

3

ABC Warehouse II Winding Up the Job

It was June 4th, the Monday morning after ABC Warehouse Company's grand opening celebration. ABC's president, Allen Brady, was comfortably planted in his imposing new office chatting elatedly with Carl Daly, his gloomy warehouse manager. Allen crowed, "Well, the party was a resounding success. Did you see the envious looks of our competitors? And our regular customers were really impressed. I'm sure business will be booming!"

Carl, dampening Allen's enthusiasm, complained, "Yeah, the party was great, but look at all the unfinished construction work. There are a million loose ends and Hyde's people are all over the place getting in our way. We can't occupy all of the warehouse yet and their job shack, chemical toilets, and trucks are scattered all over our truck turning area."

Allen suggested, "Why don't you phone Hyde and tell them to get off the dime? After all, with the final payment and retention, we're holding over \$500,000 of their money. That should get their attention!"

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At Hyde Construction Company's offices, George Hyde was at his desk and had his ABC job superintendent, Ezra Field, on the phone. He was laying down the law, "Ezra, I want all those punch list items finished this week. We're submitting our final payment request tomorrow and I don't want any flack from Allen or Ivor about unfinished work."

Ezra replied, "OK, Boss, you got it! I'm on top of it! Most of the subs are here now and I'm sure we'll be out of here by Wednesday, no later."

Hyde's last shot was, "Well, you better be!" and hung up.

Then he strode to the nearby office of Ulysses Vance, his chief financial employee. "Vance, how're you coming with the ABC final billing? I want it out early tomorrow morning for sure!"

Ulysses replied, "I'm working on it, George. Say, what should I do with all these bills for extra concrete and forming where we over-excavated? It's over \$6,000!"

Hyde, frowning, said, "Let's bill it as an extra. It might slip through. After all, we did the work and spent the money. Also, add in something for our labor and supervision, and don't forget overhead and profit."

“Okay, yes, sir, will do.”

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Ivor Judge was having coffee with his partner Leo King at the offices of Judge and King, AIA, Architects. They were gratified with the design and construction of the ABC Warehouse and had thoroughly enjoyed themselves at the grand opening party. They'd made a few good contacts and were now hoping for some exciting new warehouse projects. Ivor seemed concerned however and said, “Leo, last Tuesday's punch list was a mile long and I'll be checking progress at the site tomorrow. They only just made it into the building for the party and now the work will go slower with the warehouse full of stuff as well as having to work around ABC's people. I hope Hyde doesn't lose momentum.”

Leo suggested, “Keep the pressure on Hyde and they'll get it finished. I hope we don't have to drag out the close-out procedures too long. We've spent entirely too much time on this job's construction administration already.”

“Well, Leo, the Certificate of Substantial Completion is out of the way as we issued it on May 28th prior to ABC's moving in. I understand that the building department made their final inspection on the same day and that the power company installed their permanent power and light meters on May 31st.”

“It looks like you're making good progress, Ivor. How about the Notice of Completion?”

“It's been filled in except for the completion date, Allen's signature, and notarization. Even though the building is in use there's still too much work going on to consider the project complete. I'll be checking tomorrow to see if it can be filed. If so, I'll hand the notice form to Allen and ask him to sign it right away.”

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At 9:00 AM Tuesday, Ivor was at the jobsite conferring with Hyde's superintendent. Corrective work was being accomplished by an electrician, two painters, and a finish carpenter. After reviewing the punch list with Ezra, very few items remained. Ezra said, “We'll be completed with all punch list work by quitting time tomorrow. You can count on it. We're moving the job shack and chemical toilets out now. There was some minor damage done during the owner's moving in but it's all repaired now. We won't be billing for it as the cost was negligible.”

“I'm sure the owner will appreciate that as you'd certainly have been justified in charging for it.” Ivor and Ezra both doubted that Allen would be all that appreciative.

“At this point, Ivor, all I want to do is get this job wrapped up and get outta here. This time next week I'll be relaxing on the Colorado River and hauling in fish.”

Ivor then left Ezra and went in to the new offices to see his client, Allen Brady. After mutual pleasantries, Ivor put the Notice of Completion on Allen's broad oak desk, explaining, “Allen, Ezra says that the remaining punch list work will be completed tomorrow for sure. If it is, then tomorrow's date, June 6th, should be entered as the completion date. The notice must then be filed within 10 days thereafter, on or before June 16th, in the office of the County Recorder of this county. This is very important and is for your protection as it will have the twofold effect of establishing a definite completion date and of limiting the time periods in which mechanics' lien claims may be filed against your property. Subcontractors and suppliers will

ABC Warehouse II

then have 30 days after the notice is recorded and Hyde construction will have 60 days in which to file their claims. You must sign the notice before a notary public. The sooner it's recorded the better it is for you."

Allen nodded in assent, "I understand. I'll take care of it."

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When Ivor returned to his office just before noon, he found that Hyde's final payment request had just been hand delivered. Ivor immediately reviewed it line by line and noted that all line items in the Schedule of Values were now advanced to 100 percent. That's okay, he thought, since all that're left are minor pick-up items. He spot-checked the arithmetic with his desk calculator and found no errors.

But--what's this? A new Change Order #15, for extra concrete as a result of over-excavating, \$11,353.38. That was Hyde's fault for not checking the plans and watching their levels.

And another, Change Order #16, for wood paneling in Allen's office, \$14,661.35. Allen never actually agreed to this charge, but I know he asked for the work, so there'll be some heated discussion on this, I'm sure.

All the other change orders appear to be in order. Wait--there's no final accounting for the allowances. I'll have to talk to George Hyde about this. So he dialed Hyde Construction's number and got George on the line.

"George, Ivor here. I just finished reviewing your final bill. It seems to be pretty well in order except for a couple of small matters. First, we'll need your final accounting on the allowances."

"Okay, Ivor. No problem. I'll have Vance get right on it."

"Then, we must discuss Change Order #16 since it was not actually agreed upon. The field work got ahead of the change order paper work. We'll need to see some back-up to support the charges. Material bills, time cards, wage rates, and so forth. You know what's needed. But I'm sure Allen will pay it since he asked you to do the work."

"Well, okay. More work for Vance."

"And finally, as to Change Order #15, \$11,353.38. That was for inadvertent over-excavation and cannot be billed to the owner. You will have to ..." He wasn't allowed to finish the sentence.

George's pressure had been building up and now exploded, "Ivor, what the blazing hell are you talking about? We spent that money and it's in the job! Whadda ya mean we won't get paid?"

Ivor was holding the phone about 12 inches from his ear and didn't actually hear the last of it before George angrily slammed the receiver. So, Ivor called back and asked Hyde's secretary to have him at a meeting in Allen Brady's office tomorrow at 11:00 AM. "And tell him to bring the final accounting for the allowances."

Ivor then called ABC Warehouse and confirmed the appointment with Allen to discuss the final billing with George Hyde. Ivor thought, this will be a memorable meeting.

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Ivor arrived at the ABC Warehouse an hour early on Wednesday morning so he could check on the progress of punch list work before meeting with Allen and George. Greeting Ezra at the warehouse entrance, he quickly reviewed the list and they discussed the few remaining items. Ezra was right, they could easily finish the work by mid-afternoon today. He and Ezra went around verifying and checking off what had been completed. He was satisfied with the quality and with Ezra's efficiency in organizing the work of the various trades. He finished with Ezra just in time to walk into Allen's office at 11.

George and Allen were both seated and were chatting with an air of uneasy formality. They both had their copies of the final payment request in front of them but had not started to discuss it. As soon as Ivor was seated and had his copy on the desk, George Hyde blurted out, "Let's cut through all the crap and get right down to the important matters! Allen, Ivor wants to swindle me out of my rightful money! I hope you're not going to go along with that, too! Let's talk about those items first."

Ivor, trying to restore order, "Now, George, calm down. We'll discuss everything, but let's do it in a logical order." He was keeping notes.

George conceded, "Okay, Ivor. But I'm not going to sit here and get swindled."

Ivor spread out Hyde's final bill which was on AIA's standard form, Application and Certificate for Payment, Document G702 and the Continuation Sheet, Document G703. The total amount now requested was \$353,511.24. This still left \$221,220.94 in retainage to be requested later. Ivor was thinking, George might be an outspoken, irascible, old curmudgeon, but his paper work was always in order. He rearranged his papers and note pad on the desk and addressed Allen and George, "The Payment Request shows that all work items are completed to 100 percent and I'm in agreement with that. All the physical work appears to be satisfactorily completed except for the few remaining minor punch list items that are expected to be completed today. This leaves two items to be discussed, Change Orders #15 and 16."

George interrupted, "You're damn right we'll discuss them!"

Ivor, ignoring the interruption, continued, "Change Order #15 is for additional concrete and forming to correct a problem caused by the contractor's inadvertent over-excavation at the southeast corner of the loading dock. The excavation subcontractor misread the plans and cut too deeply. To maintain structural integrity of the footings and foundation walls, additional concrete had to be poured. This involved additional forming, reinforcing steel, and compacted fill. The total cost for materials, labor, overhead, and profit is \$11,353.38."

George erupted, "And we spent every red cent of it! We should get paid!"

Allen replied, "This is the first I've ever heard of this. I didn't sign any change order!"

Ivor went on, "I can't approve this change order. It's clearly the contractor's responsibility. George, you're going to have to resolve this one with your excavator. It's not the owner's responsibility."

George knew Ivor was right and had suspected it would turn out this way. He didn't pursue it any further. Better to save the effort for Change Order #16. I'm not going to give in so easily on this one, he resolved. He sat grim-faced, alert, and poised for action.

ABC Warehouse II

Ivor started explaining, "Allen, Change Order #16 is for the enhancements to your private office, in which we're now sitting. The original plans and specifications call for 5/8-inch gypsumboard walls with a texture coat, two coats of paint, and a vinyl carpet base. During construction, you and I decided to upgrade it to book-matched oak paneling with solid oak raised mouldings, an oak crown molding at the ceiling, and a solid oak two-piece base. The two room doors had to be changed to oak to match."

Allen interposed, "I know all that. And when we asked George to do the work, he said okay. He didn't say anything about charging for it. I thought he would just throw it in as a friendly gesture. After all, this project is costing me over two million dollars! Besides, I didn't sign anything and the contract says that all change orders must be in writing!"

George Hyde's knuckles were white as he grasped the chair arms and his face was reddening, "How could you think I wouldn't charge for all this? If I knew you would welsh on this I wouldn't have done the work! You have the fanciest office in the county and now you don't want to pay for it!"

Ivor, trying to regain control of the meeting, "Allen, I'm going to have to decide in George's favor on this one as you asked for the changes and you knew the work was being done. You also approved the revision drawings. I'm sorry if you thought it would be free but, on reflection, surely you must now realize that wasn't a reasonable presumption."

Allen, thoughtfully reconsidering his position, "Well, I guess that was an unrealistic expectation on my part and I'm more than pleased with the outcome. But the price looks high to me. Do I have to pay whatever he asks?"

Ivor replied, "No, Allen, the price must be reasonable and must be supported by invoices for materials, time cards, payroll costs, and invoices showing credits for the omitted texturing, painting, vinyl base, and the originally specified doors. I've compared these costs with similar work and they seem in line. I've already asked George to submit all the back-up documentation."

George confirmed, "We're working on it and I'll have it delivered this afternoon."

Ivor, summarizing, "So, I'll approve Change Order #16, assuming that the back-up supports the figures. I'll therefore ask George to revise this payment request, eliminating Change Order #15, and I'll approve it."

Ivor continued, "Allen, after you pay this installment, all that remains is the retainage. It now amounts to \$220,085.61 and can be applied for, George, as soon as you can get all your documentation in order. Then, Allen, according to the contract it'll be due and payable 35 days after the Notice of Completion is recorded. I presume you'll take care of it and have it recorded today as we discussed?"

"Yes. It's already dated, signed, and notarized. I'll have it delivered to the County Recorder first thing after lunch this afternoon."

Ivor added, "One other thing, Allen, if you wish to have your accountants audit the payment requests, retainage, payments on account, and the balance due, this would be the ideal time for that to be done. They should also review Hyde's reconciliation of allowances. They'll have over a month before the retention payment will be due."

"Yes, that would be a good idea."

Construction Nightmares

Ivor resumed, "George, you'd better get started accumulating the documents and other things which must accompany your request for the retention payment. Some of these are required by the General Conditions, AIA Document A201, Fourteenth Edition, 1987. Others are itemized in the construction agreement. Documents required by the General Conditions, Subparagraph 9.10.2 are as follows:

- (1) An affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied.
- (2) A certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Owner.
- (3) A written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents.
- (4) Consent of surety, if any to final payment.
- (5) If required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

"The following are required by the construction agreement, supplementary conditions, and specifications:

- (1) All of the building keys and master keys and the keying schedules.
- (2) Operating instructions for all the mechanical and electrical equipment. You will also be required to instruct Allen's maintenance personnel in the operation of all equipment.
- (3) All of the specified spare parts for mechanical and electrical equipment.
- (4) All specified extra tiles and other materials needed for future maintenance.
- (5) All specified equipment lists and color and material schedules needed for future maintenance.
- (6) An updated list of all subcontractors and suppliers.
- (7) A complete set of the record drawings and specifications marked to show all as-constructed conditions where they deviate from the contract documents.
- (8) Return all excess plans and specifications to the architect's office, retaining one complete set for the contractor's records.
- (9) All specified warranties and Hyde Construction Company's written warranty.

- (10) A Mechanics' Lien Guarantee from a title insurance company showing that there have been no liens recorded within the 30 days after the Notice of Completion was recorded.
- (11) Hyde Construction Company's unconditional waiver and release of mechanic's lien.

"George, this'll keep your office busy. I suggest you get right on it so the retention payment won't be held up."

Allen was overwhelmed by the large amount of administrative technicality required in getting the project wound up. "George, I'll have your check ready in a couple of days and in no event later than 10 days from today as required by our agreement."

George, warmly, "Thank you, Allen, I'll appreciate that."

Allen added, "By the way, George, I noticed a burned out light bulb in the hallway outside of my office. Will you take care of it?"

"Sure, Allen, I'll have it replaced this afternoon. But from now on you gotta take care of the building yourselves. We'll be finished by the end of today. Don't call us back unless it's to correct defective construction. From now on normal care and maintenance is your problem."

Ivor confirmed this, "Allen, he's right."

Allen acquiesced, "Oh."

They then all stood up, shook hands, and the architect and contractor left.

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The three reassembled a month and 3 days later, on July 9th, in Allen's office. George had just emptied the contents of a large cardboard box onto Allen's clean desk. "Well it's all here, Ivor, everything required by the contract documents. However, we do have one small problem."

Allen and Ivor exchanged glances and looked up apprehensively.

George continued, "Yeah, well when the Mechanics' Lien Guarantee arrived yesterday, we noticed a lien claim had been recorded by W & X Air Conditioning Company, in the sum of \$900. We had backcharged them for some carpentry they were responsible for and now they don't want to pay it. We deducted it from their last progress payment and that stubborn old Charlie Woods filed a mechanic's lien claim."

"Why don't you just pay it?" asked Ivor.

"I don't want to give in to Charlie! He can go fly a kite. We've worked on dozens of jobs together but he isn't getting any easier to deal with."

"Why do you keep doing business with him?"

“Well, he’s the most reliable air conditioning contractor in the business and besides he’s one of my oldest friends and poker-playing buddies.”

“Well, you and your buddy are going to have to straighten out this mess before I can approve payment of the retention.”

George asked, “What’ll I have to do?”

“That’ll be up to Allen’s lawyer, Philip Quinn. Allen, will you please call Phil and ask him how this can be resolved?” Allen, becoming irritated, said, “Ivor, why should I incur more legal expense? Why can’t you make this decision? Why should I spend money because George wants to play stupid games with his poker crony?”

Ivor replied, “Allen, this has become a legal matter and, according to our agreement, you’re obligated to furnish any legal services as may be necessary at any time for the project. This is in subparagraph 4.8 of AIA’s Owner-Architect Agreement, Document B141, Fourteenth Edition, 1987.”

George expansively offered, “Don’t worry, Allen, I’ll pay Phil’s fee on this one.”

So, Allen dialed Phil’s number, put the call on the speaker phone so all could hear, and asked Ivor to explain the situation. Phil’s immediate reply was, “Essentially, George has two choices, either pay W & X and get a release of this claim, or post a bond with the title company until the lien claim is resolved.”

Allen asked, “Is that all there is to it?”

“Yes, but everything has to be done properly so the lien will not attach to your property. This could foul up your application for refinancing. And George should get his own attorney to handle all of the technical details. I’ll review it to protect your interests.”

Allen concluded the call and turned to George, “The ball’s now in your court.”

“Okay. I’ll take care of it. But I’m not going to pay that pirate, Charlie. He’ll have to sweat a little more. I’ll bond around it.”

Ivor, summarizing, said, “Well, Allen, as soon as George has this legal matter resolved, I’ll approve your paying the retention of \$220,085.61 It’ll be due July 11th and must be paid within 30 days thereafter.”

Ivor continued, “The general contractor’s one year warranty period started on May 28th, the date of Substantial Completion. It’ll be important to report promptly any defects noted during this period and Hyde Construction will take care of them. Early next May we should make a comprehensive examination of the building and grounds so that Hyde’s people can rectify any defective work that becomes apparent during the warranty period. The business of this meeting is now concluded. I’ll send a copy of the minutes to each of you as usual.”

The three shook hands and parted. Hyde was elated with the prospects of imminently receiving his retention payment and keeping the needle in his old poker-playing associate.

ABC Warehouse II

Ivor departed resolving to compile Judge & King's final bill as soon as he reached his office so he could get on to other projects.

Allen was again confirmed in the wisdom of his choice of architect and comfortable in the feeling that the bidding process had produced a fine, reliable, although extremely stubborn, contractor. And, most of all, he was uncommonly proud of his new building.

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Moral: Construction contracts are not as simple as they look. They are far from self-executing and require reasonable and appropriate attitudes and a fair amount of skilled administration.