

Controlling Risk And Claims Through Project Documentation

By Bruce Demeter

Hope and expectation are words that often represent mutually exclusive outcomes in the construction industry. Every project is commenced with the hope that no claims will arise. The expectation, however, is that a claim will arise from every project. Therefore, prior to the commencement of the project, plans to control and resolve claims as quickly as possible must be addressed. A key to accomplishing this goal is developing a standard process that generates and maintains appropriate documentation throughout the life of the project.

PROJECT DOCUMENTATION: WHAT IS IT?

Project documentation can take many forms. It may consist of correspondence, meeting minutes, field reports, speed memos, faxes, logs, transmittal sheets, photographs, addenda, change orders, change directives, applications for payment, and e-mails. The type of documentation used will be dependent upon the activity being conducted and the time available. The form of the documentation is secondary to the actual generation of the documentation. A key to

the control and resolution of claims is directly related to documenting the project.

PRE-CONSTRUCTION DOCUMENTATION

During the pre-construction phase of a project, documentation is often the scarcest. The design team is focused on meeting the owner's project concept and budget, while the contractor is providing value engineering and constructability input. The team's prime concern is not on documenting the design and budget decisions but managing time constraints and client relations. As a result, the design documents will be relied upon as confirmation of the decisions made by the team and the owner.

Design documents, however, do not provide the reasons why a particular change was required, requested or made. Moreover, the passage of time, and claim situations, shorten memories. The chances are that an owner will not recall that he decided to downgrade the mechanical system for budgetary reasons when his new system does not adequately heat and cool his new building. The owner will only recall that the building's mechanical system does not work.

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It is critically important that your firm document decisions made during the project. Through meeting minutes, telephone logs, speed memos and correspondence, every decision affecting the scope, budget and construction of the project must be documented. The documentation should set forth the reasons for the decision and any implications the decision has on the project, and be transmitted to the owner. If written in a professional, matter-of-fact-style that avoids opining on the “lunacy” of the owner’s decision, the documentation will be received by the project owner in a correspondingly professional manner. Owners prefer working with firms that document decisions. It provides the owners with confirmation that the team is on the same page. More importantly, documentation can prevent a claim from getting out of hand.

CONSTRUCTION PHASE DOCUMENTATION

The need for continuing documentation is often overlooked during this phase. If anything, the need to document and respond to construction phase activities is increased as the contractor begins to take over the project.

Any decision or direction issued by the design professional or owner, or requests or decisions made by the contractor, must be documented via meeting minutes, field reports, correspondence, speed memo, or diary — whichever is appropriate. The documentation should include a clear description of the direction or decision undertaken. The documentation should also describe

the ramifications of the decision on the project. Again, the documentation must be written in a matter-of-fact manner where facts and not personal opinion are the focus. A fact-laden document will frame any dispute arising from that decision on facts rather than the opinions of the parties.

Similarly, firms should not be baited into personalizing disputes. Contractors often accuse the design professional of being more concerned



with protecting their design, and themselves from claims of errors and omissions, than the good of the project. In response, the design professional will accuse the contractor of being incapable of performing the work, or just out for an extra. Instead, your stance should be measured by the contract documents and project conditions. It is harder to fight facts than innuendos and insults.

Each communication should be tracked and responded to as soon as possible. Waiting to respond at the end of the month or by some other arbitrary time period may result in an assertion you are non-responsive or per contract doc-

uments that you have waived rights or opportunity for additional compensation. A delayed response may also allow disputes to fester into claims. If time prevents a detailed response, a note indicating agreement or disagreement with a particular position should be sent with an indication that a more detailed response will follow. By transmitting an initial response, the party's initial thoughts will be contemporaneously registered. This could be critical in situations where claims proceed to a more formal dispute resolution procedure.

Lastly, in documenting construction phase activities and occurrences, also be careful to note the problems that may exist at the time the document is prepared. Often the author of a document, whether a field report, minutes of a meeting, or status update to the owner, fail to record the problems that exist at the time the document is prepared. Many superintendents, design team field personnel and job site foremen consider documentation of problems as a sign that they cannot handle their job. However, problems are the stuff from which claims arise. By not recording the problems, the firm is frequently left without the tangible proof necessary to defend against, and possibly defeat, a claim.

CONCLUSION

The importance of documenting a project's history cannot be overstated. The life of a claim is directly dependent upon the existence of documentation. The lack of documentation will allow a claim to gain momentum. Expensive legal counsel review project documents for the "smoking gun" when a claim becomes a suit. No "smoking gun," however, will be found. If one existed, the claim would have been resolved quickly and inexpensively. Proper documentation of a project will effectively control claims.

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