

Hot Topics in Clean Water Law

June 18, 2014



Next Generation MS4 Permitting & Compliance Strategies

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EPA Will Focus on Permits After Dropping National Stormwater Rule

- Pursuing a suite of ***immediate*** actions
- Providing incentives, tech assistance, and tools to encourage communities to ***implement strong*** prgms
- Leveraging existing requirements to strengthen municipal ***stormwater permits***
- ***Promoting green*** infrastructure as an integral part of stormwater management

Achieve significant, measurable, and timely results in reducing stormwater pollution

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Presentation Overview

1. Keep the ***MEP*** Compliance Standard
2. ***Right-Size*** Your Permit to Keep It “Practicable”
3. Map the MS4 ***Service Area*** to Your Minimize Liability
4. Draft Your ***TMDL Documents*** to Minimize Liability

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MEP vs. BMEP:

Keep the MEP Compliance Standard

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MEP vs. BMEP

CWA § 402(p)(3)(B)(iii)

- “reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, engineering and design methods, and such other provisions as ... appropriate”

Typical Local Government MS4 Position

- MEP is the overarching compliance standard, not WQS
- Any requirement for MS4s to comply with WQS is subject to and limited by the MEP level of effort

Typical Environmental Group Position

- Locality MS4s must “strictly comply” with WQS
- Apparently even if that requires spending and controls Beyond Maximum Extent Practicable (“BMEP”)

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No Court Has Required BMEP Over Permittee's Objection

- ***Defenders of Wildlife vs. Browner* (9th Cir. 1999)**
 - CWA does **not** require MS4s to comply with WQS
- ***Tualatin Riverkeepers v. Oregon DEQ* (Ct. App. 2010)**
 - “dischargers of municipal storm water are **not subject to** that [WQS] requirement”
- ***Cons. Law Fndtn v. Boston W&S Comm’n* (D. Mass. 2010)**
 - CWA “**does not mandate** that permits issued by EPA for ... require compliance with numeric WQS”
- ***NRDC v. New York State DEC* (NY Sup. Ct. App. Div. 2013)**
 - “municipal storm sewers shall require controls to reduce the discharge of pollutants to the **MEP without reference to any numerical limitation...**”

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MD Dangerously Close to BMEP

- ***Anacostia Riverkeeper v. MDE & Montgomery Co.***
 - Circuit Court of Montgomery County, MD (Dec. 4, 2013)
- “permit must include requirements needed to meet WQS”
- “permit lacks ascertainable metrics for meeting WQS”
- “specific requirements for meeting WQS must be stated”

Will Appellate Court Endorse MEP or BMEP?

NACWA Advocacy

Amicus Brief with Maryland Localities

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Alternative: DC Permit (EPA, 2011-12)

The permittee must manage, implement and enforce a stormwater management **program ... to meet** the following requirements: ...

Attain **applicable WLAs** for each established or approved TMDL for each receiving water body, consistent with 33 U.S.C. §1342(p)(3)(B)(iii); 40 C.F.R. § 122.44(k)(2) and (3); ...

Compliance with the provisions contained in Parts 2 through 8 of this permit, including milestones and final dates for attainment of applicable WLAs, shall constitute **adequate progress** toward compliance with DCWQS and WLAs for this permit term.

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“Adequate Progress” Provisions

- Subjects WQS Goals to MEP Concept
- Permit recognizes WQS and TMDLs, and sets WQS attainment as ultimate goal
- But Permit uses MEP to determine and approve the MS4's level and pace of effort in that direction
- With clear permit language, this protects permittee from the “strict WQS compliance” trap and associated enforcement liability

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MS4 Regulatory Success Strategies

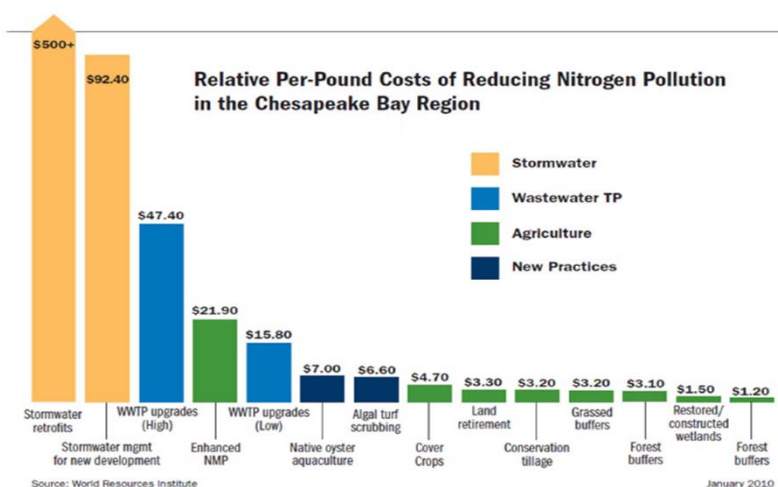
- MS4s Must Insist on a Safe Regulatory Path
- Reverse *Anacostia Riverkeeper*
- Keep control by avoiding forced non-compliance
- Challenge impossible terms and compliance traps
- Insist on doable tasks, smart investments

Stand on the Moral & Environmental High Ground

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Right-Size Your Permit

Using MEP Analysis to Keep It Practicable



MEP Analysis (MEPA) Is a Community-Specific Strategy

- **EPA Has Not Defined MEP**
 - Intended each MS4 would review on case-by-case basis
- **Recognized Considerations In Determining MEP**
 - Condition of receiving waters
 - Specific local concerns
 - Other aspects of comprehensive watershed plan
 - MS4 size
 - Implementation schedules
 - Ability to finance
 - Capacity to perform O&M
 - Hydrology / geology

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Two Primary Uses of MEP Analysis

1. **Increase Certainty / Reduce Regulatory Risk**
 - Risk arises from fact that “BMPs to the MEP” is a subjective standard
 - MEP Analysis can support determination of adequate level of effort (or even specific requirements) to reduce risk
2. **Right-Size Excessively Onerous Permits**
 - Grounded in CWA and implementing regulations, this method is useful for managing the ever-growing regulatory to-do list driven by EPA and special interests
 - Announce your MEP and negotiate it with regulators in lieu of a permit you cannot meet

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1. Managing MEP Risk

- **You Need a Strategy for Managing MEP Risks**
 - Especially Phase I MS4s
- **“BMPs to the MEP” is Subjective Standard**
 - Undefined and community-specific
 - Leaves MS4 open to allegations that program is not MEP
- **MEP Litigation Requires Court to Determine Facts**
 - No early decisions (e.g., summary judgment)
 - Generally means expensive, burdensome process for MS4

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Managing MEP Risk (cont.)

- **Define MEP Up Front**
 - Submit MEP Analysis with permit re-application
 - Begin discussing with regulator early in negotiation stage
- **Trade-Off Some Flexibility for Certainty**
 - Up front MEP determination sets your obligations
 - Minimizes risk of enforcement-based second guessing

***You keep more control over
management of your program***

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2. Right-Sizing By MEP Analysis

- **Means to Formally Request Relief**
 - From unachievable (proposed) permit terms
 - Shows your citizens you tried even if request denied
- **It Is Too Late After your Permit Is Issued**
 - Speak up during negotiations if you are worried about being able to comply
- **Create a Framework for Permit Decision**
 - Build a record before permit issued
 - Provides basis for appeal if needed
 - Gives you leverage with regulator

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How MEP Analysis Changes the Dynamics of Permit Negotiation

- **MEPA Brings Focus to Level of Effort Issues**
 - Your MEPA charges the regulator to reach a reasonable MS4-specific decision based on best available information
 - Regulators understand that and will know you are serious
 - Harder for them to ignore specifics than general statements
- **If Agency Issues Excessive Permit, MS4 Will Have**
 - Given regulator every opportunity to make reas. decision
 - Staked out the “moral high ground” in the process, and
 - Created an administrative record on which to stand during any necessary appeal

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Guidance for Performing MEPA

- **Analyze Practicability of Draft Permit**
 - Provision-by-provision
- **Example Practicability Issue: Timing Challenges**
 - Ex: Management program ramp-up demanded too fast
- **Example Practicability Issue: Cost**
 - If excessive increase in stormwater utility rates (or taxes) would be required to meet revenue requirements of draft permit ...

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MEPA Cost Component Details

- **Cost Out the Draft Permit**
 - Assist regulator with info on the program costs and the stormwater utility rates regulator is requiring
 - Many unknowns, but make reas. assumptions and do it
- **Determine MEP Level of Public Investment**
 - For developing MS4 Program, plan reasonable increases
 - Different for each community
- **Propose Best Use of Available Funds**
 - Tailor Draft Permit appropriately
 - Meet flood control / drainage needs while optimizing water quality benefits

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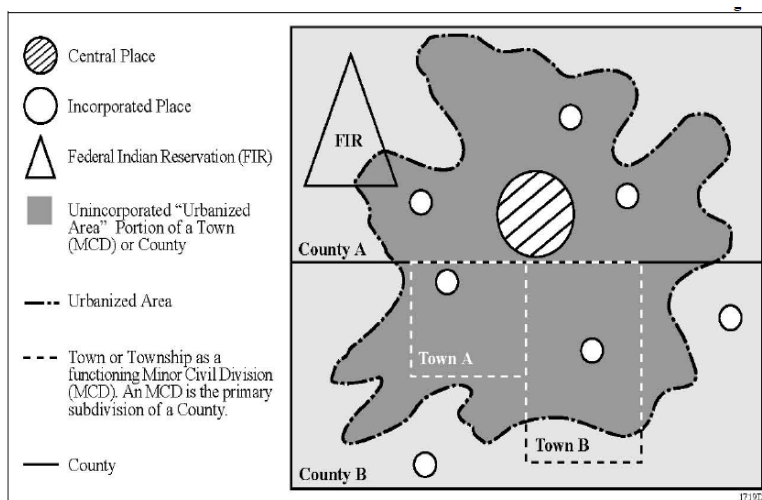
Negotiating Permits Based on Your MEPA Results

- **The Detailed Permit Approach**
 - Increase specificity of permit
 - Set specific, measurable requirements you will meet
- **The Reference Approach**
 - Incorporate MEPA's key findings by reference, or
 - Define level of effort (\$/yr) for later use in your SWMP
- **General Permit Considerations**
 - If necessary, apply for Individual Phase 2 MS4 Permit if MEPA dictates need for customization of General Permit
 - Availability / procedure is state-specific legal issue

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Map to Minimize

*Mapping Your MS4 Service Area
To Minimize Your Liability*



First Principles

- **Statutory Authority / Jurisdictional Issues**
 - Clean Water Act regulates owner's discharge of a pollutant from a point source to a water of the U.S.
- **"Next Gen" Pushing CWA Legal Envelope**
 - Ex: No EPA authority for "Flow" TMDLs despite authority claimed by EPA in 2010 stormwater guidance
- **Always Understand Legal Basis for Mandates**
 - Statutory authority
 - Applicable regulation

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Basic Concept: Legal Minimum Geographic Scope

- **"Municipal Separate Storm Sewer" Definition**
 - 40 CFR §122.2
- **Focus on the System That You Own & Operate**
 - "A conveyance or system of conveyances ... **Owned or operated by** a public body such as a State, city, town, borough, county, etc."
 - A system that the **permittee itself** owns/operates
- **Permit Is Properly Limited to MS4 Service Area**
 - CWA gives EPA no authority to order Locality MS4 to "go fix" private property not connected to Locality MS4
 - Exclude CSO areas

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“Map to Minimize” Jurisdiction: Conveyances Excluded – Phase II MS4 Rules

- **Storm Sewers Beyond “Urbanized Area”**
 - A Phase II MS4 Concept (40 CFR §122.32(a)(1))
 - “If your small MS4 is not located entirely within an urbanized area, **only the portion that is within** the urbanized area is regulated”
- **Exception for Sewers in Very Discrete Areas**
 - “Small MS4” does not include separate storm sewers in very discrete areas, such as individual buildings

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Ex: No Point Source Ownership

Sheet
Flow
Discharge
Direct to
Stream



Ex: Pipe in Private Ownership



**Discharges
from Private
Systems
(Red) Direct
to Stream**

(Not connected
to Locality MS4)

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Other Examples

- **Other NPDES Permits**
 - “Some State & Fed property, certain small municipalities, and industrial facilities are regulated under other NPDES stormwater permits and the storm drain systems in these entities may be excluded...” (MD Guidance)
- **Unpermitted Federal or State Land**
 - Fed/State govts should not shift responsibility to Locality
 - Ex: Large federal properties vs. Post Office building
- **Forests / Rural Zoning**
 - No point to include / no appropriate treatment
 - At some point, development is so little that impacts are minimal or site meets “MEP”

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Highway System Jurisdictional Issues

- **What Is the DOT's MS4 Service Area?**
 - Ex: Based on regulatory definitions?
 - Ex: Based on Right-of-Way only?
- **Private Property → Locality MS4 → Stream?**
 - Locality MS4 responsible for discharge from its system
- **Private Property → DOT MS4 → Stream?**
 - Regulations point to a fairly simple answer
 - However, DOT MS4s typically takes view that they are responsible for drainage only from their Right-of-Way
 - If not DOT, who is responsible within CWA jurisdiction?

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Manage TMDL Documents

Minimize Your TMDL Liability in Plans & Permits

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TMDL Compliance Plan Provisions

- **Next Gen Permits → TMDL Planning Provisions**
 - Potentially most costly part of next generation permit
- **These are Regulatory Documents**
 - Part of permit; binding; more “contract” than “plan”
- **What to Do With Flawed Underlying TMDLs**
 - Get them fixed before they become problem for your plan
- **MS4 Typically “Holds the Pen” in Plan Prep**
 - A well-drafted plan can serve you well for years

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Ex: Maryland MS4 TMDL Plans

- Within 1 year, County shall submit to MDE for approval a **restoration plan for each stormwater WLA** approved by EPA prior to the effective date of the permit.
- The County shall submit restoration plans for subsequent TMDL WLAs within one year of EPA approval.
- Upon approval by MDE, these restoration plans will be enforceable under this permit.
- Elements of plan ...

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Ex: MD MS4 TMDL Plans (cont.)

As part of the TMDL restoration plans, County shall:

- Include the **final date** for meeting applicable WLAs and a **detailed schedule** for implementing all structural and nonstructural water quality improvement projects, enhanced stormwater mgmt prgms, and alternative stormwater control initiatives necessary for meeting applicable WLAs;
- Provide **detailed cost estimates** for individual projects, programs, controls, and plan implementation;
- Evaluate and track the implementation of restoration plans through **monitoring or modeling to document the progress** toward meeting established benchmarks, deadlines, and stormwater WLAs; and
- Develop an ongoing, iterative process that continuously implements ... projects, programs, etc.

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Goals to Focus Your Plan Drafting

- **Authorization**
 - Power to pursue your best plan your way
- **Certainty**
 - Clear terms and conditions on the issues that matter
- **Protection**
 - Cut off adverse interpretations, additions, challenges
- **Flexibility**
 - Preserve the full value of “adaptive, iterative” process
 - 5-Year Scope for a 5-Year Permit

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Success Strategies for Your MS4 TMDL Plan Drafting

- **Established Overarching MEP Qualifier**
 - Be clear MEP trumps all other details in plan (no BMEP)
- **Manage Potential Adverse Policy Changes**
 - Capture assumptions; protect against late adverse changes
 - Ex: Down-rating of efficiency of BMP type you use pushes permit into non-compliance just before end of permit term
- **Option to Adjust for New Helpful Information**
 - Ex: State up-rating of efficiency your key BMP type
 - Ex: Corrected MS4 service area delineation

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Success Strategies for Your MS4 TMDL Plan Drafting (cont.)

- **Manage Overall Deadlines**
 - Avoid unnecessary deadlines, be conservative with timelines for real world issues, qualify/caveat, “target dates”
- **Manage Project-Specific Deadlines**
 - Site-specific qualifiers (e.g., access)
 - Programmatic approach / option to substitute equivalents
- **Anticipate Potential Trading & Other Options**
 - Option to use/substitute credits to extent authorized by state law
- **Use Flexible Terminology**
 - Set targets and goals, avoid self-imposed mandates, describe program in manner to keep options open, etc³⁶

Conclusion

1. Keep the MEP Compliance Standard
2. Use MEP Analysis to Right-Size Your Permit & Keep It “Practicable”
3. Map Your MS4 Service Area to Minimize Liability
4. Manage Your TMDL Documents to Minimize Liability

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THANK YOU

Questions / Discussion

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Always Hot Topics in Avoiding and Resolving Construction Disputes

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Who Pays for Defective Design?



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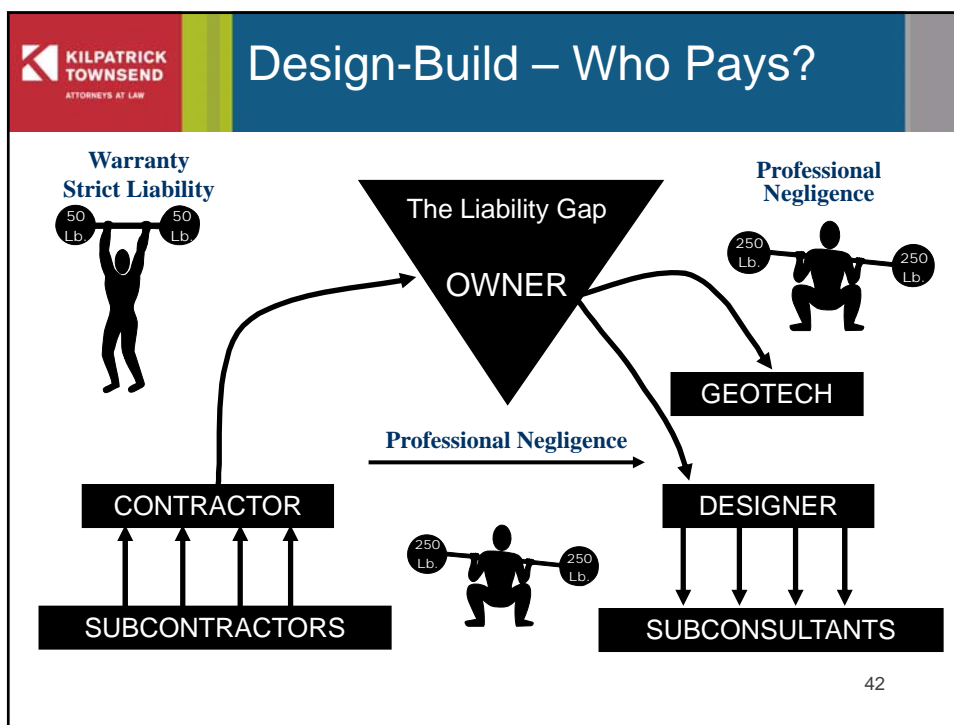
Misleading Plans and Specs

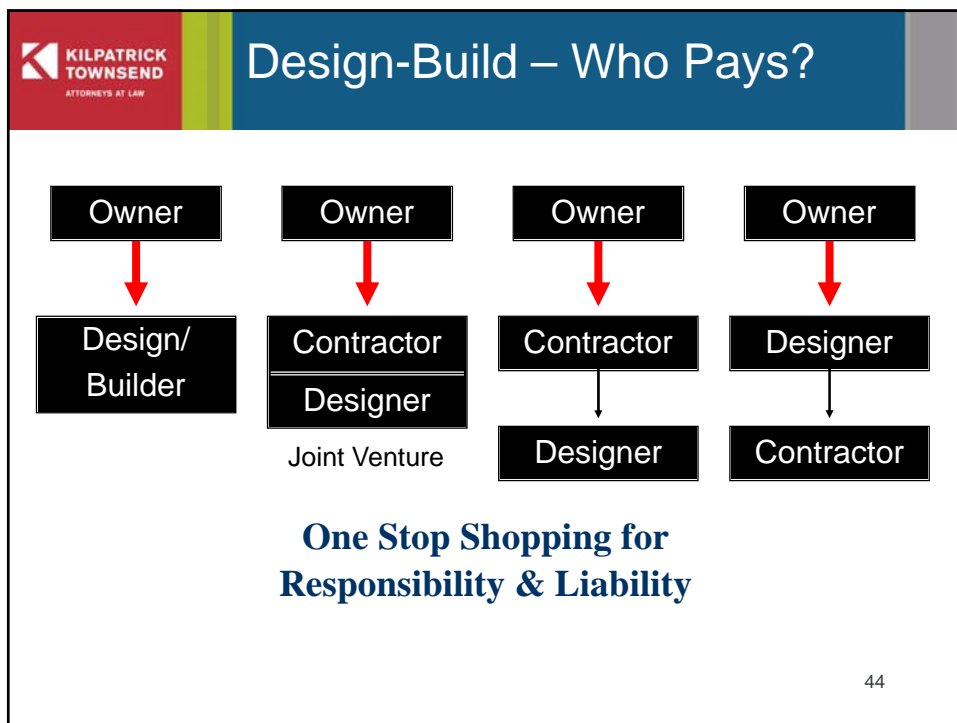
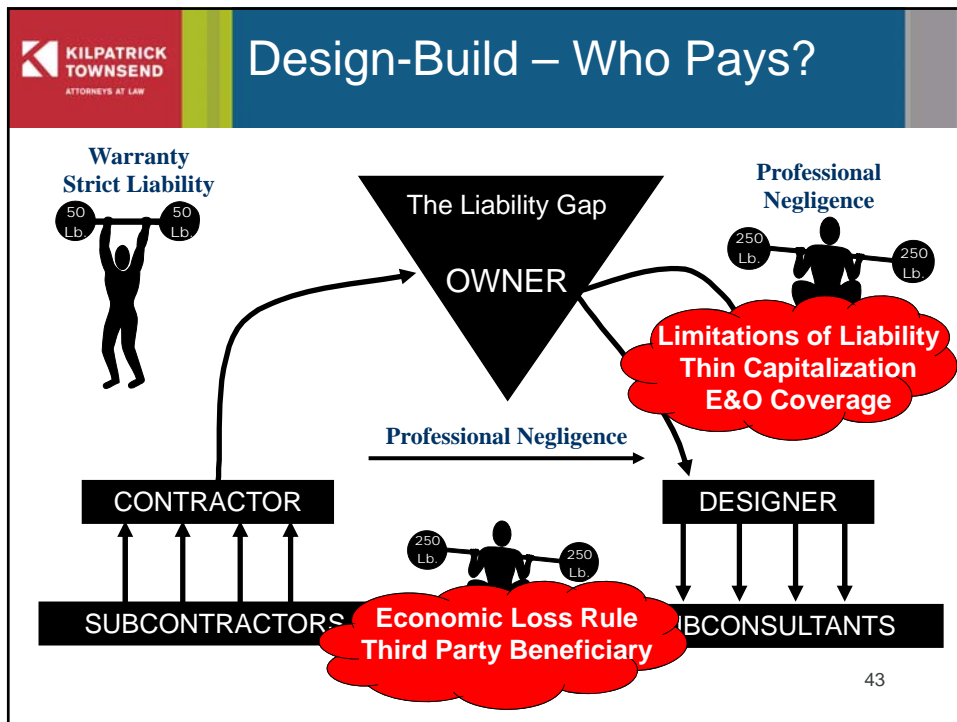



G. Voskanian Const., Inc. v. Alhambra Unified School Dist., 204 Cal. App. 4th 981 (2d Dist. 2012)

- Project to move portable buildings at school.
- During project, became clear that architect neglected to include a fire alarm system for the relocated buildings.
- During the bidding process contractor participated in a job walk to ascertain the interior configurations of the buildings, but because classes were in session bidders were allowed to view only two of the sixteen buildings and from the doorways only.
- After contractor was awarded the fire alarm contract it discovered that many of the portable buildings had more rooms than shown on the plans.
- Change order request denied.
- Court held the contractor was entitled to recover for extra work because its bid was based on incorrect plans and specifications supplied by the district. Furnishing misleading plans and specifications constitutes a breach of the implied warranty.

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Build to Design: Shades of Gray



Who pays for defective design?

Clear in “theory.”

But you do not deal in theory!

Anything that requires your attention is
in a gray area.


Five most important things.

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Build to Design: Shades of Gray




- **Performance Specifications**
 - Design/Build Responsibility
 - Design Specifications vs. Performance Specifications – High risk of latent defect or ambiguity/defect
- **Shop Drawings**
 - Liability for Design Changes
 - Designer Approval is Not Acceptance of Liability
 - What Constitutes a Design Change?
- **Secondary Design Review**
 - “Fill in the Gaps”
 - Field Coordination
 - Patent Defects
 - Permits, Codes & Regulations

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Build to Design: Shades of Gray




Design professional approval does not relieve contractor

- from responsibility of complying with plans & specs
- from errors and omission in shop drawings


AIA A201 (2007) § 3.12.8:

§ 3.12.8 The Work shall be in accordance with approved submittals except that the **Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples or similar submittals UNLESS the Contractor has specifically informed the Architect in writing** of such deviation at the time of submittal **and** (1) the Architect has given **written approval** to the specific deviation as a minor change in the Work, **or** (2) **a Change Order** or Construction Change Directive has been issued authorizing the deviation. The **Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect's approval thereof.**

Real issue: What is "change" vs. additional detail consistent with the existing design? Steel detailing . . ."Quietly" resolving design conflicts



Build to Design: Shades of Gray




Contractor responsible for field measurements & coordination

AIA A201 (2007) § 3.12.6

By submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents to the Owner and Architect that the Contractor has (1) reviewed and approved them, (2) determined and **verified materials, field measurements and field construction criteria** related thereto, or will do so and (3) **checked and coordinated the information contained within such submittals with the requirements of the Work** and of the Contract Documents.


- Field coordination vs. design coordination - Overhead MEP

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Build to Design: Shades of Gray




Catch-all clause requiring contractor to meet plans & specs AND ALSO everything that may be “reasonably inferred” and required to produce desired result.

AIA A201 (2007) § 1.2.1:

The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.


- It depends!!!
- Control piping and wiring for equipment– latent defects?
- Equipment supports on roof
- Higher risk: Multiple contractors, owner furnished equipment

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Build to Design: Shades of Gray




Contractor responsibility to review the design and to call to attention to any errors or omissions it finds.

AIA A201 (2007) § 3.2.2

*** 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.

- What if contract says “errors contractor identifies or should have identified”?
- Reverse reliance regarding the design
- CMAR constructability reviews?
- Design-build?


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Some Design-Build Cases

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Local Permit Problems – Too Bad

NACWA

Bell/Heery v. US, 106 Fed. Cl. 300 (2012)


- Design build contract for Federal BOP
- New Hampshire Department of Environmental Services permit requirements dramatically altered the project scope costs and duration.
- Requirements addressed in technical design guidelines and generally in standard Permits and Responsibilities Clause
- FBOP did not breach by failing to intercede
- No breach a duty of good faith and fair dealing
- Doctrines of constructive and cardinal change did not apply – no change or breach by FBOP

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Doctrine of Superior Knowledge Does Not Protect Design Builder



Macro-Z Technology for, 12-1 BCA P 35000 (ASBCA 2012)


- Design builder asked that its contract with NAVFAC be rescinded based on superior knowledge, *et al.*
- NAVFAC accepted proposal of \$4 million, when its estimate was \$6 million.
- Denied: the government estimate for a design build contract does not amount to knowledge of anything – much variance because of flexibility of design build.
- Real problem was contractor’s erroneous assumptions.

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Design Builder’s Misunderstanding Of Market, Not Govt Changes, Bar Claim



Fluor Intercontinental, Inc., CBCA (2012)

- Design build contract for embassy complex in Kazakhstan
- Contractor misunderstood local construction market regarding capacities of piles available from local manufacturers, its ability to use Russian rebar, and the availability of the concrete makes it specified.
- Contractor claimed changes and representations by Govt. Claim denied!
- “The contract placed all of the responsibility for design and construction (and, as a consequence, all of the risk) on the Fluor.”



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Notice Provisions

Who said constructive notice was good enough?

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Notice Provisions

– California Will Strictly Enforce


Greg Opinski Const., Inc. v. City of Oakdale, 199 Cal. App. 4th 1107, 2011 WL 4625304 (5th Dist. 2011)

- Contract required completion in 300 days; project 7 months late.
- Contract provided that time extensions because of owner delay required a written change order by mutual consent or a claim in writing requesting a formal decision by the engineer
- Contractor had not submitted any requests for time extension or received any change orders
- California statute (Civil Code 1511) held to allocate to contractor risk of delay costs – even for those beyond his control – unless notice provisions in contract explicitly followed.

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Risk of Lack of Technical Compliance With Notice Requirements




C.R. Klewin Northeast LLC v. State of Connecticut

- Contractor completed project; documented request for additional \$2,678,256.
- Over next three years accounting firm recommended a change order of \$1,535,518, and Contractor was advised CO and/or payment in process.
- Still no payment. On 04/15/04, Contractor sent letter, referring back to 08/31/01 letter and asking for payment. More attempts to resolve claim. Even governor authorized a settlement of \$1.2 million. Still nothing was ever paid.
- Contractor filed suit in 11/07 – Court granted State's motion to dismiss for failure to comply with notice requirements in contract and public construction statutes. -- There was no "reference to any intent to pursue a claim, pursuant to § 4-61 [the statutory notice requirement], or by suit or arbitration,..."
- Supreme Court of Connecticut reversed - April 15, 2004 letter conveyed the factual basis of its claim as required by § 4-61(a).
- So common sense prevailed in Connecticut, and look to the substance of the communication.

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Notice & Claim Procedures




- Timed notice requirement with content and a stipulation about prejudice from lack of notice
- Beyond initial notice, specific requirements for the timing and content of additional claim submissions
- Express warnings that failure to comply with the submission requirements will result in waiver and complete bar to the claim
- The owner must be prepared to fulfill its obligations under the claim specified process

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Notice & Claim Procedures




No claim by the Contractor against the City for additional compensation related to the Biosolids Management Services **shall be valid unless** a notice of claim is filed with the City within ten (10) days after occurrence of the event upon which the claim is based, and, . . .

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Notice & Claim Procedures




in addition, unless a detailed written statement of the claim, accompanied by vouchers and other supporting data, shall have been filed with the City by the Contractor within thirty (30) days after the occurrence of said event.

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Notice & Claim Procedures




. . . the City shall review same promptly. In conducting this review, the City shall have the right to require the Contractor to submit such additional or supporting documents, data and other information as the City may require. Failure to submit such additional documents, data or other information within fifteen (15) days following a written request therefor **shall be deemed a waiver of the claim.**

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Notice & Claim Procedures





Failure of the Contractor to file any claim within the time limits prescribed herein or in the precise form or manner required hereby shall be deemed a material prejudice to the interests of the City and shall constitute an absolute waiver of the claim and the right to file or thereafter prosecute the same.

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Time Extensions, Liquidated Damages & No Damage for Delay

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Delay Damages

Waiver of consequential damages

Liquidated damages for delay


- Scope? All time related costs. Any carve outs should be expressly stated.
- Contractor limitation of liability!
 - Make sure the price is right?
 - Project specific consideration and calculation
- Run until substantial completion or final completion?

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No Damages for Delay – Enforced Even with Owner Negligence



Markwed Excavating v. City of Mandan, 791 N.W. 2d 22 (N. Dakota, 2010)


- Contract for storm sewer improvements under existing roadways.
- Contract allowed for time extensions under certain circumstances.
- No damages for delay clause – time only, unless delay unavoidable and beyond its control.
- Clause also protected City from damages resulting from work delays caused by the City’s act or neglect, including those it employed.
- City failed to make land for staging as required by contract –project substantially delayed. Contractor sued to recover \$400,000.
- ND Supreme Court:
 - Public policy is freedom to contract, no damages for delay clause enforceable.
 - Doesn’t matter that City’s neglect caused delay.
 - Contractor should have protected himself by bidding more!

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More No Damages for Delay – More Owner Negligence is OK



Port of Houston Authority of Harris County v. Zachry Constr. Corp., 377 S.W.3d 841 (Tex. App. Houston 2012, pet. filed)


- Contractor’s sole remedy for any delay was time extension
- Contractor claimed owner interfered with means and methods during construction, resulting in project delays.
- Owner withheld LDs; jury found owner had breached and awarded \$18 million in compensatory damages to contractor. - REVERSED
- No damage for delay clause provided: “EVEN IF SUCH DELAY OR HINDRANCE RESULTS FROM, ARISES OUT OF OR IS DUE, IN WHOLE OR IN PART, TO THE NEGLIGENCE, BREACH OF CONTRACT OR OTHER FAULT OF THE PORT AUTHORITY.”
- Clause strictly enforced this – even though the owner creates delays that last in perpetuity and then grants the contractor an extension of time that lasts in perpetuity, thus breaching the contract while leaving the contractor with no remedy!
- Court said: “the parties strike the deal *they* choose to strike and, thus, voluntarily bind themselves in the manner *they* choose.”

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Time Extension Clause – Read Carefully



Ray Bell Construction Co. v. Tennessee Department of Transportation


- Contract for highway interchange in Memphis - \$10,000 per day incentive/liquidated damages clause.
- Contractor claimed that project delays caused by a combination of (1) low estimated initial quantities, (2) the owner's failure to timely provide access easements and (3) impacts caused by unforeseen damage to adjacent properties.
- Contractor wanted change in the completion date that would qualify it for incentive payments.
- Contract completed 2 days late, however.
- Involved approximately 20% more work than forecasted by the owner.
- Delayed by owner's failure to timely provide an easement according to schedule.
- Owner granted partial time extension but would not agree to apply time extension to calculation of incentives – Contractor refused and brought claim.

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Time Extension Clause – Read Carefully



Ray Bell Construction Co. v. Tennessee Department of Transportation

- Court of Appeals → contract ambiguous, parole evidence shows Contractor's pro-rata approach correct. Should get 250 day extension and \$2.5 million incentive payment
- Tenn. Supreme Court → contract NOT ambiguous. Key clause provided:
 - The December 15, 2006, completion date may be extended in accordance with the Standard Specifications, however, no incentive payment will be made if work is not completed in its entirety by December 15, 2006.
- Clause in harmony with others that allowed for extension of completion date. No incentive payment, but no LDs either.

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Hot Topics in Clean Water Law
Always Hot Topics
in Avoiding and Resolving Construction Disputes

Thank you!

Neal J. Sweeney

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NACWA



ConsensusDocs™
BUILDING A BETTER WAY

Better Contracts to Get Better Results



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www.ConsensusDOCS.org

NACWA
A Clear Commitment to America's Waters

Why Consensus is Needed in Construction Contracts

- **Perception of Bias**
 - Standard form agreement favors interests of individual drafting association
- Modifications exceed the original “standard form”
- Parties try to push risk away rather manage it
- **Industry trending towards collaboration**

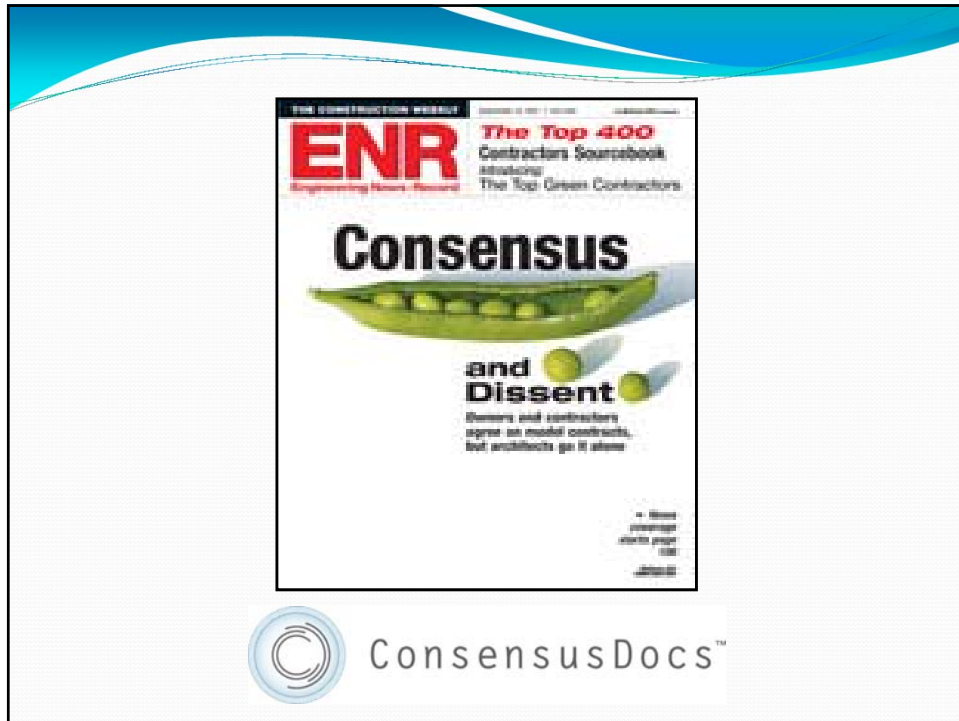


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Why Contract Documents Matter For Projects Results

- Canadian Study 8 BAD CLAUSES INCREASES PRICE 20%
- CII Study on contracts
 - Unnecessary Risk Contingencies
 - Best Contractors Seek the Best Owners
 - Worst contracts get worse results.

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The ConsensusDocs Coalition

40 Leading Construction Industry Associations



75

ConsensusDocs Library of 100+ Documents

- 200 Series: General Contracting
 - 210 Public 271 Instruction to Bidders
- 300 Series: IPD/Collaborative
- 400 Series: Design-Build
- 500 Series: Construction Management
- 700 Series: Subcontracting
- 800 Series: Program Management

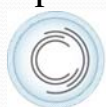


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Contract Drafting Principles

- Best Practices + Fair Risk = Better Projects
- Reduce transactional costs & inefficiencies
- Change Zero-Sum to Win-Win
- Empower Owners
- Written in plain English



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Infrastructure Documents NACWA Volunteers

- St Louis Sewer District
- Wayne County MI Department of Public Services
- King County
- Northeast Ohio
- Kilpatrick Stockton LLP

ConsensusDocs Highlights

Owner/Constructor Agreement & General Conditions

- Active Owner
- A/E is NOT the funnel for decisions/communications
- Limited consequential damages
- Dispute Resolution
- Electronic communications protocol.



Proven Results for St of Iowa

- Iowa DAS' using AIA vs ConsensusDocs

Using AIA	Using CDs
68 project/year	98 projects/year
\$40M/ year	\$80M/year
Claim/s on EVERY PROJECT	NO Formal CLAIMS on over \$400 M in construction

See *Constructor* Jan/Feb issue 2014.

Agreement Structure

ConsensDocs

- One integrated document – GCs and Agreement
- Written in a understandable and precise language

AIA

- A201 is separate general conditions document.
- Same general conditions are used for design-build, design-bid, build, and CM/GC.

Ethics (2.2.1)

- Avoidance of conflicts
- No Contingent Fees or Gratuities to or from either Party
- Flows to agents, officers and employees

Defining the Parties' Relationship

ConsensusDOCS

- Perform with Integrity, Avoiding Conflicts (*Art. 2.4*)
- Work Together on Basis of Mutual Trust, Good Faith & Fair Dealing
- Take Actions Reasonably Necessary to Enable Each to Perform Timely, Efficiently & Economically
- Promote Harmony & Cooperation (*Art. 2.2*)

AIA

- Architect May not Accept Employment, Interest or Contribution That Would Appear to Compromise Architect's Judgment (*B101 . 2.4*)

Dispute Mitigation and Resolution

- Mitigate through mandatory direct Party communications
 - Project Level
 - Management Level
- Optional Project Neutral or Dispute Review Board (DRB)
 - Must visit the site and make finding w/in 5 days
- Mediation is required
- Parties decide - Arbitrate or Litigate
 - Current AAA rules for arbitration
 - **Non-Prevailing party pays, including legal fees**



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Order of Precedence

ConsensusDOCS

- Provides an order for interpreting conflicting contract documents
- Avoids unneeded litigation costs
- Most recent contract documents govern
- Change Orders = highest precedence.

AIA

- Golden Rule. He who has the gold, makes the rules.

CONSEQUENTIAL DAMAGES

ConsensusDOCS 200

- Exclude LDs.
- Waiver shall not affect losses covered by contractually-required insurance
- Fuller definition of conseq. damages.

AIA A201

- Excludes LDs (Sec. 15.1.6)

ConsensusDocs 240

Owner/Design Professional Agreement & Gen. Conditions

- Detailed insurance requirements
- Detailed basic and add't services
- Copyright permission or ownership
- Schinnerer "finds ConsensusDocs agreement is fair and insurable."



INSTRUMENTS OF SERVICE / COPYRIGHT OWNERSHIP

ConsensusDOCS 240

- Owner may use Instruments for "maintaining, renovating, remodeling, constructing, using, maintaining, expanding" project (10.3.3)
- If Agreement Terminated, Owner may continue to use Instruments upon payment of amounts then due under the Agreement (10.1.2)
- Copyright transfer can be negotiated (10.1.1)

AIA B-101

- Architect owns copyright (7.2)
- Owner gives license for construction, using or altering adding to project (7.3)
- If Agreement Terminated for Owner Default or Convenience, Owner's license to use Instruments ceases unless additional licensing fee paid (7.3, 11.9)



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Arlington Metrolink Project • Metrolink 200 contract

Documents	Share	Uploaded	Comment	Compare Documents	Actions
Download Finalized	Share	Brian P. 10:31 AM	Comment	1.2 to Standard (PDF)	Share
Download 1.1	Share	Brian P. 10:29 AM	Comment	1.2 to 1.1 (PDF)	Share
Starting with: Brian P. <bdoctester@agc.org>					
Download 1.0	Share	Eric Santiago 10:25 AM	Comment	1.1 to 1.0 (Word) / (PDF)	Share More
Starting with: Brian P. <bdoctester@agc.org>					
Download Standard	Share	Eric Santiago 10:23 AM		1.0 to Standard (Word) / (PDF)	Share More


Supporting Documents

[Add document](#)

Supporting Documents	Creation Date	Share Documents
No supporting documents.		

Project Dashboard:

- Share contracts
- Version control
- Document Comparison
- Make Favorites
- Finalize Documents
- Add Supporting Documents



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Finalized

vs.

Standard

ARTICLE 1 AGREEMENT

Job Number: 12345 Account Code: _____

This Agreement is made this 9th day of March in the year 2012.

by and between the

OWNER, VDOT

and the

CONSTRUCTOR, ABC Contractors

Tax identification number (TIN) _____

Contractor License No., if applicable _____

for construction and services in connection with the following

PROJECT Arlington Metrolink Project

Notice to the Parties shall be given at the above addresses.

The Design Professional is _____

ARTICLE 2 GENERAL PROVISIONS

2.1 The Constructor shall furnish construction administration and management services and use the Constructor's diligent efforts to perform the Work in an expeditious manner consistent with the Contract Documents. The Parties shall each endeavor to promote harmony and cooperation among all Project participants.

2.1.1 The Constructor represents that it is an independent contractor and that in its performance of the Work it shall act as an independent contractor.

2.1.2 Neither the Constructor nor any of its agents or employees shall act on behalf of or in the name of the Owner except as provided in this Agreement or unless authorized in writing by the Owner's Representative.

2.2 ETHICS The Parties shall perform their obligations with integrity, ensuring at a minimum that each: (a) avoids conflicts of interest and promptly discloses any to the other Party; and (b) warrants that it has not

2

ConsensusDocs™ 200 - Standard Agreement and General Conditions Between Owner and Constructor - "200" Standard Form
THIS DOCUMENTARY AGREEMENT AND GENERAL CONDITIONS BETWEEN THE STANDARD AGREEMENT, and a report of conditions on the
provided through the Construction process. Consistent with the agreement and conditions of the other documents
are hereby incorporated. Payment of the contract price shall be made to the party to whom the contract price is payable
only. The only valid release of the contract documents is in accordance with the terms of the contract and the other documents
and any provision. Contract between the parties to the contract.

Job Number: 12345 Account Code: _____

This Agreement is made this 9th day of March in the year 2012.

by and between the

OWNER, VDOT

and the

CONSTRUCTOR, ABC Contractors

Tax identification number (TIN) _____

Contractor License No., if applicable _____

for construction and services in connection with the following

PROJECT Arlington Metrolink Project

Notice to the Parties shall be given at the above addresses.

The Design Professional is _____

ARTICLE 2 GENERAL PROVISIONS

~~2.1 - STANDARD RELATIONSHIP AND ETHICS. The Parties each agree to proceed with the Project on~~

~~the basis of mutual trust and confidence.~~

2.1.1 The Constructor shall furnish construction administration and management services and use the Constructor's diligent efforts to perform the Work in an expeditious manner consistent with the Contract Documents. The Parties shall each endeavor to promote harmony and cooperation among all Project participants.

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3

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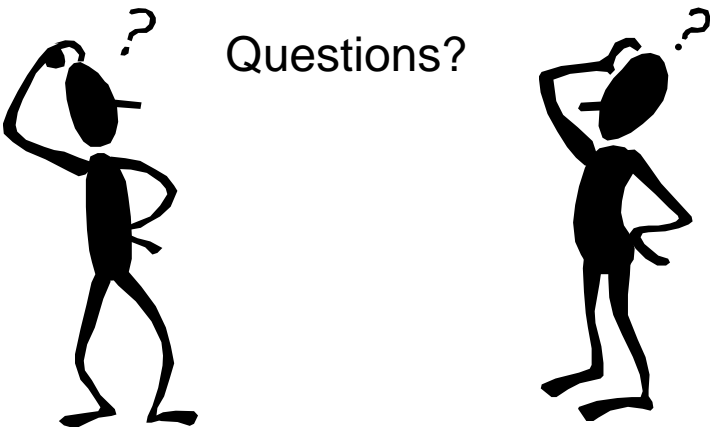


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866-925-DOCS (3627)



Questions?

