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Table of contents

Effective Arbitration
New OSHA Penalties
Arbitration Discovery
State Law Matrix
Webinar: Contract Termination
Webinar: Contract Killer Clauses

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Strategies for Drafting an Effective Arbitration Clause

Eugene J. Heady, Smith Currie & Hancock LLP, Partner

Claims and disputes in the construction industry are commonplace. On a construction project of any complexity, disputes are often the rule–not the exception. During the lifetime of most construction companies, it is likely that the company will become embroiled in a claim or dispute that cannot be resolved without resorting to arbitration or litigation. While it is best to avoid construction claims and disputes from the beginning of a project, it is important to resolve them

quickly and efficiently once they arise. The efficient resolution of claims and disputes is often crucial to the economic success of the project.

Claims and disputes involving construction projects tend to be technically complex and factually intensive. As a result, the resolution of construction claims and disputes can be time consuming and costly. Absent reaching a negotiated or mediated settlement of a claim or dispute, arbitration may be the best way to reach a satisfactory resolution for all involved. The goal in arbitration is to achieve a just, efficient and cost effective resolution of the dispute. When first introduced to the construction industry, arbitration was hailed as a less expensive and more efficient alternative to the litigation of complex construction claims and disputes. Regrettably, for many in the construction industry, the distinct benefits of arbitration—*speed, cost and efficiency*—have proved to be illusory where parties have allowed arbitration to evolve into a process which too closely resembles the litigation process. If approached right, however, arbitration can be a much better way than litigation to resolve complex construction claims and disputes quickly and efficiently.

One primary advantage of arbitration over litigation is that the contracting parties generally have greater ability to tailor the dispute resolution process to their individual needs and preferences. If there is a particular aspect of arbitration which you find objectionable, a careful revision of your contract's arbitration clause may supply the desired "fix." Whether you are an owner, contractor subcontractor, or supplier, consider the following checklist of considerations which you should observe in creating an effective arbitration clause in a contract with a lower-tier contractor, subcontractor, or supplier:

- ***Pre-select the hearing locale in your arbitration provision.*** In order to make the arbitration proceeding less expensive, pre-select a location for the hearing that is most convenient for you and the likely witnesses that you will need to present in the event a later dispute is arbitrated. By requiring that the hearing be conducted in your own "backyard," you can also minimize the possibility of having an arbitrator or a panel of arbitrators selected from your opposition's home territory. Once an arbitrator is selected, the parties can always mutually agree to have the hearing conducted in a different location if it makes more sense at that time.

- ***Consider including an election to arbitrate clause***. In many jurisdictions, it is permissible to structure your arbitration clause so as to allow one party to require arbitration at its sole option, as opposed to litigation or some other dispute resolution procedure, by that one party unilaterally electing to arbitrate *after* the dispute has arisen. Depending on the facts of your case and the contract provisions and legal principles at play in the dispute, you may determine that litigating your dispute has some distinct tactical advantages over arbitrating your dispute. By reserving the right to elect or reject arbitration after the dispute has arisen, you then can judge the likely suitability of the dispute for arbitration versus litigation after all of the elements of the dispute are known. To determine whether including an election to arbitrate clause is a viable option, you must check the law governing your contract, and you should also check the law in the locale of the project. If your election to arbitrate clause is not valid and enforceable under the controlling law, you may find an opposing party arguing that the entire arbitration provision is unenforceable.

- ***Limit pre-hearing discovery.*** Most arbitration proceedings are conducted under the rules of an arbitral institution such as the American Arbitration Association. Even if the arbitration clause adopts the standard rules of the administering arbitral institution or service, the parties may contract to limit or alter those "standard" rules. For example, the arbitration clause might provide that there will be no pre-hearing discovery at all or that pre-hearing discovery will be limited to only an exchange of relevant documents or to those documents that each party intends to use as hearing exhibits. Similarly, the arbitration clause might provide that pre-hearing discovery depositions will be limited in number, duration, and scope. For example, you could agree that there will be no more than two four-hour depositions of fact witnesses and one four-hour deposition of expert witnesses by each party. Contractually limiting discovery in this way could dramatically reduce the costs to each party by avoiding any unnecessary and time-consuming discovery and by making protracted and costly discovery disputes much less likely. Given that the parties in an arbitration proceeding have necessarily been in a contractual relationship with one another, each party should already be in possession of most of the relevant facts. Thus, the downside risk of dramatically limiting discovery may be minimal.

- ***Establish a protocol for pre-hearing discovery and exchange of any electronically stored information*.** Certain electronically stored information, such as email communications and project scheduling files, may become critically important in the resolution of a construction claim or dispute. Consider whether such information should be exchanged in native file format in its original form instead of in paper or PDF format. If so, considering addressing this issue from the outset by detailing such requirements in the arbitration clause. Also, consider requiring that any paper documents be exchanged in separate, searchable (embedded OCR) PDF files.

- ***Differentiate between complex and small disputes***. The arbitration clause may provide separate sets of rules and procedures (e.g., allowed discovery procedures, number of arbitrators) depending on the size and complexity of the arbitration dispute. If the dispute is particularly small, the arbitration clause might provide that the parties waive the right to any hearing before the arbitrator and that the parties agree to submit the dispute to the arbitrator in writing, with appropriate page limitations for each side's argument. Or, if a hearing is to be allowed in disputes of a certain size, the arbitration clause might limit the time in which each side must present its case to the arbitrator to a specific number of hours or days.

- ***Specify the arbitrator selection process***. One of the great benefits of arbitration is the ability to have your dispute resolved by an arbitrator who has general or specialized knowledge of the construction industry. The arbitration clause can limit the number of arbitrators, as well as specify the manner in which the arbitrator is to be selected. If you wish to require that the arbitrator possess certain qualifications relevant to the construction industry or to the specific project involved, then you can specify such qualifications in the arbitration agreement. If, for example, you are an owner of a high-rise construction project who does not want a contractor as an arbitrator, you can contractually agree that your arbitrator must be an architect or have some experience as an owner's representative on high-rise construction projects or possess other defined qualifications. If the arbitration will require a three-member panel of arbitrators, you could, for example, require that the panel of three arbitrators consist of one contractor, one architect, and one construction attorney. If you are an owner, your agreeing to have on the panel one arbitrator with experience as a contractor may assuage any concerns that your

contractor may have regarding the dispute resolution process. In the alternative, you might pre-select and name a selected or mutually agreeable arbitrator in the arbitration clause.

- ***Specify the number of arbitrators.*** For small disputes the appointment of one arbitrator is the norm. For larger, more complex, disputes a three-arbitrator panel is typically used. For example, if the parties have not otherwise agreed, the American Arbitration Association's Construction Arbitration Rules & Mediation Procedures provide for the appointment of one arbitrator where the claims or counterclaims are under $1,000,000. However, if a claim or counterclaim of any party is $1,000,000 or more, the AAA will appoint three arbitrators if the parties are unable to agree that only one arbitrator shall be used. If you want to avoid the added expense of a three-arbitrator panel, then expressly address this issue up front in your arbitration clause. If you desire a three-arbitrator panel for larger claims ($5,000,000 and above as an example) then expressly address this issue up front in your arbitration clause.

- ***Empower the arbitrator to allocate or award attorneys' fees.*** Absent specific statutory authorization or agreement by the parties, the law is unsettled regarding whether arbitrators have the authority to award attorneys' fees. While there is no such prohibition in the Federal Arbitration Act, some states forbid arbitrators to award attorneys' fees unless specifically empowered to do so by the parties' agreement. Accordingly, if your contract contains a prevailing party attorneys' fee provision, which requires the loser to pay fees, then make sure that within the arbitration clause itself you expressly authorize the arbitrator to include in the award an allocation or award of attorneys' fees. Absent such express authority, the arbitrator may leave each party with the responsibility to pay its own attorneys' fees.

- ***Provide for consecutive hearing days*****.** Arbitrations typically "grow" in overall duration when hearings are not scheduled to begin and conclude on consecutive days. With each recess in the arbitration process, each party finds more witnesses, more documents, or more questions which must be presented when the hearings resume. This, of course, results in a longer overall duration and therefore higher costs to each party. Contractually agree that the arbitration hearing will be scheduled to start and conclude on consecutive hearing days. Another way to control the overall duration of the arbitration proceeding is to impose outside limits on the time allowed to each party for the presentation of its case.

- ***Consider requiring the arbitrator to strictly enforce contract terms and to adhere to legal principles***. Typically, an arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties. Parties sometimes complain that contractual and legal principles are lost in an arbitrator's desire to "do the right thing." If you are proud of the favorable contract terms you have negotiated, consider drafting the arbitration clause to require that the arbitrator strictly follow the contract terms and/or established legal principles in making a final decision and that the arbitrator's failure to do so will be grounds for an appeal. Understand, however, that such a requirement is of limited effect unless accompanied by a requirement that the arbitrator issue a reasoned opinion whereby the arbitrator's required enforcement of contract terms and adherence to established legal principles can be demonstrated.

- ***Consider a mandate for reasoned opinions accompanying the arbitrator's award***. Unless the parties request or require otherwise, there is no requirement that an arbitrator

provide the parties with a specific form of the award. If it is important to you to know why the arbitrator decided as he or she did, provide in the arbitration clause that the arbitrator will write a reasoned opinion explaining the award and that the arbitrator will specifically identify the manner in which each separate claim or counterclaim is decided. You may also require that the arbitrator include with the award the arbitrator's "findings of fact" and "conclusions of law" on specific issues presented in the case. Note, however, that requiring an arbitrator to issue findings of fact and conclusions of law may significantly increase costs to the parties. When faced with this requirement the arbitrator will typically request that each party submit individually their proposed findings of fact and conclusions of law for the arbitrator's consideration. If the submission is made after the conclusion of the evidentiary hearing, the arbitrator will not officially close the hearing until after the submissions are made. If so, this will delay publication of the final arbitration award given that the publication deadline will run from the date that the hearing is officially closed.

- ***Identify conditions precedent to arbitration***. Consider the wisdom in requiring that the parties participate in some non-binding process, such as structured settlement negotiations between principals or mediation, as a condition precedent to either party's resort to the arbitration process. Even a streamlined and carefully-tailored arbitration proceeding can be distracting and destructive of business relationships. More often than you might expect, the early involvement of an experienced mediator or a structured settlement meeting between the principals of opposing parties may resolve difficult construction disputes more quickly and less expensively than participating in arbitration.

- ***Provide for consolidation and joinder of other parties***. Oftentimes, complex construction claims and disputes will involve multiple parties. If you are concerned that other parties may be involved in a construction claim or dispute, preserve your right to join those parties in the arbitration based solely on your determination of the likely involvement or interest of the other party in an arbitration proceeding. In addition, your arbitration clause might allow you to invite others (e.g., subcontractors or sureties) to participate in an arbitration and be bound by its result, even if that third party is not made an official party to the arbitration proceeding. If you include a consolidation and joinder provision in your contract, then make certain that you include a similar provision in all of your downstream subcontracts and purchase orders so that you can join lower-tier subcontractors and suppliers in the arbitration if they are needed to obtain a full and final resolution of a claim or dispute.

The checklist above is not exhaustive, but it should quickly demonstrate that much can be done to improve on a standard boilerplate arbitration clause. You should review your standard form contracts, subcontracts, and purchase orders and think about those aspects of arbitration that are important to your satisfaction with the arbitration process. Then, consult with your construction attorney to help craft an arbitration clause that will be enforceable and that will meet your unique objectives.

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government contractor clients for fifty years. We pride ourselves on staying current with the most recent trends in the law, whether it be recent court opinions, board decisions, agency regulations, current legislation, or other topics of interest. Smith Currie publishes a newsletter for the industry "Common Sense Contract Law" that is available on our website: www.SmithCurrie.com.

Back to Top

Get Ready For OSHA

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The Occupational Safety and Health Administration ("OSHA") has not increased its civil penalties since 1990. OSHA lacked the authority to increase its civil penalties because it was exempt from a requirement that federal agencies increase their penalties to keep up with inflation—cost-of-living adjustment. The Bipartisan Budget Act of 2015 removed OSHA from that exemption in Section 701, entitled the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.[1] We will call it "the Act" for short.

The First Adjustment: The "Catch Up" Adjustment

The Act allows federal agencies to make a one-time adjustment to their civil penalties, which is intended to allow agencies to catch up to current levels of inflation. This adjustment has been referred to as the "catch up" adjustment. The catch up adjustment is calculated by taking the percentage difference between the Consumer Price Index ("CPI") in October 2015 and the CPI in October in the calendar year in which the agency last increased its civil penalties.

That means OSHA uses the CPI from October 1990 to calculate its catch up adjustment. The CPI in October 2015 increased about 78% from its level in October 1990. Therefore, OSHA can adjust its civil penalties by as much as 78%. The catch up adjustment is meant to account for the absence of periodic penalty increases and will be effective on or before August 1, 2016.

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[1] 28 U.S.C. §2461 (2015) (amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015).

How Great Will the "Catch Up" Adjustment Be?

The Act allows OSHA to choose to impose a catch up adjustment that is less than the maximum amount allowed by the Act. However, in order to do that, OSHA must clear some hurdles that would otherwise not be required if the maximum adjustment is implemented. OSHA can impose a lesser-than-maximum catch up adjustment if (1) the head of OSHA, after putting the lesser-than-maximum adjustment through the full federal proposed rulemaking and comment period, determines that (a) increasing to the maximum amount will have a negative economic impact, or (b) the social costs of a maximum increase outweigh the benefits, and (2) the director of the Office of Management and Budget agrees with OSHA's determination.

That may appear to be a drastic increase in hoops for OSHA to jump through. That is because it is. OSHA can adopt the maximum increase and the increase becomes immediately effective on August 1, 2016. Or, OSHA can choose a lesser-than-maximum catch up adjustment and go through months, if not years, of rulemaking procedures and the blessing of a separate federal agency. That, coupled with Dr. David Michaels', Assistant Secretary of Labor for OSHA, comments to the House Subcommittee on Workforce Protections that "[t]he most serious obstacle to effective OSHA enforcement of the law is the very low level of civil penalties allowed under our law . . . . [and] OSHA's current penalties are not strong enough to provide adequate incentives" are very strong indicators that OSHA will likely adopt the maximum catch up adjustment.

Subsequent Adjustments: Annual Adjustments to Penalties

The Act also requires subsequent annual adjustments to OSHA's civil penalties in addition to the one-time catch up adjustment. No later than January 15th of each calendar year after 2016, the head of OSHA must adjust their civil penalties for that year and publish the adjustment in the Federal Register.

All subsequent adjustments are calculated in a manner similar to the catch up adjustment, using the cost-of-living adjustment. The adjustment will increase the previous year's penalty by the percentage by which the October CPI in the year preceding the adjustment exceeds the October CPI one year earlier. More simply stated, when OSHA increases its penalties for January 15, 2017, it will increase its penalties by the percent the October

2016 CPI exceeds the October 2015 CPI. For example, the lower OSHA penalty in August 2016 after the catch up adjustment will be $12,471 ($7,000 multiplied by 78%). If the October CPI increases by 5% between 2015 and 2016, that lower OSHA penalty will be $12,755 in calendar year 2017, effective January 15, 2017.

Understanding that increased penalty amount is important because once the catch up adjustment is implemented in August 2016, OSHA's civil penalties will not remain stagnant for the next 25 years. OSHA penalties are statutorily required by law to increase annually.

State OSHA Plans

About half the states have state OSHA plans. Contractors in affected states should be aware that the Act does not directly affect state plans. That is because state plan maximum penalties are set by state law. But, state plans are required to be at least as effective as OSHA.[2] Therefore, it is very likely that state plans will increase their civil penalties in the near future because lower state plan civil penalties might not be considered as effective as OSHA's adjusted civil penalties.

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Agreements to Arbitrate Are Simple, Right?

Ann B. Graff, Pepper Hamilton LLP, Partner

Limited discovery (and the associated cost savings) is often touted as one of the benefits of arbitration over traditional litigation. Parties are generally confident that even the scaled-back discovery devices available in arbitration will be sufficient to obtain the critical

[2] 29 U.S.C. §667.

documents necessary to prove and/or defend their respective cases. But what if those critical documents exist only in the hands of a third party who is not a party to the arbitration agreement? You might think, “No problem, I’ll just have the arbitrator issue a subpoena.” In fact, getting those documents may not be so simple.

Section 7 of the Federal Arbitration Act (FAA) limits an arbitrator’s authority over third parties to the following: “[t]the arbitrators . . . may summon in writing any person ***to attend before them*** . . . as a witness ***and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case***.” 9 U.S.C. § 7 (emphasis added). If a third party fails to comply, the arbitral subpoena may be enforced by petition to the U.S. district court for the district in which the arbitrator(s) sit. *Id.*

Because arbitration is a creature of contract, however, most courts are loath to subject individuals who have not contractually agreed to participate in the arbitration process to its burdens. As a result, the Second and Third Circuits (as well as district courts in the Fifth, Seventh and Eleventh Circuits) strictly and narrowly interpret section 7 of the FAA to hold that it does not permit an arbitrator to issue a subpoena requiring ***pre-hearing*** document production by a non-party witness. *See, e.g., Life Receivables Trust v. Syndicate 102, Lloyd’s of London*, 549 F.3d 210 (2d Cir. 2008); *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004); *Chi. Bridge & Iron Co. v. TRC Acquisition, LLC*, No. 14-1191, 2014 U.S. Dist. LEXIS 103287 (E.D. La. July 29, 2014); *Kennedy v. Am. Express Travel Related Servs. Co.*, 646 F. Supp. 2d 1342 (S.D. Fla. 2009); *Empire Fin. Grp., Inc. v. Penson Fin. Servs., Inc*., No. 3:09-CV-2155-D, 2010 U.S. Dist. LEXIS 18782 (N.D. Tex. Mar. 3, 2010); *Ware v. C.D. Peacock, Inc*., No. 10 C 2587, 2010 U.S. Dist. LEXIS 44737 (N.D. Ill. May 7, 2010). These courts hold that the only power conferred on arbitrators with respect to the production of documents by a non-party is the power to summon a non-party to attend before them at a hearing and to bring documents with him.

Not all courts are as restrictive. While the Fourth Circuit takes a similarly narrow view, refusing to enforce an arbitrator’s prehearing discovery subpoena absent a showing of “special need or hardship,” *see, e.g., COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 278 (4th Cir. 1999), the Sixth and Eighth Circuits *will* enforce such subpoenas. These courts hold that “implicit in an arbitration panel’s power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.” *See, e.g., In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865 (8th Cir. 2000); *Am. Fed’n of Television & Radio Artists v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999).

So what can you do if you find yourself in a jurisdiction that narrowly interprets section 7? Must you wait to review potentially critical documents in the hands of a non-party until he or she is subpoenaed to bring them to the final hearing? Not necessarily. The key to success is requiring that the non-party appear and produce his or her documents *in the presence of the arbitrators*. But the timing of this appearance and production is not limited

to the final “trial-like arbitration hearing on the merits.” The non-party can be subpoenaed to appear, produce documents and testify at a “preliminary hearing” before the entire arbitration panel or any one of the arbitrators. The arbitrator can then adjourn the proceedings to allow the parties time to review the documents. *Hay Grp.*, 360 F.3d at 413 (Chertoff, J., concurring). Even courts that narrowly interpret section 7 have rejected the notion that permitting an arbitrator to hold a “non-merits” preliminary hearing transforms the proceeding into a prohibited discovery device. *Stolt-Nielsen Transp. Grp., Inc. v. Celanese AG*, 430 F.3d 567, 578 (2d Cir. 2005); *Alliance Healthcare Servs., Inc. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011).

Below are a few practice tips:

1. Evaluate the need for third-party documents early.

2. Make the arbitrator(s) aware of the need for third-party discovery at the initial scheduling conference and build the time necessary to obtain it into the scheduling order — including the potential for a preliminary hearing and/or court enforcement of the subpoena.

3. Do whatever you reasonably can to compel voluntary production. Can you narrow your document requests to make the third party more receptive to voluntary production? If not, and no other leverage exists, a reminder to the third party that he or she can be subpoenaed to produce the documents and appear before the arbitrator may well prompt the witness to deliver the documents and waive presence.

4. If the third party will not voluntarily agree to produce the documents, request a non-merits “preliminary hearing” before the arbitrator(s) at which the non-party can be subpoenaed to attend and produce documents. Be aware, however, that you may not be permitted to later re-subpoena the non-party witness for a merits hearing, so be prepared to conduct any examination of the third-party witness accordingly.

Newly Updated Construction State Law Matrix

AGC of America tracks state laws that impact construction through its Construction State Law Matrix, which was recently updated, is the most comprehensive and concise resource available for quickly locating information on state laws affecting public or private construction projects. Updated annually by AGC and the nationally prestigious recognized law firm of Smith, Currie, and Hancock, LLP, your subscription provides searchable online information for all fifty states, DC, and Puerto Rico, which can be easily sorted by state or topic area. This essential resource covers 60+ issues from bidding to payment to warranty including: Licensing Requirements, Electronic Bidding, Pay If-Paid/Pay-When-Paid, Bidding Requirements, Prequalification, Lien laws, MBE, DBE, WBE Prompt Payment Bond Requirements, Design-Build, CM At-Risk, P3s, Statute of Repose, Immigration, and more.

For 2016 published maps, interestingly, little has changed in regard to legal authority for design-build, CM At-Risk, and P3 authority. States like Florida and Maryland passed major P3 legislation in 2013. “The majority of states have already authorized the use of design-build, and CM At-Risk, and even P3. So it shouldn’t be surprising that the remaining states did not pass authorizing legislation” comments Brian Perlberg, Sr. Counsel for AGC. The Matrix now breaks down P3 authority for horizontal, vertical, and utility work. Interestingly 32 states and D.C. have no authority P3s for utility work. Updated reference maps can be found at AGC construction law page. A paid subscription to the Construction State Law Matrix provides more detailed, comprehensive, and concise information that answers questions about state law requirements on P3s and 60+ construction law issues, which are updated annually.

Click here to view complementary sample. If you would like to subscribe to AGC’s Construction State Law Matrix simply click here.

WEBINAR: What Contractors & Their Attorneys Need to Know About Terminations of Construction Contracts - Liabilities, Challenges and Recovery
June 22, 2016 - 2:00pm to 3:30pm

REGISTER

All webinar times are in EST

Co-sponsored by:

FORUM ON CONSTRUCTION LAW
American Bar Association

AGC & ABA Member Price: $79
Non-Member Price: $99

Description:

Gain a better understanding of respective rights and responsibilities when encountering a termination for default or a termination for convenience of a construction contract. The webinar will cover contracting in both the private and public sectors. Key Federal Acquisition Regulation (FAR) principles will be highlighted as will relevant provisions utilized in AIA, ConsensusDocs and other proprietary contracts, including analysis of applicable case law. Issues include:

- Basis and requirements for termination
- Termination processes and notifications
- Potential defenses and recoveries
- Potential liabilities
- Appeals

The webinar will facilitate a better understanding of terminations (and how to avoid them when being terminated for default) in order to minimize damages and maximize recovery under a termination for convenience or termination for default.

Learning Objectives:

1. Understand the respective rights and responsibilities when encountering a termination for default or a termination for convenience of a construction contract
2. Analyze key public and private sector contract termination provisions
3. Identify potential defenses, recoveries and liabilities
4. Understand appeals process, rights and responsibilities

CLE and CEU credits pending

Speakers:

Owen Walker
Associate
Smith Pachter McWhorter PLC

James Nelson
Manager, Forensic Services, Government Contracts Practice
PwC

Ryan Lamb
Vice President and General Counsel
The Weitz Company, LLC

Moderator:

Carrie Ciliberto
Senior Director & Counsel, Contracts & Construction Law
The Associated General Contractors of America

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please visit http://www.gotomeeting.com/fec/online_meeting_support (link is external) or contact webinars@agc.org (link sends e-mail).

WEBINAR: Top Ten Contract Killer Clauses & How to Neutralize Them
June 28, 2016 - 2:00pm to 3:30pm

REGISTER

Member Price: $99

Non-Member Price: $149

All webinar times are in ET

Description:
The top 10 contract clauses can increase project costs by more than 20%. Learn how to identify some of the ticking time bombs that are commonly used in traditional construction contracts which create silos and shift risk inefficiently. Gain strategies to negotiate the worst causes. Learn how industry standard contracts like ConsensusDocs and the American Institute of Architects (AIA) can help or hurt you in leveraging industry standard contract documents to protect your bottom line.
You'll will learn:

- Why unbalanced contract clauses are commonly used in the industry
- How to Identify contract killer clauses that shift risk to the wrong party
- Effective negotiating strategies to neutralize the worst contracts provision Key differences between the AGC-endorsed ConsensusDocs and the American Institute of Architects (AIA) standard contract documents

Speakers:

Brian Perlberg, Esq
Senior Counsel, Construction Law
AGC of America

Brian Perlberg is Executive Director & Senior Counsel for ConsensusDocs, a coalition of 40 leading construction organizations dedicated to drafting best practice construction contracts. Mr. Perlberg is the lead staff person responsible for the content of ConsensusDocs 100+ standard contracts that guide the A/E/C industry. He is also in-house counsel for the AGC of America for all construction law and contract matters. In addition, Mr. Perlberg serves on the ABA Forum on the Construction Industry Steering Committee for the Contract Documents, National Construction Dispute Resolution Committee (NCDRC) of the Arbitration Association of America (AAA), the Construction SuperConference Board, and WPL Publishing Advisory Board.

Michael Zisa
Partner
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Michael C. Zisa is a partner in the Washington, D.C. office of Peckar & Abramson, P.C. where he focuses his practice on construction, surety and government contracts law and chairs the Firm's Surety practice group. He represents sureties, general contractors, subcontractors and owners in all aspects of their business – from contract review and negotiation to contract administration and claim analysis and development to litigation in federal and state as well as various contract appeals boards and alternative dispute resolution forums. Mr. Zisa regularly speaks and writes on surety and construction issues and was recently recognized again by Washington, D.C. Super Lawyers in the areas of construction litigation, surety and government contracts.

Kristin Protas
Senior Legal Counsel
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Kristin Protas is Senior Legal Counsel for Gilbane Building Company, based in its Maryland office. After graduating from the University of Michigan (B.A., English Language and Literature) and Brooklyn Law School (J.D.), Kristin worked as a construction litigation associate for Quagliano & Seeger, P.C. and Seeger, Faughnan Mendicino, P.C. in Washington, D.C. Thereafter, Kristin moved in-house as Associate Counsel for James G. Davis Construction Corporation in Rockville, Maryland. In 2014, Kristin joined Gilbane Building Company and is responsible for the Mid-Atlantic, Northeast and New York business units. Kristin's in-house practice includes contract reviews, claim preparation and litigation oversight. Kristin regularly conducts internal education on contract language and associated risks. Kristin recently participated as a panelist on the Spearin doctrine for the Virginia Construction Law and Public Contracts Conference and as a panelist on public construction claims for the ABA Section of Public Contract Law. Kristin is a member of the Maryland, District of Columbia and Virginia bars.

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