Construction Law
Fall 2013
Adjunct Professor William R. Allensworth
Adjunct Professor Matthew J. Sullivan

HOW TO REACH US

You may reach William Allensworth by e-mail wra@aaplaw.com or at his law firm, Allensworth and Porter, L.L.P., 100 Congress Avenue, Suite 700, Austin, TX 78701 (Phone: 708-1250).

You may reach Matthew Sullivan by e-mail msullivan@dbeslaw.com or at his law firm, DuBois, Bryant, Campbell & Schwartz, L.L.P., 700 Lavaca, Suite 1300, Austin, TX 78701 (Phone: 381-8050).

COURSE LOCATION/HOURS

This class will be taught in Classroom TNH 3.114 on Mondays and Wednesdays from 3:45-5:00 p.m. We will be available before class in JON 6.255 from 2:30-3:30 p.m. for office hours.

COURSE MATERIALS

The following course materials are required for the course:


- Additional readings will be assigned and will be available on the UT Blackboard, http://www.utexas.edu/law/students [13F Construction Law 29170] under Course Documents.

- We will use various contracts as part of our class discussion almost every day. The contracts are on the UT Blackboard under Course Documents.

COURSE FINAL

The final will be a 3-hour essay/short answer exam, which will be “open book” on December 18, 2013.
COURSE OUTLINE:

1. Introduction to Course

We will introduce ourselves to each other, and will outline the manner in which the course will be taught, identify the teaching materials, and our teaching goals.

Read our Introduction to the Course, which is posted on the Blackboard, and Chapter 1 of the Text, which is a brief overview of the history of construction law.

2. Participants in the Process

We will introduce our semester-long course problem to you and briefly describe the participants in the construction of a multifamily project and their roles in the process. Everything we talk about subsequently will be repeated in the course, but we believe that you will be able to grasp more of the materials if we can provide a contextual background at the beginning of the semester.

After the class, weather permitting, Matt Sullivan and I will adjourn to the Posse East for refreshments. Those of you who would like to join us are welcome to do so.

Read the Fall 2012 Construction Problem which is posted on the Blackboard, and Chapter 2 of the Text.

3. Project Delivery Systems

There are a number of different Project Delivery [management] Systems used for the construction of a project. We will explore some of more common ones, including the advantages and disadvantages of each. This is a very important class since the contracts which bind the participants to each other are based upon the Project Delivery System selected for the Project, or should be.

Read the Project Delivery Systems Problem posted on the Blackboard and the Text, Chapter 4. You may want also to read pages 1-4 of my paper, Construction Contracting: An Introduction to Construction Contracts, which also is posted on the Blackboard. You will not, however, be tested on materials contained only in my papers; stated differently, I think they can be helpful, but we are not looking for answers which could be divined only by examining them.
4. **Construction Contracts**

The parties to the construction process usually attempt to “make their own law” [or at least some of it] by entering into contracts governing their performance. We will spend a class session reintroducing you to Contract Law, and its importance to the Construction process. Our discussion will focus on an apparently simple construction contract, the contract for the geotechnical investigation for the Project.

Read the *Text*, Section 5.01, and my paper, *Construction Contracts: Formation and Interpretation*, and the *Atlantis Engineering* contract, both of which are posted on the Blackboard. Also read the *Initial Construction Contract Problem*, which is on the Blackboard.

5. **Contracts, continued**

We will spend some time discussing the use of form agreements and their perils, and introduce you to the American Institute of Architects’ family of construction contracts.

Read the *Text*, Sections 5.02-5.07, and the American Institute of Architects’ *AIA Document A101—2007, Standard Form of Agreement Between Owner and Contractor*, and scan the *General Conditions for the Contract of Construction, AIA Document A201—2007*, both of which are in the Course Materials posted on the Blackboard. We will be returning to both of these documents all semester. Print them out and always bring them to class with you.

You may find pages 4-7 of my paper *Construction Contracting: An Introduction to Construction Contracts* to be useful to you, as well.

6. **Financial Responsibility**

The risk of insolvency of one or more of the parties is almost always a concern in construction contracting. We will explore the effect that the use of single purpose entities and the chronic undercapitalization of the industry can have upon the enforcement of contractual obligations in Texas. Since most Owners finance their projects, we will have a brief primer on construction financing and the manner in which financial responsibility is addressed in the AIA documents.

We will turn our attention to Builders and discuss the organization of the construction industry, including particularly licensing requirements [or the lack of them] in Texas and the practical effect of the Builders’ use of limited liability entities to conduct business. We will briefly discuss the use of suretyship and property and liability
insurance to provide financial responsibility for at least some of the risks inherent in the construction process.

Finally, we will discuss the inclusion—or exclusion—of other parties from the enforcement of contractual obligation through anti-assignment and “no third-party beneficiary” clauses, and the effect of waivers of subrogation to limit potential claimants.

Read the Text, Sections 3.06 and 20.01-.02 and 20.06-.07 and 20.09, and review Sections 1.1.2, 2.1, 2.2.1 and Article 11 of the AIA General Conditions.

7. The Property

The Owner—at least under our course problem—will furnish the building site. We will examine the legal overlay which may affect the Owner’s ability to build on and to use the site, including deed restrictions, zoning, homeowner association rules and building codes. We will also discuss the Owner’s responsibility to furnish site information, including particularly boundary and topographic surveys and, sometimes, geotechnical information.

Read the Text, Section 3.01-.03, and review the manner in which Sections 2.2.3-4 and 3.2.1, 3.7.4 and 3.7.5 of the A201 General Conditions attempt to allocate the responsibility between the Owner and the Contractor for furnishing and reviewing site information.

8. The Contract Documents

In the Traditional Project Delivery System we are using for the course problem, the Owner has the responsibility for furnishing the Contract Documents. We will explore what those documents consist of and the extent of the Owner’s responsibility for their suitability, both at common law and in the AIA documents.

_Interstate Contracting Corp. v. City of Dallas, Texas_, 407 F.3d 708 (5th Cir. 2005) is a summary of Texas law on this difficult issue. Read those portions of it which we have put on the Blackboard, and try to determine whether the case would have been decided differently if the A201 General Conditions had been used for the Project. See also, _Millgard Corp. v. McKee/Mays_, 49 F.3d 1070 (5th Cir. 1995), which is a case that demonstrates the importance of the contracted designation of “Contract Documents.”

Review Sections 1.1.1-1.1.2, 1.2, 3.2 and 3.7.4 of the General Conditions.
9. **Designers and the Design Process**

   The Owner usually furnishes the Drawings and Specifications by hiring professionals to prepare them. We will introduce you to the design industry and the relationships between the members of the design team, the phases of the design process and the standard of care applicable to their services.

   Read Chapter 6 and Sections 7.01-2 of the Text and briefly review *AIA Document B 101—2007, Standard Form of Agreement between Owner and Architect* and *AIA Document B101—2007 Exhibit A*, both of which are posted on the Blackboard.

   Also review the Texas Certificate of Merit Statute, Tex.Civ.Prac.&Rem.Code §150.002 (Vernon’s 2011 Supp.) which is posted on the Blackboard.

10. **Programming**

    Often the key to the success of the project is the Architect’s ability to match the design to the Owner’s budget. This imperfect science can be a fertile source of misunderstanding, and therefore it is usually addressed in well-drafted design contracts.

    Read Section 7.04 of the Text [but not the Pizza Oven case] and try to determine how *Koontz v. Thomas*, 511 S.E.2d 407 (S.C.App.1999) would have been decided under *AIA Document B101-2007*.

11. **Design Contracts**

    Design contracts should—but often do not—address a number of issues such as ownership of the design, the terms of the architect’s payment, the scope and schedule of services, contract administration, contract termination, dispute resolution and any limitations on his liability.

    Read Sections 7.04-.08 and 13.01-03 of the Text, review *AIA Document B101* and its Exhibit A, and compare it to the Urban Architects’ Agreement which is posted on the Blackboard. You may find my paper, *Negotiating the Owner-Architect Agreement*, helpful to you as well. It is posted on the Blackboard.

12. **Architect’s Contract Administration and Course Site Visit**

    We will visit a residential construction site, where we will examine the roles of the members of the construction team and introduce you to the role of the Architect in the administration of the Construction Contract. We briefly will discuss the Drawings and Specifications, and then will adjourn to 1201 Pasaguarda Drive for our annual class party.
Read Sections 13.01-03 of the *Text* and Sections 3.6.1 and 3.6.4 of *AIA Document B101-2007* and Section 4.2.1 of *AIA Document A201-2007*.

13. **Contractor Selection**

We will discuss the roles of General Contractors and Construction Managers in the construction process and some of the methods of their selection, including competitive bidding and the use of Requests for Proposals in both public and private contracting.

Read Chapter 8 of the *Text*.

Those of you with an interest in the constitutional limitations on contractor selection may want to look my 15-year-old paper, *Racial, Ethnic and Gender Preferences in Public Contracting*, which is posted on the Blackboard, together with then-adjunct Professor of Law [now President of the United States] Barack Obama’s constitutional law question on the topic, and then-advocate [now Chief Justice of the United States] John Roberts’ amicus brief to the U.S. Supreme Court in *Rothe Dev. Corp. v. U.S. Dep’t of Defense*. The constitutionality of these programs will not, however, be tested in this course.

14. **The General Contract and the General Conditions**

The Contractor is responsible for constructing the Project in accordance with the Contract Documents, and for the manner, methods and means of construction. In this class, we will explore how the initially begins to discharge this responsibility, including the assembly of a construction team, obtaining the necessary building permits, and mobilizing for construction. We will introduce you to the Contractor’s responsibility for supervision and safety, site cleanup and staffing, and the concept of “general conditions.”

Read the A201 General Conditions, particularly Sections 1.1.3, 1.2, 3.3, 3.4, 3.7, 3.9, 3.11, 10.1 and 10.2.

15. **Subcontracting**

The Contractor performs most of his work through subcontractors, who typically are at the “bottom of the food chain.” We will discuss the subcontracting industry and some of its characteristics, subcontractor selection, and some of the more salient subcontract provisions, including “flow down” and “pay if paid” clauses.

Read Sections 10.01-10.07 of the *Text* and Article 5 of the A 201. Review *AIA Document A-401-2007, Standard Form of Agreement between Contractor and Subcontractor* and the sample subcontract, both of which are posted on the Blackboard.
16. **Contract Price**

The Contract Price is one of the most significant of the terms of the construction contract. There are several pricing systems, and indeed most construction contracts combine more than one of them. Our class will examine these systems, including fixed price, cost-plus a fee, unit pricing, and introduce you to the use of allowances.

Read Chapter 9 of the *Text*, Article 4 of the A101, and *AIA Document A102-2007, Standard Form of Agreement between Owner and Contractor where the basis of Payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price*, and Section 3.8 of the A201.

17. **Payment**

Most construction contracts make some attempt roughly to match the Owner’s payments to the stage of the completion of the Project, thereby providing some basis for ensuring that neither the Owner nor the Contractor get too far ahead of each other. We will discuss how this is done in both the AIA contracts and will introduce you to the related topics of retainage, subcontractor payment, and the role of the lender and—if she has been hired to assist in it—the Architect in the payment process.

Read Section 13.06 and Chapter 14 of the *Text*, Article 5 of the A101, Article 9 of the A201, and Section 3.6.3 of the B101.

18. **Contract Time**

The timely completion of the Project is often of paramount importance and is the source of many construction disputes. We will discuss the importance of time, and its measurement, and introduce you briefly to the closely-related topic of Construction Scheduling. We will also review some of the contractual devices which are used to quantify or limit the damages which flow from tardy completion.

Read Chapter 11 and Sections 12.01 and 12.02A of the *Text*, and Article 3 of the A101 and Article 8 and Sections 3.10, 15.1.5 and 15.1.6 of the A201.

If you want to delve more deeply into contractual attempts to limit damages for delay, look at my paper entitled *Contractual Devices to Limit, Waive and Liquidate Schedule-Related Damages*, which is posted on the Blackboard.

19. **Construction Quality**

The Contractor has the obligation to construct the Project in accordance with the Plans and Specifications and may expressly or impliedly warrant the Improvements for
some period of time after completion of the Project. The extent of these obligations usually is addressed in the general contract, often in terms which attempt to limit or to disclaim the Contractor’s warranty obligations, or to impose time limits upon their assertion. We will examine how the AIA documents approach these issues, including the curious one year “Correction Warranty” in the General Conditions.

Read Section 3.5 and Article 12 of the A201 and Sections 22.01-.02 of the Text.

20. Architect’s Construction Observation

The Architect may assume some responsibility to guard the Owner from defects in the construction process, and the extent of this responsibility has been a steady source of Construction disputes. We will explore the architect’s contractual obligation to observe the work, and the current status of Texas law governing it.

Read Section 22.03 of the Text and Sections 3.6.2.1-2 of the B101, and Black + Vernooy Architects v. Smith, 346 S.W.3d 877 (2011).

21. Substitutions, Changes and Differing Site Conditions

Once construction begins—sometimes, even before it begins—the parties recognize the need to change the scope or the schedule of the Project, or are compelled to do so because conditions are different from those they anticipated at the time of contracting. We will explore the reasons for these changes and the manner in which the AIA contracts accommodate changes to the contract time and price. We will introduce you briefly to the related topic of Differing Site Conditions—a fertile source of construction disputes—and how the industry contracts anticipate them, as well.

Read Chapter 16 and Sections 17.01-17.02 of the Text, together with Section 3.7.4 and Article 7 of the A201.

22. Liens and Subcontractor Payment Claims

The failure timely to pay the Contractor for his work—or for the Contractor to pay his subcontractors for their work—often is coupled with the risk of insolvency. Liens created by statute and, in some states, by constitutional provisions are intended to ameliorate the risk to the contractor and subcontractors of non-payment by the Owner or Contractor.

Read Chapter 19 of the Text.
23.  **Project Closeout and Termination**

As the Project nears completion, issues which may have been festering between the parties sometimes become intractable. Claims for payment, delays in the construction process, quality issues and general unhappiness may poison the functioning of the Project so greatly that either or both of the parties contemplate terminating the contract. We will review the availability and consequences of this last-ditch option in light of the industry contracts and briefly examine the damages which may flow from its exercise.

Read Chapter 18 of the *Text* and Article 14 of the A201.

24.  **Claims and Dispute Resolution**

A process as complicated and potentially stressful as a construction project carries with it the distinct possibility that the parties will end up in a dispute over its performance. Recognizing this, the parties may attempt contractually to narrow or limit the scope of potential disputes, or the damages which flow from them, and often attempt to remove the disputes from the judicial system altogether through mediation or arbitration clauses. We will discuss some of the more common dispute resolution systems and the manner in which the AIA family of documents address them.

Read Sections 21.01-.02 and 21.04-.05 of the *Text*, Article 15 of the A201 and Article 6 of the A101.

25.  **Home Construction**

The construction of a large custom home raises many of the issues that are involved in a commercial project, but which are governed by contracts which often are radically more biased in favor of builders than the AIA contracts. We will spend the remainder of the course exploring the form contract promulgated by the Texas Association of Builders, and participate in a class discussion of how its terms might be negotiated in the unlikely event that the client seeks legal advice before signing it. This exercise should serve as a useful summary of the course, as well as a run-up to the final examination.

Read the Texas Association of Builders *Residential Construction Contract—Fixed Price* [2009] and be prepared to discuss the manner in which it deals with the questions of time, price and quality which are common to all construction contracts.