**Construction and Design Law: Managing the Network of Interdependent Relationships**

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**Lesson 9: Payment Issues**

Because construction projects typically involve multiple participants performing work and services over an extended time, the payment process requires careful management, and it sometimes leads to disputes. As we observe so frequently in the construction industry, considerations stemming from different perspectives dominate. To the extent that those who perform work and services or who supply materials and equipment do not receive payment in advance, their contributions temporarily become part of the project’s financing. As a result, they face cash flow challenges, and they incur risks of payment delays and defaults. Owners want to condition payment on progress toward completion of the work that is in accordance with plans and specification and that is on time and within budget. The circumstances, however, make it difficult to determine the quality of construction and whether the project will meet its schedule and budget requirements, Owners also want assurance that the payments they make flow down on time to subcontractors and suppliers and then on to lower tier participants. The construction lender needs to assure that the value of the work in progress at any time exceeds the total loan amount disbursed, and they want safeguards to protect against potential construction liens.

With these considerations as background, read the following authorities:

* Sections 8:1-8:3, 8:18, 8:52-8:58, 8:70, 8:89, and 8:150 in volume 3 of *Bruner & O’Connor on Construction Law* (Westlaw Aug. 2023), by Phillip L. Bruner & Patrick J. O’Connor, Jr.

As these sections explain, statutes, regulations, and judicial controls apply to many aspects of the payment process, including the owner’s ability to withhold some funds pending completion (retainage), the timing of payments, construction lien rights, and the enforceability of conditional payment provisions. Section 8:150 provides an extremely general introduction to mechanics’ (construction) lien laws. While this lesson is not the place to learn about this complex topic in detail, it is important to recognize that the prospect of construction liens represents a serious risk that owners and construction lenders must consider as part of the payment process. Although the details vary from one jurisdiction to another, valid and properly perfected construction lien ultimately can result in a judicially forced sale of the property subject to the lien so that the sale proceeds can be applied against the lien claim.

* Article 9 of the AIA’s A201 (2017), “General Conditions of the Contract for Construction.”.

The AIA’s payment process reflects a common approach for projects using fixed pricing or a guaranteed maximum price, It includes steps intended to afford protection to the owner, the construction lender, the general contractor, subcontractors and others entitled to payment.

* Articles 7 and 10 of ConsensusDocs 410, “Standard Design-Build Agreement and General Conditions between Owner and Design-Builder (Cost of the Work Plus a Fee with a GMP”.

As you read Article 10, consider how its payment process differs significantly from that of Article 9 of A201.

For Review and Discussion

1. How does a schedule of values, as provided for in A201, protect the interests of owners and construction lenders?
2. Does Article 9 of A201 adequately safeguard against the risk that subcontractors may file construction liens if the general contractor does not make timely payments to them?
3. Are any significant differences between the payment process of A201 and that of ConsensusDocs 410 attributable to the distinction between fixed pricing and cost-based pricing?
4. In what respects do differences in the payment provisions of A201 and those of ConsensusDocs 410 favor one participant’s interests over another’s? Do these two approaches to the payment process reflect different attitudes about how best to manage the owner-builder relationship?