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### Forum Selection Clauses: Avoiding Potential Pitfalls to Losing Home Field Advantage

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Forum selection clauses—like arbitration agreements—have appeared in commercial construction contracts for decades. Yet, when arbitration is not mandatory and litigation arises, owners and general contractors alike often find themselves first battling downstream contractors over whether the forum selection clause at issue is enforceable, and consequently, where and by whom the dispute will be decided. And let's face it: this initial battle for a subcontractor—even if a long shot—may be well worth the resources to potentially have its disputes decided on its home turf by a familiar jury rather than a federal court in a foreign state. Whichever role your

company plays in the project, this article outlines a few issues that may affect the enforceability of your contract's forum selection clause.

Recent U.S. courts have considered three issues when deciding the enforceability of a particular forum selection clause. The two threshold issues are whether the clause is (1) mandatory and (2) valid and enforceable. If these two conditions are satisfied, the third issue is whether the plaintiff can demonstrate that certain "public interest factors" warrant keeping the lawsuit in the plaintiff's selected forum. Each of these questions is addressed below.

#### Is your forum selection clause "mandatory" or "permissive"?

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Forum selection clauses can either be mandatory or permissive. As the term suggests, a mandatory forum selection clause contains precise language indicating that jurisdiction and venue are proper exclusively in the designated forum. An example of a mandatory clause is:

Any dispute arising under, relating to, or in connection with the agreement or related to any matter which is the subject of or incidental to the agreement (whether or not such claim is based upon breach of contract or tort) shall be subject to the exclusive jurisdiction and venue of the state court located in Broward County Florida. This provision is intended to be a "mandatory" forum

selection clause and governed by and interpreted consistent with Florida law.

Conversely, a permissive forum selection clause merely authorizes jurisdiction and venue in a designated forum but does not prohibit litigation elsewhere. An example of a permissive clause is:

This Agreement and the performance thereof shall be governed, interpreted, construed and regulated by the laws of the State of Louisiana and the parties hereto submit to the jurisdiction of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana. The parties hereby waive any and all plea[s] of lack of jurisdiction or improper venue.

Note that the language of this clause permits jurisdiction in a particular state court but does not exclude venue in other courts if other courts also satisfy any requirements for jurisdiction and venue.

If the clause is exclusive as in the first example, a court is more likely to transfer or dismiss a case if not filed in the designated forum. Courts however are unlikely to dismiss or transfer a case if the forum selection clause permits—but does not expressly designate—a particular forum. Depending on the desired outcome, parties should consider whether to include a mandatory or permissive forum selection clause.

#### **Is your forum selection clause “valid and enforceable?”**

Another threshold issue when considering a forum selection clause is whether the clause is “valid and enforceable” within the meaning of applicable law. The question of what law to apply is critical where federal courts and state courts vary widely as to whether forum selection clauses are presumptively enforceable or unenforceable as against public policy.

Federal courts apply federal law in determining whether a forum selection clause is enforceable. And under federal law, forum selection clauses are presumptively valid and enforceable unless the party attacking its validity can demonstrate one of four factors: (1) the clause was the product of fraud; (2) the party will be deprived of its day in court because of the selected forum; (3) the chosen law will deprive the party of a remedy; or (4) enforcement of the clause would contravene a strong public policy of the forum state. Generally, a plaintiff faces a steep uphill battle in federal court when challenging whether a forum selection clause is valid and enforceable.

State courts consider this question very differently. State courts apply the parties’ chosen state law in determining whether a forum selection clause is enforceable. And here, state law significantly varies as to whether forum selection clauses are presumptively valid or invalid as against public policy.

The key is to determine whether a particular state has enacted a statute sometimes referred to as an anti-forum selection statute. Many states have such statutes. Many do not. When applicable, these statutes can be viewed as the reverse of federal law and create a presumption that forum selection clauses are unenforceable, and thus, the court applying these statutes will not dismiss or transfer a case to the designated forum. Take Louisiana’s anti-forum selection statute, which provides in relevant part:

The legislature finds that, with respect to construction contracts, subcontracts, and purchase orders for public and private works projects, when one of the parties is domiciled in Louisiana, and the work to be done and the equipment and materials to be supplied involve construction projects in this state, provisions in such agreements requiring disputes arising thereunder to be resolved in

a forum outside of this state or requiring their interpretation to be governed by the laws of another jurisdiction are inequitable and against the public policy of this state.

So in Louisiana at least, a prime contractor is unlikely to convince a Louisiana state court to transfer or dismiss a lawsuit in favor of the designated forum when any of the parties—the subcontractor for example—is a Louisiana company working on a project in the state. Therefore, even if your contract contains a mandatory forum selection clause, a party may be able to avoid the designated forum if the circumstances meet the elements of an applicable anti-forum selection statute.

**Can the plaintiff demonstrate that certain “public interest factors” warrant keeping the lawsuit in the plaintiff’s selected forum?**

If the forum selection is mandatory and if an anti-forum selection statute does not apply, the last question is whether the plaintiff can demonstrate that specified public interest factors under the doctrine of *forum non conveniens* justify maintaining the case in the plaintiff’s selected forum. *Forum non conveniens*—Latin for “forum not agreeing”—is a longstanding legal doctrine that permits a court to dismiss a case where there is a more appropriate forum available to the parties. Outside the presence of a forum selection clause, the doctrine requires courts to balance both private- and public-interest factors in considering whether the case should be dismissed or transferred in favor of a more appropriate forum. And without an applicable forum selection clause, the defendant—not the plaintiff—often faces long odds to overcome the deference given to the plaintiff’s decision of where to bring suit. In 2013 however, the U.S. Supreme Court issued a decision clearly shifting the burden to the plaintiff who tries to circumvent enforcement of a forum selection clause.

In a case titled *Atlantic Marine Construction Co. v. United States District Court*, the Supreme Court held that a plaintiff seeking to avoid enforcement of a forum selection clause must demonstrate that transfer to the designated forum would violate one of four “public interest” factors: (1) the clause was the product of fraud; (2) the party will be deprived of its day in court because of the selected forum; (3) the chosen law will deprive the party of a remedy; or (4) enforcement of the clause would contravene a strong public policy of the forum state. Importantly, since the decision in *Atlantic Marine*, several courts have held that a plaintiff can rarely demonstrate these factors, which means that the practical result is that forum selection clauses will control except in rare cases. Overall, the Supreme Court’s decision in *Atlantic Marine* and subsequent cases applying the decision indicate a fairly significant swing of the pendulum in favor of forum selection clauses.

In sum, there are a few things a party can do to increase the odds that a forum selection clause will be enforced requiring the plaintiff to file suit in the forum designated in the contract. First, ensure the clause contains language that is mandatory and not merely permissive. Second, make efforts to get the case into federal court such that federal law applies or, if possible, look out for states that have enacted anti-forum selection statutes. Lastly, recall the Supreme Court’s fairly recent decision in *Atlantic Marine*, which, absent rare circumstances, compels a plaintiff to file suit in the forum designated in the contract.

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## ConsensusDocs 305 – New Tool to Contract for Lean Projects

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As the awareness and embrace of Lean Construction continues to expand in the construction industry, ever-increasing numbers of projects grapple with the question of how to address Lean Construction principles and methods in their design and construction contracts. Project owners have taken primarily three approaches on this:

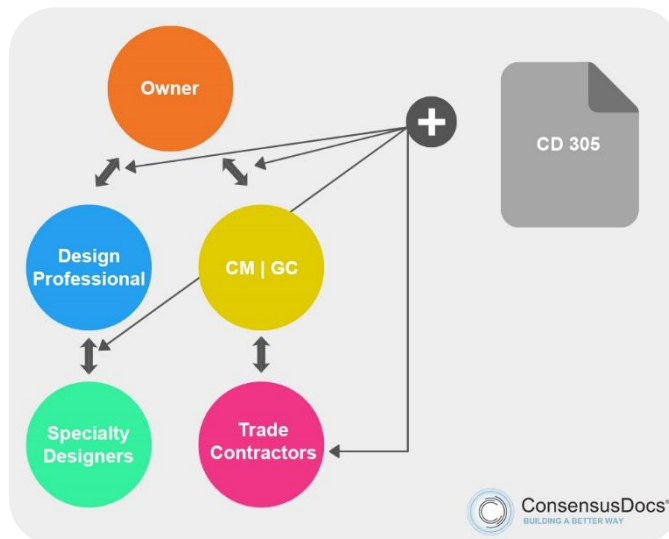


- Seeking the highest level of Lean performance, owners have used Integrated Project Delivery (IPD) agreements, such as the ConsensusDocs 300, sometimes called integrated forms of agreement (IFOAs).
- When they or their team are not willing or able to use an IPD agreement, other owners have used legal counsel to custom-draft design and construction contracts under more conventional project delivery models such as CM-at-Risk, to address Lean design and construction methodologies.
- Other owners will seek to promote Lean behaviors among the project team independent of what is in the design and construction contracts.

Now, project teams have a new option for contracting for a Lean project when they cannot implement an IPD Agreement. In 2018, ConsensusDocs published the ConsensusDocs 305 Lean Construction Addendum (CD305). For the first time, we have a non-IPD contract document available to the whole industry that provides for a wide spectrum of Lean design and construction practices. With the CD305, an Owner can use either an industry standard form front-end contract or its own standard contract and add to it a Lean Construction Addendum that reflects the best thinking in the industry around Lean design and construction.

### What is the CD305?

Let's be clear right up front. The CD305 is not a complete contract. It has no compensation terms, no schedule, no project scope. Instead, the CD305 is a document you add to a project contract to provide for selected Lean project features.



In the graphic to the left, the bi-directional arrows show the contracts for the project. There are separate contracts between the owner and each of the design professional and general contractor and also separate lower-tier subcontracts or design contracts. The CD305 gets added to each of those contracts as an addendum. Note, however, that the CD305 is not intended for use on design-build projects (a future ConsensusDocs document on Lean Construction is under development for design-build projects).

The CD305 does not change the compensation or liability of the parties under the contracts it gets attached. Its exclusive focus is providing clear terms for the parties to agree on how they will incorporate Lean design and construction methods into their project.

### **Using the CD305**

Because the CD305 is attached to both the design professional (architect or engineer) and constructor (general contractor or construction manager) agreements with the owner, it requires a joint negotiation between the owner, design professional and constructor and ideally their key design consultants and trades. Once the CD305 is finalized among the parties, then it gets separately attached and incorporated into each party's contract, binding everyone to the same set of Lean Construction provisions. Also, the CD305 provides that it governs over any contrary provisions in the front-end agreement, so that project teams can be assured that their implementation of the Lean methods in the Addendum will not trigger a breach of their main contracts.

ConsensusDocs recommends finalizing the CD305 as early in the project as the owner can accommodate. Certain Lean project features are for the conceptualization and design phases, so a team loses the benefit of those features by waiting until later in the project. However, there is still value in implementing Lean only during the construction phase, so if that is your project's situation, you can still use the CD305.

The CD305 was designed to be flexible so that it can be adapted to a variety of project contexts and Lean deployments. It uses a check-the-box approach to allow project teams to select the Lean features that will apply to their project. The CD305 allows teams to selectively address one or more of the following Lean practices during the design and pre-construction phases simply by checking the applicable boxes:

- *Joint Worksite Investigation*: the project team evaluates what site information is needed, comes up with options for different levels of site investigations, aligns on the appropriate level of investigation and reports the investigation's findings and recommendations.
- *Evaluation of the Owner's Program*
- *Validation Study*: the project team validates whether the owner's program for the project can be designed and constructed within the owner's maximum budget. A conceptual (or schematic) level of design and cost estimating is done to give an early check on whether the owner's business case for the project is viable.
- *Construction Team Cost Modeling*
- *Target Value Design*: Section 6.5 describes an integrated design process featuring Target Value Design (TVD). TVD is one of the key Lean design and construction methods for achieving greater project value. It requires intense collaboration of the designers and constructors and a disciplined approach to value determinations and decision-making.
- *Risk Identification & Management Planning*: the project team conducts a risk workshop to identify and evaluate risks, then prepares a risk register to describe key risks and who is responsible for monitoring and leading team efforts at managing that risk. A risk management plan is developed to put in place contingency plans for addressing specific risks.

### **General Lean Principles & Methods**

The CD305 also has standard provisions that apply to any Lean Construction project. Article 3 of the CD305 starts by laying out the major objectives of Lean Project Delivery:

1. collaborating throughout the Project with all members of the design and construction team;
2. planning and managing the Project as a network of commitments;
3. optimizing the Project as a whole, rather than optimizing particular pieces; and
4. tightly coupling learning with action, which promotes continuous improvement throughout the life of the Project.

Article 3 also describes the principle of making reliable commitments and keeping them, which is fundamental to reliable workflow and the process of planning and managing the Project as a network of commitments.

The CD305 provides for a collaborative leadership structure by forming a Core Group. Article 4 describes the Core Group's role and operations. Each of the owner, design professional and constructor appoint a Core Group representative empowered to direct and coordinate its company's work. The Core Group together manages the work using Lean methods for the best interest of the project. They are responsible for the project's key decisions, and they make consensus decisions. They are also responsible for regular team performance evaluations to foster continuous improvement.

If the Core Group cannot come to a unanimous decision, the owner may issue directions it believes to be in the best interest of the project, but that will be subject to any further dispute resolution provisions of the contract to which the Addendum is attached.

Article 5 of the CD305 requires the Project team to use a pull scheduling approach to planning and scheduling the work. The CD305 describes features of the planning system that the team must incorporate, all of which would be satisfied by a full implementation of the Last Planner System® promulgated by the Lean Construction Institute (LCI).

### **Construction Phase Lean Methods**

The last article of the Lean Construction Addendum provides for construction phase Lean methods.

Section 7.1 provides for a Lean approach to quality. To avoid addressing quality through re-work, it provides for the team to develop and implement a "Built-In Quality Plan" that addresses standardized work, agreed levels of quality, good hand-offs of work between trades, and continuous improvement.

Section 7.1 also provides for the construction team to develop an operations quality plan using the Lean principles of "5S": sort, set in order, shine, standardize and sustain.

Under Section 7.2, the constructor develops a materials logistics plan that promotes just-in-time delivery of material to the worksite consistent with the current pull-planning work plans.

In Sections 7.3 and 7.4, the CD305 provides for a Lean approach to submittals and requests for information. The basic idea is that the team member needing information directly contacts the team member who can provide the information, figuring out the resolution together, and then documenting the resolution for the benefit of the entire project team.

Finally, Section 7.5 requires the team to develop a phase plan specific to closing out the project so that everyone is aligned as to what needs to be done to satisfy the project stakeholders without needing a long process of inspections and re-inspections for reaching substantial completion.

## Conclusion

ConsensusDocs has provided a great resource to the construction industry with its recent publication of the CD305 Lean Construction Addendum. For the many projects that are not able or ready to utilize an IPD Agreement, now there is an industry standard form that can be added to a project's design and construction contracts to provide for a wide range of Lean design and construction practices without triggering violation of the front-end contract's provisions. For helpful resources visit: [https://www.consensusdocs.org/lean\\_webinar](https://www.consensusdocs.org/lean_webinar) and the [ConsensusDocs Lean Addendum Guidebook](#).

To download a sample of the CD305 Lean Construction Addendum [click here](#).

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### Increased Reporting Requirements for Contractors — Even if All Claims Are Settled

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For most professionally licensed groups, reporting requirements are the norm, not the exception. In fact, it is commonplace for boards to require licensees to

report judgments, settlements and convictions that may reveal potential patterns and problems with a licensee. See Ed Howard, *SB 465 (Hill) – Support*, Center for Public Interest Law, University of San Diego (July 7, 2015). This is true for architects, engineers, physicians and accountants, which to varying extents, are all required to report settlements and awards relating to their professional practice. *Id.* at 3. By contrast, reporting requirements for contractors are fairly uncommon. But that does not mean they are nonexistent, and contractors must be cognizant of state-specific reporting requirements — even if all claims are settled.

California is a prime example of why contractors, and their attorneys, must remain up to date; new reporting requirements for residential contractors begin this year. In August 2018, California implemented Senate Bill 1465, which added sections 7071.20, 7071.21 and 7071.22 to the Business and Professions Code. These sections require reporting within 90 days of final judgments, settlement agreements or final arbitration awards in which the licensee is named as a defendant or cross-defendant filed after January 1, 2019, if, among other things, the amount is \$1

million or greater and the action is a result of a claim for damages regarding a failure or potential failure of the “load bearing portions of a multifamily residential unit.” See §7071.20, subd. (a). For complex multiparty litigation in California, this reporting requirement applies to all contractors involved as long as their respective liability is in excess of \$15,000.

Oregon has also adopted reporting requirements, and contractors must report final judgments if the balance is not paid within 30 days. See §701.109. Although the statutes of both California and Oregon are relatively specific, and at present, no other states have similar requirements, contractors must remain abreast of industry changes. With California’s new law, failure of a licensee to report to the registrar in the time and manner required is grounds for disciplinary action, which could threaten a contractor’s licensure status. See §7071.20, subd. (f). This article will analyze the driving forces behind California’s recent legislation and discuss the varying factors states must consider if they implement similar requirements.

## I. California Senate Bill 1465

Prompting California’s recent legislation was the tragic Berkeley balcony collapse, which resulted in the death of six students and critically injured seven others. After the collapse, news reports revealed that the company that constructed the apartment complex had paid \$26.5 million in construction defect settlements in the previous three years. See Robert Reichel, *CA State Senator Hill Proposes Contractor’s Bill*, Patch (Apr. 18, 2018). In response, California passed Senate Bill 465, which required the Contractors State License Board (CSLB) to prepare a study to determine whether “the board’s ability to protect the public . . . would be enhanced by regulations requiring licensees to report judgments, arbitration awards, or settlement payments of construction defect claims for residential units.” *Senate Bill 465 (Hill) Study*, Contractors State License Board (Dec. 2017). As evidenced by the recent legislation, the CSLB determined reporting requirements would enhance public safety, and, as a result, Senate Bill 1465 came to fruition.

The conclusion that reporting requirements should be implemented for contractors echoes what commentators have described as the fundamental purpose of licensure: public safety. See Ed Howard, *SB 465 (Hill) – Support*, at 2. Because licensure disrupts the market by restraining the number of people who may enter a profession, it is only warranted for those professions that, if practiced incompetently or dishonestly, injure consumers or patients. See *id.* Thus, the purpose behind disciplinary action for licensees is not punishment, but rather the protection of future consumers. See, e.g., *Senate Bill 465 (Hill) Study*, at 2 (“protection of the public shall be the highest priority”). With this overarching goal in mind, the CSLB weighed a number of considerations in determining whether to recommend that contractors should be required to report settlements.

## II. Considerations When Implementing Reporting Requirements

One of the primary concerns when implementing reporting requirements is drawing the line between reporting and discipline. In California, only 11 percent of architects who report settlements or judgments are disciplined; for engineers, that number is 15 percent. Although these percentages may seem low, they are consistent with the purpose behind the reporting requirements. Both boards highlight that reporting is (i) solely a consumer protection tool for the public good and (ii) that the emphasis to licensees is that the intent is not to be a clearinghouse for how many lawsuits they have. *Id.* at 33. Moreover, before any discipline can be handed down, a board must conduct its own investigation. This presents two distinct challenges that must be addressed before implementing similar legislation.

First, licensing boards must address the standard of proof required for disciplinary action. In general, claims against contractors are primarily civil actions, where the burden of proof is “preponderance of the evidence.” But in order for the CSLB to discipline one of its licensees, it must establish the violation by a showing of “clear and convincing evidence,” a much stricter standard. This requires licensing boards to allocate resources for investigations, even if a contractor was found liable in an arbitration/hearing. As the CSLB notes, reporting does not identify



licensees who are “subject to” an enforcement action; it simply provides information on potential violations, which, if substantiated, may lead to disciplinary action.

Second, when instituting reporting requirements, licensing boards must address the statute of limitations for disciplinary action. If the statute of limitations is too short, the board may learn about violations after it is powerless to penalize. This is somewhat counterintuitive, considering the overarching goal of public safety. Take California for example, where the statute of limitations to investigate a complaint is either four or 10 years and runs from the time the act or omission occurred. As one attorney noted, the majority of apartment buildings that have a catastrophic failure are likely constructed more than 10 years before the failure. *Id.* at 23. Moreover, parties are often tied up in litigation for years, especially when pursuing high-dollar-value claims, further delaying the time at which reports are received by the board. Although the CSLB still concluded that settlement reporting would be beneficial, future legislation should take this into consideration.

There is also a question of confidentiality. As noted by the CSLB, “when insurance companies pay out tens of millions of dollars for construction defect claims, they require a full and complete release . . . as well as strict confidentiality.” *Id.* at 9. While strict confidentiality provisions may be overridden by legislation requiring disclosure, states must be mindful of striking a balance. Whether settlement information is made available only to the board, or potentially to the public, could have widespread implications. As some commentators have noted, any reporting requirement could potentially chill a contractor’s willingness to settle claims out of fear it could be viewed as an admission of wrongdoing. *Id.* at 39. Yet the lack of reporting leaves licensing boards largely in the dark, especially considering that the CSLB’s study found that 95 percent of defect cases settle. Again, this is something that licensing boards and legislatures will need to balance if they consider drafting regulations of their own.

### III. Conclusion

Despite the various considerations surrounding contractor reporting requirements, perhaps the most interesting finding came as a result of an industry survey. A majority of those surveyed — 54 percent of licensees, 63 percent of insurers and 96 percent of consumers — supported a reporting requirement. *Id.* at 37-38. If both industry professionals and consumers generally support increased disclosure, it should not come as a surprise if additional states begin considering this type of legislation. And while most contractors need not worry just yet, it is not unrealistic to think similar laws could be passed in the near future. In the end, responsibility rests with both sides. Licensing boards must work with industry professionals if they hope to formulate effective laws, and contractors must stay abreast of potential legislation so they can comply with their professional duties. This final point is especially salient for lawyers and in-house counsel who handle construction litigation — even if a contractor or design professional settles, they must be aware of potential reporting requirements.

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**Differing Site Conditions Produce Differing Challenges**  
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The saying “The best laid plans of mice and men often go awry” can too often apply in the construction industry. A contractor may receive a description of site conditions that is ultimately found flawed or misleading. The costs associated with addressing these surprise conditions often fall on the contractor to pay. The following article details proactive steps to avoid costly obstacles that may cause a project’s success to go awry.

**What are Differing Site Conditions?**

There are generally two recognized types of differing site conditions. The first, often referred to as a “Type I Changed Condition”, exists when a specification in the conditions indicated in the contract documents varies from what is represented. The second category, generally referred to as a “Type II Changed Condition”, is a variance so unusual in its nature that it materially differs from conditions ordinarily encountered in performing the type of work called for in the geographic area where the project is located.

Recognizing the possibility of both circumstances, most construction contracts contain notice clauses requiring the contractor to stop work and notify the owner before disturbing a differing site condition so as to give the owner an opportunity to inspect and evaluate. Failure to give the required notice may jeopardize the contractor’s ability to recover an adjustment for the additional cost, time, or both required to address the differing site condition.

**How can a Contractor Demonstrate a Differing Site Condition?**

To recover for a Type I changed condition, a contractor generally must show that: (1) the conditions were indicated in the contract documents; (2) the contractor relied on the conditions indicated in the contract documents; (3) the nature of the actual conditions encountered; (4) the actual conditions encountered materially differed from those indicated; (5) proper notice was given; and (6) the changed condition resulted in additional performance cost, time, or both, as demonstrated by appropriate documentation.

To recoup costs and time for a Type II changed condition, a contractor generally must show that: (1) the conditions encountered were unusual and differed materially from those reasonably anticipated, given the nature of the work and the locale; (2) proper notice was given; and (3) the change resulted in additional performance cost or time, as demonstrated by appropriate documentation.

**What is Required by a Contract Includes a “Site Investigation” Clause?**

Bid and proposal documents sometimes contain a site investigation clause that requires the contractor to investigate and examine existing conditions before submitting its bid or proposal. The language may also require a contractor to inspect existing documents documenting site conditions. Such site investigation clauses become part of the contract.

When the contract contains both a site investigation clause and a differing site conditions clause, the contractor’s ability to recover for cost or time may depend on whether the condition was one that a contractor, experienced in the particular field of work involved, would discover based on a reasonable site investigation. While a “reasonable” site investigation does not require an independent subsurface investigation, if a contractor is warned of certain infrastructure issues,

such as roads, water, and site utilities, this information may be sufficient to place the risk on the contractor, especially in the context of a design-build project.

Recovery on an otherwise valid differing site condition claim is questionable if the contractor cannot prove that the unanticipated condition increased its cost or the time of its performance. To avoid liability for such differences, documentation of the contractor's site investigation effort is imperative. Contractors should consider using a standardized checklist to investigate for concealed conditions before submitting a bid or proposal. The checklist should include a notation section where a contractor can note a description of any unusual site or subsurface condition observed, when such an issue was observed, what geotechnical information, reports, surveys or analyses were furnished or requested, and how the owner was provided notice of such variances.

### **The Importance of Complying with Notice Requirements**

Providing notice of a differing site condition to the owner benefits both the owner and the contractor: it allows the owner to change the design or alter the contractor's method of performance and it prevents the contractor from absorbing the cost associated with the changed condition. In some instances, a lack of strict compliance may be excused if the contractor substantially complied with the notice requirement or if the owner had actual knowledge of a differing site condition but did not provide such information to the contractor. However, a contractor should not assume such scenarios will excuse it from complying with explicit notice obligations contained in its contract. Contractors should always endeavor to give prompt written notice of differing site conditions and to use delivery methods that show proof of the owner's receipt. Never think that oral notice to the owner or its representative will suffice.

### **The Use of Exculpatory Clauses**

Many public and private owners use differing site condition clauses, but also include other exculpatory clauses in an effort to shift the risk of differing site conditions back to the contractor. Some courts have held such exculpatory clauses are generally not enforceable and have narrowly construed them and their limited effect. That being said, a contractor should not assume a court will automatically insulate it from the impact of an exculpatory clause. Instead, try to negotiate such language and/or include the risk of encountering such conditions in the bid or proposal price.

### **What if the Contract Has No Differing Site Conditions Clause?**

In the absence of a differing site conditions clause, a contractor may be able to recover the additional cost caused by a changed condition if the contractor can establish misrepresentation, breach of warranty, mutual mistake, or establish an owner's superior knowledge and a duty to disclose on the part of the owner. Reliance on such theories can, however, be risky. If a contract contains no differing site conditions clause, contractors should consider performing a heightened site investigation or, perhaps, forgoing the project entirely.

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## ConsensusDocs Content Advisory Council Chair Elected

Bob Majerus, Vice President and General Counsel of [Hensel Phelps](#), has been elected as the Chairman of the ConsensusDocs Content Advisory Council (CCAC) for 2019-2021. Majerus has been a long-term member of the CCAC and helped produce comprehensive updates to the most used ConsensusDocs contract documents in 2016/17. More recently, he oversaw the development of a working group that drafted the AGC commentary ([download the commentary here](#)) on the new American Institute of Architects (AIA) A201 General Conditions Document.



Each organization participating in the ConsensusDocs Coalition possesses an equal vote in approving industry standard contract documents. The CCAC Chair helps facilitate each organization's voice to be heard in creating fair documents that benefit the A/E/C industry as whole rather than a segment of the industry. ConsensusDocs Executive Director, Brian Perlberg commented, "Bob has a wonderful ability to facilitate consensus within the Content Council. His deep knowledge and insightful comments were instrumental in making some of the most significant changes in the recent comprehensive updates that were made to ConsensusDocs contracts in 2016 and 2017."

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