CLAIMS AND PROPER PREPARATION OF CLAIMS

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AGENDA

- Contractor Claims
- Industry Perspective
- Claim preparation
- Owner Claims
• **Ingredients – Fixed Price Contracts**
• **Poor Scope Definition: Extensive Growth / Rework**
• **Acceleration: Overtime / Congestion**
• **People: No communication and NO**
TRUST

BETWEEN PROJECT PARTICIPANTS

&

WITHIN THE PROJECT TEAM
CLAIMS BY CONTRACTORS

- IMPEDED and/or NO ACCESS TO SITE
- DELAY IN SUPPLYING DRAWINGS
- DELAY IN SUPPLYING PRE-PURCHASED EQUIPMENT/MATERIAL
- OWNER’S NON-DISCLOSURE OF RELEVANT INFORMATION
- ACTIVE INTERFERENCE ON PART OF OWNER
ACTIVE INTERFERENCE

- IMPROPER REJECTION OF AN EQUALLY SUITABLE ALTERNATIVE
- INTERFERENCE WITH METHOD OF CONSTRUCTION
- INTERFERENCE WITH SEQUENCE OF CONSTRUCTION
- UNDULY DEMANDING INSPECTION
  - (Quality Assurance - Safety)
CLAIMS BY CONTRACTORS

- Impeaded access to site
- Delay in supplying drawings
- Delay in supplying pre-purchased equipment/material
- Owner’s non-disclosure of relevant information
- Active interference on part of owner
- Changed soil conditions
CLAIMS BY SUBCONTRACTORS

- Same issues as Contractor
- Pass Through after Review
- Satisfy Notice Provisions
- Performance of other Subcontractors
OTHER CAUSES OF CLAIMS

 OWNER’S FAILURE TO GRANT TIME EXTENSION
CONSTRUCTIVE ACCELERATION

- CONTRACTOR IS ENTITLED TO EXTENSION OF TIME
- CONTRACTOR REQUESTED EXTENSION IN A TIMELY MANNER
- EXTENSION DENIED IN WHOLE OR PART
CONSTRUCTIVE ACCELERATION

- Owner must direct to complete work within unextended time
- Contractor must provide notice that they consider action to be constructive acceleration
- Owner must be silent or disagree
- Contractor must accelerate
Inflated Claims

Never 100%

What happened first?
1. Make-up Of Group-Do You Work For A:

<table>
<thead>
<tr>
<th>Organization Type</th>
<th>Responses</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Owner organization - buyer of service</td>
<td>19</td>
<td>41.30%</td>
</tr>
<tr>
<td>Engineering organization - design of service</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Contractor organization - builder</td>
<td>14</td>
<td>30.43%</td>
</tr>
<tr>
<td>Firm that consults to one or more of the above.</td>
<td>13</td>
<td>28.26%</td>
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<tr>
<td><strong>TOTALS</strong>:</td>
<td><strong>46</strong></td>
<td><strong>100%</strong></td>
</tr>
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</table>
2. Inflation in Claim - What is the General Level of Inflation in Claims?

<table>
<thead>
<tr>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>10% higher than actual value</td>
</tr>
<tr>
<td>30% higher than actual value</td>
</tr>
<tr>
<td>60% higher than actual value</td>
</tr>
<tr>
<td>100% higher than actual value</td>
</tr>
<tr>
<td>200% or more than actual value</td>
</tr>
</tbody>
</table>

**TOTALS:**
### INFLATION

2. Inflation in Claim - What is the General Level of Inflation in Claims?

<table>
<thead>
<tr>
<th>Percentage Increase</th>
<th>Responses</th>
<th>Percentage</th>
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</thead>
<tbody>
<tr>
<td>10% higher than actual value</td>
<td>6</td>
<td>13.64%</td>
</tr>
<tr>
<td>30% higher than actual value</td>
<td>18</td>
<td>40.91%</td>
</tr>
<tr>
<td>60% higher than actual value</td>
<td>12</td>
<td>27.27%</td>
</tr>
<tr>
<td>100% higher than actual value</td>
<td>8</td>
<td>18.18%</td>
</tr>
<tr>
<td>200% or more than actual value</td>
<td>0</td>
<td>0%</td>
</tr>
</tbody>
</table>

**TOTALS:** 44 100%
3. Inflation in Claim - What is the General Level of Inflation in Extras?

<table>
<thead>
<tr>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>10% higher than actual value</td>
</tr>
<tr>
<td>30% higher than actual value</td>
</tr>
<tr>
<td>60% higher than actual value</td>
</tr>
<tr>
<td>100% higher than actual value</td>
</tr>
<tr>
<td>200% or more than actual value</td>
</tr>
</tbody>
</table>

**TOTALS:**
3. Inflation in Extras - What is the General Level of Inflation in Extras?

<table>
<thead>
<tr>
<th>Response</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>10% higher than actual value</td>
<td>7 (15.56%)</td>
</tr>
<tr>
<td>30% higher than actual value</td>
<td>23 (51.11%)</td>
</tr>
<tr>
<td>60% higher than actual value</td>
<td>9 (20%)</td>
</tr>
<tr>
<td>100% higher than actual value</td>
<td>6 (13.33%)</td>
</tr>
<tr>
<td>200% or more than actual value</td>
<td>0 (0%)</td>
</tr>
<tr>
<td><strong>TOTALS:</strong></td>
<td><strong>45 (100%)</strong></td>
</tr>
<tr>
<td>Agree</td>
<td>Somewhat Agree</td>
</tr>
<tr>
<td>---------------</td>
<td>----------------</td>
</tr>
</tbody>
</table>

**TOTALS:**
4. Claim Submissions are Well Prepared

<table>
<thead>
<tr>
<th>Opinion</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree</td>
<td>3</td>
</tr>
<tr>
<td>Somewhat Agree</td>
<td>11</td>
</tr>
<tr>
<td>Somewhat Disagree</td>
<td>22</td>
</tr>
<tr>
<td>Disagree</td>
<td>9</td>
</tr>
<tr>
<td><strong>TOTALS:</strong></td>
<td><strong>45</strong></td>
</tr>
</tbody>
</table>

- Agree: 6.67%
- Somewhat Agree: 24.44%
- Somewhat Disagree: 48.89%
- Disagree: 20%
STRUCTURE OF A CLAIM DOCUMENT
APPROACH

Claim = Sales

Document = Brochure
SET THE STAGE

- Satisfy notice provisions;
- Avoid surprises;
- Ensure project records are not adverse to the claim position;
- Understand the position of the other side;
- Most importantly keep emotion out of the equation.
THE PURPOSE OF A CLAIM DOCUMENT

- To obtain an equitable adjustment of contract price (and time)

- To convince the other party of:
  - Factual events
  - Responsibility for damages (causation)
  - Contractual entitlement to adjustment (liability)
  - Quantification of loss (damages)

- Must establish a cause and effect relationship
CLAIM OBJECTIVE

Transfer Money
NON-ADVERSARIAL COMMUNICATION

Claims are about money not people
The law imposes a duty of care on an innocent party to mitigate losses that result from a breach of contract or a tort.

Court awards for damages are always limited to what is reasonable.
A successful claim should put the injured party back in the same financial position it would have been in had the damage not been incurred.
TYPICAL CONTENTS OF A CLAIM SUBMISSION

- Executive Summary
- Chronology of Key Events
- Contractual Entitlement
- Analysis of Each Individual Issue
- Delay Analysis
- Quantification of Damages
- Appendices
EFFECTIVE CLAIMS

An effective claim must clearly establish:

- Entitlement
- Causation
- Damage quantification
ENTITLEMENT

- Terms of the Contract
- Contract expectations and what has changed
- Notice provisions
CAUSE

- What is the issue
- Background
- Timing and Extent
- Activities or trades affected
- Isolated or ongoing
CAUSATION

- Establish a cause and effect relationship between the alleged actions or inactions of the other party and the damages which were incurred.

- Demonstrate causation and quantification in narrative and graphic form using tools such as:
  - Schedule analysis
  - Productivity analysis
CAUSE

&

EFFECT
CAUSE - EFFECT

- Discrete determinations
- Appropriate credits
- No global all encompassing amounts
EFFECT

- In the physical details or the quantity of work
- The conditions of work performance
- Methods employed
- Sequence of operation and/or the time of performance
EFFECT

- Extended duration costs
- The increase in the cost of the work contemplated by the contract
- The cost of the additional (new and/or not defined) work
FACTORS THAT IMPACT EFFECTIVENESS OF A CLAIM

- Stand-alone document
- Adherence to notice provisions of contract
- Accurate facts with backup documentation
- Contractual basis for entitlement
- Identification and analysis of specific issues
FACTORS THAT IMPACT EFFECTIVENESS OF A CLAIM

- Schedule analysis
- Reasonable and realistic
- Effective graphics and exhibits
- Accurate calculation of damages
- Clear, well organized presentation
NOT A POKER GAME
A total cost claim occurs when a contractor attempts to recover its entire man-hour overrun on a given scope of work, i.e. the difference between its planned and actual man hours.
TOTAL COST METHOD

- Total Cost Method least favored by courts
- Difficult to designate or allocate specific costs to specific portions of work
- Skews results
  - Bidding inaccuracies
  - Performance inefficiencies
THE TENDER WAS REASONABLE

THE ACTUAL COST IS FAIR AND REASONABLE

ALL OF THE INCREASES IN COST RESULTED FROM THE COMPLAINT

THERE IS NO PRACTICAL WAY TO DETERMINE THE QUANTIFICATION
CLAIMS BY OWNERS
CLAIMS BY OWNERS

➢ Contractor
  ▪ Delay
  ▪ Termination

➢ Engineer
  ▪ Contractor Claims
  ▪ Performance
LATE COMPLETION

- LIQUIDATED DAMAGES
- GENERAL DAMAGES
GENERAL DAMAGES

- DIRECT DAMAGES
- CONSEQUENTIAL DAMAGES
DIRECT DAMAGES

- Extended Supervisory Cost
- Extended Cost of Professionals
- Extended Cost of Services
- Extended Cost of Insurance
- Increased Cost of Insurance
- Increased Cost of Financing
- Escalation of Follow-Up Contracts
- Damages Suffered by Other Contractors
CONSEQUENTIAL LOSSES
Possible Examples
Needs to be Defined

- LOSS OF USE
- LOSS OF PROFIT
- LOSS OF BUSINESS OPPORTUNITY

Must be foreseeable
Frequently excluded by Contract
CONTRACT CLOSE-OUT

Typically, can have one of the following situations:

1. NORMAL COMPLETION
2. TERMINATION FOR CONVENIENCE
3. TERMINATION FOR DEFAULT
4. REMOVAL OF SCOPE

The contract needs to define the conditions, obligations and process for each of these
OWNER CLAIMS AGAINST THE DESIGN PROFESSIONAL

WHAT ARE THE AREAS OF CLAIMS?

- Cost Overruns
- Errors or Lack of Accuracy in the Estimate
- Failure to Coordinate the Design
- Failure to accurately record engineering progress
- Faulty Design or Design Failure
- Late Completion of the Work
- Representations Made to the Parties
- Contractor Claims Against the Owner