

WEBINAR



CHANGE MANAGEMENT:

THE PROJECT YOU PLAN FOR & THE PROJECT YOU MANAGE AFTER DESIGN



PRESENTER

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Ericksen Legal, PC

WED., NOV 19 | 2:00 - 3:00 PM ET



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.

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PUA Overview

Meet PUA

WHEN IT COMES TO
PROFESSIONAL LIABILITY

WE'RE THE
PROFESSIONALS



Formed in 1990

- Stability & proven track record
- \$65M+ in GWP
- 1,500+ Insureds

Four lines

- A&E
- Design-build contractors
- Miscellaneous PL
- Excess limits

Strong paper & broad coverage

- Arch – admitted
- Lloyd's – E&S

Assist in navigating difficult, complex risks and issues

- PUA Market Solutions

Value-added CE webinars via PUA University

- Library of past webinars on puainc.com



► puainc.com

Abbreviated Services Collateral Changes





Value Engineering Substitutions

Real World Realities...

- Few projects unfold as “planned”
 - (if there even was a plan)
- The Successful Identify, Manage, & Lead Change
- The Successful Sometimes Even Reject Change
- Victims of Change Receive & Retreat



Today's Agenda

- Project Planning as a Change Management Platform
- Contain the Change in Contract
- Identifying Change of Significance
- Tools & Procedures for Change Analysis & Action
- Change Management Applied in the Real World
 - Clients
 - Contracts
 - Program

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Project Planning as a Change Management Platform

The Planning Imperative

“He who fails to plan is planning to fail”

- Winston Churchill, WWII

Project Planning in the Real World

- Project planning not considered a valuable task
- When we plan, we do so for the best and “unforeseen” things happen
- The more narrow a system, the easier it is to disrupt
- Project plans often do not consider risk



Without a Plan, There is No Change: Three Levels of Project Planning



1. Baseline Project Plan for Core Projects
2. Project Specific Plan Tailored for Project Variations
3. **Contingency or Risk Planning**

Core Project Specific Planning Issues: Look Before You Leap!

- Client Selection
- Project Selection with a Scope for Success
- Team Selection
 - Design Team
 - Owner Team
- Risk Assessment vs. Economic/Strategic Benefit
- A Contract Framed Plan for Informed Project Delivery



Project Plans as Contract and Performance Guides

- The preliminary Project Plan is the initial guide to contract drafting and negotiation
- The initial project plan should reflect and conform to the contract realities
- The living project plan should guide performance and evolve in sync and in response to the project evolution and the services required and delivered.

The Making of a Contract

Guiding Principles:

- A Contract is to represent “a meeting of the minds”
- A Binding Contract Requires Three Elements:
 - Offer
 - Acceptance
 - Consideration

Contain the Change



RELATIONSHIP:

- No assignments – it is a relationship
- To the client, not third parties



ROLE:

- Defined & complete scope of work
- Assumptions
- No reductions in scope



PROJECT:

- Changes & substitutions

Preserve the Relationship

This Agreement and all of the Obligations and Services set forth herein are intended for the sole use and benefit of the Parties and are not intended to create any third party rights or benefits.

Neither Party may assign this Agreement or any of Consultant's work product without the written consent of both parties



Preserve the Role Reduced Scope Impact Protections

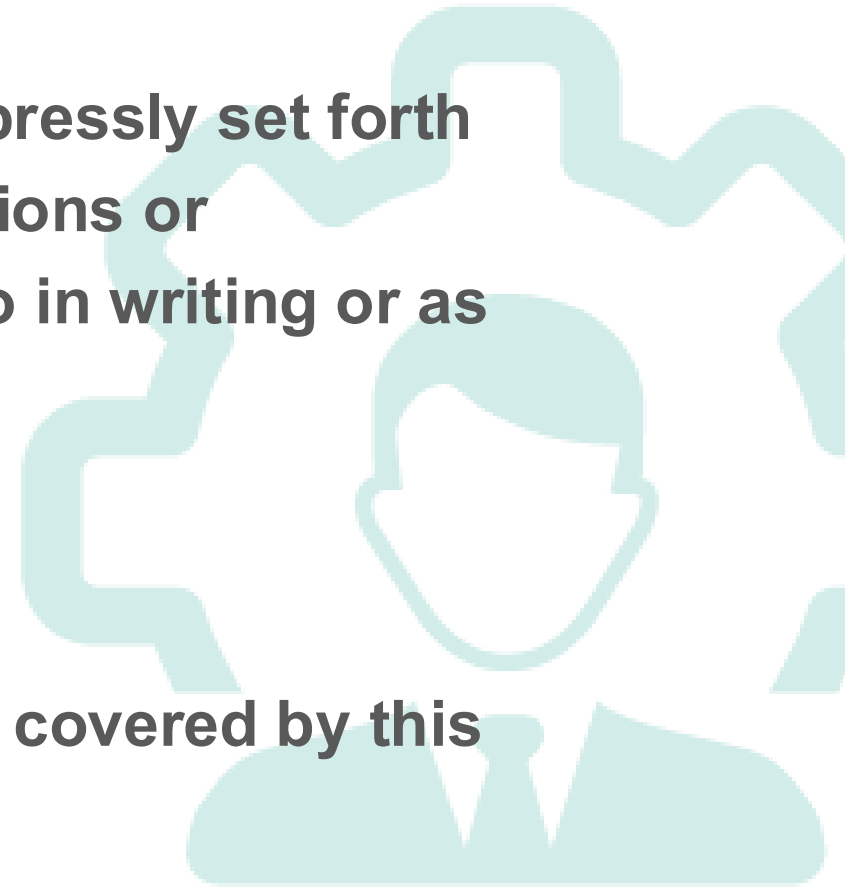
Consultant's commitments as set forth in this Agreement are based on the expectation that all of the services described in this Agreement will be provided. In the event Client later elects to reduce Consultant's scope of services, Client hereby agrees to release, hold harmless, defend, and indemnify Consultant from any and all claims, damages, losses, or costs associated with or arising out of such reduction in services.

(Based on California ACEC Standard Form Agreement)

Preserve the Role Inclusion & Containment

Consultant's services shall be limited to those expressly set forth above, and Consultant shall have no other obligations or responsibilities for the Project except as agreed to in writing or as provided in this Agreement.

All of Consultant's communications, actions, and documentation relative to the Project shall be covered by this Agreement.



Assumptions

Consultant's Scope as set forth below is based on the following **mutual** assumptions:

In the event any of these or other project assumptions change or are inaccurate, Consultant's Scope, Schedule, and Compensation shall be adjusted accordingly.



The Approval Waterfall

Client shall review and approve Consultant's services at the milestones identified below. In the event, of a subsequent change or modification of such approval impacting Consultant's services, Consultant's Scope, Schedule, and Compensation shall be adjusted accordingly.



Preserve the Project Substitutions & Changes

Consultant's review of submittals, substitutions, and proposed changes and modifications shall be solely for the purpose of confirming that the submitted information is in general conformance with the design and the project objectives and shall not be responsible for variations proposed or implemented by Contractor. Contractor shall remain exclusively responsible for satisfaction of all project objectives, codes, and criteria.



Change Markers

Routine Issues

- Unforeseen Site Conditions
- Contractor performance
- Weather
- Codes & Regulations



Change Markers Critical Categories

- Client
- Contract
- Scope/Program
- Change in Prime or Manager Level Players
- \$\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$



Models to Monitor Projects

- Metric Based
- Earned value analysis
- Schedule
- Payments
- Event Based
- Scope
- Staff & Representation
- Communication



Metric Models to Monitor Projects

- Fees Earned
- Fees Received
- Schedule (you and others)
- Budget (you and others)
- Change Orders (and requests)
- Requests for Information
- Client & Third Party Claims



Event Based Triggers to Monitor Projects

- Schedule & Budget Busts
- Material staff/leadership changes by any party
- Failure to follow agreed upon procedures
- Communication breakdowns
- Missing milestones or other commitments
- Claims & Backcharges



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**Change Measure,
The Project Plan**

So “it” is happening – now what?

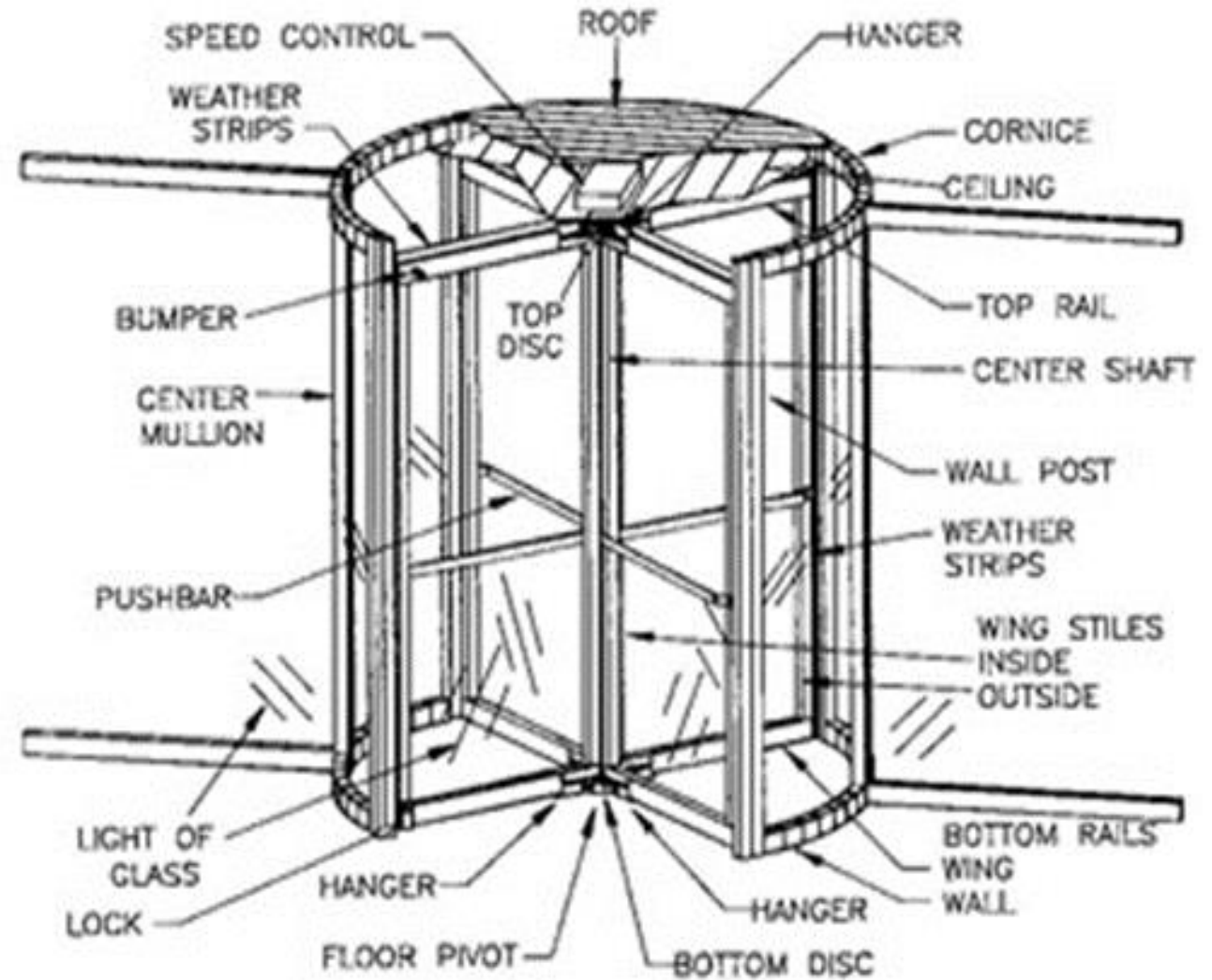
- IROPE
- Engage Internal & External Resources
- DOCUMENT the event and action!
- Continued Follow Up & Assessment
 - With the Internal & External Resources
 - 10/30/90 Days
 - Adjust As Necessary

IROPE

- Issue
- Risks
- Options
- Plan
- Execute

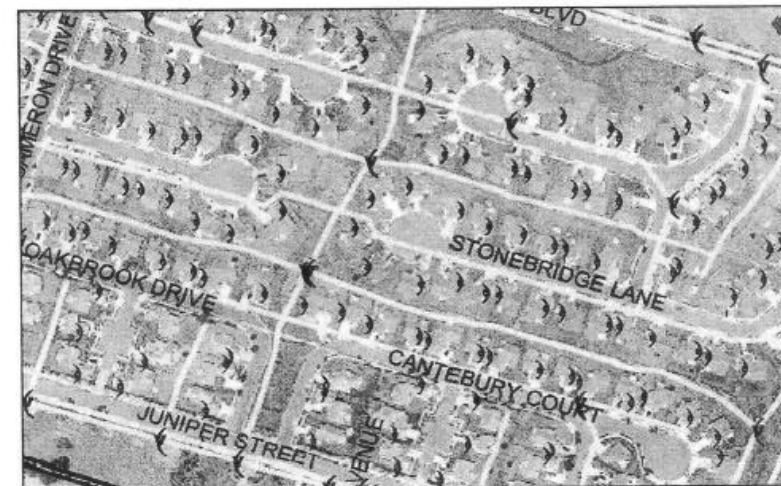


The Client Change



The Setting

- Design-Build Renovation of 700+ units of residential construction on military base constructed over 30+ year time period
- Seven prior similar projects with same Design-Builder and Architect
- Design-Builder went to fixed price \$50M contract with military based on 15% design documents
- At same time, Design-Builder went to fixed price contract with its contractor subsidiary



RENO HOUSING PROJECT UNIT MIX						
		BLDG. TYPE	PHASES	BLDGs. MAKE-UP	QTY. OF BLDGS.	NO. OF BEDROOMS
JNCO		1	PHASE-3	1A	51	2 TO 2 MOD.
		2	PHASE-3	1B	30	2 TO 2 MOD.
		3	PHASE-2	1C	89	2 TO 2 MOD.
		4	PHASE-2	1D	83	2 TO 2 MOD.
		5	PHASE-3	1B	31	2 TO 3
		6	PHASE-1	2A	32	3
		7	PHASE-1	2B	35	3
		8	PHASE-2	2C/B1	102	3
		9	PHASE-1	2CH	5	3
		10	PHASE-1	2D/B2	33	3
		11	PHASE-3	5A	8	3
		12	PHASE-1	5B	8	3
		13	PHASE-1	5C	10	3
		14	PHASE-3	2D/B2	75	3 TO 4
		15	PHASE-3	3A	9	4
		16	PHASE-1	3B	10	4
		17	PHASE-3	3C/C1	21	4
		18	PHASE-1	3D/C2	15	4
		19	PHASE-1	6A	3	4
		20	PHASE-1	6B	1	4
SNC		21	PHASE-3	5A	19	3
		22	PHASE-3	5B	5	3
		23	PHASE-1	5C	11	3
		24	PHASE-3	5B	13	3 TO 4
		25	PHASE-1	6A	2	4
		26	PHASE-1	6B	2	4

§ 2.8.3 The Architect shall furnish or provide the following services only if specifically designated:

Services		Responsibility (Architect, Owner or Not Provided)	Location of Service Description
.1	Programming	Owner	
.2	Land Survey Services	Owner	
.3	Geotechnical Services		
.4	Space Schematics/Flow Diagrams	Architect	
.5	Existing Facilities Surveys	Owner	
.6	Economic Feasibility Studies	Not Provided	

The Architect shall be entitled to rely on the accuracy and completeness of services and information furnished by the Owner. The Architect shall provide prompt written notice to the Owner if the Architect becomes aware of any errors, omissions or inconsistencies in such services or information. The Architect represents and warrants that it has reviewed the Project parameters and other information identified in Article 1.1 and the Project site- and, to the best of the Architect's knowledge and professional judgment, has satisfied itself that such information and-site is sufficient for the performance of the Architect's Services under this Agreement.

Without limiting the foregoing, the Architect shall have sole and exclusive responsibility for the design and engineering of the Project, and the Architect shall prepare and provide the various drawings, specifications and other design documents (which shall include utilities systems and landscaping) necessary or appropriate for the completion of the Project, including those documents described in summary in **Exhibit F** attached hereto (each a "Deliverable Document"). All drawings, specifications and other design documents shall comply with the Project parameters and applicable laws and requirements identified in this Agreement and shall provide for the design of the Project to a standard of quality and integrity that is equal to or better than such Project parameters and requirements. Without limiting the foregoing, all drawings, specifications and other design documents must satisfy all "Design Criteria" defined in **Exhibit E** attached hereto.

The Claim

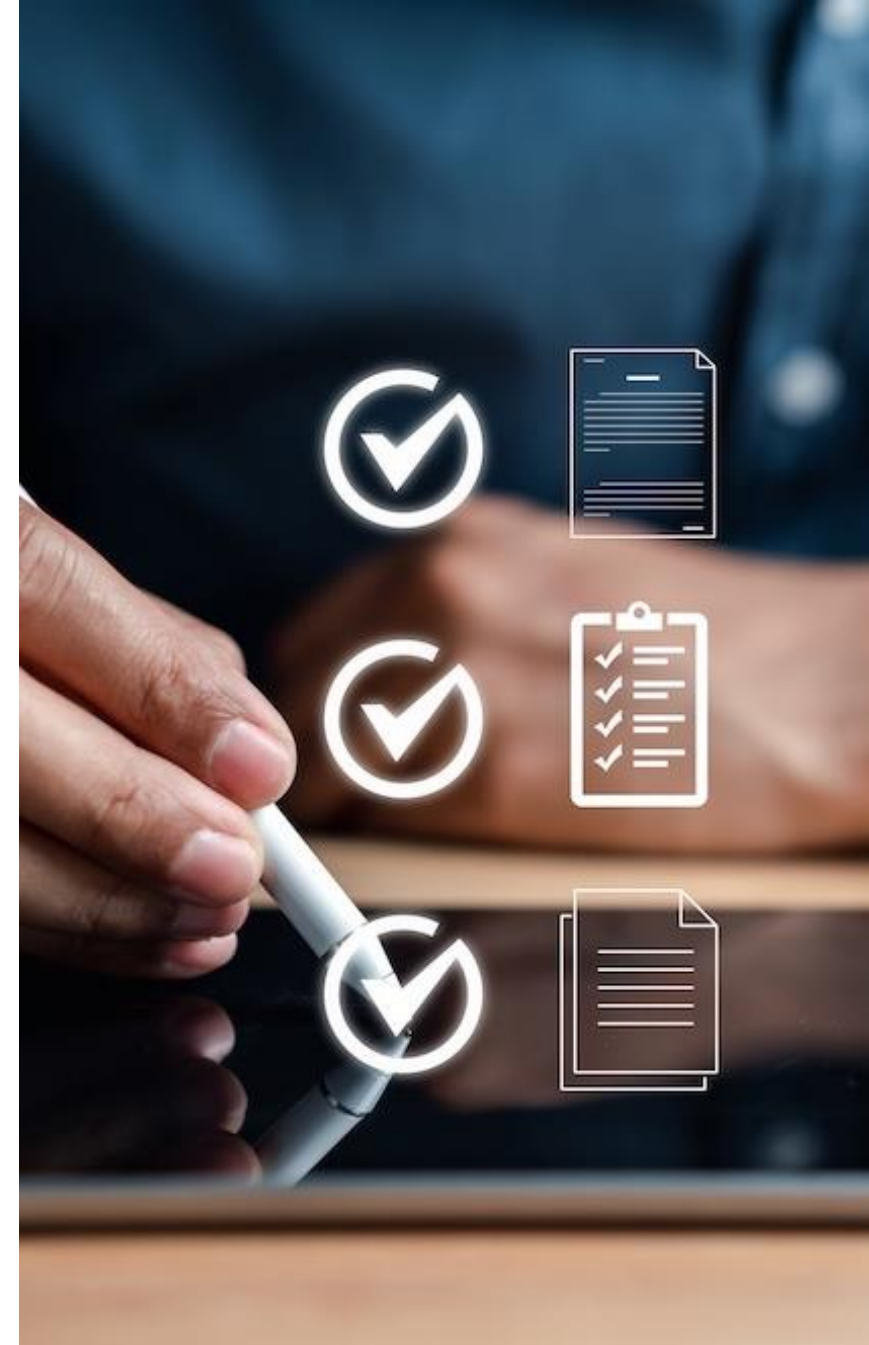
- Design-Builder sold out to larger international company six weeks before CDs complete
- Architect de facto did all review of existing site plans and site reconnaissance
- Architect received undifferentiated directions simultaneously from new Design-Builder and its contractor subsidiary. Design-Builder later disclaimed validity of contractor directions/commitments.
- Claim for \$1.1M for 100% of all change orders from site conditions or variations
 - Changes from 15% documents
 - Differing Site Conditions
 - Client rejected “value engineering”

The Client Strategies & Solutions

- A contract consistent with appropriate project delivery strategies and principles and not “faith and trust”
- No assignment
- Understand and establish organizational structures and project responsibilities of participants

Critical Issues & Actions

- Risk & Advice Documentation
 - Variation from Plan & Expectations
- Client Change
 - Communicate & Document Status and Plan
- Scope Discipline
 - Lack of Contract Recognition

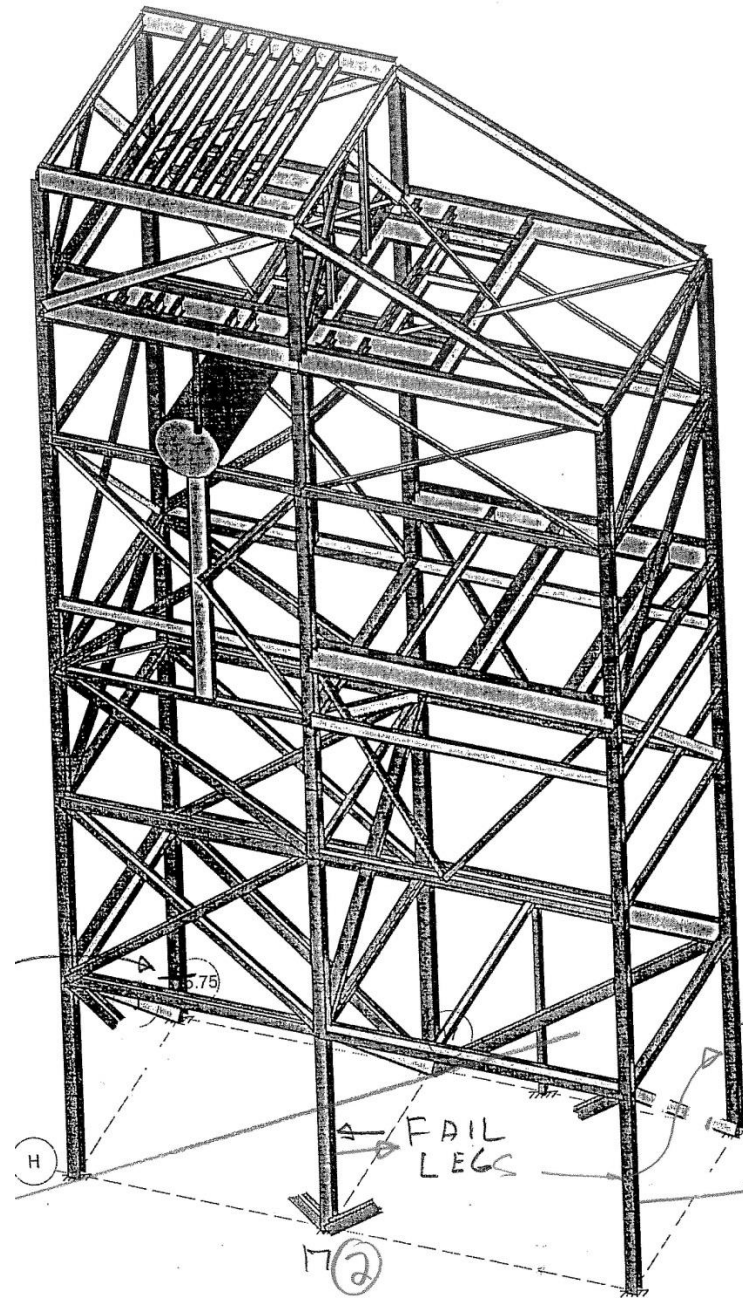


The Contract



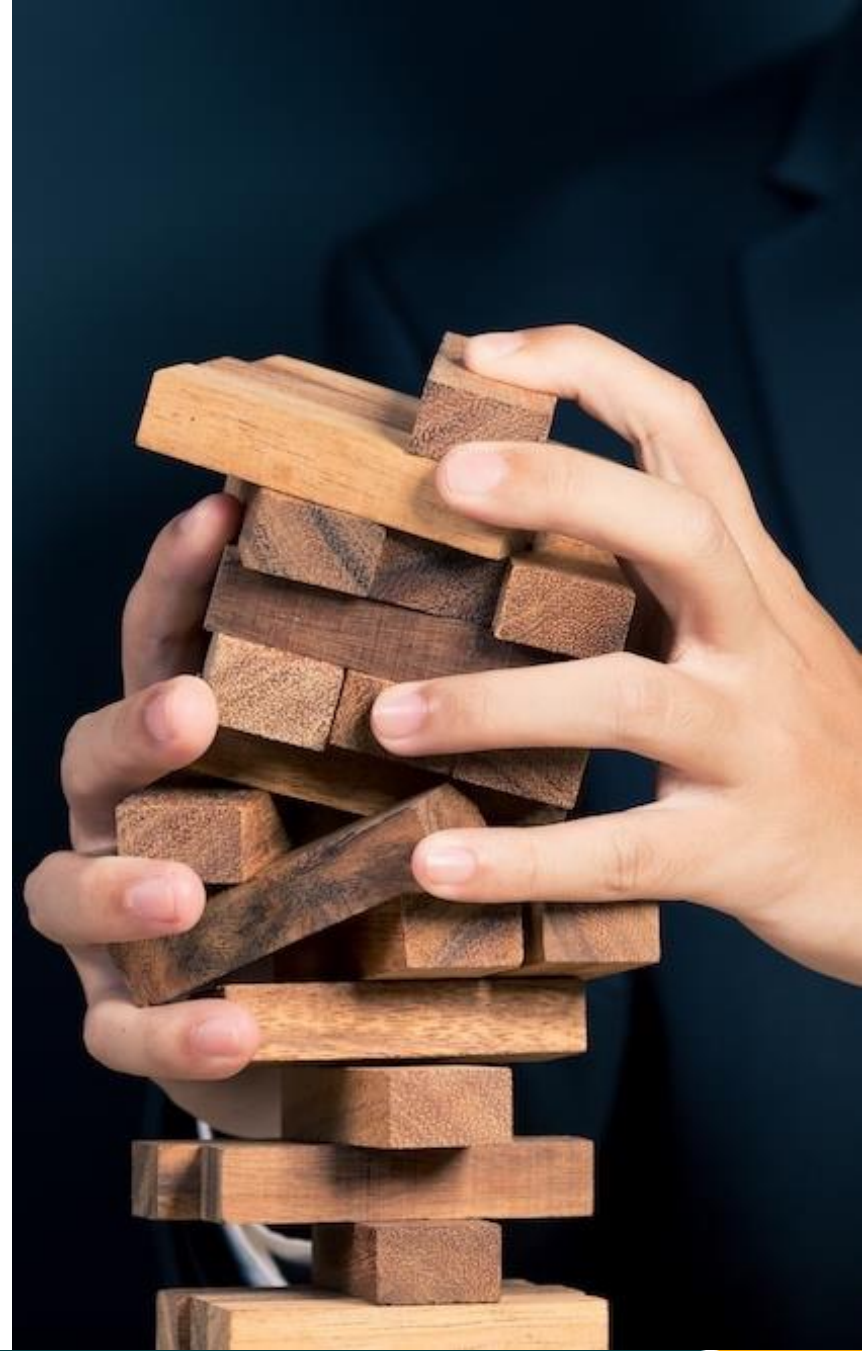
The Setting

- Engineer as Consultant to Contractor (but that isn't the point or relevant)
- 6+ year relationship over multiple projects
- Steel Frame Structure over 150 feet tall
- Periodic, non-documented, limited engineer contact with owner
- Site presence on a non-specific “as requested” basis.



The Punch Line

- Total Project Collapse
- One Death
- Two Injured Workers
- Combined Claims Exceeding \$10M



5. STANDARD OF CARE

██████ represents that its services shall be performed, within the limits prescribed by Client, in a manner consistent with that level of care and skill ordinarily exercised by other professional consultants under similar circumstances at the time the services are performed. No other representation, express or implied, and no warranty or guarantee are included or intended in this Agreement, or in any report, opinion, document, or otherwise.

6. LIMITATION OF LIABILITY

The liability of ██████, its employees & subconsultants, including but not limited to liability for Client's claims of contributions and indemnification related to third party claims arising out of services rendered by ██████, and for any losses, injury or damages to persons or properties or work performed arising out of or in connection with this Agreement and for any other claim shall be limited to the greater of (i) ten thousand dollars (\$10,000) or (ii) payment received by ELCE from Client for the particular service provided giving rise to the claim. The limitation of liability set forth herein is for any and all matters for which ██████ may otherwise have liability arising out of or in connection with this Agreement, whether the claim arises in contract, tort, statute or otherwise.

12. JOBSITE SAFETY

Neither the professional activities of [REDACTED], nor the presence of [REDACTED] employees and subconsultants at a construction site, shall relieve the contractor and any other entity of their obligations, duties and responsibilities including, but not limited to, construction means, methods, sequence, techniques or procedures necessary for performing, superintending or coordinating all portions of the Work of construction in accordance with the contract documents and any health or safety precautions required by any regulatory agencies. [REDACTED] and its personnel have no authority to exercise any control over any construction contractor or other entity or their employees in connection with their work or any health or safety precautions. The Client agrees that the general contractor and its various subcontractors are solely responsible for jobsite safety, and warrants that this intent shall be made evident where appropriate in the Client's agreements with other contractors. If the Client is a Contractor or Sub-contractor on the Project, the Client also agrees that the Client, [REDACTED], and [REDACTED] consultants shall be indemnified and shall be made additional insureds under the client's general liability insurance policy; in other cases the Client agrees to arrange for this indemnification and additional insureds under the General Contractor's general liability insurance policy

RECEIVED
 SEP 28 REC'D
 NO. 8721

PURCHASE ORDER/SUBCONTRACT

BY: [Redacted] NO. 8721

IMPORTANT: Invoices must be submitted in triplicate as detailed in Article 4 on the reverse side of this order and must refer to the Order Number in the upper right hand corner.

DATE September 16, 2005

To: [Redacted] Perform Work at or Ship to: Various Projects

Attn: [Redacted]

Phone: [Redacted]

Subject to Requirement for:

☐ Retainage of ____ %

☐ Performance Bond and Payment Bond

☒ Subcontractor Invoice Due ____ of each month

☐ Supplier Agreement Only

Job/Phase No. Various Projects

Activity Code TBD

Vendor No. 84225

Description of Work or Materials	Amount
<p>All labor, material and equipment is to be provided in strict accordance with the project plans and specifications and includes, but is not limited to, all work required to provide a complete installation.</p> <p>Drawings Dated: <u>NA</u> Section: <u>NA</u></p> <p>Specifications Dated: <u>NA</u></p> <p>Prepared by: [Redacted]</p> <p>Work for projects will be in accordance with our contract with cover letter dated January 29, 2002 with the following changes in labor rates:</p> <p>[Redacted] - \$165/hour</p> <p>[Redacted] - \$140/hour</p> <p>Scope of Work:</p> <p>Engineer - \$75/hour</p> <p>Drafter - \$65/hour</p> <p>This purchase order is not valid until [Redacted] Services receives a certificate of insurance evidencing general liability and workers compensation coverage naming [Redacted] Services as the certificate holder and additional insured on projects performed for it during the policy period.</p> <p>Invoices will not be processed for payment if our PO# and Job# are not referenced on them.</p> <p>EQUAL EMPLOYMENT OPPORTUNITY - The Equal Opportunity Clause Section 202 of the Executive Order 11246 as amended related to Equal Employment Opportunities and Implementing Rules of the Secretary of Labor; Section 503 of the Rehabilitation Act of 1973; and Section 4212 of the Vietnam Era Veteran's Readjustment Assistance Act of 1974 are incorporated herein by specific reference.</p>	

The Subcontractor represents that, prior to submitting his bid or executing this Agreement he has visited the site to ascertain the nature and location of the Work, character and accessibility of the site, available facilities, location and character of existing work in or adjacent to the site, and all other general and local conditions including labor which might affect the Work or the cost thereof. No extra payments shall be allowed for claims for additional work that could have been determined or anticipated by proper and careful examination of the site.

This Agreement shall not become effective and no work by Subcontractor shall begin until a Certificate of Insurance in accordance with the provisions of paragraph 3 of this Purchase Order/Subcontract is delivered to LVI Environmental Services Inc. by Subcontractor.

Conditions printed on the reverse side are part of this Purchase Order/Subcontract

SIGN AND RETURN ALL PARTS OF AGREEMENT WITHIN 10 DAYS. THE "ORIGINAL" PART OF THE DOCUMENT WILL BE COUNTERSIGNED AND RETURNED TO YOU. NO PAYMENT WILL BE MADE UNTIL AGREEMENT IS RETURNED.

TERMS AND CONDITIONS ACCEPTED: [Redacted] Inc. [Redacted] (Contractor)

By: [Redacted] Date: 9/22/05

By: [Redacted] Date: 9/22/05

ORIGINAL

“Subcontractor shall hold harmless, indemnify and defend Contractor, its directors, officers, employees and agents from and against any and all claims, damages, liabilities, losses and expenses, including reasonable attorneys’ fees, attributable to bodily injury, sickness, disease or death of any person, whomsoever, including Contractor’s and Subcontractor’s employees or property damage to any persons or organizations whatsoever, arising out of or occasioned by or in any way connected with the performance of the work called for by this Purchase Order/Subcontract. Nothing in the foregoing is intended as an agreement to hold harmless, indemnify or defend Contractor, its directors, officers, employees and agents from such person’s own willful conduct”.

Project Sequence

- Thursday notification to proceed with topple structure using methodology proposed by contractor – no engineer experience with method
- Friday site visit and revelation that contractor has already removed more support than intended by engineer – no objection stated
- Monday morning topple

4

Tools & Procedures for Change Analysis & Action



Side Note: Jobsite Photography

- Photos should be taken with a specific and strategic purpose
- Generally, photos should be taken from 3 feet or 300 feet
 - Focused on specific observation
 - Overall project status
- Link photos to reports
- Discard the remainder

On Site Chaos

Total Elapsed Time: 27 minutes

- Contractor directs accelerated activities on multiple fronts
- Contractor Superintendent speaks with engineer, but states, “You worry too much.”
- Engineer notes apparent shift in structure and tells superintendent who responds that “it’s been like that.”
- Superintendent walks away. Engineer is looking again as work continues.
- Collapse

The Contract Chaos Outcome

- Initially, financial responsibility acknowledged by contractor and its insurance carrier
- Then, “purchase order” uncovered in accounting
- Contractor/Carrier withdrew commitment
- Two years of litigation and \$2M loss

Contract Lessons & Strategies

- Signed agreements for all projects
- Recognize the danger (and opportunity) of conflicting contract terms
- Single contract per project
- Procedures & authority for contract execution
- Contract updates and confirmations
- Contain “as needed” & “as requested” services

Job Site Safety

- Disclaim responsibility in contract
- Assign responsibility in contract – “sole” or “exclusive”
- Act and correspond consistent with contract
- Insurance and Indemnity
- If people are in danger, be forceful

Responding to Observed Conditions

- Notify responsible party of concern
- NEVER recommend a solution
- Clarify that it is outside scope
- Confirm in writing

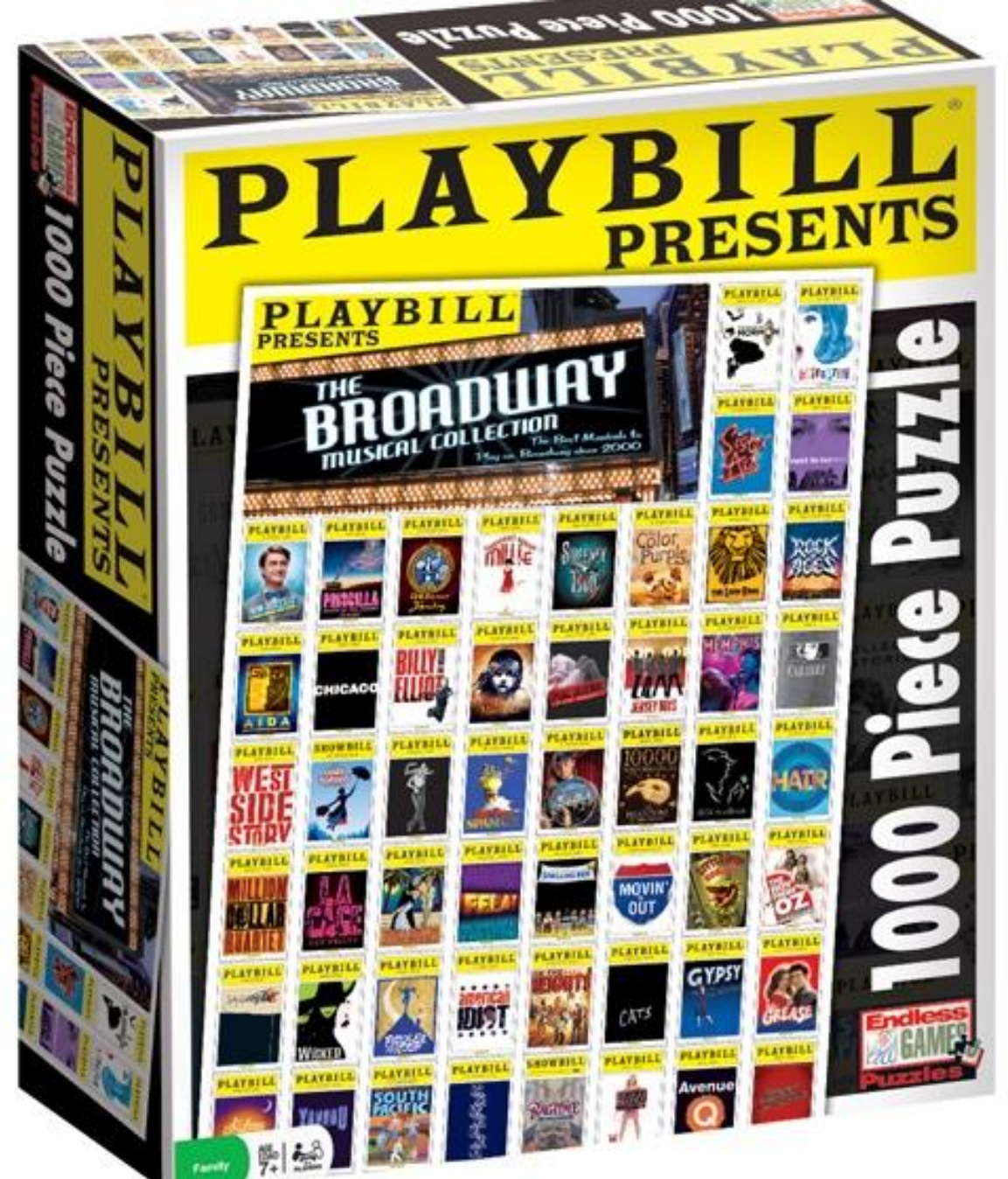
Equip Your Team for Documentation

As you know, jobsite safety, means, methods, and sequences are not our responsibility as these issues are the contractor's sole responsibility. Nevertheless, when we were on the project site on _____, 2012, we noted _____ which may be a safety issue. We informed _____ of our observation and suggested that he/she look into it. As it is outside of our scope, we did not suggest a solution. If you have any questions as to our observations, please contact us.

Keys to Avoid the Storm

- Appropriate Written Contracts
- Avoid Scope Creep
- Clear/Consistent/Documented Contractor Communications
- Don't Abdicate Design Role
- Clearly Establish and Follow Site Safety Role

The Scope/Program



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**Change Management
Applied in the Real World**

Moving Target

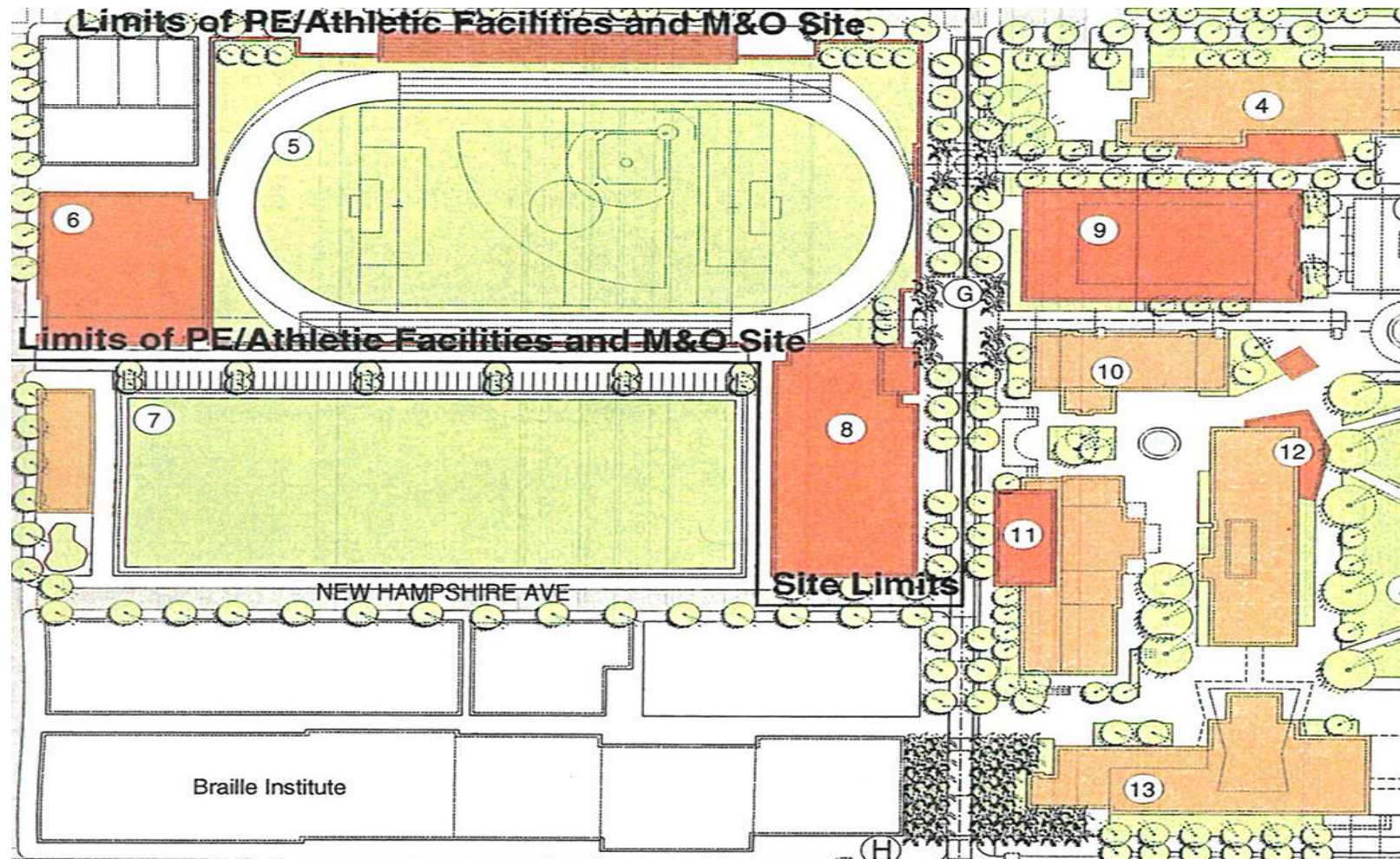
- Architect identifies opportunity to pursue community college project in inner-city location.
- Assumes since it is “higher education”, the same instinctive principles will succeed
- Two part project – a building and a parking structure.
- Will lead on building, but will essentially sub out all design on parking structure



Moving Target

Realities

- Community college projects subject to same State oversight as K12 projects and architect has no experience in process.
- Proposed project surrounds a “parcel” leased by college for 20 years to private entity.
- Private entity simultaneously developing private parcel
- Two independent “managers” “oversee” project for college with undefined roles.





“Change” Happened

- Event No. 1: Building Eliminated, but A/E remained as prime for the reduced contract.
- Event No. 2: Private project changed and expanded in size, scope, and plan without coordination with A/E’s project.
- Event No. 3: Contractor disagreed with Building Officials as to design requirements for design build elements and refused to relent. Since the project was being delayed, the A/E stepped into complete the design/build design.

The Claim

- State oversight delays project three years mid-project
- College pays contractor over \$6M for changes, delays, and price escalation.
- Architect cannot explain actions at critical moments of “change”.
- Core response & defense: “No good deed goes unpunished.”
- Claim: \$7.2M+

IROPE Applied

Issues:

- Role, responsibility, & reliability of third party “managers”
- Interplay of “in fill” private parcel
- K12-like oversight impacts
- Dependence on subconsultants

IROPE Applied

Risks:

- Uncertainty of owner's manager's responsibility and authority
- Potential impacts from simultaneous private development
- Control standards, necessity of external approval, schedule impacts
- Cost impacts from potential liability and claims

IROPE Applied

Issues:

- Role, responsibility, & reliability of third party “managers”
- Interplay of “in fill” private parcel
- K12-like oversight impacts
- Dependence on subconsultants

IROPE Applied

Options/Plan/Execute:

- Define overall project responsibility & right to rely. Limit duties to manager
- Limit scope of work to the building footprint and exclude rest of site
- Note process and lack of control over decisions & schedule
- Validate subconsultants for quality and viability and support same with contracts for scope of work, indemnity, and insurance

Summary

- **Evaluate the Plan and Project**
- **Coordinated Contracts Consistent with the Plan**
- **Monitor, Evaluate, and Act Strategically & Consistently**
- **Communicate & Document Critical Transitions**
- **Continued Vigilance and Follow Up**

Obtaining CE Credits

To obtain a certificate that you participated, email Brad Lynch at blynch@puainc.com

Architects must self-report their participation to the AIA for continuing education credits

Certificates of Completion for are available on request.

This program does not include content that may be deemed or construed to be an approval or endorsement by the AIA of any material of construction or any method or manner of handling, using, distributing or dealing in any material or product. Questions related to specific materials, methods, and services will be addressed at the conclusion of this presentation.

Questions and Concluding Remarks

Questions?



COURSE CONTENT

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