PITFALLS WITH CONSTRUCTION PROJECTS AND HOW TO PREVENT THEM

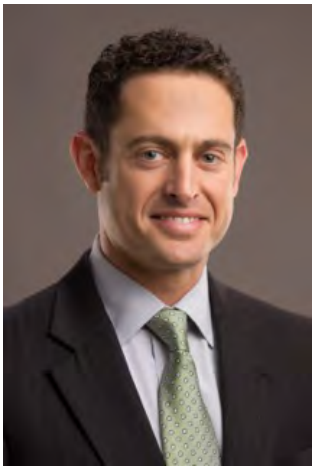
JEFFREY S. CHAPMAN, *Austin*
The Chapman Firm

State Bar of Texas
32ND ANNUAL
ADVANCED GOVERNMENT LAW
July 30-31, 2020

CHAPTER 17

Jeffrey S. Chapman

Jeff practices construction law exclusively.



While Jeff is proud to call Austin home, he is known across the state and represents clients throughout Texas. He represents owners and contractors in transactions and disputes. While he enjoys a broad practice many types of construction projects, the vast majority of his practice involves civil, industrial, commercial and municipal construction.

He has signi cant experience in the negotiation, management, and dispute resolution on Construction Manager at-Risk (CMAR), Design-Build and other alternative delivery methods. In his transactional practice, Jeff assists clients with drafting and negotiating the full range of contract documents for design and construction, including procurement packages, contracts, subcontracts, purchase orders, and bonds. Jeff also serves as general counsel or special counsel to his clients and continues to assist them with project management and project administration following the initial contract phase of projects. Jeff's dispute work and experience includes performance and payment disputes, delay claims, defect litigation, surety law and contract award controversies.

On a Personal Note

An endurance sports enthusiast since 2005; Jeff competes in both on and off-road triathlons of all distances. He has completed 3 ironman triathlons, with a personal best of 11:13:26. He has also run marathons. Jeff and his wife Robin enjoy skiing, mountain biking, travel and live music. They make a point to attend the Austin City Limits Music Festival each year. They have three young sons who like to ski and ride bikes like their parents.

Statewide Construction Law

- civil, industrial, commercial and municipal construction projects
- negotiation, management, and dispute resolution

Transactional Experience

Drafting and Negotiating the full range of contract documents for design and construction, including:

- contracts
- subcontracts
- purchase orders
- bonds

Dispute Experience

- performance and payment disputes
- delay claims
- defect litigation
- surety law
- contract award controversies

Representative Experience

Mr. Chapman recently completed a series of matters where he represented municipal clients in contractor default and performance bond disputes. Two of these disputes resulted in litigation where Mr. Chapman was able to successfully resolve the matters prior to trial in settlements that allowed the municipal clients to complete the projects and cure the contractor defaults. On two other projects, Mr. Chapman was able to negotiate settlements that compensated the municipalities and facilitated the repairs required while avoiding litigation entirely.

Mr. Chapman represented a general contractor on a delay claim involving the construction of a multi-train wastewater treatment plant. In the representation, Mr. Chapman assisted the client in the preparation and presentation of the delay claim to the owner, a municipal utility district. Ultimately, Mr. Chapman secured a favorable settlement for the general contractor client from the owner through alternative dispute resolution activities prior to trial.

Awards

Jeff was named a Texas *Super Lawyer* in 2013-2019 and has also been named a Texas *Super Lawyer* "Rising Star" in the area of Construction Litigation and Construction/Surety Law for 2005, 2008-13 as reported in Super Lawyers magazine; Thomson Reuters.

Jeffrey Chapman

BOARD CERTIFIED
Texas Board of Legal Specialization
CONSTRUCTION LAW

Education

J.D., University of Texas at Austin (2001)
B.A., Political Science, Emory University (1998)

TABLE OF CONTENTS

POWERPOINT PRESENTATION –
Pitfalls with Construction Projects and How to Prevent Them 1

Pitfalls with Construction Projects

And How to Prevent Them

Jeff Chapman
The Chapman Firm PLLC
3410 Far West Blvd.
Suite 210
Austin, Texas 78731
512.872.3840
jeff@chapmanfirmtx.com

Scope of Work Disputes

- Define “Contract Documents” and “the Work"
- Description of The Work – should be accurate, comprehensive, detailed
- Permit changes, modifications consistent with Design Intent
- Address imperfections in technical documents by requiring Contractor to execute the Work and other items “reasonably inferable from Contract Documents”
- Require Contractor to promptly report errors, omissions, inconsistencies, nonconformities – or waive claims if not done

Concealed Site Conditions

- Require Contractor to study Contract Documents & visit site
  - confirm ability to perform
  - Thorough site inspection – identification of underground impediments
- Provide geotechnical report but disclaim warranty by Owner
- *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 811-12 (Tex. 2012).

Change Order Disputes

- Owner must be able to order changes to the Work
- Written and approved Change Orders
- Define allowable costs and mark-up for change orders
- Construction Change Directives
  - Define methods for payment and direction of Work

Delay Claims

- Contractors may contractually agree to waive the right to seek damages unless the delay:
  - was not intended or contemplated by the parties
  - resulted from owner's fraud, misrepresentation, or bad faith
  - is so unreasonably long that abandonment would be justified
  - is not within the specifically enumerated delay to which the clause applies
  - is the result of the owner's active interference or wrongful conduct

No Damages for Delay Clause

- *Zachry Construction Corp. v. Port of Houston Authority*, 449 S.W.3d 9, 103 (Tex. 2014).
  - Contractor shall receive no financial compensation for delay or hindrance to the Work. In no event shall the Owner be liable to Contractor or any Subcontractor or Supplier, any other person or any surety for or any employee or agent of any of them, for any damages arising out of or associated with any delay or hindrance to the Work, regardless of the source of the delay or hindrance, including events of Force Majeure, AND EVEN IF SUCH DELAY OR HINDRANCE RESULTS FROM, ARISES OUT OF OR IS DUE, IN WHOLE OR IN PART, TO THE NEGLIGENCE, BREACH OF CONTRACT OR OTHER FAULT OF THE OWNER. Contractor's sole remedy in any such case shall be an extension of time.

Losses Incurred from Delays

- Evaluation of delay
- Delays have 4 categories
  - Excusable
  - Non-excusable
  - Compensable
  - Non-compensable
- Claimant has burden to utilize an accepted method of delay analysis
- Projected vs. Incurred
- Critical Path delay

Tools to Limit Impact of Delay

- “Time is of the essence” – for all time periods in the Contract Documents
- Require contemporaneously notice of delay
- Incentives or bonuses for early completion
- Force Majeure – cite cases that defer to contractual language
- Limit remedy for delay – time extension
  - Equitable Adjustment??? Window for claims

Liquidated Damages

- Requires careful draftsmanship
  - Identify milestone trigger
  - Evaluate and identify contemplated damages – per diem
  - Not a penalty, damages inherently difficult or impossible to estimate
  - *Belfiore Developers, LLP v. Sampieri*, No. 01-17-00847-CV, 2018 Tex. App. LEXIS 1671, at *23-24 (Tex. App.—Houston [1st Dist.] Mar. 6, 2018) – must be reasonable estimation of damages pre and post contract/completion
- Contractors favor LD's – quantifiable risk

Consequential Damages Claims

- Mutual waiver?
  - Owners give up more than Contractor
  - More than generally anticipated – on public and private projects
- Define "consequential damages
  - Expressly identify each category waived
  - Exclude categories –Owner's delay damages, rental or other revenue, debt service, consultant and attorney's fees, lost productivity, third-party claims or related costs

Completion and Close-Out Challenges

- Substantial Completion, Final Completion and associated time must be addressed in Contract Documents
- Close-Out Provision identify requirements
- Compliance with above express condition precedent to payment
  - Certificate of Occupancy & Certificate of Substantial & Final Completion
  - Commencement and assignment of warranties/warranty bond
  - All Bills Paid Affidavit/Lien Releases
  - O&M Manuals
- Detail component of Final Payment – rightful withholdings, compensation for acceptance of nonconforming work, retainage, all remaining contract sums
- Acceptance of Final Payment = Contractor's Waiver of All Claims

Defective or Non-Conforming Work

- Express warranty that Contractor's Work Will Be:
  - good and workmanlike,
  - In strict accordance with the Contract Documents,
  - Free from defects (not inherent in the quality required or permitted).
- Identify term and commencement of warranty
- Owner's can accept (with deduction), direct cure, self-cure, back-charge

Note re: Prohibition on Contracts with Companies Boycotting Israel

- April 2019 – Temporary injunction against Tex. Gov't Code § 2271.002 on 1A Grounds. *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717 (W.D. Tex. 2019).
- May 2019 – Amended. Only state contracts with companies (not sole proprietorships, more than 10 employees & contract exceeds $100,000
- April 2020 – 5th Circuit: challenge was moot because 2019 amendments narrowed 2271.002 application & no longer applied to *Amawi* plaintiffs, dodging the constitutional question

Questions ?