Law of Construction Administration for Architects

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HalfMoon Seminars

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Determining Applicable Law

☐ First place to look
  - The contract itself
  - Contract = law between the parties
  - Contract includes
    ☐ all incorporated documents
    - E.g., Unsigned arbitration provision
Contract Liability

- Liability based on terms or reasonable implication of terms of contract
  - Parties are presumed to have read contract
  - Parties are held to contract terms
But I Did Not Read the Contract

☐ Still binding
  ■ Law presumes
    ☐ Parties read and agreed to all contract terms
    ■ Even if party does not speak or read English
      ▪ Assuming no trickery
Construction Contract Terms

- Design Professional
  - Positioned to suggest construction contract terms
- If you learn nothing else
  - Use AIA Documents
    - Zealously protect Architects
AIA Contract Document Regime

- A101 Standard Form Agreement
  - Between Owner & Contractor
- A101/CMa Standard Form
  - Construction Manager Adviser
- Etc.
- Coupled with A201 General Conditions
AIA Contract Document Regime

- Developed over 120 years
- Many court interpretations
  - Lessens argument
  - Increases certainty
- Revised repeatedly to protect architects
Owner-Architect Agreement

- Should be in writing
  - Should define scope of duties
    - If no construction administration
      - Should so state
  - Should state exclusions
Owner-Architect Agreement

- Architect should press for construction administration
  - Allows architect to avoid problems from imprecise design
    - Last chance to get it right
Owner-Architect Agreement

- Perils of exclusion from construction administration process
  - Owner may seek recovery for misguided efforts
  - To resolve perceived design problems
Owner-Architect Agreement

- Incorporates by reference prime construction contract general conditions
- Plus supplementary conditions
- Architect required to "enforce"
Owner-Contractor Contract

- Architect usually required to administer
  - General conditions
  - Supplementary conditions
- Potential liability
  - Failing to administer properly
Owner-Contractor Contract

- Effect of use of AIA contract documents regime
  - Owner arbitrates with architect
  - Owner arbitrates with contractor
    - Owner cannot consolidate arbitrations
    - Owner cannot join third party
Construction Administration

Issues

- Payment
  - Schedule of values
  - Applications for payment
  - Inspection
- Shop Drawings
- Etc.
Payment

- Architect usually determines appropriate level of contractor payment
- Payment usually based on schedule of values
Payment

- Justice Phillips:
  - “The power of the architect to stop work is tantamount to a power of economic life or death over the contractor.”
Payment

☐ To gauge payment
  ■ Architect must monitor quality & extent of contractor’s work
  ☐ Architect must become generally familiar with work
Payment

- Architect has obligation to report on contractor’s problems
- Architect has obligation to protect owner from contractor’s problems
Hunt v. Ellisor & Tanner

- Design professional can be liable for not reporting contractor problems
  - Or for not making suitable recommendations to resolve
Schedule of Values

- Beware of front end loading
- Beware of unbalanced schedule
Applications for Payment

- Payment request based on % completion
  - Of schedule of value items

- Architect must review & determine if work generally conforms to contract documents
Application for Payment

- Architect not required to exhaustively or continuously review contractor’s work
- Architect must ensure general conformance with contract documents
Application for Payment

☐ If architect determines contractor entitled to payment
  ■ Architect issues certificate for payment
  ■ Certificate = representation to owner that architect has reviewed contractor’s work
  ☐ Such work generally conforms to contract documents
Application for Payment

- Inspection
  - AIA provisions do not require “inspection”
  - Architect should resist description of service as “inspection”
Shop Drawings

- Contract documents require contractor to submit shop drawings for review
  - Architect should review
  - Make that “Competently Review”
  - Review by person with clue
Kansas City Hyatt Regency

- Walkway collapse
  - July 17, 1981
  - 114 people died
  - >200 injured
  - $140 million awarded to victims & families

- All due to improper shop drawing review
Changes

- Contracts may be changed
  - Writing
  - Oral
  - By implication
Changes

- **American Garment Properties v. C.B. Richard Ellis-El Paso**
  - Written contract not required by law to be in writing may be modified by subsequent oral agreement
  - Even though contract states it can only be modified by written agreement
Changes

- Pricing
  - Negotiated
  - Unit prices
  - Time & materials
  - Force account
  - Specified limits on overhead & profit
Changes

☐ AIA Contract Documents
  ▪ Change orders
  ▪ Construction change directives
    ☐ With or without price
    ☐ With or without contractor’s agreement
Implied Contract Obligations

- Not generally inserted by courts
  - Unless implied term clearly contemplated
- But parties deemed it unnecessary to express
  - Unless necessary to give effect to contract purposes
Implied Contract Obligations

- **Construction contracts**
  - Owner will not delay or obstruct performance
    - E.g., lack of right of way
  - Contractor
    - Obligation of good & workmanlike performance
    - Warranty of habitability (residential contracts)
Implied Contract Obligations

☐ Contractor
  ■ Fitness for particular purpose
    ☐ If contractor knows purpose
    ☐ Important for design-build
Implied Contract Obligations

- Plans & Specs
  - Longeran v. San Antonio Loan & Trust
    - No owner warranty of sufficiency
  - Shintech v. Group Constructors
    - Owner warranted sufficiency
    - Cf. Emerald Forest v. Simonson
Implied Contract Obligations

- No implied duty of good faith
  - City of San Antonio v. Forgy
    - City had prior knowledge of design inadequacy
      - But no duty of good faith to disclose
Implied Contract Obligations

- May be disclaimed
  - Disclaimer must be expressly stated

- No valid disclaimer of implied warranty to perform repairs
  - In good & workmanlike manner
    - Melody Homes v. Barnes
Differing Site Conditions

- Conditions that differ from what parties expected
- DSC Clause
  - Allocates responsibility for differing site conditions
- Theory of use
  - Allows contractor to omit contingency
- Pro’s & con’s
Differing Site Conditions

- Federal Contracts
  - Type I
    - Conditions materially differ from that indicated in contract docs
  - Type II
    - Unusual physical conditions differing materially from those ordinarily encountered in this type of work
    - Included in all federally funded work
Differing Site Conditions

Type I

Contract documents must provide sufficient grounds to justify bidder’s expectation of latent conditions which differ materially from those actually encountered.
Differing Site Conditions

- American Institute of Architects A201 General Conditions
  - DSC similar to federal provision

Frank Lloyd Wright 1867 - 1959
Differing Site Conditions

- Contractor must provide timely notice of DSC
  - Owner / A-E to investigate
  - Equitable adjustment
    - If appropriate
    - May increase or decrease contract price or time
Differing Site Conditions

- Contractor must inspect site
  - Has implied obligation to make site inspection
  - Failure to make inspection
    - Contractor charged with knowledge gained from reasonable inspection
Differing Site Conditions

- Contractor required to discover conditions
  - Apparent through reasonable investigation
  - “Reasonable” based on time & circumstances
Differing Site Conditions

- Conflict between site inspection clause & DSC provision
  - Site inspection clause
  - Contractor required to fully inspect and evaluate suitability of site for project
Differing Site Conditions

Courts: Standard of Reasonableness

- Contractor not obligated to discover hidden conditions
- Or undertake burdensome, extensive or detailed tests or analyses
- Investigation must be reasonable under circumstances
Differing Site Conditions

☐ Disclaimer

- Info owner provides is solely for info purposes
  - No warranty of accuracy
  - No guarantee of completeness
- Objective to render unreasonable any reliance by contractor

“Your medical insurance doesn’t cover ‘Acts of God’ - like illness.”
Differing Site Conditions

- Disclaimer
  - Court reactions
    - Brown-McKee v. Western Beep
      - No warning of hard subsurface rock
      - Claim for hard rock denied due to broad disclaimer
      - No proof of deception or bad faith by owner
      - No withholding of info owner required to disclose
Differing Site Conditions

- Disclaimer
  - Court reactions
    - *Millgard Corp. v. McKee/Mays*
      - Contract disclaimed soil boring report
      - Contractor could not rely on disclaimed report
      - Contractor’s claim rejected
Differing Site Conditions

- Attempted Disclaimer Invalid
  - Reliance OK where contractor performed reasonable investigation to confirm owner’s info
  - Reliance OK when owner intended for contractor to rely in preparing bid
Differing Site Conditions

- No Valid Disclaimer (cont’d)
  - Reliance OK where insufficient time for contractor to conduct adequate investigation
  - Contractor may rely on info from owner
    - Except when simple inquiry reveals contrary conditions
No Damages for Delay

General Rule

- Owner responsible for delays to contractor
  - E.g., failure to obtain rights of way timely
    - If contractor plans to work in summer
      - But owner delays
      - Contractor may recover $ for inefficiencies
        - *Anderson Dev Corp. v. Coastal*
No Damages for Delay

- Board of Regents v. S&G Construction

- Owner liability for failing to provide proper plans & specs
- Work delayed while job redesigned on daily basis

- Court: Owner had caused delays & increased costs
  - Owner should pay
No Damages for Delay

- City of Houston v. RF Ball Construction
  - Contractor received 100’s of change orders & 900 design clarifications
  - Contractor incurred $3 million in extra cost
  - Court: No damages for delay clause barred recovery
No Damages for Delay

☐ Sample Provision:

“Owner shall not be liable to Contractor for delays of any kind or nature in the progress or completion of the work on the Project. Contractor’s sole remedy for any delay whatsoever shall be an equitable adjustment of contract time.”
No Damages for Delay

- Exceptions
  - Clause not enforced if
    - Delays were caused by owner’s active interference, bad faith or intentional conduct
    - Owner abandons contract
    - Owner materially misrepresents site conditions
      - Or conceals material site condition info
No Damages for Delay

- Getting Around No Damages for Delay
  - Avoid clause by focusing on costs of added time for change
  - Do not use word “delay” in claims
  - Capture job costs with cost coding for changes
Claims & Disputes

☐ Obligation of Continuing Performance
  ■ Contractor required to continue work
    ☐ While dispute process underway
    ☐ If contractor ceases work
      ■ Contractor in contract breach
Claims & Disputes

☐ Architect Decision
  ■ Dispute must first be submitted to architect for decision
  ■ Otherwise prerequisite condition not satisfied
Architect Decision

- **Tribble & Stephens Co. v. RGM Constructors**
  - Court upheld “satisfaction clause”
  - Contract may require performance to satisfy architect
  - Valid unless fraud, misconduct or gross mistake implying bad faith
  - Court should not substitute its judgment for architect’s
Claims & Disputes

- Mediation
  - Valid for contract to require mediation before arbitration or litigation
Mediation

- **In re Pisces Foods**
  - Appellate court held that trial court
  - Could not order arbitration
    - Without mediation
    - When contract required mediation before arbitration
Arbitration

- Voluntary but binding dispute resolution process
  - May be waived
  - May be compelled if adversary files suit
Arbitration

☐ Agreement to arbitrate must be in writing
  ■ May be incorporated by reference
  ■ Equitable estoppel
    ☐ Precludes party from avoiding arbitration by suing related third party
    ☐ Seeking benefits under contract
In re U.S. Home Corp.

- Homeowners with arbitration sales contract sued builder
  - Builder omitted shower pans
  - Sought class action
  - Texas Supreme Court
    - Not contract of adhesion
    - Nothing unconscionable about arbitration agreements per se
Arbitration

- **Benefits**
  - **Arbitrator** = construction industry professional or construction attorney
  - Parties have input into arbitrator selection
  - No joinder of contractor
Retainage

- Generally held to ensure contractor’s interest in completing project
- Required by Texas Property Code Chapter 53 on private projects
  - Until 30 days after project fully complete
Retainage

- Additional retainage
  - Reasonable cost of correcting defects
  - Failure to pay for labor or materials

- Goal
  - Protect owner should contractor not properly complete or pay for work
Retainage

- **Contract balance**
  - Should be sufficient to complete project if contractor abandons
  - As prospects for contractor failure increase
    - Retainage should increase
  - Owner cannot rely on surety
Suretyship

- Tri-partite relationship
  - Surety supplements its principal
  - But surety not always required to satisfy all of principal’s obligations
  - E.g., all bills paid affidavit
  - Owner must satisfy its obligations
Retainage

- Public contracts
  - May be 5% of contract payments
Contract Time

- Time specified in contract
- If not specified
  - Reasonable time
- “Time is of the essence” magic language
Contract Time

- Extensions
  - Time should be extended for
  - Delays beyond contractor’s control
  - Risk of “constructive acceleration”
Delays

- If owner sustains damages from contractor’s delay
  - Owner may be entitled to payment from contractor
  - Contract may restrict or prohibit recovery of consequential damages
- Lost profits or loss of use
Liquidated Damages

- Pre-determined damages for late completion
  - Supposed to be reasonable forecast of damages not easily determined
  - When starts?
  - When stops?
  - Calendar vs. working day
Liquidated Damages

☐ Not supposed to be
  ■ Bargaining chip
  ■ Arbitrarily imposed
  ■ Penalty
  ☐ If penalty, then invalid
Requests for Interpretation

- Contractor request for clarification or information
  - Contract documents unclear
  - Construction method undeterminable
  - Product not available

- Architect required to respond timely
  - Should keep log
Substitutions

- Contractor required to seek approval
  - Specified product may not be available

- Problem
  - Substitution does not perform
    - Architect has some explaining to do
Progress Meetings

- Architect should hold and chair
  - Keep minutes
  - Distribute minutes
  - Good method to prevent or minimize liability
Rejection of Work

- Architect guards against defective work
  - If certifies payment for defective work
    - Architect has some explaining to do
    - Architect may have to deal with contractor’s surety
Care & Feeding of Contractor’s Surety

- If obligee has not honored contract
  - Surety may be discharged
  - *Old Colony Ins. v. City of Quitman*
- Owner’s failure to adequately inspect work & overpayment to contractor discharged surety’s obligation on bond
Indemnity

- Indemnity for one’s own negligence
  - Express Negligence Doctrine
    - Ethyl Corp. v. Daniel Construction Co.
Indemnity

☐ AIA A201 General Conditions ¶3.18

- Does not satisfy
  Express Negligence
  Doctrine
3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify ... Owner ... from and against claims ... arising out of ... performance of the Work, provided that such claim ... is attributable to bodily injury, sickness, disease or death, ... but only to the extent caused ... by negligent acts or omissions of the Contractor ... regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.
Indemnity

- *Atlantic Richfield Co. v. Petroleum Personnel*
  - Contractor agrees to hold harmless and indemnify Arco against and for all liability ... in any manner arising from the work ... including ... any negligent act or omission of Arco.
  - Texas Supreme Court:
    - Express Negligence Doctrine satisfied
Indemnity

☐ Indemnity clause

- Must be conspicuous
- Must provide fair notice
  - Must draw attention and be apparent to reasonable person
- *Dresser Industries v. Page Petroleum*
Indemnity

- Indemnity provision
  - Must initially satisfy express negligence doctrine
  - Cannot wait to see if indemnitee turns out not to be negligent
    - *Fisk Electric Co. v. Constructors & Assoc.*
Indemnity

- Contractor cannot indemnify A/E
  - For liability
    - Arising from A/E’s professional negligence
      - In preparing plans or specs or in contract administration
Indemnity

- Tex.Gov’t Code §2252.902
  - Invalidates indemnity provisions on state public work
    - Except allows indemnity on construction contract
      - For liability caused by sole, joint or concurrent negligence of indemnitee
        - Arising from bodily injury or death of employee of indemnitor or its subcontractors or vendors
        - Does not affect validity of insurance contract
    - May not be waived by contract
Indemnity

☐ Tex.Gov’t Code §2254.0031

- State governmental entity may require contractor
  - To indemnify State from claims from negligence of contractor or persons contractor employs
- But may not require contractor to indemnify State from claims resulting from State employee negligence
If owner requires indemnity for owner’s own negligence

- A/E should obtain insurance

- Indemnity should be limited to extent of insurance coverage
  - Otherwise, A/E should qualify its bid
  - Or not bid at all
Insurance

- Insurance can resolve indemnity obligations
  - Repair defects
  - Pay for injury claims
Insurance

- Additional Insured
  - If Architect is additional insured on contractor’s CGL policy
    - Insurer pays for attorney
    - Often no extra cost to contractor
    - Contractor pays deductible
    - Lessens chance of contractor suing architect
Insurance

- Waiver of Subrogation
  - If insurer pays claim
    - Insurer becomes subrogated to claimant’s rights
    - Insurer may sue architect
    - Waiver of subrogation precludes insurer back door claim
Safety

- Architect should not dictate safety precautions
  - Architect should place onus on contractor
    - To abide by all OSHA rules & good safety practices
      - Without specifying actual requirements
  - Architect should allow contractor to control means, methods, techniques & sequences
Safety

- Owner has no duty to ensure that independent contractor performs safely
  - Independent contractor is responsible for training & monitoring own employees
  - Owner can be liable for injuries only if owner retained control or had actual control
Safety

- Even if owner knew that work was “very dangerous”
  - And did not warn contractor
    - There is no duty to warn contractor of obvious premises defects
    - There is no duty to warn contractor about contractor’s own means & methods & work plan
Mechanic’s Liens

- Unpaid contractor or subcontractors or suppliers
  - Have Texas Property Code Chapter 53 lien rights
  - Owner or contractor may secure bond to indemnify against lien
    - Removes lien from owner’s property
    - 1 year statute of limitations to sue on bond
Owner’s Decision

- Contract documents may provide owner with right to decide merits of dispute
  - Common on state government projects
    - Contractor must abide or risk losing claim
  - Owner’s decision must be made in good faith
Termination

- Default
  - For reasons specified in contract
  - Or where contractor has breached contract in material way
  - Risky
    - E.g., termination for default for failure to complete on time
      - But contract did not have time of essence clause
Termination for Default

- Upon termination
  - Contractor does not have to complete project
    - May be inclined to sue for wrongful termination
  - If architect certified default
    - Architect could face claim from owner for wrongful certification
Termination for Default

- Before terminating for default
  - Owner should provide contractor with notice of default
    - And opportunity to cure
    - Contractor may have reasonable explanation
      - Might not be in default
Termination for Default

- More complicated if performance surety
  - Surety not obligated to perform unless contractor declared in default
- Upon default termination
  - Surety can investigate
  - Surety not required to complete contractor’s work
Termination for Default

- Surety Options
  - Write check to owner
  - Pay penal sum
  - Tender replacement contractor
  - 3 way contract with owner & new contractor
  - Takeover agreement
  - Retain principal to complete
  - Do nothing
Termination for Default

- **Surety Dealings**
  - If surety not timely informed of principal’s defaults
    - Surety may claim prejudice
  - If owner pays contractor for defective work
    - Surety may claim discharge
Termination for Default

- **Surety Dealings**
  - If contractor is paid for greater % of work than appropriate
    - Surety may claim overpayment & pro tanto discharge
  - If owner does not timely terminate
    - Surety may claim prejudice & discharge
Termination for Convenience

- Allows owner to discharge contractor
  - Without risk of wrongful discharge suit
  - Owner has to pay appropriate value of work done
  - No payment for work not done
    - Or lost profits
Termination for Convenience

- Useful in Negotiations with Contractor
  - Owner can threaten to send contractor packing
  - Unless contractor reasonably negotiates change order
  - Owner just pays for value of proper work to date of termination
Termination for Convenience

- Useful for suspension of work
  - To allow owner to resolve construction or design problem
  - If coupled with no damages for delay
- Owner owes nothing for suspension
Supplementation of Forces

- Owner may supplement contractor’s work force
  - Then issue deductive change order for cost of supplemented work
  - May use schedule of values to assess amount of deduct
Substantial Completion

- Work has progressed to point where owner can take beneficial occupancy
  - & use work for intended purpose
  - E.g., when certificate of occupancy issues
  - Contractor should be paid all but retainage
    - OK to withhold extra for correction of specific defects or omissions
Acceptance

- Acceptance issued when all work satisfactorily completed
  - Date may start running of applicable statute of limitations for claims on contractor’s work
  - Owner to hold retainage for 30 days (private projects)
Final Payment

- Due when owner accepts project
  - & contractor has submitted close out documents
  - Owner may withhold appropriate amount for documents or work not submitted or done
Warranty Claims

- Warranty Claim not = to breach of contract
  - Warranty implicated for work performed properly
    - But later became defective
  - Contract breach = work not performed or not performed properly
Warranty Claims

- Owner should not withhold payment for warranty claim
  - Unless contractor not inclined to resolve
  - But OK for contract breach
  - Architect could face liability for recommending money be withheld
  - Or failing to so recommend
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