# Litigation 2020 - Lessons Learned for Design Professionals

*Presented by:*

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# Learning Objectives

- Identify and manage risks related to design and construction issues reported in recent court decisions;
- Learn about site safety risk management issues and how to address them.

# STANDARD OF CARE

# Example Good clause

- "Consultant shall perform its services consistent with the professional skill and care ordinarily provided by firms practicing in the same or similar locality under the same or similar circumstances (hereinafter the "Standard of Care") and expressly disclaims all express or implied warranties and guarantees with respect to the quality of performance of professional services."

- Don't agree to warrant the quality of professional services.
  - Time of the Essence clauses
  - Compliance with laws and codes clauses.

# INDEMNIFICATION

# Indemnification did not Apply to Damage to "the Work Itself"

- Engineer designed wastewater plant and after construction two specified pumps failed – with concrete floor in one of the tanks heaving and rupturing and making the tank nonoperational.
- County sued the engineer, as well as the contractor who allegedly did defective installation of the pumps.
- Engineer cross-claimed against contractor to indemnity it.
- Held: No indemnification was owed because contract clause clearly stated indemnity was only for personal injury and destruction of property "other than to the work itself." County of Saratoga v. Delaware Engineering, 189 A.D 3d 1926 (NY 2020).

# Individual was not "Agent" entitled to Indemnification

- Laborer employed by masonry contractor fell from scaffolding on Wegman's grocery store construction job site.
- Sued Wegmans and its employer and also a firm that was under a staffing agreement whereby it provided a construction foreman.
- Laborer's employer sought indemnity from the foreman and the foreman's employer – asserting that they were "agents" of Wegman's.
- HELD: Indemnity claim dismissed because the term "agents" is too ambiguous to conclude they were intended Intended "Indemnitees." Court said if parties intended them to be Indemnitees they could have done so "in unmistakable terms."
- *Fireman's Insurance v. ACE Insurance,* 465 F.Supp. 3d (NY 2020) **(See Next Slide)**

# Indemnitee Agents (continued)

- The court further stated:

"The risk of an overly broad reading is present here, as words like "agents," "employees," and "representatives" are ambiguous and can readily be interpreted in a manner not intended by the parties. Indeed, one New York court has noted that the word "agent" is often a "referentially treacherous term" that fails to clearly manifest the parties' intentions."

"If the parties had intended to extend indemnification to the employees of other contractors, they could have simply used those phrases rather than the amorphous terms they did employ."

# Indemnification Owed to Owner's "Representative"

- Employee of landscape subcontractor was injured in a crane accident and sued the Prime and the project Architect (SOM).
- The Prime had to indemnify the Architect per indemnity clause requiring it to indemnify the Owner's "representatives" against claims arising out of contractor's work.
- Court said Architect fell in category of "representative" of Owner.
- This case demonstrates why it is important when reviewing indemnification clauses to carefully consider who is included in terms such as "agent, servant and representative."

Valdez v. Turner Construction & Skidmore Owings Merrill (SOM), 171 A.D. 3d. 836 (NY 2019)

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# “Representative” Indemnification (continued)

- Court said: “[Contractor’s] contract with [owner] obligated [contractor] to indemnify, inter alia, the owner’s representative, construction manager, and servants.”
- “Even though Skidmore contracted with Turner to perform construction management services, Skidmore retained the responsibility of overseeing contractor’s compliance with the design drawings and specifications and quality control on behalf of DASNY. Turner and Skidmore, therefore established that Skidmore was the **owner’s representative** with the meaning of [the] contract.”
- “This evidence, along with the evidence that the plaintiff's injuries arose out of KJC’s work and that Skidmore was free from negligence, demonstrated Skidmore’s prima facie entitlement to contractual indemnification under KJC’s contract.”

# Indemnification

- Fire marshal injured while inspecting office building;
- Sued owner, alleging he tripped on pile of construction debris.
- Owner made indemnity claim against fire sprinkler contractor ("STAT") and a 3rd party action against general contractor (GC) who then asserted indemnification claim against STAT as well.
- STAT moved for summary judgment on basis that owner and GC themselves had specific responsibilities with regard to removal of the construction debris and couldn't prove themselves free of negligence.
- Held: the motion should have been granted.

*Fedrich v. Granite Building*, 86 N.Y.S.3d 566 (NY, 2018).

# Indemnification in California Still Includes Automatic Duty to Defend – Court Relies on Crawford v. Weather Shield

- Under subcontract indemnification clause, Sub owed Prime a duty to defend against a third party negligence claim.
- The duty to defend arose when the claim was made.
- Citing *Crawford v. Weather Shield*, appellate court held summary declaration should have been granted to enforce the duty to defend because,
  - "the duty to defend arose immediately upon the proper tender of defense of a claim embraced by the indemnity agreement."
  - "Where the plaintiff's complaint alleges facts embraced by the indemnity agreement, the indemnitor has a duty to defend throughout the underlying tort action unless it can conclusively show by undisputed facts that plaintiff's action is not covered by the agreement.

*Centex Homes v. R-Help Construction Co., Inc.*, 32 Cal. App. 5th 1230 (2019).

# Malpractice Statute of Limitations applies to Breach of Contract Claims asserting Negligent

- Statute of Limitations for causes of action for negligent supervision and breach of engineering contract are both deemed professional malpractice clams subject to a three year statute of limitations for negligence actions and began to run when firm completed its services – not later after the plaintiff incurred its damages.
- A separate cause of action on **a contractual indemnification claim**, however, was governed by six year of statute of limitations that didn't begin to run until the plaintiff had made payment to third parties to which it was entitled to recover from the engineer under the indemnification clause.

*WSA Group, P.E. v. DKI Engineering & Consulting, USA PC*, 178 A.D. 3d 1320 (NY 2019).

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# DKI Indemnification was for 1st Party Claims and not only Third Party Claims

- Court in *WSA v. DKI* found indemnity article written so broadly it applied to 1st party claims as well as 3rd party claims.
- Plaintiff could recover under the clause for its own damages and losses even if not from 3rd party claims against plaintiff.
- Court stated: "It is a familiar principle that a cause of action for *common-law* indemnification must be based upon a defendant's breach of duty to a **third party**."
- This case, however, didn't involve common-law indemnification. "Instead, the scope of defendant's obligation is governed by the parties' intent as revealed by the plain language of the indemnification provision that they agreed upon."

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# Broad 1st party indemnity continued

- The court stated:

"Nothing in the provision's broad language, which requires defendant to indemnify plaintiff 'against any claim, demand or cause of action of every name or nature,' reveals that the parties intended to exclude claims such as this from its coverage or to limit its scope to breaches of duty to third parties. Instead, the parties "chose to use highly inclusive language in their indemnification provision, which they chose not to limit by listing the types of proceedings for which indemnification would be required."

# SITE SAFETY

# Site Inspection Subjects A/E to Personal Injury Suit

- During site visit, architect discovered contractor installing manifold covers over cleanout ports that were not proper for intended purpose, and reported this to its client/project owner;
- Owner took no action;
- A/E continued to do bi-weekly site inspections;
- After job was complete, part of the contractor's makeshift cover rattled apart and fell onto the plaintiff's head;
- Was A/E was negligent in failing to detect problems with the contractor's work?;
- Architect argued contractor's unauthorized installation of angle irons constituted a superseding cause of the injury;
- Held: The question of superseding causes must go to trial. "A jury could reasonably conclude that the effort to reinforce the cleanout port covers having angle irons was a normal and foreseeable consequence of the alleged inadequacy of the covers, which [Architect] either approved or failed to detect…."

*Demetro v. Dormitory Authority of the State of New York*, 170 A.D. 3d 437 (NY 2019).

# Site Safety: No duty of Engineer to Warn Contractor's Employee of Dangerous Condition of Roof

- Engineer that was hired by school district prepared plans for certain roof repairs, and also prepared contract documents and bidding documents for bidding out roofing project to contractors.
- Contractor's employee went onto roof to begin removing debris and fell through deteriorated area and suffered injury.
- Employee sued engineer, claiming it knew of the dangerous condition and should have warned him.
- Held: Engineer had no contractual or common law duty to warn.

*Waltman, v. Engineering Plus, Inc.*, 264 So. 3d 758 (Miss. 2019)

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# Engineer Duty to Warn (continued)
# The Factors Considered

- Although the construction contract stated the work "shall be done under the direct supervision of" the engineer, this didn't result in the engineer legally assuming those duties.
- Court says to determine whether engineer has **supervisory duty** outside the provisions of its own contract, a seven-factor test is to be applied.
- "**Those factors are**: (1) actual supervision and control of the work; (2) retention of the right to supervise and control; (3) constant participation in ongoing activities at the construction site; (4) supervision and coordination of subcontractors; (5) assumption of responsibilities for safety practices; (6) authority to issue change orders; and (7) the right to stop the work."

# Prime Contractor Liable for Injuries to Subcontractor Employee (No Indemnification Recovered)

- Subcontractor employee injured by falling into expansion joint in a concrete floor that prime contractor failed to adequately cover.
- Employee sued prime contractor for his injuries.
- Indemnification clause in the subcontract required the Sub to indemnify the Prime for all injuries to employees of the Sub.
- Held: Because the Prime controlled the site, was responsible for the safety problem, and affirmatively created the hazard, the Prime could not enforce the indemnification clause against the Sub.

*Strousse v. Webcor Construction*, 34 Cal. App. 5th 703 (2019).

# DIFFERING SITE CONDITION CLAIMS

# Contractor wins Differing Site Condition Claim

- Project owner denied DSC claim despite contractor demonstrating subsurface conditions differed materially from bid documents.
  - Soil bore data was provided with bidding documents
  - Bid documents repeatedly stated approximate depth of subsurface rock ledge where an existing bridge had its foundation.
- Owner asserted contractor could not rely on documents because of a notation on one of the plan sheets stated “el. varies.” Owner argued that from that notation the contractor should have known elevations varied and could not depend on it being as the ledge elevation shown on all the plan sheets.

*W. M. Schultz Construction, Inc. v. Vermont Agency of Transportation*, 203 A. 3d 1205 (Vermont 2018).

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# DSC Claim continued

- Contractor prevailed because it proved there were “reasonably plain or positive indications in bid information or contract documents that subsurface conditions would be different than what was found.
- A contractor must prove:
  - (1) “the conditions indicated in the contract differ materially from those it encounters during performance”;
  - (2) “[t]he conditions actually encountered” were “reasonably unforeseeable based on all the information available to the contractor at the time of bidding”;
  - (3) “it reasonably relied upon its interpretation of the contract and contract-related documents”; and
  - (4) “it was damaged as a result of the material variation between the expected and encountered conditions.”

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# The Reason for DSC Clauses

- As explained by the court, quoting from the important precedent of *Foster Construction v. U.S*, the purpose of a DSC clause is that:

"makes it clear that bidders are to compute their bids, not upon the basis of their own pre-award surveys or investigations, but upon the basis of what is indicated and shown in the specifications and on the drawings."

"The clause should induce the bidder not to consider such contingencies as the latent or subsurface conditions, for which the Government has assumed responsibility."

# To Prove Delay Damages – Must have CPM Schedule

- Project owner (D.C. government agency) denied contractor's $1.2 million equitable adjustment claim for delay damages on road project.
- On appeal, the D.C. Contract Appeals Board (CAB) found in favor of contractor on the merits based on defective specs and/or differing site conditions, but remanded to agency to negotiate "quantum" of damages.
- Agency concluded "quantum" was "Zero" because contractor failed to prove damages with a critical path method (CPM) schedule.
- Appealed again, and court held contractor couldn't recover under a theory of "overall delay" because it failed to prove extent of delay to items on the critical path.

*Rustler Construction, Inc. v. District of Columbia*, 2111 A.3d 187 (2019)

# INSURANCE DISPUTES

# CGL Carrier: No Duty to Defend Professional Liability Claim on Florida Pedestrian Bridge Collapse

- Commercial general liability (CGL) primary and umbrella policies included professional liability exclusions for damages;
- Carriers asserted all allegations fell under definition of "professional services" subject to professional services exclusion.
- Also argued that even if the allegations don't describe "professional services" they at least "*arise out of*" the professional services that Design Professional (DP) rendered or failed to render.
- DP argued there were some allegations that didn't fall solely and entirely within the definition of "professional services" and were therefore outside of the exclusion.

*Travelers Indemnity Company v.* ***Figg*** *Bridge Engineers, Inc.*, 389 F.Supp. 1060 (2019).

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# FIGG – What are "Professional Services?"

- When professional services are undefined, courts consider many factors, including "whether the service involves specialized skill, required specialized training, is regulated, requires a degree, and/or whether there is an entity that certifies or accredits persons or that sets forth standards of practice for the performance of those services."
- "Whether 'an act results from the nature of a professional services is determined by focusing upon the particular act itself, as opposed to the character of the individual engaging in the act."
- Court found underlying complaints alleged DP was liable by virtue of engineer's status, and by accepting duties, obligations and responsibilities attendant to the design and construction of the pedestrian bridge. "The design and construction of a pedestrian bridge requires specialized skill or training."

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# FIGG – What is "Arising out Of?"

- The polices in question contained identical exclusions for bodily injury or property damage "**arising out** of the rendering of or failure to render any professional services."
- The court explained that when the words, "arising out of" are used in a contract, this does not require "proximate cause." It is much broader than direct and proximate cause.
- Risk Management Comment: This is good reason to when negotiating indemnity provisions in design professional contracts to strike out "damages arising out of" and replace with "**to the extent caused by.**"

# THIRD PARTY BENEFICIARY AND ECONOMIC LOSS DOCTRINE

# Contractor not 3rd party Beneficiary of A/E Contract

- Engineer provided 30 percent preliminary designs (bridging documents) to its client/owner that owner then gave to design-builder to complete and then construct D-B project.
- Contractor sued engineer for "breach of contract" for alleged defects in the the preliminary docs, which it asserted caused it to spend time and resources to redraw, obtain new permits, conduct additional excavation, soil compaction, and hydrogeological studies and demolish more structures than it anticipated.
  - Claimed it was 3rd party beneficiary of engineer's contractual obligation to owner to do adequate site assessments and preliminary designs. Engineer was granted summary judgment.

*Arco Ingenieros, S.A. de C.V. v. CDM International, Inc.,* 368 F. Supp. 3d 256 (District Ct., Mass. 2019).

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# 3rd Party Beneficiary (continued)

- Court explained: For party to quality as an intended beneficiary, "the language and circumstances of the contract" must show that parties to contract "clearly and definitely" intended non-party to benefit from the promised performance.

- "The caselaw on point from other jurisdictions does not support third-party beneficiary status in the construction context without a clear indication of intent. This is because significant construction projects generally involve multiple contracts that are 'inevitably intertwined' to ensure the project is completed in a timely manner according to the agreed-upon specifications…. Unless a construction contract manifests a contrary intent, it will not create enforcement rights in a third party that separately contracts with the project owner."

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# 3rd Party beneficiary (contract drafting tips)

- (1) To avoid any chance of a contractor successfully asserting that it was an intended third party beneficiary under a design professional's contract with a project owner, it may be prudent to include a simple clause in the design professional contract clearly stating that there shall be no third party beneficiaries under the contract.
- (2) Because we are seeing so many claims by design-build contractors asserting that the design firm's preliminary designs were inadequate or defective, it may be prudent to add a clause in the design firm contract stating that the designs are only preliminary and will be judged only by what can reasonably be expected of preliminary designs, and that they are not expected to be as accurate or complete as 100 percent complete Construction Documents.

# Economic Loss Rule Bars Suit against Subcontractor

- Owner/Developer contracted with GC to construct apartments.
- Allegedly defective construction resulted in floor trusses sagging and cost $8 million to repair.
- Owner filed negligence lawsuit against a subcontractor to the GC.
- HELD: Suit dismissed because barred by economic loss doctrine. Reasons:
  - Owner possessed bargained-for means of recovery against the GC and could seek recovery from the GC accordingly.
  - Owner had "full knowledge of and power to control the acquisition and engagement of subcontractors…."
  - The rule applies even where the parties were not in privity of contract. *Crescent University City Venture, LLC v. Trussway Manufacturing, Inc.*, 852 S.E. 2d 98, (2020)

# Rejected Low Bidder Lacks 3rd Party Beneficiary Right to Sue Engineer for Contract Interference

- Engineer that prepared Request for Proposals (RFP) owed no duty to bidder as a 3rd party who could foreseeably be injured or suffer economic loss due to engineer's negligent performance of a contractual duty owed to its client, the project owner.

- Low bidder asserted information comments provided by engineer to Authority resulted in rejection of the bid and thereby constituted intentional interference with its right to contract.

- Court found engineer couldn't be sued for negligence since it owed no duty to the bidders.

*John Rocchio Corp. v. Pare Engineering Corp.*, 201 A. 3d 316 (RI, 2019).

# UNLICENSED CONTRACTOR

# Unlicensed Contractor Forfeits Right to Fees

- Where HVAC sub lacked the relevant license to do as a refrigeration and air conditioning contractor, its subcontract on a project was illegal and, therefore, void and unenforceable.
- It thereby forfeited any right to recover its fees and out of pocket costs from the general contractor (GC).
- Even though GC knew sub had no license when entering subcontract, "the doctrine of unclean hands does not entitle [HVAC] to recover in the instant action."

*HVAC Specialist, Inc. v. Dominion Mechanical Contractors, Inc.*, 201 A.3d 1205 (District of Columbia 2019).

# FRAUD CLAIMS

# Fraud Claims against Engineer Dismissed for Lack of Specificity

- Homeowner sued design-build contractor for defects in a $1 million swimming pool -- alleging fraudulent inducement, fraudulent misrepresentation, and fraudulent omission.

- Court held Complaint failed to state with particularity the circumstances constituting fraudulent inducement.

- Complaint failed to state claim for fraudulent misrepresentation, because it didn't allege with particularity a false statement of fact by the engineer upon which the plaintiff relied.

*Hinman v. ValleyCrest Landscape, Inc. and Aquatic Design & Engineering, Inc.*, Case No. 3:19-cv-00551 (M.D. Tenn 2019).

# Court's Explanation of Proving Fraud

- The court explained that, "Because claims based on fraud pose 'a high risk of abusive litigation,' a party making such allegations 'must state with particularity the circumstances constituting fraud or mistake.'" "A plaintiff, at a minimum, must 'allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud."

# FORCE MAJEURE FOR EPIDEMICS

# Government Contractor Entitled to Time Extension (but not Costs) Caused by Pandemic Delay to Project

- Government contractor was constructing a facility for U.S. State Department in Sierra Leone when the Ebola epidemic occurred in 2014.
- Due to Ebola, the contractor suspended its work, demobilized, sent its employees home, and put its construction materials into storage.
- When the contractor later remobilized, it paid for medical facilities and services onsite for the health and safety of its workforce.
- Contract submitted a Request for Equitable Adjustment ("REA" or "change order"), the government granted a time extension but denied the request for $1.25 million for additional costs incurred. Affirmed by Civilian Board of Contract Appeals because Delay clause in the contract specifically disallowed equitable compensation adjustment for an excusable delay based on epidemics.

*Pernix Serka Joint Venture v. Department of State* (20-1 BCA P 37589).

# FIDUCIARY DUTY

# Fiduciary Duty not Owed by Contractor in Absence of Contract Language Expressly Stating So

- Where contract didn't explicitly contain language such as "relationship of trust and confidence," court rejected the owner's assertion that the contractor owed it a **fiduciary duty**.

- Owner's failure to pay constituted a breach of contract entitling the contractor and subs to file and enforce liens for payment.

- "Occasionally a cost-plus arrangement may place additional burdens upon a contractor, this is typically recognized where the contract language provides that 'the contractor accepts a 'relationship of trust and confidence established' between it and the owner.'"

- For example, in a Maryland appellate case relied on by the [Plaintiffs], the contractor accepted a " 'relationship of trust and confidence' " with the homeowners and explicitly agreed to further their interests by performing " 'the Work … in the most … economical manner consistent with' " their interests and to " 'keep … full and detail[ed] accounts.'" *Goes v. Vogler*, 304 Neb. 848 (Supreme Ct. Nebraska, 2020).

# Fiduciary Duty (continued)

- Court says, "[i]n any cost-plus contract there is an implicit understanding between the parties that the cost must be reasonable and proper…. However, other than those already required by law **and by the parties' contracts**, we decline to impose further fiduciary duties on contractors as a matter of law."

- To create such a duty, the court says wording like the following would be needed:

  - "the contractor accepts a **relationship of trust and confidence** established between it and the owner."
  - "the **contractor agrees to further the interests of the owner** by performing the Work in the most economical manner consistent with the owner's interests and to keep full and detailed accounts."

# BRAND NAME SPECIFICATIONS

# Brand Name or Equal Specification Makes Contractor Responsible for Design Changes Necessary for use of the Or Equal

- Contract clause made contractor solely responsible for any changes of whatsoever nature.

- This was not ambiguous when it came to the extra costs to change the influent pipe size and design to fit with an “or equal” equipment item submitted by the contractor in place of the specified “brand name.”

- Court stated that just because an equipment item is listed in the specifications as an additional manufacturer to the name brand does not make that additional brand interchangeable with the brand around which the project was designed. The court found this to be a performance specification and not a design or prescriptive specification that would have rendered the project owner responsible under an implied warranty of design.

*Cummins v. Bradford Sanitary Authority*, 237 A.3d 584 (2020).

# Brand Name (continued)

- Most importantly, the specifications stated:
- "If products of manufacturers other than those named first differ from those named first in the Project Manual or on the [Contract] Drawings to the extent that their proper incorporation into the [work required by the Contract Document (]Work[)[4]] requires changes to the structural, piping, mechanical, electrical, instrumentation, or any other changes of whatsoever nature, the [C]ontractor shall be responsible for such changes."

- Numerous other provisions in the specifications also stated that if a product other than the one first named on the list were used by the contractor, the contractor would be responsible for all costs associated with design changes to any part of the project to make use of the equipment possible.

# DISPUTE CLAUSES

# Dispute Clause Interpretation in Prime and Subcontract Language

- Subcontractor sought to litigate claims against GC instead of arbitrating them as called for by the disputes clause of the subcontract.
  - It argued that the prime contract disputes clause took precedence.
- The subcontract clause stated that disputes between the prime and sub were subject to the dispute resolution procedures of the Prime Contract, if any, **but** "if there was no specific requirement in the prime agreement for dispute resolution" or "should the [Owner] not be involved in the disputes, any such controversy or claim shall be resolved by arbitration…."
- Court rejected Sub's argument that owner was "**involved**" merely by virtue of its contractual 3rd party beneficiary status.

*Austin Commercial, L.P. v. L.M.C.C. Specialty Contractors, Inc.*, 268 So. 3d 215 (2019).

# Architect Final Decision Reversed by Court as Gross Mistake and Arbitrary

- Where contract stated that Architect would render final decision on matters such as scope of work disputes, court will generally defer provided the decision is not a gross mistake or arbitrary.
- The GC bid a project that included repaving a parking lot.
- It sought subcontract bids for the repavement without first visiting the site to see what was there.
- Subcontract bidding documents described work to include removing "pavement," "cement concrete pavement," "existing Portland cement concrete pavement," and "existing PCC pavement."
- Subcontract included Scope of Work requiring Sub to demolish "the existing concrete pavement." *F.H. Paschen, S.N. Nielsen & Assoc. v. B&B Site Development, Inc.*, 311 So.3d 39 (FL 2021). (next slide)

# Scope of Work (architect decision) page 2

- GC argued removal of all asphalt was within scope of Sub's work.
- Sub performed the work under protest and provided the GC with its costs.
- GC stated the project architect would review costs and proposals to "ensure that this area was not already included" in the subcontract.
- Architect reviewed the matter and opined that the asphalt area was included in the cost of the project. The GC then refuse the subcontractor's change order request and this law suit was filed.

# CHAT ROOM
# QUESTIONS/COMMENTS?

# DISCLAIMER

**Disclaimer**: This information is not legal advice and cannot be relied upon as such. Any suggested changes in wording of contract clauses, and any other information provided herein is for general educational purposes to assist in identifying potential issues concerning the insurability of certain identified risks that may result from the allocation of risks under the contractual agreement and to identify potential contract language that could minimize overall risk.

Advice from legal counsel familiar with the laws of the state applicable to the contract should be sought for crafting final contract language. This is not intended to provide an exhaustive review of risk and insurance issues, and does not in any way affect, change or alter the coverage provided under any insurance policy.

# Questions?


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