

CONSTRUCTION CLAIMS PROCEDURES

BY

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In the recent past, the construction industry has spawned a rising tide of construction claims litigation. Increased competition has forced contractors and owners to adopt positions which are “hard nosed” in order to foist upon other contractors the expense of mistakes made by architects, consulting engineers and others. The owners, architects and general contractors no longer can absorb the costs of the mistakes. Instead, litigation or arbitration is being utilized in order to determine liability.

The enclosed procedures and guidelines will assist your company in controlling construction claims, maximizing your profitability and defending construction claims when launched against your company.

It is well established that a contractor should begin building an evidentiary support file for construction claims at the start of a job, long before the problems arise. A documentation system should exist and include:

1. Initial site inspection report compiled after a walk around with the owner’s representative wherein the parties jointly note and discuss site conditions including problems of access, ground conditions, possible unforeseen conditions, problems with removal of debris and existing structures. Notes should be taken during the job site walk. Pictures also serve as good documentation. The pictures should be signed and dated. This report will provide a baseline against which developments during construction can be compared. It will also provide essential support for any claim or differing site conditions.

2. A daily log or report must be kept. The log should be a record of such matters as weather, site conditions, labor force, safety conditions, work activity being performed, important conversations, directions given by the owner’s representative and other factors affecting progress. The log should be maintained by the job foreman or superintendent. Both favorable and unfavorable comments should be recorded in the log so that it is believable.

3. Correspondence on important construction problems, agreements and claims must be made in a very timely manner. Most construction contracts require timely notice of claims. The general provisions of the specifications describe the claims and notice procedures. You must be familiar with them. A simple letter describing the problem and asking for additional time or money or both is the easiest way to give such notice under most circumstances. Correspondence should also be used to confirm important conversations relating to the job. Once a potential dispute is identified, counsel should be obtained immediately so as to review the dispute and limit adverse correspondence originating from your office. If you say too much or if you say the wrong thing within your letters pertaining to a dispute, it can permanently harm the case. Letters from others

asserting contrary positions should be answered in writing. If you attend a meeting, notes should be taken and minutes should be dictated. Copies of the minutes should be sent to all interested parties so that any disagreement about what transpired will be quickly raised and resolved. Personal diaries can also be maintained by other company agents at the site. Always put it in writing! The published minutes from the regularly scheduled job conferences should be collected, retained and contested if inaccurate.

4. A change order log should be maintained so that change orders can be documented. This log should contain for each change order (a) the date the problem giving rise to the change order was discovered, (b) the date the claim or request for a change order was made, (c) the date appropriate plan revisions or shop drawings were submitted by the owner's representative and a bid was requested, (d) the date that the change order was quoted, (e) the disposition of the change order request, (f) the delay caused by the problem, the change order, or both. Make sure that the person requesting any field change has the authority to do so. Get it in writing before the work is started.

5. Photographs should be taken in an effort to document the status of the project and potential disputes. A picture truly is worth a thousand words. Pictures can demonstrate progress, delays, interference, weather, demolition, obstruction of access and numerous other circumstances. They can also be utilized to demonstrate strikes and other forms of illegal work stoppages. Some system should be developed for periodically photographing job progress and problems.

6. Job scheduling information should be maintained, separately. Minutes of scheduling conferences should be kept. If a critical path method (CPM) schedule is used, all data used in preparing that schedule and which is provided to you should be maintained. The information should include such things as lists of activities, time estimates of tasks, work force utilization, sequencing projections, computer print-outs and logic diagrams. Any input received from the owner, consultants or other contractors should also be maintained.

7. A shop drawing log should be maintained showing (a) the date of receipt of the drawings, (b) the date the shop drawings were submitted, (c) the date the drawings were approved. Such a log will help show who was responsible for any delay.

8. Weather data should be maintained in order to document unusual weather conditions which may provide a basis for a claim or extension. To show that weather was unusually severe, you must show what weather was actually experienced and how that compares with normal weather at the site. Keep the information in your daily log. Information can be obtained from the National Oceanic and Atmospheric Administration's Environmental Data Service, but the closest reporting station may be too far away to accurately reflect job site conditions. Keep your own records.

9. Progress payment logs should also be maintained which include all progress payment meeting minutes and all data on the amounts and dates of progress payments received.

10. Waiver of lien type documents must not be executed if by signing the waiver a bona fide claim is being extinguished. When you sign documents in order to receive progress payments or retainage, be sure you are not giving up your rights to process claims you may have.

11. Payroll records should be quite detailed and maintained for each employee. These records should show who worked how long on what area of the job each day. This information will help illustrate how much additional work over the bid amount resulted from a particular construction problem. If you are performing disputed work under protest, the records should be co-signed each day by a representative of the owner or prime contractor.

12. Equipment use records should also be maintained and serve the same purpose. These records should show the type of equipment, the work performed, the length of use, the amount of idle time, the name of the equipment operator and the nature of the work then in progress.

13. Know job site personalities in order to maximize your job efforts and in order to avoid conflicts. If your work is being managed by “nit pickers” it will make the project more costly. Find out the reputations of those with whom you must deal on the site before you bid the work or at least before you mobilize.

If a construction claim arises, counsel should be consulted immediately so as to determine the dispute resolution procedures, including claims presentation, within the general provisions of the specifications.

Perhaps most of these matters are attended to in one form or another by your staff at this time. I think it is important to review your procedures at this time and determine if you are following these twelve points.

As always, we would welcome the opportunity of representing you should a construction dispute arise and should you not have counsel familiar with this unique area of the law. Our firm regularly represents construction contractors in such disputes as well as in labor relations, discrimination, OSHA, workers’ compensation and wage-hour matters, including prevailing wage. Our job site experience maximizes the client’s opportunities for being successful.

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