A cluster of abstract, 3D-style geometric shapes is positioned on the left side of the image. The shapes are rendered in a minimalist style with thin black outlines and pastel colors. They include various rectangles, squares, and a few triangular forms, all stacked together to create a sense of depth and volume. The colors used are soft blues, pinks, yellows, and reds.

CONTRACTS AND MORE

WHO ARE WE AND WHAT DO WE DO?

Ryan Browne

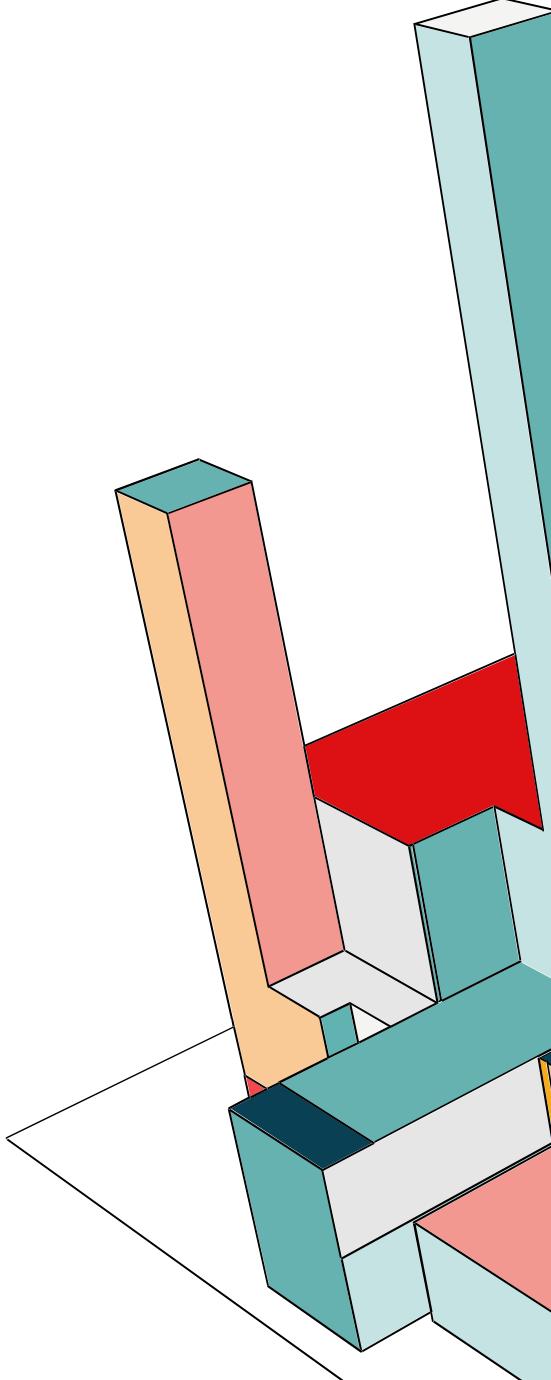
(406) 389-6236

ryan@montanacivildefense.com

Brian Taylor

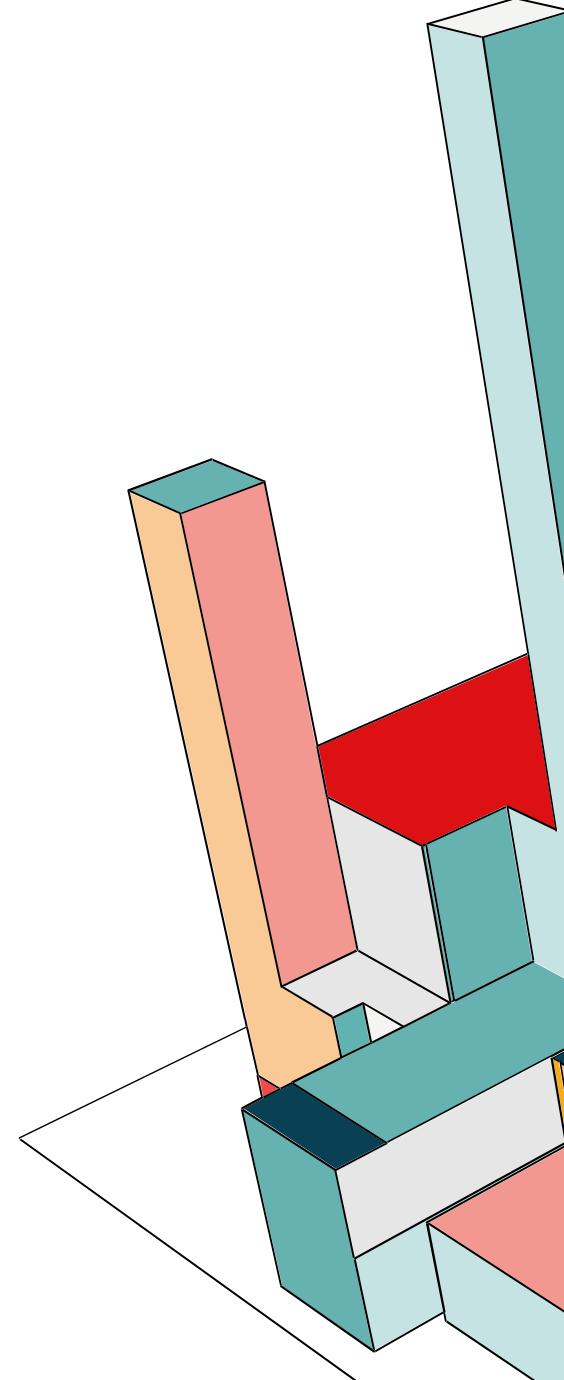
(406) 389-6204

btaylor@montanacivildefense.com



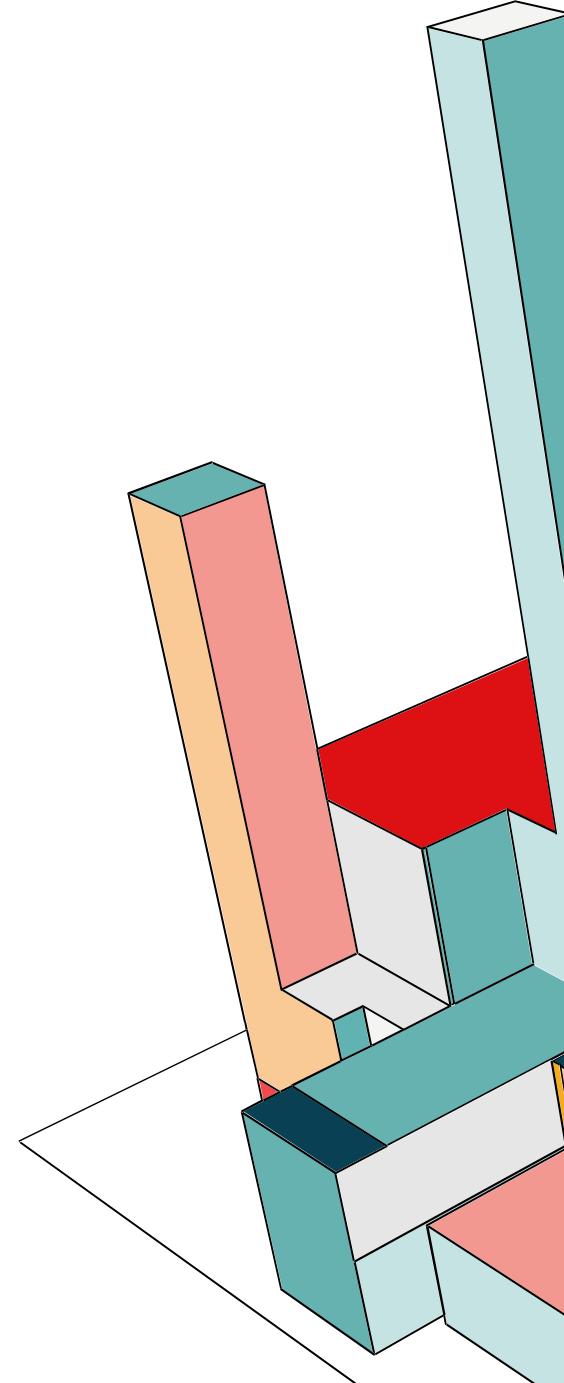
WHY WE ARE HERE?

- 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

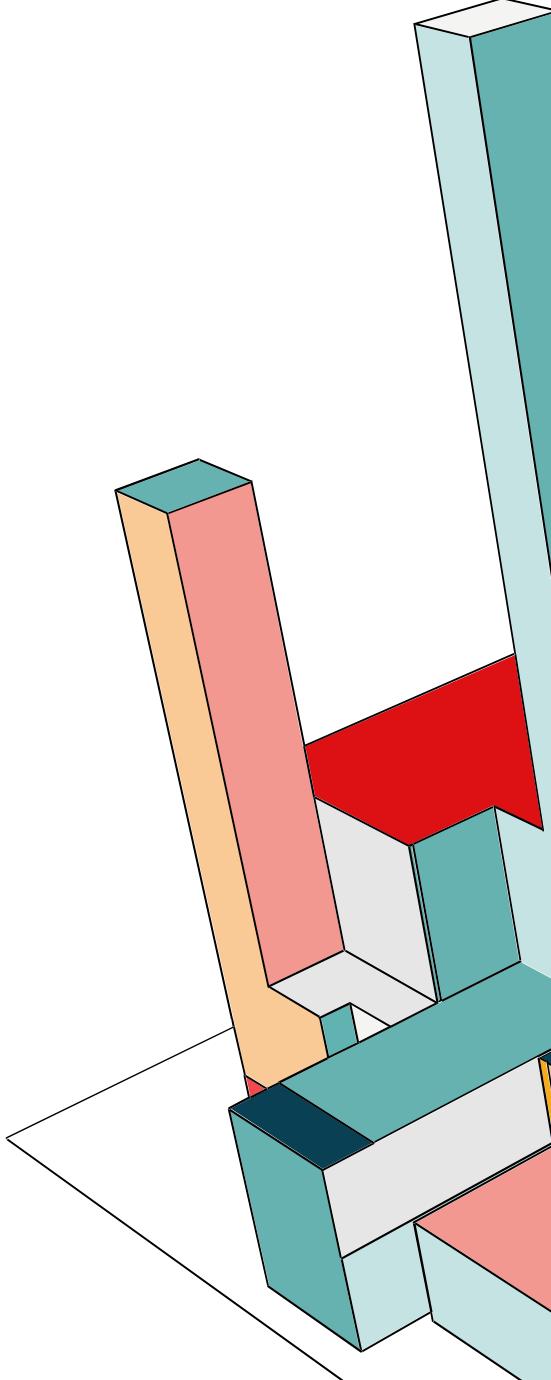


A CAUTIONARY TALE ABOUT THE IMPORTANCE OF DOCUMENTING YOUR WORK

YOUR WORDS MATTER; USE THEM CAREFULLY!

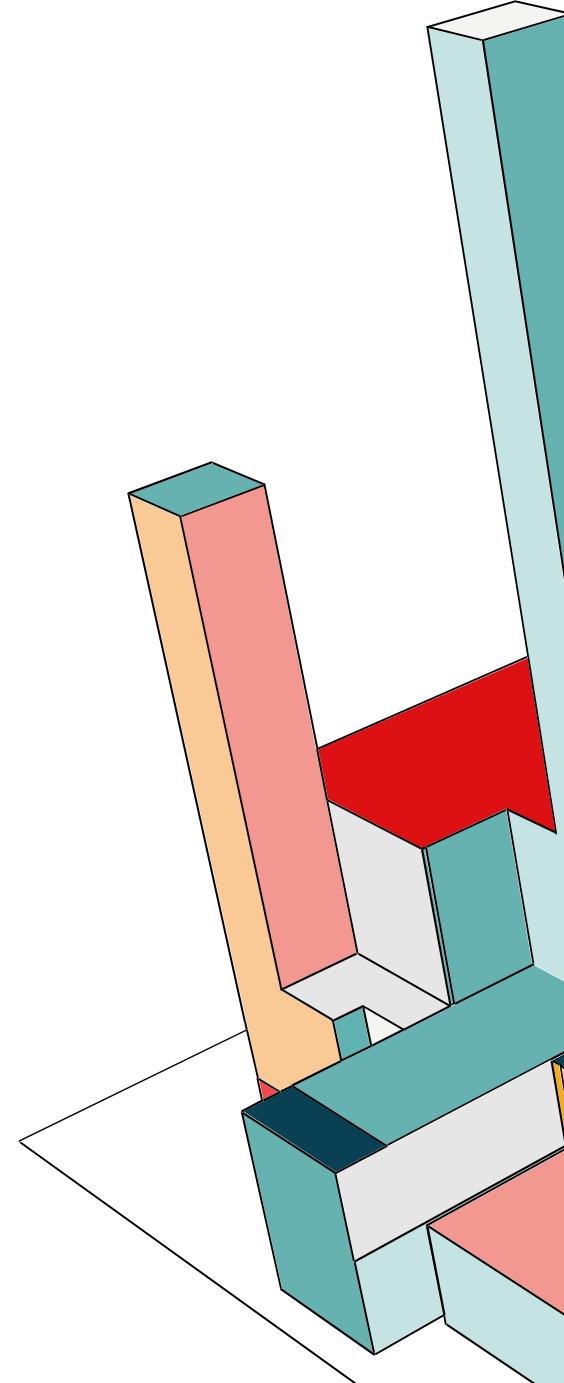
- Failing to prepare is preparing to fail.
 - Deposition preparation
 - Where things can go wrong:
 - **Question:** What kind of due diligence did you do on that? You - just as far as you were concerned its not within my scope, [name omitted] will take care of that?
 - **Answer:** I could have had a 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:

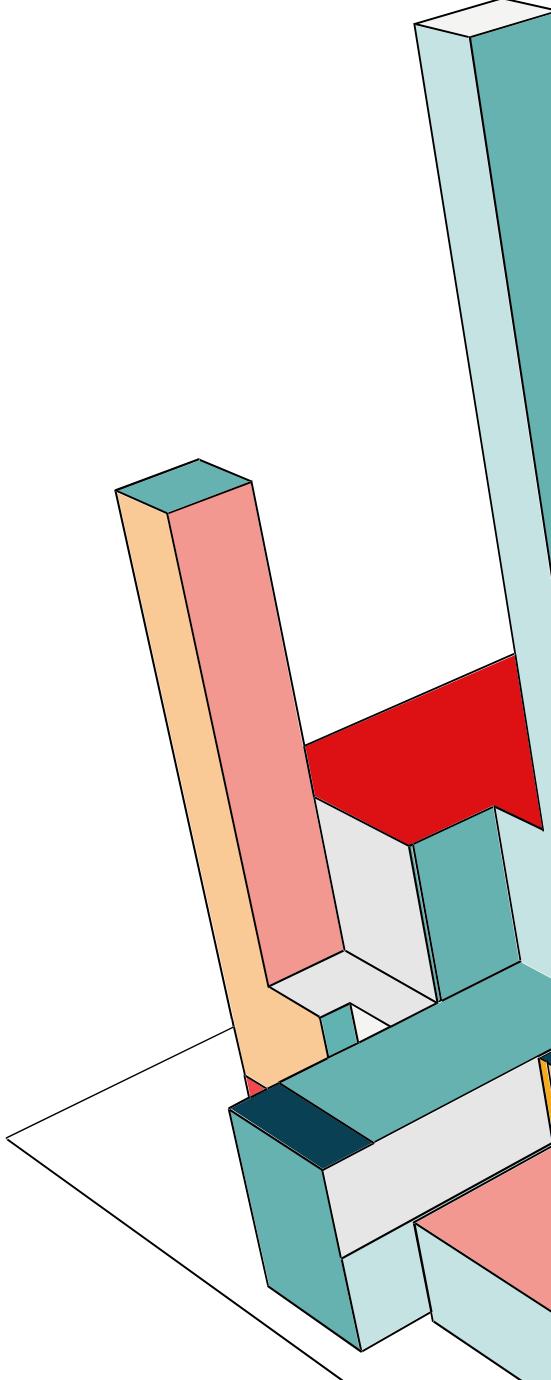


RAINBOW RANCH (CONTD.)

- 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.

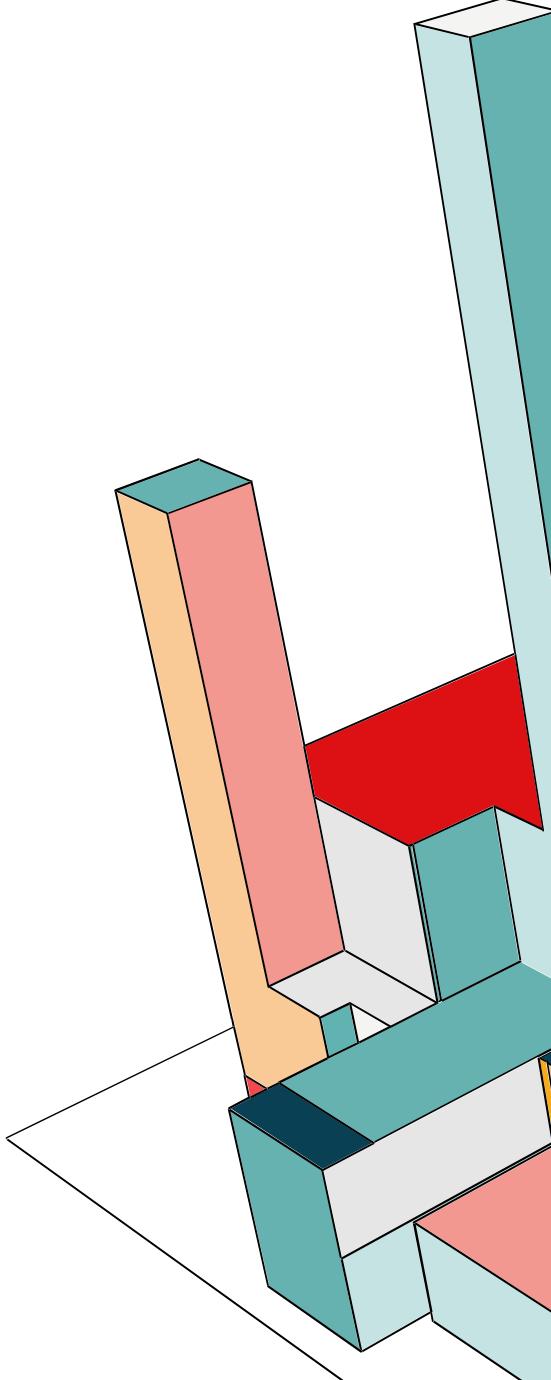
Change order or alteration.



CONSTRUCTION CONTRACT TERMS AND PROVISIONS

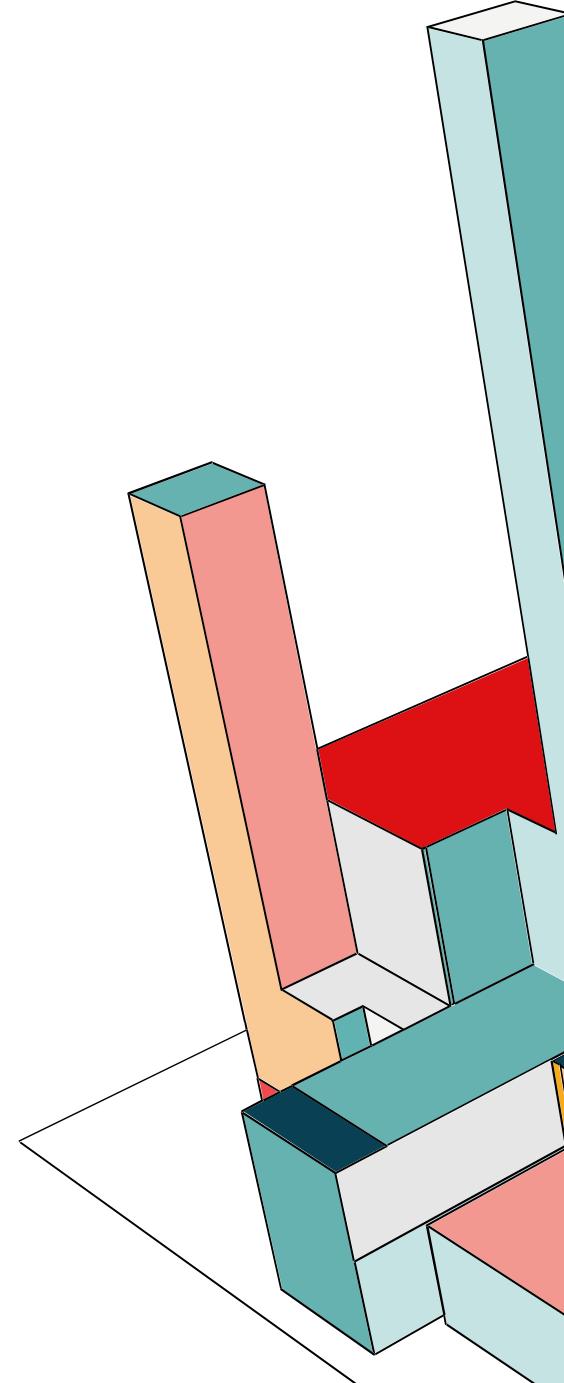
Large Commercial Project

- 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.



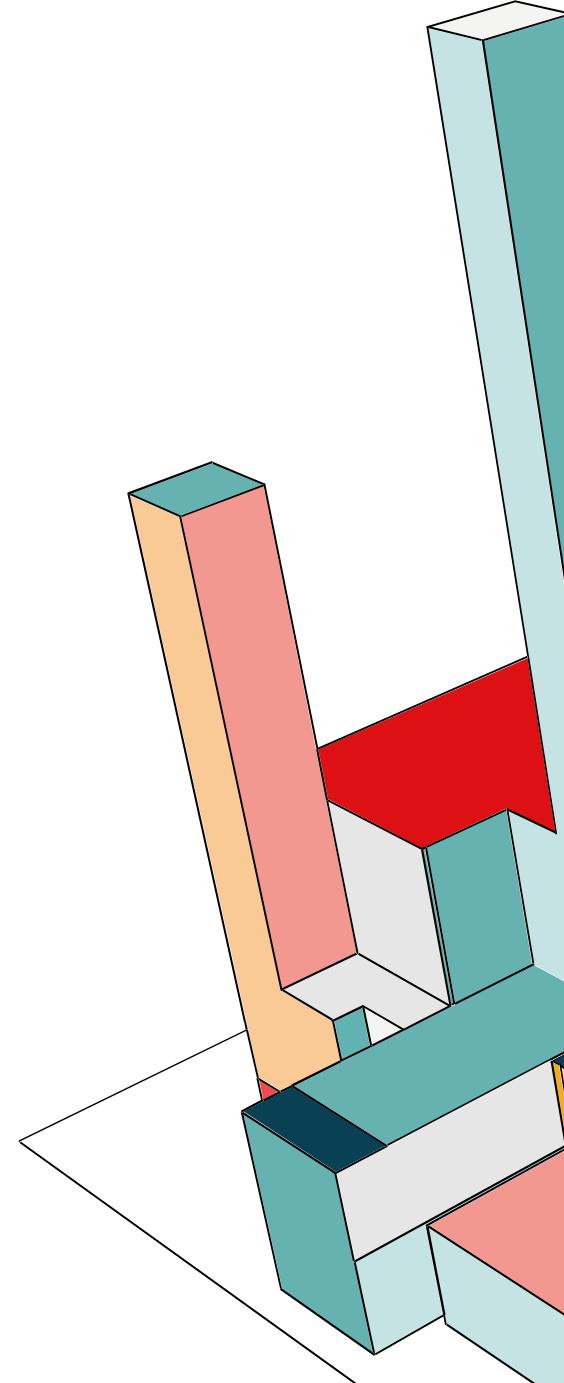
AIA® Document A101® – 2017

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

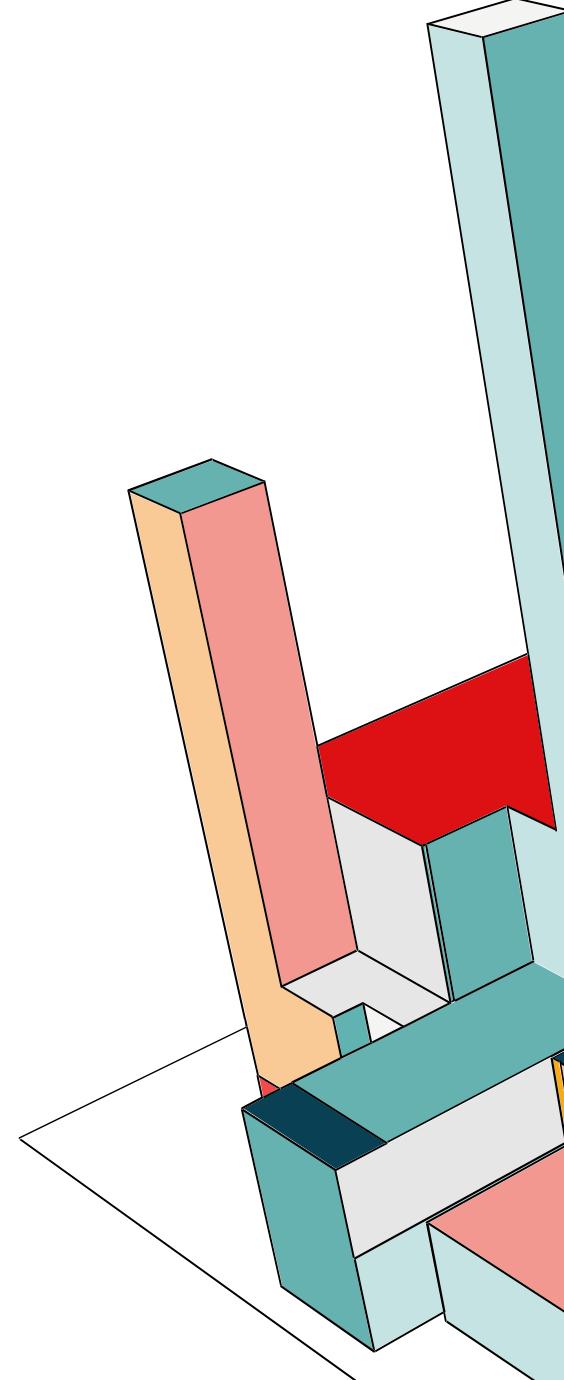


AIA® Document A201 – 2017

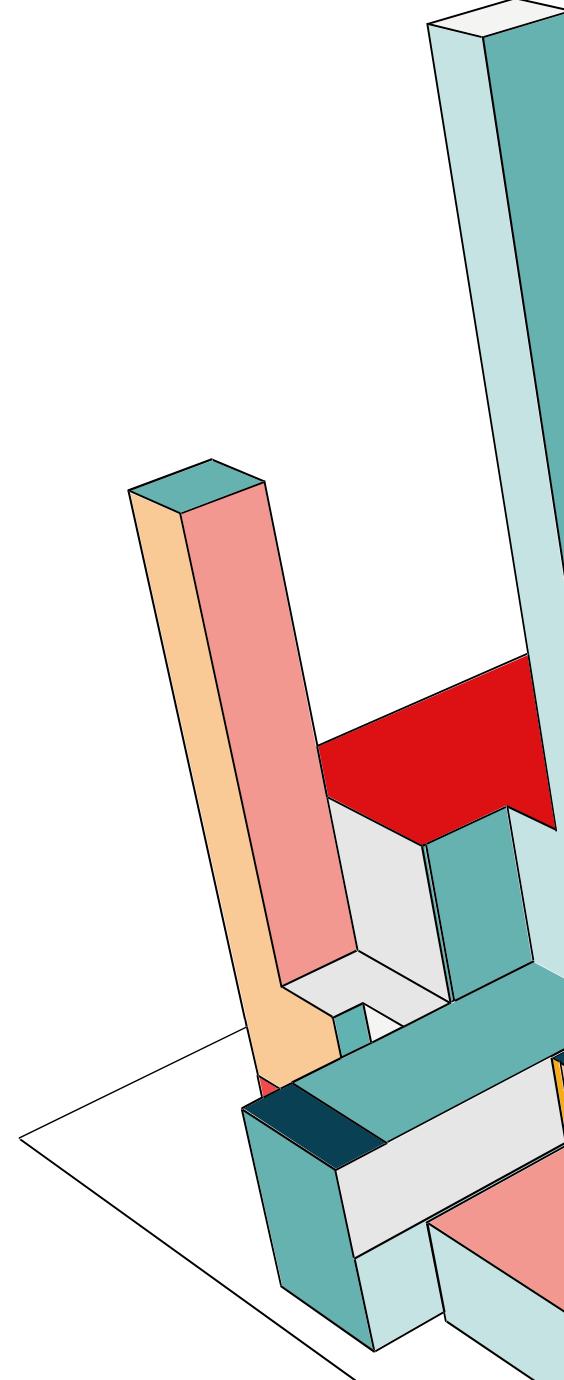
General Conditions of the Contract for Construction



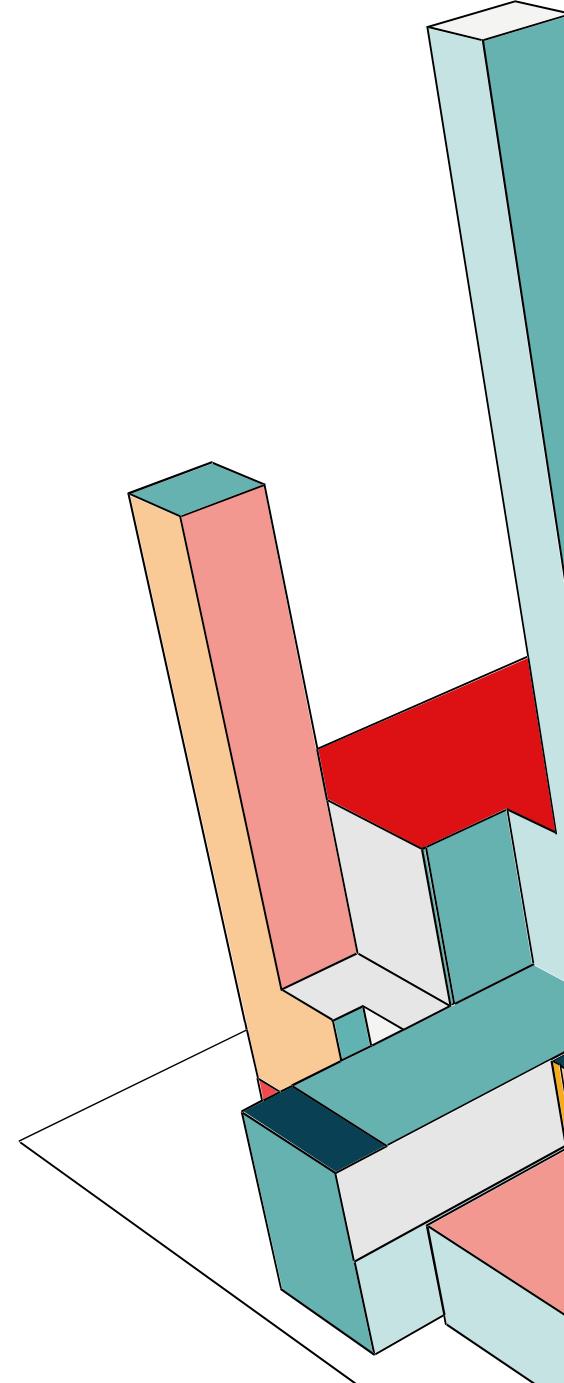
- Date of Substantial Completion
 - How many CD's until substantial completion?
- Contract Sum
 - Subject to additions and deductions?
- Liquidated Damages
 - What is the pre-set daily penalty for being late?



- **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

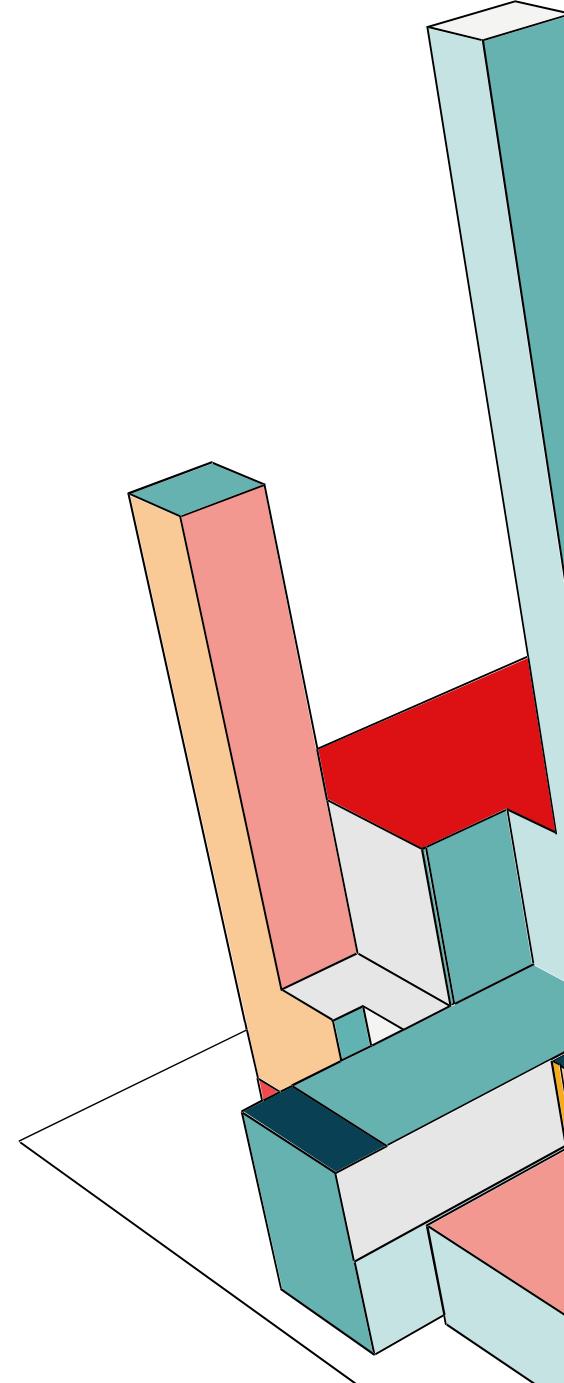
For any Claim subject to, but not resolved by, mediation pursuant to Article 15 of AIA Document A201 2017, the method of binding dispute resolution shall be as follows:

(Check the appropriate box.)

[« »] Arbitration pursuant to Section 15.4 of AIA Document A201 2017

[« X »] 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

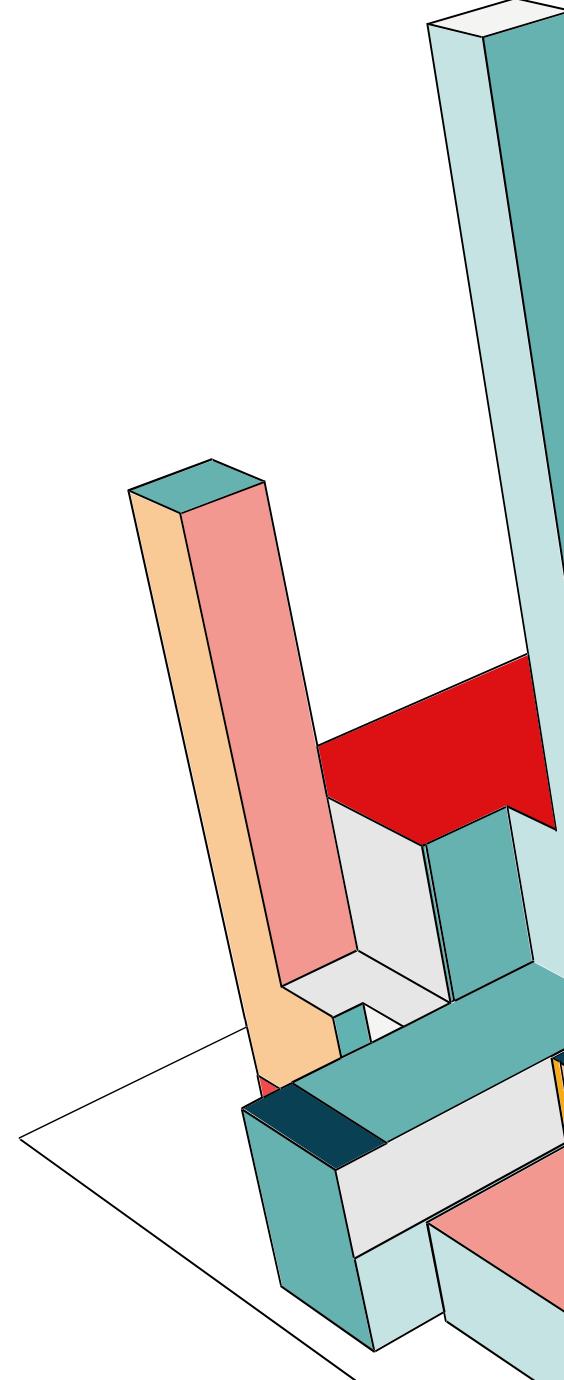
- Typically, Slow
- Still Expensive
- “Jury of Your Peers”
- Public Proceedings
- Appellate Rights Exist
- Enforceability of Judgments

WHAT DOES LITIGATION LOOK LIKE?

COMMON CONSTRUCTION CLAIMS AND MONTANA LEGAL STANDARDS

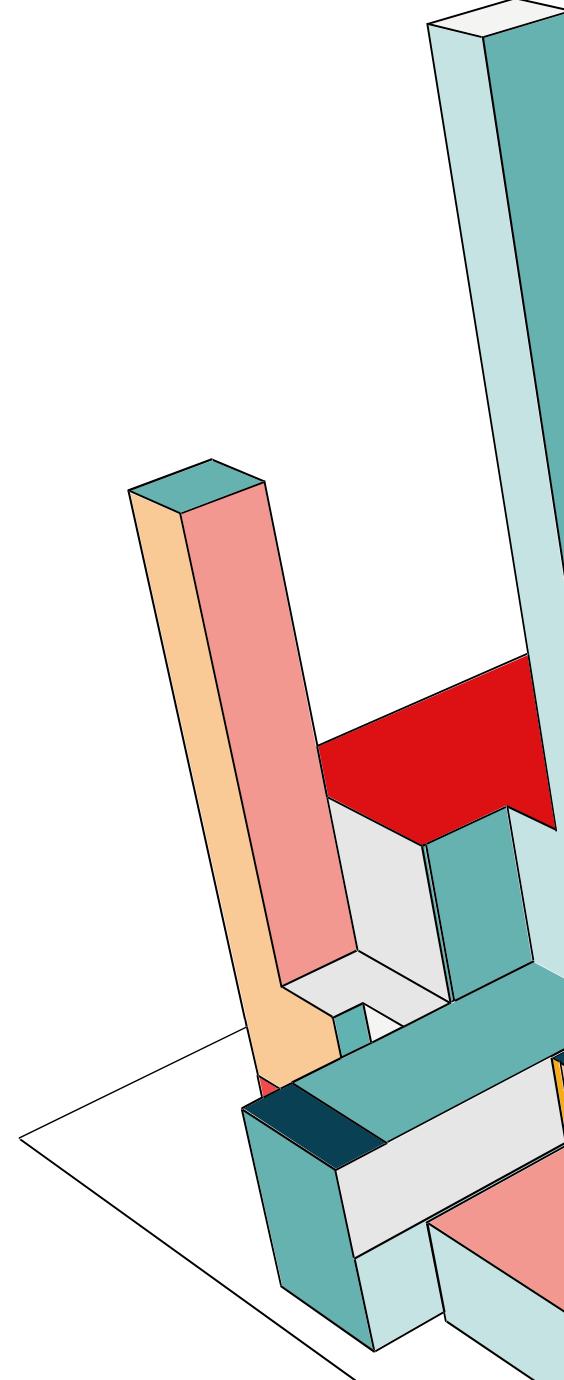
Negligence / Professional Negligence

- 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.)

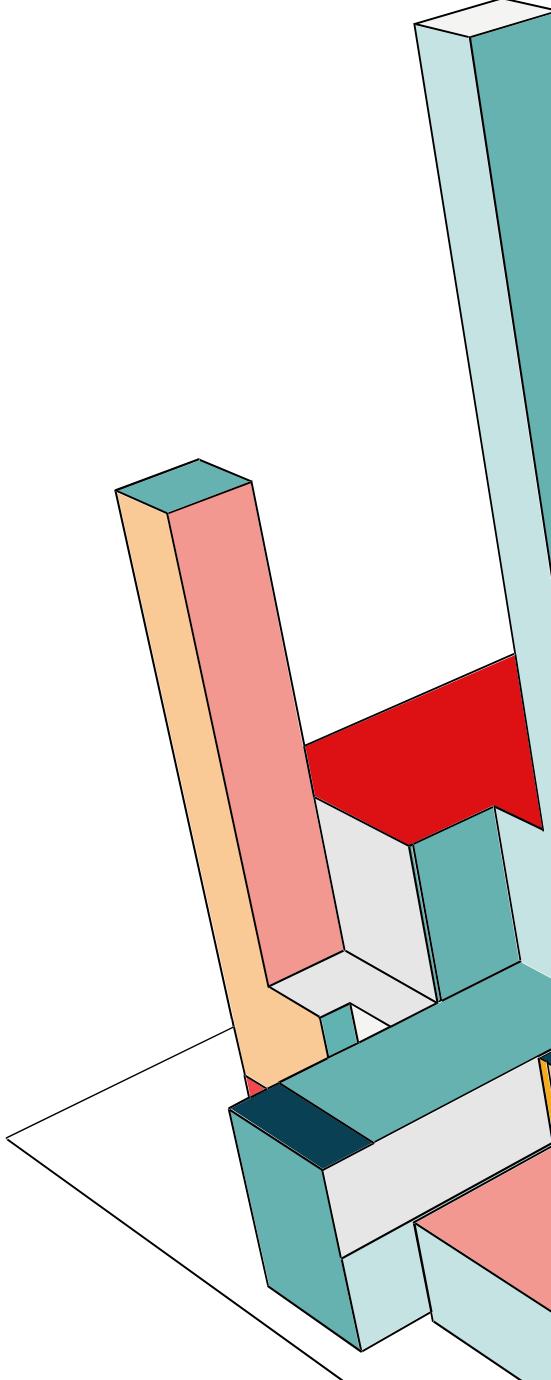
- The Standard of Care Can Be Pulled From the Following:
 - Common law
 - Statute, Regulation, or Code
 - Contract and Contract Documents (Drawings, Plans, etc.)
 - Accepted Industry Standards and Practices
 - Manufacturer's Instructions or Recommendations
 - Unique Circumstances of the Situation



COMMON CONSTRUCTION CLAIMS AND MONTANA LEGAL STANDARDS (CONTD.)

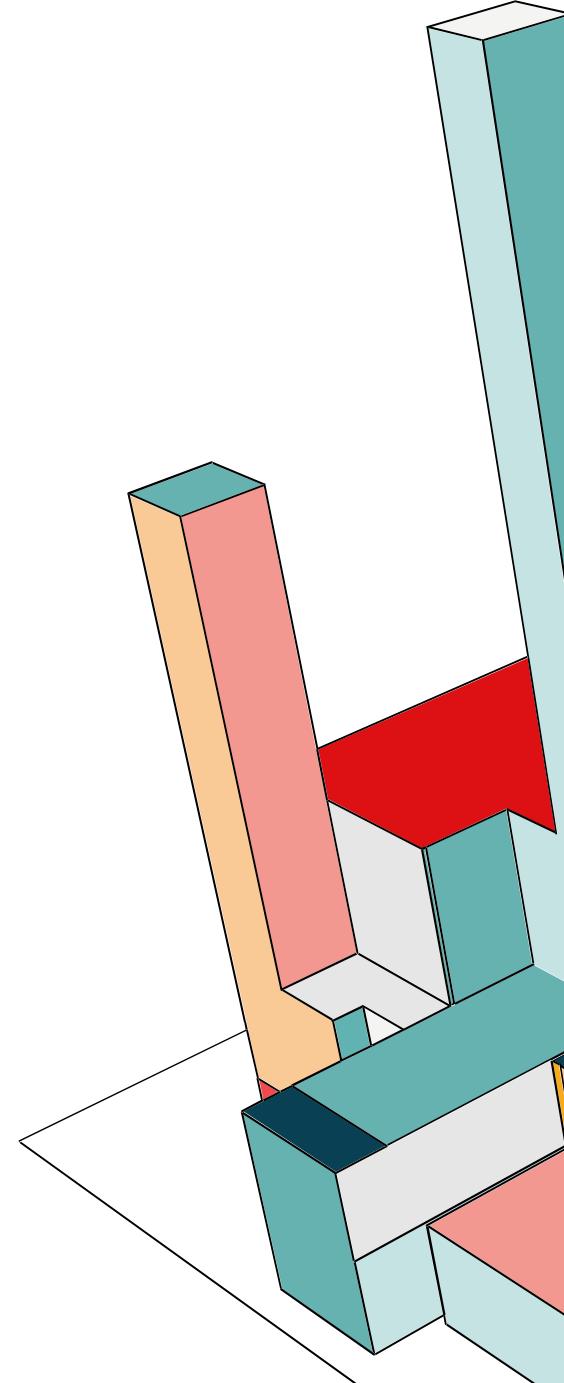
Breach of Contract

- 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

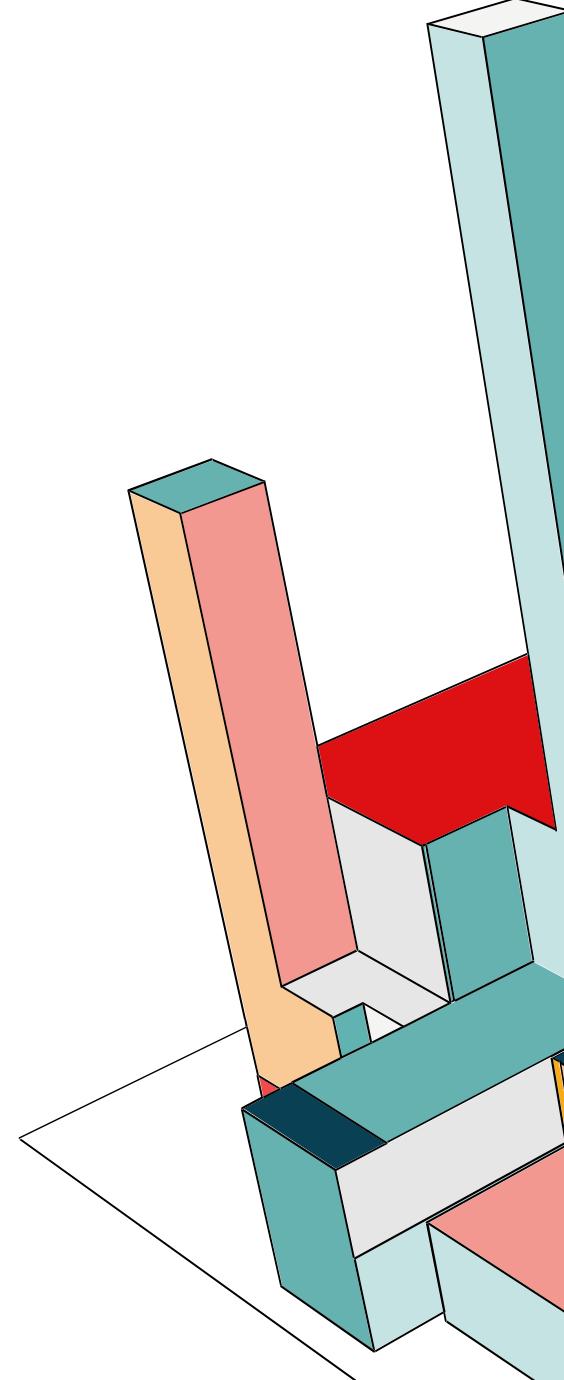


DEFENSES TO CLAIMS (CONTD.)

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.

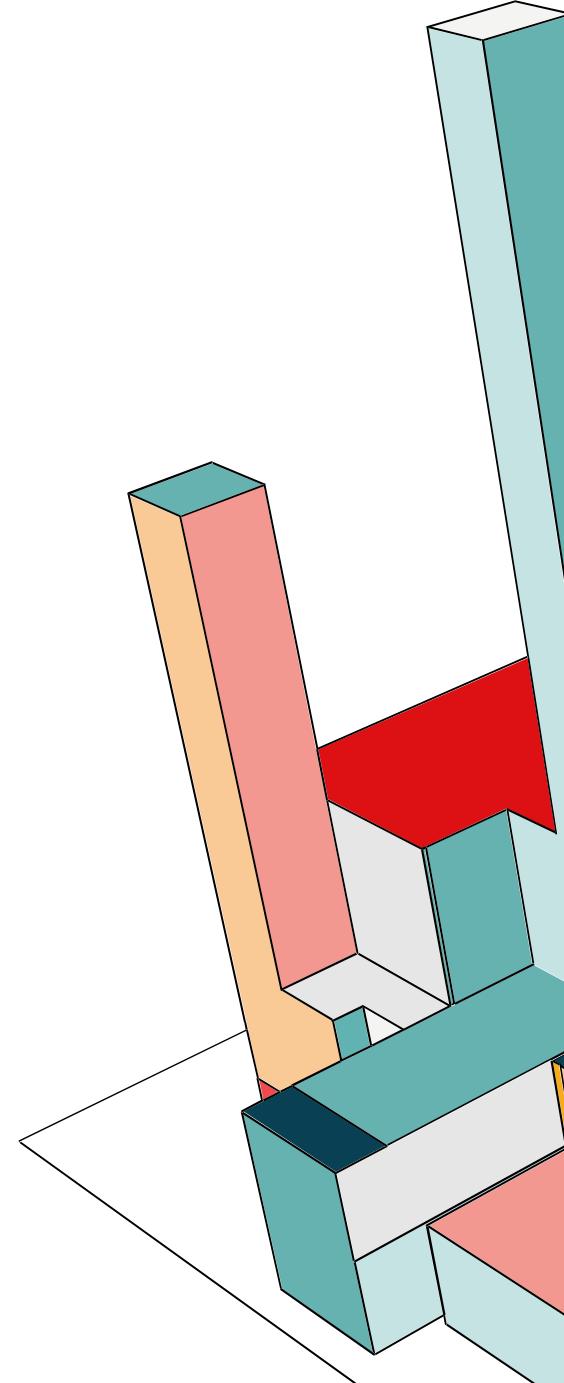
→ **Performance Specifications:** *Spearin* inapplicable. Performance specifications state the results to be obtained and leave it to the contractor to achieve those results.

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



DEFENSES TO CLAIMS (CONTD.)

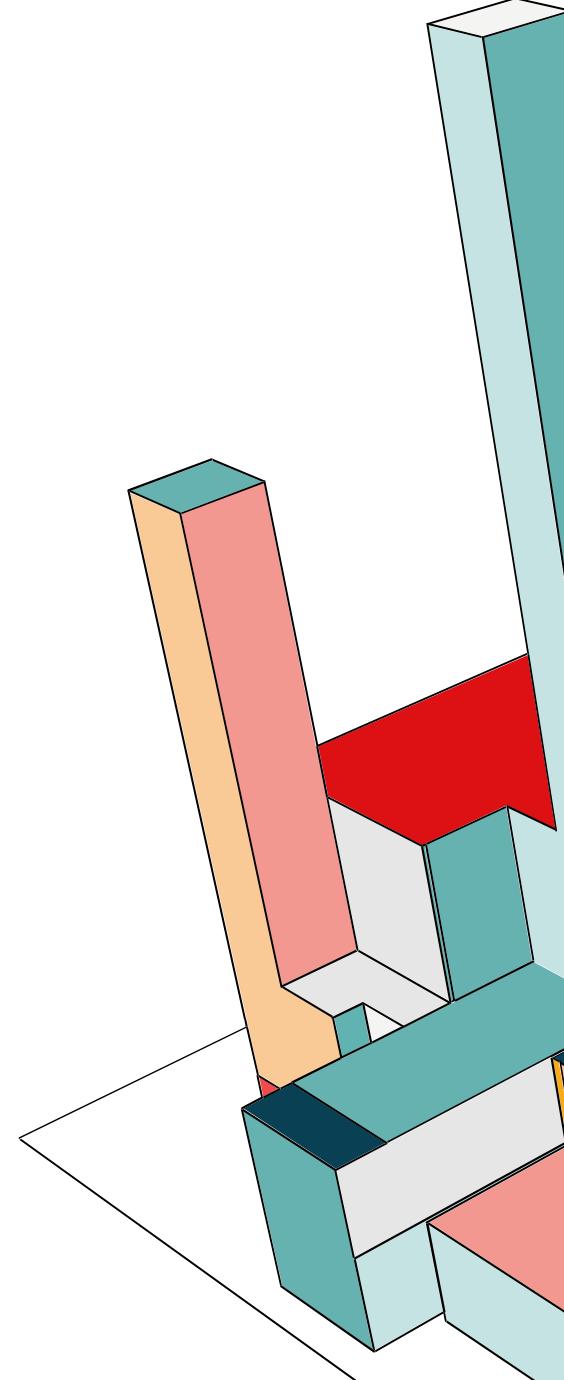
- Statute of Limitations (27-2-202, MCA and 27-2-204, MCA)
 - Negligence (3 years; however, the discovery rule applies)
 - Contract (8 written agreement; 6 oral agreement)
- Statute of Repose (27-2-208, MCA)
 - Bars claims commenced more than 6 years after completion of the improvement (*i.e.*, that 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).



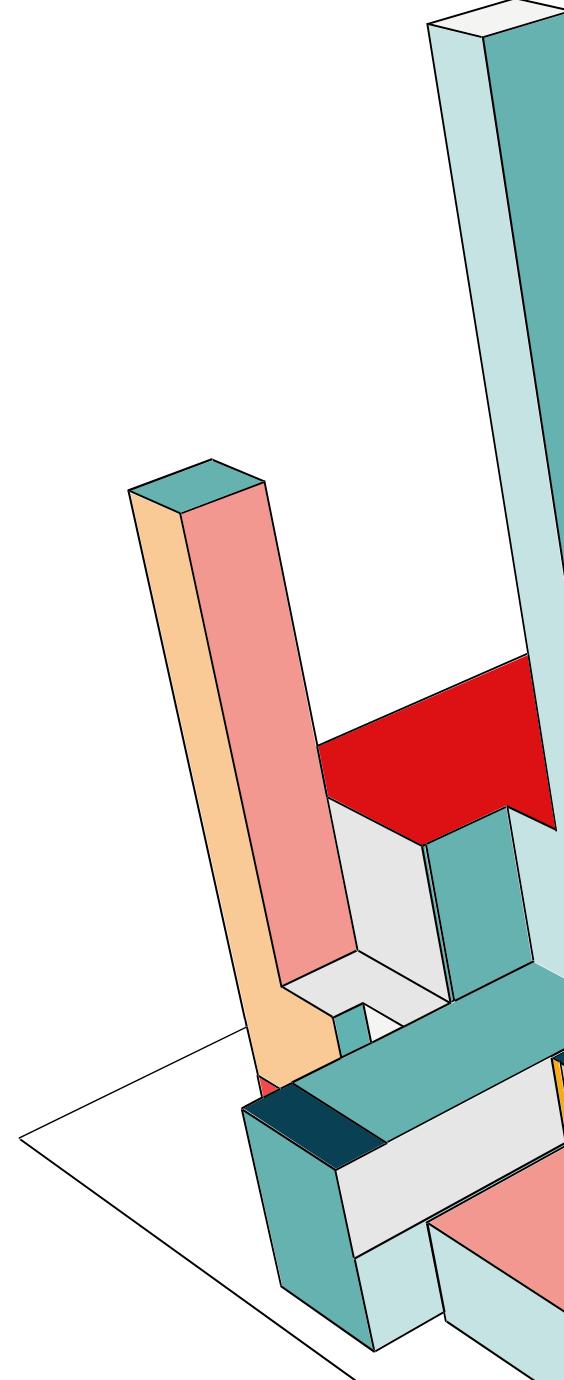
INSURANCE COVERAGE AND CONSIDERATIONS

ARE YOU COVERED?

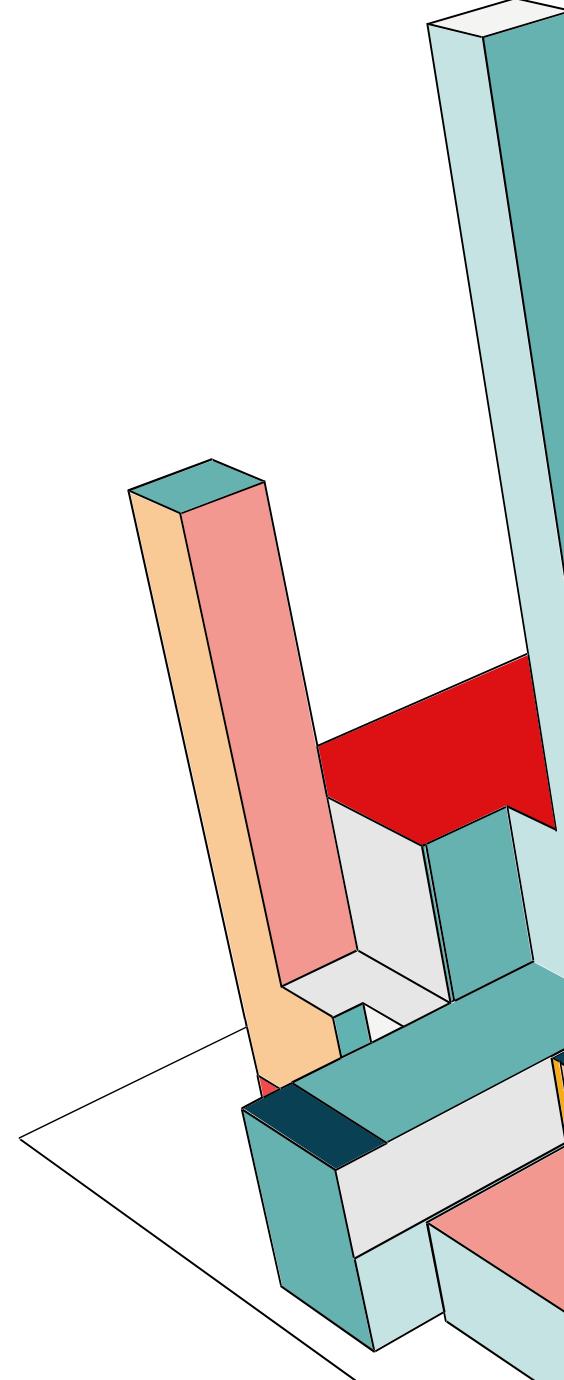
- Types of Insurance Available:
 - Workers Compensation
 - OCIP (Owner Controlled)
 - Builders Risk
 - Commercial General Liability



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

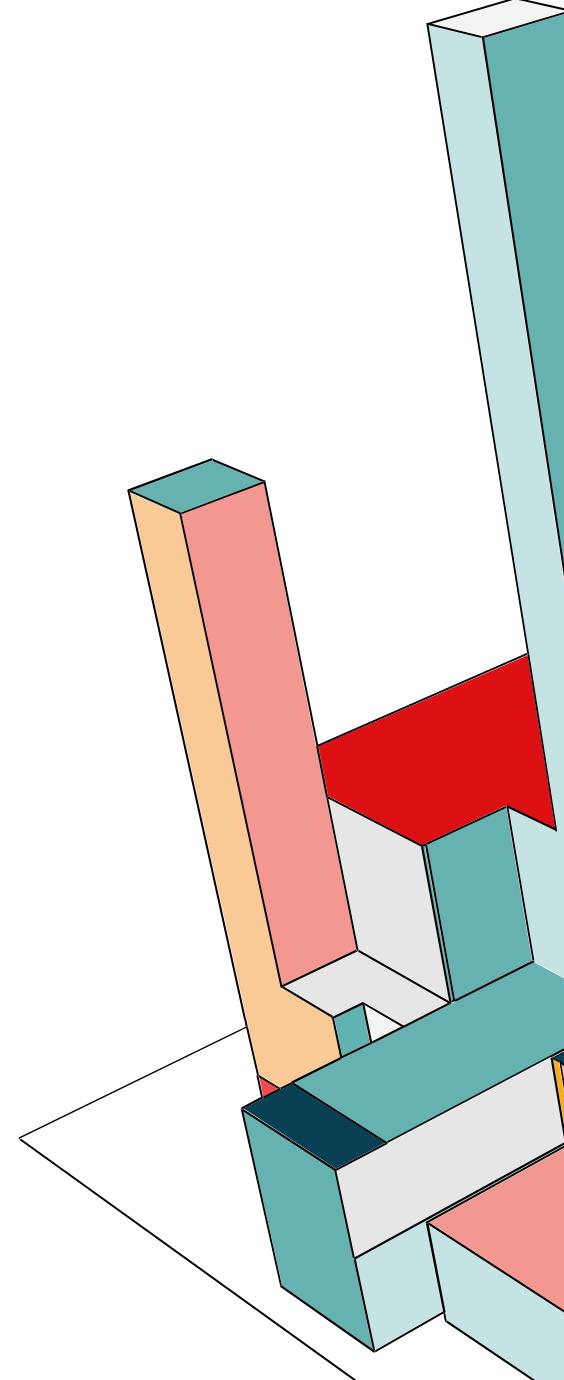


- Builders Risk Insurance - Covers Fire, Lightening, Theft, Vandalism
 - NOT faulty work



- 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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