

# CONTRACTS

Professor Terry S. Kogan

Fall Semester, 2006

## Final Examination

Friday, December 8, 2006

8:30 a.m. to 12:30 p.m.

Examination Number: \_\_\_\_\_

This Final Examination is entirely open book. You may use the *Problems in Contract Law* casebook, the *Contract Law: Selected Source Materials* book, notes, outlines, and/or any other materials. The use of other human beings or data in the hard drive of your computer is **not** permitted.

This examination consists of three essay questions, weighted **unequally** as follows: Question One - 25% of examination grade; Question Two - 37.5% of examination grade; Question Three - 37.5% of examination grade. The recommended time allotment for each answer is indicated.

You have **four hours** to complete this examination. **The first fifty minute period is to be used exclusively for reading the questions carefully and outlining your answers.** You should outline on scrap paper that will be supplied by the exam proctor. If you are word-processing this exam, you are **not** allowed to type during the first fifty minutes. If you are handwriting this exam, Blue Books will **not** be handed out until fifty minutes into the exam. You then will have **three hours and ten minutes** to write your answers.

Please **double-space** your answers if you are writing this exam on a computer. Please write on **every other line** if you are handwriting this exam in a Blue Book.

Please put your examination number in the space provided above, on the outside of all Blue Books, and on all typewritten pages.

**Do not write your name anywhere on this examination.**

You **must turn in** these examination questions and any scrap paper on which you have taken notes.

**You must sign the College of Law Honor Code Statement on the last page of this examination. [This sheet will be removed prior to the professor's receiving the exams for grading.]**


**Good Luck.**

## Question One

[Question One will count 25% of the total examination grade. You should devote approximately 50 minutes to writing the answer.]

While reading the April 1, 2005 edition of the Salt Lake Tribune, Joe Q. Public ["Mr. Public"] noticed the following advertisement:

Barry Miller Jewelers, Inc.



SPECIAL !!!!!

As a result of a special purchase, we are offering three lucky buyers the opportunity to buy a Five Carat Diamond Ring at the ridiculously low price of

\$ 8,000.00

[One per Customer - Valid until 4/5/05]

Mr. Public immediately went to the jewelry store, walked up to the salesman (the owner, Barry Miller ["Mr. Miller"]) and said, "I'd like to buy one of the special purchase diamond rings advertised in this morning's newspaper." Mr. Miller proceeded to fill out a receipt and then said, "It's a pleasure dealing with you. That'll be \$80,000 plus tax." Quite surprised, Mr. Public objected and said that the ring was advertised in the morning newspaper as costing \$8,000, not \$80,000. Mr. Miller picked up the newspaper and upon seeing the advertisement explained that there was a serious typo in the ad. (Mr. Miller also immediately posted a sign on the jewelry store door stating: "The diamond ring advertisement in this morning's newspaper should read '\$80,000,' not '\$8,000.' We apologize for any inconvenience this may have caused.")


Mr. Miller apologized to Mr. Public and offered to pay for the fuel, time, and effort expended in traveling to the store to examine the ring. Not satisfied, Mr. Public insisted that the diamond ring be sold to him for \$8,000 and threatened to sue. Mr. Miller said he would get back to him after looking into the matter.

Mr. Miller checked with his marketing department, and was shown a photocopy of the final printer's page proof that the jewelry store returned to the newspaper's advertising department. (This was the last opportunity given the advertiser to review and

make changes to the advertisement before publication.) Here is what Mr. Miller was shown:

⇒PRINTER'S PAGE PROOF←

Barry Miller Jewelers, Inc.



SPECIAL !!!!!

As a result of a special purchase, we are offering three lucky buyers the opportunity to buy a Five Carat Diamond Ring at the ridiculously low price of

\$ 80,000.00

[One per Customer - Valid until 4/5/05]

⇒PRINTER'S PAGE PROOF←

Mr. Miller immediately called the newspaper advertising department. After investigating, the advertising director explained what happened: The typesetter who had worked on the jewelry store's advertisement was a new employee and, in the course of correcting the typo indicated on the printer's page proof, had inadvertently removed one of the zeros from the price. Mr. Miller then telephoned Mr. Public to apologize again and explain what had happened. Mr. Public was not satisfied and said that he would sue to get the advertised price.

Your law firm does legal work for Barry Miller Jewelers, Inc. Mr. Miller has come to your firm seeking legal advice, and the senior partner has turned the matter over to you. Write a legal memorandum discussing the rights and obligations of Barry Miller Jewelers, Inc. with respect to this controversy. **Assume the Uniform Commercial Code does NOT apply to this question.**

### Question Two

[Question Two will count 37.5% of the total examination grade. You should devote approximately 70 minutes to writing the answer.]


On February 1, 2005, the State of Utah [the “State”] solicited bids for a construction project related to renovating the Public Works Dept. office building in Salt Lake City [the “Project”]. A major component of the work involved retrofitting the heating, venting and air conditioning [“HVAC”] systems in the building. Bids from general contractors were due on March 1, 2005.

Among the general contractors bidding on the Project was Reliable Construction Company [“Reliable Construction”], owned by Harry Builder [“Mr. Builder”]. In order to prepare its bid for the Project, Reliable Construction solicited subbids from HVAC subcontractors, including Air-Flo Heating and Air Conditioning, Inc. [“Air-Flo”]. The President of Air-Flo was Joseph Wind [“Mr. Wind”].

On February 28<sup>th</sup>, Air-Flo submitted its HVAC subbid to Reliable Construction in the amount of \$50,000. Because Air-Flo’s subbid was the lowest, it was used by Reliable Construction in preparing its own Project bid submitted to the State on March 1<sup>st</sup>.

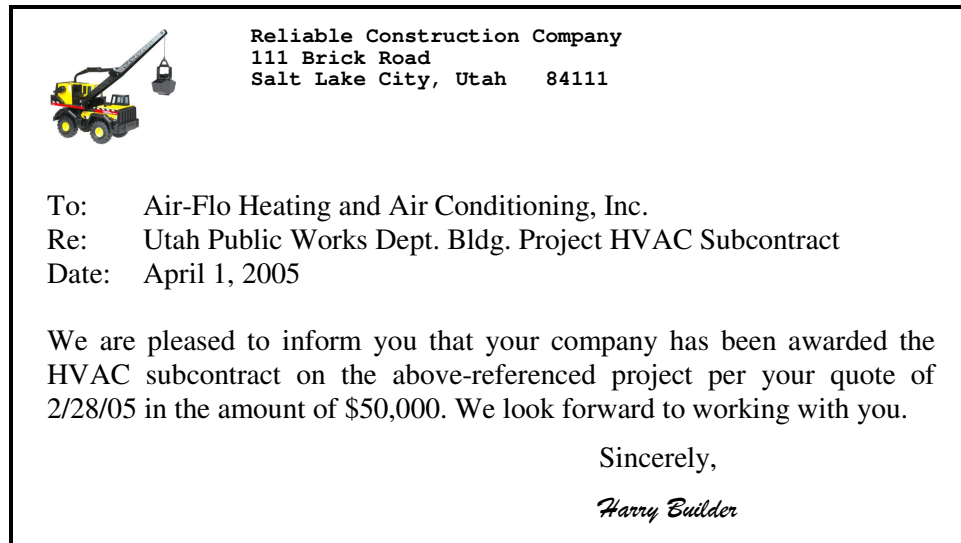
When the State opened the general contractors’ bids on March 5<sup>th</sup>, Reliable Construction’s bid was the second lowest and thus it was not awarded the general contract for the Project. Disappointed, Air-Flo’s Mr. Wind reviewed his own subbid that had been submitted to Reliable Construction, and discovered that his estimator had made a mistake resulting in the subbid’s being too low by \$15,000. Because Reliable Construction had not been awarded the general contract for the Project, however, Mr. Wind decided that there was no need to notify Reliable Construction of the mistake in Air-Flo’s subbid.

On March 10<sup>th</sup>, the State announced that the low bidder initially awarded the Project contract had been disqualified. The next day, the State awarded the general contract for the Project to Reliable Construction. Reliable Construction immediately sent the following letter to all HVAC subcontractors from which it had received subbids:

	<b>Reliable Construction Company</b> 111 Brick Road Salt Lake City, Utah 84111
To: HVAC Subcontractors Bidding on Utah Public Works Dept. Building Renovation Project	
Date: March 12, 2005	
Please review your HVAC subbid on the above-referenced project. Reliable Construction Company has been notified that it has been awarded the general contract on this Project, as the original low bidder was disqualified. We anticipate awarding the HVAC subcontract on or about April 1, 2005.	

Upon receiving this letter, Air-Flo's Mr. Wind decided not to resubmit its HVAC subbid for the Project, as there were several other jobs that Air-Flo was considering.

On April 2, 2005, Air-Flo received the following letter:



Air-Flo's Mr. Wind immediately telephoned Mr. Builder to explain that Air-Flo's subbid contained a serious mistake and that the company was no longer interested in doing the HVAC work on the Project. Mr. Builder refused to release Air-Flo from its subbid, insisting that it do the HVAC work. Exasperated, Mr. Wind hung up the phone.

A week later, Reliable Construction's Mr. Builder telephoned Mr. Wind and, in a conciliatory tone, requested that Air-Flo submit a new subbid for the same HVAC work on which it had previously bid. Because its prospective alternative projects had not materialized, Air-Flo submitted a new HVAC subbid to Reliable Construction in the amount of \$65,000. Because that subbid was still the lowest received, Reliable Construction awarded Air-Flo the HVAC subcontract for the Project. (The second lowest HVAC subbid was \$66,000.)

Payments under the HVAC subcontract were scheduled as follows: \$15,000 at the outset; a progress payment of \$35,000 upon completion of  $\frac{3}{4}$  of the work; final payment of \$15,000 upon completion. When Air-Flo had completed  $\frac{3}{4}$  of the work, Reliable Construction paid it the \$35,000 progress payment, bringing total payments to \$50,000. Air-Flo then completed the project and submitted its request for final payment. In response, Mr. Builder informed Mr. Wind that Reliable Construction was holding Air-Flo to its original subbid, and that Air-Flo had been paid everything to which it was entitled.

Joseph Wind has come to your law firm for advice. The senior partner has requested that you draft a memorandum of law discussing Air-Flo's rights and obligations with respect to the Reliable Construction HVAC subcontract.

### **Question Three**

[Question Three will count 37.5% of the total examination grade. You should devote approximately 70 minutes to writing the answer.]

Robert Rich [the “Owner”] raises horses at his country cottage near Heber, Utah. In February 2003, he decided to build a new stable for his horses. He engaged an architect [the “Architect”] to design the project, which involved both demolition of the old stable and construction of the new building.

On April 2, 2003, the Owner entered into a Construction Agreement with Heber Construction Co. [“Heber Construction”], which provided in pertinent part:

<b><u>Construction Agreement</u></b>
...
47. The cedar planks on the exterior of the stable shall be unstained English-Aged <sup>®</sup> cedar, manufactured by British Mills, Inc. of London, England, so as to match the cedar planks on the exterior of the adjacent country cottage.
...
59. Any variation from the specifications governing this Construction Agreement must be pre-approved by the Owner’s Architect.
...
70. Time is of the essence of this Construction Agreement. To assure no harm to the health of the Owner’s horses, construction of the stable hereunder shall be completed on or before November 1, 2003.
...
80. In consideration for demolition of the existing stable and construction of the new stable pursuant to this Construction Agreement, Heber Construction Co. will be paid \$500,000 as follows:
a. \$50,000 payment at the beginning of construction’
b. \$250,000 progress payment upon ½ completion, as certified by the Owner’s Architect;
c. \$200,000 final payment upon 100% completion, as certified by the Owner’s Architect.
...

British Mills, Inc. [“British Mills”] was one of several suppliers of very high quality construction lumber. That company had previously supplied the English-Aged<sup>®</sup> cedar used in constructing the Owner’s adjacent country cottage. Though a warm brown hue when first built, the cottage had weathered to a rich grey color.

At the time of executing the Construction Agreement on April 10<sup>th</sup>, the Owner paid the contractor \$50,000. Heber Construction immediately ordered the lumber from British Mills to assure timely delivery. The project proceeded smoothly through demolition of the old stable and into the new construction. On June 20<sup>th</sup>, the Owner’s

Architect certified that construction was ½ complete, and Heber Construction was paid the \$250,000 progress payment.

On July 1, 2005, Heber Construction received an email informing it that a labor strike had occurred at British Mills and, as a result, the scheduled shipment of the cedar planks would be delayed. Heber Construction immediately contacted another British lumber company, Olde English Lumber, Inc. [“Olde English”], and was informed that the company milled a comparable cedar plank. Heber Construction told the Architect about the labor strike at British Mills, and requested permission to substitute the Olde English planking. Despite assurances that the substitute planking was of comparable quality and appearance, the Architect flatly refused to give permission, explaining that the Owner was insistent on using the same cedar planking that had been used on the outside of the country cottage.

Heber Construction was deeply concerned that waiting out the labor strike might result in its not completing the stable by the required completion date of November 1<sup>st</sup> which, in turn, might threaten the horses’ welfare. Accordingly, despite the Architect’s refusal to grant permission, Heber Construction ordered the lumber from Olde English at a cost \$25,000 greater than the amount it had contracted to pay British Mills. Though it delayed installing the substitute cedar planking after its delivery, when the labor strike had not been settled by September 1<sup>st</sup>, Heber Construction determined that the contract completion date would not be met unless it began installing the substitute planking. Accordingly, it did so and construction was completed on October 20<sup>th</sup>.

When Heber Construction requested the final \$200,000 payment, the Architect refused to certify payment.

Though its pre-contract projections had labor and material costing \$450,000, given the added cost of the substitute lumber, Heber Construction’s total cost for the project was \$475,000.

Heber Construction comes to you for legal advice. You have found an expert witness who will testify that the substitute cedar planking from Olde English Lumber, Inc. was of comparable quality to that manufactured by British Mills, and would weather to a similar appearance to the planking on the country cottage. Write a legal memorandum discussing the relative rights and obligations of the Owner, Robert Rich, and your client, Heber Construction, with respect to this controversy. Include in your memorandum a discussion what damages, if any, each party might recover from the other if litigation ensues.