Law for Professional Engineers and Professional Geoscientists

Contracts

Law and Ethics Seminar
Spring 2019
Contracts: Overview

• Enforceable voluntary agreement
  – Enforceable – will the courts uphold the contract?
• Sets out rights, responsibilities and liabilities of parties, but also allocates risk and obligations between parties
• Terms: express or implied
• Most contracts need not be written
• Only parties privy to the contract can sue on it
Essential Elements

• Essential elements of a contract to be enforceable:
  – offer and acceptance
  – consideration
  – capacity to contract
  – intention to create legal obligations
  – lawful purpose
Contract Formation: Offer and Acceptance

- Offers must contain all essential terms
- Acceptance must be unequivocal agreement, or else it will be a counteroffer
- Invitation to treat: call for offers (advertisement)
- Rejection: must be communicated to the offeror; counter-offer has effect of a rejection
- In the past, no general duty to negotiate in good faith (unless required by agreement or by statute) but courts may be reconsidering this (Bhasin case at SCC)
Consideration

- Each party must give, or promise to give, something of value
- Is a prerequisite for an enforceable contract
- Lack of consideration will result in an unenforceable promise to give a gift
- The consideration given by each party does not have to be of equal value
- Forbearance (e.g. giving up the right to sue) may be valid consideration
- Amendments: must have fresh consideration
Other Elements

• Capacity
  – Minors, drunks and lunatics
    • Contract may be voidable by person lacking capacity

• Intention to Create Legal Relations
  – court will not enforce “agreement to agree”

• Legal purpose
  – Void if contrary to statute (ex. cannot contract out of Worker’s Compensation) or common law (ex. contrary to public policy in restraint of trade)
Agreements to Agree

• Agreements to agree are not enforceable as contracts

• Letter of intent or MOU: expression of intention to form a contract in the future

• Dangers of letters of intent or MOU:
  – Parties may not appreciate they are unenforceable
  – Parties may commence performance without ever creating a formal contract
  – On the urging of one of the parties, it may be interpreted by the court as an enforceable contract
Voiding a Contract

• Mistake
• Misrepresentation
• Duress
• Unconscionability
• Frustration
Mistake

• Three prerequisites to void a contract for mistake
  – The mistake must be material (significant)
  – The mistake must be mutual (both parties must have been mistaken)
  – Mistake must have been made at the time the agreement was made

• There is no remedy for a mistaken party if the mistake was not mutual
Misrepresentation

• Misrepresentation: untrue factual statement that induces the other party to enter the contract

• Three categories:
  – fraudulent (intentional false statement, most serious)
  – negligent (statement carelessly made)
  – innocent (difficult to obtain a remedy)

• Damages are generally available for fraudulent and negligent misrepresentation

• Common case arises with subsurface soil conditions
Duress, Unconscionability and Frustration

• **Duress**: improper pressure, threats or coercion used to induce a party to enter into a contract
  – Must be extreme pressure: "coercion of will so as to vitiate consent"

• **Unconscionability**: so unfair, oppressive and one-sided that the courts won't enforce it
  – Generally requires extreme inequality of bargaining power at the time of contract formation. Fine line between legitimate business pressure, and duress

• **Frustration**: occurs when an unforeseen event makes performance impossible, or of no value
  – Event must not be a risk that was anticipated by the parties
  – *Force majeure* clauses: prescribe the consequences of unlikely events
Amendment of Contracts

• Amendments must be agreed upon by both parties
• Original contract may specify formalities for amendment, and these should be obeyed
• Requirements for contract apply: agreement, consideration, certainty of terms, intention to create legal obligations
• Amendments may be voided e.g. for duress
Waiver and Estoppel

- **Waiver**: when a party, by words or conduct, relieves the other party of the duty to perform
- **Estoppel**: "to be stopped"; a party is estopped from enforcing rights that it has waived
- Estoppel requires a clear expression that the waiving party intended to waive its rights, and reliance by the party benefiting
- Formalities for amendments often waived
Repudiation and Anticipatory Breach

- **Repudiation**: When one party, by words or actions, makes it known that it does not intend to perform its obligations under the contract.

- **Anticipatory Breach**: When one party lets the other know, before the time for performance, that it will not be performing its obligations, the anticipatory breach will be a repudiation.
Drafting and Interpretation of Contracts
Principles of Interpretation

• Key principles of interpretation:
  – give effect to the objective intention of the parties
  – apply the canons of contract construction
  – if necessary, consider additional evidence

• The court should not re-write the contract for the parties, but rather, interpret the contract the parties made
Interpretation: The Intention of the Parties

• Courts aim to give effect to the intention of the parties

• Establish the *objective* intention of the parties by reviewing the terms of the contract

• Objective intention is what reasonable parties would have intended by agreeing to the specified terms; what the parties subjectively intended is not relevant
Canons of Construction

- Are not rules of law, but guiding principles
- Canons include:
  - Plain and ordinary meaning: the "golden rule"
  - Special Meaning: if the context requires it
  - Reading the contract as a whole
  - Giving effect to all parts of the contract: don't read one part in a way that makes another part redundant

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Canons of Construction (Continued)

- Restriction by express provisions: special conditions trump general provisions
- Commercial purpose: presume the parties did not intend a commercially unreasonable result
- Context: read the words in context
- Contra proferentem: construe ambiguous provisions against the party that drafted the contract
Additional Evidence

• The contract itself is the primary evidence
• Parol evidence rule: where the contract is clear and unambiguous, extrinsic evidence of the parties intentions will not be considered
• The parol evidence rule does not preclude evidence of the factual matrix i.e. background
• Where the contract is ambiguous, subsequent conduct of the parties may be considered
Drafting Contracts

• Three principal purposes of drafting:
  – Reflect the business arrangement between the parties
  – Clearly allocate risk between the parties to minimize the likelihood of disputes
  – Provide protections and incentives for the parties

• Carefully consider the fundamental elements

• Consider "what if" scenarios
Getting to Contract
Overview

• Goals for all contracts: to be completed on time, within budget, to a high quality

• There are different methods for getting to contract e.g. call for tenders, negotiation, request for proposals; each has advantages and disadvantages

• Buyers must choose the delivery system and the method of payment e.g. fixed price, cost plus, public-private-partnership
Transfer of Risk and Obligation

• A key aspect of contract negotiation is distributing risks (e.g. cost increases) and obligations (e.g. design responsibility) between the parties.

• Risks can be assigned to a party, shared between the parties, or transferred to a third party e.g. supplier, insurer, bonding company.

• Generally, costs are minimized when risks are optimally distributed.
Choosing a Procurement Process: Overview

- Buyers generally start by appointing a consultant.
- Early on, the buyer must select a suitable procurement process.
- Some buyers, e.g. government institutions, may be obligated to use a formal tender process because it is fair and transparent.
- Using a tender process precludes negotiation.
Tendering

• The law of contract applies
• Large amounts of money at stake: failure to abide by the rules of the process may result in lost contracts for bidders & liability for buyers
• Law of mistake applies, but courts are reluctant to allow bidders to withdraw bids
• Bid depositories resolve some of the problems inherent in tendering
• Know the process if it is within your field of practice
Selection of Method of Project Delivery

- The nature of the project drives the choice of project delivery model
- Transparency and fairness requirements for public projects may necessitate a tender process
- Labour and materials markets may influence the choice of project delivery model
- Innovative delivery models are sought to alleviate the adversarial relationship that has traditionally existed between buyers and sellers
Ensuring public safety

Methods of Project Delivery

• Design-Bid-Build
• Construction Management
• Design-Build
• Design-Build-Operate
• Design-Build-Operate-Finance
International and Interprovincial Trade Agreements

- Set rules for the transfer of goods and services
- May influence procurement and dispute resolution processes
- International agreements: NAFTA, WTO
- Interprovincial agreement: Agreement on Internal Trade (AIT), New West Partnership
- Treaties have criteria for determining which transactions they cover
Specific Contracts and Clauses
Overview

• The method of payment often defines the form of contract e.g. lump sum, cost plus
• Other contracts are defined by the roles the parties will perform e.g. design-build
• Some contracts confer rights (e.g. licensing agreements); others provide for the provision of services (e.g. professional service agreements)
• In all contracts, the roles and duties of the parties must be clearly defined
Standard Form Contracts

• Created by industry groups for use by their members, and generally favour the interests of their members over the parties their members will contract with

• Most standard form contracts require modification to suit the particular context

• Standard form contracts are often used without modification to save costs, but this can lead to far greater costs if litigation results
Examples of Contract Types

• Fixed price contracts (CCDC2)
• Cost Plus Contracts
• Unit Price Contracts
• Construction Management Contracts (CCA5)
• Design Build Contracts (CCA14)
• Public Private Partnership
Professional Service Agreements: Introduction

• Should define the scope of work and expected outcomes
• May be fixed price, cost plus, or a percentage of the actual construction costs
• Often have limitation of liability clauses that protect the consultant from claims in excess of the available insurance coverage
• May give the owner alternative remedies in the event the claim is not covered by insurance
• Field review clauses are often contentious: the scope and purpose of the review should be clearly set out
Engineering Service Agreements

• Commonly used standard form contract: ACEC 31

• The parties should address the following issues in detail when using ACEC 31:
  – Site inspections
  – Copyright
  – Limitation of liability
  – Termination
Geoscience Service Agreements

• Commonly used standard form contract: AAPG Contract for Geoscience Services

• The parties should give special attention to the following clauses:
  – The scope of services
  – The responsibility for workers' compensation insurance premiums
  – Termination of the relationship
  – The liability of the Geoscientist
Licensing Agreements

• A license is a grant of rights
• Exclusive license: licensee obtains the exclusive right to use the rights granted by the licensor
• The "grant provision" is the most important in a license agreement; it defines the scope of the license
• Commonly used in intellectual property and real property
• The license fee may be based on profits made by the licensee
Geoscience Agreements

• Define rights and responsibilities in exploration projects
• Take many forms e.g. joint ventures, limited partnerships
• Grubstake agreement: contributions are made to the prospector's exploration costs in return for a stake in the resources discovered
• Option agreements: provide the optionee with the right to purchase land at a specified price within a specified time frame
Requirement of Writing

• Some contracts must be in writing to be enforceable
  – Statute of Frauds (1677)
  – Examples:
    • Transfer of an interest in land
    • Contract in which one party becomes a surety (ex. guarantee the debt of another)
Other Contract Issues and Special Clauses
Agency and Authority

- An agent is a person authorized to act on behalf of another party; the principal
  - Engineer is often the agent of the owner
- Agency relationship can be created by
  - Actual authority is an actual agreement between the agent and the principal
  - Apparent authority is the representation by the principal to a third party
- The principal is bound by the acts of the agent that are done within the scope of the agency
Indemnities

• An indemnity is an agreement to bear the financial loss of another party for a specified event

• Insurance policies are contracts of indemnity

• Many indemnities simply reflect the common law that each party is responsible for the harm it causes; these clauses add clarity to avoid litigation, and give the indemnified party contractual remedies
Change Orders

- Changes to the scope of work frequently occur on construction projects
- Extra: increase in the contract price
- Credit: decrease in the contract price
- Change Orders result from
  - Design changes (design error, cost saving, changes to building regulations)
  - Unforeseen conditions
Extras for Design Negligence

- Contractors are entitled to extras resulting from design changes.
- Owners may have the right to recover the costs of design changes from the consultant, but generally waive this right if the amounts are relatively small.
Impact Costs

• Impact costs occur when extra work is requested that may impact the schedule and efficiency of the rest of the work

• When agreeing to a price for an extra, contractors are expected to incorporate all impact costs arising from that extra

• However, the parties may agree that the contractor retains the right to claim impact costs at some later time
Performing Under Protest

• Ideally, the parties agree on the cost of the extra before the work is done

• In reality, the owner may instruct the contractor to do the extra work before a price is agreed upon: change directive

• To reserve the right to dispute payment for a change directive, the contractor should file a notice of performance under protest
Unforeseen Conditions

• "Unforeseen" refers to conditions that are known to be possible, but are not expected to occur e.g. large amounts of subsurface rock

• Unforeseen conditions commonly result in extras, but may also lead to credits

• The owner is required, at the tender stage, to divulge all available information regarding unforeseen conditions

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Unforeseen Conditions

• The contract documents may shift the risk of unforeseen conditions onto the contractor
• Bidders will seldom have time to thoroughly assess the risks associated with unforeseen conditions e.g. by doing a soils investigation
• It is often economically inefficient to have the contractor bear the risk of unforeseen conditions
Contract Administration

• The contract administrator is typically the owner's agent: architect or engineer

• Consultant may play a dual role: owner's agent and initial arbiter of disputes
  – As arbiter, the consultant must act fairly to the contractor, and not favour the owner's interest

• The administrator must perform tasks in timely manner

• The administrator's field review duties may not be clearly detailed in the contract, but must be adequate in frequency and scope giving consideration to the purpose

• The administrator must not interfere with the right of the contractor to choose the method and order of work
Contract Termination

• Contract may end by:
  – Complete performance
  – Frustration
  – Mutual agreement
  – Breach
Termination Clauses

• The parties may incorporate a termination clause into the contract
• Termination clauses specify acts that justify termination of the contract
Concurrent Liability in Contract and Tort

• Historically, it was not possible to sue in tort when the parties had a contract covering similar duties

• *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147: a duty in tort can co-exist with a duty in contract so long as the contract does not define the nature and scope of the duty of care

• Therefore, if the parties want to control the rights between them, they should exhaustively define the duty of care in their contract
Questions

Bob McDonald, P.Eng., LL.B.
Executive Director & Registrar
APEGS
(306) 525-9547
1-800-500-9547
www.apegs.ca

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