Construction Claims and Avoidance

NW CCC
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Introductions

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- 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

- **Claim Submitted by Contractor**
  - **Owner's Representative Reviews in 10 days**
    - **Additional Data Required?**
      - **Yes**
        - **Contractor Submits in 10 days**
          - **Owner's Representative has 30 days (if less than $50.00) or 60 days to render decision**
      - **No**

- **Negotiations**
  - **Settlement**
    - **Demand for Arbitration or Litigation Within 30 days**
      - **Yes**
        - **Arbitration or Litigation**
          - **Settlement**
            - **Change Order**
      - **No**
        - **Decision of Owner's Rep Binding**
          - **Change Order**

- **Voluntary Mediation**
  - **Keep Options Open**

- **Mandatory Mediation**

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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

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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