

# CONSTRUCTION PROJECT CLAIM MANAGEMENT

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## Abstract:

*Conflicts of interest and independent agenda of the parties brought together for implementation of a construction project often leads to dispute in Contract and claim situations. Construction Industry is notorious for claim that is managed on its arising and there lacks an endeavor to minimize the breeding grounds through efficient planning and alignment to purpose, of all contract-documents. There failure of a concerted effort entails wastage of resources, delayed completion of facilities and stained relationships of parties when collide in mistrust in contract to win over the other. There needs a focus on the claim breeding issue and establish an effective mechanism to deal with disputes in urgency.*

*Claim occurs mostly during the construction phase. But the seeds of claim and nutrients essential for development are contained in the contract documentation and the information supplied or not in pre-contract phase.*

*Opportunity to prevent nutrients for seed of Claim comes to an end once tender-documents are finalized, the contract is awarded and established or not a mechanism for dealing with claim situation.*

*The processes presented here would help in minimizing the breeding grounds and emergence of disputes during progression of works and dealing with eventualities in forceful manners for finding a resolution most effectively in relevant time.*

**Keywords:** *(conflict, dispute, claim, claim prevention, claim mitigation, claim pursuance, claim identification, claim quantification, claim resolution)*

## Introduction

Endeavor here is not meant to be a primer on claims which is a very involved and complex subject that has plagued the construction industry for years and still does. Rather, it presents an approach to claim management to stimulate a careful approach to manage contract documents preparation and expeditious handling of claims should they arise.

The processes are noted following:

1. Claim Prevention
2. Claim Mitigation
3. Pursuing Claims
  - a) Claim Identification
  - b) Claim Quantification
4. Claim Resolution

There are two significant elements in the control of the employer and his professional-team. The first is the efforts expended in pre-contract preparation as regards the reliability and completeness of information, design and documentation aligned to purpose. The second is the development of scheme for risk distribution and plan for management of construction that together leads to selection of Form of Contract and procedure for dealing with emergent issues, besides fulfilling commitments envisaged in the contract.

Some form of conflict is inevitable; the preponderance of opinion is that “Construction conflicts are endemic in the industry” for involvement of stakeholders, having varied requirements and expectations associated with project, for particular need. Further the tendency of contracts generate dispute because of externality of interpretation; contract cannot “specify their own indexical” by providing how they will be read or used by parties and interpreted differently in conjunction with documents prepared by various parties. The majority view that the nature of the construction process makes conflict unavoidable in some form, to some extent, that can be characterized as “pragmatic” as contrasted with the “long term strategic”.

Claim management processes need closer attention and effectively come into play on a construction undertaking much earlier than the formulation of Contracts. On going processes may be carried out along with Contract Management to ensure the desired outcomes envisaged in the purpose of the endeavor. Billions of dollars are wasted in mismanagement of the construction claims that lead to fatal-damages to parties or undertaking or both. The key to success lies in a win/win approach all through life cycle of project for success together.

The construction project has well-recognized four phases noted following;

#### PRE-TENDER

- |                              |  |
|------------------------------|--|
| a) Ph-1 Pre-tender Planning  | -from initial concept up to invitation of tenders  |
| b) Ph-2 Contract Formulation | -preparation and submission of tenders, tender assessments, pre-contract negotiations and contract |

formulation

## POST-TENDER

- c) Ph-3 Construction Execution -during construction up to substantial completion
- d) Ph-4 Post Completion -settlement of outstanding matters after substantial completion

The Claim Management necessarily includes the processes applied to major phases in Pre-tender & Post-tender arenas to ensure that the project achieves win/win contract closing. The application of processes to different phases is noted as following;

- 1 Claim Prevention -an endeavor made during phase-1&2
- 2 Claim Mitigation -efforts made during phase-3
- 3 Pursuing Claims -an approach for evaluation & preparation
  - a) Claim Identification -an approach for phase-3&4
  - b) Claim Quantification -an approach for phase-3&4
- 4 Claim Resolution -an approach for phase 3&4

## Project Claim Management

The Claim Management Processes essentially are to avoid or minimize harmful situations under disputes and help expeditious handling when they do occur, for earliest settlement. It can be viewed from two perspectives: the party making the claim and the one defending against it.

A claim is, “A demand for something due or believed to be due”, usually the result of an action or direction. In construction “something” is usually additional compensation for work claimed to be extra to the contract or an extension of time for completion or both. What distinguishes a claim from a change is the element of disagreement between the parties as to what is due or whether or not anything is due. If agreement is reached, then the claim disappears and becomes a change. If not, the claim may proceed to negotiation, mediation, arbitration and worst to litigation before it is ultimately resolved. Often claims are thought of in terms of the contractor making claims against the owner or other prime party and by subcontractors against the contractor but claims can also originate from the owner/prime party who believes that some requirement of the contract is not being performed by the contractor.

## PRE-TENDER - PLANNING

### 1. CLAIM PREVENTION

The prevention process is necessarily activated at Ph-1 & 2 of project that starts with formulation of contract documents and development of integrated project plan with sufficient knowledge of the purpose. The emphasis is on formulation of economic exchange for parties with clarity of responsibilities and the deliverables. Avoidance of ambiguities & misinformation is ensured to minimize or prevent claims from arising. Alignment of

purpose, and development of all documents related with Contracts for a project are all prepared in same line of direction. The ingredients are management scheme, identified risk distributed to ones in best position to control and defined roles & responsibilities. Effort is required to align the contract documents to the defined purpose, logical risk sharing and management scheme. The seeds of claim and nutrients essential for their development are contained in the contract formulation / documentation and the information supplied or not supplied at relevant point in time.

The greatest opportunity to Prevent Claims comes to an end once tenders are invited and the contract is awarded. The pre-contract preparation needs to be supported / benefited with the feedback of the lessons learned earlier on similar projects. Prevention of nutrients necessary for claim breeding or at least minimized to a greater extent that may be managed through application of below noted.

### Tools and Techniques for Claim Prevention

#### .1 Development of Economic Exchange Methodology in Contract:

Methodology conforming to the win/win position of parties that serves bests the scheme of responsibilities and risk sharing of project players.

#### .2 Project Scope Assessments:

Every thing that is necessary to add value or required to serve the purpose of project, needs to be incorporated in Project Scope.

#### .3 Information Sharing.

Share information in accordance with the responsibility & risk carried by project players.

#### .4 Template.

Make use of templates having tested methodology and lessons learned on similar project.

#### .5 Expert judgment.

Independent views of Experts of the field to ensure that the approach adapted will lead to win/win end results.

#### .6 Documentation.

Preparation of careful Contract Documents & record keeping is mandatory for Contract Administration. One of the most important factors in the claim prevention is the process that all documents are aligned with the purpose of project.

#### .7 Dispute Resolution.

Develop a reliable mechanism for fast resolution of issue/dispute

#### .8 Partnering Approach.

Awareness need to be enhanced for development of trust and respect to independence of project player's and their commercial interest.

#### .9 Education & Training.

Players of larger Project need continuous education & training to align their understanding / actions and help development of an atmosphere of trust & respect.

## 2. CLAIM MITIGATION

Construction activities are carried out in changing environments. Perfect conditions and control on every thing are next to impossible. Best approach is to mitigate the possibilities of arising claim all through the progression of construction. Thus, the emphasis is on how to mitigate claims from arising. Effective communication besides the perfect, well-scoped, defined roles & responsibilities and logical risk allocated contract will entail lesser disputes.

The project players need to do their best with timely and effective communication toward resolution of disputes. General principles of practice for mitigating claims are to ensure economic exchange that no party favors the other with extra benefit for no return. Fast communication, partnership approach and respect for other party's interest help to minimize the occurrence dispute and claims. The below noted would help to mitigate the arising of dispute.

#### Tools and Techniques for Claim Mitigation:

##### .1 Clarity of Purpose & Language used in Contract.

The contract terms, scope and specifications should be written in clear and unambiguous plain simple language.

##### .2 Schedule:

The requirement of schedule should be clearly stated and reasonable time allocated for completion of works. Schedule update submission requirements should be fair and capable of providing good schedule positions without complexity.

##### .3 Constructability Review:

An independent constructability review can avoid field errors later and unnecessary changes in construction methods all of which are liable to lead to claims.

##### .4 Request for information (RFI)

In contracts requiring designer or owner approval of shop drawings, materials of construction, RFIs and like items should contain a clause stating a reasonable time for the answer given. It is true, if this time is not met, the contractor may have grounds for a claim but those grounds will be clear to all. The time period for an answer is realistic, not inordinately longer nor so short that the responding person / agency face difficulty to comply.

##### .5 Partnering.

Project-specific, the relatively new technique of partnering have shown an improved opportunity to eliminate claims because of the mutual dedication and much better communication that are a part of this technique.

##### .6 Prequalification process.

Projects that utilize prequalification of contractors have the benefit of dealing with seasoned and qualified contractors who are less likely to find themselves in desperate situations that might drive others to frantic claim activity.

##### 7. Dispute Review Board (DRB).

Some projects, usually larger ones, establish an independent DRB at the outset of the project with good results. The DRB acts as a kind of arbitration panel over any disputes that arise during the project. There parties in contract discuss issues and find resolution together. The potential claims are turned into changes or are dismissed for good reason before the project is ended.

##### 8. Joint Recognition of Changes.

One of the best ways of reducing claim potential is for the other party to recognize when, in fact, a change has occurred. The tendency to fail to do this or to argue incessantly over every potential change is a major factor in perpetuating claims. Both parties need to be realistic.

.9 Documentation.

Good documentation leads quickly to recognize a change whereas poor documentation will only prolong any argument between the parties. Good documentation can also provide a good defense against claims. A complete factual analysis may defeat spurious or poorly supported claims.

## POST-TENDER IMPLEMENTATION

### 3. CLAIM PURSUANCE

Natural eventuality may arise when Claim Pursuance becomes necessary. In Contract no party is prepared to take extra financial or other burden for the default, omission and commission of other party or to bring additional benefits on cost. The process provides an approach to successfully pursue claim in contract. On construction project number of such natural eventualities go waste for improper approach that brings suffering to the party. The approach has two major process areas:

- a) Claim Identification
- b) Claim Quantification

#### a) CLAIM IDENTIFICATION

The identification of a claim starts with sufficient knowledge of the scope and responsibilities stated in contract terms, when some activity appears to be a change in scope or terms requiring a contract adjustment. Proper identification involves not only an interpretation of what the contract requires but also a documented description of the activity viewed as extra to that required by the contract. There the below noted would help.

#### Tools and Techniques for Claim Identification

.1 Contract terms.

The contract provisions relate to changes and notice provisions affect the claim. In many cases claims not raised in specified time are rendered invalid.

.2 Expert judgments.

It is often worthwhile to reach a consensus among more than one person that the activity under question does merit claim status. In some cases of more important or larger claims legal advice may be sought to add further support to the validity of the claim.

.3 Documentation.

One of the most important factor in the claim process is the need for good supportive documentation. This may take the form of photographs and videos of the work in question, relevant contract sections and drawings, relevant statements of persons involved in or related to the claimed work. In addition, the time and days the work was performed should be noted.

It is helpful to open a new cost account to cover the claimed work in order to clearly separate it from other contract work.

## b) CLAIM QUANTIFICATION

Once an activity has been reviewed and a decision made that it is worthy of pursuing as a claim the next step is to quantify it in terms (usually) of additional compensation or a time extension to the contract completion or other milestone date. Those who have had experience with this side of claim management know that it is not unusual for the claimant to inflate the amount of the claim to the extent possible and thus it later becomes a form of bargaining process between the parties as a reasonable “truth” is sought. Nevertheless, there are proper and logical ways of determining the cost of the extra activity or damages both in terms of money and time. The process basically uses a cause and effect approach to determine the full effect of the claimed activity-what was the full effect on the construction work caused by the claimed activity? Sometimes the claimed activity has an indirect effect on other aspects of the construction project-making other work more costly, changing sequences, delaying other activities. To the extent that these indirect effects can be justified and quantified they are properly part of the total cost of the claim. The below noted would help.

Tools and techniques for claim quantification

### .1 Quantity Measurement.

Actual quantities of the claimed work in terms of specified unit for relevant item forms the basis for recheck. When disagreement arises the first place to look for agreement is the quantity involved.

### .2 Cost Estimation.

The estimate comprises the cost of the activity based labor, material and equipment involved in the claimed work. If cost records are available they will provide the basis of the estimate. If not, the cost will have to be estimated using applicable rates. Additions for overhead and profit are common and usually proper as the claim is treated at this stage as though it will be considered a change. Sometimes the claimed work has an effect on other work on the project that causes additional cost. Usually this cost will have to be estimated since the cause and effect relationship is not obvious. Often, though, the justification for this indirect effect is difficult to prove to the satisfaction of the opposing party.

### .3 Contract Law Precedents.

It is often helpful to be able to cite previous cases that will act to support the claim in those more complex situations where the contract does not provide a solution. Such cases may give guidance as to what may or may not be included in the claim or how the claim may be evaluated. In the U.S. for example a court decision commonly referred to as, “the Eichleay formula” set forth principles for determining the allocation of overhead in certain kinds of claims.

### .4 Schedule Analysis.

The usual way of approaching the schedule effect of changes and claims is to compare the “as planned” schedule with the “as built” schedule to support the time extension requested not only for the claimed activity but also for the effect (if any) on the balance of the project. Schedule analysis with the aid of today’s sophisticated computer programs can help but also can make this analysis very complicated. The ultimate deciding factor is the effect on the critical path and it can become difficult to separate because of all of the other factors that can and do affect construction schedules.

.5 Business History of Party.

Opportunity loss for delays is complicated assessment that requires to establish the capabilities, market conditions and history of business approach.

#### 4. CLAIM RESOLUTION

Justifiable disagreement as to whether the claim in question is a change to the contract or not or whether the claimed amount of compensation or time requested is correct. When this situation arises there begins a step-by-step process to resolve these questions. It is axiomatic that the longer this process takes the more expensive and disruptive it is to both parties. Therefore, the goal is to settle these issues as soon and at the lowest point in the organizations as practicable. The process begins with negotiation, perhaps at more than one level, before moving on to mediation, arbitration and litigation depending on the remedies afforded by the contract. Because of the proliferation of claims in construction and the expense of litigation, alternate methods of resolution have been increasingly used. Called ADR for Alternate Dispute Resolution, they include mediation, arbitration and mini-trials. The following are important.

##### Tools and Techniques for Claim Resolution

.1 Negotiation.

Always the first and best step to resolute is negotiation. Sometimes it needs to be elevated to a higher level but it is still a negotiation between parties trying to find an equitable solution.

.2 Alternate Disputes Resolution (ADR).

These include mediation, arbitration and mini-trials. All are usually

.3 Litigation.

This is the usual result when all earlier attempts for settlement have failed. Construction lawsuits are commonly complex for a jury to understand and often take a long time to present. This is the “court of last resort” and is expensive in terms of cost and upset the organizations involved. Parties in litigation really want to be sure that this is the only way the dispute can be resolved.

.4 Estimated Cost of Resolution.

When the initial attempts at negotiation fail it is prudent for each of the parties to estimate the cost of carrying the dispute further. Mediators are costly (but can be cost effective) and some arbitration cases can approach the expense of litigation due to



the amount of discovery involved. An estimate of these costs can help in deciding just how important it is to keep pursuing a claim.

## CONCLUSION

Claim management is a management issue and needs to be dealt with same emphasis. Project Sponsors are responsible to implement the approach and take necessary step. Due care & concerted endeavors through the processes would help minimizing the breeding grounds for Claims & Emergence of disputes leading to stakeholders loss of benefits, delayed completions of undertakings, wastage of resources and stained relationships.

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