

NJAPM 2011 Peer Training

BASIC CONSTRUCTION PROJECT DISPUTES

NJAPM CONSTRUCTION INTEREST SECTION

April 30, 2011

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Construction Disputes

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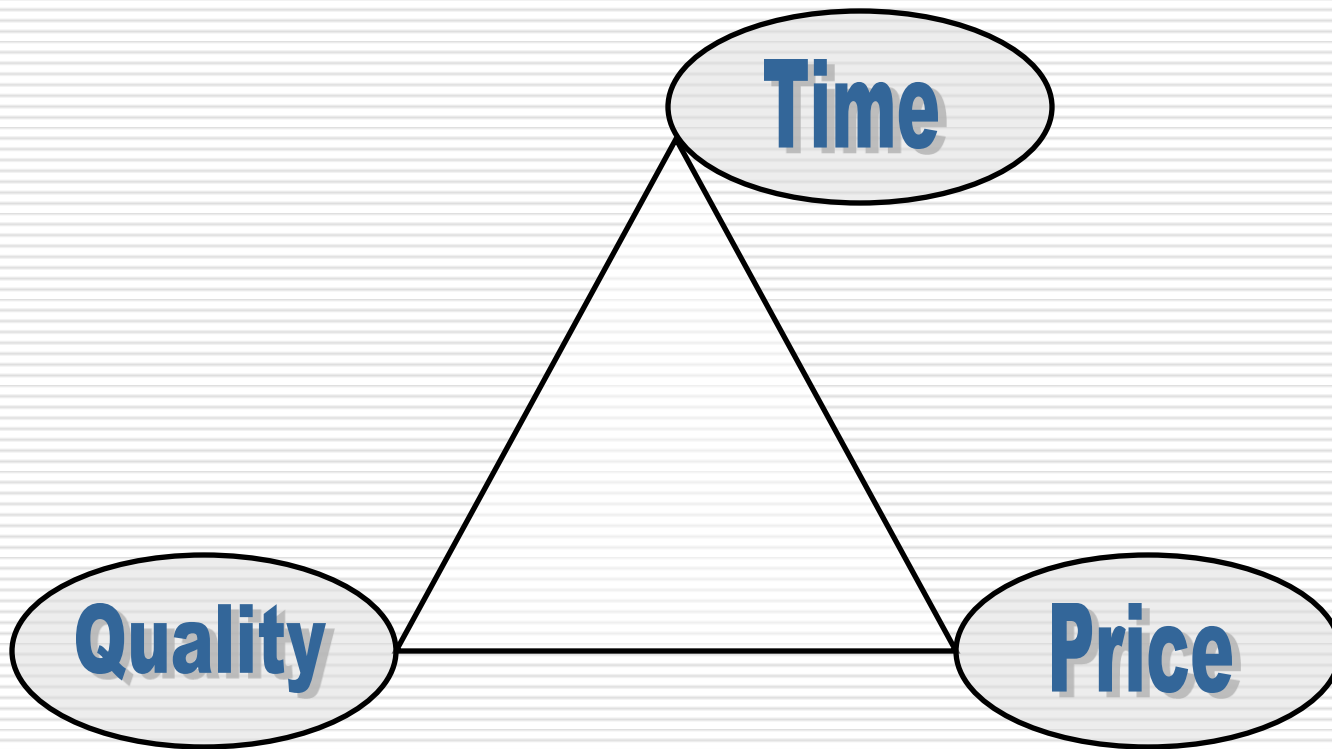
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Construction Triangle



What's So Different About a Construction Dispute?

- ❑ Number of Players
 - ❑ Complex Contracts
 - ❑ Unknown Conditions
 - ❑ Outside Influences
 - ❑ Scheduling Difficulties
-

Who are the Players?

The Project



- 3 Bedroom
 - 2 Bath
 - Kitchen
 - Dining Room
 - Living Room
 - Full Basement
 - Gas Hot Air Heat
 - Central A/C
-

Project Participants

- Owner
 - Owner's Professionals
 - Contractors
 - Material Suppliers
 - Utility Companies
 - Regulators
 - Others
-

Project Participants

Group Input

A Bit Larger Project



Owner's Team

- Owner
 - Attorney
 - Architect
 - Surveyor
 - Engineers
 - Geotechnical
 - Civil
 - Structural
 - Mechanical
 - Electrical
 - Plumbing
 - Landscape Architect
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Contractor's Team

- Attorney
 - Subcontractors
 - Electrician
 - Plumber
 - Structural Steel
 - Mechanical
 - Roofing
 - Utilities
 - Site Work
 - Fire Protection
 - Suppliers/Fabricators
-

Regulators

- Building Department
 - DEP
 - DOT
 - Labor
 - OSHA
 - Municipal Engineer
 - Police Department
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Public Utilities

- Gas
 - Water
 - Electric
 - Sewer
 - Cable TV
 - Telephone
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Others

- Construction Manager
 - Scheduler
 - Bonding Company
 - Insurers
 - Bankers
 - Equipment Rental
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Responsibilities of the Parties

- Design
 - Scheduling
 - Obtaining Permits
 - Material Purchasing & Delivery
 - Site Safety
 - Inspections
 - Utility Services
 - Changes
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The Contract

What is a Contract?

- A Contract is an Enforceable Agreement, whether written or oral, between two or more parties.
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Types of Business Relationships

- Joint Venture
 - Inside/Outside Consortiums
 - Teaming Agreements
 - Memorandum of Understanding
 - Pre-Bid Agreement
 - Letter of Award
 - Subcontract
 - Agency
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Joint Venture/ Consortium

- A Joint Venture or Consortium is a contractual relationship between two or more persons to carry out a stated purpose.
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Teaming Agreements, Memorandum of Understanding, Pre-Bid Agreement

- A Teaming Agreement, Memorandum of Understanding or a Pre-bid Agreement is a contractual relationship between two or more parties for a stated business purpose usually entered into prior to a Joint Venture or Consortium Agreement.
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Letter of Intent, Letter of Authorization

- A Letter of Intent is normally used to initiate work prior to the execution of a contract.
 - A Letter of Authorization is a document which defines a certain scope of work which has been authorized by an owner.
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Subcontracts

- A Subcontract is a contractual relationship between two or more parties for a stated purpose. A Subcontract has traditionally been used for field services involving labor as distinguished from a purchase order which traditionally has been used for material or equipment where no field labor is involved.
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Agencies

- An Agency is a relationship where one person (the Principal) gives a certain amount of authority to the Agent to represent the Principal in certain transactions. The scope of the agent's authority may be actual or apparent. Actual authority is based upon the specifics of the agency agreement while Apparent authority is that authority which a third party perceives by the actions of the Agent.
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Contract Variations

- Private Owner
 - Public Owner
 - State of NJ – NJAC 17:12
 - County and Municipal Government - NJSA 40A:11-1
 - Including Boards, Commissions Authorities and Agencies
 - School Boards – NJSA 18A:18A-1
 - Colleges and Universities
 - Not Including Rutgers University
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Contract Variations

- General Contract
 - Fixed Price
 - Unit Prices
 - Reimbursement for Time & Materials
 - Guaranteed Maximum Price
 - Combination of Above
 - Independent Prime Contracts
 - Construction Manager
 - Turnkey
 - Design Build
 - Design Build Operate Maintain
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Key Contract Issues

- Scope
 - Price
 - Payments
 - Changes
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CONTRACT COMPONENTS

Plans

- Demolition
 - Civil
 - Architectural
 - Electrical
 - Plumbing
 - Mechanical
 - Structural
 - Fire Protection
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CONTRACT COMPONENTS

- General Conditions
 - Supplementary Conditions
 - Technical Specifications
 - Project Schedule
 - Bonds
 - Performance
 - Payment
 - Insurance
 - Bid and Form of Contract
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Order of Precedence

- Agreement (Could be Purchase Order)
 - Plans
 - Specifications
 - Special Conditions
 - Technical Specifications
 - Supplementary Conditions
 - Schedule
 - General Conditions
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Typical Table of Contents

- Acceptance of Agreement
 - Scope, Price, Schedule
 - Time is of the Essence
 - Release of Lien and Waivers
 - Right to Audit
 - Changes
 - Removal of Employees
 - Ownership of Documents
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Typical Table of Contents (cont'd)

- Confidentiality
 - Licenses, Permits, Compliance with Laws and Owner's Rules, Regulations and Policies
 - Warranty
 - Termination and Suspension
 - Indemnity
 - Insurance
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Typical Table of Contents (cont'd)

- Non Assignment or Subcontracting
 - Governing Law and Venue
 - Disclaimer of Consequential Damages
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Unknown Conditions

- Conditions Existing Prior to Contract Execution Which Were Unknown or Misrepresented on Plans and Could Not be Anticipated
 - Soil Conditions
 - Groundwater Conditions
 - Underground Structures & Utilities
 - Hidden Conditions (Often in Renovations)
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Outside Influences

- Labor Disputes
 - Material Shortages & Delivery Delays
 - Material Cost Escalation
 - Inclement Weather
 - Work by Others
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The Project Schedule

SCHEDULING CONSIDERATIONS

- Order of Construction
 - Receipt of Permits
 - Site Availability
 - Shop Drawing & Material Approvals
 - Weather
 - Fabrication & Delivery Time
 - Availability of Utility Services
 - Union/Non Union Subcontracts
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Now Let's Schedule Our Project



SITUATIONS THAT LEAD TO DISPUTES

□ Owner's Conduct

- Delay in Award or Notice to Proceed
 - Requiring Work Not in Contract
 - Requiring Out of Sequence Work
 - Slow Decisions on Change Orders/Claims
 - Acceleration of Work
 - Payment Delays
 - Partial Occupancy During Construction
 - Delays in Owner Furnished Items
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SITUATIONS THAT LEAD TO DISPUTES

□ Designer's Conduct

- Insufficient Plan or Specification Detail by
 - Conflicting Plan/ Specification Provisions
 - Design Errors
 - Delay in Issuing Instructions
 - Shop Drawings
 - Interpretations
 - Overly Rigid Inspection Requirements
 - Additional Work Caused by Plan or Spec Revisions or Clarifications
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SITUATIONS THAT LEAD TO DISPUTES

Contractor's Conduct

- Failure to Prosecute the Work
 - Timeliness
 - Manpower
 - Inadequate or Untimely Submittals
 - Shop Drawings
 - Material Samples
 - Refusing to Follow Directions
 - Failure to Pay Subs and Suppliers
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SITUATIONS THAT LEAD TO DISPUTES

Contractor's Conduct

Scheduling Problems

- Material Deliveries

- Subcontractors

- Inspections

Deficient Work

Improper Site Safety and Cleanup

OTHER SITUATIONS THAT LEAD TO DISPUTES

- Failure to Accept Responsibility for Changes
 - Misunderstandings
 - Pride
 - Greed of Owner or Contractor
 - Catch up Profit
 - Vindictiveness
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COMMON AREAS OF DISPUTE

□ Conflicts

- Interpretations of Plans and Specs
- Discrepancies between Plans and Specs
- Division of Work

□ Delays in Obtaining Approvals

- Shop Drawings
 - Material Samples
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CHANGES IN THE WORK

- Changes are Inevitable
 - Unknown Conditions
 - Changes By Owner
 - Additional Work
 - Errors
 - Changed Regulations
 - Changes to the Schedule
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Change Orders

- Contract Changes Clause
 - Allows Participants to address unforeseen issues without a new contract
 - Allows Owner to Order Changes
 - Requires the Contractor to Proceed
 - Must be Within Scope of Contract
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CHANGE ORDERS

- Must Be In Writing
 - Must They? Actions may speak louder than words
 - Notice of Claim
 - Protects Owner
 - Allows Owner to Mitigate or Document Damages
 - Authorization to Execute Change Order
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CHANGE ORDERS

- Change in Price
 - Change in Contract Time
 - Change in Other Conditions
 - Guarantees
 - Impacts
 - Cumulative Impacts are often not obvious until later in the project
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DELAYS

□ Excusable Delays

- Extension of Time Only
 - Unforeseeable by Contractor
 - Beyond Control of Contractor
 - Not Due to Contractor's Negligence
 - Examples
 - Strikes
 - Inclement Weather
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DELAYS

- Excusable/Compensable Delays
 - Extension of Time
 - Potential Increase in Price
 - Delay Caused by Owner, or
 - Delay is the Fault of Owner, or
 - Delay is the Responsibility of Owner
 - Examples
 - Defects in Plans and Specifications
 - Owner Requested Changes
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DELAYS

Inexcusable Delays

- Delay is due to Contractor's Conduct

- No Extension of Time

- Potential Charge for Damages

- Examples

- Failure to Staff Job Properly

- Failure to Obtain Shop Drawing Approvals
Resulting in Delays in Obtaining Materials

Delays

Concurrent Delays

- When two or More Delays Overlap
 - Some are Contractors Responsibility
 - Some are Owner's Responsibility
 - Example
 - Owner Delays Start of Project
 - Contractor Goes to Another Job and Does not Start Immediately When Authorized
 - A Strike Occurs Halfway Through the Contract
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Something Unexpected Happened – Who is Responsible?



- ❑ Contract Date:
9/1/10
 - ❑ Completion Date:
8/31/2011
 - ❑ Contractor Applies
for Permits
9/15/10
 - ❑ Permits Issued:
10/15/10
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Something Unexpected Happened – Who is Responsible?

- ❑ Starts Foundation Excavation: 10/20/10
 - ❑ Building Inspector Finds Unsuitable Soil Conditions: 10/23/2010
 - ❑ Architect Completes Footing Redesign: 11/10/2010
 - Concrete Footing Now 3' Wide x 18" Thick – Was 18" Wide x 12" Thick
 - ❑ Building Dept Approves Revised Plan: 11/25/2010
 - ❑ Contractor Completes Foundation: 12/2/2010
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A Change is Needed

- After Discussion at New Year's Eve Party Spouse Decides Master Bathroom and Walk in Closet are inadequate: 1/2/11
 - Increase Size of Both & Reduce Size of Guest Room
 - Purchase Special European Spa/Shower and Marble Tile
 - Owners to Order Directly From Supplier
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A Change is Needed – The Impact

- ❑ Architect Revises Drawings: 1/21/11
 - ❑ Building Dept. Approves: 2/10/11
 - ❑ Work Delayed by Snow Until 3/1/11
 - ❑ Contractor Asks for Extension of Time
 - 90 Days
 - ❑ Owner Denies Request
 - Lease Expires 8/31/11
 - Tells Contractor to Complete by 8/31/11
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A Change is Needed – The Impact

- ❑ Contractor Begins 55 Hour Work Week on 3/10/11
 - ❑ Bathroom Fixtures Delayed Until 8/1/11
 - ❑ Owner Moves to Hotel and Puts Belongings in Storage: 8/25/11
 - ❑ House Complete –c/o Issued 9/30/11
 - ❑ Contractor Requests Final Payment
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How Did We Get Here?

- Owner Refuses to Make Final Payment
 - Additional Cost of Hotel & Storage
 - Emotional Distress
 - Contractor Files Suit
 - Pay Contract Amount
 - Cost of Acceleration
 - Cost of Inefficiency
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How to Avoid Litigation

- ❑ Clear Plans and Specifications
 - ❑ Written Project Documentation
 - ❑ Regular Project Meetings
 - ❑ Address Disputes Quickly
 - ❑ Allocate Project Risk Fairly
 - ❑ Understand Consequences of Your Actions
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Benefits of Construction Mediation

- ❑ Offers decision makers an opportunity for an early, unbiased assessment of the merits of their case.
 - ❑ Allows parties a way to resolve differences to be able to work together in the future.
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Additional Roles for Mediators

- Early Intervention
 - Owner's or Contractor's Representative
 - Co-Mediation
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Handling the Complex Multiparty Case

- Call preliminary meeting: ask counsel to diagram all parties/insurers/sureties and agree on one diagram.
 - Determine whether certain groups need a spokesperson (e.g., all lien claimants, all subcontractors, etc.).
 - Discuss and finalize form of Mediation Agreement, including parties' percentage fee allocation.
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Handling the Complex Multiparty Case

- Work with counsel to develop litigation budget if case fails to settle (if possible get consensus draft in advance) for later use during end stage negotiations.
 - Ask insurers', sureties' and guarantors' counsel to attend mediation.
 - If possible, ascertain policy limits and insurer/surety's defenses to coverage, and whether surety has signed indemnification agreement(s) from solvent indemnitors.
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Handling the Complex Multiparty Case

- Identify any joint venturers and determine if conflict exists between them that might prevent or jeopardize settlement. May need standstill agreement.
 - Require mediation statements with essential exhibits and detailed issues charts. Require electronic document production on compatible systems to ease the heavy document burden.
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Handling the Complex Multiparty Case

- Expert reports should be exchanged and filed with parties' mediation statements. Several ways to deal with experts:
 - counsel agree to involve only experts and mediator at certain point(s) in mediation.
 - retain separate mediator to deal with expert's opinions. Get experts to agree on either liability or quantum.
 - at mediation, let experts meet privately (without counsel, mediator or parties) to evaluate each other's opinions and reach consensus.
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Handling the Complex Multiparty Case

- Have counsel develop, write up and strictly adhere to procedural format and agreed order/duration for preliminary presentations at mediation. Counsel and mediator can fine tune these schedules in pre-mediation meetings.
 - Stage the mediation process: allow certain document production and discovery to complete; conduct mini-mediation sessions with certain subgroups (e.g., all defendants, all insurers, all sureties) to resolve certain preliminary issues (e.g., percentage allocation of responsibility for liability, damages, costs/fees, etc.).
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Insurance and Bonding

Insurance is Omnipotent:

- ❑ Construction projects require careful risk management and sufficient "cradle to grave" insurance coverage
 - ❑ Surety bonds for contractors, owners, consultants, design professionals, subcontractors and suppliers
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Insurance is Omnipotent:

- The amounts, scope and source of such coverage must be addressed in the project contracts
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Insurance/Surety Bonds are Complex

- ❑ Insurance coverage can be primary, secondary, excess, occurrence or claims-made, all-risk, specified perils
 - ❑ General liability, workers' compensation, auto, builders' risk, wrap up, professional liability
 - ❑ Beware of exclusions (contractual liability, mold, completed operations, owned property, etc.)
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Insurance/Surety Bonds are Complex

❑ **Builders' Risk Insurance**

- ❑ Protect construction property for project "in progress": construction, renovation or repair
- ❑ Covers accidental loss, damage to or destruction of property; covers owner, lender, GC, subs
- ❑ Ends when project completed

❑ **Wrap Up Insurance**

- ❑ OCIP: Owner Controlled: owner purchases insurance on behalf of the GC (rather than traditional purchase by contractor for self and owner for self). Types of insurance include: Workers Comp, General Liability, Excess Liability, Pollution Liability, Professional Liability, Builders Risk, and Railroad Protective Liability. Covers contractors, subs, construction management and state employees working on site approved by owner for participation in program.
 - ❑ CCIP: Contractor Controlled: all participants involved in project are covered by single policy whose sponsor is typically the general contractor.
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Insurance/Surety Bonds are Complex

- ❑ Surety can provide bid, performance and payment bonds
 - ❑ Not a policy but a guarantee involving the principal (contractor), obligee (owner) and surety (guarantor)
 - ❑ In default, principal/surety can be jointly/severably liable to owner
 - ❑ Surety has indemnification rights against the principal and surety can step in and replace principal to complete the job
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Important to Document Existence and Scope of Insurance and Filing and Prosecution of Claims

- Coverage verification
- "Limits" of certificates of insurance
- Additional insureds/notification issues

Document Existence/Scope of Insurance and Filing and Prosecution of Claims

- ❑ Establish entitlement to claim: objective review of contract terms/conditions, applicable laws, schedules, plans, specifications, building codes, industry standards and occasionally expert opinions
 - ❑ Establish quantum of claim: objective analysis of costs of additional work
 - ❑ Either contracts establishes method to determine additional costs (e.g. T&M) or claimant must use cost accounting principals to quantify damages. Types of costs include: home office overhead, job site overhead, material costs, labor costs and equipment costs
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Insurers/Sureties: Bureaucracies, Guidelines and Authority Levels:

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- ❑ In house claims adjusters/supervisors review and approve claims based on internal and industry guidelines; what's in/not in the file
 - ❑ Limited meaning of the "posted reserve"
 - ❑ Complex relationships between insurer/surety-hired counsel and the insureds/bonds principals; lurking conflicts of interest
 - ❑ Insurer/surety appetite for trial and opposed to mediated settlements

Question and Answer Period
