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CONSTRUCTION LEGAL EDGE

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ARTICLES CONTAINED IN THIS ISSUE OF THE CLE:

PA Court Declares Contractors Lack Standing to Challenge P3 Contracts

This summer, in a case of first impression, Pennsylvania's Commonwealth Court ruled that contractors do not have standing to challenge contracts awarded for municipal projects under Pennsylvania's P3 law. The Court unanimously affirmed a trial court's decision to throw out Clearwater Construction, Inc.'s suit against Northampton County's General Purpose Authority, which had awarded a contract to replace 33 bridges to another contractor under the P3 law.

For those unfamiliar with the law at issue, the "P3 law" is the state's public-private partnership law enacted in July 2012. The law allows public entities to enter into agreements (P3 Agreements) or partnerships with a private party to develop a transportation facility project. Under the law, "public entities" are defined as a Commonwealth of Pennsylvania executive agency (such as PennDOT), a Commonwealth independent agency, a Commonwealth-affiliate entity, a municipal authority, or an authority created by statute that owns a transportation facility. Counties, cities, townships, and other local government units are not "public entities" under this law. However, a county that wants to undertake a P3 project can establish a municipal authority or industrial development authority, or use an existing authority in order to be eligible to enter P3 Agreements under the law. A provision in the P3 law also allows for unsolicited proposals that come directly from the private sector.

In October 2015, Clearwater Construction, Inc. submitted an unsolicited proposal to replace or repair 34 bridges in Northampton County. In March of 2016, the county's council decided to transfer 33 of the proposed 34 bridges to the county's General Purpose

Authority so that the bridges would be eligible for repair under the P3 law. Subsequently, the authority allowed for open bidding that involved Clearwater Construction and three other contracting companies. The General Purpose Authority awarded the bridge replacement contract to Kriger Construction, Inc. Disappointed with the outcome, Clearwater Construction filed a petition to protest the award, but a Northampton County Court of Common Pleas judge found that the company did not have standing and dismissed their suit. Clearwater appealed.

Clearwater argued on appeal that the language of the P3 law allowed parties "aggrieved by selection" to file a grievance challenging the decision of a non-Commonwealth entity. The Authority and Kriger argued that the statute limits the right to challenge to "development entities," which are defined as parties to contracts awarded under the law. The judges found ambiguity in the statute, and agreed with Clearwater that if a "development entity" was by necessity a party to a contract, it would be unlikely to sue over being selected in the bidding process. The court went further, though, and looked at other provisions of the law that stated that "prospective offerors", "offerors" and "development entities" all had the right to file bid protests against Commonwealth agencies. The court compared the two provisions in order to reach their decision. Judge Cohn Jubelier stated, "Here, the General Assembly's conscious decision to amend the bill to exclude offerors from bringing a claim against a non-Commonwealth entity, while allowing them to pursue protests against the Commonwealth, is strong evidence of its intent to distinguish the two." The appeals panel affirmed the decision to dismiss Clearwater Construction's case.

The court found that generally, absent a statutory provision, disappointed bidders lack standing to challenge the award of a government contract. Under the specific provisions of the P3 law, private contractors do not have standing to challenge contracts awarded for non-Commonwealth projects; however, they do have standing to challenge awards for Commonwealth projects.

The full opinion for *Clearwater Construction, Inc. and Northampton County Bridge Partners, LLC v. Northampton County General Purpose Authority, et al.* can be accessed and read here: http://law.justia.com/cases/pennsylvania/commonwealth-court/2017/1658-c-d-2016.html.

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Dazed and Confused: What Should Pennsylvania do with Their Drug Testing Programs in Light of Shifting Legal Trends Surrounding Marijuana Use?

Pennsylvania is on the cusp of a significant change as the State's medical marijuana industry becomes fully operational. This summer, Pennsylvania awarded permits to twelve businesses to grow marijuana and twenty-seven businesses to sell medicinal marijuana. By June 2018, residents can start purchasing marijuana from dispensaries for approved medical purposes, and the industry is projecting first-year sales of 150 million dollars. Once the dispensaries open, the consumption of marijuana by Pennsylvania residents may increase substantially.

Given the magnitude of anticipated change, Pennsylvania employers should prepare for the likelihood of increased marijuana usage by their employees. As a starting point, employers with mandatory drug testing programs need to closely monitor medicinal marijuana legal

developments, not just because of the tension between state disability discrimination laws and the Federal Controlled Substances Act's prohibition on marijuana use generally, but also because of the conflict between state laws permitting medicinal marijuana use and certain industry-specific regulations banning the use of medicinal marijuana. As an example, the Department of Transportation's drug and alcohol testing regulation, 49 CFR § 40.151(e), prohibits companies from allowing individuals in safety sensitive positions in the transportation industry to use marijuana for medicinal purposes, even if they live in a state that permits such activity.

Most employers have always operated in a world where they could lawfully terminate an employee for failing a drug test, including due to the presence of marijuana. It did not matter whether the drug use occurred during non-working hours. For now, that is the law in Pennsylvania. That used to be the law in Massachusetts, Rhode Island, and Connecticut; it no longer is…..or at least the law is no longer as black and white. In states allowing medical marijuana, employers may have to "accommodate" an employee's medical marijuana use as a reasonable accommodation for an employee's disability. Over the past few years, disability discrimination case law has evolved to the point where almost any type of medical condition is considered a "disability." Pennsylvania's medical marijuana authorization statute enumerates those conditions for which marijuana can be used and all of those conditions might be considered a disability under current case law.

Whether employers with blanket policies prohibiting marijuana use will have to modify their policies to comply with disability discrimination laws is a to-be-determined question in Pennsylvania. The answer will likely depend on the specific facts. For example, while a commercial truck driver is within his rights in using medicinal marijuana for a legitimate medical condition, his employer, as a company subject to the above-referenced Department of Transportation regulation, is within its rights to terminate that driver for using medicinal marijuana, even though that conduct is lawful under state law. Still, for most companies that rely upon drug tests, there will not be bright line answers to questions about how they should administer their drug test policy until the case law in this field becomes more clearly defined. Nevertheless, companies should be consulting counsel in the event their drug testing practices are challenged in court or during a government agency investigation.

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Cyber Risk - Should your Company Obtain a Cyber Insurance Policy?

ABC Subcontracting is a small company that works primarily in the private sector. ABC Subcontracting sends invoices to its customers via U.S. mail. ABC Subcontracting did not believe it has a cyber exposure and decided not to obtain cyber insurance coverage.

ABC Subcontracting has a very close relationship with BIG GC Contracting and relies on BIG GC to provide most of ABC Subcontracting's work.

One day ABC Subcontracting was awaiting a new drawing for an upcoming job from BIG GC. Typically Big GC sends a drawing as an attachment to an email without any written text in the body of the email. On one particular day the owner of ABC Subcontracting clicked on an email from Big GC without a second thought. It turned out to be a phishing

scheme that stole all of ABC Subcontracting's phone and email contacts. Thereafter, the hacker sent out more corrupted emails to those ABC Subcontracting contacts.

Small companies like ABC Subcontracting typically do not have ready access to forensic, legal, and public relations experts. A typical Cyber policy's main benefit, besides paying claims, is providing an immediate response to situations like the hypothetical hacking event described above. The quicker that ABC Subcontracting's contacts are notified of the hack and are provided with credit monitoring, the quicker the potential loss can be limited.

As an illustration, AIG offers CyberEdge insurance coverage that covers the financial costs associated with a breach, including event management, data restoration, financial costs to third parties, network interruption, and cyber extortion. Below is a list of some of the items covered:

- Defense costs and damages if a claim alleges the business contaminates someone else's data with a virus;
- Costs of notification, public relations, and other services to manage and mitigate a cyber attack;
- Expenses to restore or recreate lost electronic data;
- Forensic investigation, legal consultation expenses, as well as identity monitoring costs for breach victims;
- Loss of net profit and extra expenses as a result of a material interruption to the business caused by a network security breach;
- Ransom payments (extortion loss) to third parties that are incurred in terminating a security or privacy threat;
- Regulatory Action – investigation costs, fines, and penalties (if insurable); and
- Impersonation Fraud Coverage – this is Crime coverage as it deals with theft of money, but can be offered via Endorsement to the Cyber policy,

Because 31% of all cyber attacks occur at companies with fewer than 250 employees, it would be prudent for companies of that size to contact an insurance professional about getting Cyber Insurance. Since there is no standard ISO Form for Cyber Insurance, the types of coverage for cyber risks and the rates can vary.

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You are Still A Fiduciary Even After the New U.S. Department of Labor Rules

One of the keys to a successful business is to offer a competitive wage and employee benefits package to help with hiring new employees and rewarding the present staff. Many companies offer employees a retirement plan as part of that package.

Companies that sponsor a 401(k), Profit Sharing or Pension Plan need to be aware of their fiduciary responsibility in managing that benefit program. A Fiduciary is some person (company owner) or some entity entrusted to manage the retirement plan to the best of their

abilities and to work in the best interest of ALL plan participants.

The DOL has recently implemented new Fiduciary rules governing financial professionals that sell and service qualified retirement plans. This is a very positive step towards fee clarity and impartial/professional conduct.

Unfortunately, many employers have the impression that with these new rules, all the burden of fiduciary responsibility has been reassigned to the financial consultant. That is not the case and you still are a fiduciary.

There are 3 levels of fiduciary services available to help meet plan sponsors obligations. The first is a 3(16) fiduciary which is a plan administrator that takes responsibility for daily plan functions; however, it is the plan sponsors obligation to monitor these individuals (becoming a fiduciary themselves). The second is a 3(21) fiduciary which is a "co-fiduciary". It does take some responsibility by selecting funds for the employer, however the plan sponsor must approve the funds (becoming a fiduciary themselves) The third is a 3(28) fiduciary that has total control in selecting and approving funds; however, it is the plan sponsor's responsibility to monitor that adviser (becoming a fiduciary themselves). By virtue of a company sponsoring a plan and selecting those vendors to service your plan, YOU STILL ARE A FIDUCARY. Along with fulfilling your responsibilities as a plan sponsor it may also be in your best interest to insure this risk as part of your insurance program.

So what should an employer do to meet their fiduciary obligation? First, have a process for plan decisions that cover plan design, vendor selection, and employee communications. Secondly, meet with professionals to help establish the correct policies and procedures. (Legal consultation, third party administrators, insurance professionals and compliance consultants)

It is imperative to first understand your obligation as a fiduciary and secondly, have a plan to protect yourself and your company from possible litigation. Offering employees a good benefit package is a great way to retain talent but there are always risks that need to be addressed to mitigate any potential problems in the future.

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Contract Risk Review: Comparing Contracts- A Review of the AIA 201 and ConsensusDocs

The following summarizes important contract sections and provides bullet pointed analysis of particular issues to consider from the AIA 201 (2007 and 2017 versions) and the ConsensusDocs (2014 and 2017 versions). It is not intended to be all inclusive, but provides a summary comparison of the various documents.

Key Contract Issues

- Financial Assurances
- Design Risk
- Project Management/Contract Administration
- Schedule/Time
- Consequential Damages/LDs
- Claims

- Disputes/ADR
- Insurance and Indemnification
- Payment

Financial Assurances

- What assurances do you have that the owner can pay for the project?

- The Contractor should have the right to request and obtain proof that the Owner has funding sufficient to pay for the Work. The provision should also provide that the Contractor may terminate the Contract if the Owner refuses to allow a review of funding documents, or should the Contractor reasonably determine that the Owner does not have sufficient funds to pay for the Work.

Relevant Sections:

- 2007 & 2017 A201: Section 2.2.1
- 2014 & 2017 ConsensusDocs 200: Section 4.2

AIA:

- Section 2.2.1 A201 2007 & 2017: Both editions require the Owner, upon written request of the Contractor, "reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract." Thereafter, the Contractor may only request such evidence if (1) the Owner fails to make payments; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due.

ConsensusDocs 200:

- Section 4.2: both before and after commencement of the Work, at the written request of the Constructor, the Owner must provide reasonable evidence of sufficient financial arrangements to fulfill its obligations. This is a condition precedent to Constructor's commencing or continuing the work. Further, the Owner must notify the Constructor before any material changes in its funding condition occur.

Design Risk

Relevant Sections:

- 2007 A201: Section 3.2.1 – 3.2.4
- 2014 A201: Section 3.2.2, 3.2.4
- 2014 & 2017 ConsensusDocs 200: Sections 2.3; 3.15, 3.3.1-3.3.2

2007 A201:

- Section 3.2.1: "…the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work … These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, any errors, inconsistencies or omissions discovered … shall be reported promptly to the Architect

… Having discovered such errors, inconsistencies or omissions, ***or if by reasonable study*** of the Contract Documents the Contractor should have discovered such, ***the Contractor shall bear all costs arising therefrom***."

2017 A201:

• Section 3.2.2: "…the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.3.4, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it…These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents."

• Section 3.2.4: "…If the Contractor fails to perform the obligations of Section[] 3.2.2… ***the Contractor shall pay such costs and damages to the Owner…as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages*** resulting from errors, inconsistencies or omissions in the Contract Documents, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities."

Pursuant to the 2007 and 2017 versions of the A201, the Contractor must:

• carefully study and compare the Contract Documents;

• take field measurements;

• observe site conditions affecting the work;

• The Contractor is liable if it fails to perform the obligation mentioned above and the failure to perform these obligations results in damages to the Owner.

• The Contractor is **not** required to ascertain whether the Documents are in accordance with applicable law, statute, ordinance, etc.

ConsensusDocs 200:

• Section 2.3: The Owner's Design Professional provides architectural and engineering services except as otherwise required by section 3.15 and excluding services within the construction means, methods, techniques, sequences, and procedures employed by the Constructor in connection with construction operations.

• Section 3.15: The Constructor is not responsible for design criteria specified in the Contract Documents. If the Contract Documents specifically require the Constructor to be responsible for the design of a particular system of component, the Owner must specify all required performance and design criteria. The Constructor must then procure the services of a Design Professional but is not responsible for the adequacy of the performance and design

criteria supplied by the Owner.

• Section 3.3.1-3.3.2: Prior to commencing work, the Constructor must examine and compare drawings and specifications with information furnished by the Owner, relevant field measurements made by the Constructor, and any visible conditions that could affect the work. If the Constructor discovers any errors, omissions, or inconsistencies in the Contract Documents, the Constructor must report them in writing to the Owner.

• Under the *Spearin Doctrine*, the Party responsible for furnishing the completed design impliedly warrants its sufficiency and adequacy. *U.S. v. Spearin, 248 U.S. 132 (1918)*.

• Constructors must take care in specifying any design responsibilities in section 2.3, including but not limited to performance specifications, equipment selections, preparation of shop drawings, etc.

• Constructor-initiated value-engineering changes could alter the Parties' respective responsibilities concerning the adequacy of component designs and thereby shift risk for design responsibilities to the Constructor.

Project Management

Relevant Sections:

• 2007 A201: Section 3.9.1 – 3.9.3

• 2014 & 2017 ConsensusDocs 200: Section 3.4.1

2007 & 2017 A201:

• Section 3.9.2 & 3.9.3: The Contractor submits the name and qualifications of its proposed superintendent to the Owner and Architect (or to the Owner through the Architect). The Architect may reply within 14 days stating whether the Owner or Architect has reasonable objection or if the Architect requires additional time to review the choice. The Architect's failure to respond within 14 days constitutes notice of no reasonable objection.

• Section 3.9.3: The Contractor shall not employ a proposed superintendent to whom the Owner or Architect has made reasonably and timely objection. ***"The Contractor shall not change the superintendent without the Owner's consent, which shall not be unreasonably withheld or delayed."***

2017 ConsensusDocs 200:

• "Constructor shall provide competition supervision for the performance of the Work. Before commencing the work, Constructor shall notify Owner in writing of the name and qualifications of its proposed superintendent(s) and project manager so Owner may review their qualifications. If, for reasonable cause, Owner refuses to approve the individual, or withdraws its approval after once giving it, Constructor shall name a different superintendent or project manager for Owner's review."

• ConsensusDocs 200 allows for more direct communication between the Owner and Constructor without an intermediary and balances decision-making responsibilities and exposure different than the AIA. (See sections 2.3, 3.3, 3.15, 4.3, etc.).

Contract Administration

Relevant Sections:

- 2007 & 2017 A201: Section 4
- 2014 & 2017 ConsensusDocs 200: Sections 2.1 and throughout

AIA 2007 & 2017: Section 4:

- The Architect is the Contract Administrator. The Architect must become generally familiar with and keep the Owner informed about the progress and quality of the Work.
- The Architect is required to report "known deviations" and "observed" defects or deficiencies in the Work.
- The Architect acts as the Administrator "during construction until the date the Architect issues the final Certificate for Payment."
- The Architect must respond to RFI's in accordance with agreed time limits or "otherwise with reasonable promptness."
- One change between the 2007 and 2017 editions is that the newer edition states that the Architect is required to be included in conversations between the Owner and Contractor only when related to the Architect's services of professional responsibilities. The Owner must notify the Architect of conversations that relate to the Work even when they do not affect the Architect's services or professional responsibilities. This allows more direct communication between the Owner and Contractor while maintaining the Architect's ability to remain knowledgeable of discussions relating to its responsibilities.

2017 ConsensusDocs 200:

- Unlike the AIA A201, ConsensusDocs 200 virtually removes the Design Professional (Architect) from the intermediary role between Owner and Constructor.
- Instead, ConsensusDocs 200 places much of the supervision and contract administration duties on the Owner. Pursuant to section 3.10.1, the Owner and not the Design Professional issues a written order containing work instructions, now called an Interim Directive rather than Directed Change, to uncover work for the Owner's inspection and review.
- Pursuant to section 3.11.5, the Owner and not the Design Professional notifies the Constructor when the Owner deems any part of the work or worksite to be unsafe. The Owner and not the Design Professional directs the Constructor to stop work and/or take corrective action.
- Additionally, under the ConsensusDocs Contract, the Owner, not the Design Professional, issues certificates of substantial completion and final completion pursuant to sections 9.6.1 and 9.8.1. At the Owner's discretion, the Owner may seek the assistance of its Design-Professional to compile a list of items to be completed or corrected prior to issuing the certificates.
- It is important to note that the Design Professional's role is largely controlled by ConsensusDocs 240, not 200. The Constructor generally does not have access to this agreement unless the Owner or Design Professional provides a copy.

• According to ConsensusDocs, this shift away from the central role the Architect plays under AIA documents allows the Owner to establish a role for the Design Professional during the construction phase of the Project that matches the Owner's needs and desires.

Schedule/Time

Relevant Sections:

• 2007 & 2017 A201: Section 3.10.1

• 2014 & 2017 ConsensusDocs: Section 6.2

AIA:

• Section 3.10.1 of the 2007 A201 requires that the Contractor promptly after being awarded the Contract, prepare and submit a construction schedule providing for Work to be completed within the time limits required in the Contract Documents.

• This schedule shall be revised at appropriate intervals.

• The 2017 edition breaks down the schedule to contain date of commencement, interim milestone dates, date of substantial completion, apportionment of Work by trade or building system, and the time required for completion of each portion of the Work.

• Under section 3.10.2, if the Contractor fails to submit a submittal schedule, the Contractor is not entitled to any additional compensation or a time extension based on the Owner's or the Architect's slow processing of submittals, regardless of how long they take.

ConsensusDocs 200:

• The 2017 Contract replaces the term Contract Time and instead requires a "Schedule of the Work…formatted in detailed precedence-style critical path method that (a) provides a graphic representation of all activities and events, including float values that will affect the critical path of the Work and (b) identifies dates that are critical to ensure timely and orderly completion of the Work."

• The Constructor must submit an initial schedule to the Owner only before, "first application for payment" and thereafter on a monthly basis. (Section 6.2.1).

• The Owner is allowed to change the sequences provided in the schedule as long as it does not "unreasonably interfere with the Work." (Section 6.2.2).

Consequential Damages

Relevant Sections:

• 2007 A201 Section 15.1.6 & 2017 A201 15.1.7

• 2014 & 2017 ConsensusDocs 200: Sections 6.5 & 6.6

AIA:

• Both the 2007 and 2017 A201 Documents contain a mutual waiver of consequential damages, limiting both the Owner and Contractor to direct damages.

ConsensusDocs 200:

• 2007 and 2011 ConsensusDocs 200 provides a limited mutual waiver of consequential damages. This benefits the Constructor if the waiver truly is mutual, meaning that liquidated damages are not specified in section 6.5

• Section 6.6 provides that the Owner and Constructor agree to waive the more volatile of consequential damages arising out of the agreement as a default provision. If no items are listed, consequential damages not covered by insurance are waived.

• ConsensusDocs gives the Owner and Constructor an express opportunity to provide for liquidated damages instead of other damages that may be incurred because of a delay. Because this provision allows for the election of liquidated damages, it must be read in connection with the waiver of consequential damages found in section 6.6. A contract that allows the Owner to recover liquidated damages but otherwise prohibits the Parties from collecting consequential damages, is not truly mutual.

• Is this good for you? Constructors should be cautious in electing to provide any liquidated damages in this section. Liquidated damages are intended to compensate the Owner and substitute for actual delay damages and/or lost revenues. Constructors also should not agree to liquidated damages measured from final completion.

• On the other hand, it may be prudent for general contractors and construction managers to insist that the Contract provide for liquidated damages and that they be capped at some specified amount. In doing this, the Constructor can attain a true limitation of damages.

Claims Process

• Most Contracts contain a claims process and, in such instances, the claims process must be followed, or claims can be waived.

• "A Contractor seeking to recover payment in excess of the Contract price must follow the procedures set out in the Contract." *Sutton Corp. v. MDC,* 423 Mass. 200, 207 (1996); *Chiappisi, et al. v. Granger Construction Co., Inc., et al,* 352 Mass. 174 (1967).

AIA:

• 2007 A201 section 1.1.8 states that "[t]he Initial Decision Maker is the person indentified in the Agreement to render initial decisions on claims in accordance with section 15.2 and certify termination of the Agreement under section 14.2.2." The 2017 edition clarifies that the Initial Decision Maker may not show partiality to the Owner or Contractor. It also clarifies that he or she will not be liable for the results of interpretations and decisions rendered in good faith.

• 2007 A201 section 15.1.3 and 2017 A201 section 15.1.4.1 require work under protest. They also require the Contractor to preserve its rights in the event of a denial of its claim.

• 2007 A201 section 15.1.2 and 2017 A201 section 15.1.3.1 require that claims by parties must be initiated within 21 days after the occurrence of the event giving rise to such claim or within 21 days after the claimant first recognizes a condition giving rise to the claim, whichever is later.

• The Architect is the "default" Initial Decision Maker in both the 2007 and 2017 editions. (A201 section 15.2.1).

ConsensusDocs:

• Pursuant to sections 8.1.1, 8.2.2 and 8.3.4, the following occurs during the claims process:

- Change Orders can be directed by the Owner or requested by the Contractor.
- In the instances where the Owner simply rejects the claim altogether, the Work proceeds as an interim work directive without prejudice to the Owner's right to reimbursement in the event that the Work is later determined to be within the scope of the base Contract
- If the parties cannot agree upon the Change Order price, an Owner may order an Interim Directive. Although the 2014 ConsensusDocs require the Owner to pay the Constructor 50% of its estimated costs to perform such work, the 2017 edition requires the Owner to pay the Constructor 50% of its actual (incurred or committed) costs. In both instances, the Constructor shall submit its application for payment within 30 days of the issuance of the Interim Directive.
- Cost of the Work under sections 8.3.4 and 8.3.4.19 now is determined net of savings from the change. Constructor's Overhead, and profit shall be added to any net increase in the cost of the Work.

Dispute Resolution

Relevant Sections:

• 2007 A201: Section 15.4.1

• 2014 & 2017 ConsensusDocs 200: Sections 12.1 – 12.7

AIA:

• 2007 and 2017 A201 sections 15.4.1 contain default provisions requiring litigation. Arbitration must be selected as part of the Contract negotiation process if it is going to be required.

• Both the A201 2007 and 2017 documents require mediation before resort to arbitration or litigation, at least in most instances.

• A201 2007 section 15.3.3 allows one party to demand that the other party file for mediation following an initial decision under section 15.2.6.1. If mediation concludes without resolution or progresses without resolution, a party could not demand that the other party file for binding resolution. A201 2017 section 15.3.3 now allows one party to demand that the other party file for binding dispute resolution within 30 days from the date mediation concludes without resolution or 60 days after mediation has been demanded without resolution. If the party receiving the demand for binding dispute resolution fails to file within 60 days of receipt of the demand, then both parties waive their right to further pursue the Claim.

ConsensusDocs 200:

• The ConsensusDocs process is very different from that of the AIA documents.

• As with the A201, the Contractor must continue to work while the dispute is being resolved. (Section 12.1). However, pursuant to section 8.2.2, where the dispute involves whether certain work constitutes extra work or the value of extra work, the Owner and Constructor must split the estimated cost of work until a resolution is achieved. This sharing of cost arrangement does not prejudice its right to reimbursed should it be determined that the disputed work was within the scope of the Work and the Constructor's

receipt of payment for the disputed work does not prejudice its right to receive full payment for the disputed work should it be determined that the disputed work is not within the scope of the Work. (Compare to AIA A201 section 7, which requires the Contractor to proceed with the work at the Contractor's sole expense).

• Pursuant to section 12.2, party representatives with the authority to resolve matters must work to resolve matters within 5 business days. If not resolved within 15 days of first discussion, then matters proceed to dispute resolution.

• Section 12.3 requires "mitigation"-a non-binding review either with a dispute review board or a project neutral.

• If mitigation is unsuccessful, mediation must follow.

• If mediation is unsuccessful, the parties will either arbitrate or litigate, depending on which choice they selected as part of negotiating the Contract. If nothing is selected, litigation is the default and not arbitration.

• Both the 2014 and 2017 ConsensusDocs require the non-prevailing Party to pay costs and reasonable attorneys' fees as determined by the adjudicator of the dispute.

Insurance and Indemnification

Relevant Sections:

• 2007 & 2017 A201

• 2007 & 2011 ConsensusDocs 200: Sections 10.1; 10.3

AIA 2007:

• Pursuant to section 3.18.1, the Contractor must defend and hold harmless the Owner, the Architect, and the Architect's consultants and agents.

• **Beware of indemnifying the Architect or any design professional.**

• The indemnification provision is pro rata – "**but only to the extent caused by** the negligent acts or omissions of the Contractor …"

• The indemnification provisions did not change between the 2007 and 2017 A201 documents.

• The insurance requirements did not change practically between the 2007 and 2017 documents. Section 11.1.4 requires the Contractor to name the Owner and the Architect as additional insureds on the Contractor's General Liability Insurance Policy. Section 11.1.2 requires the Contractor to provide Completed Operations Insurance coverage.

• Section 11 requires the Owner and Contractor to waive all rights against each other, their subcontractors, sub-subcontractors, agents, and employees, each of the other, and the Architect and the Architect's related entities, if any, for damages cause by fire or other causes of loss to the extent covered by property insurance. It also contemplates putting the carrier on notice of the waiver. Waiver does not bar third-party lawsuits or claims for deductibles and other non-covered items. Waiver will be defined by the risks covered by the insurance and the scope of the work in the contract.

• Under this clause, contractors who would normally bear the risk of loss before project completion, may avoid that risk to the extent the builder's risk or property insurance covers the loss.

AIA 2017:

• Many of the 2007 insurance provisions have been removed from the 2017 version and instead can be found in an exhibit to the Owner-Contractor agreement.

• The 2017 version also now requires that insurance and bonds be issued by insurers lawfully licensed to issue insurance and bonds where the Project is located. The National Association of Insurance Commissioners provides contact information for state insurance commissioners.

• The waiver of subrogation provisions remain the same.

ConsensusDocs:

• Significantly the ConsensusDocs Contract provides **MUTUAL INDEMNIFICATION** language (section 10.1) and only proportional indemnification responsibility.

• Additionally, ConsensusDocs 200 provides for the recovery of attorney's fees and costs that exceed the percentage of the parties' negligence in causing a loss.

• In defining the scope of parties entitled to indemnification as including "Others" (defined as "other contractors, material suppliers, and persons at the worksite who are not employed by the Contractors or Subcontract"), the indemnification clause may be broader than the Constructor or Owner intends.

• Section 10.2.2 allows for combining primary and excess coverages to satisfy total limits required under the Contract.

• Section 10.2.1 sets the completed operations coverage for one year. This is similar to the A201, which requires completed operations coverage for the warranty period (typically one year) or longer if specified.

• Section 10.3.1 requires that the Constructor maintain a Builder's Risk Policy that also names subcontracts, sub-subcontractors, suppliers, and the design professional as additional insureds. Section 10.3.2 requires the party that is the primary cause of the Builder's Risk Policy claim pay any deductible or coinsurance. If no Party is the primary cause of a claim, the Party who obtained and maintained the policy must pay the deductible or coinsurance.

• Section 10.3.2 requires the Builder's Risk Policy to provide for a waiver of subrogation. Pursuant to section 10.3.3, if the Owner directs the Constructor not to obtain property insurance, the Owner may issue a deductive Interim Directive.

• Pursuant to section 10.4, the Owner may require the Constructor to purchase additional liability coverage that names the Owner as an additional insured on certain specified policies and to the extent the Constructor or someone acting on its behalf caused the negligent acts or omissions.

• Pursuant to section 10.4.1, Constructor and Subcontractor insurance is primary and non-contributory to any insurance available to the Additional Insureds.

Payment

Relevant Sections:

• 2007 & 2017 A201: Section 9

• 2014 & 2017 ConsensusDocs 200: Section 9

AIA:

• AIA 2007 & 2017 sections 9.6.2 provide that, "[t]he Contractor shall pay each Subcontractor no later than 7 days after receipt of payment from the Owner …" This is **not** "pay when paid" language in some jurisdictions. For instance, the following is the "pay if paid" magic language in Massachusetts: "payment to the Subcontractor is to be directly contingent upon the receipt by the General Contractor of payment from the Owner."

• AIA 2007 & 2017 sections 9.6.4 also provide that the Owner has the right to request written evidence from the Contractor that it has properly paid Subcontractors and material suppliers. If the Contactor fails to furnish this evidence within 7 days, the Owner has the right to contact the Subcontractor directly.

• Pursuant to AIA 2007 section 9.5.3 and AIA 2017 section 9.5.4, if the Contractor fails to properly pay the Subcontractors, the Architect can withhold certification for payment and, "**[t]he Owner may … issue joint checks to the Contractor and any Subcontractor or material or equipment suppliers …**"

ConsensusDocs:

• Both AIA and ConsensusDocs allow the Owner to withhold payment if a third party files a claim. They differ in the determination of what is sufficient security to require the eventual release of funds.

• Pursuant to section 9.3.7, the Owner may adjust or reject a payment application to the extent that the Contractor is responsible under the Agreement for third party claims involving the Contractor or reasonable evidence demonstrating that third party claims are likely to be filed unless and until the Contractor furnishes the Owner adequate security. Adequate security consists of a surety bond, letter of credit, or other collateral or commitment that would be sufficient to discharge such claims once established.

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Search Warrant Execution: Keeping the Wolves at Bay

One of the most stressful events that any entity can face is the unannounced execution of a search warrant by federal and/or state law enforcement agents. If the situation is not handled with cool-headed competence, it can wreak lasting havoc on any business, from a one-physician medical practice to a multi-national corporation.

The Fourth Amendment to the U.S. Constitution constrains the government's ability to obtain and execute search warrants. Of course, those "search and seizure" issues are not ripe for litigation until after agents have stormed the office and taken what they wanted. See Fed. R. Crim. P. 41(g) (permitting a "person aggrieved by an unlawful search and seizure of property" to move for the property's return in the district where the property was seized).

But in *every* instance, knowledgeable attorneys can minimize the impact of a search warrant by ensuring that a client (in the case of outside counsel) or a company (in the case of in-house counsel) is prepared for the disruption and agitation that the execution of the warrant invariably causes. Agents executing a warrant not only operate within the "four corners" of the warrant – gathering enumerated documents and items from identified locations – but

they also use the time-honored element of surprise to interview unsuspecting, and often shell-shocked, employees. In this manner, agents gain access to information and witnesses that the warrant does not contemplate, but may be essential to furthering their criminal investigation.

The time to prepare for the execution of a search warrant is not while it is happening. If you are in-house counsel, have a plan in place in the event that law enforcement shows up at your reception desk. If you are outside counsel, talk to your clients about implementing such a plan. To guide you in the task of preparation, we provide a succinct, albeit non-exhaustive, checklist of steps to be taken in immediate aftermath of the government's unwelcome arrival.

1. CORPORATE COUNSEL SHOULD CONTACT OUTSIDE COUNSEL IMMEDIATELY. As soon as badges are flashed, in-house counsel should be on the phone to the company's outside legal representatives. In-house counsel should ask the lead agent if the search can be delayed until counsel arrives on site, even though the answer is likely to be "no." Because agents are unlikely to wait, outside counsel should jump in the next available plane, train, or automobile to get to the client's site post haste. The presence of legal representation will add order and needed discipline to the chaos.

2. GET THE BASICS AS QUICKLY AS POSSIBLE. Identify the lead agent and ask him or her to provide (1) the purpose of the search; (2) his or her name and the names of the other agents present; (3) the names of the agencies involved in the search; and (4) the name of the lead prosecutor to whom the agent reports. Record the information you have requested. It is easy to forget even the most rudimentary details in the heat of the moment.

3. REQUEST THE WARRANT AND SUPPORTING AFFIDAVIT(S). While the agents need not provide a copy of the warrant at the outset of a search, *United States v. Grubbs*, 547 U.S. 90, 98-99 (2006), there is no harm in making the request. Note that the agents are required to leave a copy of the warrant, along with an inventory of property seized (discussed in greater detail below), once the search concludes. When you receive the warrant, review it to determine the terms and scope of the investigation. Additionally, ask the agent for any affidavits that were filed in court to support the issuance of the warrant. Agents are less likely to provide these affidavits than the actual warrant; indeed, the investigation may be under seal, which would render the affidavits unavailable at the time of the search. Still, you lose nothing by asking for the documents.

4. ENSURE THE SEARCH IS APPROPRIATELY LIMITED. Do not consent to a search in areas or of materials beyond those listed in the warrant, at least until in-house and outside counsel are able to discuss the risks and benefits (if any) of permitting an expanded search. If the government wants information beyond the scope of the warrant, and you say no, it can always seek another warrant. Conversely, once you have given agents the information they want, it is impossible under most circumstances to claw it back.

5. INSTRUCT THE EMPLOYEES. If practical, send home all employees who are not essential to the investigation (i.e., those who will not monitor the search or gather information) or the functioning of the business, and close the office. If customers or patients are due to come in, they should be contacted and asked to reschedule their appointments. Direct all employees to preserve all files and documents and not

to take any materials out of the office while the search is being conducted. Remind all employees that they are not required to talk to the agents and that they have the right to consult with outside counsel before or during any interview.

6. CHOOSE A MONITOR OR MONITORS. Task one or more persons with monitoring the search. Outside counsel is ideally suited for this role. If outside counsel cannot be present, in-house counsel or trustworthy and knowledgeable employees should be given the responsibility. In any event, agents should not be left unattended. The monitor(s) should take detailed contemporaneous notes regarding the items seized, areas searched, and the names of employees with whom the agents spoke (or attempted to speak). The monitor(s) should also ask to make copies of any materials necessary for ongoing operations before they are seized. Finally, the monitor(s) should ensure that the search is confined to the areas and materials designated in the warrant.

7. PROTECT PRIVILEGED, CONFIDENTIAL, AND PROPRIETARY MATERIALS. Tell the agents that the company is not waiving any privileges that protect its documents and information. If the agents seize any documents that are potentially privileged or confidential or that contain trade secrets or proprietary information, ask that such documents be segregated and kept under seal. Outside counsel should inform the lead prosecutor that protected materials have been seized and negotiate the procedures under which they will be reviewed.

8. REMAIN ORGANIZED. Ensure a unified approach to the investigation, and, if necessary, work with a public relations firm to develop an appropriate response. Consider how to manage the press associated with a noisy or well-publicized search. If the government has demanded the subsequent production of documents or information, coordinate all responses through outside counsel and ensure that company representatives work with counsel to effectuate the company's approach.

9. DETERMINE WHAT WAS SEIZED. Just as importantly, figure out what items of potential interest to the government were left behind. The monitor's notes regarding materials seized will be helpful in this regard. Additionally, request an inventory of all items that agents have seized (which the agent must prepare pursuant to Federal Rule of Criminal Procedure 41(f)(1)(B)), as well as copies of all photographs taken and all documents seized from the premises. If any seized materials are essential to business operations, outside counsel should attempt to negotiate a swift return from the lead prosecutor.

10. DEBRIEF ALL EMPLOYEES WHO WERE PRESENT. After the search is completed, conduct interviews with all employees who were present for the execution of the warrant as soon as possible. The attorney-client privilege should protect these interviews from discovery because they are being conducted to assist counsel in providing legal advice to its client, the company. *E.g., United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995); *see also Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981) (communications by employees, in the form of questionnaire responses, to corporate counsel were privileged). This task is critical; it must be undertaken while memories are fresh. The information learned will give counsel insight into the purpose and direction of the government's investigation. Outside counsel should lead this debrief, and, where applicable, in-house attorneys should be involved. Document all discussions

with employees, including, most pertinently, the statements, questions, and actions of agents that the employees observed during the search.

It is typically impossible to stop law enforcement from executing a warrant. But careful preparation for the agents' arrival and meaningful involvement by competent criminal counsel during the execution can mitigate the damage that flows from the search and seizure. The time to prepare is now, while facing a search warrant is just an unpleasant hypothetical.


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Where In The World?

Construction Mystery: What a storied past this city has had, from the early belief it was where Ali Baba and his forty thieves hid their treasure, to being a featured location in the movie Indiana Jones and the Last Crusade. Dating back more than 2,000 years, it was originally a temporary refuge for nomadic Nabataeans, who sought refuge in its rocky caves. Ultimately, more than 800 mountains were carved to transform the city into a mighty fortress. Poets describe it as a rose-red city half as old as time, since the rocky cliffs have red, pink and ochre shadings. Travelers enter the city through a narrow fissure between overhanging cliffs that tower overhead. From this shaded crack in the mountains, the visitor makes the last turn to see this city's most impressive monument captured in this photograph. It is carved from the solid rock of the mountain and extends roughly 140 feet into the sky. The scope of this accomplishment is breathtaking. Unfortunately another marvel, the Roman amphitheater, with a seating capacity of 8,500 (although some scholars claim it only had a 3,000 seat capacity) was destroyed in an earthquake in 363 B.C.

Question: What is the name of this city and structure?

Last Issue Answer: Kentuck Knob, Chalk Hill, Pennsylvania

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