Battle of Construction Contracts

Team U.S.A. v. Team Canada

Presenters

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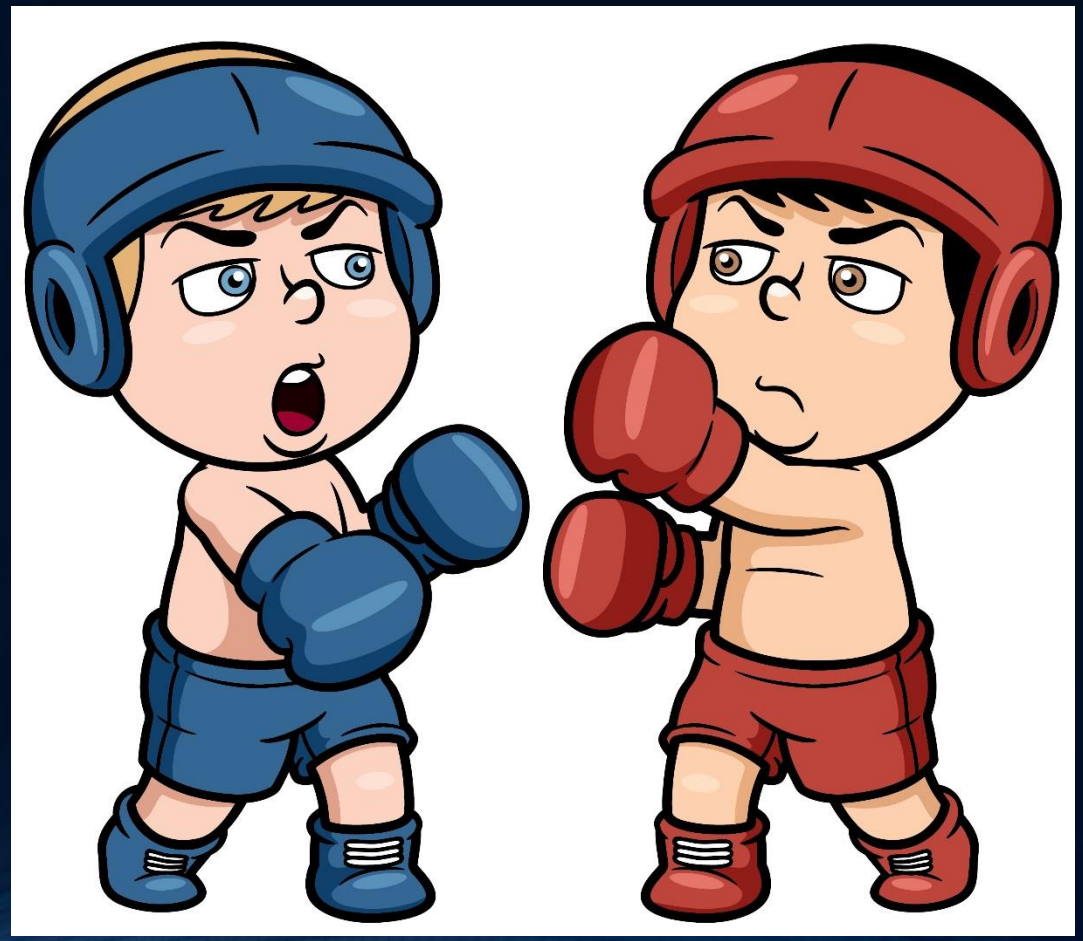
IMLA 82nd ANNUAL CONFERENCE
NIAGARA FALLS, ONTARIO, CANADA
OCTOBER 14-18, 2017

So what's Canada all about anyway?

- https://www.youtube.com/watch?v=biqoNAF2e6o



Team U.S.A. v. Team Canada

- Canadian and U.S.A. Perspective on Construction Contracts
  - Driving Forces in Construction Contracts
    - Politics
    - Sources of Funding
    - Procurement Processes
    - Legal Requirements and Impediments

Unique Aspects of Canadian Law

- 3rd Party Beneficiary rule
- Jury Trials
- Contract A/ Contract B Procurement
- Duty of Honest Contractual Performance



Covered Topics

- Tools of the Trade
- Risk Allocation (Pros and Cons)
- Disputes
- Practical Experiences

Tools of the Trade

- Traditional Project Delivery
  - Stipulated Price
  - Guaranteed Maximum Price (GMP)
  - Cost Plus Fee
  - Construction Management at Risk (CMR)
  - Design-Bid-Build (DBB)
  - Design-Build (DB)
- Public Private Partnership (P3)
- Integrated Project Delivery (IPD)
- Competitive Dialogue
- Request for Project Partner
- BAFO
- Other

CCDC 14 – Design Build

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A-7 Language of the Contract
A-8 Succession

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Change Order
Construction Documents
Construction Equipment
Consultant
Contract
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Contract Time
Design-Builder
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Drawings
Notice in Writing
Other Consultant
Owner
Owner's Advisor
Owner's Statement of Requirements
Payment Certifier
Place of the Work
Product
Project
Shop Drawings
Specifications
Subcontractor
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Work
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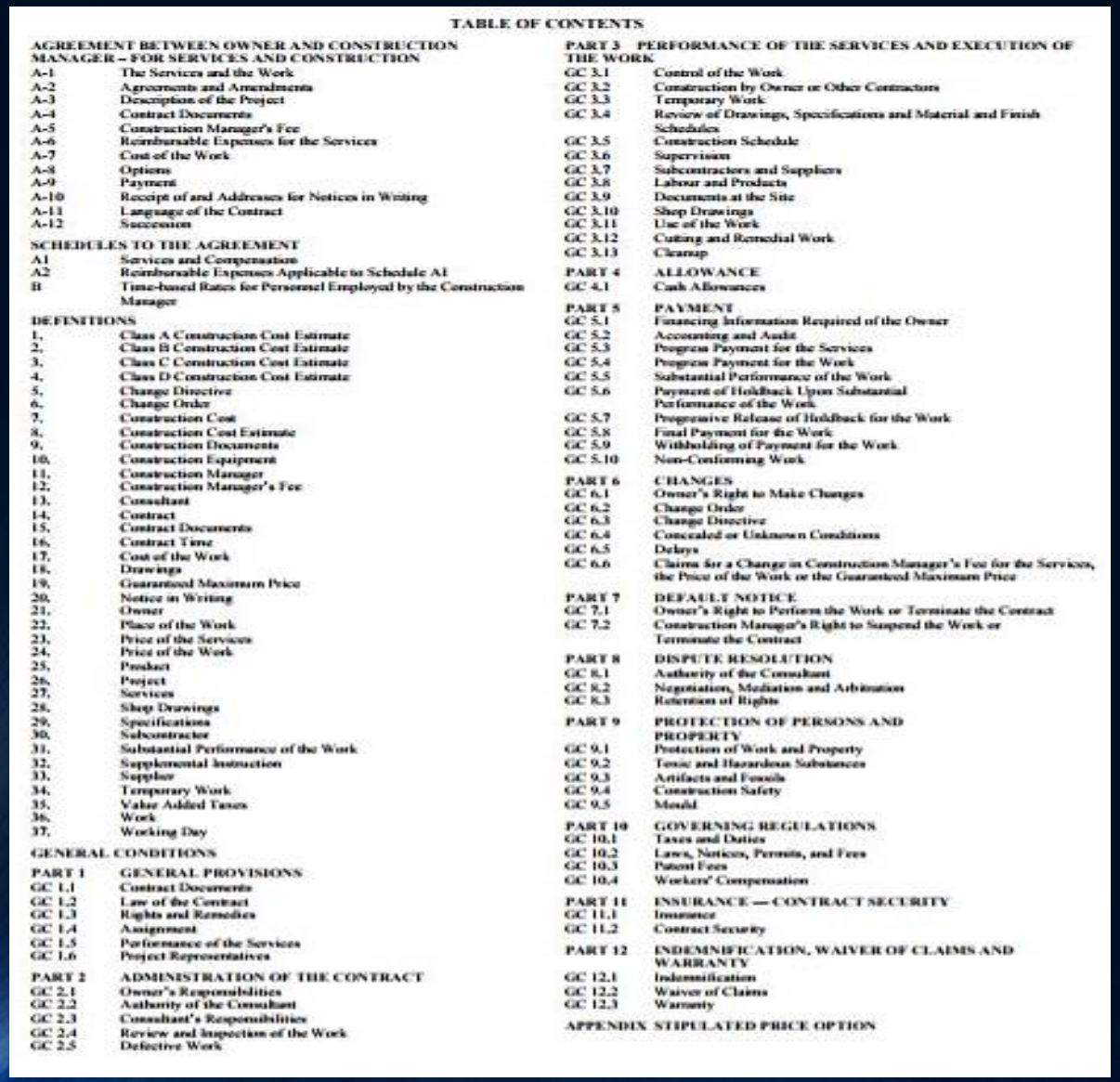
- 35 Pages
- Supplementary Conditions

CCDC 5B - Construction Management



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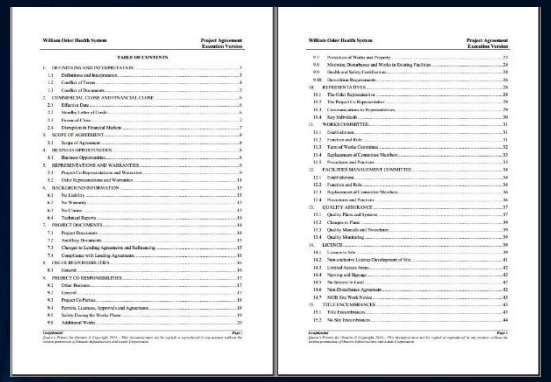
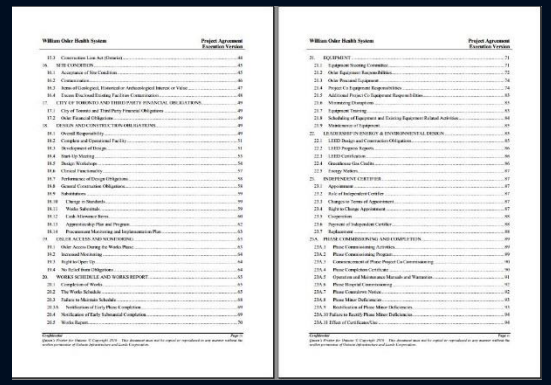
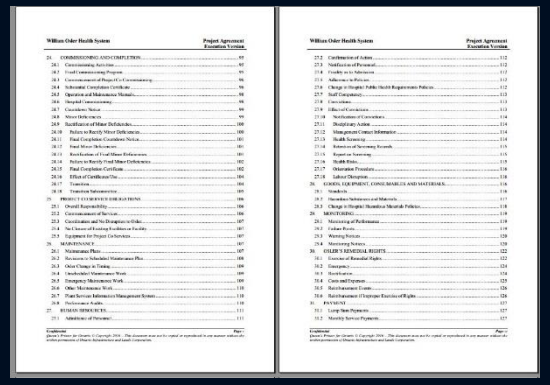
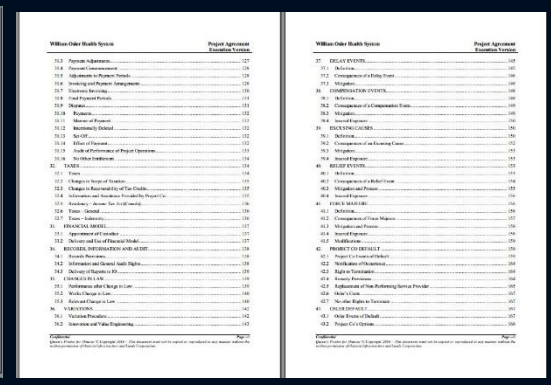
APPENDIX STIPULATED PRICE OPTION

- 59 Pages
- Supplementary Conditions

IO – Design Build Finance Maintain Agreement

- 11 page Table of Contents
- 37 Schedules
- 780 page Agreement

Canadian Procurement Law

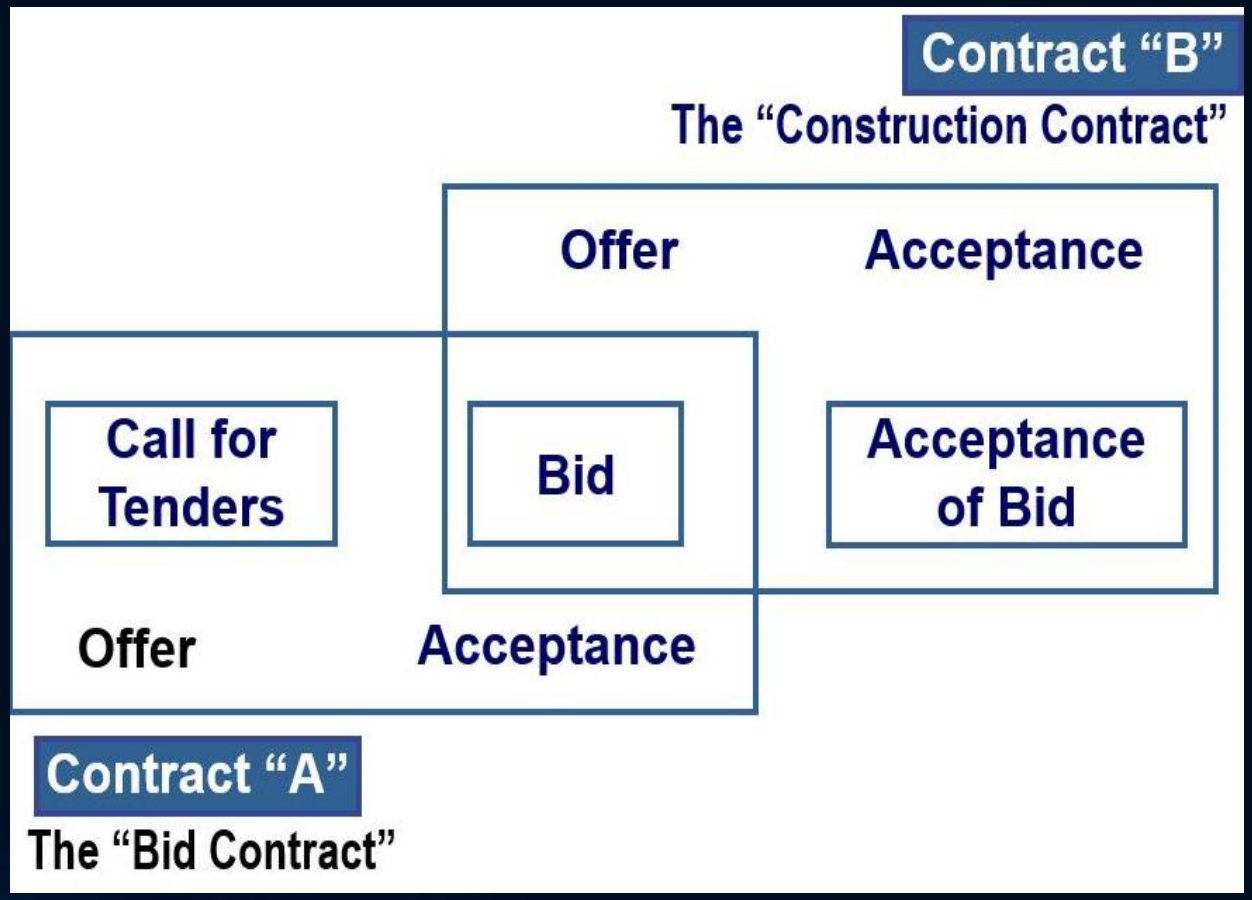
Contract "A" – Contract "B"

R. v. Ron Engineering (1981)

Tenders may give rise to the <u>following implied duties</u> :

1. To provide proper and full disclosure to all bidders;
2. To consider only compliant bids;
3. To conduct a fair evaluation process of all submitted bids pursuant to the disclosed selection criteria provided and any evaluation methodology specified;
4. To award to the winning bidder*; and
5. To award the contract (Contract B) as tendered.

*Subject to owner's Privilege Clause.

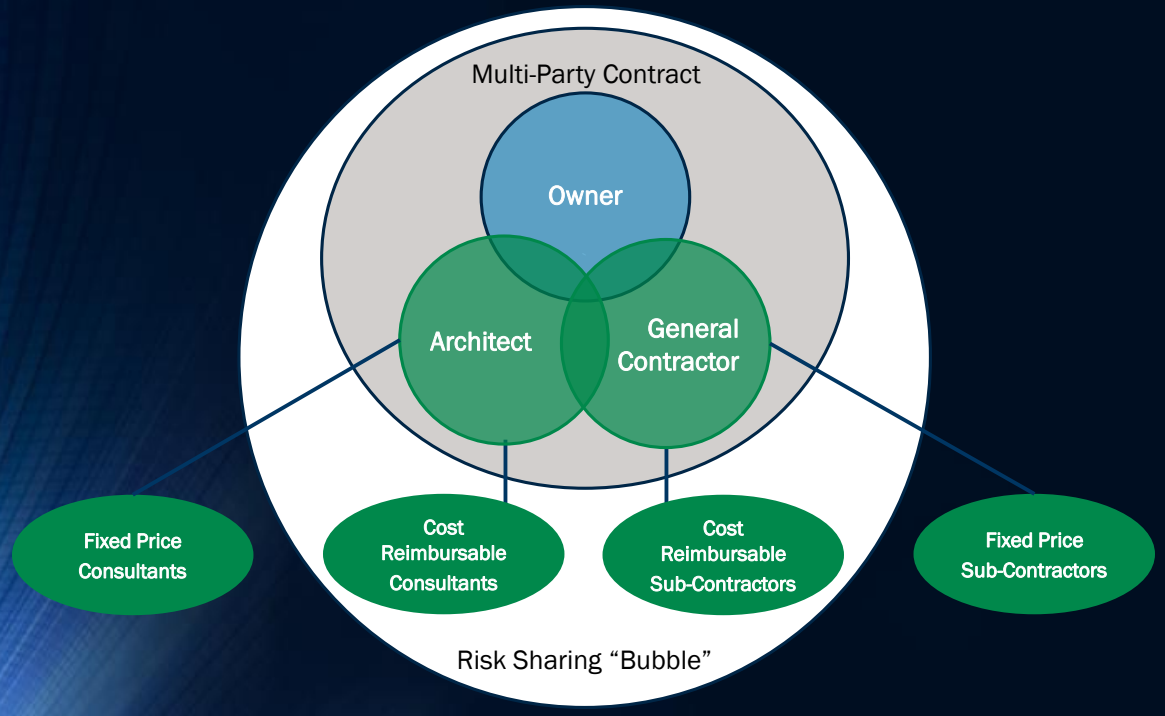


Canadian Procurement Considerations

- **Canadian Free Trade Agreement (CFTA)**
  - An intergovernmental trade agreement signed by Canadian Ministers that entered into force on July 1st, 2017. Its objective is to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investments within Canada and to establish an open efficient, and stable domestic market.
  - **Canada and European Union (EU) Comprehensive Economic and Trade Agreement (CETA)**
    - Similar to CFTA but struck between Canada and the EU
  - **Broader Public Sector Procurement Directive (BPSPD)**
    - 25 mandatory requirements for public sector procurement in Canada.

Integrated Project Delivery

Relatively New to Canada



<u>Keys to Integrated Project Delivery</u>

- Early Involvement of key participants
- Shared Risk/ Reward on project outcomes
- Joint/ shared project control
- Collaborative decision making
- Jointly developed & jointly validated targets
- Outcome based structure
- Behavior change
  - Trust
  - Enhanced collaboration through Lean Principles & Building Information Modeling (BIM)

Competitive Dialogue

- Used in European Union, but application in Canada may be more complex
- Competitive Dialogue:
  - One means for innovative procurement
  - Potential to better meet certain owner needs and deliver value for money



The Brampton City Hall Expansion: Ontario's Foray into Competitive Dialogue



Trends in Canadian Contracts

- Amending Construction Lien Act
- Internal/External Trade Agreements (CFTA, CETA, NAFTA) affecting procurement.
- Integrity in Contracting
  - Combating Collusion and Corruption
  - Canada's Duty of Honest Contractual Performance
- Move toward Liquidated Damages
- Push for identifying Key Personnel in Contracts



Tools of the Trade

- Preferred Contracting Methodologies
  - Canada
    - P3
    - CCDC
  - U.S.A.
    - Design-Bid-Build
    - Design-Build
    - P3

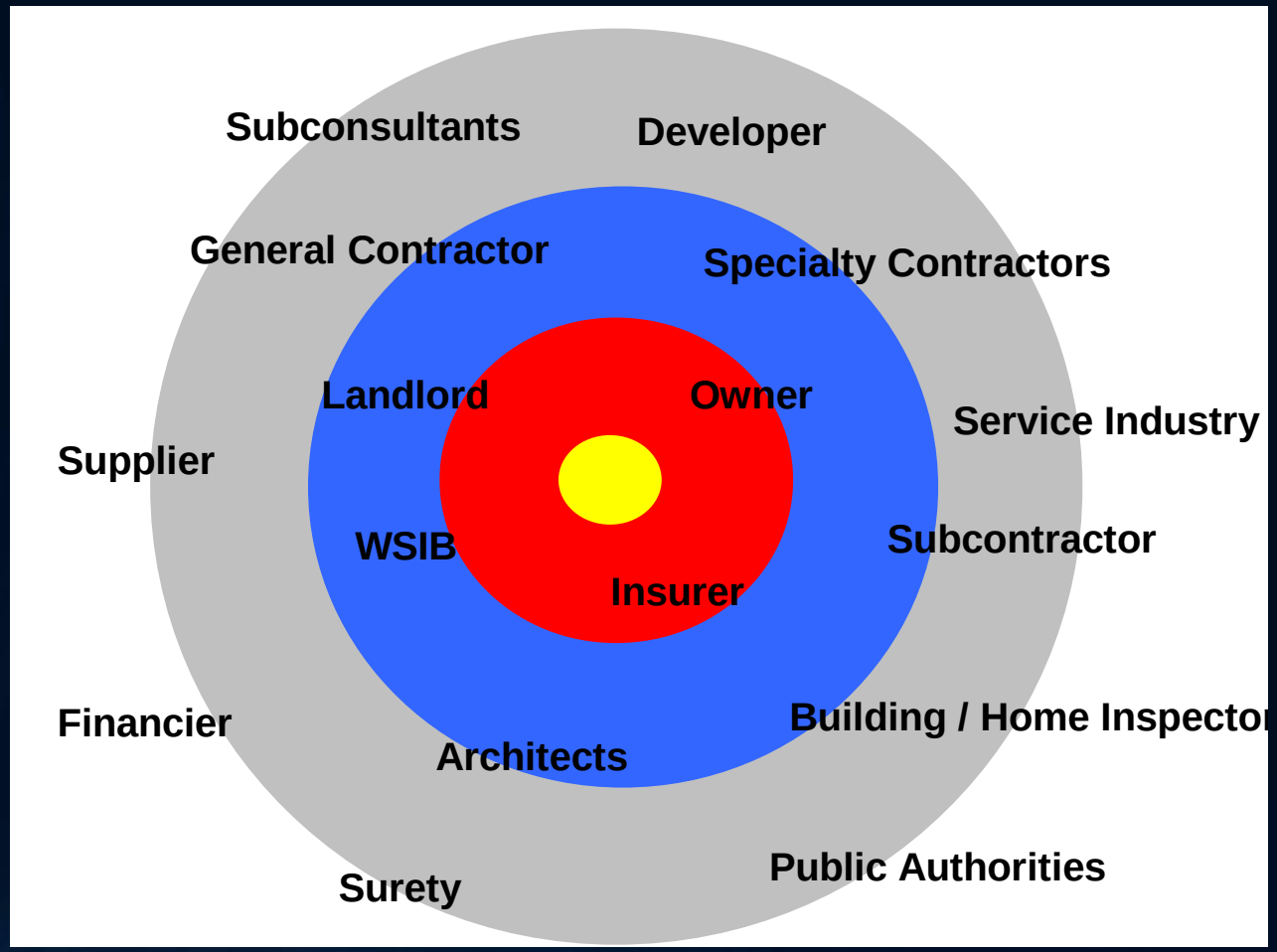


Risk Allocation

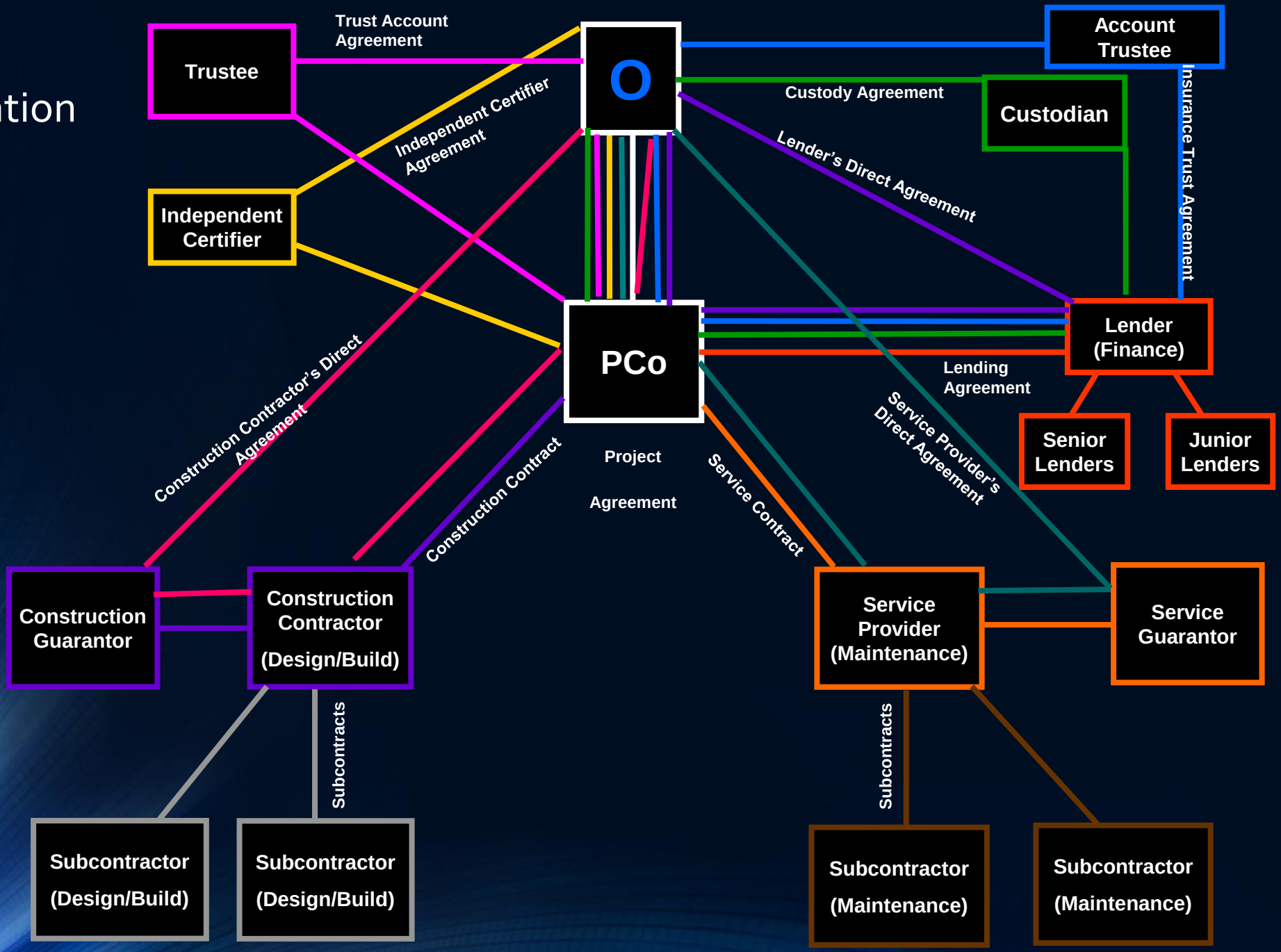
- Methods of Risk Allocation - Canada v. U.S.A.
  - Shifting the Risk
    - Contract
    - Bonds
    - Insurance
  - Pros and Cons of the Methods
    - Attorneys' Fees
    - Consultants' Fees
    - Court Costs
    - Arbitration Costs/Fees



Risk Allocation - Stakeholders



Risk Allocation in P3



Disputes

- Methods of dispute Resolution
  - Canada v. U.S.A.
    - Litigation and Arbitration
    - Administrative Process and Procedures
    - Adjudication - proposed new Lien Act (Ontario)
  - Pros and Cons of the Methods Used in Canada and U.S.A.
    - Procedural and Substantive Issues
      - Forum and Venue Selection
      - Unique Laws – Yes, We Have the Same Mother, But…?
      - Assessment of Fees and Costs – Loser Pays?
      - Electronically Stored Information – Bane of Existence?

Practical Experiences

- Canada
  - Municipal Infrastructure and Procurement
- U.S.A.
  - Silver Spring Transit Center

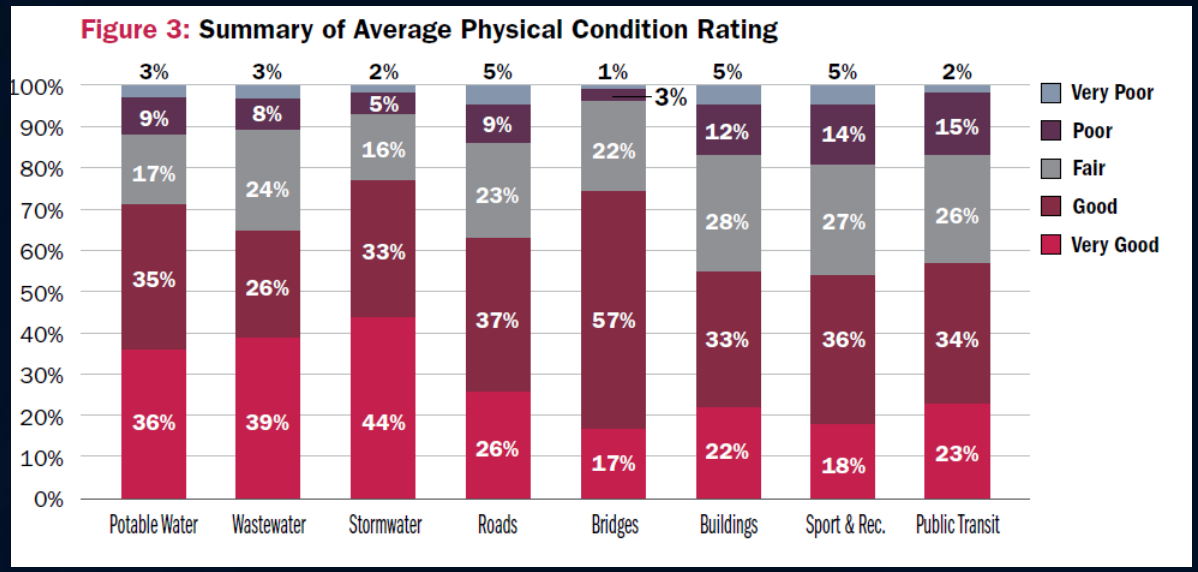


Unique Nature of Municipal Infrastructure and Procurement

- Why focus on municipal infrastructure?
  - Infrastructure deficit in Canada is well known
  - Recent Federal and Provincial budgets look to address it
- Canada Infrastructure Bank Developments
  - Purpose is to build more infrastructure and to attract private sector and institutional investors.
  - Investment of $35 billion.

Unique Nature of Municipal Infrastructure and Procurement

- According to the recently released *Canadian Infrastructure Report Card*:
  - 60% of Canada's core public infrastructure is owned and maintained by municipal governments
  - one third of it is in fair, poor or very poor condition



- Source: *Informing the Future: The Canadian Infrastructure Report Card (accessed: August 14, 2017 at http://www.canadainfrastructure.ca/downloads/Canadian_Infrastructure_Report_2016.pdf)*

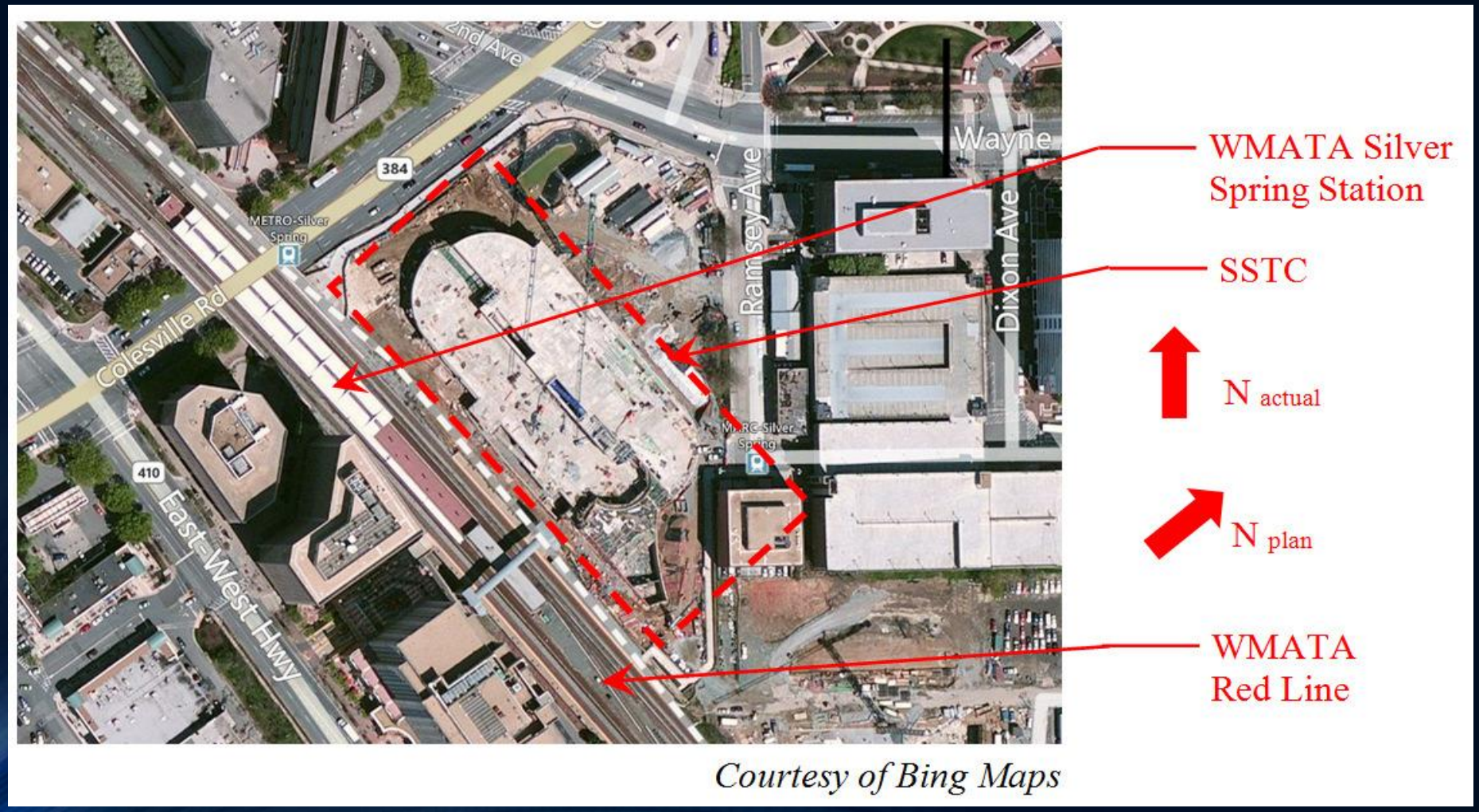
Crazy Canadian Laws

- 1. In Nova Scotia, a person is not allowed to water their grass when it is raining.
- 2. In British Columbia, it is illegal to kill a sasquatch.
- 3. In Alberta, it is illegal to set fire to the wooden leg of a wooden legged man.
- 4. In Toronto, it is illegal to drag a dead horse down Yonge Street on a Sunday.
- 5. In Montreal, it is illegal to swear in French.
- 6. In Ottawa, you are not allowed to eat ice cream on Bank Street on a Sunday.
- 7. In Fort Qu'Appelle Quebec it is illegal for a teen to walk downtown main street with his shoes untied.
- 8. In Uxbridge, Ontario, it is illegal to have an internet connection faster than 56K.
- 9. In Kanata, it is illegal to have a clothesline in your backyard.
- 10. In Oshawa, it is illegal to climb trees.

U.S.A. - Silver Spring Transit Center (SSTC)



SSTC


WMATA Silver Spring Station
SSTC
N actual
N plan
WMATA Red Line
Courtesy of Bing Maps
Colesville Rd
East-West Hwy
Ramsey Ave
Dixon Ave
Wayne
2nd Ave
384
410
METRO-Silver Spring

SSTC



SSTC


MARC Trains
TRIPS, Intercity Bus
Level 2
Down to Level 1
5 TWINBROOK
S2 FEDERAL TRIANGLE
metrobus
RideOn
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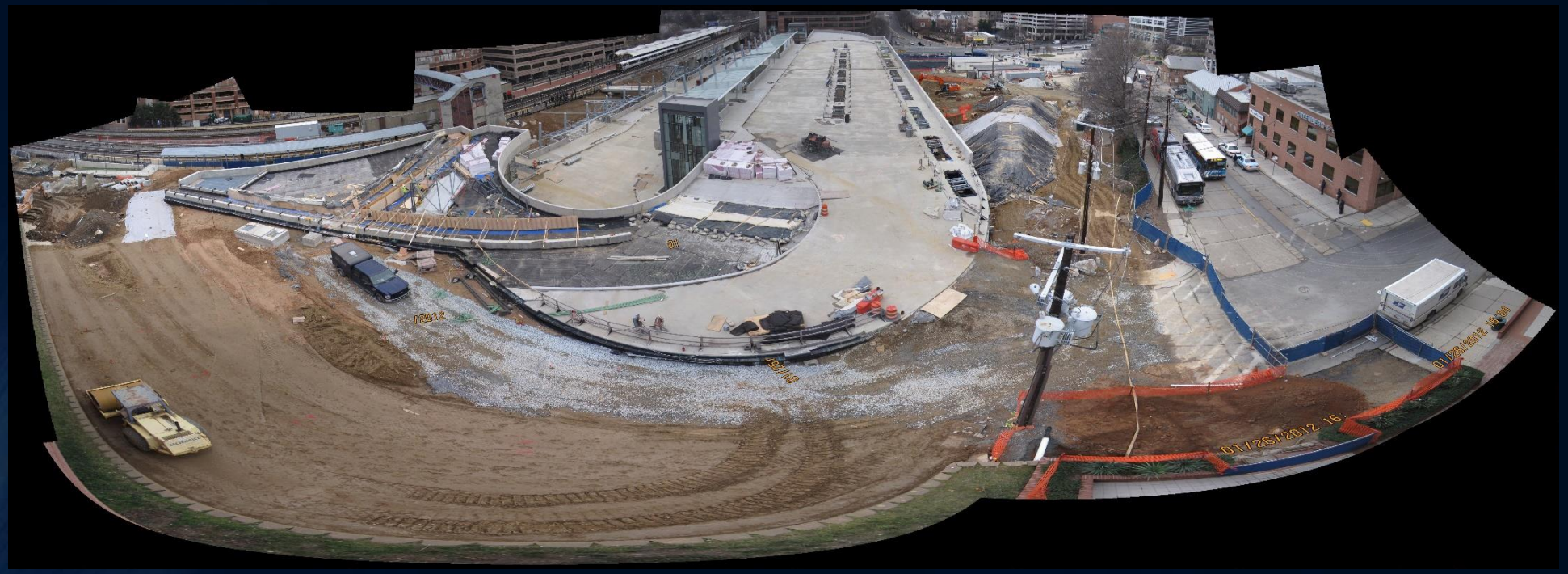
tcn.com

SSTC



SSTC



SSTC



SSTC



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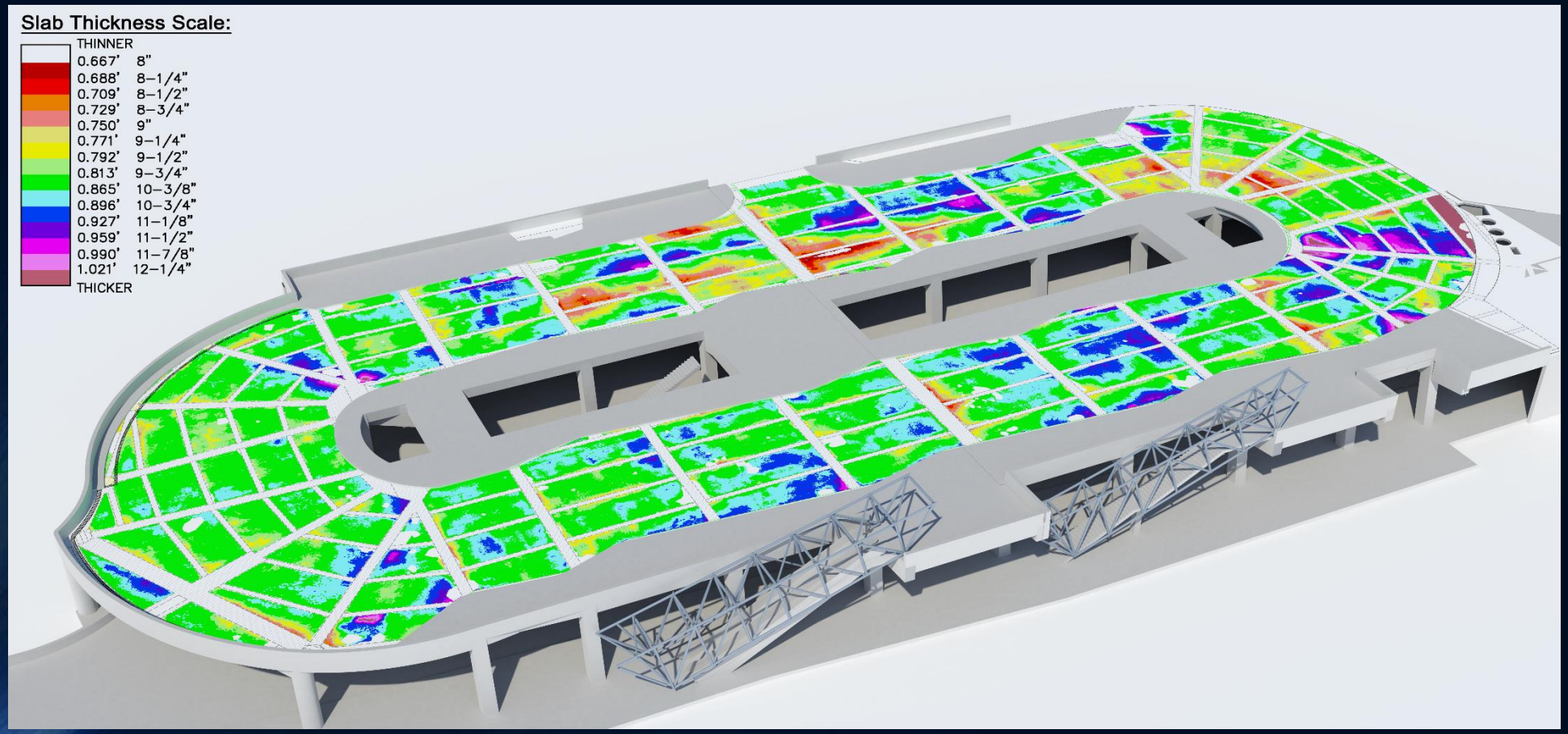
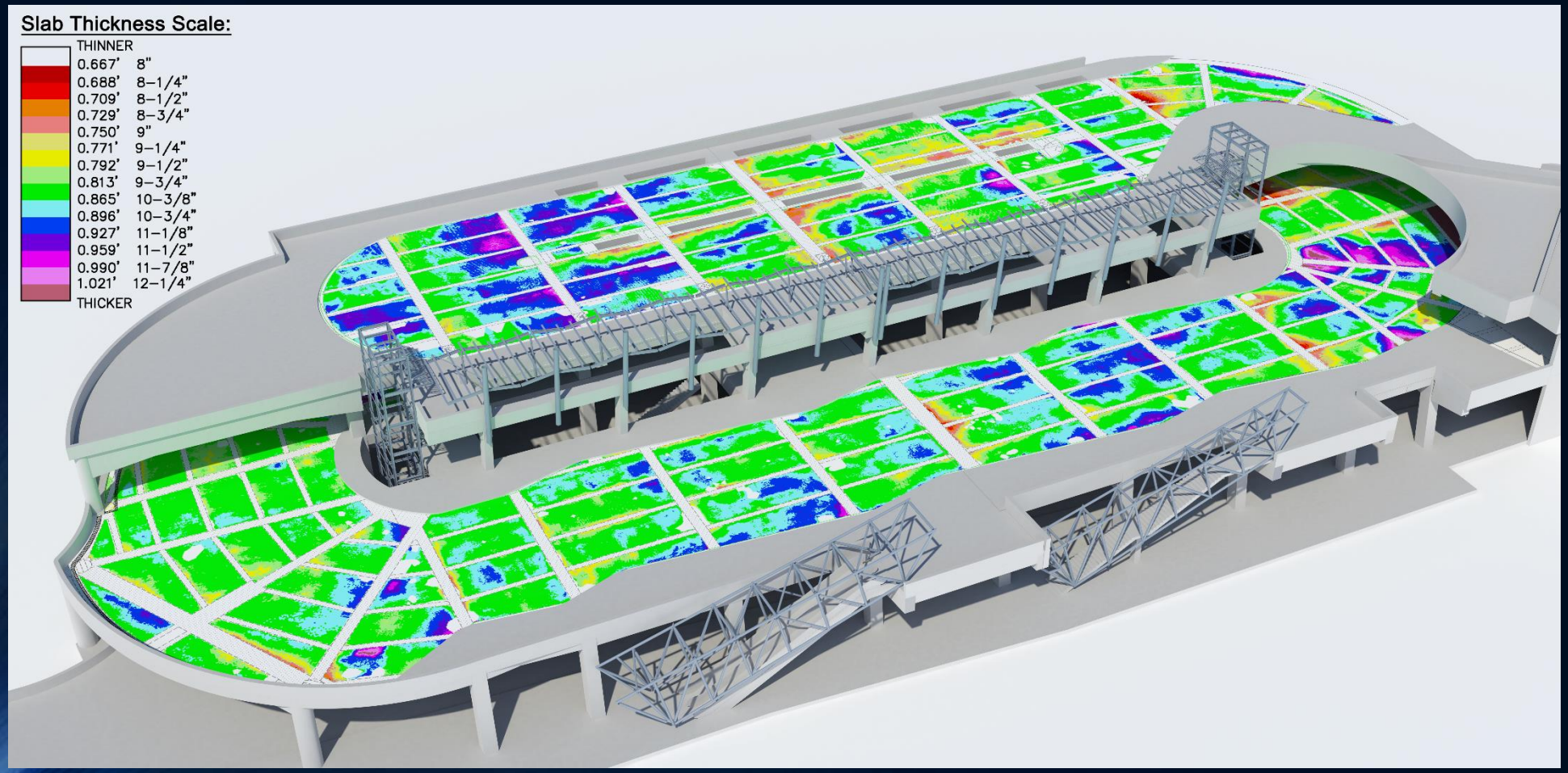
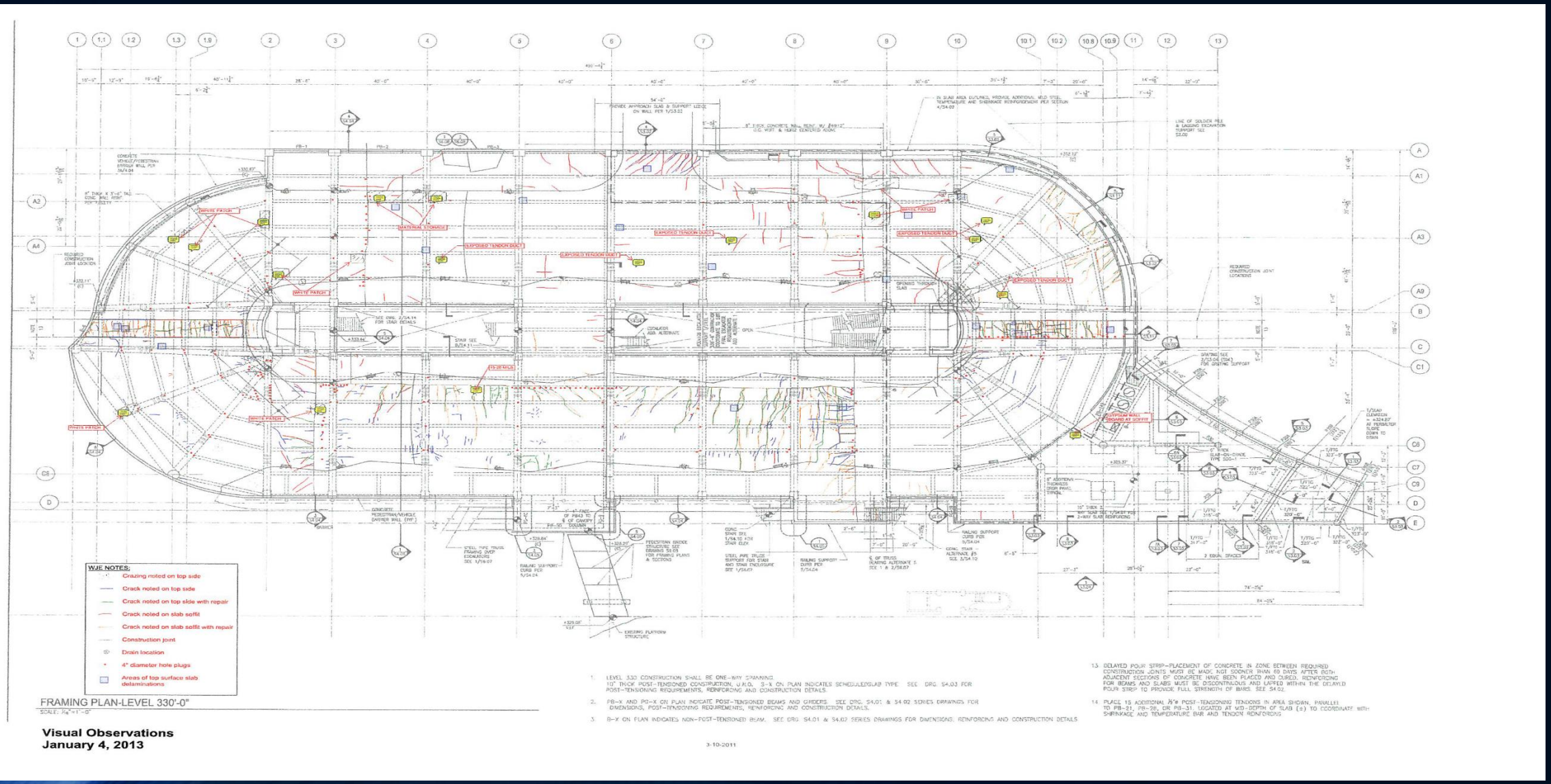
SSTC Slab Thickness L330



SSTC Slab Thickness L350



SSTC

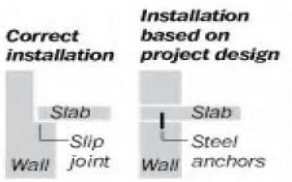

WJE NOTES:
Crazing noted on top side
Crack noted on top side
Crack noted on top side with repair
Crack noted on slab soffit
Crack noted on slab soffit with repair
Construction joint
Drain location
4" diameter hole plugs
Areas of top surface slab delaminations
FRAMING PLAN-LEVEL 330'-0"
Visual Observations
January 4, 2013

SSTC – Washington Post Article

Cracks

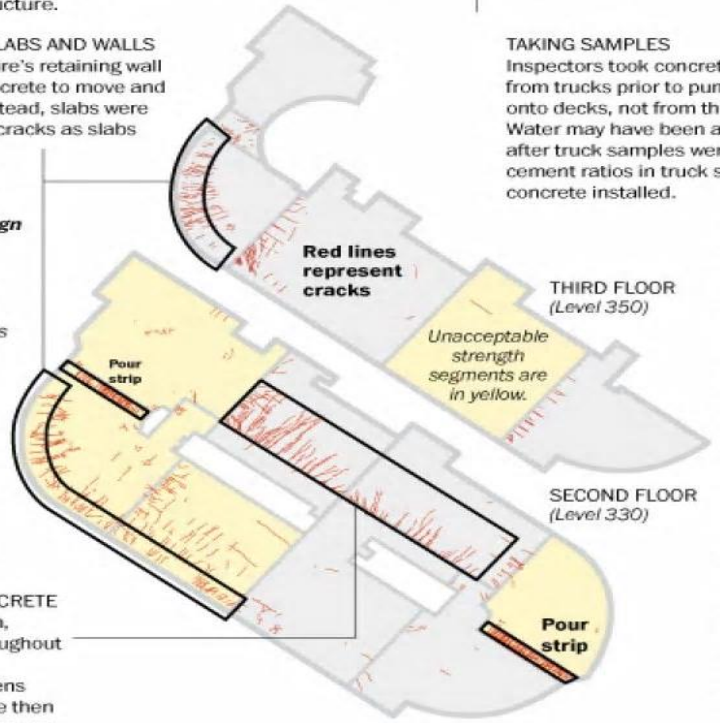
Cracks do not impact load support but can affect the durability and longevity of the building, allowing moisture to penetrate concrete slabs and accelerate corrosion of reinforcing steel. Several factors caused cracks throughout the structure.

NO SLIP JOINT BETWEEN SLABS AND WALLS
A slip joint along the structure's retaining wall would have allowed the concrete to move and contract as it hardened. Instead, slabs were anchored to walls, causing cracks as slabs shrank and pulled away.



NO SUPPORT CABLES BETWEEN CONCRETE SECTIONS
The second floor did not have support cables — known as post-tensioning cables — inside areas called pour strips, which serve as buffers between poured concrete sections.

OVER-TENSIONING OF CONCRETE
Similar to tightening a drum, post-tensioning cables throughout the concrete are pulled, or stressed, as concrete hardens and strengthens. Cables are then injected with epoxy to keep everything in place. The post-tensioning cables at the Silver Spring Transit Center were over-stressed, which caused cracks in the concrete.



Strength

Concrete is poured in segments to allow for contraction as it cures. Several were found to have unacceptable strength levels.

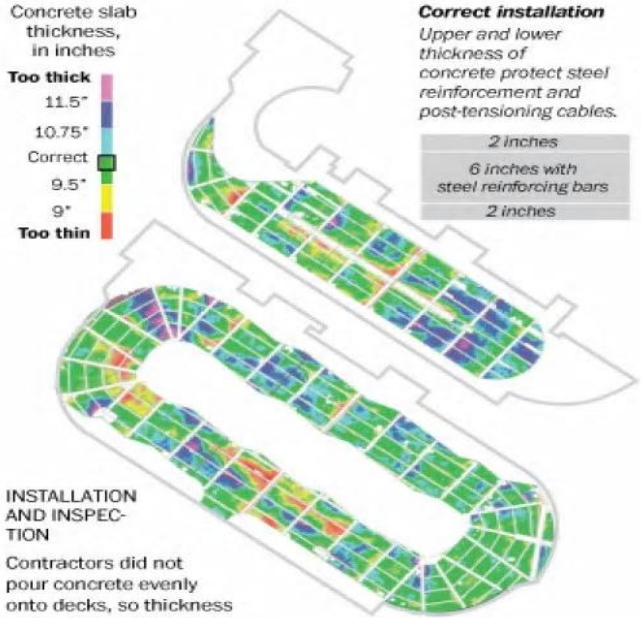
TAKING SAMPLES
Inspectors took concrete samples mostly from trucks prior to pumping the concrete onto decks, not from the decks themselves. Water may have been added to the concrete after truck samples were taken, so water-to-cement ratios in truck samples differed from concrete installed.

STORAGE OF SAMPLES
Inspectors stored samples in a curing box at temperatures between 60 to 80 degrees. These samples cured under essentially ideal conditions and strengthened more than the deck concrete, making them misrepresentative of concrete strength of the elevated slab.

MONITORING TEMPERATURE
Some concrete was poured in temperatures below 32 degrees, risking freezing or slow development in strength. Internal temperatures were not monitored, and surface temperatures were taken days after installation.

Thickness

Concrete decks were found to be thicker or thinner than required by the project's contract documents. Deficiencies were attributed to design and inspection.

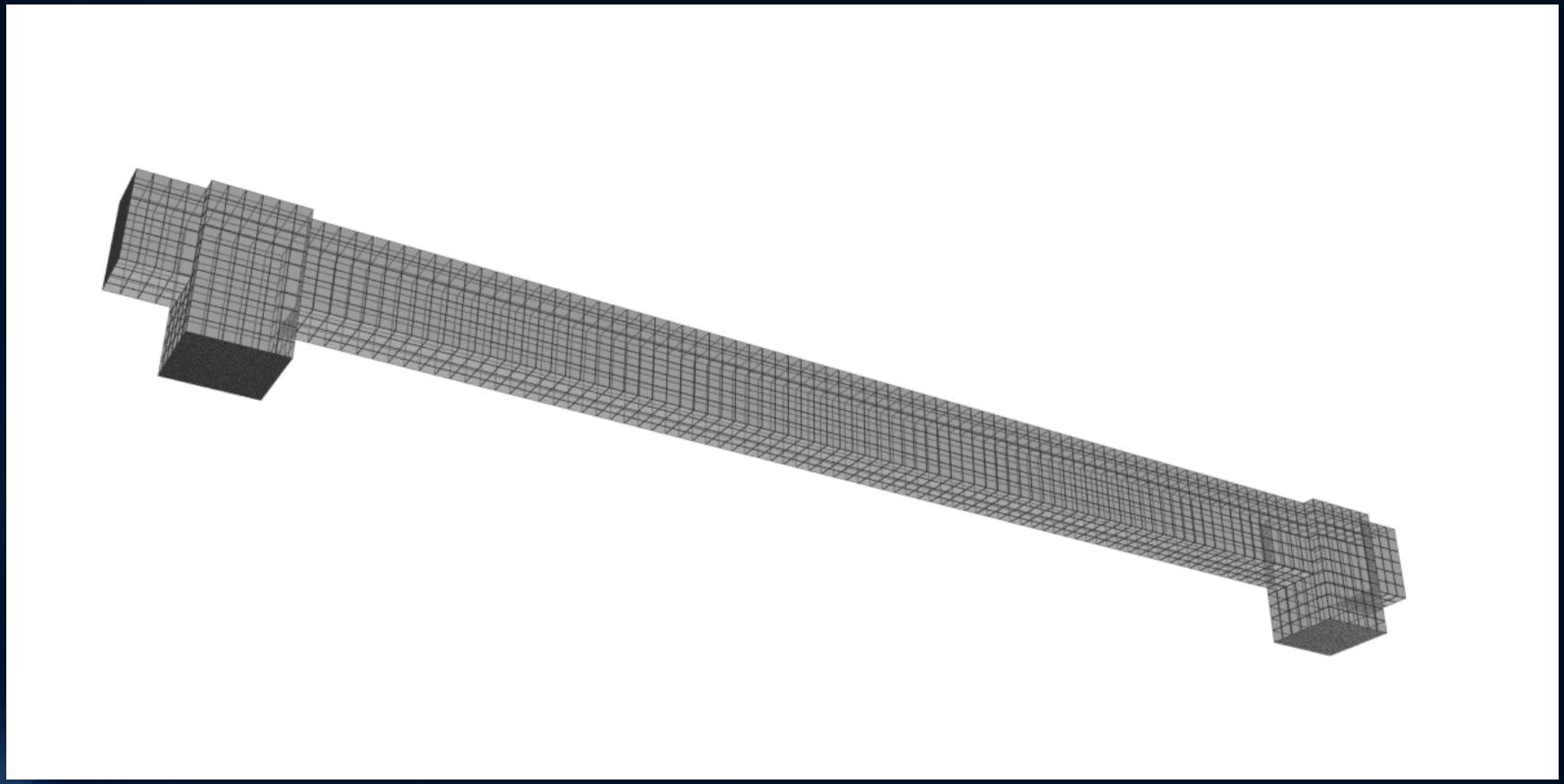


INSTALLATION AND INSPECTION
Contractors did not pour concrete evenly onto decks, so thickness varies. The correct thickness range was between 9.75 inches and 10.375 inches. Areas that are too thick do not affect load support, but areas that are too thin could lead to the exposure of steel reinforcement and post-tensioning cables.

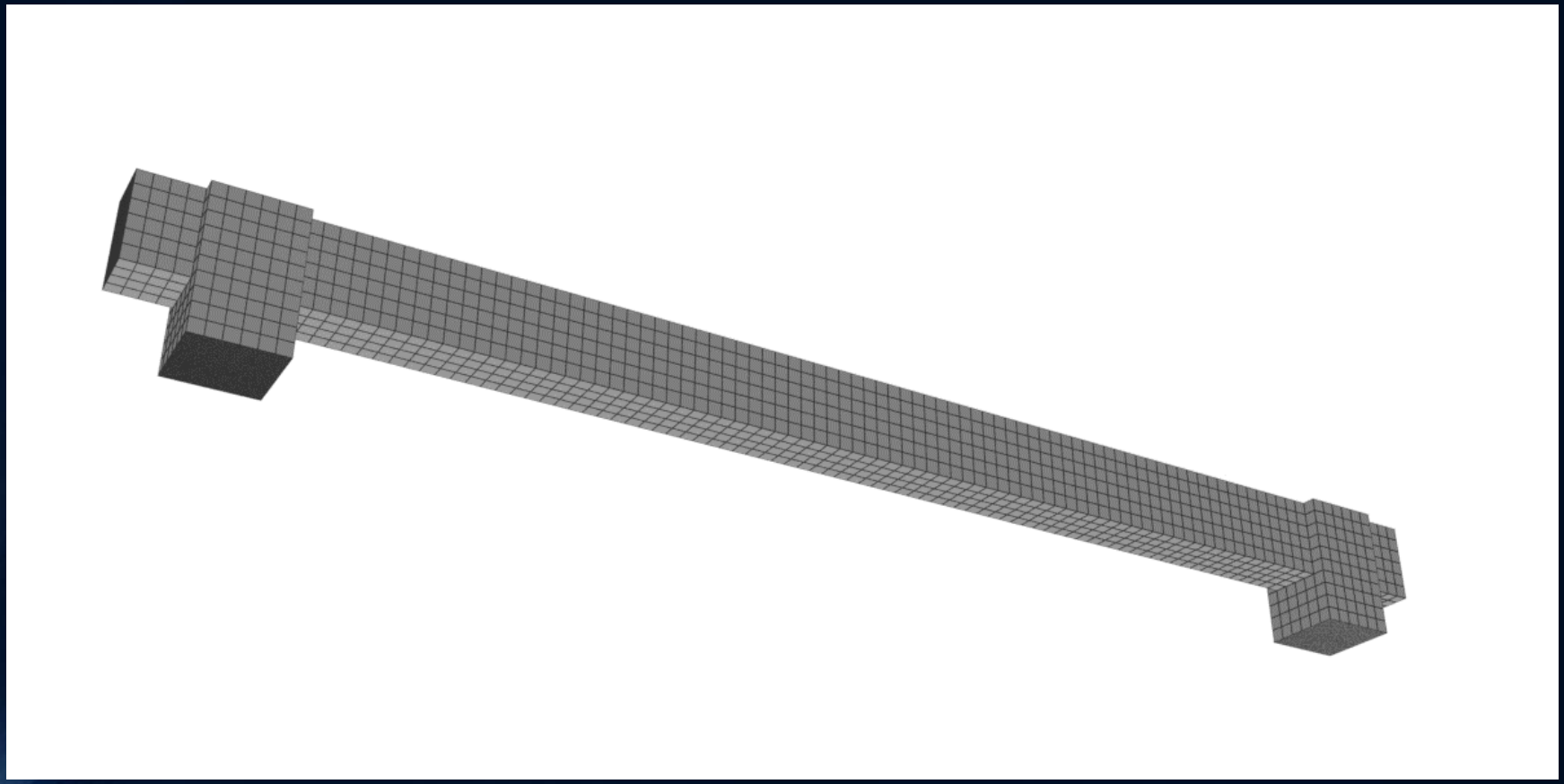
SSTC - Lawsuit

- Lawsuit Filed August 2015 with SSTC Opening September 2015
- Four Defendants
  - Foulger Pratt Contracting, LLC (GC)
    - Facchina Construction (Subcontractor for post-tensioning, steel, concrete)
  - Parsons Brinckerhoff (Engineer of Record)
  - Robert B. Balter Company (Special Inspections)
- 100 Depositions (Expert and Fact Witnesses)
- 30 Motions for Summary Judgment argued over two days
- 4 Terabytes of Data for Montgomery County
- Thousands of Trial Exhibits
- May 2017 - Six Week Jury Trial
- 3rd Week of Trial - Settlement

SSTC - Trial Exhibit - Beam Shear



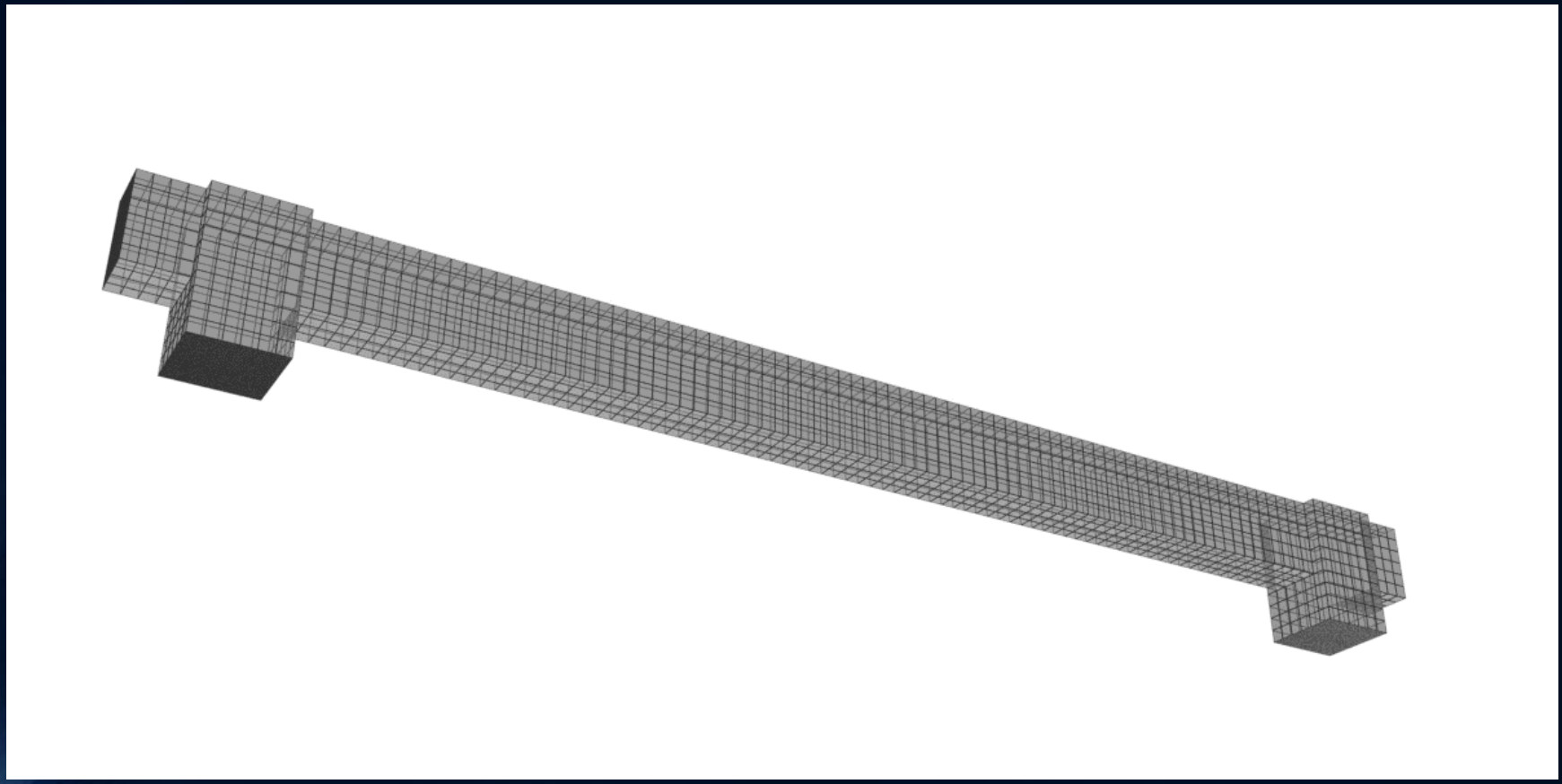
SSTC - Trial Exhibit - Beam Torsion



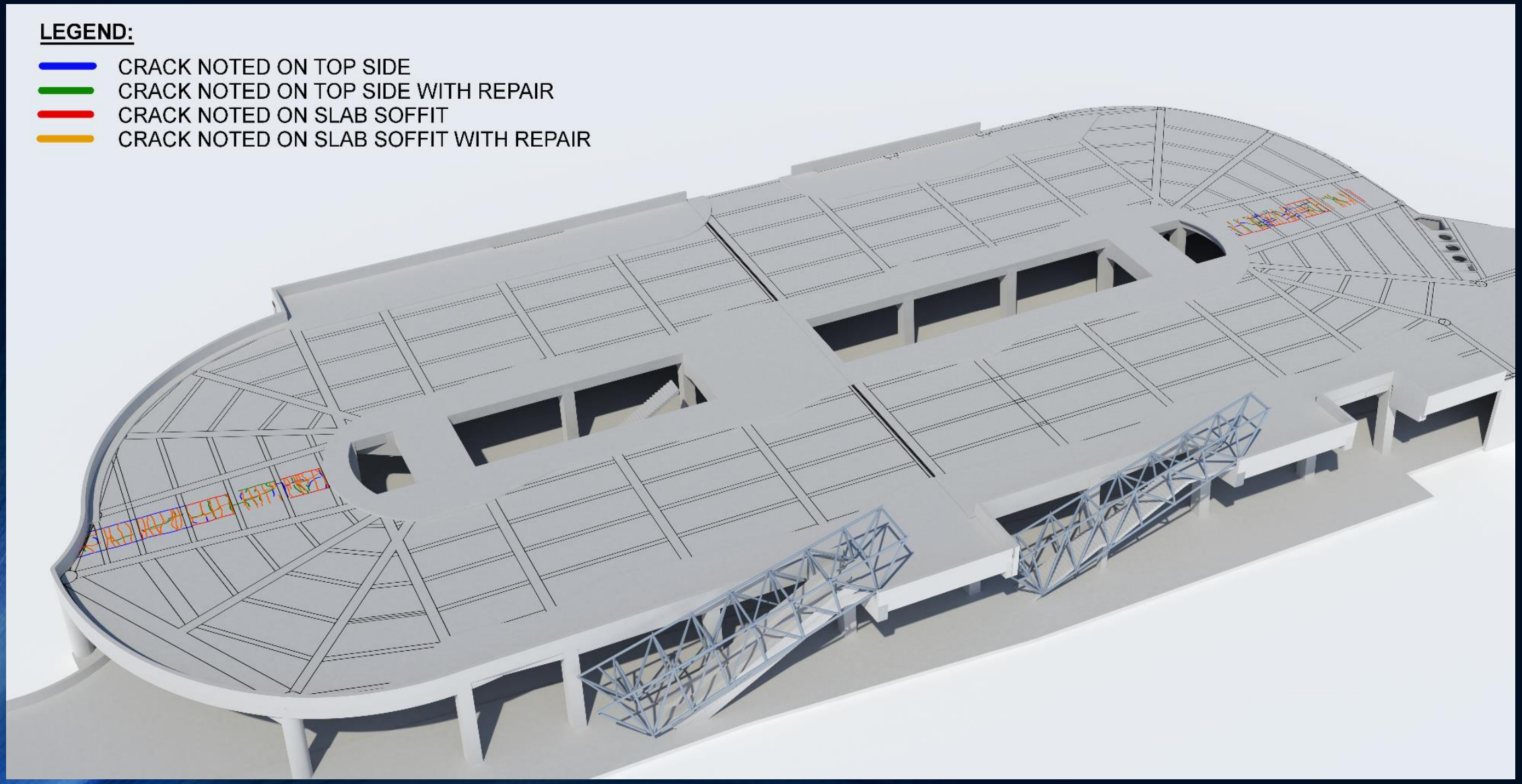
SSTC - Trial Exhibit - Girder Torsional Cracking

GIRDER TORSIONAL CRACKING

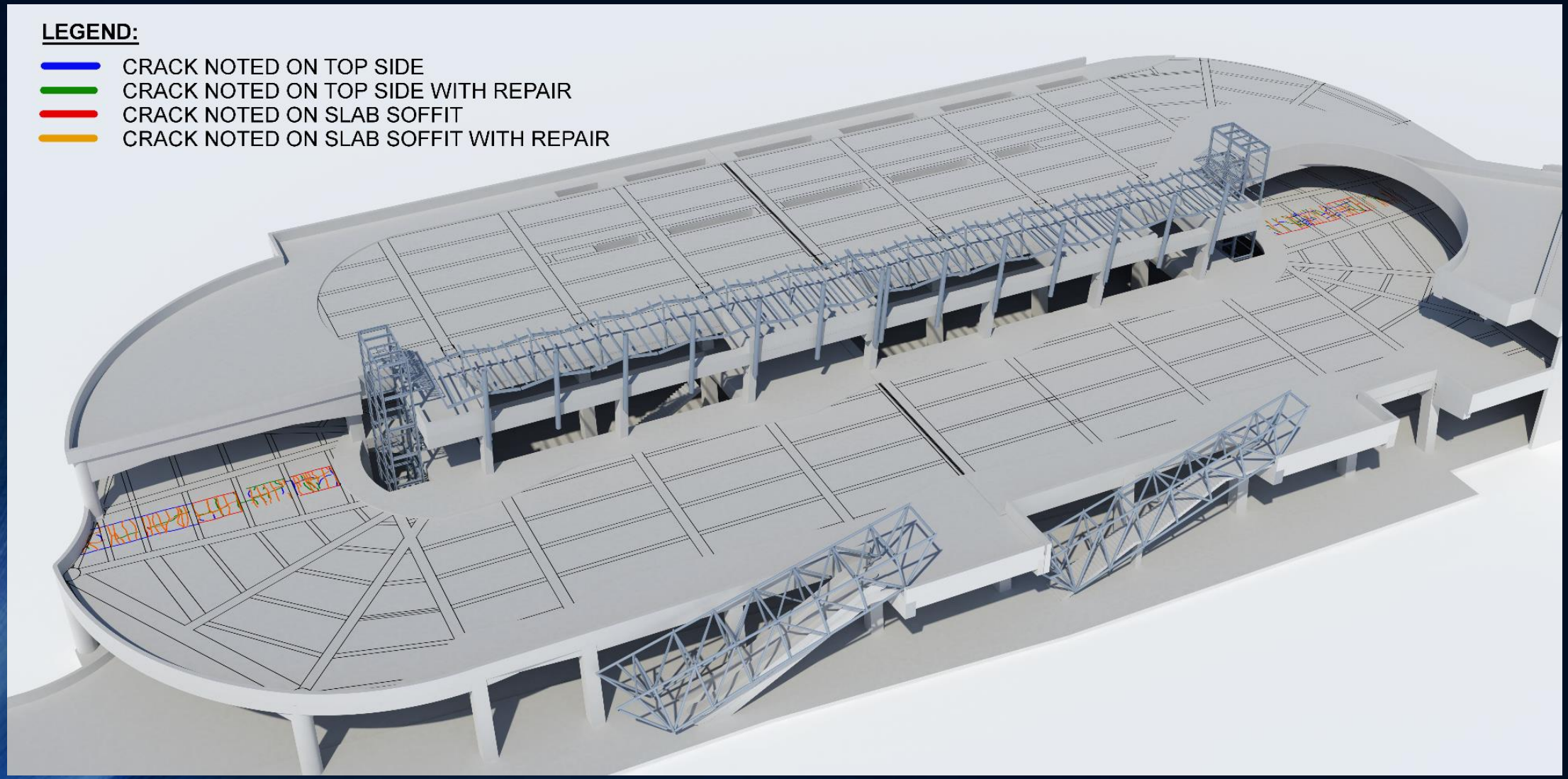
Trial Exhibit - Beam Flexsure



Trial Exhibit - SSTC Pour Strips Cracking L330



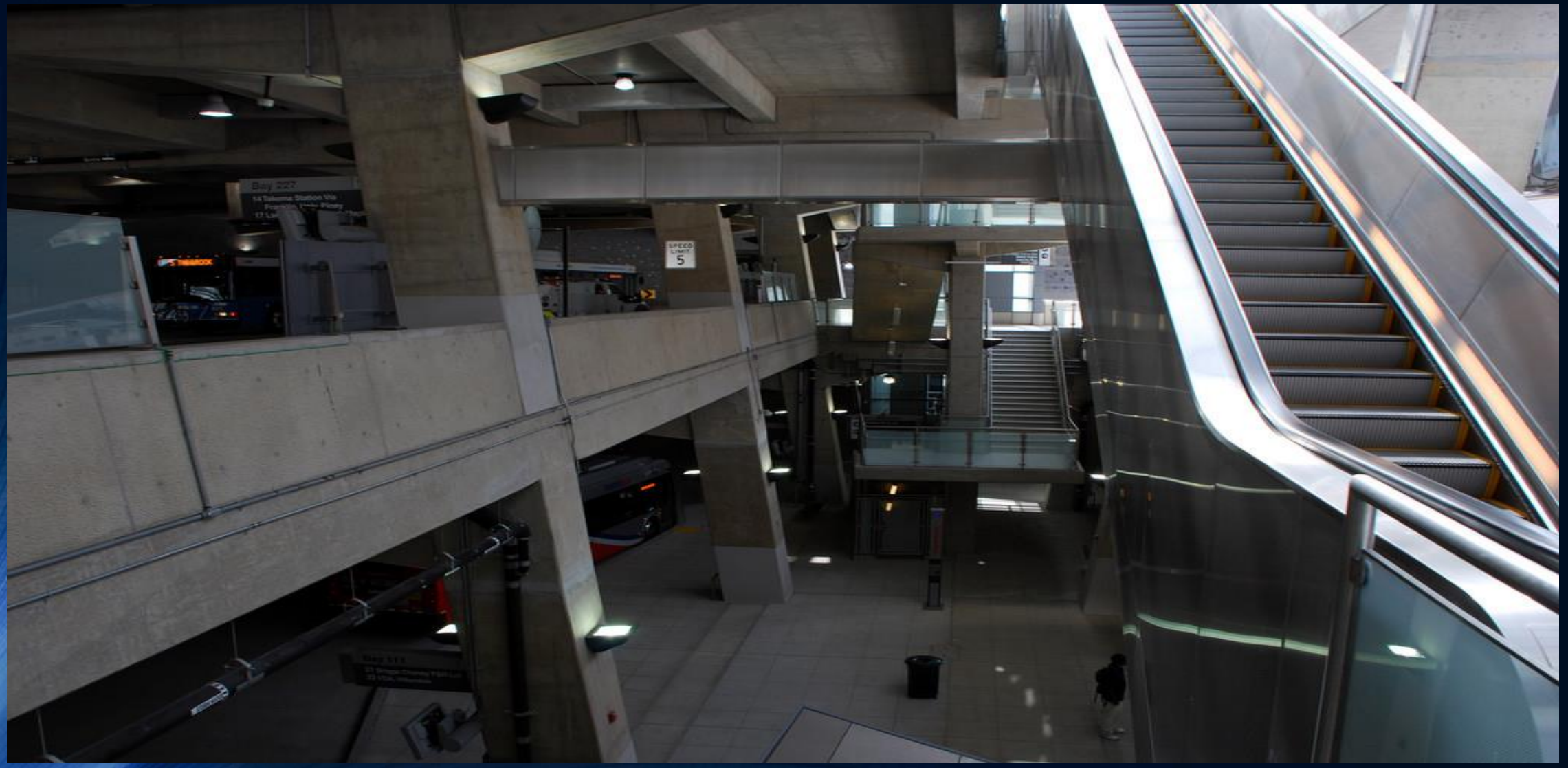
Trial Exhibit -SSTC Pour Strips Cracking L350



Silver Spring Transit Center



SSTC



SSTC - Lessons Learned

- Client representatives must be strong witnesses to tell your story
- Electronically Stored Information – time consuming and costly morass – Love that "Clawback" Agreement
- Experts are expensive, must be hired early, and shield opinions through attorney work-product until required to make a designation of experts during litigation
- Establish a scheduling order that allows sufficient time after the resolution of summary judgment motions and well before trial to mediate
- Never underestimate the capacity of insurance companies to interfere with the parties' efforts to resolve the case
- Yes, a jury demand can be your friend

QUESTIONS

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