

Risk, Claims and Why Contractors Do What They Do!

CMAA Southern California Chapter
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Our Speakers

- Ken Fredrickson, PE, CCM, DBIA
 - Director, Berg & Associates
- Ryan Aukerman
 - Executive Vice President, Griffith Company
- Jaime Burrola
 - Vice President, MWH Constructors
- Ron White
 - Lubka & White, LLP

Ken Fredrickson, PE, CCM, DBIA

Director, Berg & Associates

- Director of Special Projects for Berg & Associates.
- He has served as a senior executive and manager for national and international companies providing construction and management of infrastructure projects with a focus on alternative project delivery.
- He has worked for both public and private clients on numerous industrial, transportation, and environmental projects all over the world – half as a contractor and half providing oversight of projects and programs
- He is a Designated Design-Build Professional, a CCM, a PE and a licensed general contractor in several states.
- He is a published author in peer-reviewed journals and industry publications.

Ryan Aukerman

EVP, Griffith Company

- 2004 – joined Griffith Company Team as a project engineer
- Became an Estimator/Project Manager while completing his degree in Technology and Operations Management CSPU Pomona
- 2010 became Southern Regional Manager – overseeing such projects as Tom Bradley International Terminal, Omnitrans SBX E Street Corridor, POLB Pier G Terminal Redevelopment and POLA Berth 142-143 Terminal Automation Improvement
- 2015 – promoted to his current position as Executive Vice President with oversight of operations throughout the company
- Ryan has worked with a variety of public and private owners, and has participated in alternative project delivery methods such as Design-Build and CMAR.
- He has been serving as a State Director for the AGC of California and a Los Angeles District Board since 2010
- Ryan works to support the education foundation, interacts with multiple AGC Student Chapters and Griffith's own Internship program.

Jaime Burrola

Vice President, MWH Constructors

- Vice President and Regional Director of MWH Constructors, Inc.
- MWH Constructors is a national contractor and construction management firm specializing in the Water / Wastewater Industry.
- Jaime is currently managing all MWH construction management personnel in CA.
- As a contractor, he has managed both traditional delivery and alternative delivery projects in CA.

Ronald White

Lubka & White, LLP

- J.D. and B.A. degrees, Brigham Young University
- Partner at Lubka & White LLP
- Law practice of more than 30 years focuses on all aspects of public and private construction law, including drafting construction contracts
- Resolved by way of trial, arbitration, and mediation hundreds of millions of dollars of construction claims
- Mediator of construction disputes
- Presenter of numerous seminars on construction law and dispute resolution
- Can be contacted at 626-301-0700 or ron@lubkawhite

Today's Agenda

- The Impact of Contract Language
- How Does Anything Get Done
- Approaches to Claims Resolution



Learning Objectives

- How contract language affects contractor behavior
- Risk management is to everyone's advantage
- Understand different approaches to claims resolution

Contract Language Sets a Tone

Do the documents establish a

- Confrontational contract resulting in a mutual attempt to take advantage of the other party

or

- A partnership-based approach to contracting, in which both parties find it advantageous to find ways of helping each other to be more successful

What world do you want to work in?

The Impact of Contract Language

As an Owner you want:

- to be notified in a timely manner of a problem,
- costs and other impacts collected expeditiously, and
- once negotiated, the costs of a change to be final.

So you write your contracts to cover every possible problem

Strict Limits on Notification

- *“Contractor must notify AGENCY of any event, discovery, act, omission or uncertainty which could affect the contract schedule or the price of the contract. Such potential change must be reported in writing, within 10 days of its discovery.*
- *“The (notification) must include a reasonable estimated schedule impact, if any, and a reasonable estimated cost, if any.”*
- *“Upon discovery of differing site conditions, Contractor shall discontinue activities in the immediate vicinity, then provide immediate oral notice of the discovery of such conditions to the Resident Engineer, followed by written notice within 24 hours”*

Timely Notice is Vital!!

California is a “Strict Notice” state

In 2011, the California Court of Appeal affirmed a judgment against a contractor, reasoning that under the amended and current version of Civil Code Section 1511, parties to a construction contract may agree (as the contractor did in *Opinski*) that a contractor “intending to avoid the effect of its failure to perform by asserting that [the owner’s acts] caused the failure must be given written notice of this intention within a reasonable time.” ***This decision underscores the importance to contractors to read and strictly comply with the construction contract and its notice, change order and claims provisions.***

Timely Notice is Vital!!

“Failure to timely report a Potential Change shall result in loss and waiver of Contractor’s right, if any, to an extension in the schedule or for additional compensation.”

“If Contractor fails to timely submit all of the requested information, it will have waived its right to a schedule adjustment or to additional compensation.”

“Contractor shall 10 days from issuance of a CN In the event that Contractor fails to give timely notice claim is waived and released.”

“Failure to submit the daily report by the close of the next working day may waive any rights to recover compensation for that day.”

“The Contractor shall not be entitled to any remedy for an asserted DSC if it does not give the AGENCY both (1) timely notice And (2) an opportunity to investigate...”

Is This Practical?

Many changes are not so clear-cut as to have definite start and completion dates

- Do you make a claim for changed conditions after the first hard driving pile of 500, the 10th, ???

What constitutes notice is sometimes an issue as well. Is formal written notice of a potential claim required, are site meeting minutes sufficient, is the change so obvious that notice is a given?

Which Clause Promotes a Collaborative Approach?

“The Contractor shall submit RFCs within 10 days after the occurrence ... If the Contractor delivers any RFC later than 10 days ... the Contractor shall not have, and will have deemed to have waived, any Claim to any increase in Contract Price and Time ... for the period prior to the date of delivery of the RFC.”

or

“If the Contractor fails to provide an RFC within 60 days after any occurrence of an Event, Contractor shall not have, and will have deemed waived, any claim ... unless Contractor can show ... (Client) was not materially prejudiced by lack of notice or (Client) had actual knowledge of the event.”

No Good Turn Goes Unpunished

“The Contractor shall not do any extra or changed work, except upon written order from the Resident Engineer. Compensation for such extra work shall be previously agreed upon in writing between the Contractor and Resident Engineer.”

Now what happens?

1. Discovery of a potential change
2. Submit RFC within 10 days
3. AGENCY response within 15 days with a CN
4. Contractor provides a proposal within 15 days
5. AGENCY specifies time and place for negotiations within 10 days

No Good Turn Goes Unpunished

Agreement on a lump sum amount may take up to 50 days. This is not an acceptable delay in most situations - so

“If it is determined by the AGENCY that the Contractor should proceed immediately the CN shall direct the Contractor to account for its costs (per) Section ...”

Contractor may not be able to properly assess the true impacts of a change within the time allowed (these can be substantial) - so

“Contractor shall keep record of disputed work in accordance with Section XX, “Extra Work”.”

No Good Turn Goes Unpunished

Or

“If the Contractor and the AGENCY are unable to reach agreement on disputed work, the AGENCY may direct the Contractor to proceed with the work. The Contractor must proceed Contractor may also submit a claim contingent upon Contractor having timely met all of the requirements for making a claim.”

We now entered the “Time and Material” zone

Timely Notice is Vital!!

As a Contractor you must:

- make a rapid decision as to what constitutes a changed condition,
- divert limited resources to deal with a problem that you did not create,
- predict and justify all associated costs and impacts of a change,
- maintain project progress.

Contractors have little choice but to claim quickly and often

Agreement on Impact

“Regardless of the party responsible for the delay Contractor shall be responsible to develop and implement measures to mitigate such delays and to identify all time and cost impacts within 10 days of notice of delay.”

“Contractor further acknowledges that it has the ability to track costs which are the result of any changes made Contractor specifically waives the right to make a total cost claim, regardless of the number of changes which may occur.”

“Both the Contractor and the AGENCY agree and acknowledge that execution of change orders constitutes a mutual accord and satisfaction of work covered by a Change Order, and the Contractor specifically waives and releases any and all claims ...
“

Agreement on Impact

A series of changes may have a different cumulative impact than the sum of the individual changes

- Imagine your efficiency if you are diverted regularly to deal with a new problem
- Cumulative impacts can be unforeseeable and difficult to quantify unless the proper controls systems are in place to capture the disruption and impacts that may not be apparent on an individual basis

Some changes result in incremental increases in the cost of the work which are difficult to isolate and quantify

- For example, a high-water table impacting the rate at which material can be excavated

Agreement on Impact

Is it fair to assume that a change has no impact on work efficiency?

“Base the proposal on the Contractor’s actual, expected construction productivity rates (and provide appropriate support for these productivity rates) ...”

“Incidental engineering costs ... shall be included in the overhead mark-up, shall include all time sent by engineers ... and all other tasks normally performed by contractors as a part of the Work ...”

Agreement on Impact

Schedule impacts go beyond the critical path schedule

“The Contractor shall submit ... with each claim for an adjustment on account of delay ... a proposed revision to the critical path schedule incorporating the effects of the delay claimed”

and most likely include impacts on resource scheduling

Lean construction scheduling techniques recognize resource scheduling as a critical planning issue

Agreement on Impact

As an Owner are you willing to consider the impact of:

- Loss of production/inefficiency
 - Crews are stopped and re-directed
 - Idle equipment
 - Stacking of Trades
 - Acceleration
- Schedule Delays and Disruptions
 - Out of Sequence Work
 - Unavailability of Materials & Equipment
 - Interference
- Dilution of supervision

What's A Contractor To Do?

Contractors can either:

- hope that the Owner will ignore the contract language, or
- refuse to agree to any settlement, operate in negative cashflow and fight it out in the end, or
- price the change high and risk a false claims action, or
- go for a total cost claim
 - Information collection has improved spectacularly in the past years where contractors are able to accurately measure productivity – the “measured mile” approach is much more credible.

Panel Comments

- Notification Restrictions
- Arbitrary Waiver of Rights
- Lump Sum vs. T&M Dilemma
- Agreement on Impact



Collaboration vs. Confrontation

How Does Anything Get Done

- Directing work on a “time and material” basis reduces schedule impact but has an associated perceived loss of cost control
- Directing work on a negotiated lump sum basis gives the illusion of cost containment but can delay critical work
 - Contractor has to account for all contingencies and unknowns as the resulting price is “full and final”
 - Contractor may be unwilling to take the “full and final” risk at a price that is acceptable
- Using existing unit prices often results in arguments of applicability

How Does Anything Get Done

Managing T&M:

- Define the scope of work narrowly
 - Be very specific as to what is considered extra work
 - It may be desirable to break a large effort into several smaller ones so that each effort is more easily tracked and the scope is limited
- Establish the schedule associated with the effort
 - Limit the number of days that the work can continue before re-authorization
- Establish a mutual understanding of the scope and cost
 - Set maximum limits on the authorization (for example - no more than \$5,000) and re-authorize as needed

How Does Anything Get Done

Issues With T&M:

- Heavy administrative burden for Owner and Contractor
- Requires additional resources to manage
- Takes project teams focus away from other work and priorities
- Cash flow stress – 90 – 120 day pay typically
- Potential to not capture 100% of all costs associated with the change, small items missed and add up over time (small tools, equipment attachments, fuel, etc.)
- Owner typically pays more in markup than fixed price change orders

How Does Anything Get Done

Managing Lump Sum:

- Determine what can be negotiated consistent with the work schedule and balance potential savings with possible delay impacts
 - Clearly define the scope and limits of the work – particularly where it impacts unchanged work or where limited T&M efforts have been authorized associated with the change
- Make use of the unilateral change order when pricing and impacts can be reasonably established

How Does Anything Get Done

Resolving changes quickly and efficiently is desirable to everyone:

- Frees up payments
- Reduces jobsite friction
- Reduces the chance of big cost or schedule surprises
- Claims rarely get smaller
- Less likely to fight for a little than a lot

Anticipate Change

Change can come from many places:

- Design changes
 - Due to regulatory changes
 - Did not work/fit as intended
 - Changed the design intent
 - Mutual agreement (VE, etc.)
- Unforeseen conditions
 - Things aren't as planned
 - Force majeure

Expect the Unexpected

Each project decision has an associated risk that needs to be tracked and monitored

- Each risk should have a contingent cost and schedule impact assigned and included in the project estimate

If you made the decision as an owner not to spend money on additional geotechnical exploration – don't be shocked if there are change requests due to differing site conditions

Expect the Unexpected

Risk management is:

- A disciplined process that can help avoid negative outcomes and help recognize emerging opportunities.
- An action plan that may help to mitigate the probability of a risk happening and the consequences of when it happens.
- Improved decision making
- Better allocation of resources

Why not identify potential issues before they occur and develop ways to deal with these issues that best allocates risk

Expect the Unexpected

- **Initial Planning:** preliminary identification and assessment of project risks
- **Design Development:** collection of engineering decisions and their consequences
- **Procurement:** refine the risk management analysis
- **Contract Award:** refine the risk analysis based on negotiated positions
- **Construction:** monitor risk mitigation strategies, add new risks and retire risks as they are resolved.

PROJECT RISK REGISTER																										
PROJECT TITLE					Fallbrook Water Treatment Plant					PROJECT BUDGET					\$15,325,000					PROJECT DURATION		15 Months		Last Updated		10/15/18
Risk Identification					Quantitative Analysis					Qualitative Display of Max Impact					Risk Mitigation Plan					Implementation and Monitoring						
ID No.	Status	Priority	Date Identified	Project Phase	Summary Description Risk and/or Opportunity	Detailed Description of Risk Event (Specific, Measurable, Attributable, Relevant, Timebound) (SMART)	Risk Impact	Type	Cost Impact Range (B, M, L, W)	Schedule Impact Range (D, M, L, W)	Risk Distribution	Best Case Measure / Worst Case	Likely Cost or Schedule Impact	Likelihood	Potential Impact	Risk Matrix	Strategy	ACTION TO BE TAKEN Response Actions including advantages and disadvantages include date	Risk Owner	Cost Contingency	Date, Status and Review Comments (Do not delete prior comments, therefore providing a history)	Expiration Event				
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10a)	(10b)	(11a)	(11b)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	(19)	(20)	(21)				
0	Open	1	8/15/09	Design	Risk Additional piling requirement	Soil conditions are inconsistent and may result in significantly more piling lengths than planned.	Cost, Schedule	Coast	6.0 11.0 20.0	10.0% 80.0% 10.0%	Best Likely Worst	11.4	90%	Moderate	VH H M L VL	Mitigate	Additional soils testing will be performed	Mary M.	\$ 5,700	9/10/09 - subcontract for additional testing was obtained	Completion of foundations work					
					Risk		Schedule	2 5 10	25.0% 50.0% 25.0%	Best Likely Worst	5.5			VL L M H VH												
			8/15/10		Opportunity		Cost, Schedule	0.0	10.0%	Best					VH H											

Plan for Change

Why not work with the project delivery team to brainstorm better risk solutions and encourage more flexible planning where risks are greater:

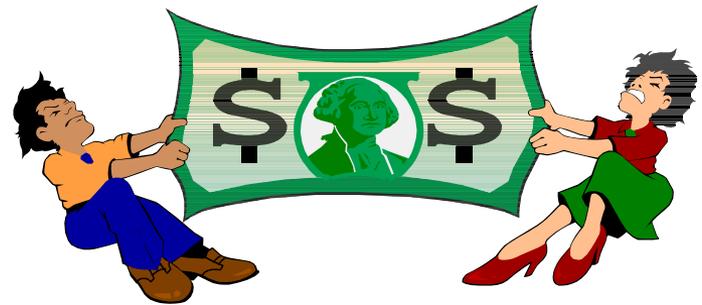
- Ask for pre-bid RFI's to expose risk identified prior to the bid
- Propose risk mitigation options for unreasonable risk transfers

Share your risk register:

- Don't want the contractor to know where you think that there may be problems
- Consider whether it is better to know and discuss in advance or discover the issue in the field

Panel Comments

- Consider How Changes are Administered
- Resolve as You Go
- Anticipate
- Plan
- Brainstorm the Best Solution



Claims Have to be Dealt With

Follow a Process

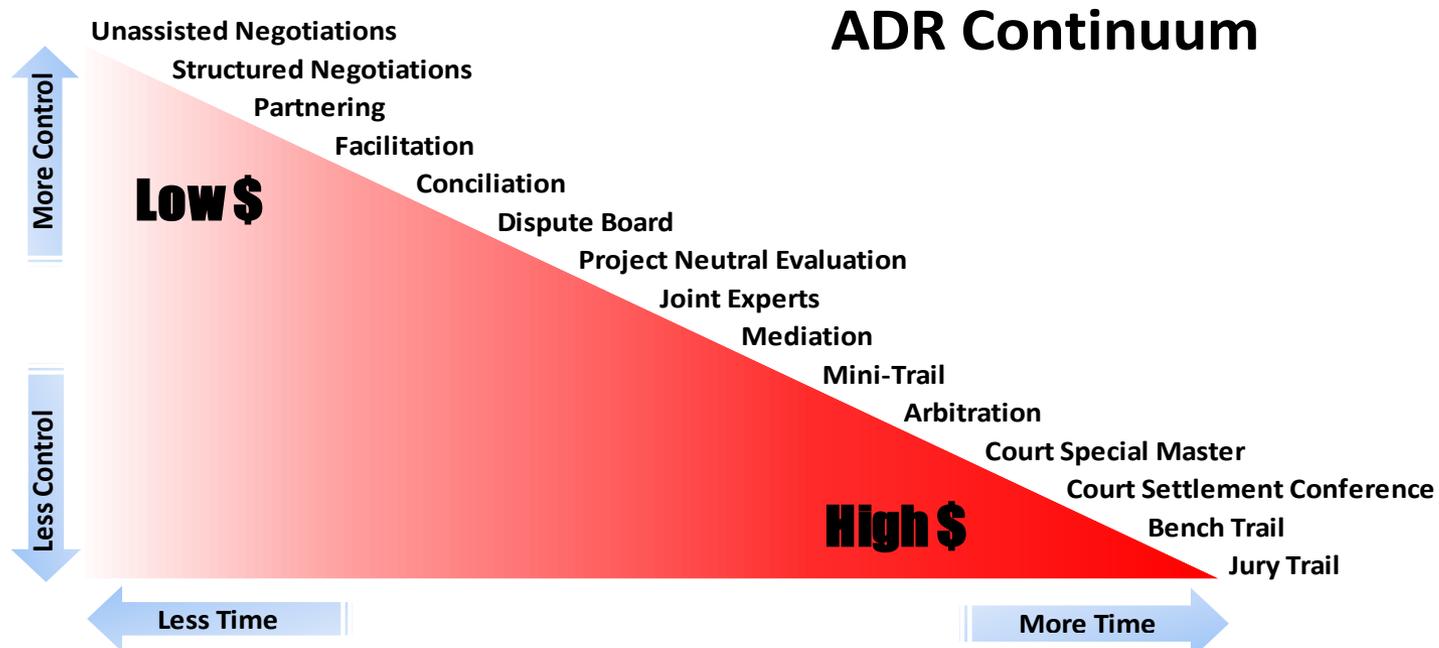
- Know when to escalate an issue
- Have a dispute resolution process
 - Include language in the contract appropriate to the desired approach so that the process moves forward smoothly within the relatively short window provided

Claims Have to be Dealt With

Effective January 1, 2017, California Public Contract Code Section 9204 was added. ***This new regulation establishes a claims resolution process for state and local public contracts. The intent of the regulation is to ensure that contractors are paid for undisputed claims in a timely manner and that there is a process for resolving disputed issues.*** Except for those entities specifically excluded, the new regulation applies to all California public entities – state agencies, local cities and counties (including charter cities and counties), districts, special districts, public authorities and others.

Understand Your Options

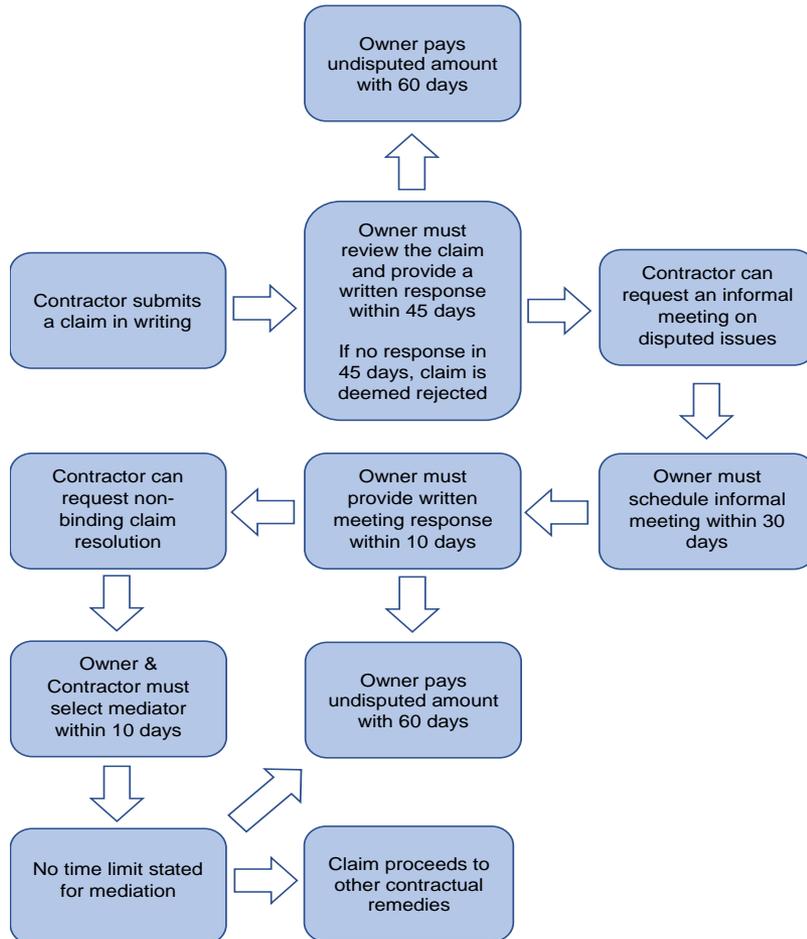
There is a huge gap between failure to agree in the field and “going to court”



Courtesy of the Dispute Resolution Board Foundation

Understand Your Options

New Claims Resolution Process for Public Works Agencies



There are a variety of options available for non-binding dispute resolution:

- Mediation
- Project Neutral
- Dispute Resolution Board (permanent or ad hoc)

Each of these approaches have advantages and disadvantages as well as varying costs.

Make the Effort Worthwhile

ADR is most valuable when decisions have consequences:

- The intention is to reach a settlement
- It is not intended to be a delay tactic
- If findings may be used in any concurrent or subsequent claim, litigation or other action both parties take the process more seriously

Panel Comments

- Follow a Process
- Understand Your Options
- Make the Effort Worthwhile

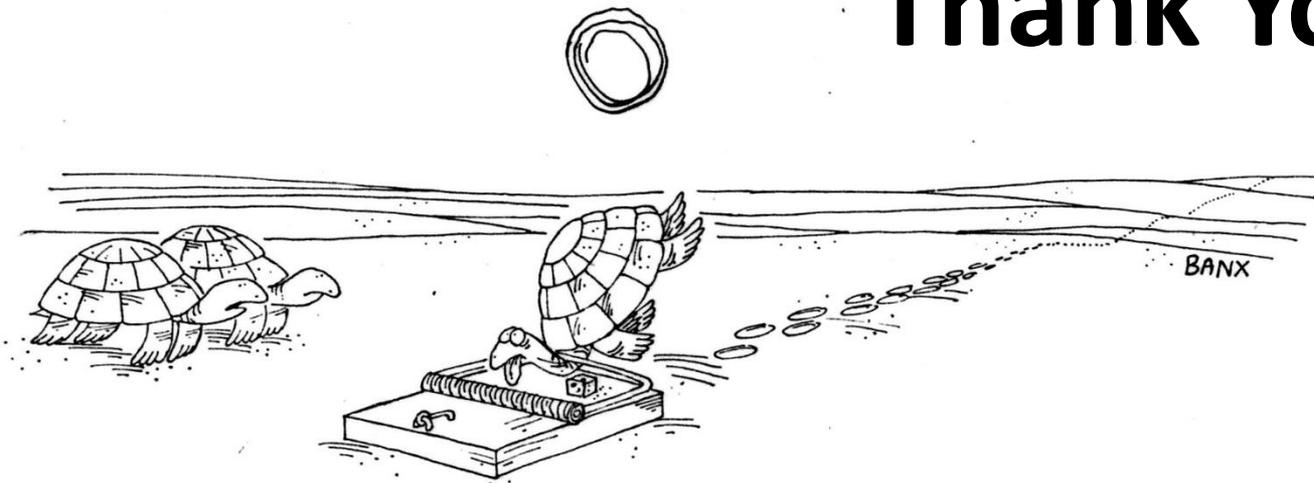


Summary

- ✓ Contract language can have unintended consequences
- ✓ If you make the rules – don't be surprised if other people follow them
- ✓ Anticipating problems pays off
- ✓ Working together to solve problems pays dividends
- ✓ Use all of the tools in your toolbox to keep your project moving forward

Questions

Thank You!



"Poor Brendon—he never stood a chance."