CONSTRUCTION …
Law, Risk, Liability & Respondeat Superior

By

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What's the Issue?

A construction project involves so many stakeholders *1, each of whom has a several, often competing needs and interests. These interests and parties include, but are certainly not limited to: oneself versus one or more of the other stakeholders, home or business owner, financial, time, aesthetics, functionality, durability, features and specifications of products and materials, regulatory, professional standards, and ethics. When two or more parties enter into a contract, they assume certain "duties", but what happens when conflicting interests and goals affect how each fulfills those duties? What is a "successful" *2 project? What are the rewards and/or penalties for performance or lack thereof? Probably, the more important question is, how do we, as responsible members of the Architecture/Engineering/Construction (A/E/C), legal, financing, regulatory, vendor, and other related communities, manage risk to protect our clients, projects, companies, and ourselves from potential liabilities? See Table 1

*1 Stakeholder – n. refers to all parties who are involved in a project, including but not limited to: owners, architects and engineers, project managers, subcontractors, regulators, suppliers, vendors, craftspeople. The implication is the parties' interdependence in achieving a successful project completion via win-win relationships.

*2 Success – n. in this context, describes a best combination of completing the project within the contracted: scope, time frame, quality, cost of construction and maintenance, design, material selection and provision, craftsmanship, construction, thinking outside the box to save money for the owners, fulfillment of each party's fiduciary duties, durability, code compliance, and aesthetics

A risk is simply the possibility that an event or outcome may occur, and the occurrence of an adverse event or outcome typically comes with consequences. In some cases, we control risks. In the context of this paper, we reduce risk by obtaining insurance and licenses; practicing and participating in good workmanship and business practice; implementing a safety program; complying with prevailing codes, ordinances, and regulations; dealing in good faith, and so forth.

Concepts in Liabilities

In its most basic form, a liability is the consequence of an inability or a failure to manage a risk. We can reduce risk and mitigate liabilities by complying with or preferably exceeding relevant laws; participating in mutuality-agreed, valid, unambiguous contracts; acting on good, independent judgment and decisions, even those that we don't prefer; working as though one's workmanship and/or product will not be vetted, and obtaining requisite insurances, bonding, and credentials.

Before beginning any ambiguous work in the plans, every building partner *3 has a duty to approach his or her manager, the contractor, subcontractor, architect, and even the code official with related questions, concerns, and suggestions.

*3 Building partners – n. all contractors; their subs, vendors, and suppliers who are involved in a project. The connotation is that ALL are partners in the project's success or failure.

1. On occasion, the architect may be unavailable to consult with other building partners because of contractual terms and conditions. However, since the architect's continued involvement may benefit the owner and the Spearin Doctrine (*Spearin v. UNITED STATES* (248 U.S. 132 (1918), Nos. 44, 45)) may apply, it is in the interest of all stakeholders that the designer remains somewhat involved in the project. See Appendix 5.

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2. Good project management requires clearly assigned duties and responsibilities among team members with minimal ambiguities. Ambiguous terms and conditions in the master contract, along with the GC's demands for good productivity and quality from building partners, perhaps supplying improper materials or instructing them to omit components of assemblies that the architect specified are certain to increase risk of liabilities for all parties. All addenda, change orders, shop drawings must be properly drafted and endorsed by the proper parties.

   To use a football analogy, the coach, quarterback, and the whole team practice plays, plan, and prepare for each game. Then, during the game, the quarterback calls specific plays with the guidance of the offensive coach. If a "contractor", during a huddle, ignored standards of practice and said to his squad, "we have practiced and you all know the game, so use your good judgment, run around the field, and we'll score touchdowns." All building partners must cooperate in order to score a "touchdown" by completing all terms and conditions of the project contracts, plans, standards of practice, and permits professionally.

3. Vicarious Liability and Respondeat Superior - While each subcontractor must be held to the standards of his or her craft, the terms and conditions of any contracts that are in force, building code, architectural plans, any implied duty to collaborate with other building partners, and other expectations, the respondeat superior doctrine holds an employer or principal liable for an employee's or agent's wrongful acts committed within the scope of the employment or agency.

   In **Valles v. Albert Einstein Medical Center**, 758 A.2d 1238 (Pa.Super. 2000), the estate of an alleged medical malpractice victim brought a suit against the hospital in which the procedure was performed. The Pennsylvania Superior Court was called upon to decide whether the hospital was vicariously liable to the victim's estate for the doctor's failure to secure the victim's informed consent prior to performing the procedure. The court explained that the answer turned on whether the doctor was a "servant" or employee of the hospital as opposed to an independent contractor.

   The court noted that in certain circumstances an employer's vicarious liability may extend to intentional or even criminal acts committed by the employee. However, not every relationship of principal and agent creates vicarious responsibility in the principal for the acts of the agent. A principal and agent can be in the relationship of an employer and employee, or simply in the status of two independent contractors. If the parties' relationship is that of two independent contractors rather than employer-employee, the principal is generally not liable for the acts of the agent.

   In the Valles case, the court determined that the hospital was neither the doctor's employer; nor was it required to make sure that the doctor obtained informed consent.

   In **Akins v. Golden Triangle Planning & Dev.**, 34 So.3d 575 (Miss. 2010), plaintiff, filed suit in the Circuit Court of Oktibbeha County against Golden Triangle Planning and Development District, Inc. (Golden Triangle) under the theory of respondeat superior, seeking, inter alia, $80,628, an amount that he claimed represented profits owed to him for constructing homes under the federal government's HOME Investment Partnerships Program (HOME), which was administered locally by Golden Triangle. According to Akins, the profits to which he was entitled were embezzled by a Golden Triangle employee, Phyllis Tate. Upon both parties filing motions for summary judgment, the trial court denied Akins's motion for summary judgment and granted summary judgment in favor of Golden Triangle. Consistent with these actions, the trial court entered final judgment in favor of Golden Triangle, thus dismissing Akins's claims with prejudice. Aggrieved by the trial court's judgment, Akins timely filed this appeal.

Phyllis Tate (Tate) was employed by Golden Triangle as a Housing Specialist within the Housing Department. Tate's duties included enrolling the seven participating counties in the HOME program; assisting counties and municipalities in selecting eligible participants; advertising and soliciting bids from third-party contractors to construct the houses; verifying that the most competitive participants were awarded the bids; reviewing inspector reports certifying percentage of work completed on houses; and submitting requests to the Mississippi Development Authority for disbursement of money to counties and municipalities for payment to the contractors. Eventually, Tate began a scheme in which she colluded with her daughter and her daughter's then-boyfriend, Jason Clark, to divert HOME funds by transferring profits from the building projects to the checking account of a shell corporation, J-Max Construction Company, purportedly owned by Clark. In reality, J-Max was created for the fraudulent purpose of receiving the illegally diverted HOME funds. Tate convinced future homeowners to contract with builders with whom she purportedly had been working, and then requested cash allotments for J-Max Construction Company. The county or municipality receiving the grant funds wrote checks to J-Max. Tate, Clark, or Tate's daughter would withdraw the necessary funds to pay the subcontractors. When building was complete, Tate incorporated into the withdrawals the profits which should have been paid to the general contractor who actually had performed the work.

In August 2005, Golden Triangle suspected that Tate and/or Akins was involved in fraudulent activity after learning that Akins was charging building supplies to an account opened by Tate on behalf of a county at an area building supply warehouse, thereby avoiding sales tax on the building supplies. A forensic certified public accountant, hired by Golden Triangle, investigated and determined that Tate was embezzling HOME funds. Upon receiving this information from the forensic CPA, Golden Triangle reported Tate's actions to the local district attorney, the Mississippi State Auditor, and the Mississippi Development Authority. In due course, the Federal Bureau of Investigation conducted its own investigation, ultimately resulting in a forty-seven-count federal grand jury indictment being handed down in the United States District Court for the Northern District of Mississippi.

In due course, both Akins and Golden Triangle filed motions for summary judgment. The Circuit Court of Oktibbeha County, Judge Lee J. Howard presiding, denied Akins's motion for summary judgment and granted Golden Triangle's motion for summary judgment on the grounds that Tate was acting outside the scope of her duties in stealing government money and that Golden Triangle did not receive any benefit from Tate's illegal actions. From the trial court judgment entered in favor of Golden Triangle, Akins appeals to us.

The trial court relied on the test in Commercial Bank v. Hearn, 923 So. 2d 202 (Miss. 2006), for determining whether an employee was acting within the scope of employment. However, the trial court opinion referred to a "three prong" test from Hearn, and erroneously omitted the fourth prong when citing to Hearn. In Hearn, this Court defined an employee's conduct as being in the scope of employment if:
(a) it is of the kind he is employed to perform;
(b) it occurs substantially within the authorized time and space limits;
(c) it is actuated, at least in part, by a purpose to serve the master, and
(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

The Majority affirmed the lower court's ruling:

As a matter of law, Akins was not entitled to recover any funds from Golden Triangle, given that Golden Triangle's employee, Tate, embezzled money for her own personal gain and did not serve to mutually benefit Golden Triangle. Rather, such actions were to the detriment of Golden Triangle. For

all the reasons stated, the trial court did not err in granting Golden Triangle's motion for summary judgment; therefore, the Oktibbeha County Circuit Court's final judgment entered in favor of Golden Triangle Planning & Development District, Inc., dismissing with prejudice all claims of Walter Akins d/b/a Akins Construction Company, is affirmed.

AFFIRMED by Justice Waller; Justices Graves, Kitchens, and Pierce CONCUR.

Justice Randolph drafted the dissenting opinion; Justices Dickinson, Lamar, and Chandler concurring

The Minority's position suggests that Golden Triangle had a duty to
1) Implement policies and procedures that would have uncovered any signs of turpitude in applicants for responsible positions in their organization, and
2) Install prudent controls that would reduce and ideally eliminate the risk of embezzlement.

If Golden Triangle had taken those precautions, the firm could have theoretically prevented the whole incident, including among other impacts, its financial cost, expenditure of time, damage to its reputation, and the effects first on Akins and secondarily on Tate.

Duties

A duty is a legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right (see Appendix 1). For example, a construction contract creates duties among the parties to perform certain tasks, in a prescribed manner, at a specified time, in one of more particular locations, and so forth.

While there may be flexibility in these specifications, terms, and conditions, variations from those approved details and standards of practice are not without limit. Duties and liabilities for failure to perform according to those expectations vary, depending on the party, the nature of the project, severity and number of violations, prevailing building codes, ownership and property class, licensure, legal jurisdiction, technology, and zoning issues, to name only a few criteria.

All parties have a duty to comply with prevailing codes, ordinances, and standards of practice at the local, state, and possibly, Federal level, including Contract, Property, Trust, Tort, Criminal, Constitutional, and Administrative law.

1. Homeowner – single-family, owner occupied – duties under project contracts, mortgage, and insurance agreements; is generally as responsible for complying with codes and ordinances as construction and trade professionals.
2. Home or condominium owner or renter – multi-family – duties and prerogative to make changes vary under association bylaws; local, state, and federal ordinances; project contracts, and mortgage, rental, and insurance agreements; privileges generally more limited than in 1, and may be more liable for their own work in cases of failures to comply with codes and ordinances.
3. Business property owner and lessee - duties and prerogative to make changes vary under local, state, and federal ordinances; project contracts, and mortgage, rental, and insurance agreements; privileges generally more limited than for the single-family homeowner, and may be more liable for performing their own work on a commercial property.
4. Construction official – duties under state and local laws, diligence, impartiality, ethics beyond reproach, not cavalierly overlooking details that violate codes and standards, immunity except for malfeasance (see Appendix 2)

5. Architect or engineer – duties under state and other laws and ordinances, the project contract, and professional standards of practice; specifications that at meet or ideally exceed code and prevailing ordinances, manufacturers' or engineering standards supersede
6. Licensed electrician, plumber, lock smith, and other specialists – duties under state and other laws and ordinances, the project contract, and professional standards of practice; may not perform work under the auspices of other regulated crafts
7. Contractor – duties under state and other laws and ordinances, the project contract, and professional standards of practice, though often not as stringent as those of licensed architects and electricians, for example; may not perform work under the auspices of other regulated professions and/or crafts.

   Under the premise of protecting the public from unprofessional contractors, several states have implemented a patchwork of laws that require our clients, and members of the Architecture/ Engineering/Construction (A/E/C) community to register their business, document having obtained required insurance policies, submit to a background check, and in some cases, even pass examinations and maintain continuing professional education. Until recently, New Jersey still had a mosaic of "license" and "registration" requirements under the auspices of municipalities, and many continue to believe that licensure is more about revenue and a meager effort at consumer protection than a bona-fide effort to raise the bar for quality and service in the state. There are efforts in play in New Jersey to raise the bar in ways that California has already done.

   With its Contractors State License Board (CSLB), California appears to have differentiated itself with a spectrum of requirements for experience, successful completion of written law and trade examinations, capitalization, bonding, and other prerequisites. The State also supports compliant contractors with its Statewide Investigative Fraud Team (SWIFT), which deals with unprofessional contractors and even those in the underground economy. Depending on various perspectives, some might say that the rules and regulations are Draconian, or let the buyer beware, but each state must find an acceptable level of controls and protections for all stakeholders (see Appendix 3).

Duties among construction stakeholders

- Scenario 1 – A licensed electrician's helper connects power to the wall plate, not the electrical device. A building occupant received a shock and is injured.
  - The electrician had a duty to prudently hire the helper, to train him, and to check his work. His liability insurance would probably compensate the injured person for the injury.
  - The helper had a duty to understand and use proper techniques and procedures, to ask the licensed electrician for guidance in cases of uncertainty, and to perform as though his work would not be inspected. He could receive additional training or be fired.
  - The electrical inspector had a duty to catch the error on inspection, but would be immune from prosecution unless grossly negligent or for malfeasance.
  - The owner had a duty to hire a licensed electrician, or if within his or her skill set and legal, to exercise the same standards of performance as the electrician. The injured person would probably be compensated by the liability insurance of the owner or licensed electrician who performed the wiring.

- Scenario 2 – An architect's plans includes details that do not comply with code and/or other relevant standards. Work is completed according to the plans that the architect had submitted and the construction official approved, leading to water damage throughout the building, including, structural and finish materials. Tenants were inconvenienced, the reputation of the apartment complex was tarnished, and the property owner lost rental revenue.
  - The architect had a duty to catch the error(s) before they got into the final plans. With exceptions for any relevant exclusions, his or her liability insurance would most likely

compensate the owners. In addition, the State professional credentialing board might apply sanctions, even including revocation of the architect's license for a more serious error.

- The Building Department staff member who reviewed the plans had a duty to catch the error(s) before the plans were approved. In most cases, such public officials are immune from liability, and only ethical violations or gross negligence may pierce the immunity.
- The contractor had a duty to call the issues to the attention of the architect for clarification and redesign, and if rebuffed, call the construction official, and/or the State agency that bears oversight. Typically, contractors and developers "bury their heads in the sand", and avoid making waves due to fear of retribution.
- Any subcontractors had a duty to call the issues to the attention the prime contractor, and if rebuffed, call the architect and/or the construction official. They may simply feign ignorance due to fear of losing work and earning a reputation of being a trouble-maker.
- Building inspectors had a duty to cite the errors, deny approval for the work, possibly issue a "stop-work order", and require clarification or correction of the plans by the architect. There have been numerous incidents of bribery and deal-making between regulators and members of the construction community over the years. Among many victories, a NJ construction official was convicted for accepting work on his home in return for improper permitting. A building code instructor was stripped of his numerous building code and training certifications after the State learned of inappropriate practices in class.

Exclusions in Agreements

John Caravella, Esq. published this topic in his Construction Law Blog (www.liconstructionlaw.com) (Reprinted with permission)

Many contractors and subcontractors go about their work feeling protected from claims for damages because their agreements contain certain exclusions. Some of these agreements will even have language stating 'Not responsible for [X, Y, and Z]'.

But the ruling handed down February 14, 2012 by the Supreme Court, Nassau County serves as a reminder that contractual indemnity provisions are more of a privilege than a right, and are not subject to enforcement automatically.

"The law is settled that a party seeking contractual indemnification must prove itself free of negligence in order to enforce the indemnity clause." Cibellis Constr., Inc., v. Hamilton Owners, Inc. This effectively places an affirmative burden on the party seeking the enforcement of this protection to prove that no negligence on their part exists. The proving of any negative event can be challenging however, like proving the loch ness monster does not exist.

Ultimately this line of logic is what caused the ruling to come down against this contractor, as the court declined enforcement of its contractual indemnity protection. As the underlying project facts of this matter relate to damages to the underground electrical service caused during excavation of a driveway, it was found to be evidence of negligence on the contractor's part for failure to call the "one-call" notification system to verify the precise locations of the underground facilities.

Note: This was a ruling in a Nassau County, New York court. There may be other theories of law or cases on point relative to court standings in other jurisdictions.

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Summary

Professionals prefer to build perfectly, according to all of the best practices. Risk of "failure(s)" rises if one slacks-off on quality and design specifications, safety, contractual and regulatory obligations, et al, as does liability. Few like to approach a new business relationship cynically, but stakeholders can reduce risk by vetting one another and contracting wisely. It In other words, liability is a penalty for cavalier practices and lapses in judgment.

Profit is a most common reward that businesses seek in exchange for risk. Risk is a probability that a negative outcome may occur. The progressively larger size and severity of that negative outcome creates progressively greater liability, for which one party compensates another or mitigates some shortcomings. The party at fault forfeits money, property, rework, prison time, one's license, injuries, death, etc., depending on the nature of the risk, one's actions and involvement, the jurisdiction, time, contractual terms and conditions, and insurance, to name just a few factors. We have some degree of control over the risks, and in turn, the liability. In general, good business behavior and adherence to technical standards of practice reduce risk and liability, and tend to insulate and immunize us from liability.

Disclaimer

The Artisans Group's expert witness practice supports attorneys, prosecutors, owners, and construction and trade professionals in their efforts to fairly, accurately document the facts of the case at hand versus building code, ordinances, architectural and engineering plans, standards of practice, any contracts that may be in effect, etc. Any references to expertise in construction-related matters are a function of our skill, knowledge, and experience as a construction and business professional. They are not intended, nor should they be construed, as legal advice in any respect by The Artisans Group. We encourage those seeking legal advice to consult with an attorney of their choice to discuss all legal matters.

BIO

Wayne Baruch, MBA is President of The Artisans Group - A full-service remodeler, specializing in historic restoration & repairing structural, insect, & water damage, an expert witness, and an instructor in construction-related topics.

His audiences have included several colleges and universities, the NY Real Estate Investors Assn., and he has been a repeat guest on WDVR-FM. In addition to being a hands-on craftsman, he holds an MBA from Temple Univ., and owns Lead-Safe Certified Firm NAT-20233-1. The Bucks County, PA Chamber of Commerce honored Baruch & three others with its 2009 Humanitarian Award for their work rebuilding in Miss. in the aftermath of Katrina, Rita, & Gustav.

Baruch is past Vice Chair of PMI's Design-Procurement-Construction Group, was the #5-ranked Builder for Lennar Corp's NJ Div. in 2003, & has earned awards for The Artisans Group's work from the NJ Community Builder's Assn. & the Central Jersey Chapter of NARI.

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Table 1 - Good Practice & Typical Concern for Topic by Stakeholder Group

	Standards of practice			Aesthetics, features, & specifications			Code & ordinance compliance			Risk management			Budget			Expect collaboration, & support			Project schedule/ duration			Profitability		
Owner	S3	O1		S1	O1		S3	O3		S1	O1		S1	O3		S1	O1		S3	O1		S3	O3	
General, specialty, & subcontractors	S1	O1	C1	S1	O1	C1	S1	O2	C1	S1	O2	C1	S1	O3	C1	S2	O1	C1	S1	O1	C2	S1	O1	C3
Architects, engineers	S1	O1	C1	S1	O1	C1	S1	O1	C1	S1	O3	C2	S1	O3	C1	S1	O1	C1	S2	O2	C3	S1	O3	C3
Suppliers & vendors	S1	O1	C1	S1	O1	C1	S1	O2	C3	S1	O3	C2	S1	O3	C3	S2	O2	C2	S1	O1	C3	S1	O3	C3
Regulators	S1	O1	C1	S3	O1	C1	S1	O1	C1	S3	O3	C3	S3	O3	C1	S3	O2	C2	S2	O3	C3	S3	O3	C3
Attorneys	S1	O1	C1	S3	O1	C1	S1	O3	C1	S1	O2	C1	S1	O3	C1	S2	O2	C1	S2	O1	C2	S1	O3	C3
Financiers & insurers	S1	O2	C1	S3	O1	C1	S1	O2	C1	S1	O2	C1	S1	O3	C1	S2	O3	C1	S1	O1	C1	S1	O3	C3

Self, Other Stakeholders, Client/Owner – 1-2-3 (most – least)

This table tells us that

- A project is most successful if all parties equally support one-another's concerns and needs, and that this, at least anecdotally, only occurs in a few factors and between few parties.
- All parties ideally want good work that complies with code, the plans, contract, etc.
- We expect more from those who we hire than those who have invested less in the project.
- For the A/E/C stakeholders, one's professional standards, customer service, and a good client reference compete with profitability, productivity, varying levels of cooperation, and numbers of project changes.
- The time and expense of good risk management are pure overhead, but essential.
- Parties are most passionate about their own finances and foster the least mutual concern about the other parties' finances.

In other words, all that holds this potential rabble together, at least anecdotally, is an offer, consideration, acceptance, a contract, and hopefully, some professionalism and ethical standards.

Why is this issue mentioned in a paper about liability? Mutuality and shared risk encourage proper exercise of stakeholders' duties and these attributes and behaviors tend to reduce liability.

Table 2 - Standards of Practice, Penalties for Violations

	Regulated By…	Risks to Unqualified/ Uncertified Parties for Regulated Work	Penalties for Violations
Owner (depending on building class)	"All" Building Official	Prohibited from performing some regulated work	• Work stop order; Fines and Penalties • Raised insurance premium
Architects, engineers, general, specialty, & subcontractors	"All" Credentialing Org(s). Business Insurers Building Official	Limited by prevailing • codes & ordinances • certifications & licenses • manufacturers' specifications	• Raised insurance premium • Work stop order • Fines and penalties • In severe circumstances, loss of licenses/certifications, treble damages, prison time, etc.
Suppliers & vendors	"All" Credentialing Org(s). Business Insurers	Limited by prevailing • codes & ordinances • manufacturers' specifications	• Raised insurance premium • Fines and Penalties • In severe circumstances, loss of licenses/certifications, treble damages, prison time, etc.
Regulators (local, county, state, federal)	"All" Credentialing Org(s) Regulating Official	Limited by prevailing • codes & ordinances • certifications & licenses	• Fines and Penalties • In severe circumstances, termination of employment, censure, loss of license/certification, prison time, etc.
Financiers & insurers	"All" Credentialing Org(s)	Limited by numerous regulations & standards	• Fines and Penalties • In severe circumstances, censure, prison time, etc.
Licensed crafts (e.g. electrician, locksmith, plumber, sprinkler, alarm, pest control, etc.)	"All", Credentialing Org(s) Business Insurers Building Official	Limited by prevailing • codes & ordinances, • certifications & licenses, • manufacturers' specifications	• Raised insurance premium • Work stop order • Fines and penalties • In severe circumstances, loss of licenses/certifications, treble damages, prison time, etc.

For example, an architect is regulated by the State licensing board, but must collaborate with code enforcement. He or she may not perform work that requires other licenses/certifications. A construction official can issue a stop-work order for code violations, as well as fines, penalties, and more severe penalties for certain infractions. The architect's liability insurance carrier may require a higher premium.

"All" construction must comply with prevailing laws and ordinances, standards for workmanship, and may be regulated by

- Code Enforcement, Zoning, Health, Environmental Protection, Consumer Affairs, & other local, county, and state governmental departments;
- Courts; IRS, EPA, OSHA, and other Federal authorities
- Sureties

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Appendix 1 – Duty, Black's Law Dictionary, 7th Ed., West Group, 1999

1. A legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right.
2. Any action, performance, task, or observance owed by a person in an official or fiduciary capacity.
3. Torts. A legal relationship arising from a standard of care, the violation of which subjects the actor to liability. — Also termed duty of care.
4. A tax imposed on a commodity or transaction, esp. on imports;
5. IMPOST - A duty in this sense is imposed on things, not persons.

Appendix 2 – New Jersey Tort Claims Act

Tort –"a wrongful act, injury or damage for which a civil action may be brought."

Tort Claims Act 59:1-2 Legislative declaration

The Legislature recognizes the inherently unfair and inequitable results, which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand the Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done.

Consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carry out the above legislative declaration.

Nonfeasance –"failure to do what duty requires to be done."

59:2-6. Failure to inspect, or negligent inspection of property

A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property, provided, however, that nothing in this section shall exonerate a public entity from liability for negligence during the course of, but outside the scope of, or shall this section exonerate a public entity from liability for failure to protect against a dangerous condition as provided in Chapter 4 of the Tort Claims Act.

Comment

This immunity is essential in light of the potential and existing inspection activities engaged in by public entities for the benefit of the public generally. These activities are to be encouraged rather than discouraged by the imposition of civil tort liability. The inclusion of the reference to Chapter 4 is intended to indicate that this immunity shall not apply when dangerous conditions of public property are involved. In those cases Chapter 4 of this act provides the controlling principles of liability.

Misfeasance –"the doing of a lawful act in an unlawful or improper manner."

59:3-3. Execution or enforcement of laws - Construction Official Commentary - A public employee is not liable if he acts in good faith in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

Malfeasance –"commission of an act that is positively unlawful; wrongdoing or misconduct, especially by a public official."

> Willful Misconduct- Marley v. Borough of Palmyra, 193 N.J.Super. 271,473 A.2d 554 (L. 1983). The term 'willful misconduct" as used in the New Jersey Tort Claims Act provides that a public employee is not exonerated from liability if his conduct constitutes willful misconduct, which is the commission of a forbidden act with actual, not imputed, knowledge that the act is forbidden. It is more than an absence of "good faith" and is much more than negligence.

Appendix 3 – California Dept. of Consumer Affairs

California Department of Consumer Affairs, Contractors State Licensing Board
Business & Professions Code, 2012 Edition

Excerpt from California Contractors License Law - One can access CSLB's 2012 California Contractor License Law & Reference Book at www.lexisnexis.com/clients/caagencylaw.

CSLB licenses and regulates contractors in 43 license classifications that constitute the construction industry. The Statewide Investigative Fraud Team (SWIFT) polices unlicensed activity. CSLB staff

- receives and processes applications for new contractor licenses, additional classifications, changes of license records, and license renewals.
- reviews and maintains records of disciplinary actions initiated by the field offices, provides verified certificates of licensure used in court or other legal actions, and provides the status of licensure and other support services.
- directs the activities of field offices, and initiates all disciplinary actions resulting from investigations.
- investigates consumer complaints against contractors.

General Requirements & Qualifications
To qualify for a California contractor license, an individual must be 18 years of age or older, have a valid Social Security number (SSN) issued by the federal Social Security Administration, and have the experience and skills necessary to manage the daily activities of a construction business, including field supervision, or must be represented by someone else with the necessary experience and skills who serves as the qualifying individual.

The person who will act as the qualifying individual must have had, within the ten (10) years immediately before the filing of the application, at least four (4) full years of experience as a journeyman, foreman, supervising employee, or as a foreman, supervisor, or contractor in the classification for which he or she is applying. The experience claimed on the application must be verifiable, and individuals who have knowledge of the experience must certify the accuracy of the experience information as stated on the Certification of Work Experience form.

Selected Regulations
All businesses or individuals who construct or alter, or offer to construct or alter, any building, highway, road, parking facility, railroad, excavation, or other structure in California must be licensed by the California Contractors State License Board (CSLB) if the total cost (labor and materials) of one or more contracts on the project is $500 or more. Contractors, including subcontractors, specialty contractors, and persons engaged in the business of home improvement (with the exception of joint ventures and projects involving federal funding) must be licensed before submitting bids.

- All applicants for licensure are required to submit a full set of fingerprints for the purpose of conducting a criminal background check.
- The qualifying individual for a contractor license is required to pass the written Law and Business Examination and a specific trade examination, unless he or she is approved for a waiver.
- $2,500 worth of operating capital
- The contractor must file a license bond or cash deposit with the Registrar in the amount of $12,500.
- In addition, he or she must submit a separate bond of qualifying individual or cash deposit in the amount of $12,500 for the RME or the RMO (with two exceptions).

CSLB issues licenses to contract in particular trades or fields of the construction profession. Each separate trade is recognized as a "classification." Upon qualification (including certification of four years of journey-level experience), there is no limit to the number of classifications that may be added to your license. CSLB issues licenses for the following classifications:

- Class "A" — General Engineering Contractor - The principal business is in connection with fixed works requiring specialized engineering knowledge and skill.
- Class "B" — General Building Contractor - The principal business is in connection with any structure built, being built, or to be built, requiring in its construction the use of at least two unrelated building trades or crafts; however, framing or carpentry projects may be performed without limitation. A "B"General Building contractor may take a contract for projects involving one trade only if the contractor holds the appropriate specialty license or subcontracts with an appropriately licensed specialty contractor to perform the work.
- Class "C" — Specialty Contractor - There are 41 separate "C" license classifications for contractors whose construction work requires specialized skill and whose principal contracting business involves the use of specialized building trades or crafts. Manufacturers are considered to be contractors if engaged in on-site construction, alteration, or repair.

CSLB lists the C-61 Limited Specialty classification in 65 "D"subcategories.

Violations

CSLB has established statewide investigative teams that focus on unlicensed contractors and the underground economy. These units conduct stings and sweeps to curtail illegal contracting activities. Stings and sweeps are routinely publicized to ensure maximum consumer education.

Contracting without a license is usually a misdemeanor. Unlicensed contractors face a first offense sentence of up to six months in jail and/or a $5,000 fine, and potential administrative fines of $200 to $15,000. Subsequent violations increase criminal penalties and fines. However, felony charges may be filed against those who contract without a license for any project that is covered by a state of emergency or disaster proclaimed by the Governor or the President of the United States. Felony convictions may result in a state prison term as specified by the court.

Penalties for conduct that violates the security of the examination include prosecution on misdemeanor charges resulting in a fine of $500, payment of damages of up to $10,000 plus the costs of litigation, and a sentence in county jail. You would also be subject to automatic exam failure; any fee(s) paid to the State of California would not be refunded; and you would not be allowed to apply for any license classification for a period of one (1) year from your examination date.

Civil Court Judgments

- A contractor is required to report a construction-related civil court judgment to CSLB within 90 days of the judgment date. When a copy of the judgment is received by CSLB, the information is entered on the contractor license record and a notice is sent to the contractor.
- The notice gives the contractor 90 days from the date of the notice to resolve the judgment. After 90 days, if the judgment is not resolved, the contractor license is automatically suspended and remains suspended until the judgment is resolved. If the contractor fails to report the judgment within 90 days, then when the judgment is reported, his or her contractor license is suspended immediately. The license remains suspended until the judgment is resolved.
- Once a judgment is entered on a contractor's license record, the unsatisfied judgment can affect any other license that a person is on or any license for which he or she may apply. For example, suppose a contractor has a sole ownership license and a corporation license. If the judgment is against the corporation, then the suspension for failure to resolve the judgment will also suspend the sole ownership license.

Enforcement Procedures: Complaints and Citations

Complaints against contractors may be filed with CSLB by homeowners, other contractors, subcontractors, material suppliers, or employees. Public agencies may also file complaints.

Most complaints made against contractors involve poor workmanship; abandonment of a project; failure to pay subcontractors, suppliers, or employees; building code violations; lack of reasonable diligence in executing a construction project; use of false, misleading, or deceptive advertising; & violations of the law governing home improvement contracts.

When a complaint is made against a licensed contractor, the CSLB Intake and Mediation Center nearest the location of the alleged violation receives and processes the complaint. Each written complaint is reviewed to determine if it falls within CSLB's jurisdiction. CSLB sends a confirmation to the complainant that the complaint has been received. CSLB also sends a notice to the licensed contractor to determine if the complaint can be resolved without further board involvement.

If CSLB believes that a complaint fits the criteria for assignment to an enforcement representative (ER), an investigation may be conducted to determine if there are violations of the Contractors State License Law. Such an investigation may include interviewing the complainant, the contractor, and any other parties who can furnish relevant information.

If a violation is established but it is an isolated or minor one, CSLB may send the licensee a warning letter. The warning letter informs the licensee that CSLB is aware of the violation and that a future occurrence of the same violation may result in more stringent board actions.

If, on the other hand, a more serious violation is established, the Registrar of Contractors may issue a citation, which can include an order to correct a project, make restitution to an injured party, and pay a civil penalty of up to $5,000 for violations by licensees and $15,000 for unlicensed contractors. (See B&P §7099.2(b) regarding $15,000 citations for B&P §7114 and B&P §7118 violations.)

For flagrant violations of law, the Registrar will take administrative action by filing an accusation with the state Attorney General stating the board's intent to suspend or revoke the license. The licensee may be provided the opportunity to resolve the matter at a Mandatory Settlement Conference. If the matter is not settled, the licensee is given an opportunity to defend himself or herself at a hearing before a state administrative law judge.

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Addressing Complaints Against Unlicensed Contractors
In California, it is a misdemeanor to engage in the business or act in the capacity of a contractor without a contractor license unless the contractor meets the criteria for exemption specified in Business and Professions Code sections 7040 through 7054.5.

When a complaint is filed against an unlicensed contractor, CSLB will verify that the accused individual or firm contracted without a contractor license and will, with sufficient evidence, determine the amount of financial injury involved.

The Registrar may issue a citation to an unlicensed contractor when there is probable cause to believe that the person is acting in the capacity of a contractor or engaging in the business of contracting without a license that is in good standing with CSLB. The citation includes an order of abatement to cease and desist and a civil penalty of up to $15,000. Unless the board receives a written appeal within fifteen (15) working days after the citation is served, the citation becomes a final order of the Registrar. Upon a successful appeal, an administrative law judge submits a decision to uphold, modify, or dismiss the citation, which is sent to the Registrar for adoption.

If the cited unlicensed contractor continues to contract without a license, the Registrar may refer the case to the local district attorney for criminal action.

- Criminal Action CSLB may refer investigations to the local prosecutor to file criminal charges. If criminal charges are filed, the unlicensed contractor appears in local court, which renders a final decision on the case. The court may order a fine, probation, restitution, a jail sentence, or all of these.
- Injunction The Registrar may apply for an injunction with the superior court of either the county in which an alleged practice or transaction took place or the county in which the unlicensed person maintains a business or residence. An injunction restrains an unlicensed person from acting in the capacity or engaging in the business of contracting without a license that is in good standing with CSLB.

Statewide Investigative Fraud Team
In addition to the complaint process, CSLB established the enforcement division Statewide Investigative Fraud Team (SWIFT) that focuses on the underground economy and the unlicensed contractor who prospers at the expense of consumers and legitimate businesses. The SWIFT unit has the authority to visit any job site without cause or complaint, ask contractors to produce proof of licensure in good standing, and cite those who are not properly licensed. (See B&P Code §§ 7011.4 and 7099.)

Chapter 5. Home Improvement Mechanic's Lien
Anyone who helps improve property, but who is not paid for performed work or supplied materials, may record what is called a mechanic's lien against that property. A mechanic's lien is a claim, like a mortgage or home equity loan, made against the property and recorded with the county recorder.

Even if the contractor is paid in full, unpaid subcontractors, suppliers, and laborers who helped to improve the property may record mechanic's liens and sue the property owner in court to foreclose a lien. If a court finds the lien is valid, the property owner could be forced to pay additional monies or have a court officer sell the home to pay the lien. Liens can also affect personal credit records.

In the State of California, mechanic's liens are provided for in the California Constitution. Article 14, Section 3 of the California Constitution provides: "Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished materials for the value of such labor done and materials furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

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The list of people who may claim liens as provided by the Constitution, as well as the California Civil Code, is as follows: mechanics; persons furnishing materials; contractors; subcontractors; lessors of equipment; artisans; architects; registered engineers; licensed land surveyors; machinists; builders; teamsters; draymen; and all persons and laborers performing labor on or bestowing skill or other necessary services to, furnishing material or leasing equipment to be used or consumed in, or furnishing appliances, teams, or power contributing to a work of improvement. This does not mean that these people must have a contract directly with the owner. However, they must have a contract with the agent of the owner and every contractor, subcontractor, architect, builder, or other person having charge of a work of improvement is held to be the agent of the owner.

A material supplier is not the agent of the owner; and, therefore, a material supplier's supplier is not entitled to a statutory lien. Further, in order to be able to perfect your lien, the work and/or materials, etc. must be incorporated into the structure. That is to say that it has to be installed.

Stop Notices
A mechanic's lien is a lien on property. A stop notice is a lien on funds. You may use one or the other, or both. However, it should be noted that in public works, you cannot file a mechanic's lien; and, therefore, your only remedy may be a stop notice. Since the stop notice is a lien on funds, it may be preferable to a mechanic's lien in some instances.

Substantial compliance; Exceptions
(a) Except as provided in subdivision (e), no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract, regardless of the merits of the cause of action brought by the person, except that this prohibition shall not apply to contractors who are each individually licensed under this chapter but who fail to comply with Section 7029.
(b) Except as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract.
(c) A security interest taken to secure any payment for the performance of any act or contract for which a license is required by this chapter is unenforceable if the person performing the act or contract 296 SECTION VI. LICENSE LAW, RULES, REGULATIONS, AND RELATED LAWS was not a duly licensed contractor at all times during the performance of the act or contract.
(d) If licensure or proper licensure is controverted, then proof of licensure pursuant to this section shall be made by production of a verified certificate of licensure from the Contractors' State License Board which establishes that the individual or entity bringing the action was duly licensed in the proper classification of contractors at all times during the performance of any act or contract covered by the action. Nothing in this subdivision shall require any person or entity controverting licensure or proper licensure to produce a verified certificate. When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure shall be on the licensee.
(e) The judicial doctrine of substantial compliance shall not apply under this section where the person who engaged in the business or acted in the capacity of a contractor has never been a duly licensed contractor in this state. However, notwithstanding subdivision (b) of Section 143, the court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, (3) did not know or reasonably should not have known that he or she was not duly licensed

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when performance of the act or contract commenced, and (4) acted promptly and in good faith to reinstate his or her license upon learning it was invalid.

(f) The exceptions to the prohibition against the application of the judicial doctrine of substantial compliance found in subdivision (e) shall apply to all contracts entered into on or after January 1, 1992, and to all actions or arbitrations arising therefrom, except that the amendments to subdivisions (e) and (f) enacted during the 1994 portion of the 1993–94 Regular Session of the Legislature shall not apply to either of the following:
   (1) Any legal action or arbitration commenced prior to January 1, 1995, regardless of the date on which the parties entered into the contract.
   (2) Any legal action or arbitration commenced on or after January 1, 1995, if the legal action or arbitration was commenced prior to January 1, 1995, and was subsequently dismissed.

Insertion of void or unenforceable provisions in contract prohibited

(a) No contractor who is required to be licensed under this chapter shall insert in any contract, or be a party, with a subcontractor who is licensed under this chapter to any contract which contains, a provision, clause, covenant, or agreement which is void or unenforceable under Section 2782 of the Civil Code.
(b) No contractor who is required to be licensed under this chapter shall require a waiver of lien rights from any subcontractor, employee, or supplier in violation of Sections 3262 or 8122 of the Civil Code.

Remedies; Violations; Fees and costs

In addition to all other remedies, any licensed contractor or association of contractors, labor organization, consumer affected by the violation, district attorney, or the Attorney General shall be entitled to seek injunctive relief prohibiting any violation of this chapter by an owner-builder who is neither licensed nor exempted from licensure under this chapter. The plaintiff in that action shall not be required to prove irreparable injury and shall be entitled to attorney's fees and all costs incurred in the prosecution of the action, provided the plaintiff is the prevailing party. The defendant in that action shall be entitled to attorney's fees and all costs incurred in the defense against the action, provided the defendant is the prevailing party.

Reciprocity

The registrar may accept the qualifications of an applicant who is licensed as a contractor in a similar classification in another state if that state accepts the qualifications of a contractor licensed in this state for purposes of licensure in that other state, and if the board ascertains, on a case-by-case basis, that the professional qualifications and conditions of good standing for licensure and continued licensure are at least the same or greater in that state as in California.

The registrar may waive the trade examination for that applicant if the applicant provides written certification from that other state in which he or she is licensed, that the applicant's license has been in good standing for the previous five years.

The current edition of the California Contractors License Law and Reference Book is the basic study reference for the examination (www.lexisnexis.com/bookstore or www.cslb.ca.gov).
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Appendix 4 – Design Error and the Spearin Doctrine

Design Error by Melissa Dewey Brumback
Ms. Brumback's *Construction Law in NC* Newsletter, 7/1/2010 Ed. (Reprinted with permission)

Two words that strike fear into the heart of any architect, engineer, or lawyer representing them. Today's post discussion is to discuss the different obligations of each of the parties on a construction project relating to design errors.

As discussed last week, designers have an obligation to design in accordance with a reasonable standard of care. That does not mean that the plans and specifications are perfect, however.

While the contractor is not responsible for design errors, he does have a duty to report any design errors or omissions which he discovers during his review of the plans. If he discovers any design errors, he must report them to the owner. See, for example, AIA A201 3-2.2.

As we have also discussed, an owner also impliedly warrants the adequacy of the plans and specifications. This is sometimes known as the "Spearin Doctrine," after the seminal Supreme Court case, US. v. Spearin, 248 U.S. 132 (1918). In Spearin, a contractor sought to recover from the government for the government's failure to provide accurate plans reflecting the overflow issues which preexisted at the Brooklyn Navy Yard, The Court held:

[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications, (Citations omitted). This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view.

Id. at 136-137. The Spearin Doctrine has been faithfully followed in the North Carolina courts. See, e.g., City of Charlotte v. Skidmore, Owings and Merrill, 103 N.C, App. 667, 407 S.E.2d 571 (1991); Burke Co Public School Bd of Education v Juno Construction Corp, 50 N.C App. 238, 273 S.E,2d 504 (1981).

One state court held, "[i]t is simply unfair to bar recovery to contractors who are mislead by inaccurate plans and submit bids lower than they might otherwise have submitted." Battle Ridge Companies v. North Carolina Dept. of Transportation, 161 N.C. App. 156, 160, 587 S.E.2d 426 (2003), quoting Lowder v. Highway Comm., 26 N.C, App, 622, 638, 217 S.E.2d 682, 692, cert denied, 288 N.C. 393, 218 S.E.2d 467 (1975).

Obviously, the architect or engineer is the ultimate party responsible for design errors, but all parties play a role in identifying and minimizing the effect of such errors through prompt notification.

Implied Warranties on Construction Projects by Melissa Dewey Brumback
Ms. Brumback's *Construction Law in NC* Newsletter, 6/17/2010 Ed. (Reprinted with permission)

A contractor client asked me to explain to him what it meant when someone told him that he had given implied warranties to an owner. This is an excellent question.

Implied warranties are warranties that the law presumes you have given to the other party. Even if you never make any written warranty or guaranty, North Carolina courts will often find that you are still liable for certain warranties unless you explicitly disclaim them.

The warranties that are generally implied in construction contracts include:

1. Warranty of Merchantability - Under the Uniform Commercial Code, this warranty states that the merchant or supplier of a product delivered to the buyer warrant that the product is able to be used as intended. (disclaimable)
2. Warranty of Fitness for a Particular Purpose - This warranty, also under the Uniform Commercial Code, states that a product will be able to be used for a specific purpose which the buyer has told you about. It is usually less of an issue that merchantability—however, if a buyer tells you of an unusual need that he is expects the product you supply to him will meet, it can come into play.(disclaimable)
3. Warranty of Habitability (residential construction only) - The contractor for new residential construction owes a duty to build a house (and related fixtures) such that it can be lived in for normal residential purposes. This duty extends to both the original purchaser and subsequent purchasers, so long as statute of limitation and repose are met.
4. Warranty of Plans and Specifications - The owner impliedly warrants to the contractor that the plans and specifications provided to the contractor are adequate. This is also called the "Spearin doctrine."
5. Warranty of Workmanship - Every contractor impliedly warrants that his construction will be built in a workmanlike manner and sufficiently free of major defects. This implied warranty is sometimes made express in written contracts—such as in AIA A201 3.5.1.
6. Warranty to not delay or hinder any other parties on the Project - This warranty is owed by each contractor to his subcontractors, prime contractors to one another, and the owner to the contractor.

What do these warranties mean? Essentially, they all mean the same thing: that your product or labor is at least acceptable. It may not be perfect—but it meets certain minimum expectations.

Warranties 1 & 2 can be disclaimed—that is, you can assert that you are making no such warranties in your written contract or purchase order form. Certain requirements apply to make a disclaimer valid, so check with legal counsel.

The remaining warranties—Habitability, Plans and Specifications, Workmanship, and Not to Hinder or Delay—are warranties that, in general, cannot be disclaimed. If a warranty is breached, the other party has a claim for breach of the implied warranty at issue.

The Architect's and Engineer's "Standard of Care" by Melissa Dewey Brumback
Ms. Brumback's *Construction Law in NC* Newsletter, 6/24/2010 Ed. (Reprinted with permission)

Architects and engineers are required to meet the appropriate standard of care for their work on a construction project. Such a simple phrase is actually a very loaded statement. What, exactly, is the "standard of care" that the design professional is required to meet? This is one of the "terms of art" that lawyers love and everyone else tends to hate.

Basically, the "standard of care" is a shorthand description that states the designer owes a duty to perform reasonably well on the project. How is "reasonably well" defined? It is not perfection. It is, however, the showing of "reasonable care" and performing the "level of skill and diligence those in engaged in the same profession would ordinarily exercise under similar circumstances." Again, what? If you are an architect practicing in, for example, Raleigh, you will be presumed to:

1. possess the required degree of learning, skills, and experience that is ordinarily possessed by similarly situated professionals in the community (that is, perform as well as other architects practicing in the Raleigh area);
2. use reasonable and ordinary care and diligence in the exercise of your skill to accomplish your professional tasks; and
3. use your best judgment in performing your professional tasks.

Notice that nowhere did I say that the architect's plans had to be perfect. However, the plans do need to meet a "typical" standard. They must meet the applicable Codes. They must generally be sound. But they do not have to be perfect. (Question: Is there ever a perfect set of plans?).

Courts in North Carolina have spent a lot of time, and a lot of ink, discussing the deceptively simple concept of "standard of care," but essentially this is how it is defined. If you want to read caselaw discussing the standard, a good case is RCDI Const. Inc. v. Spaceplan/Architecture, Planning, & Interiors, PA., 148 F. Supp. 2d 607 (W.D.N.C. 2001).

Note for Contractors & Subcontractors – If you are not a licensed professional, are you off the hook? No. But your duties fall under the "implied duty of workmanship". Essentially, you have a duty to make sure your work is sufficiently free from defects such that it meets the requirements of the Contract documents.

Ms. Dewey Brumback is a partner at Ragsdale Liggett PLLC, who represents architects, engineers, designers, and other construction professionals in construction disputes throughout NC, and also handles complex commercial and business litigation matters.

Appendix 5 – Spearin v. UNITED STATES.

248 U.S. 132 (1918), Nos. 44, 45

APPEALS FROM THE COURT OF CLAIMS.
133*133 Mr. Assistant Attorney General Thompson for the United States.

Mr. Charles E. Hughes, with whom Mr. Frank W. Hackett and Mr. Alfred S. Brown were on the brief, for Spearin.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Spearin brought this suit in the Court of Claims, demanding a balance alleged to be due for work done under a contract to construct a dry-dock and also damages for its annulment. Judgment was entered for him in the sum of $141,180.86; (51 Ct. Clms. 155) and both parties appealed to this court. The Government contends that Spearin is entitled to recover only $7,907.98. Spearin claims the additional sum of $63,658.70.

First. The decision to be made on the Government's appeal depends upon whether or not it was entitled to annul the contract. The facts essential to a determination of the question are these:

Spearin contracted to build for $757,800 a dry-dock at the Brooklyn Navy Yard in accordance with plans and specifications which had been prepared by the Government. The site selected by it was intersected by a 6-foot brick sewer; and it was necessary to divert and relocate a section thereof before the work of constructing the dry-dock could begin. The plans and specifications provided that the contractor should do the work and prescribed the dimensions, material, and location of the section to be 134*134

substituted. All the prescribed requirements were fully complied with by Spearin; and the substituted section was accepted by the Government as satisfactory. It was located about 37 to 50 feet from the proposed excavation for the dry-dock; but a large part of the new section was within the area set aside as space within which the contractor's operations were to be carried on. Both before and after the diversion of the 6-foot sewer, it connected, within the Navy Yard but outside the space reserved for work on the dry-dock, with a 7-foot sewer which emptied into Wallabout Basin.

About a year after this relocation of the 6-foot sewer there occurred a sudden and heavy downpour of rain coincident with a high tide. This forced the water up the sewer for a considerable distance to a depth of 2 feet or more. Internal pressure broke the 6-foot sewer as so relocated, at several places; and the excavation of the dry-dock was flooded. Upon investigation, it was discovered that there was a dam from 5 to 5 1/2 feet high in the 7-foot sewer; and that dam, by diverting to the 6-foot sewer the greater part of the water, had caused the internal pressure which broke it. Both sewers were a part of the city sewerage system; but the dam was not shown either on the city's plan, nor on the Government's plans and blue-prints, which were submitted to Spearin. On them the 7-foot sewer appeared as unobstructed. The Government officials concerned with the letting of the contract and construction of the dry-dock did not know of the existence of the dam. The site selected for the dry-dock was low ground; and during some years prior to making the contract sued on, the sewers had, from time to time, overflowed to the knowledge of these Government officials and others. But the fact had not been communicated to Spearin by anyone. He had, before entering into the contract, made a superficial examination of the premises and sought from the civil engineer's office at the Navy 135*135 Yard information concerning the conditions and probable cost of the work; but he had made no special examination of the sewers nor special enquiry into the possibility of the work being flooded thereby; and had no information on the subject.

Promptly after the breaking of the sewer Spearin notified the Government that he considered the sewers under existing plans a menace to the work and that he would not resume operations unless the Government either made good or assumed responsibility for the damage that had already occurred and either made such changes in the sewer system as would remove the danger or assumed responsibility for the damage which might thereafter be occasioned by the insufficient capacity and the location and design of the existing sewers. The estimated cost of restoring the sewer was $3,875. But it was unsafe to both Spearin and the Government's property to proceed with the work with the 6-foot sewer in its then condition. The Government insisted that the responsibility for remedying existing conditions rested with the contractor. After fifteen months spent in investigation and fruitless correspondence, the Secretary of the Navy annulled the contract and took possession of the plant and materials on the site. Later the dry-dock, under radically changed and enlarged plans, was completed by other contractors, the Government having first discontinued the use of the 6-foot intersecting sewer and then reconstructed it by modifying size, shape and material so as to remove all danger of its breaking from internal pressure. Up to that time $210,939.18 had been expended by Spearin on the work; and he had received from the Government on account thereof $129,758.32. The court found that if he had been allowed to complete the contract he would have earned a profit of $60,000, and its judgment included that sum.

The judgment of the Court of Claims is, therefore,

Affirmed.

(MR. JUSTICE McREYNOLDS took no part in the consideration and decision of this case.)

[1] "271. Examination of site. — Intending bidders are expected to examine the site of the proposed dry-dock and inform themselves thoroughly of the actual conditions and requirements before submitting proposals."

[2] "25. Checking plans and dimensions; lines and levels. — The contractor shall check all plans furnished him immediately upon their receipt and promptly notify the civil engineer in charge of any discrepancies discovered therein. . . . The contractor will be held responsible for the lines and levels of his work, and he must combine all materials properly, so that the completed structure shall conform to the true intent and meaning of the plans and specifications."

[3] "21. Contractor's responsibility. — The contractor shall be responsible for the entire work and every part thereof, until completion and final acceptance by the Chief of Bureau of Yards and Docks, and for all tools, appliances, and property of every description used in connection therewith. . . ."

Appendix 6 – Permitting and Regulatory

New Jersey Register, Vol. 43, No. 21, November 7, 2011
TITLE 5. COMMUNITY AFFAIRS
Excerpt from Chapter 23. Uniform Construction Code
Subchapter 2. Administration and Enforcement; Process, N.J.A.C. 5:23-2

§ 5:23-2.4 Alterations, replacements and damages

(a) Existing structures, when repaired, renovated, altered or reconstructed, shall conform to the requirements of N.J.A.C. 5:23-6, Rehabilitation Subcode.
(b) If an existing structure is damaged by fire or any other cause, the requirements of N.J.A.C. 5:23-6, Rehabilitation Subcode, shall apply to the restoration of such building or structure.
(c) Any work which is mandated by any housing, property or fire safety maintenance code, standard or regulation or other State or local law requiring improvements to buildings or structures shall be made to conform only to the requirements of that code, standard, law or regulation and shall not be required to conform to the subcodes adopted pursuant to this chapter unless the code requiring the alteration so provides.

§ 5:23-2.21 Construction control

(a) Responsibilities: The provisions of this section shall define the construction controls required for all buildings involving professional architecture/engineering services and delineate the responsibilities of such professional services together with those services that are the responsibility of the contractor during construction.
(b) Professional architecture or engineering services:
Design: All new, renovation, alteration, reconstruction, expansion, addition or modification work involving the practice of professional architecture or engineering, as defined by the statutory requirements of the professional registration and licensing laws of this State, shall be prepared by registered architects or licensed engineers. All plans, computations and specifications required for a construction permit application must be prepared by or under the direct supervision of a registered architect or licensed engineer and bear his or her signature and seal in accordance with the State's statutes and regulations governing the professional registration and licensing of architects and engineers.
(c) Responsible person in charge of work: The owner shall designate a person to be in charge of the work who shall be responsible for:
1. Verification of all controlled materials per building subcode requirements of testing, certification and identification;
2. Special inspection of critical construction components;
3. Submission of amended plans and specifications whenever substantial deviations are necessary or desired, or when required to do so pursuant to N.J.A.C. 5:23-2.15(f)4v; and

4. The responsible person in charge of work shall perform the necessary services and be present on the construction site on a regular and periodic basis to determine that, generally, the work is proceeding in accordance with the code and any conditions of the construction permit.

(d) Reporting: At the completion of the construction, the responsible person in charge of work shall submit to the construction official a report as to the satisfactory completion and the readiness of the project for occupancy and shall certify that, to the best of the responsible person's knowledge and belief, such has been done substantially in accordance with the code and with those portions of the plans and specifications controlled by the code, with any substantial deviations noted.

(e) Construction contractor services: The actual construction of the work shall be the responsibility of the contractor(s) as identified on the approved construction permit and shall involve:

1. Execution of work in accordance with the regulations;
2. Execution and control of all methods of construction in a safe and satisfactory manner;
3. Execution of all work in accordance with the code and those portions of the plans and specifications controlled by the code;
4. In general, render all such construction services as required to effect a safe and satisfactory installation of the project;
5. Upon completion of the construction, the contractor shall certify to the best of the contractor's knowledge and belief that such has been done substantially in accordance with the code and with those portions of the plans and specifications controlled by the code, with any substantial deviation specifically noted.

(f) The provisions of this section do not relieve the enforcing agency of any of the responsibilities required by the regulations.

§ 5:23-2.31 Compliance

(a) If the notice of violation and orders to terminate have not been complied with, the construction official in addition to any other available remedies likely to bring about compliance, may request the legal counsel of the municipality, or of the joint enforcement agency, or the Attorney General in the case of the State, to institute the appropriate proceeding at law or in equity to restrain, correct, or abate such violation or to require the removal or termination of the unlawful use of the building or structure in violation of the provisions of the regulations or of the order or direction made pursuant thereto.

(b) Penalties:

1. Any person or corporation, including an officer, director or employee of a corporation, shall be subject to a penalty if that person:
   i. Violates any of the provisions of the act or the regulations;
   ii. Constructs a structure or building in violation of a condition of a building permit;
   iii. Fails to comply with any order issued by an enforcing agency or the department;
   iv. Makes a false or misleading written statement, or omits any required information or statement in any application or request for approval to an enforcing agency or the department.
2. Anyone who knowingly refuses entry or access to an inspector lawfully authorized to inspect any premises, building or structure pursuant to the act or the regulations, or who unreasonably interferes with such an inspection, shall be subject to a fine of not more than $ 250.00.
3. With respect to (b)1iii above, a person shall be guilty of a separate offense for each day that he fails to comply with a stop construction order validly issued by an enforcing agency or the department and for each week that he fails to comply with any other order validly issued by an enforcing agency or the department. With respect to (b)1i and iv above, a person shall be guilty of a separate offense for each violation of any provision of the act or the regulations and for each false or misleading written statement or omission of required information or statement made in any application or request for approval to an enforcing agency or the department. With respect to

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(b)1ii above, a person shall be guilty of a separate offense for each violation of conditions of a construction permit.

4. No such penalty shall be assessed except upon notice of violation and orders to terminate and upon the expiration of the time period delineated in the notice; except that in the case of a false or misleading statement pursuant to (b)1iv above, the failure to obtain a construction permit or request required inspections, or allowance of occupancy prior to receipt of a certificate of occupancy, an order to pay a penalty shall be issued immediately.
5. The construction official may separately serve a notice of penalty assessment and order to pay a penalty.
6. The penalties pursuant to this section may be collected pursuant to the "Penalty Enforcement Law of 1999" (N.J.S.A. 2A:58-10 et seq.). Jurisdiction to enforce such penalties is conferred upon judges of the municipal court and of the Superior Court. Suit may be brought by a municipality or the State of New Jersey. Payment of a money judgment pursuant hereto shall be remitted in the case of a suit brought by a municipality to the municipal treasurer and in the case of a suit brought by the State of New Jersey to the State Treasurer.

(c) The construction official may assess a monetary penalty whenever such shall be likely to assist in bringing about compliance.

(d) Stop construction order:

1. If the construction of a structure or building is being undertaken contrary to the provisions of the regulations, or other applicable laws or ordinances, the enforcing agency may issue a stop construction order in writing which shall state the reasons for such order and the conditions under which construction may be resumed and which shall be given to the owner or the holder of the construction permit or to the person performing the construction. If the person doing the construction is not known, or cannot be located with reasonable effort, the notice may be delivered to the person in charge of, or apparently in charge of, the construction.
2. If, at the time of inspections requested pursuant to N.J.A.C. 5:23-2.18(c), a pattern or practice is identified and documented in writing of the same code violation(s) occurring in most or all of the dwelling units inspected within a housing development, affecting framing, fire safety or structural safety, the construction official may issue a stop construction order for all buildings within the development.
3. No person shall continue, or cause to allow to be continued, the construction of a building or structure in violation of a stop construction order, except with the permission of the enforcing agency to abate a dangerous condition or remove a violation, or except by court order.
4. If an order to stop construction is not obeyed, the enforcing agency may apply to the appropriate court as otherwise established by law for an order enjoining the violation of the stop construction order. The remedy for violation of such an order provided in this subsection shall be in addition to, and not in limitation of, any other remedies provided by law.

§ 5:23-4.5 Municipal enforcing agencies--administration and enforcement

(j) Conflict of interest:

1. No person employed by an enforcing agency as a construction or subcode official or as an inspector shall knowingly carry out any inspection or enforcement procedure with respect to any property or business in which he or she, or any close relative or household member, or his or her superior within the enforcing agency, or any close relative or household member of such superior, or any other public official or employee having any direct or indirect control over the funding or operations of the enforcing agency, or any household member of any such public official or employee, has an economic interest. For purposes of this paragraph, "close relative" shall mean and include a spouse, sibling, ancestor or descendant, or the spouse of any of them.
    i. Where an inspection or enforcement procedure is necessary or required in any such property or business, and there is no other person employed by the enforcing agency who is qualified, pursuant to this chapter, to perform the inspection or enforcement procedure and

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who is not a subordinate of the person with the direct or indirect economic interest in such property or business, the official or inspector shall arrange for the inspection or enforcement to be carried out either by another local enforcing agency or by the Department.

ii. A separate log shall be maintained by the enforcing agency of all inspections and enforcement procedures performed, when permitted in accordance with (j)1i above, with regard to any properties or businesses in which any persons employed by the enforcing agency have a direct or indirect economic interest.

2. No person employed by an enforcing agency as a construction or subcode official, assistant to the construction or subcode official, trainee, inspector or plan reviewer, shall, whether directly or indirectly, be engaged in ownership of, or employment by, or contracting to provide goods or services to, any business furnishing labor, materials, products or services for the construction, alteration or demolition of buildings or structures, or for the maintenance of any equipment or building component the maintenance of which is regulated pursuant to this chapter, that is engaged in any such activity within any municipality in which he is so employed by an enforcing agency, or in any municipality adjacent to any municipality in which he is thus employed. For purposes of the prohibition set forth in this paragraph, it shall be immaterial whether the employment by the business, or the providing of goods and services to the business, occurred within the employing municipality or an adjacent municipality or occurred elsewhere.
3. Persons subject to this subsection shall annually report any income or benefits received from any business or property subject to the Code, or from any business furnishing materials, products, labor or services for types of work subject to the Uniform Construction Code regulations, to the municipal governing body. This report shall include a list of all sources of income, but need not list the amount.
4. No person employed by a municipal enforcing agency as a construction official, subcode official or inspector shall be employed to appear before any construction board of appeals, or be involved in any court proceeding within the State, as a paid expert witness, or in any other compensated capacity in any proceeding involving the enforcement of the Uniform Construction Code except on behalf of another enforcing agency, or as a court-appointed witness.
   This prohibition shall not apply to any litigation not involving enforcement of the Code, or to an appearance as a fact witness; nor shall it apply to any activities unrelated to an action for, or an appeal of, enforcement of the Code.
5. This section shall not apply to:
   i. The ownership of stock or other investment instrument in any corporation listed on any national stock exchange.
   ii. Any such business or employment outside the State;
   iii. Dual employment by two or more enforcing agencies;
   iv. Any business or employment which is not subject to the regulations.
   v. Service as an instructor in a code enforcement training program.
6. Nothing herein shall prohibit a municipality from establishing by ordinance more restrictive provisions covering conflict of interest.

(k) No person employed by an enforcing agency as a construction official, subcode official or inspector shall accept, or continue to hold, employment in one or more other municipalities as a construction official, subcode official or inspector unless the resulting combined workload is such that it can be discharged in a manner consistent with the requirements of this chapter.

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