A NIGHTMARE ON CLAIM STREET:

WHEN CONTRACTS FAIL!

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MEET YOUR NIGHTMARES



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TRAVELERS

THE ROAD TO A PROJECT NIGHTMARE

UNDERSTANDING AND NEGOTIATING YOUR CONTRACT → TIPS FOR MANAGING THE RISK OF FEE COLLECTION → NEGOTIATION TIPS

TAILORING YOUR DESIGN TO REDUCE COSTS → WHEN THE PROJECT IS BUSTED → Q + A

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UNDERSTANDING AND NEGOTIATING YOUR CONTRACT

Clauses That Can Help Manage Relationships and Expectations





AGENDA

- **Keys for Success**
- **Clauses That Can Help Manage Relationships and Expectations**
  - Scope of Services
  - Client's Responsibilities
  - Invoicing and Payment
  - Suspension or Termination of Professional Services
- **What's at Stake, and Key Issues**
- **What a Clause May Look Like**
- **Negotiation Tips**



UNDERSTANDING AND NEGOTIATING YOUR CONTRACT

Keys for Success

- Read your contract first and gain an understanding of the requirements
- Reference industry contracts and other guides
- Consult your legal and other advisors with specific questions



SCOPE OF SERVICE

What's at Stake

- Your client may not fully understand the design and construction process, or the scope and limitation of professional services
- Your client may have unreasonable expectations which can lead to a claim of professional negligence

Key Issues

- Your contract should include a well-defined scope of the professional services you will provide (and won't provide)



SCOPE OF SERVICE

Key Issues

- If your client does not want a service that is typically or could be reasonably expected to be included, clearly state that service is not included
  - e.g. some typical construction contract administration services
- Explicitly exclude services that are required but outside your responsibility and ability to manage
  - e.g. “no responsibility for construction site safety which is the sole responsibility of the contractor”
- Explicitly list required services and information to be provided by others
- Address the possibility of changes in services, and additional services



SCOPE OF SERVICE

*What a Clause May Look Like**

Scope of Service: Design Professional's Services shall be limited to those expressly set forth in this Agreement. Design Professional shall have no other obligations or responsibilities for the Project except as agreed to in writing. All of Design Professional's actions and communications relative to the Services shall be subject to this Agreement.

*This example should not be used in your professional services contract. This example may serve as a guide in developing a professional service agreement in consultation with your legal advisor that is appropriate for your firm and practice.



SCOPE OF SERVICE

*What a Clause May Look Like**

Additional Services: Additional Services will be subject to review and authorization by both Parties prior to start of additional services. Where Design Professional believes additional services are appropriate, it shall notify Client of the scope of Additional Services as well as compensation the Design Professional will be entitled to. Client shall respond within three (3) business days to such notification. The Design Professional will not proceed until receipt of written authorization.

*This example should not be used in your professional services contract. This example may serve as a guide in developing a professional service agreement in consultation with your legal advisor that is appropriate for your firm and practice.



SCOPE OF SERVICE

Negotiation Tips

- Ask detailed questions to fully understand client's project goals, timeline, budget, and expectations
- Discuss the abilities of the design process to meet, or not meet, client's expectations
- Discuss your role and services, including any limitations, and the value you bring to the process
- Avoid over-promising or undervaluing your services and abilities

Memorialize scope of services in a written agreement signed by both parties



CLIENT'S RESPONSIBILITIES

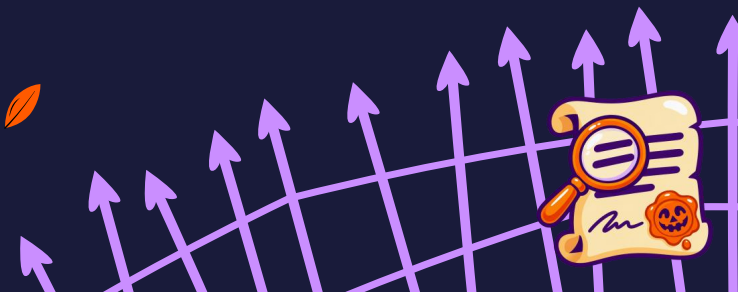
What's at Stake

- Clients may fail to recognize the value and importance of their contribution to the design and construction processes
- A client's failure to meet their own obligations can impact the success of the project

Key Issues

- The client's responsibilities should be well-defined and included in the contract
- Ramifications of the client's failure to meet their obligations should be well defined and included in the contract





CLIENT'S RESPONSIBILITIES

*What a Clause May Look Like**

Client's General Responsibilities: Client shall have the responsibilities set forth in this agreement and shall provide information in a timely manner. Client shall coordinate the services of its own consultants, and the Design Professional is entitled to rely on information supplied by the Client and other consultants retained directly by the Client. Design Professional has no obligation to check the accuracy or completeness of Client-supplied information but will bring to the Client's attention any discovered discrepancies.



*This example should not be used in your professional services contract. This example may serve as a guide in developing a professional service agreement in consultation with your legal advisor that is appropriate for your firm and practice.



CLIENT'S RESPONSIBILITIES

Negotiation Tips

- Discuss the client's role, what it will be, during design and construction
- Discuss how partnership contributes to project success
- Discuss responsibilities, dependencies, their importance and impact
- Discuss decision-making
    - Who will be the contact, and who is authorized to make decisions
    - What are the communication protocols

Memorialize client responsibilities in a written agreement **signed by both parties**

INVOICING AND PAYMENT

What's at Stake

- Professional firms need regular income to remain viable
- Failure to pay invoices may be a sign of bigger issues
- Actions to collect past due fees can be time-consuming and expensive
- Fee collection is not covered by the professional liability policy

Key Issues

- Contract should clearly define fees for professional services, reimbursables and timing for invoices and payment
- Contract should also outline consequences for late or non-payment





INVOICING AND PAYMENT

*What a Clause May Look Like**

Invoicing and Payments: Design Professional shall issue invoices for services provided and reimbursable costs incurred. Client's payment shall be due within thirty (30) days of the invoice date and shall incur interest at the rate of X% per month thereafter. Client shall not withhold any payment or portion thereof as an offset to any current or prospective claim.

If Client fails to make payments to Design Professional as set forth in this agreement, such failure shall be, at the Design Professional's option, cause for immediate suspension or termination of services under this Agreement.







*This example should not be used in your professional services contract. This example may serve as a guide in developing a professional service agreement in consultation with your legal advisor that is appropriate for your firm and practice.

INVOICING AND PAYMENT

Negotiation Tips

- Discuss your client's budget for professional services
  - This is separate from the budget for construction
- Discuss your expertise and the value you bring to the process
  - Explain fees and justify them
- Discuss options for fee structure and timing of invoices
  - e.g. obtain retainer before starting
  - e.g. fixed fee, hourly rate, phased pricing, etc.
  - e.g. 1st of the month, 15th of the month, 1st Wednesday of a month, etc.



INVOICING AND PAYMENT

Negotiation Tips

- Discuss options and process for change in services or additional services
- Discuss invoicing and payment process
  - Who should receive the invoice?
  - How will payment be transmitted?



Know your bottom line... be willing to walk away!

Memorialize invoicing and payment process in written agreement signed by both parties.



SUSPENDING OR TERMINATING PROFESSIONAL SERVICES

What's at Stake

- Suspension or termination of services may be required due to unforeseen circumstances

Key Issues

- Suspension or termination should be given careful consideration:
  - Consider financial as well as reputational consequences
  - Consult legal advisor
- Identify situations in the contract that allow suspension or termination
- Follow procedures outlined in the contract for suspension or termination



SUSPENSION OR TERMINATION OF PROFESSIONAL SERVICES

*What a Clause May Look Like**

Suspension/Termination: Design Professional may, after giving 7 days' written notice to the Client, suspend services under this Agreement if the Client fails to pay invoices for services and expenses, or persistent circumstances beyond the control of the Design Professional prevent performance of obligations under this Agreement.

Either party may terminate the Agreement for cause upon 30 days' written notice in the event of substantial failure by the other party to perform in accordance with the terms of the Agreement, through no fault of the terminating party.

*This example should not be used in your professional services contract. This example may serve as a guide in developing a professional service agreement in consultation with your legal advisor that is appropriate for your firm and practice.



SUSPENSION OR TERMINATION OF PROFESSIONAL SERVICES

*What a Clause May Look Like**

If the Project is suspended or terminated for any reason outside the exclusive control of Design Professional, Design Professional shall have no liability to Client or any other Party for any associated delay or damage caused to Client or others because of such suspension of services, and Client shall indemnify Design Professional for any claims arising from such suspension.

*This example should not be used in your professional services contract. This example may serve as a guide in developing a professional service agreement in consultation with your legal advisor that is appropriate for your firm and practice.



SUSPENSION OR TERMINATION OF PROFESSIONAL SERVICES

Negotiation Tips

- Discuss what circumstances and situations may warrant suspension or termination
- Discuss how to address key issues such as notice and process, outstanding fees, expenses related to suspension or termination, intellectual property rights, etc.
- Discuss how suspension or termination can be mutually beneficial

Memorialize in a written agreement signed by both parties, permissible reasons for suspension or termination, and the process.



TERMINATION



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TIPS FOR MANAGING RISKS OF FEE COLLECTION

Reduce payment risks with clear billing terms and effective collection strategies





AGENDA

- Before You Contract
- Your Contract
- Why a Client Would Not Pay Fees
- Managing the Risk
- Options If Fees Are Not Paid
- What Could Go Wrong?



BEFORE YOU CONTRACT...

What do you know about your client?

- Finances
- Reputation for prompt payment?
- Legal status

What do you know about the project?

- How will the project be financed?
- Are there any special billing, invoicing requirements and payment schedule?
- Are lien rights or the ability to make a claim on a payment bond an option for non-payment of fees?



YOUR CONTRACT

- Clear billing/invoicing and payment procedures
  - When will billing/invoicing occur
  - When is payment due
  - Time frame to dispute a bill/invoice
- Balanced “pay-if-paid” provision
- Rights if payment is late or there is default
  - i.e., suspend or terminate services
- Assignment – what it could mean for you



WHY A CLIENT WOULD NOT PAY FEES

- Did not receive an invoice/bill
- Invoice/bill does not match payment schedule or conform to contract requirements
- Financing issues with lending institution
- Budget overruns
- Dissatisfaction with professional services



MANAGING RISK

- Bill/invoice on time and regularly per contract terms
- Set a “check point” to determine next steps for nonpayment
- At the “check point”…
  - Contact your client and inquire if there is an issue
    - Did they receive the bill/invoice
    - Dissatisfaction with professional services?
    - Bank has not released funds?



MANAGING THE RISK

At the "check point"...

- Assess the viability of fee collection
  - Internal review, to consider:
    - How much is past due
    - The relationship with the client
    - The current stage of design and construction
    - The current stage of design and construction of other projects funded by your client





MANAGING THE RISK

At the "check point"...

- Assess the viability of fee collection
  - Internal review to consider
    - Anticipated impact of the project on the local community and anticipated media coverage
    - What will happen to the project, and its goals, if it is derailed by claims



MANAGING THE RISK

At the "check point"...

- **Seek external advice of counsel**
  - Evaluate strength of contractual terms and other evidence to support the claim for damages
  - Exposure to attorney's fees if failure on collection claim?





OPTIONS, IF FEES ARE WITHHELD

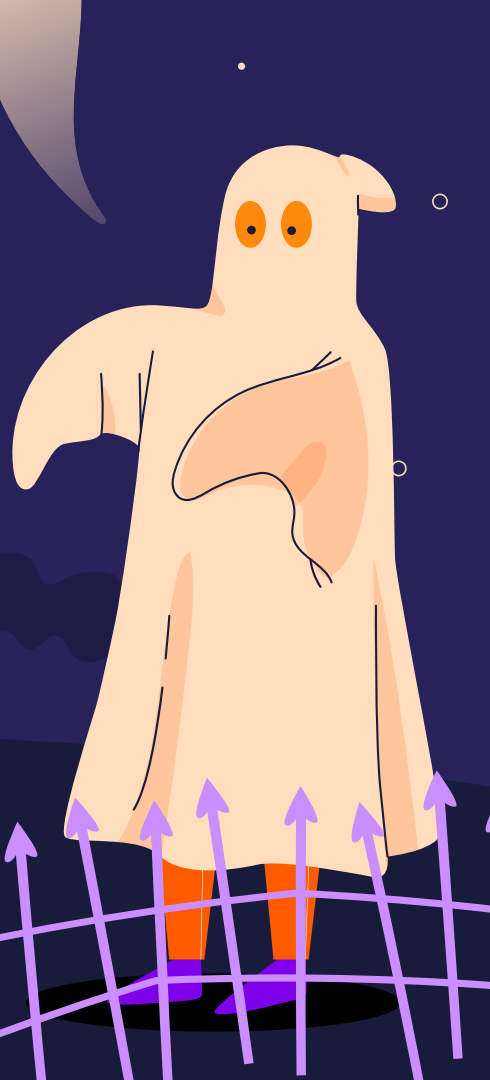
- Does the contract have a dispute mechanism?
- Mechanics Liens
- Payment Bonds
- File a claim for non-payment of fees



WHAT COULD GO WRONG?

The feared counterclaim:

- Insured sued its client for $170,000 in outstanding fees
- Client filed a counter claim for professional negligence
- After lengthy, costly litigation, the matter ultimately settled on the eve of trial with the Insured agreeing to waive the outstanding fees and provide a $500,000 payment to their client



WHAT COULD GO WRONG?

Professional liability policy covers claims alleging professional negligence, however:

- Consider time and expense of litigation
- Consider deductible obligation
- Consider policy limits
- Consider potential future impact on premiums



RISK OF GOING AFTER FEES



3 NEGOTIATION TIPS

Contracts Through Project Close Out





AGENDA

- Tips on Contract Terms and Limitations of Liability
- Tips on Negotiating Contracts
- Tips to Identify and Address Scope Creep
- Tips on Negotiating Problems During Construction
- Tips on Project Close Out



CONTRACT TERMS

WHOSE CONTRACT FORM IS IT?

WHO ARE YOU TAKING RESPONSIBILITY FOR?

WHY DOES IT MATTER?



IMPORTANT TERMS TO INCLUDE

- Scope of Services
- Appropriate Standard of Care
- Disclaim Means and Methods
- Disclaim Site Safety
- Right to Rely
- Bilateral Termination Clause

COMMONLY FOUND TERMS TO AVOID

- Prevailing Party Attorneys' Fees Clause
- Defense Obligation in Indemnity Provision
- Indemnity for More Than Your Share of Fault
- Insurance Obligations for Contractual Liabilities or Additional Insureds (under Professional Liability)
- Warranties or Guarantees

LIMITATIONS OF LIABILITY

- When are they advantageous?
- When are they disadvantageous?
- Was it freely negotiated by parties with equal bargaining power?
- Are they enforceable?
- Types of Limitations of Liability
  - A designated amount, or available insurance
  - Category of damages
  - Personal

STRATEGIES IN NEGOTIATING CONTRACT TERMS

- Successful Negotiating Positions
- Public versus Private Projects
- Go/No Go
- Considerations on Subconsultant Contracts
  - As the Prime
  - As the Subconsultant

GENERAL NEGOTIATION TIPS

- Have a goal
- Understand the goals of the other participants - is there common ground?
- Meet people where they are
- Managing conflict
  - Be the professional in the room
  - Interpersonal conflicts
  - Are the right parties at the table?

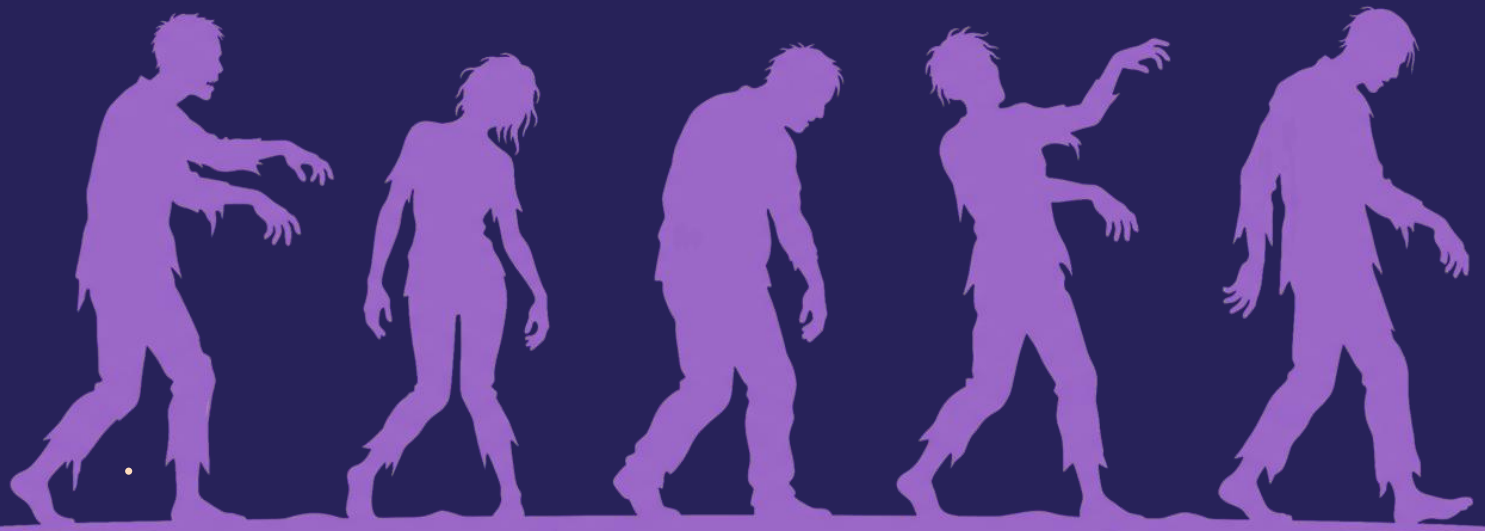
THE HIDDEN PERIL OF SCOPE CREEP

- What is Scope Creep?
- Why does it matter?
- Ways to Counter Scope Creep Adverse Impact:
  - manage client expectations
  - ask for additional services
  - early engagement by impacted participants
  - consider impacts-schedule, design, approvals...
- Is Non-Payment for Services a Defense?

SCOPE CREEP



CONTRACT ADMINISTRATION



FACTORS DURING CONSTRUCTION

- What are your Contractual Obligations?
- Are there Legal Obligations?
- Are there Design Performance Issues?
- How do the Relationships impact the Parties?
- Can you try to Renegotiate?

COMMON ISSUES

- Changes in Contract Administration Services
- Disputes over Change Orders
- Construction not following the Plans
- Substitutions and Value Engineering
- Progress Payment Approval

PROJECT CLOSE OUT - POSSIBLE ISSUES

- “As-Built” versus “Record” drawings?
  - Are they an Additional Service?
- Are all Warranties or Guarantees delivered to the Owner?
  - And is delivery documented?
- Are all Punchlist Items Completed?
- Is Commissioning Completed?
- Does the Owner know how to Operate?

CERTIFICATION LETTERS AT CLOSE-OUT



4

TAILORING YOUR DESIGN TO REDUCE COSTS

Managing the Risks of **Value Engineering**





AGENDA

- What is Value Engineering?
- How Can Value Engineering Lead to Legal Liability
- What Can Go Wrong?
- When Does the Risk of Value Engineering Occur?
- How to Manage the Risk of Value Engineering



WHAT IS VALUE ENGINEERING?

Academic Definition

“Value engineering is a focused, systematic, approach used to analyze a system, service or facility, to identify the best way to manage essential functions while lowering cost.”

-Villanova Project Management

Goal

Improve efficiency and decrease construction and operating costs

Challenge

Can the project schedule be preserved and constructed and operated for less cost, **AND** maintain or increase quality



HOW CAN VALUE ENGINEERING LEAD TO LEGAL LIABILITY

Elements of Liability for Professional Negligence

Plaintiff must prove:

1. The design professional owes a legal **duty**
    - The common law standard of care
    - Statutory and regulatory requirements
    - Contractual requirements
2. The design professional **breached** that duty;
3. The breach of duty was a substantial **cause** of the plaintiff's harm; and
4. The plaintiff incurred actual **damages**



WHEN DOES THE RISK OF VALUE ENGINEERING OCCUR

During Contract Negotiations for Professional Services

- Clauses that raise the common law standard of care
- Clauses that warrant or guarantee professional services
- Clauses that focus on "design to budget"
- Clauses that refer to value engineering specifically
- Clauses that require redesign for free if the budget is exceeded



WHEN DOES THE RISK OF VALUE ENGINEERING OCCUR

During the Permitting Process

- Changes required to obtain a permit may exceed budget
- Short time frame to make necessary changes to design

During Bidding or Negotiated Proposal

- Budgetary constraints
- Contractor input
- Material availability or cost



WHEN DOES THE RISK OF VALUE ENGINEERING OCCUR

During Construction

- Material availability or cost affect budget or schedule
- Constructability issues affect budget or schedule
- Changes no longer meet the applicable standard of care or code requirements
- Changes expand the scope of services



How to Manage the Risk of Value Engineering

During Contract Negotiations for Professional Services

- Avoid clauses that raise the common law standard of care
- Avoid clauses that warrant or guarantee professional services
- Avoid clauses that focus on “design to budget”
- Use a well-defined scope of services
    - Adjustment for fees and schedule for expanded scope of services
- Address the possibility of the need for value engineering
    - Define value engineering process and limits



WHEN DOES THE RISK FROM VALUE ENGINEERING OCCUR?

During Contractual Negotiations for Professional Services

- Use or reference industry standard contracts
  - AIA Document B204-2007®
    - *Standard Form of Architects Services: Value Analysis*
  - EJCDC Exhibit A of E500-2020®
    - *Agreement Between Owner and Engineer for Professional Services*



How to Manage the Risk of Value Engineering

During the Design Phases

- Utilize appropriate review process for conformance with budget and code requirements
  - Internal review
  - Peer review
  - Constructability review
- Coordination with other design professionals
- Document decision-making process



HOW TO MANAGE THE RISK OF VALUE ENGINEERING

During Construction

- Document who made the request and why
- Document the budget and schedule implications
- Check the “ripple affect” and potential impact on other parts of the project
- Coordinate decisions with all parties
  - Project owner
  - Design team
  - Construction team
- ***DO NOT*** rush a decision



How to Manage the Risk of Value Engineering

Throughout the Design and Construction Process

- Attention to “high-risk” value engineering categories
  - e.g. mechanical and electrical, fire/life safety, structural, etc.
- Communication with project owner
  - Explain and document the potential impact on quality, durability, performance, etc.
  - Explain and document potential risk
  - Explain and document pros and cons of options



How to Manage the Risk from Value Engineering

Bottom Line

- Control the process
- Clarify responsibility
- Communicate trade-offs
- Done well and managed, value engineering can benefit a project
- Done poorly and not managed, value engineering can shift disproportionate risk onto the design professional



VALUE ENGINEERING MISTAKE



5

OUCH! WHEN THE PROJECT IS BUSTED

and Allegations of Delays and Other Damages





AGENDA

1. Overview of Delay Claims
2. Contract Phase
3. Design Phase
4. Construction Phase



WHO MAKES DELAY CLAIMS?

OWNER

Money was lost loan payments, overhead, and sales/rental opportunities

CONTRACTOR

Cost to construct exceeded the agreed-to construction cost



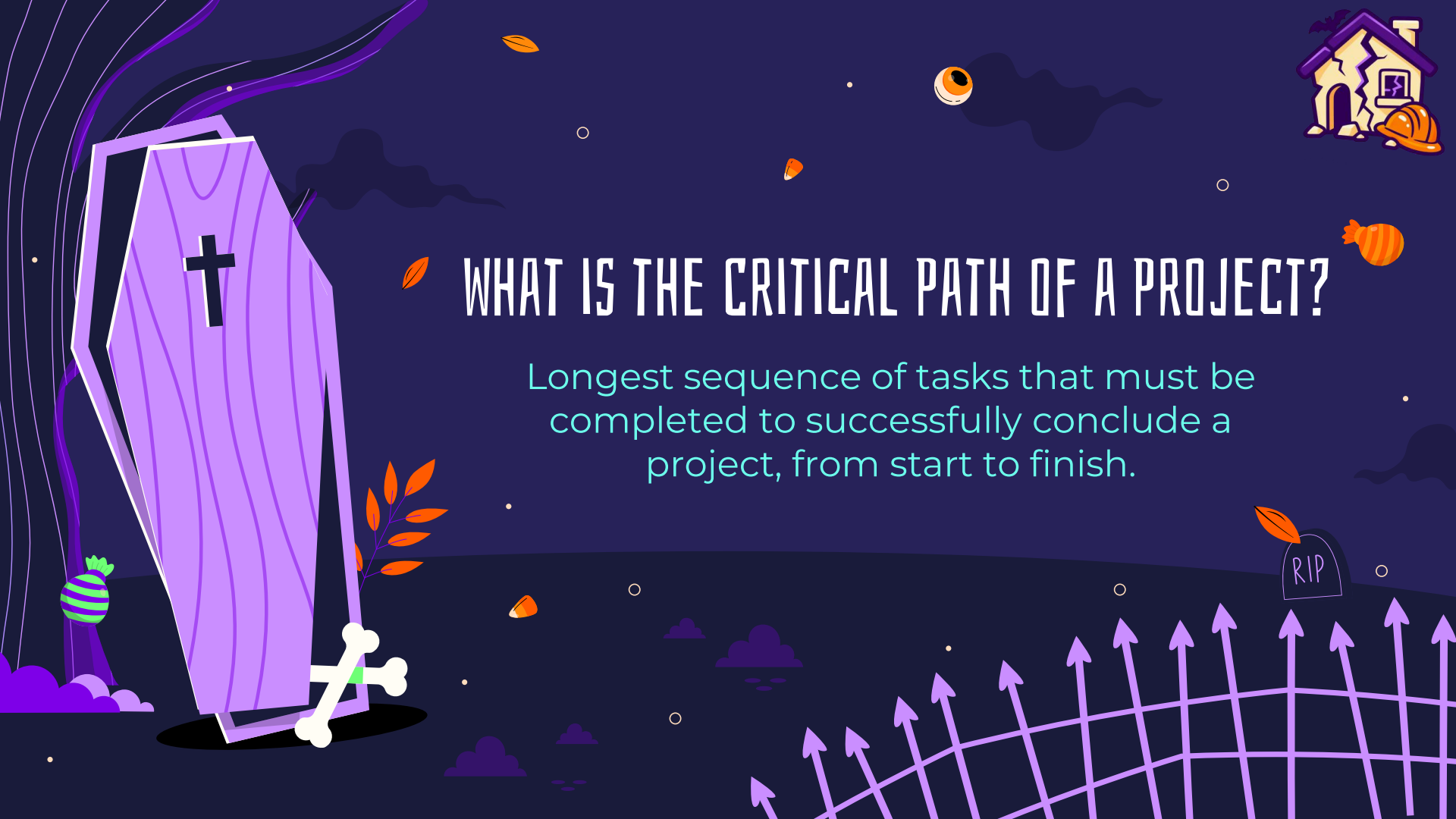
DELAY CLAIMS

- Take, on average, 15 months to resolve
- Heavily expert driven
- Are caused by ambiguous plan requirements
- Incomplete design could contribute
- CA Services



WHAT IS THE CRITICAL PATH OF A PROJECT?

Longest sequence of tasks that must be completed to successfully conclude a project, from start to finish.



TWO CATEGORIES OF DELAY CLAIMS

Inexcusable Delay

- Caused by the contractor's team
- Contractor receives neither additional time nor money
- Owner may be entitled to damages, including liquidated damages

Excusable Delay

- Caused by forces outside of the reasonable control of the contractor
- **Compensable Excusable Delay** - caused by project owner, including design team
- **Non-Compensable Excusable Delay** - neither caused by the contractor or owner. "Act of God."



WHEN CONTRACTS ARE MISALIGNED



CONTRACT PHASE – SETTING EXPECTATIONS

1. Compare the project budget against the client's goals
2. Discuss limitations
3. Draft a contract with a well-defined SCOPE OF WORK



CONTRACT PHASE & NEGOTIATIONS

- Professional duties you will perform
- What you are NOT responsible for on the project
- “Additional services” agreements
- Cost of labor, materials, equipment
- Notice provisions

CONTRACT PHASE & NEGOTIATIONS

Include:

- No liability for delays beyond **reasonable control**
- **Force Majeure** provision
- **Waiver of consequential damages**
- Disclaimer for delays by **AHJs**
- ***Limitation of Liability***

CONTRACT PHASE & NEGOTIATIONS

- **Avoid** Guarantees
- **Avoid** “Design to budget” provisions

DESIGN PHASE – CONFIRMATION & DOCUMENTATION

Document delays caused by:

- Owner
- Consultants retained by owner
- Governing agencies (permit approval expectations and deviations)

DESIGN PHASE

- Project budgets at ***conceptual*** and ***schematic*** design phases

- The budget is a guideline, **not a guarantee**



CONSTRUCTION PHASE

- How and when to respond to the **Contractor's RFI's & Submittals**
- Project management review
- Review General Contractor/ Owner agreement
- Fast Track Critical RFIs



CONSTRUCTION ADMINISTRATION RISKS



QUESTIONS?





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