### CHAPTER 1. TENNESSEE CONTRACT LAW

- § 1:1 Introduction
  § 1:2 Formation
  § 1:3 Mutual assent; meeting of the minds
- § 1:4 Consideration § 1:5 Controlling law
- § 1:6 Offer
- § 1:7 Acceptance
- § 1:8 Revocation of offer
- § 1:9 Counteroffer
- § 1:10 Defenses to contract enforcement
- § 1:11 —Capacity to contract
- § 1:12 —Authority
- § 1:13 —Unilateral mistake
- § 1:14 —Mutual mistake
- § 1:15 —Fraud
- § 1:16 —Misrepresentation
- § 1:17 —Duress
- § 1:18 —Undue influence
- § 1:19 —Unconscionability
- § 1:20 —Statute of frauds
- § 1:21 —Failure to execute
- § 1:22 Interpretation of contracts
- § 1:23 —Ambiguity
- § 1:24 —Interpretation against the drafter
- § 1:25 —Parol evidence rule
- § 1:26 —Incompleteness
- § 1:27 —Inconsistent terms
- § 1:28 ——Specific over general
- § 1:29 Written over printed
- § 1:30 —Custom; course of dealing; usage of trade; course of performance
- § 1:31 —Construction to avoid forfeiture
- § 1:32 Privity of contract
- § 1:33 Third-party beneficiary
- § 1:34 Performance and breach
- § 1:35 —Time of performance
- § 1:36 —Partial performance
- § 1:37 —Substantial performance
- § 1:38 —Impossibility

- § 1:39 —Abandonment
- § 1:40 Implied contracts
- § 1:41 Quantum meruit
- § 1:42 Notice and opportunity to cure
- § 1:43 Modification
- § 1:44 Waiver
- § 1:45 Rescission
- § 1:46 Estoppel

### CHAPTER 2. PRIVATE CONSTRUCTION CONTRACTING

- § 2:1 Introduction
- § 2:2 Parties
- § 2:3 —Owners: Private/public
- § 2:4 —Design professionals
- § 2:5 —Contractors
- § 2:6 —Construction managers
- § 2:7 —Suppliers and materialmen
- § 2:8 —Sureties
- § 2:9 —Insurers
- § 2:10 Contract types
- § 2:11 Project delivery methods
- § 2:12 —Design/bid/build (traditional PDM)
- § 2:13 —Design/build
- § 2:14 —Multiple primes
- § 2:15 —Construction managers
- § 2:16 —Fast tracking
- § 2:17 Terms
- § 2:18 —Incorporation by reference
- § 2:19 —Flow down provisions
- § 2:20 —Scope of work
- § 2:21 —Payment
- § 2:22 —Withholding payment provision
- § 2:23 —Pay when paid
- § 2:24 —Pay if paid
- § 2:25 —No damage for delay
- § 2:26 —Retainage
- § 2:27 —Changes
- § 2:28 —Right to stop work
- § 2:29 —Exculpatory clauses
- § 2:30 —Subrogation waivers
- § 2:31 —Liquidated damage clauses
- § 2:32 —Time requirements and scheduling
- § 2:33 —Close out
- § 2:34 —Termination clauses
- § 2:35 ——Termination premised upon default

- § 2:36 ——Termination for convenience
- § 2:37 —Suspension
- § 2:38 —Differing site condition clauses
- § 2:39 —ADR
- § 2:40 Prompt Pay Act

## CHAPTER 3. PUBLIC CONSTRUCTION CONTRACTING

- § 3:1 Introduction
- § 3:2 Enabling legislation; governmental entities; contracting authority
- § 3:3 City councils; county commission
- § 3:4 Industrial development corporations
- § 3:5 Public building authority
- § 3:6 Quasi-public corporations
- § 3:7 School boards
- § 3:8 Construction project delivery systems
- § 3:9 —Traditional
- § 3:10 —Design/build
- § 3:11 —Multiple primes
- § 3:12 —Construction managers
- § 3:13 —Fast tracking
- § 3:14 Public bid statutes
- § 3:15 Conflicts of interest
- § 3:16 Public contracting
- § 3:17 —Competitive bidding
- § 3:18 —Lowest responsible bid/lowest and best bid
- § 3:19 —Compliance with bid documents
- § 3:20 —Prequalification
- § 3:21 —Solicitation
- § 3:22 —Specification
- § 3:23 —Awarding the contract
- § 3:24 —Rejection of bid
- § 3:25 —Exemption from competitive bidding
- § 3:26 —Contracts below the requisite sum
- § 3:27 —Professional service contracts
- § 3:28 —Emergency purchases
- § 3:29 —Challenging a bid award
- § 3:30 —Remedies
- § 3:31 Bond statutes
- § 3:32 —Bid bonds
- § 3:33 —Performance bonds
- § 3:34 —Payment bonds
- § 3:35 —Bonds on department of transportation projects
- § 3:36 Prompt Pay Act of 1985
- § 3:37 Tennessee retainage statutes

# CHAPTER 4. NEGOTIATION AND FORM OF CONTRACT

COI	
§ 4:1	
§ 4:2	AIA document system
§ 4:3	ConsesusDOCS
§ 4:4	AIA A201—General conditions of the contractor for
8 4 5	construction
§ 4:5	—Contractor's duties and responsibilities
§ 4:6	Architect's duties and responsibilities
§ 4:7	Owner's duties and responsibilities
§ 4:8	Change provisions
§ 4:9	Minor changes
§ 4:10	Construction change directive
§ 4:11	Change orders
§ 4:12	Constructive change
§ 4:13	Failure to follow the change order process
§ 4:14	Site investigation
§ 4:15	Differing site conditions
§ 4:16	Basis for Type I Claim
§ 4:17	Basis for Type II claim
§ 4:18	Pricing of differing site condition claim
§ 4:19	Resolving differing site condition disputes
§ 4:20	Hazardous materials
§ 4:21	Payment clauses
§ 4:22	Termination
§ 4:23	Indemnification
§ 4:24	Dispute resolution
$\S 4:25$	Initial decision maker
§ 4:26	Mediation
§ 4:27	Arbitration
§ 4:28	Owner/contractor agreements
§ 4:29	Subcontractors
§ 4:30	Owner/architect agreements
§ 4:31	—Standard form
§ 4:32	—Architect's duties
§ 4:33	—Owner's duties
§ 4:34	—Architect's additional services
§ 4:35	——Programming
§ 4:36	——Schedule development and monitoring
§ 4:37	— —Value analysis
§ 4:38	——Project representative
§ 4:39	——Project administration services
§ 4:40	——Contract administration services
§ 4:41	—Ownership of documents
§ 4:42	—Design to budget
§ 4:43	—Dispute resolution

- § 4:44 —Termination
- § 4:45 —Standard of care
- § 4:46 —Architect insurance

## CHAPTER 5. CONSTRUCTION SURETY BONDS

- § 5:1 General principles
- § 5:2 Obtaining a bond
- § 5:3 —Selecting a surety
- § 5:4 —Evaluation of the contractor
- § 5:5 —Indemnification agreements
- § 5:6 —Indemnification
- § 5:7 —Deposit of collateral
- § 5:8 —Right to take over
- § 5:9 —Contract proceeds as trust fund
- § 5:10 —Additional provisions
- § 5:11 —Bonding limit
- § 5:12 Bid bonds
- § 5:13 Performance bonds
- § 5:14 —Statutory provisions for public bonds
- § 5:15 —Incorporation by reference
- § 5:16 —Parties covered
- § 5:17 —Default
- § 5:18 —Notice and filing requirements
- § 5:19 —Obligee's obligations
- § 5:20 —Surety's obligations
- $\S 5:21$  ——Tender the penal sum
- § 5:22 ——Complete the work with the principal
- § 5:23 ——Complete the work with another contractor
- § 5:24 ——Presenting a new contractor
- § 5:25 ——Taking no action
- § 5:26 —Claims
- § 5:27 ——Damages covered
- § 5:28 ——Limitation of damages
- § 5:29 ——Cost of completion
- § 5:30 ——Defective work
- § 5:31 ——Liquidated and delay damages
- § 5:32 ——Incidental and consequential damages
- $\S 5:33$  ——Interest
- § 5:34 ——Attorney fees
- § 5:35 ——Penalties for the refusal to pay claims
- § 5:36 —Defenses
- § 5:37 ——Setoff
- § 5:38 ——Effect of changes
- § 5:39 ——Misrepresentation
- § 5:40 ——Modification or breach of contract

- § 5:41 ——Improper payment § 5:42 — —Fraud § 5:43 ——Statute of limitations § 5:44 Payment bonds § 5:45 —Statutory provisions for payment bonds § 5:46 -Who is protected on a public bond § 5:47 -Parties covered § 5:48 ——Subcontractors ——Suppliers § 5:49 § 5:50 —What is covered § 5:51 --- Rental equipment § 5:52 ——Attorney fees --Interest § 5:53 § 5:54 —Notice and filing requirements § 5:55 —Defenses § 5:56 — —Contractual payment provisions § 5:57 — — Misrepresentation § 5:58 ——Statute of limitations § 5:59 Miller Act § 5:60 —Who is protected § 5:61 —What is covered § 5:62 -Enforcing a claim under the Act § 5:63 — —Notice § 5:64 — —Contents and form of notice § 5:65 — —Timing of notice
- CHAPTER 6. INSURANCE

——Service requirements

§ 6:1 Introduction

§ 5:66

§ 5:67

§ 6:2 Evidence of insurance

— Filing suit

- § 6:3 Duty to defend
- § 6:4 Duty to indemnify
- § 6:5 Commercial general liability
- § 6:6 —Occurrence v. Claims Made
- § 6:7 —Who is the insured?
- § 6:8 —What are the policy limits?
- § 6:9 —What is an occurrence?
- § 6:10 —Exclusions
- § 6:11 ——Care, custody, and control
- § 6:12 ——Completed operations
- § 6:13 ——Impaired property
- § 6:14 ——Own work
- § 6:15 ——Pollution
- § 6:16 ——Delayed completion and force majeure
- § 6:17 ——Contractual liability

- § 6:18 ——Expected or intended injury
- § 6:19 Workers' compensation
- § 6:20 Builder's risk
- § 6:21 Professional liability
- § 6:22 Estoppel and waiver of the insurer's defenses
- § 6:23 Project specific insurance

### CHAPTER 7. REGISTRATION AND LICENSING

- § 7:1 Introduction
- § 7:2 Contractors
- § 7:3 —State licensing board
- § 7:4 —Who is a contractor?
- § 7:5 —Who is not a contractor?
- § 7:6 —What is contracting?
- § 7:7 —Obtaining a license
- § 7:8 ——Necessity
- § 7:9 ——Classifications
- § 7:10 ——Failure to obtain license
- § 7:11 —Offenses
- § 7:12 Residential contracting
- § 7:13 Enforcement
- § 7:14 Home inspections
- § 7:15 Design professionals
- § 7:16 —Purpose of licensing
- § 7:17 —Exemptions from licensing
- § 7:18 —Offenses
- § 7:19 —Board of examiners
- § 7:20 —Qualification and registration
- § 7:21 ——Engineers
- § 7:22 ——Architects
- § 7:23 ——Firms
- § 7:24 —Grounds for disciplinary action
- § 7:25 —Investigation of potential violations
- § 7:26 Surveyors
- § 7:27 —Board of examiners
- § 7:28 —Qualifications
- § 7:29 —Unauthorized practice
- § 7:30 —Disciplinary actions
- § 7:31 —Offenses
- § 7:32 —Limitations of liability

#### CHAPTER 8. WARRANTIES

- § 8:1 Introduction
- § 8:2 Express warranty
- § 8:3 Implied warranty

	PTER 9. CONSTRUCTION CONTRA
§ 8:11	implied —Third-party beneficiary of warranty
§ 8:10	—Cumulation and conflict of warranties, express or
§ 8:9	Limitations and exclusions
§ 8:8	specifications —Warranty of title
§ 8:7	—Warranty of constructability—Fitness of plans and
§ 8:6	—Fitness for a particular purpose
§ 8:5	a good and workmanlike manner —Merchantability
§ 8:4	—Warranty of habitability; warranty of construction in

### ACT **DISPUTES**

	· ·
§ 9:1	Introduction
§ 9:2	Changes
§ 9:3	—Change orders
§ 9:4	—Construction change directive
§ 9:5	—Authority
§ 9:6	—Requirement of written changes
§ 9:7	—Constructive change
§ 9:8	—Changed conditions/Differing site conditions
§ 9:9	—Proceeding with disputed work
§ 9:10	—Alternative theories for recovery
§ 9:11	— — Waiver of written change order requirement
§ 9:12	——Promissory estoppel
§ 9:13	——Quantum meruit
§ 9:14	Delays
§ 9:15	—Nonexcusable delays
§ 9:16	—Excusable delays
§ 9:17	—Compensable delays
§ 9:18	—No damage for delay
§ 9:19	—Concurrent delays
§ 9:20	—Acts of God
§ 9:21	-Strikes, labor disputes, accidents and delays beyond
	the contractor's control
§ 9:22	Limitation of liability
§ 9:23	Errors, inconsistencies, and omissions
§ 9:24	Acceleration
§ 9:25	Costs of acceleration
§ 9:26	Remedies
§ 9:27	—Burden of proof
§ 9:28	—Apportionment of delay
§ 9:29	Failure to pay
§ 9:30	—Right to stop work
§ 9:31	Damages

- § 9:32 —Increased labor cost
- § 9:33 —Loss of productivity
- § 9:34 —Increased material cost
- § 9:35 —Disruption and resequencing
- § 9:36 —Overhead
- § 9:37 —Lost profits
- § 9:38 —Interest
- § 9:39 —Loss of use

## CHAPTER 10. MECHANICS' AND MATERIALMEN'S LIENS

- § 10:1 Introduction
- § 10:2 Statutory basics
- § 10:3 Who is entitled to statutory protection
- § 10:4 Public property not subject to a lien
- § 10:5 Property subject to a lien
- § 10:6 Residential property
- § 10:7 Notice requirements
- § 10:8 —Notice of lien rights on a residential project
- § 10:9 —Notice of nonpayment
- § 10:10 —Notice of lien
- § 10:11 —Notice of completion
- § 10:12 Filing requirements
- § 10:13 Enforcing the lien
- § 10:14 Waiver
- § 10:15 Priority
- § 10:16 Remedies of the owner
- § 10:17 Other remedies

### CHAPTER 11. CONSTRUCTION DEFECTS

- § 11:1 Introduction
- § 11:2 Patent defects
- § 11:3 Latent defects
- § 11:4 Warranties
- § 11:5 —Express warranties
- § 11:6 —Implied warranties
- § 11:7 Design defects
- § 11:8 Construction defects
- § 11:9 —Faulty materials
- § 11:10 —Defective workmanship
- § 11:11 Right to cure
- § 11:12 Statutes of limitations and repose
- § 11:13 Damages: cost of Repair v. Diminution in value

## CHAPTER 12. COMMON LAW CAUSES OF ACTION

§ 12:1 Introduction

§ 12:2	Negligence
§ 12:3	—Duty
§ 12:4	—Breach
§ 12:5	—Injury
§ 12:6	—Cause in fact
§ 12:7	—Proximate cause
§ 12:8	Negligence per se
§ 12:9	Res ipsa loquitur
§ 12:10	Gross negligence
§ 12:11	Professional negligence
§ 12:12	Strict liability
§ 12:13	Defenses
§ 12:14	Negligent misrepresentation
§ 12:15	Intentional torts
§ 12:16	—Intentional misrepresentation/fraud
§ 12:17	—Inducement of breach of contract/intentional
	interference with a business relationship
§ 12:18	Nuisance
§ 12:19	Quantum meruit

# CHAPTER 13. STATUTES AFFECTING CONSTRUCTION

§ 13:1	Introduction
§ 13:2	Prompt Pay Act of 1985
§ 13:3	Prompt Pay Act of 1991
§ 13:4	Statute of repose for construction
§ 13:5	Limitation of liability
§ 13:6	—Consumer Protection Act
§ 13:7	—Notice and right to cure

§ 13:8 Choice of law

# CHAPTER 14. ALTERNATIVE DISPUTE RESOLUTION

§ 14:1	Generally
§ 14:2	Negotiation
§ 14:3	Mediation
§ 14:4	Rule 31 alternative dispute resolution proceedings
§ 14:5	Arbitration
§ 14:6	Applicability of Federal Arbitration Act
§ 14:7	Tennessee Uniform Arbitration Act
§ 14:8	Jurisdiction
§ 14:9	Agreement to arbitrate
§ 14:10	Appointment of arbitrator
§ 14:11	Representation
§ 14:12	Hearings

xxviii

- § 14:13 Awards
- § 14:14 Review of the award
- § 14:15 Confirmation
- § 14:16 Modification
- § 14:17 Vacation
- § 14:18 Judgments
- § 14:19 Venue

#### CHAPTER 15. LITIGATION

- § 15:1 Introduction
- § 15:2 Prelitigation
- § 15:3 —Project documents
- § 15:4 Filing suit
- § 15:5 —Jurisdiction
- § 15:6 —Personal jurisdiction
- § 15:7 —Subject matter jurisdiction
- § 15:8 —Venue
- § 15:9 —Forum non conveniens
- § 15:10 Basic rules for pleading
- § 15:11 Amended pleadings and relation back
- § 15:12 Third-party pleadings
- § 15:13 Motions under Tennessee Rules Civil Procedure
- § 15:14 Tenn. R. Civ. P. 11; representations to the court; sanctions
- § 15:15 Intervention
- § 15:16 Interpleader
- § 15:17 Discovery
- § 15:18 —Spoliation
- § 15:19 Experts
- § 15:20 Evidence
- § 15:21 Appeals

### **CHAPTER 16. DAMAGES AND REMEDIES**

- § 16:1 Introduction
- § 16:2 Compensatory damages
- § 16:3 General v. Special Damages
- § 16:4 Lost profits
- § 16:5 Cost of Repair v. Diminution in value
- § 16:6 Incidental damages
- § 16:7 Liquidated damages
- § 16:8 Punitive damages
- § 16:9 Duty to mitigate damages
- § 16:10 Injunctions
- § 16:11 Breach of contract
- § 16:12 Negligence
- § 16:13 Economic loss doctrine

#### Construction Law Handbook

§ 16:14	Negligent misrepresentation and negligent
	supervision
§ 16:15	Strict liability
§ 16:16	Quantum meruit
§ 16:17	Tennessee Consumer Protection Act
§ 16:18	Bad checks
§ 16:19	Attorneys' fees
§ 16:20	Unlicensed contractors
§ 16:21	Collection
§ 16:22	—Execution
§ 16:23	—Judgment liens
§ 16:24	—Garnishment
§ 16:25	—Statutory interest
§ 16:26	—Costs

### **Table of Laws and Rules**

#### **Table of Cases**

Index