

# 2026 SURETY BONDING & CONSTRUCTION RISK MANAGEMENT CONFERENCE

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## Managing Unforeseen Problems During Construction: Balancing the Short-Term and the Long-Term

By: Ali Ashrafi, Ben Strawn, Brenda Radmacher, and Rupa Patel

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If you've managed projects through tough seasons—pandemic supply shocks, historic storms, sudden regulatory changes—you already know: certainty is rare, clarity is earned. The teams that succeed don't react; they anticipate, plan ahead, and, when needed, decide with discipline. They send notices even when it feels awkward. They document even when it's busy. They invite joint inspections even when it's inconvenient. And they preserve relationships—because construction is ultimately built on trust as much as concrete and steel.

Use this playbook to make the next hard day a little easier—and to ensure that the choices you make early on set up your project, your claims posture, and your reputation for success.

Unforeseen problems will happen on construction projects. Treat that as a certainty—not a failure. The difference between projects that survive surprises and those that spiral is how quickly and deliberately teams assess, communicate, and act while keeping both short-term continuity and long-term consequences in view.

However, the successful team is one who starts before bid day, and remains diligent and consistent throughout the entirety of the project, and one that looks for the unforeseen issues to manage the risk.

### A. The Backdrop: Expect Variability—and Manage It

Modern delivery methods, accelerated schedules, tight supply chains, extreme weather, and evolving regulations all increase variability. That variability doesn't mean you can't succeed; it means you need foresight and disciplined real-time decisions.

Think about every significant project decision on two timelines:

- Short-term continuity: safety, stabilization, access, schedule, and cash flow.
- Long-term consequences: claims posture, reputation, relationships, audit trails, and lessons learned.

As we consider what success looks like for a project, it may differ from company to company. However, what is a true through-line is that a successful project is one that is safe, that finishes as close to on time and budget as practicable, and has a team that strengthens relationships and trust through transparent communication, fair dealing, and clean documentation.

### B. What are Unforeseen Issues?

#### 1) Physical / Field Conditions

Differing Site Conditions (DSC)—Type I (conditions materially different from what the contract indicates) and Type II (unusual conditions not inherent to the work)—are classic project disruptors.

Just like we learned in school, when an unforeseen issue occurs, your immediate next moves can make all the difference. In these situations: Stop, notify, preserve.

For DSCs, first, be sure to not disturb the condition until you have investigated and documented the issue. Send notice within the contract window and establish a hold point so you don't lose rights or evidence.

Other physical surprises include design or construction errors, latent defects, equipment failures, and weather extremes. In each case, your first moves are consistent:

- Stabilize safety and public interface (barriers, traffic control, falling-object protections).
- Establish stop-work/hold points where appropriate.
- Issue contractual and insurance notices promptly.
- Document with photos, video, mapping, and samples.

## 2) Structural / Organizational Challenges

Maybe less visible, but equally disruptive to projects are changes in structural or organizational terms of a project. Joint ventures and multi-prime arrangements bring scale and expertise—but also complex governance, risk allocation, and claims interfaces.

Similarly, the delivery method selection (DB, CMAR, CM Multi-Prime, IPD) for a project directly influences communication lines, speed of decisions, and dispute posture. Choose with eyes open to who controls design, how risks flow, and what escalation paths exist.

And, when challenges occur in these areas, successful teams attack the issues head-on, first recognizing the unforeseen issue, then developing a plan for the necessary communication and any changes needed, and working through the plan methodically.

## 3) Project Scope & Design Changes

Directed changes are straightforward; constructive changes (owner decisions, defective specs, or informal directives) are less obvious but just as impactful. Track directives carefully. Distinguish design development from design defects. Document contemporaneous labor, equipment, and standby costs. Keep the tone constructive while preserving rights.

## 4) Legal / Regulatory / Political Shifts

“Change in law” provisions matter—particularly on long-duration work and PPPs. Consider tariff risks, procurement rule changes, and local policy shifts. Some of these issues can actually be anticipated and addressed in your contract. Pre-allocate cost and schedule risk where you can; build specificity and adjustment mechanisms into your contracts and pricing strategies.

## 5) Insurance Triggers

Builders risk, CGL, and professional liability policies are abstract until they are suddenly very real. Clarify:

Who are the Named and additional insureds

Is there a Waiver of subrogation

Who has Claim authority and what is the adjustment process

Treatment of soft costs and delay

Notice and cooperation obligations

When there is a potentially covered loss, be sure to go to your number one colleague – good and clear communication. Report early and document thoroughly. Working hand-in-hand with the insurance professionals related to changes and unforeseen issues will help to mitigate the impacts. In order to effectively prepare for any insurance related issues, be sure to have a careful review of and align the contract language with the actual policy terms to avoid gaps.

## C. Keys to Successful Solutions—Before and After Problems Occur

### **Plan & Prepare (Pre-Flight)**

Before bid or award, conduct a contract risk review focused on:

- Differing Site Conditions clause presence and notice windows
- Force majeure specificity (events, thresholds, documentation requirements)
- Insurance exhibits and specifics (who is insured, waivers, soft costs, claim handling)
- Dispute resolution processes (Initial Decision Maker, DRB, step negotiation, early mediation, arbitration) and contractual provisions to ensure that the dispute resolution process is sufficiently detailed so it can be followed
- Order of precedence

Align your delivery method to stakeholder complexity, speed, design control, and risk appetite. Build governance and escalation paths that will actually work under pressure. Establish site-specific Emergency Action Plans (EAPs), train crews, and run drills; include public-interface controls.

### **Communicate Candidly (Beyond Minimum Notice)**

Notice language is often a condition precedent—miss it and you may lose relief. Communicate early and in writing, but keep your tone solutions-oriented. Map stakeholders and set a cadence: owner, architect/engineer, JV partners, primes/subs, insurers, regulators, and affected public.

## **Negotiate Constructive Conflict Resolution Paths**

Consider Dispute Review Boards (DRBs), clear roles for the Initial Decision Maker (IDM), and step-negotiation clauses that keep work moving while issues are vetted.

## **Assemble the Right Team—at the Right Time**

Blend technical experts with lawyers, insurers, and risk managers. When retaining consultants, structure non-testifying roles through counsel to maximize work-product protection and preserve privilege. Limit distribution, mark communications appropriately, and distinguish business advice from legal advice to avoid inadvertent waiver.

Of course, it is imperative to consider how to protect yourself and your information and communications. The determination of bringing in consultants and counselors is one of the key issues that should be considered early on. Even if you do not anticipate litigation, or believe an issue can be resolved amicably, bringing in third party experts/consultants and your legal team early can make the difference in failure and success. “Lawyering up” does not need to be a negative – finding the right lawyers to help you reach early resolution is a great option. But be careful, if you simply “cc” your in-house or outside counsel on emails, that communication may not be protected. (See, e.g., *Nedlog Co. v. ARA Servs., Inc.*, 131 F.R.D. 116, 117 (N.D. Ill. 1989).) Your consultant team should likely also include your insurance professionals – brokers, risk managers, and possibly underwriters – to evaluate the issues and assist to seek to obtain any and all available coverage. Similarly, if you are bringing in a third party consultant to help with preparing TIAs or working through schedule impacts, or to investigate a failing condition, consider engaging these experts through counsel who may be able to protect the investigation as part of the attorney work product doctrine. (See Federal Rule of Civil Procedure 26(b)(3)(A); the purpose of the work-product doctrine is to protect an attorney's "mental impressions, conclusions, opinions, or legal theories."; see also *Manufacturing Admin. and Management Systems, Inc. v. ICT Group, Inc.* 212 F.R.D. 110 (E.D. New York 2022).)

## **D. Anticipate Problems & Get Ahead (Options Analysis)**

Alternative designs, materials, and methods can reduce exposure and maintain continuity. Use preconstruction services under CMAR/DB for constructability reviews, phasing, and fast-track options. Document the decision basis (cost, schedule, safety, quality) to support later claims or defenses.

Have a Rapid Triage Checklist handy, especially for emergency situations. Your Checklist will need to cover and address safety and public interface secured (EAP activated; barricades; traffic controls); stop-work/hold points established where appropriate and simultaneously ensuring that evidence is not disturbed; the issuance of contractual/insurance notices; preservation of evidence (photos, video, mapping, samples) with notice to counterparties when feasible; having a privilege plan ready (team structured through counsel; non-testifying consultants retained via counsel). Once you have made your initial triage, further options can be analyzed and an options analysis plan prepared – looking at cost, schedule, risk, and a recovery plan -- and then shared at the right cadence with the various team members.

## E. Legal & Insurance Notifications—Timing, Content, and Tone

Having good contractual notice discipline will also set you up for success even when faced with unforeseen issues. You must know your windows though. A late notice can bar relief even when everyone “knows” about the problem. Use the right language: identify the event, potential impacts, and mitigation steps; reserve rights without sounding adversarial.

For any potential insurance notice required, be sure to provide sufficient information and to keep your insurance team up to date. Be sure to also confirm your insured status across the project’s contracting chain. Have a point person to track adjuster communications, document inspections, and maintain chain of custody for samples.

When tracking the impacts of unforeseen conditions and issues, specificity matters. In your documentation be sure to define events, set thresholds (e.g., weather metrics), identify any mitigation efforts, and set forth the planned recovery scheduling. Remember: time relief and cost relief are not always paired—draft for both where appropriate.

## F. Managing Communications (Including with In-House Counsel)

### *Stakeholder Communication Plan*

Define audiences, channels, and cadence up front – you likely will need a few different lines of communication. Poor communication is a top driver of underperformance and safety incidents. Make sure field teams get instructions that are practical and timely. In addition to your internal communications, be sure to have a plan for communicating with the rest of the project team. Of critical importance is to ensure your claims narrative is accurate and contemporaneous.

### *Privilege & Work-Product Hygiene*

To preserve attorney-client and work-product protections:

- Retain consultants through counsel with a written scope tied to rendering legal advice.
- Limit distribution and mark communications appropriately.
- Separate business communications from legal analyses.
- Prefer non-testifying consulting experts for early technical evaluation; testifying roles invite discovery.

### *Document Control & Evidence Preservation*

When disputes are reasonably anticipated, issue litigation holds. Coordinate necessary repairs with notice and documentation to avoid spoliation claims. Photograph extensively, keep samples, maintain chain of custody, and consider inviting counterparties for joint inspection when feasible.

Courts don't automatically sanction necessary repairs, but spoliation risk rises if you plow ahead without notice or documentation. The balance turns on notice, availability of other proof, and intent. Practical moves:

- Issue repair & preservation protocols in writing.
- Give advance notice and invite joint inspection where possible.
- Keep representative samples and maintain chain of custody.
- Document necessity and urgency of repairs with photos, video, maps, and logs.

#### G. Business Relationship vs. Legal Risk (Owner Relations Drive Outcomes)

Calibrate your tone—firm and rights-preserving, yet constructive and solutions-oriented. Owners value transparency and workable continuity plans and thus clear communication and using the change order processes effectively will be critical.

Distinguish directed changes (clear owner directive) from constructive changes (design defects, implied directives, interference).

Maintain contemporaneous records of labor, equipment, standby, and impact to schedule—don't wait until the end to recreate history. Be sure to track carefully and additional work or change work that potentially could be the basis for a change, and to document how it is distinguished from original work under the contract.

Under CMAR, owners retain more design control but may see more “finger-pointing.” Under DB, accountability is centralized—oversight shifts to performance and quality.

#### H. Public Safety & Project Continuity

Construction sites interface with communities. Protecting the public is both an ethical imperative and a continuity strategy. Of course, you should have your emergency preparedness basics in place - establish alarms, evacuation routes, accountability procedures, and training. Plan for natural and man-made events.

Thinking through your public interface is important as well and to ensure you have controls set up to avoid and address falling-object protections, tool tethering, traffic plans, perimeter security, signage, and night-condition strategies. Having frequent exterior inspections may reduce incident potential—and reputational harm.

#### I. Ongoing Response: Adjust Without Losing the Big Picture

“Zoom in” to fix the technical problem. “Zoom out” to evaluate claims posture, schedule recovery, and relationship management. Track your risk register and decision log. Course-correct openly as new facts emerge.

Keep long-term objectives in mind. Your documentation today is your story in tomorrow's mediation or arbitration. The same goes not just for having the documentation but the words that are used. Show that you sent timely notices, mitigated reasonably, protected evidence, and engaged constructively, using professional words.

#### J. Finish Strong (and Conduct the Post-Mortem)

A strong finish looks like this:

- Minimized direct impacts through smart mitigation and recovery.
- Minimized long-term impacts through timely notice, disciplined documentation, and fair conflict resolution.
- Enhanced relationships and reputation—even when you had to assert rights.
- Lessons learned captured and fed back into templates and playbooks: tighten DSC language, add force majeure specificity, refine change-in-law allocation, tune insurance exhibits, and strengthen dispute resolution paths.

Then, revisit your contracts and training. Adjust based on what you learned. Your next project benefits most when you close the loop. Plan for surprises, don't just hope against them.