

ARKANSAS CONSTRUCTION LAW MANUAL

2016

TABLE OF CONTENTS

Chapter 1 - Overview

Chapter 2 - Contractor Licensing Requirements

Chapter 3 - Bidding for Construction Work

Chapter 4 - Bonds

Chapter 5 - Construction Insurance

Chapter 6 - Change Orders

Chapter 7 - Delay

Chapter 8 - Contract Claims

Chapter 9 - Damages

Chapter 10 - Arkansas Mechanics' and Materialmen's Liens

Chapter 11 - Statutes of Limitation and Repose

Chapter 12 - Alternative Dispute Resolution

Chapter 13 - Public Contracts

Chapter 14 - Professional Liability

DETAILED CONTENTS

Chapter 1

Overview

Cyril Hollingsworth

- 1.1 Scope of Chapter
- 1.2 Construction Law - Generally
- 1.3 The Construction Industry Players
- 1.4 The Construction Industry Process
- 1.5 The Contractual Relationship as the Foundation for Construction Law
- 1.6 Overview of the Manual Topics as Part of Construction Law

Chapter 2

Contractor Licensing Requirements

Lizabeth Lookadoo and Gregory L. Crow

- 2.1 Scope of Chapter
- 2.2 General Requirements for Both Commercial and Residential Licenses
- 2.3 Requirements for a Commercial License
- 2.4 Requirements for a Residential License
- 2.5 Organization of the Commercial Board
- 2.6 Organization of the Residential Committee
- 2.7 Powers of the Commercial Board and Residential Committee
- 2.8 Enforcement of Licensing Laws and Regulations; Unlicensed Contractor Barred from Suit
- 2.9 Duties of Investigators
- 2.10 Hearings Before the Commercial Board and Residential Committee
- 2.11 Penalties for Violations of the Licensing Laws and Regulations
- 2.12 Additional Criminal and Civil Penalties for Violations
- 2.13 Other Reasons a Licensee May Be Asked to Appear Before the Commercial Board or Residential Committee
- 2.14 Steps a Contractor Can Take to Avoid Violations and Otherwise Being Called before the Commercial Board or Residential Committee

Chapter 3

Bidding for Construction Work

Jack East, III

- 3.1 Scope of Chapter
- 3.2 Purpose of Competitive Bidding and Statutory Framework

- 3.3 Bid Document Requirements and Bid Protests
 - A. Is the Bid Responsive to the IFB?
 - B. Is the Bidder a Responsible Bidder?
 - C. Would the Best Interest of the Owner Be Served by Rejection of the Bid?
 - D. Remedies and Burden of Proof
 - E. Protests by Other Bidders
- 3.4 Contractor Bid Errors and Remedies and Bid Bonds
 - A. General Principles Governing Allegedly Defective Bids
 - B. The Elements of a Defective Bid Claim
 - C. Relief Prior to Award
 - D. Relief After Award but Before the Work Begins
 - E. Relief After the Work Has Begun
 - F. The Paper Trail
- 3.5 Subcontractor Issues, Including Bid Withdrawal
- 3.6 Private Job Bidding

Chapter 4

Bonds

David A. Grace

- 4.1 Scope of Chapter
- 4.2 What is a Surety Bond?
- 4.3 Distinction Between Payment Bonds and Performance Bonds
- 4.4 Construction Surety Bonds Required or Authorized by Arkansas Law
- 4.5 Payment Bond Claim Liability
- 4.6 Performance Bond Claim Liability
- 4.7 Attorney's Fees
- 4.8 Unfair Claims Settlement Practices and Bad Faith
- 4.9 Equitable Subrogation
- 4.10 Exoneration and Indemnification
- 4.11 Conclusion

Chapter 5

Construction Insurance

J. Don Overton

- 5.1 Scope of Chapter
- 5.2 The Role of Insurance in Construction
 - A. Types of Insurance
- 5.3 Contractual Insurance Requirements
- 5.4 WC - Workers' Compensation Insurance

- 5.5 CGL – Commercial General Liability Insurance
 - A. Bodily Injury and Property Damage
 - B. Exclusions to Coverage
 - C. Additional Insured Status and Additional Named Insured
- 5.6 Builder’s Risk Insurance
 - A. Who Buys?
 - B. Perils Insured and Property Covered (Excluded)
 - C. Excluded Property
- 5.7 Waiver of Subrogation and Real Party in Interest
 - A. Waiver of Subrogation
 - B. Real Party in Interest
- 5.8 CIP – Controlled Insurance Programs
- 5.9 Conclusion

Chapter 6

Change Orders

Ashlea Brown

- 6.1 Scope of Chapter
- 6.2 Purpose of Change Orders
- 6.3 Contractual Change Order Clauses and the Change Order Process
 - A. AIA Forms
 - B. Federal Government Contracts
- 6.4 Circumstances Requiring Change Orders
 - A. Additional or Reduced Scope of Work
 - B. Changed Conditions and Differing Site Conditions
 - C. Weather Delays
 - D. Design Modifications and Revised Specifications
 - E. Adjustments to Unit Pricing
- 6.5 Pricing Change Orders
- 6.6 Change Order Documentation
 - A. Written Change Orders
 - B. Waiver of the Written Change Order Requirement
- 6.7 Authority to Issue Change Orders
- 6.8 The Role of the Design Professional in the Change Order Process
- 6.9 Subcontractor Considerations
- 6.10 Change Order Dispute Process
 - A. Notice Requirements
 - B. Continuing Contract Performance
 - C. Performance of Work under Protest

6.11 Conclusion

Chapter 7

Delay

Jeffrey H. Moore

- 7.1 Scope of Chapter
- 7.2 Types and Causes of Delays
- 7.3 Excusable and Non-Excusable Delay
- 7.4 Compensable and Non-compensable Delay
- 7.5 Concurrent Delay
- 7.6 Burden of Proof and Apportionment in Delay Cases
- 7.7 Methods to Establish Delay
 - A. Schedule Analysis
 - 1. Impact vs. As-planned (not favored)
 - 2. Measured Mile
 - 3. As-built But-for
 - 4. Window Analysis
 - 5. Time Impact Analysis
 - B. Importance of Critical Path Method ("CPM")
 - 1. Explanation
 - 2. Examples
 - 3. Recovery for Delays to the Critical Path
 - 4. Recovery for Delays Off the Critical Path
 - 5. As-planned Schedule Important
 - 6. Schedule Updates to Reflect Actual Sequencing and Schedule Adjustments
 - C. Productivity Analysis
- 7.8 Delay Damage Theories
 - A. Detailed, Actual Cost Information
 - B. Jury Verdict Method
 - C. Total Cost Method
 - D. Quantum Meruit
- 7.9 Damage Elements
- 7.10 No Damage for Delay Clauses

Chapter 8

Contract Claims

John M. Scott

- 8.1 Scope of Chapter
- 8.2 Claims of Performance and Breach
 - A. Substantial Performance
 - B. Breach of Contract
 - 1. In General
 - 2. Breach of Express Warranties
 - 3. Breach of Implied Warranties
 - C. Restitution, Unjust Enrichment, and *Quantum Meruit*
 - D. Rescission
 - E. Damages
 - F. Negligence and Other Tort Claims Arising Under a Construction Contract
 - G. Strict Liability Applied to New Construction
- 8.3 Differing Site Conditions
 - A. Type I Differing Conditions
 - B. Type II Differing Conditions
 - C. Site Inspection and Disclaimer Clause
 - D. Superior Knowledge
- 8.4 Inadequate, Ambiguous or Defective Plans or Specifications
 - A. The *Spearin* Doctrine
- 8.5 Scope and Cardinal Changes
- 8.6 Acceleration
- 8.7 Owner Interference
- 8.8 Untimely or Improperly Reduced Payment
- 8.9 Improper Inspection or Rejection
- 8.10 Wrongful Termination
- 8.11 Pass-Through Claims and Liquidation Agreements
- 8.12 Indemnification
- 8.13 Importance of Notice of Claims
- 8.14 Waiver and Release of Claims
- 8.15 Other Defenses

Chapter 9

Damages

Dennis M. Zolper and Jeffrey W. Puryear

- 9.1 Scope of Chapter
- 9.2 Basic Theory – Compensatory Damage

- 9.3 Owner's Damages – Cost to Complete or Repair
- 9.4 Owner's Damages – Diminution in Value
- 9.5 Owner's Consequential Damages
- 9.6 Liquidated Damages
- 9.7 Contractor's Damages – Contract Balance Less Cost to Complete
- 9.8 Contractor's Other Damages
 - A. Direct v. Indirect Costs
 - B. Direct Labor, Materials, and Equipment
 - 1. Labor
 - 2. Direct Materials
 - 3. Direct Equipment
 - 4. Cost Escalations
 - C. Site Overhead
 - D. Home Office General and Administrative Expense
 - E. Additional Bond Costs, Insurance Premiums, and Taxes
- 9.9 Contractor's Consequential Damages
- 9.10 Restrictions on and Waiver of Consequential Damages
- 9.11 Interest, Attorney's Fees, and Litigation Costs
 - A. Pre-Judgment Interest
 - B. Post-Judgment Interest
 - C. Attorney's Fees
 - D. Court Costs
- 9.12 Mitigation of Damages
- 9.13 Limitations on Damages
- 9.14 Contractually Barred Damages
- 9.15 Disclaimers

Chapter 10

Arkansas Mechanics' and Materialmen's Liens

Junius Bracy Cross, Jr.

- 10.1 Scope of Chapter
- 10.2 General and Background Information
- 10.3 What Industries, Entities, and People May Claim a Lien?
 - A. Contractors, Subcontractors, Suppliers, and Others
 - B. Contracts Dealing with Improvements to Leased Land
 - C. Assignees of Lien Rights
- 10.4 Priority of Mechanics' and Materialmen's Liens
 - A. Priority and the Commencement of the Work
 - B. Issues Concerning Construction Money Mortgages
 - C. Issues Concerning Pre-existing Mortgages

- D. Demand for Information
- 10.5 Perfection of Liens
 - A. Pre-construction Notice: Important Notice
 - B. 75-Day Notice
 - C. 10-Day Notice of Intent of File Lien
- 10.6 Statement of Account
- 10.7 Calculating the 120-Day Period Allowed
- 10.8 Attorney Fees
- 10.9 Filing a Lien Foreclosure Complaint
 - A. Venue
 - B. Enforcement of the Foreclosure Decree
- 10.10 Owner Defenses and Considerations
 - A. Contractual Provisions
 - B. Observation of Construction Project
 - C. Surety Bonds
 - D. Removing Liens
 - E. Use of Joint Checks
 - F. Use of Construction Contract Proceeds
 - G. Slander of Title
 - H. Releases and Accord and Satisfaction

Chapter 11

Statutes of Limitation and Repose

David L. Jones

- 11.1 Scope of Chapter
- 11.2 Contract Actions
 - A. Oral Contract
 - B. Written Contracts
- 11.3 Tort Actions
 - A. Negligence
 - B. Breach of Warranty
 - C. Products Liability
- 11.4 Professional Liability
- 11.5 Latent Defects
- 11.6 Statute of Repose
- 11.7 Conclusion

Chapter 12

Alternative Dispute Resolution

Allen Dobson and Jeffrey Swann

- 12.1 Scope of Chapter
- 12.2 Mediation
 - A. Arkansas Statutes and Caselaw
 - B. Process, Generally
 - C. Arkansas Voluntary Appellate Mediation Pilot Program
 - D. Advantages
- 12.3 Arbitration
 - A. Arkansas Law
 - B. Arbitrability Under the Arkansas Uniform Arbitration Act
 - C. Compelling Arbitration
 - D. Third Parties
 - E. Effect 12-12
 - F. Federal Law
 - G. Federal Arbitrability - Preemption and Choice of Law
 - H. Arbitration Clauses in Contracts
 - I. Advantages / Disadvantages
- 12.4 Other Forms

Chapter 13

Public Contracts

Andrea Woods and Patrick Wilson

- 13.1 Scope of Chapter
- 13.2 Arkansas Public Construction Contracts
 - A. State
 - 1. Arkansas Division of Building Authority and Non-Regulated State Agencies
 - 2. Quasi-Public Entities
 - a. School Districts
 - b. Arkansas Highway and Transportation Department
 - c. Higher Education Institutions
 - d. Water Districts and Utilities
 - B. Counties and Municipalities
 - 1. Various Classes of Cities
 - C. Bid Process
 - 1. Bid Mistakes
 - D. Payment and Performance Bonds

- 13.3 Alternative Delivery Systems
 - A. Alternative Delivery Systems – Construction Management
 - B. Construction Management Selection Procedures
 - C. County Use of Construction Management – Agency “CM-Agency”
 - D. Municipalities
 - E. Design-Build
- 13.4 Other Considerations
 - A. Liens and Publicly Owned Property
 - B. Immunity
 - C. Indemnity
 - D. Prompt Pay
 - E. Retainage for Public Works Projects
 - F. Non-Profits and Bonds

Chapter 14

Professional Liability

Carl J. Circo and David L. Gershner

- 14.1 Scope of Chapter
- 14.2 Contractual Bases for Professional Liability
- 14.3 Tort Bases for Professional Liability – Generally
- 14.4 Professional Malpractice
- 14.5 Ordinary Negligence
- 14.6 Negligent Misrepresentation
- 14.7 Negligence Per Se
- 14.8 Tortious Interference
- 14.9 Other Tort Theories of Liability
- 14.10 Considerations Relating to Particular Activities and Roles
- 14.11 Professional Liability Insurance
- 14.12 Conclusion

Appendix

About the Authors