

AVOIDING & DOCUMENTING CONSTRUCTION CLAIMS

By David J. Pfeffer and Michael R. Wood



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Today's marketplace presents new challenges to both owners and contractors during the construction process. To an owner, potential delays and complications in the completion of a project and management of an asset are, more than ever, something to be avoided at all costs. Likewise, to a contractor, the potential for owner defaults, delays in payment, and a fluctuating value of any security for that payment make it equally important to manage credit effectively.



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The most important steps that

both parties to a construction project can take to mitigate these risks, at least to some degree, are to know their contracts, implement procedures to administer those contracts effectively, and document their progress – good or bad – on the project.

Knowing Your Contract

For all their project expertise, project personnel often make assumptions or generalizations about the contracts they are working under. On all projects, but especially on large or complex ones, contract provisions have been specifically drafted to meet the owner's or designer's goals or visions for the project. Applying lessons learned on a previous project, under a different contract, can very well result in more lessons being learned – at a significant expense.

Project personnel need to expect that contract language regarding a contractor's entitlement to compensation, extensions of time for changes to the work, unforeseen site

conditions, or for any of the other myriad issues that arise on a daily basis, can – and will – vary from project to project.

Take, for example, a simplified situation of a general contractor building a mixed-use condominium in New York City. Needing a foundation, the general contractor solicits proposals from and subcontracts with a foundation contractor. The foundation contractor excludes from his proposals any obligation to remove or remediate contaminated materials found during his excavation.

Since he has encountered contaminated materials on other projects, the general contractor's project manager is able to demonstrate the existence of an unforeseen site condition and negotiate a change order with the owner. However, on this project, the owner has contracted away any responsibility for contamination. If the project manager is not aware of this obligation under his contract with the owner or his subcontract with the foundation subcontractor, the general contractor will be at a significant disadvantage when it comes time to resolve the contamination claims.

The general contractor's project manager will be left to negotiate for this work at the last minute – when the work becomes critical to his progress on the project. Although the general contractor bargained long ago to remove the contaminated materials from the site, the project manager's lack of understanding as to his contractual obligations will leave him at a significant disadvantage when forced to negotiate with the end provider of that service.

All too often, parties assume that they fully understand their obligations under the multiple agreements in place on a construction project without actually reading those agreements.

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Effectively Administering Agreements

The most effective method of administering multiple agreements on a project is to address commonly encountered provisions before they become the center of a dispute. A project team that takes the time to be proactive and establish a manual of policies and instructions for field and project level personnel to rely upon during the project is steps ahead of the project team that has to retreat to the home office to deal with each of the inevitable unknowns in the construction process. To that end, most projects would be well-served if each project team assembled a book or binder of such policies and instructions.

Without such a procedure for claims identification and prosecution, a foreman who discovers an unidentified utility service line during a renovation project might note his discovery in a daily log, but otherwise not take action, and seriously damage his employer's entitlement to recover any compensation for additional costs or time associated with working around the line. Likewise, an owner's project manager who is unfamiliar with the relationships and procedures contained in his contracts with his contractor or construction manager and with his design professional might fail to understand his obligations when he learns of potential conflicts between drawings and specifications from his designer.

Conversely, the project team that can turn to a set of easy-to-understand policies for managing conflicts in contract documents, delays, changes to the project and any other issues is in an infinitely more advantageous position to address, document and prosecute a claim. A project manual that provides the forms, letters and flowcharts needed to address and document situations on a real-time basis will put project personnel in a position to be even more proactive.

Documenting Claims

To the extent that a claim is not resolved at the project level, it can not be disputed that the better documented a party's claim is, the more likely the chances of success.

A party attempting to argue its entitlement to compensation or an extension of time needs to rest that entitlement upon some documentary evidence. Once a claim leaves the people who see the project on a daily basis and might be aware of the more subjective elements of the claim (e.g., were the marble counter tops supplied of the same quality that was promised?), the most reliable basis for negotiating or litigating the claim is the documentation in the project file.

For those who are working for or advising an owner, contractor, design professional or any other organization involved in a construction project, the best practice can be to have the project team compile and record the real-time cost implications of potential claims. It will always be extremely complicated – and expensive – to hire an expert to try to recreate the impact a claim will have. The organization that has policies in place for the people most familiar with the nuts and bolts of the project to identify issues on a daily basis will be at a significant advantage when claims are being resolved or litigated.

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