

# Introduction

Lawyers and contract representatives engaged in the construction industry find many technical contracts crossing their desks.

This book presents a framework for the evaluation of the construction documents, suggesting alternative clauses for cross-negotiation, and offering numerous forms for the drafting of entire documents.

The various documents are commented upon with numerous citations to cases and to reports and studies of the trade and of professional societies. The cases cited are primarily drawn from the capital construction and allied fields, both public and industrial.

Since 30 to 60 percent of final construction costs is comprised of purchasing raw materials or engineered components and assemblies, this book deals with industrial purchasing for capital construction and plant renewal and modification. Again, the approach is to examine the more common procurement documents, to comment upon them and to draw from cases dealing with technological procurement.

For some reason, service contracts and purchasing contracts in the capital development industry are not treated together. However, as the contracts are intimately related and ultimately combined to help form one integrated project, dual treatment and interfacing is desirable. Having considered purchasing, it is but one short step to consider and to interrelate production contracts as a point of demarcation.

Finally, the book contains many ancillary and supporting forms to assist in negotiation and long-range contract planning, such as nondisclosure agreements, licensing agreements, and environmental plans. Interorganizational agreements are also included, such as, joint ventures, consortiums, build, operate, and transfer (BOT), etc.

Many feel that the traditional categories of contract law (offer, acceptance, consideration, etc.) deal as adequately with engineering and construction contracts as with other forms of contracts. This view of general contract law viability in specialized situations is under attack without rejection of the whole. See Ian R. MacNeil, "Whither Contracts," 21 *Journal of Legal Education*, 403 (1967).<sup>1</sup> Form should not be extolled over substance nor for that matter should form be obliterated. Consequently, certain areas of law, such as creditors' rights, collective bargaining, etc., deserve specialized treatment apart from the traditional categories of contract law. Furthermore, this specialized treatment should be extended to engineering and construction contracts.

In this regard, trade usage has double bearing. First, it is brought to the bargaining table by knowledgeable negotiators. Thus there may never be a conflict that invokes trade usage. It has fulfilled its function by establishing a basis of communication. Second, in the event of conflict, trade usage, together with high priority express language, course of performance, and course of dealing, help in resolution of the dispute. Precedent for all these concepts are found in the cases and materials reflected in the text. Moreover, the experienced lawyer will find ready reference and backup in the forms that reflect usage and in the referenced articles and literature. Lawyers new to construction practice will also find access to basic materials leading to skills development and application. Moreover, Professor Corbin's admonition is heeded. In order to counsel a client, "it is necessary to know the business that is involved. Such knowledge can be gained from books as well as from living experiences. Indeed, most of it must, of necessity, come from books, especially the records of cases;

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<sup>1</sup> Ian R. MacNeil has since written several articles explaining his principles in terms of "relational contracts." See "A Primer of Contract Planning", 48 *S. Cal. L. Rev.* 627 (1975) and "Contracts: Adjustment of Long Term Economic Relations under Classical, Neoclassical and Relational Contract Law", 72 *Nw. U. L. Rev.* 854 (1968). See also Ch. 20.

for no one can live many lives at once. . . .” Lawyers in construction practice also learn of usage by sitting side by side with interdisciplinary counterparts, in adopting, working out, and approving the contract documents that govern the progress of construction.

Uniqueness of construction law derives from the nature of the work. It can extend interactively, through scores of contracts, between many construction industry collaborators during and after completion of construction. Life cycle will start from conception and design to hammering the last nail on the work. It extends also during the warranty period and applicable statutes of limitations. In this latter regard, many states have passed special legislation unique to the construction industry. Hence, a special effort has been made to collect technological cases and to blend them with existing engineering and construction contract practice.

Additionally, it has been observed that the Sales Article of the Uniform Commercial Code does not accommodate itself adequately to the large-scale engineering-construction project. The Code was not written by men familiar with large-scale construction contracts. See W. D. Hawkland, published commentary before the Engineering and Construction Contracting Committee of the American Institute of Chemical Engineers, New Orleans, March 1973. Thus, there is double relevance in the collection of technological cases drawn from the general contract and the sales or procurement area, as applied to construction and allied contracts and their spinoffs. Here, general contract law and Code law intersect. A book entitled *CODE and Other Laws of Cyberspace*, by Lawrence Lessig, sheds new light on constitutional issues and the Internet. It says that Internet operation is predetermined by websites in place and care should be taken to see that they accord with constitutional precepts. The constitution here is not a fixed document but rather one in accordance with the British view developed over a period of time that becomes part of its law.

The opinion has been voiced in the Construction Forum of the American Bar Association that some thought be given to establishing a “Code” for construction law or some form of uniformity in particular areas. The discussion itself attests to the uniqueness of construction law, meriting specialized consideration.<sup>2</sup>

It will be noted that much of the treatment in this work on construction law is done on a situational basis. What are the actors doing in this particular situation? What are the specifications, and what representations have been made respecting site excavation? What are the expectations of the parties and what should the result be?

Ideally, then, domestic industrial prowess should be augmented by planning, design, and construction know-how to efficient point-of-application site construction whether conventional, civil or industrial in nature. From a technical, as well as a legal, standpoint, there is an interrelationship among these various disciplines.

Guidelines for Contracting for Industrial Projects in Developing Countries adverts to the fact that a contract for the construction of civil works can lay the basis for a contract for the supply and erection of plant and equipment. By the very nature of the construction project, there is an interchangeability, with adaptation, of various technical and legal concepts.

References are made from time to time to hard-core legal aspects of federal construction contracting. Holdings, of course, are not uniformly transferable to private contracting, but the disciplinary thought process dealing with core subjects such as specifications, time, and dollars is transferable. These project concepts are interdisciplinary. The controlling Federal Acquisition Regulations have been termed elaborate to the point of complexity, detailed to the point of unintelligibility, and strangely uninformative on matters of principle.<sup>3</sup> Yet potentially everything becomes systematic within their structure as with a Code. Avoiding comparison with the larger picture would be to lose sight of the benefits to be derived from such a comparative analysis.

<sup>2</sup> See Mark L. McAlpine & David A. Breush, “A Uniform Construction Law Code: Is There a Foundation to Build On?” 74 Mich. B.J. 554 (1995).

<sup>3</sup> Keyes, *Government Contracts Under the Federal Acquisition Regulations* (1986).

This text makes reference to core concepts using the established project constraint terminology of scope, time, and dollars. These are the eternal verities upon which sound construction contracting and administration are based. Peripheral protective clauses, insurance, force majeure, etc., distribute the risk in helping to bring in contracts, by and large, on target. Repetitive use of contract construction and technological concepts allows the structuring of a serviceable decision-making model. The lawyer interrelates with his opposite number in problem recognition, solving and avoidance, both in the formation and performance of the contract. Standard and prevalently used private construction contracts and their phraseology are a starting point. When contract language fails to cover, then larger principals of contract law and sometimes tort law applies. This book aids the lawyer in becoming conversant with others in an emergent “unified field” of construction and technological law. In the event of a dispute, the larger picture is always helpful in approaching the negotiating table or in seeking an alternative dispute resolution. See Chapter 20.

Invariably, one will find counts for negligence and torts in construction contract cases as an attempt to break out of the contract cage. Courts are struggling with this concept. They do not wish the law of torts to swallow up the law of contracts where consensual agreements have been reached. On the other extreme, aggrieved parties try to get into the cage as third-party beneficiaries to obtain the benefit of contracts. Lawyers must be aware of these two tendencies in master transaction planning, whether or not litigation is ever involved.

The mechanisms for putting into practice these various interdisciplinary concepts exist. The challenge is to do it effectively, technically, and contractually. To the extent, then, that the law can lend predictability to the contracting process, the parties will be able to proceed more efficiently. Further, to the extent the law can suggest or reflect mutually beneficial modes of operation, a more cost-effective project will be built with planned return on investment.

Additionally, since 1994, the federal government has moved to require that the purchasing of commercial items as defined be free of many of the traditional strictures. Procurement in this regard has been liberalized. Hence, in this respect, commercial buying in public and private areas find a common meeting ground that invites comparative reference.

As part of commercial item buying and acquisition generally, the government is requiring its contracting officers to conduct organized marketing research that includes the use of the Internet. For this reason, and on the merits generally, Internet sites are referenced topically throughout the text. Both the United States and United Nations policies agree on the global extension of Internet usage.

The writer re-echoes the admonition of the various professional societies and trade associations issuing sample documents. It is one thing to use such documents on routine jobs, but quite another to use them or to revise them when the job is not routine. In the latter instance, counsel should be consulted.

Also cited are the views of engineering writers on contract matters. They are, in the real sense, expert witnesses, not on the point of law involved but rather on trade usage and acceptable contracting norms.

Albert Dib  
Albert Hamilton Dib