Construction Claims Protection Checklist

BE EVENT ORIENTED

Personnel must be event oriented. Keep records which document fully and accurately construction progress and problems in the field. Protective record keeping may prevent claims from ever arising or may facilitate early settlements of claims.

This checklist will assist you in recognizing what records are important to keep and how you can protect your interests. The checklist may protect your company's interests and thus enhance your profitability.

KEEP GOOD RECORDS

1. Maintain a good record keeping system to include the following:
    - 1.1. Progress payment requisitions with supporting data;
    - 1.2. Inspection reports;
    - 1.3. Daily field reports or logs (indicating where and what work was done);
    - 1.4. Memoranda of conversations, inspections, directions, agreements and observations;
    - 1.5. Correspondence (keep it all!);
    - 1.6. Progress photographs and videos to show construction progress and to document a particular problem arising in the field. Document date and location of each photograph or video;
    - 1.7. Minutes of weekly job meetings or other meetings between the contractors or and on site personnel;
    - 1.8. Cost Reports;
    - 1.9. Copies of approved and rejected shop drawings, shop drawing logs and all other submittals;
    - 1.10. Internal company correspondence;
    - 1.11. Notes of telephone conversations;
    - 1.12. Journals maintained by any field personnel (but be careful what your personnel write in their journals!); and
    - 1.13. Documentation of labor productivity.

Note: Always obtain and record all important information in writing, signed and dated (information received orally should be confirmed in writing including identification of the source of the oral information and the date received).

SAVE ALL PROJECT SCHEDULES

2. Save all project schedules, even if out-of-date, including:
    - 2.1. Records of input provided by consultants, subcontractors, or other prime contractors relating to the duration or sequencing of activities;
    - 2.2. Initial schedules submitted to owner, subcontractors, suppliers, etc.;
    - 2.3. Schedules marked up in the field as part of the updating process;
    - 2.4. Approved updates of the schedule;
    - 2.5. Copies of CPM reports or other scheduling reports prepared by consultants on the project;
    - 2.6. Supplementary schedules utilized on the project such as concrete placement schedules, finish schedules or detailed daily or weekly schedules;
    - 2.7. In-house schedules prepared for trades, subcontractors or suppliers;
    - 2.8. All hand-drawn schedules utilized by personnel on an informal basis in the field.

KNOW YOUR CONTRACT AND FOLLOW ITS REQUIREMENTS

3. Knowledge of and conformance with contract terms may avoid routine problems encountered on construction projects. Therefore:
   - 3.1. Determine the extent of the authority (in terms of subject matter and dollar limits) of owner representatives; and
   - 3.2. Make a checklist of all notice requirements in the contract and post it conspicuously for your project manager to follow.
4. Respond quickly to correspondence received from the owner or contractor. Respond to every complaint question or allegation. Do no concede issues unless you have no choice.
5. Use standard purchase orders and subcontracts for your suppliers and subcontractors which shift appropriate risks relating to their work. Limit your liability to them for owner caused delays, changes, etc., to the amount which you recover. Incorporate the terms of the contract by reference and make sure all required clauses are included therein.

MONITOR SATUTORY TIME PERIODS

6. Monitor statutory time periods to avoid waiver or forfeiture of statutory claims.
   - 6.1. Timely file all preliminary notices whether for mechanic's liens or payment bond claims.
   - 6.2. Be familiar with time periods for filing notices of lien and foreclosures of such liens.
   - 6.3. Be familiar with time limitations for filing suit to enforce a claim on a payment bond.

PROTECT AND SUPPORT YOUR CLAIMS

7. File in writing all protests or notices of potential claims within the time specified in the Contract when encountering a potential claim or you are directed to:
   - 7.1. Perform extra work not specifically provided for in the drawings and/or specifications;
   - 7.2. Perform work differently than as provided in the drawings and/or specifications;
   - 7.3. Perform work in a particular manner or by a particular method which varies from or is more expensive than the method originally anticipated;
   - 7.4. Perform work according to specifications or drawings which have been changed, amended, revised, amplified or clarified;
   - 7.5. Perform work according to incomplete drawings which require you to perform unanticipated engineering services;
   - 7.6. Perform work according to one particular method when two or more alternative methods are allowed by the contract or when the contractor should be free to devise his own methods;
   - 7.7. Perform work different than planned or the normal sequence;
   - 7.8. Stop, disrupt or interrupt work either wholly or partially (such direction may be given either directly or indirectly) ;
   - 7.9. Work in congested areas;
   - 7.10. Accommodate late delivery of owner or other prime contractor furnished equipment and materials or accommodate such equipment and materials if they are in poor condition or not suitable for the intended use;
   - 7.11. Accelerate performance in any way to regain schedule (*i.e.*, to add men or materials, to work overtime, etc.);
   - 7.12. Compress work (*i.e.*, where you are forced by circumstances beyond your control to do a greater amount of work in a shorter period of time than anticipated);
   - 7.13. Follow any schedules which vary from your approved schedule or your planned sequence of work; or
   - 7.14. Relocate existing work because of lack of coordination or information.

8. Be sure that you timely give Notices of Potential Claim, and any subsequent change orders; include requests for time extensions as well as price adjustments.
9. Fully document the calculation of requested price adjustments and requested time extensions.
10. Keep all bid documents to support pricing of claims for changes in work from that which was anticipated.
11. Do not negotiate and sign off on modifications or change orders which do not provide for time extensions or compensate you for impact costs as requested in the change order or modification. This is critical if you have disruption costs, extended overhead, wage rate and material escalations, acceleration costs and other impact costs substantially beyond your direct labor and material costs for the changed work. In such cases, you should consider using the following reservation of rights in such change orders:

    > "This proposal (change order) is based solely on direct cost elements such as labor, material, and normal markups, and does not include any amount for changes in sequence of work, delays, disruptions, rescheduling, extended overhead, acceleration wage, material or other escalations beyond the prices upon which the proposal was based, or other impact costs, and the right is expressly reserved, and notice of potential claim made, for any and all of then related items of cost prior to final payment under the contract."

    As a practical matter, many owners will be reluctant or refuse to sign a change order with such language included. If so, consider proposing as an alternative the following language:

    > "This change only covers the direct costs incurred by the contractor in performing the work which is the subject hereof."

MONITOR JOB PROGRESS

12. Analyze job progress prior to job site progress meetings. Use such meetings to discuss and protest delays, extra work, etc.
13. Request time extensions in writing whenever events occur which may entitle you to time extensions.
14. Record all conflicts, discrepancies, etc. and inform the owner as they arise.
15. Forward any significant information received from or sent by the owner to legal counsel so that legal counsel can determine if action is required.
16. Obtain written confirmation of all oral directives, or, if not available, write a confirmation letter to document your understanding.
17. Maintain a log of all drawings, submittals, change orders and proposals, pertinent correspondence and other like data for ease of reference.
18. Maintain detailed employees' time cards or foreman's Daily Reports in case of potential claims for extra work, delays, etc. Indicate the hours worked and the amount of work accomplished (e.g., the number of feet of conduit installed). Such records are often a good basis for proving loss of efficiency.
19. Categorize your cost records (*i.e.*, segregate your excess installation costs by area and type of work) in such a manner that all claim aspects can be recognized, particularly with regard to loss of efficiency or impact type costs. Analyze them immediately to identify these items.

REVIEW AND MONITOR SCHEDULING REQUIREMENTS

20. To protect your rights under the scheduling and coordination provision of your contract, we suggest the following:
    - 20.1. Determine what scheduling method and form is specifically required;
    - 20.2. Determine what method and form is most desirable from your standpoint;

20.3. Determine whether you have any option regarding the method and form of scheduling or whether these are negotiable;
20.4. Seek clarification before bidding begins regarding the method, form, or detail requirements in the project scheduling. Go on record during any pre-award negotiations if not satisfied with the specification requirements;
20.5. Make sure you have the capability to provide all of the scheduling detail and data that is required by the contract and within the time limitations specified;

21. If there is an owner-prepared schedule, ask the following questions:
    21.1. Does the owner expressly warrant the schedule as feasible and the durations as realistic?
    21.2. What responsibility does the contractor expressly have under the contract for reviewing the schedule and checking and verifying its feasibility?
    21.3. Does the contractor have the option of rejecting the owner's schedule and preparing its own schedule?
    21.4. What responsibility does the contractor have for updating the schedule?
22. Go on record with the owner if the schedule is not feasible or if the durations are not realistic or if there has not been sufficient time to review the schedule.
23. Determine whether progress payments are based upon the schedule and whether front end loading is permitted.
24. Determine what role the owner plays in the preparation of the contractor prepared schedule.
25. Determine whether an interim schedule is required, *i.e.*, a 60 day or 90 day initial schedule.
26. Determine whether schedule approval is required by the owner or its agent.
27. Determine whether there is a specific requirement that the schedule be used to implement or execute the work.
28. Determine whether supplementary schedules are permitted at the contractor's option;
29. Determine whether subcontractors are required to receive the schedule and schedule updates.
30. Determine whether there are any other requirements for coordination of the project such as weekly job meetings.
31. Determine whether the contract requires the contractor to have anyone on his staff with an expertise in use of CPM scheduling or whether the contractor can rely on an outside consultant.
32. Determine what exculpatory language, if any, the prime contract contains.
33. Determine when time extensions are given and for what reasons.
34. Determine who gets the benefit of float time.
35. Determine whether the contract makes allowances for holidays, possible strikes, inclement weather, etc.
36. As to subcontractors:
    36.1. Are subcontractors required to provide input for creating the progress schedule (this may be viewed as an express warranty that the progress schedule will be used by the general contractor)?
    36.2. Is the CPM going to be used by the general contractor to execute the work; if so, can the subcontractor use the approved CPM schedule or should the subcontractor be expressly required to follow whatever schedule is issued by the general contractor?
    36.3. Does the contract provide that the general contractor does not guarantee or warrant the duration time for the various items of work, or their start and finish dates as set forth in the schedule? The general contractor might consider sending the following letter to subcontractors or to the owner when the CPM schedule is forwarded to them pursuant to the contract requirement:

"Enclosed please find our proposed CPM Schedule for the project. Except for contractual completion requirements, the duration times for the various items of work shown on the enclosed CPM schedule are not commitments. They are estimates based on presently known or represented conditions and any changes therein will require a change in the schedule. Please note specifically any items of work which are paced by or dependent upon actions by the owner or those under his control, since we are relying on being able to commence and proceed with those activities on the dates shown and any delays of that nature would affect our schedule."

"We will assume that this schedule is acceptable to you and in conformance without contract requirements unless we hear from you to the contrary within the next __ days."

JOB COMPLETION

37. Project close-out is a critical time for keeping documentation and keeping track of contract and legal rights. While many people allow demands of project close-out to supersede proper documentation and the need to keep track of critical time periods, many claims are lost or severely diminished as a result of inadequate record and claim control during project close-out. With this in mind, we suggest the following:
    - 37.1. Retain copies of all inspection reports, punch lists, observation reports, etc.;
    - 37.2. Record dates when areas or items of work are completed;
    - 37.3. Record dates when all punch list items are completed;
    - 37.4. Record the date on which the project is completed to the point that it can be used for the purpose for which it is intended - *i.e.*, "substantial completion";
    - 37.5. Since project close out is a time when many change orders are finalized, be careful that any waiver language in such change orders accurately reflects the claim that you intend to waive. Also, be sure that any such change orders compensate you with additional time required by the change order as well as with money;
    - 37.6. Know the statutory requirements for filing mechanic's liens or for making a claim against a payment bond surety (including any preliminary notice requirements); and
    - 37.7. Timely file mechanic's liens and send notices to the proper parties.

This material is provided as a general reference only. Due to the changing nature of laws, you should consult with an attorney for specific requirements.