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Contract Law Basics and Standard Form  
Construction Contracts  
ENSC 406 - SFU

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# Overview

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- > Contract Law Basics
- > Construction Contracts
  - > Typical Forms
  - > Project Delivery/Contract Models
  - > Key Terms

# What is a Contract?

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- > Private law
- > Terms chosen by the parties
- > Enforceable by courts

# Requirements to Form a Contract

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- > Offer
- > Acceptance
- > Consideration
- > Legal Capacity
- > Intention to Create Legal Relations

# Offer and Acceptance

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- > Offer must be accepted as proposed
- > If the party purporting to accept the offer changes some of the terms:
  - > initial offer is rejected; and
  - > revised terms are a counter-offer
- > Contrast offers with “invitations to treat”

# Offer Vs. Invitation to Treat

- > An invitation to treat is when a client invites contractors to make him/her an offer.
  - > For example, when the client advertises a job on internet or newspaper, it is usually an invitation to treat rather than an offer. The offer only comes into existence after the client reviews the tenders handed in by the contractors and accept the offer.
- > An offer on the other hand is when the client offers the job to one contractor without advertising the job or having contractors to submit in the tender.
- > Making an invitation to treat, rather than an offer, protects the client from finding him/her self agreed into a contract he/she cannot fulfil. Instead the client can refuse the contractor's offer for many different reasons.
- > This can be a very important protection for the client making the offer if the advertisement for the job offers at long distance:
  - > for example, through the internet or newspaper. Always ensure that any website, advertisement etc. make it clear that it is only an invitation to treat, not an offer

# Consideration

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- > Each party must give something valuable, e.g.:
  - > make a payment; or
  - > perform some act
- > Courts will rarely investigate whether consideration provided is adequate
- > Common to see consideration of \$1.00

# Legal Capacity

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- > Infants
- > Intoxicated
- > Mentally incompetent
- > Unincorporated organizations



# Intention

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- > All parties must intend to be bound

# Contracts - Other Considerations

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## 1. Writing

- > Not required
- > BUT: Please always use a written contract

## 2. Certainty of Terms

## 3. Interpretation

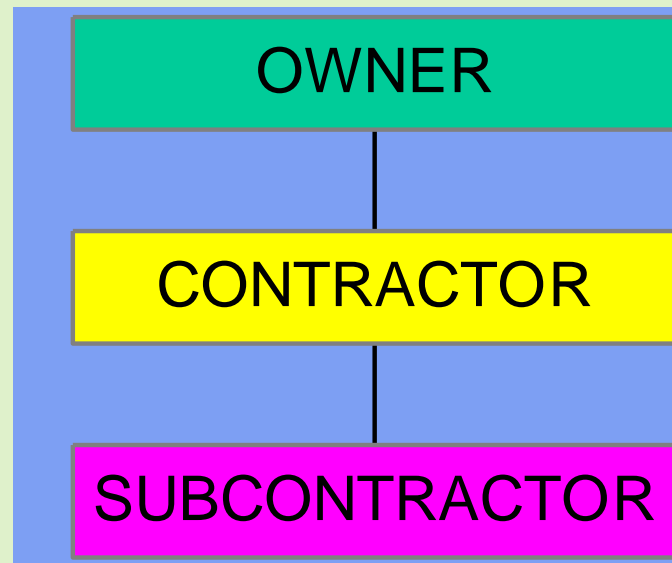
- > Precise Meaning
- > Context
- > Implied Terms

# Privity of Contract

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## 4. Privity of Contract

- > Non-parties cannot be bound to contract
- > A relation between two parties that is recognized by law, such as that of blood, lease, or service.

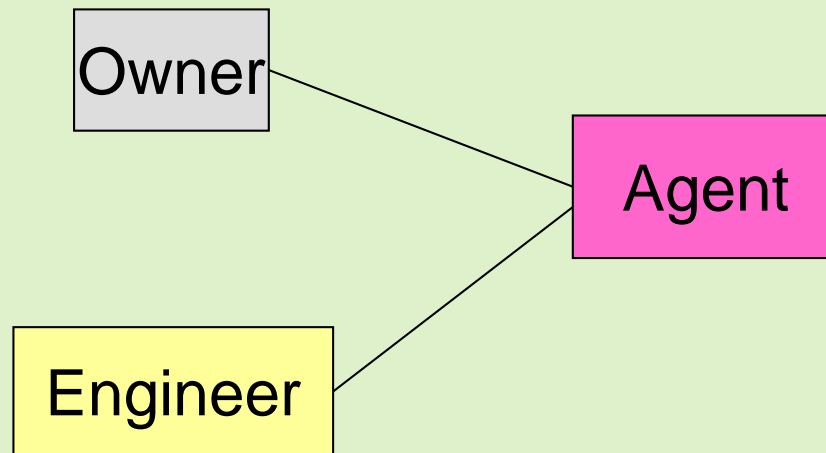


# Contracts - Other Considerations

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## 5. Agency

- > Agent can negotiate contract on behalf of principal



# Contracts - Other Considerations

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## 6. Term

- > Contract is binding until:
  - > Obligations are fulfilled
  - > It is terminated
  - > It is amended by consent of each party

# Contracts - Other Considerations

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## 7. Amendment

- Parties can amend the terms of a contract after they have entered into it provided they agree to the amendments
- In general, “*fresh*” consideration should be exchanged to make the amendments enforceable, but with respect to construction contracts, “changes” to the scope of work are not actually contract amendments and therefore do not require “fresh” consideration. This is because the original contract gives the project owner the right to impose changes unilaterally (perhaps for payment of more money but perhaps not).

## 8. Subcontracting:

- Subcontracts (*common in the construction industry*) are agreements by one party to a contract to have another person perform its obligations under the contract.
- Contract may expressly permit or prohibit subcontracting, or may permit subcontracting only to pre-approved persons

## 9. Remedies

- Damages and Specific Performance.

# What is a Construction Contract?

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- > A private law agreement between
  - > a person wanting something built (the “**Owner**”); and
  - > a builder (the “**Contractor**”)
  
- > Sets out what each party must do and what each is entitled, including:
  - > the work to be performed
  - > schedule for the work
  - > the price for the work
  - > other rights and responsibilities of the parties

# Players in Construction Projects

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- > Owner
- > General Contractor
- > Architect
- > Engineers
- > Trade Contractors
- > Suppliers



# Standard Form Contracts

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- > Construction contracts are typically based on standard industry documents
  - > CCDC
  - > CCA
  - > MMCD

# Why Use Standard Forms?

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- > Preparation efficiency
- > Certainty
- > Comprehensive
- > Accepted in market
- > Developed in a collaborative environment with consideration of rights of all parties

# Dangers of Standard Forms

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- > One-size does not fit all
  - > Unique project issues may not be captured
  - > Risk allocation not necessarily appropriate
- > Use supplementary general conditions to tailor standard forms

# Construction Project Delivery Models

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1. Design-Select-Build
2. Design-Build
3. Construction Management
4. Public Private Partnerships (P3s)

# 1. Design-Select-Build

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- > Owner retains architects and engineers to design project
- > Owner then retains a “general contractor” to construct the project in accordance with the design prepared by the architect and engineers
- > General contractor performs work itself and/or retains “trade contractors” to perform work

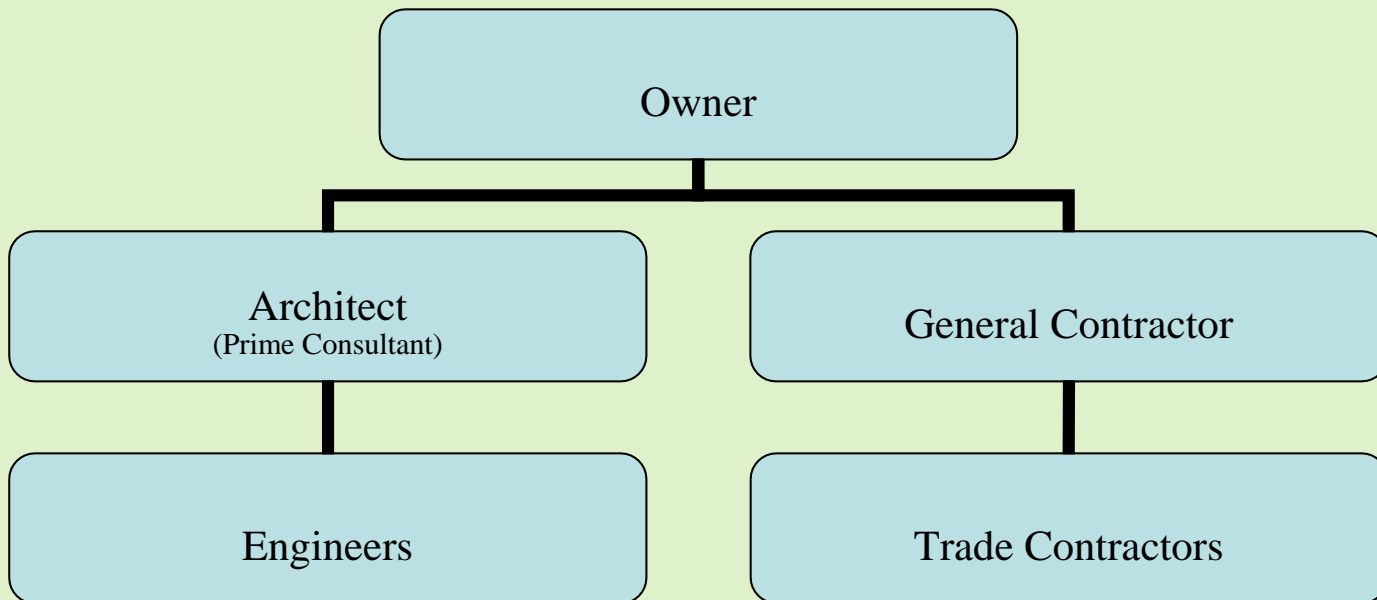
# 1. Design-Select-Build

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- > Owner and Contractor are “parties” to a general construction contract
- > Other players are “non-parties”
  - > architect
  - > engineers
  - > trades and suppliers

# 1. Design-Select-Build

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## 2. Design-Build

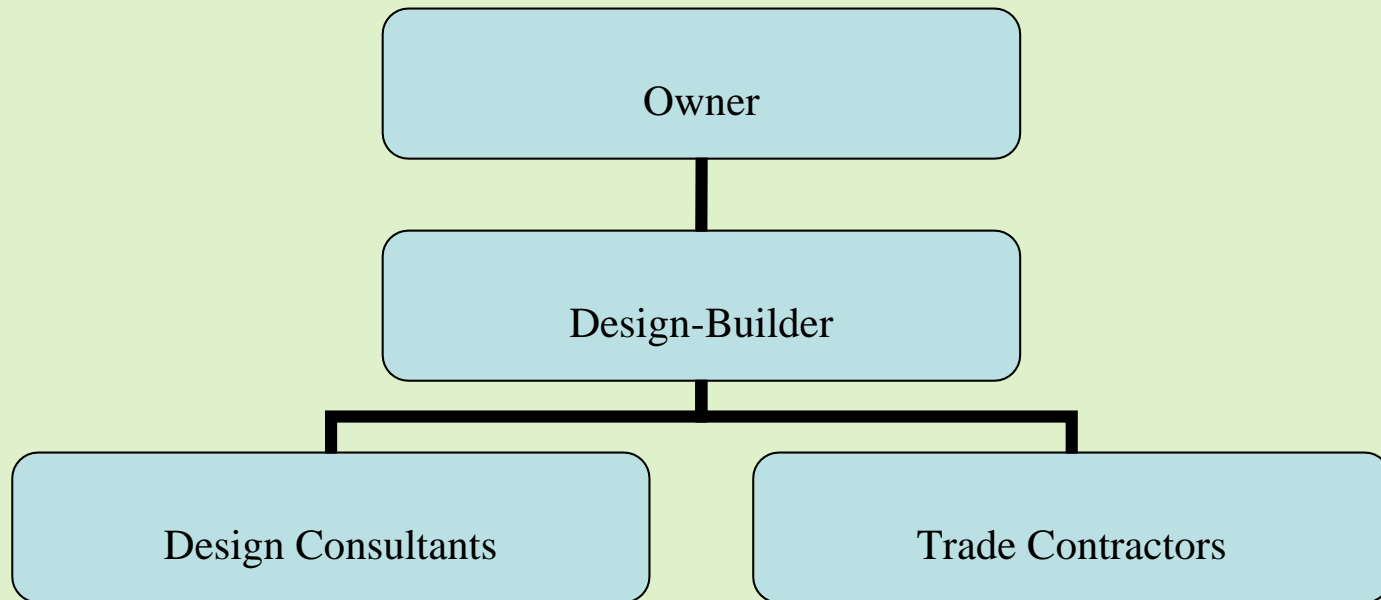
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- > Owner has single contract with “Design-Builder” for design and construction
- > Design-Builder often a joint venture or partnership between an architect and a contractor



## 2. Design-Build

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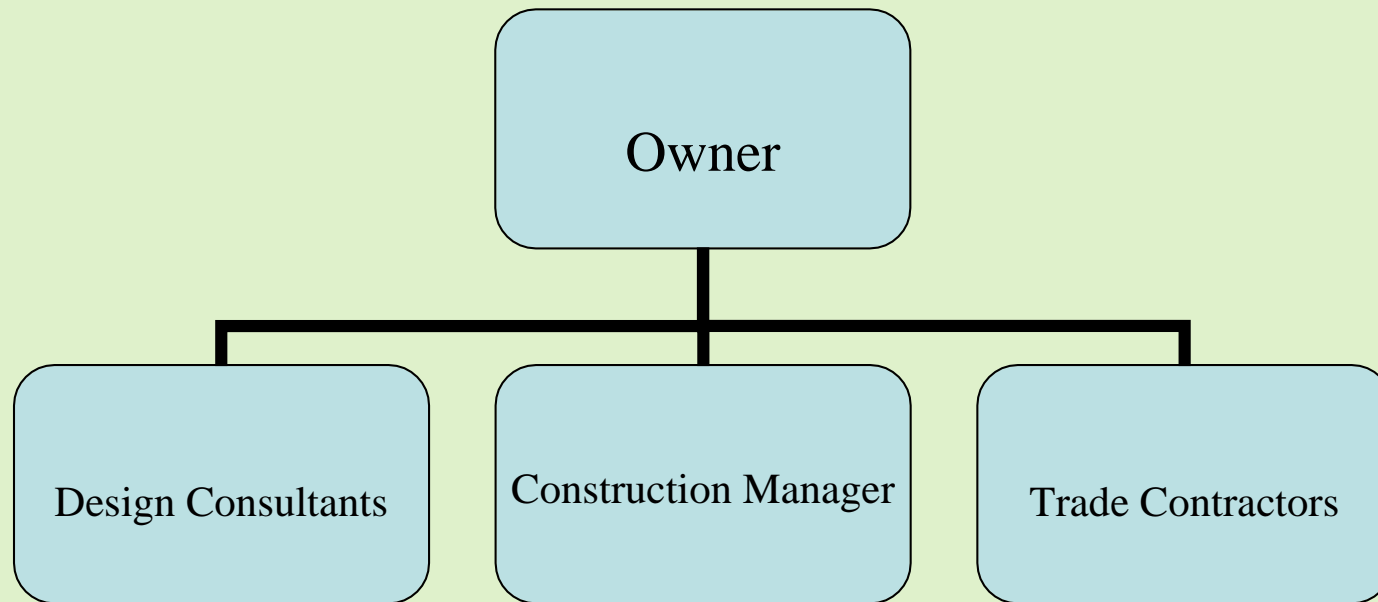
### 3. Construction Management

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- > “Construction Manager” assists the owner to enter into multiple construction contracts with trade contractors
- > Owner engages “construction manager” to provide advice on how to best construct the project and which trade contractors to engage
- > Owner then contracts with the trade contractors directly – construction manager administers and co-ordinates the various trade contracts
- > Owner will have contracts with various trade contractors as opposed to one contract with a general contractor

### 3. Construction Management

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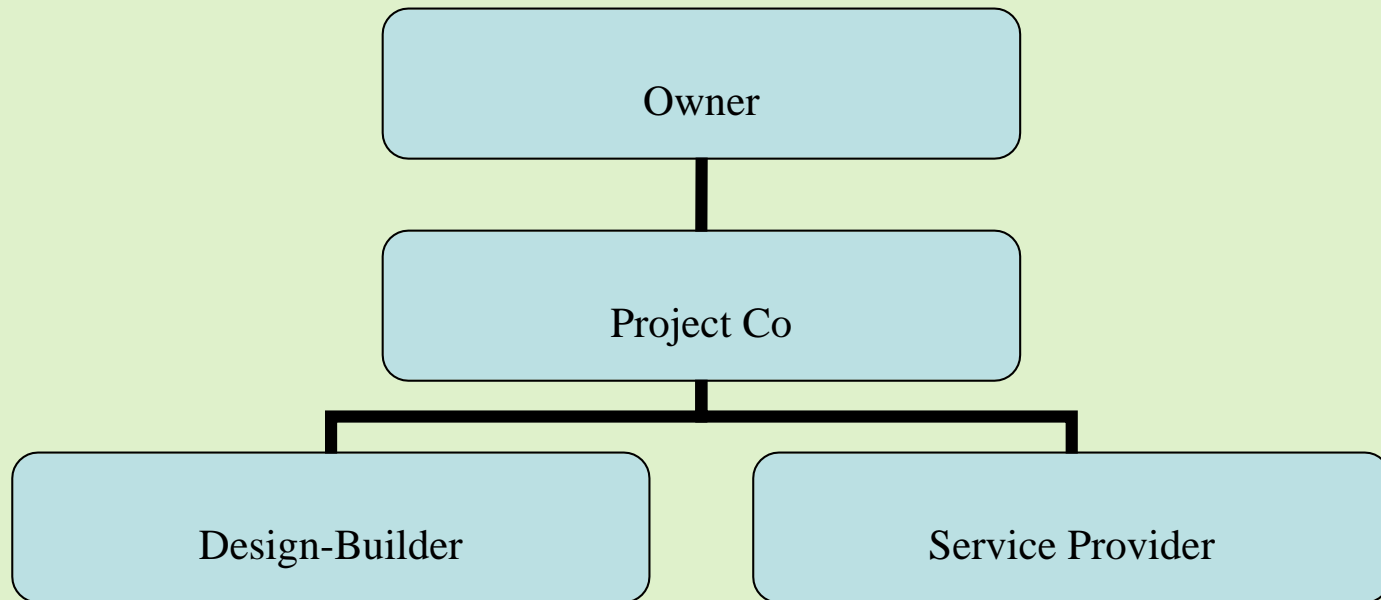
## 4. Public Private Partnerships (P3s)

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- > Public Owner (e.g. Health Authority) retains a private consortium to:
  - > design;
  - > construct;
  - > finance; and
  - > maintain,new infrastructure, like a hospital
  
- > Project Co is a “Special Purpose Vehicle” created for a specific project

## 4. Public Private Partnerships (P3s)

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## 4. Public Private Partnerships (P3s)

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- > Project Co subcontracts Design Build (DB) and maintenance responsibilities
- > Project Co receives Service Payments
- > Owner may make deductions from Service Payments if service failures occur

# Basic Construction Contract Terms: Parties

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- > Eg. General Construction Contract - Owner and Contractor
- > Use proper legal names of contracting parties
- > Recall privity of contract

# Basic Construction Contract Terms: Scope of Work

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- > “Work” means the total construction required by the “Contract Documents”
- > Make scope of work as clear as possible
- > Do not include other contract terms in the scope



# Basic Construction Contract Terms: Scope of Work

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- > “Contract Documents” are documents listed in the Contract that set out the labour and materials that make up the Work, including:
  - > Agreement
  - > Supplementary conditions
  - > Definitions
  - > General conditions
  - > Specifications
  - > Drawings

# Basic Construction Contract Terms: Schedule

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- > Contract specifies date by which Work must be:
  - > commenced; and
  - > completed
  
- > Contractor usually provides detailed construction schedule for owner
  
- > Contractor is required to:
  - > achieve milestones included in schedule; and
  - > update the schedule as the work progresses.

# Basic Construction Contract Terms: Price

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- > Different price structures require different forms of contract:
  1. Stipulated Price
  2. Cost Plus
  3. Unit Price

# Basic Construction Contract Terms: Price

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## **Stipulated Price**

- > Most common
- > Contractor agrees to perform the Work for a fixed “Contract Price” that is set in advance
- > Contractor takes risk that it has correctly assessed the cost of work
- > CCDC-2

# Basic Construction Contract Terms: Price

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## **Cost Plus**

- > “Contract Price” is cost of work plus an agreed upon percentage for contractor’s profit
- > CCDC-3

# Basic Construction Contract Terms: Price

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## Unit Price

- > Contract includes estimated quantities of materials and price for materials given
- > “Contract Price” is sum of products of actual quantities of materials used and applicable unit prices
- > CCDC-4 and MMCD

## **Some Additional Contract Terms:**

### **1. Review and Inspection of the Work**

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- > Owner's consultant inspects work as it proceeds**
- > Consultant has authority to reject work that does not conform with the requirements of the Contract Documents**

## Some Additional Contract Terms:

### 2. Payment

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- > Payment certification by Consultant
- > Monthly progress payment less builders lien holdback
- > payment of holdback upon “substantial performance of work”
- > final payment upon completion of all outstanding items



# Some Additional Contract Terms:

## 3. Changes

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- > Owner has right to make changes to the Work:
  - > Change order
  - > Change directive
  
- > Unknown Conditions may result in change to schedule or Contract Price
  
- > Delays may result in change to schedule or Contract Price

# Some Additional Contract Terms:

## 4. Insurance/Bonding

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- > Parties must carry required:
  - > Insurance – Professional liability, general liability, property, etc.
  - > Bonding – Performance, Labour and Materials

# Some Additional Contract Terms:

## 5. Disputes

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- > Consultant makes first ruling on interpretation of requirements of Contract Documents
  
- > Methods of dispute resolution:
  - > negotiation
  - > mediation
  - > arbitration
  - > litigation

# Some Additional Contract Terms:

## 6. Non-Performance

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- > By Contractor
  - > correction of defects (by contractor or owner)
  - > owner takes over work and charges contractor
  - > termination of contract
  
- > By Owner
  - > stop work
  - > terminate contract

# Tips for Drafting Contract Documents

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- > Be consistent
  - > Use of a different term or phrase suggests a different meaning is intended
  
- > Avoid repetition
  - > Lawyer's rule: say it once
  - > Review all documents to ensure no duplication or inconsistencies

# Tips for Drafting Contract Documents

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- > Use active voice
  - > Passive: “The Contract Price will be paid in monthly instalments”
  - > Active: “The Owner will pay the Contractor the Contract Price in monthly instalments.”
- > Avoid putting commercial terms (price, payment, insurance) into specifications

# Review

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Remember:

- > Contract law principles
  - > Offer, acceptance, consideration
- > Construction contract forms
- > Project delivery models
- > Key contract terms