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PRESENTING A CLAIM

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November 2003

INTRODUCTION

Claims arise on many construction projects. A great deal of emotion and anxiety is wasted by parties to a construction dispute because claims are often not fully and fairly documented and properly presented. The purpose of this paper is to provide practical tips in organizing, documenting, negotiating and resolving construction claims. A well organized and documented claim has a far greater chance of success in convincing a contract payor that payment is fair and reasonable in the circumstances.

REQUIREMENTS OF A SUCCESSFUL CLAIM

Many contractors harm their credibility in providing verbose, complicated, emotionally charged and over reaching claims without addressing the primary requirements for a successful claim. These include:

- (1) Recognize when a potential claim arises and provide timely notice of the claim in accordance with the terms of the contract;
- (2) Determine the facts;
- (3) Establish entitlement/identify the applicable contract provision or law/establish liability;
- (4) Establish causation;
- (5) Calculate damages in accordance with the contract; and
- (6) Negotiate or adjudicate the claim.



1. RECOGNIZE A POTENTIAL CLAIM AND PROVIDE TIMELY NOTICE OF THE CLAIM IN ACCORDANCE WITH THE CONTRACT

Claims arise on a construction project for many different reasons. Frequently the prospect of making a claim is not recognized until some considerable time has passed since the events arose which gave rise to the claim. It is quite common that at the commencement of construction, both parties wish to remain in a non-adversarial relationship so frequently facts or circumstances which may give rise to a claim are ignored with subsequent far reaching consequences. No one likes to give notice of a claim at the early stages of a construction project. It typically creates an adversarial relationship and a polarization of the parties' interests. This is the time however when most claims arise. Issues with respect to site access, adequacy of the plans and specifications, changes in the scope of the work and impediments from utilities, etc. all arise at or near the beginning of construction. Failure to provide notice of a claim at this time will preclude the party from raising it subsequently.

The main reasons for disputes arising on a construction project are:

I. General

- a) Adversarial nature of contracts
- b) Poor communication between the parties:
 - i) communication on site; and
 - ii) understanding terms of contract and expectations of the parties.
- c) Proliferation of subsidiary contracts and warranties including those with consultants.
- d) Fragmented nature of the industry.
- e) Contractual documentation.
- f) Tender systems and government policy on tendering encouraging low tenders followed by claims.
- g) Inability or reluctance to pay.
- h) Erosion of contract administrator's role as quasi-arbitrator in contracts.
- i) Knock-on effect of third party interests.



II. Consultants

- a) Design errors.
- b) Design inadequacies.
- c) Lack of appropriate competence.
- d) Failure to define brief.
- e) Failure to define conditions of engagement and fees.
- f) Delay in settling claims.
- g) Late information.
- h) Incomplete information.
- i) Ambiguous specifications.
- j) Variations and late confirmation of variations.
- k) Lack of coordination of information from different sources.
- l) Under-certifying.
- m) Statutory Authority requirements.
- n) Briefing client on implications of contract and building process.
- o) Checking contractor's programme and method statement.
- p) Unclear delegation of responsibilities.
- q) Inexperience.

III. Client

- a) Poor briefing.
- b) Expectations at variance with contract documentation.
- c) Changes of mind during construction.
- d) Changes to standard contract conditions and additional non-standard conditions.
- e) Poor financial arrangements leading to late payments.



- f) Rigid budgets
- g) Reluctance of public bodies to reach decisions which might be criticized.
- h) Interference by administrators outside the contract process.
- i) Interference by client in contractual duties of the contract administrator.

IV. Contractor

- a) Inadequate site management.
- b) Poor programming.
- c) Poor workmanship.
- d) Disputes with subcontractors/suppliers.
- e) Late payment of subcontractors/suppliers.
- f) Deliberate manufacture of claims premeditated or at conclusion of contract.
- g) Coordination of sub contractors.
- h) Unforeseen items.

V. Subcontractors

- a) Terms of subcontract and/or mis-match with main contract.
- b) Coordination of design input in non-design main contracts.
- c) Failure to follow conditions of contract.
- d) Inability to substantiate costs at the appropriate time.

VI. Manufacturers and suppliers

- a) Failure to define performance or purpose.
- b) Failure of performance.

Taken from: Peter Campbell, *Construction Dispute Avoidance and Resolution*, 1997, Whittles Publishing at p. 51.



The longer a potential problem or claim is allowed to go on, the more likely it is to escalate and less likely that the matter will be resolved without a dispute. An early notice of claim has the advantage of avoiding surprise and enables the parties at an early stage to consider solutions to avoid and minimize the impact of any potential claim.

Timely notice of a claim is critical to the claim's ultimate success. Many court authorities have held that the failure to provide timely notice of a claim to the other party to the construction contract precludes any claim from subsequently being advanced. This applies to both parties to the construction contract. The purpose of timely notice is to provide the other party with an opportunity to assess the circumstances to determine whether or not there is an alternate method of dealing with the problem so as to avoid the costs associated with a claim. The lack of notice prejudices the other party's position and the courts will take steps to deprive the claimant of any claims advanced without timely notice even though the claim may be meritorious.

The CCDC2 – 1994 Stipulated Price Contract has many requirements for notice for claims. These include the following:

I. Changes

If a contractor proceeds with work that is in addition to the original scope of work under the contract without a Change Order or Change Directive, then it is required to provide notice to the owner of its requirement that a Change Order or Change Directive be issued. If the owner refuses to provide a notice, then the contractor is required to provide a Notice of Intention to Perform the Work under Protest in order to preserve any right to a claim.

II. Concealed or Unknown Site Conditions

If the contractor discovers subsurface or other physical conditions at the place of the work which are materially different from those indicated in the contract documents or those ordinarily found to exist, then the contractor is required to provide notice in writing to the owner of such conditions no later than five working days after the conditions were first observed.



III. Delays

If the contractor is delayed in the performance of the work by an act or omission of the owner or anyone for whom the owner is responsible, or by an act or as a result of an event for which the owner is not responsible, then the contractor is entitled to an extension of time for delay if notice in writing of the claim is given to the consultant no later than ten working days after the commencement of the delay.

IV. Owner's Right to Terminate the Contract

An owner is entitled to terminate the contract as a result of the bankruptcy or insolvency of a contractor only after providing notice in writing of such termination to the contractor.

If the contractor neglects to prosecute the work properly or otherwise fails to comply with the requirements of the contract to a substantial degree, and if the consultant is given a written statement to the owner that sufficient cause exists, then the owner may notify the contractor in writing that the contractor is in default of its obligations and instruct the contractor to correct the default in five working days immediately following the receipt of such notice. If the default is not remedied in five working days, then the owner is at liberty to terminate the contract or correct the default.

V. Contractor's Right to Terminate the Contract

If the owner is adjudged bankrupt or is insolvent, the contractor may terminate the contract after giving notice in writing to the owner or its trustee.

If the work is stopped or otherwise delayed for a period of 30 days or more pursuant to an order of a court or other public authority, and if such order was not the fault of the contractor, then the contractor may, by notice in writing to the owner, terminate the contract.

If the contractor wishes to terminate the contract for owner caused default, then the contractor is required to provide five working day notice to the owner to correct the default. If the owner fails to take steps to remedy the default, then the contractor is free to terminate the contract.



VI. Dispute Resolution

If a dispute arises between the parties, the consultant is the initial arbiter of the dispute. A party is conclusively deemed to have accepted the finding of the consultant unless within 15 working days after receipt of the finding the parties send a notice in writing of the dispute to the other party and the consultant. The responding party is required to send a notice in writing of a reply to the dispute within 10 working days after receipt of the notice.

After a period of 10 working days following receipt of a responding party's notice in writing of a reply, the party shall request the project mediator to assist the parties in reaching agreement on the dispute. If the dispute is not resolved within 10 working days after the project mediator was requested to resolve the dispute, then the project mediator shall terminate the negotiations by notice in writing to both parties. Either party is entitled to refer the dispute to arbitration not later than 10 working days after the date of termination of the mediated negotiations by the project mediator. If the parties fail to provide notice of arbitration within 10 working days, then either party is free to take the unresolved dispute to the courts.

VII. Damages and Mutual Responsibility

If either party to the contract suffers damage in any manner because of any wrongful act or neglect of the other party, then in order to preserve a claim against such party, notice in writing to the party liable must be made within a reasonable time after the first observance of such damage.

VIII. Toxic and Hazardous Substances

If the contractor encounters toxic or hazardous substances or materials at the place of the work, or has reasonable grounds to believe that toxic or hazardous substances exist at the place of the work, then the contractor must immediately report the circumstances to the consultant or the owner in writing in order to preserve a claim.

IX. Indemnification by the Contractor

The contractor is requested to indemnify the owner for any claims brought against the owner by third parties attributable to the contractor's performance of the work. In order to perfect the indemnity, the claim must be made in writing within a period of six years from the date of



substantial performance of the work. Claims not notified to the contractor within the six year period are expressly waived.

X. Waiver of Claims by Owner

The owner expressly waives and releases the contractor from all claims against the contractor, including those that might arise from negligence or breach of contract except those made in writing within a period of six years from the date of substantial performance of the work.

XI. Warranty

The owner is obliged to provide prompt notice in writing of defects and deficiencies observed during the warranty period.

Timing is vital to success. Without a timely notice of claim, the parties to a construction contract have waived any entitlement to claim by the terms of the contract.

In order to ensure timely notice of claims, a post bid contract review should be conducted to identify areas of potential claim. These should include:

- (a) identify non-standard potentially risky contract clauses;
- (b) identify potential design issues which may increase construction costs;
- (c) identify potential scheduling problems which may affect difficult work or weather sensitive work;
- (d) identify unique features of the site or work that may increase risks of claim;
- (e) identify notice periods under the contract for change orders, extra work and delays; and
- (f) identify contractual requirements for providing a claim.

The timely notice of claims will be assisted by implementing a weekly Change Letter and weekly Delay Letter which will provide ongoing notice to an owner of changes and delays.



2. DETERMINE THE FACTS

Often contractors are unsuccessful in presenting a claim because the historical account is unclear because of poor contract administration. It is extremely important that a proper program of record keeping and fact retention be implemented in order to successfully capture all facts which are pertinent to a claim. Some suggestions for proper contract documentation which should be implemented on projects include the following:

- (a) establish effective estimating and job cost accounting systems and procedures;
- (b) establish accounting system procedures that capture all needed information. You should record and track both budgeted and actual work quantities, costs, labour hours and productivity. The cost accounting system must compare planned versus actual costs on an earned value basis so that prompt action can be taken to correct problems;
- (c) the cost accounting system must identify and record extra work separately from bid work and provide a separate cost code for extra work items;
- (d) record weekly production quantities in order to compare actual labour productivity with planned. This is critical for a measured mile analysis to prove efficiency;
- (e) track the cost of all changes, even for signed change order work, in order to control costs to identify further changes, delay impacts, and document additional claims;
- (f) verify compliance with procedures in order to avoid change order costs becoming buried in standard cost code categories. A reallocation of costs to the correct cost code after the fact by the project manager and/or supervisor cannot be done with reasonable accuracy and always appears suspicious;
- (g) if disputed work is ongoing, use time lapse video photography or standard video tape to record the detailed steps of impacted operations;
- (h) use photographs and more detailed daily diaries and other data collection techniques to preserve valuable information;



- (i) train and motivate company staff by educating them with respect to the company's policy and procedures on change orders;
- (j) alert field personnel to critical contract clauses such as the notice provisions and potential problem areas;
- (k) be certain that field personnel closely review the plans and specifications before starting work;
- (l) produce a list of critical concerns and special procedures for the project;
- (m) review daily field reports regularly and respond where appropriate;
- (n) develop standard forms for costing information, allocating labour and materials to extra work, etc.;
- (o) time cards are the primary source of data for the accounting system and can be an invaluable source of information for costing claims. The time cards should have columns for assigning cost codes to time expended and columns for work to be described for time expended. Labour hours should be coded to specific cost codes with a note of specific work activities undertaken;
- (p) develop a field supervisor's daily report which includes basic project information, including date, weather information, high and low temperatures, site conditions (muddy, flooded, frozen ground, etc.), impacts from weather or site conditions, schedule of activities with start and finish dates of activities that began or ended on the date of the report, use of equipment, work performed, crew size and work accomplished, equipment operating or on standby, material deliveries, each subcontractor, their crew size and work performed, note when equipment is mobilized or demobilized, describe problems, delays and extra work being performed, describe inefficiencies and the reasons why and the approximate loss, describe acceleration or expediting efforts in response of subcontractors, list owners and others on site and provide for the report to be signed. These reports must be completed daily and bound in a book. Their purpose is to contain statements of fact and not opinions or conclusions. A copy of the report



should be sent to the project manager to be reviewed and actions should be taken on reported problems immediately. Field supervisors' daily reports are commonly accepted as being more reliable than documents prepared by office personnel and by an exchange of correspondence;

- (q) a daily diary should be maintained by the project manager and project engineer, if any;
- (r) a proper schedule should be prepared with monthly updates;
- (s) take photographs before starting work of the entire site and take photographs weekly or monthly throughout the course of the work. When problems occur, take photographs more frequently. Use a camera with date stamping and make sure that the date is set properly. Keep a log of the photographs and who took them and why;
- (t) keep proper detail of minutes of meetings. If the meetings are taken by others, keep detailed notes of the meetings and check the official version of the minutes with your notes immediately upon receipt. If there are any errors, notify the author of the minutes immediately;
- (u) record notes of all informal meetings and telephone conversations;
- (v) communication and correspondence must be clear and concise. Limit each letter to one topic and clearly describe the topic on the reference line. Short letters to the point are far more convincing than long rambling letters. The use of serial numbers in all letters is a convenient way to keep track of correspondence. Maintain a log of all correspondence;
- (w) make a file printed copy of all incoming and outgoing e-mails. Use e-mails for information gathering but do not use e-mails for taking formal positions for a claim;
- (x) use requests for information (RFI) to obtain clarification on design or other issues or to confirm oral questions. Ensure that an RFI log is maintained with the date



the RFI was sent and the time for the response of the RFI. The RFI should contain a clear description of the request and an indication of the date required and the priority and impact arising from the request;

- (y) maintain an extra work order form for recording force account work. Set up a separate file for each extra work issue, including the document first identifying the change, sketches of the change, correspondence, supporting documentation, force account records, etc.; and
- (z) maintain a log of submittals identifying all required submittals, who is to prepare them, when they are due and where they are described in the specifications.

If these records are properly maintained, they should be an excellent collection of information to form the factual basis of a claim.

3. ESTABLISH ENTITLEMENT

A claim will have no chance of success if it is not grounded in the contract. Claims at large are not compensable. There must be a breach of an obligation by a party to the contract or a change in the scope of the work or a delay under the contract as a basis for a claim. Contracts on large projects contain many volumes of specifications and often consist of a confused assembly of general conditions, special provisions, special conditions, specifications, etc. Many times, these documents are not co-ordinated, so that inconsistencies and ambiguities exist between them. A detailed familiarity with the terms and conditions of the contract is essential to the success of a claim. In order to be successful, the contractor must be familiar with the Dispute Resolution clauses, the Change clauses and the Delay clauses in the contract so that it is aware of the requirements that it must meet in order to establish liability. These clauses will also detail the cost elements that are reimbursable, including costs such as direct or indirect costs, labour, materials, equipment, subcontract costs, overhead costs and profit costs.

In establishing entitlement, the following information should be collected:

- (a) identify the issue and establish a claim file;
- (b) provide notice of claim with specific contractual references;



- (c) define the scope of the problem, change, delay, impact, etc.;
- (d) notify subcontractors and instruct them to maintain proper records of costs;
- (e) schedule the work, including the creation of an updated schedule;
- (f) prepare an estimate of the costs using a standard estimating form – use crew productivity unit rates from the estimate and include impact and delay costs; and
- (g) document the change order or delay request on the appropriate form describing the scope of the work, the proposed cost and time which should include all costs, direct costs, indirect costs, overhead costs and profit – use a standard cost estimating form to price out the costs.

It is often helpful to use a pre-construction meeting to initiate a change management program. This establishes an upfront methodology for identifying, presenting and dealing with claims. It can be used to establish an agreed upon rate for activities within the scope of the work and, on complex projects, it is very helpful to establish an agreed upon productivity rate for impacted work or agreed upon indirect overhead rate for delayed work. The following matters could be usefully dealt with at a pre-construction meeting in order to assist in establishing entitlement:

- (a) seek clarification of any contract ambiguities;
- (b) establish procedures to better manage changes such as an agreement with the owner's representative that it will sign force account sheets of disputed extra work to confirm the work was done without acknowledging entitlement;
- (c) establish weekly change notification and delay notification letters;
- (d) agree on a process for submitting and obtaining approval of change orders, requests for information and claims;
- (e) seek agreement on any modifications to notice terms and time required in the contract;



- (f) agree to avoid paper wars – they waste time and create an adversarial approach and reprisals;
- (g) document the facts and provide notice of changes as required by the contract but avoid exchanging accusations and allegations;
- (h) set a positive and friendly tone with a matter of fact reference to the contract requirements and establish your position without arguing the point; and
- (i) if warranted, call before sending the notice letter in order to let them know it is coming and that you do not want to escalate the dispute.

4. CAUSATION

Without establishing causation, there is no basis for recovery of a claim. In many claims, causation is self evident where the increase in the scope of the work or the delaying event is clearly attributable to one party or another. In complex claims, establishing causation is very difficult and time consuming. Writing a lot of letters and pointing an accusing finger does not establish causation. Causation is established by the injured party demonstrating that its loss arose from an act or omission of the other party in respect of which the contract provides compensation. Without an act or omission of the other party, or without the contract providing compensation for such act or omission, causation is not established.

The question of causation frequently arises on large projects with complex issues of who caused a delay and what are the consequences to the project completion date by the delay. In these cases, causation is often established through the use of consultants such as delay consultants.

I. Delay Consultants

The use of delay consultants in delay claims is a vexing issue. They are very expensive and some are better than others. They are expensive because most delay consultants believe they need to review all the project correspondence and project records in order to express an opinion on delay claims. Most delay consultants have a history of writing claim reports which by and large are completely inadmissible in any subsequent court case. They believe that it is the role



of the claims consultants to review project records and provide a “fair and impartial view” on who is at fault and what the amount of the loss was. This role is limited to a judge at trial and undermines the credibility of a delay consultant.

If you hire a delay consultant, you should expect to spend a great deal of time with them rewriting their reports. If you don't assist them in constructing a report that is limited to a specific question, based on clearly identifiable assumed facts, you run the risk of having your experts report being inadmissible in any legal proceedings and thereby waste hundreds of thousands of dollars. In my view, the areas of proper evidence of a delay consultant in this area are as follows:

- a general discussion about how an activity may delay a contractor or an owner on a construction project;
- a general discussion about the purpose and adequacy of a schedule;
- a general discussion of productivity;
- an analysis of the schedule to determine if it fairly and properly provided a plan for the work; and
- an analysis of the as-built schedule to determine what activities were delayed and the range of causes of the delays.

Beware of the delay consultant's tendencies to write a report like a judge at trial. They will get you into trouble and will never convince the other party to the contract of the merits to the claim.

II. Auditing Costs

On large claims, it is my practice to conduct an audit, or at least a review, of the costs of the contractor or the owner as the case may be. This is an accounting exercise to determine whether or not in fact the costs were incurred. You would be amazed with the amount of fluff which is found in owners' and contractors' claims.

I have on very large cases had my own client's costs audited and have proved the audit as part of the case. In this way, there is evidence before the court that the contractor actually suffered substantial losses from its plan which, with other evidence, establishes that the losses are caused by the breach of contract of the owner.



III. Concurrent Delay

Concurrent delay must be considered when trying to prove causation. Many construction contracts contain clauses which provide that a contractor is not entitled to be compensated for a delaying event caused by the owner if the contractor also causes a concurrent delay. These clauses can define a concurrent delay to include a delaying event caused by the contractor or even a delaying event caused by a third party which would not give rise to a right of compensation to the contractor. Even where concurrent delay clauses are not found in contracts, I have seen owners argue that a contractor is not entitled to compensation because of a concurrent delay caused by the contractor.

The issue is one of causation. The theory is that even though the owner breached its contract and caused the contractor to be delayed, the contractor is not entitled to any compensation as it would have been delayed in any event because of the event of concurrent delay. I have even seen clauses which require the contractor to provide a revised schedule at the time of an owner's caused delay in order to convince the owner that there is not a concurrent delay.

There is a great deal of dispute in U.S. authorities and in text writers as to what is a concurrent delay. Does it have to be an overlapping delay or is a delay at any time during the project sufficient? For instance, if the contractor is delayed by the owner for three months at the beginning of the project but then the contractor is delayed by an event of its own for three months in the middle of the project, are these concurrent delays?

In my view, the whole argument over concurrent delay ignores the contractual right of the contractor to plan and manage the sequence of its work. The contractor may be able to recover its own delay by re-sequencing work or using additional resources in order to complete the activity without any delay. The mere fact that there was an event which had the propensity to cause the contractor to be delayed should not preclude the contractor from recovering for the owner's delay. In other words, the owner should not be able to take advantage of another event to excuse it from its own breach of contract.

IV. Float

The issue of causation and concurrent delay is also intertwined with the question of who owns the float in a construction schedule. In simple terms, float is the flex time built into a schedule in



order to permit the contractor to overcome the typical difficulties and events which arise on a construction project which cause delays. There is again a debate among U.S. authorities as to whether or not the float should be used to exclude an owner from the consequences of any of its delays. In other words, if a delay caused by the owner occurs at the beginning of the job and uses up all the flex time, should the owner be excused from having to compensate the contractor for the delays. This seems unfair as any subsequent delaying event caused by the contractor would be without compensation and all the contractor's flex time to recover from such delays has been consumed. In my view, the debate on float again ignores the contractor's right to plan its schedule. Once the owner has accepted the contractor's schedule, then any delay caused by the owner should compensate the contractor if it puts the contractor off its planned schedule.

V. Use of Visual Aids

On a very complex delay claim, it is very helpful to use visual aids to demonstrate the delay. Where there are a number of change orders that affect the work, it is useful to plot the change orders on plans. Where there are a large number of access constraints, it is powerfully persuasive to plot these constraints on the site plan. In the most complex cases, an animation showing the sequence of delaying activities, one against the other, is incredibly powerful as people are highly conditioned to believe something they see visually as being accurate.

VI. Proof of Delay Claims

As I mentioned earlier, most construction contracts on large projects have very detailed requirements for proving delay claims. Not only must there be proof of delay in accordance with the schedule, the contractor must also be able to prove which direct and indirect costs were incurred as a result of the delay. As I mentioned, where there are a number of delays caused by, for instance, inadequate plans or changes, it is very difficult to trace with any precision which delaying event caused which additional cost. This makes it impossible for the contractor to comply with the contractual requirements to prove each delay to its schedule when presenting its delay claim. Faced with this task, contractors often prepare a global claim. In my experience, these claims are often rejected by the owner for a number of reasons, including failure to take into account contractor delays and inefficiencies, or failure to comply with the requirements of the contract.



Logic has prevailed over the impossibility of contract performance to document all changes associated with each change or delaying event. There are a number of English cases which have held that where it is impossible to separate the contractor's costs into discrete delaying activities, it is quite appropriate if the delaying claims are bundled together in rolled-up claim. It will be interesting to see if this line of argument is accepted in Canadian courts.

5. CALCULATE DAMAGES IN ACCORDANCE WITH THE CONTRACT

Many contractors spend a great deal of effort in documenting the claim and establishing causation but pay little attention to the calculation of damages. Proper record keeping as set out in Section 2 herein will be invaluable in recording actual direct costs incurred by a contractor in performing changed or delayed work. Without contemporaneous records of costs allocated by appropriate cost codes, the exercise of calculating damages can be one of guess work.

I. Contractor Claims

The typical claims advanced by contractors include the following:

- (a) Extra Work: This claim should include the direct labour hours, equipment and subcontractor costs incurred in performing extra work. It should also include supervision, overhead and profit as agreed in the contract or an allowance for these costs if the contract contains no agreed method of calculation.
- (b) Delay or Prolongation Costs: These costs should include the additional labour hours, additional equipment time and supervision costs incurred beyond the planned completion date for the contract. These costs should also include a component for site indirect costs as well as home office overhead for the extended period based upon industry recognized calculation format such as the Eichley or Hudson formulas.
- (c) Productivity Costs: In order to prove productivity losses, the measured mile is often used by contractors or claims consultants. This methodology measures the labour and equipment efficiency on a part of the project where there were no impacts caused by delays or changes with the labour and equipment efficiency for the impacted part of the project. In order to be successful, a proper measured



mile must be available together with reliable labour and equipment hour records. In addition, there are a variety of studies of efficiencies that can be used to justify a productivity claim. They include:

- the U.S. Army Core of Engineers “Modification Impact Evaluation Guide” published July 1979;
- Proctor & Gamble – Business Round Table Report; and
- the National Electrical Contractors Association studies; etc.

All of these studies show that inefficiency increases from acceleration, overtime, crowding and trade stacking, overstaffing, task reassignment, multiple changes, extreme temperature, learning curves and a combination of the above.

- (d) Acceleration: This claim includes the premium overtime hours incurred by a contractor in accelerating the work in order to meet a completion date. It generally involves only the premium portion of the overtime hours and care should be taken to ensure that it does not result in any duplication with a productivity claim.
- (e) Subcontractor Claims: This claim usually involves subcontractor claims of delay, productivity or acceleration and should be documented in detail by each subcontractor demonstrating entitlement, causation and proper calculation of their damages.
- (f) Overhead: This claim usually involves a claim for head office or site office overheads to the extent that it was not included in any of the previous claims. It is usually based upon a recognized formula such as the Eichley or Hudson formulas.
- (g) Profit: Profit may be claimed on the basis of the rate planned at the time of bidding of the tender for the project or, alternatively, on the basis of the historical gross profit by the contractor in similar projects.
- (h) Financing Costs: This is a claim for the costs of financing or other bank interest charges and penalties incurred by the contractor as a result of being deprived of



its cost of funds. If a claim for financing costs is advanced, then the contractor will not be entitled to a claim for interest under the contract. The contractor should determine which alternative is more appropriate to advance.

- (i) Claim Preparation Costs: These are often claimed by a contractor but are rarely agreed to. Generally, owners take the position that costs in preparing a claim are a cost of doing business.

II. Owner's Claims

A significant bar to an owner's claim is the failure to provide timely notice of claim to the contractor, particularly with respect to delays. Case authorities have found that without timely notice, an owner is barred from bringing any claim against the contractor. Additionally, reference is made to the CCDC2 – 1994 Stipulated Price Contract which provides that the owner expressly waives and releases the contractor from all claims unless notice in writing is made within a period of six years from the date of substantial performance of the work.

Owners' claims usually fall into the following categories:

- (a) costs incurred in remedying deficiencies in the work;
- (b) costs incurred in performing work not performed by the contractor upon termination;
- (c) additional professional services rendered by design professionals and construction managers;
- (d) overhead expenses incurred by the owner that are directly attributable to the delayed project, such as owner staff (managers, representatives, secretaries, security personnel), equipment rentals, utilities, etc.;
- (e) rental of substitute facilities for the period of delay and rental of storage facilities to store equipment and furniture that could not be installed on schedule;
- (f) additional financing costs, such as extended interim financing, increased cost of permanent financing, or loss of permanent financing;



- (g) lost rent;
- (h) lost profits and loss of goodwill to an established business;
- (i) damage claims of tenants who are prevented from occupying space when planned;
- (j) diminution in market value caused by loss of tenants or adverse permanent financing;
- (k) delay claims by follow-on contractors and litigation costs to defend mechanic lien claims;
- (l) escalation costs from delayed purchases of equipment, added insurance warranty costs; and
- (m) liquidated damages provided by the contract.

6. NEGOTIATE THE CLAIM

A properly documented and presented claim is much easier to negotiate than an ill founded and disorganized claim. Negotiation is a much more profitable result for the resolution of a claim than arbitration or litigation. Preparation for negotiations is key. Negotiation is not simply showing up and compromising in order to achieve an objective. In order to be successful, the following basic negotiating techniques should be followed:

- (a) Appreciate that the negotiation is a process: It usually involves more than one exchange, sometimes it involves many. Still, these exchanges can occur in a short time. Good negotiation is not an “all or nothing” confrontation at the first contact.
- (b) Plan the negotiation: Not all disputed items are dealt with in the same way. Select a method of negotiation: person-to-person meetings, letters, or a combination. One must assess how long one can afford to negotiate before a resolution, the deadlines imposed, and the effects of delays on oneself and others.



- (c) Prepare the negotiation: There is no substitute for thorough and structured preparation. It is absolutely essential to prevent claims, to negotiate them, and to advance them through ADR and litigation. This must be done at the earliest stage, to improve one's prospects, to save time and money, and to avoid complications later on. Be complete in the preparation; one will not make much progress in a meeting by saying that some of the supporting material is back at the site office. Paper and material don't tell the whole story; before negotiating, one should check with the persons who were actually involved for additional information. In preparing the negotiation position, one must take the time to prepare the calculations and arguments.
- (d) Choose negotiators carefully: One should make a considered decision as to who should represent one either at various stages or all the way. Consider whom the other side is likely to present and whether there is some other person who is likely to be important in the proceedings. Assuming that one's negotiator has good negotiation skills, there is still a distinction in face-to-face negotiations between having the "facts person" and the "decision person" there. In commercial negotiations and labour negotiations, the decision person is often excluded from the room for obvious purposes.
- (e) Decide how much to say: Since construction has specific time frames, dispute negotiations requires one's "best shot" at the outset. In protracted commercial negotiations parties frequently hold some arguments in reserve; construction doesn't lend itself to that. Also, if the dispute is heard by a third party later on, something may well turn on the completeness of one's first presentation to the other party.
- (f) Cover all the elements: In one's preparation and presentation at the meeting, there are at least four elements that must be addressed every time - even if their significance is nil.
- the work - labour, material, supervision;



- the money involved or, if not determinable at the time, a formula or way to determine it;
 - the nature and extent of effect on others;
 - the time fact - what is necessary, what is allowable.
- (g) Give and take: Event though one may be irrefutably right on one's position, one must be prepared for a little or perhaps a lot of give and take. Although neither side likes to admit it is wrong, if they are to keep working together, usually there should be at least some small element of credit to the other side. Too rigid an approach can paint a party into a corner from which it can't escape. As well, one may entrap oneself with defensive nitpicking. One may not have to give, but one must be prepared to wait and see.
- (h) Develop a last position: Even before negotiating, the parties should develop some sense of what result they can live with and what they cannot. At the same stage, each should consider what the other side's last position might be.
- (i) Watch for signals: Gut reactions tend to create far more problems than solutions. A good negotiator will develop a skill of truly listening, rather than busily thinking about its next response. A good negotiator will read material carefully and will read the significant parts more than once.
- (j) Allow for pauses: Negotiations can develop heat, and they may raise a point on which one wishes to reflect. If either of these or another factor presents itself, the parties should take a break. If they are meeting face to face, another meeting should be suggested. Any excuse will do, but the most tactful one is "You've given me something to think about".
- (k) Recognize the end: It's crucial to know when one has reached the end of negotiations. A negotiator will know whether it has a deal or whether it has come to an impasse. The skilled negotiator will not waste time flogging a hopeless cause but will rather terminate the procedure and proceed to a preplanned alternative.



BORDEN
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Taken from a paper by John C. Carson, Q.C. entitled *Dispute Resolution: Negotiation, Mediation and Arbitration in Ontario*, (Ont. 92) 11 Advocates Society Journal 10 at p. 14.

CONCLUSION

The proper organization and presentation of a claim takes time and a great deal of care. The whole purpose of presenting a claim is to convince the other party to the contract that they should pay the claimant additional funds under the contract. Detailed scrutiny is brought to bear on the question of whether or not the claim is valid and should be paid. More often than not, the claim reviewers must answer to corporate or governmental managers in determining whether or not a claim is valid and should be paid. It is not usually a pleasant task to tell your boss that their budget has to be altered because a claim is proper and should be paid. Well prepared and documented claims that maintain their consistency throughout the project are much more successful in getting paid than ill prepared claims that lack foundation, analysis and justification. Without hard work and attention to detail, most claims are rejected. If you follow the recommendations set out in this paper, you will have a much greater chance of success in having your claims paid.