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October 2018

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Constructive Changes – An Important Doctrine Obsolete by ConsensusDocs?
[Charles W. Surasky](#), Senior Counsel, and [Jonathan R. Mayo](#), Associate, [Smith, Currie & Hancock LLP](#)

A “constructive change” occurs when an owner action or omission, that is not formally acknowledged by the owner to be a change in the contract’s scope of work, forces the contractor to perform additional work.

Constructive changes are not formal change

orders, but informal changes that could have been ordered under a contract’s changes clause if the change had been recognized by the owner. The constructive change doctrine recognizes that being informally required to do extra work is similar to a formal change order and should be governed by similar principles. The doctrine of constructive changes is very important to contractors working under a non-ConsensusDocs changes clause. Contractors using a ConsensusDocs changes clause have a better, more direct means of obtaining payment for changed work.

There are four general categories of constructive changes for both public and private contracts. The first occurs when an owner informally directs or orders extra work. This happens any time an authorized representative of the owner directs a contractor, verbally or in writing, to perform work beyond the original scope of the contract, but does not issue a formal change order. If this informal order is determined to be a constructive change, the contractor may be entitled to recover its additional costs incurred and possibly an extension of the contract time. However, it is important to not confuse informal change orders with advice, comments, or suggestions that are offered by technical representatives of the owner. In order to prevail under this category, a contractor should provide proper notice to the owner that the directive is considered to be a change. Special attention should be given to the required notice period for such a change in the contract.

The second category of constructive changes occurs when the contractor is required to expend extra effort because drawings or specifications are defective. This category is based on the *Spearin* doctrine, which provides that when an owner supplies the plans and specifications for a construction project, the contractor cannot be held liable for an unsatisfactory final result attributable solely to defects or insufficiencies in the plans and specifications. Owner-supplied plans and specifications come with an

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implied warranty that if the contractor complies with the plans or specifications, then a satisfactory product will result. Delivery of defective plans and specifications is a breach of this warranty. A contractor can recover its additional costs when defective plans and specifications cause extra or remedial work, if the contractor reasonably relied on the plans and specifications.

The third constructive change category occurs when the owner or its representative misinterprets the contract and erroneously rejects work that satisfies contractual requirements or requires an unreasonably high standard of performance. Specifically, this category may arise from the owner's implied duty not to hinder or delay the contractor in the performance of its work, which is an implied obligation contained in every contract. Such interference by over inspection would be a constructive change if unacknowledged by the owner. For example, when the contract provides for a certain method of performance or material, or states that the contractor can choose a method of performance or material, but the owner requires the contractor to use a method or material that is more complicated and expensive than what the contractor planned in its bid, the owner has constructively changed the contract. This third category can also arise when the owner interprets a contract ambiguity in its favor. In order to prevail in either situation, the contractor must establish that its interpretation was a reasonable one and that it relied on its interpretation during the bidding phase. Failure to prove the latter element may defeat an otherwise valid claim.

The fourth category of constructive changes occurs when the owner denies the contractor an otherwise justified time extension, thereby forcing the contractor to accelerate performance. Also known as "constructive acceleration," this occurs when the owner does not explicitly direct acceleration, but instead refuses a valid request for a time extension or threatens other action so that the contractor must accelerate to complete work within the originally specified time to avoid liquidated damages or other loss. The constructive acceleration doctrine allows recovery for extra expenses incurred as a result of the contractor accelerating after the owner's refusal to grant the warranted time extension. To prevail on such a claim, the contractor must show 1) that an excusable delay existed, 2) timely notice of the delay and a proper request for an extension was given, 3) the time extension request was postponed or refused, 4) the owner ordered either by coercion, direction, or other manner that the project must be completed within its original performance period, and 5) the contractor made efforts to accelerate its performance and incurred costs as a result.

The ConsensusDocs Changes clause, Article 8 in the CD200, Standard Agreement and General Conditions Between Owner and Constructor (Lump Sum), provides in ¶ 8.1.1 that the Constructor can request a change in the work or the timing or sequencing of the work. This simple, straightforward provision, if used correctly, can eliminate a contractor's need to rely on a constructive change argument to get paid for disputed work. The key is for the contractor to request a change, not make a claim pursuant to ¶ 8.4 of the same Article. Once the contractor requests a change pursuant to ¶ 8.1.1, the owner is obligated to either issue a Change Order accepting the contractor's request, or, if the owner does not agree that a Change Order is warranted, issue an Interim Directive directing the contractor to perform the work that the owner believes is not a change. The contractor is then obligated to perform the disputed work and to give the owner an estimate of the cost to perform the disputed work in accordance with the owner's interpretation. If the owner does not accept the contractor's estimate, the owner is obligated to pay the contractor 50% of the contractor's actual cost as the work progresses. Eventually the dispute must be resolved in accordance with the contract's disputes provisions and the losing party must reimburse the disputed 50% paid by the prevailing party.

Two aspects of this process are of particular benefit to contractors. First, and most importantly, the contractor is not obligated to finance the entire cost of disputed changes. The requirement that the owner cover 50% of the disputed cost may also reduce the number of disputed changes. Second, the contractor is not required to argue constructive change. Any dispute regarding changes can be resolved within the boundaries of the Changes clause. By the simple expedient of allowing the contractor to request a change order, ConsensusDocs obsoletes the constructive change doctrine.

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The authors thank Washington and Lee law student Christopher Henry for his help with this article.

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The ConsensusDocs Coalition Publishes A New Lean Addendum

On September 6th, the ConsensusDocs Coalition published the industry's first Lean Addendum standard contract document. The ConsensusDocs 305 utilizes lean tools and processes without an Integrated Project Delivery (IPD) agreement. Not all owners may procure design and construction services with an IPD or integrated lean project delivery (ILPD) agreement. The Lean Addendum provides a contractual mechanism for owners, architects, engineers, general contractors, and subcontractors alike to take advantage of lean construction efficiencies and memorialize in writing a more collaborative and cooperative culture on projects.

Joe Cleves, partner at Taft law firm in Cincinnati, who served as chair for the ConsensusDocs Coalition working group that developed the Lean Addendum, explained "this new standard addendum is perfect for all stakeholders involved in the design and construction process interested in incorporating lean processes on CM At-Risk projects." He added, "publication of this document will benefit the industry in adopting lean tools, which have a demonstrated increase in construction productivity." The ConsensusDocs Coalition was first to publish a standard IPD agreement in 2007.

The Lean Addendum is significantly shorter than other integrated forms of agreement (IFOAs), such as the ConsensusDocs 300 standard IPD agreement. The ConsensusDocs 305 coordinates well with a CM At-Risk agreement as the underlying prime agreement, such as the ConsensusDocs 500 CM At-Risk agreement. Many would characterize the use of a CM At-Risk agreement with the Lean Addendum as an "IPD-lite," "IPDish," or "transitional" IPD agreement.

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New Standard Design-Assist Contract Document is First Industry Standard Document to Address Growing Practice

On September 28th, the ConsensusDocs Coalition published the industry's first standard contract document addressing design-assist. The ConsensusDocs 541 Design-Assist Addendum creates a contractual structure to better coordinate design professionals, construction managers, and subcontractors in developing and constructing design documents. The range of services including constructability reviews before design completion; owner's program review; recommended procurement of materials; prefabrication recommendations; cost estimating; integrated value analysis; design-build packaging; and coordinated milestone scheduling. The document tackles the difficult task of defining the

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range of design-assist services. Optional design-assist services are identified including life cycle cost analysis; risk analysis; sustainability; and production planning. By gaining the early involvement of builders' expertise and coordinating those efforts with design teams, greater project cohesion and efficiency is achieved.

Joe Leone, partner at Drewry Simmons Vornehm, LLP in Indiana, served as chair for the ConsensusDocs Coalition working group comments, "Design-assist is the most important development in the design and construction industry not addressed in a standard form contract document. Contractually isolating the efforts of architects and engineers and the expertise of constructors and trade contractors has proven detrimental to creating quality design documents that can be built on time and on budget. This first of its kind design-assist addendum, which brings all of the key project participants together in a collaborative environment, helps bridge this gap."

This design-assist addendum coordinates with the recently released ConsensusDocs 305 Lean Construction Addendum by allowing users to opt into several Lean construction tools and processes. The Lean and design-assist Addendums work well together or independently.

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Recovery of Material Escalation Costs Arising From Steel and Aluminum Tariffs

[Adrian L. Bastianelli, III, Esq.](#), Partner, and [Mark R. Berry, Esq.](#), Partner, [Peckar & Abramson, P.C.](#)



Introduction

On **March 8, 2018**, President Trump signed executive proclamations imposing a 25% tariff on imported steel and a 10% tariff on imported aluminum products under Section 232 of the Trade Expansion Act of 1962.ⁱ Initial ex-emptions for Canadian and Mexican products have been announced by the Trump Administration, and the full scope of the tariffs remains subject to trade negotiations. The tariffs will invariably result in increased steel and aluminum prices, which will impact contractors and subcontractors with fixed priced construction contracts. This Bulletin addresses approaches prime contractors and subcontractors may assert to recover under fixed priced contracts for the price increases resulting from the tariffs.

The construction industry has been through historic periods of price escalation in the past, including the oil embargos of the 1970s and the copper and steel spikes in the 2000s economic boom.

Historical Cold Rolled Steel Pricing

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Historical cold rolled steel pricing (St. Louis Fed 1982-Present <https://fred.stlouisfed.org/graph?g=jfCA>). Contracts may specify the baseline index by which escalation is measured. If not specified, several common industry and governmental indices may be used.

During these periods of instability, contractors, who were not protected by price escalation clauses in their contracts, faced difficulty in recovering their increased costs. MCAA's Management Methods Bulletin, [Fixed Price Construction Contracts, Material Price Volatility and Contract Cost Adjustment Clauses](#)ⁱⁱ (2010) discusses the most common approaches that contractors may pursue to recover for market-driven price escalation referred to above. The traditional arguments discussed in Bulletin CT 10, however, have not proven successful except in extraordinary circumstances, leaving contractors without adequate relief on existing fixed price contracts. Fortunately, increased material costs typically may be passed through on cost-reimbursement contracts and to a lesser degree on Guaranteed Maximum Price contracts.

While the concepts set out in the 2010 Bulletin can be applied to claims for increases in prices due to the recent steel and aluminum tariffs, there are additional bases that may be used as a means for recovery because of the nature of a tariff. Tariffs are the result of a government decision to require material suppliers to pay increased taxes or duties on imported material, which generally results in an increase in the price of the imported goods above the prevailing market price at the time, rather than a change in market conditions. This distinction may provide additional avenues for cost recovery depending on the contract terms.

Challenges of Traditional Price Escalation Recovery Arguments

Material price escalation is traditionally considered a bargained for risk in fixed price contracting—the contractor bears the risk that costs will increase during the performance of the contract. Thus, standard contract provisions generally provide very limited avenues for relief from price escalation. In any event, the starting point for a claim for price escalation is a close examination of the contract provisions, including flow down provisions which could import favorable cost recovery language from upstream agreements. Some provisions that may form a basis for recovery are discussed below.

Recovery as a Force Majeure Event

Force majeure is an arcane legal principal that nonperformance of a contract is excused for both parties where the events are beyond the control of either party and the risk has not been allocated to one party by the contract. Typically, performance must be made commercially impractical to perform by the unanticipated event in which case both parties to the contract are excused from performance at the agreed schedule or price, or, in rare instances, from any further performance altogether. *Force majeure* events typically include acts of God, strikes, war or other hostilities, acts of the government or other third parties, and other similar events that are not caused by either party.

Substantial price escalation could constitute a *force majeure* event, which would excuse both parties from having to perform. In order to prevail, the contractor or subcontractor must demonstrate that the

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escalation made it impossible or commercially impractical to perform the contract work. If the contractor or subcontractor can get over this high bar, the remedy is not an increase in the price of performance. Instead, the *force majeure* event excuses non-performance by both parties. Most contracts and subcontracts today contain a narrow form *force majeure* clause that limits relief for a *force majeure* event solely to a time extension. The result of the extension is to excuse the owner from liability to the contractor for delay damages and excuse the contractor from liquidated damages or actual damages to the owner as a result of the delay but provide no additional compensation for the *force majeure* event—an unsatisfactory remedy for the contractor.

Because the tariffs are unforeseen acts of the federal government, rather than market driven escalation, the risk of which is normally allocated to the prime contractor or subcontractor, they have greater potential to constitute a *force majeure* event for which the contractor and subcontractor may obtain a time extension or be excused from performance of the contract or subcontract, if the event precludes performance of the work.

Recovery as an Impact of Delay

A contractor may be able to recover for the escalation or the impact of the tariffs under a provision in the contract allowing recovery of delay damages. If an owner caused delay prevented the prime or subcontractor from purchasing materials before the escalation or tariff price increases, the prime or subcontractor is likely to recover these additional costs. A subcontractor similarly may have a right to recover for delay caused by the prime contractor or higher tier subcontractor, provided the appropriate delay and/or changes provisions flow down or are otherwise included in the subcontract.

Recovery Under a Contract Adjustment for Escalation Clause

The parties to a construction contract learned their lesson after the escalation of the early 2000s, and price adjustment clauses for allocating the risk of escalation for certain specified products to the owner began to show up in some contracts. In addition, subcontractors and suppliers began to limit the time period during which their prices were valid.

The ConsensusDocs cost adjustment clause 200.1, ***Time and Price Impacted Material Amendment 1*** (2007, Revised 2011), is a good example of a cost adjustment for escalation clause. Under this provision, the parties establish a baseline price for specifically identified materials potentially subject to time and price impacts. Either party is entitled to an equitable adjustment for an increase or decrease in this baseline price subject to timely notice. The contractor is also entitled to a time extension and compensation for any delay.

The escalation clause should expressly designate the methodology for determining a baseline price. For example, Schedule A of the 200.1 clause recommends that pricing methodology be based on an objective standard comprised of: (1) established market of catalog prices, (2) actual material costs, (3) material costs indices, or (4) such other mutually agreed upon method. Among other indexes, the United States Bureau of Labor Statistics publishes producer price indexes for a broad range of commodities in all stages of processing and has published excellent guidance on their use, “How to Use the Producer Price Index for Contract Escalation”[1].

When negotiating the chosen adjustment methodology, the parties also may agree on a range of variability, establishing a minimum price change threshold before entitlement to an adjustment is triggered or a ceiling, which caps the total amount of adjustment. In addition to establishing floors and ceilings for adjustment, the clause may provide specific measures for risk sharing when prices increase, or benefit sharing, when prices decrease.

It is very important when pricing escalation claims based on price indexes, for contractors and subcontractors to correlate the adjustment to the actual price increase or decrease paid. Claiming impact or escalation costs in excess of actual costs incurred raises the potential for false claim violations, even where the pricing conforms to the contract methodology.

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While the AIA standard form contracts do not contain a similar provision, Article 3.8.1 of A503, **Guide for Supplementary Conditions** (2007) recognizes the potential need for such a clause and states:

“...In recent years, unanticipated price escalations in construction materials after the contract is executed have caused concern to owners and contractors. If the owner and architect are concerned about facing such price escalations in certain materials, they should identify those materials prior to the bid and provide for them in the bidding requirements as allowances.”

If such a clause is included in the contract, it will provide the contractor or subcontractor the ability to recover escalation regardless of cause.

Other Contract Provisions

Contractors and subcontractors faced with large escalation claims should review the contract provisions in detail to determine if there are representations or other contract language on which a claim can be made that the contract transferred the risk of escalation to the other party.

Tariff Based Price Increases May Provide Additional Avenues for Recovery

Tariffs may provide a contractor or subcontractor with additional bases for recovering price increases due to the tariffs, because they result from an intentional action of the government for the purpose of increasing the prices of foreign products above the current prices. While sophisticated contractors and subcontractors may be in a position to adequately assess the risk and account for standard market driven price fluctuations, forecasting the possibility and extent of governmental tariffs is beyond the reasonable risk profile for most contractors and subcontractors. As a result, contracts often include contract provisions that provide the contractor or subcontractor with relief from increased prices due to the tariffs.

Change in Law and/or Tax Provisions

A change in law and/or tax provision is found in many industry contract forms, including ConsensusDocs and the AIA documents, as well as the Federal Acquisition Regulation (“FAR”). For example, ConsensusDocs 750, **Agreement Between Constructor and Subcontractor** (2016) contains the following change in law provision:

*3.27.1 To the extent Constructor receives reimbursement or additional time from the Owner under the prime agreement, the Subcontract Amount or Progress Schedule shall be equitably adjusted for Changes in the Law enacted after the date of this Agreement, **including taxes, affecting performance of the Work.***

Under this provision, the prime contractor may argue that the subcontractor’s recovery is limited to the prime contractor’s recovery from the owner. The prime contractor probably is obligated to pass though and pursue the subcontractor’s claim, but this requirement may be dependent on other contract terms and the state law.

Contracts sometimes contain change in tax provisions that might apply to the tariffs. On federal contracts, FAR 52.229-3 broadly permits cost recovery for changes in “federal excise taxes and duties.” AIA A201 § 3.6, General Conditions of the Contract for Construction (2017) allows recovery for changes to “sales, consumer, use or similar tax.” The question of whether the current steel and aluminum tariffs, enacted by executive order, constitute a change of tax remains unresolved.

These change in law and/or tax provisions arguably limit recovery to the amount of the tariff alone, which may not make a contractor whole. For example, tariffs often not only increase the cost of imported goods, but lead to an increase in the price of domestic goods which rise due to the market conditions. This could result in a potentially perverse incentive where a contractor or subcontractor could recover the full tariff increase when purchasing imported steel or aluminum, but have no contractual remedy if purchasing

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domestic steel and aluminum that may have increased in price because of the market conditions resulting from higher prices for the foreign product. Another cost that may not be recoverable is delay if the contractor or subcontractor elects to avail itself of the lower prices of the domestic product and switch to a new supplier. In addition, the contractor or subcontractor may not be able to recover for equipment or products manufactured with steel and aluminum even though their price has increased due to the tariffs.

Contract Clause for Tariffs

Contractors and subcontractors should include a clause in any quotation they provide that reserves their right to recover for the increased tariff costs similar to the following:

The Price does not include any amounts for changes in taxes, tariffs, or other similar charges that are enacted after the date of this Quotation. Subcontractor shall be entitled to an equitable adjustment in time and money for any costs that it incurs directly or indirectly that arise out of or relate to changes in taxes, tariffs, or similar charges due to such changes including, without limitation, escalation, delay damages, costs to reprocur, costs to change suppliers, costs of manufactured equipment or goods, or other costs of any kind resulting from the changes.

The clause needs to be included or incorporated into the resulting contract or subcontract. If a price is being submitted after the enactment of the tariff, the prices should include the impacts of the tariff.

Recommendations

Review Your Contract

If you incur substantial additional costs as a result of tariffs, review your contract for clauses addressing contract adjustments for escalation, changes in law and/or tax, limits on variability of prices, force majeure, delay damages, or any other provision that might support an argument that the risk of increased costs of the tariffs has been transferred to the other party. The contract governs your ability to recover these additional costs. Unless you have a contract provision that clearly provides for recovery, your claim should focus on the uniqueness of the tariffs.

Proactively Include Cost Adjustment for Escalation Clauses and Change in Law and/or Tax Provisions in Your Contract

The lessons learned from past price escalations should be applied to tariffs, and you should include clauses in your contract or subcontract to protect yourself in the future. The starting point is a cost adjustment for escalation clause that specifically provides you the right to recover, if the cost of certain products escalates for any reason. This clause should be broad enough to allow for the recovery of other costs, such as delay damages or escalation in the cost of equipment or products containing the material. A change in law and/or taxes should also be included.

*This article was originally by MCAA, a ConsensusDocs Coalition member, in their Management Methods Manual.

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ICE, ICE, Baby: Using E-Verify to Protect Against Immigration Employer Enforcement
[Kaytie Pickett](#) and [Adam Stone](#), Partners, [Jones Walker LLP](#)

For a contractor, not understanding fundamental immigration law means risking being put out of business. This isn't an exaggeration: in September 2017, a brush-clearing contractor paid a staggering [\\$95 million dollars](#) in fines and forfeiture to the U.S. Immigrations and Customs Enforcement (ICE) for hiring thousands of undocumented workers. Nor is this example an

isolated incident. From January to July 2018, ICE served over [5,000 audit notices](#), with a goal of conducting [15,000 a year](#).

Contractors should prepare to be hit. One of the nation's [largest home building contractors](#) is under ICE audit. And it's well known that the construction industry employs a significant number of immigrants; one recent study puts the percentage of the workforce at [24.4%](#). The study reports that for certain states, such as California, Texas, New York, Nevada, and Florida, that percentage is much higher. For certain trades, like plasterers, brick masons, drywall installers, roofers, and painters, the percentage is higher as well.

What does an ICE audit entail?

ICE serves a Notice of Inspection on the employer requiring the employer to produce all of its [Form I-9s](#), and the employer has [3 business days](#) to respond. The Form I-9 is the Employment Eligibility Verification that [all](#) employees and employers must complete. After the employer turns over the I-9s, ICE will examine them and then notify the employer of any violations and, later, of its intent to issue a fine.

What is ICE looking for?

Primarily, ICE is investigating whether a contractor has knowingly hired undocumented workers. A finding that the contractor has hired undocumented workers can lead to worksite raids, with ICE coming to arrest the undocumented workers. Besides this disruption to the work, the monetary penalty for knowingly hiring undocumented workers is high. For a first-time violator, the standard fine amount varies from [\\$548 per worker to \\$3,726](#) per worker, depending on the percentage of undocumented employees, but the overall fine can be enhanced by up to 25%. On a big job, these numbers can quickly add up. In addition to fines, ICE can recommend debarment to the states. Many states have mandatory debarment or licensure loss for immigration law violators. And because many multi-state contractors rely on licensure reciprocity, loss of a license in one state can have a domino effect on others.

One contractor recently told us his strategy for avoiding an ICE audit is simply to not hire Hispanic workers. Putting aside the fact that there are plenty of authorized Hispanic workers (and unauthorized workers of other ethnicities), discriminating on this basis is [illegal](#). Under Title VII, employers cannot discriminate on the basis of ethnicity or national origin, and under the Immigration Reform and Control Act of 1986, employers cannot discriminate on the basis of an individual's citizenship or immigration status.

The best defense against being penalized for hiring undocumented workers is to use the federal E-Verify program, which creates a rebuttable presumption that the employer is not in violation. See Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), § 402. Participation in E-Verify is mandatory for federal contractors, see FAR case 2007-013, *Employment Eligibility Verification*, and, with some qualifications, in the following states:

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- Alabama (Ala. Code § 31-13-15(h));
- Arizona (A.R.S. § 23-214);
- Florida (on state contracts, see Executive Order No. 11-116);
- Georgia (Ga. Code Ann. § 36-60-6);
- Indiana (Ind. Code Ann. § 22-5-1.7-11);
- Louisiana (on state contracts, La. Stat. Ann. § 38:2212.10);
- Minnesota (on state contracts over \$50,000, Minnesota Statute Ann. § 16C.075);
- Mississippi (Miss. Code Ann. § 57-1-373);
- Missouri (on state contracts, Mo. Ann. Stat. § 285.530);
- Nebraska (on state contracts, Neb. Rev. Stat. Ann. § 4-114);
- North Carolina (N.C. Gen. Stat. § 64-26);
- Oklahoma (on state contracts, Okla. Stat. Ann. tit. 25, § 1313);
- Pennsylvania (43 P.S. § 167.3);
- South Carolina (S.C. Code Ann. § 41-8-20);
- Tennessee (Tenn. Code Ann. § 50-1-703);
- Texas (on state contracts, Texas Executive Order RP-80);
- Utah (Utah Code Ann. § 63G-12-301);
- Virginia (Va. Code Ann. § 2.2-4308.2);

No state can prohibit the use of E-Verify, see *United States v. Illinois*, No. 07-3261 (C.D. Ill. Mar. 12, 2009), but Illinois heavily regulates its use. Under 820 Ill. Comp. Stat. Ann. 55/12, an employer must attest that all of its employees that will administer the program have been trained and must post notices that it is enrolled in E-Verify. It is a violation of this law to use E-Verify prior to the completion of the employee's I-9 or to terminate an employee based on a tentative non-confirmation from E-Verify.

Use of E-Verify won't protect a contractor from penalties from other I-9 violations, such as the employee signing in the wrong place, producing the wrong documents, or the employer not signing the I-9 within three days. Having a clear I-9 policy that all employees charged with hiring understand and consistently follow is imperative. This, with the use of E-Verify, can save a contractor from another \$95 million ICE settlement.

In the current political climate, ICE undoubtedly will conduct more audits and be less willing to settle with contractors who hire undocumented workers. Given the harshness of potential penalties, contractors should take steps to insure they are complying with state and local hiring laws. E-Verify, when properly utilized, can help protect contractors from potentially huge fines and loss of their contractor's licenses.

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Standardization of BIM Implementation in the United States

[Joseph Imperiale](#), Partner, [Pepper Hamilton LLP](#), and [Michael Chase](#), Senior Counsel, [Bechtel Power & Infrastructure](#)

The authors wish to thank Bechtel Power & Infrastructure's Brett Stefanko, DEP PMO Project Controls Manager; Giana Morini, DEP PIM Process Lead; and Jason Moore, DEP IWPP Project Management Lead, for their insights and contributions to the article.



Advances in digital technology are rapidly changing the way contractors, owners and engineers exchange information and streamline efficiency in the construction industry. A key element of this transformation is building information modeling (BIM), the processes and tools that, among other things, digitally represent the physical and functional characteristics of a facility.

Although there are many definitions of BIM generated by various organizations, the Associated General Contractors of America defines BIM as “the development and use of a computer software model to simulate the construction and operation of a facility.” BIM uses three-dimensional modeling and a common data environment to access and share information. Digital modeling allows the representation of a design in three dimensions and from different views, facilitating identification of conflicts or “clashes,” thereby reducing design errors and resolving constructability issues much earlier in a project.

BIM is an attractive tool for project owners because its potential extends beyond planning and design. If implemented effectively, BIM can generate cost savings over the entire life cycle of a project. By facilitating collaboration and shared knowledge between users, it can generate more accurate cost estimates before a project even begins. During construction, real-time communication can minimize wasted materials and unnecessary labor.

Finally, BIM can simulate operating costs up to a project's final decommissioning — producing perhaps the biggest opportunity for cost savings. See BSI Kitemark, *Why BIM is a Must For Manufacturers* (2018).ⁱⁱⁱ The potential of BIM is widely recognized, and a recent UK Government Construction Strategy report noted that when fully implemented, BIM can lead to cost savings of 15-20 percent. *Id.*

It should come as no surprise that project owners are requiring adoption of digital information models. The United Kingdom has even mandated the use of BIM on all centrally procured public sector projects and commissioned a protocol for the standard implementation of BIM. Realizing BIM's potential, reports in its first three years show it has saved the government \$2.1 billion. See Construction Industry Council, *Building Information Modeling (BIM) Protocol Second Edition* (2d ed. 2018)^{iv}; Stefan Mordue et al., *Building Information Modeling For Dummies*, 123 (2016).

Given its potential to reduce costs, BIM increasingly is becoming a widespread requirement for construction projects in the United States. But due to its level of maturity in the market and the differing requirements of the states, BIM implementation in the United States is largely ad hoc and differs from project to project. BIM requirements are often stated in vague and ambiguous terms, creating uncertainty about what the owner is buying, what the contractor is providing, and how BIM might affect allocation of responsibility and liability among all parties.

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While there are multiple BIM guidelines published in the United States, the industry lacks a standardized protocol. Currently, the closest the United States has to a standardized protocol is the National BIM Standard (NBIM-US). NBIM-US attempts to integrate five different U.S. industry guidelines⁹ to create a uniform set of procedures, and it is supported by prostandardization groups, such as BuildSMART. While NBIM-US is a step in the right direction for standardizing BIM implementation in the United States, it is still not close to serving as a uniform protocol. Indeed, NBIM-US itself specifically notes that standard contracts are not yet available and that “[b]usinesses must therefore work with legal counsel to develop and negotiate special contract clauses that include” the following:

- allocation of responsibility for creating information
- appropriate access to, reliance on and use of electronic information provided
- responsibility for the updating and security of the data
- ownership and downstream uses of the information
- compensation for team members that recognizes the costs and risks they incur and the value they deliver.

The U.S. AEC industry would likely benefit from developing a standardized model protocol, such as the CIC BIM Protocol used for the UK’s BIM Level 2 standards. But to do so, certain legal issues presented by BIM should be resolved and addressed. And while the significant benefits of BIM to owners are apparent, the development of a model protocol for its implementation should fairly balance the interests of contractors, service providers and other project participants.

Legal Considerations for a Potential Model BIM Protocol in the United States

BIM’s information sharing is the driving force behind greater efficiency, but the philosophical underpinnings of BIM create a tension with the traditional allocation of liability among project participants in the AEC industry — liability that is assigned to project participants based on their control over their scope of work. Below we identify seven potential issues that should be addressed in any model BIM protocol.

1. **Requirements:** Given the absence of a standardized approach in the United States, it should not be surprising that one of the most basic issues confronting contractors is the lack of definition around BIM requirements. In solicitations and requests for proposals, BIM requirements are often stated in vague and ambiguous terms, often because owners may not know what BIM information they need or how they will use the information. As a result, contractors expend considerable time and resources trying to clarify with owners what exactly is being requested in terms of BIM data and deliverables. The NBIM-US provides a sample BIM production timeline, a project execution spreadsheet that is completed by the parties and integrated into the agreement, and a number of guidelines that owners should use to ensure they provide definite, comprehensive and understandable requirements to contractors. Specific BIM requirements must be developed at the outset of each project and tailored to each level of BIM so that owners and contractors have clarity as to what they are buying and providing, respectively.
2. **Design Responsibility:** BIM envisions a collaborative approach in which different design professionals add discipline-specific information to a shared model. Full implementation of BIM means that design plans are dynamic, subject to various inputs from multiple parties. The NBIM-US provides examples of what needs to be detailed in the contract (Example: “Who creates each information package, in terms of project or facility role? Is this an internal or external role? The precise individual and external organization will be identified in the project information handover plan.”) But, given the collaborative nature of BIM design, a standardized protocol should address statutory professional engineer “responsible charge” responsibilities, including the sealing of

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drawings, specifications and other design documents. A standardized U.S. protocol must establish the rights, responsibilities and liabilities of the engineer in charge and other designers, and provide clarity on when the level or state of design is sufficiently mature to be relied upon, for what purposes and by whom. This may include a defined method for granting access and locking documents, as these procedures will also have implications in liability disputes.

3. **Standard of Care:** The NBIM-US provides no specific guidelines but notes that businesses must work with legal counsel to develop and negotiate special contract clauses that include when parties are entitled to rely on electronic information that has been provided. It does not, however, suggest that one approach is preferable to others. In truth, BIM's collaborative approach to design raises questions as to whether a designer's standard of care will be legally altered. For example, it is unclear what effect the use of BIM will have on established legal doctrines, such as an owner warranting the design provided by its professional. See *United States v. Spearin*, 248 U.S. 132 (1918). In addition, a designer's duty of care traditionally is owed only to its customer. However, a designer's knowledge that the use of, and potential reliance on, its design by multiple users raises questions as to whether a designer's duty of care should be expanded to include parties other than its customer.
4. **Design Risks and Liabilities:** Here, too, the NBIM-US provides no specific guidelines but notes that businesses must work with legal counsel to develop and negotiate special contract clauses that include appropriate access to, reliance on and use of electronic information. But the shared environment of design associated with BIM may increase liability exposure for designers, who must be cognizant of the various parties that may be relying on the accuracy of the data they contribute to the model. This concern is particularly salient in the context of negligent misrepresentation claims, which in many jurisdictions allow a third party to make a tort claim seeking recovery of economic losses when it can allege that its reliance on a professional's design was foreseeable. The compensation received by the designer in return for providing professional services, however, generally does not account for the risk of such third-party claims. And multiple designers and shared BIM workspaces create questions regarding how to allocate and measure liability. This also has important implications for professional liability insurance, which is underwritten on the basis that the scope of insureds' responsibilities is defined and delineated from that of other project participants.
5. **Intellectual Property Rights:** Again, the NBIM-US notes only that businesses must work with legal counsel to develop and negotiate special contract clauses that include ownership of intellectual property and downstream uses of BIM information. When BIM is used as envisioned, the contributions by various contractors and subcontractors all come together to create a final model. This raises legal questions regarding who owns and who has license to use the final composite. While owners will insist upon ownership rights to the model, the intellectual property rights of the model's contributors also must be taken into account. The market economics that affect the pricing of design services do not generally allow the full cost and value of the designer's expertise and know-how to be reflected in the pricing of services on any particular project. Furthermore, given that a designer's expertise and know-how is developed over time, across many projects, and often pursuant to proprietary processes and procedures, it is paramount that designers retain intellectual property rights for future use.
6. **Confidentiality:** While the NBIM-US notes that this must be addressed with legal counsel, no specifics are provided. BIM's foundation rests on information sharing, both before and during a project, but this should not occur at the expense of confidentiality. Contractors sharing data with many project participants have legitimate concerns that their proprietary information could end up being shared with a competitor. A model BIM protocol should put meaningful limits on what

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information is subject to sharing and how shared information is protected so that construction firms can maintain their competitive advantage.

7. **Security:** A model BIM protocol in the United States must provide guidance on how parties will allocate the costs associated with data housing and exchange and detail the roles, responsibilities and procedures for cybersecurity. Again, these procedures should be sufficiently uniform so that contractors can factor the costs/risks into their pricing estimates.

Conclusion

While industry groups have provided guidelines, and the NBIM-US has integrated these guidelines into a useful protocol, the U.S. AEC industry is still far from a standard implementation approach that fairly balances the interests of all project participants. A more standardized protocol that affirmatively addresses these considerations would benefit the industry.

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Upcoming Free Webinar



Webinar Title: *Successful Construction Contracts: Essential Clauses and the Advantage of Using ConsensusDocs*

Webinar Description: Studies demonstrate that fair, best practice contracts, achieve superior construction project results versus the one-sided, outdated, and siloed clauses that lead to claims and litigation. What are the most important clauses that you should prioritize in negotiations to set a foundation for success, and which clauses to avoid? The two-main standard construction contract documents, AIA and ConsensusDocs, take different approaches in some areas and similar approaches in others. Learn how you can leverage the advantages in standard construction and architectural agreements to improve your bottom-line.

- Learn how utilizing proper risk allocation boosts party relationships, profits, and avoids claims and delays
- Spot some contract killer clauses and contractual best practices to prioritize
- Learn the differences and advantage between ConsensusDocs and the AIA A201.

Register

Presenters:

Robert P. Majerus – Vice President and General Counsel, Hensel Phelps

Robert (Bob) P. Majerus, is a graduate of Georgetown University with a Bachelor of Arts Degree and has a Law Degree from the University of Notre Dame. He joined Hensel Phelps in 2006 and serves as Vice President and General Counsel, Bob has overall responsibility for contractual and legal



matters for the Greeley, Colorado-based organization. Prior to joining Hensel Phelps, Bob was a trial attorney for a private law firm.

Bob is admitted to the Arizona, Washington and Alaska bar Associations. He is Chair of the Documents Committee of the Associated General Contractors of America (AGC) and is a member of the AGC Building Division Leadership Board.

To meet his strong pledge to give back to the community, Bob is actively involved in supporting local, regional and national organizations with a commitment of his time and personal contributions.

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**Brian Perlberg – Executive Director and Senior Counsel,
ConsensusDocs**

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.

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ⁱ Proclamation 9704, “Adjusting Imports of Aluminum Into the United States”, March 8, 2018; (83 Fed. Reg. 11619);

Proclamation 9705, “Adjusting Imports of Steel Into the United States”, March 8, 2018 (83 Fed. Reg. 11625);

ⁱⁱ <https://www.mcaa.org/resource/fixed-price-construction-contracts-material-price-volatility-and-contract-costadjustment-clauses/>

ⁱⁱⁱ <http://www.bimplus.co.uk/management/why-bim-must-manufacturers/>

^{iv} <http://cic.org.uk/admin/resources/bim-protocol-2nd-edition-2.pdf>

^v Association Guidelines, GSA Guidelines, AIA Guidelines, 12SL Guidelines and IFMA Guidelines.

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