

October 7, 2011

DE-CODING CONSTRUCTION RISK MANAGEMENT

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I. THE IMPORTANCE OF DOCUMENTATION

- A. Project control and cost accounting to fulfill normal business needs.
- B. To maintain and establish an ongoing, accurate and comprehensive record of job conditions and problems and their impact upon the project, which records may later be used to assist in:
 - 1. Risk mitigation
 - 2. Dispute avoidance
 - 3. Dispute settlement
 - 4. Proof of liability and damages in litigation, arbitration or administrative proceedings
- C. No matter how clear the liability may appear to the contractor; and no matter how much the contractor may claim to have suffered by virtue of the wrongful acts of the Owner, design professional or other third party, the contractor will usually be unable to obtain an acceptable negotiated settlement or recovery unless it can provide authentic, detailed and convincing documentary proof of:
 - 1. The adversary's acts or omissions which detrimentally impacted the contractor's work;
 - 2. How, when and to what extent the contractor's performance was affected; and
 - 3. The resultant cost to the contractor attributable to the other party's culpable conduct.
 - 4. The Risk Analytics will provide early identification of changes in conditions, previous delays and effects, emerging trends in the behavior and performance of the project stakeholders.

II. THE CONTRACT DOCUMENTS

- A. The contract documents include:
 - 1. Contracts between the contractor and owner and between contractor and subcontractor
 - 2. The plans and specifications, including an index of any revisions to the contract drawings
 - 3. The general and special conditions
 - 4. Technical specifications
 - 5. Addenda

Note: Any superseded portions of the specifications should be cut or crossed out and the superseding addenda affixed in their stead as a matter of course, along with the addenda date. This will help avoid the embarrassing specter of misplaced reliance upon inapplicable provisions of the specifications during subsequent claims negotiation, arbitration or litigation. *It should go without saying that digital copies will be marked up and noted accordingly as well as recorded in the "version history" of the documents.*

6. The bid documents

Consists of information provided by the owner, including, but not limited to; Construction Drawings for Civil, Architectural and Mechanical as well as engineering data, soils analysis information, boring and blasting logs, precedence diagrams, milestone dates, scheduling CPMs, etc.

7. Any bulletins, letters of clarification, etc.

8. Anything which the owner or the owner's representative incorporates in the contract by specific reference.

Warning: For any codes or standards which are incorporated by reference, make sure that the proper (usually the latest) edition of any such referenced document is consulted and added to the digital library.

B. The importance of familiarity with the contract documents

1. An intimate knowledge of the contract and its requirements is necessary for both the home office personnel and the field supervisor and/or foreman in order that any or all might immediately recognize material or labor "requirements" which go beyond the contract obligations, thereby justifying a claim for additional compensation.

2. The home office should thoroughly investigate and evaluate all claim data and "red flags" from the field and should from the outset maintain a separate claim file for each issue of potential dispute which can readily be recalled and reviewed at a later date by the contractor, the contractor's attorney and/or any other consultants.

a. This is a "sweet spot" for your digital collaboration capabilities to come to the forefront. What? You don't have a digital knowledgebase set up for your project? Now is the time to do it!!!

b. Centralized on line or otherwise enterprise and central repository for digital versions of all project documentation can be accessible by not only all permissioned company-wide work stations, but via tablet PC's and iPads. Due to the growing popularity and utilization of the iPad, the addition of apps for iPad access are a must.

3. The prompt recognition of deviations from the contract is necessary to avoid any possibility of "losing" a change order request or a claim through

a. Failure to timely comply with applicable notice provisions; or

b. Failure to preserve necessary supportive evidence; or

- c. Acting in a way which permits the owner to allege; and the ultimate finder of facts to determine; that the contractor has performed what would otherwise be extra work on a "volunteer" and therefore non-compensable basis.
4. Knowing which parties or individuals have the authority to issue directives and orders for field changes and the correct procedures for making such communications and modifications will prevent the contractor from putting itself in a position where it has performed technically unauthorized work for which no compensation will be paid and for which the contractor may have to bear the expense of removal and / or repair.
5. Familiarity with the contract requirements will help ensure that necessary notice to the owner or architect will not be overlooked and a claim lost through failure to timely file necessary documentation.
6. Knowledge of what constitutes compensable and non-compensable delays and of contractual exculpatory (favorable) clauses will help ensure that a claim is presented or prosecuted on a proper and recoverable theory of liability.
7. *NOTE:* It is wise for the contractor to prepare a claims checklist noting the applicable provisions relating to claims and notice requirements under the contract documents of the particular job. Such a checklist (which can be prepared by contractor's own staff, attorney or consultant) should be used and referred to frequently from the beginning of the job.

COMMENT: All of the above emphasize the necessity for a central, digital repository for all project documents, accessible on line, for the duration of the project.

C. When in doubt, get it in writing – a.k.a. always get it in writing

1. Whenever the contractor is uncertain as to whether or not a change has been properly authorized, he should immediately submit written confirmation to the owner, together with an indication, if applicable, that such change constitutes additional work and that performance by the contractor will result in the filing of a claim for relief.
 - a. Owner's responding alternatives
 - (i) The owner can override the change directive, thereby saving the contractor from performing such unauthorized work.
 - (ii) The owner can ratify the communicated directive and confirm that additional compensation will be paid to the contractor, thereby resolving any questions as to the contractor's entitlement for additional compensation.
 - (iii) The owner can ratify the directive but indicate that the work called for is part of the original contract, thereby entitling the contractor to no additional compensation; in which case the contractor should file a further written protest before proceeding with the work.
 - (iv) The owner may not respond at all, in which case the court or arbitration panel will probably later find a tacit (knowledgeable) approval of the change and of the contractor's demand for additional compensation.

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2. Similarly, written confirmation of all oral instructions, directions, and changes should be requested from the A/E, Owner's Representative or other design professional directly responsible for the related scope of work. Now they can sign your IPad using a stylus.

Coming Soon

- III. MAINTAINING PROPER RECORDS – IN THE TRENCHES**
- IV. THE USE OF DISCOVERY PROCEDURES TO DEVELOP CLAIM DOCUMENTATION**
- V. DOCUMENTARY PROOF OF CLAIMS FROM RISK MANAGEMENT HISTORY**
- VI. RISK, MITIGATION, and THE CLAIM DOCUMENTS**
- VII. THE EFFECTIVE USE OF DOCUMENTARY EVIDENCE TO SUPPORT LEGAL SERVICES**
- VIII. DOCUMENT INDEXING AND RETRIEVAL SYSTEM; DIGITAL DATA BASE MANAGEMENT AND ON LINE COLLABORATION SYSTEMS.**