



# AVOIDING PROJECT CLAIMS

How to Keep Your Project on Track

**DISPUTE RESOLUTION**



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## INTRODUCTION

Resolving claims on construction projects between the owner and contractor over disputed damages can be lengthy and expense endeavors. And typically, after any such event, everyone says they never want to go through that pain again. The time and effort spent in pursuing recovery of damages or defending against them is never recovered, regardless of the outcome, and is a massive distraction from other priorities. But avoiding project claims does not just happen. Avoiding disputes requires active steps throughout the project or contract life-cycle. Taking these steps will ideally help avoid disputes altogether but should at least help resolve differences before they escalate to formal claims. And they may even help your project be more successful.

Some of the more common claims on projects include the following issues:

- + Significant number of scope changes impacting the contractor's ability to perform;
- + Design errors or omissions that result in construction disruption;
- + Unforeseen or differing site conditions;
- + Events impacting the contractor's means and methods;
- + Conditions impacting the contractor's labor productivity;
- + Schedule impacts, either delays or acceleration of work;
- + Force Majeure events, such as pandemics, that impact work;
- + Owner interference with contractor's management of work; and
- + Poor performance by the contractor.

Owners and contractors need to keep these types of issues and others that may occur in mind when negotiating the contract, as well throughout execution of the work. Both parties need to ensure that the contract and execution processes are established to clearly address each type of issue.

## PROJECT LIFE-CYCLE CLAIMS AVOIDANCE

Working to avoid claims on a project starts long before any issues emerge, beginning even before the contract is in place and continuing through project close-out, covering the entire life-cycle.



*Figure 1. Research Methodology*

For an owner, this starts with the preparation of the request for proposal that is issued to potential contractors. For contractors this starts in the preparation of the proposal to perform the work. Both parties should work together in finalizing the contract to remove any uncertainty in requirements and understand the other's position. During execution, both parties should meet their responsibilities and work together to resolve any discrepancies.

**The best battle is the battle that is never fought. The best war is the war that is won without a battle.**

*Frederick Lenz*

## ESTABLISHING THE CONTRACT

Prior to finalizing a contract, multiple steps can be taken by both parties to help ensure a contract is clear and well structured to support the successful execution of the project.

- ✓ Selection of Contract Type – Owners need to consider the appropriate contract type to use for a project. The best type can vary depending on the conditions related to the project. Owners should conduct an analysis to assess factors such as business criticality, state of scope development and design, schedule priority, type of project (new build, renovation, expansion, etc.), and other factors. For example, fixed price contracts are better suited when the scope is well defined and the work has limited interaction with existing activities. Cost reimbursable contracts may be better suited when the scope is still being defined. It may also be suitable if the owner wants more control over the work or if the work may be significantly impacted by existing activities, such as a renovation project in an operating facility.
- ✓ Peer Reviews – Owners should have someone conduct a peer review of the RFP prior to issuing it to ensure it is comprehensive and addresses all of the project requirements. Likewise, contractors should have peer reviews of the proposal prior to submission to ensure it is complete and clear. Peer reviews are likely to catch gaps in the RFP or proposals or identify items that need additional clarity.
- ✓ Scope Definition – Owners and contractors should meet together as a part of the contract negotiations and review the project scope to ensure all the requirements and interfaces are well defined and agreed to by both parties. This type of review typically identifies some disconnects between what the owner and the contractor assumed.
- ✓ Realistic Requirements – Both parties need to review the requirements of the project and ensure they are realistic. These requirements include what the owner has to provide, such as access or other provisions, and what the contractor has to perform. Any concerns should be addressed prior to finalizing the contract.
- ✓ Clarifications of bids, qualifications, and contract terms – As a part of the negotiations, all of the contractor's assumptions, qualifications, and other bid terms should be reviewed and agreed to or refined as needed. Additionally, the contract should be reviewed together to ensure a common understanding of the contract terms and requirements.
- ✓ Risk Allocation – In every contract certain risks are assumed by one party or the other. For example, most owners are responsible for the site conditions while the contractor is responsible for the execution means and methods. But this division is not always the case, and there are multiple other risks that should be discussed to ensure a common understanding of responsibility for impacts if risks are realized. A common area of dispute is who is responsible for design risks or site logistics. A common understanding should be reached on these items.
- ✓ War Gaming Exercise – A recommendation to help clarify the contract terms is a “War Gaming” exercise when the two parties get together and go through multiple scenarios of fictional events and how each party would apply the contract to address the issue. This exercise helps bring clarity to how each party interprets key contract terms related to issues and performance. The scenarios can be based on common issues that arise on projects.

## KNOW THE CONTRACT

Once the contract is finalized, it is important for both the owner and contractor project teams to understand the contract requirements as each team will be leading the implementation of the contract for their organization. Ideally the full contract, possibly with some redactions of certain confidential information, will be available for both teams to reference throughout the contract execution. The following elements need to be known by the project teams to help ensure contract compliance.

- ✓ **Commitments** – The key commitments in the contract include 1) the timeline for completion of work and potential interim milestones and 2) the cost for performing the work. Both the timeline and cost commitments can be simple dates and fixed price amounts or can be complicated requirements depending on multiple factors and defined terms. Both parties need a clear understanding of the requirements and how they are calculated.
- ✓ **Responsibilities** – Owners and contractors need to understand not only the responsibilities of the other party but also understand their own responsibilities. These responsibilities may include how the work will be executed, how the work will be managed, and how the parties will communicate. For owners, these responsibilities can include providing access to areas, timely reviews, providing utilities, and many other items. For contractors, these responsibilities can include planning and coordination of work, developing and managing a schedule, quality of work, regular reporting, timely submissions, and many other items.
- ✓ **Key Contract Terms** – Both parties, but particularly the contractor, need to know key contract terms relating to their execution. The contract will typically include a number of “standard of care” terms that define the level of quality in how the contractor executes the work. It will also include terms related to notice requirements in the event something happens that the contractor believes has or will impact the work. Teams also need to understand the contract penalties for not meeting the requirements, including liquidated damages for not meeting the schedule milestones, owner steps in correcting non-conforming work, or the basis for termination.
- ✓ **Key Processes** – Contracts will also often define certain key processes related to the execution of the work that both parties need to be familiar with, including processes related to establishing schedule and performance baselines, change orders, pay applications, schedule updates, turnover of completed work, and disputes. Developing flow charts of these processes can also help clarify the requirements.

Regretfully contracts can be challenging for many to understand due to the complex legal language. It can be very helpful to prepare a contract “playbook” that summarizes the primary contract elements noted above. Describing the commitments, responsibilities, key terms, and processes in plain language can be incredibly helpful to teams in complying with the contract. The playbook will also help consolidate contract terms that may be in different sections of the contract but relate to the same topic.

#### RECOMMENDED CONTRACT PLAYBOOK OUTLINE:

<p><b>Highlights</b> Parties, Contract Date, Amount, Schedule Completion</p>	<p><b>Owner Responsibilities</b> + Items provided by owner + Access + Owner review + Coordination + Design/scope</p>	<p>+ Design/scope + Safety and environmental + Schedule management + Reporting</p>
<p><b>Key terms</b> + Order of precedence + Resolution of conflicts + Cost reimbursement details + Schedule details + Liquidated damages + Other key terms</p>	<p><b>Contractor Responsibilities</b> + Standard of Care + Staffing and staff changes + Submittal + Coordination</p>	<p><b>Key Processes</b> + Delay impacts &amp; Force Majeure events (notice requirements, etc.) + Change orders + Pay Applications + Completions and turnover + Project closeout</p>

## LIVE THE CONTRACT

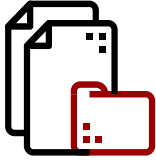
Once the teams understand what the contract requires, they need to live the contract every day in not only meeting the specific terms of the contract but also the spirit of the contract and what it represents. Living the contract manifests itself in multiple ways:

- ✓ Meeting Contract Obligations - Both the owner and contractor teams need to ensure they are meeting their obligations as documented in the contract, including providing information and support to the other party in addition to performing their own activities as required. For example, if the contract requires the contractor's schedule updates to include an explanation of schedule changes and forecast variances, that information needs to be included with each update.
- ✓ Coordination Between Parties – While one party or another may have specific coordination responsibilities, both parties can play a major role in helping to coordinate between all stakeholders involved in the project. Keeping the other party aware of current activities and events, planned events, and future concerns, will go a long way in mitigating or avoiding project impacts. For example, if the owner had the project design performed by a separate firm, the owner needs to be prepared to help coordinate and resolve any issues between the designer and contractor, even if the contract requires the contractor to coordinate directly with the design firm.
- ✓ Change Order Preparation and Execution – When the owner requests a change, the contractor needs to prepare a timely response that includes all the detail necessary for the owner to assess the reasonableness of the proposal. If a schedule impact is anticipated, the contractor should include the proper schedule analysis to demonstrate the impact and support the additional time requested. In the instance when the owner provides some verbal instruction or takes some action that the contractor perceives is a change, the contractor should provide proper notice to the owner within the contract allotted time of the perceived change and how it may impact the project.
- ✓ Strong Communication – When the owner and contractor have strong communication between them, most issues can be resolved without becoming formal disputes. For example, if an owner of an operating facility has some work on an adjacent part of the facility, they should let the contractor know so they can adjust plans if needed. If a contractor submits an RFI that needs a fast turnaround on to avoid a schedule impact, it should include that information in the request and verbally make the owner aware that it needs to act quickly. When the parties can work towards a common goal of completing the project successfully, the project typically does not have any formal disputes. Too often disputes arise due to a lack of good communication between the parties. It fosters a lack of trust between them and results in a lack of understanding of the other party's concerns.

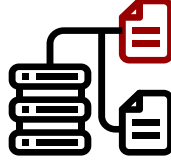
## DOCUMENT EVERYTHING

An important aspect of project management and avoiding claims is maintaining quality documentation throughout the life of the project. Maintaining this documentation can help resolve issues that occur during the project before they become formal disputes. If a contractor or owner can demonstrate it had a previous agreement regarding the interpretation of the contract or scope, then an issue related to that may be resolved without further debate. If the contractor can provide documentation that it complied with the owner's instructions regarding some issue, then it may be resolved quickly. In the instance of quantifying the impact of an issue, if the owner or contractor has the necessary performance data to either clearly demonstrate there was an impact or that there was not an impact, then the parties will likely reach agreement quickly on the matter.

This documentation can take three forms:



Existing documentation that is already created in the course of the project



Creating documentation of events & discussions that occur to preserve that information



Collecting data to help manage & document performance related information

The following information should be collected and retained by both owner and contractor project teams to the greatest extent possible:

- + Original RFP documentation, including any Q&A documents or site information provided;
- + Contractor proposal documentation, including qualifications and assumptions;
- + Any contract negotiation documentation regarding scope clarifications, qualifications, contract term interpretations, risk allocation, or related information;
- + Baseline schedule;
- + Original manpower plans;
- + Baseline cost breakdown including material quantities, costs, labor hours, labor rates, indirects;
- + Submittals and submittal logs;
- + Schedule updates and any associated narratives and analysis;
- + Pay applications, including all supporting documentation;
- + Inspection records;
- + Daily records of weather, manpower on site, activities work, equipment on site, other events;
- + Change Order requests, proposals, and log;
- + Photographs;
- + Non-conformance reports, resolution records, and log;
- + RFI's, responses, and log;
- + Weekly/monthly reports;
- + Correspondence including letters, emails, transmittals, etc.;
- + Meeting minutes, including documentation of issues, actions, instructions, and agreements;
- + Verbal instructions from owner to contractor or contractor to subcontractor;
- + Performance data, including quantity installation tracking per period, actual hours per craft or subcontractor per period;
- + Indirect staffing and facilities per period; and
- + Actual cost tracking per period.

### ADDITIONAL CONSIDERATIONS

In considering how to avoid claims, there are additional facets that should be considered. Local culture, relationships, and integrity can play a factor as to whether it is worth pursuing or avoiding a claim.

### **CULTURE**

In some countries, how projects are executed and the relationship between the owner and contractor can be different from what a party is accustomed. When entering a country as either an owner or contractor for the first time, it is important to investigate the local culture for project execution and how to work with the other party. This effort can help avoid confusion and misunderstandings over the life of the project. Culture can also play a part within companies as some companies would rather reach an agreement if a reasonable settlement can be reached without the distraction of a formal claim.

### **RELATIONSHIPS**

The relationship between the owner and contractor can also play a major factor in avoiding disputes. If the contractor and owner have an alliance relationship, avoiding claims on the current project can be beneficial for the long-term relationship. Even if there is not an alliance relationship, the prospect of future work together and the benefits it can offer both owner and contractor can outweigh any value to be gained from pursuing the current dispute.

### **INTEGRITY**

It is important for owners and contractors to be self-aware and realistic about the impacts they may have caused the other party or self-inflicted during the project. Owners can refuse to acknowledge the impact their acts or failure to act may have had on the contractor. Contractors can refuse to acknowledge their own management failures that impacted their own performance on the project. If both parties can be forthright in acknowledging their own contributions to the issues on the project, claims can be avoided.

## **CONCLUSIONS**

Both owners and contractors would prefer to avoid claims on projects, if possible. The time and effort required to prepare and pursue claims or defend against them can be significant, not to mention the cost of claims. However, most owners and contractors have not developed a practical set of steps to help avoid those claims when issues arise on a project. The steps described in this paper can help both parties be in a better position to work with the other party to discuss the issue, what caused the issue, entitlement according to the contract, and quantifying the impacts related to the impact. If both parties can put the effort into avoiding claims, starting before the contract is even executed and following through project completion, the reward in avoiding formal claims will be well worth it. The benefit of following these steps may not only help avoid claims on the project but also support a better outcome to the project through improved understanding of the requirements, better management, and strong performance data.

*The content included in this article is for informational purposes only and does not reflect the opinions or recommendations expressed by any individual unless otherwise stated.*



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