



Garden State CLE
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INTRODUCTION TO CONSTRUCTION LAW

Featuring

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Senior Instructor, Author

And

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Program description

Construction law is complex; it involves contract law, bonding, sureties, claims, liens, and more. To complicate things further, it affects many participants – contractors, financial institutions, surveyors, architects, engineers, construction workers, and more.

I. Introduction

- **Hypothetical project**
 - **Plot of land**
 - **Going to build a school**
 - **Public financing**

II. An Attorney's job as a construction attorney and the issues that arise

- **Construction lawyers deal with zoning boards**
- **Some get involved in the bidding phase and then take through to litigation at the end, negotiate and draft the contracts, help contractor with claim forms, advise during project**
- **Bidding phase – contractor bids on project from the owner – looks at specs and bids the project; governed by NJSA 56:8-136, et seq. which requires that a contractor must be on a list and have specific parts of the bid – if lowest bid, then get project**
 - **Need certain percentage of minorities on a job – must certify to that**
 - **Union job or non- union job? – labor and union issues come with this situation**
 - **Prime contractors are usually large – some only specialize in roadways, some specialize in building schools; extremely large contractors do everything**
 - **Bonding – must have a bond as the contractor indemnify the surety on the project and if you default the bonding company will step in**
 - **Public bidding has public board – very particular**
 - **NJSA 40A:II-I, et seq., NJ Local Public Contracts Law**
 - **Must certify at the end of the bid by an attorney or officer of company that what is in bid is accurate**
 - **Other bidders can take you to court and challenge you based on various parts of the bid, i.e. minority companies on the contract, or not including certain paperwork or not having it on time**
 - **Lowest bid gets the job for a public bidding process – does this compromise quality?**
 - **Open bid by making it public and contractor must be on approved list to bid**

- **Attorneys help contractors by reviewing bids and signing off on them**
- **Once bid is accepted, you have specs, architect, sub contractors, etc., and lawyers help with these agencies/companies**
- **Schools have a governing body that monitors the bids on the project**
- **Prime contractor has relationships to finance the project as well as bonding companies**
- **“if paid” contract provision – prime contractor if not paid by owner, then prime contractor does not have to pay the sub contractor**
- **Prime contractor gets own financing and then also public monies/financing depending on the project**
- **Retainage is “hold back” to make sure project is completed and then once completed then get the retainage back – typically 10%**
- **Prime contractors have labor attorneys that deal with labor issues, as well as construction attorneys that help to draft and negotiate the contract**
- **Construction contracts are very complex**
- **Penalty clauses in the contract – if you miss the deadlines, then penalties**
- **If meet deadlines, you are rewarded in the contract**
- **Public bid requires the lowest bidder get project – no matter if the owner has a prior relationship with contractor**
- **“Critical path” – timeline to complete project, delay is when you are off the critical path, engineering firms chart this out for the contractor, need to stay on critical path because you can end up litigating because you are late in completing the job – not making certain milestones in the project**
- **Change orders can effect critical path – change orders are usually not written and just a handshake with sub contractors, doesn’t go to the owner but should – causes delays and litigation at the end when the sub contractor needed more time to complete change order because prime contractor is ultimately responsible for everyone and the timeline**
- **Litigation occurs when the project is delayed**
- **Can get thrown off a project**
 - **Cannot continue with the contractor – “for convenience”**
 - **“for cause” – contractor has not cured problems and fire contractor – go to bonding company to finish job**

- **Attorney's job to get client to cure problems, cure notice (10 days to cure), try to work it out – usually contractors and subcontractors work it out together but attorneys get involved to make sure that there is proper notice – depending on issue**
- **Attorneys deal with pre-bid, ongoing issues with subcontractors, end of project litigation**
- **Contractors can handle pre-bid on their own – have contract administrators but need lawyers at the end for litigation – can try to smooth things over with the owner**
- **Litigation about delay – contractor is ultimately liable for even subcontractor's work**
- **Important to have a lawyer that you can consult with as a contractor – larger companies do have attorneys but smaller sub contractors do not**
- **Prime contractor may lose money at the end of the day, or not making a profit, when there are problems – under bidding, economy turns, equipment is more expensive than bid, materials increase in price – sub contractors are the ones that end up losing money more than prime contractors**
- **Prime contractors can hire whatever sub contractor they want but need to be careful of minority and union requirements of the job**
- **Try to mediate/arbitration but then may have to go to court**
- **Additional litigation because prime contractor has to deal with sub contractors as well – if take a settlement from owner, then need to negotiate with sub contractors to settle with them**
- **Should be formal contracts between prime contractor and sub contractors – attorneys would draft**
 - **Arbitration clause**
 - **Indemnification clause – prime indemnify damage that they did not cause**
 - **Project milestones – then damages assessed**
 - **Material costs**
- **Most sub contractors have attorneys at the end for litigation but often they do not have attorneys early on**
- **Complex issues in these types of cases**
- **Attorneys need to understand all the various issues involved with a construction project, materials, environmental issues, etc.**

- **Worker's compensation is an obligation through the contract – prime contractor is responsible for his people – included in contract with sub contractors**
- **At the end of the project, you may deal with the school board who supervises the project – negotiate with this agency to get paid at the end of the project**

III. PA v. NJ construction law

- **no major differences, some distinctions do exist, timing distinctions exist, some terminology differences, different statutes**
 - **Timing is biggest difference – less latitude in PA than NJ because of statutes – timing being after the project is complete**
 - **Notice requirements for litigation are different**
 - **PA is more stringent**

IV. Dealing with private contracts

- **Residential construction – deal with consumer fraud, NJSA 56:8-1, et seq., Consumer Fraud Act**
 - **New homes are not as much an issue for attorneys as additions, etc. because developers are pretty sound in their contracts and there is little negotiation**
 - **Attorneys are more concerned with putting an addition on a house with a less savvy contractor than some large development company – large amount of money with smaller contractor – need to have all the specifics in the contract**
 - **Certain things need to be in the contract – code is very particular as to what needs to be in the contract, i.e. time lines/deadlines**
 - **Both sides should have an attorney – contractor and homeowner/buyer**
 - **Becomes an issue when there is no contract – so should have a contract**
- **Commercial property – prime contractor is higher up on the food chain than the sub contractor**
 - **Can lien a property if not paid**

- **Difficult for sub contractors because attorney may not have drafted the contract or reviewed contract and took job just to get the money**
- **Sub contractors do not have working capital – can negotiate that into the contract**
- **NJSA 2A:30A-1, et. Seq., The Prompt Payment Act – 30 day – owner must pay sub**

V. Last words of advice

- **To protect subcontractor – put change orders in writing, give change orders to prime contractors, make sure “pay when paid” in contract, look at indemnity clauses – may not want to take responsibility for certain things**
- **Labor lawyers must address issues of using illegal workers**
- **Attorneys get paid by contractors – they set aside a litigation fund, and budget when there is a project – billing hourly and send an invoice monthly**
 - **Some larger contractors have in house attorneys**