

KELLEN PATTERSON
JONATHAN SCHIRMER

WSAMA Spring 2025

Your Rights and Remedies
in Construction Disputes
A guide for Owners

April 25, 2025

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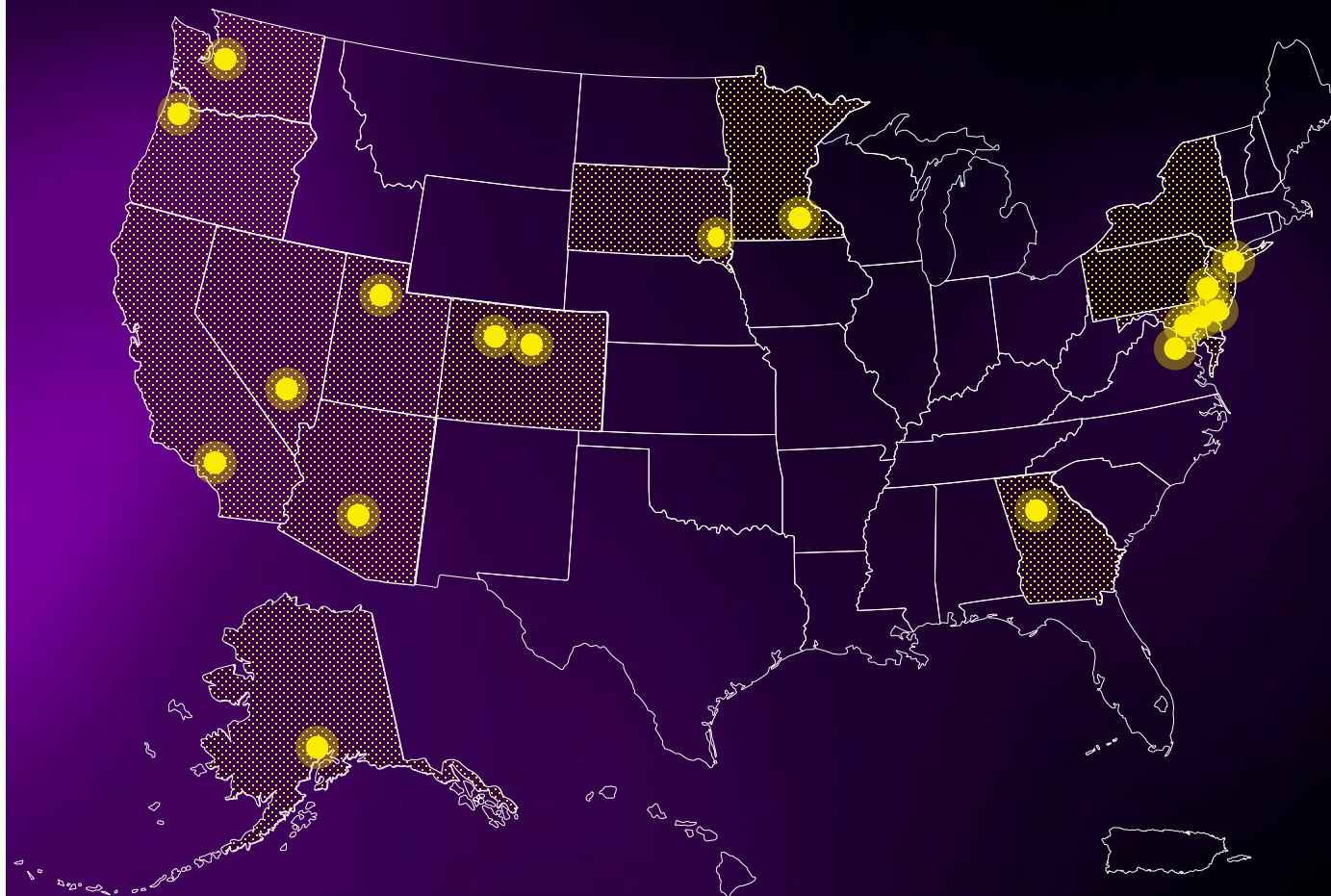
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LIFE CYCLE OF A PROJECT

Planning (& Procurement)

Contracting

Construction

Claims

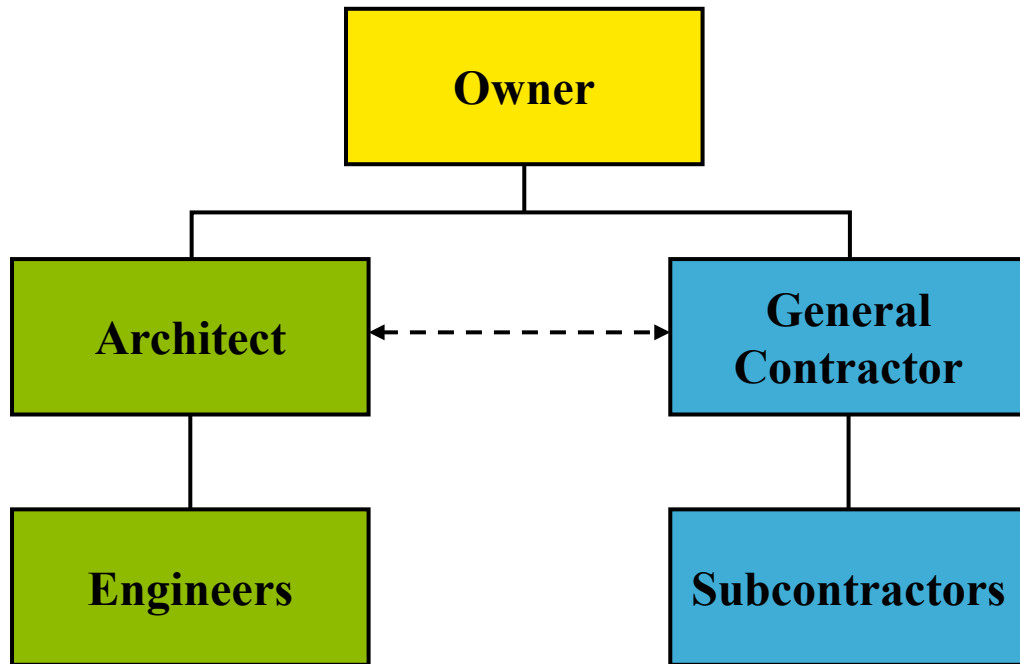
Litigation



THE PLANNING PHASE; *CHOOSING A DELIVERY METHOD, I.E., ALLOCATING RISK*

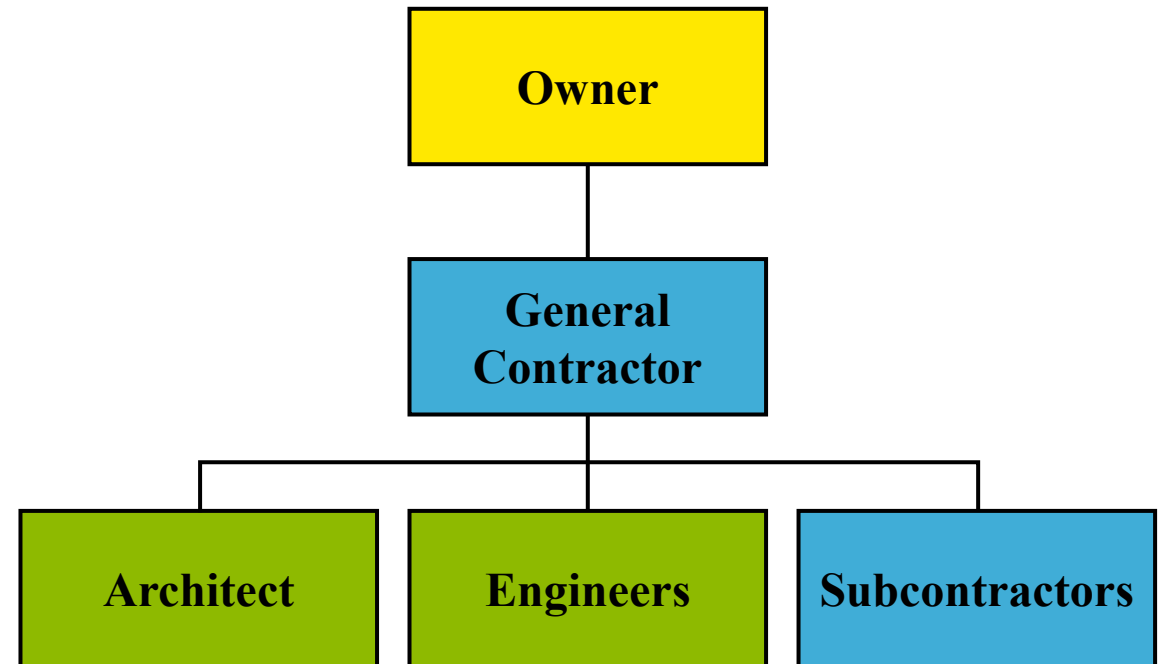
Design, Bid, Build (DBB)

“Traditional” Method:



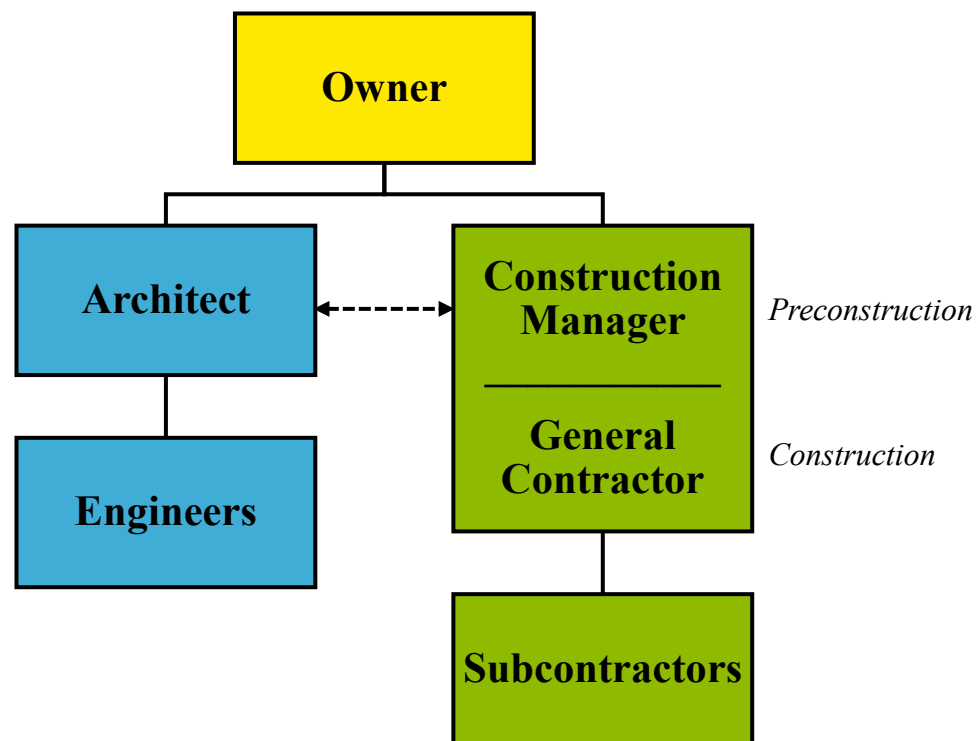
Design-Build (DB)

General Contractor as “Design Builder”:



THE PLANNING PHASE; *CHOOSING A DELIVERY METHOD, I.E., ALLOCATING RISK*

General Contractor / Construction Manager (GGCM):



THE PLANNING PHASE; *DRAFTING KEY CLAUSES IN YOUR CONTRACT(S)*

NOTICE OF CLAIMS (KEEP ME INFORMED)

- A.** General. As set forth in Paragraph G-04.35, the Design-Builder must provide timely Notice of Event if the Design-Builder encounters, experiences or suffers any Event that may entitle it to an adjustment of a Guiding Term, a Commercial Term, or a Limiting Term. This Paragraph G-05.02 outlines the two-step process (G-05.02.B, G05.02.C or G-05.02.D) the Design-Builder must comply with in order to preserve and not waive its right to seek an adjustment to any Guiding Term, a Commercial Term, or a Limiting Term or any other remedy or relief that occurs due to the occurrence of any Event.
- B.** Notice of Event. Without regard to whether the Event implicates a Guiding Term, Commercial Term, or Limiting Term, the Design-Builder shall provide the Engineer with a written Notice of Event no later than seven (7) Days after the occurrence of the Event. The Design-Builder shall include the following information in the Notice of Event:
1. A description of the Event and when it occurred;
 2. Whether the Event effects a Guiding Term, Commercial Term, or Limiting Term;

CONTRACTING TIP: Contract should address both anticipated and unanticipated changes (within and outside the scope of work) and address what information is required from the contractor

THE PLANNING PHASE; *DRAFTING KEY CLAUSES IN YOUR CONTRACT(S)*

DISPUTE RESOLUTION (CHOOSE YOUR FORUM)



CONTRACTING TIP: If incorporating WSDOT Standard Specs, consider use/non-use of a DRB; stipulate that DRB decisions are non-admissible in later litigation

THE PLANNING PHASE; *DRAFTING KEY CLAUSES IN YOUR CONTRACT(S)*

CONTINUING THE WORK (DON'T QUIT ON ME)

WSDOT Standard Specification I-04.5(1), “Disputes”:

“Regardless of any protest or dispute, the Contractor shall proceed promptly with the Work as the Engineer orders and the Contracting Agency will continue to pay for all undisputed amounts.”

THE PLANNING PHASE; *DRAFTING KEY CLAUSES IN YOUR CONTRACT(S)*

INDEMNIFICATION (COVER ME)

Washington Anti-Indemnity Statute, RCW 4.24.115:

(1) A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith, a contract or agreement for architectural, landscape architectural, engineering, or land surveying services, or a motor carrier transportation contract, purporting to indemnify, including the duty and cost to defend, against liability for damages arising out of such services or out of bodily injury to persons or damage to property:

(a) Caused by or resulting from the sole negligence of the indemnitee, his or her agents or employees is against public policy and is void and unenforceable;

(b) Caused by or resulting from the concurrent negligence of (i) the indemnitee or the indemnitee's agents or employees, and (ii) the indemnitor or the indemnitor's agents or employees, is valid and enforceable only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor, and may waive the indemnitor's immunity under industrial insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefor and the waiver was mutually negotiated by the parties. This subsection applies to agreements entered into after June 11, 1986.

THE PLANNING PHASE; *DRAFTING KEY CLAUSES IN YOUR CONTRACT(S)*

INDEMNIFICATION (COVER ME)

- All contracts should require indemnification to the extent permitted by RCW 4.24.115
- Example – WSDOT Standard Specification I-07.14, “Responsibility for Damage”:

Subject to the limitations in this section, and [RCW 4.24.115](#), the Contractor shall indemnify, defend, and save harmless the State, Governor, Commission, Secretary, and all officers and employees of the State from all claims, suits, or actions brought for injuries to, or death of, any persons or damages resulting from construction of the Work or in consequence of any negligence or breach of Contract regarding the Work, the use of improper materials in the Work, caused in whole or in part by an act or omission by the Contractor or the agents or employees of the Contractor during performance or at any time before final acceptance. In addition to a remedy authorized by law, the State may retain so much of the money due the Contractor as deemed necessary by the Engineer to ensure the defense and indemnification obligations of this section until disposition has been made of such suits or claims.

THE PLANNING PHASE; *DRAFTING KEY CLAUSES IN YOUR CONTRACT(S)*

LIQUIDATED DAMAGES (DOLLARS FOR DELAY)

- Owner's remedy for delay
- Per day rate, expressly NOT a penalty
- Expert analysis re. delay allocation generally required

1-08.9 Liquidated Damages

Time is of the essence of the Contract. Delays inconvenience the traveling public, obstruct traffic, interfere with and delay commerce, and increase risk to Highway users. Delays also cost tax payers undue sums of money, adding time needed for administration, engineering, inspection, and supervision.

Accordingly, the Contractor agrees:

1. To pay the liquidated damages identified in the Special Provisions for each working day beyond the number of working days established for Physical Completion, and
2. To authorize the Engineer to deduct these liquidated damages from any money due or coming due to the Contractor.

2025 Standard Specifications M 41-10

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THE PLANNING PHASE; *DRAFTING KEY CLAUSES IN YOUR CONTRACT(S)*

WAIVER OF CONSEQUENTIAL DAMAGES

Example (AIA A201, 2017):

§ 15.1.7 Waiver of Claims for Consequential Damages

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit, except anticipated profit arising directly from the Work.

THE PLANNING PHASE; *DRAFTING KEY CLAUSES IN YOUR CONTRACT(S)*

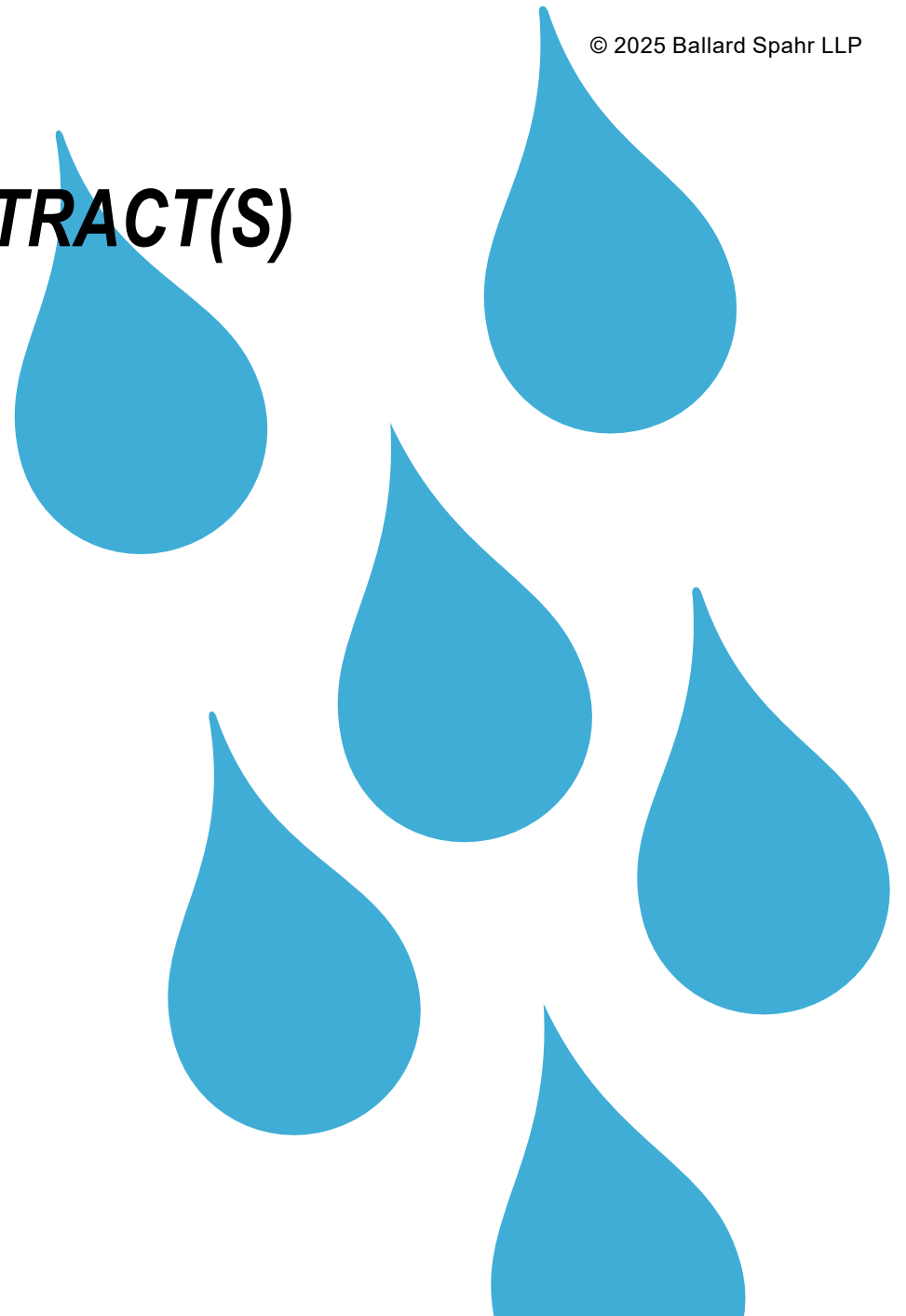
INSURANCE REQUIREMENTS

- Owner as an additional insured
- As to contractor, WSDOT 2025 Standards Specs (1-07.18(5)) require:
 - Owners and Contractor's Protective (OCP), \$3 million per occurrence
 - Commercial General Liability (CGL), \$3 million per occurrence
 - Commercial Automobile Liability, \$1 million per occurrence
- Builder's Risk
- Professional Liability – E&O
- **Contract disputes over the cost of the work are not insured!**

THE PLANNING PHASE; *DRAFTING KEY CLAUSES IN YOUR CONTRACT(S)*

FLOW DOWN PROVISIONS

- **Purpose:** Align obligations / liabilities down the “chain” of contracts
- Consider impact on:
 - Notice requirements for subcontractors
 - Indemnity obligations
 - Insurance
 - Waiver of consequential damages



THE CONSTRUCTION PHASE; DEALING WITH CHANGE

- What is a **Change Order**?
 - Request for time
 - Request for (more) money
 - Or both!
 - If executed, a modification to the contract
 - If disputed, a “Claim”
- Owner as decision-maker

Practice Tip: always consider waiver/preservation of future claims—know what you are getting for the Change Order

DRAFT AIA® Document G701™ – 2017

Change Order

PROJECT: <i>(Name and address)</i>	CONTRACT INFORMATION:	CHANGE ORDER INFORMATION:
[insert address]	Contract For: AIA A101-2017 Date:	Change Order Number: 00__ Date:[insert]
OWNER:	Architect:	CONTRACTOR:

THE CONTRACT IS CHANGED AS FOLLOWS:
(Insert a detailed description of the change and, if applicable, attach or reference specific exhibits. Also include agreed upon adjustments attributable to executed Construction Change Directives.)

Excavate and remove abandoned underground utility line at 123 Sesame Street.

The original Contract Sum was	\$ 1,000,000.00
The net change by previously authorized Change Orders	\$ 0.00
The Contract Sum prior to this Change Order was	\$
The Contract Sum will be increased by this Change Order in the amount of	\$ 50,000
The new Contract Sum including this Change Order will be	\$ 1,050,000

The Contract Time will be **increased** as follows: 0 days
The new date of Substantial Completion will be January 8, 2026.

NOTE: Execution of this Change Order shall constitute full satisfaction and a waiver of any and all claims by the Contractor arising out of, or relating in any way to, the Work to be performed or deleted pursuant to this Change Order.

NOT VALID UNTIL SIGNED BY THE OWNER AND CONTRACTOR

_____ CONTRACTOR <i>(Firm name)</i>	_____ OWNER <i>(Firm name)</i>
_____ SIGNATURE	_____ SIGNATURE

THE CONSTRUCTION PHASE; *DEALING WITH OTHER IMPACTS*

FORCE MAJEURE (ACT OF GOD)

Example (AIA A201, 2017):

§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

THE CONSTRUCTION PHASE; *DEALING WITH OTHER IMPACTS*

DIFFERING SITE CONDITION (DSC)

WSDOT Standard Spec I-04.7:

“...preexisting subsurface or latent physical conditions ... differing materially from those indicated in the Contract, or preexisting unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the Work provided for in the Contract...”

Elements:

1. Contract documents indicate certain conditions,
2. Actual conditions materially differ from those indicated in the contract,
3. Contractor reasonably relied on those indications when making its bid, and
4. The materially different conditions were not foreseeable.

WSDOT v. Seattle Tunnel Partners, 2022 WL 213780 (2022) (citing *King County v. Vinci Constr. Grands Projets*, 191 Wn.App. 142, 364 P.3d 784 (2015))

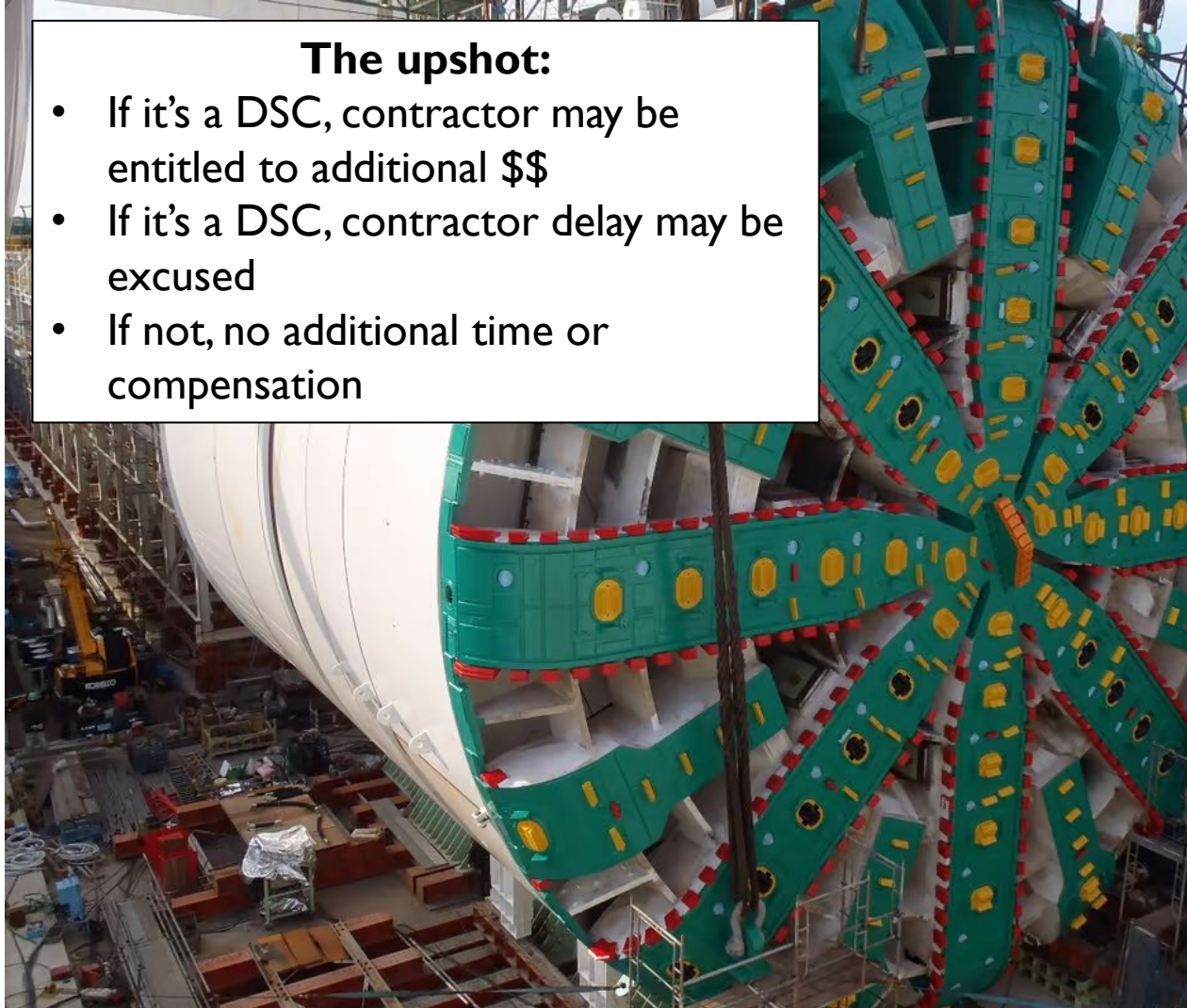
THE CONSTRUCTION PHASE; *DEALING WITH OTHER IMPACTS*

The upshot:

- If it's a DSC, contractor may be entitled to additional \$\$
- If it's a DSC, contractor delay may be excused
- If not, no additional time or compensation

TW-2, a case study:

- Big Bertha hit an exploratory well casing
- Contractor said it was a DSC, WSDOT rejected the claim
- What's the baseline? Here, it was the GBR and the GEDR – both contract documents
- Contractor responsible for reviewing the contract documents and being familiar with the site
- Properly instructed jury found TW-2 was NOT a DSC
- WSDOT recovers liquidated damages



THE CLAIMS PHASE; *RESPONDING TO CAPITAL C “CLAIMS”*

- Construction “**Claim**” is a defined term
- Predicate to next steps in contractual dispute resolution process
- Fully supported Claim with contractually required backup
- Often supported by expert analysis
- Owner as decision-maker

All Certified Claims filed by the Contractor shall be in writing and in sufficient detail to enable the Engineer to ascertain the basis and amount of the claim. All claims shall be submitted to the Engineer as provided in Section 1-05.15. As a minimum, the following information must accompany each claim submitted:

1. A detailed factual statement of the claim for additional compensation and time, if any, providing all necessary dates, locations, and items of Work affected by the claim.
2. The date on which facts arose that gave rise to the claim.
3. The name of each Contracting Agency individual, official, or employee involved in or knowledgeable about the claim.

THE LITIGATION PHASE; *LITIGATING CAPITAL C “CLAIMS”*

- Cue discovery
- Joint Defense / Tolling Agreements with your designer(s)
- Stay / consolidation of Claims in litigation pending project completion
- Project and/or Claims consultants as experts?
 - Consider privilege / disclosure issues

CRITICAL DEFENSES; *ENTITLEMENT*

NOTICE/CLAIM REQUIREMENTS AS A DEFENSE

- STRICTLY enforced in Washington, many times over!
 - *Mike M. Johnson & its progeny*
- Non-compliance = waiver
- BUT, you need express waiver language in the contract:

If the Contractor does not accept the Engineer's determination then the Contractor shall pursue the dispute and claims procedures set forth in Section 1-04.5(1). In spite of a protest or dispute, the Contractor shall proceed promptly with the Work as the Engineer orders.

By failing to follow the procedures of Sections 1-04.5, the Contractor completely waives any claims for protested Work.

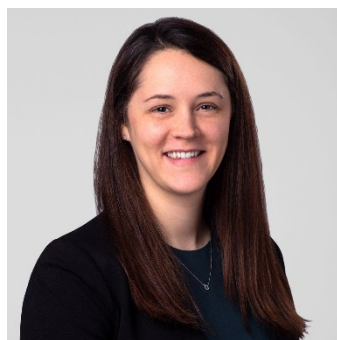
CRITICAL DEFENSES; *QUANTUM*

THE CRITICAL PATH

- Contract can / should specify no recovery for delay that does not affect the critical path
- No recovery for concurrent delay
- Allocation of delay is an expert issue
- Delay is either excusable, or conversely, the basis for LDs

The Contract Time and the Target Schedule will only be extended for delays to the Critical Path of the Work. If an extension of the Contract Time or the Target Schedule is warranted under any of the following provisions, the extension of the Contract Time and Target Schedule will be limited to the period of time the Engineer determines the Critical Path was delayed/extended.

BALLARD SPAHR CONSTRUCTION TEAM



Kellen Patterson

patterssonkf@ballardspahr.com

206.223.7148



Jonathan Schirmer

schirmerj@ballardspahr.com

206.223.7734