



Construction Comparative Guide



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1. Legal framework

1. 1. Which legislative and regulatory provisions govern construction projects in your jurisdiction?

United States

Peckar & Abramson PC

A vast array of legislative and regulatory provisions govern construction in the United States, at both the federal and state levels, as well as the local level (cities and municipalities). Depending on the project, an owner or contracting party may be subject to one or more of these statutory and regulatory frameworks. The types of laws affecting construction generally include:

- public bidding laws;
- wage and hour laws;
- environmental laws;
- occupational safety and workplace health standards;
- building and housing codes;
- minimum design standards; and
- construction permitting and contractor licensing and registration requirements.

1. 2. What other legislative and regulatory provisions have relevance for construction projects in your jurisdiction?

United States

Peckar & Abramson PC

See question 1.1

1. 3. Which bodies are responsible for enforcing the applicable laws and regulations? What powers do they have?

United States

Peckar & Abramson PC

The laws and regulations affecting construction are enforced by the applicable agencies charged with the administration and enforcement of the particular law. For example, state and federal departments of environmental protection are generally charged with the enforcement of environmental laws. Local building departments also have general enforcement powers with regard to safety and building code violations. The powers ascribed to these enforcement agencies may be both civil and criminal; and the agencies may also have the ability to stop all work on the project until the particular violation is corrected.

1. 4. What is the general approach in regulating the construction sector?

United States

Most regulations in the construction sector revolve around safety and the protection of workers and the public. The legislative frameworks aim to protect the public and the environment against unsafe and potentially harmful design and construction methods, as well as to protect workers from injury from unsafe working environments.

2. Procurement methods

2. 1. What procurement methods are most commonly used in your jurisdiction? Do these vary depending on whether international parties are involved?

United States

Peckar & Abramson PC

Project procurement methods do not vary based on whether a party is domestic or international. The most common procurement method utilised in the United States is likely design-bid-build, whereby the owner retains the services of a design professional to develop a 100% design of the project, which is then bid upon and constructed by the successful general contractor or construction manager. Less common is design-build, in which the owner contracts with a design professional to partially design the project and develop design or performance criteria, and then retains a design-build firm to complete the design and construction in accordance with the design criteria. In addition, many states have public-private partnership laws that permit certain public bodies within the state to submit best value proposals to design, build, operate and maintain a project.

2. 2. What are the advantages and disadvantages of these different methods?

United States

Peckar & Abramson PC

The advantages of design-bid-build procurement are as follows:

- There are well-defined responsibilities between the design professional and the contractor;
- It provides the owner with greater control over the project design; and
- It enables the owner to obtain the lowest competitive bids to construct the project, since the design is 100% complete.

However, the disadvantage is that while there is more control over the design, there is less control over the total cost of the construction, as the owner cannot be sure that the project can be constructed within its budget until it has received bids from interested contractors. Also, the owner bears the risk of additional costs and delays during construction that arise from design omissions or ambiguous or conflicting design details.

The advantages of a design-build project are as follows:

- The owner avoids design risk by having a single point of accountability for both the project design and the construction;
- The project is typically completed quicker than a traditional design-bid-build project, since the design

and construction occur simultaneously, instead of the construction having to await full completion of the design; and

- It provides greater flexibility to modify the design to address construction issues created by field conditions.

The downside to this method from the owner's perspective is that it loses the ability to control the design, since the design-build firm is typically permitted to control the design as long as it adheres to the owner's design criteria and performance requirements.

2. 3. What other factors may influence the choice of procurement method?

United States

Peckar & Abramson PC

Factors that will influence the choice of one procurement method over another include:

- the timeframe for delivering the project;
- the complexity of the project;
- the available financing for the project; and
- design and cost control.

3. Project structures

3. 1. How are construction projects typically structured in your jurisdiction? Does this vary depending on whether international parties are involved?

United States

Peckar & Abramson PC

The structure of a construction project is not dependent on whether an international party is involved. The most common structure is where the owner contracts directly with an architect or engineer for the design of the project and with a general contractor for the construction. The general contractor then enters into subcontracts with the various trade contractors. This typically occurs in the design-bid-build scenario. However, several states have laws requiring public entities on certain public improvement projects to enter into separate contracts with major trades (mechanical, electrical, plumbing, general contracting and structural steel), as opposed to a single-source contract with a general contractor, which then subcontracts out that work. Alternatively, if the design-build procurement method is used, the owner will enter into a contract with a design-build team that is responsible for both the design and the construction; or perhaps just a contractor that subcontracts out the design to a separate design firm.

3. 2. What are the advantages and disadvantages of these different structures?

United States

Peckar & Abramson PC

The advantages and disadvantages are as stated in question 2.2.

3. 3. What other factors may influence the choice of project structure?

United States
Peckar & Abramson PC

The primary factors influencing these project structures are:

- the owner's need to expedite the project timeline from design to completed construction; and
- the degree of control that the owner wishes to maintain over the details of the design.

4. Financing

4. 1. How are construction projects typically financed in your jurisdiction? Does this vary depending on whether international parties are involved?

United States
Peckar & Abramson PC

Project financing is not dependent on the involvement of an international party. Private projects are generally financed differently from public projects. Typically, a private owner will secure a construction loan from a private lender to finance a portion of the construction. In the case of public-private partnership projects, the developer may be able to secure private activity bonds (PABs) – a type of public bond issue made available for private infrastructure developments. Public construction may be financed from a variety of sources, including the tax rolls and public bond issues. Depending on the nature of the project, the public entity might also secure funding from the federal government or the state.

4. 2. What are the advantages and disadvantages of these different structures?

United States
Peckar & Abramson PC

The advantages of debt financing of a project are as follows:

- It allows the owner to spread the cost of the project over a long period of time;
- It allows the owner to construct projects sooner than if it were required to have funds in hand for the entire project cost;
- Bond issues (especially PABs) may have lower interest rates than private loan financing; and
- For public entities, PABs will not usually require the public entity to pledge its credit.

4. 3. What other factors may influence the choice of financing structure?

United States
Peckar & Abramson PC

Generally, it is the project type (public versus private), as well as the overall cost of the project, that will determine the financing that is available to an owner to fund the project or guide the owner's choice of financing. For example, a small construction project may not require any special funding source and may be funded from moneys already reserved for construction within the company or the public entity. Also, PABs are not available for most private projects, except infrastructure projects; although a sizeable company could issue a corporate bond to obtain additional financing.

4. 4. What types of security and other protections are available to lenders to safeguard their position?

United States
Peckar & Abramson PC

There are various methods by which lenders may safeguard their position. One method is to have the owner require the general contractor to furnish a payment and performance bond from a licensed surety. The performance bond will protect the interests of the lender by ensuring the completion of the contract in the event the contractor defaults and fails to complete the project. Similarly, a payment bond protects the lender by enabling an unpaid subcontractor to make a claim against the bond instead of filing a mechanic's lien against the property. Lenders also may require that the construction contracts provide for 'step-in' rights, which protect the lender against an owner default on the construction contract by permitting it to step into the owner's position to rectify the default and take over the construction to complete it and sell it to pay off the debt. A lender may also be given rights to review and approve contractor payment requisitions, to ensure that the payments being requested – and which it is ultimately paying – were actually earned by the contractor.

4. 5. What law typically governs project finance agreements in your jurisdiction? Do any specific requirements apply in this regard?

United States
Peckar & Abramson PC

Project finance agreement are generally governed by the law of the jurisdiction designated by the parties in their finance agreements.

5. Bribery and corruption

5. 1. What measures are in place to combat bribery and corruption in your jurisdiction?

United States
Peckar & Abramson PC

In the United States, bribery is a crime that is punishable by imprisonment or fines, or both. The person and the company offering the bribe may be subject to criminal prosecution and will likely lose the right to be paid under that contract, even if the work was performed. There may also be other adverse consequences as a result of the illegal activity, including suspension or debarment from the right to perform work for any government agency. In addition, there are private measures to aid in safeguarding against bribery and corrupt activities in the form of whistleblower laws, which encourage employees of companies to voluntarily report incidents of fraud, bribery, criminal conduct and other statutory violations.

6. Standard form contracts

6. 1. Which standard form contracts are typically used for construction projects in your jurisdiction? Does this vary depending on whether international parties are involved?

United States
Peckar & Abramson PC

Many different standard form contracts are utilised in the United States. The most common form contracts are published by the American Institute of Architects (AIA), which has form contracts for agreements between all the different players in a construction project, as well as for different types of project delivery methods and forms of payment (eg, fixed price, cost plus) The AIA's A201 document – which sets forth general conditions of contract for general construction contracts – is probably the most commonly used form in the US construction industry and is often used with customised contract forms that are not written by the AIA. In addition to the AIA contracts, other organisations publish similar form contracts for construction – for example, the ConsensusDOCS construction documents, which were developed jointly by 22 owner, contractor, designer and surety organisations, including the Associated General Contractors of America (AGC). In addition, there are contract forms developed just by the AGC; as well as others developed by the Engineers Joint Contract Documents Committee. Which standard form contract is used – or whether a standard form contract is used at all – is not dependent on whether international parties are involved; though at times International Federation of Consulting Engineers contracts may be used for US government procurements that are to be performed abroad.

6. 2. What are the advantages and disadvantages of using the different standard forms?

United States
Peckar & Abramson PC

There is no real advantage or disadvantage of using one organisation's form over another, as all are well conceived and established. Perhaps the standard form contracts of the AIA may provide some advantage over the others, in that their terms are familiar to most contracting parties, since these forms have been around the longest and are the most commonly used form construction contracts in the United States.

6. 3. What other factors may influence the decision to use standard form contracts and the choice of standard form?

United States
Peckar & Abramson PC

Because the AIA documents are the most commonly used series of construction contracts, choosing these forms as the base contract for negotiations may accelerate the contract negotiations. The type of project may also drive the parties to consider one organisation's form agreements over another. For example, the ConsensusDocs include form contracts for green building, as well as for public-private partnerships; while those of other organisations do not.

6. 4. Where standard form contracts are used, do parties typically modify their provisions?

United States
Peckar & Abramson PC

It is very common for the parties to modify the terms of these standard form contracts.

7. Contractual issues

7. 1. Is a choice of foreign law or jurisdiction valid and enforceable? In the case of a choice of foreign law of jurisdiction, will any provisions of local law have mandatory application?

United States
Peckar & Abramson PC

Federal law and the law of most states generally provide that the parties to a contract are free to agree on the choice of law that governs their contract, as long as the choice of law bears a reasonable relationship to the parties or the dispute. If not, the courts may engage in a conflict of laws analysis (under local state law) to determine the appropriate jurisdiction's law to apply. However, several states have special laws that prohibits the parties to a construction contract that is performed within the state from agreeing in their contract to apply the laws of a different state (or country).

7. 2. What formal, substantive and procedural requirements typically apply to construction contracts in your jurisdiction? Are there any mandatory terms? What terms are typically included? Are any terms prohibited?

United States
Peckar & Abramson PC

There are no mandatory terms for construction contracts, but typically they contain terms relating to:

- the price and the method and timing of payment;
- the scope of the work;
- variations/change orders;

- the timeframe for completion of the works;
- delays to the works;
- how disputes are to be resolved;
- the law governing the parties' contract; and
- termination of the contract.

Not many terms are prohibited in construction contracts; but some states prohibit – whether by legislation or decisions of the state's courts – pay-if-paid provisions, which transfer the general contractor's risk of non-payment by the owner to its subcontractors.

7. 3. How is risk typically allocated between the parties? What steps can the parties take to mitigate these risks?

United States

Peckar & Abramson PC

Construction risks will vary depending on the type of project and the type of contract. For example, on a design-bid-build project, design risks and the costs of changes as a result of deficient designs will remain with the owner, which contracted with the design professional. Also, on a lump-sum or fixed-price contract, the contractor bears the risk of cost overruns in the construction; whereas on a cost-plus contract, the owner bears the risk of increased costs. These risks can be mitigated by altering the project to a design-build or modifying the contract type to include a guaranteed maximum price. There are also risks of non-payment and defaults by the contractor or its subcontractors. These risks may be mitigated by including a pay-if-paid provision in subcontracts, such that if the owner fails to pay the general contractor, it may avoid being liable to pay the subcontractor for the work for which the general contractor did not receive payment. In terms of failure to complete the project work, this risk could be mitigated by requiring the contractor to post a performance bond that guarantees the completion of the work or by securing subcontractor default insurance, which covers the costs of damages and increased costs of construction due to a defaulting subcontractor.

7. 4. How can liability be excluded or restricted in your jurisdiction? Are parties able to cap their liability?

United States

Peckar & Abramson PC

In the United States, parties are generally free to agree on limits to their liability. It is not uncommon for parties to a construction contract to agree to waive consequential-type damages arising from breach of the contract. In addition, in the event of damages arising from the contractor's delay in timely completing the construction, the parties may agree to liquidated damages as an estimate of the potential damages that would be incurred from each day of delay; and even these damages may be capped by agreement between the parties. Another type of contractual liability exclusion is a no damage for delay clause, whereby the contractor agrees that if the contractor is delayed by the owner, it will be entitled only to an extension of time to complete its work, and not to any additional compensation attributable to that delay.

7. 5. In the event of delay to the project, what consequences will this typically have for the parties?

United States
Peckar & Abramson PC

In the event of unexcused delay, the parties typically agree to a fixed daily amount of damages to be paid to the owner for each day of delay (liquidated damages).

7. 6. Is the concept of *force majeure* recognised in your jurisdiction? If so, what are the typical implications for the parties?

United States
Peckar & Abramson PC

Force majeure provisions are recognised in the United States and are included in most construction contracts. However, the types of events that are included within such provisions often vary; and absent a particular event being included within the *force majeure* cause, the contractor will bear the risk of the consequences of that event. If the clause is applicable to a particular event, the contractor ordinarily will be entitled to an extension of time to complete its scope of work, but without any additional compensation from the delay.

7. 7. What scope do the parties typically have to make material variations to the works?

United States
Peckar & Abramson PC

The parties are typically free to make material changes to the scopes of work under the contract without invalidating the contract. When a change is made, the parties will agree on all costs and associated impacts arising from that change. However, there is legal authority in the United States whereby if the change is so materially different from the underlying scope of work to be performed by the contractor, such that the original works cannot be performed at the prices and rates previously agreed upon, the change may be deemed a ‘cardinal change’ and the contractor may be entitled to its actual costs to perform the construction.

7. 8. Are there any particular requirements for completion or taking-over in your jurisdiction?

United States
Peckar & Abramson PC

A project typically is deemed substantially complete when the owner can take beneficially use or occupancy of the building or structure, which typically arises when the construction works are inspected by public officials, which will issue a temporary certificate of occupancy to allow the owner to utilise the works. At final completion, a contractor will usually be required to provide final waivers of the right to seek additional compensation beyond what already has been paid by the owner, as well as as-built drawings, among other items that may be specified in the parties' contract.

7. 9. What requirements and restrictions typically apply to the termination of the construction contract in your jurisdiction?

United States

Peckar & Abramson PC

There are typically two categories of termination set forth in most agreements:

- terminations 'for cause'; and
- terminations 'for convenience'.

A termination for cause provision generally allows the party to terminate the contract when the other party has breached or is in default of its material obligations under the contract, such as non-payment, non-performance or delayed performance. In the event of such a default, the termination provisions frequently require notice of the breached obligation and an opportunity to cure. If notice is not provided, this will result in a wrongful termination, which would be a breach of contract and subject the other party to damages. Conversely, a termination for convenience permits a party to terminate the contract for any reason (or no reason at all), and sets forth the compensation to which the other party will be entitled (usually actual costs of all work performed to date). Some contracts also have safeguard provisions which state that if there is an erroneous termination for cause, the improper termination will be deemed to be a termination for convenience and the parties' rights will be adjusted accordingly.

7. 10. How are delay or liquidated provisions dealt with in your jurisdictions?

United States

Peckar & Abramson PC

The parties are free to agree on the consequences and the extent of relief for delayed performance, as well as the events that may excuse late performance. Liquidated damages provisions for delayed performance are fully enforceable, as long as they are a reasonable estimate of the actual damages that a party may suffer from the delay and are not merely a contractual penalty.

8. Subcontractors and suppliers

8. 1. Are there any particular issues which arise when dealing with subcontracts and/or subcontractors which are different from the issues discussed elsewhere?

United States
Peckar & Abramson PC

Most of the issues between the contractor and its subcontractors are the same as those that arise between the contractor and the owner. However, there are a couple unique issues, such as with ‘pay-if-paid’ provisions that would require a subcontractor to bear the risk of an owner’s failure to pay the contractor for the subcontractor’s work and make such payment by the owner a precondition to the contractor’s obligation to pay the subcontractor. In addition, while contractors and subcontractors have the right to file a mechanic’s lien against the owner’s real property in private construction, on non-federal public construction projects the general contractor has no lien rights, while its subcontractors have the right either to file a lien with the owner against the moneys due or to become due to the contractor or to file a claim against the payment bond posted by the contractor to guaranty payment to its subcontractors. In the event of such a lien, in order to avoid the owner withholding payment, the contractor may be required to post a bond in an amount of up to double the lien in order to discharge the lien; and if a claim is lodged with the payment bond surety, the surety can compel the contractor to post collateral in an amount that the surety determines is necessary to safeguard its interests against the subcontractor’s non-payment claim.

8. 2. Are there nominated subcontractors in your jurisdiction?

United States
Peckar & Abramson PC

It is extremely rare for there to be a nominated subcontractor. This may occur if there is a specialty product that is produced by a particular vendor. However, in such instances, that vendor’s product would likely be identified in the design specifications, with the contractor being permitted to provide an ‘equivalent to’ product by an alternative subcontractor/vendor.

9. Payment

9. 1. Are there any statutory or other requirements which govern how parties are paid?

United States
Peckar & Abramson PC

Many states within the United States have enacted ‘prompt pay’ laws that set out certain requirements for approval of payment applications and remitting payment for work performed. In general, these laws will provide that the owner or general contractor has a fixed period to approve or reject a payment application (in whole or in part), and to provide a written explanation for any disputed items of work. They are then obliged to remit payment of all undisputed amounts within a specified timeframe; if not, the other party may have the right to suspend performance.

9. 2. Are ‘pay when paid’ clauses valid? In what circumstances?

United States
Peckar & Abramson PC

In the United States, there is a difference in terminology. ‘Pay when paid’ is used to reflect the mere timing of payment to a subcontractor, such as paying the subcontractor within 30 days of the contractor’s receipt of payment; whereas ‘pay if paid’ is used when payment to the subcontractor is conditioned upon the contractor’s receipt of payment from the owner. In the former instance, the contractor is ultimately liable to pay the subcontractor; and in the latter, the contractor is not liable for the subcontractor’s payment unless it receives the payment from the owner. In many states, ‘pay if paid’ provisions are fully enforceable, as long as they clearly reflect the parties’ intent that the risk of the owner’s non-payment is transferred to the subcontractor. However, a number of states have made such provisions unenforceable, either by legislation or by judicial decisions.

9. 3. How are retentions typically dealt with?

United States
Peckar & Abramson PC

Retention is determined by agreement between the parties in their contract. Typically, owners in the United States will require 10% of payment to be retained and contractors will correspondingly require a similar retention in their subcontracts – although it is not uncommon for retention to be only 5% or 2.5%. The retention is often withheld until substantial completion, at which time the owner or contractor will retain funds sufficient to cover the cost of completing any outstanding punchlist work or some multiple of the cost to complete the punchlist. Sometimes, in the case of large contracts and large retentions, the contract may provide for retention to be partially released at different stages, with the balance to be remitted upon final completion of the contracted works.

10. Health and safety

10. 1. What key health and safety requirements apply to construction projects in your jurisdiction?

United States
Peckar & Abramson PC

Numerous health and safety laws and regulations have been enacted at the federal, state and municipal levels. The most prominent law is perhaps the federal Occupational Safety and Health Act (OSHA), pursuant to which the US Department of Labor (DOL) has promulgated regulations governing the safety of construction worksites. These regulations, among other things:

- promote safety training, inspection of job sites and workplace accident investigations; and
- provide for hearings and monetary sanctions for violations.

Civil and criminal liability may be imposed for OSHA violations. Public construction projects with the US government are also subject to the Contract Work Hours and Safety Standards Act, which provides that no contractor or subcontractor may require any labourer to work in surroundings or under working conditions that are unsanitary, hazardous or dangerous to health or safety. Under this act, federal contracts can be cancelled for violations and the contractor can be charged with any additional costs incurred by the federal agency to complete the contract. There are also many state and local-level statutes and regulations which mirror and supplement these broader federal laws.

10. 2. What reporting requirements apply with regard to construction site accidents in your jurisdiction?

United States
Peckar & Abramson PC

Under OSHA, contractor and subcontractor employers must notify OSHA when an employee:

- is killed on the job (within eight hours of the fatality); or
- suffers a work-related hospitalisation, amputation or loss of an eye (which all must be reported within 24 hours of the incident).

In addition to reporting, the employer must record and maintain records of, among other things:

- any work-related fatalities, work-related injuries or illnesses that result in:
 - loss of consciousness;
 - days away from work;
 - restricted work; or
 - transfer to another job; and
- any work-related injury or illness requiring medical treatment beyond first aid.

Various states and localities also have similar reporting requirements, which may result in fines or other penalties for failure to timely comply.

10. 3. What are the potential consequences of breach of these requirements – both for the contractor itself and for directors, managers and employees?

United States
Peckar & Abramson PC

Civil and criminal liability may be imposed for health and safety violations. Under OSHA, civil penalties can range up to \$70,000 for wilful or repeat violations; and up to six months' imprisonment can also be imposed where a wilful violation has led to a fatal injury. Work at a job site can also be suspended due to health and safety violations or during the pendency of an accident investigation; and for certain serious or repeated violations, contracts can be cancelled and a contractor may be barred from bidding on certain public projects or, at a minimum, may be viewed as a less responsible bidder.

10. 4. What best practices in relation to health and safety should construction contractors consider adopting in your jurisdiction?

United States
Peckar & Abramson PC

A contractor should have in place a written safety programme to govern its work and that of its subcontractors, as well as quality assurance and quality control measures and protocols in the event of exposure to or release of hazardous substances. In doing so, a contractor must also be careful to avoid the extent to which it may be dictating or controlling the constructions means and methods employed by its subcontractors, since many states' worksite safety laws will impose strict liability for worksite injuries on the party that controls the worksite and/or is the instrumentality that gave rise to the injury. Additionally, contractors should:

- maintain appropriate insurances; and
- insist that subcontractors:
 - procure insurances with robust policy limits; and
 - provide evidence of such policies, naming the contractor and the owner as additional insureds on those policies.

Contractors should also consider including carefully worded indemnification provisions in their contracts to ensure that they will be held harmless for injuries caused by the actions of their subcontractors.

10. 5. Which bodies are responsible for enforcement of health and safety obligations?

United States
Peckar & Abramson PC

The DOL, and specifically the Occupational Safety and Health Administration, is responsible for enforcing the provisions of OSHA. State DOLs and their corresponding agencies are responsible for enforcing their parallel state health and safety laws. To the extent that the health and safety issue is the result of exposure to a hazardous substance, the US Department of Environmental Protection (DEP) and/or the state DEPs are responsible for enforcing the implicated environmental laws under their jurisdiction. Also, local building departments can stop work on the project for violations of any health and safety obligations.

10. 6. What is the general approach in regulating the construction sector from a health and safety perspective?

United States
Peckar & Abramson PC

The general approach to the regulation of the construction sector for health and safety is to:

- protect the life and wellbeing of labourers and the public; and
- create minimum standards to which contractors must adhere in order to ensure such protections.

11.Environmental and sustainable development issues

11. 1. What environmental authorisations are required for construction projects in your jurisdiction? Do these vary depending on the type of project or the location of the site?

United States

Peckar & Abramson PC

Before a contractor commences work on a project, it will likely be required to secure one or more permits to engage in certain regulated activities in furtherance of the construction that could affect the environment. For instance, there are extensive state and federal environmental laws affecting construction projects, arising from potential impacts to water, soil and the air. The main federal statutes, which have comparable state statutes, are:

- the Clean Water Act, which protects and maintains the nation's waters by:
 - prohibiting the discharge of pollutants into those waters; and
 - preventing the destruction and disturbance of freshwater wetlands;
- the Resource Conservation and Recovery Act, which establishes specific requirements for properly handling, storing, transporting and disposing of hazardous and non-hazardous solid waste; and
- the Clean Air Act, which is designed to control the generation of particulate and ozone precursor emissions, such as dust, vehicle emissions, burning debris and the release of chlorofluorocarbons and other ozone-depleting substances.

11. 2. What is the process for obtaining environmental authorisations?

United States

Peckar & Abramson PC

An application and permitting process is associated with each of the major federal and state environmental laws. Permits may be required at both the state and federal levels, depending on the project and whether federal or state lands or waterways may be affected.

11. 3. What environmental requirements must the contractor observe while the site is operational?

United States

Peckar & Abramson PC

Numerous environmental requirements must be observed during the course of construction, but some typical requirements include:

- proper dumping and disposal of construction debris and waste;
- limitations on stockpiling debris or contaminated soils on site;
- dust control;
- avoidance of water run-off; and
- sediment control.

There may also be significant containment and disposal issues associated with lead paint and asbestos.

11. 4. What are the potential consequences of breach of these requirements – both for the contractor and for directors, managers and employees?

United States
Peckar & Abramson PC

Violations of these environmental statutes can result in an array of potential liabilities, from a simple fine ranging from a few hundred dollars to several thousands of dollars for each violation and for each day that the statute is violated. In addition to fines, if the violation is severe and found to have been done intentionally, criminal prosecution of corporate principals and responsible employees is also possible. Developers and contractors may also find themselves liable for environmental remediation and clean-up of hazardous waste, as well as the creation of new freshwater wetlands that were illegally destroyed or impacted.

11. 5. What environmental requirements apply to new buildings?

United States
Peckar & Abramson PC

New buildings generally have no special environmental requirements; although a project owner may choose to have the new construction designed and constructed to achieve a particular Leadership in Energy and Environmental Design certification rating from the US Green Building Council.

11. 6. Which bodies are responsible for enforcement of environmental obligations?

United States
Peckar & Abramson PC

Environmental obligations are generally enforced by state and federal departments of environmental protection; and to a lesser degree the local building departments may impose certain worksite restrictions or stop work orders based on environmental violations.

11. 7. What is the regulators' general approach in regulating the construction sector from an environmental perspective?

United States
Peckar & Abramson PC

The general approach to environmental regulation of the construction industry is to:

- preserve the integrity of the environment and natural resources; and
- maintain safe, pollution-free resources.

11. 8. What is the impact of Net Zero in your jurisdiction?

United States
Peckar & Abramson PC

No answer provided.

12. Insurance

12. 1. What types of insurance arrangements - whether compulsory or optional - are typically put in place for construction projects in your jurisdiction?

United States
Peckar & Abramson PC

For the most part, the types and amounts of insurance that may be required on a project are governed by the terms of the parties' contract; although certain insurance, such as workman's compensation insurance, is required by statute. Nevertheless, there are various types of insurance policies typically obtained for US construction projects, which may include:

- employer liability insurance;
- errors and omissions insurance;
- comprehensive general liability insurance;
- pollution liability insurance;
- property insurance;
- builder's risk insurance;
- owners' and contractors' protective liability insurance;
- umbrella or excess liability insurance;
- worker's compensation insurance; and
- subcontractor default insurance.

12. 2. If local insurance is required, can local insurers assign reinsurance contracts in your jurisdiction?

United States
Peckar & Abramson PC

Yes.

12. 3. Is it possible to obtain insurance for fitness for purpose design obligations?

United States
Peckar & Abramson PC

Typically, fitness for purpose is excluded from coverage under errors and omissions policies, since a party is not required to establish that the designer was negligent in failing to ensure that the design was fit for its intended purpose.

12. 4. What other forms of insurance feature in construction projects in your jurisdiction?

United States
Peckar & Abramson PC

Depending on the project or the owner or general contractor involved, the project insurance for the project participants might be included as part of an owner-controlled insurance programme or a contractor-controlled insurance programme, whereby the owner or contractor procures insurance to cover all those in the downstream contractual chain in order to control costs, and to avoid each party in the contractual chain marking up the costs of its work to provide for its own insurance.

13. Employment

13. 1. What legislation must employers and contractors be aware of when hiring labour?

United States
Peckar & Abramson PC

For federal public construction projects or those that are federally funded, the Davis-Bacon Act requires employers and contractors to pay labourers' 'prevailing wages', which is an hourly rate equal to or greater than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area. Further, when hiring labour for a project:

- the Contract Work Hours and Safety Standards Act mandates that labourers be paid at least one-and-a-half times their regular rate of pay for all hours worked over 40 in a work week or eight hours in a single day; and
- the US Family Medical Leave Act mandates that eligible employees be permitted up to 12 weeks of unpaid, job-protected leave each year for specified family and medical reasons.

Many states have adopted similar wage and hour and medical leave laws that affect public construction projects and/or the state workforce as a whole.

14. Tax

14. 1. What issues must be considered from a taxation perspective in relation to construction projects in your jurisdiction?

United States
Peckar & Abramson PC

No answer provided.

14. 2. Are any exemptions or incentives available to encourage construction in your jurisdiction?

United States
Peckar & Abramson PC

No answer provided.

14. 3. What strategies might parties consider to mitigate their tax liabilities in the construction context?

United States
Peckar & Abramson PC

No answer provided.

15. Technology

15. 1. How is Building Information Management (BIM) dealt with in your jurisdiction? Does the government mandate any particular BIM standards or other requirements?

United States
Peckar & Abramson PC

BIM is not mandated on projects and is utilized as deemed necessary on a project-by-project basis.

15. 2. Are smart contracts used in your jurisdiction? Are there any special restrictions or regulations?

United States
Peckar & Abramson PC

Smart contracts generally have not been used in the United States. There may be some limited instances of projects or contracts where they have been used, but this author is unaware of any specific instance of its use in the United States.

15. 3. What developments in digital technology do you see having a major impact on the construction industry?

United States
Peckar & Abramson PC

While not exactly “digital technology,” drones or unmanned aircraft systems have gained in popularity and use in construction projects in recent years. Drones can be useful in documenting job progress, site surveys, site safety, and other uses. For example, visual inspection of work could be recorded and tracked by drone instead of having a contractor observe high up areas by scissor lift of building maintenance units. Drones also have been used in conjunction with Light Detection and Ranging (“LiDAR”) to create high resolution digital topographical maps for road construction.

Other emerging technologies being introduced into construction include virtual reality (VR) and artificial intelligence (AI). While BIM technology has been around for a while to present a three-dimensional rendering of a project, to enable parties to detect conflicts in the building components, and to better visualize the completed project, VR can be used take that technology to the next level. VR can allow owners and contractors to actually see a virtual representation of the completed project, and move around within the project, even though it has not yet been constructed. It also can be used during different stages of construction to enable the parties to better visualize and feel how the project is coming together. In addition, AI is starting to be use by architects and engineers to develop better construction cost estimates and assist in devising alternative designs that can be used for value engineering and achieving the owner’s needs.

16. Disputes

16. 1. In which forums are construction disputes typically heard in your jurisdiction?

United States
Peckar & Abramson PC

See question 16.3.

16. 2. What issues do such disputes typically involve?

United States
Peckar & Abramson PC

The typical construction case in the United States usually centres on non-payment by the owner to the contractor or by the contractor to the subcontractor. The issue of non-payment also frequently gives rise to other fairly standard issues, raised as a defence to non-payment and as counterclaims, such as defective construction, delayed performance or other contractual defaults. Other frequent claims that are litigated include:

- additional cost due to delays;
- extra work performed pursuant to disputed variations/change orders; and
- impacts and inefficiencies due to excessive variations/change orders and interference with the work.

16. 3. How are disputes typically resolved?

United States
Peckar & Abramson PC

Construction disputes are typically resolved in state or federal courts, or through arbitration or mediation. Mediation is a non-binding form of alternative dispute resolution (ADR), whereby a neutral third party aids the parties in a facilitated negotiation of the dispute to hopefully achieve an amicable settlement of the dispute. Whether a dispute gets resolved by a state or federal court or by arbitration is an issue that is typically agreed as part of the parties' contract. If the contract does not specify that disputes are to be resolved by arbitration, the parties must litigate the dispute in court, unless they both subsequently agree to proceed with arbitration instead. For construction disputes between the federal government and its agencies and a contractor, the contractor has the option of:

- presenting its claim before various 'contract appeals boards' established by certain federal agencies (eg, the Civilian Board of Contract Appeals and the Armed Services Board of Contract Appeals); or
- bypassing the boards entirely and filing a complaint before the US Court of Federal Claims – a court specially created to hear claims for monetary damages against the US government.

Binding ADR in the form of arbitration is highly favoured and courts will routinely enforce agreements to arbitrate, instead of allowing a party to evade their agreement to arbitrate by seeking compensatory relief in the courts. In the United States, mediation or other non-binding ADR mechanisms are also highly favoured and are frequently required by parties as a precondition to their right to pursue binding dispute resolution in court or in arbitration. The courts also have mandatory mediation programmes whereby they require parties to engage in mediation at some point during the course of an in-court litigation.

16. 4. Is the use of alternative dispute resolution common and/or encouraged by legislation or the courts?

United States
Peckar & Abramson PC

See question 16.3.

16. 5. Is the use of dispute boards common in your jurisdiction?

United States
Peckar & Abramson PC

Dispute resolution boards are not common for most construction project in the United States, although they have been utilised on several very large mega projects and have been successful in avoiding disputes that otherwise might have caused delays to the completion of the projects.

16. 6. Have there been any recent cases of note?

United States
Peckar & Abramson PC

There are no particular cases of note. Between the courts of the 50 states and the extensive federal court system, cases addressing issues of construction law are frequently published; and even if there were a noteworthy decision for one particular state, that decision would have no binding precedential effect on the same issue being litigated before a different state court.

17. Trends and predictions

17. 1. What has been the impact of the COVID-19 pandemic on construction in your jurisdiction?

United States
Peckar & Abramson PC

No answer provided.

17. 2. How would you describe the current construction landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

United States
Peckar & Abramson PC

The overall construction market remains positive, as various infrastructure projects have begun receiving funding from the \$1.2 trillion Infrastructure Investment and Jobs Act, of which \$550 billion is new federal spending to be allocated to various state and federal projects over the next five years. According to the legislation, of this new spending, approximately:


- \$110 billion is earmarked for roads, bridges, and tunnels;
- \$105 billion for public transportation and railways;
- \$42 billion for airports and waterways; and
- the balance divided between various social, environmental and technological infrastructure initiatives.

Additionally, construction associated with the technology sector is being supported with the recently passed CHIPS and Science Act, which provides billions of dollars in funding to encourage the construction of microprocessor manufacturing facilities in the United States. Notwithstanding, the construction industry's optimism is tempered by the continuing challenges it faces in dealing with rising material costs from inflation, supply chain issues, and labour shortages to meet the needs of the industry.

18. Tips and traps

18. 1. What are your top tips for smooth completion of construction projects in your jurisdiction and what potential sticking points would you highlight?

United States
Peckar & Abramson PC



The top tips are to follow the requirements of the contract and to engage construction counsel early on, when disputes first arise, instead of at the end of the project. Too often, clients treat the contract as a mere formality and do not pay attention to the contractual requirements for providing notices of potential variations/change orders, claims or disputes, and end up waiving their rights to seek additional compensation because they did not strictly adhere to the terms of their contract. It is not uncommon to hear clients say that they did not want to upset the owner by sending paperwork, documenting delays or changes; and that they will simply work things out with the owner at the end of the job. The time to employ competent construction counsel is when a dispute first arises on a project, so that they can guide the client on what is required to preserve its right or assist in resolving the issue short of litigation, so that the issue does not impact other aspects of the work or create further complications for the project. If the parties wait until the end of the project to retain counsel, the issues are often unresolvable outside of litigation.



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