

# Digging Deep

## Updates From Hirschler Fleischer's Construction Law Group

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Providing insights and updates to the construction industry on emerging legal and regulatory issues, project management and litigation trends.

The Hirschler Fleischer Construction Law Group is a highly experienced team consisting of litigation attorneys who specialize in representing general contractors, subcontractors, architects, engineers and developers in all phases of construction contracts and claims.

### FEDERAL CONTRACTING NEWS FLASH!

A new federal regulation requires all federal contractors and subcontractors to have a code of business ethics and conduct. The new law also requires federal contractors to post specific fraud hotline posters at the jobsite and the business office. These new requirements are designed to foster the highest degree of integrity and honesty in federal contracting and apply to all contracts and subcontracts for federal jobs of \$5,000,000 or more with performance periods of 120 days or more. Under the new law, many federal contractors will also be required to adopt training programs, internal control systems and mechanisms for reporting suspected fraud.

For more information on these new requirements, contact Barry A. Hackney at [bhackney@hf-law.com](mailto:bhackney@hf-law.com)

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## Contract Provisions that Might Make you Want to Ditch a Project

By: Chandra D. Lantz, Esq.

Once the scope of work and contract value meet your needs, are there other contract provisions that could be so one-sided as to make you want to avoid the contract? Quite simply, yes. Buried in the contract are some other key provisions that can quickly turn a job so unfairly one-sided that it might be better to look for another project or contractor:

1. Indemnity and limitations of liability that make you the insurer for everyone on the job;
2. Consequential damage requirements and waivers;
3. Payment terms with unreasonable withholding provisions or "pay-when-paid" limitations;
4. Guarantees of constructability of the drawings (for contractors);
5. Pre-existing and site conditions clauses that shift all liability to one party; and
6. No damages for *any* delay clauses.

For more information on evaluating your contract before the project begins, contact **Chandra Lantz**, **Courtney Paulk** or **Webb Moore**.

## Building Information Modeling: Today's Contracts Might Not Work with Tomorrow's Technology

By: Chandra D. Lantz, Esq.

Three-dimensional building modeling is no longer just a design tool of the future. The technology is here today and will rapidly make its way into the landscape of routine commercial construction design. What is still uncharted, however, is who is on the hook if the as-built project doesn't resemble the 3-D design.

To realize maximum possible benefit, an owner utilizing 3-D design technology will require not just the designer but also the prime contractor and all subcontractors to input their design and coordination information into the model. The model should then provide, for example, coordination details that identify conflicts between trades or design errors. But what if one trade's contribution is incomplete through a data loss or human error? What if the modeling program fails to properly incorporate the information provided? What about judgment calls and field coordination issues that the model isn't savvy enough to provide? Not surprisingly, the law has not caught up with the emerging technology.

To read the full article, click [HERE](#).

### **Indemnification: Get it in Writing**

By: Devon Williams Cushman, Esq.

Indemnification, simply put, means one person pays for damage to another caused by a specified event or loss. Every construction project contains situations ripe for indemnity: defective work, stolen equipment, personal injuries, broken pipes. Shifting final responsibility to the person who actually caused the damage, however, isn't always a straightforward process.

There are two types of indemnity: express and implied. A claim based on express indemnity arises from a written agreement. Implied indemnification only arises if there are specific relationships between the parties.

Every effort should be made to address indemnification in the contract documents. These provisions provide certainty that any losses incurred will be shifted to the party who is primarily liable for the loss.

To read more about Indemnification, click [HERE](#).

### **AGC Fails to Endorse New AIA General Conditions but Endorses New ConsensusDocs**

By: Courtney M. Paulk, Esq.

Despite previous endorsements to the AIA Contract Documents by The Associated General Contractors of America ("AGC"), the AGC did not endorse the 2007 Edition of the AIA A201 General Conditions. The AGC decided not to endorse the A201 for several reasons. For example, the AGC concluded that the new A201 creates an inappropriate standard of care by requiring contractors to perform "perfectly" to avoid liability when operating under owner-mandated means and methods. The AGC also viewed the changes to the contractor's right to obtain financial assurances from the owner as more restrictive than the 1997 A201. The AGC also disliked the use of language from the 1997 version that encourages owners and contractors to communicate through the architect rather than directly. Focusing on recent trends toward collaboration, especially in light of BIM and other delivery methods, the AGC

determined that this requirement is not consistent with industry best practices. To read full article, click [HERE](#).

## Do Your Projects Have Written Contracts?

By: Courtney M. Paulk, Esq.

In Virginia, all "contractors" are regulated by the Virginia Department of Professional and Occupational Regulations ("DPOR"). DPOR regulates both commercial and residential Contractors. "Contractor" is broadly defined as to include anyone who is paid to bid, contract, order, manage, perform, supervise, or undertake the "construction, removal, repair or improvement of any building or structure permanently annexed to real property or any other improvements to such property." Any person operating as Contractor in these ways must have a DPOR Contractor's license and subject to a whole host of DPOR rules and regulations.

To read full article, click [HERE](#).

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