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2nd Circ. Issues Problematic Opinion on Role of Party-Appointed Arbitrators

[Albert Bates Jr.](#), Partner, and [R. Zachary Torres-Fowler](#), Associate, Pepper Hamilton LLP

On June 7, the U.S. Court of Appeals for the Second Circuit, in the case of *Certain Underwriting Members of Lloyds of London v. Insurance Company of the Americas*, No. 17-1137-cv (2d Cir. June 7, 2018), overturned the lower court's decision to vacate an arbitrator's award and remanded the case for further

proceedings. While this case arose in the unique context of a reinsurance arbitration using nonneutral party-appointed arbitrators, the opinion contains broad language that could have lasting negative ramifications on the arbitration community, as it risks causing confusion over the role of party-appointed arbitrators.

The appellant, Insurance Company of the Americas (ICA), insures workers' compensation claims in the construction industry. The appellee, Certain Underwriting Members of Lloyds of London (the underwriters), provided ICA with second and third layer reinsurance under a series of treaties, each of which contained an arbitration clause requiring disputes to be resolved through arbitration using a three-arbitrator panel. The panel was composed of two party-appointed arbitrators and a third arbitrator, selected by the two party-appointed arbitrators, who served as the panel's chair. However, in this case, the party-appointed arbitrators were not intended to be "neutral" arbitrators. Instead, as the court noted, the parties' arbitration agreement permitted the parties to engage in ex parte communications with their party-appointed arbitrator during discovery.

During the course of the relationship, a dispute arose concerning the coverage of multiple claims valued in excess of \$12.5 million by ICA against the underwriters. After the underwriters declined the claim, the parties proceeded to arbitration, where ICA was awarded net damages of \$1.5 million. The underwriters subsequently filed a motion in the Southern District of New York to vacate the arbitration award on several grounds, including evident partiality on the part of the arbitrator appointed by ICA, manifest disregard of the law, and prejudicial misconduct. ICA cross-moved to confirm the award.

The lower court granted the underwriters' motion to vacate the award and denied ICA's motion to confirm on the basis that the arbitrator appointed by ICA failed to disclose various relationships he maintained with ICA representatives and that those relationships were found to be "significant enough to demonstrate evident partiality." ICA appealed the lower court's decision, arguing that the arbitration award was not void for evident

partiality under the Federal Arbitration Act, even if ICA's party-appointed arbitrator failed to disclose close relationships with former and current directors of ICA.

On appeal, the Second Circuit announced a new standard to assess "evident partiality" on the part of an arbitrator appointed by a party. The court held that a party seeking to vacate an award "must sustain a higher burden to prove evident partiality on the part of an arbitrator who is appointed by a party and who is expected to espouse the view or perspective of the appointing party." As a result, according to the court, "an undisclosed relationship between a party and its party-appointed arbitrator constitutes evident partiality, such that vacatur of the award is appropriate if: the relationship violates the contractual requirement of disinterestedness ... or it prejudicially affects the award." Accordingly, the Second Circuit vacated the lower court's decision and remanded for further proceedings consistent with its opinion.

The Second Circuit's opinion should logically be limited to cases where the party-appointed arbitrator is not intended to be "neutral." However, an animating and problematic feature of the decision is the court's apparent assumption that all party-appointed arbitrators are fundamentally distinct from the arbitrator-chairs because, unlike the arbitrator-chairs, party-appointed arbitrators are not presumed neutral. Specifically, the Second Circuit repeatedly returned to the concept that party-appointed arbitrators should not be considered neutral umpires, but rather "are expected to serve as de facto advocates" and therefore, should be subject to a different standard for "evident partiality." To those active in the U.S. arbitration community, the overly simplistic assertion, albeit in dicta, that arbitrators appointed by a party are de facto advocates, flies in the face of the American Bar Association/American Arbitration Association Code of Ethics for Arbitrators in Commercial Arbitration (2004) (ABA/AAA Code) as well as other institutional arbitration rules and general arbitration practices.

Canon IX of the ABA/AAA Code establishes the presumption that party-appointed arbitrators are neutral, but recognizes that there are certain types of tripartite arbitration where the parties understand and expect that the two arbitrators appointed by the parties may be predisposed towards the appointing party. This limited circumstance, when a party-appointed arbitrator is not subject to the default presumption of neutrality, is governed by Canon X of the ABA/AAA Code, titled "Exemptions for Arbitrators Appointed by One Party Who Are Not Subject to the Rules of Neutrality." Unfortunately, the Second Circuit's opinion appears to gloss over the distinction between neutral and non-neutral party-appointed arbitrators.

Canon IX's presumption that all three arbitrators are neutral, and are expected to observe the same standards as the third arbitrator, has been the default presumption among U.S. practitioners and arbitrators since the ABA/AAA Code was adopted in 2004. Consequently, if read broadly, the Second Circuit's statement, in dicta, that "expecting of party-appointed arbitrators the same level of institutional impartiality applicable to neutrals would impair the process of self-governing dispute resolution," would be at odds with the ABA/AAA Code and contrary to the rules of leading arbitral institutions, such as the American Arbitration Association (Commercial Rule 18; Construction Rule 20), CPR Institute (Administered Rule 7), JAMS (Comprehensive Rules 7), and the ICC (Article 11.1 of the Rules). Indeed, although the Second Circuit highlighted that some of its sister circuits followed similar distinctions between party-appointed arbitrators and chairs, most of the cited cases were outdated and do not reflect the current ABA/AAA Code, institutional rules governing the majority of arbitrations conducted in the United States, or current practices and expectations in the commercial arbitration community at large.

Unfortunately, the Second Circuit's opinion may create further confusion. The facts presented involved a non-neutral party-appointed arbitrator who failed to make appropriate disclosures regarding his relationship with the party that appointed him. The holding that a party seeking to vacate an award "must sustain a higher burden to prove evident partiality on the part of an arbitrator who is appointed by a party and who is expected to espouse the view or perspective of the appointing party" is also clearly directed to non-neutral party-appointed arbitrators.

However, the vast majority of business-to-business disputes do not involve partisan arbitrators. In the absence of an express agreement of the parties that the party-appointed arbitrators are nonneutral, each arbitrator is expected to be neutral, impartial, and independent. Consequently, some of the court's dicta suggesting that so-called "wing" arbitrators will not be held to the same disclosure or other standards as the chair is problematic. The ABA/AAA Code, and the rules of leading arbitral institutions, presume that all party-appointed arbitrators are intended to be neutral, and are expected to observe the same standards as the third arbitrator, unless the agreement to arbitrate provides otherwise. The court's failure to expressly distinguish between the differing duties of a party-selected neutral arbitrator and a party-appointed nonneutral arbitrator may create confusion where none should exist.

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The 3 Most Important Steps to Avoid Claims in the Aftermath of Hurricane Florence

[Brandon L. Rutledge](#), Associate, [Peckar & Abramson](#)



As contractors across Texas learned all too well in the aftermath of Hurricane Harvey last year—after the wind and water subsides, disruption and delay claims arise.

In the coming weeks, as those in the Tar Heel State work to rebuild their lives and communities, the massive recovery and restoration effort promises to lead to an extreme shortage of construction workers as well as construction materials and equipment caused by supply chain disruptions and limited infrastructure.

Contractors in North Carolina should anticipate increased competition for these resources along with sharp increases in wage, equipment, and material prices. As observed in recent years with Andrew (1992), Ike (2008), Sandy (2012), and Harvey (2017), hurricanes leave behind environments ripe for conflicts between general contractors, owners, subcontractors, equipment rental firms and material suppliers, alike. Given the heightened risk, contracts should properly address the predictable difficulty and commercial impracticability of performing contractual obligations in a pre- and post-disaster environment.

For the contractors who suffer the misfortune of not only finding themselves in the path of a hurricane, but also a liquidated damages claim, the ability to avoid the negative impacts caused by such circumstances rests on their written contract—particularly the inclusion of certain clauses that allocate the risk of storm-related delay and cost impacts—and compliance with applicable notice provisions. The devil can be (and almost always is) in the detail.

For that reason, contractors should review their contracts immediately to determine the precise steps required to comply with notice provisions related to delays and extra costs arising from the storm. Contract notice requirements and time limits vary, whether for force majeure or other similar time and compensation rights. In order to ensure compliance and preserve rights, contractors should pay special attention to requirements related to content, form of delivery, and the parties designated to receive notice as well as carbon copy recipients such as the architect. By way of example, a notice provision might require a contractor to identify affected activities and estimate the duration of the delay.

First Step

First, notice should be sent to the owner on all potentially affected projects explaining the cause of delay and reserving rights for additional time and money. Consider the possibility that impacts may not result exclusively from the storm or the site itself, but from indirect regional impacts such as shortages of labor, material, equipment and fuel. Also consider whether hazardous conditions require remediation to ensure that workers' safely return to work sites. Take care to advise that, due to the dynamic nature of the ongoing situation, parties in the region lack the ability to fully assess the impact. Request that the owner put all applicable insurers on notice of their claims and ask for copies of all such notices. To the extent a contract requires a contractor to identify affected activities and estimate the time for delay, any preliminary estimate sent for the sole purpose of ensuring compliance should preserve the right to revise the estimate as delay continues.

Second Step

Second, contractors should thoughtfully evaluate the various insurance policies in effect in order to thoroughly record and document all categories of damages, physical losses, and recoverable injuries. For example, policies such as business interruption insurance may provide for "actual loss of Business Income you sustain due to the necessary suspension of your operations...caused by direct physical loss of or damage to property." If applicable, expect to document business interruption damages, including the often-overlooked staff time necessitated by the storm, in addition to "direct physical loss of or damage to property." Preserve now the evidence needed later to demonstrate the impact of the storm on the project and the ability or inability to work. Documentation includes, without limitation, time-stamped photographs and videos to memorialize all damage before mitigation efforts begin.

Third Step

Third, contractors must mitigate loss and protect undamaged property from further loss or damage to the extent possible. Remove all water damaged porous materials as well as any other materials prone to growing mold in order to prevent further damage. Note, however, that insurance companies require a reasonable time under the circumstances to investigate the conditions and damage. Take care not to discard anything unless first confirmed by an insurance adjuster or authorized representative of the applicable carriers. Parties who overlook the importance of thorough documentation may face accusations related to the destruction of evidence and risk compromising legitimate claims—even when it is not practical to wait.

Given the heightened risk of claims, contractors must exercise diligence in order to avoid bearing the primary responsibility for disruptions and delays. While no one size fits all solution promises to be effective, beginning the claims process as soon as possible remains the surest approach to reserve time and compensation rights arising from the storm.

Long known for leadership and innovation in construction law, Peckar & Abramson's Results FirstSM approach extends to a broad array of legal services — all delivered with a commitment to efficiency, value and client service since 1978. Now, with more than 100 attorneys in eleven U.S. offices and affiliations around the globe, our capabilities extend farther and deeper than ever. Find Peckar & Abramson's newsletter [here](#).

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Watch Out! Issues Every Contractor Needs to Know Before Working Out of State

[Mary Caroline Bubnovich](#), Associate, [Jones Walker LLP](#)

Whether you are looking for greener pastures or expanding an already booming business, when taking on or even just pursuing work in a new state there are certain issues for which every contractor needs to be on the lookout.

This article highlights some of the most critical and common areas that can trip up contractors when they venture out into another state. This is not an exhaustive list of the potential pit-falls or the differences you may face from state to state, but underscores the need to tread carefully and deliberately when working in an unfamiliar jurisdiction.

Licensing

A first step when even contemplating pursuing work in another state is to investigate that state's contractor licensing requirements. Detailed information and requirements typically can be found on the website of the state's contractor licensing board or similar agency. Trade organizations may also offer basic information and serve as a starting point. AGC's members have access to the Construction State Law Matrix, which outlines each state's licensing requirements, and is generally a helpful state-by-state guide and a good starting point on a range of issues such as lien laws, prompt payment, pay-if-paid/pay-when-paid clauses, bidding requirements, etc.

The state's license application process, including forms, directions and schedules, for obtaining a contractor's license can also typically be found on the website of the state's licensing board. Those websites will provide information on reciprocity for contractors licensed in other states, but never assume reciprocity. Due to the timing of exams, collection of financial data, possible background checks, and the frequency of licensing board meetings, the process may take time.

Although almost every state has some contractor licensing requirement, the level of regulation, the types of licenses and classifications (by trade and/or dollar value), and the level of enforcement vary tremendously. You should assume nothing about licensing in a new state regardless of how knowledgeable you are about your current state's licensing regime.

Be aware that even if a state does not require a contractor's license, there may be similar licensing requirements at the local level. For example, the state of Illinois does not issue contractor's licenses outside of public works and roofing, but many city municipalities and county governments require a contractor's license. On the other end of the spectrum, Utah requires all contractors to obtain a state license regardless of the size or value of the project. Lastly, there are states that fall somewhere in the middle and only require a contractor to obtain a license for projects of a certain type or over a certain size. For example, Georgia does not require a license for projects under \$2,500 in value. However, Georgia requires all applicants to pass the Georgia Business Law exam and the Contractor's exam, if they do not qualify to apply for licensure by prior approval status.

States also vary in their requirements for the timing of obtaining a contractor's license. Certain states may require a valid license as a prerequisite for submitting a bid on a project, where other states do not require a valid license until the project work begins.

The consequences for contracting without a license can be severe, and each state imposes its own penalty. In some states you may not have any recourse if an owner does not pay for work you already performed. In others, you may face both civil and criminal liability for performing work without a license. For example, in California, an unlicensed contractor faces misdemeanor charges that carry up to six months of jail time and a fine of up to \$5,000, as well as an administrative fine of up to \$15,000. If the court believes that you tried to mislead the public and presented yourself as a

licensed contractor, you will face felony charges that carry a prison sentence. These penalties may seem draconian, which is all the more reason to know the licensing requirements before working in a new state.

Lastly, be aware that if elements of your work include design (such as scope that requires sealed drawings), or if you enter into design-build contracts, there may be additional requirements for design professional licensing or that otherwise necessitate that you engage a licensed design professional.

Qualifying to Do Business Generally: Other Registration Requirements

In addition to contractor-specific licensing requirements you must investigate whether the state has any other requirements to register to do business within that state. A good place to start is by checking out the state's Secretary of State website. This should address requirements to register as a foreign corporation and whether it is necessary to file registration with the state revenue department. For example, in Georgia, if a nonresident contractor fails to properly register with the Georgia Department of Revenue, the nonresident contractor is precluded from bringing an action to recover payment. There may be general requirements to do business in the new state in addition to registering as a foreign corporation and as a nonresident contractor, so broader investigation and the assistance of legal counsel may be appropriate.

Indemnity

Indemnity clauses shift the risk of paying damages from one party to another. They are a very hot topic in construction and continue to get a lot of attention from state legislatures and courts.

There are different variations of indemnity clauses, and states treat them differently. At one end of the spectrum, an indemnity clause may shift all liability from one party to the other. Here, a general contractor would indemnify the owner against the owner's negligence. In other words, if an owner's negligence causes harm, the general contractor is on the hook for the damages caused by the owner's actions even if the general contractor himself is without fault. This is sometimes called "broad form indemnity." However, a number of states have statutes on the books that limit the enforceability of such provisions. North Carolina is one such state where the legislature enacted a statute which states that construction indemnity provisions cannot hold one party responsible for the negligence of another. Conversely, North Dakota does not have a statute on the books that prohibits broad form indemnity provisions, and therefore they are generally enforceable as written. The key take-away is that every state approaches indemnity clauses differently, and to appropriately mitigate risk it is critical to understand which provisions will be enforceable and which will not.

Prompt Payment Act

Many states have a statute that mirrors the federal Prompt Payment Act, which requires prompt payment regardless of the specific payment terms of a contract. However, though many states have a statute that addresses payment, they can vary widely both in terms of which parties the statute applies to as well as in terms of the consequences of violating the statute. The first distinction to be aware of is between public and private projects. Nebraska, for example, has a statute similar to the federal Prompt Payment Act but it only applies to public projects and there is no statute addressing late payment on private projects. Texas, on the other hand, has statutes addressing prompt payment that apply to both private and public projects.

Another distinction to be aware of is whether the statute applies to payments from owners to general contractors, general contractors to subcontractors, and finally from subcontractors to lower tiers. South Carolina imposes an interest rate of 1% of each month the payment is overdue, and flows this penalty downwards to payments from subcontractors to lower tiers. Alternatively,

Mississippi's statute addressing prompt payment applies to both public and private projects, but does not apply to payments from subcontractors to lower tiers.

Pay-If-Paid and Pay-When Paid Clauses

There are two types of contingent payment clauses that frequently appear in contracts. Pay-if-paid clauses allow a contractor to delay, theoretically indefinitely, payment to subcontractors until the contractor is itself paid by the owner. The contractor will pay the subcontractor *if* he is paid by the owner. Pay-when-paid clauses on the other hand speak to the timing of the payment, and state that a contractor's payment to its subcontractor becomes due when the contractor is paid by the owner. Pay-when-paid clauses typically do not entitle the contractor to withhold payment indefinitely.

States are increasingly moving to limit the enforceability of both pay-if-paid and pay-when-paid provisions. Some states refuse outright to enforce pay-if-paid provisions, and some, like Colorado, will only enforce a pay-if-paid provision if the provision is unequivocal and clearly states that the subcontractor bears the risk of the owner's nonpayment. As to pay-when-paid clauses, courts in some states have limited their impact by holding that payments must be made within a reasonable time, and do not create a condition precedent to payment. Alabama is such a state, and its courts have held that pay-when-paid clauses are a timing mechanism, rather than a condition precedent to payment, and even if the contractor never receives payment from the owner, it must nevertheless pay its subcontractors.

Preliminary Notices and Liens

Liens can be an invaluable tool to protect the contractor's right to payment, and contractors performing work in a new state should take great care to familiarize themselves with the basics of the new state's approach to liens. In particular, it is crucial to know prior to starting work whether the new state imposes any early notice requirements on the party seeking to record a lien. For example, if there is a rule on the books requiring the contractor to provide written notice to the owner within a certain time period, failure to comply could result in a complete loss of lien rights, or it could limit your lien rights. Georgia law states that if a Notice of Commencement is properly filed by the owner, the owner's agent, or the prime contractor, then subcontractors or suppliers who do not have a contract with the prime contractor must file a Notice to Contractor within 30 days of the later of either: first providing materials or labor, or the filing of the Notice of Commencement. If a Notice of Commencement has been filed, then failure to provide the Notice of Contractor results in a complete waiver of lien rights.

It is also important to know that there can be different timing requirements for general contractors versus subcontractors. In California, for example, subcontractors are required to send a preliminary notice to owners within twenty days of first providing materials or labor to the project in order to preserve their lien rights. This notice is an absolute prerequisite to filing a lien. The preliminary notice can be served more than 20 days after first providing material or labor, but only covers materials or labor provided within 20 days of the notice. Though it may seem awkward to address liens before a project has even started, it is crucial to do so. Otherwise, you may find that you have lost or severely curtailed your rights before a problem ever arose.

In addition to preliminary notice requirements, there are other lien-related deadlines that you need to know, such as the time for filing the lien and time for bring a lawsuit to foreclose on the lien. These deadlines vary state by state, and are typically on a short timeline. Finally, public projects may have their own set of deadlines and notice requirements related to Little Miller Acts and payment bonds.

The success or failure of a job in a new state could easily depend on how well prepared the contractor is to do business in that state rather than his or her construction capabilities. This article highlights the big icebergs to be on the watch for, but more risks could lie beneath the surface. Be

sure to do your research before jumping headfirst into a new state, and consider consulting with an attorney.

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A Guide to Obtaining Payment for Changed Work Not Expressly Authorized

[Eugene Polyak](#), Associate, [Smith, Currie & Hancock LLP](#)



Changes in the work are common on construction projects. But not all changes are handled in strict accordance with the contract's changes clause. For contractors, it is essential to be paid for the extra work caused by changes. This can become a problem if the change has not been expressly authorized by the owner or the owner's designated representative. Before doing extra work, contractors should make sure that the work has been properly authorized. This also does not always happen. Performing extra work without obtaining proper authorization is risky—it diminishes the likelihood of getting paid for the extra work. All, however, is not necessarily lost. This article demonstrates how the legal concepts of express, implied, and apparent authority can facilitate payment for changed work performed on a project.

Express authority

The simplest way to be paid for changed work is to follow the written directions of someone expressly authorized to issue changes to the work. Ascertaining proper authorization starts with the contract. Every contract should set forth the names of the parties' authorized representatives and should detail the extent of their authority. Ascertaining express authority is particularly important in public contracting where contractors are held to very strict standards by the courts in order to prevent misuse of public funds.

Consider the following scenario. Contractor begins work clearing the site and discovers that actual conditions do not match the site plan. The contractor calculates the discrepancy will require clearing and grading an additional acre of ground. The contractor needs a change order.

The contract states:

The owner shall designate in writing a representative who shall have express authority to bind the owner with respect to all matters requiring the owner's approval or authorization.

The contractor checks its file and determines the owner has never designated a representative. The contractor, who has been dealing with the owner's architect, tells the architect there is an issue with the plans and the extra clearing and grading is going to cost more money. The architect does not agree that the plans are erroneous, but tells the contractor to do the work and states that payment will be taken care of at the end of the job. The contractor bills the owner for the changed

work at the end of the job. The owner refuses to pay on the grounds that the architect did not have authority to order changes to the work.

The above hypothetical demonstrates the importance of verifying that changed work has been properly authorized. Unless the contract delegates express authority for the architect to bind the owner, the contractor should obtain the owner's written authorization to proceed with extra work.

Having failed to obtain express authorization, the contractor may still assert implied authority; apparent authority; or ratification or estoppel to demonstrate that the work was in fact authorized and should be paid for. The bad news: the contractor will probably need to hire a lawyer to make these arguments.

Implied authority

Showing that the architect had implied authority to bind the owner is one avenue for recovery in the scenario presented above. Implied authority is actual authority inferred from circumstances. For example, if the owner, as principal, has the architect perform acts on behalf of the owner, this may demonstrate the owner's consent to have the architect act as the owner's agent. Implied authority can be inferred when the actions of the architect are incidental to the authorized conduct and further the owner's interests. Generally, an agent is authorized to do anything which is reasonably incidental to the work specifically directed or which is usually done in connection with such work. To demonstrate implied authority in the above scenario, the contractor would need to show that it was entitled to draw an inference from the particular relationship and conduct between the owner and architect. For example, the contractor might show that the architect had previously approved change orders with the owner's knowledge and consent.

Apparent authority

Another way to establish that the work was properly authorized is to prove that the architect had apparent authority to bind the owner. Apparent authority exists when a principal, here the owner, holds another party, the architect, out as having authority to bind the principal. If the owner held out the architect as its agent with authority to approve changes to the work, apparent authority can be established. Apparent authority will not help, however, if the above fact pattern involved a public contract. This is because public bodies are not bound by the apparent authority of their agents. In public contracts, proper authorization to execute change orders must be based on express authority.

Other theories facilitating recovery for extra work

In addition to express, implied, and apparent authority, principles of ratification and estoppel can be used to recover the cost of changed work. Ratification may occur when the owner expressly approves the contractor's unauthorized acts. Ratification may also occur when the owner has full knowledge of the architect's acts and fails to disavow the architect's authority to perform those acts. Estoppel can be found when the contractor has changed his position in detrimental reliance on the owner's actions or inactions, in which case the owner may be prevented from taking a contrary position after the fact. Under the scenario presented above, suppose the contractor notified the owner in advance that it was proceeding with the changed work based on the architect's instructions and the owner allowed the contractor to proceed or simply did not respond. Under such facts, the owner may be estopped from denying that it authorized the contractor to proceed.

Conclusion

Failure to obtain proper authorization before performing changed work is risky business. The safest way for a contractor to get paid is to not perform extra work without a properly authorized change order. There will be times, however, when the overall circumstances dictate that the work must

proceed. In such cases, the contractor may need to rely on the doctrines discussed above to get paid for the changed work.

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New Tariffs Take Effect – What You Need to Know

[Brian Perlberg](#), Executive Director, [ConsensusDocs](#)

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Over this last year, the Trump administration has imposed tariffs that are having a major impact on import prices of essential construction materials, supplies, and equipment. These tariffs are now not limited to the imports of steel and

aluminum, but also include solar panels, Canadian softwood lumber and \$250 billion in Chinese imports—including everything from cement and paint to nails, nuts and bolts, and they are looking to only expand its reach. Fortunately, ConsensusDocs is at the forefront looking to help you and your company. ConsensusDocs better facilitate resolutions to these issues. The [ConsensusDocs 200.1 Time and Price Impacted Materials Amendment and Schedule A](#) provides language that is flexible, and allows prices to escalate up or down.

ConsensusDocs is the only standard contract that includes explicit language that a change in the law, including taxes, merits a change in contract price. A relevant contractual tool in light of tariffs is the [ConsensusDocs 200.1 Time and Price Impacted Materials Amendment and Schedule A](#). The document can be attached to any prime agreement and then can be used for subcontract agreements as well. The [Guidebook for the 200.1 Amendment can be found here](#).

- The 200.1 Amendment has no specific index listed, giving it the flexibility to be used for any material.
- Material prices have the ability to escalate or descend unpredictably, which is one of the reasons why construction owners' groups like the National Association of State Facility Administrators, the Construction Users Roundtable, Construction Owners Association of America, and Associated General Contractors of America endorse this ConsensusDocs document.
- Lastly, provisions in the ConsensusDocs standard construction contracts are relevant to this discussion. Unlike other standard contract documents produced in the industry that are all silent on this issue, ConsensusDocs explicitly says that a change of law after contract signing merits a price adjustment through change order. Under the ConsensusDocs 200 Owner/Constructor Agreement and General Conditions, §3.21 requires the Constructor (General Contractor) to comply with all applicable laws at their costs. However, §3.21.1.

explicitly states: “The Contract Price or Contract Time shall be equitably adjusted by Change Order for additional costs or time needed resulting from any change in Law, including increased taxes, enacted after the date of this Agreement.” The ConsensusDocs 200 is for design-bid-build, but this provision is flowed down through all project delivery methods, such as the ConsensusDocs 410 Design-Build Agreement.

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Upcoming Webinars



[Lean Contracting Practices without an IPD Contract and the New ConsensusDocs Lean Addendum](#)

Friday, September 28th | 1:00PM - 2:00 PM EDT

Price: Free

Lean design and construction methods have emerged as one of the most significant developments to improve value, efficiency, and relationships in the design and construction industry. Design and construction contracts provide both a potential obstacle and opportunity to incorporating lean tools and developing a lean culture for your next construction project. Learn how you can use the new ConsensusDocs 305 Lean Addendum to facilitate a lean project without an integrated project delivery (IPD) contract. Getting your contracts right to encourage lean is difficult. Now there is an industry contract standard form to help.

Learning Objectives

- Gain an overview of the new ConsensusDocs 305 Lean Addendum
- Learn lean project fundamentals that you can incorporate in your project's contracts
- Understand how to implement lean practices and lean culture when an Owner's constraints preclude use of an IPD contract.

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[What Contractors Absolutely Need to Know About the New AIA A201 and ConsensusDocs Industry Standard Contracts: Stay Ahead of the Curve](#)

September 25, 2018 - 2:00pm to 3:30pm EDT

Member Price: \$79

Non-Member Price: \$99

The American Institute of Architects (AIA) updates its AIA A201 General Terms and Conditions document and related agreements only once per decade. The AIA A201 is the most litigated contract document in construction. This webinar will review the most troubling changes just made to the 2017 AIA A201. All attendees will receive the new AGC Commentary on the AIA A201 (2017) which has dissected what the AGC membership absolutely needs to know when forced to use AIA contract documents.

Learning Objectives

- Understand the change to the AIA A201 that impact your bottom line including claims notice and termination.
- Learn contract negotiation strategies out of the most troubling new provisions in the AIA A201.
- Learn how General Contractors should flow this language down in subcontracts.
- Understand how the AGC-endorsed ConsensusDocs compare to AIA and provide an alternative.

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