Plumb Law

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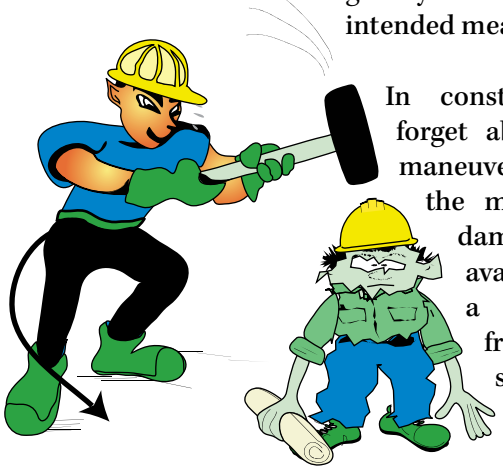
Harsh Laws for Contractors

New State Laws

Contractors Beware... Here's Where

Construction law isn't fair. Don't whine; get over it. Instead, learn its hard edges, understand why they exist, and know the general rules to avoid the worst of them.

The basic reason why courts are not fair is because they assume contractors are "big boys" who should understand a project's risks before undertaking it. They also assume that contractors actually understand the mishmash of terms and conditions found in construction contracts which most lawyers don't understand. So, if a contract assigns some risk to one side or the other, the law will rarely undo it. Where it does so, there tend to be three possible reasons: (a) a party acted in "bad faith"; (b) a party is profiting from its own contract breach or wrongdoing; or (c) the contract penalizes a party too harshly for a mistake. This is a much tougher standard than fields like insurance law or consumer-oriented home remodeling where the courts regularly muck with a contract's intended meaning.



In construction cases, forget about the fancy maneuvers you see in the movies. Punitive damages are not available unless a bad act is fraudulent or similarly evil. Construction projects will not be stopped by injunctions except for public bidding disputes. Courts do not award legal fees unless a contract provides for them or they fall into narrow exceptions like defective lien filings or constitutional violations. And even if the contractor is 100% right, it must still go through the legal process in order to prove it.

Fines and penalties in contracts are void. So, a contract which arbitrarily assesses a $1,000 penalty for a missed meeting is unenforceable. But, *liquidated damages* clauses are generally enforceable unless the clause imposes an outrageous amount in comparison to the anticipated damages. A clause which requires a contractor to indemnify for an OSHA penalty or other fine is enforceable.

Unanticipated site and subsurface conditions are the responsibility of the contractor, not the owner, unless the

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owner had superior knowledge about them which was withheld from the contractor. Also, the disclosure of these conditions "for informational purposes" will not bind the owner to their accuracy and the contractor remains liable if different conditions are found. Thankfully, most contracts change this rule by permitting a contractor to recover for them.

Under almost all contract forms, *disputed extra work* must be performed by a contractor after a direction to do so. With two exceptions, these are enforced: where the direction is in bad faith or the extra work is so fundamentally different in its character or magnitude that it is like a wholly new contract. The courts so narrowly interpret these that they should almost never be used to refuse performance.

Delay damages issues are a patchwork best left to the experts. Project owners and primes can include an enforceable clause to bar recovery for damages due to delay, acceleration or resequencing. Courts will generally enforce them unless: (a) the other party was willfully at fault; (b) the cause was beyond the assumed intent of the language which limited recovery, or (c) the cause was due to the violation of an essential contract obligation by the other party, like payment. New Jersey goes further for local public works contracts by barring prohibitions against delay damages due to negligence, "bad faith", "active interference" and certain other wrongdoing.

Indemnity clauses will be enforced by the New Jersey courts even when they provide that a party who is negligent must be fully indemnified by the innocent party. The only exception is where the wrongdoer was totally responsible for the negligence. New York does not permit indemnity to the wrongdoer for any of its own negligence, but, New York law does impose absolute liability for safety.

"Pay-if-paid" clauses are still enforceable in New Jersey. They are rare, however, and should not to be confused with "pay-when-paid" clauses. With one small exception, they are not enforceable in New York.

Waivers of future lien rights are not permitted in New Jersey for private projects, or for any projects in New York. But, this is because of language in those laws. There is no explicit prohibition in New Jersey against *municipal mechanics lien* waivers, and lawyers don't agree where the law stands on the subject. In both states, a contractor can be required to "bond off" a sub's lien.

Damages caps may be enforced. In commercial contracts, they can limit damages to the contract price. Similarly, they can bar unanticipated potential losses known as "consequential" damages. Contracts can also deny recovery for wrongful termination damages, like lost future profits. A party suffering property damage can be limited to recovery from its own carrier.

Incorporation by reference clauses will bind unsuspecting contractors to terms which are not written into the actual contract. Subcontractors, in particular, can lose carefully negotiated contract rights when the general contract states that its terms control over subcontract terms.

Forum selection clauses which give one party the sole right to decide whether to arbitrate or litigate are enforceable. Many of these clauses also limit an action to a particular state or county, and most of them are also enforceable.

The courts are not completely heartless. Unusual circumstances can create special exceptions, and there are ways around some of these rules. But if you protect against the worst, you can only do better in the future.

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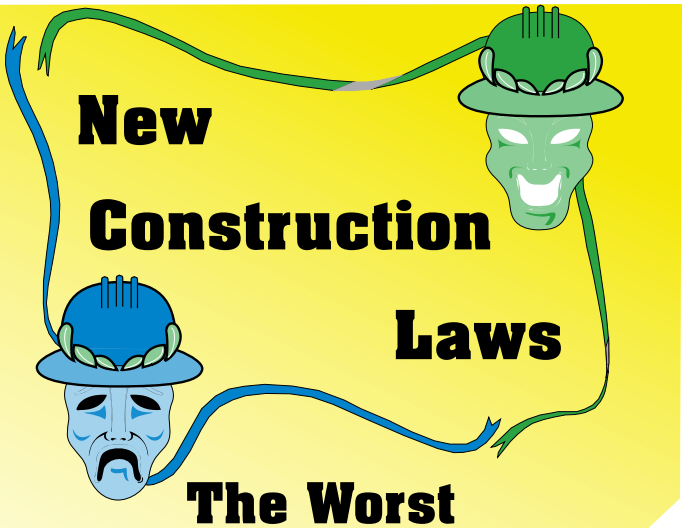
The Best

vendor, the bids are to be voided, the project rebid, and for the first time in a New Jersey bidding law, reasonable attorneys fees are supposed to be awarded. Unfortunately, the new law will only apply to towns, counties and the like. It does not cover school districts or the State. Furthermore, the requirement for ranking alternates is only applicable to projects with an estimated value of over $500,000.

The Legislature finally fixed a blunder it had made during the 2001 revisions to State and local bidding. Chapter 315 (N.J.S.A. 40A:11-23.2; 52:32-44). There, the Legislature listed five mandatory types of documents which had to be submitted with each bid in order to avoid a mandatory rejection. The blunder was made when the Legislature included a requirement for the submission of a business registration certificate for each bidder and for all mandatory listed subcontractors. Since the determination of a company's registration status was easily available from public records, this caused responsible bidders to lose awards due to clerical errors and public bodies to lose better deals. Now, if a company is registered before bidding, the new law lets bidders submit registration certificates after bidding but before award. Alternatively, the public body can verify registration on its own. Note that these government bodies can still mandate those documents before bidding, along with other documents. School district bidding was never affected by this foul-up.

Road builders, in particular, received a benefit with Chapter Law 187 (N.J.S.A. 40A:11-16) because the State approved price adjustment clauses for asphalt and fuel. Price adjustments for hot mix asphalt are now required if 1,000 or more tons are either anticipated or actually used. Adjustments are to be based on the most current NJDOT formula. Fuel price adjustments will only be allowed if permitted by the NJDOT and if the monthly change exceeds 5%. Price adjustment clauses are still not permitted for other raw material.

In a telltale sign of another school construction foul-up, the NJ Schools Development Authority can now prohibit an affiliate of its construction manager on a project from also acting as a GC, subcontractor or subconsultant on the same project. Chapter Law 225 (N.J.S.A. 18A:7G-42.1) Can you spell "conflict of interest" and "easy money"?



The law also creates a "rebuttable presumption" that a new company is a "successor" to an old one. This means all the old business's penalties and assessments will attach to the new one. This presumption exists if they share two or more of the following attributes: (a) the performance of similar work in the same area; (b) using the same control personnel; (c) occupying the same premises; (d) having the same phone, fax, e-mail address or website; (e) employing substantially the same workforce or administrative employees; and (f) utilizing the same tools and equipment. The law also increases required workplace notice postings and penalties for retaliatory discharges.

This law's particular danger comes from the wide interpretation given to the phrase "every record" so that it covers even minor paperwork violations. The Department of Labor can now use it to club violators into huge settlements while unions abuse it to attack non-union companies. That "successor" language can then deny individuals the chance for a fresh start.

Prevailing wage requirements have also been extended to construction which had been exempt as "maintenance work." Chapter Law 249 (N.J.S.A. 34:11-56.26). Prior law defined "maintenance work" to mean repairs to existing facilities when the "size, type or extent of such facilities is not thereby changed or increased." According to the legislative history from the Senate, prevailing wages must now be paid for items like: "a major replacement of sewer pipes, but not something like the regular, ongoing maintenance of a housing complex…."

As Governor Corzine packed up and left town, he also signed a large bunch of new laws affecting construction which are nicely summed up by a line from *A Funny Thing Happened on the Way to the Forum*: "something appealing, something appalling, something for everyone..." Among the group's highlights, we had some real reforms to public bidding, saw the prevailing wage laws' tentacles extended, and benefitted from a few fixed foul-ups. Here is a share of them:

The Best

Restrictions have been placed on the use of alternates in public bidding, and that ought to somewhat curtail local favoritism. Chapter Law 292 (N.J.S.A. 40A:11-23.1.d.). First, any proposed bid alternates must be within available funding. Second, if a local government wants bid alternates, and more than one specified alternate is sought, "the contracting unit shall specify in the bid specification the criteria or ranked order by which specified alternate proposals shall be selected and included in the award..." Selected alternates cannot exceed 50% of the base bid. If a court later finds that a locality chose specific alternates in a manner intended to award a contract to a specific

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The Worst

The worst of the new laws can first destroy companies who violate prevailing wage laws, and then, stick new companies with the liabilities of the old ones. Chapter Law 194 (N.J.S.A. 34:1A-1.11 to 1.14). Companies could always be debarred or suspended for violating the prevailing wage laws, but a company could still perform private construction work. Under the new law, the Department of Labor can suspend or revoke a contractor's right to transact any business at all by using a two step process. First, it must find that a contractor failed to maintain "every record" regarding wages and benefits. Then, it must find after an audit that a contractor's failure is continuing.

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