

Table of Contents

<i>Preface and Acknowledgments</i>	<i>ix</i>
<i>About the Authors</i>	<i>xi</i>
<i>Summary of Contents</i>	<i>xix</i>

1 Commonly Used Construction Contracts and Forms	1
<i>Michael P. Subak</i>	
<i>Jason C. Spang</i>	
1-1 Introduction	1
1-2 Types of Form Contracts.....	1
1-2.1 AIA	1
1-2.2 ConsensusDOCS	2
1-2.3 How the AIA Documents and the ConsensusDOCS Differ	3
1-2.3.1 Role of the Architect	3
1-2.3.2 Ownership of Design Documents	4
1-2.3.3 Electronic Data	5
1-2.3.4 Disclosure of Owner's Financial Arrangements.....	5
1-2.3.5 "Green" Building.....	6
1-2.4 EJCDC	6
1-3 Limits, Problems, and Risks of Using Form Contracts	7
2 Pennsylvania Insurance for Construction Projects	11
<i>A. Peter Prinsen</i>	
2-1 Introduction	11
2-2 Property-Type Construction Insurance Coverages	12
2-2.1 Builders' Risk Insurance.....	12
2-2.1.1 Premises Insured	12
2-2.1.2 Perils Insured Against.....	12
2-2.1.3 Loss of Business Income Coverage	13
2-2.1.4 Extra Expense Coverage.....	13
2-2.1.5 Soft Costs Coverage.....	13
2-2.2 Installation Floater.....	14
2-2.3 Contractors' Equipment Coverage	14
2-2.4 Contract Drafting Considerations for Property-Type Coverages.....	14
2-2.4.1 Insurance Coverage Requirements	14
2-2.4.2 Waiver of Subrogation	15
2-3 Liability-Type Coverages.....	15
2-3.1 Commercial General Liability Insurance	15
2-3.1.1 Aircraft, Automobile, and Watercraft Exclusions.....	16
2-3.1.2 Damage to Property Exclusion	16

Table of Contents

2-3.1.3	Property Damage to "Your Work" Exclusion	17
2-3.1.4	Pollution Exclusion	17
2-3.1.5	Employers' Liability Exclusion	17
2-3.2	Umbrella and Excess Insurance	18
2-3.3	Professional Liability Insurance	18
2-3.4	Riggers Liability	19
2-3.5	Additional Considerations	19
2-3.5.1	Additional Insured Coverage	19
2-3.5.2	Primary Additional Insured Status	19
2-3.5.3	Indemnification and Additional Insured Coverage	20
2-4	Workers' Compensation Coverage	20
2-5	Miscellaneous Insurance Coverages	21
2-5.1	Pollution	21
2-5.2	Aviation Policies	21
2-5.3	Maritime Coverage	22
2-6	Owner-Controlled Insurance Programs	22
2-7	Claims-Handling Considerations	23
2-7.1	Prompt Notice to All Insurers Required	23
2-7.2	Proof Required for Property-Type Claims	23
2-7.3	Duty to Defend for Liability-Type Coverages	24
3	Surety Bonds on Construction Projects in Pennsylvania	25
	<i>William J. Taylor</i>	
	<i>Douglas R. Widin</i>	
3-1	Introduction	25
3-1.1	Typical Surety Bond Provisions	26
3-1.1.1	Performance Bonds	26
3-1.1.2	Payment Bonds	28
3-1.2	Miscellaneous Bonds	31
3-1.2.1	Bid Bonds	31
3-1.2.2	Warranty Bonds	32
3-2	Surety Bonds on Construction Projects in Pennsylvania	32
3-2.1	Performance Bonds in Pennsylvania Generally	32
3-2.2	Payment Bonds in Pennsylvania Generally	36
3-2.3	The Surety Industry Gets a Boost from Pennsylvania's Legislature	39
3-3	Conclusion	42
4	Project Performance and Termination	45
	<i>John M. Tedder</i>	
4-1	Introduction	45
4-2	The Default Termination	46
4-2.1	Common-Law Termination for Cause	46
4-2.2	Contractual Termination for Cause	49
4-3	Defenses to Default Termination	50
4-3.1	Substantial Performance	50
4-3.2	Lack of Proper Notice and the Opportunity to Cure	52
4-3.2.1	Termination Notice	52
4-3.2.2	Opportunity to Cure	54

4-3.3	Waiver/Equitable Estoppel	56
4-3.4	Material Breach Excused	57
4-4	Alternatives to Default Termination	57
4-4.1	The Termination-for-Convenience Alternative	59
4-4.2	The “De-scoping” Option	60
4-5	Termination Damages.....	60
4-6	Conclusion.....	61
5	Notice of Claims.....	63
	<i>Rochelle R. Koerbel</i>	
5-1	Introduction	63
5-2	Notice Requirements	64
5-3	Statutory Notice Provisions	72
5-4	Mechanics’ Lien Law of 1963: Notice Requirements	72
5-5	Bond Claims: Notice Requirements	74
5-6	Statute of Limitations Provisions and Their Impact on Notice Provisions	75
5-7	Statute of Repose.....	77
5-8	Summary.....	77
6	Delay and Disruption Claims	79
	<i>Joseph A. Battipaglia</i>	
	<i>Patrick Kearney</i>	
6-1	Types of Delay and Disruption Claims.....	79
6-1.1	Delays and Disruption to a Contractor and Subcontractor’s Performance.....	80
	6-1.1.1 Extended General Condition Costs	80
	6-1.1.2 Acceleration	80
	6-1.1.3 Additional Supervision Costs	81
	6-1.1.4 Disruption and/or Inefficiency Costs	81
	6-1.1.5 Wage Escalation.....	82
	6-1.1.6 Unabsorbed Home Office Overhead	82
6-1.2	Delays and Disruption to the Owner’s Use of the Property.....	83
6-1.3	Direct versus Consequential Damages.....	83
6-2	Liability to Pay Delay and Disruption Damages	84
6-2.1	Owner’s Use of a No-Damages-for-Delay Contractual Provision to Prevent a Contractor’s Recovery of Delay Damages	84
6-2.2	Owner May Be Liable for Delay and Disruption Claims Under the <i>Spearin</i> Doctrine.....	85
6-2.3	Design Professional May Be Liable for Delay and Disruption Claims.....	86
6-2.4	Surety May Not Be Liable for Delay and Disruption Claims	87
6-2.5	Contractors Can Bring Claims on Behalf of Their Subcontractors	87
6-2.6	Contractors and Subcontractors Can Waive Their Right to Assert Delay and Disruption Claims Through Progress Payment Waivers	88
6-3	Burden of Proof for Establishing a Compensable Delay and Disruption Claim and the Role of a Scheduling Expert.....	89

Table of Contents

6-4	Calculation of Delay and Disruption Damages	90
6-4.1	Delay and Disruption Damages Must Be Proven with Reasonable Certainty	90
6-4.2	Loss-of-Productivity (Inefficiency) Damages	91
6-4.3	Total Cost Method	91
6-4.4	Measured Mile	92
7	Construction Defect Claims	95
	<i>Kurt F. Fernsler</i>	
	<i>Marc J. Felezzola</i>	
7-1	Introduction.....	95
7-2	Theories of Recovery.....	95
7-2.1	Contract-Based Claims.....	96
	7-2.1.1 Breach of Contract	96
	7-2.1.2 Breach of Warranty	96
7-2.2	Tort-Based Claims.....	96
	7-2.2.1 Negligence	96
	7-2.2.2 Fraud.....	97
	7-2.2.3 Negligent Misrepresentation	97
7-3	Limitations on Recovery.....	99
7-3.1	Statute of Limitations	99
7-3.2	Statute of Repose	100
7-3.3	Gist-of-the-Action Doctrine	100
7-3.4	Economic-Loss Doctrine.....	101
7-4	Damages.....	102
7-5	Insurance Considerations	104
7-6	Conclusion	106
8	Construction Warranties	107
	<i>Joyce K. Hackenbrach</i>	
8-1	Design Warranties: The <i>Spearin</i> Doctrine's Implied Warranty of Adequate Design.....	107
8-1.1	The Basics of the <i>Spearin</i> Implied Warranty	107
	8-1.1.1 The Implied Warranty, Defined	107
	8-1.1.2 Practical Effects of the <i>Spearin</i> Implied Warranty	108
8-1.2	Inapplicability of <i>Spearin</i> Warranty to Performance Specifications	109
8-1.3	"Hybrid" Prescriptive and Performance Specifications	110
8-1.4	Important Limitations on the <i>Spearin</i> Implied Warranty	110
	8-1.4.1 Express Warranties Trump the Implied <i>Spearin</i> Warranty	110
	8-1.4.2 The Contractor's Duty to Inquire About Patent Defects or Ambiguities	111
8-2	Implied Warranties of Workmanlike Construction or Fitness for the Purpose.....	112
8-2.1	Generally	112
8-2.2	In Residential Construction.....	113
8-2.3	Disclaimers of Implied Warranties	113
8-3	Express Construction Warranties; Limited Warranties	114
8-3.1	Typical Express Warranties Applicable to Construction	114
8-3.2	Practical Issues to Consider in Negotiating Express Construction Warranties	114
	8-3.2.1 Express Warranties on Materials as Well as Workmanship.....	115
	8-3.2.2 Additional Express Warranties	115
	8-3.2.3 Express Warranties of Fitness for the Purpose.....	116
	8-3.2.4 Express Call-Back Warranty Remedies	116

8-3.3	Warranties for Design-Build Projects	117
8-3.3.1	Performance Guarantees	117
8-3.3.2	Remedies for Failure to Achieve Performance Guarantees	119
8-3.3.3	Warranties in “Hybrid” Projects	119
8-3.3.4	Deconstructing Design-Build Warranties	120
8-3.3.5	Cumulative Express Design-Build Warranties	120
8-4	Limited Warranties/Limitations of Remedy and Limitations of Liability.....	121
8-4.1	Limitations on Warranty Remedy	121
8-4.1.1	Nature and General Enforceability.....	121
8-4.1.2	Failure of the Essential Purpose of a Limited Remedy.....	122
8-4.2	Waiver of Consequential Damages and Limitations of Liability	122
8-5	Conclusion.....	123
9	Substantial and Final Completion.....	125
<i>Joshua R. Lorenz</i>		
9-1	Contract Documentation	125
9-2	Substantial Completion	126
9-2.1	AIA—Substantial Completion.....	127
9-2.2	Commentary on AIA—Substantial Completion	128
9-2.3	ConsensusDOCS—Substantial Completion	129
9-2.4	Commentary on ConsensusDOCS—Substantial Completion.....	130
9-2.5	Public Works Projects and Pennsylvania Law	131
9-2.6	Miscellaneous Points	131
9-3	Final Completion	131
9-3.1	AIA—Final Completion.....	132
9-3.2	Commentary on AIA—Final Completion	133
9-3.3	ConsensusDOCS—Final Completion	134
9-3.4	Commentary on ConsensusDOCS—Final Completion.....	135
9-4	Conclusion.....	136
10	Getting Paid on Private and Limited Public Contracts/ Pennsylvania Contractor and Subcontractor Payment Act.....	137
<i>Robert A. Prentice Patrick J. Kearney</i>		
10-1	Contractor and Subcontractor Payment Act.....	137
10-1.1	Applicability	137
10-1.2	The Owner’s Payment Obligations to the Contractor.....	138
10-1.2.1	Progress Payments	138
10-1.2.2	Final Payment.....	138
10-1.3	The Payment Obligation of Contractors and Subcontractors.....	138
10-1.3.1	Obligation to Disclose Payment Provisions	138
10-1.3.2	The Timing of Payment.....	139
10-1.3.3	Implied Pay-if-Paid Provision.....	139
10-1.4	Retainage.....	140
10-1.4.1	Definition	140
10-1.4.2	Payment of Retainage	140
10-1.5	Withholding for Defective Work.....	140
10-1.5.1	Owner’s Withholding for Deficiency Items	140
10-1.5.2	Contractor/Subcontractor Withholding for Deficiency Items	141

Table of Contents

10-1.6	Penalties Available Under CASPA	141
10-1.6.1	Interest on Overdue Owner Payments.....	141
10-1.6.2	Interest on Overdue Contractor and Subcontractor Payments	141
10-1.6.3	Other Penalties	141
10-1.7	Award of Attorneys' Fees and Expenses.....	142
10-1.8	Postjudgment Remedies	143
10-1.9	Waiver of CASPA Penalties and Attorneys' Fees	143
10-1.10	CASPA's Impact on Forum Selection and Choice-of-Law Provisions	144
10-1.11	Contractor's Failure to Sign a Release.....	145
10-1.12	Exceptions to CASPA Application	145
10-1.12.1	CASPA Only Applies to Pennsylvania Projects	145
10-1.12.2	CASPA Only Applies to Construction Contracts	146
10-1.12.3	Limitations on Residential Properties.....	146
10-1.12.4	Owner's Exclusion.....	146
10-1.12.5	Delay Damages and/or Unapproved Claims.....	146
10-1.12.6	Claims for Penalties and Attorneys' Fees Against a Surety.....	146
10-1.12.7	Mechanics' Lien Claims	147
10-1.13	CASPA Must Be Pledged in a Complaint	147
10-1.14	Compliance with CASPA Bars Third-Party Claims	148
10-1.15	Errors in Invoicing	148
10-1.16	Advance Payments.....	148

11 Getting Paid on Public Projects/Pennsylvania Procurement Code 149

James M. Doerfler

11-1	Introduction.....	149
11-2	The Payment Provisions in the Construction Agreement	150
11-3	A Brief Overview of the History and Applicability of the Procurement Code.....	151
11-3.1	The Applicability and Structure of the Procurement Code.....	152
11-3.1.1	The Applicability of the Code to PennDOT Contracts	153
11-3.1.2	The Applicability of the Code to Sureties	154
11-3.2	The Precursors to the Procurement Code: The "Private" Prompt Payment Act and the 1995 Award and Execution of Public Contracts Act Amendments	155
11-3.3	The Intent Behind the Prompt Pay Act Provisions of the Procurement Code	155
11-3.4	11-3.4 The Prompt Payment Provisions of the Procurement Code and How the Courts Have Applied These Payment Provisions	156
11-3.4.1	11-3.4.1 Payment Responsibilities Under Contract and the Procurement Code	156
11-3.4.2	11-3.4.2 The Retainage Provisions of the Code	159
11-3.4.3	11-3.4.3 The Prompt Payment Act's Statutory Penalty and Attorneys' Fees Provisions.....	159
11-3.5	11-3.5 The Other Provisions of Procurement Code Relevant to Contractor Payment Proceedings	169
11-3.5.1	11-3.5.1 Forum Selection Clause Limitations.....	169
11-3.5.2	11-3.5.2 Certain Governmental Failures of Payment Will Not Be Subject to Chapter 39's Statutory Remedies	169
11-3.5.3	11-3.5.3 "Innocent Party" Provisions	170
11-3.5.4	11-3.5.4 Final Payment and Arbitration Provisions	170
11-4	Claims Against Sureties on Public Projects	171
11-4.1	11-4.1 Public Works Contractors' Bond Law of 1967	172
11-4.1.1	11-4.1.1 Applicability	172
11-4.1.2	11-4.1.2 Timing of Claims	173

	11-4.1.3	Preliminary Notices Required of Lower-Tiered Subcontractors and Material Suppliers	174
	11-4.1.4	Bond Requirements	174
11-4.2		The Procurement Code's Modification of the Bond Law	174
	11-4.2.1	Applicability of the Procurement Code's Bond Requirements	175
	11-4.2.2	Bond Requirements	175
	11-4.2.3	Case Law Regarding the "Intent" of the Bond Provisions of the Code	175
11-5	Conclusion.....		176
12	Pennsylvania's Mechanics' Lien Law of 1963 (Including the 2007 and 2009 Amendments).....		177
	<i>Edward B. Gentilcore</i>		
12-1	Pennsylvania's Mechanics' Lien Law of 1963—Introduction		177
12-2	The Lien Law from the Owner's Perspective.....		178
12-2.1	A Suddenly Dying Breed—Up-front Waivers of Liens	178	
12-2.2	The Participants	187	
12-2.3	Special Changes Regarding Subcontractors	193	
12-2.4	What Kind of Improvement Is Necessary to Permit a Mechanics' Lien Claim?	197	
12-2.5	Analysis of Erection and Construction versus Alteration and Repair	198	
12-2.6	A Fuzzy Line Becomes Even More Blurred—Erection and Construction versus Alteration and Repair 2005–2009	199	
12-2.7	Special Defense Strategies Available to the Owner.....	201	
12-2.8	"If I Get Hit by a Lien Claim, How Much Will It Hurt?"—Lien Priority Issues	206	
12-3	The Lien Law from the Contractor's Perspective		207
12-3.1	The First Step—Perfecting the Mechanics' Lien Claim.....	207	
	12-3.1.1 Perfecting a Lien—The Basic Rules for Both Contractors and Subcontractors.....	207	
12-3.2	Advice of Past Claimants	208	
12-3.3	Converting the Perfected Lien into a Money Judgment	212	
12-4	Procedure to Obtain Judgment		212
12-4.1	Sections 1701–1706 of the Lien Law	212	
12-4.2	File Complaint or Agreement for Amicable Action	212	
12-4.3	File Within Two Years	212	
12-4.4	File in the Proper County	214	
12-4.5	Note Five-Year Time Limitation.....	214	
12-4.6	File Praecipe with Prothonotary if Ruled to Do So	214	
12-4.7	Remedies Available to Claimants	215	
12-5	Contents of the Complaint		215
12-6	Responsive Pleadings		216
12-6.1	Preliminary Objections	216	
12-6.2	Pleading Defenses	217	
12-6.3	Prohibitions Against Joinder and Counterclaims.....	217	
12-7	Discovery		218
12-8	Trial.....		218
12-8.1	Nonjury Trials	218	
12-9	Appeals		218

Table of Contents

12-10	Execution and Lien Priority	219
12-10.1	Enforcement and Execution	219
12-10.2	Lien Priority in Relation to Other Security Interests	219
12-11	Conclusion	223
Index of Cases		225
Index of Statutes		245
Subject Index.....		249