



# CONSTRUCTION **SUPER**CONFERENCE **2021**

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# **The Most Heavily Negotiated Terms in Construction Contracts from the Perspective of the Owner, Contractor, and Subcontractor**

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# **#1 Delays / Damages for Delay**

# #1 Delays / Damages for Delay – **OWNER'S VIEW**

- Force Majeure

- More time, but not more money
- The broader, the better!
- Require contractor to anticipate potential causes of delay.

Inadequate manpower or failure of Contractor's workers to prosecute their work on schedule because of strikes, boycott, picketing, or other form of labor dispute shall not be deemed force majeure unless there is clear and substantial danger of bodily harm or property damage.

Contractor is aware of the SARS CoV-2 (COVID-19) pandemic and of related project requirements and the global impact of the virus on labor availability and global supply chain. Subcontractor has considered and accounted for the impact of the pandemic on its scope of work, if any, prior to contract execution. To the extent the spread of SARS CoV-2 results in project shut-downs, critical impacts, or delays, Contractor's sole remedy for delay is the non-compensable time extension referenced above.

# #1 Delays / Damages for Delay – **OWNER'S VIEW**

- Force Majeure
  - No extensions of time if...
    - Float exists
    - Critical path not affected
    - Contractor could have avoided
    - Concurrent delay
    - Minor delay (e.g., less than one day)

# #1 Delays / Damages for Delay – OWNER'S VIEW

- Delay Claims
  - Strict notice requirements
    - Standard: 21 days
    - Better for Owner: 10 days
    - Clear language of waiver of claim if not timely claimed
    - Substantiation
  - No damages for delay:
    - ~~§ 8.3.3. This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.~~ An extension in the Contract Time shall be the Contractor's sole remedy for any (i) delay in the commencement, prosecution, or completion of the Work, (ii) hindrance, interference, suspension, or obstruction in the performance of the Work, (iii) loss of productivity, or (iv) other similar claims, whether or not such delays are foreseeable.

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# #1 Delays / Damages for Delay – **CONTRACTOR'S VIEW**

- Force Majeure
  - More time and more money
    - At least extended GC's and other delay-specific costs.
    - Compromise: allow use of contingency
    - Specify what qualifies:

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work . . . (3) 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 (including, but not limited to, labor or material shortages, supply chain disruptions, delays to deliveries, and Owner, government, or regulatory actions, such as stop work orders, arising out of or relating to quarantines, embargos, travel restrictions, virus, disease, contagion, or any other widespread communicable disease, such as epidemics or pandemics); . . .



# #1 Delays / Damages for Delay – **CONTRACTOR'S VIEW**

- Force Majeure
  - Day-for-day extension, regardless of...
    - Existing float
    - Concurrent delay
    - Critical path

# #1 Delays / Damages for Delay – **CONTRACTOR'S VIEW**

- Delay Claims

- Relaxed notice requirements
  - Standard: 21 days
  - Better for Contractor: “within a reasonable time”
  - Compromise: preliminary notice in 21 days; substantiation within 45 days

- Broad damages for delay

§ 8.3.3. This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

- Limit subcontractor recovery to what GC recovers.

# #1 Delays / Damages for Delay – SUBCONTRACTOR'S VIEW

- Force Majeure
  - More time and more money
  - Include specific risks subcontractor cannot anticipate
  - Day-for-day extension
- Delay Claims
  - Relaxed notice requirements
  - Broad damages for delay
  - **No** tying recovery to what contractor gets from owner
    - Owner may not award time/money if GC in breach

## **#2 Consequential Damages**

## #2 Consequential Damages – OWNER'S VIEW

- Consequential vs. Direct
- Major issue for Owner
- **Good**: keep waiver, add liquidated damages
- **Better**: keep waiver, add liquidated damages, carve out exceptions
  - Fines from authorities having jurisdiction
  - Costs and expenses from A/E or Separate Contractors arising out of Contractor's act or omission
- **Best**: completely delete waiver of consequential damages

## #2 Consequential Damages – **OWNER'S VIEW**

- Other Important Considerations:
  - Retain right to recover direct damages on account of delay
    - Owner's right to carry out work
    - Owner's right to order acceleration
    - Owner's remedies after termination for cause
    - Owner Claims
- Revert to consequential damages if Contractor claims LD's are void or unenforceable.

## #2 Consequential Damages – **CONTRACTOR'S VIEW**

- Major Risk
- **Good**: partial waiver, with limited exceptions and LD's
- **Better**: complete waiver, with LD's
- **Best**: complete waiver, no LD's



## #2 Consequential Damages – **CONTRACTOR'S VIEW**

- Other Important Considerations:
  - LD's as Owner's exclusive remedy for delays
  - Flow-Down Clauses in Subcontract
  - LD provision in subcontract even in absence of Prime Contract LDs

## #2 Consequential Damages – SUBCONTRACTOR'S VIEW

- Similar concerns as Contractor
- Limit Contractor's assessment of LDs to proportionate share of what Owner assesses against Contractor
- No liability for LDs unless Contractor informs Subcontractor in writing of Owner LD provision.

## **#3 Terminations**

## #3 Terminations – **OWNER'S VIEW**

- Termination for Convenience
  - Any time, any reason
  - Payment for work performed
  - No profit & overhead on unperformed work
  - No termination fee
- Termination by Owner for Cause
  - Short notice period
  - No (or small) opportunity to cure
  - Payment for work performed, less cost to complete, less damages
- Termination by Contractor for Cause
  - Limited right to terminate
  - No overhead & profit on unperformed work

## #3 Terminations – **CONTRACTOR'S VIEW**

- Termination for Convenience
  - Payment for work performed
  - Profit & overhead on unperformed work, or termination fee
  - Payment for termination costs related to subcontracts and supplier agreements
- Termination by Owner for Cause
  - Material breach only
  - Long notice period
  - Opportunity to cure
  - Payment for work performed
- Termination by Contractor for Cause
  - Short notice period before work stoppage, then termination
  - Overhead & profit on unperformed work, or termination fee
- Ability to terminate subcontract immediately upon Owner termination

## #3 Terminations – **SUBCONTRACTOR'S VIEW**

- Termination for Contractor's Convenience
  - Payment for work performed
  - Profit & overhead on unperformed work, or termination fee
- Termination by Contractor for Cause
  - Material breach only
  - Long notice period
  - Opportunity to cure
  - Payment for work performed
- Termination by Subcontractor for Cause
  - Short notice period before work stoppage, then termination
  - Overhead & profit on unperformed work, or termination fee

## **#4 Indemnification**



## #4 Indemnification – **OWNER'S VIEW**

- Standard Indemnification by Contractor to Owner

§ 3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, regardless of whether such claim or damage is caused in whole or in part by an indemnified party.

- Indemnification for Fines, Penalties, and Other Economic Harm

§ 3.18.3 The Contractor's indemnity obligations under this Section 3.18 shall also specifically include, without limitation, all **finances, penalties**, damages, liability, costs, expenses, attorneys' fees, and punitive damages arising out of, or in connection with, any (i) **violation of or failure to comply with any law, statute, ordinance, rule, regulation, code, or requirement** of a public authority that bears upon the performance of the Work by the Contractor, a Subcontractor, a Sub-subcontractor, or any person or entity for whom either is responsible, (ii) **means, methods, procedures, techniques, or sequences** of execution or performance of the Work, or (iii) **failure to secure and pay for permits, fees, approvals, licenses, and inspections** as required under the Contract Documents, or any violation of any permit or other approval of a public authority applicable to the Work, by the Contractor, a Subcontractor, a Sub-subcontractor, or any person or entity for whom either is responsible.

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## #4 Indemnification – CONTRACTOR'S VIEW / SUBCONTRACTOR'S VIEW

- Indemnification by Owner to Contractor

§ 3.18.3 To the fullest extent permitted by law the Owner shall indemnify and hold harmless the Contractor, Subcontractors, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the design of the Project, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property to the proportional amount of fault attributable to the negligent acts or omissions of the Owner, the Architect, the Architect's consultants, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, compared to the proportional amount of fault, if any, attributable to all parties indemnified hereunder.

## **#5 Scope and Risks of the Work**

## #5 Scope and Risks of the Work – **OWNER'S VIEW**

- Assumption of Site Conditions

**§ 3.2 Review of Contract Documents and Field Conditions by Contractor**

**§ 3.2.1** Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed, and correlated personal observations with requirements of the Contract Documents.



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§ 3.2.2.1 The exactness of grades, elevations, dimensions, or locations given on any Drawings issued by the Architect, or the work installed by other contractors, is not guaranteed by the Architect or the Owner. The Contractor shall, therefore, satisfy itself as to the accuracy of all grades, elevations, dimensions, and locations. In all cases of interconnection of its Work with existing or other work, it shall verify at the site all dimensions relating to such existing or other work. Any errors due to the Contractor's failure to so verify all such grades, elevations, dimensions, or locations shall be promptly rectified by the Contractor without any additional cost to the Owner.



## #5 Scope and Risks of the Work – **OWNER'S VIEW**

- Defining and Identifying the Scope of Work

### § 1.2 Correlation and Intent of the Contract Documents

§ 1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

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### § 1.1.9 "Reasonably Inferable"

The expression "reasonably inferable" and similar terms in the Contract Documents mean reasonably inferable by a contractor familiar with the Project and exercising the care, skill, and diligence required of the Contractor by the Contract Documents.

## #5 Scope and Risks of the Work – **CONTRACTOR'S VIEW**

- Sufficiency of Design and Site Conditions

### § 3.2 Review of Contract Documents and Field Conditions by Contractor

§ 3.2.1 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed, and correlated personal observations with requirements of the Contract Documents.

§ 3.2.2 Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.3.4, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents.

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- Beware of Owner attempts to disclaim all implied warranties (including Spearin).



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# #5 Scope and Risks of the Work – **CONTRACTOR'S VIEW**

- Use of and Reliance on Shop Drawings

## § 3.12 Shop Drawings, Product Data and Samples

...

§ 3.12.4 Shop Drawings, Product Data, Samples, and similar submittals are not Contract Documents. Their purpose is to demonstrate how the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents for those portions of the Work for which the Contract Documents require submittals. Review by the Architect is subject to the limitations of Section 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals that are not required by the Contract Documents may be returned by the Architect without action.

...

§ 3.12.6 By submitting Shop Drawings, Product Data, Samples, and similar submittals, the Contractor represents to the Owner and Architect that the Contractor has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

...

§ 3.12.8 The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from the requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples, or similar submittals, unless the Contractor has specifically notified the Architect of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples, or similar submittals, by the Architect's approval thereof.

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## #5 Scope and Risks of the Work – **CONTRACTOR'S VIEW**

- Labor Issues and Requirements
- Incorporation by Reference of Entire vs. Specific Parts of Prime Contract

## #5 Scope and Risks of the Work – SUBCONTRACTOR'S VIEW

- Assumption of Site Conditions
- Defining and Identifying the Scope of Work
- Use of and Reliance on Shop Drawings
- Labor Issues and Requirements
- Incorporation by Reference of Entire vs. Specific Parts of Prime Contract

## **#6 Payment Provisions**

## #6 Payment Provisions – OWNER'S VIEW

- Payment Issues

- On cost-plus projects, require all backup
- Certificate for Payment: Keep it flexible

§ 9.4.3 If after issuing any Certificate for Payment, the Owner or Architect determines that any previous Certificate for Payment was in error (whether by review of additional conditions or documents, discovery of mathematical error, or any other reason), then the Architect shall issue a revised Certificate for Payment setting forth the changes in the amounts due the Contractor as well as a reason for such revision.

- Time for Payment

- 30 days is standard
- 45 days is more realistic
- 90 days for special owners

- Non-payment remedy: Contractor must give notice and suspend before terminating.



## #6 Payment Provisions – OWNER'S VIEW

- Retainage
  - 10% until Substantial Completion
- Lien Waivers
  - Ideal: full prospective lien waiver
  - Typical: conditional and unconditional

§ 9.6.9 If any claim or lien for which the Contractor is responsible is asserted or there is any reason to believe that such a claim or lien may be asserted, the Owner may withhold payment otherwise due to satisfy such claim or lien. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor shall furnish a bond satisfactory to the Owner to indemnify the Owner against such lien or claim.

## #6 Payment Provisions – **CONTRACTOR'S VIEW**

- Payment Issues
  - On cost-plus projects, make backup available upon request
  - Time for Payment
    - 30 days max
  - Non-payment remedy:
    - 7-day notice
    - Suspension for 60 days
    - Termination
- Heightened interest for improper withholding of certification

## #6 Payment Provisions – **CONTRACTOR'S VIEW**

- Retainage
  - 8% on labor and materials only
  - 0% once project is 50% complete
- Lien Waivers
  - Retroactive only (in exchange for payment)
  - Subcontractor waivers from major subs only
- Pay-if-Paid Clauses

## #6 Payment Provisions – SUBCONTRACTOR'S VIEW

- Payment Terms
  - 30 days after invoice or 10 days after payment from Owner
- Retainage
  - No greater than what Owner holds on Contractor
  - Ideal: 8% on labor and materials only; 0% at 50% complete
- Pay-if-Paid Clauses
  - Reject
  - Convert to pay-when-paid
  - If must accept, provide for fast and easy termination
- Lien Waivers

## **#7 Claims and Dispute Resolution Procedures**

# #7 Claims and Dispute Resolution Procedures

- Notices of Claims

## AIA

### § 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party under this Section 15.1.3.1 shall 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.

## ConsensusDOCS

12.2 DIRECT DISCUSSIONS If the Parties cannot reach resolution on a matter relating to or arising out of this Agreement, the Parties shall endeavor to reach resolution through good faith direct discussions between the Parties' representatives, who shall possess the necessary authority to resolve such matter and who shall record the date of first discussions. If the Parties' representatives are not able to resolve such matter within five (5) Business Days from the date of first discussion, the Parties' representatives shall immediately inform senior executives of the Parties in writing that resolution was not affected. Upon receipt of such notice, the senior executives of the Parties shall meet within five (5) Business Days to endeavor to reach resolution. If the dispute remains unresolved after fifteen (15) Days from the date of first discussion, the Parties shall submit such matter to the dispute mitigation and dispute resolution procedures selected herein.

# #7 Claims and Dispute Resolution Procedures

- Notices of Claims

## DBIA

### 10.1 Requests for Contract Adjustments and Relief.

**10.1.1** If either Design-Builder or Owner believes that it is entitled to relief against the other for any event arising out of or related to the Work or Project, such party shall provide written notice to the other party of the basis for its claim for relief. Such notice shall, if possible, be made prior to incurring any cost or expense and in accordance with any specific notice requirements contained in applicable sections of these General Conditions of Contract. In the absence of any specific notice requirement, written notice shall be given within a reasonable time, not to exceed twenty-one (21) days, after the occurrence giving rise to the claim for relief or after the claiming party reasonably should have recognized the event or condition giving rise to the request, whichever is later. Such notice shall include sufficient information to advise the other party of the circumstances giving rise to the claim for relief, the specific contractual adjustment or relief requested and the basis of such request.

## EJCDC

### 12.01 Claims.

*B. Submittal of Claim:* The party submitting a Claim shall deliver it directly to the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto; in the case of appeals regarding Change Proposals within 30 days of the decision under appeal. The party submitting the Claim shall also furnish a copy to the Engineer, for its information only. The responsibility to substantiate a Claim shall rest with the party making the Claim. In the case of a Claim by Contractor seeking an increase in the Contract Times or Contract Price, or both, Contractor shall certify that the Claim is made in good faith, that the supporting data are accurate and complete, and that to the best of Contractor's knowledge and belief the amount of time or money requested accurately reflects the full amount to which Contractor is entitled.

# #7 Claims and Dispute Resolution Procedures

- Initial Claim Resolution
  - Party Executive Negotiation
  - Initial Decision Maker
  - Project Neutral
  - Dispute Review Board
  - Mediation
- Arbitration vs. Litigation



## **#8 Change Orders**

## #8 Change Orders – OWNER'S VIEW

- Method

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents. The Contractor shall proceed promptly with changes in the Work, unless otherwise provided in the Change Order, Construction Change Directive, or order for a minor change in the Work. Except as permitted in Section 7.3, Section 9.7.2, and Article 15, a change in the Contract Sum or the Contract Time shall be accomplished only by Change Order. Accordingly, no course of conduct or dealings between the parties, nor express or implied acceptance of alterations or additions to the Work, and no claim that the Owner has been unjustly enriched by any alteration of or addition to the Work, whether or not there is, in fact, any unjust enrichment to the Work, shall be the basis of any claim to an increase in any amounts due under the Contract Documents or a change in any time period provided for in the Contract Documents.

§ 7.2.1 . . . Unless specifically authorized in the Change Order, the Contractor shall not reserve any rights or take other similar action with respect to a Change Order if the effect or intent of such reservation or action would be to accommodate a further adjustment of the Contract Sum, the Contract Time, or both, after the Contractor signs the Change Order. By signing a Change Order, the Contractor irrevocably certifies that the elements of a Change Order described in this Section 7.2.1 are completely satisfied, and waives all rights, if any, to seek further adjustment of the Contract Sum, Contract Time, or both, at a later date with respect to the associated change in the Work.

- Pricing

- Actual cost with cap on profit and overhead
- Include profit and overhead on deduct change orders

## #8 Change Orders – **OWNER'S VIEW**

- Construction Change Directives
  - Minimize role of A/E
  - Cap profit and overhead
- Notice Provisions
  - Strictly enforce deadlines for Claims

## #8 Change Orders – **CONTRACTOR'S** / **SUBCONTRACTOR'S VIEW**

- Method
  - Email notification of need for change order within reasonable time; substantiation to follow.
  - If Owner insists on strict process, add:

Owner expressly acknowledges that Contractor will not begin performance of any work required by a Change Order, Construction Change Directive, or minor change in the Work until such change is authorized in writing by the Owner's designated Project Representative, and Owner hereby waives any claim for damages arising out of Contractor's refusal to perform a change in the Work that has not been specifically authorized in writing by the Owner's designated Project Representative.
- Pricing
  - Actual cost plus mark-up, with no cap.

## #8 Change Orders – **CONTRACTOR'S** / **SUBCONTRACTOR'S VIEW**

- Construction Change Directives
  - Clarify that all CCDs will result in cost increase

ConsensusDocs 8.2.2 The Parties shall negotiate expeditiously and in good faith for appropriate adjustments, as applicable to the Contract Price or the Contract Time arising out of an Interim Directive. As the directed Work is performed, Constructor shall submit its costs for such Work with its application for payment beginning with the next application for payment within thirty (30) Days of the issuance of the Interim Directive. If there is a dispute as to the cost to Owner, Owner shall pay Constructor fifty percent (50%) of its actual (incurred or committed) cost to perform such Work. In such event, the Parties reserve their rights as to the disputed amount, subject to the requirements of Article 12...

- Notice Provisions
  - Take advantage of Owner-caused course-of-dealing, or Owner's ignoring of change order or Claim process.

## **#9 Limitations of Liability**

## #9 Limitations of Liability

- Limitations of Contractual Liability
  - Liability capped at fee
- Limitations of Tort Liability
  - Liability capped at insurance proceeds
- Limitations of Consequential & Direct Damages for Delay
  - Liquidated damages (as exclusive remedy)
  - Liability capped at extended general conditions, e.g.
  - Itemize specific consequential damages waived
  - Hybrid damage calculation: X% of actual damages + \$Y in liquidated damages

## **#10 Warranties**



# #10 Warranties

- Standard Warranties
  - Commencement
    - At substantial completion of a subcontractor's work?
    - At substantial completion of all work?
    - At final completion?
  - Length
    - One year?
    - Through manufacturers' warranty period?
    - Through statute of repose?
  - Re-Start for Corrected Work
  - Warranty Call-Back vs. Breach

# #10 Warranties

- Disclaimers of Implied Warranties & Duties
  - Implied warranty of constructability
  - Implied duty of full disclosure
  - Implied warranty of adequacy of contract time
  - Implied duty to warn of defects, code violations
  - Implied duty to provide work site without hindrance and interference
  - Implied duty of good faith and fair dealing

# **The Most Heavily Negotiated Terms in Construction Contracts from the Perspective of the Owner, Contractor, and Subcontractor**

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Peter W. Hahn  
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Logan Hollobaugh  
Senior Legal Counsel  
Clough Group  
Houston, TX

Robert L. Konopinski  
General Counsel & Secretary  
Rieth-Riley Construction Co., Inc.  
Goshen, IN



The background of the slide is a composite image. It features a construction site at sunset, with silhouettes of workers on a building's steel framework and a large tower crane. Overlaid on this is a semi-transparent image of a person in a white business suit and a red patterned tie, with their hands clasped in front of them. The text is overlaid on the central part of the image.

**How was our session?**

**Please complete the session  
evaluation in the CSC  
mobile app**