

Construction Claims and Avoidance

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Introductions

Stephen Warhoe, PhD, PE, CFCC

- Over 32 years working in claims and dispute resolution and CM business
- Testifying construction delay and productivity expert
 - On projects ranging to well over \$6 billion in ultimate cost
- Former AACE Association President, 2009-10
- I am not an attorney, so *caveat emptor*

- *Note: every bullet in this presentation can easily be another one hour or more presentation.*



Claims & Forensics - Overview

- Important Contract Clauses
- Overview of Claims and Disputes in Construction
- Avoid Claims, but if you have to...
- Asserting or defending against a Claim and the 3 required proofs



Before we get Started...

- The construction industry is unique in that no two projects are exactly alike, which can bring on many challenges;
- Construction Industry is very competitive;
- Challenge often is management of a project by all of its aspects; i.e. PM/CM, project controls, procurement, design, etc.



Contract Claims & Disputes Clauses

- A primary purpose of a Contract: it allocates risk!
- Describes the process for submitting claims;
- Describes what claim submittals must contain including when:
 - Claiming for money/damages
 - Claiming for additional time
- Claim clauses are designed to decrease bid contingencies and future confusion;



Contract Claims & Disputes Clauses

- Describes the dispute process, which usually is one or more of the following venues:
 - Negotiation
 - Mediation
 - **Arbitration**
 - **Litigation**
- ****The project team should learn and understand these clauses!**
- Good claims management is not measured by the number of claims – but by the number of unresolved disputes at end of project.



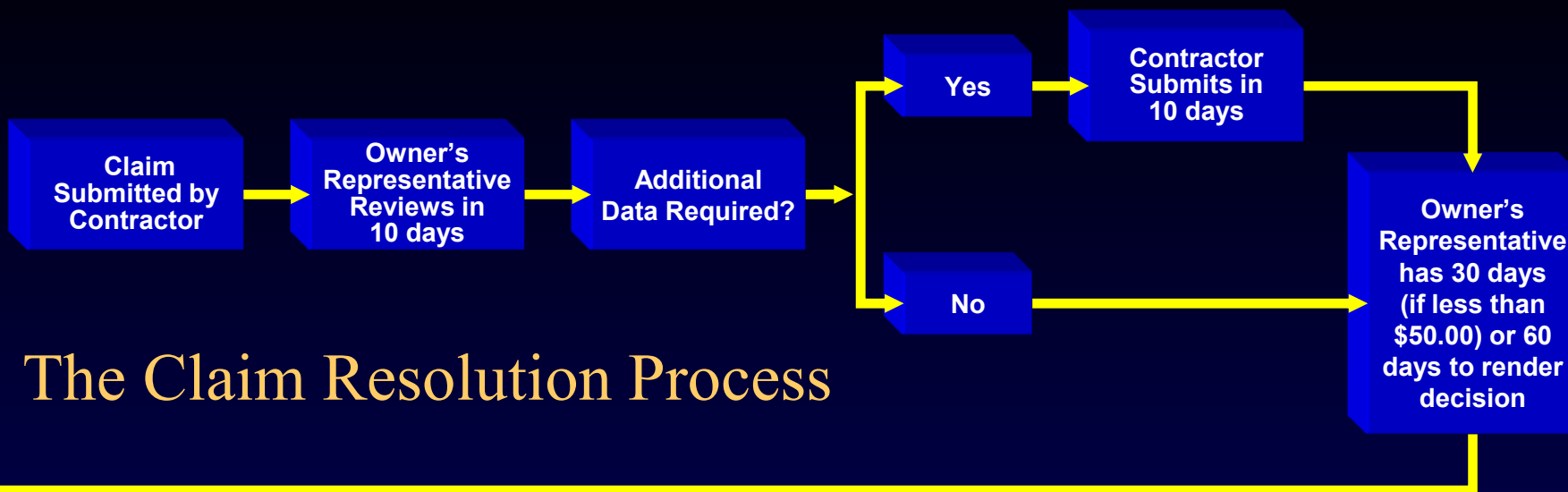
Overview of Claims & Disputes

- Difficult to avoid claims and disputes in construction
 - There is a common reason why disputed projects get to where they are.
 - There are actions that can be taken to mitigate risks
- Must focus more on managing claims
- Goal of Good Claims Management
 - Resolve claims through negotiation at lowest level
 - Issue properly documented change orders
 - Negotiate in good faith

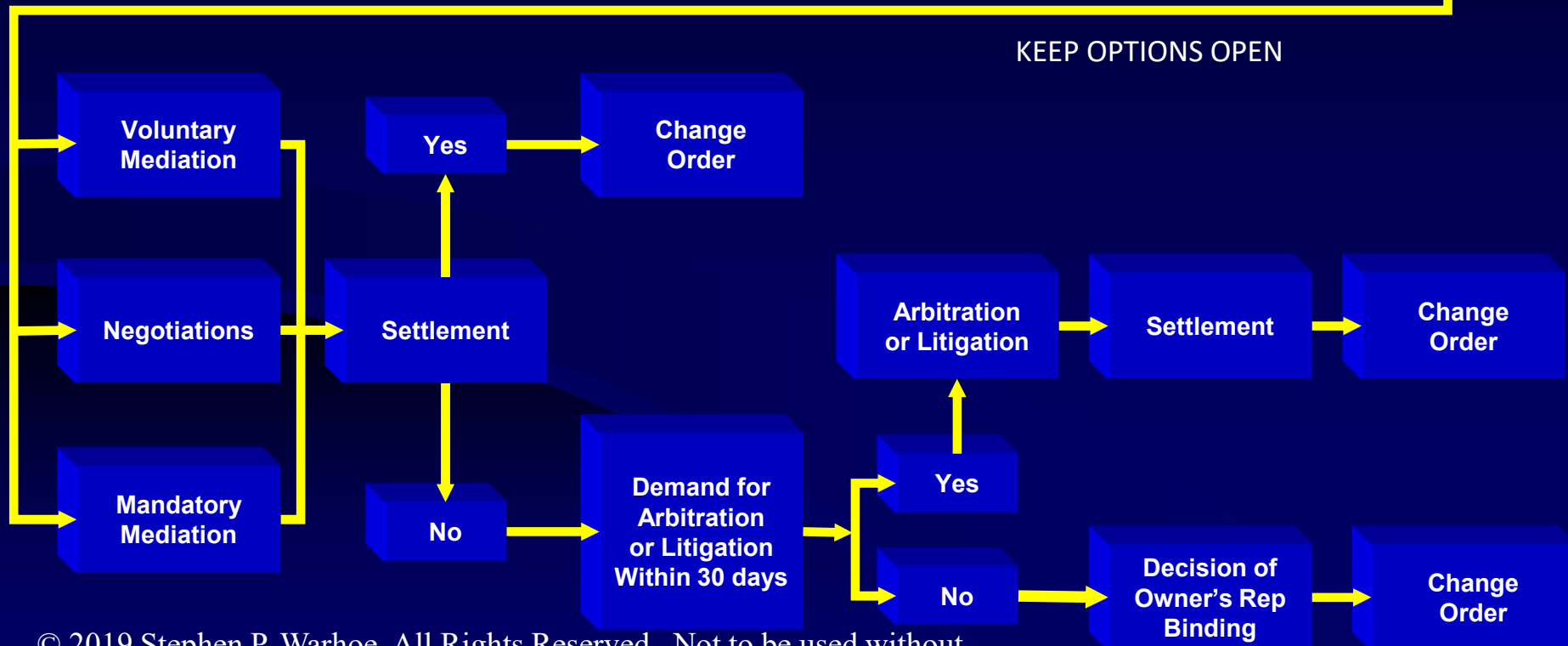


Definition of a “Claim”

- Generally, it is:
 - A written demand or assertion by one contracting party
 - Often is the result of disputed change
 - One party seeks, as matter of contractual right:
 - Payment of additional money,
 - Adjustment of time of performance, or
 - Other change to the contract.



The Claim Resolution Process



Avoiding Claims Starts with Good Project Management Processes...

- Cost & Schedule control systems
- Thorough and accurate project records
- Document management system
- Change order management system
- Procurement management system

Avoiding Claims Starts with Good Project Management Staff & Tools

- Staff are adequately trained and motivated
- Provide the best hardware, software and other tools for the job.



Avoid Claims, but...if you have to

- Claims / Dispute management system
- Addressing issues early often leads to:
 - Timely & inexpensive resolution of problems & claims
- Most of all: Read, Understand & Follow the CONTRACT



Preparing a Claim

- Prepare and maintain your project schedule & budget
 - Consistently
 - Per good industry practices
 - **Maintain and store the baseline schedule, original budget estimate and bases documents!**
- Submit all required notices per the contract...timely
- Document, document, document!
 - **“He who documents best, usually does best”**



Preparing Claims

- Arbitration Tribunals and Courts
 - Can be very costly
 - Takes a long time to get to a decision
 - Non-productive for revenue generators
 - Much of your company's control is taken away
 - What is in black and white will prevail

Preparing a Claim

- There are three proofs that must be adequately demonstrated in order to successfully submit a claim:
 - 1) Prove Liability
 - 2) Prove Causation*
 - 3) Prove Damages
- Contractor/plaintiff has burden of proof to convince owner/defendant or adjudicator.



Proving Liability

- Also referred to as ‘basis of change’
- In general, Contractor must demonstrate that:
 - Change did or will occur
 - It couldn't avoid or mitigate change
 - It has right through terms of the contract to request change



Proving Causation

- The contractor must demonstrate:
 - That the cause for the change was beyond the contractor's control.
 - The change was not foreseeable or preventable by the contractor.
 - The cause and effect relationship between events or circumstances and the cost/schedule impact.
- Most difficult of the proofs to demonstrate.



Causes of Changes in Construction

- Defects in plans & specifications (#1):
 - Errors
 - Omissions
 - Ambiguities
 - Conflicts
 - Impossible or impracticable requirements
- Differing Site Conditions
- Changes in Government requirements
- Owner Directed Changes - Betterments



Causes of Claims

- Failure by owner to enforce contract provisions & time of completion requirements
- Failure to negotiate time extensions & delay impact costs with changes
- Force Majeure, *e.g.*:
 - Acts of God, including unusually severe weather
 - Acts of government
 - Strikes



Proof of Damages

- Demonstrate that the requested time extension and cost damages are:
 - Reasonable
 - Supportable
 - Appropriately and understandably prepared

Thank you

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