CONSTRUCTION INDUSTRY LAW

SYLLABUS

This seminar is offered jointly with the College of Civil Engineering. The course covers such topics as: selecting the appropriate delivery system for complex real estate development and construction projects; competitive bidding for public works construction; claims for changes-in-scope, delay and construction defects; default, termination and calling upon the performance bond surety to complete; professional ethics; defective design and engineers' & architects' professional liability; ADR and dispute resolution mechanisms.

The seminar is highly interactive, giving civil engineering graduate students and law students the opportunity to draw upon each other's educational background and to observe each other's approach to problem solving. Seminars are divided between team presentation (such as oral argument of a bid protest lawsuit, and mock direct examination and cross examination of a CPM scheduling consultant expert witness), and class discussion of issues raised by the reading materials, which consist of appellate decisions, statutes, contract and bond forms, textbook, and professional journal articles. There are written assignments for each class session. The seminar is structured around a fact pattern describing a complex (and highly troubled) construction project involving the extension of a subway line to a large housing development. The problems encountered in the fact pattern implicate the legal principles discussed.

There are no examinations. Students' grades are determined by their class participation, their performance in team presentations, and their written papers.

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1. Class 1

- Introduction to Professors
- Introduction to Students
- Overview of Class
- Structure of Course
- Introduction to Fact Pattern

Supplemental Materials
- Fact Pattern
- Drawings
2. **Class 2 Introduction to Construction Engineering & Law**

   **Class Focus**
   - Introduction to Construction Engineering & Law

   **Reading**
   - *The Project Fact Pattern*
   - “Lawyerization of the Engineering and Construction Industry”
   - “The Case for Construction Law Education”
   - “What We Teach When We Teach Construction Law”

3. **Class 3 Contracts “A” – Risks**

   **Class Focus**
   - Elements of Design and Construction Contracts
   - Contractual Relationships: Allocation of Risks

   **Supplemental Reading:**
   - Robert A. Rubin & Dana Wordes, "Changing Project Delivery Systems: Who's at Risk"

   **Contract Documents:**
   - Agreement between the Authority and Beta Engineering, P.C. (particularly Article 6), including Exhibit A: "Engineer's Services"
   - Agreement between the Authority and D&E Construction Company

   **General Conditions:**
   - Particularly §§ 4.2 / 4.3 / 6.1 - 6.6 / 6.29; § 9 (entire section); § 10 (entire section); § 12 (entire section)

   - §§ 1.18 through 1.23
   - §§ 2.23 - 2.51

4. **Class 4 Contracts “B” – Contracts Provisions**

   **Class Focus**
   - Contractual Relationships: Essential elements of owner/engineer and owner/contractor agreements

   *Same reading as Class 3 but with a particular emphasis on the contract documents.*
5. **Class 5 Competitive Bidding**

*Class Focus*
- General rules and rationale for competitive bidding on public works projects

*Contract Documents:*
- Bid bond
- Notice of Award
- Notice to Proceed

*Understanding Legal Citations*

*Cases:*
- Plumbing Contractors Ass'n v. City of Buffalo, 70 Misc.2d 412, 334 N.Y.S.2d 9 (Sup. Ct. Erie County 1972)
- Reynolds Elec. Co. v. Board of Educ., 46 Misc.2d 140, 259 N.Y.S.2d 503 (Sup. Ct., Special Term, Queens County 1965)

*Statutes:*
- General Municipal Law §§ 101 / 103
- 2008 Statutory Changes

*New York Construction Law Manual:*
- §§ 2.01 through 2.22

*Supplemental Reading:*
- Case T-183/00, Strabag Benelux NV v. Council of the European Union

6. **Class 6 Subcontracts**

*Class Focus*
- Contractor/subcontractor relationships
- Limitations on parties' freedom to negotiate unfavorable or inequitable terms
- Liquidating Agreements

*Contract Documents:*
- Subcontract
Cases:
- Fixture Specialist, Inc. v. Global Construction, LLC, 2009 WL 904031 (D.N.J)

New York Construction Law Manual:
- Chapter 3 (Subcontracts)
- § 2.21 (Promissory Estoppel)

7. Class 7 Changes

Class Focus
- Identify “changes”
- Distinguish between what constitutes changes that are part of the contract and changes that are so extensive that the contractor is not required to perform them

Reading:
- Justin Sweet, “Historic Cases: Spearin v. United States

Contract Documents:
- Variation-in-Quantities Clauses

Cases:
- MacKnight Flintic Stone Co. v. The Mayor, 160 N.Y. 72 (1899)
- National Contracting Co. v. Hudson River Water Power Co., 192 N.Y. 209 (1908)

New York Construction Law Manual:
- §§ 6.01 through 6.05 (changes in general)
- § 6.13 (disputed work)
- § 6.22 (performance v. detailed specs)
8. Class 8 Ethics

Class Focus
- Professional ethics in engineering
- Ethical standards
- Responding to ethical problems

Reading:
- The Fifty-Nine-Story Crisis
- Think Like an Engineer: The Place of a Code of Ethics in the Practice of a Profession
- NSPE Code of Ethics for Engineers
- Engineering Ethics – The IPP Method: Identify, Prepare and Plan
- Whistle-Blowing Engineer
- An Engineer’s Dilemma
- Engineering Ethics – Select Annotated Bibliography

9. Class 9 Differing Site Conditions / Job Safety

Class Focus
- Differing site conditions clauses, their effect on allocation of risk
- Criteria used in determining when a differing site condition has been encountered
- Job site safety

Contract Documents:
- Instructions to Bidders
- Bid
- General Conditions (sections indicated under class discussion) [Document is under Tab 3]

Cases:
- Buckley & Co. v. City of New York, 121 A.D.2d 933, 505 N.Y.S.2d 140 (1st Dep't 1986)
- CH2M Hill v. Hermann, 192 F.3d 711 (7th Cir. 1999)

Statutes:
- N.Y. Labor Law §§ 240, 241

New York Construction Law Manual:
- §§ 5.01 through 5.09 (changed conditions generally)
- Chapter 13 (construction safety)
10. **Class 10 Delays**

*Class Focus*
- Identifying delays and understanding the mechanics of calculating time extensions and compensation for delay

*Cases:*

*New York Construction Law Manual:*
- §§ 7.01 through 7.12 (delay generally)
- §§ 7.20 through 7.23 (excusable and compensable delays)
- § 7.31 (concurrent delays)
- §§ 7.32 through 7.42 (no damage for delay and exceptions)
- §§ 7.52 through 7.73

*Reading:*
- Mark E. Hanson, “Aspects of Construction Scheduling”

11. **Class 11 Termination and Performance Bonds**

*Class Focus*
- Distinguishing termination for “cause” from termination “for convenience”
- Understanding what triggers a surety’s obligations under a performance bond, the surety’s options and the factors a surety should consider when a claim is made against a performance bond

*Supplemental Materials:*
- "What is Suretyship?"
- "What are Letters of Credit?"

*Contract Documents:*
- General Conditions § 15 [Found under Tab 2]
- Performance Bond
- Draft NYC Performance Bond
- Maintenance Bond

*Cases:*
- Peru Associates, Inc. v. State, 70 Misc.2d 775, 334 N.Y.S.2d 772 (Ct. of Claims 1971)
- Kyrgoski Construction Co., Inc. v. United States, 94 F.3d 1537 (1996)

New York Construction Law Manual:
- §§ 4.01 through 4.04 (termination generally)
- §§ 8.12 through 8.24 (surety’s obligations and defenses)

12. Class 12 Architect/Engineer’s Liability, Professional Liability Insurance

Class Focus
- A/E’s liability to its client, to third party participants in the construction project, and to members of the public for economic and non-economic losses
- The “Economic Loss Rule”
- Distinction between professional liability and other types of insurance
- Claims-made and occurrence insurance policies
- Statutes of limitation and statutes of repose

Supplemental Materials:
- Bettina Quintas, “A/E Liability and the Statute of Limitations”
- Alfred A. Malena, Jr., “The Economic Loss Rule - The Only Certainty Is More Uncertainty”

Cases:
- Indianapolis-Marion County Public Library v. Charlier Clark & Linnard, Court of Appeals of Indiana, Feb. 6, 2009.
- Floor Craft Floor Covering, Inc. v. Parma Community General Hospital Association, 54 Ohio St. 3d 1, 560 N.E. 2d 206 (1990)

Statutes:
- CPLR § 214-d, 3211(h), 3212(i)

New York Construction Law Manual:
- § 10.04
- §§ 10.06 through 10.09
- §10.11
• §§ 11.04 through 11.14
• §§ 11.22 through 11.25

13. Class 13 Remedies to Secure Payment: Mechanics’ Liens and Payment Bond - Alternative Dispute Resolution

Class Focus
• Overview of mechanic’s lien
• Distinguishing public improvement liens from liens on private property
• Role of Payment Bonds as a means of securing payment for work performed
• Remedies available to subcontractors who have not been paid for work performed
• Overview of alternative dispute resolution in the construction industry

Contract Documents:
• Payment Bond

Supplemental Materials:


Cases:
• Gem Plumbing & Heating Co., Inc. v. Rossi, 867 A.2d 796 (2005) (Rhode Island)
• Fixture Specialists, Inc. v. Global Construction, LLC [found under tab for Class No. 6: Subcontracts]
• Blanford Land Clearing Corp. v. National Union Fire Ins. Co of Pittsburgh [found under tab for Class No. 6: Subcontracts]

Statutes:
• N.Y. Lien Law § 34
• N.Y. State Finance Law § 137
• 40 USCS § 3131 (Miller Act)
New York Construction Law Manual:

- §§ 9.01 through 9.04 (private)
- §§ 9.07 through 9.09 (public)
- § 9.11 & 9.15 (lienable property)
- § 9.68 (trust fund)
- §§ 16.01 (general)
- § 16.02 (pages 577-579, notice of claim)
- §§ 16.04 through 16.12 (types of alternative dispute resolution)