



## Everything You Wanted to Know About Construction Claims...But Were Afraid to Ask


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For these hours to appear on your certificate, you must:

- Have your badge scanned at the door
- Attend 90% of this presentation
- Fill out the online evaluation for this session



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## Meet the Presenters



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 Partner  
 Cohen Seglias



**Tony Byler**  
 Partner  
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**Daniel E. Fierstein**  
 Partner  
 Cohen Seglias



**William Haydt**  
 Managing Principal  
 Trauner Consulting Services, Inc.

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## 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 have more than 80 attorneys across nine offices in Pennsylvania, New York, New Jersey, Delaware, Kentucky, Florida and Washington, DC.
- We represent over 1,300 construction and construction-related companies across the country.





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## About Trauner Consulting

One of the most respected construction consulting firms in the industry

- We have been using independent and objective approaches to analyze critical path method (CPM) schedules and construction claims on complex projects for over 35 years.
- We wrote the book on Construction Delays...literally.
- We're the experts' experts, developing industry best practices and using industry-recognized and court-tested methods for delay, disruption, inefficiency, acceleration, termination, differing site conditions, and many other topics.

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## Presentation Overview

- Key Stages of the Construction Claims Process
- Notice Provisions and Types of Notice
- Types of Claims
- Dispute Resolution Procedures
- Working with Construction Counsel and Experts
- Practical Takeaways

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## Key Stages of the Construction Claims Process

## Construction Claims Process

1. **Identify the claim** and **notify** your customer in writing
2. Collaborate with **construction counsel** and **experts** to develop and prepare your claim
3. Follow the **preliminary steps** of the contract's **claim and dispute procedure**
4. Present and negotiate your claim at **mediation**
5. Prosecute your claim at binding **arbitration** or in **litigation**

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## How Mediators / Arbitrators Analyze Claims

- Contemporaneous documentation
- Contractual compliance and sincere efforts to comply
- Likable, trustworthy, sympathetic people
  - Company overall
  - Witnesses
  - Counsel
  - Experts
- Demonstrate that equity favors you
- Thorough and rigorous analysis with terse and persuasive presentation

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## Claims and Notice



## Warning Signs of a Potential Claim

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.

- Late processing of payment
- Late approval of change orders
- Frequent design changes
- Slow submittal review / RFI responses
- Lack of regular, coordinated schedule updates
- Lookahead schedules only
- Resequencing of work
- Trade stacking
- Direction to work overtime (at your own cost!)
- Predecessor delays or defaults, but no extension of completion date

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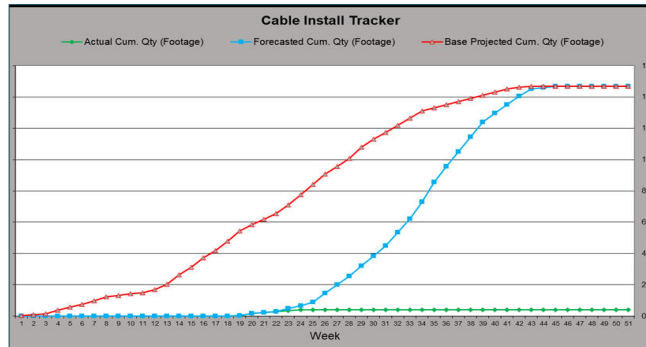
## Claim Preparation

- Maintain good **documentation** practices throughout the project
- Know your baseline **schedule**, planned durations, planned sequencing, and planned crew size(s)
- Maintain / document a plan that shows **your critical path** of work
- Communicate in **writing** to your customer when your plan is changed

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## Critical to Track Planned and Actual Progress of Work



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## Claim Preparation

- Recovery is dependent on the contractor being able to **substantiate and support the claim**: best claims can result in no recovery if not properly documented!
- Create, locate and maintain all pertinent documents
  - Contracts and estimate / bid
  - Project records (RFIs, COs, meeting minutes, dailies, photos)
  - Job cost and labor reports
  - Correspondence and emails
  - Schedules (request updates be issued in native format, not just PDFs)
  - “Issue folders” – all pertinent documents related to significant issues

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## Claims and Notice

- Critical to understand the **types of claims** that are recoverable as well as the **notice** that is required for each type of claim!

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## 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.

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## Types of Claims

- Breach of Contract Claims
  - Additional scope / extra work
  - Delay / extended performance
  - Acceleration / inefficiencies
  - Payment dispute
- Prompt Pay Act Claim
- Payment / Performance Bond Claim
- Mechanic's Lien Claim

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## Claims Regarding Changes / Additional Work

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

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## 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**.

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## Causes of Delays

- Failure to provide access or limited access only
- Unforeseen subsurface condition
- Impossible to perform work
- Design changes
- Failure to have submittals 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

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## Costs Associated With Delays

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



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## Claims Involving Acceleration

**Q:** What is “acceleration”?

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

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## Causes of Acceleration

- Decision by owner or 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 or contractor to grant valid time extension
- Directive by owner or contractor to man project at certain levels
- Cumulative changes to the contract without additional time

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## Types of Acceleration

### Directed

- When confirmed by written change order or other written directive

### 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

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## Costs of Acceleration

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



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## What is Notice?

### A Noun... (a notice)

- **Black's Law Dictionary:**
  - "A legal notification or warning that is delivered in a written format or through a formal announcement."

### A Verb... (to notice)

- **Cambridge Dictionary:**
  - "To see or become conscious of something or someone."

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## Where Do We See Contractual Notice Provisions?

- EVERYWHERE!
- The AIA A201-2017 has **68 discrete references** to "notice," not including "notify," "alert," "identify," "inform," etc.
- Check the notice provisions in the prime contract if there are **flow-downs**.
  - The flow downs can trump, supplement, or conflict with your contract's notice provisions.

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## What is the Purpose of Notice?

- Provide an upstream opportunity to cure
- Mitigate damages
- Document impacts
- Preserve / reserve claims
- Make a record
- Demonstrate knowledge on the part of the recipient

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## Notice: Ways to Fail

- Timeliness
- Completeness
  - Ongoing claim
  - Unquantifiable claim
- Service of notice
- Risk of complete bar / waiver

**When in doubt, provide written notice!**

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## Different Legal Standards

**Standards for failure to comply with notice requirements vary by jurisdiction.**

### Strict Compliance

- Failure to strictly comply is a complete bar with no exceptions.

### Prejudice

- Failure to strictly comply is a complete bar only if recipient can demonstrate prejudice as a result of the non-compliance.

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## Notice of a Claim / Changed Conditions

1. 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 subcontractor believes is affected thereby.

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## Notice of a Claim / Changed Conditions

2. 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 **manhours** by craft or discipline, quantities of **material**, and any **other applicable costs**.

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## Notice of a Claim / Changed Conditions

3. 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.

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## Where Else Do We Find Notice Provisions?

- Mechanics Lien Statutes
- Payment / Performance Bonds
- Prompt Payment Statutes
- Other Statutes

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## Strictly and Timely Comply if You Can

- Provide the notice within the required time
- Provide all of the information requested
- Provide the notice to all of the right people
- Provide the notice in the right manner – if you can't comply, then explain why you can't

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## What if....

### You are already late?

- Provide notice anyway!

### You need more time to provide specifics?

- Say so! And then provide specifics when you have them.

### You can't yet quantify the impact?

- Say so! And then provide quantification when you can.

### You are in arbitration vs. court?

- The notice requirements may be viewed less strictly, even if strict compliance is the standard.

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## Correspondence

- Be an advocate—support your position
- Notice letters don't need to be adversarial to be effective (consider email); after all, you are merely following the requirements of your customer's form of contract
- 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 and date stamp all incoming documents

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## Sample Letter Regarding Delay & Acceleration

Mr. John Doe  
Doe Building Corporation  
1234 Main Street  
Anytown, P A 19001

RE: XYZ Electric SAP Project

Dear John:

I am writing to advise that XYZ Electric has been and is being delayed on this project by reason of the acts of Doe Building Corporation and/or its other subcontractors. At present, the job is \_\_\_ weeks behind schedule. Our price to Doe Building Corporation was predicated upon a \_\_\_ week duration. At present, XYZ's work is being accelerated and its durations compressed.

As a consequence, XYZ hereby requests a \_\_\_ calendar day extension of time. If Doe Building Corporation fails or refuses to grant this extension of time, XYZ will have no choice but to consider this refusal to be a constructive acceleration. All additional costs incurred by XYZ to achieve this compressed, accelerated schedule win be maintained on a daily basis and win be submitted to Doe Building Corporation daily for signature. At the conclusion of the project, XYZ will present a Change Order Request or claim for the increased cost caused by this constructive acceleration.

I trust you will give this matter your immediate attention and advise XYZ of Doe Building Corporation's decision on its request for an extension of time.

Very truly yours,

James Smith



## Emails

Joe,  
As we discussed in the 10am meeting today,

- Need dates for scaffold removal and mechanical completion (stg mezz and aux boiler)
- On 7-10-19 Dean [REDACTED] said he was not down with mechanical/scaffold and may be complete by the end of July.
- There was walk down of these areas last week but no notes or dates for resolution were sent out.
- Please provide the dates for these areas.
- [REDACTED] cannot schedule dates without these scaffold removal dates and/or mechanical completion dates. Affect CTO's
  - 00-STL-01
  - 00-STG-01
  - 00-AS-01
  - 00-TGS-01
  - 01-HRH-01
  - 01-CRH-01
  - 01-UP-01
- As of today there are partial delivery of missing GE cables/wire were delivered. There are 17 cables/wire missing and items cannot be completed. Dates cannot be established for completion. Need delivery dates from GE. GE has the list and Andy Smith is aware of the missing GE cables. This was brought up in the CTO meeting and is noted on the schedule.
- [REDACTED] will start sending the exceptions list on 7-17-19.
- [REDACTED] has tracking methods and has been using these tracking methods since this job has started. [REDACTED] knows exactly what is required to finish and what has been completed. These tracking methods are sent daily to [REDACTED]. Please forward on to anyone that needs them.

BR,



## 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
- Remove delay events / hindrances once they have been resolved—accuracy and credibility are important
- Make copies / separately save!

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## Daily Reports

## Project Daily Job Journal

Project Information					
Job Number:	25150083100	Date:	2023-07-11		
Job Description:	Simple Cycle	Project Manager:			
Work Order:	25150083100	Sent By:			
Supervisor:		Location:	KY		
Customer:		Weather:	Sunny		
Mean Temperature:	88F				
Labor Working Hours					
Name	Qty	ST	OT	DT	Comments
Office	12	8.00	2.00	0.00	2-Superintendents, 3- GF's, 2- Field Engineer, 2-QAQC, 1- Field Coordinator, 1- Safety Officer, 1- PM.
Operators	2	8.00	2.00	0.00	
Material Coordinator	1	8.00	2.00	0.00	
Laborer	1	8.00	2.00	0.00	
	9	8.00	2.00	0.00	
	3	8.00	2.00	0.00	
	6	8.00	2.00	0.00	
	6	8.00	2.00	0.00	
	9	8.00	2.00	0.00	
(GF)	7	8.00	2.00	0.00	
	6	8.00	2.00	0.00	
	2	8.00	2.00	0.00	
	6	8.00	2.00	0.00	
	1	8.00	2.00	0.00	
	2	8.00	2.00	0.00	
	6	8.00	2.00	0.00	
Totals:		560.00	140.00	0.00	Hours and counts are estimates, not actuals



## Daily Reports

Hindrance to Job Progress and By Whom:	X# Associated
1.) Hindrance- Continued engineering issues across the whole site are starting to effect work that is already complete.	
2.) Hindrance-Northwest handrail on unit 7 GCB at the top on the breaker is bent towards south. The lighting stantion cant not be installed correctly until the handrail is fixed. The is causing a delay to finish the lighting that needs to be finished for grounding for turnover.	
3.) Hindrance- is having consistent issues with trying to procure hardware from . Continue looking into sourcing elsewhere. This will continue to hinder the project.	
4.) Delay- The Generator Exciter Leads Terminal Box must be re-worked at all three units per . was informed by that wants us to cut our cable tray short and stop it flush to the top of the of the Generator concrete pad, approximately 16-18 inches lower than the Generator Exciter Leads Terminal Box, and free air the all 10 DC 750mcm conductors to the Generator Exciter Leads Terminal Box, and install each conductor in its own 2 inch chase nipple so it will match the install down at . Since we already have the boxes and tray installed so that all 10 DC conductors would be completely enclosed and sealed, we must now procure a 38.5" X 38.75" stainless steel plate for each Generator Exciter Leads Terminal Box, and a 40" X 20" galvanized steel plate for each pull-box. Also 20-2" chase nipples/lock nuts/grounding bushings will be needed for each unit, 10 at the Generator Exciter Leads Terminal Box, and 10 at the pull-box. The original install method was approved by . Hindrance will be removed once work is complete. An X number has been set up to track and charge for the change. **This is now delaying from working on any more MV cables.**	



## Schedules

Install Conduit - CTG 1 PEECLCI Expected delivery 08/24	10	2	06-Jun-18 A	3	14-Aug-18	-36
Install Overhead Crane - CTG	9	3	28-Jul-18 A	2	15-Aug-18	-4
Install Cable Tray - CTG 1 Expected delivery 09/07	10	3	30-Jul-18 A	8	22-Aug-18 95%	0
Install Generator Circuit Breaker - CTG 1	4	1	01-Aug-18 A	3	13-Aug-18	-2
Install Conduit - CTG 1 Generator Access + dug issues.	10	5	02-Aug-18 A	10	17-Aug-18	6
Install Instruments and Tubing - CTG 1 Generator Need Eng. answers	20	19	08-Aug-18 A	3	07-Sep-18	1
00-EL-08 Install Equipment - CT1 MCC's EAC/1AC/2AC	12	12	13-Aug-18	0	28-Aug-18	0
Install Conduit - CTG 1 Turbine	20	20	20-Aug-18	0	17-Sep-18	0
Cable Pulls - CTG 1 Generator	15	15	23-Aug-18	0	13-Sep-18	0
00-EL-08 Install Conduit - CT1 MCC's EAC/1AC/2AC	5	5	29-Aug-18	0	05-Sep-18	0
00-EL-08 Cable Pulls - CT1 MCC's EAC/1AC/2AC	4	4	06-Sep-18	0	11-Sep-18	0
	77	33	06-Jun-18 A	1	27-Sep-18	0

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## Photographs



Jan. 11, 2019 – CT north elevation. Why are there openings in the high roof?

## Log of Impacts

Updated Through: 9/12/2019					
ITEM	DATE OF ISSUE	DESCRIPTION	LOCATION	RESTRAINT	DATE OF CLOSURE
PF 1	4/29/2019	NO WELL	CONDENSER OUTLET TO COOLING TOWER TEMP	CANNOT BE INSTALLED	6/7/2019
PF 2	4/29/2019	NO WELL	CONDENSER OUTLET TO COOLING TOWER TEMP	CANNOT BE INSTALLED	6/7/2019
PF 3	4/29/2019	NO WELL	CW PUMPS DISCHARGE TO CONDENSER TEMP	CANNOT BE INSTALLED	6/13/2019
PF 4	4/29/2019	NO WELL	CW PUMPS DISCHARGE TO CONDENSER TEMP	CANNOT BE INSTALLED	6/13/2019
PF 5	4/29/2019	VALVE NOT INSTALLED	CR LETDOWN WATER BLOCK VALVE SOL	CANNOT BE TUBED	6/4/2019
PF 6	4/29/2019	NEEDS FITTING WELDED	HRSG1 HP STM SUPPLY TO HP DSH PRESSURE	CANNOT BE INSTALLED	5/10/2019
PF 7	4/29/2019	NEEDS FITTING WELDED	HRSG1 HP DSH OUTLET PRESSURE	CANNOT BE INSTALLED	5/10/2019
PF 8	4/29/2019	NEEDS ANUBAR	HRSG1 HP STEAM SUPPLY FLOW RATE	CANNOT BE INSTALLED	5/10/2019
PF 9	4/29/2019	NEEDS ANUBAR	HRSG1 HP STEAM SUPPLY FLOW RATE	CANNOT BE INSTALLED	5/10/2019
PF 10	4/29/2019	POSITION NOT INSTALLED, NO AIR	HRSG 1 HP TURB BYPASS POSITIONER	CANNOT BE TUBED	
PF 11	4/29/2019	SOLENOID NOT INSTALLED, NO AIR	HP DRAIN LEG VALVE SOL	CANNOT BE TUBED	7/27/2019
PF 12	4/29/2019	PIPING NOT COMPLETE	HP INNER INLET DRAIN 1 TO CONDENSER	CANNOT BE INSTALLED	
PF 13	4/29/2019	PIPING NOT COMPLETE	HP INNER INLET DRAIN 1 TO CONDENSER	CANNOT BE INSTALLED	
PF 14	4/29/2019	PIPING NOT COMPLETE	HP INNER INLET DRAIN 1 TO CONDENSER	CANNOT BE INSTALLED	
PF 15	4/29/2019	PIPING NOT COMPLETE	HP TURB SV1 PRESS	CANNOT BE INSTALLED	
PF 16	4/29/2019	PIPING NOT COMPLETE	HP TURB SV2 PRESS	CANNOT BE INSTALLED	
PF 17	4/29/2019	PIPING NOT COMPLETE	HP TURB SV1 TO CV1 PRESS	CANNOT BE INSTALLED	
PF 18	4/29/2019	PIPING NOT COMPLETE	HP TURB SV2 TO CV2 PRESS	CANNOT BE INSTALLED	
PF 19	4/29/2019	PIPING NOT COMPLETE	HP TURB STEAM TEMP	CANNOT BE INSTALLED	

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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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## Preliminary Contract Claims and Disputes Procedures

## Preliminary Claim Stages

- What does the contract say?
- Initial decision maker
  - Often the design professional
- Good faith negotiation meetings
 

**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. If the

  - Single meeting vs. Multiple meetings: Field Representatives → Project Executives → Ownership
- Should you involve counsel / expert? When?

# Construction Counsel and Experts



## Construction Counsel & Experts

- Why engage?
- When engage?
- Who to engage?
  - Construction counsel vs. general practitioner
  - Large firm vs. construction boutique firm
  - Local firm vs. national firm
  - Specialty focus (e.g., typically represent owners, GCs, trades, design team)



## Experts

### Why engage?

- Only “independent” and non-advocate person “on your team”
- Assist in **claim preservation**
  - Pre-claim analysis
- Assist in **claim presentation**
  - Fact presentation
  - Technical explanation and analysis
  - Opinions / conclusions and expert report
- Assist in **rebuttal** of claims asserted against you



## Experts

### What type?

- **Specialty focus / expertise** (may need more than one)
  - Schedule analysis
  - Trade specific (e.g., MEP, design professional)
  - Accounting and damage quantification / analysis
- **Consulting vs. testifying**
  - **Consulting** → retained / consulted in anticipation of litigation but who will not testify at trial
  - **Testifying** → used at trial to present evidence
- Know limits of expertise



## Considerations for Your Expert

### What is the scope for the expert?

- Understand the methods used to perform the analysis
- Ensure that the project facts support the analysis
- Limit the opinions to the area of expertise
- Opinions must be expert-driven
- Expert cannot make legal conclusions

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## Considerations for Your Expert

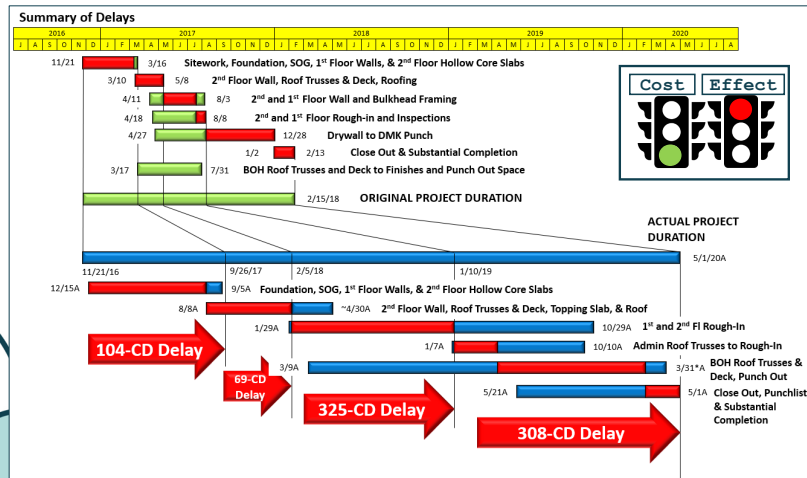
Type of methodology utilized often depends on project documentation as well as budget and timeframe

- Limitations on level of effort
- Mediation v. arbitration / trial
- Milestones / deadlines
- Compilation of data by others
- Expert testimony by others
- Alternative methodologies (examples)

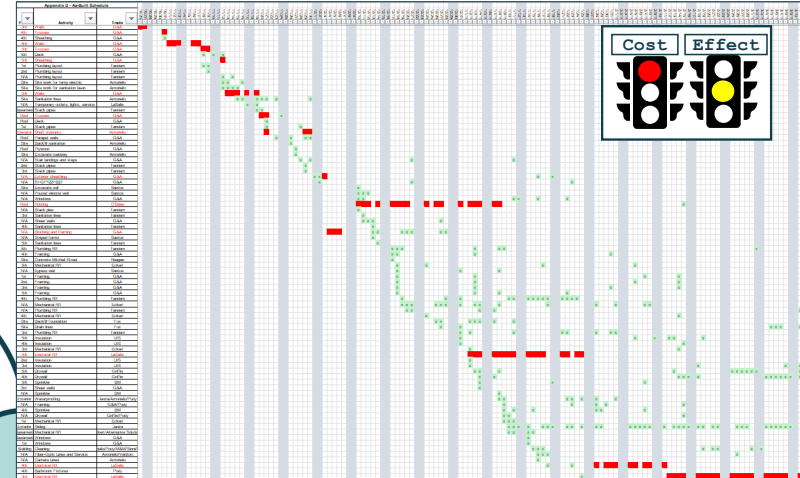
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## Example 1 – Schedule Analysis Methodologies

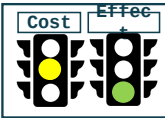


## Example 1 – Schedule Analysis Methodologies



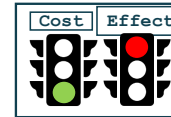
## Example 1 – Schedule Analysis Methodologies

8/31/2016	Update 9	Revisions	5	197	11/9/2016
8/31/16 to 9/26/16	MT-055, Existing 480v Service Mod Fabrication & Delivery	Did Not Make Planned Progress	13	210	11/22/2016
9/26/2016	Update 10	Revisions	0	210	11/22/2016
9/26/2016 to 9/27/16	C-245, Install Existing 480v Service Mod	Early Finish	(5)	205	11/17/2016
9/27/16 to 9/30/16	C-255, Commission Diesel Generators	Late Finish	5	210	11/22/2016
10/1/16 to 10/12/16	C-210, Test Pumps (P3, P4, P5)	Late Start, Late Finish	8	218	11/30/2016
10/13/16 to 10/19/16	C-035, Demo 3 Existing Pumps & Equipment (P1, P6, P7)	Made Planned Progress	0	218	11/30/2016
10/20/16 to 10/31/16	C-069, Remove Equipment From Existing Platform	Did Not Start	9	227	12/9/2016
10/31/2016	Update 11	Revisions	5	232	12/14/2016
10/31/16 to 11/30/16	C-290, Repair Emergency Shelter Building	Did Not Progress	29	261	1/12/2017
11/30/2016	Update 12	Revisions	8	269	1/20/2017
11/30/16 to 12/31/16	C-290, Repair Emergency Shelter Building	Did Not Make Planned Progress	11	280	1/31/2017
12/31/2016	Update 13	Revisions	23	303	2/23/2017
12/31/16 to 1/17/17	MT-065, Procure Material for CO-003	Late Finish	6	296	2/16/2017
1/17/17 to 1/18/17	C-275, Install Emergency Shelter Building Electrical Systems	OSP	(13)		
1/18/17 to 1/31/17	C-275, Install Emergency Shelter Building Electrical Systems	Better than Planned Progress	(1)	295	2/15/2017

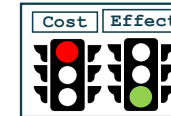


## Example 2 – Labor Analysis Methodologies

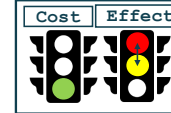
### Total Cost Claim



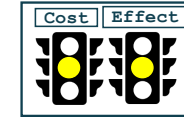
### Measured Mile



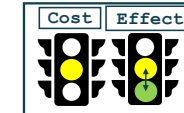
### Labor Hours Overrun



### MCAA / NECA Analysis



### Earned Value Analysis



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## Example 2 – Labor Analysis Methodologies

Cable Pulls - Measured Mile Analysis			
Period	QTY (LF)	Hours	Productivity
Aug 24 thru Aug 31, 2018	17,422	857	20.341
Sep 7 thru Sep 28, 2018	24,041	2,376	10.118
Oct 5 thru Oct 26, 2018	53,064	6,407	8.282
Nov 2 thru Nov 23, 2018	91,388	5,910	15.464
Nov 30 thru Dec 21, 2018	103,276	7,098	14.550
Dec 28 thru Jan 18, 2019	100,157	5,799	17.273
Jan 25 thru Feb 22, 2019	110,373	7,126	15.488
Mar 1 thru Mar 22, 2019	61,517	4,499	13.673
Mar 29 thru Apr 26, 2019	261,067	11,643	22.424
May 3 thru May 24, 2019	238,174	10,758	22.139
May 31, thru June 28, 2019	266,926	12,666	21.075
Jul 5 thru Aug 2, 2019	140,793	8,347	16.869
Aug 9 thru Aug 30, 2019	113,361	6,020	18.831

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## Experts in Litigation

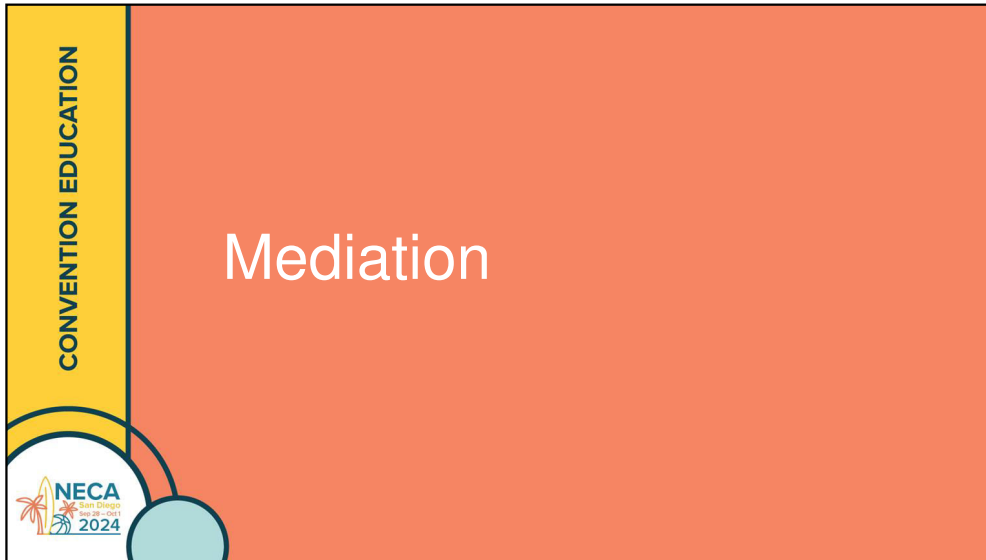
### Understand your expert's skill set and approach to testimony

- Sometimes these disputes can become a battle of experts
- Writing a report and testifying at trial are very different skill sets
- What do you want?
  - You want the right answer...
  - ...that was arrived at with the most tested and reliable approach...
  - ...that is communicated clearly and persuasively...
  - ...from someone that will hold up on cross examination.

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## Mediation

- What is mediation?
- Can you “win” at mediation?
- Mediator selection
- What does the contract say?
  - Voluntary or required
  - When?
  - Where?
  - Who pays?
  - Administered v. private

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## Mediation Considerations


Exchange information in advance of mediation?

- Mediation statement
- Discovery exchange
- Expert analysis
- Expert report

Who attends?

- Not just the “suits” – can also be the “boots”
- Company representative with settlement authority

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## Litigation or Arbitration

- Who decides?

written notification from the complaining party of the claimed dispute. 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 Pennsylvania state or federal court of competent jurisdiction unless the Contractor elects, in its sole discretion, to have the dispute decided by arbitration. If the Contractor elects arbitration, it

- Best practice: decide **before** contract execution!

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## Similarities

- Hearing / trial before ultimate decision maker
- Often a battle of the experts
- Witness credibility

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## Differences

- |   |   |
|---|---|
| <ul style="list-style-type: none"><li>• Predictability of outcome<ul style="list-style-type: none"><li>– Decision maker(s): judge / jury v. arbitrator / panel of arbitrator(s)</li></ul></li><li>• Time</li><li>• Cost</li><li>• Location</li><li>• Extent of discovery: document exchange and depositions</li></ul> | <ul style="list-style-type: none"><li>• Dispositive motions</li><li>• Post-hearing submissions</li><li>• Appealable</li></ul> |
|---|---|

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## How Mediators / Arbitrators Analyze Claims (reprise)

- |  |  |
|--|--|
| <ul style="list-style-type: none"><li>• Contemporaneous documentation</li><li>• Contractual compliance and sincere efforts to comply</li><li>• Likable, trustworthy, sympathetic people<ul style="list-style-type: none"><li>– Company overall</li><li>– Witnesses</li><li>– Counsel</li><li>– Experts</li></ul></li></ul> | <ul style="list-style-type: none"><li>• Demonstrate that equity favors you</li><li>• Thorough and rigorous analysis with terse and persuasive presentation</li></ul> |
|--|--|

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# Practical Takeaways



## Claim Preparation at Every Stage

- Proactive contract negotiation and management
  - Review and understand contract documents
  - Clear communication and documentation during the project
- Develop a claims management strategy
  - Internal process for claim identification and management
  - Claim awareness and documentation– train PMs and PEs
- When to get counsel involved – assist with project management and letter writing to avoid and / or strengthen claim
- When to get expert involved – assist with schedule analysis and damage quantification



# Questions?



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