

Construction Project Claims

While commercial construction projects have a history of being competitive fixed price contracts, the current economic environment is also forcing municipal, state, and federal contracts to be very competitively bid and mostly fixed price in nature. Along with this movement toward fixed price contracts is the production of work scope definitions that have virtually all contingencies removed in an effort to keep bid prices to a minimum. When work scopes and project schedules are trimmed to contain only the bare necessities for accomplishment of the technical objectives of the project, there will usually be unanticipated conditions or problems that require departures from the strict interpretation of the work scope or schedule. With little flexibility in project execution, the impact of these changed conditions and contract changes becomes a critical factor in the contractor's ability to make a profit.

Claims Costs and Complexity

For the contractor to be able to recover additional costs, he must be able to convincingly state and properly support his assertion of impact by the buyer. This can be complicated and time consuming for both the contractor and the buyer. It can also be costly to both parties. If a claim is in dispute before the project is complete, it is costly in terms of project performance. If the claim cannot be negotiated, it is costly in terms of time and money to support arbitration or litigation.

Determining and understanding the facts is usually the most difficult part of preparing a claim. As construction projects become more technically demanding and complex, contract claims become more technically oriented, requiring sophisticated analysis of the project's technical aspects for proper assessment and fault determination. The project and any claim might be further complicated by the necessary handling of hazardous materials and other environmental requirements. Conralytics' consulting staff includes engineers and technicians, project planners and analysts, and project and contract managers.

Prime Contractors vs. Subcontractors

The relationship of the contractor to the end user or project purchasing agency sets the framework for an impact claim. As the prime contractor on a construction project, you must be prepared to develop and process your own claim or Request for Equitable Adjustment (REA) as well as any claims or REAs you might receive from your subcontractors. Subcontractor claims might be completely integrated into your own claim, passed through to the customer as its own technical and support document with integration only in the costing of your claim, or something in-between.

Within the framework of prime contractor or subcontractor, the next most influential factor in the nature of your claim development is determined by the ultimate project customer and the rules, regulations, and laws under which the contract is operational. Construction contracts can usually be characterized as being commercial, municipal, state, or federal. As such, they are subject to



different institutionally defined contractual requirements pertaining to claims as well as the specific contract language requirements. Contralytics is experienced in all of these environments.

If you are a subcontractor, your claim usually must be against the prime even though the party responsible for your problem might have been the prime's customer, but there are several basic options as to how you can proceed. When the claim issue is not going to be passed on to the prime's customer, a relatively informal and simple REA can be developed and submitted to the prime in anticipation of a negotiated settlement. When the prime is planning to pass your REA or claim through to his customer, he will probably require that your claim be rigorous and completely documented.

There are also relationships between prime contractors and subcontractors which can work to the benefit of both parties. Most subcontractors are reluctant to proceed with a claim that is going to antagonize the prime, since he frequently depends on an ongoing relationship with the prime for a good portion of his business. In these cases, it is possible to forge a relationship with the prime where each shares the work and cost of claim preparation and also shares in the settlement. Contralytics will work with your attorneys to set up and manage these working relationships.

Claims Development

Some claims are simple, deal with one or two change or impact issues, and the party responsible for the contract impact is readily identifiable. These claims are usually amicably negotiated by the parties with little or no requirement for in-depth analysis. More complicated claims require sophisticated analyses which are usually justifiable by the amount of money in dispute. These are the claims where the technical expertise and claims experience of Contralytics pays off. Since the company was formed in 1989 by a group of independent claims consultants, it has developed claims or claims rebuttals totaling over one billion dollars.

Whether developing a claim or a claim rebuttal, an analysis must be undertaken to identify all changes, determine when the changes occurred, assign responsibility for the changes, and quantify all impact of the changes. The magnitude of such an analysis is determined by the complexity and scope of the project, the complexity and scope of the claim issues, the availability and nature of the claim data, and whether the analysis will be used for negotiation, arbitration, or litigation. This analysis effort might be undertaken by the contractor in its entirety, an outside firm like Contralytics might be engaged to conduct the analysis, or a shared analysis can be performed by the contractor and a consulting firm.

The first step in any claim analysis should be a thorough examination of the contract documents. While it is essential that personnel knowledgeable of the project participate in this examination, since they are familiar with all the aspects of the project, it is usually beneficial to have the principal analysis effort performed by personnel which are not biased by their previous



participation in the program. The types of contract documentation which should be analyzed are:

- Contract Terms and Conditions
- Contract Specifications
- Contract Drawings
- Bid Documents/Original Estimate
- Change Orders/Delivery Orders
- Monthly/Quarterly Reports
- Planned and Progressed Schedules
- Correspondence

Once all the change issues have been identified, the responsibility for these changes must be assessed. Contralitics has developed an integrated but flexible responsibility assessment technique which brings together various methods regularly used in claims analysis. The technique uses standard desktop computer programs familiar to most legal and municipal office environments, which enhances understanding of the processes utilized and the output obtained.

The determination of delay, disruption, inefficiency, and acceleration for a claim requires the flexibility to draw on many available techniques that have proven themselves in the courts for application to the specific case in point. Again, it is the nature of the project, the nature of the claim, and the availability of project and claim data which most influence the selection of an appropriate technique. Contralitics is familiar with and has applied a wide variety of delay, disruption, inefficiency, and acceleration techniques, both objective and subjective, or a combination of the two.

For instance, Contralitics can utilize virtually any of the industry standard Critical Path Method (CPM) programs for schedule analysis or can apply non-computer techniques if data is not available for this court preferred approach. As an example of disruption and inefficiency, if the nature of the project was road construction and the data being recorded on the project allowed the establishment of a normal efficiency factor for roadway base preparation (e.g. feet per day or feet per thousand manhours) for standard or expected site conditions and new site conditions were encountered, the loss of efficiency would be a rather straightforward calculation. However, if a multi-story municipal building being constructed was found to have lower floors of concrete so badly out of flatness specification that they required replacement while the rest of the work continued, the disruption and inefficiency would be very high but with no established baseline from which to measure departures from normal efficiency. This scenario would require the use of a more complex approach like the range method, causal factoring, dynamic modeling, or some hybrid of these techniques.

No matter what technique is used, the ultimate test of its acceptability is the ability to show a cause and effect relationship from the imposed change to the departure from plan in the project's performance. To show these cause and effect relationships, the analyst must have a working technical knowledge of the type of work being performed on the project. This is the type of expertise Contralitics can provide.



Once the claim analysis is complete, the results must be compiled and presented with the facts of the case in a manner that best supports the contractors' interest. In most cases, the details of how this is accomplished depends on whether the claim will be negotiated, arbitrated, litigated, or some combination of these, but usually this results in a formal document and some type of presentation material. Contralytics has the experience and skills to produce these professional products, and it can follow up with negotiation support and expert testimony.