

SMITH,
CURRIE
& HANCOCK'S

Fifth Edition

COMMON SENSE CONSTRUCTION LAW

A PRACTICAL GUIDE FOR THE
CONSTRUCTION PROFESSIONAL

THOMAS J. KELLEHER, JR., JOHN M. MASTIN, JR.
& RONALD G. ROBEY

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Smith, Currie & Hancock's COMMON SENSE CONSTRUCTION LAW:

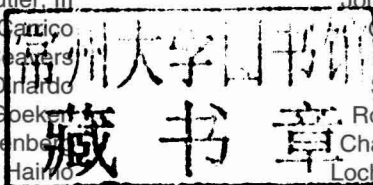
A Practical Guide for the Construction Professional

FIFTH EDITION

Edited by
Thomas J. Kelleher, Jr., John M. Mastin, Jr., and
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In the first edition of Common Sense Construction Law, we recognized Overton A. Currie and Luther P. House, Jr., for their leadership and mentoring of the firm and its construction law practice. Consistent with the tradition established by the founders of this firm, we dedicated the second edition of Common Sense Construction Law to our clients, whose confidence and trust will always be essential to our practice and success. In the third edition of Common Sense Construction Law we recalled the fond memories of our deceased partners, G. Maynard Smith (1907–1992), E. Reginald Hancock (1924–2004), and Bert R. Oastler (1933–2002), who devoted their professional lives to the practice of our profession at the highest level of excellence and set the standard for future generations of lawyers in the firm. In the fourth edition of this book, we honored the remarkable life and achievements of Overton A. Currie (1926–2005). Without him, the practice of construction law as it exists today would not be nearly as defined. Overton was truly a giant in, and left an indelible mark upon, the construction industry and our firm.

In this fifth edition, we honor additional partners who have dedicated their professional careers to their clients by practicing at our firm, Tom Abernathy and Phil Fortune. We also remember and acknowledge the outstanding contributions, personal courage and faith of our partner, Aubrey L. Coleman, Jr. (1942–2014). There will never be a better construction attorney, partner, or mentor. Finally, this is the fifth edition of Smith, Currie & Hancock's Common Sense Construction Law. All five were edited by Tom Kelleher as senior editor. The massive collection of knowledge and years of hard work represented by these books stand as a testament to Tom's scholarship, diligence, and dedication to advancing the practice of construction law.

PREFACE

The attorneys of Smith, Currie & Hancock LLP have practiced construction law and government contracts law for five decades since its founding in 1965. During that time, we have conducted hundreds of construction and government contract law seminars for clients, trade associations, colleges and universities, and professional groups. Throughout those efforts, our consistent goal has been to provide a practical, commonsense perspective to the legal issues affecting the construction industry. In many respects, this book reflects a culmination and refinement of those educational endeavors and the practical approach they entail.

Construction law and the related legal concepts are essential to the construction industry, as they provide the theories, principles, and generally established rules that contribute to the smooth running of the construction process. When that process falters and disputes arise that involve the design and construction of a project, a variety of procedures can be used to resolve these differences. These procedures vary in their legal formalities; however, an appreciation of these processes and principles should not be limited to lawyers. Individuals in management and supervisory positions in the industry must be cognizant of what the law requires of their companies and personnel and what they can expect and require from others. Nor can lawyers focus on legal rules and procedures to the exclusion of the *business* of construction and expect to effectively represent and assist their clients. Construction law and the business of construction are inextricably intertwined and evolve with innovations such as Building Information Modeling (“BIM”) and Public-Private Partnerships (“P3s”). We hope this book reflects this interrelationship in the topics that it covers and the various perspectives and approaches it employs.

Claims and disputes are addressed throughout this fifth edition of *Common Sense Construction Law*. They must be in any complete and competent analysis of the construction environment. This book, however, is about much more than just preparing claims and resolving disputes once they arise as it seeks to address practical steps to avoid pitfalls whether the project is performed domestically or internationally or uses a traditional design-bid-build delivery system or one of the many alternative project delivery systems. Rather, our goal is to help provide the kind of insight and understanding needed to *avoid* claims and disputes. Reasonable recognition of the contractual allocation of rights, risks, and legal responsibilities, coupled with a spirit of communication and teamwork in the execution of the work, is far more likely to culminate in a successful project than an atmosphere rife with confrontation and dispute. Practical knowledge of the general rules governing employment-related issues

can have the same beneficial result. Of course, the possibility of claims and disputes cannot be ignored. Careful attention, planning, and solid documentation are all required to avoid disputes and to deal effectively with them if they become inevitable.

Consistent with the goal of providing a comprehensive overview of construction law topics and issues for the construction professional and those teaching courses in construction management related subjects, the primary sources of standard form construction documents were contacted, and they provided their consent to make sample copies of these forms available on a website for review by those using this book. We wish to express our appreciation to The American Institute of Architects, ConsensusDocs, the Design-Build Institute of America, and the Engineers Joint Contract Documents Committee for their willingness to assist in the effort to provide practical teaching tools for the industry. These industry form documents may be viewed at www.wiley.com/go/constructionlaw5e.

The fifth edition of *Common Sense Construction Law* is a general teaching tool and is not a substitute for the advice of your attorney. Specific concerns and problems require the timely attention of legal counsel familiar with construction law, government contracts, and employment law. Nevertheless, this book will help you to expand your knowledge and awareness of the issues in construction that may affect you at any time. It may not provide all the answers, but you will be well equipped to ask the right questions. To make these materials more useful to you, we have included checklists, sample forms, and summary “Points to Remember” for each chapter.

We thank our clients and academic professionals who have shared their insights and concerns and provided the opportunities for experience and learning that are shared in this book. We also owe much gratitude to the construction industry as a whole for allowing us as construction attorneys to participate in the challenges of the industry to avoid and resolve problems. We hope this work will contribute to the worthy goals of the industry. We also hope that this book helps its users pursue their interests in and commitments to construction from concept to completion.

SMITH, CURRIE & HANCOCK LLP

Atlanta, Georgia
January 2015

SMITH, CURRIE & HANCOCK LLP

A Firm Concentrating Its Practice on the Construction Industry

During the last 50 years Smith, Currie & Hancock LLP, with offices in Atlanta, Georgia; Charlotte and Raleigh, North Carolina; Fort Lauderdale, Florida; Los Angeles and San Francisco, California; and Washington, D.C., has developed a nationally recognized practice focused on the construction industry and the variety of legal issues facing that industry. Representing private and public clients working or located in all fifty states, as well as Puerto Rico, Mexico, Canada, Central and South America, Europe, Asia, and Africa, construction contract law has been a principal practice area since its founding.

After developing construction and employment law practices in the context of a general service firm, G. Maynard Smith, Overton A. Currie, and E. Reginald Hancock formed Smith, Currie & Hancock in 1965 to concentrate their practices in those areas in order to provide more effective service to the firm's clients. Having trained and practiced law in the culture created by those three outstanding attorneys, the current members of the firm remain committed to a tradition of providing quality, cost-effective legal services to clients ranging from small, family-owned concerns to multibillion-dollar corporations.

In representing the many construction industry participants competing for and performing public and private construction contracts, we are necessarily involved in a wide variety of legal and business-related issues. The breadth of those issues is reflected by the spectrum of topics addressed in *Common Sense Construction Law—Fifth Edition*. The goal of this book is to provide an informative discussion of these topics for the construction professional without all of the specific details of a multivolume legal treatise. To accomplish that task in a practical and meaningful manner, this book reflects the collective efforts of many attorneys drawing on more than 1000 years of collective experience in the areas of construction law and federal government contracts law.

Many of the firm's attorneys have engineering degrees in addition to their legal education, and several worked in the construction industry prior to obtaining their law degrees. Others joined this firm after military service as government contracts legal counsel or have extensive training in public procurement. Three members of Smith, Currie & Hancock have served as chairs of the Section of Public Contract Law of the American Bar Association, and another partner has served as the chair of the American Bar Association Forum Committee on the Construction Industry.

Smith, Currie & Hancock has represented clients from the entire spectrum of the construction industry: contractors, subcontractors, construction managers, owners (public and private), architects, engineers, sureties, insurance companies, suppliers, lenders, real estate developers, and others. They include multinational and *Fortune* 500 companies and trade associations representing billion-dollar industries as well as local and regional clients. While our attorneys have appeared in numerous reported court decisions and even more arbitrations, our primary goal has been to achieve resolution of differences by communication and agreement rather than formal litigation. Consequently, over the last five decades we have assisted in the amicable resolution of many more matters than these reported decisions.

In addition to serving clients nationwide, Smith, Currie & Hancock attorneys have published numerous articles in trade magazines and other periodicals and have authored or coauthored dozens of books on construction and public contract law. Our lawyers maintain a heavy schedule of lectures and seminars sponsored by various trade associations, colleges, and universities, including The Associated General Contractors of America, Georgia Institute of Technology, Auburn University, the American Bar Association, the Practising Law Institute, and the Associated Builders and Contractors, Inc.

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