

# Managing Contracts In Crisis (A Legal Perspective)

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## Course Outline

- **General** – Legal Issues re Contract Admin
  - How To Identify A Crisis
  - Specific Claim Problems Common To Public Works
  - Terminating A Contract (Default vs. Convenience)
  - Owner’s Design Warranties – The “Spearin Doctrine”

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## Course Outline (Cont.)

- Avoiding A Crisis
  - Communication – clear, concise, direct
  - Cooperation – good faith performance
  - Knowledge – know your contract
- Managing The Crisis
  - Documents – preservation, organization, tracking
- Resolving The Crisis
  - Forms Of Resolution – Benefits & Limitations

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## **How To Identify A Crisis**

- The hardest thing about solving a crisis is knowing it exists (Author, unknown).
  - Crisis defined: “a difficult or dangerous situation that needs serious attention” (Webster)
  - Tools For Spotting A Contract In Crisis:
    - Notice, Pay Applications
    - Schedules, Budgets, Schedule of Values
    - Communications, Timeliness, Production
    - Stress, Attitude, Organization, Attention

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## **The Quintessential Claim Case**

Bignold v. King County  
65 Wn.2d 817 (1965)

- Favorite Of Contractors arguing “waiver” and “actual notice” of claims
- County ordered contractor to open new “borrow pits” without issuing change order
- County argued contractor failed to meet written notice requirements, even though oral directive was given
- County relied upon unit prices rather than actual costs
- Held: County had actual notice and ordered contractor to proceed to obtain gravel borrow from other sources and changed conditions invalidated unit prices

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## **Specific Claim Problems**

- Changed Conditions:
  - Type I, “preexisting subsurface or latent physical conditions . . . Differing materially from those indicated in the Contract”
  - Type II, “preexisting unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the Work”
  - Source: WSDOT Std. Spec. 1-04.7

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## **Duty of Good Faith And Fair Dealing**

- In every contract there is an implied duty of good faith and fair dealing, but it does not apply to contradict express terms of the contract
- the duty of good faith and fair dealing arises when a contract gives a party discretionary authority to determine a contract term. See [Goodyear Tire, 86 Wn. App. at 738, 935 P.2d 628.](#)

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## Implied Warranty of Design and the “Spearin Doctrine”

- By furnishing the designs and specifications calling for the 96-inch culverts, the State warrants by implication that the designs are “sufficient for the purpose in view.” *Prier v. Refrigeration Eng'g Co.*, 74 Wash.2d 25, 29, 442 P.2d 621 (1968).

Donald B. Murphy Contractors, Inc. v. State, 40 Wn. App. 98, 102, 696 P.2d 1270, 1273 (1985)

- *Murphy* holds: “Washington law requires only that the design be sufficient for the intended purpose.”

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## Warranty of Design (cont.)

- Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered (citing cases). Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil (citing cases). But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications (citing cases).
- Dravo Corp. v. Municipality of Metro. Seattle, 79 Wn.2d 214, 218, (1971)

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## **Unconscionability**

- A contract provision is unconscionable if it is “one-sided or overly harsh” (substantive) or is a “lack of meaningful choice” and whether the “party had a reasonable opportunity to understand the terms of the contract” (procedural).

Adler v. Fred Lind Manor, 153 Wn.2d 331, 346, 103 P.3d 773, 782 (2004)

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## **Contract Termination** **Convenience v. Default**

- Convenience: Std. Spec. 1-08.10(2)-(4) makes owner liable for acceptable work to date plus termination costs; excludes lost profits and consequential damages
- Default: Std. Spec. 1-08.10(1) entitles owner to replacement and increased costs less amounts otherwise due original contractor

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## Contract Termination (cont.)

- Default Termination is the “Nuclear Option”
- Affects Contractor’s ability to meet “responsibility criteria” in bids for future work, i.e. stigma
- Contractor will generally fight termination for default
- Requires serious (material) breach of contract
  - Objective verification

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## Homework

- Read ***Mike M. Johnson v. Spokane County***
  - Note nature of negotiations, lack of notice, reservations by County, was it fair to the contractor?

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## Avoiding, Managing, and Resolving A Crisis



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## Overview

- Avoiding Crisis
  - Communications, Cooperation, Knowledge
- Managing Crisis
  - Documents, Information, Claim Resolution
- Resolving the Crisis
  - Mediation
  - Arbitration
  - Litigation

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## **Avoiding A Crisis** **Effective Communications**

- Develop Good Forms
  - Contracts, Letters, Memos, Daily Reports
  - Standard Contracts, Bid Documents
  - Don't Allow Unauthorized Modifications
- The Problem(s) With Email
  - Avoid the flaming email – the “draft then wait” technique, don't get angry, use the phone
  - If you need a letter, write a letter not an email
  - Do Not Text, Public Record Act

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## **Avoiding Crisis** **Effective Comm. (cont.)**

- The Problem With Email (cont.)
  - Minimize number of emails
  - Break the email chain, use “do not forward” and similar instructions
  - Mark privileged communications “privileged”
  - Attorney/Client communications and their limits, i.e. waiver by sending to third parties, i.e. consultants
  - Alternatives – conversation, phone call, letters, smoke signals
  - You are a public works professional, act like one
  - Things to avoid: hubris, fear, anger, threats, profanity

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## Avoiding Crisis Effective Comm. (cont.)

- Contractor Meetings and Daily Reports
- Non-Conformance Reports
- Pay Applications
  - Schedule of Values
- Contractor Forms – watch the fine print
- Public Records Act Considerations
  - Assume documents will be disclosed

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## Avoiding Crisis: Cooperation and Appearance of Fairness

- The duty to cooperate exists only in relation to performance of a specific contract term. **See *Cavell v. Hughes***, 29 Wn. App. 536 (1981)
- There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. ***Badgett v. Sec. State Bank***, 116 Wn.2d 563, 569 (1991)
- Like many things, obstructionism, blame, angry outbursts, are not persuasive but they have one thing in common – **they are hard to justify and defend.** (per WAL)

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## **Avoiding Crisis:** **Knowing Your Contract/Rights**

- Claim/Notice Provisions
  - Std. Spec. 1-04.4 – 1-04.7 & 1-09.11
- Claim Resolution
  - Std. Spec. 1-09.11 and 1-09.13
- Project Manual Provisions
  - Legal Rights and Obligations
  - Design Requirements – Plans and Specs
- Negotiating with confidence – concentrate on the problem, not the people

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## **Avoiding Crisis:** **Effective Negotiation**

- Read “Getting To Yes” and the like, then get out a large dose of salt
  - Things the negotiation manuals don’t tell you:
    - People Lie
      - 1. Error, 2. Omission, 3. Restructure, 4. Denial, 5. Minimization, 6. Exaggeration, 7. Fabrication
    - People Are Hostile (and they don’t tell you)
    - People Have Other Priorities (and it isn’t making a deal with you) – get to the top of their “list”
    - Don’t take offense, concentrate on being positive and focus on the problem, concentrate on details

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## **Avoiding Crisis:** **Effective Negotiation (Cont.)**

- Countering Unfair Negotiators – Getting Specific
  - Capture and document the opposing party's facts, documents, commitments, statements and arguments, i.e. take good notes and preserve them.
  - Get detailed. Ask plenty of questions. Require documentation. Solve simple disputes immediately, save your time and energy for the complex and difficult.

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## **Avoiding Crisis:** **Effective Negotiation (Cont.)**

- Be Positive
- Demand and enforce deadlines document those deadlines/compliance
- Promote yourself as the problem solver. Provide interim remedies and assistance where needed to encourage compliance with contract requirements and standards.
- Consider your BATNA (Best Alternative To A Negotiated Settlement)

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## Managing The Crisis



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## **Managing The Crisis:** **Process Control**

- Process Control During Crisis
  - Just because there is a Crisis, don't abandon your established procedures and forms
  - Watch out for the "secondary crisis"
  - Look for causes of the crisis as you respond
  - Embrace criticism and dissenting voices -- they can alert you to upcoming risks
  - Maintain "PMA" Positive Mental Attitude
  - Maintain communication channels

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## Diagnose The Problem

- Technology v. Personnel v. Natural Occurrence
- Sudden v. Creeping Crisis
  - Sudden crises pose problems of pressure, stress, and information management
  - Creeping crises encourage procrastination by not appearing urgent – don't "assume"
    - Mike Johnson and City of Olympia cases
    - Spradlin v. Grays Harbor PUD

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## Determine Solution(s)

- Beware of Imposed Solutions (Martin Loosemore, Crisis Mgt. In Const. Projects, ASCE Press, 2000)
- Focus on common interests and encourage people to put preconceived interests aside. (Loosemore)
- Managers must portray themselves as knowledgeable and as arbiters of a source of "independence, reliability, and fairness"

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## **How Legal Concepts Affect Dealing With Crisis**

- Contract v. Tort concepts
- Formal allocation of risk and responsibility
- “Contracts provide little protection against parties who are determined to avoid responsibility” (Loosemore)
- A “party’s political astuteness rather than contractual obligations are the main shaper of resource distributions during a crisis.” (Loosemore)

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## **Impact Claims**

- Loss of Productivity, Ripple Effect, Etc.
- Delay of Unaltered Work –
  - Std. Spec. 1-09.6, “Nothing in this provision shall preclude the Contractor from seeking an extension of time or time-related damages to unchanged Work arising as a result of the force account Work.”
- Change Orders – include waiver of all related claims if possible

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## Resolving The Crisis



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## Legal Remedies (and their limitations)

- First, do no harm (Hippocratic Oath)
  - Given an existing problem, it may be better to do little, or even to do nothing, than to risk causing more harm than good.
  - The law does not provide an efficient or even fair remedy for all eventualities
  - Paradoxes frequently arise and are decided on public policy considerations
    - Eastlake v. Hess, 102 Wn.2d 30 (1984)

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## **Measure of Damages**

- The “But For” Analysis
- Expectation Damages
  - Cost To Correct
  - Impact To Contractor’s Costs and Schedule
    - Overhead, Home Office, etc.
- Liquidated Damages
  - Concurrent Delay

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## **Settlement Negotiations**

- Avoiding Waiver – Express v. Implied Waiver
  - American Safety v. City of Olympia
- Open Public Meetings Act Considerations
  - Municipal Code may require approval of settlement agreements
  - Get it in writing
- Lawyers and Civil Rule 2A v. OPMA

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## **Mediation**

- Mediation before trial is required by most courts by rule
- Most cases settle based upon “risk” and “leverage”
- The mediator’s job is to reach a negotiated settlement, not necessarily a “fair settlement”
- About 95% of all litigation is settled before trial

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## **Litigation**

- A lawsuit is started by filing a summons and complaint
- Easy to start, difficult to end
- Key features – time consuming and expensive
- Law and Court Rules are geared toward resolution by attrition

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## Arbitration

- RCW 7.04A authorizes arbitration
- “Arbitration” v. “Mediation”
- Arbitration is favored by the courts
- Forms of arbitration
- Rules applicable to arbitration
- Appeal from an arbitration decision is very limited

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## Questions and Conclusion

- What did you want to know but did not find out?
- What is the most significant thing you learned from “Contracts In Crisis”?
- Thanks, and Best Wishes

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