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Staking Your Claim: Effective Claim Resolution

Mr. Philip D. Barnard, PE

Without question, construction disputes consume precious time, money and resources for all parties involved. Regardless of the experience and capabilities of the construction professionals involved in a dispute or claim, the claim process can quickly become very complex. Before addressing the process in detail, this paper will provide a general discussion on the definition of a construction claim, the parties involved and the claims made by the parties and how to deal with claims.

WHAT IS A CLAIM?

Quite simply, a construction contract claim is understood to be a demand asserted by one party on another party relating to the services or products specified in the contract. The most common claim on construction projects concerns payment (or nonpayment) for work performed under the general contract. A claim basically boils down to monetary relief sought by one or more of the parties. The following key questions are usually addressed:

- How much money does the claim involve?
- Who is going to pay?
- Why should the claim be paid?

Who Are the Parties Involved and What Claims Might They Make?

The owner and the contractor are the parties typically involved in a construction contract. A contractor may make claims that address changes to the work, work schedule, or work methodology. Alternatively, an owner's claims may concern the contractor's failure to perform the work in accordance with the contract or the contractor's lack of performance.

As mentioned, a claim usually involves monetary relief. The relief sought in a contractor's claim often concerns receiving additional time and/or money to complete the work. The relief sought in an owner's claim can also involve time, but it typically involves money to complete repairs necessitated by defective construction, complete a project, or forgive a contractor's failure to perform the work in accordance with the contract. Claims cannot be generalized as always involving monetary relief. To do so would be to

oversimplify a claim as simply someone's request for monetary relief, and it belies the complexity of the claims process. It should be understood there is no typical claim, and all claims have the potential to be time consuming and expensive.

How Does One Deal With a Construction Claim?

An April 1990 study conducted by the Construction Industry Institute (CII), *The Impact of Changes on Construction Cost and Schedule* [1], concluded that a construction claim is a process, and the process begins with a dispute between the parties involved in a construction contract. The study suggests that all parties should have a thorough knowledge and understanding of the claims process and understand that a claim is more complex than just a dispute over monetary relief. The process includes an accurate interpretation of the facts surrounding the dispute, the contract wording, and the applicable law. The parties should realize the sums of money involved can be significant, regardless of the project's size. It is imperative that the parties evaluate and prepare for the dispute.

As mentioned, the parties should possess knowledge and an understanding of the claims process, but how do they gain this knowledge and understanding? It begins with understanding the types of claims and recognizing the factors involved with each type of claim.

This paper addresses a variety of claims, including familiar topics such as changes and delay, as well as less familiar topics like the impossibility of performance and default. Section II specifically addresses the types of claims principally from the contractor's perspective. It is followed by a discussion of the owner's perspective regarding the claim and the owner's evaluation of the claim. The final section addresses the key role of documentation in the claims management process.

CLAIMS ASSERTED BY CONTRACTORS OR OWNERS

Though there are many different types of construction claims, this paper groups claims into categories relative to terms generally defined in a contract. Contractors and owners must understand and possess knowledge of different claims so they can recognize the problem or dispute early and, equally as important,

begin the required notification and documentation processes. Recognizing potential claim conditions can protect contractors from losing their ability to file a claim or allow them to recover the compensation to which they are entitled.

This section addresses the most prevalent types of claims and highlights other types, recognizing that these categories are somewhat arbitrary and that two or more types of claims may apply to a given situation. The most prevalent types of claims pertain to:

- Delay,
- Directed change,
- Constructive change,
- Acceleration and constructive acceleration, and
- Differing site conditions.

Other types of claims include the following

- Defective and deficient contract documents,
- Owner-furnished items,
- Impossibility of performance,
- Interference with performance,
- Defective inspection/misinterpretation of the contract,
- Superior knowledge/misrepresentation,
- Strikes,
- Weather,
- Suspension,
- Default/Nonpayment,
- Termination, and
- Warranty.

Delay

Delay is generally recognized as the most common occurrence that can upset a project schedule. Delays become the subject of a claim when the activity of one party is impeded by the actions or inactions, activities or inactivities and/or constraints of another party. The disputes over project delays revolve around who is at fault for the delay and whether the delay is excusable or non-excusable and compensable or non-compensable. Excusable and non-compensable delays are generally not pursued.

Unfortunately, construction project delays are easier to recognize than to analyze, and understanding the issues involved with a delay is critical. Issues involved in the delay include the actual cause or causes of the delay, the specific work activities impacted by these causes, the delay durations related to each cause, and the possibility of concurrent delays. Many of these issues are interrelated and contribute to the complexity of the analysis. As a result, the amount of delay attributable to the owner, the contractor, or third party may be difficult to quantify.

Regardless of the complexity of the analysis, once a delay occurs, the delayed party should give notice to the other party and carefully document any impacts of the delay. A delayed contractor should submit a written request for time extension, if necessary, and notice of a request for compensation of delay costs, if allowed by the contract language. Even if the contract includes a no damages for delay provision, the owner needs to be notified of the delay and the potential for monetary impact. Notices should

be sent promptly, without waiting for quantification of time or costs. It should be noted, however, that some contracts require quantification of time and cost at the time of notice. Therefore, understanding the contract is critical to preserving entitlement.

The progress of work on a construction project is composed of complex and interrelated events. Therefore, a delay in any event may create confusion or disruption on other events and can affect operations other than the directly delayed event. When two or more delays arise, or when more than one party or cause is contributing to the delay, the need for concise documentation is paramount.

Once agreement is reached between the contractor and the owner concerning the cause of the delay and entitlement, and the delay is non-excusable and compensable, the cost must be determined and presented. The analysis and presentation are complex and will not be addressed in this paper. Typically the cost of the delay is calculated by identifying and pricing the time-related project costs.

Directed Change

Changes to a contract or work items or events to be covered by a change order can be an extremely broad topic. Directed changes can encompass not only extra work but also virtually all of the claim topics addressed by this paper. For the purposes of this paper, however, a directed change includes any situation where the owner directs the contractor to perform work that is different than work defined in the contract plans and specifications of the original scope of work. Thus, a directed change may be the addition of a work item, the deletion of a work item, a change in the method of construction, the material used in construction, or a change in the design specified for the original work.

The owner generally initiates a directed change via written or oral instruction to the contractor that results in a change to some aspect of the work. As such, the owner recognizes the existence of a directed change by issuing its instruction. However, a directive change dispute or claim can arise regarding the contractor's request for compensation due for performing the changed work as well as for the associated time impact. Additionally, disputes can surface with a directed change when the contractor believes the owner has made a directed change, while the owner believes the direction was merely a clarification of the work scope specified in the contract.

Considering this, it is critical for a contractor to take immediate steps when an owner gives an instruction the contractor believes to be a change and when the instruction given is not in writing or, if written, is not clearly identified as a change instruction. The contractor must notify the owner in writing that the instruction is considered a change. If a disagreement is going to occur regarding whether an owner's instruction is included in the original contract scope of work or is a directed change, the most economical time for both parties to deal with this disagreement is at the first notice of the change.

Most contracts allow an owner to add changes in the work to the contract without invalidating the contract. The most important article(s) in the contract regarding changes in the work involve the contractor's execution of the change and the approval

authority required in the contract for the contractor to begin the change. On many occasions, a contractor, to expedite the change so the schedule is minimally impacted, will begin the changed work without contract approval. This can jeopardize the contractor's ability for compensation, should the owner refuse to approve the work.

Constructive Change

This claim area applies to contract modifications caused by factors other than the owner's explicit instructions to change the scope of work. The nature or manner of construction of the work is changed, not because of an explicit direction to make the change, but rather as a result of other conditions or events. For example, the end product may be the same as originally contemplated, but the method of construction is changed.

Constructive changes may also arise from many of the causes covered in this discussion, including differing site conditions, deficient and defective contract specifications, defective inspection, misinterpretation of the contract, interference, and/or disruption. A constructive change may also develop from an owner's instruction, where the instruction causes a side effect rather than being an explicit objective of the instruction.

In the absence of a directive from the owner, constructive change may begin without being noticed. An estimator may have priced work on the basis of pre-bid information that the contractor would have certain access to the site. However, when the work begins the access is changed. This changes the contractor's approach to the construction of the project. If the construction project team is not aware of the constructive change and the new construction approach results in the schedule slipping and added costs begin to overrun the budget, the contractor may jeopardize its ability to support a demand for extra costs if the owner is not adequately notified of the change in a timely manner. The contractor's failure to recognize a constructive change and give timely notice to the owner may lead to difficulties in resolving this change. Vigilance is required by all parties to effectively manage constructive change. This vigilance must include early recognition of a difference in construction parameters regarding how the project was planned to be built and how the project is being built. Open communication between those who estimated the work and those performing the work is critical to maintaining the planned approach to constructing the project. The challenge is to recognize constructive change in time to effectively take action.

Acceleration and Constructive Acceleration

Acceleration normally occurs when a contractor must expedite the pace of the project's construction. This acceleration may occur when a delay occurs, but the scheduled end-date is not modified to accommodate the delay. In order to meet the contract mandated completion date, the contractor must increase its rate of progress to make up the lost time. If the contractor causes the delay, the cost of acceleration is non-compensable.

When the owner directs acceleration to offset delays that are not the contractor's fault, then the acceleration is considered to be a directed change, and the contractor is entitled to reimbursement

for the extra work. The costs of acceleration may include costs of additional equipment, premium payments for overtime work, and the loss of efficiency associated with working excessive hours and working in crowded work sites, should multiple trades need to work in the same area.

Acceleration frequently becomes an issue when constructive acceleration occurs. Constructive acceleration occurs when:

- The contractor is delayed for reasons entitling it to a time extension.
- The contractor requests a time extension.
- The owner fails or refuses to grant a time extension.
- The owner directs the contractor to complete work per the original schedule or indicates intent to penalize contractor for a late finish (typically via liquidated damages).
- The contractor endeavors to accelerate and incurs costs in doing so.

All of these events must occur for a contractor to demonstrate constructive acceleration.

Typically, constructive acceleration becomes an issue when the causes of delay are disputed and the possibility of assessing liquidated damages remains in the contract. Projects built quickly to meet fixed need dates, such as schools, manufacturing plants, or sports stadiums are particularly prone to constructive acceleration claims. In contracts with no-damages-for-delay clauses, a constructive acceleration claim may arise in spite of the no-damages-for-delay clause if the owner fails to grant time extensions when appropriate and properly requested. Thus, owners who chose to use this relatively inequitable no-damages-for-delay clause may negate the advantage sought from the clause if they fail to take appropriate action on proper time extension requests.

Experience indicates that acceleration often fails to meet the intended goals because the matters that first caused the delays continue to impact the project. So, owners and contractors are well-advised to carefully consider potential costs before embarking on an expensive acceleration exercise.

Differing Site Conditions

Differing site conditions, commonly known as changed conditions, frequently involve variations from subsurface or underground conditions stated or reasonably anticipated in the contract. Generally, underground or foundation work is designed based on subsurface investigations conducted by or for the designer. The results of the underground investigations may or may not be made available to the contractor, but the resulting design and anticipated conditions are implied within the contract. Changes in the implied or stated underground conditions can result in a changed condition. Differing site conditions can also result from conditions of an existing facility, which are made part of the contract work, that differ in their location, makeup or general state of existence than the information included in the bid documents or from what would be apparent to a contractor making a responsible pre-bid inspection.

When the contract does not contain a differing site conditions clause to rely upon, the contractor may still have a valid

claim against the owner. Other headings such as directed change, if the owner has to modify its design to accommodate the differing condition, or defective specifications, if the conditions differed from those explicitly represented by the owner in his plans and specifications, may provide the contractor with support for a valid claim in the absence of a differing site conditions clause.

Differing site conditions can quickly undermine a project's success, with unpredictable financial impact. If differing site conditions are not dealt with promptly, expensive claims for constructive changes and/or delays are likely to follow. Knowledge of the contract provisions and site conditions can provide considerable rewards to the contractor and the owner.

The following sections highlight some of the other, less prevalent, types of claims.

Defective and Deficient Contract Documents (Plans and Specifications)

Generally, if a contractor constructs a facility in accordance with detailed plans and specifications provided by the owner, the contractor will not be held accountable for the financial consequences of design defects or oversights built into the project that are later found in the detailed plans and specifications documents. In fact, the contractor cannot deviate from the specifications prepared by the owner unless the contractor specifically knows about the defect or oversight. As such, the contractor is entitled to rely upon an owner's plans and specifications.

In federal government contracts and under the laws of most states, when an owner provides the detailed plans and specifications for a construction contract, the owner is considered to have given to the contractor an implied warranty of those plans and specifications. Under this implied warranty, the contractor, without making an independent investigation, is entitled to expect that its performance of the work in accordance with the owner's plans and specifications will produce the result desired by the owner. If this is not the case, the contractor is not at fault and may claim extra compensation for any corrective action required or, in extreme cases, may be excused from meeting standards, capacities, or other expectations of the contract. This principle is known as the Spearin Doctrine after a 1918 decision of the US Supreme Court [2]. It is widely but not universally accepted, with the state of Texas being a notable exception.

Impossibility of Performance

Impossibility of performance is defined in a number of ways, covering both absolute impossibility and commercial impracticability. Impossibility may entitle a contractor to relief from performance of the contract. The burden of proof of impossibility is on the contractor, and the standards of proof are difficult.

Impossibility may arise from an erroneous design specification describing an impossible task or a performance requirement that is beyond the capability of present technology. To prove absolute impossibility, the contractor must show that no contractor could have done the work and that no method would have worked, regardless of cost.

Commercial impracticability bears an equally difficult burden of proof. The fact that performance of the contract would cause an economic hardship on the contractor is not enough. The commercial impact must be drastic. To prove commercial impracticability, the contractor must establish that the contract can be performed only at an excessive or unreasonable cost.

Interference with Performance

This type of claim can result from the owner's actions or inactions but frequently involves third party constraints or disruptive influences imposed by the owner's contract administration. Contractors ordinarily expect to perform their work efficiently and productively without owner interference.

Claims of interference can arise when more than one contractor or subcontractor shares a site, when part of a site is not made available as planned or when a facility is occupied or used during construction. A typical example of active interference is when an owner issues a premature notice to proceed to one contractor that prevents another contractor already on site from completing its work on time.

Defective Inspection/Misinterpretation of the Contract

Defective misrepresentation/misinterpretation of the contract occurs most frequently when the owner's inspector requires a standard of workmanship not explicitly required by the contract and/or in excess of standard industry practice. If a contractor feels that it is being held to an incorrect or exceptional standard, it must first check the contract requirements including any referenced standards or codes, evaluate any imposed standard of workmanship requirement by the inspector and analyze the most current industry standard practice accepted for such work.

Contractors should be aware that owners experienced in a particular type of construction, such as state highway departments and refining or oil exploration companies, may have their own standards that vary from industry standards. These should be well understood by contractors performing work for these owners. Owners with specific project expertise and project histories have the right to impose their own construction standards, and contractors must be aware of these implied industry standards.

Owner-Furnished Items

Owner-furnished equipment and materials are items that the owner chooses to procure directly rather than through the contractor as part of the construction contract. While the owner may have sound economic reasons for making such purchases directly, these items have the potential for causing claim situations. These claims arise when the owner-furnished items are delivered late, are defective or are different in nature from the items specified in the contract such that different installation methods are required.

A contractor has the right to expect owner-furnished equipment and materials to arrive on schedule, and the owner has the right to provide equipment and materials. Close schedule coordination is imperative to prevent project schedule interruptions. If the contractor fails to inform the owner of the proper schedule

retirement or changes to the construction sequence for the owner-furnished equipment and materials, the contractor may not be entitled to damages resulting from the owner's failure to provide equipment and materials.

Superior Knowledge/Misrepresentation

These claims relate to allegations that the owner knew or should have known facts that were not disclosed at the pre-contract stage and that would have had significant impacts on the contractor's bid and/or did have a significant impact on the contractor's performance. In other words, there is a duty to abstain from inducing a party to enter into a contract through the use of fraudulent misrepresentations. In order for the contractor to successfully claim superior knowledge or misrepresentation, the contractor must be able to establish, preferably with contemporaneous documentation, that the facts were known to the owner and not disclosed to the contractor. Further, the contractor must demonstrate that this failure to share knowledge had a detrimental effect on the project.

Strikes

Under typical construction contracts, labor disruptions are treated as situations that are beyond the control of both parties and are considered Force Majeure events. Under such contracts, strikes entitle the contractor to time extension but rarely give the contractor entitlement to additional compensation. Regardless of the contract language, the contractor must inform the owner of the project disruption resulting from a strike, attempt to work around or within the strike conditions, and inform the owner of the anticipated time in which the strike should be resolved.

Weather

Coverage of weather varies from contract to contract. Many state highway contracts call for completion of the work in a set number of working days, where working days are defined as days in which the contractor has the ability to work a majority of a day. When rain or inclement weather prevents contractors from working a full day, the day is not counted as a working day. Most other contracts, however, define the contract duration in calendar days and contain a table of the weather days (non-work days) anticipated for each calendar month and provide for time extension if this number of days is exceeded. Finally, many lump-sum contracts simply place the risk of weather on the contractor. In this case, a contractor may obtain a time extension only for extraordinary weather, such as floods or named tropical storms.

Weather is not a compensable delay under most contracts, although exceptions exist. Regardless of the contract language involving weather delays, the contractor should continually inform the owner of weather delay impacts on a timely basis, as the owner must be informed of resulting schedule impacts.

Suspension

Suspension is generally self-evident. The rights of the parties in the event of a suspension of work are typically established by the contract. A contractor can claim a constructive suspension when work is stopped because of an action or inaction of the owner that is not an explicit suspension. For a constructive suspension to occur, the contractor must be totally prevented from continuing its work. In other words, the contractor cannot be only partially shut down. Should this constructive suspension occur or the contractor believes it occurred, the contractor must notify the owner immediately for the contractor to preserve its rights and allow the owner to mitigate the constructive suspension.

Default/Nonpayment

Default occurs when either party to a contract fails or refuses to perform. Contracts often address the parties' rights in case of default, but in owners' documents this coverage is typically restricted to default by the contractor. In some cases, a contract may permit the contractor to claim default when payment is not made in accordance with the contract. Again, as with suspension of the contract, the contractor must provide timely notification to allow the owner to cure the cause of the default. Additionally, the owner must provide timely notification to allow the contractor to cure the cause of the defect.

Termination

Contracts may be terminated for cause, in the case of a contractor default, or for convenience, as when an owner decides that a facility is no longer needed. In either case, the contract should address the parties' rights in the event of termination.

In contracts terminated by the owner for default, the contract generally allows the owner to recover costs to repair defective work discovered after default as well as costs to complete the original work. If the cost to complete the balance of the work is more than the balance of the contract, the defaulted contractor is usually liable to the owner for this additional cost. If the cost to complete the original work is less than the actual contract cost, the contractor may be entitled to receive actual project costs not paid by progress payments through the date of the termination. Alternatively, if the project is bonded, the language stipulated in the bond governs the provisions for completing the work.

In termination for owner convenience, the contractor is generally entitled to actual project costs not paid by progress payments through the date of termination plus costs associated with demobilization, cancellation on purchase orders, and closing out subcontracts.

Warranty

Warranty claims are made by the owner and are typically governed by contract terms. In the absence of specific contractual warranties, the contractor is generally considered responsible for providing a facility free of material and workmanship defects, subject to the statute of limitations applicable in that jurisdiction.

CLAIMS FROM THE OWNER'S PERSPECTIVE

Introduction

Owners have contractual rights to claim damages against the contractor generally associated with failure to pay for labor, materials, or equipment utilized on the project; completion or repairs of defective work; timely project completion; costs associated with the contractor's suspension of its work; or costs to the owner for a contractor's failure to perform the work in accordance with the contract. On most public works projects, the contractor is bonded; therefore, the owner may seek damages against the bonds for the aforementioned issues.

This section discusses the owner's response to a contractor's claim instead of discussing the owner's actual claims process. In that context, owners should consider several steps in evaluating a contractor's claim. The following are key considerations in the claims process and contractors can use them as a checklist to determine if claims presentations are comprehensive before submitting the claim to the owner.

What Are the Facts?

A contractor claim that does little more than describe damages is not sufficient. Disputants must determine and document the facts, present those facts properly, and provide credible support of the facts and cost. Determining and documenting the facts is not easy, and most construction claims involve factual disputes. While the contractor and the architect/engineer may express certainty about their own versions of truth in a contractual dispute, predictably the parties do not share the same interpretation of the facts. Factual disputes may involve the history of contract events, the content of past conversations, the interpretation of project documents, or the events leading up to the matter in dispute. Additionally, the impact and cost of the dispute are rarely agreed upon by the parties.

For these reasons, an owner should expect, and require, full documentation of a claim from the contractor and also seek information from other sources. The following steps are recommended:

- Carefully analyze and evaluate all material the contractor presents;
- Request explanations and documentation;
- The owner should review its documentation for information that may support or contradict the contractor's position;
- Review and analyze the dispute from the architect, engineer, and/or construction manager's perspective;
- Perform a detailed construction schedule analysis, where the dispute involves complex delay/disruption/acceleration claims matters.

Is the Request Timely?

Almost all construction contracts require timely written notice of contractor claims for additional time or compensation and many contracts explicitly state that the contractor waives such

claims if notice is not provided within the allowed time. An owner must carefully consider the circumstances before relying on failure to give written notice as a defense against claims. If the owner already knew about the matters that are the subject of the contractor's claim, a court may later rule that the owner had constructive notice and may overturn the owner's defense based on lack of notice. This may be the case when the owner participated in conversations about the problem, approved or did not disagree with the contractor's actions, or was not prevented from making its own determination of the costs.

On the other hand, if the owner was not made aware of the underlying events, e.g. the discovery of a differing site condition, was not given the opportunity to cure the problem before the contractor proceeded, was not given the opportunity to object to the contractor's actions and expenditures or was prevented from observing and recording the contractor's costs of performing the disputed work, the owner can and should use lack of notice as a defense. The owner could reasonably expect this position to be upheld by the courts under these circumstances.

Is the Contractor Entitled to Compensation and/or Time Extension?

When a construction contract dispute includes questions regarding the contractor's entitlement to extra time or money, the owner should ask the following questions:

- Does the contract provide for additional time and/or compensation to the contractor in the circumstances alleged by the contractor? Examine all clauses that may entitle the contractor to additional time or money;
- Did the contractor contractually assume responsibility for the risk involved in the dispute (e.g., blanket no-damages-for-delay clauses)? Specific language placing the cost of risks on contractors will usually be upheld;
- Is the disputed work part of the contractor's original scope of work? Examine relevant plans and specification, referenced standards, special provisions and general conditions of the contract and, if necessary, the clause stating the order of precedence of documents;
- Did the contractor perform the work in accordance with the contract, or did the problem arise when the contractor deviated from the specifications?

How Much Money is the Contractor Authorized?

After determining the facts and reviewing the contractor's contractual entitlement, the owner must examine the contractor's claim quantification. Any or all of the following actions should be considered, as applicable:

- Require the contractor to provide a detailed damages calculation, if these figures have not already been submitted;
- Compare the contractor's calculations to records kept at the time, which may include the contractor's daily reports to the owner, payrolls, inspector's daily reports or diaries, or force account reports;

- Check for duplication, overlapping, or overstatement of the contractor's costs;
- Request an independent estimate from the architect, engineer, or construction manager;
- Apply any contract language governing the method of the pricing of changes or claims;
- Require proof of expenditures from the contractor, including copies of invoices and payrolls. In more complex cases, request the contractor's actual cost statements, reports, and/or ledgers to prove that claim amounts are not overstated;
- Demand an audit if the contract provides this right or it is otherwise feasible;
- Consider applicable deductions or offsets to the amounts claimed, such as costs of repair, completion of deficient work, credits for work not performed, etc.
- Excessive expenditure by the contractor/failure to mitigate the damages: This situation may be caused by the contractor planning or managing the situation poorly or performing unnecessary work.
- Determining the degree of fault attributable to each party: The contractor's entitlement is unclear or debatable, so damages may be split. For example, a 50-50 split occurred in a case where specifications clearly were defective, indicating an obvious owner fault; however, the contractor failed to make a key submittal that may have revealed the defect.
- Prior settlement/release or waiver of the claim by the contractor: A waiver is the intentional release, relinquishment, or surrender of a known right. This most commonly happens when change orders are resolved and paid on the basis of direct cost, and the change order language bars a later case for delay or disruption impacts.
- Enforcing liquidated damages provisions in the contract: Counterclaims against the contractor should also be considered where there is justifiable cause. However, be aware that an owner's counterclaims should stand up to all of the tests set forth above for contractor's claims.

Are the Requested Damages Caused by the Basis of the Claim?

A common weakness in claim submissions covering complex issues is the absence of provable linkage between the causes of claims and their effects. A contractor may establish its claim entitlement and show that extra costs were incurred but may fail to demonstrate that the extra cost was incurred solely because of matters that are the subject of the claim. This failure to establish a valid cause-effect relationship is often the weakest link in contractor claims.

The owner is entitled to require proof of the cause-effect relationship. For example, this may be proof of the following:

- A delay in completion, which is easily measurable, is solely due to delays that are the owner's responsibility and not attributable to contractor delays.
- Costs incurred in performing extra work contain elements that are not the owner's responsibility, such as higher costs attributable to the contractor assigning its least skilled workmen and poorest equipment to the extra work.
- Costs incurred are for work to correct the contractor's defective or delayed work;
- The contractor must link the cause of the dispute to the dispute's effect on the contractor's performance.

Are Offsets or Other Defenses Available?

In claim defense, the owner should look for offsets and mitigation, which can reduce or eliminate the contractor's claim. These may include the following:

- Concurrent delay: The contractor had its own delays and would not have met the schedule, even without the owner's delay. In cases of concurrent delay, the contractor is not entitled to compensation for delay costs, but neither is the owner entitled to collect liquidated damages, as both parties are at fault.
- Delays beyond the control of the owner: These delays may excuse the owner from liability for delay damages under many contracts, limiting the contractor's recovery to a time extension.

DOCUMENTING CLAIMS

Introduction

Documentation is a vital construction management function. If profitability depends upon the collection of extras or defense of claims and the claimant has no records, the world's best consultants and lawyers cannot create them. Likewise, if the claimant has the records, but the documentation's organization and quality are poor, the cost of compiling suitable information for the pursuit or defense of a claim may be too high to justify the cost.

Perhaps the most important point regarding documentation is that it must be created at the time of the disruption. It is not sufficient simply to save documents created by others. For example, letters must be written to record compliance with the contract, confirm verbal requests or instructions, report unforeseen events or conditions, record disagreements with statements or positions written by others, and give timely notice of requests for additional time or compensation.

It is imperative to maintain a sound record-keeping and project documentation system. Proving the occurrence and sequence of events and the causes of problems are essential to resolving change orders and avoiding construction claims. Negotiations may be held months or even years after the work was performed, and often such negotiations are conducted by individuals not personally involved in the events that gave rise to the request for additional compensation. It is crucial for contractors to maintain all documentation as a historic record of the project. Courts and arbitrators tend to give greater credence to written documentation than to testimony.

Guidelines

Effective documentation results from following simple guidelines and maintaining organizational discipline. Project managers must establish a minimum checklist of records for retention. In the best of scenarios, organized documentation is the rule, not the exception. With a thorough documentation system, contractors can use essentially the same system in a claims situation that they have used to manage and supervise the project. The benefits of effective documentation are multifaceted. A good system provides data for planning future projects and input for estimating similar projects and, with a systematic record retention policy, provides the documentation necessary to obtain equitable resolution when disputes arise.

A standardized format or outline for organizing the files to be kept is beneficial to maintaining effective documentation. The following types of records should be included in a well-organized filing system:

- The original estimate, with all data upon which it is based;
- The site investigation report;
- The contract and other legal documents;
- Correspondence (including pre-contract correspondence);
- Meeting minutes;
- Daily logs or diaries;
- Weekly/monthly reports;
- Photographs;
- Engineering drawings;
- Project submittals/other technical information;
- Quality control/quality assurance records;
- Schedules/planning documents;
- Procurement/purchasing records;
- Cost and financial reports;
- Payroll and personnel records;
- Equipment assignment and use records; and
- Weather data.

The aforementioned checklist highlights the essential documentation that should be accumulated for any project. It can be tailored to suit company requirements and further customized for projects. Many construction management software programs exist to support and maintain such project documentation and can transform a traditional project which is buried in paper into a streamlined, virtually paperless project. The documents contained and managed by these programs can also support a contractor's claim.

It is important to remember the ability to retrieve documentation is almost as important as creating and retaining records. Documentation management can produce paper that is worth substantially more than its weight in gold.

To effectively resolve construction claims, the owner and contractor must know and understand the contract and the various issues that can occur on a construction project that can lead to a claim. Knowing the types of claims and how to document, present, and evaluate them is paramount to effective claim resolution.

REFERENCES

1. Construction Industry Institute. *"The Impact of Changes on Construction Cost and Schedule."* (April 1990).
2. United States v. Spearin, 248 US 132, (39 Sup. Ct. 1918).

Philip D. Barnard, PE
Interface Consulting International, Inc.
One Riverway, Suite 2350
Houston, TX 77056

E-mail: pdarnard@interface-consulting.com

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