# CONSTRUCTION CONTRACT LAW

JOHN J. P. KROL

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JOHN J.P. KROL, ESQ.

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# PREFACE

The difficulty in writing this book lies with its title *Construction Contract Law*. The fact is there is no one construction contract law. We operate in a federal union, composed of 50 different states, with, on some issues, as many as 50 different opinions on how to deal with contracts. Add to this the overlay of a federal system with its own idiosyncracies when dealing with federal construction contracts, and you have some idea of the magnitude of my problem.

The cases used here are for illustration only. In using them, I did not attempt to demonstrate the current statutory or case law of any particular jurisdiction. What I have attempted to do is provide you, the contractor and layman, with some insight into the judicial mind, its thought processes, and the very real result of those processes. I have done this in the hope that it will better enable you, first, to recognize your own problems in these cases, and second, to empower you to be more fully prepared to discuss these with your own attorney. Your own attorney is necessary. He or she is necessary to lead you through the labyrinth that your particular state has laid, by statute or by prior court decisions, upon the general principles and considerations contained in this volume. Your counsel will know enough to consult the particular case law of your jurisdiction.

In our world, which threatens to leave order behind, this book resurrects the ghosts of the past. The jurists of the past have striven, by their words, to impart widom, to do justice. Why? Because justice is all there is in a democracy. Justice is that plea, of one citizen, that will be answered. Justice means that the plea of that one citizen is the equal to that of any other citizen, or any corporation, or of any multinational corporation. That single, sole plea is evaluated on its merits and on its merits alone. This is justice.

The volume cannot provide you with the current law of your particular jurisdiction. What it can provide is some idea of the breadth and range of the intellectual and moral underpinnings of that system; a system by which justice is surely done.

*New York*
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JOHN J.P. KROL

**NOTE**

The author thanks Kenneth Lazaruk, Esq. of New York City and John Moss Hinchcliff, Esq. of Ithaca for their efforts in reviewing this text.

# ABOUT THE AUTHOR

John J.P. Krol was born in New York City. He received his engineering degree from Manhattan College and his law degree from Fordham University. He is a licensed Professional Engineer in New York State, and is admitted to the New York State courts as well as to the Eastern, Southern, and Northern District Federal courts in New York. He is a member of the bar of the United States Court of Appeals for the Federal Circuit, the United States Court of Federal Claims, and the United States Supreme Court. He is a member of the panel of arbitrators of the American Arbitration Association, of the New York State Bar Association, and of the American Society of Civil Engineers.

He is in private practice in Rockville Centre and New York City.

To Lizanne, for all.

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CHAPTER 1

# FORMATION OF CONTRACTS

This book will alert you, the contractor, to the pitfalls contained in any construction contract. On one hand, you will need merely to be aware of a particular provision and its consequences. On the other, there are times when the clear and present danger of a contractual provision cries out to you to consult your attorney. If smart is accepting only half of any advice offered, then brilliant is knowing which half to accept.

As an attorney who has read many contracts and advised many contractor clients, I am often shocked to discover that those provisions that most alarm me and my fellow attorneys were hardly noticed by my clients. *Prior notice* provisions, no damages for delay clauses, and conditional payment provisions are among the items that will be discussed here. Too frequently they come to the contractor's attention when the contractor comes to his attorney. The premise of this book is that I will act as your "Dutch uncle," whispering when to accept a contractual provision and move on, and when to go directly to your telephone and call your attorney. Of course, any book can only offer generalities. The individual nature of any particular contract will always dominate the legal evaluation of its effect. But this book can help you know what you don't know and can provide a solid basis for an intelligent discussion with the attorney you select.

## 1.1 FORMAL REQUISITES

### § 1.1.1 Delivery

If there were a title that would put you off, "Formal requisites" may be it. Still, the law does require that certain minimal standards be met before it will say that a contract has come into being. Most construction contracts come in standardized guises. The American Institute of Architects provides a popular form of construction contract. Large municipalities and state and interstate agencies all have their own forms of contract and their own peculiar boilerplate. Federal contracts could be, and are, the subject of many erudite volumes. What I intend to do is distill from all those sources, the essentials of the construction contract. To do that, we must begin at the beginning, at those formal requisites.

The law provides a battery of requisites, but many of them need not concern us here. Three perennial concerns are delivery, signature, and content.

Signed, sealed, and delivered. We almost nod our heads in agreement, but what does it mean? Return to, perhaps, your first civics class. In *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), outgoing President John Adams had signed the commissions of a number of justices of the peace for the District of Columbia. Onto those commissions had been affixed the seal of the United States. But the appointments were never delivered to those prospective justices.

The Supreme Court held that those prospective justices had a right to those commissions. Without delivery, their commissions never were effective. The Court ordered delivery of the commissions. This is a precise analogy to the delivery requirement in connection with a contract.

When a contractor approaches his attorney with a contract problem, it is rarely a delivery problem. In fact, the courts have held that when there exists sufficient evidence exhibiting the contracting party's intent to assume both the benefits and the burden of a contract, then physical delivery itself is unnecessary. *Birch v. McNall*, 19 A.D.2d 850, 244 N.Y.S.2d 60 (4th Dept. 1963).

In the construction industry, the issue of delivery of a contract most frequently arises where a party to the purported contract contests its very existence. Such a case would arise where one party expects performance, and performance is refused. This is not typically the situation where the contractor supplies significant amounts of labor and materials only to find that the owner refuses to pay. In that instance, the court would find that the conduct of the parties indicated an existing contract.

Of course, we cannot forget the moral of *Marbury v. Madison*. In general, a contract is not effective without delivery of the contract; but delivery need not be absolute. A contract may be delivered conditionally; that is, not to become effective without the occurrence of some event or condition. In such a situation, the contract is not effective until the occurrence of the event or the fulfillment of the condition.

The law affords such weight to the conduct of the parties that it will presume the delivery of a contract where the acts of the parties reflect their recognition of contractual obligations. *Sarasohn v. Kamaiky*, 193 N.Y. 203, reh'g den. 194 N.Y. 535 (1908).

### § 1.1.2 Signature

Like delivery, the effect of a signature on a contract is dependent on the circumstances. Parties indicating an intent to be bound by their actions or otherwise will be held to an unsigned contract. There is such a creature as an oral contract. However, the problem with proof of an oral contract gives credence to the old saw: "An oral contract isn't worth the paper it's printed on." A person agreeing to the terms of a contract and governing his or her actions pursuant to those terms will be bound by that contract even if he or she has not signed it. It is unnecessary that a written agreement be signed by a party, in order to bind that party. *Soundview Woods, Inc. v. Mamaroneck*, 14 Misc.2d 866, 178 N.Y.S.2d 800 (West. Co. 1958), aff'd 9 A.D.2d 789, 193 N.Y.S.2d 1021 (2nd Dept. 1959).