



Construction Claims and Disputes

Instructor

Mike Giuliano

Mike graduated from Cal Poly, San Luis Obispo in 1986 with his Bachelor of Science in Civil Engineering. During his career, he has worked as an Inspector and Resident Engineer in Construction, acted as Caltrans District 5 Maintenance Engineer from 1996-2003, was the Caltrans District 5 Local Assistance Engineer from 2003-2010, and has served as a Caltrans Construction Oversight Engineer up to the present time. Mike particularly enjoys working with and assisting local agencies in the implementation of their federally funded projects.



Claim Definition



A Dispute

A difference of opinion over the need to revise the contract for:

- A fair time extension
- A fair payment for added work
- A fair payment for unanticipated work



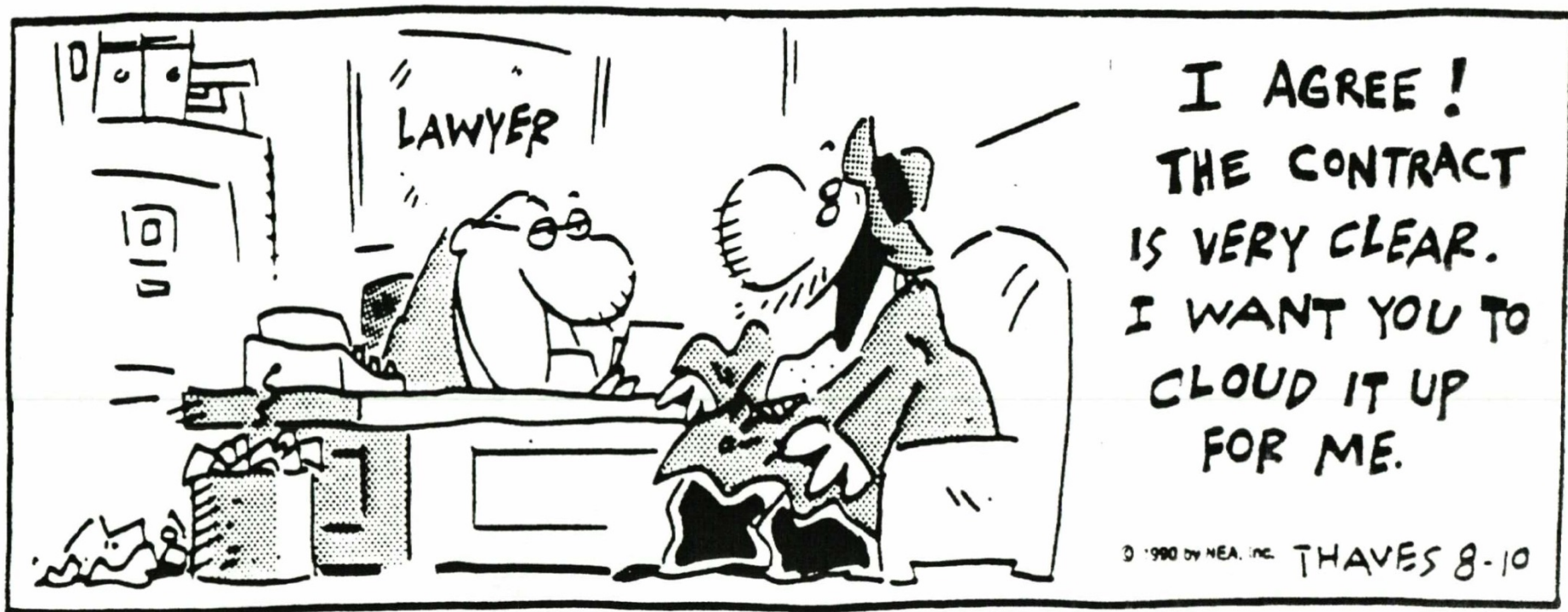
Construction Contract Components



- **Project Plans**
 - Specific plans drawn for your project
- **Project Specifications**
 - General Specifications (Standard Specifications, Greenbook, etc...) applicable to similar projects
 - Special Provisions for your specific project
- **Project Site Information**
 - A report of specific site conditions, foundation information, environmental alerts and requirements

KNOW THE HIERARCHY

FRANK & ERNEST





Legal Responsibilities



- **Spearin Doctrine**
 - United States Supreme Court
 - U.S. vs. Spearin (1918) 248 US 132
- The owner impliedly warrants the constructability of the plans and specifications
- The contractor is liable for defects resulting from the contractor's failure to perform work adhering to the plans and specifications
- the contractor is not liable for defects caused by mistakes in the owner's plans or specifications



Public Agency Responsibilities



- **Create Plans & Specifications** a professional contractor will find suitable to bid and build the project
- **Provide bidders with all relevant information** to determine the difficulty of construction, the quantity of materials and reasonable time to complete the work
- **Award the contract to the lowest responsible bidder**
- **Make the site available** in the promised time
- **Provide sufficient supervision** to be assured of the quality of the work
- **Make timely payments** to the contractor



Contractor Responsibilities



- Perform the work as directed by the contract
- Perform the work as directed by the Engineer
- Follow the contract procedures for disputes
- Comply with all Claim Notice requirements
- Document time and materials for extra work
- File timely claims pursuant to the Contract

Standard Specifications 5-1.43



Potential Claim



- **Potential Claim**

Contractor's notification that a claim is probable if resolution is not reached prior to issuing the proposed final estimate (PFE).

- **Notice**

- A (properly noticed) demand for monetary compensation or damages
- Initial, Supplemental and Final Potential Claim notices

(Standard Specifications 5-1.43)



Types of Claims – Contractual



- **Contract Interpretation Disputes**
 - Ambiguous parts of plans or specifications
 - Changes in the Work or Materials
 - Contract schedules and updates issues
 - Administrative deductions
 - Quantity disputes





Types of Claims – Physical



- **Differing site conditions**

Physical conditions differing materially from any of the following:

- Contract documents
- Job site examination
- Physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract

(Standard Specifications 4-1.06B)



Contract Changes

- **Contract Changes and Extra Work**

By signing the Contract, the Owner, Contractor and all Subcontractors agree:

- Owner has the right to make Changes
- Contract dictates the procedure for changing the work and paying for those changes
- Contractor is required to perform the directive despite disagreements
- Any change to the contract must have a CCO

(Standard Specifications 4-1.05)



Delay Issues



- **Excusable Delay**

A Delay to a controlling activity beyond the Contractor's and Owner's control that extends the project scheduled completion date.

- **Inexcusable Delay**

A Delay to a controlling activity caused by the Contractor or the Owner that extends the project scheduled completion date.

- **Concurrent Delay**

A Delay to a controlling activity partially caused by both parties



Liability



Owner Responsible for Delay when its own actions (or inaction) adversely affect Contractor

- Owner prevents contractor from proceeding with work (e.g. Change to plans)
- Owner adds work, but no time
- Owner impedes contractor's progress
- Owner does not deliver all areas of the site



Analyze Delay Claims



- **Non-Critical Delay**
 - A delay to activities that were never on the critical path
Example: Using Float
- **Critical Delay**
 - A delay that extends the project scheduled completion date
- **Perform Time Impact Analysis as Necessary**



Subcontractor Issues



- **Subcontractors are Contractor's Agents**
 - Subcontractors have no contractual relationship (privity) with the owner
 - Owner communicates officially through the prime contractor
 - CCOs are issued to the contractor, not the subs
 - Subcontractor claims must “pass through” the prime contractor



Contract Administrative Remedies



Does your contract require a Notice of Potential Claim?

Should you remind the contractor that a Notice of Claim is required?

Why would you want to do so?





When Potential Claim is Filed



- Review initial Potential Claim Notice ASAP
- Compare claim notice with your contract
- Discuss issues with contractor and your chain of command
- Determine merit and need for more information
- Provide initial written response (within 5 days)
 - Notify contractor **in writing** of your assessment of the potential claim

WHO HAS BURDEN – OWNER OR CONTRACTOR?



Follow Up Notice of Potential Claim



- There is always additional information
- How will you work on a solution if you don't understand the problem?
- Follow up your response with additional questions to define the exact problem
- Remind contractor of its responsibility in your specifications, request backup documentation to support costs claimed
- Document the potential extra work linked to the Notice of Potential Claim (NOPC)



Keep Thorough Records



- Document what you do and why in such a way that it could be easily explained to others
- Follow your agency's policies whenever possible; however, if deviation is necessary, explain why
- Follow-up on all final paperwork
- Take regular photographs and videos



Claim Problem



- Specifications required contractor to install buried conduit for changeable message sign. Conductors for each circuit in the conduit had to be of different colors.
- Contractor began installing each circuit with only black wire.
- Your inspector recorded the contractor's work, but made no mention of the different color requirements.
- When the contractor was half done, he asked the inspector if everything was OK. The inspector said it looked fine.
- When the Resident Engineer came by later, he saw the circuits were wired improperly and ordered the contractor to fix them by pulling the wires and replacing one of the black wires in each circuit with a red one.
- The contractor asked for a CCO but was denied. He filed and pursued a claim based on the fact the inspector watched the improper installation and said the wiring was satisfactory.
- Can field personnel verbally waive the contract requirement?



Damages on Claims



- **Actual Expenses**
 - Verified time and materials
 - Premium time
- **Estimated Expenses**
 - Estimated labor
 - Estimated equipment
 - Stand-by labor
 - Stand-by equipment
 - Loss of efficiency



Anticipating Claims



- **Notice**
 - Unusual pre-construction questions
 - Notice of Potential Claim
 - Unusual volume of contractor correspondence
 - Failure to adhere to schedule
 - Failure to obtain materials
 - Failure to schedule subcontractors
 - Verbal complaints – contractor or subcontractors
 - Subcontractor/employee problems
 - Adjacent/concurrent contracts



Defending Claims



DOCUMENT EVERYTHING

- The equipment and laborers on the project
- Take regular photos and videos of the project
- Be aware of current important activities
- Be accurate in measurement and payment
- Read and understand your contract
- Have timely communications with the contractor
- Be professional and clear with your expectations



The Contractor's Production Rate



- **Daily reports**
 - Track Production before and after a claimed event
 - Follow man-hours per unit of production
 - Follow Efficiency before and after
 - Use photographs and movies to illustrate the normal activity before and after



Evidence in a Contract Dispute



- Contract plans and specifications
- Pre-construction meeting documents
- Change orders
- Schedules and monthly updates
- Daily reports
- Correspondence (letters and emails)
- Submittals and RFIs
- Photographs and videos



California Public Records Act (CPRA)



Govt. Code 6250-6270

"Public records" includes **any writing** containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.



California False Claims Act (CFCA)



Govt. Code 12650 et seq

Liability under CFCA:

- Knowingly “presents or causes to be presented” a false claim to the state or local agency
- Knowingly makes or causes to be made or used a false record or statement to get a false claim paid or approved
- Conspiring to defraud the state or agency by submitting a false claim, or be paid one
- Delivering less property than stated in the receipt
- Falsifying a receipt for state or agency property
- Knowingly buying or taking a pledge of public property from another not authorized to sell or pledge the property
- Knowingly benefitting from a false claim
- Benefits from an inadvertent submission of a false claim and fails to disclose the false claim within a reasonable time after discovery



Will FHWA Participate in Claim Resolution and Support Costs?



- **Adhere to Contract's Claim Resolution Process**
 - At least one to two iterations of process

- **Require Contractor to Meet His/Her Burden**
 - Backup documentation to support specific costs

- **Do Not Settle Prematurely**
 - Do not want to set Agency precedent
 - Settlement for Business Reasons Okay AFTER satisfying 1 and 2 Above



QUESTIONS???