



YOUR **50 STATE** PARTNER®

Lions- Shortages & Escalation & Tigers - Collecting Payment & Bears - OSHA OH MY!

Angela M. Richie, Esq.
April 5, 2022



DO YOU SUPPOSE WE'LL MEET
ANY WILD ANIMALS?

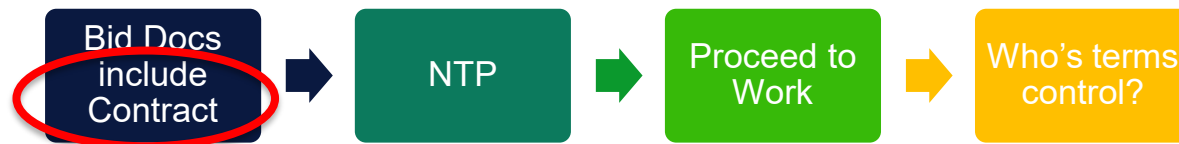
Navigating the Yellow Brick Road

- Lions
 - Key Contract Terms
 - Supply Shortages
 - Material Escalation
- Tigers
 - Getting Paid
 - Lien Waivers
- Bears
 - OSHA Inspections
 - Citations & Contests
 - Injury reporting and drug testing
- If there is time:
 - Communication problems that lead to disputes



When is a Contract Formed?

1. Offer = Bid/Proposal
 1. The invitation to bid is not an offer
2. Acceptance = NTP
 1. Words used
 2. or by "other manifestations of intent having reference to the contract"
 1. Using a bid does NOT = acceptance (w/o more)
3. Consideration (value)
 1. You agree to galvanize
 2. Fabricator agrees to pay
4. Sufficient Specification of Terms
 1. Scope of Work and Price in the Proposal



Proposal Terms

- Key Terms:
 - » Payment Terms
 - Timing of payment
 - Interest if not paid
 - Attorneys' fees for collection of payment
 - » Escalation Costs
 - » Force Majeure



Hot Issues – Labor/Material Shortage & Material/cost Escalation





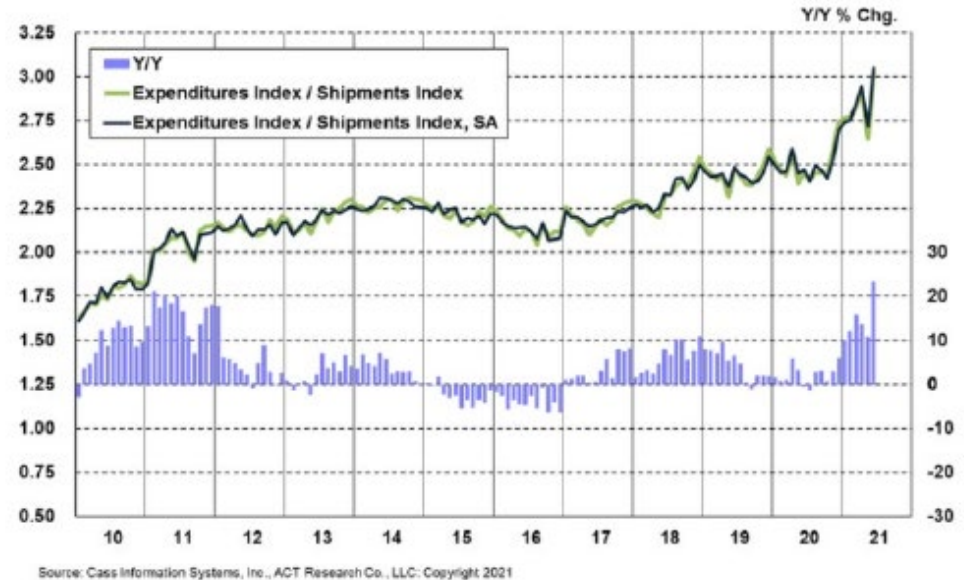
Force Majeure

"The true courage is facing danger when your afraid. "

- 6.2 FORCE MAJEURE. If the performance of the Contract by Seller is interrupted by any cause beyond the reasonable control of Seller, ... Seller shall be excused from the performance of this Contract while and to the extent it is prevented from so performing by any one or more of such causes:
 - (1) labor shortages, ..., or other inability to obtain necessary labor;
 - (2) acts of God, including, but not limited to, epidemic, ...;
 - (3) changes in laws, proclamations, acts, regulations, ...;
 - (4) explosions, accidents...;
 - (5) lack of or failure of or other inability to obtain necessary transportation, supplies, fuel, power, materials, machinery, equipment or facilities, delays caused by other contractors, subcontractors or their subcontractors of any tier, or any materialmen or suppliers.
- Any such delay shall extend the time for completion of the Contract by not less than the duration of the delay.
- Additional costs incurred to complete, repair and/or replace any portion of the work due to a force majeure event shall be compensable to Seller, whether or not a change order for this work has been issued.

Escalation

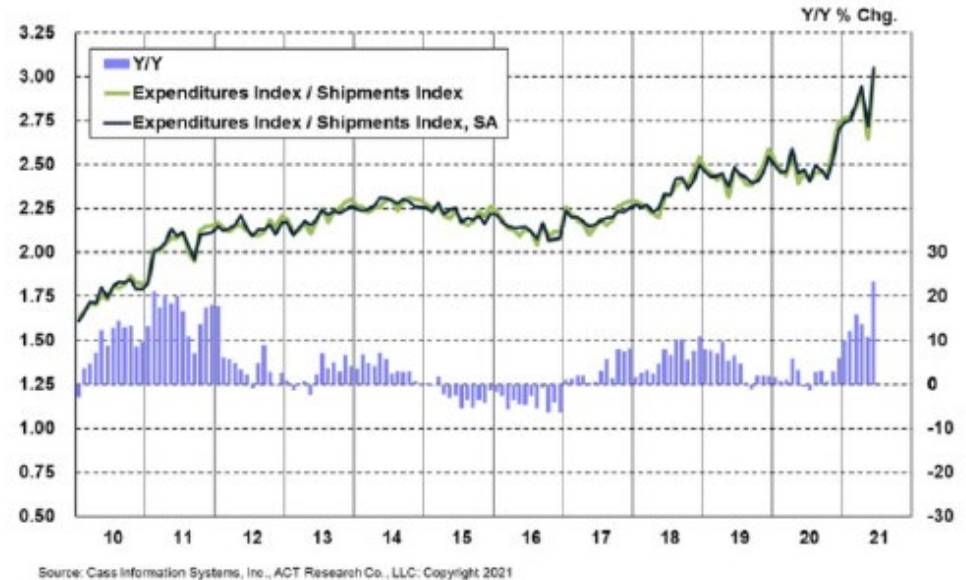
Chart: Cass Implied Freight Rates, January 2009 – June 2021 (01'1990=1.00)



- 7.5 ESCALATION. Seller's Contract Sum (including but not limited to labor, material, transportation prices) are based on current prices at the time of the Proposal.
 - Any significant price increases (meaning a price increase exceeding 10% of the price at time of contracting) in materials, transportation, labor, or other services necessary to perform the Work that occur during the period of time between the date of the Proposal and substantial completion of the Project, shall cause the Contract Sum to be equitably adjusted by an amount reasonably necessary to cover any such increase.

Escalation

Chart: Cass Implied Freight Rates, January 2009 – June 2021 (01'1990=1.00)



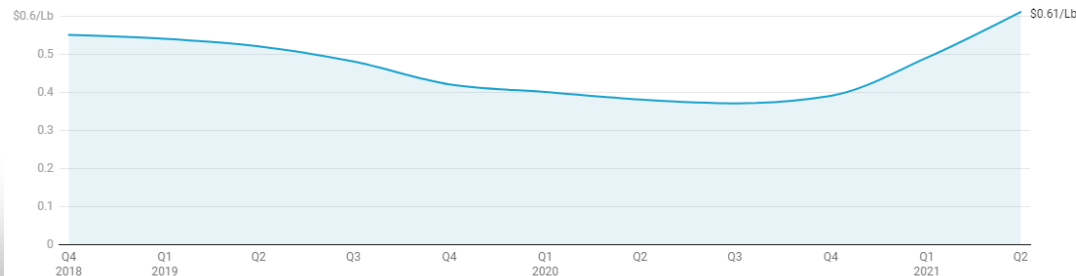
- 7.5 ...Likewise, if the completion of the Work is extended more than six (6) months beyond the anticipated substantial completion for such Work, then the **hourly manufacturing rate shall also be equitably adjusted.**

Other Escalation Arguments

- Commercial Impracticability
 - Great unanticipated costs renders performance impracticable
 - Occurrence of an event which was a basic assumption on which the contract was made
 - Party cannot perform w/o extreme unreasonable expense
 - Party did not assume the risk
- Force Majeure
 - Typically Time only
- Public Work
 - Unanticipated and extreme price increases

Average mill price of A709-50W Plate (\$/Lb)

(1-1/2" thick x 96" wide x 636" long)

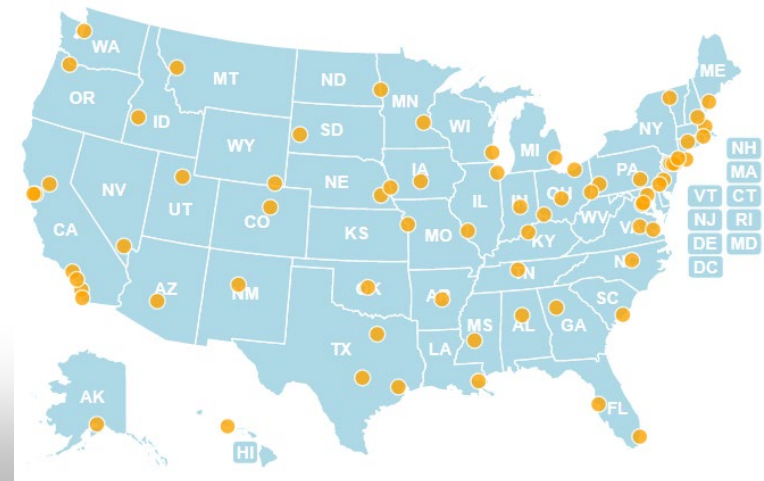


Collecting Payment



Methods Depend on Public v. Private

- Private
 - Issue demands to the Contractor and Owner
 - Liens
 - » Before starting work issue pre-lien notices
 - » During Project – watch lien waivers
 - » During/After - File timely mechanic's liens
 - Time is extended by legit change order work
 - Time is not extended by punch list /warranty work
 - Demand Mediation
 - Proceed with Dispute Resolution



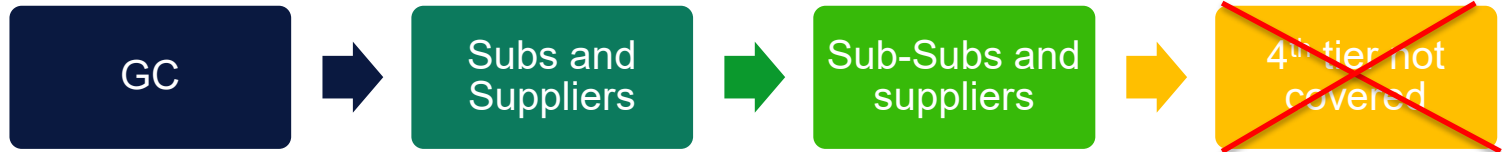
Methods Depend on Public v. Private

- Public
 - Issue demands to the Contractor and Owner
 - Get the bond prior to starting work
 - » During Project – watch claim waivers
 - » During/After - File timely notice of bond claim
 - Demand Mediation
 - Proceed with Dispute Resolution
 - » Consider Liquidating Agreement



Miller Act Payment Bond Deadlines

- Contract > \$100,000 - public building of the United States.
- The parties covered by a Miller Act Payment Bond include:]



- **Notice of Claim on Bond**
 - Not required if contract with GC
 - 2nd and 3rd tier – written Notice of its claim on the Bond to the general contractor within **90-days** of from the date on which it last furnished labor or materials to the project. 40 U.S.C. §3133(b)(2).
 - Notice must state with substantial accuracy:
 - » Amount claimed; and
 - » Name of party Claimant contracted with to furnish labor or materials.
 - Send to general contractor by Registered Mail
- **Enforcement of Claim Against Bond** - The action must be commenced within **1 year** of the last date labor or materials were supplied. 40 U.S.C. §3133(b)(4).

Example Bond Claim

August 16, 2021

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Travelers Casualty & Surety Co. of America
One Tower Square
Hartford, CT 06183

Re: Payment Bond Claim
Bond No.:
Surety:
Principal:
Project:
Claimant: _____

To Whom It May Concern:

Claimant submits this claim for payment pursuant to the Payment Bond referenced above, issued by the Surety on behalf of its Principal. Claimant contracted with the Principal who served as the prime contractor for the Project. Claimant seeks payment of unpaid amounts for structural steel which Claimant fabricated at Principal's request to specific specifications for the Project.

In material breach of the subcontract between Claimant and Principal, Principal refused to pay Claimant for material supplied to, and custom-fabricated for, the Project. Claimant is due \$_____ for the structural steel it fabricated for the Project and **\$310,000.00** for storage fees, with storage costs continuing to accrue.

Please consider this letter Claimant's demand for immediate payment from Travelers pursuant to the Bond. Claimant makes this demand without waiving its right to pursue all remedies available under the contract and applicable laws. Please contact me with any questions regarding this claim.

Best regards,





PROMPT PAYMENT ACTS

YOUR 50 STATE PARTNER®



FEDERAL PROMPT PAYMENT ACT (31USC § 3902)

A banner for the Financial Management Service, a bureau of the United States Department of the Treasury. The background is dark blue with a faint image of the Statue of Liberty and a US dollar bill. The text is in white and yellow.

FINANCIAL MANAGEMENT SERVICE
A Bureau of the United States Department of the Treasury
fms.treas.gov

- Interest on unpaid amounts
- Rates change
- Use the calculator
 - <http://www.fms.treas.gov/prompt/ppinterest.html>

Always Check Your State's Prompt Payment Statutes

- What are the differences between public vs. private projects?
- What is the deadline for Owner to pay GC?
 - Deadline for GC to pay sub?
 - Sub to pay sub?
 - If silent, what would deadline be?



Always Check Your State's Prompt Payment Statutes

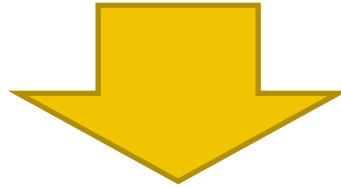
- Check for:
 - Does statute speak to attorneys' fees?
 - Does statute speak to retainage?
 - Interest? Notice issues?
- Know and understand these statutes and deadlines
- Failure to understand can cost you money!



Owner's Release of Retainage

- What does your Prompt Payment Statute require re: retainage?

0%-----51%-----SC-----FC
10% of 5% of 2x work left
undisputed amount due total contract amount 30 days after SC



GC release to Sub w/in 15 business days

- *Not for materials provided by owner*

Failure to Release Retainage

~~INTEREST~~

- 12% per year
- Send Notice.



Mechanic's Liens

“Walking the Tightrope”



- Public v. Private
- Commercial v. Residential
- Sub v. direct Contract

Private Projects

- Notice of Commencement (if filed by the Owner)
 - File a Notice of Furnishing w/in 21 days of starting work
 - » To Owner
 - » To GC (optional if direct contract, but its recommended)
- Lien – know the deadlines – some are really quick!!
 - Residential - w/in 60 days LDOW
 - Commercial – w/in 75 days LDOW
 - Punch list and warranty work does not extend the deadline

Public Projects

- File Notice of Furnishing
- Public Improvement Lien
 - File w/in 120 days of LDOW
- Owner must serve affidavit on Prime w/in 5 days
 - Not disputed w/in 20 days = correct and amount retained by Owner paid on pro-rata basis

Public Projects - Perfecting the Lien

Perfecting public liens

- Attested by County Clerk
- Send letter and Lien by certified mail
 - to owner
 - and person contracted with (if not the owner)



Public Projects - Lien Protests

- GC has 30 days to file protest
- Owner to hold funds
- If no protest –owner pays
- If protest – file suit & serve owner w/in 30 days



Suit to Enforce Lien



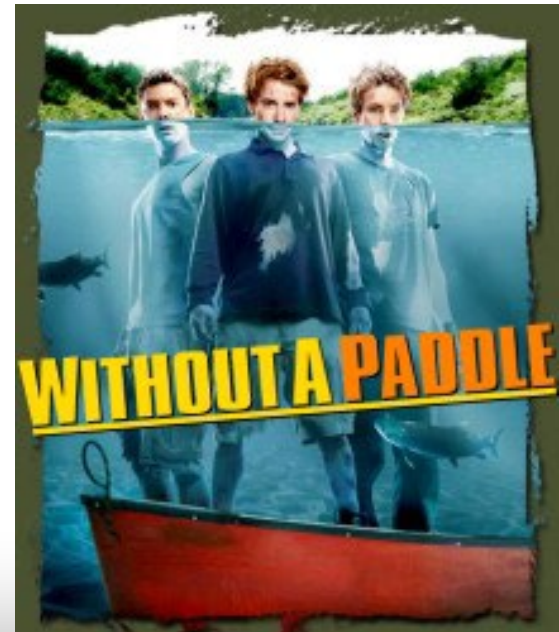
- What does statute say?
- Where is suit filed?
 - In Circuit Court in County where project is located
- Parties, typically:
 - Party with whom you contracted
 - Any party who has an interest in the property
- Causes of Action, typically
 - Breach of contract
 - Enforcement of lien – must be carefully drafted

IMPORTANT: Do Not Over State Your Claims

Lien laws are extremely particular:

- Know them...
- Understand them...
- Follow them...

Don't get caught...



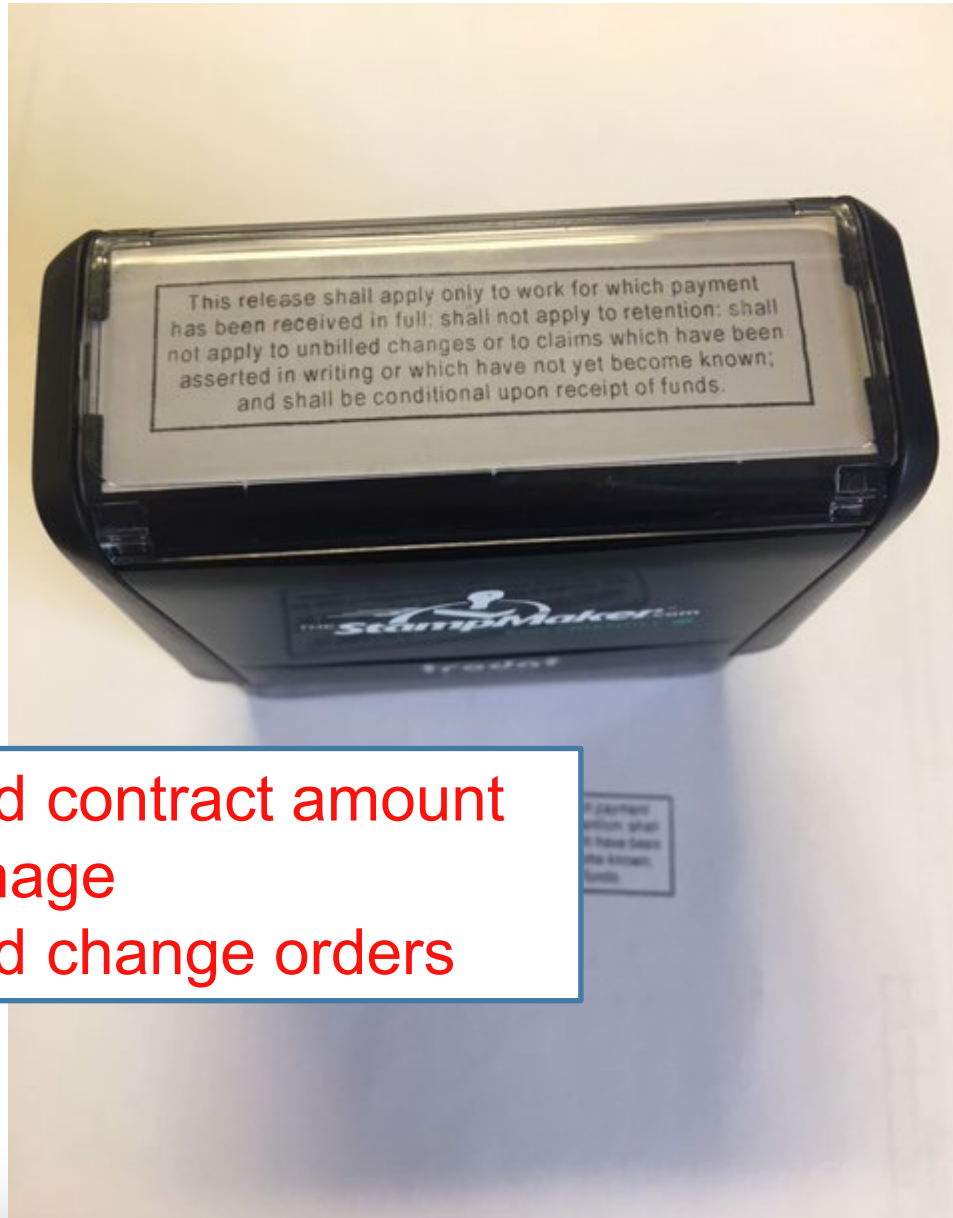
Lien Waivers



Lien Waivers

- Any form or release wherein the Subcontractor purports to release the Contractor, Owner, or Design Professional is hereby qualified by the following language, whether or not the Subcontractor specifically adds the language: **“This release shall apply only to work for which payment has been received in full by Seller, and it shall not apply to retainage, unbilled changes, or amounts not yet paid.”**





1. Unpaid contract amount
2. Retainage
3. Unpaid change orders

OSHA



Types of Inspections

Unprogrammed Inspections

- Employee Complaints
- Referrals
- Imminent Dangers
- Fatalities and Catastrophes
- Follow-up inspections

Programmed Inspections



What Happens During an Inspection?



- Opening Conference
- Walkaround
- Interviews
- Document Requests
- Closing Conference

Opening Conference

- Inspector will present credentials
 - Employer has right to refuse entry without a warrant (generally not recommended)
- Nature and scope of inspection explained
 - ask to see written complaint if applicable

Opening Conference (cont'd)

- Identify areas containing confidential information or trade secrets
 - Require inspector to follow all workplace safety procedures
- ** Select **at least 2 company representatives** in advance of an inspection who will represent the Company's interests during an OSHA inspection



Walkaround

- Know the proper scope of the inspection
- Take your own photographs/video or measurements
- Correct unsafe conditions observed during walkaround



Interviews

- Management employees have a right to representation during an OSHA interview
- OSHA has the right to interview non-management employees in private
- Employers **can conduct their own interviews** of employees before and after OSHA inspection

EMPLOYEE INTERVIEW GENERAL PROGRAM QUESTIONS	
Explain Purpose of interview, show ID, provide a Business Card EXPLAIN Employee Rights and Protections	
Company Name: <i>Blue Apron</i>	Date: <i>5/15/15</i> Time:
Interview employee in a private, quiet area, with no management present, unless employee insists.	
Employee Background Information	
Name: [REDACTED]	Phone: [REDACTED]
Address: [REDACTED]	Job Title: <i>Rec. Inventory</i>
Who is the Boss/Supervisor: <i>Khyber Khan</i>	
How Long this Work? Yrs Mo Days	Prior Job same type of work? Yes (No) How Long? <i>Rest</i>
How Long with this Company? Yrs <i>(60)</i> Days	Shifts? Days: <i>MTF</i> Hours/day: <i>2p-10:30p</i>
Name of Area work? <i>Warehouse</i>	Machines work on? <i>None</i>
What is UNSAFE here?	
OSHA	
AKA called: Safety Program, Safety and Health Program, Safety Training Program, OSHA program, 58198 Program, SHP, Programa de Seguridad.	
Training: Initial? Yes No When?	Ongoing? Yes No Often? D W M T F S
Covers?	Covers?
Who is in Charge?	Do you SIGN safety meeting paperwork? <i>Y N</i>
Employer does inspections? Y N DK	What was the last SAFETY MEET about?
How do you Report a 'Safety Hazard'?	Have you seen Corrections? Y N DK
How do you Report Accident?	Know of any injuries? Y N DK What Kind?
What happens if you violate SAFETY rules?	How well HAZARDS corrected? <i>Fixed 1st</i>
<i>Programme - Warning 1st</i>	Is there a Safety Committee? <i>Y N DK</i>
	Who is on it? <i>Superior SCS</i>
OTHER REQUIRED WRITTEN and PRACTICED PROGRAMS	
HazCom	Hearing Conservation
Work with Hazardous Substances? <i>Y N DK</i>	Do you wear Hearing Protective Devices? Y N Type: <i>N/A</i>
What? (List chemicals KNOWN by EMPs):	How many TYPES of HPD offered?
What is a MSDS?	Do you get hearing tests? Y N DK
When was Training on MSDS?	Last Time? How Often?
Where is Program and MSDS's Kept?	Receive training on Noise & HPD: Y N DK When?
What is on a MSDS?	Where is it loud here?
Personal Protective Equipment	How long work in loud areas?
What PPE do you wear? <i>Safety Shoes</i>	Do you drive a forklift? <i>Yes, trained</i>
Who gives you the PPE? <i>Blue Apron has</i>	Training? Y N
Who Pays for the PPE? <i>WHS, talk to HR</i>	When Last? How Often?
Is there training on the PPE use?	Where are the FL rule posted? <i>No</i>
Has your work been evaluated for PPE appropriateness? Y N	Have you read them?
<i>Certified for pallet jack</i>	
<i>people in charge of safety meet for safety talks only.</i>	
<i>Small talk w/ Supervisor prior to work shift about safety meetings they attended</i>	

Document Requests

- Ask that document requests be **in writing**
- Maintain **your own copy** of records produced
- Keep safety policies, disciplinary records, etc. **easily accessible**

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
High Hazard Unit North
1515 Clay Street, Ste. 1303, Box 40
Oakland CA 94612
Tel: (510) 622-3009 Fax: (510) 622-3025
www.dir.ca.gov/DOSH

DOCUMENT REQUEST

EMPLOYER: Blue Apron, Inc DATE: 8/12/15 Postmark by: 8/15/2015
EMPLOYER CONTACT: Emily Bieber Cal/OSHA Inspector: Tara Huffman

As discussed during the inspection on 8/12/15, it has been determined that copies of the following documents are required for review. Please provide the Cal/OSHA inspector with the required copies by the "postmark" date noted above. If the copies are not provided by that date, it will be interpreted as an admission that the documents do not exist, and possible citations and monetary penalties could result.

Document	Rec'd
<input checked="" type="checkbox"/> Licenses & Permits: <input checked="" type="checkbox"/> Business License <input checked="" type="checkbox"/> State ER Tax ID No. <input type="checkbox"/> CSLB <input type="checkbox"/> Garment Reg. <input type="checkbox"/> Farm Labor Contractor	Rec'd 8/14/15
<input type="checkbox"/> Facility Layout (floor plan, evacuation routes, etc)	Rec'd
<input checked="" type="checkbox"/> OSHA Log 300 (from <u>2012</u> to <u>2015</u>) 8 CCR 14301 w/ 300 A	Rec'd 8/14/15
<input type="checkbox"/> OSHA 5020 (Employer's First Report of Injury)	Rec'd
<input type="checkbox"/> DWC Form 1 (Worker's Compensation Claim)	Rec'd
<input checked="" type="checkbox"/> Worker's Compensation Insurance Carrier	Rec'd 8/14/15
<input checked="" type="checkbox"/> Injury and Illness Prevention Program (written safety program) 8 CCR 3203	Rec'd 8/14/15
<input checked="" type="checkbox"/> Safety Inspection Records <u>Most current 4</u>	Rec'd 8/14/15
<input checked="" type="checkbox"/> Employee Training Records	Rec'd 8/14/15
<input checked="" type="checkbox"/> Safety Committee Meeting Minutes <u>IF ANY</u>	Rec'd
<input checked="" type="checkbox"/> Heat Illness Prevention Program 8 CCR 3395	Rec'd
<input checked="" type="checkbox"/> First Aid Kit approval 8 CCR 3400	Rec'd 8/24/15
<input checked="" type="checkbox"/> Emergency Action Plan 8 CCR 3220	Rec'd
<input type="checkbox"/> Fire Prevention Plan 8 CCR 3221	Rec'd
<input checked="" type="checkbox"/> Hazard Communication Program 8 CCR 5194	Rec'd 10/14/15
<input checked="" type="checkbox"/> Material Safety Data Sheets for <u>Handford info for Ammonia units</u>	Rec'd 8/18/15
<input type="checkbox"/> Respiratory Protection Program 8 CCR 5144	Rec'd
<input checked="" type="checkbox"/> Hearing Conservation Program (Noise) 8 CCR 5097	Rec'd N/A
<input type="checkbox"/> Exposure Control Plan / Bloodborne Pathogens 8 CCR 5193	Rec'd
<input checked="" type="checkbox"/> Workplace Exposure Records/Monitoring Results <u>Noise & AIR - IF ANY</u>	Rec'd N/A
<input type="checkbox"/> Chemical Hygiene Plan 8 CCR 5191	Rec'd
<input type="checkbox"/> Carcinogen Registration 8 CCR Article 110	Rec'd
<input checked="" type="checkbox"/> Permits / Variances for <u>AIR COMPRESSORS - IF ANY</u> <u>Not posted on or near</u>	Rec'd 8/27/15
<input checked="" type="checkbox"/> Maintenance Records of Equipment <u>HVAC, FORK LIFTS, REFRIG. SYSTEMS</u>	Rec'd
<input type="checkbox"/> Safety Instructions / Equipment Manuals	Rec'd
<input checked="" type="checkbox"/> LIST OF EMPLOYEE NAMES & JOB TITLES	Rec'd 8/14/15
<input checked="" type="checkbox"/> FORK LIFT CERTIFICATIONS OF AUTH. DRIVERS	Rec'd 8/14/15

If you require an extension of time in order to satisfy this request, please contact the Cal/OSHA inspector identified with your inspection at the phone numbers above before the deadline.

INSPECTION NO. 1084143 INSPECTOR ID. 71691 OPT RPT NO. 003-116
Cal/OSHA IAY(10/12)

Closing Conference

- Don't try to **argue** or **settle** citations with the inspector
- Clarify the **specific standards** being cited
- Do not **admit** violations or recognized hazards
- Take thorough notes

Types of Citations

Willful	→	Up to \$126,749
Repeat	→	Up to \$126,749
Serious	→	Up to \$12,675
Other than Serious	→	Up to \$12,675
Failure to abate	→	Up to \$12,675/day

So You Got a Citation?



TAKE IT, TALK ABOUT IT OR CONTEST IT?

Informal Conference

- Employer may request an Informal Conference after citations are issued (must be completed within 15 working days)



- OSHA Program Director is authorized to enter into settlements that revise citations

How to Contest

- Employer has **15 working days** from receipt of citation to file a Notice of Contest, until the citation and penalty are final
 - Must Identify what you are contesting
 - Must be in writing
 - May be mailed, but must be postmarked within 15 days
 - No extensions

Procedure After Notice of Contest

1. OSHA files suit
2. You file an Answer
3. Discovery and negotiations
4. Hearing

See State Administrative Regs for Details

Administrative Hearing

- Hearing before the ALJ is similar to bench trial
 - Opening statements
 - Witnesses
 - Post-hearing briefs
 - Decision
 - Appeal

OSHA'S Burden



OSHA'S Burden (cont'd)

In order to prove a violation of a standard, OSHA must prove four elements:

- 1) The standard cited applies to the conditions;
- 2) There was noncompliance with the standard;
- 3) An employee was exposed to or had access to the hazardous condition; and
- 4) The employer knew or should have known of the hazardous condition.

Defenses

Preemption

Procedural

- Statute of Limitations – 6 months
- Lack of reasonable promptness

Substantive

- Employee misconduct
- Impossibility of compliance
- Greater hazard
- Lack of exposure/knowledge
- Existence of more specific standard

Most Common Defenses

1. Lack of knowledge
 - ✓ employer **did not and should not** have known of the hazardous condition
2. Employee misconduct
 - ✓ Conduct unknown to the employer;
 - ✓ in violation of a work rule;
 - ✓ which was communicated and uniformly enforced.



Document Your In-House Inspections

- 1) **Include duty to inspect** in job descriptions
 - Can be simple language
- 2) **Create forms** to record daily inspections
 - Date, Area of Inspection, Pass/Fail
- 3) **Keep records** of disciplinary actions
 - Even if verbal warning, record it

Drug Testing Under New Rule

- OSHA states that “the final rule prohibit[s] employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses” *and*
- “Blanket post-injury drug testing policies deter proper reporting.”

Drug Testing Under New Rule (cont'd)

- OSHA states: “Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing. In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting.”

Drug Testing Under New Rule (cont'd)

Best Practices:

- Investigate potential causes of incidents before conducting post-incident testing.
- Do not tie drug and alcohol testing to:
 - Injuries alone.
 - The employee's filing of a workers' compensation claim.
 - An OSHA recordable injury or illness.
- Mirror language of new rule:
 - "reasonable possibility"
 - "contributing factor"



YOUR **50 STATE** PARTNER®

Common Communication Errors: Tips for How to Avoid Disputes



Angela M. Richie, Esq.
Denise M. Motta, Esq.
June 8, 2021

Overview

- Any communication throughout the project can lead to a dispute or be used against you in a dispute:
 - » Upstream communications (bid, contract negotiations, project management, change orders, payment issues, lien waivers, project close-out)
 - » Internal communications (contract negotiations, compliance with contracts, project management, change orders, sub-subcontractors)



Types of Communications

- Verbal – in person
 - » Project meetings
 - » Directions provided on the jobsite
- Telephone
- Emails
- Text Messages
- Handwritten Notes

A portrait of Qui-Gon Jinn from Star Wars, shown from the chest up, wearing his brown robes and having a long white beard and hair.

**"The ability to
speak does not make
you intelligent."**

- Qui Gon Jinn

Who is Communicating?



- VERY Important to identify who is communicating on your behalf during the Project.
 - » Who has authority to bind the company?
- Is oversight necessary?
 - » Should supervisory personnel be consulted before agreeing to certain terms, change order?
 - » Should supervisory personnel be copied on communications?

Establish a Chain of Command

- Make it clear who can bind the company.
- Establish an internal communication protocol for the project.
 - » Should sensitive communications be in writing?
 - » Discuss “Bet the Company” issues verbally before memorializing in writing.
 - » When are project issues or disputes escalated internally?
 - » Who is permitted to sign lien waivers?
 - » Who communicates upstream?
 - » Who communicates with subcontractors?
 - » Will you be bound by custom and practice?



Lack of Communication

- Lack of Communication leads to problems!



Too Much Communication

- Is there such a thing as too much communication?



Clear and Accurate Documentation

- Document Verbal Directives
 - » Should be complete and concise.
 - » Take accurate notes during project meetings (preferably typed and saved in project file) – make sure subcontractors are invited and document via email.
 - » Document hostile or argumentative behavior.
- Email Communications
 - » Clear and concise – state facts not legal argument.
 - » The more you say, the more that can be used against you later.
 - » **Avoid text messages – if text is sent, follow up with formal email.**



Clear and Accurate Documentation

- Providing too much information can be overwhelming.
- Refer to specific contractual requirements.
- Offer to answer questions or hold a meeting to avoid confusion.
- Avoid being verbose or offering legal opinions.
- Stick to the basics: progress made, problems and solutions, budget update.
- Know your audience – will they understand highly technical information?



Avoid Saying Yes to Everything



- Before agreeing to something, make sure it is consistent with the contract.
- Don't respond immediately
 - » Evaluate risk/benefits.
 - » If time sensitive, ask for time to assess the demand.
 - » Discuss with decision makers.

Use Email Wisely



- Confirm recipients
- BE PROFESSIONAL
 - » Avoid slang
 - » DO NOT use curse words!
 - » Avoid ALL CAPS
 - » Avoid excessive punctuation!!!!
 - » DO NOT use emojis.
 - » Avoid being overly personal or flirtatious
 - » Check for grammatical errors and typos

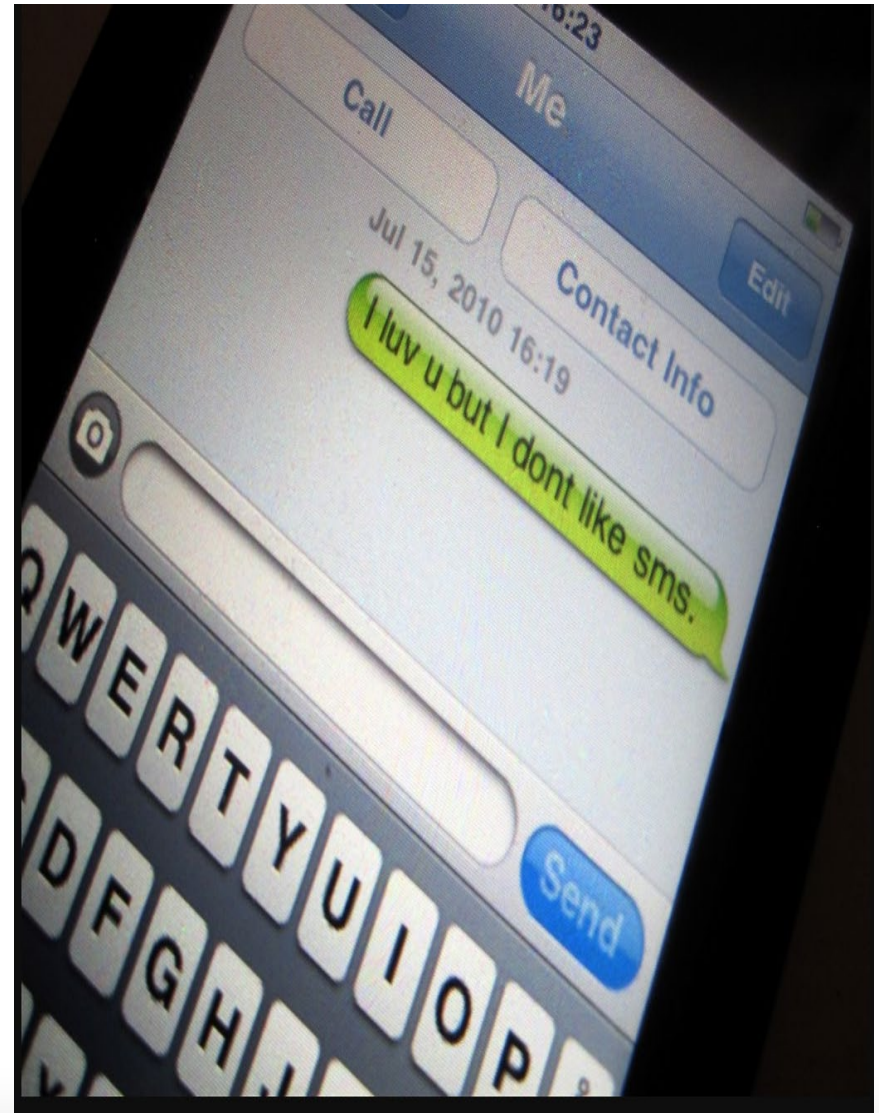
Use Email Wisely

- DO NOT Respond when angry or tired
 - » Type your response and leave it for later
 - » Have someone else review
 - » Before responding on “Bet the Company” issue discuss internally
- Use email to document verbal communications.
- Use email to confirm directions sent via text message.
- Ask for confirmation of directives in writing (indicate you will proceed when confirmed and confirm it is sent by the person who can bind).



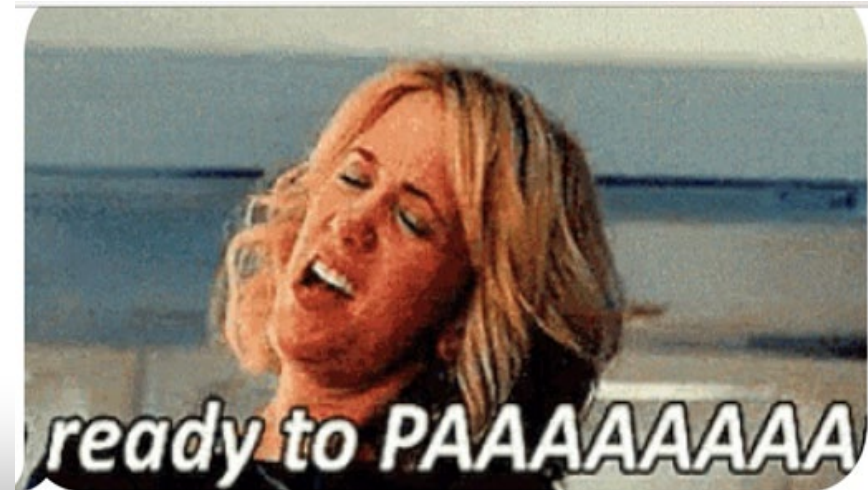
Avoid Text Messages

- Text messages can give the impression that the information is not important.
- Text and email communications could conflict.
- Use only for personal messages that ARE NOT project related (lunch, dinner, happy hour)
- Information about the project or project directives should be sent via email ONLY.
- May send the wrong impression about how serious you take the project.



Try to Avoid Text Messages

- Privacy considerations – personal information about employees.
- Unprofessional messages containing derogatory comments about other contractors.
- Unprofessional messages containing derogatory comments about co-workers.
- Emojis and Memes can be misinterpreted!



Try to Avoid Text Messages

- Text messages do not go away.
- Subject to discovery and must be preserved.
- Additional cost for obtaining and reviewing in litigation.
- To gather text message data – ALL text messages must be collected – even personal messages.
- Even text messages from private cell phones are discoverable.
- Destroying the phone or BleachBit to wipe clean could result in spoliation of evidence (negative instruction, sanctions).



Admissions in Communications

- Be careful about what you say and how you say it:

Please see attached for the over-time hours mentioned, \$819K. Total hours and the inefficiencies you mention appear to be the key. Like you were saying, we break the job down into its tasks and find out how to rationalize the delta. For example, we budgeted 12,062 hours and we have 52,472. If we have dates when these hours overages happen, we say these are the inefficiencies. We then support the hell of out of it, even if it is made up, to get our number.

Contract	\$5,724,105
Change Orders	\$-----
Inefficiencies	\$-----
Total Billings on [REDACTED]	\$XXXXXX
Costs To Date	\$9,141,200

XXXX – Our billings to target would be \$10,043,436 based on our contract's budgeted margin of 9.87%

What I wondering if they are doing is purposefully delaying our WAF's approval, to confuse us and delay payment. I say F-#\$% them and come up with the difference and throw-it into our inefficiencies number above. I'll get back with you tomorrow after we call [REDACTED]

Be Truthful

- Not being honest in communications will always come back to bite you.



Legal Significance

- Your communications will be used in litigation.
 - » Any matter that is not privileged.
 - » Relevant to a party's claim or defense.
 - » Proportional to the needs of the case.
 - » Whether burden and expense outweighs the benefit.
 - » Includes ESI (emails, text messages, electronic documents).
- Courts and arbitrators have great discretion in allowing discovery.
 - » Our experience is that they will require production.
 - » Discoverable is different than whether it is admissible.



File Organization to Assist with Litigation

- Save all project communications to the project file in an organized manner.
- Title emails so that the topic is readily identifiable.
- Save emails by topic/issue; separate out internal communications to the extent possible.
- Use Confidential or Attorney-Client/Work Product where it is applicable.
- Internal communications regarding dispute strategy may be privileged.
- Save potentially confidential or privileged documents so they are easily identifiable (File Name.Confidential.pdf; File Name.Privileged.pdf).
- Handwritten notes and hard copy files maintained similarly.

Questions?

Send an email to arichie@grsm.com





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