

Contractors: Project Documentation Can Make or Break Your Claim

Article By:

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Weak project documentation impairs the claimant's ability to resolve the claim, whether by settlement, arbitration, or trial. The weaknesses generally fall into three categories: (1) failure to follow contractual requirements for notice; (2) failure to completely document daily events, impacts and costs on the project; and (3) failure to raise critical issues as soon as practicable after they are known. Each of these weaknesses can and should be addressed on the project to improve the likelihood of a favorable and timely resolution of claims.

Read and Follow the Contract Requirements for Notice

I cannot say how often a client has told me it did not read the contract, or that "it's just boilerplate," or that it trusted the other party to do the right thing, regardless of what the contract says. None of those statements provides any relief whatsoever in a dispute. Contracts should be read and followed to the greatest extent possible, and if it is truly impracticable to do so, the reasons for that impracticability must be well documented. It may be true that much of what is in a contract is "boilerplate." So what? Boilerplate provisions are enforceable, period. And the riskiness of relying on the other party to do the right thing is obvious.

The solution to this problem is simple, even if it may be difficult to implement. Whoever is responsible for managing and administering the project must read the contract, and they must pay close attention to what the contract requires in terms of notice. Most construction contracts require notice of some sort if the contractor encounters some circumstance that is likely to make the work take longer, or be more costly, or both. At the outset, even before work has begun, the project manager should identify the notice and claim provisions under the contract and keep them handy. When any issue comes up, the project manager (or whoever is responsible for communicating with the other party) should refer back to the notice and claim provisions and notify the owner in accordance with those terms. This requires very active contract administration, and while it may detract a bit from the general goal of completing the work, it will pay dividends if there are unresolved claims at the end of the job.

Take the Time to Document Daily Events, Impacts and Costs

Most contractors keep some sort of daily log or other record of what is happening on the job, and that's good as far as it goes. But too often the daily logs only reflect weather, crews on the job, and

what work was done that day. What logs often fail to reflect, though, are the various impacts on the work. Those impacts might be caused by weather, equipment breakdowns, regulatory issues, other contractors, the owner, and a host of other issues. The best daily logs reflect all of those impacts, at least the material ones, without regard to whether they might later form the basis for a change order, schedule extension or claim. Such impacts should be noted objectively, not just with a view to setting up a claim. If done properly, such logs can provide the backbone for a request for additional compensation or time, and if need be for a claim.

Of course, daily logs can be supplemented by internal and external e-mails, notes and reports made in the ordinary course of the project. But in a surprising number of cases the daily logs and notes say very little about what is impacting the progress of the work. That can lead to a perception that becomes reality in court or arbitration, the perception being that whatever impact is now being claimed must not have been that dramatic because no one made note of it at the time. Sometimes the impacts are more in the nature of “death by a thousand cuts,” and therefore are hard to fully document, but every effort should be made to do so.

A similar problem exists with cost records. All too often, little or no effort is made to segregate the costs caused by some compensable impact – perhaps interference by another contractor – as distinguished from the normal and expected costs to do the job. While it may be impossible to segregate such costs in some instances, some effort must be made to do so. And the effort must go beyond simply dumping every cost outside the budgeted costs into an “extra bucket.” Project managers and personnel responsible for tracking costs must give thoughtful consideration to how extra costs should be allocated. If there truly is no reasonable means of segregating such extra costs, then at a minimum the responsible employees should document why they are unable to segregate costs and what efforts they made to do so. If the potential claim is big enough, it might even be worthwhile to engage an outside consultant to assist in tracking and segregating costs.

Raise Issues Early and Often

One of the biggest problems I see in project documentation is the failure to raise issues and provide notice early in the project. At the outset of the project, it seems that everyone is optimistic that things will go well and that whatever hiccups are encountered early on the project, big or small, will be overcome as the project continues. Perhaps that is true for projects that don't end up in dispute, but it assuredly is not true on projects that end up in dispute. Instead, problems seem to build and compound as the project goes on. By the time it's obvious that the project will end in dispute, the parties typically become very good at notifying each other of deficiencies or impacts or interferences. But the parties cannot at that point go back and rewrite a history that was never written down to begin with.

For example, it is not entirely uncommon for a project to start late because the owner hasn't lined up its financing, hasn't signed the contract, or hasn't authorized the work to begin for some reason outside the control of the contractor. This might cause multiple headaches for the contractor. For weather sensitive work, it might force the contractor to miss a good seasonal window to do the work, and it might push some portion of the work into an adverse seasonal window. For work with a fixed completion date, the period for performing the work might be shortened. For work that was planned to be performed in a specific sequence, that sequence might be disrupted or various trades might have to be stacked, creating obvious but sometimes difficult to prove inefficiencies. For almost any project, a critical labor or supply window might be missed, forcing the contractor to procure labor or materials in a tighter and pricier market. All of these impacts and others like them potentially affect the cost of the work.

What should a contractor do when faced with these circumstances? Speak up – now! Contractors cannot afford to sit on their hands or assume things will work out for the best. Contractors who don't want to rock the boat early in the contractual relationship face the risk of eating extra costs caused by early project impacts. Even if the lack of early notice can be overcome, the claim will be more difficult to prove than if the contractor had been proactive. Rather than wait and hope for the best, contractors need to pay attention to early project impacts, and notify the owner of the event causing the impact and what the impact means in terms of increased time and cost. If the work starts late because of the owner, the owner must be told the reason why the work is starting late, and it must be told what the impacts will be. Obviously, not every impact can be perfectly predicted, but the contractor should be as accurate as possible, noting any necessary caveats. All of this should be done in writing. Depending on the circumstances, it might even make sense to involve a claims consultant or lawyer to help with the early documentation process.

Conclusion

Project documentation can make or break a claim. For that reason, it is imperative that the parties consistently and accurately document what is happening on the project, including the impacts on the cost and schedule, with an eye to what is required to preserve rights under the contract. Contractors cannot just go along to get along. Otherwise, contractors are likely to experience a costly, and perhaps unhappy, result in dispute resolution.

When handling a dispute, I often find myself thinking there wouldn't even be a dispute, if only someone had sent a notice or letter, or maybe two or three of them, at the right time. Contractors who regularly and proactively provide written notice are much less likely to wind up in disputes. And when disputes cannot be avoided, contractors who establish a regular pattern of providing notice and keeping good documentation are likely to fair better in settlement, trial or arbitration.

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