

The background features a large, semi-transparent watermark of the year '2021' in a bold, sans-serif font. Behind the numbers, there is a faint image of construction cranes and a building under construction. The overall color palette is dominated by shades of orange and grey.

CONSTRUCTION
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2021

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The Best Defense is a Good Offense: Keys to Effective Risk Mitigation in the Life Cycle of a “Typical Project: A.K.A “A Train Wreck”

- Anamaria Popescu, PhD,PE,PSP,PMP, Managing Director, BRG
- Emma Schaafsma, Partner, CMS-Infrastructure Construction & Energy
- Burns Logan, Assistant General Counsel, Jacobs
- Tiffany Raush, Partner, Jones Walker LLP
- Amy Skaggs, Principal and Litigation Counsel, Gensler

Agenda

- Intro to Panel Members
- Learning Objectives
- The Contract Negotiation
- The Kickoff Meeting
- Change Order Management
- The Life and Death of a Delay Claim
- Q&A Session

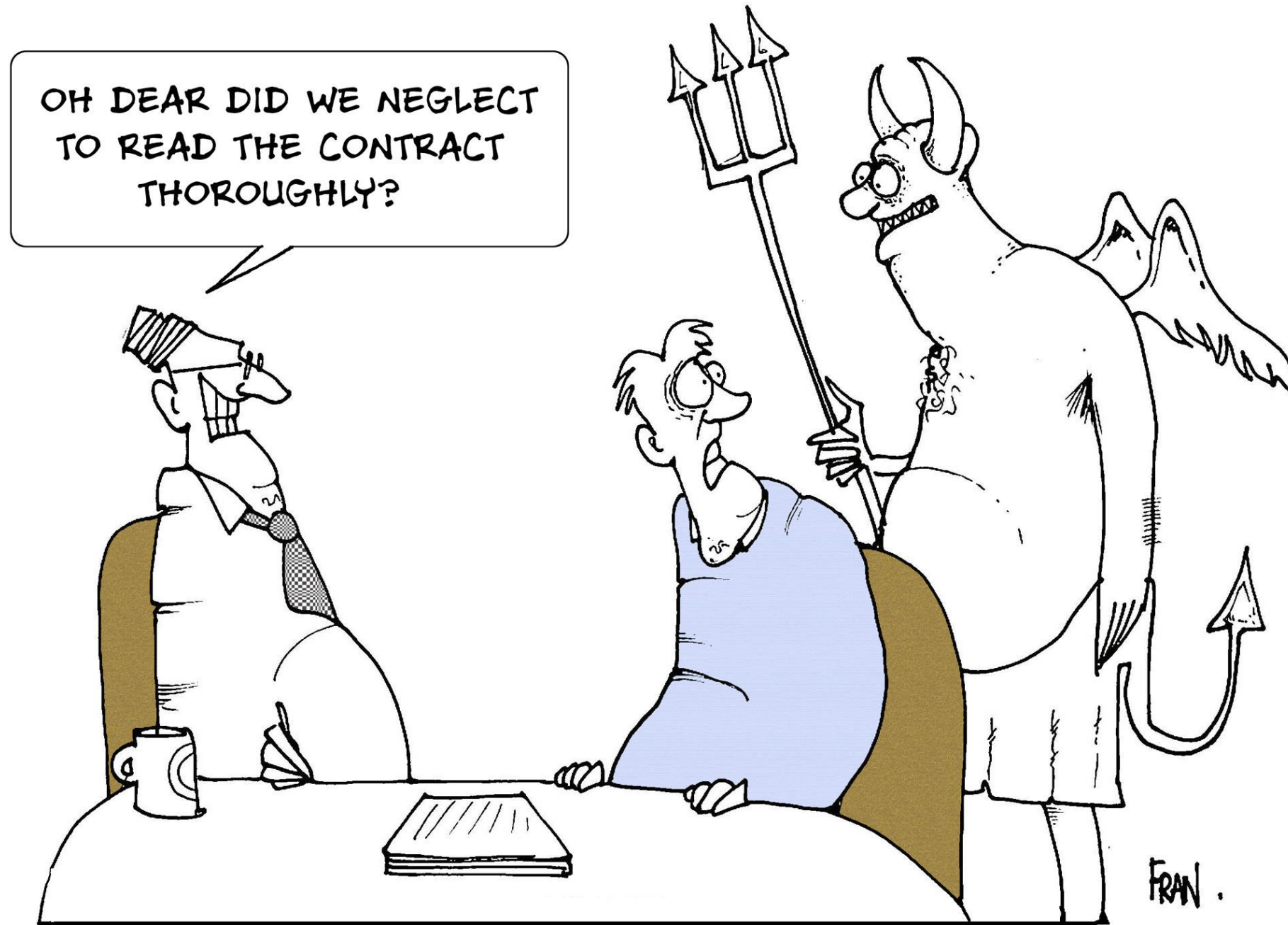
Panel Members

- **Anamaria Popescu**, PhD, PE, PSP, PMP, Managing Director, BRG
- **Emma Schaafsma**, Partner, CMS
- **Burns Logan**, Assistant General Counsel, Jacobs
- **Tiffany Raush**, Partner, Jones Walker LLP
- **Amy Skaggs**, Principal and Litigation Counsel, Gensler

Learning Objectives

- How to effectively manage the contract negotiation process to ensure alignment with project goals.
- How to effectively conduct a kickoff meeting.
- How to set the proper “tone” for the integrated team.
- How to manage change orders to ensure successful resolution.
- How to properly prepare and submit a delay claim to minimize chance of rejection.

The Contract Negotiation



The Contract Negotiation

Key Takeaways

1. Contract negotiation is not adversarial or zero sum.
2. Before any contract negotiation, it is important to understand and prioritize “why” you are doing a project.
3. It is critical that the stakeholders in the project participate in the contract negotiation.
4. The contract tells the story of the client relationship and the project.
5. Preparation for negotiation with international clients is especially important – relationships are not as entrenched and cultural understanding is key to communication.

Key Takeaways

6. In some countries, the contract is considered “fluid” and negotiators prefer ambiguity as a perceived means of having flexibility when things go wrong.
7. Internationally, Letters of Intent are commonplace but must be replaced by the full contract.
8. Beware of moving away from standard forms in less sophisticated jurisdictions.

Contract Should Align with the “Whys” of the Project

Client Relationship

- Scope
- Add Services
- Lien Rights
- Retainer
- Indemnity
- Limitation of Liability
- Consultant Type and Mark Up
- Lower Fee/Higher Risk Tolerance

Marketing

- Publicity Rights
- Document Ownership
- Photography Rights

Profit

- Scope
- Add Services
- Lien Rights
- Retainer
- Reimbursables
- Document Ownership (Leverage)
- Insurance
- Staffing- Team Flexibility
- Schedule
- Higher Fee/Lower Risk Tolerance

The Kickoff Meeting



The Kickoff Meeting

Key Takeaways

1. Make sure team is highly integrated, has the right qualifications, and has open lines of communications so things don't fester and escalate.
2. "Communication" across cultures-make sure your "Cultural Intelligence" is spot on.
3. On some international projects there is a real issue with the experience and quality of the owner's consulting engineer.
4. What is "Contractual Awareness" really?
5. Scope development and management-Integrated WBS/Schedule Development Workshop.

Key Takeaways

6. Agreements on processes and procedures might be later argued as "legally binding amendments" to the contract as establishing a course of dealing or waiver, despite specific contract provisions to the contrary.
7. Teams must align such processes and procedures with the contract and clearly document whether departures from contract terms are contract amendments/waivers.
8. Set Expectations Early On: e.g. Notice Requirements and Giving Notice.
9. Set a defined time and process for the kickoff meeting for every project.

Change Order Management



Original Contract

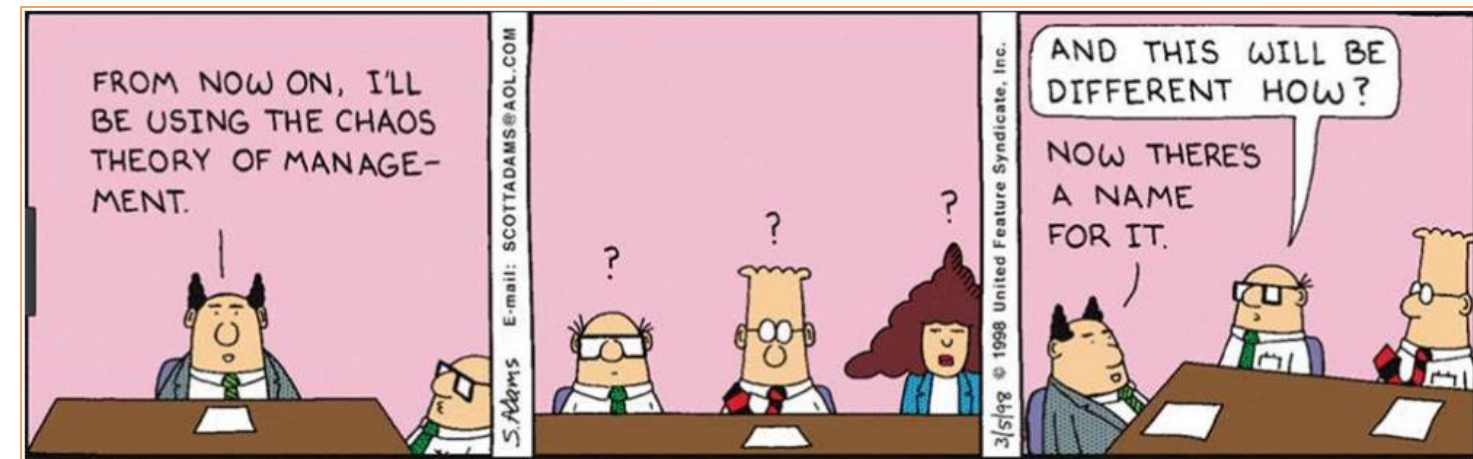
Change Order Management

Key Takeaways

1. A change is anything not contracted for:
 - a) Is this really a change?
 - b) Is it a change that is compensable?
2. Effective Management
 - a) Contract Requirements: notice deadlines, waiver, pricing, TIA
 - b) Change Order release language: Is it included? Should it be?
 - c) Internal review/approval
3. Minimize Behavioral Risks (CO hoarding, too many cooks in the kitchen, procrastination, appeasement, lack of documentation)
4. Minimize Technical Risks (pricing errors, calculation errors, TBD for schedule impact, lack of documentation)

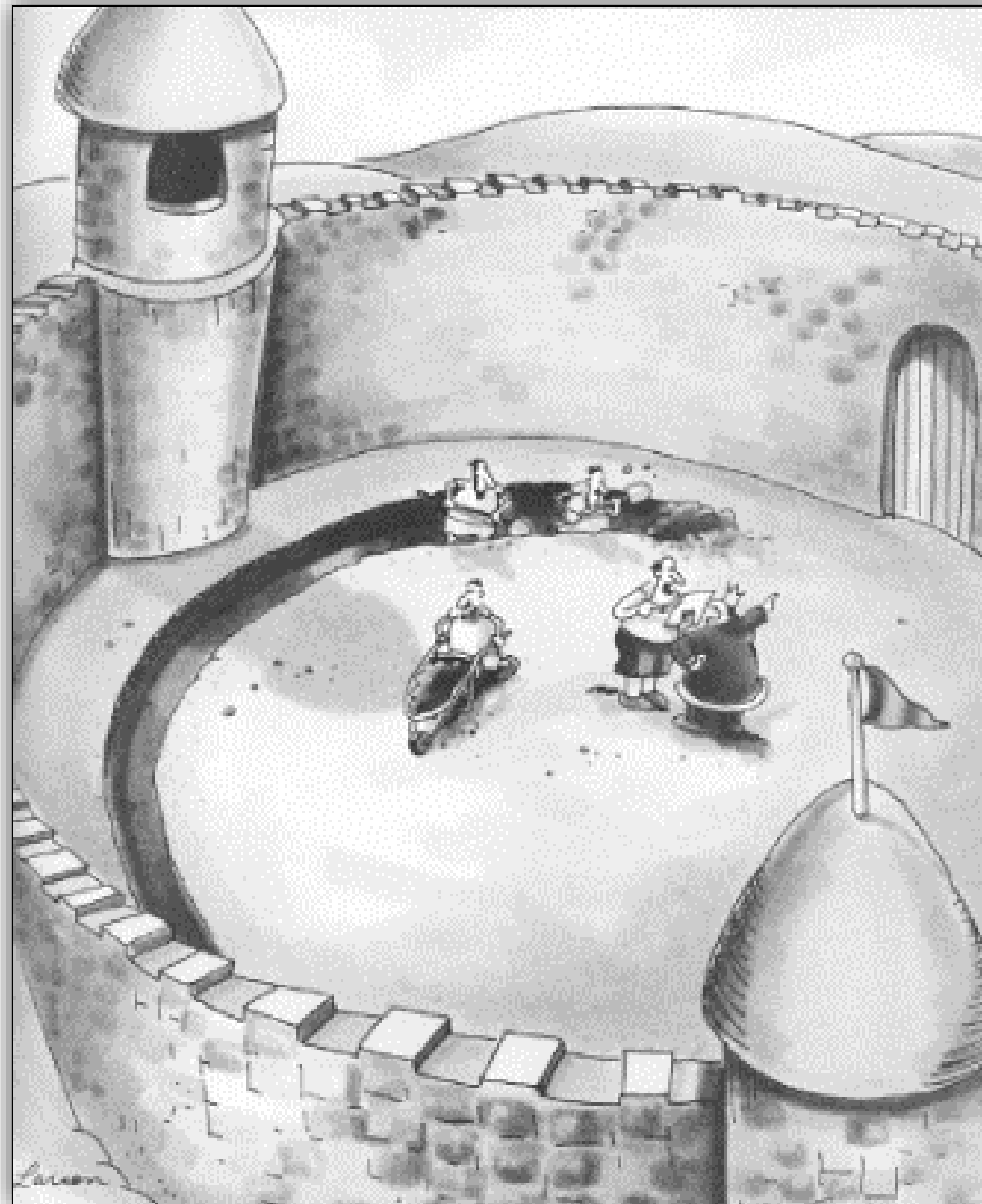
Key Takeaways

5. International contracting is moving toward a more managed process with time-bar clauses to provide rigor.
6. Common scenario on international projects where owner uses its power to pressurize contractors not to issue notices, with disastrous results.



The Life and Death of a Delay Claim

“Suddenly, a heated exchange broke out between the king and the moat contractor”



The Life and Death of a Delay Claim

Key Takeaways

1. Records and Documentation-there is a difference-daily reports key objective gem
2. Issue Database Development
3. Death of 1,000 Cuts Concept
4. Schedule Integrity is key
5. Don't have Valid CP-Don't have valid EOT claim
6. Causation Gradient-early claims negotiations vs. formal disputes
7. In some countries your claim wont progress if you have not made the effort to parcel up all relevant documents/evidence with legal analysis.
 - there is a greater need to manage the owner's requests for more and more evidence.

Key Takeaways

8. Be wary of relying on “Global Claims”
 - Seeks to avoid establishment of causation
 - Even a small chink in armor brings it down
9. Contractors should beware of the claim escalation process within the Owner's organization without established gateways and long-stop dates.
10. Preserve your rights to ensure claims which have been denied can be brought again.

Questions?



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