



★ NASHVILLE, TN ★

BEC

CONFERENCE

★ MARCH 1-3, 2020 ★

NGA

NATIONAL GLASS ASSOCIATION with GANA

With Every Reward Comes Risk

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Loss Prevention Elements

- Preparation of agreement
- Qualified team members
- Proper insurance coverage
- Performance to minimize potential for dispute
- Proactivity – recognition and resolution of problems before a dispute arises
- Legal advice (when necessary)

What is Delegated Design?

- The transfer of design responsibility for a **component system** from the design professional of record to the contractor.
 - Distinguished from **design-assist** where design responsibility is not transferred
 - Example - building envelope expert is retained to assist AOR/EOR with design development.
 - Distinguished from **design-build** where **ALL** design responsibility is transferred.

What is Delegated Design?

- The delegated design responsibility may be transferred to you by contract phrases like:
 - “scope of work includes, design, delivery and installation of a functioning building system, consistent with the intent of the contract documents.”

What is Delegated Design?

- The AIA General Conditions – AIA A201-2017, Section 3.12.10.1 provides:
 - If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional.

Top Contractor Risks

- Not understanding the design risk undertaken by contractor (e.g. who has design liability).
- Inadequate understanding of design responsibilities.
- Inadequate experience with performing design scope.

Top Contractor Risks

- Inadequate contract protections
- Inadequate insurance
- Engaging designer with inadequate experience
- Inadequate planning and management to head-off problems.

Keys to Success

- Careful drafting of your contract.
 - Must have clear communication up front to establish expectations.
 - Should engage designer in drafting process.
 - Must make sure contract terms are clear and free from ambiguity.

CONTRACT

This Contract states that Harrison McConnell can not call me names, hurt me in any way, come in my room without permission or steal any of my stuff. Do you agree with these terms?

Yes ~~No~~

After signing this contract I will not do any of the things to you that are listed above. If you violate any of these terms after signing this contract there will be severe consequences. By signing this contract you may not do any of these things.

X Harrison

CONTRACT

This Contract states that Harrison McConnell can not call me names, hurt me in any way, come in my room without permission or steal any of my stuff. Do you agree with these terms?

Yes ~~No~~

Consideration?

After signing this contract I will not do any of the things to you that are listed above. If you violate any of these terms after signing this contract there will be severe consequences. By signing this contract you may not do any of these things.

X Harrison

CONTRACT

This Contract states that Harrison McConnell
can not call me names, hurt me in any
way, come in my room without permission
or steal any of my stuff. Do you agree
with these terms?

Yes ~~No~~

Duress?

After signing this contract I will not
do any of the things to you that are
listed above. If you violate any of these
terms after signing this contract there
will be severe consequences. By signing
this contract you may not do any of these
things.

X Harrison

CONTRACT

This Contract states that Harrison McConnell
can not call me names, hurt me in any
way, come in my room without permission
or steal any of my stuff. Do you agree
with these terms?

Yes ~~No~~

Definite Terms?

After signing this contract I will not
do any of the things to you that are
listed above. If you violate any of these
terms after signing this contract there
will be severe consequences. By signing
this contract you may not do any of these
things.

X Harrison

Understanding Contract Obligations

- Other Documents Comprising the Contract
 - General Conditions
 - Contains general terms and conditions that govern performance of the contract work
 - Contains risk shifting clauses
 - Supplementary Conditions or Special Conditions
 - Unique to project
 - Addenda

Understanding Contract Obligations

- Incorporation-by-reference of other documents not necessarily attached.
- Makes incorporated document become part of contract as if fully set out therein.
- Each document will be construed with reference to the other.

“Red Flag” clauses

- Key risk shifting clauses
- If nothing else, PLEASE read red flag clauses!
 - Scope
 - Flow down
 - Indemnity
 - Insurance
 - Limitation of liability
 - Warranty

Scope

- Performance and design criteria must be communicated clearly
- Responsibility of the parties must be clearly established and understood
 - This is why you need design professional involvement
 - Must carefully define and understand limits of design responsibility (e.g. address design interface and avoid gaps)
- Additional services must be addressed

Flow-Down Clauses

- Cover all bases (one way vs. two way)
 - Sub assumes toward Contractor all obligations Contractor assumes toward Owner & Architect.
 - Contractor has all rights against Sub that Owner has against Contractor.
 - Contractor assumes toward Sub all obligations Owner assumes toward Contractor
 - Sub has all rights against Contractor that Contractor has against Owner.

Indemnity

- Express or implied where special relationship exists
- Obligates one who is actively negligent to indemnify one who is passively negligent
- Typical clause:
 - Requires a party to defend, indemnify and hold harmless another from all losses arising from any act or failure to act of the party in the performance of the contract work.

Indemnity

“Contractor agrees to indemnify and hold harmless the Owner for all claims arising during construction of the Project.”

Indemnity

- Clause requires indemnity for one's own negligence
 - Strictly construed – intent must be expressed in clear and unequivocal terms
- Some state statutes render void clauses that indemnify someone for their sole negligence

Indemnity

“Contractor agrees to indemnify and hold harmless the Owner for all claims except those caused solely by the Owner.”

Indemnity

“Contractor agrees to indemnify and hold harmless the Owner to the extent of damages caused by the negligence of Contractor.”

Indemnity

“Each party agrees to indemnify and hold harmless the other party to the extent of damages caused by the negligence of either party.”

Indemnity

- So what is the big deal?
 - Duty to defend
 - Attorney's fees
 - Theirs and yours

Indemnity for Owner Supplied Information

- Identify information supplied in contract
- Request disclaimer
 - The owner agrees to waive any claim against the contractor and its design professional and will defend, indemnify and hold each harmless from any claim or liability for injury or loss allegedly arising from any errors or omissions which are contained in information supplied by the owner.

Insurance

- Contract requirements?
- Must ensure proper COVERAGE
 - Comprehensive General Liability (CGL)
 - Errors & Omissions (E&O)
- Involve insurance risk manager

Insurance

- Proof of insurance coverage
 - Copy of Certificate of Insurance
 - Verify reputable carrier (AM Best A++)
 - Proper limits

CGL Insurance

- Protects policy holder (and other named insureds) from claims for personal injury or property damage by third parties.
 - Coverage for injury to others resulting from defective workmanship
 - Not intended to cover business risks
 - E.g. risk of faulty performance
 - No coverage for injury to contractor's own work or cost of correcting work itself
 - Must be damage to property other than contractor's work

CGL Insurance

- Work product exclusion
 - Bars coverage for damage to insured's products or work arising from insured's products or work
 - Bars cost to remedy own defective work
 - Exclusion will not apply to work done for you by others (e.g. subcontractors)

E&O Insurance

- Insurance that covers the professional negligence (errors and omissions) of design professionals.
 - Does not cover intentional acts or breach of obligations under contract.
 - Keyed to negligence – breach of the standard of care.

E&O Insurance

- Keyed to standard of professional care – one will be judged according to the standard of care required by their profession.
 - Will not be held to higher degree of skill than the average person of his profession.
 - “one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.”

E&O Insurance

- Do not agree to elevated standard of care!
 - Insurance coverage only for acts of negligence
 - No insurance coverage for breach of contract
 - Breach of warranty
 - Unfulfilled guarantee
- NEVER EVER WARRANT OR GUARANTEE OUTCOME
 - Example: Contractor agrees to complete scope in accordance with highest standards.
 - Equates to guarantee and may not be insurable!

Limitation of Liability

- Waiver of Consequential Damages
 - Owner agrees, to the fullest extent permitted by law, that the contractor shall not be liable to the Owner for any special, indirect or consequential damages whatsoever, whether caused by the contractor's negligence, strict liability, breach of contract, breach of warranty, or other cause or causes.
 - Can also identify specific damages (e.g. lost profits, lost rent, loss of use, loss of income, business interruption)

Limitation of Liability

- To sum certain
 - Owner hereby agrees that, to the fullest extent permitted by law, Envelope Contractor's total liability to the Owner for any and all injuries, claims, losses, expenses or damages whatsoever arising out of or in any way related to the Project or this agreement from any cause or causes including, but not limited to, the Envelope Contractor's negligence, errors, omissions, strict liability, breach of contract, or breach of warranty shall not exceed the compensation paid to Envelope Contractor under this agreement, or the total amount of \$100,000, which ever is greater.

Limitation of Liability

- Clauses that shorten applicable statute of limitations.
 - “The owner and engineer agree that the applicable statute of limitations shall commence to run upon substantial completion of the project”
 - “Any and all actions related to the work shall be brought within two years of completion of the work”

Limitation of Liability

- No Damage for Delay
- Example
 - Contractor expressly agrees not to make, and hereby waives, any claim for damages on account of any delay, obstruction or hindrance of work progress for any cause whatsoever and agrees that its **sole right and remedy for any delay shall only be an extension of time for completion of the Work.**

Warranty Exposure

- Work conforms to EOR Contract Documents
- Work free from defects
- NOW – Delegated design scope is not deficient
- Exceptions:
 - Abuse, alterations to Work by others, improper maintenance, normal wear and tear

Risk Mitigation

- Know your contract rights!
- Effective use of communication to mitigate risk
 - Regular meetings with full project team
 - External expert input if necessary
 - **Documentation!**

Know When to Manage and Document More Carefully

- Recognize risky situations
 - Finger pointing
 - Scope changes
 - Cost overruns
 - Delays
 - Defects
 - Work stoppage

Best Practice Checklist

- Document decisions made/direction provided
- Immediate response to criticism or inaccurate information
- Maintain organized and complete records of correspondence

Best Practice Checklist

- Keep meeting minutes and confirm accuracy/inaccuracy with participants
- Keep records of conversations and confirm important conversations
- Document site conditions
 - Observation reports
 - Photographs

Best Practice Checklist

- Document events that could generate claims
- Document suspected claims contemporaneously
- Engage in careful communications
 - Avoid scathing emails
- **AVOID ANY ADMISSIONS!!!!**

The Admission

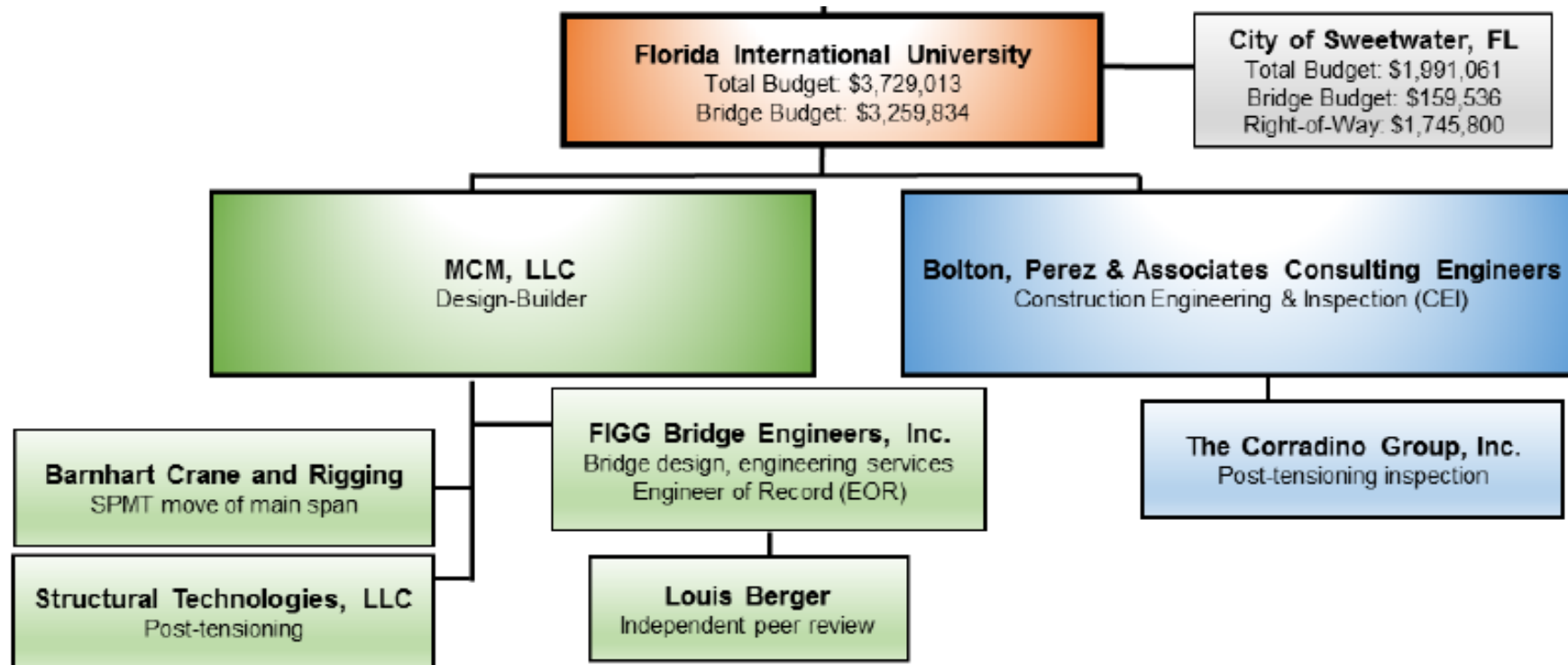
I wanted to apologize for all of our contribution to this mess. Of the 16 jobs we've done in the past 4 years on 3 different Army post, this is the first time we have had anything like this kind of problem. I am used to getting quality and safety awards, not getting fired from jobs. I wish I could say we were blameless in this situation, but that would not be true. I believe that we did perform some work at a very high level, but we certainly did make mistakes.

FIU Pedestrian Bridge Collapse

March 15, 2018



Players



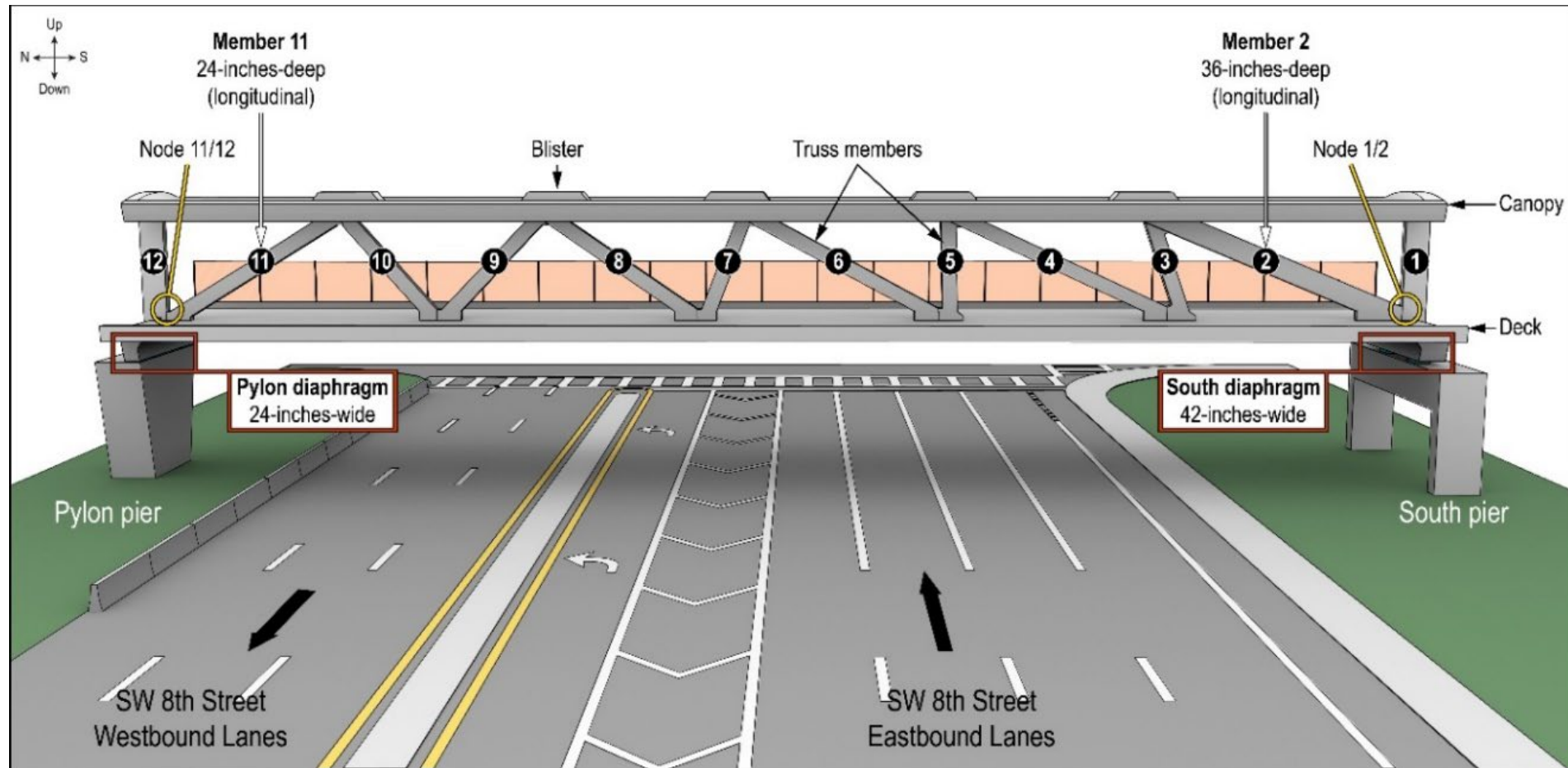
What Happened

- Single concrete truss pedestrian bridge
 - 174 foot span; 930 tons
- Structure was cast offsite
- Was placed over road on supporting piers 5 days prior to collapse
- Numerous wide and deep structural cracks began to develop weeks before failure

What Happened

- Collapsed on March 15, 2018 at 1:46 p.m.
- 5 vehicle fatalities and 1 worker fatality.
- Caused by catastrophic structural failure in nodal connection between truss members 11 & 12.
- At time of collapse, workers were re-tensioning the post-tensioning rods at the direction of EOR.

Layout



Timeline

- Bridge structure was cast offsite
- **Feb. 13, 2018** – CEI report to MCM documenting development of concrete cracks.
- **Feb. 16, 2018** – EOR notified of cracks and responds to CEI report.
- **Feb. 24, 2018** – Construction workers reported hearing loud, distinct sound of concrete cracking.
 - Cracks found in nodal region 11/12 and 1/2.

Timeline

- **Feb. 28, 2018** – CEI prepares 2nd report to MCM documenting cracks.
- **March 7, 2018** – EOR provided preliminary comments in response to CEI 2nd report.
- **March 10, 2018** – Span moved into place over piers.

March 10, 2018



March 10, 2018

Post tensioning
contractor
employee text
to his supervisor



March 12



March 12



March 13



March 14

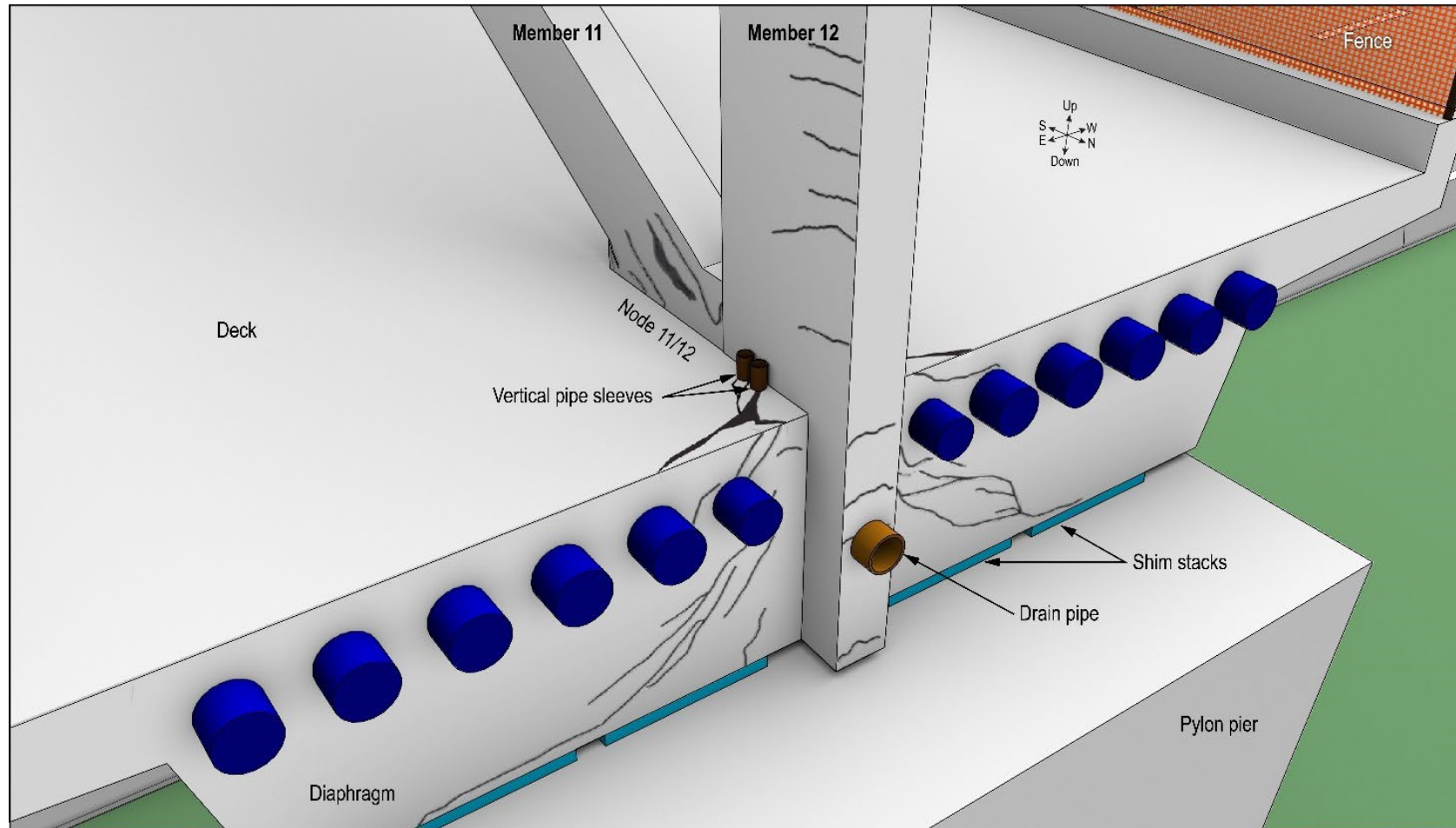


March 15

- 8:00 a.m. – EOR viewed the cracks and took this photo.
- Meeting at 9:00 a.m. with project team to discuss cracking



SE View of Node 11/12 Cracking



March 15, 2018 at 1:46 p.m. – Bridge collapses



March 15, 2018 at 1:46 p.m. – Bridge collapses



March 15, 2018 at 1:46 p.m. – Bridge collapses



Probable Cause

- Load and capacity calculation errors made by EOR.
- Contributing was EOR's failure to:
 - Identify the significance of the structural cracking; and
 - Seek independent peer review of the remedial plan to address the cracking.

Probable Cause (as it relates to contractor)

- MCM did provide EOR with photos and measurements showing crack growth weeks before collapse.
- MCM possessed extensive experience with concrete structures.
- MCM deferred to decision of EOR and did not exercise *independent judgment* to close road and shore structure.

Do you really want to be here?



Avoiding Litigation

- Well drafted contract
- Performance to minimize potential for dispute
- Documentation of significant events
- Know danger signs
- Be proactive – confront disagreements before they become disputes

Opry Mills Mall

“Pictures speak louder than words”



QUESTIONS?

Text goes here