible for all interferences, delays, and added costs resulting from this lack of attention.

The next job meeting will be held on (insert day and date) promptly at (insert time).

Very truly yours,

Project Manager

cc: Owner
Architect
Subcontractor Field Representative's Immediate Superior

SAMPLE JOB MEETING FORM

Job Meeting No. _____
 Date:
 Location:

Page 1 of ____
 Project No.:

| Present | | Distribution | |
|---------|---------|--------------|---------|
| Name | Company | Name | Company |
| | | | |

NOTICE to attendees and minutes recipients:

If any of the following items are incomplete or incorrect in any way, please notify the writer. Failure to advise of such corrections by or before the next job meeting constitutes acceptance of all information contained therein as it is represented.

| SUBJECT | ACTION REQUIRED | |
|--------------|-----------------|------|
| | By | Date |
| OLD BUSINESS | | |

Job Meeting No. _____
Date:
Location:

Project No.:

Page 1 of ____

| SUBJECT | ACTION REQUIRED | |
|---------|-----------------|------|
| | By | Date |
| | | |

PROGRESS SCHEDULE LETTER

January 25, 2013

Mr. John Kidney
Bean Construction Co.
1234 First St.
Waterless, FL 10209

PROJECT – Flushing WWTP
SUBJECT – Progress Schedule

Dear Mr. Kidney:

We have not received the progress schedule on the above referenced project. It is our intention to provide labor and material as required to meet the start and finish dates of our work as specified in the mutually agreed schedule. Please send us the proposed schedule as soon as possible so that we may plan our work accordingly.

We look forward to a team effort on this project with a timely and profitable completion for all concerned. Please contact us if we can assist you in any way regarding the schedule.

Sincerely,

A.C. Current

cc: File
Jack Sparks
Ben Short

REQUEST FOR DELAY DAMAGES

RE: Delay Damages for _____

Dear _____:

As you know, Slowblow Electric is in the process of performing electrical work in connection with the construction of the above project under a subcontract dated _____, 200__. The original bid of Slowblow Electric was based upon the projected completion date of _____ as set forth in the original contract. It is evident that this project will not be completed by that date, therefore, Slowblow Electric will require additional time in order to complete our subcontract. These delays are the result of _____, none of which are attributable to Slowblow Electric. As a result of these delays, Slowblow Electric estimates that it will not be able to complete construction under its subcontract until approximately _____ days beyond the original completion date.

The purpose of this letter is to advise you that Slowblow Electric intends to seek compensation for the additional costs incurred as a result of these delays. The additional expenses will total approximately _____ per day, representing _____.

Slowblow Electric will seek to recover this amount for each day our work is delayed beyond the original completion date of _____.

Sincerely,

cc: File

CONTESTED BACKCHARGE LETTER

January 25, 2013

Mr. John Kidney
Bean Construction Co.
1234 First St.
Waterless, FL 10209

PROJECT – Flushing WWTP
SUBJECT – Contested Backcharge for Cleanup
AMOUNT - \$250.00

Dear Mr. Kidney:

We disagree with the validity of the backcharge described above.

We feel that you have no right to withhold any money from our Pay Request. We expect payment in full immediately.

Sincerely,

A.C. Current

cc: File
Jack Sparks
Ben Short

RECEIVED LATE PAYMENT LETTER

January 25, 2013

Mr. John Kidney
Bean Construction Co.
1234 First St.
Waterless, FL 10209

PROJECT - Flushing WWTP
SUBJECT – Payment requisition #3

Dear Mr. Kidney:

We acknowledge receipt of the above payment. This payment was received late, which is in violation of the terms of our Subcontract AIA A401 Article 11.3.

By accepting this late payment, we are not agreeing to any waiver of our rights or modification of the payment terms of our Subcontract.

We demand that all payments be made on time as called for in the terms and conditions of the Subcontract.

Failure to pay on time may result in the suspension of our work pending payment as required in the Subcontract, Article 4.7.1.

Sincerely,

A.C. Current

cc: File
Jack Sparks
Ben Short

NOTICE OF DELAY

To: _____

Attention: _____

Date: _____

Job: _____

Our Job No.: _____

Contract No.: _____

WE ARE EXPERIENCING THE FOLLOWING DELAYS _____:

YOU ARE HEREBY ADVISED THAT THIS PROBLEM CONSTITUTES A SUSPENSION OF WORK AND CHANGE FOR WHICH ABC CONTRACTORS, INC. RESERVES THE RIGHT TO REQUEST AN EQUITABLE ADJUSTMENT UNDER THE CHANGES CLAUSE OF THE SUBCONTRACT ONCE THE FULL IMPACT OF THE DELAY IS KNOWN.

ABC CONTRACTORS, INC. _____

DISPUTE DOCUMENTATION LETTER

ABC SUBCONTRACTOR
XYZ Street
Anywhere, USA

January 25, 2013

Reasonable General Contractor
123 Steel Lane
Somewhere, USA

RE: Mega Project Phase I
Eye Wash Sinks – Rooms 222, 232
Project Drawings A132, A134

Dear General Contractor:

On _____, your jobsite superintendent instructed our jobsite superintendent to furnish and install the above-referenced eye wash sinks. Both our proposal/confirmation dated February 2, 2003, and the subcontract between ABC and Reasonable exclude plumbing work shown on the architectural drawings but not shown on the mechanical drawings. The above-referenced eye wash sinks do not appear on the mechanical drawings and are not addressed in the mechanical specifications.

On _____-, ABC submitted a subcontract change order request for furnishing and installing these eye wash sinks. We have now received a letter from you, dated January 2, 2005, informing us that our change order request has been denied. You also have instructed us to complete this disputed work pursuant to Section 19.3 of our subcontract agreement.

Please be advised that, in accordance with your instructions, we are completing this work, but the work is being performed under protest and with full reservation of our right to seek reasonable compensation for this work. By separate letter, we hereby are requesting arbitration of this dispute in accordance with the provisions of our subcontract.

Sincerely,

Project Manager
ABC Subcontractor

CLAIM NOTIFICATION LETTER

ABC SUBCONTRACTOR
XYZ Street
Anywhere, USA

January 25, 2013

Reasonable General Contractor
123 Steel Lane
Somewhere, USA

RE: Mega Project Phase I
Site Grading at West End of Building

Dear General Contactor:

At the _____ jobsite meeting, our jobsite superintendent informed Reasonable of the need to complete site grading at the west end of the building. This completion is necessary in order to allow ABC to install site utilities in this area, and we confirmed this situation in a letter to you dated _____.

I noted yesterday that the site grading at the west end of the building had not been completed as required in the latest edition of the project CPM. In fact, substantial work remains to be done in this area before ABC can begin installation of site utilities.

As you know, the installation of site utilities is on the critical path of the Project Schedule. Consequently, the overall project will likely be delayed as a result of ABC's inability to complete its work in this area. In addition, ABC has moved additional equipment, including two backhoes, a truck, and a track drill and compressor, onto the jobsite in anticipation of performing this work. ABC also has assigned a seven-person site utilities crew to the Mega Project to work in this area. Because of the delays in receiving access to this work, ABC's equipment and labor are idle and ABC is suffering delay damages. While the exact magnitude of these damages cannot be calculated until the delayed work is completed, the damages are substantial.

Please instruct ABC, immediately, as to when ABC will be able to perform this work.

Sincerely,

Project Manager
ABC Subcontractor

CONTINUING CLAIM NOTIFICATION LETTER

ABC SUBCONTRACTOR
XYZ Street
Anywhere, USA

January 25, 2013

Reasonable General Contractor
123 Steel Lane
Somewhere, USA

RE: Mega Project Phase I
Site Grading at West End of Building

Dear General Contractor:

On _____, we informed you by letter of the delays to ABC's work, occurring at the west end of the building. I later received a call from your Project Manager, and he informed me that ABC would receive access to this area by _____. Consequently, ABC kept the equipment and labor necessary to accomplish its work in this area on the jobsite.

Please be advised that Reasonable's work was not completed by _____, and ABC continues to be unable to install site utilities at the west end of the building. Overall project completion will be delayed and ABC continues to accrue substantial delay damages on a daily basis.

We now have been informed that Reasonable's work will be completed by _____. Since ABC's work is on the critical path of the Project Schedule, we believe the prudent approach is to keep our equipment and workers on the jobsite until Reasonable completes its work. ABC could transfer its equipment and workers to a project in New Orleans, Louisiana. However, the cost of the transfer to a project 1,000 miles away, plus the lost time incurred during the transfer of the equipment and staff back to this job when it is finally ready for our crew to begin work, would likely make the transfer counter-productive. Since ABC expects Reasonable to compensate ABC for the costs of this delay, including lost time for the equipment and crew, we welcome your comments regarding our proposed course of action.

Sincerely,

Project Manager
ABC Subcontractor