### Volume 1

### PART I. TEXT

### CHAPTER 1. INTRODUCTION AND OVERVIEW

2	1.1	T 4
Q.	1:1	Introduction

- § 1:2 Common areas of disagreement
- § 1:3 —Occurrence of breach
- § 1:4 —Mechanic's liens
- § 1:5 —Termination for convenience
- § 1:6 —Notice
- § 1:7 —Privity issues
- § 1:8 —The Uniform Commercial Code
- § 1:9 —Safety and liability
- § 1:10 —Forum selection
- § 1:11 —Compliance with Americans with Disabilities Act
- § 1:12 —Environmental issues
- § 1:13 —Condition of materials
- § 1:14 —Arbitration and dispute resolution
- § 1:15 —Bankruptcy issues
- § 1:16 —The Visual Artists Rights Act
- § 1:17 —Electronic contracting and the Internet
- § 1:18 ——Government contracting
- § 1:19 —Bidding requirements
- § 1:20 Types of construction contracts
- § 1:21 —Prices
- § 1:22 —The fast-track approach
- § 1:23 —The design/build contract
- § 1:24 —The parallel prime approach
- § 1:25 —The construction manager
- § 1:26 —Institutional forms
- § 1:27 —Work letters
- § 1:28 Summary and conclusion

### CHAPTER 2. UNANTICIPATED SITE CONDITIONS

§ 2:1 Introduction

		CONSTRUCTION CONTRACTS D
§ :	2:2	Differing site conditions clauses
	2:3	—When is a clause triggered?
§ 2	2:4	—What is the contractor required to discover?
§ :	2:5	—Existence of differing site condition is a question of law
§ :	2:6	—Differing site conditions clauses and extra work clauses
§ 2	2:7	—Notice requirements in differing site conditions clauses
§ 2	2:8	Use of exculpatory and disclaimer clauses
§ :	2:9	—Disclaimer clauses are ineffective in federal contracts
§ 2	2:10	—Relationship of disclaimers to differing site conditions clauses
§ 2	2:11	—What is an effective disclaimer?
§ :	2:12	Misrepresentation and failure to disclose information—Misrepresentation
§ 2	2:13	—Failure to disclose
§ 2	2:14	—Definite description
§ :	2:15	—Contractor's obligation to review ancillary documents referenced in the contract
§ 2	2:16	"Duty to inspect" clauses
§ 2	2:17	Claim for breach of contract
C	HAI	PTER 3. DIFFERING SITE
$\mathbf{C}$	ONI	DITIONS IN EXISTING STRUCTURE
s :	3:1	Introduction

### ES

§ 3:2 Misrepresented site conditions—Misrepresen	tations
arising from the contract documents	
§ 3:3 —Misrepresentation by a proffered sample of site conditions	f expected
§ 3:4 —Necessity of contractor's reliance on the misrepresented information	
§ 3:5 Contractor's duty to perform reasonable site investigation—Contractor is under no duty invasive testing to satisfy requirement	to perform
§ 3:6 —Contractor cannot recover for differing site conditions when the contractor unduly restriction investigation	
§ 3:7 —The degree and kind of knowledge expected contractor	d of a
§ 3:8 —Contractor that affirmatively represented to conducted a pre-bid inspection when it did in	
§ 3:9 Accrual of cause of action for breach	
§ 3:10 Parol evidence	
§ 3:11 Owner's ability to limit liability for differing conditions by contractual disclaimers—	site

Broadsweeping and general disclaimers are insufficient to limit owner's liability —Owner's warning that field verification required or § 3:12 drawings not to scale may preclude a claim —Disclaimer of liability ineffective in Type I condition § 3:13 when contract contained affirmative representations of conditions —Jurisdiction over additional claims made under § 3:14 government contracts § 3:15 —Catastrophic events § 3:16 —Changes to design or performance specifications

### **CHAPTER 4. CHANGES IN** CONSTRUCTION CONTRACTS

CON	SIRUCTION CONTRACTS
§ 4:1	Introduction
§ 4:2	Requests by owners for extra work
§ 4:3	—Unanticipated repairs
§ 4:4	—Broadly worded change orders
§ 4:5	—Like effect provision
§ 4:6	Changes without proper written documentation
§ 4:7	—Additional work performed without objection
§ 4:8	—Contractor's failure to comply with explicit "changes" provision
§ 4:9	—Government contractor's compliance with change order provisions
§ 4:10	—Change order executed by unauthorized parties
§ 4:11	—A significant increase in the scope of work impliedly authorizes an increase in time to complete the work
§ 4:12	—Change order that left undetermined amount of compensation to be determined at later time was not unenforceable agreement to agree
§ 4:13	Owner's waiver of written change order—Verbal order as waiver of writing requirements
§ 4:14	—Constructive change orders
§ 4:15	—Waiver through course of conduct
§ 4:16	—Owner's inaction as waiver
§ 4:17	—Insufficient evidence of waiver
§ 4:18	—Antiwaiver provision
§ 4:19	The use of quantum meruit in construction contracts
§ 4:20	Changes by the architect
§ 4:21	Change orders as applied to a subcontractor
§ 4:22	Change orders that excuse performance under or alter significant terms in the original contract—"Cardinal" changes resulting in the abandonment of the original contract
§ 4:23	—Change order as modifying essential term of original

contract

§ 4:24 —Use of trade practice and custom to determine meaning of ambiguous term in change directive

### CHAPTER 5. PRIVITY ISSUES IN CONSTRUCTION CONTRACTS

§ 5:1	Introduction
§ 5:2	Quantum meruit, implied contract, and unjust enrichment
§ 5:3	—Contractor with an express contract with lessee of property may maintain an action against the property owner for <i>quantum meruit</i> and unjust enrichment
§ 5:4	—When owner has not fully paid anyone for subcontractor's work, subcontractor may sue owner for unjust enrichment
§ 5:5	—To recover under an implied contract theory contractor must show owner was benefited and that contractor's efforts were for owner's benefit
§ 5:6	—No recovery for work done with no expectation of payment
§ 5:7	—Privity and <i>quantum meruit</i> or unjust enrichment claims
§ 5:8	Statutory remedies—Subcontractor's statutory remedies against owner are not exclusive
§ 5:9	—The existence of mechanic's lien laws did not vitiate a subcontractor's right to sue an owner for labor and materials supplied by the subcontractor
§ 5:10	Third-party beneficiaries
§ 5:11	—Hold-back provision in general contractor/ subcontractor contract does not create third-party beneficiary rights in subcontractor's materialmen
§ 5:12	—In usual construction contract a subcontractor is merely an incidental beneficiary of the owner/general contractor contract
§ 5:13	—In usual construction contract, an owner is merely an incidental beneficiary of the general contractor/ subcontractor contract
§ 5:14	—Contractor may have third-party beneficiary status where subcontractor/sub-subcontractor contract clearly expresses the intent to benefit contractor specifically
§ 5:15	—A third-party beneficiary cannot attain greater rights than the parties in direct privity
§ 5:16	—Co-prime contractors may be third-party beneficiaries of contracts with owner
§ 5:17	Agency theory
§ 5:18	—Landlord/tenant relationship alone is not sufficient to establish agency relationship
§ 5:19	—Construction manager was owner's agent so as to

		subject owner to arbitration provision in construction
e	F.00	manager/subcontractor contract
	5:20	—Contractor as apparent agent of owner
8	5:21	—Agency relationship in acquisition of insurance coverage
§	5:22	Negligence and fraud—Introduction
§	5:23	—Tort concepts of duty in construction contract setting
§	5:24	—Accepted work doctrine
	5:25	Arbitration clauses—Introduction
§	5:26	Agency theory—Subcontractor cannot compel arbitration with owner by virtue of the owner/general contractor contract
§	5:27	Payment bonds—Introduction
§	5:28	—Subcontractor without privity may recover on payment bond if the claim falls within the bond's coverage
§	5:29	Warranties—Introduction
§	5:30	—Privity and notice of breach of warranty
§	5:31	Pass-through claims
Ş	5:32	The economic loss doctrine
(	CHAI	PTER 6. CONSTRUCTION DELAYS
	6:1	Introduction
§	6:2	The reasonable time requirement and "time is of the essence" clauses
§	6:3	—Time for commencement of work
§	6:4	Substantial completion
§	6:5	Contractor's rights and responsibilities as a result of delays—Contractor's right to recover for excusable delays
Ş	6:6	—Contractor's liability to subcontractors for delays
	6:7	—Owner's right to recover liquidated damages
	6:8	—Owner's right to recover delay damages from contractor's surety
§	6:9	Owner-caused delays
§	6:10	—Owner's responsibility for site availability and coordinating work of prime contractors to minimize delay
§	6:11	—Owner's liability for defective plans and specifications
§	6:12	Authority to resolve delay damages disputes
§	6:13	Waiver of delay damages
	6:14	—Release
	6:15	Constructive acceleration
	6:16	"No damage for delay" clauses
	6:17	—Validity of clauses—Clauses generally upheld
8	6:18	——Strict construction

——Parties at fault § 6:19 § 6:20 ——Limited to original scope of work § 6:21 —Use of clause to protect other parties § 6:22 ——Architects and engineers § 6:23 ——Construction managers § 6:24 — —Other contractors § 6:25 —Exceptions — — Willful and deliberate or "active" interference § 6:26 ——Gross negligence § 6:27 § 6:28 — —Breach of fundamental obligation § 6:29 — — Delays not contemplated by the parties § 6:30 — —Fraud or active concealment — —Hindrance § 6:31 § 6:32 — — Disruption --Force majeure clause § 6:33 § 6:34 Delays in government contracts § 6:35 —Miller Act § 6:36 —Sovereign immunity § 6:37 -McMullan presumption § 6:38 —Unabsorbed home office overhead § 6:39 —Unabsorbed home office overhead due to ownercaused delays—The Eichleay formula in federal contracts § 6:40 — — Stand-by — — The Eichleay formula in state court § 6:41 § 6:42 —Suspension of work clause § 6:43 —State statutes Liquidated damages § 6:44

#### CHAPTER 7. MECHANIC'S LIENS

- § 7:1 Overview
- § 7:2 Requirements for filing a lien
- § 7:3 —Time limit for filing and location of materials
- § 7:4 —Who may file a claim?
- § 7:5 —Payment of fee
- § 7:6 —Who may file a claim?—Assignment
- § 7:7 —Lienable and nonlienable items—Wages
- § 7:8 ——Machinery and tools
- § 7:9 ——Insurance premiums
- $\S 7:10$  Contractor's fee
- § 7:11 —Types of labor covered
- § 7:12 ——Affixation to property
- § 7:13 Visibility
- § 7:14 —Materials—Delivery versus incorporation
- § 7:15 —Work ordered by a party other than the owner
- § 7:16 —Notice

§ 7:17 —Contents of notice § 7:18 —Service of notice § 7:19 — —Bankruptcy § 7:20 Priority—Relation back § 7:21 Lienable funds § 7:22 Avoiding liens—Waiver -Notice of nonresponsibility § 7:23 § 7:24 —Lien-free construction § 7:25 — —Direct disbursement § 7:26 ——Claims process --Conclusion § 7:27 § 7:28 —Fraudulent liens —Failure to file notice of commencement of action § 7:29 § 7:30 —Other methods of minimizing the risks of mechanic's liens exposure § 7:31 Defenses to mechanic's liens § 7:32 Lienable claim for imposing fiduciary duty on contractor § 7:33 Release of lien

Appendix 7-A. Sample Form of Lien and Claim Waivers

# CHAPTER 8. LIEN RIGHTS OF DESIGN PROFESSIONALS AND CONSTRUCTION MANAGERS

§ 8:1	Introduction
§ 8:2	Architect's right to file a lien
§ 8:3	—Recovery for drawings and supervision
§ 8:4	—Work that constitutes an improvement— Enhancement of property's value
§ 8:5	— —Constructive improvement
§ 8:6	—Types of services for which an architect may file a lien—Supervision
§ 8:7	— — Construction administrative services
§ 8:8	——Additional services
§ 8:9	Construction manager's right to file a lien
§ 8:10	Engineer's right to file a lien—Recovery for preliminary site work
§ 8:11	—Owner's knowledge of improvement
§ 8:12	—Notice to third parties
8:13	—Timely filing of engineer's mechanic's liens
§ 8:14	Necessity of compliance with other state laws
8:15	Prompt payment acts
8:16	Ability of other professionals to file lien claims
§ 8:17	Copyright claims
8 8:18	Conclusion

## CHAPTER 9. WAIVER OF MECHANIC'S LIENS

Ş	9:1	Background
§	9:2	Waivers of liens contained in the construction
		contract—Generally
Ş	9:3	—Waiver of lien by incorporation of prime contract
§	9:4	—Statutory restrictions on no-lien contracts—No-lien contracts prohibited by state law
§	9:5	— —"Pay-if-paid" clause in construction contract is impermissible indirect waiver of mechanic's lien rights
§	9:6	—Effect of general contractor's waiver on materialmen and lower-tier subcontractors
§	9:7	Waiver by conduct—Written lien waivers
Ş	9:8	—Written lien waiver—Statutory requirements
§	9:9	—Partial written waivers of lien
	9:10	—Waiver by acceptance of joint payee checks
§	9:11	—Waiver by acceptance of other consideration in lieu of lien
§	9:12	—Waiver by actions inconsistent with an intent to file lien
§	9:13	—Waiver of right to recover attorneys' fees by arbitrating lien dispute
§	9:14	Subcontractor/materialmen defenses to waiver of liens—Failure of consideration
§	9:15	—Breach of contract by owner
§	9:16	—Fraud in procuring lien waiver
§	9:17	—Scope of lien waiver—Execution date of lien waiver
§	9:18	— Waiver of lien and retention payments
§	9:19	Conclusion

## CHAPTER 10. PERFORMANCE AND PAYMENT BONDS

§ 10:1	Introduction and overview
§ 10:2	Bond requirements for federal construction contracts
§ 10:3	Contractual requirements
§ 10:4	Statutory requirements
§ 10:5	Subcontractors as third-party beneficiaries of owner's performance bond—Subcontractors granted third-party beneficiary status
§ 10:6	—Subcontractors not granted third-party beneficiary status
§ 10:7	Surety's liability for pre-bond work
§ 10:8	Surety's liability for defects/deficiencies in contractor's work—No surety liability once owner accepts substantially completed project

§ 10:9	—Surety is liable on contractor's warranties
§ 10:10	Surety's liability when owner/contractor agreement is modified
§ 10:11	—Contract modification must actually prejudice surety to negate surety's liability
§ 10:12	—Material contract change negates surety's liability without a separate showing of prejudice
§ 10:13	—Surety remains liable where contract modifications do not substantially increase surety's risk
§ 10:14	—Surety not liable where contract modifications substantially increase surety's risk
§ 10:15	—Waiver of defense
§ 10:16	Notice of contractor's default to surety—Introduction
§ 10:17	—Surety not liable for damages avoidable with notice
§ 10:18	—Statutory notice requirements
§ 10:19	——Service
§ 10:20	— —Waiver
§ 10:21	Waiver of bond requirement—Introduction
§ 10:22	—Owner waives bond requirement by allowing contractor to remain on job without bond
§ 10:23	Surety's obligation of good faith—Surety analogous to insurer
§ 10:24	—Surety is not an insurer
§ 10:25	Surety's obligations after principal's release— Introduction
§ 10:26	—Surety remains liable if creditor reserves rights against surety
§ 10:27	—Contingent pay clause excuses bond obligation
§ 10:28	Recovery under the bond
§ 10:29	—Parties entitled to recovery
§ 10:30	— —Miller Act
§ 10:31	—Acceptable tender under the bond
§ 10:32	—Time for filing claim
§ 10:33	— —Miller Act
§ 10:34	—Calculation of recovery
§ 10:35	—Waiver
§ 10:36	—Excess contract proceeds
§ 10:37	—Set off
§ 10:38	Claim under policy of insurance
§ 10:39	Surety's right to equitable subordination
§ 10:40	—Liquidated damages
§ 10:41	Private right of action against government for failure
	to comply with bonding statute

# CHAPTER 11. LIABILITY EXPOSURE WHEN CONTRACTORS WORK ON PREMISES

§ 11:1 Introduction

§ 11:2 Property owner's duty of ordinary care —Independent contractors § 11:3 —Independent contractor—Inherently dangerous work § 11:4 § 11:5 Property owner's duty to warn § 11:6 Property owner's liability for contractor's actions —Where the contractor's employee is injured § 11:7 § 11:8 —Where the public is injured § 11:9 —Indemnity § 11:10 Property owner's liability for loaned, defective tools § 11:11 Property owner's liability for negligent hiring § 11:12 Strict liability § 11:13 —Repairman exception

Conclusion

§ 11:14

# CHAPTER 12. LIABILITY UNDER THE OSH ACT AT MULTIEMPLOYER CONSTRUCTION SITES

§ 12:1	Introduction
§ 12:2	Statutory provisions
§ 12:2	The multiemployer worksite defense—The Anning-
8 12.0	Johnson/Grossman Steel framework
§ 12:4	—What constitutes control of the hazard?
§ 12:5	<ul> <li>— General contractor liability for subcontractor safety violations</li> </ul>
§ 12:6	— Other employment relationships where "control" was present
§ 12:7	<ul> <li>— Subcontractor liable for its subcontractor's violations</li> </ul>
§ 12:8	—Responsibility of noncontrolling employers
§ 12:9	—Contractual allocation of control
§ 12:10	—What are "reasonable efforts" to abate the hazard?
§ 12:11	— —Alternative safety measures
§ 12:12	— Did the subcontractor adequately complain to the general contractor?
§ 12:13	— —The effect of craft or jurisdictional rules
§ 12:14	—Creation of duty of care for tort actions
§ 12:15	Application of multiemployer defense to the federal sector
§ 12:16	OSHA Field Inspection Reference Manual Multiemployer Citation Policy
§ 12:17	Summary of compliance requirements
§ 12:18	—Any general contractor, construction manager, or other employer who has general supervisory authority over the construction site will probably be liable
§ 12:19	—contractor which controls or creates the hazardous

	condition and whose own employees have access to
	the hazardous condition will be liable
§ 12:20	—Contractor which controls or creates the hazardous condition but which exposes only employees of other employers will be liable
§ 12:21	—Contractor which neither controls nor creates the
	hazardous condition but whose employees have
	access to that hazardous condition may be liable
§ 12:22	— The contractor must make a reasonable effort to
3 12.22	detect the hazardous condition
§ 12:23	— —The contractor must take realistic measures as
	an alternative to literal compliance with the
	relevant standard
§ 12:24	State statutes
§ 12:25	Contractor liability under the Hazard Communication
0	Rule
§ 12:26	Site owner liability
8 12:27	Conclusion

## CHAPTER 13. CONTRACTS FOR WORK TO BE DONE ON YOUR PREMISES

§ 13:1	Introduction
§ 13:2	The legal differences
§ 13:3	Practical difference between these contracts and a
	"sale of goods"
§ 13:4	—Scope of the work and changes
§ 13:5	—Work disruption
§ 13:6	—Payment
§ 13:7	—Occupational Safety and Health
§ 13:8	—Environmental concerns
§ 13:9	— —Hazardous materials
§ 13:10	—Public liability
§ 13:11	—Clauses concerning the behavior of the vendor's
	employees
§ 13:12	——Sexual harassment
§ 13:13	——Drug and alcohol abuse
§ 13:14	—Termination
§ 13:15	—Time of completion
§ 13:16	—Subcontracts
§ 13:17	—The warranty
§ 13:18	—Taxes
§ 13:19	—Intellectual property and works of authorship
§ 13:20	—Use of resources and utilities
§ 13:21	—Relationship of the parties
§ 13:22	—Confidential information
§ 13:23	—Qualifications of personnel
8 13.24	—Security

- § 13:25 —Property and equipment
- § 13:26 —Access to site
- § 13:27 How to use our supplementary terms and conditions
- § 13:28 Arbitration
- § 13:29 Delegation of duty

Appendix 13-A. Checklist of Issues to Consider When Entering into Contracts for Work to Be Done on Your Premises

### CHAPTER 14. THE APPLICATION OF ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE TO CONSTRUCTION CONTRACTS

- § 14:1 Introduction
- § 14:2 —Why is the Uniform Commercial Code important in construction contracts?
- § 14:3 —Contract formation issues
- § 14:4 —Impact of the Uniform Commercial Code in the construction contract setting—UCC versus tort remedies
- § 14:5 UCC warranties
- § 14:6 ———Express warranties
- § 14:7 ——Privity
- § 14:8 ———Merchantability
- § 14:9 — Fitness for particular purpose
- $\$  14:10 ———Notice requirement
- § 14:11 ———Warranty disclaimers
- $\S 14:12$  ——Statute of limitations
- § 14:13 ——Statute of frauds
- § 14:14 ——Revocation of acceptance
- § 14:15 —General rules on Uniform Commercial Code application
- § 14:16 ——Goods or services transaction
- § 14:17 ——Mixed goods and services transaction
- $\S 14:18$  —Indemnification
- § 14:19 — UCC Application in a Purely Service Transaction
- § 14:20 —Summary and conclusions
- § 14:21 Tests for determining whether Article 2 applies— Whether the contract is primarily for goods or services
- § 14:22 —UCC applied—Supplying goods (roofing product) was the dominant factor, therefore, no recovery for both breach of warranties and negligence
- § 14:23 —— UCC applied to contract for purchase and installation of dehumidification system
- § 14:24 ——Design, testing, and supervision incidental to purchase of air handling units

§ 14:25	— — — Value of pool liner exceeded value of installation under predominant factor test
§ 14:26	— — — Application of the UCC to contract to supply structural steel beams for construction of building
§ 14:27	— — — Application of the UCC to a contract for the sale and erection of prefabricated building
§ 14:28	— — Granite processing plant constitutes goods under predominant factor test
§ 14:29	<ul> <li>— — Electrical substation constitutes goods under predominant purpose test</li> </ul>
§ 14:30	— —UCC not applied—Installation of a new roof was predominantly a service and complaint was with the service portion of the contract
§ 14:31	— — Main objective of the contract was the construction of a barn not the provision of goods
§ 14:32	— — —UCC did not apply to dispute between general contractor and subcontractor where dispute centered on contract performance and not goods
§ 14:33	— — — There must be a contract for the UCC to apply
§ 14:34	— — —UCC provisions on tender and rejection do not apply to in-ground pool
§ 14:35	— — Design, testing, and installation of fire alarm systems constitute services
§ 14:36	— — —Interior decorating not a sale of goods
§ 14:37	<ul> <li>— UCC application in large, complex construction project</li> </ul>
§ 14:38	—Substantial justification for application of Article 2
§ 14:39	Warranties generally—Introduction
§ 14:40	—Contractor as agent of supplier may create an implied warranty despite disclaimer
§ 14:41	—Disclaimer only applied to defects in workmanship, not to suitability of system as a whole
§ 14:42	—Disclaimer provided after negotiations are ineffective
§ 14:43	<ul> <li>Express warranty created by promotional materials despite lack of direct privity</li> </ul>
§ 14:44	Evidence necessary to demonstrate merchantability of goods
§ 14:45	Necessity of reliance for implied warranty of fitness for a particular purpose—No reliance when owner supplies specifications
§ 14:46	— Buyer could not recover under a theory of implied warranty of fitness where it supplied the faulty plans and continually ignored the seller's suggestions for improvements
§ 14:47	— —Buyer of cement could not recover under an implied warranty of fitness where it provided the

supplier with improper specifications for the cement's content —No implied warranty when the owner is an expert § 14:48 § 14:49 —Fitness claim viable for defective vent fabrication Non-Uniform Commercial Code implied warranties § 14:50 developed by case law Third-party beneficiaries of warranties § 14:51 § 14:52 Strict liability for economic loss § 14:53 —House was held to be a "product" § 14:54 -Recovery denied where owner suffered only damage to defective property itself

### CHAPTER 15. CONTINGENT PAYMENT CLAUSES

§ 15:1	Introduction
§ 15:2	Types of clauses
§ 15:3	Condition precedent clauses—Minority view—
	Generally
$\S 15:4$	——Contract wording
§ 15:5	— Intent—Contract provisions evidenced parties'
	intent to create a pay-if-paid clause
§ 15:6	———Evidence of the parties' intent was not
	relevant when contractual language was clear
§ 15:7	————Court enforced contingent payment clause
	that specifically stated that payment by owner was a
0.450	condition precedent to subcontractor getting paid
§ 15:8	————Court enforced clear language creating
	condition precedent where both parties were
6 1 5 0	experienced in construction industry
§ 15:9	———Ambiguity in contingent payment clauses—
C 17.10	Jury issue
§ 15:10	— — — Partial payment made to subcontractor
§ 15:11	Reasonable time for payment—Majority view—
¢ 15.10	Generally
§ 15:12	— — Risk of owner's insolvency should not be shifted to subcontractor unless expressly agreed to
	in the contract
§ 15:13	— — — When owner became insolvent, pay-when-paid
3 10.10	clause required general contractor to pay
	subcontractor within a reasonable time
§ 15:14	— — Otherwise valid pay-when-paid clause held
<b>0</b>	unenforceable as against public policy
§ 15:15	— — Otherwise valid pay-when-paid clause may be
	excused by gross mistake of fact by owner
§ 15:16	— —Intent and ambiguity—Questions of law
§ 15:17	————Use of the word "conditioned" was not
	sufficient to create a condition precedent

§ 16:7

§ 16:8

§ 16:9

§ 16:10

§	15:18	————Contractual language was not a clear, unambiguous expression of parties' intent to require
		forfeiture
§	15:19	————No intent by supplier to assume risk of nonpayment as stated in purchaser's subcontract incorporated by reference in general contractor's letter of assurance
§	15:20	Enforcement of condition precedent clauses in majority-view states
§	15:21	—When subcontract states that subcontractor relies on owner's credit
§	15:22	—When subcontract specifically addresses owner's nonpayment
§	15:23	—When general contractor has received partial payment from owner
§	15:24	Obligation of the surety
	15:25	—Regardless of contingent payment clause validity, subcontractor is entitled to payment under surety bond
§	15:26	—Contingent payment language in a surety contract is only valid if contract between contractor and subcontractor contains a valid pay-when-paid clause
§	15:27	—Contingent payment clause in subcontract protects surety
§	15:28	—Pay—when—paid clause unenforceable if time for payment unspecified and undefined
§	15:29	Prompt payment acts
_		TER 16. WARRANTIES IN
(	CONS	TRUCTION CONTRACTS
§	16:1	Owner's warranties as to the accuracy of the plans and specifications
§	16:2	—The <i>Spearin</i> Doctrine—The implied warranty of accuracy and suitability
_	16:3	—Notice of claim
-	16:4	—Repercussions of breach of implied warranty
§	16:5	—Elements of proof to demonstrate breach
§	16:6	—Defenses available to the owner

Design professional's liability under warranty for errors—Majority view—Design professional not

—Minority position—Design professional impliedly warrants fitness for a particular purpose and

 —Implied promise to use reasonable and customary care in performance of professional services
 Contractor's liability under warranty law—Express

liable for errors or latent design defects

general fitness of design

warranties

§ 16:11	——Puffing
§ 16:12	——Duration of warranty
§ 16:13	—Contractor's implied warranties—Contractor's implied warranty of workmanlike performance
§ 16:14	— —Implied warranty of workmanship not abrogated by express warranty of repair and replacement
§ 16:15	—Implied warranty of habitability—Protects purchasers of new homes
§ 16:16	——Degree of defect—When is a home "not habitable"?
§ 16:17	— —Who is covered by the implied warranty of habitability?
§ 16:18	—Implied warranty of habitability—Disclaimer
§ 16:19	—Malfunction theory
§ 16:20	—Implied warranty of fitness for a particular purpose
§ 16:21	—Component parts doctrine
§ 16:22	—Notice of breach of warranty
§ 16:23	—Time for bringing action
§ 16:24	——Discovery rule
§ 16:25	——Statute of repose
§ 16:26	Arbitrability of breach of warranty
§ 16:27	Third-party beneficiary of warranties
§ 16:28	Public policy
§ 16:29	Recovery of consequential damages
§ 16:30	Disclaimers and limitations of liability
§ 16:31	Guarantees
§ 16:32	Contract term requiring manufacturer's warranty

## CHAPTER 17. ENVIRONMENTAL ISSUES IN CONSTRUCTION CONTRACTING

§ 17:1	Introduction
§ 17:2	Clean Air Act—Asbestos issues
§ 17:3	—New source review
§ 17:4	—Permitting issues
§ 17:5	—Indoor air pollution
§ 17:6	Comprehensive Environmental Response,
	Compensation, and Liability Act issues
§ 17:7	Resource Conservation and Recovery Act
§ 17:8	—Waste issues
§ 17:9	—Underground storage tank issues
§ 17:10	—Anti-duplication provision
§ 17:11	Clean Water Act
§ 17:12	—NPDES issues
§ 17:13	—Wetlands issues
§ 17:14	—Regulated activities

§ 17:15 Endangered Species Act issues

§ 17:16	National Environmental Policy Act
§ 17:17	State transfer laws and state laws in general
§ 17:18	Lead-based paint
§ 17:19	Abatement work
§ 17:20	Multiemployer worksites
§ 17:21	Negligent exposure to hazardous materials
§ 17:22	Pollution exclusion clause in commercial liability policies
§ 17:23	Conclusion

Appendix 17-A. Checklist of Environmental Issues in Construction Contracting

### CHAPTER 18. QUANTUM MERUIT

§	18:1	Introduction
§	18:2	Quantum meruit and the contract—Express contracts
§	18:3	—Implied contracts
§	18:4	Case discussions
§	18:5	—Elements and burdens of proof
§	18:6	—In some courts, plaintiff must expect payment from the defendant, not a third-party beneficiary, for the quantum meruit claim to prevail
§	18:7	—Cases where <i>quantum meruit</i> arises in the context of a clear contract
§	18:8	——Circumstances in which <i>quantum meruit</i> will be denied
§	18:9	— —Circumstances in which <i>quantum meruit</i> will be granted
§	18:10	——Circumstances in which quantum meruit will be granted—Partial performance
§	18:11	—What if the parties have a contract but one of them has breached it?
§	18:12	—Waiver of right to sue by nonbreaching party
§	18:13	—Entitlement to quantum meruit remedy under arbitration
§	18:14	—Claim by subcontractor against owner
§	18:15	—No <i>quantum meruit</i> recovery without proof that services rendered had value
§	18:16	—Failure to file lien
§	18:17	—Quantum meruit recovery when the contractor fails to comply with licensing statute
§	18:18	—Quantum meruit recovery from landlord by contractor who contracted with tenant
§	18:19	—Quantum meruit and privity
§	18:20	—Entity being charged must receive benefits
§	18:21	—Issue preclusion under the seventh amendment
§	18:22	—Prejudgment interest
§	18:23	Conclusion

### CHAPTER 19. CORPORATE COUNSEL'S GUIDE TO THE DAVIS-BACON ACT

§ 19:1	Introduction
§ 19:2	Contracts governed by the Davis-Bacon Act
§ 19:3	—"Construction" contracts and work "on the site"
§ 19:4	—"Public buildings" and "public works"
§ 19:5	—"Within the United States"
§ 19:6	—"Mechanics" and "laborers"
§ 19:7	—"Wages" and "fringe benefits"
§ 19:8	Provisions required in contracts governed by the Act
§ 19:9	—Provision specifying minimum wages to be paid, within DOL Guidelines
§ 19:10	— — The wage determination process
§ 19:11	— —The secretary's authority regarding wage determinations under the Act
§ 19:12	——Application of Davis-Bacon wage determinations
	to contracts with option clauses
§ 19:13	—Provisions stipulating weekly payment to employees
§ 19:14	Arbitration
§ 19:15	Penalties for violation of the Act—Liability on the
•	contract, withholding, and challenges to withholding
§ 19:16	—Contract termination
§ 19:17	—Debarment
§ 19:18	—False Claims Act
§ 19:19	—No private right of action
§ 19:20	—Fair Labor Standards Act
§ 19:21	—Unjust enrichment
§ 19:22	Criticism of the Act
§ 19:23	Conclusion
Appendix	19-A. Fact Sheet #66: The Davis-Bacon and Related Acts (DBRA)—U.S. Department of Labor (April 2009)
Appendix	19-B. Fact Sheet #81: The Davis-Bacon Wage Survey Process—U.S. Department of Labor (April 2016)

### CHAPTER 20. INCORPORATION BY REFERENCE AND FLOW-DOWN PROVISIONS IN CONSTRUCTION CONTRACTS

§ 20:1	Introduction
-	
$\S~20:2$	Incorporation by reference clauses are generally
	enforced
§ 20:3	Incorporation by reference or flow-down provisions
•	are not all they are made out to be

§ 20:4	No damages for delay provisions
§ 20:5	Indemnity provisions
§ 20:6	Contract manual provisions
§ 20:7	Dispute resolution provisions
§ 20:8	—Federal contracting dispute resolution procedures
§ 20:9	—Incorporation of general contract arbitration
	clauses
§ 20:10	Forum selection clauses

### CHAPTER 21. PAYMENTS USING JOINT CHECKS

§ 21:1	Introduction
§ 21:2	Joint check agreements—Consent required
§ 21:3	—Scope of the agreement
§ 21:4	—Condition precedent
§ 21:5	—Consideration
§ 21:6	-Protection of rights under the agreement
§ 21:7	—Identity of payees
§ 21:8	—Relationship of parties
§ 21:9	The joint check rule
§ 21:10	Priority of competing claims to payments
§ 21:11	The Miller Act
§ 21:12	Waiver
§ 21:13	Estoppel
§ 21:14	Damages
8 21.15	Conclusion

### CHAPTER 22. DESIGNING AND BUILDING A PROJECT

§ 22:1	Introduction
§ 22:2	—What the chapter covers
§ 22:3	—Criteria for a successful project
§ 22:4	—The owner needs to be in control
§ 22:5	—The value of developing owner's standard
	documents
§ 22:6	—Corporate counsel's role
§ 22:7	Key issues in drafting the designer agreement
§ 22:8	—Which entity will manage construction?
§ 22:9	—Designing to the owner's program
§ 22:10	—Designing to the owner's budget
§ 22:11	—Construction inspection
§ 22:12	—Schedule administration
§ 22:13	—Review of requisitions for payment
§ 22:14	—Review of change orders/analysis of claims
§ 22:15	—Reimbursable expenses/additional services
§ 22:16	—Deliverables required for management

### Construction Contracts Deskbook

§ 22:17	Managing the designer—Introduction
§ 22:18	—Establishing baselines
§ 22:19	—Program
§ 22:20	—Deliverables
§ 22:21	—Schedule
§ 22:22	—Budget
§ 22:23	—Progress Reports
§ 22:24	—Monitoring designer performance
§ 22:25	— —What to monitor
§ 22:26	——How to monitor
§ 22:27	— — —Regular meetings
§ 22:28	———Document discussions and decisions
§ 22:29	———Require and utilize reports
§ 22:30	——Designer not complying with requirements of
Ü	designer agreement
$\S 22:31$	—The three gaps
§ 22:32	Key issues in drafting the construction contract—
	Introduction
§ 22:33	—Coordination with the design agreement
§ 22:34	—Risk allocation
§ 22:35	—Specific issues to consider when drafting the
	construction contract
§ 22:36	——Schedule
$\S 22:37$	— —Change orders
§ 22:38	——Damages for delay
$\S 22:39$	— —Indemnification
§ 22:40	— —Termination
$\S~22:41$	Effective contract administration—Introduction
$\S 22:42$	—Avoiding disputes
§ 22:43	—Comprehensive documentation
$\S 22:44$	——The Contract documents
$\S 22:45$	— —What happens in the field
§ 22:46	——Contractor submittals
$\S 22:47$	——Correspondence
$\S 22:48$	—Document management
$\S 22:49$	—Effective communication
$\S 22:50$	— —Format
$\S~22:51$	——Substance
$\S 22:52$	—Avoiding waivers
$\S 22:53$	——Responding to correspondence
$\S 22:54$	——Avoiding acquiescing in procedures and/or
	actions inconsistent with contractual requirements
$\S 22:55$	—Written procedures
§ 22:56	——Document management
$\S 22:57$	——Requisitions for payment
$\S 22:58$	<ul> <li>— Change order and claims management</li> </ul>
$\S 22:59$	——Contract closeout

§ 22:60	—Rules of contract administration
§ 22:61	Requirements for the contractor to prove claims—
0	Introduction
§ 22:62	—The four basic requirements for all claims
§ 22:63	——Actual damages
§ 22:64	— — Entitlement
-	
§ 22:65	— — — Applicable contractual provisions
§ 22:66	———The factual basis of the claim
§ 22:67	——Direct causation
§ 22:68	——Sufficient documentation
§ 22:69	— — Substantiation of the facts alleged
§ 22:70	— — Substantiation of damages
§ 22:71	——Conclusion: A claim submission must have all
	four elements
§ 22:72	—What the contractor has to show for specific
3	claims
§ 22:73	——Acceleration
§ 22:74	———Contractor's requirement to recover schedule
§ 22:75	— —— Instruction to accelerate
-	— ————————————————————————————————————
§ 22:76	
§ 22:77	——Cardinal change
§ 22:78	——Defective specifications
§ 22:79	——Delay
§ 22:80	— — — The function of construction schedules
$\S 22:81$	— — — The two most common types of schedules
§ 22:82	———Preparing a CPM schedule
§ 22:83	— — — Understanding float
§ 22:84	——Using the schedule to analyze delay claims
§ 22:85	——Denial of access to the site
§ 22:86	——Differing site conditions
§ 22:87	———Physical condition at the site
§ 22:88	
-	———Differs significantly
§ 22:89	——Prompt notice
§ 22:90	———Site investigation
§ 22:91	— —Extra work
§ 22:92	——Improperly denied substitution
§ 22:93	— —Inadequate utilities
§ 22:94	— —Interference
§ 22:95	——Performance impossible or impractical
§ 22:96	— Problems caused by other contractors
§ 22:97	— — Wrongful termination
§ 22:98	Common owner defenses—Introduction
§ 22:99	—Change order includes all costs
	—Defective work
§ 22:100	
§ 22:101	—Designer's decision is final
§ 22:102	—Failure to comply with procedural requirements of
	the contract

#### Construction Contracts Deskbook

```
—Lack of authority
§ 22:103
§ 22:104
          —Lack of causation
§ 22:105
          —No damage for delay
§ 22:106
          —Statutes of limitation
§ 22:107
          Calculating damages—Introduction
§ 22:108
          —The purpose of damages
§ 22:109
          —All damage calculations based on the contract
§ 22:110
          —Introduction to cost categories
§ 22:111
          — —Labor costs
§ 22:112
          — — Material costs
§ 22:113
          ——Equipment costs
§ 22:114
          ——Subcontractor costs
§ 22:115
          — —Contractually specified markups
§ 22:116
          ——Supplemental costs
          — — Home office overhead costs
§ 22:117
§ 22:118
          —Types of contractor damage calculations
§ 22:119
          ——Actual costs
§ 22:120
          ——Estimated costs
§ 22:121
          — —Total costs
§ 22:122
          — — Modified total cost
§ 22:123
          —Damage calculations
§ 22:124
          --Extra costs
§ 22:125
§ 22:126
          How to analyze claims—Introduction
§ 22:127
          — — Objectives of claims analysis
§ 22:128
          — Entitlement
§ 22:129
          ——Damages
§ 22:130
          —Reviewing the contractor's claim submission
§ 22:131
          —Analyzing the contractual requirements
§ 22:132
          ——Procedural requirements
§ 22:133
          ——Analyzing the substantive requirements
§ 22:134
          — — Techniques of contractual analysis
§ 22:135
          ———Identify the specific issues
§ 22:136
          ———Examine the contract thoroughly
§ 22:137
          ———Review key control provisions
          ———Read provisions in the context of the claim
§ 22:138
§ 22:139
          —Evaluating the contractor's factual position
§ 22:140
          — —Confirm work in question
§ 22:141
          — — Utilizing construction inspection
§ 22:142
          — — Utilizing the schedule
§ 22:143
          — Reviewing the contractor's documentation
§ 22:144
          ———Contractual requirements
          ———Support for factual assertions
§ 22:145
§ 22:146
          ——Developing a conclusion
§ 22:147
          —Determining entitlement
§ 22:148
          —Calculating damages
```

- § 22:149 —Preparing a formal response
- § 22:150 Conclusion

### Volume 2

### CHAPTER 23. ARBITRATION OF CONSTRUCTION DISPUTES

§ 23:1	Introduction
§ 23:2	Federal Arbitration Act
§ 23:3	—Transactions "involving commerce"
§ 23:4	—Transactions "involving commerce"—Interstate
§ 23:5	—Severability of agreement to arbitrate
§ 23:6	—Conflict between state law and federal law
§ 23:7	—Bankruptcy
§ 23:8	—Incorporation by reference
§ 23:9	—Assignment of arbitration clause
§ 23:10	—Arbitrary and capricious standard of review
§ 23:11	—Waiver of right to compel arbitration
§ 23:12	—Vacating awards
§ 23:13	—Post-award proceedings
§ 23:14	State arbitration acts—Existence of agreement to
3 20.11	arbitrate
§ 23:15	—Authority to decide arbitrability
§ 23:16	——Construction Industry Arbitration Rules
§ 23:17	—Severability of agreement to arbitrate
§ 23:18	—Scope of arbitration clause
§ 23:19	—Incorporation by reference
§ 23:20	—Interrelated contracts
§ 23:21	—Consolidation of arbitration hearings
§ 23:22	—Full faith and credit
§ 23:23	—Res judicata
§ 23:24	—When a valid agreement to arbitrate will not be enforced
§ 23:25	—Standing to enforce arbitration agreement
§ 23:26	—Third-party beneficiary
§ 23:27	—Waiver
§ 23:28	—Withdrawal of consent
§ 23:29	—Union disputes
§ 23:30	—Invalid arbitration agreements
§ 23:31	Expedited arbitration of construction disputes
§ 23:32	Non-signatories
-	Evidence
§ 23:33	Evidence

Appendix 23-A. Summary of Significant Changes to Construction Industry Arbitration Rules and Mediation Procedures

# CHAPTER 24. NEW CONSTRUCTION OBLIGATIONS UNDER THE PUBLIC ACCOMMODATIONS PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

- § 24:1 Introduction § 24:2 Affected parties § 24:3 —Places of public accommodation and commercial facilities § 24:4 —Individuals with disabilities § 24:5 Prohibition against discrimination § 24:6 —General prohibition § 24:7 — —Activities § 24:8 — —Integrated settings § 24:9 — —Administrative methods § 24:10 — —Association § 24:11 —Specific prohibitions § 24:12 — —Existing facilities § 24:13 Prohibitions against discrimination—Specific prohibitions— Existing facilities—Readily achievable § 24:14 — — —Alterations — — — Maximum extent feasible § 24:15 § 24:16 — —New construction § 24:17 Exemptions Enforcement § 24:18 —Injury-in-fact § 24:19 § 24:20 —Standing § 24:21 —Indemnification § 24:22 Conclusion
- Appendix 24-A. Common ADA Errors and Omissions in New Construction and Alterations—U.S. Department of Justice

Appendix 24-B. ADA Resources

### CHAPTER 25. THE VISUAL ARTISTS RIGHTS ACT

$\S~25:1$	Introduction
$\S 25:2$	Claim for destruction
§ 25:3	Claim to enforce right of integrity
$\S~25:4$	Claim to enforce right of attribution
\$ 25:5	Types of works to which the Visual Artists Rights Act of 1990 applies
325:6	—Unfinished works
$\S~25:7$	—Temporary works
325:8	—Immovable art

xxxvi

§ 25:9	Works that are excluded under the Visual Artists
	Rights Act of 1990
$\S 25:10$	—Works made for hire
§ 25:11	—Advertising and promotional works
§ 25:12	—Functional art
§ 25:13	—Works of art that are illegally placed on property
$\S 25:14$	—Site-specific art
§ 25:15	Duration of rights in works under the Visual Artists Rights Act of 1990
§ 25:16	Establishing recognized stature
$\S 25:17$	Construction/Renovation/Conservation
§ 25:18	Are the claims covered under general liability insurance policies?
§ 25:19	Sovereign immunity
§ 25:20	Waiver
$\S 25:21$	Recovery
§ 25:22	—Attorneys' fees

Appendix 25-A. Lease Contract Provision

### PART II. FORMS

### **CHAPTER 26. SAMPLE FORMS**

§ 26:1	Construction bid solicitation form
§ 26:2	Construction contract proposal
§ 26:3	Contractor qualification statement
$\S~26:4$	Contractor prequalification questionnaire
§ 26:5	Sample instructions to bidders
§ 26:6	Lump sum construction contract proposal——Owner's form
§ 26:7	Construction agreement
§ 26:8	Special services agreement (construction context)
§ 26:9	Small construction contract
$\S~26:10$	Contractor and owner form
§ 26:11	Agreement for construction services (from a large bottling company)
§ 26:12	Sample time-and materials form
§ 26:13	Blanket contract for miscellaneous construction (medium sized manufacturing plant)
$\S~26:14$	Annual contractor services agreement
§ 26:15	Cost-plus construction agreement (large diversified company—Chemical)
§ 26:16	Cost-plus-fixed-fee construction agreement (large diversified company—Manufacturing)
§ 26:17	Lump sum construction contract (large diversified company—Chemical)
§ 26:18	Construction contract lump sum forms

### Construction Contracts Deskbook

	26:19	General requirements for construction (major utitlity)
Š	26:20	General terms and conditions for construction (major utility)
Ş	26:21	Consulting agreement for construction services
	26:22	Confidential information agreement with
		subcontractors engaged in construction work
§	26:23	Supplementary terms and conditions for purchase orders issued for construction, installation, or repair work to be performed on your premises
§	26:24	Terms and conditions for work to be performed on buyer's property
§	26:25	Supplementary terms and conditions for work done on your premises
§	26:26	Independent contractor's agreement for use in the United States
§	26:27	Special conditions—Independent contractor
		agreement (construction context)
§	26:28	Agreement between contractor/builder and subcontractor
§	26:29	Construction contract between construction manager and contractor
Ş	26:30	Contract for construction projects of limited scope
	26:31	Engineering contract
	26:32	Engineering contract 2
-	26:33	Engineering Services, Equipment Sale, and Construction Agreement
8	26:34	Architectural agreement short form
	26:35	Conditions for contract for architectural and engineering services
§	26:36	Waiver of mechanic's and/or materialmen's liens
	26:37	Waiver of liens and claims
-	26:38	Waiver of lien
	26:39	Major chemical company—Supplier's release
	26:40	Contractor's release
	26:41	Sample payment bond
	26:42	Sample performance bond
	26:43	Sample performance and payment bond
	26:44	General procedures—Health, safety, and environmental protection rules for contractors
§	26:45	General rules and procedures expected of contractors and service organizations of company
§	26:46	Necessary precautions checklist
	26:47	Contractor safety guidelines from a large consumer products company
Ş	26:48	Construction safety checklist
	26:49	Sample agreement regarding use of alcohol and controlled substances by contractors and suppliers
§	26:50	Insurance agreement

§ 26:51	Contractor employee confidentiality agreement
§ 26:52	Secrecy and inventions agreement
§ 26:53	Sample confidentiality agreement
§ 26:54	Sample contract for labor, supervision, and materials
§ 26:55	Field Service Agreement
§ 26:56	Supervisory services conditions
$\S~26:57$	Equipment loan agreement
§ 26:58	Agreement for plumbing/electrical services between company and contractor
§ 26:59	General conditions—Equipment rental (pharmaceutical company)
§ 26:60	A checklist for drafting terms and conditions for construction contracts
§ 26:61	Selected terms and conditions for construction contracts

### CHAPTER 27. FORMS FROM THE SEC'S EDGAR DATABASE

§ 27:1	Construction Agreement
§ 27:2	Construction Agency Agreement
§ 27:3	Engineering, Procurement and Construction Contract
§ 27:4	Construction Loan and Security Agreement
§ 27:5	Construction Contract
§ 27:6	Tenant Work Letter
§ 27:7	Fixed Price Turnkey Agreement for the Engineering,
	Procurement and Construction of Train 4 Rio Grande
	Natural Gas Liquefaction Facility (2024)
§ 27:8	Health, Safety, Security, and Environmental Policies (2024)
§ 27:9	Contractor Document Deliverables (2024)
§ 27:10	Sample Change Orders
§ 27:11	Master Construction Agreement (2025)
§ 27:12	Development Agreement
$\S 27:13$	Environmental Indemnity Agreement
$\S 27:14$	Letter of Credit
§ 27:15	Lien Waiver Forms
§ 27:16	Line Installation Agreement
§ 27:17	Construction Management Services Agreement
§ 27:18	Contractor and Subcontractor Waivers and Releases (2024)
§ 27:19	Change Order Form (2024)

### **APPENDICES**

Appendix A.	Construction Contracts Bibliography
Appendix B.	Internet Resources on Construction Contracting
Appendix C.	Summaries of Forms Available on EDGAR

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

### Construction Contracts Deskbook

Table of Cases Index