



مدیریت ادعاء و اختلافات در طول چرخه حیات پروژه

بخش پنجم:

اجرای برنامه و مدیریت ادعاء، دعاوی و اختلافات در فاز ساخت/اجرا (Construction Phase)

ارائه دهنده:

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What we will learn?

☐ Claims management

- ❖ Introduction
- ❖ Project and claim documentation
- ❖ Contract and claim administration
- ❖ Types of claim
- ❖ Claim and dispute notification
- ❖ Claim and dispute tracking and processing
- ❖ Notes to consider before writing the claim

☐ Claims and disputes resolution

- ❖ Resolution methods
- ❖ Contract forms

What we will learn?

☐ Parties' considerations

- ❖ Construction manager
- ❖ General contractor and subcontractors
- ❖ Design consultant

☐ Lessons learned from case studies

- ❖ Recommendations
- ❖ Examples

☐ Final recommendations

Claims Management

(Introduction)

While virtually all the actions taken in the pre-design and design phases represent measures that help the owner avoid claims, the actions taken by the CM during the construction phase also help mitigate the potential impacts of unforeseen issues that may develop into disputes and claims.

Suggested terminology by CMAA

❑ A **typical hierarchy** of **potential disagreements** may include the following:

1. *A request for change*
2. *A request for equitable adjustment*
3. *A formal claim*
4. *Litigation*



Suggested terminology by CII

If the **owner admits** the claim of contractor and **grants him extension of time or reimbursement of additional cost**, or both,

the issue is sorted out.

However, if the **owner does not agree** to the claim put out by contractor and there are **differences in the interpretations**,

the issue takes the form of a dispute

Dispute

It is “**any contract question or controversy** that must be settled **beyond** the jobsite management”

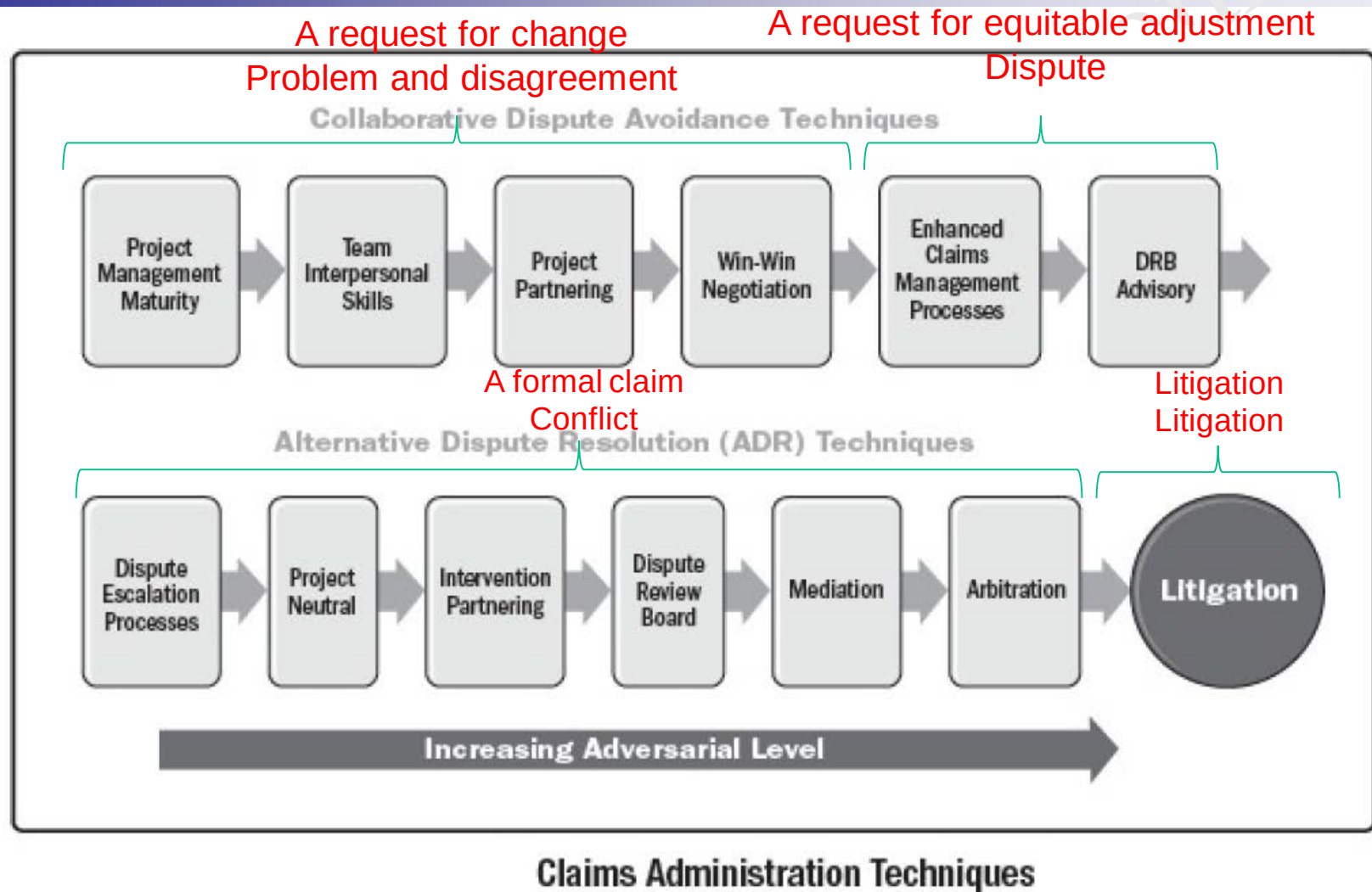
Individuals Involved	Stages in the Claims Process				
	Problem	Disagreement	Dispute	Conflict	Litigation
Litigators					Formal court documentation and proceedings
Consultants & Neutrals				Assist with quantification and entitlement on an issue-by-issue basis	
Sponsors, Standing Advisors & Standing Neutrals			Attempts at resolution removed from day-to-day management		
Project Managers	Routine discussions & negotiations	Substantial honest negotiation on defined problem			
Level of Resolution	On the Project			Removed from the Project	

A formal claim

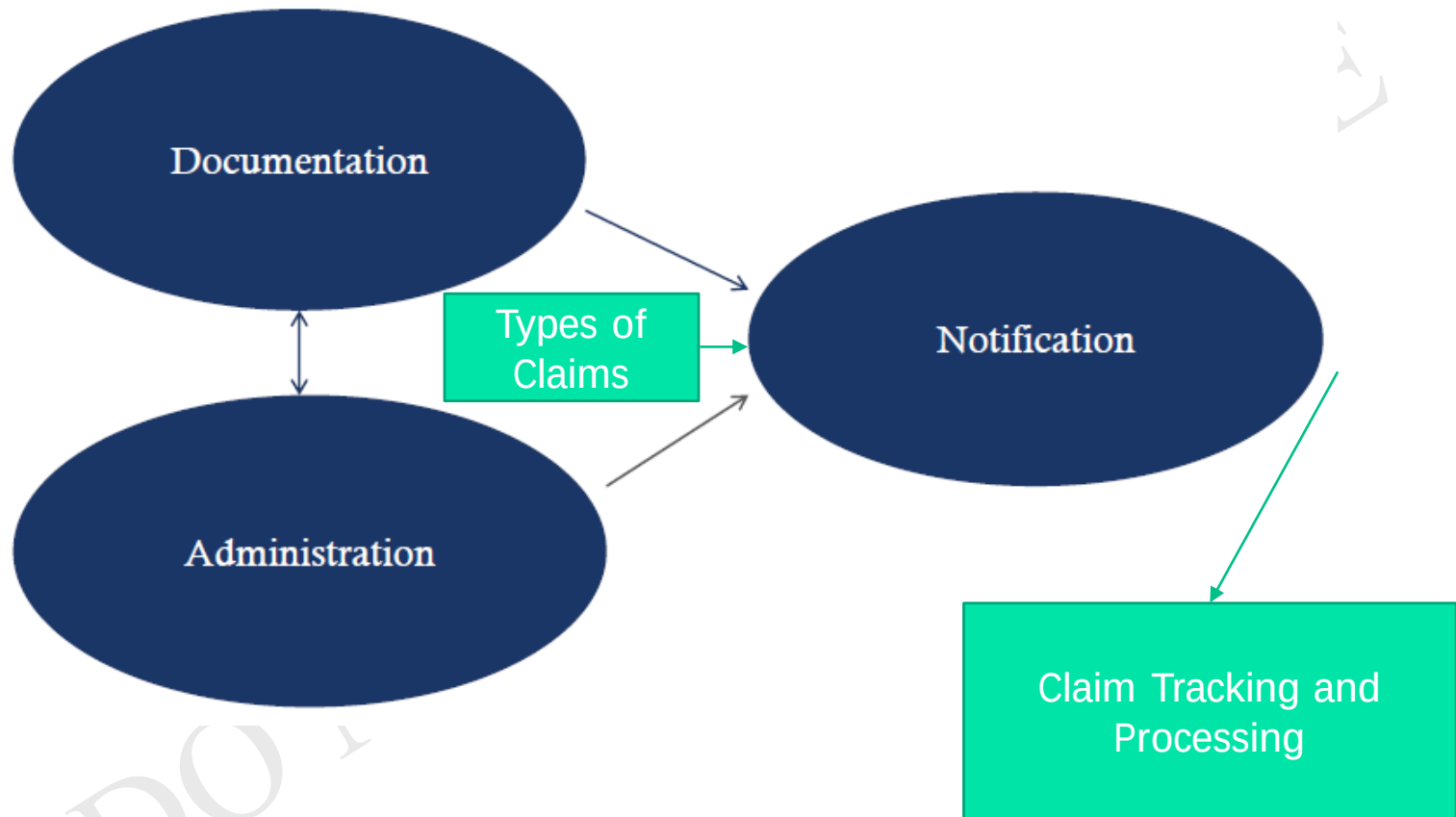
A request for equitable adjustment

A request for change

Suggested terminology by PMI



Suggested terminology for claim management in Construction Phase





Elements of every claim

❑ Every claim consists of **three elements**:

(1) **Identification of and entitlement to recovery**

- ❖ To identify a possible claim, **project personnel** must **understand** the **conditions entitling the contractor** to pursue such relief.

(2) **Impacts**

- ❖ The **contractor** must be able to **demonstrate** the **impacts** of the **change**.

(3) **Quantification**

- ❖ Quantification defines the **dollars and days** for which you believe you are **entitled to recover**.
 - ❖ These are your **“damages.”**
 - ❖ This often requires **proof** that:
 - Owner** proximately **caused** the breach
 - Resultant damages** were reasonably **foreseeable**

Claims Management

(Project and Claim Documentation)

Importance of complete project documentation

KEY POINT:

- ❑ The **standard dictum** of **“put everything in writing”** applies here.
- ❑ It is to be noted in this regard that, to be effective,
*documentation **must be prepared during the construction process.***
 - ❖ Records created **after the fact** will **not** generally receive **consideration.**
- ❑ **Project photographs, dated and identified,** can be **very effective** when documenting for claims.

Importance of complete project documentation

KEY POINT:

It is also noted that frequently when a dispute arises and when the **contractor presents his documentation** or evidence to support his position, including photographs, *the other party will frequently seek to reach a settlement rather than allowing the claim and the dispute resolution process to proceed.*

Thorough and complete documentation is the key.

Importance of complete project documentation

- ❑ **Avoid** claims and disputes or at least **reduce** disputed issues.
- ❑ **Preserve** **right** to claim
 - ❖ A sense of entitlement **without proof** of **entitlement** leads **nowhere**
- ❑ **Defend** against **claims of others**

Remember that many claims and disputes **don't happen** on the
real time on the project,
but **significant disputes** happen **years after the claim arises.**

Remember that you don't know what is going to happen!

What to document?

Choose what data and level of detail should be tracked for defending against a claim

Remember the documents we mentioned in delay analysis course?

1. Programme records
2. Progress records
3. Resource records
4. Costs records
5. Correspondence and administration records
6. Contract and tender documents

Claims Management

(Project and Claim Documentation)

Record keeping and reporting by construction contract administration (CCA)

- ☐ Documentation created by **construction contract administration (CCA)** is effective for
 1. **Communication** of the construction stage activity.
 2. **Historical record** of the construction stage activity.
- ☐ The documentation should be **maintained in a format** that can be **easily retrieved**.

Let's see some of them!



Non-conforming work notice

❑ **AIA Document A201** states that work **not conforming to the requirements** of the contract documents may be considered **defective**.

- ❖ The A/E has the authority to **reject work** that does not conform to the requirements of the contract documents.
- ❖ Only the owner **can accept nonconforming work**; the **A/E is not authorized** to do so.
- ❖ The A/E, upon **discovery of nonconforming work**, should
 1. **Document** the **deficiencies in a field observation report** and
 2. **Present copies** to the contractor and the owner
- ✓ A specific document in the **form of a Notice of Nonconforming Work** is an aid in **documenting and tracking nonconforming work** and the remedy.

NONCONFORMING WORK NOTICE

Project: _____ Report Number: _____
 _____ From: _____
 To: _____ Date Observed: _____ Date Reported: _____
 _____ A/E Project Number: _____
 Re: _____ Contract For: _____

Specification Section:	Paragraph:	Drawing Reference:	Detail:

Nature of Nonconformance:

Signed by: _____ Date: _____ Date Response Needed: _____

Proposed Correction (Response):

Amount of Time for Correction:

☐ Attachments

Response From:	To:	Date Rec'd:	Date Ret'd:

Signed by: _____ Date: _____

Copies: ☐ Owner ☐ A/E ☐ Consultants ☐ _____ ☐ _____ ☐ _____ ☐ File

Field observation reports

- ❑ The **A/E's record of site visits** consists basically of
 1. Site observations and
 2. Communications
- ❑ Having the **previous site report** in hand while performing the **new observation** **provides continuity** as well as an opportunity to **update and close open items**.
- ❑ These reports are for the **benefit of the A/E** and may be used as **a means of communication** with the owner and the contractor.
 - ❖ AIA Document G711, Architect's Field Report, is a useful format.

*What should be included in the **field observation reports**?*



Field observation reports

❑ **Field observation reports** include the following standard information:

- Project name
- A/E project number
- Date of visit (including day of week)
- Report number
- Weather (clear, overcast, rainy, misting, foggy, hot, warm, cold, windy, etc.)
- Approximate temperature range
- Site conditions (clear, muddy, dusty)
- Time and duration of visit
- Others present during the visit
- Remarks:
- Status of project, work in progress, work completed
- Products delivered/stored materials onsite
- Items discussed
- Deficiencies noted
- Contractor comments/queries
- Signature and date of report



Field observation reports



Knowledge for Creating
and Sustaining
the Built Environment

PERIODIC FIELD OBSERVATION REPORT

Project: _____ Report Number: _____

Owner: _____ Date: _____ Time: _____

Re: _____ A/E Project Number: _____

Weather

☐ Clear ☐ Snow ☐ Warm
☐ Overcast ☐ Foggy ☐ Hot
☐ Rain ☐ Cold ☐ _____

Site Conditions

☐ Clear ☐ Dusty
☐ Muddy ☐ _____
☐ Temperature Range _____

Day

☐ Monday ☐ Thursday
☐ Tuesday ☐ Friday
☐ Wednesday ☐ _____

Persons Contacted:

Work Observed:

Items Discussed:

Remarks:

☐ Attachments

Signed by:

Date:

Copies: ☐ Owner ☐ A/E ☐ Contractor ☐ Consultants ☐ _____ ☐ _____ ☐ File

By: Alavipour, PhD, PMP, CM

Project representative's documentation

- ❑ A full-time project representative normally keeps a **daily log (journal)** in which **important events** that penetrate on the project site are **recorded**.
 - ❖ The **log** should contain **only facts** related to the project.
 - ❖ **Logs** should contain **sequential entries** with **no gaps**.
 - ❖ **Weekends** and holidays should be **accounted** for, **even if a “No Work” entry is required.**
 - ❖ Each entry can be **separated** by a **line and date or time**.
 - ❖ An entry made in error should **not be erased** but **crossed out with a single neat line.**
 - ❖ **Logs** should **not have the appearance** of information **inserted or removed** at a **time other than** when the **original** entry was made.

Project representative's documentation

- ❑ A **full-time project representative** normally keeps a **daily log (journal)** in which **important events** that penetrate on the project site are **recorded**.
 - ❖ In addition to the field reports addressed earlier, the daily log contains the following information:
 - ✓ Work performed, start or completion of any unit of work
 - ✓ Delivery of products
 - ✓ Construction problems and remedies
 - ✓ Documentation of significant delays
 - ✓ Documentation of oral instructions and questions
 - ✓ Observation of nonconforming work and actions taken
 - ✓ Visitors to the site
 - ✓ Inspections performed, tests taken
 - ✓ Signature and date of report

Project representative's documentation

- ❑ The A/E's project representative may be required to **complete and distribute weekly and monthly reports**.
 - ❖ The weekly/monthly reports **summarize** the **daily log** and specifically **address important issues** that remain unresolved.
 - ❖ The report also **addresses important activities** that occurred during the report period.
 - ❖ These reports give an **overview of construction activity and progress** in relation to the construction **progress** schedule.
 - ❖ **Attention** should be **drawn to items** that may **impact** the **schedule or the construction cost**.



Project representative's documentation

the Built Environment

DAILY FIELD OBSERVATION REPORT

Project: _____ Report Number: _____
Owner: _____ Date: _____ Time: _____
Re: _____ A/E Project Number: _____

Weather

☐ Clear ☐ Snow ☐ Warm
☐ Overcast ☐ Foggy ☐ Hot
☐ Rain ☐ Cold ☐ _____

Site Conditions

☐ Clear ☐ Dusty
☐ Muddy ☐ _____
☐ Temperature Range _____

Day

☐ Monday ☐ Thursday
☐ Tuesday ☐ Friday
☐ Wednesday ☐ _____

Persons Contacted:

Work Observed:

Items Discussed:

Materials Delivered:

Requested Revisions or Interpretations:

Nonconforming Work Reported this Date to Contractor:

Remarks:

☐ Attachments

Signed by:

Date:

Copies: ☐ Owner ☐ A/E ☐ Contractor ☐ Consultants ☐ _____ ☐ _____ ☐ File

By: Alavipour, PhD, PMP, CMI

Project: _____ Report Number: _____

Owner: _____ Report Date: _____

Contractor: _____ A/E Project Number: _____

Contract Completion Date/Time: _____ Approved Time Extensions (Days): _____

Date Construction Started: _____ Contract Completion Date/Days: _____

Revised Completion Date: _____ Percent of Project Completion: _____

Percent of Time Used: _____ Days Elapsed: _____

Is Project on Schedule: _____ If not, why? _____

Summary of Construction Activities Since Last Report:

☐ Attachments

Signed by: _____

Date: _____

Copies: ☐ Owner ☐ A/E ☐ Contractor ☐ Consultants ☐ _____ ☐ _____ ☐ File

Review, analysis, and evaluation

- ☐ **Feedback** should occur **during each stage of a project**, especially during the **construction stage**.
- ☐ During **large or complex projects**, feedback to the project team should be **continuous rather than periodic**.
- ☐ Documentation in the form of **photos or video recordings** of both **successful and less-than-desirable** execution of the project helps to transition the **review from the field** to in-house personnel.



By: Alavipour, PhD, PMP, CM

Project: _____ ☐ Specification Item: _____
 _____ ☐ Drawing Item: _____
 To: _____ Date: _____
 _____ A/E Project Number: _____
 Re: _____ Contract For: _____

Use this form to suggest improvements based on actual experience. The improvements may involve changes in the master specification or the standard drawing detail library.

Detailed Explanation:

Suggested Improvement:

Supporting Data Attached: ☐ Specification ☐ Drawing ☐ Photograph ☐ Video ☐ _____

Signed by:

Date:

[illegible]



Request for interpretations

- ❑ The acronym **RFI** is sometimes used to mean **request for information**.
- ❑ **AIA Document A201 and FIDIC** state that the architect will **review and respond** to requests for information about the contract documents.
 - ❖ **RFIs** should be **limited** to **requesting an interpretation** of the documents or may be a request for information that may be **missing**.
 - ❖ The **A/E requirement** to respond to RFIs should **not give rise** to a practice of a contractor or subcontractor **not reviewing the documents** and **simply asking** where to find a particular piece of information.

Construction Specifications Institute (CSI) uses the acronym RFI to mean a request for interpretation, since that is a specific contractual obligation.

- ❖ RFIs asking for interpretation of an item in the contract documents, **may be initiated** by the **owner or by the contractor**.

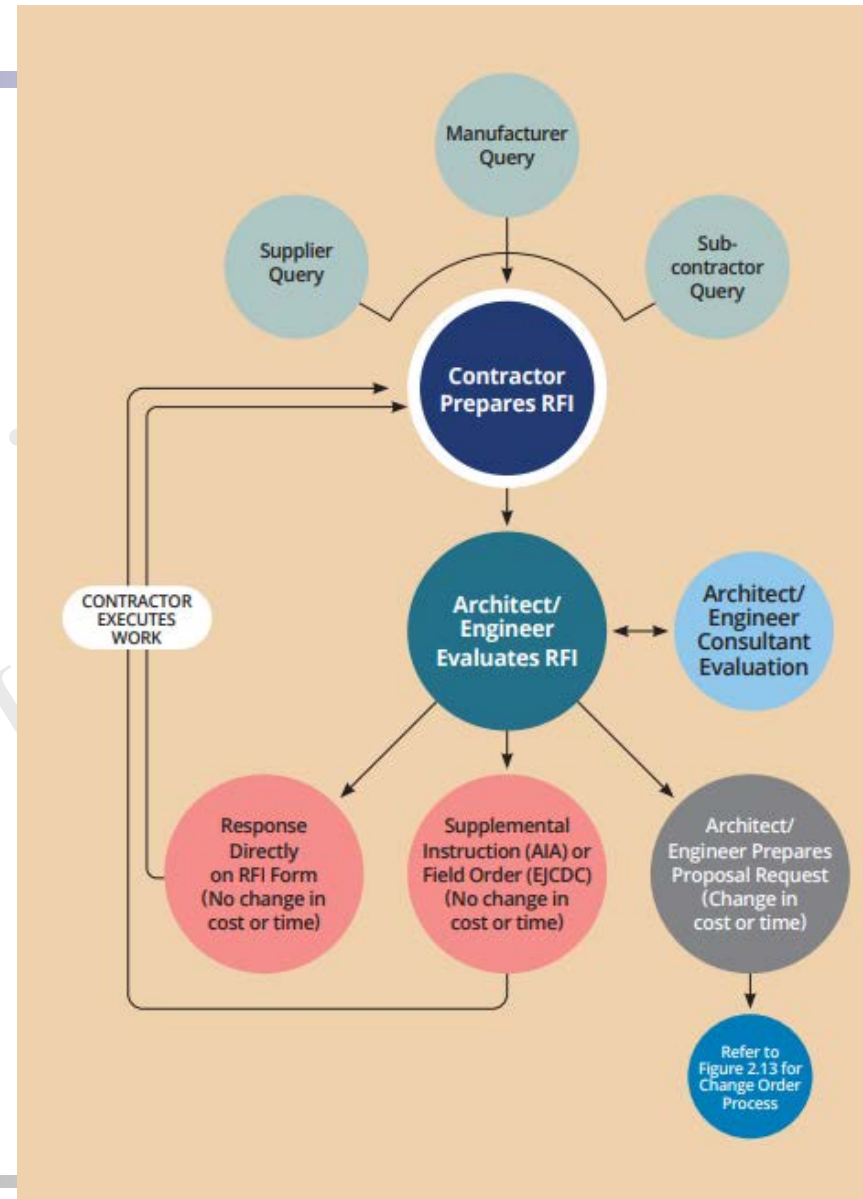
Request for interpretations

*Procedures should be established among the parties to the contract for the **management of RFIs**.*

Depending on the nature of the RFI, there are **several possible responses**.

The **reply** to the contractor could be:

1. Written directly on the RFI form as a **clarification**, or
2. **Minor change** in the work.
3. Revised drawings, revised specifications, or a **proposal request**.





REQUEST FOR INTERPRETATION

Project: _____ R.F.I. Number: _____
From: _____
To: _____ Date: _____
A/E Project Number: _____
Re: _____ Contract For: _____

Specification Section: _____ Paragraph: _____ Drawing Reference: _____ Detail: _____

Request:

Signed by: _____ Date: _____

Response:

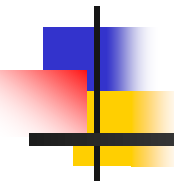
☐ Attachments

Response From: _____ To: _____ Date Rec'd: _____ Date Ret'd: _____

Signed by: _____ Date: _____

Copies: ☐ Owner ☐ Consultants ☐ _____ ☐ _____ ☐ _____ ☐ _____ ☐ File

- ☐ Rec'd = Received
- ☐ Ret'd = Returned



By: Alavipour, PhD, PMP,



1.9

Delayed Drawings or Instructions

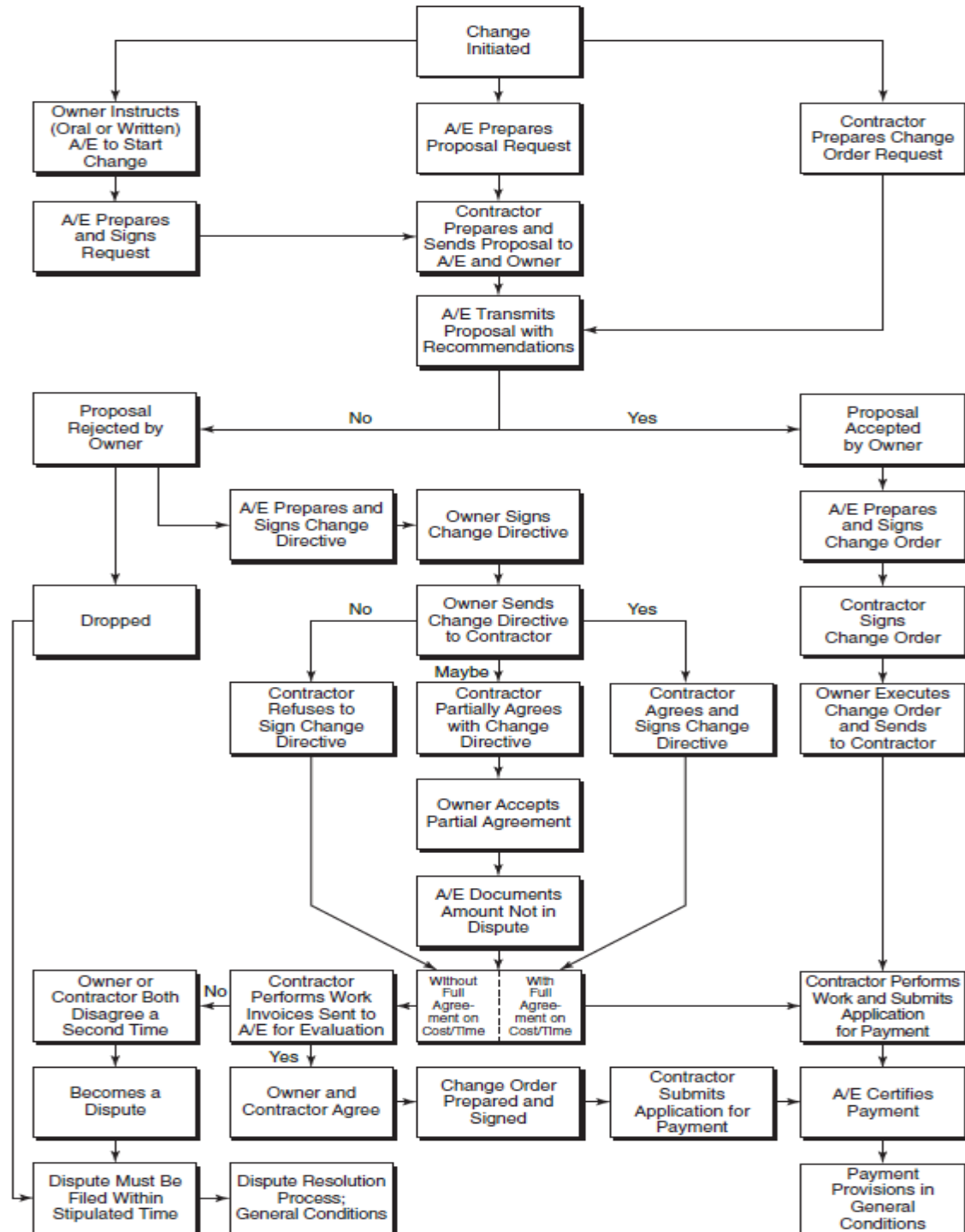
The Contractor shall give a Notice to the Engineer whenever the Works are likely to be delayed or disrupted if any necessary drawing or instruction is not issued to the Contractor within a particular time, which shall be reasonable. The Notice shall include details of the necessary drawing or instruction, details of why and by when it should be issued, and details of the nature and amount of the delay or disruption likely to be suffered if it is late.

If the Contractor suffers delay and/or incurs Cost as a result of a failure of the Engineer to issue the notified drawing or instruction within a time which is reasonable and is specified in the Notice with supporting details, the Contractor shall be entitled subject to Sub-Clause 20.2 [*Claims For Payment and/or EOT*] to EOT and/or payment of such Cost Plus Profit.

However, if and to the extent that the Engineer's failure was caused by any error or delay by the Contractor, including an error in, or delay in the submission of, any of the Contractor's Documents, the Contractor shall not be entitled to such EOT and/or Cost Plus Profit.



By: Alavipour, PhD, PMP, CMIT



Proposal request

- ❑ A proposal request is a **written document**,
usually prepared by the **A/E**, that describes a **proposed change** to the project.
 - ❖ A proposal request is for **information only** and is not an instruction to
 1. Execute the proposed changes or
 2. Stop work in progress.

Proposal request

- ❑ The proposal request must include **enough detail** for the contractor to accurately estimate the **cost and time impact** of the proposed change on the project.
 - ❖ The proposal request should state the **reasons** for the **proposed change**.
 - ❖ This is not a change order or a directive to make changes to the project.
 - ✓ It is only a request for the contractor to **prepare** and submit a written and itemized quotation of changes in the contract sum or time that **would result** from the proposed change
if accepted.

Remember that I emphasized on TIA before ordering a change order?



- ❖ The request may be **supplemented** by additional or revised drawings and specifications.

2. The **proposal request** is sent to the **contractor for evaluation** of how the proposed change will *affect the contract sum and time*.

3. The contractor then responds to the owner with a change order request itemizing changes to the contract sum, the contract time, or both.

- ❖ The change order request should not be confused with a proposal request.





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Proposal request



AIA® Document G709™ – 2018

Proposal Request

PROJECT: *(name and address):*

CONTRACT INFORMATION:

Contract For:

Date:

Architect's Project number:

Proposal Request Number:

Proposal Request Date:

OWNER: *(name and address):*

ARCHITECT: *(name and address):*

CONTRACTOR: *(name and address):*

The Owner requests an itemized proposal for changes to the Contract Sum and Contract Time for proposed modifications to the Contract Documents described herein. The Contractor shall submit this proposal within _____ () days or notify the Architect in writing of the anticipated date of submission.

(Insert a detailed description of the proposed modifications to the Contract Documents and, if applicable, attach or reference specific exhibits.)

THIS IS NOT A CHANGE ORDER, A CONSTRUCTION CHANGE DIRECTIVE, OR A DIRECTION TO PROCEED WITH THE WORK DESCRIBED IN THE PROPOSED MODIFICATIONS.

REQUESTED BY THE ARCHITECT:

PRINTED NAME AND TITLE

By: Alavipour, PhD, PMP, CMIT

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Proposal request

CHANGE ORDER TECHNICAL
JUSTIFICATION [FORM 03]

- ❖ This form is usually **prepared** by the owner's representative or a project engineer.
- ❖ The **intent** of this form is to **provide the owner** with documented credibility and justification relative to **completing** the work scope for a **potential Change Order**.

CHANGE ORDER TECHNICAL JUSTIFICATION

	Potential Change Order No. _____
	Contract Change Order No. _____

Contractor _____

Contract No. _____

Prepared / Submitted By ☐ Owner's Representative ☐ Engineer

Name _____ Date _____

Description of Change _____

Reason for Change _____

Alternatives Considered _____

Impact of Non-Incorporation _____

Approved _____

OWNER

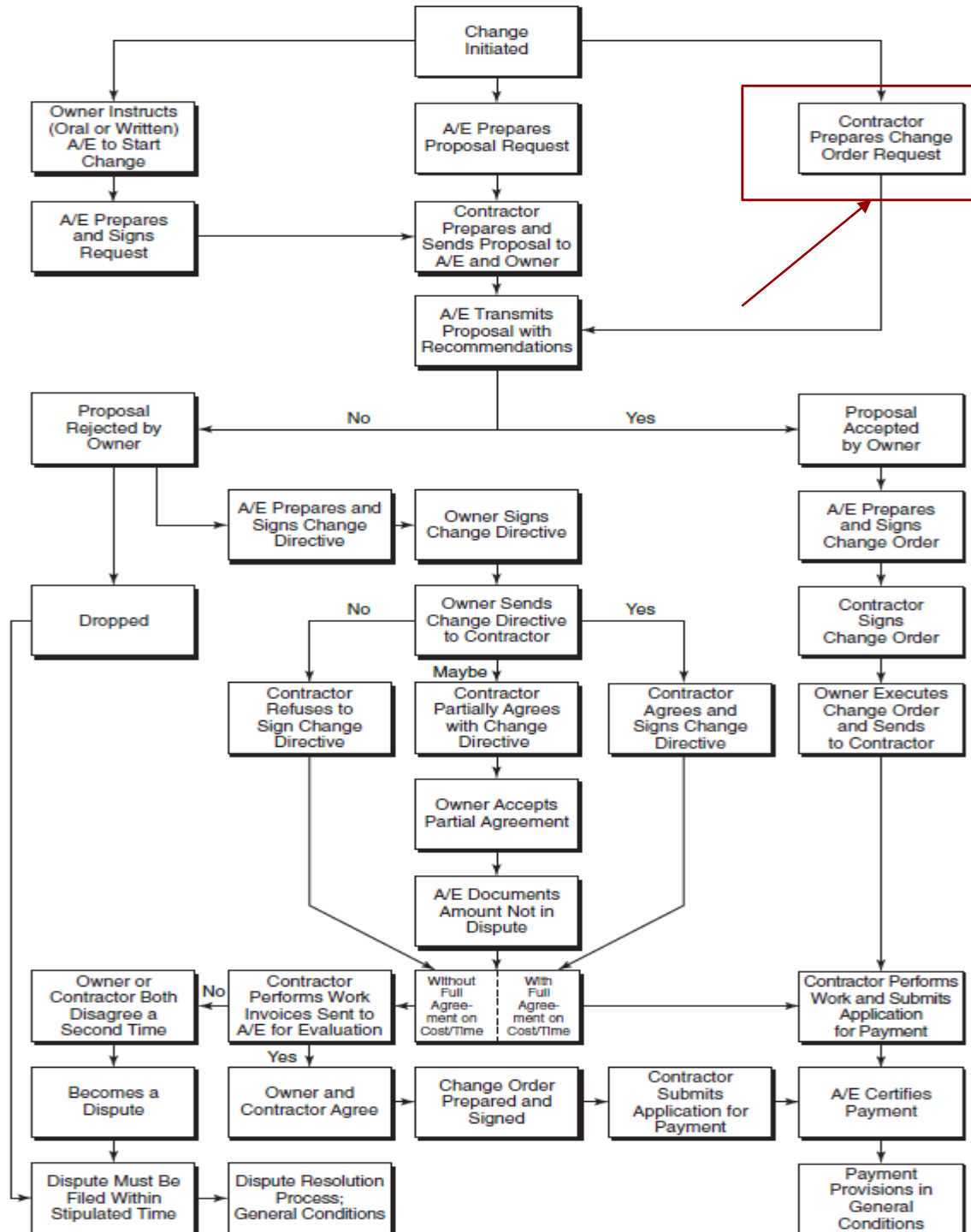
DATE

Change order request

A change order request may be **used by the contractor** to initiate **proposed changes** that the contractor **deems necessary**.

❑ A contractor-initiated change order request should

1. State **reasons** for the proposed change
2. State an **itemization of time and costs** for labor, material, taxes, subcontracts, bonds, insurance, and overhead and profit.
3. Reference the portion of the **drawings or specifications** generating the need for change.



CHANGE ORDER REQUEST (PROPOSAL)

Project: _____ Change Order Request Number: _____

 From (Contractor): _____
 To: _____ Date: _____

 A/E Project Number: _____
 Re: _____ Contract For: _____

This Change Order Request (C.O.R.) contains an itemized quotation for changes in the Contract Sum or Contract Time in response to proposed modifications to the Contract Documents based on Proposal Request No. _____.

Description of Proposed Change:

Attached supporting information from: ☐ Subcontractor ☐ Supplier ☐ _____ ☐ _____

Reason For Change:

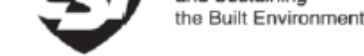
Does Proposed Change involve a change in Contract Sum? ☐ No ☐ Yes [Increase] [Decrease] \$ _____
 Does Proposed Change involve a change in Contract Time? ☐ No ☐ Yes [Increase] [Decrease] _____ days.

Attached pages: ☐ Proposal Worksheet Summary: _____
☐ Proposal Worksheet Detail(s): _____

Signed by:

Date:

By: Alavipour, PhD, PM



PROPOSAL WORKSHEET SUMMARY

Project: _____ Change Order Request Number: _____
To: _____ From: _____
Re: _____ Date: _____
Proposal Request Number: _____ A/E Project Number: _____

Complete and attach Proposal Worksheet Detail for each element of Work. Enter Worksheet Information below.

ADDITIONS:

	Sheet	Description	Material	Labor	Subtotal
1					
2					
3					
4					
5					
6					
7					
Subtotal					

DEDUCTIONS:

	Sheet	Description	Material	Labor	Subtotal
1					
2					
3					
4					
5					
6					
7					
Subtotal					

Subcontractor's Net: _____
Subcontractor's OH&P: _____
Subcontractor's Bond: _____
Subcontractor's Total: \$ _____
Contractor's OH&P: _____
Contractor's Bond: _____
Insurance: _____
Tax: _____
WORKSHEET TOTAL: \$ _____



Change order request



Knowledge for Creating
and Sustaining
the Built Environment

PROPOSAL WORKSHEET DETAIL

Project: _____

Change Order Request Number: _____

To: _____

From: _____

Contact: _____

Re: _____

Date: _____

Proposal Request Number: _____

A/E Project Number: _____

SHADED AREAS FOR A/E USE

ADDITIONS					UNIT PRICES				SUBTOTALS				TOTAL	
	Ref. No.	Item Description	Quantity		Materials		Labor		Materials		Labor			
1														
2														
3														
4														
Subtotal (Enter this number on Worksheet Summary.)														

DEDUCTIONS					UNIT PRICES				SUBTOTALS				TOTAL	
	Ref. No.	Item Description	Quantity		Materials		Labor		Materials		Labor			
1														
2														
3														
4														
Subtotal (Enter this number on Worksheet Summary.)														



Minor changes to the project or clarifications of the contract documents are defined as instructions or clarifications not involving adjustment of the contract sum or time.

Remember?
We talked about this in Design Phase!

By: Alavipour, PhD, PMP,



FIELD ORDER

Project: _____ Field Order Number: _____
From: _____
To: _____ Date: _____
A/E Project Number: _____
Re: _____ Contract For: _____

You are hereby directed to execute promptly this Field Order which interprets the Contract Documents or orders minor changes in the Work without change in Contract Sum or Contract Time.

If you consider that a change in Contract Sum or Contract Time is required, submit a Change Order Request to the A/E immediately and prior to proceeding with this Work.

Specification Section:	Paragraph:	Drawing Reference:	Detail:

Description of Interpretation or Change:

☐ Attachments

Signed by: _____

Date: _____

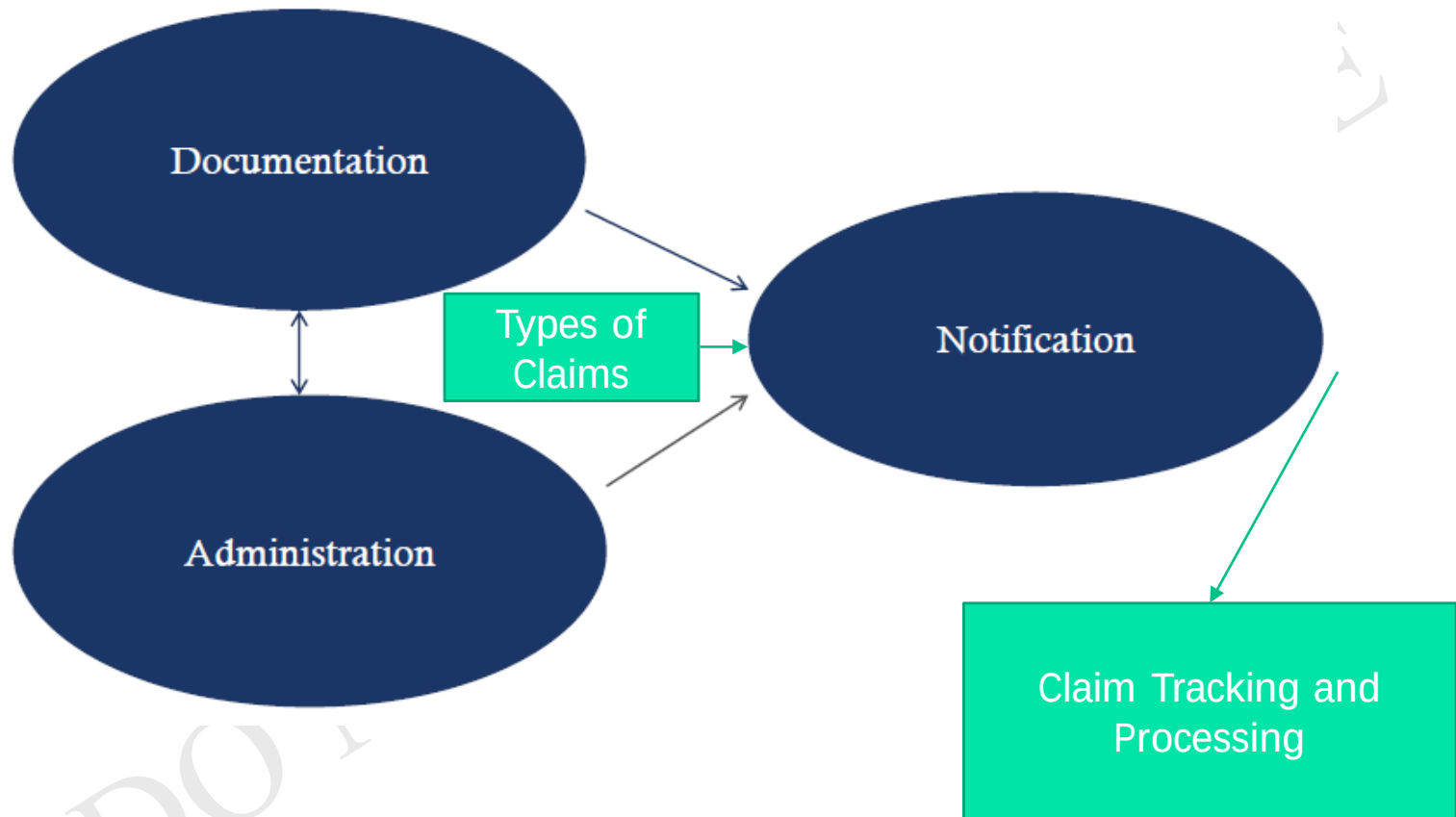
Copies: ☐ Owner ☐ Consultants ☐ _____ ☐ _____ ☐ _____ ☐ _____ ☐ File

Claims Management

(Project and Claim Documentation)

Record keeping and reporting by Contractor

Suggested terminology for claim management in Construction Phase



Typical project documentation

In addition to typical CCA records, the contractor's project manager should maintain records of items specific to the construction of the project. Some of these include:

- ☐ Bid documentation
- ☐ Estimates, manpower analysis, and quantity takeoffs
- ☐ Time cards
- ☐ Job cost accounting system
- ☐ Production reporting
- ☐ Material and delivery receipts
- ☐ Schedules and progress reporting
- ☐ Cash flows
- ☐ Correspondence, transmittal, and submittal logs
- ☐ Daily reports
- ☐ Photographs and videos
- ☐ Change orders
- ☐ Periodic reviews
- ☐ E-Mail and social media

We will talk about these items later

Typical project documentation

- ☐ Contract documents
- ☐ Payrolls
- ☐ Purchase orders
- ☐ Invoices
- ☐ Notice of commencement
- ☐ Notice of furnishing
- ☐ Meeting minutes
- ☐ RFIs and RFI responses and logs
- ☐ Request for change / Notices claims
- ☐ Punchlist
- ☐ Site access logs
- ☐ Funding sources
- ☐ Permits
- ☐ Payment applications

And many mores

Typical project documentation

Keeping accurate records of costs for equipment, overhead, direct cost items, and work orders is very important.

If the contractor combines **too many different cost items** into a **single job cost account**,
*the data can become meaningless particularly when used to **prepare analysis of damages**.*

Let's look at some of these documents

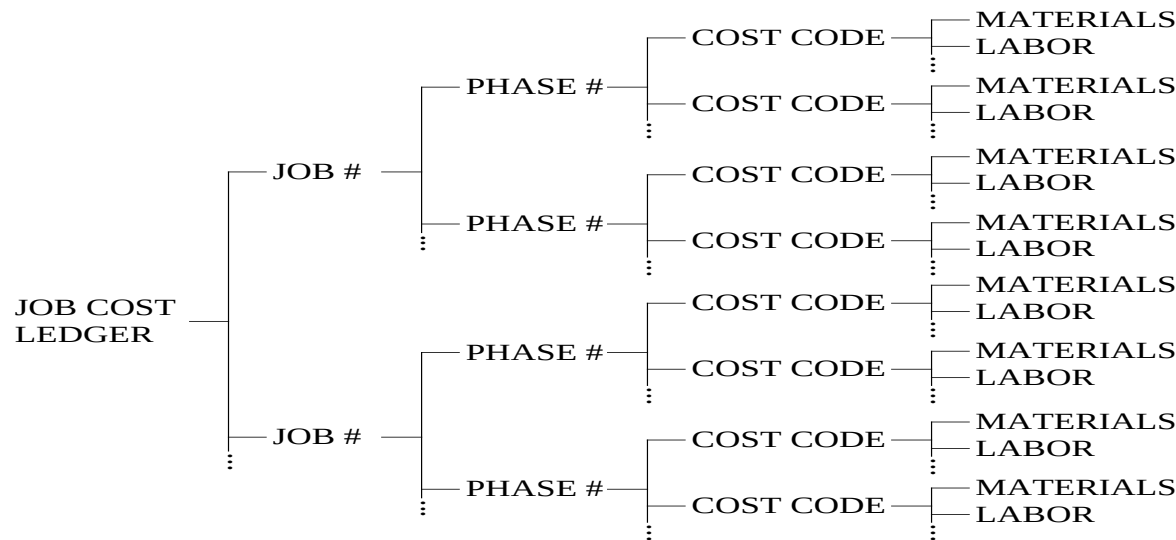


Bid, estimate, and budgets

- ❑ **Cost estimates** could become one of the **key foundational documents** should a **claim** arise during project execution.
- ❑ The information contained in the **estimate and supporting documentation** can be used to establish
 1. Contractor's original quantities
 2. Production rates
 3. Anticipated costs
- ❖ Most **job cost accounting systems** allow the contractor to
 1. Record budgeted costs
 2. Compare them with actual costs
- ❖ The **budget** should be **developed at a level of detail consistent** with
 1. **Cost coding** reflected in the **job cost accounting system**
 2. Any **billing** or **contractual** requirements.



Bid, estimate, and budgets



Bid, estimate, and budgets

❑ Because the **bid estimate** is only an estimate,

contracting agencies **hesitate** to **allow** the bid estimate to **serve as the sole basis** for claiming extra costs,

but under extreme circumstances it may be the **only reasonable method** available.

Do you remember total cost method?

1. Actual cost to perform compared with the original bid estimated cost to perform,
2. Actual cost to perform compared with a “reasonable” estimated cost to perform, and
3. Actual cost to perform compared with actual cost of identical work
 - i. Performed under normal conditions on the affected project
 - ii. Performed under another **similar project**.



Time cards

- ❑ The **time card**, which usually serves as the **input source** for the **job payroll**,
 - ❖ **Individual's time spent** working on a **particular project** for each payroll period.
 - ❖ **Which individuals** worked on **any given day** and for **how long**.
 - ❖ **Number of hours** worked **overtime**, if any
 - ❖ **Number of hours** worked on **each task performed** that day.
 - ❖ **Each task or item** worked should be **coded to correspond** to the **cost code** reflected in the contractor's **job cost accounting system**.
 - ❖ **Record daily production** for each item worked if units installed are recorded along with the **actual time expended**.

*Time cards are usually prepared at the **foreman level** and then **later reviewed** by **supervisory and administrative** personnel.*



Time cards

مدیریت ادعاء و اختلافات در طول چرخه حیات پروژه
اجرای برنامه و مدیریت ادعاء، دعاوی و اختلافات در فاز ساخت/اجرا (Construction Phase)

Labor Time Reporting

Daily Labor Time Card

Project Highway Bridge
Date July 20

Project No. 200808-05

Wea ther Cloudy-windy
Prepared by G.A.S.

Employee Number	Name	Craft	Time Classification	Hourly Rate	Cost Code					Total Hours	Gross Amount
					03157.10.3	03157.20.3					
132	Winnowich, N.	F	ST	34.00		8				8	\$272.00
			OT								
221	Clouten, S.	C	ST	\$31.00		8				8	\$248.00
			OT								
248	Schluder, L.	C	ST	\$31.00		8				8	\$248.00
			OT								
319	Mills, R.	O	ST	\$33.00		2				2	\$66.00
			OT	0							
143	Gibson, E.	L	ST	\$22.00		8				8	\$176.00
			OT								
417	Sears, K.	L	ST	\$22.00		8				8	\$176.00
			OT								
176	Sibanda, M.	L	ST	\$22.00	2	6				8	\$176.00
			OT								
Total Hours					2	48				50	
Total Cost					\$44.00	\$1,318.00					\$1,362.00

Highway bridge, daily labor time card



Job cost accounting system

- ❑ The **job cost accounting system**, which is the **computer application** that **project costs** are **entered into**, should include the **same activity list** that was contained in the **original estimate**.

In other words, assuming the **estimate** was made in **sufficient detail**, the **cost coding breakdown** should **bear some resemblance in format** to the system used in the **bid estimate**.

Remember how much I emphasized on this?

Cost estimating-Scheduling-Cost control

Departments should be unified!

Job cost accounting system

- ❑ With the **bid estimate** loaded into the **cost accounting system**, performing a **variance analysis** when **activity completion percentages** are **known** is somewhat **easy**.
- ❑ To the extent that the **cause of the variance** is the **responsibility** of the **owner**,
the **contractor** should
 1. ***Timely notify the owner***
 2. ***Request a change order for the impact***



Job cost accounting system

Weekly Labor Cost Report

Project	Highway Bridge	Project No.	200808-05							
Week ending	July 21 (working day 27)	Prepared by	S.K.S.							
Cost Code (1)	Work Type (2)	Unit (3)	Total Quantity Budgeted (4)	Total Quantity to Date (5)	Percent Completed (6)	Budgeted Direct Labor (7)	Budgeted Labor to Date (8)	Actual Labor to Date (9)	Cost Difference (10)	Deviation (11)
31220.10.3	Excavation, unclassified	cy	1,667	1,667	100.00%	\$2,643	\$2,643	\$2,459	(\$184)	0.93
31222.10.3	Excavation, structural	cy	120	120	100%	\$2,985	\$2,985	\$3,353	\$368	1.12
31350.00.3	Pile-driving rig, mob. & demob.	job	—	—	100%	*\$4,374	\$4,374	\$4,004	(\$370)	0.92
31361.10.3	Piling, steel, driving	lf	2,240	2,016	90%	\$8,221	\$7,399	\$15,762	\$8,363	2.13
03150.10.3	Footing forms, fabricate	sf	360	360	100%	\$936	\$936	\$963	\$27	1.03
03150.20.3	Abutment forms, prefabricate	sf	1,810	1,810	100%	\$3,548	\$3,548	\$2,780	(\$768)	0.78
03157.10.3	Footing forms, place	sf	720	360	50%	\$360	\$180	\$165	(\$15)	0.92
03159.10.3	Footing forms, strip	sf	720	360	50%	\$158	\$79	\$48	(\$31)	0.61
03157.20.3	Abutment forms, place	sf	3,620	1,810	50%	\$7,312	\$3,656	\$3,504	(\$152)	0.96
03311.10.3	Concrete, footing, place	cy	120	60	50%	\$1,200	\$600	\$554	(\$46)	0.92
Totals to Date							\$26,400	\$33,592	\$7,192	1.27

*67% of budget for mobilization

Highway bridge, weekly labor cost report (#2)

Production reporting

❑ In the case of **loss of efficiency claims**,

one of the **preferred methods** for calculating and quantifying that loss relies on **actual production rates**

(REMEMBER MEASURED MILE METHOD?)

❖ To **utilize this method**,

having **access to actual production data**,

which typically **include information** about

1. **Actual labor and/or equipment hours**
 2. Corresponding **actual work units** installed,
- is essential.

*Sometimes, this information is recorded as **part of the daily reports** prepared under the contractor's supervision; however, it **can be recorded in a separate report**.*

Production reporting – Methods of quantifying the cost of lost productivity

❑ Example of poorly written daily report

Description	Begin Time	End Time	Quantity (LF)
Excavating Soil	700	913	
Excavating Rock	913	1400	
Excavation Soil	1400	1500	

Quantity 14.5

Duration 8

❑ Information captured to perform productivity analysis

Description	Begin Time	End Time	Duration	Quantity (LF)	Productivity
Excavating Soil	700	910	2.1	20	9.52
Excavating Rock	910	1400	4.9	10	2.04
Excavation Soil	1400	1500	1	10	10.00

Material and delivery receipts

❑ The **contractor** must be able to **prove** that it procured **permanent materials** and **equipment** and **temporary construction materials** in a **timely manner**, thus

1. Avoiding **unnecessary delays**
2. Potential **price escalations**

Remember how materials and purchase orders managed in **Financial Management Course**?

- ❖ Material records, including **purchase orders and invoices**, are required to
 - i. Verify **escalation costs**
 - ii. Establish proof that the **contractor did not cause delays** due to failure to have material on time
 - ✓ These **records also serve** as the basis on
 1. **Which escalation determinations** are made
 2. **Amounts** that will be allowed

Remember how we calculated **escalation cost** in **Delay Analysis Course**?



Schedules and progress reporting

❑ The primary value of schedules for claims is their use

as a tool to **prove or disprove** the effect of changes and/or delays on

1. Contractual interim milestones

2. Overall project completion

❖ Electronic native files of each CPM schedule

❖ Hard copies of each CPM schedule

should be preserved for **future review**

Schedules and progress reporting

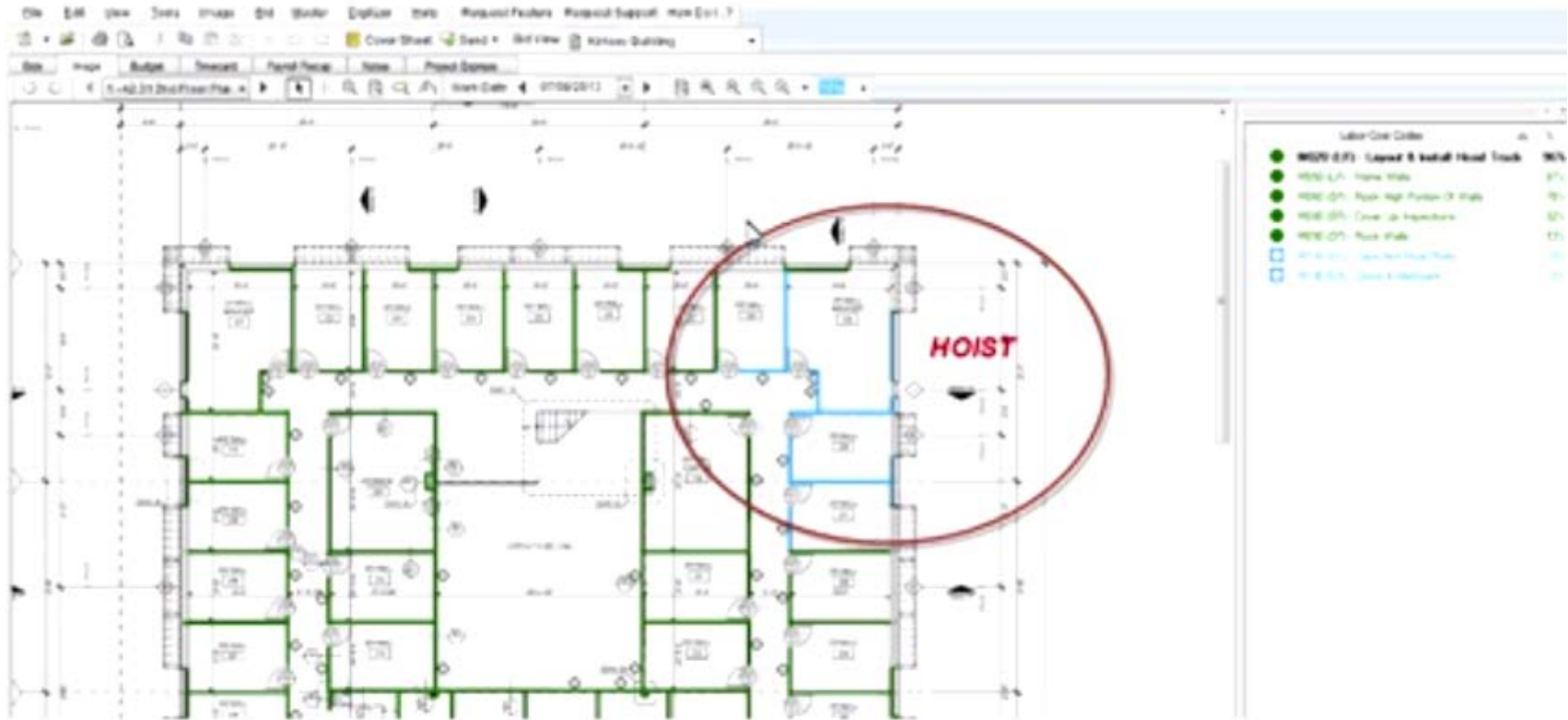
❑ This **practice includes**:

1. **Baseline**, or as-planned schedule
2. **Every update** prepared and submitted to the owner
3. **Any schedule analysis** for changes and delays
4. **Periodic** progress report
5. Schedule **narrative report**
6. **Notice** to the owner of any issues that are or will be delaying

Contractor's ability to progress the work and complete the project on time

Contractors, CM, and owners should consider use of a **schedule log** to **track the submission dates** of CPM schedule **updates** and their **approvals**

Schedules and progress reporting – Example of measuring progress by measuring quantities



Digital
Production
Control™

Schedules and progress reporting – Example of documentation for delays

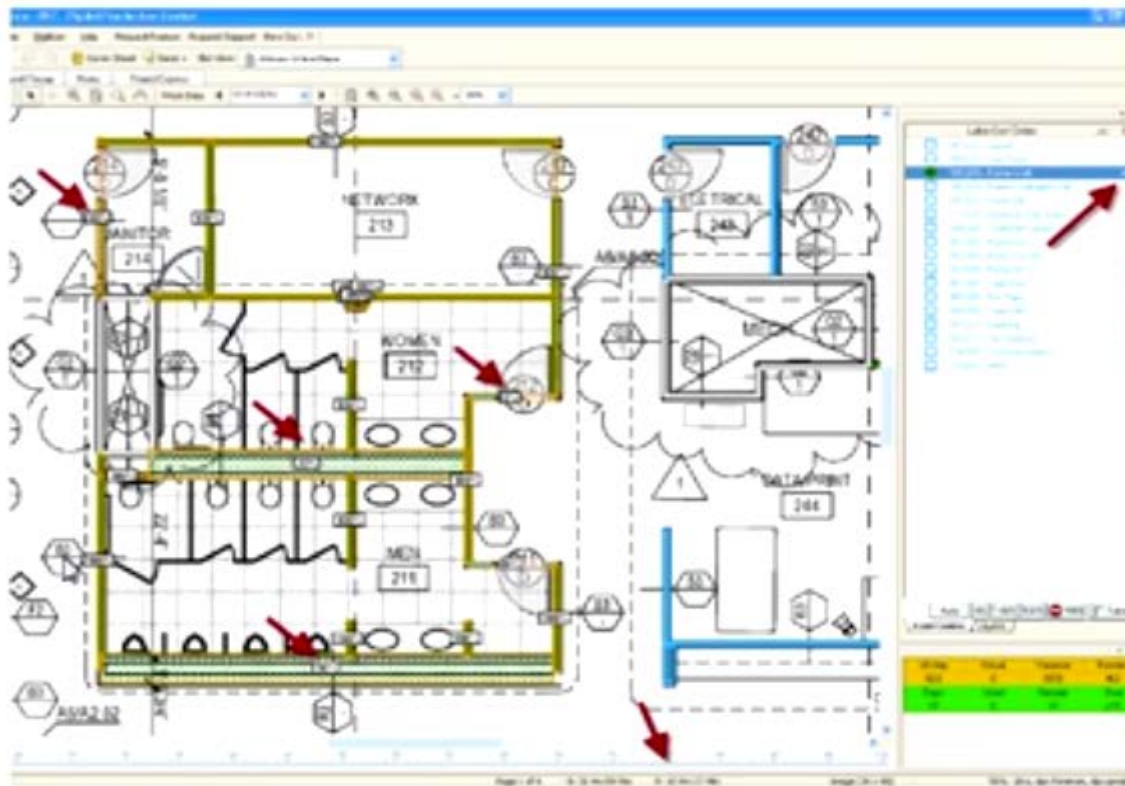
- ❑ This example documented the fragnets

ABC Office Building
Delays to Scheduled Activities
07/17/12

ID	Area	Activity	Delay		Elapsed
			Start	End	Time
1	2nd Floor	Unable to Proceed with metal framing until shoring is removed	6/1/2012	6/15/2012	11
2	2nd Floor	Unable to Complete metal framing due to delay of window mullions	6/18/2012		22
3	2nd Floor	Unable to Complete shaftwall due to delay in elevator fronts	5/11/2012		48

Schedules and progress reporting – Example of documentation for delays

- ❑ This shows the duration and location of a delay
 - ❖ You can easily prove your claim by using this documentation system
 - ❖ You can also add photo, video, etc.



Correspondence, transmittal, and submittal logs

❑ A good idea is for the **contractor** to **keep up-to-date**

1. Logs of all correspondence
2. Logs of all drawing transmittals
3. Logs of all submittals

❖ These logs should be **prepared and maintained separately**

❖ These logs should **track** the **sender** and **who received** each piece of correspondence, transmittal, or submittal.

✓ **This allows the contractor**

1. Easy access

2. Opportunity to pinpoint quickly those items that are **lagging in response or need action.**

3. References when preparing **new correspondence**.

Correspondence, transmittal, and submittal logs

- ❑ Some of other logs
 - ❖ Request for information (RFIs)
 - ❖ Proposed change order requests (CORs)
 - ❖ Site photographs

*This information is, of course, in the **contractor's files** and can be researched when needed for further detail.*

*But, the speed and convenience of having the information summarized in a log pays off when the **contractor must claim** on a prompt basis is important.*

Commercial software is available to **manage this process**.

Correspondence, transmittal, and submittal logs – Request for information (RFI) tracking

❑ RFIs is another **key factor** for dispute and claims.

❖ The duration of the response process, particularly on critical items, can **impact** the progress of a project.

❑ It is critical that **CCA**

1. Maintains a log of the RFIs
2. Categorizes the basis of each RFI and monitor and track each document

Correspondence, transmittal, and submittal logs – Request for information (RFI) tracking

- ☐ The **RFI log** should **contain** the
 1. Specification section and/or
 2. Drawing number that the RFI pertains to
 3. Response duration for each RFI

Everything that is done for submittal tracking should be done for RFI as well

Correspondence, transmittal, and submittal logs – Request for information (RFI) tracking

What if the contractor submit improper RFIs such as providing notice?

The CCA should reject the RFI and direct the contractor to submit the proper notice as required by the contract

Correspondence, transmittal, and submittal logs – Example of RFI with audit trail

RFI

Submittal

CD

Inspection

Punch List

T&M Tags

Permits

Non-Compliance

RFS

back

Copy

New

RFI # 45

Created By General Contractor, Derrick Morgan

Date Created: 04/22/2014

Date Submitted: 04/22/2014

Status: Closed

Priority: Low

Due Date: 04/29/2014

+ Additional Send & Assignment Information

Subject: Question about 3" conduit E103

Folder:

File Index: 8 Construction

History

Apr 22 2014 3:55:20pm	Created By	General Contractor	Derrick Morgan		
Apr 22 2014 3:55:31pm	Submitted By	General Contractor	Derrick Morgan	Assigned To	Owner/Construction Manager Priority: Low, Due Date: 04/29/2014
Apr 22 2014 3:56:24pm	Read By	Owner/Construction Manager	Eric		
Apr 22 2014 3:56:47pm	Forwarded By	Owner/Construction Manager	Eric	Assigned To	Engineer Priority: Low, Due Date: 04/29/2014
Apr 22 2014 3:57:16pm	Read By	Engineer	Rodney Dawson		
Apr 22 2014 3:58:21pm	Responded to By	Engineer	Rodney Dawson	Response	1 - Engineer Response to RFI # 45
Apr 22 2014 3:58:21pm	Forwarded By	Engineer	Rodney Dawson	To	Owner/Construction Manager
Apr 22 2014 4:45:51pm	Forwarded By	Owner/Construction Manager	Eric	To	General Contractor
Apr 22 2014 4:45:58pm	Official Response	Owner/Construction Manager	Eric	Response	RFI Response # 1 - Engineer Response to RFI # 45
Apr 22 2014 4:45:58pm	Closed By	Owner/Construction Manager	Eric		



Correspondence, transmittal, and submittal logs – Example of RFI with audit trail

RFI

Submittal

CD

Inspection

Punch List

T&M Tags

Permits

Non-Con

[back](#)

RFI # 45

Created By	General Contractor, Derrick Morgan	Status:	Closed
Date Created:	04/22/2014	Priority:	Low
Date Submitted:	04/22/2014	Due Date:	04/29/2014

+ Additional Send & Assignment Information

Subject: Question about 3" conduit E103

RFI Response # 1

Closed

Subject: Engineer Response to RFI # 45

History

Apr 22 2014 3:58:16pm	Created By	Engineer	Rodney Dawson		
Apr 22 2014 3:58:21pm	Submitted By	Engineer	Rodney Dawson	To	Owner/Construction
Apr 22 2014 3:58:37pm	Read By	Owner/Construction Manager	Eric		
Apr 22 2014 4:45:51pm	Forwarded By	Owner/Construction Manager	Eric	To	General Contractor
Apr 22 2014 4:45:58pm	Marked Official By	Owner/Construction Manager	Eric	Shared With	General Contractor
Apr 22 2014 4:45:58pm	Marked Official By	Owner/Construction Manager	Eric	Shared With	Owner/Construction
Apr 22 2014 4:45:58pm	Marked Official By	Owner/Construction Manager	Eric	Shared With	Engineer
Apr 22 2014 4:46:47pm	Read By	General Contractor	Derrick Morgan		

Correspondence, transmittal, and submittal logs – Submittal tracking

- ☐ The **duration** of the **review process**, particularly on critical items, can **impact** the **progress** of a project.
- ☐ It is critical that the **CCA** **maintains** a **log of the submittals** and monitor and track the following information:
 1. The number of revisions for each submittal
 2. The duration of the review period
 3. Submittals for long-lead items

Correspondence, transmittal, and submittal logs – Submittal tracking

❑ Prior to each project meeting, the CM should compare

1. Status of submittals as reported by the contractor
2. Status of submittals as tracked by the CCA

❖ **Discrepancies** should be discussed at the **project meeting**

to resolve **differences** and

resolution should be documented in the meeting minutes.

Daily reports

❑ The contractor's project manager or superintendent prepares a **daily report**

❖ **Important events** that transpire on the project site are recorded.

❖ These reports should be objective, factual, and complete

❖ The following are the **most important records**.

✓ Diaries,

✓ Production records,

✓ General job progress reports

A **diary** is a record with **discreet entries** arranged by **date** reporting on **what has happened** over the course of a day or other period.



Daily reports

❖ **Michael S. Simon, a New York attorney** and author of legal reviews for **Engineering News-Record**, says,

❖ “I need to know what happened, when it happened, why it happened, who caused it to happen, and what we did about it.

I need to know all of this on a daily basis.

❖ As your legal counsel, I must say that no single document is more important than your daily reports.

The reports are often crucial to the outcome in negotiations or in court.

Write true and complete daily reports.

No one expects a job without problems.

*It's essential to **write down all the facts** that exist.”*

Contractor: _____
 Project Name: _____ Project No.: _____
 Address: _____
 Day and Date: _____ Report No.: _____
 Owner Name: _____ A/E Name: _____
 Telephone: _____ Telephone: _____
 Contact Name: _____ Contact Name: _____
 E-mail Address: _____ E-mail Address: _____

Weather:

Temperature at: 7:00 a.m. _____ 11:00 a.m. _____ 3:00 p.m. _____

Weather: _____ Wind Velocity: _____

Precipitation: _____ Total Precipitation to Date: _____

<u>Crew:</u>	<u>Name</u>	<u>Hours</u>	<u>OT Hours</u>	<u>DT Hours</u>	<u>Task or Activity Code</u>
Contractor:	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____

	<u>Company Name</u>	<u>Number of Workers</u>	<u>Hours Worked</u>
Subcontractors:	_____	_____	_____
	_____	_____	_____
	_____	_____	_____
	_____	_____	_____
	_____	_____	_____
	_____	_____	_____
	_____	_____	_____
	_____	_____	_____

	<u>Company Name</u>	<u>Visitor Name</u>	<u>Reason for Visit</u>
Visitors:	_____	_____	_____
	_____	_____	_____
	_____	_____	_____



Work Progress (include Areas and Quantities where appropriate):

Contractor:

Subcontractors:

Equipment on Site
(including rental
equipment):

<u>Company Name</u>	<u>Equipment Description</u>	<u>Hours Used</u>

Material Deliveries:

Meetings:

Yes ____ No ____

Led by:

Minutes:

Yes ____ No ____

Recorded by:

Safety Meeting:

Yes ____ No ____

Led by:

Items Discussed:

Safety Inspection:

Yes ____ No ____

Inspected by:

Comments:

Injury Today?

Yes ____ No ____

Describe:

Issues Raised or Resolved:

Reported by:

 Reviewed/Approved by:



Daily reports

- ☐ A form used to record track-work production on rapid transit rail system

مدیریت ادعاء و اختلافات در طول چرخه حیات پروژه
(Construction Phase) اجرا و ادعاء، دعاوی و اختلافات در فاز ساخت/اجرا

Daily Production Report Form (Sample Form)

Contract 8A0033 Trackwork Constructors, Inc. Ballast Track Production Report

Job #204 Report No.: ____ Date: ____/____/____ Working Day No.: ____ Weather: ____

Operation*	Route	Track	Lane	From	To	Quantity	Comments
Excavation							
Embankment							
Subgrade preparation							
Subballast							
Top ballast (first lift)							
Distribute ties and track material							
Lay rail							
Gauge and spike							
Ballast (top off)							
Raise and line							
Adjust and anchor							
Other work							

Additional Information:

Contract No.: _____ Today's Date: _____ Weather: _____ Temperature Range: ____

Contractor's Staff:	Supervisory	Craftsman	Job Location	*Work Performed	Hours Worked

Subcontractors on Job:

Contractor:	Supervisory	Craftsman	Job Location	Work Performed

* Should correlate



Daily reports

- ❑ A form used to demonstrate the disruptive effect of extra work and interference on the track-work contractor for the project

مدیریت ادعاء و اختلافات در طول چرخه حیات پروژه

اجرای برنامه و مدیریت ادعاء، دعاوی و اختلافات در فاز ساخت/اجرا (Construction Phase)

Job Report Summary of Effect of Disruptions and Interference (Sample Form)

Contract 8A0033

Trackwork Constructors

Summary Narrative of Extra Work and Disruptions on Ballasted Track

Excerpts taken from Supervisor and Management Daily Diaries

Week Ending: _____

Date	Entered by	Disruptions	Entered by	Extra Work

Number of Shifts _____ $\frac{\text{Extra Work Volume}}{\text{Direct Work Volume}} = \text{_____} \%$ $\frac{\text{Extra Work Volume}}{\text{Total Work Volume}} = \text{_____} \%$

Miscellaneous Comments:



Photographs and videos

- ❑ **Photographs** provide **one of the best**—if not the best—record of job progress.
- ❑ The contractor should endeavor to take pictures of representative job **progress regularly**, preferably **no less than weekly**, or more frequently if needed.
- ❑ The **time-lapsed photographs** are very beneficial
if a **dispute arises** in determining the status of construction
at **various points in time**.
- ❑ When using **digital photography**, the contractor should ensure that
 1. Photographs are digitally dated,
 2. In some cases time stamped.

Remember we talked about this in Planning and Scheduling course?





Photographs and videos

❑ Additionally, a **log** should be maintained for **each photograph** that records the following information:

- ❖ **Photograph number**

- ❖ **Specific format** should be tied to the **filename** of the electronic photograph

- ❖ **Date** the photograph was taken;

- ❖ **Who took** the photograph; and

- ❖ **A brief description** of

1. Location
2. What the photograph depicts
3. Orientation of the view

Photographs and videos

- ❑ Contractors also should consider **video recording** any **high-risk activities**
e.g., big lifts, and possibly from multiple angles, or equipment testing.

These videos will be very valuable if an incident occurs.



Change orders

❑ There are **several different types of documents** frequently associated with the **change order process**. These documents include:

1. **Design clarifications** **provided** by the **designer**

❖ e.g., “plan clarifications” or “supplemental instructions” or “minor changes”

2. **Request for change orders**

❖ e.g., “proposal request” and “change order request (COR)”

3. **Design revisions** **directed** by the **designer**

❖ e.g., “change directive” and “change order”

4. **Change Order Log** **provided** by the **designer**

5. **Change Order Status (COS)** **provided** by the **contractor** (**for** unresolved changes)

Change orders

☐ The GC should

1. Have a **change order request (COR) form** for
 - i. Each change or
 - ii. Potential claim encountered
2. Should **immediately complete** the form upon **observance** of
 - i. Change situation
 - ii. Claim situation

Change orders

❑ If the **GC** is directed to proceed with **work** that the contractor **believes** is a **change** and the **CM believes** that it is a **minor change** or only a **clarification**, the **contractor** should record its efforts in an **extra work form** so the **specific details** regarding the **contractor's actual efforts** are recorded on a **daily basis**.

❖ If **changed or extra work** is being performed at **multiple locations**,

multiple forms are recommended.

*Additionally, the GC should **attempt to obtain** the **owner's acknowledgment** of the **changed or extra work performed** on a **daily basis**.*

SAME THING SHOULD OCCUR FOR SC IN RELATION TO GC

What if the owner or GC does not accept or approve them?



Change orders

What if the owner or GC does not accept or approve them?

- ❑ Although **either of these acknowledgments** will likely **not** be perceived as **approval** of a change order or claim,

it does **establish for the record** what **specific work was performed** by the contractor should entitlement to a **change be recognized** at a **later date**.

- ❖ This **form** should **identify and quantify**

- ✓ Actual work performed;
- ✓ Specific location;
- ✓ Contractor's labor, material, and equipment

such that the activity can be **priced out later**.



Change orders

Important note!

- ❑ A separate file should be kept for each change,
 - ❖ With a **copy** of the **initiation form** (proposal request, change order request, change directive, change order)
 - ❖ Pertinent **correspondence**,
 - ❖ Associated **invoices**,
 - ❖ Extra **work forms** and/or **time cards**,
 - ❖ **Memos-to-file**,
 - ❖ Any **other items** relevant to the change order or claim.

*Keeping a separate folder **exclusively** for copies of all initiation forms is also advisable.*

This will serve as a **handy reference** when making **periodic reviews of the status** of job claims and change orders.





Change orders

Important note!

- ❑ To keep the owner informed of the **status** of **unresolved change orders and claims**, the **contractor** should prepare and submit a **periodic (e.g., weekly or monthly) status report** to the owner

reflecting the **open and unresolved** change requests and/or claims.

*The **purpose** of such a report is to **show** the owner and/or its representatives*

1. Which items are still **in progress**,
2. Which are **awaiting** the owner's and/or architect's/engineer's **action**,
3. Which are **ready to be negotiated**, and
4. Which are **negotiated** and **awaiting formal modification**.



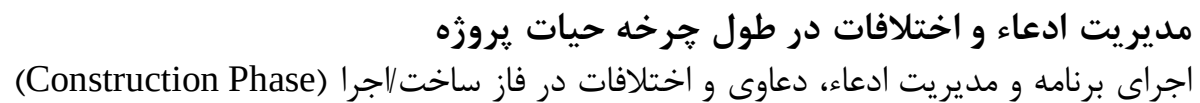
Change orders

مدیریت ادعاء و اختلافات در طول چرخه حیات پروژه
اجرای برنامه و مدیریت ادعاء، دعاوی و اختلافات در فاز ساخت/اجرا (Construction Phase)

☐ Change Order Status (COS) report

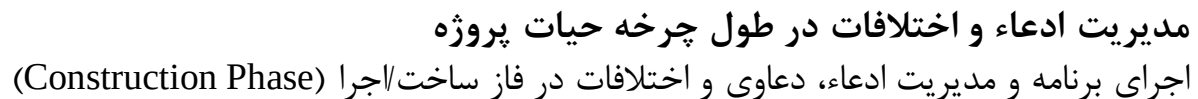
Contract No. _____ Date _____ Change Order Status Report No. _____

Extra Work Order #	Change Order #	Date Initiated	Description	Date of Request to Proceed	Date of Receipt of Notice to Proceed	Projected Cost (Ballpark Figure)	Proposal Submitted		Date Negotiated	Modification		Remarks (Current Status)
							Date	Amount		No.	Amount	



❑ Change Order Status (COS) report





Change orders

❑ Change Order Status (COS) report

CHANGE ORDER LOG





Change orders

☐ Change Order Status (COS) cover letter

مدیریت ادعاء و اختلافات در طول چرخه حیات پروژه
اجرای برنامه و مدیریت ادعاء، دعاوی و اختلافات در فاز ساخت/اجرا (Construction Phase)

TRACKWORK CONSTRUCTORS, INC.

P.O. Box
City, State, Zip

April 8, 2007
Ref#: 433

Owner's Representative, Inc.
Main Rail Yard Project
Street Address
City, State, Zip

Attention: Mr. A. Jones
Resident Engineer

RE: Contract Number 8C0033
Change Order Status Report No. 24

Gentlemen:

Submitted herewith is our monthly *Change Order Status Report No. 24* outlining the current status of all unresolved claims and change orders. We call your attention to the following figures and request you take whatever action necessary to process these items into contract modifications.

1. Outstanding Change Orders ____.
2. Outstanding Work Order Accounts _____. These _____ represent, in addition to the outstanding change orders in (1) above, a combination of directives by the resident engineer (RE), claims by Trackwork Constructors, and changes initiated by us with the RE's concurrence. All but _____ of these have been reduced to writing, yet there have been no change orders issued for any of them by the owner.
3. Trackwork Constructors has submitted cost proposals for _____ outstanding change orders (totaling \$_____) and _____ outstanding work orders (totaling \$_____) for a total dollar value of \$_____.
4. The remaining claims and change orders represent a projected total dollar value of \$_____, of which \$_____ has been expended by us to date. We expect to have proposals for these items to you shortly.
5. Outstanding time extension requests not associated with any of the previously referenced changes and/or claims.

We look forward to your earliest attention to these open items. Thank you.

Very truly yours,

B. Johnson
Project Manager

Periodic review

☐ In addition to

1. Updating the project schedule each month
2. Producing a change order status report periodically

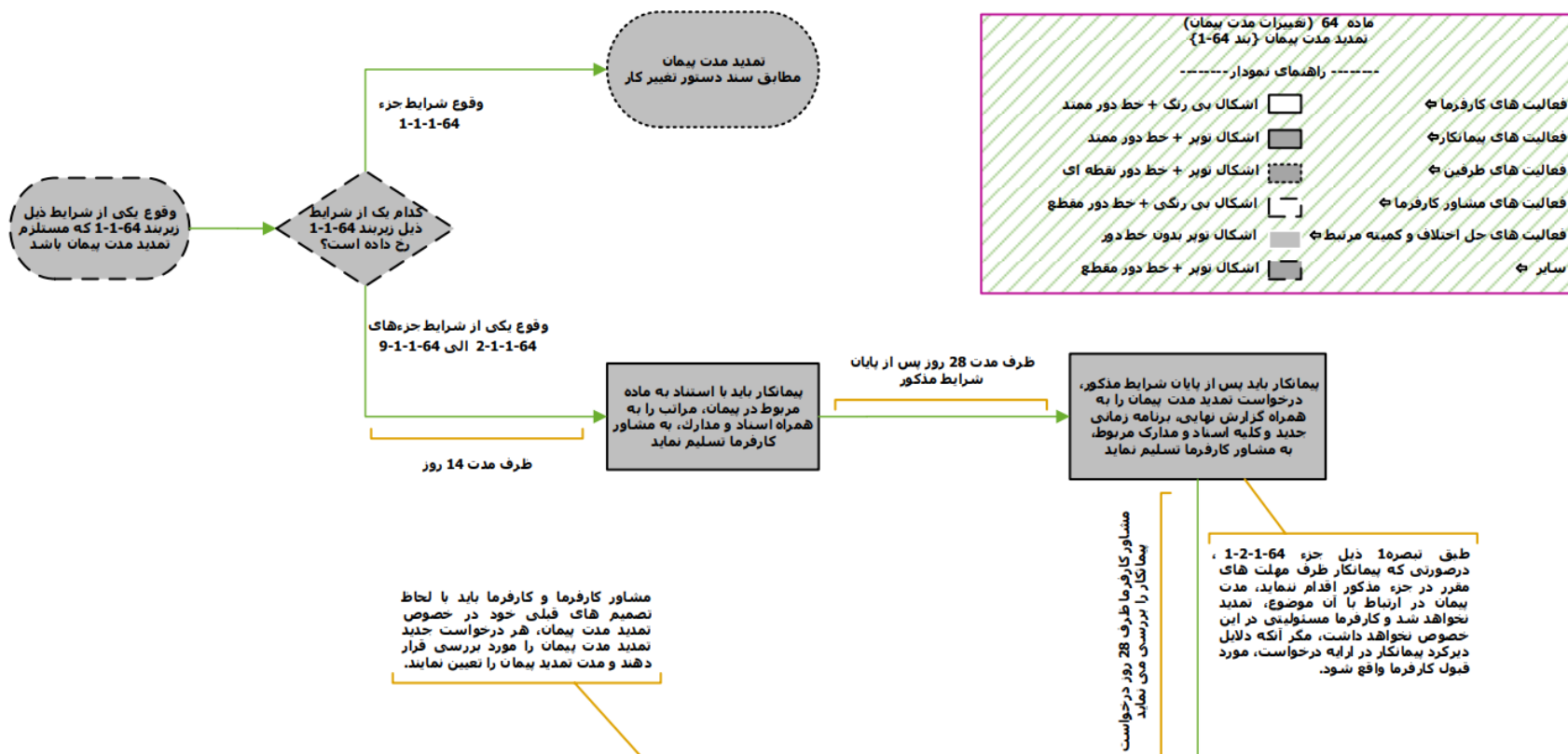
the GC should **endeavor to have a formal review session** of all documents to:

1. **Determine** whether **any actions** have been **overlooked** or
2. **Determine** whether **additional actions** need to be **taken**.

Periodic review

GC should **not wait** until the **end of the project** to file delay and/or impact, or extra work claims,
but
they should try to prepare and file them **as they are incurred**,
or
at least give notice of the potential claims.

Periodic review





E-Mail and social media

- ❑ The use of **e-mail** has become a **very common** form of communication, **not only** between **project personnel**, but also for **intradepartmental communication** and **communication outside** of the company, such as with subcontractors, vendors, owners, and regulatory bodies.
 - ❖ As such, companies must have **procedures in place** to retain e-mails.
- ❑ Unfortunately, **e-mails are not the only method** of transmitting inappropriate communications.
 - ❖ Therefore, the **company must educate** and train its employees about the proper use of e-mail, **social media**, and **other forms of electronic communication**.

Project correspondence

❑ We talked in detail about this in delay analysis course, however we should consider the following points:

- ❖ Every letter or email needs a prompt and complete reply
- ❖ Avoid letter-writing wars
- ❖ Address each issue raised directly
- ❖ Use references when responding
- ❖ Let the facts and the contract speak for themselves
- ❖ Be professional; remember you wear the “white hat” (a moral person)
- ❖ A letter should follow all oral direction
- ❖ Insist on timely notice and timely action
- ❖ Keep correspondence impersonal

Project meetings

- ❑ **Project meetings and minutes** are an important forum to **discuss**
 1. Current progress
 2. Status of submittals and RFIs
 3. Manpower and equipment
 4. Potential change orders
 5. Potential issues and actions

- ❑ **During the meeting**, the **CM** should review the **contractor's progress** **compared** to the **current approved project schedule**, including progress on the **critical path** and **overall progress** to ascertain the **contractor's ability** to meet the performance **obligations** under the contract.



Document management

❑ Many of the records mentioned may be **submitted to the Engineer** (or his representative or equivalent under various forms of contract) on a periodic basis **to sign off**.

❖ While it may **not always be possible to persuade** an **Employer's agent to 'sign off'** on such records,

i. If they are **submitted to such a party**

ii. If they are **not refuted** within a **reasonable time**,

*then it would be **difficult to deny** their accuracy at a **later date**.*

Document management

20.2.3 Contemporary records

In this Sub-Clause 20.2, "contemporary records" means records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim.

The claiming Party shall keep such contemporary records as may be necessary to substantiate the Claim.

Without admitting the Employer's liability, the Engineer may monitor the Contractor's contemporary records and/or instruct the Contractor to keep additional contemporary records. The Contractor shall permit the Engineer to inspect all these records during normal working hours (or at other times agreed by the Contractor), and shall if instructed submit copies to the Engineer. Such monitoring, inspection or instruction (if any) by the Engineer shall not imply acceptance of the accuracy or completeness of the Contractor's contemporary records.

۱۸- و)

پیمانکار متعهد است که یک نسخه از برنامه، نمودارها و جدول‌های پیشرفت کار را در کارگاه آماده داشته باشد تا در صورت لزوم مهندس مشاور و کسانی که اجازه بازدید از کارگاه را دارند از آن استفاده کنند.

Document management

It is therefore extremely important that,

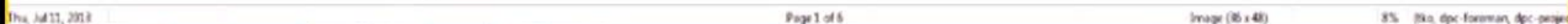
1. Firstly, a **robust contract administration system** is created and
2. Secondly that **systems and procedures** are put in place to **adequately record** the events and the effects on a **contemporaneous basis**.

Document management

Let's see some examples!

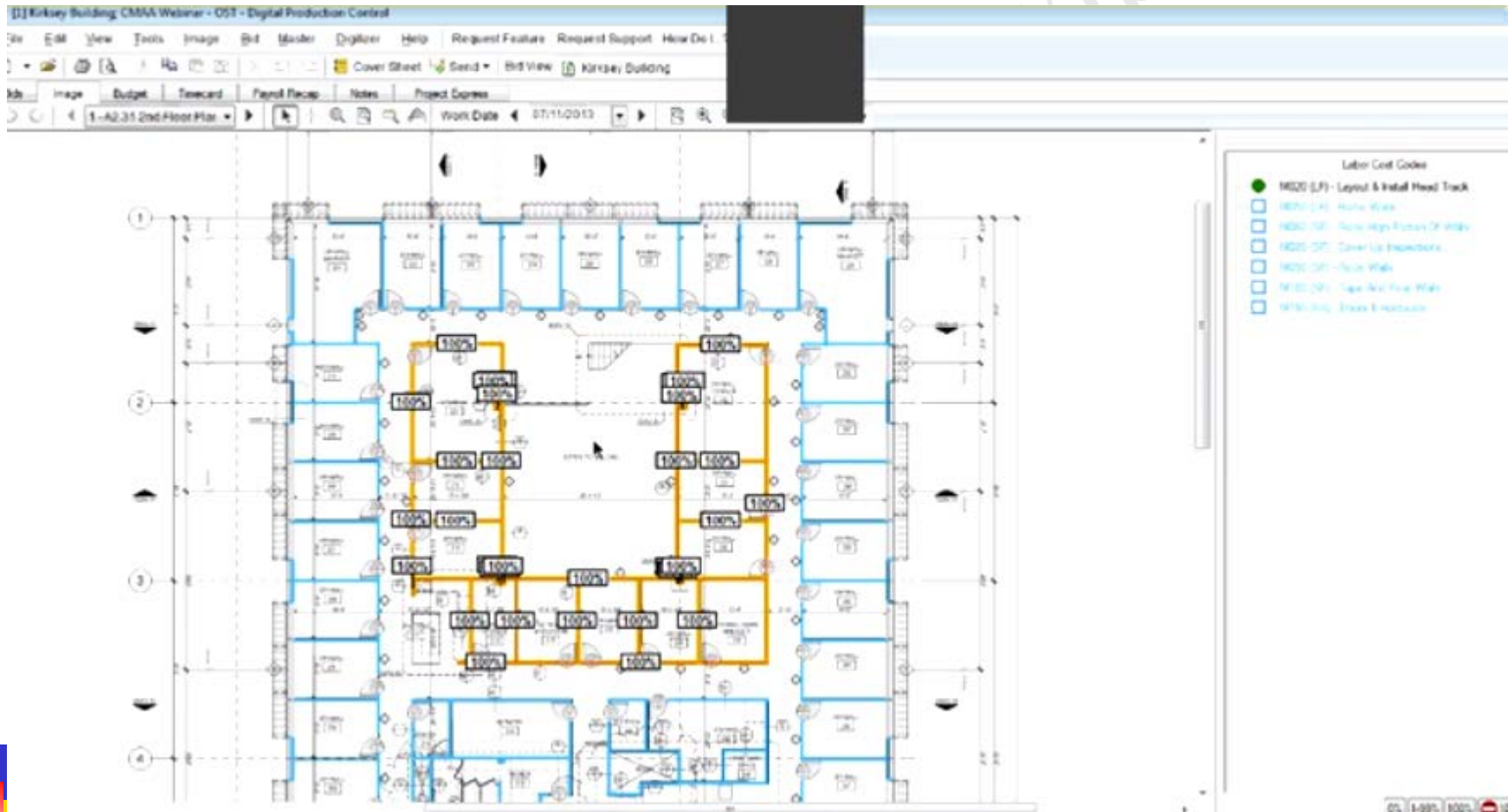


Example of scope



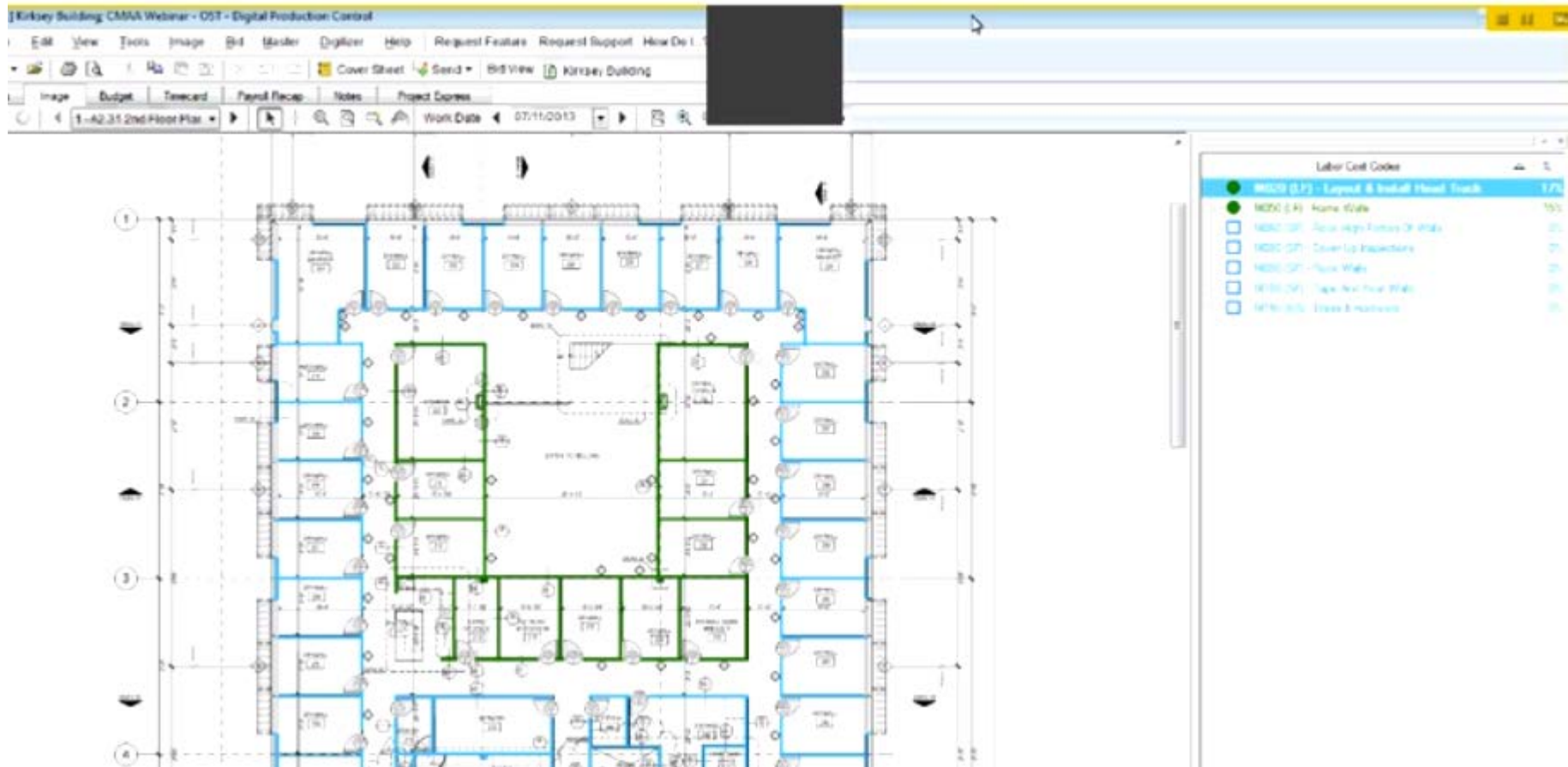
Example of scope

- ❑ You can track the completion of each scope by adding the percentage on the items



Example of scope

❑ Green color shows completion





Example of chronology and database

An example of a simple database that may be compiled in a spreadsheet is shown in Table.

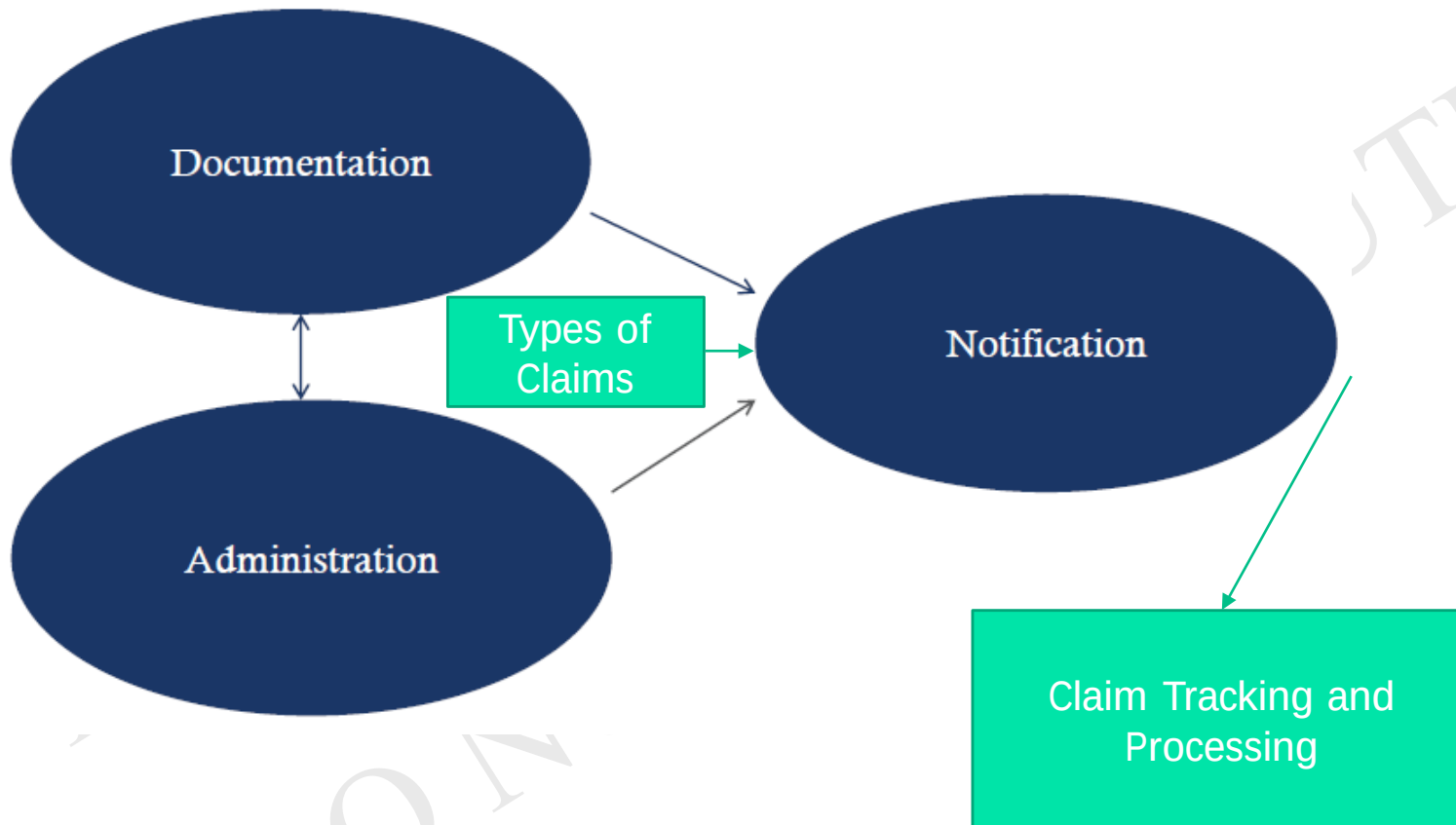
Johnson Construction Group
Northern ring road, Newtown
Document database – Waterproofing claim

Date	Type	Ref.	From	To	Subject	Contents
08-Jul-13	Letter	0306	JCG	APS	Supply and Apply Eliminator System (Spray Type Waterproofing)	Letter of intent
18-Jul-13	Mat App	44	JCG	ENGR	Materials Approval	Product and subcontractor approval
25-Sep-14	Test	C1194	APS	JCG	Test Certificate	Test Certificate 2A Underpass Bridge
14-Oct-14	Letter	2053	ENGR	JCG	Laying of Sub-grade at Different Locations in Type 1 waterproofing	Waterproofing under investigation. Instructed not to lay until approved. APS to provide requested information
16-Oct-14	Letter	001	JCG	APS	Waterproofing Type 1	Request technical clarifications. Enclosing mix designs
17-Oct-14	Letter	2196	JCG	ENGR	Laying of Sub-grade at Different Locations Waterproofing Type 1	Conf of verbal instructions. Proceed with sub-grade where waterproofing completed
17-Oct-14	Letter	2061	ENGR	JCG	Laying of Sub-grade at 1C-2A on Waterproofing Membrane Type 1	Letter of undertaking required from APS
25-Oct-14	Email	1194	APS	JCG	Waterproofing Type 1	Re Meeting 12 Oct. required RSA mix design to confirm compatibility. Pointing out conflicts in dwgs and request clarification
01-Nov-14	Letter	2114	ENGR	JCG	Waterproofing Membrane Type 1	Repeat request for APS to provide undertaking of product performance
02-Nov-14	Letter	2264	JCG	ENGR	Waterproofing Type 1–APS report	Request instructions re use of RSA and RSA specification
03-Nov-14	Letter	2123	ENGR	JCG	Waterproofing Type 1–APS report	Query why RSA is required. Repeat request for performance undertaking

Claims Management

(Contract and Claim Administration)

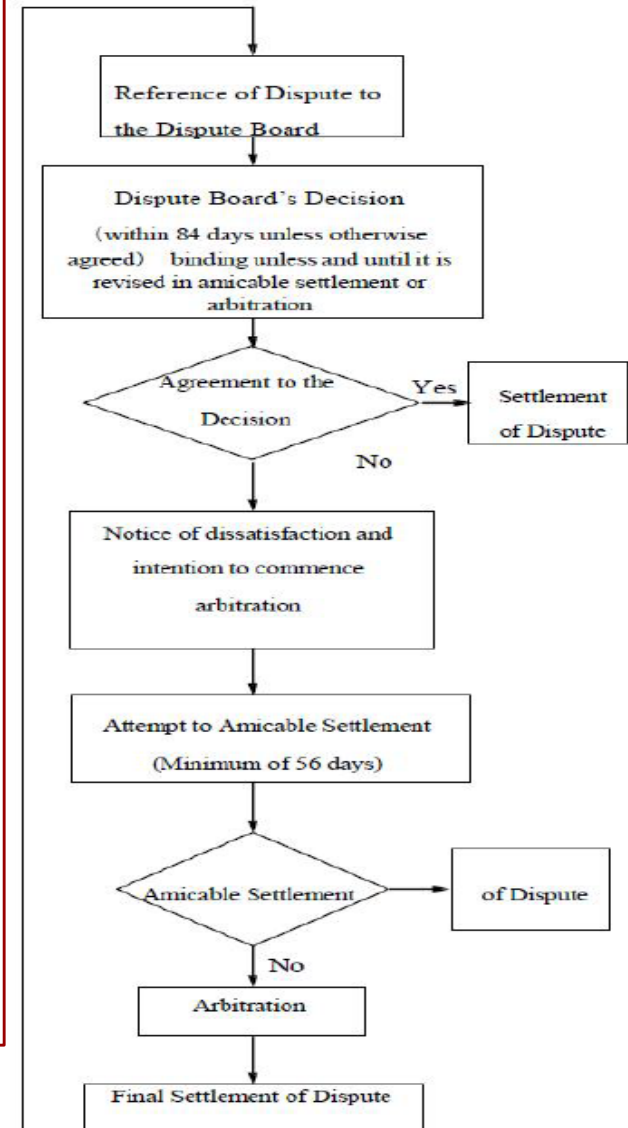
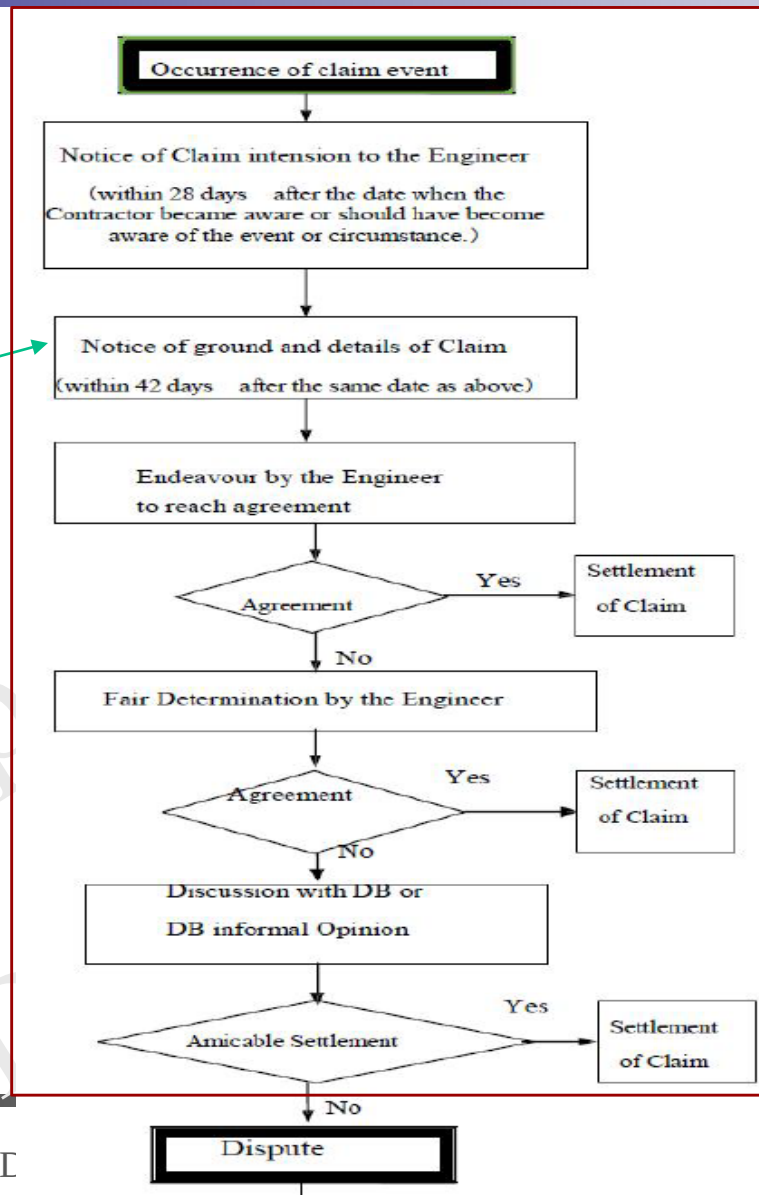
Suggested terminology for claim management in Construction Phase



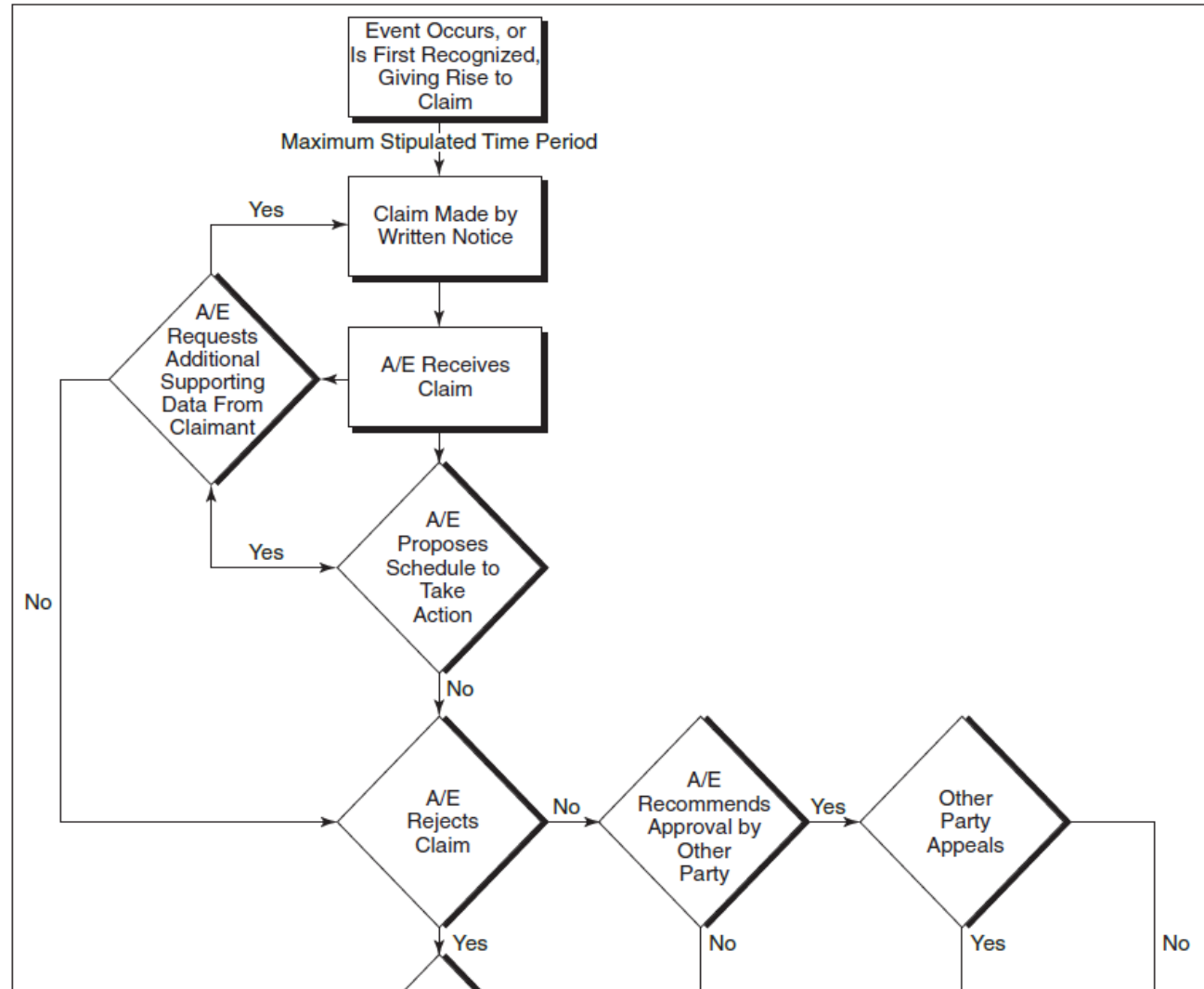
Claims management process – Sample 1

Submitting final details of the claim **within 42 days** of the **end** of the events giving rise to the claim

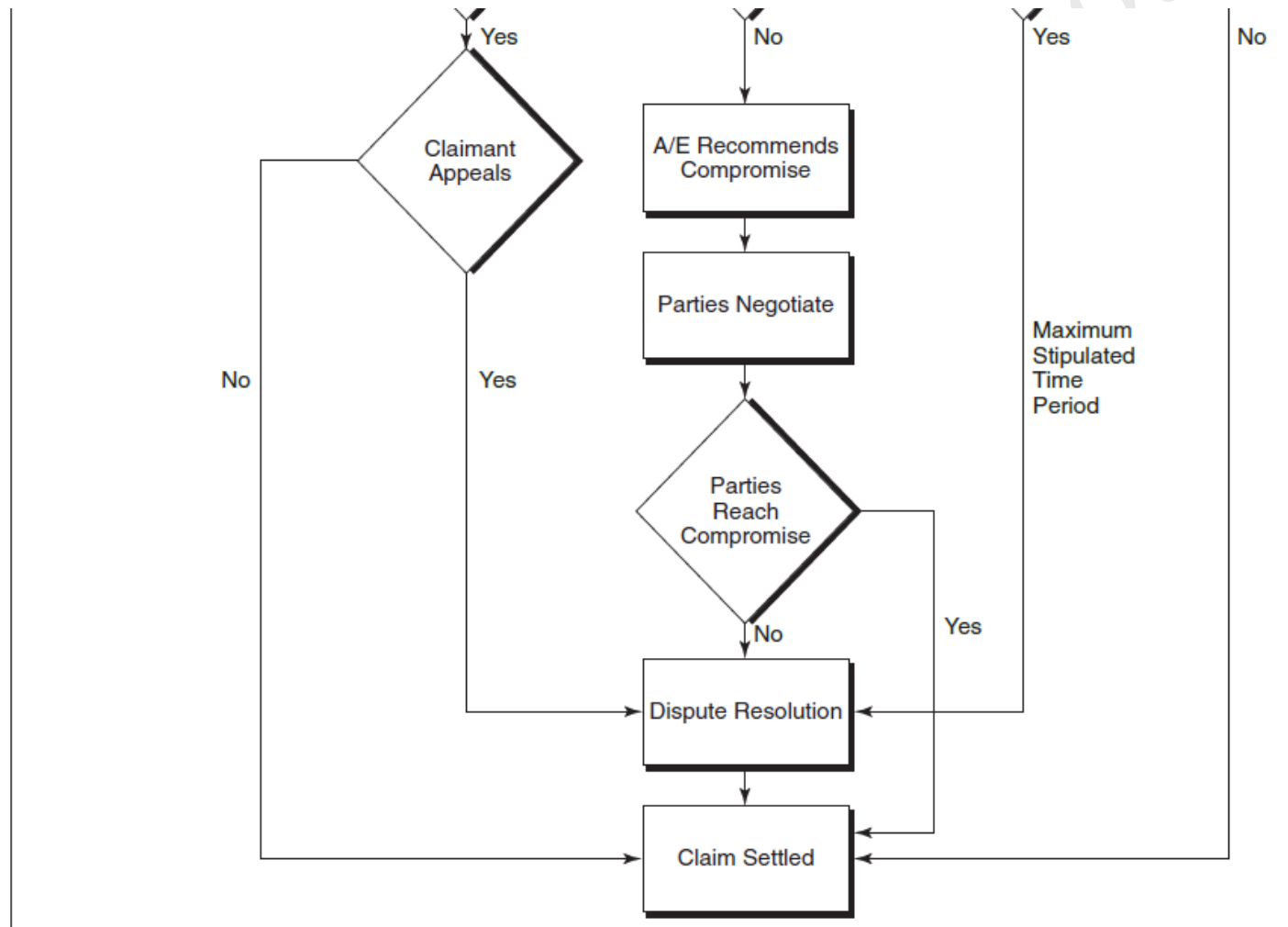
FIDIC 2017 changed this process



Claims management process – Sample 2



Claims management process – Sample 2



Submittals – Diagram

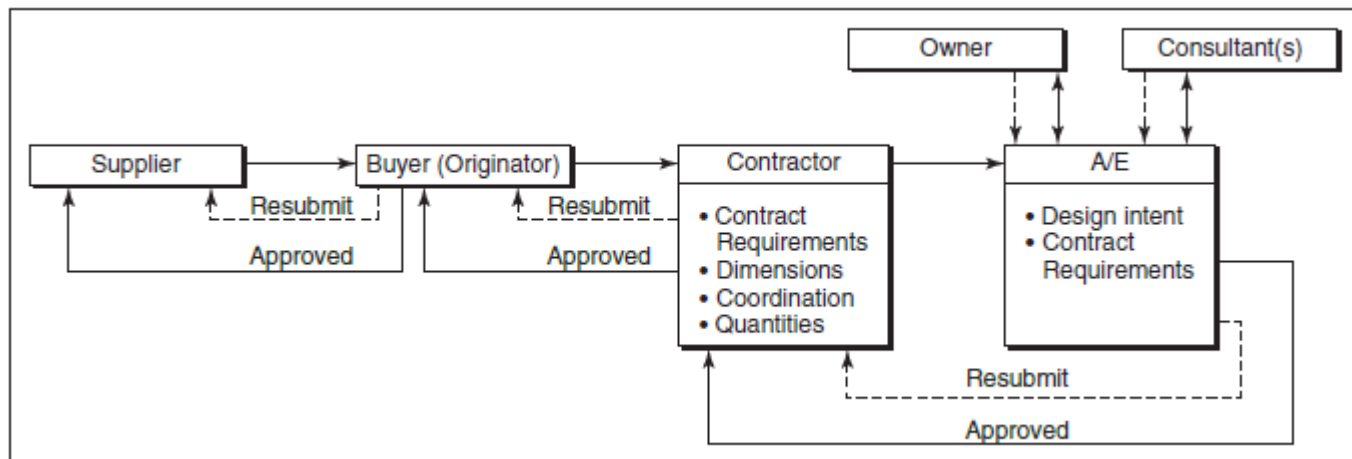


Diagram of Routing Submittals for Review and Approval

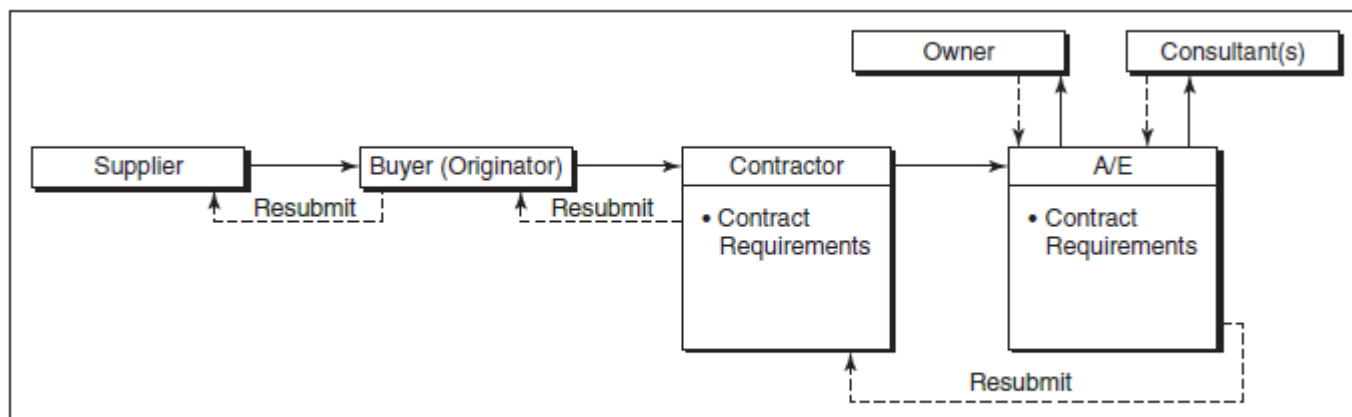


Diagram of Routing Informational Submittals

Submittals – Stamps

Contractor Review:
Contractor has reviewed in accordance with contract requirements:
☐ Approved ☐ Approved as Noted ☐ Revise/Resubmit ☐ Rejected/Resubmit
By: _____ Date: _____
Contractor

Sample Contractor
Submittal Stamp

A/E Review:
Approval is for conformance with information given and design concept expressed in contract documents. Approval does not authorize changes to contract documents.
☐ Approved ☐ Approved as Noted ☐ Revise and Resubmit ☐ Rejected/Resubmit ☐ No Action Taken or Required ☐ Not Required for Review
By: _____ Date: _____
A/E Firm

Sample A/E Submittal
Stamp

Submittals – Not required by the specifications

Submittals Not Required by the Specifications

Occasionally, the contractor submits information to the A/E for review and approval when the submittal was not required by the specifications. The A/E should be careful in processing these because the review and approval of them may involve accepting more responsibility than the A/E intended. When an A/E receives a nonrequired submittal, all copies should be returned without review to the contractor, with an annotation that the submittal is “not required for review.”

Submittals – Submittal log

CSI FORMS 12.1B AND 12.1C SUBMITTAL LOG FOR A/ES AND CONTRACTORS (Page 1)



Knowledge for Creating
and Sustaining
the Built Environment

**SUBMITTAL
LOG (A/E)**

Project: _____

A/E Project Number: _____

Owner: _____

Contractor: _____

[illegible]

SUBMITTAL TRANSMITTAL

Project: _____ Date: _____
A/E Project Number: _____

TRANSMITTAL A To (Contractor): _____ Date: _____ Submittal No. _____
From (Subcontractor): _____ By: _____ ☐ Resubmission

Qty.	Reference / Number	Title / Description / Manufacturer	Spec. Section Title and Paragraph / Drawing Detail Reference

- ☐ Submitted for review and approval
☐ Resubmitted for review and approval
☐ Complies with contract requirements
☐ Will be available to meet construction schedule
☐ A/E review time included in construction schedule
- ☐ Substitution involved - Substitution request attached
☐ If substitution involved, submission includes point-by-point comparative data or preliminary details
☐ Items included in submission will be ordered immediately upon receipt of approval
- Other remarks on above submission: _____ ☐ One copy retained by sender

TRANSMITTAL B To (A/E): _____ Attn: _____ Date Rec'd by Contractor: _____
From (Contractor): _____ By: _____ Date Trnsmt'd by Contractor: _____

☐ Approved
☐ Approved as noted

☐ Revise / Resubmit
☐ Rejected / Resubmit

Other remarks on above submission: _____ ☐ One copy retained by sender

TRANSMITTAL C To (Contractor): _____ Attn: _____ Date Rec'd by A/E: _____
From (A/E): _____ ☐ Other By: _____ Date Trnsmt'd by A/E: _____

- ☐ Approved
☐ Approved as Noted
☐ Revise and Resubmit
☐ Rejected/Resubmit
☐ No Action Taken or Required
☐ Not Required for Review
- ☐ Provide file copy with corrections identified
☐ Reproducible copies only returned
☐ Point-by-point comparative data required to complete approval process
☐ Submission Incomplete / Resubmit

Other remarks on above submission: _____ ☐ One copy retained by sender

TRANSMITTAL D To (Subcontractor): _____ Attn: _____ Date Rec'd by Contractor: _____
From (Contractor): _____ By: _____ Date Trnsmt'd by Contractor: _____

Copies: ☐ Owner ☐ Consultants ☐ ☐ ☐ ☐ ☐ One copy retained by sender

Formal record-keeping procedures and controls

Apply best practices in enforcing, monitoring and tracking document contract compliance

Advancement in construction technology make integrated project documentation solutions possible...

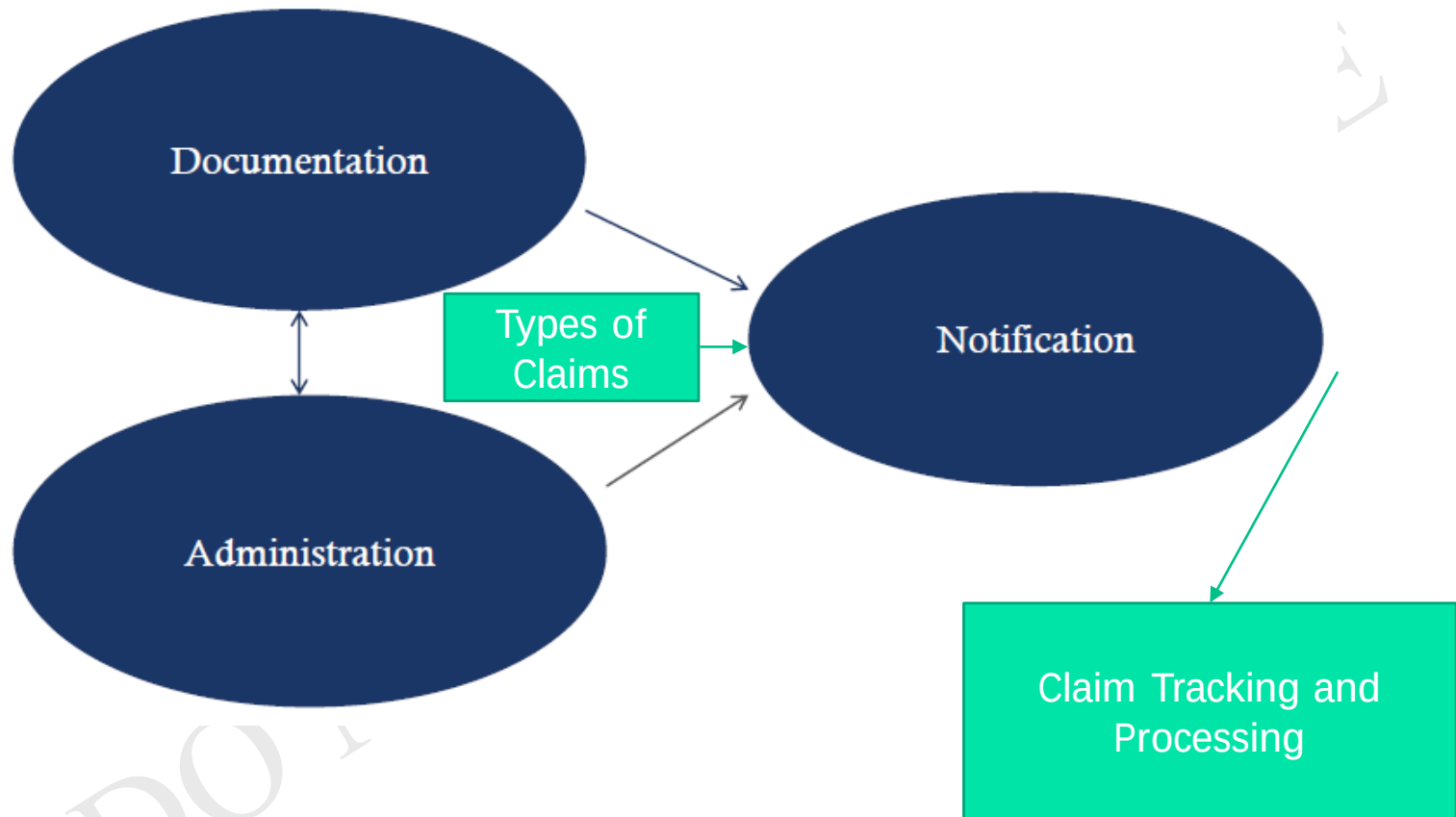
BUT THE INDUSTRY IS NOT THERE YET 100%

EVEN WITHOUT TECHNOLOGY, IT IS NOT AN EXCUSE FOR FAILING TO MAINTAIN THE BASIC RECORD-KEEPING PROCEDURES

Claims Management

(Types of Claim)

Suggested terminology for claim management in Construction Phase



Types of claims

- ❑ This is **different** from the cause of claims question.
- ❑ In the construction industry, the **dispute or claim by a contractor** against an owner is often based on **one or more of the following types of claims**:
 1. *Claims for variations (Extra work or change orders)*
 2. *Claims for extensions of time (Delay or EOT)*
 3. *Claims for additional payment due to prolongation (Compensation)*
 4. *Acceleration and Disruption claims*
 5. *Claims for damages under law*
 6. *Interim and final claims*

If a dispute or claim arises, the demand for **additional compensation should be presented in a manner required by the contract and should be an **accurate and proper measure of the damages** claimed.**

Claims for variations

- ❑ A **variation** is something that **changes the nature** of the project.
- ❑ This may consist of
 - ❖ **Additional** or **less** work,
 - ❖ A **change in the specification** for part of the work, or
 - ❖ In some cases a change to the **contractual basis** of the project such as the contract **price or period**.

*In **most construction contracts**, the **Employer** is **permitted** to make such changes, and this is **usually administered** by his **appointed agents** such as the **Engineer** under the **FIDIC** forms of contract.*

Claims for variations

Most standard forms of contract place the **obligation** on the **Engineer** to
issue instructions to vary the works

AND

most will specifically **prohibit** the **Contractor** from carrying out variations without
written instructions.



Claims for variations

- ❑ The **FIDIC** contract has this to say about the subject of variations.

Sub-Clause 1.1.6.9

“Variation” means any change to the Works, which is instructed or approved as a variation order under Clause 13 [*Variations and Adjustments*].

Sub-Clause 13.1 Right to Vary

Variations may be initiated by the Engineer at any time prior to issuing the Taking-Over Certificate for the Works, either by an instruction or by a request for the Contractor to submit a proposal.

The Contractor shall execute and be bound by each variation, unless the Contractor promptly gives notice to the Engineer stating (with supporting particulars) that the Contractor cannot readily obtain the Goods required for the Variation. Upon receiving this notice, the Engineer shall cancel, confirm or vary the instruction.

Each variation may include:

- (a) changes to the quantities of any item of work included in the Contract (however, such changes do not necessarily constitute a Variation),
- (b) changes to the quality and other characteristics of any item of work,
- (c) changes to the levels, positions and/or dimensions of any part of the Works,
- (d) omission of any work unless it is to be carried out by others,
- (e) any additional work, Plant, Materials or services necessary for the Permanent Works, including any associated Tests on Completion, boreholes and other testing and exploratory work, or
- (f) changes to the sequence or timing of the execution of the Works.

The Contractor shall not make any alteration and/or modification of the Permanent Works, unless and until the Engineer instructs or approves the Variation.



Claims for variations

- ❑ The **FIDIC** contract has this to say about the subject of variations.

Sub-Clause 13.3 Variation Procedure

If the Engineer requests a proposal, prior to issuing a Variation, the Contractor shall respond in writing as soon as practicable, either by giving reasons why he cannot comply (if this is the case) or by submitting:

- (a) a description of the proposed work to be performed and a programme for its execution,
- (b) the Contractor's proposal for any necessary modifications to the programme according to Sub-Clause 8.3 [*Programme*] and to the Time for Completion, and
- (c) the Contractor's proposal for evaluation of the Variation.

The Engineer shall, as soon as practicable after receiving such proposal (under Sub-Clause 13.2 [*Value Engineering*] or otherwise), respond with approval, disapproval or comments. The Contractor shall not delay any work while awaiting a response.

Each instruction to execute a Variation, with any requirements for the recording of Costs, shall be issued by the Engineer to the Contractor, who shall acknowledge receipt.

Each variation shall be evaluated in accordance with Clause 12 [*Measurement and Evaluation*], unless the Engineer instructs or approves otherwise in accordance with This Clause.

Claims for variations

☐ The provisions mentioned are **quite clear** as to the **authority of the Engineer** to

1. Vary the works
2. Procedures to be adopted

☐ **If** this **procedure is adhered** to,

there would be **no reason to submit a claim** because

1. Variation
2. Entitlement to additional payment

*have **already been acknowledged.***

Claims for variations

In reality, however, the Contractor may not be requested to **submit a proposal**,
and

instructions for variations **may not be issued** under a formal variation order.

*Even **Construction Change Directive***

It is quite common for instructions to be **issued by**

1. Letter
2. Response to a request for information
3. Issue of revised drawings or
4. Way of a verbal instruction

Therefore, this should be predicted in the contract. Let's see!

Claims for variations

- ❑ **Sub-Clause 3.5 of FIDIC** contemplates that this may be the case and provides the following:

3.5

Engineer's Instructions

The Engineer may issue to the Contractor (at any time) instructions which may be necessary for the execution of the Works, all in accordance with the Contract. The Contractor shall only take instructions from the Engineer, or from the Engineer's Representative (if appointed) or an assistant to whom the appropriate authority to give instruction has been delegated under Sub-Clause 3.4 [*Delegation by the Engineer*].

Subject to the following provisions of this Sub-Clause, the Contractor shall comply with the instructions given by the Engineer or the Engineer's Representative (if appointed) or delegated assistant, on any matter related to the Contract.

Claims for variations

- ❑ **Sub-Clause 3.5 of FIDIC** contemplates that this may be the case and provides the following:

If an instruction states that it constitutes a Variation, Sub-Clause 13.3.1 [Variation by Instruction] shall apply.

If not so stated, and the Contractor considers that the instruction:

- (a) constitutes a Variation (or involves work that is already part of an existing Variation); or
- (b) does not comply with applicable Laws or will reduce the safety of the Works or is technically impossible

the Contractor shall immediately, and before commencing any work related to the instruction, give a Notice to the Engineer with reasons. If the Engineer does not respond within 7 days after receiving this Notice, by giving a Notice confirming, reversing or varying the instruction, the Engineer shall be deemed to have revoked the instruction. Otherwise the Contractor shall comply with and be bound by the terms of the Engineer's response.

But, here there is question. Let's see!

Claims for variations

How does the Contractor therefore ensure that he is **compensated** properly in a case where he considers **comprises a variation**,

but

which has **not been instructed or approved** as a **variation order**?

Firstly, the **Contractor** should **acknowledge receipt** of the **instruction** and **confirm** that he considers the **instruction to be a variation** under the provisions of Sub-Clause 13.3 [*Variations and Adjustments*].

- ❖ The **Engineer may agree** with this and, if so, he should **issue a variation order as confirmation**.

What if Engineer disagrees?



Claims for variations

If **no such confirmation** is forthcoming or if the **Engineer disagrees**, then

Contractor's recourse under FIDIC is contained in the provisions of Clause 20 [Claim, Disputes and Arbitration], which has this to say:

A Claim may arise:

- (a) if the Employer considers that the Employer is entitled to any additional payment from the Contractor (or reduction in the Contract Price) and/or to an extension of the DNP;
- (b) if the Contractor considers that the Contractor is entitled to any additional payment from the Employer and/or to EOT; or
- (c) if either Party considers that he/she is entitled to another entitlement or relief against the other Party. Such other entitlement or relief may be of any kind whatsoever (including in connection with any certificate, determination, instruction, Notice, opinion or valuation of the Engineer) except to the extent that it involves any entitlement referred to in sub-paragraphs (a) and/or (b) above.

Claims for variations

This **sub-clause** thus provides that

if the **contractor considers** that an instruction given by the **Engineer** should be followed by a **variation order**

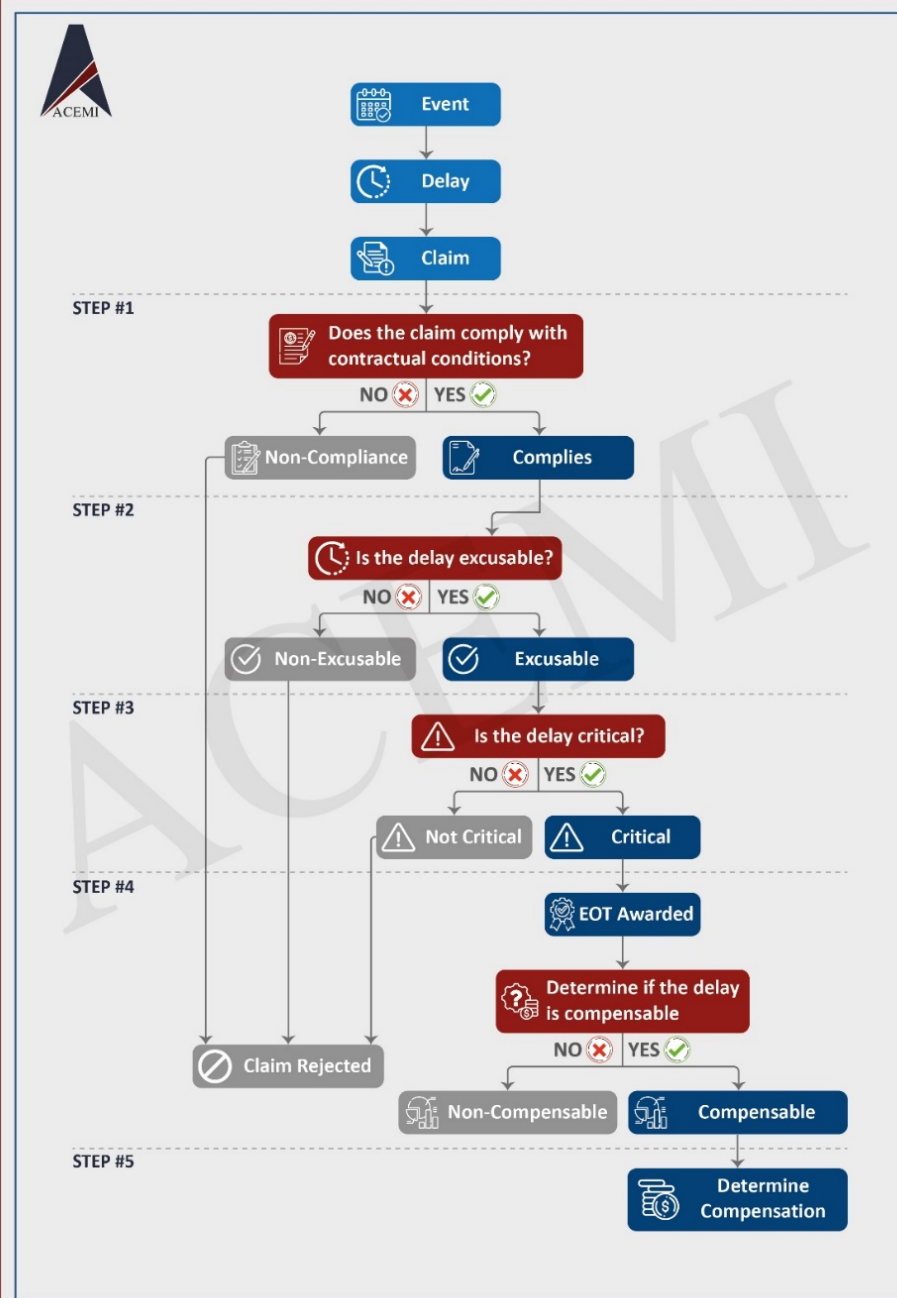
then he should

1. ***Give notice*** of the event or circumstances to the **engineer**
2. ***Proceed*** to submit a **fully detailed claim**.



Claims for extensions of time

- ❑ Other than variations, the **most common reason** for the submission of a claim is for an **extension to the time** for completion of the works.
- ❑ It
 1. **Establishes** new completion date for the project and
 2. **Prevents** the engineer from deducting **liquidated damages or penalties** for delay
- ❑ An *award of an extension* of time may also, however,
 - ❖ **Entitle** the contractor to **additional payment** as **compensation** (for example increase in **overheads**) for a **longer period**
 - ✓ The latter case is referred to as a claim for **prolongation costs**.



Is the delay excusable?

Is the delay catered for in clause 8.5(a)?

The Contractor shall be entitled to an extension of the Time for Completion if and to the extent that completion is or will be delayed by any of the following causes:

A Variation (unless an adjustment to the Time for Completion has been agreed under clause 13.3 [Variation Procedure]) or other substantial change in the quantity of an item of work included in the Contract.

YES ☒ NO ☒

Has an adjustment to the Time for Completion been agreed under clause 13.3 [variation procedure]?

YES ☒ NO ☒

EOT to be dealt with in terms of clause 13.3 (variation procedure)

Is the delay catered for in clause 8.5 (b)?
b) a cause of delay giving entitlement to EOT of time under a clause of these Conditions

YES ☒ NO ☒

Does the clause require additional notification?

YES ☒ NO ☒

Did the contractor give the required notification?

YES ☒ NO ☒

Was the delay as a result of the contractor's failure?

YES ☒ NO ☒

Non-Excusable

Does the clause provide for other requirements to be met?

YES ☒ NO ☒

Did the contractor meet the requirements?

NO ☒ YES ☒

Non-Excusable

Excusable

Is the delay catered for in clause 8.5 (c)?
c) exceptionally adverse climatic conditions

YES ☒ NO ☒

Is the delay catered for in clause 8.5 (d)?
d) unforeseeable shortages in the availability of personnel or goods caused by epidemic or governmental actions

YES ☒ NO ☒

Is the delay catered for in clause 8.5 (e)?
e) any delay, impediment or prevention caused by or attributable to the Employer, the employer's personnel or the Employer's other contractors.

YES ☒ NO ☒

Non-Excusable

Nr	Clause	Additional notification	As a result of contractor's failure	Specific requirement
1.9	Delayed drawings	☐	☐	☐
2.1	Right of access	☐	☐	☐
4.7	Setting out	☐	☐	☐
4.12	Unforeseeable conditions	☐	☐	☐
4.23	Archaeological	☐	☐	☐
7.4	Testing	☐	☐	☐
8.6	Delays by authorities	☐	☐	☐
8.10	Suspension of work	☐	☐	☐
10.3	Interference with tests for completion	☐	☐	☐
13.6	Adjustments for changes	☐	☐	☐
16.1	Contractor's entitlement to suspend work	☐	☐	☐
18	Exceptional Events	☐	☐	☐

Claims for extensions of time

Most forms of contract include specific provisions with regard to extensions of time,

1. Circumstances under which they **may be granted**
2. Procedures to be followed by the parties in the event of an extension of time being warranted.



Claims for extensions of time

❑ FIDIC is no exception and has this to say on the matter:

❑ This provision actually *require the contractor to submit a claim in order to start the procedure by which an extension of time may be awarded.*

Sub-Clause 8.4
Extension of
Time for
Completion

The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed by any of the following causes:

- (a) a Variation (Unless an adjustment to the Time for Completion has been agreed under Sub-Clause 13.3 [Variation Procedure] or other substantial change in the quantity of an item of work included in the Contract,
- (b) a cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions,
- (c) exceptionally adverse climatic conditions,
- (d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions, or
- (e) Any delay, impediment or prevention caused by or attributable to the Employer, the Employer's personnel, or the Employer's other contractors on the Site.

If the Contractor considers himself to be entitled to an extension of the Time for Completion, the Contractor shall give notice to the Engineer in accordance with Sub-Clause 20.1 [Contractor's Claims]. When determining each extension of time under Sub-Clause 20.1, the Engineer shall review previous determinations and may increase, but shall not decrease, the total extension of time.



Claims for extensions of time

Sub-Clause 20.1 [Contractor's Claims] outlines the following requirements for the submission of claims:

Sub-Clause 20.1
Contractor's
Claims

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply.

Claims for extensions of time

FIDIC 2017

20.2

Claims For Payment and/or EOT

If either Party considers that he/she is entitled to any additional payment by the other Party (or, in the case of the Employer, a reduction in the Contract Price) and/or to EOT (in the case of the Contractor) or an extension of the DNP (in the case of the Employer) under any Clause of these Conditions or otherwise in connection with the Contract, the following Claim procedure shall apply:

20.2.1 Notice of Claim

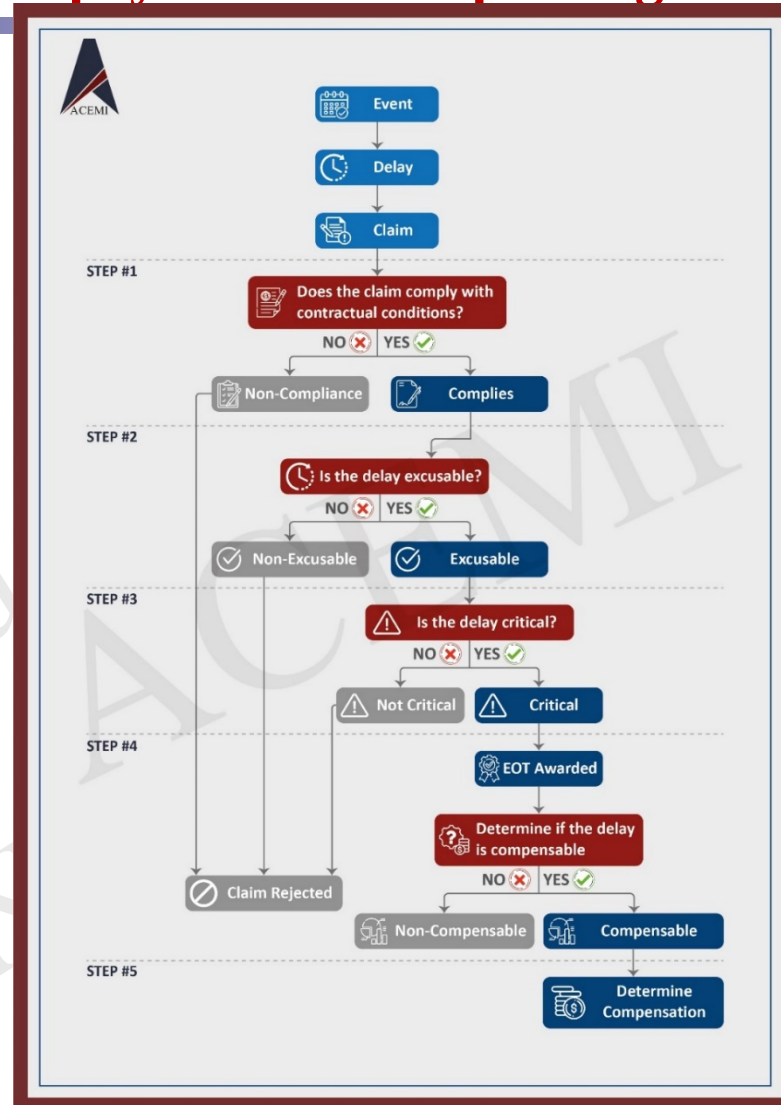
The claiming Party shall give a Notice to the Engineer, describing the event or circumstance giving rise to the cost, loss, delay or extension of DNP for which the Claim is made as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance (the "Notice of Claim" in these Conditions).

If the claiming Party fails to give a Notice of Claim within this period of 28 days, the claiming Party shall not be entitled to any additional payment, the Contract Price shall not be reduced (in the case of the Employer as the claiming Party), the Time for Completion (in the case of the Contractor as the claiming Party) or the DNP (in the case of the Employer as the claiming Party) shall not be extended, and the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim.

Claims for additional payment due to prolongation

- ❑ EOT will **not automatically** result in an entitlement to **any additional payment** for **prolonged period**.
- ❑ If the contractor is also entitled to the compensation,
He should be obliged to **submit a claim** for the **additional payment**
 - ❖ This is in **addition to the payment** for the **additional work**
 - ✓ Additional work usually would be measured at the **rates and prices** contained in the **contract**.

Claims for additional payment due to prolongation



Claims for additional payment due to prolongation

- ❑ Again, under FIDIC, the Contractor's recourse is contained in the following provisions:

20.2

Claims For Payment and/or EOT

If either Party considers that he/she is entitled to any additional payment by the other Party (or, in the case of the Employer, a reduction in the Contract Price) and/or to EOT (in the case of the Contractor) or an extension of the DNP (in the case of the Employer) under any Clause of these Conditions or otherwise in connection with the Contract, the following Claim procedure shall apply:

20.2.1 Notice of Claim

The claiming Party shall give a Notice to the Engineer, describing the event or circumstance giving rise to the cost, loss, delay or extension of DNP for which the Claim is made as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance (the "Notice of Claim" in these Conditions).

If the claiming Party fails to give a Notice of Claim within this period of 28 days, the claiming Party shall not be entitled to any additional payment, the Contract Price shall not be reduced (in the case of the Employer as the claiming Party), the Time for Completion (in the case of the Contractor as the claiming Party) or the DNP (in the case of the Employer as the claiming Party) shall not be extended, and the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim.

Claims for additional payment due to prolongation

It is a common practice for contractors to link claims for prolongation costs to claims for extensions of time and to present both as one single claim.

While this **may be appropriate in straightforward circumstances**, consideration should be given to **dealing with the two subjects separately**. *Why?*

1. A claim for **EOT** often reviewed more quickly, whereas additional payment claims often, by their very nature, become **protracted** while *details of monetary calculations for prolongation are considered, discussed and negotiated.*
2. Likely that different personnel will examine the time and monetary issues.
3. While the Contractor may claim a certain number of days for an extension of time, Engineer may determine that a lesser time is warranted for compensation.

Claims for additional payment due to prolongation

It is a common practice for contractors to link claims for prolongation costs to claims for extensions of time and to present both as one single claim.

If it is **decided to submit two separate claims**, **care must be taken** to comply with the time frames prescribed in the Contract for the submission of the prolongation costs.

So, what is the better approach?

A sensible way of dealing with this is to submit both the extension of time claim and the claim for additional payment at the same time,

but

as separate and discrete submissions.

Acceleration and disruption claims

ACCELERATION

- ❑ It could be that the **Employer** has **prevailed** upon the Contractor to **accelerate the work** to
 1. Mitigate delays caused for which the employer is **allocated the risk (recovery schedule provided)**, or
 2. Complete the project earlier than the time for completion provided for in the contract (**accelerated schedule provided**)

What costs would be incurred to the contractor?

Acceleration and disruption claims

ACCELERATION

❑ In such circumstances, the Contractor will **incur additional costs** and consequently be entitled to **additional payment** for the following:

- ❖ **Extended working hours**, resulting in additional costs of labor due to **overtime payments**
- ❖ **Increased plant and labor**, resulting in additional **mobilization and demobilization costs**
- ❖ **Increased plant and labor**, causing **loss of efficiency** as a result of **too many workforce** operating at **once**
- ❖ **Loss of production** caused by
 1. Working **out of sequence**, or
 2. Working **on more than the optimum number** of workforce

Acceleration and disruption claims

DISRUPTION

- ❑ While **acts of the Employer** may **not always cause delay**,
they **may cause disruption** to the **Contractor's planned method** of working,
leading to
1. *Loss of efficiency or*
 2. *Additional costs incurred in order to **mitigate the effects** of the disruption.*



Acceleration and disruption claims

In the case of **FIDIC**, the same claim provisions apply as in the previous examples as follows:

20.2

Claims For Payment and/or EOT

If either Party considers that he/she is entitled to any additional payment by the other Party (or, in the case of the Employer, a reduction in the Contract Price) and/or to EOT (in the case of the Contractor) or an extension of the DNP (in the case of the Employer) under any Clause of these Conditions or otherwise in connection with the Contract, the following Claim procedure shall apply:

20.2.1 Notice of Claim

The claiming Party shall give a Notice to the Engineer, describing the event or circumstance giving rise to the cost, loss, delay or extension of DNP for which the Claim is made as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance (the "Notice of Claim" in these Conditions).

If the claiming Party fails to give a Notice of Claim within this period of 28 days, the claiming Party shall not be entitled to any additional payment, the Contract Price shall not be reduced (in the case of the Employer as the claiming Party), the Time for Completion (in the case of the Contractor as the claiming Party) or the DNP (in the case of the Employer as the claiming Party) shall not be extended, and the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim.

Acceleration and disruption claims

Essentially, claims for acceleration or disruption are recoverable,

but

the matter of **proving the quantum** of such a claim will be central to the **question** as to whether or not the claiming party will in **fact recover**.

Records in such a situation will be essential to the success.

Claims for damages under law

❑ Many forms of contract

include specific **circumstances** that entitle the Contractor to make a **claim** for additional time and/or payment.

❖ FIDIC is quite comprehensive about this and the conditions include the following **circumstances** under which the **Contractor** may make such a claim:

Clause number	Clause Title	Type of compensation
1.9	Delayed drawings or instructions	Cost & profit
2.1	Right of access to site	Cost & profit
4.7	Setting-out	Cost & profit
4.12	Unforeseeable physical conditions	Cost
4.23	Archaeological and geological findings	Cost
7.4	Testing by the contractor	Cost & profit
8.10	Consequences of employer's suspension	Cost & profit
10.2	Taking over parts	Cost & profit
10.3	Interference with tests on completion	Cost & profit
11.2	Cost of remedying defects	Compensation determined in terms of clause 13.3 variation orders
11.8	Contractor to search	Cost & profit
12.4	Omissions	Cost
13.2	Value engineering	Particular conditions
13.3	Variation order	Compensation determined in terms of clause 12.3 valuation of the works
13.6	Adjustment or changes in laws	Cost
15.5	Termination for employer's convenience	Cost & damages
16.1	Suspension by contractor	Cost & profit
16.4	Payment after termination by contractor	Cost, profit & damages
18.4	Consequences of an exceptional events	Cost & profit in some instances
18.5	Optional termination	Cost
18.6	Release from performance under the law	Cost

Should circumstances arise that fall outside those specified in the Contract, it would be necessary to make a **claim for damages under law**.



Claims for damages under law

❑ In this case, a claim may be submitted based on the **law of prevention**.

❖ Simply put, the **prevention principle** is that each party has an **obligation to positively enable** the other to perform his obligations under the Contract and **not to take advantage** of the circumstances.

✓ Should the **Employer** or his agents **prevent** the **Contractor** from performing his **obligations properly**, then the **Employer has committed a breach of contract** and Contractor, under many **legal jurisdictions**, has entitlement **under law** to adequate compensation.

Let's see an example!

Claims for damages under law

Example:

- ❑ If we consider a scenario whereby the **Employer** had moved equipment into the **room** that was to be **divided into two** and
- ❑ It was **not possible for the Contractor** to **commence the work immediately** on receipt of the instruction (change order),

*This would be considered as an **act of prevention** which would **delay the start** of the additional work until such time as the **employer removed** the equipment.*

- ❑ This, in turn, would **affect** both the extension of time and the additional payment for prolongation to which the Contractor would be **entitled**.

Interim and final claims

- ❑ **Some contracts** ask for claims to be submitted when only a claim is matured.

If the claim is continuing, the Contractor shall supplement the information required above in a timely manner.

The Contractor shall provide to the Resident Engineer full and final documentation to support the claim no later than 60 calendar days following the date the claim has been fully matured. A claim fully matures when all the direct damages (money and/or time) resulting from the claim issue can be reasonably quantified. The possibility of impact damages should not delay the submittal of full and final documentation of claims for direct damages.

So, what to do for a claim that may not have ended or may not be possible to ascertain **during the time that is allowed!**

Interim and final claims

❑ In some cases the event which **gives rise to the claim**

1. May **not have ended** or
2. May **not be possible to ascertain** the **final effects** of the event
when the **prescribed period** for the submission of the claim **has expired**.

*An example of such may be where a **variation instruction** includes an item that is **subject to special order** and **manufacture and delivery periods** have **not been finalized** at the **time when the claim is due** to be submitted.*

Interim and final claims

❑ As with notices,

Employer and his agents need to be made **aware of the effects** to

1. **Enable them** to plan for the **financial and time implications** on the project
and
2. **Continue** to consider **mitigation measures**.

*Consequently, many forms of contract require the claimant to provide interim information on the **predicted effects** at regular intervals.*

Interim and final claims

Sub-Clause 20.2 from FIDIC stipulates the following in this regard:

20.2.4 Fully detailed Claim

In this Sub-Clause 20.2, "fully detailed Claim" means a submission which includes:

- (a) a detailed description of the event or circumstance giving rise to the Claim;
- (b) a statement of the contractual and/or other legal basis of the Claim;
- (c) all contemporary records on which the claiming Party relies; and
- (d) detailed supporting particulars of the amount of additional payment claimed (or amount of reduction of the Contract Price in the case of the Employer as the claiming Party), and/or EOT claimed (in the case of the Contractor) or extension of the DNP claimed (in the case of the Employer).

Within either:

- (i) 84 days after the claiming Party became aware, or should have become aware, of the event or circumstance giving rise to the Claim, or
- (ii) such other period (if any) as may be proposed by the claiming Party and agreed by the Engineer

the claiming Party shall submit to the Engineer a fully detailed Claim.

Interim and final claims

Sub-Clause 20.2 from FIDIC stipulates the following in this regard:

20.2.6 Claims of continuing effect

If the event or circumstance giving rise to a Claim under this Sub-Clause 20.2 has a continuing effect:

- (a) the fully detailed Claim submitted under Sub-Clause 20.2.4 [*Fully detailed Claim*] shall be considered as interim;
- (b) in respect of this first interim fully detailed Claim, the Engineer shall give his/her response on the contractual or other legal basis of the Claim, by giving a Notice to the claiming Party, within the time limit for agreement under Sub-Clause 3.7.3 [*Time limits*];
- (c) after submitting the first interim fully detailed Claim the claiming Party shall submit further interim fully detailed Claims at monthly intervals, giving the accumulated amount of additional payment claimed (or the reduction of the Contract Price, in the case of the Employer as the claiming Party), and/or extension of time claimed (in the case of the Contractor as the claiming Party) or extension of the DNP (in the case of the Employer as the claiming Party); and
- (d) the claiming Party shall submit a final fully detailed Claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the claiming Party and agreed by the Engineer. This final fully detailed Claim shall give the total amount of additional payment claimed (or the reduction of the Contract Price, in the case of the Employer as the claiming Party), and/or extension of time claimed (in the case of the Contractor as the claiming Party) or extension of the DNP (in the case of the Employer as the claiming Party).



Interim and final claims

❑ The requirements mentioned are quite specific in that

1. **Contractor** is obliged to send monthly updates until the **final effects** of the circumstances of the claim **can be ascertained**.
2. Such **interim updates** should be based upon the **Contractor's best estimate** from the information to hand at the time the update is prepared.
3. In such a case, **each submission** should be **clearly designated** as an interim or final claim

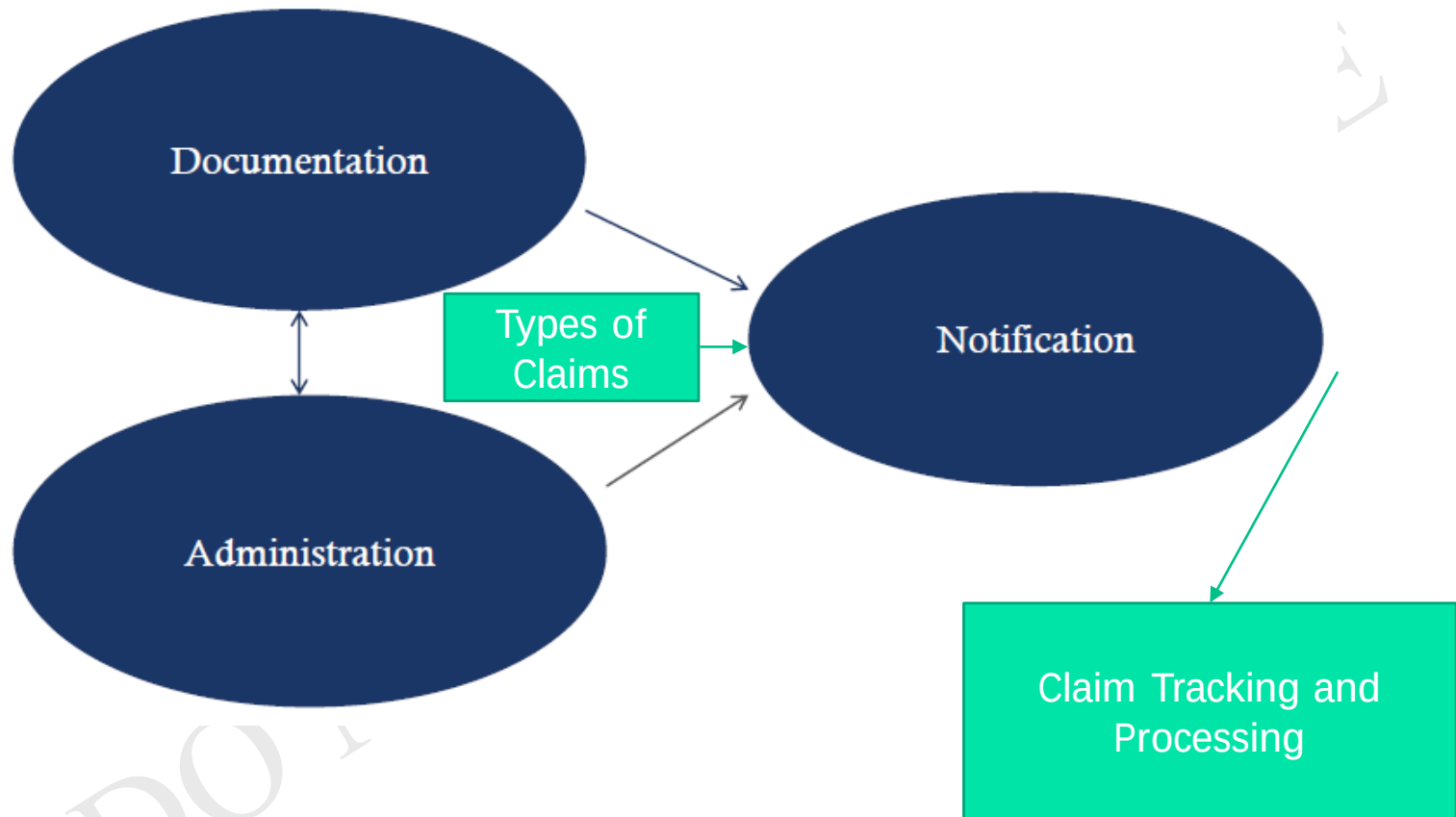
in much the same way as are applications for interim progress payments and final accounts.

*If a claim is based on several events, then **interim claims** should be submitted **until all the events** in question are closed out with the full effects demonstrated.*

Claims Management

(Claim and Dispute Notification)

Suggested terminology for claim management in Construction Phase



Claim notice requirements and best practices

- ❑ **Proper claims management** begins with **identification** of a claim.
- ❑ The **contractor** must be able to **recognize and identify** a **claim situation** when it **first develops**,
not after it has become a controversy.
- ❑ **Identification** goes **hand-in-hand** with **notification**.
 - ❖ Most public and private contracts **contain clauses** requiring **notification** of
 - ✓ Differing site conditions
 - ✓ Changes
 - ✓ Delays within a stated period of time before equitable adjustments can be pursued

But, what should be included in the notices?

Claim notice requirements and best practices

❑ Substance of notice

The notice should include:

- ❖ A **notice** need **not be a long** or detailed document because
its **sole purpose** is to **draw the attention** of the Engineer to the **fact** that
something has happened that
may give the **Contractor entitlement** to make a **claim**.
- ❖ It should however **do the following**:
 1. **State clearly** that it is a **notice**.
 2. **Provide details** of the **event** or circumstance and the **date** of its **occurrence**.
 3. **State** the **contractual** or legal **provisions**, which provide **entitlement** to the claim.
 4. **State** whether the **Contractor intends** to claim for an extension of **time**, additional **payment** or **both**.
 5. **Request** the **Engineer to advise** of any **records** that he requires to be kept.

Claim notice requirements and best practices

Strict compliance: The law, not the exception

❑ Important note

It should be remembered that a notice is not a claim, and

1. **Temptation to go into detail** or to attempt to quantify the claim at this stage is **unnecessary**, and
2. Going into claim may cause an **unwelcome response**
which attempts to **reject the claim before** it has
been properly considered, prepared and submitted.

*Such a situation is a **waste of time and effort** for both parties and is also likely to
lead to ill feeling and animosity.*

Claim notice requirements and best practices

Strict compliance: The law, not the exception

❑ Time limitations

- ❖ Limitation for a notice
- ❖ Limitation to submit a supplementary documents
- ❖ Limitation to response
- ❖ Limitation to appeal
- ❖ Limitation for final decision
- ❖ AIA A201

§ 15.1.2 Time Limits on Claims

The Owner and Contractor shall commence all Claims and causes of action against the other and arising out of or related to the Contract, whether in contract, tort, breach of warranty or otherwise, in accordance with the requirements of the binding dispute resolution method selected in the Agreement and within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all Claims and causes of action not commenced in accordance with this Section 15.1.2.

Claim notice requirements and best practices

Contents of the contracting officer's final decision

❑ Engineer's decision

Under Federal contracts:

- ❖ A **contracting officer** must issue a decision on any submitted claim **within 60 days** of receipt of a contractor's **written request** for a final decision.
- ❖ For claims exceeding \$100,000, the contracting officer must either
 - (1) **Issue a decision**
 - (2) **Notify** the contractor of **when the decision** will be issued, **within 60 days** of the contracting officer's receipt of the **certified claim**.

The contracting officer's final decision must be in writing, and the contracting officer must send a copy of the final decision to the contractor by certified mail or by any other method of submission providing evidence of receipt.

Claim notice requirements and best practices

Contents of the contracting officer's final decision

❑ Announcement of engineer's decision and alternatives for an appeal

- ❖ If the **contracting officer** denies the claim,

*he or she is required to give the contractor **notice** of the contractor's appeal rights.*

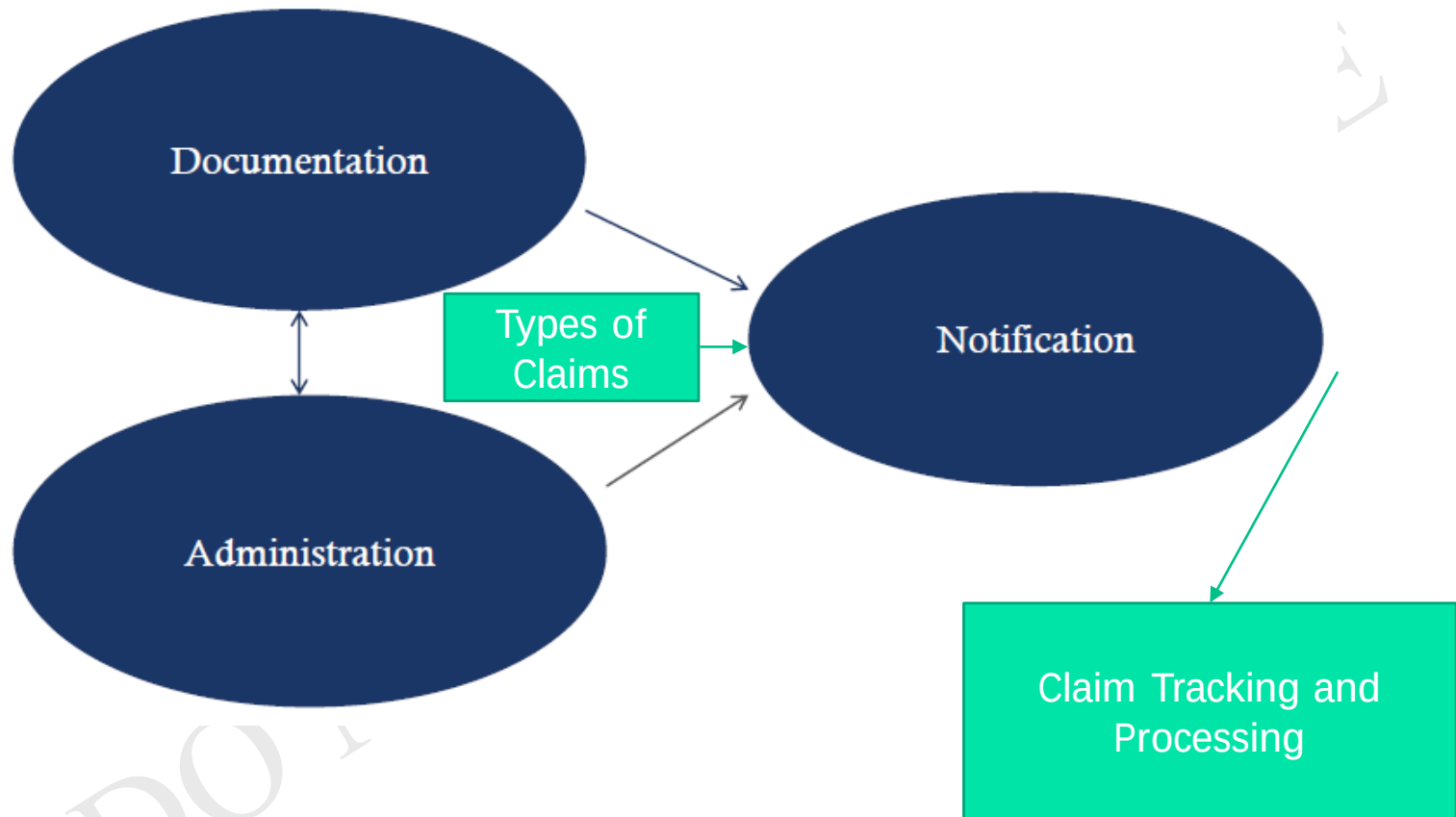
- ❖ *This notice usually contains the following language:*

This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

Claims Management

(Claim and Dispute Tracking and Processing)

Suggested terminology for claim management in Construction Phase



Introduction

Based on PMBOK Construction Extension, CMAA, and my experience

- ❑ Regardless of the origin of the potential claim, the claims identification process should
 1. Start with a clearly understood project scope and contract
 2. Include a written description of the claim
 3. Claim issue file development
 4. Claim issue evaluation and assessment
 - i. Time and cost impacts
 - ii. Prompt payments
 - iii. Capability gap analysis
 - iv. Expert judgment
 - v. Pending claim file and statement of claim



Project scope and contract

Based on PMBOK Construction Extension

❑ Strict adherence to the contract can be **very difficult** if one does not fully understand its requirements.

❖ However, a **strict or difficult** to follow contract does not excuse noncompliance.

✓ Seeking legal counsel or expert judgment to assist with the interpretation and requirements is proactive and time well spent.

In many cases, claims not made in a timely manner could become invalid.

Project scope and contract – Claim preparation

❑ **Not only** should the Contract **specify a time limit** for the **filing of claims**, but it should also **specify exactly the information** that the Contractor must **submit when asserting** a claim, **such as the following:**

- ❖ A **clear narrative** of what the claim is with **references to attached documents**.
- ❖ An **explanation** of **why** the **claim item differs** from that **already required** by the **Contract**.
- ❖ **References** to the **specific Contract clauses** that apply.
- ❖ An **explanation** of the **cause (or liability)** for the claim.
- ❖ A **clear definition** of the **specific impacts** associated with the claim (**i.e., extra work, overtime, delay, etc.**).
- ❖ A **detailed breakdown** of the **damages or extra costs** with **supporting information**.

Project scope and contract – Claim preparation

❑ Submission of supplementary documents

If additional information is necessary or not available, say it...

SEE THE FOLLOWING EXAMPLE

Unrelated claim issue will be processed as separate claims and therefore must be submitted as separate claims.

The Contractor shall supplement the written notice of claim within 15 calendar days of filing the notice of intent to file a construction claim with a written statement providing the following:

1. The date of the claim.
2. The nature and circumstance that caused the claim.
3. The Contract provisions that support the claim.
4. The estimated dollar cost, if any, of the claim and how that estimate was determined.
5. An analysis of the schedule showing any schedule change, disruption, and any adjustment of Contract time.

Project scope and contract – Claim preparation

The full documentation of the claim, as presented in the administrative process shall, at a minimum, contain the following elements.

1. A detailed factual narration of events that details the nature and circumstances that cause the claim. This detailed narration of events shall include, but is not limited to, providing all necessary dates, locations, and items of work affected by the claim.
2. The specific provisions of the Contract or laws which support the claim and a statement of the reasons why such provisions support the claim.
3. The identification and copies of all documents and the substance of any oral communications that support the claim. Manuals that are standard to the industry may be included by reference.
4. If an adjustment for the performance time of the Contract is sought:
 - a. The specific days and dates for which it is sought.
 - b. The specific reasons the Contractor believes a time adjustment should be granted.
 - c. The specific provisions of the Contract under which additional time is sought.
 - d. The Contractor's detailed schedule analysis to demonstrate the justification for a time adjustment.

What do you see here?

Project scope and contract – Claim preparation

What do you see here?

5. If additional monetary compensation is sought, the exact amount sought and a breakdown of that amount into the following categories:
 - a. Labor. Listing of individuals, classification, hours worked, and so on
 - b. Materials. Invoices, purchase orders, and so on
 - c. Equipment listing detailed description (make, model, and serial number), hours of use, and dates of use. Equipment rates shall be at the applicable Blue Book Rate, which was in effect when the work was performed, as defined in Subsection 109.03.
 - d. Job site overhead.
 - e. Home office overhead (general and administrative).
 - f. Other categories
6. The above data shall be accompanied by a notarized statement from the Contractor containing the following certification:
Under penalty of law for perjury or falsification, the undersigned,

(Name)

(Title)

(Company)

Project scope and contract – Claim preparation

Claims certification

☐ Submission of good faith certification

- ❖ For any claim in excess of \$100,000, the following language must be used in the contractor's certification:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

Signed by: _____ [name, company, position]

Description of claim

Based on PMBOK Construction Extension

- ❑ This is a **written description of the work** believed to be outside of the contract, **where it occurred**, and **when it took place**, including **contract specification references** that support the requested claim.
 - ❖ A justification statement
 - ❖ The claim should **document the activities** that **were affected** by the situation, including resources, schedule, etc.

Contemporaneous documentation should be recorded promptly at the **time of the occurrence** and **cover all aspects** that support the claim and the contract provisions.

Claim issue file development

Based on CMAA

- ❑ Once a potential dispute has been identified, or a claim has been submitted to the CM,

it is imperative that the **CM** establishes a separate file to **properly monitor** the status of the issue.

- ❖ If the claim is the peak of an issue that has been progressing through the **various stages** of the administrative process, then the CM should establish a potential claim issue file that contains all **relevant documents** related to the issue.

Claim issue evaluation and assessment

Based on CMAA

- ❑ The **CM** should **review** the **claim issue** and **determine** if the **claim submittal** **complies** with the **requirements** of the **contract**.

If so, the CM should provide

1. **Objective** evaluation as to potential merit
2. Independent **cost and schedule** evaluation
3. Review of the **reasonableness** of the alleged **damages**

***If additional information is needed**, the **CM** should promptly **request** the necessary information from the contractor*

*while providing a realistic **timeframe** for the expected response.*

Time and cost impacts

Based on PMBOK Construction Extension

- ❑ All time extension requests and time impact analyses should be **reviewed promptly** in order to avoid claims later of **Constructive Acceleration**.
 - ❖ This type of claim most frequently occurs when owners ignore time extension requests, deny them outright without respectful analysis, or refuse to engage with contractors over such requests,
resulting in substantiated cost impacts for the contractor.

The Constructive Acceleration Doctrine allows recovery for the additional expenses the contractor can establish.

Time and cost impacts – Tracking of costs for disputed items (time and material)

❑ If a contractor has been directed to **perform disputed work**,

It is imperative that the **CM validates** that

1. Work being performed is in fact **part of the disputed work** and **not paid** for under another undisputed pay item, and
2. That **all labor**, **material**, and **equipment** are **accurately documented**.
 - ❖ The **CM and the contractor** should **both confirm** by signature the amount of **manpower and equipment** dedicated to the disputed item on a **daily basis**.

*By doing so, the CM **eliminates the potential dispute** over the quantum of effort with the contractor, since the actual effort was **verified contemporaneously**.*

Time and cost impacts – Schedule management

❑ The **CM** has the **primary responsibility** of

1. Reviewing the contractor's schedule and update
2. Determining the schedule status
3. Analyzing cause of delays
4. Reviewing the contractor's time extension requests
5. Working with the contractor to identify recovery plans, in the case of delays



Time and cost impacts – Schedule management: Resource loading

- ❑ If appropriate, the **CM should recommend** that the contract requires a **resource-loaded schedule**.
- ❑ This information enables the **CM** to **understand** and **monitor** the **contractor's commitment** of resources in the accomplishment of the work.
- ❑ It is important for the contractor to **commit sufficient resources** to properly **progress the entire project, not just the critical path**.
- ❑ The **CM** should **track and monitor** the resource commitments by the contractor to identify ***deviations from the current plan*** that may ***present concern*** as to the contractor's ***ability to sustain the planned rate of progress***.

Time and cost impacts – Schedule management: Critical path

❑ The CM should

1. **Track** the **progress** of the contractor **against critical path and near-critical paths**
2. **Monitor** the change in **float** on critical and near-critical paths on the project.

Time and cost impacts – Delay claims

❑ If a **delay claim** is submitted by the **contractor**,

CM needs to **validate** that the alleged delay has been **properly presented** and substantiated by the **contractually prescribed methodology**.

❖ The **construction contract** should **specify** what **schedule delay analysis methodology** is to be employed by the contractor **when filing** a delay claim.

1. Many contracts today contain a **TIA submittal requirement** that is intended to address a **predicted delay** caused by the underlying contract deviation issue
2. If the delay claim is **presented after the delay and claimed impacts** have occurred, then a **forensic delay analysis** will be required.



Time and cost impacts – Delay claims

❑ The CM must

1. **Be acquainted** with the contractually prescribed method

2. Should also be **well versed** in forensic schedule analysis

*More complex analyses may be developed, typically after the fact, and the **CM** should be able to consider and evaluate these analyses in consideration of the **contract terms** and the actual events that occurred.*

Under any circumstance, the **CM** must **advise the owner** as to whether the delay is *excusable or unexcusable, compensable or non-compensable.*

Thereafter, the CM can assist the owner in the negotiation and resolution of the disputed delay.

Time and cost impacts – Delay claims: Recovery and mitigation

1. If a delay claim has been submitted and reviewed, and
2. Owner has agreed that the contractor is **entitled to relief**, the owner has two options:
 - a) **Time Extensions** - The owner can grant a time extension and delay damages to the contractor for the length of the excusable delay.
 - b) **Acceleration** - **If** an **extension** to the project completion date is **not feasible** for the owner due to an **external constraint**,
then the owner can authorize the contractor to accelerate the work on the critical path by employing additional resources, working additional shifts, or working overtime.
 - ❖ If the delay is excusable, then the **cost of acceleration** would likely be compensable to the contractor.

Time and cost impacts – Delay claims: Liquidated damages

❑ If the construction contract requires the **assessment of liquidated damages** for late completion of any milestone,

then the **date** upon which the **liquidated damages** begin to accrue is **established in the contract**.

If **excusable delays have been granted**, the **contract milestone dates** need to be **adjusted** to the **new date(s)**, resulting from granted time extensions.



Capability gap analysis

- ☐ If the **CM** does **not have the capability** to review CPM schedules, time extension requests, and delay claims,
the **owner should engage a professional** to perform these functions.
- ☐ If **both** the owner and the contractor teams have **competent construction project managers** with a mutual **understanding of the contract requirements**,
it is more likely that **time extension requests and delay claims** can be resolved on the job site **through negotiation**.

Expert judgment

Depending on the project delivery method employed,

the **owner may seek advice** from one or more of the contract stakeholders as to **whether a claim is valid**.

This may be the designer of record or the construction manager.

Pending claim file and statement of claim

- ❑ As a good practice, **items identified as potential claims** should be kept in their own **separate files** that contain **all related documentation**, including **correspondence and contract references**.
 - ❖ This ensures that relevant **information and documents** are collected and retained in an **accessible file or database**.
- ❑ **Without this proactive approach** for organizing and **indexing**,
managing the hundreds to tens of thousands of project documents will become an **extremely expensive component** of qualifying and proving the claim.

Claims Management

(Notes To Consider Before Writing the Claim)

Important notes to consider before writing the claim

- ☐ When an **event or events have occurred** that
the **project team consider** give rise to the **need to submit a claim**
it is sensible to **consider certain matters before proceeding**.

YOU WILL SEE 7 KEY POINTS HERE!

Important notes to consider before writing the claim

☐ Things to be **considered in the early stages** are the following:

1. The likely outcome and seriousness of the event.

- ❖ Will it have a **serious enough impact** on the claimant to **justify the submission** of a claim?

Important notes to consider before writing the claim

❑ Things to be **considered in the early stages** are the following:

2. The value of the claim.

❖ Obviously the **ends must justify the means** here and

- ✓ if it will **cost a significant amount to prepare a claim** for a **small return**,
it *may make little economic sense* to pursue the action.

Similarly, if a claim is **likely to attract a high return**, it is probably worth **providing the necessary resources to ensure a *high-quality effort*** is made.

Important notes to consider before writing the claim

☐ Things to be **considered in the early stages** are the following:

3. The strength of the claim and its chances of success.

❖ Are the chances of success **great** enough to **justify** the **effort and expense**?

Important notes to consider before writing the claim

☐ Things to be **considered in the early stages** are the following:

4. The strategy should also consider how the claim is to be persuasive.

❖ It is **unlikely** that the claimant will **receive the full value** of his claim submission, so it is wise to **include a negotiation margin**.

i. Maximizing all issues leaving a **large amount for negotiation**, or

ii. Ensure that all **arguments are absolutely sound**?

✓ The **second one** usually results in a **submission with a lesser value**, but is often **harder to defend** against.

✓ It is also **true to say** that while an inflated claim strategy may have a **chance of success if reviewed by inexperienced parties**,

*however, such a claim is **unlikely to succeed** when the **experts get involved**.*

Important notes to consider before writing the claim

☐ Things to be **considered in the early stages** are the following:

5. Some claims are complicated in their very nature and if this is the case, they require a certain amount of knowledge and experience to prepare.

- i. Do **in-house resources** contain **adequate experience and knowledge** to produce the desired result, or
- ii. Should **additional resources** be **brought in**?

Important notes to consider before writing the claim

❑ Things to be **considered in the early stages** are the following:

6. Client relationships should be considered.

❖ Claims are **inevitably** viewed **negatively** by the respondent.

- i. **At best**, the person **responsible for reviewing** the claim will consider **inconvenience** and
- ii. **At worst**, the claim will be viewed as an **attempt** by the ‘**greedy and unscrupulous**’ contractor to **maximize** his returns by any means from the ‘**poor, hard-done-by and totally innocent**’ client.

While the **reality** will most likely fall somewhere between **these extremes**, **existing and future client relationships** should be considered, maybe at **executive level**.

Important notes to consider before writing the claim

☐ Things to be **considered in the early stages** are the following:

7. The parties who are likely to make the determination should also be considered.

- ❖ Do they have a **responsibility** to protect the Employer's interests or to be impartial?
- ❖ Are they actually **likely to act impartially**?
- ❖ Is the person likely to have **sufficient knowledge** to
 - i. Understand the **matter in question**
 - ii. **Contractual principles** relied upon
- ❖ Is the **Employer** likely to **engage the services** of an **expert**?

Claims and Disputes Resolution

(Resolution Methods)

Suggested terminology by CMAA

❑ A **typical hierarchy** of **potential disagreements** may include the following:

1. *A request for change*
2. *A request for equitable adjustment*
3. *A formal claim*
4. *Litigation*



Suggested terminology by CII

If the **owner admits** the claim of contractor and **grants him extension of time or reimbursement of additional cost**, or both,

the issue is sorted out.

However, if the **owner does not agree** to the claim put out by contractor and there are **differences in the interpretations**,

the issue takes the form of a dispute

Dispute

It is “**any contract question or controversy** that must be settled **beyond** the jobsite management”

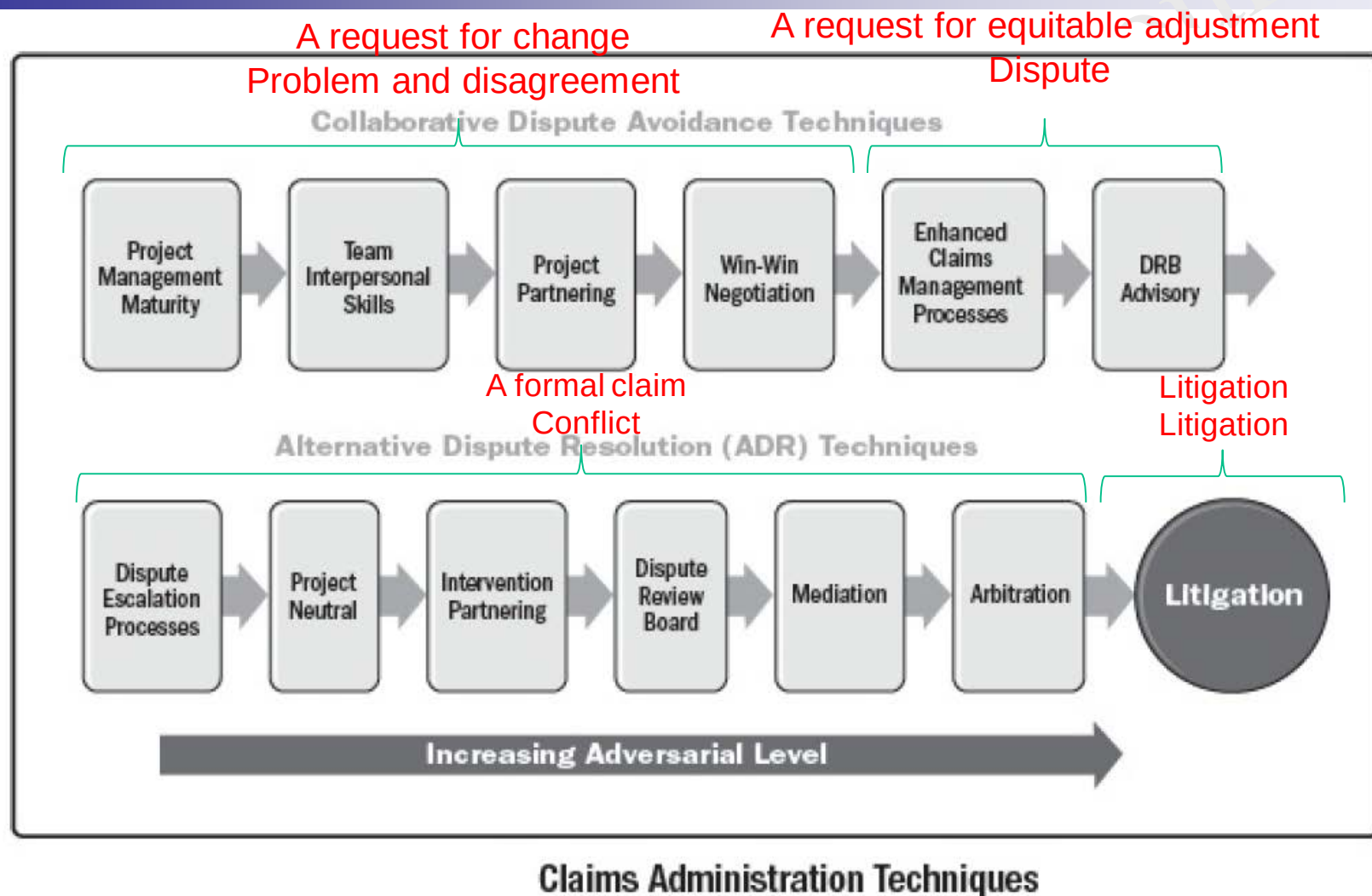
Individuals Involved	Stages in the Claims Process				
	Problem	Disagreement	Dispute	Conflict	Litigation
Litigators					Formal court documentation and proceedings
Consultants & Neutrals				Assist with quantification and entitlement on an issue-by-issue basis	
Sponsors, Standing Advisors & Standing Neutrals			Attempts at resolution removed from day-to-day management		
Project Managers	Routine discussions & negotiations	Substantial honest negotiation on defined problem			
Level of Resolution	On the Project			Removed from the Project	

A formal claim

A request for equitable adjustment

A request for change

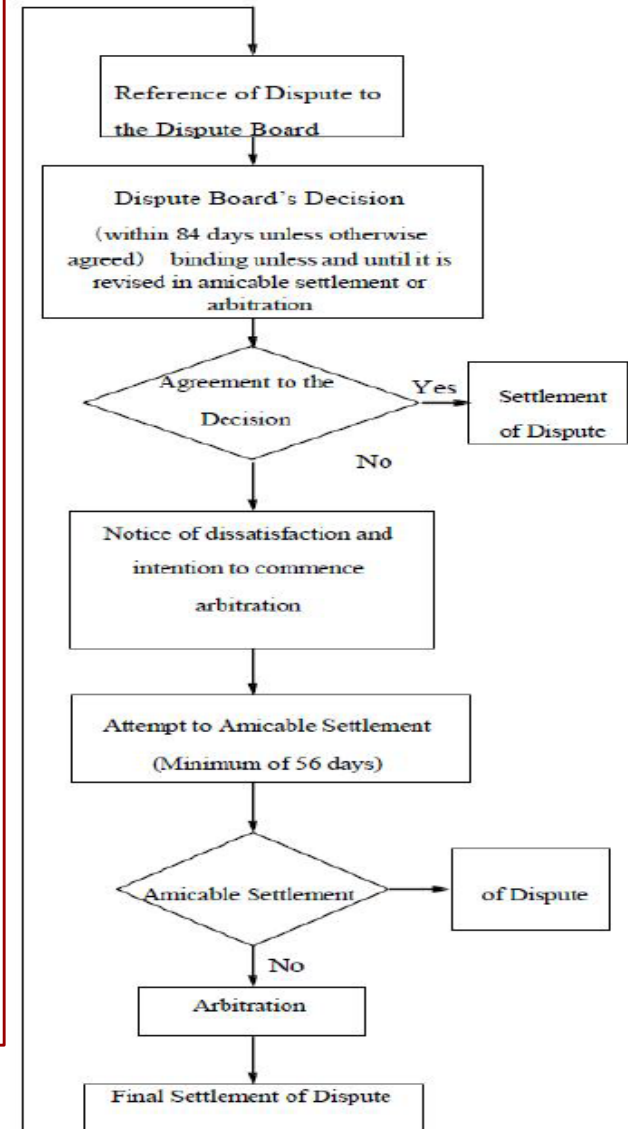
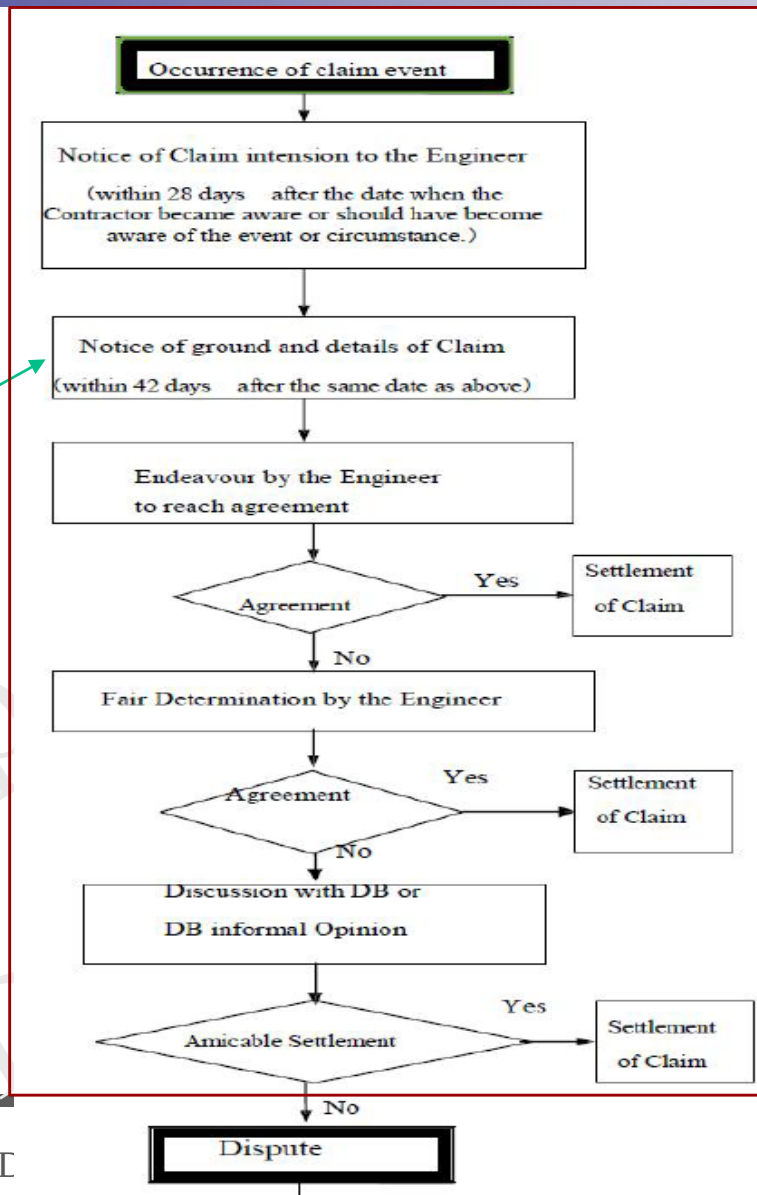
Suggested terminology by PMI



Claims Administration Techniques

Claims management process – Sample 1

Submitting final details of the claim **within 42 days** of the **end** of the **events** giving rise to the **claim**



Claims and disputes resolution

Refusal by the owner to recognize the claim does not ordinarily authorize the contractor to refuse to continue its field operations.

However, the **contractor should proceed with the work in dispute only after filing a written protest** with the owner.

*Although the **disputed work may be performed under protest**, the contractor must continue field operations **with diligence**, relying on remedies stipulated in the contract to settle the questions of compensation and extension of time.*

Claims and disputes resolution

☐ AIA A201-2017: General conditions for construction

§ 15.1.4 Continuing Contract Performance

§ 15.1.4.1 Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.



Claims and disputes resolution

The **requirement** that the contractor **must proceed** with the disputed work **does not** apply,

*if the **change or modification** involved is **beyond the scope** of the contract.*

(۲۹-الف-۲)

جمع مبلغ مربوط به کاهش مقادیر و حذف آن‌ها نباید از ۲۵ درصد مبلغ اولیه پیمان بیشتر شود. اگر این مبلغ، از حد تعیین شده بیشتر شود و پیمانکار با اتمام کار با نرخ پیمان موافق باشد، عملیات موضوع پیمان در چارچوب پیمان انجام می‌شود. ولی در صورتی که پیمانکار مایل به اتمام کار نباشد، پیمان طبق ماده ۴۸ خاتمه داده می‌شود.

The **distinction** between what is and **what is not within the scope** of the contract is often **difficult** to establish however,

*and should not be invoked by the contractor **without** **consultation with legal counsel.***



❑ If a **contractor** submits a **claim**,

CM should **promptly mitigate** any further escalation by immediately **administering the dispute resolution process.**

❑ The **CM** should **understand all the administrative requirements** contained in the contract regarding the **submission of claims** by the contractor.

❑ The **dispute resolution process** specified in the construction contract is for the **benefit of the owner** and the contractor,

and is intended to **protect both** from a **delay in resolution.**

CM's role

- ❑ Each construction contract should identify the **administrative remedies** to be followed during the project in the **event** the contractor or owner are in **dispute**.
- ❑ The **specific dispute resolution process** should be identified and may include **any one, or more**, of the **commonly used methods** and processes.
- ❑ The **CM** should endeavor to **resolve disputes** at the **project level** **before** allowing the **dispute to escalate** to a **higher management level** for resolution.
- ❑ Many contracts specify **alternative dispute resolution (ADR)** methods in lieu of, or before, the **last resort of litigation**.

CM's role

- ❑ The **CM** often plays an important role as a **facilitator** in the **resolution** of construction claims.
- ❑ There are **several different approaches** that can be used to **negotiate agreements**.
 - ❖ However, **true negotiations** can only occur **when**
 - all the parties are willing to honestly** participate and the negotiations are done with representatives
 - who have the authority** to enter into such agreements.

National construction dispute resolution committee (NCDRC)

❑ In an effort to provide a remedy for the excessive litigation which they saw arising from construction projects,

leaders of the industry in 1991 established a task force whose purpose was to

promote awareness and understanding, of private dispute resolution techniques, and to encourage their use as standard practice in the industry.

The National Construction Dispute Resolution Committee (NCDRC) (www.adr.org.) was formed as a committee of the American Arbitration Association.



National construction dispute resolution committee (NCDRC)

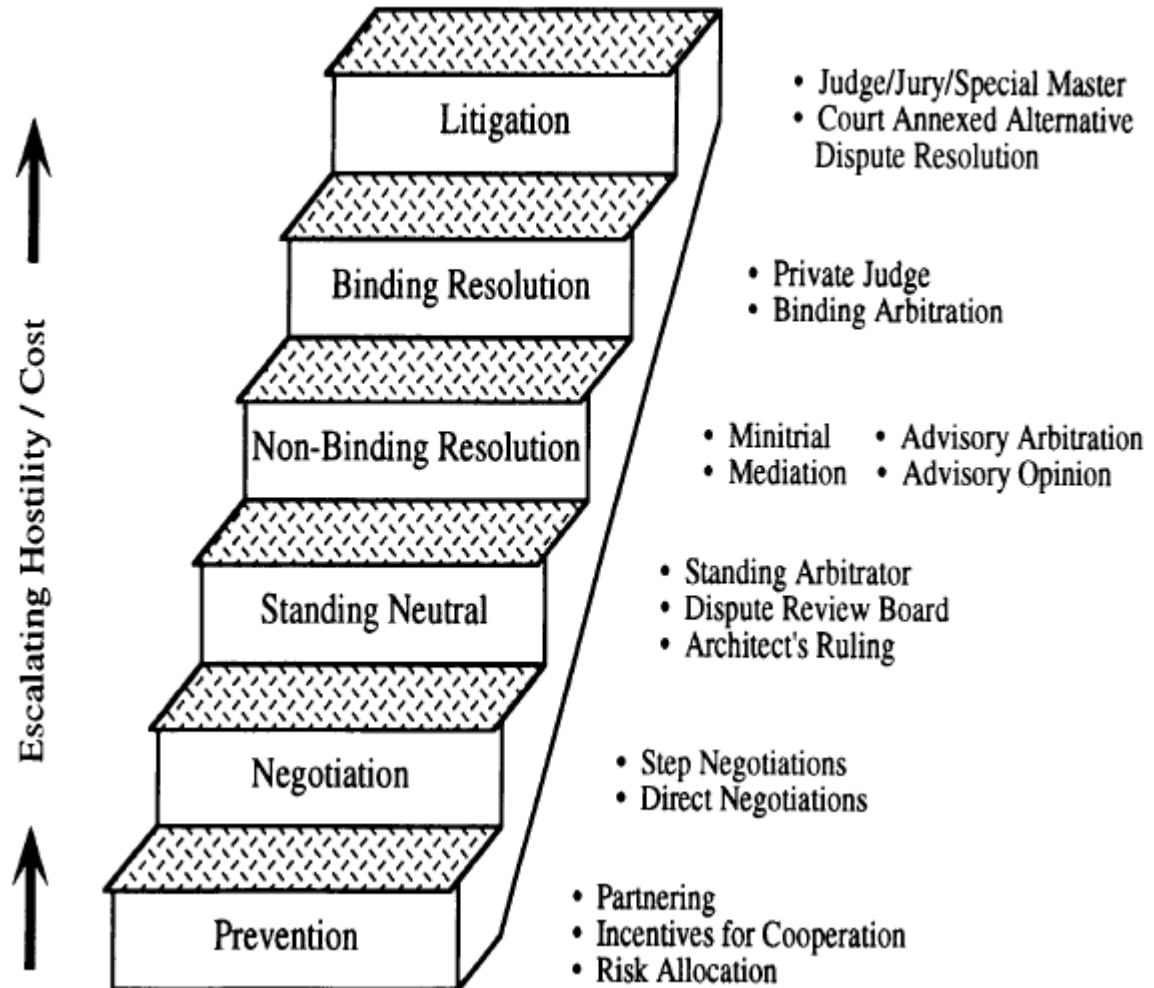
- ❑ **This committee** represents all segments of the construction industry: **public and private** owners, architects, engineers, contractors, subcontractors, insurers, lenders, and others.
- ❑ All share a common goal, which is to actively seek **ways of avoiding unnecessary disputes** and litigation in construction.
- ❑ The **NCDRC** has emerged as a **provider of leadership to the industry** in moving toward the best utilization of ADR methods for the benefit of the construction process.



Alternative dispute resolution

- ❑ Different techniques exhibit rising levels of hostility and cost source

- ❑ *Some of them will be reviewed in this course!*





Alternative dispute resolution

- ❑ Another model by HKA Consulting Inc.

DISPUTE RESOLUTION CONTINUUM

• Litigation

• Arbitration
• Special Master
• Binding DRB's

• Expert Determination
• Admin. Board
• Mini Trial

• Non-Binding DRB's
• Mediation

• Negotiation

• Contemporaneous

↑
HOSTILITY AND COST

MORE
Parties Decide for Themselves

CONTROL OF OUTCOME

LESS
Third Party Imposes Decision



Alternative dispute resolution – Major methods

- ☐ Partnering

- ❖ Many call this method as dispute **prevention alternatives**

- ☐ Engineer's decision clause

- ☐ Negotiation

- ☐ Mediation

- ☐ Arbitration

- ☐ Dispute review board

- ❖ Many call this method as dispute **prevention alternatives**

- ☐ Litigation

Alternative dispute resolution – Other methods

- ☐ Early neutral evaluation
- ☐ Non-binding summary jury trial
- ☐ Mini-trials
- ☐ Private judging
- ☐ Boards of contract appeals
- ☐ Etc.



Alternative dispute resolution – Partnering

- ❑ The Construction Industry Institute (CII) Partnering Task Force defined partnering in its 1989 report as follows:

“Partnering is a long term commitment between two or more organizations for the purpose of achieving specific business objectives by maximizing the effectiveness of each participant's resources. The relationship is based upon trust, dedication to common goals and an understanding of each other's individual expectations and values. Expected benefits include improved efficiency and cost-effectiveness, increased opportunity for innovation, and the continuous improvement of quality products and services.”

In its publication, *Partnering: A Concept for Success*



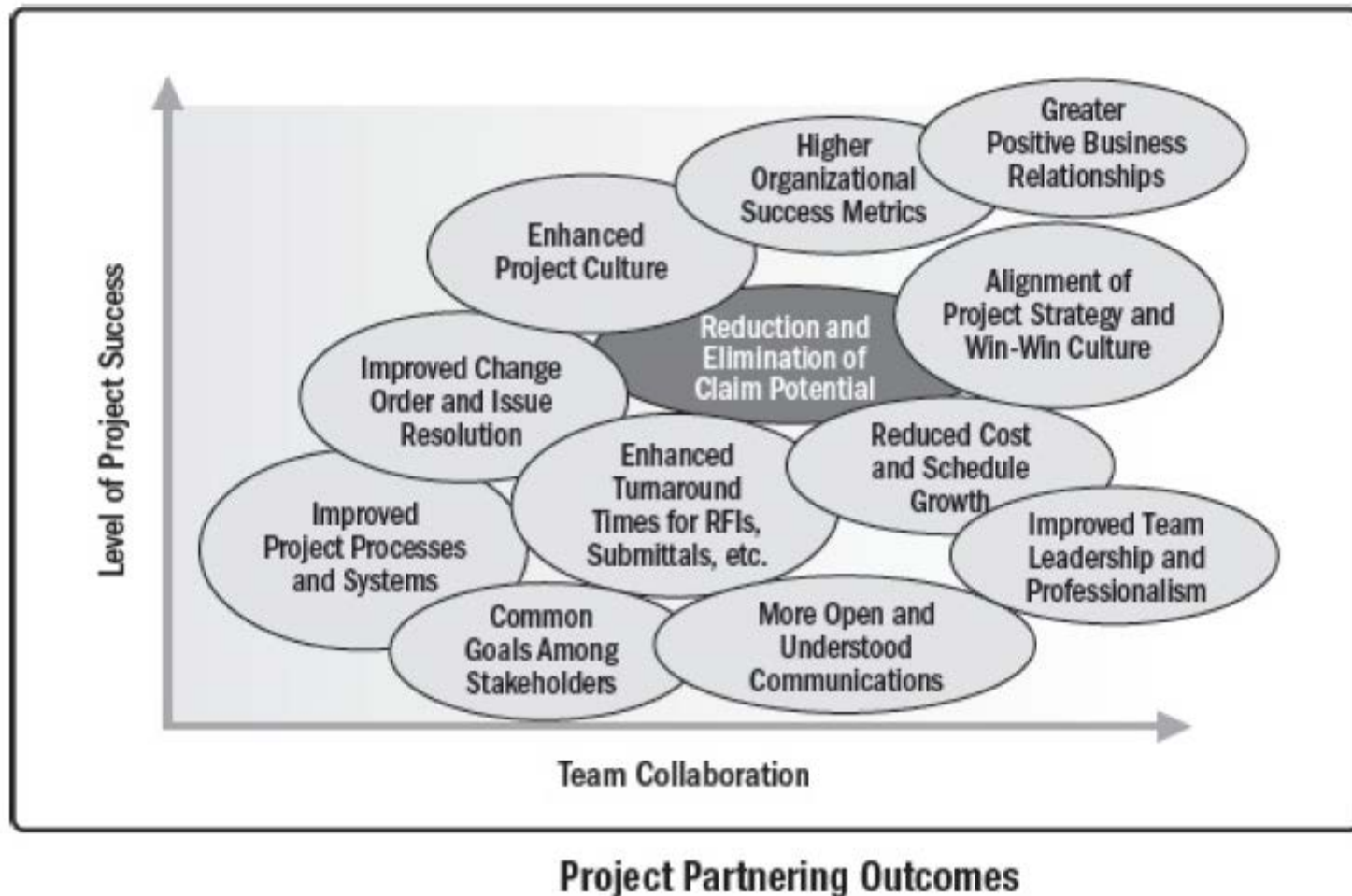
Alternative dispute resolution – Partnering

❑ AGC lists seven key elements of partnering.

1. **Commitment**
2. **Equity**
3. **Trust**
4. **Development of Mutual Goals/Objectives**
5. **Implementation**
6. **Continuous evaluation**
7. **Timely responsiveness**

Alternative dispute resolution – Partnering

❑ In PMBOK Construction Extension.



Alternative dispute resolution – Partnering

The **CM** should foster a **partnering culture** on the project even in the **absence** of a **formal partnering requirement** in the interest of claims avoidance.

The **CM's actions**, communications, and conduct should be positive and cooperative.

Alternative dispute resolution – Engineer's decision clause: An overview

- ☐ The **contractor** submits **all claims** to the project **Architect or engineer (A/E)**
- ☐ The A/E's **decision** is **final** and **binding** on all parties
- ☐ **Used** to be common in **public works** contracts, **not common now!**

Alternative dispute resolution – Engineer’s decision clause: Pros

- ❑ As a party **intimately familiar** with the overall project, the A/E is in a **good position** to **judge the validity** of the contractor’s claims
- ❑ It is **appropriate** that the A/E, as the owner’s representative at the site, be given **prompt notice** of any **contractor complaints**
- ❑ In practice, **many claims**, particularly the **smaller ones**, are **resolved by the A/E** to the **mutual satisfaction** of the owner and the contractor

Alternative dispute resolution – Engineer's decision clause: Cons

- ❑ The A/E has **conflict of interest**
 - ❖ He/She is **owner's representative**
 - ❖ It creates perception of **unfairness** and **lack of objectivity**
- ❑ **Contractors** and their **trade associations** **object** to this practice
- ❑ It creates an **unfavorable bidding climate**: **fewer bidders** and **higher bids**
- ❑ It **attracts hostility** from the **courts**
 - ❖ Courts does not like this method

Alternative dispute resolution – Negotiation: An overview

- ❑ New version of the **engineer's decision clause**
- ❑ The **contractor** is asked to **submit** claims to the **CM (or A/E)**
- ❑ The **CM (or A/E)**'s **role** resembles the role of a **mediator**
- ❑ The **CM (or A/E)**'s **decision** is **not final nor binding**
 - ❖ Some items would be defined as **artistic effects** and the decision of **CM (or A/E)** is **binding on those items**

The CM is likely to be a primary participant in such negotiations as the person most knowledgeable on behalf of the owner.

The CM should support these negotiations in an objective, honest, and ethical manner.

Alternative dispute resolution – Negotiation: An overview

❑ If contractors are not happy with the decision:

1. Private owners or the contractor are **free to submit** the dispute to **arbitration** (sometimes mediation before arbitration)
2. Public contracts usually call for the **initial submission** of a dispute to the **A/E** but **allow** for an **appeal** to an **administrative board** which is **not bound** by the **A/E's** findings

Alternative dispute resolution – Negotiation: An overview

❑ Negotiation is:

- ❖ Voluntary
- ❖ Bilateral/Multilateral
 - ✓ Can involve two, three or dozens of parties
- ❖ Non-adjudicative
 - ✓ Involves only the parties involved in the project (not a third-party neutral)
- ❖ Informal
- ❖ Confidential
 - ✓ There can be criterial governing disclosure as specified in the contract
 - Like the rule of **Access to Information Act and the Privacy Act**
- ❖ Flexible

Alternative dispute resolution – Negotiation: Typical procedure

❑ Each negotiation has its own **unique** characteristics.

❖ There is thus **no uniform** manner

*For example, the **timing** of an **offer** and the question of **which party** is to make the **first offer***

- 1. fall within the discretion of the negotiator and are*
- 2. determined by the **overall dynamic of a particular negotiation.***

Alternative dispute resolution – Negotiation: Typical procedure

1. Negotiation Session
2. Don't forget statutory/Policy considerations

During any negotiation, some considerations should be kept in mind,

let's look at them!

Alternative dispute resolution – Negotiation: Typical procedure

Do not forget to consider the following points

1. Initial assessment:

- ❖ Authority/Mandate to negotiate and reach an **agreement** or settlement
- ❖ Willingness to negotiate
- ❖ Credibility of other party(ies)
- ❖ Ability to **negotiate** (equality?)
- ❖ Alternatives to **negotiation**
- ❖ Know the other **side's objectives**

Alternative dispute resolution – Negotiation: Typical procedure

Do not forget to consider the following points

2. Contact with the other party to arrange/confirm:

- ❖ Agenda
- ❖ Location (neutral)
- ❖ Timetable
- ❖ Participating parties
- ❖ Public/Confidential nature (See statutory requirements, below)
- ❖ Official Languages
- ❖ Support services (word processing, etc.)

Alternative dispute resolution – Negotiation: Typical procedure

Do not forget to consider the following points

3. Preparation of a strategy and interest assessment:

- ❖ Study the **issues**
- ❖ Harmonize/reconcile **competing interests** within the team
- ❖ Assess the **BATNA** (Best Alternative to No Agreement) for all parties
- ❖ Assign roles for **team members** (spokesperson(s), etc.)
- ❖ Create **options** for mutual gain (“win-win”)
- ❖ Consult relevant rules and policies mentioned in the contracts

Alternative dispute resolution – Negotiation: Typical procedure

Do not forget to consider the following points

4. Points to consider for a negotiation:

- ❖ Concentrate on **interests**, not positions
- ❖ Separate the **people** from the **problem**
- ❖ Listen **carefully** and **actively**
- ❖ Respect the **other party** (e.g., any cultural, linguistic or other differences)
- ❖ Create and propose **options** for mutual benefit (“win-win”)
- ❖ Use **objective standards**
- ❖ Assess **progress** in light of **one's BATNA**
- ❖ Anticipate and avoid **responding** to provocative tactics
 - ❖ Proactive tactics are used in an **attempt to influence someone** to carry out an **immediate request**.
- ❖ Communicate frequently with the **client**
- ❖ Remain within the **limits** of the negotiating mandate

Alternative dispute resolution – Negotiation: Typical procedure

Do not forget to consider the following points

5. Consider using experienced counsel and experts for a proper and OBJECTIVE assessment of:

- ❖ Legal issues
- ❖ Technical facts
- ❖ Impacts
- ❖ Damages
- ❖ The most advantageous way to present your position

Alternative dispute resolution – Negotiation: Pros

❑ **No need** for resource to a **third-party neutral**, therefore:

1. **Quickest** and can begin right away
2. **Least expensive**

❑ **Informal** with no set rules

❑ The parties **control** the process

❑ Does **not preclude (avoid)** other methods

❖ Not binding

Alternative dispute resolution – Negotiation: Cons

- ❑ May **not lead** to any **resolution**
 - ❖ **Cannot guarantee** to reach an agreement
 - ❖ Anyone who chooses to **terminate** negotiations may do so **at any time** in the process and this may result to **loose money and time.**
- ❑ **Both party** should have **authority**
- ❑ The **absence of a neutral third party** may encourage one party to attempt to **take advantage** of the other. Therefore:
 - ❖ May need to **compromise**
 - ✓ May **lose** your true **rights**

Alternative dispute resolution – Mediation: An overview

❑ Not new

- ❖ Used in India, Islamic world, Greece, Rome & China, medieval Europe

❑ As **litigation** & **arbitration** became too lengthy, too expensive industry turned to **mediation**

- ❖ Popularity grew from **1980's on**



Mediation now most popular form of ADR

Private, confidential, informal submittal of dispute to non-binding dispute resolution process

Individual party or panel

Alternative dispute resolution – Mediation: An overview

- ❑ **Negotiation** between parties assisted by a **neutral third party**
- ❑ **Third party** is selected to **facilitate** settlement as a “mediator”
 - ❖ **Often** is a **lawyer**, but **not have to be**
- ❑ The parties **agree** to the **process**
- ❑ **Mediator** does **not make a decision** and has **no power** to do so
 - ❖ **Conflict check**
 - ❖ Remember the **main role is to facilitate** the discussion between parties
 - ❖ All parties must **come to an agreement** to have successful mediation
- ❑ **Private and confidential**
 - ❖ Can tell the mediator to **keep** some points **secret** and **don't reveal** that against you
- ❑ **Not legally binding**, **unless** and until a **settlement agreement** or settlement term sheet is **signed** at the **end of the mediation**
 - ❖ A **signed agreement** has the **force of a contract**, when **signed**, becomes **binding**



Alternative dispute resolution – Mediation: An overview

□ Typical road to use mediation

- ❖ Claim filed
- ❖ Analysis performed
- ❖ **Negotiations** attempted
- ❖ **Negotiations** fail
- ❖ Dispute starts
- ❖ Parties agree to **mediate**



Alternative dispute resolution – Mediation: An overview

Although it is desirable to include a clause in the contract providing for mediation, it is not necessary for the parties to agree to attempt mediation in the event of a post-contract dispute.

- ❑ The **CM** may wish to **recommend** and **incorporate** a **contract clause** in the trade contract that is administered under the **CM's jurisdiction**. Such a clause would read as follows:

*If during this contract, the parties are **unable to resolve** the dispute or controversy among themselves (**negotiation**), they shall at **first endeavor** to settle such a dispute in a **non-binding**, **voluntary manner** by referring same to (name of individual or dispute-resolution firm) **prior to filing for arbitration** or having recourse to a **judicial forum**.*

Alternative dispute resolution – Mediation: An overview

❑ Mediation is:

- ❖ Voluntary
- ❖ Non-coercive
 - ✓ Mediator does **not decide** for parties, but helps them make their own decision
- ❖ Informal
- ❖ Confidential
 - ✓ There can be criteria governing disclosure as specified in the contract
 - Like the rule of **Access to Information Act and the Privacy Act**
- ❖ Flexible

Alternative dispute resolution – Mediation: Typical procedure

How to hold a mediation session?

1. Starting off with all parties in the same room (called joint session)
2. Beginning the mediation session
 - ❖ **Open communication** and negotiation between the parties
 - ❖ Establish an **open** and **positive tone**
 - ❖ Establish **ground rules** and behavioral guidelines
 - ❖ Assist the parties in constructively **discharge emotions**
3. Defining issues and setting an agenda
 - ❖ **Identify** broad topic **areas of concern** to the parties
 - ❖ **Obtain agreement** on the **issues** to be **discussed**
 - ❖ Determine the **sequence** of **handling** the **issues**

Alternative dispute resolution – Mediation: Typical procedure

How to hold a mediation session?

4. Uncovering hidden interests of the disputing parties

- ❖ Break out and take each party and put them **into separate rooms**
 - a) Sometimes keep them **separate for the rest** of the entire mediation session
 - b) Sometimes ask them to **go back to the joint session**
- ❖ Identify the **interests** and **needs** of the parties
- ❖ Educate the parties about **each other's** interests and needs
- ❖ Show diplomacy and **exchange documents**, facts by going back and forth between the rooms and **take each offer** from each party **until you reach an agreement**

Alternative dispute resolution – Mediation: Typical procedure

How to hold a mediation session?

4. Uncovering hidden interests of the disputing parties

- ❖ Contractor presents position
 - ✓ No examination by other side
 - ✓ Mediator may/may not summarize
- ❖ Owner presents position
 - ✓ Mediator may/may not summarize
- ❖ May have question & answer session
 - ✓ Lead by mediator
- ❖ May have discussion session

Alternative dispute resolution – Mediation: Typical procedure

How to hold a mediation session?

5. Generating options for settlement

- ❖ Develop an **awareness** among the parties of the **need** for **options**
- ❖ Generate **options** through **brainstorming** and **dialogue**
- ❖ Assist in **lowering** parties' commitment to positions or **sole alternatives**

*Typically you are a facilitator and should not tell either side that your case is **horrible**, instead you only point out **some weaknesses** and try to reach an agreement*

However, some mediator may put themselves in the position of evaluator and tells either party the major risk in their cases.

Alternative dispute resolution – Mediation: Typical procedure

How to hold a mediation session?

6. Assessing options for settlement

- ❖ Review the **interests** of the parties
- ❖ Assess how **interests** can be **met** through **various options**
- ❖ Assess the **costs** and **benefits** of **each option**

7. Final bargaining

- ❖ Bring the **parties' interests** together
- ❖ Generate **willingness** to **compromise**
- ❖ Create an agreement or **memorandum** of understanding

8. Achieving formal settlement

- ❖ Identify procedural **steps** to operationalize the **agreement**
- ❖ Formalize the **settlement** and create an **enforcement mechanism**

Alternative dispute resolution – Mediation: Typical procedure

What is the role of a mediator?

- ❑ **Regardless of what techniques** are used by the mediator to assist the parties in reaching a solution, the mediator is **not** empowered to **render a decision**.

Mediator = Negotiation facilitator

- ❑ **Neutral**

- ❖ Helps analyze positions
- ❖ Identifies strong, weak points
- ❖ Role is advisory – to both parties
- ❖ Assists in structuring acceptable settlement

Alternative dispute resolution – Mediation: Typical procedure

Do not forget to consider the following points

- ❑ The **choice** to go to the mediation **rests with the parties**, all of whom **must agree** to attend.
- ❑ The parties **must mutually select** a mediator, either through referrals or directly.
- ❑ The **mediation agreement** should be **drafted**, laying out a number of critical items, including, but **not limited** to:
 - ❖ The **logistics** of the mediation
 - ❖ The **cost-sharing arrangement** (normally 50/50)
 - ❖ The **mandate** of the **mediator**
 - ❖ Whether the mediation will be **confidential or of public record**
 - ❖ **How disclosure** would operate – in advance or as required by mediator
 - ❖ **Amount of money** to pay to the mediator

Alternative dispute resolution – Mediation: Typical procedure

Do not forget to consider the following points

- ❑ Select a mediator who is **not only a professional** in the mediation field, but is **knowledgeable** in the **construction industry**.
- ❑ Select a **mediator** based on references
- ❑ Prepare a **persuasive presentation** of your position
- ❑ Base your **position** on the **contract/law** and the established facts
- ❑ Highlight the **weaknesses** of the both sides' **positions**
- ❑ Know your **minimum expectations**
- ❑ Consider using **experienced counsel** to present the legal attributes of your case
- ❑ Consider using **independent experts** to:
 - ❖ Provide objectivity & credibility (independent view)
 - ❖ Apply accepted analytical techniques
 - ❖ Present facts in a persuasive manner
 - ❖ Quickly evaluate the strengths and weaknesses of the other side's case.

Alternative dispute resolution – Mediation: Typical procedure

Do not forget to consider the following points

- ☐ Has the **date** and **time** of the **mediation** been determined?
- ☐ Has a **neutral location** been chosen?
- ☐ Have **limits** been set on how **long the mediated sessions** will take?
- ☐ Have any **special requirements** been met (i.e., translation, wheelchair accessibility)?
- ☐ Has a **procedure** to be followed been **established** and **agreed** upon by all parties?
 - ❖ **If not**, does the **neutral** have the **authority to set** the procedure?
- ☐ Is there a **provision** for **disclosure**?
- ☐ Will the **disclosure** be in **advance** or as **required by mediator**?
- ☐ Will **any eventual agreement** (Memorandum of Agreement/Intent) be subject to **independent legal advice**?
- ☐ Is it established **who will draft the agreement**?
- ☐ Is there an articulated **alternative** if the **mediation is not successful**?

Alternative dispute resolution – Mediation: Pros

- ❑ **More control** over the process and outcome
 - ❖ When you are in **court** you are **dictated** by the **schedule and process**
- ❑ **Advantageous** in **complex cases** which involve numerous issues.
- ❑ **Shorter** time frame
- ❑ **No discovery** required, but you can have some (**mediation statements**)
- ❑ Generally, the **least expensive** option after negotiation
- ❑ Give each party **sense of other's case** and opportunity to **test other party's resolve**
- ❑ **Informal process** allows parties to describe the dispute from his or her perspective **without the restrictions**
 - ❖ Parties **retain control** over the process

Alternative dispute resolution – Mediation: Cons

- ❑ Mediator qualifications are up to the parties
- ❑ Mediator's objective is a **deal, not justice**
- ❑ Possible lack of participation by all parties due to voluntary nature
- ❑ Successful mediation requires compromise
- ❑ Enforceability of a mediation agreement
- ❑ No guaranteed outcome
 - ❖ You may pay a lot of money with no success
 - ❖ Since parties to a mediation meet face to face, there is **concern**, particularly in cases **involving harassment**, that there might be a power imbalance between the parties.
 - ❖ *For example, if a female employee felt she had been harassed by a male superior, she might not be able to confront him as a person with an equal voice at the mediation sessions.*
 - ❖ **Use separation in this case**

Alternative dispute resolution – Mediation: Cons

- ❑ Mediators trained to **“drive a deal”**
 - ❖ Not always concerned with **facts**
 - ❖ Not always concerned with **contract**
 - ❖ Not always concerned with **law**
- ❖ Mediation difficult if parties on **“opposite sides of \$0”**

Alternative dispute resolution – Mediation: How to succeed at mediation

The points mentioned in the following section used and documented by Navigant

Consulting Inc. in 2015

1. General points
2. Preparation for mediation
3. At mediation
4. After mediation

Alternative dispute resolution – Mediation: How to succeed at mediation

1. General points

- ❖ Be prepared
 - ✓ **Know** your **facts**
 - ✓ Be able to **document facts**
- ❖ Stay relaxed, cool, business-like
- ❖ Keep process **informal**
- ❖ Prepare & practice!
- ❖ Do a **“reality check”** of your case
- ❖ **Don't fall in love** with your case

Alternative dispute resolution – Mediation: How to succeed at mediation

1. General points

- ❖ Maintain **“objectivity”** and focus on **facts**
- ❖ Understand & define **“win”** for YOU!
 - ✓ **What** do you need to **attain** to succeed?
 - ✓ **What** can you **give up** to succeed?

**Know where you want to end up
before going into mediation!**

Alternative dispute resolution – Mediation: How to succeed at mediation

1. General points

- ❖ Remember.....

*Mediation is simply continuation
of the preceding negotiations with
the assistance of a neutral
facilitator!*

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Mediator selection

- ✓ Key to successful mediation!
- ✓ Choose mediator very carefully
- ✓ Decide on type of mediator
 1. Evaluative mediator
 2. Facilitative mediator
 3. Subject matter experience

How to select the mediator?

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Mediator selection

How to select the mediator?

- ✓ Identify potential mediators
- ✓ Get list from American Arbitration Association (AAA), attorney, others
- ✓ Research background, track record, history, reputation
- ✓ Get recommendations
- ✓ Talk to owners, contractors, attorneys
- ✓ Don't be fooled by "record of success"
- ✓ Consider "personality" & ability to work with disputing parties

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Process understanding

- ✓ Work with attorney
- ✓ Learn mediation process (remember we talked about?)
- ✓ Understand mediators don't make decisions
- ✓ May offer mediator proposals
- ✓ Understand roles
 - o Yours
 - o Project staff
 - o Attorney
 - o Experts mediator

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Process participation

- ✓ Actively **participate** in formation of “**ground rules**”
- ✓ Actively **participate** in **document exchange**
- ✓ Assist in **preparation** of **mediation brief**
 - **Attorney** knows how to write briefs—**entitlement**
 - **You know facts** of case – **causation & damages**
- ✓ Disagree, agree on **your role** at mediation
 - This is not a “wake me when it’s over” process

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Process participation

- ✓ Prepare to participate in
 - o Presentation
 - o Discussion
- ✓ Get ready to make decision
 - o Key role, only you can decide!

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Be prepared

- ✓ Learn your case
- ✓ Value your case
 - o Calculate **costs & losses factually**
- ✓ Prepare **arguments**
- ✓ Organize **documents**
- ✓ Build up own **confidence**
 - o **Documentation** would be very helpful
- ✓ Transmit **confidence to others** on your team

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Critical documents

- ✓ During preparation, identify **critical documents**
- ✓ Key to success is documented **facts and damages**
- ✓ **Organize** documents **together with presentation**
- ✓ **Bring** documents to mediation
 - **Have copies** to turn over to other side & mediator

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Legal support

- ✓ Attorney fees?
- ✓ Statute limitations?
- ✓ Enforceability of contract language?
- ✓ Confidentiality of settlement?

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Entitlement support

- ✓ If questioned about **entitlement**, be ready to **address**
 - Have contract clause, specs, drawings, etc. ready for mediator
- ✓ **Don't rely solely** on presentation **skills and logic**
 - Mediators may ignore logic
 - Must **deal** with **documented entitlement** issues

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn own strong points

1. During preparation, find **your strong points**

o **Strong points** = **Facts** which lead to settlement in **your favor**

➤ Points which are

- i. Clearly in your favor
- ii. Solidly documented
- iii. Cannot be argued or “interpreted”
- iv. Cannot be dismissed or ignored

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn own strong points

2. Document strong points
3. Figure out **how to emphasize** presentation of strong points during presentation
4. Determine **how strong points** can be used to **leverage favorable** settlement

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn own weak points

1. During preparation, find **your weak points**

o **Weak points** = **Facts** which lead to settlement in **other party's favor**

➤ Don't have to like them, but must be **able to deal** with them

i. In other party's favor

ii. Not well documented

iii. Can be argued or “interpreted”

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn own strong points

2. Be prepared to **accept weak points**
3. Learn **how to acknowledge** weak points
 - ✓ If possible, **present** weak points in **your presentation**
 - ✓ The idea is to **minimize damage to own** case

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn other side's strong and weak points

- ✓ Examine **other side's claim** & **presentation** objectively
- ✓ Study **claim** from **their point** of view
- ✓ Examine **other side's case** as if you **want to approve it**
- ✓ Find **their strong points**
 1. Learn how to handle
 2. Decrease your damage
- ✓ Find **their weak points**
 1. Learn how to use to own advantage
 2. Decrease your damages

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn other side's strong and weak points

- ✓ Provide **mediator** with weapons to “shoot holes (discredit)” in other side's case

✓ **To convince mediator your case is stronger, you should prevail!**

Use mediator to convince other side!

What points should be focused?

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn other side's strong and weak points

- ✓ Find, document, point out in mediation
 - ✓ Mistakes
 - ✓ Inconsistent statements
 - ✓ Undocumented statements
 - ✓ Overinflated costs
 - ✓ Unrealistic damages
 - ✓ Double counted costs
 - ✓ New legal theories
 - ✓ Claims that violate contract provisions

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Know own real damages

- ✓ **Mediators** focus heavily on **damages** and tend to
 - **Set aside “soft costs”**
 - General and administrative costs
 - Dismiss and **cut down overinflated costs**
- ✓ Calculate **“real”** damages
- ✓ Be prepared to
 - Show **detailed calculations**
 - Document **damages**
 - Tie real damages to **contract language**

(if silence, refer to standards!)

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Estimate failure cost

- ✓ If mediation fails
 - Arbitration or litigation likely to result
- ✓ Calculate **“BATNA** (best alternative to no agreement)”
 - Cost of doing **legal battle**?
 1. Have **attorney** provide **realistic estimate** of **legal cost**
 2. Prepare **estimate** of **yours** and **your staff’s costs**
 3. Analyze **“risk”** of **legal battle**
 4. Assess **other side’s legal costs**

Compare the cost of “failure cost” and the cost of “agreement”

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Rehearse (practice)

- ✓ Run **mock** mediation
- ✓ Use **real mediator** (you can hire for half a day)
 - **Your staff knows your stuff** and not recommended
- ✓ Present case
- ✓ Present other's case
- ✓ Get prepared for mediation day

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Authority to settle

- ✓ Authority to craft **own solution**
- ✓ Decisions must be made **during mediation**
- ✓ Each party must have **someone** present with **authority to settle**
- ✓ For mediation to succeed all parties have **full settlement authority** at the table **during mediation** (not out of the table after mediation)

*But this is problematic when mediating with **public owners** since there is usually not an **authorized person** available during mediation*

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ **Authority to settle**

*But this is problematic when mediating with **public owners** since there is usually not an **authorized person** available during mediation*

- ✓ If you are representing a public owner...
 - **Arrange** to have decision makers **at mediation**, if possible
 - If cannot do so, obtain authority to settle **within “range”**
 - If cannot settle within “range” have **personal/cellphone numbers** of **decision makers** and ask them during the mediation
 - If cannot, arrange to **present** to decision makers **immediately following mediation**

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Authority to settle

*But this is problematic when mediating with **public owners** since there is usually not an **authorized person** available during mediation*

- ✓ If you are representing a claimant against public owner
 - Check to see if owner representative has “**range authority**”
 - Is settlement subject to **council approval**
 - If reach **settlement**
 - Get agreement that **owner representative** prepared to “sell” settlement to **decision making authority**

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ During mediation

- ✓ Be a participant & a decision maker
- ✓ Remember, it is
 - Your project
 - Your case
 - Your money
 - Your solution!

And you have to live with outcome

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Project staff participate?

- ✓ **Advantages** – more likely to
 - **Present** case **better**
 - **Evaluate** **facts** & arguments **objectively**
 - **View** settlement as fair, **reasonable** if participated in mediation
 - Gain **understanding** of **risk** of “**legal battle**”

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Trust the mediator

- ✓ If mediator carefully selected, has
 - Expertise
 - Analytical skills
 - Straightforward approach
- ✓ For mediation to succeed, **do not**
 - Constantly question approach
 - Assume bias against you
 - Assume you will be “forced” into unfavorable settlement
- ✓ Develop trust with mediator
- ✓ Respond openly to mediator questions

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Team approach

- ✓ Having **one person** make **presentation easier** for mediator
 - But, **team approach** may make presentation better & **improve outcome**
- ✓ With team
 - Different perspectives possible
 - Different personalities in play
 - More balanced issue discussion possible

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Summary presentation

- ✓ **Purpose** of mediation is **settlement**, not fact finding
- ✓ **Not forum** for **detailed technical** presentations
- ✓ **Presentations** should be **brief**
- ✓ **Details** should be **summarized**
- ✓ **Supportive materials** ready, if requested
- ✓ Focus on **main points**, not details
- ✓ Follow **KISS rule**
 - Focus on **key issues**

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ No insults

- ✓ **Don't insult** other party, attorney
 - Insults harden positions
 - Not make them more flexible
- ✓ **Impress** other party with **facts**
 - Do **not offend** them with insults
- ✓ **Personal attacks** on other side **not likely to result** in reaching goal of reasonable settlement

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Use documented facts

- ✓ **Facts are facts**, argue them strongly
 - Do so to **influence**, **not inflame** others
- ✓ Do **not digress** to **personality** issues
- ✓ Be **hard** on the **problem**!
- ✓ Be **soft** on the **people**!

Remember, you need their consent to reach settlement!

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Factors in other benefits

- ✓ **Settlement** typically involved **\$\$ payment**
- ✓ But **other benefits** may also result
 - ✓ Allow project **close out**
 - ✓ Allows **retainage release**
 - ✓ May allow **return of LD's**
 - ✓ **Frees up bond** limits
 - ✓ Avoids **litigation costs**

Find items of high value to other side, low value to you – use them!

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Prepare graphics

- ✓ Summarize case in a few **graphics**
- ✓ **Graphics** should show essence of **issues**
- ✓ Use **graphics** to help **focus case**
 - Aid oral presentation
 - Remind mediator of your story
 - Provide synopsis of merit, damages

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Know “walk away” number

- ✓ Mediation generally focuses on **“how much”**
- ✓ Mediators will **ask, expect response**
- ✓ Must go into mediation knowing your **“bottom/top line”**
- ✓ Once know your case, identify your **“walk away number”**
 - At what point, is deal not worth it? Know that point!

For example, the owner says

I don't have \$6,000,000 because I don't have budget for this

Let's go to the court!

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Know “walk away” number

- ✓ Remember...
 - ✓ “**Bottom line**” may **change** in mediation
 - ✓ Don’t “negotiate against yourself”
 - ✓ Don’t honor “**outrageous demands**”
 - ✓ Don’t be “**too generous**” in revealing “**bottom line**” too early in mediation

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Dealing with numbers

- ✓ If **expecting payment** from other side
 - **“Boost” minimum number** willing to accept
 - It will be negotiated **downward**
- ✓ Remember also that mediators **trained to “push” numbers** offered by both parties

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ **Maintain control**

- ✓ Aggressive, **inflammatory tactics** generally **not work** in mediation
- ✓ Do not become
 - o Angry
 - o Upset
 - o Fixed in concrete
- ✓ Remain in control!
 - o Take breaks, as needed

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Listen, then talk!

- ✓ Repeat what you **heard**, what you **think** other **side said**
- ✓ Ask for confirmation, **clarification**
- ✓ Check, see if getting **entire message**
- ✓ Don't be in such a **rush** to **respond** that thinking of response while other still speaking

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ How to talk?

- ✓ Don't **counterattack**
 - Probe
 - Ask why?
- ✓ Ask other side to **“explain again”**
- ✓ Don't be afraid to **“be slow”**
- ✓ **Don't underestimate** other side's ability to solve own problem with creative alternatives
- ✓ Be prepared to **modify own position** as learn more about other's position

Remember, the goal is settlement!

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ No walk outs

- ✓ One **key to success** in mediation
 - Keep talking!
- ✓ Good mediators **keep both** sides at the **table**
 - Wear down position
- ✓ Walk outs
 - **Stop communication**
 - Leave other **side** in **stronger** position
- ✓ **Not likely** to lead to **resolution**
 - More likely to **lead to litigation!**
- ✓ **Successful** mediation requires **control & patience!**
- ✓ Be prepared to spend a **lot of time in mediation**

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Make settlement easy

- ✓ Identify concerns
- ✓ Emotional issues may be settled without costing money
 - Apology
 - No adverse commentary
 - No bad performance rating
 - Promise of future work
- Try to find concessions (امتیازات) that are
 - Meaningful to other side
 - Little cost to your side

Do not let emotions block settlement

Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Be prepared to make business decisions

- ✓ Win/win settlement **desirable**
- ✓ Potential settlements **may not** be based on
 - o Legal considerations
 - o Moral / equity considerations
 - o Contractual requirements

But, may make business sense

- ✓ May have to make **painful decisions**
- ✓ May have to
 - o Swallow **pride**
 - o Admit **wrongdoing**
 - o **Compromise** positions

*Do not have to make deal, but
remain open if worth it!*

Alternative dispute resolution – Mediation: How to succeed at mediation

4. After mediation

❖ Sign settlement at mediation

- ✓ Execute settlement while **still at mediation** session
- ✓ Avoid buyer's **regret** the **next morning**
- ✓ Avoid **post**-mediation **problems**

Alternative dispute resolution – Mediation: How to succeed at mediation

CONCLUSION

❑ Mediation is

- ❖ Continuation of negotiation
- ❖ In structured setting
- ❖ With assistance of neutral

❖ Mediation is not easy

❖ Should not be attempted without thorough preparation

Alternative dispute resolution – Mediation: How to succeed at mediation

CONCLUSION

Properly done, mediation is a very effective dispute resolution mechanism

Improperly done, mediation is frustrating, amounts to “free discovery”

Alternative dispute resolution – Mediation: How to succeed at mediation

Remember

It's almost never too late to request mediation!



Alternative dispute resolution – Arbitration: An overview

- ❑ In late 19th century, arbitration came into **construction industry**
 - ❖ In U.S. introduced by **AIA** in **1888 & 1905 contracts**
- ❑ In 1966, a committee of engineers, architects and contractors developed **construction industry arbitration rules** for use specifically within the construction industry to be administered by the American Arbitration Association (AAA).
- ❑ This committee, the National Construction Dispute Resolution Committee (NCDRC), remains in existence and **continuously reviews** and **updates** these rules.
- ❑ The AAA rules and procedures are the **most commonly utilized** within the industry.
 - ❖ They are **incorporated** by reference in the majority of standard construction documents, including those issued by **CMAA** as well as by **AIA** and **AGC**.

*We will see the procedure of Arbitration and Mediation provided by AAA in the **Consulting course***

موسسه مهندسی و مدیریت ساخت علوی پور (ACEMI)

دفتر آموزش



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