

Construction Law in Mississippi



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TABLE OF CONTENTS

Drafting Construction Contracts that Minimize Disputes	1
Handling Change Orders	23
Legal Responses to Construction Delays	31
Defective Bids	41
Deficient Plans and Specifications	48
Liability and Other Legal Issues Affecting Architects and Engineers	53
Insurance Coverage and Surety Bond Issues	63
Key Issues Affecting Condominium Developments and Homeowners' Associations	75
Errors to Avoid when Handling a Construction Contract Negotiation or Dispute	95

CHAPTER 1

DRAFTING CONSTRUCTION CONTRACTS THAT MINIMIZE DISPUTES

I. INTRODUCTION

Preprinted form contracts are very common in the construction industry. Before an attorney is consulted by either side, it is common for one party or the other to have already “roughed out” an agreement using a standard form distributed by the American Institute of Architects (AIA), the Associated General Contractors, or similar organization. Of course these forms are drafted to serve the interests of the construction company in question and not the prospective property owner (and even then the standard boilerplate in these forms does not anticipate all the protections the contractor might need in a particular situation. (An extensive set of AIA construction contract forms has been updated recently and is available from their website at www.aia.org.)

Insofar as the prospective property owner is concerned, he is prone to pass such a proposed agreement from the contractor on to his own attorney with instructions to look it over and make sure the owner’s interests are protected. At the same time, however, the owner client is likely to expect his lawyer to protect his interests without delaying things and without getting things “too legal” or complicated! No simple task for the conscientious attorney who understands the expensive disputes that can result from poorly considered and ambiguous contracts.

The material that follows provides a partial checklist of drafting considerations for (1) design contracts with project architects or engineers and (2) construction contracts with contractors. The chapter will conclude with a look at contractual provisions that may be *implied* by law or fact.

Recognizing that attorneys attending this seminar and reading this material come from the differing perspectives of both contractors and project owners, the first two sections of this chapter are worded more from the owner’s perspective, while the final section is approached more from a contractor’s point of view. However, attorneys in this field should not be overly provincial, and it should be recognized that the topics raised throughout this chapter merit careful consideration by any construction law attorney – regardless of his or her client’s angle. Moreover, the written materials in this manual were assembled and compiled by the editors of *Barristers*, and thus the comments contained herein may not always reflect the positions of the various seminar speakers.

II. DESIGN CONTRACTS

The initial agreement between the owner and the architects and/or engineers who draw up the plans and designs for a project is often overlooked because, in terms of dollars, these services constitute a small portion of the overall project budget. However, major headaches and expense can be avoided by being aware of the key omissions and deficiencies found in most form contracts.

Insurance

The design professional, with employees and consultants, will often be physically present at the project site during construction. The contract should require the design professional to maintain appropriate levels of liability insurance, which may include commercial general liability, automobile liability, employer's liability and workers' compensation coverage. Moreover, because a general liability policy excludes losses attributable to professional negligence, the design professional should maintain professional liability insurance to cover errors and omissions in design services. The industry form contracts most commonly used completely omit any requirement for the design professional to maintain insurance for the owner's protection. Accordingly, the owner's counsel must add those requirements.

Services Included

Some industry forms include detailed lists of the professional services to be performed for the basic contract fee, along with lengthy lists of services that are excluded or that will only be provided if specifically requested and paid for in addition to the basic fee. Some of the more recent AIA forms leave the identification of the professional services to be defined by the parties through a separate document to be incorporated into the agreement.

Review with the client the services that are included or excluded. For example, will the architect:

- Assist the owner in establishing a budget, re-design the project to meet the established budget, and provide other value engineering services?
- Appear at public meetings to assist the owner in obtaining project approval?
- Review the contractor's requests for progress payments?
- Periodically inspect the progress of the work?
- Evaluate proposals or change orders submitted by the contractor?
- Prepare a set of final, as-built drawings upon completion of construction?
- Continue to provide advice and services to the owner until final completion of the project and issuance of all necessary permits?

Does the basic fee include these services? Many forms are written as if each owner and each project require the exact same services. Often, the client may be surprised to learn that the design professional may seek additional compensation for certain services the client believes should be included in the agreed fee.