



Listen Up Contractor! I've Got Something to Say

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THE MAP


- ☺ *Contractor and Construction Manager at Risk Standards for Performance*
- ☺ *Documentation*
- ☺ *Claims*
- ☺ *Do It Yourself*
- ☺ *Bond Claims*
- ☺ *The Termination*
- ☺ *Liquidated Damages*

ASSUMPTIONS

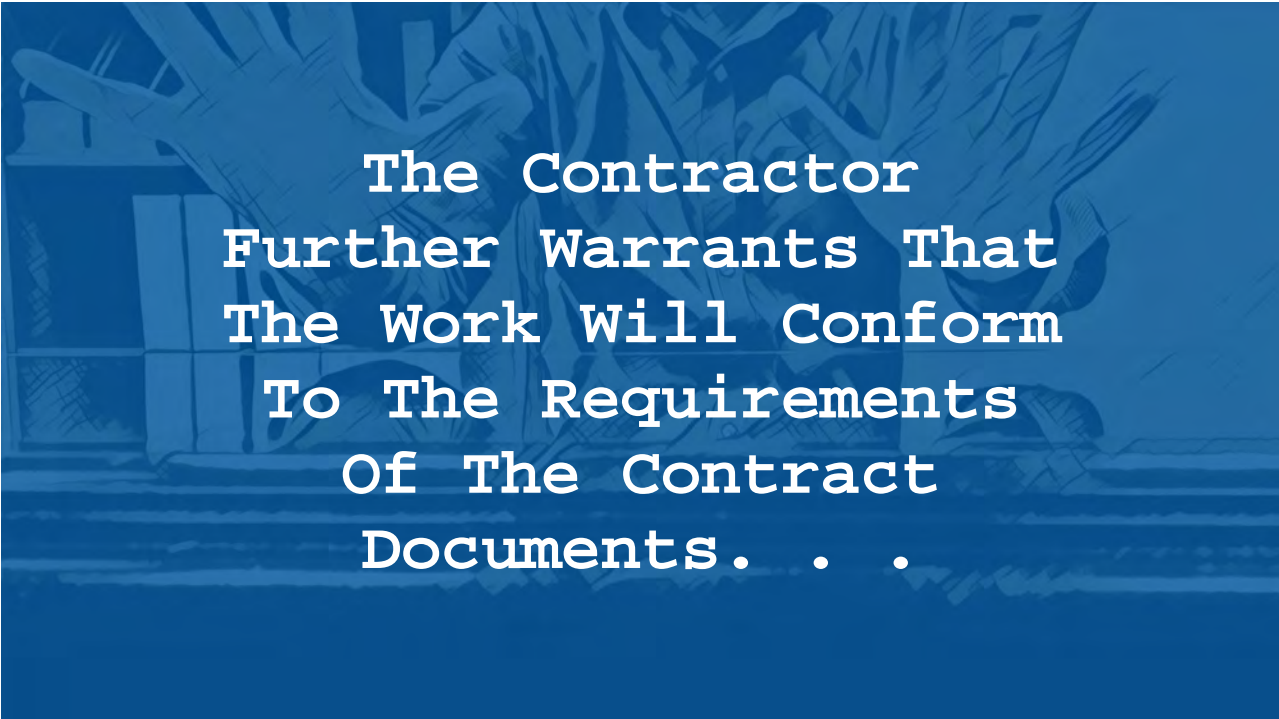
- ☺ *This Training Is Not Legal Advice*
- ☺ *The Basic Assumptions for the Project Are:*
 - ☺ *Unmodified Terms of a Standard Form AIA Agreement*
 - ☺ *These Are the Basics - Consult With Your Attorney About Your Individual Project.*



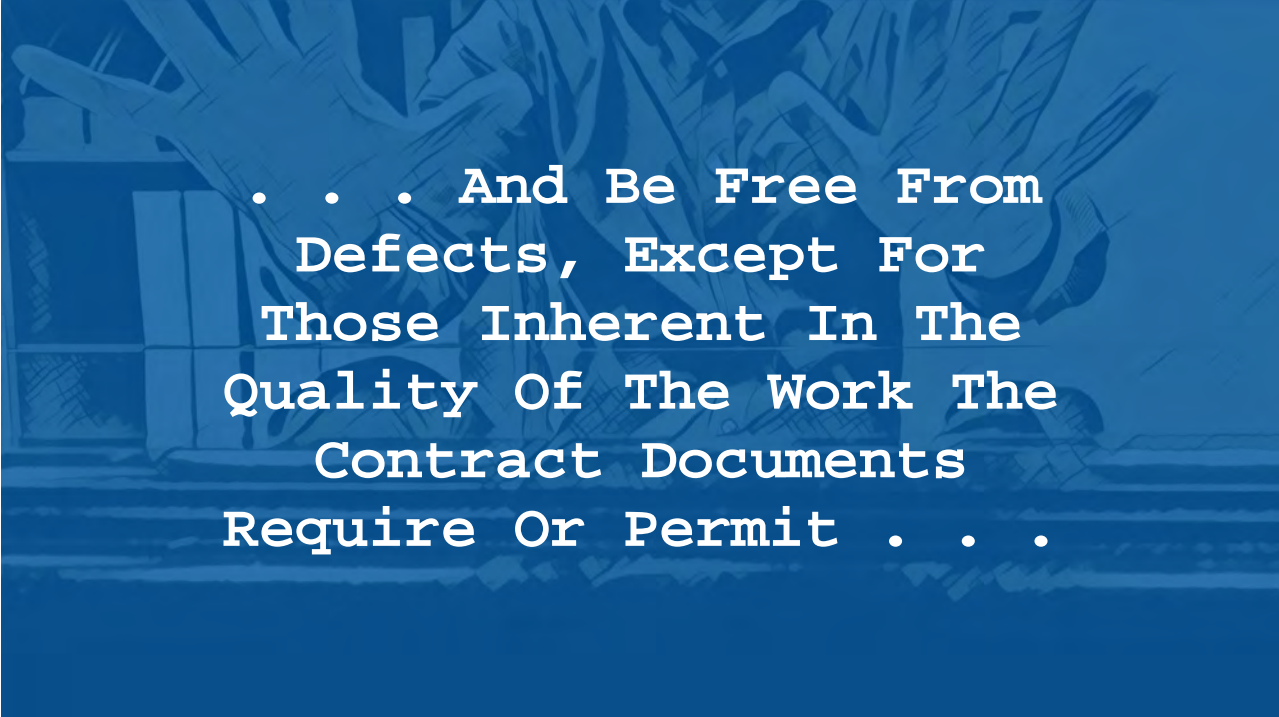
*THE
BOILERPLATE
WARRANTY*




The Contractor
Warrants . . . That The
Materials And Equipment
Furnished Under The
Contract Will Be Of Good
Quality And New. . .



The Contractor
Further Warrants That
The Work Will Conform
To The Requirements
Of The Contract
Documents. . .



. . . And 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 RESPONSIBILITY

👤 *The Contractor Shall Supervise and Direct the Work, Using the Contractor's Best Skill and Attention.*



THE CONTRACTOR'S RESPONSIBILITY

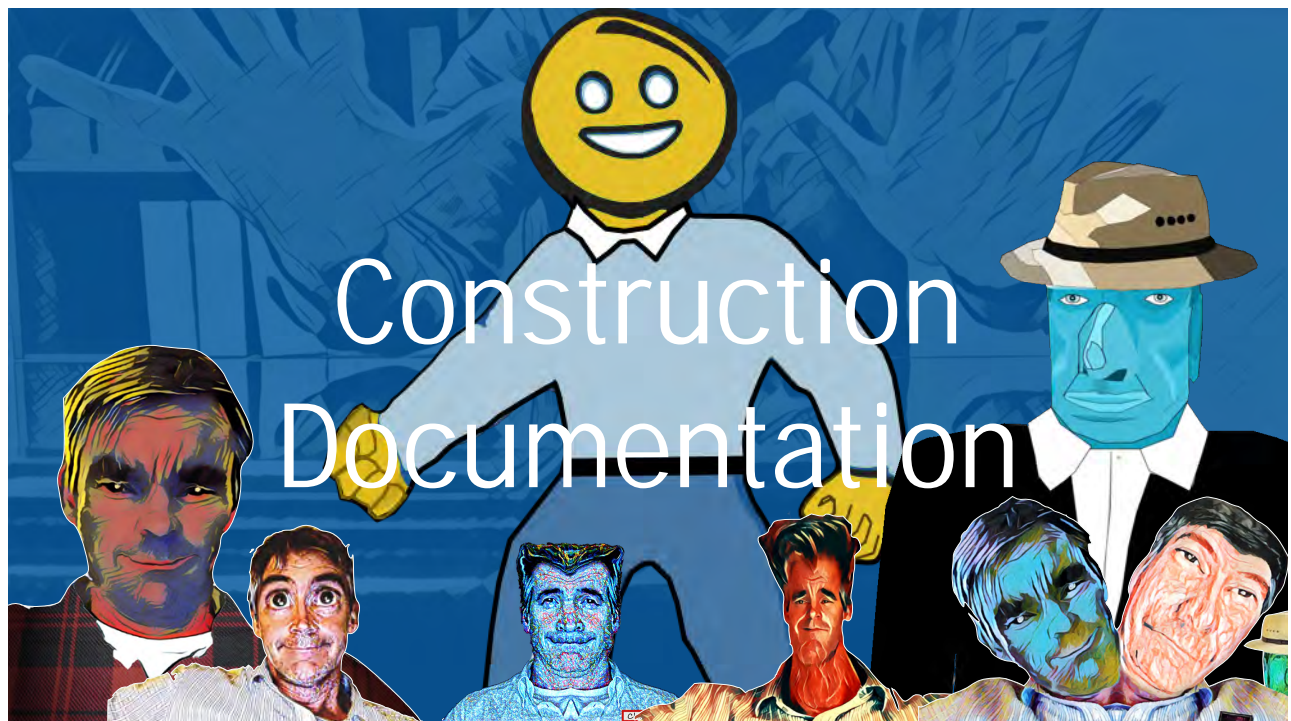
😊 *Contractors Are Responsible for Their Subs.*

😊 *No More: "Call my Sub if You Have a Problem."*



THE CONTRACTOR'S RESPONSIBILITY

- ☺ *Ultimately the **Contractor** Is Responsible for*
- ☺ *The **Quality** of the Work*
- ☺ *The **Quantity** of the Work*
- ☺ *Ensuring That the Work Conforms to the Architect's Plans and Specifications*
- ☺ *Timely Completion of the Work*



DEMAND EXCELLENCE

- 😊 **Written Documentation Is a MUST.**
- 😊 **Be Able To *Show* That You Were Fair and That You Conveyed Your Expectations.**

IT'S FUNDAMENTAL

- 😊 **If It Isn't in *Writing* It Didn't Happen.**
- 😊 **You Didn't Tell the Contractor About the *Leaky Roof*.**
- 😊 **The Architect and Contractor Did Not Agree To *Fix the Roof*.**
- 😊 **If You Don't Have *Proof That You Sent* It They Never Got It.**

GOOD DOCUMENTATION

- 😊 *Include Verbatim Excerpts From the Contract or Specifications.*
- 😊 *Your Lawyer Can Help You With This.*
- 😊 *Cite Timelines*



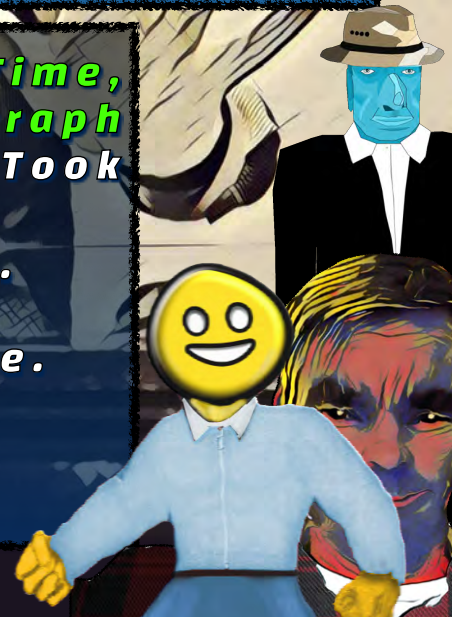
GOOD DOCUMENTATION BEGINS THE CLAIMS PROCESS

- 😊 *Demand a Date for Action*
- 😊 *Ask the Architect or Contractor as to **What They Are Going To Do To Fix the Problem***
- 😊 *Include Their Proposed Remedy in the Documentation*



A NOTE ABOUT PHOTOGRAPHS

- ☺ *Always Identify the Date, Time, and Location of the Photograph as Well as the Person Who Took the Photograph.*
- ☺ *Identify Them Right Away. Suits Can Take **Years** To Prosecute. Memories Fade. Employees Move on.*
- ☺ *Get Your Documentation in Front of the Board.*



ALL DOCUMENTATION SHOULD CONTAIN:

- ☺ *A Timeline*
- ☺ *Material Facts Like **Time, Place, Date & Witnesses***
- ☺ *References to **Contracts, Photographs, Reports***



ALL DOCUMENTATION SHOULD CONTAIN:

- 😊 **An Outline of all Previous Notices to the Contractor and Architect**
- 😊 **Be Accurate and Honest**
- 😊 **Errors Impact Credibility**



HELP YOURSELF WITH THE FACT FINDERS

- 😊 **Small Words - 8 Letters or Less**
- 😊 **Short Sentences - 15 Words or Less**
- 😊 **One or Two Page Documents**
- 😊 **Focus on Facts — Not Conclusions (Save the Rants)**
- 😊 **Identify Real Consequences if the Architect or Contractor Fails To Comply With Their Responsibilities Under the Agreement**





CLAIMS

- ☺ *What Is a **Claim**?*
- ☺ *Is It **Required**?*
- ☺ *Proceed As Though **It Is**.*
- ☺ *Can Be Complicated*
- ☺ *During Construction **It Is Controlled by the Contracts***
- ☺ ***Beware of Deadlines***

A man with red hair and a blue face with a hat. The man with red hair is on the left, and the blue face with a hat is on the right. The background is a dark blue with some faint, abstract patterns.

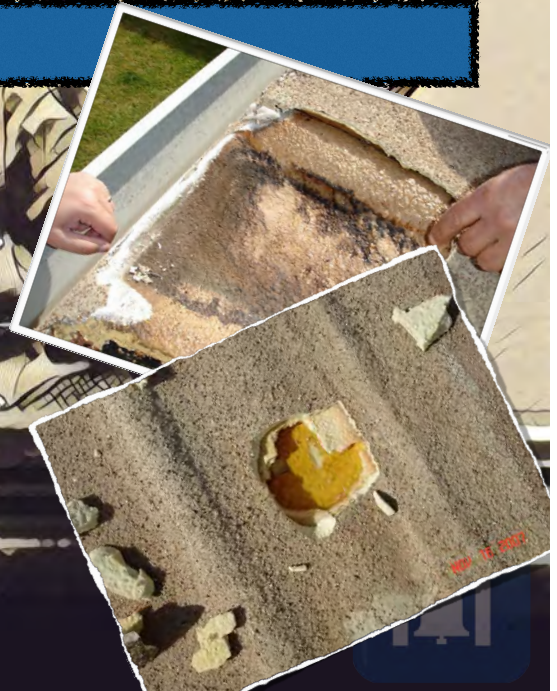
TIMELINE FOR FILING A CLAIM

- ☺ *Think of This as the Contractual Grievance Process.*
- ☺ *If You Are Properly Documenting You Should Never Be Late.*
- ☹ *Failure to Timely File a Claim May Act as a Bar To Recovery!*



CLAIMS

- ☺ *If You Believe You Have a Defective Condition, Tell the Architect.*
- ☺ *They Have the Authority To Reject Work That Does Not Comply With the Documents.*



CLAIMS - COMMON LANGUAGE

- ☺ *If the Architect Determines That the Work Fails To Conform With the Contract Documents, the **Contractor Is Required To Promptly Correct the Work.***
- ☺ *The Costs of Correcting the Rejected Work, Including Additional Testing and Inspections, and, of Course, Compensation for the Architect **Shall Be Paid by the Contractor.***

CLAIMS

- ☺ *If the Architect Rejects the Work, **You Shouldn't Have To Pay for It Until the Condition Is Remedied.***
- ☺ *The **Architect Is Supposed To Protect You in This Regard.***

STATUTORY NOTICE OF CONSTRUCTION DEFECT

- 😊 *Before You Can File a Lawsuit:*
- ★ *Notice of the Claim Will **Be Required***
 - ★ *You Will Have To Give an Opportunity To Resolve the Problem*
- 😊 *Call Your Attorney*
- ★ *You Just Need To Follow the Steps.*



TESTING AND EXPERTS

TESTING AND EXPERTS

😊 **When To Test**

😊 **When *the Architect* Recommends a Test, or**

😊 **When Something Looks *Wrong*,**

😊 **For Example:**

😊 **- *Cracks* in a Foundation**

😊 **- *Uneven Floor*, or *Leaks***



NO PARKING FIRE LANE

TESTING AND EXPERTS

- ☺ *If the **Testing** Reveals a **Defect** in the Construction, the **Contractor Pays** for the Testing.*
- ☹ *If the Testing Reveals **no Defect**, the **Owner Pays**.*

TESTING AND EXPERTS

- ☺ *Depending on When You Discover the Defect...*
- ☺ *If During the Project:*
 - ☺ *Might Need To Hire Geotech for Extra Services if Compliance Depends Upon a Scientific Determination*
- ☺ *If After the Project Is Complete*
 - ☺ *Also Scientific Testing*
 - ☺ *Might Also Need an Expert To Evaluate Contractor Performance*
 - ☺ *Might Need Independent Engineer or Architect To Sort Design Defects From Construction Defects*

SELF HELP

SELF-HELP-"DIY"

- If the Contractor **Fails To Carry Out the Work** in Accordance With the Contract Documents and **Fails To Begin Fixing the Problem** in the Time Required by the Contract, **Most Contracts Allow the Owner To Correct the Deficiencies in the Work.**
- Try To Set the Expectation About What It Means **"To Begin"** Early in the Process.

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SELF-HELP-“DIY”

😊 *If the Owner Has to **DIY** the **Architect** Issues a **Change Order** Deducting the Expenses From Future Pay Applications.*

😊 ***Great...** but What if the Contractor Doesn't Sign the **Change Order**?*

SELF-HELP-“DIY”

😊 ***Deductions** Can Include:*

😊 *The **Cost of Correcting the Deficiencies**; and*

😊 *The **Cost Charged by the Architect** for **Additional Services**.*

SELF-HELP-“DIY”

- ☺ *Hopefully You Haven't **Overpaid***
- ☺ *If You Owe the Contractor Less Than the Cost of the Repairs...*
- ☺ *The Contractor Is Supposed To Pay the Difference to the Owner.*
- ☺ *So, **Monitor Those Pay Apps** and **Don't** Put Off Dealing With Known Construction Issues.*

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BOND CLAIMS



BOND CLAIMS

- ☺ **What Are They?**
- ☺ **Subcontractors Make Claims on Payment Bonds.**
- ☺ **Owners Make Claims on Performance Bonds**



BOND CLAIMS

- ☺ **Performance Bonds**
- ☺ **To Guarantee Completion of the Work**
- ☺ **Useful When Your Contractor Can't Finish the Job.**



BOND CLAIMS

- ☺ **Consult Your Attorney**
- ☺ **Must Follow all of the Steps to the Letter**
- ☺ **Documentation?**
- ☺ **Claims?**
- ☺ **Special Bond Notices?**
- ☺ **Special Contract Notices**



BOND CLAIMS

- ☺ **CONSULT YOUR ATTORNEY**
- ☺ **Is There a Default or "Material Breach of the Contract"**
- ☺ **Have YOU Materially Breached the Contract?**



BOND CLAIMS

- ☹️ **Biggest Mistake**
- ☹️ **Termination Without Following the Steps From the Contract**
- ☹️ **Termination Without "Good Cause" Under the Agreement.**



TERMINATION

TERMINATION: CAUSES

- ☺ *The Standard Agreements Typically Permit Termination if the Contractor:*
 - ☺ *Persistently or Repeatedly Refuses or Fails To Supply Enough Properly Skilled Workers or Proper Materials;*
 - ☺ *Fails To Pay Subcontractors;*
 - ☺ *Persistently Disregards Laws; or*
 - ☺ *Substantial Breach of a Provision of the Contract Documents.*
 - ☺ *Always Check With Your Attorney.*
- CONTRACTS DIFFER.**



TERMINATION: CAUSES

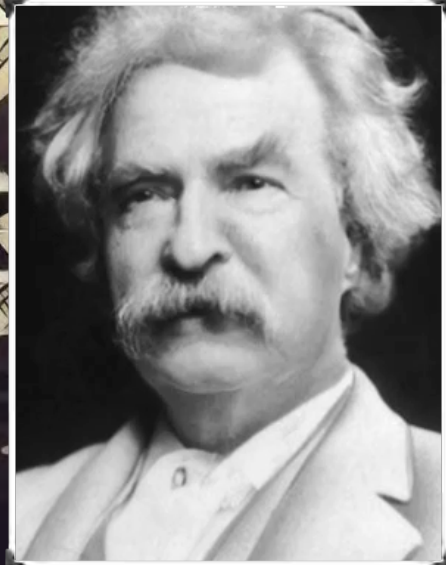
- ☺ *Use Your Attorney To Guide You Through the Process*
- ☺ *It Is Not Simple.*
- ☺ *There Are Required Notices*
- ☺ *There Are Required Waiting Periods.*
- ☺ *There Are Potential Financial Consequences.*



LIQUIDATED DAMAGES

LIQUIDATED DAMAGES

🤔 *"The Report of
my Death Was an
Exaggeration"*
MARK TWAIN



LIQUIDATED DAMAGES

- ☹️ **NOT a PENALTY**
- ☹️ **FOR USE WHEN THE DAMAGES ARE DIFFICULT TO ASCERTAIN AT THE TIME OF CONTRACTING**
- ☹️ **ASSIGNS a DAILY DOLLAR AMOUNT FOR PROJECTS THAT FAIL TO COMPLETE ON TIME**
- ☹️ **DO NOT UNDERESTIMATE THEM.**
- ☹️ **IT IS BETTER TO HAVE NO CLAUSE THAN A LOW CLAUSE.**

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**DON'T BE THE
AVATAR FOR
INCOMPETENCE**

THE AVATAR OF INCOMPETENCE

☹️ **DESIGN ERRORS**

☹️ *These Are To Be Presented to the Board by the **Design Professional***

☹️ **CONSTRUCTION ERRORS**

☹️ *These Are To Be Addressed to the Board by the **Constructors***

☹️ **CHANGE ORDERS**

☹️ *These Are To Be Presented to the Board by the **De\$igner** and the **Con\$Tructor***

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SEND US AN EMAIL
IF YOU WOULD
LIKE A 1 HOUR
SESSION SPECIFIC
TO CHANGE ORDERS



SUMMARY

- ☺ **CLAIMS** - Your Written **Claims** Set the Stage for Everything You Do.
- ☺ **DEFECTIVE WORK (DURING CONSTRUCTION)?** The Architect Makes the **Initial Determination** on the Cost Adjustment and **Prepares the Change Order.**
- ☺ **DEFECTIVE WORK (After Construction)-New Law - Notice Required - Call Your Lawyer.**
- ☺ **TERMINATION** - You Need Your **Lawyer.**
- ☺ **LIQUIDATED DAMAGES** - ARE NOT DEAD!

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