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# **Problem Project Takeovers: Navigating the Risks and Challenges Of Taking Over the Troubled Project**

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# Introduction & Panel

- Purpose of the Session
  - Understanding the legal, financial, operational, and risk-management challenges when taking over a terminated contractor's project.
- Panelists & Roles
  - Outside Counsel
  - In-House Counsel
  - Contractor Executive
  - Surety Representative

# Context

- Claims and Defaults Rising
- Challenges for stakeholders
  - Owners
  - Prime Contractors
  - Specialty Contractors and Material Suppliers
  - Sureties
  - Design Professionals

# The Contract(s)

- What was in the defaulted contract?
- Considerations for the new or takeover contract
  - Bonding
  - Insurance
  - The work
    - Known Incomplete work
    - Complete but known deficient work
    - Unknown deficiencies
    - Unknown site conditions

# Signs of Trouble

- What are you hearing?
- What are you seeing?
- What are you saying in writing?
  - Reserving rights
  - Risks of including (or not including) the surety?

# Considerations for the Takeover Contractor

- Walking into it or stepping in it?
  - Litigation likely
  - Limiting liability for prior work
  - Getting paid for the risk and time
- Understanding the fight
  - What's happening in the background
  - How does the background fight affect behavior?
- Owner-Driven Pressures

# Operational Realities of Stepping Into a Problem Project

- Rapid Assessment & Mobilization
  - Establishing site control and securing the project.
  - Determining workforce and subcontractor needs.
- Continuity of the Work
  - Should you engage original subcontractors?
  - Risks of taking assignment of subcontracts vs. new agreements.
  - Dealing with unpaid subcontractors.
- Project Management & Communication
  - Resetting Expectations with the Owner.
  - Implementing enhanced reporting & cost controls.

# Pricing the Unknowns

- Estimating in a Cloud of Uncertainty
  - Allowances and contingencies for latent defects.
  - Pricing demolition, uncovering, rework, and forensic discovery time.
- Contractual Pricing Models
  - Cost-plus vs. GMP vs. fixed-price for takeover work.
  - Use of force account or T&M for investigative work.
  - Clarifying change order process for discovery of defects.
- Protecting Against Future Disputes
  - Clear delineation of responsibility for defects

# Scenario 1

## Structural Surprise: The Sagging Floor (Structural Defect Discovery)

### ■ Fact Pattern

- A \$42M municipal office building is halfway constructed when the owner terminates the original GC for repeated schedule delays and nonpayment to subs. The surety elects a takeover and hires your company as the completion contractor.
- Upon mobilization, your superintendent notices unusual deflection in the second-floor steel joists. No load calculations or corrected shop drawings are available—submittals stopped due to the predecessor GC's failure to pay the steel subcontractor.

# Scenario 1

## Structural Surprise: The Sagging Floor (Structural Defect Discovery)

### ■ What You Discover

- Steel joists are undersized compared to contract drawings.
- The original contractor approved multiple field changes on handwritten sketches with no engineer-of-record review.
- The city building official issues a stop-work order until structural adequacy is confirmed.
- Owner disputes responsibility, claiming the takeover contractor “accepted” the condition.

# Scenario 1

## Structural Surprise: The Sagging Floor (Structural Defect Discovery)

### ■ Legal Contract Issues

- Liability for pre-existing defective work.
- Whether shop drawings approval constituted a design assumption.
- Right to a change order for remediation vs. owner claim that replacement contractor accepted existing conditions.
- Surety's salvage claim against original steel subcontractor.

# Scenario 1

## Structural Surprise: The Sagging Floor (Structural Defect Discovery)

### ■ Questions to Discuss

- What should the takeover contractor document before touching the structure?
- How can you protect against being deemed to have accepted the defective condition?
- Who bears the cost/schedule risk if the fix requires re-engineering the steel frame?

## Scenario 2

# We're Not Coming Back Until We Get Paid (Subcontractor Non-Payment)

### ■ Fact Pattern

A retail distribution center is 60% complete. The owner terminates the original contractor for cause due to abandonment. The surety selects your company for completion. The original contractor owes \$3.8M to subs, including MEP subs who control critical-path work.

## Scenario 2

# We're Not Coming Back Until We Get Paid (Subcontractor Non-Payment)

### ■ What Happens Next

- The electrical and fire protection subcontractors refuse to return without being paid for prior work; file liens and bond claims and demand contract reformation at new rates.
- Surety directs you to re-engage them because they know the design but will not commit to paying them for prior arrears.
- Owner insists that time is of the essence because delays threaten owner's ability to meet distribution commitments.

## Scenario 2

# We're Not Coming Back Until We Get Paid (Subcontractor Non-Payment)

### ■ Legal / Operational Issues

- Assignment of subcontracts and right to compel subs to resume work.
- Whether the surety must fund past-due payments.
- Risk of acknowledging liability for original contractor's nonpayment.
- Liquidated damages exposure.

## Scenario 2

# We're Not Coming Back Until We Get Paid (Subcontractor Non-Payment)

### ■ Questions to Discuss

- Should the takeover contractor use the same subcontractors or rebid the remaining work?
- If subcontractors refuse to return, does the surety have to pay them to get them back?
- How do you protect yourself from inheriting prior payment disputes?

# Scenario 3

## Hidden Envelope Disaster: The Leaking Library

### ■ Fact Pattern

- A \$28M public library expansion is 95% complete when the GC is terminated. You are brought in under a takeover agreement. The building appears visually complete.

# Scenario 3

## Hidden Envelope Disaster: The Leaking Library

- **What You Discovery After First Significant Rainfall**
  - Major water intrusion at curtainwall anchoring points.
  - Incorrect flashing installation concealed behind finished drywall.
  - Vapor barrier missing in certain wall sections.
  - Moisture and mold in areas previously signed off on in inspections.

# Scenario 3

## Hidden Envelope Disaster: The Leaking Library

### ■ Complicating Factors

- Owner has already moved furniture and books into sections of the building.
- The architect insists the details were properly designed and blames installation.
- The original curtainwall subcontractor has filed bankruptcy.
- Owner wants immediate warranty coverage from your company.

# Scenario 3

## Hidden Envelope Disaster: The Leaking Library

### ■ Legal Issues

- Latent defect allocation: Is this part of “completion” or “correction”?
- Whether you must perform demolition to uncover source of leaks at your expense.
- Insurance interplay (builder’s risk vs. CGL vs. OCIP)
- Protecting against warranty obligations for prior contractor’s non-conforming work.

# Scenario 3

## Hidden Envelope Disaster: The Leaking Library

### ■ Questions to Discuss

- What do you document upon discovering mold or moisture in a takeover?
- How do you negotiate owner expectations around “correction” vs. “completion”?
- What contract language is needed before removing any drywall?

# Scenario 4

## The Litigation Trap: You're Now a Witness

- **Fact Pattern**

- Original GC is terminated from a \$250MM hospital project after becoming embroiled in high-stakes litigation with the owner over delays, design defects, and delay damages in excess of \$30M.

# Scenario 4

## The Litigation Trap: You're Now a Witness

### ■ You Inherit

- A project that is 14 months behind schedule.
- A design team that refuses to issue clarifications until litigation is resolved.
- Discovery requests directed at contractors on site, which include your company.

# Scenario 4

## The Litigation Trap: You're Now a Witness

### ■ What Happens

- You receive subpoenas for documents and deposition notices for your superintendent.
- Owner demands you provide cost details to support its claim against the original contractor.
- Design team refuses to stamp corrections due to fear of litigation liability.
- Surety requires you to support claims to maximize salvage value.

# Scenario 4

## The Litigation Trap: You're Now a Witness

### ■ Legal Risks

- Becoming a fact witness in litigation between owner, surety, and original contractor.
- Risks of creating damaging documents or disclosures.
- Obligation to assist in prosecution of claims.
- Interference with ability to manage the project.
- Higher level of scrutiny of work and management.

# Scenario 4

## The Litigation Trap: You're Now a Witness

### ■ Questions to Discuss

- How does a contractor protect its project team from litigation entanglement?
- Should the takeover contractor negotiate limits on cooperation with litigation?
- What reservation of rights language is essential before mobilizing?

# Scenario 5

## The Unknown Underground: The Missing Storm Line

### ■ Fact Pattern

- A civil contractor is terminated from a wastewater treatment plant project. The surety tenders the project to you. The underground utilities are partially installed.

# Scenario 5

## The Unknown Underground: The Missing Storm Line

### ■ What You Find

- As-built drawings are incomplete and conflict with surveyed field conditions.
- A 36” storm line is missing entirely—never installed.
- Installed pipe has questionable compaction; soil tests incomplete or appear inconclusive.
- Groundwater infiltration appears at unknown locations.

# Scenario 5

## The Unknown Underground: The Missing Storm Line

### ■ Complications

- Owner demands that completion occur without additional compensation because the design was unchanged, and replacement contractor had opportunity to inspect site.
- The geotechnical engineer disclaims liability due to lack of oversight by the original contractor.
- Bond penal sum is nearly exhausted.

# Scenario 5

## The Unknown Underground: The Missing Storm Line

- **Legal / Contract Questions**
  - Are you responsible for locating, uncovering, and correcting missing underground work?
  - Can you get a change order for investigative excavation?
  - Who owns the risk of defective pre-existing underground conditions?
  - What happens if the bond is insufficient to cover the actual cost to complete?

# Scenario 5

## The Unknown Underground: The Missing Storm Line

### ■ Questions to Discuss

- How should a takeover contractor scope investigative and exploratory work?
- What documentation is needed before disturbing underground work?
- How can you price the unknown without becoming the guarantor of the original contractor's mistakes?

# Scenario 6

## The Design Defect Quicksand: Who Owns the Mistake Now?

### ■ Fact Pattern

- Project was terminated due to original contractor's delay in completion and multiple breaches for non-payment to subcontractors. Original contractor claimed problems arose from cost overruns allegedly caused by bad design. The new contractor (you) is hired under a surety takeover agreement. The owner refuses to acknowledge design defects.

# Scenario 6

## The Design Defect Quicksand: Who Owns the Mistake Now?

### ■ What Emerges

- Multiple unbuildable details (slab transitions, pipe routing, curtainwall anchors)
- The A/E insists these issues never caused delay; contractor error created the problems.
- Owner directs you to address issues within current contract price.

# Scenario 6

## The Design Defect Quicksand: Who Owns the Mistake Now?

### ■ Legal Issues

- Whether takeover contractor inherits disputes over design adequacy.
- Entitlement to change orders for constructability fixes.
- Shared exposure between contractor and design team.

# Scenario 6

## The Design Defect Quicksand: Who Owns the Mistake Now?

### ■ Questions to Discuss

- How does the takeover contractor avoid becoming the scapegoat for design flaws?
- What contractual reservations should be made regarding design liability?

# Questions