Construction Law Newsletter

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RESOLVING DISPUTES EARLY TO AVOID DISPUTE RESOLUTION

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A typical dispute resolution provision in a design or construction contract might require mediation, followed by either binding arbitration or litigation. Variations might also require project level or senior executive meetings and negotiations prior to mediation. For any dispute not resolved through such discussions or negotiations – whether contractually mandated or otherwise – the dispute may linger or sit unresolved until one or both parties initiate the formal dispute resolution processes following project completion. These festering conflicts can have a negative impact on project performance, including distracting the project teams and creating an atmosphere of hostility or resentment.


Zach

Some owners – most often on large or mega-projects – have sought to tackle disputes during construction by inserting a third-party neutral process into their construction contracts. While these processes can vary significantly, the third-party neutral ("TPN") – or a dispute resolution board ("DRB") – is typically retained at the outset of the project to assist the parties in resolving disputes as they arise and before they snowball into having a negative impact on project performance.

Multiple studies show the use of DRBs results in fewer disputes, lower overall construction costs, and more timely completion of projects. For

instance, in a study published in 2013 by the ASCE Journal of Legal Affairs and Dispute Resolution in Engineering and Construction, the authors reported that the use of DRBs on projects by the Florida Department of Transportation significantly reduced costs and schedule growth when compared to non-DRB projects. Those projects also saw settlement of disputes at a higher rate than their counterparts.

Thus, the strategic utilization of DRBs and TPNs – on appropriate projects – appears to have significant benefits. But implementing DRBs or other forms of TPN into construction contracts requires buy-in by contractors that might be hesitant to wade into unchartered waters. Obtaining that buy-in is best achieved through a thoughtful and collaborative discussion about how the process will work, along with other practical considerations, including:

- How will the neutral(s) be selected and what qualifications will be considered? A contractor might question a TPN that has served on a prior project with the owner. On the other hand, the owner may appreciate the benefit of retaining a TPN that is familiar with the owner's construction program, has proven effective in the role, and can hit the ground running. Typically, most owners and contractors will prefer a TPN with lengthy industry experience – ideally on the same type of project currently being constructed.
- Who will pay? Contractors might also be uncomfortable with the optics of the owner paying for the neutral's services, assuming the neutral may favor the owner. But even if the owner and contractor agree to split the cost, the contractor's share is certain to be included in the contract price. Thus, either way the owner will likely bear most or all the cost.
- Will the DRB or TPN decide disputes following a hearing with live testimony and evidence, on the papers without a hearing, or through an alternative process? If the parties hold a hearing, will attorneys participate? Many common disputes on construction projects are capable of resolution by the TPN based on a review of the parties' written submissions and/or by interviewing the parties about the facts of the dispute. More complex disputes may benefit from a traditional hearing with live witness testimony. Often parties will agree to allow their attorneys to attend the hearing but not participate. Forbidding attorneys from taking an active role might result in a cheaper, more efficient, and timely process. On the other hand, a party may be hesitant to commit to a hearing process – particularly if the result will be binding – if its legal counsel is prohibited from taking an active role.
- Will the TPN have a pre-dispute role, such as mediator or coach? Many effective neutral programs allow the neutral to wear multiple hats throughout the project, both to avoid or resolve disputes without the necessity of a hearing or other formal process and to ensure that the neutral is an engaged and trusted member of the team.
- Will the neutral's decisions be binding? This is often the biggest question, with the answer largely dependent on the parties' shared comfort with the process.

A DRB or other TPN process may only be appropriate for projects with significant scopes, budgets, and likelihood for claims. But there are analogous concepts that may be appropriate for projects not fitting that bill.

For instance, the AIA contract documents provide for an "initial decision maker" tasked with the first stab at resolving disputes between the owner and contractor. The default under the AIA forms is for the architect to serve as the initial decision maker. Yet, the owner and contractor are free to select another person for that role and to mold the process to fit the needs of the project or otherwise address any perceived flaws in the AIA default process. While many owners and contractors are fine simply striking the initial decision maker from their contracts, there may be instances when an independent expert as the initial decision maker for disputes could bring value to the project.

The thoughtful use of a TPN may present the opportunity to inject unbiased perspectives and

leverage industry expertise to resolve disputes mid-stream. By maintaining relationships and ensuring project continuity, the TPN may also contribute to the overall success of construction projects. As the adoption of these dispute resolution strategies becomes more prevalent, clients with construction projects are increasingly likely to consult their construction lawyers about incorporating these processes into their project contracts.

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CONTRACTING FOR CLIMATE RESILIENCE: LEGAL TOOLS FOR A WARMING WORLD

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On June 11, 2025, the Ferry fire in central Oregon burned through Cottonwood Canyon State Park. On June 28, 2021, Portland experienced a "Heat Dome," measuring 118°F. The devasting Labor Day wildfires of 2020 destroyed thousands of structures, displacing tens of thousands of Oregonians. Putting the politics of causation aside, the construction industry stands on the front lines of climate change. Rising temperatures drive more frequent wildfires, floods, and other extreme weather events. The built environment faces unprecedented risks. In response, construction law also needs to evolve to incorporate new legal tools and contract provisions aimed at addressing climate resilience objectives. Yet, this evolution brings complexity—raising questions around liability, shifting performance standards, and the allocation of risk among project stakeholders.

To address climate risks, owners, design professionals, and contractors are turning to their construction agreements:

1. Performance Specifications Linked to Climate Projections:

Contracts increasingly reference climate models or anticipated future conditions rather than historical weather data. For example, specifying that structures must withstand "100-year storm events based on projected 2050 climate data" moves beyond conventional historical baselines and creates forward-looking performance obligations. This shifts the focus from merely complying with current codes to anticipating future environmental realities.

Jacob

2. Material and Design Mandates:

Owners are embedding specific material requirements aimed at resilience, such as the use of ignition-resistant materials, fire-rated assemblies, and site design features that create defensible space around structures. While these provisions promote durability, they also introduce legal debates over design liability, particularly when materials are perhaps untested in the real world and the standards exceed, or potentially conflict with, local codes.

3. Force Majeure and Delay Clauses Reimagined:

Traditional force majeure provisions often exclude foreseeable risks. As extreme weather becomes more predictable, parties must now distinguish between unforeseeable events that excuse performance, and foreseeable but disruptive climate impacts that require risk-sharing and contingency planning. Parties are renegotiating these clauses to clarify which climate-related events excuse performance, trigger extensions, or shift costs. This reflects a growing understanding that what was once "unforeseeable" may now be a foreseeable risk.

4. Insurance and Indemnity Adjustments:

Climate resilience measures often coincide with enhanced insurance requirements, such as builder's risk policies covering wildfire damage or flood impacts during construction. Additionally, indemnity clauses are being modified to clarify responsibility for implementing and maintaining resilience features over a project's lifecycle—raising complex questions about latent defects, product warranties, and post-completion obligations.

5. Oregon's legal and construction communities must continue collaborating to align contracts, regulations, and resilience objectives. Best practices include:

- Draft clear, enforceable contract terms that fairly allocate risks between the stakeholders;
- Tailor performance standards based on credible regional data; and
- Advocate for code updates that integrate adaptive, climate-focused construction practices.

Construction law practitioners face a delicate balance: fostering innovation and resilience while providing clear, enforceable contract terms. Ultimately, climate resilience in construction is not merely a technical challenge, it's a legal one. As the climate changes, construction contracts will play a pivotal role in defining how projects withstand, adapt to, and mitigate environmental hazards. Navigating these complexities requires foresight, cooperation

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RENOVATION WORK AND LEAD-BASED PAINT REGULATIONS

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Failure to follow the regulations relating to lead-based paint could lead to costly penalties and other legal issues.

Construction contractors performing renovation work on housing or child-occupied buildings constructed before 1978 are required to have specialized lead-based paint licenses and follow lead-safe work practices. The EPA's Lead Renovation, Repair, and Painting Rule ("RRP Rule") requires construction businesses that perform renovation, repair, and painting projects that disturb lead-based paint in homes, child-care facilities and pre-schools constructed before 1978 to meet certain requirements. Shortly after the RRP Rule went into effect, the EPA granted the Oregon Construction Contractors Board (CCB) and the Oregon Health Authority (OHA) authority to jointly administer the RRP Rule in Oregon.

Lead is a naturally occurring element found in the earth's crust. Until it was banned in the use of paint, lead was added to paint to speed up drying, increase durability, maintain a fresh appearance, and resist moisture that causes erosion. Lead-based paint was used in more than 38 million homes until it was banned. In 1977, the US Consumer Product Safety Commission banned the

use of lead paint in residential properties and public buildings (along with toys and furniture containing lead paint). The cited reason for the ban was "to reduce the risk of lead poisoning in children who may ingest paint chips or peelings."

Lead is one of the main health and environmental hazards associated with paint. Lead in dust is the most common way people are exposed to lead. People can also get lead in their bodies from lead in the soil or paint chips. Lead dust is often invisible. Exposure to lead has been found to be particularly dangerous to children and pregnant women. Lead exposure to children can result in behavioral and learning problems, lower IQ and hyperactivity, slowed growth, hearing problems and anemia.

Van

The RRP Rule went into effect beginning in April 2010. Oregon assumed enforcement of the RRP Rule in May 2010. The RRP Rule requires that individuals and businesses conducting renovation, repair, and painting projects on pre-1978 homes and child occupied facilities (e.g., schools and childcare facilities) be trained in and certified to follow lead safe work practices. To aid in the regulation and enforcement of the RRP Rule, the CCB initiated a set of Administrative Rules (OAR 812-007-0000 – 812-007-0360) related to the licensing of individuals engaged in lead-based paint renovation activities in Oregon. Pursuant to OAR 812-007-0015, the CCB adopted the following Federal Regulations regarding lead-based paint and construction activities: 40 CFR 745, Subpart D (Lead-Based Paint Hazards); 40 CFR 745, Subpart E (Residential Property Renovation); and 40 CFR Subpart L (Lead-Based Paint Activities).

In addition to the regulation and enforcement of lead-based paint renovation activities, the CCB also regulates and enforces contractors that inspect structures for lead-based paint (which requires a Lead Inspector Contractor License) and contractors that are permanently eliminating lead-based paint hazards (which requires a Lead Abatement Contractor License). Lead-based paint inspection and abatement activities are referred to as "lead-based paint activities" by the CCB. ORS 701.510(1) specifies that a contractor may not perform lead-based paint activities in Oregon unless the contractor is a lead-based paint activities contractor. ORS 701.510(2) specifies that a contractor may not perform lead-based paint renovation in Oregon unless the contractor is a certified lead-based renovation contractor. The remainder of this article focusses on lead-based paint renovation in Oregon.

Over the past few years, a fair number of contractors in Oregon have been penalized by the CCB for: (1) not having the lead-based paint specialty license required for the performance of renovation work on homes constructed before 1978 and; (2) not following the applicable lead-safe work practices while performing renovation work on housing constructed before 1978. Generally, a first offense is subject to a $1,000 civil penalty, a second offense is subject to a $3,000 penalty, and a third offense is subject to a $5,000 penalty, plus the possibility of the suspension of the contractor's CCB license for up to a year. Furthermore, pursuant to ORS 701.131(3), a residential customer might be able to assert failure to have the lead-based paint

specialty license required for the performance of renovation work on homes constructed before 1978 as a defense to a contractor's claim for payment.

OAR 812-007-0300 holds that no contractor shall offer to perform or perform renovation in target housing or child-occupied facilities without first receiving a certified Lead Based Paint Renovation (LBPR) Contractor License from the CCB, unless the contractor is exempt from the CCB's licensing requirements. The license status page on the CCB website even includes a section, under Additional Business Licenses and Certifications, which shows whether the contractor has an active Lead-Based Paint Renovation (LBPR) Contractor License.

Renovation (per 40 CFR 745.83) means the modification of any structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement (as defined by 40 CFR 745.223). 40 CFR 745.83 further states that renovation includes (but is not limited to): The removal, modification or repair of painted surfaces or painted components (e.g., modification of painted doors, surface restoration, window repair; surface preparation activity (such as sanding, scraping, or other such activities that may generate paint dust)); the removal of building components (e.g., walls, ceilings, plumbing, windows); weatherization projects (e.g., cutting holes in painted surfaces to install blown-in insulation or to gain access to attics, planning thresholds to install weather-stripping), and interim controls that disturb painted surfaces. A renovation performed for the purpose of converting a building, or part of a building, into target housing or a child-occupied facility is renovation under this subpart. The term renovation does not include minor repair and maintenance activities.

Target housing (per 40 CFR 745.223) means any housing constructed prior to 1978, except housing for elderly or persons with disabilities or any 0-bedroom dwelling (unless any child who is less than 6 years of age resides or is expected to reside in such housing). Child-occupied facility (per 40 CFR 745.83) means a building, or a portion of a building, constructed prior to 1978, visited regularly by the same child, under 6 years of age, on at least two different days within any week (Sunday through Saturday period), provided that each days' visit lasts at least 3 hours and the combined annual visits last at least 60 hours.

Per 40 CFR 745.83, minor repair and maintenance activities, which are not deemed to be renovation, are activities, including minor heating, ventilation or air conditioning work, electrical work, and plumbing, that disrupt 6 square feet or less of painted surface per room for interior activities or 20 square feet or less of painted surface for exterior activities where none of the work practices prohibited or restricted by CFR 745.85(a)(3) are used and where the work does not involve window replacement or demolition of painted surface areas. When removing painted components, or portions of painted components, the entire surface area removed is the amount of painted surface disturbed. Jobs, other than emergency renovations, performed in the same room within the same 30 days must be considered the same job for the purpose of determining whether the job is a minor repair and maintenance activity.

A contractor licensed with the CCB cannot bid on a renovation project unless it has obtained a Lead-Based Paint Renovation Contractor License through the CCB, even if the activities relating to the disturbance of lead-based paint are to be performed by a different contractor who does hold a Lead-Based Paint Renovation Contractor License. The CCB and/or OHA can penalize contractors for the failure to have a Lead-Based Paint Renovation Contractor License for performing lead-based paint renovation work or submitting a bid to do so without an active Lead-Based Paint Renovation Contractor License. Even if the contractor does have an active Lead-Based Renovation Contractor License issued by the CCB, the contractor can also be penalized by the CCB for failure to follow the lead-based paint

work rules. Examples of lead-safe work practices include: work area containment to prevent dust and debris from leaving the work area; prohibition of certain work practices like open-flame burning and the use of power tools without High Efficiency Particulate Air (HEPA) exhaust control; and thorough clean up followed by a verification procedure to minimize exposure to lead-based paint hazards. There are also a number of related recordkeeping requirements.

The CCB enforcement section performs numerous investigations across the state, including random job site checks, targeted job site checks based upon complaints to the CCB, and joint sweeps between the CCB and other governmental agencies (such as OHA, OSHA and BOLI). As a result of the CCB's jobsite checks across the state, the CCB has been regularly issuing a fair number of civil penalties to contractors for violation of the lead-based paint renovation rules. Other than working as a contractor without a CCB license, violations for failure to abide by the lead-based paint renovation rules are one of the highest categories of civil penalties issued to contractors by the CCB.

Per OAR 812-007-0310, a person applying with the CCB to become a certified Lead-Based Paint Renovation Contractor must submit the following: (1) a completed application on a form provided by the CCB; (2) proof that the applicant is licensed by the CCB as a contractor; (3) a license fee (currently $50); and (4) proof that the licensee is owned by or employs at least one individual who has a valid course completion evidencing that the individual is a certified renovator as provided in 40 CFR 745.83.

In addition to obtaining a Lead-Based Paint Renovation Contractor License and following the lead-based paint work rules, persons performing renovation, repair and painting work in pre-1978 homes must also provide the EPA pamphlet titled Lead-Safe Certified Guide to Renovate Right to their homeowner client before commencing the renovation work. Said pamphlet covers the following areas: basic facts about lead and health; how to choose a contractor for the renovation work; how to prepare for the renovation or repair project; what to look for during and after the project; and where to get more information about lead.

If you are assisting contractors who perform renovation, repair, and painting work in houses constructed before 1978, you should be aware of the lead-based renovation rules in Oregon. Despite a fair bit of publicity on the subject from the CCB, it appears that many contractors in Oregon are not aware that they cannot submit a bid to perform renovation work on a house constructed before 1978 unless that have an active Lead-Based Paint Renovation Contractor License (even if the work which will disturb the lead-based paint will be performed by a different contractor who does possess a Lead-Based Paint Renovation Contractor License).

In addition to having a Lead-Based Paint Renovation Contractor License, it is also important that contractors closely follow the lead-based paint work rules. Many of the civil penalties issued by the CCB relating to lead-based paint are for failure to follow the required lead-safe work practices. If you are advising residential contractor clients in Oregon who renovate houses, you could help them avoid costly CCB civil penalties by reminding them of the requirement to have a Lead-Based Paint Renovation Contractor License and to closely follow the required lead-safe work practices. On the other hand, if you are assisting residential property owners involved in the remodeling of their pre-1978 house, you can help them ensure that that their project is performed safely and their family isn't exposed to lead-based hazards by informing them that they should hire a contractor who has the Lead-Based Paint Renovation Contractor License and strictly follows the required lead-safe work practices.

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SB 1575: Reining in the "Duty to Defend" in Public Construction Contracts

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In the 2024 legislative session Oregon enacted Senate Bill 1575, revising how public bodies may allocate defense and indemnity obligations to design professionals. SB 1575 amends ORS 30.140 and limits contract terms that require consultants (i.e., architects, engineers, surveyors, and certain related professionals, collectively "A&E Consultants") to defend public entities against claims of professional negligence. The change, which took effect January 1, 2025, is the culmination of years of industry negotiation and addresses an exposure that design firms, and their insurers, have flagged as unfair and uninsured.

For years, the duty-to-defend issue has been a contested issue in Oregon. See, e.g., Walsh Construction Co. v. Mutual of Enumclaw, 189 Or App 400, 76 P3d 164 (2003), aff'd 338 Or 1, 104 P3d 1146 (2005) (ORS 30.140 applies to additionally insured coverage); Montara Owners Assn. v. La Noue Development, LLC, 259 Or App 657, 317 P3d 257 (2013), aff'd 357 Or 333, 353 P3d 563 (2015) (indemnity provision requiring subcontractor to indemnify contractor for contractor's negligence is enforceable only to extent that provision also requires subcontractor to indemnify contractor for subcontractor's negligence); Sunset Presbyterian Church v. Andersen Construction, 268 Or App 309, 341 P3d 192 (2014) (ORS 30.140 voids provision in contract to extent that contract required subcontractor to pay cost of defending general contractor against allegations of contractor's own negligence).

Historically, public procurement standard-form contracts and agency templates included broad indemnity-and-defense clauses, requiring an A&E Consultant to defend and indemnify the contracting agency against third-party claims, even when the A&E Consultant's fault was limited or disputed. However, professional liability policies typically exclude defense costs for parties other than the insured (or otherwise do not cover defending the public body), so these broad indemnity-and-defense clauses forced A&E Consultants to pay uninsured defense costs out of their operating funds. Over several legislative cycles design professionals, local governments, insurers, and contractors negotiated a compromise to limit that exposure. SB 1575 reflects the compromise.

Jacob

The central purpose of SB 1575 is narrow. SB 1575 prevents public bodies from contractually forcing A&E Consultants to bear defense obligations that their professional liability insurance does not cover. By making unconditional "duty to defend" provisions unenforceable for certain professional-services contracts, SB 1575 aligns contractual risk allocation with available insurance coverage, reducing the risk that A&E Consultants will be left paying large, uninsured defense bills.

SB 1575 does three primary things:

1. **Prohibits unconditional duty-to-defend clauses.**

Under SB 1575, a public body may not require an A&E Consultant to defend the public body against claims of professional negligence. Meaning, clauses that obligate the A&E Consultant to defend irrespective of whether that consultant is at fault are now unenforceable.

2. **Carves out a proportionate-fault exception.**

SB 1575 allows defense and indemnity where the A&E Consultant's liability or fault is determined by adjudication, arbitration/ADR, or resolved by settlement, and then only to the extent of the consultant's proportionate fault. In short: a consultant may be required to satisfy its share of liability once fault is established, but public bodies cannot make consultants shoulder the public body's defense unilaterally.

3. **Limits scope and establishes timing/variants.**

The act applies to the specific list of professional services enumerated in ORS 279C.100 and includes some limited exceptions (for example, certain design-build contracts are treated differently). The Legislature also staged applicability and included a sunset mechanism for some provisions (the enrolled bill and agency guidance set out effective dates and transitional rules). Agencies such as DAS and ODOT quickly issued FAQ guidance and revised template language to implement the new law. See SB1575_FAQ.pdf and ODOT Bulletin 101-74

SH 1575 preserves the ability of public bodies to be indemnified for a consultant's share of fault while closing the door on one-sided boilerplate indemnity terms that transfer the contracting agency's defense costs onto its consultants.

SH 1575's effects are several. First, for A&E Consultants there is reduced risk of uninsured defense costs and a closer match between contractual obligations and insurance coverage. That should lower unexpected cash-flow shocks and improve predictability for firms bidding on public work.

Second, for contracting agencies, there is potentially greater near-term exposure to defense costs in disputes until fault is apportioned, and an administrative need to update templates and RFP language. Agencies may respond by tightening insurance requirements, revising payment/settlement approaches, or relying more on proportionate-fault mechanisms.

Finally, for the insurance industry, there is a clearer boundary between covered professional liability and contractual defense obligations, reducing coverage fights and aligning underwriting expectations with contract practice.

Over time, eliminating the practice of shifting defense costs onto A&E Consultants may reduce the risk premiums consultants build into proposals, increase competition, and make public projects more accessible to smaller firms.

In summary, SB 1575 no longer allows contracting agencies to shift uninsured defense costs onto A&E Consultants. An A&E Consultant's defense and indemnity obligation is tied to proven, proportionate fault. Moving forward, stakeholders should review existing contract templates, update procurement documents, and coordinate with counsel and insurance brokers to ensure that contract language, coverage, and expectations align with SB 1575. State agencies have already circulated FAQs and amended templates to help with implementation. Design professionals are well advised to take advantage of those resources when preparing bids and drafting agreements.

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