

The Unexpected and Unwelcome: Defective Design and Changed Conditions Disputes [Video]

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Last year, my construction colleague Neal Sweeney and I presented on a topic that is still a widely discussed question in the construction industry: who really pays for defective design? Despite contractual mechanisms to deal with them, defective design and changed (or differing site) conditions remain the most unexpected and unwelcome departures from everyone's hopes and intentions. In our presentation, instead of outlining the applicable law, we compiled practical suggestions for owners and contractors when they face these claims both before they emerge and once they are in play.

Specifically related to differing site conditions, I offered the following practical suggestions:

For owners

- Disclose all known conditions prior to submission of the bid.
- Use strict notice requirements so there is no room for error.
- Limit recovery costs to direct costs.
- Limit positive representations in the contract.
- Understand risk allocation.

For contractors

- Carefully review contract documents.
- Look for onerous exculpatory clauses and disclaimers.
- Inspect the site and what is around it before you bid the job.
- Provide notice.
- Understand law in your jurisdiction.

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