

Construction Loans and Contractor Documents

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INTRODUCTION

No Work
Done on Site

Limiting
Change Orders

Past-due
Sums

Removing
All Rights

Notice to
Lender

Pre-emptive
Strike

Architect

Final Note



Introduction

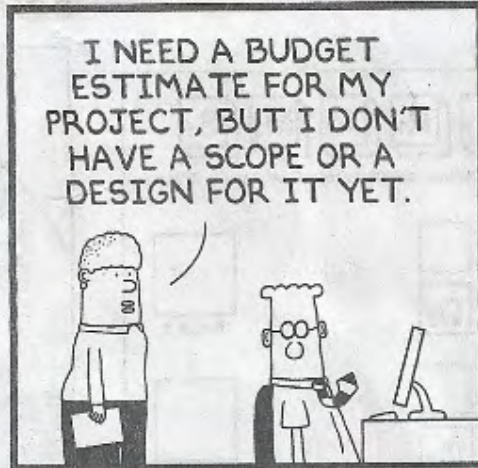
Before negotiations with the Lender, the contractor or architect have negotiated with the owner

Example 1

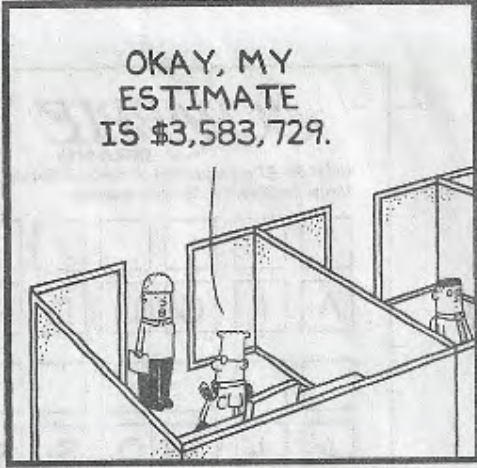
Example 2

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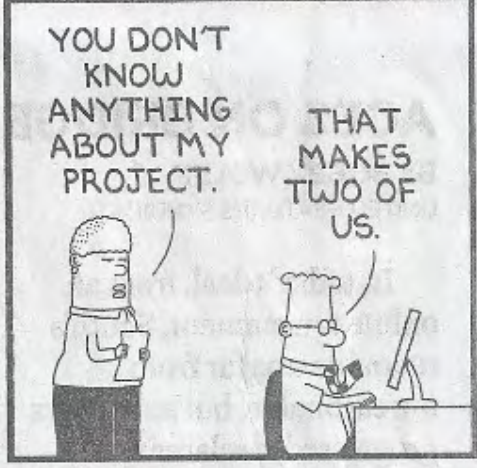
By Scott Adams



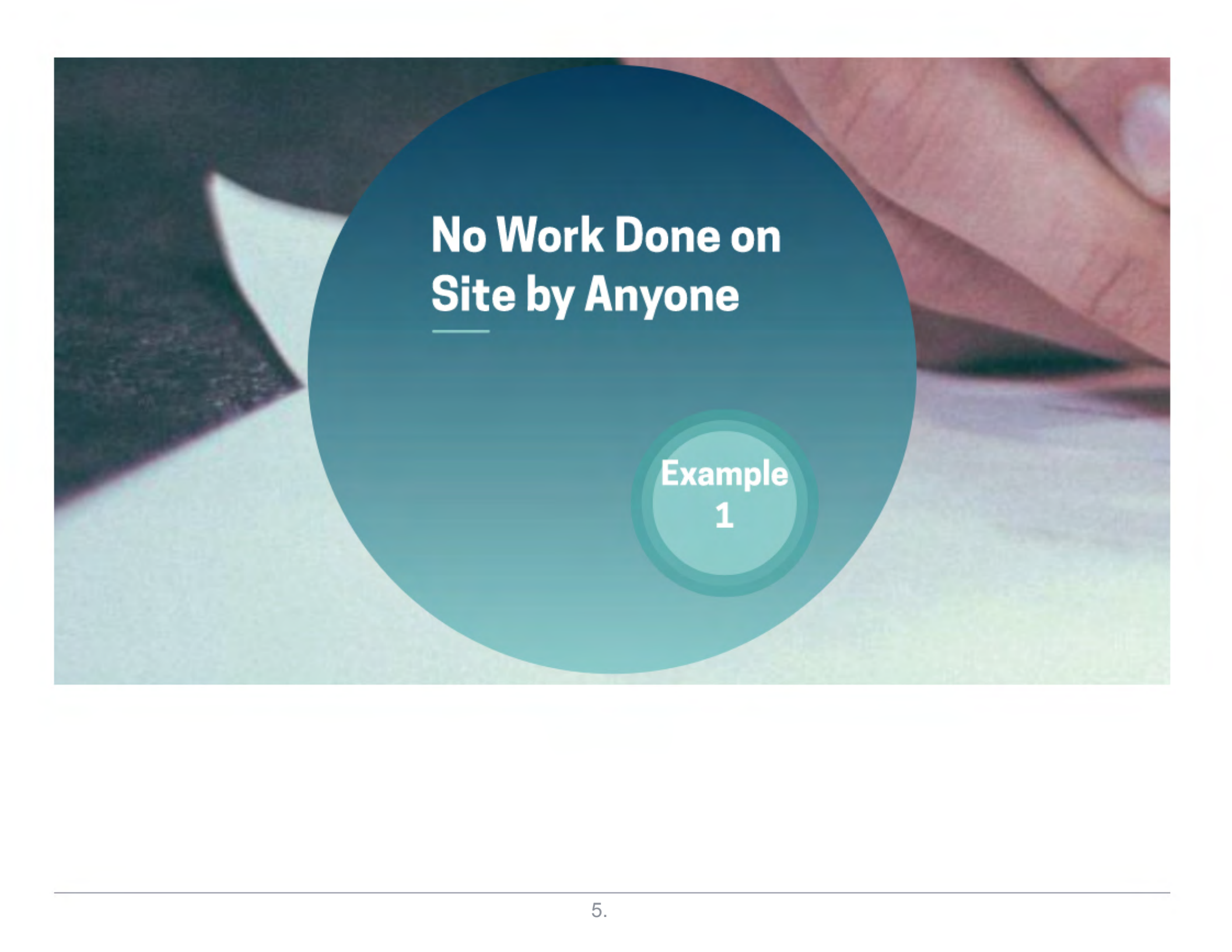
Dilbert.com DilbertCartoonist@gmail.com



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No Work Done on Site by Anyone

**Example
1**

Example 1

(e)(d) To the best of Contractor's knowledge, no work of any kind by Contractor or its subcontractors (including the destruction or removal of any existing improvements, site work, clearing, grubbing, draining or fencing of the Property) has been commenced or performed on the Subject Property and no equipment or materials have been delivered to the Subject Property.

Limiting Change Orders

Limiting Change Orders or cost increases, even if the Borrower agrees:

**Example
1**

**Example
2**

**Example
3**

Example 1

3. General Contractor certifies that no party is in default under the Contract as of the date hereof and there are not any circumstances which would constitute a default upon the passage of time, the giving of notice, or both. ~~General Contractor agrees not to enter into any amendment or modification of the Contract without the prior written consent of Lender.~~

Example 2

Without the prior written consent of Lender, Contractor agrees not to perform work pursuant to any change order which alone or together with any prior changes (i) increases or decreases the contract price set forth in the Construction Contract by an amount in excess of \$100,000.00 with respect to any single change order, or an aggregate amount in excess of \$250,000.00 when combined with all prior change orders, (ii) impairs the structural integrity or the configuration of the Project, (iii) substantially changes the architectural appearance of the project or (iv) results in a violation of any applicable legal requirement. In the event such approval is not given by the Lender, **as between Contractor and Lender**, the Construction Contract shall be deemed not to have been modified by such change order and shall be ineffective in the event that Contractor is required to continue performance under the Construction Contract pursuant to the terms of Paragraph 4 above. Nothing in this Paragraph 5 shall preclude Contractor from recovering from Borrower amounts expended by Contractor based on Borrower's

Example 3

(c) The maximum fee for services rendered by Contractor to Borrower in connection with the Improvements shall not exceed the sum set forth in the Construction Contract, unless modified in accordance with the terms of the Construction Contract and with ~~without~~ the approval of Bank, which approval shall be Borrower's obligation, and no change orders have been agreed to that would increase or decrease said maximum fee.

Past-due Sums

*Contractor won't be paid past-due sums by lender,
but must continue working:*

**Example
1**

**Example
2**

Example 1

specifically requested by Administrative Agent in writing following such notice. Contractor will look solely to the Owner for all sums owing under the Contract attributable to periods of time prior to the date Contractor begins to act on Administrative Agent's behalf and at Administrative Agent's specific written request. ~~Contractor's agreement to act under the Contract for Administrative Agent will not depend upon Contractor being paid any sums owing by the Owner under the Contract prior thereto nor on whether the Owner has otherwise defaulted under the Contract.~~ Nor will Administrative Agent be liable for any amounts owing Contractor if Administrative Agent requests Contractor to stop work and vacate the Property pursuant to clause (ii) above. Administrative Agent shall not be liable for any damages Contractor may be entitled to recover from Owner or for change orders made by Contractor and not approved by Administrative Agent pursuant to the Loan Agreement. In the event the Contract is terminated for any reason, Contractor shall

Example 2

that such default has occurred under the Loan Documents and indicating Lender's intent to either exercise its rights under the Assignment or to terminate the Contract. If Lender elects to exercise its rights under the Assignment, then General Contractor shall perform all of its duties and obligations ~~under in accordance with the terms of the~~ Contract for the benefit of Lender ~~regardless of any prior default by Borrower or any other party under the Contract, provided that Lender pays to General Contractor the fees for those services rendered to Lender, at Lender's request, in accordance with the terms of the Contract.~~ If Lender terminates the Contract, Lender shall not have any liability to General Contractor under the Contract and General Contractor's sole recourse shall be against Borrower.



Removing All Rights

**EXAMPLE
1**

**EXAMPLE
2**

**EXAMPLE
3**

EXAMPLE 1

(c) Contractor will promptly provide Bank with copies of all notices of default sent by Contractor to Borrower pursuant to the Construction Contract, and no such notice shall be effective for any purpose unless and until a copy of such notice shall have been received by Bank. Contractor will not ~~exercise any remedies, including, but not limited to, any right to~~ terminate the Construction Contract, until and unless Contractor shall give notice of intention to do so to Bank and Bank shall fail to remedy such default, either for a period of sixty (60) days after receipt of such notice or within such longer time as may be reasonable and appropriate, taking into account the nature of the default.

EXAMPLE 2

(e)(b) Contractor will promptly provide Bank with copies of all notices of default sent by Contractor to Borrower pursuant to the Construction Contract, and no such notice shall be effective for any purpose unless and until a copy of such notice shall have been received by Bank. Contractor will not ~~exercise any remedies, including, but not limited to, any right to~~ terminate the Construction Contract, until and unless Contractor shall give notice of intention to do so to Bank and Bank shall fail to remedy such default, either for a period of sixty (60) days after receipt of such notice ~~or within such longer time as may be reasonable and appropriate, taking into account the nature of the default.~~

EXAMPLE 3

EXCEPT →

Agent of any obligation under the Contract. In addition, Contractor will not ~~amend, modify, or~~ terminate the Contract ~~without the prior written consent of Administrative Agent, provided that Contractor may terminate~~ the Contract because of a default by Owner thereunder to the extent Contractor has such right in the Contract, provided Contractor has first complied with Paragraphs 2 and 3 above.

Notice to Lender

Contractor to provide notice to Lender:

**Example
1**

**Example
2**

Example 1

8. Contractor shall provide *TO OWNER, IN ACCORDANCE WITH THE CONTRACT,* ~~Administrative Agent promptly in each case~~ with (a) any information Contractor may have regarding defects in workmanship or materials incorporated into or provided for the project which come to Contractor's attention, (b) Contractor's estimate(s) of the stage(s) of completion of the project, (c) any deviations or variations in construction of the project from the plans and specifications used by Contractor, (d) any information Contractor may have regarding any defaults by Owner,

Example 2

14. ~~Contractor will address to Administrative Agent, naming Administrative Agent as an additional named party or beneficiary, all certificates, statements, or representations regarding the completion of the project or any portion thereof.~~

Lender's Requirements

Owener's, recognizing the problems, have started including clauses like this in the Agreement:

**Example
1**

Example 1

§ 15.6.12 LENDER'S REQUIREMENTS. Contractor shall provide to the lender or lenders furnishing financing for the development and construction of the Project any Project information that such lender(s) or its (their) designated representatives reasonably require or any such certification that Contractor is obligated to provide to the Owner under the Contract Documents. The Contractor further agrees to execute such documents as may be reasonably required by the lender or lenders furnishing financing for the development and construction of the Project and which are consistent with reasonable commercial practices for the financing of a project of the size and scope of the Project, including but not limited to, the following: (a) a subordination of Contractor's lien rights (including an lien on removables or fixtures) to any liens of the lender(s) securing any obligations arising from the Project; (b) an agreement by Contractor to provide notice prior to suspension of the Work or termination of the Contract by Contractor and providing such lender(s) with a reasonable opportunity to cure Owner's default; (c) a contingent assignment of this Agreement to the lender(s) in the event of a default by Owner under this Contract or under the documents creating the loan(s), provided that Contractor shall not be required to perform additional work for lender unless lender has assumed responsibility for payment of such additional work; (d) an agreement by Contractor to certify its compliance with the requirements of the Contract Documents; and (e) an acknowledgement that no Change Order or Construction Directive resulting in a material increase in the Contract Time or the Cost of the Work will be effective without the consent of such lender(s). Contractor shall also agree to such modifications to this Agreement as such lender(s) may reasonably require, provided the Contractor's costs or time of performance are not increased unless this Agreement is equitably adjusted.

Architect

Example
1

Example
2

Example
3

Example
4

Example 1

3. Architect hereby certifies to Lender that in Architect's professional opinion:

(a) The Plans are complete, or will be complete, and adequate for the construction of the Improvements.

(b) The Plans have been approved, or will be approved, by all applicable governmental authorities.

4. Architect hereby certifies to Lender that to the best of Architect's knowledge:

(a) The Improvements, if constructed in accordance with the Plans, will comply with applicable statutes, ordinances, codes, and regulations.

(b) All building permits required for the construction of the Improvements have been duly issued, or will be duly issued, and will remain in effect.

Example 2

(b) The Plans have been submitted for consideration ~~approved~~ by all applicable governmental authorities, and are reasonably anticipated to be approved for use in construction of the Improvements.

Example 3

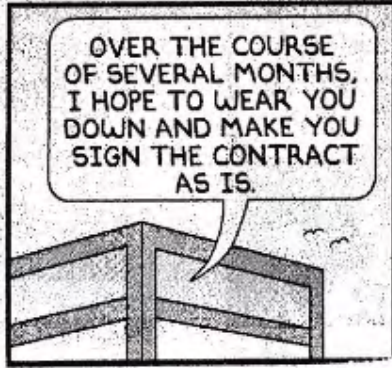
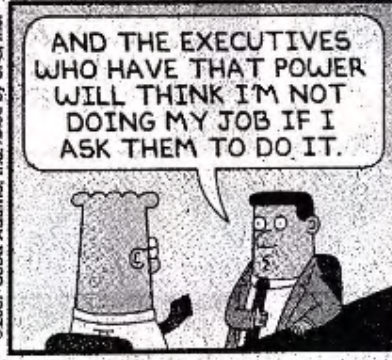
4. Architect hereby certifies to Lender that, in Architect's professional opinion, the Improvements, if constructed in accordance with the Plans, will comply with applicable statutes, ordinances, codes, and regulations ("Applicable Laws") in force at the time the Architect Agreement was executed and as amended to the extent such amendment was known to Architect.

5. Architect acknowledges that Borrower has assigned to Lender all of Borrower's right, title and interest in the Plans. Architect consents to the assignment of the Plans from Borrower to Lender, and agrees that Lender is entitled to use the Plans for the purpose of constructing the Improvements before or after any default by Borrower and without any additional cost to Lender, provided that Lender assumes the obligations of Borrower to Architect and agrees to be bound to the terms and conditions set forth in the Architect Agreement.

6. Architect has been paid in full for all services and costs in connection with the Plans except fees to be paid hereafter for additions or changes thereto or for inspection-observation of the construction of the Improvements, and Architect waives any lien to which Architect may be entitled with respect theretoto services already performed and compensated.

Example 4

It is expressly understood that Assignee neither assumes nor has any obligation to Architect to exercise its rights under the Assignment, and that the option to exercise such right rests in the sole and absolute discretion of Assignee. In the event Assignee exercises its rights under the Assignment, Architect agrees that Assignee shall have no personal obligations or liabilities under the Agreement or the Assignment and the sole rights and remedies of Architect as against Assignee under the Agreement or under this Consent shall be a suit against Owner and enforcement of Architect's lien rights, if any, against the property described in the Agreement. The preceding sentence notwithstanding, Architect shall have no obligation to continue ~~construction~~ providing architectural services on behalf of Assignee in the event Assignee exercises its rights under the Assignment unless Assignee assumes the obligation to pay sums due to Architect for ~~work~~ services performed or materials supplied as and when such payments become due under the terms of the Agreement.



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