What is Construction Law?

Rights and Remedies:

- CONTRACT LAW
- TORT LAW
- COMMON LAW
- STATUTES
- REGULATIONS
What Type Of Project Is It?

• Public or Private

RIGHTS AND REMEDIES AVAILABLE TO THE PARTIES ON PUBLIC PROJECTS ARE GOVERNED BY STATUTE AND PUBLIC CONTRACTS ARE GENERALLY NOT NEGOTIABLE
What Type Of Project Is It?

• **New Construction or Renovation**

RIGHTS AND REMEDIES AVAILABLE TO THE PARTIES ON PRIVATE RENOVATION PROJECTS ARE LIMITED BY THE MECHANICS’ LIEN STATUTE
What Type of Contract Is It?

- **PAYMENT**
  - LUMP SUM
  - COST PLUS FEE
  - GUARANTEED MAXIMUM PRICE

- **DELIVERY METHOD**
  - DESIGN/BID/BUILD
  - DESIGN/BUILD
  - CONSTRUCTION MANAGER
  - AT RISK OR NOT AT RISK
  - SINGLE PRIME OR MULTI-PRIME

What is Construction Law?
PROJECT NEED IDENTIFIED BY OWNER

PROGRAM DEVELOPED BY DESIGNER; BASED ON OWNER INFORMATION

Construction entity CAN be introduced

Construction entity MUST be introduced

CONSTRUCTION

Close-Out & Commissioning

Bidding & Procurement

Program is memorialized through Design Process

1. Conceptual Phase
2. Schematic Phase
3. Design Development Phase
4. Construction Document Phase

Owner Use/Move In

Claims

Post Construction

Warranty Work
The basic rules for determining the sums of money that a person is entitled to recover as compensation to redress business-related wrongs that commonly arise in the construction industry.
Four Common Sources of Damages

• Contract Law
• Statutory Law
• Surety/Bond Law
• Public Contract Law
Prompt Payment Act – Private Contracts
Md. Code Ann. Real Property Sect. 9-302

If a contract with a private owner, the owner shall:

(i) If the contract does not provide for specific dates or times of payment, the owner must pay to the contractor the undisputed amounts owed under the terms of the written contract, within the earlier of:
   - 30 days after the day on which the occupancy permit is granted; or
   - 30 days after the day on which the owner or the owner’s agent takes possession; or

(ii) If the contract provides for specific dates or times of payment, pay to the contractor undisputed amounts owed within 7 days after the date or those specified in the contract.
COMAR 21.10.08.00

Prompt Payment for State Construction Contracts

- Subcontractor is due payment 10 calendar days from the general contractor receiving the payment from State.
- Upon non-payment, subcontractor reports to procurement officer.
- Within 2 days, procurement officer must determine if an undisputed amount exists.
- If there is an undisputed amount, contractor must make payment within three business days.
- If contractor continues to withhold payment, a hearing will be scheduled.
- Any undisputed amount must be made within 7 business days of the hearing.
Penalties for Failure to Pay under COMAR

1. Further payments to the contractor not be processed until payment to the subcontractor is verified;

2. All or some of the work under the contract or subcontractor be suspended without affecting the contractually required completion date of the work; and

3. May order the contractor to pay a penalty to the subcontractor, not exceeding $100 per day from the date that payment was required.

(a) **Definition**: For the purposes of this subtitle, "managing agent" means an employee of a contractor or subcontractor who is responsible for the direction over or control of money held in trust by the contractor or subcontractor under subsection (b) of this section.

(b) **Moneys to be held in trust**:  
(1) Any moneys paid under a contract by an owner to a contractor, or by the owner or contractor to a subcontractor for work done or materials furnished, or both, for or about a building by any subcontractor, shall be held in trust by the contractor or subcontractor, as trustee, for those subcontractors who did work or furnished materials, or both, for or about the building, for purposes of paying those subcontractors.

(2) An officer, director, or managing agent of a contractor or subcontractor who has direction over or control of money held in trust by a contractor or subcontractor under paragraph (1) of this subsection is a trustee for the purpose of paying the money to the subcontractors who are entitled to it.

Misuse:

“Any officer, director, or managing agent of any contractor or subcontractor, who knowingly retains or uses the moneys held in trust under § 9-201 of this subtitle, or any part thereof, for any purpose other than to pay those subcontractors for whom the moneys are held in trust, shall be personally liable to any person damaged by the action.”
A claim against the property of the owner for work performed or materials furnished for the property.

Positives
Negatives
“Every building erected and every building repaired, rebuilt, or improved to the extent of 15 percent of its value is subject to establishment of a lien in accordance with this subtitle for the payment of all debts, without regard to the amount, contracted for word done for or about the building and for materials furnished for or about the building....”
Claims

Mechanic’s Liens

- Drilling and installation of wells
- Swimming pools
- Fences
- Landscaping
- Leasing of equipment
- Waterlines
- Sewage Lines
- Storm Drains
- Machine, wharves and bridges
- Landscaping and architectural services
Timing is Key

Calculated from the last day work was performed or materials furnished

• 180 days to file the lien
• 120 days for subcontractor to serve Notice to Owner of its intent to file a lien
Claims
Mechanic’s Lien

Information needed to draft a Notice of Intent to file a mechanic’s lien and a lien claim:

• Date of last work performed on project
• Address of project (land and building)
• Owner’s real name and address
• Description of work performed
• Total amount billed so far and amount due and unpaid
Claims
Mechanic’s Lien


- Name and address of Petitioner
- Name and address of owner of subject property
- Description of work done/materials furnished
- New construction or statement that work increased building’s value by 15%
- Dates work was done/materials furnished
- Name of person for whom was done/materials furnished
- Amount claimed (if two buildings with same owner, amount claimed on each)
- Description of land and description of building

Must be attached to Petition - Md. Code Ann. Real Prop. §9-105(a)(2)-(3):

- Affidavit of plaintiff setting forth facts upon which lien is based.
- Relevant Material Papers
The legal relation that arises when one party assumes liability for a debt, default, or other failing of the second party.
The Parties

• The Principal
  – the entity whose obligation is being assured

• The Obligee
  – third party that entered into the contract with the principal
  – is entitled to performance
  – has received a bond

• The Surety
  – liable for the payment of another’s debt or the performance of another’s obligation
If the principal defaults in its obligations, the surety will be required to perform the obligations it bonded, as the bond provides.
Suretyship is Not the Same as Insurance

- Extends credit rather than indemnifying against expected losses.
- Surety underwriting is based on a presumption of zero loss.
- If the surety is obligated to make a payment to the obligee, the surety is entitled to recover that payment from the principal.
• Surety bond is a contract.

• Surety bonds set forth specific dollar amounts or penal sums.

• Surety bond is a conditional contract.

• The bond references and incorporates the underlying construction contract into the bond.
Surety Bonds

• Three main types of surety bonds:
  – Bid bonds
  – Performance bonds
  – Payment bonds (for labor or materials)
Bid Bonds

• Provides assurance that if the owner awards a construction contract, the contractor will sign the contract and provide final bonds.

• If the contractor fails to execute and provide the final bonds, the surety will pay the owner:
  – the amount equal to the stipulated percentage of the original contract price, or
  – the difference between the amount of the defaulting bid and the next lowest bidder.
Performance Bonds

• Guarantees to the owner that if the contractor defaults in performing the contract, the surety will either cause completion of the work or provide some other relief.

• Liability of the surety to the owner is contingent upon the principal’s default and the satisfaction of any additional conditional precedent set forth in the bond.
• Guarantees that laborers and materialmen will be paid for their work, materials, and services provided in connection with the bonded construction project.

• For public projects, the payment bond provides subcontractors and suppliers with security for payment.
• If a surety fails to respond within the contractually required time frame, or fails to include a defense in its response, the surety waives the right to raise any defense.
• Miller Act
  – Federal
  – 40 U.S.C. §§ 3134 to 3134

• Little Miller Act
  – Maryland
  – Patterned after Federal Miller Act
    • Look to those cases to determine what is recoverable
• The Little Miller Act requires bonds be issued when a public body awards a construction contract.
Little Miller Act

• **Labor**
  – Costs of physical labor performed on the job site
  – Only on-site supervision or on-site duties of professional services are recoverable.

• **Materials**
  – Includes materials or equipment not consumed in the performance of work, but are “reasonably expected” to be used up or consumed on the project.

• **Rental Equipment**
  – Rental equipment is covered.
• Required to give notice to the prime contractor within 90 days after the labor or materials for which the claims is made were last supplied in the work covered by the bond.

• The date from which the 90 day period will run is the last day upon which any work or materials necessary to complete the contract is performed or furnished.
Time Requirements for Bringing Action

• Must be brought no later than one year after the day on which the last of the labor was performed or material was supplied by the person bringing the action.
  – Returning to the project to compete the repair or corrective work does not restart the clock.
  – Similarly punch lists usually do not extend the time.

• Civil action against a Little Miller Act Payment Bond- filed within 1 year after the public body accepts the work.
Project Schedules
Bar or Gantt Schedules
Critical Path Method (CPM)
CPM Terms
- Critical Path
- Float (or slack)
- Update
- As built schedule
Who owns the Float?
Contract Changes

Owner has the right to make changes and compel performance only if contract provides Changes Clause.
Changes

Construction Change Directives ("CCD")
Direction to proceed with work before agreement on price adjustment and/or time adjustment

Minor Changes
Architect or Owner’s representative has the right to order “minor” changes in the work without adjustment to the contract price or time
Constructive changes

- Changes that are not ordered but caused by occurrences on the project
  - Unreasonable inspections
  - Improper rejection of work
  - Delays in delivery of needed materials by owner or Prime
  - Restricted site access
  - Defective or unclear specifications (if Owner refuses to acknowledge problem)
Cardinal changes

• Fundamental changes beyond the general scope of the contract
• Dramatic or drastic changes in what was contracted or how performance to be rendered, throws out old contract and requires a new one
• Look at totality of the change, magnitude and quality
• Allows you to stop work until change is resolved
Categories of Delay

- Excusable and Compensable Delay
- Non-Excusable Delay
- Concurrent Delay
Excusable and Compensable Delay

- Act or omission from Owner or General Contractor
  - Changes;
  - Defects in specifications
  - Lack of Site access
- Result
  - Time extension
  - Compensation
Non-excusable delay

- Delays by contractor
  - Non-performance
  - Low productivity
- Result
  - Compensation to General Contractor and Owner
    - Liquidated damages
    - Termination
    - supplementation
Concurrent Delay

• Delays by two parties to the contract
• Result
  • No compensation unless there is a clear apportionment of the delay
  • No liquidated damages
  • Just time
No Damages for Delay Provisions

• Generally Enforceable

Exceptions:

1. Delays due to intentional wrongdoing or gross negligence by Prime or Owner; or
2. Delays resulting from fraud or misrepresentations by Prime or Owner
Directed Acceleration
Ordered to complete project ahead of completion date

Constructive Acceleration
Failure to adjust contract time for excusable delays

• Contractor ordered, in effect, to accelerate
  • Denial of time extension request
  • Improper threat to terminate
• Contractor accelerated
• Extra costs incurred
  • Labor inefficiency
  • Increase in material costs, equipment costs, supervision and/or overhead
Key Contract Provisions

Scope of Work

- Describes what it is that the Owner wants to be built
  - Plans, specifications, addenda, etc.
- Prime Contractor generally does not perform the actual work
- Scope bust is when Prime Contractor fails to assign all parts of the job to its subcontractors

Incorporation by Reference

- Binds you to the document as if it were physically part of your contract
- Flow down provision: transfers risk from the Prime Contractor to its subcontractor
Key Contract Provisions

Payment Provisions

- **Progress payments: usually on a monthly basis**
  - Look at type of contract
  - Paid based on percentage of completion
  - Paid based on actual cost

- **Retainage: Owner withholding from Prime Contractor; Prime withhold from its subcontractors**
  - Usually 5% to 10% . . . released at Substantial Completion

- **Pay when paid: timing of the payment**
  - Receive payment after the Prime Contractor is paid by the Owner
  - Does not excuse Prime Contractor’s obligation to pay for work properly performed after reasonable time for payment has passed, EVEN if prime is not paid by owner

- **Pay if paid: payment is a condition precedent**
  - Receive payment only IF Prime Contractor is paid by the Owner for your work

- **Prime Contractor’s right to stop work**
Key Contract Provisions

Damage Waivers

• **Mutual waiver of consequential damages**
  • What are “direct” damages?
  • What are “consequential” damages?

• **Waiver of subrogation**
  • Standard waiver in form contracts made by the insured
  • Limit rights of insurers to pursue claims
Key Contract Provisions

Damage Caps
- Limit liability to certain amount, e.g., the fee

Liquidated Damages
- Actual damages are difficult to calculate
- LD amount is reasonable estimate of likely damages
- Not a penalty
Key Contract Provisions

Notice and time limits

- When and How a claim is made for extension of time of increase in price
- Some exceptions to strict compliance with notice provisions:
  - Waiver – intentional relinquishment of known right
  - Estoppel – reasonable reliance
  - Owner has actual or constructive knowledge
  - No prejudice
  - Impossibility of performance
Differing Site Conditions

1. **Type 1:** differs materially from what was “indicated” in the contract; more common
   - Anticipate one type of subsurface condition but another actually exists

2. **Type 2:** condition is unknown, unusual and differs materially from those ordinarily encountered in the performance of that type of work; more uncommon
   - Contract silent about soil type and the what is found varies from what one would reasonably expect
Key Contract Provisions

Indemnity

– Shifting of loss from one party to another
– Language must be clear and unambiguous; apply standard rules of construction
– What is covered?
  • Broad: all liability, including owner’s sole negligence (void in Maryland)
  • Intermediate: includes partial owner’s negligence
  • Limited: covers claims from contractor’s sole negligence
– Accrual of indemnity claim
Key Contract Provisions

Warranty

- Express
- Implied
- Manufacturers
- Statutory
- Corrective period
- Statute of Limitations: sometimes altered by contract, e.g., when claim accrues or specific length of limitations period
- Statute of Repose: limits liability for latent defects, e.g., bars claim before it even accrues
Key Contract Provisions

Completion

– **Substantial Completion**
  • Occupancy
  • Punch List Work
  • Triggers warranty period
  • Retainage

– **Final Completion**
  • Final payment and acceptance of work
Key Contract Provisions

Termination – procedures for termination strictly enforced, e.g., notice and cure

1. For Cause/Default:
   - Where there has been a material breach as defined by the contract
   - Substandard or defective work
   - Failure to pay subcontractors and suppliers
   - Limitation on the recovery of damages

2. For Convenience (equivalent of at-will termination):
   - Exercised at owner’s discretion
   - Required to act in good faith
   - Owner pays for work that has been performed and sometimes part of overhead and profit