Navigant Construction Claims from A to Z

AACE International

2ND Latin America Cost Management Symposium

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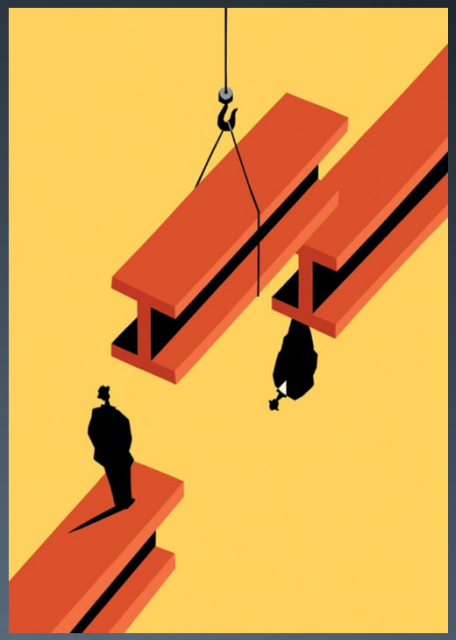

GLOBAL CONSTRUCTION PRACTICE

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POR FAVOR USE MICRÓFONO PARA TODAS LAS PREGUNTAS Y COMENTARIOS

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  - **B. Architecture 1975, Syracuse University**
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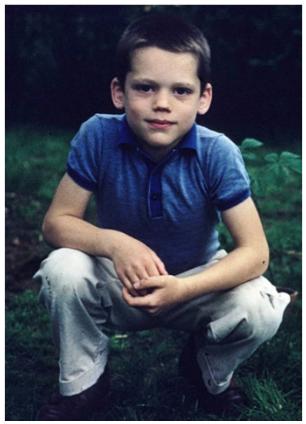
- Years of Experience:
  - **Architect – 7, Attorney – 3, Claims Consultant – 28**
- Professional Field:
  - **Claims Consultant**
- AACE --- Board of Directors 2010-2014
- Something you do not know about me:
  - **I had pet Raccoons**



Focus Slide

Raccoon

Construction Claims

a. Strikes fear and particularly loathing
b. Created an entire industry
c. World's hyper competitiveness.
d. Overshadowing project execution
e. Forced stricter contracts
f. Explosion of dispute resolution methods
g. Hardened employer attitudes

START AT THE END

Employer Goals

a. Meets needs

b. within budget

c. on-time

d. delivered safely

e. community or stakeholders needs

f. minimal conflicts and disputes

Contractor Goals

a. Profitable

b. Fulfills client's needs

c. Contractual design requirements

d. Within contracted cost

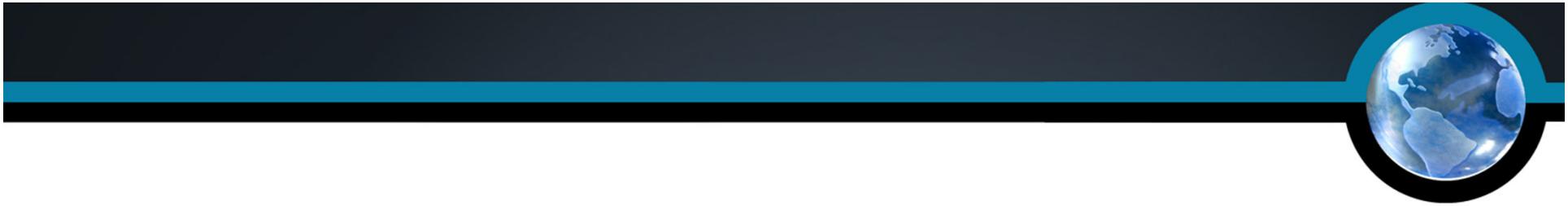
e. On-time

f. Delivered safely

g. Minimal conflicts and disputes

Avoiding Claims Through Good Planning

a. Start early and allow ample time to prepare
b. Hire competent and well-experienced designers
c. Make timely decisions throughout the entire project
d. Have proper construction phase management



TYPES OF CLAIMS

Directed Changes

a. Design/Scope Change

b. Differing Site or Changed Conditions

c. Directed Suspension of Work

d. Directed Acceleration

e. Termination for Convenience (T4C)

f. Termination for Default (T4D)

Constructive Changes

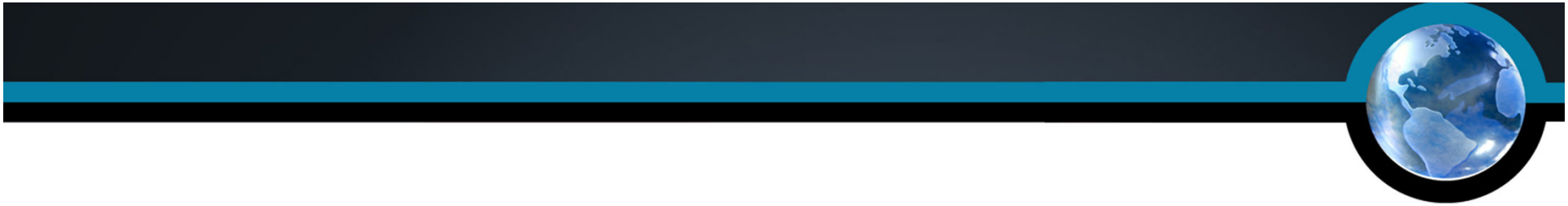
a. Cumulative Impact Changes

b. Constructive Suspension of Work

c. Impact Delay

d. Constructive Acceleration

e. Design Deficiency Claims



DIRECTED CHANGES

Characteristics

a. Common during construction projects
b. All contracts have a changes clause
c. Written directive (e.g., change-order or contract modification)
d. Bilateral (with agreement on time, cost and scope between the parties) or
e. Unilateral

Proof for Directed Changes

a. Entitlement is automatic

b. Quantification must be established

c. Cost Estimate

d. Time Estimate

e. Negotiation

Design/Scope Change

a. Most Common

b. Owner adds or subtracts work

c. Issues a change order

d. Change may be to increase scope or

e. Correct for mistake or

f. Adjust for conditions

Differing Site or Changed Conditions

a. Unanticipated or hidden physical conditions

b. Transfer the risk of latent, pre-existing site conditions to the employer

c. Natural or man-made

d. Above or below ground level

e. Additional cost and/or time

f. Reasonably relied upon the contract documents

Type 1: Differing Site Conditions

a. Subsurface or latent (hidden) physical conditions at the site differing materially from those indicated in the contract documents.

b. Examples include:

   i. **Rock where none is shown**
   ii. **Subsurface water where none is indicated**
   iii. **Buried pipes or utilities where none are depicted**

Type 2: Differing Site Conditions

a. Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered in work of the character provided for in the contract.

b. Examples include:
    i. Subsurface hazardous or toxic waste materials in an apparently undisturbed area
    ii. Soft ground beneath previously undisturbed dry soils
    iii. Buried construction debris in an area where no previous construction was know

Directed Suspension of Work

a. Allows the employer to order all or part of the work stopped during the project

b. Allows the contractor to recover time and associated costs

c. Suspension clauses preclude the recovery of profit on the suspension costs

Directed Acceleration

a. Actions taken by the contractor to complete the work earlier than planned
b. Required by the employer despite an acknowledged delay.
c. Speed-up work and shorten the time of performance,
d. Overcome employer-caused delays already experienced.
e. Usually issued in the form of a variation.
f. Contractor's costs incurred in complying with this directive

Termination for Convenience

a. Allows the employer to delete all or portions of the project work for the convenience of the employer

b. Examples include:

   i. **Employer is significantly delayed**
   ii. **Employer can't get financing**
   iii. **Employer does not need facility**

Termination for Default or Cause

a. Contractor fails to perform in accordance with the contract in a substantial manner

b. Governed by contract clause

c. **Examples include:**

   i. **Insufficient labor, materials, or equipment,**
   ii. **Poor quality**
   iii. **Refusing to comply with laws and building codes**

Procedure for a T4C

a. Follow Contract
b. Cure notice identifying what conditions must be remedied within a stipulated time period.
c. If the contractor fail to cure its performance, the employer may terminate
d. Contractor's surety may have rights
e. Default terminations have serious consequences

CONSTRUCTIVE CHANGES

Characteristics

a. Constructive changes are unintended changes.

b. Some action or inaction of the employer

c. Examples

   i. Comments on shop drawings or submittals
   ii. Construction Change Directives or Bulletins or RFIs
   iii. Ambiguous contract requirements

Proof of a Constructive Change

a. The work performed was in the original scope

b. Appropriate notice

c. Change was actually required by the employer

d. Additional costs and/or time were actually incurred

Cumulative Impact Changes

a. Aggregation of numerous events

b. Could be separate variations

c. Interaction creates an impact greater than the sum of the individual events

d. Events need not be individually significant

Cumulative Impact Changes

e. Employer is not aware that the combination of events creates its own, separate impact

f. Examples include:

i. Variations
ii. RFIs (Request for Information)
iii. Bulletins
iv. Access restrictions
v. Late approvals

Constructive Suspension of Work

a. Caused by employer's acts or omissions that have the effect of unreasonably delaying the contractor's work.

b. Typically unintended acts that result in an unanticipated delay.

c. Examples include:

   i. Delayed approval of shop drawings

   ii. Delayed issuance of variations

   iii. Site or right-of-way unavailability

   iv. Delayed delivery of employer-furnished items

Constructive Suspension of Work, the Contractor Must Prove:

a. A delay to the work occurred
b. The cause was an action or inaction of the employer or its agents
c. The delay could not have been foreseen by the contractor
d. Proper notice was given to the employer
e. The contractor incurred additional time and/or costs as a direct result of the delay or suspension

Delay Claims

a. Project delay is common

b. Impact to the contractually-specified completion date.

c. Four types of delays:

   i. Excusable, non-compensable delay (Time)

   ii. Excusable, compensable delay (Time and Money)

   iii. Inexcusable delay (Nothing)

   iv. Concurrent delay (Time)

Excusable, Non-Compensable Delay (Time)

a. Delay caused by third parties

b. Incidents beyond the control of both the employer and the contractor.

Excusable, Non-Compensable Delay (Time)

c. Examples:
   i. Force Majeure
   ii. God
   iii. Unusual weather
   iv. Strikes
   v. Fires and Floods
   vii. Acts of government in its sovereign capacity
   viii. No Damages for Delay
   ix. Contractor is normally entitled to a time-extension
   x. Contractor also entitled to relief from liquidated damages
   xi. No compensation for delay costs

Excusable, Compensable Delay

a. Delay caused by the employer or the employer's agents.

b. Examples:

   i. Delay in Access
   ii. Differing Site Condition
   iii. Variations
   iv. Suspensions of work

c. Contractor is generally entitled to a time extension

d. Contractor entitled to damages for delay

Inexcusable Delay

a. Delay caused solely by the contractor, its subcontractors, or its suppliers

b. Contractor is generally not entitled to relief for such a delay, and must either make up the lost time, or be contractually liable to the employer for late completion and liquidated damages

Inexcusable Delay

c. Examples:

i. Lack of workers

ii. Late delivery of contractor-furnished equipment or materials

iii. Less than planned productivity

iv. No Concurrency Clause

Concurrent Delay

a. Two or more delays occur within the same time frame, each of which would independently impact the project's critical path

b. Also known as overlapping delays

c. If the concurrent delays are caused by both the employer and the contractor

   i. **Extent that they actually overlap**

   ii. **Neither party is entitled to damages.**

Concurrent Delay

e. Contractor receives a non-compensable time extension but no delay damages

f. The employer will not recover liquidated damages or late completion damages

g. Employer does not have to pay delay damages to the contractor

h. Contract clauses that convert Concurrency into Contractor delay

Constructive Acceleration

a. The unintended shortening of the time of performance

b. Contractor must generally show that:

   i. A delay occurred for which a time extension should have been granted
   ii. A notice of delay and time extension request was properly submitted
   iii. No time extension was granted
   iv. Contractor was required or directed to complete “on time”
   v. Contractor filed a separate notice of constructive acceleration
   vi. Contractor actually accelerated its operation and incurred additional costs as a result of the acceleration

Design Deficiency Claims

a. Aspects of the A/E's work may be called into question

b. Examples:

   i. Design defects,

   ii. Late shop drawing review,

   iii. Untimely response to Requests for Information (RFIs),

   iv. Inadequate site reports

   v. Hard to show that the A/E failed to meet the standard of care in the performance of its duties as a design professional

TYPES OF DAMAGES

Characteristics

a. Monetary damages must be proven with some degree of specificity

b. Many contracts allow the employer to audit

c. Damages associated with construction claims generally fall into these categories:

   i. **Direct Costs**

   ii. **Indirect Costs**

   iii. **Delay Costs**

Direct Costs

a. Direct costs are those costs incurred as a direct result of the claim situation
b. “Hard dollar costs” or costs incurred in “extra work”
c. Examples:
    i. Labor costs, including fringe benefits & payroll taxes
    ii. Materials
    iii. Equipment
    iv. Subcontractor direct costs
    v. Mobilization/demobilization costs
    vi. Storage costs

Indirect Costs

a. Not allocable to any specific item of direct work
b. Such indirect costs may also be time-related costs
c. Two basic types of indirect costs
    i. Field overhead
    ii. Home office overhead

Field Overhead

a. Project management staff

b. Superintendents

c. Project office

d. Temporary utilities and security

e. Maintenance and clean-up

f. Communications

g. Office equipment

Home-Office Overhead

a. Corporate management
b. Accounting and payroll staff
c. Other personnel costs
d. Engineering
e. Estimating
f. Computers and office equipment
g. Insurance
h. Home-office space rent
i. Central equipment yard

Delay Costs

a. Costs that may be incurred by both contractors and employers when a project is delayed.

b. Contractor Examples:

   i. Idle equipment

   ii. Idle personnel

   iii. Additional or extended storage costs

   iv. Escalation costs of labor, materials, and equipment

Delay Costs

c. Employer actual damages include

i. **Lost use of the facility,**

ii. **Lost rental income,**

iii. **Lost profits,**

iv. **Delayed proceeds of the sale of the facility,**

v. **Increased or extended financing costs,**

vi. **Extended general conditions**

No-Damage-For-Delay

a. No money

b. Time allowed

c. Legality depends on jurisdiction

d. Clause or a waiver of consequential damages clause may complicate the recovery of delay costs by either party

Impact Costs

a. Fastest growing areas of claimed costs
b. Associated with non-critical path delays -- productivity losses
c. Contractor asserts higher than anticipated costs
d. The productivity loss might be claimed using:
    i. Activity total costs (planned vs. actual)
    ii. A measured mile analysis (un-impacted productivity vs. impacted productivity)
    iii. Industry standard (actual vs. industry standard)
e. Impacts may include critical path

Other Contractor Damages

a. Bond and insurance costs

b. Loss of bonus

c. Lost profits due to restricted bonding capacity

d. Interest cost

e. Legal fees

f. Claim preparation costs

Other Employer Damages

a. Defective work – repair or replacement costs

b. Costs to complete the project

c. Re-procurement costs

d. Warranty costs

e. Third-party claims

PROJECT DELIVERY METHODS

Characteristics

a. Construction claims occur in all types of project delivery methods

b. Some delivery methods reduce the probability of claims

c. Claims occur when the allocation of risk is inconsistent with the parties' abilities to control and manage that risk

Unit Price

a. Engineer provides a detailed estimate

b. Bidders know the quantities

c. Cost per for the various units that vary

d. Contracts often become lump-sum contracts, with changes based on the variation in units

e. Claims also arise when the performance of the work becomes more difficult, making the original pricing of the unit wrong

Design – Bid – Build

a. Traditional design-bid-build method projects
b. Separate Employer-Designer agreement
c. Separate Employer-Contractor agreement
d. Called lump sum/low-bid contracting (need not be low bid)
e. Primary delivery system in the public sector for more than a century
f. Long history of claims and legal precedents
g. If properly designed, managed and administered, this system will have few claims

Design – Build

a. Developer to complete the design based upon the employers' programme, and then to construct it
b. Some employers mistakenly believe it is risk-free
c. Design-build project delivery system can shifting some risk
d. Can be a faster method of project delivery
e. No guarantee of a claims-free contracting method
f. Ambiguities lead to disputes
g. Design-build projects can provide greater certainty with respect to cost and programme

Fast-Track Construction

a. Construction starting prior to design completion
b. Can lower costs and speed construction
c. Potentially high-risks associated with starting construction with an incomplete design
d. CM coordinates the interfaces between the multiple contracts
e. If properly designed, managed and administered, claims can be minimized or avoided

Multi-Prime Construction

a. Often required by law
b. Used on EPC projects
c. Construction manager, to provide overall coordination among the prime contractors
d. Potentially saving the employer the profit markups
e. There is no direct contractual relationship between the contractors
f. Called the full employment method for lawyers and consultants

Construction Management at Risk (CM@R)

a. CM@R is initially engaged to perform pre-construction services
b. CM@R executes a construction contract acting like a general contractor
c. CM@R responsible for cost and time.
d. Contracts between CM@R and Contractors or Employer and Contractors
e. This method tends to generate fewer claims

Alliance Contracting (Integrated Project Delivery – IPD)

a. Relatively new delivery method
b. Requires a three-way contract between the employer, contractor and designer
c. Establishes the risks and responsibilities of each party
d. In exchange for greater certainty of cost and liability, each party gives up some of its ability to claim for changes in the project
e. Requires great trust between parties

Public-Private Partnership

a. Another relatively new delivery system

b. Developer works with an employer and provides a wide range of services:

   i. Site selection

   ii. Programmatic development

   iii. Financing

   iv. Design

   v. Construction

c. Minimum up-front cost. In exchange, it often relinquishes control to the developer

Agency Construction Manager (CMa)

a. Not a delivery system

b. The CMa will enable the employer to evaluate the APD methods

c. Represents the employer throughout the design and construction process

d. CMa service is delivery method neutral and solely represents the employer interests

ANALYSIS OF A CLAIM

Stages in Analysis

a. Phase 1: Preliminary Analysis

b. Phase 2: Programme Analysis

c. Phase 3: Damage Analysis

d. Phase 4: Settlement Negotiations

e. Phase 5: Formal Disputes Resolution

Phase 1: Preliminary Analysis

a. Identify each issue
b. Identify and evaluate contract language
c. Establish issue files
d. Analyze each issue
e. Determine contractual entitlement
f. Allocate costs to specific issues if possible to prioritize further analysis
g. Request additional information, if necessary

Phase 2: Programme Analysis

a. Obtain baseline and updated programmes
b. Compare as-planned, programme updates and as-built programmes
c. Determine which activities were delayed and whether concurrent delays occurred
d. Identify periods of delay, disruption or acceleration
e. Associate claim issues with the identified periods
f. Perform a detailed programme analysis

Phase 3: Damage Analysis

a. Determine direct costs associated with each claim and demonstrate entitlement
b. Determine potential indirect and impact costs
c. Determine overhead costs
d. Prepare damage calculations for each issue

Phase 4: Settlement Negotiations

a. Complete the analysis of each issue before commencing negotiations

b. Meet with the other parties to negotiate settlement of each issue

c. Use an independent mediator as appropriate to facilitate settlement

d. Draft and execute the appropriate settlement documents

Phase 5: Formal Disputes Resolution

a. Failed negotiation
b. Seek appropriate legal advice
c. ADR or litigation

Phase 5: Formal Disputes Resolution

d. ADR:
    i. Voluntary Settlement Conference Arbitration
    ii. Mediation
    iii. Dispute Review Board
    iv. Neutral Advisor
    v. Arbitration
    vi. Private Judge
    vii. Mini-Trial
    viii. Bench Trail
    ix. Jury Trials

CONCLUSION

a. Claims are here to stay
b. No special contract method that will eliminate claims
c. No magic method that will assure there will be no claims.
d. Intelligent and active prospective planning will reduce potential claims

CONCLUSION

a. **Best defense to claims is:**

   i. **Good design**

   ii. **vigilant and fair contract management**

   iii. **Prompt attention to events**

   iv. **flexibility among employers and contractors teams**