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ATTORNEYS

# **MAINTAINING, PRESERVING AND DEFENDING CONSTRUCTION CLAIMS**

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## IMPORTANT CONSIDERATIONS FOR CONTRACT CLAIMS

### I. SCOPE OF WORK

The scope of the contract outlines the general obligations of each party. The scope of the contract generally defines terms so that each party knows the other party's obligations and what causes one's own performance to become due. Determining and defining the scope of the work is significant as the scope relates to the rest of the provisions in the contract. For example, a contractor is generally not entitled to extra compensation for performing the work, and may not refuse to accept, change orders issued within the "scope" of the project.

The issue of whether something falls within the "scope" may have significant ramifications with respect to the liability of particular party or whether there is insurance coverage for a particular defect. Likewise, almost all other provisions are construed in relation to the "scope" of the work to be performed. For the foregoing reasons, the scope provision usually provides a definition of the term "Work" so that parties are better able to determine what is, and perhaps more importantly, what is not, the responsibility of the Contractor.

#### **Sample: AIA A201 Section 1.1.3**

<p>The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.</p>
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Within the definition of "Work" is a cross-reference to "Contract Documents". The "contract documents" generically refer to the other provisions which outline the scope of the work. The contract documents outline such things as a construction schedule (contract time, changes and when payment is due), warranties of work, construction supervision and administration procedures and what events are necessary for the contract to be considered completed.

There is not one "sample" scope section that will cover all situations, but close attention should be paid to the drafting and negotiation of the "scope of work" provision in the contract because it is that provision that will govern the parties' intent, and Wisconsin courts, when interpreting contracts, seek to effectuate the parties' intent. Eden Stone Co. v. Oakfiled Stone Co., 166 Wis. 2d 105, 116, 479 N.W.2d 557 (Ct. App. 1991). See also Stevens Constr. Corp. v. Carolina Corp., 63 Wis. 2d 342, 355, 217 N.W.2d 291 (1974).

### II. CONTRACT PRICE

Refer to **Section V.** below.

### **III. CONTRACT TIME**

#### **A. Generally**

The contract contemplates a period of time that defines the commencement date as well as the anticipated date of completion. Those dates are either determined based on a “calendar day” or “working day” system. The word “completion” has a customary meaning of “substantial completion” which has been construed to mean when “performance meets the essential purpose of the contract.” Metz v. Prism Corp. Southwest, 203 Wis. 2d 270, 551 N.W.2d 870 (1996).

#### **B. Commencement Date**

The commencement date in most cases is wither the date of the contract, an alternative fixed date, the date of approval of the appropriate party, or the date upon which the “notice to proceed” is issued. There are several significant implications of the commencement date. For example, establishing a definite starting date allows the parties to determine, among other things, the following: (1) whether a delay has occurred, and when to start counting if a delay has occurred; (2) whether an extension should be permitted if the delay in commencement was due to an Owner’s delaying execution of the contract; (3) whether any remedies are available to either party as a result of the construction schedule deviating from the commencement date. Also, under Wis. Stat. 799.01 (4), a mechanic’s lien is given priority according to the “commencement” date, although the method for determining the commencement date is provided within the statute itself. (Mechanic’s liens will be discussed later).

#### **C. Completion Date**

There are different approaches parties can take to determining when completion is determined to have occurred. Contracts will either specify a completion date or provide that performance is due “within a reasonable time.” Hunzinger Const. Co. v. Granite Resources Corp., 196 Wis.2d 327, 338, 538 N.W.2d 804 (1995). If the parties determine that completion is due on a specific date, the parties need to determine whether completion is substantial or final as those words have different meanings.

#### **D. Delays and extensions**

Parties will want to negotiate circumstances under which the Contractor is liable for the delay and conversely, circumstances under which the Contractor is not liable.

##### **1. Force Majeure:**

A Contractor is not going to want to be held liable for things beyond his or her control. Provisions which list the circumstances under which a Contractor is not liable have become generically known as “Force Majeure” provisions because they are generally contained within the boilerplate provisions of contracts. Courts

have become increasingly more skeptical about these provisions that list broad “Act of God” situations where performance is impossible or impractical. The courts usually examine these situations under the contract defenses of impossibility and frustration of purpose. See 2 Bruner & O’Connor Construction Law § 7:230.55. That said, courts will look to specifically negotiated provisions that list the situations under which performance is not required. See e.g. Goldstein v. Lindner, 2002 WI App 122, 254 Wis. 2d 673, 648 N.W.2d 892 (holding that a force majeure clause in a mineral lease had not been triggered).

**Sample: AIA A201 Section 8.3.1**

If the Contractor is delayed at any time in the commencement or progress of an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor’s control; or by delay authorized by the Owner pending mediation and arbitration; or by other causes that the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

**Sample: AIA A201 Section 8.3.3**

This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

**E. Time as a “Material” Element**

Untimely performance results in substantial liability, only if time of performance is a material issue. Courts have typically taken two different approaches to time as a material issue. Some courts have held that time is material to a construction contract even if the parties have not specifically provided that time is a material issue. Other courts have held that time is not a material issue, unless the parties specifically provide a provision to the contrary in the contract. Wisconsin takes the approach that determining whether “time is of the essence” in a contract is one in which the court will look at the circumstances of each case. Employers Ins. of Wausau v. Jackson, 190 Wis.2d 597, 617, 527 N.W.2d 681 (1995). The court did note that if there is express language in the contract that “time is of the essence” then that will be dispositive, although it is possible for the party to waive such a provision. See id. The question about whether “time is of the essence” is a question of fact for the jury. Id. at 616.

## IV. CHANGES

### A. Generally

Changes in the work may be necessary to carry out the rest of the contract and a provision within the contract should be included to allow for the changes in work to be done without invalidating the rest of the contract.

### B. Change Orders

A Change Order provision may be inserted into the contract to indicate how changes in the work may be determined, the process by which a Change Order may be made and whose consent is all needed for a Change Order to be effective.

#### **Sample: AIA A201 Section 7.2.1**

A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect stating their agreement upon all of the following:

1. The change in the work
2. The amount of the adjustment, if any, in the Construct Sum; and
3. The extent of the adjustment, if any, in the Contract Time.

Parties may also want to provide a method for resolving disputes between the parties so that construction can avoid being interrupted.

### C. Enforcement of Rights Pursuant to a Change Order

If the parties include a provision in the contract requiring a Change Order, the party who benefits from the Change Order, usually the Owner, should ensure that it enforces its right to a Change Order. Wisconsin courts have denied a plaintiff's refusal to pay for extra work done by a defendant, a contractor, when the defendant did not submit a written order to the chief engineer. McGrath Constr. Co. v. Waupacagreen Bay R.R. Co., 148 Wis. 372, 378, 134 N.W. 824 (1912). See also S & M Rotogravure Service, Inc. v. Baer, 77 Wis. 2d 454, 469, 252 N.W.2d 913 (1977).

In McGrath, the contract specifically provided, "No claim for extra work shall be allowed unless such work shall have been done pursuant to a written order from the engineer in charge." The plaintiff alleged that the plaintiff should not be responsible to pay the defendant's claim for extra work because the defendant did the work without a written order by the chief engineer. The court held that because the plaintiff had previously paid claims for extra work without a written order, the defendant was permitted to rely on this custom between the parties in performing extra work without needing to obtain a written order from the chief engineer.

In Baer, the court simply noted that a number of courts have recognized that a provision in a construction contract requiring written change orders may be avoided where the parties evidence by their words or their conduct an intent to waive or modify such a provision. 77 Wis. 2d at 469 (citing McGrath, 148 Wis. at 378. The Wisconsin Supreme Court reaffirmed this general rule in Royster-Clark, Inc. v. Olsen's Mill, Inc., 2006 WI 46, ¶ 21, 290 Wis.2d 264, 714 N.W.2d 530.

#### **D. Minor Changes**

If the parties do have a Change Order provision within the contract requiring the Owner's consent before a change in work is permitted, the parties may also want to include a provision which gives the Architect or Contractor the authority to order minor changes in the work so that any minor changes do not halt construction for only minor changes.

##### **Sample: AIA A201 Section 7.4**

The Architect has authority to order minor changes in the Work not involving adjustments in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes will be effected by written order signed by the Architect and shall be binding on the Owner and the Contractor.

### **V. PAYMENTS**

#### **A. Contract Sum**

The total contract price, or the amount that is being exchanged between the parties.

##### **Sample: AIA A201 Section 9.1**

The Contract Sum is stated in the Agreement and, including authorized adjustments is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

#### **B. Schedule of Values**

A schedule of values is method of dividing the contract price owed for the entire contract, the Contract Sum, over the component parts of the contract. Because a schedule of values requires divvying up the total contract price over the contract's component parts, a schedule of values is only used when the contract has a Contract Sum, like in the cases of a negotiated fixed sum or a guaranteed maximum price.

**Sample: AIA A201 Section 9.2**

Where the Contract is based on a stipulated sum or Guaranteed Maximum Price, the Contractor shall submit to the Architect, before the first Application for Payment, a schedule of value allocating the entire Contract Sum to the various portions of the Work and prepared in such a form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment

**C. Applications for Payment**

This is the process by which the Contractor seeks reimbursement of costs and payments of fees. This process helps the Architect determine whether the work is in compliance with the plans and specifications as well as ensure that the price for the particular portion of the work is consistent with the schedule of values, if one exists.

**Sample: See AIA 2007 Form A201 Section 9.3**

**Also see: AIA A201 Section 9.4.2 - Certificates for Payment**

The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data comprising the Application for Payment, that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents....

However, the issuance of a Certificate for Payment will not be a representation that the architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences, or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

**D. Progress Payments**

The progress payment portion of construction contracts provide the method of paying the Contractor as well as the Subcontractors as the work is satisfactorily performed. The purpose of these provisions is to avoid having the Contractor finance the construction for the Owner and the progress payment system allows the Contractor to embark on multiple projects at one time without the fear of having to front the entire cost of the construction.

Provisions within the progress payment section may provide the process by which the Contractor provides notice to the Owner within a time frame set by the parties for the

Contractor to demonstrate that the Contractor has paid the appropriate Subcontractors and that the Contractor has paid the necessary expenses for machinery, equipment or the like.

**Sample: AIA A201 Section 9.6**  
(Refer to 2007 A201 Deskbook)

#### **E. Failure of Payment**

Receipt of payment is the main objective in every construction contract. If, however, payment is not made by the party responsible for payment when payment is due because of the satisfaction of the provisions in the contract which call for payment to become due, the issue then focuses on the available remedies of the Contractor when payment is not promptly received. The Contractor can negotiate certain remedies available to him or her in the event of a failure to pay by the Owner.

**Sample: AIA A201 Section 9.7**

If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect or awarded by binding dispute resolution, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

### **VI. WARRANTIES**

#### **A. Generally**

A warranty is a promise that incorporates the contractor's commitment to the quality of his or her work.

**Sample AIA A201 Section 3.5**

The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damages or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance,

improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

## **B. Remedies**

A breach of a warranty – if the work or materials or equipment prove to be defective as outlined in the “Warranty” provision in the contract – will typically require the contractor to repair the work with a certain period of time, usually one year. See AIA 2007 Form A201 Section 12.2.2.1 (providing that if the Work is found to be not in accordance with a warranty, the Contractor shall promptly correct the problem).

## **C. Notice**

Typically, a Contractor will want to negotiate a “Notice” requirement within the provision that discusses the Contractor’s responsibilities for a breach of warranty.

For example, AIA A201 Section 12.2.2.1 further provides that:

The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty.

The fact that the parties negotiate a warranty provision and parallel provisions which outline the process for correcting Work that breaches a warranty, does not mean that the Owner’s exclusive remedy is a breach of warranty action against the Contractor.

## **VII. CONSTRUCTION SUPERVISION**

### **A. Generally**

Construction supervision is an important role in construction contracting. The party responsible for this role needs to ensure that the project is being carried out according to the plans and specifications and that any necessary Change Orders are completed in consistent with the written Change Orders.

### **B. Design Professionals in Wisconsin**

#### **1. Engineers**

In Wisconsin, under Chapter 443: Examining Board of Architects, Landscape Architects, Professional Engineers, Designers and Land Surveyors, the Wisconsin legislature has included within its definition of the “Practice of professional engineering” any “professional services requiring the application of engineering

principles and data... such as consultation, investigation, evaluation, planning, design, or *responsible supervision of construction*, alteration, or operation in connection with any public or private utilities, structures, projects, bridges, plants and buildings...” Wis. Stat. § 443.01. This statute arguably imposes a burden on every engineer involved in the construction of a building to exercise “responsible supervision of construction” in order to fulfill its duties.

## 2. Architects

An architect did not breach his duty to supervise construction site by not providing construction workers with instructions or supervision regarding the installation of trusses, where Wisconsin Administrative Code only required architect to inspect the final bracing and connections of the wood trusses once the building was completed. *Baumeister v. Automated Prods., Inc.*, 2004 WI 148, 277 Wis. 2d 21, 690 N.W.2d 1 (applying Wis. Admin. Code ILHR § 50.10, relevant section now Wis. Admin. Code A-E § 8); see also Wis. Stat. § 443

Supervising architect at construction site was not liable to workman injured in excavation collapse where owner-contractor agreement merely required architect to periodically visit the site and where architect did not owe worker a duty either as an “owner” under safe place statute or under common law. *Luterbach v. Mochon, Schutte, Hackworthy, Juerlsson, Inc.*, 84 Wis. 2d 1, 267 N.W.2d 13 (1978).

## VIII. CONTRACT ADMINISTRATION

### A. Generally

Contract administration is the phraseology assigned to the responsibility for ensuring the parties have abided by the terms of the contract.

Some commentators have argued contract administration is an onerous burden placed on the parties that requires additional, unnecessary costs, especially in small projects. The criticisms are aimed at the A201 provisions, with critics saying the provisions are too complicated and require too much contract administration. As a result, there is a construction industry rule of thumb that a project needs to be in the \$2 to \$3 million dollar range before parties should consider adopting the provisions below. The parties should consider the level of administration necessary and the increased costs and burdens such expansive provisions place on itself and other parties to the contract. See 2 Bruner & O’Connor Construction Law § 5.8: Construction Contract standard forms: An evolutionary process.

**Sample: AIA A201 Section 4.2: Administration of the Contract**

§ 4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents and will be an Owner's representative during construction until the date the Architect issues the final Certificate For Payment. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.

§ 4.2.2 The Architect will visit the site at intervals appropriate to the stage of construction, or as otherwise agreed with the Owner, to become generally familiar with the progress and quality of the portion of the Work completed and to determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not have control over, charge of, or responsibility for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Section 3.3.1.

§ 4.2.3 On the basis of the site visits, the Architect will keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies observed in the Work. The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractor, or their agents or employees, or any other persons or entities performing portions of the Work.

**IX. PROJECT CLOSEOUT**

The contractor begins project closeout by commencing the punch list process. A contract can spell out the responsibilities of the contractor to do punch list work before final payment is made.

**Sample: AIA A201 Sections 9.8.2**

When the Contractor considers that the Work, or a portion thereof which the owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

The following clauses also deal with closing out a project:

**Sample: AIA A201 Sections 9.10.1**

Upon receipt of the Contractor's written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Section 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

**Sample: AIA A201 Sections 9.10.2**

Neither final payment nor retained percentage shall become due until the Contractor submits to the architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

One problem that may develop during project closeout, depending on the terms of the contract, is when final payment, including retainage, will be paid. If not specifically spelled out, the owner will argue payment should be made upon final completion, while the contractor may argue payment is due upon "substantial completion". Substantial completion is a legal term of art that means one has taken occupancy of the building for its intended purpose. Holy Family Catholic Congregation v. Stubenrauch Associates,

Inc., 136 Wis. 2d 515, 402 N.W.2d 382 (Ct. App. 1987). Most contracts will spell out that final payment is due after the work has been inspected and the punch list work has been completed, which is similar to the AIA A201 General Conditions.

The contract could also indicate that an Owner will only have to make final payment after punch list work has been completed and inspected and maintenance and operations manuals have been provided to the owner. This could especially be true in the context of home construction.

## X. DIFFERING SITE CONDITIONS

### A. Background/Purpose

Differing site conditions, “changed conditions”, or “concealed conditions” clauses are used to allocate the risk of unknown subsurface or concealed physical conditions are discovered during construction. For a contractor, this is a way to get compensated for encountering these unknown conditions that increase cost or overhead. For owners, it is actually a way to keep the bids down. A contractor could be entitled to compensation for site conditions that were not reasonably foreseen, so it will not include large contingencies in its bid. A differing site condition clause such as the one below provides for an adjustment of time and/or compensation in the event site conditions that differ materially from those indicated in the contract. In return for the promise of extra compensation in the event of adverse conditions, it is hoped that the inclusion of such a clause will prompt lower bids.

#### **Sample: DBIA 535, Standard Form of General Conditions of Contract Between Owner and Design-Builder.**

Concealed or latent physical conditions or subsurface conditions at the Site that (i) materially differ from the conditions indicated in the Contract Documents or (ii) are of an unusual nature, differing materially from the conditions ordinarily encountered and generally recognized as inherent in the Work are collectively referred to herein as Differing Site Conditions. If Design-Builder encounters a Differing Site Condition, Design-Builder will be entitled to an adjustment in the Contract Price and/or Contract Time(s) to the extent Design-Builder’s cost and/or time of performance are adversely impacted by the Differing Site Condition.

Upon encountering a Differing Site Condition, Design-Builder shall provide prompt written notice to Owner of such condition, which notice shall not be later than fourteen (14) days after such condition has been encountered. Design-Builder shall, to the extent reasonably possible, provide such notice before the Differing Site Condition has been substantially disturbed or altered.

In Metropolitan Sewerage Commission v. R.W. Construction, Inc., 72 Wis.2d 365, 241 N.W.2d 371 (1976), the Wisconsin Supreme Court favored using a differing site conditions clause for the following reasons:

The changed conditions clause is a contractual innovation designed for the mutual benefit of both the government and the contractor. The government benefits by the use of such a clause because the contractor no longer needs to add large contingency sums to his bid in order to cover the risk of encountering adverse subsurface conditions. The contractor benefits because he is awarded extra compensation if adverse subsurface conditions are encountered which materially differ from those indicated in the contract. Thus, much of the gamble is taken out of underground construction. The government does not have to pay the contractor a windfall price when only normal conditions are encountered, and the contractor suffers no disaster when unanticipated conditions arise. Furthermore, both parties benefit by the existence of an informal machinery for resolving problems through negotiation rather than litigation.

## **B. Different Types of Differing Site Conditions**

The U.S. government uses a standard differing site conditions clause that has been in existence for many years and has been the subject of a number of contractor claims for federal work. It states:

### **1. Type 1**

The first type is “subsurface or latent physical conditions at the site which differ materially from those indicated in this contract. This means there must be a comparison of the conditions encountered with conditions listed in the contract documents.

The key question is whether the conditions encountered “differ materially” from the contract documents. Examples include discovering rock where none was indicated in soil borings, discovering asbestos during the demolition that was not identified in the demolition plan, or discovery of soil with different properties requiring blasting, fill, or other geotechnical engineering.

However, a contractor is held to a standard of what a reasonable contractor should have anticipated on the project. Metropolitan Sewerage Commission v. R.W. Construction, Inc., 72 Wis.2d 365, 241 N.W.2d 371 (1976) For example, it could be that the contractor encountering asbestos during demolition should have reasonably known asbestos would be present given factors such as the age of the building and common past building practices.

Generally, weather is an act of God and not a differing site condition. Turnkey Enterprises, Inc. v. U.S., 597 F.2d 750 (Ct. Cl. 1979). However, adverse weather may combine with a pre-existing differing site condition and if the pre-existing differing site condition is compensable, the adverse weather condition is as well. In Wisconsin, a weather-related incident may be viewed as a differing site condition. Watler D. Giertsen Co. v. State, 34 Wis.2d 114, 148 N.W.2d 741 (1967).

## 2. Type 2

A Type 2 site condition is an unknown physical condition at the site, of an unusual nature, which differs from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

A Type 2 condition is harder to prove because there is no comparison between conditions encountered and those identified in the contract documents. It is an evaluation on a case by case basis, but it must be unknown, unusual, or abnormal conditions. (For example, encountering pollutants or rare wildlife.)

### C. Bidding and Notice

Some differing site conditions clauses limit the contractor's ability to recover for conditions that would have been observed with a reasonable site inspection. For example:

In Thomsen-Abbott Construction Co. v. City of Wausau, 9 Wis.2d 225, 100 N.W.2d 921 (1960), the court took the position that a reasonable site investigation is adequate. The court recognized that bidding time constraints and the expense of having a number of contractors conduct their own investigation and testing is ultimately more costly to the owner.

Also, a number of differing site conditions clauses require the contractor to give written notice to the owner before continuing the work or at least, before receiving compensation. This protects the contractor because the owner is unable to say it was unaware of the conditions encountered. It also protects the owner because it allows it the opportunity to investigate the differing conditions and contractors' claims. With any notice provision, a contractor can still prevail if it can show actual or constructive notice.

## XI. CONSEQUENTIAL DAMAGES

The parties to a construction contract can also limit or eliminate liability for consequential or incidental damages.

### **Sample: AIA A201 Sections 15.1.6**

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. The mutual waiver includes:

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

.2 damages incurred by the Contractor for principal office expenses, including the compensation of personnel stationed there, for losses of financing business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

**Sample: DBIA 535, Standard Form of General Conditions of Contract Between Owner and Design-Builder.**

Notwithstanding anything herein to the contrary (Except as set forth in Section 10.5.2 below), neither Design-Builder nor Owner shall be liable to the other for any consequential losses or damages, whether arising in contract, warranty, tort (including negligence), strict liability or otherwise, including but not limited to losses of use, profits, business, reputation or financing.

Consequential damage clauses or other clauses limiting damages have been allowed in Wisconsin. Turk v. H.C. Prange Co., 18 Wis.2d 547, 119 N.W.2d 365 (1963). Please note that this is not deemed an exculpatory clause that is prohibited by Wis. Stats. § 895.49, as discussed above because one can still be liable for direct damages instead of consequential damages, so there is not a complete elimination of liability.

In Wausau Paper Mills v. Chas. T. Main. Inc., 789 F. Supp. 968 (W.D. Wis. 1992) a contract limited an engineer's liability to the amount of its insurance coverage and excluded consequential damages. The owner of the pulp mill that sued the engineer in contract and negligence was not allowed to continue the case beyond the available insurance coverage.

## **XII. INSURANCE AND BONDS**

### **A. Common Types of Insurance for Construction Work**

There are a number of types of insurance coverages that insure different risks on a construction project to protect people of property. The two main types of insurance coverage for construction work are liability insurance and property insurance, which includes builder's risk coverage.

## 1. Liability Insurance

Liability insurance protects the insured against damages it causes other persons due to its own negligence is often required by contract.

### **Sample: AIA A201 Sections 11.1.1**

The contractor shall purchase from and maintain in a company or companies lawfully authorized to business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations and completed operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

- .1 Claims under worker's compensation, disability benefit and other similar employee benefit acts that are applicable to the Work to be performed;
- .2 Claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
- .3 Claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
- .4 Claims for damages insured by usual personal injury liability coverage;
- .5 Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- .6 Claims for damages because of bodily injury, death or a person or property damage arising out of ownership, maintenance or use of a motor vehicle;
- .7 Claims for bodily injury or property damage arising out of completed operations; and
- .8 Claims involving contractual liability insurance applicable to the Contractor's obligations under Section 3.18

The AIA A201 emphasizes the need for "completed operations". This reflects the demand of Owners and lenders, and corresponds generally to the liability coverages that are currently available to most contractors. Completed operations coverage is liability coverage for injuries to persons or damage to property occurring after an operation is completed, but attributed to that operation. Under most CGL policies, an operation is completed when (1) all operations under the

contract have been completed or abandoned; or (2) when all operations at one job site are completed; or (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by the person for whom that portion of the work was done. However, this insurance does not apply to the completed work itself.

There should be no problems for most contractors in obtaining coverage for the risks identified in the AIA A201, as most are typically provided in worker's compensation, liability, or auto policies. There may be a question regarding the last type of risk, which involves obligations under 3.18. This is the indemnification clause and most CGL policies exclude coverage for loss arising out of a breach of contract. However, most CGL policies also provide an exception to that exclusion for indemnity agreements that restores coverage.

Under the AIA B-141 contract for design professionals, the design professional is not required to obtain errors and omissions liability insurance. This is a frequently negotiated change to the contract as owners will insist upon that.

## 2. **Builder's Risk Insurance**

Generally, this is a policy of insurance that covers loss regardless of fault. It is primarily to protect owners and the materials and equipment used on a project. Fault is still a consideration, however, because there are subrogation clauses in most policies, which allow the insurer to recover from the party who caused the loss.

### **Sample: AIA A201 Sections 11.3.1**

Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract Modifications and costs of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed to in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Section 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 11.3 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

When a homeowner is acting as their own general contractor, they can usually obtain a homeowner's policy with a builder's risk endorsement, but it may not be as inclusive as the "all-risk" policy specified in the AIA contracts. "All-risk" means all risks are covered except those that are excluded.

The burden is usually on the owner to procure builder's risk coverage, but there are occasions when an owner will ask the contractor to do so because the Contractor is more familiar with the construction business and associated risks. However, the cost of the contractor procuring such coverage will be passed on the owner.

### **3. Additional Insured Issues**

A construction contract will often contain a requirement that a contractor name the owner, architect, or other contractors or subcontractors as an additional insured under an applicable insurance policy.

#### **Sample: AIA A201 Sections 11.1.4**

The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Architect and the Architect's Consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's completed operations.

This is a controversial topic because owners insist upon it and then general contractors force it on subcontractors. Subcontractors obtain it with increased premiums and pass the costs on to the general contractor, which then flows up to the owner. It also creates an adverse work environment because general contractors and subcontractors feel they should not be held responsible for others over whom they have no legal or practical control. This particular provision is troubling because the contractor is supposed to provide insurance for the architect, but the contractor's own policy excludes coverage for professional liability exposure.

Whether the additional insured provision actually results in coverage depends on the language in the applicable insurance policy. The policy will usually contain an endorsement regarding entities that are required to be named as additional insured based on the terms of a contract. Some endorsements will specifically identify the entity to be named as an additional insured while others will only say the endorsement covers any entity that is required to be named as additional insured based on the terms of a contract. The language in the endorsement will

usually only provide coverage to an additional insured based on the negligence of the named insured.

In Mikula v. Miller Brewing Co., 2005 WI App 92, 281 Wis. 2d 712, 701 N.W.2d 618, the subcontractor's employee was injured and sued the owner and general contractor's liability carrier. Owner filed third-party claims against subcontractor claiming it was an additional insured. The Owner was named as an additional insured in both the general contractor and subcontractor's policies and certificates of insurance. The policy language ("Such person or organization is an additional insured only with respect to liability **arising out of** your ongoing operations performed for that insured") was broad enough to only require that there be some causal relationship between the injury and risk for which coverage is provided. The plaintiff only alleged negligence against the owner, Miller Brewing Company and not against the general or subcontractor. The court said it did not matter if the contractors were even alleged to have been negligent by the plaintiff and still found the owner to be an additional insured.

## **B. Performance Bonds**

A bond is not insurance. A general contractor is often required to obtain a bond from a surety to protect the owner from a default in performance by the general contractor. In bond terms, the general contractor is usually the "obligor" that provides the bond, the owner, is usually, the "obligee" who is protected by the bond, and the surety is the company that provides the bond and pays in the event the obligor defaults.

### **1. How is a performance bond triggered?**

A performance bond is triggered by (1) a material default by the contractor in performing its contractual obligations and (2) a formal declaration of default by the owner and resulting tender of the job to the surety.

Also, under AIA A-312 a provision is made for a pre-default conference between the owner, contractor, and surety, which must occur before a formal declaration of default can occur. If the conference is unsuccessful in resolving the outstanding issues, the owner may then proceed with a formal declaration of default.

### **2. Surety's obligations**

A surety is likely to have an indemnification agreement in the bond, which allows it the opportunity to recover monies it pays from the obligor (contractor). The surety will also usually have personal guarantees from the obligor's principals. If it wishes to enforce those provisions, it must act in good faith to minimize its liabilities. If it pays under the opposition of the general contractor, it is likely to jeopardize its ability to indemnification or enforcement of the guarantees.

Therefore, the surety may completely deny liability and there will be a lawsuit instead of a completed building.

The surety may take over the project and still have a number of options, which may include the following:

- a. Completion by the principal, but funded by the surety (this is usually not a good idea since the contractor just defaulted);
- b. Completion by the surety;
- c. Completion by an independent contractor hired by competitive bids or by the surety; or
- d. Negotiation with owner to buy out the bond or liquidate the damages (may just pay the owner the amount of the bond).

### **XIII. INDEMNIFICATION**

In Wisconsin, indemnity clauses that attempt to indemnify a wholly negligent party, even where the indemnitor is totally free of negligence are not necessarily contrary to public policy. Dykstra v. Arthur G. McKee & Co., 100 Wis.2d 120, 301 N.W.2d 201 (1981). Contractual language indemnifying an indemnitee for liability occasioned by its own negligence must be specific. Webster v. Klug & Smith, 81 Wis.2d 334, 260 N.W.2d 686 (1978). Indemnification is presumed not to extend to the consequences of activity that is in the control of the party seeking indemnification. HK Systems, Inc. v. Eaton Corp., 553 F.3d 1086 (7th Cir. 2009).

An attempt to include a limitation of liability clause in a construction contract, other than in an indemnification context, may fail under Wis. Stats. § 895.49, which states in part:

“Any provision to limit or eliminate tort liability as a part of or in connection with any contract, covenant, or agreement relating to the construction, alteration, repair or maintenance of a building, structure, or other work related to construction, including any moving, demolition or excavation, is against public policy and void.”

In Gerdman v. U.S. Fire Ins. Co., 119 Wis.2d 367, 350 N.W.2d 730 (Ct. App. 1984), the court held that Wis. Stats. § 895.49 did not void an indemnity clause in a construction contract because indemnification clauses shift liability, not limit or eliminate tort liability.

#### **Sample: AIA A201 Section 3.18**

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expenses is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible

property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

#### **XIV. SUBCONTRACTORS**

##### **A. “Flow Down” Clause**

This is a clause that binds the subcontractors to all the same terms and conditions to which the general contractor is bound to the owner. The subcontractor has the same rights and duties with the general contractor as the general contractor has with the owner.

This clause may work for most items in the in the contract documents like plans and specifications, but it may not apply to things like indemnification, arbitration, and insurance issues. For example, it will be hard to bind a subcontractor to arbitration or to indemnification of the owner without including it as a specific separate clause in the subcontract.

##### **B. Pay When Paid Versus Pay If Paid**

A “pay when paid” clause is common in a subcontract and it allows a general contractor to wait to pay the subcontractor until it receives payment from the owner. These are enforceable in Wisconsin. However, Wis. Stats. § 779.135 requires a contractor pay a subcontractor within a reasonable period of time even if the contractor is never paid by the owner, or the owner unreasonably delays making payment to the contractor.

A “pay if paid” clause is unenforceable in Wisconsin. A contractor is not allowed to include a provision that it will pay the subcontractor “if” it is paid by the owner. A subcontractor cannot be the ultimate bearer of risk when an owner is not making payment to the contractor.

#### **XV. SUSPENSION AND TERMINATION**

##### **A. Right to Suspend Work**

###### **Sample: AIA A201 Sections 14.3 – 14.4**

###### **Suspension By the Owner for Convenience – Section 14.3**

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such a period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Contract.

## **B. Right to Terminate Work**

Construction contracts often include provisions allowing a party to terminate work under certain circumstances call for it. These clauses help alleviate the risk that exists when one party to the contract must determine whether there are sufficient grounds to terminate another.

Generally, contract law holds that one cannot terminate another without a material breach by the other party. A material breach is generally defined as defeating the central purpose of the contract.

### **Sample: AIA A201 Sections 14.1 and 14.2**

#### **Termination by the Contractor – Section 14.1**

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor, or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:

- .1 Issuance of an order a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2 An act of government, such as a declaration of national emergency that requires all Work to be stopped;
- .3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has no made payment on a Certificate for Payment within the time stated in the Contract Documents; or
- .4 The Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Section 2.2.1.

§ 14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor, or their agents or employees or any other persons or entities performing portions of the Work under

direct or indirect contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner described in Section 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed including reasonable overhead and profit, costs incurred by reason of such termination, and damages.

§ 14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor, or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor because the Owner has repeatedly failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Section 14.1.3.

#### **Termination by the Owner for Cause – Section 14.2**

- § 14.2.1 The Owner may terminate the Contract if the Contractor
- .1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
  - .2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and Subcontractors;
  - .3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of a public authority; or
  - .4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

§ 14.2.2 When any of the above reasons exist, the Owner, upon certification by the Initial Decision Maker that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- .1 Exclude the Contractor from the site and take possession of all materials, equipment, tools and construction equipment and machinery thereon owned by the Contractor;
- .2 Accept assignment of subcontractors pursuant to Section 5.4; and

.3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 14.2.3 When the Owner terminates the Contract for one of the reasons state in Section 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

§ 14.2.4 If the unpaid balance of the Contract Sum exceeds the cost of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Initial Decision Maker, upon application, and this obligation for payment shall survive termination of the Contract.

There can also be a termination for convenience. This allows an owner to terminate the contractor without a default. These types of clauses are enforceable and can typically seen on jobs where a design is vague or certain aspects of a design become unfeasible. The biggest question is usually how much does the contractor who gets terminated get paid. Does the contractor get paid its costs to date? Does it get costs plus profit on those costs? Does it get anticipated profit from the whole job? Does it get liquidated damages? This can all be spelled out in the contract.

#### **Sample: AIA A201 Sections 14.4**

##### **Termination by the Owner for Convenience – Section 14.4**

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by

reason of such termination, along with reasonable overhead and profit on the Work not executed.

## XVIII. LIQUIDATED DAMAGES CLAUSES

### **Sample: Design Build Institute of America (DBIA) 525, Standard Form of Agreement Between Owner and Design-Builder – Lump Sum.**

Design-Builder understands that if Substantial Completion is not attained by the Scheduled Substantial Completion Date, Owner will suffer damages which are difficult to determine and accurately specify. Design-Builder agrees that if Substantial Completion is not attained by \_\_\_\_\_ days after the Scheduled Substantial Completion Date (the “LD Date”), Design-Builder shall pay Owner \_\_\_\_\_ Dollars (\$) as liquidated damages for each day that Substantial Completion extends beyond the LD Date. The liquidated damages provided herein shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages, whether special or consequential, and of whatsoever nature incurred by Owner which are occasioned by any delay in achieving Substantial Completion.

To be valid, liquidated damage clauses should contain a damage amount that is reasonable and just for the harm caused by the contemplated breach, and replace an award for compensatory damages resulting from the breach that would be difficult, if not impossible, to ascertain. Liquidated damage clauses allow the parties to predict with certainty exposure for a breach which would activate the clause. Provided that the clause is not intended as a penalty and where actual damages are uncertain but realistically in the range of the liquidated amount, the clause should be upheld. Martinson v. Brooks Equipment Leasing, 36 Wis.2d 209, 152 N.W.2d 849, reh’g denied, 36 Wis.2d 224a, 154 N.W.2d 353 (1967).

## XIX. NO DAMAGE FOR DELAY

Contracts may contain clauses precluding a contractor from making claims for delays.

### **Sample:**

Notwithstanding anything to the contrary in the Contract Documents, an extension in the Contract Times, to the extent permitted under Paragraph 12.1, shall be the sole and exclusive remedy of the Contractor for any: (1) delay in the commencement, prosecution or completion of the Work; (2) hindrance or obstruction in the performance of the Work; (3) loss of productivity; or (4) other similar claims (collectively referred to in this paragraph as Delays) whether or not such Delays are foreseeable. In no event shall the Contractor be entitled to any compensation or recovery of any damages, in connection with any Delay, including, without limitation, consequential damages, lost opportunity, costs, impact damages, or other similar remuneration. The Owner’s exercise of any of

its rights or remedies under the Contract Documents (including, without limitation, ordering changes in the Work, or directing suspension, rescheduling or correction of the Work or terminating this agreement for its convenience), regardless of the extent or frequency of the Owner's exercise of such rights or remedies, shall not be construed as active interference to the Contractor's performance of the Work. If the Contractor submits a progress report indicating, or otherwise expressing an intention to achieve, completion of the Work prior to any completion date required by the Contract Documents or expiration of the Contract Times, no liability of the Owner to the Contractor for any failure of the Contractor to so complete the Work shall be created or implied.

There are three (3) types of construction delays that occur on a project: (a) excusable; (b) non-excusable; and (c) compensable. An excusable delay is caused by factors beyond a contractor's control, but not caused by the owner's actions or inaction. Generally, a contractor can obtain time extensions due to excusable delays, but it may not be entitled to additional costs incurred by the delay. Non-excusable delays are caused by factors deemed within the contractor's control and the contractor is not entitled to a time extension or additional compensation due to the delay. Compensable delays are delays attributable to the owner which entitles the contractor to a time extension and reimbursement for increased costs associated with the delay. Some clauses may only limit monetary compensation to site overhead expenses.

Wisconsin courts have usually enforced no damage for delay clauses. Gregory & Son v. Guenther & Son, 147 Wis.2d 298, 432 N.W.2d 584 (1988); First Savings & Trust Co.v. Milwaukee County, 158 Wis.2d 202, 148 N.W.22 (1914). Relief from no damage for delay clauses is allowed only when the delay is caused by one of three circumstances: (i) fraudulent conduct of the architect/engineer; (ii) orders made in bad faith and to hamper the contractor; and (iii) orders, unnecessary in themselves and detrimental to the contractor, which were the result of inexcusable ignorance or incompetence of the engineer or architect.

## NEGLIGENCE CLAIMS

**WI JI-Civil 1022.4** provides that a building contractor has a duty to exercise ordinary care in the construction or remodeling of a building. This duty requires such contractor to perform work with the same degree of care and skill and to provide such suitable materials as are used and provided by contractors of reasonable prudence, skill, and judgment in similar construction.

To establish a claim of negligent construction, a plaintiff must prove that a defendant failed to use such care as used and provided by contractors of reasonable prudence, skill, and judgment. They also have to prove that the failure to use such care caused the damage claimed. *Stoll v. Adriansen*, 122 Wis. 2d 503, 513, 362 N.W.2d 182, 188 (1984).

“It is the duty of a person who, while delivering (installing, servicing) a machine (equipment), has observed defects in the same, to exercise ordinary care to repair such defects so as to render such machine (equipment) safe for its intended use, or give the buyer or user thereof notice of the danger involved in the use thereof.” **Wis. JI-Civil 3250** – Negligence: Duty of Seller: Installing (Servicing) Product.

### **A. Independent Contractors**

The general rule is that one who contracts with an independent contractor cannot be held liable to others for the independent contractor’s torts. *Brandenburg v. Briarwood Forestry Servs., LLC*, 2014 WI 37, ¶ 2, 354 Wis. 2d 413, 416, 847 N.W.2d 395, 397. Exceptions to the general rule include:

- a. When a general contractor owes a contractual duty of care to the homeowner;
- b. When a non-delegable duty is imposed on an owner by statute; and
- c. When the subcontracted work is inherently dangerous. *Adams v. Westmark Dev., LLC*, 2012 WI App 106, ¶ 6, 344 Wis.2d 297, 821 N.W.2d 412 (unpublished).
  1. An activity is inherently dangerous
    - a. If the activity poses a naturally expected risk of harm and
    - b. If it is possible to reduce the risk of the activity to a reasonable level by taking precautions. *Brandenburg v. Briarwood Forestry Servs., LLC*, 2014 WI 37, ¶ 2, 354 Wis. 2d 413, 416, 847 N.W.2d 395, 397.

### **B. Design Professionals**

Sample Proposed Jury Instruction:

- In providing professional design services to a client, it is a design professional’s duty to use the degree of care, skill, and judgment which reasonably prudent design professionals practicing in this state would exercise under like or similar circumstances. A failure to conform to this standard is negligence. Plaintiff has the burden to prove the design professional was negligent.
- You are to determine whether the design professional was negligent in light of the facts and circumstances of this case. A design professional is not negligent because of the results of his/her services, if his/her efforts were those reasonably prudent design professionals would have taken under the same circumstances. The standard you apply is whether the design professional was negligent at the time the service was rendered.

Cases:

- i. Church architect did not breach his duty to supervise construction site by not providing construction workers with instructions or supervision regarding the installation of trusses, where Wisconsin Administrative Code only required architect to inspect the final bracing and connections of the wood trusses once the building was completed. *Baumeister v. Automated Prods., Inc.*, 2004 WI 148, 277 Wis. 2d 21, 690 N.W.2d 1 (applying Wis. Admin. Code ILHR § 50.10, relevant section now Wis. Admin. Code A-E § 8); see also Wis. Stat. § 443.
- ii. Supervising architect at construction site was not liable to workman injured in excavation collapse where owner-contractor agreement merely required architect to periodically visit the site and where architect did not owe worker a duty either as an “owner” under safe place statute or under common law. *Luterbach v. Mochon, Schutte, Hackworthy, Juerlsson, Inc.*, 84 Wis. 2d 1, 267 N.W.2d 13 (1978).
- iii. Despite the lack of privity, the court allowed a contractor to pursue an action for the architect allegedly failing to adequately supervise the construction of the building. *A.E. Investment Corp. v. Link Builders Inc.*, 62 Wis. 2d 479, 214 N.W.2d 274 (Ct. App. 1992).
- iv. No common law duty existed that required an architect to perform subsoil test or design safety features for site’s ingress and egress routes to assure that those routes would withstand passage of construction equipment. Therefore, the architect is not liable for injury sustained when the edge of path along construction site gave way, sending worker and his truck over the side of a 40 foot drop. *Kaltenbrun v. Port Washington*, 156 Wis. 2d 634, 457 N.W.2d 527 (Ct. App. 1990).
- v. After a defendant’s assurance that a building to be purchased was structurally sound turned out to be false, the question became whether allegations against an engineer are more properly based on breach of contract or negligence. The court concluded that the claim for engineering malpractice properly sounded in tort. *Milwaukee Partners v. Collins Engineers, Inc.*, 169 Wis. 2d 355, 485 N.W.2d 274 (Ct. App. 1992).
- vi. Contract did not absolve architectural firm from its duty to exercise due care in evaluating the adequacy of a third party’s inspection report, and a renovation plan based on the report resulted in an “unsafe or defective design” of the structure. *Kerry Inc. v. Angus-Young Assocs., Inc.*, 2005 WI App 42, 280 Wis. 2d 418, 694 N.W.2d 407.
- vii. *Liability to One Injured in Course of Construction, Based Upon Architect’s Alleged Failure to Carry Out Supervisory Responsibilities*, 59 A.L.R. 3rd 869.

## DEFENSES

### STATUTE OF LIMITATIONS/REPOSE

**A. Statute of limitations - Wis. Stats. § 893.43 (Breach of Contract)**

“An action upon any contract, obligation or liability, express or implied, including an action to recover fees for professional services, except those mentioned in section 893.40 shall be commenced within six years after the cause of action accrues or be barred.”

The statute of limitations for a breach of contract claim is not subject to the discovery rule. Williams v. Kaerek Builders, Inc., 212 Wis.2d 150, 568 N.W.2d 313 (Ct. App. 1997). In other words, the claim must be brought within six years of the breach, regardless of whether the plaintiff had knowledge of the breach or could have diligently discovered the breach. 212 Wis.2d at 160.

**B. Statute of limitations - Wis. Stats. § 893.52 (Negligence)**

“An action not arising on contract, to recover damages for an injury to real or personal property shall be commenced within six years after the cause of action accrues or be barred, except in the case where a different period is expressly described.”

The “discovery rule” does apply to a negligence claim. Under this rule, the claim does not accrue and the statute of limitations does not begin to run until the plaintiff either discovers or should have discovered the nature of their injury and the probable cause of that injury. 212 Wis.2d at 157. Thus, in some cases a plaintiff’s right to sue on negligence is extended beyond six years.

**C. Statute of repose for design and construction - Wis. Stats. § 893.89**

1. A party cannot bring an action against an owner or occupier of property or person involved in the improvement to real property for any injury to property, bodily injury, or wrongful death arising out of “[a]ny deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, or the construction of, or the furnishing of materials for, the improvement of real property” more than seven (7) years after substantial completion of the improvement.
2. However, if the injury occurs during years five (5) through seven (7), the time period for bringing an action is expanded for three years after the date of injury.
3. Statute is inapplicable to:
  - a. ability to bring an action under Worker’s Compensation statute
  - b. fraud, concealment, or misrepresentation related to the deficiency or defect in the improvement;

- c. an express warranty or guarantee, for the period of such warranty or guarantee;
  - d. an owner's or occupier's negligence in maintaining, operating, or inspecting the improvement
4. An absolute cut-off exists at either seven (7) years or the number of years the statute is extended if the damages occur in years five (5) through seven (7) after "substantial completion." Substantial completion means one has taken occupancy of the building for its intended purpose. *Holy Family Catholic Congregation v. Stubenrauch Assoc., Inc.*, 136 Wis. 2d 515, 402 N.W.2d 382 (Ct. App. 1987).
5. An exception to the statute of repose limiting exposure to ten years after "the date of substantial completion" of the improvement was found in *Wosinski v. Advance Cast Stone Co.*, 377 Wis.2d 596, 901 N.W.2d 797 (Ct. App. 2017); see **Wis. Stat. § 893.89(1)**. The statute is rendered inapplicable in cases where "[a] person ... commits fraud, concealment or misrepresentation related to a deficiency or defect in the improvement to real property. **Wis. Stat. § 893.89(4)(a)**. In *Wosinski*, the court found that Advanced Cast Stone deviated from Dietz's original design, but Advanced Cast Stone concealed and misrepresented this information by showing Milwaukee County plans that did not represent the deviations.
6. Another statute of limitations question was considered in *Williams v. Kaerek Builders*, 212 Wis. 2d 150, 568 N.W.2d 313 (Ct. App. 1997). It was determined that a home buyer's suit against a builder for negligent construction of a house was not barred because the discovery rule may apply to extend the period within which suit may be brought. Here, the builder repeatedly assured the homeowners that over time their leaky basement problems would resolve, thus causing a justifiable delay in discovering the actual cause of the problem. *C.f. Banc One Building Management Corp. v. W.R. Grace Co.*, 210 Wis. 2d 62, 565 N.W.2d 154 (Ct. App. 1997) (claim accrued when the plaintiff knew or should have known that the metal was covered in asbestos).
7. In *Kalahari Development, LLC v. Iconica, Inc.*, 2012 WI App 34, 340 Wis. 2d 454, 811 N.W.2d 825 the court applied the six-year statute of limitations for claims for contract damages applied to resort owner's claims against contractor for breach of construction contract, rather than ten-year statute of repose for lawsuits relating to property improvements.

Parties to a construction contract can also agree to different statutes of limitations by contract. The 2007 AIA A201 attempts to provide “Time Limits for Claims”.

**Sample: AIA A201 Sections 13.7**

The Owner and Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all claims and causes of action not commenced in accordance with this Section 13.7.

This is an attempt to simplify things by providing a limit of ten years, unless a state provides different limits, from date of Substantial Completion. The old AIA contract distinguished between claims resulting from work before or after substantial completion or before or after a final certificate of payment was issued.

**ECONOMIC LOSS DOCTRINE**

Definition of the Economic Loss Doctrine

Economic loss is “the loss in a product’s value which occurs because the product is ‘inferior in quality and does not work for the general purposes for which it was manufactured and sold.’” *Insurance Co. of N. Am. v. Cease Electric Inc.*, 276 Wis. 2d 361, 371–72, 688 N.W.2d 462 (2004) quoting *Wausau Title, Inc. v. Cnty. Concrete Corp.*, 226 Wis. 2d 235, 246, 595 N.W.2d 445 (1999).

The Economic Loss Doctrine is a judicially created doctrine that “requires transacting parties in Wisconsin to pursue only their contractual remedies when asserting an economic loss claim, in order to preserve the distinction between contract and tort.” *Digicorp, Inc. v. Ameritech Corp.*, 262 Wis. 2d 32, 46–47, 662 N.W.2d 652; see also *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 573 N.W.2d 842 (1998).

Application of the Economic Loss Doctrine

1. When a contract covers both products and services, the economic loss doctrine bars negligence claims if the predominant purpose of the contract is to provide a product. *Kalahari Development, LLC v. Iconica, Inc.*, 2012 WI App 34, 340 Wis. 2d 454, 811 N.W.2d 825.
2. Courts use a predominant purpose test to determine whether a contract for products and services is predominately a sale of a product or predominately a contract for services and therefore, not subject to the economic loss doctrine. *Kalahari*.

The predominant purpose test is a totality of circumstances test. In *Kalahari*, the predominant purpose of the contract was for a product (water park), even though the contractor provided some architectural and engineering services (amounting to about 4% of the contract value), and thus, pursuant to the economic loss doctrine resort owner was precluded from bringing a negligence action against contractor for water damage to walls.

3. Economic Loss Doctrine does not apply to services or contracts for services. *Insurance Co. of N. Am. V. Cease Electric, Inc.*, 276 Wis. 2d 361, 688 N.W.2d 462 (2004) (holding that electrician’s contract with barn owner to install upgrade to ventilation system in chicken barn was for services, not product, and, thus, economic loss doctrine did not apply to bar negligence action by barn owner and its property insurer after system failed); *see also Linden v. Cascade Stone Co.*, 276 Wis. 2d 267, 687 N.W.2d 823 (Ct. App. 2004) (the economic loss doctrine applied to bar tort claims against the general contractor and subcontractor because the contract at issue was essentially for one product (a home). The contractor’s services were incidental to the construction of the product).
4. “The nature of the loss incurred dictates whether the buyer’s claim is to be brought in contract or tort. Thus, it is essential to be able to distinguish solely ‘economic loss’ from ‘personal injury’ and ‘other property’ damage.” Ralph C. Anzivino, THE ECONOMIC LOSS DOCTRINE: DISTINGUISHING ECONOMIC LOSS FROM NON-ECONOMIC LOSS, 91 MARQ. L. REV. 1081, 1082 (2008). The damage must be to the product itself, not “other property.”

## GOVERNMENTAL IMMUNITY

1. Parties who contract with state authorities and are directed to perform certain tasks under that contract enjoy a form of government immunity. *Estate of Lyons v. CNA Ins. Co.*, 207 Wis. 2d 446, 558 N.W.2d 658 (Ct. App. 1996) (court extends “government contractor” defense to an engineer working as an independent contract for the state Department of Transportation to help design a bridge). *See also Showers Appraisals, LLC v. Musson Bros., Inc.*, 2012 WI App 80, 343 Wis. 2d 623, 819 N.W.2d 316 *rev. granted* 345 Wis. 2d 400.

### A. Requirements for receiving immunity:

1. The governmental authority approved reasonably precise specifications;
  2. The contractor’s actions conformed to those specifications; and
  3. The contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the contractor but not to the governmental officials.
2. The question of whether an independent contractor was an agent of the property owner so that it enjoyed immunity depended upon the circumstances of control. If the owner provided reasonably precise specifications which controlled the contractor’s allegedly

injury-causing conduct, then immunity is possible. *Westmas v. Selective Ins. Co. of S.C.*, 2016 WI App 92, 372 Wis. 2d 683, 889 N.W.2d 178, *review granted*, 2017 WI 32, 374 Wis. 2d 160, 897 N.W.2d 53.

3. In *Melchert v. Pro Elec. Contractors*, 2017 WI 30, 374 Wis. 2d 439, 892 N.W.2d 710, the DOT hired a general contractor to complete a highway improvement plan. The general hired a subcontractor, which augered holes during the project work, eventually severing a sewer lateral. The subcontractor did not enjoy governmental immunity as a government contractor because it was solely responsible for the means and methods of inspecting its excavation, ascertaining if there was any damage, and refraining from backfilling until all necessary repairs were completed. Its functions and tasks were not quasi-legislative, or quasi-judicial in nature, so were not discretionary and thus not subject to governmental immunity.
4. 2011 Wis. Act. 132 revised Wis. Stat. § 893.83, removing the statutory authorization for a claim against a municipality to recover damages caused by a highway defect. Thus, such claims are likely subject to the governmental immunity provisions of § 893.80(4). However, the statute still authorizes claims against a municipality for damages incurred due to the accumulation of ice or snow on a bridge or highway if the accumulation has existed for 3 weeks or more.