Join UC's ABA Connect.americanbar.org Page

AMERICANBARASSOCIATION
Forum on Construction Law

VOLUME 22, NUMBER 2 • WINTER 2020

UNDERCONSTRUCTION

Solving the Quandary of Designer Quantity Risk in Alternative Project Delivery With Insurance

Kent W. Collier

The Quandary

Alternative project delivery ("APD") – namely design-build and public-private partnership methods of contracting – are popular and growing in the United States, particularly among construction projects for civil and transportation infrastructure, manufacturing facilities, healthcare, and educational buildings. The prospects of a post-COVID-19 construction recession hint at even more opportunity and incentive for public owners to offload design and financing responsibilities to design-builders and concessionaires via APD.

As these projects multiply and continue, however, owners and contractors must face a stark reality: inequitable risk allocation to designers on APD projects must be remedied before reeking catastrophic results on design firms. Without a notable shift in approach and results, highly qualified and experienced design firms and their professional liability carriers may simply refuse to accept the risks and instead exit the APD market entirely.

Under traditional design-bid-build project delivery, the owner provides design documents to bidding contractors from which quantities can be estimated in order to formulate a contract price. After construction contract execution, the owner remains responsible for completing or refining the design – typically through a design team contracted for separately from the contractor – and can be held liable to the contractor for the consequences of defects in the design under the well-known *Spearin* doctrine.

By contrast, an owner on an APD project delegates much of its design responsibility to the design-build contractor after providing only partially completed conceptual design information and/or performance requirements. This shift reflects the fundamental APD value proposition: placing most design decisions and tasks in the hands of contractors and designers on a coordinated team with incentives and efficiencies that produce faster completion and innovation. In some APD models, financing and long-term operations and maintenance are also transferred – providing public owners with limited funds and more latitude to spend and build. Public infrastructure "mega" projects are, in particular, increasingly taking the form of APD. In exchange for proceeding on an APD basis, public owners have been rewarded with shiny new assets of the highest profiles and accolades.

A Dark Underbelly

The popularity and success of APD on large public infrastructure projects hides a dark underbelly of trouble for architects and engineers designing the projects. With restricted opportunities for recoveries from public owners, design-build contractors are targeting designers and their professional liability insurance programs with claims for cost overruns and delays. These claims are increasing in frequency and severity – with a common root cause wherein the design-builder has aggressively bid the project and a resulting fixed-price contract with insufficient contingency and little meaningful recourse to the owner and thus turns to its subconsultant design team

IN THIS ISSUE

Under Construction (ISSN: 8756-7962) is published three times per year, by season, by the American Bar Association Forum on Construction Law, 321 North Clark Street, Chicago, Illinois 60654-7598. *Under Construction* seeks to support the Forum on Construction Law's mission to "build the best construction lawyers" by publishing articles, columns, and reviews concerning legal developments relevant to the construction industry.

seeking damages for quantity growth over early estimates based on preliminary and understandably incomplete design schemes and studies.

Few reported cases analyze APD and designer liability for quantity growth as many projects use alternative dispute resolution and claims are often settled without generating public verdicts or decisions, but two recent orders highlight the precarious position of designers with respect to APD quantity growth in relation to the fees these designers command for preliminary design work. In *Middlesex Corporation, Inc. v. Fay, Spofford & Thorndike, Inc.*, the design-build contractor for a bridge replacement project in Massachusetts sued its designer for approximately $2.2 Million in additional costs related to structural steel procurement, in comparison to a design fee of approximately $300,000 for the designer's work during the preliminary design phase. In *Walsh/Granite JV v. HDR Engineering, Inc.*, the court summarizes circumstances where the design-builder of a P3 project to replace hundreds of bridges in Pennsylvania withheld over $18 Million in owed fees in response to an alleged $40 Million cost overrun based on quantity growth after an initial design phase where the designer was paid approximately $1.4 Million. The quantity growth exposure compared with designer fees and ordinary limits of professional liability insurance are incongruous and unsustainable.

In addition to responsibility for changed quantities, designers also repeatedly face exposure on APD projects from, among other things, prime contract flow-down of improper contract terms, ambiguous or inadequate scope of services, compensation pressure, uninsurable warranties including fitness for purpose and "free from defect" language, overly broad indemnification and duty to defend, fee withholding and backcharges, standard of care, schedule related clauses such as liquidated damages for delay, responsibility for cost estimating, and requirements to design within budget or re-design due to value engineering or performance criteria and optimization.

For designers to avoid crippling claims and exposure on APD projects, the participants must recognize the inherent limitations of preliminary design work particularly with respect to quantity and cost estimating, and then provide a fair allocation of risk regarding such quantities and costs – most commonly through establishing proper contingency, protecting firms with unqualified limitations of liability, and procuring insurance.

Project Specific Coverage Helps, With Limitations

Project specific professional liability ("PSPL") insurance provides a critical method of protecting designers from claims by design-builders on these projects. Many large design firms desire, if not mandate, PSPL in order to accept the imbalanced risk allocation frequently imposed by prime APD contractors. PSPL offers the following benefits to designers:

- Transferring risk of a claim by the prime APD contractor (i.e., design-builder or concessionaire) alleging negligent professional services of the design team – particularly with respect to quantity risk and cost escalation attendant to design development and revision;
- Insulating design team practice insurance programs from claims outlined in the foregoing bullet;
- Facilitating the agreement of appropriate limitations of liability in design subcontracts on APD projects commensurate with limits of PSPL insurance obtained;
- Standardizing the coverage terms, limits of insurance, and risk management approach of all design team members from prime or joint venture level to subconsultants of all sizes and disciplines (and thus promoting participation of smaller and disadvantaged enterprises); and
- Encouraging innovation by providing a financial safety net to reasoned risk taking in design.

These worthy benefits, however, do not come without a cost. Primary PSPL is an expensive proposition that many owners and contractors refuse to entertain solely for financial reasons. Even when utilized, PSPL has notable pitfalls that must be avoided through careful placement, structure, and contracting:

Relationship to Contractor and Other Insurance.

In some instances, owners require, or contractors suggest, that a proper PSPL structure is to have the prime APD contractor place PSPL that insures both its professional exposures as a design-build contractor and the professional services of its subconsultant designers. This structure is attractive to owners and contractors because the coverage may be less expensive when procured as a contractors' professional policy or in lieu of two separate insurance programs for contractor and designer. This approach is extremely problematic for design firms because the naming of both contractor and designer as insureds typically leads to an exclusion that prevents coverage for a claim by the contractor against the designer. In addition, PSPL can be primary or excess, and careful coordination must occur with placement. When placed as protective excess, the coverage provides little to no benefit to the designers and actually leads to an incentive to exhaust underlying primary insurance in order to access the PSPL as excess.

Responsibility for Self-Insured Retention.

Primary PSPL often involves a self-insured retention of several hundred thousand to over one million dollars. Smaller members of the design team may be accustomed to much smaller deductibles or retentions and be unable to satisfy such a major expense in the event of a claim determined to implicate their services. There are several approaches to equitable allocation or responsibility for the PSPL retention, including deductible gap in-fill policies for smaller subconsultants, but these mechanisms must be explored and clearly set forth in design team contracts.

Additional Premium for Material Variance.
PSPL policies typically allow insurers to charge additional premium when the project materially changes during execution – most notably if the construction schedule is extended or the construction values or professional fees constituting the underwriting baseline increase by a specified threshold. How these common charges are addressed is an issue that must be agreed early on to avoid disputes and possible policy cancellation later in the project.

Even after navigating these potential issues, two major concerns remain:

Insurance for Professional Negligence, Not a Performance Bond.
Other parties must view PSPL as insurance for actual negligence (a designer's failure to comply with the applicable standard of professional care), rather than as a surety bond for schedule and cost impacts related to design and quantities derived from the developed design. Having paid a substantial premium, too many owners and contractors view the PSPL limits as a bucket of money to draw on in the event of probable schedule delay or increased costs. Insurance does not function in that way, and utilization of PSPL in this manner jeopardizes the long-term viability of the product. Without the availability of PSPL, many designers who currently pursue APD (so long as they obtain appropriate contract terms with insurance protection) will likely withdraw from the APD market. This issue emphasizes the need for design contracts to be properly drafted with respect to liability arising from negligence and the insurability of warranties, guarantees, standards of performance, and delay provisions.

No Substitute for a Contingency.
PSPL is not a replacement for a proper contingency. Instead, contingency, at significant levels, is critically required on APD projects, with PSPL structured in support. PSPL and contingency are mutually beneficial, work in tandem, and are equally necessary for proper risk allocation on an APD project. The global professional liability marketplace is hardening as of late 2020 (partially in reaction to COVID-19 but more so in reaction to claims trends). Repetitive poor performance on PSPL placements will significantly impact the pricing, limits capacity, and coverage terms for future PSPL policies.

Closing Thoughts

APD contractors should fully understand the untenable position of their designers because they, too, feel the pain of estimating based on preliminary information that will assuredly change while then contracting for fixed prices without proper recourse for those inevitable changes. Without such opportunity for recovery, they are turning downstream too often with staggering impact. Owners must be made aware of these massive claims simmering in the background of otherwise successful APD projects and support the industry with agreements on contingency, equitable adjustments, limitations of liability, and PSPL. ■

Kent W. Collier, Greyling Insurance Brokerage, Alpharetta, GA, Division 7 (Insurance, Surety & Liens) and Division 3 (Design)

Visit www.ambar.org/FCLUC to view the endnotes for this article.

New Forum Guide Program Helps Members Find Their Forum Homes

Veterans of the Forum know that it offers an amazingly broad range of benefits and opportunities to its members. Networking with like-minded construction lawyers, honing your skills as a practitioner, exploring unfamiliar practice areas, taking a leadership role in the Divisions or the Governing Committee, and connecting with people who "get" what you do are just a few of the many ways to participate in the Forum.

Connecting with desired opportunities can be daunting, though, and not just for new Forum members or younger lawyers. Precisely because of the depth and breadth of the Forum's offerings, it can be challenging for individual members to find the way to their Forum "home."

The Forum's new Guide program is intended to help Forum members of all ages, backgrounds, and tenure in the Forum achieve their goals for Forum membership. The program will pair interested members with one or several "Guides" who are uniquely positioned to help them get where they want to go in the Forum.

Guides need not hold formal leadership positions; the only requirement is a desire to help others reap the benefits of Forum membership. Participants need not be new members or young lawyers; any Forum member who wants to chart a clearer course toward their Forum objectives is welcome to join the program.

Visit the Forum's website to learn more about the Forum's Guide Program!

Challenging Unfair CPARS Evaluations

Dorn C. McGrath and Ken M. Kanzawa

Back in 1928, the federal government questioned the wisdom of emphasizing past performance to measure a prospective construction contractor's capability.[1] Times have changed. Today, past performance is a mandatory and often a deciding factor in awarding most federal contracts and task orders.[2] To facilitate consideration of past performance in the award process, agencies must prepare performance evaluations for construction contracts valued at $700,000 or more, and for each construction contract terminated for default, using the Contractor Performance Assessment Reporting System ("CPARS").[3] These CPARS ratings and evaluations ("reports") serve as a primary source of past performance information.

Issued at least annually and at the time work is completed, CPARS reports assess contractors on a scale of Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory across categories, including Quality, Schedule, Management, and Regulatory Compliance.[4] Depending on contract requirements, rating categories also can include Small Business Subcontracting, Cost Control, and up to three other areas. The CPARS assessing official's comments should support and justify ratings, and are followed by an overall standardized recommendation: "Given what I know today about the contractor's ability to perform in accordance with this contract or order's most significant requirements, I [would, or, would not] recommend them for similar requirements in the future."

Given the importance of CPARS reports for winning future federal business, government contractors should track trends in their evaluations and use them to identify areas for improvement. Moreover, contractors should ensure that each evaluation is fair and accurate. This is especially important because CPARS reports are long-lived: the government may use a report in source selections for six years from the completion of an evaluated construction contract or task order.[5]

Unfortunately, getting an agency to reconsider or withdraw an unfair or inaccurate evaluation is no simple task. But contractors taking the following steps will be in a better position to manage their CPARS reports:

Before the Evaluation

Be proactive. During project startup, meet with your government counterparts to discuss how project accomplishments will be reflected in CPARS. Ask whether CPARS evaluations are tied to payment or incentives. During performance, keep an open dialog with the government. Promptly address performance issues and apprise the government of corrective measures. An up-front mutual understanding of expectations, followed by consistent communications, can help avoid surprises. Do not wait to get your first feedback in the form of a bad CPARS report.

Provide input. While a project is ongoing, consider providing the government with factual information that would support a favorable CPARS report, particularly to show that performance has been better than merely "Satisfactory." Remember that CPARS is one more duty assigned to already over-subscribed government officials. Useful input from the contractor can assist when it comes time to prepare interim or final CPARS reports.

Read the rules. Familiarize yourself with (1) Federal Acquisition Regulation ("FAR") subpart 42.15 and (2) the government's guidance for preparing CPARS reports, available at https://www.cpars.gov/documents/CPARS-Guidance.pdf. Knowing the rules will help you focus on the specific aspects of contract performance that will be rated, and prepare you to identify inaccurate or unfair performance evaluations worth disputing.

Responding to a CPARS Report

Once the government issues a CPARS report, you can state your concurrence or non-concurrence with the evaluation and enter comments in response. Take advantage of this opportunity, even after a favorable evaluation. Here's why: projects receiving positive CPARS reports can be featured in future proposals. For these projects, your response allows you to highlight accomplishments for selection boards and to expand on the assessing official's narrative, often without counting against future proposal page limits. For unfavorable CPARS reports, on the other hand, your response can help manage fallout, or even simply set the record straight. Whatever the ratings, a well-organized and detailed response is key.

Act quickly. The clock is ticking. Although you have 60 days from the issuance of a CPARS report to enter a response, you have just 14 days before the report goes live (*i.e.*, becomes available government-wide for use in source selections).[6] If submitted promptly, your non-concurrence and "contractor comments" can delay the agency's posting of unfavorable ratings to the CPARS pending revision. Make sure that your designated employee timely acts on any notification that an evaluation is ready for comment. If you miss the initial 14-day period, still take advantage of the opportunity to provide comments within the 60 days.

Request a meeting. In addition to submitting contractor comments, you should request to meet with the contracting agency to discuss the CPARS report. Under government guidance, you have seven days to make this request.[7] When disputing a report, schedule the meeting as soon as possible, within the 14-day holding period, to present your rebuttal in advance of written comments. If a meeting is not possible until after the evaluation goes live, do not wait to submit your written response.

When disputing ratings or narratives, do not "concur." When responding to a CPARS report, you will be presented with the option to check one of two boxes: the contractor "concurs" or "does not concur." If disputing the evaluation, mark the "does not concur" box. This should trigger a first review within the government.

Request review at a level above the contracting officer. In addition to marking the "does not concur" box, when disputing a CPARS report, you should also request in your written comments

a review "at a level above the contracting officer."[8] A supervisory contracting official (acting as the reviewing official, who may not be as close to the project details) might provide a more neutral perspective.

Be factual. Take a professional tone. Address all issues with the government's ratings and assessing official comments. When disputing a CPARS report, a convincing rebuttal should not just voice disagreement, but needs to show that the evaluation is unfair or inaccurate. For example:

- Is the evaluation based on objective facts? Are rating categories and rating types (i.e., interim, final, addendum) used properly?
- Does the evaluation address performance within the stated evaluation period and contract?
- Does the evaluation fault the contractor for not exceeding contract requirements? Is the assigned rating consistent with the definitions in FAR 42.1503, Table 42-1?
- Is the government following its own CPARS Guidance?

Although the CPARS module will not let you upload them, cite documents when possible to refute inaccurate statements or characterizations.

Know your audience. Your audience is two-fold: (1) the agency's reviewing official, and (2) future source selection officials government-wide. The reviewing official likely will be less familiar with day-to-day contract performance than the assessing official. A source selection official from another agency will be even less familiar. So although your response should cite documents as support when possible, do not exclusively rely on them to speak for themselves. Explain why they support your position. Only the contractor's narrative entry, not referenced documentation, will be visible to officials accessing the CPARS for source selection use.

Filing a Contract Disputes Act Claim

If meetings with the government and a well-written response fail to elicit the desired change in a CPARS report, you might simply "shrug it off" and turn your attention to improving performance for the next evaluation. Not all would be for naught: your contractor comments will be visible to future selection boards and may assist them in determining how much weight to give the CPARS report as compared to other past performance information.

But should you still take issue with a CPARS report, you can challenge it by filing a claim with the contracting officer pursuant to the Contract Disputes Act ("CDA"), asserting that the evaluation is unfair, inaccurate, arbitrary, or capricious, and requesting a final decision withdrawing or revising the evaluation. A standalone CPARS claim need not seek damages.[9] Even though the contracting officer may have been the assessing official,[10] filing a "claim" and requesting a "final decision" is separate from the contractor comments process, and required under the CDA. Your claim should carefully address any factual or procedural errors and cite governing regulations in FAR subpart 42.15. The claim, however, is not subject to the technical limitations of the CPARS module, and so supporting documentation can, and should be, attached to the claim. If the contracting officer issues an adverse final decision or fails to timely issue a decision, you can either appeal to a Board of Contract Appeals or file suit in the U.S. Court of Federal Claims.[11]

Neither a Board nor the Court will rewrite a CPARS report, but they can issue declaratory relief if a CPARS report was unfair, inaccurate, arbitrary, or capricious.[12] The Armed Services Board of Contracts Appeals, moreover, has stated it will send a CPARS report back to the contracting officer with a requirement to follow applicable regulations and provide a fair and accurate performance evaluation.[13] But to succeed you should not rely on only procedural errors. You should further show prejudice, *i.e.*, that the ratings and evaluations would have been different but for the demonstrated errors in the CPARS report.[14]

Declaratory relief, even in the absence of a reevaluation, could be cited in proposals to disclaim any inaccurate CPARS ratings, or in a bid protest to challenge an agency's evaluation citing the CPARS report. Yet, relevant case law is still developing. Because CPARS ratings are often negotiated as part of settlements, there remains to be seen a definitive Board or Court decision focusing primarily on the merits of a CPARS report.

Conclusion

Competitions for federal contracts can be close, and awards can turn on even a single CPARS evaluation. To put yourself in the best position possible, contractors are well-advised to take a proactive approach to managing CPARS reports. Left unattended, an unfair or inaccurate evaluation can come back to haunt a contractor for years to come. ■


Dorn C. McGrath and Ken M. Kanzawa, Kelley Drye & Warren LLP, Washington, DC, Division 13 (Government Construction)

Visit www.ambar.org/FCLUC to view the endnotes for this article.

In Memoriam

Luther P. House, Jr., Chair of the Forum on Construction Law 1991-92 and recipient of the Forum's 1999 Cornerstone Award, passed away peacefully at his home on August 2, 2020 of natural causes at the age of 86. After receiving his LLM from Yale he served in the US Air Force as a Staff Judge Advocate.

Luther then joined Smith, Currie & Hancock in Atlanta in 1961. Luther was at the forefront of the development of construction law as a distinct practice, beginning in the early 1960's and into the new millennium. He practiced at Smith Currie & Hancock for 40 years, 25 years serving as managing partner.

Luther was a gentleman, a great construction lawyer and a great mentor to many construction lawyers across five decades. Above all, he was dedicated to his family, which he always put first. He will be missed and remembered fondly.

MESSAGE FROM CHAIR-ELECT

FCL – The Melting Pot of Construction Lawyers With The Recipe For Success

Wm. Cary Wright

The ABA Forum on Construction Law is a diverse melting pot and home to thousands of attorneys working in nearly every facet of Construction Law. Our members include sole practitioners and attorneys at large firms, people living in large cities and rural areas, and those practicing in the United States and abroad. Despite our many individual differences, we are all united by a common goal to share best practices and work together to build the best construction lawyers. In pursuing this goal, together we focus on the 3 P's - Programs, Publications and, most importantly, People.

Programs

The Forum traditionally has three national programs – Fall, Mid-Winter, and Annual Meetings. These are held in different locations and range from one-and-a-half days to two-and-a-half days. Organizing and preparing these programs require an extensive amount of effort. The planning begins eighteen months to two years in advance of the meeting, and a team typically is comprised of a Governing Committee Liaison, two Co-Chairs, Marketing Liaison, Session Coordinators and, of course, world class speakers. The written materials are top notch, and each program contains multiple opportunities to learn from and get to know one another. Attendance at these meetings range from 350 to nearly 700 attendees (Boston 2017 and New Orleans 2018 tied at 697 attendees).

Recognizing that not everyone can attend a national meeting, the Forum has Regional Meetings, which focus on a specific topic, and are conducted simultaneously at five or more locations across the nation.

Given the increased difficulty for newer attorneys to obtain trial experience, the Forum developed The Trial Academy, which is an intensive hands-on course. There around thirty participants learn from seasoned trial lawyers and conduct a trial on a hypothetical case study in an actual courtroom.

Understanding that not everyone is able to travel to a meeting, years ago (long before COVID), the Forum created the Special Programs and Education Committee (SPEC). The SPEC Committee pioneered the distant learning programming of the Forum, providing Forum-quality programming through conference calls and webinars.

Publications

The Forum also publishes many books and articles written by our experts on nearly every aspect of construction law. The first title was *Sweet on Construction Law* in 1997. Since that time, the Forum has published 33 books and generated hundreds of thousands of dollars over the last 20 years. Because some of these books are treatises, used by law schools across the nation, they cement the Forum as the go-to resource for law schools.

The Forum has two periodicals – *The Construction Lawyer* and *Under Construction*. *The Construction Lawyer* is comprised of law-review quality articles and, along with the books published by the Forum, propel the Forum as the thought leader in construction law. Alternatively, *Under Construction* provides timely and relevant articles, which are more condensed, allowing the reader to quickly digest an issue. Both are must-read publications, which I always look forward to receiving and often refer to in my daily practice.

People

Of all that the Forum offers, our most valuable resource is our members. We invest heavily in educating our members and create multiple opportunities for members to be involved. The Forum contains thirteen Divisions focusing on different areas of construction law plus the YLD Division, each with a Chair and Steering Committee, plus ten additional Standing Committees. These not only provide ways for members to dive into parts of the organization they are interested in, but also provide many opportunities to serve. When serving on a committee, you will quickly find that the people are the best and most important aspect of the Forum! Over the years, I have thoroughly enjoyed meeting and becoming close friends with lawyers and industry professionals from across the nation. Forum members are incredibly competent and generously willing to share their experience and insight. The industry consultants are masters of their areas of expertise. The attorney members are the most collegial you will find and, even when opposite a fellow member in a case or transaction, they are the most respectful people to work with or against.

As Chair-Elect, I look forward to working with our existing members and hope to increase our membership with even more dynamic and diversified members. If you are not yet involved, I encourage you to do so; it will become one of the best professional and personal decisions you will ever make. It is rewarding to know that even though we are involved in a challenging profession, the Forum melting pot provides the recipe that produces The Best Construction Lawyers, who also become great friends and colleagues. ■

Wm. Cary Wright, Carlton Fields, Tampa, FL

ON IN-HOUSE COUNSEL'S DESK

Division 11 (In-House Counsel) has given us something to think about when it comes to protecting our clients' and consultants' intellectual property and negotiating service contracts. Read Messrs. Neuffer and Kresz' article on *Under Construction* online at www.ambar.org/FCLUC.


Don't Give Away Your Intellectual Property

By: Brian E. Neuffer, CTLGroup, Skokie, IL, and Mat Kresz, Wilson Elser LLP, Chicago, IL

CONSTRUCTION LAW 101

Looking to build the next generation of the best construction lawyers, *Under Construction* publishes articles on fundamental construction law topics for our law student and young attorney members. Read Craig McCloud's article about pay-if-paid and pay-when-paid clauses on *Under Construction* online at www.ambar.org/FCLUC.

Construction 101: Pay-if-Paid vs. Pay-When-Paid Clauses

By: Craig L. McCloud, McCloud Law Group, Lexington & Columbia, KY

WORKPLACE CHATTER

The Forum's Division 6 (Workforce Management & Human Resources) provides regular contributions to *Under Construction* in its Workplace Chatter column. In this edition, we publish Brendan Carter's article concerning dual gate processes used in connection with labor relations. Thanks Division 6!

The Dual Gate System in Construction Labor Relations: Primary, Neutral, and Contamination

By: Brendan Carter, Vice President of Labor Relations, AGC of California, Sacramento, CA

#ABA*UnderConstruction* Online

http://ambar.org/FCLUC

Read these additional and excellent articles on *Under Construction* Online.

- **A Construction Lawyer's Guide to Navigating Drone Law Amid the Rise of Drone Use During the COVID 19 Pandemic**
  By Cristina Sacco, Hollingsworth LLP, Washington, DC
- **Design Assist vs. Delegated Design Industry Trade Associations Release Guidance**
  By Mike Koger, The American Institute of Architects, Washington, DC
- **Is "Unfettered Access" to a Project Site an Implicit Right of the Contractor in Every Construction Contract?**
  By Olivia Polston, JD Candidate, University of Louisville

Not receiving Forum communications?
Visit http://ambar.org/electronicinstructions.

DISPUTE RESOLVER

Division 1 (Litigation & Dispute Resolution) members and Forum litigators will contribute articles for *Under Construction*'s newest Dispute Resolver column. Read these articles at www.ambar.org/FCLUC.

Question: A Single Arbitrator or Three-Arbitrator Panel? Answer: A Two-Arbitrator Panel

By: Adrian Bastianelli, Peckar & Abramson, Washington, DC

Read this novel proposal for a two-arbitrator panel.


Using Zoom for Pre-Mediation Activities to Achieve Earlier Settlements

By: Paul M. Lurie, Schiff Hardin LLP, Chicago, IL and Robyn L. Miller, Callison RTKL Inc., Los Angeles, CA

Mediate using Zoom for pre-mediation activities and earlier resolutions.

Four Tips for Remote Construction Arbitrations: Distance Does Not Have to Mean Poor Communication

By: Brenda Radmacher, Gordon Rees Scully Mansukhani LLP, Los Angeles, CA

You can remotely arbitrate a construction case effectively.


Entering a New Era – Taking and Defending Remote Depositions

By: Mary Salamone and Michelle Wells, Procopio, Irvine, CA

In these unprecedented times, everything a litigator needs to know to successfully take and defend remote depositions.

Arbitration Without Argument

By: Megan George, Stites & Harbison, PLLC, Lexington, KY

Looking for a speedy, cost-effective means to resolve project disputes: try arbitration on briefs alone.


Certificates of Merit: Practical Guidance to Avoid Procedural Pitfalls

By: James Moye and Paul Bennett, Moye, O'Brien, Pickert, Dillon & Masterson, Maitland, FL

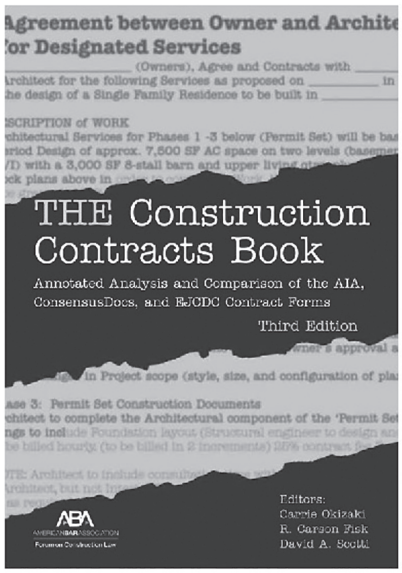
A primer on jurisdictions with certificate of merit statutes.

UNDERCONSTRUCTION

ABA Forum on Construction Law
American Bar Association
321 N. Clark St.
Chicago, IL 60654

Nonprofit Organization
U.S. Postage
American Bar
Association

New Publication from the Forum



THE Construction Contracts Book, Revised Third Edition

Annotated Analysis and Comparison of the AIA, ConsensusDocs and EJCDC Contract Forms.

Most construction lawyers are familiar with the American Institute of Architects (AIA), Engineers Joint Contract Documents Committee (EJCDC) forms of agreements, and the newer ConsensusDOCS forms. Now completely revised, this invaluable resource offers a topic-by-topic comparison of these forms.

Editors

Carrie Lynn Haruko

David A. Scotti

R. Carson Fisk

Forum Social Media

Like us on Facebook, follow us on Twitter and Instagram and join our LinkedIn page!
The Forum is everywhere!