



**SIGNATURES ARE NOT  
MERE ORNAMENTS!  
THE PITFALLS OF CONSTRUCTION  
CONTRACTING**

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## Building Contract

- Louisiana Civil Code article 2756 defines a building contract as follows: “To build by a plot, or to work by the job, is to undertake a building or a work for a certain stipulated price.”
- Jurisprudence has consistently held that a contract involving work to be done on the owner's land or building is a construction contract (as opposed to a sale) within the definition of Article 2756, even when the undertaker (contractor) is required to furnish some of the materials. *Martin v. AAA Brick Co., Inc.*, 386 So.2d 987, 990 (La.App. 3d Cir. 1980).



## Building Contract

- It is implied in every building contract that the work of the builder be performed in a **good workmanlike manner, free from defect either in material or workmanship**. *Nichols Ford Co., Inc. v. Hughes*, 292 So.2d 345 (La.App. 2nd Cir. 1974).
- C.C. Art. 2769. If an undertaker fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his non-compliance with his contract.



## Substantial Performance

- Substantial Performance- Even if defects are present, Contractor is entitled to recover the contract price, and the owner is relegated to having the price reduced by the amount necessary to perfect or complete the work. *Airco Refrigeration Service, Inc. v. Fink*, 242 La. 73, 134 So.2d 880 (1961).
- No substantial performance- The contractor's recovery is limited in *quantum meruit*. Also, if the defects are such that cannot be corrected except by removing and replacing the construction, the owner may require the contractor to remove the object from his land and restore the premises to their prior condition. In addition, the owner is entitled to damages. *National Water-Purifying Co. v. New Orleans W. W. Co.*, 48 La. (Ann.) 773, 19 So. 865 (1896);



## Writing required?

- A building contract need not be in writing, parole evidence is admissible to prove a subsequent verbal agreement to modify or even to abrogate a written construction contract. *Great Southern Homes, Inc. v. Holten*, 460 So.2d 662 (La.App. 1 Cir. 1984), writ denied, 462 So.2d 1250.
- Exceptions: Public Works, see LSA R.S. 38:2216 and Home Improvement Contracts, LSA R.S. 37:2175.1.
- Written notice of contract required to be filed by GC prior to commencement of work to preserve lien rights on private projects. Must identify parties, signed by parties, describe work, price and payment terms. LSA R.S. 9:4811.



## **Contract Basics**

- Parties
- Scope of Work
- Price
- Time
- Changes
- Termination
- Dispute Resolution
- Acceptance of Work
- Warranty and Remedies for Defects
- Indemnity
- Insurance/Bonds



## Form Contracts

- AIA
- ConsensusDocs
- EJCDC (Engineers Joint Contract Documents Committee)
- Supplementary Conditions required
- Select correct contract
- Incorporated general conditions, i.e. A-201 General Conditions



## 2017 A101- Standard Form of Agreement Between Owner and Contractor

- 5.1.6- Calculation of progress payments – language simplified.
- 5.1.8- If final completion materially delayed through no fault of Contractor- Owner shall pay any amounts due.
- 7.1.1- Termination for convenience- provides for termination fee .





## 2017- A101- Exhibit A

- Insurance and Bonds
- Owner required to purchase “usual general liability insurance”
- Owner required to purchase builders risk. Shall include interests of contractor, sub-contractors and sub-subcontractors.
- Also requires coverage for loss resulting from errors, omissions and deficiencies in design, workmanship and materials.



# A201-2017- General Conditions of the Contract for Construction

- 1.1.8- The Initial Decision Maker shall not show partiality and shall not be liable for decisions or interpretations made in good faith.
- 1.2.1.1- Severability clause
- 1.6.2- Notice of Claims are required to be in writing and sent by certified or registered mail or courier providing proof of delivery
- 2.1.1- Evidence of financial arrangements. No obligation to begin work until evidence is produced. Contractor may also demand evidence after commencement of the work.



## A-201- 2017

- 2.5- Architect may nullify a Certificate of Payment.
- 3.5.2- All warranties shall be issued in the name of the Owner or transferable to the Owner.
- 3.10.1- new detailed schedule requirements. Milestones, apportionment of construction activities, time for completion of each activity.
- 3.12.10.1- Contractor can rely upon adequacy and accuracy of performance and design criteria provided in contract documents.



## A-201-2017

- 9.6.8- Contractor required to indemnify Owner for lien claims so long as Owner has fulfilled payment obligations.
- 9.10.4- Final payment does not serve as waiver of right of Owner to conduct audit.
- 15.1.2- 10 year time period for claims.
- 15.3.3- May demand that party file for binding arbitration. If not filed within 60 days, claims are barred.
- 15.4.1- Arbitration locale shall be where Project is located.
- American Arbitration Association Rules are default.



## Licensing

- Under Louisiana law, a contracting agreement entered into without the benefit of a contractor's license is null and void. *Hagberg v. John Bailey Contractor*, 435 So.2d 580, 584-85 (La.App. 3 Cir. 1983); *Alonzo v. Chifici*, 526 So.2d 237, 243 (La.App. 5 Cir. 1988);
- Thus, a party suing to enforce such a contract may only receive damages under the theory of unjust enrichment for the actual cost of materials, services, and labor. *Alonzo*, 526 So.2d at 243.



## Are Signatures Ornaments?

- “[S]ignatures to obligations are not mere ornaments.” *Boullt v. Sarpy*, 30 La. Ann. 494 at 495. Additionally, the courts of our state have long held that “[i]f a party can read, it behooves him to examine an instrument before signing it; and if he cannot read, it behooves him to have the instrument read to him and listen attentively whilst this is being done.” *Snell v. Union Sawmill Company*, 159 La. 604 at 608, 105 So. 728 at 730 (1925). *Bagneris v. Oddo*, 2 Pelt. 278 (La.App. 1919). *Tweedel v. Brasseaux*, 433 So.2d 133 (La. 1983).
- A person who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending that he did not read it, or that it was not explained or that he did not understand it. *First South Farm Credit, ACA v. Gailliard Farms, Inc.*, 38,731 (La.App.2d Cir.08/18/04), 880 So.2d 223. It is not within the province of the courts to relieve parties of what they perceive to be bad bargains. *Shepard v. Phycor of Ruston, Inc.*, 29,181 (La.App.2d Cir.05/07/97), 711 So.2d 288, citing *Kenny v. Oak Builders, Inc.*, 256 La. 85, 235 So.2d 386 (1970).



## Acceptance

- General rule that a contract is not perfected until the offeror receives notice of the offeree's acceptance. *Aguillard's Enterprises, Inc. v. Smith*, 439 So.2d 1158, 1160 (La.App. 4th Cir.1983), writ den., 444 So.2d 1224 (La.1984).
- Our jurisprudence is replete with construction contract cases in which a owner signed the proposed contract but prior to the contractor's acceptance thereof withdrew his consent, cancelling the proposed contract without incurring liability. *Loeb v. Johnson*, 142 So.2d at 520 ; *City Glass & Mirror Co. v. Charles Carter & Co.*, 144 So.2d 240, 243 (La.App. 1st Cir.1962);



## Acceptance, cont.

- Acceptance need not be by the same act or instrument, *Advertiser, Division of Independent Inc. v. Tubbs*, 208 So.2d 340, 343 (La.App. 3d Cir. 1967, writ den., 251 La. 1084, 208 So.2d 537 (1968)); See also *Van-Trow Olds-Cad-Toyota, Inc. v. Wiggins*, 516 So.2d 1261 (La.App. 2d Cir. 1987).





## Corporate Capacity

- It is well-established that to avoid personal liability, an agent who is acting on behalf of a corporation must disclose his agency status and identify his principal. *R.H.S. (Racing Head Service) v. Fallon*, 395 So.2d 940 (La.App. 2d Cir. 1981), writ den., 399 So.2d 609 (La. 1981); *Lagniappe of New Orleans, Ltd. v. Denmark*, 330 So.2d 626 (La.App. 4th Cir. 1976). **Absent such disclosure, the law presumes that a person is acting in his individual capacity and holds him personally liable for his actions.** *Marmedic, Inc. v. International Ship Management Services, Inc.*, 425 So.2d 878 (La.App. 4th Cir. 1983).



## Apparent Authority

- An agency relationship is **never presumed**. *Barrilleaux v. Franklin Foundation Hospital*, 96-0343, p. 7 (La.App. 1 Cir. 11/8/96), 683 So.2d 348, 354.
- La. Civil Code article 3021: One who causes a third person to believe that another person is his mandatary is bound to the third person who in good faith contracts with the putative mandatary.
- Apparent authority is a doctrine by which an agent is empowered to bind his principal in a transaction with a third person when the principal has made a **manifestation to the third person that the agent is authorized to engage in the particular transaction**, although the principal has not actually delegated this authority to the agent. *Waffle House, Inc. v. Corporate Properties, Ltd.*, 99-2906, p. 5 (La.App. 1 Cir. 2/16/01), 780 So.2d 593, 597. The third party may not blindly rely upon the assertions of an agent, but has a duty to inquire into the nature and extent of the agent's power. *Id.*



## Ratification

- Under the law, ratification occurs when the principal, knowing of the contract, does not repudiate it but accepts its benefits. *Bamber Contractors, Inc. v. Morrison Engineering & Contracting Co., Inc.*, 385 So.2d 327 (La.App. 1st Cir. 1980). See also: *Melancon v. A & M Pest Control Service Co., Inc.*, 325 So.2d 391 (La.App. 4th Cir. 1976); *John Deere Indus. Equipment Co. v. McCullen*, 275 So.2d 437 (La.App. 2d Cir. 1973).



## A Word on Personal Liability

- A contractor is not a professional within the meaning of LSA R.S. 12:1320. As such, no exception for personal liability. *Nunez v. Pinnacle Homes, L.L.C.*, 15–0087, p. 7 (La. 10/14/15), 180 So.3d 285, 290
- “To hold that poor workmanship alone suffice[s] to establish personal liability would allow the exception in La.Rev.Stat. 12:1320(D) to negate the general rule of limited liability in La.Rev.Stat. 12:1320(B).”



## **Price and Scope of Work**

- Price needs to be determinable – cost plus, fixed sum, maximum guaranteed
- Scope of Work defined by Contract Documents
- Plans, Specifications, Incorporated Standard Specifications, Addenda, Supplementary Conditions, Proposals, Bid Documents



## Contract Time, Date of Commencement and Substantial Completion

- What is contract time?
- When does contract time begin and end?
- Who determines this?
- Liquidated Damages?
- What is Substantial Completion and who determines it?



## Liquidated Damages

- The purpose of a stipulated damages clause is to fix the measure of damages in advance and to constrain the timely performance of the principal obligation. It is not necessary for the plaintiff to show pecuniary or other actual damage to enforce the clause. La. C.C. art. 2009; *Utlely–James of Louisiana, Inc. v. State, Division of Administration, Department of Facility Planning and Control*, 94–2504, p. 6 (La.App. 1st Cir.10/6/95), 671 So.2d 473, 476. The stipulated amount replaces the need for damages to be determined by the court. *Lombardo v. Deshotel*, 94–1172, p. 6 (La.11/30/94), 647 So.2d 1086, 1090.
- However, courts may modify stipulated damages if they are **so manifestly unreasonable** as to be contrary to public policy. La. C.C. art.2012; *Lombardo*, 94–1172 at p. 6, 647 So, 2d. at 1090. Nevertheless, because a stipulated damages clause gives rise to a presumption that the obligee has suffered loss due to the failure to perform, the obligor bears the burden of defeating that presumption. See, La. C.C. art. 2009, Revision Comment (d); *Saul Litvinoff*, 6 Louisiana Civil Law Treatise, Obligations § 13.16.



## Changes

- Scope of Work
- Extensions of Time and Increase in Contract Sum
- *Force Majeure*
- Additional compensation for *Force Majeure* events?
- Must be in writing.
- Must be approved before beginning work.
- But . . . .





## Changes, cont.

- **A written construction contract may be modified by oral agreement and by the conduct of the parties, even when the contract provides that change orders must be in writing.**

*Wisinger v. Casten*, 550 So.2d 685 (La.App. 2d Cir. 1989); *Rhodes Steel Bldgs., Inc. v. Walker Const. Co.*, 35,917 (La.App.2d Cir. 4/3/02), 813 So.2d 1171. See also, *Pelican Elec. Contractors v. Neumeyer*, 419 So.2d 1 (La.App. 4th Cir. 1982), writ denied, \*501 423 So.2d 1150 (La. 1982); *Newman Marchive P'ship, Inc. v. City of Shreveport*, 41,460 (La.App. 2d Cir. 11/1/06), 944 So.2d 703, writ denied, 2007-0060 (La.3/9/07), 949 So.2d 448, and writ denied, 2007-0097 (La.3/9/07), 949 So.2d 452; *Amitech U.S.A., Ltd. v. Nottingham Const. Co.*, 2009-2048 (La.App.1st Cir. 10/29/10), 57 So.3d 1043, writ denied, 2011-0866 (La. 6/17/11), 63 So.3d 1036, and writ denied, 2011-0953 (La. 6/17/11), 63 So.3d 1043; *Bonvillain Builders, LLC v. Gentile*, 2008-1994 (La.App. 1st Cir. 10/30/09), 29 So.3d 625, writ denied, 2010-0059 (La. 3/26/10), 29 So.3d 1264; *Fleming v. JE Merit Constructors, Inc.*, 2007-0926 (La.App. 1st Cir. 3/19/08), 985 So.2d 141; *Cajun Constructors, Inc. v. Fleming Const. Co., Inc.*, 2005-2003 (La.App. 1st Cir. 11/15/06), 951 So.2d 208, writ denied, 2007-0420 (La. 4/5/07), 954 So.2d 146; *Aqua Pool Renovations, Inc. v. Paradise Manor Cmty. Club, Inc.*, 04-119 (La.App. 5th Cir. 7/27/04), 880 So.2d 875.



## Changes, cont.

- Modification of a written agreement can be presumed by silence, inaction, or implication. *Fleming v. JE Merit Constructors, Inc., supra*; *Amitech U.S.A., Ltd. v. Nottingham Const. Co., supra*. Whether there is an oral agreement that modified the written contract is a question of fact. *Wisinger v. Casten, supra*; *Pelican Elec. Contractors v. Neumeyer, supra*. The party asserting modification of an obligation must prove by a preponderance of the evidence facts or acts giving rise to the modification. *Cajun Constructors, Inc. v. Fleming Const. Co., Inc., supra*.



## Termination

- For Convenience
- For Cause
- Notice
- Opportunity to cure
- Recovery needs to be specified for each



## Warranty

- Date of commencement
- Warranty period
- Work complete
- Work performed in accordance with contract documents
- Work is new and performed in workmanlike manner
- Contractor responsible for costs to correct, including expert and attorneys fees



## Warranty

- LSA-R.S. 9:2774. A. The guarantee and warranty period of all construction contracts **shall commence on the date certified by the architect or engineer as the date the prime contract(s) has (have) been substantially completed in accordance with plans and specifications, or beneficially used by the owner, whichever first occurs.** B. The provisions of this Section shall not be subject to waiver by contract.



## Insurance

- Workers Comp.
- General Liability
- Professional Liability
- Builders Risk
- Flood
- Additional Insured Status
- Notice of Change In Coverage
- Waiver of Subrogation



## Consequential Damages

- Mutual waiver of consequential damages
- LSA R.S. 9 § 2775. Any provision in a contract for the sale of equipment or machinery to be incorporated in a construction project, as hereinafter defined, which excludes liability for consequential damages is null and void.



## Indemnity

- Damage(personal injury and property damage)
- Claimants(Project participants and Third Parties)
- Intellectual Property
- Liens and Payment Claims
- Attorneys fees defending underlying claims and enforcing indemnity clause
- Limited to extent of fault
- Severability Clause





## Indemnity, cont.

- LSA R.S. 9:2780.1: Notwithstanding any provision of law to the contrary and except as otherwise provided in this Section, any provision, clause, covenant, or agreement contained in, collateral to, or affecting a motor carrier transportation contract or construction contract which purports to indemnify, defend, or hold harmless, or has the effect of indemnifying, defending, or holding harmless, the indemnitee from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the indemnitee, an agent or employee of the indemnitee, or a third party over which the indemnitor has no control is contrary to the public policy of this state and **is null, void, and unenforceable.**



## Indemnity, cont.

- Multi-state contracts
- Off shore construction contracts
- The Outer Continental Shelf Act provides that adjacent State law applies so long as it does not conflict with federal maritime law. The OCSA only applies to work on fixed platforms less than roughly 200 miles out.



## Indemnity – Other Limitations

- LA C.C. art. 2004 - Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party. Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.



## Indemnity- Other Limitations, cont.

**LSA R.S. 38:2216(G)** It is hereby declared that any provision contained in a public contract, other than a contract of insurance, providing for a hold harmless or indemnity agreement, or both, (1) From the contractor to the public body for damages arising out of injuries or property damage to third parties caused by the negligence of the public body, its employees, or agents, or, (2) From the contractor to any architect, landscape architect, engineer, or land surveyor engaged by the public body for such damages caused by the negligence of such architect, landscape architect, engineer, or land surveyor is contrary to the public policy of the state, and any and all such provisions in any and all contracts are null and void.

**LSA R.S. 38:2216(H)** Any provision contained in a public contract **which purports to waive, release, or extinguish the rights of a contractor to recover cost of damages, or obtain equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void or unenforceable.** When a contract contains a provision which is void and unenforceable under this Subsection, that provision shall be severed from the other provisions of the contract and the fact that the provision is void and unenforceable shall not affect the other provisions of the contract.



## Choice of Law and Venue

- LSA R.S. 9 § 2779.
- A. The legislature finds that, with respect to construction contracts, subcontracts, and purchase orders for public and private works projects, **when one of the parties is domiciled in Louisiana, and the work to be done and the equipment and materials to be supplied involve construction projects in this state**, provisions in such agreements requiring disputes arising thereunder to be resolved in a forum outside of this state or requiring their interpretation to be governed by the laws of another jurisdiction are inequitable and against the public policy of this state.
- B. The legislature hereby **declares null and void and unenforceable** as against public policy any provision in a contract, subcontract, or purchase order, as described in Subsection A, which either: (1) **Requires a suit or arbitration proceeding to be brought in a forum or jurisdiction outside of this state**; rather, such actions or proceedings may be pursued in accordance with the Louisiana Code of Civil Procedure or other laws of this state governing similar actions. (2) **Requires interpretation of the agreement according to the laws of another jurisdiction.**



## Mandatory Venue- LSA R.S. 38:2181

- a. a suit to annul a public contract on the grounds of fraud, illegality, or violation of contract, **may be instituted against the contractor either in the parish of the domicile of the contractor or in the parish where the real or personal property involved is located, or in the parish or in any one of the parishes wherein the work under the contract is to be performed.**
- b. a suit arising under any public contract regarding the construction, alteration, or repair of any public works or for the purchase of materials or supplies **may be instituted either in the parish in which the public entity is located or in any other parish where, by law, such action may be instituted.**
- c. any other provisions of the law to the contrary notwithstanding, the parties to a public contract **may stipulate in the contract that the venue of any possible litigation arising under such contract shall be in the parish in which the public entity is located.**



## Arbitration Clauses

- AIA checkbox
- Binding arbitration
- Applicable Rules
- Locale
- Applicable Law
- Discovery
- Number of arbitrators
- Costs and attorneys fees



## Federal Arbitration Act Preemption

- *OPE Intern. LP v. Chet Morrison Contractors, Inc.*, in which the Fifth Circuit held that the FAA preempted La. R.S. 9:2779 – a Louisiana statute that prohibits forum selection clauses outside of Louisiana in construction contracts. In finding that the district court properly compelled the parties to arbitrate, the *Chet Morrison* court explained:
- La. R.S. 9:2779 declares “null and void an unenforceable against public policy any provision in [certain construction subcontracts] ... which [ ] [r]equires a suit or arbitration proceeding to be brought in a forum or jurisdiction outside of [Louisiana]. La. Rev. Stat. Ann. 9:2779(B)(1). The statute directly conflicts with § 2 of the FAA because the Louisiana statute conditions the enforceability of arbitration agreements on selection of a Louisiana forum; a requirement not applicable to contracts generally. See, *Doctor's Assocs.*, 517 U.S. at 687, 116 S.Ct. 1652. **The FAA therefore preempts the Louisiana statute.**





## **Payment Provisions**

- Application for Payments
- Must be supported
- Schedule Updates
- Partial Lien Releases
- Retainage
- Final Payment
- Pay if Paid



## Pay if Paid

- Subcontractor or supplier entitled to payment only when GC/Subcontractor receives payment from Owner or GC.
- Protects GC or Subcontractor from financial distress involving owner.
- “Condition precedent” language required. Otherwise, considered “Pay when Paid” and payable within a reasonable time.
- For Public Works Projects see, *Glencoe Educ. Found., Inc. v. Clerk of Court & Recorder of Mortgages for Parish of St. Mary*, 101872 (La.App. 1 Cir. 5/6/11), 65 So.3d 225, writ denied, 11–1142 (La. 10/21/11), 73 So.3d 383., where the Louisiana First Circuit found that an owner's failure to pay the general contractor and the “pay if paid” clause in the subcontract did not prohibit a subcontractor who had performed satisfactorily to pursue a claim **against the sureties on a payment bond**.
- **Significance:** General Indemnity Agreement with surety.



## Miscellaneous

- Statutory Employer
- Inspection of Project Site
- Title to materials and equipment
- Flowdown of contract provisions
- Authority of architects and engineers
- Notice of Claim deadlines
- Differing conditions
- Design errors



## 2016 DOTD Standard Specifications for Roads and Bridges

- 101.04- “For Information Purposes Only”- only provided for illustrative purpose.
- 102.02- License required before execution of contract not commencement of work.
- 102.05- Unit prices include all direct and indirect costs as well as costs to complete incidental work.



## 2016 Purple Book

- 102.06- Representations and Warranties: 1) Bidder is unaware of errors, omissions, ambiguities or deficiencies in bid documents; 2) bidder is unaware of site conditions that will have impact on performance of work; 3) bidder has provided notice of any of the above.



## 2016 Purple Book

- 104.01- Scope of the work- definition expanded: 1) Work necessary due to increase in quantities; 2) Work necessary to deliver a completed Project conforming to Contract and “suitable for its intended purpose”; 3) performance of testing; and 4) correction or replacement of non-conforming work.
- Work shall be carried out in accordance with best industry practices.
- 104.02- If Contractor refuses to execute change order, DOTD may sign it and give it full effect.



## 2016 Purple Book

- 104.05- Warranty greatly expanded. All work performed in a good and workmanlike manner and fit for its intended use and purpose. Note: Requires reimbursement of expenses due to accidents.
- 105.14- Load Restrictions. Department entitled to ask for structural analysis to ensure loads do not compromise structural integrity. Only responsible for requests arising out of loads exceeding limits set forth in the contract.
- 107.01- All subcontracts shall require litigation to be instituted in 19<sup>th</sup> JDC.
- 107.17- Defense obligation added to indemnity.



## 2016 Purple Book

- 108.04.02- Disqualification
- Single Project: < 90% complete at expiration of contract time.
- Multiple Projects: a) 50% or more behind on one Project and shall remain disqualified until progress is within 10% of the elapsed contract time; or b) on two or more Projects, contract time has expired and Contractor is < 90% complete.
- 108.08- Confession of Judgment for LD's.
- 108.12- Termination for convenience.





# QUESTIONS?