

Dean Foreman's

28 Laws of Contracting



Copyright (c) 1999 Dean E. Foreman
All rights reserved.

www.dforeman.com

published by
Universal Publishers/uPUBLISH.com
USA • 1999

ISBN: 1-58112-790-1

www.ipublish.com/books/foreman.htm

American Institute of Architects (AIA), Primavera[®], Microsoft Project,[®]
or FastTrack[®] and all other trademarks or registered trademarks are
property of their respective holders.

No part of this publication may be reproduced in any way, including but
not limited to, photocopy, photograph, magnetic, CD-ROM, or other
record, without prior agreement and written permission of the author.

Dedication

To my wife Debbie, who many times put up with the annoying sound of a clicking mouse and tapping keyboard into the wee hours of the night. To Ephraim Hatch, my mentor and friend, for encouragement, prompting and honest critique. More special thanks to the expert panel of editors, whose insights and comments were invaluable: Stephanie Scott, L.E. Foreman, Paul Plumb, Maria Sanches, Vanessa Christensen and any others I forced to read and edit.

oh... and to Bill Gates, who's crashing operating system and word processor provided the "opportunity" to write and re-write this book several times. Thanks Mr. Softy for teaching me to "BACK-UP!"

Dean Foreman's 28 Laws of Contracting

Preface	7
Law #1 - Avoid the Fantasy Land of Wishful Thinking	11
Law #2 - Use Discovery to Control the Options	16
Law #3 - The Customer is Not Always Right	23
Law #4 - Good or Bad, the Customer Is the "Chairman of the Board"	25
Law #5 - If It Walks Like a Duck and Quacks Like a Duck, It's a Duck	29
Law #6 - Some Projects Are Better Left to the Next Guy	33
Law #7 - The Contractor is the "Captain"	36
Law #8 - Architects are Only Designers	40
Law #9 - Planning is Not Just Scheduling	45
Law #10 - Don't "Rig Your Ship" for the Wrong Voyage	49
Law #11 - Draw a Line in the Sand	52
Law #12 - Estimating Is Almost as Important as Scheduling	56
Law #13 - The Pen Is Mightier than the Sword	59
Law #14 - Use the Contract as a Rifle, Not a Shotgun	63
Law #15 - If the Contractor Wins, the Customer Wins	66
Law #16 - Anything You Give Away for Free Is Valued as Worthless	70
Law #17 - Only Profitable Jobs Have Happy Customers	74
Law #18 - Scheduling Is Almost as Important as Estimating	79
Law #19 - Scheduling can Make the Biggest Dummy Look Smart	84
Law #20 - You Can't Pour Concrete Before Setting Forms	90
Law #21 - Time Is of the Essence	95
Law #22 - Nobody Can Tell the "Captain" How to Sail the Ship	100
Law #23 - Customers Are Responsible for Ripple Effects	104
Law #24 - Subcontractors Are Like Three-Legged Stools	107
Law #25 - A "Wronged" Subcontractor Is an Infection	111
Law #26 - The Subcontractor's File Cabinet is the Truck Floor	115
Law #27 - Money is the Project Scorecard	119
Law #28 - Never Show a Chink in Your Armor	125
Index	129



Preface



Let me introduce myself. I have been a licensed General Contractor for twenty-two years. I have built large, expensive homes, small cheap ones, commercial buildings, fast food restaurants, medical clinics, multi-family units, office buildings and have developed subdivisions. I am currently working as the Construction Manager for a development company building multi-family units, office buildings, and single family housing.

If I were to ask myself, “Am I a construction management expert,” I would have to answer, “Probably not.” “Expert” implies a compulsion for higher education and perfectly run projects. I have yet to experience the perfectly run project and my compulsion is mainly focused on making money. My expertise stems from my 22 years of building experience. My qualifications as an authority come from succeeding in the "construction game." Many of the rules for success are simply hard work and common sense like getting up early, organizing paper work, returning phone calls and habitually keeping daily logs. On the other hand, there are other important construction rules for success. That is what my 28 Laws of Contracting are about! These Codes of Law explain what it takes to become a “great” general contractor.

Of course no one is perfect in applying every technique, nor in the building business is every project perfect; but you have to think perfect. You might say I think like others who find success in different occupations. If you talk to a successful farmer, the chances are he knows how to farm better than he does. A good coach believes he knows how to coach better than his win/loss record might indicate.

Likewise, an attorney may feel he did an outstanding job in presenting his case even though his client lost. And so it is. A successful contractor knows how to manage a project better than it turns out.

Ask yourself this question: What would I say if someone asked why I chose the construction industry as my profession? You could respond with a rehearsed answer about it being a noble mission to create, build, and make life better for humanity. But in truth—you are paid well, there are a variety of job descriptions, and once in your blood, it is hard to leave. The construction industry is in my blood, and relying on the success or failure of construction projects to make a living can be a rewarding game. It is also a unique, challenging and complicated occupation.

Throughout the course of this book, I have chosen to illustrate different patterns of behavior and solutions, by drawing parallels with ships, their Captains, and sea-going planning efforts. Captains, such as Leif Ericsson, Ferdinand Magellan, Sir Francis Drake, like Blackbeard or Captain Kidd, were all skilled leaders. Their accomplishments are especially notable when taking into consideration the number of crewmembers who were inexperienced and of dubious character—a skill not lost as it applies to construction leadership with its complexities and challenges.

Contractors and Captains, big or small, take the brunt of both praise and criticism for their crew's mission and performance whether they are involved directly in the planning or not. Who can forget the publicity and rumors surrounding Captain Joseph Hazelwood of the Exxon Valdez oil spill? Whether you are a Captain on a ship, as with Captain Hazelwood, or a contractor on a project, the planning, coordinating, and leadership challenges you face are strangely comparable and similar.



There may be some pirates in the construction industry, but most are honest, hardworking individuals.

Although the construction industry may have some pirates in its ranks, it is generally filled with honest, hardworking craftsmen, who, in order to practice their trade, are thrust into the role of project leaders and business managers. These hardworking craftsmen need to get a tight hold on the rudder of their “project delivery ship”.

If they fail to do so they will find themselves shouldering the blame for every problem that comes along while watching hard-earned profits seep through their hands. Construction projects do not run themselves just as ships do not steer themselves. When there is a void in leadership, all you have

is untrained and unprepared contractors dealing with untrained and unprepared customers.

Arming a contractor with a cache of management tools has proven to be much more profitable than using simple “bullying” tactics to stay in control of a project. Using bullying tactics is not simply a “pick-up truck contractor” problem, but exists in many large and medium-sized construction firms as well. Their struggles with managing customers, budgets, and schedules cost them dearly.

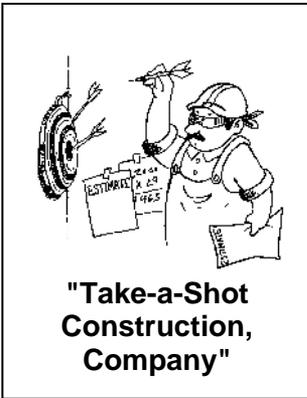
The initial motivation for compiling this book was borne out of frustration in searching for resources that address leadership and management specifically for construction. In an industry filled with customers armed with misinformed “consumer-beware” type self-help books, contractors need to know their contracting rights and responsibilities. I found that a lot of good material does

exist, but is sprinkled in bits and pieces among different manuals and guides. My search turned up production checklists; “nuts and bolts” guides; thick management system guides; forms; legal notices; contracts; computer software programs; scheduling programs; accounting packages; and “how-to” guides. I concluded that having a variety of guides available for the advanced contractor is helpful, but unless the principles of these guides are already understood they are overwhelming—this is why a quick guide of basic construction principles for all types of contractors is essential.

These laws are written mostly for the contractor or construction professional who deals with customers, architects, and subcontractors on a daily basis. The concepts and principals are also valuable to developers, homeowners, or anyone working with or hiring contractors. The construction industry represents the epitome of the entrepreneurial spirit. These free spirits need a good quick guide to balance the competitive scales and to insure success.

This book addresses many issues that may or may not have legal implications. It is intended as a guide and is suggestive. It is not intended to offer legal advice. The consequences of any actions or transactions are determined by the specific facts, circumstances, contracts, local and state laws pertaining to any particular individual situation. Particular individual transactions should be reviewed by an attorney to avoid adverse consequences prior to the utilization of the suggestions or advice in this book.

Law #1 - Avoid the Fantasy Land of Wishful Thinking



The truth be known, contractors are very susceptible to "wishful thinking." To believe that unrealistic budgets and schedules will somehow work out is a deadly "contractor" trap. If greed and desperation take over, it is easy to think, "I'll make the project work somehow because I really need the job and cash flow." Coupled with a persuasive customer who is looking for a deal, a vulnerable

contractor can lose his or her good judgment. As any experienced contractor knows, when a job goes bad, it really goes bad. It is usually twice as hard recovering from a losing project as it is staying home and refusing the job. Additional anxiety and cash flow problems create an urgency to only repeat the problem again, making contractors more susceptible to wishful thinking. Instead of making up lost ground, the result is another step backward.

Many contractors have found success with sloppy estimating, scheduling and job costing. That's Great! But, here is a warning. A series of small successes can lull a contractor into a false sense of security, then, "Wham!" the unexpected happens. Unexpected obstacles come in many forms including abnormal weather conditions, accidents, mistakes or unyielding customers. It's a tough, competitive world out there and if the project's planning is based on wishful thinking, it might as well be set in quicksand.

Customer Wishful Thinking

Customers (property owners) are not immune to the wishful thinking syndrome either. Several years ago, one of my favorite subcontractors stopped by my project and it was obvious he was perturbed about something. I probed a little and he explained he had just returned from an appointment to estimate a new floor for a homeowner's kitchen. After he measured the floor and began adding up numbers, the customer pulled out a large stack of bids and waved them in front of his face saying, "you had better sharpen your pencil because you are up against a lot of competition." The customer had ten bids in his hand, nine of which were within pennies of each other. He expected my friend to beat the one "lowball" quote and said, "If you can't do it, I will find someone that will."

This customer, assumed all contractor bids, even blatant low ones, were reliable and did not realize or care that some contractors use a dart board for estimating. As soon as my friend realized what was going on, he closed up his binder, grabbed his coat, wished the owner "good luck" and headed for the door.

Was this customer stuck in the fantasy land of wishful thinking? Absolutely! The customer was not only looking for a low bid, but for the deal of the century. If there are nine bids within pennies of each other and a lowball quote comes in at half the price, get a clue! Something is wrong!

It is wishful thinking on a customer's part to assume that a contractor with incompetent bidding skills will be competent enough to show up on time, install a beautiful new floor, clean up the job and pay all associated bills in a timely manner. The reality is the contractor will be too busy

juggling an avalanche of problems and upset clients to take care of one more bargain hunting homeowner.

Cheap contractors are usually encumbered by the same problems that plague all under funded jobs—past due bills, supply disruptions and a revolving door of substandard installers. Under-funded jobs, poor performance and customer dissatisfaction are like the "Three Musketeers" — they always seem to be together. A customer's fantasy of having negotiated the “deal of the century” usually implodes into the “scam of the century” with a contractor that is missing in action.

Common Contractor and Customer Misconceptions

Wishful thinking is not always obvious and can affect many aspects of the project. Some common misconceptions that are potential obstacles to success are listed below.

Fantasy

A “Fixed Price Contract” will always provide the best results ... the best quality, the cheapest price, the shortest time.

Reality

A “Fixed Price Contract” is a shotgun approach and usually one or more goals will suffer setbacks.

Fantasy

A “Cost Plus Contract” gives the contractor an open checkbook and will almost always cost more.

Reality

A “Cost Plus Contract” gives the owner as much participation in cost control as he/she deems necessary.

Fantasy

The General Contractor automatically knows his responsibilities and duties because he has a license.

Reality

Most Contractors are strong on trade skills and weak on business management and try and compensate by working harder.

Fantasy

All the General Contractor does is call the subcontractors and everything automatically falls into place.

Reality

Subcontractors are a unique group that need constant regulation and supervision.

Fantasy

Once the plans are finished and the Contractor hired, most of the Owner's work is done.

Reality

The Owner's role is crucial to a successful project. The Owner is "The Chairman of the Board."

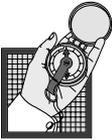


On a ship in the middle of the ocean, guesswork planning based on wishful thinking can easily become life threatening. The crew may be the best and most efficient in the fleet, but if the customer, to save money, persuades the Captain to leave without an ample supply of provisions or fuel, what does it matter how efficient the crew is?

Likewise, the contractor needs ample time and money to finish a project. Good record keeping will help ensure there is enough time and money. The prepared contractor protects his or her interests by avoiding guesswork and executing a good workplan.

Anything you give away free, will be valued as worthless by the customer. (This concept is explained further in Law 16.) If you have only guessed at the value, how will you even know what to charge? If you perform work, have a solid basis to charge for it. Compensation and recognition for this extra effort may not be immediate, but should come in the form of a smoothly run project. Well planned and thought out projects pay, disasters don't!

Law #2 - Use Discovery to Control the Options



There are two definition phases that are essential to a successful construction project: the *customer's definition phase* and the *contractor's definition phase*. This is the melding process of different concepts and ideas pertaining to the project schedule, budget, and design. They are an essential part of the planning process and help prevent costly mistakes. Construction planning is not only drawings and specifications, but includes information about the schedule, subcontractors, workers, costs, scope of work, and each party's responsibilities. For example, the customer is responsible to communicate the schedule requirements, the desired product, and the amount of money available. The contractor is responsible to plan the course, assess conditions, and schedule the project. The definition phase, if properly implemented, draws out the important information needed and is the criteria for holding each party accountable to their duties.

Project Goal Discovery

The complexity of the job should dictate the complexity of the preconstruction planning and organization. Preparing organization charts may be a little overboard for building a redwood deck, but certainly someone needs to discover what the design specifications and time requirements are before starting. After preliminary assessment of the complexity, final product, and budget requirements, you are ready to start the definition phase of the project. To again use the analogy of the ship, you will need to determine how treacherous the waters are, the

seaworthiness of the craft, the skill level of the crew, and the amount of money the customer wants to part with in order to get to the destination.

Start with a customer discovery process by evaluating the technical requirements, conditions, and amount of time allowed to complete the project. Sit down with your customer and ask a series of discovery questions. Sometimes customers are evasive with information because of fear—fear that revealing the amount of money available for the project, takes away negotiating advantages. Some even plead poverty trying to get the contractor’s best price. Somehow you need to communicate the importance of revealing their true budget in order to choose the correct approach to plan the project. If a customer is disguising the real goals for negotiating advantages it is thwarting the discovery process. The plan must match the customer’s goals and the customer’s goals must match the plan.

If cost is King—the schedule and/or product must yield.

If product is King—price and/or schedule must yield.

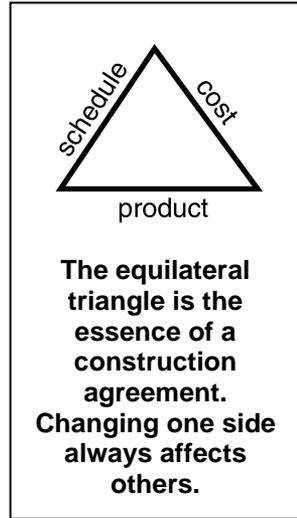
If schedule is King—price and/or product must yield.

It is a law of mathematics. If you add more product, quality or difficulty, it costs more money. If a customer is pleading poverty, it means the quality and schedule must yield to the “poverty” driven budget. Consider, an equilateral triangle with the three sides representing the three aspects of a project: schedule, cost, and quality. In order to maintain the balanced shape of the triangle, one side cannot be changed without affecting one of the other sides. The same holds true with your project. If you accelerate the schedule, taking tasks out of order, the cost goes up. If customers add work, they must also add time and/or money to keep it in balance. If the customer wants to pay less

money, the contractor will have to reduce scope by lowering quality or quantity. Changing one side of the triangle always affects the others. It's the law! If you disobey, reality will enforce the penalties.

You cannot cheat this law by simply neglecting to charge the customer. If you do, the customer's expense is simply being absorbed at the expense of something else. That "something else" in many cases involves borrowing against funds allocated for use later in the project, causing a struggle at the end with items such as clean-up, finishes, or, in the worse case, profits! Avoiding this mistake is a good reason for planning.

If the contractor has accurately defined the product, cost, and schedule, future variations in the triangle are easy to identify. Establishing accurate guidelines and goals in the beginning helps measure performance and cost when a customer starts making changes. To compare it to a sea-going voyage, if a customer starts randomly ordering changes in the ship's course, the Captain is helpless in presenting a case for additional compensation, without maps, charts and a pre-set plan. In order for the Captain to monitor the position, speed, and resources during the voyage, he must have preset standards already in place. A construction project has the same needs. So early on, identify guidelines and goals with a customer's definition phase checklist, translate them into a contractor's definition checklist and then write them into a contract.



Sample Customer's Definition Phase Checklist

The customer's definition phase checklist systematically evaluates a customer's demeanor and intentions. It is a process to draw out information. For example a customer's checklist might follow this procedure:

Step 1. Rate the following in order of importance:

Product/Quality

Cost/Budget

Schedule/Time

Determine if cost is of prime importance, and if so "design to a budget." If final product is of prime importance, "budget to the design." If schedule is of prime importance, design and price drop in priority.

Step 2. Write out *conditions of satisfaction*. As expectations and reality come together, cost, time and quality goals become apparent. This is a major advantage in ensuring proper compensation for high quality. For example, if the job must be finished by a drop-dead date and high quality is essential, cost loses its ranking as a priority. This is called *balancing the conditions*.

Step 3. Make a responsibilities/accountability checklist. Get an idea of the general organization and hierarchy needed for the project. Map out an itemized responsibility matrix with the information you discover. For example, the criteria might include items such as,

- **Customer**—to approve drawings, obtain financing, pay architect.

- **Architect**—to approve shop drawings, finish interior details, submit for permits.
- **General Contractor**—to finalize milestone schedule, prepare budget for bank, coordinate design-build subcontractors.
- **Sub Contractors**—to finalize bids, submit shop drawings to architect.
- **Interior Designer**—to identify long lead-time items.

A contractor’s checklist is more detailed and is approached differently than the customer's definition checklist. The contractor’s checklist is used more for setting up the “nuts and bolts” of management strategies. For example a contractor's checklist might follow this procedure:

Sample Contractor’s Definition Phase Checklist

Budget Feasibility

- Review building program: define project scope and objectives.
- Identify major building systems.
- Recommend cost-effective alternatives.
- Prepare conceptual budget and value analysis.
- Establish allowance items and exclusions.

Design Development

- Site conditions and feasibility.
- Reconcile conditions with objectives.
- Coordinate with Architecture & Engineering (A&E) team and monitor compliance to objectives.

- Establish design-build requirements and participation.
- Monitor progress of documents.
- Communicate scope of project to design team.

Schedule Development

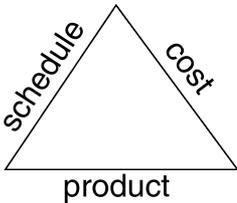
- Prepare initial milestone schedule.
- Determine government permit, review, and approval requirements.
- Set critical path for architect, contractor, and design-build trades.
- Identify long lead-time items.

Just like any other task, following these procedures becomes easier and more effective with experience.

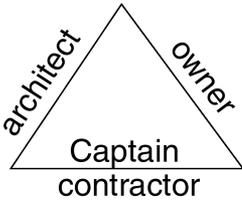
There is really no wrong approach to a project as long as there are no hidden agendas and all members of the team agree to the terms. The key is to turn assumptions into certainties and documenting those certainties in the contract. Again, the construction customer must know what he or she wants to build, how much money to spend, and the desired completion date. Remember the Captain of the ship must know the destination, resources, and crew capabilities in order to begin the journey. Verifying what the customer wants before boarding the ship is always preferable to discovering a different agenda in the middle of the ocean.

However, if *you* both *agreed to wait* until the middle of the ocean to establish the objectives, the customer is within his or her bounds. If all members of the team have agreed beforehand, no one can cry foul later. As the contractor, you have planned and allowed for the atypical approach at the beginning, including compensation adjustments.

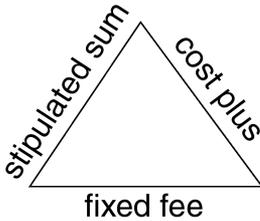
Keeping focused on the principle goals of a project when going through the discovery process helps in establishing important basics.



The 3 principle project goals:
cost
schedule
finish product



The 3 principle players:
owner
designer/architect
contractor



The 3 principle agreements:
stipulated sum
cost plus
fixed fee

The Contractor's role is critical to all project goals.

Law #3 - The Customer is Not Always Right



In a perfect world, owners or construction customers have a definite idea of what they want to build, how much money there is to spend, and the desired completion date. They have a firm understanding of leadership in the construction delivery process and communicate openly and honestly revealing the true budgets and goals they have set. They assemble and utilize the unique qualities and skills of a good team of professionals. They disarm and neutralize opposing goals by meeting individual compensation needs and turning everyone's focus to group goals and objectives. In essence, the ideal owner/leader sets an atmosphere of shared risk instead of allocated risk. Energy and focus is centered on the true goals and objectives instead of only self-preservation.

But hold on! This is not a perfect world! Customers do not always provide accurate goals and direction for contractors to do their jobs properly. This breach of information happens many times because no one involved, including the contractor, understands the true responsibilities and roles between the customer and builder. The fact is, when customers fail to keep their contractual responsibilities, the contractor almost always take the brunt of blame for subsequent project failures.

If we step back and look at the structure and organization of a construction project, we see that the owner hires the contractor for his or her resources, as well as technical and management expertise. The contractor in turn relies on the owner for information and timely payments. Some customers, for whatever reason, feel justified in

tricking or taking advantage of contractors, in order to get a better deal for themselves. Maybe they think all contractors are making a killing and have stashed away a secret bag of money. Maybe they are fearful of failing as “wise consumers.” Whatever the reason, contractors need to beware of customers persuading them to go against their best judgment when negotiating a project. The contractor is the construction expert, not the customer. As a contractor, if the customer tries to talk you into doing work for less than you know it will cost, all the red flags should go up. In construction, the customer is not always right. In fact, they are often wrong.

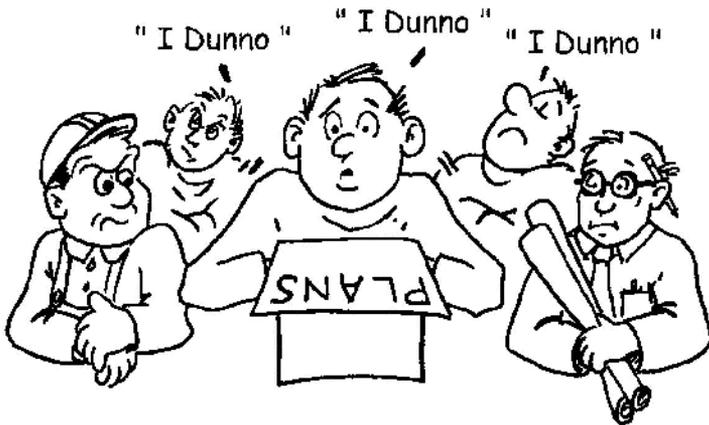
Customer Downplaying

One thing to watch out for is *customer downplaying*. Customer downplaying is the owner’s attempt to minimize the true amount of work in an effort to keep the project in budget. In other words, acting like he or she will accept a lower cost alternative in order to keep the cost in budget, then switching back to the more expensive options hoping the contractor won’t notice. If it is done purposefully, it is deceptive and foolhardy. Demands for top quality on low budgets may seem like “good, shrewd business,” but it usually backfires with subsequent delays and bad feelings. Even when this practice is done unintentionally, it sabotages the flow of the project. More often than not, *downplayed* work is added in later anyway with an ensuing fight over the added cost. Preconstruction planning exposes or at least warns of possible trouble. If you see trouble on the horizon, it allows time to present your argument and possibly train your customer.

Some customers hide the purpose of the project from the contractor in hopes of saving money. This causes the contractor to waste time guessing which direction they are going.



Law #4 - Good or Bad, the Customer Is the "Chairman of the Board"



Starting from the top, the customer (or owner) is, by default, the leader of the project. Think about it, this usually means that the one who generally has the least experience in managing construction is supposed to; assemble a team, define all the roles, make assignments and make sure everyone is happy. Yet sometimes the same customer, or project's "Chairman of the Board," may avoid help from the experts because he or she distrusts their motives. This may be a hindrance in promoting successful team approach contracting and at times a contractor may be better off sticking with standard "fixed-price," or "us against them" type contracts. It depends on several factors, including the complexity of the project, the talent and resources of the players, the schedule, and the budget.

The main factor is whether the customer is comfortable trusting a contractor or architect to watch their money. The fear of losing control to a stranger may be hard