

Timeline Analysis for a Delay in Startup (DSU) Claim within a Builder's Risk Claim

Moderator



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North American Construction Summit



FG FORAN GLENNON

Timeline Analysis

Delay in Startup (DSU) Within Builder's Risk Claims

January 17, 2024



Henry Densham

**Managing Director
Insurance Services
Americas, CCI**



A Rimkus Company



John Eggum

**Partner & Shareholder
Foran Glennon**





- 1. Permitting and Approvals**
- 2. Design Changes**
- 3. Unforeseen Site Conditions**
- 4. Labor Shortages**
- 5. Material Delays**
- 6. Financing Issues**
- 7. Contract Disputes**
- 8. Technology and Equipment Failures**
- 9. Quality Control Issues**
- 10. Availability of Utilities**
- 11. Environmental Concerns**
- 12. Logistical Challenges**
- 13. Political and Social Factors**



DELAYED OPENING INSURANCE EXTENSION COVERAGE FORM

INSURING AGREEMENT:

In consideration of the additional premium charged, and subject to the terms, conditions, and limitations of the Policy to which this extension is attached and to the Limit of Liability, terms, conditions, and limitations of this extension, this Policy is extended to indemnify the Insured, specified in the Delayed Opening Insurance Extension Schedule, for Delayed Start-Up Expenses, Loss of Gross Earnings, and / or Loss of Rental Income, as defined in this extension, incurred during the Period of Delay, **when such delay is caused by direct physical loss or direct physical damage to Insured Property** during the Period of Insurance, provided such loss or damage is indemnifiable under the Policy to which this extension is attached or would have been indemnifiable except for the application of the Deductible.











Anatomy of the Builders Risk Policy

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Anatomy of the Builders Risk Policy

CONTRACTORS INSTALLATION/BUILDERS RISK FORM

Named Insured

Additional Insured

Loss Payees

Anatomy of the Builders Risk Policy

CONTRACTORS INSTALLATION/BUILDERS RISK FORM

Named Insured

Additional Insured

Loss Payees



ADDITIONAL INSURED(S):

To the extent required by contract for the Insured Project and then only as their respective interests may appear, owners, contractors, subcontractors and other individual(s) or entity(ies) specified in such contract shall be recognized as Additional Insured's hereunder, but limited only to their activities at the Insured Project (herein Additional Insured(s)).

The Named Insured shall be deemed the sole and irrevocable agent of each and every Insured under this policy for the purpose of giving or receiving notices to/from the Company, giving instructions to or agreeing with the Company for alterations of this policy and making or receiving payments of premiums or adjustments of premium.

Anatomy of the Builders Risk Policy

2. INSURED PROJECT:

A. (i) Project Name:

As On Contract Documents

(ii) Description of Project:

Description

B. Location of the Insured Project:

Location

C. Total Project Value (estimated):

\$82,311,141

3. PERIOD OF INSURANCE:

A. Effective Date:

May 04, 2020

B. Expiration Date:

August 19, 2021

With prior notification to and agreement by the Company, this policy may be extended for up to 60 days, not including the testing period, at a pro rata additional premium. Extensions beyond this period and extensions of the testing period are subject to payment of additional premiums at rates and terms to be determined by the Company at the time of the Company's agreement to such additional extensions.

Anatomy of the Builders Risk Policy

Builder's Risk - Property Damage	\$155,856.00
Builder's Risk - Delayed Opening	\$12,336.00
Certified Terrorism	\$10,088.00
<hr/>	
TOTAL AMOUNT PAYABLE BY THE INSURED	\$178,280.00
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Anatomy of the Builders Risk Policy

LIMIT OF LIABILITY:

The Company shall not be liable for more than \$82,311,141
except as sublimited below:

A.	Property Damage	\$79,177,743 per Occurrence
B.	Delay-in-Completion	\$3,133,398 16 months Period of Indemnity

Non-Accumulative Sublimits

C.	Land Movement	\$82,311,141 (Annual Aggregate)
D.	Flood including Storm Surge	\$82,311,141 (Annual Aggregate)
E.	Named Windstorm	\$82,311,141 per Occurrence

Accumulative Sublimits

F.	Debris Removal 25% of adjusted loss subject to a maximum	\$10,000,000
G.	Demolition/Increased Cost of Construction	\$10,000,000
H.	Architect and Engineering Fees	\$1,000,000
I.	Transit	\$5,000,000
J.	Offsite Storage	\$5,000,000
K.	Extra/Expediting Expense limited to 25% of adjusted loss subject to a maximum	\$5,000,000
L.	Trees, Grass, Shrubbery and Plants	\$100,000 maximum \$5,000 per item
M.	Emergency Property Protection Expense	\$500,000
N.	Valuable Papers	\$1,000,000
O.	Fire Department Service Charges and Extinguishing Expenses	\$500,000
P.	Contaminants and/or Pollutants Clean-Up	\$1,000,000
Q.	Claims Preparation Expenses	\$100,000
R.	Mold Remediation Expense	\$1,000,000 (Term Aggregate)
S.	Construction Trailers	\$100,000
T.	Crane Re-Erection Expense	\$250,000

These sublimits do not increase the Limit of Liability.

Anatomy of the Builders Risk Policy

LIMIT OF LIABILITY:

The Company shall not be liable for more than

\$82,311,141

DEDUCTIBLES:

Each loss shall be adjusted separately and from the amount of each adjusted loss the amount as stated below shall be deducted:

For Land Movement	\$50,000
For Named Windstorm	\$50,000
For Flood	\$50,000
For Water Damage	\$100,000
For LEG-3/96	\$250,000
For Delay-in-Completion	30-Days
For all other perils	\$50,000

In the event that more than one Deductible amount applies per Occurrence, except in the event of Delay-in-Completion, then only the largest applicable Deductible amount shall be applied.

M.	Emergency Property Protection Expense	\$500,000
N.	Valuable Papers	\$1,000,000
O.	Fire Department Service Charges and Extinguishing Expenses	\$500,000
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Anatomy of the Builders Risk Policy

CONTRACTORS INSTALLATION/BUILDERS RISK FORM

INSURING AGREEMENT:

This Policy, subject to the Limit of Liability and the terms, conditions, and limitations contained herein or endorsed hereon, insures against all risks of direct physical loss of or direct physical damage to Insured Property during the Period of Insurance while such Insured Property is at the construction site, stored off-site, or in the course of transit within the Territorial Limits specified in the Schedule.

Provided always that this insurance shall cease to attach as from the time the Insured Property is taken over or taken into use by the purchaser, tenant, or owner, or the Expiration Date stated in Item 3 of the Schedule, whichever is the earlier.

Anatomy of the Builders Risk Policy

CONTRACTORS INSTALLATION/BUILDERS RISK FORM

"Occurrence"

Occurrence shall mean any one loss, disaster, or casualty, or series of losses, disasters, or casualties arising out of one event. With respect to the perils except Land Movement, Flood, or Named Windstorm, one event shall be construed to be all losses arising during a continuous period of seventy-two (72) hours. With respect to the perils Land Movement, Flood, or Named Windstorm, one event shall be construed to be all losses arising during a continuous period of one-hundred and sixty eight (168) hours.

The Insured may choose the time from which any such seventy-two (72) hour period shall be deemed to have commenced, provided it shall not be earlier than the time of the first loss sustained by the Insured during the Occurrence.

Anatomy of the Builders Risk Policy

CONTRACTORS INSTALLATION/BUILDERS RISK FORM

EXCLUSIONS:

This Policy does not insure:

Contamination

Mold

Liquidated Damages

Foundation Piles/Casings/Sheet Pile Constructions

Water Inundation and Other Manuscript Endorsements

Anatomy of the Builders Risk Policy

CONTRACTORS INSTALLATION/BUILDERS RISK FORM

PARTIAL PERMISSION TO OCCUPY

This policy is extended to cover the Insured Project during periods of occupancy or commercial service occurring prior to or after completion of the Insured Project but prior to final acceptance by the Owner.

The following additional conditions apply to any building(s), structures, plant or portion(s) of the Insured Project that has become occupied or is placed into commercial service

1. The Insured shall immediately report any increase in hazard beyond that provided for in the Policy;
2. All fire protection, security and other protective devices and systems shall be installed, tested, activated and certified by local authorities, where required;
3. Delay in Completion coverage shall not apply during periods of occupancy or commercial service, unless otherwise endorsed.

Anatomy of the Builders Risk Policy

DELAYED OPENING INSURANCE EXTENSION COVERAGE FORM

INSURING AGREEMENT:

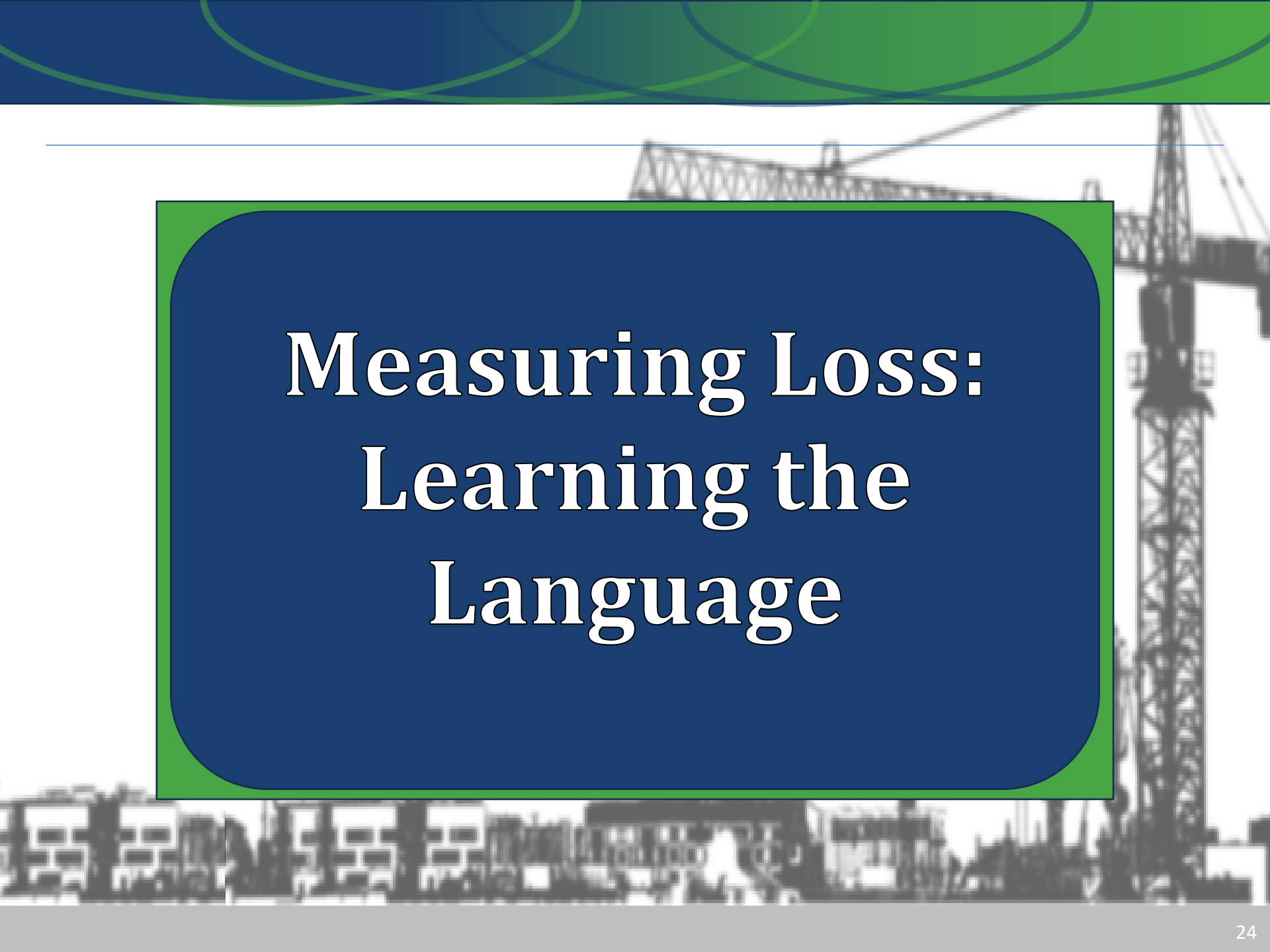
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Measuring Loss: Learning the Language

Learning the Language

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Learning the Language

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Learning the Language

"Period of Delay"

Period of Delay shall mean the period of time between the Scheduled Date of Completion and the actual date on which commercial operations or tenant / owner occupancy commenced or could have commenced; however, not exceeding such delay as would result if the loss or damage were repaired or replaced with the exercise of due diligence and dispatch, but in no event exceeding the Period of Indemnity stated in the Schedule for all indemnifiable Occurrences combined. The Period of Delay shall not be terminated by the expiration or cancellation of the Policy with respect to indemnity payable hereunder in direct consequence of insured loss or damage occurring prior to such expiration or cancellation.

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Learning the Language

START

Scheduled Date of Completion

Later of the following:

(i) The date stated in the Schedule; or

(ii) The date on which, but for the insured loss or damage, commercial operations or tenant / owner occupancy would have commenced.

STOP

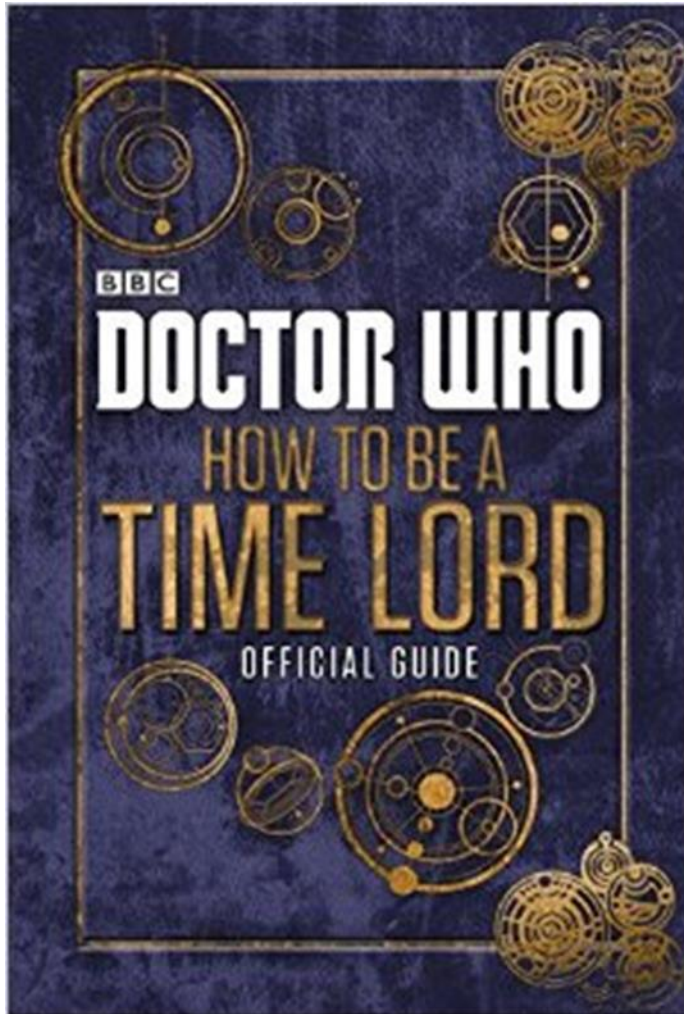
The actual date on which commercial operations or tenant / owner occupancy commenced or could have commenced

Not exceeding such delay as would result if the loss or damage were repaired or replaced with the exercise of due diligence and dispatch



Measuring Loss: Time Lords Needed

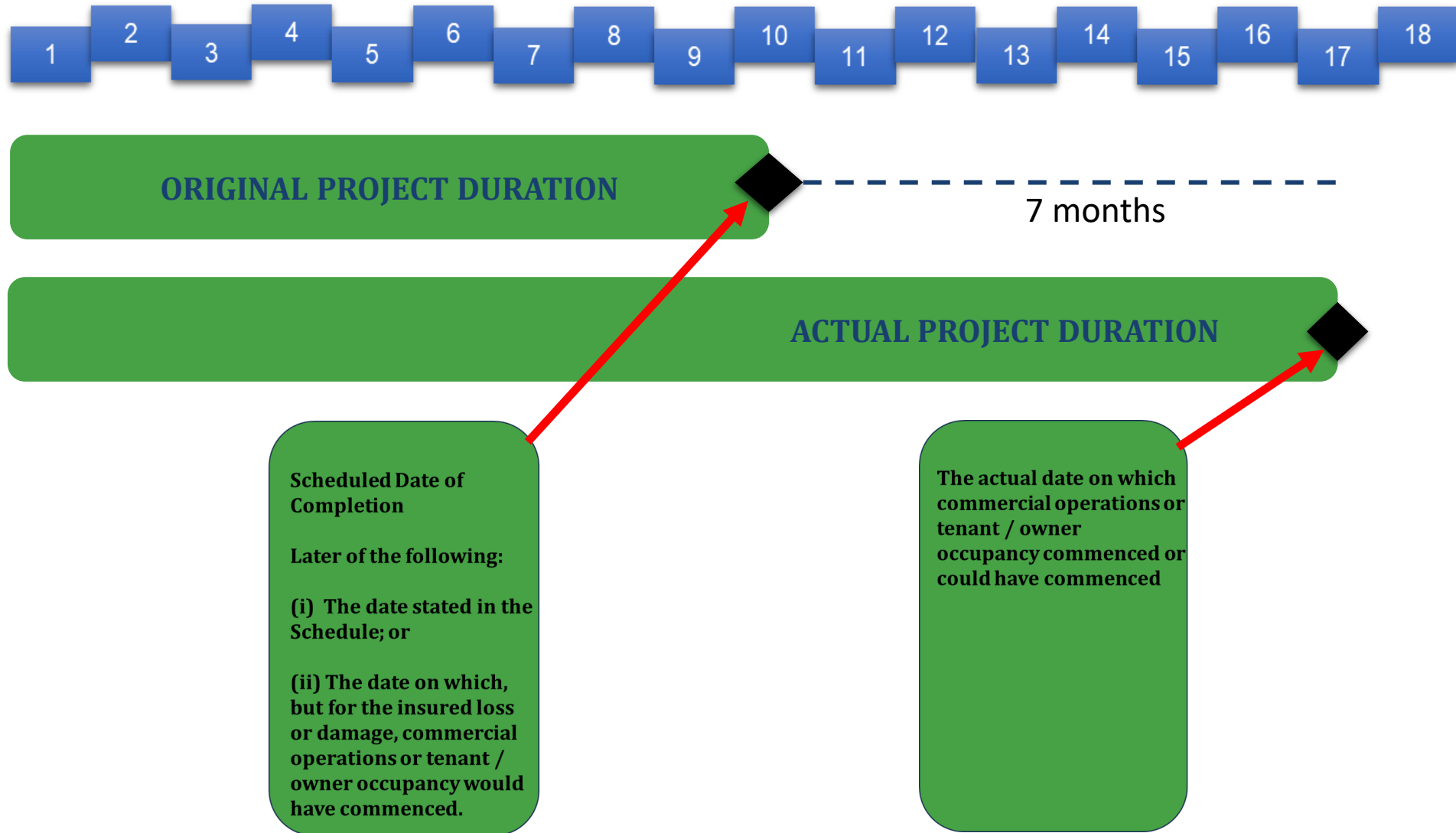
Measuring Loss



**What do you need to know
to measure a claimed DSU
delay?**



Measuring Loss



Measuring Loss

What does the analysis entail?

- **Verification of the Pre-Incident Position**
- **Identification of the post-incident critical path and track its development throughout the repair period**
- **Identification of the 'Return to Pre-Incident' Status**
- **Identification of concurrent delays during re-instatement period**
- **Identification of post-repair delays**
- **Effect of delays resulting from the Incident but not covered by the Policy**

Measuring Loss

Anticipated Completion Date (ACD)

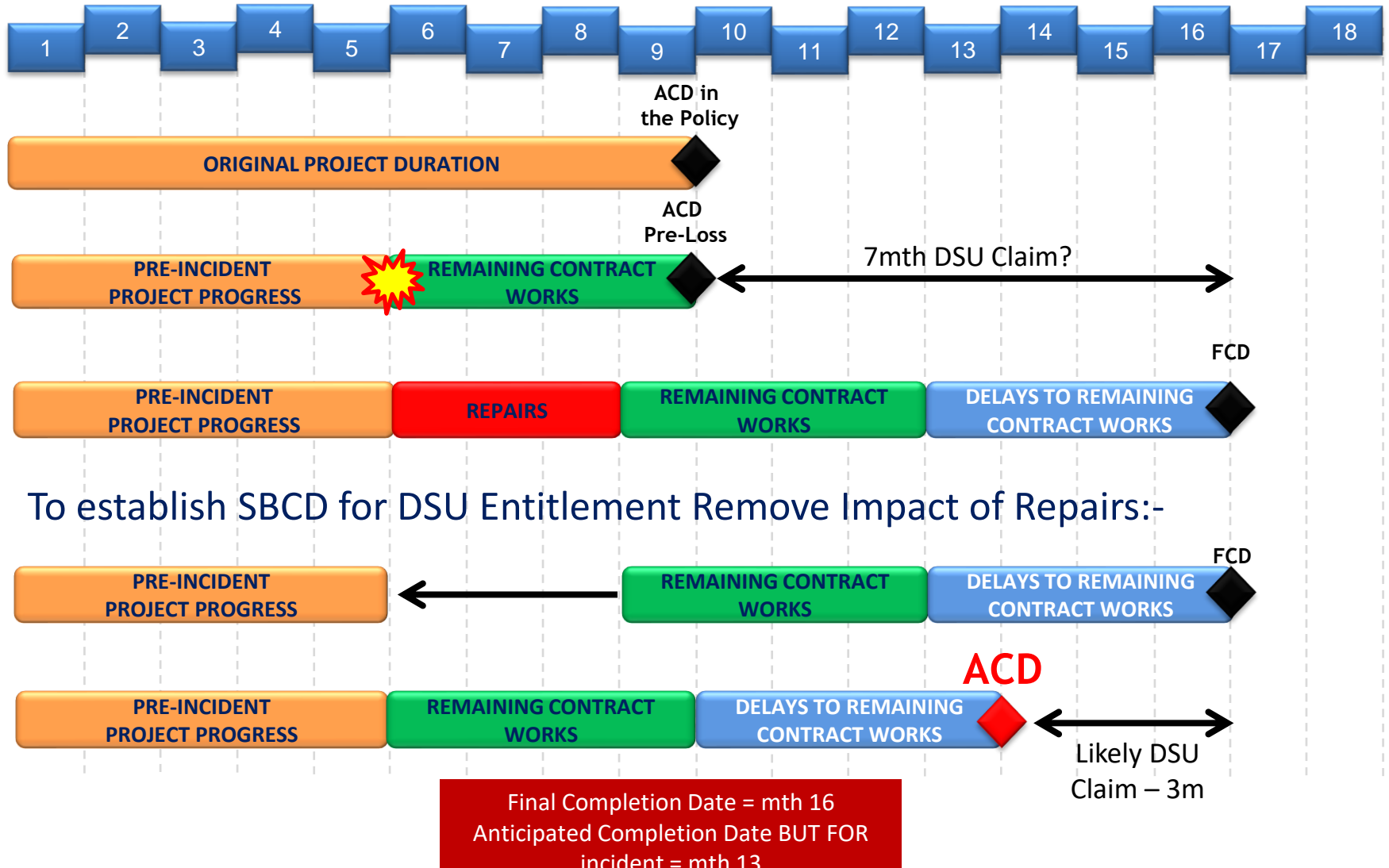
- **What the Insured would have achieved ‘but for’ the damage**

“Would commercial operations have commenced on the date stated within the policy had the incident not occurred, or some other later date?”

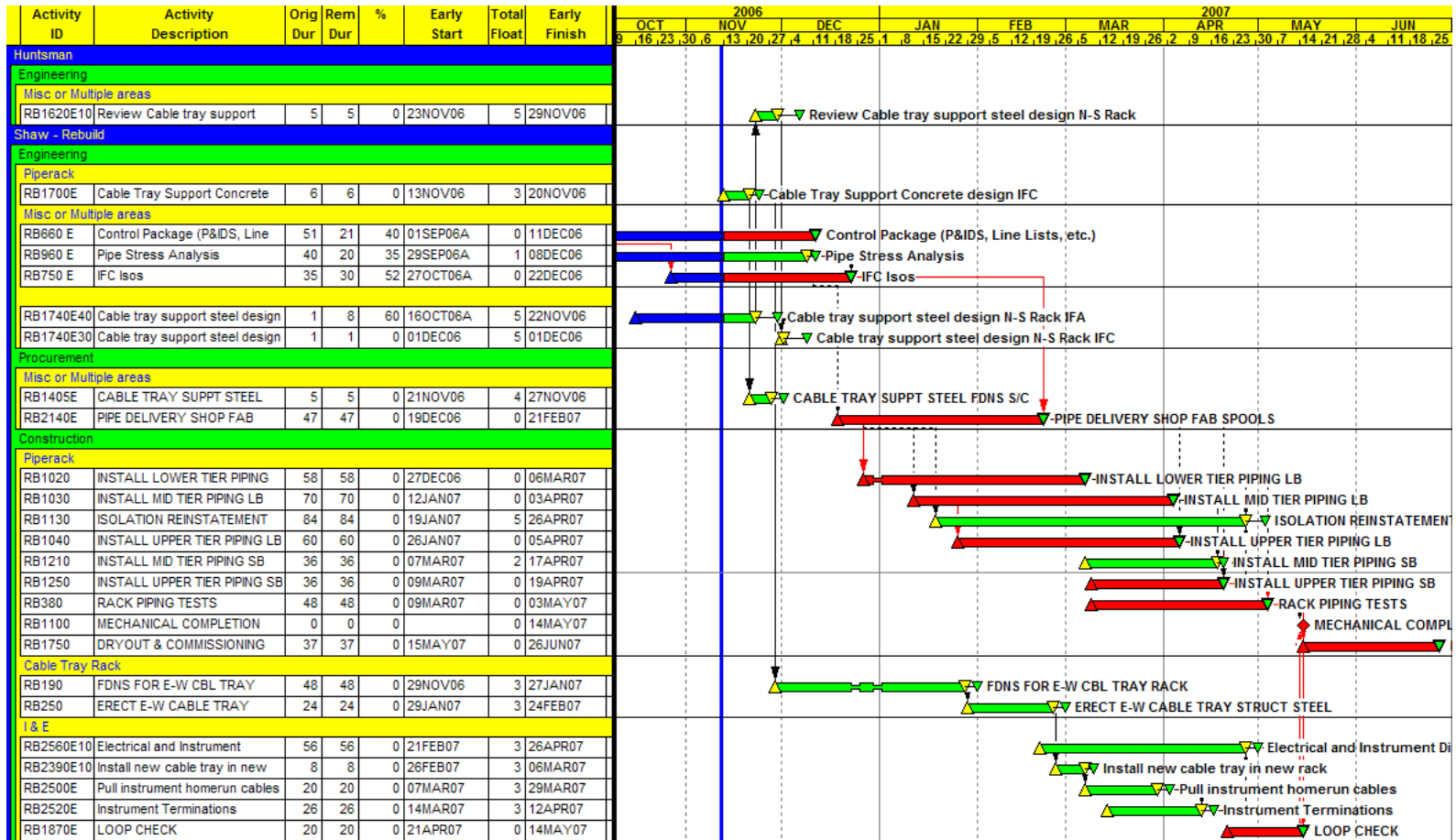
- **Requires retrospective review of all works (insured repairs and uninsured contract works) up to the final completion date**
- **Need to remove the impact of the Incident related repair works from the schedule**
 - **“but-for” analysis**

**The ACD is when the Project would have been completed
if the Incident had not occurred**

Measuring Loss



Measuring Loss



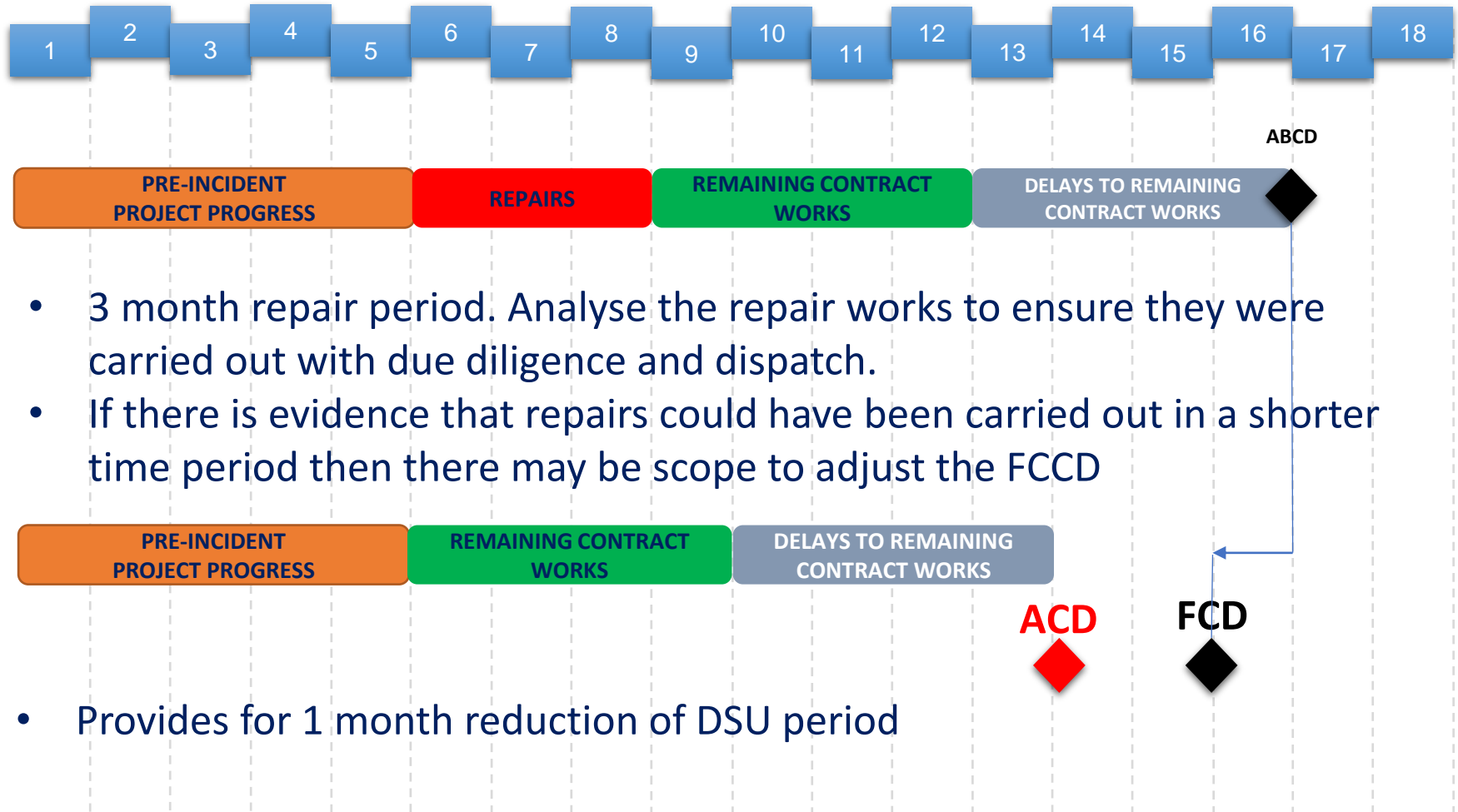
- Thousands of activities in a single schedule
- Pre-loss project monitoring will reduce analysis required following a loss

Measuring Loss

Final Completion Date (FCD)

- **The date the project can commence commercial operations “...with the exercise of due diligence and dispatch”**
- Requires retrospective review of repair works on the critical path
- Need to verify critical repair works were carried out with due diligence and dispatch:-
 - No pacing of repairs due to concurrent non-incident related delays
 - No betterments installed
 - Decisions made in line with economic test
- Resulting adjusted period for repair can then be factored into the actual timeline

Measuring Loss



- Provides for 1 month reduction of DSU period

Measuring Loss

What does the analysis entail?

- **Verification of the Pre-Incident Position**
 - Was the project 'on-time'? Pre-Incident delay may not be reported or reflected in schedule
- **Identification of the post-incident critical path and track its development throughout the repair period**
 - Is the incident critical?
- **Identification of the 'Return to Pre-Incident' Status**
 - At what date will the incident cease to impact the works?
- **Identification of concurrent delays during re-instatement period**
 - Would these have delayed the project 'but for' the incident?
 - Need to review project as a whole and not just the damaged component / area.
- **Identification of post-repair delays**
 - These are unlikely to be incident related, but potentially can be.
 - E.g. A HEP plant. Commissioning difficulty due to lower water flow. Would commissioning have been quicker 'but for' the incident?
- **Effect of delays resulting from the Incident but not covered by the Policy**
 - Civil authorities shoutout (e.g. OSHA)



Difficult Issues

Difficult Issues

- **Measurement Methodologies**
- **Accelerating and Buy-In From Insurers**
- **Who owns the float in the analysis?**
- **What is covered – General Conditions and Soft Costs**

Difficult Issues

- **Final completion date issues**
- **Your Lender and What You've Told Them**
- **The Other People You're Suing**
- **What is the Project**

Questions?



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