Plenary Session 3

A Wrinkle in Time: Recovery Plans, Change Orders, Liquidated Damages and the Owner’s Implied Obligations. Who is responsible when the schedule slips?
"You may delay, but time will not." — Benjamin Franklin

"Time isn’t the main thing. It’s the only thing." — Miles Davis
Your Presenters

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Recovery Plans, Change Orders, Liquidated Damages and the Owner’s Implied Obligations

Who is responsible when schedules slips?

Hint: Not these guys
Scenario
(detailed version in Appendix 1 of your materials)

The Players
- Owner - private entity corporation building a power generation facility in North America.
- Designer of record ("DOR") is under direct contract to the Owner.
- Contractor bid and was awarded a firm fixed-price contract from Owner.

The Facts
- 5 Change Orders:
  - 3 bilateral; 2 with time extensions
  - 2 unilateral; cost agreed but time extensions not agreed
  - Bilateral COs all contain waiver and release language
- Regular progress meetings, no major concerns raised until end of project
- Informal “Recovery Plan” discussed and implemented.
- Owner’s PM emails Contractor “let’s get the job done and we will take care of you”

The Contract
- Mandatory change notice provisions.
- Liquidated damages provision.
- DOR dispute resolution provisions.
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POTENTIAL CAUSES OF ACTION
1. Contract
2. Implied Contract
3. Third-party beneficiary
4. Tort
Contract Formation

- The diligent Owner invests considerable time and effort in developing a project from engineering to construction.

- Ideally internal resources develop scope from FEED to Issued for Construction drawings and through to project controls during construction.

- Contract development and negotiation is a large piece of that equation.
Invitations to Tender or Request for Proposals can take weeks and involve numerous stakeholders.

Many factors can play into both the contract delivery method and form of contract used, including:

- Budget;
- Maturity of the scope;
- Market conditions;
- Schedule; and
- Appetite for risk.
Contract Formation

- Hopefully all this work results in a contract form that most accurately reflects the Owner’s needs, appetite for risk and maturity of scope, and that will be acceptable to the Contractor in terms, particularly of risk allocation; typically time and cost being of particular focus.

- The Owner’s evaluation determines the project delivery method, and for design-bid-build offers various costing alternatives such as:
  - Lump Sum
  - Unit Rates / Allowances
  - Guaranteed Maximum Pricing
  - Cost Reimbursable
  - Time and Materials
  - Combinations
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Who is responsible when the schedule slips?
Recovery Plans

- "Recovery" - the act or process of getting something back (Merriam Webster online dictionary).

- Designation as a “recovery plan” has multiple perceptions, some negative and some positive.

- Often recovery plans follow specific directives; other times they informally evolve.

- Foundations questions impacting associated liability for the “recovery” include:
  - Recovery from what?
  - Why?

- Moreover: What does the contract say / not say about delay, float, scheduling methods, scheduling updates; etc.
“Architecture should speak of its time and place, but yearn for timelessness.”
– Frank Gehry

“Nothing is so simple that it cannot be misunderstood.”
– Freeman Teague, Jr. aka Claire Daniels

From the **Code of Hammurabi**:

- 229 If a builder builds a house for some one, and does not construct it properly, and the house which he built falls in and kill its owner, then that builder shall be put to death.

- 232. If it ruin goods, he shall make compensation for all that has been ruined, and inasmuch as he did not construct properly this house which he built and it fell, he shall re-erect the house from his own means.

- 233. If a builder builds a house for some one, even though he has not yet completed it; if then the walls seem toppling, the builder must make the walls solid from his own means.

*The Code of Hammurabi*, translated by L. W. King, Yale Law School, the Avalon Project. [http://avalon.law.yale.edu/ancient/hamframe.asp](http://avalon.law.yale.edu/ancient/hamframe.asp)
Designer Standard of Care

Typically stated along the lines of:

Design Professional shall perform its services consistent with the professional skill and care ordinarily provided by design professionals practicing in the same or similar locality under the same or similar circumstances. Design Professional shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

Stated differently... the care and skill ordinarily possessed and exercised by similarly situated design professionals.

E.g., Lowes Home Centers, Inc. v Laxson, 655 So. 2d 943, 945 (Ala. 1994);
  Greenhouse v. C F Kenner Assocs. Ltd P’ship, 723 So 2d 1004 (La. Ct. App. 1998);
  Clark v. City of Seward, 659 P.2d 1227 (Alaska 1983)
The question is not whether design documents are perfect, but whether, unless specifically contracted for otherwise, the design documents met the basic standard of care duty.

Coombs v. Beede, 36 A. 104, 89 Me. 187 (Me., 1896);
Chubb Group of Ins. Companies v. C.F. Murphy & Associates, Inc. 656 S.W.2d 766, 780 (Mo. Ct. App. 1983),
Parties can negotiate a contractually higher standard of care.


But Beware: to what effect upon the designer’s insurance coverage?
Designer Standard of Care

Governmental Projects:

- Generally apply the same analysis for standard of care. E.g., In re Leo A. Daly Co., 85-1 BCA P 17740 (Eng. B.C.A), ENGBCA No. 4463, 1984 WL 13843

- However, application of statutes of limitations and of repose vary by jurisdiction’s interpretation regarding sovereign immunity
Designer Standard of Care

Duty Relationships
- Design phase
- Administration phase
- Exercising authority

To Whom Owed
- Contractual liability between contracting parties
- Third-party contractual liability to non-contracting parties (sometimes referred to as “privity equivalent” parties)
- Negligence liability to contracting parties and to third-parties
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Change Orders – General Overview

- Typically dictated by terms of the contract in terms of circumstances for entitlement and adjustment.

- Typically governed by pre-notice and written change term respecting which enforcement varies by jurisdiction.
  - Some courts / arbitrators enforce the contract terms strictly as written.
  - Other courts / arbitrators are more equitable in their application, with varying focus on actual knowledge and prejudice principles, in particular.

**Takeaway:** Know your jurisdiction and know your tribunal in evaluating and giving advice regarding entitlement and adjustment for changes.
Change Orders
Contract vs Practical

- Request for Information Process
- Change Order Request Notices
- Strict construction versus
- What did (or should) the contractor know and when was it (or should it have been) known
- Exculpatory provisions
- Waiver language
Change Orders
Cause Resulting in Effects vs Effects Resulting in Claims

- Change or original work?
- Change or bid / proposal bust?
- Change or inefficient work?
- Changes overcome by other events?
- Changes concurrent with other events?
A Wrinkle in Time:
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Liquidated Damages

- Penalty vs genuine pre-estimate of delay damages
- Waivers:
  - By contract
  - By conduct
- Change order impacts / reservations of rights
- LD specter (or outright threat) and constructive acceleration principles
The implied promise of good faith and fair dealing has in the construction law - - applied based on facts and circumstances to the dealings by and between the Owner, the Contractor, and the Designer and applies to both pre-bid/proposal and post-award phases of the construction project.

Commonly stated basis of doctrine:

George A. Fuller Co. v. U.S, 108 Ct. Cl. 70 (1947):

(An implied provision of every contract is “that neither party to the contract will do anything to prevent the performance thereof by the other party or that will hinder or delay him in its performance.”)
Entire agreement clauses and judicial expansion for contractual relationships necessitating party cooperation (Bhasin, et al.)

- Field impacts on express contractual terms
- Owner time-line compliance with Change Order provisions

What is the Owner’s obligation to the Contractor and vice versa?
Other Implied Obligations of the Parties

- Accuracy and completeness of bid / proposal information
- Post-award timely and accurate information bearing on the work
- Contract document constructability
- Suitability of specified materials, equipment, or products
- Timely and accurate performance of contractual duties
- Duty to cooperate and duty to not hinder, obstruct or delay
- Duty to do that which is contractually required

BUT WHAT ABOUT EXCULPATORY PROVISIONS?
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Who is responsible when the schedule slips?
Pathways to Resolution

- Is there a path forward without need of formal dispute resolution proceedings?

- If so, how do we get there (while ideally maintaining all parties’ working relationships)?
Dispute Resolution Practicalities

- Timing
- Relationships
- Emotions
- Impacts
- Field mentality / management mentality

“The precepts of the law are these: to live honestly, to injure no one, and to give everyone else his due” -- Marcus Tullius Cicero
Alternate Dispute Resolution Discussion

DOR as initial determiner

- Duty to fairly determine the issues.
- But can the DOR truly be impartial?

Mediation

- Non binding; but allows parties to control outcome.
- Mediate early or mediate later? – views vary considerably

Arbitration

- Confidential.
- Subject matter experts evaluating and rendering binding decisions.
- However, will it be quicker and less expensive for issue(s) in dispute.

Litigation

- Expensive and typically lengthy.
- Decision by judges and juries that typically are unfamiliar with construction.
- How will litigation affect the parties’ relationship(s)?