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CONSTRUCTION
TRIALS
REAL ESTATE
CORPORATE
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# MCA - Texas Summer Conference 2024

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*Presented by:*

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# Presentation Overview:

- **Unsigned Change Orders**
- **Building Information Modeling**
- **Scheduling Changes**
- **AI/Chat GPT/Teams/Zoom**

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# Unsigned Change Orders

- **Some good news… for once!**
- Takes some control away from Owners and GC's
- Adds a layer of protection and security – while giving subs the right to say "No" to a CCD.
- **Effective for contracts entered into on or after 9-1-23**
- **Codified in Government Code 2251.0521/Property Code 28.0091**
  - Allows subcontractors to elect to not proceed with disputed extra work in both public and private contracts under *certain* conditions.
  - Subcontractors can refuse to proceed if:
    - No executed change order for the additional work; and
    - The amount of disputed/unsigned change orders exceeds 10% of the subcontract amount.

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# Unsigned Change Orders

- Subcontractors who elect not to proceed with extra/additional work would **not** be responsible for any damages associated with the election to not proceed.

- Fights over "actual or anticipated value" and who gets to decide those issues are expected.

- Be on the lookout for language giving the Contractor or the Owner the power to decide "anticipated value"

- Cannot be waiver by contract language.

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# Unsigned Change Orders

- Hypothetical
  - $1mm subcontract price
  - 3 CCD's totaling $75k ($25k each) have been issued.
  - 4th CCD issued where anticipated value is $50k.
  - What options?
  - What if CCD#1 is paid?
  - What if CCD#5 is issued?

  - Key Language: "*We are electing not to proceed with CCD#__ since the anticipated value of this CCD puts us over 10% of the subcontract price for all pending CCD's.*"

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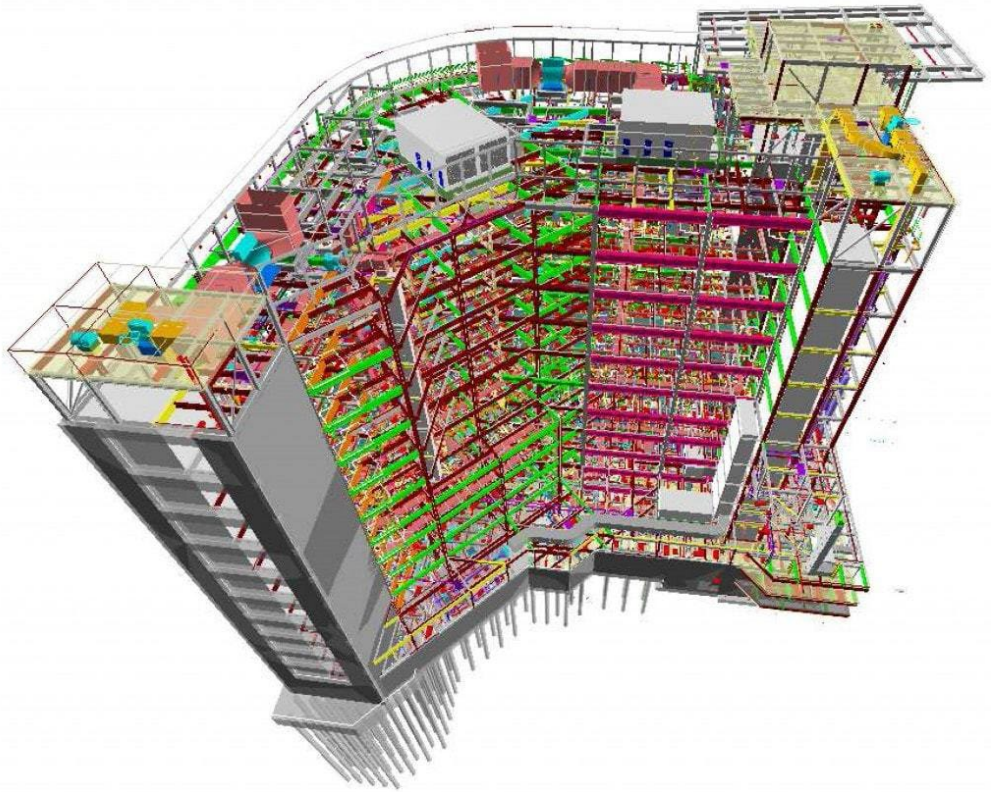
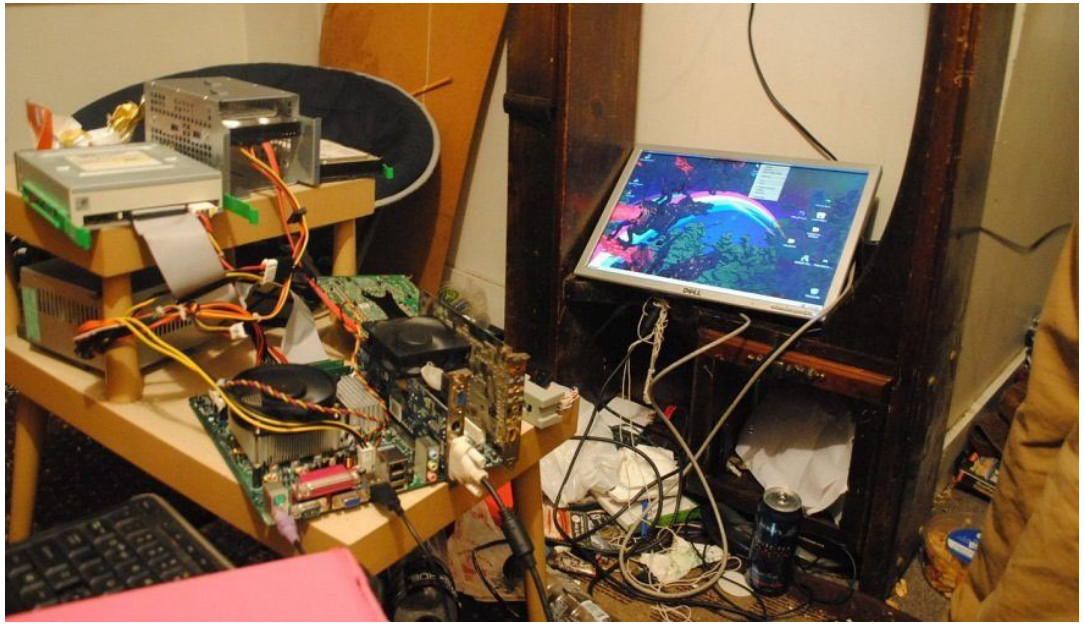
# Building Information Modeling

Expectations…



vs.

Reality…



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# Building Information Modeling

- Increasing number of design professionals and owners are using BIM for their Projects.

- BIM projects can have several potential risks, including:
  - End user disconnect and confusion among other subs/trades
  - Financial - added costs and expenses
  - Added Legal exposure / issues
  - Lack of integration

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# Building Information Modeling

- Remember BIM systems are only as effective as the information entered into them, and human error is always possible.

- BIM can be expensive to implement, requiring an initial investment in software and hardware updates, training, and workflow changes.

- A loosely planned BIM delivery process can prevent effective communication and collaboration. Make sure the obligations, expectations and deliverables are clear up front!

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# Building Information Modeling

- Fixed price
- Schedule/Timing
- Scope gaps
- Additional costs/Clashes
- Design risk
  - CMAR
  - Design Assist
  - Design Build
- Other issues?

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# Building Information Modeling

- Proposal language
  - We have included _____ hours and our BMI schedule/budget is based on all BIM participant being included in the model within _____ days of commencement of BIM services
  - We reserve the right to seek additional compensation if schedule/budget is exceeded for items outside of our control.

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# Building Information Modeling

- Proposal language (cont'd)
  - We have included the scope shown in the plans and specifications – we have not included omitted items that may be required for compliance with code.
  - We do not assume design risk for defective or omitted items except to the extent of our *design-build* scope
  - *Others*?

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# Wrap Insurance – OCIP/CCIP

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# Wrap Insurance – OCIP/CCIP

- More and more projects have wraps where the Owner or the GC buys the insurance.
- Get the contact person for notice of claims and the policy numbers.
- Get the builder's risk, worker's comp and CGL information.
- Check for gap insurance and see if your carrier will provide it.
- Consider purchasing professional liability and pollution if not included in Wrap

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# Wrap Insurance – OCIP/CCIP

- Insurance Code Sec. 151.003. ….*Not later than the 10th day before the date a principal enters into the contract* with the person, the principal shall provide the following information about the consolidated insurance program to the person:
- If not provided – then (a) Contractor does not have to enter into the contract and/or (b) does not have to enroll in the Wrap and/or (c) must be compensated for the cost of purchasing its own similar insurance.

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# Wrap Insurance – OCIP/CCIP

- Make sure to include mutual waiver of subrogation
  - If the project is covered by a CIP, then all parties covered under the CIP waive subrogation for any claims covered by the CIP, including any deductibles.
- Make sure to check on the status of the CIP at the time of final payment.

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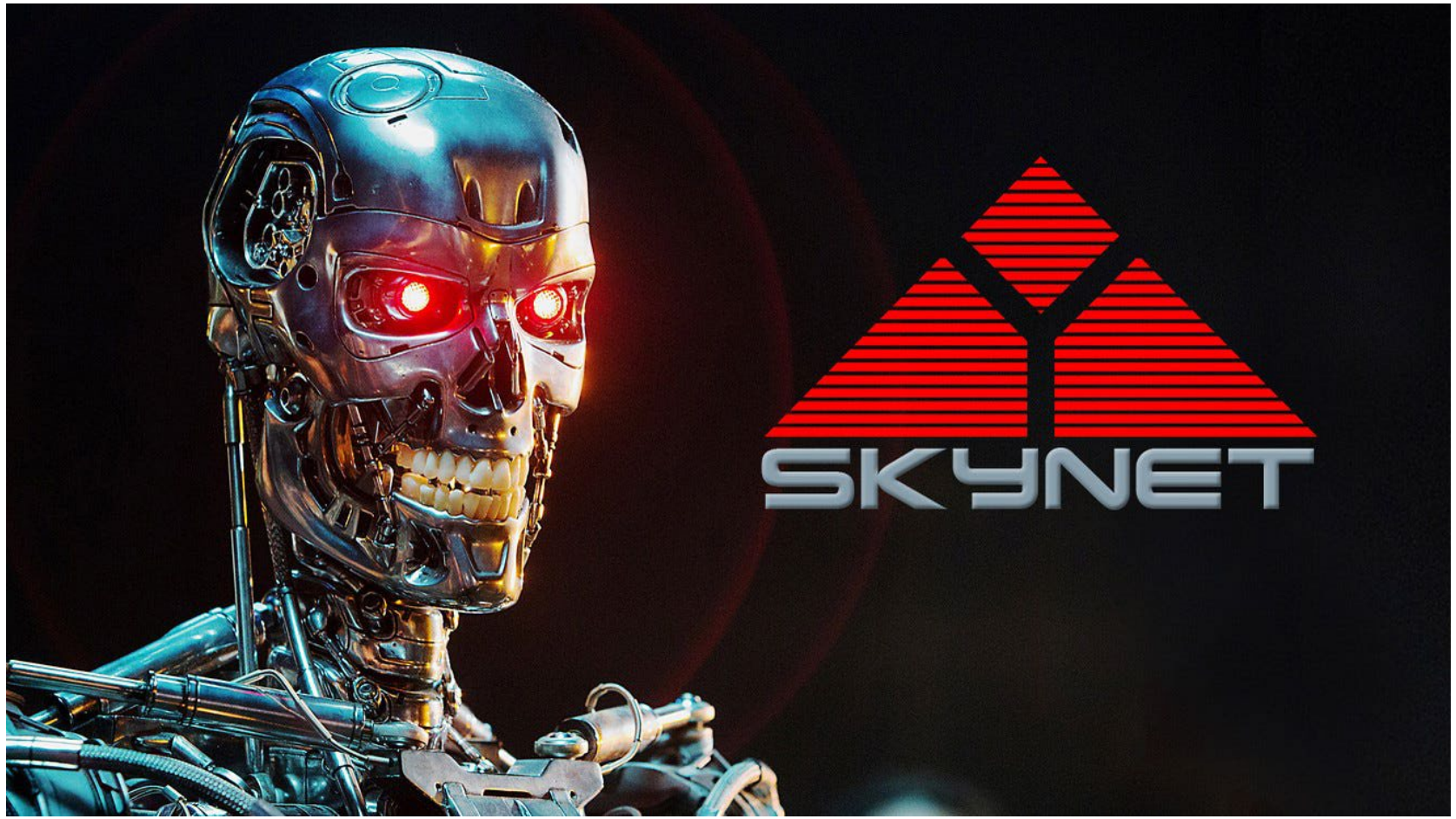
# AI/Chat GPT/Teams/Zoom

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# AI/Chat GPT/Teams/Zoom

- AI may be a promising new technology for the construction industry…but it's not without some serous risks. These risks fall mostly into three primary areas:
- Data security and privacy
  - generates and analyzes large amounts of sensitive data which subcontractors need to protect from unauthorized access and make sure they are in compliance with contract and company regulations.
  - AI systems and thereby your data will be vulnerable to cyberattacks, phishing scams or hackers that could access or use your data for their own benefit.

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# AI/Chat GPT/Teams/Zoom

- Incorrect assumptions and data
  - AI is based on assumptions and data it is provided
  - Any incorrect or incomplete assumptions can impact results, making AI less effective / with error.
- Compromised systems
  - Compromised AI systems can be manipulated into making incorrect assessments, which can lead to flawed project decisions – don't turn a profitable job into all-out disaster.

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# AI/Chat GPT/Teams/Zoom

- User Beware: The data is not yours anymore; once it is inputted you can't control it
- Be careful of the details and information you provide
- Confirm whether meetings are being recorded – what you say can and will be used against you later…
- Ok to use for general purposes – no specific names contractor – subcontractor- owner are fine. (type a weather delay notice)
  - then pull it out of the system and tweak it to fit your project.
- Make sure you review the confidentiality requirements of your contract – could violate those as well

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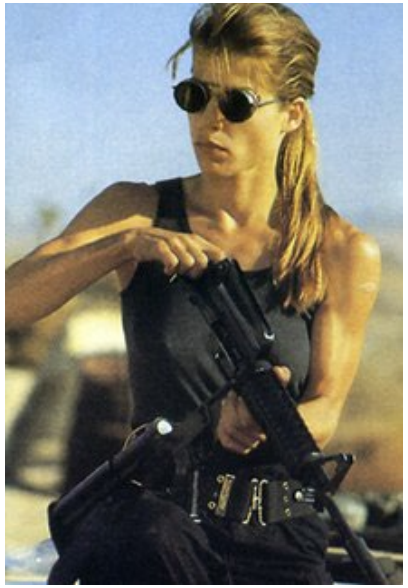
# AI/Chat GPT/Teams/Zoom



Recommended practices when using approved AI Tools:

- First - always confirm that the use of product generated by using AI Tools is permitted by your company and your clients

- Make sure it does not become the intellectual property of the AI Tools (or anyone else).

- Do not enter any confidential, trade secret, intellectual property, or other personal or proprietary information into a prompt for an AI Tool.

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# AI/Chat GPT/Teams/Zoom

Recommended practices when using approved AI Tools (cont'd):

- Do not upload confidential and/or proprietary company documents or data to any third-party platform or AI Tool.

- Do not use offensive, discriminatory, or inappropriate content.

- Thoroughly review and check all AI Tool outputs before using them or forwarding to others (inside or outside your company).

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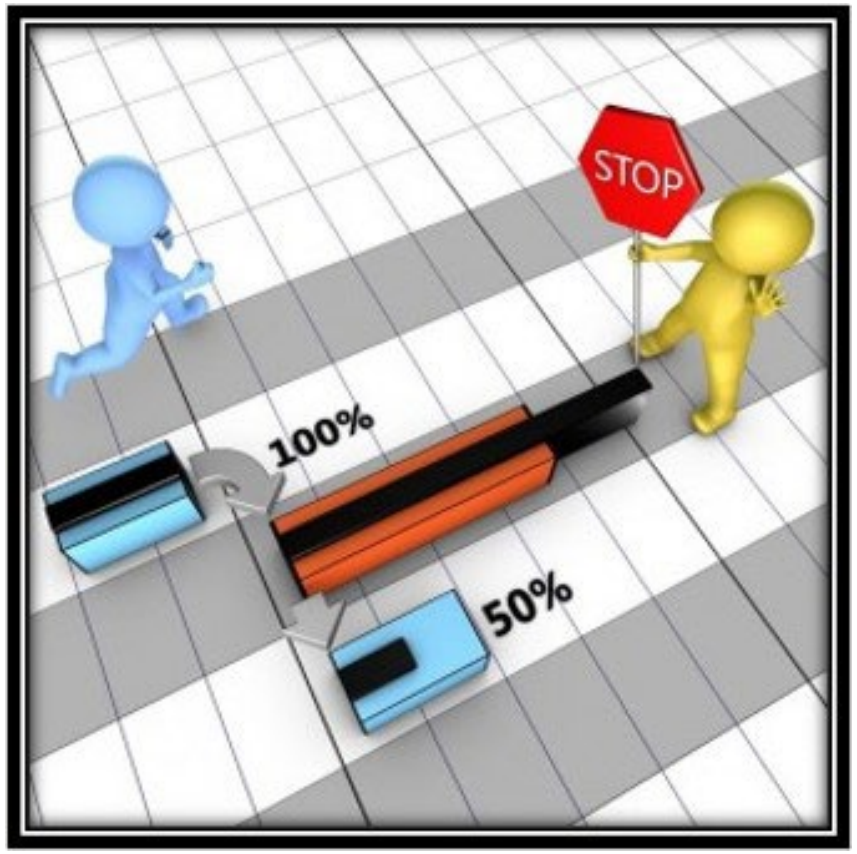
# Scheduling Changes

| Activity ID | Activity Description | Orig Dur | Rem Dur | % | Early Start | Early Finish |
|---|---|---|---|---|---|---|
| **GENERAL** | | | | | | |
| **GENERAL** | | | | | | |
| 1000 | DESIGN DEVELOPMENT / SELECT SUBCONTRACTORS | 151 | 39 | 74 | 26OCT04A | 24MAY06 |
| 1009 | NTP CONSTRUCTION | 1 | 1 | 0 | 25MAY05 | 25MAY06 |
| 1009C | COMPLETE PLUMBING | 0 | 0 | 0 | | 04AUG06* |
| 1009A | COMPLETE PROJECT | 0 | 0 | 0 | | 02OCT06* |
| 7890 | USER GROUP MOVE INTO BARRACKS | 33 | 33 | 0 | 03OCT06 | 15NOV06 |
| 8000 | ABATE BUILDINGS | 20 | 20 | 0 | 17NOV06 | 18DEC06 |
| 8050 | DEMO BUILDINGS | 20 | 20 | 0 | 05DEC06 | 03JAN07 |
| 8330 | ESTABLISH PERMANENT GRASS | 36 | 36 | 0 | 04JAN07 | 22FEB07 |
| **Barracks #1** | | | | | | |
| **STRUCTURE** | | | | | | |
| 1010 | FRP FOOTINGS & GRADE BEAMS | 15 | 15 | 0 | 25MAY05 | 14JUN05 |
| 1015 | U/G PLUMBING ROUGH-IN | 6 | 6 | 0 | 15JUN05 | 22JUN05 |
| 1900 | SET BOTTOM MAT OF 2ND FLOOR REINF. | 2 | 2 | 0 | 25JUL05 | 26JUL05 |
| 1910 | ELECT. AND PLUMB. SLAB ROUGH-IN 2ND FLOOR | 1 | 1 | 0 | 27JUL05 | 27JUL05 |
| 1095 | SET BOTTOM MAT OF REINFORCEMENT 3RD FLOOR | 2 | 2 | 0 | 08AUG05 | 09AUG05 |
| 1105 | ELEC. AND PLUMB. SLAB ROUGH-IN 3RD FLOOR | 1 | 1 | 0 | 10AUG05 | 10AUG05 |
| 1940 | SET BOTTOM MAT OF REINFORCEMENT ROOF | 2 | 2 | 0 | 22AUG05 | 23AUG05 |
| 1950 | ELEC. AND PLUMBING SLAB ROUGH ROOF | 1 | 1 | 0 | 24AUG05 | 24AUG05 |
| 1970 | POUR ROOF SLAB | 1 | 1 | 0 | 26AUG05 | 26AUG05 |
| 1070 | INSTALL LIGHT GAUGE TRUSSES | 6 | 6 | 0 | 06SEP05 | 13SEP05 |
| 1075 | INSTALL METAL ROOF DECK | 7 | 7 | 0 | 14SEP05 | 22SEP05 |
| 1081 | STRUCTURE COMPLETE | 0 | 0 | 0 | | 22SEP05 |
| **EXTERIOR** | | | | | | |
| **FIRST FLOOR** | | | | | | |
| 1090 | ROOF COMPLETE BARRACKS #1 | 0 | 0 | 0 | | 11NOV05 |
| **INTERIOR** | | | | | | |
| **FIRST FLOOR** | | | | | | |
| 1110 | INTERIOR STUD WALLS 1ST FLOOR | 7 | 7 | 0 | 23SEP05 | 03OCT05 |
| 1260 | PLUMBING WALL ROUGH 1ST FLOOR | 12 | 12 | 0 | 04OCT05 | 19OCT05 |
| 1260A | INSULATE PLUMBING 1ST FLOOR | 10 | 10 | 0 | 11OCT05 | 24OCT05 |
| 1071P | INSTALL PLUMBING MECHANICAL ROOM | 18 | 18 | 0 | 12OCT05 | 04NOV05 |



# Scheduling Changes

- Delays to the project schedule is one of the most common occurrences on a construction project.
- Delay claims are some of the most challenging types of claims to prove in a construction case that is being litigated.
- A good scheduler is critical to the success of a subcontractor that performs large commercial or industrial projects.

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# Scheduling Changes

Typical Scheduling Delay Events:

- Weather
- Fire
- Design/Specifications
- Material Shortages
- Late Deliveries
- Depleted labor pool
- Jobsite accidents
- Improperly sequencing the work
- Congestion/Stacking of trades
- Defective work
- Interference
- Changes

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# Scheduling Changes

For a contractor to prevail on a delay claim it must show:

1. that a delay occurred;
2. the cause of the delay;
3. who is responsible for the delay; and
4. that the delay caused damages that are recoverable under the contract and/or the applicable law.

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# Scheduling Changes
## *- Each Contract is Crucial*

Most construction contracts include a no damages for delay clause. A typical no damage for delay clause will limit a contractor's remedy for a compensable delay to an extension of the project schedule.

Other clauses that can limit a contractor's recovery for a compensable delay include a waiver of consequential damages, limitations on what costs can be marked up, and limits on the amount of the mark-up.

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# **Scheduling Changes** - *Know the Contract*

No Damages for Delay

"If Contractor is unreasonably delayed because of Owner's failure to supply any necessary approvals for engineering work or equipment specified by the contract, an … extension of time shall constitute Contractor's sole and exclusive remedy for damages caused by reason of such delay."

(*The extension of time can be critical, when facing liquidated damages or significant actual damages*.)

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# **Scheduling Changes** - Delays

- **15. Delays, Accelerations, and Extensions of Time.** Contractor's liability to Subcontractor for delays or suspensions is limited solely to an extension of time for the Subcontract Work, even if Contractor is partially or wholly at fault. If Owner grants Contractor an extension on account of a delay or suspension in the Subcontract Work, the length of Subcontractor's extension shall be measured by Owner's extension to Contractor. Contractor shall have no liability to pay damages to Subcontractor for alleged delays, suspensions, hindrances, inefficiencies or accelerations, unless Owner or another party actually pays Contractor for Subcontractor's claimed damages. **Subcontractor accepts the risk that it may suffer delays or suspensions for which there will be no extension and which will result in uncompensated damages**. Subcontractor shall be barred from any remedy available under this paragraph unless Contractor receives a written claim from subcontractor within five (5) days from the beginning of a delay, suspension, or acceleration.

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# Scheduling Changes –

## Exceptions to a No Damages for Delay Clause

The courts have developed exceptions to the enforcement of otherwise valid no damages for delay clause. The recognized exceptions are:

1. The cause of the delay was not intended or contemplated by the parties at the time of entering into the contract;
2. The delay was so long as to justify abandonment of the contract;
3. The cause of the delay is fraud, misrepresentation or other bad faith;
4. The delay is not within the specifically enumerated delays to which the clause is applicable; and
5. The delay is caused by active interference or other wrongful conduct.

*Green International, Inc. v. Solis*, 951 S.W.2d 384, 387-388 (Tex. 1997).

Owners, of course, attempt to contract around these exceptions.

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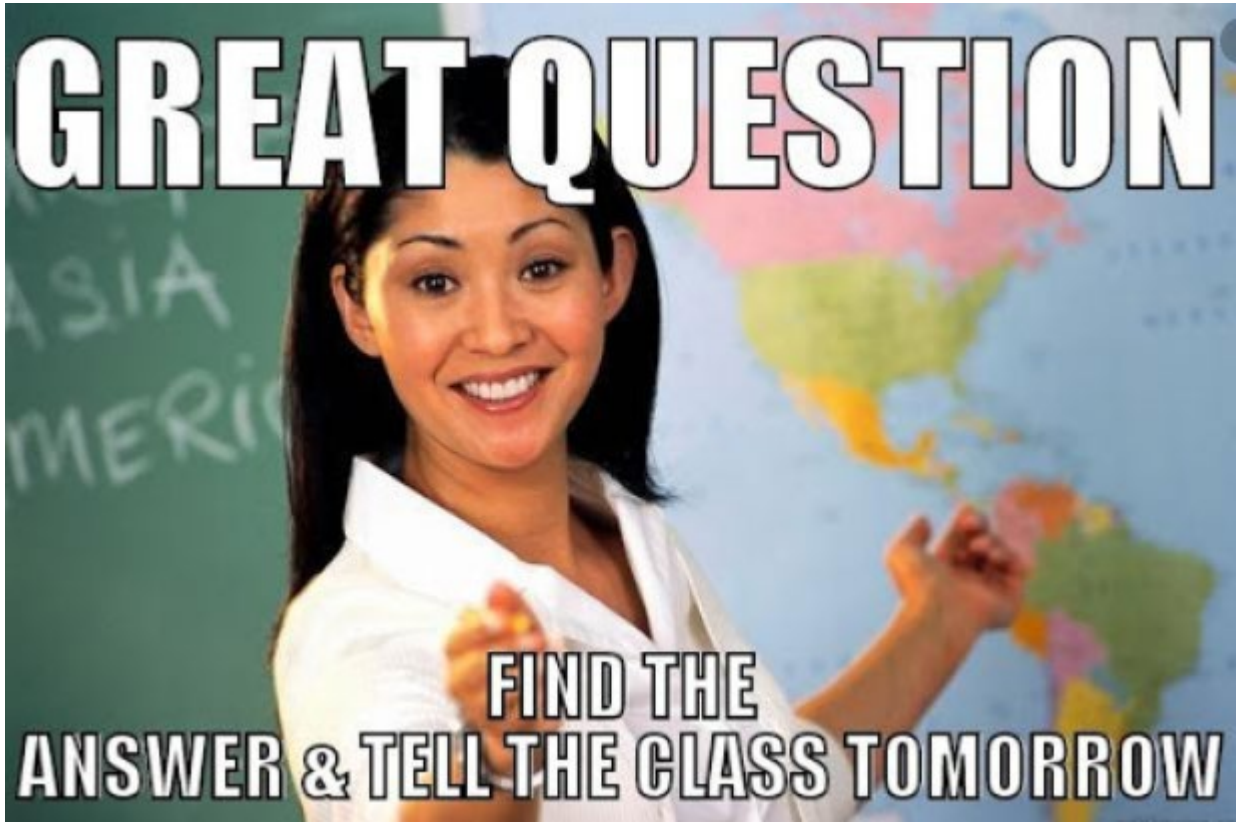


# QUESTIONS?

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