

# Current Legal Issues

2023 Spring Meeting - ICRI Gulf South Chapter  
IP Casino Resort Spa  
March 8-9, 2023  
Presented by Larry S. Logsdon



WALLACE  JORDAN

WALLACE JORDAN RATLIFF & BRANDT LLC

# Types of Contracts



# Types of Contracts

- Construction Contract



# Types of Contracts

- Construction Contract
- Purchase Order with Terms and Conditions



The image shows a hand using a pen to fill out a 'Purchase Order' form. The form includes fields for 'P.O. Date', 'Expected Ship Date', and 'Vendor Number'. Below these fields is a table with columns for 'Num', 'Qty', 'Unit ID', 'Description', 'Unit Price', and 'Amount'. The table contains three rows of data: 'Switch 240v 100a', 'Category 7 Cable', and 'Wireless Access Point'. The total amount is listed as '\$ 376.20'.

Ms  
Current Name  
Street Name: 1  
70000 City Name  
Tel: 0000 5555555  
E-Mail: emailname@.com

Street Name: 1  
70000 City Name

**Purchase Order**

P.O. Date  
January 17, 2018  
Expected Ship Date  
January 31, 2018  
Vendor Number  
0001

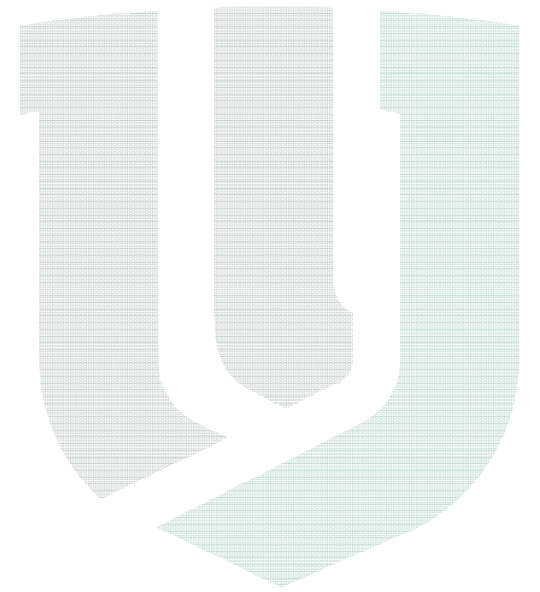
P.O. Number 0011100  
Please include this number on all invoices and shipping documents

Num	Qty	Unit ID	Description	Unit Price	Amount
1	1	102-34-555	Switch 240v 100a	\$ 273.11	\$ 273.11
1	33	253-37-534	Category 7 Cable	\$ 2.52	\$ 83.16
1	1	624-14-325	Wireless Access Point	\$ 20.00	\$ 20.00
<b>Purchase Order Total</b>				<b>\$ 376.20</b>	

# Types of Contracts

- Whose Terms and Conditions Control?

# Rider or Clarifications





# Rider or Clarifications

- The terms of this Rider shall take priority and precedence over any conflicts or ambiguities between this and any of the other terms and provisions of the Subcontract or Contract Documents. Notwithstanding anything elsewhere in the Subcontract or Contract Documents to the contrary, Contractor and Subcontractor agree as follows:

# Rider or Clarifications

- Not responsible for **Design**.
- Only **indemnify** to the extent of negligent acts.
- **Delays** for things outside of contractor's Control.
- Payment is not conditional upon **payment by the Owner**.



# Rider or Clarifications

- Work will not be **released in a piecemeal manner**.
- Will be given an **opportunity to cure**.
- Times to submit **notice of claims** shall not begin to run prior to when Subcontractor can reasonably appreciate the extent and impact of the claim.
- **Venue** for the resolution of any dispute shall be in the location of the Project and governed by the law of the of the state of Project.

# Important Terms of a Contract

# Limitation of Liability Clause

## Mutual Limitation of Liability

To the maximum extent permitted by applicable law, Contractor's entire liability to Company and Company's entire liability to Contractor under the Contract or any purchase order will be **limited to the price** for the Work under the applicable purchase order and the parties will not be liable to each other for, and the parties hereby release, remise, acquit, and forever discharge each other from, any other costs, fees, expenses, or other amounts arising pursuant to or in connection with this Contract including, without limitation, any such costs, fees, expenses, and other amounts arising from any breach of this Contract by Contractor or Company.

# Limitation of Liability Clause

## Liability Limit

- Common in design and specialty contractor agreements
- Limit liability to a **Fixed Amount** Or the **Limits of Insurance**.

# Limiting Liability

## Waiver of Consequential Damages

Consequential Damages: Damages that do not flow directly or immediately from the act of the party, but only from some consequence or result of the act.

Examples: *loss of use, lost rent, maintenance costs*

# Limiting Liability

- Consequential Damages
  - Lost Profits (loss of use, rent, etc.)
  - Maintenance Costs



# Waiver of Consequential Damages

## Mutual Waiver of Indirect or Consequential Damages

In no event shall Contractor or Company be liable to each other for any indirect, special, incidental, consequential, or punitive damages, lost profits, lost business or lost revenue claims, arising out of or relating to this Contract or a purchase order, irrespective of whether such damages are foreseeable, Contractor and Company have been advised of the possibility of such damages.

# Important Terms of a Contract

Can Accelerate Work or Require Overtime without Additional Compensation.

# Important Terms of a Contract

City where dispute will be resolved.



# Important Terms of a Contract

Indemnity.

# Important Terms of a Contract

Pay if Paid.

# Price Escalation Clauses

In the event of **significant delay or price increase** of material occurring during the performance of the contract through **no fault of the contractor**, the **contract sum**, **time of performance**, or contract requirements shall be equitably adjusted by change order in accordance with the procedures of the contract documents.





# Price Escalation Clauses

A change in price of an item of material shall be considered significant when the price of an item **increases 5%** between the date of this contract and the date of installation.



# Price Escalation Clauses

In the event of a **price increase** of in material, labor, equipment, overhead, contracting costs and other items occurring during the performance of the Contract through no fault of Contractor, the Contract Sum, Contract Time, or contract requirements shall be **equitably adjusted** by change order to account for the price increase.



# Price Escalation Clauses

- Requirement to list the potential materials that will increase.



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- Contractor must take reasonable efforts to lock in prices in 30 days.



# Price Escalation Clauses

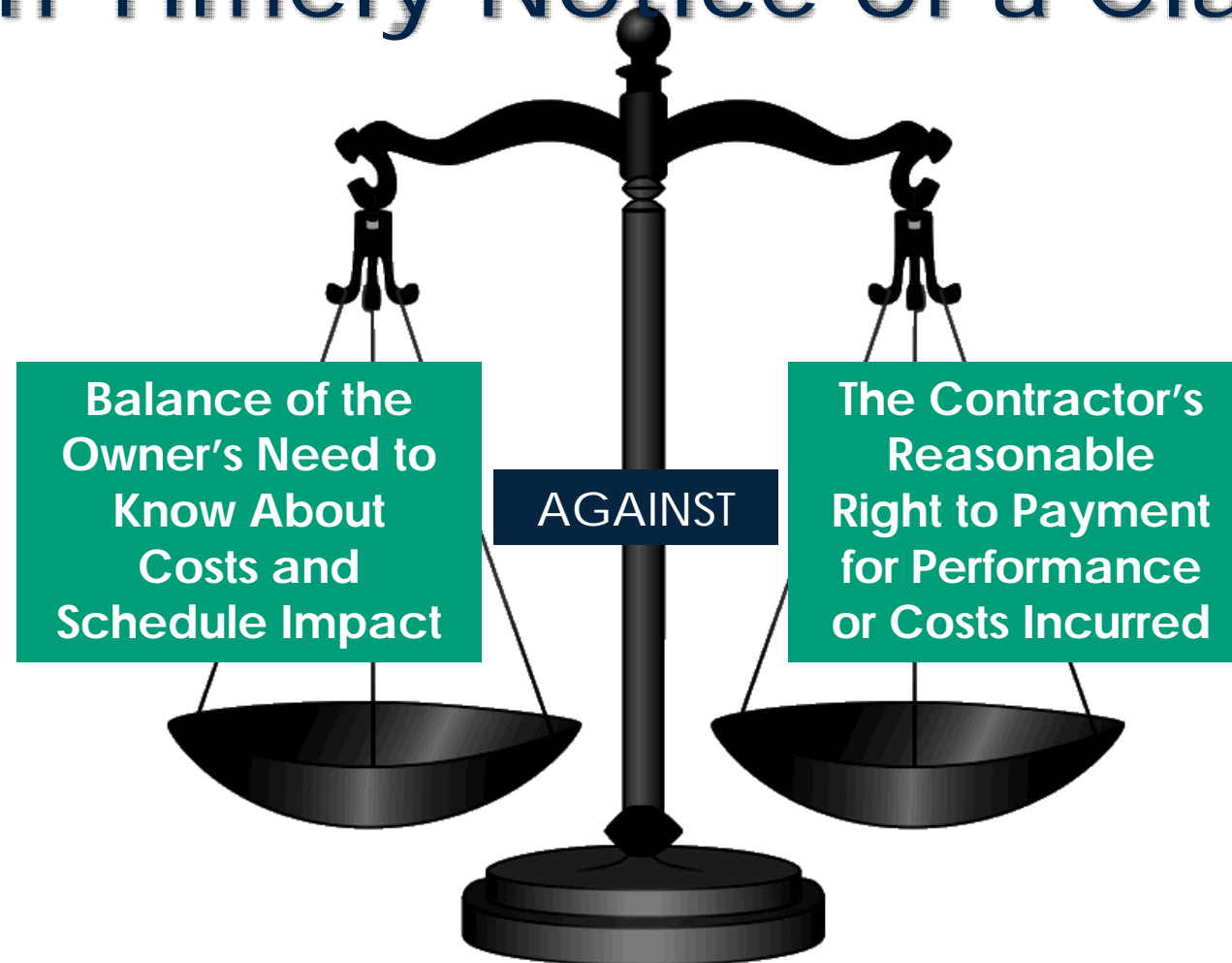
- Requirement to list the potential materials that will increase.
- Contractor will work to mitigate price increases.
- Contractor must take reasonable efforts to lock in prices in 30 days.
- Contractor must provide documentation of price increase.



# Important Terms of a Contract

Notice of Claims.

# Contractual Clauses Dealing with Timely Notice of a Claim



# Contractual Clauses Dealing with Timely Notice of a Claim

- AIA 201 - "Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the Claimant first recognizes the condition giving rise to the Claim whichever is later."

# Contractual Clauses Dealing with Timely Notice of a Claim

Notice of Claim Usually Requires at Least Some Specificity of Claim.



FAR 52.243-4(b) “written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order. . . .”

# Contractual Clauses on What Must Be Provided with Claim

- Detailed factual statement of the claim providing all necessary dates, locations and items of work affected by the claim.
- The date on which actions resulting in the claim occurred conditions resulting in the claim became evident.
- The specific portions of the Contract which support the claim, and a statement of the reasons why such provisions support the claim.
- The amount of additional compensation sought and a break-down of the amount into the categories specified as payable under Article 110.05, Claim Compensation.

(Alabama Department of Transportation Specifications at § 110.06)



# Importance of Contemporaneous Documents in Documenting Claims

- Daily Reports
- Correspondence (Email and Letters) in General – Timing and Content
- iPad, Smart Phones and Drones to Document the Project and Delay Claim
- Requests for Information
- Cost Information



# Notice

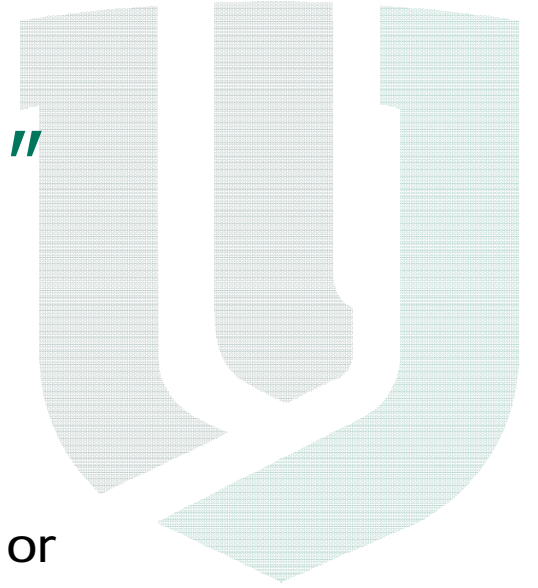
- Send Notice via Certified Mail
- Address in Contract
- Secretary of State Address



# Construction Defects



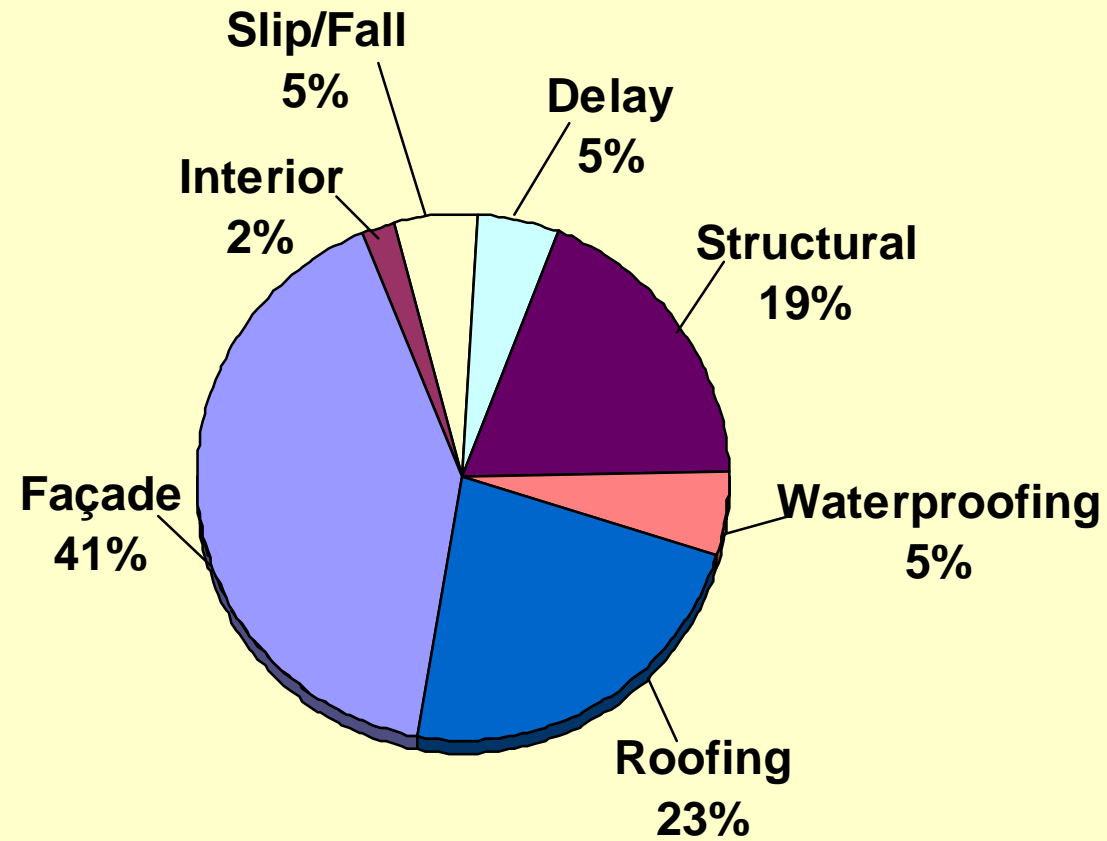
# What is a “Construction Defect?”



- \* *Black's Law Dictionary*: “defect, *n.* An imperfection or shortcoming, esp. in a part that is essential to the operation or safety of a product. – defective, *adj.*”



## Sources of Construction Claims in Buildings



# Common Defects

- Improper Materials
- Water Leakage
- Structural Problems

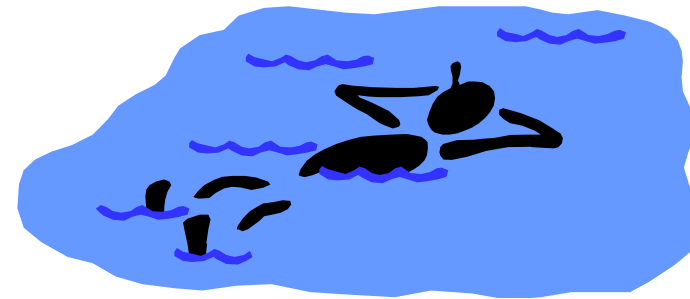


# Common Defects



## Water Leakage

- Wall systems are not impermeable
- Need flashing system to prevent water leakage

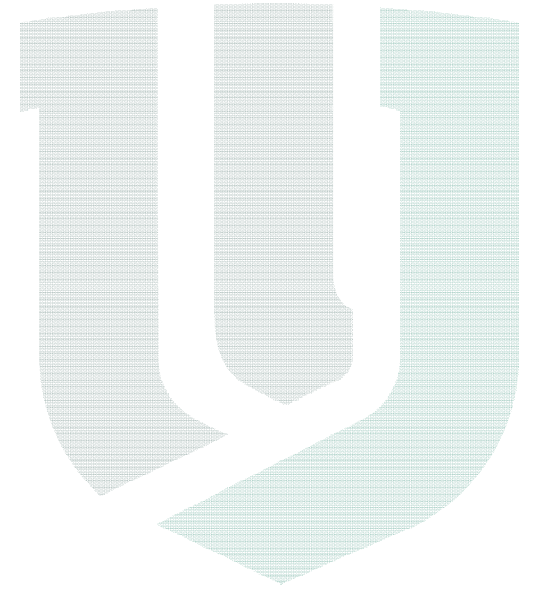




# Common Defects

## Structural Problems

- Improper Design
- Improper Construction
- Overload



# Typical Types of Defect Claims

- Breach of Contract
- Breach of Warranty
  - Express Warranties
  - Implied Warranty of Workmanship – The law implies a duty upon all contracting parties to use reasonable skill in fulfilling their contractual obligations. This obligation manifests itself in the implied warranty of workmanship. Turner v. Westhampton Court, LLC, 903 So. 2d 82 (Ala. 2004)
- Negligence
- Failure to Comply with Federal/State/Local Codes

# Construction Defect Defenses

## *Spearin* Doctrine

### Compliance with Plans and Specifications

- Under the *Spearin* doctrine, if a contractor, or arguably subcontractor, establishes that it **followed plans and specifications** in a reasonable manner, then it is not responsible for a result unsuited to the owner's purpose.
- *United States v. Spearin*, 248 U.S. 132 (1918).



# Construction Defect Defenses

## *Spearin Doctrine*

### Cracks in Asphalt Paving

- *Woods v. Amulco Products*, 235 P.2d 273 (Ok. 1951), an owner sued a contractor for cracks and flaws that developed in asphalt paving. The contractor, however, had not been responsible for compacting the subgrade; it merely laid the asphalt according to the owner's plans and specifications. Thus, the contractor was not liable for problems with the asphalt paving resulting from subgrade failures.

# Construction Defect Defenses

## *Spearin Doctrine*

### Cracking and failure of walls

- *Millner v. Mumby*, 599 N.E.2d 627 (Ind. Ct. App. 5th Dist. 1992), where the contractor constructed walls in accordance with the owner's specifications, it was relieved of liability for the cracking and eventual failure of the walls due to insufficient rebar.





# Construction Defect Defenses

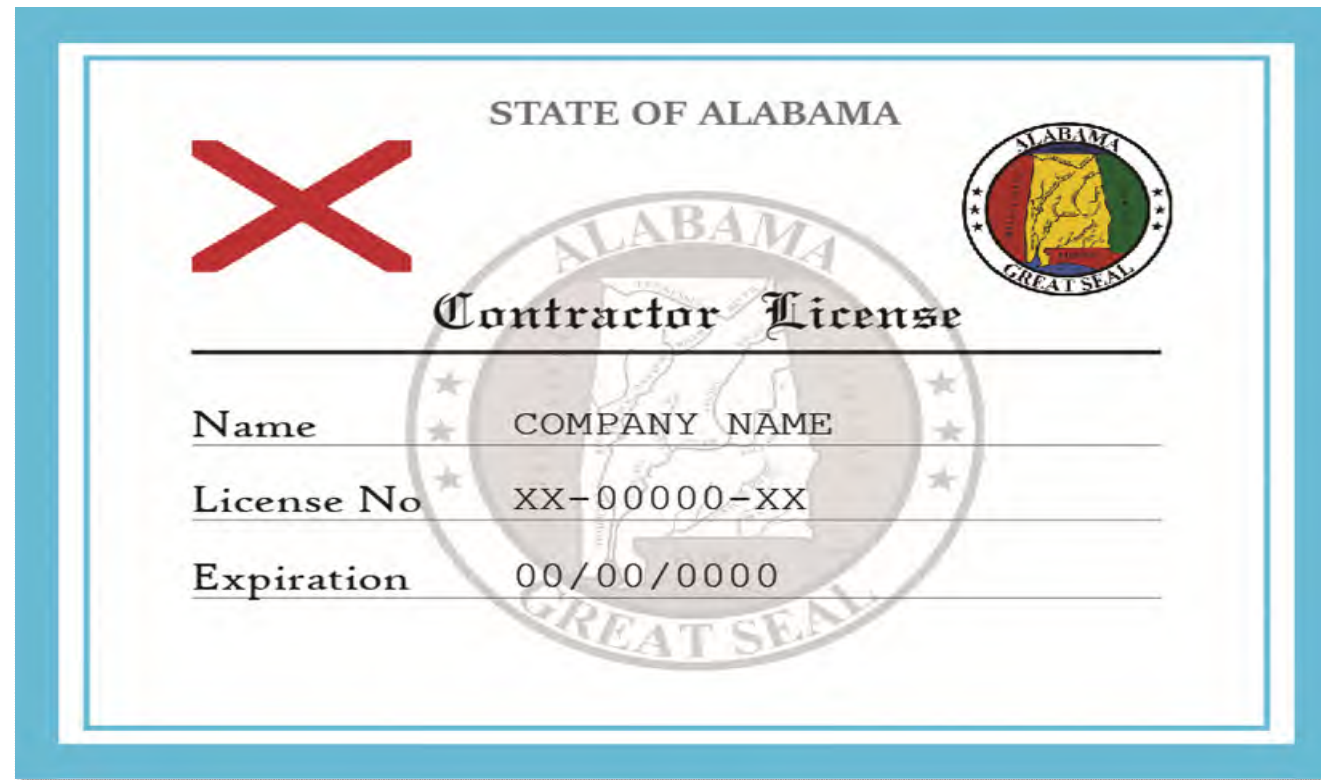
## Spoliation and Opportunity to Repair

Owner cannot “fix problem and spoil the evidence without giving notice.

- *Thompson v. Gardner*, 889 So.2d 596, 605 (Ala. Civ. App. 2004) (“[t]he spoliation of evidence doctrine mandates dismissal or summary judgment only when the “spoiled” evidence is necessary for the adequate defense of the claim.”)



# Unlicensed Contractors and Labor Brokers.



# Waiver of Delay Claims By Project Documentation

- In Pay Application Lien Waiver Language
  - “Waiving all claims for delays prior to the date of this payment application.”
  
- Change Orders
  - “Waiving all claims for delays for the claims that are the subject of the change order and up through the date of this change order.”

**AIA Document G702™ – 1992**  
**Application and Certificate for Payment**

TO OWNER: PROJECT: APPLICATION NO: Distribution to: OWNER ☐  
 PERIOD TO: ARCHITECT ☐  
 FROM CONTRACTOR: VIA ARCHITECT: CONTRACT FOR: CONTRACTOR ☐  
 CONTRACT DATE: FIELD ☐  
 PROJECT NOS: OTHER ☐

**CONTRACTOR'S APPLICATION FOR PAYMENT**  
 Application is made for payment, as shown below, in connection with the Contract.  
 AIA Document G702™, Continuation Sheet, is attached.

1. ORIGINAL CONTRACT SUM \$  
 2. NET CHANGE BY CHANGE ORDERS \$  
 3. CONTRACT SUM TO DATE (Line 1 + 2) \$  
 4. TOTAL COMPLETED & STORED TO DATE (Column G on G703) \$  
 5. RETAINAGE:  
 a. % of Completed Work \$  
 b. % of Stored Material \$  
 Total Retainage (Lines 5a + 5b, or Total in Column I of G703) \$  
 6. TOTAL EARNED LESS RETAINAGE \$  
 7. LESS PREVIOUS CERTIFICATES FOR PAYMENT \$  
 8. CURRENT PAYMENT DUE \$  
 9. BALANCE TO FINISH, INCLUDING RETAINAGE \$

**CHANGE ORDER SUMMARY**

CHANGE ORDER SUMMARY	ADDITIONS	DEDUCTIONS
Total changes approved in previous months by Owner	\$	\$
Total approved this month	\$	\$
TOTAL	\$	\$
NET CHANGES by Change Order	\$	\$

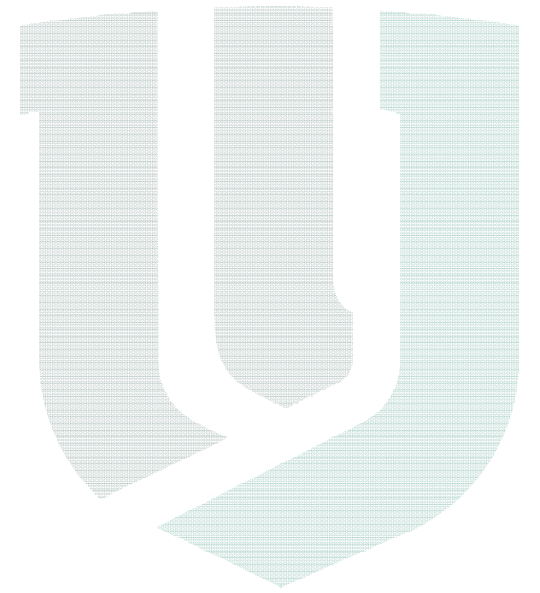
**ARCHITECT'S CERTIFICATE FOR PAYMENT**  
 In accordance with the Contract Documents, based on actual observations and the data comprising this application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED \$  
 (Attach explanation if amount certified differs from the amount applied. Initial all figures on this Application and on the Continuation Sheet that are changed to conform with the amount certified.)

By: ARCHITECT: Date: \_\_\_\_\_  
 This Certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Payment and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract.

CAUTION: You should sign an original AIA Contract Document, in which this text appears in RED. An original assures that changes will not be obscured.  
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# COVID-19 Russian Ukraine Conflict and Construction Delays





# COVID-19 and Construction Delays



Legal Alert

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# Is Covid-19 a *Force Majeure* Event?

- *Force majeure* clauses address circumstances **beyond the parties' control**
- Making contractual performance too difficult or impossible.
- Allow possibilities for time extension and price increase.



# Determined by Contract Language

- **Federal Acquisition Regulations**

*"Excusable delays"* lists "epidemics [and] quarantine restrictions [as] an occurrence beyond the reasonable control of the Contractor and without its fault or negligence . . . ." FAR 52.212-4 (f); *see also*, FAR 52.249-14.

- **AIA A201**

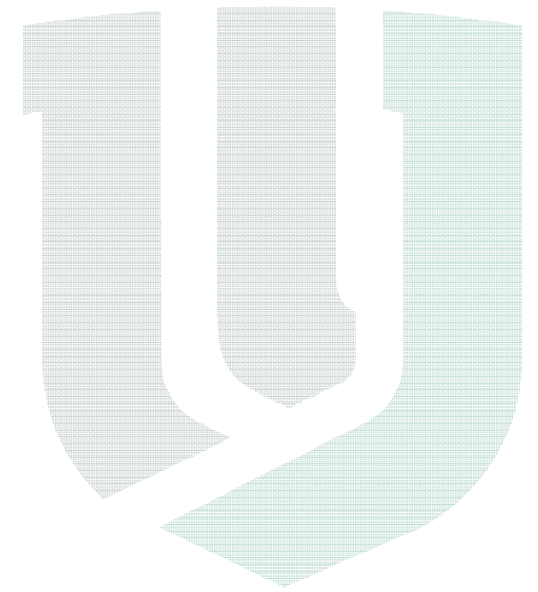
"by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control.



# Other Requirements to Show COVID Delay

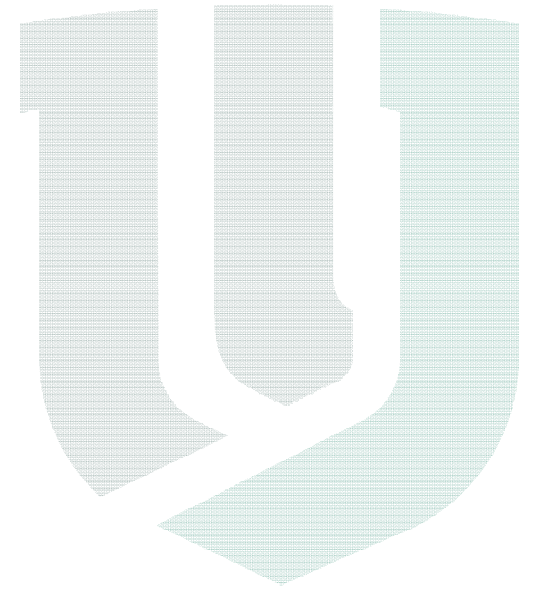
- Did COVID-19...
  - Actually cause a delay?
  - Impact the critical path?
- Was the delay not able to be reasonably mitigated?

# Resolving Disputes



# Choice of Forum

- Judge
- Jury
- Arbitration



# Comparison of Arbitration to Court

- Typically Faster to Final Resolution
- Less Likely to Settle
- Very Limited Appeal Rights for Arbitration

# Comparison of Arbitration to Court

- Summary Judgment Much Less Likely in Arbitration
- Technical Defenses May Be Less Likely to Be Followed
- Arbitrators are More Prone to Baby Split

# Comparison of Arbitration to Court

- Attorneys Fees Awards Less Likely in Arbitration
- Limited Discovery



# Comparison of Arbitration to Court

- Filing Fees and Fees to Pay Arbitrator are Higher
- Fees May Have to Be Paid by Business if Consumer Case
- Arbitrators are Knowledgeable about Construction

# Change Orders and Change Directives,

# Change Orders

- Change orders or construction changes generally come into play when there has been some alteration of the work originally agreed upon in the contract.
- Courts usually interpret change orders using a "changes clause" in the contract.

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# Change Orders



- A "changes clause" generally allows the owner to make changes and the contractor to be compensated for these changes. A frequent issue is whether the change is significant enough to be compensable.



# Change Orders

## 2. Construction Change Directive

§ 7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.



Larry S. Logsdon

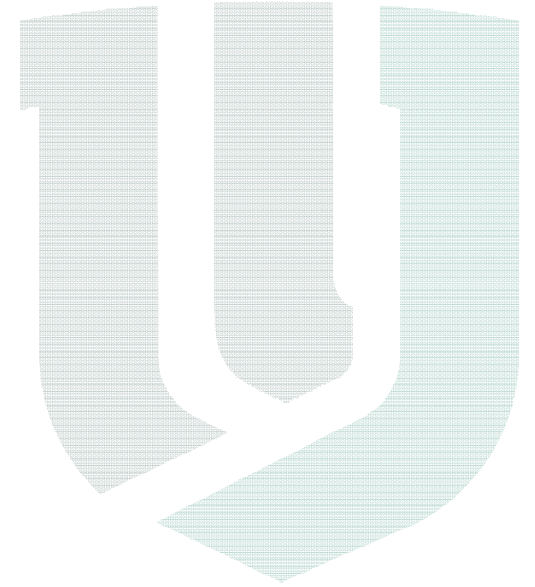
[llogsdon@wallacejordan.com](mailto:llogsdon@wallacejordan.com)

(205) 874-0341

[www.wallacejordan.com](http://www.wallacejordan.com)

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