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United States CONSTRUCTION

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This country-specific Q&A provides an overview of construction laws and regulations applicable in United States.

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UNITED STATES CONSTRUCTION



1. Is your jurisdiction a common law or civil law jurisdiction?

The United States is a common law jurisdiction. The common law in the United States is comprised of both state specific rulings as well as federal jurisprudence. The federal courts are comprised of the United States district courts, courts of appeal and the U.S. Supreme Court. Each state has its own unique judicial system typically with courts of common jurisdiction, appellate courts and a final appellate court that issues final rulings on state law. As a common law country, the courts in both the federal and state systems rely upon prior rulings when deciding disputes or interpreting statutory language.

The sole exception is Louisiana, which is a civil law jurisdiction. As a result, judges in Louisiana are supposed to rely upon interpretation of the civil code when deciding matters. Louisiana is the only civil law jurisdiction in the United States.

2. What are the key statutory/legislative obligations relevant to construction and engineering projects?

Statutory and legislative obligations applicable to construction and engineering projects vary by state. Most local jurisdictions have zoning and building code obligations with which each project must comply. In addition, every project must comply with federal and state Occupational Health and Safety Administration (OSHA) requirements, which are described in more detail below. Federal law mandates performance and payment bonds on all federal project. Most states have similar bonding requirements for state projects. As discussed below, there are also several substantial employment statutes that govern employment on construction projects.

There are numerous other statutory obligations related to construction work in the United States, many of which are discussed below. Engineers, in particular, need to be

aware of state-specific statutes governing the practice of engineering in each state.

3. Are there any specific requirements that parties should be aware of in relation to: (a) Health and safety; (b) Environmental; (c) Planning; (d) Employment; and (e) Anti-corruption and bribery.

The Federal Occupational Safety and Health Act, 29 U.S.C. Sec. 15 (1970) extends to all employers and their employees in all 50 states, the District of Columbia, Puerto Rico and other territories under federal jurisdiction. The law was enacted to ensure worker and workplace safety, with the intent to require employers to provide workplaces free from recognized hazards to safety and health, such as exposure to toxic chemicals, excessive noise levels, mechanical dangers, heat or cold or unsanitary conditions. The law is enforced by the Occupational Safety and Health Administration (OSHA), which is a division of the U.S. Department of Labor.

OSHA has enacted numerous regulations governing health and safety for construction activities. Any entity performing construction work within the United States or its territories must comply with OSHA regulations governing construction safety. See 29 CFR 1926. The OSHA standards for construction govern a diverse range of safety and health issues from safety training and education, to the types of personal protective and life safety equipment required. Careful review and compliance with these regulations is important, as substantial fines can be assessed for non-compliance.

In addition to OSHA, many states have enacted their own occupational safety and health laws. For example, Maryland has adopted the Maryland Occupational Safety and Health Act (MOSH Act) for all non-federal projects within the State of Maryland. Under the MOSH Act, all employers are required to comply with health and safety regulations adopted by the Maryland Department of Labor, Licensing, and Regulation — Division of Labor and Industry. These regulations closely mirror the Federal

Occupational Safety, but include a number of distinct substantive regulations. Failure to comply with MOSH regulations can result in significant daily penalties as well as criminal liability for willful violations.

Maryland is not unique. Many other states, such as Alaska, California, Hawaii, Indiana and the District of Columbia also have state health and safety plans governing construction projects. Knowing and understanding the obligations imposed upon employers through these regulations is critical to avoiding costly penalties that can undermine the success of a construction project.

Construction projects involving clearing, grading, excavation or demolition may require compliance with federal environmental regulations. In addition, if the Project will involve dredging or the discharge of fill material into a waterway or wetland specific sections of the Clean Water Act apply and strict compliance with those sections is required. Additional requirements under the Clean Air Act may apply to heavy-duty trucks used for construction and may require regulation of dust emissions at your construction site. Other requirements apply to the use of hazardous materials as well as to requirements mandating reporting of any spill of a hazardous chemical.

Most of the environmental requirements applicable to U.S. construction projects are regulated by the United States Department of Environmental Protection (US EPA). The US EPA has, however, delegated authority to states to regulate certain aspects of the Clean Air Act as well as other regulatory programs. Fines for non-compliance with environmental regulations can result in civil penalties and in some circumstances, even criminal liability.

As noted below, most jurisdictions have land use and zoning laws that must be adhered to. Knowing the applicable zoning laws and allowable uses for your property prior to commencing design and construction is imperative. Failure to comply with applicable zoning or land use laws can result in fines and, potentially, demolition of non-conforming work. Typically, these issues are addressed during the permitting phase of the project. At that stage the local permitting authority reviews completed construction drawings for compliance with building codes and land use and zoning laws prior to issuing a construction permit.

In the United States, there are numerous requirements that govern employment relationships for construction. For example, when performing construction work in the United States, it is common to encounter union labor. Special legal requirements apply when union labor is used. Even if union labor is not used, however, there are

several other employment requirements applicable to construction projects.

In 1935, the National Labor Relations Act (NLRA) was passed in the United States. The NLRA provides the framework and foundation for collective bargaining between unions and employers. Collective bargaining is the process by which an employer and a union negotiate wages, benefits and other terms of employment. The NLRA is administered by the National Labor Relations Board (NLRB). The NLRB has exclusive jurisdiction over certain labor disputes between an employer and a union including the right to investigate unfair labor practices, levy charges, bring cases and issue enforcement orders. The nuances relating to the use of union labor in the United States could fill an entire chapter of its own. Understanding the requirements imposed by the NLRA and the implementing regulations promulgated by the NLRB, however, is important if union labor will be used during any aspect of the construction process.

Other major employment laws applicable to construction in the United States include the Fair Labor Standards Act and corresponding state laws (e.g., Maryland Wage and Hour law), state wage payment and collection laws and the Davis-Bacon Act.

The Fair Labor Standards Act (FLSA) is a federal law that mandates minimum wage, overtime pay and youth employment protections. While the FLSA does exempt some employees (e.g., certain executive, administrative and professional employees) construction workers are typically non-exempt and covered by FLSA. As a result, construction employees are entitled to be paid at least a federal minimum wage as well as time and a half for all hours worked over 40 in a work week. Many states have also enacted their own wage and hour laws that are applicable to most construction employees. Maryland, for example, requires employers to comply with state minimum wage laws and provides an employee with a private cause of action against an employer for violating the law. Numerous other states have enacted similar laws. Failure to comply with FLSA or applicable state laws can result in significant penalties, significant damages, and in some instances having to pay the legal fees incurred by an employee to recover his or her wages.

Finally, the Davis-Bacon Act, and its corresponding regulations, mandates the wages paid for work performed on any federal construction project. The Davis-Bacon Act applies to all federal government or District of Columbia contracts in excess of \$2,000 for the construction, alteration, or repair of public works. See 49 U.S.C. Sec. 3141-3148. Under the Davis-Bacon Act, all contractors and subcontractors are required to pay

workers in accordance with the wage rates set by the Secretary of Labor. If a contractor fails to comply with the Davis-Bacon Act, the government can withhold payments due to the contractor under the contract. As with wage and hour laws, many states have enacted laws similar to the Davis-Bacon Act requiring contractors and subcontractors to pay prevailing wage rates on state construction projects.

The United States Department of Justice (DOJ) aggressively prosecutes bribery and corruption both within the United States and globally. The principal U.S. law governing bribery and anti-corruption is the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. Sec. 78dd-1, et seq. In addition, 18 U.S.C. Sec. 201 makes bribery of public officials and witnesses in the United States a crime.

Pursuant to 18 U.S.C. Sec. 201, it is a crime to directly or indirectly offer or promise anything of value to any public official or person who has been selected to be a public official with the intent to influence an official act or induce such person to do any act in violation of the lawful duty of such person. 18 U.S.C. Sec. 201(b). It is also illegal to directly or indirectly give or promise anything of value to a public official, former public official or person selected to be a public official because of an act performed by such person. See 18 U.S.C. Sec. 201(c). In short, contractors operating in the United States cannot bribe a public official or offer a gratuity after benefiting from an official act. While bribery is somewhat self-explanatory, what constitutes a gratuity is not always intuitive. Under United States law, an illegal gratuity is any gift to a public official *after* an official act occurred and does not require any *quid pro quo*. See *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999). Thus, to avoid criminal liability construction professionals should avoid making gifts to public officials in the United States. Otherwise, such professional expose themselves to potential criminal liability.

The FCPA prohibits offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business. The FCPA's provisions can apply to conduct both inside and outside the United States. Construction entities operating within the United States, even if not domestically incorporated, must be aware of, and comply with, the FCPA. This is because the FCPA applies to foreign nationals or entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment while in the territory of the United States or that involves interstate commerce

(this can be triggered by simply placing a telephone call or sending an email, text message or fax from to or through the United States or by sending a wire transfer from or to a U.S. bank). The law can also reach to officers, directors, employees, agents or stockholders acting on behalf of such persons or entities that are subject to the FCPA.

For example, in one recent case a vendor of air-conditioning, ventilation and refrigeration equipment and services supplier, through its subsidiaries, paid approximately \$522,500 to an intermediary who used the funds to pay certain government officials in the UAE. Payments were made to secure contracts related to the construction of a government-owned luxury hotel. Although vendor did not make any of the payments to the UAE officials itself, vendor knew that its intermediary was making the payments on its behalf to secure certain contracts. Vendor made similar payments to obtain contracts in Iraq, Bahrain, Egypt, India, Turkey, China, Nigeria and various other European and Middle Eastern Countries. The payments made by Vendor to its intermediary were recorded as "consultancy payments."

As a result of these payment, the U.S. Department of Justice and the U.S. Securities and Exchange Commission filed criminal and civil charges against Vendor. Those charges included violations of the FCPA's anti-bribery provisions, failure to devise and maintain internal controls to prevent and detect violations and failure to accurately record the bribes. Vendor paid \$10 million to settle the criminal charges and was required to engage an independent FCPA compliance monitor for a period of three-years. Vendor's settlement with the Securities and Exchange Commission included disgorgement of \$8,949,132 in profits, payment of \$1,083,748 in prejudgment interest and a civil penalty of \$2 million.

The United States prosecutes bribery and corruption cases aggressively. Construction professional operating in the United States must be sure to comply with such laws. This includes insuring compliance on projects outside the United States. Failure to comply with these laws can result in massive penalties, disgorgement of profits and criminal liability.

4. What permits/licences and other documents do parties need before starting work, during work and after completion? Are there any penalties for non-compliance?

Permit and licensing requirements vary by state and even locality (i.e., county, city, municipality, etc.).

Permits are required to ensure that construction projects satisfy local, state and federal codes and meet minimum health and safety requirements. Permits are required for any new construction and are also typically required for alterations to existing buildings. For example, any alteration to structural, plumbing, mechanical, or electrical systems typically require a permit. Owners are required to obtain proper permits prior to the start of construction. Owners can, however, delegate this duty to a construction manager, program manager, general contractor, design-builder or other authorized-agent.

The permit process in many U.S. jurisdictions overlaps considerably with land use regulations. Many U.S. jurisdictions have strict zoning requirements that dictate the allowable uses for commercial property. The first step in any construction project is to review applicable zoning requirements to ensure that the zoning for the project allows for the anticipated commercial use. Once land use requirements have been satisfied, most U.S. jurisdictions require a pre-plan review where the applicable building or regulatory agency reviews the anticipated development plan and identifies items that may need to be modified before final construction drawings are submitted for review and permitting. Once that process has successfully concluded, a building permit / construction permit / commercial permit is issued that allows construction to commence.

In addition to obtaining a construction permit for the project, many jurisdictions also require additional trade-specific permits. For example, additional permits may be required for mechanical, electrical and plumbing trades. Again, an owner is typically required to obtain such permits, but this duty can be delegated downstream to an authorized agent or even to a trade-specific subcontractor.

Additional permits may also be required under federal and state environmental laws. For example, the Clean Water Act requires that an owner obtain a permit for the discharge of storm water if construction will disturb one or more acres of land. If the project will require discharge of dredged materials (e.g., in connection with the construction of an in-water structure or marine wharf) a permit is required by Section 404 of the Clean Water Act. Depending on the type of Project, permits may also be required under the Clean Air Act as part of an effort to reduce pollution.

Once a permit is issued, inspections will be required at different milestones insure compliance with permit conditions and applicable building codes. Such inspections must be coordinated with the local permitting agency, and approval is typically required before further construction can proceed. Once the

project is complete a final inspection will be required to obtain a use and occupancy permit. The project cannot be used for its intended purpose until a use and occupancy permit is awarded by the permitting agency.

Depending upon the nature of the project, additional permits may be required. For example, permits may be required from the Federal Department of Transportation and/or the local transit authority if the project will have any significant impact on federal, state or local roadways. In addition, permits will likely be required in order to tie the project into municipal sewer and water lines. Storm water prevention permits and other sedimentation and erosion control permits may also be required.

Many states and localities also require contractors to obtain contractors licenses prior to performing construction work in that locality. Some U.S. jurisdictions also require that joint ventures obtain licenses prior to contracting for work. Likewise, professional engineers and architects are required to be licensed in any state where work will be performed. A professional engineer or architect typically cannot affix his or her seal to drawings for use in a construction project unless that professional engineer is licensed in the state where the work is to be performed. It must also be noted that the specific requirements placed upon professional engineers and architects differ considerably among the various states.

Failure to obtain proper permits and licenses can have devastating consequences for the owner and the project. If a permit is not obtained, the project can be shut down by the local building authority until proper permits are approved. If work performed without a permit fails to comply with applicable building codes, the local permitting agency can order the work to be demolished. In addition, failure to comply with zoning requirements can result in substantial fines and potentially having to demolish any work that does not comply with local land use laws.

It is also imperative that appropriate licenses are obtained. In most jurisdictions, unlicensed contractors and design professional are unable to get the permits required to commence construction work. If work is commenced, however, many jurisdictions prohibit unlicensed contractors and professional engineers from enforcing claims for unpaid work performed without a license. As a result, unlicensed contractors and professional engineers have no recourse for non-payment if services are provided in a jurisdiction where a license is required. In addition, some jurisdictions, like California, prohibit an unlicensed contractor or engineer from enforcing a binding arbitration clause.

5. Is tort law or a law of extra contractual obligations recognised in your jurisdiction?

The law of torts can create extra-contractual obligations for parties to a construction contract under certain circumstances. The most common method is when there is an instance of personal injury or property damage. In such instances, tort law applies and can result in unanticipated liability. There are means for limiting such liability, however, including through the use of indemnity provisions, warranty exclusions and the procurement of appropriate insurance to cover such risks. Proper contracting and insurance at the outset of a project are the most effective mechanisms for limiting potential tort liability.

In addition, some jurisdictions in the United States allow a party to sue for negligence or professional negligence even where a contract exists. Such lawsuits are not common, however, as many jurisdictions in the United States recognize the economic loss doctrine, which prohibits a party from suing in tort to recover for the breach of a contractual obligation. There are, however, exceptions to the economic loss doctrine.

Certain exceptions to the economic loss doctrine allow a party to sue in tort for money damages stemming from the breach of a contractual duty. For example, some states exempt any claim for professional negligence — i.e., a defective design, engineering calculation or even professional management of a project — from the economic loss doctrine. See e.g., *Municipality of Anchorage v. Integrated Concepts & Rsch. Corp.*, No. 3:13-CV-00063-SLG, 2016 WL 7109098, at *2-3 (D. Alaska Dec. 5, 2016). Some states allow a contractor or subcontractor to sue a design professional for professional negligence when that professional's work results in damages to the contractor or subcontractor. See *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 451 Md. 600, 610, 155 A.3d 445, 450-51 (2017). Other states allow such claims where the work creates a "serious risk of personal injury." *Id.*

Due to the wide variance in application of the economic loss doctrine, it is important to understand the local law when negotiating contract terms or preparing claims. Failure to account for the possibility of tort liability can have serious unintended consequences and open a construction professional to significant risk.

6. Who are the typical parties to a construction and engineering project?

The primary parties to a construction contract are the owner, construction manager, general contractor, design

professionals, subcontractors, and suppliers.

The owner is typically a developer, a governmental entity, or a private corporation or individual whose primary responsibility is to finance the construction and set the requirements and programmatic direction for the project. The owner does not typically self-perform the construction work. Instead, the owner contracts with either a construction manager, a general contractor, or both.

A construction manager acts as an advisor to the owner on various aspects of the project, including financing, design, construction, scheduling, purchasing, and budgeting, among others. Construction managers come in two forms, each defined by the risk being undertaken. On one hand, an "agency" construction manager (also called a "fee advisor") performs all the responsibilities of a typical construction manager without holding any of the contracts (i.e. without taking on the risk). On the other hand, a construction manager "at risk" advises the owner during the design phase of the project and then acts as a general contractor during construction by entering into subcontracts to perform the work (i.e. undertakes the risk by holding the contract).

A design professional such as an architect or engineer performs the design work on the project. In a design-bid-build project delivery method, the owner will enter into a contract directly with the architect/engineer to procure design services, as well as environmental and project management services. In a design-build project delivery method, the architect/engineer will be hired directly by the general (or "prime") contractor. Architects/engineers typically provide plans and specifications for the general contractor to follow when performing construction work.

A general contractor (also known as a prime contractor), is generally responsible for scheduling, directing and supervising the work. Although the general contractor may self-perform some (or all) of the work, the general contractor usually hires subcontractors to perform all of the work on most projects.

A subcontractor (or first-tier subcontractor) is generally hired by the general contractor to perform work in a certain trade (i.e., electrical, mechanical, masonry, plumbing, etc.). A sub-subcontractor (or second-tier subcontractor) is a subcontractor hired by the first-tier subcontractor to prosecute some specialty trade.

A supplier does not actually perform work on a project, but rather delivers materials and equipment to the project site.

7. What are the most popular methods of procurement?

The most common type of project delivery method in the United States is design-bid-build. Under this method, the owner first retains an architect to prepare design drawings and specifications, after which the owner puts those documents out for review and bidding by contractors. Contractors who place bids agree to construct the project in accordance with the design prepared by the architect. The lowest, most responsive bidder is generally selected by the owner. Both the architect and contractor have separate contracts with the owner, who exerts control over the design.

Another popular project delivery method is known as design-build. Under this method, the owner generates the concept and the programmatic requirements, and then contracts with a single entity (known as the "design-builder") to perform both the design and construction of the project. The owner benefits from the design-build method because it provides a single point of contact, minimizes risk for the owner, and expedites the design and construction phases of the project, which reduces the delivery schedule by overlapping those two phases. The contractor on the other hand takes on additional risk by contracting for both design and construction; however, such risk can be mitigated through contractual indemnity and insurance.

There are several other forms of project delivery which are lesser used, but nonetheless have important applications:

The design-build-operate-maintain method combines the design and construction responsibilities of design-build procurements with operations and maintenance. Generally used in heavy construction projects, the design builder is also required to operate and maintain the project upon completion, and is compensated with a portion of operating revenues subsequently generated.

The design-build-operate-transfer is the same as the design-build-operate-maintain, with the additional requirement that the design-build contractor is responsible for obtaining project financing. The design-builder is then paid from project proceeds upon completion, and once fully compensated, turns the project over to the owner.

The Construction Manager at Risk method involves both preconstruction and construction phases. The owner retains the architect to prepare design drawings and specifications. The owner also retains a construction manager to consult with the architect and manage the construction. As the architect is developing the design,

the construction manager is reviewing it and putting out to bid those portions of the design that are complete. The construction manager enters into contracts with subcontractors. This method allows construction to begin before the design is complete.

The Construction Manager Not at Risk method is nearly identical to the "at risk" method. The one key exception is that the owner, not the construction manager, enters into contracts with the trade subcontractors to construct the project.

8. What are the most popular standard forms of contract? Do parties commonly amend these standard forms?

The most popular standard form contract in the United States is produced by the American Institute of Architects ("AIA"). AIA publishes a wide range of contracts for small, medium, and large projects. AIA documents cover a large variety of contract types, including fixed-price, cost-plus, and design-build. The most commonly used AIA contract for large or complex fixed-price projects is A-101, while A-102 is used for large or complex cost-plus (time and materials) projects with a guaranteed maximum. Both A-101 and A-102 are accompanied by the General Conditions (A-201) which set forth the general conditions for the contract, including the rights, responsibilities, and relationships of the owner, contractor, and architect.

Aside from the widely used AIA contracts, ConsensusDocs, Design Build Institute of America ("DBIA") and Engineers Joint Contract Documents Committee ("EJCDC") publish the most common forms used in the United States. Most of these organizations draft the forms in part to protect the parties that they represent. For example, the Association of General Contractors ("AGC") publishes a series of standard form contracts that tend to favor contractors (The AIA contracts are considered to favor owners). For international projects, the International Federation of Consulting Engineers ("IFCF") and the International Chamber of Commerce ("ICC") offer forms that are frequently used.

Standard form contracts are typically amended by the parties during a negotiation process to protect the rights of both parties and to better align the contract requirements with the particular project being procured. For example, AIA contracts are written with the assumption that the owner has retained an architect to not only design the project, but to supervise construction and otherwise administer the contract. However, if the owner elects to use a construction manager to perform

these tasks, the standard language will need to be amended. Additionally, certain types of projects may not be suited for the standard allocations of risk in form contracts and need to be amended to add protective clauses and other carve outs to account for proper risk allocation. The most highly modified and scrutinized provisions include those clauses dealing with payment, notice, changes, termination, indemnity, and liquidated damages.

9. Are there any restrictions or legislative regimes affecting procurement?

There are no material restrictions or legislative regimes that affect private construction procurement. However, some states have enacted statutes that impact the rights and obligations of parties to a construction contract. For instance, some states prohibit certain kinds of contractual indemnification obligations, and some states also have statutes governing payment, such as the Prompt Payment Act. Where contracts contain provisions in conflict with state law, such provisions are considered void and unenforceable. Additionally, there are numerous state and federal statutory frameworks affecting public construction procurement.

10. Do parties typically engage consultants? What forms are used?

Consultants are routinely engaged by parties to a construction project to perform a variety of roles, often in a specialized capacity. Owners typically hire construction managers to provide advice on defining the programmatic requirements for the Project, including coordinating the design, administering the contracts, ensuring proper documentation and inspection of the work being performed. The Owner may retain other consultants including architects, engineers, and cost consultants.

Construction Managers are either “at risk” or not at risk. The Construction Manager at Risk method involves both preconstruction and construction phases. The owner retains the architect to prepare design drawings and specifications. The owner also retains a construction manager to consult with the architect and manage the construction. As the architect is developing the design, the construction manager is reviewing it and putting out to bid those portions of the design that are complete. The construction manager enters into contracts with those subcontractors. This method allows construction to begin before the design is complete. The Construction Manager Not at Risk method is nearly identical to the “at Risk” method, with the key exception being that the

owner, not the construction manager, enters into contracts with the trade subcontractors to construct the project.

11. Is subcontracting permitted?

Subcontracting in the United States is permitted and frequently utilized. Most general contractors lack experience or expertise in a specific trade for which it must provide services as part of the overall project. Subcontracting also provides a way to reduce costs or to mitigate risk. Among the benefits, subcontractors are generally less expensive than hiring full-time employees, subcontractors warrant the services they provide, risk can be transferred through a subcontract, and subcontracts can be easily terminated. Subcontracts often contain “flowdown” provisions, allowing the terms of the principal contract to flow down through the subcontract to the subcontract. This makes the subcontractor liable to the contractor for the same things for which the contractor is liable to the owner.

12. How are projects typically financed?

Most private projects are financed through bank debt. In these situations, the owner or developer secures private financing to undertake and complete the Project. There are instances where public funds can be used to finance private projects, for example through low income housing credits, but such funds typically come with significant conditions. In addition, some state and local governments provide tax credits for certain projects.

Public projects are financed through state or federal funds. Typically, a state or federal agency procuring the construction work cannot contract for that work without appropriated funds. Public funding can come from tax revenues or from special bonds issued to finance the project.

In some instances, state and local governments have turned to public private partnerships (P3s) to develop and construct major projects. For example, Maryland recently enacted legislation authorizing the largest P3 project in the United States. The project will provide for the construction of a major highway. In a typical P3 situation, the government contracts with a private entity who pays for the construction of the project. In return, the private entity operates the asset making revenue from operation of the asset. For example, the Maryland project will include construction of express toll lanes, which the private entity will operate and from which it will retain a portion of the toll revenue.

13. What kind of security is available for employers, e.g. performance bonds, advance payment bonds, parent company guarantees? How long are these typically held for?

The most common types of security used to guarantee performance in the United States are surety bonds. Surety bonds for construction projects typically include payment and performance bonds. Payment bonds assure the owner that subcontractors, material suppliers and others downstream from the owner's contractor will be paid for work performed or for materials supplied. A performance bond guarantees an owner that the contractor will perform the contract in accordance with its terms and conditions. Payment and performance bonds usually have strict time requirements for claims, and often expire at the completion of the project or when the warranty period is reached. Typically the cost for obtaining the bonds is included in the contract price and passed onto the owner.

The other common type of security used in the United States to guarantee performance of a contract is a parent company guarantee. A parent company guarantee, as the name implies, requires that the ultimate parent company guarantees the prompt performance of the contractor's contractual obligations. This gives the owner additional assurance that any defects or delays in the contractor's work will be promptly corrected or addressed. The benefit of a parent company guarantee over a surety bond is that the parent company's liability is concurrent with the contractor's liability under the contract. That means that claims can be brought against the parent company as long as they are timely under the applicable statute of limitations (unless otherwise modified by contract).

In addition to these types of security, a less common type of security that is occasionally used in the United States is Subguard. Subguard is an insurance policy originally developed by Zurich North American Insurance Company that shifts the risk of subcontractor default from the contractor to an insurance company. Unlike surety bonds, Subguard policies are procured for an entire project and cover all the subcontractor trades working on the project. Subguard policies are typically claims-made policies, meaning that any claims for defective workmanship must be made during the policy term. While Subguard is sometimes used on private projects, surety bonding is required for any public project in the United States.

14. Is there any specific legislation relating to payment in the industry?

On public projects in the United States, Congress has imposed on agencies an obligation to pay every "proper invoice" within 30 days after its receipt. Under the Prompt Payment Act, an agency that fails to pay within the required time will be liable for interest on the delinquent payment. Furthermore, while the invoice must be "proper" in order to trigger the Prompt Payment Act requirements, an agency may not impose unreasonable requirements on its submission.

Many states have adopted their own version of the Prompt Payment Act that provides contractors or subcontractors who do work or furnish materials under a contract to prompt payment for materials or services provided. This type of statute is considered a corollary to a state's mechanic's lien law. The amount must be "undisputed," i.e., there is no good faith dispute over the amount owed. Monies withheld by the owner or by an upstream contractor that are the subject of a dispute do not fall within the statute.

15. Are pay-when-paid clauses (i.e. clauses permitting payment to be made by a contractor only when it has been paid by the employer) permitted? Are they commonly used?

A "pay when paid" clause is a contract clause that states that the contractor is obligated to pay its subcontractors only following receipt of payment from the owner. General contractors in the United States routinely include such clauses in their subcontracts to avoid cash flow problems by only triggering payment to subcontractors when the contractor is paid by the owner. Thus, if the owner delays payment for four months, the general contractor is not obligated to pay its subcontractors until payment is actually received. Many courts view such a clause as a "timing mechanism," whereby payment by the owner triggers the timing of when the general contractor must pay its subcontractors. Conversely, if the subcontract does not contain a pay when paid clause, then the subcontractor must be paid within a "reasonable" period of time.

A pay-when-paid clause is generally viewed upon as favorable to subcontractors because the general contractor is deemed obligated to pay the subcontractors even if the owner defaults. A similar yet different type of clause is known as a "pay-if-paid" clause, which shifts the entire risk of owner non-payment to the subcontractor. Thus, under a pay-if-paid clause, subcontractors are paid only if the contractor receives

payment from the owner. Both types of clauses are routinely included in construction contracts.

16. Do your contracts contain retention provisions and, if so, how do they operate?

Most construction contracts in the United States contain retention provisions, whereby a certain percentage of the amount certified as due and owing to the contractor is deducted from the payment amount, and retained by the owner. Typical retention provisions require the release of retainage to the general contractor upon substantial completion, less the estimated cost as determined by the owner or architect to complete any "punch list items" (small items that need to be completed, but do not interfere with the owner's use and enjoyment of the project). General contractors may also apply retention to their subcontractors in the same manner. The purpose of retention is to ensure that the contractor properly completes the requirements under the contract. The amounts retained typically range from 5-10% depending on the type of project, although many states have enacted statutes limiting the amount of retention that can be withheld.

17. Do contracts commonly contain delay liquidated damages provisions and are these upheld by the courts?

Liquidated damages provisions are commonly used in construction contracts in the United States. Liquidated damages represent an amount of money that the contracting parties agree represents an estimate of the damages a party will sustain if the contract is breached. In construction contracts, liquidated damages most commonly apply when the contractor breaches the contract by not completing the work on time. A formula is generally employed to compute how much a contractor owes for failing to complete on time. For example, the prime contract might provide that the contractor must pay the owner \$1,000 for each calendar day that the contractor misses the date for substantial completion. Conversely, contractors may encounter unforeseeable delays beyond their control (often called "excusable delay"). Rather than being assessed liquidated damages, a contractor is generally permitted a time extension, which will not trigger liquidated damages.

Liquidated damages clauses provide advantages to both parties by setting the amount of damages for breach – an owner knows how much it will be compensated, and a contractor knows how much exposure it has in the event of late completion. Liquidated damages also provide

certainty for either party in situations when proving the amount of actual damages due to late completion proves difficult. Generally, if the owner stipulates to an amount of liquidated damages that are lower than what is later determined to be its actual damages, the owner has forgone the right to pursue a claim for actual damages.

Although commonly found in construction contracts, the enforceability of liquidated damages provisions is very unpredictable. To be enforceable, the clause must contain various elements. The actual damages must be difficult to quantify, the amount must be agreed upon in advance (i.e. liquidated), the amount must be reasonable, the amount must serve as compensation and not act as a penalty, and the remedy must be exclusive. Most of the litigation involving the enforceability of liquidated damages provisions revolves around the "reasonableness" of the amounts sought using the formula employed in the contract, as well as whether the provision acts as a penalty imposed on the breaching party.

18. Are the parties able to exclude or limit liability?

Many construction standard form contracts contain provisions shifting or limiting the parties' risk, generally known as "exculpatory clauses." An exculpatory clause is one that relieves a party from liability resulting from a negligent or wrongful act. Generally, exculpatory clauses in contracts are disfavored under the law of most states, and such contract provisions are strictly construed against the party claiming the benefit of the clause.

A Limitation of Liability ("LOL") clause is a type of exculpatory clause commonly found in services contracts. An LOL clause generally establishes the maximum liability or exposure of the design professional if there is a claim. The purpose of the clause is to recognize the proportional role of the professional service provider in the project and limit their liability according to the level of compensation received.

In order to contractually limit damages for a party's future conduct, the contractual language at issue must be:

1. clear,
2. unambiguous,
3. unmistakable,
4. conspicuous, to be enforceable.

While a contractual clause limiting the amount of damages that may be recovered for the acts of a party (LOL clause) in contrast to one that totally exonerates a party from its future conduct (exculpatory clause) are

not exactly the same, both clauses are generally referred to by courts as “exculpatory clauses.”

Courts are reluctant to enforce contracts that relieve parties from the effects of their future acts. Such clauses, although not per se against public policy, have resulted in states enacting anti-indemnity statutes which hold such clauses void and unenforceable. However, where the parties to a contract are sophisticated business entities who deal at arm’s length, courts will generally enforce a Limitation of Liability clause to protect design professionals, especially when the damages are purely economic.

19. Are there any restrictions on termination? Can parties terminate for convenience? Force majeure?

An owner or general contractor can generally “terminate” a contract, subject to the language in the parties’ contract. The same rights are generally not afforded to a contractor or subcontractor (although either can “abandon” a contract upon breach by the owner or general contractor). There are two types of terminations:

1. terminations for convenience, and
2. terminations for default.

Termination for convenience allows the owner/general contractor to stop the work for mostly any reason without having to pay for anticipated profit or unperformed work. In contracts, a termination for default allows the owner/general contractor to procure alternative performance at the contractor/sureties/subcontractors’ expense.

A termination for convenience (“TforC”) clause affords the owner or general contractor the flexibility to alter its course, and eliminate unnecessary expenditures without repudiating its performance or materially breaching the contract. If the contract does not contain a TforC clause, the owner/general contractor can still terminate but would likely have exposure for breach of contract. The federal government on the other hand has the ability to terminate for convenience even if the contract does not expressly provide for it.

As far as limitations, an owner/general contractor cannot exercise a TforC clause in bad faith or when abusing its discretion. Courts have found that where a contractor is terminated for reasons unrelated to the performance of the contract, the termination was a pretext for breaching the contract and the contractor would be entitled to its lost anticipated profits. In the federal contracts, the government may have to demonstrate some “changed

circumstances” as a precondition to terminating the contract for convenience. The court may also apply a heightened scrutiny when private TforC clauses are employed to terminate a contractual relationship.

A termination for default (“TforD”) clause is exercised by the owner/general contractor when the downstream party fails to fulfill some material element of the contract. Typical examples include: failure to meet the completion date; failure to make progress; failure to make payment to subcontractors, lower-tier subcontractors, and suppliers; failure to repair or replace faulty or defective work; disregard of laws, ordinances, rules, or other regulations; filing for bankruptcy; or otherwise materially breaching a term of the contract/subcontract.

TforD clauses allow the owner/general contractor to procure alternative performance at the contractor/sureties/subcontractors’ expense. Such clauses act as forfeitures and are therefore heavily scrutinized by Courts. Written termination notices must identify the grounds for default, provide the contractor/subcontractor with a period of time to “cure” the default, and provide the default remedies.

Contracts may also be terminated for frustration of purpose when circumstances that are not the fault of either party render it impossible to continue with the contract. The contract will come to an end without any party being considered to be in breach. A typical frustration of purpose provision is a force majeure clause, which frequently addresses “acts of god” such as adverse weather. However, force majeure clauses typically do not result in terminations of the contract (although they can), but rather qualify as a relevant event that allows for an extension of time for the contractor.

20. What rights are commonly granted to third parties (e.g. funders, purchasers, renters) and, if so, how is this achieved?

Contracts in the United States typically do not provide for third-party beneficiary rights. In the event that parties to a contract do want to give rights to third-parties, U.S. law requires that such intent be clearly expressed in the contract. Express third-party beneficiaries have the same rights to enforce the contractual promises in the contract as the original contracting parties.

Third-party rights can also be created incidentally in construction contracts. The potential for incidental third-party beneficiaries varies by state with most state court

holding that downstream contractors, subcontractors and material suppliers are not third-party beneficiaries to contracts between a general contractor and an owner. Most courts have a strong presumption against incidental third-party rights, and expect any third-party rights to be expressly granted in the contract.

21. Do contracts typically contain strict provisions governing notices of claims for additional time and money which act as conditions precedent to bringing claims? Does your jurisdiction recognise such notices as conditions precedent?

Standard form construction contracts in the United States generally provide a framework for the Contractor to give notice to the relevant party administering the contract of a claim or change event that gives rise to possible additional entitlement for time and/or costs. Contractual notice provisions are critical to the claims process by triggering the contractor's rights to pursue additional contractual entitlements based on known conditions. Thus, the act of providing notice imparts fairness into the contract, whereby the owner is placed on notice of changed circumstances or conditions that trigger relevant contract provisions, and permit the owner a timeframe in which to respond.

Contract notice provisions typically provide a defined time frame, which can vary between contract forms. Generally, most notice provisions range from 7 to 15 days. Contractors favor longer notice periods, while owners favor shorter periods. The defined time frames are frequently a source of pre-contract negotiation, as both the owner and contractor want to employ notice provisions that are advantageous to their position without limiting any rights. Thus, any notice provisions less than 7 days are usually modified during negotiation, as the shorter the time to act, the more unreasonable the provision. Strict enforcement of notice provisions can vary among states, with some states applying a strict construction and other states taking a more liberal stance where fairness considerations are present.

22. What insurances are the parties required to hold? And how long for?

Parties to a construction contract often procure multiple types of insurance coverage to account for different types of risk. These insurance products fall under either first party coverage or third party coverage. First party coverage applies to and protects an organizations own physical assets, such as equipment, buildings, and personal property. Third party coverage, also known as

liability or casualty insurance, covers the insured's liability for damages to third parties.

A typical first party insurance is known as Builder's Risk insurance, which covers loss or damage to the work during construction, including losses arising from the negligence of contractors and other acts of god. Builder's Risk is often provided on an "all risk" basis, which means that all risks of physical loss or damage to property is covered, unless otherwise excluded. Other types of first party coverage typically carried are Worker's Compensation insurance, which covers injuries to employees suffered in the course of their employment, and Automobile Liability insurance, which covers parties who may be traveling to the construction site. Owner's generally procure Builder's Risk, while contractors generally procure Worker's Compensation and Automobile Liability insurance.

A typical third party insurance is Commercial General Liability ("CGL") insurance, which protects the insured against third-party claims and lawsuits for bodily injury or property damage arising out of its business operations. Another type of third party insurance is professional liability coverage (also called Errors & Omissions coverage), which covers losses arising from services deemed "professional" in nature, such as architects and engineers. The difference between a CGL policy and a professional liability policy is that the latter covers purely economic losses, while the former only covers claims for bodily injury or property damage.

Parties may procure other types of insurance not automatically provided for in the aforementioned types of coverage, such as coverage for environmental and pollution exposure, land acquisition, financing, zoning, and other aspects of construction, although these policies tend to be more expensive.

The length of the policy period can vary, but is generally the anticipated length of the project or the duration of the contract period. Sometimes policies are required for longer durations to cover warranty periods or claims periods for defective workmanship.

23. How are construction and engineering disputes typically resolved in your jurisdiction (e.g. arbitration, litigation, adjudication)? What alternatives are available?

Construction and engineering disputes in the United States can be resolved through litigation or through alternative dispute resolution (*i.e.*, mediation or arbitration). Most disputes are handled through either

administered or non-administered arbitration and there are numerous different arbitration rules commonly used in construction contracts in the United States (e.g., American Arbitration Association, JAMS, International Institute for Conflict Prevention and Resolution or International Chamber of Commerce). The benefit to using arbitration in the United States is the ability to obtain a decision maker knowledgeable about construction and, in many instances, the ability to shorten the time for a decision on the claim. Stepped disputes clauses are typical in U.S. construction contracts, often requiring direct party-to-party negotiations and mediation prior to commencing litigation or arbitration.

Other alternative dispute methods exist in the United States, such as mini-trials or early neutral evaluations; however, these alternative dispute methods are infrequently used in the construction industry. Beside mediation and arbitration, most claims are handled by litigation in the state and federal courts.

24. How supportive are the local courts of arbitration (domestic and international)? How long does it typically take to enforce an award?

The United States recognizes, and its courts will enforce, foreign arbitral awards pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention). The New York Convention was incorporated into U.S. Law through Chapter 2 of the Federal Arbitration Act (FAA). See 9 U.S.C. Sec. 201, et seq. In order for the award to be enforceable in the United States, the arbitral award must be final and binding on the parties in the foreign country where the award was rendered. U.S. courts look to the law of the foreign country where the award was rendered in determining whether the award is enforceable and final. U.S. courts will not, however, enforce an arbitration award if the scope of the arbitration award exceeds the scope of the agreement to arbitrate or where the party against whom the award was issued did not receive proper notice of the proceedings or was not afforded an opportunity to present its case.

U.S. courts also recognize and enforce domestic arbitration awards. Like international arbitration awards, enforcement of domestic arbitral awards is governed by the FAA. The only instances in which U.S. courts refuse to enforce arbitral awards is when the award was procured through fraud, where there is evidence the arbitrators were not impartial, where the arbitrators were found guilty of misconduct or where the arbitrators

exceeded their powers. The party opposing enforcement of the arbitration award bears the burden of proving the award should not be enforced.

The FAA provides the framework and procedures for the enforcement of arbitration awards in the United States. In order to enforce an arbitral award, the party seeking enforcement must commence a petition or motion to confirm the award in either the state or federal courts. These proceedings are intended to be summary in nature, thereby speeding the enforcement process. Nevertheless, the timing for enforcement varies considerably in the United States depending upon the forum in which the enforcement action is brought. In most cases, the time between filing the enforcement action and confirmation of the award can take between several months to over a year. Enforcement proceedings must be commenced within three years of the award. See 9 U.S.C. Sec. 207

25. Are there any limitation periods for commencing disputes in your jurisdiction?

State law governs the limitation period for commencing a construction dispute in the United States. As a result, the time limitations for commencing construction claims vary from state to state. Construction professionals must be aware of the specific statutory limitation periods for bringing a claim in each state in which work is performed. Failure to commence a dispute within the time permitted will forever bar the claim.

In addition, some states allow parties to modify certain limitations periods by contract. For example, certain AIA Form Contracts set the time period within which a party may bring a claim for defective construction. Courts in some states, such as California and Illinois, have ruled that contractual limitations periods are enforceable. Construction professionals operating in the United States should be mindful of their ability to curtail the uncertainty of claims by contractually reducing the limitations period for asserting claims.

26. How common are multi-party disputes? How is liability apportioned between multiple defendants? Does your jurisdiction recognise net contribution clauses (which limit the liability of a defaulting party to a "fair and reasonable" proportion of the innocent party's losses), and are these commonly used?

Multi-party disputes are common in the United States. For example, it is not uncommon for an owner asserting

a claim for defective work to sue both the contractor and the designer for the same scope of damages. Likewise, claims can be asserted against multiple parties for delay damages where there are multiple concurrent delay events resulting in the assessment of liquidated damages or delays to substantial and final completion.

While multi-party disputes are common in the United States, the use of net contribution clauses is not. In fact, depending upon the nature of the claim the methodology for apportioning liability will depend upon the state where the dispute proceeds. For example, in the tort arena every state has adopted a different methodology for apportionment of liability. Some states, such as Maryland and Virginia are pure joint and several liability states. That means that plaintiffs prevailing against multiple parties on tort claims can recover the full amount of their damages from any one of the parties. Other states, such as Georgia and Kansas, have adopted pure several liability meaning that each party is responsible to pay for only its portion of the awarded damages. As with most other issues in the United States, the answer as to how liability will be apportioned will be dictated based on the location of the dispute.

In the context of breach of contract actions, most courts hold that a party is responsible for all the damages resulting from its breach. Moreover, most courts reject comparative fault in a breach of contract claim. As a result, a party who breaches its contract will be responsible for all of the damages sustained regardless whether there are multiple concurrent breaches by other parties. Some states have ameliorated this sometimes harsh result by adopting legal standards, such as the substantial factor test, that look for the most culpable party who caused the damages. Such rules are, however, the minority view in the United States.

27. What are the biggest challenges and opportunities facing the construction sector in your jurisdiction?

The impact of COVID-19 continues to be felt in the construction industry, primarily in the form of supply chain shortages. Shortages of materials such as lumber and steel have delayed construction of new residential homes. As a result of these material shortages, supply is not meeting demand resulting in increased prices in the housing market. Supply chain shortages are also having an impact on commercial and civil construction projects as lead times for material increase and costs for labor and material escalate. Material shortages and escalation for labor and material will be a major issue in the industry in the coming year.

In addition, the construction industry in the United States continues to deal with a shortage of skilled labor. During the last economic downturn, the construction industry in the United States shed a substantial number of jobs, and those workers did not return to the industry. In addition, the construction labor force in the United States is aging out, and younger workers are not filling those vacancies. At the start of 2022 this remained a major challenge for the construction industry, and likely will continue to be a challenge for the foreseeable future.

There is, however, reason to be optimistic about the U.S. construction industry in the coming years. In November 2021, President Biden signed the \$1 trillion Infrastructure Investment and Jobs Act into law which is intended to rebuild America's roads, bridges and rails, expand access to clean drinking water, ensure every American has access to high-speed internet, tackle the climate crisis, advance environmental justice, and invest in communities that have too often been left behind. The legislation is designed to help ease inflationary pressures and strengthen supply chains by making improvements to ports, airports, rail, and roads, in addition to creating an average 1.5 million jobs per year for the next 10 years. The construction industry will be a major beneficiary of this legislation via an influx of federal money into domestic infrastructure projects.

28. What types of project are currently attracting the most investment in your jurisdiction (e.g. infrastructure, power, commercial property, offshore)?

With passage of the Infrastructure Investment and Jobs Act, there is significant investment in infrastructure and heavy civil projects in the United States. In particular, there is a lot of investment in airports, bridges, tunnels, rail, ports and roadways. Several of these larger projects, particularly those involving airports or toll roads, are turning to public private partnerships (P3) to finance and deliver the project. We anticipate that this trend will continue as public dollars are made available to fund large infrastructure projects. Industrial and power projects also continue to attract significant investment in the United States, and this is expected to continue as energy independence becomes a renewed focus.

29. How do you envisage technology affecting the construction and engineering industry in your jurisdiction over the next five years?

The use of technology in the design and construction of projects will continue to increase in the United States in

2022 and beyond. For example, Building Information Modeling (BIM) has steadily increased over the years, and looks to further expand in the coming years. BIM provides for the creation and management of 3D building data during the design and construction process, which allows for a better understanding of how components of the project will integrate and work. BIM is used for design purposes, but also for identifying changes and modifications that can result in significant project cost savings. Artificial Intelligence (AI) continues to evolve and will likely impact the construction industry in the years and decades to come. AI has the potential to help contractors prevent cost overruns, design better buildings, mitigate risk, increase productivity, and address labor shortages, among other things.

The use of Virtual Reality (VR) and augmented reality are integrating into the construction industry and their use is likely to increase in the next five (5) years. Contractors

in the U.S. have used VR to provide owners and stakeholders with a way to immerse themselves in project environments. VR has been used for planning and design phases on several major hospitality and entertainment projects in the United States. In addition, 4D environments allow contractors to fully plan every aspect of their projects, which allows for improved safety, efficiency and can lead to a better final outcome.

In addition to these technological developments, we also anticipate seeing a continued increase in the use of prefabrication. While prefabrication is not a new technology, advances in prefabrication technology are drastically increasing the benefits of prefabrication. Other technological advances have also improved the prefabrication process and provided greater visibility into the process. Given that labor shortages are anticipated to continue in the construction industry for the next several years, the use of prefabrication is likely to increase in the near term.

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