

# Rules of Engagement for Construction Claims



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*Editor's note: Last month, in Part I, the author discussed the rules of engagement from a contractor's perspective. Part II discusses an owner's perspective when entering a contract.*

The owner, like the contractor, enters a construction contract with some basic assumptions. The first assumption is that the contractor is qualified to complete the work accurately, has sufficient support staff to manage the project effectively, and has financial support necessary to work within the payment provisions of the contract. The owner also assumes that the contractor can schedule its work appropriately and efficiently to complete the project within the time limits allowed by the contract. Finally, the owner assumes the price the contractor proposed and contracted to build the project is the total amount to be paid. When these assumptions are not met, a claim will usually develop and the owner must be ready.

An owner must understand the six important rules of engagement to execute a construction contract:

1. Read and know the contract documents;
2. Understand and analyze the contractor's construction schedule;
3. Prepare accurate and comprehensive daily construction reports;
4. Respond appropriately and quickly to the contractor's notification of issues;
5. Analyze and research the contractor's cost for performing extra work; and
6. Maintain inclusive documentation.

## Rule 1:

### Read and Know the Contract Documents

Reading and knowing the contract documents is an unusual task for the owner because the contract is the owner's contract; however, the architectural or engineering consultant likely prepared the documents, and the owner's attorney likely developed the contract language.

Some owners place sole responsibility for understanding the contract requirements on the contractor. Other owners believe the rules are written only for the contractor and the owner has no requirements to follow. It is important to convince the owner that the contract documents provide a roadmap to manage the administration of the contract.

## Rule 2:

### Understand and Analyze the Contractor's Construction Schedule

Understanding and analyzing the contractor's construction schedule is critical to an owner's ability to manage the project. Most owners require a comprehensive construction schedule to be developed and maintained throughout the progress of construction. These project schedules do not have to be complicated, resource-loaded schedules; they must, however, be accurate and updated on a routine basis.

As long as the owner understands the construction schedule, the owner will know what construction tasks are completed, current or planned. This allows the

owner to better acknowledge the amount of work performed, especially when payment is based on work completion. A high risk an owner faces is overpaying for work that is alleged to have been performed.

A comprehensive construction schedule details when specific material, equipment or labor is needed to perform a work task. An owner that understands the schedule can readily evaluate the timeliness and status of the contractor's performance based on the use of scheduled material, equipment and/or labor.

The contractor's updated construction schedule also gives the owner the opportunity to know when or if a work task is scheduled for completion, should the owner desire to change the scope or work. The owner should understand the reasons for changes in the timing or execution of the work task, if other work tasks are affected.

If the scheduled project completion time is impacted and becomes an issue between the owner and the contractor with regard to accountability, a complete tracking of work-task items can help determine the work task that caused the impact. Without a well-documented, current construction schedule, the contractor and owner are left to recreate an impacted schedule analysis.

## Rule 3:

### Prepare Accurate and Comprehensive Daily Construction Reports

An owner rarely takes the time to prepare accurate and comprehensive daily construction reports. This important task is often left to the contractor. The contractor

generally writes contractor-biased reports, which may be inaccurate. Even if the contractor writes non-biased reports, owners should take the time to complete their own written records of job progress. The owner's daily reports should include any and all issues affecting the project, regardless of responsibility for the issues. These reports should attempt to report work progress accurately and comprehensively.

Accurate, unbiased daily reports are credible sources for establishing a record of events affecting daily work productivity. These comprehensive daily reports notify the contractor of issues that may be referenced in a dispute situation.

## Rule 4:

### Respond Appropriately to the Contractor's Notification of the Issues

If a construction issue outside the expected occurs on a project, the owner must be notified. The construction issue may or may not affect the contractor's overall project productivity, but if there is the possibility of a productivity impact and the issue is not the contractor's responsibility, the owner must be notified. Most contracts define when, how and why that notification should be made. If this requirement is not followed, then any claim may not be valid. If the contractor's notification of an unexpected issue to the owner is timely and accurate, the owner also has an obligation to respond appropriately and in a timely manner. Proper notification allows the owner the ability to correct the detrimental impact of the construction issue or, at least, understand its potential consequences.

There are few definitions of what is considered a timely response to a contractor's notification of a detrimental impact on its performance. Generally, the owner, through its architect, engineer, project manager or other technical expert must evaluate the issue, the timing and/or cost of the impact, and, finally, forward instructions to the contractor. These instructions are usually drawings or requests for a cost proposal. The owner should make his intentions clear as early as possible.

A timely response allows the contractor to adjust the work schedule accordingly and prevent or decrease any loss to productivity. The owner must understand

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that it costs contractors money to recover time lost on a project.

## Rule 5:

### Analyze and Research the Contractor's Cost for Performing Extra Work

During the course of a construction project, plans change and extra work items often arise. Most extra work items are routinely cheaper to perform during the initial construction than after the project completion. An owner should prepare ahead of time for evaluating the cost of any extra work items.

In many contracts, the owner can audit the contractor's costs. If this provision is not allowed, the owner must have other resources to evaluate any cost proposals generated by the contractor for extra work. Many resources are available to the owner for this purpose, such as published guides on estimation or construction-estimating software. Whatever method the owner uses to verify and approve a contractor's cost proposal, a consistent record should be maintained to track labor productivity, hourly rates, labor burdens, equipment usage, overhead and mark-up cost.

## Rule 6:

### Maintain Inclusive Documentation

Accurate and timely documentation of detrimental construction impacts assists in mitigating construction claims.

A job documentation accounting system is paramount, even if the project runs smoothly and completely without any lost productivity or cost overruns. Many project management software systems incorporate documentation identification and numbering systems, and an owner can specify a system in its contract for the con-

tractor to use. Maintenance should include adding information from written notes and conversations. This way, if a claim is established, all information is documented in the system and not on pieces of paper.

An owner that maintains inclusive documentation can more effectively establish entitlement for costs or defend against contractor claims.

### THE CONSTRUCTION CLAIM

If the rules of engagement are followed, the contractor and the owner will have a thorough knowledge of the contract requirements and will have preserved their contractual rights. But, even when both the contractor and the owner follow their respective rules of engagement, the resulting project is not assured to be claim free.

A construction claim does not necessarily result from disputes among the parties. A claim can develop concurrently with an event that disrupts the construction process, or it can develop after the results of the disruption are thoroughly reviewed and all cost impacts are evaluated.

The basic theory behind construction claims remains simple; the claims, however, have become extremely complex. Successfully proving and pricing claims requires an extensive knowledge of key elements of the claim and the ability to illustrate the facts and position persuasively. Successfully challenging a claim also requires an extensive knowledge of key elements of the claim, the ability to illustrate the facts, and the ability to respond persuasively to the pricing of the claim.

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