

**IS THE WORST
REALLY OVER?**



**Designing
New Opportunities
in 2021**

Agenda



**Pandemic
Impacts**

1:00 – 1:50 pm



**Contracting
& Risk
Management**

2:00 – 2:50 pm



**Q&A/
Political
Updates**

3:00 – 4:00 pm

The Presenters

Cindy King



PUI Agency of Colorado

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PROFESSIONAL
UNDERWRITERS

Incorporated



HE HALL & EVANS LLC
& ATTORNEYS AT LAW

01 | Pandemic Impacts



2020 – What a Year!

SENIOR CENTER

WEAR A MASK
WASH YOUR HANDS
SOCIAL DISTANCE
STAY SAFE

COME JOIN US



"I Can't Breathe"

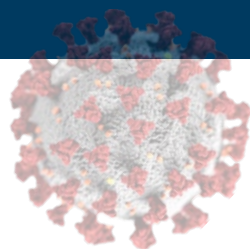
How were projects impacted?





**What did the virus
actually cause?**

**In other words, what's
new, and what's just an
excuse?**



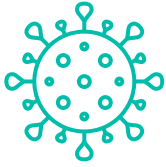
Me coming out of lockdown with all
the stupid stuff I ordered online.

Project Types Most Impacted

- ✓ Hospitals, nursing homes and care facilities
 - ✓ Commercial interiors
 - ✓ Restaurants & retail spaces
 - ✓ Residential?
 - ✓ Government jobs? P3s?
 - ✓ Transit-oriented developments (TODs)?
- 

Ventilation/HVAC Upgrades





Claim Study:

COVID-19

**What can be
done to protect
yourself?**



Design was changed to accommodate vaccine site



Claim Impacts

Virus-Related Claims...

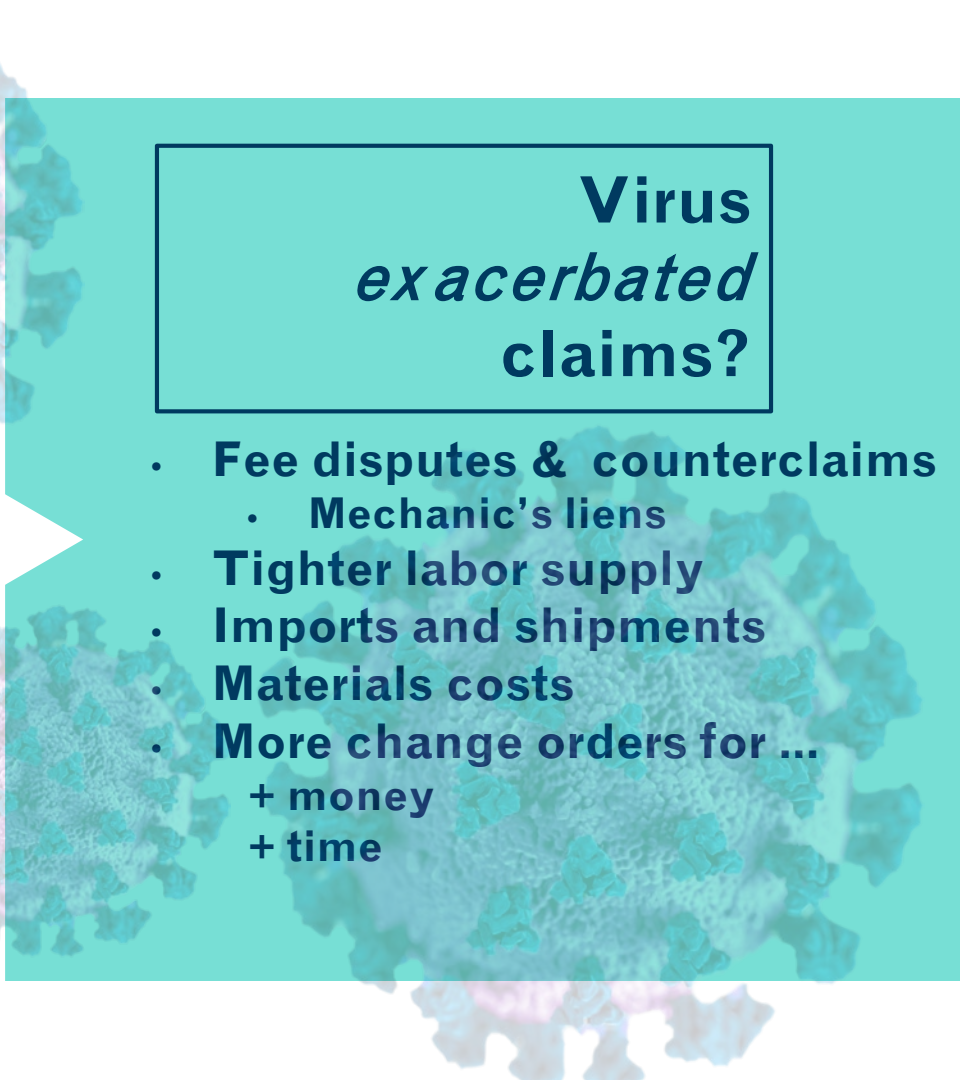
- ✓ **Workers' compensation**
- ✓ **Site safety**
- ✓ **Ventilation and HVAC issues (design and retrofiting)**
- ✓ **“Accommodation” claims**





Virus
caused
claims?

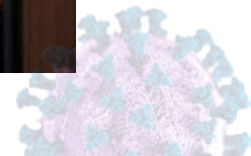
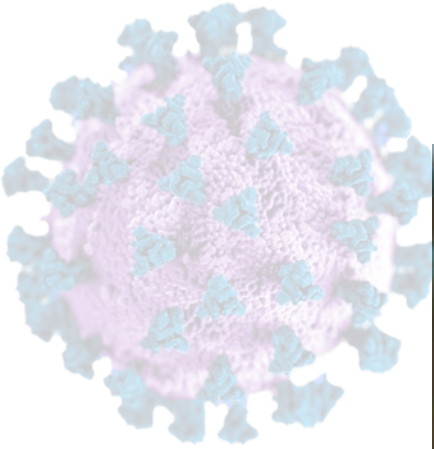
- **Government lockdowns**
- **Health & safety shutdowns**
- **Workers' comp & OSHA**
- **Stalls, delays leading to...**
 - **Schedule busts**
 - **Budget busts**



Virus
exacerbated
claims?

- **Fee disputes & counterclaims**
 - **Mechanic's liens**
- **Tighter labor supply**
- **Imports and shipments**
- **Materials costs**
- **More change orders for ...**
 - + money
 - + time

Local Orders



Can workers' comp claims arising from design?

What about premises liability?



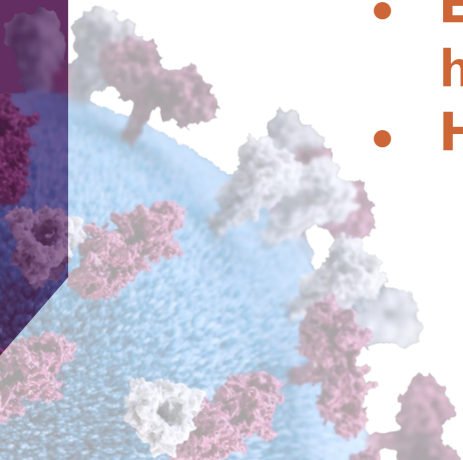
Workplace Safety, Enforcement and Personal Injury

“OSHA standards remain in effect. However, OSHA understands employers are concerned about their ability to comply with certain requirements during the pandemic and is exercising temporary enforcement discretion for certain provisions ... such as those for initial or recurring training, audits, reviews, testing, and assessments.”



Conflicting Guidance?

- **Outside, or inside?**
- **Parking garage v. construction trailer?**
- **Listen to OSHA, or the CDC?**
- **Local, state or federal regs?**
- **Exposure – is the virus “equivalent” to asbestos or hydrogen sulfide?**
- **Hard science v. anecdotes, speculation**





Stalled and Delayed Projects

- **Are contractors tempted to overplay pandemic impacts on specific projects?**
- **Do they use it as an “excuse” to request schedule relief and more money?**

Fee Disputes & Counterclaims



- **Small \$ claims can turn into big \$ lawsuits**
- **Document client changes**
- **Be aware of the pitfalls**
- **Mechanic's liens**

Guarantees & Cost Estimates

Project overbudget

Increased construction costs and materials

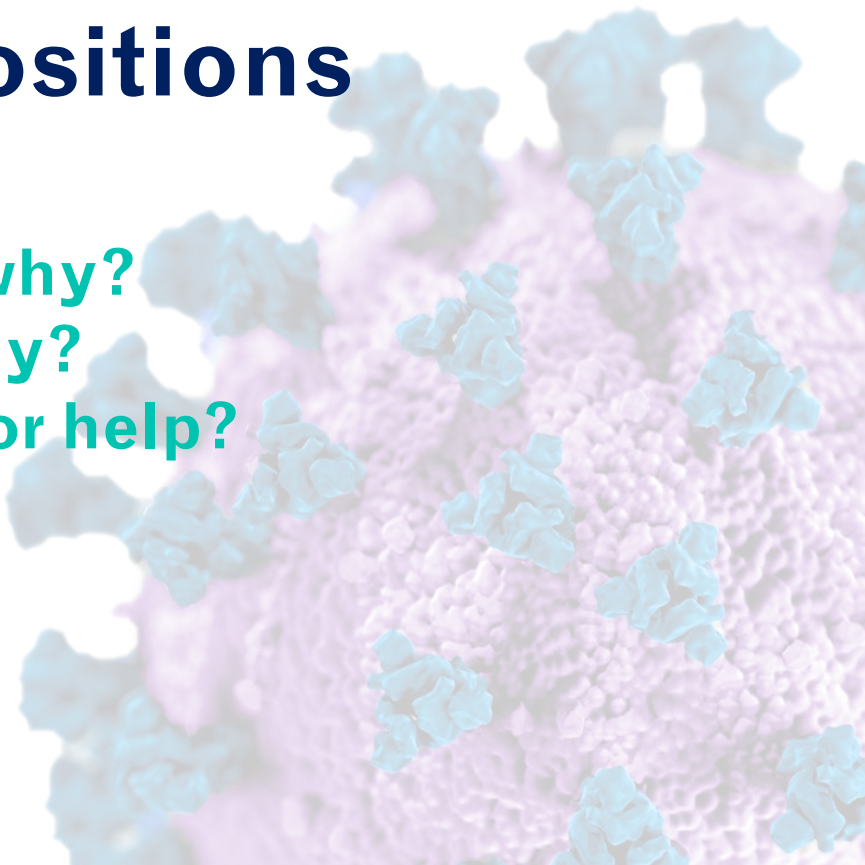
Protecting yourself with contract language



**Change orders =
must be due to design issues?**

Subpoenas for Documents and Depositions

- ✓ Seeking project files – why?
- ✓ Seeking testimony – why?
- ✓ Where can you turn to for help?
- ✓ Risks of a **DIY** response



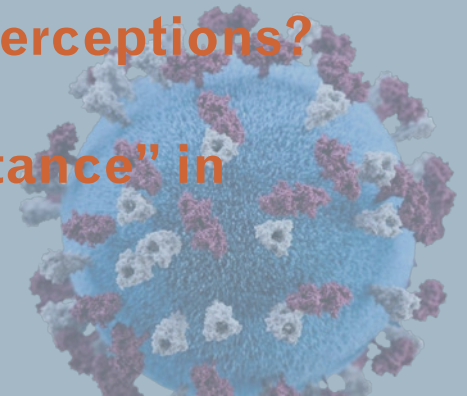
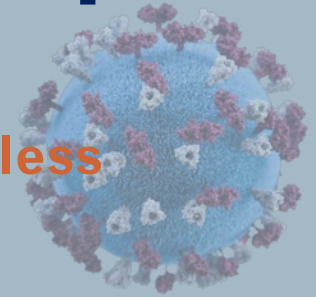
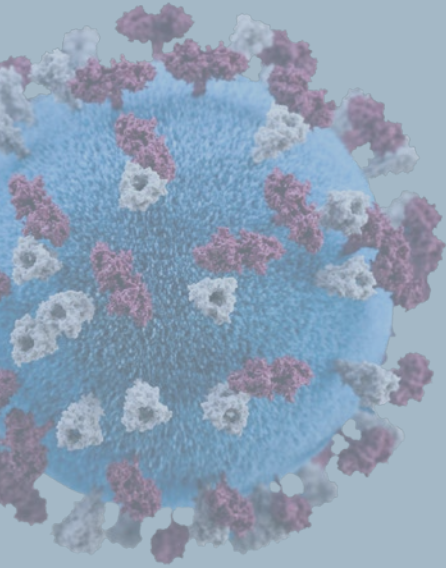
Subpoenas



- **Report to your insurance carrier**
- **Pre-Claims Assistance**

Court and Arbitration Impacts

- **Case delays = more aggravation, less productivity**
- **Less pressure to settle**
- **Higher expert costs**
- **Increased attorneys' fees**
- **Trials, hearings by Zoom (Juror perceptions? Due process & confidentiality?)**
- **No ability to maintain "social distance" in packed courtroom**





The Virus in Your Practice

394th Judicial District Court

Recording of this hearing or live stream
is prohibited.

Violation may constitute contempt of
court and result in a fine of up to \$500
and a jail term of up to 180 days.



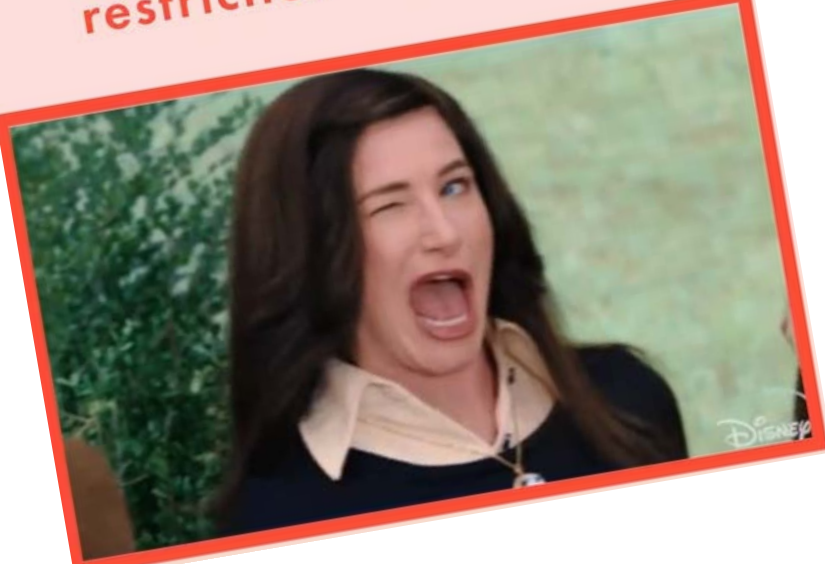
394th Judicial District Court

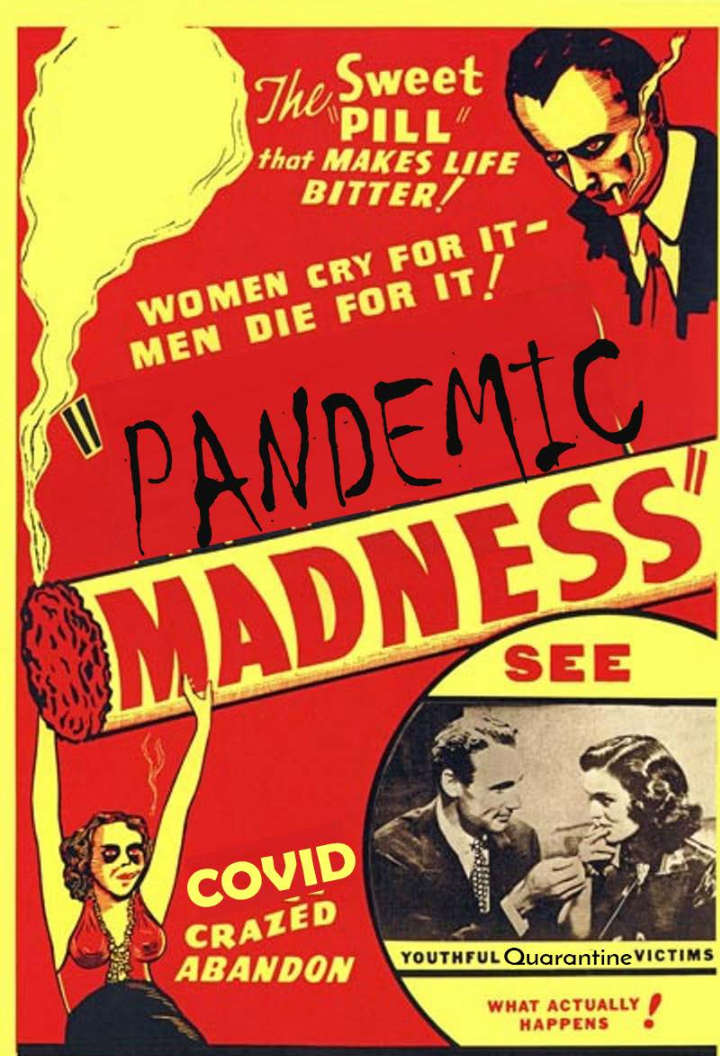


**Remote work – what
can go wrong?**

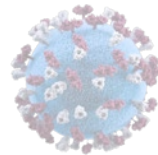
No Meetings, No Travel

Me telling someone
we'll meet up when
restrictions are lifted





Does the Standard of Care Change?



Site Visits

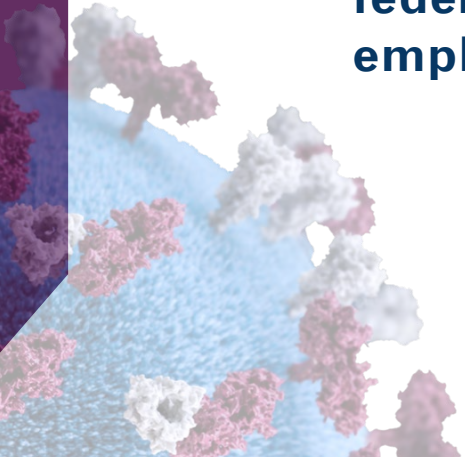


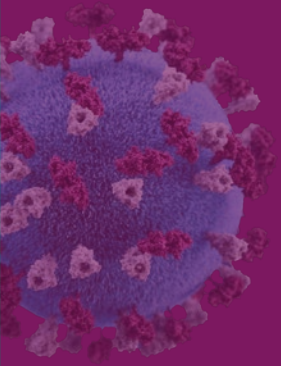
Virtual or In Person?

- Purpose
- Frequency
- Technology
- What could go wrong? (case study)
- Documentation ... what you saw, what you couldn't see

Worker Safety

OSHA: “Your employer may require you to come to work during the COVID-19 pandemic. However, some government emergency orders may affect which businesses can remain open during the pandemic. Under federal law, you are entitled to a safe workplace. Your employer must provide a safe and healthful workplace.”





Contracting & Risk Management

02



CONTRACTS

Why
bother?

```
graph LR; A[CONTRACTS] --> B[Economic Loss Rule]; A --> C[Exceptions];
```

Economic
Loss Rule

Exceptions

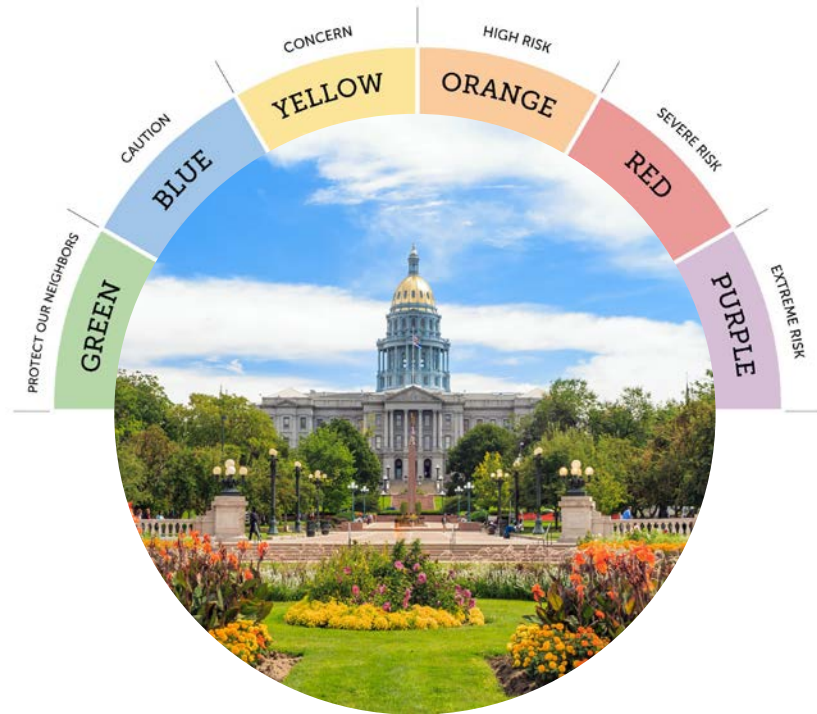
**If possible, contracts
need to line up!**



Changes in Laws

Choice
of law

Law changes
trigger
extensions
and
compensation





Have to Have: Standard of Care

Otherwise,
who gets to
define it?

What can
experts “get
away with?”

Is design
“innovative”
or reliant on
untested
products that
can fail?





Claim Study 1:

“I Want the **BEST** in the **Business**”

- Project: **Upscale loft renovation**
- Discipline: **Architect**
- Details: **Architect provided design for renovation *and guaranteed* that the total project cost would be within the Client’s budget. Overruns occurred due to overly-optimistic schedule, unreasonable client expectations, inexperienced contractor, and weather.**

Damages: **\$2 Million**

Lesson Learned:

Perfection is impossible to attain.

Scope Creep

**Not only what is
in your scope,
But more
importantly
what is *not***





Claim Study 2:

“Don’t let that scope creep!”

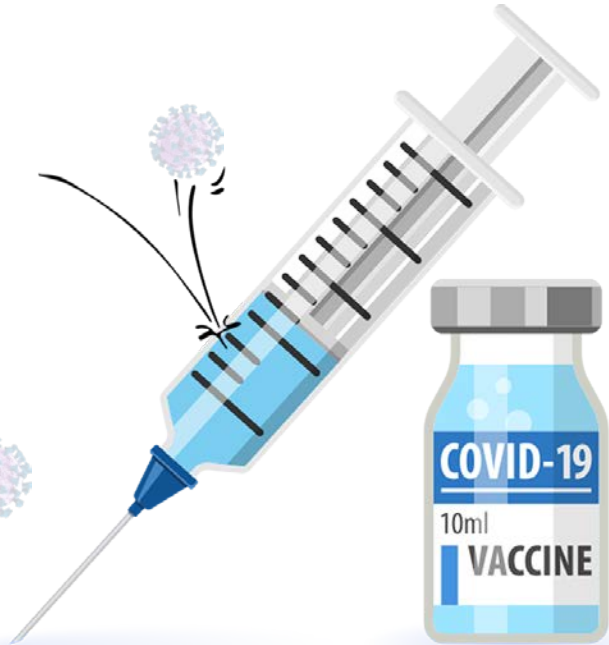
- Project: **Residential**
- Discipline: **Civil Engineer**
- Details: **Residential construction was 60% complete when a landslide occurred, causing significant damage. While the engineer’s contract explicitly excluded design of the retaining wall, the engineer opined on aspects of the wall design while on the Project.**

Damages: **\$7 Million**

Lesson Learned:

Only provide contracted-for services. Be careful with course of dealings.

Indemnity

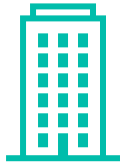


Duty to defend

Duty to indemnify

What is the law?

What are the practicalities?



Claim Study 3:

“Defend me, Even If It’s My Fault”

- Project: **Apartment complex**
- Discipline: **Surveyor**
- Details: **Surveyor provided layout of a new 10-story building with 90 apartments, adjoining Plaintiff’s property. Plaintiff sued Developer alleging construction debris and equipment encroached, and that erection activities caused cracking in Plaintiff’s foundation and walls. Developer sent tender letter to surveyor demanding defense and indemnification under the design contract.**

Claimed damages: **\$1 Million**

Lesson Learned:

Review your indemnification agreement to ensure: (1) no defense obligation exists; and (2) indemnification obligation is negligence-based.

Limitation-of-Damages





Claim Study 4:

“There’s really *no limit* to your exposure”

- Project: **Assisted living facility**
- Discipline: **Architect**
- Details: **Design and construction defects led to a lawsuit against the general contractor and design professionals for water intrusion and roof failures. The architect only had \$500,000 in professional liability coverage. The contractor was out of business, and other designers had no insurance.**

Damages: **\$5 Million**

Lesson Learned:

Your limit of liability provision can be tied to your available insurance proceeds.

Minimize Exposure If You Can

- **No personal liability**
- **Statute of limitations accrual**
- **Prevailing party attorney's fees?**
- **Force majeure**

I was told 2021 would be different.



Force Majeure

- **Force majeure = event that: 1) was unforeseeable at the time the contract was entered into; 2) was outside the impacted party's control; 3) could not be prevented or overcome; and, 4) prevented a party from performing some or all its contractual obligations.**
- **Note, will only excuse obligations directly impacted by the specific event.**

how you act when COVID-19 cancels all those events you really didnt want to go to anyway



Less-Common Claims

Defenses can be helped by better contract terms, such as when dealing with:



**Inadequate
warnings and
safety**

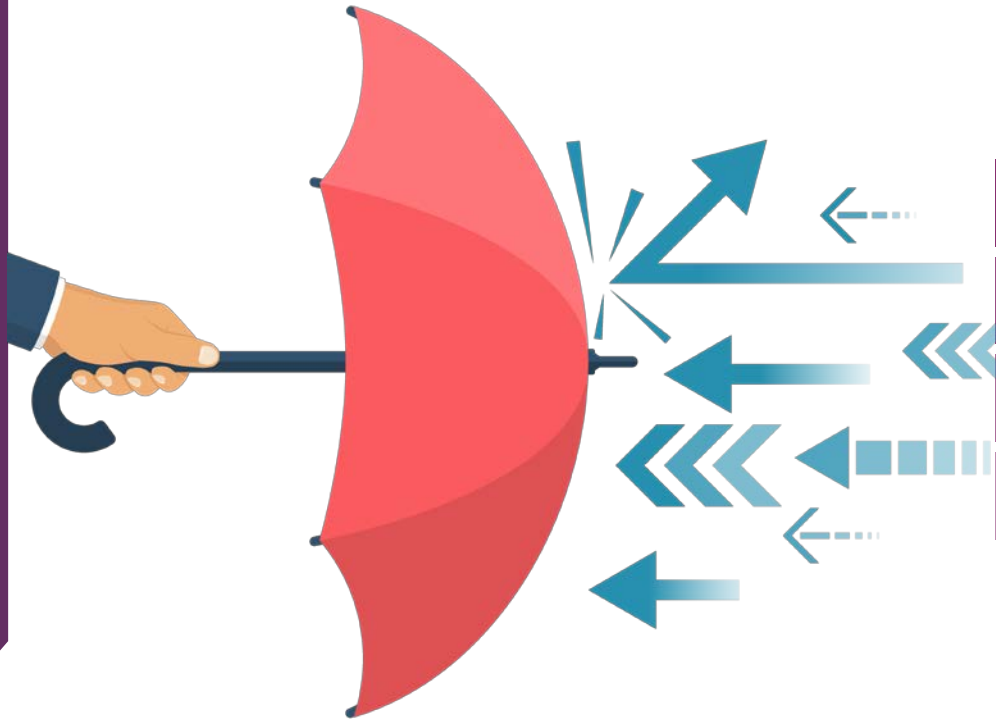


**Intellectual
property**



Cyber liability

Other Tools for Managing Risk



- Insurance
- Go/no-go (vetting projects)
- Who are your business partners?
- Updating proposals & contracts

Termination

Necessary to spell out why, how, when, and what happens if you get fired, *or if you quit.*



**When all
else
fails...**

Course of Performance

- **Blessing or curse?**
- **Sequence of conduct**
- **Can be proven through testimony and documents**
- **Cannot have it both ways**

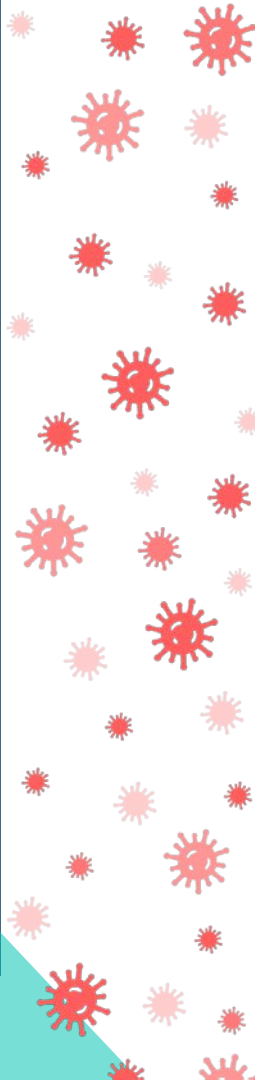


Q&A

Plus, Political
Updates

03

Questions?



Post-Election Transitions - Politics & Regulations

Trump Approach v. Biden Approach



**Shifts happen quickly,
especially with mid-
year swings.**

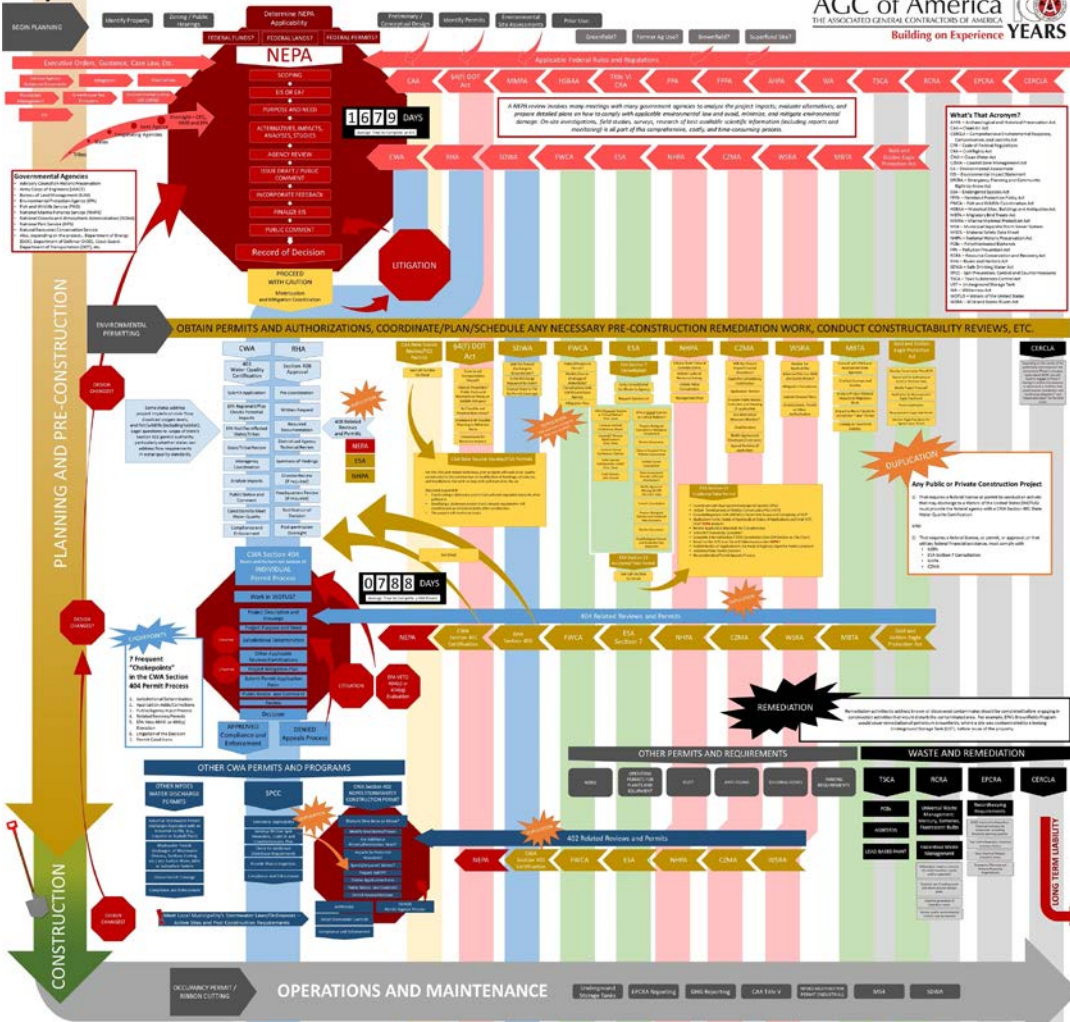


The Trump Years Impacted Construction Projects Through Proposals to Change ...



- Trade
- Immigration
- Infrastructure
- Finance
- Taxes
- Regulations

So you want to BUILD? Good luck with that...



What We Are Expecting On Infrastructure and P3s

Biden was
the VP for
"stimulus"
in 2009

Shovel-
ready
projects?



What might happen with the Green New Deal?



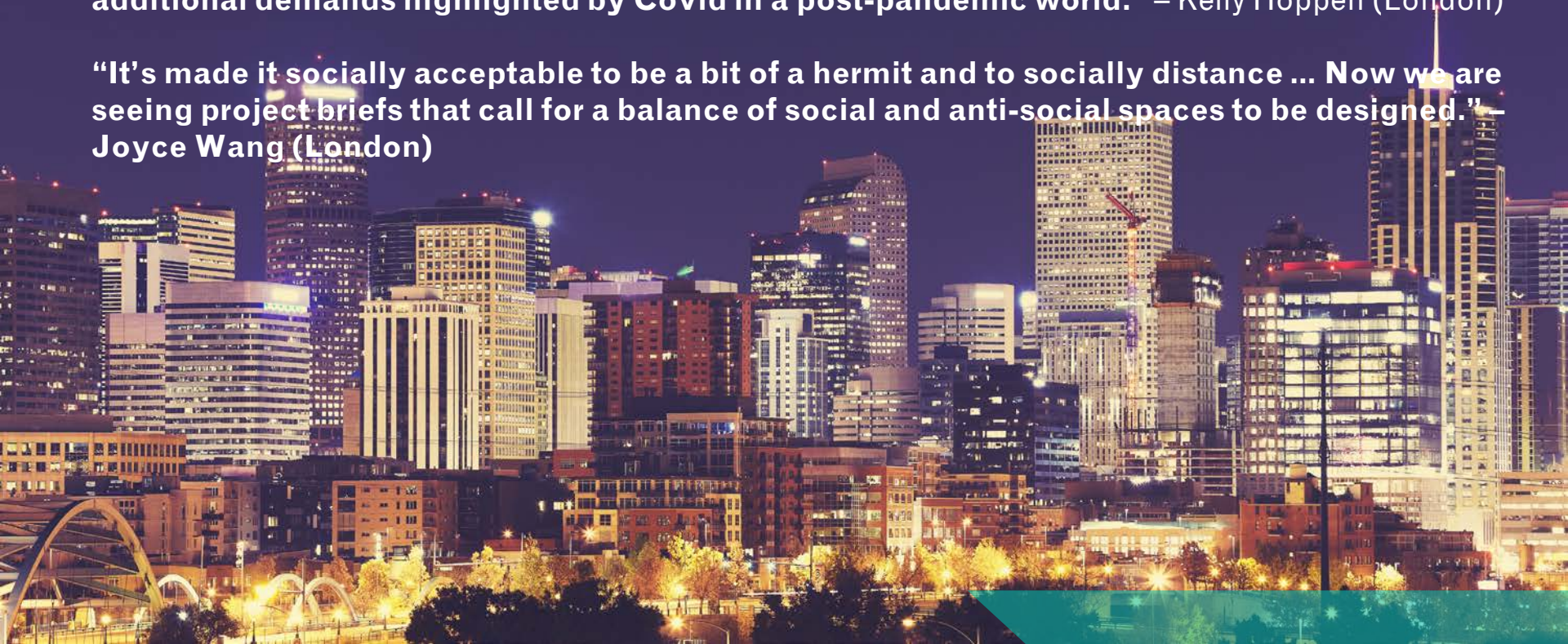
- Old-school energy projects?

- What about pipelines, powerplants, oil & gas, fracking?

Opportunities

“Interiors ... will have to be created with hygiene and practicality at the forefront. [D]esign details will need to be adapted to ensure space adheres to everyday living, with the additional demands highlighted by Covid in a post-pandemic world.” – Kelly Hoppen (London)

“It’s made it socially acceptable to be a bit of a hermit and to socially distance ... Now we are seeing project briefs that call for a balance of social and anti-social spaces to be designed.” – Joyce Wang (London)



What's Next?

“Activity-based work is becoming the standard, meaning we have to come up with new solutions for office workers to feel comfortable not having their own work station, and offices to feel vibrant even when they are half empty.” – Joyce Wang (London)

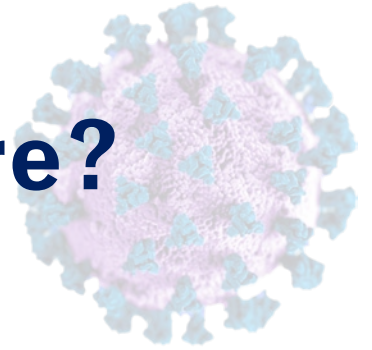


What's Next?



“It’s incredibly difficult to communicate complex ideas which are all about experience and tactility from remote locations ...” – Sabine Marcelis - Rotterdam

Evolving Standard of Care?



“In times past, the primary function of architectural structures was to shelter human beings from the elements and predatory animals. In the future, protecting people from viruses will be one of the important functions of architecture.” – Sun Dayong (Beijing)

Mid-Terms Coming in 18 Months!



Zoom Meeting

Audio only

With video



Optimism?

Cities are not dead and will come back. They have endured damaging pandemics in the past – in the 14th century Venice lost 60 per cent of its population because of the black death and yet, in the following centuries, we continued crowding its narrow streets and theatres. – Carlo Ratti (Turin)



THANK YOU!

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