



TRENDS IN CONSTRUCTION CLAIMS & DISPUTES

A Research Perspective Issued by the
Navigant Construction Forum™

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Building on the lessons learned in construction dispute avoidance and resolution.™



Notice

This report was prepared by the Navigant Construction Forum™ of Navigant Consulting, Inc (“Navigant”). Claims and disputes are a constant in the construction industry, regardless of whether the industry is doing well or poorly. The number of claims seems to have risen during the recent recession despite the downturn (or perhaps as a result of downturn) in the construction industry. This research perspective is intended to provide an overview of some relatively recent trends related to construction claims and disputes observed by the Navigant Construction Forum™. Through this insight it is hoped that owners, design professionals, construction managers, contractors and subcontractors can devise ways to avoid such issues going forward – thus making projects more successful, and more profitable, for all stakeholders.

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Navigant Construction Forum™

Navigant (NYSE: NCI) established the Navigant Construction Forum™ in September 2010. The mission of the Navigant Construction Forum™ is to be the industry’s resource for thought leadership and best practices on avoidance and resolution of construction project disputes globally. Building on lessons learned in global construction dispute avoidance and resolution, the Navigant Construction Forum™ issues papers and research perspectives, publishes a quarterly e-journal (Insight from Hindsight), makes presentations and offers in-house seminars on the most critical issues related to avoidance, mitigation and resolution of construction disputes.

Navigant is a specialized, global expert services firm dedicated to assisting clients in creating and protecting value in the face of critical business risks and opportunities. Through senior level engagement with clients, Navigant professionals combine technical expertise in Disputes and Investigations, Economics, Financial Advisory and Management Consulting, with business pragmatism in the highly regulated Construction, Energy, Financial Services and Healthcare industries to support clients in addressing their most critical business needs.

Navigant is the leading provider of expert services in the construction and engineering industries. Navigant’s senior professionals have testified in U.S. Federal and State courts, more than a dozen international arbitration forums including the AAA, DIAC, ICC, SIAC, ICISD, CENAPI, LCIA and PCA, as well as ad hoc tribunals operating under UNCITRAL rules. Through lessons learned from Navigant’s forensic cost/quantum and programme/schedule analysis of more than 5,000 projects located in 95 countries around the world, Navigant’s construction experts work with owners, contractors, design professionals, providers of capital and legal counsel to proactively

manage large capital investments through advisory services and to manage the risks associated with the resolution of claims or disputes on those projects, with an emphasis on the infrastructure, healthcare and energy industries.

Purpose of Research Perspective

The Navigant Construction Forum™ was recently asked to identify new trends in the area of construction claims and disputes. In response to this request the Forum conducted a survey of Navigant senior claims consultants in-house and an e-mail survey of a number of external claims professionals with national and international claims experience. The response rate was somewhat over 30% as many claims consultants have either sensed or observed new or developing trends in the claims arena. The purpose of this research perspective is to summarize these new trends in an effort to alert stakeholders in the construction industry as to the issues we see coming now and in the relatively near future. Additionally, the Navigant Construction Forum™ offers recommendations that should help decrease the downside risk of these new trends related to construction claims and disputes.

Introduction

When I first became involved in construction claims and disputes on a full time basis in the 1970's I asked a noted claims consultant why he had chosen claims consulting as a career. The response was short and pithy – "When construction is good, claims are good. When construction is bad, claims are better!" I did not fully appreciate the accuracy of this response until the recession in the early 1980's. The construction industry suffered a severe downturn but the number of claims proliferated in an inverse ratio

thus providing even more work for claim consultants than when the industry was doing well.

Over the past few years of the current recession the industry has again taken a substantial hit economically. The number of projects declined as did the number of construction companies. However, despite this decline (or perhaps as a logical reaction to this adverse impact to the industry) it appears from the Construction Forum's research that the number of claims has risen.

"Claimsmanship"¹ has proliferated in the past few years and appears to be equally practiced by both owners and contractors, and their representatives. As a direct result, the number of claims has likewise grown. From this growth in claims several trends have developed, among them:

- » The value of construction disputes has declined in the U.S. (as opposed to the Middle East) but the duration of such disputes has increased;
- » Courts and Boards of Contract Appeals decisions limiting recovery of damages in the areas of concurrent delay; suspensions of work; time extensions; notices and claim filing requirements; calculation of extended home office overhead costs; proof of differing site conditions; and risk transfer in the design/build environment have all become more frequent;
- » Public owners have increased the use of False Claim allegations in response to claim filings;
- » Contractors are becoming more creative in developing new forms of claims; and,
- » Increased use of Alternative Dispute Remedies ("ADR") has grown significantly in order to avoid costly arbitration and litigation, resolve issues and, perhaps, maintain relationships between the parties.

¹ "Claimsmanship" is generally defined as the art of practice of making and winning claims by questionable expedients without actually violating the rules." See James G. Zack, Jr., "Claimsmanship": *Current Perspective*, Journal of Construction Engineering and Management, Vol. 119, No. 3, September, 1993, American Society of Civil Engineers.

These trends may have been exacerbated by what the construction bar refers to as the “vanishing trial”. In regard to this issue a recent article noted that between “...1938 and 2009, there was a decline in the percentage of civil cases going to trial of over 90%...”² The author also noted that “...the pace of the decline was accelerating toward the end of that period...”²

In March 2012, Andrew D. Ness, then Chair-Elect of the American Bar Association Forum on the Construction Industry addressed this issue. As Mr. Ness pointed out, in the U.S. legal system “construction law” is derived primarily from case law – prior legal decisions.³ Mr. Ness pointed out as the construction industry changes and evolves (i.e., project delivery methods, Building Information Modeling, Green construction, location based scheduling, etc.) so too must construction law. The unintended consequence of the vanishing trial is that construction law stops evolving. Mr. Ness quoted the Rt. Hon. Beverly McLachlin, Chief Justice of Canada (whom he identified as a “recovering construction lawyer”) on this issue as follows:

“All areas of law – construction law included – are living, constantly evolving trees. Some branches sprout and grow; others crack and need trimming. Thus, the law develops and remains responsive to changes in society. The Construction Law tree looks different than it used to. It may not be dead, but new branches are not appearing as often as they once did. And old branches that need pruning are being neglected.”

This research perspective discusses each of these growing trends, and where possible, offers ideas for mitigating or avoiding the negative impacts of such trends in construction claims and disputes.

Value and Duration of Construction Disputes

It has been reported that globally the value of construction disputes has declined in the United States and Asia but increased slightly in Europe and substantially in the Middle East.⁴ The average value of the disputes sampled for this report is set forth below by region. At the global level, dispute value declined 8% from 2010 to 2011.

REGION	DISPUTE VALUE – 2011 (MILLIONS)	DISPUTE VALUE - 2010 (MILLIONS)
UK	US\$10.2	US\$7.5
EUROPE	US\$35.1	US\$33.3
MIDDLE EAST	US\$112.5	US\$56.3
ASIA	US\$53.1	US\$64.5
US	US\$10.5	US\$64.5
GLOBAL AVERAGE	US\$32.2	US\$35.1

This same report, however, also concluded that the time required to resolve disputes rose from 9.1 months to 10.6 months. The average length of time (in months) to resolve the disputes sampled increased at the global level by some 16%, as set forth below:

REGION	LENGTH OF DISPUTE – 2011 (MONTHS)	LENGTH OF DISPUTE – 2010 (MONTHS)
UK	8.7	6.75
EUROPE	11.7	10
MIDDLE EAST	9	8.25
ASIA	12.4	11.4
US	14.4	11.4
GLOBAL AVERAGE	10.6	9.1

² Robert P. Burns, *What Will We Lose If The Trial Vanishes?*, Northwestern University School of Law, Public Law and Legal Theory Research Paper Series No. 11-48, 2011. See also, Marc Galanter and Angela Frozena, ‘A Grin Without A Cat’: Civil Trials in the Federal Courts, 2010 Civil Litigation Conference, Judicial Conference Advisory Committee on Civil Rules, Durham, N.C., May, 2010.

³ Andrew D. Ness, *The Future of Construction Law and Claims*, 51st Annual Western Winter Workshop, AACE International, Lake Tahoe, NV, March 2012.

⁴ *Global Construction Disputes 2012: Moving in the Right Direction*, EC Harris, London, May 28, 2012.

CAUSE OF CLAIMS	ASIA	EUROPE	MIDDLE EAST	NORTH AMERICA	UK
Ambiguous requirements		3		1	5
Conflicting party interests	3			3	2
Contract administration issues		1	1	5	1
Failure to resolve time extension & delay damages contemporaneously	1	4	4	4	
Incomplete design	5	2	2	2	
Owner caused changes		5	3		4
Unrealistic time of completion	4				
Unrealistic risk transfer	2		5		3

By reverse scoring these rankings by region⁵ and adding up the scores this report indicates that these causes of claims can be ranked globally in the following order.

1. Contract administration issues;
2. Incomplete design and ambiguous contract requirements;
3. Failure of the owner and contractor to resolve time extensions and delay damages at the time they occur on the project;
4. Conflicting party interests;
5. Unrealistic risk transfer; and,
6. Unrealistic time of completion.

This cause of claims listing and ranking offers some suggestions regarding claims avoidance and resolution which will be discussed at the end of this research perspective.

This report provided a good deal of information on claims value, length of time to resolve disputes and the most common causes of disputes. The methodology employed in this study limited the projects and disputes sampled to those the firm handled during the 2010 and 2011 period.

A more robust survey of claims and disputes submitted to international arbitration was published in the summer

of 2011. This survey determined that in the 2009 – 2011 timeframe there were 65 international contract arbitrations in which at least US\$1 billion was in controversy.⁶ The amounts in controversy ranged from US\$20 billion to US\$1 billion.⁷ The total value of these 65 disputes was US\$174.8 billion with the median value being US\$2.73 billion. This global survey indicates a much higher range of dispute values than the earlier cited study. This study also indicates that more international projects, at least, are going to arbitration than the earlier study seemed to indicate.

Like the American Lawyer survey, a recent Navigant Construction Forum™ research perspective also concluded, among other things, that international construction arbitration is growing rapidly.⁸ Born and Miles have reported that case filings with the International Chamber of Commerce (“ICC”), the American Arbitration Association (“AAA”) and the International Center for Dispute Resolution (“ICDR”) have increased between three and five fold over the past 25 years.⁹ A major university in the UK also documented an 8.5% growth among 22 arbitral institutions between 2003 and 2007.¹⁰

⁵ Where a 1st place gets a 5; 2nd place receives a 4; and so forth.

⁶ Michael D. Goldhaber, *2011 Arbitration Scorecard*, americanlawyer.com/focuseurope, Summer 2011.

⁷ The “amount in controversy” represented the sum of claims and counterclaims.

⁸ *Trends in International Construction Arbitration*, Navigant Construction Forum™, Navigant Consulting, Inc., October 2012.

⁹ Gary Born and Wendy Miles, *Global Trends in International Arbitration*, *American Lawyer – Focus Europe*, August 2006.

¹⁰ *International Arbitration: Corporate Attitudes and Practices*, Queen Mary University of London School of International Arbitration and PricewaterhouseCoopers, 2008.

In preparing this research perspective the Navigant Construction Forum™ conducted a survey of Navigant senior claims consultants in-house and an e-mail survey of a number of external claims professionals with national and international claims experience. Juxtaposed to the earlier cited study, the Forum's survey found that in the United States, the numbers of claims filed with project owners has increased substantially over the past few years. However, like the earlier cited study, the Forum's survey determined that (1) the value of the claims filed has fallen substantially and (2) fewer claims are being prosecuted to arbitration or litigation.

Some of the findings of the Forum's survey follow:

- » Due to the change in the economy over the past few years, and the government funding more projects than the private sector, many contractors experienced with negotiated private contracts bid on and were awarded government contracts binding them to much stricter contract requirements.
- » Along the same lines, many of the less than US\$1 million claims are filed by small contractors and subcontractors who entered the public sector when work in the private sector dried up and had, previously, little or no experience with pursuing claims in the public sector.
- » Fewer claims are proceeding to arbitration or litigation as most are settled through negotiation or ADR processes such as mediation, project neutrals and private trials.
- » Public works owners seem to be less willing now to hand off dispute matters to attorneys and are more ready to compromise in order to reach settlements or settle through various ADR mechanisms.

The Navigant Construction Forum™ concludes that international construction projects have larger disputes and are more likely to resolve their disputes through arbitration. On the other hand, while the number of claims within the United States seems to have increased substantially, claim values have declined as many more small claims are now asserted. Additionally, fewer claims are going to arbitration or litigation in the United States and more are resolved through negotiation and/or various forms of ADR. The result of this trend is that owners and contractors will, more than likely, be left on their own to resolve disputes without resort to arbitration or litigation. For those well prepared to take on this challenge dispute resolution costs may decline and cost recovery or defense will increase. For those not so well prepared, the outcome will not be nearly as satisfactory. This research perspective should help both owners and contractors to become better prepared to face this new challenge.

Increased Limitations on Recovery of Damages

Another trend observed by the Navigant Construction Forum™ is that it is becoming increasingly difficult for contractors to recover on claims in litigation on government contracts. Courts seem less likely to rule in favor of contractors in a number of areas. Some limitations on contractor claim recovery are set forth below.

Concurrent Delay

Concurrent delay is defined as “[t]wo or more delays that take place or overlap during the same period, either of which occurring alone would have affected the ultimate completion date.”¹¹ Concurrent delay has been a contentious and hotly debated issue since its creation in 1867.¹² One in-depth article on the issue of concurrent delay examined the origins of the doctrine of concurrent delay. The authors summarized the history of concurrent delay as follows:

“...it is evident that the modern doctrine of concurrent delay is premised not on the equitable resolution of construction delays, but is instead based on past litigants’ failure or inability to effectively prove their cases and the older courts’ hostility toward liquidated damages ... Over time, these factors merged and evolved into the legal doctrine of ‘concurrent delay.’ After several years, the later courts stopped delving into the ‘real’ analyses of these early courts, and instead rotely applied these early courts’ resolutions of concurrent delay as a ‘rule’ for resolving all overlapping construction delays.”¹³

The issue is contentious in the main because it is frequently used as a “get out of jail” card. When owners assess liquidated damages for late project completion, contractors frequently respond with allegations of concurrent delay (i.e., overlapping owner and contractor delay periods) asserting that all or a part of the late completion was excusable, non-

compensable delay due to overlapping owner caused delay and thus not subject to liquidated damages.¹⁴ The argument works equally well in reverse: when contractors assert owner caused delay owners often respond with allegations of contractor caused delay, alleviating the need to pay for delay damages.

It appears, however, that courts have become more conservative when faced with concurrent delay arguments and are less likely to simply accept concurrent delay as a way of resolving delay cases. Courts seem to be placing more of a burden on contractors with respect to concurrent delay. For example, in *George Sollitt Construction Company v. U.S.*¹⁵ the Court stated that a contractor has an affirmative obligation to separate and apportion concurrent delay. That is, when a contractor is asserting a delay claim they must first prove the delay was caused by an event for which they were not responsible; then document the duration of the delay to the critical path or the end date of the project; and then prove there was no concurrent delay during the same period.¹⁶ The Court also stated that generally, recovery will be denied when delays are concurrent or intertwined and the contractor has not separated its delays from those caused by the owner.¹⁷ The Court also stated that a contractor seeking recovery of compensable delay must “... disentangle its delay from those allegedly caused by the government...” and prove that both delays impacted the project’s critical path.¹⁸ Rulings such as this obviously increase a contractor’s burden of proof when arguing for recovery of compensable delay.

¹¹ *Recommended Practice No. 10S-90, Cost Engineering Terminology*, AACE International, Morgantown, W.V., Rev. December 13, 2011.

¹² *Stewart v. Keteltas*, 36 N.Y. 388, 1867 WL 6457 (1867), 2 Transc. App. 288 (1867).

¹³ James K. Bidgood, Steven L. Reed and James B. Taylor, *Cutting the Knot on Concurrent Delay*, Construction Briefings No. 2007-02, Thomson/West, February, 2008.

¹⁴ *Levering & Garrigues Co. v. U.S.*, 73 Ct. Cl. 566, 578 (1932); *Schmoll v. U.S.*, 91 Ct. Cl. 1, 28 (1940); *PCL Constr. Servs., Inc. v. U.S.*, 53 Fed. Cl. 479, 484 (2002), *aff’d*, 96 Fed. Appx. 672 (Fed. Cir. 2004).

¹⁵ 64 Fed. Cl. 229, February 23, 2005.

¹⁶ *William F. Klingensmith, Inc. v. U.S.*, 731 F. 2d 805, 809 (Fed. Cir. 1984).

¹⁷ *Blinderman Constr. Co. v. U.S.*, 695 F. 2d 552, 559 (Fed. Cir. 1982).

¹⁸ *Mega Const. Co. v. U.S.*, 29 Fed. Cl. 396, 424 (1993).

Additionally two significant court cases – one a Federal case in 2010 and the other a State case in 2011 – seem to have created new hurdles concerning concurrent delay.

In *M. Maropakis Carpentry, Inc. v. U.S.*¹⁹ the Court of Appeals for the Federal Circuit ruled that the contractor could not allege or assert concurrent delay against government imposed liquidated damages unless the contractor had filed a certified delay claim under the terms of the Contract Disputes Act²⁰ and requested and received the Contracting Officer's final decision. In this case, the contractor had written letters to the Contracting Officer but did not submit and certify a delay claim. Nor did the contractor request and receive the final decision from the Contracting Officer. While the Court of Federal Claims upheld the government imposed liquidated damages it stated that they had no jurisdiction to hear the contractor's claim of concurrent delay. On appeal to the Court of Appeals for the Federal Circuit, that Court likewise upheld the liquidated damages assessment but again denied the contractor the right to argue concurrent delay due to their lack of compliance with the Contract Disputes Act. Through two court cases, the contractor was denied the right to present his defense of concurrent delay due to their failure to conform to the strict requirements of the Contract Disputes Act.

In *Greg Opinski Construction, Inc. v. City of Oakdale*²¹ a California Court of Appeals issued a similar ruling to Maropakis but relied instead on the terms of the contract documents as California does not have a statute analogous to the Federal Contract Disputes Act. The Superior Court ruled that since Opinski had not followed

the contractually mandated procedure related to change orders, claims and time extensions, it was not necessary for the Court to review the alleged delay issues (the concurrent delay argument), regardless of which party was responsible for the late completion. On appeal the Appellate Court ruled that:

“[The] City was entitled to liquidated damages for [the] general contractor's late completion under the construction contract, even if the delays were caused by the City's conduct, where the contract required any extension of time to be obtained through certain procedures, and [the] general contractor did not use such procedures.”²²

The Appellate Court ruled in this manner despite the fact that the City admitted some of the delay for which they assessed liquidated damages was actually City caused delay.

After surveying the scene concerning the issue of concurrent delay it appears that courts have increased the contractor's burden of proof concerning concurrent delay and constructed new hurdles concerning the use of concurrent delay as a defense when owners assess liquidated damages for late project completion.

Owners seeking to enhance their defenses against concurrent delay situations can draw a lesson from these cases. Contractors need to carefully comply with contract provisions and statutory requirements in order to maintain the ability to present concurrent delay as a defense against liquidated damages.

¹⁹ 609 F.3d 1323 (Fed. Cir. June 17, 2010).

²⁰ 41 U.S.C. § 605.

²¹ 199 Cal. App. 4th 1107 (2011), 132 Cal. Rptr. M3d, 170 Court of Appeal, Fifth District, California (Oct. 6, 2011).

²² *Greg Opinski Construction, Inc. v. City of Oakdale*, *ibid.*

Limitation on Recovery of Suspension Costs

An owner directed suspension of work is typically considered an excusable, compensable delay. Unless the terms of the contract specifically preclude cost recovery, in most cases the compensation sought includes extended field office overhead costs as well as extended or unabsorbed home office overhead costs. In the United States the Eichleay Formula is the classic way to calculate unabsorbed home office overhead. As such, arguments concerning suspensions of work typically revolve around how much delay did the suspension order actually cause and are the extended or unabsorbed home office overhead damages properly calculated.

In *The Redland Company, Inc. v. U.S.*²³ the Air Force issued a contract to The Redland Company to resurface an aircraft parking area at Homestead Air Reserve Base in Florida in October 2000. On December 1, 2000 the Contracting Officer issued the Notice to Proceed (“NTP”) for the work. The contract required the contractor to begin work within 14 days of receipt of the NTP. Also on December 1, 2000 the Contracting Officer issued an order suspending all work on the project until further notice. The Air Force finally lifted the suspension order on October 18, 2004 (nearly four years later) and directed that work begin on October 20th and be completed by December 19, 2004 – a period of 60 days. The Redland Company began work as directed but was unable, for a variety of reasons, to complete the work until January 11, 2006 – some 449 days after the suspension of work order was lifted, and far beyond the 60 day period of completion. The Contracting Officer granted a time extension through January 11, 2006, did not assess any liquidated damages but also did not grant any compensation for the additional time.

The contractor filed several claims for additional compensation in September, 2006 and requested that the Contracting Officer issue a final decision approving or denying each claim within the 60 day time limit contained in the Contract Disputes Act. The Contracting Officer neither issued a final decision on any of the claims nor did he notify the contractor when such a decision would be issued. The contractor then filed suit in the Court of Federal Claims. The case involved nine distinct claims. However, of interest for this research perspective is Claim 1 – Unabsorbed Home Office Overhead.

The contractor sought recovery of their unabsorbed home office overhead for the period between December 1, 2000 and October 18, 2004 – nearly four years – and calculated the damages based on the Eichleay Formula. The Court openly acknowledged that the Air Force issued the NTP and suspended all work on the same day. The Court likewise acknowledged that the suspension extended until October 18, 2004.

Citing *P.J. Dick, Inc. v. Principi*,²⁴ *Nicon, Inc. v. U.S.*²⁵ and *Altmayer v. Johnson*²⁶ the Court noted that to establish entitlement to Eichleay damages a contractor must prove three elements:

1. Government caused delay or suspension of work of an uncertain duration;
2. The delay must have extended the original time of performance or that the contractor finished on time but still incurred unabsorbed overhead costs because it planned to finish earlier; and,
3. The government required the contractor to remain on standby during the period of suspension, waiting to begin work immediately or on short notice once the suspension was lifted.

²³ 2011 Ct. Fed. Cl. No. 08-606C (Apr. 7, 2011).

²⁴ 324 F.3d 1364, 1370 (Fed. Cir. 2003).

²⁵ 331 F.3d 878, 882 (Fed. Cir. 2003).

²⁶ 79 F.3d 1129, 1132 (Fed. Cir. 1996).

With respect to arbitration, the 2006 Queen The Federal Circuit in *Nicon* stressed that Eichleay damages are only available when the government caused delay occurs after performance has begun, thereby extending the period of performance.

The Court of Federal Claims analyzed Redland's claim and determined while the government had issued a suspension order of uncertain duration which extended the original time of performance, Redland (1) had not started work on the project and (2) had not been required by the Contracting Officer to "remain on standby" until the suspension order was removed. Thus, despite a four year delay, the contractor was denied recovery of unabsorbed home office overhead using the Eichleay Formula and was denied the right to recover unabsorbed home office overhead using an alternative method of calculation (allowed under certain circumstances based on *Nicon*). The denial of recovery centered on the fact that the suspension directive was silent as to whether the contractor was to "remain on standby" while the work was suspended.

After *PJ. Dick* some commentators had suggested that it would be very difficult to establish the "standby" requirement "... because it is unlikely that a Contracting Officer will issue a suspension order containing a requirement that the contractor be ready to immediately resume full scale work with no remobilization period."²⁷ It is more likely to be the case now that *Redlands* has zeroed in on the same issue.

Based on these cases, it appears that Courts are actively looking for ways to limit contractor damage recovery pursuant to suspension directives. It appears that

in *Redlands* the Court felt that the four year suspension of work was too long to justify the award of overhead costs to the contractor. It also appears that Courts may not understand that "work" begins before the first shovel of dirt is moved. Providing bonds and insurance; arranging and finalizing subcontracts and vendor agreements; planning the work; preparing and submitting the bid breakdown; etc. all are "work" even though no physical work in the field is underway. Additionally, once a contract is awarded a contractor's bonding capacity is impaired to the extent of the initial contract value. During the four years Redland was suspended, their bond was in full force and effect. If Redland was a small contractor this bond impairment may have prevented Redland from bidding on other projects as they may not have had sufficient bonding capacity to cover new projects. All are real costs incurred by contractors but the Courts in these cases either did not know how the construction industry operates or chose to ignore such damages to protect the government.

The lesson for contractors – in the event a contracting officer suspends all work on a project but does not state that the contractor "...must remain on standby ready to resume work promptly upon direction from the government..." recovery of unabsorbed home office overhead is seriously in doubt. One option is for the contractor to immediately write back to the contracting office specifically asking if they are to "...remain on standby..." If the answer is "yes" then home office overhead damages may be recoverable. If the answer is "no" then the contractor is alerted to the situation and may seek out other ways to reduce their damages.

²⁷ Ralph C. Nash and John Cibinic, *Postscript: Unabsorbed Overhead and the "Eichleay" Formula*, 17 No. 6 Nash & Cibinic Report ¶ 33 (June 2003).

Restrictions on Time Extensions

In a recent article published in *Insight from Hindsight* the author commented that –

“Turning to decisions addressing the merits of delay claims and the means to prove them we find that the boards and courts are demanding greater specificity in proof of delays. Total time claims continue to be denied. Lack of contemporaneous, updated schedules is criticized. Contractor delays are scrutinized for proof of government delays. Claims lacking segregation of contractor and government delays often lead to denial as do analyses based solely on claims prepared after the project is completed.”²⁸

The author pointed to *Phillips National, Inc.*²⁹ in which the Armed Services Board of Contract Appeals held Phillips responsible for a number of delays on the project because Phillips did not present a schedule delay analysis of any sort to the Contracting Officer or the Board separating the delays resulting from the government’s change orders from the delays caused by the contractor. The Board noted that “Without a CPM schedule, there was nothing to approve and it follows that no bilateral modification incorporating an approved as-built schedule could have been issued.” As noted in this article, it appears that the Board denied the claim solely on the basis of non-compliance with the contract’s schedule requirements.

The author of this article went on to point out the results of *Jackson Construction Co., Inc. v. United States*.³⁰ In discussing the outcome of this case the author noted that “In denying the claim, the Court’s decision provides a checklist of what not to do in presenting a claim.” (Underscoring provided.) Among the things Jackson did wrong:

1. Improperly calculated the home office overhead amount claimed;
2. Was unable to prove their intended early completion;
3. Failed to support the contention of cumulative impact of multiple changes beyond merely pointing to a large number of change orders; and,
4. Signed off on all government issued change orders without a proper reservation of rights.

As was pointed out by the author of the referenced article, “In summary, this claim had no contemporary factual support for its theories of claim, no support for government liability, no reservation of rights on many change orders, no proper showing of causation and no justification for using the total cost method of calculating damages.”³¹ It is noted, however, one interesting outcome from this decision was the Court’s statement that “...notice to the government is not a prerequisite to proving intent to finish early.”

In a similar manner the Court in *George Sollitt Construction Company v. U.S.*³² analyzed Federal delay claim case law, going back to 1909, to ascertain a checklist concerning time extensions. The *Sollitt* Court came up with the following checklist.

²⁸ Geoffrey T. Keating, *Government Contracts – Feast or Famine*, *Insight from Hindsight*, Issue No. 4, Navigant Construction Forum™, December, 2012, www.navigant.com/NCF.

²⁹ ASBCA No. 53241, 04-01 BCA Para. 32,567.

³⁰ 62 Fed. Cl. 84 (2004).

³¹ Keating, *Government Contracts – Feast or Famine*.

³² 64 Fed. Cl. 229, February 23, 2005.

» **Compensable Delay**

- › The government is liable for an equitable adjustment when they cause a delay to the contractor's performance.
- › The government's liability is limited to unreasonable delays under the Suspension of Work clause.
- › The government's actions or lack of action must be the sole proximate cause of the delay.
- › The burden of proving compensable delay falls to the contractor as the claimant.
- › The contractor bears the burden of separating and apportioning concurrent delays.
- › The contractor must prove the extent of the government's delay and its increased costs in order to recover.
- › Increased costs of winter construction may be recoverable; provided that the contractor can demonstrate that but for the government's delay the work would have been completed prior to the winter.
- › Increased cost of winter work must be apportioned if there are concurrent delays.
- › When demonstrating the extent of the government's delay the contractor bears the burden of proving critical path delays.
- › Because the critical path changes over time, critical path schedule updates are needed to analyze delays.
- › The contractor bears the burden of apportioning concurrent critical path delays.
- › The contractor may recover wage rate increase costs that would not have been incurred but for the government's delay.

- › The contractor must prove the amount of home office and field office overhead directly related to the government's delay.
- › When the parties stipulate to a daily delay cost the contractor must prove the extent of the government's delay but is relieved of the obligation of proving their increased costs.
- › When multiple delays by one party are concurrent with each other, that other party's delays must be analyzed to ensure that the overall effect of these multiple delays is correctly attributed to that party.

» **Excusable Delay**

- › The government has the initial burden of showing late completion and the contractor has the burden of showing that the delay was excusable.
- › When the government has caused part of the delay to project completion, liquidated damages are either waived or apportioned.

Some may consider these various decisions harsh and very tough on contractors attempting to assert delay claims. Others, however, believe that these decisions reflect a growing sophistication on the part of the judiciary when considering delay claims and the standard by which such claims are measured. Finally, it is also acknowledged that these decisions may reflect a lack of attention to contract requirements on the part of contractors who fail to file notice, follow contract procedures, or wait until the end of the project to prepare and submit delay claims.³³

Contractors should use the guidelines above as a checklist when considering filing a delay claim. Documentation of each of the points in these guidelines must be thoroughly documented or contractors risk losing their ability to obtain time extensions.

³³ Keating, *Government Contracts – Feast or Famine*.

Notice and Claim Filing Requirements

A recent article published in *Construction Lawyer* discussed lack of notice as a defense against construction claims.³⁴ The author noted that “When technical and procedural defenses are upheld, they encourage contract drafters to include more of them. Owners and their construction managers devise increasingly complex ways to channel and limit the claims of their prime contractors. Prime contractors may similarly seek to circumscribe the claims of their subcontractors.” While notice of claims is an issue of fairness between owners and contractors, the article points out that many owners now “...impose lengthy and detailed claims notice requirements as preconditions for recovery.” The author points to one set of contract documents which requires the following be provided within a short time after the initial notice of claim.³⁵

The contractor is required “at a minimum” to provide the following –

1. Factual statement of claim;
2. Dates concerning the event leading to the claim;
3. Owner and A/E employees knowledgeable about the claim;
4. Support from contract documents;
5. Identification of other supporting documentation;
6. Details on claim for contract time;
7. Details on claim for adjustment of contract sum; and,
8. Statement certifying the claim “...under penalty of perjury...”

Finally, this set of contract documents also states that any claim not in compliance with these requirements “...shall be conclusively deemed to have been waived by Contractor.” (Lest readers conclude that this particular set of prerequisites is unique to this particular State, the author of this research perspective has encountered similar requirements in many contracts across the country.)

This article goes on to discuss enforcement of notice requirements in State and Federal courts. With respect to enforcement of notice requirement in Federal courts, the article notes four general exceptions to notice requirements, as follows –

1. Written notice was actually provided;³⁶
2. The Contracting Officer had actual or imputed knowledge of the facts giving rise to the claim;
3. Notice to the contracting officer would have been useless;
4. The contracting officer considered the claim on its merits despite the lack of notice.³⁷

“Unless a contractor is operating in a jurisdiction where the enforceability of notice provisions is clearly limited, it is important for contractors to understand the full literal requirements of their contractual provisions and either comply fully or negotiate a written agreement as to what form of notice will satisfy the other party under those clauses.”³⁸

³⁴ Douglas S. Oles, *Lack of Claim Notice As A Defense To Construction Claims*, *Construction Lawyer*, Winter 2012, American Bar Association.

³⁵ General Conditions for Washington State Facility Construction, www.ga.wa.gov.

³⁶ *Hoel-Steffen Constr. Co. v. United States*, 456 F. 2d 760, 763 (Ct. Cl. 1972).

³⁷ *Appeal of Powers Regulator Co.*, G.S.B.C.A. No. 4838, 80-2 B.C.A (CCH) ¶ 14,463 (Apr. 30, 1980).

³⁸ Douglas S. Oles, *Lack of Claim Notice As A Defense To Construction Claims*.

Extended Home Office Overhead Calculated as a Percentage of Costs

A 2012 U.S. Court of Appeals case determined that when a contractor's time of performance was extended as a result of owner caused changes, then any extended home office overhead cost had to be calculated as a percentage of the direct cost of that work. In *Redondo Construction Corp. v. Puerto Rico Highway and Transportation Authority*³⁹ the contractor was awarded three highway construction contracts by the Authority. All three projects encountered differing site conditions and owner caused changes resulting in compensable changes and delay. Redondo filed claims but before these claims could be resolved, went into bankruptcy. The various claims were tried in Bankruptcy Court which awarded some \$12 million in damages to Redondo plus pre-judgment interest.

On appeal to the Federal District Court the damages awarded were affirmed in all respects. The Authority appealed this decision to the First Circuit Court of Appeals. The Appellate Court upheld some of the lower Court's findings but focused on the issue of home office overhead recovery. Citing *C.B.C. Enterprises, Inc. v. United States*⁴⁰ and *Aniero Concrete Co. v. N.Y. C. Constr. Auth.*⁴¹ the Court concluded that:

"When a project's completion is delayed due to necessary but unanticipated work for which the contractor is entitled to compensation, extended overhead is usually calculated as a percentage of the direct costs of the additional work. This percentage-of-direct-cost approach comports with standard practice in the construction

industry under which a contractor normally charges an owner a percentage of a project's direct costs to cover its overhead.

... at least some of the project delays were attributable to extra work for which the debtor was compensated. (*Citation omitted.*) For those delays, extended overhead should have been awarded as a percentage of the direct costs associated with the projects' change orders and extra work orders. (*Citation omitted.*) It is inappropriate to use the Eichleay formula to calculate home office overhead for contract extensions because adequate compensation for overhead expenses may usually be calculated more precisely using a fixed percentage formula."

Some Federal government agencies use fixed markup rates in their construction contracts – specifically the General Services Administration⁴² and the Veteran's Administration.⁴³ Many State and local government agencies and professional associations also impose fixed change order markup rates in their contract documents.⁴⁴ However, based on the author's experience, such percentage of cost markup rates rarely, if ever, take into account the cost of delay arising from owner caused changes. Rather, such predetermined percentages are typically the owner's opinion of what it may cost the general contractor to administer added work (including the management of vendors, suppliers and subcontractors involved in performing a portion of the added work).

³⁸ 2010 International Arbitration Survey: Choices in International Arbitration, pp. 11 – 16.

³⁹ Litigation Trends Survey Report – Trends in International Arbitration, 2011, page 4.

⁴⁰ International Arbitration: Corporate Attitudes and Practices, 2008.

⁴¹ The Increasing Importance of Arbitration in Trade and Investment in the World – General Trends, Opportunities and Challenges, 2010.

⁴² See FAR §552.243-71.

⁴³ See FAR §8-7.650-21.

⁴⁴ Herbert Saunders, Survey of Change Order Markups, Practice Periodical on Structural Design and Construction, American Society of Civil Engineers, February, 1996.

As a result the *Redondo* ruling may deprive contractors of the right to recover delay damages arising from owner directed changes that also cause project delay. Contractors performing work under contracts without fixed markups for change order costs in the contract should consider adjusting their markups when quoting changes which involve project delay as they may no longer be able to collect extended home office overhead costs as separate damages.

Differing Site Conditions - A Change in the Rules?

The Armed Services Board of Contract Appeals (“ASBCA”) recently examined a Type I differing site condition (“DSC”) claim in the case of *Appeal of NDG Constructors*⁴⁵ which arose from a contract with the U.S. Army Corps of Engineers. The contract involved the construction of a waterline under I-90 to service Ellsworth Air Force Base in South Dakota. A portion of this waterline was to be tunneled under I-90 employing the bore and jack method. NDG subcontracted the tunneling portion of the project to BT Construction, Inc. BT examined the two geotechnical reports issued with the bid documents when preparing their bid to NDG. The NDG contract included the standard Differing Site Conditions clause from the Federal Acquisition Regulations (“FAR”).⁴⁶

BT encountered subsurface conditions it considered materially different than those indicated in the contract documents and filed notice of DSC to NDG, who provided notice to the Contracting Officer. The Contracting Officer denied NDG’s claim and NDG appealed to the ASBCA. NDG contended that they encountered a “different soil profile”, soil with different characteristics and increased soil moisture conditions all of which, they claimed, were materially different from the conditions indicated at the time of bidding. In part, NDG based their claim on BT’s assumption that the soils would transition from one type to another along “...a straight

line projection.” Citing *Sternberger v. United States*⁴⁷ the NDG Court stated that “It is highly improbable that subsurface soil of one type would transition into another type along a straight line projection. We do not accept NDG expert’s opinion in this regard because it is intrinsically unpersuasive.”

With respect to NDG’s other claims the Court focused on the issue of what conditions were “indicated” in the contract documents and concluded that –

“A Type I differing site condition claim is dependent on what is ‘indicated’ in the contract. *Foster Constr. C.A. and Williams Bros. Co. v. United States*, 435 F.2d 873, 881 (Ct. Cl. 1970) (“On the one hand, a contract silent on subsurface conditions cannot support a changed conditions claim.... On the other hand, nothing beyond contract indications need be proven.”). A contractor cannot be eligible for an equitable adjustment for Type 1 changed conditions unless the contract indicated what those conditions would supposedly be. *P.J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984); *S.T.G. Construction Co. v. United States*, 157 Ct. Cl. 409, 414 (1962). Here, the contract documents did not indicate where precisely the contractor would encounter Carlile Shale. In bidding the project, BTC did not expect to transition from “Fine Alluvium” to “Carlile Shale” or, to use its terminologies, from “clay fill material” to “shale rock material” at any specific point but only “at some point.” ... And, as BTC predicted, the soil profile indeed changed from clay fill material to shale rock material ‘at some point.’”

⁴⁵ ASBCA No. 57328, August 21, 2012.

⁴⁶ FAR §52.236-2 (April 1984).

⁴⁷ 401 F.2d 1012, 1016 (Ct. Cl. 1968).

The Court concluded that since the soil conditions did, in fact, transition “at some point” then the conditions encountered did not differ materially from those “indicated” in the contract documents at the time of bidding. The Board also ruled that with respect to the soil conditions the general warnings contained in the geotechnical report to the effect that “...soils between boring locations may vary...” was sufficient information to alert a contractor to changing soil conditions. The Board in this case also ruled that despite the fact that the soil borings were silent on the moisture content of the soils, the contractor was solely at risk for drawing any assumptions based on the absence of moisture content.

In the *Appeal of Bean Stuyvesant LLC*⁴⁸ the Armed Services Board of Contract Appeals dealt with the issue of what “...physical conditions at the site...” were indicated in the contract documents. In *Bean Stuyvesant* the contractor relied upon the geotechnical information provided with the bidding documents. However, the Invitation to Bid did not include soils information taken from another set of borings at the site. The information from the separate boring was “... available upon request...” The contractor did not request this additional information and did not see it until the information was produced by the government at the Board hearings.

The Board ruled against the contractor on the basis that the conditions encountered did not differ materially from those indicated based upon “available” information. The Board concluded that “...a contractor has a duty to review information that is made available for inspection.” (Underscoring supplied.)

Based upon these cases, contractors seeking recovery under the Differing Site Conditions clause –

1. Are at risk when they draw straight lines between boring in order to calculate soil transition or encounters with differing types of soils and/or rock;
2. Are at risk by drawing conclusions or inferences from “silence” (i.e., the absence of any groundwater information from a series of borings may no longer justify the assumption that there is no groundwater to be encountered on the project); and,
3. Information referred to at bid as being “available upon request” may now be considered as information included in the contract documents or incorporated into the contract documents by reference.

These two cases taken together increase a contractor’s risk concerning latent site conditions considerably and appear to indicate a lack of understanding by the Boards as to how a contractor uses geotechnical information during bidding. They seem to miss the point that the bidders are attempting to turn geotechnical information into means and methods and costs to be included in their bids. For example, 20 borings on a project showing no groundwater at excavation depth typically means that the contractor should not expect to encounter groundwater while excavating. How else could a contractor possibly interpret the absence of such an indication? While the absence of data such as this has typically been considered reasonable and logical when making a bid, it is apparently no longer sufficient to justify a “material difference” when seeking recovery for a differing site condition.

⁴⁸ ASBCA No. 53882, October 5, 2005.

Risk Transfer Increasing in Government Contracts

The concept of equitable risk allocation has started to unravel in recent years. The equitable adjustment doctrine that has for many years, provided avenues of recovery for cost and time, are now being modified by contract drafters. For example, one respondent to the Navigant Construction Forum™ survey conducted in support of this research perspective commented that he is seeing more anti-concurrent delay clauses in contracts (i.e., contracts that declare concurrent delay is non-excusable delay).

This same respondent also commented that he had been asked to review two sets of “bridging documents” that were approximately 90% complete design (versus the more typical 30% design). The design/build entities in these cases claim that given this level of design detail done by the owner’s consultant prior to bidding, the Spearin Doctrine should apply. The owner, as might be expected, asserted that since this is a design/build contract the design/builder is solely responsible for the design and the bridging documents were intended for general guidance only. Strictly speaking, this is not risk transfer but has the effect of substantially increasing the design/builder’s risk if the owner holds the design/build entity to the requirements of the bridging documents as if they were crafted by the design/builder.

A very recent Civilian Board of Contract Appeals (“CBCA”) case related to construction of a U.S. embassy under a design/build contract.⁴⁹ According to the CBCA the design/build contract transferred all risk under the contract to the design/build entity by using clauses such as the following:

“The Contractor remains solely responsible and liable for design sufficiency and should not depend on reports provided by the Government as part of the contract documents.”

“Offerors shall not rely on any information provided by the Government concerning the host country, such as climatology data at the site, local laws and customs, currency restrictions, taxes, or the availability of local labor, etc.”

With respect to the infrastructure that was supposed to be available to the site at the outset of construction the Board commented that while the contract documents stated the local government had “...committed to provide utilities ... to the site by June 2003”⁵⁰ nothing in these statements can be construed as a promise from the Department of State that these events would occur...

The Board decided that design/build contractor had no right to rely on the design documents provided by the government at time of bidding because the contract advised bidders “...not to rely on the drawings, as the drawings are for the sole purpose of illustrating the design intent...” Finally, the Board ruled that since the design/build contractor was “...solely responsible and liable...” for the design, they “...should not depend on reports provided by the Government as part of the contract documents.”⁵⁰

⁴⁹ *Fluor Intercontinental, Inc. v. Department of State*, CBCA Nos. 491, et al., March 28, 2012, WL 1144872.

⁵⁰ This ruling is an interesting juxtaposition to the decision reached in the *Appeal of Bean Stuyvesant LLC*. In *Bean Stuyvesant* the contractor was held liable for “available information” not included or incorporated by reference in the contract documents whereas in *Fluor Intercontinental* the design/builder was not allowed to rely on information specifically provided by the government and included in the contract documents.

Increased Use of False Claim Actions

False claims allegations are becoming much more frequent in construction today than at any time previously. With the increased emphasis on the False Claims Act⁵¹ (“FCA”) contractors who certify a claim to the U.S. government are potentially liable to the government if any portion of a passed through subcontractor claim is determined to be a false claim. Subsequent to the Deficit Reduction Act of 2005⁵² some 28 States have adopted State False Claim Acts and others apparently are contemplating doing the same.⁵³ Not only are government agencies more likely to counter contractor claims with allegations of false claims but the legal profession has also become very active in this arena. If one Googles “whistleblower attorneys” you’ll find some 2.95 million hits in 0.22 seconds – most of which advertise firms ready, willing and able to assist potential whistleblowers with *qui tam* lawsuits under the FCA.

Added to this are some recent changes to Federal law which broadened the definition of the term “claim” and extended the reach of the FCA to include subcontractors. One recent paper summarized the impact of the Fraud Enforcement Recovery Act of 2009 (“FERA”)⁵⁴ in the following manner.

“FERA expanded the FCA in several additional ways, such as by eliminating the “presentment” requirement, adding a “relate back” provision to circumvent statutes of limitations, and declaring retroactivity for certain amendments. The passage of

FERA reflects the government’s growing commitment to discover and prosecute fraud. In furtherance of that commitment, Congress began to include antifraud measures in statutes, such as the American Recovery and Reinvestment Act (the Stimulus Bill), that create an independent board to oversee disbursed funds and provide for government audits.”⁵⁵

“False claims and charges of fraud are receiving increased emphasis by the federal government. For years, the playing field was generally limited to procurement of supplies, and defense industry contracts, but recently the clear trend has increased prosecution overall and therefore greater focus on construction.”⁵⁶ The author pointed to *Riley Construction Co. v. United States*⁵⁷ and *Daewoo Engineering and Construction Co. Ltd. V. United States*⁵⁸ to help make his point. Riley (a design build contractor) included both their claimed costs as well as their architect’s cost on the basis that the architect’s fee was based on a percentage of total construction cost. Riley did this without asking the architect, thus the architect was unaware that they were involved in the claim. When the government found out about this they counterclaimed with false claim and fraud allegations against Riley. The Court determined that Riley lacked “intent” when submitting the claim for the architect’s fee and dismissed the government’s FCA claim. This case serves to highlight the government’s intent to seek out and prosecute false claims and fraud and illustrates the risk a contractor assumes when submitting a claim that is not fully vetted.

⁵¹ 31 U.S.C. § 3729(a).

⁵² P.L. 109-171, February 2, 2006.

⁵³ www.whistleblowerslawyerblog.com, “Part 6: States’ Experience With Their Own False Claim Acts”, December 2010.

⁵⁴ Pub. L. No. 111-21, 123 Stat. 1617.

⁵⁵ Elspeth England, The Government Upgrades the False Claims Act: Implications for Construction Contracting, Construction Lawyer, Winter, 2012, American Bar Association.

⁵⁶ Keating, Government Contracts – Feast or Famine.

⁵⁷ 65 Fed. Cl. 264 (2005).

⁵⁸ 73 Fed. Cl. 47 (2006), aff’d 557 F.3d 1332 (Fed. Cir. 2009), cert. denied 130 S.Ct. 490 (2009).

In *Daewoo* the contractor submitted a certified claim to the government in the amount of \$64 million that included approximately \$50.6 million in unsubstantiated costs. The contractor apparently assumed that the claim would be settled via negotiation and did so in order to give them some room to negotiate with the government. Regardless of the merits of the initial claim the government counterclaimed under the Contract Disputes Act and the FCA and entered a “special plea in fraud” under the Contracts Dispute Act seeking forfeiture of Daewoo’s entire claim under the provisions of 28 U.S.C. §2514. When all was said and done the U.S. Court of Appeals for the Federal Circuit ruled that Daewoo not only forfeited their entire \$64 million claim but also owed the government an additional \$50 million plus FCA penalties.

Contractors working on government contracts need to understand the implications of the FCA and FERA; need to thoroughly examine and document all claimed costs; and must understand the legal significance and risk of “certifying” a claim to the government.

New Forms of Claims

Lest readers conclude that current claimsmanship is exercised solely by owners let’s now look at contractors. Based on the Forum’s survey most contractor “claimsmanship” seems to result in assertion of new forms of claims. Some of those identified are set forth below.

Constructive Claim

In *M. Maropakis Carpentry, Inc. v. U.S.*⁵⁹ the contractor submitted a number of letters to the government requesting time extensions. However, notwithstanding the requirements of the contract and the Contract Disputes Act, the contractor did

not certify the claim nor did the contractor request and receive a final decision from the contracting officer. During their appeal to the Court of Appeals for the Federal Circuit the contractor argued that their letters to the contracting officer constituted a valid claim for a time extension sufficient to give the Court of Federal Claims jurisdiction over the matter. As stated by the Court of Appeals “Maropakis also argue[d] that even if it was not in technical compliance with the CDA, the United States had actual knowledge of the amount and basis of Maropakis’ claim and therefore the Court of Federal Claims had jurisdiction.”

In essence, Maropakis tried to create a “constructive claim” – a claim derived by inference or implied by operation of law – analogous to a constructive change, a constructive suspension or constructive notice. Maropakis did this, of course, in order to get the Court to hear their case as the Court of Federal Claims ruled that they did not have jurisdiction since the contractor had not fully complied with the requirements of the Contract Disputes Act. The Appellate Court focused on the statutory requirements of the Contract Disputes Act and chose not to infer the existence of a constructive claim in the absence of these clear requirements.

All in all, this was an ingenious attempt by a desperate contractor to get around their failure to conform to clear statutory requirements. The Navigant Construction Forum™ believes that more contractors will attempt to use the “constructive knowledge” approach to excuse their own non-compliance with contract or statutory requirements concerning claim submittals.

⁵⁹ 609 F.3d (Fed. Cir. June 17, 2010).

Underinspection Claim

The concept of a constructive change to a contract arising from “improper inspection” or “overinspection” is not a new one in construction law.⁶⁰ Several respondents to the Forum’s survey, however, mentioned having experience with claims of “underinspection.” Typically, these claims have been described in one of two ways. In the first instance, underinspection is alleged as a way to recover additional costs for completion of punchlist work at the end of the project. The theory asserted is that, had the owner or their representative inspected the contractor’s work properly during the performance of the work, they would have found the work was improperly performed or incomplete and corrected the situation, thus eliminating the need for punchlist work. Since the punchlist work exists this proves allegation of improper inspection and the resulting damages are the cost of the punchlist work. The second way the underinspection claim is used is to allow the contractor to argue wrongful termination for default due to substandard work. Despite the number of times the author and others heard this type of claim asserted none had heard of this claim being litigated.

*The Appeal of Tawazuh Commercial and Construction Co. Ltd.*⁶¹ involved construction of 40 kilometers of road in Afghanistan. The contractor was ultimately terminated for default due to failure to perform its contract obligations; failure to provide a remediation plan as required by the cure notice; and, failure to perform in accordance with the contract requirements. The contractor asserted, among other defenses, that if the Corps of Engineers had performed adequate quality inspections throughout the project the situation would have been corrected earlier and thus prevented the default termination.

The ASBCA, citing *Amigo Building Corp.*⁶² stated that –

“It is well established that the government’s right to inspect work generally does not relieve a contractor of its obligations to perform, nor can the contractor properly rely on government inspection for the discovery and correction of any errors.”

Based on this approach the ASBCA concluded that –

“It is unfortunate that appellant’s failure to comply with the contract requirements did not come to light earlier in the performance of its work. However, appellant would have us decide that the government’s alleged failure to perform an early adequate inspection shifts the contract performance issues to the government’s shoulders. This we cannot do. The contract clauses and the relevant law clearly establish that it was appellant’s legal responsibility to maintain an adequate inspection system to ensure that its work conformed to the contract requirements. The government proved that appellant was in default and appellant did not establish that the default was excusable.”

Tawazuh, like Amigo before it, lost their argument that an owner’s underinspection entitled Tawazuh to additional money and time to repair the substandard work and/or excused the substandard work and deprived the owner of the right to terminate for default. However, the Navigant Construction Forum™ believes it is foreseeable that as less experienced, less skilled contractors undertake to perform more complex projects this type of claim is likely to occur with greater frequency.

⁶⁰ See *J.J. Barnes Constr. Co. v. U.S.*, ASBCA No. 27876, 85-3 B.C.A. (CCH) ¶ 18,503 (1985) and *Adams v. United States*, 358 F.2d 986 (Ct. Cl. 1966).

⁶¹ ASBCA No. 55656, 2011-2 B.C.A. (CCH, ¶ 34,781), June 13, 2011, 2011 ASBCA LEXIS 37.

⁶² ASBCA No. 54329, 05-2 BCA ¶ 33,047.

Equipment Productivity Loss

Lost labor productivity claims in U.S. construction law are hardly new. *Wunderlich Contracting Co. v. United States*⁶³ involved a request for delay damages and lost labor productivity arising from a contract issued in 1950 and completed in 1951. Although the Wunderlich joint venture did not prevail in this case, their failure to recover was based on lack of causation – that is, they did not establish the nexus between the government’s actions and the damages sought – not because the Court rejected the theory of entitlement.

However, the Navigant Construction Forum™ survey revealed that some contractors have started to assert “equipment inefficiency claims.” Such claims attempt to establish a direct cost ratio between labor costs and equipment costs using the following formula –

$$\frac{\text{Actual Equipment Cost}}{\text{Total Labor Cost}} = \text{Equipment Cost adder}$$

What contractors are attempting to show is that for every labor cost dollar expended “\$x” dollars was spent on equipment. This equipment productivity cost is applied to labor productivity claims (whether total cost, modified total cost, measured mile calculations, etc.). To calculate this type of claim, first the contractor has to calculate the labor cost added to the base scope cost and then the added labor cost is multiplied by the equipment cost ratio calculated by the formula set forth above.⁶⁴

While the claim is understandable (due to its simplicity) and the mathematics of the calculation are easy to follow, there is often no direct correlation between labor and equipment cost. There is a strong likelihood that when labor is less productive, that equipment costs go up. However, increased equipment costs are more likely to increase due either to idled equipment or equipment retained on site longer than anticipated resulting in increased equipment rental or ownership costs on the project.

Despite the flaws inherent in this new type of claim the Navigant Construction Forum™ believes it will become more common as contractors seek new ways to recover losses or less sophisticated contractors become more involved in claims.

“Expanded” General Condition Costs

Extended general condition costs, frequently referred to as extended field office overhead are a well accepted element of damages when a contractor encounters excusable, compensable delay. The general rules governing extended field office overhead cost recovery are fairly straight forward.

1. The contractor must prove they encountered an excusable, compensable event as defined by the terms of the contract;
2. The contractor must document notice of delay was provided per the contract;
3. The contractor must submit their time extension request in accordance with the terms of the contract;
4. The contractor must demonstrate that the event caused “x” days of delay as required by the contract and that there was no concurrent delay; and,
5. The contractor must then document the daily field office overhead cost after removing all non-time related field office overhead costs.

⁶³ 351 F.2d 956 (Ct. Cl.1965).

⁶⁴ It is noted that this claim does not include the cost of small tools and consumables, such cost being added separately to the total claim.

Assuming the contractor can show all of the above then they are generally entitled to a time extension and delay damages (consisting of extended field office overhead and, perhaps, extended home office overhead).

In response to the Navigant Construction Forum™ survey a new variant of this claim was identified. The “expanded general conditions” claim is not grounded on compensable delay. This new form of claim is a request for additional cost to add field resources in order to complete the project on time. At first blush, this sounds like an element of damages arising from either directed or constructive acceleration – but no acceleration is being alleged by the contractor.

After execution of the contract and notice to proceed, the contractor submits a change order proposal for expanded general conditions on the basis that the project is more complicated; is less fully designed; has more design busts and flaws; requires more coordination with third parties; will have more changes than normal; etc. Any or all of these allegations are then used to justify the addition of field resources (i.e., document control, project control, project engineering staff, superintendents, etc.).

The problems with this new form of claim are many –

1. The contractor has not proven entitlement to any of these allegations under the contract;
2. The contractor has not expended any additional costs as a result of any of these allegations; and,
3. There is not yet any cause and effect relationship between any of the potential future problems the contractor anticipates and the cost the contractor is presently seeking.

In more general terms, this new form of claim creatively “front end loads” anticipated claim costs. As such, there is a distinct possibility that the contractor asserting this new form of claim has walked, inadvertently though it may be, into a false claim under either the Federal or a State statute.

The Navigant Construction Forum™ believes that this new claim will likely spread for a while; at least until a Court ruling concerning the false claim potential is issued. If this claim is found to be a false claim, then it will slowly fade into the background as this information gets around. If it is found not to be a false claim (along the lines of *U.S. ex rel. Alva Bettis v. Odebrecht Contractors of California, Inc.*⁶⁵) where the Court found that the fraud-in-the-inducement theory, on its own, did not constitute a false claim, then this new form of claim may become more common.

Recommendations

Claimsmanship has not declined over the past two decades and is projected to continue based upon this review of current trends. Based on this conclusion, the Navigant Construction Forum™ offers the following recommendations for all stakeholders in the construction industry.

For Owners

- » Since owners have more opportunity to practice claimsmanship when preparing the contract documents, owners need to spend more time training their own staff concerning the terms and conditions of their contracts and in contract administration. Recall that one major international survey showed that improper contract administration is, in fact, the most common cause of disputes.⁶⁶ With appropriate and ongoing training, this type of dispute should be avoidable.

⁶⁵ 393 F.3d 1321 (2005).

⁶⁶ E. C. Harris, *Global Construction Disputes 2012: Moving in the Right Direction*.

- » Since so many claims and disputes arise from incomplete, poorly coordinated or flawed drawings and specifications and from owner issued changes, owners are well advised to spend more time in planning and design stages of the project to “get it right” before bidding. If owners make certain that all project stakeholders have adequate input to the planning and design, then this should sharply reduce owner issued change orders during construction, reducing in turn the disputes that stem from such changes.
- » Recognizing that no “perfect” set of drawings and specifications exists, owners seeking to avoid changes and disputes should implement biddability, constructability, claims prevention and operability reviews before issuing bidding documents using an independent review team⁶⁷ in order to find and eliminate errors and mistakes and prevent the need for owner issued changes during construction.
- » End of the job claims are complicated, difficult to analyze and tough to resolve. Such claims result from owners refusing to settle delay claims until all work is completed. Owners need to train their staff to focus on timely delay notice and act aggressively to resolve time extension requests and delay damages at or near the time they occur. Owners should not discourage contractors from filing notices of change, delay, etc. but should encourage them to do so in order to identify potential claims and disputes as early as possible and then focus on issue resolution in a timely manner.
- » A knee jerk reaction of many owners (and their representatives) when faced with a claim or dispute is to automatically go into a self-preservation mode. However, experience demonstrates that if both the owner and the contractor can maintain focus on project success, not party interest, and seek out solutions to potential problems when they first occur, then there will be fewer claims and disputes later as jointly crafted solutions tend to result in negotiated change order settlements at a lower cost.
- » Owners who are considering crafting unique risk assignment clauses must keep the basic rules of risk transfer in mind at all times. First, all risk belongs to owner unless specifically assigned elsewhere in the contract since the owner has all the benefit of the constructed project. Second, when any risk is assigned in a contract that risk should be assigned to the party best able to control risk if the risk event occurs.⁶⁸
- » Project owners need to spend more time with project delivery scheduling in order to avoid unrealistic scheduling requirements at the time of bidding as inappropriate schedules (either too short or too long) cause claims and disputes.

⁶⁷ An “independent review team” is one made up of experienced construction and operations personnel who were not part of the design team. This “cold eyes” review is necessary because it is difficult in the extreme for someone to review work they themselves performed.

⁶⁸ *Mitigation of Risk in Construction: Strategies for Reducing Risk and Maximizing Profitability*, McGraw Hill Construction, Navigant Consulting & Pepper Hamilton, LLP, New York, 2011.

Contractors

- » Contractors must pay more attention to scheduling, notice, and claim filing requirements lest they lose their right to prosecute such claims and recover time and cost. Contractors need to train their own staff in each of these areas and provide refresher training routinely rather than run the risk of losing their rights.
- » Contractors working on government contracts need to understand the implications of the FCA and FERA; need to thoroughly examine and document all claimed costs; and must understand the legal significance and risk of “certifying” a claim to the government.
- » Based upon the cases discussed in this research perspective contractors seeking recovery under the Differing Site Conditions clause –
 - › Are at risk when they rely upon straight line interpretations between borings in order to calculate soil transition or encounters with differing types of soils and/or rock;
 - › Are at risk by drawing conclusions or inferences from “silence” (i.e., the absence of any groundwater information from a series of borings may no longer justify the assumption that no groundwater will be encountered on the project); and,
 - › Are at risk should they not review information referenced to in bid documents as “available upon request” as this available information may now be considered information included in the contract documents or incorporated by reference.
- » Contractors must remember that they cannot rely upon owner quality control inspections. Contractors must keep in mind that owner inspections are solely for the benefit of the owner, not the contractor. Contractors are obligated to conform to all requirements of the contract and perform their own inspections.
- » Contractors seeking to be creative with claims must seek out competent legal advice experienced with construction law in order to avoid pursuit of a claim that is unwinnable.
- » Contractors trying out a new theory of entitlement on a public works project must obtain legal advice from attorneys familiar with both Federal and State False Claims Acts in order to avoid accusations of false claims from the owner.

⁷⁴ *International Arbitration: Corporate Attitudes and Practices*, 2008, page 5.

⁷⁵ *International Arbitration: Corporate Attitudes and Practices*, 2008, pp. 10 - 12.

⁷⁶ *Litigation Trends Survey Report – Trends in International Arbitration*, 2011, page 2.

Conclusion

Owners and contractors seeking to practice claimsmanship need to keep in mind a paraphrased version of one of Sir Arthur Conan Doyle's Sherlock Holmes quotations –

**“What one man can invest,
another can circumvent!”**

At a time when owners and contractors say they want to discourage disputes on construction projects and find ways to deliver projects on time, within budget, safely and with the quality required by the contract, claimsmanship seems counterproductive and wasteful. The recommendations set forth above should help stakeholders achieve their stated goals.

Future Efforts of the Navigant Construction Forum™

In 2013, the Navigant Construction Forum™ will continue its analysis of construction industry issues. The Navigant Construction Forum™ is in the process of conducting a survey related to the use and abuse of Requests for Information (“RFIs”) and crafting recommendations on how to handle the problems caused by RFIs in today's construction industry.

Further research will continue to be performed and published by the Navigant Construction Forum™ as we move forward. If any readers of this research perspective have ideas on further construction dispute related research that would be helpful to the industry, you are invited to e-mail suggestions to jim.zack@navigant.com.

