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Keys to Preserving and Preparing Successful Claims



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New England ATSSA
Chapter Committee
Meetings
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Keys to Preserving and Preparing Successful Claims



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Keys to Preserving and Preparing Successful Claims

- (1) Introduction to Claims
- (2) Claims Recognition
- (3) Notice, Notice, Notice...
- (4) Strategies for Preserving Claims
 - The Contract
 - The Schedule
 - The Bid/Estimate
 - Standard Operating Procedures
- (5) Claim Documentation
- (6) Types of Claims
 - Changed Conditions/Differing Site Conditions
 - Defective Plans/Specifications
 - Acceleration, Suspension, and Delay
 - Loss of Productivity, Interference, Hinderance
 - Constructive Change/Cardinal Change
 - Total Cost Claims
- (7) How to Prepare the Claim

Introduction - Changes

- **All construction contracts change.**
- Changes can result from:
 - Decisions by the owner, architect, or contractor
 - Unanticipated events
 - Ex. discovery of differing site conditions.

Introduction - Changes

- Changes Clauses:
 - Establish an exception to the rule of law that requires strict compliance with contract terms by allowing changes without causing breach of the contract.

Notice

▶ NOTICE PROVISIONS

- Requires parties to formally notify one another of problems or changes as they arise
- Changes or extra work must be authorized in writing
- Courts generally only allow recovery by subcontractor for written change orders, unless subcontractor can establish that the contractor waived the notice provision
- Notice provisions designed to protect contractors against the risk of surprise claims or conditions.

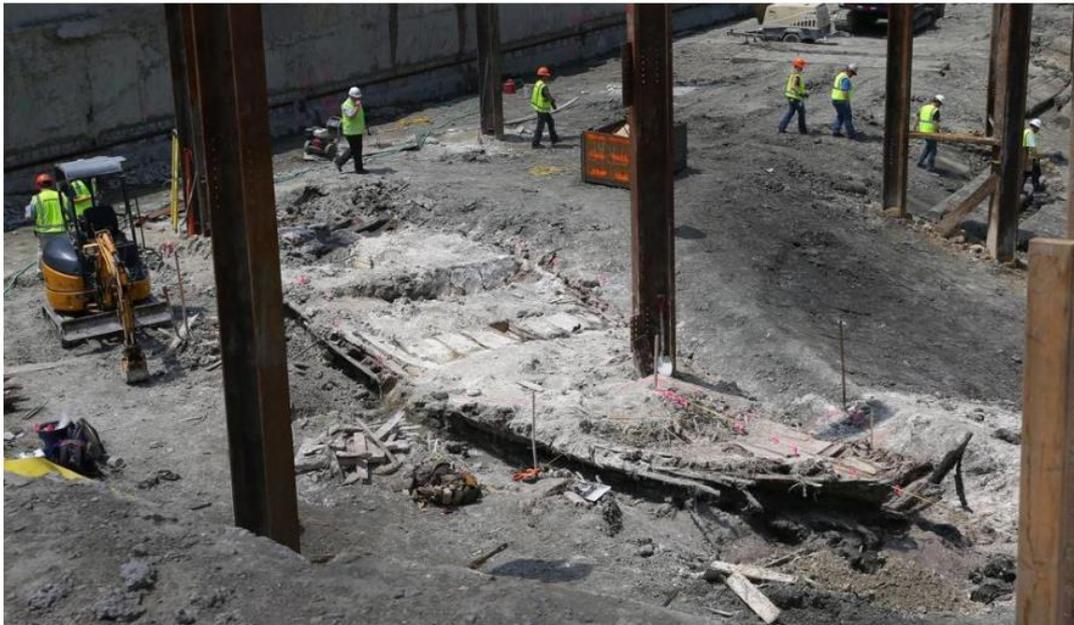
▶ Why is notice critical?

- **CONTRACTOR CAN PASS THROUGH YOUR CLAIM TO THE OWNER!**

Notice

Building crew in Seaport unearths shipwreck

A work crew makes a stunning discovery



DAVID L. RYAN/GLOBE STAFF

A 19th-century shipwreck was found at a construction site in the Seaport.

“This might delay our work...”



Strategies for Preserving Claims (The Contract)

- Claim preparation procedures should be initiated at the beginning of any substantial project.
- First Step:
 - Know your contract.
- While this may sound relatively straightforward, it is a critical process even though it may seem tedious.



Strategies for Preserving Claims (The Contract)

- Primary purpose of reviewing the ENTIRE contract:
 - **Prepare a flow-chart of every single step in the claims and dispute-resolution process**
 - From the day the claim arises until the claim is fully adjudicated.

Strategies for Preserving Claims (The Contract)

- **PUBLIC PROJECTS:**

- Include statutory requirements that even if not expressly written in the contract nevertheless can govern certain aspects of the contract.

- Ex. There are statutes that are “included” in Massachusetts construction contracts regarding the requirements for payments to lower-tier subcontractors / vendors.

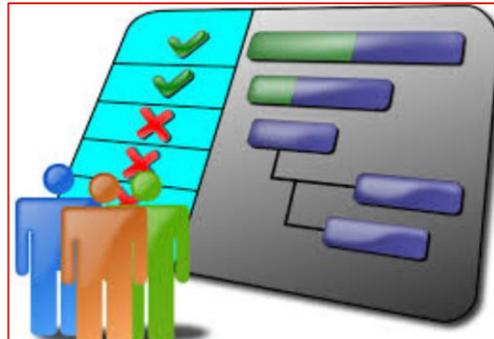
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Strategies for Preserving Claims (The Contract)

- **The flow-chart should include the following:**
 - The event that must be complied with (e.g., initial written notice, submission of claim, demand for arbitration).
 - When the event must be done.
 - What the event must include.
 - Who it must go to.
 - How it must be delivered.
 - How the receiving party must respond.
 - What happens if the receiving party does not respond as required.
 - Whether the event is mandatory or optional.

Strategies for Preserving Claims (The Schedule)

- For almost all **time-related claims**:
 - **The approved / accepted Baseline Schedule will serve as the basis for all subsequent analysis.**

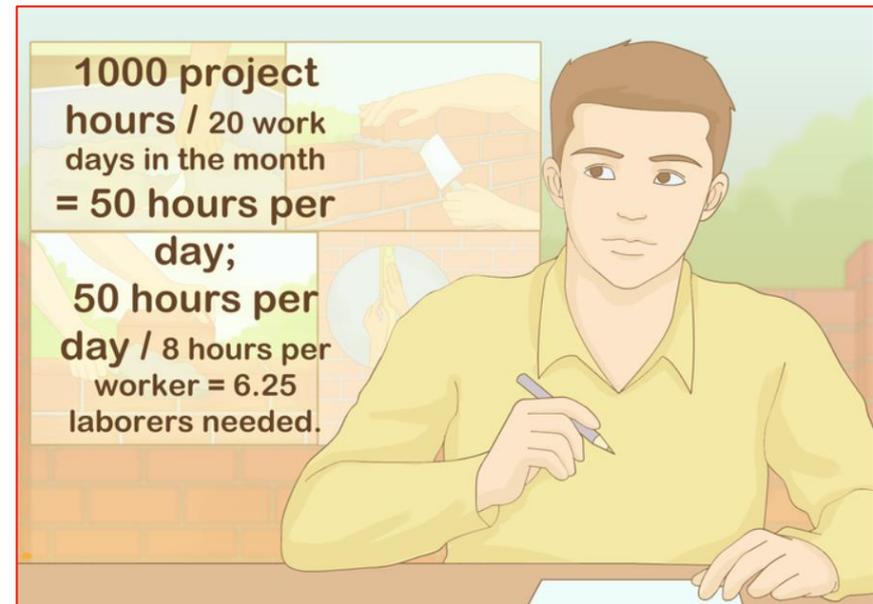


Strategies for Preserving Claims (The Schedule)

- The Baseline Schedule (and the subcontractor's schedule) must be:
 - **COMPREHENSIVE;**
 - **ACCURATE;** and,
 - **BUILDABLE.**

Strategies for Preserving Claims (Bid/Estimate)

- Claims based on the original Project Bid / Estimate.
- Ensure that the original Project Bid / Estimate is accurate and includes vital information such as:
 - Man-hours
 - Material quantities
 - Subcontractor proposals
 - etc.
- The Project Bid / Estimate must be ***maintained for the life of the Project and beyond***
 - It may need to be referenced for information or relevant calculations.



Strategies for Preserving Claims

- Written **NOTICE, NOTICE, NOTICE.**
- **Follow the flow-chart** to ensure you have met all of the contractual requirements.
- **Create cost-codes** to track all of costs associated with the change
 - These cost-codes should also, if possible, be used to track management costs and salaries.
- **Obtain contemporaneous information** (as much as possible) about the claim by discussing the claim with applicable project personnel.
- **Prepare schedule updates.**
- **Maintain thorough contemporaneous records.**

Claim Documentation

- Standard types of documents that should be regularly maintained and tracked (which can become key documents during claim prosecution), on any project include:
 - Daily Progress Reports
 - Labor, Material and Equipment Records
 - Payment Requisitions
 - Submittals
 - Meeting Minutes
 - Photographs / Videos
 - RFI's
 - Design and Change Notices
 - Change-Orders
 - Punch Lists
 - Close-out & Warranty

Claim Documentation

▶ Beware of Lien/Claim Waivers:

- **Partial lien waiver:** Eliminates your lien/claim rights through and up to the date of the waiver.
- **Final lien waiver:** Eliminates lien/claim rights for all work performed on the project. Most contract forms require final lien waiver as condition of Final Payment

Claim Documentation

- Project participants should **never rely on any verbal directions** or authorization.
- **Any verbal direction** or authorization should be **immediately reduced to writing**.
 - Creates record of direction or authorization.
 - Avoids future potential misinterpretation.



Types of Claims

- Some claims are strictly financial without any time elements, yet we have found that ***almost all claims include a time component.***
- Various types of claims:
 - Changed Conditions / Differing Site Conditions
 - Defective Plans and Specifications – implied warranty
 - Actual or Constructive Suspension or Delay
 - Actual or Constructive Acceleration
 - Loss of Productivity / Interference / Hindrance / Inefficiencies
 - Constructive Changes
 - Cardinal Changes
 - Total Cost Claims

Changed Conditions / Differing Site Conditions

- Actual field conditions often vary:
 - From what is shown in contract documents (Type I) or
 - From what the parties otherwise expect (Type II).
- “Field conditions” does not just refer to underground or geotechnical conditions.
 - “Field conditions” can refer to any field condition that varies from what is shown in the contract documents or what the parties otherwise expect.

Loss of Productivity / Interference / Hindrance / Inefficiencies

- Loss of Productivity, Active Interference, Active Hindrance, or Cumulative Inefficiencies – result from the contractor’s or owner’s actions or inactions
- In some cases, a subcontractor may benefit from defining its claim as a Loss of Productivity / Interference / Hindrance / Inefficiency claim in order to potentially **avoid harsh application of a “no damages for delay”** provision.
 - These types of claims are supported by the use of a “measured mile”
 - Attempts to establish a baseline for the duration a particular activity should have taken vs. the time that same particular activity actually took.
 - Ex. If it takes 1 day to paint a room three different times, yet it takes 3 days to paint an identical room due to contractor interference, the subcontractor can assert a 2-day claim for the actual work vs. the “measured mile” for that work.

Loss of Productivity / Interference / Hindrance / Inefficiencies

Loss of efficiency or productivity claims can arise under a number of circumstances, including the following:

- ▶ Adverse weather
- ▶ Piece-meal production
- ▶ Acceleration to exhaustion
- ▶ Excessive numbers of changes
- ▶ Owner or engineer inaction
- ▶ Loss of project rhythm
- ▶ Increased learning curves
- ▶ Diversion of supervision
- ▶ Increased supervision and engineering costs

Total Cost Claim

- **Total cost claim:**

Where a contractor presents a bill for all of its costs, subtracts the amount of its contract, and asks for payment of the difference.

- Total costs claims are **disfavored** by courts. Most courts hold that the total cost method is to be used only when there is no alternative to compute damages.
- The total cost method is an improper method for damages calculation when an alternative reliable method is available.

Total Cost Claim

- Total costs recoveries are only allowed in the event that the contractor can satisfy a four-part test as follows:
 1. The nature of the damages makes it impossible or highly impracticable to calculate the actual damages;
 2. The contractor's **bid estimate was realistic**;
 3. The actual costs incurred are reasonable; and
 4. The contractor has deducted any additional cost caused by its own actions.

How to Prepare the Claim

In general, a claim will include the following components:

1. Executive Summary
2. Relevant Contract Provisions
3. Identification of Key Issues, Events and Milestones
4. Confirmation of adherence to Relevant Contract Provisions
5. Discussion of substantive entitlement
6. For time-related claims, Schedule Comparison and Schedule Impact Analysis
7. Detailed Analysis of Costs with supporting back-up
8. Conclusion
9. Attachments and Exhibits

Questions?



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