AIA Releases 2017 Construction and Design Agreements

The American Institute of Architects has released several revised documents including the primary agreements between the owner and contractor and the owner and architect, reports Dickinson Wright PLLC.

The article on the firm's website explains that any of the revisions are attempts to clarify existing provisions. A number of changes, however, are more significant.

The update covers general conditions of the contract for construction, such as building information modeling and digital data, evidence of owners' financial arrangements and minor changes in the work.

It also discusses agreements between the owner and the contract, including assumptions, contractor progress payments and owner termination.

Topics also include the agreement between the owner and arthitect.

Read the article.

The Beneficiaries of 'Pay-if-Paid' Clauses in Construction Contracts

In construction law, general contractors have largely negotiated a shift in the distribution of risk away from the general contractor and to the subcontractor with the inclusion of "pay-if-paid" contractual clauses," writes **Dana Chaaban** in Shutts & Bowen's **Construction Law Blog**.

Writing for the Florida firm, Chaaban explains that such clauses make the general contractor's receipt of payment from the owner a condition precedent to the general contractor's ultimate payment to the subcontractors. Absent such a provision, general contractors bear the risk of an owner's potential insolvency.

Subcontractors have sought to circumvent contractual "pay-if-paid" provisions by bringing claims against both the general contractors and their sureties who may guarantee payment.

Chaaban discusses some cases on the subject.

Read the article.

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Mitigation of Construction Defect Litigation – Top 10 Construction Contract Issues

When negotiating a construction contract with a general contractor, the owner/developer should be aware of, and address, a number of issues to attempt to mitigate or limit the risk of construction defect litigation for a residential project, including multi-family and for-rent residential apartment and senior housing projects, advises **Rebecca W. Dow** in Holland & Hart's **Construction Law Blog**.

She explains that tandard forms of construction contract – such as the American Institute of Architects (AIA) or ConsensusDocs – are more beneficial to the contractor than the owner in many respects.

A construction contract will need to be reviewed thoroughly and revised to better protect the owner, and in the case of residential construction, should in particular, address 10 key issues.

She discusses those issues, which include: scope of work, change orders, indemnification, warranties, subcontracts, insurance, dispute resolution, compliance with laws/environmental matters, construction lender, damages/attorneys' fees.

Read the article.

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Clear Arbitration Provision Deemed Enforceable

In his **Petes' Take** blog for Porzio, Bromberg & Newman, **Peter J. Gallagher** describes a New Jersey case in which a court ruled that a clear arbitration provision, negotiated by a sophisticated party while represented by counsel, is enforceable.

In Columbus Circle NJ LLC v. Island Construction Co., LLC, the appellate court held that the arbitration provision in the AIA contract used in this case satisfied the requirements to explain to the signer the possible consequences of giving up the right to adjudication in a court of law, Gallagher explains.

"By its terms, the provision required plaintiff to choose between arbitration and 'litigation in a court of competent jurisdiction,' therefore, when plaintiff chose 'arbitration,' it did so 'with full knowledge that arbitration [was] a substitute for the right to have [its] claim adjudicated in court.' Moreover, the Appellate Division noted that neither the LLC nor its sole member was 'an average member of the public,'" according to Gallagher.

Read the article.

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Drafting Arbitration Clauses in Construction Contracts

Many construction lawyers who specialize in transactional work acknowledge that they do not spend much time considering or negotiating the arbitration clauses in construction contracts, points out
Patricia H. Thompson in a post on the **website of JAMS**.

She addresses the question: Should an arbitration clause be just a boilerplate provision, taken "off the shelf," or should it be specifically negotiated and crafted for the particular construction project and to accommodate the parties' requirements?

The post lists some of the major questions to consider, such as: Should arbitration be mandatory or permissive? Should there be one or three arbitrators, should they all be neutral, and should they have particular qualifications or professional expertise? Should the arbitrator's power be broader or more limited than otherwise provided by relevant statutes or rules?

Read the article.

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How Do Additional Insured Obligations Work with Subcontract Flow-Down Clauses?

In his **Commonsense Construction Law** blog, Stan Martin asks the question "How do additional insured obligations work with subcontract flow-down clauses." And he answers it with one word: "They don't."

"Unless the subcontract is carefully drafted, that is. So where the prime contract required the owner to be named as an additional insured, and the subcontract flow-down clause passed along the GC's obligations to the owner, as the sub's obligations to the GC, this did not by itself result in a requirement that the sub name the owner as an additional insured. That is one lesson from a New York court decision," Martin explains.

He discusses *Navigators Ins. Co. v Merchants Mut. Ins. Co.* at length and concludes with two lessons to be learned.

Read the article.

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Contract Barred Recovery of Lost Productivity Damages Suffered by Contractor

Because there are often multiple causes of delays and a variety of types of delay damages on construction projects, it is critical that the parties consider and properly allocate the risk of such delays and the potential resulting costs in the contract documents, advises **Robinson+Cole**.

Elizabeth Wright explains that the Massachusetts case of *Cumberland Farms, Inc. v. Tenacity Constr., Inc.* offers insight into the importance of the contract in allocating the risk of delay damages.

"In this case, the court noted that the contract not only provided that the contractor is only entitled to an extension of time for delay damages but it also expressly provided that the contractor would only be entitled to time and material costs for Winter condition work," she writes.

Read the article.

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When Construction Contracts Go Sideways in Bankruptcy

When a contractor on a project files a bankruptcy case, the property owner and subcontractors have some serious decisions to make, writes **Tracy Green** in the **California Construction Law Blog**.

The blog is a publication of **Wendel Rosen Black & Dean LLP**.

When a party to a contract files bankruptcy, the other party's actions are constrained by the bankruptcy code, Green explains.

The article covers the types of bankruptcies involved, benefits of bankruptcy for the debtor, benefits of bankruptcy for the creditor, executory contracts, liens and bonds, getting the work done, preferences, and doing business with a distressed contractor.

Read the article.

The Importance of Clear Contract Terms

Many legal battles in the construction industry revolve around contract interpretation disputes. Care in contract drafting is

a valuable way to avoid disputes, writes **Michael Wilson** in Greensfelder, Hemker & **Gale's Construction Law Blog**.

"A fundamental principle of contract interpretation is to ascertain and give effect to the parties' objectively expressed intent. What a party was trying to say, without accurately expressing it, does not count. Contract terms are usually given their ordinary (i.e., dictionary) meaning unless the contract specially defines them or the industry has adopted a special meaning known to both parties," Wilson writes.

In his article, he discusses at length the principle of identifying and interpreting ambiguity, and the tools that can be used to improve a contract.

Read the article.

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Construction Contract Keystones, Part I: Payment Mechanisms

Much Shelist, P.C. has published **an article** reviewing the three most commonly used payment mechanisms in construction contracts and the benefits and drawbacks of each.

David A. Eisenberg discusses at length the benefits and

drawbacks of fixed price, or lump sum payments, which he calls "perhaps the simplest and most commonly used payment mechanism." Then he examines cost-plus contracts, in which the owner agrees to pay the contractor for its actual costs incurred in performing the work, plus a predetermined fee.

Finally, the covers the guaranteed maximum price, in which the owner is responsible for paying the contractor's costs up to a certain cap. It is essentially a cost-plus contract with a cap.

Read the article.

Are Non-Compete Agreements Right for Your Construction Company?

Peter C. Vilmos of **Burr Forman** writes in an article published by **JDSupra Business Advisor** that contractors have several reasons to require that their high-level employees (e.g., C-Level) enter non-compete agreements.

"Non-compete agreements, or non-competition agreements, are contracts into which an employer and an employee enter that restricts the work the employee can perform for another company when the employee's tenure at the employer company ends," Vilmos explains. "Typically, it's illegal to

intentionally restrain trade; however, some states allow employers and employees to voluntarily enter into agreements with future employment restrictions."

Read the article.

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Who Pays for Delay? How Enforceable is a No Damage for Delay Clause?

Delays are an all too common occurrence on construction projects. And they almost always cost money, points out **Eugene Polyak** on the website of **Smith, Currie & Hancock LLP**. So who pays for the increased costs caused by delays?

"This is one of the most durable issues in all of construction contract law. The answer is – it depends," writes Polyak. "It depends first on whether the risk of delay is addressed in the parties' contract. Owners and contractors frequently use No Damage for Delay clauses to push down the risk of delay costs. It may also depend on the law of the state where the project is performed. No Damage for Delay clauses are not uniformly enforced in different jurisdictions."

He gives some examples of no-damage-for-delay clauses and discusses some exceptions.

Read the article.

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What to Consider When Preparing Construction Contracts

It's important for parties entering into any significant economic transaction to have written contracts. This is especially true for construction projects which are, by their nature, complicated, writes Jason T. Strickland for Ward and Smith, P.A.

A contract on a construction project sets forth the parties' obligations to each other and determines how risks will be shared or divided on the project.

Strickland explains the value of having a written construction contract, rather than simply an oral agreement. Then he discusses risk shifting, parties to a construction contract, key elements of a construction contract, consistency, flow down and tiers, and industry forms.

Read the article.

Trial Lawyer Jay Old Joins Texas-based Hicks Thomas LLP

Veteran trial lawyer Jay Old has joined commercial litigation firm **Hicks Thomas LLP** where he will continue to represent construction, insurance, petrochemical and health care companies as part of his client portfolio.

Old's addition will add offices in Austin and Beaumont. Old joined the firm effective Jan. 1.

"We are thrilled to be adding Jay and his team. He's an exceptional lawyer with an outstanding track record," said John B. Thomas, name partner and firm co-founder. "Many of us have known Jay for years, dating back to our days together at Andrews Kurth."

Old's clients include refineries, construction contractors, manufacturers, hospital systems and insurers. Joining him is labor and employment lawyer Jim Henges, along with four other lawyers from Old's firm.

"I like to say I represent the job creators," Old said. "I'm very excited to be joining the Hicks Thomas team, and hope to add to its reputation as a premier trial firm."

Old is a frequent speaker at continuing education programs for lawyers across the country. He also is a former president of the Texas Association of Defense Counsel and has chaired the

Construction Law Section of the State Bar of Texas.

He has defended national clients in statewide and regional mass tort litigation, in toxic torts, construction and product liability cases. He also successfully defended insurance companies in a series of high-profile trials involving hailstorm claims in Galveston and elsewhere.

Old is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization and has been recognized on the Texas Super Lawyers list every year since 2005. A native of Beaumont, he is a graduate of Texas A&M University and the Texas Tech University School of Law.

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Navigating Construction Disputes, From Mediation to Litigation

All parties involved with a construction contract need to explore which dispute resolution option is right for them and the project, and also ensure their contract terms are as clear as possible to avoid potential problems down the road, writes **Kim Slowey** in *Construction Dive*.

In her article, Slowey covers mediation, arbitration vs.

litigation, and the importance of planning.

She quotes Margaret Greene, partner and leader of the construction planning practice group at Honigman Miller Schwartz and Cohn in Detroit, who counsels that perhaps the most important aspect of dispute resolution is to minimize the chance of conflict before disagreements rise to the level of "disputes" or "claims."

Read the article.

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What are Consequential Damages on a Construction Contract?

When a party breaches a contract and the contract does not contain a valid liquidated damages clause, the non-breaching party may be entitled to compensatory damages. **Charles B. Jimerson** and **Kayla A. Haines** of Jimerson & Cobb, P.A. explain that the appropriate measure of damages arising from a breach of an enforceable contract is usually "the difference between the value expected from the contract and the value actually received by the non-breaching party."

In **their article**, they write: "Many factors can impact the recoverability of consequential damages, such as common law implied warranties, or indemnity provisions. Therefore, when

entering into a construction contract, parties should carefully evaluate the proposed contract language to fully comprehend the risks they are about to assume. In order to prevent any extensive consequential damages that might result from a construction project, parties should use whatever power they may have while creating their contract to predestine certain expenses that a party would incur in the event of pervasive defects or significant project delays."

Read the article.

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5 of the Most Commonly Misinterpreted Terms in Construction Contracts

The **latest installment** of Construction Dive's "The Dotted Line" series discusses a problem many construction contractors see in their business: misinterpretation of terms in their contracts.

Writer **Kim Slowey** covers five of the most common sources of this misinterpretation, with input for experts.

"Most construction contractors follow custom and standard practice in the industry, or what they've always done in the past," said Chicago attorney Matthew Horn, a long-time construction law attorney and founder of **Legal Services Link**.

The article discusses incorporation clauses, pay-if-pay versus

pay-when-paid, Change orders and extras must be in writing to obtain payment, indemnify versus defend, and mechanics' liens.

Read the article.

Why You Need to Know If Your Construction Contracts are 'Under Seal'

When a client wants to pursue a lawsuit or arbitration, one of the first things an attorney should do is determine whether the statute of limitations has run on the client's claim, advise **Darren Rowles** and **Scott Cahalan** in **a post** for Smith, Gambrell & Russell, LLP's Construction Law blog.

"Many people are not aware, however, that parties to contracts, including construction contracts, may have the ability to increase the statute of limitations for a written contract by a factor of more than three hundred percent just by adding a few words to make their contracts 'under seal.' As a result, these people may increase their exposure to breach of contract/warranty claims without knowing they are doing so," according to their post.

They explain that, in Georgia, for example, a written contract that is not for the sale of goods would normally have a six-year statute of limitations measured from the date of breach,

But a contract signed "under seal," has a statute of limitations of 20 years from the date of breach.

Read the article.

Additional Insured By Written Contract Clause Construed to Bar Coverage

Commercial construction projects necessarily involve many moving parts, including multiple parties from the owners to the construction managers to the project financiers to the contractors and to the sub-contractors, points out **Larry P. Schiffer** in Squire Patton Boggs' **Insurance and Reinsurance Disputes blog**.

"These moving parts generally result in a web of interrelated insurance policies covering the project. Typically, when there is no controlled insurance program, contractors and sub-contractors are required to obtain liability insurance covering their potential negligence and very often are also required to add others, like the property owner or construction manager, as additional insureds onto those insurance policies," Schiffer writes.

In his post, he discusses what a New York appellate court recently called an "additional insured by written contract" clause. The language of an additional insured clause may make all the difference as to whether a party is covered as an

additional insured or not.

Read the article.

Construction Litigator Kim Ashby Joins Foley in Orlando

Foley & Lardner LLP announced that Kim Ashby has joined the firm's Construction Litigation Practice as partner in the Orlando office. Ashby work in complex construction law includes a focus on appellate work.

In a release, the firm said Ashby represents developers, contractors and governmental entities on a range of complex litigation matters, including lenders and special servicers in commercial mortgage-backed securities foreclosures and workouts. She has experience in construction lien disputes, defect litigation, workouts & restructurings, construction contract formation and tax exemption issues.

The release continues:

> "Kim has substantial experience successfully litigating matters in the construction industry, which aligns perfectly with our recognized national practice. Her experience and in-depth understanding of the industry will be a valuable asset as we continue to handle and attract some of the most complex construction cases," said Jeff Blease, chair of Foley's Construction Litigation Practice.

In addition, Ashby has represented public- and private-sector appellants across an array of appeals, including judgments for lender liability, review of non-compete clauses, review of construction conditional payment bond issues and the first conditional payment bond case.

“Kim’s arrival will further expand our existing construction practice in Florida and adds significant bench strength to our appellate practice,” said Michael Okaty, managing partner of Foley’s Orlando office.

Prior to joining Foley, Ashby was a partner at Akerman.