

CONTRACTORS' CONSTRUCTION-CLAIMS AVOIDANCE

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ABSTRACT: The number of construction claims has been increasing and has become a time-consuming and costly element in construction projects in North America. The probability of a claim arising at some point in time is a fact of life on most construction projects. In recent years, contractors have become increasingly concerned with claims, their associated costs, and the poor recovery of actual costs associated with their settlements. Therefore it is in the interest of every contractor to familiarize himself with the means to avoid claims or to be ready to mitigate the consequential damage therefrom. The purpose of this article is to minimize both contractors' and owners' chances of becoming involved in construction claims and disputes. It will emphasize the need to have proper knowledge of the contract and good record keeping, which is essential for the contractor to maintain control over the project and mitigate potential claims. The article includes a list of major causes of construction claims and presents a general claim protection guideline.

INTRODUCTION

This paper is intended as a tool to help practitioners, particularly field personnel, implement constructive changes in their work environment. Therefore, it presents a deliberately simplistic view of a topic that has already been covered by numerous, more detailed articles published before. The rationale is that, despite these other more complex articles, practice in industry has not changed.

The term "construction claim" is commonly used to describe any application by the contractor for payment that arises other than under the ordinary contract payment provisions. When the contractor incurs additional costs and/or there is a delay, the potential for a claim arises. The claim is a tool used by contractors to request more time and/or money. Claims can also originate with the owner and are defined as the assertion of right to payment arising under the contract for neglect or delay on the part of the contractor (Revay 1990).

The term claim may also be defined as the seeking of consideration or change (to contract terms), or both, by one of the parties, to a contract based on an implied or expressed contract provision (Dickmann and Nelson 1985).

Claims may arise on a construction project for a number of reasons. Some well known ones include the following:

- Increase in scope of work (changes, extras and errors)
- Inadequate bid information
- Faulty and/or late owner-supplied equipment and material
- Inferior quality of drawings and/or specifications, giving rise to ambiguities in contract requirements

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Note. Discussion open until February 1, 1995. To extend the closing date one month, a written request must be filed with the ASCE Manager of Journals. The manuscript for this paper was submitted for review and possible publication on June 10, 1993. This paper is part of the *Journal of Construction Engineering and Management*, Vol. 120, No. 3, September, 1994. ©ASCE, ISSN 0733-9364/94/0003-0553/\$2.00 + \$.25 per page. Paper No. 6328.

- Insufficient time for bid preparation
- Stop-and-go operations because of lack of coordination, design information, equipment, or material
- Work in congested areas and overcrowding
- Acceleration to regain schedule
- Inadequate investigation before bidding
- Unbalanced bidding and underestimation

Authors Dickmann and Nelson (1985) have found that the most common causes for a contract claim are design changes and errors. A comprehensive analysis of claims indicates that 46% resulted from design errors. An additional 26% were due to either discretionary or mandatory changes. Thus 72% of all contract claims can be traced to design changes, extra work, and errors.

CONTRACTOR'S PROTECTION GUIDELINES

The principal aim of producing the following guidelines is to assist contractors in overcoming some of the ongoing problems in the North American construction industry. The guidelines and comments are prepared to assist site superintendents and project managers in recognizing what records should be kept and what action should be taken to protect contractors' interests. Following similar guidelines will also serve the owner and its representatives in reducing the potential for claims. If any or all of the following suggestions are implemented, the writers cannot guarantee that contractors will never be involved in a claim or litigation. They do, however, believe contractors' interests (and, hopefully, profitability on the project) will be enhanced.

This article presents guidelines and the writers' general comments on record keeping, knowledge of the contract, preservation of rights, qualifying the basis of pricing change orders, planning and scheduling, and proactive action.

Note that this article is written from the contractor's perspective. The principles apply equally to others involved in the construction process, be they owner, consultant, subcontractor, or supplier.

RECORD KEEPING

Our experience in preparing documentation for claims on behalf of contractors has been that contractors generally fail to protect their contractual position. This situation arises from failure to completely understand and actively manage the contract, or failure to keep proper records.

Site records may seem to have little future value, but when problems arise over who is responsible for what and how much the associated costs are, they can prove invaluable. Proper job records must be kept, as they may ultimately allow contractors to justify and quantify requests for adjustments to the contract price and/or duration. In other words, proper construction records are necessary to demonstrate and quantify the contractor's entitlement.

Most contractors dislike paperwork—an attitude easily understood, but difficult to defend in litigation or arbitration. Notice provisions in contracts are often neglected, extra work is routinely performed without written authorization (on a limited scale), change orders are not qualified, erroneous or biased minutes of site meetings are not objected to, self-serving letters

are left unanswered, written notes of important telephone conversations or verbal instructions are rarely maintained, and contractual defaults by the owner are not documented or confirmed by letter.

Witnesses disappear over time. Memories are highly fallible and, in the absence of written evidence, honest-intention claims have little chance of success. This results in contractors negotiating their claims from a position of weakness. Therefore, contractors must establish and maintain a good record-keeping system that documents job progress and problems as they occur. Such a record system should monitor cost, time, scope, and quality.

Daily-progress reports should be kept and should indicate the date, weather and temperature, type of work in progress and quantities produced, and hindrance to job progress and by whom.

Photographs and video films (in cases where not prevented by contract documents) should be taken on a routine basis (dated and with commentary) to show construction progress, site conditions, and particular problems encountered. This should be done whenever it is considered necessary to document a particular problem arising in the field that causes delays to work, disrupts or interferes with the progress of work, or that may result in a change or claim for extra work.

A record of any memoranda relating to conversations, inspections, directions, or observations should always be filed, as well as records of correspondence between parties to the contract; minutes of weekly job-site meetings and other meetings; notes of telephone conversations, progress-billing certificates and all data submitted to support such requests; cost and productivity reports; delivery reports of owner-supplied material and equipment; diaries; job schedules (periodically updated); transmittals; drawings and specifications; shop drawings; vendors' drawings and specifications; change orders and associated documentation; inspection reports; and accident and site safety reports.

KNOWLEDGE OF CONTRACT

The entitlement of any claim first of all depends on the specific terms of the contract, which governs the execution of the given project.

All too often contractors do not read the contract document before bidding and, in many instances, not even when they execute the document. It is our experience that few contractors take the time to carefully read and understand the contract and, thus, too often the claim consultant is the first person, after the fact, to read the entire contract document. It is our contention, therefore, that contractors' site superintendent should fully review the contract documents and compare them with those that were bid; make a checklist of all requirements of a notice nature in the contract (see Fig. 1 for example); and read the contract sections titled "Special and/or Supplementary Conditions."

Articles in the section of the contract entitled "General Conditions" dealing with the following matters should be considered to ensure the contract is complete with respect to the terms and conditions to have a dispute mechanism (Revay 1990):

- Changes/extras
- Disputes
- Disclaimer
- Authority/roles/definitions

Type	Clauses in Contract Agreement	Clauses in General Conditions	Clauses in Supplementary Conditions	No. of Days for Notification
Delay/Time Extension				
Changes/Extras				
Acceleration				
Differing Soil/Site Conditions				
Disputes				

FIG. 1. Notice Requirement Checklist

- Soil/site conditions
- Delay
- Payment
- Notice provisions

Occasionally, contradicting clauses may be found. Such a contradiction may be resolved by the contract if it specifies which section of the document governs over others in such an event. Whether or not this is the case, interpretation should be obtained from or confirmed by the owner. Remember that in the event of ambiguity, the courts of most jurisdictions will decide against the author of a contract.

PRESERVATION OF RIGHTS

All claim avenues should be kept open by filing written notices of potential claim within the time specified in the contract after the contractor encounters, receives, and/or is directed (either orally or in writing) to do any of the following (Walstad and Asselin):

- Work different than that provided in the drawings and/or specifications
- Work in a particular manner or by a particular method that varies from or is more expensive than the method originally anticipated
- Work according to specifications or drawings that have been changed, amended, revised, amplified, or clarified
- Work according to one particular method when one or more alternative methods are allowed by the contract or when the contractor should be free to devise his own methods
- Work out of planned or normal sequence
- A requirement to stop, disrupt or interrupt work wholly or partially, directly or indirectly
- Work in congested areas
- Owner-supplied equipment delivered late, in a poor condition or not suitable for the use intended
- Accelerate performance in any way; to regain schedule by adding labor, material, equipment, working overtime or extra shifts

QUALIFY CHANGE ORDERS

Site superintendents should not waive claim rights by negotiating and signing off on change orders that pay part of the extra costs (usually the

direct costs), but that do not provide for additional burdens, administrative costs, overheads, time extensions, or impact costs as appropriate. This is particularly critical when contractors could have acceleration costs (extended work hours, shifts, congestion, overmanning), inclement weather, extended overhead, wage-rate and material escalations, substantially beyond the direct labor costs and material cost for the changed work. If the site superintendent cannot assess in detail the aforementioned impact costs at the time of issue, contractors must consider indicating that the change only covers the direct costs incurred in performing the work and should formally preserve their right to recover other costs associated with the added work at a later date.

Many practitioners advise that contractors should indicate that their quotation specifically excludes consideration for the cumulative impact of changes on contract work, i.e. loss of productivity.

Two Canadian construction lawyers advise contractors to include the following two qualifications in the change-order quotation to preserve the contractor's right to bring the impact claim of the cumulative effect of change orders later:

"We hereby reserve all our rights to claim subsequently for the costs, of any nature whatsoever, other than direct costs, associated with the performance of this extra work and the delays which may result."
(Blaikie 1986)

"The above price does not include any impact or delay costs that may result from this change in the work or from the cumulative effect of this and other changes, and the right to claim such costs is hereby reserved." (Kenny 1990)

A further point to consider is the presentation of a request for payment. Owners are, typically, reluctant to contribute to contractors' overheads, but are willing to pay for legitimate costs. It is therefore advisable to separately identify costs associated with small tools, consumables, site cleanup and others, rather than including them in a general overhead line item.

PLANNING AND SCHEDULING

Planning is the backbone of the whole project, and must be based on clearly defined objectives. With proper planning, adequate resources are available at the right moment, adequate time is allowed for each activity, and all activities start at the appropriate times. Planning and scheduling should be cost effective, simple, and practical.

One of the prime objectives of proper planning by contractors is to reduce the likelihood that they will be held liable as a result of not having proper management practices and controls.

Scheduling for contractors should include (Austin and Neale 1984) forecasts of resource requirements of people, materials and equipment, and analyses of their most efficient use; forecasts of financial requirements; and provision of milestones against which progress can be measured.

Scheduling techniques range from simple hand-drawn bar charts to computerized network analysis. The most suitable presentation of schedules for contractors is the bar chart, which should be based on the critical path method (CPM). All techniques, however, have certain important principles in common (Austin and Neale 1984): The schedule should provide infor-

mation in a readily understood form, however complex the situation it describes; it should be realistic and practically achievable; it should be flexible (circumstances will almost inevitably change during the construction stages—it should be possible to alter certain elements without disrupting the entire plan, i.e., must have sufficient contingency in all paths); and it should serve as a basis for progress monitoring and control. In addition, the bar chart can be used to prepare the cost control system.

A number of scheduling software packages are available on the market. These packages are based on network analysis techniques. Most of these systems provide excellent bar-chart presentations.

The regular updates and issuance of the schedule to the owner is a very effective nonadversarial communication tool and is generally considered (in Canada and the United States) to satisfy the legal requirements for providing notice of problems and associated delays. However, contractors must check specific notice provisions as previously discussed in this article.

The schedule can be used to determine the impact of changes to the plan and to establish a cause-and-effect relationship in a claim situation, i.e. the impact of delays, reduced or increased resources, scope changes, resequencing and other workflow changes to current activities.

Following substantial time overrun, various options can be scheduled to determine the most cost-effective way to get the project back on schedule within the existing constraints. Additionally, schedule updates will assist in illustrating and quantifying cost and schedule impact of any of the following:

- Acceleration to regain schedule by adding resources, working overtime, or working extra shifts
- Work out of planned sequence
- Late owner-supplied equipment
- Extension of time

PROACTIVE ACTION

Contractors' site superintendents and project managers should consider the following proactive steps to protect contractors' interests and reduce liability (Walstad and Asselin):

- Request appropriate extension of time whenever significant events occur which may entitle you to an extension of time and make it clear who pays for the costs of extended duration.
- Make it clear who pays for acceleration.
- Respond as quickly as possible to every complaint initiated by the owner.
- Analyze job progress in detail prior to any job-site-progress meetings that are held. Such meetings should be used as a forum for discussing and notifying potential or current delays, extra work, etc.
- Record in detail all delays and man-hours lost, conflicts, and discrepancies. Inform the owner when delays occur so that the contractor does not incur responsibility due to lack of information. Fig. 2 gives a sample of a delay report developed to assist contractors in establishing cause-effect and quantification relationships.
- Carefully read all correspondence and minutes of meetings and promptly record any disagreements you may have with them.

Causes of Delay	(1)* Hours Lost	(2) Number of Men Affected	(3) Manhours Lost (1) X (2)
1 - Waiting for Owner-Supplied equipment/material			
2 - Design changes/errors/extras · Move to other work areas · Redo work · Wait for information/authorization/approvals			
3 - Interference by other contractors			
4 - Change in work sequence			
5 - Congestion/overcrowding			
6 - Inclement Weather			
7 - Unforeseen Subsurface Conditions			
8 - Force Majeure			

FIG. 2. Delay Report

- Obtain written confirmation of all oral directives issued by the owner or engineer. If they do not confirm in writing, the contractor should write a confirmation letter to them.
- Forward any significant information received from or sent to the owner to senior management so that they can keep current with the project and determine if further specific activity is required.
- Wait for authorization before proceeding with changes and extras. Without proper directive to do such work, contractors will typically be deemed to be a volunteer in the performance of the extra work and may not be paid.
- Qualify the basis of, and limitations to, the pricing of your change orders.

CONCLUSION

There is no guarantee that claims can be avoided entirely. Avoiding disputes requires understanding the causes of claims, understanding contractual terms and obligations, and early and continued nonadversarial communication.

The comments presented in this report will assist all parties to the contract to reduce liability by resolving disputes through reference to contemporary records of fact and clear interpretation of contract terms. We believe the suggested processes are necessary for proper project management, which is far more advantageous and profitable than seeking advice of a construction claim consultant after the dispute is entrenched. The latter course often takes place too late and is costly.

ACKNOWLEDGMENTS

The writers wish to acknowledge Mr. Stephen O. Revay, vice president-Western Region of Revay & Associates Ltd., for his advisory role and permission to use internal documents and claim reports.

APPENDIX. REFERENCES

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