



## How To Fix a Broken Project: Habits and Practices of a Superstar Project Manager

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## Presentation Overview

- Traits of a superstar project manager
- Key contract provisions
- Preconstruction strategies
- Methods for project monitoring
- Managing supply chain challenges
- Claims and notice: what, when and how



## About Cohen Seglias

One of the premier construction law firms in the country

- Our attorneys and construction practice groups are frequently recognized nationally and regionally.
- We represent over 1,300 construction and construction-related companies across the country.
- We have more than 80 attorneys across nine offices in Pennsylvania, New York, New Jersey, Delaware, Kentucky, Florida and Washington, DC.





## Traits of a Superstar Project Manager

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## Traits of a Superstar Project Manager

- Thinks like the company's owner (e.g., increase revenue, reduce costs, increase profit)
- Strong leader – inspires and guides the construction team
- Clear and effective communicator – verbal and written, both internally and externally
- Detail-oriented – efficient planning, budgeting and implementation
- Risk manager – identifies potential risks, remains calm under pressure and proactively mitigates
- Adaptable – navigates challenges (expected and unexpected) and implements creative strategies
- Strategic and forward thinking – always considering ways to improve processes





## Key Contract Provisions

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## 10 Key Contract Provisions To Recognize

1. Flow-down provisions
2. Waivers and releases of liens/claims
3. Payment
4. Notice provisions
5. Change provisions
6. No-damages-for-delay
7. Liquidated damages
8. Termination
9. Indemnification
10. Claim/dispute resolution






# 1. Flow Down Provisions

- Your subcontract **DOES NOT** contain all of the terms of your agreement
- Intended to fill gaps between form subcontract and specific terms on this project
- Limited ability to change terms:
 

“The PRIME CONTRACT between Contractor and Owner is attached and made part of this Subcontract. Contractor and the Subcontractor agree that the PRIME CONTRACT is a part of this Subcontract to the extent that its terms affect the services to be provided by the Subcontractor. In the event of a conflict between the terms of this Subcontract and the PRIME CONTRACT, the stricter terms shall control.”
- In event of a conflict between subcontract and prime contract, which terms govern?



# 1. Flow Down Provisions

Provisions to look out for within prime contract:

- Responsibility for concealed/unknown conditions
- Design review/modifications
 

§ 3.2.2.2 The layout of mechanical and electrical systems, equipment, fixtures, piping, ductwork, conduit, specialty items, and accessories indicated on the Drawings is diagrammatic, and all variations in alignment, elevation, and detail required to avoid interferences and satisfy architectural and structural limitations are not necessarily shown. Actual layout of the Work shall be carried out without affecting the architectural and structural integrity and limitations of the Work and shall be performed in such sequence and manner as to avoid conflicts, provide clear access to all control points, including valves, strainers, control devices, and specialty items of every nature related to such systems and equipment, obtain maximum headroom, and provide adequate clearances as required for operation and maintenance.
- Notice provisions (timing of claims, notices of delay/impacts)
- Payment terms (timing, pre-conditions)
- Waivers of liens/claims
- Liquidated damages



# 2. Partial/Final Releases

- Usually required to be submitted monthly with each payment application
- Partial and final lien waivers are permitted to the extent that payment is received for the work completed
- Form should be attached as part of a contract document
- Read them carefully and keep your accounting department in the loop if there are potential claims
- Once executed, can serve as a complete waiver of liens and claims up through the date of execution
- Acceptance of final payment can also serve as a complete release of all claims
- Watch out for waiver/release language on the payment application itself



# The Dreaded Monthly Release

RELEASE

TO: \_\_\_\_\_  
 FROM: \_\_\_\_\_  
 PROJECT: \_\_\_\_\_  
 OWNER: \_\_\_\_\_

1. The undersigned does hereby release all Construction Lien Rights, Mechanics' Liens, Stop Notices, and Equitable Liens resulting from labor and/or materials, contract work, equipment or other work, rents, services or supplies heretofore furnished in and for the construction, design, improvement, alteration, additions to or repair of the above described project.

7. In addition to the foregoing, this instrument shall constitute a **\*\*\*final and complete\*\*\*** (partial) release of **all debts, rights, claims, damages and demands of the undersigned against the Contractor and Owner, in law or in equity, arising out of or pertaining to the above referenced project and whether known or unknown** and whether presently ascertainable or not, which the undersigned and/or its successors and/or assignees ever had, now have, or ever will have, against the foregoing, by reason of delivery of material and/or the performance of work relating to the Project up to and including the date hereof, including, but not limited to, all claims for damages associated with delay, disruption, acceleration, inefficiency or extra work. If partial, all such rights and claims on the project are released up to and including the \_\_\_ day of \_\_\_\_\_, 20\_\_.

SIGNED BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

DATE OF EXECUTION: \_\_\_\_\_

The foregoing release was submitted and given to before me this \_\_\_ day of \_\_\_\_\_, 20\_\_.

My Commission expires \_\_\_\_\_



## The Dreaded Monthly Release

- **What do you do if you have been delayed or impacted?**
  - Include a statement on the partial waiver/release form that states you do not waive, and specifically reserve, all claims for additional compensation and additional time for work performed for *[describe the impact]*.
  - Include as much detail that would be necessary for a third party to understand that you are reserving your rights for money and time with respect to specific work or impact.
  - Also includes pending change order requests!
- What if your customer rejects your additional language?



## The Dreaded Monthly Release

### Best Practice:

- If you need to be paid, then you may elect to sign the waiver without the additional statement, but you **must** transmit it with a contemporaneous letter that states:
  - the customer rejected your change;
  - you need to be paid, so you have signed the waiver unmodified; and
  - you reserve all of your rights to seek compensation for the delay/impact.
- In the letter, you should identify all of the claims for which you are reserving your rights.
- The law is not clear whether this procedure will protect your rights to payment, so consult with your attorney before executing the waiver.



## 3. Payment

### Pay-if-paid:

- Contingent: **If I don't get paid, You don't get paid**
- Takes the risk of an owner's nonpayment and transfers it down to subcontractors

4.1.2 Subcontractor recognizes that payment from the Owner to the Contractor for the Subcontractor's labor and materials is a condition precedent to payment from the Contractor to the Subcontractor. By entering into the Subcontract, Subcontractor agrees to bear the risk of non-payment by the Owner.

- Payment bonds can be similarly conditioned
- Applies to change orders, retainage, etc.
- Invalid in some jurisdictions



## 3. Payment

### Pay-when-paid:

- More of a timing provision than a condition precedent.
- **EXAMPLE:** Progress payments to the subcontractor for satisfactory performance of the subcontract work shall be made no later than seven days after receipt by the contractor of payment from the owner for the subcontract work.
- Requires payment within a "reasonable time"



## 4. Notice

- Notice provisions often apply to **claims, extra work, changed conditions, and delays**
- Be aware of notice provisions that require notice within a short period of time (i.e., 24 hours)
- Be aware of notice provisions that require the full amount and scope of the damages or impact – if do not provide, could result in a waiver of claims
- Know what the prime contract requires to the extent it flows down
- When in doubt, provide written notice



## Sample Notice Provision

**7.1 NOTICE OF CONDITION.** Unless a shorter time limit is required under the EPC Contract, **within forty-eight (48) hours after the commencement of any condition** claimed to be grounds for a Claim, Subcontractor shall give Contractor a written statement of any such condition, **together with the particulars of time and money** claimed and the reason(s) therefore, **and thereafter submit updates of such particulars to Contractor from time to time** not more than thirty (30) days after any further such costs or losses of time are incurred.

**7.3 STRICT COMPLIANCE.** Without limitation, strict compliance with all of the terms of this Section and all other “notice” provisions of or incorporated into this Subcontract **is a condition precedent to the assertion by Subcontractor of Claims or suits of any kind.** The failure of Subcontractor to timely and strictly comply with the requirements of this Section 7 will be conclusively deemed to be a waiver by Subcontractor of, and will relieve Contractor of all responsibility to present or pay for, any such Claim or dispute. Contractor’s acceptance, presentation or prosecution of Subcontractor’s Claim shall not constitute a waiver by Contractor of any previous failure by Subcontractor to strictly comply with this Section 7.



## 5. Change Provisions

### AIA A201-2017 §7.2.1 “Change Orders”

A Change Order is a **written instrument** prepared by the Architect and **signed** by the Owner, Contractor, and Architect, stating their agreement upon all of the following:

1. The **change** in the Work;
2. The amount of the **adjustment**, if any, in the **Contract Sum**; and
3. The extent of the **adjustment**, if any, in the **Contract Time**



## Disputes Regarding Changes/Additional Work

- Is this work within original scope of work?
- Does this additional work require additional time to perform?
- How is the price of the additional work to be determined? (i.e., lump sum, unit price)
- Is the contractor entitled to a markup? How much?
- Does the contractor have to proceed without a change order?



## Change Provision Example

"If Subcontractor becomes aware of any circumstance which Subcontractor believes necessitates a change in the subcontract price, work schedule, or any other provision of the subcontract, Subcontractor shall **within three business days** submit a **written request** to Contractor for an adjustment to the subcontract price, work schedule, or other provision of the subcontract that Subcontractor believes is affected thereby."

"Subcontractor's written request **shall include detailed documentation** sufficient to enable Contractor to determine the factors necessitating the adjustments and to substantiate the adjustments being requested. Such documentation **shall include a detailed cost breakdown** including man-hours by craft or discipline, quantities of material, and any other applicable costs."



## Change Provision Example

"For any **work schedule impact**, Subcontractor **shall provide the impact to specific schedule activities**, and Subcontractor **shall prepare an analysis** identifying the extent of the **delay to the critical path**."

"If Subcontractor fails to provide such written request to Contractor **within such three business day period**, Subcontractor **shall be deemed to have waived any claim** for an adjustment of the applicable subcontract price work schedule or other provision of the subcontract."



## Change Orders Best Practices

- Immediately notify your customer in writing of changed conditions.
- Send a change order request to the customer.
- Wait for a signed change order.
- Most contracts will expressly state that the contractor is not entitled to compensation for changed conditions **without** an executed change order.



## Authorization of changed work

- Who must authorize?

10. **Changes in the Work.** [REDACTED], without invalidating the Subcontract, and without notice to any surety, may order extra work or make changes by altering, adding to or deducting from the Work or accelerating the Work ("Change Order Work"). All Change Order Work shall be executed under the terms and conditions of the Subcontract. Subcontractor shall not proceed with any Change Order Work except upon execution by [REDACTED] of a written Change Order.

Any Change Order Work, or any other work which Subcontractor claims is beyond the original scope of the Work of the Subcontract, performed by Subcontractor without a written Change Order shall be considered as having been performed as part of the original scope of the Work of the Subcontract, without additional charge to [REDACTED] or the Owner.

- Is a written directive to proceed with extra work enough?
- What if directive is oral?



# Change Orders

Before signing change order, you should ask the following questions:

- Does change order **cover all costs** to perform extra work?
- Does change order **provide an extension of time** to perform extra work?
- Does change order **account for any delay, impact or extended general condition costs**?



# Change Directives

If directed to perform additional work without an agreement on price or time, use a construction change directive

- 9.3 Change Directive.
- (a) In the event [redacted] requires Subcontractor to proceed with a Change prior to the Parties agreeing upon the related adjustments to the Subcontract Price or Subcontract Schedule, [redacted] may issue a Change Directive. Upon receipt of a Change Directive, Subcontractor shall proceed promptly with performance of the Change.
  - (b) The adjustment to the Subcontract Price for a Change pursuant to a Change Directive shall be determined: (i) where unit pricing for the same or similar work or service subject to the Change is set out in Schedule G and or H, then in accordance with the unit pricing set out in Schedule G and or H; (ii) where no unit pricing for the same or similar work or service subject to the Change is set out in Schedule G and or H, then on the basis of the cost of Subcontractor's actual expenditures and savings attributable to the Change Directive. For documented costs outside Scheduled of Values (Schedule H) 10% will be added.
  - (c) Subcontractor shall keep full and detailed accounts and records necessary for the documentation of the cost of performing the Change attributable to the Change Directive, including signed timesheets and materials and equipment invoices and shall provide [redacted] with copies thereof when requested. Subcontractor shall provide [redacted] with reasonable access to all of Subcontractor's pertinent documents related to the cost of performing a Change pursuant to a Change Directive, and for this purpose Subcontractor shall preserve such records for a period of one year from the date of Substantial Performance of the Work or as otherwise required in this Subcontract.
  - (d) If the Parties do not agree on the proposed adjustment to the Subcontract Price and the Subcontract Schedule attributable to the Change Directive, or the method of determining it, the disagreement shall be referred to dispute resolution as included in Article 16.1.



# 6. No Damage for Delay Provision

- What does this mean?
- How enforceable is this provision?

If the Subcontractor shall be delayed in the commencement, prosecution or completion of the work or shall be obstructed or hindered in the orderly progress of the work by any act, neglect or default of the Contractor, the Owner, the Architect, another contractor or subcontractor or by any cause beyond the control of the Subcontractor, then the time fixed for completion of the work shall be extended for a period equivalent to the period of the delay incurred by the Subcontractor as determined by the Contractor; but no extension shall be granted unless a claim in writing therefor is presented to the Contractor within seventy two (72) hours of the start of such delay, obstruction, or hindrance. The Subcontractor expressly agrees not to make, and hereby waives, any claim for damages on account of any delay, obstruction or hindrance for any cause whatsoever, including but not limited to the aforesaid cause, and agrees that its sole right and remedy in the case of any delay, obstruction or hindrance shall be an extension of the time fixed for completion of work unless and to the extent that the Contractor recovers the same from the Owner.



# 7. Liquidated Damages

- Intended to be a reasonable approximation of actual damages
- Unenforceable if determined to be a penalty
- Cannot recover both actual damages and liquidated damages
- Pass-through of liquidated damages
  - Applied on pro-rata basis
  - Who determines which subcontractors are responsible for delays?



## 8. Default/Termination

### Termination For Cause

- Default – written notice required?
- Opportunity to cure or commence to cure?
- Who determined what constitutes default?

### Termination for Convenience

- Termination for any reason
- AIA contract provides for profit and overhead on work not performed



## 9. Indemnity Provisions

- What is indemnity?
- Are you responsible for the negligence of others?
  - “. . . but only **to the extent** . . . ”
- Does it really matter? Don't we have insurance for this?
  - Provisions allowing payment to be withheld
  - Property damage and personal injury
  - Expansion of indemnification to economic loss



## 10. Dispute Provisions

- Litigation or arbitration?
- Mediation or senior-level meeting first?

**14.1 INITIAL DISPUTE RESOLUTION.** The Contractor and Subcontractor shall first attempt, in good faith, to resolve any and all disputes that arise out of or relate to this Subcontract or the breach thereof by informal discussion, after written notification from the complaining party of the claimed dispute.

- Who gets to choose the forum?

\_\_\_\_\_ If the dispute cannot be resolved by informal discussion, and either party wishes to have it decided, then the dispute shall be decided by a \_\_\_\_\_ state or federal court of competent jurisdiction unless the Contractor elects, in its sole discretion, to have the dispute decided by arbitration.



## 10. Dispute Provisions

- Governing law and venue of dispute
  - Disputes can be resolved in states other than where the project is located
  - Disputes can be resolved using laws from other jurisdictions
  - Some states require the law of project to govern








# Preconstruction Strategies

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## Preconstruction Meeting

The preconstruction turnover/hand-off meeting—understand its importance and use a good checklist!







### Be Diligent: Preconstruction Project Manager Checklist

**Bid/Proposal**


1. Have I saved our bid estimate? Yes  No
2. Have I broken down our labor, material, subcontractor and profit margins out of the estimate? Yes  No
3. Have I created a manpower loading chart showing how we plan to allocate our manpower? Yes  No
4. Did any exceptions in our proposal get incorporated into the contract? Yes  No
5. Did we increase our profit margin by making savings on “buys”? Yes  No 
  - a. If yes, where and how much? \_\_\_\_\_

### Be Diligent: Preconstruction Project Manager Checklist

**Dates/Schedule**

6. What is the notice to proceed date? \_\_\_\_\_
7. What is the substantial completion date? \_\_\_\_\_
8. What is the project duration? \_\_\_\_\_
9. What are the milestone dates in the contract/schedule? \_\_\_\_\_





## Be Diligent: Preconstruction Project Manager Checklist

### Dates/Schedule

10. Is there a schedule listed as a contract document? Yes  No
- a. If yes, is it attached to the contract? Yes  No
- b. If no, have I requested, in writing, a copy of the schedule? Yes  No
11. Prior to signing the contract, did I confirm whether the project is ahead or behind schedule? Yes  No
- a. If yes, did I qualify my signature by reserving the right to seek costs for delay and acceleration? Yes  No



## Be Diligent: Preconstruction Project Manager Checklist

### For subcontractors:

12. Did I request that the CM/GC provide electronic updates of any schedules? Yes  No
13. Did I request and receive a copy of the Prime Contract with the owner? Yes  No
14. Did I request and receive a copy of any performance and/or payment bond that the GC/CM posted on the project? Yes  No
15. Does the CM/GC have a Subguard program on the project? Yes  No
16. Is there a pay-if-paid clause in our subcontract? Yes  No



## Be Diligent: Preconstruction Project Manager Checklist

### Payment

17. When do I need to submit my payment application? \_\_\_\_\_
18. When is payment due? \_\_\_\_\_
18. What is the retainage percentage? \_\_\_\_\_
- a. Does the retainage percentage decrease during the Project? Yes  No
- b. If yes, when and to how much? \_\_\_\_\_
20. Do I need to sign a waiver or release with every payment application? Yes  No



## Be Diligent: Preconstruction Project Manager Checklist

### Notice

21. To whom do I need to send notice of claims/issues? \_\_\_\_\_
22. How is notice to be sent? (e.g., email, certified mail) \_\_\_\_\_
23. How quickly do I need to give notice? \_\_\_\_\_
- a. Changed condition/additional scope? \_\_\_\_\_
- b. Delay/labor impact? \_\_\_\_\_
24. What information do I need to include with my notice? (i.e., time impact analysis, quantification of costs) \_\_\_\_\_
25. Is there a no-damages-for-delay provision or other limitation on the costs that I can recover if impacted? Yes  No





## Be Diligent: Preconstruction Project Manager Checklist

### Notice

26. Am I entitled to notice and opportunity to cure in the event of a default? Yes \_\_\_\_\_ No \_\_\_\_\_
- a. If yes, how much time do I have to cure? \_\_\_\_\_



## Be Diligent: Preconstruction Project Manager Checklist

### Dispute Resolution

27. If I have a claim, to whom do I submit and when? \_\_\_\_\_
28. Is mediation a necessary step? Yes \_\_\_\_\_ No \_\_\_\_\_
28. Is the dispute to be decided by arbitration or litigation? \_\_\_\_\_
29. If arbitration:
- a. Is it governed by AAA or can the parties privately arbitrate? \_\_\_\_\_
- b. Where must the arbitration be held? \_\_\_\_\_



## Be Diligent: Preconstruction Project Manager Checklist

### Dispute Resolution

29. If litigation:
- a. State or federal court and in which state? \_\_\_\_\_
- b. Do I have a right to a jury? Yes \_\_\_\_\_ No \_\_\_\_\_
31. Is the prevailing party entitled to recover interest, costs and attorneys' fees? Yes \_\_\_\_\_ No \_\_\_\_\_
32. Do I have the right to file a mechanics' lien? Yes \_\_\_\_\_ No \_\_\_\_\_



**Monitoring the Project**

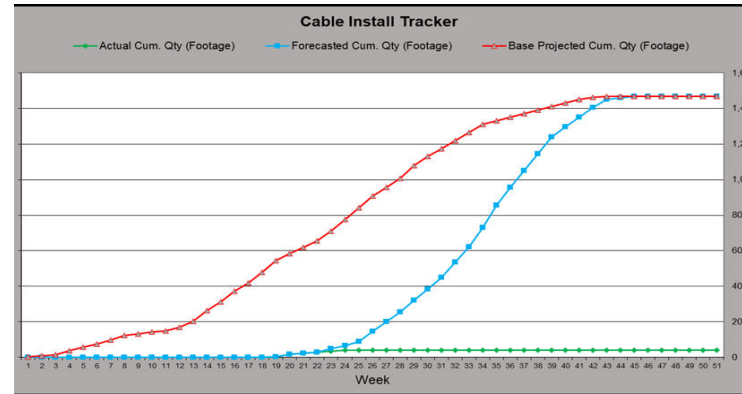
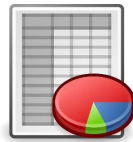
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# Track Performance Monthly

## Compare to bid/estimate

- Cost
- Materials
- Manpower



# Monthly Evaluations

- At least monthly, the project team needs to discuss and analyze project progress
- If the job is behind schedule, why?
  - Because of something we did → correct it
  - Because of reasons unrelated to our work?
    - Have we put the GC/CM on notice?
    - Have we written the right letters?
    - Have we taken pictures and videos?



# Monthly Project Manager Checklist

1. Are we receiving monthly schedule updates from the CM/GC/Owner? Yes  No
2. If not, have we requested (in writing) monthly schedule updates (in native .XER format)? Yes  No
3. Is the overall project ahead or behind in comparison with the contract or baseline schedule? Yes  No 
  - a. Why? \_\_\_\_\_
4. Are our durations for activities being compressed by the CM/GC/Owner? Yes  No 
  - a. If so, which activities? \_\_\_\_\_





## Monthly Project Manager Checklist

- 5. Are we experiencing stacking of trades from other contractors being in the same areas as us? Yes  No 
  - a. If so, which trades and where? \_\_\_\_\_
- 6. Are there incomplete predecessor tasks that are impacting our ability to perform our work? Yes  No 
  - a. If so, which trades and where? \_\_\_\_\_
- 7. Are trades working out of sequence and impacting us? Yes  No 
  - a. If so, which trades and where? \_\_\_\_\_
- 8. Are we being accelerated by the CM/GC/owner? Yes  No 
  - a. If so, is it directed acceleration or constructive acceleration? \_\_\_\_\_



## Monthly Project Manager Checklist

- 9. If we are being delayed, impacted or forced to work inefficiently, have we:
  - a. put the CM/GC/Owner on notice **in writing**? Yes  No
  - b. qualified our monthly partial releases of liens? Yes  No
  - c. qualified our change order forms? Yes  No
  - d. raised the issue at job meetings? Appear in minutes? Yes  No
  - e. asked for an extension of time **in writing**? Yes  No



## Monthly Project Manager Checklist

- 10. If we have been directed to perform work outside of our scope, have we:
  - a. put the CM/GC/Owner on notice **in writing**? Yes  No
  - b. tracked the labor and materials expected on the additional work? Yes  No
  - c. submitted T&M tickets? Yes  No
  - d. Set up a separate cost code? Yes  No




# Managing Supply Chain Challenges

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## Supply Chain Challenges

- Supply-chain challenges are real!
- Risks include:
  - Delay/acceleration damages
  - Indemnity
  - Termination
- Significant challenges to contracting around the challenges



## Real Examples

- j. Supply chain dictates the availability of the electrical equipment, which conflicts with the schedule requirements. Anticipated lead time of electrical equipment/gear is noted below. Costs associated with these lead times have been incorporated into the Agreement Price:
  - i. Metal Clad PECO Incoming Switchgear
    - 1. 10-12 weeks for factory submittals
    - 2. 60-65 weeks for manufacturing after clean release of factory drawings
  - ii. Low Voltage Substation – (field drawings and onboard engineering required)
    - 1. Medium Voltage Transformers
    - 2. 4-6 weeks for factory drawings
    - 3. 28 weeks for manufacturing after clean release of shop drawings



## Real Examples

- iii. Medium Voltage Switch
  - 1. 1-2 weeks for field drawings
  - 2. 60-65 weeks for manufacturing after clean release of shop drawings
- iv. Low Voltage Switchboards
  - 1. 1-2 weeks for field drawings
  - 2. 80-85 weeks for manufacturing after clean release of shop drawings
- v. Free Standing Switchboards
  - 1. 1-2 weeks for field drawings
  - 2. 50-55 weeks for manufacturing after clean release of shop drawings



## Real Examples

- vi. Busway & Switches
  - 1. 4-6 weeks for shop drawings
  - 2. 15-20 weeks for manufacturing after clean release of shop drawings
- vii. Generator
  - 1. 85 weeks for shop drawings, approval, manufacturing after clean release of shop drawings
- viii. UPS
  - 1. 55 weeks for drawings, approval, manufacturing after clean release of shop drawings





## Contract Provisions at Issue

- Liquidated Damages
- Warranty/Guarantees of Performance
- Force Majeure
- Suspension of Services
- Material Escalation Clause
- Contingency Funds
- Venue and Choice of Law
- **NOTE:** If the “cause” of the problem is “owner-caused delay,” you may be able to obtain payment as well as a time extension.



## Keys To Managing Supply Chain Issues During Construction

1. Communication, communication, and communication: early, often and in writing
2. Approach customer immediately and seek “fair” resolution
3. Examine and exercise contract remedies



## Claims, Impacts, and Notice

## Claims, Impacts, and Notice

- Unfortunately, it is the rare construction project that does not involve issues that ultimately lead to a claim, whether it be for more money, a time extension or both.
- Recovery is dependent on the contractor being able to **substantiate and support the claim**.
- In order to substantiate and support a claim:
  - Create, locate and maintain all pertinent documents, records, correspondence, photos, *etc.*



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## Claims, Impacts a Notice

- Claims are often important not only to **recover money**, but also to **negotiate offsets and defend** against claims asserted by another party.
- When deciding whether or not to pursue a claim:
  1. The decision should be made by senior management **and**
  2. Look to economic and/or political reasons
- Recognize potential claims early in order to take necessary steps to preserve and support them.



## What Is a Claim?

**Look to your contract!**

§ 4.3.1: A claim is a demand or assertion by one of the parties seeking, as a matter of right, an adjustment or interpretation of contract terms, payment of money, extension of time or other relief with respect to the terms of the contract.



## What Is a Claim?

**What does your contract require?**

§ 4.3.3 **Time Limits on Claims.** Claims by either party must be **made within 21 days after occurrence** of the event giving rise to such claim or within 21 days after the claimant first recognizes the condition giving rise to the claim, whichever is later. Claims must be made by **written notice**. An **additional claim** made after the initial claim has been implemented by change order will not be considered unless submitted in a timely manner.



## What Is a Claim?

**§8.3 Delays and Extensions of Time**

§ 8.3.1 If the contractor is **delayed** at any time in the commencement or progress of the work by an act or neglect of the owner or architect, or of an employee of either, or of a separate contractor employed by the owner, or by changes ordered in the work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the contractor's control, or by delay authorized by the owner pending mediation and arbitration, or by other causes which the architect determines may justify delay, then **the contract time shall be extended** by change order for such reasonable time as the architect may determine, **provided contractor gives written notice within 21 days of the first occurrence of any delay.**





## What Is a Claim?

§4.3.7.2 If adverse **weather conditions** are the basis for a claim for additional time, such claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction.

**Take Away:** Check contract for requirements for each type of claim, because they differ.



## Claims Involving Delays

**Q: What is a “DELAY”?**

**A:** A delay is an event that causes an **increased time of performance** and, consequently, **causes the completion** of the contract to be **accomplished later than planned**.



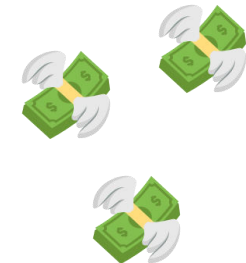
## Causes of Delays

- Failure to provide access or limited access only
- Unforeseen subsurface condition
- Impossible to perform work
- Design changes
- Failure to have shop drawings and samples prepared and approved in a timely manner
- Failure to have material and equipment delivered in a timely manner
- Acts of God – flood, storm, etc.
- Weather
- Strikes and labor disputes
- Low productivity
- Cash flow restrictions
- Lack of project coordination
- Labor mobilization
- Delayed by another contractor on the project



## Costs Associated With Delays

- Extended job supervision and field overhead
- Extended equipment costs
- Wage escalation
- Inefficiency
- Finance costs
- Reduced job opportunities
- Profits



## Delay Claims

### Nonexcusable Delay

- Fault lies with you and no compensation will follow.

### Excusable but Noncompensable Delay

- No one is at fault. You get more time, but no money.

### Excusable and Compensable Delay

- Fault lies with the other party. You get time and money if you can prove it.



## Questions About Delays

- How do you provide notice of delay?
- Should your notice identify specific areas of work impacted by delay?
- Should your notice identify the manner in which you are being damaged by delay?
- How do you quantify days of delay?



## Claims Involving Acceleration

### Q: What is an “acceleration”?

A: An acceleration is a **compression of time to perform work**.



## Causes of Acceleration

- Decision by contractor
- Directive by owner to finish all or part of the project early
- Delay or stop by owner with no extension to finish date
- Failure by owner to grant valid time extension
- Directive by owner to man project at certain levels
- Cumulative changes to the contract without additional time



## Types of Acceleration

### Directed

- When confirmed by written change order

### Constructive, implied when:

1. Excusable delays are incurred
2. **Contractor specifically requests time extension**
3. Owner fails to grant time extension
4. Owner expressly orders completion within original performance time
5. Contractor gives notice to owner that its actions constitute constructive acceleration



## Always Ask for Time!

### FINAL AWARD OF ARBITRATORS

a result of any of the foregoing.” In this case, the Owner refused to allow extensions of time to the schedule, and [REDACTED] repeatedly advised [REDACTED] that no extensions of time would be granted. While [REDACTED] refused to provide any extension of time or other schedule relief to [REDACTED], [REDACTED] directed [REDACTED] to hire more people, work overtime and additional shifts, and do what else was necessary to accelerate its work to meet the schedule deadlines imposed by [REDACTED]. The actions of [REDACTED] directly caused [REDACTED] to accelerate its work to meet [REDACTED] schedule deadlines. **Having breached its obligation to compensate Subcontractor with time extension in accordance with Article 13.1, [REDACTED] is liable for the damages caused by that breach of the Subcontract.**



## Costs of Acceleration

- Overtime
- Inefficiencies of overall operations
- Costs of expedited vendor/material delivery
- Additional supervision and overhead
- Additional equipment rental costs



## Effective Notice

- Write clearly and professionally – no slang/profanities
- Make your company look good!
- Give notice via:
  - Daily Reports
  - Correspondence – letters and emails (no texts)
  - Meeting minutes



## Daily Reports

- Critical to establish what actually took place on the job:
  - Note where crews are working and crew sizes
  - Document materials delivered
  - Note important conversations
  - Document weather

**BUT ALSO...**



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## Daily Reports

- Note actual and possible delays and problems by each trade
- Note deviations from schedule, why and who
- Note discrepancies in plans
- Describe out-of-sequence work by each trade
- Make copies/separately save!



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## Correspondence

- Be an advocate—support your position
- Notice letters don't need to be adversarial to be effective (consider email)
- Objective is to put other side on notice – make them aware of the problem and give them the opportunity to address
- Answer every letter in writing and defend your position with facts (do not let inaccurate information remain unchallenged, it may come back to haunt you!)
- Keep signed copies and confirmations of receipt
- Date stamp all incoming documents



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## Meeting Minutes

- Review immediately for accuracy
- Supplement any minutes **IMMEDIATELY** that do not accurately reflect information exchanged during the meeting
- Be diligent!



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## Notice: Lessons Learned

- Create a working, cumulative document that you share regularly with the CM/GC (in good times and bad)
- If you do something from the beginning of the project, it is likely perceived as a normal, company practice
- Just because you sent a notice letter, are you done? **Probably not! Check your contract!**
  - Follow through with costs, backup, updates, *etc.*
  - What does contract say next about claims, disputes, *etc.*?
  - “Your form of subcontract requires me to \_\_\_\_\_.”



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## Complete the Online Evaluation

