

# Construction and the Law

## Best Practices in Construction - Part I: The Construction Contract

By Michael Bosse



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This article is the first in a three-part series on best practices in the construction industry with respects to the legal aspects of a project. As a construction lawyer, I mentally divide a construction project into three periods: the construction contract, the progress of the work, and project completion and beyond. This first article addresses best practices for construction contracts.

A construction contract allocates project risks to different project participants. Unfortunately, because of the breakneck speed of the world now, not every construction contract gets a detailed review before execution. Often firms are so elated to get the work that no review takes place. Everyone should strive to avoid being in this position. Time spent on the front-end understanding and negotiating the construction contract will always add value to the end product. Understanding your risks is half the battle on a construction project, and being oblivious to them can spell disaster.

The vast majority of construction disputes concern either scope of work, quality of work, or price. Focusing on these three areas will solve the majority of future headaches. I will cover each of these areas briefly, and devote the remainder of the article to other important contractual concepts.

### Scope of Work

All parties involved must have a thorough understanding of the scope of the work. Contractors must ensure in pricing the work that no gaps or holes exist. The contractor generally focuses on discrete items of construction. To the contrary the owner wants a completed building. If an owner agrees to a certain lump sum, there will most likely be plenty of heartburn if extra costs appear down the road for work the owner thought was already included.

### Quality of Work

Both the owner and contractor's perspective is important. From the contractor's view, what are the rights of the owner to consider work defective and to reject it? Is the time to cure defective work to avoid termination reasonable? Do the owner's warranty rights exist for a sufficient but not unreasonably long time period? From the owner's perspective, is the warranty realistic? Do exclusions to the warranty

eviscerate its usefulness? Both sides must understand the scope of warranty coverage, and in the best case scenario, the signed contract is fair and gives adequate protection to both sides.

### Price

Lump sum projects are easier because the price is fixed, and both sides have to live with that price. On cost plus contracts, or those with a guaranteed maximum price, though, both sides should understand what "costs" are part of the deal. Again, the failure to have a meeting of the minds here can cause obvious problems later.

Apart from scope of work, quality and price, there are some other important concepts in construction contracts. For instance, a contract usually carries a specific time period in which notice needs to be made of claims against the other side. Miss the deadline, and the claim may be extinguished. Much later, a judge might even enforce what one might consider an unreasonably short time period (48 hours for an unforeseen condition). Because predicting how it will turn out in court is difficult, the best practice is to fully understand and negotiate a reasonable time deadline on claims made during the progress of the project.

Insurance is another area that is sometimes glossed over at this stage. Insurance is a major way that risks are covered on a construction project. For instance, owners

can insure for the value of the work in place by purchasing a builders risk policy. Contractors have workers compensation insurance, liability and auto insurance that cover the company's project operations. A best practice for owners and contractors is to run the insurance provisions of a construction contract by their insurance agent to ensure that there is appropriate coverage in place.

One must also understand the termination provisions of a contract. Can the owner terminate for cause only, or can they terminate without the presence of a contractor default? Under what circumstances can the contractor terminate in light of non-payment? Termination should be a matter of last resort, because termination of a contract can often lead to litigation. However, if one must terminate, one must understand if they have the right to do so, when they can, and how to follow the letter of the contract to terminate properly.

Finally, consciously think about the choice of forum for resolving disputes. Although arbitration has been popular, the pendulum has started to swing, and now there is a more even distribution between those who favor litigation in court, mediation, or binding arbitration. One must ensure, however, that all project participants are resolving the dispute in the same place; you don't want to have to arbitrate with your engineer, while the claim with your contractor proceeds in court.



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