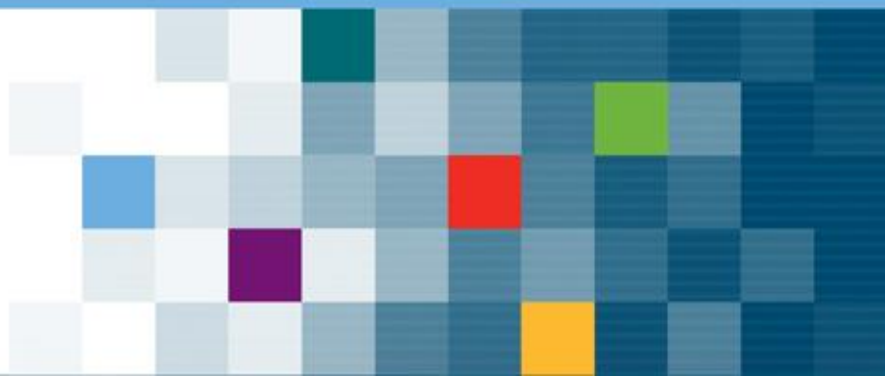


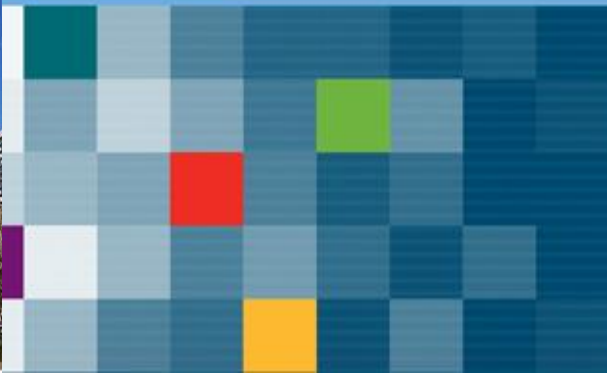


## Killer Contract Clauses – September 1, 2015



# Construction Lawyer Stites & Harbison, PLLC

How did I become a construction lawyer?



STITES & HARBISON<sup>PLLC</sup>  
ATTORNEYS

# The Ascent Project

21 story, 72-unit  
condo & garage



# The Parties

- Ascent = Owner & Developer



- Corporex = Design Builder



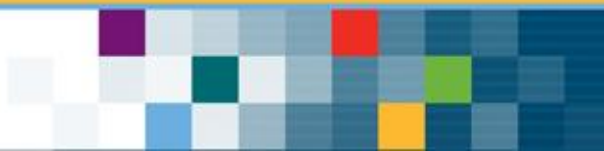
- Dugan & Meyers = CMAR



- Superior Steel = Fabricator



- Ben Hur = Erector



# What happened?

- Multiple design changes to roof tip
- CM directed Fabricator/Erector to perform extra work
  - keep track of their time/costs =\$1M
- Fab/Erec. obtained additional assurances from authorized representatives of CM and DB
  - to proceed with the extra work
  - and keep track of time/costs





I did the work . . . Show me the \$\$\$



ARBISON<sup>PLLC</sup>

NEWS

CMAR: I don't have it



# KEY - CM Argues

Pay-if-paid clause

You don't get paid unless the  
DB pays me.

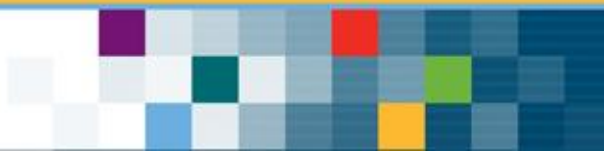
I wasn't paid . . .





# DB points to contract

- “No Extra Work or Costs shall be recognized unless the approved, designated representative of DB and/or Owner shall have issued, prior to the beginning thereof, its written order therefore.”
- “All changes must be authorized by Design Builder.”



# KEY - DB-CM Contract

- Expressly understood that requests for COs will NOT be approved for:
  - Conflicts in plans & specifications; and
  - Lack of details in the plans & specifications
- BIG, BIG, BIG, BIG, BIG DEAL
  - Contradicts COSP



Litigation -> 3 week jury trial = \$\$\$\$\$



# Jury Verdict

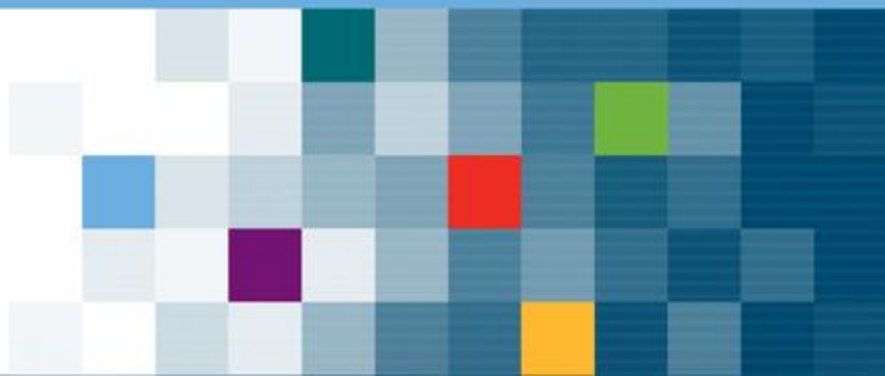
Returned in 1 hour:

- Of \$1M claim – got 60%
  - Fabricator
    - Original claim: \$664,353.40
    - Award: \$330,000
  - Erector
    - Original claim: \$361,246.09
    - Award: \$284,295.53



# Lessons Learned?

Contracts are important!







## Progress Payments

Paid within x days of payment  
from Owner?

Based on delivery?  
Or purchase of materials?

# What does Acceptance of Payment Mean?

Goodbye



# Pay-If-Paid

- You assume risk of non-payment
- To the fullest extent allowable by law, receipt of payment by the Contractor from the Owner shall be a **condition precedent** for payment to the Subcontractor.
- Subcontractor agrees to bear the risk of non-payment from Owner.



# Pay-If-Paid

- Steps:
  - Is it enforceable?
  - Modify to Pay-When-Paid = reasonable time
    - Bid – payment based solely on performance
  - Last resort – Will not be waiver of lien or bond rights



# Waiver of Lien Rights

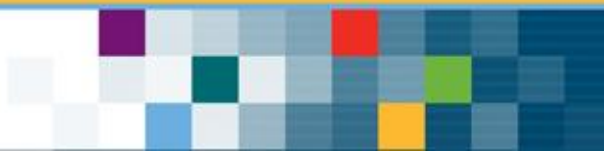
- Subcontractor waives any right to file an action under any bond or mechanic's lien
- Subcontractor shall not file any lien . .





# Waiver of Lien Rights

- Best Chance of Payment
- Steps
  - Is it enforceable?
  - Modify it – waive to extent paid
  - Ask for Bond – will not waive right to make claim against bond
- Lien Waivers for Progress Payments
  - Waive ALL claims



# Get Bonds Before work starts

<b>PAYMENT BOND</b> (See Instructions on reverse)	<b>DATE BOND EXECUTED</b> (Must be same or later than date of contract) <b>SEPTEMBER 1, 2008</b>	<b>OMB NO. 9000-0045</b>									
Public reporting burden for this collection of information is estimated to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition Policy, GSA, Washington, D.C. 20405 <b>BOND NO. 8 SB 104738210 BCM</b>											
<b>PRINCIPAL</b> (Legal name and business address)  <b>ARCHER WESTERN CONTRACTORS, LTD.</b> 3715 Northside Parkway NW Building 100, Suite 550 Atlanta, GA 30327-2835		<b>TYPE OF ORGANIZATION</b> ("X" one)  <input type="checkbox"/> INDIVIDUAL <input type="checkbox"/> PARTNERSHIP  <input type="checkbox"/> JOINT VENTURE <input checked="" type="checkbox"/> CORPORATION  <b>STATE OF INCORPORATION</b> ILLINOIS									
<b>SURETY (IES)</b> (Name(s) and business address(es)) <b>TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA</b> One Tower Square, Hartford, Connecticut 06183		<b>PENAL SUM OF BOND</b>  <table border="1"> <tr> <th data-bbox="1122 1222 1319 1365">MILLION(\$)</th> <th data-bbox="1319 1222 1522 1365">THOUSAND(\$)</th> <th data-bbox="1522 1222 1721 1365">HUNDRED(\$)</th> <th data-bbox="1721 1222 1843 1365">CENTS</th> </tr> <tr> <td>062</td> <td>439</td> <td>000</td> <td>00</td> </tr> </table>		MILLION(\$)	THOUSAND(\$)	HUNDRED(\$)	CENTS	062	439	000	00
MILLION(\$)	THOUSAND(\$)	HUNDRED(\$)	CENTS								
062	439	000	00								
<b>CONTRACT DATE</b>		<b>CONTRACT NO.</b>									

# Notice

- Failure to report in writing to the Architect and Owner, errors, omissions or inconsistencies in the Contract Documents within ten (10) days of the Discovery of same shall operate as a waiver of any claim or defenses arising from those errors, omissions or inconsistencies.



# Notice

- Failure = Waiver of Claims
- Steps
  - Outline all notice requirements for any types of claims
  - Modify harsh turn around – 1 day – 3 days
    - Modify to Business days
    - Modify to Actual knowledge



## Contract Checklist

### I. Extra Work / Change Orders Notice Provisions

- A. Extra work must be approved in writing prior to beginning work (send an email to R Gen **Notice Provisions** ng to get approval). To the e obtain an agreement on the amount prior to beginning the work.

### II. Liens and Lien Releases in Virginia

- A. Dharma must bond off or remove its subcontractor's lien within 10 days of the lien being filed.
- B. IMPORTANT - The lien waivers state that receipt of payment has been acknowledged. Make sure payment is received prior to executing the Waiver of Lien.

Lien Req

Agent's Contact Info



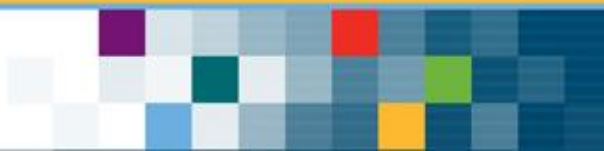
# Retainage

- § 15.3 Retainage shall be 10%
- Change:
  - Retainage shall be reduced to 5% of the total contract amount after 50% completion of Subcontractor's Work, and Retainage shall be paid in full within thirty (30) days after final completion of Subcontractor's Work.



# Retainage

- Check State Law
  - How long can they hold?
  - What % can they hold?
    - On what? Raw material?
  - 30 days after FC of entire job? Your scope?
- Modify – 30 days after SC of your work

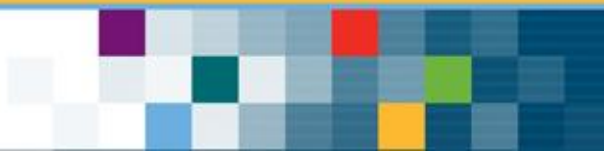


*RIGHT TO STOP  
WORK*



# Right to Stop Work

- Pending final resolution of a Claim, Subcontractor shall proceed diligently with performance of the Contract.



# Right to Stop Work

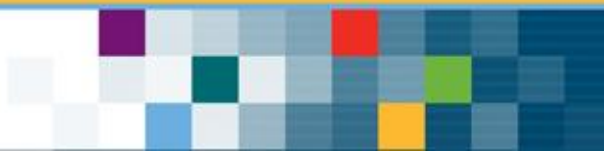
- Expressly include the right to stop work for non-payment
  - Strike clauses that say you will continue
- If payment not received as stated in contract, Subcontractor after \_\_ days written notice shall stop work until such payment is received and bear no obligation to Contractor for the consequences of such work stoppage.
- The Subcontract Sum shall be increased by the Subcontractor's reasonable costs of demobilization, delay, and remobilization.





# Right to Accelerate

- Contractor shall have the right to change the time, order, and priority of work, and Subcontractor shall be bound to changes to the Schedule of Work.



# Right to Accelerate

- Right to modify sequence/schedule?
  - Strike/ modify
  - Explain fabrication process
- Subcontractor is entitled to the time set out in the project schedule for performance of its work. Subcontractor is also entitled to schedule such work in its shop in such manner as it deems most efficient to meet its project schedule obligations. Subcontractor will not accept orders to accelerate its work that stem from events beyond Subcontractor's control unless such orders are made in writing and include agreed terms to compensate Subcontractor for the cost of the acceleration.



# Code of Standard Practice

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## Code of Standard Practice for Steel Buildings and Bridges

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April 14, 2010

Supersedes the March 18, 2005 AISC *Code of Standard Practice  
for Steel Buildings and Bridges* and all previous versions.

Prepared by the American Institute of Steel Construction  
under the direction of the AISC Committee  
on the Code of Standard Practice.



Incorporate the  
COSP in bid and  
contract

# No Damages for Delay

- If Subcontractor is delayed, the Subcontractor shall be entitled to an extension of Time.
- The Subcontractor shall not be entitled to and shall make no claim for damages arising out of or relating to delays, disruptions, suspensions, accelerations, inefficiencies or impacts upon the work.



# No Damages for Delay

- Enforceable?
- Modify



# Damages

- Liquidated
  - You will pay \$\$\$ if you delay
    - Is amount reasonable?
    - Is it tied solely to your delays?
  - Limit to what you can control
    - Reasonable amount
- Actual Damages – Repair Only
  - Not open ended- quantify it
- Consequential - Waiver



# Insurance

- Get the Certificates of Insurance
- Send the insurance provisions to your agent

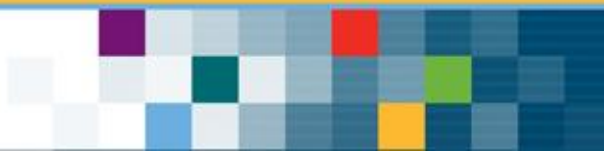
**ACORD**      **CERTIFICATE OF LIABILITY INSURANCE**

<b>PRODUCER</b> Louisville, KY Branch Logan Lavelle Hunt Ins., LLC P O Box 24315 Louisville KY 40224 Phone: 502-499-6880    Fax: 502-499-7871		<b>OP ID ES</b> PELLAS1	<b>DATE (MM/DD/YYYY)</b> 03/28/07
<b>INSURED</b>		<b>THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.</b>	
<div style="border: 2px solid red; padding: 10px; text-align: center; font-size: 2em; font-weight: bold;">You need proof . . .</div>		<b>INSURERS AFFORDING COVERAGE</b>	
		<b>INSURER A:</b> Motorists Mutual Ins. Co.	<b>NAIC #</b>
		<b>INSURER B:</b>	14621
		<b>INSURER C:</b>	
		<b>INSURER D:</b>	
<b>COVERAGE</b>		<b>INSURER E:</b>	
<small>THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN SHALL BE THE EXCLUSIVE POLICY. AGGREGATE LIMITS SHOWN MAY VARY.</small>			



# Flow Down Clauses

- Check for Flow Downs
  - Prime Contract
  - Buy American Act
- *S.J. Amoroso Construction Co., Inc. v. United States*, 12 F.3d 107 (Fed. Cir. 1993)
  - FAR 52.225-5 was incorporated by reference into a pursuant to the *Christian* doctrine.
  - The *Christian* doctrine – certain FARs incorporated by reference bc fundamental



# Look at the Specifications

<b>FAR Section</b>	<b>Title</b>	<b>Spec Section</b>
52.215-2	Audit and Records - Negotiation (OCT 2010)	00700-21
52.215-13	Subcontractor Certified Cost or Pricing Data – Modifications (Oct 2010)	00700-24
52.222-6	Davis Bacon Act (JUL 2005)	00700-35
52.225-11	Buy American Act - Construction Materials Under Trade Agreements (SEP 2010)	00700-66
52.225-13	Restrictions on Certain Foreign Purchases (JUN 2008)	00700-70

# Change Orders/Extra Work

Unlikely/Rare  
Scenario



# Change Orders/Extra Work

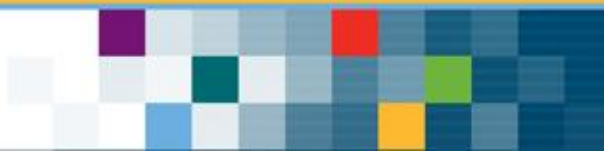
More Common Scenario



# Change Orders

## Basic Rules:

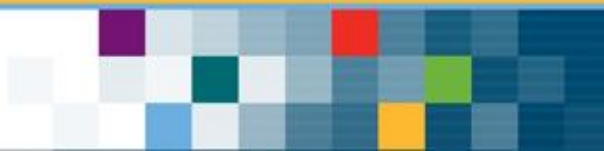
1. Must know scope
  1. In scope = no change
2. Understand your contract
  1. AND ANY CONTRACTS INCORPORATED.
3. Negotiate the best terms possible at the beginning of the project.



# Change Orders

## Common Factors Leading to Change Orders:

- Unforeseen site conditions;
- Sudden and drastic increase in price of materials;
- Owner's changes;
- Specifications conflicting with construction plans; and
- A defective design or design changes.



# Change Order Provisions: Common Themes

- Notify in x days
- In writing
- Signed by parties
- specify modifications to contract price or time;
- No changed work to be performed without change order or change directive.

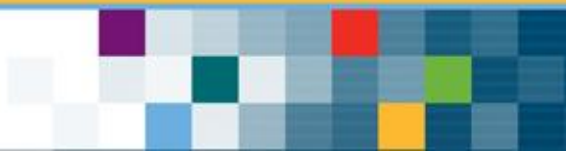




# Extra Work Provisions

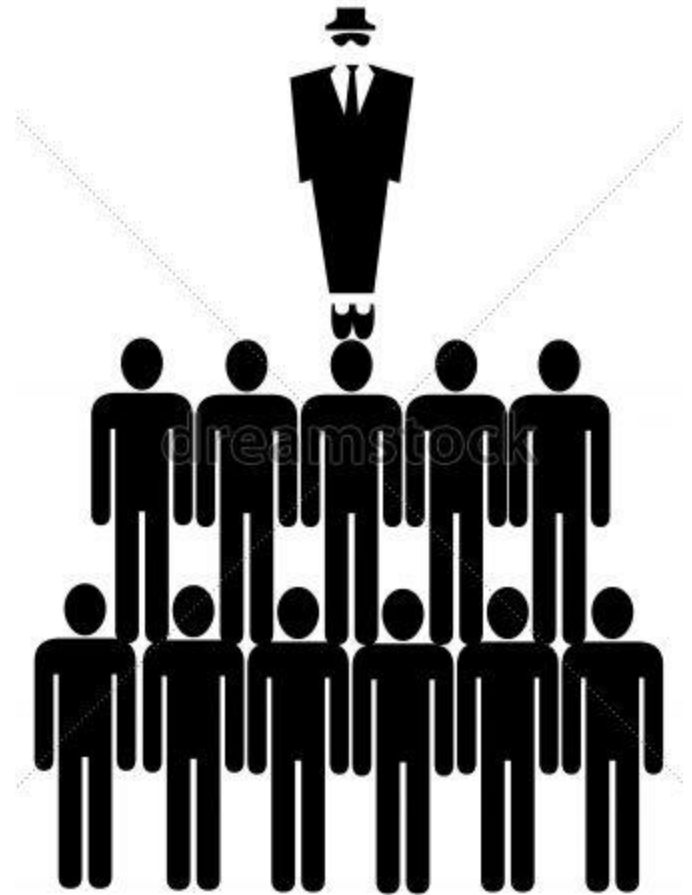


- Get it in WRITING
  - Get it signed by GC/DB
- State: Fab/Erec will be paid for extra work
  - notwithstanding any other provisions to the contrary



# Extra Work Provisions

- KNOW and understand contract provisions in the project chain of command
- Get the prime and incorporated contracts



# Changes/Extra Work

- No writing may = no payment
- If parties cannot agree, DOCUMENT, DOCUMENT, DOCUMENT (preserve your rights)



# Change Orders: Failure to Give Notice

*F. Garofalo Electric Co. v. New York University* (2000)

- Sub performed additional work based upon oral agreement to pay from Owner and CM
- Sub didn't give written notice as required
- Sub argued owner and CM waived writing requirement
- Court
  - Sub loses- failed to comply with notice and documentation reqs



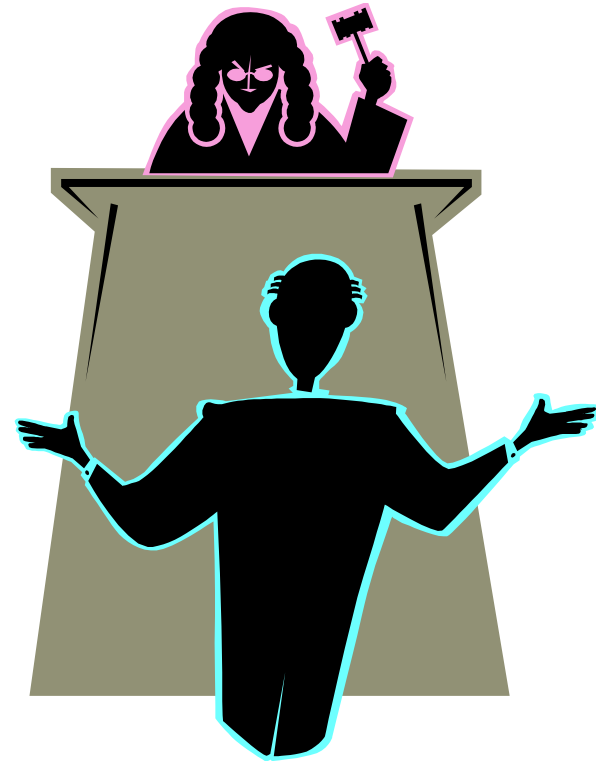
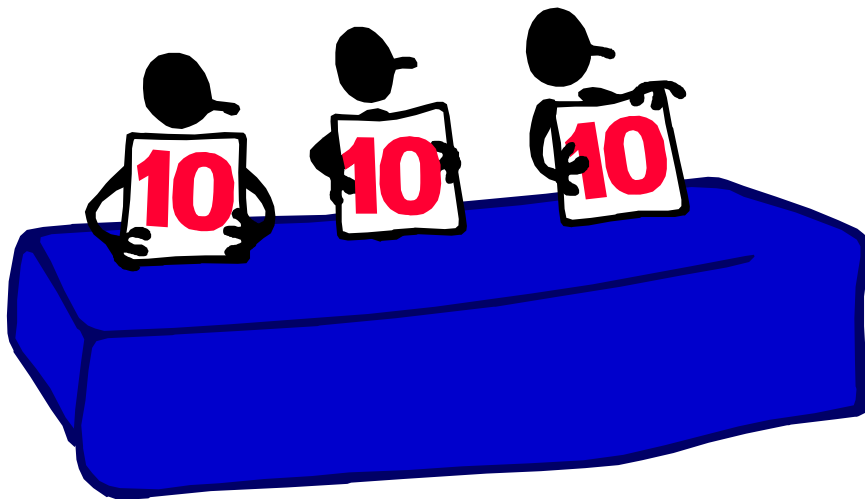
# Change Orders: Waiver of Notice

*Wehr Contractors, Inc. v. Steel Fabricators, Inc.* (1988)

- Fabricator performed extra work
- Contract required this to be approved in writing by GC
  - Fabricator did not get approval in writing
- Fabricator was lucky
  - Court found parties didn't follow those contract terms = waived them
  - GC orally modified writing requirement
  - DO NOT RELY ON THIS



# Arbitration v. Litigation



# Arbitration v. Litigation

Unique problems with construction contracts & dispute resolution:

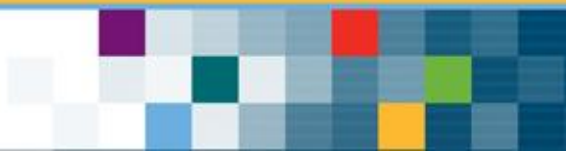
- Contracts govern
- Can't joint all parties
- Conflicting forum selection
- Technical issues
- Most construction claims must be proved through experts





# Litigation

- What state? What laws apply?
- Interest?
- Attorneys fees?
- Waste of Court's Resources?
- Length of time?
- Expense



# Arbitration

- Lay out “end game” at the beginning – be clear about damages up front
- Can request individuals with construction expertise
- Less expense?
- Arbitration faster or mere perception?
- Generally private & kept out of public eye?



# QUESTIONS??



# ANGELA R. STEPHENS, LEED AP

- **Civil Engineering Degree from University of Louisville Speed Scientific School**
- **JD, Louis D. Brandeis School of Law**
- **Leed AP**



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