

BMSS Presents:

A Construction Industry Update



Tuesday, December 9
8:30 a.m. – 10:00 a.m.



Larry Logsdon

*Wallace Jordan
Ratliff & Brandt, LLC*



Gaines Moorer

Lakeview Risk Partners

LEGAL VIEWPOINT



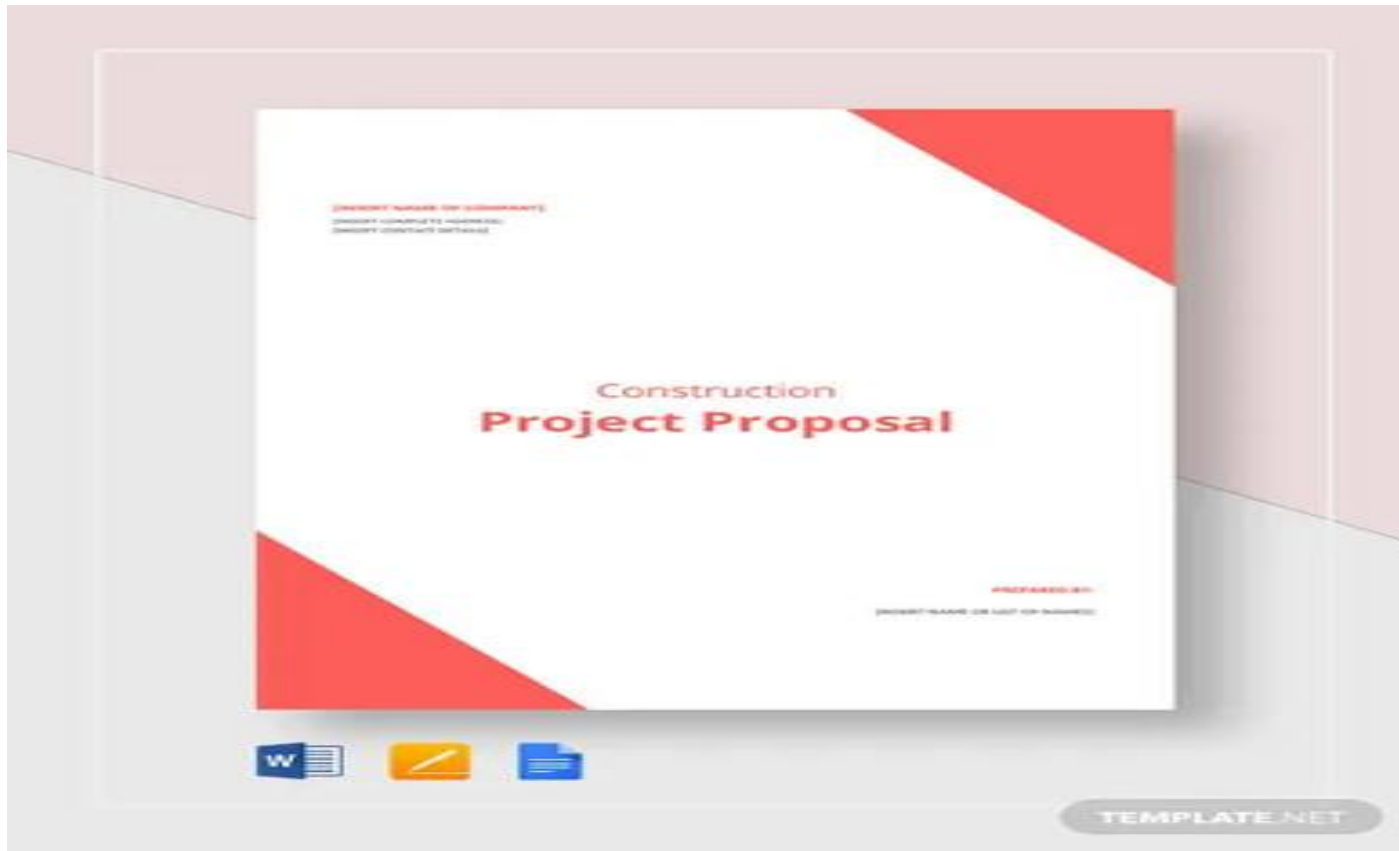
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The Proposal



Types of Contracts



Types of Contracts

Construction Contract

- Fixed Price
- Cost Plus
with Guaranteed Max. Price



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 'Ms. Current Name', 'Street Name', 'City Name', 'Tel.', 'E-Mail', 'P.O. Number', 'P.O. Date', 'Expected Ship Date', 'Vendor Number', and a table for items. The 'Purchase Order' title is prominently displayed in the center. The 'P.O. Number' is 0011100. The 'P.O. Date' is January 17, 2018. The 'Expected Ship Date' is January 31, 2018. The 'Vendor Number' is 0001. The table lists three items: 'Switch 240v 100a', 'Category 7 Cable', and 'Wireless Access Point'. The 'Purchase Order Total' is \$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. 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
Purchase Order Total					\$ 376.27

Purchase Order

-Whose Terms and Conditions Control?

Types of Contracts

Master Agreement with Accompanying
Work Order or **Purchase Order**



Master Agreements

- Owner to Prime Contractor
- General Contractor to Subcontractor



Negotiating the Construction Contract

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 Agreement or Contract Documents. Notwithstanding anything elsewhere in the Agreement to the contrary, Contractor and Owner agree as follows:"

Important Terms of a Contract

Important Terms of a Contract

Indemnity

INDEMNITY

means a promise to protect someone from loss, damage, or liability.



Put simply:

→ If something goes wrong, one party agrees to cover the other party's costs.

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.

Limitation of Liability Clause

Contractual Limitations of Damages

- Common in design and specialty contractor agreements
- Limit damages to a capped amount

Limitation of Liability

Liquidated Damages

Fixing the costs of delays

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.

Important Terms of a Contract

No Damages for Delay

No Damage for Delay Clauses

- Generally Enforceable
- But Strictly Construed

No Damage for Delay Clauses: **Exceptions to Enforceability**

3. Time Extensions Not Granted.

- ("Because [delay Claimants'] contractual waiver of its damages remedy was limited by a condition precedent - the extension of time to complete performance - which was neither fulfilled nor excused, we hold that it cannot operate to preclude Pertun's recovery."). See *U.S. for Use and Benefit of Pertun Construction Co. v. Harvesters Group, Inc.*, 918 F.2d 915, 920 (11th Cir. 1990)

Important Terms of a Contract

Attorneys' Fees if you Win.

Important Terms of a Contract

City where dispute will be resolved.



Important Terms of a Contract

Notice of Claims

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 and Information about the Claim must be Provided Timely or Claim is Waived.**

Marriot Corp. v. Dasta Construction Co., 26 F.3d 1057 (11th Cir. 1994)
(failure to provide required seven day notice).

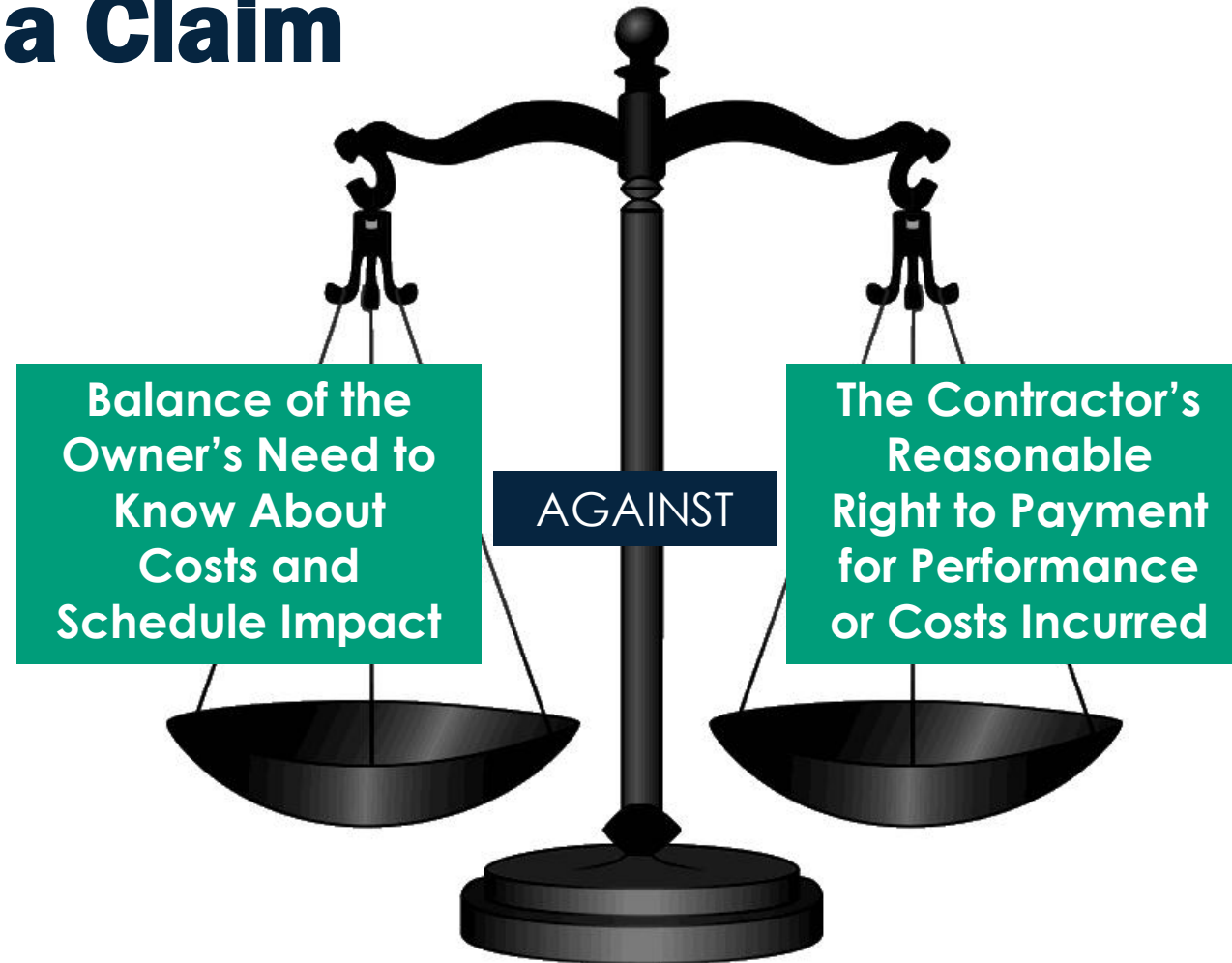
Contractual Clauses Dealing on What Must Be Provided with Claim

Business reasons for hesitancy to provide notice.

Providing contractually required notice without upsetting the customer.



Contractual Clauses Dealing with Timely Notice of a Claim



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)

Starting the Construction Project



Winning the Letter Writing War

- Must Communicate



Winning the Letter Writing War

- Must Communicate
 - and do so in Writing



Importance of Contemporaneous Documents

- 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

Winning the Letter Writing War

Who Writes the Letters?

Notice

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



Keep Good Records of Extra Costs

- Costs for Cost Plus Work

Keep Good Records of Extra Costs

- Costs for Cost Plus Work
- Change Order Work

TIME AND MATERIAL TICKETS

By signing below I acknowledge that the portions of work, labor, services and materials reflected herein have been completed and supplied by CONTRACTOR per a change directive and that CONTRACTOR is due payment for this, plus profit and overhead, as additional compensation over and above the contract price. Additionally, this acknowledges that the work, labor, services and materials reflected herein have been performed in accordance with the directive and with the contract documents, plans and specifications and in that the amounts, quantities, rates and prices listed herein are accurate.

Keep Good Records of Extra Costs

- Delay Claim Costs

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:
FROM CONTRACTOR: VIA ARCHITECT: CONTRACT FOR: OWNER ☐
CONTRACT DATE: ARCHITECT ☐
PROJECT NOS: CONTRACTOR ☐
OTHER ☐

CONTRACTOR'S APPLICATION FOR PAYMENT
Application is made for payment, as shown below, in connection with the Contract, AIA Document G703™, 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 \$
6. TOTAL EARNED LESS RETAINAGE \$
7. LESS PREVIOUS CERTIFICATES FOR PAYMENT \$
8. CURRENT PAYMENT DUE \$
9. BALANCE TO FINISH, INCLUDING RETAINAGE \$

ARCHITECT'S CERTIFICATE FOR PAYMENT
In accordance with the Contract Documents, based on 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.

CHANGE ORDER SUMMARY
Total changes approved in previous months by Owner: \$
Total approved this month: \$
TOTAL: \$

NOTES
CAUTION: You should sign an original AIA Contract Document, on which this list appears in RED. An original assures that changes will not be obscured.
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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.”)

Resolving Disputes

Resolving Disputes

- Meeting
- Formal Mediation



Choice of Forum

- Judge
- Jury
- Arbitration

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

Comparison of Arbitration to Court

- Attorneys Fees Awards Less Likely in Arbitration
- Limited Discovery

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

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

- *Woodsv. 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

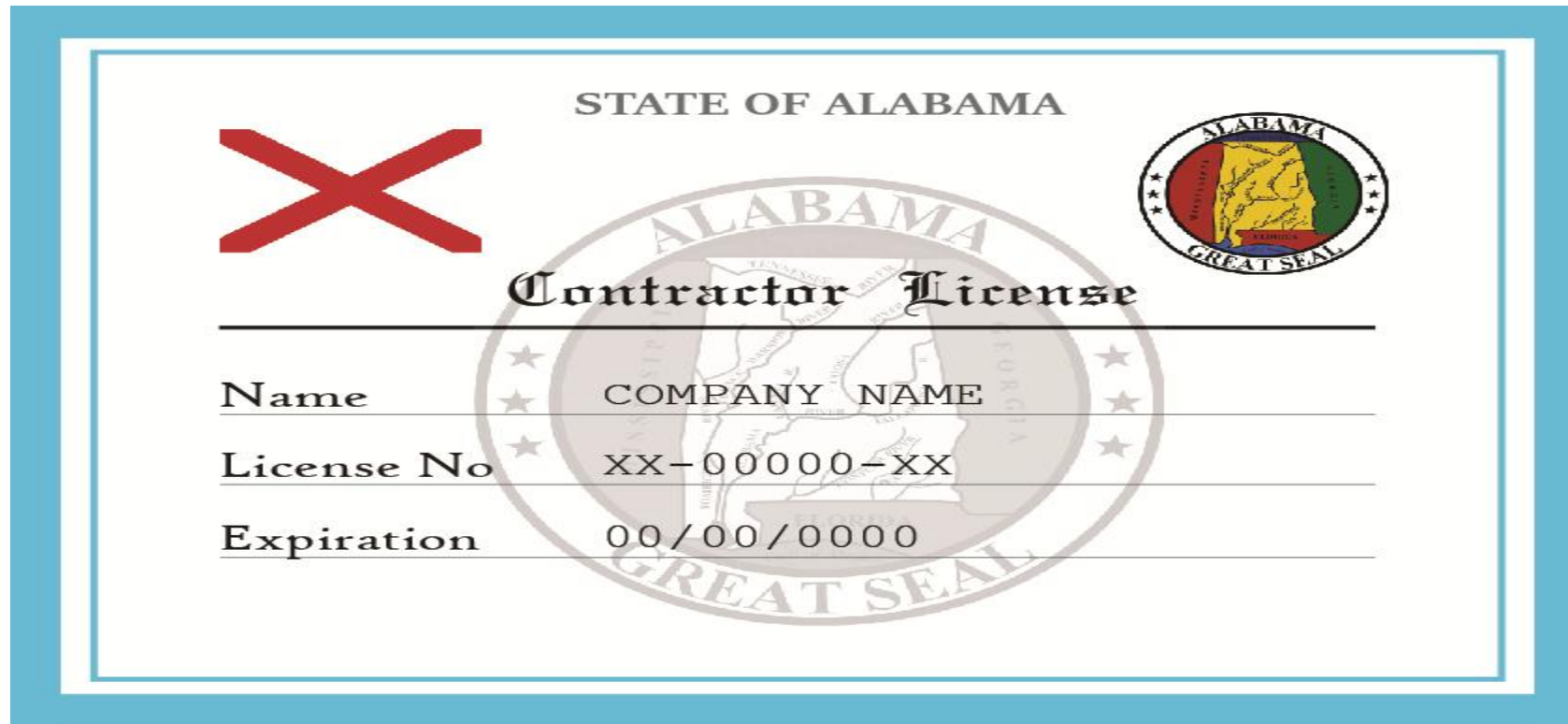
Spearin Doctrine

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**.



Unlicensed Contractors and Labor Brokers.



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Marriot Corp. v. Dasta Construction Co., 26 F.3d 1057 (11th Cir. 1994) (failure to provide required seven day notice).

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Ways Around Notice Provision Requirements

Owner Already Had Actual or Constructive Notice of the Event.

“Generally, where the owner has **actual or constructive notice** of the conditions underlying the claim and an opportunity to investigate that is sufficient.”

Brinderson Corp. v. Hampton Roads Sanitation Dist., 825 F.2d 41, 44 (4th Cir. 1987).

Ways Around Notice Provision Requirements

No Material Prejudice Caused by Lack of Notice.

“Because the purpose of the notice requirement is to allow the government to mitigate costs that might result from the differing site condition, a contractor that fails to provide adequate notice will not be barred from recovery unless the government is prejudiced by the lack of notice.”

***Ace Constructors, Inc. v. United States*, 70 Fed Ct. Cl. 253 (Ct. Cl. 2006);
Shepherd v. United States, 113 F. Supp. 648, 651-52 (Ct. Cl. 1953)**

Force Majeure

Question: *Specified materials are not available and not discovered until after the project commences and will impact completion schedule, does this waive liquidated damages liability for the contractor or subcontractor?*

- Depends on what the **contract** says
- AIA says “unusual delays in delivery”

Suspension of Work

Does an Owner or Designer have the authority to stop construction work when QA/QC standards are poor? Not followed?

- If allowed by the Contract

Limitation of Liability

Question: *How best to limit liability from condominium HOA's when providing general ICRI guideline type concrete repair details. The details are specific to identified locations but could be used in the future for additional needed repairs that are discovered.*

- Limiting damages
- Qualifying Language
 - Opinion based on what is visible - latent defects.
 - A lot depends on the repair. Can it be repaired? Is it new?

No Damage for Delay Clauses: **Exceptions to Enforceability**

1. **Delay Not Contemplated by the Parties.**

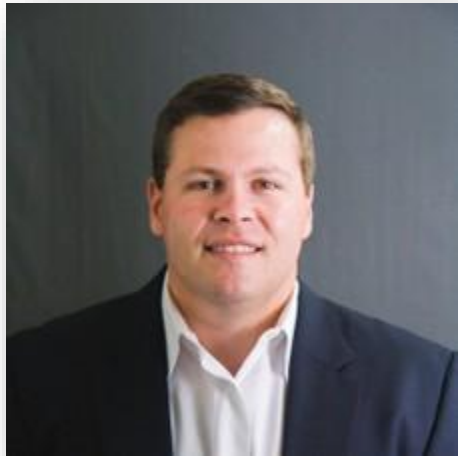
Three Month Delay - *Mississippi Transp. Com'n v. Ronald Adams Contractor, Inc.*, 753 So. 2d 1077 (Miss. 2000) (holding that a three-month delay due to untimely utility relocation was unreasonable and barred invocation of no damage for delay clause as a defense).



No Damage for Delay Clauses: **Exceptions to Enforceability**

Delay Not Contemplated by the Parties.

INSURANCE VIEWPOINT



T. Gaines Moorer, CRIS

Lakeview Risk Partners

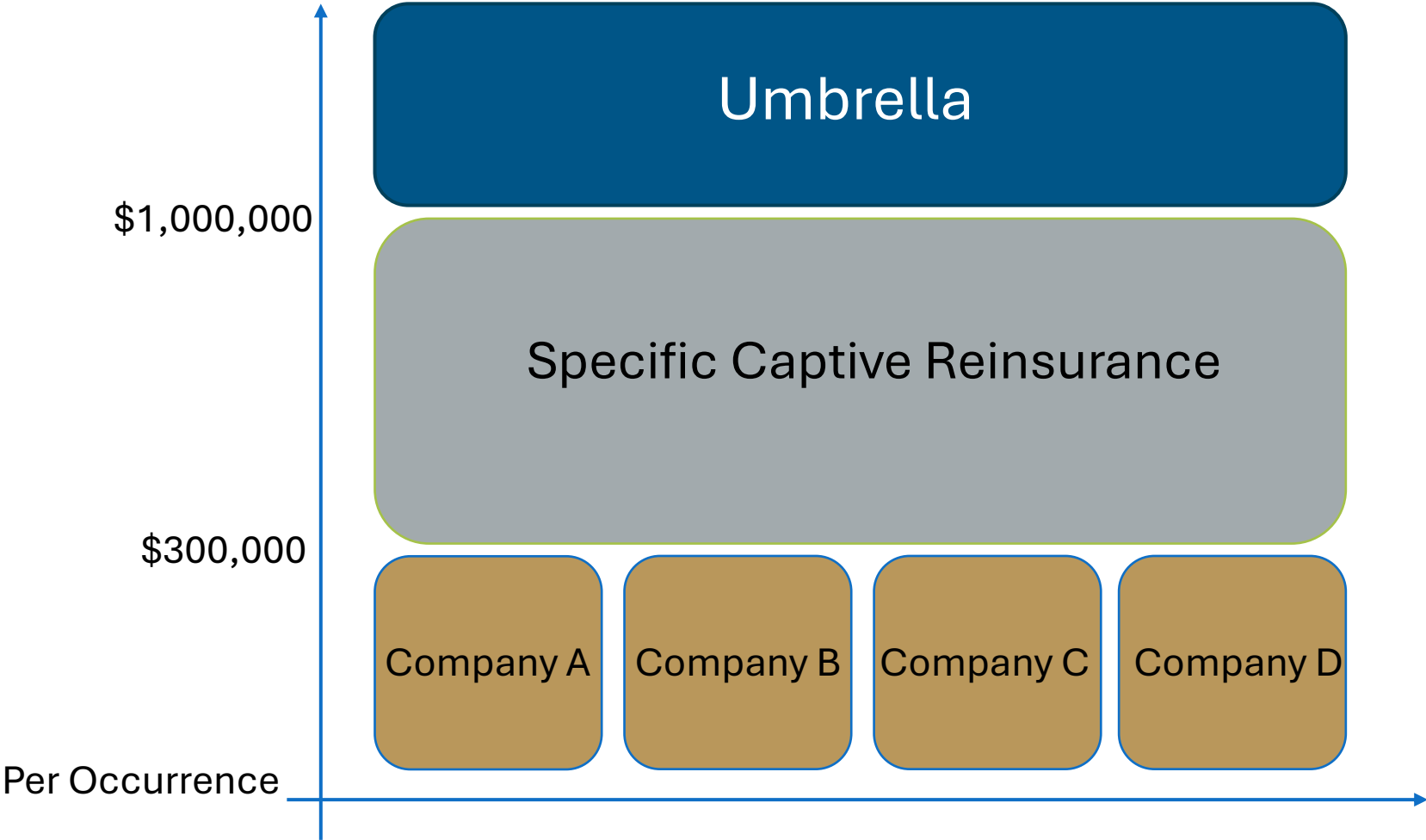
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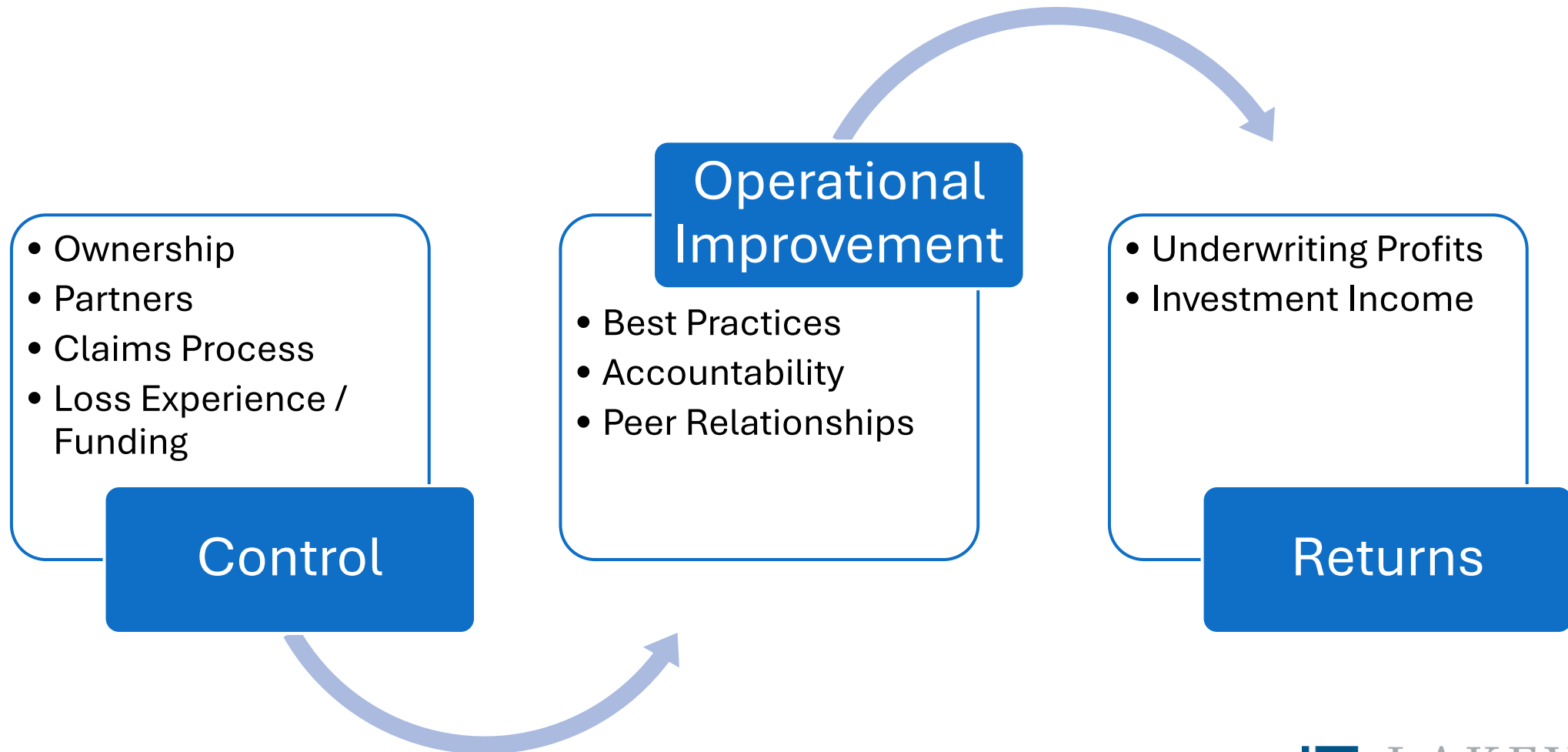
Ideal Captive Candidate

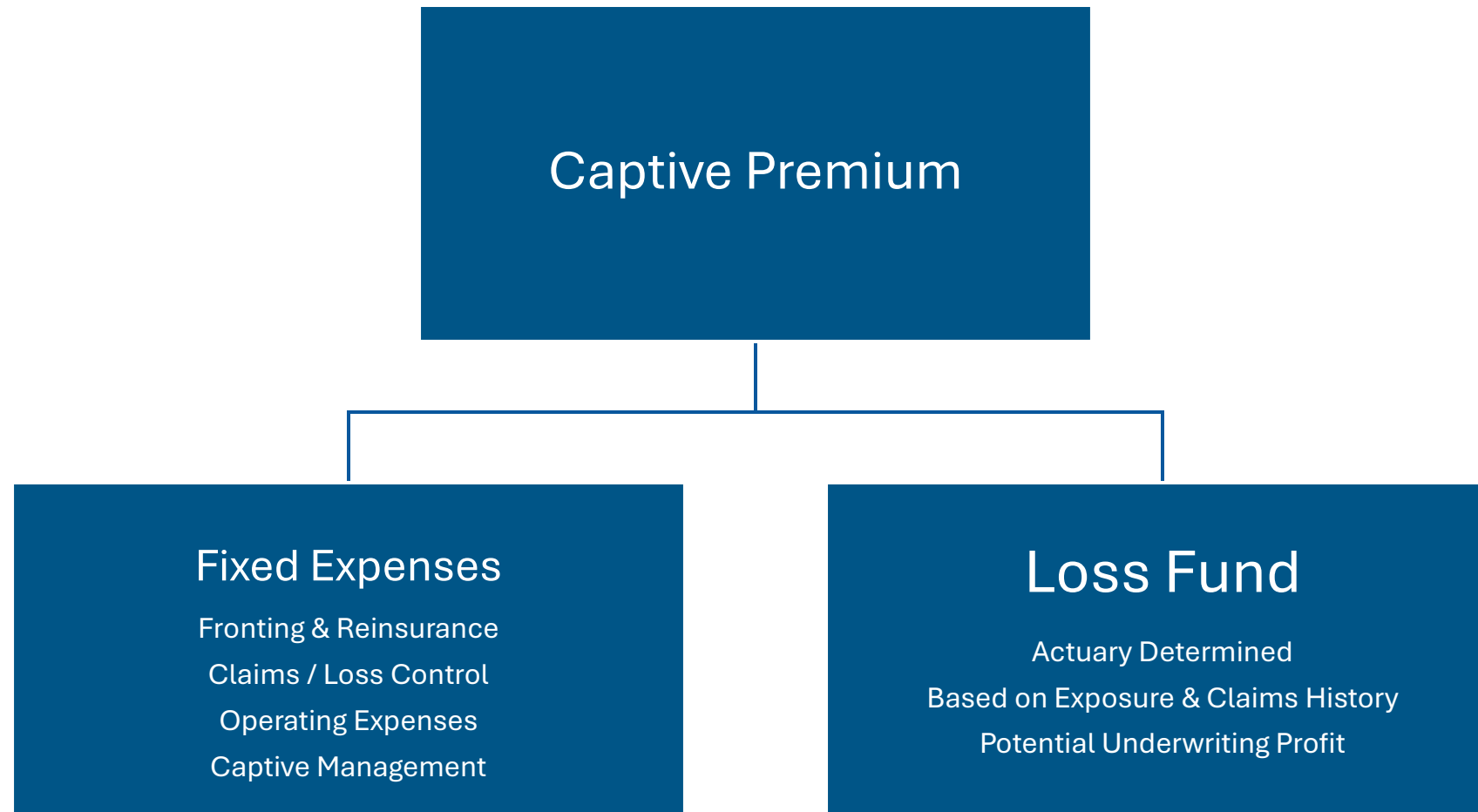


Captive Structure



Benefits of Captive Ownership





Captive Goals

Fund for expected losses

Reinsurance catastrophic or unexpected shock losses

Each company pays for own losses

Minimize risk sharing

Capture underwriting profits

Importance of Surety Bonds

- Protects project stakeholders.
- Required by statute for most public works projects.
- Ensure projects are completed per contract and all subcontractors and vendors are paid.
- US bond market was \$10.6 Billion in 2024

Surety Underwriting Considerations

- Financial Stability and Financial Ratios
 - Working Capital
 - Net Worth
 - Debt to Equity
 - Net Cash
- Project Underwriting
 - Type of Work /Location of Project
 - Contract Terms / Owner Reputation
 - Duration of Project
 - Capacity – Personnel and Equipment to Perform

Questions?

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*If you have a question that you'd like to ask, please use the **Q&A Button** at the bottom of your screen.*

CPE certificates will be issued approximately two weeks after the presentation.