

Key Legal Issues Relevant to Construction

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AIA CONTRACTS

(Industry Standard)

- Larger Projects
 - A101- Lump Sum
 - A102- Cost of Work w/ GMP
 - A 103- T & M w/ Control Budget
 - A201- General Conditions Useable w/ All Forms
 - Owner Friendly Revisions Required

Indemnification



Why important

Equitable doctrine that **shifts the burden** of a judgment from one party to another.

→ The indemnitor is the party holding the other party harmless, the indemnitee.

Does not apportion liability among a number of jointly liable parties. Transfers the **entire loss** from one party to another.

One of the primary **risk shifting devices** in any construction contract can be the indemnification provisions. Allocates possible risks to those who should more appropriately bear responsibility.

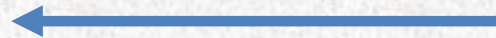
Usually, indemnification clauses attempt to require one party to pay the damages and costs (including legal costs and expenses) incurred by another party.

Indemnification



Why important

1% at Fault
Owner
\$1,000,000 in Liability



Employee of
General
Contractor
\$1,000,000 in
Damages

No Indemnification Provision

99% at Fault
General
Contractor

Indemnification



- Scope:
 - Third party claims?
 - Bodily Injury and Property Damage?
 - Fault Based?
 - Concurrent Negligence

Indemnification



§ 3.18 INDEMNIFICATION

- **§ 3.18.1** To the fullest extent permitted by law the Contractor shall **indemnify (no “defense”)** 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, 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 (other than the Work itself)**, but only to the extent caused by the **negligent** acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 3.18.



§ 3.18 INDEMNIFICATION

§ 3.18.1 The Contractor shall, to the fullest extent permitted by applicable law, indemnify, defend, protect and hold harmless the Owner and its constituent members, and lenders to Owner, all subsidiary or affiliated companies of the Owner or any of Owner's constituent members, any person who holds a direct or indirect ownership interest in Owner, any of Owner's constituent members or any lender to Owner, as well as all of the foregoing parties' respective employees, officers, directors, managers, trustees and agents and the respective heirs, executors, administrators, successors and assigns of all of them (including Owner, collectively, the "Owner Parties") from and against any claims, demands, debts, causes of action, liabilities, losses, damages costs, expenses, including actual attorneys' fees, awards, court costs, penalties, fines or judgments (collectively, "Claims"), resulting from or arising out of: (1) the performance of the Work; or (2) violations of or failure to comply with any safety order, rule or regulation(3) any and all liens, stop notices and charges of every type, nature, kind or description which may at any time be filed or claimed against the Project, or any portion thereof, or against any and all Owner Parties as a consequence of acts or omissions of the Contractor, any Subcontractor or Sub-subcontractor or any other person for whom any of them is responsible or the agents, servants or employees of any of them; or (4) any workers' compensation claims, equal employment opportunity claims, unemployment claims, withholding claims or social security claims by any employee of the Contractor, any Subcontractor or Sub-subcontractor or any other person for whom any of them is responsible; or (5) any other act or omission with respect to the Work by the Contractor, any Subcontractor or Sub-subcontractor or any other person for whom any of them is responsible or the agents, servants or employees of any of them, attributable to death, bodily injury, sickness, disease or injury to or destruction of tangible property, or loss of use thereof. Contractor's duty to indemnify,



disease or injury to or destruction of tangible property, or loss of use thereof. Contractor's duty to indemnify, including the cost to defend Owner Parties, **shall not apply** to claims for damages arising out of the services performed or to be performed by Contractor, or arising out of bodily injury to persons or damage to property caused by or resulting from **the sole negligence of an Owner Party**, or its agents or employees. Contractor's duty to indemnify Owner Parties, including the duty and cost to defend, for claims arising out of the services performed or to be performed by Contractor, or arising out of bodily injury to persons or damage to property caused by or resulting from the **concurrent negligence** of (a) an Owner Party, or its agents or employees and (b) Contractor or its agents, employees, and subcontractors and suppliers of any tier, shall apply only to the extent of the negligence of Contractor, its agents, employees, and subcontractors and suppliers of any tier. **THIS INDEMNIFICATION OBLIGATION SHALL INCLUDE, BUT IT NOT LIMITED TO, ALL CLAIMS AGAINST THE OWNER PARTIES BY AN EMPLOYEE OR FORMER EMPLOYEE OF THE CONTRACTOR OR ANY SUBCONTRACTOR FOR THIS PURPOSE, THE CONTRACTOR EXPRESSLY WAIVES, AS RESPECTS TO THE OWNER PARTIES ONLY, ALL IMMUNITY AND LIMITATION ON LIABILITY UNDER ANY INDUSTRIAL INSURANCE ACT, INCLUDING TITLE 51 RCW, OR OTHER WORKER'S COMPENSATION ACT, DISABILITY ACT, OR OTHER EMPLOYEE BENEFIT OF ANY ACT OF ANY JURISDICTION WHICH WOULD OTHERWISE BE APPLICABLE IN THE CASE OF SUCH A CLAIM. BY INITIALING BELOW THE OWNER AND CONTRACTOR CERTIFY THE WAIVER OF IMMUNITY SPECIFIED BY THIS PROVISION WAS MUTUALLY NEGOTIATED.**

☐ Owner

☐ Contractor

Defense cost recovery under Section 3.18 shall include all fees of attorneys and experts and costs and expenses incurred in good faith.

Mutual Waiver of Consequential Damages



§ 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES

- The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes
 - damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
 - damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.
- This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

Liquidated Damages



- Key to preserve a delay remedy if contract has consequential damages waiver
- Cannot be a “penalty”
- Must be reasonable forecast of delay damages at time of contracting
- Likely will be Owner’s exclusive delay remedy
- Can be tied to phased completion
- Very important to properly define substantial completion

Liquidated Damages



§ 4.6 In the event the Contractor fails to Substantially Complete the entire Project on or before the Completion Date, as the same may be extended pursuant to the Contract Documents, the parties agree that it would be extremely difficult and impractical under the presently known and anticipated facts and circumstances to ascertain and fix the actual damages the Owner will incur by reason of such failure. Accordingly, the parties agree that if the Contractor fails to achieve Substantial Completion of the Project on or before the Completion Date, then the Contractor shall be liable to the Owner for

Liquidated Damages each day in accordance with the Liquidated Damages scale identified below as follows:

0-30 Day delay in achieving Substantial Completion: \$0/day

31-60 day delay in achieving Substantial Completion: \$ 3,000/day

61-90 day delay in achieving Substantial Completion: \$ 5,000/day

91-plus day delay in achieving Substantial Completion: \$13,692/day

Liquidated Damages



The Liquidated Damages provided herein shall be the Owners exclusive damages remedy for the Contractor's failure to complete the Project by the date of Substantial Completion within the Contract Time provided herein and such Liquidated Damage payment shall be in lieu of all liability for any and all extra costs, losses, expenses, claims and any other damages, whether special or consequential and whatsoever nature, incurred by the Owner which are occasioned by any such delay. The parties agree the liquidated damages rates above are not a penalty and represent a reasonable calculation and amount of damages based on the facts presently known that Owner will incur as a result of delays to Substantial Completion and that the longer the delay, Owner will incur increased damages for the delay. Liquidated Damages will be capped at \$_____.

In the event Contractor achieves Substantial Completion of the Project more than 30 days prior to the Substantial Completion Date, Contractor shall be entitled to an early completion bonus of \$25,000.

Changes/Delays – Notice and Claim Procedures



§ 15.1.2

- **Claims and Disputes.** A Claim is a demand or assertion by Contractor seeking payment of money, or other relief with respect to the terms of the Contract. A notice of a potential or future claim does not constitute a claim. The Contractor shall submit a written notice of any Claim to the Owner within seven (7) days of the occurrence of the event giving rise to such Claim and the notice shall include a clear description of the event leading to or causing the Claim. For all Claims, the Contractor shall submit a written claim as provided herein within fourteen (14) days of delivery of the notice. Claims shall include a clear description of the Claim and any proposed change in the contract sum (showing all components and calculations) and/or contract time (showing cause of and analysis of the resulting delay in the critical path and other information) and shall provide data fully supporting the Claim. Contractor shall not perform changed Work in the absence of a written, executed Change Order. THE CONTRACTOR'S FAILURE TO GIVE WRITTEN NOTICE AND A CLAIM WITHIN THE STATED TIME PERIODS AND PROCEDURES SHALL CONSTITUTE AN ABSOLUTE AND COMPLETE WAIVER, RELEASE AND BAR OF SUCH CLAIM. Pending final resolution of a Claim, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.



Reset Change Order

CHANGE ORDER

AM Apartments, LLC
2002 Western Avenue, Suite 230
Seattle, WA 98113
Phone: 206 876 8061

PROJECT: **James M. Moor**
Apartments, 625 East Lake
Sammamish Parkway, NW
CONTRACTOR: **Ventura General**
Contracting LLC
Phone: 206 562 4800
Email: mparent@ventura-seattle.com
Designated Representative: Matt Parent

CHANGE ORDER NO: 23

DATE: December __, 2018

THE CONTRACT IS CHANGED AS FOLLOWS:

1. The Owner and Contractor intend for this Change Order to (i) resolve all existing claims and issues, including the PCIs referenced in Exhibit A hereto and Contractor's claim for additional staffing costs and/or cumulative impact, as set forth in [REDACTED] Change Proposal [REDACTED] for [REDACTED] in additional staffing and impact costs and communications related thereto (collectively "Claims") through an increase to the Guaranteed Maximum Price totaling [REDACTED]; (ii) establish revised completion deadlines for the Project; (iii) establish agreed deferred compensation to be paid to Contractor upon Contractor achieving Final Completion of the Project; and (iv) revise the liquidated damages clause of the Contract by establishing revised completion dates and liquidated damages to resolve Owner's existing claim for Liquidated Damages for delayed completion of the Project. ✓
2. Contractor has requested additional compensation and additional time for the Claims. The Parties agree to resolve the Claims by increasing the Guaranteed Maximum Price by [REDACTED], established as follows:

PCIs in Exhibit A:	[REDACTED]
Cumulative Impact Claim Agreement	[REDACTED]
TOTAL:	[REDACTED]

3. Contractor shall achieve the following completion deadlines:

- MP.
12-17-06

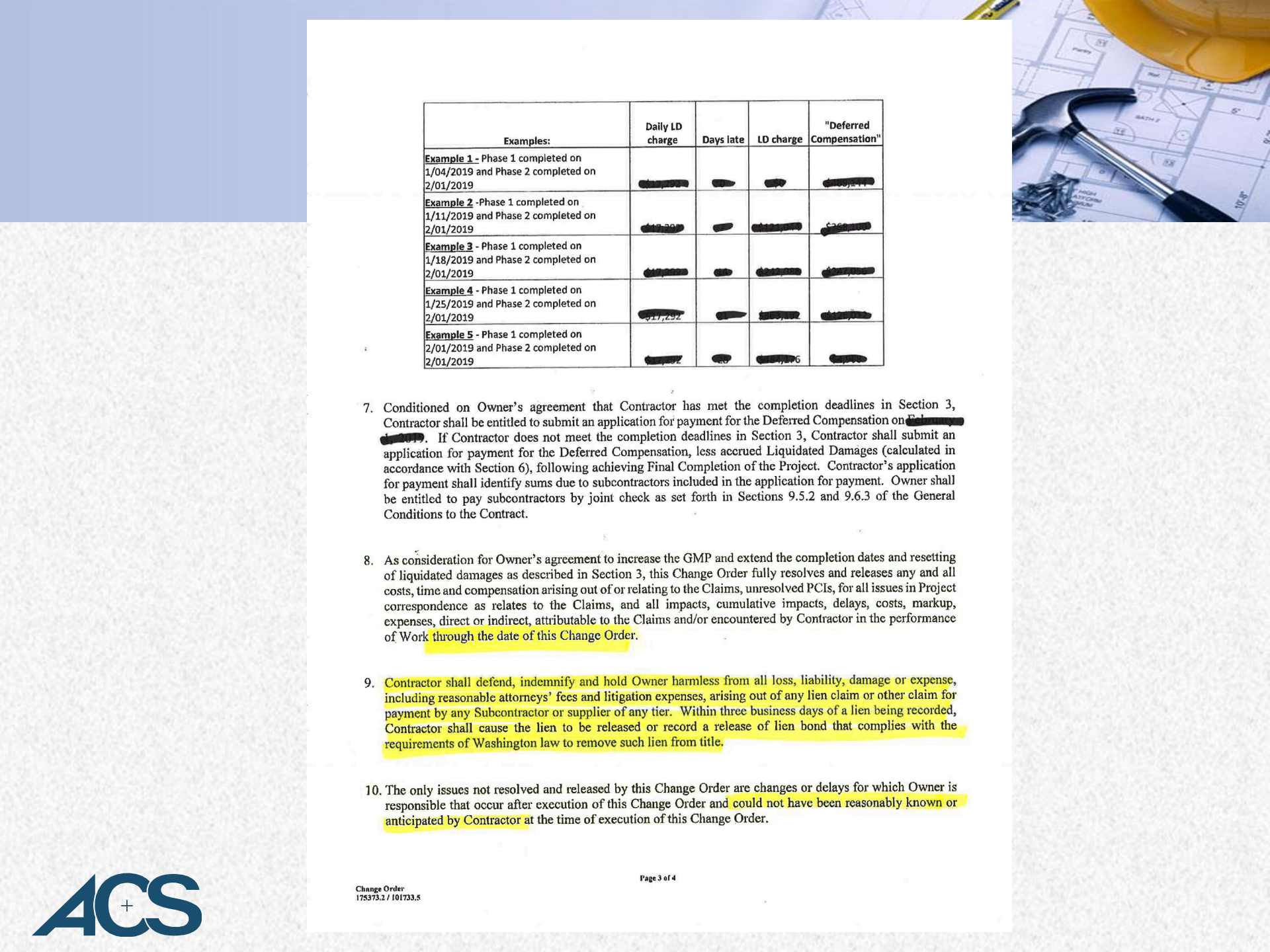
4. Owner believes it is currently entitled to Liquidated Damages for delayed completion of the Project. Owner agrees to defer entitlement to Liquidated Damages by extending the completion dates in the Contract and establishing a revised daily rate for Liquidated Damages. The Parties agree that the Liquidated Damages figures set forth in Section 4.6 of the Contract shall be revised to a daily rate of \$17,000.

The Parties agree that Owner shall be entitled to defer compensating Contractor for the following Contractor achieves Final Completion of the Project:

Continental Impact Claim Settlement Per Section 2				2000.000
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3. See following chart, which represent examples but not limitations on Liquidated Damages:





Examples:	Daily LD charge	Days late	LD charge	"Deferred Compensation"
Example 1 - Phase 1 completed on 1/04/2019 and Phase 2 completed on 2/01/2019	\$1,200	28	\$33,600	\$33,600
Example 2 - Phase 1 completed on 1/11/2019 and Phase 2 completed on 2/01/2019	\$1,200	21	\$25,200	\$25,200
Example 3 - Phase 1 completed on 1/18/2019 and Phase 2 completed on 2/01/2019	\$1,200	14	\$16,800	\$16,800
Example 4 - Phase 1 completed on 1/25/2019 and Phase 2 completed on 2/01/2019	\$1,200	7	\$8,400	\$8,400
Example 5 - Phase 1 completed on 2/01/2019 and Phase 2 completed on 2/01/2019	\$1,200	0	\$0	\$0

7. Conditioned on Owner's agreement that Contractor has met the completion deadlines in Section 3, Contractor shall be entitled to submit an application for payment for the Deferred Compensation on ~~2/15/2019~~. If Contractor does not meet the completion deadlines in Section 3, Contractor shall submit an application for payment for the Deferred Compensation, less accrued Liquidated Damages (calculated in accordance with Section 6), following achieving Final Completion of the Project. Contractor's application for payment shall identify sums due to subcontractors included in the application for payment. Owner shall be entitled to pay subcontractors by joint check as set forth in Sections 9.5.2 and 9.6.3 of the General Conditions to the Contract.
8. As consideration for Owner's agreement to increase the GMP and extend the completion dates and resetting of liquidated damages as described in Section 3, this Change Order fully resolves and releases any and all costs, time and compensation arising out of or relating to the Claims, unresolved PCIs, for all issues in Project correspondence as relates to the Claims, and all impacts, cumulative impacts, delays, costs, markup, expenses, direct or indirect, attributable to the Claims and/or encountered by Contractor in the performance of Work through the date of this Change Order.
9. Contractor shall defend, indemnify and hold Owner harmless from all loss, liability, damage or expense, including reasonable attorneys' fees and litigation expenses, arising out of any lien claim or other claim for payment by any Subcontractor or supplier of any tier. Within three business days of a lien being recorded, Contractor shall cause the lien to be released or record a release of lien bond that complies with the requirements of Washington law to remove such lien from title.
10. The only issues not resolved and released by this Change Order are changes or delays for which Owner is responsible that occur after execution of this Change Order and could not have been reasonably known or anticipated by Contractor at the time of execution of this Change Order.

The original Contract Sum was	666,888.03
The net change by previously authorized Change Orders (including #22 which is not yet fully executed)	66,666.66
The GMP prior to this Change Order was	666,888.03
The Contract Sum will be increased by this Change Order in the amount of	666,666.66
The new Contract Sum including this Change Order will be	666,666.66

EXCEPT AS EXPRESSLY MODIFIED HEREIN, THE TERMS AND CONDITIONS OF THE CONTRACT REMAIN UNCHANGED.

NOT VALID UNTIL SIGNED BY THE CONTRACTOR AND OWNER.

CONTRACTOR	OWNER
UNITED GENERAL CONTRACTING INC	CONDO APARTMENTS, LLC
1234 Main Street, Suite 100	1234 Main Street, Suite 100
ADDRESS	ADDRESS
1234 Main Street, Suite 100	1234 Main Street, Suite 100
BY (Signature)	BY (Signature)
Mark Parent	Mark Hoyt - Vice President
(Typed Name)	(Typed Name)
12/1/2018	12/1/2018
DATE	DATE

EXHIBIT "A"
LIST OF CHANGE ORDERS

[REDACTED]		
PCI 156	Walkway Lathing Above Electrical Room (RFI 702-703)	\$ 21,267.00
PCI 157	Allowance #3 - Monument Sign Foundation - Reconciliation	\$ (10,492.00)
PCI 158	Fence Connection Detail (RFI 702)	\$ 21,700.00
PCI 167	Refractory Brick Standing Ceiling (RFI 700-701)	\$ 15,985.00
PCI 170	Bike Room Steel Nailers (CCD-29)	\$ 1,495.00
PCI 175	Mechanical and Electrical Coordination	\$ 17,043.00
PCI 176	Cabinet Show Wiring (CCD-30)	\$ 47,225.00
PCI 178	Refractory Brick Standing Ceiling (RFI 700-701)	\$ 5,410.00
PCI 181	Type K Windows at 01 Stack	\$ 506.00
PCI 182	Upgrade Decks to PMMA	\$ 639.00
PCI 184	Roofing Waterproofing (RFI 702)	\$ 1,141.00
PCI 185	Storefront Waterproofing	\$ 11,920.00
PCI 186	Screen Wall Connection Waterproofing	\$ 1,183.00
PCI 187	Cabinet Revision (RFI 701)	\$ 1,100.00
PCI 189	Storefront Curbs at L1 (RFI 740)	\$ 1,200.00
PCI 190	Garage Entrance Handrail (RFI 700)	\$ 800.00
PCI 192	Microwave Vent Covers (RFI 700)	\$ 500.00
PCI 193	Refractory Brick Standing Ceiling (RFI 700)	\$ 3,300.00
PCI 194	Additional Rain Leader Connections (RFI 740, RFI 754, RFI 755)	\$ 1,000.00
PCI 195	Handrail at Public Sign Height (RFI 740)	\$ 1,310.00
PCI 196	Elevated Footing at the Garage Entrance (RFI 700)	\$ 1,148.00
PCI 197	Garage Antenna Assembly (RFI 700, CCD-27)	\$ 1,950.00
PCI 198	Window Shades in 15 Stack	\$ 1,152.00
PCI 199	Common Area Restroom askelectrician access room outside	\$ 1,186.00
PCI 200	Fire Alarm Transformer Power (RFI 701)	\$ 11,026.00
PCI 201	Replace the CFLs with Dimmable LEDs	\$ 2,000.00
PCI 203	Trunk Casing in Fire Room	\$ 10,371.00
PCI 204	Electric Heater on Roof (CCD-30)	\$ 1,345.00
PCI 205	Refractory Brick Standing Ceiling (RFI 700)	\$ 1,320.00
PCI 207	HVAC Control with Wiring from (RFI 752)	\$ 9,291.00
PCI 208	Off-Campus Watch in October	\$ 17,605.00
PCI 209	Waterproofing in Kitchen	\$ 7,908.00
PCI 210	Refractory Brick Standing Ceiling (RFI 700)	\$ 8,747.00
PCI 211	Refractory Brick Standing Ceiling (RFI 700)	\$ 1,206.00
PCI 212	Refractory Brick Standing Ceiling (RFI 700)	\$ 4,000.00
PCI 213	Overhead ADA Ramp	\$ 2,500.00
PCI 214	Refractory Brick Standing Ceiling (RFI 700)	\$ 11,700.00
PCI 215	Refractory Brick Standing Ceiling (RFI 700)	\$ 2,873.00
PCI 217	Refractory Brick Standing Ceiling (RFI 700)	\$ 8,190.00
PCI 218	Two additional delays to protect power	\$ 1,000.00
PCI 220	ADA Ramp Handrail	\$ 13,775.00
TOTAL :		\$ 536,059.00
Accumulative Impact / Staffing PCI:		
PCI 202	Accumulative Impact / Additional Staff Time/Chair	\$ 200,000.00
TOTAL:		\$ 200,000.00
TOTAL AMOUNT OF THIS CHANGE ORDER:		\$ 536,059.00





Terminations

Termination for Convenience



Two Types of Termination

(1) Termination for convenience (TforC).

Allows the owner/general contractor to stop the work, alter the course of the project, without breaching the contract and without having to pay for anticipated profit or unperformed work.



In absence of a TforC clause, the owner or general contractor would have the right to terminate the contract, **but could face the full consequence of breach of contract, including payment of anticipated profits on unperformed work.**

(2) Termination for default.

Allows the owner/general contractor to procure alternative performance at the contractor/sureties/subcontractors' expense.

Termination for Convenience in the public context



Typical TforC Clause:

Termination/Suspension for Convenience. Upon three (3) calendar day's written notice to Subcontractor, Contractor may terminate this Subcontract in whole or in part for Contractor's convenience and/or at its option. Subcontractor's remedy for such convenience or optional termination is limited to the following: (1) payment pursuant to the terms of this Subcontract for all Work properly performed prior to termination; (2) partial payment for lump sum items of Work on the basis of the percent complete of such items at the time of termination; and (3) Subcontractor's reasonable close-out costs. In no event shall Subcontractor be entitled to any compensation for loss of anticipated profits or unallocated overhead on Work not performed.

TforC in Public Context



- ✓ *Torncello* is seminal federal case on improper TforC by the Government:

In *Torncello v. United States*, the U.S. Court of Claims first discussed the obligations of good faith and lack of arbitrariness in termination-for-convenience clauses. 681 F.2d 756 (Ct. Cl. 1982). In that case, the Government was found to have breached its contract with a pest control contractor when it terminated a contract for such services so that it could take advantage of a lower price from another contractor.

TforC in Washington



Although Washington courts often find federal decisions persuasive on questions involving government contracts, there are no cases in Washington following *Torncello*.

See however, Judge Andrus's Order Granting Preliminary Injunction in *Skanska-Hunt, Joint Venture v. Washington State Convention Center*, King County Superior Court, Cause No. 16-2-06475-2 SEA (discussed below).

- ✓ It *has* been rejected as to private contracts in Washington.

TforC in Private Context



- ✓ In *SAK & Associates, Inc. v. Ferguson Const., Inc.*, Division I declined to apply *Torncello* rule. The SAK Court explained that:

The extensive jurisprudence governing termination for convenience provisions in government contracts is grounded in the particular role played by government agencies. But the case-law supporting such a broad right in federal contracts obviously is of limited value when interpreting a contract ***between private parties***.... We do not find the federal case law on government contracts helpful in analyzing ***the private contract issues*** presented in this appeal.

SAK v. Ferguson, 189 Wn. App. 405, fn. 12, 357 P.3d 671, 674 (2015).

See also *Questar Builders, Inc., v. CB Flooring, LLC*, 410 Md. 241, 271, 978 A.2d 651 (2009) and *Vila & Son Landscaping Corp. v. Posen Constr., Inc.*, 99 So.3d 563, 567 (2012) (Maryland and Florida courts similarly rejected the federal jurisprudence regarding improper termination for convenience *but only as to* private contracts, just as the Washington court in *SAK*).



SAK's holding is confined to the private contract setting.

- ✓ Open question: will Washington apply *Torncello* to a public body in a published opinion?

CASE STUDY: WSCC Expansion Project



- ✓ In the spring 2016, the Washington State Convention Center (WSCC) Addition Project generated numerous headlines after it terminated the General Contractor/Construction Manager (GC/CM), Skanska-Hunt, A Joint Venture.
- ✓ It did so, relying on the Termination for Convenience clause in Skanska-Hunt's Preconstruction Services Agreement.
- ✓ WSCC's termination came after it had selected the GC/CM as a result of this qualifications-based process.



Rendering shows the proposed five-story exhibition facility that is part of the expansion, as seen from 4th Avenue and Pine Street, looking north. The Paramount Theatre and The Camlin are in the background. (Courtesy of LMN Architects)

Construction Dive

Skanska
term

By Kim

Dive



Special Project of the Washington State Convention Center

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Check back frequently to keep up-to-date on all upcoming events pertaining to the Washington State Convention Center Addition.

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FEATURES

Skanska-Hunt \$1.4B Sea center expansion

By Kim Slawey | March 4, 2016



Capitol Hill Times

HOME NEWS A/V GALLERY

Convention Center Term Contractor

By: Capitol Hill Times Staff March 4, 2016



DJC Oregon

Skanska-Hunt removed from Seattle

By: Garrett Andrews in Construction March 8, 2016

The developer of the Washington State Convention Center expansion project has removed Skanska-Hunt as its construction manager-general contractor – a joint venture.

Seattle-based commercial developer Pine Street Group has selected a new joint venture of

Construction of the \$1.4 billion expansion is still in the early stages, Group principal Matt Griffin said.

The contract in this case allows Pine Street Group to select a new joint venture with the owner's approval.

Griffin said all subcontractors would be retained.

In a statement, the joint venture said its work on the project in San Francisco, Phoenix, San Antonio and

"The action by the WSCC Board today to discontinue the Skanska-Hunt joint partnership is shocking and tremor-inducing for construction professionals who have been working on this project for months," the statement reads.

The project team also includes design firm LMN Architects and Kiemenc Associates.

Skanska's Portland office was not involved in the project.

S-H TERMINATION COVERAGE



DOWNTOWN SEATTLE DEVELOPMENT NEWS DOWNTOWN SEATTLE

0 0 0

Contractor Dropped From \$1.4B Convention Center Expansion Plans

The Washington State Convention Center expansion team dumped the news on Friday they were discontinuing their relationship with the Skanska-Hunt joint partnership.

BY SEAN KEELEY - @SEANKEELEYISME - MAR 7, 2016, 11:00A

TWITTER SHARE PINTEREST

CASE STUDY: WSCC Expansion Project



- ✓ S-H filed a lawsuit in King County Superior Court.
- ✓ It argued, in part, improper termination by WSCC.

S-H made two main arguments:

- 1) Skanska-Hunt was improperly terminated under the TforC clause (contract breach);
- 2) WSCC violated Washington's GC/CM statute by terminating Skanska-Hunt (statutory breach).

CASE STUDY:

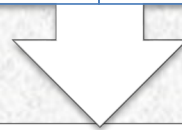
WSCC Expansion Project



Issue was whether WSCC, a public body, had “complete discretion” in TforC clauses or whether there were limitations to WSCC’s ability to terminate S-H.

S-H argued that limitations existed and WSCC wrongfully terminated its contract for convenience.

WSCC argued it had “complete discretion” to terminate S-H.



Case assigned to the Honorable Beth Andrus.

CASE STUDY: WSCC Expansion Project



In her Order, Judge Andrus ruled:

(1) Public owners have the discretion to terminate any contract for convenience, “as long as the public owner’s decision is not [1] arbitrary and [2] it has deemed the termination to be in the public interest.”

(2) In the event a contractor selected pursuant to Washington’s GC/CM procurement procedures is terminated for convenience under a Preconstruction Services Agreement, the public owner may not solicit proposals for a new GC/CM under RCW 39.10.370.

Termination for Default

- ✓ Termination for default, often called draconian action, constitutes a type of forfeiture.
- ✓ Courts scrutinize terminations for defaults carefully to ensure that the contractual provisions the parties agreed to as part of their original bargain are followed to the letter.
- ✓ Procedural review.
- ✓ Substantive review.

Termination for Default



Definition of Default

- ✓ The default provision contains certain grounds for a default termination.
- ✓ Most common are the failure to meet the completion date; failure to make progress; failure to make payment to subcontractors, lower-tier subcontractors, and suppliers; failure to repair or replace faulty or defective work; disregard of laws, ordinances, rules, or other regulations; filing for bankruptcy; or otherwise materially breaching a term of the contract/subcontract.

Termination for Default

- ✓ Must a reasonable time to cure be provided, even in the absence of a contract provision?

→ **YES**

Even in the absence of such a written cure provision, it is well accepted in the industry that an owner should give a contractor notice and an opportunity to cure a default prior to termination.

§ 5.III.B.7 Default and Termination Processes, Construction Projects 5.III.B.7

A contractor must be granted the opportunity to cure or the default may be ruled defective and the contractor be awarded breach of contract damages, including lost anticipated profit

§ 5:263.¶ 14.2.2—Termination upon notice and architect's certification (risk mitigation), 2 Bruner & O'Connor Construction Law § 5:263

Termination for Default




- ✓ To serve its remedial purpose, the cure notice must fairly appraise the breaching party of the specific breaches considered to warrant termination.
- ✓ It must describe the inadequate performance.
- ✓ It should provide the corrective action required.
- ✓ It must fairly advise the breaching party that the non-breaching party considers the inadequate performance serious enough that, without prompt correction, the contract will be terminated.
- ✓ Must provide a “reasonable” time to cure (what is reasonable, though?).



PAYMENTS

Risk of General Contractor or Subcontractor Default



- Owners have to pay twice if sub or supplier lien is valid
- Mitigation:
 - Rigorous management of lien releases from General Contractor, subcontractors, and suppliers during payment process.
 - Traditional Bonding
 - Performance Bond
 - Payment Bond



LIEN RELEASES

- Key is for release to be of all claims and rights to lien through the date of payment
 - *Form provided below*



WARRANTIES

Warranty



- What are you getting?
 - Return and Repair obligation
 - Warranty will not be “read into” the contract

Repair Warranties



Warranty. The Contractor warrants to the Owner that materials and equipment furnished under the Contract will be of good quality and new unless the Contract requires or permits otherwise. The Contractor further warrants that the Work will conform to the requirements of these Terms and Conditions and the Contract, and will be free from defects. Work, materials, or equipment not conforming to these requirements shall be considered defective.

If, **within one year of the later of the date of Final Acceptance of the Work**, or by the terms of an applicable special warranty required by the Contract, any of the Work is found not to be in accordance with the requirements of the Contract, the Contractor shall correct it. If the Contractor does not initiate work to correct the Work designed in the notice within 14 days of receipt, the Owner may without further notice proceed to correct the Work. The Owner may dispose of materials and equipment as it sees fit, and the Contractor shall be liable for all costs. This correction period shall be extended for an additional one year correction with respect to portions of the Work corrected pursuant to this Section. The year shall commence upon acceptance of the corrected Work. The obligations set forth herein shall survive acceptance of the Work under the Contract and termination of the Contract and are in addition to the other warranties provided by this Contract or law and does not establish a time limit for damages. Nothing contained in this Section 2 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Terms and Conditions.

State Warranties



- Contractual liability remains for 6 years from substantial completion--RCW 4.16.310



RELEASES / LIENS



SUBCONTRACTOR RELEASES

Applications for Payment



- As a condition precedent to Owner's obligation to make payment to Contractor, Contractor shall provide Owner with a conditional waiver and release of lien form signed by all subcontractors and suppliers with \$5,000 or more in payment due in a given progress payment and an unconditional waiver and release of lien form from each such subcontractor or supplier also stating that such subcontractor or supplier has been paid in full, less earned retainage, to the end of the last preceding invoice.

EXHIBIT "D"
INTERIM LIEN/CLAIM WAIVER

FROM: _____
(Name of Firm Giving Release)

(Business Address)

(City, State, Zip Code)

Contact Person: _____

Contact Telephone: _____

PROJECT: _____
(Project Name)

(Project Address)

(City, State, Zip Code)

Project Manager: _____

Project Telephone: _____

CONDITIONAL RELEASE

The undersigned does hereby acknowledge that upon receipt by the undersigned of a check from (Name of Firm writing check:) _____ in the sum of \$ _____ and when the check has been properly endorsed and has been paid by the bank upon which it was drawn, this document shall become effective to release any and all claims, rights of lien, bond claims (including Federal Miller Act claims) or retainage claims of any nature which the undersigned has on the above referenced Project for labor, services, equipment, materials furnished and/or claims through (Date:) _____ except it does not cover any retention or items furnished thereafter. Before any recipient of this document relies on it, said party should verify evidence of payment to the undersigned.

I CERTIFY UNDER PENALTY OF PERJURY UNDER LAWS OF THE STATE OF WASHINGTON THAT THE ABOVE IS A TRUE AND CORRECT STATEMENT.

Signature: _____
(Authorized Corporate Officer/Partner/Owner)

(Title)

Dated this _____, 200__ at _____

(City, State)

UNCONDITIONAL RELEASE

The undersigned does hereby acknowledge that the undersigned has been paid and has received progress payments in the sum of \$ _____ for labor, services, equipment or materials furnished to the above referenced job and does hereby release any and all claims, rights of lien, bond claims (including Federal Miller Act claims) or retainage claims of any nature which the undersigned has on the above referenced Project. This release covers all payment for labor services, equipment, materials furnished and/or claims on the above referenced job through (Date:) _____ only and does not cover any retention or items furnished after that date.

NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.

I CERTIFY UNDER PENALTY OF PERJURY UNDER LAWS OF THE STATE OF WASHINGTON THAT THE ABOVE IS A TRUE AND CORRECT STATEMENT.

Signature: _____
(Authorized Corporate Officer/Partner/Owner)

(Title)

Dated this _____, 200__ at _____

(City, State)





LIEN LAWS

Who Has the Right to Create a Lien?



- Generally - Contractor, Supplier, Architect Engineer, Surveyor who furnishes labor, materials, services, or equipment used in **improving private real property.**

Definitions of Material and Labor



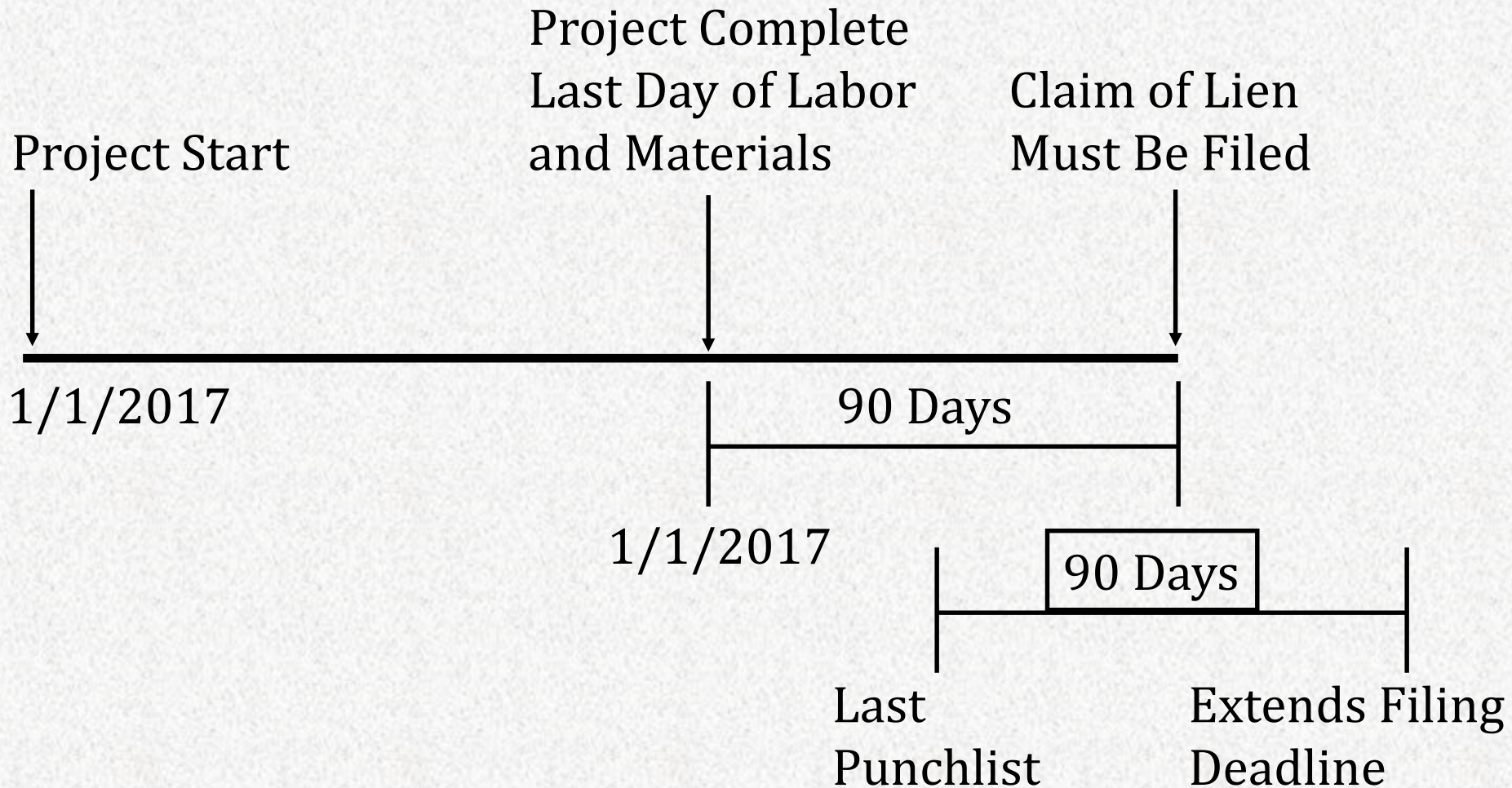
- Materials - things that become part of the physical structure (lumber yes/furniture no)
- Labor - work directly performed as part of improvement (labor on material before delivery is NOT lienable)
- *Furnishing material and labor must be on request of owner or owner's agent

Creation of a Lien



- The Claim of Lien must be filed within **ninety (90) days** from the last day labor, professional services, materials, or equipment was supplied to the project.
 - The Claim of Lien must be served/mailed to the OWNER within **fourteen (14) days** of recording. **Failure results in forfeiture of attorneys' fees and costs.**
- * Certified mail or better

Extending Lien Filing Requirements

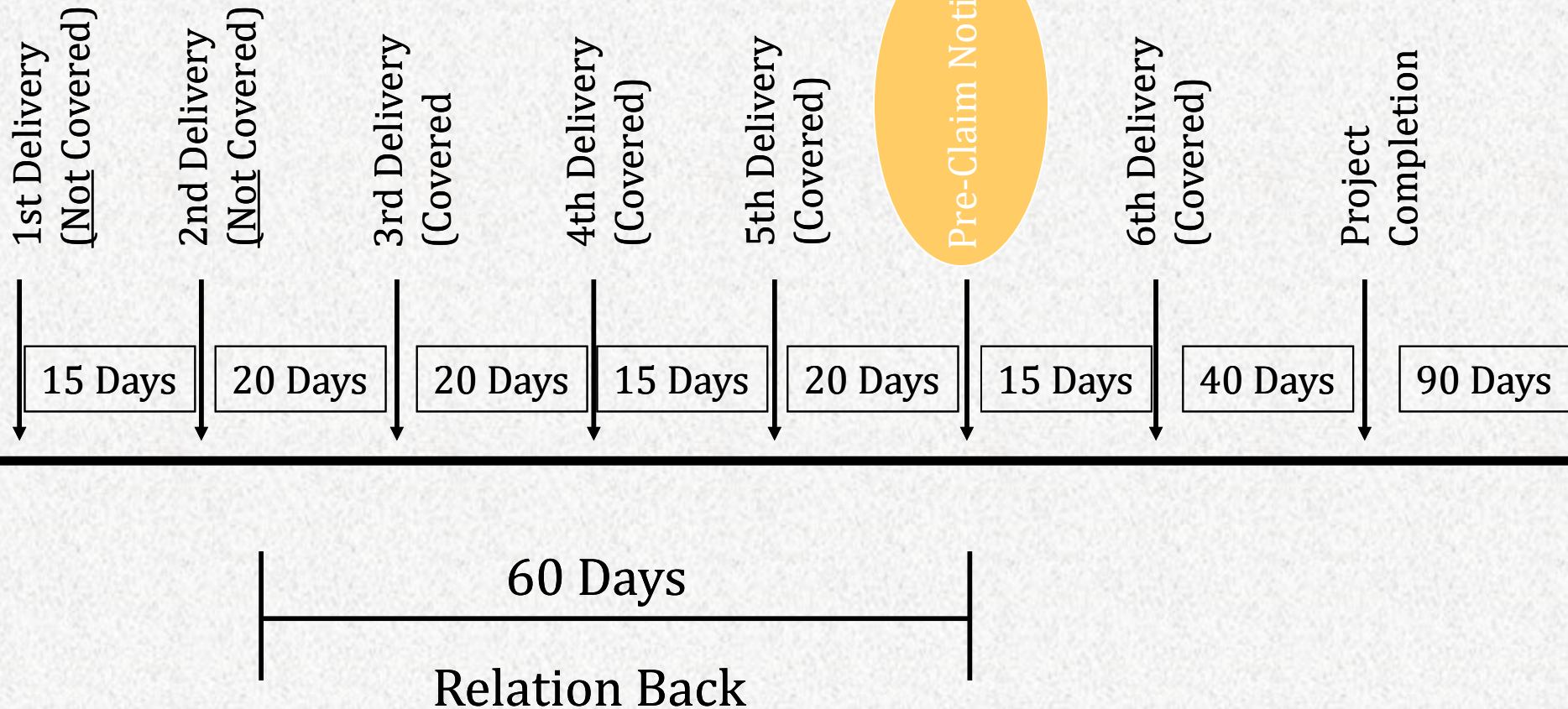


Special Requirements for Professionals, Suppliers, and *Lower-Tier* Subcontractors

Notice to Owner:

- Form of notice
- Time of service of notice
 - Commercial projects within sixty (60) days of the first work or material delivery
 - Residential projects within ten (10) days of the first work or material delivery
- *Certified mail or better
- * Not required of laborers, or those who contract directly with Owner or Owner's agent

Commercial Project



How Long Does A Lien Last?



- Lawsuit must be filed within eight (8) months of the filing date of the Claim of Lien
- Lawsuit must be tried within two (2) years
 - Expedited Procedures
- Payment on foreclosure
- Priority is determined by date lien is recorded

What To Do About a Lien?



- Owner can bond around lien at 1.5x lien amount
- Frivolous Lien Statute- proceed with caution



INSURANCE

Insurance Clauses



What is covered by your insurance policy?

- Commercial General Liability (“CGL”) typically only provide coverage for an “occurrence” resulting from *personal injury or damage to property*.
- Breach of contract claims typically are NOT covered.
- Duty to Defend is broader than actual coverage
- Property Insurance:
 - What does the Contract require?