This exam consists of five pages, including this instruction page. Before starting, please be sure that you have all of the pages. There are two questions, each of which is allotted one hour. They are of equal weight.

If you are handwriting the exam, please start each answer in a new bluebook. Please try to write legibly and on only one side of the page, leaving a line between each line of writing. Put your exam number on the front of each bluebook, and insert the scratch paper on which your outline to the answer appears.

If you are typing the exam on computer, put your exam number as a header to appear on each page. Indicate to the program when you are starting a new answer, so it can be printed starting on a new page.

Outlines are required for each answer, prepared on scrap paper. Write your exam number in the upper right corner of the scrap paper.

Good luck!
QUESTION ONE
(One Hour, 60 Points; Outline Required)

You are a first year associate at the law firm of Wee Do Wright Bayou ("Firm"). Low Bidder Construction Company ("LB," "Contractor" or "K’r") has retained the firm to represent it in a dispute with Owner Investors ("Owner," or "O"), over claims arising from construction of a single-family residence. Partner has asked you to analyze the following facts, identify and discuss the relevant legal issues, and assess the likelihood of success on any claims between Contractor and Owner.

Contractor is an experienced contractor, and Owner is a real estate investor. On April 12, 2003, the parties entered a contract in which Contractor agreed to construct a house on land owned by Owner, using the standard owner-contractor agreement form drafted by the American Institute of Architects.

THE CONTRACT
In Article 2, Numbers 1 through 11, Contractor agreed to do “everything requisite and necessary” to:

- construct a single family house per plans; no kitchen and or bath cabinets/countertops furnished or installed; no appliances; no wallpaper or wall coverings; no fill material supplied or installed; no water or rock removal; no removal of contaminated materials; no stump removal from site, only burial on site; wood beams in place of steel; fireplace flue to be 12" by 12"; furnace flue to be 8; no wood ceiling in master bedroom.

The contract specified that construction was to commence by April 16 and be completed by September 30. Owner agreed to pay Contractor $220,000 for all labor and materials, in accordance with a schedule of progress payments based on stages of construction, with each payment due within fifteen days after Owner’s architect (“Architect” or “A”) issued a Certificate of Completion for that stage of work. Ten per cent (10%) of the price allocated to each stage was to be retained until Architect issued a Final Certificate of Completion (“retainage”).

General Conditions (in relevant part)
§ 3.7.1. Permits. Owner will secure and pay for the building permit and other permits . . . necessary for the proper commencement, execution and completion of the work.
§7.1. Change Orders. Changes to the contract and contract price are permissible and accomplished by execution of a written Change Order signed by all parties.
§8.3.1. Delays. If the Contractor is delayed at any time in progress of the Work by an act or neglect of Owner . . . or other causes beyond the Contractor’s control . . . then the Contract Time shall be extended by written Change Order for such reasonable time as the Architect may determine.
§14.2.2. Termination or Suspension. Owner, upon certification by Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of Owner and after giving Contractor . . . seven days’ written notice, terminate employment of Contractor.

PERFORMANCE
On May 15 Owner recorded the lot as separate and distinct from the subdivision, as
required to obtain a building permit authorizing the start of construction. The building permit was issued June 1, and construction commenced the next day.

Several verbal change orders are disputed. Contractor claims that Owner orally agreed to pay additional sums for the following items of work not required under the contract, which would increase the contract price to $236,000.

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
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<tr>
<td>Stump removal</td>
<td>$800</td>
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<tr>
<td>Kitchen cabinets</td>
<td>$9,000</td>
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<tr>
<td>Septic system</td>
<td>$4,000</td>
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<tr>
<td>Jacuzzi</td>
<td>$1,200</td>
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<tr>
<td>Excavator blasting</td>
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</table>

**Total $16,000**

Owner has refused to pay for any of these items, asserting they were included under the original contract; disputing the amounts claimed; and in the alternative, contending that any verbal changes were unenforceable.

By November 15, work on the house was 90% complete. Owner complained that Contractor worked sporadically, and that some of the work was not done properly according to the plans and specifications. Owner’s Architect approved Contractor’s Application and issued a Certificate for Payment, entitling Contractor to payment of $20,000 by December 1. Owner, angry about the delay in completion, refused to pay this amount unless Contractor agreed to landscaping, at no additional cost to Owner. Contractor refused, and on December 20 gave written notice that it was suspending all work until Owner paid the full amount due under the contract. On December 31, Owner tendered payment of $15,000, “in full satisfaction of all claims to date,” and demanded that Contractor return and complete performance.

**CLAIMS**

According to Contractor’s calculations, by December 31, Owner had paid Contractor $185,000 and still owed $5,000 for the basic sums due under the contract, plus $16,000 for the extras under the verbal change orders, for a total of $21,000. When Contractor refused to proceed with work until Owner paid this full amount, on January 6, 2004 Owner terminated the contract without any advance written notice to Contractor. Because of Owner’s termination, Contractor did not complete the construction, and thus did not obtain the Architect’s Final Certificate of Completion, which would have entitled Contractor to payment of an additional amount, for the 10% re-tainage for work performed thus far ($19,800, for your purposes rounded to $20,000).

Total Contractor claim under contract and extras: $41,000. In the alternative, Contractor claims that the work done on the house, at Owner’s request, was reasonably valued at $60,000.

(Contractor estimates that it would have cost no more than $3,000 for it to complete performance, entitling it to $35,000, the balance due under the contract, plus $16,000 for extras)

Owner denies any liability to Contractor, claiming that it had to pay $50,000 over the original contract price for a new builder, “Beauty Builders” (“BB”), to complete construction. Owner has threatened to sue Contractor to recover $50,000 as cost of completion. Of course, Contractor denies any liability for breach of the contract.

Law firm Partner has provided you with all the supporting documents, and asks your assistance in sorting out this mess. Please analyze, discussing and applying relevant contract doctrine studied this semester, and forecasting how a court is likely to rule on each of these issues if the case went to trial.
Contracts II, Spring 2004
Exam Grading Sheet: Question 1 (max. 60 pts)

I. Mixed question of interpretation and facts: What K duties are presently owed, and who committed first material breach to be treated as such?

A. Interpretation

1. Start & completion dates: Prom. or Condition? Analysis of words + policy; appears time not of essence enough to be true C, so antifeasibility policy likely to call promise. Significance: K’s fail. to complete on time gives O rt to damages (if there be any). In alt., even if call C, O’s failure to timely record lot, needed for building permit, triggers prevention doct. to excuse non-occurrence of C.
   a. Was delay in K’s perform. Excused by O delays? [K lang., time for perf. SHALL be extended...]

2. C’s of T/P Satisfaction: Architect’s certificate for progress payment occurred, triggering O’s present duty to pay $20,000.
   a. K’s response to suspend & demand cure was measured; probably justified in light of outstanding claims ($20 K prog. pymt + $16K extras). Q: was suspension & demand for cure also a demand for adeq. assurance of performance, per §251? Q: is payment in full true C of K’s duty to proceed w/ next segment of performance, or does partial payment of $15K on 12/31 count as “subs!l performance”? Relevance of O’s demand for free landscaping [duress doct.], and tendering ant admittedly due? [Accord & Sat’n] (See also Rstnt 241-2). O’s tender m/b willful breach.

B. Performance

1. When O terminated 1/6/04, was this proper response to mat’l br. by K’r? Or was this 1st mat’l br. to be treated as such?
   a. Stated rsn: delay in construc. but per above, 6 wk delay caused by O, K permits time extension per written change order, w/ A’s involvement. Tho not written, Architect’s certificates: indicate K had substlly performed work thus far. Also, no written advance notice.
   b. No indication that Certif. issued for verbal change orders. Q: wh. these items beyond sc. of work in orig. K, so add’l work was consideration for alleged prom. To pay add’l costs. [FQ: see orig. K, excluded excavation, stump removal, appliances; are they subsumed by “everything requisite & necessary clause”?]
   c. NOM clause: oral modifs can operate as waiver of writing requirement. See 2-209(4)

2. Conclude: O mat’lly breached in refusing to pay $21K presently due, K’r justified in suspending perform w/ opportunity for O to cure br. O’s termination of K = Total & material br. [factors]

II. Claims

A. K’s IP, can elect to sue for T breach damages under K, or to treat K as discharged and sue for restitution.

B. K damages: K pr. - cost to perform = lost profit, alternative formula: K pr. - (amt pd + cost to complete) = lost profit. Applied: 236 - (185 + 3) = $48K. JLM facts: unpd $21 + 20 retainage for work done, doesn’t allow anything for lost profits. Dmgs must be proved w/ sufficient certainty, foreseeable & causation: no apparent problems here. Conclude: IP’s dmgs for breach = $48K.

C. Restitution: where mat’l br. Entitles IP to treat K as discharged, recovery not limited by K price. Where rsnlbl val. of goods & services exceeds unpd K price, IP may elect to sue off the K. If can prove rsnlbl val. of work done on house really is $245 (185pd + 60), K’s can recover greater amt.

D. Reject as bogus O’s claim that K’s mat’lly breached + is liable for $50 cost to complete. Application of law to facts; no way 10% of remaining work would cost $50. A’s certificate refutes O’s contention.

GRADING SCALE

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