



YOUR 50 STATE PARTNER®

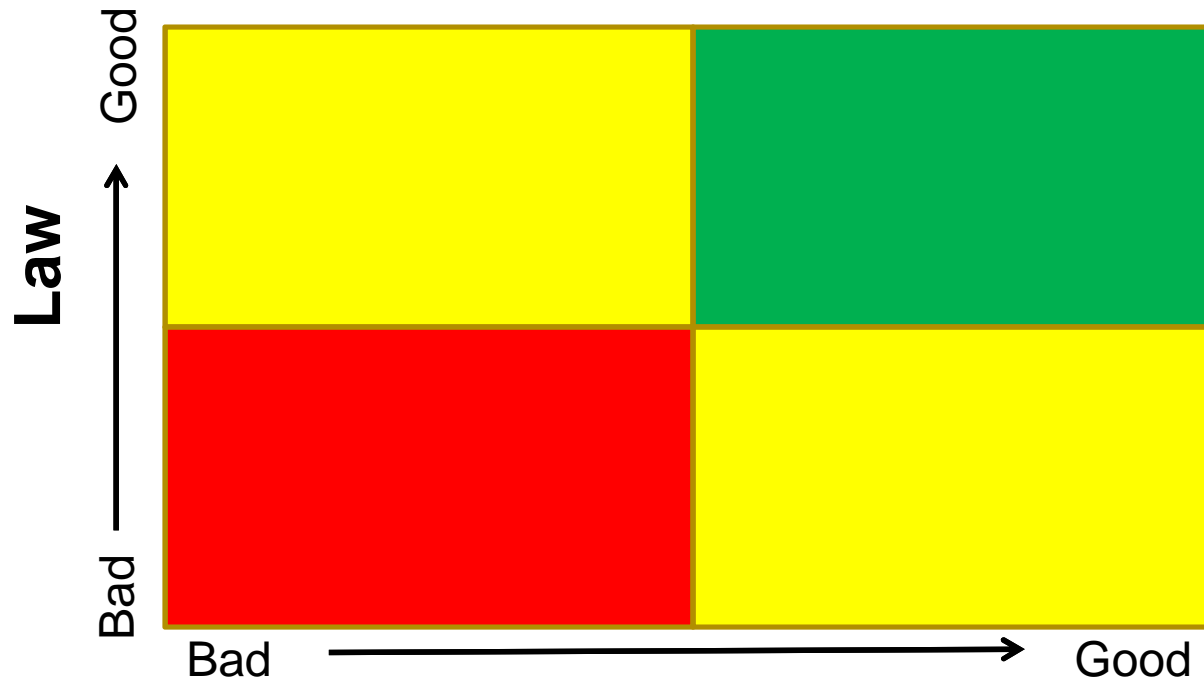
“Lawyers, Guns and Money” What You Need to Know About Defending and Prosecuting Claims Before You Get Into a Dispute

Angela M. Richie
Angelo D. DiBartolomeo

Most Common Claims on Construction Projects

- Non-Payment – Basis
 - Defective Work
 - Delays
 - Unapproved Change Orders
- Defective Plans
 - Delays
 - Unapproved Change Orders

LEGAL ANALYSIS OF CLAIM



Green – Good
Yellow – Maybe
Red – Bad

DECISION TO PURSUE A CLAIM

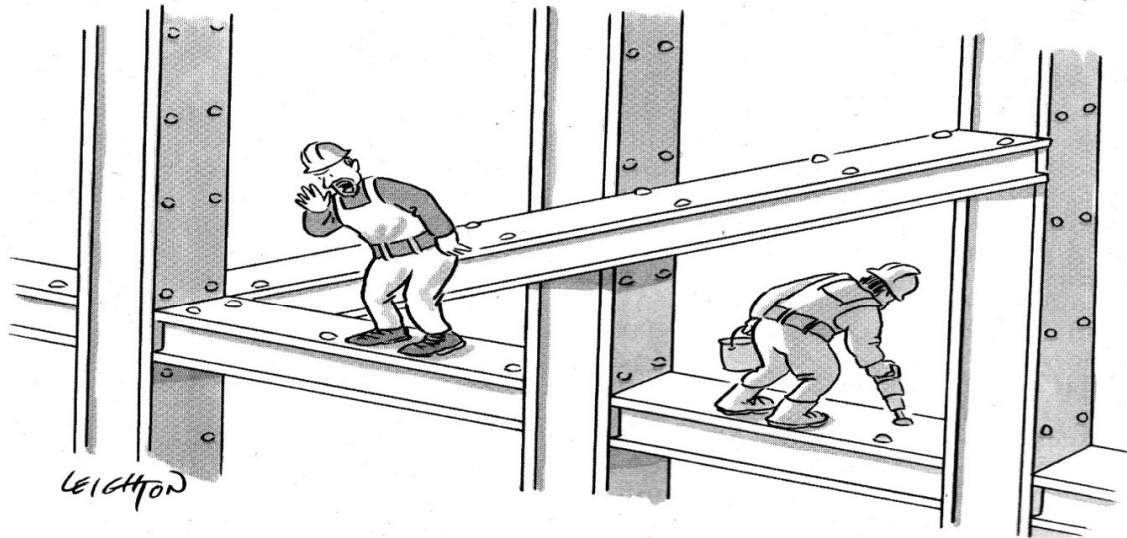
Low High

Chance of Recovery	Red	Yellow	Green
Amount at Stake	Red	Yellow	Green
Cost	Green	Yellow	Red

Green – Yes
Yellow – Maybe
Red – No

What Does the Contract Say?

Don't wait until there are problems to understand your contract



"Escher! Get your ass up here."

Contract Clauses Affecting Claims

- Scope and Changes
- Claims and Disputes
- Limitation of Liability and Waiver of Consequential Damages
- Indemnification and Insurance

What is your scope of work?

- Fabrication
- Shop drawings
- Connection Design
- Coating – galvanizing, paint, fireproofing
- Transportation
- Erection or Erection Drawings
- Bolts and other bulk materials for erection
- Schedule



Why is scope important?

- It defines the work to be done.
- Payment is only for extra work –beyond that contemplated in bid/proposal.



Change Provisions

- Must be a change to the scope.
- Notification of change within prescribed time.
- Change Orders Must Be in Writing Signed By the Affected Parties
- Change Orders Must Specify Modifications to Contract Price or Time
- No Changed Work to Be Performed Without Change Order or Change Directive

Differentiate Who is responsible for the Change

- Owner Changes
 - Scope change
 - Error or omission in plans
 - Force Majeure
- Contractor Change
 - Mismanagement

PRICING CHANGE ORDERS

How much will the change cost?

- Lump Sum Price
- Unit Price
- Costs “To Be Determined”

DUTY TO PROCEED WITH DISPUTED WORK

Options when directed to proceed with disputed work

1. Stop all work until a change order is issued.
2. Continue to only perform the non-disputed work – the original scope of work and try to resolve the change work.
3. Proceed with disputed work, insist on being paid for undisputed work and place contractor on written notice of objection to proceeding without a change order and preserve right to cost later.

Claim and Dispute Provisions

1. Notice of Claim

- Within how much time?
- How given?
 - » Written notice is typically required
- To whom?

2. Dispute Resolutions

- How are claims resolved?
 - » Internally with GC/Owner?
 - » Mediation?
 - » Arbitration?
 - » Litigation?

Limitations of Liability and Consequential Damage Waivers

- What does the contract say about liability?
 - » What party is liable for what acts?
 - » Are there monetary limits on liability?
 - Is liability limited to amounts paid by owner?
- Examples of Consequential Damages that may be waived
 - » Lost opportunities
 - » Lost profits
 - » Damage to business reputation

Insurance and Indemnification

- Take note of your insurance and indemnification requirements and responsibilities under the contract
 - » What are your insurance coverage requirements?
 - » For what acts are you required to indemnify the GC/Owner/Third-parties?



CLAIM DOCUMENTATION

**Imagine you are in
a dispute . . .**

**What documents
do you wish you
had . . .**

HINDSIGHT IS 20-20

Why Document?

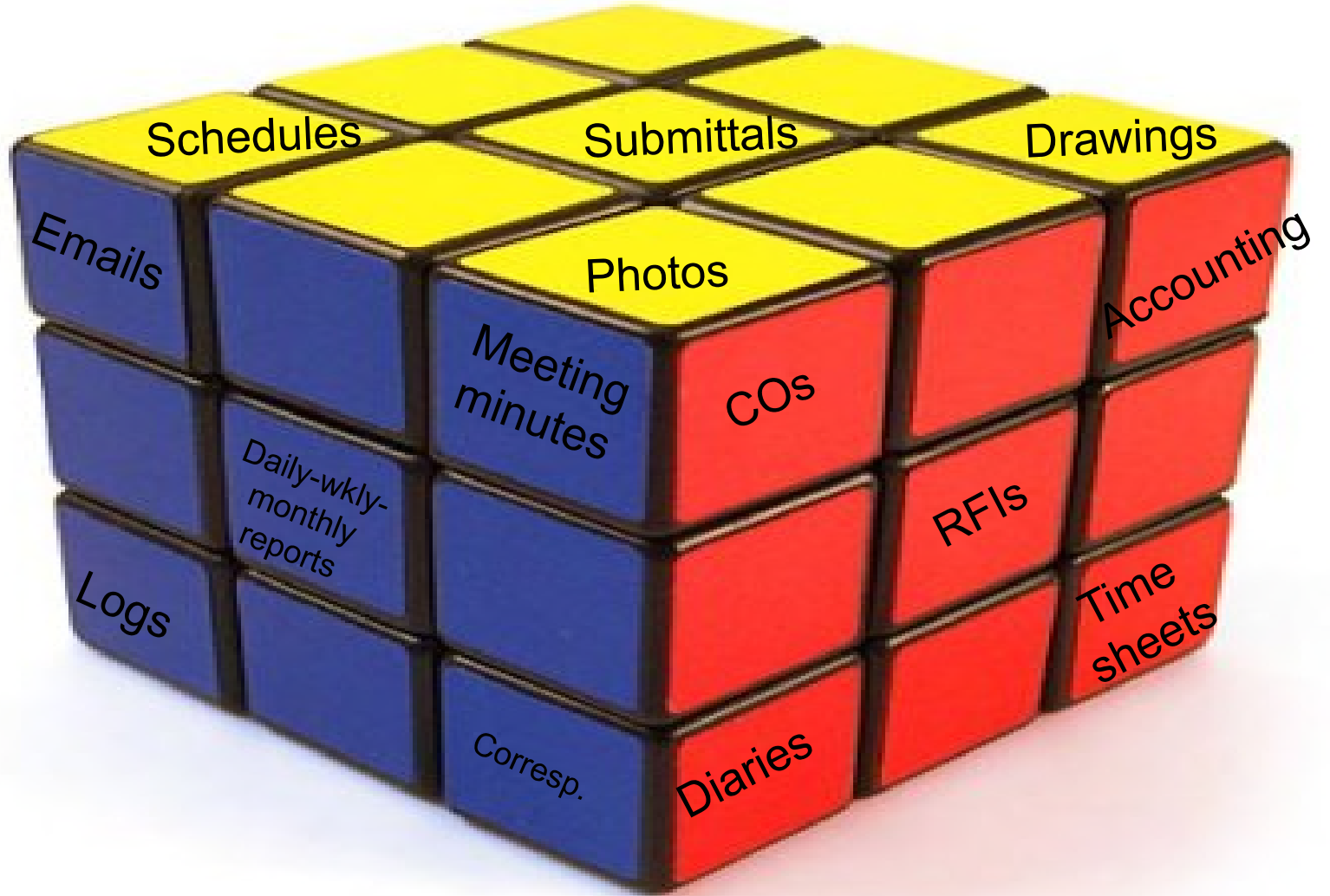
Communicate
expectations

Document
progress

Preserve
claims

Minimize exposure
and prevail in disputes!

Critical Documentation



“Put it in Writing”

- Why?
- Who?
- What?
- How?
- When?





TYPES OF CLAIMS

Most Common Construction Claims

1. Defective Work
2. Extra Work
3. Delays



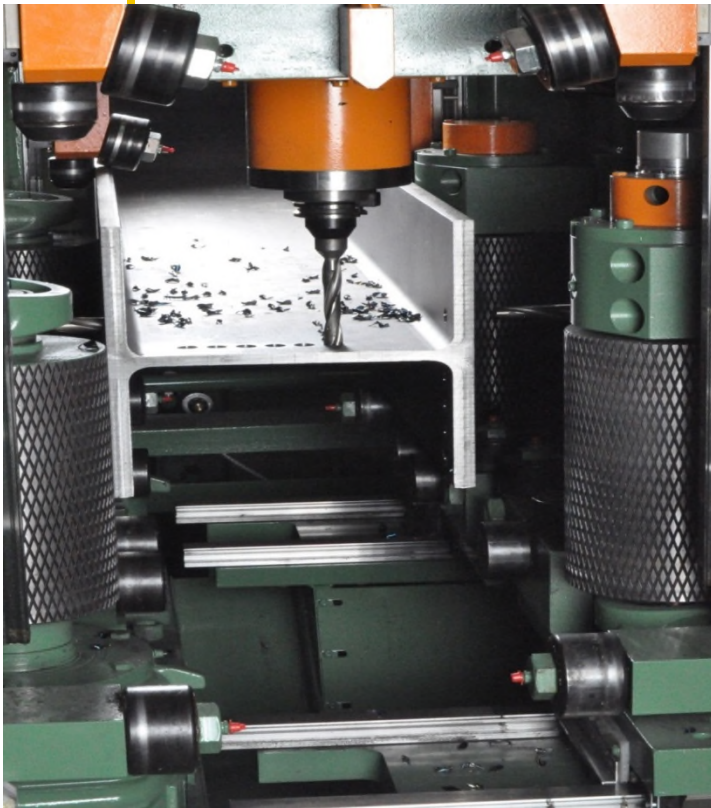
DEFECTIVE WORK

Defective Work Claims

Defense vs. Offense



Fabrication = Shop Drawings = Plans / Specs



DEFENSE

Be Specific

Their Strategy = Distraction and Confusion

Use of generalities

ID Piece Marks – Have good QC Records

DEFENSE

Uniform Commercial Code Warranties

- Article 2 - Covers the sale of “goods”
 - » Discusses when materials are ACCEPTED
- “**Goods**” are “all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale.”
- General construction contracts – not covered
 - » “services” v. supply of “goods”

DEFENSE

Does the UCC apply to Steel Contracts

1. Furnish and erect structural steel is not governed by Article 2.
Schenectady Steel Co. v. Bruno Trimpoli Gen. Constr. Co. (New York)
2. Fabricate and furnish structural steel to another contractor for installation are considered to be sales of “goods” covered by the UCC. *Standard Structural Steel Co. v. Debron Corp (Conn.)*

DEFENSE

- **Notice and Opp to Cure**
 - **§ 3.4 CONTRACTOR'S REMEDIES**
- If the Subcontractor . . . neglects to carry out the Work . . . and **fails within five working days** after receipt of written notice from the Contractor to **commence and continue correction of such . . . Contractor** may . . . deduct the reasonable cost . . .
- **Failure to provide Subcontractor with such notice and an opportunity** to cure such alleged deficiencies shall constitute a **waiver** of such claims.

DEFENSE

Document Defective Work via Photos



- Pictures worth 1000 words
- Include Time stamps

OFFENSE

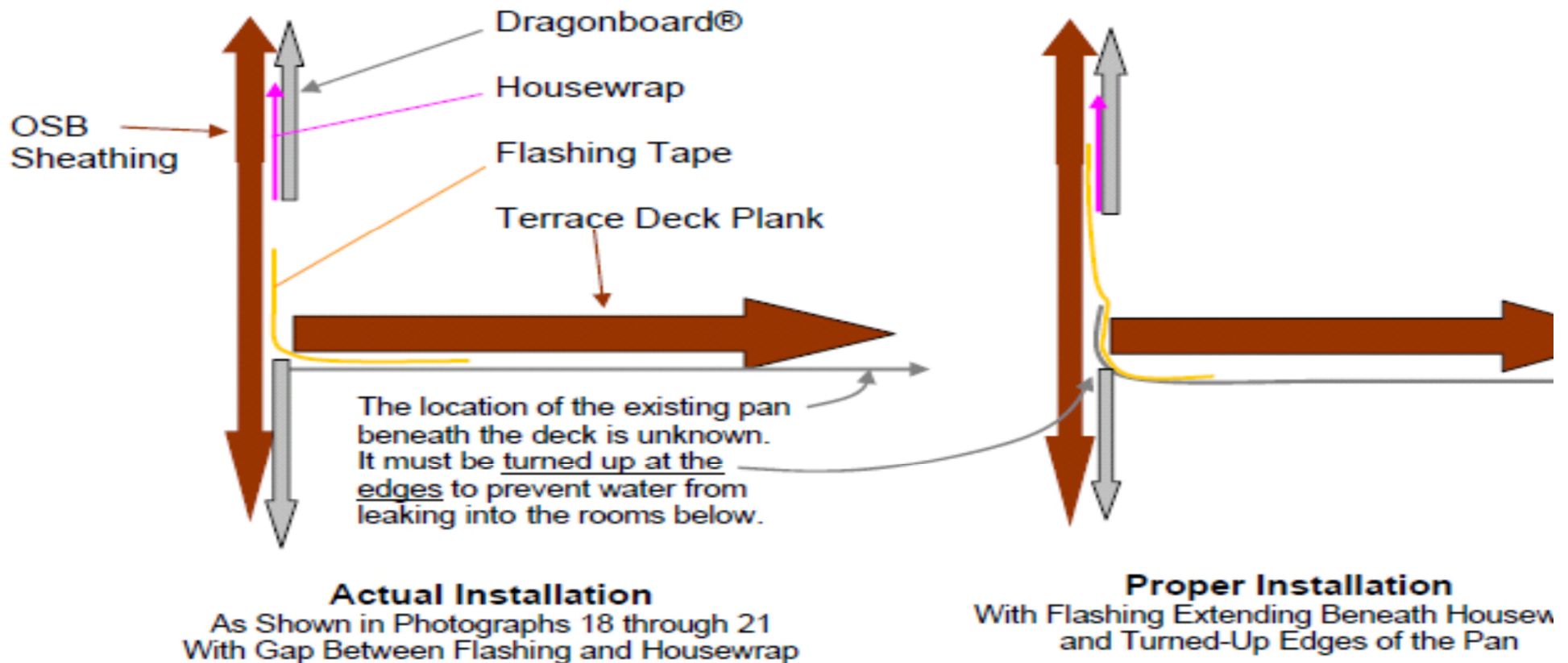
Photos: The Smoking Gun



(Bad photo if you are the blasting contractor!)

OFFENSE

Document Defective Work via Images



Document Expenses



QUALITY AND SERVICE COUNT.

Please remit to:
WARE INDUSTRIES
MarinoWare Industries
P.O. Box 530642
Atlanta, GA 30353-0642

TRANSACTION			
ORDER #	TYPE	NUMBER	PAGE
415957	Shp	1068277	Page 1 of 1
REFER TO THIS NUMBER ▲ ON INQUIRIES			
DATE	DUE DATE	TERMS	
10/13/2010	11/30/2010	2% 10th net30th	

SHIP TO:
UNITED STRUCTURES, INC. d/b/a
customer pick up
CAIRO GA 31728
229-377-7772
Fax:

Labor
Materials
Equipment

Invoices

ACCOUNT NO.	P.O. NUMBER	SALES PERSON	SHIPPED VIA		B/L NUMBER					
176550	WET BARRACKS	Steve McDaniel	p/u							
LN	ITEM CODE	QTY SHIPPED	UNIT	SIZE	LINEAR FEET	DESCRIPTION/COMMENTS	PRICE	MLF	PER	AMOUNT
1	600ST16	24	PC	3.75	90	6 TRACK 16GA (600T125-54) 3ft 9in.	3.74	997.00	E	\$89.73
2	600SS16	32	PC	12.15	390	6 SW STUD 16GA (600S162-54) 12ft 2.25in. UnPunched	14.06	1,154.00	E	\$450.06

CAIRO, GA 39828

11/10/2010

PAY TO THE ORDER OF MARINO / WARE INDUSTRIES \$**2,224.77

Two Thousand Two Hundred Twenty-Four and 77/100 DOLLARS

Ware Industries, Inc.
MarinoWare Industries
PO Box 530642

MEMO 17

VOID AFTER 60 DAYS
TWO SIGNATURE REQUIRED OVER \$3000.00

AUTHORIZED SIGNATURE

Checks

OFFENSE



EXTRA WORK

Claims for Extra Work

Document Extra Work Via Plans



ID Work

Work was Outside Scope

- » As designed and As-built Plans

Document Extra Work Via Photos



- Organize
 - Month
 - Issue

Payroll & Daily Reports

Name and Address	Soc Sec No. Class Mar Exemp.	Hours Worked This Job							Tot	Pay Rate	Gross Pay This Job All Jobs	Deductions		Check # Net Pay
		06/27 Mon	06/28 Tue	06/29 Wed	06/30 Thu	07/01 Fri	07/02 Sat	07/03 Sun				Fed. Fica State	Local Other Total	
[REDACTED]	R:	8.00	8.00	8.00	8.00	8.00	0.00	0.00	40.00	32.142	1285.67	216.99	26.22	
	1 O:	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	+0.348FR.	94.09	55.79		
	R:	8.00	8.00	8.00	0.00	0.00	0.00	0.00	24.00	19.974	479.38	74.11	12.52	
	0 O:	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	+0.396FR.	42.66	57.86		
[REDACTED]	R:	8.00	8.00	8.00	8.00	8.00	0.00	0.00	40.00	27.551	1102.02	111.46	10.52	
	1 O:	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	+1.300FR.	80.48	49.98		
	R:	8.00	8.00	8.00	8.00	8.00	0.00	0.00	40.00	27.551	1102.02	111.46	10.52	
	1 O:	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	+0.000FR. 40hrs	0.000	615.38	23.96	211.11
[REDACTED]	R:	8.00	8.00	8.00	8.00	8.00	0.00	0.00	40.00	27.551	1102.02	111.46	10.52	
	1 O:	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	+1.300FR.	80.48	49.98		
	R:	8.00	8.00	8.00	8.00	8.00	0.00	0.00	40.00	27.551	1102.02	111.46	10.52	
	1 O:	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	+0.000FR. 40hrs	0.000	1102.02	54.96	307.40

ID extra time v. scope time

ID amount paid

Document Expenses



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888-757-9000 ; 800-627-4661
908-757-9251

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Atlanta, GA 30353-0642

MEMO 176550

004914 06 12

DAYS OVER \$3000.00

Checks

Keeping Track of Change Orders



- Log – Spreadsheet
- CO files – suggest electronic files
 - Change Orders
 - » CO #1
 - » CO #2
 - » CO #3

OFFENSE

Change Order Log

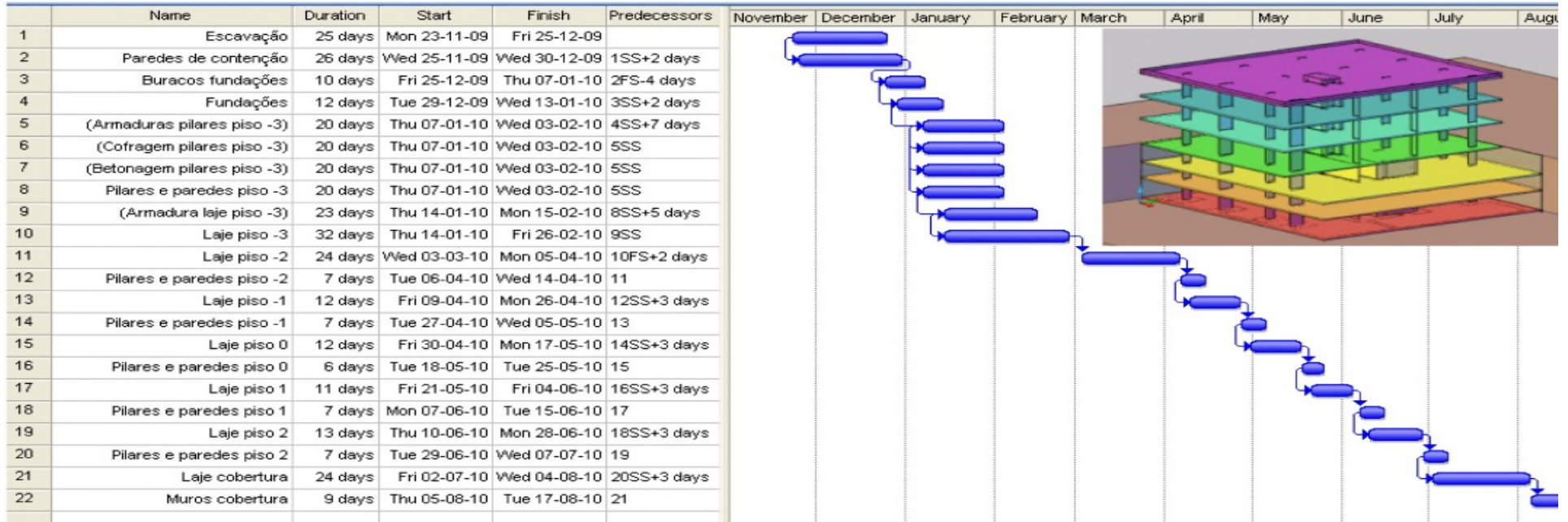
No.	Item	Date	Amount	Pending	Notes
1	Rebar masonry	3/14	\$114,450	0	Missed quantity
2	Rebar	3/14	\$92,896	0	Missed quantity
3	Curb	3/14	\$58,905	0	Missed quantity
4	Additional pumps	5/7	\$105,990	0	Engineer
5	Additional filters	5/7	\$12,450	0	Engineer
6	Electrical	5/7	\$311,412	\$311,412	Engineer

OFFENSE



DELAYS

Delay Claims



Your Job Is to Meet the Schedule as Adjusted

- If scheduled changes – document the impact
- Written Notice
 - Email or letter
- Proof that Delayed
 - Schedules
 - Original
 - As-built
 - Progress Photographs
 - Accurate Pay Apps - % complete

Photos: Proof of delays



Include Date Stamps on
Photos

Photos: Proof of Delays



5/30/00

Location:

Pittsburg, PA

User:

Steel Contractor

Feature:

Aerial photos show
staging area used by
other trades and
impacted schedule

A person wearing a white hoodie and blue pants is sitting on a grassy area in a park. The background shows trees and sunlight filtering through the leaves. A blue rectangular box is overlaid on the left side of the image, containing text.

Cause of the Delays

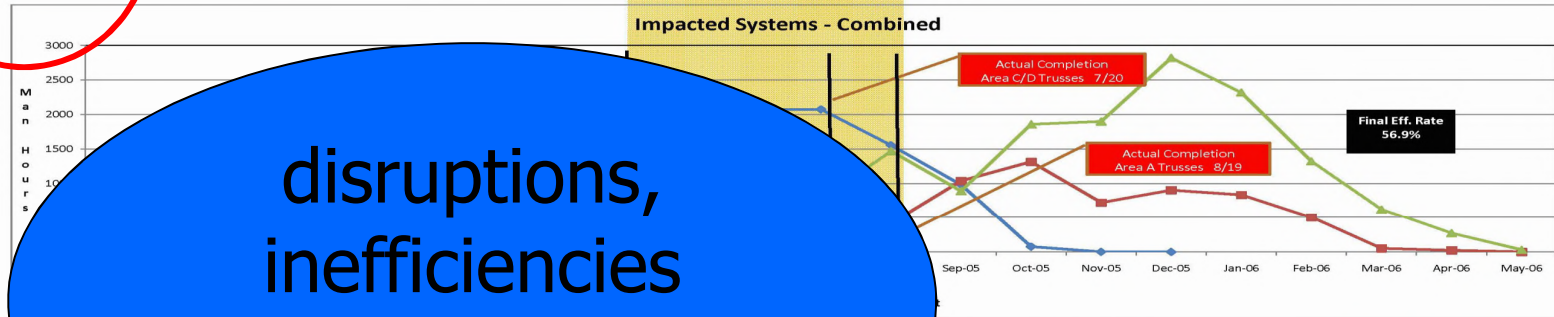
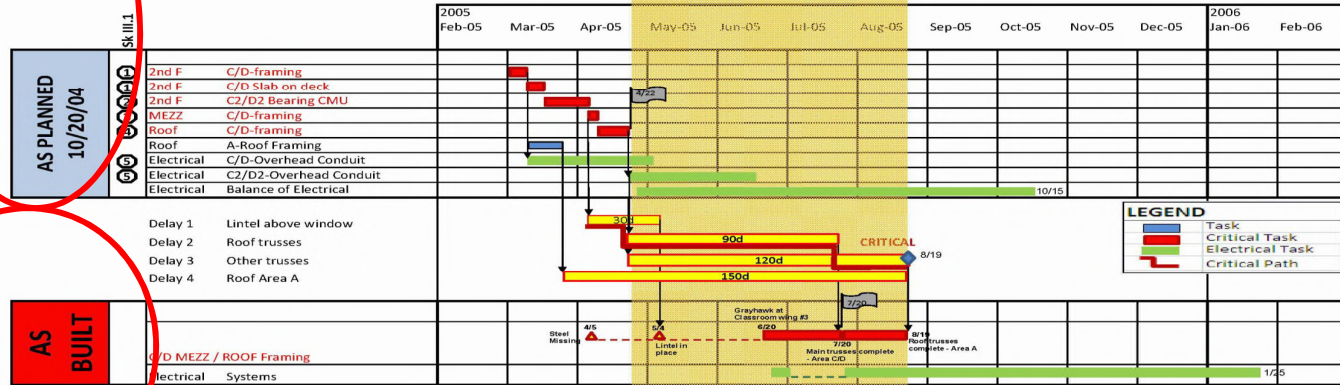
Meeting Minutes

Letters or Emails

A thin yellow vertical line is located on the left side of the slide, extending from the bottom edge of the image area down to the bottom edge of the slide.

BAR CHART III.2

EXHIBIT III.2

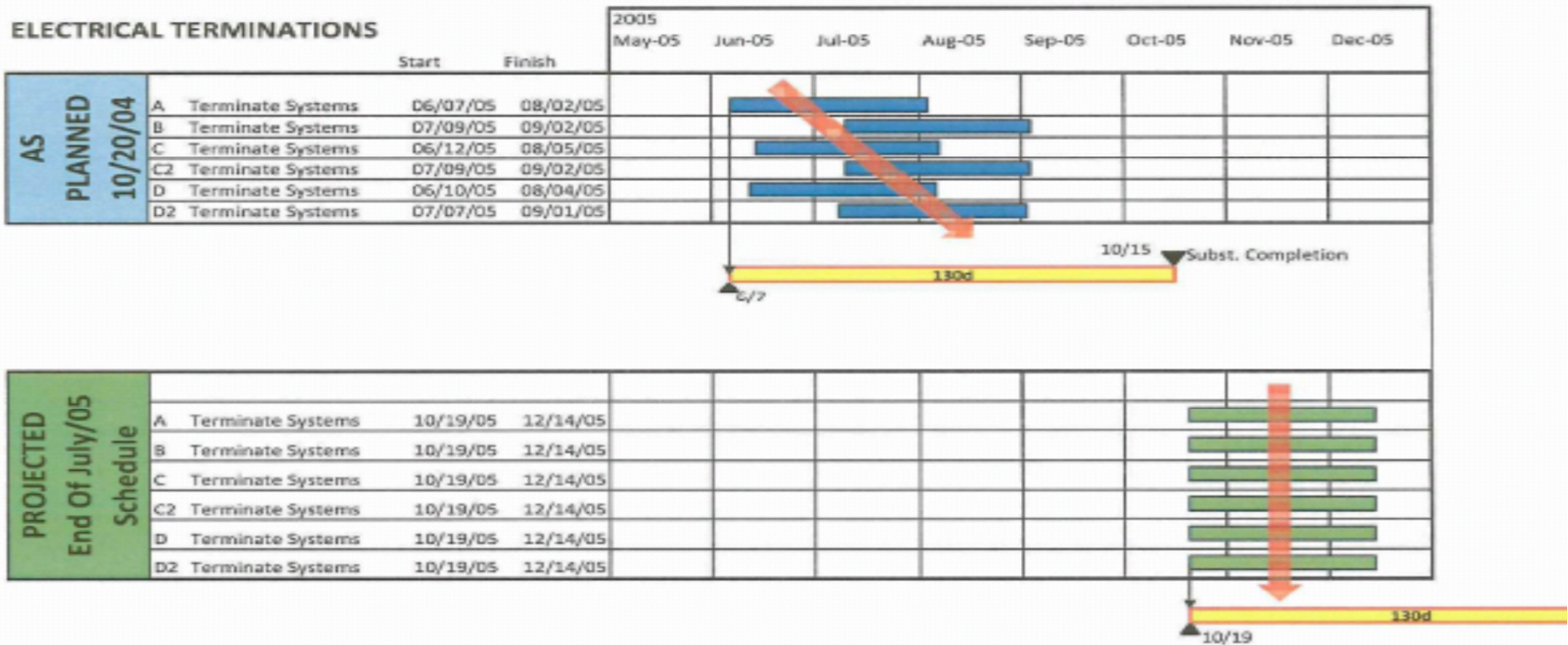


disruptions,
 inefficiencies
 demob / remob
 Date, # hours

Idle Time / Stacking of Trades

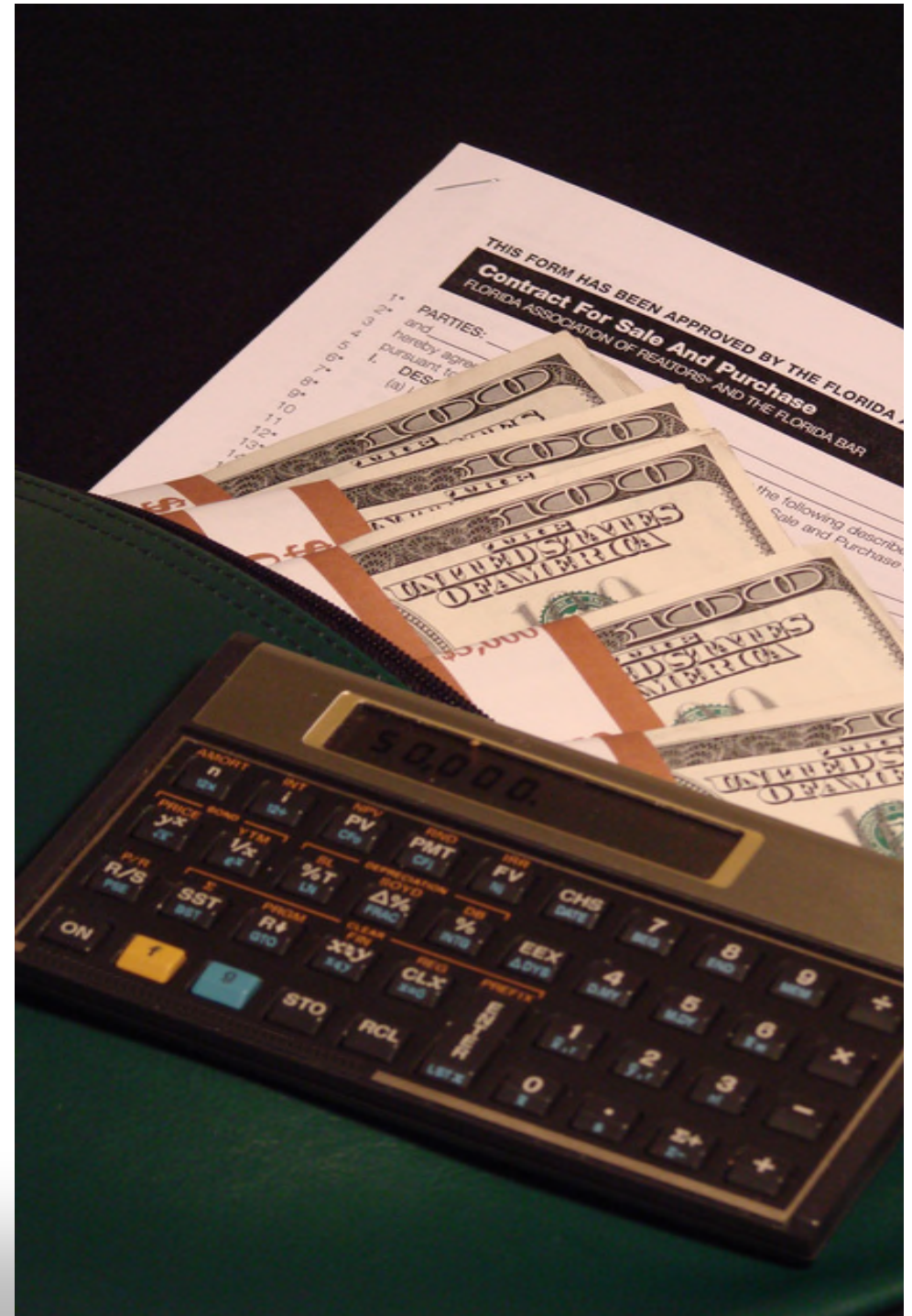
BAR CHART V.1

EXHIBIT V.1



Delay Damages

- Costs
 - Labor
 - Equipment (idle time)
- Compare:
 - Actual
 - Estimated



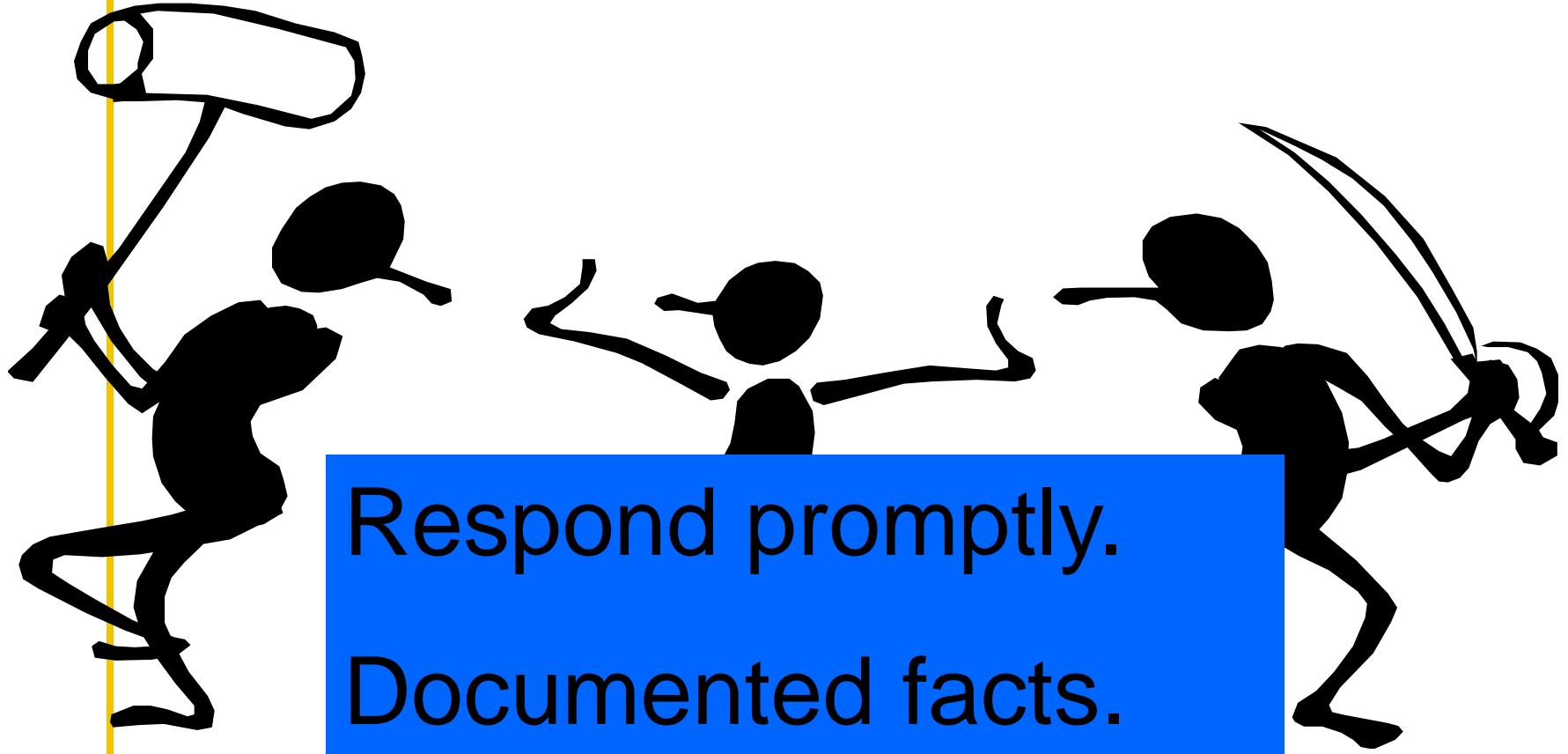
“No Damages for Delay” Clauses

- Some contracts will limit claims for delays to extensions of time only
- Whether or not these clauses are enforceable varies by State
- There are exceptions recognized to these clauses, including:
 - » Delays not contemplated by the parties
 - » Unreasonable delays
 - » Active interference with subcontractor’s work
 - » Fraud, bad faith, or gross negligence
 - » **Exceptions recognized also vary by State**



DEFENDING CLAIMS

What if you get a claim?



Respond promptly.
Documented facts.

Paper or Paperless?

How to Document

It doesn't matter how.

ORGANIZATION IS KEY



Record Keeping

- Paper files
 - subfolders
- Email
 - Organize both sent and received messages in project files
 - Read Receipts
- Text Messages
 - print
 - photo





Record Phone Conversations

- Memo to file
- Confirmation email or letter

Things you don't want in writing:



E-Mail: Bad

From: Contracts Manager about Upper Management

How can we be successful with the schedule and cost if **we do not have the resources to execute the job proactively** and/or **project management does not respond when we make recommendations?** WE NEED HELP!!!!

E-mail: Not-So-Good

I think we need to begin the discussion with our management that **we are late** and tell them that we are analyzing how late. **We also need to consult the claims team as how we tell our management that we are late.** The schedule needs some serious work to be used as a float tool and everyone is going to be looking to get answers.

E-Mail: The Worst

From: Upper Management to Contracts Manager

If we are going to make the contractor look like they cannot do their job, we MUST look and act like we are doing ours!!!

Retention of Records After Accident or Claim

- Keep what you know or should know is:
 - » Relevant;
 - » lead to discovery of evidence;
 - » likely to be requested; and/or
- If no claim – destruction depends on:
 - statutes of limitation
 - state law

Document Retention Policies



Storage = \$\$\$



How Long?

Contracts & Pricing

Contracts files (with related correspondence and documents)	7 years
Other miscellaneous agreement files	7 years
Subcontract files	7 years
Consultant files	7 years
Quotations, bids & proposal files	7 years
Project miscellaneous files (daily reports, etc)	7 years

Contact Information



YOUR 50 STATE PARTNER®

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Waterfront Plaza Suite 1810
Louisville, KY 40202
D: 502-371-1251 | C: 502-592-6564 | arichie@grsm.com

www.grsm.com
vCard



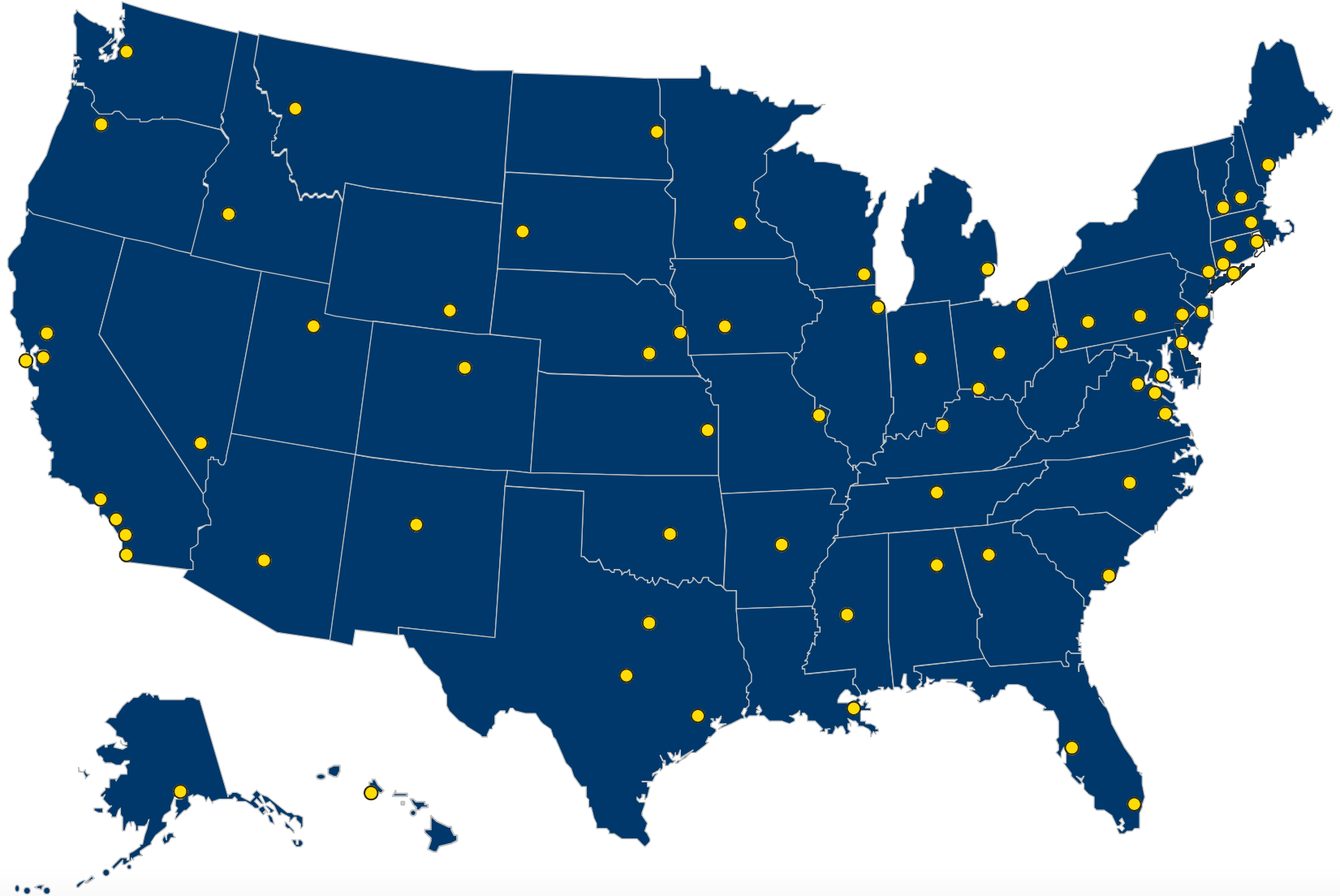
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