

Preventing Construction Claims

In general, the volume of construction claims rises and falls with the tide of the economy. In a bull market, with more projects and less competition among contractors, qualified contractors can bid projects at higher prices—retrieving their operating expenses and higher profit—and assume less financial liability.

In some instances, they can almost name their price on a project-by-project basis and can afford to overlook all but the most costly disputes in the interest of completing the job and moving on to the next profit-laden project.

In a bear market, when project opportunities are limited, contractors face more competition to acquire work and must lower their bid prices to become the successful bidder. In these circumstances, contractors reduce their profit margins and work closer to their overhead costs in the interest of paying the bills.

Contractors may not have the luxury of ignoring minor disputes because their profit margin is already tight and they are paying close attention to their own operating expenses. Not challenging an architect's or the owner's questionable position on a relatively costly issue might put the contractor in the position of paying the owner for the opportunity to work on the project.

Climate of Claims

In the current economy, the volume of construction claims has cycled upward. Often, delays and cost overruns can be anticipated even before the project begins. Many claims are time-based and involve schedule slippage, changes and delays. Other claims are due to disruption of labor forces resulting in cost acceleration, labor cost overruns and a loss of productivity.

Claims arise due to a number of factors. For example, extremely tight bidding results in contractors' bids providing little room for contingencies, causing contractors to attempt to recover additional monies or time for every change that occurs. Plans and specifications are never flawless, and contractors may be forced to incur the cost of design deficiencies. During construction, owners frequently make changes to their projects, but may not want to pay for the cost impact.

Claims Prevention

In response to these dynamics, both owners and contractors must fulfill their obligations and work together to keep problems from becoming claims. Project owners can accomplish this by

- Attempting to minimize errors and omissions in the contract documents;

- Providing timely access to the project, adequate lay-down and staging areas, and necessary right-of-ways; and
- Turning around shop drawings, responding to requests for information and processing change orders in a timely manner.

Contractors can fulfill their obligation by training personnel to be competent project managers and superintendents and to recognize problems early so they can be resolved before disputes arise and costs are incurred.

Having both the project team and office staff involved in schedule preparation allows them to more accurately and reliably manage the project. It is vital that subcontractors help develop the schedule and stay informed of all issues that affect progress.

Claims Recognition

To use the project schedule to reveal construction problems and delays before they become claims, a contractor must submit a realistic as-planned schedule.

By granting approval of a contractor's schedule, an owner essentially is obligated to follow the schedule. It is expected that the owner and contractor will meet their obligations. Network-based schedules have proven to be a sword and shield for negotiating timely settlement of disputes, changes and delays throughout a project.

Keep in mind that the schedule must be kept up to date to be used as an important tool in analyzing construction delay, inefficiency and acceleration claims.

Early detection and acknowledgement of problems is an important step in tracking and curtailing changes. Unresolved change orders typically become claims. The sooner changes are resolved, the less they impact the project's schedule or budget.

Additionally, field staff must be involved in recognizing and avoiding potential claims. Contractors must ensure that they, too, understand the importance of their role in the success of a project.

Claims Management

Four factors affect claims: the contract, facts, law and personalities. These often are reflected in the documents generated on a project. All parties must ensure the project documents are retrievable so they can substantiate events as they occurred and develop a "no-fault" atmosphere.

To deal with disputes before they become claims, contractors should:

- Thoroughly understand the contract documents;
- Take action quickly;
- Evaluate claims objectively;

- Keep lines of communication open;
- Alert field staff to potential disputes;
- Isolate areas of dispute;
- Use all parties as information sources; and
- Review relevant contract provisions.

When a dispute arises, the owner and the contractor should communicate and attempt to resolve the problem equitably and quickly. Communication can occur in pre-bid, pre-construction or coordination meetings, as well as through letters, memos and emails. All affected parties should make sure they document the problem so a complete record of the dispute is maintained.

Individual parties should put all claim notices in writing and submit correspondence to the appropriate project participants. If verbal notice is given by a contractor that a claim is forthcoming, the owner should instruct the contractor to put the claim notice in writing.

The owner should advise the contractor to include a thorough explanation of the claim situation, including:

- A statement of facts concerning the claim;
- A statement providing a description of the nature and the extent of the claim;
- A statement regarding the contract documents related to the claim;
- A statement of what initiated the situation and how it will affect the project; and
- A statement of monetary and time extent of the claim.

The owner must investigate the contractor's allegations as soon as possible and document the results of the findings. Information should include progress of work, cost impact and what actions, if any, the field staff can take to lessen the impact of the claim on the project.

Construction is not an exact science; unanticipated events always will occur. But, recognizing and preventing claims will save money and resolve disputes.

The keys for success are promptness, communication, and clear and concise documentation.