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The 2023 AAA® Construction Conference

# Effective dispute avoidance & resolution

throughout the project lifecycle

June 8, 2023

Hilton Santa Monica Hotel & Suites, Santa Monica, CA



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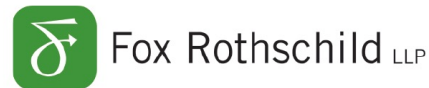
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**June 8, 2023  
8:45-10:00 AM**

# **Breakfast with General Counsel – Collaborating to Minimize Risk from the Construction Team Perspective**

## **Faculty:**

**David Hecker**, Group General Counsel – Claims and Litigation, Kiewit Corporation; Omaha, NE

**Celestina Jimenez**, Vice President General Counsel, RK Industries; Denver, CO

**Charlotte P. Scaglione**, General Counsel, DEPCOM Power; Scottsdale, AZ

**Marian Selvaggio**, Vice President and General Counsel, Rudolph and Sletten, Inc; San Carlos, CA

**R. Craig Williams FAIA, RIBA**, Chief Legal Officer and Principal, HKS Architects, Inc.; Dallas, TX

## **Session Moderator:**

**Giovanni Ruscitti**, Berg Hill Greenleaf & Ruscitti LLP; Denver/Boulder, CO

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## DISPUTE AVOIDANCE: IT STARTS WITH A FAIR CONTRACT

- Match the Needs of the Project and the Parties with the Contract
- Reasonable Baseline Schedule and Schedule Update Process
  - Fair process for prompt resolution REAs
  - Avoid Acceleration or Compression
- Timely Resolution of RFIs
- Payment Process
  - Prompt payment of undisputed amounts



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## DISPUTE AVOIDANCE: IT STARTS WITH A FAIR CONTRACT (CONT.)

- Reasonable Notice Provisions
  - Avoid the 1 or 3 day notice provisions that are not realistic
  - Avoid Waiver language
- Reasonable Change Order (CO) Process and Forced Account Provisions
  - Units rates or T&M while CO is pending/disputed
  - Tipping basket while CO is pending/disputed
- Add Meeting Requirement for all Stakeholders to Address Delays and Other Issues
- Consider Use of DRB or Initial Decision Maker
- Tier Dispute Resolution Process – Project level, to Senior Mgt. to Mediation to Arbitration



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## DISPUTE AVOIDANCE: WHAT TO DO WHEN A GOOD PROJECT GOES BAD DOES THE CONTRACT STILL WORK?

- Misalignment with the contract terms and the project's needs – if the contract doesn't meet the needs of the project, then change the contract. Collaborate to change the contract.
- Make sure subcontracts align with prime contract and allow subcontractor participation in dispute resolution.
- Tools for project management perspective vs. claims perspective.
- What happens if not everyone buys in?



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A CONTRACT CANNOT LEGISLATE GOOD BEHAVIOR, AND WITH GOOD BEHAVIOR YOU DON'T NEED A CONTRACT.

- All three major parties to a construction project typically come together in the beginning of a project with great expectations supported by confidence in the relationships, experience of the parties, and excitement for the project.
- Why does it fall apart from the perspective of the Owner, Construction team and Design Team?
- Steps bring everyone back together.





Writing effective notices: The art and reality of protecting contract rights while not creating further issues that will make it contentious and litigious

- *Balancing contractual and legal obligations with the needs of the project*
- *Keeping the lawyers out of the process*

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## COMMUNICATION – WORKING AS TEAMS

- Tools for General Contractors and Subcontractors to work together when issues arise
- Tools for Design Team to work together with Construction Team



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## USE OF TECHNOLOGY

- Use of technology and other ways to share information when a dispute arises



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## EARLY DISPUTE RESOLUTION

### Tools for effective early dispute resolution:

- RFI process
- Forced account provisions
- DRB, IDM, Senior Management Meetings



## **War stories of what worked and what didn't (any why)**

# Questions?





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