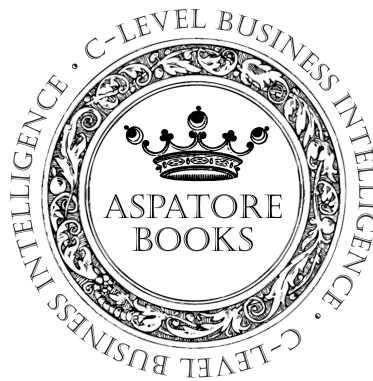


I N S I D E T H E M I N D S

Construction Law Litigation Strategies

*Leading Lawyers on Analyzing the Basis of a Dispute, Preparing for Trial, and Understanding
Construction Laws*



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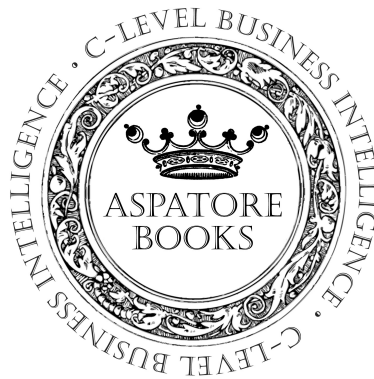
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Construction Attorneys, Risks, and Disputes: An Owner's Guide

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Shareholder

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As a construction lawyer, I predominantly represent owners of construction projects, and the majority of my clients are public entities such as cities, counties, state agencies, school districts, transit districts, water districts and the like. My work begins at the inception of the construction process, starting with the choice of project—in other words, what the owner wants to build, who the owner wants to have design and build it, and how the owner wants to pay for it. For the construction lawyer the choice of project entails the creation of a project delivery vehicle, which involves deciding how the owner intends to contract for the project, i.e., what types of contracts it will use for what construction-related services. Obviously, the choice of how to contract for what services by what entity can matter a great deal to the success and overall cost of a project.

During the pre-construction process, I draft contracts for both project design and construction, and combinations thereof; I prepare bid documents for work which is competitively bid, as is typical in public works construction and less typical in the private sector; and I advise my client with respect to all statutory and regulatory issues affecting public works construction. The majority of my work focuses on state and local projects as opposed to federal projects, but all public works construction is highly regulated by either state or federal law or some combination thereof. I also assist in resolving disputes that arise during the construction process and which may lead to litigation, arbitration or some other form of alternative dispute resolution.

I am typically involved at the beginning of a project, at the end of a project, or both. Like most construction lawyers, I add the most value at the beginning of a project, because at that stage I am able to advise the client as to how it can manage and minimize risks throughout the project, in order to reduce the risk of litigation at the end of the project. If I become involved at the end of a project, it is usually because a dispute has arisen as a result of the contractor sustaining a loss. I may be asked to assist in a resolution of claims for breach of contract made by the contractor; in that context, I am usually involved in minimizing the amount of the loss that the owner has to pay. I may also become involved in litigation by the owner against design professionals (architects or engineers) arising from the project. As one might expect, my ability to provide value in construction litigation at the end of a project is circumscribed by the facts I am given.

Basic Components of Construction Law

Construction projects in the United States are, of course, built in both the private and the public sector; the public sector projects are built by both the federal government and state and local entities. Federal construction law as it applies to federal projects is an entirely separate body of law; the contract provisions are typically found in the Federal Acquisition Regulations System (“FARS”),¹ which prescribes not only the general terms and conditions (exclusive of technical specifications) for federal projects but also the entire federal government contract administrative process. Federal construction law is set forth in federal decisions handed down by agency Boards of Contract Appeals and the Court of Federal Claims, the tribunals which adjudicate disputes between federal contractors and the federal government.²

State and local construction is largely a matter of state law rather than federal law. The basic principles of state public contract law often do not materially differ from, and sometimes specifically follow, federal contract law precedents. State and local contracts may also incorporate federal requirements mandated by the use of federal funds; the best known of these is the federal prevailing wage law, the Davis-Bacon Act.³ Other federal requirements (e.g., the Occupational Safety and Health Act)⁴

¹ 48 C.F.R. Parts 1 – 9999 (rev. 2005)

² Contract litigation with the federal government is governed by the Contract Disputes Act (CDA), 41 U.S.C. §606, *et seq.*; see generally A. Bastianelli and C. Lange, “Litigating with the Federal Government,” *The Construction Lawyer* (ABA) Vol. 20 No. 4, p.24 *et seq.* The CDA gives the contractor the option to pursue its claim before either the Court of Federal Claims or the appropriate agency Board of Contract Appeals. 41 U.S.C. §§606, 609. The contractor thus has the choice of forum selection but its election is final; it cannot change forums or voluntarily dismiss and refile in the other forum. The jurisdiction of the Boards and the Court of Federal Claims is concurrent. 41 U.S.C. §607(d). The Boards and the Court are administrative tribunals, and they follow their own rules and procedures and not the Federal Rules of Civil Procedure. The Court of Federal Claims is bound to follow the Federal Rules of Evidence. 28 U.S.C. §2503(b). The Boards are not so bound and may admit evidence that is inadmissible under the FRE.

³ The Davis-Bacon Act was originally enacted March 3, 1931, Ch. 41, 46 Stat. 1494; codified at 40 U.S.C. §276a-276a-5. These provisions were subsequently repealed and replaced by Public Law 107-217, enacted August 21, 2002, 116 Stat. 1150, and the statute is now codified at 40 U.S.C. §3141-3144. The Davis-Bacon Act, by its terms, applies to Federal government projects but its requirements have been incorporated as a condition to certain federally funded state and local construction projects by numerous other federal statutes. *See, e.g.,* the Federal Aid Highway Act, 23 U.S.C.

are not tied to the use of federal funds. State statutes regulating state and local public works construction vary from state to state, but generally include such components as competitive bidding laws;⁵ public sector labor laws such as state prevailing wage laws and payroll reporting requirements;⁶ public sector payment remedies for unpaid contractors and suppliers;⁷ building codes;⁸ state OSHA regulations on the safety of construction projects;⁹ storm water pollution prevention and other environmental requirements;¹⁰ contractors licensing laws;¹¹ and any other form of regulation that affects the construction process.

Financial Implications of the Choice of Delivery Vehicle

At the beginning of a construction project, it is of obvious importance for the owner—in particular, a public owner—to consider all the project's financial implications and risks. Owners typically have a choice of contract delivery vehicles—different ways to procure the same project. They can, for example, contract with an architect or engineer to design the project and prepare bid documents (plans and technical specifications), then solicit bids for the contract based on those documents, and then contract with a contractor to build the project. That is the simplest form of contract delivery—known as “Design-Bid-Build”¹²—and it is the form which is most commonly used in the public sector.

The bidding process may take various forms. For example, a “civil” construction project, which involves infrastructure as opposed to buildings, is typically bid on a unit price basis; that is, contractors bid per unit installed—e.g., by the cubic yard of aggregate base, asphalt concrete, imported soil, poured concrete, lineal feet of pipe, and the like. The total cost of the project is estimated by the designer at the beginning of the project but determined at the end of the project when the actual quantity of

§113; the federal Urban Mass Transit Act (and predecessor statutes), 49 U.S.C. §5333. Related to the Davis-Bacon Act is the Contract Work Hours and Safety Standards Act, 80 U.S.C. §3701 *et seq.*, which establishes a standard 40 hour work week and overtime pay on federally funded jobs, and the Copeland Anti-Kickback Act, 40 U.S.C. §3145, which prohibits wage kickbacks or rebates by employees on federally funded jobs. *See* U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Davis Bacon website, www.dol.gov/esa/programs/dbra.

⁴ The Occupational Safety and Health Act of 1970 is 84 Stat. 1590, 29 U.S.C. §561 *et seq.* The OSHA regulations are compiled at 29 C.F.R. Parts 1900-1999.

⁵ *See generally* R. Cushman and W. Doyle, eds., *Construction Bidding Law*, Chapter 1 (J. Wiley & Sons 1990).

⁶ Some thirty states have enacted prevailing wage legislation for public works projects, known as “little Davis-Bacon Acts.” *See generally, Frank Bros., Inc. v. Wisconsin Department of Transportation*, 409 F.3d 880, 889 n.9 (7th Cir. 2005) for a list of states and statutes.

⁷ State remedies for unpaid contractors and suppliers on state and local public works projects generally include stop notice and payment bond remedies. The payment bond remedies are established by so-called “little Miller Acts” which have been enacted in all states. These generally require contractors on state and local public works projects to provide payment bonds for the benefit of all subcontractors and suppliers. *See generally, S. Stein, ed., Construction Law*, ¶ 17.03[1] n.1 (Matthew Bender rev. 2005), for a list of states and statutes.

⁸ Building codes are enacted on a state-by-state basis but are based on a number of model codes including the Uniform Building Code promulgated and updated regularly by the International Conference of Building Officials (ICBO). Related model codes include the Uniform Fire Code published by the International Fire Code Institute and the National Electrical Code published by the National Fire Protection Association (www.nfpa.org).

⁹ Some two dozen states have state OSHA plans approved by OSHA. Other state OSHA regulations not implemented as part of such a plan and differing from the federal OSHA regulations are potentially subject to preemption. *See generally, Occupational Safety and Health Law Handbook*, Chapter 15 (Gov't Institutes 2001).

¹⁰ The federal EPA was given authority by the 1987 amendments to the Clean Water Act (Section 402(p)) to regulate stormwater discharges under the NPDES program. *See* 33 U.S.C. §1342(p). In 1990, the EPA issued regulations governing stormwater discharges from construction sites in excess of 5 acres. In 1999, the EPA issued regulations governing stormwater discharges from sites from 1 to 5 acres. *See* 40 C.F.R. §§122.26(b)(15); *see generally Texas Independent Producers and Royalty Owners Assn. v. EPA*, 410 F.3d 964 (7th Cir. 2005) (stormwater regulatory history). The EPA has promulgated a series of general permits adopted by a large majority of states as NPDES permitting agencies. *See www.epa.gov/npdes/stormwater*; General Permit for Stormwater Discharges Associated with Construction Activity No. 99-08 DWQ (California State Water Resources Control Board, www.swrcb.ca.gov). The basic mechanism of these general permits is to require an owner to file with the state or local regulatory authority a Notice of Intent and prepare (or have the contractor prepare) a Stormwater Pollution Prevention Plan (SWPPP) compliant to the requirements of the general permit, implementing Best Management Practices as described by EPA.

¹¹ *See generally* C. Circo and C. Little, eds., *A State-By-State Guide to Construction and Design Law* (ABA 1998).

¹² Several national entities publish standard form contract documents generally suitable for use with private and public sector projects constructed using the simple Design-Bid-Build model. The American Institute of Architects (AIA), www.aia.org, publishes and periodically updates copyrighted standard form contracts for use on design-bid-build type projects. The most commonly used are A101 Standard Form of Agreement Between Owner and Contractor, A201 General Conditions, and B141 Standard Form of Agreement between Owner and Architect. These were most recently updated in 1997; new versions are expected to be released in 2007. AIA also publishes standard form contract between owners and construction managers (AIA Forms A121 CMc and A131 CMc (2003)) and standard form design-build contracts (AIA Form A141, *see* note 14 below). The Associated General Contractors of America (AGC), www.agc.org, publishes standard form contracts between owners and contractors. The Engineers Joint Contract Documents Committee (EJCDC), a joint effort of the American Consulting Engineers Council, the American Society of Civil Engineers, and the National Society of Professional Engineers, has issued a standard form Owner-Contractor Agreement, and standard General Conditions and a standard form Owner-Engineer Agreement, all designed for use on projects designed by engineers and not architects. *See www.nspc.org/EJCDC*.

units installed (cubic yards, tons, lineal feet, etc.) is known. A building is usually not bid that way; it is typically bid on a lump sum basis, i.e., for a single-fixed price for the entire project, rather than a unit price per unit installed. Some projects are bid on a lump sum basis for some components and a unit price basis for other components. Some projects are bid with additive or deductive alternates,¹³ which the owner may opt for after bids are received and the owner has compared the bids against its project budget and available funds.

The competitive bidding process is not the only way an owner can procure construction. “Design-Build,” a process that has been widely used for many years in the private sector to build large projects,¹⁴ is now increasingly being used in the public sector as well.¹⁵ Simply put, in a design-build project, the owner does not contract with an architect or engineer and contractor separately; it contracts just once with a single entity which performs both the project design and the construction; the design-build entity is the “single point of responsibility.” The entity can be a contractor with in-house design capability, a contractor with a design consultant, or vice-versa, or a contractor-designer joint venture.¹⁶ Design-build projects are typically done for any or all of a number of reasons. First, the owner may want a choice of designs, and may want different design-build proposers to submit different alternate designs for the same price or similar prices. The owner may want to choose a particular design-builder based on evaluative criteria other than competitively bid prices.¹⁷ Second, an owner may not want to be put “in the middle” between a designer and contractor under circumstances where the owner has separate contracts with each entity and is legally responsible to the contractor for the constructability of the design and the adequacy of the design documents. The “Design-Bid-Build” model places the owner “in the middle.” The “Design-Build” model makes the design-builder responsible for the design, thus the owner is not “in the middle.”¹⁸ Third, the owner may want to reduce the design or construction costs overall without sacrificing project quality. A central goal of the design-build process is to allow a contractor

¹³ In California, the use of additive and deductive alternates by public entities is restricted in order to prevent public owners from changing the scope of the project after the bids are opened in order to favor a particular bidder. See Calif. Public Contract Code §20103.8.

¹⁴ The leading national entity that supports design-build construction is the Design-Build Institute of America (DBIA), 1010 Massachusetts Avenue, N.W., Washington D.C. 20001, www.dbia.org. DBIA promulgates and periodically updates and multi-volume Design-Build Manual of Practice, and disseminates voluminous additional materials on the subject. The AIA, AGC and EJCDC have all published periodic revisions to standard form design-build contracts. The AIA issued its most recent revisions in March 2005. The AIA basic document is Form A141, the Owner-Design Builder Agreement, for which AIA has also published a Subcontract Design-Builder Between Architect (B145), a Design-Builder-Contractor Agreement (B142) and related documents. The AGC has published AGC Document 410 standard form of Design-Build Agreement and General Conditions Between Contractor and Architect/Engineers for Design-Build Projects, AGC Document 460 Standard Form of Agreement Between Design-Build Contractor and Design-Build Subcontractor. The EJCDC has published a series of documents designed for use with EJCDC Document 1910-40 (now Document D-700 (2002 ed.)), Standard General Conditions of the Contract Between Owner and Design-Builder. These include, *inter alia*, EJCDC D-750 (Standard General Conditions of the Subcontractor Between Design/Builder and Subcontractor; D-500 (2002 ed.) (Standard Form of Agreement Between Owner and Owner’s Consultant for Design Professional Services or Design/Build Projects; D-505 (2002 ed.) Standard Form of Subagreement Between Design Professional and Engineer for Design Professional Services.

¹⁵ The Federal government began small scale design-build procurement in the 1980’s. The General Services Administration issued a Design Build Request for Proposal Guide in 1991. The Army Corps of Engineers issued Design-Build Instructions for Military Construction in 1993. Broad statutory authority for federal design/build procurement was enacted in 1996. See 10 U.S.C. §2305a (armed forces); 41 U.S.C. §253m (executive agencies generally). Regulations implementing this authority were adopted in 1997. See FAR 36.300 & 301, 48 C.F.R. §§36.300 & 301 (1997). The Transportation Equity Act for the Twenty-First Century (TEA-21), P.L. 105-178, 112 Stat. 184 et seq. enacted in 1998, authorized the Federal Highway Administration to fund federal aid highway projects contracted for by the states on a design-build basis provided the project exceeded certain monetary limits. The Federal Highway Administration then promulgated regulations required by TEA-21 for federally funded design-build highway projects. See 23 C.F.R. Part 636 (published 2002). The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), P.L. 109-59, 119 Stat. 1170, enacted in 2005, replaced TEA-21 with expanded funding. SAFETEA-LU eliminated the monetary limits on design-build contracting set forth in TEA-21. See SAFETEA-LU §1503; 23 U.S.C. §112(b)(3).

¹⁶ For a complete state-by-state review of the licensing requirements for design/builders, see R. Cushman and M. Loulakis, eds., Design-Build Contracting Handbook, Chapter 2 (Aspen Publishers 2d ed. 2001).

¹⁷ It is not uncommon for an owner to pay pre-proposal stipends to competing design-build proposers for the preparation of preliminary designs to be evaluated for construction and life cycle costs, aesthetics, etc. See generally, Cushman & Loulakis, supra, Chapter 10; AIA/AGC Recommended Guidelines for Procurement of Design-Build Projects in the Public Sector (1995).

¹⁸ The issue of *Spearin* warranties is complicated in the so-called “bridging situation.” In this situation, the owner separately contracts for the creation of initial design drawings (typically a 5 to 30 percent complete design) which it then provides to the design-builder to use to develop the rest of the design. In this case, a limited *Spearin* warranty may attach to the owner’s design product in favor of the design-builder while the design-builder is responsible for the “correctness” of the final product. See generally, Donahue Electric, Inc., VABCA No. 6618, 03-1 BCA (CCH) ¶32, 129 (to the extent that specifications in a design-build contract set forth specific quantities and sizes of equipment the owner bears the risk of design deficiencies); M. A. Mortenson Co., ASBCA No. 39978, 93-3 BCA (CCH) ¶26, 189.

and designer to cooperate in both the design and construction process to eliminate unnecessary design costs and reduce the contractor's overhead costs of obtaining design information during construction.¹⁹

Other ways to contract for large projects include “cost plus fee,” paid to a contractor or to a construction management firm that subcontracts for construction, and “cost plus fee” with a guaranteed maximum price (GMP) provided by the contractor or construction management firm.²⁰ These forms of contract are typically used on projects where the design process occurs in stages and construction of earlier stages commences before later stages are designed (so-called “fast track” projects), and other projects not susceptible to the “Design-Bid-Build” model. For these projects the time constraints, as much as or more than cost constraints, drive the choice of delivery vehicle. Whatever the project, the choice of a project delivery vehicle has immediate financial implications for an owner—and it is the first choice that an owner has to make. Once that choice is made, it dictates whether one or more than one project contract is required and dictates the essential terms (scope of services, guarantees and payments) of the contract or contracts.

Allocating Risk: Contract Considerations

My clients cannot control the entire construction process. Neither can I. Owners typically do not perform their own design work and do not build without contractors. Lawyers typically neither design nor construct. By constructing a project an owner exposes itself inevitably to a variety of risks. Therefore, the first and overriding concern that an owner should have at the beginning of a construction project is to allocate risk. This should be done when preparing contract documents that reflect the owner's choice of project delivery vehicle. The risks to be allocated include most importantly the following: the “design” risk or responsibility; the risk of errors or omissions in the design; the construction responsibility—in other words, what the contractor is going to be responsible for in the way of performance; the standards to which the contractor is going to construct; the choice of sub-contractors and suppliers; and risk of non-performance by subcontractors and suppliers.

Allocation of the “design” risk often drives the choice of delivery vehicle. Among the basic legal principles common to all public and private sector construction is the concept of the owner's implied warranties. It has long been recognized by federal and state courts that an owner who provides a contractor with a set of design documents thereby impliedly warrants their overall “correctness.”²¹ Correctness in this context is understood to mean both (1) the accuracy of any factual representations in the design documents (e.g., about site conditions) and (2) the sufficiency and constructability of the design based on information provided in the documents. These warranties, known in federal construction law as *Spearin* warranties,²² are also commonly recognized as a matter of state law and are basic to any discussion of risk allocation and choice of delivery vehicle.²³ By virtue of these warranties, the owner who provides the design to the contractor generally bears the risk of defects in the design, and any additional costs caused by such defects, whether caused by the owner or by its design consultant. The warranties may be limited by contract language, and some or all of this risk may be transferred by contract to the contractor or the design consultant, but as between the owner and the contractor the law allocates the risk of defective design to the owner in the absence of such risk transfer.²⁴ Notably, in the design-build context, the owner does not provide the design and therefore does not impliedly warrant its correctness. Hence the choice of delivery vehicle may itself be an allocation of the “design” risk.

¹⁹ See generally R. Cushman and M. Loulakis, *supra*, Chapter 3; G. Hunt, et al., “The Allocation of Risks in A Design/Build Construction Project,” *Los Angeles Lawyer* (January 1999).

²⁰ See AIA Form A111, Standard Form of Agreement Between Owner and Contractor – Cost Plus Fee with Negotiated Guaranteed Maximum Price (1997).

²¹ See generally, Harrington, et al., “The Owner's Warranty of the Plans and Specifications for a Construction Project,” 14 Pub. Cont. L.J. (ABA) 240 (1984); Patten, “The Implied Warranty That Attaches To Government Furnished Specifications,” 31 Fed.B.J. 291 (1972).

²² The leading case establishing such warranties was *United States v. Spearin*, 248 U.S. 132 (1918).

²³ See generally S. Stein, ed., *Construction Law*, ¶5.03[2][6] and cases cited therein.

²⁴ It is common for owners to shift part of the risk to the contractor by requiring the contractor to notify the owner pre-bid of any “patent” defects in the design documents. See Stein, note 24, *supra*, ¶5.03[2][6] n. 86.

Other risks that have to be addressed include the “time” risk—who bears what risk if the project is delivered late. If the contractor is bearing some of that risk, what events are going to excuse late completion, and is the contractor going to be responsible to pay actual or liquidated damages in the event of late completion? The owner’s choice of a liquidated damages clause is itself a kind of risk allocation. As a general rule, liquidated damages clauses are often presumptively enforceable in the public sector, and are otherwise enforceable in the private sector where proven to be a reasonable attempt to quantify the owner’s actual damages as foreseen at the time of contracting.²⁵ But the liquidated damages clause is typically construed to be “in lieu of” actual damages.²⁶ Thus, the owner who opts for a liquidated damages clause potentially assumes the risk that its quantification will be wrong.

Related to the “time” risk is the risk of consequential damages to the owner if the project does not succeed.²⁷ Private sector projects often involve the construction of facilities and systems (e.g., manufacturing plants), the performance of which is commercially vital to the owner. Public works projects for construction of complicated facilities and systems often must meet specific performance criteria imposed by or on an owner (e.g., public water or wastewater treatment plants required to meet quality standards for drinking water or plant effluent). The potential consequential damages to the owner and the public at large if the performance criteria are not met can be very serious. The performance criteria are typically assumed in the design and the project design professional (usually an engineer) is required to design the system to meet the criteria. The design professional then assumes the risk of consequential damages if the design does not meet the criteria. Depending on the exposure, however, neither the designer nor the contractor may be willing to accept the risk of consequential damages.²⁸ Alternatively, the designer may accept the risk only to the extent that it can obtain professional liability insurance to cover the risk.

Where the consequential damages risk can be transferred, its transfer can raise complex issues. The design professional and owner may decide, for example, to shift to the contractor the responsibility to design a product or system to meet particular performance criteria. This may be done by drafting a so-called “performance specification.”²⁹ Where the system involves the product or system of a particular manufacturer, the contractor may, in turn, shift the responsibility to meet the performance specification to the product or system manufacturer by subcontract. As a general rule, risk transfer by performance specification makes sense if the necessary design work can be done most cost-effectively by someone other than the design professional; it may be especially appropriate if the design or performance capability of the product or system is best

²⁵ See generally S. Stein, ed., Construction Law, ¶6.10[2] (Matthew Bender rev. 2005).

²⁶ Id., n.19.

²⁷ “Consequential damages” are generally understood as “such damage, loss or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act.” Black’s Law Dictionary (6th ed. 1990). It has long been recognized in American and British contract law that consequential damages are recoverable for breach of contract only where they were reasonably foreseeable at the time the contract was entered into. The Uniform Commercial Code embodies this restriction in its definition of the consequential damages recoverable by a buyer for a seller’s breach of any contract for the sale of goods: “Consequential damages resulting from the seller’s breach include . . . [a]ny loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.” U.C.C. §2715(2). While most construction contracts are not subject to the U.C.C. per se, supply contracts for equipment are contracts for the sale of goods subject to U.C.C. Article 2. Disclaimers of consequential damages in such contracts are subject to U.C.C. §2719(3).

²⁸ Commencing in 1997, the AIA added mutual waivers of consequential damages to its A201 Owner-Contractor form (Section 4.3.10). No definition of “consequential damages” was provided. However, the new Section 4.3.10 defined the waived damages to include:

- .1. Damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2. Damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation and for loss of profit other than anticipated profits arising directly from the Work.

This section also expressly states that the waivers do not preclude “an award of liquidated direct damages” under the contract. See generally C. Sink, et al., The A201 Deskbook, Chapter 3 (ABA 1998).

²⁹ A “performance” specification is distinguished from a “prescriptive” specification, which identifies a particular design or product(s) supplied to meet the owner’s needs. Construction specifications generally are prepared by design professionals using a format and standard form language available from the Construction Specifications Institute, www.csinet.org.

understood by its manufacturer or is protected as competitively sensitive information not available to the design professional. In the context of a negotiated contract, the risk transfer to the manufacturer may also depend on whether the manufacturer will stand behind its product (or system) and accept (and not disclaim) the risk of consequential damages if the performance criteria are not met. If the risk cannot be transferred (because the design professional and/or contractor will not accept it and the manufacturer disclaims it), the owner should, at a minimum, be aware at the outset of the project of the consequential damages risk it faces. In the context of a competitively bid public project, the owner ideally should understand who will end up bearing the risk before it agrees to use a performance specification to transfer that risk from the design professional. Because the public owner cannot know the low bidder in advance, this goal is only imperfectly achievable.

Similar risk transfer issues may be created among owners, design professionals, contractors and manufacturers in the context of “sole-sourcing.” In the public works context, a “sole source” specification is one that requires the contractor to provide the product or service of a particular manufacturer, supplier or subcontractor. No other “source,” however equivalent in design or quality, will meet the specification. Such specifications are permitted on federal, state and local projects subject to various restrictions imposed as a matter of federal or state law.³⁰ Similar specifications are used in the private sector where the private owner separately provides for the procurement of equipment to be installed as part of the project. Equipment that is not owner-supplied may be specified for supply from the owner’s preferred suppliers by purchase order to be issued by the contractor. Such “sole source” specifications raise the issue of who, as between owner and contractor, bears the risk of non-performance by the sole-source supplier or subcontractor. In the federal context, at least, the law is clear; in the absence of contractual allocation to the contrary, the risk of such non-performance falls on the contractor, and not the federal government.³¹ The contractor may or may not be able to hold the sole-source supplier or subcontractor liable for its own non-performance, depending on the terms of the subcontract or purchase order.

Other risks to be allocated at the outset include a variety of force majeure risks. These include the risks of weather, strikes, floods, earthquakes, terrorism, etc. There are also risks of unknown events and unforeseen conditions that may be discovered or may arise during the course of the project, such as the quality of subsurface—i.e. underground—conditions. In the public sector, the risk of adverse underground conditions is typically required, either by federal law or state statute, to be allocated in a particular way. There is a well-developed body of state and federal public contract law that addresses the subject of so-called differing site conditions.³² These are either (1) conditions that are discovered to differ from what the owner has represented them to be, or (2) conditions that are discovered to differ from what is normally encountered in construction of the type that is being undertaken. In the public sector, these are known as Type One and Type Two differing site conditions, both of which are recognized as risks that the owner typically bears; that is to say, if such conditions are encountered, the owner has to pay the contractor extra money to address these conditions.³³ This rule is usually justified on the ground that it reduces the overall project cost to the owner, since it eliminates the incentive for contractors to include in their bids a contingency for unknown subsurface conditions.

In the public sector, management of the owner’s subsurface risks usually involves conducting a geotechnical investigation and preparing a geotechnical report pre-bid. The geotechnical report is typically prepared in order to supply design-related information concerning the project site and its subsurface for the benefit of the design professional. The report will typically

³⁰ The federal restrictions on sole source procurement are set forth in the Competition in Contracting Act (CICA) and in FARS. See 10 U.S.C. §2304(c); 41 U.S.C. §253(c); 48 C.F.R. §§14.101 (1987); 36.202(b). The Comptroller General reviews bid protests which assert that the federal government has arbitrarily narrowed a bid solicitation to a sole source procurement. See generally J. Cibinic and R. Nash, Formation of Government Contracts, Chapter 3 (George Washington Univ. Press 1998). Compare Calif. Public Contract Code §3400 (sole-source state procurement).

³¹ See *Monde Construction Co., Inc.*, ASBCA Nos. 44993 *et al.*, 96-2 BCA (CCH) ¶28, 400; *Alabama Dry Dock & Shipbuilding Corp.*, ASBCA No. 39215, 90-2 BCA (CCH) ¶22, 855; *Ainslie Corp.*; ASBCA No. 29, 303, 89-2 BCA (CCH) ¶21, 811; *Monaco Enterprises, Inc.*, ASBCA No. 27, 423, 86-2 BCA (CCH) ¶18, 922; *Cascade Electric Co.*, ASBCA No. 28674, 84-J BCA (CCH) ¶17, 210.

³² See generally R. Nash & J. Cibinic, Administration of Government Contracts, Chapter 5 (3d ed. George Washington Univ. Press 1995); R. Cushman & D. Tortorello, eds., Differing Site Condition Claims (J. Wiley & Sons 1992).

³³ Type 1 and Type 2 differing site conditions are recognized in FARS, see FAR 52.236-2(a)(1), the Differing Site Conditions Clause, 48 C.F.R. §52.236-2 (1991). The AIA form A201 Section 12.2.1 (1997) recognizes both types of differing site conditions. Similar clauses are required by FHWA on federal aid highway projects (23 C.F.R. §635.131(a)(1) 1991) and by EPA on federally funded pollution control projects (40 C.F.R. §35 subpart E app. C-2 (1991)). Such clauses are also required in state and local construction contracts for a number of states. See, e.g., Calif. Public Contract Code §7104. Colo.Rev.Stats. §24-105-301; Maryland Ann. Code St. Fin. & Proc. §13-218(b); Mass Gen. Laws, Ann. Chap. 30 §39N.

include soil boring logs, soil characterizations, measurements of soil moisture and density, test results, calculations and professional opinions.

Disclosure of the geotechnical report as part of the bid documents is a matter of routine risk management. First, such disclosure eliminates the risk of the contractor later contending that material geotechnical information was deliberately withheld. Second, by providing bidders with the benefit of actual subsurface information, the public owner reduces the risks to the project of the bidders' lack of such information. By reducing the unknowns, the owner reduces the risk of disputes over which unknowns should reasonably have been expected. In so doing, the owner reduces the risk of disputes over Type Two differing site conditions. To be sure, disclosure of the geotechnical report may create the risk that the disclosed information will be incorrect, and the owner may be liable for the resulting Type One differing site condition (or equivalently, for breach of an implied *Spearin* warranty). This risk, however, can be controlled and minimized; the owner can manage it through careful choice of its geotechnical consultant, and the geotechnical consultant can manage it by properly conducting its investigation and preparing a geotechnical report which is accurate and appropriately limited and qualified in its scope and its opinions. Lastly, by the terms of its professional services agreement with the geotechnical consultant, the owner may also transfer the risk of Type One differing site conditions to the consultant.

As the foregoing discussion demonstrates, the most important initial task for the construction attorney acting for an owner is to allocate the project risks clearly by contract so that all project participants understand what risks are assumed by which participant. It also makes sense to allocate the risks to the project participant best able to manage them—either the participant who is best able to avoid the risk, or the participant who is best able to insure the work against the risks that it is assuming. In addition, the owner has to assume that whenever a project participant buys insurance against a project risk, the owner is going to pay for it one way or another; it will either be separately charged as a cost or it will be included in a fee, markup or other charge. Allocation of insured risks to project participants should minimize the insurance premiums which they, and ultimately the owner, will have to pay for the desired coverage.

In the context of competitively bid public works projects, this goal is often pursued with imperfect success, due to the owner's inability to predict the low bidder's insurance premiums at the time it prepares bid documents. Public entities typically require contractors to provide statutorily required workers' compensation insurance for their employees, builder's risk insurance covering damage to the work in progress, and commercial general liability insurance covering the contractor's own liability for bodily injury or property damage.³⁴ These coverages are typically required in order to "protect the project" and to protect the participants essential to its success. All of these coverages are usually most cost effectively purchased by the contractor since its carriers, and not the owner's, are most familiar with its loss history. It also makes sense for the owner to become an additional insured under the builder's risk coverage so that the owner can control the use of builder's risk insurance proceeds to repair any damage to the work in progress. Public owners often go beyond this and require the contractor to add the owner (and potentially its consultants) as additional insureds under the contractor's liability insurance by endorsement. Since the owner who requires such an endorsement typically has its own liability coverage, the effect is to provide duplicate coverage and protect the owner's own insurance from claims that can be paid by the contractor's carrier. The owner's goal is to protect its existing insurance and not "the Project." This may or may not be cost-effective and the owner who requires contractor-supplied duplicate coverage may have only imperfect information to justify such a requirement, since it can only estimate pre-bid what will be charged for the additional insured endorsement.

Not all construction risks are insurable, which is also a concern for the owner. Such risks as terrorism, earthquake, or flood may not be insurable in the commercial market, or coverage may be either limited, prohibitively expensive, or both.³⁵

³⁴ The AIA A201 form requires the contractor to purchase worker's compensation and commercial general liability insurance (Section 11.1.1 (1997 ed.)) and requires the owner to purchase "all risk" builder's risk coverage as property insurance (Section 11.4.1 (1997 ed.)). As AIA suggests, owners should consult carefully with their counsel and risk managers before adopting this language since "all risk" builder's risk coverage includes risks (flood and earthquake) which may be unnecessary and expensive.

³⁵ See generally, U.S. Government Accountability Office (formerly General Accounting Office), "Terrorism Insurance: Implementation of the Terrorism Risk Act of 2002," Rept. GAO-04-307 (April 23, 2002); "Terrorism Insurance: Measuring and Predicting Losses from Unconventional Weapons Is Difficult, But Some Industry Exposure Exists," Rept. GAO-06-1081 (Sept. 25, 2006); "Federal Emergency Management Agency:

Defective work by the contractor causing economic damage is typically treated as an uninsurable “business risk.”³⁶ The owner can make the contractor bear this risk but cannot cause it to be an insured risk.

Once the risks are allocated, an equally important contract drafting task is to provide the owner the means to verify that other project participants are properly managing the risks that they have assumed. Contractor quality assurance and quality control (QA/QC) programs are written into construction contracts to provide a procedure for the owner to be assured that the contractor is managing the quality of its work. Contractual submittal and shop drawing requirements are integral to this process.³⁷ Contractual requirements for regular project inspections serve a similar purpose. Contractual requirements for computerized project scheduling and regular updating serve the purpose of ensuring that the “time” risk is being managed to promote timely project delivery. Contractual insurance requirements usually require delivery of regular certificates and other proofs of coverage (e.g., copies of policies or endorsements) to make sure that risks to be insured against are in fact being insured against.

Lastly, when it comes to avoiding the risk of disputes at the end of a project, the most important thing an owner can do is to document the project clearly throughout its course. That process has two aspects, one of which is to document what happens on a daily basis; the second is to document clearly what is agreed to during the course of a project, especially agreements as to changes in contract scope and compensation for extra work.

The Attorney's Role as Risk Manager

The construction lawyer's role should be to help manage the owner's risks throughout the contracting process. That role should not be limited to giving an opinion regarding the final contract documents, or to advising the client about compliance with the statutes applicable to public or private construction. The lawyer's role should be to review the contracting process as a whole, including the preparation of design documents; choice of project delivery vehicle; and other procurement decisions, including procurement of owner-supplied or sole-source equipment, inspection, and testing of systems.

The construction lawyer is best suited to identifying and evaluating the legal risks that arise from those choices; other parties representing the owner, including design professionals and in-house managers, may not be as sensitive to their implications. Often, public entities assume that the lawyer's role is simply to opine as to the legality of the contract boilerplate, but if the lawyer's role is so limited, a great deal of legal experience in managing risks and dealing with claims at the end of projects is wasted. Therefore, my first strategy in any construction project is to help the owner to realize that it should use the lawyer as a manager of legal risks, and not simply as a source of legal opinions as to the legality of the process.

How Construction Disputes Happen

The predominant sources of construction disputes include design errors or omissions; defective construction; defective construction management, which may be done by either an owner, construction manager or contractor; unforeseen events or unknown conditions; and unclear contract language, which may create a dispute over what the contract specifications mean, and how they are to be interpreted.

Bad design may cause a contractor to incur additional costs that the contractor did not anticipate in his bid; bad construction practices may cause the contractor's work to be rejected by the owner; unforeseen events and unknown conditions typically

Improvements Needed to Enhance Oversight and Management of our National Flood Insurance Program,” Repts. GAO-06-119 (Oct. 18, 2005) and GAO-06-1835 (Oct. 20, 2005); see www.gao.gov.

³⁶ See generally, S. Turner, *Insurance Coverage of Construction Disputes*, Chapters 26 & 27 (Thomson/West rev. 2006).

³⁷ See, e.g., AIA Form A201 Article 312, Shop Drawings, Product Data and Samples. Section 3.12.8 (1997) specifically provides that the work shall be in accordance with approved shop drawings submitted except that the contractor is not relieved of the requirement to conform to the contract documents. Section 3.12.10 specifically addresses the contractor's responsibility to design to a performance specification.

cause additional costs to be incurred, which project participants—owners; contractors; design professionals such as architects, engineers and consultants; contractors; subcontractors; and suppliers—are likely to fight over.

There are several general types of construction disputes. There are claims by contractors against owners for extra costs arising from projects; claims by owners against contractors for construction defects; claims by owners against architects and other design professionals for errors or omissions in design; and payment disputes—instances where a contractor, subcontractor or supplier have not been paid properly. In the public sector, construction disputes may involve bonding companies, which bond the performance of public works contracts and payment of contractors, subcontractors, suppliers, and workers on public works projects. Private sector disputes may involve special statutory mechanics' lien remedies, described below.

The types of cases I typically get involved in are claims by contractors for extra work or for additional costs incurred due to a delay or disruption of a project. These types of cases tend to be large, with claims totaling millions of dollars. They are also extremely fact and document-intensive, which is a unique aspect of construction litigation.

Stages of Construction Dispute Resolution

The stages of construction litigation, arbitration or other dispute resolution differ, depending on the type of case. In proceedings brought by contractors against owners, in particular large scale, multi-million dollar delay and disruption claims, several stages may be identified. The first stage is typically the preparation and submission of a claim by a contractor. This stage involves the collection of documents, including an analysis by a claims consultant, which is typically forwarded to the owner in the form of a claim, or request for equitable adjustment. This documentation may include several binders of supporting materials. As this stage is typically handled by the contractor, the owner's lawyer is not involved.

The second stage is the review of the claim and the backup, which is typically done by the owner, its lawyer, and a cost or schedule consultant, or both. In some cases, this stage results directly in claim resolution. More typically, it is only the beginning of the investigation and analysis necessary for the owner to respond to the claim.

The third stage of the dispute resolution process involves reviewing the project documentation from the owner's standpoint. At this stage, I try to segregate and focus on the owner's key project documents. That typically involves reviewing the key contract provisions; the computerized project schedule; all project correspondence; and all diaries and reports on the progress of the project which were prepared by project inspectors or other owner representatives. The process is greatly aided if the owner has maintained computerized logs, including logs of change order requests, requests for information, project payments, correspondence, and meetings. The document review process may take several months.

The fourth stage of the dispute resolution process involves accessing and reviewing the contractor's project documentation and cost records; these may be provided with the claim, or the owner may have to negotiate with the contractor to gain access to them. If the contractor has been required by the bid documents to deposit its pre-bid project estimate in an owner-controlled escrow or safe deposit box, the owner will have access to the estimate to verify as-bid quantities and prices. If the contractor has filed suit against the owner, its project records are available through discovery. Reviewing these records enables the lawyer and his or her consultants to understand aspects of the project not disclosed to the owner (e.g., correspondence with subcontractors and suppliers), and to verify with some level of detail what the contractor's job costs actually were.

The fifth stage of the dispute resolution process typically involves some form of expert analysis of the time and costs claimed. This may involve a schedule analysis; an apportionment of delays on a project, which relates to the recovery of delay costs; a review of the contractor's cost data; and an attempt to apportion responsibility for cost overruns. Both a schedule consultant and a cost consultant may be involved.

The sixth stage of the process is the actual litigation or arbitration of the claim, or negotiation, mediation or some combination thereof. The overwhelming majority of construction cases are settled, either before or after a lawsuit is filed. Construction cases are most cost-effectively settled earlier, as opposed to later in the process.

Early Client Meetings: Key Information and Documentation

During my initial meetings with a client, there are two key pieces of information that I need to obtain: what is the dispute; and where do the parties stand? In other words, what are the disputing parties fighting over; and what positions have they taken?

Next, I need to understand the background of the dispute. I need to understand what claim has been presented, whether it is a single-page set of calculations, or ten binders of supporting documents. I also need to see the contract documents. On a typical public works project these include instructions to bidders, general and special conditions, technical specifications and any addenda, project plans and all revisions thereto, and all change orders.

In addition to the contract documents, important documentation that I must obtain during or following these initial meetings include project correspondence, internal memoranda, including e-mail; requests for information submitted by the contractor; meeting minutes, and daily reports, logs and diaries, especially on public works construction, from a building inspector or an owner's representative. Much of this documentation is now recorded electronically, using construction management software packages.

The most important documentation that I need to obtain is the complete and accurate "as built" information—the daily logs, reports, and diaries recording what went on at the job site; what contractors and subcontractors were there; how many other people were there; and where they were working, what work they were performing, and how much progress they achieved. Quantitative information about daily progress is particularly helpful. That information is recorded either electronically or in the form of daily written records kept by inspectors, depending on the nature of the project. On most types of public works projects, such daily reporting is standard, and it may be required by statute or regulation.

Laws Governing Construction Litigation and Dispute Resolution

Construction disputes can, of course, arise under federal contract law (FARS), state public contract law or state contract law applicable to the private sector. In California, where I practice, state and local public works construction is controlled by the Public Contract Code,³⁸ which includes the State Contracts Act and related provisions, applicable to contracts entered into by state agencies,³⁹ and the Local Agency Public Construction Act, applicable to contracts by local public entities.⁴⁰ Both acts include statutes controlling competitive bidding,⁴¹ subcontractor sub-bidding,⁴² required contract provisions, and required dispute resolution procedures.⁴³ Other requirements for public sector labor are embodied in the California Labor Code, which controls the employment of construction workers by contractors, requires payment of prevailing wages, and imposes payroll record keeping requirements on both contractors and public owners.⁴⁴ Other state laws affecting the public sector construction process include occupational safety and environmental protection laws and contractors licensing laws.

There are also special laws that create construction remedies for unpaid contractors, workers, and suppliers on construction projects. Most importantly these include, in the private sector, mechanics' lien laws, which allow unpaid contractors, subcontractors, suppliers, and workers to record and foreclose liens on the improved property, thereby recovering the value of any improvement they created.⁴⁵ There are no mechanics' lien rights on public works projects, but bond rights are provided instead. Federal projects are subject to the Miller Act,⁴⁶ which requires payment bonds to be provided by prime contractors on

³⁸ Calif. Public Contract Code §§1-22355.

³⁹ Calif. Public Contract Code §10100-10285 (State Contract Act); §§10500-10506 (University of California); §§10700-10717 (State University).

⁴⁰ Calif. Public Contract Code §20100-22355.

⁴¹ See Calif. Public Contract Code §§20105-21641 (competitive bidding laws for local agencies); §§21000-22045 (alternative uniform cost accounting procedures); §22050 (emergency procedures).

⁴² Calif. Public Contract Code §§4100-4114 (Subletting and Subcontracting Fair Practices Act, which prescribes the listing of subcontractors over .5 percent in any bid to a public entity).

⁴³ Calif. Public Contract Code §§7100-7200 (contract clauses); §§20104-20104.6 (local agency dispute resolution procedures).

⁴⁴ Calif. Labor Code §§1770-1775 (payment of prevailing wages); §§1776-1771 (retention of certified payroll records); §§1777.5-1777.7 (employment of apprentices).

⁴⁵ See generally R. Cushman, ed., *Fifty State Construction Lien and Bond Law* (J. Wiley & Sons, 2d ed. 2006).

⁴⁶ 40 U.S.C. §§3131-3134.

federal public works projects; similar state law versions of this statute (called “Little Miller Acts”) also apply to state and local public works projects.⁴⁷ In essence, instead of the right to record mechanics’ liens, the people who work on these projects or supply materials to them have rights to proceed against bonding companies on payment bonds if they are not paid.

Recent Trends in Public Works Construction Law

A number of trends are bringing change to the realm of public sector construction law. In recent years, public entities have become much more sensitive to false claims by contractors on both the state and federal level. False claims statutes, state and federal, impose both civil and criminal penalties for false claims submitted to governmental entities.⁴⁸ State and local entities have now become increasingly interested in using these false claims statutes as a means to police the filing of claims by contractors. In some cases, they are using these laws to permanently debar contractors from doing public sector work based on their claims experience.⁴⁹

A second development that has been occurring in a number of states concerns the public sector competitive bidding laws, which normally require public entities to competitively bid public work projects larger than certain monetary thresholds. These laws are now being relaxed, and public entities have been provided with greater flexibility in their choice of project delivery vehicle. Specifically, they are allowed to solicit and enter into design-build contracts which are not necessarily competitively bid.⁵⁰ Many public entities are interested in that option, since it may allow them greater flexibility in the choice of design and allow them to transfer design responsibility to the contractor. Public entity owners increasingly want that kind of flexibility; in fact, several very large public works projects in California and elsewhere have been constructed on a design-build basis.⁵¹ That has been true for the last fifteen years; this trend is now starting to trickle down to smaller projects such as schools and office buildings, in addition to larger projects such as freeways and toll roads.⁵²

⁴⁷ See note 7, *supra*.

⁴⁸ The federal False Claims Act was originally created in 1863 to combat fraud perpetrated by contractors on the U.S. military during the Civil War. *See* Act of Mar. 2, 1863, Ch. 67, 12 Stat. 696 (codified at 31 U.S.C. §§3729-3733). In 1986, Congress amended the False Claims Act to increase the civil penalties and damages available to the federal government. Pub. L. 99-562, 100 Stat. 3153 (1986). At the same time, Congress passed the Program Fraud Civil Remedies Act of 1986, Pub.L. 99-509, 100 Stat. 934., creating additional administrative remedies codified at 31 U.S.C. §§3801-3812. Criminal penalties are provided by separate statute. *See* 18 U.S.C. §1001. A number of states have passed comparable state false claims acts. *See generally* J. Boese, *Civil False Claims and Qui Tam Actions*, Appendices I-K, state statutes (3d ed. Aspen Publishers 2007); Calif. Gov. Code §§12650-12654 (California False Claims Act).

⁴⁹ The debarment remedy has long been recognized by FARS and its predecessors. *See* 48 C.F.R. §9.400 *et seq.* (FARS debarment procedure). The federal Department of Transportation has issued its own debarment regulations applicable, *inter alia*, to all DOT-funded projects. *See* 49 C.F.R. Part 29 (§§29.25-29.1020). At the state and local level, debarment is prescribed by statute or ordinance, or is inherent in the public entity’s power to disqualify bidders as non-responsible. *See, e.g.*, Calif. Public Contract Code §6109 (debarment for violations of state Labor Code).

⁵⁰ Well over half the states now have some form of design/build legislation for public works. States other than California that have enacted design-build legislation include the following (the list is not exhaustive): Alaska (Alaska Stat. §36.30.200); Florida (Fla.Stat. Ann. §337.11 (FDOT projects)); Idaho (Idaho Code §67-5711A); Kansas (Kan.Stat. Ann. §68-2001 *et seq.*); Maryland (MD Code Ann. State Fin. & Proc. §3-602(g)(1)); Montana (Mont. Code Ann. §60-2412); Nevada (Nev.Rev.Stat. §341.161); New Hampshire (N.H. Rev.Stat. Ann. §228:4(1)(c)); Utah (Utah Code Ann. §63-56-502); Washington Rev. Code Ann. §39-10.051).

⁵¹ During the 1990’s, local California agencies in Orange County formed joint powers authorities known as the Transportation Corridor Agencies, which constructed three toll roads with a combined construction cost exceeding \$2.5 billion, on a design-build basis. The projects were the San Joaquin Hills Transportation Corridor, the Eastern Transportation Corridor and the Foothill-South Transportation Corridor. In 1989, the California Legislature enacted statutes to empower the California Department of Transportation (CalTrans) to contract with private entities on a design-build basis to construct and operate a limited number of toll way facilities. AB680, 1989 Cal.Stats. Ch. 107, Calif. Streets & Highways Code §143. Pursuant to that authority, CalTrans contracted for the 91 Express Lanes, a \$126 million automated toll lane project in Orange County, which opened in 1995. *See generally*, J. Gomez-Ibanez, et al. “Private Toll Roads in the United States; the Early Experience of Virginia and California,” Final Report prepared for the U.S. Department of Transportation (Harvard University 1991). In other states, recent notable large-scale design-build highway and transit projects include the \$1.5 billion Interstate 15 Project in Utah, the \$300 million 895 Connector Project in Virginia, the \$290 million Atlantic City/Brigantine Connector Project in New Jersey, and the \$1.2 billion Hudson Bergen Light Rail Transit Project between New York and New Jersey. *See generally* www.fhwa.dot.gov/ppp.

⁵² Recently enacted California statutes give design-build contracting authority to a number of state and local entities for different kinds of projects. These include the following:

- (1) State Department of General Services (State Office Buildings) - Calif. Government Code §§13332.19, 14661;
- (2) University of California – Calif. Public Contract Code §10503;
- (3) California State University – Calif. Public Contract Code §10708;

Successful Strategies for Dispute Resolution

Success in any kind of construction dispute resolution depends on meticulous preparation and attention to the facts. The biggest mistake an attorney can make in construction dispute resolution is not discovering all the relevant facts before opposing counsel does. Failure to learn all the facts leads to failure to see all sides of a case. The construction lawyer must review the owner's documents; see what the contractor's costs were; and hire experts to allocate costs and assess responsibility—in other words, the lawyer must ultimately figure out who caused what to happen, in circumstances where the parties themselves may not know. Virtually all large claims are causation-related; therefore, the construction lawyer must go through each step of the dispute resolution process to some extent, depending on the size of the dispute.

All construction disputes are alike in one very basic respect: a project participant is dissatisfied with the result and is seeking redress. It may be that the owner is dissatisfied with the design, the workmanship, or both, and has been left with a defective building, windows or flooring system, or a contractor may be dissatisfied because the project cost him more than he bid and/or he is being held responsible for what went wrong with the project.

In order to achieve a successful resolution for my client, I strive to be in a position to assess what the case is about and what the risks are—and I try to do this as early on in the process as I can. That usually involves as much informal document gathering or discovery as I can do, given the state of the dispute resolution process at the time I become involved. Early assessment is often cost-effective. Construction litigation and arbitration and the attendant time, effort, and costs typically drive the parties toward some attempt at an early resolution; that resolution is often facilitated by an early review of the project documents and cost records. Early settlement discussions are always worthwhile.

Depositions of witnesses are usually a last resort in construction litigation. In this respect construction litigation is unlike other types such as tort or employment litigation, where the first thing a lawyer may want to do is take a deposition of an opposing party in order to pin down his or her story. In construction disputes, the case story is typically told by documents, and we are less concerned with taking depositions than in discovering the facts that can be gleaned from the relevant documents and cost records. Indeed, if the lawyers or their clients wanted to depose everyone involved in a large scale construction project, the result would often lead to dozens of multi-day depositions, which would greatly run up litigation costs, often to little or no advantage.

To organize all the relevant documents can be a daunting task. Large public works projects typically produce hundreds of thousands of pages of project documentation and the document control and organization process can be extremely complicated. In order to meet these challenges, I regularly use not only consultants but paralegals trained in construction management and litigation support software; they can be especially helpful in document organization if many of the documents are in electronic form.

Construction Litigation Wisdom

In conclusion, the most important goals for construction attorneys to remember when handling large construction cases are: they need to understand the history of the project; they need to obtain all of the relevant documents, and organize them as early as possible; and they need to learn all the relevant facts. Attorneys and clients together need to recognize that these cases

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- (4) Bay Area Rapid Transit District (BART) (San Francisco Airport Extension) – Calif. Public Contract Code §20221.1;
 - (5) Los Angeles County Transportation Commission (rail transit projects) – Calif. Public Contract Code §20362;
 - (6) Oakland Redevelopment Authority – State Joint Powers Authority (Elihu M. Harris State Office Building) – Calif. Government Code Section 14669.12;
 - (7) School Districts (school construction exceeding \$10 million) - Calif. Education Code Section 17250.1 et seq.;
 - (8) California Counties (seventeen listed counties for projects exceeding \$2.5 million) - Calif. Public Contract Code §20133;
 - (9) Transit Districts – Calif. Public Contract Code §20209.5 et seq.;
 - (10) Santa Clara Valley Transportation Authority – Calif. Public Contract Code §20301.5;
 - (11) Cities in Solano and Yolo Counties – Calif. Public Contract Code §20175.2;
 - (12) All local government agencies (fee-producing infrastructure projects) – Calif. Government Code §§5956-5956.10.

are typically resolved not just before trial, but often before pre-trial preparations such as depositions, interrogatories, expert disclosures, evidentiary motions and the like, because that is the most cost-effective solution.

Construction dispute resolution is not a law practice that involves a large volume of depositions. It is not a practice with a large number of pre-trial motions attacking pleadings or seeking injunctive relief, summary judgment, or other pretrial resolution by the court. It is also not a practice with a high volume of jury trials. The cases are complicated and often of little interest to an average juror. The length of time required to present such a case often strains the capacity of the state trial court systems. At least in California, construction litigators looking for a spare courtroom and judge to hear a three month construction case in any major city are often accorded a judicial welcome normally reserved for people on their way to prison.

Perhaps the best advice for clients when approaching construction litigation is to bear in mind not only the costs already incurred, but also the costs that will be incurred if the parties are unable to resolve the case. None of these cases are easy to try; indeed, the transaction, legal, and consultant costs of taking one of these cases through trial are typically such that most owners and contractors would rather not incur them.

James P. Wiesel, a shareholder in the firm, is an accomplished litigator with a practice that emphasizes construction, insurance and environmental law. In practice for more than twenty-eight years, he provides considerable depth and breadth in his representation of public and private sector clients.

Mr. Wiesel's extensive experience in construction litigation includes representing clients before state and federal courts, boards, arbitrators and panels. In his twenty-eight years of practice he has been involved in many of the largest construction projects undertaken in the Sacramento area. He has tried cases in excess of \$5 million and negotiated construction contracts in excess of \$180 million. As counsel to both public and private clients, Mr. Wiesel performs a number of services, including negotiating and drafting contracts for owners and contractors, dispute resolution, including prosecution and defense of claims on public works contracts, and service as a private arbitrator.

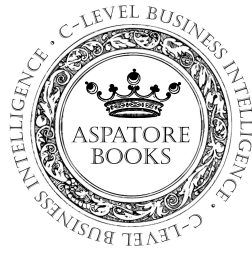
Mr. Wiesel regularly drafts and reviews public contracts and advises the firm's public agency clients on all aspects of public works construction and related real estate matters. His experience also encompasses insurance and environmental litigation. His insurance practice entails insurance coverage counseling and litigation for commercial liability and other policies. His environmental practice includes counseling and litigation with respect to federal and state liabilities (CERCLA, RCRA, and the Clean Water Act) and related California toxics statutes, and California law governing environmental review of proposed projects (CEQA).

Mr. Wiesel's project experience includes: jails, prisons, courthouses, museums, schools, colleges, highway construction, industrial, water and wastewater process plants, pipelines, commercial high-rises, government office buildings and subsidized housing, baseball stadiums, light rail systems, and building control, data acquisition, and communication systems. His recent projects include resolution of over \$30 million in contractor claims arising out of four separate light rail extension projects in Sacramento County and negotiation of the construction contracts for Raley Field, home of the Sacramento River Cats baseball club.

Mr. Wiesel is a published author and frequent speaker on construction related topics. His publications include "Refining the Concept of Concurrent Delay," ABA Public Contract Law Journal, Vol. 21 No. 2 (Winter 1992), "The New Commercial General Liability Forms – An Introduction and Critique," Federation of Insurance and Corporate Counsel Quarterly, Vol. 36, No. 4 (Summer 1986), and "Construction Bonds," chapter in S. Stein, ed., Construction Law, Matthew Bender 1987, 2d ed. 1990.

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