

PREPARING AND DEFENDING CONSTRUCTION CLAIMS

BY



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In the construction industry, in general terms, we also define a claim something very close to the definitions given in the Oxford English dictionary as ‘ a demand for something as due ; an assertion of a right to something’. Also The Webster dictionary defines it as a demand for something due or believed to be due”. In this article, we are not considering the monthly claims prepared by the contractors on the progress of the work in accordance with the BOQ rates. A claim can be considered as any unresolved matter between parties to a contract. To be more precise, if we cannot agree on the following during the performance of a contract, then we are in a claim situation:

- (a). What is to be done.
- (b). The time in which it is, has or had to be done.
- ©. What is to be paid.

As we know, a claim may not involve money, it may be additional time to perform the work or it may be time and money both. Furthermore. A claim may not be sought only by the contractor, but a client may also against a contractor.

The question is why gaining of knowledge in preparing, analyzing and defending claims is so important to us? The answer is, the bottom line of any claim is involved with money and/ or time. At the same time, we are aware, most of the public clients who have constructed a project in the past few years have found that they are faced with more change orders and claims than they were 10 years ago. Sometimes, the values of these claims were much higher than that of the awarded contracts. One of the reasons for this is, it is difficult for a contractor to ignore a claim when the money involvement is high and another is, today most of the construction contractors employ professionally qualified staff and as a result they recognize their obligations as well as rights under the terms and conditions of the contract they signed. Therefore, as professionals in the construction industry it is very important for us to know:

- (1). Can Construction claims be totally avoided ?
- (2). What are the main reasons for construction claims ?
- (3). What are the categories of construction claim ?
- (4). What factors should be considered when preparing & defending a claim ?
- (5). How to analyze claims.

Can Construction claims be totally avoided?

Answer is NO. It has recognized that claims are inevitable. Claims are not a game. We must not use claims as a fighting word.

Main reasons for claims

- (1). Not reading the Contract Documents
- (2). Misunderstanding and Miscommunication
- (3). Too many checkers at the site
- (4). Pride – This happens when a consultant maintains that he has designed the ”perfect” project, and thinks that that any request for changes or claims pertaining to those changes are a threat to his competence.

(5). Greedy Clients who think “ that he as long as the contractor is here, the contractor can do little bit of paving or painting here and there without any extra cost to the client”. In this type of situation, when the contractor sends a claim, the client says “ I never expected you to send a claim for this work, after all you are handling the major work and we may consider you for next job too”.

(6). Under estimate by contractor

(7). Catch – up profit: There are also some contractors who realize that they are losing on the job and they try to make their losses through claims, whether these claims are justified or not.

(8). Rigid contract interpretation

(9). Vindictiveness: The client can deal with a claim in two ways, one is on a reasonable basis and the other is, he can retaliate. If the client considers ”claim” as a dirty word and he does not want to look whether it is reasonable or not, then that attitude can lead to rapid deterioration of the project climate. Sometimes, When a contractor sends a claim or shows his intention to claim, the client starts to do tougher inspection, rigid contract interpretations, delaying payments of bills and other unpleasant actions which eventually sets the ground for arbitration and litigation.

(10). More profits for change orders

Categories of Construction claim:

Basically, there are three categories of claims – Contractual, Extra Contractual and Ex-gratia.

Presenting & defending a claim:

There is no established model or standard form for claims. Claim must be in the form of an account, and the account must give particulars as full and detailed as possible. In order to achieve that the claim must meet the following criteria:

(1). It must be realistic.

(2). It must be accurate.

(3). It must be recognized.

If you are preparing a claim, the burden is on you to present strong evidence in support of your claim, the acceptable way of proving a position are:

(a). Project records.

(b). Expert testimony.

When preparing a claim, there are other important points we must remember. ie.

(a). Claims must be positive/subjective.

(b). Avoid verbosity/repetition

©. Avoid emotive statements.

Check list for Records:

Tender Details: - * Cost breakdown for tender rates * Clarifications and Addenda
* Details any Discounts

Contract Documents: - Copies of parts/pages of contract documents related to each claim
Heading

- Drawings (showing number and revision)
- Specification (Showing reference number and page number)

Programme:-

*Contractual Programme (Tender stage)

*Detailed Base Programme (post contract award)

*Programme Revisions

*Conditions on Programme, Listed by Contractor

*Consultant’s Report on the Detailed Base programme

- *Minutes of meeting and correspondences related to the base programme and any revisions
- *Schedule of Dates(relevant to the contract or claims)
- *Progress of work- Planned and actual(S-Curve)
- *As-built CPM Programme

Resources:-

- *Site Overhead – Planned and Actual: identification of site resources associated with a particular event(monthly and cumulative S-Curve)
- *Project Direct Resources(equipment, lab our, material)-Planned and Actual(monthly and cumulative S-Curve)
- *Contract Cash Flow –Planned and Actual(monthly and cumulative S-Curve)
- *Records of any delays in the receipt of materials, equipments and lab ours.
- *Production Rates Comparison: between planned production rates and actual production rates

Contractual Background:-

- *List of all Contract Clauses that relates to each claim headings
- *Extracts of all relevant Conditions of Contract clauses. This to include clauses that both the contractor and consultant referred to in their argument
- *Details of any non-standard contract clauses
- *Cause and Effect Analysis
- *Well – defined Claims Heading: e.g. Disruption, Delay, Acceleration, etc.
- *Compliance with the Claims Notice
- *Compliance with all Government Regulations

Documentation:-

- *Chronological Records of Correspondence: including date issued and date received.
- *Copies of Relevant Correspondence in a Chronological Order
- *Drawings Registration Log: to include title of drawings, revisions etc.
- *Technical Submittals Log: to include the description of each submittal, date of submission, date of approvals
- *Details of all Notices to Claim and Verbal/Written Instructions
- *Copies of any of the following records that is relevant to the case: (a). Resources(lab our and plant) Allocation (b).Site diaries (c). Time sheets (d). Cost records (e). Photographs
- Project Organization Structures(for Consultant and Contractor),key personnel details e.g. positions, contacts etc.
- *Monthly Progress Reports(Summary/Executive Level)
- *Minutes of Meetings(regular and special)
- *Partial/Substantial Completion Certificates

- *Variation Orders Record: with backup computations, correspondence, etc.
- *Payment Records: advances, requisitioned ,paid, retention
- *Procurement and Delivery Notes: delivery schedule, delivery tickets, invoices
- *Laboratory Test Results: that was carried out at pre-tender stage and at construction stage
- *Site Safety Records
- *No objection Record: at design stage and at construction stage

Actual Presentation:

* Establish contract particulars. * Record the matters affecting the contract * Establish contractual legal matters * Establish extension of time * Estimate the financial sums involved * Delay claims & Analyzing them ie. Non-excusable delays, Excusable / non-compensable and Excusable / compensable.

Conclusion:

As professionals who are working in the construction industry, we must use our knowledge and experience and take whatever possible steps from the beginning of the contract to reduce claim situations. We must be in a position to say that the contractor should receive what he is entitled to receive and the client should pay all sums he is legally obligated to pay.

The preparation of claims begin at the start of the construction activities at the site. It is easy to deal with a well presented claim. We are aware that a considerable professional effort is required to prepare a claim and analyze a claim. The construction claims are inevitable. Therefore, we must not consider “Claim” as a dirty word.