

CONTRACTS AND MORE

WHO ARE WE AND WHAT DO WE DO?

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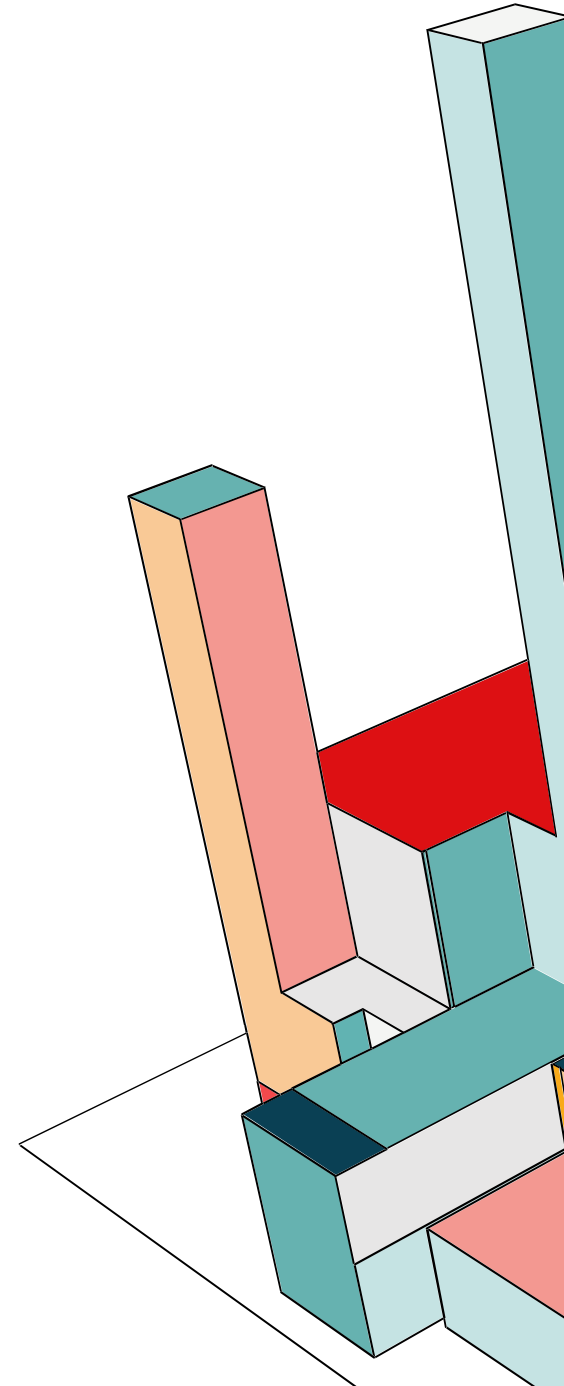
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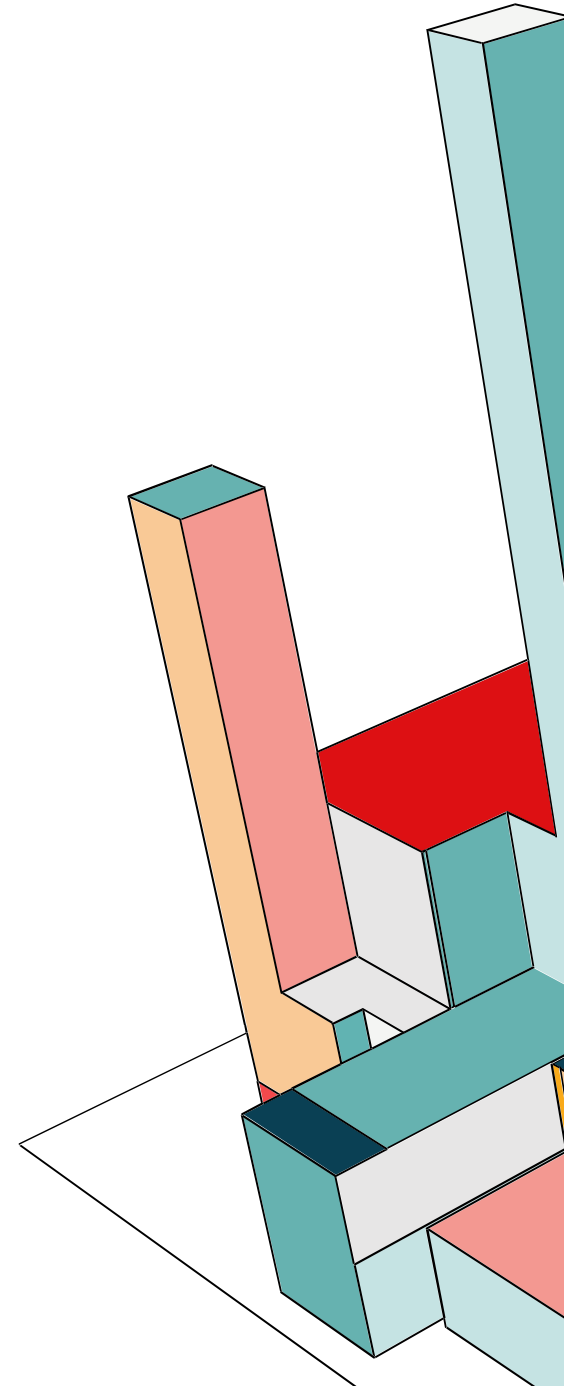
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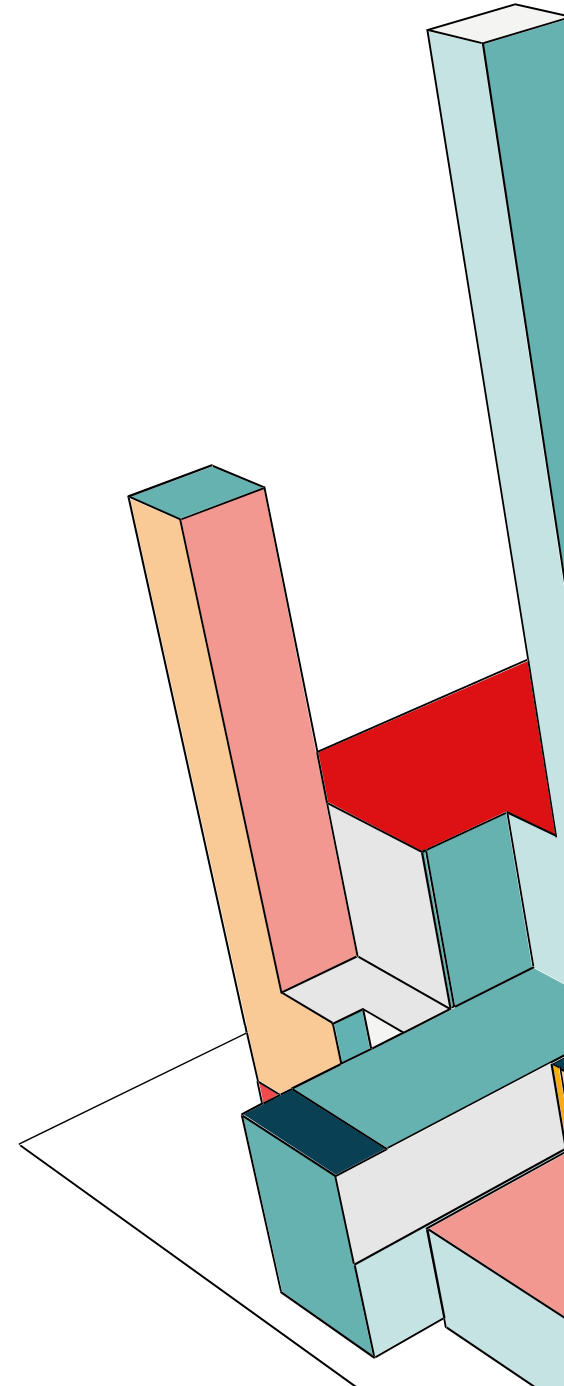
WHY WE ARE HERE?

- 30% of Construction Projects end in Mitigation, Mediation or Litigation.



GROUND TO COVER?

- Construction Contract “Fine Print”
- Insurance Coverage Issues
- Disputes Arising During the Course of the Work
- Alternative Dispute Resolution
- Payment and Delay Issues
- Liability Claims
- Construction Lien’s / Mechanic’s Liens
- Title Disputes
- Surety and Bonding Issues

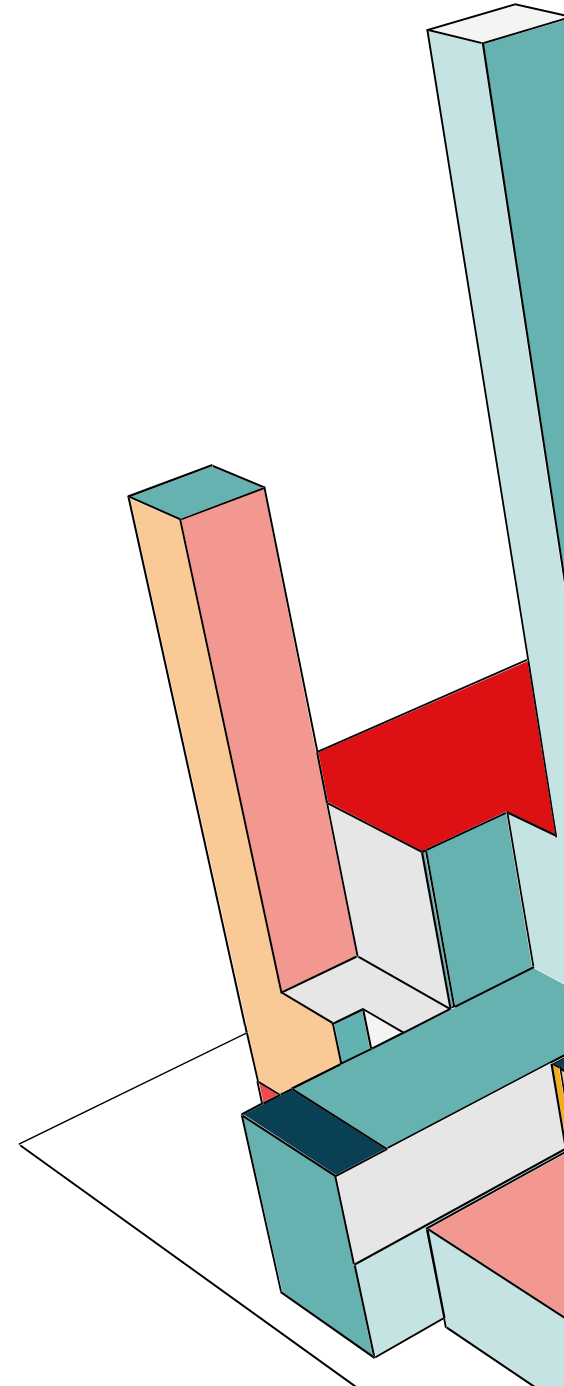


A CAUTIONARY TALE ABOUT THE IMPORTANCE OF DOCUMENTING YOUR WORK

YOUR WORDS MATTER; USE THEM CAREFULLY!

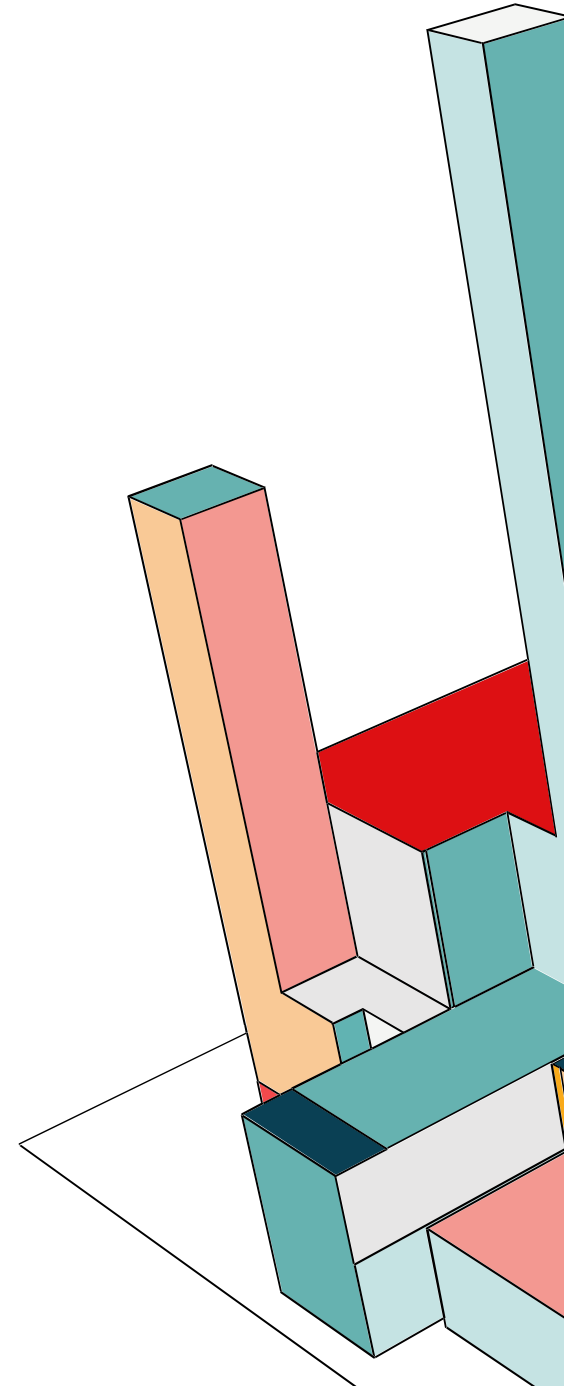
- Failing to prepare is preparing to fail.
 - Deposition preparation
 - Where things can go wrong:
 - **Question:** What kind of due diligence did you do on that? You – just as far as you were concerned its not within my scope, [name omitted] will take care of that?
 - **Answer:** I could have had a bad day, could have been fighting with my wife. I don't know. But for another reasons that I just don't do a lot of due diligence on that particular comment because there is a lot of people involved in this and I wasn't sure that that really applied.

Takeaway: Thou shall prepare for depositions. You might not be able to win a case in your deposition, but you can lose it.



RAINBOW RANCH STORY – JANUARY 15, 2021

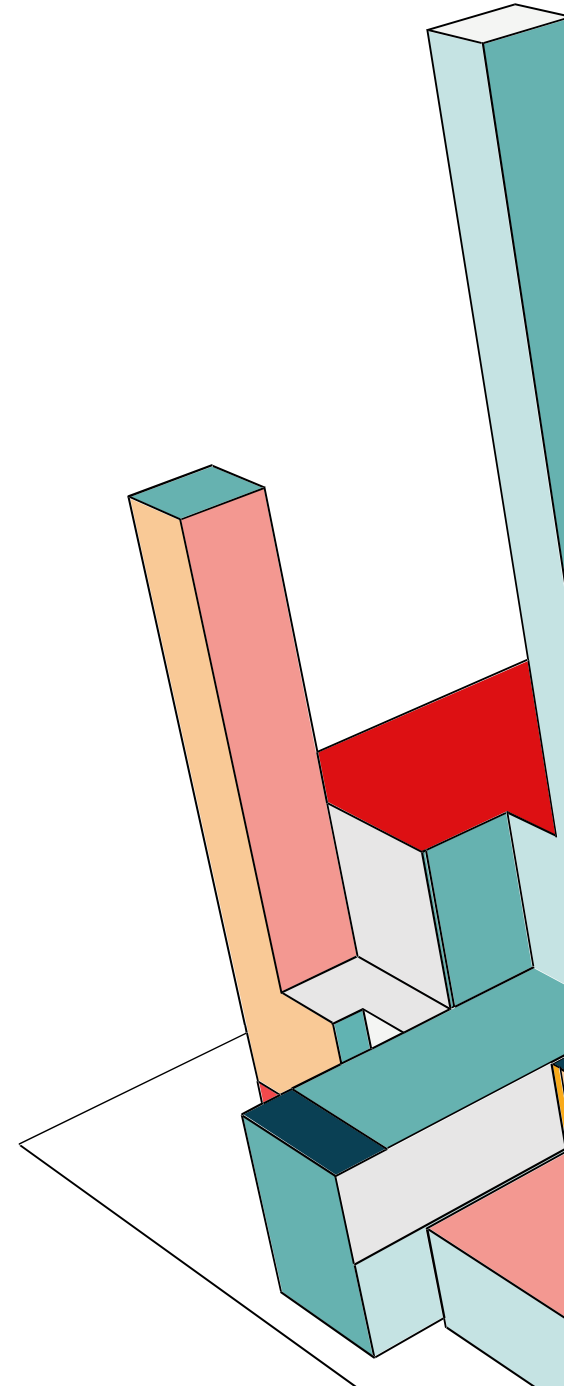
- Craziest case I have ever been involved with in over 25 years of practice.
Takeaway: Be vigilant in documenting your work.
 - Background – Couple on their honeymoon after Alabama wedding.
 - Carbon Monoxide issue – Boiler on the opposite side of the wall from the room they stayed in.
 - Multiple entities worked on this boiler.
 - Deposition of the business owner – and planting of evidence
 - My client had worked on this matter, the last time was about 14 months prior to the failure. They documented their work:



RAINBOW RANCH (CONTD.)

- My client worked on the boiler on 12/5/18 - WO when arrived record noted that "flow switch had been jumped" and "Need to replace flow switch and remove jumper for safe operation."
- **February 11 & 15 2019** - WO noted that High Limit Switch failed and my client left boiler off. Returned with the refractory shield and it was running. The WO noted that: "Found boiler running, someone bypassed [high] limit switch." "Unsafe"
- Said that needed replaced.
- Provided bids to replace boiler or heat exchanger - Rainbow Ranch declined.

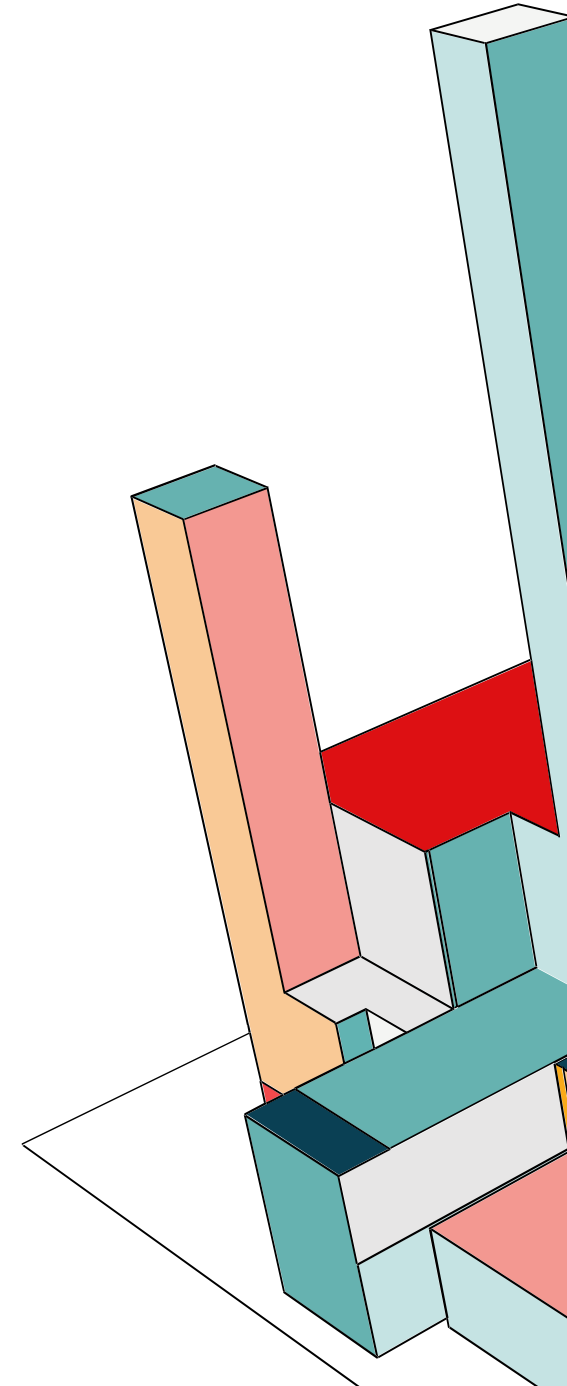
Takeaway: Document your work - especially when the proverbial eyebrow is raised. Change order or alteration.



CONSTRUCTION CONTRACT TERMS AND PROVISIONS

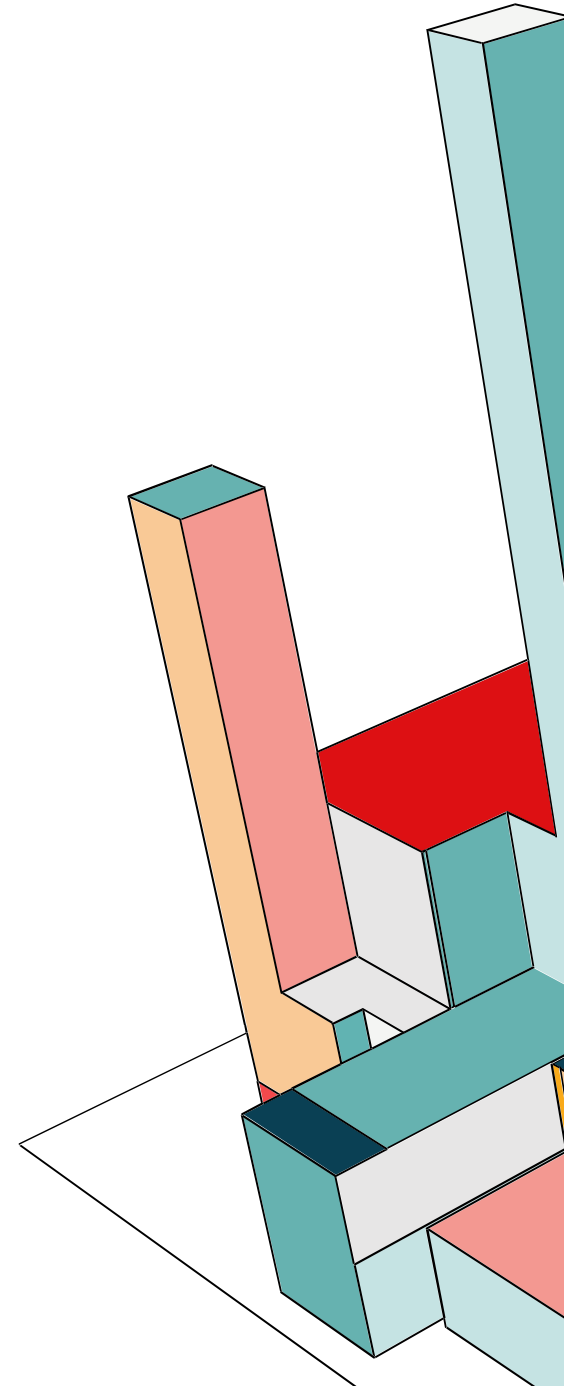
Large Commercial Project

- AIA Series / Family of Contracts
- Obligations, rights, and remedies can depend on:
 - The standard contract language
 - Modifications made by the parties
 - Interconnectedness of various contract documents
 - Takeaway: Read the contract before you sign and know what you are signing. If you don't know, then ask questions. A little bit of time and money upfront can save significantly more time and money down the line.



Single Family Residence

- Is there a contract?
- Does it make sense?
- Are its provisions enforceable?
- Contracts should say what they mean; if you don't mean it, don't say it.

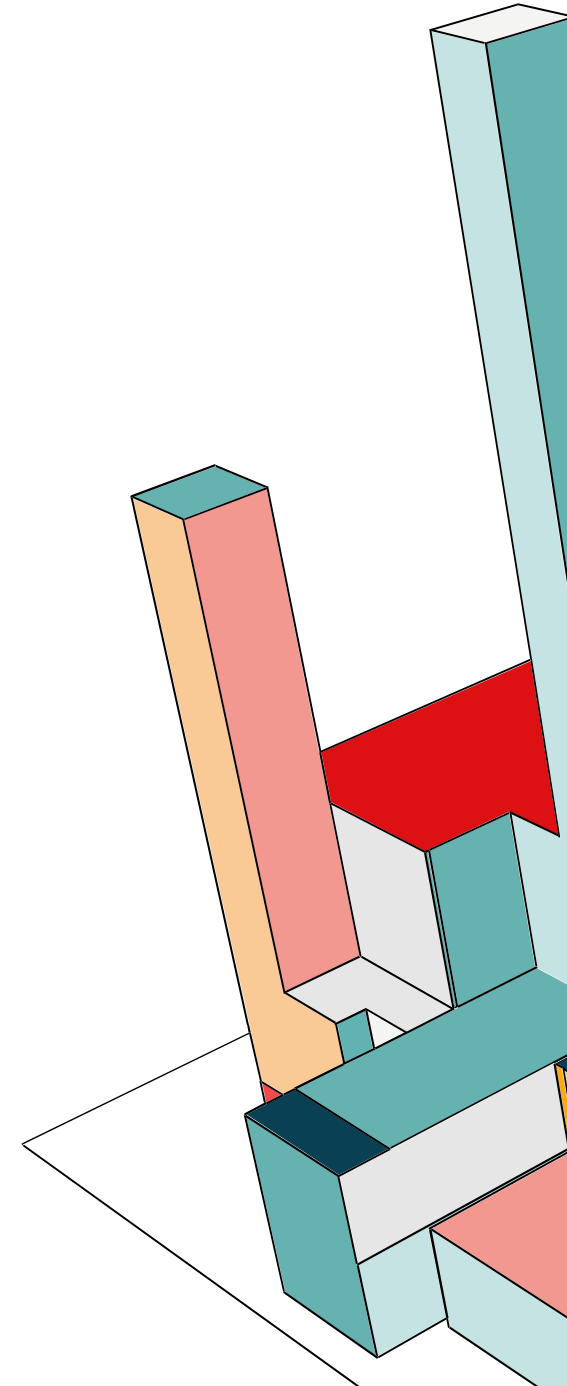


AIA® Document A101® – 2017

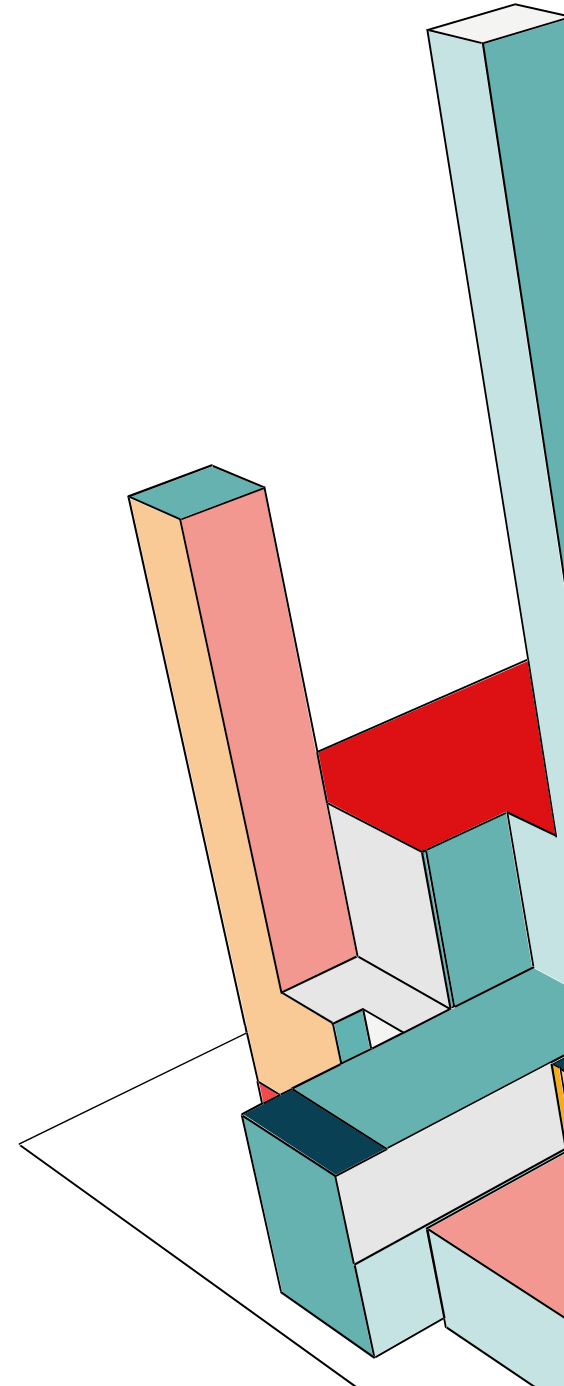
*Standard Form of Agreement Between Owner and Contractor
where the basis of payment is a Stipulated Sum*



General Conditions of the Contract for Construction



- Date of Substantial Completion
 - How many CD's until substantial completion?
- Contract Sum
 - Subject to additions and deductions?
- Liquidated Damages
 - What is the pre-set daily penalty for being late?



- Progress Payments

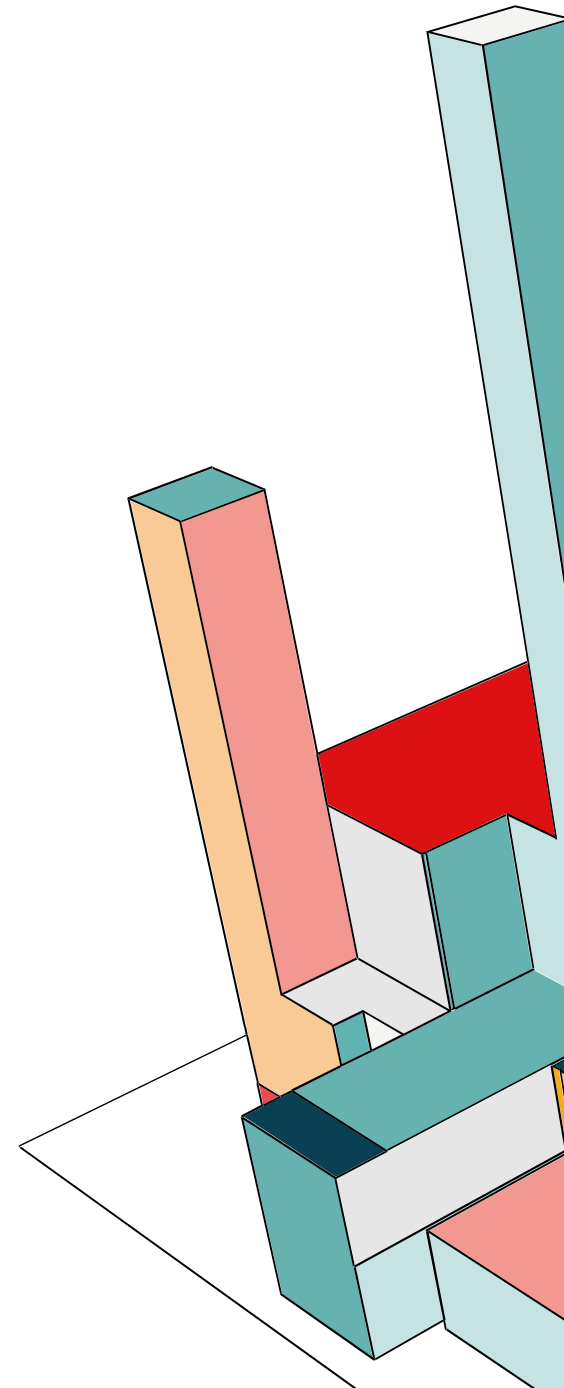
- Pay attention to the timing for submission of pay apps.

- Attorney Fees and Interest

- Is there an attorney fees clause?

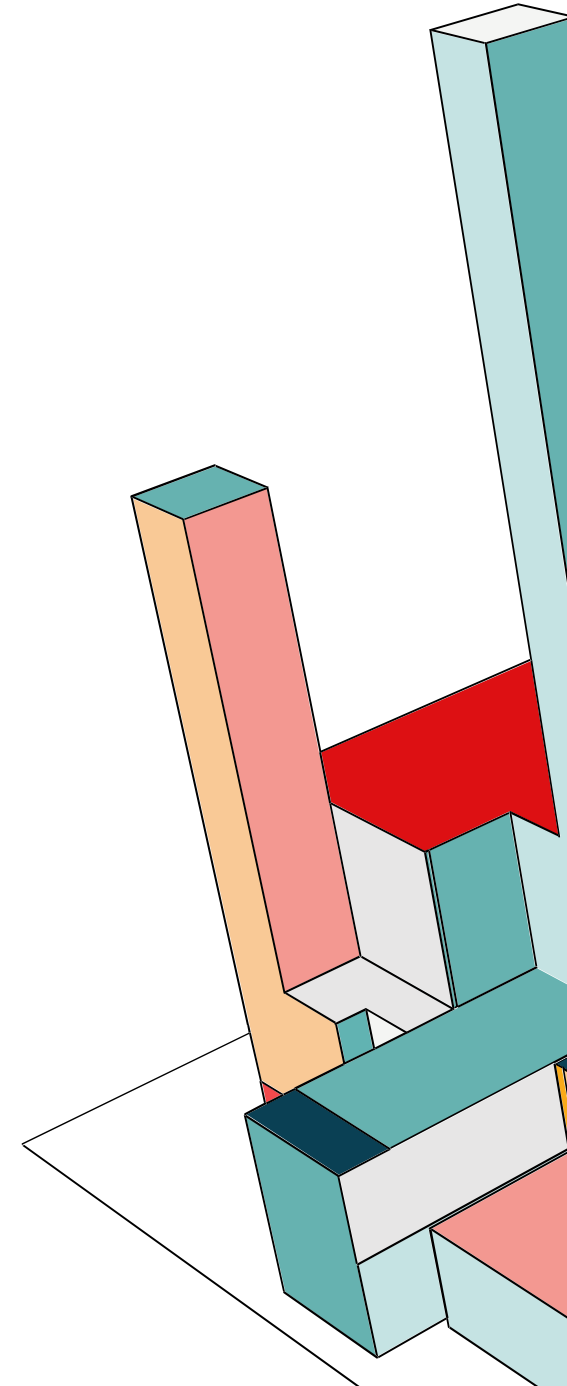
- What is the standard for recovery?

- Statutory Interest Rate (Default) or Agreed-Upon Rate?



- Dispute Resolution Process

- What happens when a dispute arises mid-project?
- Is there a designated Initial Decision Maker ("IDM")?
- What does the decision-making process look like?



§ 6.2 Binding Dispute Resolution

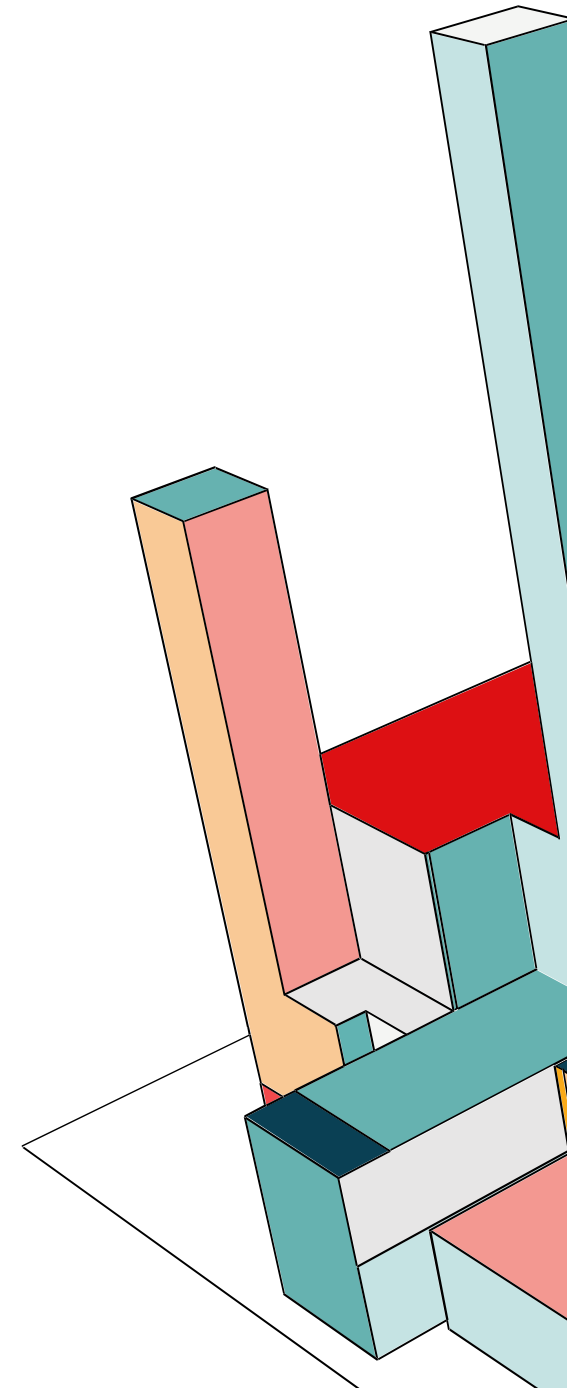
For any Claim subject to, but not resolved by, mediation pursuant to Article 15 of AIA Document A201-2017, the method of binding dispute resolution shall be as follows:

(Check the appropriate box.)

☐ Arbitration pursuant to Section 15.4 of AIA Document A201-2017

☒ Litigation in a court of competent jurisdiction

☐ Other *(Specify)*



ARBITRATION VERSUS LITIGATION

Arbitration

- Parties Must Agree to Participate
- (*Perceived*) Expedient Resolution
- Expensive
- Arbitrators Experienced in Subject Matter
- Confidential
- No Jury or Public Trial
- Almost Non-Existent Appellate Rights

Litigation

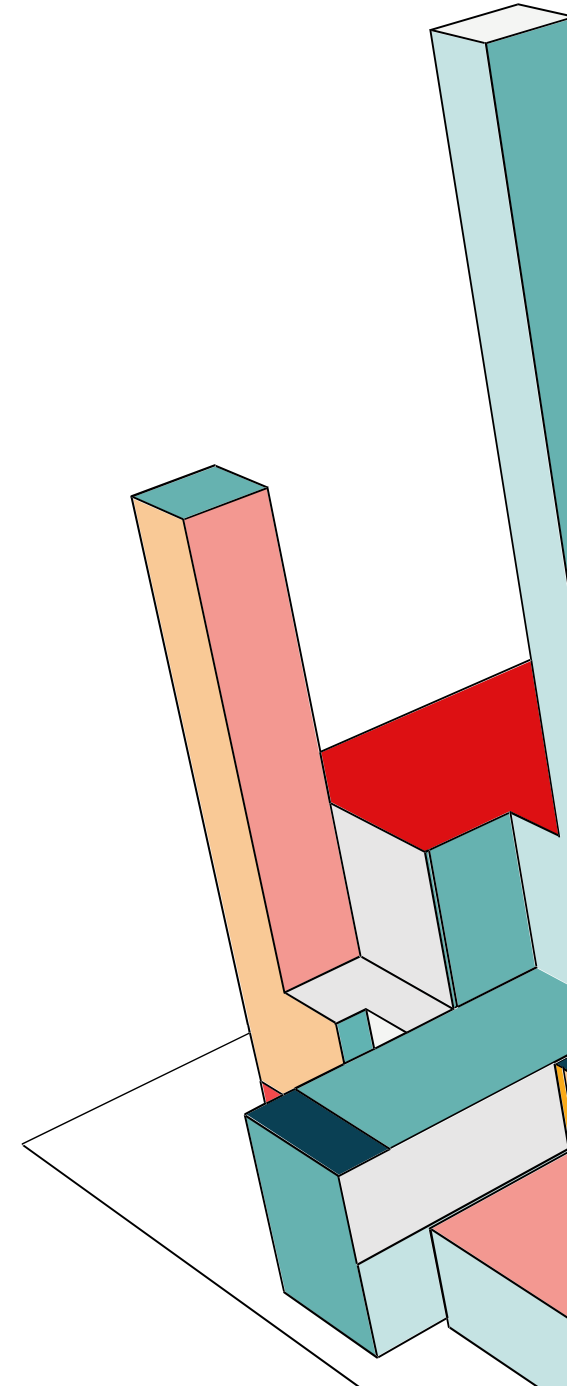
- Typically, Slow
- Still Expensive
- "Jury of Your Peers"
- Public Proceedings
- Appellate Rights Exist
- Enforceability of Judgments

WHAT DOES LITIGATION LOOK LIKE?

COMMON CONSTRUCTION CLAIMS AND MONTANA LEGAL STANDARDS

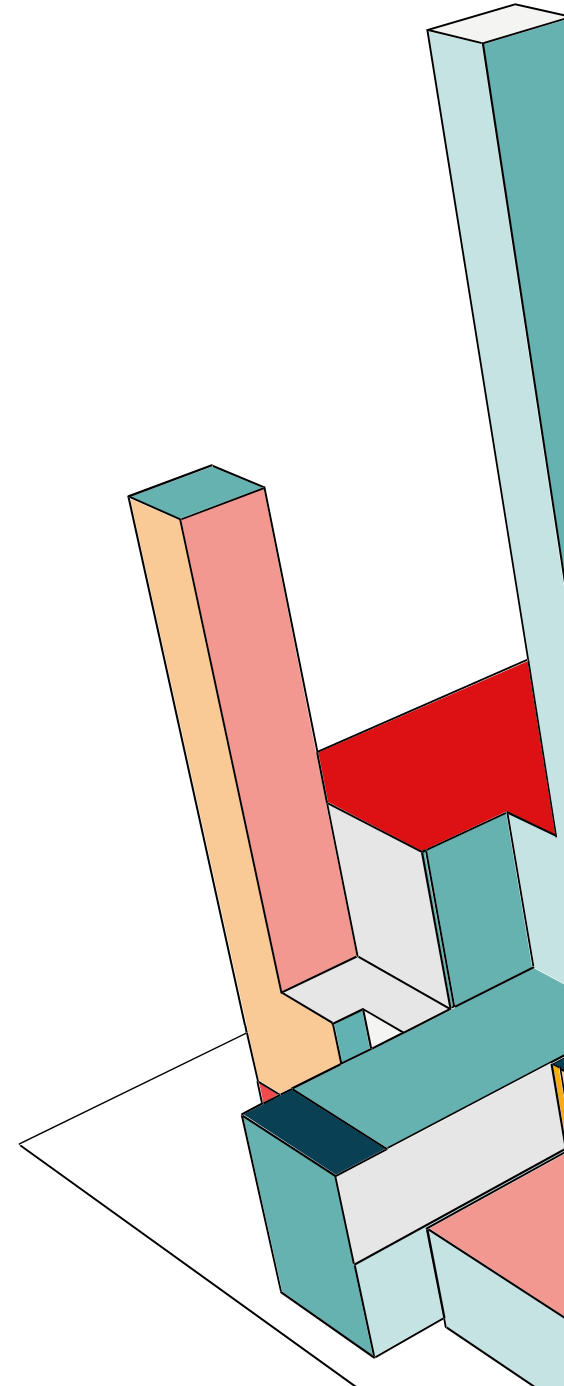
Negligence / Professional Negligence

- Default: The work must be performed in a “reasonably skillful and workmanlike manner.” How is this standard assessed in litigation?
- Did you (or your employee, agent, representative, etc.) breach that standard of care?
- However, the parties can contract for a higher standard of care.
- What are the damages?
- Third-Party Claims and Litigation?



COMMON CONSTRUCTION CLAIMS AND MONTANA LEGAL STANDARDS (CONTD.)

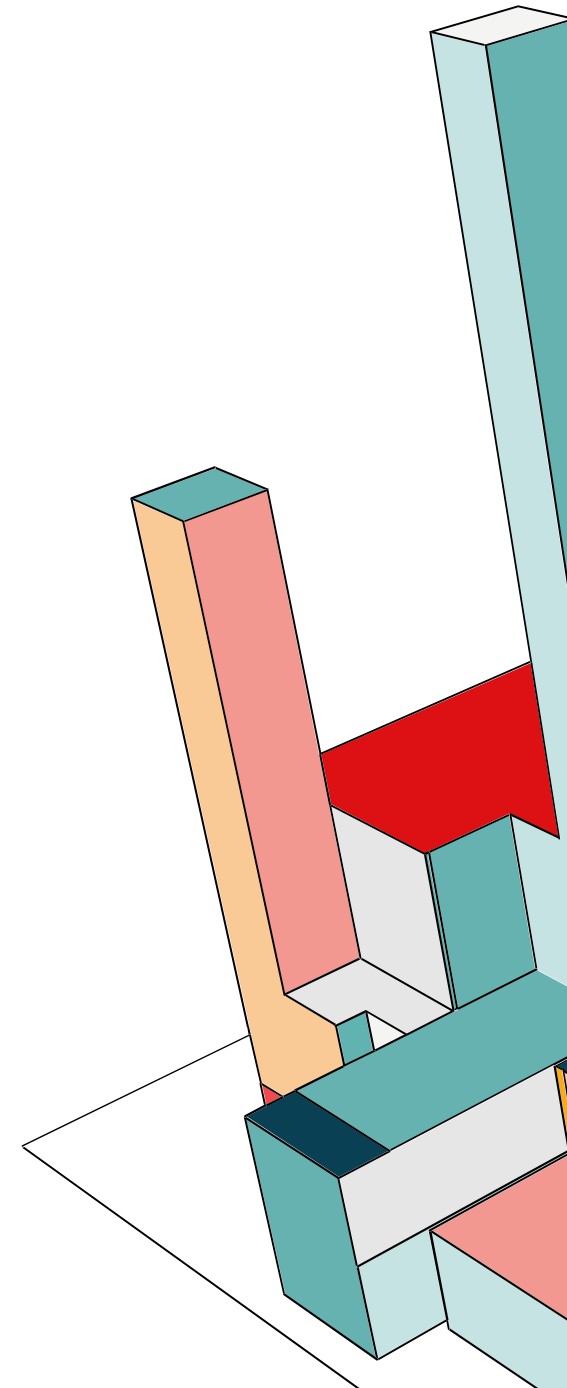
- The Standard of Care Can Be Pulled From the Following:
 - Common law
 - Statute, Regulation, or Code
 - Contract and Contract Documents (Drawings, Plans, etc.)
 - Accepted Industry Standards and Practices
 - Manufacturer's Instructions or Recommendations
 - Unique Circumstances of the Situation



COMMON CONSTRUCTION CLAIMS AND MONTANA LEGAL STANDARDS (CONTD.)

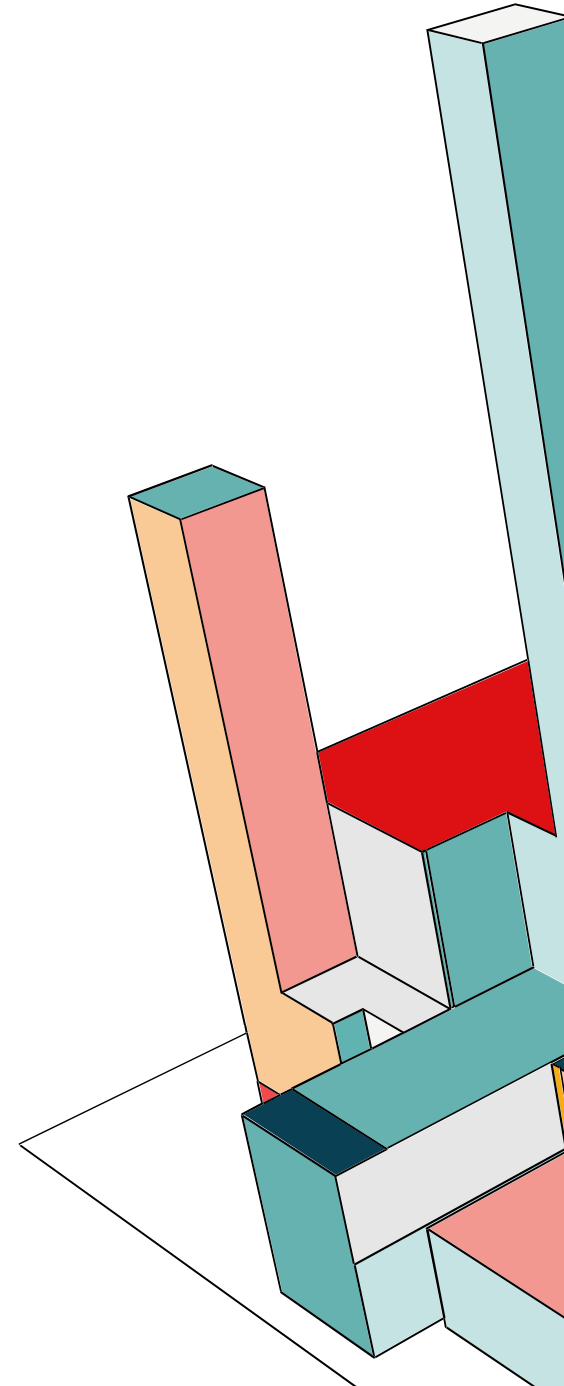
Breach of Contract

- What term or provision was breached and how was it breached?
- Was that term or provision legally enforceable?
- What is it going to take to make things right or make the innocent party whole?
- Is there a waiver of consequential damages?
- Are liquidated damages available?



DEFENSES TO CLAIMS

- Satisfied All Standards of Care
- Comparative Negligence (27-1-702, MCA)
- Apportionment of Fault / Contribution (27-1-703, MCA)
- Contract-Based Indemnity and Contribution
 - But watch out for the Construction Contract Anti-Indemnity Statute (28-2-2111, MCA); however, liability caps are generally allowed if both parties are sophisticated businesses making informed decisions.
- Mitigation of Damages

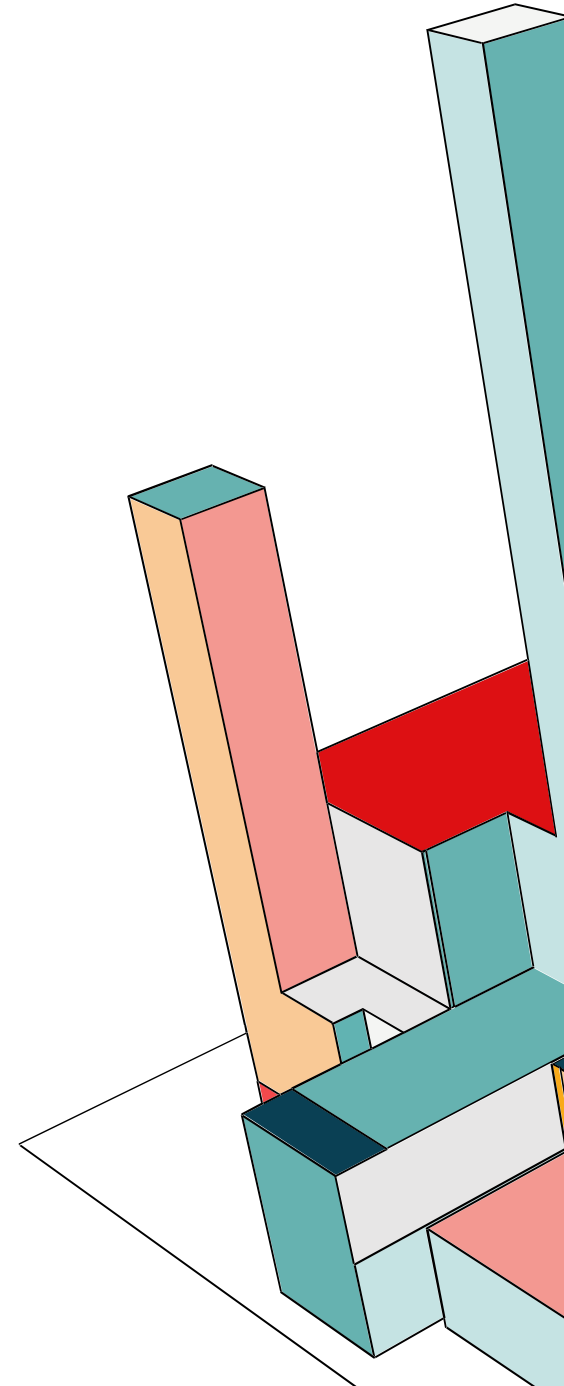


DEFENSES TO CLAIMS (CONTD.)

The *Spearin Doctrine* provides that if a "contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *U.S. v. Spearin*, 248 U.S. 132, 136 (1918). Pursuant to the *Spearin Doctrine*, there is an implied warranty that if the specifications were complied with, the work would be adequate or satisfactory. *Shepard v. Handcrafted Constr.*, 2019 Colo. Dist. LEXIS 4479, *14.

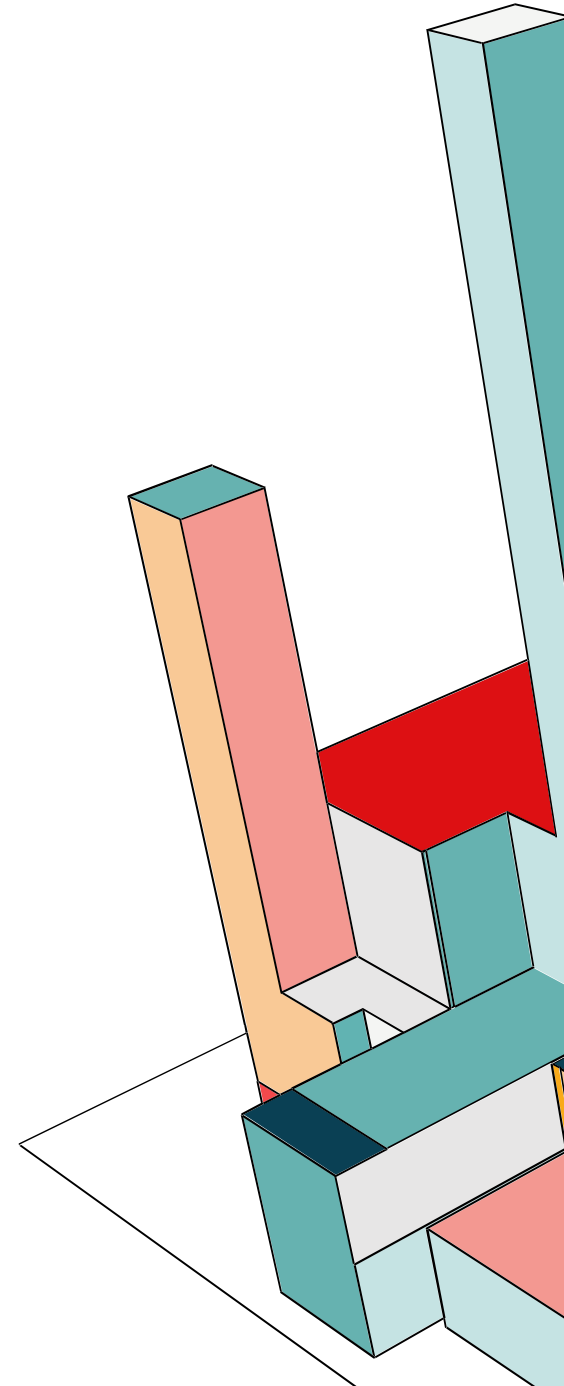
→ **Performance Specifications:** *Spearin* inapplicable. Performance specifications state the results to be obtained and leave it to the contractor to achieve those results.

→ **Design Specifications:** *Spearin* applicable. Design specifications state how the contract is to be performed; no deviations are permitted.



DEFENSES TO CLAIMS (CONTD.)

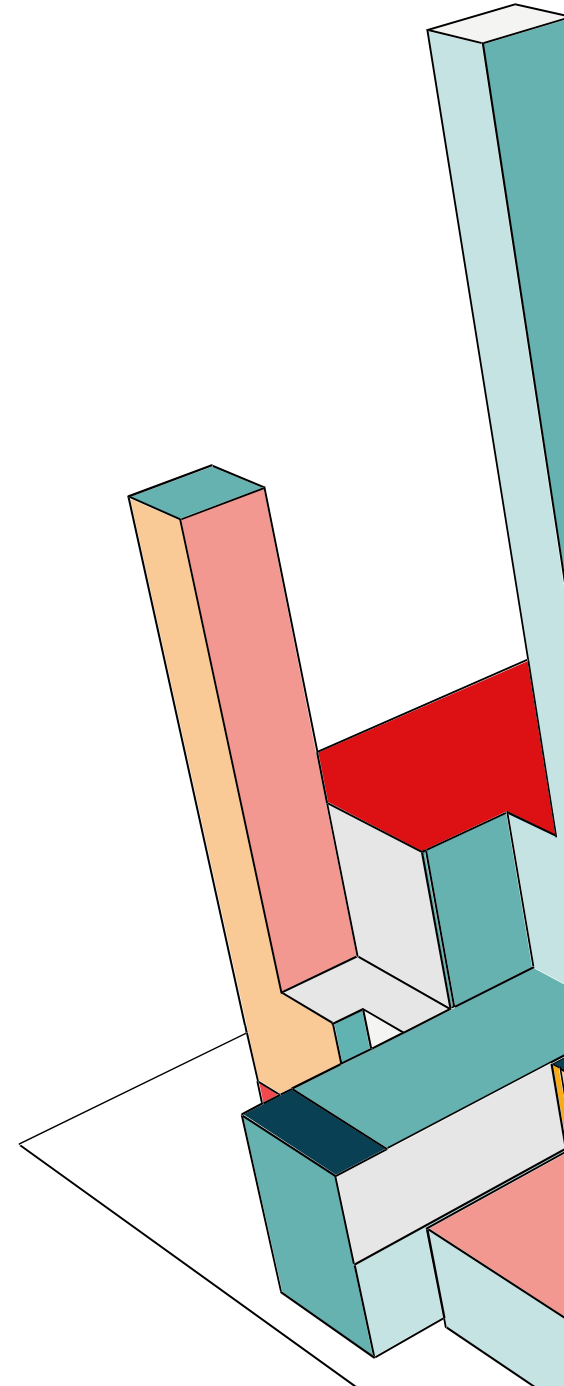
- Statute of Limitations (27-2-202, MCA and 27-2-204, MCA)
 - Negligence (3 years; however, the discovery rule applies)
 - Contract (8 written agreement; 6 oral agreement)
- Statute of Repose (27-2-208, MCA)
 - Bars claims commenced more than 6 years after completion of the improvement (*i.e.*, that degree of completion at which the owner can utilize the improvement for the purpose for which it was intended or when a completion certificate is executed, whichever is earlier).



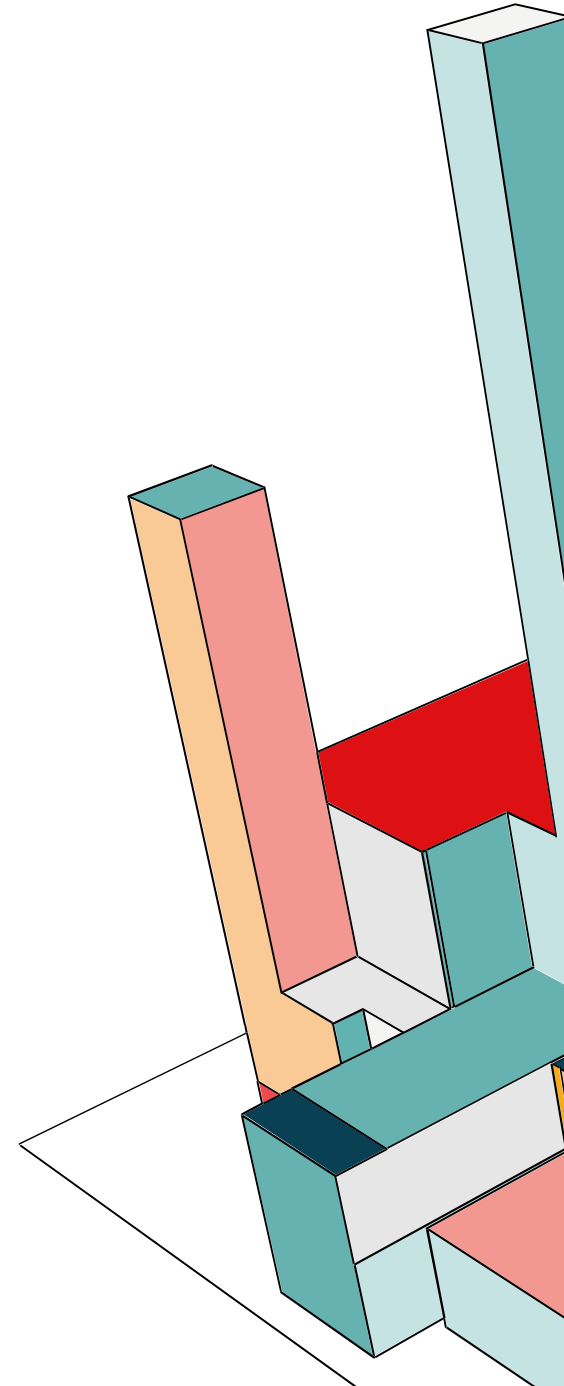
INSURANCE COVERAGE AND CONSIDERATIONS

ARE YOU COVERED?

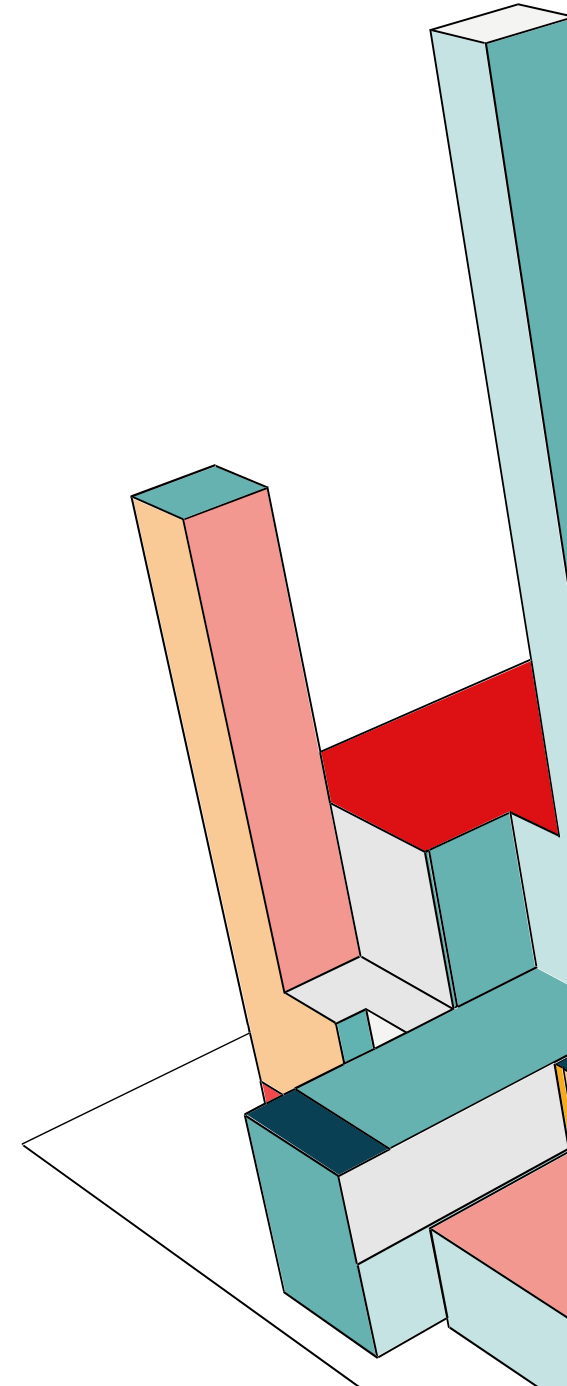
- Types of Insurance Available:
 - Workers Compensation
 - OCIP (Owner Controlled)
 - Builders Risk
 - Commercial General Liability



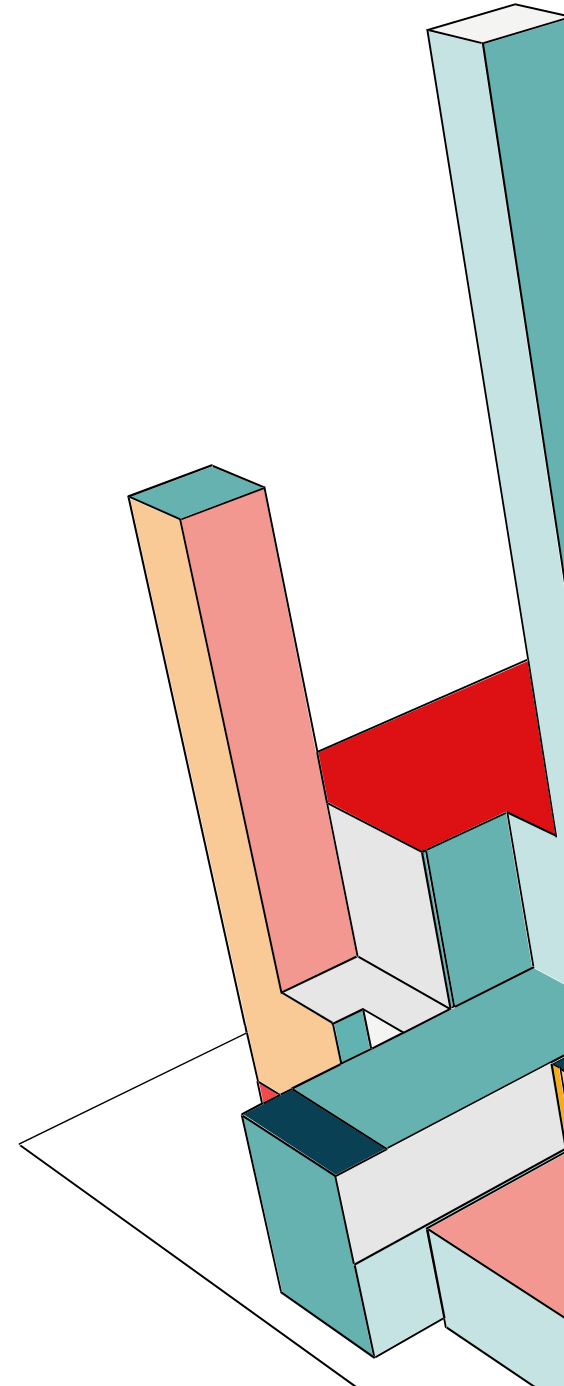
- Workers Compensation – You know what that is about
- OCIP – The GC and all enrolled subcontractors. Large projects – think Big Sky and Yellowstone Club



- Builders Risk Insurance – Covers Fire, Lightening, Theft, Vandalism
 - **NOT** faulty work



- Commercial General Liability -- Most common or known:
 - Additional Insured Endorsement – In writing and make sure you get a copy.
 - Not a bond:
 - Does not cover faulty work whether during construction or after;
 - Not cover faulty work – does cover resulting damage
- But always duty to defend v. duty to indemnify – In it for a penny in it for a pound



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