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DEVELOP AND TEACH A COURSE ON PRACTICES AND PITFALLS IN THE CONSTRUCTION INDUSTRY THAT ARE SUBJECT TO LAW SUITS

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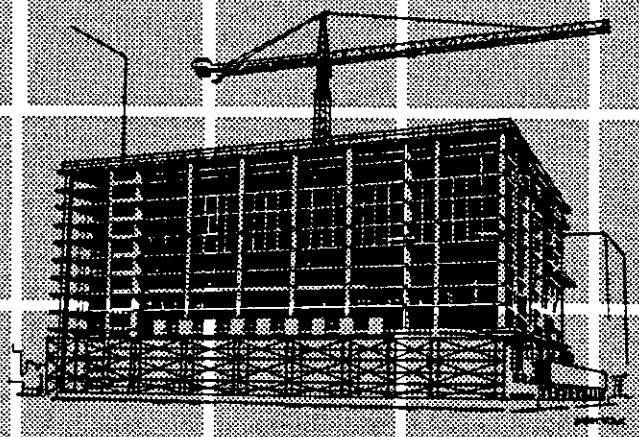

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I. EXECUTIVE SUMMARY

This project was initiated in response to increasing pressures within the construction industry that are generated by project related law suits. Over the last twenty years we have experienced a significant increase in construction litigation that has had an extremely adverse effect on the industry. Quite apart from the admittedly essential litigation which serves to police the industry and seeks to redress gross negligence, error, or outright criminal fraud; we have come to anticipate that every miscue, oversight or mistake no matter how minor will be met with a volley of legal charges seeking compensation. The consequences of this trend have been: to degrade the climate of good faith between parties to construction contracts, to encourage an adversarial attitude among industry practitioners, and to promote financial chaos within the industry. The end result has been that a lot of extra money is being pumped into the cost of projects, but that very little of it is going into product of any kind.

The reaction within the construction industry has been for the practitioners to adopt defensive and risk shifting tactics in attempts to insulate themselves from the almost certain to come squeeze plays. Those practitioners with greater staff and financial resources have found this easier to do than those smaller shops and companies who traditionally have focused more on doing the work rather than on running a business. In a modest survey of the industry we found that the kinds of problems practitioners were experiencing primarily had to do with getting paid for their work. Quite apart from the slowness of the general economy, there has been a clear trend toward avoidance of financial responsibility on the part of clients and first tier practitioners. The impact of these trends on the smaller contractors and lower tier practitioners has been extremely harsh. Business failures and simple closings have become the norm as the win-through-confrontation philosophy has replaced the traditional attitude of working together in good faith to get a job done.

This study attempted to strike at the heart of the problem. Initially it sought to identify what the problem really was; and secondly, it sought to identify ways to prevent or avoid problem occurrences. If outright prevention and avoidance were impractical, then reduction certainly was an acceptable alternative. We determined through the literature, interviews, and a modest survey that the root causative factors underlying practitioners getting into trouble were procedural in nature, both technical and business, but primarily of a management character. In many cases, people were simply not doing what they should in the day to day procedural conduct of their businesses. In an alarming number, the failure to act properly was based on lack of knowledge. Some cases obviously involve both. The Course describes the problem, teaches recognition, and prescribes preventive techniques.

II. FINDINGS, CONCLUSIONS, and RECOMMENDATIONS

A. Findings

1. The research team has conducted extensive review of legal reference books, construction law manuals and periodicals, court records, newspaper file banks, and indexes of relevant periodicals and journals. The results in terms of factual data capable of influencing our opinion or defining a direction were frustratingly disappointing, with the exception of a small number of court recorded cases. However, the results in terms of inferential data, i.e. textual allusion or suggestion as to causal activity or lack of activity were remarkably consistent in highlighting proper procedure as a primary issue to be examined more closely.

2. The research team conducted extensive interviews with leading Construction Attorneys, General Contractors, Sub-Contractors, and supporting professionals in the construction industry. The dominant theme that surfaced in all of these interviews gave strong credibility to the inferential evidence and minimal court recorded evidence referred to in paragraph 1. above. This dominant theme can be best expressed as weak or poorly conducted management of our projects and businesses. Although there are many external manifestations of this commonplace practice, it is unfortunately these external manifestations that are most easily identifiable in a legal sense, and ultimately highlighted as the characteristic defects within the industry. The real defects go much deeper. Unless we can uncover and correct them, we will always be dealing with symptoms rather than the sickness.

3. In order to substantiate the perception developed by the research team of the causal factors behind lawsuits in the industry, it was important to have some hard statistical data. The team generated a survey questionnaire which attempted to elicit both fact and opinion from a sample group of industry practitioners. A total of 413 questionnaires were sent out, predominantly in the Broward County area. In the sixty day post distribution period, we received 50% responses. This level of response not only provided an adequate population sample to work from, but also indicated that clearly there was a high level of interest in our subject matter.

4. The individual questions generated a distribution of answers that substantially reinforced our theories about causal factors. The questionnaire respondents in many cases gave more information than was asked for. This further emphasized the high level of interest at the same time it alerted us to shortcomings in the composition of the questionnaire. In combination with the court data and the interviewee notes, the survey questions enabled us to effectively identify the central theme of the causal factors. The identity of the central theme then enabled us to structure a course which could stand alone or be expanded with selected modules or instructional packages to satisfy the indicated shortfalls in procedural knowledge.

B. Conclusions

1. There are two major problems which have dominated the construction industry for the past ten years. They continue unabated as we enter the decade of the 90's. For the most part, they are inter-related in the sense that they either occur in tandem, or they occur one as a consequence of the other. They appear in numerous forms but generically we can refer to them as "lawsuits," and/or "getting paid."

2. The proliferation of litigation has nourished an adversarial environment that the construction industry struggles to operate within. Veiled opportunism and borderline hostility characterize many of the operational strategies we see employed today. Doing a good job, or a job to the best of one's ability, are practices and philosophies that we see too little of any more. Part of the reason for this is our defensive or self preservation instinct, and part is certainly attributable to the highly competitive market for the services that we provide. Perhaps a third part, larger than we would like to admit, is traceable to a general decline in the ethical standards of our society.

3. The opportunities for contractors to get into trouble are increasing constantly. More governmental agencies with more codes and regulations have to be dealt with each year. More adversarial and unscrupulous clients are on the street each year. More legal knowledge is being developed each year with a body of precedents being established which fosters an attitude of win by lawsuit.

4. The nature of law suits is to focus on outcomes rather than causes. Therefore the recording of cause has not been attended to in a manner that makes it easy to analyze or even identify why outcomes develop the way that they do. Statistical data in this area has been virtually non-existent. One thing is clear, however. Where good faith has prevailed throughout the life of construction problems, the resolution of problems and the process of getting to that resolution has been far less painful and costly to all parties concerned.

5. The data generated by this project overwhelmingly indicates that a lack of procedural knowledge and/or a lack of attention to procedure in our business as well as our technical activities is the primary causal factor leading to lawsuits in the industry which result from something the contractor has done or failed to do. We have therefore chosen the phrase "Tending to Business" as one which best describes how we can improve our position vis a vis lawsuits.

6. Economic loss seems to be on the increase although it is difficult to differentiate from that related to the general economy. It does seem that the lower down the chain or tiers of players, the more severe is the problem.

7. An extremely high level of interest in this study has been demonstrated by industry members. They not only need, but want the knowledge to help them. The small and medium shops suffer most.

C. Recommendations

1. That the content of this project be made available in the form of presentations to construction industry associations or groups around the State.

2. That a phase 2 expansion of this project be initiated immediately to capitalize on the work completed to date, the network of support developed to date, and the urgency of need for improvement in our industry's trend toward more and more law suits. Such an expansion will address in detail the four key knowledge areas of:
   - Contracts and Termination
   - Bonds and Insurance
   - Notice to Owner and Mechanics Liens
   - Scheduling and Delays

3. That a second questionnaire be developed which embodies refinements, is more objective, and more specific. The survey audience should be expanded to full state-wide coverage, perhaps consistent with the seven D.O.T. districts. This would ultimately facilitate data analysis of building construction on relatively comparative terms with construction in transportation.

4. That a general Continuing Education Program be mandated for all licensed construction industry practitioners throughout the State.

5. That the central theme developed by this project, "Tending To Business," be the first module of a Construction Industry Continuing Education Program.

6. That the modules proposed for a phase 2 expansion of the theme developed in this current project be prepared as soon as possible and added to the now existing central theme. This will create an appropriately sized package both in scope and content to address the procedural knowledge and management slack we have identified.

7. That the check lists developed through this and expansion projects be reproduced on durable plastic pocket cards to be made available to the industry.

III. PROJECTION

This course should be presented to construction industry associations or groups around the state. Ideally, the course should be presented by the research team. However, the course material proper, the report and appendices provide more than sufficient information and data to facilitate presentation by other parties.

Over time, the additional modules from phase two would be presented in the same manner.

IV. MAIN DISCUSSION

A. Approach, Sources, and Perceptions

When the research project was originally proposed, the controlling assumption was that so called "low intensity" issues such as delays, quality control problems, and inter-contractor relationships were responsible for greater monetary losses to the construction industry than losses which result from accidents and collapses. While accident and collapse were spectacular and in the public eye, aspects of job performance and job management which lead to conflict and litigation were undermining the industry in a more subtle fashion. The suspicion was that these relatively unattractive problems would be not only hard to uncover, but once uncovered, harder still to analyze. For instance, when does "lack of knowledge" (named as the second most prevalent cause of trouble) become a construction industry problem as opposed to a societal or governmental one? The impetus behind this study is, then, the belief that such problems merit both emphasis and understanding.

Our original research approach was to survey the industry to develop a base of case histories. To accomplish this we proposed contacting contractors, bonding companies, construction attorneys and various support agencies, and conducting a literature search for relevant materials. Almost immediately, however, we were struck by the magnitude of the inquiry undertaken. Everyone keeps data related to these problems, but no one has analyzed any of this data in such a way as to make it directly relevant to our purpose.

The broad body of literature in the field of construction law has been written by lawyers for lawyers consumption. For the most part it is presented in a manner

more intended to instruct and advise the legal profession than to appeal to the contractor who is trying to figure out where he has gone wrong. Despite this fact, as the project developed and our network of literature sources expanded, we began to find a number of references directed toward construction professionals as an audience. These references, all relatively new on the market, reflect not only an increasing awareness of a need, but also a realization that contractors must read and absorb the material. A full listing of all literature consulted during the study is contained in Appendix A to this report.

County Court records reveal some systematic problem areas (e.g. pervasive disputes involving oral contracts), but are surprisingly lacking litigation involving established construction firms. It also seems clear that on their face, court pleadings may have little to do with the underlying cause of disputes between the parties, and more to do with the skill of the attorneys in drafting them. Appellate court decisions are valuable in that they focus on current interpretations of the law, but there is no direct correlation between what reaches the appellate court and what never gets there. (There may be 100 cases involving delay problems which resolve themselves at the trial court level, and one case about a contract payment clause which finds its way to the Florida Supreme Court.) Many disputes end up in arbitration, mediation or some other form of alternative dispute resolution; unfortunately these files are closed and cannot be reviewed. A listing of all the court records which we did obtain access to and reviewed is contained in Appendix B of this report.

Interviews proved to be an extremely fruitful medium of information development. Through a few initial contacts we were able to reach a responsive and mostly supportive cross section of knowledgeable sources across the state. These sources included construction attorneys, industry practitioners, bondsmen, insurance

and claims persons, risk analysts, and construction associations. The interactive and continuing support of these sources has been invaluable to the success of this study. For instance, bonding companies record and chart failures in monetary terms but not in causative terms. Although bonding and insurance companies may be more aware of the causative factors than they realize, when we presented questions directed to cause, the interviewees were noticeably slowed in responding. Cause however, is highly relevant to bondsmen and insurance brokers because they are in the business of investing based on evaluation of people and their performance characteristics. Ultimately we received excellent input from these sources. Subsequent sections of this report discuss much of the extracted sense of the various interviews, a complete listing of the sessions and meetings with typed reports of each are contained in Appendix C.

As our interviews of construction attorneys, general and subcontractors, insurance/risk management people, and experts on mediation progressed, a definite pattern began to emerge. In broad terms these disparate sources were telling us that contractors get into litigation because they are not taking care of business. Management skills are either lacking or not being used as they should. Concurrently, the construction industry is becoming more and more dependant on such skills. Competition is steadily increasing -- the economy is taking its toll.[1] Where the successful firms are getting the upperhand is in the area of management. Lack of these skills is what is exposing weaker companies to litigation. These weaker companies either do not know how to stay out of trouble, or they do not know what

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[1]See Arden Moore, "Jobless workers pawn their tools for rent," News and Sun Sentinel, February 23, 1991, p.1A, cols.1-4, "Statewide, 43,000 construction jobs have been lost in the past 12 months, including 3,000 in Palm Beach, Broward, and Dade counties, said Brad Hunter, chief economist for Goodkin Research in Lauderdale-by-the-Sea." see also, Ellen Forman, "Slump's effects snowball -- Building woes hit architects, engineers," News and Sun-Sentinel

to do once they get into trouble. Sophisticated owners and contractors on the other hand are more able to take advantage of any lapse on the part of their weaker counterparts. Subcontractors, who are in the weakest position of all, are being pounded. As one attorney put it, "the American dream of owning your own business is disappearing." Many subcontractors are merely working for wages, while at the same time, as contractors, they bear the attendant risks of loss, without the hope of profit. With this in mind our research turned toward these broader management concerns.

Our decision to focus on the management aspects as apparent causal factors was a direct consequence of the findings of the project to this point. Every source of information we had looked into had indicated that lack of proper procedure was a primary if not the primary root cause leading to lawsuits. Lack of proper procedure was being manifested in many different ways and activities. A further division of procedure along knowledge- based versus negligence-based reasons was also suggested by these same sources.

This opportunity to focus our efforts came at an appropriate point as we had known for a long time that we could not entirely solve the industry's problems within the scope of the present study. The management/procedure issue seemed to be the central issue or theme that we had hoped might exist. Such a central theme of practices and pitfalls made addressing the remedy far more easy than if we had been left with the option of nibbling away at the fringe of our lawsuit dilemma in a piecemeal manner.

In an effort to test this management hypothesis, we devised a questionnaire which probed the thoughts of practitioners to see just what their perceptions are about what the major causes of litigation are, if they had been in litigation, what was

the underlying cause, and several questions about how they approach their contracts, and attorneys. As part of the course we share and discuss the results of this survey in the light of the many interviews and conversations we have held. The survey questionnaire, and visual plots of the results are contained in Appendix D. In addition, we present various suggestions and recommendations which run to the heart of the problems perceived. By necessity, this first course is more general in nature -- specific problems of delay and defect cannot be handled in a cursory fashion. Our intention is to touch the broad, major areas first, advocating prevention, and expand on specific, more narrow areas at a later date.

The consensus of opinion among those we have spoken to is that there is something wrong with the way business is being conducted in the construction industry.[2] There is strong feeling among many that the problem is fundamental. No one, not a single interviewee, presented a positive picture of the present or an optimistic assessment of the future. For the most part, the fact that we were looking into this problem was greeted with an "it's about time" reaction. It was clear to us at every encounter that any action by the State of Florida Building Construction Industry Advisory Committee to alleviate the current construction woes would be welcome.

More specifically, practitioners have pointed toward the many problems which exist with construction contracts themselves. The unequal bargaining position which the weaker parties find themselves in at the inception of the contracting process,

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[2]See News & Sun Sentinel investigative series by Dan Lovely on the construction industry which included one example from Boca Pointe "where prices range from about $95,000 to more than $600,000 -- at least six building companies have abandoned projects. Buyers complain of uncompleted houses and debris filled lots. Lawsuits allege misused deposits, improperly diverted loans and defective construction."

becomes, by the end of the contract negotiations, solidified in the contract document itself. The stronger players are becoming more adept at inserting risk-shifting clauses into the contracts which are harder to defeat in court. Contractors must, therefore, pay more attention to their contracts themselves, read them, understand them, know when to engage professional help if they do not understand them.

Contracting itself is becoming more dependant on the business skills of an accountant. As Builder magazine put it "[p]aperwork, the nemesis of many builders, is nevertheless a key ingredient in managing a successful building operation."[3] Without good accounting support, the small contractor probably will not last long enough to get sued. We consider this a prerequisite to even thinking about independent contracting. Likewise, construction attorneys have named four key support personnel with which every contractor must have good relations: their attorney, their bonding/insurance company, their accountant, and their banker. When asked to rank them in order of importance the accountant was ranked first, followed by their banker, bonding/insurance company and only, last, their attorney.

When a dispute does arise "you have reasonable people and unreasonable people." This is a truism unworthy of further comment perhaps. However, it behooves every contractor to find out before signing the contract who is unreasonable and who is not. We were often told that contractors, hungry for work, do not know who they are dealing with and make no effort to find out. In some cases, we were told, even when they were warned about others having been burned on the same job before them, they went on to get burned themselves. "Good faith, good faith, good faith," is what contracting is based on.

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[3]"Nine Nifty Management Reports," Builder, July 1989, p. 184.

Finally, when good faith does break down, and when the relationship goes sour, as many a relationship does, how and when do you terminate. This has been aptly called "the choreography of termination," and it is something which needs to be taught.

B. Problems, Practices, and Pitfalls in the Industry

1. Non-payment

In a brief questionnaire to a group of general contractors, subcontractors, material suppliers and other construction industry related practitioners we asked who had ever been involved in construction litigation and why. The majority said they had been involved in litigation. When asked to indicate which one of a number of broad categories this litigation fell under, namely, design/code problems, delay, non-payment, quality of the work, defective workmanship, or other, most indicated non-payment. Many indicated that, simply put, "the other guy just didn't want to pay." These views were confirmed by our research into the trial court cases, many still pending, in Broward County.

Of the many lawsuits filed for breach of contract during February, 1989, in Broward County Circuit Court, thirty-two involved contractors, or sub-contractors as one of the parties. Of these thirty-two, twelve involved problems of failure to pay. Payment problems are by far the most common cause of action among the trial court cases studied. These facts are reinforced by the comments of attorneys who specialize in construction law. Cases which reach the appellate level, however, do not reflect this same high percentage and, therefore, a perusal of appellate decisions does not reveal this fact. By and large, contractors are the victims in non-payment cases between owner and contractor, although most cases involved contractor/subcontractor disputes. Non-payment is commonly thought of as a result of any number of variables e.g., poor quality workmanship, nonconforming work, delay etc., but this is not always so. Often non-payment is just that, non-payment. A contractor goes out of business and just does not pay the bill, or moves, or is

somehow unavailable and cannot be served to appear in court, or denies any bill exists, [4] or does not respond to the suit and defaults.[5]

So what does a builder do to become insulated from non-payment? A common suggestion is to investigate the person you are working for. [6] This may not be all that simple.[7] Where does a contractor go to get adequate information about a developer or owner? The means available to a contractor or subcontractor are few and

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[4] Williams v. Glen Wright Const., No. 89-004912-05, $11,219.22 due for services performed i.e., "for delivery of fill and sand and removal of trash," the defandant denies the allegations and claims "any amounts allegedly due and owing plaintiff have been paid in full." Cramer's Concrete Floor Inc. v. H & S Forming, No. 89-004505-02 oral contract to supply labor and materials. "Plaintiff delivered the concrete and labor to defendant...and submitted bills." Defendant replies: "Said defendants deny each and every allegation contained in paragraph 7 and 9 of complaint." That is, they deny everything.

[5] See e.g., Martin Contractors, Inc. v. Occidental Aircraft International Corp., No. 88-31833-23, where an oral agreement to pay $260,000 for site clearing and grading and excavation of building pads. With $90,000 outstanding the defendant can't be found.

[6] See Thomas M. O'Leary, "Negotiating the General Construction Contract," Design and Construction Contracts, ABA, 1989, pp.21-22 "There is nothing more frustrating for a party to a contract than the realization that while the terms of the contract favor the party's position, the other party to the agreement does not have sufficient funds or assets available to satisfy a potential award or judgment. From the contractor's viewpoint, it is essential that sufficient investigation is performed in order to insure that it is not contracting with a shell corporation or a partnership without capital. If the owner insists on limiting the contractor's remedy solely to the assets of the partnership without recourse to the general partners, then the contractor must assure itself that the partnership has a comfortable level of equity in the project or other assets sufficient to complete the cost of construction."

[7] See Jim McNair, "The Subs Just Want to be Paid," News and Sun Sentinel, July 6, 1986, p. 1D, cols. 2-4, which offered this checklist:

Checklist For Subcontractor Protection
Before signing a contract:

Know the project's general contractor, its performance record and lien history.

Find out about the developer, owner, and lender and their relationships with each other and the general contractor.

Determine if the general contractor will post a bond on subcontractors' labor and materials. Identify the bonding company.

Be sure the project has a good chance of financial success.

Read and understand the contract, especially the provision on the general contractor's obligation to pay subcontractors if he isn't paid by the owner.

unreliable.[8] Credit reports, bank balances, word of mouth, etc. offer no insurance against the unscrupulous practitioner. Some have expressed the opinion that "credit reports aren't worth the paper they are written on," and money in the bank is no indication that you will get paid if the owner has a history of non-payment. Yet credit reports, when taken along with other background information, are useful. In spite of the difficulty, contractors and subcontractors should endeavor to get information on an owner's or developer's past history, track record and reliability.[9] This applies to subcontractors as well.[10]

It is nevertheless significant that such a large percentage of construction related actions for breach of contract are brought as a direct consequence of non-payment. It would seem that seeking remedy at law would be used as a last resort after all possible avenues have been explored. It should be realized that if a contractor terminates a contract for non-payment when not entitled to do so, the possibility exists that the termination itself becomes a material breach entitling the other party to terminate the contract and sue for damages.[11] Contractors must know that "[t]he

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[8] Ibid. "Builders Notice Corp. is one of several local companies that, for a fee, provides subscribers with a weekly list of all mechanics' and tax liens filed in South Florida. With that information, said company President Jim Carmel, a subcontractor can figure out who's paying his bills and who's not."

[9] Leiby, L. Florida Construction Manual 2nd Ed., p. 2 f. (1989) Likewise "[t]he owner should investigate the contractor before making a contract. First of all, the owner should know what entity the contractor is. If Jones Contracting is what the owner is dealing with, who is the legal person called Jones Contracting? An appalling number of people don't know the entity with which they are doing business The time to find out is in the beginning, when everyone is friendly and headed toward a common goal of completion of the project." Advice applicable to contractors and subcontractors as well as owners.

[10] "Subcontractors Feel Chill of Construction Cool Down," offers checklist items such as "[t]hink twice about who you bid. Carefully evaluate the risk in taking each project. Check out the project financing as well as the other members of the construction team and their expertise. Stick to the companies with known track records for success whenever possible."

[11] Michael F. Nuechterlein, et al., Florida Construction Law: What Do You Do When....?, National Business Institute, Eau Claire, Wi., 1990, p. 263.

stakes in this area are extremely high."[12]

As with many other aspects of managing a business, the answers to guide contractors should be a part of the contract itself. Turning next to the topic of contracts we explore another major problem area for construction practitioners.

2. Contracts

"The construction industry can literally be described as being built on contracts."[13] It is no surprise that contract problems are at the root of much construction litigation. No one we spoke to would argue with this statement. This topic has also been the focus of much that is written about construction law. Short of actual litigation, nothing strikes fear into a contractor like signing a bad contract. Contract language can be mystifying and intimidating, especially to the inexperienced practitioner.[14] Many subs feel manipulating contracts is one of the things which keep the generals always ahead of the them, and among the forces which keep the sub in the weakest position in the construction hierarchy.[15] (Although other factors do play an important part in this state of affairs.) It may be impractical, if not outright impossible, to expect small practitioners to become adept at such a highly specialized

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[12] Ibid.

[13] Leiby op. cit. p.70 "This is illustrated by the fact that the main characters in the building industry are usually termed contractors and subcontractors rather than builders and sub-builders. Knowledge of contracts is indispensable to anyone running a construction business. Because the undertakings are often large, and involve large sums of money, just one error in a contract or subcontract has been known to result in losses that can wipe out a construction firm (for example, errors relating to contingent payment clauses, broad indemnity clauses, warranty clauses)."

[14] O'Leary, op. cit., pp. 61-62 "In most cases the attorney assumes that the clients (whether it is the owner or contractor) understands what work will be included under the contract and it has been adequately described in clear unambiguous language. That assumption is often incorrect. Accordingly, the lawyer must take an active role in framing the contract language for this topic."

[15] Steven Siegfried (personal communication).

area as contract law. Yet, it is not unreasonable to say that as the construction industry becomes more competitive and litigious, an ability to understand (at least) the basics of what a contract is has become, so to speak, part of every plumber's training. There are several reasons why this is so.[16] Among them is the fact that, legal services are expensive for everyone, but more so for a small contractor who is unable to spread the cost of legal services over a broad base of work. [17] Even an ounce of prevention, when that means seeing an attorney, can price a small operator out of the market. Often we were told that contractors are just not reading their contracts. [18] What is meant, in general, is that few are aware of what to look for when they read a contract.[19] There is a general belief among those we interviewed that contracts need to be better understood before they are signed, and that practitioners should learn what to do about a bad contract once it has been signed.[20]

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[16] McNair loc. cit. Not the least of which is monetary: "'There are unscrupulous general contractors who will take money and put in the bank and draw interest on it instead of paying you. That actually happens,'....[b]ut...subcontractors wouldn't get into so much trouble if they read contracts closely and knew their rights."

[17] Ibid. As Fort Lauderdale attorney, Tom Shahady said: "Litigation is not a cut-and-dried thing,...[i]t's very time-consuming and expensive, and there always sees to be a claim for defective work, You just can't buy construction litigation without spending substantial dollars to collect your money."

[18] Although few are as hapless as the parties in All Florida Surety Co. v. Coker, 88 So.2d 508 (Fla 1956) in which the subcontractors defended themselves on the grounds that, among other things, they had neglected to read the papers before signing them.

[19] A comment about subcontractors which applies equally to generals: "They sign contracts that lock them into slow death -- and they don't even know they're doing it." McNair loc.cit.

[20] A list of clauses to be aware of by an anonymous author is circulating. It lists the following:

1. Payment only out of funds received from the owner.
2. Arbitration in a remote place, and/or before a prejudiced arbitrator.
3. Payment and/or Performance Bonds to be given by the Subcontractor.
4. Indemnification clauses for damages caused by others. (and agreements to furnish insurance against such losses, and demand.)
5. Waiver of lien and/or bond claim rights.
6. Preapproval of release foroms which do more than release for amount of money received.
7. Provisions giving 21 days for claim notices.
8. Other documents incorporated by reference, the contents of which are unknown to the

Contracts are seen by some as a battle ground upon which the conflicts between owners and generals, generals and subs are worked out. [21] One sub-contractor told us that in an effort to obscure the actual terms of the contract from him, a general used the basic form of an AIA contract and with the use of hi-tech computer capabilities and a laser printer re-arranged sections of the document, adding and deleting items to create an AIA look alike.

Many subcontractors feel that they will always be on the losing end when it comes to signing a contract with a general, and generals feel that they are in the same position with owners or developers who impose unfair or unreasonable conditions on them which the general then shifts to the sub. [22] Despite the risks both generals and subs are often willing to take the chance in hopes that they will make it up later in change orders or by using their technical expertise. This state of affairs then shows up in shoddy workmanship or worse. That the subcontractor is in the weakest position is clear.[23]

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subcontractor.

[21] "Subcontracting is a risk-shifting device which enables costs and cash flow to be controlled by general contractors. Subcontracting is used not only by general contractors who wish to control costs and cash flow but also by subcontractors who often subcontract to second-tier subcontractors....Too often subcontractors sign subcontract forms which are furnished them by general contractors without having any knowledge of the very serious legal implications of many of the subcontract clauses that give the general contractors unnecessary legal and practical advantages. Many subcontractors only check to see that their name is spelled right and that the money is correct before they sign subcontract forms which create unsuspected liabilities on the part of the subcontractors." McNeill Stokes, Construction Law in Contractor's Language, McGraw-Hill, New York, 1989, p. 83.

[22] See Stanley Sklar's "To Lien or Not to Lien - That Is the Question." Although we were unable to obtain this article it concerns the role of the subcontractor in construction and the recent reallocation of risk being imposed upon subcontractors by general contractors and construction managers.

[23] In Cheezem Development Corporation v. Intracoastal Sales and Service, Inc., 336 So.2d 1210 (Fla. 2d DCA 1982) the developer included a provision in the contract which read "Contractor does hereby waive all right of liens or conditional bills of sale and does waive all right to file any notices in relation thereto...." which the court found to be a "substantial breach" of contract when the subcontractor filed a lien after of a progress payment dispute.

The issues of preventing, mitigating, and managing liability of contractors have been addressed by numerous construction attorneys in seminars, treatises, and articles recently.[24] Some have suggested that there ought to be a Uniform Commercial Code for construction contracts which establishes a lender policy, and a standard way of dealing with writing contracts, even a Prompt Pay Act. The idea is to put the money on defining the process and resolution will follow. Presently good faith is the guiding principle.

3. Oral Contracts

Often in the cases researched, the problems involved disputes about the scope of the work to be done.[25] Normally speaking the contract language and terms will be looked to first to decide these issues, however, in many cases no contract existed.[26] As the saying goes "an oral contract is not worth the paper it is written

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[24]See Stanly P. Sklar, "A Subcontractor's View of Construction Contracts."

[25]Nuechterlein op. cit., p. 19.

[26]O'Leary op. cit., p.71. "Too often the individual representatives of the owner and contractor enter into "gentlemen agreements", athe terms of which, at the conclusion of the project, are either remembered differently by the individuals involved or ignored by the owner's auditors."

on," [27] but, unfortunately, oral contracts are far from uncommon.[28] Oral contracts are legal in Florida. [29] Yet, however legal, such oral or implied contracts should never be more than a fall-back position. [30] The problem lies in the fact that without a written document it is often quite difficult to know what exactly the parties intended, and the burden of proving this intent must be clear from the surrounding facts and circumstances which, even under the best of conditions, may be hard to prove.[31]

4. General Contractor as Broker

Once the job is awarded and the contract signed it is time for what most people

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[27] Stokes, op.cit. p.

[28] Rossmoor Corporation v. Tri-County Concrete Products, Inc., 375 So.2d 896 (Fla. 4th DCA 1979), is typical of the type of situation in which an oral contract to supply construction materials existed between a materialman, a subcontractor, and a developer. When the subcontractor abandoned the job, the material supplier tried to collect from the developer. The developer denied that an oral contract existed. We have found numerous similar affirmative defenses among the cases researched. It is interesting to note that in none of the issues raised in this case on appeal did the developer claim not to have received the materials. Nevertheless, the court ruled in favor of the material supplier. However, the court noted "the case law on the issue of the quantum of evidence necessary to establish an oral contract is rather unclear." See also, Jim McNair "The subs just want to be paid," where the contractor accepted a $33,700 contract without either an advance payment, or a bond to cover the work, just a verbal agreement to pay. "[L]ittle did he know that his payment would get tied up in an international lawsuit stretching to Munich, Germany."

[29] Lewis v. Meginniss 12 So.2d 191 (1892).

[30] Nuechterlein op. cit., p. 8. "It should always be remembered, however, that implied contracts should be treated as a fall-back position and never considered preferable to an express written contract. As noted by the Florida Supreme Court in Bromer v. Florida Power & Light Co., 45 So.2d 658, 660 (Fla. 1949):

> It is our view that a greater burden should be placed upon a plaintiff who relies upon an implied contract that one who uses reasonable care and foresight in protecting himself by means of an express contract. To hold otherwise would be to encourage loose dealings and place a premium upon carelessness.

[31] Ibid., p. 4 states: "The importance to a contractor of obtaining even a simple writing, confirming oral discussions, cannot be overemphasized. The contractor will enjoy two basic benefits from such a practice, one legal and the other business. The legal benefit is that at least a writing provides each party with evidence and proof of the contractor's intent during the discussions. The business benefit is that it provides a convenient written record that can be referred to later by the contractor to determine what duties are still owed either to him or by him."

think of as the essence of contracting: building the building. The actual nuts and bolts of construction are probably the area where contractors feel most comfortable. Here is where the contractor is at an advantage over the owner and his attorney. The contractor can now put his expertise to work to regain the upperhand in the struggle for profits. So it would seem to an outsider at least. Nevertheless contractors are all too willing to relinquish their advantages at this stage by not taking care of that which they know so much about. We call this aspect of the contractor's duties project management.

Project management should rightly be the domain of the general contractor. It is in fact virtually synonymous with what a general contractor is supposed to do - his job description could read project manager. Yet we have spoken to those who feel that project management should be turned over to someone else - the architect or engineer perhaps. The reason is that the general is not getting the job done.[32] Of course, this does not apply to all generals; the best either avoid problems administering their projects, know how to successfully handle problems when they occur, or have unnaturally good luck.

Our fieldwork revealed to us that there is a perception among subcontractors, attorneys etc. that generals are failing in several areas. One of these is in their role as project managers. Generals, it seems, would rather act as brokers of construction services than as active managers of the projects themselves. The allure of this position is clear; if he could just close the deals, convince the owner that he can handle the project, then all that is left is to bring together the proper people to put the building up. Good contracting, in other words, is simply a matter of putting together

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[32]O'Leary op. cit., p. 70, "[t]he majority of contractor caused problems on a jobsite are the direct result of inattentive project management..."

the right team and the proper paperwork. What is not so obvious is what the law expects of the general in his role as project manager. What is the legal responsibility of the general to the project in terms of the actual building of the building? Can a general simply be a broker and leave the project to subs and office personnel?

The contractor who brings together a good team has not dispensed his responsibility to the project; rather, he has simply fulfilled the first duty that is expected of him. Florida courts have held contractors to their statutory duty as qualifying agents (Fla. Stat. 489) of a corporate builder to "supervise construction." This is a non-delegable duty. Construction companies which abuse the requirements for qualifying agents are a grave concern of everyone we spoke to. This was also highlighted by the Dade County Grand Jury report, fall term, 1989. Another failing is general-sub inter-communication.

Once a good team has been put together it is necessary for the general to work with the team to achieve his goal. Subcontractors have complained to us that generals are simply not communicating their needs to the subs. Lack of communication often leads to lack of coordination which often leads to delay. And delay is frequently named as one problem (and prime source of litigation) which can be avoided if contractors involve subs in the scheduling process.

5. The Squeeze Play

Contractors themselves feel that the knowledge and skill is there but that by being squeezed by owners to sign unfavorable contracts they are not being given the latitude and time to apply their skills. When making up the profit on a job by

shortening the time is their only option, quality suffers in the exchange.[33] There was no dearth of "horror stories" about subs desperate for work who took on jobs despite warnings that another sub had gone broke on the identical project - predictably the next sub suffered the same fate or worse. [34]

On the other hand, there are construction attorneys and others who attribute the lack of quality workmanship to lack of training, or poor skills in general. While still others complain of a failure to enforce the regulations which are in place to insure quality.[35] There is ample evidence that all three of these factors contribute to the lack of quality workmanship which inevitably results in construction litigation.

6. Construction Defects

We alluded to the fact that, as one might expect, signing a bad contract can result in poor workmanship. But contractors can knowingly and unknowingly place themselves in precarious legal situations when they either roll the dice and cut corners to improve profits, act carelessly or fail to acquire the requisite knowledge or training needed to complete the job. Licensing must be viewed as providing a minimum level of competence below which a contractor cannot fall. [36] Examples abound in trial

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[33]See Nuechterlein op. cit., p. 202, "[o]ften contractors are reluctant to provide owners with formal notices because of the risk of undermining the existing relationship. Many contractors are concerned that if they "paper the project" with written notices, the owner or general contractor will resent the activity and not use the contractor on another project."

[34] McNair loc.cit."They're really in the vise," said William Benson, a Fort Lauderdale attorney who specializes in mechanics' lien law. "They are always asked to give competitive bids, then when the work is done, they're asked to wait for everybody else to be paid. At the other end, they're pressed by suppliers who are 10 times their size."

[35] "Changes in state and county licensing are essential if construction incompetence is to be corrected. Dade County Grand Jury, "Final Report," filed May 15, 1990, p. 18.

[36] Ibid. p. 21.

court and appellate records which illustrate any and all imaginable defects. Construction defects have also been a feature topic in newspaper articles warning buyers that high prices are no guarantee of high quality workmanship.[37] Common problems involved moisture protection or water penetration due to a variety of reasons. These defects could be sued upon under a theory of negligence.[38] Or under a theory of implied warranty of fitness and merchantability; for instance, where the failure to perform the work as specified in building plans.[39] Or where the developer altered the building from the plans "for aesthetic and structural reasons."[40]

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[37] Christopher Ryan, "Court ruling favors Boca Grove residents," The Boca Raton News, Wednesday, August 29, 1990, p. 9D, cols. 1-5. "The 1988 [Boca Grove lawsuit between the homeowners and developer of Boca Grove] claimed construction defects in the homes and asked for $4 million in damages." See also, Dan Lovely, "'We got taken' Condominium owners at La Paz Phase I found that high prices are no guarantee against construction problems," News & Sun Sentinel, Feb. 15, 1987. "These days owners confront leaky roofs, cracked walls and faulty plumbing. They've already been assessed almost $130,000 for repairs and condo officers estimate total costs may reach $500,000 -- in a luxury development not yet three years old."

[38] At the trial court level Pine Island Ridge Condominium v. Metro Drywall, No. 89-004413-01, in which actions were brought for negligence and breach of contract on a $121,000 contract to perform waterproofing repairs. Obviously, because of waterproofing problems which already existed; plaintiff claimed that within one year of the repairs, the paint began to peel causing the premises to be unsightly and subject to water intrusion. The defendant was accused of not furnishing materials of proper quality and of not performing its contract in a good and workmanlike manner. Specifically, plaintiff claimed that defendant a.) failed to use adequate water pressure in surface preparation, b.) failed to prepare the surface adequately prior to commencing to paint, and c.) failed to select and use proper materials of proper quality. See also Schmeck v. Sea Oats Condominium Ass'n, Inc., 441 So.2d 1092 (Fla. 5th DCA 1983); D.D. Jackson v. Riley, 427 So.2d 255 (Fla. 5th DCA 1983).

[39] See David v. B & J Holding Corporation, 349 So.2d 676 (Fla. 3d DCA 1977), where purchasers of a condominium unit brought an action for damages against a developer-builder, alleging breach of warranty for failure to construct party walls as specified in the approved building plans:

> "After taking occupancy of their unit, plaintiffs discovered several defects, including the failure of the defendant to include proper sound proofing and insulation in the party walls according to the building plans recorded and approved with the [t]own....after the adjoining units became occupied [plaintiffs] informed the defendant of the fact that either so little or no wall insulation was used that they could literally hear every work spoken and sound made by their neighbors in the adjacent units."

[40] Schmeck v. Sea Oats Condominium Ass'n Inc., 441 So.2d 1092 (Fla. 5th DCA 1983), where:

> "The developer admitted he shortened the roof eighteen inches for aesthetic and structural reasons, and it was a deviation from the plans. He denied that this caused the unit owners' water seepage problems, but he did not deny they existed."

7. Workmanship

In the case of enforcement of regulations, our interviews have revealed generally this: there exists a lack of adequate enforcement of existing regulations (to quote one interviewee "nobody is watching the store.") Contractors, attorneys, subs all have commented more or less in a similar vein.

It must be said that a lack of regulation invites problems, and unenforced regulations invite noncompliance. An unskilled work force is the reality, however, when squeezed by a bad contract even skilled workers cannot perform as they should. There is no doubt but that ignorance and poor workmanship go hand in hand, but contractors and subcontractors are not availing themselves of the legitimate avenues of help offered by professional and trade organizations.

8. Training

It may seem axiomatic that well trained workers beget well built buildings. What is also axiomatic is that poorly build buildings beget well prepared lawsuits. The consensus of opinion from our work has been that "training is needed," that "the work force is poorly trained and [generally] unprepared." (What contractors want to know about most after mechanic's lien is their own liability.) Organizations like NAHPCC, AGC and others have recognized the need for training and offered apprenticeship programs. For contractors worried about liability the connection should be clear between poor workmanship and lawsuits.Florida law treats this issue under statutes addressing warranty and workmanship. Contractors should be aware of their content and importance.

Section 672.2 - 313, Florida Statutes, addressing warranties in general say that "[a] purchaser of a new residence receives an implied warranty that the residence has

been constructed in a workmanlike manner." Lawsuits which address this problem are manifold.

When all is said and done, what is behind all regulations, licensing and training is an effort to insure a quality product. Contracting is ultimately done by people and the competence and responsibility of the people must be guaranteed.[41] People therefore make quality.

The problems addressed here apply to contractors and government and trade organizations. They are inter-related concerns that each have an effect upon the others. It may well be that one engenders the other; however, this is a chicken-and-egg debate which brings us no further. Suffice it to say, there exist causal relationships between enforcement (government and other), enactment and construction of regulations (be it licensing, insurance, qualifying) and the contractors application or response to these regulations.

9. Qualifiers

Qualifying agents are a well known source of trouble, yet regulations are in place to combat this problem.[42] The Dade County Grand Jury reported in May 15, 1989, that "many construction companies are formed by unlicensed and inexperienced people utilizing the license of a contractor, called qualifiers, who permits his name and license to be used for a fee." The problem is well understood by the legislature which has taken steps to address the problem.[43] The practice can invoke

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[41] Dade County Grand Jury op. cit., p. 22.

[42] "All primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization; for all field work at all sites; and for all financial matters, both for the organization in general and for each specific job." Fla. Stat. 489.1195 Responsibilities.

[43] The court in Alles v. Dept. of Professional Regulation, 423 So.2d 624, 626 (Fla. 5th DCA 1982), explains the legislature's rationale in holding qualifying agents liable. "The obvious purpose of these statutes allowing a company to act as a contractor through a licensed contractor is to insure that projects

disciplinary action under section 489.533(1)(k), Florida Statutes. This statute is aimed at preventing those who knowingly allow their certificate to be used without actually participating in the company.[44] Nevertheless, according to our field work the popular perception is that "no one is watching the store" when it comes to restricting abuses of qualifiers.[45] The problem of liability exists for the qualifiers themselves, of course, only when something goes wrong. Often they are unaware of their liability, indeed some can't imagine that they are liable at all since they "had no involvement at any time with any phase of the...project."[46] Nevertheless, courts in Florida have rejected the claim that a contractor is not individually liable. A qualifying agent has a statutorily-imposed duty of supervision and civil liability for damages can be imposed on the qualifying agent by reason of the negligent breach

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undertaken by a company are to be supervised by one certified and licensed by the board. To allow a contractor to be the "qualifying agent" for a company without placing any requirement on the contractor to exercise any supervision over the company's work done under his license would permit a contractor to loan or rent his license to the company. This would completely circumvent the legislative intent that an individual, certified as competent, be professionally responsible for supervising construction work on jobs requiring a licensed contractor."

[44] Fla. Stat. 489.533(1) "The following acts shall constitute grounds for disciplinary actions.... (k) [k]nowingly combining or conspiring with any person by allowing one's certificate to be used by any uncertified person with intent to evade the provisions of this part. When a certificate holder allows his certificate to be used by one or more companies without having any active participation in the operations or management of said companies, such act constitutes prima facie evidence of an intent to evade the provisions of this part."

[45] This perception may be skewed, but a glance at the classified ads of the Sun Sentinel reveals ads such as these:

A/C QUALIFIER -- W/Active State License for new Co. Call

and:

A/C QUALIFIER -- wanted to hire. Class A or B license. Call

although these may be legitimate solicitations one wonders to what extent such ads invite abuse.

[46] See Alles v. Dept. of Professional Regulation, id. at 624, in which the general contractor, Unive Inc., of a condominium project which collapsed during construction causing great loss of life had an arrangement with Dynamic Construction Co. to use Dynamic's designated agent instead of Univel's qualifying agent to supervise the project. The facts were undisputed that the qualifier had failed to supervise and be professionally responsible for the construction. Although Dynamic's agent was the "de facto" qualifying agent and the actual qualifying agent "had no involvement at any time with any phase of the...project," nevertheless the court found that the qualifying agent had a duty to supervise the project.

of such duties.[47] Contractors must be made aware of the consequences attendant to violation of these rules.

10. Lenders

Although many contractors and subcontractors think it is a good idea if banks took a more active role in keeping the reins on construction projects, few, if any, believe that the banks will involve themselves.[48] However, lenders seem to be in a prime position from which to control contractors or help prevent contractors from getting into trouble. [49] Many have expressed the view that greater lender involvement

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[47] In Gatwood v. McGee, 475 So.2d 720 (Fla. 1st DCA 1985), a building contractor was found individually liable for negligence although he never supervised the construction and thought he had "satisfied his statutorily-imposed duty as qualifying agent to supervise construction by hiring an apparently competent person to supervise construction" although such person was admittedly not certified as a qualifier for the company. The facts of this case are worthy of note:

> "Gatwood, a building contractor, was the president and sole stockholder of a home construction business known as Gatwood Enterprises, Inc. Gatwood Enterprises entered into an agreement with a builder named Glynquest whereby Glynquest was employed to manage and supervise the company's home building operation pursuant to which agreement Glynquest supervised the construction of a number of homes for Gatwood Enterprises. Gatwood himself, although involved in various aspects of the company's operations, has nothing to do with the actual construction or supervision of construction of the homes.
>
> "With respect to the subject home, Gatwood applied for a building permit to construct the home on a lot owned by Gatwood Enterprises. When the home was in the latter stages of completion in 1979, Glynquest departed. At the time of his departure, there were five or six other homes in various stages of completion....[The completed home was sold in October 1979 to Paul and Linda McGee.] Within two months, the McGees became aware of structural problems with the home. It was subsequently determined that the home had been constructed on a bed of much ten to twelve feet deep which had been covered with a layer of fill sand. The unstable ground was causing substantial problems to the southwest corner of the home."

[48] "Lenders monitor their construction loans however they see fit -- and that's as it should be, say Florida bank and savings and loan representatives....Florida law now permits lax monitoring because lenders usually aren't accountable when a project goes bad. In a key legal decision the 4th District Court of Appeal ruled: 'A lender owes no duty to others to supervise the construction and development of projects which it has financed.'

"When developers abandon projects, that ruling can mean big trouble for home buyers: Since the law shields lenders, buyers often lose deposits or are left with uncompleted houses." James Tolpin, "State Lets Lenders Monitor Construction As They See Fit," News and Sun Sentinel, February 16, 1987, p. 10A, cols. 1-5.

[49] Ibid. But supervision is possible. One bank officer in charge of real estate lending described

would go a long way to solving contractors' problems. The new lien law attempts to address some of these problems.[50]

11. Alternative Dispute Resolution (ADR)

When problems do occur, it is important for construction practitioners to know how to handle them. An effort is being made to avoid the traditional legal forum (litigation) and resolve disputes in less costly, less formal settings.[51] These various different techniques fall under the general heading of Alternative Dispute Resolution or ADR.

Alternate dispute resolution is currently a hot topic, as well as contract drafting provisions.[52] Such systems for dispute resolution in contracts are felt to be a good move in the right direction. Indeed according to one report, every construction litigation case in West Palm Beach goes to mediation.[53] Standard contracts of the AIA include provisions for arbitration, and other forms of ADR exist e.g. mini-trial,

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procedures his institution for monitoring contractors: "his bank hires an independent engineer to monitor construction projects on which million-dollar loans have been made....When the builder asks for part of the loan money -- which usually happens once a month -- the bank's engineer inspects the construction site. The engineer determines whether the quality of the completed work justifies releasing more money, whether the developer is following project specifications, and whether the construction money remaining is sufficient to complete the job.".

[50]Larry R. Leiby, "The Florida Construction Lien Law, Result of the Mechanics' Lien Study Commission - 1990" states: "[i]n the past, lenders had some rights but no duties under the Lien Law. While several proposals were made to impose some lender liability, or parity with lienors, there were some provision passed which impose obligations on lenders."

[51]Nuechterlein op. cit. p. 291 f.

[52]See Joseph G. Wagman and Judy H. Chen, "Liability for Defective Work -- Drafting Contract Provisions from the General Contractor's Perspective," The Construction Lawyer, Vol. 10, Number 2, May 1990.

[53] It would be interesting to see what the actual number is of cases which are settled by ADR, and whether the parties are any more satisfied with the results.

mediation-arbitration, contract review board. The fact that alternatives to litigation exist is a good thing, but it behooves contractors to know what they are getting into when they agree to alternate forms of dispute resolution. The attraction is, of course, the ability to save the parties the costs of litigation. [54] However the decision on which method of ADR to choose will depend on the complexity of the case, whether there are numerous claims or conflicting decisions, and the whether the parties are dealing in good faith.[55] Most important perhaps is "good faith." "When one party believes that time is on his side, that is to his advantage to delay the outcome and increase the adversary's cost, he will find a means of doing so, regardless of the method of dispute resolution." Florida courts have looked on agreements to arbitrate favorably.[56] Therefore, contractors should be made aware of just what ADR is, the benefits and drawbacks of different alternatives and to keep in mind "good faith" dealing is a key element in success. The best method of dispute resolution, however, is to prevent disputes from occurring, or prevent minor disputes from becoming major ones.[57]

Construction attorney's have told us that after mechanic's lien (construction lien) concerns, contractors are worried about their liability. Comparatively few

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[54]Robert A. Rubin, and Lisa A. Banick, "Alternative Methods to Resolve Construction Disputes," Consulting/Specifying Engineer, Aug. 1989, p. A1-3, (reprint).

[55]Ibid. "Even more important, it must be remembered that the resolution of a dispute involves more than a legal or mechanical decision about who is right or wrong. It involves psychological and emotional issues as well."

[56] Leiby, op. cit., p. 402.

[57]Robert A. Rubin and Lisa A. Banick, "Alternative Dispute Resolution Forms," p. A2-42, (reprint). "The authors have often likened the question 'What is the best method of dispute resolution?' to the question 'What is the best method of being put to death, e.g., the gas chamber, the electric chair, or the firing squad?' The answer in both cases is that you do not want to be in the position of having to ask the question in the first place."

construction lien cases are on the books (computer) at the Broward County Courthouse however. In fact in a month where there may be an average of 30 breach of contract cases involving contractors, only a handful of construction lien cases appear. Of course, many cases are typically settled before ever getting to this stage of litigation.

12. Conclusion

Paperwork has been called the nemesis of many builders.[58] Nevertheless, it is a key ingredient in managing a successful building operation.[59] To the extent that paperwork is not managed makes it a legal nemesis. Throughout our fieldwork, concern has been voiced about contractors lacking business skills, and more precisely the skills of an accountant. Following good accounting practice is only one step in developing proper and necessary business skills a contractor needs. Management skills are necessary for a builder to know when things are going wrong as well.[60] There are some good reasons why, especially now, contractors need to know how to handle paperwork. An industry shakedown has been predicted (probably "underway" is more accurate) and with the S&L crisis restricting the financial sources available, many of the small and mid-sized companies will fall by the wayside. In spite of the grim predictions the well-managed builder, no matter what his size, can survive in any market. A high degree of management skills has become essential to the building

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[58] Builder, loc. cit.

[59] Ibid.

[60] Gerry Donohue, "Fighting Over a Shrinking Market," Builder July 89, p.184.

game,[61] as has a knowledge of contract language and provisions. Not long ago, in what may be a sign of the times, the Palm Beach County commissioners hired an attorney to keep an eye on construction at Palm Beach International Airport.[62] Their aim was to "make certain that legal groundwork [was] laid to combat lawsuits officials [thought were] all but certain once the work [was] done." We live in a litigious society, and, like it or not, attorneys and contractors have become necessary bedfellows.

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[61] "Nine Nifty Management Reports," Builder p. 154, May 1990.

[62] See Robert McClure, "Commission to hire attorney to oversee airport construction," News and Sun-Sentinel, Sept. 24, 1986, p.2B, cols. 2-5. where "[t]he [Palm Beach County] commission voted 3-1 to hire Louis McBane of the prestigious law firm of Boose, Ciklin, Lubitz, Martens, McBane & O'Connell. McBane's job will be to inform county employees about what sorts of events need to be documented, and to review documents such as change orders, said Rick Martens, a partner of McBane.

"'This is sort of a preventive legal approach,' County Attorney Gary Brandenburg told the commission, '...so that if we ever get to a point that we enter into litigation, everything will be there and ready for us to go.'"

C. Comment Synthesis From Interviews

1. The Attorneys

*Contractors in general lack the skills of an accountant and attorney. It has become increasingly necessary to include a mark up for these types of professional services in a more competitive and litigious climate.

*Looking at the job as a whole two problem areas stand out, funding and project administration. Contractors are not aware of market conditions which will affect their work.

*Contract administration should be handled by the design professionals. Inspections must be carried out.

*In disputes there are reasonable people and unreasonable people. The idea is to find a common denominator.

*Alternate dispute options like arbitration are ok given the amendment of the arbitration agreement which allows the parties to go to a jury trial if the arbitration is unlawful.

*With the faltering economic environment in construction there will be a trend toward more litigation based on manufactured disputes.

*It is uncertain whether continuing eduction will solve the problem.

*There is a need to register local licenses.

*The Construction Industry Advisory Board is underfunded.

***Contractors are in a position of balancing costs and consequences. The cost of doing a job right vs. the consequences of doing it wrong. There is no free lunch.

*Defects in design and workmanship and delays are the typical problems.

*Contract administration should be handled by professionals i.e. attorney, cm etc.

*"Builder Plans" have been used without regard for the appropriateness to the local

and state codes.

*Uninsured design professionals are also a problem. The state must mandate insurance. What is illustrative of the problems with the construction industry in Florida is that Mr. X's firm employs 11 attorneys for construction law.

*Because of the increase of construction litigation, "defective work has declined dramatically in Southeast Florida."

*The codes are generally good. However code compliance "runs up and down".

*Contractors feel that their job stops with the plans.

*Design professionals are not current with the codes.

*Owners are also at fault.

*Building departments do not have high enough standards; their employees are not paid enough, and they are not manned adequately

*The '74/'75 grand jury report is not unlike that latest grand jury report in this regard.

*In relation to the rest of the state So. Florida is probably subject to more deliberate actions which result in lawsuits while in other areas the builders have been unchallenged and lazy.

*By far the biggest day to day concern of contractors is mechanics liens; second concern is their liability.

***There is a chain of risk in the construction industry i.e. the lender controls the money, the contractor controls the work and subs are in the weakest position.

*There has been a tendency towards "risk-shifting" clauses which tend to squeeze the subs.

*When funding stops, for whatever reason, someone in the chain of relationships gets hurt, usually the person in the weakest position i.e. sub.

*If subs try to protect themselves they won't work. By enforcing their rights they will

be "blackballed" in the industry.

*On the legal side the problem exists with attorney's who don't know the ins and outs of the construction business. So there is a need for educating the legal community itself.

*There should be a referral service for the construction industry.

*Educators should teach contracts and focus on the contract clauses. Standard forms are in reality lopsided.

*The state needs to address the construction licensing policy. *The failure of this policy is hurting legitimate contractors and the consumer.

*The state needs to address the problem of "qualifying agents." DPR cannot track abuses, and qualifiers are liable to lose their licenses.

*More sub trades should be licensed and tested.

*The public should be made aware of just what a license means. What is a contractor's license and what is an occupational license.

*There has been attempt at including risk-shifting clauses from the design to the performance specs. Designers to contractors. This transfer of risk is both overt and covert as a backup of the General Conditions and behind the specialty subcontracts.

*Quality problems which exist are: unskilled labor force, fire protection (drywall), need to redo work, concrete placement. Roofing on the other hand has not been a serious problem.

*Building officials are not doing their jobs. (see Grand Jury report.)

*GC's should be controlled just as other professionals such as engineers and held personally liable. Corporate shield should not be a protection.

*Codes are not a problem, on the contrary they are quite good.

*Lenders should be tapped for help. They should help insure that the money flows properly.

2. The General Contractors

*Among the issues raised were: roofing contractors, swimming pool contractors, and small contractors who make room additions etc. They employ a scam whereby they require e.g. 25% upon completion of a certain phase of the job which only represents 5% of the cost of the work. Once they receive the money they disappear with 20% as profit.

*There are not enough inspectors, the present inspectors have much too large a work load, etc. Roofers should supply ladders for the inspectors.

*One problem that gets contractors into litigation is the fact that the owners are making changes as they go.

*Nobody is watching the store.

*Fake insurance companies have been used by GC, subs.

*Contractors are using loopholes to get around the laws on the books for overtime etc.

*The biggest problem is A/E, owner, contractor are all trying to cut corners.

*Ignorance of the public is being abused.

*Testing isn't being done.

*Question: There is a willful decision to cut costs?

Answer: Codes were written for safety, health of public. The plumbing and electrical problems are a 3rd degree misdemeanor. The penalties should be stiffer.

Question: Shouldn't the financial institutions get more involved?

Answer: You won't get the lenders to help out. They are down and don't want the bother.

Question: Maybe this is the time to hit them.

Answer: You can't even borrow money.

3. The Subcontractors

*Concerning problems which occur between design professionals and subs. Specification sections are double specifying or not specifying items like fixtures etc. where in one area they are considered the obligation of the sub to supply in another there is no mention of who is to supply them. Subs are then held to supply them.

*Mechanical drawings are missing certain items which are present in other drawings, but subs are given only mechanical to bid by. The GC then holds the sub up to potential litigation and because of the expense involved subs either pay the price or immediately begin arbitration by involving the owner or architect. Owner or architect will then hold sub responsible. This type of problem is responsible for "lots" of friction between sub and GC.

*GC issues a work order which is assumed to be a change order. When the work is performed the GC denies that it's a change order and refuses to pay. This is a problem more prevalent with design/build projects when the GC is in on the design/build.

*In contracts there is usually a provision that GC will pay when paid. If the GC doesn't get paid neither does the sub.

*Insufficient funding by owner/developers. Banks have the 1st lien rights and subs are left holding the bag.

*How do you know that the person you are dealing with is reputable? All you can do is hope you are dealing with reputable people. Credit reports don't "mean crap".

*Job scheduling problems result when GC don't get input from subs for work to be done. They "don't bring the subs in". The good ones will invite you in for work value scheduling. But the subs are held to scheduling problems of the GC.

*CM firms represent the owner rather than doing project management. If they are

project managers they should establish A/E deficiencies and hold the A/E responsible.

*GC's are acting as "brokers" and not really performing the duties of a GC - cleaning etc. They hire a shell contractor, and other subs and let them figure it out themselves.

*CM's with large public entities (school board, county commission etc.) pass their vested authority on to bureaucratic types who don't want to level charges against design professionals, and the trades end up in litigation.

*A newcomer, or an early entry person to the building industry doesn't understand the game. They take greater risks than proven businessmen.

*There should be levels of prequalification. [It] is important to continually qualify trades people at all levels to insure quality.

*The problems are not problems with construction. He has never been involved with problems of design or construction. The problems are communication and management.

D. The Survey - A Data Generator

Appendix D contains a copy of the questionnaire given to a group of over 200 general contractors, subcontractors, materialmen, and others in Florida. The respondents were about 55% subcontractors, with 25% generals. The majority had been involved in construction litigation; they named non-payment as the main reason; they usually require a written contract before initiating services; have a regular attorney; review their contracts before executing them with someone; feel that they understand the terms and conditions; feel that the threat of litigation affects them adversely; consider greed, followed by lack of knowledge to be the major causes of litigation in construction; 50% have been involved in alternative dispute resolution (ADR) and about 75% were satisfied with the outcome. The responses were compiled in a computer program to facilitate analysis and reporting. The survey is discussed in more detail with analytical charts of the responses in Appendix D.

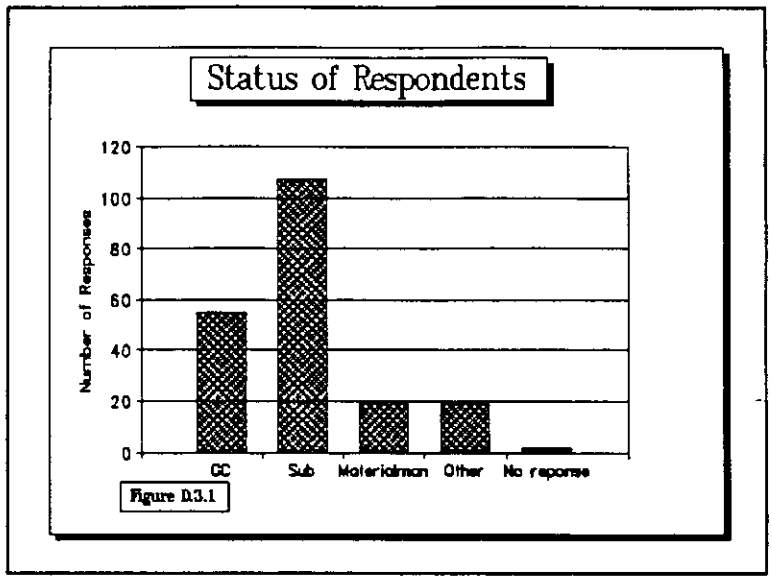

Figure D.3.1

E. Summary

During the course of this study, we researched the literature, reviewed court records, interviewed industry practitioners and supporting professionals, and conducted a questionnaire-type survey.

We analyzed the data continuously as it developed, formed a hypothesis, validated it within our resource constraints, and arrived at a set of findings and conclusions.

These were presented to a "test class" along with our prescriptive procedures for staying out of trouble. These prescriptive procedures focus attention on what all of us as industry practitioners should or should not do, in both a technical and business sense to prevent trouble. They focus on what we can do to enhance our recognition of trouble in early stages. And they focus on the least painful ways to reduce or resolve trouble once we have it.

A great deal of our industry's propensity for getting into trouble can be traced to a lack of fundamental knowledge about what we should or should not do procedurally in the course of getting a job done. Therefore, we attempted to structure our course/seminar to be instructive as well as informative. It is interesting to note that our test class attendees proved to be ill informed in the area of our discussion.

The following section is directed to a course presentation format. It contains both outline and detailed discussion of relevant material. It should be used in conjunction with parts I, II, III & IV, and the material in the appendices. There is sufficient supporting material to permit individual instructors some freedom of choice without diluting the primary message.

V. THE COURSE

A. Introduction

Welcome attendees and try to set tone for an informative and beneficial period.

Identify the instructors. Explain their professional justification for being here.

Present a background on the project.

This course/seminar is Presented through the courtesy of Building Construction Industry Advisory Committee of the State of Florida. The Project was developed through a BCIAC Research Grant in response to the profusion of lawsuits in the Construction Industry. The Project was directed toward improving the position of Construction Industry practitioners in our lawsuit prone environment.

The original project objective was to conduct a study to "Develop and Teach a Course on Practices and Pitfalls in the Construction Industry that are Subject to Law Suits."

Construction Industry Practices and Pitfalls. Issues of quality control, time delay, personal injury, and construction collapse are familiar to us all and strike fear into the hearts of most.

Although many of the more prominent construction cases are traceable

to design defects and therefore are likely a liability of architects and engineers, there are a great number of cases running directly to the contractor as the responsible and controlling party. Some of the reasons are well known to most of us, others are less.

In almost all cases, the basic condition or improper action behind the litigation could have been avoided.

There is no question that instances of construction collapse or construction site accident are dramatic attention grabbers. Far less is known and far less has been written about the aspects of job management and job performance affecting both generals and subcontrctors that lead to conflict, litigation, and usually monetary loss.

For example: roofing problems, drywall not satisfying fire ratings or finish, or improper formwork and concrete finishing with all the attendant scheduling revisions and extra costs. For example: inability to collect for extra work, schedule dragout or acceleration, or the breakdown of good will and cooperation as a project moves along, engendering animosity and adversarial attitudes.

While it is inherently more difficult to analyze the issues of quality control, time delay, and relationships between contractors, we felt that this less dramatic end of the trouble spectrum merited the major emphasis of this study.

These low intensity issues tend to slip away and impact more of us on a continuing basis than the higher profile accidents and collapses. In addition, we suspected that the monetary losses resulting from litigation of these low profile issues was significantly greater than those which result from accidents and collapse.

Lastly but perhaps most important, it was appropriate for us to try to bring something new to the table that we as constructors could influence and benefit from.

It was unfortunately obvious to us that undesirable extensions of problems were beginning to dominate the lives of many practitioners. We determined that it would be advantageous to know how and why problem issues develop. Beyond that, if we could determine the root causative factors, then we could work on reduction of the sickness rather than treating symptoms with lawsuits.

B. Approach to Problem & Outcomes

We looked for answers with:Attorneys

Bondsmen

Financiers

Supplymen

Architects

Engineers

Court Records

The Literature

Practitioners

As data developed, a pattern began to emerge. Certain features or themes were recurring in an underlying mode.

"Essentially there was not a tight enough practice management technique on both technical and business matters. Most of us enjoy the work that we do. We like to put things together, but we are not tending to business as we should in order to stay out of trouble."

All of the data we developed to this point was through court records, literature search, and a broad interview base. We were getting the message as to what was wrong but we had very little data of statistical value to confirm that message.

We developed a survey questionnaire for the industry and sent out some 413 on a predominantly local basis in Broward County. We sent a limited number to other locations in the state, and overall had a 50% response to date. With many of the firms we solicited now out of business, the level of response was remarkably high.

What is it all about?

Contracts

Administration

Documentation

Cash Flow

Resource Management

Problems

Disputes

Conflict

Non-Payment

Litigation

Select and read portions of interviews - Feedback comments:

To share information

To build empathy with our interpretation of interviews

To build consensus with our identity of central theme

(Does this sound familiar?)

(Get audience on your side)

This is what research has said so far. There have been some outrageous comments recorded about developers.

Discuss Survey

Distribute questionnaire copies and have them filled out.

Collect and give back plain copies.

Run through charts showing results to date.

Discuss the meaning of results and our interpretations.

We need more knowledge, mostly procedural.

We need a system to maintain currency both in technical and in business matters.

We need to strengthen the small to medium firms.

We need to look hard at our clients and financial reputations.

Discuss the trend of business in the Con/Ind today.

Cannot get through a career as business owner any more simply by having a trade and being a good craftsman.

Success requires two feet firmly on ground, one technical and one business. Both feet must step forward for the body to advance and stay with the times. The terrain and forces which impact on us are changing constantly. As successful practitioners we must not only adapt but we must learn how to better control our destinies.

Alternate Material - Scenario - Narrative Option

TAB 1

Use will depend on audience and time. Instructor will need a partner. Emphasize audience participation with input or responses during the scenario dialogue.

BREAK

C. More Practices and Pitfalls

1. Clarification (The Course)

Follow the written material emphasizing the high probability of getting involved in litigation and the desirability of avoiding it.

Litigation - The Road To Ruin

TAB 2

Discuss alternative dispute resolution and the several form variations it can take. Describe characteristics and relative benefits of each form:

pre-litigation settlement

mediation

arbitration

pre-trial settlement

litigation

rent-a-judge

Discuss dispute prevention, when and where it can occur.

Discuss "good faith" and "The Scale of Good Faith."

2. Illustrative Development of Background

A. Business Skills

TAB A

B. Invalid Contract

TAB B

C. Contract Administration

TAB C

D. Licensing

TAB D

E. Project Administration

TAB E

F. Liability & Termination

TAB F

G. Other Concerns

TAB G

D. Preventive and Defensive Strategies

1. Check Lists - Structured Review/Procedural

a. Procedural Checklist

- Business Organization
- Bid Process
- Bid Selection and Award
- Control in the Field
- Daily Procedures
- Weekly Procedures
- Monthly Procedures

b. What Triggers Claims and Disputes

- Design Errors and Problems
- Ineffective Early Response to Problems
- Inadequate Administration
- Failure to Comply
- Differing Site Conditions
- Differing Building Conditions
- Change Orders
- Breaches of Contract
- Schedule Deviation
- Inadequate Financial Strength

1a. Procedural Checklist

Handout and Overhead

I. Business Organization

- A. Structure (Corporation vs. Sole Proprietorship)
- B. Licensing
  1. Can lose contract rights.
- C. Insurance (shop it)
- D. Vehicles (lease/buy)
- E. Banking Relationships
- F. Nestegg -- Fallback
- G. Lawyer, Accountant
- H. Notice to Owner Co.

II. Bid Process

- A. Plans and Specs
  1. Review full set of all trades.
  2. Review all contract documents.
  3. Keep a CLEAN set of bid documents to follow the trail of changes.
- B. Visit the Site
- C. Camera
- D. Pocket Tape Recorder
- E. Video Camera
- F. Trade Checklist
- G. 3x5 Cards
- H. Man the Job
- I. Schedule the Job
- J. Feel the Job
- K. Read the Contract Documents

III. Bid Selection and Award

- A. Negotiate
- B. Schedule entirely
- C. Lay out job on a master calendar.
- D. Price job (nuts & bolts)
- E. Supply (Material) list (periodically shop it)
- F. Check out owner and/or General
  1. D & B reports.
  2. Courthouse records (litigation history).
  3. Bonding.
- G. Notices FROM Owner (bond or notice to owner)
- H. Notice TO Owner
  1. Follow-up and keep up to date.
- I. Send Insurance Certificate
- J. Contract
  1. Review with Attorney.
  2. Signed by legally authorized person?
  3. Make sure the contract you sign is the contract you bid on.

IV. Crew Chief/Foreman/Superintendent Briefing

A. Briefing for the Project
B. Daily In/Out Log Procedure
C. Master Diary
    1. Activities.
        a. Visitors on the job (who are they and why are they there).
        b. Subs on the job (who, how many, what did they do).
        c. Deliveries received at the site.
        d. Anything unusual or noteworthy.
        e. Accidents (even if a separate report is filed).
        f. Inspections (who, what, why, result).
    2. Time.
    3. Weather conditions.
    4. Resources.
    5. Quantities.
    6. Result.
D. Knowledge of Change Orders
E. Items & Procedures for Change Orders
F. Photos
    1. To document job progress.
    2. To record unusual conditions.
    3. To substantiate change orders.
    4. To show compliance.
G. Document everything
H. Give him good backing

V. Daily Procedures

A. Office Diary
    1. job
    2. individuals
    3. key words: resources, periodic pictures
B. Check Supply List
C. Establish a P.O. filing system.
D. Daily In/Out Log
    1. correspondence
    2. submittals
E. Delivery Receipts
F. Time Cards
G. Correspondence Filing System
    1. chronological
    2. issue
        a. change orders
        b. anything that's filed as a claim
H. Check Schedule

VI. Weekly Procedures

A. Deposit Payroll Taxes
B. Check Job Status against Calendar
C. Review all Changes
    1. learn the process
    2. overhead
    3. time involved
D. Draws if necessary
E. Job Site meeting
    1. If you are not there get the minutes.
F. Check Schedule

VII. Monthly

A. Employee Reviews
B. Pay Bills
C. Draws on AIA's (monthly submittals)
D. Compare Job Cost with Budget (Biweekly)
    1. This means you must have a budget already developed.

1b. What Triggers Claims and Disputes?

Handout and Overhead

1. Plans and specifications that contain errors, omissions, ambiguities, or requirements that don't or won't fit the actual conditions.

2. Incomplete or inaccurate responses or nonresponses to questions or resolutions of problems presented by one party to the contract to another party to the contract.

3. Inadequate administration of responsibilities by the owner, architect, engineers, contractor, subcontractors, or material suppliers.

4. Unwillingness or inability to comply with the intent of the contract or to adhere to industry standards in the performance of the work.

5. Site conditions which differ materially from those described in the contract documents.

6. Existing building conditions which differ materially from those shown in the contract documents.

7. Extra work or change order work.

8. Breaches of contract by any party to the contract.

9. Disruptions, delays, or acceleration to the work which causes the work to deviate from the normal prescheduled sequences.

10. Inadequate financial strength of any of the parties to the contract.

From Levy, Project Management

2. Construction Problem Sources

Handout and Overhead

CONTRACTS----------Ambiguities

Conflicting Information

Omissions

Adjustment Clauses

Multiple Prime Contracts

Fast Track Design and Construction

Inadequate Performance Time

PARTIES & PRACTICES

DESIGNERS----------Design Errors

Lack of Design Coordination

Inadequate Design Review

Construction Phase Services

Inadequate Investigation

Project Cost Estimate

Performance Specifications

CONTRACTORS--------Estimate Preparation

Site and Design Review

Management

Experience

Poor Workmanship

Labor Problems

Equipment Problems

SUBCONTRACTORS

& SUPPLIERS----Same as Contractors--PLUS

Trade Coordination

Payment, Lien, & Bond Disputes

Material Requirements & Substitute Approvals

Shop Drawing, Fabrication & Delivery Delays

OWNERS----------Preconstruction

Owner Changes

Owner Interference

Owner Design Responsibility

PROJECT----------Type

Site (Subsurface, Hidden, Latent)

Remote or Congested

Inadequate Borrow or High Water

State of Art Design

New Construction Techniques

Low Bid Pricing

OUTSIDE FORCES-----Acts of God

Approval Inaction, Embargoes, Quarantine

"Beyond Contractors Control"

"Unavoidable Casualty"

Bramble et al pp. 33-54; FIU CM-Legal Research, 3/7/91

3. Tending to Business

Handout and Overhead

Contractor must constantly balance his business interests against contractual interests.

Look at checklist (handout)

Think in terms of developing 'Knowledge' in the key areas of Prevention, Recognition, and Resolution.

Strive constantly to reduce your risk, little things add up to big things.

Maintain a positive attitude, financial success in this industry is heavily dependent on good faith.

Read every contract as if it were a new book.

Emphasize communications, up, down, and laterally.
Make reporting and briefing habitual in your operations.
Educate employees on contract documents and keeping requirements.

Maintain documentation religiously; written and pictorial.

Inspect the work constantly and systematically.
Observation goes hand in hand with inspection.

Assure timely approval of your schedule of values.

Push for timely approval of shop drawings.

Obtain written and signed change orders.

Temporarily use: Authorization to Proceed

or Notice of Intent.

Follow the procedures set forth in the contract.

Follow through on protective procedures, i.e.

Construction Liens (Mechanic's Liens).

Watch the small problems, they often indicate what reactions will be to bigger problems.

Consider testing good faith with a small claim.

Remember, a claim is a request for something someone thinks they are entitled to - not necessarily a dispute. How the claim is made,i.e. the tone, is crucial to its receptivity.

Good Faith

TENDING TO BUSINESS

Handout and Overhead

CONTRACTOR MUST CONSTANTLY BALANCE HIS BUSINESS INTERESTS AGAINST CONTRACTUAL INTERESTS

CHECKLIST OF KEY PREVENTIVE & DEFENSE TACTICS

PREVENTION-----Maintain Positive Attitude - Develop Good Faith
Use Checklists
Develop Knowledge Continually
Seek Risk Reduction (Narrow Market, Select Jobs)
Read Every Contract as if It Were a New Book
Communicate Up, Down, and Sideways
Document Everything, Write & Photo
Inspect the Work at Every Opportunity
Assure Approval of Shop Drawings
Assure Approval of Schedule of Values
Obtain Written & Signed Change Orders
Temp. Notice of Intent or
Authorization to Procede
Test Good Faith - e.g. Small Change Order

RECOGNITION---Education
Briefing of Supervisors
Communication
Documentation: Written & Pictorial
Inspection
Observation
Watch the Small Problems
Response Indicates Likely Reaction to Big One's

RESOLUTION----Positive Attitude - Maintain Good Faith
Follow the Contract Procedures as Set Forth
Use Documentation

A CLAIM IS A REQUEST FOR SOMETHING SOMEONE BELIEVES THEY ARE ENTITLED TO - NOT NECESSARILY A DISPUTE.

4. Restructuring for Success

Handout and Overhead

Review Your Organization

Small or Big

Can Small Survive

Target Your Market - Find A Niche

Market Your Services

Pick Your Clients

Practice Problem Avoidance

Reduce the Number of Problems to Deal With
Too Many Variables Increases Risk

Employ Sound Procedures

Protect Your Rights: Insist on contracts but watch the terms
Understand Florida's Construction Lien Law
Insist on filing of
- Notice of Commencement
- Notice To Owner
- Discuss in Laymen's terms
- Subs must follow up

Do credit check-ups
- Dunn & Bradstreet
- Local suppliers

Check DPR for complaints

Watch Time - Time is Money

Try to deal with: Known Clients
Known Products (Building Types)
Strict Schedules
Known Sub Requirements
Known Material Requirements

Try doing the same thing for the same people and getting better all the time.

Analyze your Losing Bids: Why did you lose it?
By how much?

Develop a set of Ground Rules for operation

Maintain Good Faith

E. Same Subject - More Knowledge

This project has dealt with "Practices and Pitfalls in the Construction Industry That Are Subject to Lawsuits." We have found that defective management procedure and technical procedure underlie a perceived majority of our industry problems.

Therefore, we have focused on problem prevention, recognition, and resolution through better procedure as being of greatest interest and benefit to our audience, the construction practitioners.

An expansion of this project and course work is under consideration. We anticipate that additional modules will be available for presentation on the issues of:

1. Contracts
   Risk Sharing
   Retainage
   Termination

2. Construction Lien Law (Mechanic's Liens)
   Waivers
   Releases
   Dispute Resolution

3. Bonds

   Insurance

   Financing

   Credit

4. Scheduling

   Change Orders

   Delays

   Claims

Your attention during this presentation is sincerely appreciated. We shall advise you through you local associations when additional modules are scheduled.

Thank you very much.

TAB 1

Scenario - Narrative Option

Our goal has been to find out what the problems are of construction industry practitioners and see if we could propose some solutions.

Our intention now is to share what we have learned about the seemingly pervasive problems in the industry and try to bring about a change in the way things are being done -- at least to provoke some thinking about how we all, as practitioners, can make a change in the way business as usual is being conducted.

To do this we want to start a dialogue which will carry us through many of the critical phases of the construction process, pointing out as we go certain practices and pitfalls which lead to litigation.

Along the way we will build up a checklist of items of which based on our study we feel everyone must be wary, not only aware.

Scene I.

Setting the Stage

Checklist

1. What do you do when you need work and somebody offers you a great deal?

2. Do you know who you are dealing with?

3. How can you find out?

4. What questions do you need to ask?

5. When is it a good time to start asking questions?

Suppose you are a General Contractor working mostly in residential and light commercial buildings; you meet Bill Barnes at a social gathering. You get to talking and he tells you he's a Developer working on a 50 acre tract in West Palm Beach. Bill asks you if you'd like to look over the drawings. The market being really slow you decide to take him up on it, and agree to meet for a drink at The Hard Hat Bar tomorrow at 6PM.

Scene II.

The Hard Hat Bar 6PM

Checklist

1. Before you agree to do a bid what question should be asking?

2. Do you even know if Bill is the owner?

3. Has Bill already purchased the property?

4. Is there any financing in order?

5. Does he want a complete bid or a rough estimate?

6. What is it going to cost you in time (i.e. money) to give him the bid?

Bill meets you at the bar and shows you the blueprints. The project looks impressive, and after some preliminary discussions regarding the type of construction and other particulars, the conversation turns more serious. Bill would like you to submit a bid. He would like it to be a turn-key operation. The says the bid needs to be in within the next two weeks. Since you,re not very busy, that doesn't seem too bad. You plan to go visit the site. During the next two weeks you and your staff work diligently on the bid drawings. You have an appointment to meet Bill at the Hard Hat.

Scene III.

The Hard Hat Bar.

Checklist

1. Have you checked your bid numbers against current local prices?

2. Have you double checked the bid or had someone else check it?

You submit your bid numbers. Since you really want to get the job your numbers are pretty competitive. Joe thinks the figures look pretty good too and he says they "fit well within the budget." Now he wants to know how soon you could start. You figure about two weeks before your people are free from their present jobs. Bill says that's great and he'll go discuss the figures with his partners and if everything is ok he'll draw up a contract.

Scene IV.

The Hard Hat

Checklist

1. Before signing a contract do you review it with anyone?

2. Do you have a regular attorney?

3. Do you feel that you understand all the terms and conditions of your contracts?

Bill says he and his partners like the numbers and they would like to sign a contract. Now the negotiations begin. You tell Bill that the contract price is OK and that you require a 50% performance bond, monthly progress payments, an 18 month completion period and 1% mobilization -- that's not quite enough, but if you get the job you'll make it work. You sign the contract shake hands.

Scene V.

Sink Hole Drive.

Checklist

1. You've got the mobilization money, but are you going to be able to get to the first draw.

2. Do you know how much it's going to cost between draws?

3. Now is the time you need good relations with your Banker. You are going to need a line of credit to get to the first draw.

It's 3/4/91 and you're at the Sink Hole Drive job site. You've received your 1% ($150,000) mobilization funds and proceed to bring in the excavation equipment. On 4/3/91 everything is going along smoothly, you submit your first progress payment. On 4/8/91 you receive your first check and everybody's happy.

Scene VI.

4/10/91 Sink Hole Drive

You meet with Bill.

Checklist

1. Who has the authorization to issue change orders?

2. What does the contract say?

3. Have you ever done work without a change order?

4. If it's a rush and you do the work without a change order what can happen to you?

5. When calculating the cost of the change order are you including the time?

Bill calls up and says he would like to meet with you and go over a couple of things. Bill says he needs to make a minor change. "We decided to put a swimming pool in the center of the complex next to the recreation building. I'll need you to dig a pit tomorrow before you proceed with any further ground works." You tell him that's OK, and you prepare the change order. The following day you submit the change order to Bill's site supervisor. He looks it over and says it "looks good." With this assurance you start digging.

Sidebar: Do you require a written contract before initiating services? A. Always B. Mostly C. Sometimes D. Never

What do you think the survey said?

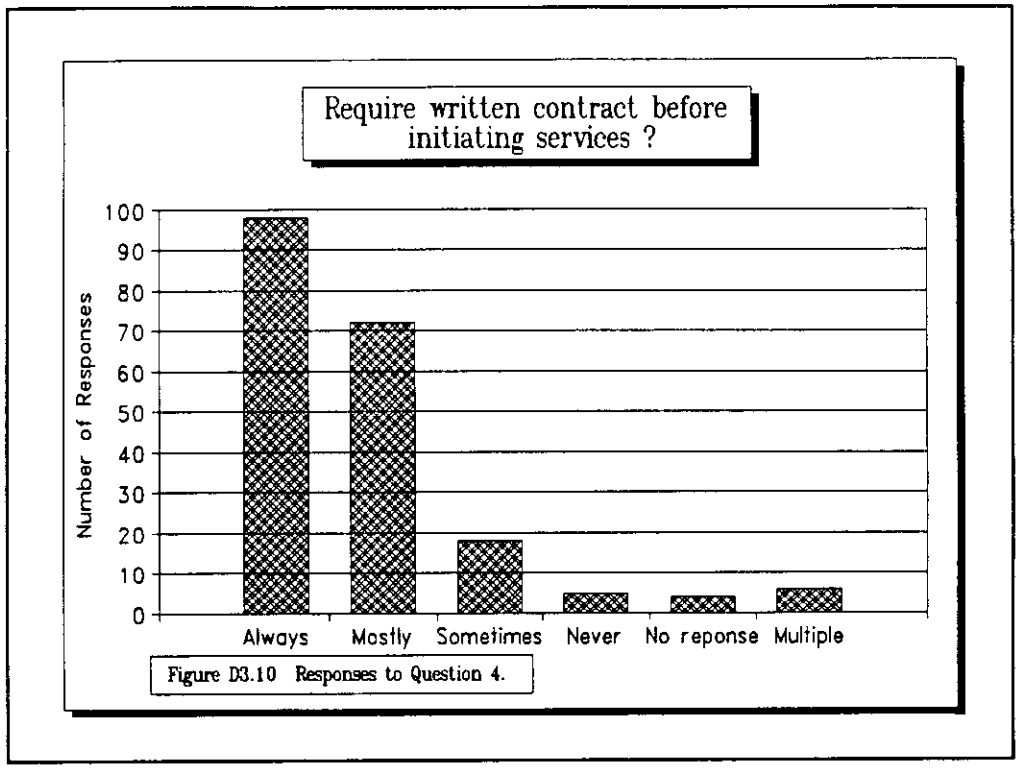

Figure D3.10 Responses to Question 4.

Scene VII.

Sink Hole Drive

Checklist

1. Is it time to ask around about an attorney yet?

2. What is your responsibility toward your subs when the owner doesn't pay on time?

3. What does the contract say about that?

You submit your second progress payment including the charge for the change order. Your payroll is increasing, and you've already had to take out a short term loan from the bank. Your subs are getting a little perturbed and your can't pay the material supplier who is threatening to cut you off. Two weeks go by no check. You give Bill a call. Bill says he's sorry, but he's been tied up with some cost overruns at another job, but he promised to cut you a check this afternoon. Bill cuts the check and has his super bring it out to the job site. You notice that the amount of the change order wasn't included. You call Bill back. He promises to look into the matter first thing tomorrow.

Sidebar: Do you have a regular attorney? Yes or No.

What do you think the survey said?

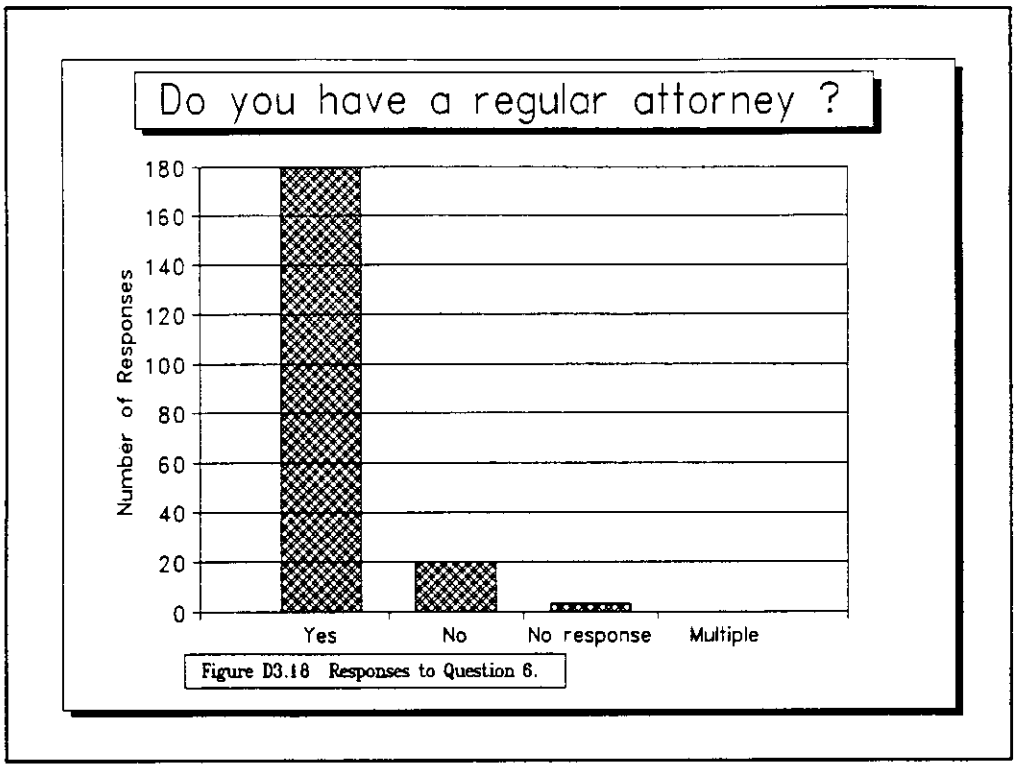

Figure D3.18 Responses to Question 6.

Does this result seem correct to you?

Scene VIII.

Sink Hole Drive

Checklist

Getting Paid

1. Which of the following do you think is the major cause of litigation:
A. Design problems
B. Code problems
C. Delays
D. Quality of the work
E. Defective workmanship
F. Non-Payment
G. Other_____?

2. Turn to the next page to see what the survey said.

It's now 6/1/91 and you have still not received any additional payment -- in the meantime you submit another claim for a progress payment. Now you call Bill to tell ask what's up with the change order and ask to get together with him tonight. Bill agrees to meet again at the Hard Hat at 6pm. Bill doesn't show up. You call and his secretary tells you he's in a meeting -- he'll get back to you as soon as he gets out.

Sidebar: Which of the following do you think is the most common cause of construction litigation: A. Design problems B. Code problems C. Delays D. Quality of the work E. Defective workmanship F. Non-Payment G. Other_____?

The survey said:

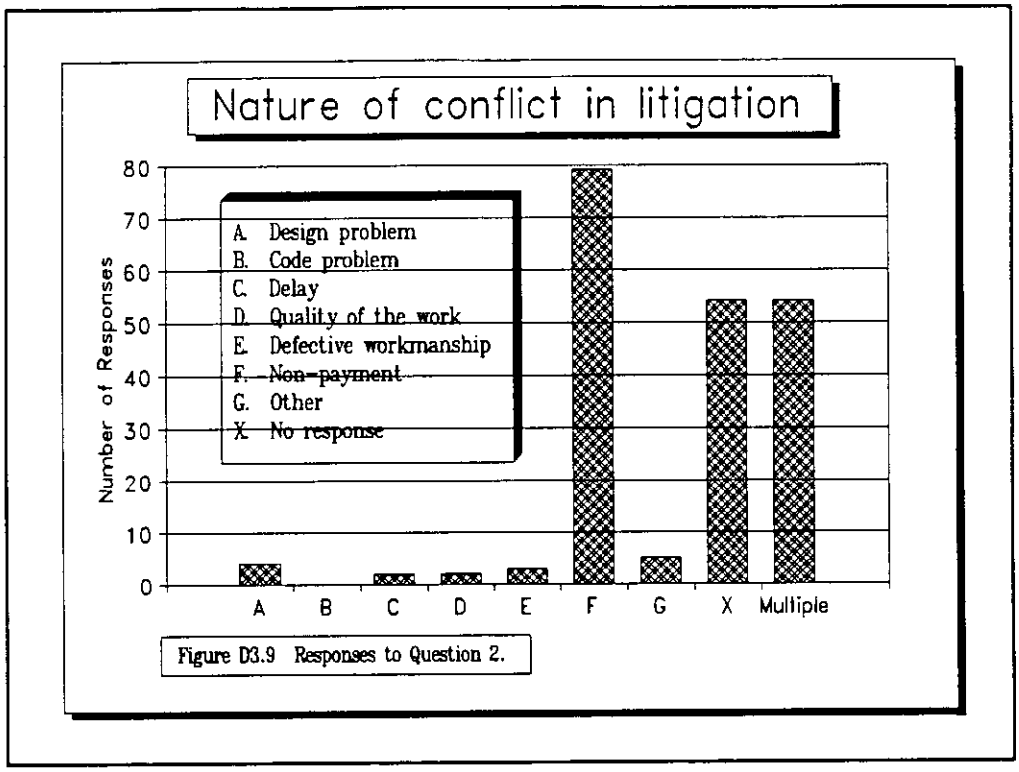

Figure D3.9 Responses to Question 2.

If this is indeed the case, what can or should you do about it?

Who do you think can do something about it?

What would you tell them?

What aspect of your business does this relate to?

Scene IX.

Sink Hole Drive

Checklist

The choreography of Termination.

1. Is it time to think about calling it quits with Bill?

2. When is it OK to walk off the job?

3. What does the contract say?

4. Time to call your attorney yet?

You're back on the job site the next day, 6/2/91, and you're waiting for Bill's job site superintendent to show up, but he never does. You call Bill. His secretary says he's in a meeting, but now you insist to talk to him. Bill gets on the line. "What's up," he asks. You tell him you haven't heard a word about the change order, and you wonder why he didn't return your call yesterday or show up the day before. Bill says he's been really tied up on this other job that's giving him fits. He's sorry but as soon as he can get that straightened out he'll cut you a check -- as for now everything's on hold.

IV. THE CONTRACT

Now that you have completed the preliminary negotiations, Bill Barnes presents you with the following contract to sign.

STANDARD FORM OF AGREEMENT BETWEEN

OWNER AND CONTRACTOR

Agreement made as of the 21st day of February, in the year of 1991.

Between the Owner: Bill Barnes,

Nova Drive, Ft. Lauderdale, Fl.

and the Contractor: J.J. Construction, Inc.

No Road, Ft. Lauderdale, Fl.

The Project: The construction of 150 townhouses with recreation complex on 50 acre site at Sink Hole Drive, West Palm Beach, Fl.

The Architect: Dewey, Cheatem, and Howe

Hollywood, Fl.

The Owner & the Contractor agree as set forth below:

I.

The Contract Documents consist of this Agreement, the Conditions of the Contract (General, Supplementary & other Conditions), the Drawings, the Specifications, all Addenda issued prior to & all Modifications issued after execution of this Agreement. These form the Contract & all are as fully a part of the Contract as if attached to this Agreement.

II.

The Contractor shall perform all the Work required by the Contract Documents for construction of 150 townhouse units plus 5000 s/f recreation complex on a 50 acre site located on Sink Hole Drive, West Palm Beach, Fl.

III.

The Work to be performed under this Contract shall be commenced within fifteen days after receipt of Notice to Proceed and subject to authorized adjustments; Substantial Completion not later than Eighteen months after receipt of Notice to Proceed.

It is mutually agreed that the Owner shall withhold from the Contractor, as liquidated damages and not as a penalty, the sum of $100.00 per day for each calendar day that the work remains uncompleted beyond this date.

IV.

The Owner shall pay the Contractor for the performance of the Work, subject to additions and deductions by Change Order as provided in the Contract Documents, the Contract Sum of $15,000,000.00.

V.

Based upon Applications for Payment submitted to the Owner by the Contractor, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided in the Contract Documents for the period ending the last

day of the month as follows:

Not later than 10 days following the end of the period covered by the Application for Payment. The initial payment of 2 1/2% ($375.000.00) will be issued in advance on mobilization.

VI.

Final payments constituting the entire unpaid balance of the Contract Sum, shall be paid by the Owner to the Contractor when the Work has been completed, the Contract fully performed, and a final application for Payment has been submitted by the Contractor.

VII.

The Contractor must provide a performance bond equal to 50% of the contract price and a 50% payment bond.

All change orders must by approved by the owners only.

This agreement entered into as of the 21st day of February, 1991.

Owner_____ Contractor_____

TAB 2

The construction industry can literally be described as being built on contracts. This is illustrated by the fact that the main characters in the building industry are usually termed contractors and subcontractors rather than builders and sub-builders. --Larry Leiby, Florida Construction Law Manual

Part I Clarification - (The Course)

Litigation - The Road to Ruin

What do you think your chances are of getting into construction litigation? The results of our research suggest that your chances are very high, as high as 50%. Everyone in construction is concerned about risk, liability and exposure. There is one very good reason for this -- money. Litigation is a dirty word because it is very expensive. Contrary to what many people think, lawyers do not like litigation any more than contractors do. Although lawyers get paid to go to court, many would much rather settle their disputes beforehand. Because litigation is expensive, and time consuming (which is just another measure of expense), cheaper, quicker alternatives have been devised to avoid it. These alternatives, arbitration, mediation, mini-trial, etc. fall under the heading of Alternative Dispute Resolution (ADR). Florida courts look favorably on ADR clauses which means that they will tend to enforce a demand for arbitration etc., when this has been written into a contract. (Leiby). We highly recommend that you know what the benefits and drawbacks are of the different types

of ADR, and that you are aware of what you contracts say in this respect. (Supply references.)

In our survey, we found that just under 50% of all general contractors, subcontractors, and others in the construction industry have been involved in either Arbitration or Mediation, and that almost 75% of these were satisfied with the results.

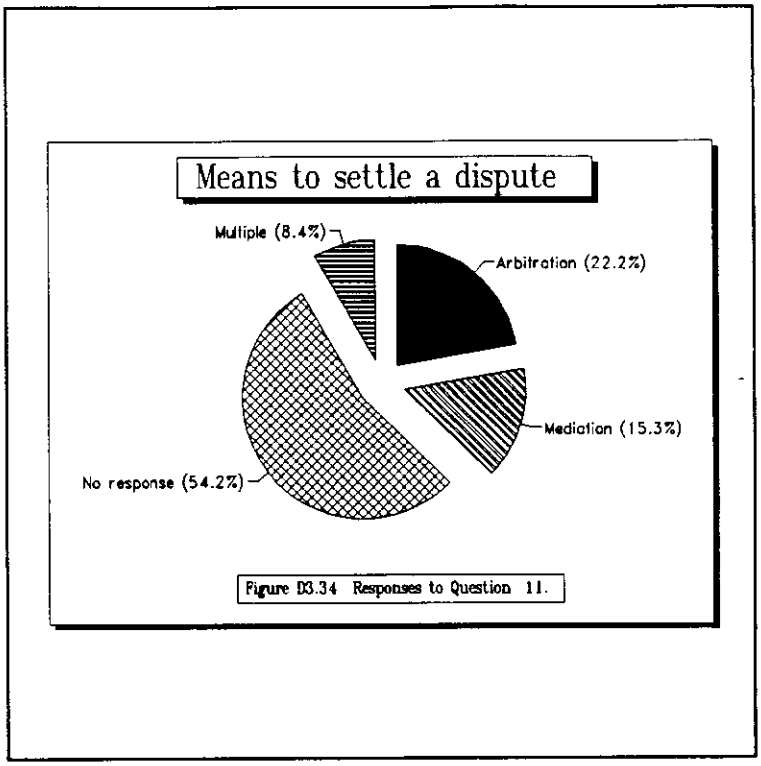

Figure D3.34 Responses to Question 11.

Why is ADR seemingly so successful? To discover the answer to this question requires a glance at the nature of litigation itself, to which ADR is intended as an alternative. Litigation is very expensive (as we all know), but arbitration is not necessarily cheaper -- according to a leading construction attorney (Leiby) it "may be less expensive then [sic] litigation." It "is generally quick." (emphasis added) It is private. What makes ADR work is the fact that it is less adversarial. Litigation is a battle -- almost entirely adversarial. By the time the parties have decided to engage in litigation, a psychological barrier has been erected which becomes very hard to now tear down. Our point is this: the less adversarial the forum -- the greater the chance

Two well known construction attorneys put it this way, "[w]hen one party believes that time is on his side, that it is to his advantage to delay the outcome and increase the adversary's cost, he will find a means of doing so, regardless of the method of dispute resolution." (Rubin & Banick "Alternative Methods"). As a construction risk management consultant told us, "it is good faith, good faith, good faith."

"[I]t must be remembered that the resolution of a dispute involves more than a legal or mechanical decision about who is right or wrong. It involves psychological and emotional issues as well." (Rubin & Banick, op.cit.) To see how emotional and adversarial things can become, here is a sampling of some comments we received to the question, "What in your opinion are the major causes which lead to construction litigation?":

"Owners holding you over [a] barrel."

"The GC is weak. He won't fight owner or architect."

"Dishonesty."

"People that are not honorable..."

"Owners & General Contractors want the work done for free..."

Construction attorneys, Robert Rubin and Lisa Banick, have often likened the question "'[w]hat is the best method of dispute resolution?' to the question '[w]hat is the best method of being put to death, e.g., the gas chamber, the electric chair, or the firing squad?'" As they said, the answer in both cases is that you do not want to be in the position of having to ask the question in the first place." ("Alternative Dispute Resolution Forms.") What does this mean to general and subcontractors?

PREVENT DISPUTES FROM OCCURRING, OR PREVENT MINOR DISPUTES FROM BECOMING MAJOR ONES.

If this seems like a restatement of the obvious -- it is. Unfortunately, the obvious is precisely what is getting contractors in trouble. The obvious things -- sound management skills, business and accounting skills, and most of all commonsense need attention. Just remember, commonsense is the least common of all the senses.

Prevent disputes from occurring. Easier said than done, you say. How do we go about this? The first question to ask is what exactly is causing the trouble. For the answer to this we can turn to our survey.

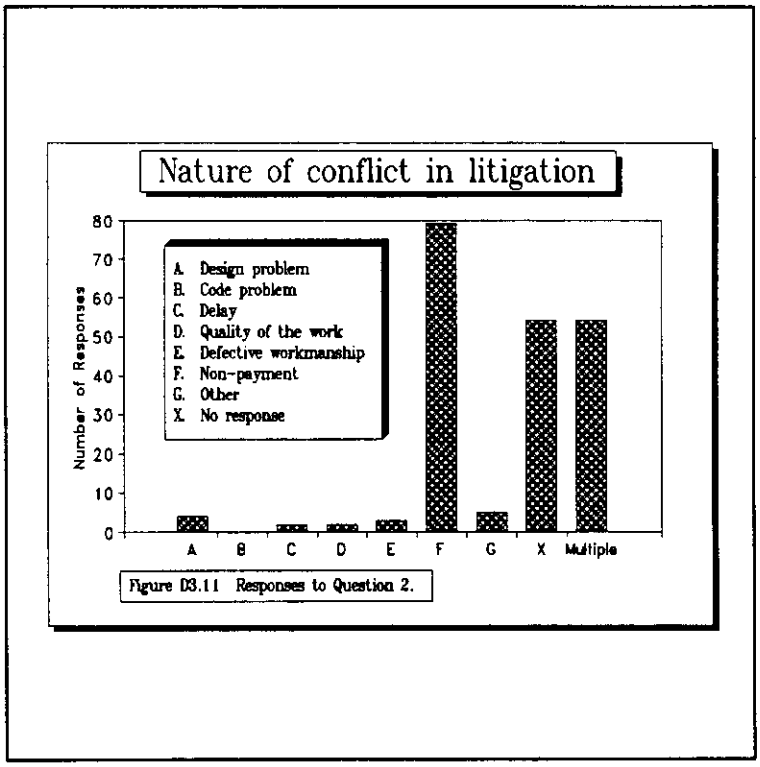

Figure D3.11 Responses to Question 2.

The survey shows that of those involved in construction litigation -- among design, delay, defect, code, workmanship, and non-payment problems -- an overwhelming number of respondees (89%) named non-payment as the conflict. 2.7% named design problems, 1.3% code problems, 1.3% delay problems, 1.34% quality of work, 1.48% defective workmanship, and 2.46% other. How are we to interpret the data? What does this tell us?

This result suggests two possibilities: 1. they want to pay but they have no money or 2. they don't want to pay. In both cases you want to know when to terminate your contract before you get hurt; in the second instance you want to avoid ever getting into the relationship altogether.

Before tackling this question we want to introduce what we believe to be the key support players for every contractor: Accountant, Attorney, Banker, and Surety/Insurer. Here's a quiz:

Rank them in order of importance to you as contractors. Now compare them to how an prominent construction attorney ranks them. Accountant, Banker, Surety/Insurer, Attorney.

Remember, when a problem like non-payment arises, the consequences of the problem flow through the contractor and have an effect down the line. There is a chain reaction of sorts.

Let's focus on some points, briefly.

1. Before signing a contract -- negotiation stage -- when the most "good faith" exists, and everybody is friendly -- the most important thing toward insuring "good faith" at this stage is to know who you are dealing with.

2. Signing the contract -- put it in writing -- oral contracts are not worth the paper they are written on -- read it -- understand the terms -- if you don't understand, ask for professional help.

3. On the job -- "claim is not a dirty word" (Fogel) -- claims will occur -- the bluprint for claim resolution should be the construction contract -- emergency jobsite mediation -- be prepared for a claim with documentation -- inspect don't expect -- a

contractor is not a broker.

4. When a claim becomes a dispute -- prevent minor disputes from becoming major ones -- at this stage no one is clean -- know the choreography of termination i.e. when, and how to stop the work.

TAB A

A. Business Skills

As we move back to more examples and problems you can relate to, we want to note that to successfully deal with litigation much less avoid it, a couple of prerequisites have to have been met. They are: 1. Experience in your field and 2. Good accounting practices.

If either of these two criteria are missing, you probably won't last long enough to get sued.

Consider the following:

In May, 1989 the Dade County Grand Jury said that "to assist in the prevention, detection, and prosecution of fraud in the contracting industry, all developers, contractors and builders should be required to maintain complete financial records of their business. [R]egulatory agencies emphasized the need for records to prove any fraudulent activity by a contractor or company. All ...payments made or received relating to them should...be recorded and maintained in written form for...three years.

Who are the key support players in the construction industry?

Given an ATTORNEY an ACCOUNTANT a BANKER and INSURANCE/BONDER how would you rank them in order of importance.

How would an attorney rank them in importance?

When would you bring them into the process?

Comments from our field work:

1. Contractors lack business skills (the skills of an accountant)

it is necessary to mark-up the contract price to allow for services in an increasingly

competitive market.

2. Contractors are unaware of market conditions and how they effect work.

3. Management is the key resource.

4. Successful contracting is a balancing of costs & consequences.

Builder magazine, in an article on management reports, called paperwork "the nemesis of many builders." (Builder, May 1990, p. 151) It is probably fair to say no one would argue with this statement. Nevertheless, as Builder pointed out, it is "a key ingredient in managing a successful building operation." To the extent that paperwork is not managed makes it a legal nemesis. Throughout our fieldwork, concern has been voiced about contractors "lack[ing] the business skills," and more precisely "the skills of an accountant." But business skills do not end with good accounting practices. Management skills are necessary for a builder to know when things are going wrong as well. In another article, Builder gave some good reasons why, especially now, contractors need to know how to handle paperwork. They predict an industry shakedown and with the S&L crisis restricting the financial sources available many of the small and mid-sized companies will fall by the way side. But in spite of the grim predictions they feel that "the well-managed builder, no matter what his size, can survive in any market." (Builder, July 1989, p. 184) A high degree of management skills has become essential to the building game. How do business skills relate to legal ills?

In a brief questionnaire to a group of subcontractors we asked if they had ever been involved in construction litigation and why. The majority answered yes to the first question. When asked to indicate which the of a number of broad categories

this litigation fell under such as design/code problems, delay, non-payment, quality of the work, defective workmanship, or other, the overwhelming majority named non-payment. Simply put, in many cases, "the other guy just didn't want to pay."

Consider the following comments and case studies:

Reference: Leiby, L. Florida Construction Law Manual 2nd Ed.

Chapter 7 Contract Terms, s. 7.09 Payment

"One of the more problematical types of contract clauses is the payment clause in a subcontract that seeks to delay payment from the contractor to the subcontractor until such time as the contractor has received payment from the owner. The practical reason behind such a clause is obvious. The contractor does not want to advance funds to the subcontractor before being paid."

Illustrative case: Dyser Plumbing Co v Ross Plumbing & Heating, Inc, 515 So 2d 250 (Fla 2d Dist Ct App 1987).

Scenario:

Barnes Plumbing was engaged by the owner to install plumbing in an addition to a hospital. Barnes subcontracted with Wilson Plumbing and three other subs for the work. The contract read "Final payment, inclusive retention, shall be made within thirty days of completion of the construction project, acceptance of the same by the Owner, and as a condition precedent, receipt of final payment of Barnes Plumbing from the Owner or Prime Contractor, as the case may be." The project experienced substantial delays. When the project was five months behind, Barnes requested delay damage estimates from its subcontractor, Wilson. When the project became eleven months behind, Barnes mathematically projected everyone's five-month delay

estimates to eleven months and submitted the total to the owner. The total was 1,136,799.00. Wilson Plumbing estimated its delay damages at 108,130.00. Barnes Plumbing settled with the owner for 175,000.00. Wilson sued Barnes.

What do you think the contract language actually means?

What result?

The held that Barnes Plumbing is liable to Ross only to the extent allowed by and received from the owner. The owner allowed and paid $175,000.00 on a claim of over one million dollars. Wilson may be able to successfully pursue the owner or whoever caused the delay; but under the terms of the contract, Barnes is the "wrong guy."

Methods used to settle a dispute

Contractors and Subcontractors

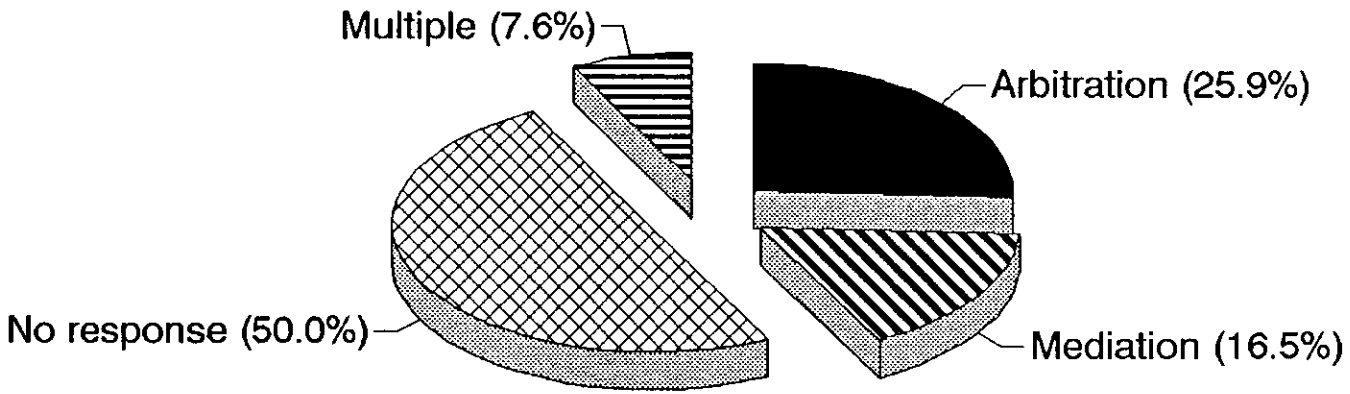

Figure D3.33 Responses to Question 11.

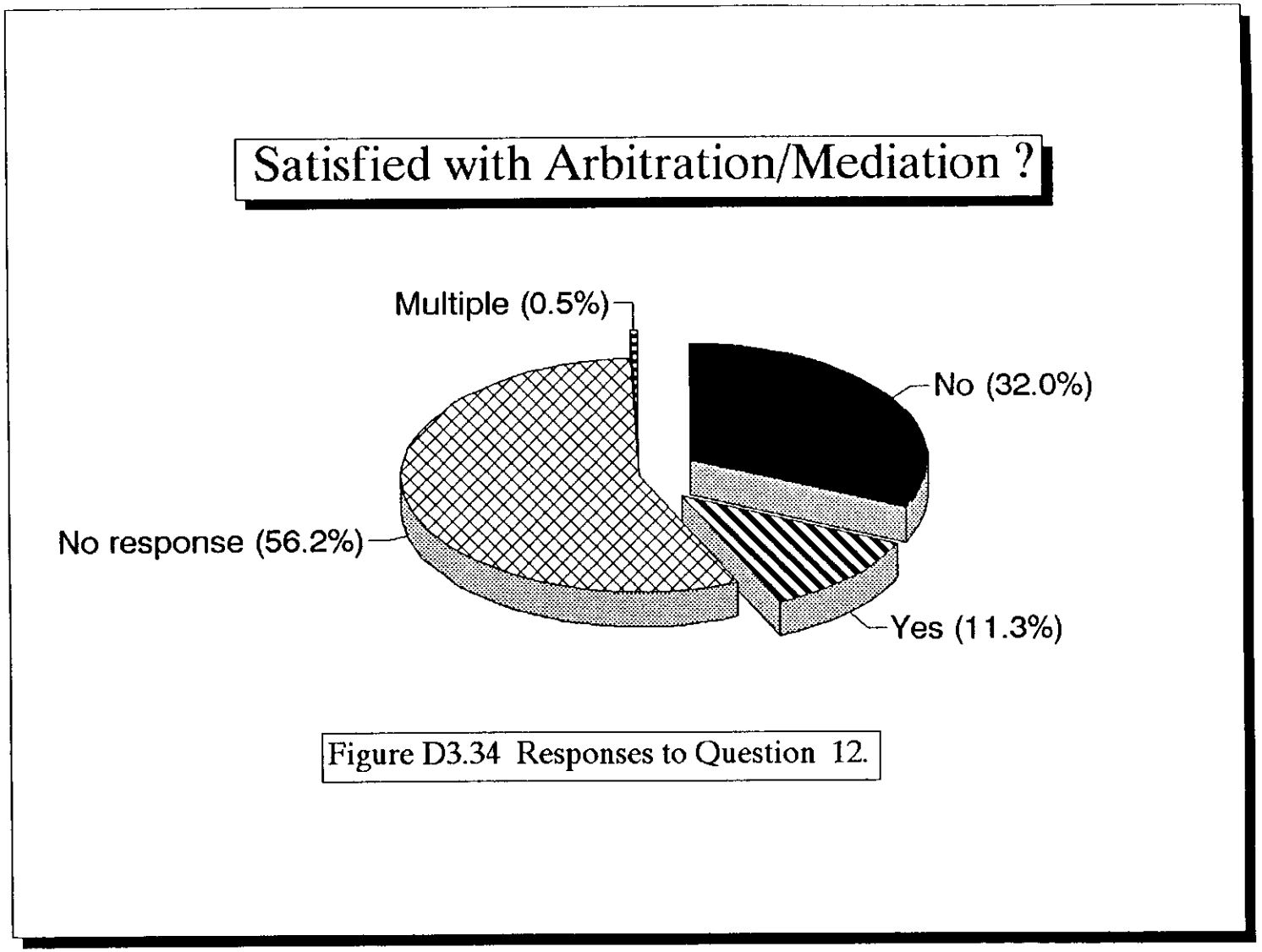

Figure D3.34 Responses to Question 12.

TAB B

B. Invalid Contracts

Does it seem realistic that you could sign a contract with a company that doesn't even exist? Believe us, it happens as the following case from the Florida Court of Appeals shows.

DSA GROUP, INC., a Florida corporation, Appellant,

v.

Lawrence GONZALEZ, individually, d/b/a 620 Madison Ltd., an unregistered limited partnership, Appellee.

No. 88-03512.

District Court of Appeal of Florida, Second District.

Oct. 20, 1989.

LEHAN, Judge.

[1] We affirm the judgment in favor of defendant in this suit for breach of a contract for payment for engineering and architectural services performed by plaintiff in connection with the development of certain real property. We cannot conclude that there was insufficient competent evidence on the basis of which the trial court could, and did, determine that defendant was not to be personally liable under the contract which plaintiff prepared and which defendant signed as purported president of a nonexistent limited partnership "or assigns." That evidence was properly admitted in this case. *See Landis v. Mears*, 329 So.2d 323, 326 (Fla. 2d DCA 1976) (parol evidence admissible as to capacity in which party signed contract). *See also Puckett v. Codisco, Inc.*, 440 So.2d 596 (Fla. 2d DCA 1983).

The facts of this case appear to contrast with those in *Akel v. Dooley*, 185 So.2d 491 (Fla. 2d DCA 1966), in which it was held that a party who signed a contract for a nonexistent entity was personally bound under the contract. In this case the entity named in the contract for which defendant purported to sign was nonexistent. But there was also in this case testimony of defendant which could be taken to have been to the effect that it was defendant's intention, which had been communicated and agreed to by plaintiff, that the entity which was to do the development work, which did that work, which was to contract for plaintiff's services for that purpose, and on whose behalf it was intended by the parties that defendant sign the contract, was an existent corporation, not named in this suit, which had been formed shortly before the contract was executed. Thus, there was evidence which could be taken to have been to the effect that the entity on whose behalf defendant signed the contract was misdescribed, and was known by plaintiff to have been misdescribed, in the contract.

While plaintiff's evidence was strongly otherwise, we are not entitled to reweigh the evidence. *Tsavaris v. NCNB National Bank*, 497 So.2d 1338 (Fla. 2d DCA 1986). Also, all of the evidence indicated that prior to the execution of the contract plaintiff had been willing to contract with a corporate entity and not with defendant personally.

[2] Whether or not the trial court's memorandum to counsel, which announced the court's ruling, reflected evidence inaccurately is not determinative. The court's fundamental conclusion reflected in that memorandum was that defendant was not to be personally bound under the contract. *See Chase v. Cowart*, 102 So.2d 147, 150 (Fla.1958) (result in trial court must be affirmed if right, even if right for wrong reason).

Consider next this situation reported in the Sun-Sentinel 1987 "Subs just want to get paid."

By JIM MCNAIR
Business Writer

When Christopher Morrison accepted a $33,700 contract last fall to pave three tennis courts, a parking lot and a road at the high-priced Monterey Lakes development in Delray Beach, little did he know that his payment would get tied up in an international lawsuit stretching to Munich, Germany.

Morrison, 34, founder and owner of AAA Courts Inc. in Fort Lauderdale, took the job last October. Although the developer, Taurus Development One Inc., of Boca Raton, employed him, Morrison says the Maryland-based lender, Chevy Chase Savings & Loan, verbally guaranteed payment. There was no advance payment from Taurus, no bond covering his work, just the usual promises to pay.

Within two months, Morrison's crews finished the work to the developer's satisfaction. But his October and November draw requisitions went unpaid, forcing him to file a lien on the property. Soon afterward, Chevy Chase foreclosed on Taurus. Taurus responded with a claim that Chevy Chase maliciously cut off funds and conspired with Taurus' limited partners in Munich to seize the project.

More than $200,000 is owed to the various subcontractors on the Monterey Lakes job. The list of subcontractors is typical for a real estate development: builders, excavators, masons, roofers, cabinetmakers, landscapers, tile and marbleworkers among others. And typical for a development where owner and lender are squabbling over money and performance — and where foreclosure or bankruptcy overshadow a project — the scrupulous subs at Monterey Lakes have been left to the mercy of their creditors as lawyers imbibe in a legal imbroglio.

Morrison has no idea when he'll be paid, knowing how lawsuits go. Two years ago, Palmer Roofing Co. of Fort Lauderdale took a roofing job at the Laver's International Tennis Resort in Delray Beach. The project fell into financial chaos last year, and Palmer had to file a lien to collect his $25,000 bill. Finally, on June 9, a judge awarded him the unpaid balance, interest and legal costs.

Subcontractors can be pretty helpless sometimes. Some don't read or understand contracts very well, while some who do are jinxed into one distressed project after another. Subcontractors who insist on bonds for their materials and labor or who refuse to let a general contractor off the hook in the event of developer default are easily bypassed in favor of subs who are less finicky. And when a subcontractor's livelihood depends on finding work, he often can't afford to be too particular.

"They're really in the vise," said William Benson, a Fort Lauderdale attorney who specializes in mechanics' lien law. "They are always asked to give competitive bids, then when the work is done, they're asked to wait for everybody else to be paid. At the other end, they're pressed by suppliers who are 10 times their size.

"Most subs are frightened," Benson continued. "Most subs need the business so badly that they'll sign most anything and put up with most anything as the work progresses. So the average life of a sub is less than two years."

AAA Courts, a small, 6-year-old company, survived the Monterey Lakes disaster. Morrison hired a lawyer, Lise Armater of Fort Lauderdale, to pursue his $33,700 claim. She filed suit against the developer, the lender and the general contractor, Diversified Contractors Inc., for the contract amount, along with legal fees and punitive damages of more than $1 million.

"He [Morrison] had to pay all his employees and his suppliers. Not only did he not make any profit, he almost lost the entire $33,000," Armater said. "$33,000 doesn't seem like a tremendous amount of money when you're talking about a large developer, but to a small contractor, it could put him out of business."

Where there is construction, there are usually constraints on timely payments to contractors. Even the most savvy developers have underestimated construction costs and overestimated demand for office space or condominiums. The resulting crunch on available cash leads to an assortment of headaches stemming from the late paying of bills. At worst, lending institutions will foreclose on hopelessly defaulted projects if the owner hasn't already filed for bankruptcy.

In South Florida, one of the fastest-growing regions of the country, contractors, subcontractors and suppliers file an average of 400 mechanics' liens every week in the courthouses of Dade, Broward, Palm Beach and Martin counties, according to a Fort Lauderdale company that publishes a weekly list of such liens, Builders Notice Corp. Most of those involve claims of a few thousand dollars, but others are reflections of seriously distressed construction projects:

- S&S Drywall of Deerfield Beach is one of many subcontractors bogged down in a complex lawsuit involving the Palm Beach Hampton, a pair of oceanfront apartment towers whose 81 units start at $435,000. The drywall company fulfilled its $1 million contract, but $99,000 was never paid. A bank that took over the project offered to pay 60 percent of the claim. S&S turned it down and filed a lien against the property.
- Many subcontractors have filed liens

SEE SUBCONTRACTORS, 2D

CHECKLIST FOR SUBCONTRACTOR PROTECTION

Before signing a contract:

- Know the project's general contractor, its performance record and lien history.
- Find out about the developer, owner, and lender and their relationships with each other and the general contractor.
- Determine if the general contractor will post a bond on subcontractors' labor and materials. Identify the bonding company.
- Be sure the project has a good chance of financial success.
- Read and understand the contract, especially the provision on the general contractor's obligation to pay subcontractors if he isn't paid by the owner.

If the general contractor doesn't pay on time:

- Advise all parties involved that payment is overdue.
- Issue a written notice of default to the contractor. Provide copies to the owner and lender if the overdue amount isn't received by the next payment requisition date. Cease work.
- File a mechanic's lien on the property if payment still isn't received.

FROM PAGE 1D

Subcontractors often last in line to get paid

and claims in recent months against Three D Development of Boca Woods Inc., the developer of a residential community in suburban Boca Raton. The claims come from roofers, drywallers, insulators, cabinetmaker, marbleworkers — a full range of subcontractors — but they will be of little to no avail. Three D Development filed for Chapter 7 bankruptcy three months ago, listing more than $3 million in debts.

● During a single week last month, more than $125,000 worth of mechanics' liens were placed on the Boca Gardens development as a result of alleged defaults by the owner, Synergism One Corp., and the general contractor, Wingfield Construction. The big losers were insulation, lumber and aluminum suppliers.

Subcontractors often don't know whom to turn to when they aren't paid. The general contractor is the logical first choice since the contractor hired the subcontractors. But a common contract provision, a former legal requirement, releases the contractor from obligation to pay subs if the owner or developer ceases to finance the contractor. Thus the lowly subcontractors are forced to contend with a parade of people all ducking responsibility to pay. More and more often the list includes lenders, limited partnerships and real estate investment funds far removed from Florida.

Thomas Shahady, a Fort Lauderdale lawyer who helped draft the Florida mechanics' lien law, said liens and litigation are no guarantee that a scrupulous subcontractor will be fully compensated for his work. Foreclosure by a bank, whose claim almost always has top priority, can spell total erasure of all other claims. Shahady said that, in his experience, subcontractors end up receiving an average of half their original claim, excluding legal fees.

"Litigation is not a cut-and-dried thing," he said. "It's very time-consuming and expensive, and there always seems to be a claim for defective work. You just can't buy construction litigation without spending substantial dollars to collect your money."

Shahady added that when subcontractors haven't been paid, it generally means that the contractor hasn't been paid either. In the majority of his cases, the owner is the one who defaults.

In spite of owner defaults, Ted Taff, general manager of Central Glazing Contractors Inc. and acting president of the American Subcontractors Association of South Florida, said general contractors have a large responsibility to the subcontractors they hire. For one, he said subs should receive at least a partial payment even when the general contractor isn't paid. He said he wouldn't take a job that wasn't bonded to cover a sub's labor and materials.

"There are unscrupulous general contractors who will take money and put it in the bank and draw interest on it instead of paying you. That actually happens," Taff said. But he added that subcontractors wouldn't get into so much trouble if they read contracts closely and knew their rights.

"They sign contracts that lock them into slow death — and they don't even know they're doing it," Taff said.

Builders Notice Corp. is one of several local companies that, for a fee, provides subscribers with a weekly list of all mechanics' and tax liens filed in South Florida. With that information, said company President Jim Carmel, a subcontractor can figure out who's paying his bills and who's not.

General contractors aren't all that free to delay a subcontractor's payday in order to draw interest. Lenders keep close tabs on the progress of projects they have a stake in, ensuring that their money is properly disbursed. And some developers are hiring and paying subs directly, just as Taurus was to have paid AAA Courts for the work at Monterey Lakes.

But old ways die hard, and subcontractors are simply too hungry for work to do a background investigation on a contractor or developer. Mark Kimbro, vice president of Broward Millwork Inc., said his company is out almost $5,000 for work it did on the Plantation Corporate Center last year. Although the debt had not been paid, Kimbro said the developer had the nerve to ask him to participate in two other projects in Pembroke Pines, an offer he had no reservations about passing up.

"When it comes to business, you have to figure what the chances are," he said, "and if I had heard of this guy, I would never have taken the job."

C. Contract Administration

What do you look at when you start to negotiate?

When you are satisfied that the person you are dealing with is on the level and you reach the contract signing stage, what do you need to look out for? What clauses are of particular importance, knowing that the friendly atmosphere that exists now will begin to change? How do you insure some measure of good faith will find its way to the day a claim occurs? Risk-shifting clauses, payment clauses, clauses describing methods of settling a dispute, and termination clauses are of particular importance. Remember, if a contract is full of untenable rules it is doomed to failure.

Comments from our field work:

1. Risk-shifting clauses in contracts are overt and covert. Contracts are a means of shifting the risk usually from the stronger to the weaker party. Subs are in the weakest position.
2. There are contracts which never should be signed.
3. Contract language needs to be understood and reviewed.
4. Research those who you work for and those who work for you.
5. A credit report isn't worth the paper it's written on.
6. Contracts are a problem.
7. The general is always ahead of the sub.

Contracts are a problem. No one we spoke to would argue with this statement.

Short of actual litigation, nothing strikes fear into a contractor than signing a bad contract. Contract language can be mystifying and intimidating. Many subs feel manipulating contracts is on of the things which keep the generals always ahead of the sub, and among the forces which keep the sub "in the weakest position" in the construction hierarchy. (Although other factors do play an important part in this however.) It may be impractical, if not outright impossible to expect small contractors/operators to become adept in such a highly specialized area as contract law. Nevertheless, it is perhaps not unreasonable to say that as the construction industry becomes more competitive and litigious an ability to understand (at least) the basics of what a contract is has become "part of every plumber's training." There are several reasons why this is so. Among them is the fact that, legal services are expensive for everyone, but more so for a small contractor who is unable to spread the cost of legal services over a broad base work. Even an ounce of prevention, when that means seeing an attorney, can price a small operator out of the market.

Contracts are seen by some as a battle ground upon which the conflicts between owners and generals, generals and subs are worked out. One sub-contractor told us that in an effort to obscure the actual terms of the contract from him a general used the basic form of an AIA contract and with the use of hi-tech computer capabilities and a laser printer re-arranged sections of the document, adding and deleting items to create a AIA look alike. See TAB A case study.

TAB D

D. Licensing

Qualifiers

The Dade County Grand Jury reported in May 15, 1989, that "many construction companies are formed by unlicensed and inexperienced people utilizing the license of a contractor, called qualifiers, who permits his name and license to be used for a fee." The practice can invoke disciplinary action under section 489.533(1)(k), Florida Statutes. This statute is aimed at preventing those who "knowingly ...[allow] one's certificate to be used." The problem is well understood by the legislature which has taken steps to address the problem. Nevertheless, according to our fieldwork the popular perception is that "no one is watching the store" when it comes to restricting abuses of qualifiers.

This perception may be skewed, but a glance at the classified ads reveals ads which solicit "qualifiers" and although these may be legitimate solicitations one wonders to what extent the ads invite abuse. Why after all is the legislature and DPR concerned about qualifiers? The answer is probably obvious, nevertheless, the Dade Grand Jury provided a source of the answer when they said that "[l]icensing provides a minimum level of competence below which a contractor cannot fall." (emphasis added)

This problem is well illustrated in the following case:

Reference: Leiby, Chapter 2

Licenses and Certification, s. 2.02 State Certification

"A qualifying agent may be liable to a subsequent purchaser of a home for building defects under a theory of negligence in performing his or her statutory duty to supervise."

Illustrative case: Gatwood v McGee, 475 So 2d 624 (Fla 5th Dist Ct App 1982). see also, Florida Statute: s. 489.105 (1983)

Barnes, a building contractor, was president and sole stockholder of a home construction business known as Barnes Enterprises, Inc. Barnes Enterprises, Inc entered into an agreement with a builder named Wilson whereby Wilson was employed to manage and supervise the company's home building operation. Barnes had nothing to do with the actual construction or supervision of construction of the homes. Barnes applied for a building permit to construct a home on a lot owned by Barnes Enterprises. When the home was in the later stages of completion, Wilson departed. At the time of his departure, there were five or six other homes in various stages of completion. Due to financial difficulties, Barnes Enterprises conveyed the title to the home to Bill's Custom Homes, Inc. Bill completed the home and sold it. Within two months, the new owners became aware of structural problems with the home. It was subsequently determined that the home had been build on a bed of muck ten to twelve feet deep which had been covered with a layer of fill sand. The new owners filed suit against Barnes Enterprises, Inc, Bill's Custom Homes, Inc, and Bill. Barnes claims he is not responsible because he hired Wilson to supervise the construction.

What result?

The court said that the only way a company may be a contractor is by obtaining an individual licensed as a contractor as its qualifying agent. The qualifying agent

must show that he is legally qualified to act for the business organization and that he has the authority to supervise construction undertaken by such organization. The legislative intent under the Florida Statutes is that qualifying agents have the professional duty to supervise the construction projects entered into under their names. It must be shown that, by the qualifying agent's exercise of due care in carrying out his statutorily-imposed duty of construction supervision, the construction defects could reasonably have been avoided.

Moral:

Comments from our field work:

1. Licensing of contractors and subs must be improved and monitored.
2. Qualifying agents are a well known problem.
3. Training is needed. The work force is poorly trained and unprepared. The work force is for the most part unskilled.
4. More subcontractor trades need to be licensed.
5. Building officials are not doing their jobs.
6. There are not enough building officials.
7. Building departments are sorely understaffed.
8. Defects in design.
9. Nobody is watching the store.

The problems addressed here apply to contractors and government and trade organizations. They are inter-related concerns each has an effect upon the others. It may well be that one engenders the other; however, this is a chicken-and-egg debate which brings us no further. Suffice it to say, there exist causal relationships

between enforcement (government and other), enactment and construction of regulations (be it licensing, insurance, qualifying) and the contractors application or response to these regulations.

Our interviews have revealed generally this: there exists a lack of adequate enforcement of existing regulations (to quote one interviewee "nobody is watching the store.") Contractors, attorneys, subs all have commented more or less in a similar vein. Several problems emerge from this state of affairs.

First, lack of regulation invites problems. An unskilled workforce is the reality. Yet it is perceived as a direct cause of poor workmanship. There is no doubt but that ignorance and poor workmanship go hand in hand. Second, unenforced regulations invite noncompliance. Qualifying agents are a well known source of trouble, yet the regulations are in place to combat this problem.

It may seem axiomatic that well trained workers beget well built buildings. What is also axiomatic is that poorly build buildings beget well prepared lawsuits. The consensus of opinions from our work has been that "training is needed," that "the work force is poorly trained and [generally] unprepared." What contractors want t know about most after mechanic's lien is their own liability. Organizations like NAHPCC, AGC and others have recognized the need for training and have offered apprenticeship programs. For contractors worried about liability the connection should be clear between poor workmanship and lawsuits. Florida law treats this issue under statutes addressing warranty and workmanship. We suggest you take a look at these laws.

Sections 672.2 - 313, Florida Statutes addressing warranties in general say,

that "[a] purchaser of a new residence receives an implied warranty that the residence has been constructed in a workmanlike manner." Lawsuits which address this problem are manifold. Consider the following case and comment:

Reference: Leiby, L. Florida Construction Law Manual 2nd Ed.

Chapter 12 Warranties -Implied Warranties

s. 12.06 --Constructed in a Workmanlike Manner

"A purchaser of a new residence receives an implied warranty that the residence has been constructed in a workmanlike manner."

Illustrative case: Rapallo South, Inc v Jack Taylor Dev Corp, 375 So 2d 587 (Fla 4th Dist Ct App 1979).

Background: Questions of workmanship and quality popped up again and again in our interviews with contractors and subs. Quality control is one of the aspects of job management and job performance which lead to conflict, litigation, and monetary loss. Contractors need be aware that there are implied standards of workmanship that go with each job.

Scenario:

A developer is sued by a condo association for defects caused by the use of defective materials and/or poor workmanship. It's been a year since obtaining a C.O., and the contractor feels confident that a certain stipulation in his contract will protect him from having to fix the defects. The contract reads like this:

> It is understood and agreed that the Seller shall, for a period of one year from the date of the C.O., continue to remain responsible to the Purchaser and the Condo Association for the correction of all defective work

resulting from the use of defective materials and/or poor workmanship in the construction of the building.

Should the contractor feel confident about not having to fix the work?

What result?

The court said that the express warranty in this case in no way precluded, or is inconsistent with, the imposition of an implied warranty of fitness and merchantability.

Moral: Don't count on the contract to keep you out of litigation when you use defective materials or poor workmanship. Count on the quality of you workmanship.

Conclusion

When all is said and done what is behind all regulations, licensing and training is an effort to insure a quality product. And as the Grand Jury pointed out "[c]ontracting is ultimately done by people and the competence and responsibility of the people must be guaranteed." People therefore make quality.

TAB E

E. Project Administration

Claims - Thinking Ahead

"Claims are an inherent part of construction." (Fogel) Going into a claim, the key ingredient to success is proper documentation.

LIST OF NECESSARY DOCUMENTS

Remember that how you settle you claim depends on the rules set forth in the contract to solve disputes which arise in the field.

Comments from our field work:

1. Project administration is important - there is a question about who should handle this.
2. Successful contracting is a balancing of costs & consequences.
3. Ambiguity in plans and specs is a cause of many disputes.
4. Owners cause problems when they make changes as they go along.
5. Communication between generals and subs is lacking. Generals are not making the effort to involve subs in decisions which effect subs directly.
6. Avoidable delays are the result of this lack of communication.
7. Generals are acting as brokers. They are not managing their projects.

Once the job is awarded and the contract signed it is time for what most people think of as the essence of contracting: building the building. The actual nuts and bolts of construction and probably the area where contractors feel most comfortable.

Here is where the contractor is at an advantage over the owner and his attorney. The contractor can now put his expertise to work to regain the upperhand in the struggle for profits. So it would seem to an outsider at least. Nevertheless contractors are all to willing to relinquish their advantages at this stage by not taking care of that which they know so much about. We call this job project administration.

Project administration should rightly be the domain of the general contractor. It is in fact virtually synonymous with what a general contractor is supposed to do - his job description could read "project administrator." Yet we have spoken those who feel that project administration should be turned over to someone else - the architect or engineer perhaps. The reason is that the general is not getting the job done. Of course, this does not apply to all generals; the best either avoid problems administering their projects, know how to successfully handle problems when they occur or have unnaturally good luck.

Our fieldwork revealed to us that there is a perception among subs, attorneys etc. that generals are failing in several areas. One of these is in their role as project managers. Generals, it seems, would rather act as brokers of construction services than as active managers of the projects themselves. The allure of this position is clear: if he could just close the deals, convince the owner that he can handle the project then all that is left is to bring together the proper people to put the building up. Good contracting, in other words, is simply a matter of putting together the right team and the proper paperwork. What is not so obvious is what the law expects of the general in his role as project administrator. What is the legal responsibility of the general to the project in terms of the actual building of the building. Can a general

simply be a broker and leave the project to subs and office personnel?

The contractor who brings together a good team has not dispensed his responsibility to the project; rather, he has simply fulfilled the first duty that is expected of him. (Although we will not talk here about hiring personnel, we do take not of an article by Raymond D. Scott, "Contractors liable for employee acts." Concrete Construction, July 1990 p. 649) Florida courts have held contractors to their statutory duty as qualifying agents (Fla. Stat. 489) of a corporate builder to "supervise construction." And this is a non-delegable duty. Construction companies which abuse the requirements for qualifying agents are a grave concern of everyone we spoke to and was also highlighted by the Dade County Grand Jury report, Fall term 1989. (see Licensing) Another failing is general-sub communication.

Once a good team has been put together it is necessary for the general to work with the team to achieve his goal. Subcontractors have complained to us that generals are simply not communicating their needs to the subs. Lack of communication often leads to lack of coordination which often leads to delay. And delay is frequently named as one problem (and prime source of litigation by some sources) which can be avoided if contractors involve subs in the scheduling process. Ask yourself the following questions: How does this help prevent delay? How does delay occur? When does delay cost money? And consider the following cases:

Reference: Leiby, L. Florida Construction Law Manual 2nd Ed.

Chapter 12 Warranties

Implied Warranties s. 12.06

Constructed in a Workmanlike Manner

"A purchaser of a new residence receives an implied warranty that the residence has been constructed in a workmanlike manner."

Illustrative case: Rapallo South, Inc v Jack Taylor Dev Corp, 375 So 2d 587 (Fla 4th Dist Ct App 1979).

Leiby, L. Florida Construction Law Manual Chapter 16

Remedies, s. 16.02 Fraud

"Fraud is the intentional misrepresentation of material fact, which misrepresentation is relied on and causes damage. Punitive damages may be recovered for fraud....Contractors and others performing construction work have ample opportunity to cheat owners. A number of devious practices can be used to accomplish illegal gains. Among the most common are the use of materials and supplies inferior to those specified."

"In an interesting case, a contractor represented to an owner that all permits were obtained, all work was completed, and all inspections were obtained."
Illustrative case: Rudy's Glass Constr Co v Robins, 427 So 2d 1051 (Fla 3d Dist Ct App 1983).

A contractor licenced in glass and glazing maintenance and repairs, contracted to remodel a store in the Mall. Several months later the agent for the store owner was told by the contractor that construction was completed and inspection performed. The agent then requested a C.O. from the Building Department and proceeded to occupy the premises. Six months later the owner was charged by the Building and Zoning Department with several violations, such as, failure to comply with approved plans, failure to call for mandatory inspections, and failure to obtain final inspections prior to occupancy. The owner's agent was arrested and was

required to appear in court.

The owner then filed suit against the contractor. The owner's agent said that the president of the company told him three months before he occupied the store that the construction was complete and that he could occupy the store.

What result?

What did the contractor do wrong?

The court said that there was ample basis to support the conclusion that the contractor misrepresented the facts that the construction was complete. Moreover, the court said that the president, as overseer of the construction had to have known that the work was not complete, nor the final inspection obtained, and that the statement was not merely a statement of opinion but a misrepresentation of the facts. The contractor's attorney to "set the standard of business morality." The jury then returned a verdict for twice as much as was asked for.

Moral: You play -- you pay.

Among the most common [of devious practices uses to accomplish illegal gains] are the use of materials and supplies inferior to those specified.

Illustrative case: Joseph v Bray, 354 SE2d 878 (Ga Ct App 1987).

Scenario:

The contractor, Barnes, build a home for the Wilsons based on a written contract incorporating specifications and plans which required that the roof be built with 2" by 6" beams on 16" centers. In fact, the roof was built with 2" by 4" beams on 24" centers. The Wilsons were never on the job site when the house was being built. And Barnes never mentioned the change to the Wilsons and when they did come to the job site the roof was covered and the beams were not open to view. The

defect was discovered by Bill, the bank representative, when he conducted his inspection prior to final payment to Barnes. Bill never mentioned this to the Wilsons, but he did have a talk with Barnes who stated that he would stand behind his work. But Barnes never corrected the defect. The Wilsons sued for breach of contract, fraud, and for attorney feed and punitive damages.

What result?

The court held that there was evidence of fraud and that a jury could award punitive damages.

Moral: You pay for your mistakes -- you pay double when the make mistakes on purpose.

TAB F

F. Liability and Termination

Remember that how you settle your claim depends on the rules set forth in the contract to solve disputes which arise in the field. There should be some provision, which we call emergency jobsite mediation, which sets forth specific guidelines on how to handle claims as soon as they occur.

Comments from our fieldwork:

1. In disputes - finding the common denominator between the reasonable and unreasonable people is critical.
2. Alternative dispute resolution - plays a big part in contract construction and avoiding litigation.
3. The biggest concern among contractors in Florida is Mechanic's Lien (Construction Lien) the second biggest is "what is my liability."
4. Management is the key.
5. Expect frivolous lawsuits in a time of economic downturn.
6. Avoid condos.
7. The expense of litigation leads generals and subs to back down even where their claims are legitimate.
8. The problems are not with the construction, but with management and communication.

Liability touches several concerns which have come up in the discussion of the previous topics as well e.g. business skills, and project administration, and, of course, pervades the entire topic.

TAB G

G. Other Concerns - (Insurance interests, financial institutions, public ignorance)

Comments from our fieldwork:

1. Lenders must be tapped for help.
2. Management is the key.
3. Banks need to get better at overseeing work.
4. Insurance requirements must be complied with before they become a problem.
5. Public ignorance encourages deceptive practices.

APPENDIX A

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APPENDIX B

COURT RECORDS REVIEWED

BROWARD COUNTY CIRCUIT COURT

cases between 11-01-88 and 12-01-88

docket #	case name
029160-22	Harcar Aluminum Prod. v. MGC Development Inc.
029170-10	Byron Development v. Styx River Resort Inc.
029208-07	Byron Development v. Venture Out Resort Inc.
029251-13	McNab Associates Ltd. v. American Wood Inc.
029277-09	Oakwood On the Green v. G L Homes of Oakwood
029278-15	Heinerl, Marianne v. Atlantic Seashore Properties
029299-23	Property Systems Inc. v. Sabbagh, Edgar
029655-01	Beaver Properties Inc. v. Deitch, Barbara
029775-10	Check Cashing Store Inc. v. World Erectors & Water
029821-04	Salerno, Benedetto v. C & L Plumbing Inc.
030146-22	Ducille, Carl v. James Plumbing Service
030157-12	Precision Waterproofing v. Rock Island Land Corp.
030166-24	Picchioni, Gene M. v. Deer Creek Golf Properties
030488-18	Sparky Electric v. First Continental Building
030551-05	Anthes Inc. v. Universal Building Supply
030595-08	Aeicor Aluminum Products v. Worldwode Const. Co.
030627-01	Coral Gables Ins. v. Bergeron Land Development
030680-03	Cypress Bend Condo. v. Oriole Homes Corp.
030719-18	Hemmerle Development Corp. v. Kerns, Charles J.
030771-25	J.D. Bligh Const. v. Standard Pre Fab Erector
030779-25	Fla. Rock Industries v. McConnell Masonry Inc.
030907-20	GDG Services Inc. v. Townhouses of Oriole Assn.
030986-14	Highland Beach Development v. Connor, Philip R Jr.
030970-02	Eighty-Four Lumber Co. v. T & T Drywall Interiors
031015-08	O'Dwyer, Rory v. Superior Homes, Inc.
031062-12	Greenbriar Bldg Mat. v. Jenkins Economy Roofing
031219-09	Production Products Inc, v. Great Western Const.
031228-02	Townhouses of Harbor Beach v. Roof King Ind.
031388-24	Liberty Mutual Ins. v. Ross Building Corp.
031448-22	Stephen B. Tracy Assoc. v. Master Contractors Inc.
031509-10	Class Inc. v. L and L Construction Inc.
031527-15	KJK Enterprises Inc. v. Warren E Daniels Const.
031701-19	Maryland Casulty Co. v. Channel Const. Co.

031758-24	Interbanc Savings and Loan v. Fla. Villages Inc.
031833-23	Martin Contr. Inc. v. Occidental Aircraft Inc.
031845-24	Dayton Superior Corp. v. Progressive Contr. Supp.
031860-12	Precision Waterproofing v. Fitch, Robert
031926-18	Sunshine, Anita v. Rissman Development Corp.
031972-12	Riewold Phipps Develop. Corp. v. Commercial Rest.
031987-09	Holmes Lumber Co. v. Intercoastal Builders Inc.
032014-03	Forster Pannel Kerr v. Anderson Elect. Inc.
032040-14	Ropers Assoc. Inc. v. Gemcraft Homes INc.

cases between 12-01-88 and 01-01-89

docket #	case name
031998-04	Miron Bld. Prod. Co. v. Kronholm, Ron
032134-05	Fla. Truss Inc. v. Better Construction Inc.
032136-17	Franz, Robert v. Jade Beach Lands Inc.
032206-03	McDonald Dist. of Fla. v. Jaguar Elect. Inc.
032243-11	Coral CS Ltd. Assoc. v. Golder Greek Int'l.
032266-20	Tobin, Steve v. Tamerland Homeowner Assoc.
032284-19	SAC Construction v. Pembroke Pines, City of
032502-20	Causeway Lumber v. Artisan Builders Inc.
032522-15	Marley Cooling Tower Co. v. Mech. Development
032523-25	Technical Prod. v. Cox and Palmer Construction
032711-01	Pinos Window v. Builders Int'l Enterprises
032940-20	Eaton Financial v. Fla Enineering. Construction
032857-22	Hollyto Properties Ltd. v. T & B Inc.
033035-23	Samuel Friedland v. Altman Myers Construction
033055-13	Dixie Clamp v. EJ Belany Construction Inc.
033126-16	HS White v. Environmental Control Inc.
033316-20	ABCO Pipe v. King Cole Plumbing
033341-22	Landolina, Clauco v. Florida Construction Co.
033642-03	Colt Roofing Contractors Inc v. Roberson, Sam
033814-10	CES Industries v. AABCO Construction Co.
033823-23	Galt Towers Condo Assn. v. Cooley Roofing Systems
034231-24	Gemaire Dist. v. Econonmy Heating and AC
034267-08	Am. Vent. Interior Systems v. Chistophers Inc.
034287-24	Everglades Paving Co. Inc. v. So. Atlantic Assn.
034326-14	Nat. Homeowners Service v. Custome Upholstery
034338-20	So. Fla. Steel v. Cox and Palmer Construction
034423-21	Hanley Landscape Inc. v. Am. Prop. Development
034424-12	Tarmac Fla. Inc. v. Trafalgar Management Assoc.
034459-03	Scaffolds of Fla Inc. v. Shannon, Derreck
034576-13	Check Cashing Store v. Winn Bros. Construction
034582-17	PESCO v. So. Fla. Steel Serv. Co.

034698-06	Causeway Lumber v. Florida Serenity Construction
034760-20	AFGO Engineering Corp. v. Hardin Construction

cases between 02-01-89 and 03-01-89

docket #	case name
002916-04	Old Republic Ins. v. J. Downs Const. Co.
003015-18	Sears v. Gold Coast Development
002985-01	Rudy's Sirloin v. Focus Development
003079-23	Cole and Steven Roofing v. Chisesi, Ignazio
003143-05	Rust Construction v. Frame Optical
003218-05	Am. Aerial Lift v. Gold Coast Construction
003269-16	Sunbeam Properties v. County Contractors
003502-13	Preferred Builers War. v. Cue Construction
003558-10	Sun City Builders v. Bryant Victor
003716-07	Sorenson v. Diversified Home Builders
003781-20	Celcore Inc. V. Gold Coast Construction
003860-13	Hutchinson v. Keenan Development
003862-01	Fleming Prop. v. Archer West Construction
004133-22	BEC Const. v. American Engineering
004413-01	Pine Isl. Ridge Condo v. Metro Drywall
004428-23	Leward v. Cox and Palma Construction
004437-16	Paxex v. First Bld. Corp.
004444-20	Fla. Waterproofing v. Brouer
004505-02	Cramer's Conc. Fl. v. H & S Forming
004645-09	Xanadu Land Development v. Ralph Denworia
004653-20	Group 2 Adventure v. So. Fla. Custom Home
004673-19	Toko Four Const. v. Kenwyck Construction
004807-22	Equip. Design v. So. Steel Construction
004912-05	Williams v. Glen Wright Construction
004951-25	Casino Drywall v. S & C Construction Co.
004983-22	Fortin B. v. RR Bldg. Enterprises
004987-13	McConnel Masonry v. Whiting-Turner Const.
005029-11	Roof Structures v. Seppala & Aho Const.
005068-24	D & B Tile v. Interior Construction
005247-24	May Mechanical v. Bodee Development
005277-04	J. Downs Construction v. Russel Inc.
005317-20	Pantropic Power v. C. Ardavin Construction

cases between 03-01-89 and 04-01-89

docket #	case name
005478-08	State Farm Mutual v. Casino Drywall
005492-05	Centrust Leasing v. D & J Construction
005721-15	Lake Co. Assoc. v. Central Fla. Construction
005744-22	Valmor Dist Inc. v. Margate Construction
006079-15	Mack Industries Inc. v. Nat. Construction
006082-10	Mack Industries Inc. v. Total Commer. Builders
006086-13	Dal Tile Corp. v. Sessoms Grice Construction Co.
006184-08	Velez, Gloria v. Homes America Blds. Inc.
006231-02	S.E. Casulty v. V.M. Carter Construction
006339-17	Greenbriar Bldg. v. Consolidated Roofing Cont.
006514-04	Adams Dewind v. Ameri Underground Construction
006536-02	CES Industries Inc. v. L G H Construction Co.
006582-05	Westberrys Crane v. Ahmad Construction & Develp.
006777-13	EM Enterp. v. VES Carpenter Contractors
006850-14	Morris, Elliot v. Durango Homes Corp.
007068-01	EDD Helms Elec. v. H & T Construction Inc.
007130-20	Hanover Ins. Co. v. Emerald Construction Corp.
007159-01	East Coast Construction v. Total Comm. Builders
007202-03	Gemaire Distrib. v. Air Conditioning & Heating
007246-03	M and M Excavating v. Conduit and Foundation Corp.
007269-11	Burton, Marion D. v. Consolidated Building Prod.
007309-22	CES Industries Inc. v. Double D. Electric Inc.
007339-23	Richardson, Ella v. Coast to Coast Contractors
007493-18	C & S Capital v. Am. Eagle Contractors
007544-24	Trans Fla. Supply v. Amcar Engineering Contractors
007570-02	Indiana Ins. Co. v. Minto Building Fla. Inc.
007571-15	Skyline Steel v. Cox and Palmer Construction Inc.
007587-20	Giuffre, Joe C. v. Dynasty Homes and Investments
007601-22	Interstate Development Ltd. v. Meyer, Robert F.
007606-04	Nova Gardens Condo. Assn. v. Butler Seal Coating
007672-06	West Broward Develop. Corp. v. Sotomayer, John
007748-09	Lesser Martin v. Crain Engineering Co. Inc.
007867-23	SAC Construction v. Wenax Peppertree Co.
007942-23	Noland Co. v. Sunshine Contractors Inc.
007979-04	Nationwide Mutual Fire v. Pro Caulk Corp.
008025-02	Sea Ranch Lakes v. Gable Roofing Corp.
008036-17	Burk Co. v. Merit Construction Inc.
008184-10	Coral Spr. Comm. Ctr. v. Diversified Home Builders
008193-17	Gemaire Dist. v. Turstons Heat and Air Cond.
008254-03	American S & L v. Drywall and Stucco Inc.

cases between 04-01-89 and 05-01-89

docket #	case name
008432-07	Atarler Inc. v. Air System Engineering Inc.
008462-05	Great Am. Supply v. Air Systems Engineering
008660-08	Dupuis, Arther v. Trafalgar Developers of Fla.
008673-02	Snead Bulldozing v. Southland Eng. Contractors
008880-25	Aeicor Aluminum v. Gold Coast Roofing & Building
008888-01	Towne So. Plaza v. Custom Repairs
008935-01	Douma Contractors v. So. Fla. Construction Co.
009035-08	Patent Scaffolding v. J.M. Walters Co.
009049-04	Blaine Plastering v. Stvenson Building & Design
009199-04	Parkinson Corp. v. Gracon Contracting Inc.
009382-13	Tarlow, Wm. v. M. Price Development Corp.
009620-17	Causeway Lumber v. DEH Construction Co.
009665-24	Jones & Erickson v. Corn Construction Corp.
009690-23	Dale Industries v. Emerson Steel and Construction
009705-24	U.S. Fidelity v. Avro Cable Construction Inc.
009748-03	Cris Interiors Construction v. Palm D'oro Develop.
010033-11	Noland Co. v. David Bishop Plumbing Inc.
010057-10	Savage Construction Corp. v. Flour Danier Services
010387-10	Delta Construction v. Employers Insurance
010401-11	MLM Fla. Yellow Pages v. Tamarac Air Conditioning
010488-16	Bass & Ross v. Howard Torn Construction Assoc.
010534-02	Sisco Erectors v. Knight Erection and Fabrication
010633-14	Exclusive Services v. Draline Development Corp.
010634-07	S.E. Casulty v. J.L. Erectors
010814-01	Level Line Tile Co. v. Gucci Construction Inc.
010815-24	Level Line Tile Co. v. Elite Builders Inc.
010827-21	Marcon Builders v. Klee, J. Walter
010905-09	L & W Supply Corp. v. Tri County Drywall & Plaster
010925-01	Level Line Tile Co. v. Superior Homes Inc.
010988-12	Citicorp North Am. v. J.L. Dial Construction Inc.
010996-22	Urban Custon Home v. Jones, Terry
011028-12	Addison Steel Inc. v. SAC Construction Co.
011048-19	AD A Room of So. Fla. v. Birdsall, Douglas
011095-24	Fla. Air Cond. v. Broward Heating and AC
011235-01	Focus Development of Fla. v. Rudy's Sirloin Steaks
011256-01	CJB Enterpr. v. Robert Cormine Builders Inc.
011301-16	Abams Dewind Machiners Co. v. L & L Construction
011343-23	Tracy Temp. v. Durd Construction Corp.
011434-23	Mission Bay Development Co. v. RHJ Contracting
011449-05	Federal Maintenance Inc. v. Duro Construction
011475-12	S.E. Casulty v. Don Connolly Construction Inc.
011613-01	Aetna Casulty v. Miami Roofing and Coating

011619-23	Cannati, Ralph v. J & H Construction
011669-19	Vigilante, Frank v. V. and S. Corp.
011694-22	Tenebaum, Stanley W. v. Trincale Homes Inc.
011751-24	Barclase Corp. v. Bar Builders Inc.

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Air Conditioning Equipment, Inc. v. Rogers, 551 So. 2d 554 (Fla. 4th DCA 1989).

All Florida Surety Co. v. Coker, 88 So. 2d 508 (Fla. 1956).

Alles v. Department of Professional Regulation, Construction Industry Licensing Board, 423 So.2d 624 (Fla. 5th DCA 1982).

American Agronomics Corp. v. Ross, 309 So.2d 582 (Fla. 3rd DCA 1975).

Bromer v. Florida Power & Light Co., 45 So. 2d 658, (Fla. 1949).

J.M. Beeson Co. v. Sartori, 553 So.2d 180 (Fla. 4th DCA 1989).

Cheezem Development Corp. v. Intracoastal Sales and Service Inc., 336 So.2d 1210 (Fla. 2d DCA 1976).

Darin & Armstrong, Inc. v. Monte Costella, Inc., 542 So. 2d 1053 (Fla 3rd DCA 1989).

David v. B & J Holding Corporation, 349 So.2d 676 (Fla. 3d DCA 1977).

D.D. Jackson v. Riley, 427 So.2d 255 (Fla. 5th DCA 1983).

DSA Group, Inc. v. Gonzalez, 555 So. 2d 1234 (Fla. 2nd DCA 1989).

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Fletcher v. Laguna Vista Corp., 275 So.2d 579 (Fla. 1st DCA 1973).

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Gatwood v. McGee, 475 So.2d 624 (Fla. 5th DCA 1982).

G. H. Craddock v. Greenhut Construction Company, 423 F.2d 111 (1970).

Gesco Inc. v. Edward L. Nezelek, Inc., 414 So.2d 535 (Fla 4th DCA 1982).

Home Electric of Dade County, Inc. v. Gonas, 547 So.2d 109 (1989).

Joseph v. Bray, 354 SE2d 878 (Ga Ct App 1987).

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Rudy's Glass Construction Co. v. Robins, 427 So.2d 1051 (Fla. 3d DCA 1983).

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W.C. Murphy, Architect, P.A. v. W.P. Austin Construction Corp., 547 So.2d 302 (Fla. 3rd DCA 1989).

Westinghouse Electric Corp. v. Nielsons, Inc., 647 Fed Supp. 896 (1986).

Winn Dixie Stores, Inc. v. Cochran, 540 So.2d 914 (Fla. 5th DCA 1989).

APPENDIX C

INTERVIEWS CONDUCTED

Mr. Burton Harris of Security Bond Associates, Inc., Miami, Fl.

Mr. Larry R. Leiby of Leiby, Elder, Ferencik, and Libanoff, Miami, Fl.

Mr. Alan C (Peter) Brandt, of Chappelle and Brandt, P.A., Ft. Lauderdale, Fl.

Mr. Steven Siegfried of Siegfried, Kipnis, Rivera, Lerner, Delatorre P.A., Miami, Fl.

Mr. Alan S. Becker of Becker, Poliakoff, & Streitfeld P.A., Ft. Lauderdale, Fl.

The late Mr. Gene Marks of Marks Brothers Inc., Miami, Fl.

Mr. Dick Irwin of Farmer and Irwin, Riviera Beach, Fl.

Mr. John C. Harrison Jr. of Harrison Construction Corp., Miami, Fl.

Members of the Construction Law Section of the Real Property Section of the Florida Bar:

W. H. Benson, A.C. Brandt, Jesse Diner, D. G. King, L. R. Leiby, R. Pershes, and Tom Shahady.

Members of Florida Association of Plumbing and Heating Contractors:

S. Welcovitz, H. Green, M. Ellis, H. Gresham, C.S. Swain, A. Karch, J. Thompson, D. Smith, P. Gatto.

Mr. Charles Hartley, Construction Risk Management, Inc., Tampa, Fl.

Mr. James Carmel, of Builder's Notice, Ft. Lauderdale, Fl.

Mr. James B. Chaplin, Esq. of Mediation Inc, Ft. Lauderdale, Fl.

Mr. Ronald S. Steiner, P.E. of Fogel and Associates, Ft. Lauderdale, Fl.

Mr. George E. Spofford IV, of Cummings, Lawrence & Vezina, Ft. Lauderdale, Fl.

Mr. Brock Andrews, High Tech Interiors, Inc. Ft. Lauderdale, Fl.

Mr. H. Eugene Cowgers, PE, Chairman of the State of Fla. Arbitration Board, Tallahassee, Fla.

Mr. Clay McGonagill, Chief of Litigation, DOT, Tallahassee, Fla.

SEMINARS ATTENDED

"Legal Pitfalls in Construction," American Society of Civil Engineers, ASCE, Continuing Education, New York, June 28, 1990.

"Mechanics Lein Law Seminar," Hosted by Broward Builders Exchange, Ft. Lauderdale, Fl. 1990.

APPENDIX D

SURVEY

1. The Questionnaire

Date_____

Construction Litigation
Questionnaire

Please circle the appropriate answer or answers (more than one answer may be applicable). Comments are not necessary, however, we would be very happy to read and consider anything which you would care to add.
Are you a:

1. General Contractor 2. Subcontractor
3. Material supplier 4. Other_____

1. Have you ever been involved in construction litigation? Y/N

2. If you have been involved in construction litigation what was the nature of the conflict?

A. Design problem B. Code problem
C. Delay D. Quality of the work
E. Defective workmanship F. Non-Payment
G. Other_____

3. If Non-Payment, can you identify the contributing cause?

_____

_____

4. Do you require a written contract before initiating services?

A. Always B. Mostly C. Sometimes D. Never

5. If you require a contract is it:

A. Trade standard (Name)_____ B. Self-defined

6. Do you have a regular attorney? Y/N

7. Before executing a contract do you review it:
   Alone Y/N With a third party C. With an attorney
8. Do you feel that you understand all the terms & conditions of your contracts? Y/N

9. How does the threat of litigation effect you:
   A. Not at all B. Adversely C. Positively

10. What in your opinion are the major causes which lead to construction litigation?
   A. Lack of knowledge
   B. Greed
   C. Lack of regulation
   D. An incompetent work force
   E. Willful negligence
   F. Other_____

11. Have you ever used: A. Arbitration B. Mediation
to settle a dispute?
12. If so, were you satisfied with the outcome? Y/N

2. Responses to question 3

GENERAL CONTRACTORS
Question 3. If Non-Payment, can you identify the contributing cause?
18. Distribution of funds to other projects.
39. Varies.
44. Owner's reluctance to pay.
45. Owner under financing.
49. Greed, dishonesty.
52. Bad developer
58. Incompetent GC who should never have been issued a license.
60. One person did not pay another.
65. Owner went bankrupt.
66. Owner lack of funding program to meet needs of project.
71. Attempt by owner to not live up to his responsibility of payment upon completion.
72. Owners failure to acknowledge interference with work caused by owners changes.
73. Owner/Developer went out of business.
85. Non-exis?tion of change orders, and spent more money than the client had.
86. Developer thought economic pressure would make us settle for much less than owed.
90. Owner just plain slippery.

97. Company spent may funds then went out of business.
119. Greed.
125. Contract wording was intentionally designed for ease of non-payment.
126. Customer filed chapter 7.
138. Bankruptcy.
145. Owner did not want to pay for extra work.
167. Owner refused to pay approved change orders.
185. Breach of contract.
188. Owner's greed.
193. Greed.
195. The 45 day grace period for subs to file notice to owner.
197. Owner went banktrupt.

SUBCONTRACTORS
Question 3. If Non-Payment, can you identify the contributing cause?

1. Payment held from contractor by owner thru no fault of this sub.
4. Broke contractor
6. Gen. Contractor problem with owner which affects sub getting paid.
8. Non Payment from owner.
11. Owner doesn't pay general and we go after owner w/lien -- poorly written contract -- GC goes bankrupt.
12. Owner ran out of funds.
17. The bank who held mortgage should have made sure they secured release of lien from subcontractor before funding to owners.
18. Distribution of funds to other projects.
21. GC or developer using money for other than project.
24. Poor owner or GC.
27. Non-payment from owner/developer.
28. Lack of specification as to jobsite responsibilities. GC unscrupulous.
31. Retention held to end of job. Price does not have money to pay off at end. We loose.
32. Not enough money. Not enough space to list.
34. Contingent Payment Clause.
35. Abuse of Chapter 11.
48. Dispute about who was responsible for damage.
50. Contractor not passing through funds collected from the general.
52. Bad developer.
55. Back charges, delays.
56. Owner did not pay general.
57. Small subcontractors and cash poor general contractors who keep the payment draw knowing that litigation is costly and time consuming.
58. Incompetent GC who should never have been issued a license.

59. Lack of funds at end of project.
61. Contractor over drew his money and job came up short.
64. Usually financial trouble by G.C.
73. Owner/developer went out of business.
74. General Contractor co. mingled funds, used money paid by owner to continue work on other projects.
75. Lack of money and lack of desire to pay.
78. Too large a balance due upon completion. Economy.
79. General Contractor did receive payment from owner and so, the contractor did not pay his sub-contractor.
82. Prime contractors holding money. Public works jobs cannot be liened. Surety can hold money for years.
83. Owner not having the money. Problems between owner/architect and the general contractor.
84. Company went out of business.
87. County work with construction manager - cumbersome system, totally unable to make decisions.
93. Disbursement of funds inappropriate.
97. Company spent my funds then went out of business.
99. Deadbeat, no money.
101. Work not completed properly by other trades so owner does not pay G.C. - G.C. fraud.
102. Irresponsible subcontractors.
104. Misappropriation of funds by contractor.
107. Bad contractors/unscrupulous owners.
113. Financing - bonding.
115. Bank foreclosed, building did not sell.
118. Dispute between G.C., Arch. and us.
121. Non-payment was because of design problem.
122. G.C. not performing for owner. G.C. demands work not covered in subs contract.
123. G.C. thrown off job.
124. Various, the majority related to non-payment by the owner resulting in default by the GC.
130. General Contractor not paying us after he was paid.
133. Refusal of G.C. to pay or G.C. cash flow problems.
136. Developer ran out of money.
139. G.C. not paid. G.C.paid - choose not to pay subs.
149. Developer bankruptcy; general contractor disappearance.
150. Contractor finally went bankrupt.
156. Bankrupt
161. G.C. hold on to the money as long as he can to gain interest off it.
162. Mismanagement of funds by developer.

163. Lack of funds.
168. General Contractor and owner regarding construction forming problems.
173. Project failed, bad management and fraud by owner.
176. Developer failure.
177. Builders lack of funds (spending it elsewhere).
178. Non-payment from owner to general contractor.
180. Owner withholding retention due to general contractor, subcontractor incomplete.
183. General Contractor/Developers fail to pay our requisitions bue to bankruptcy, lack of funds or other reasons.
186. Both condo "scattershot" lawsuits and failure financially of contractor.
187. Chapter 11.

3. Data Charts

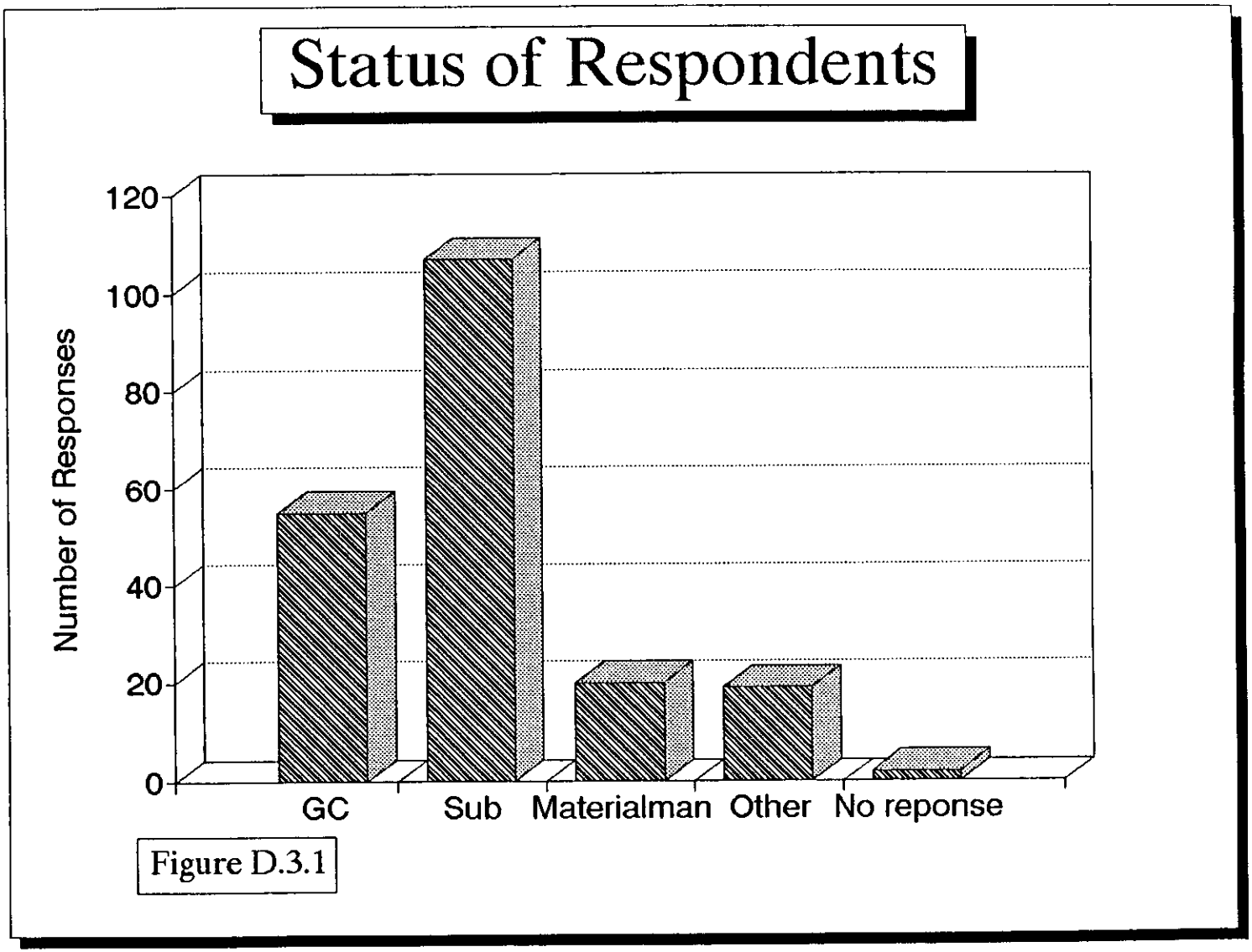
Status of Respondents
Number of Responses
120
100
80
60
40
20
0
GC
Sub
Materialman
Other
No reponse

Figure D.3.1

Status of Respondents

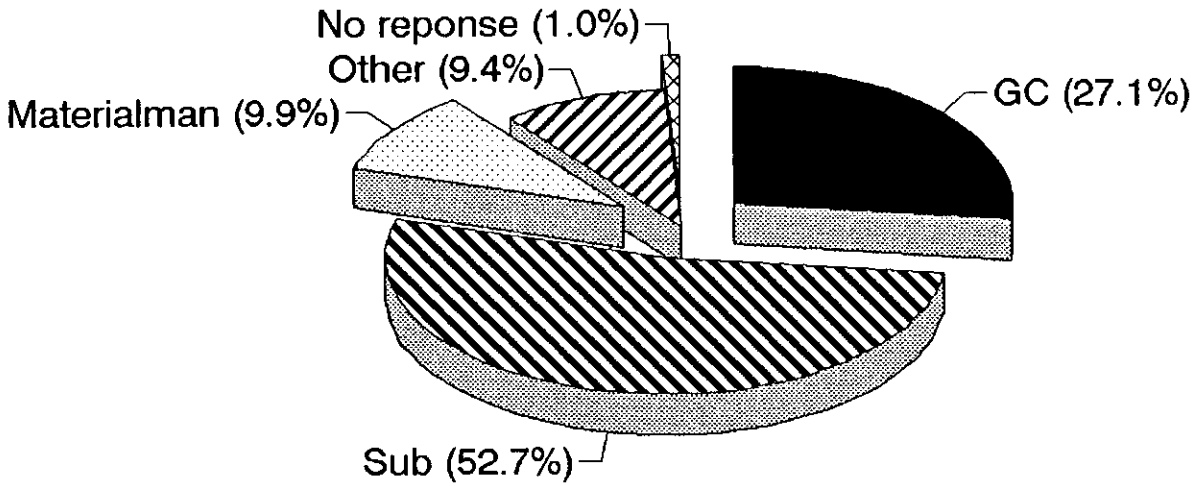

Figure D3.2.

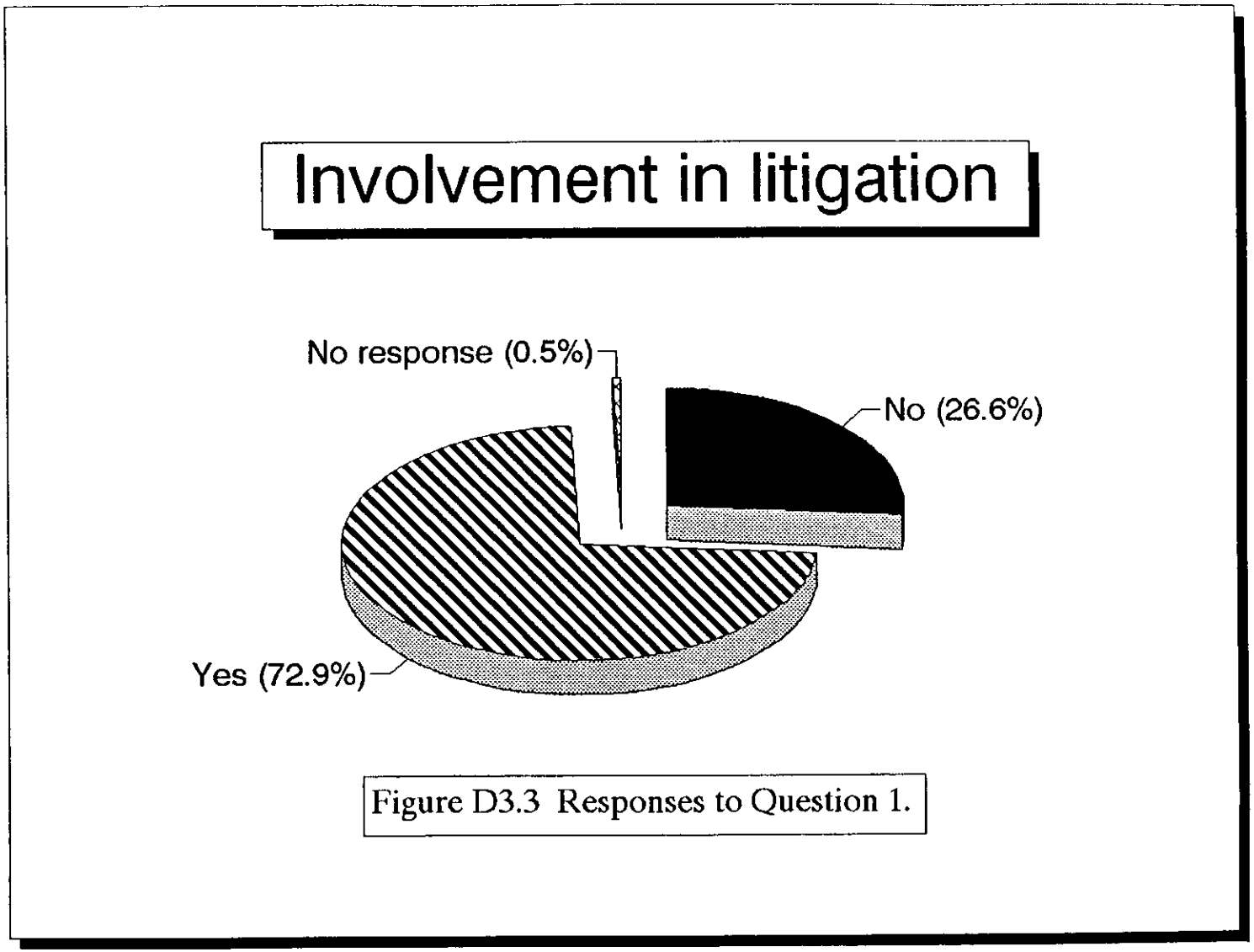

Figure D3.3 Responses to Question 1.

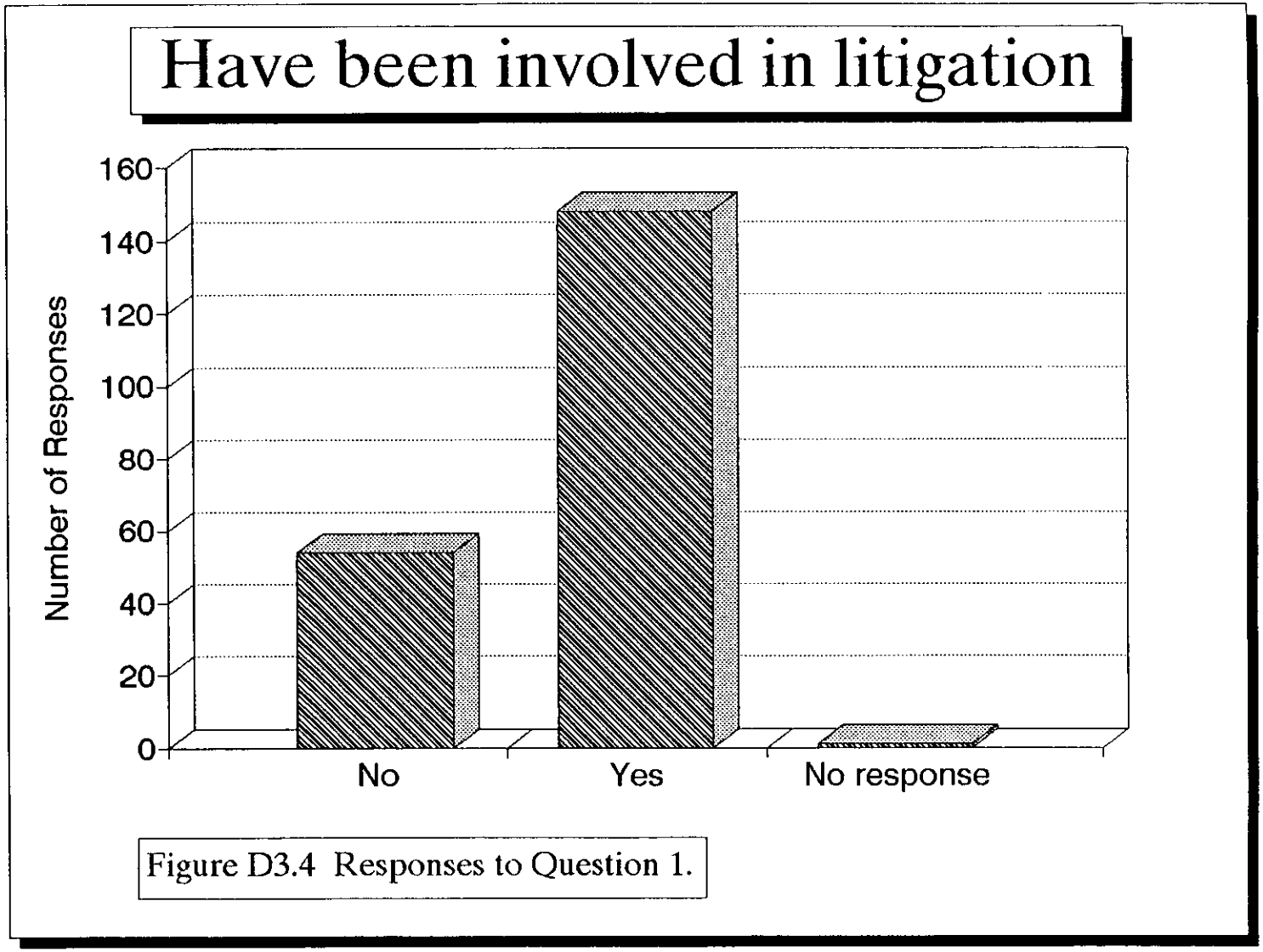

Figure D3.4 Responses to Question 1.

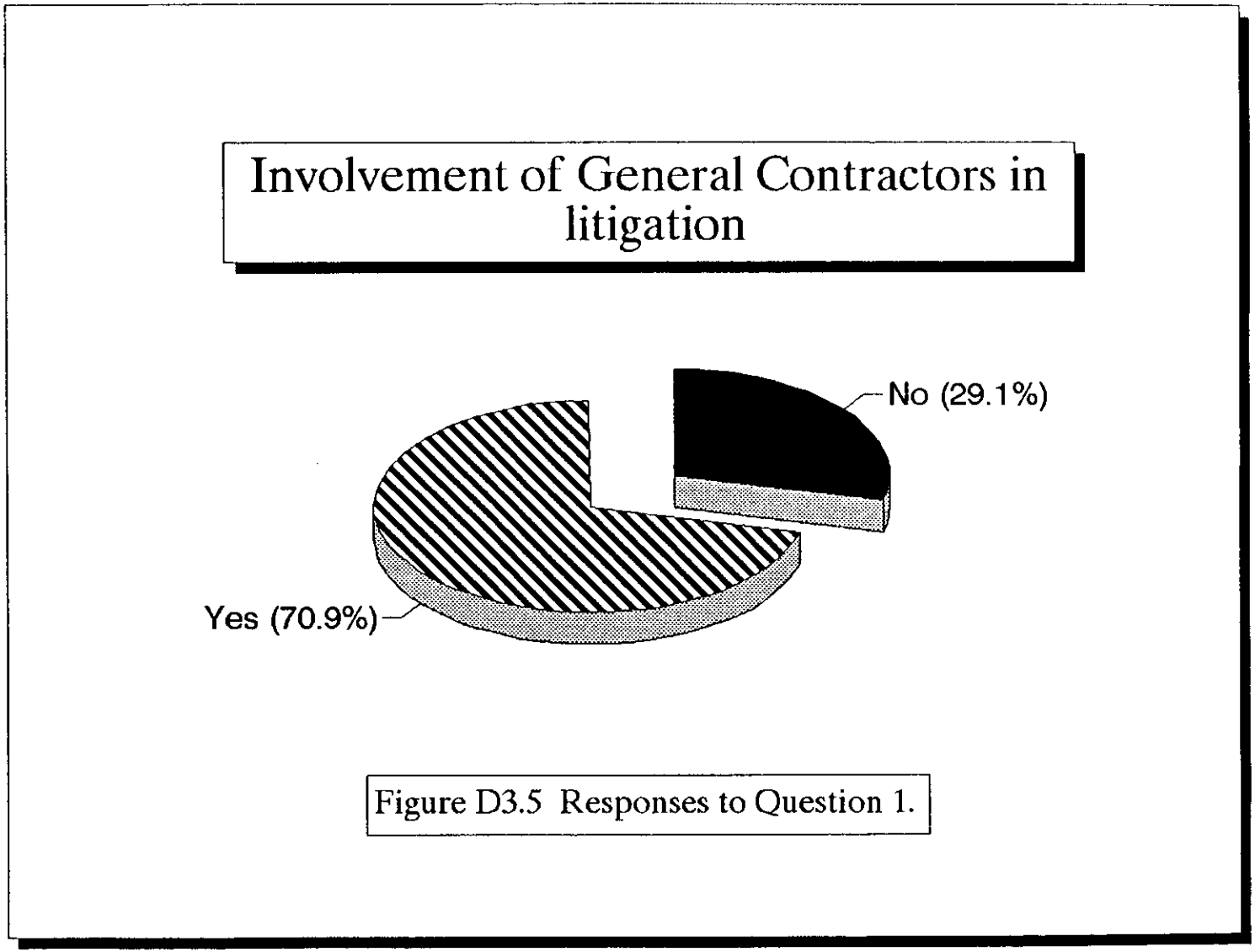

Figure D3.5 Responses to Question 1.

Involvement of Subcontractors in litigation

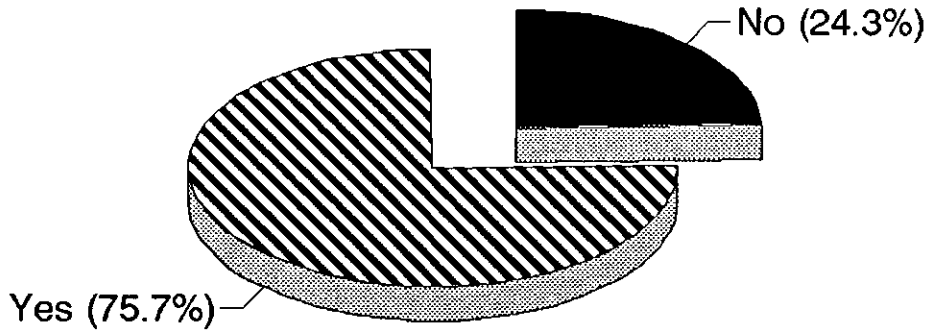

Figure D3.6 Responses to Question 1.

Involvement of Materialmen in litigation

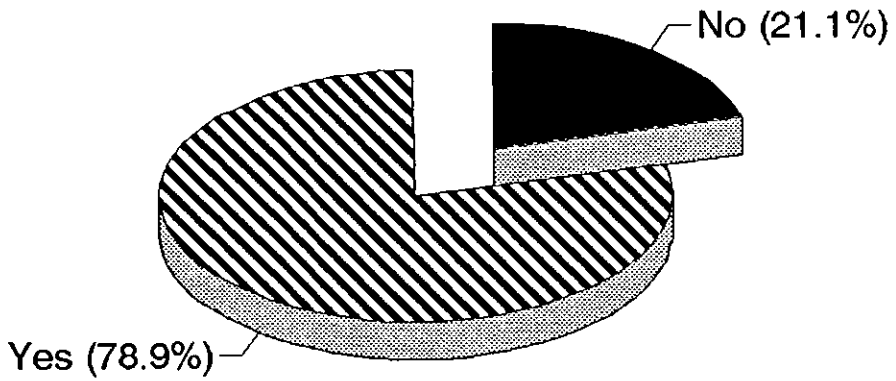

Figure D3.7 Responses to Question 1.

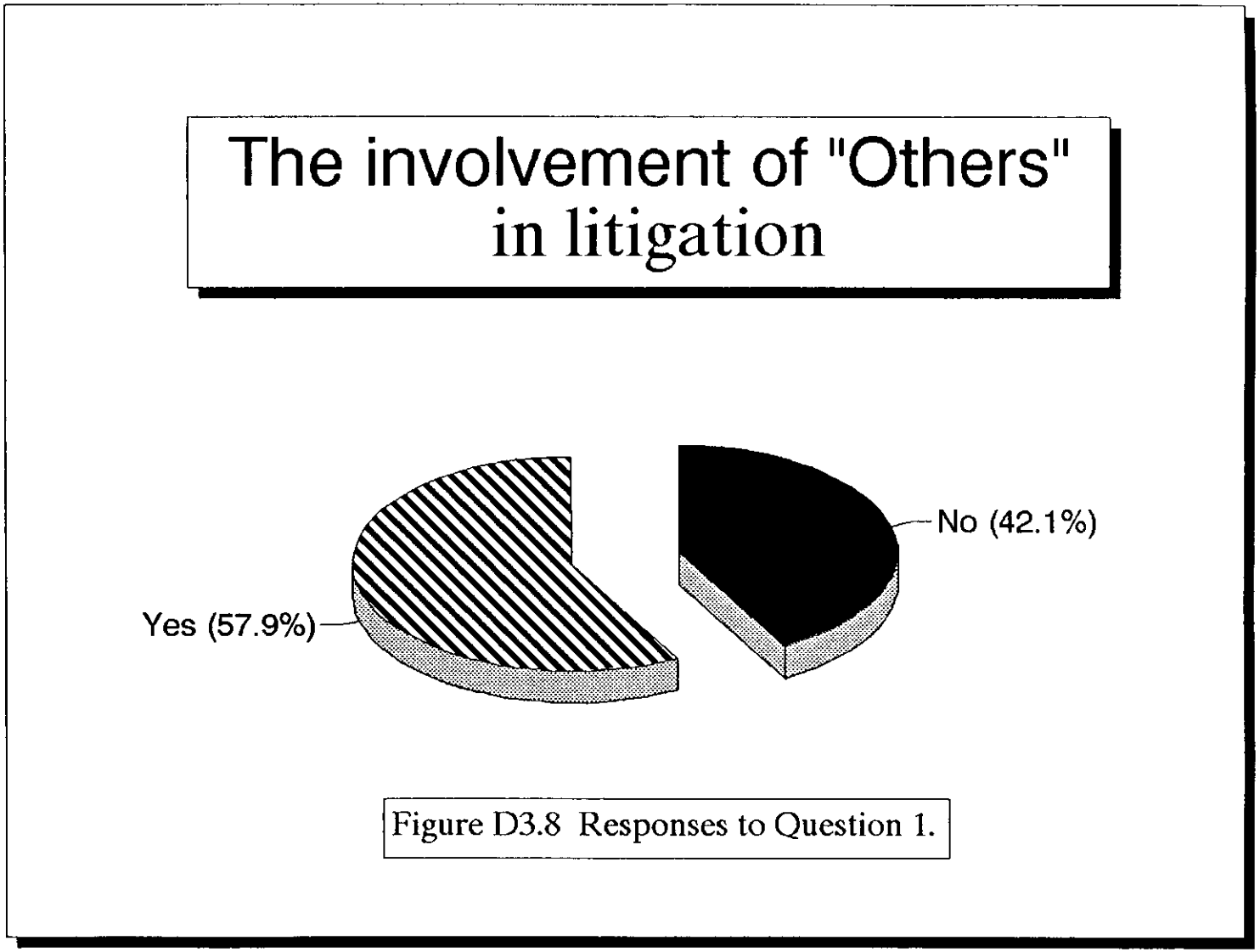

Figure D3.8 Responses to Question 1.

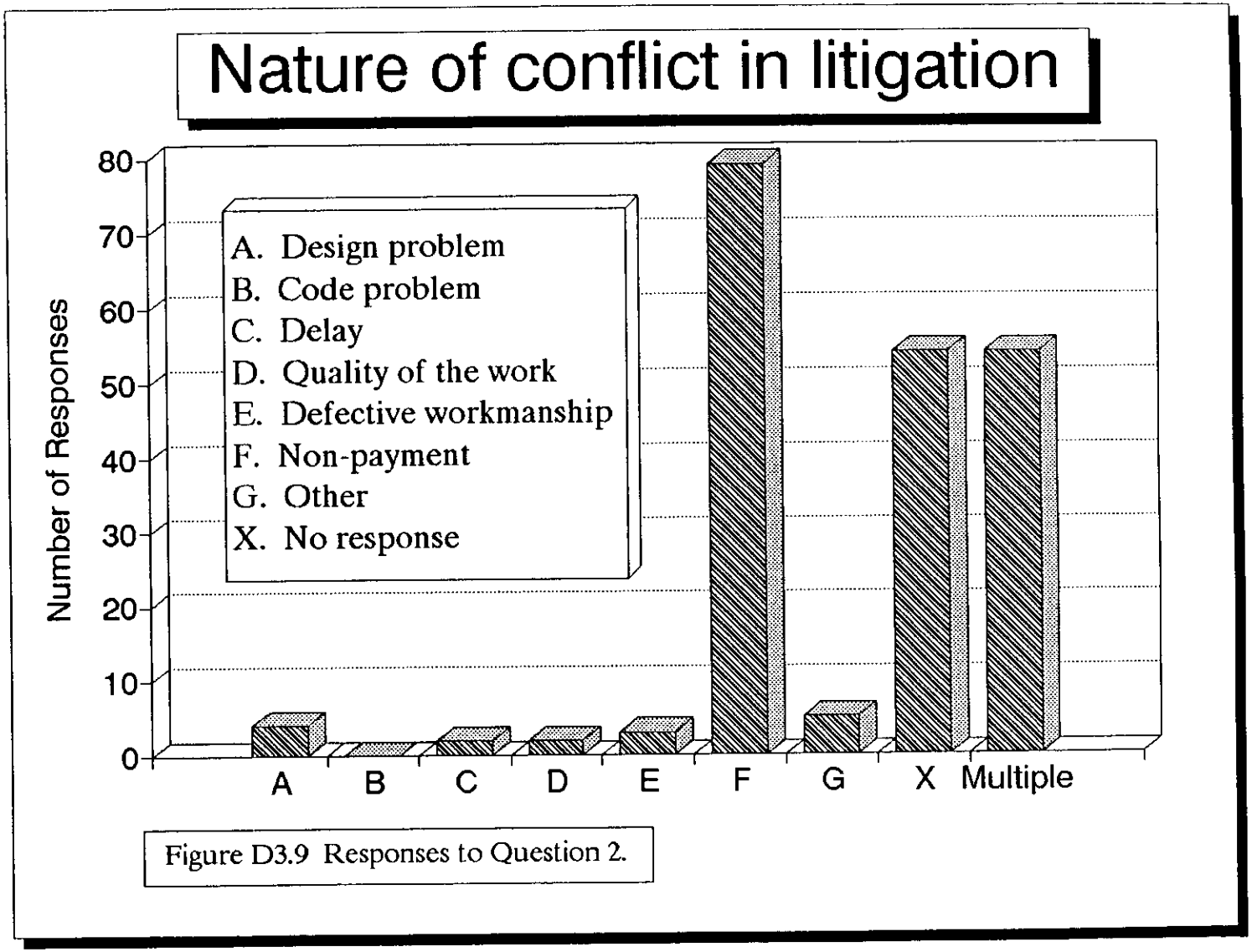

Figure D3.9 Responses to Question 2.

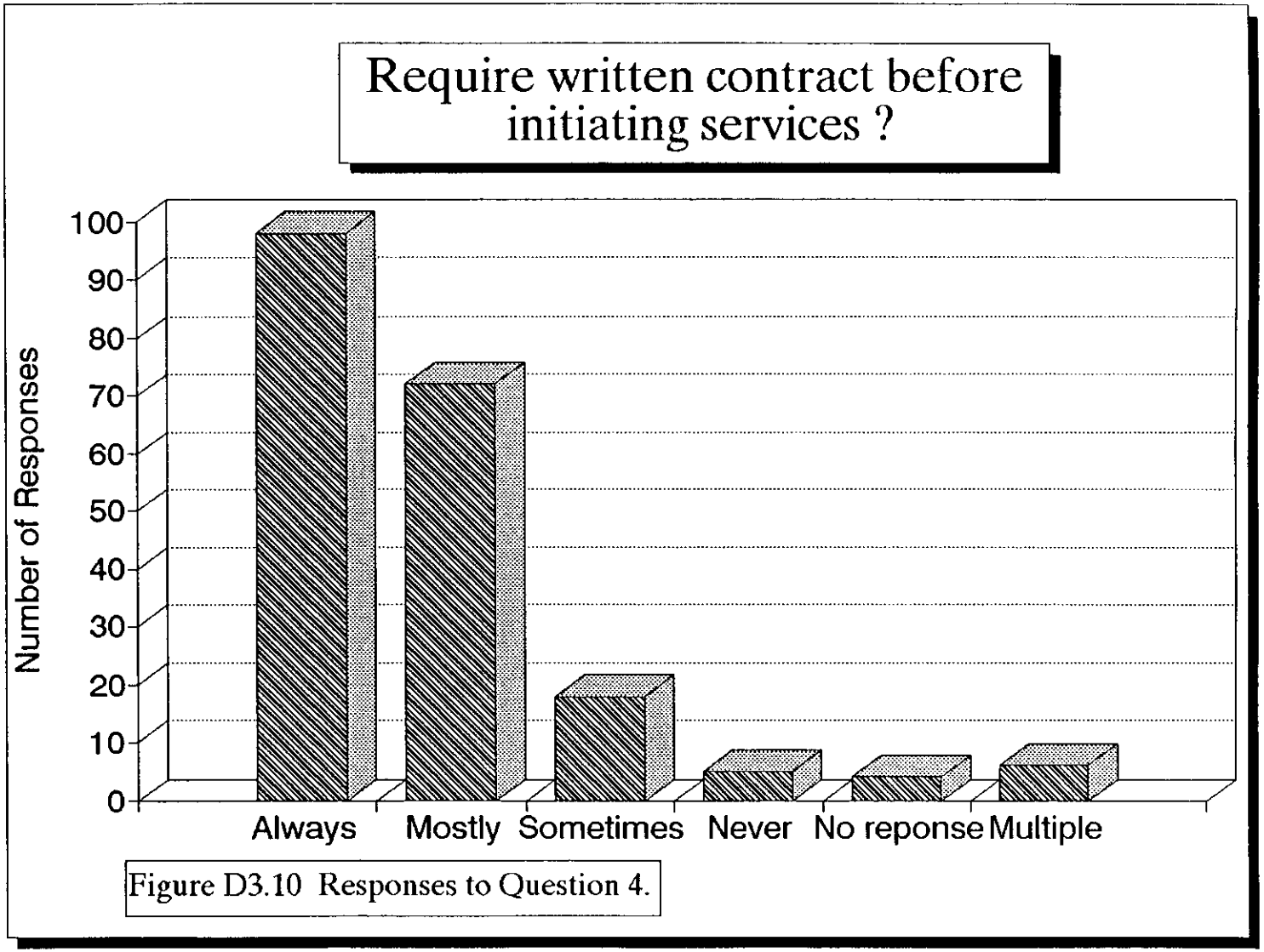

Figure D3.10 Responses to Question 4.

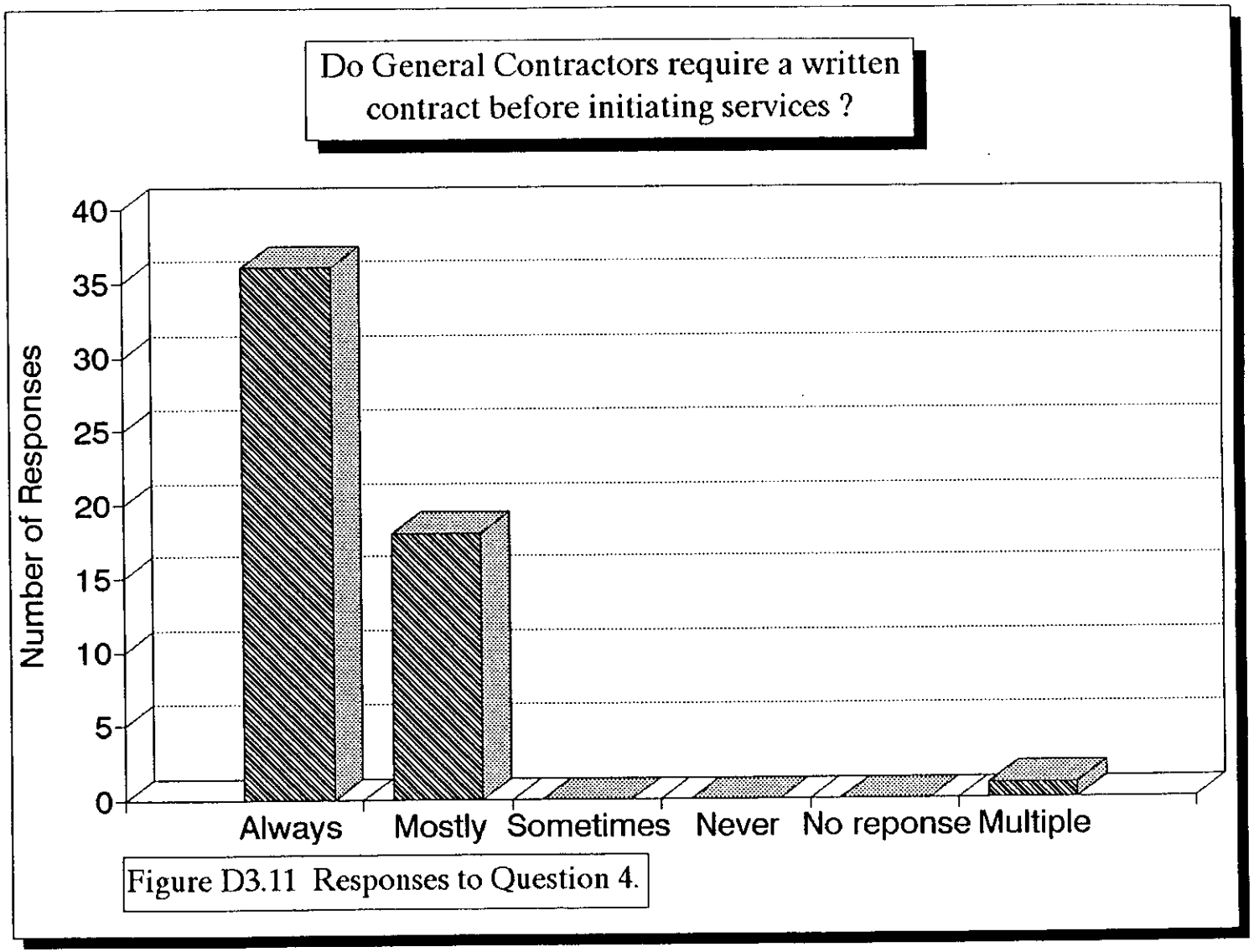

Figure D3.11 Responses to Question 4.

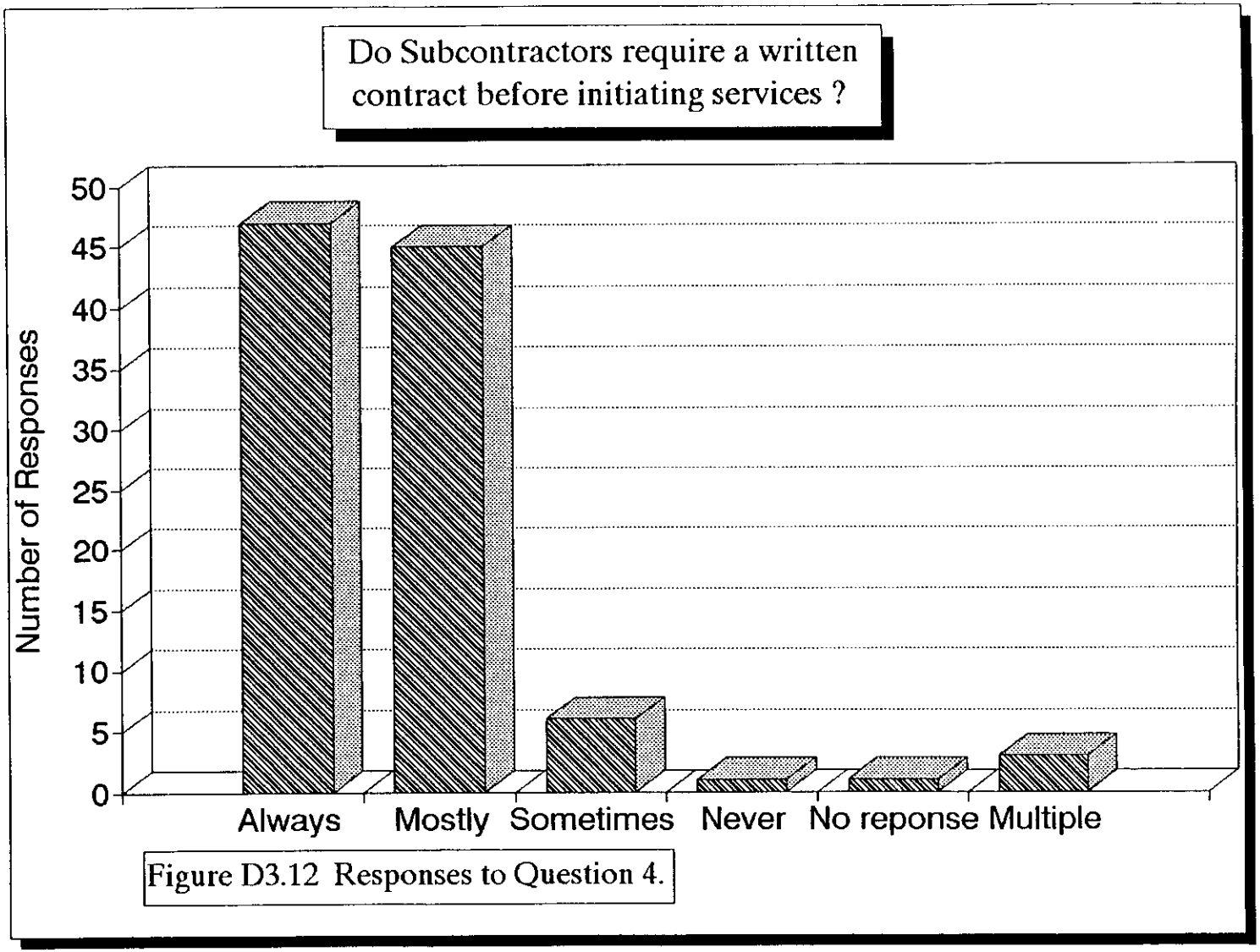

Figure D3.12 Responses to Question 4.

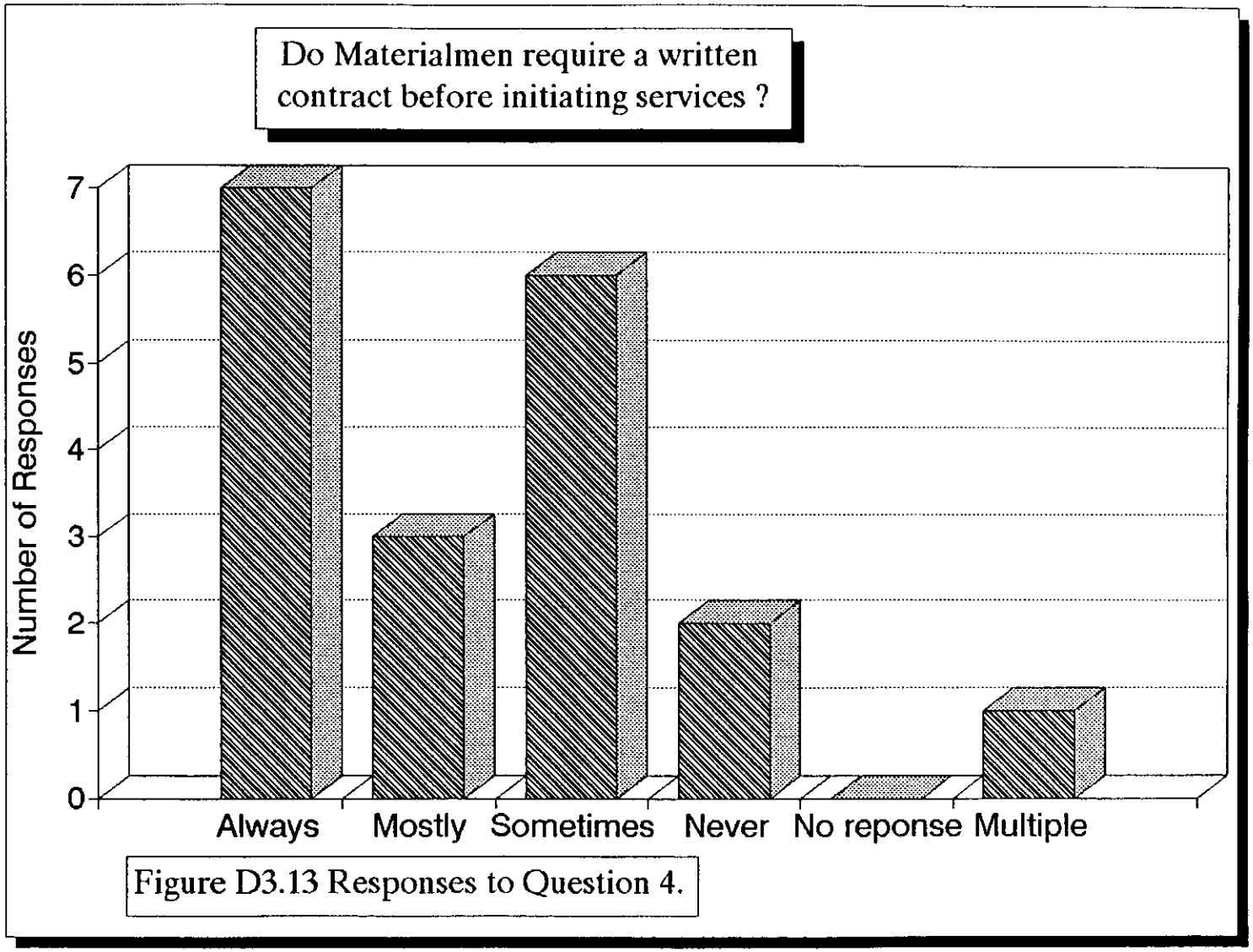

Figure D3.13 Responses to Question 4.

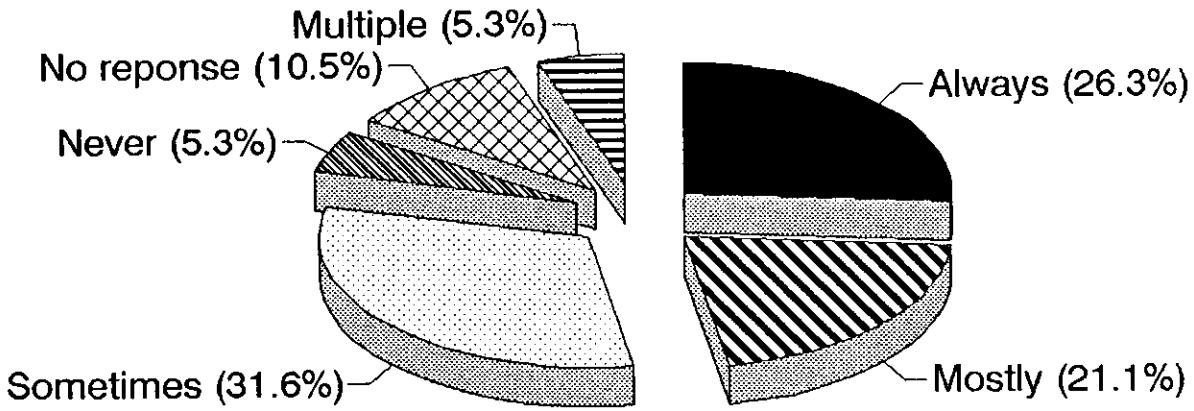

Figure D3.14 Responses to Question 4.

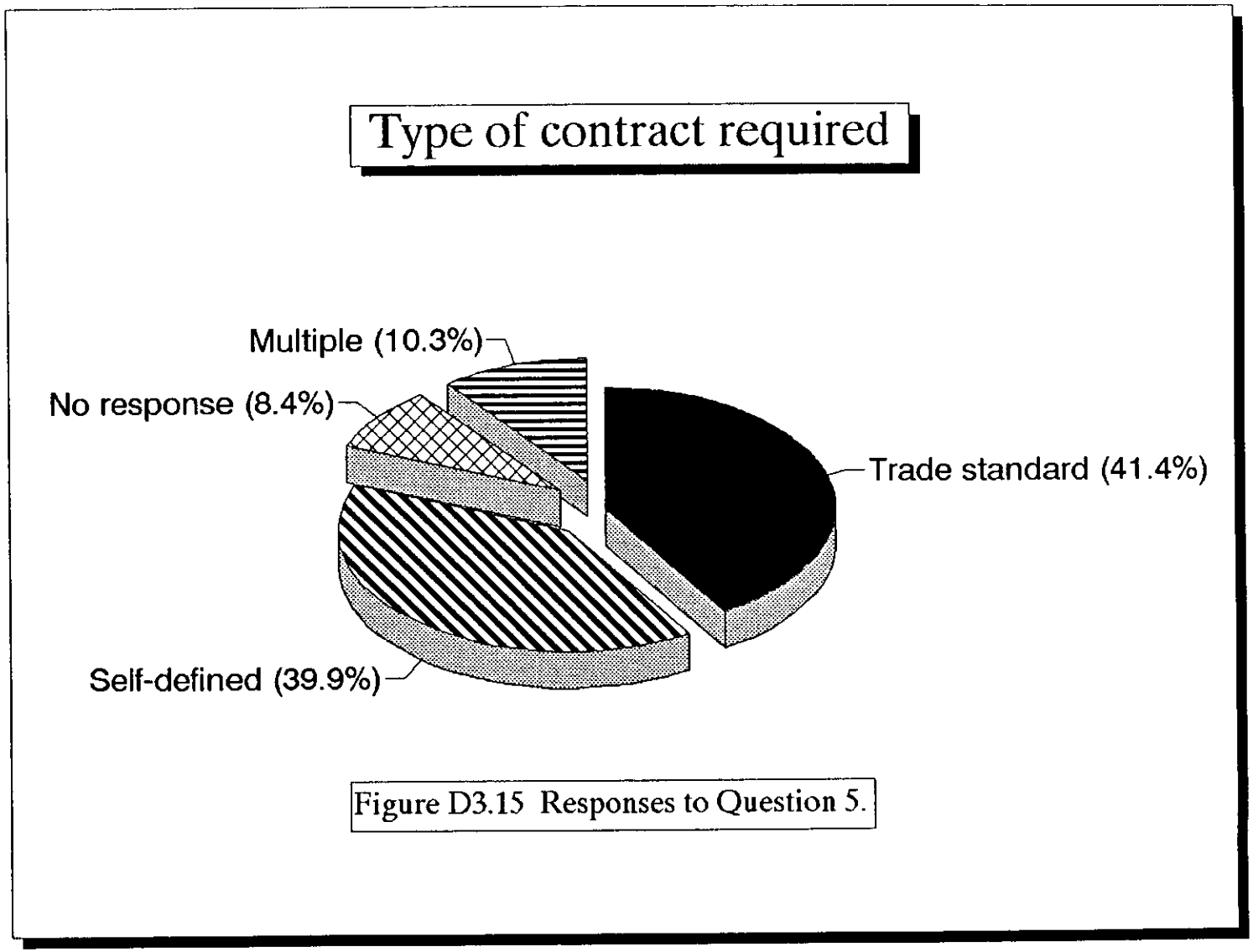

Figure D3.15 Responses to Question 5.

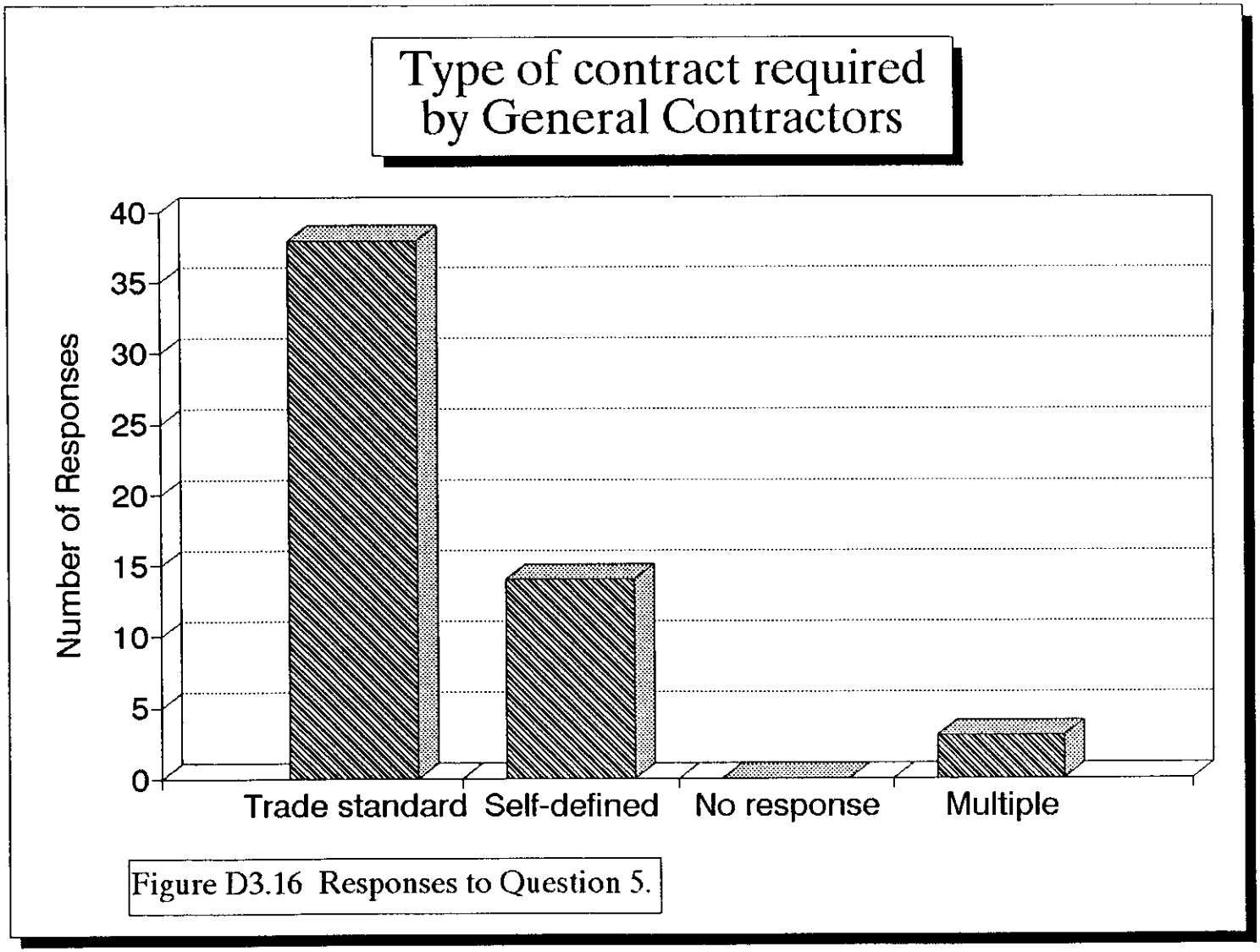

Figure D3.16 Responses to Question 5.

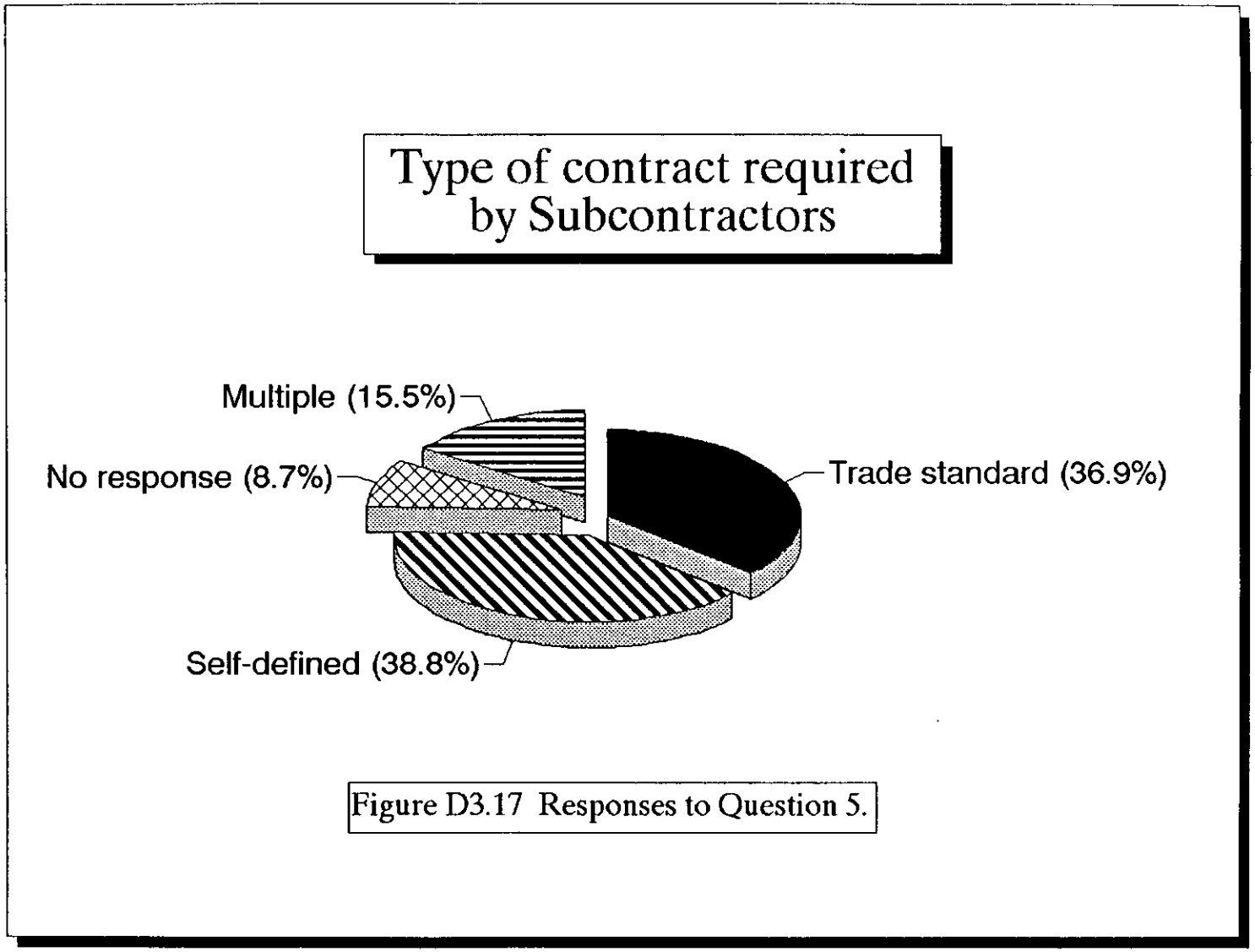

Figure D3.17 Responses to Question 5.

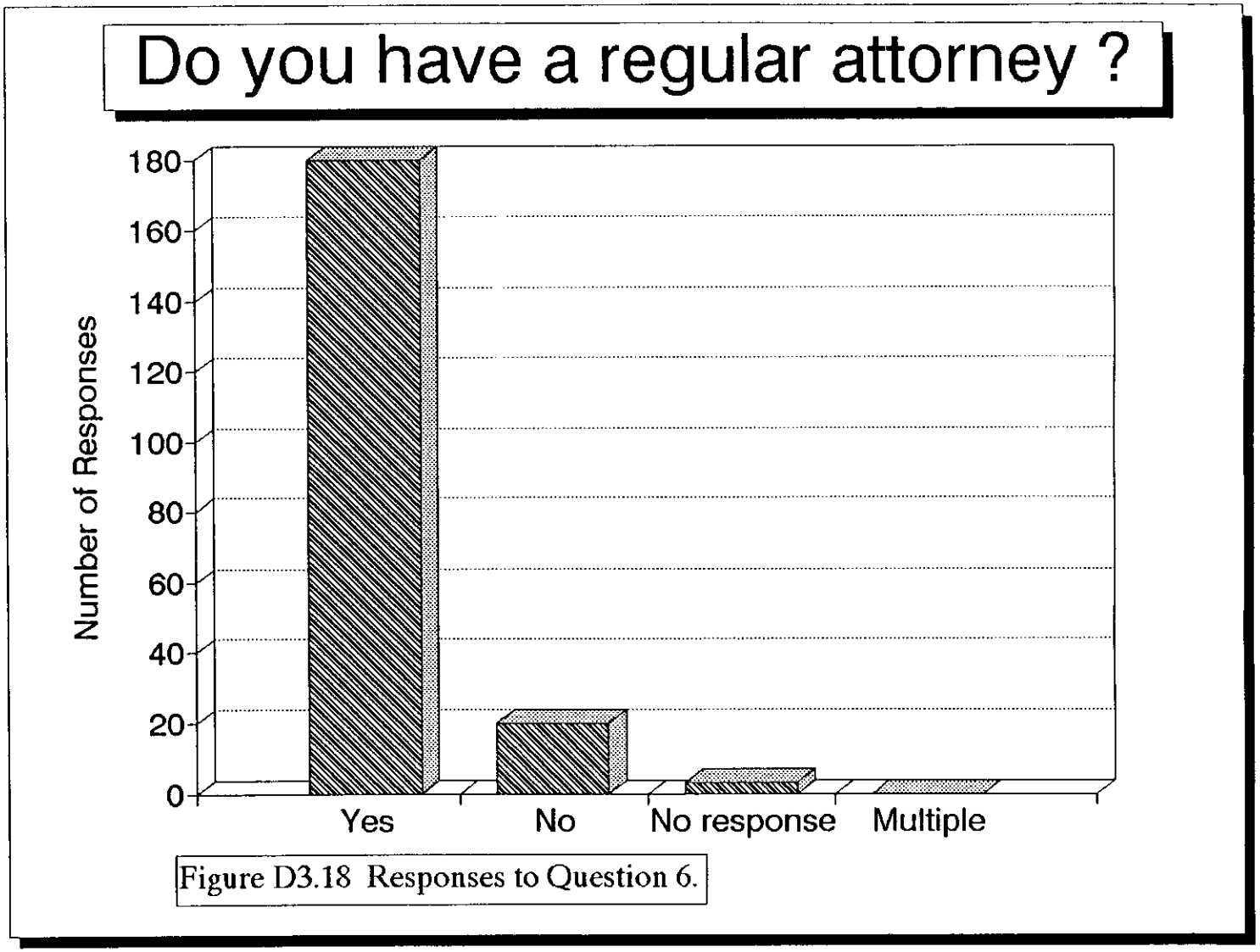

Figure D3.18 Responses to Question 6.

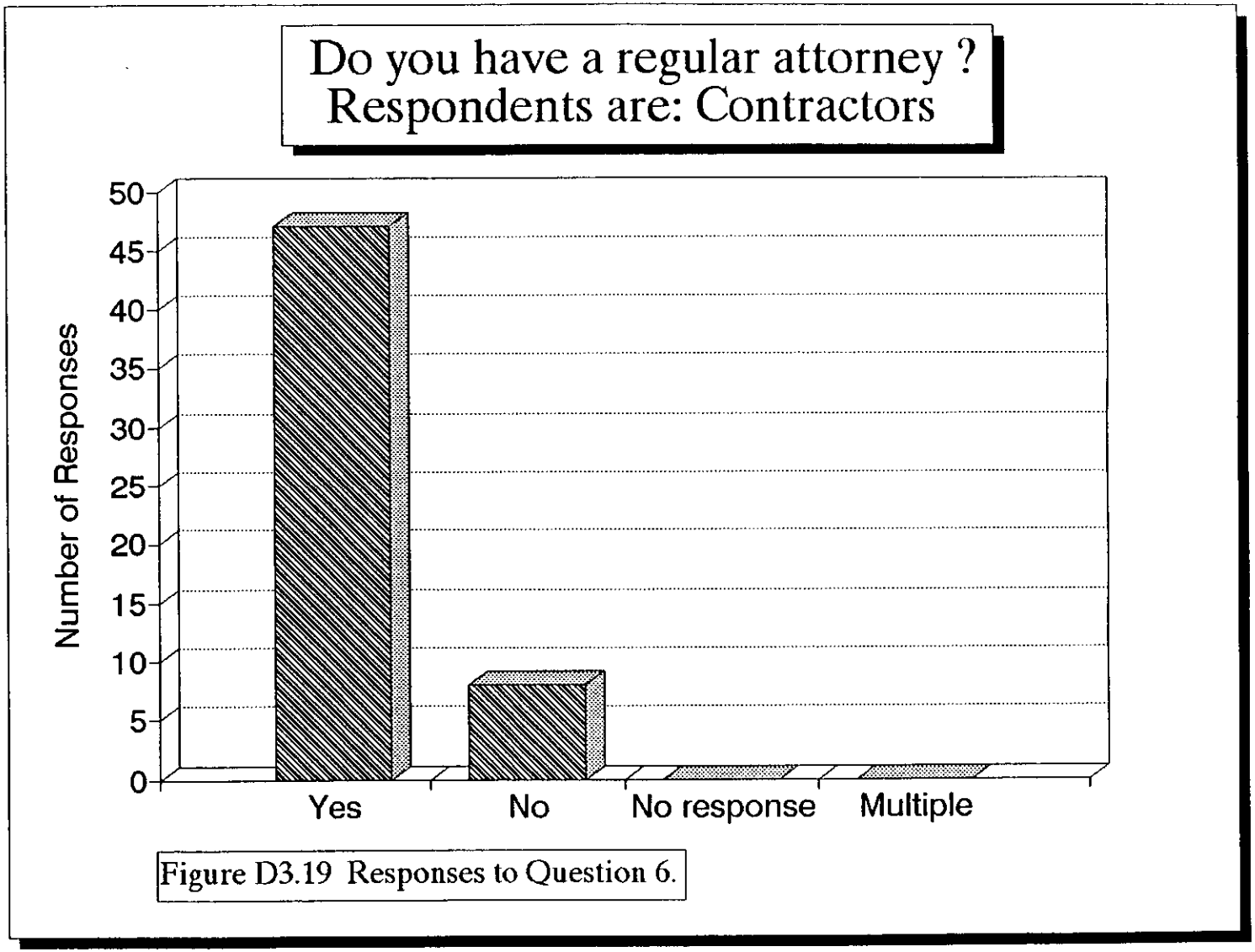

Figure D3.19 Responses to Question 6.

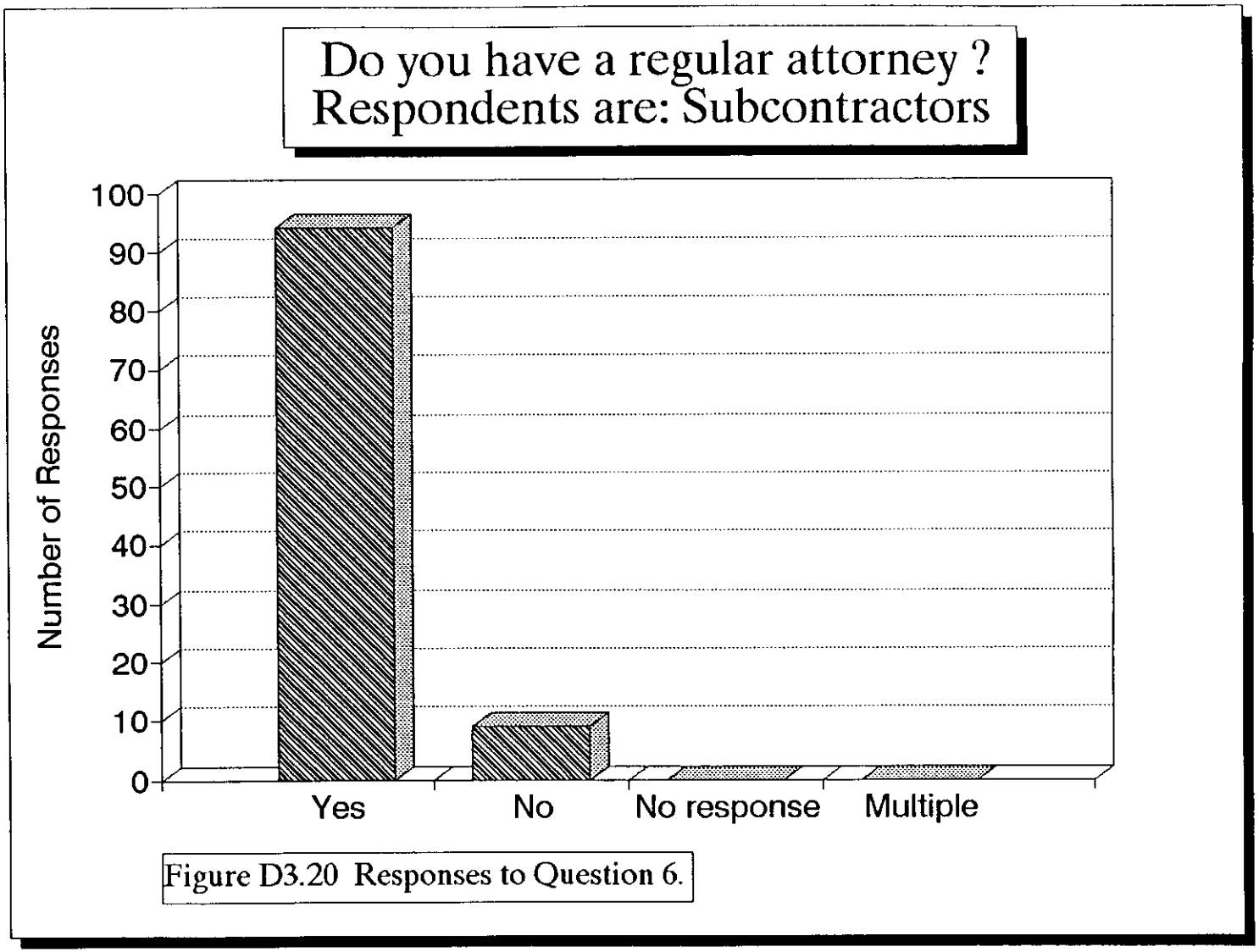

Figure D3.20 Responses to Question 6.

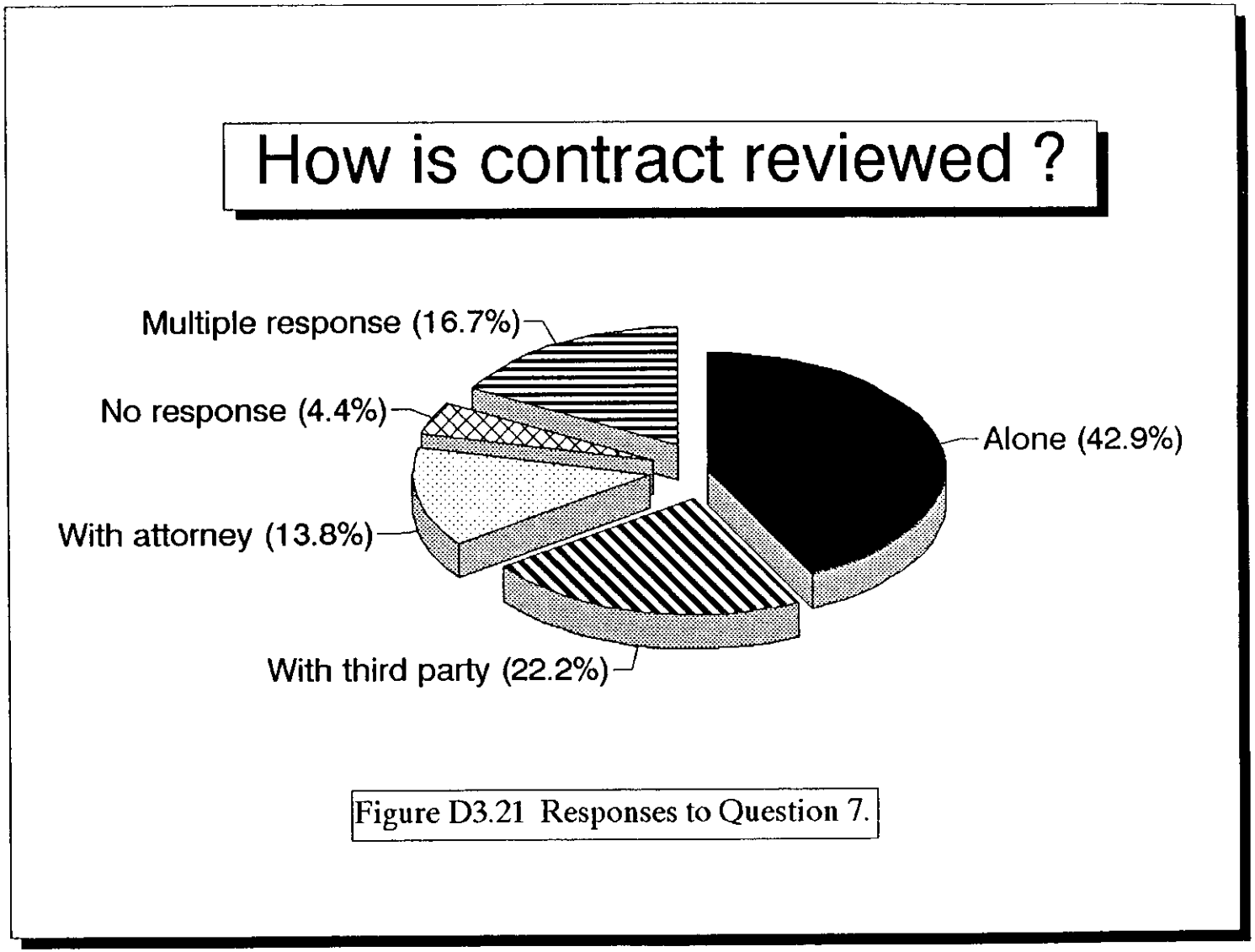

Figure D3.21 Responses to Question 7.

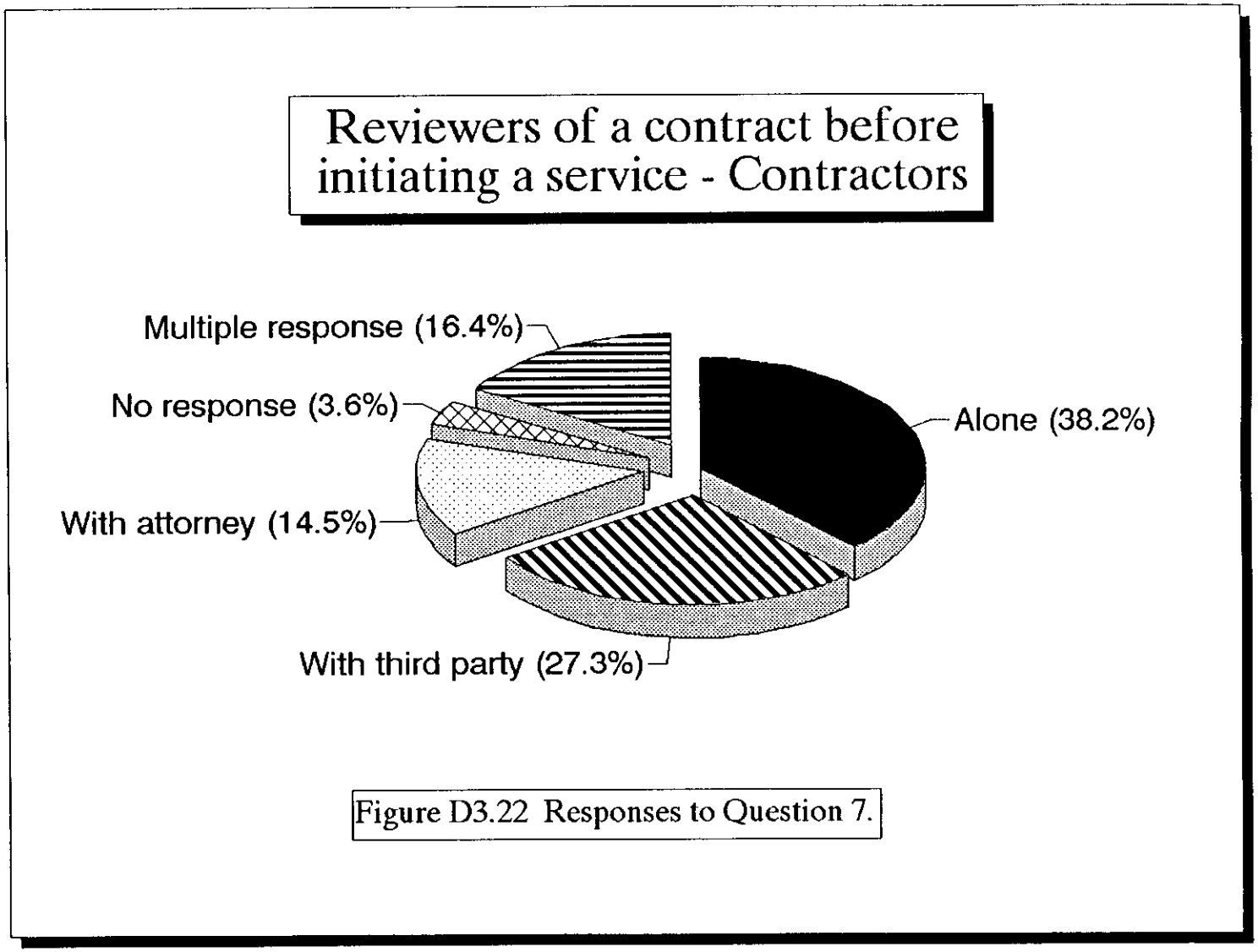

Figure D3.22 Responses to Question 7.

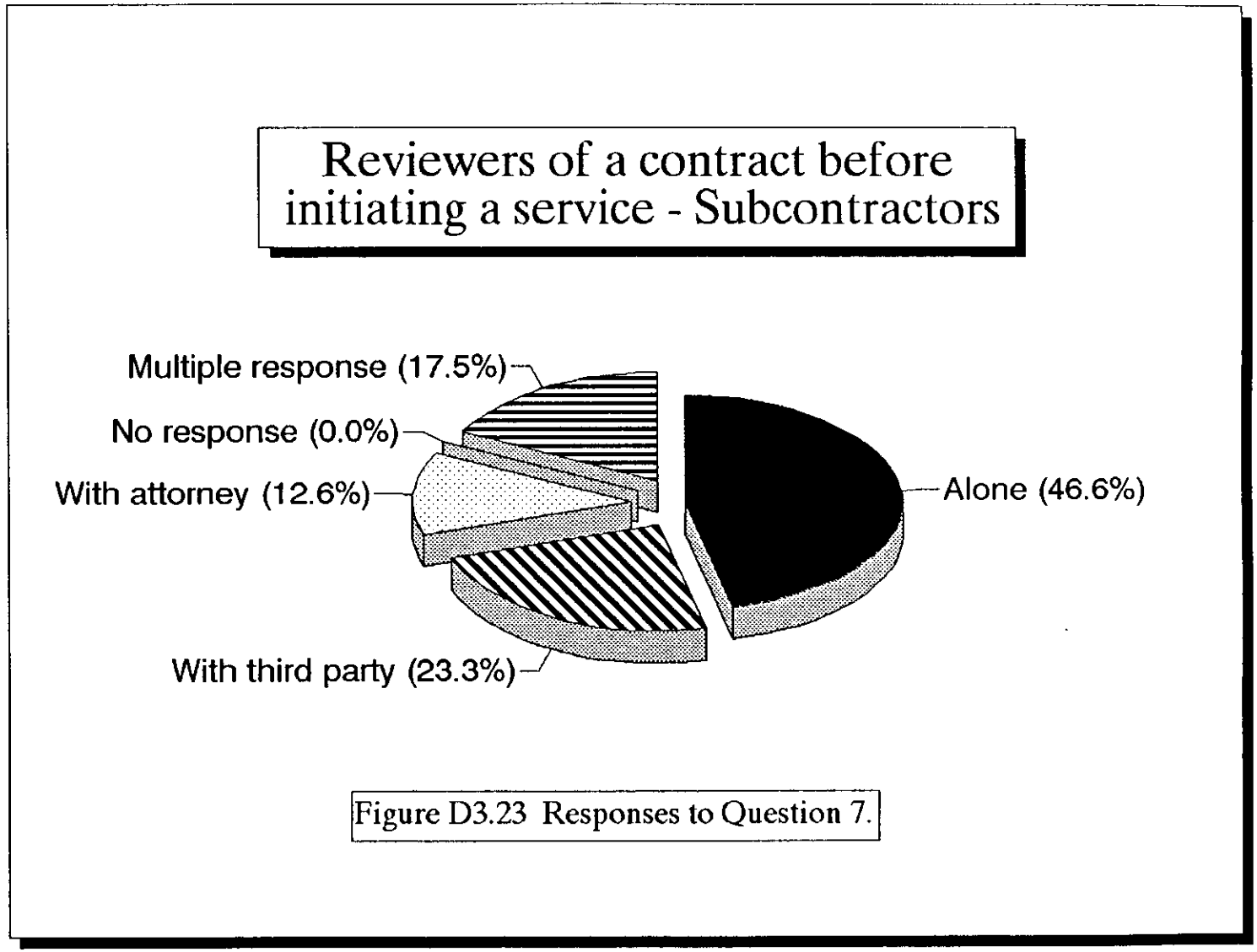

Figure D3.23 Responses to Question 7.

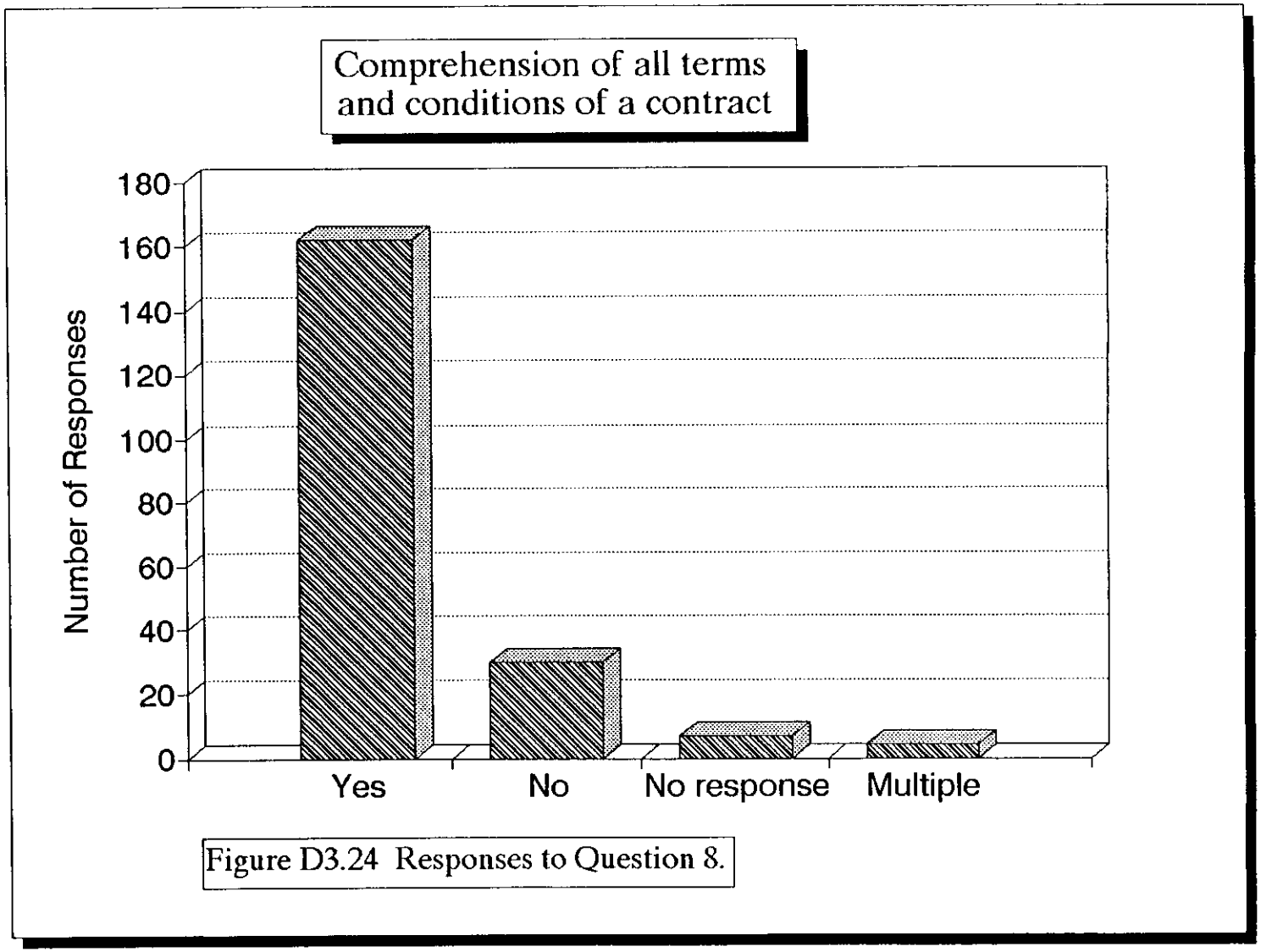

Figure D3.24 Responses to Question 8.

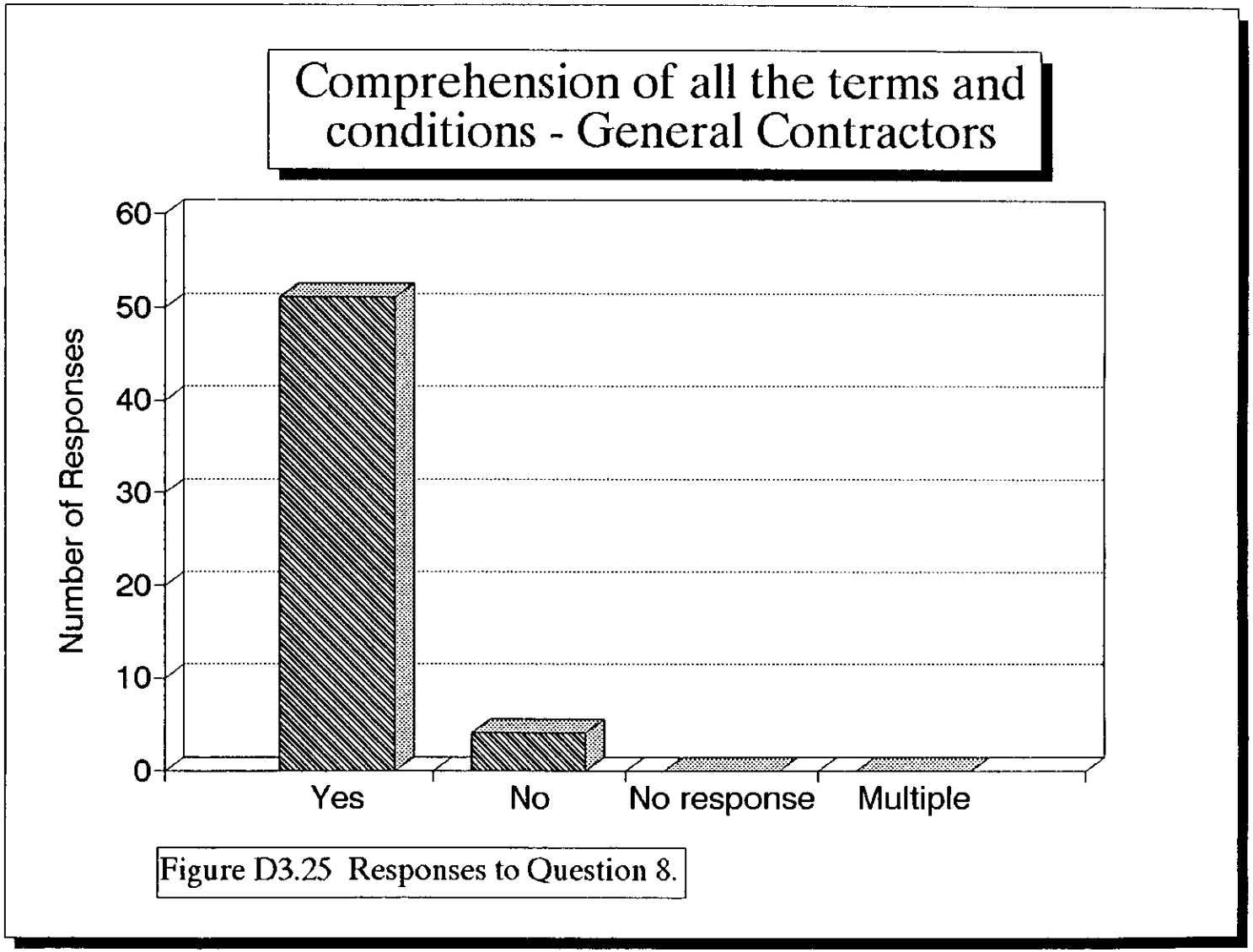

Figure D3.25 Responses to Question 8.

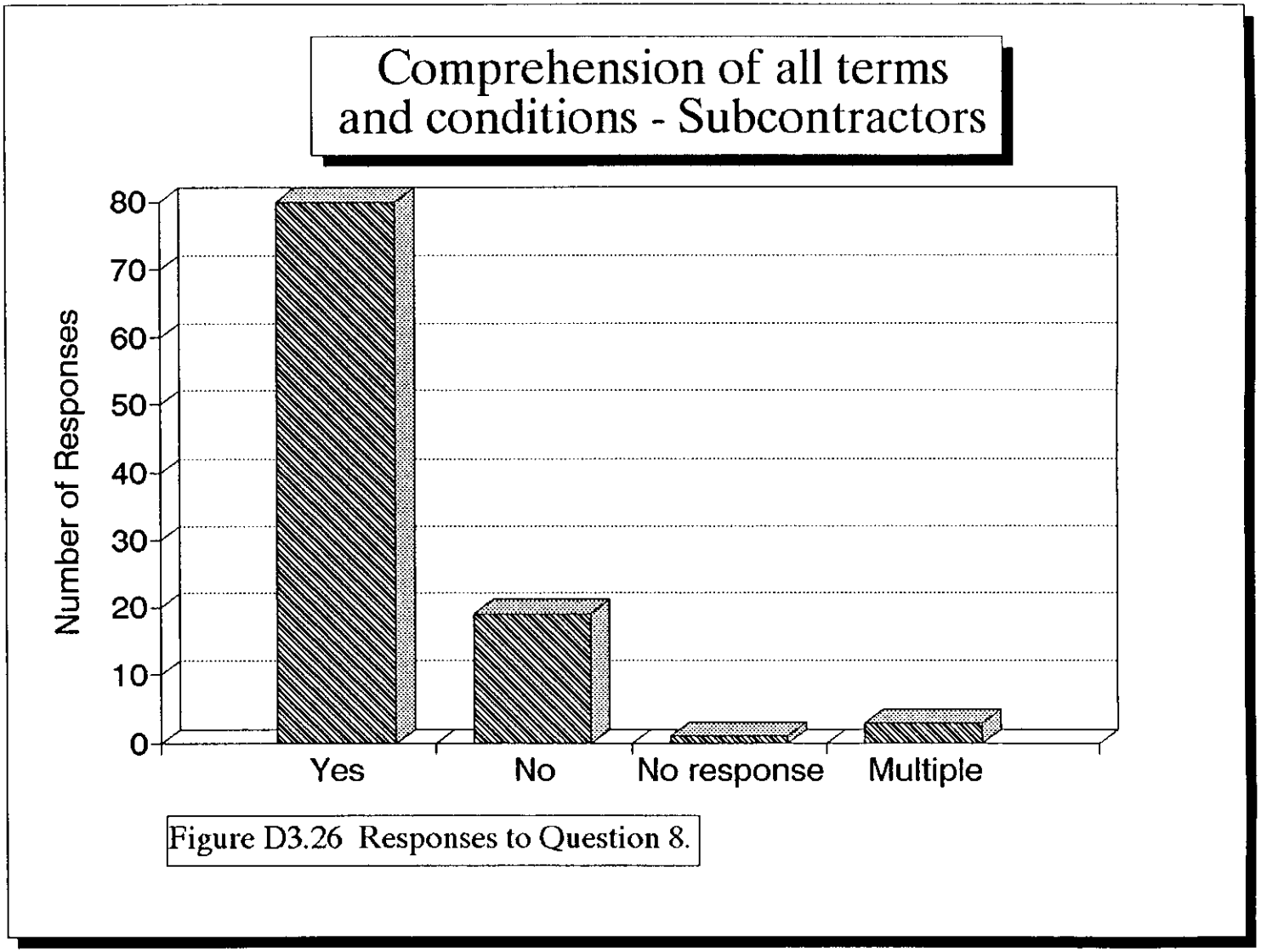

Figure D3.26 Responses to Question 8.

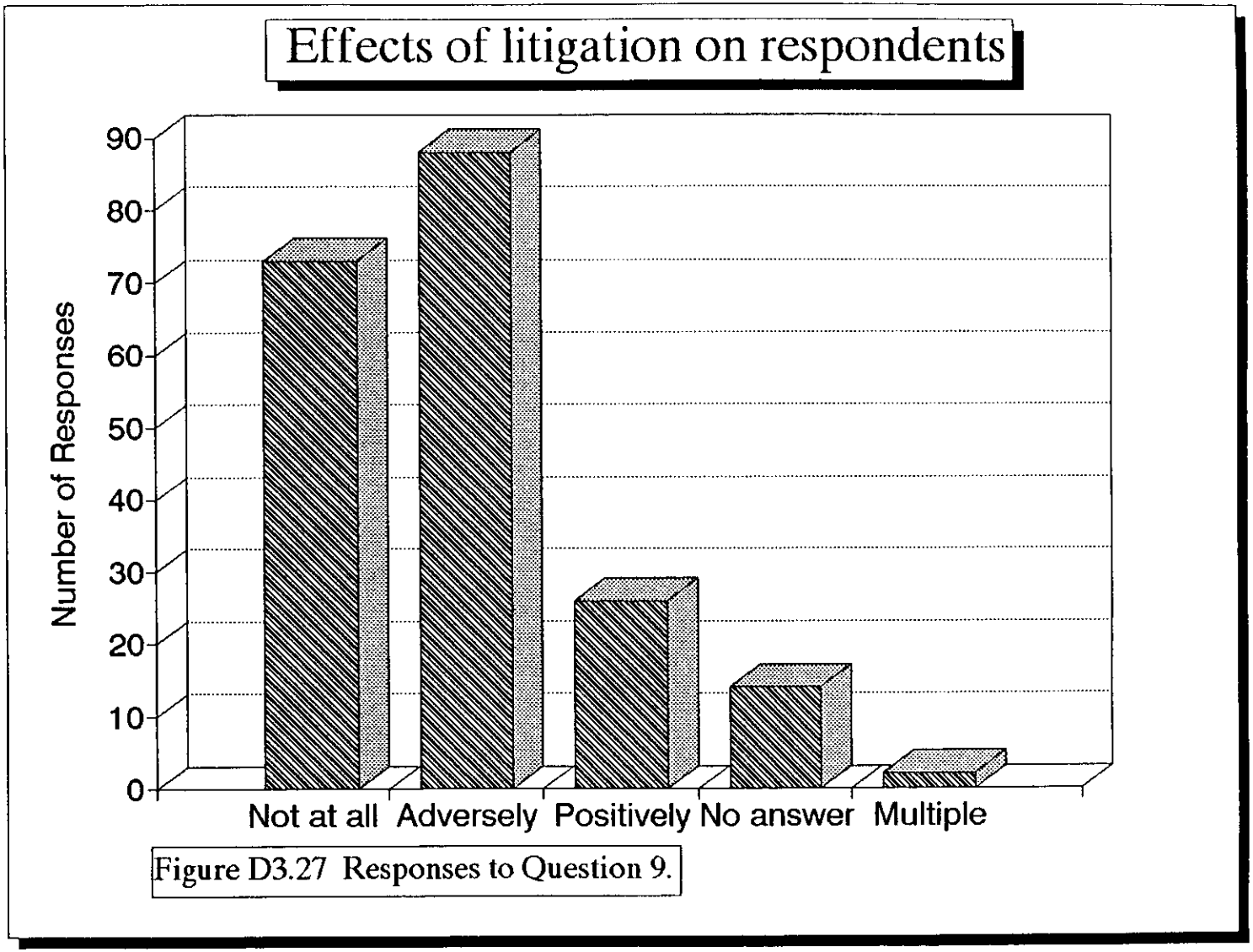

Figure D3.27 Responses to Question 9.

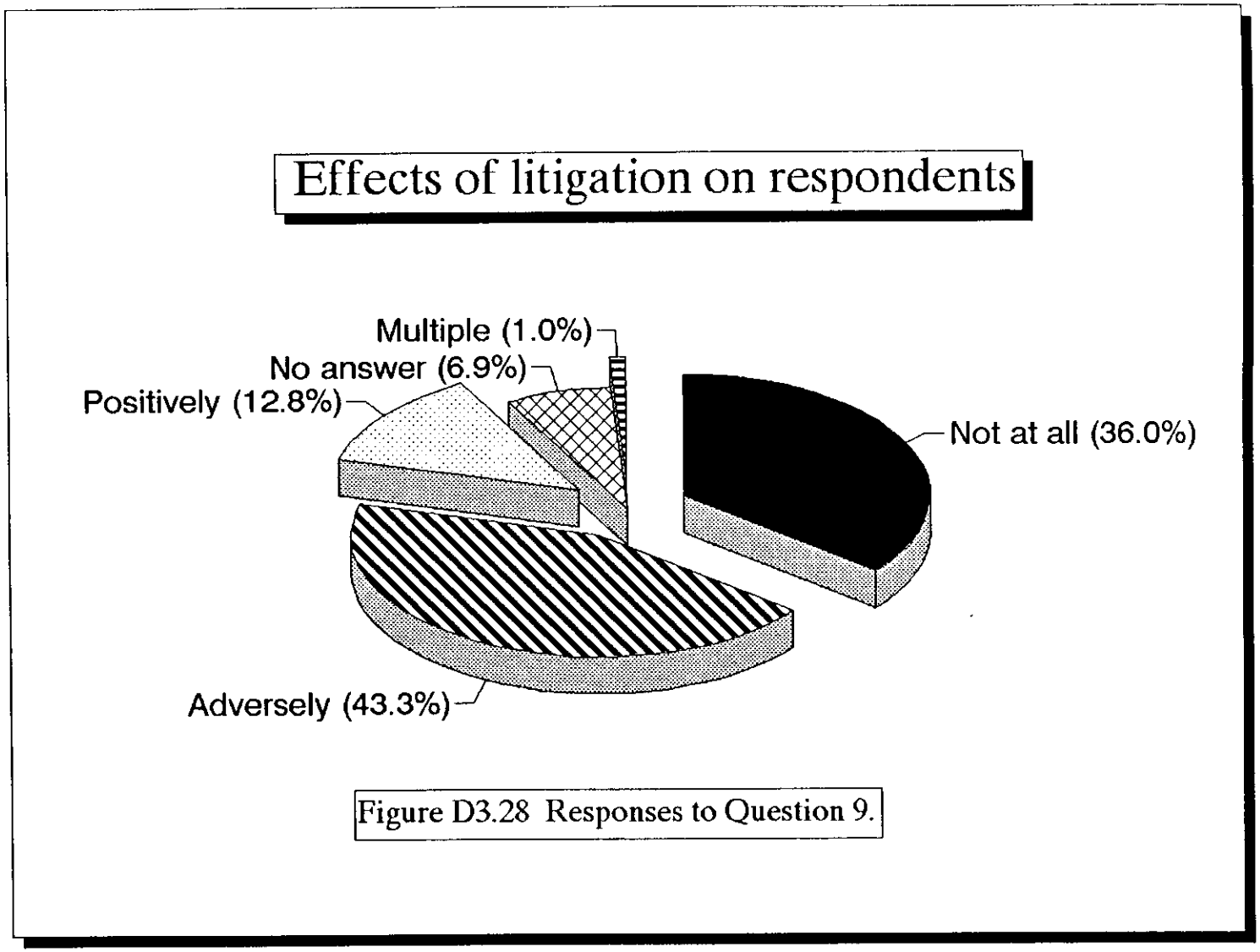

Figure D3.28 Responses to Question 9.

Major cause of construction litigation

A. Lack of knowledge B. Greed C. Lack of regulation
D. An incompetent workforce E. Willful negligence

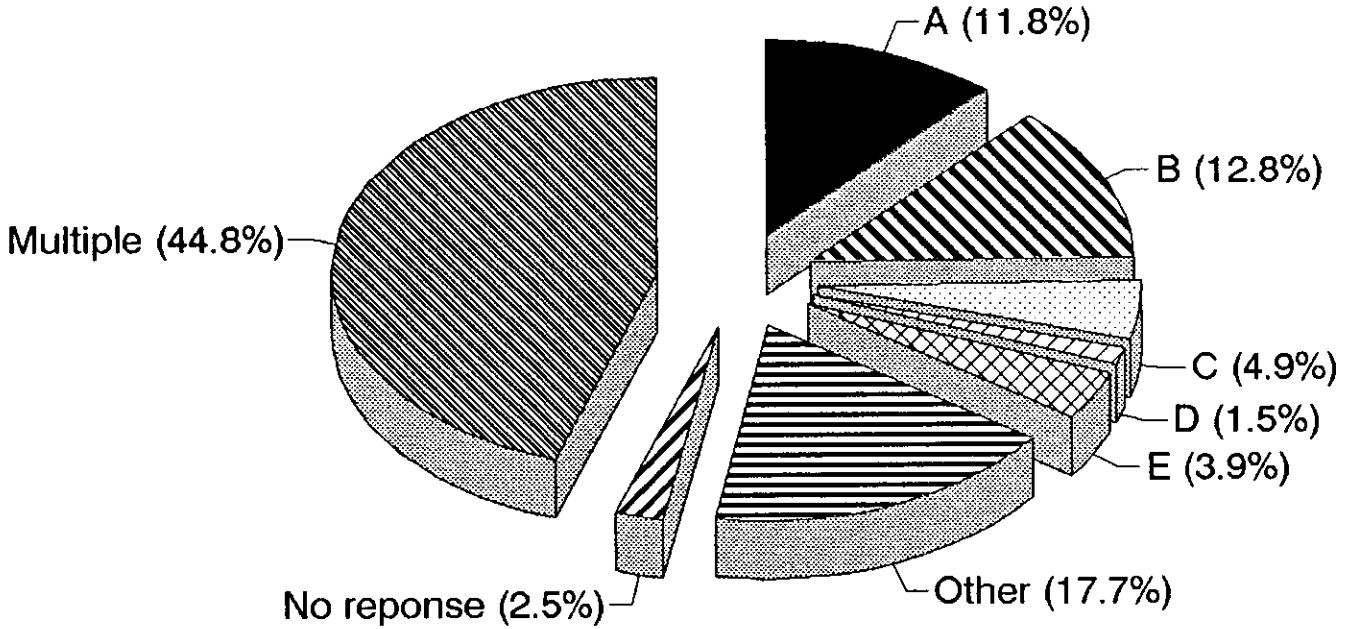

Figure D3.29 Responses to Question 10.

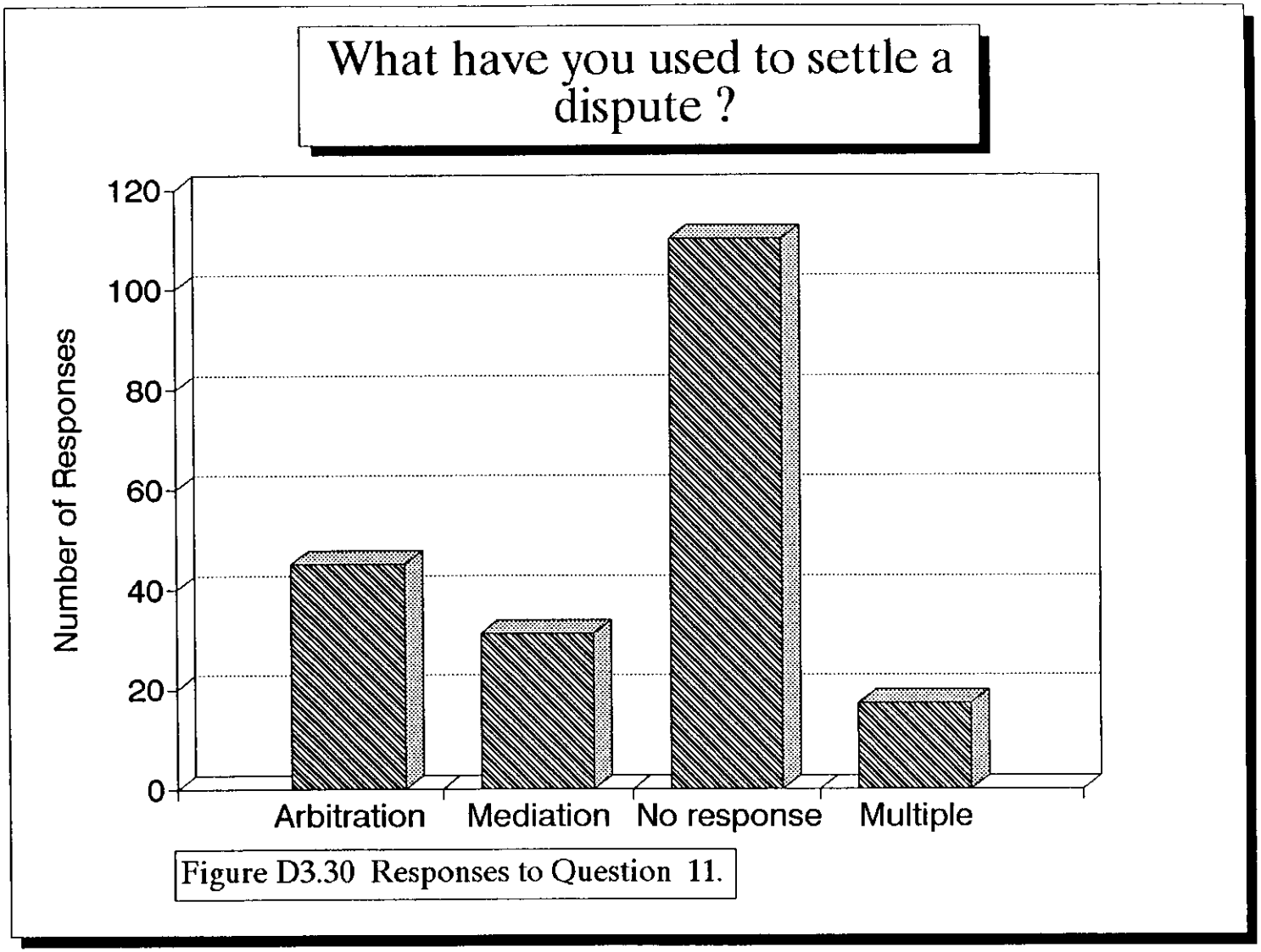

Figure D3.30 Responses to Question 11.

Means to settle a dispute

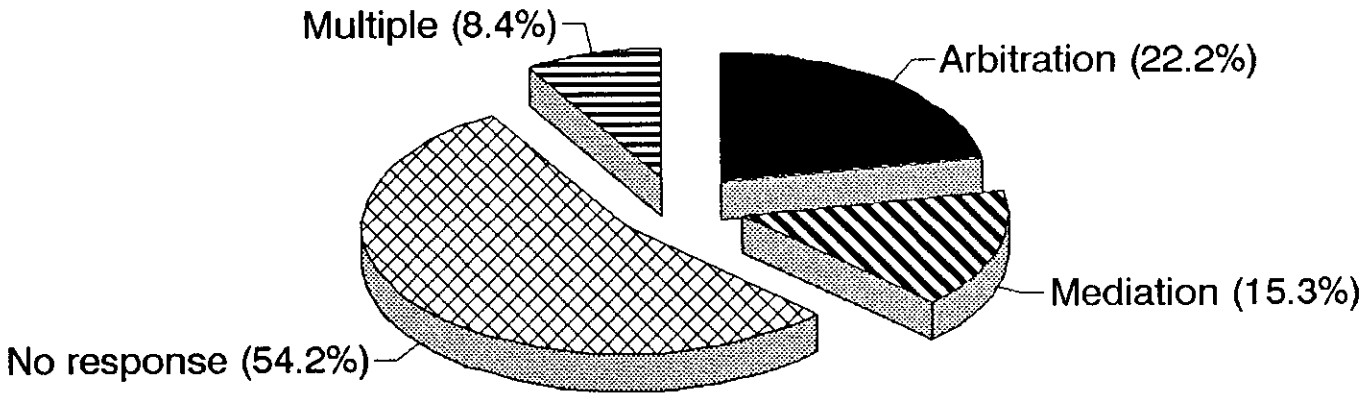

Figure D3.31 Responses to Question 11.

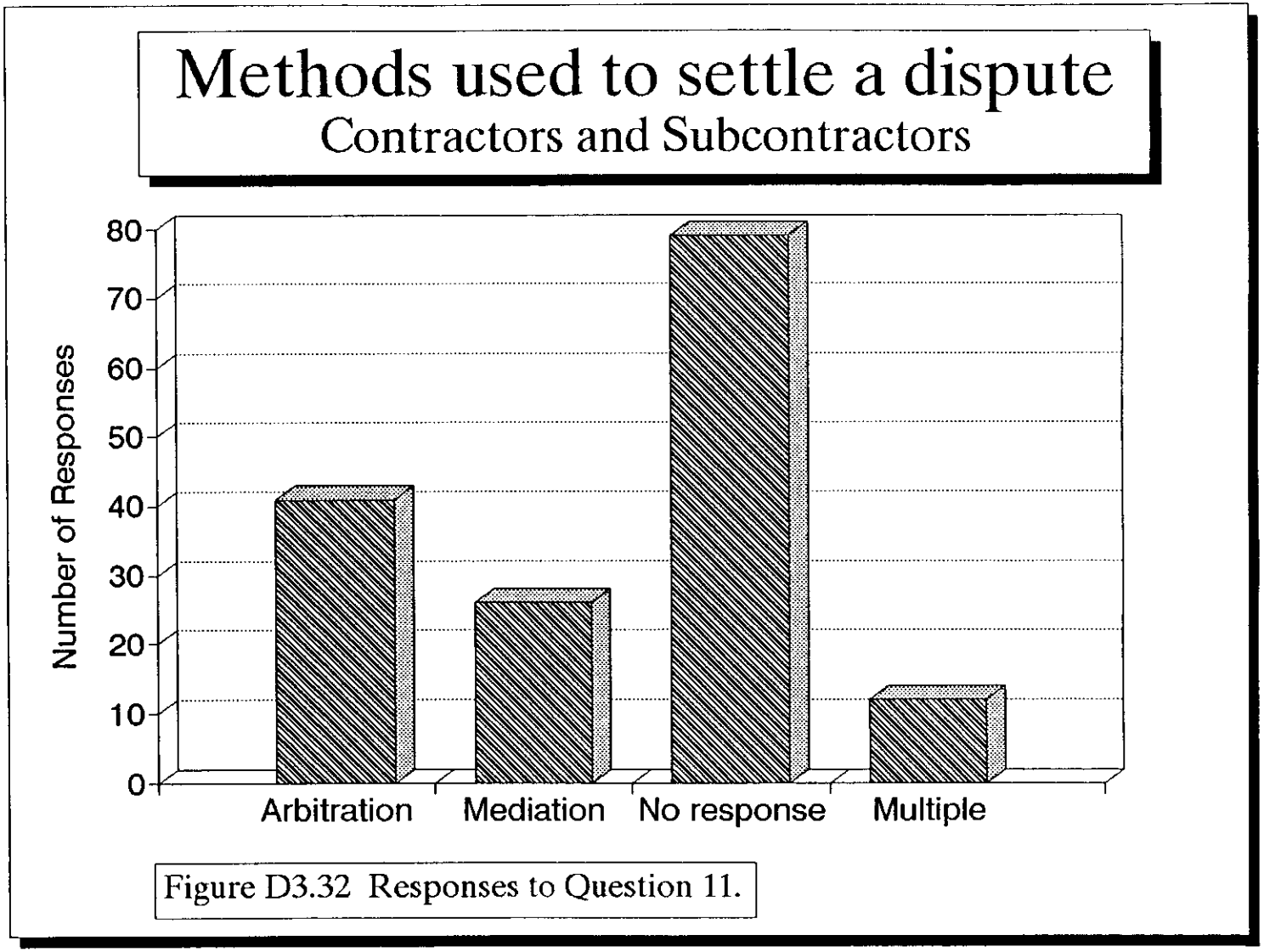

Figure D3.32 Responses to Question 11.