



CONSTRUCTION
TRIALS
REAL ESTATE
CORPORATE
ENERGY
EMPLOYMENT
BANKRUPTCY

Texas Construction Law Trends

Presented By:

Ben Westcott

Co-Managing Shareholder

Andrews Myers, P.C.

bwestcott@andrewsmyers.com

Disclaimer

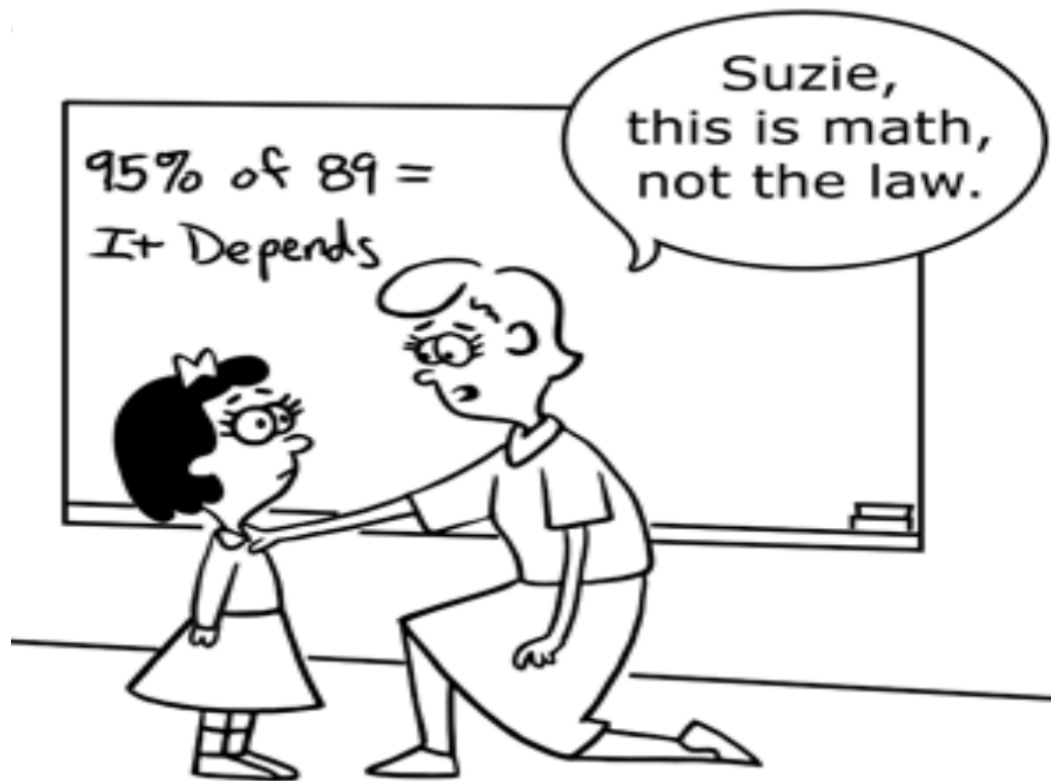
The materials and information have been prepared for informational purposes only. This is not legal advice, nor intended to create or constitute a lawyer-client relationship.

Before acting on the basis of any information or material, readers who have specific questions or problems should consult their lawyer.

It Depends...

Stu's Views

© Stu All Rights Reserved www.STUS.com



Be Prepared for Risk...

- Unfortunately, certain contractual risks are “facts of life” in today’s construction industry.
- **The challenge is to identify potential risks before they appear and to manage them until they are resolved, or at least minimized.**

Topics

- Design Defects
- Schedule/Delays / Liquidated Damages
- Payment Terms
- Warranties
- Price Escalation
- Lien Law Changes

Design Defects

The legislature got it right... finally.
Until 9/1/21, Contractor takes
responsibility for sufficiency of
design

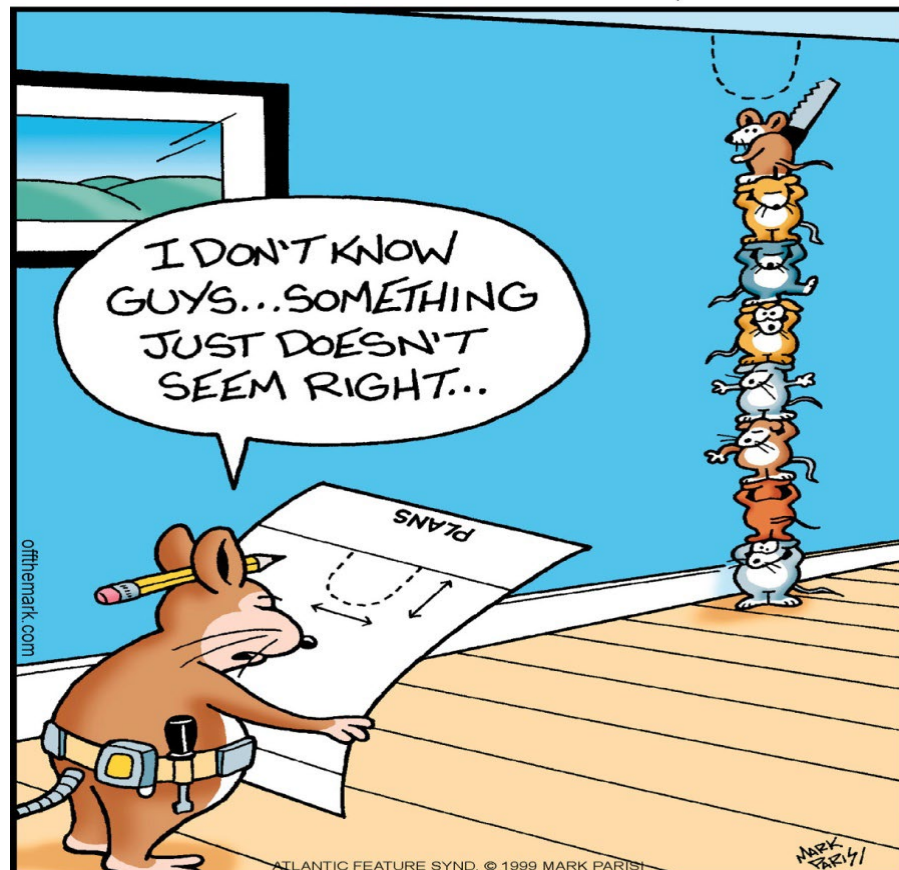
Now, general commercial/vertical
construction protected

Duty is limited to reporting
discoverable defects

Critical infrastructure excluded:

O&G, Power, Water, Airports,
Ports and Railroads

off the mark.com by Mark Parisi



Differing Site Conditions

If underground conditions are worse than anticipated, who is responsible?

- The Owner
- The Contractor
- The Geotechnical Consultant
- The Architect/Engineer
- The Subs

Differing Site Conditions

***El Paso Field Servs., L.P. v. Mastec N. Am., Inc.*, 389 S.W.3d 802 (Tex. 2012).**

- El Paso hired MasTec to replace a pipeline
- Third-party survey reports that listed 280 “foreign crossings” along the old line were included in the bid package
- MasTec discovered 794 foreign crossings instead of the 280 listed on the reports and sued for breach of contract
- Trial judge ruled in favor of El Paso.
- Court of appeals reversed, holding that El Paso failed to exercise due diligence in locating foreign crossings

Differing Site Conditions

“[Mastec] represents that it has fully acquainted itself with the site, including without limitation . . . subsurface conditions, obstructions and all other conditions pertaining to the Work. . . .[Mastec] made all investigations essential to a full understanding of the difficulties which may be encountered in performing the Work. . . . [Mastec] assumes full and complete responsibility for any such conditions pertaining to the Work, the site of the Work, or its surroundings and all risks in connection therewith . . . notwithstanding . . . anything in any of the Contract documents or in any representations, statements or information made or furnished by [El Paso] or its representatives.”

And

“[El Paso] will have exercised due diligence in locating foreign pipelines and/or utility line crossings

The Supreme Court Says:

***El Paso Field Servs., L.P. v. Mastec N. Am., Inc.*, 389 S.W.3d 802 (Tex. 2012).**

- Supreme Court reverses – Owner wins
- A clause generally allocating “all risks” for unknown site conditions trumps a more limited, specific clause requiring the owner to exercise due diligence
- The court’s role is not to protect people from contracts they sign, but to enforce them as written
- Emphasizes Texas’ strong public policy in favor of “freedom of contract” and allowing “sophisticated parties” to allocate risk as they see fit

Concealed Conditions

- Changes you can make:
 - Only responsible for items actually noted as a result of visual observations
 - No independent testing required
 - Entitled to rely on owner supplied information
 - Assuming owner disclosed all known adverse conditions
 - No liability for subsurface or concealed conditions not in supplied reports or information

Schedule

off the mark.com

by Mark Parisi



The schedule shows the final carpet is installed before the roofing subcontractor gets to the job site.

Schedule

off the mark.com

by Mark Parisi



What's outside of
your control?

Schedule

What did you sign up for? What was your plan? Why?



© Mark Parisi/Dist. by UFS, Inc.

Schedule

- Generally includes “no damage for delay”
- Extension of time is sole remedy for delay
- Daily rate for liquidated damages
- Need agreed upon schedule, with input from major subcontractors
- Need copies of schedules
- Need compensation for material or unreasonable schedule changes

Liquidated Damages

- Liquidated damages (LDs) can be a sword or shield – depending on the amount of exposure for actual damages if completion is late and its your fault
- If no LD clause, then actual damages recoverable unless there is an express waiver of delay damages

Liquidated Damages

- To prevail on a claim for LDs, two elements must be established:
 - damages must be difficult to calculate, and
 - it must be a reasonable forecast of just damages.
- These two elements must be present at the time of contracting.
- If a LD clause is determined to be a penalty (penalty = unenforceable), the default is to allow the owner to recover its actual delay damages, if any.

Liquidated Damages

***FPL Energy, L.L.C. v. TXU Portfolio Mgmt. Co., L.P.*, 57 Tex. Sup. J. 325 (Tex. 2014).**

- LD provision may be unenforceable where actual damages incurred are much less than the agreed LD
- Courts can “look back” to determine whether the LD is unreasonably greater than actual damages incurred
- Texas law is now potentially more favorable to contractors in a delayed completion situation with liquidated damages that are disproportionately higher than actual damages

Liquidated Damages Clause – Practice Tips

- Make sure LD clause includes all possible damages that may be associated with delay – watch the exceptions!
- Contract should be clear as to when LDs start and stop (substantial completion / final completion)
- Try to get a grace period

Construction Payment Cycle

- What steps must occur to get paid?
 - Sub files pay app
 - GC files pay app
 - Owner's rep reviews
 - Owner review and payment
 - Owner pays

Payment Terms

- On Texas projects (not federal), you are entitled to be paid within 30-35 days.
- The prompt pay act says:
 - For private projects, payment must be made to a contractor on or before the 35th day after the date “the owner receives” “a written payment request”.
 - For public projects, payment must be made on or before the 30th day.
- These laws cannot be waived by contract
- Bill monthly – always _____

Payment Terms

- For private projects, the interest is 1.5% per month.
- For public projects, the interest is 4.25% per year.
- Both of these statutes also provide the right to suspend work for late payments with 10 days written notice.
- Both of these laws give contractors the right to recover their attorney's fees in connection with a claim for recovering interest on late payments.
- The owner does have the right to withhold payment for a "good-faith dispute" relating to the goods or services performed; however, the owner can only withhold an amount sufficient to cover the ite _____

Payment Terms

- For subs on private projects, payments must be made within 7 days of the GC's receipt of payment;
- For subs on public projects, payments must be made within 10 days of GC's receipt of payment.
- Subs have the same rights as GC's to stop work and recover interest and fees.
- These rights cannot be waived by contract.
- Be wary of “pay-if-paid” language vs. “pay-when-paid” language

Warranty

- Types of warranties – express and implied
- §3.5.1 Warranty
 - The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. (AIA A201, 2007 at §3.5.1)
- § 12.2.2.1 Establishes Warranty Period
 - 1 year from the date of substantial completion
 - Implied warranty is 10 years long

Warranty

Practical Tips –

- Exclude equipment or products purchased directly by, or at the direction of, the Owner.
- Limit warranty of equipment or products solely to the manufacturer's warranty.
- Disclaim all warranties not expressly stated in the contract (needs to be conspicuous).

Warranty

Avoid exaggerated verbiage in your warranty:

- "World Class Construction"
- "Watertight and Leak-proof"

Repair or replacement as sole remedy if possible



Price Escalation Claims

- Is there a “price escalation” clause in the contract?
- If so, follow the specific notice requirements for each category of anticipated pricing change
- Provide amended notices for additional price increases

Price Escalation Claims

- If there is a price escalation provision (or if you are making or anticipating a claim) collect careful documentation about what costs were anticipated
- Schedule for normal purchase of raw materials and pricing on those dates
- Evaluate manpower curves and when maximum labor force was planned

Price Escalation Claims

- Entitlement to a price increase can and often is directly related to the project schedule
- Consider the upstream and downstream impact of change orders that extend the overall completion deadline or significant project milestones

Price Escalation Claims

Numerous contract provisions may provide the basis for making a claim related to the increased cost of materials and/or labor

- Equitable adjustment
- Excusable delay
- Unanticipated or differing conditions
- Force majeure
- Exclusions from contract / incorporation of terms of proposal

Price Escalation Claims

- Regardless of whether the contract specifically addresses price escalation, the claim needs to be supported by specific facts
- Track costs that are subject to ongoing increases separately from others
- Identify specific quotes from downstream parties and suppliers in the notice
- Evaluate what information regarding planned pricing you are willing to share to negotiate a change in pricing

Changes to Lien Laws

- **Modernizing/simplifying lien laws (HB 2237)/53 Property Code – effective January 1, 2022**
 - Eliminates the second month subcontractor notice requirement to general contractors. Remains optional
 - Non-GC retainage lien due by 15th of 3rd month of prime contract completion
 - Lien deadlines are extended to the next business day
 - Shortens the statute of limitations to foreclose on a lien to one year from when the lien could be filed
 - Provides for expedited discovery for information relating to the validity and removal of the lien
 - Makes design services and equipment rental lienable
 - Certified mail no longer required (optional)
 - 53.083 claims removed

Discussion

Presented By:

Ben Westcott

Co-Managing Shareholder

Andrews Myers, P.C.

bwestcott@andrewsmyers.com

Andrews Myers, PC

1885 Saint James Place, 15th Floor, Houston, TX 77056

919 Congress Avenue, Suite 1050, Austin, Texas 78701

www.andrewsmyers.com