Plumb LAW

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As the seductive offer of a juicy new job calls for you, it's too easy to ignore the words in the contract which come with that voluptuous beauty. Buried by the fine print are the "dirty contract words"—warning signals which surround harsh language that can steal away your rights. From our lawsuit files, here are some of the foulest offenders and what they can really mean to contractors.

"*Incorporate*" adds terms to your contract without physically attaching them to the agreement. Those terms are also like birthday presents from your maiden aunt—you may not like what is wrapped in the box. For example, incorporated language can secretly attach unexpected time limits and procedures to claims. The claims are then lost because the unknown terms were learned too late to follow. Other incorporated terms can cover arbitration, indemnity, audit rights and liquidated damages. In rare cases, incorporations can even supersede the negotiated terms in the contract you think you signed. Read every incorporated document or strike it from the contract.

While the legal meaning of "*consequential damages*" refers to unexpected or indirect losses, their practical impact is more likely to lead to far-fetched defenses and overly expensive litigation. In one case, for example, a contractor had performed tenant fit-up work and was owed about $900,000. The tenant's lawyers stalled the case by arguing that a few weeks' delay cost the tenant a right to a 3 year lease extension and over $1 million in lost profits even though the contractor did not cause the delay or know about the potential lease extension. We think the AIA A201 picks the most sensible approach by forcing both parties to give up their consequential damages rights against each other. Some rarified recoveries will be lost, but they come at too high a price to justify the cost.

"*Condition precedent*" means "you must", and these words are particularly dangerous when used in a payment clause. There, for example, a GC must first receive payment from the owner "as a condition precedent" to the GC's obligation to pay a subcontractor. Mixing those words and some other language can bar a sub's recovery even though more typical "pay when paid" language does not. "Conditions precedent" will also interfere with a GC's payment rights when found in "close-out document" clauses if a sub will not furnish a mandatory release or finish a punchlist item.

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Never shy about expanding exposure to lawsuits, the New Jersey Supreme Court has decided that a company's officers and employees can be personally liable for a corporation's technical violations of a law. While the decision interprets the New Jersey Consumer Fraud Act ("CFA"), one part of that analysis could pave the way for further undercutting the limited liability advantages of corporations and LLC's.

Personal Liability

Corporate officers and employees have always been personally liable for their negligence or other "torts" caused during employment. But, some laws also impose liability without fault. Under the CFA regulations involved in this case, home remodeling contracts and product substitutions must be in writing. Here, a contractor had orally contracted to build a pool's retaining wall and may have substituted a different type of fill for the specified variety without written approval. Later, the wall bulged and cracked. A jury found the contractor at fault for CFA violations and the wall deficiencies, while the court imposed triple damages and counsel fees under the CFA.

The Supreme Court decided that the contractor was automatically liable under the CFA because there was no written contract. The Court then decided that the individuals who engaged in the making of the oral contract could be personally liable regardless whether they caused the actual harm. As the Court stated, a company officer could be liable for the damage if the failure to use a written contract was part of the business's course of conduct. *Allen v. V and A Bros., Inc.*, A-30-10.

Lots of laws will impose liability without fault. For example, a contractor can be liable for another party's attorneys fees expended to discharge a construction lien if the lien filing was not based on a written contract. Courts could use this decision's reasoning to assign those costs to the person who signs the lien even if the signer did not know of this written contract requirement. Or perhaps this decision will be limited to the CFA and "public interest" laws? The Court left the details for the future, so more lawsuits will follow.

Technicalities can be a terrible way to lose a contract. Under a New Jersey DPMC regulation, a firm may not be awarded a contract if the contractor's bid plus its backlog of uncompleted contract work exceeds the firm's aggregate rating. In this case, the court held that a GC's bid had to be rejected because one of the GC's mandatory listed subcontractors had exceeded its aggregate rating. The GC's bid included a quote from an HVAC subcontractor whose aggregate

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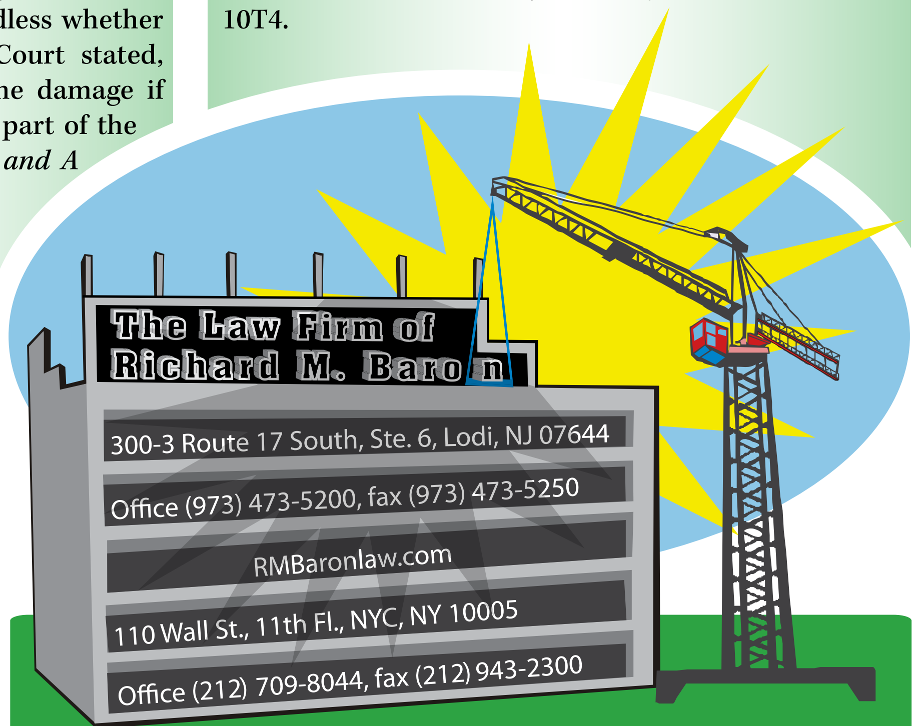
limit was $15,000,000. The sub's quote to the GC was for $7,250,000, and the sub also had uncompleted contract work of over $10,000,000. Since the combination of uncompleted and new, proposed work would exceed the sub's aggregate limit, and the sub must be used by the GC, the GC's bid had to be rejected. Furthermore, the GC could not take advantage of the "85% rule." When a contractor is a single prime, this rule allows the contractor to reduce the calculated value of awarded contracts for each principal trade by 85% of their actual subcontract prices. While the sub might have been within its limit because it had over $4,000,000 worth of subcontract work, the sub did not certify that the work was performed when it was a single prime contractor. So, the 85% rule could not apply. *Brockwell & Carrington Contractors, Inc. v. Kearny Board of Education*, A1806-10T4.



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"*Final and binding*" is a type of decision which means "you're stuck with it." Arbitration decisions should be "final and binding", but some contracts also allow a decision by an owner, GC or architect to have that effect. They can be attacked in court, at your expense, but courts will typically give at least the architect's decision some weight. In the 2007 AIA A201, this language is in section 15.2.5, and it should be heavily modified.

"My choice" is what the other party gets to make when "*absolute discretion*" or "*unilateral election*" are used. For example, if a contract gives a project owner the "absolute discretion" to resequence a project schedule, the project owner will try to claim it can direct a contractor to work inefficiently without paying for the extra cost. The owner may be wrong, but court battles for "loss of efficiency" claims can be costly. The phrase "unilateral election" is typically used when a single party can wholly decide that a legal battle should be in arbitration or court.

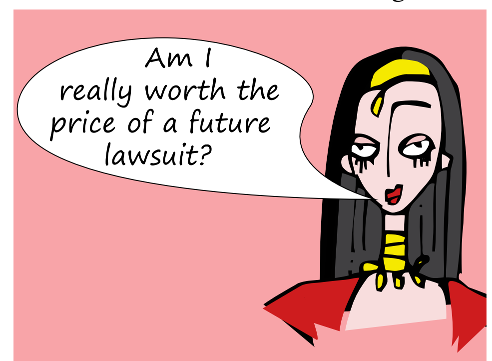
"*Waive*" means good-bye, as in good-bye to your claims, rights and money. Contracts can include language which "waives" almost anything, but pay particular attention when found in clauses governing extra work, delays, changed conditions, time and claims. Waivers of lien rights are usually, but not always, unenforceable in New Jersey and New York.

"*For informational purposes*", "*contractor's convenience*" and "*an accommodation*" boil down to legalized scams. These phrases are typically used when one contracting party is being given information with the understanding that the information is unreliable and may be wrong. That language most often arises when subsurface information is conveyed to a contractor in order to later defeat claims caused by unanticipated field conditions.

Contractors may know that "*indemnify*" means "reimburse", but it is still one of the dirtiest words which a contract can contain. The only time when indemnity can be safely given is if the precise damage is fully covered by your insurance, like property damage which is your fault. But, indemnity clauses can require reimbursements which are not within your insurance or coverage for losses which are not caused by your conduct. Most indemnities should also require the other party to indemnify you for the same kinds of losses which you provide to the other party. Consider this rule: when in doubt, strike it out.

"*Liquidate*" means more than liquidated damages and has nothing to do with liquids. For disputes involving an owner, GC and sub, a sub's right to recover against a GC is limited, or liquidated, to whatever the GC can recover from the owner even if the sub disagrees with the value allowed for its claim. Liquidating agreements can be fair for both parties, but they deserve careful negotiation.

"*Shall be deemed*" or "*acknowledges*" can make you responsible for something you may know nothing about. For example, if you start work without notifying the owner of deficiencies in pre-existing conditions, you "shall be deemed" to consider them satisfactory and you accept responsibility for them. When these words appear, limit them to actually observable conditions or things you do know about. The related word "*represents*" acts like a warranty. If you don't want to warrant something, don't represent it.



Lawyers like to point out that tough contract language can be overcome in litigation when the other party does not act "reasonably", and sometimes, they are right. But like a good vaccine, it is a lot cheaper to prevent problems during contract negotiations than cure the pain those dirty contract words can cause after the work has already started.

New Jersey Public Contracts Database

Beginning on March 1, 2012, a new New Jersey law requires the Division of Local Government Services in the Department of Consumer Affairs to run a free, on-line, searchable database called "Bulletin NJ." Intending to promote competition, the database is supposed to include all bidding opportunities for construction and other contracts offered by local governments and school boards. Unfortunately, the Legislature did not extend this obligation to colleges and universities or to State contracting. The database is also supposed to be updated monthly or sooner if new information becomes available. The law has no teeth, however, because its violation cannot void or "otherwise impact" a valid contract when the proposal had not been listed.

If you don't want to wait, the New Jersey Press Association already has a free on-line database of all public notices published anywhere in New Jersey at www.publicnoticeads.com/nj/. A paid subscription service is also offered.

Public Bidding New York

The legal difference between "responsibility" and "responsiveness" was highlighted by the New York Court of Appeals' rejection of a town's attempt to bypass a lowest bidder based on criteria which were not in the bid documents. The lowest bidder's bid was "responsive." It had met all the town's advertised requirements, like the provision of operating and safety training for its employees. But, the town council was more impressed by the second lowest bidder's "qualitative factors", like a supposedly stronger commitment to worker safety, "professionalism" and the bidder's ownership of lots of spare parts for newer trucks.

The Court threw out the award. The law requires an award to the "lowest responsible bidder", and the lowest bidder was not found to be irresponsible. Instead, the town council essentially tried to award to a "more responsible" bidder by making a decision based on criteria which had not been in the town's bidding proposal. As such, prospective bidders could not evaluate the criteria before bidding. Allowing the town to reject the lowest bidder would then give rise to the appearance of favoritism, corruption and effectively evade the law's requirement to award to the lowest responsible bidder. The Court did say, however, that the owner could reject all bids and readvertise with new criteria rather than award to the lowest bidder. *In the Matter of AAA Carting and Rubbish Removal, Inc. v. Town of Southeast*, 17 N.Y.3d 136.

While a New Jersey court would have likely thrown out the award using a similar analysis, the New Jersey courts are more likely to direct an award to the lowest responsible bidder rather than allow a town to rebid the contract.