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Fixed-Price Contracts Are Simple – Or Are They?

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[Fixed-Price Contracts](#)

Firm fixed-price contracts seem like a simple concept in practice — agreements that do not allow for the modification of the contract price after award without an express agreement between the parties. But in reality, there is very little case law guiding the practical approach to these types of contracts. Further, public entities have attempted to use audit provisions to capture contractor profits in fixed-price contracts. Some audit provisions imply that any savings discovered in an audit of a fixed-price contract should be returned to the owner. Therefore, a close examination of any audit provision in a fixed-price contract is necessary to prevent a public entity from attempting to claw back profits made on the contract.

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This article examines, in brief, the definition of fixed-price contracts and cases in which the audit provision in the contract has been unsuccessfully used to assert claims for reimbursement and False Claims Act liability.

A. [Fixed-Price Contracts — Defined](#)

Fixed-price contracts are one of two primary types of contracts: (1) fixed-price and (2) cost-type contracts. Fixed-price contracts generally provide for a price that is not dependent on the costs incurred by contractors during performance, although some fixed-price contracts allow for price adjustments based on cost performance in relation to a target cost agreed on by the parties.

Subpart 16.2 of the Federal Acquisition Regulation (FAR) recognizes five types of fixed-price contracts: (1) firm fixed-price; (2) fixed-price with economic price adjustment; (3) fixed-price with price redetermination (both prospective and retroactive); (4) fixed-price level-of-effort; and (5) fixed-price incentive. Focusing on firm fixed-price contracts, the FAR states that “[a] firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor’s cost experience in performing the contract.” 48 C.F.R. § 16.202-1 (2012).

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“This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.” *Id.*

Courts have interpreted the FAR to preclude adjustment or reimbursement for the value of fixed-price contracts. See *Info. Sys. & Networks Corp. v. United States*, 64 Fed. Cl. 599, 606 (2005). Indeed, the court in *Information Systems* held that the government “bore the risk of the adequacy of [the contract] price and that it was ‘fair and reasonable’ in light of all the known costs, whether they be ‘allowable’ or not.” *Id.* at 607.

Courts have also recognized the risk-shifting mechanism of fixed-price contracts. “Unlike the cost-reimbursement type contract in which the government bears the burden of all allowable costs, the burden is shifted entirely to the contractor in a fixed-price contract, and the government bears only the risk of over-estimating project costs (and therefore agreeing to pay an unnecessarily large fixed-price).” *Id.* at 606. “In a fixed price contract, if the final total costs of the agreed upon services exceed the contracted price, the contractor takes the loss; conversely, he can profit if the costs are lower than the contract price.” *S & B/BIBB Hines PB 3 Joint Venture v. Progress Energy Florida, Inc.*, 365 F. App’x 202, 203 (11th Cir. 2010) (internal citations and quotations omitted). “A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor’s cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.” *Prime v. Post, Buckley, Schuh & Jernigan, Inc.*, No. 6:10-CV-1950-ORL-36, 2013 WL 4506357, at 9 (M.D. Fla. Aug. 23, 2013).

B. Auditing the Fixed-Price Contract

Public entities have attempted to use audit provisions to circumvent the fixed-price terms in contracts. Some have gone so far as to use the False Claims Act to claw back money when those audits demonstrate that the contractor performed the work well under the fixed-price amount. *Empire Blue Cross & Blue Shield v. United States*, 26 Cl. Ct. 1393, 1395-1396 (Cl. Ct. 1992), *aff’d*, 5 F.3d 1506 (Fed. Cir. 1993), provides an illustrative example of the government’s use of an audit of a fixed-price contract

In *Empire Blue Cross*, the U.S. Claims Court held that a government contractor, Empire, was not liable to reimburse the government for increasing profits through the use of lower-cost labor. There, the contractor entered into a fixed-price contract with the government to serve as a Medicare intermediary for New York state. During the negotiations of the contract, the government requested Empire provide a “Certificate of Current Cost or Pricing Data” in support of its proposed contract price. “Included in the data . . . was a summary of expected administrative costs which listed, among other information, an estimated average manpower requirement of 433 employees to perform the contract work.” *Id.* at 1395.

During the contract’s initial term, there were 23 amendments to the scope of work, 11 of which involved price increases. The 11 price adjustments included \$1,277,575 for increased costs of labor for such work. However, a subsequent audit revealed that Empire’s labor costs actually decreased because it reduced its staffing levels from an original 337 employees to 302 employees. This was well short of the 433 employees listed in the estimated costs section of the contract and the Certificate of Current Cost or Pricing Data.

Nevertheless, the court found that Empire’s “accomplishment of the work with fewer personnel than initially thought necessary becomes a circumstance that inures exclusively to Empire’s

benefit.” *Id.* at 1396. “Savings in estimated costs realized by a contractor during performance of the base contract work give the Government no reprieve from the obligation to pay more for extra work.” *Id.* Accordingly, the court held that Empire was entitled to reap the benefits of performing its work at a lower cost and was not required to repay the government for the increased labor costs under the adjustments to its scope of work.

United States ex rel. Wilkins v. North American Construction Corp, 173 F. Supp. 2d 601 (S.D. Tex. 2001), provides another example of the government’s inability to claw back funds under a fixed-price contract. The court held that a contractor, under a fixed-price contract with the government, has no False Claims Act liability for allegedly “padding” its fixed-price proposal with extraneous cost items within its fixed price.

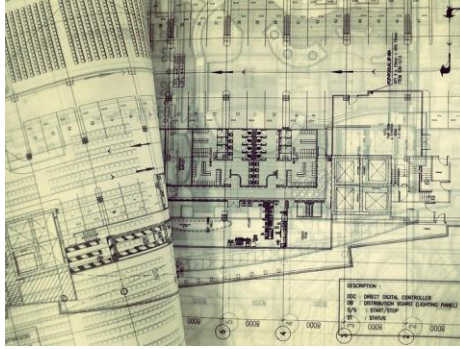
In *Wilkins*, the Army Corps of Engineers (the Corps) awarded a fixed-price contract to North American Construction Corporation (NACC) for the construction of a groundwater treatment facility. The Corps subsequently filed a False Claims Act action against NACC and its sub-subcontractor, ECE, after discovering the work agreed to in the fixed price included items that were supposed to be unit priced. The Corps argued that it “reasonably assumed that the fixed price it agreed to pay for drilling the wells did not include any costs for waste removal because the price for waste removal was separately classified” — “if it had known that the total contract price of \$1,295,000 for drilling and waste management included \$280,000 in costs for waste removal, it would not have agreed to pay ECE that total price” of \$1,295,000. *Id.* at 609.

The contractors countered that, “by bidding and approving a fixed price contract, the government chose not to impose an obligation to disclose the cost basis of the fixed price bid or contract.” *Id.* Ultimately, the court held that, by agreeing to accept the fixed-price bid, the Corps could not protest that the fixed price should have been lower, stating, “However, the mere fact that an activity may be accomplished less expensively in a fixed-price contract falls measurably short of fraud under the False Claims Act.” *Id.* at 635 (internal citations omitted).

For now, it appears the courts have little appetite to change fixed-price contracts to allow public entities the ability to recover or share in profits received by contractors. But, as noted, audit provisions in contracts can be written to allow potential recovery if evidence of overpricing is discovered, and thus must be examined carefully.

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Avoiding Unintended Liability for Design **[Daniel F. McLennon](#), Partner, [Smith, Currie & Hancock LLP](#)**

A recent trend in design-build contracting, especially on large projects, is for the owner to incorporate a heightened standard of care for the design aspects of the building. Creeping into contracts is language requiring the project to perform according to unspecified expectations, such as “fit for owner’s use” or “suitable for the use intended”. This heightened, ambiguous standard of care conflicts

with the traditional designer’s standard of care—the ordinary care expected of reasonably competent designers—leaving a gap between the performance that may be required from the design team and the performance expected by the owner. This gap may result in uninsurable exposure to the design builder. This article explores that gap and how to prevent or handle it.

Traditional Design-Bid-Build Projects

In a traditional design-bid-build project, the owner hires the design team, and the contractor builds the design provided to it by the owner. The design team is typically liable to the owner for any failure to meet the standard of care resulting in design deficiencies. The owner would absorb any loss related to failure of the building to perform according to the owner’s expectations that did not result from a breach the standard of care. Anecdotally, studies have shown that these losses have ranged between 3-4% of a project’s hard costs.

The contractor who builds according to the plans and specifications under the design-bid-build model should not be liable for any failure by the building to perform according to the owner’s expectations. The contractor promises only to build what is depicted in the plans and specifications. The contractor makes no promise that the building will perform to any particular standard. To the contrary, under the *Spearin* doctrine—named after the United States Supreme Court case *Spearin vs. United States*, 248 U.S. 132 (1918)—construction contracts include an implied warranty by the owner that the plans are accurate and suitable for the owner’s intended purposes. Thus, if the plans and specifications are not accurate or not suitable, the owner cannot recover from the general contractor for damages related to building performance deficiencies. Moreover, an owner who breaches the *Spearin* warranty may be liable to the contractor for damages, including actual costs and delays incurred in rectifying deficiencies so that the building may be built.

Heightened Design-Build Requirements an Emerging Trend

When the owner contracts for a design-build project, the responsibility for designs shifts to the contractor, and there is no implied warranty of the plans from the owner to the contractor.

Recently, design-build contracts, especially those found in large infrastructure projects and P3 projects, are incorporating elevated expectations for sufficiency of designs. These creep into contracts in at least three ways: Elevated warranties, standards of care, and indemnity requirements.

When these elevated contract requirements call for results that may not be met by the design team’s exercise of ordinary care, any damage resulting from failure to meet such requirements generally would not be covered by the design team’s professional liability policy because such policies cover only damage resulting from a breach of the ordinary standard of care. Additionally, the contractor’s own general liability policy would not cover such damage for a multitude of reasons, such as the absence of an “occurrence” and the “your work” exclusions.

Thus, under these new contract requirements the contractor faces real exposure to an uninsurable loss.

Elevated Warranty

Most prevalently, we are seeing owners extracting warranties from design-build contractors to the effect that the building will be “fit for the intended use” or “suitable for the intended use”. Sample language includes:

The Work shall be *free of Deficiencies*, shall be *fit for use for the intended function* and shall meet all of the requirements of the Contract, including, without limitation, any performance standards.

Unfortunately, whether a building is fit for its intended use, like beauty, may be in the eye of the beholder. The building may be judged according to the owner’s unstated, subjective standards. For example, consider:

- Power line towers that vibrate under certain wind conditions – the design may not be negligent because the wind conditions might not be foreseeable yet may increase maintenance costs—How much extra cost is too much? Subjective standard;
- Tunnels that leak, but not significantly – How much water is too much? Subjective standard;
- Windows and other exterior systems that keep out moisture and insulate, but admit noise – How much noise is too much? Subjective standard;
- Interior lighting that is adequate, but less than ideal – How much light is enough? Again, subjective standard.

One project for an electrical and utility vault included this language:

Contractor absolutely and unconditionally warrants the Relay and Substation Enclosure at the Substation (“Substation Enclosure”) as provided in this Section 11.7 for the period and with the consequences set forth herein. Contractor *absolutely and unconditionally warrants* that the Substation Enclosure shall be completely weather-tight (as defined herein) in all weather conditions for a period of ten (10) years from the date of Final Acceptance. *“Weather-tight” shall mean that no water, rain or other moisture shall leak, seep or otherwise pass through the roofs, walls, doors or accessory equipment of the Substation Enclosure.*

Imagine the contractor’s exposure under such language—having to keep out any moisture whatsoever, such as moist air entering the vault through the ventilation system and condensing on the wall of the vault. Technically that would be a breach of this warranty. Would the contractor be required to retrofit the system to include moisture-scrubbing air handling equipment, even though the condensation on the vault wall causes no physical damage or injury to any equipment therein?

Elevated Standard of Care

Additionally, such contracts may include expressly elevated standards of care, such as:

Contractor holds sole responsibility, *regardless of the ordinary standard of care*, for providing, the design and construction of the Project free from all defects which meets the requirements of the Contract, including any portions thereof provided by Contractor’s Subconsultants, Subcontractors and Suppliers.

Under such a clause the design-build contractor may have to absorb any liability for designs not meeting owner's heightened expectations, because ordinary care by the design team may not anticipate such heightened expectations and thus the designs may comport with the standard of care.

Elevated Indemnity

And finally, indemnity clauses may themselves import the elevated standard of care. Sample language includes:

18.1.1 Subject to section 18.1.2, DB Contractor shall release, protect, defend, indemnify and hold harmless the indemnified parties from and against any and all claims, causes of action, suits, judgments, Investigations, legal or administrative proceedings, demands, and losses, in each case if asserted or incurred by or awarded to any third party, arising out of, relating to or resulting from:

(M) Errors, inconsistencies, or other defects in the design or construction of the project.

Again, the contractor may absorb liability for injury to others caused by non-negligent designs, since that liability may not be passed on to the design team.

A Word to the Wise

Design-build contractors are cautioned to review carefully contract clauses that might otherwise escape close scrutiny. Contracts should be reviewed for language that implicates a heightened standard of care. Particularly, any warranty, standard of care, and indemnity language should be reviewed and modified, if possible.

To avoid the risk of subjective standards creeping into a contract and creating liability for the contractor, any performance requirements should be identified and be carefully specified. For example, "suitable lighting" should not be left undefined. The lighting contractor should require the owner to specify in industry terms the expected square footage of coverage, how bright the light should be in lumens, and what color the light should be in degrees Kelvin. Similarly, air conditioning performance should be specific in terms of degrees Fahrenheit to be maintained per square foot of area for defined durations.

To counter a "fitness for use" or similar warranty requirement, the contractor should consider adding language that grants the contractor the affirmative defense that non-negligent designs were "state of the art" at the time provided to the owner. Additionally, the contractor will want to ensure that the contract carefully defines the intended purpose and end use of the project and voids the warranty obligations if the owner changes the purpose or end use.

One sure-fire way to avoid elevated liability is to insist on use of the appropriate ConsensusDocs 400 Series Design-Build contract. The 400 Series documents do not contain elevated warranty or indemnity provisions and define the standard of care as "the standard of professional skill and care required for a Project of similar size, scope, and complexity, during the time in which the Services are provided".

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Caveat Contractor: Your Subcontractor’s Employees May be Considered Your Own Employees under State and Federal Labor Laws

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Contractors have been relying on subcontractors in the construction industry for as long as buildings have been built. One main reason for this is that subcontractors typically have specialized employees that a general contractor would not need for every project. So, the subcontractor provides the necessary personnel for the particular project and the contractor need not worry about the risks and headaches associated with direct employment of that staff, right? Well, maybe not. According to a recent federal appellate decision, contractors may be required to comply with the applicable labor laws for their own workers and the workers of their subcontractors. Failure to do so could result in civil and criminal penalties.

Fair Labor Standards Act and the Joint Employment Doctrine

Generally, an employer’s obligations to its employees are governed by both federal and state law. The Fair Labor Standards Act (“FLSA”) is a federal labor law that establishes, among other things, minimum wage and overtime. 29 U.S.C. § 201, *et seq.* States also have their own labor laws. Employers who do not comply with federal and state labor laws may be subject to civil and criminal penalties.

While employers know to comply with these laws for the personnel that they directly employ, an employer’s determination of its compliance with the FLSA should also consider the joint employment doctrine. The Department of Labor’s regulations provide that an individual may be employed by two employers at the same time under FLSA. See 29 C.F.R. § 791.2(a). Such a determination of joint employment “(1) treats a worker’s employment by joint employers as ‘one employment’ for purposes of determining compliance with the FLSA’s wage and hour requirements and (2) holds joint employers jointly and severally liable for any violations of the FLSA.” Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 134 (4th Cir. 2017) (citing Schultz v. Capital Int’l Sec., Inc., 466 F.3d 298, 305, 307, 310 (4th Cir. 2006)).

Under the joint employment doctrine, if a contractor and subcontractor jointly employ a worker, both the contractor and subcontractor must comply with the FLSA provisions and local labor laws applicable to that worker. Such a joint-employer relationship would also render the contractor and subcontractor jointly and severally liable for any violations of the FLSA related to the jointly-employed worker. Thus, contractors could be subject to civil and criminal penalties for FLSA violations related to workers of a subcontractor.

Federal Appellate Court Decides that Contractor and Subcontractor Jointly Employed Workers of Subcontractor

In January 2017, the Fourth Circuit held that a contractor and its subcontractor jointly employed the subcontractor’s workers for the purposes of the FLSA. Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 129 (4th Cir. 2017). This means that the contractor and

subcontractor were *both* responsible for complying with the FLSA and analogous Maryland law regarding the workers of the subcontractor. Although this holding seems somewhat inconsistent with the traditional contractor-subcontractor relationship, the Fourth Circuit made clear that the prevalence and acceptance of the contractor-subcontractor relationship in the construction industry has no bearing on the determination of whether entities constitute joint employers under the FLSA. *Id.* at 143-44.

In *Salinas*, four drywall installers (the “Workers”) were directly employed by a framing and drywall installation subcontractor (the “Subcontractor”) that worked almost exclusively for a general contracting and interior finishing services company (the “Contractor”). 848 F.3d at 129. The Workers sued the Subcontractor (and its owners) and the Contractor for violations of the FLSA and analogous Maryland laws on the bases that Subcontractor and Contractor jointly employed the Workers, “(1) requiring aggregation of Plaintiffs’ hours worked for [Contractor] and [Subcontractor] to assess compliance with the FLSA and Maryland law and (2) rendering [Contractor] and [Subcontractor] jointly and severally liable for any violations of the statutes.” *Id.* The Court developed a novel, six-factor test to determine whether the Contractor and Subcontractor jointly employed the Workers.

A. Part 1: Test to Determine Whether Contractor and Subcontractor are Joint Employers

The Fourth Circuit rejected the tests developed by other circuits and created its own standard to determine whether joint employment exists. The first fundamental question in this inquiry is: “whether two or more persons or entities are ‘not completely disassociated’ with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker’s employment.” *Id.* at 141. There are six factors that courts should consider when answering this question:

- (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
- (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker’s employment;
- (3) The degree of permanency and duration of the relationship between the putative joint employers;
- (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;

- (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
- (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

Id. at 141-42. The foregoing list of factors is not exhaustive, and courts must consider all factors that go to the fundamental question of whether a purported joint employer "shares or codetermines the essential terms and conditions of a worker's employment." Id. at 142.

The Court applied the foregoing test and held that the Contractor and Subcontractor jointly employed the Workers based upon, *inter alia*, the following:

- (1) Contractor and Subcontractor jointly directed, supervised and Controlled the Workers. Contractor actively supervised the Workers' work on a daily basis by foremen and required the Workers to attend frequent meetings about tasks and safety protocols. Contractor also required the Workers to hold themselves out as Contractor employees by providing the Workers with Contractor-branded apparel and safety equipment.
- (2) Notwithstanding that Subcontractor generally hired and fired its employees, Contractor dictated the Workers' hours and sometimes required the Workers to work additional hours or on additional days. When Subcontractor performed work for Contractor on an hourly basis instead of a lump-sum basis, Contractor dictated how Subcontractor should staff the project and when overtime could be paid.
- (3) Regarding the permanency of the relationship, Contractor and Subcontractor had a longstanding business relationship. The Workers worked almost exclusively on Contractor jobsites.
- (4) Although Contractor did not own Subcontractor, they had a longstanding business relationship.
- (5) The Workers performed nearly all of their work on Contractor jobsites for Contractor's benefit. Contractor required the Workers to sign in and out with Contractor foremen upon arrival to, and departure from, the jobsite each day.
- (6) Contractor provided the main tools and equipment necessary for the Workers to complete their work. Contractor provided housing for Subcontractor employees on one project. Subcontractor issued the Workers' paychecks, but Contractor recorded the Workers' hours on timesheets and maintained those timesheets.

Id. at 145-47.

Despite the foregoing, the Contractor asserted four reasons to support its position that it did not jointly employ the Workers. Id. First, the Contractor and Subcontractor had the standard contractor/subcontractor relationship that is normal in the construction industry. Id. The Court dismissed this argument because the fact that parties engaged in a standard business

relationship does not affect whether the parties jointly employ a worker under FLSA. Id. Second, the Contractor argued that the supervision of Subcontractors' work is quality control and not indicative of a joint employer relationship. Id. The Court rejected this argument because the Contractor's supervision went beyond "double-checking" that a task was done correctly, and instead amounted to daily oversight and regular feedback and instruction to the Workers on the pace and quality of their work. Id. at 148 (internal citations omitted). Third, the Contractor asserts that the Subcontractor was its independent contractor, as Subcontractor received a "fixed price" for supplying labor to the Contractor. Id. at 149. The Court rejected this argument because the Contractor and Subcontractor codetermined key terms and conditions of the Workers' employment – making them joint employers regardless of whether the Subcontractor is properly characterized and treated as the Contractor's independent contractor for other purposes. Id.

The Contractor's last argument addressed the financial implication of a decision in favor of the Workers. Contractor asserted that a ruling in favor of the Workers would impose unreasonable financial burdens on general contractors because it would render every general contractor a joint employer of its subcontractor's employees. Id. The Court pointed out that a general contractor can avoid FLSA liability as long as it does one of the following: "(1) disassociates itself from the subcontractor with regard to the key terms and conditions of the workers' employment or (2) ensures that the contractor 'covers the workers' legal entitlements under FLSA.'" Id. at 149 (internal citations omitted). The Court states that a general contractor increases its risk of liability only when it hires a "fly-by-night operator" or a subcontractor who plans to ignore the FLSA. Id. at 149. The Court further advises that a contractor can avoid this risk by dealing only with "other substantial businesses" or by "holding back enough on the contract to ensure that workers have been paid in full." Id. (internal citations omitted).

B. Part 2: Test to Determine Whether Workers are Employees or Independent Contractors

The second part of the joint employer analysis is to determine whether the Workers were employees or independent contractors of Contractor and Subcontractor to determine whether a worker is covered by the FLSA. Id. at 150. Although the Salinas Court did not go through each factor relevant to this analysis, the Court laid out the six-factor test to determine whether a worker constitutes an employee or independent contractor: "(1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; (6) the degree to which the services rendered are an integral part of the putative employer's business." Salinas, 848 F.3d at 150.

In Salinas, the parties did not dispute the district court's finding that the Workers were Subcontractor's employees, so the Court did not analyze each factor relevant to the determination of whether the workers were employees or independent contractors. Id. It was clear that the Workers were economically dependent on the Subcontractor and thus were economically dependent on the Contractor and Subcontractor together. Id.

One consideration that weighs in favor of classification of a worker as an employee is the degree to which the employer exercises control over the worker. Id. For example, in Salinas, Contractor's daily supervision over the Workers demonstrated that Contractor and Subcontractor both exercised control over the Workers. Id. Contractor's supply of the tools and equipment necessary to complete the work also weighs heavily in favor of the classification of the Workers as employees rather than independent contractors. Id. at 150-51.

Practical Implications for Contractors

To determine their compliance with federal and state labor laws, contractors must know whether they jointly employ the workers of their subcontractors. This determination currently varies by jurisdiction, so familiarity with the applicable laws is critical. Non-compliance with federal and local labor laws can subject contractors to civil and criminal penalties – even as it relates to the employees of a contractor’s subcontractor.

In the Fourth Circuit, joint employment hinges on the question of whether the contractor and subcontractor co-determine the terms and conditions of a worker’s employment. Salinas, 848 F.3d at 141. Contractors should be aware that, although in the Fourth Circuit this question is answered by analyzing the six factors of the Salinas joint employment test, the determination is a holistic analysis that can be informed by other factors as well. Notwithstanding that this is a holistic analysis, there is conduct that may weigh in favor of a joint employment relationship between a contractor and subcontractor.

For example, a contractor’s requirement that its subcontractor’s workers apply for employment with the contractor, and the contractor’s subsequent direct hire of such workers may be a factor that shows that a contractor and a subcontractor jointly employ such workers. See Salinas, 848 F.3d at 145-46. Similarly, a contractor foreman’s directive to its subcontractor’s workers to work additional hours or additional days; a contractor’s requirement of its subcontractor’s workers to attend frequent meetings regarding tasks and safety protocols; and a contractor’s requirement that its subcontractor’s workers sign in and out with the contractor’s foremen upon daily arrival to, and departure from, the jobsite are examples of conduct that may weigh in favor of a joint employment relationship between a contractor and its subcontractor. See id.

Similarly, a contractor’s active supervision of its subcontractor’s workers on a daily basis may increase the likelihood that a contractor and its subcontractor jointly employ the subcontractor’s workers. For example, a contractor’s foreman giving frequent directives to the subcontractor’s workers to fix deficient work is a way a contractor may actively supervise such workers. See id. Moreover, a contractor’s provision of the main tools, materials, and equipment for its subcontractor’s workers to complete their work and/or a contractor’s provision of housing accommodations for a subcontractor’s workers during a project may show that a contractor and subcontractor jointly employ such workers. See id.

Additionally, a contractor’s provision to its subcontractor’s workers of apparel and stickers with the contractor’s logo for such workers to wear is another action that may demonstrate a joint employment relationship. See id. A contractor’s payment to its subcontractor on an hourly, rather than lump-sum basis can also weigh in favor of a joint employment relationship. See id.

Contractors in states that are subject to the jurisdiction of the Fourth Circuit, such as Virginia, Maryland, West Virginia, North Carolina, or South Carolina, should familiarize themselves with the six factors of the Salinas joint employer test and consider how their actions and the actions of their subcontractor(s) are similar to or distinct from the contractor and subcontractor in Salinas. Contractors should engage in these analyses early in a business relationship so that they can accurately mitigate risk and comply with the FLSA and local labor laws to avoid civil and criminal penalties.

Different federal and state courts consider different factors to determine whether a contractor and subcontractor are considered joint employers, so contractors must understand whether they are joint employers with their subcontractors under the applicable labor laws to each jurisdiction in which that contractor conducts business. Contractors who are not comfortable with their own assessment of joint employment status should consult with counsel familiar with the applicable labor laws.

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The AIA A201 Gets a Failing Grade: Consider Alternatives or Modifications **[Brian Perlberg](#), Executive Director, [ConsensusDocs](#)**

The American Institute of Architects (AIA) recently released a new edition of the AIA A201 General Terms and Conditions Document along with the AIA A-Series agreements and Exhibits. The AIA A201 2017 edition marks the first time in AGC's 99 year history that AIA did not solicit AGC's input in the development of the document (or share an advanced copy). Unfortunately, the AIA's A201 fundamental problems remains the same -- AIA has written a document by Architects' for architects. None of AGC's top concerns were adequately addressed from the 2007 A201 edition, which AGC did not endorse. Here are five top new things to watch for in the AIA 201:

1. **Contractor is Responsible for Unsafe Owner-Directed Means & Methods:** Contractors are now responsible to correct and supervise the means and methods of Owner or Architect's directed means and methods that they see as unsafe (§3.3.1). AIA has taken a very problematic provision and made it worse.
2. **Termination for Convenience Leaves General Contractors Short and in the Middle.** A Contractor is no longer entitled to lost overhead and profit on unperformed work when an Owner terminates for convenience. However, in the [AIA A401 Subcontract](#), a Subcontractor is still entitled to lost overhead and profit on unperformed work. This leaves the General Contractor in a precarious position (§14.4). Therefore, avoid or modify the AIA subcontract for consistency.
3. **Insurance Exhibit.** This new Exhibit A is a major change and now most, but not all insurance requirements are in the exhibit. The insurance exhibit provides for a perfectly insured project that may not be readily available in most markets and for most contractors. The consequences are likely to fall on the Contractor for any failures to meet these idealize requirements.
4. **Notice the New Broad Notice.** There are different requirements for giving notice generally versus giving notice when a claim is involved. The definition of a claim is extremely broad, and you will likely lose your claim rights if you guess wrong. When in doubt, give notice for a claim, and don't hand deliver notice without a receipt.
5. **Mandating Other AIA Branded Contract Documents or Suffer Consequences.** For the first time ever, AIA uses standard language that will impact your substantive legal rights and claims based solely upon the AIA contract documents branding of certain documents (§1.7).

What should AGC members do facing the possibility of the AIA A201 2017 edition or even 2007 edition? One option is to proactively engage Owners before the A201's use is decided and consider using ConsensusDocs standard construction contracts, which are endorsed by AGC as well as major Owner's groups. At a minimum, a ConsensusDocs subcontract can be chosen. Alternatively, AGC members can download a free members-only Commentary of the

new AIA A201 at www.agc.org/contract. Overall, the 2017 edition of the AIA A201 has in some ways gotten a little better; in some ways has gotten a little worse; and in some ways made changes that don't matter. A prudent contractor will consider alternative contracts or alternative provisions.

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AGC Lean Course at Construction Superconference December 4th **[Joseph Cleves, Jr.](#), Partner, [Taft](#)**

Lean Construction allows companies to thrive in all economic conditions. By applying lean construction principles, executives can improve safety, and achieve greater customer satisfaction with higher productivity at reduced costs. The Lean Construction for Executives presentation is designed as a way for executives to share their customized lean journey with their colleagues to improve construction practices by sharing their story.

Upon completion of this session, participants will be able to:

- Create general awareness of Lean and how it is applied in our industry – overcome the stereotype that it is for manufacturing and not construction.
- Provide a reason for executives to start/continue a Lean journey within their organization.
- Provide the basis for executives and their companies to take a more comprehensive training to maximize a company's efficiency through lean principles and tools.

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Upcoming AGC Webinars on Contracts and Construction Law

In December, AGC will host two webinars highlighting recent updates to the ConsensusDocs contracts and the AIA A201. See below for brief descriptions of the webinars and links to sign-up. We look forward to "seeing" you there!

The New AIA A201 Insurance Exhibit & Updates to the ConsensusDocs Insurance Provisions: Insurance Requirements are a Chang'in

December 11, 2017 – 2:00 pm to 3:00pm

Description: The AIA A201 2017 General Conditions Document has been rewritten and restructured its insurance requirements in the new edition and created a new Insurance Exhibit A. This will impact how insurance requirements required by Owners and insurance products Contractors must procure (and avoid exclusions). The AGC-endorsed ConsensusDocs also made significant changes in its updated standard documents that among other things now defaults to the Constructor procuring the Builder's Risk Policy, instead of the Owner. This webinar will highlight changes to insurance requirements and what you need to do to comply or alternatively contract negotiation strategies. Click [here](#) to sign-up!

What You Absolutely Need to Know About the New AIA A201 and ConsensusDocs Industry Standard Contracts: Stay Ahead of the Curve

Wednesday, December 23, 2017 – 3:00pm to 4:00 pm

Description: 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. Click [here](#) to sign-up!

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