Scribbles Squibs #20 – August 22, 2013 – What Does Substantial Performance Of Your Contract Have To Do With Payment?

by Attorney Jonathan Sauer

I. INTRODUCTION. Initially, we have to distinguish between substantial performance and substantial completion. First of all, in many situations – probably most situations – the meaning of each will be very similar. But, in many other circumstances, they may be completely dissimilar. Then, we'll discuss under what circumstances a contractor's withholding of services allows for its payment without achieving substantial performance. We'll set up this *Squib's* 'Problem' and, at the end of the *Squib*, discuss some possible answers to that Problem. References to 'he' also includes 'she' and 'it' (corporations, LLC's.) I mean, mostly, we're cool. So, pay attention to this *Squib* and read this carefully. There will be questions from this *Squib* on the final exam. You know, when you get to bid new jobs tomorrow? And, when you have to make difficult decisions as to those jobs you wish you had never heard of which you are performing *today*? Also, not to induce fear, but those not doing particularly well on the final exam may not necessarily get to leave the examination room in the manner in which they entered it. *Capische?*

II. THE PROBLEM. Electrical subcontractor (ES) has the contract for electrical work for the construction of a school in the Town of Bliss (Town), for which the general contractor is Earnest and Tries Hard (ETH). Although a Massachusetts public contract – ES bid as a filed subbidder - there is some federal money involved. ES has payment and performance bonds from Honest Surety (HS). There is a reference to some various Code of Federal Regulations (CFR) sections and other federal rules in the subcontract. They are not actually set forth in the bid documents. All references to them are just to the number of a specific regulation. But, if one were to check, there is a regulation which says to perform a federal job, all materials had to be made in the USA. (The federal government, apparently, religiously watches David Muir's 'Made in America' series during the ABC Nightly News with Diane Sawyer. Only, don't necessarily look for her on Friday nights.) ES, new to Massachusetts public work, did not understand the concept of 'incorporated by reference' documents listed in his subcontract. Also, he remembered reading somewhere that the Massachusetts public procurement system does not have 'Buy American' requirements. True, the specifications for the switchgear and emergency generator (both listed as The Items) list three American manufacturers for these items. However, he knew that the Town had to accept an 'or equal' and he thought that equipment he was going to buy and supply made in Belize would be sufficient. Things went well with the early stages of the subcontract: powering up the site and trailer, installing conduit, running wires. However, it came time for him to order The Items. He had made a submittal on the Belize equipment for The Items, which the Architect had for two months and had not approved,

disapproved or otherwise acted on. However, he spoke with a junior architect (JA) briefly on the phone once and this individual said he suspected that the equipment would *probably* be alright but that ES should get the final ok from the head architect (HA.) The prices ES received from Belize for The Items was going to expire as of a certain day and he had bid the job on these numbers. Also, such items had some lead time for fabrication and delaying his decision as to his order could put him in a situation where he would complete late. (HA, the day of that telephone casll, was away at a bow-tie convention.) So, ES ordered The Items from the Belize manufacturer. They were shipped to ES and he installed them. Everything tested out: they worked fine. HA had returned from his bow-tie convention some time ago but had been busy on other projects. Upon visiting the site one day, he saw The Items and said 'what is this'? He checked the manufacturing information on the side of The Items and saw that this equipment had been built in Belize. HA ordered ES to rip this out because it was both unapproved and not made in America. ES refused. ES said that JA had orally approved the equipment. HA said that only official action on submittals provides the approval for any material. ES kept submitting for payment of The Items on requisitions – they amounted to more than one hundred thousand dollars and the manufacturer was aggressively looking for payment – and ETH wouldn't pay for them as he couldn't get paid for them by the HA, who refused to process any electrical requisitions until the equipment was removed and replaced by one of the three specified American suppliers. HA said, in any event, he was adjusting what monies were due ES as ES had over-billed on his earlier items. HA was pressuring ETH to replace The Items, either with ES or with another subcontractor, as HA contended that ETH, as the general contractor, owned all of the work of the general contract. HA said that if he were to pay ES, the federal funding could be jeopardized and Town could lose that funding source and even have to pay back monies to the Feds which it already received. HA said, besides, were he to pay ES for the requisitions outstanding, ES would not have enough money left in his subcontract to finish the job. ES had not been paid for three months and said that this violated the prompt pay provisions of Massachusetts law and the general contractor was violating them by not paying. Besides, he didn't have the money to pay his employees prevailing wages to continue the electrical work without some funding. On top of this, ES had heard that two or three other subcontractors had not been properly paid or were having problems getting paid by ETH, which made him fear that he himself would not get paid. Consequently, as a result of some or all of these factors, he pulled off of the job. ETH promptly terminated him and made a demand on ES's performance bond surety to complete the electrical work, including ripping out The Items and substituting for them American-made equipment. As to ES and his surety, the issue becomes: has ES substantially performed his contract? Is ES entitled to be paid? Anything? Or, is ES and his surety going to have to pay a bundle?

This is how legal problems present themselves. Sometimes, they are more complex! In giving clients answers on questions such as these, the lawyer has at least three jobs. First, he has to understand the facts, especially the negative facts, in addition to the information contained in all of the relevant documents, including the bid documents and referenced authorities. Secondly, he has to find the law – to the extent he can – which would apply to those facts, which would, hopefully, lead to some sustainable conclusions. (Sources of law could include appellate court cases, statutes and regulations. There is no one book the lawyer can turn to for an easy answer.) The lawyer has to find the law closest to the situation in the 'fact pattern', apply the law and

hope he doesn't get a terrible judge! Lastly, if he is worth anything, he will also give advice as to how to manage the problem, practically speaking, using common sense and comparing this situation against other similar situations he had encountered during his practice. An understanding of the law is good. An understanding of how to handle a given difficult situation with an eye towards remaining in business is even *better.*

Our question for this *Squib* then: Has ES substantially performed? If he sued ETH and ETH's payment bond, will he be entitled to be paid? Or, when ETH sues him and his surety for the increased costs of performance of the electrical work, is he likely to lose?

Let's look at *some* of these issues (limited time and space), with an emphasis on payment.

III. THE DIFFERENCE BETWEEN 'SUBSTANTIAL PERFORMANCE' AND 'SUBSTANTIAL COMPLETION'.

These are not two ways of saying the exact same thing. 'Substantial completion' can mean that the work required by the contract has been completed except for nominal remaining work, such as one would have with a typical punch list. At this stage, the contract work can be used for the purposes intended, by and large. If it is a building, the building can be occupied and used. Such remaining work items usually would not materially impair the usefulness of the work required by the contract. There are some references in the public bid laws suggesting that 'substantial completion' means that there is one percent or less from a dollar standpoint remaining in the contract to be performed. If a party has substantially performed its contract, it would be hard to imagine circumstances where that party has not also substantially completed its contract.

'Substantial performance' is a situation where the party performing has performed the material provisions of its contract, even where, sometimes, it has not substantially completed the contract work. So, it could be a situation where a party has been terminated, thrown off the job. It could be a situation where the party's contract has been terminated for convenience. It could be a situation where a contract is stopped, due to a large, unexpected differing site condition, a substantial change to the contract work or due to insufficient design. It could even be a situation where a project has been stopped by a governmental entity for one reason or another. It also could be s situation where an owner (for a general contractor and for subcontractors) or a general contractor (for subcontractors) has filed bankruptcy or otherwise run out of money. In that case, what 'substantial performance' means is that the party doing the contract work has performed properly that work until he was stopped for whatever reason. In other words, a party 'substantially performing' his contract was on the way towards 'substantially completing' his contract but was prevented from doing so for one reason or another not attributable to his own conduct or performance, some examples of why given above.

IV. WHAT FACTORS WOULD BEAR ON WHETHER OR NOT ES HAD SUBSTANTIALLY PERFORMED AND/OR WAS ENTITLED TO BE PAID WHEN HE PULLED OFF.

Now, other than terminations – for one reason or another – one of the principal reasons for contractors not 'substantially performing' their contracts is because they pulled of the job due to non-payment. Many contractors believe – *assume?*- that they have an inherent legal right to pull off the job when they are not getting paid for whatever reason. Such is not the case, at least with regard to *all* reasons. I am unaware of any general principle of law in Massachusetts which says that non-payment justifies pulling off the job in and of itself. There *ar*e a few cases providing examples of when this is permissible but no general contract law I am aware of which provides a blanket provision that this option is open under all circumstances. The number of cases allowing for this is surprisingly small.

I can think of at least six reasons for non-payment which would ***not*** justify pulling off of the job for non-payment.

First, the general contractor may not be under a legal obligation to pay a subcontractor if there are 'pay-when-paid' clauses in effect in the subcontract and the general contractor has not been paid *for whatever reason,* at least in the short run. There are court cases which indicate that, ultimately, this will not be a defense if the reason for the non-payment is unrelated to the subcontractor's performance. There is even a recent case saying that a general contractor's surety can be sued by a subcontractor subject to such a clause and win. (That, because the general contractor's surety bonded the general contract, not the subcontract in which the pay-when-paid provision is contained.

But the fact that a subcontractor can be paid ultimately in the presence of such a clause is not the same thing as saying that this will occur 'in the short term'. Several years after the fact – when the matter finally goes to court – it may be very hard to look back and try to figure out whether you were entitled to be paid in August. Or, September. Or, October. Or, November. Five or six years down the road when such a question is evaluated by an impatient, bored judge or by an indifferent, confused if not utterly hostile, jury, issues of what happened or didn't happen over a period of two or three months will probably not be important. So, the first problem is that, for whatever reason, in the presence of a pay-when-paid clause no payment is currently due or, at least, not the payment in an amount that the subcontractor was expecting (hoping for). One needs to note that the 'statutory subcontract' for filed subbidders as contained in MGL C. 149, s. 44F does *not* include a pay-when-paid clause, *as a matter of law.* But, if you agree to accept a different form of contract, the result of that choice isn't especially clear. And of course non filed subbidders on public work and all subcontractors on private work can be subject to such a clause.

Secondly, although the subcontractor or general contractor has submitted a requisition for any particular month, that is not at all the same thing as saying that the subcontractor or general contractor has actually performed that level of work indicated in the requisition or that

the level of work indicated is all satisfactory. This, ultimately, will be the decision of the owner, the architect and, for subcontractor claims, the general contractor.

Let's be honest now. Deep in our cups, we *all* know that subcontractors and general contractors like to front end load to the greatest extent allowed. And, it's a human tendency to not accept blame for a situation, even when/where some blame is attributable to *us*. All the more so when the blame is attributable to us. A problem is that owners of construction companies, in some instances, are sufficiently distant from some of the jobs on a day-to-day basis to actually understand what is *really* going on. And, it's *another* human tendency to try to keep the boss happy. Maybe the boss isn't getting good information that the job is not going well, particularly if some kind of significant error has been made by the PM or superintendent. After all, this might hurt the PM at his next salary review. Or, the problem might be serious enough to lead to his termination.

One thing to understand about properly-prepared and properly-conducted litigation is that 'it all comes out in the wash'. Meaning, if there is some difficulty you are unaware of today, if it is significant enough, chances are that the fact-finder (judge, jury, arbitrator) will find out about it five years from now when the case is tried. And, as a matter of agency law, the knowledge of a subordinate is usually attributable to the owner whether the owner knows of any particular situation or not. Let me put this another way. The business owner can say as to any specific fact or situation 'I was not aware of it.' The business owner might then think that he or she is not bound by what an employee (agent) did or didn't do. As long as the action or inaction 'arises out of or is in the scope of employment', the employee's action or inaction *will* be 'charged' to the owner.

An example of something that *might* not be handled this way? If your employee is selling one pound bags of cocaine out of his/her trunk and this is something that you (and your company) are positively and utterly not involved with, that action won't be charged to you as part of agency (principal and servant) law. However, how many change orders and job difficulties deal with a one pound bag of cocaine?

Let's look at this another way. If you put someone in place – say, a PM – and that PM does something really dumb, usually, that action will be charged (attributed) to your corporation irrespective of whether you knew personally or not about it or not. Your corporation is a legal entity. You created it. Therefore, actions you don't agree with – and wouldn't have agreed with or to while they happened – become, in the main, your corporation's acts. From a legal standpoint, you are an employee of your corporation. So, is the PM. The PM's responsibilities are, practically speaking, to you, from a legal standpoint, those responsibilities run to the corporation.

Thirdly, the failure to make any particular payment in the amount expected or in the time period expected may not be a *material* breach of contract. (This,'material breaches of contract'. the subject of our next *Squib*.) For now, the idea of a 'material breach' is something that is significant, has large consequences and/or occurs over a long period of time. Contracts are breached every day of the week. For example, what if your contract says that you are to perform

cleaning services each day at the end of the day? What if you do this for eighty days in a row but miss the eight-first day? It is almost impossible that a court would see this as a material breach of contract as to that one day.

A somewhat more difficult question . What if your contract requires you to provide certified payrolls for each week you are on the job? What if you miss just one week? Probably not a material breach of contract. What if your contract requires you to provide O&M manuals and spare parts in a certain number and, for whatever reason, you are missing just one manual or don't provide an adequate amount of spares part with the first submission? Again, probably not a material breach of contract. (There is a school of thought or idea that one can't be terminated after substantial completion has occurred. I've never verified this myself to any level of certainty. I mention it only to give you the idea that this is something that might bear looking into under certain circumstances.) But it is only *material* (serious) breaches of contract that justify a withholding of future services (if you are the recipient/victim) or which would justify a termination (if the claimed breaches are yours.)

Examples? Let's say a contract says that someone submitting the requisition – either subcontractor or general contractor – is entitled to be paid in thirty days. Common enough. Well, let's say that this requisition has not been paid in forty-five days. Possibly not even in sixty days. (Gulp) What about ninety days? Is this a *material* breach? The answer is, probably, 'no', although I would be looking hard at the ninety day situation. That's not to say that the party submitting the requisition was not right in expecting (hoping) that payment would be made within the time limits specified by the contract. Also, this is not to say that the contracting party *receiving* that requisition was justified in withholding payment for a period of time beyond contract requirements. But, let's face it. One of our current modern sayings is that **** happens. Five or six years down the road - when your court case is tried - it will be hard to convince the fact-finder that your contracting party's being thirty to sixty days (possibly, even ninety days) late was especially important in the grand scheme of things. The jury thinks: is it for *this* that I am away from my computer, letting the phone and email messages accumulate and only making fifty dollars a day as a juror?)

Having said all of this, I want to go 'off message' for a moment on an unrelated topic (although that topic is definitely related to money, which is *everyone's* most important topic.) The subject is bankruptcy. Thirty-seven years of doing this job have demonstrated to me that no one ever really 'dies' in the construction business. This particular company does not work anymore? Let's form *another* one. For those with even minimal computer skills and a couple of hundred dollars, these days, this can be done *on-line.*

Here's a general contractor trick that material suppliers and subcontractors should be aware of. Namely, a general contractor might think 'now is the time to close this company down'. So, for some of them, what they do is gradually move their subcontractors from thirty to sixty days on their payments. Then, if that works, they move the subcontractors from sixty to ninety days on their payments. At that point in time, the general contractor is holding ninety days of its subcontractors' monies. And, at that point, they file bankruptcy, looking for a Chapter 7 discharge of their debts. You would think that the Bankruptcy Court would be aware

of this type of behavior and to try to correct this wrong. My experience is that, particularly with Chapter 7's (liquidation) they are not. So, if your general contractor starts extending payment times to or for you, one has to very curious as to *why.*

A lot of folks think that the court system already makes little sense, as it presently is. If each and every contractual non-compliance justified a lawsuit, the entire system would completely and utterly self-destruct. Thanks to the excellent leadership of the current and previous presidents, the country has descended into something approaching a depression (for our industry) to a very serious recession (as to industries other than construction) and, generally, into a state that might only be described as almost sheer chaos. Government, itself, has been seriously affected by the loss of tax dollars, causing, in Massachusetts – certainly, probably, elsewhere – some slashing as to various governmental budgets, including that of the court system. Any number of judicial personnel and their support personnel have been cut. This means that it is very difficult to get a trial these days for a civil matter. (There are some constitutional guarantees for a speedy trial for a criminal matter, inapplicable to a civil matter. Criminal business runs from between sixty-six percent and seventy-five percent of all court business.)

Example. In Worcester County, the last time I had a pretrial conference there, the court scheduled a *second* pretrial conference six months later. This makes no sense in that the primary purpose of a pretrial conference is to set a trial date. But, that county is extremely backed-up with civil work (irrespective of their having a new and handsome building, for which there is almost no parking!) So, they make you schedule a second pretrial conference.

Why do they do that then? They do that for two reasons. First, to attend a pretrial conference, the attorneys have to prepare a joint pretrial memorandum, which takes a certain amount of work and involves a certain amount of discussions – 'cooperation' between counsel - to develop. As many lawyers' concept of 'cooperation' is to snarl in the key of E, this is something that a lot of lawyers aren't good at, don't like and try to avoid. Also, many people, including lawyers, don't like being dragged into court for hearings. So, the system is set up this way hoping that those two things the lawyers don't want to do – prepare the pretrial conference memorandum and attend court, possibly at an inconvenient time and distance – will lead them to settle the case, *so that the court system won't have to deal with it.*

For a jury-waived case, the attorneys are required to do an *incredib*le amount of work just to attend that conference and get a trial date. This includes – shortly after the conference - marking and agreeing in advance as to the admissibility of each exhibit. (In a construction case, this could be dozens or even hundreds of documents.) This also requires preparation of the 'requested rulings of fact' (you have to write the judge's decision, essentially.) This also involves the preparation of 'requested rulings of law', the functional equivalent of preparing jury instructions, not generally due in a jury case until just before the trial. This is an *incredible* amount of work. I have a case in an outlying county involving almost one half million dollars of damages in which we have been assigned *three* different trial dates so far. The court was not ready for the first two. It remains to be seen whether the court will be ready for the third one, which is a year after the case was originally set down for trial.

As hard as it is for you to afford legal services now as to significant matters, the situation would get much worse if legal cases with no real clear *significant* legal issue were inserted into this mix. And, in that eventuality, you may have lost the opportunity for court review of something really important to your business because the system would be too busy dealing with matters that are really insignificant, which includes a *huge* amount of prisoner complaints of one kind or another in the criminal court.

You don't want to 'guess wrong' as to whether or not you have substantially performed your contract or are forgiven from the same by the other side's 'material breach of contract'. Beauty is defined as something in the eyes of the beholder. Different people will make different judgments as to whether something or someone is beautiful. You don't want to guess *wrong* as to whether or not you are justified in refusing to work further because of what you consider to be the other side's material breach of contract, including, but not limited to, a failure to make payments in accordance with the time requirements of the contract.

Some ideas with regard to your surety bonds. The various general indemnity agreements I have read generally provide that the surety does not need your permission before it starts spending your money, whether this is in terms of hiring consultants (lawyers, completion services, accountants, expert witnesses) or paying claimants. *Secondly*, depending on your financial statements and how good an account you are for the surety (how much premiums you pay) as well as depending on how many claims you have currently or have had in the recent past, this could be the end of your getting contract bonds from that surety, which could push you out of business. The *third* thing to keep in mind is that every application for surety bonds that I can recall seeing in the last several years specifically inquires as to whether or not you have ever been 'in claim'. That doesn't mean how many times your surety has had to pay a judgment or a claim that never went to court. It means how many times has any claimant even *filed* a claim against one of your bonds - bid, performance and payment – irrespective of whether or not that claim had merit. The *fourth* thing is that, for many bond principals, a good insurance agent through whom you buy bonds may be 'shopping your account' at any given time, trying to get you a better deal. At different times, the surety industry can be very competitive as to both rates and programs (largest single bond, largest total program) and issues pertaining to individual indemnitors. Having 'claims' in your history – even ones where you were right and/or the surety never paid a claimant – could minimize your opportunities to get a better bonding program: lower rates, larger single bond and/or total program limits, removal of certain of the individual indemnitors from the indemnity agreement. ***Please note that after this series of Squibs on contracts has concluded, the next article will be 'The Care and Feeding of Your Surety'. That will include a number of helpful tips on how to maximize your surety experience and, hopefully, minimize any claims experience you might have.***

The *fourth* reason why you may not be getting paid is that you have front-end loaded excessively and either the owner, the architect, the general contractor or some combination of these have discovered that fact. Therefore, they may be making an adjustment of your amount earned to date, which you will probably not like but which, in the aggregate, is fair. The right to do this might be established by contract. Even when someone re-adjusts your completed to date

amounts, not to your liking and without benefit of a specific contract provision, a fact-finder looking at this years down the road might say: "He overcharged. The Owner discovered this. What the contractor tried to do was not right." Either way, an over-billing will not work to your ultimate success in these circumstances, especially when challenged. Or, discovered.

The *fifth* reason for non-payment is that irrespective of whatever front-end loading you have accomplished, you simply may have been paid too much for the work that has been accomplished to date. Any number of general conditions will allow an architect/owner to adjust for this factor. If you got paid for work you didn't do in advance, good for you! But, if you get called on this, at some point in time the piper might have to be paid. So, if the owner/architect/general contractor decides to adjust for this down the road, that adjustment does not justify your withholding of performance of further services when they are right.

The *sixth* reason might take a bit of thinking about. An owner, through its architect, adjusts the amount due under your subcontract because a determination is made that if you were paid what you are looking for, there wouldn't be enough money left in your subcontract or general contract to finish your work. (The architect might also suggest to the owner that no further requisitions be honored because of the same reason: there's not enough money left in the general contract to finish the job.) This type of decision is often made when there are construction issues with the contract. Some forms of general conditions, including some AIA forms, provide for this. If they are in the general conditions, they will apply to the subcontractor, if the general conditions are included in the subcontract as a contract document and those obligations in the general conditions are not purely applicable only to the general contractor. Issues relating to payment are seldom only limited to the general contractor.

Now, there most likely isn't a contract provision providing for this in your subcontract, *However,* in the vast majority of circumstances, a subcontract will 'incorporate by reference' other contract documents, which means that you are subject to them, as well, just because they are listed. It's irrelevant whether or not you even ever saw these documents. Such a provision I refer to you is contained in some of the AIA documents I have seen. Now, 'incorporation by reference' may not apply to you if the obligations assumed by them would apply to the general contractor *only*. However, that would only apply to a minority of situations. And, as to your specific payment problem, you would be wise to check with a construction lawyer before you bet the farm (your company) on whatever action you decide to take in response to non-payment.

Ronald Reagan had a good line in his debates with Walter Mondale. "There you go again!" You're reading an article written by a lawyer who is telling you when you have a problem that is complex, the ramifications of which you may not completely understand, you should speak to a lawyer. You say: "this guy's only trying to develop business." But, if you are an electrical contractor an owner contacts you with regard to an electrical issue, wouldn't you give him the benefit of your experience and specialized expertise? And, if what you are telling the owner is true or is making sense, aren't you doing that owner a favor to speak with him, educating him even when you don't ultimately work for him? Does it matter that you are being paid for your services if you are helping your client or possible client or that you hoped you might get paid for your providing these services (whether you actually did or not?) Isn't that the

nature of business? Isn't that the nature of *life?* Decent people help other decent people. Sometimes it leads to business. Often it doesn't. None of us gets paid for everything he does. I have done some of my best work for people who never hired me as an attorney. Does that make me dumb? Possibly. But, they say that when a lawyer passes, he never wishes that he had billed more hours. I like to think that I work for Someone who appreciates my providing information to those who need it, whether through articles such as this or through my seminars. God knows, He has enough *other* reasons to be upset with me! (Whether He is right or not, only time will tell!)

ES may have tried to hang his hat on the fact that a couple of other subcontractors were not getting properly paid. For our purposes, let's assume this is one hundred percent true. Does this help ES? The answer is no. If one refuses to further perform his contract because he is fearful that the contracting party will not fulfill its future obligations under the contract, this is called in the law an 'anticipatory breach of contract'. Meaning, a concern that your contracting party won't perform his obligations in the future and then withholding performance because of this concern is itself a breach of contract. More on material breaches of contract next *Squib!*

One has to understand that Massachusetts law clearly provides that one who does not 'substantially perform' his contract is not able to recover under his contract. (Hint: *quantum meruit* has nothing to do with this. That's a contract method of awarding damages, premised on the fact that the party seeking compensation has substantially performed his work to his ability to do so. *Not* doing so makes this Latin expression inapplicable. *Quantum meruit* is not a 'get out of jail free card.')

V. WHAT SHOULD ES DO (OR SHOULD HAVE DONE.)

Each situation depends on the facts of the case, the contract at issue and what happened. Meaning, there is no 'legal' advice that would apply to each and every circumstance in a vacuum.

Having said that, a few observations. The facts in this matter do not support ES. Unless he can prove waiver - highly doubtful - what a junior architect may have carelessly said over the phone is not likely to trump whatever the clear written contract requirements are. If there is a contractual requirement, the fact that a party didn't understand what that might be or the ramifications flowing from not following that is generally irrelevant. As the Coach five and one-half miles down the road from East Walpole says - when he feels compelled to say *anything* significant, something that does not often occur - 'it is what it is'.

You're in business as a contractor, right? This doesn't mean you can fix your own car. This doesn't mean that you can do your own taxes. Similarly, for you to attempt to understand your legal rights without sufficient objectivity and, especially, without the specialized knowledge someone trained in the law has, seems like a bad idea. It *is* a bad idea.

One doesn't want to lightly turn a matter over to his bonding company. A world of potential pain awaits you with a declination of further bonds and the fact that no principal can

control what a surety will do, especially with regard to the hiring of consultants, the surety's payment of claims (even if this is against your desire) or even signing your name to a settlement agreement with your contracting party, which certain general indemnity agreements provide for. It is almost always a given that no one can finish your job cheaper than you can. Moreover, in a situation where there are going to be losses – payments to labor and material suppliers and subcontractors (payment bond) or payments with regard to performance bond issues involving the 'obligee', the party to whom your bonds run - these are likely to be greater if you can't finish the job yourself or cannot, at least *influence* the completion of the project. In a difficult situation, going to your surety might be one option. While that surety is unlikely to 'lend you' the money to complete the job - at least, in the way you understand this - your surety *might* allow you to complete, understanding that your material suppliers and subcontractors may have to be paid from your payment bond. (In the surety industry, this is called 'back door financing'. For all intents and purposes, this is an indirect loan.) Understanding the principal-surety relationship and using it to your advantage might allow you to get out of difficult situations somewhat easier than one lacking this knowledge. (More on this after this the contracts series is over, with our next offering, 'The Care and Feeding of Your Surety"!)

(These materials are intended as general information only, not specific legal advice. When confronted with a legal problem you don't understand, seek the assistance of legal counsel. Construction law is something that most 'general' lawyers don't do a lot of. At Sauer & Sauer, we ***only*** *practice construction law and we attempt to assist our clients with their contractual needs and issues whenever possible. Involvement of an attorney earlier in a problem can often result in a better outcome.)*

SEVEN QUICK THINGS TO KNOW ABOUT OUR FIRM:

1. No charge to non-clients for quick answers to *general* Massachusetts construction law questions.

2. We guarantee our billing rate for five years in writing for all new clients through the end of this year who mention this offer at engagement.

3. As trials can be expensive, take a great deal of management time and the result of which is uncertain, we make our best efforts towards seeing whether something short of a trial – such as mediation – might be possible for resolving the matter. If a trial is necessary, however, we have a lot of experience trying construction cases.

4. We endeavor to maintain, wherever possible, possible future business relationships with your contracting party you are currently in a dispute with by emphasizing a fair and reasonable approach to the resolution of disputes, which often helps promote earlier (and cheaper) case resolutions than does lawyers who are 'mean and angry'. And, while you might say now that 'I'd never work for that guy again', a lot of experience over several

decades suggests to me otherwise! Given the right job, more than likely, he'd be given another chance. Particularly if it was a *good* job!

5. We try to defer until later in the case the more expensive elements of discovery – i.e. depositions – in order to try less expensive discovery first. We recently obtained a 1.5 million dollar settlement for a subcontractor against a bankrupt general contractor's payment bond surety on three projects without a single deposition ever being taken and without our client's even having to answer and sign interrogatories.

6. Being a smaller firm, our attention is focused *solely* on our clients and their problems, not on feeding the overhead of a fancy office and many partners, associates and support staff. We only have to feed our five dogs, most of which, however, are *quite large!* (If you ever meet The Worm, be respectful and, perhaps, a bit wary. After all, Rotties *can* be difficult! Especially around meal times. For big dogs like this, it is almost *always* around meal times! Or, close enough so that the difference isn't noticeable.)

7. Satellite offices in Boston and Worcester for more convenient meetings.

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"Knowledge is Money in Your Pocket!"

(It really is! Please buy into this! In my line of work, they never stopped filming *The Sopranos.* Tony may not be with us anymore. What? You think that worries *us*? It's clear you have not spent any time in Jersey! You want to wake up in the morning with a horse head next to you in bed? (I mean, exactly how much did *you* have to drink last night?) What would your wife say? What would your girlfriend say? What might they *both* say if each knew? Not necessarily about each other. Only about the horse head.)