

Construction Defects and Contract Breach¹



Presented by:
David Hansen
Eichelbaum, Wardell, Hansen,
Powell, and Mehl P.C.



EICHELBAUM WARDELL
HANSEN POWELL & MEHL, P.C.

¹ Copyright 2015, Eichelbaum, Wardell, Hansen, Powell, and Mehl P.C.

| | |
|--|----|
| Construction Defects and Contract Breach | 1 |
| Introduction | 4 |
| The Paradigm | 4 |
| The Players | 6 |
| The Owner | 6 |
| The Board | 6 |
| The Employee Representative | 7 |
| The Hired Representative | 9 |
| The Designers | 11 |
| The Architect | 11 |
| The Engineers | 14 |
| The Engineer as a Part of the Design Team | 14 |
| The Engineer as the Prime Design Professional | 14 |
| The Geotechnical Engineer | 15 |
| Civil Engineer - usually the responsibility of the Owner | 15 |
| The Design Builder | 15 |
| The Builder | 16 |
| The General Contractor | 16 |
| The Trade Contractor | 17 |
| The Construction Manager-at-risk | 17 |
| Consultants | 19 |
| Construction Manager-Agents | 19 |
| Design Consultants (e.g. Kitchen Consultants and Theater Consultants) | 20 |
| Code Consultants | 21 |
| Source of Construction Legal Duties | 21 |
| The Texas Government Code | 21 |
| The Contracts | 23 |
| The Architect's Contract | 24 |
| The Contractor's Contract, The Construction Manager-At-Risk's Contract, The Construction Manager-Agent's Contract, and The Design Builder's Contract | 26 |
| The Common Law | 26 |

| | |
|--|----|
| The Contractor's Common-Law Duty | 26 |
| The Architect's Common-Law Duty | 27 |
| The Engineer's Common-Law Duty | 27 |
| The Main Problems | 28 |
| Timely Performance | 28 |
| Too Little Thought in The Design | 28 |
| Too Much Time Spent In Planning | 29 |
| The Failure of the Contractor to Observe Deadlines | 29 |
| Cost Overruns | 30 |
| The Underestimated Budget | 30 |
| School District as Estimator | 30 |
| Architect as Estimator | 31 |
| Construction Manager as Estimator | 32 |
| Unforeseen Circumstances | 33 |
| Illustration - Unforeseen Soil Conditions | 33 |
| Illustration - Unforeseen Renovation and Repairs | 35 |
| Defective work | 35 |
| Illustration - The Uneven Floor | 36 |
| Defective Design | 38 |
| Illustration - The Leaky Roof | 38 |
| Illustration - The Taj Mahal Experience | 39 |
| Problem Avoidance and Recovery | 40 |
| Construction Documentation | 40 |
| Self Help | 43 |
| Bond Claims | 43 |
| Mediation | 44 |
| Arbitration | 44 |
| Litigation | 46 |

Introduction

How do you avoid construction defects and contract breaches? It's simple. Here's the secret:

First, hire a competent and qualified designer. How do you do that? You start by following the Professional Services Procurement Act. You follow that up by devising and understanding a contract that will govern your relationship with the Architect. You make your Architect both accessible and accountable to your Board of Trustees. You formally communicate with your Architect when they fail to meet your expectations.

Next, hire a competent and qualified builder. How do you do that? You start by following the procurement laws applicable to the construction of school district facilities. You dot your "i"s and cross your "t"s in this regard. You devise and understand your own contracts for use on the project. You make your builder both accessible and accountable to your Board of Trustees. You formally communicate with your builder when they fail to meet your expectations.

I have personally drafted enough contracts and navigated disputes concerning contracts written by others to tell you that following these steps will resolve 95% or more of your construction disputes. It is normally the case that architects and builders do not set out to breach their contracts with school districts. It is normally the case that when a school district addresses a problem **in writing** early that the problems are solved. The "writing" is critically important. During the construction process it shows that you are a professional and it commits to writing the failure of the architect or builder to meet expectations. Once there is clarity in identifying the failure, steps can be taken to remediate the failure. So, addressing the problem in writing when it first arises increases the chances that the failure will be resolved.

It is true that your correspondence will sometimes go unanswered or otherwise ignored. If that turns out to be the case, your response must be to continue to document the failure because if you are persistent, continuing to professionally document the architect's or builder's failure will likely result in a positive outcome for your case once the construction is complete.

In summary, do not cut corners in procurement, express your expectations through the contracts that you provide, and document failures to meet those expectations. These are the steps you must take to avoid breaches of contract and construction defects.

The Paradigm

The Paradigm for this paper will be that a construction project will be procured under one of the methods prescribed by Texas Government Code Section 2269. The amount of the project is greater than fifty thousand dollars and it does not fall within any exception to the bidding requirements. The project is also considered a "major space renovation" as the term is

defined by the Texas Administrative Code.² The contracts that govern the project are the most current versions of the standard American Institute of Architect Contracts.

I have spent nearly 15 years working on the development of construction contracts and helping school districts to manage their construction projects. One of the things that I've learned is that the way to ensure compliance with the contract and to avoid construction defects is to start with a good foundation. In construction procurement terms, a good foundation requires that you understand or associate with someone who understands the basic and advanced procurement laws that apply to Texas school districts.³ Problems with procurement invite problems with construction.

For example, if you begin your process by failing to observe the Professional Services Procurement Act in hiring your Architect, you may wind up having to restart the process. This self-inflicted delay will cost your district money. Certain violations could possibly even result in administrative action against the district or the architect.⁴

Times have changed. It is clear that school district administrators are becoming more and more savvy to the importance of defining the terms of their district's design and construction contracts. Handshake contracts between school districts and architects and school districts and contractors or construction consultants are happily becoming a thing of the past. Informality in contracting only works if your objective is chaos. It also appears that the age of forwarding signed construction and design contracts to the lawyers for post-execution review is -thankfully - coming to a close.

At present, the best practice is for you to provide your own contracts to your chosen contractors and design professionals. It is a best practice because, assuming that you are being given counsel about the contents of your contracts, it ensures that you and your Board are approaching the process with an understanding of how the relationship will work. You are

² "(10) Major space renovations--Renovations to all or part of the facility's instructional space where the scope of the work in the affected part of the facility involves substantial renovations to the extent that most existing interior walls and fixtures are demolished and then subsequently rebuilt in a different configuration and/or function. Other renovations associated with repair or replacement of Architectural interior or exterior finishes; fixtures; equipment; and electrical, plumbing, and mechanical systems are not subject to the requirements of subsections (d) and (e) of this section, but shall comply with applicable building codes as required by subsection (f) of this section." 19 Tex. Admin. Code § 61.1036.

³ For a more comprehensive treatment of the procurement process applicable to Texas School Districts see Eichelbaum, Wardell, Hansen, Powell and Mehl P.C., *School Construction Basics*, (2013).

⁴ Texas Government Code §2254.003 et. seq. There is an equal and inverse duty placed upon the Architect not to provide pricing information until the qualification step has been completed. 22 Tex. Admin. Code § 1.147 ("An Architect shall neither submit a competitive bid to nor solicit a competitive bid on behalf of any governmental entity that is prohibited by the Professional Services Procurement Act, Subchapter A, Chapter 2254, Government Code, from making a selection or awarding a contract on the basis of competitive bids. For purposes of this section, the term "competitive bid" means information which specifies the fee charged by an Architect for a professional service, including information from which such fee may be extrapolated or indirectly determined. An Architect may disclose to a governmental entity the fee for a professional service, including information found in a fee schedule, only after the governmental entity has selected the Architect on the basis of demonstrated competence and qualifications pursuant to the Professional Services Procurement Act.").

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Construction Defects and Contract Breach

First appeared as part of the conference materials for the
30th Annual School Law Conference session
"Construction Defects and Contract Breach"