CONTRACTOR'S POCKET GUIDE

THIRD EDITION

WAGONHEIM LAW

Redefining what a law firm should be.

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WAGONHEIM LAW DIFFERENCE

Wagonheim Law is redefining what a law firm should be. As entrepreneurs ourselves, we're in the business of developing innovative programs and services that put our expertise at your fingertips while looking out for your company's bottom line. From eliminating billable hours with our innovative Empty Hourglass Program to providing an accessible library of resources for clients and associates, we offer the trusted counsel and representation you need to take your business to the next level. Serving companies across a variety of industries—from promising start-ups to established corporations—Wagonheim Law is committed to making businesses stronger, more secure, and more profitable. Your business is one of your most-valued assets.

We believe your law firm should be, too.

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WAGONHEIM LAW

Construction is a tough business.

The companies that thrive are those which can combine excellence in their field with a working knowledge of contracts, cash flow, and the management of receivables. Construction contracts, and the laws by which they are enforced, are complicated – often using terms that are unfamiliar to the average person and written in such a way as to hide huge risks within convoluted run-on sentences.

Throughout the almost 25 years I have spent practicing construction law, I could not help but notice that clients would often come to me long after their best opportunity to help themselves had passed them by. Maybe they signed a contract they should not have signed. Perhaps they allowed payment talks to drag on past the expiration of their right to file a mechanic's lien. Or maybe they found themselves roped into a contract long after they had assumed the project was dead in the water.

This Pocket Guide is intended to help companies spot key issues and make their best moves to stop problems before they arise. In construction, perhaps more than in any other industry, an ounce of prevention is worth well more than a pound of cure.

Good luck.

Eliot M. Wagonheim

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INTRODUCING WAGONHEIM LAW'S NEW EMPTY HOURGLASS PROGRAM.

The largest obstacle to a clear line of communication is the prospect of being nickel and dimed to death under a billable hour system. As a result, many times, clients simply choose not to call.

And the cost of that reluctance is enormous as without the proper guidance small issues can quickly blow blossom into big problems. Every day, clients call us for guidance on virtually every issue facing their businesses. Here are just a few examples:

- "We're bringing on a new partner/member/shareholder."
- "Can I fire this employee?"
- "How should I handle this employee issue?"
- "Can you help us collect money we're owed?"
- "We're being sued."
- "We're buying a company."
- "We'd like to position our company for sale."
- "We need help with our succession planning."
- "Can you prepare our year-end resolutions?"

With all that, my concern is about the calls we're not getting. I suspect we're not being used as a resource by front-line personnel such as A/R clerks, on-site project managers, or supervisors, perhaps because they lack the authority to start the lawyer's meter running. So we both lose out. Our firm loses the chance to deepen a relationship; and our client loses an opportunity for advice often when it would be most effective – before the problem actually arises.

There are 1,400 minutes in a day. And we're probably the only law firm that has stopped counting them.

Scan here to find out more about our Empty Hourglass Program.

OUR APPROACH

We can't say "we value relationships" unless we've built our business model around proving it. Wagonheim Law offers a wide variety of flat fee and blended options, but our flagship program is EHP. EHP eliminates the roadblock to client communication by taking the billable hour out of the equation. For less than the amount many attorneys charge for an hour of their time, a client can gain unlimited access to our attorneys for an entire month.

The list of services for each plan is set forth in the chart below:

	EHP	EHP Plus
Unlimited phone calls	√	√
Unlimited e-mails and correspondence	√	√
Unlimited demand letters	√	√
Annual , unlimited good standing review	√	√
1 monthly contract review and analysis	√	√
Free copies of Pocket Guides and publications	√	√
Free WL mobile applications with updates	√	√
Reduced fees for seminars and workshops	√	√
3 monthly contractual reviews and analyses		√
Free Mechanic's Lien Notices		√
Annual updated corporate minutes		√
Annual audit response letter		√
Monthly in-person conference		√
Contingency fee for District Court collection matters		√
5% reduction of all WL hourly rates		√

SO HOW DOES IT WORK?

Clients pay month-to-month for each plan -- $350 for EHP and $550 for EHP Plus through automatic ACH deposits. They can cancel at any time, no questions asked. We also offer the option of signing up for one full year. We offer the following incentives for annual sign-ups:

1. As part of the plan, we will revise a client's contracts used in their businesses for free; and
2. We will donate 100% of the client's 12th monthly fee to the charity of the client's choice.

FOR MORE INFORMATION, PLEASE VISIT OUR WEBSITE AT WWW.WAGONHEIM.COM

THE TERMS YOU SHOULD INCLUDE IN EVERY CONTRACT

THE TERMS YOU SHOULD INCLUDE IN EVERY CONTRACT

Regardless of whether you conduct business using 50 page AIA contracts or purchase orders and faxed confirmations, there are certain key terms you should always include in a writing signed by the other side:

- Detailed scope of work. Failure to adequately document the full scope of work is one of the primary causes of construction disputes. Often, each side assumes that the other is responsible for a given line item. Care should be taken at the outset of the process to ensure that what you assume your scope of work to be is actually fully explained so that an objective third party would agree with you upon reading the words on the page.
- The person bearing payment responsibility. There is a big difference between DEF Development Company, Inc. and DEF Development Company Limited Partnership or DEF Development Company, LLC. Make sure you know the person or entity contractually obligated to render payment so that, if push comes to shove, you will be able to enforce your contract and get paid.
- Payment amount. This one seems easy. There is no ambiguity in a dollar sign followed by a number. A significant number of construction contracts, however, are not simply lump sum contracts. Many contain pricing for "alternative adds" and different rules for the pricing of change orders. However pricing is determined in your contract, it is important not only that you understand it, but that an objective party reading the contract would come to agree with you.

- When payment is due. To the extent possible, you should be in complete control of when payment is actually due. In other words, the due date for payment should hinge upon your performance, rather than the performance of other trades or the completion of the contract as a whole.
- Collection rights. Your contracts should always provide for the recoupment of attorney's fees and interest in the event payment is not made when due.
- Deadlines for performance. Whenever possible, do not sacrifice control over the construction schedule. In addition, your contracts should contain objective deadlines, rather than variable dates such as "ten days after the achievement of substantial completion." Substantial completion, in this example, can change. The better practice is to include hard dates or trigger event within your control.
- Warranty limitations. Your contract should be absolutely clear as to what your warranty covers and when it expires. Moreover, it should expressly state that work performed on your equipment or other areas under warranty by anyone other than your company will void the warranty.
- Risk of loss. You should no longer bear the risk of loss once you install equipment and/or lose control of your work area. This is especially true if other trades will be working in your area and have potential to damage installed work.

- Dispute resolution. Many companies opt for arbitration because they think it is cheaper than proceeding to court ("litigation"). This far from a universal truth. If you elect arbitration as a dispute resolution mechanism, you should consider carving out an exception for claims below $30,000 (the District Court jurisdictional limit) as claims in District Court will invariably be less expensive than any other alternative. Your contract should also include a jury trial waiver.

These terms can be included in contracts of varying size and complexity. At the very least, however, a faxed confirmation of the arrangement, containing all material terms and countersigned by the other side's authorized representative should be insisted upon as standard operating procedure.

WHAT TO LOOK FOR IN THE OTHER GUY'S CONTRACT

OVERVIEW

Construction is a contract-dependent industry. Many contractors do not have the luxury of using their own contracts…so they have to evaluate and sign a contract drafted by someone else. Unfortunately, too many contractors sign contracts without a complete understanding of what it is they're signing. What's more, signing the wrong contract, or failing to negotiate key (but often misunderstood) terms, can break a company and undo years or even decades of profits and hard work.

If there comes a time when you spot one or more of these company-breaking issues in the written contract, get good advice and change it.

"DON'T WORRY ABOUT THAT, WE NEVER ENFORCE IT."

People will tell you anything. Regardless of any verbal assurances you may hear, if a term or condition is not in the contract, it will not be there when you need it. Similarly, assurances that certain contractual terms will ***not*** be enforced are worthless unless they are in writing and signed by the person making the promise. The unfortunate fact is: ***Construction companies live and die by the written word.***

While not a substitute for a legal evaluation to any specific contract, the following pages are intended to help companies spot the issues and navigate the dangers presented by signing the other guy's contract.

BEFORE YOU SIGN SOMEONE ELSE'S CONTRACT…

Most construction companies do not have the luxury of insisting on the use of their own contracts. Instead, they are forced to review and negotiate terms presented to them in the other party's contract.

Before signing the other guy's contract, it is imperative that you STOP & LOOK *each and every time*.

STOP & LOOK

Scope of work. Are you comfortable with the scope of work described in the contract? In order to know for sure, and before signing the agreement, you must review not only the narrative description, but also every specification division and section referenced in the narrative. Too many companies find themselves in agreement with the description, but completely unprepared to complete the entire specification section referenced by the contract. Remember, if it's in writing, it is a part of the contract. Remove or modify any written term with which you do not completely agree.

One of the larger pitfalls concerns the conflict between specifications and a narrative description of the scope of work which may appear in the contract. If the scope of work references or incorporates a specification section, you must assume that you are responsible for everything in that section ***unless you specifically exclude it in writing.***

The flip side of the coin is that many contractors assume that whatever is in their bid is part of the contract. This is usually not the case. Unless your bid is specifically incorporated into the contract as a Contract Document, the bid will be completely superseded by the executed contract – just as if the bid never existed.

sTOP & LOOK

Time of completion. Know the scheduling. What are the deadlines in the contract for substantial completion, Use & Occupancy, or final completion? Are they reasonable? Can you meet the requirements with available resources, with some "fat" built in for delays beyond your control? Are there liquidated damages assessed for each passing day on which a certain deadline is not met? These questions must be answered before you agree to the project.

To the extent possible, make sure the schedule is tied to an objective event or date. A term stating that "work must begin within 10 days of the issuance of a Notice to Proceed" could require you to start weeks or months later than you had projected. A better term would be "work must begin within 10 days of the issuance of a Notice to Proceed, ***but in no case later than X date."*** Similarly, the completion of the contract should be tied to objective standards like the issuance of a U&O or to meeting the requirements in the plans and specifications. Under no circumstances should a project only be concluded ***upon the satisfaction of the Owner.***

There are few more subjective terms than "satisfaction." If the satisfaction of the owner or higher-tier contractor determines whether payment will be made, odds are you can forget receiving 100% payment. More to the point…in a cash-strapped project…you will have to fight for every penny you receive under such a contract because people in a cash crunch are never "satisfied."

STOP & LOOK

Other documents. Construction contracts almost always incorporate other documents by reference. These documents may include drawings, specifications, General Conditions, and the Prime Contract between the Owner and the General Contractor. While it may be a pipe dream to think that one could review all of the documents in detail for every project, you should be aware that documents you have not reviewed could be part of your contract. So, take extra care to ensure that any terms you really care about (pricing, warranties, etc.) are specifically written in your agreement.

One strategy is to make sure that the important terms and documents are specifically identified as "controlling" in the event of a conflict. Let's say that your subcontract specifically states that there will be no liquidated damages assessed on the project. Unfortunately for the general contractor, however, the Prime Contract provides for liquidated damages of $1,000 per day. If your contract also provides that your contract will control in the event of a conflict between the Contract Documents, you will not be liable for liquidated damages. When you have not reviewed all of the documents listed as Contract Documents, make sure the ones you care about will determine in the event of a conflict.

STOP & LOOK

Payment. Payment is where the rubber meets the road. Do not lose sight of the key payment terms even while you are reviewing the scope of work and scheduling provisions. Every contract should satisfy you as to:

(1) how much will you be paid – does the amount or calculation match your understanding?
(2) when will you be paid – is it after you complete your work, after the entire project is completed, or after the higher-tier contractor received its payment?
(3) what happens if you are not paid – are you entitled to interest and/or attorney's fees for pursuing payment rightfully due you?
(4) by whom are you supposed to be paid – can you trust that party to uphold its end of the bargain?

Of all these terms, the final one is the most overlooked. Who is responsible for paying you? Many owners create new partnerships or LLC's for every project. The LLC's never existed until the project came along. Consequently, there is no credit history and no assets to go after if things go wrong. This is one of the biggest business risks a contractor takes.

Consider adding a deposit, obtaining an additional party to sign as a guarantee of payment, or negotiating an advantageous payment schedule to insulate you from any undue risk. If you are not very familiar with the other side, find someone you trust in the industry who is. Look for credit references and use the connections provided your trade associations for assistance.

STOP & LOOK

Liabilities. What is the extent of your liability if something goes wrong? Usually, the answer can be found in the dense wording that typically characterizes a contractual indemnification provision. While the legalese can sometimes be mind-numbing, it is exceeding important that you understand the risks imposed upon your company by this provision. You should know that indemnification provisions are written as broadly as possible. This means that the wording of a typical provision will enable the other side will be able to impose virtually unlimited liability on you for a host of reasons including some which may have been beyond your control.

Spend some time reviewing the indemnification provision to ensure that you can only be held responsible for a loss that you caused ***to the extent that you caused it.*** Under no circumstances should you be held responsible for other contractor's acts or omissions.

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STOP & LOOK

Other obligations. Your first obligation may be to turn over a finished product. But it may be secondary or tertiary obligations that mean the difference between getting paid and not. Pay attention to your obligations to provide notices, reports, drawing, lien releases, and other documentation as a condition precedent to the release of final payment.

We frequently recommend that our clients look over the contract and physically highlight the word "notice" any time it appears. Notice provisions often impose tight time deadlines on the provision of written notice at the risk of waiving or nullifying significant claims.

Bottom line, in addition to understanding what your final product should be, know the other obligations which could determine, in and of themselves, whether or not you have a successful project.

STOP & LOOK

Outside factors. You have enough to worry about controlling your own forces, equipment, material, and work product. Many construction contracts, however, impose additional risks that come with your reliance upon the performance of others. To the extent possible, you should work to eliminate those outside factors from controlling whether or not you get paid. Make sure your understand how the contract you are considering signing addresses the following circumstances:

- Damage to your installed work product or equipment by other trades beyond your control.
- Late arrival of materials ordered or controlled by others.
- Defective work performed by trades preceding you on the jobsite.
- Delays caused by other trades.

In each case, you should ensure that you will receive compensation and deadline extensions necessary to address problems beyond your control. More importantly, you should make sure that you are not placed in a position of indemnifying the owner or third party for someone else's problems.

STOP &LOOK

Keep it simple. Earlier in this Pocket Guide I suggested that companies physically highlight the word "notice" each time it appears in a written contract. One of the reasons is that, wherever possible, you should work to reduce your obligations to provide written notice at the risk of losing rights.

Construction is hard enough without the additional administrative responsibilities imposed by many contracts. When negotiating your contract, work at the front end to limit the amount of written reports, notices, verification, and documentation your personnel has to provide throughout the contract. After all, few construction companies can afford to staff a trailer with a full time administrative assistant.

WHAT YOU SHOULD KNOW ABOUT...
BIDS AND BID PROTESTS.

BIDS

THE BID IS NOT PART OF THE CONTRACT

If the bid is not specifically "**incorporated by reference**" into the contract or attached as an exhibit and expressly listed as one of the **Contract Documents**, it disappears as soon as the contract is signed. Make sure any significant terms from the bid – scope of work exclusions, warranty information, pricing, etc. – are built into the contract.

EXPIRATION DATE

Every bid you submit should have an expiration date. Many companies have found themselves tied to pricing and performance obligations long after they had committed resources elsewhere assuming the project was dead. In the interim, labor and supply costs have gone up, meaning a significant loss on the job even if everything were to go perfectly. Bottom line: Build in an expiration date that leaves enough time for your bid to be evaluated, but does not tie your company to a commitment it will be unable to keep.

BID PROTESTS

Bid protests primarily focus upon a successful bidder's failure to adhere to applicable regulations governing the submission or content of bids. A bid protest may be based upon allegations that the successful bidder submitted an "unbalanced" bid or a bid which improperly calculated minority participation. Another basis for a bid protest is that the successful bidder failed to include all of the materials required for an award.

Deadlines for the submission of bid protests will depend upon the contracting environment and the applicable statutes or regulations. Regardless of whether the protest takes place in a federal or state contracting environment, the deadline for the submission of bids is normally extremely tight -- usually no more than 10 business days.

If you believe that your company has a basis for filing a bid protest, it is imperative that you document and submit your written bid protest ***immediately***. Any delay could very well invalidate your protest regardless of the merits.

WHAT YOU SHOULD KNOW ABOUT ...
SPECIFIC CONTRACTUAL TERMS

BIM

The term "BIM" stands for Building Information Modeling and is defined as the process of generating and managing building data during its lifecycle. BIM projects typically use three dimensional building modeling software to increase productivity and efficiency in building design and construction. Proponents claim that it offers increased speed of delivery, reduced costs through efficiency, and increased coordination of construction documents.

CHANGES ON THE JOB

Changes during the project are seldom documented as neatly as standard AIA documents would portray. According to the AIA contracts and most other standardized agreements, a change to the original scope of work will be documented, as to price, time, and work, in a **Change Order** signed by the architect, upper-tier contractor or owner, and the contractor performing the work. Projects simply do not run like that in the real world.

In the real world, a contractor will receive an order to modify the original scope of work without time to draft the appropriate Request for Change Order and solicit the proper signatures – the work has to be done NOW! In these situations, every contractor should employ four of the most powerful words in the English language:

This is to confirm…

Absent the luxury of waiting for the paperwork to catch up with directives from the Owner or upper-tier contractor, a contractor should **ALWAYS** send out a letter, via facsimile and first class mail, confirming the instructions – including a description of the revised scope of work, timing, and (if possible) payment terms. The letter should display the fax number to which it

was sent and should conclude by advising that the contractor will perform in accordance with the terms in the letter unless advised in writing (by some immediate, specified deadline).

In any case, the contractor should always pay close attention to how each contract deals with the issue of changes on the job. Can unilateral changes be enforced? How will pricing be set? What input will each party have as to scheduling? These terms must be understood before the project gets underway and pressure comes to bear for an immediate decision.

CLAIM

Whenever a contractor believes it is entitled to extra money or time, it can be said to have a "claim." The key question is what the contractor is going to do with it. If the contractor wants to pursue it, care should be taken to comply with all claim notice provisions in the contract. Most contracts provide that the failure to file a written claim (or at least provide some written notice of the triggering event) will cause the contractor to lose the right to pursue it. So when in doubt, put it in writing.

CONSEQUENTIAL DAMAGES

Consequential damages are damages that arise as a consequence of some triggering event. An example might be a retail store's lost profits resulting from a delay in opening for business. The lost profits would be consequential damages.A contract which provides for the recovers of consequential damages opens the door to some very significant exposure – especially if consequential damages are referenced in the indemnification provision. Delete or specifically exclude references to consequential damages whenever possible.

CONTRACT DOCUMENTS

Most contractors have never seen all of the items listed as "Contract Documents." In many cases, the "Prime Contract" between an Owner and a General Contractor is made a part of every Subcontract…and subcontractors rarely, if ever, know what it says. The Prime Contract could contain provisions for liquidated damages, mandatory arbitration, mechanic's lien waivers (not valid in MD, but enforceable in some states, and a host of other material terms. Bottom line: know your Contract Documents.

DISPUTE RESOLUTION

Arbitration, rather than "**litigation**" (filing suit in court) is the preferred way of resolving claims and disputes in the construction industry. A ruling from an arbitrator is just as binding as a verdict handed down by a judge in court, but that's where the similarity ends. Arbitration takes place before a person or panel chosen by the parties in the dispute. The arbitrators are experienced in the industry and generally knowledgeable about the subject matter of the dispute. The proceeding is not nearly as formal as that of a court trial and the arbitrator is not necessarily bound by state law in reaching his/her decision. While often less expensive than litigation for larger claims, arbitration can be a lot more expensive than a District Court claim (claims less than $25,000). We often recommend that mandatory arbitration provisions "carve out" or make an exception for claims less than $25,000 so that they can be tried, faster and less expensively, in District Court.

Many dispute resolution provisions also require "mediation" before either arbitration or litigation. **Mediation** is a non-binding, informal procedure in which the parties to the dispute meet with a trained mediator to discuss and work through

their issues. A skilled mediator can be incredibly effective in guiding the parties to reasonable (and sometimes creative) ways of resolving their differences.

EXTRA WORK ITEMS/CHANGES IN THE WORK

Few projects proceed exactly as laid out in the drawings and specifications. For this reason, most every construction contract not only provides for **Change Orders** (documents signed by all necessary parties as to work, pricing and/or time), but also extra work items assigned by the owner, general contractor, or higher tier subcontractor. Regardless of form, all instructions to perform work beyond what is stated in the contract **must be in writing**. If, as often happens, the paperwork lags behind the construction schedule, the contractor performing the work should always follow up with a "this is to confirm" letter.

FINAL PAYMENT

Many final payment provisions make payment to the subcontractor contingent upon the general contractor's receipt of final payment from the owner. Much like pay-when-paid provisions (discussed later), these provisions could, if not properly drafted, force a substantial delay in payment to the subcontractor due to a backcharge assessed by the owner against the general contractor for issues completely unrelated to the subcontractor's work. The subcontractor will want to limit final payment provisions to refer specifically to its own scope of work.

INDEMNIFICATION

Indemnification is not only one of the most overlooked contractual provisions, but it is also one of the most dangerous. In its most basic sense, an indemnification provision spells out the occasions on which one company will serve as the other's insurance company. As a consequence, it is imperative that contractors limit any indemnification provisions to the greatest extent possible.

A broad indemnification provision will often require that a contractor provide indemnification from any and all damages arising out of its work ***or in connection therewith***. Inasmuch as all of the work being conducted on this project is "connected to" the contractor's work, the provision is far too broad. Care should be taken to limit the scope of these types of provisions as they could single-handedly turn a profitable job into a financial disaster.

LEED

Leadership in Energy and Environmental Design is a green building certification system which features third party verification that a project was designed and built using strategies to result in energy savings, water savings, a lower carbon emissions footprint, improved indoor environmental quality, and conservation of resources. LEED consists of nine rating systems for the design, construction and operation of buildings, homes, and communities. Certification is granted by the Green Building Certification Institute which is responsible for verification of project compliance with LEED requirements. In addition to incentives provided by the federal government, state and local governments as well as many school districts have adopted LEED initiatives and incentives which can be found online.

LIQUIDATED DAMAGES

A liquidated damages provision will provide that charges will be assessed against the contractor for each day the contractor has failed to reach a certain completion milestone beyond a certain deadline. Amounts vary and often range anywhere from $100 per day to several thousand. Regardless of the amount, liquidated damages add up quickly and should be avoided, pared down, or limited in scope to the extent possible.

NOTICE

Notice provisions (and there are many of them) have the dual hazards of: (1) possibly eliminating claims; and (2) making the average person's eyes glaze over. Most contracts contain strict limitations on what kinds of notice (for items such as differing or unforeseen site conditions, delay claims, specification errors, or extra work items) are required and deadlines as to timing. This is one of the first items in a fairly short list that must be reviewed with project managers for each contract under their supervision ***before they set foot in the trailer.***

PAY WHEN PAID/PAY IF PAID

Pay-when-paid or pay-if-paid are generally enforceable in Maryland and basically provide that a subcontractor will not receive payment unless or until the owner pays the general contractor. These provisions are dangerous to a subcontractor and essential to a general contractor. A subcontractor will want to eliminate them (if possible), while a general contractor would insist on keeping them to avoid having to subsidize the owner's project.

There are two primary options in these types of clauses: (1) the subcontractor's payment would be contingent upon receipt by the general contractor of payment from the owner *for the subcontractor's work*; and (2) the receipt of payment from the owner is for all work, and is not specifically limited to the subcontractor's work. The second option is normally also used in Final Payment provisions. The difference between these two options is that under option number 2, the general contractor may attempt to withhold payment from the subcontractor if it was backcharged for issues unrelated to the subcontractor's work.

PERSONAL GUARANTEE

It may be rare, but some construction contracts seek a personal guarantee from the contractor's owner or president. Such guarantees are to be given at your own peril. In fact, while there are very few blanket statements in law, we can say that we have **never** recommended that a client sign a contract with a personal guarantee.

Construction is a tough business; and construction projects are comprised of a lot of moving parts. There is virtually no limit to the number of ways a project can head south. When this occurs with a personal guarantee on the line, decades of long hours and meticulous work can be wiped out in the blink of an eye.

PROGRESS PAYMENTS

These are payments paid at certain specific points during the project, as specified in the contract. Make sure you agree with (and have a degree of control over the timing of) the designated trigger events – whether they are the issuance of permits, the completion of inspections, or the performance of certain percentages of the scope of work.

RISK OF LOSS

Imagine a situation in which the washing machines you installed in each unit of a large condominium project were dented by the painters who used them as stepping stools to reach spots on the ceiling. If you did not pay attention to the risk of loss provisions in your contract, you may be forced to absorb the cost of replacing this equipment even though it was damaged by another trade. This is especially true if the other trade does not have the financial resources to replace the equipment.

Risk of loss means precisely what it says -- which company will be held liable in the event there is any damage or loss to material, work product, or equipment? It is imperative that you understand the circumstances addressed by the contract and agree with the outcome."

TERMINATION

Those provisions which concern the conditions under which the contract may be terminated deserve special attention. Many contracts contain what is known as a "termination for convenience" provision which enables the higher-tier contractor to terminate the contract without cause, virtually for any reason whatsoever. Care should be taken to understand and, if necessary, modify the amount of payment that will be rendered to a contractor terminated for convenience, as well as the deadline by which payment must be received.

Other termination provisions – those which concern the failure of a contractor to perform adequately – should also be examined. A general contractor or higher-tier contractor will want maximum flexibility, while a subcontractor should insist upon written notice ***and an opportunity to cure the deficiency.***

WARRANTY

The terms of your warranty should never be left to chance. Whether you are disclaiming any warranty or offer an extended period of coverage, make sure your precise terms are expressly stated in the contract. Many contracts provide that the warranty required by the Prime Contract will be incorporated into each subcontract. Subcontractors should not allow this incorporation, but instead should insert a provision specific to their company and trade. Failure to do so could break the bank sometime down the road.

WHAT YOU SHOULD KNOW ABOUT...
BONDING

WHAT IS A SURETY BOND?

In the simplest terms, a surety bond is a guarantee. There are several different types of bonds widely used in construction. The three primary types are bid bonds, performance bonds, and payment bonds. What the bond guarantees varies depending on the language of the bond. **For the principal, bonds are a form of credit, not insurance.**

HOW DO SURETY BONDS WORK?

The principal (you) pays a percentage of the bond amount called a bond premium. In return, the surety extends "surety credit" to make the required guarantee (the bond). A claim can arise when the principal does not abide by the terms of the bond. In the event of a claim, the surety will investigate to ensure it is valid. If the claim is valid, the surety will look to the principal for payment of the claim and any associated legal fees.

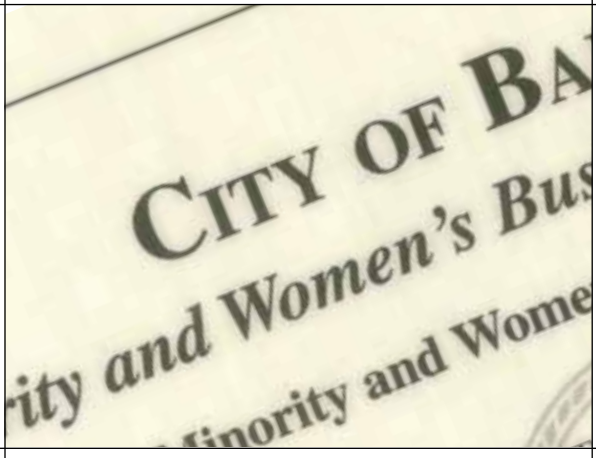
WHO IS THE OBLIGEE?

The obligee is whoever is requiring the bond of you. You are not the obigee. For example, the obligee for a contractor would be the company for which it is performing the work.

HOW MUCH DO SURETY BONDS COST?

Bond premiums vary greatly depending on the applicant, the bond type, surety, and the obligee. Just like other forms of credit, everyone does not receive the same rate. Standard market rates are typically anywhere from 1-3%, while higher risk markets can range anywhere from 5-20% of the bond amount.

WHAT YOU SHOULD KNOW ABOUT...
MBE, SDB AND WBE CERTIFICATION



OVERVIEW

MBE (Minority Business Enterprise), SDB (Small Disadvantaged Business) and WBE (Woman-Owned Business Enterprise) are business classifications used to provide avenues for smaller businesses to secure work on federal, state, and local projects. Classifications used and certification qualifications differ, depending upon whether the inquiry is being made at the local, state or federal level.

Typically, in order to obtain certification, a business must be at least 51% owned by one or more persons defined as belonging to a minority or a disadvantaged class. While definitions differ depending upon the level of government, such persons are usually defined as members of a socially or economically disadvantaged minority group, including African-Americans, Hispanics, Native Americans, Asians, Women and the Physically or Mentally Disabled.

WHAT CERTIFICATIONS ARE AVAILABLE?

Minority certifications can be obtained on the federal, state, and city levels in Maryland. Certifications offered are: the federal 8a certification, the federal SBD, the state MBE/WBE certification, the state SBD certification, and the Baltimore City Minority certification. Each certification has different criteria set by those levels of government.

WHAT ARE THE BENEFITS OF OBTAINING CERTIFICATION?

Opportunity and the potential for growth are the two main benefits. Many public and private projects incorporate goals or quotas for MBE, WBE, and/or SBD participation. Certified companies often have an advantage over their non-certified competitors as general contractors, developers, and prime subcontractors, in addition to governmental agencies, actively seek certified companies to work on a wide variety of projects.

FOR FURTHER INFORMATION...

Baltimore City:
Office of Minority and Women-Owned
Business Development
(410) 396-3818
MOMBD@baltimorecity.gov

State of Maryland:
Maryland Department of Transportation
Office of Minority Business Enterprise
(800) 544-6056 or (410) 856-1269.
www.mdot.state.md.us/MBE_Program

Federal government:
www.sba.gov

Small Business Resource Center:
www.sbrc-baltimore.com

WHAT YOU SHOULD KNOW ABOUT …
8(A) CERTIFICATION

The Small Business Administration's 8(a) Program was created in 1974 to help minority and other disadvantaged businesses to grow through a program of federal contracting preferences and set-asides. Through the program, eligible firms can be awarded federal government contracts on a sole-source or non-competitive basis. In addition, qualifying firms will also be eligible for participation in limited competitions where competitors will be other similarly situated companies. The Federal government sets aside over $6 billion in contracts for 8(a) certified firms each year.

New regulations permit 8(a) companies to form beneficial teaming partnerships and allow Federal agencies to streamline the contracting process. New rules make it easier for non-minority firms to participate by proving their social disadvantage. The SBA has also implemented the new Mentor-Protégé Program to allow starting 8(a) companies to learn the ropes from experienced businesses.

The 8(a) Program has become an essential instrument for helping socially and economically disadvantaged entrepreneurs gain access to the economic mainstream of American society. Participation is divided into two phases over nine years: a four-year developmental stage and a five-year transition stage. It is estimated that, in the past fiscal year, almost 6,000 firms participated in the 8(a) Program and were awarded close to $6 billion in Federal contract awards.

There is a wealth of useful (and free) information available on obtaining 8(a) certification from trade associations as well as from organizations such as the Small Business Resource Center.

WHAT YOU SHOULD KNOW ABOUT ...
TEAMING AND JOINT VENTURES

OVERVIEW

"Teaming" is the informal term for two or more companies or individuals who decide to work together towards a common goal. The legal relationship between the participants may be a "teaming agreement" prepared for a specific project or a joint venture agreement through which the partners form a separate, co-owned legal entity.

MBE AND WBE CONSIDERATIONS

Minority Business Enterprises ("MBE's") and Woman-Owned Business Enterprises ("WBE's") frequently form joint ventures with larger so-called "majority" firms. The developer, owner, or majority firm benefits through the use of the smaller company's MBE or WBE status to fulfill governmental or internal minority participation targets.

The MBE or WBE firm benefits by: (1) taking on bigger projects; (2) maximizing their resources; (3) being considered for projects even when a portion of the RFP is beyond their experience; and (4) making themselves known to larger players in their industry.

WHAT TO CONSIDER IN SELECTING A TEAMING OR JOINT VENTURE PARTNER

The two most important factors, by far, in selecting a partner are **integrity** and **financial stability**. Therefore, it is imperative that you do your homework before entering any business arrangement. Ask around. Find out everything you can about your prospective partner's industry reputation, projects, and past partners. Talk to vendors, subcontractors, and higher-tier subcontractors, general contractors, or developers with which the firm has worked in the past. Equally as important, request that the firm provide you with its most recent financial statements. You may have to sign a non-disclosure agreement to get it, but it is essential that you make sure your potential partner can actually support its end of the bargain.

WHAT TO INCLUDE IN A TEAMING OR JOINT VENTURE AGREEMENT

There are many considerations in drafting up a teaming or joint venture agreement. You should consult with a qualified attorney to draft the actual contract. Components of the contract will include:

- A statement of what is being formed – a team or a joint venture;
- An outline of how revenue will flow to the partners;
- Each partner's contributions to the venture;
- A detailed description of each partner's scope of responsibility;
- Management and accounting information;
- Bonding considerations; and,
- Termination and the handling of disputes

WHAT YOU SHOULD KNOW ABOUT …
GETTING PAID

OVERVIEW

Maryland law provides construction contractors with an array of weapons for use in their fight to get paid. Like most aspects of the construction industry, the successful pursuit of payment takes knowledge, time, and skill. The pages which follow are dedicated to those companies determined enough to benefit from the fruits of their labor to understand their rights and fight for their money.

In all but the smallest of claims, consultation with experienced legal counsel, well-versed in construction law, is a must. Very few of the breach-of-contract remedies provided to contractors by Maryland law lend themselves to use by the lay-person. Nevertheless, knowledge of these remedies is, in and of itself, a very powerful tool in the hands of the experienced contractor. This section of our Guide is intended to provide you with that knowledge.

ARBITRATION

(See "Dispute Resolution" on page 23)

BOND CLAIMS

A "bonded project" is one in which a company, often the general contractor, posts a **Payment Bond** to ensure the project owner that everyone will be paid, absent a backcharge. Bonds are required by federal and state statutes on larger publicly owned projects, such as bridges, schools, military installations, etc. Private owners may also elect to require that a bond be posted in order to avoid the prospect of mechanic's liens filed against the project.

To a claimant, a Payment Bond is essentially an insurance policy. A contractor or supplier seeking payment under a bonded contract may file a claim against the payment bond for work performed or materials supplied to the project. The Bonds, themselves, will spell out the specific terms and deadlines for filing a claim, but they most often specify that: (1) payment to the claimant must be 90 days past due; and (2) the bond claim must be filed within one year of the conclusion of the project.

The first step in making a claim for payment under a Payment Bond is obtaining a copy of the Bond, itself. No contractor likes to release its Payment Bond information, so expect a runaround when you ask for it. Bonds on public projects may be obtained from either the company which posted it (called the "**Principal**") or the public institution under a Freedom of Information Act Request – basically a letter on steroids. Persistent written requests to the Principal should also do the trick.

The actual bond claim is made through a detailed letter directed to the insurer (called the "**Surety**") which provides all information relevant to your claim and is delivered in the manner specified in the Bond. With the exception of minimal claims, it is often best to have an attorney prepare and forward the claim.

Should the Surety deny or fail to act on the claim, suit may be filed directly against the Surety.

BREACH OF CONTRACT ACTIONS

The purpose of a contract is to allow each party to enforce the other's obligation to perform. If a company refuses (for any reason) to pay for work or materials as required by the contract, that company is in "breach." The written contract will control whether breach of contract actions are filed in court or in arbitration. In the absence of a written term requiring that disputes (such as an action for non-payment) proceed to arbitration, breach of contract actions are filed in court – Maryland District Court, Circuit Court, or U.S. Federal Court.

In a breach of contract action, the aggrieved party can seek whatever the contract allows. Some contracts will not only allow a claim for the amount of money due for the work or materials, but also interest and attorney's fees incurred in bringing the case.

If filed in court, breach of contract actions can be accompanied by one or more of the other types of claims described in this Guide.

MARYLAND PROMPT PAY STATUTE

(§9-302, ET. SEQ. REAL PROPERTY ART., MD CODE ANN.)

True to its name, the so-called "Maryland Prompt Pay Act" establishes that a contractor or subcontractor who performs work or supplies material under contract shall be entitled to prompt payment of undisputed amounts by the earlier of:

1. Seven days after the passage of contractual deadlines for payment;
2. Thirty days after the day on which the occupancy permit is granted; or
3. Thirty days after the day on which the owner takes possession.

The Act provides for the addition of interest and, if the court determines bad faith exists, attorney's fees to the prevailing party. For this reason, an additional count filed in a breach of contract action citing violation of the Maryland Prompt Pay Statute is recommended, especially in those instances where the contract does not enable the prevailing party to recover interest and attorney's fees.

MARYLAND TRUST FUND STATUTE

(§9-201 REAL PROPERTY ART., MD CODE ANN.)

The Maryland Trust Fund Statute is one of the most powerful collection weapons available to any creditor in any industry under the laws of the State of Maryland. In a nutshell, it enables a contractor owed money to pursue collection – not only against a company, but also against that company's owners, directors, and managing agents ***personally.***

The Statute was enacted in order to protect subcontractors from losses due to improper use of funds by those above them in the food chain. Funds received by a general or upper tier contractor in payment for a subcontractor's work or materials are deemed to be held in trust – much in the same way as an attorney or title company may hold funds in escrow, although the Statute does not require a separate account. If the contractor receiving the trust funds fails to pass them on to the subcontractor, for any reason other than a legitimate backcharge, the contractor as well as its owners, directors, and managing agents may be held personally liable.

In any given set of circumstances, the Statute may also allow a contractor to recover payments due even when the upper tier contractor which received the funds files for bankruptcy. (This is the actual intention of the Statute; although bankruptcy judges in Maryland are inconsistent in their application.)

MECHANIC'S LIEN CLAIMS

(§9-102, ET. SEQ. REAL PROPERTY ART., MD CODE ANN.)

A mechanic's lien is a lien created by state statute to allow a contractor to secure payment for work performed or materials supplied to an improvement on real property. The lien can be attached not only to real estate improvements, but also to certain fixtures and equipment. The importance of a mechanic's lien is that it enables a contractor to reach the owner of a project even in cases where someone in between – be it a general contractor or upper tier contractor – went into bankruptcy or out of business.

Value

In order to file a mechanic's lien, one must adhere to very strict deadlines and conditions. Moreover, not all projects are "lienable." One may not file a mechanic's lien on a public project or on a project encompassing less than fifteen percent (15%) of the value of the property. (This does ***not*** mean that the filing contractor's claim must be equal to 15% of the value of the property, just that the project of which it is a part must meet that threshold.)

Time Deadlines

A **Mechanic's Lien Notice** must be served upon the property owner within **120** days of the last day on which the claimant last performed work on or supplied materials to the project. While the Notice has to meet very specific requirements in order to be found valid, it is not filed in court – it is simply a letter (with attachments) served on the property owner. A contractor's failure to serve a valid Notice on the property owner by the deadline will result in a loss of lien rights. The actual Mechanic's Lien Petition must be filed in the appropriate court within **180** days of the last day on which the claimant last performed work on or supplied materials to the project. Miss the deadline by one day and you miss your right to file the claim.

MECHANIC'S LIEN CLAIMS (CONTINUED)

Type of Project

Commercial

Non-residential projects such as office buildings, restaurants, and retail shops, undertaken for a private developer, are "commercial" and subject to the mechanic's lien statute. Provided the project meets the value threshold and filing deadlines have not expired, a contractor can file a mechanic's lien claim.

Residential

While a mechanic's lien may be filed on residential construction, recovery is much more limited than in commercial projects. A contractor in a residential project may only recover the amount of money which has not already been paid by the owner to the upper-tier contractor. In other words, Maryland law may act to force the owner of a commercial project to pay twice for the same work – once to the upper tier contractor and once to the successful mechanic's lien claimant – but it will not force that same hardship on the owner of residential property.

Public

Public projects are those undertaken for federal, state, or local governments. Examples of public projects are public schools, bridges, and military bases. Public projects are not lienable. Instead, contractors must resort to filing a breach of contract action for non-payment against their upper-tier contractor or filing a bond claim if a bond was posted on the job.

WHAT YOU SHOULD KNOW ABOUT ...
WAGONHEIM LAW

- Wagonheim Law serves as counsel to contractors, subcontractors, owners, and developers throughout the mid-atlantic region, providing guidance on virtually every issue likely to face our clients on a day-to-day basis: bids and bidding procedures, protests, contractual drafting and analysis, problems on the job, pursuit of payment, defense of backcharges, litigation, mediation, and arbitration.

- Wagonheim Law has an excellent track record of success in litigation and dispute resolution, including arbitration, mechanic's lien claims, bond claims, breach of contract actions, mediation, delay and scheduling claims, and general litigation.

- Wagonheim Law is a full service commercial and construction law firm, advising our clients on general business issues including succession planning, contractual formation, mergers & acquisition, stockholder issues, employment, collection, and general litigation.

- Wagonheim Law is a business law firm rated "AV" (excellent to pre-eminent) by Martindale-Hubbell, the country's most prominent and respected law firm rating service.

- Wagonheim Law is the only law firm to feature the "Empty Hourglass Program™" allowing a free flow of communication and advice between our firm and our clients without charging by the billable hour and ***without our clients ever seeing a bill***.

Scan here to read Eliot's Bio

Eliot M. Wagonheim

ewagonheim@wagonheim.com

- Admitted to practice in MD and PA
- Selected as one of SmartCEO's *Legal Elite* in 2010 as one of Baltimore's "Go To" attorneys.
- Published author of The Art of Getting Paid as well as countless articles on construction law and general business topics.
- Twenty years experience representing construction contractors, sureties, insurance carriers, and commercial clients in both litigation and arbitration
- Extensive experience in jury and bench trials before State and Federal courts, as well as in arbitration and mediation under AAA and other organizations
- Representation of clients throughout the construction process from contractual review and drafting through the bidding process to on-the-job damage control and the collection of final payment.
- AV-Rated (excellent to preeminent) by Martindale-Hubbell
- Duke University (1984), B.A.
- University of Maryland School of Law (1987), J.D.

DID YOU KNOW…

Wagonheim Law offers more than just legal services. Our firm is the product of decades of experience, relationships and contacts formed throughout the Maryland business community. Every day, we put our Rolodex® to work for clients and friends of the firm.

How can we help you?

- The purchase or sale of an ownership interest in a company is an excellent opportunity to review your estate planning. Contact us if you'd like a referral to one of our **trusted estate planning advisors.**
- Selecting the type of business entity often has just as much to do with accounting and tax strategies as it does legal protection. Contact us if you'd like a referral to one of our **trusted accounting and tax advisors.**
- One should never sell an interest in a business without appropriate and comprehensive financial planning. Contact us if you'd like a referral to one of our **trusted financial planning advisors.**
- In order to thrive, growing businesses require comprehensive and timely advice from accounting professionals experienced in their particular industry or niche. Contact us if you'd like a referral to one of our **trusted accounting and tax professionals.**

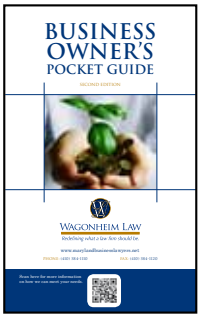
- An experienced commercial banker, knowledgeable about the financial landscape of the company's particular industry is essential to see the company through the long term. Contact us if you'd like a referral to one of our **trusted banking contacts.**

- Growing companies must manage risk. Experienced and creative insurance advisors are essential to this effort. Contact us if you'd like a referral to one of our **trusted insurance advisors.**

- Buying and selling companies requires more than just sound legal advice. The input of an experienced valuation professional can ensure knowledgeable decision-making no matter what side of the table you're on. Contact us if you'd like a referral to one of our **trusted business valuation professionals.**

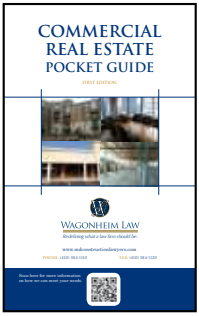
- There are business-oriented accounting firms which have formed departments geared exclusively to the bookkeeping, tax and accounting needs of small businesses. These departments offer lower rates, training, and even data entry services specifically tailored to the needs of companies without in-house accounting expertise. Contact us if you'd like a referral to one of our **trusted small business accounting professionals.**

Wagonheim Law Publications

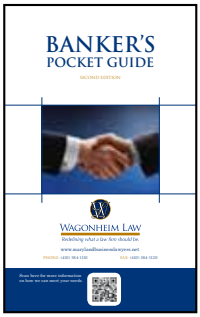


BUSINESS OWNER'S POCKET GUIDE

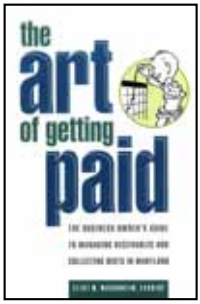
CONTRACTOR'S POCKET GUIDE



COMMERCIAL REAL ESTATE POCKET GUIDE



BANKER'S POCKET GUIDE



THE ART OF GETTING PAID

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