



Feature

# CONTRACTOR PRACTICES THAT MAY RESULT IN CONSTRUCTION CLAIMS TO RECOVER FOR DELAYS AND INCREASED COSTS



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**IN A PERFECT** world, the owner never changes his mind, the engineer never alters her drawings, the contractor never malperforms, the resident engineer's decisions are perfect, and Mother Nature behaves herself. That perfect world does not exist.

In the real world, with geometric precision, the forces of owner, engineer, contractor, and Mother Nature combine to make change. The owner changes his mind. The engineer changes her drawings. The contractor fails to manage his job. Mother Nature then changes what the others have missed.

Depending on which party is assessing and determining the causes for claim generation, the perspectives cover a broad range. Voluminous claims are not foolproof indications that a compensable claim exists and often mask the contractor's responsibility for the problems that have occurred. It is frequently necessary to examine the project history in detail before intelligent judgments can be made on the validity of the claim.

The following are regarded as the primary contractor practices that often result in construction claims by the contractor to recover its increased costs and counterclaims by the owner

as a result of the contractor's failure to perform. Bond producers and other surety professionals would be prudent to advise their contractors to avoid such practices and, in turn, help prevent claims.

## **Inadequate cost and schedule control systems**

Possible explanations for why estimated costs for project activities are so inaccurate when compared to actual costs, and why planned schedules experience significant delay, include lack of integrated costs and schedule control systems; poor definition of work activities; failure to prepare an accurate, logic-linked, baseline CPM schedule; improper updating of progress schedules; and inaccurate cost allocation of contract and actual man-hours and costs to a sufficiently defined cost accounting system that can recognize cost overruns in sufficient time to enable mitigation to occur. Contractors often attempt to inappropriately blame the owner and file claims for the delays and cost overruns that have occurred.

## **Late and inadequate submittal of change order requests**

Changes are the leading cause of delays and increased costs on construction projects. Contractors must follow the contractually required procedures for preparing and submitting

change order requests. These procedures include an adequate assessment of the cost and schedule impact of the proposed change. Not only does the contractor have to make an adequate estimate of the direct costs of material, equipment, and labor costs associated with the change, but also it must address the schedule impact and associated time-related costs. This assessment will often require a time impact schedule delay analysis to determine the potential delay associated with the change. When the man-hours associated with the changes approach a level where the cumulative impact of the change may affect the contractor's labor productivity, the contractor must include the costs for increased labor man-hours that most likely will occur. If the contractor fails to perform these analyses, it may attempt to submit an end-of-project claim to recover its increased costs and avoid liquidated damages in an owner's counterclaim.

## **Inadequate site investigation before bidding**

Contractors often venture into new geographic areas to broaden their opportunities. Too often, the contractor will bid work without performing an adequate site investigation into areas such as availability of qualified labor, labor productivity, weather patterns, underground conditions, and other projects in the area that would

compete for the available labor. As a result of not doing their homework adequately, contractors may then take every opportunity to prepare change order requests or file claims to make up for their bid errors.

#### **Bidding below costs and over optimism**

This practice would be considered a deliberate underbid, presumably justified to break into a new geographic market or new line of work. After the euphoria of winning the job disappears and the reality of losing big money on the project sinks in, contractors may be persuaded to seek every opportunity to submit requests for change orders or file claims.

#### **Brokering the work and passing all problems to the subcontractors without adequate coordination**

General contractors or large engineering, procurement, and constructor (EPC) contractors often subcontract all of the work but fail to adequately schedule and coordinate the work of the various trades. The general contractor or EPC contractor then points to the clause that it inserts in its subcontracts stating that the subcontractor must coordinate and cooperate with the other trade subcontractors. These problems often result in claims by the subcontractors that are impacted by the main contractor's failure to perform its coordination duties.

#### **Unbalanced bidding resulting from manipulating unit prices and front-end loading progress payment weighting factors**

Contractors often gamble by proposing high unit prices on types of work where they anticipate significant growth from the owner's bid quantities and lower prices on types of work where they feel that they need to be competitive. If these tactics prove to be ill advised, or if the contractor guesses incorrectly on which units will grow, the contractor may not be recovering its actual costs. In addition, contractors will try to get ahead on the cash flow curve

by putting higher progress payment weighting factors (than could be justified on a balanced cost basis) on work performed early in the project to the detriment of work performed later in the project. Another approach might be submitting a higher percentage completion estimate in its pay requests for easier work, such as installing straight run pipe, and then experiencing lower productivity and higher unit costs for valve stations or small bore pipe installations, which are more difficult to install. If these attempts at cost recovery fail, the contractor may look for other opportunities to file a claim to recover its increased costs.

#### **Failure to provide notice of delay, changes, or other impacting events**

The contract often identifies situations for which the contractor is required to provide notice to the owner if delay or increased costs occur. These events include, but may not be limited to, force majeure events, changes in scope, differing site conditions, failure on the part of the owner to respond to requests for information in a timely manner, late owner approvals, and interference by other contractors. When the contractor fails to provide timely notice, the owner may reject a request for time extension, a proposed change order, or a claim for increased costs because the owner has lost the opportunity to mitigate the problem.

#### **Failure to follow authorized means and methods and procedures**

Often, the contractor is free to use its preferred means and methods and procedures for performing the construction work. However, the owner's specifications often require more expensive and time-consuming means and methods and procedures for performing the work than recognized by the contractor when preparing its bid. When the owner rejects the contractor's work method and insists on the specified means and methods and procedures, the contractor may attempt to file a claim.

#### **Refusal to proceed with directed work pending a contract modification**

Owners often disagree with the contractor's price for performing changed work but still want the work performed. To overcome this problem, contract provisions are often included to give the owner the right to make a unilateral change. If the contractor is experiencing cash-flow problems or potential delays in completing the work, it may choose to play hardball with respect to forcing the owner to formalize the change and agree to its price and time extension request before performing the changed work. When the work is eventually performed, the actual cost may be much higher than it would have been had the work been performed when the change was identified. These situations are ripe for claims.

#### **Performing defective work**

Owners may need to withhold progress payments from contractors that have performed defective work. The delay to the project completion caused by the time required to correct these defects may also justify the owner's liquidated damages claims. The cost of correcting defective work is most certainly included in the owner's counterclaims.

Hopefully, the identification of these problems will alert the contractor's management and help to avoid the need to file claims and allow for a more successful project. Surety professionals should consider reminding their contractors of these problems and strategies for claims prevention. ●

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