
Construction and Maintenance

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THE PURPOSE OF THIS ARTICLE is to alert librarians to their rights and obligations in the planning, construction, and maintenance of library buildings. Obviously, it is impossible in a limited number of pages to comment on the statutory situation and case law in all the states and the federal jurisdiction. The approach here is general. The need for legal advice in all these matters cannot be stressed sufficiently. Whenever possible, do not sign anything, even a letter, do not agree to anything orally without advice of counsel.

The distinction between public libraries and private libraries is important in considering the law applicable to building construction and maintenance. Building and construction contracts are governed by the general rules pertaining to the formation of contracts. The construction of a public library building, however, is considered in the nature of a public work and as such is subject to legislative regulation.¹ Failure to comply with the requirements of a statute can be fatal.

Before deciding on the final location of a proposed library building, it should be determined whether zoning regulations or ordinances prohibit such use of real property in the area. It is possible that the zone is restricted to residential use only. Zoning regulations sometimes limit the height of a building. Variances to zoning regulations can sometimes be obtained on application to proper local authorities. Adjoining owners of real property in the area may have easements of light and air which also can affect the architectural design of the building. The possibility of such easements should be carefully investigated as should the subsurface rights of utility companies, and the presence of water pipes, sewers, and electric wires. Fire and building regulations often prescribe the location of doors and windows, which may affect the size and location of basement stacks.

Land may be taken or condemned for a public use or function

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by federal, state, and local governments. The courts have generally held that a public library is a public use for which the power of eminent domain may be exercised.² The owner of land so acquired must be fairly compensated which usually means he is entitled to its fair market value.³ Acquiring land by purchase involves many legal problems which at all times should be resolved by a lawyer. Especially important is determination of ownership of land and clearance of title.

The creation of the architect-employer relationship is most important in the planning and construction phases of a building project. This relationship must be clearly defined and also understood by the parties in order to avoid difficulties thereafter. What is the role of the architect? As brought out in the case of *McGill v. Carlos*,⁴ it consists of two parts: "Primarily, an architect is a person who plans, sketches and presents the complete details for the erection, enlargement, or alteration of a building or other structure for the use of the contractor or builder when expert knowledge and skill are required in such preparation. The practice of architecture may also include the supervision of construction under such plans and specifications."⁵

The architect's duties under the contract must be spelled out in detail. The employer should determine whether to limit the architect to drawing up the plans and specifications only or to add on the supervision of construction as well. For guidance in this situation it is recommended that the Standard Contract forms of the American Institute of Architects be consulted. They are designed to be fair to both sides and are written so as to be understood by the layman. The A.I.A. has prepared them for agreements between owner and architect, owner and contractor, owner-architect agreement on percentage basis, and owner-architect agreement on fee-plus-cost system. These forms have been published in W. S. Parker and Faneuil Adams' *The A.I.A. Standard Contract Forms and the Law*.⁶ This book is a companion volume for the *Handbook of Architectural Practice* published by the A.I.A.

Article I of the owner-architect contract is helpful in suggesting types of architectural services: "The Architect's professional services consist of the necessary conferences, the preparation of preliminary studies, working drawings, specifications, large scale and full size detail drawings, for architectural, structural, plumbing, heating, electrical, and other mechanical work; assistance in the drafting of forms

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of proposals and contracts; the issuance of certificates of payment; the keeping of accounts, the general administration of the business and supervision of the Work." The architect is answerable civilly and even criminally for failure to exercise reasonable professional skill, ability, and judgment. In *Bott v. Moser*, an architect failed to comply with the zoning law and was held liable in damages civilly.⁷ In *State v. Ireland*, the architect was indicted for manslaughter when his defective planning caused a building to collapse and resulted in the death of an occupant.⁸

In negotiating the contract with the architect, it should be understood that the architect does not guarantee his plan is perfect or satisfactory. He is liable only for failure to use reasonable skill and care.⁹ At the most he is guaranteeing that his plans will suit the purpose of the project. The contract can stipulate, however, that the architect's plans will be satisfactory for the purpose involved. This clause adds to the responsibility of the architect in complying with the terms of the contract.

Generally, the architect's fee is based on the estimated or actual cost of the completed structure. Actually, the parties can agree on any terms, such as a fixed sum or a prize. The contract may call for payments at certain times or upon completion of the work. Special conditions may be inserted, provided the architect agrees. A clause often inserted involves a guarantee that the building can be constructed from the architect's plans for no more than a specified amount. The rule of law in this situation has been aptly stated by one court: "It seems to be well settled that, where plans are required for a building not to cost more than a certain sum, or are accepted on condition that it can be erected for a given amount, there can be no recovery by the architect, unless the building can be erected for the sum named, or unless the increased cost is due to special circumstances, or to a change of plans by direction of the owner."¹⁰ Another clause generally used is that the architect's work will be satisfactory.

Provision for a possible abandonment of the project by the employer should also be made clear and a method of compensation arranged, note the comment of an Arkansas court: "Where the architect prepared plans and specifications for building pursuant to an unconditional order or direction of the owner, he is entitled to recover for his services whether or not the plans are used if they substantially comply with the employer's instructions. So his right to compensation will not be defeated by the fact that the building for which the plans

are prepared was never constructed or by the fact that the time is not such as to render it expedient to build."¹¹ When the contract stipulates payment upon completion of portions of the work, and the project is abandoned by the owner, the architect will be paid the proportionate amount due for the work completed as the contract is considered to be severable.¹²

Often an architect will submit plans and discuss the project with a client, without a written contract. Under these circumstances, he is entitled to receive the reasonable value of his services.¹³ When the parties enter into a "cost plus" contract, the problem arises as to what may be included in the costs. Can the architect charge for his general expenses, such as salaries, telephone service, office supplies? The answer is no.¹⁴ He may charge, however, for materials furnished, and the time he spent supervising the work under contract.¹⁵

The contract between the owner and the contractor fixes the obligations and rights of both parties. Unless stipulated to the contrary, the contractor is responsible for the completion of the building in accordance with the contract and plans and specifications, and nothing more. The contractor's responsibility is only to erect the structure skillfully and to use proper materials. He cannot be held accountable for any ensuing defect in the structure resulting from bad planning or insufficient specifications.¹⁶ It is possible for the parties to stipulate that the contractor warrants the completed structure to be free from defects, another way of protecting the owner. Of course, if the contractor is negligent or does not comply with the specifications, the courts will hold him liable to the owner for accidents ensuing from the weakened structure. This is so even after the owner has taken possession of the building.¹⁷

By statute all the states and the federal government have prescribed certain conditions for the construction of public buildings. These apply not only to state buildings but also to buildings erected on behalf of its municipalities or other local governmental units. A county library or a municipal library can thus be subject to rules established by the state legislature. In New York State, for example, the construction of public buildings is controlled by the Public Buildings Law, the Public Works Law, and the State Finance Law. The state also issues a "State Architect's Standard Construction Specifications" which contains the standard documents used in state building construction as well as the standard construction specifications. It

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outlines the qualifications of bidders, and gives information with respect to the contract, drawings, supervision, etc.

It is of interest to note the procedure followed in New York City, which is probably characteristic, with some modification, of many municipalities and local government units throughout the country. The selection of an architect or engineer is negotiated by the commissioner of public works. In the case of an architect, this selection is limited to the individuals or firms whose names appear on the *Mayor's Panel* that is published yearly.

After agreement is reached on the terms by the commissioner and the architect or engineer, a form of contract containing a standard agreement and specific requirements is prepared. Approval as to form is then requested of the Law Department. After securing such approval, three copies are transmitted to the Board of Estimate. The matter is then referred to the Bureau of the Budget, the reporting agency for the Board of Estimate. After due process of investigation by the latter, and if approved, a resolution is adopted approving the contract and the required funds appropriated for payment of fees. Only upon completion of these various requirements is the commissioner then authorized to issue an Advice of Award and the execution of contract.

In the case of a contract for the services of a construction contractor, the final approval, action by the Board of Estimate and award of contract is essentially the same as that pertaining to the services of an architect or engineer. The selection of the contractor is made after a process of competitive bidding.

Under the terms and conditions of the city charter, projects under an estimated cost of \$2,500 may be awarded without public letting on an Open Market Order basis. In such cases the department follows the policy of notifying more than three contractors with established experience in the particular field of work that the contract covers. Sealed bids are received by the department at a specified date and time and award made to the lowest financially responsible bidder provided the experience requirements have been satisfied.

For projects over an estimated cost of \$2,500, the city charter provides that where any one trade, if required in the contract, is over an estimated cost of \$25,000, such contract must be separated into individual contracts, viz: general construction, plumbing, heating, and electrical.

Public advertising is made for a minimum of ten days in the *City Record*. Notice is given through this publication of the location where plans and specifications may be procured, with notice of any fee for these documents, place, date, and time that the sealed bids shall be received. Bids are opened in the presence of the public wishing to attend the meeting. The final award is made to the lowest financially responsible bidder provided the experience requirements have been satisfied.

The rights of a private contractor negotiating with a public agency are governed by the law of contracts. To effectuate a contract, the following elements must be present:

1. An offer: This is made in the form of a bid by the contractor interested in obtaining the construction contract. The bid is in response to an invitation publicly advertised by the proper public authorities which also sets forth plans and specifications for the public building.

2. An acceptance: The contractor's bid or offer is accepted by the proper public authorities awarding the contract upon the terms of the bid. Once the contractor is advised that his bid has been accepted and entered on record, a contract exists even though no formal written contract has been executed between the parties. From this point on, the contractor can recover for the reasonable value of materials he may furnish or work performed pertaining to the construction.¹⁸

3. Additional statutory requirements before the contract can be negotiated: (a) funds must be appropriated for the building and so certified; (b) the plans, specifications, and estimates made by an architect must have been approved by the proper public authorities; (c) special situations have to be considered such as certification of compliance with law, e.g., whether non-resident contractors are involved, or other special provisions; and (d) contracts involving sums above a stipulated amount must be let out for competitive bidding. Competitive bidding requires a public invitation to bid upon announced plans and specifications as well as estimates.

Failure to comply with these statutory requirements will affect the validity of the contract, in that it will be held to be void and unenforceable.¹⁹

In private library building construction the building and construction contracts are governed by the general rules applicable to the law of contracts. There must be an offer, acceptance of the offer, and

consideration for the promises made. Local ordinances and applicable regulations pertaining to building and construction are construed as part of the contract unless expressly indicated to the contrary in the contract.²⁰ By the same token, when a building contract refers to the plans and specifications, the courts have construed the terms thereof in light of these plans and specifications. Of course, when a contract actually stipulates that the plans and specifications are a part of the contract, there is no problem.

When the owner takes possession and occupies the building constructed by the contractor, this act by itself does not constitute an acceptance of the work or a waiver of the defects in the structure.²¹ The law assumes that the building will be erected in a reasonably good and workmanlike manner and when completed be reasonably fit for the intended purpose. The owner can always obtain damages "for failure to comply fully with the terms of a contract to build a structure upon that owner's land."²²

As a rule, one cannot expect payment under a contract to perform work until he has fully performed under the contract. In building contracts, however, substantial compliance is sufficient. The courts have held that when a contractor has attempted to comply with the terms of the contract in good faith and honesty, but for some reason or other minor defects occur in the work, he is entitled to payment in accordance with the terms of the contract but subject to a deduction of the cost necessary to complete the work.²³

The parties may agree that the contractor will not be paid until the completed work is satisfactory to the owner. The courts have upheld such clauses, when the owner honestly is dissatisfied with the work.²⁴ Of course, this could be a difficult situation and the courts have added that if the work would be satisfactory to a reasonable man, the contractor would be allowed to recover payment.²⁵

A good way to protect the owner, who is usually inexperienced in building matters, is to provide in the contract that a designated architect, engineer, or expert in the field should determine the sufficiency of the work done by the contractor. This is customary in contracts for public works. The courts have upheld the validity of this clause and have refused recovery of payment to the contractor until a certificate of satisfactory performance is granted by this expert.²⁶

Artisans, engaged by the contractor, and suppliers of material used in the construction work must be paid. By statute many states and the federal government require the contractor to furnish a bond to

insure such payment. Generally, the policy in all states is to require such a bond on a public works project even without statutory requirement. It is best always to arrange for such a bond when a private building is being constructed, to prevent the imposition of a mechanic's lien on the building by unpaid materialmen and workers.

In many states, too, artisans and materialmen working under the contract, are given a statutory lien on moneys due the principle contractor by the public body, for the value or agreed price of such money or material.²⁷ Another method is to provide in the contract that the public body may withhold from the contractor money due under the contract until he pays outstanding debts to these people.²⁸

As in all other types of contracts, the parties can expressly indicate the amount to be paid the contractor. When a specific sum is not agreed upon, the owner is liable in *quasi* contract for the reasonable value of the services performed. When services are rendered, and accepted, which are not specified in the contract, the owner is liable for the reasonable value thereof.

In negotiating a contract with a builder, the librarian should note that he is bound by the terms of the contract. What he fails to stipulate therein, will be subject to certain definite rules of law. This problem usually arises when it is necessary for the contractor to do extra work or supply additional materials not called for in the contract.

A building and construction contract can stipulate that any alteration of the plans or specifications involving extra work would not be allowed unless expressly authorized in writing by the owner or his representative. Unless the owner thereafter waives, modifies, or abrogates his rights under this clause, failure to obtain an authorization in writing for extra work will deny recovery for such work.²⁹ It is important to note that such authorization can be accomplished by the librarian merely marking "O.K." or "Approved" on a letter asking approval for extra work.³⁰ The effect of this clause can also be waived by the owner permitting a method of dealing whereby he ignores the stipulation. This happens when he learns of the extra work and doesn't object and therefore implies acceptance of it, or he orally agrees from time to time, to changes throughout the work which are then performed.

Although the contract may give the owner the right to make changes in the plans and specifications, if the changes are material, the contractor will be allowed recovery for extra work involved therein. As stated in *Salt Lake City v. Smith*, "Material quantities of

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work required by such alteration, that are substantially variant in character and cost from that contemplated by the parties when they made their agreement, constitute new and different work, not governed by the agreement, for which the contractors may recover its reasonable value.”³¹ In *Westcott v. State*,³² greater length of steel piles was requested by state engineers than originally contracted for. The contractor was permitted recovery for the increased cost of the work resulting therefrom. “Provisions in contracts made by municipalities and others, calling for a definite quality and quantity of construction, and permitting changes by way of reduction and increase, have received judicial interpretation, so that their meaning is now well understood. . . .”³³

There are other points of interest to librarians that are worth mentioning. To the question, is the owner of a building being constructed liable for the negligent acts of his independent contractor or architect? The answer is generally “no.” In *People v. Gaydica*³⁴ the court said “An owner, subletting the entire work to independent contractors is not liable for the negligence of any of the latter, but is answerable only for his personal affirmative negligence while actually participating in the work; and this rule applies also to a contractor subcontracting his work. It is a well-recognized fact that building operations can be conducted safely and that they are not inherently dangerous.”

There are many indefinite terms used in contracts and legal papers. Among them are “about,” “more or less,” and “approximate.” A good guide to these and their meaning is given in *Muir Bros. Co. v. Sawyer Const. Co.*,³⁵ where the plaintiff told the defendant that the extra work would cost “approximately \$900 to \$1,000.” The bill turned out to be for \$1,759.38. Denying plaintiff’s claim, the court said: “Expressions such as ‘about,’ ‘more or less,’ and ‘approximately’ in qualifying quantity, price, and the like, are often used in contracts and they have generally been held to mean a reasonable approximation to quantity or price specified.”³⁶

Finally, a word about what affects the validity of a contract. Fraud, mistake of facts, and collusion among the bidders permits the aggrieved party to obtain rescission of the contract.

References

1. *United States to the Use of Noland Co. v. Irwin et al.*, 316 U.S. 23 (1942).
2. *R. W. Johnson v. Mayor and City of Baltimore*, 158 Md. 93, 148 Atl. 209, 66 A.L.R. 1488 (1930).

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3. *Sargent v. Town of Merrimac*, 196 Mass. 171, 81 N.E. 970 (1907).
4. *McGill v. Carlos*, 81 N.E. 2d 726 (1947).
5. *Ibid.*, p. 729.
6. Parker, W. S., and Adams, Faneuil: *The A.I.A. Standard Contract Forms and the Law*. Boston, Little, Brown, 1954, p. 5.
7. *Bott v. Moser*, 175 Va. 11, 7 S.E. 2d 217 (1940).
8. *State v. Ireland*, 126 N.J.L. 444, 20 A. 2d 69 (1941); app. dismissed 127 N.J.L. 558, 23 A. 2d 560 (1942).
9. L.R.A. 1918D, 897.
10. *Pierce v. Board of Education*, 125 Misc. Rep. 589, 592, 211 N.Y. Supp. 788, 792 (1925).
11. *Doup v. Almand*, 207 S.W. 2d 601, 603 (1948).
12. *Audubon Building Co. v. F. M. Andrews & Co.*, 187 Fed. 254 (1911).
13. *Coombs v. Beede*, 89 Me. 187, 36 Atl. 104 (1896).
14. *Shaw v. G. B. Beaumont*, 88 N.J. Eq. 333, 102 Atl. 151 (1917).
15. 2 A.L.R. 126 (1918), s. 27 A.L.R. 48.
16. *Lonergan v. San Antonio Loan & Trust Co.*, 101 Tex. 63, 104 S.W. 1061 (1907), 106 S.W. 876 (1908).
17. *Curtain v. Somerset*, 140 Pa. 70, 21 Atl. 244 (1891).
18. *Central Bitulithic Paving Co. v. Highland Park*, 164 Mich. 223, 129 N.W. 46 (1910).
19. *Lassiter & Co. v. Taylor*, 99 Fla. 819, 128 So. 14 (1930). See: 110 A.L.R. 155 (1910).
20. *Long v. Owen*, 21 Idaho 243, 121 Pac. 99 (1912).
21. *Pope v. King*, 108 Md. 37, 69 Atl. 417 (1908).
22. *Barton v. Morin*, 281 Mass. 98, 183 N.E. 170 (1932).
23. *Hammaker v. Schleigh*, 157 Md. 652, 147 Atl. 790 (1929).
24. *Erickson v. Ward*, 266 Ill. 259, 107 N.E. 593 (1914).
25. *Pormann v. Walsh*, 97 Wis. 356, 72 N.W. 881 (1897).
26. *U.S. v. Gleason*, 175 U.S. 588 (1900).
27. *Devitt v. Schottin*, 274 N.Y. 188, 8 N.E. 2d 481 (1937).
28. *Knapp v. Swaney*, 56 Mich. 345, 23 N.W. 162 (1885).
29. *Maney v. Oklahoma City*, 150 Okla. 77, 300 Pac. 642 (1931).
30. 66 A.L.R. 649.
31. *Salt Lake City v. Smith*, 104 Fed. 457, 466 (1900).
32. *Westcott v. State*, 264 App. Div. 463, 36 N.Y. Supp. 2d 23 (1942).
33. *Drainage District No. 1 of Lincoln County, Neb. v. Rude*, 21 F. 2d 257, 261 (1927).
34. *People v. Gaydica*, 122 Misc. Rep. 31, 203 N.Y. Supp. 243, 269-270 (1923).
35. *Muir Bros. v. Sawyer Const. Co.*, 104 N.E. 2d 160 (1952).
36. *Ibid.*, p. 162.