AIA 2007 Initial Decision Maker
(What to do when a problem arises?)

Presented By: Tim Schap

Agenda

- The Initial Decision Maker (IDM)
- Claims Overview
  - Definition
  - Types
- Case Study
  - The Facts
  - The Claim
  - Entitlement
  - Damages
- Claims Management
  - Claims Avoidance
  - Process/Proof
  - Defenses
  - Resolutions

Initial Decision Maker

Initial Decision Maker will within 10 days of the receipt of a Claim take one or more of the following actions:
(1) Request additional data
(2) Reject the Claim
(3) Approve the Claim
(4) Suggest a compromise, or
(5) Advise that IDM is unable to resolve the Claim
What is a Claim?

A request for:

- Adjustment to Contract Sum
- Adjustment to Contract Time

Money…Time…

Claim “Components”

- Factual Entitlement
  - Tell the story
- Legal Entitlement
  - Access to Claim per contract
  - Local legal provisions
- Damages Calculation
  - Requested adjustment to time and/or money

Contract Provisions Providing Access to Claims

Contractor Claims:

- Extended Period of Performance
  - "delay"
- Disruptions or Changed Conditions
  - access to work area
  - schedule sequence changes
- Scope Changes
  - different work
  - additional work
- Differing “Site” Conditions
  - Type I: Different from documents
  - Type II: Different that what is typical
- Termination
  - (wrongfully) for cause
  - for convenience
Contract Provisions Providing Access to Claims

Owner Claims:
- Entitlement Concepts
  - Defective Work
  - Defective Design
  - Lack of Performance within time required

- Damages
  - Liquidated Damages (Overall project)
  - Consequential Damages (Specific issues)

Case Study

Project Description:
- Construction of a new $8M Student Recreation Center and renovation of an existing gym.
- The project included an auditorium/gymnasium, natatorium (pool), weight training/fitness area, a climbing wall, offices, meeting rooms, and a game room.
- The project was a multi-prime low-bid public project.
  Four Primes (G.C., HVAC, Electrical, and Plumbing)

Background Information

Construction Phase History:
- The project started falling behind from the outset, as excavation/foundations, slab pours, and steel erection all fell behind schedule.
- As a result of problems experienced, the General Trades Contractor filed for bankruptcy soon after the completion of the Project.

Key Dates:
- Contract Start Date: March 1, 2001
- Contract Completion Date: June 3, 2002
- Adjusted Contract Completion: June 3, 2002
- Projected Completion: October 21, 2002
### Contract / Extension Timeline

<table>
<thead>
<tr>
<th>Original Contract Duration</th>
<th>Time Extension</th>
</tr>
</thead>
<tbody>
<tr>
<td>15 Months</td>
<td>4 Months</td>
</tr>
<tr>
<td>11 Months</td>
<td>Acceleration</td>
</tr>
<tr>
<td>8 Months</td>
<td>Extension</td>
</tr>
<tr>
<td>3 Months</td>
<td>$150K - $200K</td>
</tr>
<tr>
<td>Start Contract</td>
<td>$300K - $400K</td>
</tr>
<tr>
<td>Architect Identification</td>
<td></td>
</tr>
<tr>
<td>Problem</td>
<td></td>
</tr>
<tr>
<td>Notice of Claim</td>
<td></td>
</tr>
<tr>
<td>Change Management</td>
<td></td>
</tr>
<tr>
<td>Claims Management</td>
<td></td>
</tr>
<tr>
<td>Notice requirement</td>
<td></td>
</tr>
<tr>
<td>Completion</td>
<td></td>
</tr>
<tr>
<td>3/01</td>
<td>11/01 2/02 6/02 10/02</td>
</tr>
</tbody>
</table>

### Types of Time Impact Claims

**Delay vs. Disruption**

- Extended performance or “Delay”
  - Non-Excusable: Contractor at fault or responsible for
  - Excusable/Compensable: Owner caused or controlled
  - Excusable/Non-compensable: Beyond control of either
- “Disruption” … including Acceleration

### Notice

- The purpose of “notice” is to give the other party the opportunity to mitigate the impact of the issue.
- Notice requirements are not intended (usually) to unduly burden the contractor.
Notice of Claim: 2/20/02

Dear Mr. Architect,

This letter is intended to place you and the Owner on notice of claim for project delay. The Electrical Contractor (EC) hereby requests a time extension until October 21, 2002 to complete its work. This contract started on March 2001 with a scheduled completion date of June 9, 2002. The EC’s schedule approved by all contractors established that the EC would complete its work by June 3, 2002.

On January 8, 2002, I wrote to you and the General Contractor (GC) explaining to both of you that lack of progress on the project was impacting us. Since that time, there is no evidence that you have done anything to convince the GC to accelerate its work.

As a result of the delays of others, we have not been able to perform our work as scheduled. For example, switchgear, wire, and conduit are all behind schedule. It is now foreseeable that delays beyond June 9, 2002 will have to be included in the contract schedule. The delay is primarily due to the existing conditions, design defects or other causes for delays. Please let us know why these critical path activities are behind.

The EC is entitled to a compensated time extension due to impacts incurred to date. In accordance with the contract terms, please issue a written decision within ten days of this request for a compensated time extension. If the time extension is denied, please direct the EC to proceed to perform to the original contract completion date.

We anticipate that acceleration costs will be in excess of $150,000. They will be manifested in a loss of efficiency due to delays and impacts; overtime costs on other projects when we now have to pull men to this project to complete work within weeks that was scheduled over months; stacking of trades; and congestion. We will issue a statement of our costs with respect to the acceleration order as soon as they are finally accumulated.

Sincerely,
Electrical Contractor

Entitlement to Extended Performance Claim

Delay was caused solely by events in owner’s control
Impact was to critical path activity (actually delayed project)
Impact and ensuing delay was not concurrent with other impacts within contractor’s control (if same activity) or contractor controlled impact factor did not impact another activity such that it became the critical activity
There was timely and proper notice given
There is a link to damages claimed

Response to Notice of Claim: 2/26/02

Dear Mr. Electrical Contractor,

We have received your “Notice of a claim for delay in the work” dated February 20, 2002 and a request for a “compensated time extension” until October 21, 2002. As required by Article 4.4.2 of the General Conditions we offer the following response.

Your letter will be considered as notice of a potential claim and we have provided a copy to the Owner. There appears to be no justification for a time extension until October 21, 2002 when the most recent construction schedule dated February 19, 2002 issued by the General Contractor shows an August 9, 2002 completion date. As a matter of fact, the owner has not granted a time extension and the expected contract completion date is still June 9, 2002. Any future claim for acceleration costs will require detailed documentation of actual financial impact before the Owner can consider it.

You are reminded that the responsibility for the construction schedule lies solely with the contractors and primarily with the GC. The Architect and the Owner are not responsible for seeing that the work is performed on schedule, but can take action against the contractors who do not perform. We are currently discussing these options with the Owner.

Your continued cooperation on this project is anticipated.

Sincerely,
Architect
Entitlement to “Acceleration Claim”

- Excusable or compensable delay
- Notice of delay and submission of support to Owner
- Owner’s refusal to grant time extension
- Express or implied order of Owner to perform to schedule
- Contractor efforts to speed up work resulting in extra costs

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Notice of Demand – 2/27/02

Dear Mr. Architect,

Thank you for your letter yesterday. We recognize that you are trying to make the best of a bad situation. If I understand you correctly, the GC has been directed to accelerate its efforts to June. If so, please provide me a copy of those directions. If not, are you granting an extension beyond the scheduled June date?

For months now, my crew has been jumping from one portion of uncompleted work to another. Now, even though the GC is behind, it has accelerated its work. It would be helpful to place more labor on this project although now I only have enough labor budget to last through the middle of May. I highly recommend that we negotiate a way to fund extending my force through the delayed completion date. The EC cannot afford to fund these costs from its own pocket. Therefore, if we cannot reach an agreement toward negotiating these excess costs, I will have no choice but to expedite an arbitration proceeding by filing a demand at the end of next week.

You requested that we provide detailed documentation of our financial impact. I am willing to provide you our original estimate and a summary of our labor to date. That will enable you to predict our overrun as accurately as we can.

Sincerely,

Electrical Contractor

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Delay and Disruption Damages

- Extended Performance Costs (time-based)
  - Additional general conditions
  - Escalation in material and labor costs
  - Work shifted to different weather conditions (e.g. into winter)
  - Demobilization and remobilization
  - Home Office Overhead (Eichleay)
  - Loss of Subcontractors/Suppliers
  - Requirement to use different workforce

- Loss of Efficiency or Productivity (disruption-based)
  - Measured mile
  - Total Cost Method
  - Modified Total Cost Method
### Damages Summary

**Summary of Electrical Contractor's Damages**

<table>
<thead>
<tr>
<th>Description</th>
<th>Original Bid</th>
<th>Actual Cost</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Labor</td>
<td>$166,391</td>
<td>$364,234</td>
<td>$197,843</td>
</tr>
<tr>
<td>Material, Subcontract</td>
<td>$258,487</td>
<td>$263,263</td>
<td>$4,776</td>
</tr>
<tr>
<td>Overhead &amp; Profit</td>
<td>$56,055</td>
<td>$113,302</td>
<td>$57,247</td>
</tr>
<tr>
<td>Bond</td>
<td>$14,592</td>
<td>$12,000</td>
<td>($2,592)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$495,525</strong></td>
<td><strong>$752,799</strong></td>
<td><strong>$257,274</strong></td>
</tr>
</tbody>
</table>

### Total Cost and Modified Total Cost

**TOTAL COST**

\[ (\text{$\text{Labor Cost Incurred}$} - \text{$\text{Labor Budget}$}) = \text{$\text{Claimed}$} \]

**MODIFIED TOTAL COST**

\[ \left( (\text{$\text{Labor Cost Incurred}$} - (\text{$\text{Labor cost incurred not linked to impact factor}$})) \right) - \text{$\text{Labor Budget}$} (\text{(Bid Estimate + CO estimate + Amount under bid/estimated)}) = \text{$\text{Claimed}$} \]

### Claims Avoidance

- Identify Risk $ (Risk Management)
- Contract Documents (constructability review)
- Project Schedule (develop, review, approve & monitor)
- Documentation
- Change orders (quality, cost, time)
- Responding to Contractors Claims
  - Proper Submission of Claims
  - Factual Investigation
  - Legal Analysis
What Documentation is Required?

- Good PM doc. = good claim doc.
- How you planned and built the job
- Changes and impacts on time/cost

**

No Documentation = No Claim or No Defense
Lost $$!

Documentation Guidelines

- Clear & Simple
- Specific
- Timely
- Consistent with contract requirements
- Be aware of contract terms
- Don’t Sound like a lawyer
- Objective & Factual - Keep emotions out
- How will it read 3 years from now?
- Solution Focused - Proactive
- Close the loop - Don’t leave anything hanging!

Dispute Escalation

TIME

$ = 0
Occurrence

$ = ?
Notice

$ = X
Formal Request

Last Chance Period

Litigation/ Formal Claim

$ = X + 60%

Claim Management

Change Management

Lawyers
Process for Proving (or Disproving) a Claim

1. Find out what happened vs what was supposed to happen (Data Collection) \textit{THEN}

2. What made "it" happen (schedule analysis) \textit{THEN}

3. The entity (if any) who had responsibility to “avoid” the happening from occurring (liability analysis) \textit{THEN}

4. Whether that effect resulted in any damages (damages analysis) \textit{BUT}

5. Don’t forget about defenses and “exculpatory clauses”

Liquidated Damages – 9/6/02

Dear Mr. Electrical Contractor,

It is critical that the Owner be able to start using the project on September 15, 2002 for previously scheduled events. Several late completion dates have come and gone over the last few weeks which would have been acceptable to the Owner, but the contractors have failed to meet these commitments. At the project meeting this week, another goal was set for obtaining an occupancy permit from the Fire Marshal on September 13, 2002. This will be the last chance for the contractors to meet the needs of the Owner to use their new facility.

At this point, the Owner seems to be left with no alternative but to enforce the Liquidated Damages provision in the Contract documents for late completion of the project unless the contractors can meet this deadline.

Sincerely,

Architect

Defenses to Claims

- Notice and waiver
- Accord and Satisfaction (executed change order)
  - Exculpatory and limiting clauses (“No damages for Delay”)  
- \textbf{NO CAUSATION SHOWN}
- \textbf{NO LIABILITY}
- \textbf{INTERCEDING FACTORS SHOWN}

\textbf{NO LINK OR NEXUS BETWEEN CAUSAL FACTORS SHOWN TO BE RESPONSIBILITY OF OTHER PARTY AND DAMAGES OF CLAIMING PARTY}
Dear Mr. Electrical Contractor,

As you requested in your telephone conversation with the Owner today, and as permitted by the Contract General Conditions, you are hereby directed to provide the necessary additional manpower on this project to sufficiently complete the electrical work required for Owner Occupancy, by the end of the day on September 27, 2002.

With your approval and upon successful completion of this goal, the Owner offers to reimburse the Electrical Contractor $15,000 for accelerated labor costs. Electrical Contractor must then agree to relieve the Owner from all pending legal actions and arbitration. Once the Owner determines that these stipulations were fully met a change order of $15,000 will be processed for payment to the Electrical Contractor.

Sincerely,

Architect
The Economic Realities of CLAIMS

Summary

- Proper project planning and contract preparation
  - Effective contract negotiation
  - Project document review
  - Contract administration
- Proper management of the claims process
  - Project milestones and schedules Provisions
  - Notice Provisions
  - Change order provisions
- Swift and effective response to project issues
- Some claims are unavoidable
  - Minimize the impact

Thank you!

Cincinnati  Columbus  Indianapolis
Providing Services Nationwide