

Construction Claims Identification, Communication & Record Keeping

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by

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Introduction

First of all - what is a claim? Well here are a few suggestions, according to your point of view:

- A claim is a disguised form of blackmail
- A claim is the last chance to bail out a losing job
- A claim is an assertion to a contractual right

It is probably not difficult to guess who expressed which point of view, but at least the common thread is clear. What is being discussed is *extra money*.

The construction business is probably Canada's largest single industry, accounting for some 30% of all economic activity. Yet, it is also the most fragmented. Unlike the giant manufacturing industries, the construction pie is shared by many thousands of smallish contractors and sub-contractors, mostly family owned. Only a comparatively few contractors and sub-contractors are large in size. Also, there is a continuous stream of companies entering the business at one end, and for one reason or another, leaving at the other. The average lifetime of a typical company may range from 2 to 20 years, rarely more.

The construction industry is also rather like the cottage industry needle trade. Both rely on prime contractor sub-contractor relationships each according to their required specialties. In the needle trade, buyers buy, designers design, some cut the cloth, others sew the pieces together, while yet others specialize in button holes and so on.

The construction industry works in a very similar way, but because of its fragmentation, and the way it

works through competitive bidding, it is very, very competitive. When you think of it, is there any other industry that for a fixed amount of money, takes on the construction of a complex product, never ever built before, within defined time limits, and using a construction team, who, in all likelihood, have never before worked together?

By and large, the system seems to work quite well. But considering the giant size of the industry, it is hardly surprising that there are also some giant sized disputes. The real wonder is that there are so few rather than so many.

Much has been written on contractor/owner disputes, claims, litigation and settlements, especially as a result of various court cases. But perhaps we should first at least agree on terminology. For example, I have noted that on many construction jobs the monthly progress draw against the contract price has been loosely referred to as the monthly progress *claim*. In a sense it is, but I think that this particular word is much better reserved for a claim in the sense of *an extra to the contract price*.

Claim Avoidance

More formally, a contractor's claim may be defined as:

A legitimate request for additional compensation (cost and/or time) on account of a change in the terms of the contract

It follows from this definition that a claim may arise under any form of construction contract, except perhaps those very rare kind, in which all costs are fully reimbursable without any reservations at all. Of course, a claim is most likely to arise under a fixed price form of contract, and in fact today there are few such contracts in which there are no claims, negotiations and settlements before the contract is finally closed out.

It also follows that it is essential to know exactly what is expected of the contractor under the terms of the contract, both before signing (indeed at the time of bidding), as well as during its execution.

This knowledge must not just be limited to senior management at the home office. Site supervisors who deal with the day-to-day work must be equally well informed. Strictly speaking, every article and requirement of the contract must be clearly understood, if the contents of the contract are to be faithfully carried out.

It is a matter for great regret, therefore, that some contracts are written by lawyers in such a way that only other lawyers can understand them. And even then they do not always agree! So what chances have the owner and contractor in understanding their respective obligations in such contractual relationships? But that is another story!

Fortunately, the increasing use of standard documents and specifications has gone a long way to facilitate the expression of requirements, and thereby avoid disputes through simply misinterpretation. So three simple rules can be promulgated to avoid making claims:

1. Know exactly what the contract requires
2. Do what the contract requires, but without interference
3. Don't do anything else, without proper documentation

Claim Identification

In days gone by, it seems that:

- Buildings and engineering works were less complicated, of conventional design, and required less specialized sub-contract work. The contracts were for relatively less money, and of shorter durations.
- Profit margins were higher, with even a few dollars put away for contingencies.
- Relationships between the owner, architect or engineers and the contractor, as well as between the contractor and his sub-contractors, were much closer and less formal. May be, if an extra was not allowed on this piece of work, it could be built into the next.

But market conditions have changed. The state of the economy and high interest rates [1990] have made building owners much more anxious to hold down original capital outlay, and avoid additional costs. Revisions have been made to owner-consultant agreements designed to take control of funds out of the consultant's hands. Revisions are made to standard contract forms intended to transfer increased liability to the contractors and sub-contractors, as well as require more onerous warranties. Stiffer competition prevails for reasons noted earlier.

All of these give rise to a greater possibility for disputes and claims. So it is prudent to recognize the situation and deal with it in a realistic, positive and sensible manner. This is much better than trying to brush things under the carpet until the end of the job - for fear of upsetting the friendly (?) contractual relationship.

Sources of Dispute

So typical sources of disputes and claims are worth noting. Theoretically, any clause in the contract could become the basis of a claim. Indeed, it is a wonder that contracts have not become much simpler on this account alone. However, we are governed by explicit law, expressed by a profession whose major product is more words! Generally, claims may be identified as falling into one of the following main groups:

- 1) **Changed conditions.** Conditions different from that represented by the contract documents, or known at the time of bidding on the work, such as different soil conditions, or unknown obstructions etc.
- 2) **Additional work.** Disputes over the pricing and timing of additional work required, or even whether a piece of identified work is in the contract or not. Beware particularly of omissions in the design documents, requiring changes to make a system work, especially if they appear in a subtle way through the shop-drawing review and approval process. This is always very embarrassing for the designers, who would like to see them incorporated for free! Beware also

of changes requested by the users (as distinct from the owners) of the project. While the owner is seeking a Volkswagen, the users are invariably looking for a Cadillac!

- 3) **Delays.** These refer to delays strictly beyond the contractor's control. They may be caused by the owner directly, or by one of his agents. A prime example is failure to give access to the site of the work in a timely way. Or equipment promised by the owner is not delivered on time. More frequently, working drawings are not provided in time to suit the work, or shop drawings are not reviewed in a timely manner.
- 4) **Contract time.** Disputes over a contractor's request for time extension on account of changed conditions, required changes to the contract, or owner caused delays. Disputes may also arise over instructions to accelerate the work. Such instructions may not necessarily be explicit. For example, instructions to incorporate additional work without a corresponding time extension, especially if the work is on the critical path, is tantamount to an instruction to accelerate in order to meet the contract completion date.

Claim Notification

Which comes first, the dispute or the claim? Typically, the dispute comes first, principally because the paper work invariably falls behind the progress of the work.

Progress payments are late. Changes cannot be processed without agreement on prices. Sub-contractor prices are difficult to obtain, especially if the real cost is out of all proportion to the work required. Documentation for regulatory approvals have a notorious habit of getting bogged down somewhere. Even progress meeting minutes, wherein everyone agreed to do certain things in a certain sequence, somehow fail to appear until the following meeting, when it is all over!

So what starts out as a minor issue, something that might be resolved by early agreement at the time of the work, gradually grows out of all proportion and becomes the basis for a formal claim. In some cases, a claim is filed by a contractor with little or no forewarning, and this itself gives rise to a dispute.

Either way, a claim should be made only after careful consideration, in a formal and objective manner, on precisely what contractual grounds, how much money is being sought and how that sum is arrived at, and the corresponding time extension to the contract, if appropriate.

That's quite a tall order!

Reserving Rights

Very often a contractor does not know the real cause for claim until some time after the events that have given rise to the situation. A typical case involves the accumulated impact of a series of changes, each of which may appear minor, but collectively have a disrupting effect out of all proportion to the work involved. Other changes may give rise to a re-scheduling of work, with consequent loss of productivity. Often, these impacts are difficult to determine until some time later.

Notwithstanding, the prudent contractor will be constantly vigilant for the types of situations described, and will give the earliest possible warning to the owner, of his intent to claim and the anticipated grounds for doing so. In this way, under most contracts, the contractor is able to preserve his rights to claim until such time as the necessary information can be collected and appropriate analyses conducted.

Record Keeping

Obviously, the extent of record keeping required for a particular construction job will depend on the type of contract. However, some record keeping will be required in any case because it is:

- 1) Required by law
- 2) Required by the terms of the contract
- 3) Needed to control the on-going work
- 4) Needed as data for estimating future work
- 5) Needed for preserving the contractor's rights under the contract

The first item may be ascertained by referring to the authorities having jurisdiction over the place of the work. The second may be determined by a thorough reading of the contract documents, both in terms of the administrative requirements contained in the general and special conditions, and the technical requirements contained in the specifications. The third, fourth and fifth items are for the contractor to decide, and depend largely on his disposition.

Perhaps the best case that can be made is that, if the contractor wishes to remain profitable he must maintain control of his on-going work, and control of on-going work requires on-going records. Some records may need to be kept daily, others weekly, and still others monthly. Different frequencies are appropriate for different records, but the key is that all such records **must be on-going**. It is no use shutting the stable door after the horse has bolted!

A Typical Set of Records

A good set of records that might be kept on a fair sized construction project could well include the following files. Note that these files are assembled into blocks of like subject matter. This approach greatly facilitates ease of filing and subsequent recall.

- 1) Original Contract Tender Documents
- 2) Issued for Construction set, and all subsequent revisions
- 3) Instructions to contractor
- 4) Contemplated Change Notices issued by the owner, Change Estimates, and Change Orders received
- 5) Sub-contractor quotes, contracts, purchase orders and correspondence
- 6) Shop drawings, originals, all revisions and re-submissions
- 7) Shop drawing transmittals, and transmittals log

- 8) Daily time records
- 9) Daily equipment use

- 10) Daily production logs, e.g. concrete pours etc.
- 11) Material Delivery and Use Records, including expediting

- 12) Accounting records: pay-roll, accounts payable and receivable, etc.
- 13) Progress Payment Billings under the contract
- 14) Daily Force Account Records, pricing and billings

- 15) Contract Milestone Schedule or Master Schedule
- 16) Short Term Schedules and up-dates
- 17) Task schedules and analyses

- 18) Original tender estimate
- 19) Construction control budget
- 20) Actual Cost Reports, weekly or monthly, including Exception Reports.
- 21) Forecast-to-Complete Estimate up-dates
- 22) Productivity Reports/Analyses

- 23) Inter-office correspondence, including memos and faxes (all filed by topic).
- 24) Contract correspondence
- 25) Minutes of Contractual Meetings
- 26) Minutes of Site Coordination Meetings
- 27) Requests for information
- 28) Notice of claims for delays and/or extra cost by contractor

- 29) Government Inspection Reports
- 30) Consultant Inspection Reports
- 31) Accident Reports

- 32) Daily diary or journal entries
- 33) Notes of telephone conversations
- 34) Progress Reports, weekly, monthly or quarterly
- 35) Progress photographs
- 36) Any other reports, such as special consultant reports

- 37) A Filing Record of all the Record Files that are being maintained

Focus on the Last Two Groups

That's quite a healthy list, and needs the administrative staff to support it. Most of the list is automatic and self explanatory. However, the last six items are often overlooked and are therefore worth elaborating.

Original Records

As noted earlier, for the prudent contractor anxious to stay solvent, records are required for estimating future work, and for protecting his contractual rights. Both of these require some form of post-contract

review. However, there can be little argument that reliable data cannot be extracted from records created after the fact. Even the best of memories are fallible, and the written record serves to provide the solid reminder. Data may be extracted, analyzed and presented in a different light, but satisfactory records cannot be created later.

Instant memos

For example, all verbal directives should be committed to writing immediately and exchanged with the other party. This serves to keep the other party properly informed, clarify understanding if the instructions were not clear, and, of course, to preserve contractual rights.

Personal diaries

Diaries can provide a wealth of information. Unfortunately, they tend to be overlooked, either because the pace is so hectic that there is not time to keep one current, or alternatively, there seems to be so little of importance going on that it hardly seems worth writing! In any case, what should be recorded are solid facts such as the make-up of various crews, sub-contractors and equipment on site, work re-allocation and for what reasons, delivery problems, weather conditions, visitors to the site, discussions, and seemingly innocuous comments about the work. Needless to say, what should be avoided, are personal opinions and derogatory remarks. They could be read out in court!

Photographs

For record purposes, these must show what is actually going on at the time with the location and view point identified, as well as the date and photographer's name. A camera which prints the date on the negative is a great start and well worth the expense. Also the photographer should realize that it is the content, and not the artistic effect, that is the most important.

Computer Application

As we have seen, the road to contract documentation is long and arduous. The worst part is trying to find that vital piece of information amongst the morass of paper, which is now so urgently required.

Forward the micro-computer. These are now so inexpensive, and so powerful that it seems impossible to do without them. However, the secret is to get data organized as early in the job as possible, then commit to consistent maintenance, regular backup and off-site storage. If this is done meticulously, the subsequent saving in time through search and find, or through spread sheet and database design and use, can be invaluable. Even the common Speedie Memo can be produced faster on a PC, with the added advantage that it can be put in storage in a manner that can be readily traced.

Managing the Records

As well as managing the files, the records themselves also need managing. Some simple rules can help as follows:

- 1) Determine what records are to be kept, and how. Establish logs of the records, so that they can be found, referred to and/or followed up as required. Well organized contractors establish standard reference lists and coding for all their contracts. This greatly facilitates managing, analyzing and comparing contracts.

- 2) Once the records have been identified, ensure that they are in fact set up, maintained and used for managing the job.
- 3) Review the record keeping system from time to time, because records have a habit of growing in unexpected ways - like half the correspondence showing up under *Miscellaneous*, and the other half under *General*. In addition, some records may become obsolete or redundant, and should be discontinued. Unnecessary record keeping can waste a lot of time and money.
- 4) Records also take up space and equipment. Determine the useful life of the different components, and take a systematic approach to record disposal.
- 5) Take steps to ensure accuracy, reliability and hence credibility. Unreliable records can be quite useless, as well as a waste of money, and possibly even detrimental.

Useful Tips for Staying out of Trouble

The following tips are suggested for keeping a contractor out of trouble:

- 1) Develop a master schedule and a detailed schedule that fits the required dates in the contract. Then develop a detailed schedule, especially with the help of major, or critical sub-trades. ***Distribute this schedule information to all concerned***, including the owner and his consultants, so that everyone knows what is expected of them, and can plan their work effectively and economically. After all, the object of the exercise is for everyone to make money. Monitor and up-date the schedule on a regular basis. If you or your sub-trade causes a delay to the work, do something about it. If the owner, or his consultants cause a delay, notify them promptly, politely but firmly, in writing.
- 2) ***Avoid an impossible bid***, or sub-trade price, even in a tight bidding situation, when you know the sub cannot do the work for the money.
- 3) Make sure that not only the contractor's general forces, but also each of the sub-trades can perform their work ***without interference or delays*** by any others. Where close coordination is required, make sure there is proper communication taking place at a level that can have a positive impact on the work.
- 4) As general contractor, ***coordinate the entire work***, including that of sub-trades, by taking charge and ensuring that all activities are effectively organized
- 5) According to the old axiom, remember that ***time is money***. This is just as true for the owner, the consultant, the contractor and all the sub-contractors.