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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دانشگاه Illinois Tech آمریکا

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

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What we will learn?

- **Parties' considerations**
  - Construction manager
  - General contractor and subcontractors
  - Design consultant
- **Lessons learned from case studies**
  - Recommendations
  - Examples
- **Final recommendations**

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Claims Management

(Introduction)

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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.

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ODCC

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*

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Suggested terminology by CII

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

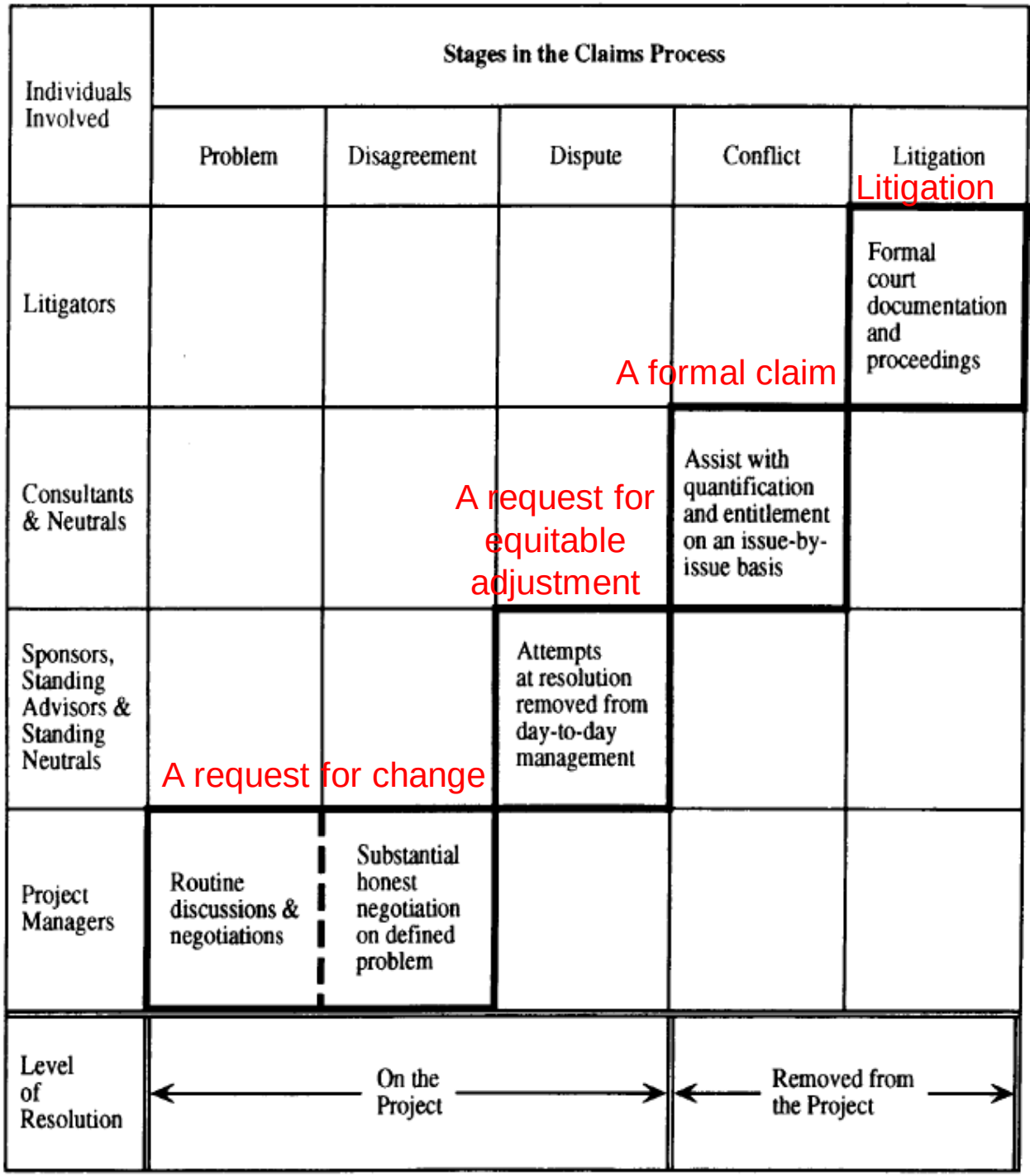
the issue is sorted out.

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**"



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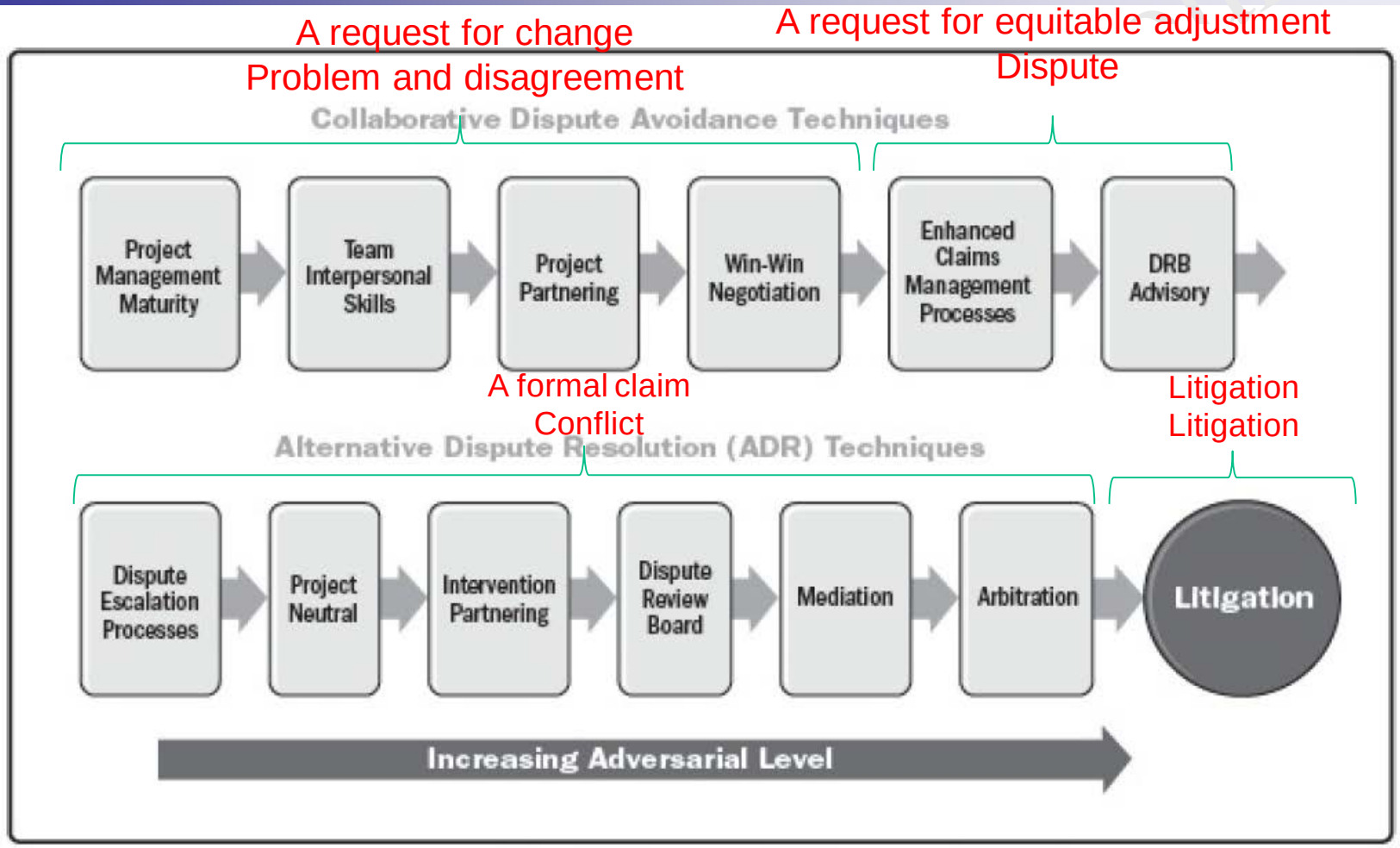
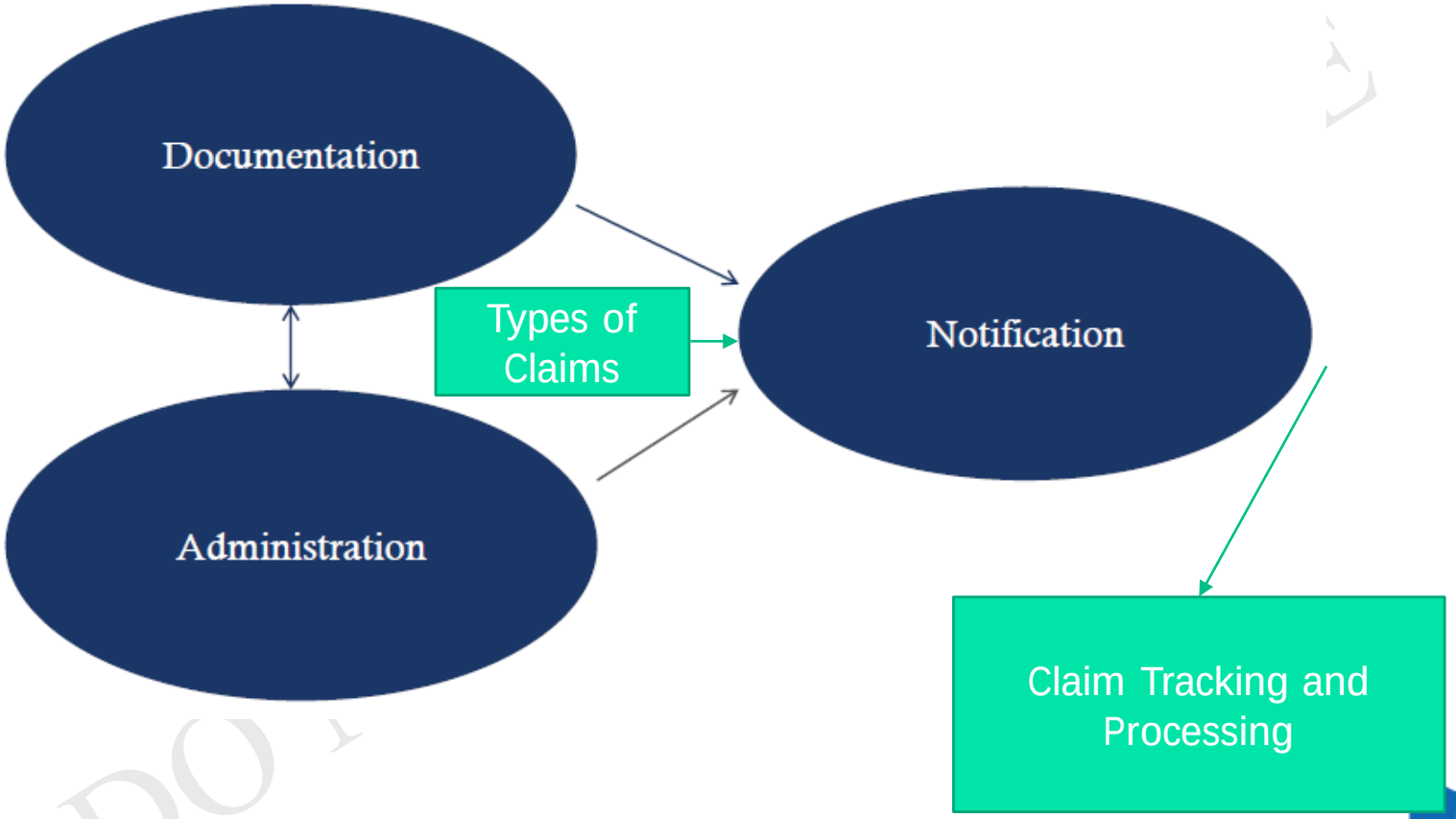
Suggested terminology by PMI



Claims Administration Techniques

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:
    - i. **Owner** proximately **caused** the breach
    - ii. **Resultant damages** were reasonably **foreseeable**

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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.

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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.

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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!

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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

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Claims Management

(Project and Claim Documentation)

Record keeping and reporting by construction contract administration (CCA)

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Introduction

- 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!

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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.

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Non-conforming work notice

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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

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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?***

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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

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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

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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.

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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

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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.**

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Project representative's documentation

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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

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Project representative's documentation

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WEEKLY / MONTHLY PROGRESS REPORT

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

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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.

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Review, analysis, and evaluation

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FEEDBACK

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:

Copies: ☐ _____ ☐ _____ ☐ _____ ☐ _____ ☐ _____ ☐ _____ ☐ File

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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**.

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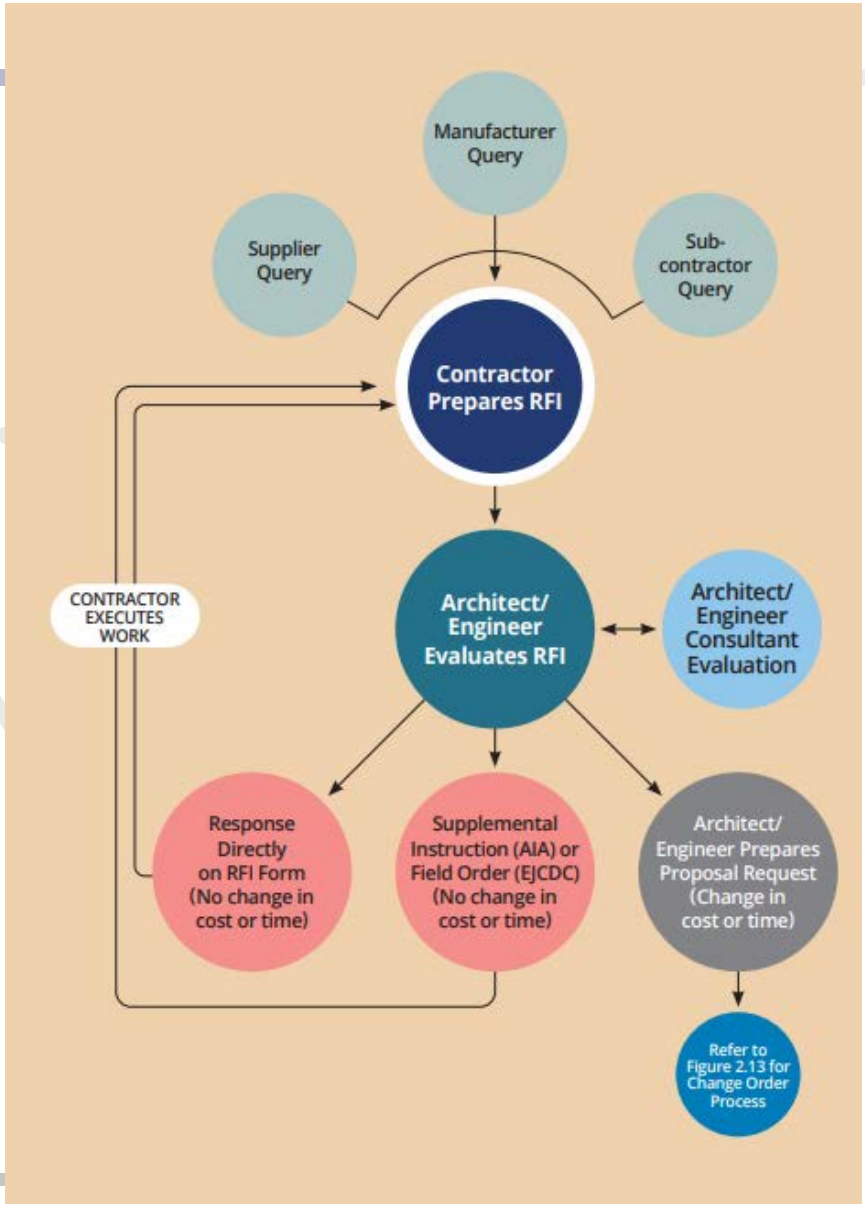
Request for interpretations

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**.



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Request for interpretations

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

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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

Request for interpretations

1.9 Delayed Drawings or Instructions

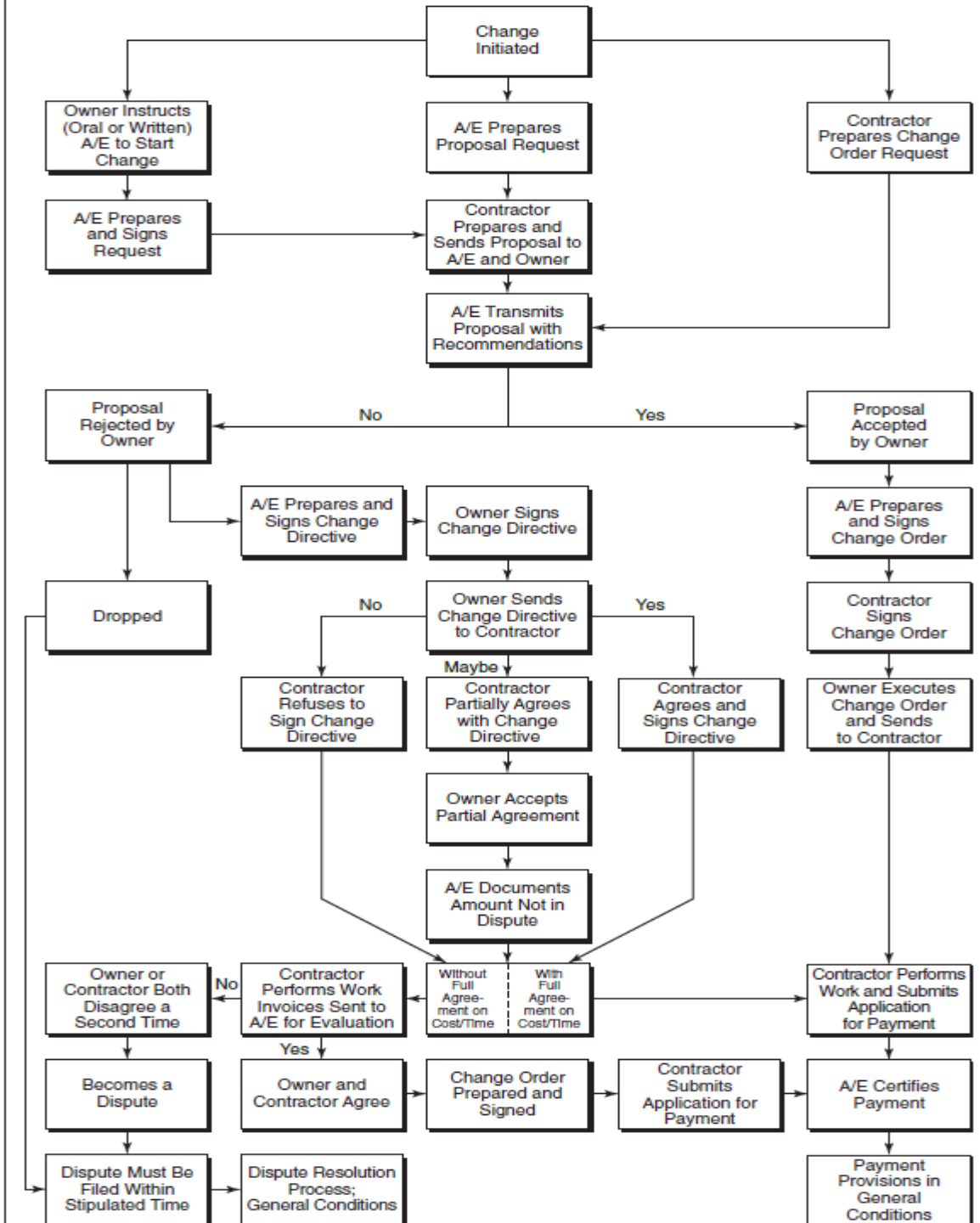
The Contractor shall give a Notice to the Engineer whenever the Works are likely to be delayed or disrupted if any necessary drawing or instruction is not issued to the Contractor within a particular time, which shall be reasonable. The Notice shall include details of the necessary drawing or instruction, 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.

Change orders

Remember this?
Let's see more details!



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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.

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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?

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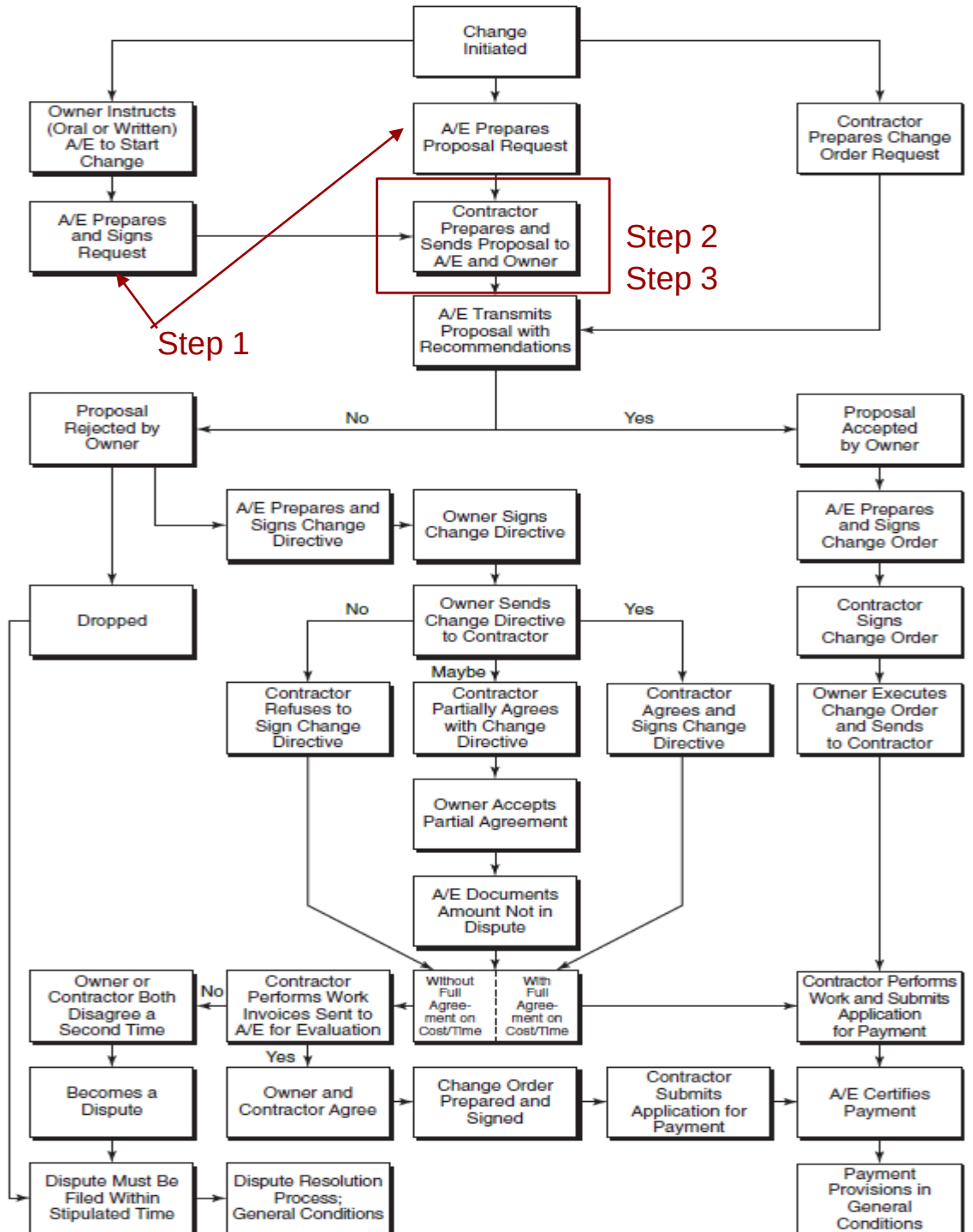
Proposal request

1. The **A/E can initiate** a **proposal request** by issuing a form similar to **AIA Document G709**, Work **Changes Proposal Request**.
   - ❖ 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**.*



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

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Sample

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

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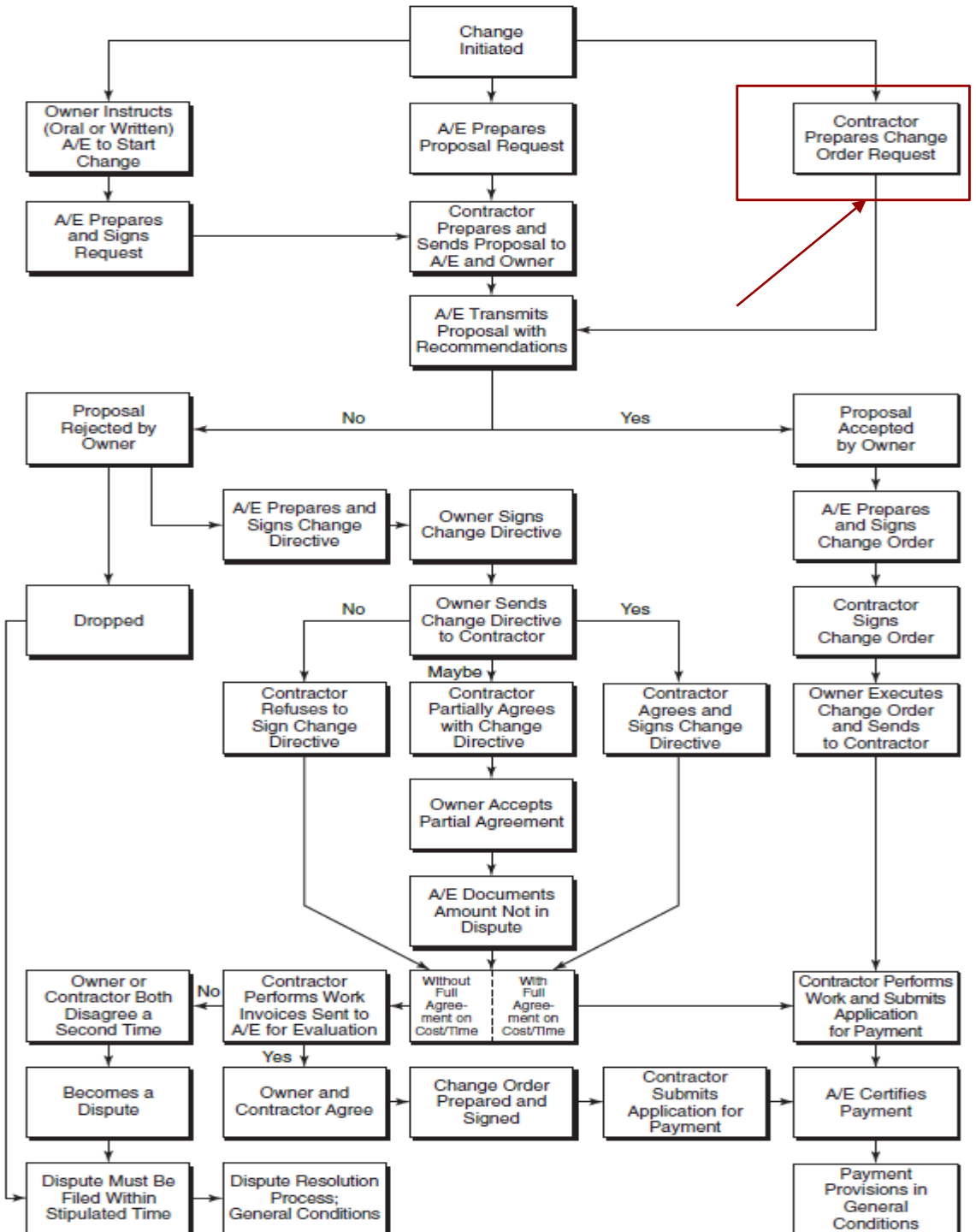
Change order request

*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.



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Change order request

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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:

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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:	$ -

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Change order request

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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

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

DEDUCTIONS

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

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Page 1

Form Version: July 1994

Minor changes

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!

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the Built Environment

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:

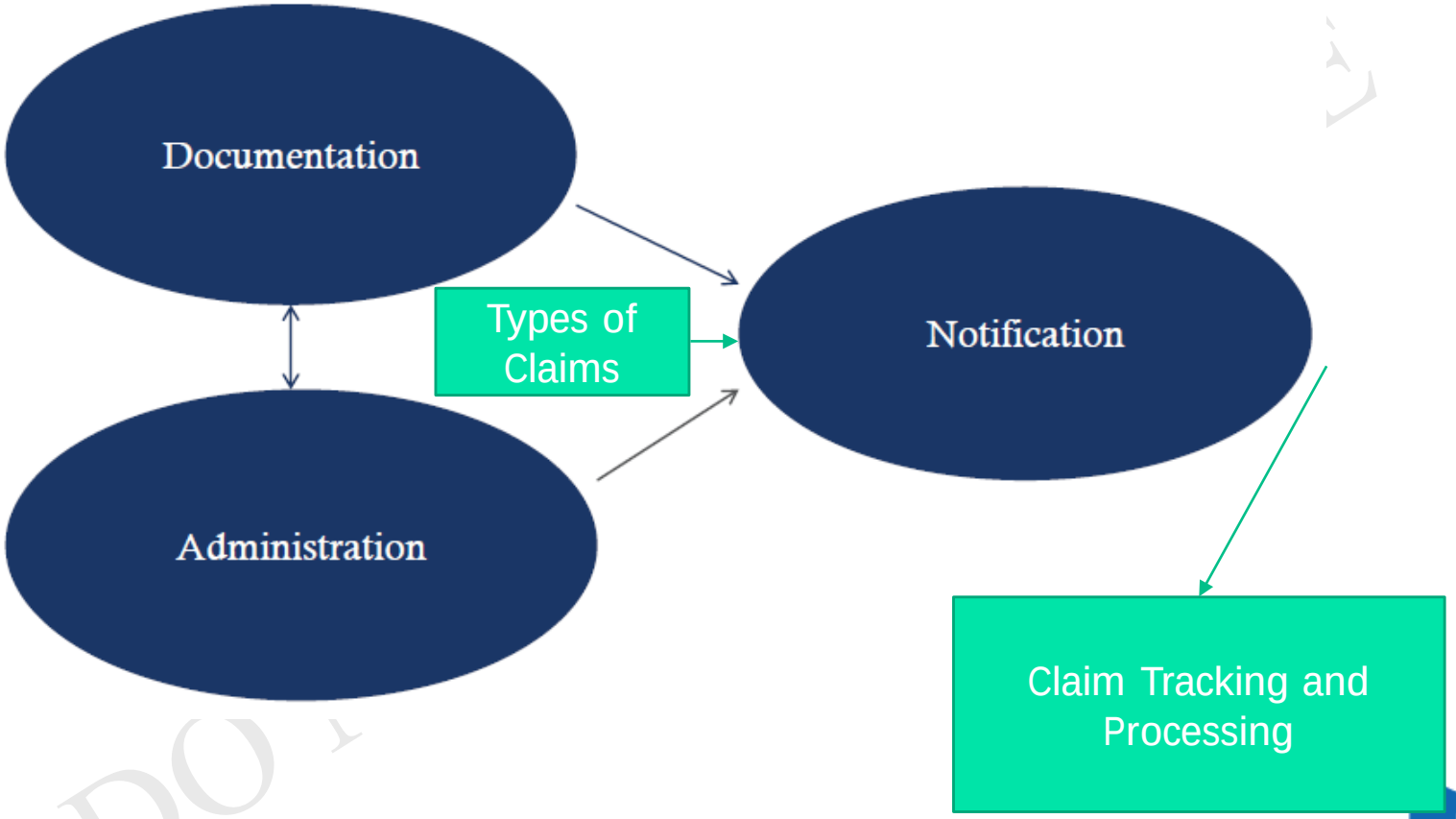
Copies: ☐ Owner ☐ Consultants ☐ _____ ☐ _____ ☐ _____ ☐ _____ ☐ File

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

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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

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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

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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.

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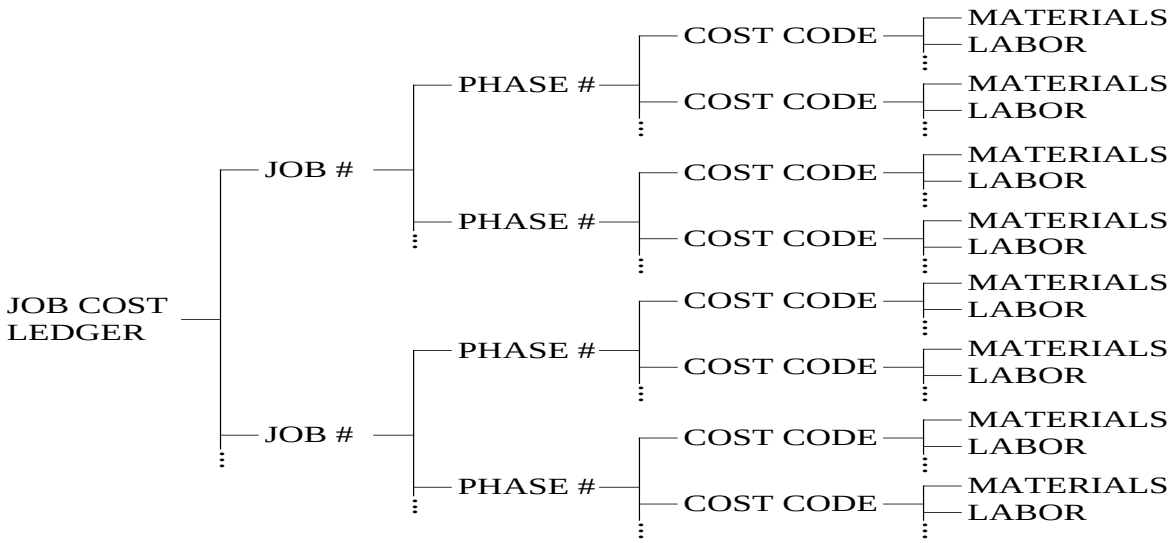
Bid, estimate, and budgets



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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**.

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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.

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Time cards

Labor Time Reporting

Daily Labor Time Card

Project: Highway Bridge Project No.: 200808-05 Wea ther: Cloudy-windy
Date: July 20 Prepared by: G.A.S.

Employee Number	Name	Craft	Time Classification	Hourly Rate	Cost Code 03157.10.3	Cost Code 03157.20.3	Cost Code	Cost Code	Cost Code	Total Hours	Gross Amount
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

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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!

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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*

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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.

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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

ذکر مطالب فوق تنها در صورت ذکر منبع بلامانع است.

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?

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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**

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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

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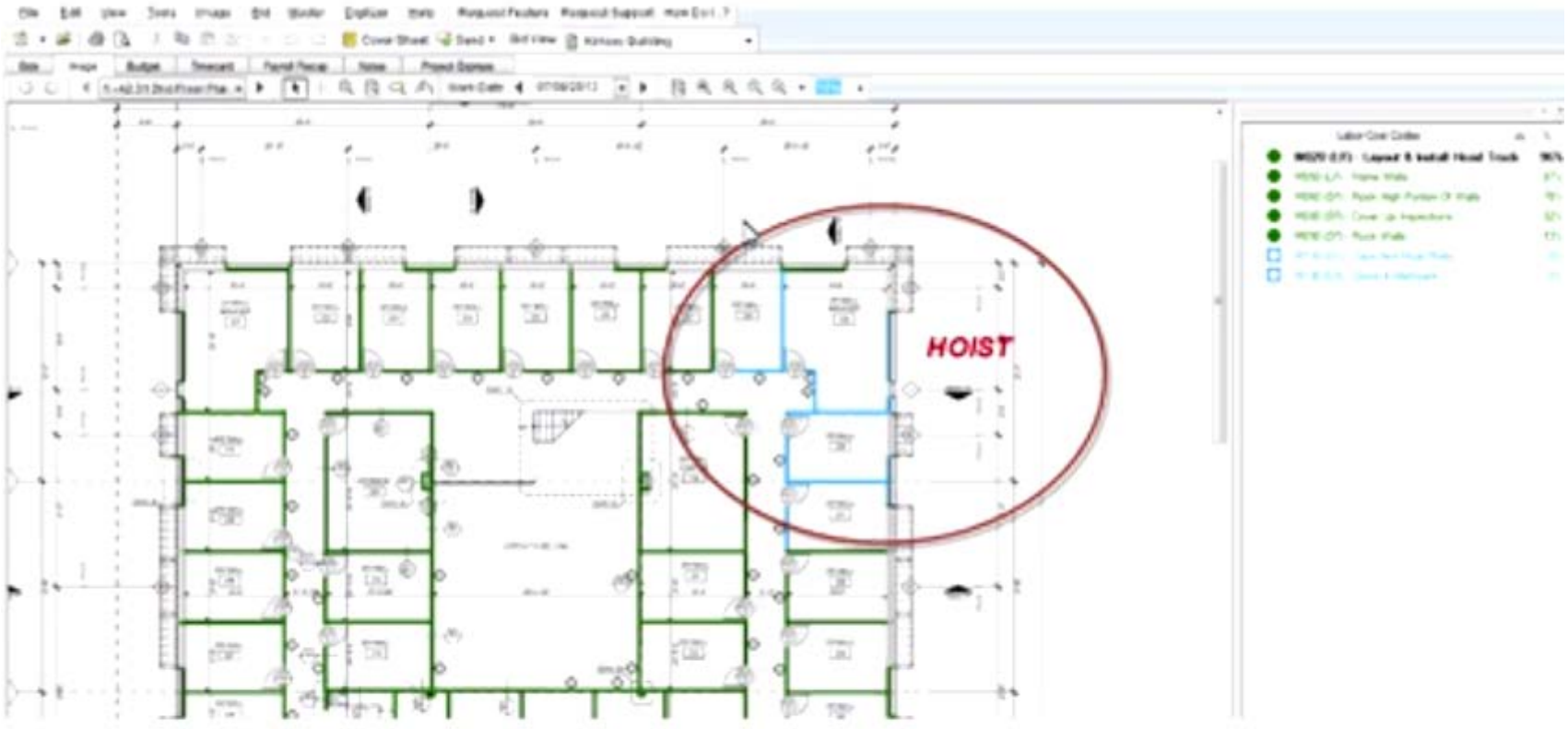
Schedules and progress reporting – Example of measuring progress by measuring quantities



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

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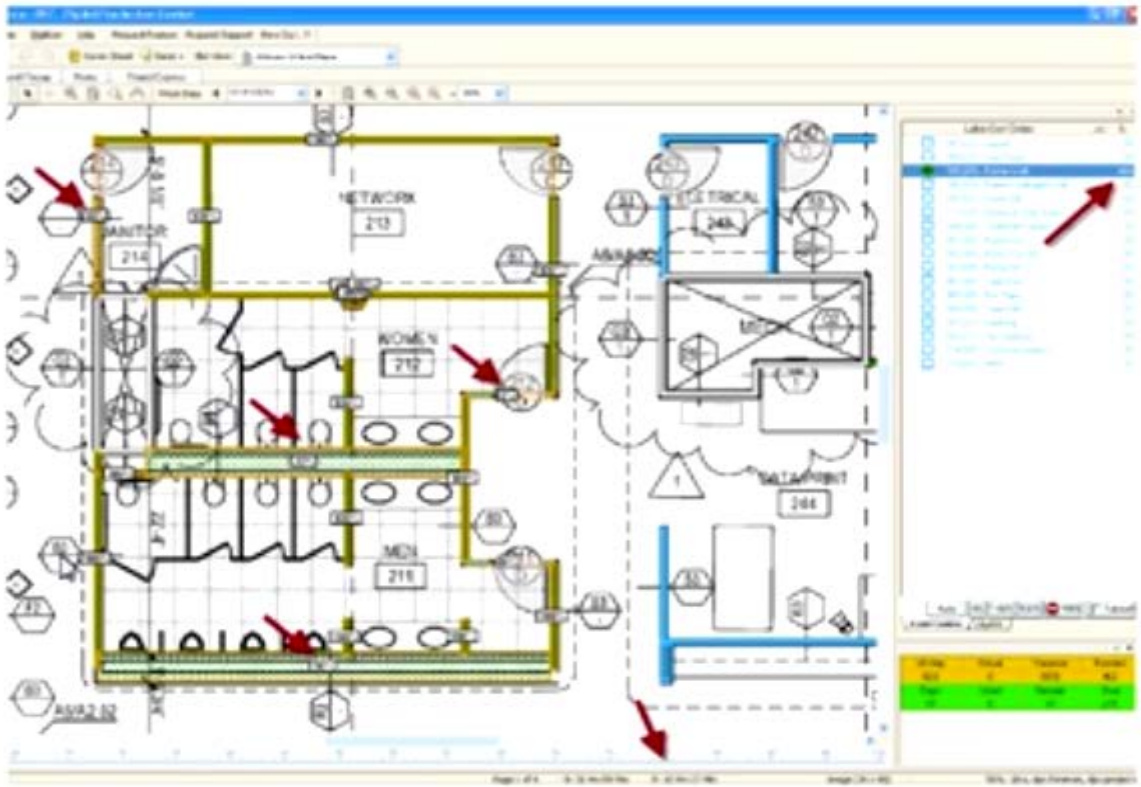
Schedules and progress reporting – Example of documentation for delays

- 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.



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Digital Production Control

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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**.

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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**.*

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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

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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

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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

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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-Co

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/Constructio
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 Contracto
Apr 22 2014 4:45:58pm	**Marked Official By**	Owner/Construction Manager	Eric	**Shared With**	General Contracto
Apr 22 2014 4:45:58pm	**Marked Official By**	Owner/Construction Manager	Eric	**Shared With**	Owner/Constructio
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

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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**.

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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.

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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."*

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Daily reports

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CONTRACTOR'S DAILY REPORT

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: _____

Crew:	Name	Hours	OT Hours	DT Hours	Task or Activity Code
Contractor:					

	Company Name	Number of Workers	Hours Worked
Subcontractors:			

	Company Name	Visitor Name	Reason for Visit
Visitors:			

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Dr

By: Alavipour, PhD, PM

Daily reports

CONTRACTOR'S DAILY REPORT

Work Progress (include Areas and Quantities where appropriate):

Contractor: _____

Subcontractors: _____

Equipment on Site (including rental equipment):	Company Name	Equipment Description	Hours Used
	_____	_____	_____
	_____	_____	_____
	_____	_____	_____
	_____	_____	_____

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: _____

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By: Alavipour, PhD, PMI

Daily reports

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

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

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Daily reports

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

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 ___ Extra Work Volume / Direct Work Volume = _____ % Extra Work Volume / Total Work Volume = _____ %

Miscellaneous Comments:

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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?

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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

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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**.*

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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)

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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

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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?

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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**.

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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.

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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**.

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Change orders

- Change Order Status (COS) report

Contract No. _____ Change Order Status Report No._____

Date _____

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 orders

- Change Order Status (COS) report

			Dates				Cost Impacts		Time	
C.O. No.	PCN No.	Description	Initiated	Negotiated	Finalized	Executed	Cost/Credit	Cumalative to Date	Extension	Adjusted Total

Change orders

- Change Order Status (COS) report

CHANGE ORDER LOG

Project No. ____ Project ____ Contract No. ____ Contractor ____ Page ____ of ____

C.O. No.	Description	Dates			Cost / (Credit)	Cumulative Amount to Date	Time (Calendar Days)	
		Initiated	Negotiated	Finalized			Extension	Adjusted Total
					$	$		

SAMPLE

Change orders

- Change Order Status (COS) cover letter

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

Prepared by Dr
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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**.

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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.

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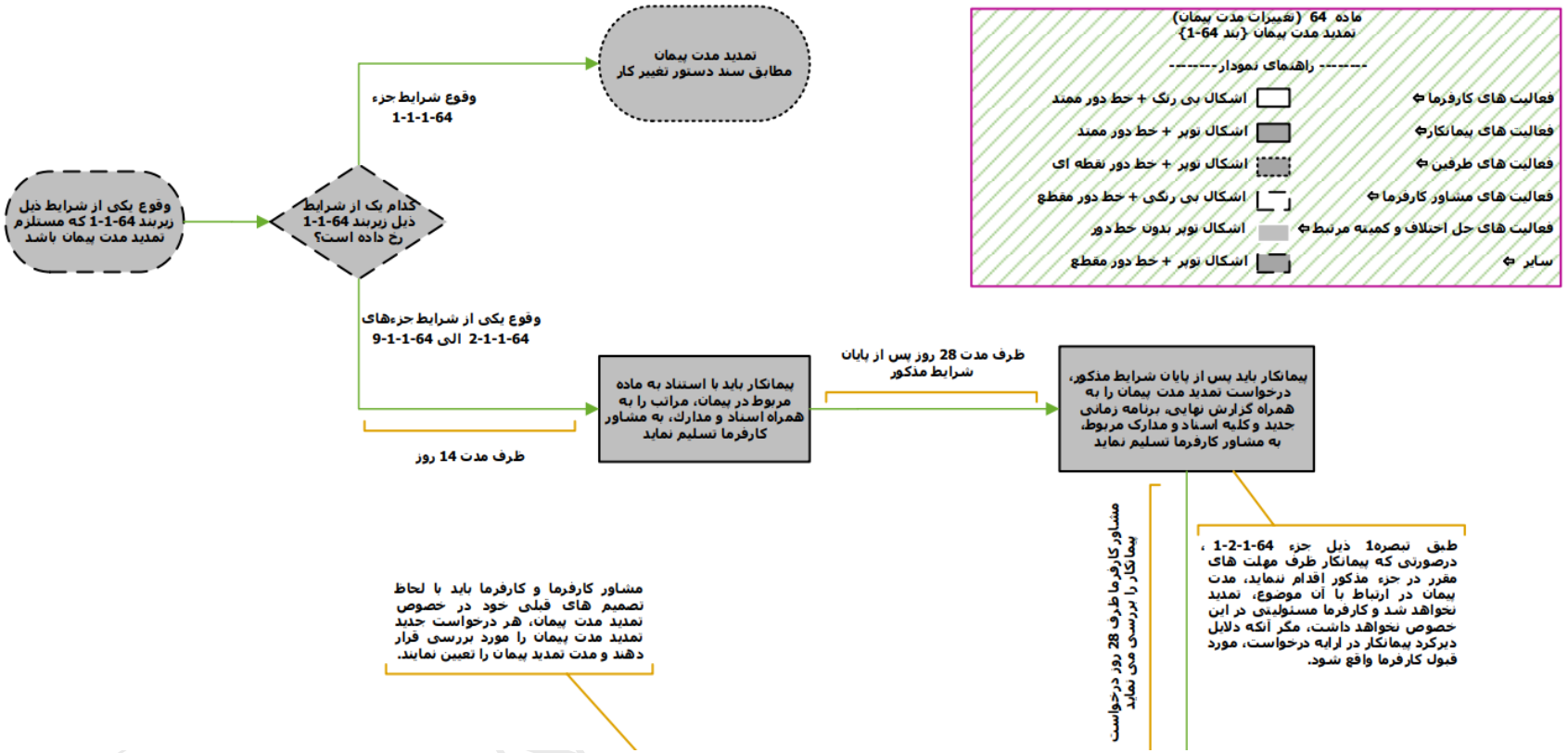
Periodic review



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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**.

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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

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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.

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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**.*

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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.

ذکر مطالب فوق تنها در صورت ذکر منبع بلامانع است.

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**.*

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Document management

Let's see some examples!

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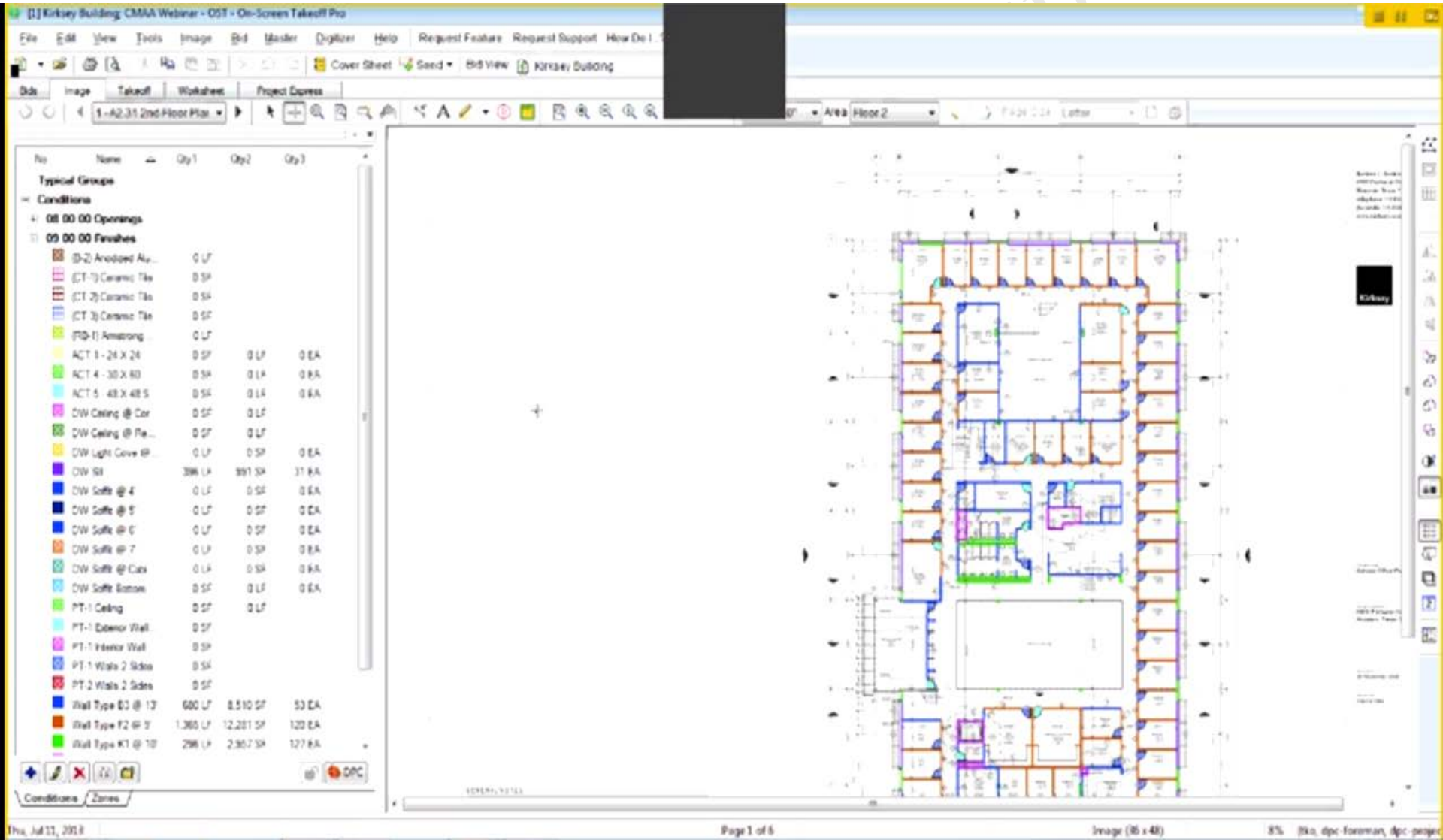
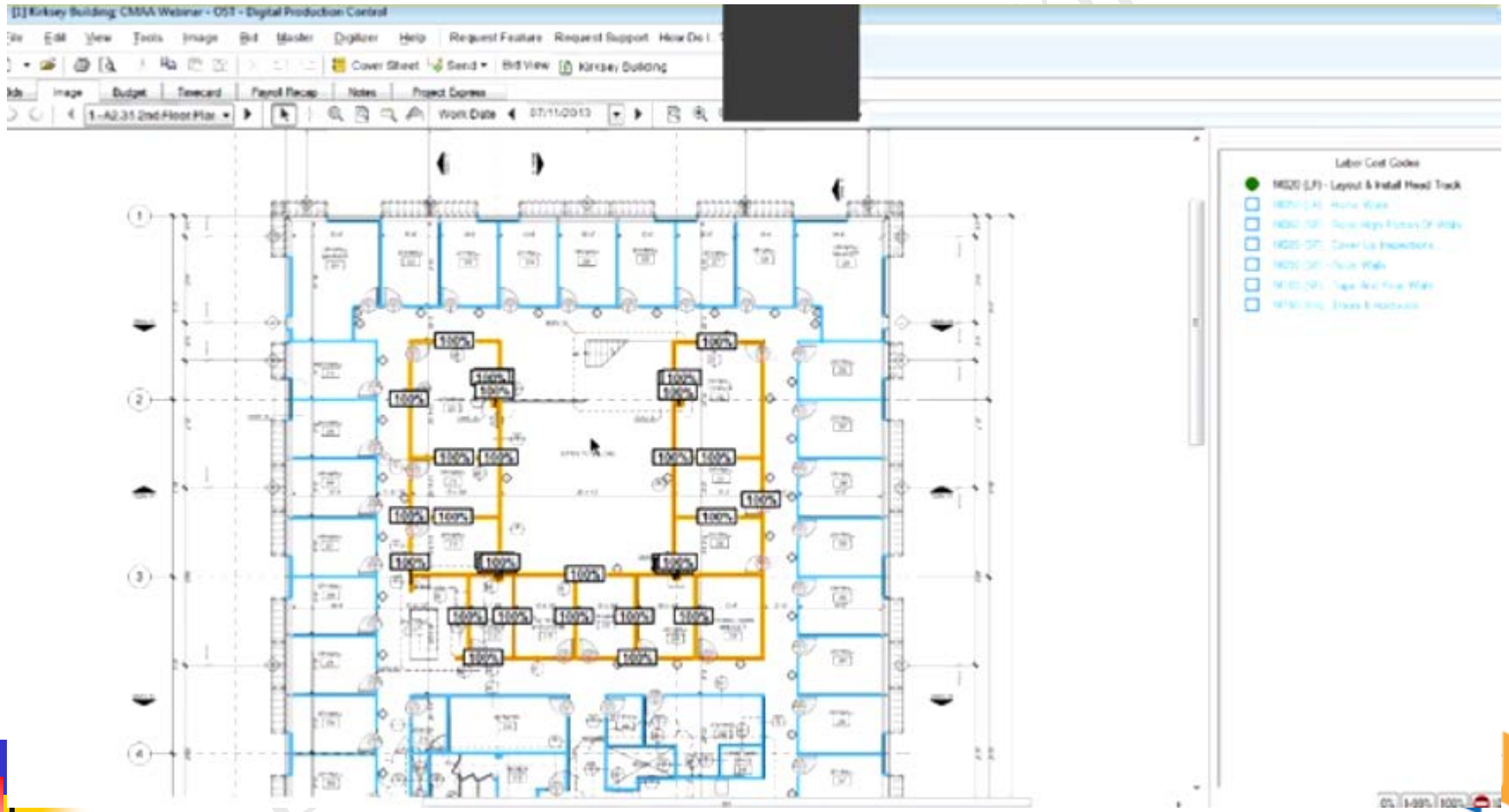
Example of scope

- On-Screen takeoff



Example of scope

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



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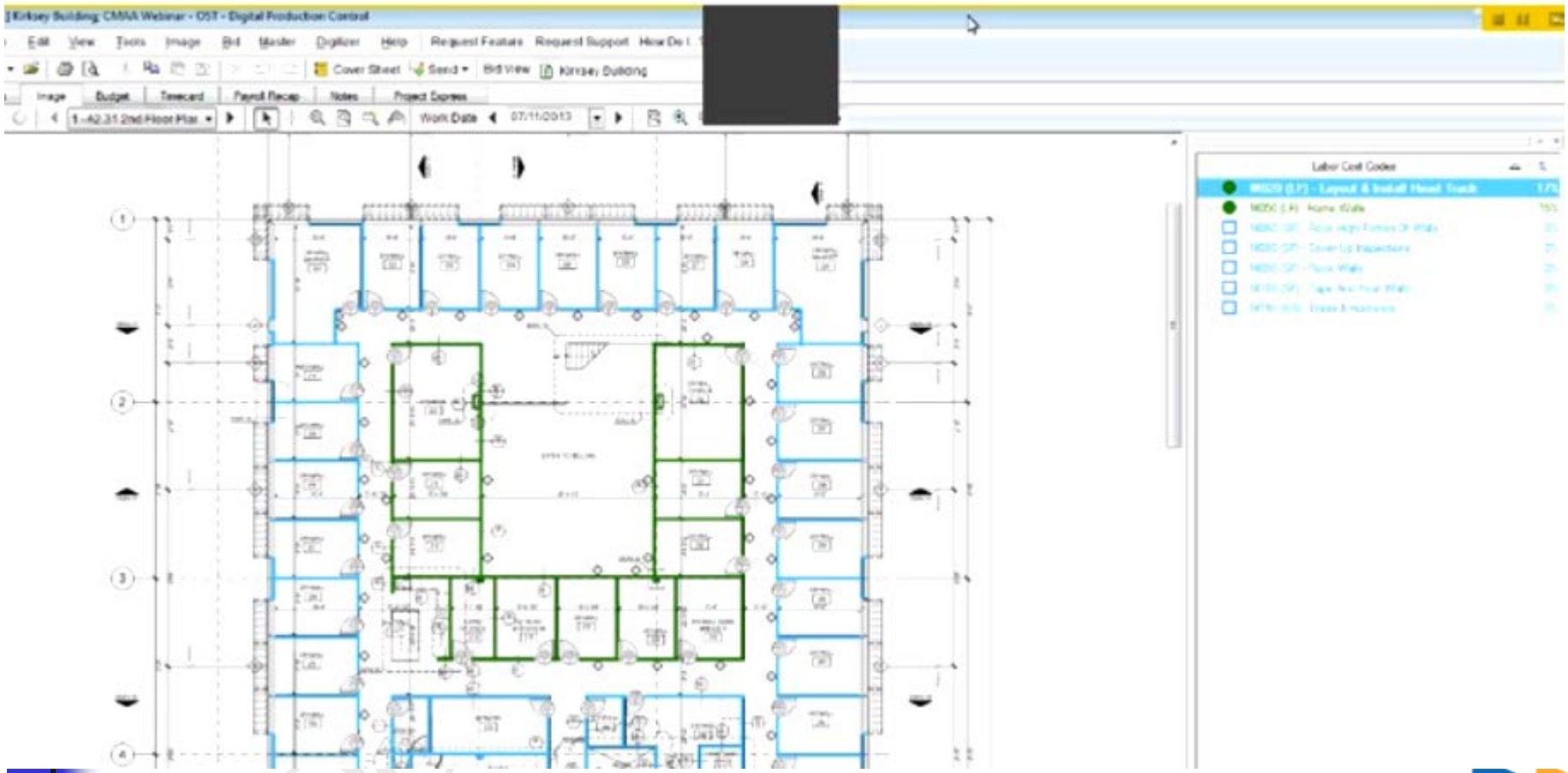
Example of scope

- Green color shows completion



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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

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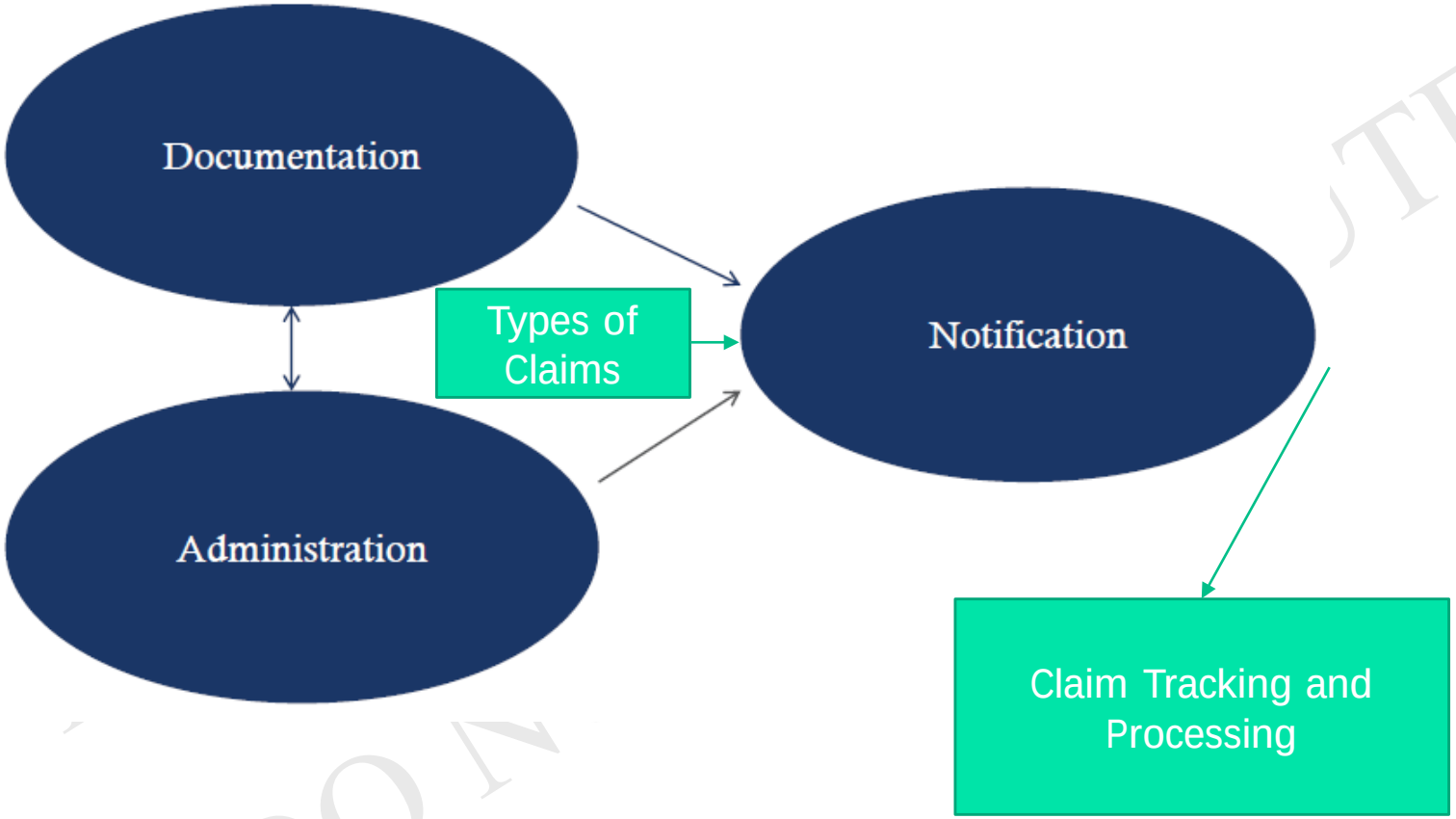
Claims Management

(Contract and Claim Administration)

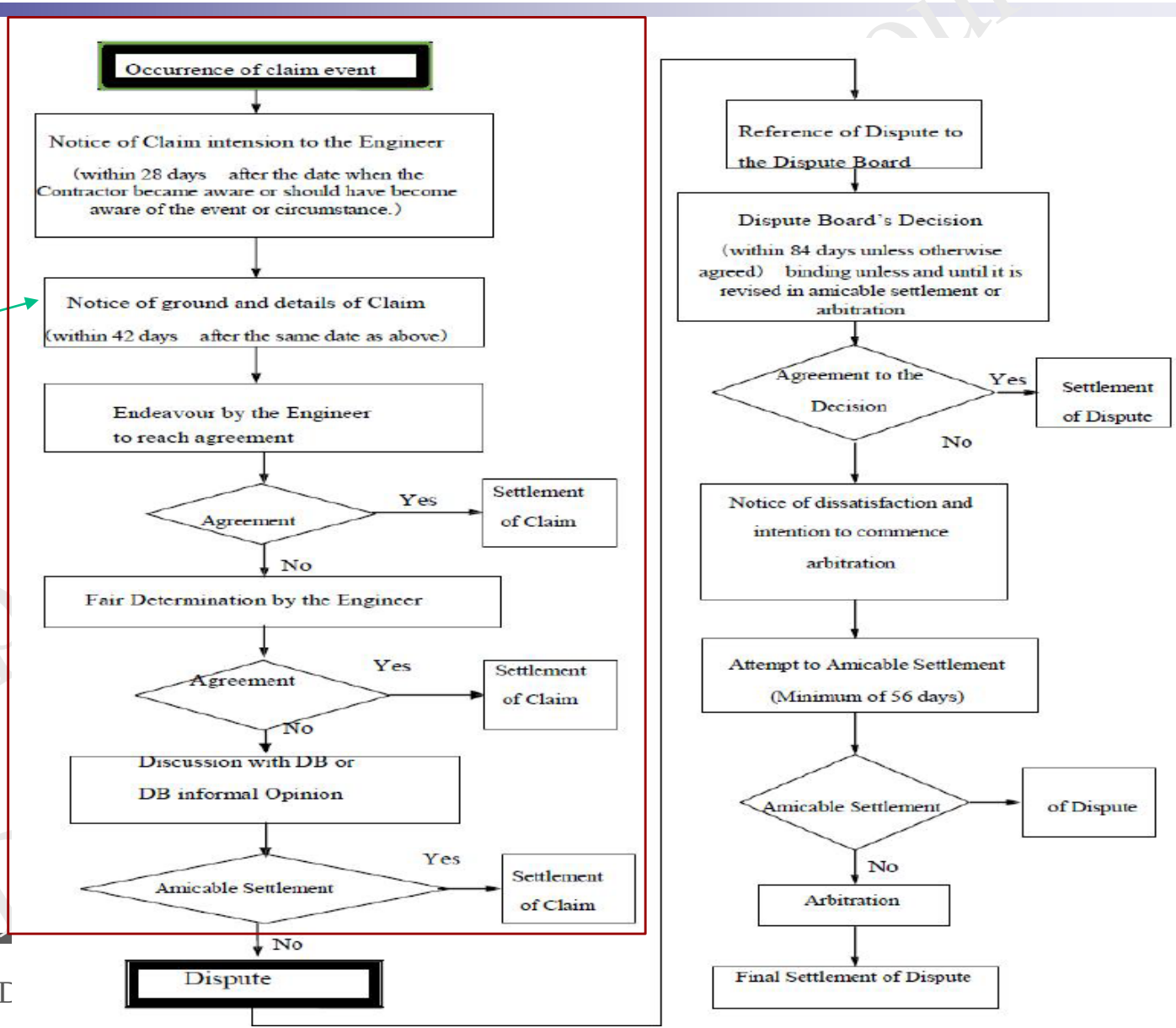
Suggested terminology for claim management in Construction Phase



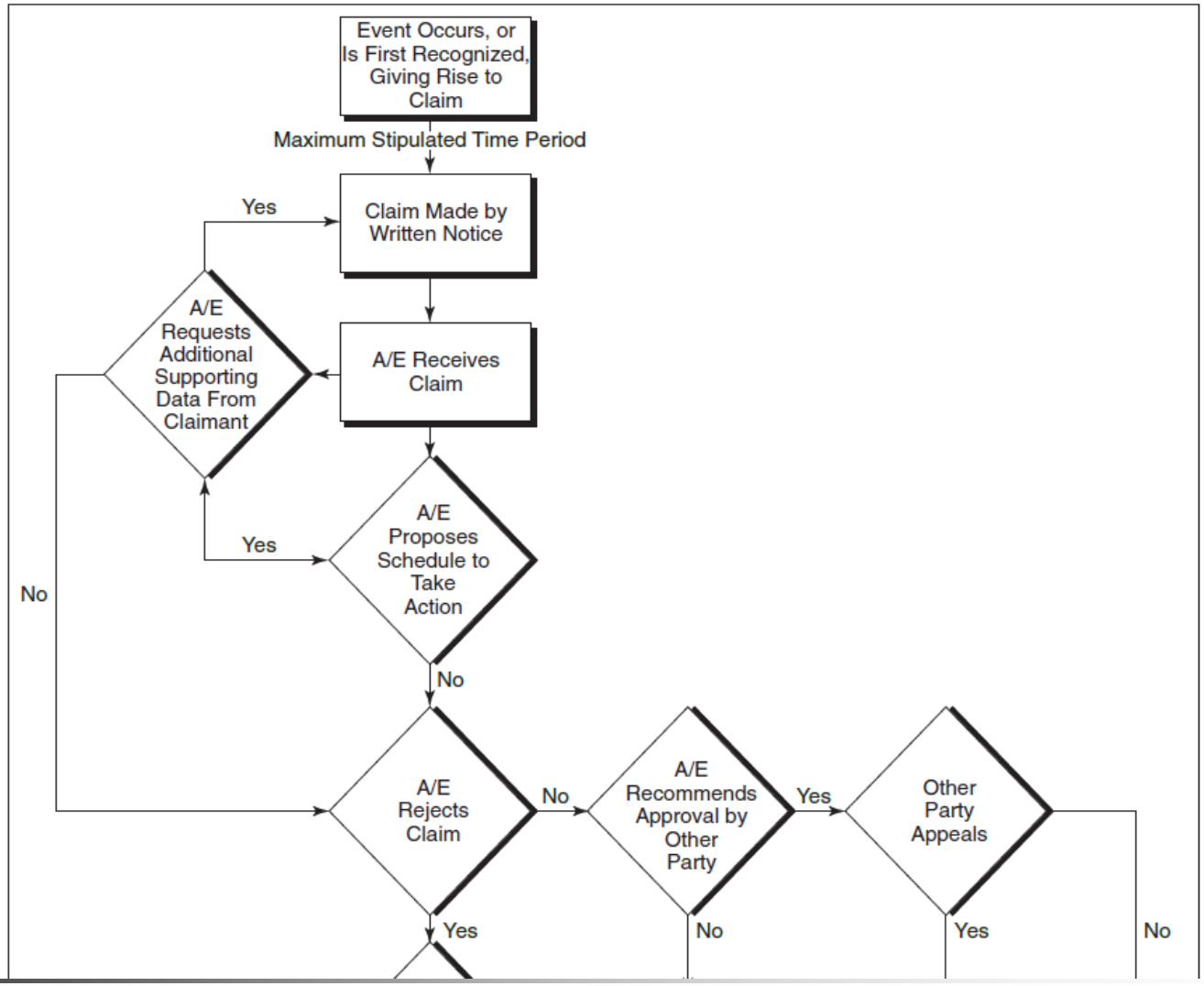
Claims management process – Sample 1

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

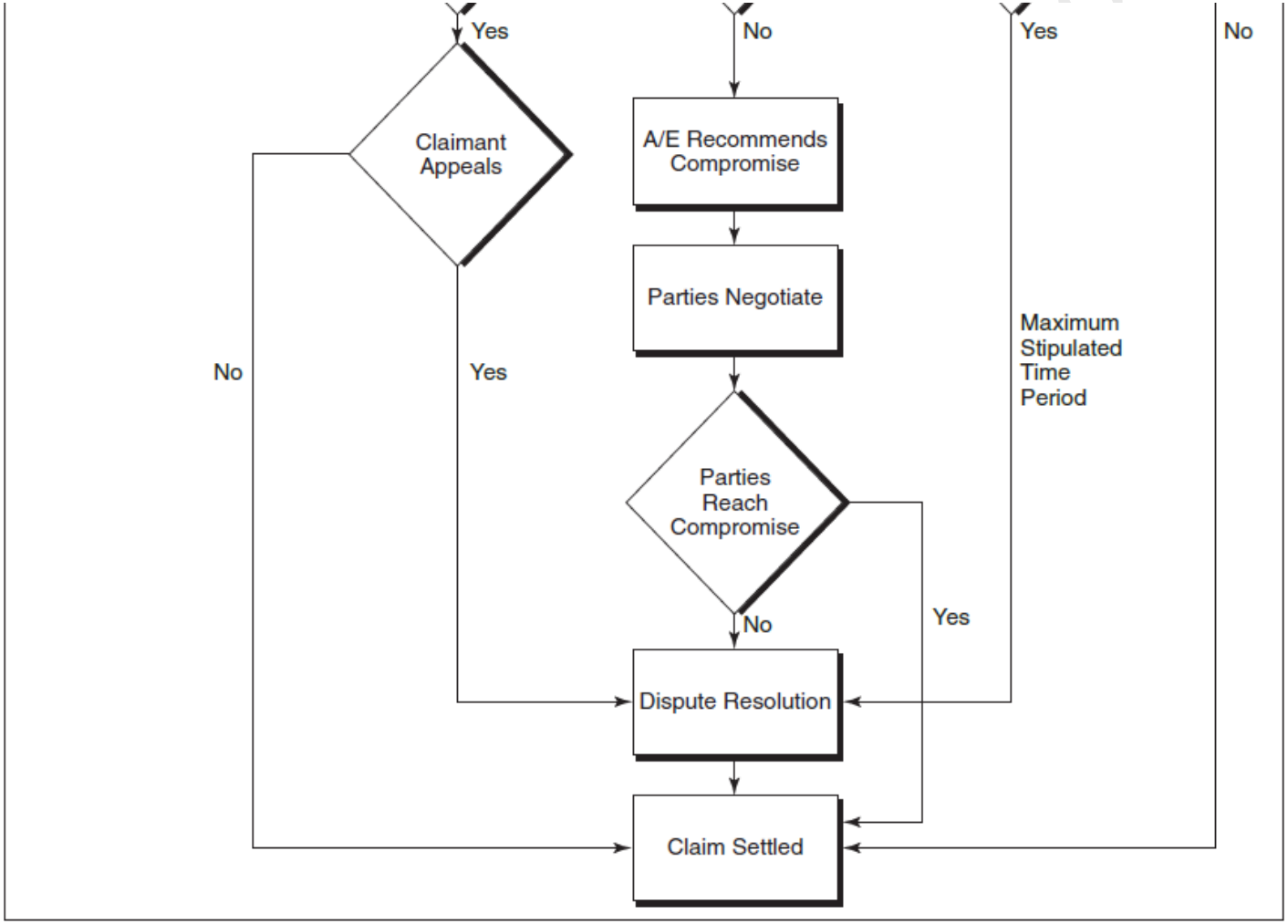
FIDIC 2017 changed this process



Claims management process – Sample 2



Claims management process – Sample 2



Submittals – Diagram

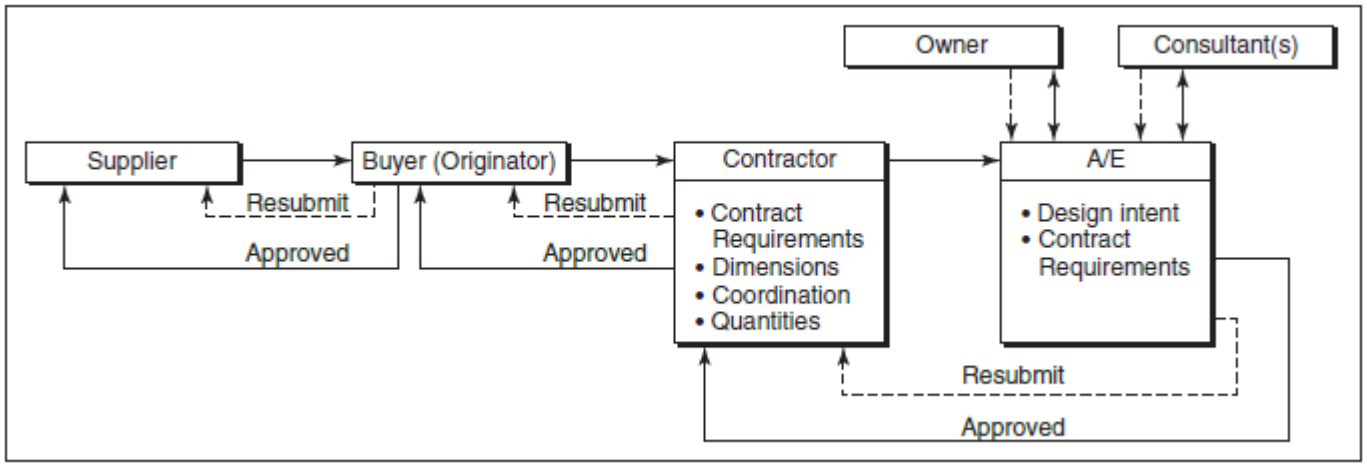


Diagram of Routing Submittals for Review and Approval

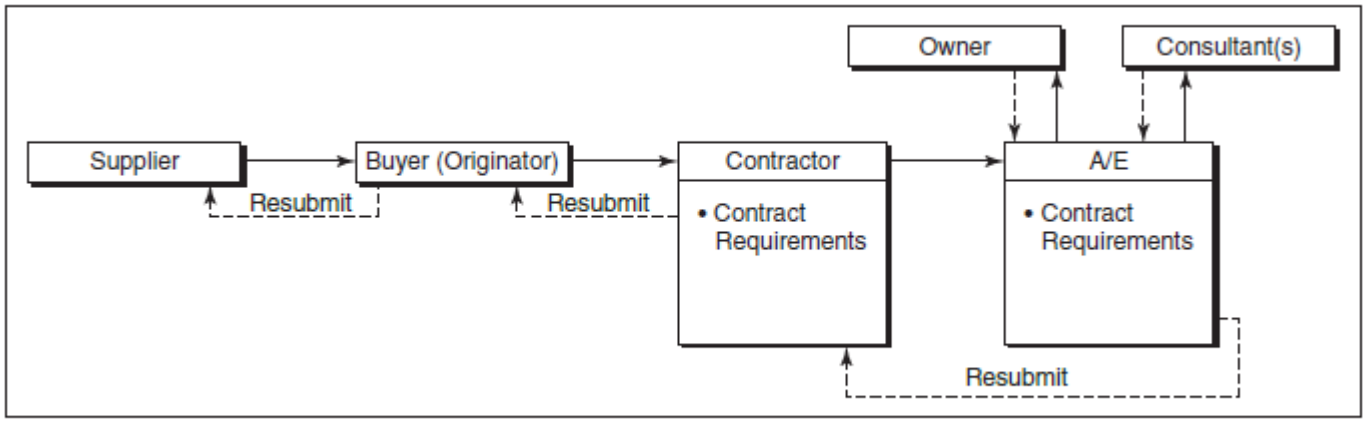


Diagram of Routing Informational Submittals

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

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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."

Alavipour
DO NOT

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: _____

SPEC. SECTION NO	NEW SUB	RESUBMIT	ITEM DESCRIPTION	SUBMITTAL NO.	DATE REC'D	CONSULTANT			DATE RET'D	ACTION						
						TO	DATE SENT	DATE RET'D		APP'D	APP'D AS NOTED	NOT SUB'T TO REVIEW	NO ACTION REQ.	REVISE/ RESUB.	REJECT/ RESUB.	APP'D AS NOTED/ RESUB.
	☐	☐														
	☐	☐														
	☐	☐														
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Page ___ of ___

Form Version: June 2004
CSI Form 12.1B

Submittals – Submittal log

CSI FORMS 12.1B AND 12.1C SUBMITTAL LOG FOR A/ES AND CONTRACTORS (Page 2)

Knowledge for Creating and Sustaining the Built Environment

SUBMITTAL LOG (Contractor)

Project: _____ Contractor Project Number: _____

Owner: _____ A/E: _____

SPEC SECTION NO.	NEW SUB	RE-SUBMIT	ITEM DESCRIPTION	SUBMITTAL NO.	SUBCON-TRACTOR/ SUPPLIER	DATE REC'D	TO A/E		DATE RET'D	ACTION						
							DATE SENT	DATE RET'D		APP'D	APP'D AS NOTED	NOT SUB'T TO REVIEW	NO ACTION REQ.	REVISE/ RESUB.	REJECT/ RESUB.	APP'D AS NOTED/ RESUB.

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Page ___ of ___

Form Version: June 2004
CSI Form 12.1C

Submittals – Submittal processing with a transmittal form

ACEMI

Knowledge for Creating and Sustaining the Built Environment

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

Prepar DC

By: Alavipour, PhD, PMP,

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

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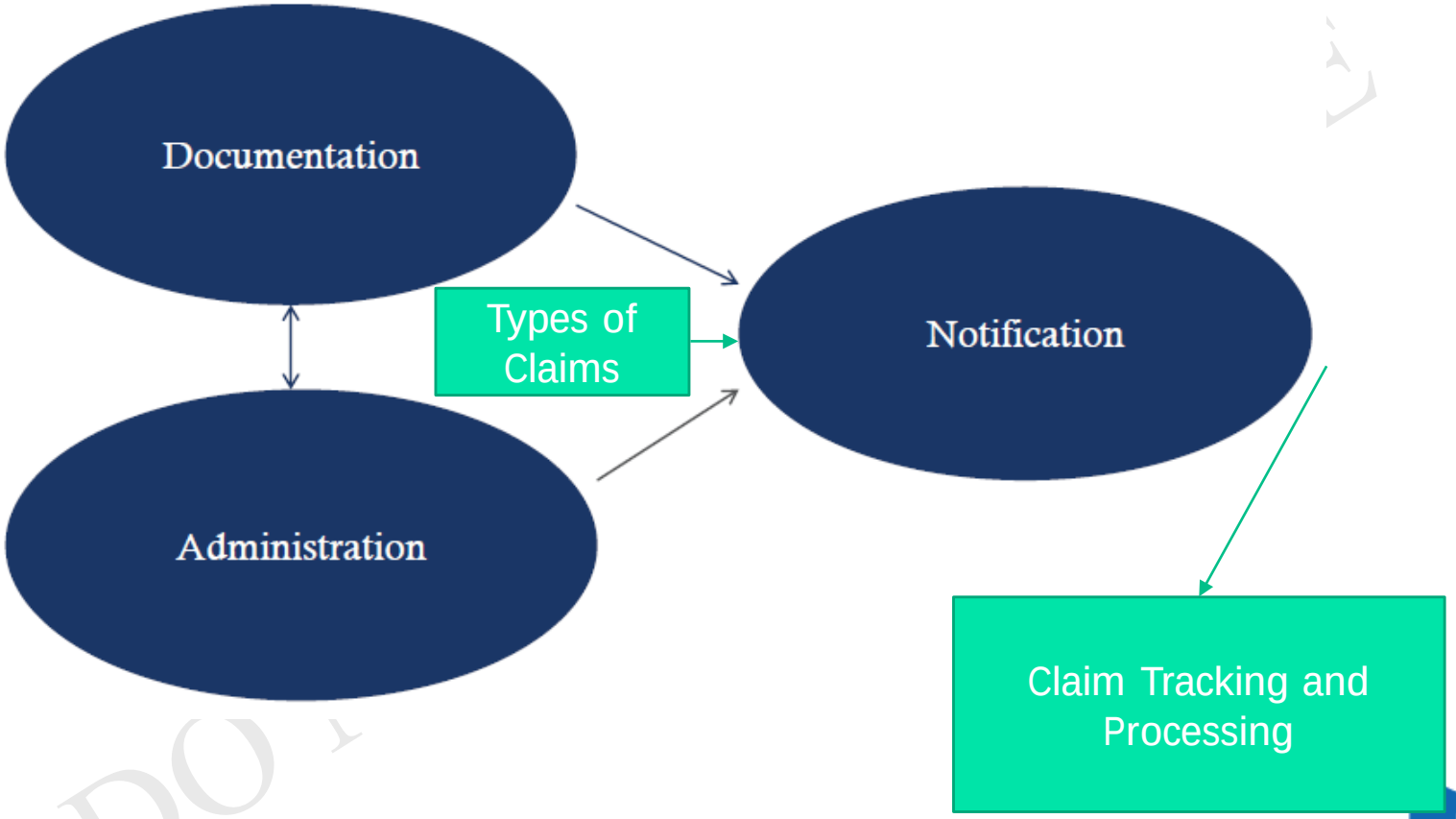
Claims Management

(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.

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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.*

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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.

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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.

Prepared
DO N

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.

Prepared for
DO NOT

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

- **<u>If</u>** 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**.*

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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!

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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.

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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!

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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?

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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.

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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****.*

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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**.

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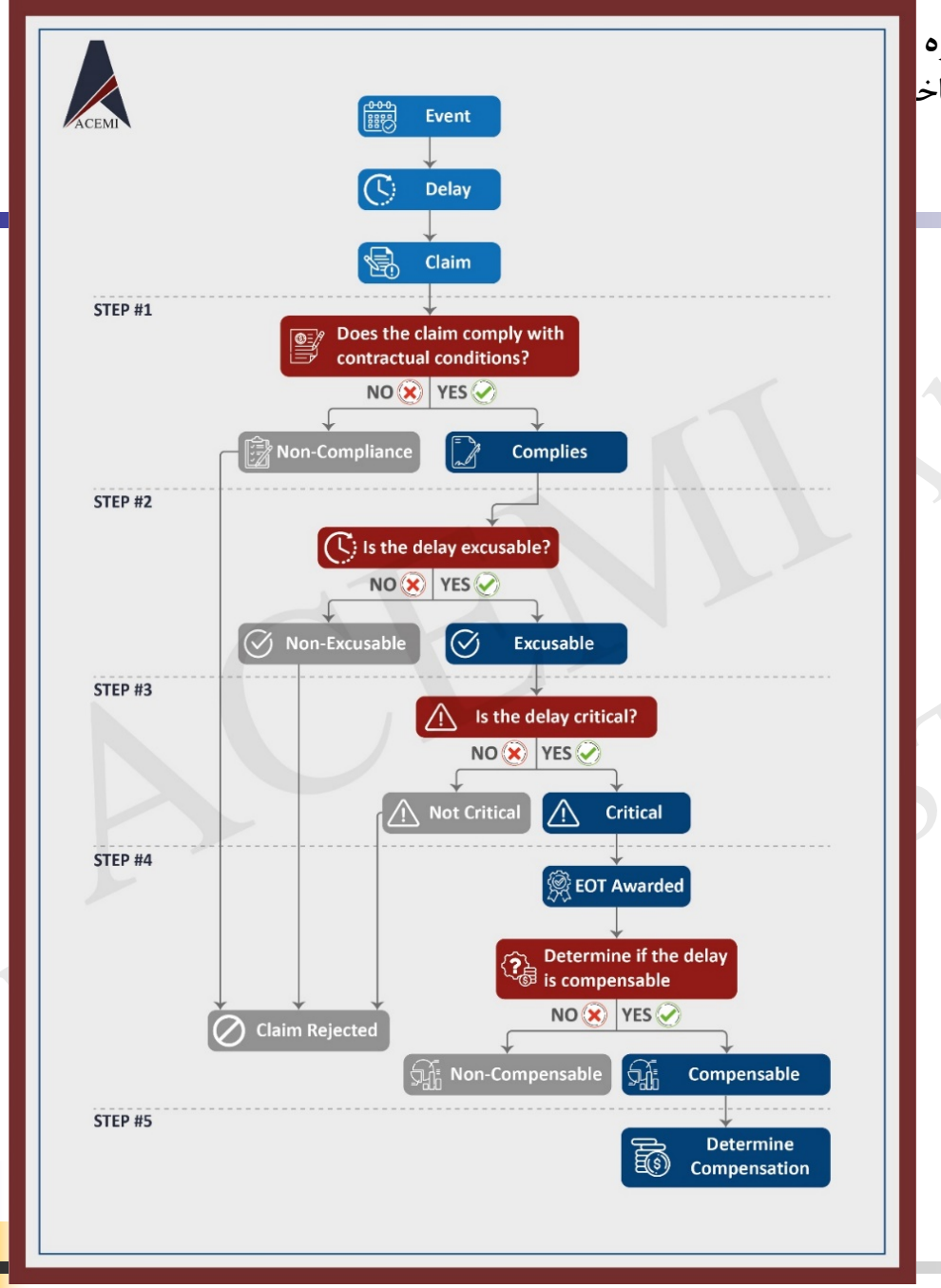

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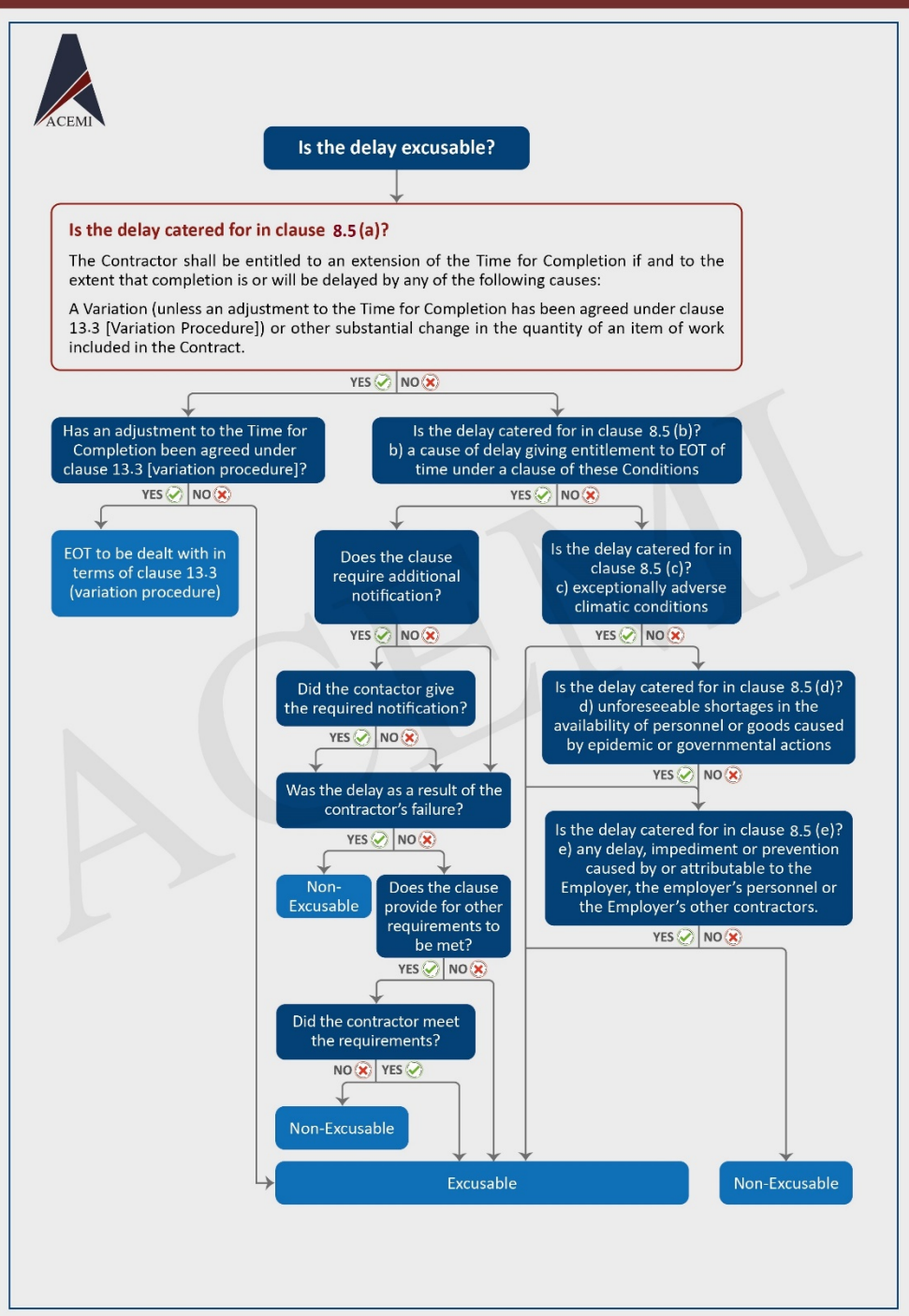

Nr	Clause	Additional notification	As a result of contractor's failure	Specific requirement
1.9	Delayed drawings	)	)	)
2.1	Right of access		)	)
4.7	Setting out		)	
4.12	Unforeseeable conditions	)		)
4.23	Archaeological	)		
7.4	Testing		)	
8.6	Delays by authorities		)	
8.10	Suspension of work		)	
10.3	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.

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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.

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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.

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Claims for extensions of time

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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**.

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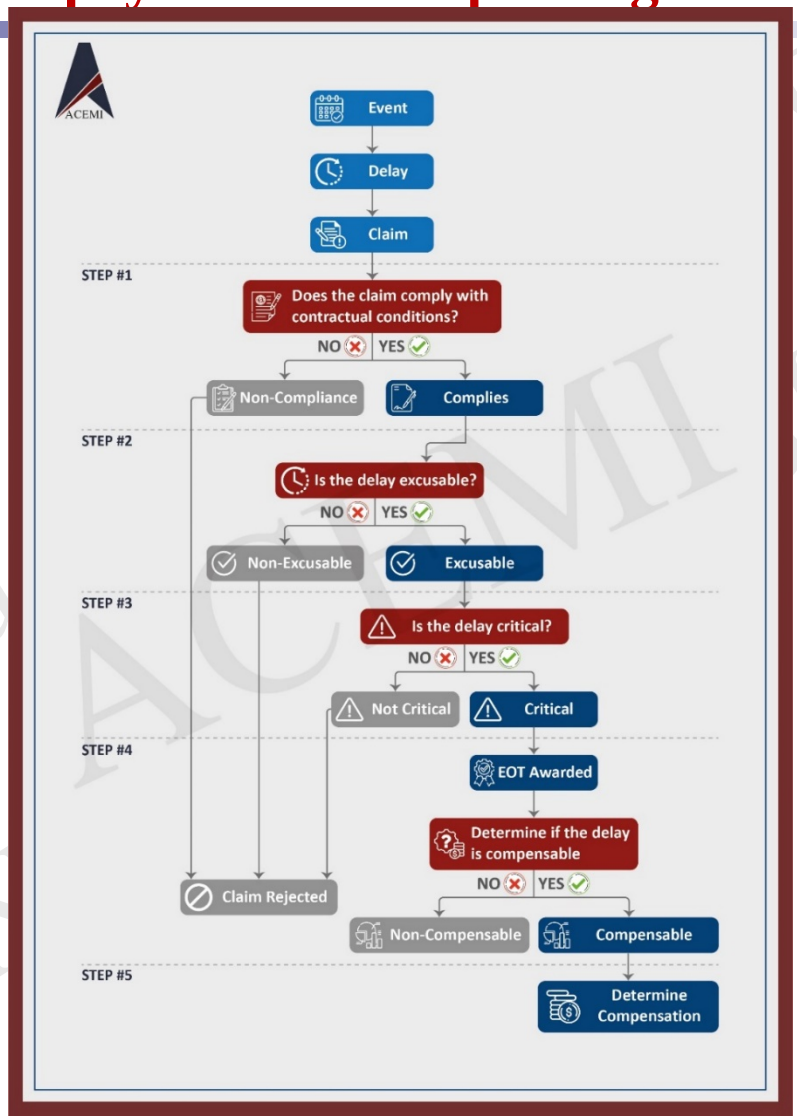
Claims for additional payment due to prolongation



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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.**

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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.

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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?

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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 workface** operating at **once**
  - **Loss of production** caused by
    1. Working **out of sequence**, or
    2. Working **on more than** the **optimum number** of workface

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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.*

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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.

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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!

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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**.

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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!

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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.

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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***.

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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.

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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.

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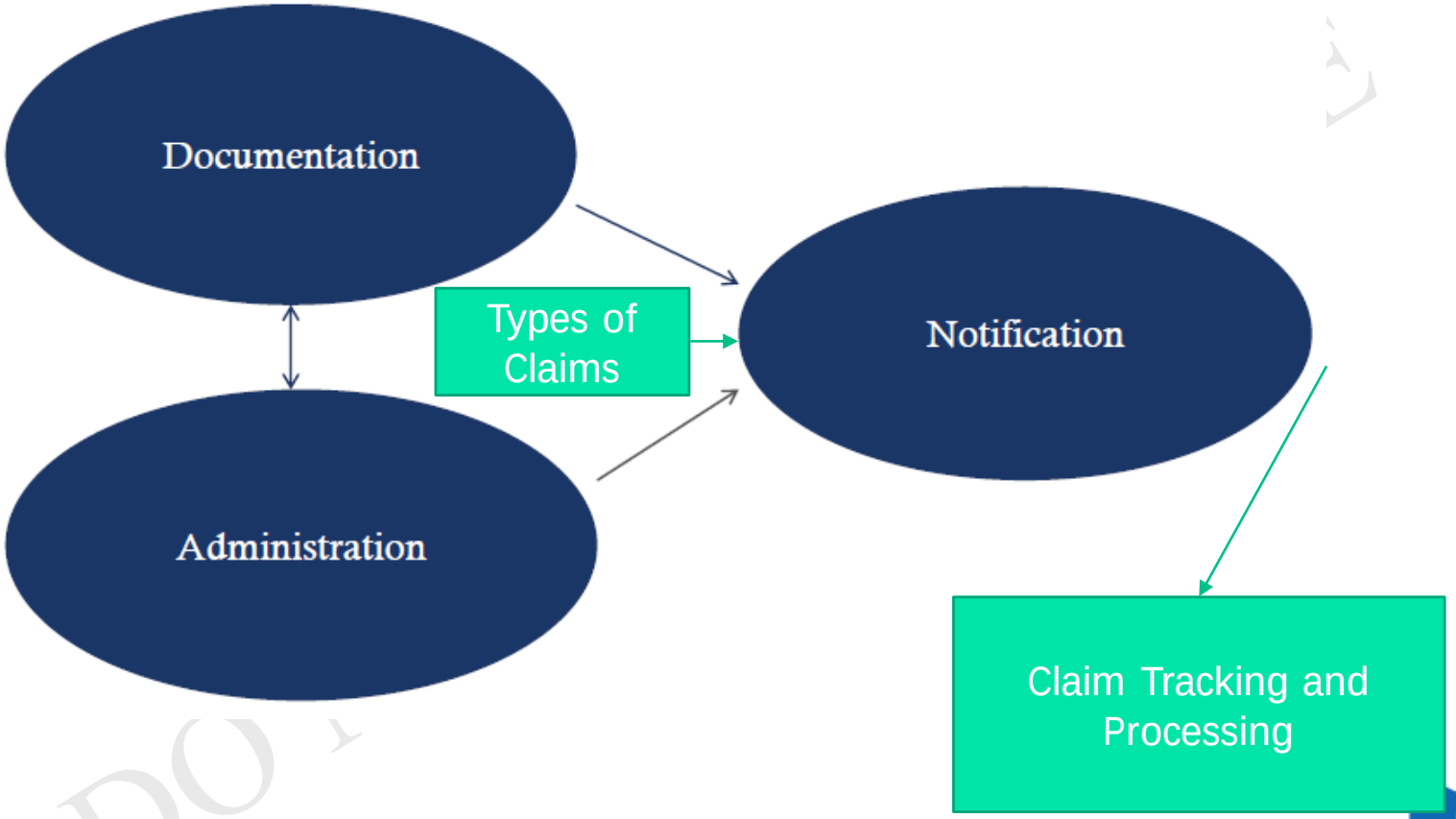
Claims Management

(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?

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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.

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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**.*

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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.

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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**.*

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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 <u>denies</u>** the claim,

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

  - *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.

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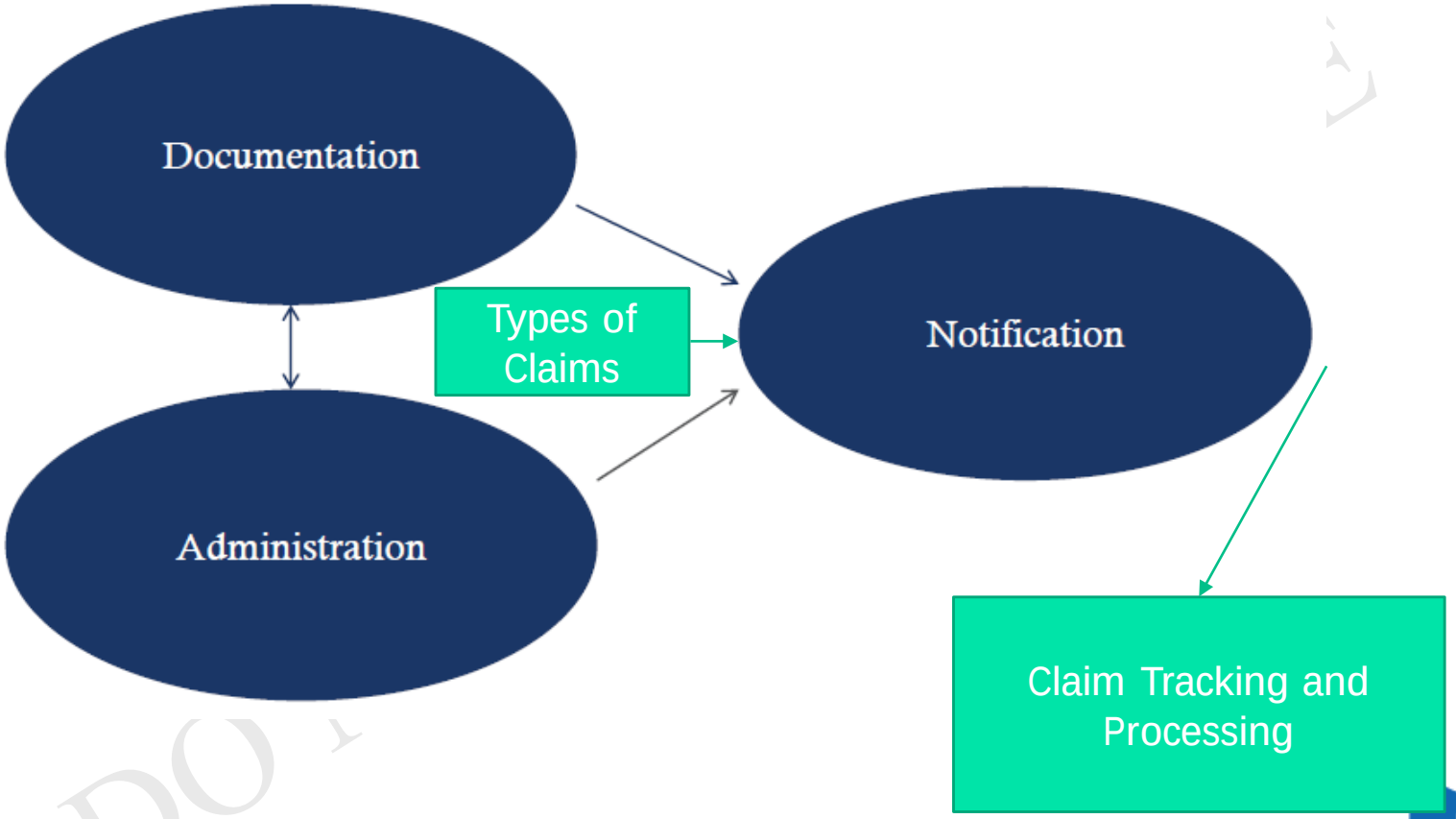
Claims Management

(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

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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.

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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.**

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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?

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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)

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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]

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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.*

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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.*

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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.*

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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.

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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**.*

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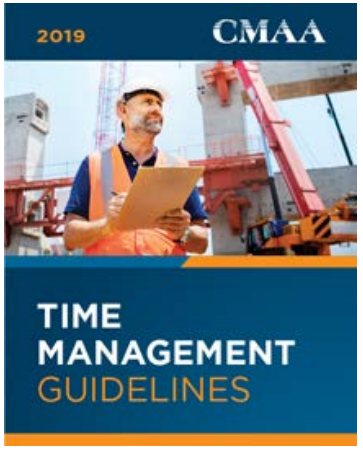
Time and cost impacts – Schedule management

- 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



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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**.*

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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.

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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.

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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.

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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**.

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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.*

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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**.

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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.

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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.

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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!

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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?

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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 w**orth providing the necessary resources** to ensure a **high-quality effort** is made.*

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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**?

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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.***

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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**?

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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**.*

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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**?

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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*

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Suggested terminology by CII

ACEMI

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

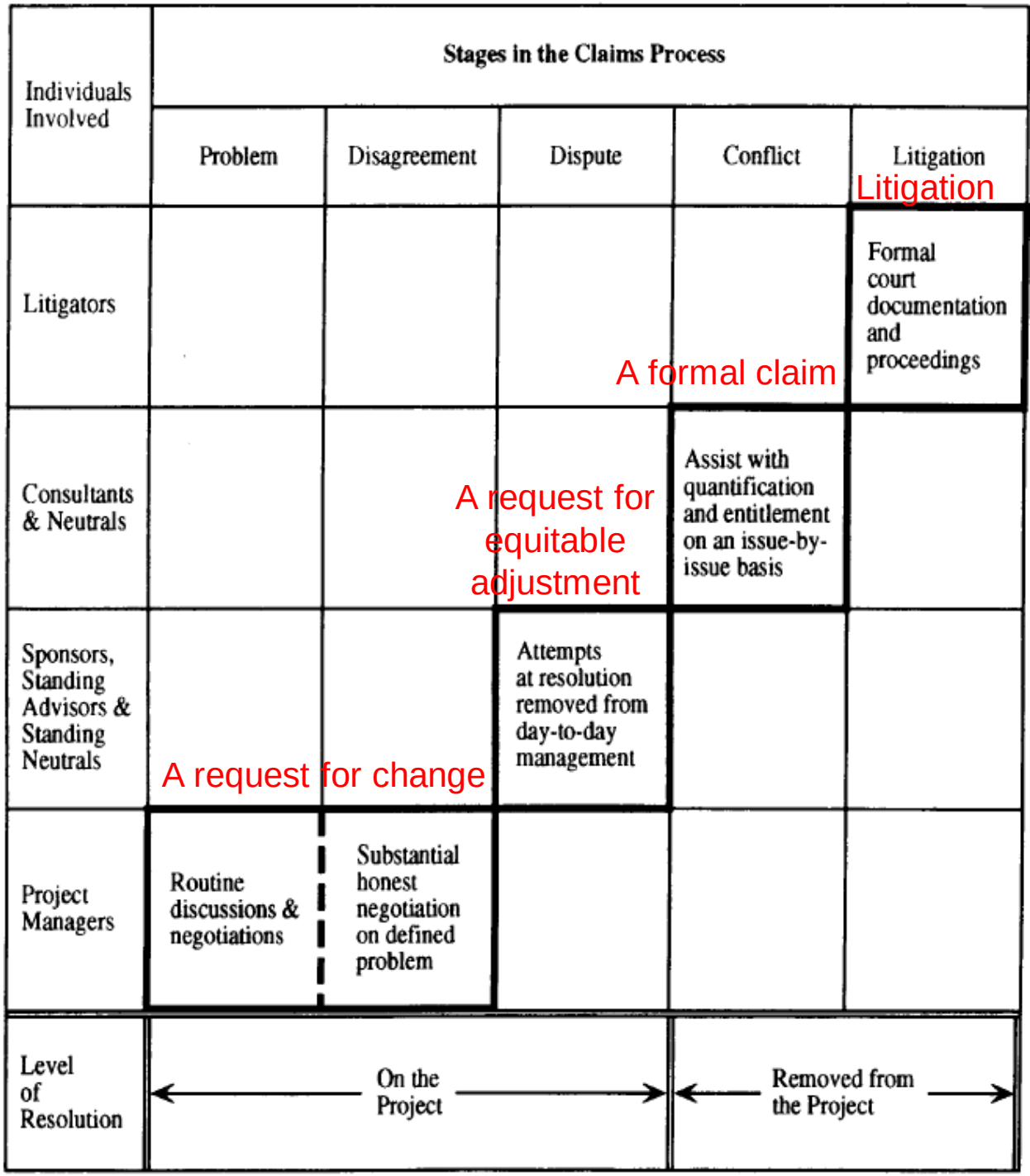
the issue is sorted out.

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**"



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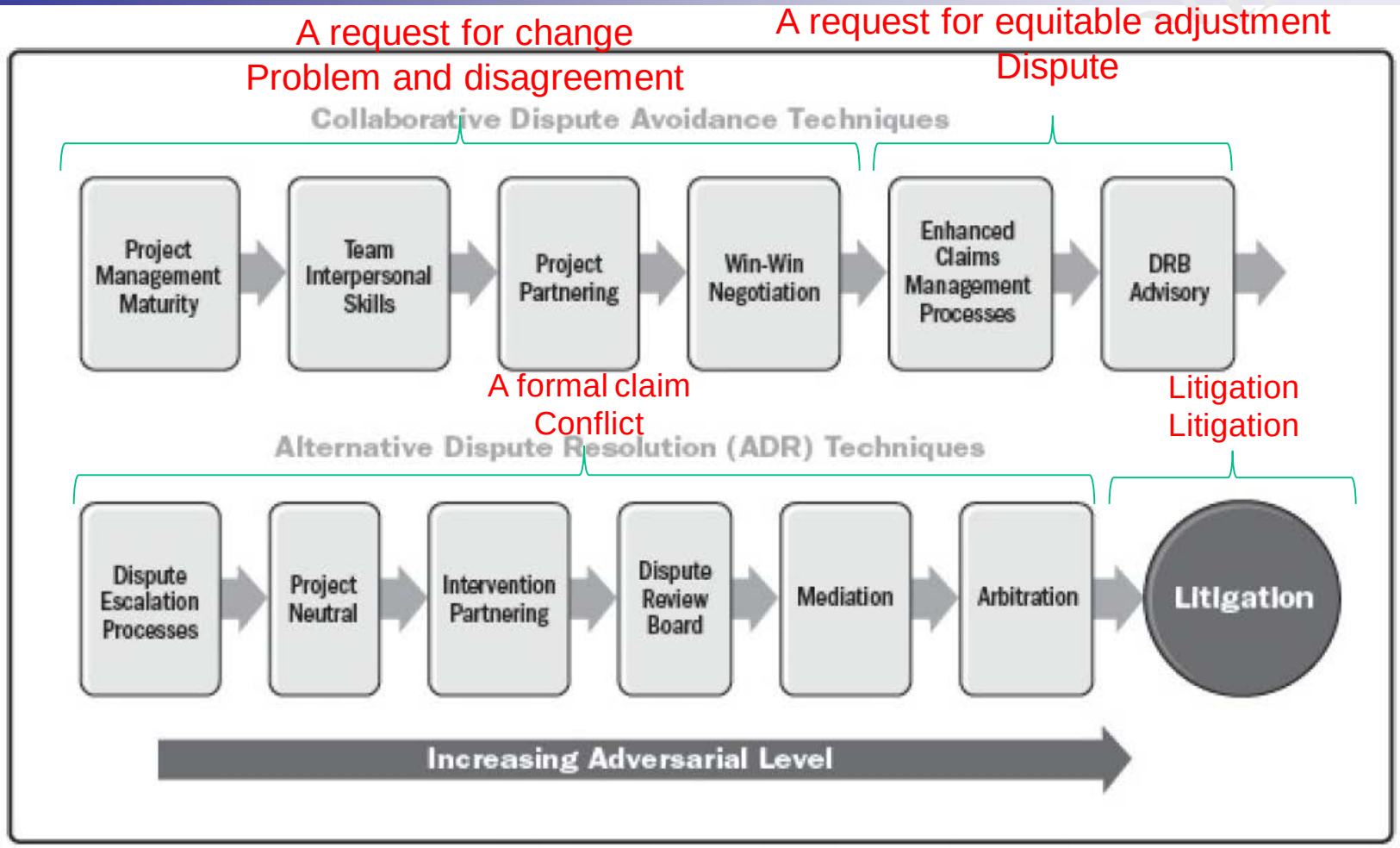
By: Alavipour, PhD, PMP, CMIT

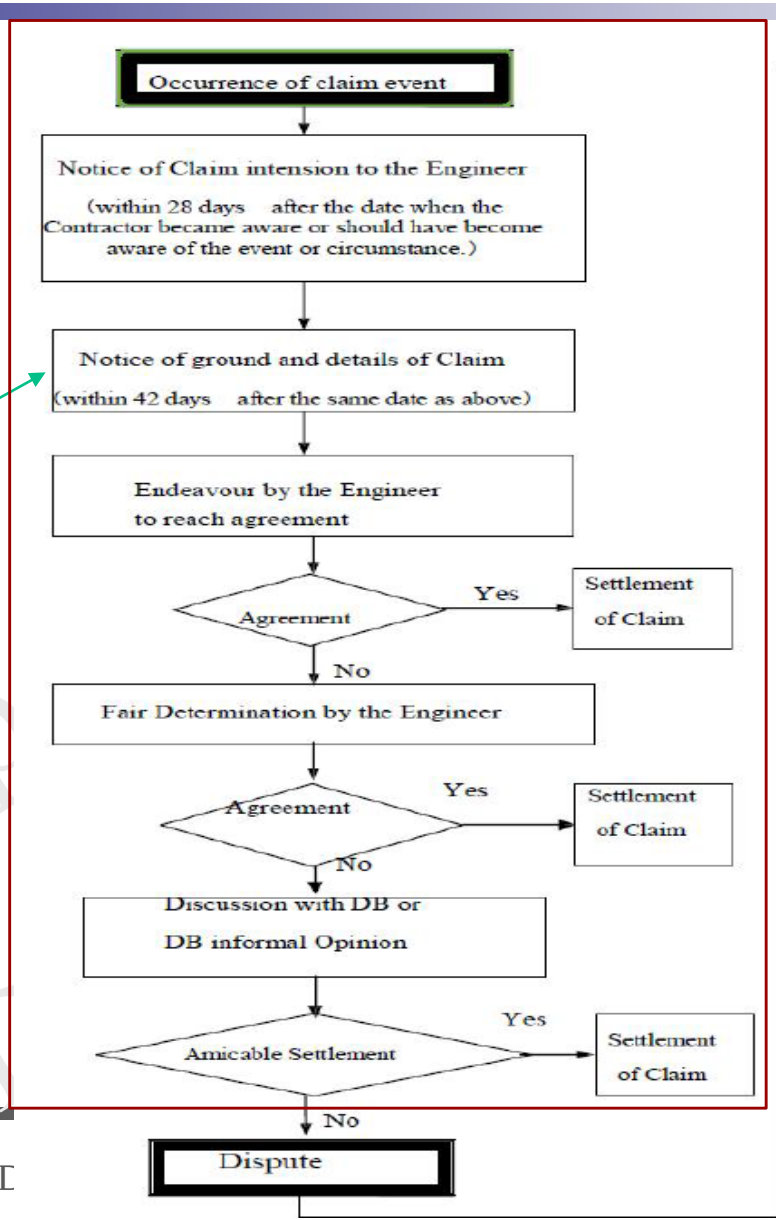
Suggested terminology by PMI

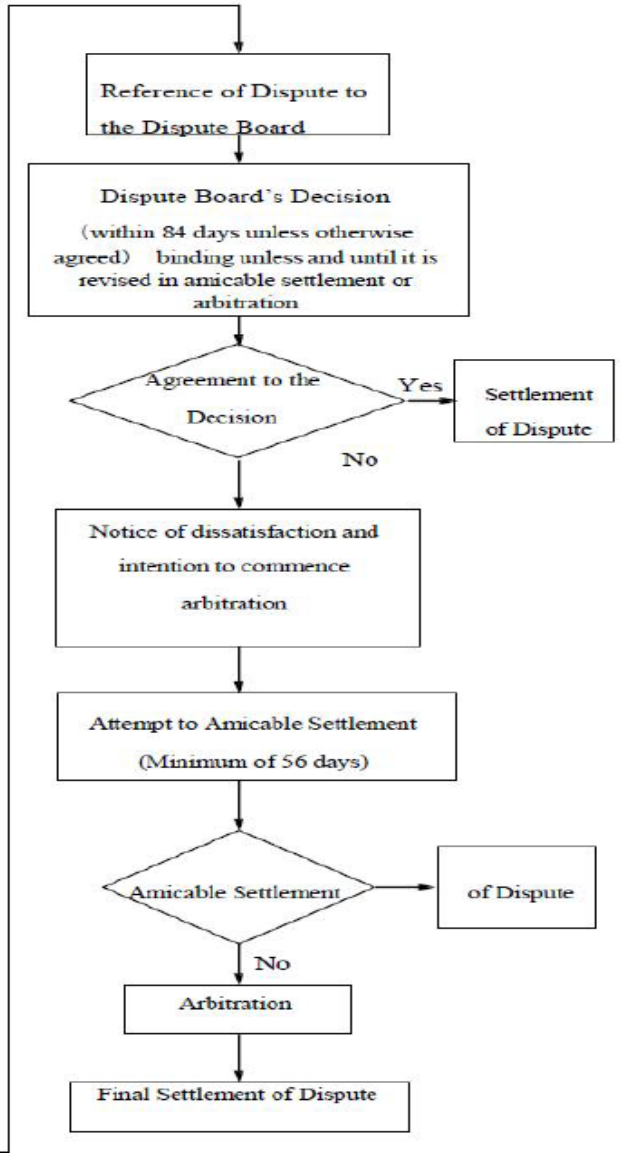


Claims Administration Techniques

Claims management process – Sample 1

Submitting <u>final details</u> of the claim **<u>within 42 days</u>** of the **<u>end</u> 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.*

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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.

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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.***

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CM's role

- 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**.

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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**.

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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.

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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.***

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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.

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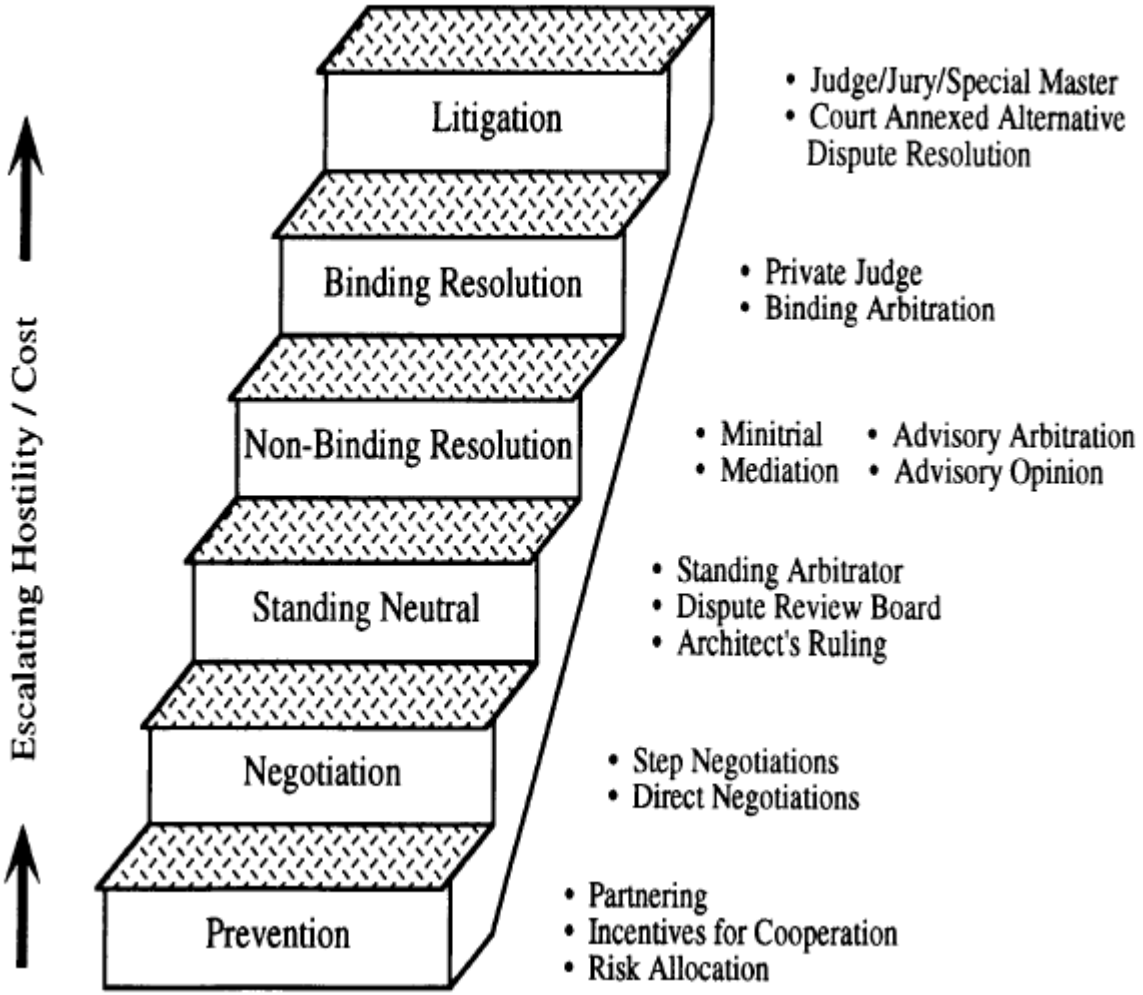
Alternative dispute resolution

- Different techniques exhibit rising levels of hostility and cost source
- *Some of them will be reviewed in this course!*



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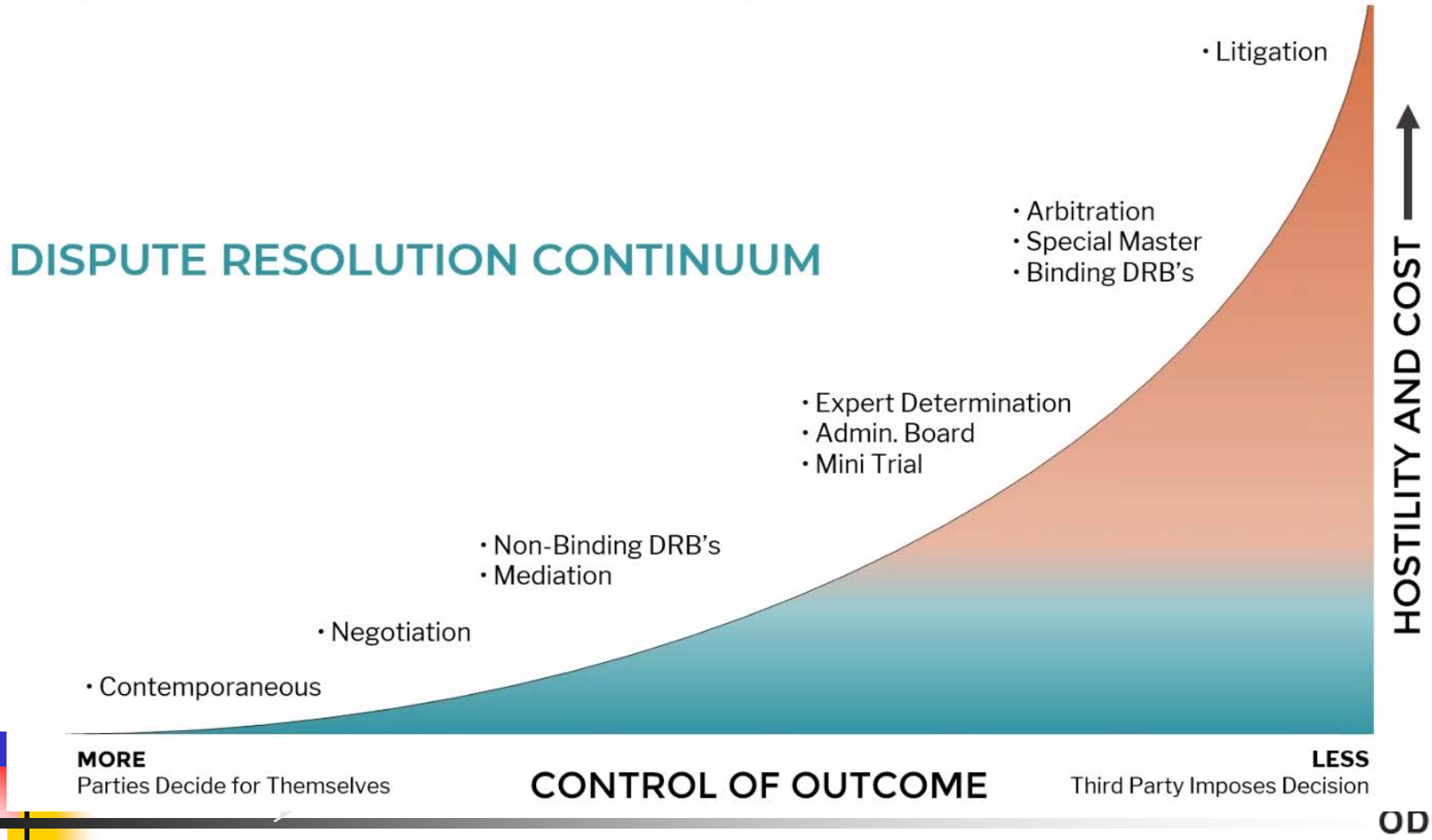
Alternative dispute resolution

- Another model by HKA Consulting Inc.



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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

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Alternative dispute resolution – Other methods

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

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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**

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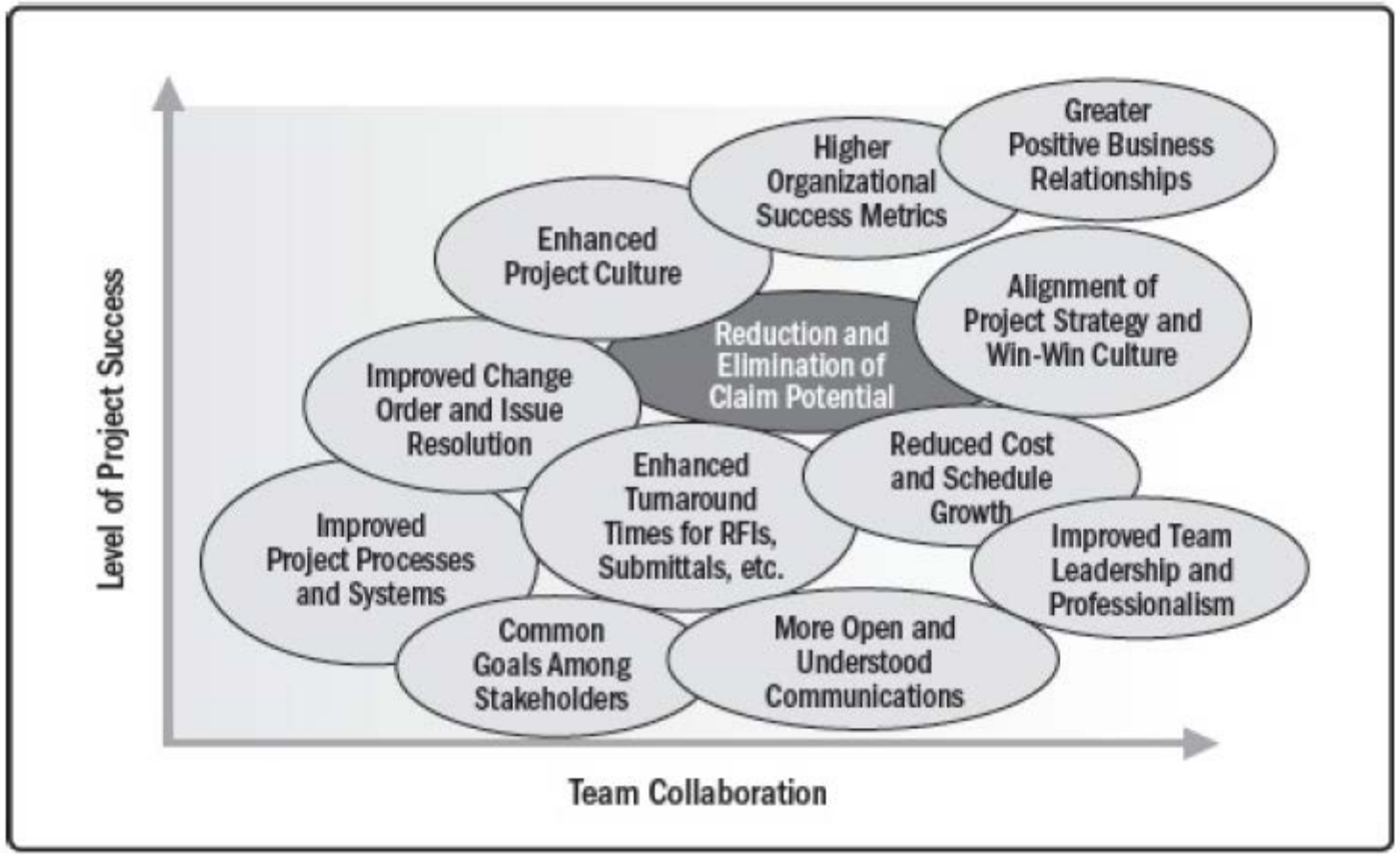
Alternative dispute resolution – Partnering

- In PMBOK Construction Extension.



Project Partnering Outcomes

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.

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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**!

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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

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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

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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.

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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

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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
      - o Like the rule of **Access to Information Act and the Privacy Act**
  - Flexible

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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**.*

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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!

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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**

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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.)

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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

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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

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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

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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

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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**

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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 t**urned 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

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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**

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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**

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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**.*

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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

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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**

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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**

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Alternative dispute resolution – Mediation: Typical procedure

How to hold a mediation session?

4. <u>Uncovering hidden interests of the disputing parties</u>

- 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

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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 you 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.

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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**

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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

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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

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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.

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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**?

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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

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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**

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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"**

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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

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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

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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!

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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!

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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?

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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

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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

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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**
  - o **Attorney** knows how to write briefs—**entitlement**
  - o **You know facts** of case – **causation & damages**
- ✓ Disagree, agree on **your role** at mediation
  - o This is not a "wake me when it's over" process

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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!

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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

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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
  - o **Have copies** to turn over to other side & mediator

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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?

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Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Entitlement support

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

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Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn own strong points

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

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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

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Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn own weak points

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

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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

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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

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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?

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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

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2. Preparation for mediation

❖ Know own real damages

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

(if silence, refer to standards!)

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Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Estimate failure cost

- ✓ If mediation fails
  - o Arbitration or litigation likely to result
- ✓ **Calculate "BATNA** (best alternative to no agreement)"
  - o **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"

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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)
  - o **Your staff knows** your **stuff** and not recommended
- ✓ Present case
- ✓ Present other's case
- ✓ Get prepared for mediation day

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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

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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**

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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**

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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

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3. At mediation

❖ Project staff participate?

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

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Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ Trust the mediator

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

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3. At mediation

❖ Team approach

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

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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**
  - o Focus on **key issues**

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3. At mediation

❖ No insults

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

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3. At mediation

❖ Use documented facts

- ✓ **Facts are facts**, argue them strongly
  - o 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!

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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!

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3. At mediation

❖ Prepare graphics

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

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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"**
  - o 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!

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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

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3. At mediation

❖ Dealing with numbers

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

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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

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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**

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Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ How to talk?

- ✓ Don't **counterattack**
  - o Probe
  - o 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!

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Alternative dispute resolution – Mediation: How to succeed at mediation

3. At mediation

❖ No walk outs

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

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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
  - o Apology
  - o No adverse commentary
  - o No bad performance rating
  - o Promise of future work
- o Try to find concessions (امتیازات) that are
  - o Meaningful to other side
  - o Little cost to your side

Do not let emotions block settlement

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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!

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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**

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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**

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CONCLUSION

Properly done, mediation is a very effective dispute resolution mechanism

Improperly done, mediation is frustrating, amounts to "free discovery"

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Alternative dispute resolution – Mediation: How to succeed at mediation

Remember

It's almost never too late to request mediation!

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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 **l966**, 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**.

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Alternative dispute resolution – Arbitration: An overview

- **اساس داوری** مبنی بر **تراضی و توافق** طرفین اختلاف است و صرف **قابل اعتماد و اطمینان** بودن طرفین برای شخص داور کافی است و **تحصیلات حوزوی** یا حقوقی و غیره **شرط نیست**.
- **کلاس‌هایی** هم در این زمینه برگزار می‌شود که **مدارک معتبر** می‌دهند و درجه‌بندی هم می‌باشد.
  - **قوه قضاییه** هم بعد گذراندن دوره مدرک داوری اعطاء می‌کند.
- **داوری حکم قاضی خصوصی** را دارد و این موضوع با **ریش سفیدی و میانجی‌گری** فرق دارد.

- **رای داور** هم **عملیاتی** هست و هم **لازم الاجرا**، ولی **میانجی‌گری** لازم الاجرا نیست و به مثابه پیشنهاد مطرح می‌گردد و ممکن است طرفین در میانجی‌گری به توافق نرسند.
  - در واقع، در **میانجی‌گری** به دنبال **توافق** هستیم و **نه صدور رای**!
- **شرایطی** وجود دارد که رای داوری از طریق **دادگاه رد می‌گردد**.
  - در شرایطی که **رای مدلل و موجه نبوده** باشد...
    - ✓ یک داور بهتر است هم **کارشناس** بوده و هم **اشنا با علم حقوق** باشد چون انشای رای یک **نکته بسیار مهم** هست.

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Alternative dispute resolution – Arbitration: An overview

اشخاص زیر نمی‌توانند اقدام به داوری نمایند:

۱-کسانی که سن آنان کمتر از ۲۵ سال تمام باشند.

۲-کسانی که در دعوی یا اختلاف ذی‌نفع باشند.

۳-کسانی که با یکی از اصحاب دعوی قرابت سببی یا نسبی تا درجه دوم از طبقه سوم داشته باشند.

۴-کسانی که خود یا همسرانشان وراث یکی از طرفین باشند.

۵-کسانی که قیم یا کفیل یا وکیل یا مباشر امور یکی از اصحاب دعوی هستند یا یکی از اصحاب دعوی مباشر امور آنان باشد.

۶-کسانی که با یکی از اصحاب دعوی یا با اشخاصی که قرابت نسبی یا سببی تا درجه دوم از طبقه سوم دارند، در گذشته یا حال دادرسی کیفری داشته باشند.

۷-کسانی که خود یا همسرانشان یا یکی از اقربای سببی یا نسبی تا درجه دوم از طبقه سوم او با یکی از اصحاب دعوی (اختلاف) یا زوجه یا یکی از اقربای نسبی یا سببی تا درجه دوم از طبقه سوم او دادرسی مدنی دارند.

۸-کارمندان دولت در حوزه ماموریتشان

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Alternative dispute resolution – Arbitration: An overview

- **Private forum** in which a **panel** of **one or three "arbitrators"**
  1. Conducts hearing
  2. Issues a decision
- **Process** dictated by **contract** or **other formal agreement**
- **Third party neutral controls** the process
- **Decisions** are usually **legally binding** and **enforceable** in the court
  - Often the contract **eliminates right** to appeal to the **court,** but can be conducted in different forms: **domestic, international, non-binding, etc.**
- May be **dictated** by contract, statute, or other agreement
- Typically **follows a formal process** controlled by a **third party**
- Typically **not confidential** and everything will be recorded and will **become public**

How to select the arbitrators?

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Alternative dispute resolution – Arbitration: An overview

How to select the arbitrators?

- **American Arbitration Association (AAA)** provides **arbitration** services to individuals and organizations who wish to **resolve conflicts out of court** (www.ADR.org)
- The **AAA** also administers **mediation** through www.AAAMediation.org
- **AAA** was founded in **1926**.
- The **International Centre for Dispute Resolution (ICDR)**, established in **1996** by the **AAA**, administers **international arbitration proceedings** initiated under the institution's rules.
  - **ICDR** has offices in **USA**, **Mexico**, **Singapore**, and **Bahrain**

Each party selects one neutral arbitrator and those arbitrators select the third neutral arbitrator
The third party is the most neutral and will be assigned a chairman of the panel

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Alternative dispute resolution – Arbitration: An overview

آشنایی با انجمن داوری آمریکا و مرکز بین‌المللی حل اختلاف

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

Read it from the following link:
https://dralavipour.com/blog/view/aaa-icdr-intro

Alternative dispute resolution – Arbitration: An overview

*The **CM** will likely be a key percipient witness on **behalf of the owner** in the **arbitration***

hearing

and

may** be responsible for **organizing the document** production **allowed by the arbitration

panel.

The **CM's readiness** to properly **testify as a witness** as to **all aspects of the claim** is

critical to the successful conduct of the arbitration hearing.

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Alternative dispute resolution – Arbitration: Typical procedure

1. **Making a written demand to the other side to initiate arbitration**
   - ❖ Stating the **nature** of the **dispute**
   - ❖ Stating the **amount involved**
   - ❖ Stating the **remedy sought**

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Alternative dispute resolution – Arbitration: Typical procedure

2. Selecting an arbitrator and arbitral panel

- If the other party agrees to arbitrate, a **board of arbitration**, usually consisting of **one or three persons**, is then selected.
  - ✓ How **many arbitrators** are required?
  - ✓ Not only based on their **impartiality**, but also their **knowledge** and **experience** in the construction field.
  - ✓ No arbitrator should have any **family**, **business**, or **financial relationship**
- What is the **technical expertise** and **experience** desired?
- What is the **individual's reputation** for **impartiality**, **fairness** and **soundness** of decisions?
- What are the **fee structures**?
- **How** will the arbitrator(s) be **chosen**?
- What **specific skills** are **required** by the arbitrator?

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Alternative dispute resolution – Arbitration: Typical procedure

3. Preparatory (preliminary) conference

❖ Once the arbitrator has been **chosen**,

parties normally agree to **hold a preparatory conference** and specify **date and place** of **hearing**.

✓ **Where** will the arbitration be held?

- The location should be **neutral**, **accessible** and **convenient**.

✓ **What type** of **formality** is required?

✓ What are the **costs** of **facilities**?

✓ Would it be **advisable** to use the **expertise** of established service providers?

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Alternative dispute resolution – Arbitration: Typical procedure

4. Exchange of statement of positions

- Then, **arbitrator asks** to

  submit the issues by asking the **exchange of statements** of position

  - ✓ Are the issues **defined in writing** and **agreed by all parties**?

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Alternative dispute resolution – Arbitration: Typical procedure

5. Conduct of the arbitration hearing

- **Each party** can be **represented** by **counsel** and
- **Each party** is **entitled** to **question** the **other party** and **its witnesses** (less formal than litigation).

i. Pre-hearing Disclosure

- ✓ What **documents** are to be **exchanged** (financial statements, business records, contracts, reports from experts..)?
- ✓ Set forth in **writing** the **names** and **statements** of **all witnesses**.
- ✓ **Exchange** expert **witness reports**.
- ✓ What are the **time frames** for **disclosure** and **penalties** for **default**
- ✓ What is the **power** of the **arbitrator** to **deal** with any **default**.

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Alternative dispute resolution – Arbitration: Typical procedure

5. Conduct of the arbitration hearing

ii. Conduct of Hearing

- ✓ Is the arbitration to be **conducted entirely** on the **basis** of an **exchange of documents?**
- ✓ Will there be **submissions only** on the **documentary evidence** (written or verbal)?
- ✓ If there will be **oral evidence**, **who** will give it?
- ✓ What is the **sequence** for the **presentation** of **evidence**?
- ✓ Will the **rules of evidence** be **formal** or **relaxed**? If the **latter**, under w**hat circumstances**?
- ✓ Will **copies of documents** be **accepted**?
- ✓ Will the **sessions** be **recorded**; if so how?
- ✓ What will be the **powers of the arbitrator**?
  - o Should they be allowed to **order interim measures**
  - o Should they be allowed to **appoint** an **expert**

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Alternative dispute resolution – Arbitration: Typical procedure

6. Awards

- An arbitral **panel** shall be in **writing** and shall be **signed** by the **arbitrator or arbitrators.**
- A **written copy** of the **findings and award** signed by the arbitrators is **sent** to each of the parties.
- Once the **disputants** have **submitted** to arbitration and an **award** is **handed down**, the parties are **bound to it.**
  - ✓ What is the **time** for **delivery** of the **award**?
  - ✓ Are there **sanctions** for **failure to deliver** the award in a **timely** fashion?.
  - ✓ Are **written reasons** required?

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Alternative dispute resolution – Arbitration: Typical procedure

Do not forget to consider the following points

- **Take** an **active role** in **panel selection**
- **Select** a **panel chair** that will help **expediting** the hearing process
- **Tailor** and **minimize discovery**
- **Simplify** the **rules of evidence**
- **Use experienced counsel** and **independent experts** to prepare a comprehensive case strategy
- Consider using **independent expert witnesses** to:
  - **Assess** the technical issues
  - **Prepare** analysis that demonstrates entitlement
  - Persuasively **present analysis** and results
  - Properly **calculate damages**
  - **Prepare** demonstrative exhibits

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Alternative dispute resolution – Arbitration: Pros

- **Arbitrators** can be **selected** on the basis of **experience** relevant to the issues
- **Follows** a format, defined process
- **Limited discovery** compared to **litigation**
- **Lower costs** for pre-trial phase
- Can be **faster** than litigation
- Party involvement in **panel selection**

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Alternative dispute resolution – Arbitration: Cons

- Positions presented are considered **sworn testimony**
  - **Unlike mediation**, cases can be used **against you**.
- **Costs** can **increase**
- Can take **longer** than expected
- **Limited appeal** options
  - Usually it is binding

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Alternative dispute resolution – Dispute review boards: An Overview

- The **DRB method** of dispute resolution was developed by the **committee** on contracting practices of the underground technology **research council of ASCE**

- The **DRB** comprises **three members**: one selected by the **owner**, one by the **contractor**, and a third selected by the **first two**

- All **DRB members** are **impartial** and **experienced** in **construction**;
  they are **appointed soon** after the **contract is awarded**.
  however, it is critical that the individuals are **neutral**.

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Alternative dispute resolution – Dispute review boards: An Overview

- Normally the contract provides for the **DRB to meet** at the **job site** on a **regular basis**.

  typically **quarterly**, or **more frequently**, if needed.

- The **board** is to be **kept informed** of

  1. Project's progress
  2. Issues as they develop

DRB members are sent progress reports and visit the project periodically

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Alternative dispute resolution – Dispute review boards: An Overview

- The **DRB** is **not used** for routing claims,

  but for the **resolution** of **major problems**

- The **board** usually does **not make decisions**,

  but gives the parties **its recommendation** in **writing** and the **reasons** for the **conclusions** reached.

- The **recommendations** of the DRB are **not usually legally binding**,

  but are **not likely** to be **reversed** in **litigation**

  Although *the recommendations of the board are usually* ***not binding****,* ***experience*** *has shown that such recommendations are* ***accepted in nearly all instances****.*

The ***DRB method*** *of dispute resolution has been used with* ***great success*** *in several* ***construction projects***

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Alternative dispute resolution – Dispute review boards: An Overview

- DRB **hearings** are **typically informal**.
- **Once** a dispute has been **heard**, the board will caucus to **render a decision**.
  - The board's findings are presented in **writing**.
  - Generally, DRB findings are **non-binding**; however, they **usually** are **admissible in court.**
- The **cost of the DRB** is generally **split 50/50** between the owner and the contractor
- **Provisions** for a dispute review board (DRB) are made in the **contract** between the parties.
- The DRB is **growing in popularity** as it has been **successfully** used on **heavy construction projects** such as dams, highways, and transit work.

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Alternative dispute resolution – Dispute review boards: An Overview

- DRBs are **similar to arbitration** in that **each party presents its position** to an **impartial panel** empowered to render a ruling.
  - The **decisions** may be **admissible** in **later arbitration or litigation**.
  - Typically a **presentation** by **each party to the DRB** is required.
  - The **DRB process** is intended to offer a **more efficient** and expedient method to resolve disputed issues **during the project rather than delaying** the resolution until litigation.
  - The **CM** may present the **owner's position** or at least **contribute materially** to the content of the **presentation**.
    - ✓ Hence, the **CM**'s readiness to **claim and present** on **behalf of the owner** is important to the successful conduct of the DRB hearing.

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Alternative dispute resolution – Dispute review boards: An Overview

The American Society of Civil Engineers (ASCE) publication *Avoiding and Resolving Disputes During Construction: Successful Practices and Guidelines*, documents projects where DRBs have been utilized. Of significance, in over 100 projects listed, there were only a small number of disputes that were heard by a DRB. Moreover, no disputes resulted in litigation. The reason for the success of the DRB can be summarized as follows:

- Disputes can be resolved on a timely basis.
- The neutral has construction expertise and is selected by the parties before any dispute arises; such pre-selection saves time.
- The timely nature of the hearings and dispute can be addressed while facts are still current.
- Recognition by bidders that an alternative dispute resolution procedure is in place.
- Early identification of issues and problems.
- Encouragement of communication and evaluation of issues.
- Heavy expenses of post-project proceedings are avoided and everybody saves money.

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Alternative dispute resolution – Dispute review boards: Pros

- The **DRB** **hears** disputes of an **informal basis** and can provide **recommendations** for their **timely resolution** before parties adopt **hard positions** leading to litigation

- The parties are **comfortable** with the recommendations of the DRB **since** the selection of the DRB members is **controlled** by the **owner and the contractor**

- Because they **meet periodically** and they are sent **progress reports**, the DRB members are **familiar** with the **elements of the project**

- With an established **DRB to address disputes** as they arise,

  *construction will continue with the **contractor's and owner's efforts** **focused** on the **work** and **not on the claims***

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Alternative dispute resolution – Dispute review boards: Pros

- There are **no expensive** and **time consuming** preparations compared to the case of **formal litigation**
- **Although** the DRB recommendations are **not usually binding** on either party, there is **strong incentive** to **accept** the findings
- The existence of the DRB **fosters** a **more cooperative** relationship between the parties and often **provides** the **motivation** for **settlement** of disputes **without appeal** to the DRB

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Alternative dispute resolution – Dispute review boards: Cons

- The DRB does **not replace** the **existing dispute settlement** methods; **rather** it is an **intermediate step** directed at **facilitating** dispute resolution
- There is a **tendency** on the part of the owner and the contractor to use the DRB as a **consulting body** rather than reaching a settlement
- The DRB method has **not been used** as **extensively** as the other **ADRs**
- **Sometimes** there are **not enough qualified people** for the DRB
- The **project** must be **large enough**, and the **probability** of **occurrence** of disputes throughout the **course of the project** must be **high enough** to

justify the expense *of* ***retaining*** *the services of the DRB members for the* ***entirety of the project***

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Alternative dispute resolution – Litigation: An overview

- Decision is made by a **judge or jury**
- Follows a **formal** process
- Legally **binding**, but **right to appeal** on questions of law
- The **CM's readiness** to properly **testify as a witness** to **all aspects of the claim** is critical to the **successful conduct** of the litigation.

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Alternative dispute resolution – Litigation: Typical procedure

Do not forget to consider the following points

- **Use** experienced **construction law counsel**
- **Know** and **understand** all of the **applicable case law**
- **Use experienced independent experts** to
  - **Prepare** a **comprehensive case strategy**
    - ✓ **Judges and juries not construction expert**, so look for a proven ability to **simplify** and effectively communicate
  - **Assess** the **technical** issues
  - **Assist** in **discovery** requests
  - **Present** analysis to demonstrate **entitlement**
  - Persuasively **present** a through analysis of the **facts**
  - **Apply accepted methods** to determine impacts and calculate damages

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Alternative dispute resolution – Litigation: Pros

- Conducted on **sequential days**, so judge/jury is more likely to **retain information**
- **Binding decision/judgement**
  - Subject to appeal for **errors** of law or **abuse** of discretion
- **Tell your side** of the **story** to a **neutral** decision-maker/fact-finder
- **Full opportunity** to take **discovery** to **uncover pertinent facts**
- **More appeal options**
  - If the **court is incorrect** in its statement or application of legal principles, the litigants have an **avenue of appeal**

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Alternative dispute resolution – Litigation: Cons

- Requires **more time**
- **Discovery** results in **higher pre-trial costs**
  - Discovery from emails, letters, notices, etc. are **extremely expensive**
- **Higher overall costs** due to trial
- Explaining a construction project to a **jury that is not professionally familiar**
- **Lack of control** over the process
- **Decision** is available to the **public**

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Alternative dispute resolution – Conclusion

When to use negotiation?

- If you are **unable to prevent the dispute**, do your best to **resolve it** through **negotiation**
  - This is your **fastest** and **cheapest** option
  - A **negotiated settlement** is the **best way to preserve** an **ongoing business** relationship
  - **Be objective** in your **analysis**
  - **Your costs** to resolve the matter only **go up from here**

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Alternative dispute resolution – Conclusion

When to use mediation?

- If you are **unable to resolve** the matter by **negotiation**, **if you believe** it is a **"good faith" dispute**, consider giving **mediation** a try
  - Do it as **early as possible**
  - All parties must be **willing to compromise**
  - Be prepared with a **persuasive presentation**
  - Be mindful of the **cost and risk** of **going forward**

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Alternative dispute resolution – Conclusion

When to use arbitration/litigation?

- If you are **unable to resolve** the matter by **mediation**, consider other alternatives to **arbitration/litigation**
  - Early neutral evaluation
  - Minim-trials
  - Fast-track arbitration

If you are unable to avoid arbitration or litigation, keep in mind:

- **It is never too late to settle**
  - Factor **costs** into your considerations and understand that you have **already lost**
  - **Keep** the **lines of communication open**
  - **Settlement** avoids the **expense and stress** of trial
    - ✓ It allows the parties to **get back** to the **business** of their businesses

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Alternative dispute resolution – Conclusion

It is never too early to think about next time

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Claims and Disputes Resolution

(Contract forms)

What forms of agreement?

- **AIA Document A201-2017:** General Conditions of the Contract for Construction
- **FIDIC (Red Book, 2017)**
- نشریه ۴۳۱۱

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❑ Claims

Remember we saw this multiple times?

§ 15.1.1 Definition

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim. This Section 15.1.1 does not require the Owner to file a Claim in order to impose liquidated damages in accordance with the Contract Documents.

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❑ Claims

Remember we saw this multiple times?

§ 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.

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❑ Claims

§ 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

§ 15.1.3.2 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party. In such event, no decision by the Initial Decision Maker is required.

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❑ Claims

§ 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.

§ 15.1.4.2 The Contract Sum and Contract Time shall be adjusted in accordance with the Initial Decision Maker's decision, subject to the right of either party to proceed in accordance with this Article 15. The Architect will issue Certificates for Payment in accordance with the decision of the Initial Decision Maker.

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❑ Claims

This requires the contractor to have contemporaneous analysis

§ 15.1.5 Claims for Additional Cost

If the Contractor wishes to make a Claim for an increase in the Contract Sum, notice as provided in Section 15.1.3 shall be given before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

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❑ Claims

This requires the contractor to have contemporaneous analysis

§ 15.1.6 Claims for Additional Time

§ 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section 15.1.3 shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

§ 15.1.6.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction.

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❑ Claims

Remember this?

§ 15.1.7 Waiver of Claims for Consequential Damages

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

.1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit, except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.7 shall be deemed to preclude assessment of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

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❑ Initial decision

Initial Decision Maker only decides for owner, unless something else mentioned!

§ 15.2.1 Claims, excluding those where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2 or arising under Sections 10.3, 10.4, and 11.5, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, an initial decision shall be required as a condition precedent to mediation of any Claim. If an initial decision has not been rendered within 30 days after the Claim has been referred to the Initial Decision Maker, the party asserting the Claim may demand mediation and binding dispute resolution without a decision having been rendered. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner.

§ 15.2.2 The Initial Decision Maker will review Claims and within ten days of the receipt of a Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Initial Decision Maker is unable to resolve the Claim if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in the Initial Decision Maker's sole discretion, it would be inappropriate for the Initial Decision Maker to resolve the Claim.

Initial Decision Maker has 5 choices after the notice received!

The decision should be made within 10 days!

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❑ Initial decision

§ 15.2.3 In evaluating Claims, the Initial Decision Maker may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Initial Decision Maker in rendering a decision. The Initial Decision Maker may request the Owner to authorize retention of such persons at the Owner's expense.

§ 15.2.4 If the Initial Decision Maker requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of the request, and shall either (1) provide a response on the requested supporting data, (2) advise the Initial Decision Maker when the response or supporting data will be furnished, or (3) advise the Initial Decision Maker that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Initial Decision Maker will either reject or approve the Claim in whole or in part.

Party should respond to Initial Decision Maker's request within 10 days in 3 different ways!

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❑ Initial decision

***Initial Decision Maker** makes initial decision in writing including the statement of reasons for decision!*

§ 15.2.5 The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.

Initial Decision Maker's decision is final and binding unless the parties do not agree…

1. ***Mediation***
2. ***Binding dispute resolution***

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❑ Initial decision

The party that disagrees with the initial decision

Should demand for mediation in writing within 30 days

§ 15.2.6 Either party may file for mediation of an initial decision at any time, subject to the terms of Section 15.2.6.1.

§ 15.2.6.1 Either party may, within 30 days from the date of receipt of an initial decision, demand in writing that the other party file for mediation. If such a demand is made and the party receiving the demand fails to file for mediation within 30 days after receipt thereof, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

If the party fails to file for mediation within 30 days after receipt of a demand for mediation, the rights could be waived!

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❑ Initial decision

§ 15.2.7 In the event of a Claim against the Contractor, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

§ 15.2.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

Mechanic's liens are legal documents that essentially **reserve the rights** of the filer to **seek unpaid compensation**. They are **usually filed by** contractors, subcontractors, or suppliers that **never received payment** for work that they performed or materials that they provided on the property.

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❑ Mediation

§ 15.3.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract, except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.7, shall be subject to mediation as a condition precedent to binding dispute resolution.

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❑ Mediation

This procedure will be taught in advanced level of this course in "Consulting Level"

§ 15.3.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section 15.3.2, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

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❑ Mediation

If disputes have not been resolved….

1. **30 days from the date that mediation has been concluded, or**
2. **60 days after mediation has been demanded**

Either party can file for binding dispute resolution

§ 15.3.3 Either party may, within 30 days from the date that mediation has been concluded without resolution of the dispute or 60 days after mediation has been demanded without resolution of the dispute, demand in writing that the other party file for binding dispute resolution. If such a demand is made and the party receiving the demand fails to file for binding dispute resolution within 60 days after receipt thereof, then both parties waive their rights to binding dispute resolution proceedings with respect to the initial decision.

§ 15.3.4 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

If demand is made but party received the demand has failed to file for binding dispute resolution within 60 days after receipt,

Both parties waive their rights for binding dispute resolution

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❑ Arbitration

This procedure will be taught in advanced level of this course in "Consulting Level"

§ 15.4.1 If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. The Arbitration shall be conducted in the place where the Project is located, unless another location is mutually agreed upon. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

§ 15.4.1.1 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

The time that the claim is not valid any more (e.g., 10 years after substantial completion)

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❑ Arbitration

§ 15.4.2 The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

§ 15.4.3 The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement, shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

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❑ Arbitration

Consolidation is the act of **combining multiple lawsuits** into a single suit.
Joinder is the act of **bringing additional parties** into a lawsuit.

§ 15.4.4 Consolidation or Joinder

§ 15.4.4.1 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 15.4.4.2 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

§ 15.4.4.3 The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joinder or consolidation, the same rights of joinder and consolidation as those of the Owner and Contractor under this Agreement.

FIDIC (Red Book)

- ***Dispute Resolution Board:*** As is well known, the **procedure** for the settlement of disputes in **Clause 20** of the **New Red Book** provides that disputes must be submitted **initially to the Engineer** for decision **before** they may be referred to **arbitration**.

- **Under this new alternative**, **instead** of having disputes submitted to the **Engineer** for settlement **before arbitration**,

  they would be submitted to the **Board**.

  - Where this **alternative procedure is adopted**,

    the **Engineer** would **no longer** have any **involvement** in deciding disputes under **Clause 20**.

How the board is constituted and how it should operate?

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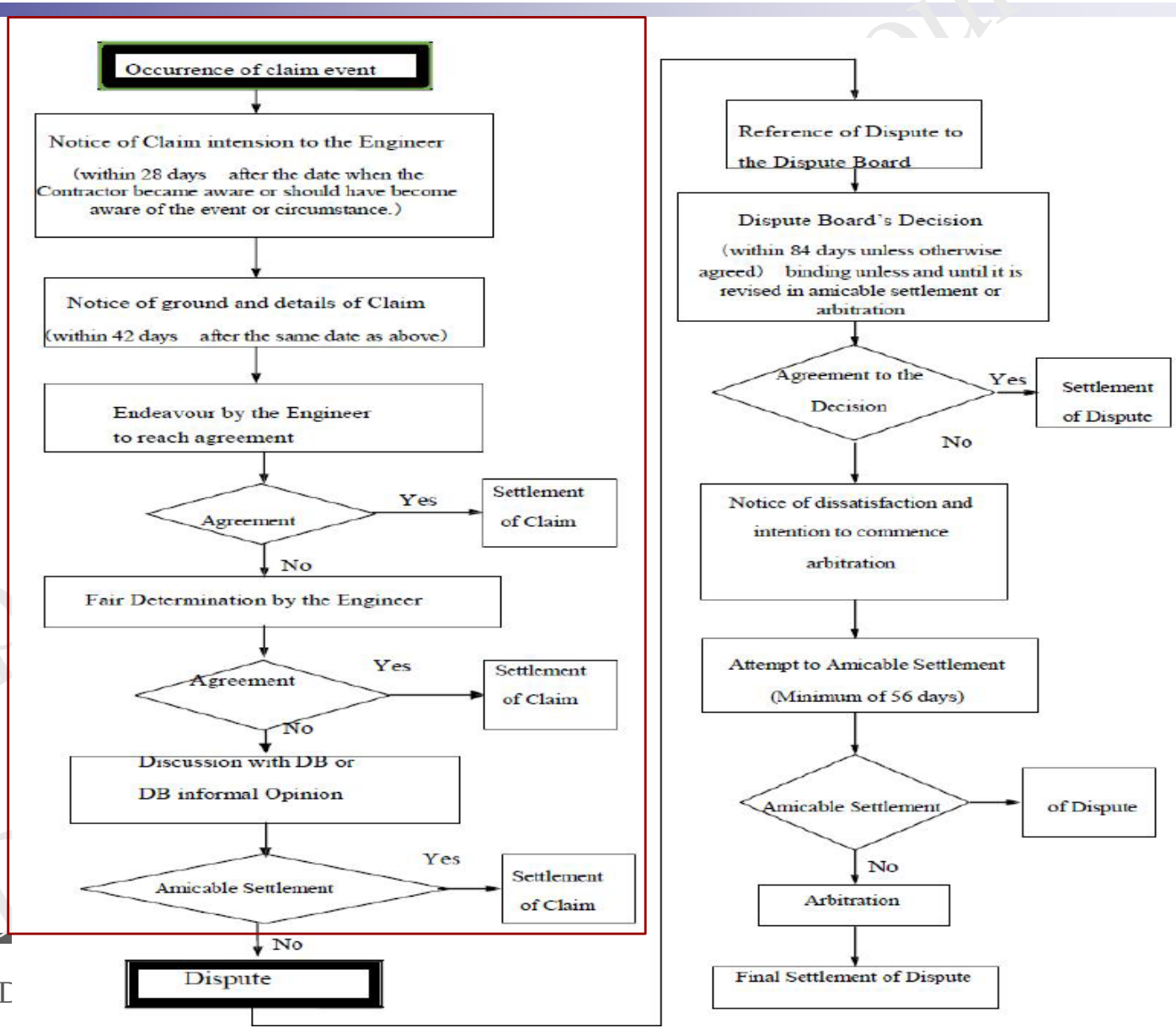
FIDIC (Red Book)



FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

This part has been received a great change and improvement compared to 1999

❖ Claims (20.1)

✓ DNP = Defects notification period

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.

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FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims (20.1)

In the case of a Claim under sub-paragraph (a) or (b) above, Sub-Clause 20.2 [*Claims For Payment and/or EOT*] shall apply.

In the case of a Claim under sub-paragraph (c) above, where the other Party or the Engineer has disagreed with the requested entitlement or relief (or is deemed to have disagreed if he/she does not respond within a reasonable time), a Dispute shall not be deemed to have arisen but the claiming Party may, by giving a Notice refer the Claim to the Engineer and Sub-Clause 3.7 [Agreement or Determination] shall apply. This Notice shall be given as soon as practicable after the claiming Party becomes aware of the disagreement (or deemed disagreement) and include details of the claiming Party's case and the other Party's or the Engineer's disagreement (or deemed disagreement).

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FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

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:

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FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

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.

FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

20.2.2 Engineer's initial response

If the Engineer considers that the claiming Party has failed to give the Notice of Claim within the period of 28 days under Sub-Clause 20.2.1 [*Notice of Claim*] the Engineer shall, within 14 days after receiving the Notice of Claim, give a Notice to the claiming Party accordingly (with reasons).

If the Engineer does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice. If the other Party disagrees with such deemed valid Notice of Claim the other Party shall give a Notice to the Engineer which shall include details of the disagreement. Thereafter, the agreement or determination of the Claim under Sub-Clause 20.2.5 [*Agreement or determination of the Claim*] shall include a review by the Engineer of such disagreement.

If the claiming Party receives a Notice from the Engineer under this Sub-Clause and disagrees with the Engineer or considers there are circumstances which justify late submission of the Notice of Claim, the claiming Party shall include in its fully detailed Claim under Sub-Clause 20.2.4 [*Fully detailed claim*] details of such disagreement or why such late submission is justified (as the case may be).

FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

Remember this?

❖ Claims for payment and/or EOT (20.2)

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.

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FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

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.

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❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

So, let's see 20.2.6 [claims of continuing effect] first, and then talk about 20.2.5 [agreement or determination of the claim]

If within this time limit the claiming Party fails to submit the statement under sub-paragraph (b) above, the Notice of Claim shall be deemed to have lapsed, it shall no longer be considered as a valid Notice, and the Engineer shall, within 14 days after this time limit has expired, give a Notice to the claiming Party accordingly.

If the Engineer does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice. If the other Party disagrees with such deemed valid Notice of Claim the other Party shall give a Notice to the Engineer which shall include details of the disagreement. Thereafter, the agreement or determination of the Claim under Sub-Clause 20.2.5 [*Agreement or determination of the Claim*] shall include a review by the Engineer of such disagreement.

If the claiming Party receives a Notice from the Engineer under this Sub-Clause 20.2.4 and if the claiming Party disagrees with such Notice or considers there are circumstances which justify late submission of the statement under sub-paragraph (b) above, the fully detailed claim shall include details of the claiming Party's disagreement or why such late submission is justified (as the case may be).

If the event or circumstance giving rise to the Claim has a continuing effect, Sub-Clause 20.2.6 [*Claims of continuing effect*] shall apply.

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❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

Do not forget that both Employer and Contractor can claim!

Contractor:

1. **Additional payment**
2. **EOT**

Employer:

1. **Reduction of the contract price**
2. **Extension of DNP**

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).

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❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

20.2.5 Agreement or determination of the Claim

After receiving a fully detailed Claim either under Sub-Clause 20.2.4 [*Fully detailed Claim*], or an interim or final fully detailed Claim (as the case may be) under Sub-Clause 20.2.6 [*Claims of continuing effect*], the Engineer shall proceed under Sub-Clause 3.7 [*Agreement or Determination*] to agree or determine:

(a) the additional payment (if any) to which the claiming Party is entitled or the reduction of the Contract Price (in the case of the Employer as the claiming Party); and/or

(b) the extension (if any) of the Time for Completion (before or after its expiry) under Sub-Clause 8.5 [*Extension of Time for Completion*] (in the case of the Contractor as the claiming Party), or the extension (if any) of the DNP (before its expiry) under Sub-Clause 11.3 [*Extension of Defects Notification Period*] (in the case of the Employer as the claiming Party),

to which the claiming Party is entitled under the Contract.

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❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

If the Engineer has given a Notice under Sub-Clause 20.2.2 [*Engineer's initial response*] and/or under Sub-Clause 20.2.4 [*Fully detailed Claim*], the Claim shall nevertheless be agreed or determined in accordance with this Sub-Clause 20.2.5. The agreement or determination of the Claim shall include whether or not the Notice of Claim shall be treated as a valid Notice taking account of the details (if any) included in the fully detailed claim of the claiming Party's disagreement with such Notice(s) or why late submission is justified (as the case may be). The circumstances which may be taken into account (but shall not be binding) may include:

- whether or to what extent the other Party would be prejudiced by acceptance of the late submission;
- in the case of the time limit under Sub-Clause 20.2.1 [*Notice of Claim*], any evidence of the other Party's prior knowledge of the event or circumstance giving rise to the Claim, which the claiming Party may include in its supporting particulars; and/or
- in the case of the time limit under Sub-Clause 20.2.4 [*Fully detailed Claim*], any evidence of the other Party's prior knowledge of the contractual and/or other legal basis of the Claim, which the claiming Party may include in its supporting particulars.

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❑ FIDIC-2017

❖ Agreement and determination (3.7)

When carrying out his/her duties under this Sub-Clause, the Engineer shall act neutrally between the Parties and shall not be deemed to act for the Employer.

Whenever these Conditions provide that the Engineer shall proceed under this Sub-Clause to agree or determine any matter or Claim, the following procedure shall apply:

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- **FIDIC-2017**
  - Agreement and determination (3.7)

3.7.1 Consultation to reach agreement

The Engineer shall consult with both Parties jointly and/or separately, and shall encourage discussion between the Parties in an endeavour to reach agreement. The Engineer shall commence such consultation promptly to allow adequate time to comply with the time limit for agreement under Sub-Clause 3.7.3 [*Time limits*]. Unless otherwise proposed by the Engineer and agreed by both Parties, the Engineer shall provide both Parties with a record of the consultation.

If agreement is achieved, within the time limit for agreement under Sub-Clause 3.7.3 [*Time limits*], the Engineer shall give a Notice to both Parties of the agreement, which agreement shall be signed by both Parties. This Notice shall state that it is a "Notice of the Parties' Agreement" and shall include a copy of the agreement.

If:

(a) no agreement is achieved within the time limit for agreement under Sub-Clause 3.7.3 [*Time limits*]; or

(b) both Parties advise the Engineer that no agreement can be achieved within this time limit

whichever is the earlier, the Engineer shall give a Notice to the Parties accordingly and shall immediately proceed as specified under Sub-Clause 3.7.2 [*Engineer's Determination*].

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- **FIDIC-2017**
  - Agreement and determination (3.7)

3.7.2 Engineer's Determination

The Engineer shall make a fair determination of the matter or Claim, in accordance with the Contract, taking due regard of all relevant circumstances.

Within the time limit for determination under Sub-Clause 3.7.3 [*Time limits*], the Engineer shall give a Notice to both Parties of his/her determination. This Notice shall state that it is a "Notice of the Engineer's Determination", and shall describe the determination in detail with reasons and detailed supporting particulars.

3.7.3 Time limits

The Engineer shall give the Notice of agreement, if agreement is achieved, within 42 days or within such other time limit as may be proposed by the Engineer and agreed by both Parties (the "time limit for agreement" in these Conditions), after:

(a) in the case of a matter to be agreed or determined (not a Claim), the date of commencement of the time limit for agreement as stated in the applicable Sub-Clause of these Conditions;

(b) in the case of a Claim under sub-paragraph (c) of Sub-Clause 20.1 [*Claims*], the date the Engineer receives a Notice under Sub-Clause 20.1 from the claiming Party; or

(c) in the case of a Claim under sub-paragraph (a) or (b) of Sub-Clause 20.1 [*Claims*], the date the Engineer receives:

(i) a fully detailed Claim under Sub-Clause 20.2.4 [*Fully Detailed Claim*]; or

(ii) in the case of a Claim under Sub-Clause 20.2.6 [*Claims of continuing effect*], an interim or final fully detailed Claim (as the case may be).

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❖ Agreement and determination (3.7)

The Engineer shall give the Notice of his/her determination within 42 days or within such other time limit as may be proposed by the Engineer and agreed by both Parties (the "time limit for determination" in these Conditions), after the date corresponding to his/her obligation to proceed under the last paragraph of Sub-Clause 3.7.1 [*Consultation to reach agreement*].

If the Engineer does not give the Notice of agreement or determination within the relevant time limit:

(i) in the case of a Claim, the Engineer shall be deemed to have given a determination rejecting the Claim; or

(ii) in the case of a matter to be agreed or determined, the matter shall be deemed to be a Dispute which may be referred by either Party to the DAAB for its decision under Sub-Clause 21.4 [*Obtaining DAAB's Decision*] without the need for a NOD (and Sub-Clause 3.7.5 [*Dissatisfaction with Engineers determination*] and sub-paragraph (a) of Sub-Clause 21.4.1 [*Reference of a Dispute to the DAAB*] shall not apply).

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❖ Agreement and determination (3.7)

3.7.4 Effect of the agreement or determination

Each agreement or determination shall be binding on both Parties (and shall be complied with by the Engineer) unless and until corrected under this Sub-Clause or, in the case of a determination, it is revised under Clause 21 [*Disputes and Arbitration*].

If an agreement or determination concerns the payment of an amount from one Party to the other Party, the Contractor shall include such an amount in the next Statement and the Engineer shall include such amount in the Payment Certificate that follows that Statement.

If, within 14 days after giving or receiving the Engineer's Notice of agreement or determination, any error of a typographical or clerical or arithmetical nature is found:

(a) by the Engineer: then he/she shall immediately advise the Parties accordingly; or

(b) by a Party: then that Party shall give a Notice to the Engineer, stating that it is given under this Sub-Clause 3.7.4 and clearly identifying the error. If the Engineer does not agree there was an error, he/she shall immediately advise the Parties accordingly.

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❖ Agreement and determination (3.7)

The Engineer shall within 7 days of finding the error, or receiving a Notice under sub-paragraph (b) above (as the case may be), give a Notice to both Parties of the corrected agreement or determination. Thereafter, the corrected agreement or determination shall be treated as the agreement or determination for the purpose of these Conditions.

3.7.5 Dissatisfaction with Engineer's determination

If either Party is dissatisfied with a determination of the Engineer:

(a) the dissatisfied Party may give a NOD to the other Party, with a copy to the Engineer;

(b) this NOD shall state that it is a "Notice of Dissatisfaction with the Engineer's Determination" and shall set out the reason(s) for dissatisfaction;

(c) this NOD shall be given within 28 days after receiving the Engineer's Notice of the determination under Sub-Clause 3.7.2 [*Engineer's Determination*] or, if applicable, his/her Notice of the corrected determination under Sub-Clause 3.7.4 [*Effect of the agreement or determination*] (or, in the case of a deemed determination rejecting the Claim, within 28 days after the time limit for determination under Sub-Clause 3.7.3 [*Time limits*] has expired); and

(d) thereafter, either Party may proceed under Sub-Clause 21.4 [*Obtaining DAAB's Decision*].

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❖ Agreement and determination (3.7)

If no NOD is given by either Party within the period of 28 days stated in sub-paragraph (c) above, the determination of the Engineer shall be deemed to have been accepted by both Parties and shall be final and binding on them.

If the dissatisfied Party is dissatisfied with only part(s) of the Engineer's determination:

(i) this part(s) shall be clearly identified in the NOD;

(ii) this part(s), and any other parts of the determination that are affected by such part(s) or rely on such part(s) for completeness, shall be deemed to be severable from the remainder of the determination; and

(iii) the remainder of the determination shall become final and binding on both Parties as if the NOD had not been given.

In the event that a Party fails to comply with an agreement of the Parties under this Sub-Clause 3.7 or a final and binding determination of the Engineer, the other Party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration under Sub-Clause 21.6 [*Arbitration*] in which case the first and the third paragraphs of Sub-Clause 21.7 [*Failure to Comply with DAAB's Decision*] shall apply to such reference in the same manner as these paragraphs apply to a final and binding decision of the DAAB.

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❑ Disputes and Arbitration (21)

❖ Constitution of the Dispute Avoidance and Adjudication Board (DAAB)

Disputes shall be decided by a DAAB in accordance with Sub-Clause 21.4 [*Obtaining DAAB's Decision*]. The Parties shall jointly appoint the member(s) of the DAAB within the time stated in the Contract Data (if not stated, 28 days) after the date the Contractor receives the Letter of Acceptance.

The DAAB shall comprise, as stated in the Contract Data, either one suitably qualified member (the "sole member") or three suitably qualified members (the "members"). If the number is not so stated, and the Parties do not agree otherwise, the DAAB shall comprise three members.

The sole member or three members (as the case may be) shall be selected from those named in the list in the Contract Data, other than anyone who is unable or unwilling to accept appointment to the DAAB.

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❑ Disputes and Arbitration (21)

❖ Constitution of the Dispute Avoidance and Adjudication Board (DAAB)

If the DAAB is to comprise three members, each Party shall select one member for the agreement of the other Party. The Parties shall consult both these members and shall agree the third member, who shall be appointed to act as chairperson.

The DAAB shall be deemed to be constituted on the date that the Parties and the sole member or the three members (as the case may be) of the DAAB have all signed a DAAB Agreement.

The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DAAB consults, shall be mutually agreed by the Parties when agreeing the terms of the DAAB Agreement. Each Party shall be responsible for paying one-half of this remuneration.

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❑ Disputes and Arbitration (21)

❖ Constitution of the Dispute Avoidance and Adjudication Board (DAAB)

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace any one or more members of the DAAB. Unless the Parties agree otherwise, a replacement DAAB member shall be appointed if a member declines to act or is unable to act as a result of death, illness, disability, resignation or termination of appointment. The replacement member shall be appointed in the same manner as the replaced member was required to have been selected or agreed, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone.

Unless otherwise agreed by both Parties, the term of the DAAB (including the appointment of each member) shall expire either:

(a) on the date the discharge shall have become, or deemed to have become, effective under Sub-Clause 14.12 [*Discharge*]; or

(b) 28 days after the DAAB has given its decision on all Disputes, referred to it under Sub-Clause 21.4 [*Obtaining DAAB's Decision*] before such discharge has become effective,

whichever is later.

When submitting the Final Statement or the Partially Agreed Final Statement (as the case may be), the Contractor shall submit a discharge which confirms that the total of such Statement represents full and final settlement of all moneys due to the Contractor under or in connection with the Contract. This discharge may state that the total of the Statement is subject to any payment that may become due in respect of any Dispute for which a DAAB proceeding or arbitration is in progress under Sub-Clause 21.6 [*Arbitration*] and/or that it becomes effective after the Contractor has received:

(a) full payment of the amount certified in the FPC; and
(b) the Performance Security.

If the Contractor fails to submit this discharge, the discharge shall be deemed to have been submitted and to have become effective when the conditions of sub-paragraphs (a) and (b) have been fulfilled.

A discharge under this Sub-Clause shall not affect either Party's liability or entitlement in respect of any Dispute for which a DAAB proceeding or arbitration is in progress under Clause 21 [*Disputes and Arbitration*].

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❑ Disputes and Arbitration (21)

❖ Constitution of the Dispute Avoidance and Adjudication Board (DAAB)

However, if the Contract is terminated under any Sub-Clause of these Conditions or otherwise, the term of the DAAB (including the appointment of each member) shall expire 28 days after:

(i) the DAAB has given its decision on all Disputes, which were referred to it (under Sub-Clause 21.4 [*Obtaining DAAB's Decision*]) within 224 days after the date of termination; or

(ii) the date that the Parties reach a final agreement on all matters (including payment) in connection with the termination

whichever is earlier.

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❑ Disputes and Arbitration (21)

- ❖ Failure to appoint DAAB members (21.2)

Read it yourself!

If any of the following conditions apply, namely:

(a) if the DAAB is to comprise a sole member, the Parties fail to agree the appointment of this member by the date stated in the first paragraph of Sub-Clause 21.1 [*Constitution of the DAAB*]; or

(b) if the DAAB is to comprise three persons, and if by the date stated in the first paragraph of Sub-Clause 21.1 [*Constitution of the DAAB*]:

(i) either Party fails to select a member (for agreement by the other Party);

(ii) either Party fails to agree a member selected by the other Party; and/or

(iii) the Parties fail to agree the appointment of the third member (to act as chairperson) of the DAAB;

(c) the Parties fail to agree the appointment of a replacement within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, illness, disability, resignation, or termination of appointment; or

(d) if, after the Parties have agreed the appointment of the member(s) or replacement, such appointment cannot be effected because one Party refuses or fails to sign a DAAB Agreement with any such member or replacement (as the case may be) within 14 days of the other Party's request to do so,

then the appointing entity or official named in the Contract Data shall, at the request of either or both Parties and after due consultation with both Parties, appoint the member(s) of the DAAB (who, in the case of sub-paragraph (d) above, shall be the agreed member(s) or replacement). This appointment shall be final and conclusive.

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❑ Disputes and Arbitration (21)

❖ Avoidance of disputes (21.3)

If the Parties so agree, they may jointly request (in writing, with a copy to the Engineer) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the DAAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint request.

Such joint request may be made at any time, except during the period that the Engineer is carrying out his/her duties under Sub-Clause 3.7 [*Agreement or Determination*] on the matter at issue or in disagreement unless the Parties agree otherwise.

Such informal assistance may take place during any meeting, Site visit or otherwise. However, unless the Parties agree otherwise, both Parties shall be present at such discussions. The Parties are not bound to act on any advice given during such informal meetings, and the DAAB shall not be bound in any future Dispute resolution process or decision by any views or advice given during the informal assistance process, whether provided orally or in writing.

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❑ Disputes and Arbitration (21)

❖ Obtaining DAAB's decision (21.4)

If a Dispute arises between the Parties then either Party may refer the Dispute to the DAAB for its decision (whether or not any informal discussions have been held under Sub-Clause 21.3 [*Avoidance of Disputes*]) and the following provisions shall apply.

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❑ Disputes and Arbitration (21)

❖ Obtaining DAAB's decision (21.4)

21.4.1 Reference of a Dispute to the DAAB

The reference of a Dispute to the DAAB (the "reference" in this Sub-Clause 21.4) shall:

(a) if Sub-Clause 3.7 [*Agreement or Determination*] applied to the subject matter of the Dispute, be made within 42 days of giving or receiving (as the case may be) a NOD under Sub-Clause 3.7.5 [*Dissatisfaction with Engineer's determination*]. If the Dispute is not referred to the DAAB within this period of 42 days, such NOD shall be deemed to have lapsed and no longer be valid;

(b) state that it is given under this Sub-Clause;

(c) set out the referring Party's case relating to the Dispute;

(d) be in writing, with copies to the other Party and the Engineer; and

(e) for a DAAB of three persons, be deemed to have been received by the DAAB on the date it is received by the chairperson of the DAAB.

The reference of a Dispute to the DAAB under this Sub-Clause shall, unless prohibited by law, be deemed to interrupt the running of any applicable statute of limitation or prescription period.

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❑ Disputes and Arbitration (21)

- ❖ Obtaining DAAB's decision (21.4)

21.4.2 The Parties' obligations after the reference

Both Parties shall promptly make available to the DAAB all information, access to the Site, and appropriate facilities, as the DAAB may require for the purposes of making a decision on the Dispute.

Unless the Contract has already been abandoned or terminated, the Parties shall continue to perform their obligations in accordance with the Contract.

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❑ Disputes and Arbitration (21)

❖ Obtaining DAAB's decision (21.4)

21.4.3 The DAAB's decision

The DAAB shall complete and give its decision within:

(a) 84 days after receiving the reference; or

(b) such period as may be proposed by the DAAB and agreed by both Parties.

However, if at the end of this period, the due date(s) for payment of any DAAB member's invoice(s) has passed but such invoice(s) remains unpaid, the DAAB shall not be obliged to give its decision until such outstanding invoice(s) have been paid in full, in which case the DAAB shall give its decision as soon as practicable after payment has been received.

The decision shall be given in writing to both Parties with a copy to the Engineer, shall be reasoned, and shall state that it is given under this Sub-Clause.

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❑ Disputes and Arbitration (21)

❖ Obtaining DAAB's decision (21.4)

The decision shall be binding on both Parties, who shall promptly comply with it whether or not a Party gives a NOD with respect to such decision under this Sub-Clause. The Employer shall be responsible for the Engineer's compliance with the DAAB decision.

If the decision of the DAAB requires a payment of an amount by one Party to the other Party

(i) subject to sub-paragraph (ii) below, this amount shall be immediately due and payable without any certification or Notice; and

(ii) the DAAB may (as part of the decision), at the request of a Party but only if there are reasonable grounds for the DAAB to believe that the payee will be unable to repay such amount in the event that the decision is reversed under Sub-Clause 21.6 [Arbitration], require the payee to provide an appropriate security (at the DAAB's sole discretion) in respect of such amount.

The DAAB proceeding shall not be deemed to be an arbitration and the DAAB shall not act as arbitrator(s).

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❑ Disputes and Arbitration (21)

❖ Obtaining DAAB's decision (21.4)

21.4.4 Dissatisfaction with DAAB's decision

If either Party is dissatisfied with the DAAB's decision:

(a) such Party may give a NOD to the other Party, with a copy to the DAAB and to the Engineer;

(b) this NOD shall state that it is a "Notice of Dissatisfaction with the DAAB's Decision" and shall set out the matter in Dispute and the reason(s) for dissatisfaction; and

(c) this NOD shall be given within 28 days after receiving the DAAB's decision.

If the DAAB fails to give its decision within the period stated in Sub-Clause 21.4.3 [*The DAAB's decision*], then either Party may, within 28 days after this period has expired, give a NOD to the other Party in accordance with sub-paragraphs (a) and (b) above.

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❑ Disputes and Arbitration (21)

❖ Obtaining DAAB's decision (21.4)

Except as stated in the last paragraph of Sub-Clause 3.7.5 [*Dissatisfaction with Engineer's determination*], in Sub-Clause 21.7 [*Failure to Comply with DAAB's Decision*] and in Sub-Clause 21.8 [*No DAAB In Place*], neither Party shall be entitled to commence arbitration of a Dispute unless a NOD in respect of that Dispute has been given in accordance with this Sub-Clause 21.4.4.

If the DAAB has given its decision as to a matter in Dispute to both Parties, and no NOD under this Sub-Clause 21.4.4 has been given by either Party within 28 days after receiving the DAAB's decision, then the decision shall become final and binding on both Parties.

If the dissatisfied Party is dissatisfied with only part(s) of the DAAB's decision:

(i) this part(s) shall be clearly identified in the NOD;

(ii) this part(s), and any other parts of the decision that are affected by such part(s) or rely on such part(s) for completeness, shall be deemed to be severable from the remainder of the decision; and

(iii) the remainder of the decision shall become final and binding on both Parties as if the NOD had not been given.

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❑ Disputes and Arbitration (21)

❖ Amicable settlement (21.5)

Where a NOD has been given under Sub-Clause 21.4 [*Obtaining DAAB's Decision*], both Parties shall attempt to settle the Dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the twenty-eighth (28th) day after the day on which this NOD was given, even if no attempt at amicable settlement has been made.

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❑ Disputes and Arbitration (21)

❖ Arbitration (21.6)

*The **language for communications** shall be that stated in the **Contract Data**.*
*If **no language is stated** there, the language for communications shall be the **ruling language of the Contract.***

Unless settled amicably, and subject to Sub-Clause 3.7.5 [*Dissatisfaction with Engineer's determination*], Sub-Clause 21.4.4 [*Dissatisfaction with DAAB's decision*], Sub-Clause 21.7 [*Failure to Comply with DAAB's Decision*] and Sub-Clause 21.8 [*No DAAB In Place*], any Dispute in respect of which the DAAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

(a) the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce;

(b) the Dispute shall be settled by one or three arbitrators appointed in accordance with these Rules; and

(c) the arbitration shall be conducted in the ruling language defined in Sub-Clause 1.4 [*Law and Language*].

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❑ Disputes and Arbitration (21)

❖ Arbitration (21.6)

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination (other than a final and binding determination), instruction, opinion or valuation of the Engineer, and any decision of the DAAB (other than a final and binding decision) relevant to the Dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the Dispute.

In any award dealing with costs of the arbitration, the arbitrator(s) may take account of the extent (if any) to which a Party failed to cooperate with the other Party in constituting a DAAB under Sub-Clause 21.1 [*Constitution of the DAAB*] and/or Sub-Clause 21.2 [*Failure to Appoint DAAB Member(s)*].

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAAB to obtain its decision, or to the reasons for dissatisfaction given in the Party's NOD under Sub-Clause 21.4 [*Obtaining DAAB's Decision*]. Any decision of the DAAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced before or after completion of the Works. The obligations of the Parties, the Engineer and the DAAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

If an award requires a payment of an amount by one Party to the other Party, this amount shall be immediately due and payable without any further certification or Notice.

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FIDIC (Red Book)

❑ Disputes and Arbitration (21)

❖ Failure to comply with DAAB's decision (21.7)

Read it yourself!

In the event that a Party fails to comply with any decision of the DAAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration under Sub-Clause 21.6 [*Arbitration*] in which case Sub-Clause 21.4 [*Obtaining DAAB's Decision*] and Sub-Clause 21.5 [*Amicable Settlement*] shall not apply to this reference. The arbitral tribunal (constituted under Sub-Clause 21.6 [*Arbitration*]) shall have the power, by way of summary or other expedited procedure, to order, whether by an interim or provisional measure or an award (as may be appropriate under applicable law or otherwise), the enforcement of that decision.

In the case of a binding but not final decision of the DAAB, such interim or provisional measure or award shall be subject to the express reservation that the rights of the Parties as to the merits of the Dispute are reserved until they are resolved by an award.

Any interim or provisional measure or award enforcing a decision of the DAAB which has not been complied with, whether such decision is binding or final and binding, may also include an order or award of damages or other relief.

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❑ Disputes and Arbitration (21)

- ❖ No DAAB in place (21.8)

If a Dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAAB in place (or no DAAB is being constituted), whether by reason of the expiry of the DAAB's appointment or otherwise:

(a) Sub-Clause 21.4 [*Obtaining DAAB's Decision*] and Sub-Clause 21.5 [*Amicable Settlement*] shall not apply; and

(b) the Dispute may be referred by either Party directly to arbitration under Sub-Clause 21.6 [*Arbitration*] without prejudice to any other rights the Party may have.

Read it yourself!

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❑ APPENDIX

- ❖ General conditions of dispute avoidance/adjudication agreement
- ❖ DAAB procedural rules

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❑ نشریه ۴۳۱۱

❖ ماده ۵۳- حل اختلاف

خبری از Notice در هیچکدام نیست! اساسا برای این موضوع Notice دیده نشده!

۵۳-الف)

هرگاه در اجرا یا تفسیر مفاد پیمان بین دو طرف اختلاف نظر پیش آید، دو طرف می‌توانند برای حل سریع آن، قبل از درخواست ارجاع موضوع یا موضوعات مورد اختلاف به داوری طبق بند "ج" بر حسب مورد، به روش تعیین شده در بندهای ۱ و ۲ عمل نماید.

آیا زمان پاسخگویی استعلام مشخص است؟ آیا حق و حقوقی برای عدم پاسخگویی به موقع دیده شده است؟

۵۳-الف-۱)

در مورد مسائل ناشی از برداشت متفاوت دو طرف از متون بخشنامه‌هایی که به استناد ماده ۲۳ قانون برنامه و بودجه از سوی سازمان برنامه و بودجه ابلاغ شده است، هر یک از دو طرف از سازمان برنامه و بودجه چگونگی اجرای بخشنامه مربوط را استعلام نماید و دو طرف طبق نظری که از سوی سازمان برنامه و بودجه اعلام می‌شود، عمل کنند.

چه شرایطی؟ جزئیات؟ بازه های به توافق رسیدن؟ زمانی مشخص شده؟

۵۳-الف-۲)

در مورد اختلاف نظرهایی که خارج از شمول بند ۱، است، رسیدگی و اعلام نظر درباره آن‌ها به کارشناس یا هیأت کارشناسی منتخب دو طرف واگذار شود و دو طرف طبق نظری که از سوی کارشناس یا هیأت کارشناسی، در چارچوب پیمان و قوانین و مقررات مربوط اعلام می‌گردد، عمل کنند.

نشریه ۴۳۱۱

❑ نشریه ۴۳۱۱

❖ ماده ۵۳- حل اختلاف

خبری از Notice در هیچکدام نیست! اساسا برای این موضوع Notice دیده نشده!

برای عدم توافق بازه ای مشخص شده؟

۵۳-ب)

در صورتیکه دو طرف در انتخاب کارشناس یا هیأت کارشناسی موضوع بند ۲، به توافق نرسند یا نظر اعلام شده طبق بندهای ۱ و ۲، مورد قبول هر یک از دو طرف نباشد برای حل اختلاف طبق بند "ج" اقدام می‌گردد.

۵۳-ج)

هرگاه در اجرا یا تفسیر مفاد پیمان بین دو طرف اختلاف نظر پیش آید، هریک از طرف‌ها می‌تواند درخواست ارجاع موضوع یا موضوعات مورد اختلاف به داوری را به رییس سازمان برنامه و بودجه ارائه نماید.

رییس سازمان برنامه و بودجه چقدر مهلت پاسخگویی دارد؟ این بخش نشریه ۴۳۱۱ در قیاس با قراردادهایی که دیدیم ریسک بالا و بلاتکلیفی زیادی را برای پیمانکار به همراه خواهد داشت!

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ذکر مطالب فوق تنها در صورت ذکر منبع بلامانع است.

سایت حقوق احداث

پرسش)

با سلام لطفا اعلام فرمایید که در ماده ۵۳ منظور از رئیس سازمان مدیریت برنامه‌ریزی چه کسی می‌باشد؟

پاسخ)

عطف به نامه شماره ۴۱۱/۵۱/۲۵۸۶۶ مورخ ۱۳۸۱/۱۰/۲۲ به آگاهی می‌رساند:

۱-بند ج ماده ۵۳ شرایط عمومی پیمان جدید تصریح می‌نماید هرگاه در اجرا یا تفسیر مفاد پیمان بین دو طرف اختلاف نظر پیش‌آید. هر یک از طرف ها می‌تواند درخواست ارجاع موضوع یا موضوعات مورد اختلاف به داوری را به رئیس سازمان برنامه و بودجه ارائه نماید، که منظور رئیس سازمان مدیریت و برنامه‌ریزی کشور می‌باشد و اشاره به رئیس سازمان مدیریت و برنامه‌ریزی استان ندارد.

در تبصره (۱) ذیل بند ج ماده ۵۳ قید گردیده، چنانچه رئیس سازمان مدیریت و برنامه‌ریزی کشور با تقاضای مزبور موافق نمود مرجع حل اختلاف شورای عالی فنی خواهد بود که عبارت مذکور شورای فنی استان یا کمیته فنی استان را دربر نمی‌گیرد.

۲-در مورد فسخ پیمان نیز عینا مانند مفاد ۱ و ۲ بالا، داوری موضوع از اختیارات رئیس سازمان و برنامه‌ریزی کشور و مرجع حل اختلافات شورای عالی فنی می‌باشد.

نشریه ۴۳۱۱

سوال اینجاست که آیا حتما باید ۵۳-الف اتفاق افتد تا بتوان به داوری رجوع کرد؟
"میتواند" در بخش دولتی لازم الاجراست؟
به خاطر دارید که در AIA به صراحت ذکر شده بود در شرایطی که INITIAL DECISION MAKER هنوز تصمیمی نگرفته است شرایط MEDIATION عملیاتی نیست؟ اما از این دست ادبیات به هیچ عنوان در ۴۳۱۱ ذکر نشده!

❑ نشریه ۴۳۱۱

❖ ماده ۵۳- حل اختلاف

تبصره-۱)

چنانچه رییس سازمان یاد شده با تقاضای مورد اشاره موافقت نمود، مرجع حل اختلاف شورای عالی فنی خواهد بود.

تبصره-۲)

رسیدگی و اعلام نظر شورای عالی فنی، در چارچوب پیمان و قوانین و مقررات مربوط انجام می‌شود. پس از اعلام نظر شورای یاد شده، طرف‌ها بر طبق آن عمل می‌نمایند.

چه شرایطی؟ جزئیات؟ بازه های زمانی بررسی؟ آیا رای نهایی و لازم الاجراست؟

ذکر مطالب فوق تنها در صورت ذکر منبع بلامانع است.

شرایط قبول داوری قراردادها از جانب شورای عالی فنی کدامند؟

1. پیش بینی داوری شورای عالی فنی در اسناد و مدارک پیمان
   - مانند ماده ۵۳ شرایط عمومی ۴۳۱۱
2. عمرانی بودن محل اعتبار طرح
3. عدم طرح اختلاف در مراجع قضایی بر اساس درخواست خواهان
4. عدم تسویه حساب نهایی و یا هر گونه توافق مبنی بر عدم ارجاع اختلاف به داوری

مقایسه کنید با شرایط تفکیکی که در AIA قبل از اتمام بازه اصلاحات کار و پس از آن تا مدت ۱۰ سال مقرر شده!

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اگر درقـــــرارداد ذکر شده باشد که طرفین "می‌توانند" به داوری مراجعه کنند، مراجعه به داوری اختیاری خواهد بود؟ یا طرفین مکلف به مراجعه به داوری هستند؟

به نمونه ای که در سایت claimlaws قرار داده شده نگاهی بیندازیم!

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اگر درقـــــرارداد ذکر شده باشد که طرفین "می‌توانند" به داوری مراجعه کنند، مراجعه به داوری اختیاری خواهد بود؟ یا طرفین مکلف به مراجعه به داوری هستند؟

به نمونه ای که در سایت claimlaws قرار داده شده نگاهی بیندازیم!

تاریخ رای نهایی: ۱۳۹۳/۱۰/۲۴ شماره رای نهایی: ۹۳۰۹۹۷۰۲۲۰۱۰۱۳۹۶

رأی بـــــدوی (نمونه)

درخصوص دعوای شرکت س به نمایندگی م.ش. به‌طرفیت دهیاری صالح‌آباد شرقی آقای م.ع. به خواسته مطالبه مبلغ ** ریال بابت تعدیل صورت وضعیت قطعی قرارداد شماره ** مورخ ** به انضمام ضرر و زیان و دیرکرد و هزینه‌های دادرسی از خوانده، نظر به اینکه حسب ماده ۵۳ قرارداد فی‌مابین خواهان و خوانده در صورت اختلاف فی‌مابین، داور می‌بایست اعلام نظر نماید فلذا طرح دعوی در دادگستری وجاهتی نداشته دادگاه به استناد ماده ۲ قانون آئین دادرسی مدنی قرار عدم استماع دعوی را صادر و اعلام می‌نماید. قرار صادره ظرف ۲۰ روز از تاریخ ابلاغ قابل تجدیدنظر در دادگاه تجدیدنظر استان تهران می‌باشد.

رئیس شعبه ۴ دادگاه عمومی حقوقی شهرری- عسگری توانی

ذکر مطالب فوق تنها در صورت ذکر منبع بلامانع است.

اگر درقـــــرارداد ذکر شده باشد که طرفین "می‌توانند" به داوری مراجعه کنند، مراجعه به داوری اختیاری خواهد بود؟ یا طرفین مکلف به مراجعه به داوری هستند؟

به نمونه ای که در سایت claimlaws قرار داده شده نگاهی بیندازیم!

رأی دادگاه تجـــــدید نظر (نمونه)

تجدیدنظرخواهی شرکت س. از دادنامه شماره ۹۳۰۰۰۴۸۴ مورخ ۱۳۹۳/۱۱/۲۲ صادره از شعبه چهارم دادگاه عمومی شهرری که به موجب آن قرار عدم استماع دعوی تجدیدنظرخواه به‌خواسته مطالبه مبلغ ** ریال بابت تعدیل صورت وضعیت قطعی قرارداد شماره** مورخ ** به انضمام ضرر و زیان و دیرکرد و هزینه‌های دادرسی صادر گردیده وارد و موجه نیست و رأی صادره صحیحاً و با رعایت اصول و مقررات و قواعد دادرسی اصدار گردیده و با عنایت به اینکه مطابق مواد ۴۵۴ و ۴۵۵ قانون آئین دادرسی در امور مدنی تعیین داور و کیفیت مراجعه به داوری منوط به تراضی طرفین دارای اهلیت برای اقامه دعوی گردیده و قید کلمه می‌تواند در قرارداد استنادی موجب خروج شرط داوری از توافق طرفین که بر اساس اراده آن‌ها صورت پذیرفته نخواهد شد مضافاً براینکه موضوع داوری و صلاحیت دادگاه با بقاء شرط موصوف مورد ایراد تجدیدنظرخوانده نیز قراگرفته است بنابراین با وصف مراتب تجدیدنظرخواهی را در مجموع غیرموجه تشخیص و با رد اعتراض دادنامه معترض‌عنه را با استناد به ماده ۳۵۳ از قانون مرقوم تأیید می‌نماید این رأی قطعی است.

ذکر مطالب فوق تنها در صورت ذکر منبع بلامانع است.

❑ نشریه ۴۳۱۱

❖ ماده ۵۳- حل اختلاف

۵۳-د)

ارجاع موضوع یا موضوعات مورد اختلاف به شورای عالی فنی، تغییراتی در تعهدات قراردادی دو طرف نمی‌دهد و موجب آن نمی‌شود که یکی از دو طرف به تعهدات قراردادی خویش عمل نکند.

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❑ نکته مهم در EPC صنعتی

❖ ماده ۵۷-۴

۵۷-۴-

با تأیید صورت‌وضعیت قطعی از سوی دو طرف، پیمانکار، از هر گونه ادعایی علیه کارفرما در رابطه با پیمان، صرف نظر می‌کند، مگر در مورد ادعاهایی که قبل از تأیید صورت‌وضعیت قطعی مطرح کرده باشد، اما حل و فصل آن توسط دو طرف، به زمان‌های بعد موکول شده باشد.

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Parties' Considerations

(Construction Manager)

Construction manager's considerations

- The **CM** can be hired by the **Owner** as **its construction representative**, in which case the **CM** is responsible for **representing the Owner** and **protecting** the best **interests of the Owner**.
  - This arrangement is typically called **"agency CM."**

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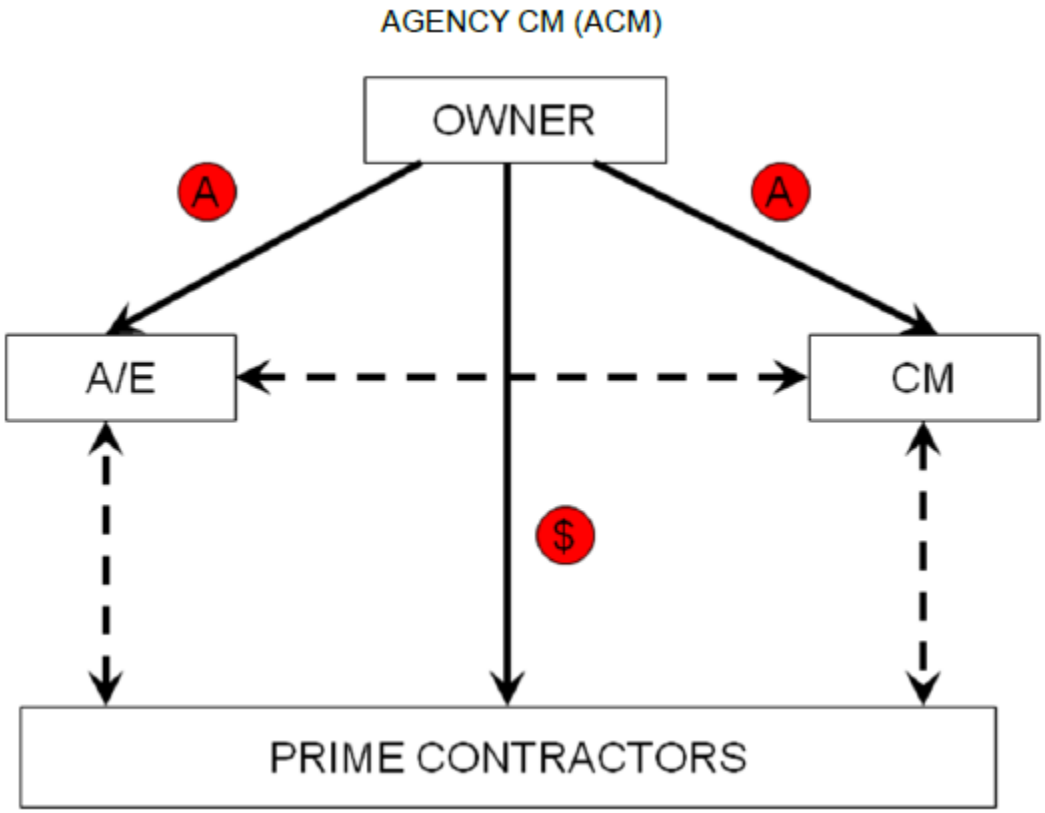
Project delivery system

Agency CM (ACM) (CM-for-fee)



Construction manager's considerations

- In **other cases**, the CM may have a **financial interest** in the Project and may be performing the Project at a pre-established maximum cost, often called a **"guaranteed maximum price," or GMP.**
  - The CM may be working in a **GMP arrangement** with some **sharing of the savings below** the GMP.
  - These types of arrangements are often called **"CM at Risk."**

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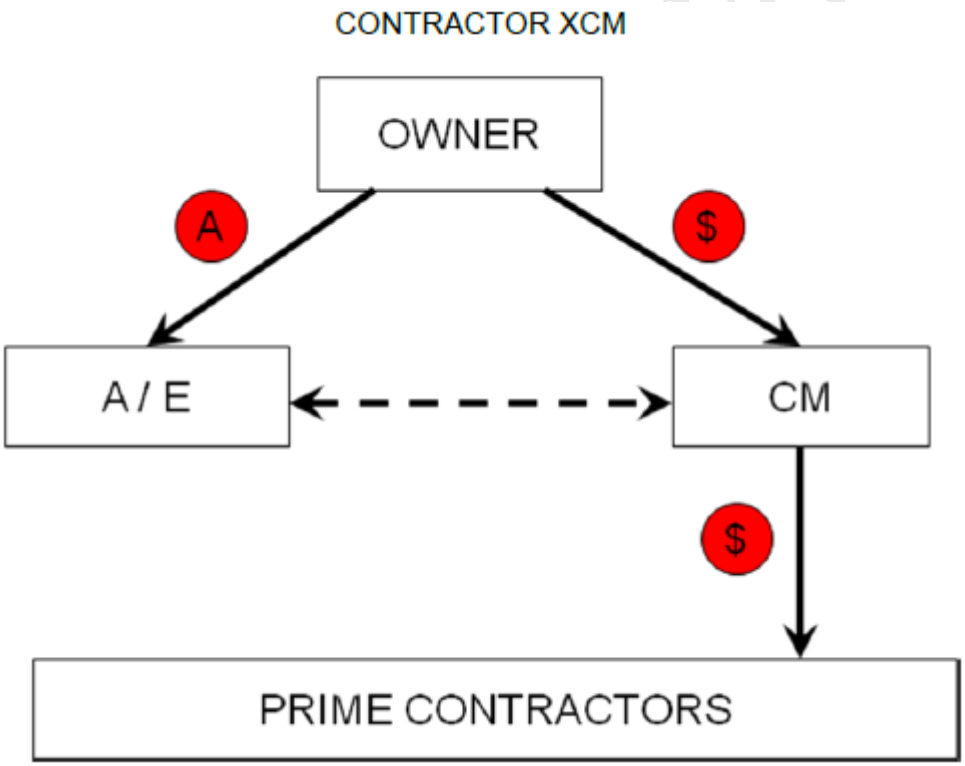
Project delivery system

Contractor XCM (CM-at-Risk)



Construction manager's considerations

Other variations exist, but the discussion of these relationships is beyond the scope of this course.

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Project time

- **Even** with the **best planning**, **delays might occur**.
- The **CM** must be able to **foresee delays** and **take proactive measures** to **mitigate** or **recover** from delays.
- Often, **Project delays** will be caused by the **performance or lack of performance** of one or more of the **Project participants**.
  - The **CM** must keep **detailed accurate records** of the **performance** of **all the parties** so that it can evaluate liability for delays.

Once again, the CM is expected to be the expert who has the responsibility to sort out Project delays for the benefit of all parties including the Owner.

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Managing changes

- Along with **managing** time and schedule, the **CM** must **manage changes** and the **change order process**.

- **Change orders** must address the **additional cost** of the **changed work** and the **time** required to perform the changed work.

- By **properly maintaining**
  - Current **CPM schedule**
  - **Detailed performance records**,
  - Seeking **adequate information from the contractor**,

  the CM should be able to evaluate **time extensions** and **additional costs**.

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Managing changes

- **All too often**, **only additional costs** resulting from changes are **addressed**, and **additional time** or **time extension requests** are **left out** of the change order.

The "postponing" or "delaying" of the management and assessment of time is not recommended and usually results in unnecessary disputes.

The CM should be proactive in preventing this common problem.

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Alternative dispute resolution

- An **owner** may choose to have **counsel involved**.
- The **CM** should be prepared to **discuss all aspects** of the **disputes** and **claims** with the **owner's counsel**.
- The **owner** and **its outside counsel** may choose to **engage outside experts** in **forensic scheduling**, **accounting**, and **other technical matters**.
- The **CM** needs to **interface** with **those experts** to discuss **project details**.

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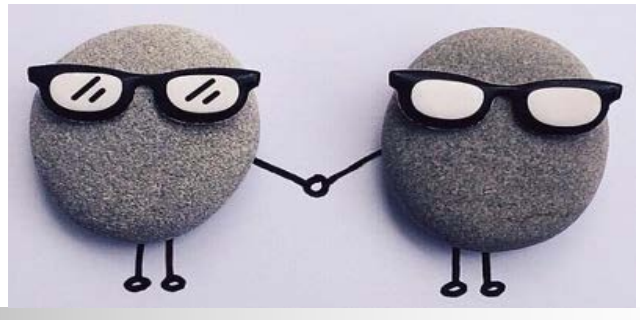
Alternative dispute resolution

Some important points to remember as a CM while working with counsel and experts

- Remember you are on the **same side** (project success)
- Understand that **difficult questions** need to be asked
- Be **clear and open** as to any **weaknesses** even in the contract and methods you proposed
- The **CM's primary role** is to **provide record** and **testimony** of the facts
- Everyone has the benefit of conception but the **CM** has the **benefit of contemporaneous insight**
- If you have the benefit of **counsel or expertise** during the **construction phase before arising the dispute**, make use of it.



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Alternative dispute resolution

Some important points to remember as a CM in arbitration (or litigation)

- The **CM** will likely be a **key percipient witness** on **behalf of the owner** in the **arbitration hearing** and

  may be **responsible** for **organizing the document production** allowed by the **arbitration panel.**

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Alternative dispute resolution

Some important points to remember as a CM in arbitration (or litigation)

- The **CM** may become involved in **legal discovery** if they are required to produce project **documentation**.
- A **well organized management process** makes the discovery process **much easier**.

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Parties' Consideration

(General Contractor and Subcontractors)

General contractor's considerations – CPM Schedules

- Trying to **recreate** the **progress on a Project**, **after it is completed**, is **far more laborious** than **contemporaneously updating** the Project schedule.

- **CPM schedules** consider **not only time** but **resources**.
  - It is the efficient use of **resources** that will allow the **Contractor** to **maximize its profits.**

- **If delays arise on the Project**, the **CPM schedule** is probably the **most effective tool** that the Contractor has to **demonstrate the delays** that occurred to both **critical** and **noncritical activities**.

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General contractor's considerations – Risk to subcontractors

- The **General Contractor** may **pass some requirements** on to its Subcontractors.

- **Passing risk** to the **Subcontractors** is **not always as easy** as including a **general pass-through clause.**

- For example, a subcontract may include the following **general language:**

  "All of the conditions of the Contract between the Owner and the General Contractor are incorporated herein by reference and are binding upon the Subcontractor."

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Subcontractor's considerations – Schedule

- Normally, the **General Contractor dictates** the **Subcontractor's schedule**.

- At times, the **schedule requirements** incorporated into subcontract agreements **may be undefined** or **unreasonable**.

  For example, subcontract agreements commonly state that the Subcontractor will perform its work in accordance with the General Contractor's schedule and will adjust accordingly so as not to delay the job.

  - Since this **statement leaves** the **work period undefined**, the **Subcontractor** may have to **accelerate** its work for the **entire duration** of the job.

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Subcontractor's considerations – Schedule

- **Subcontractors** can **insist** on **a lot of things** regarding their contracts, but **few Subcontractors** can expect **much success** with this.

- **What** the Subcontractor does **need** to make **clear** is that it **bid** the Project for the **Contract start** and **completion dates** in the **bid**.

- The **Subcontractor** will have its **own idea** of **how long** it needs to perform the work, and **if** the **General Contractor** requires a **shorter duration** or a **work sequence** that the **Subcontractor did not contemplate** in **its bid**,

  the **Subcontractor** should **carefully examine** its **ability to perform** and **request** a **Contract increase** **before** **agreeing to a change** in the schedule.

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Subcontractor's considerations – Schedule

The Subcontractor should insist that schedules be included in the terms of the subcontract agreement.

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Subcontractor's considerations – Contract language

- **Subcontractors** should seriously consider **whether** to **bid on contracts** with **extensive exculpatory** (**General Contractor protective**) language.

- **Many General Contractors** have their own **specific contracts written** to suit them, and they **strongly resist** any Subcontractor changes to the language.

- A **Subcontractor** should review the **General Contractor's agreement** before bidding and **find out** if the General Contractor is **opem** to Contract changes.

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Subcontractor's considerations – Contract language

- **Subcontractors** must become **thoroughly familiar** with **all clauses** in their contracts.

For instance, it is common to see clauses that state that for Subcontractor claims, the General Contractor will "pass through the claim to the Owner."

The Subcontractor will accept whatever damages the General Contractor is able to collect and will also share in any costs for litigation or arbitration.

Clauses of this nature may not sound fair, but they are common.

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Subcontractor's considerations – Contract language

- It is also **common** to see clauses that **state that**

if the Subcontractor is delayed by another Subcontractor, it must seek compensation directly from that Subcontractor.

- **Obviously**, the clause is **not desirable** and **creates legal problems** for the **Subcontractor** who suffers the loss.
- Clearly, the **General Contractor** may **not always** be **motivated** to **act in the Subcontractor's best interests.**

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Parties' Consideration

(Design Consultant)

Designer as owner's representative

- **Designers** who act as the **Owner's representative** during construction should require the Contractor to **submit a detailed schedule** for **construction**.

- The **Designer** then **reviews** the **schedule submitted** by the Contractor and **monitors progress** during construction.

- It is **advisable** to **establish procedures ahead of time** with the Contractor for schedule **monitoring**.

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Designer inputs

- Normally, the **Designer** provides **input** on the **duration** of the Project.
- **Such observations** should **not be formed** or communicated **casually**.
- It is a **subject** that should be **analyzed** in a careful, **detailed manner** to determine the **time required** to perform the work considering the **Project**, the **site**, the **weather**, and so **forth**.

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Changes

- **If** the Designer as the **Owner's representative** makes a **change** to the Project because of **Owner decisions or errors and omissions** in the plans and specifications, it should **assess the time effect** of that change on the Project.
  - **Designers** should **resist** the **tendency to deny** any **time extension** simply because they **fear** it might negatively reflect upon them.

- **If** a **change** necessitates a **valid extension** to the duration of the Project, the **problem** can be **resolved much sooner** and usually at **far less cost** if assessed (fairly and impartially) **as soon as it arises**.

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Changes

- Being the **Project Designer** and the **Owner's representative** is a **difficult dual role** because there is a perceived, if not an actual, **conflict of interest**.

- Virtually **all projects** have **design problems**, this is **one of the reasons** c**onstruction contracts** are **unique** in having a **changes provision**.

- **If** a **Contractor** **submits a change request** because of a **design problem**, the **Designer** must take all **necessary measures** to ensure that its **decisions** are **fair** and **impartial**.

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Lessons Learned from Case Studies

(Recommendations)

Excusable delay

- **Contractor** has burden of **showing delay excusable**
  - Because **critical path changes over time**,

    critical path schedule updates *necessary to analyze delays*
  - **Contractor** also **bears burden of separating** and **apportioning concurrent delays**
  - When **government caused part of project delay**,

    LD's *either* ***waived*** *or* ***apportioned***.
    - ✓ **When demonstrating** extent of **government delay**,

      contractor *bears burden of* ***proving critical path delay***

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Compensable delay

- **Burden** of proving **compensable delay** falls on **contractor as claimant**
  - **Contractor** must prove extent of **government's delay** and **increased costs** to recover
- Contractor may **recover wage rate increases** that would not have been incurred **but for government delay**
- **Contractor** must prove amount of **home and field office overhead directly** related to **government delay**
- **Increased costs** of **winter** construction **may be recoverable**
  - ✓ Provided that contractor can **demonstrate work** would **have been completed** prior to winter **but for government delay**
  - ✓ **Increased cost** of **winter work** must be **apportioned** if there are **concurrent delays**

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Notices

- **Many contracts include statement that:**
  - ***"Claim submittals not in compliance with these requirements shall be conclusively deemed to have been waived by contractor."***
  - **However**, there are **some general exceptions** to **notice requirements:**
    1. Written notice actually provided
    2. Owner had actual knowledge of claim facts
    3. Owner considered claim "…on its merits…" despite lack of formal written notice

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Notices

- **Many contracts include statement that:**
  - **Failure** to give proper and **timely notice** is invariably an **owner's** first line of **defense**.
    - ✓ **State law** is very important in this regard because some states **strictly enforce** these provisions.
    - ✓ In the **federal arena**, the best practice is always to give timely notice, but failure to give notice will **not necessarily be fatal** to the claim if the owner was aware.
  - The **contractor** should give **notice as soon as possible** after id**entifying a problem**,

    even if the notice is late or informal.

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Site conditions

- **Contractor's risk of recovering for latent site conditions substantially increases**
  - When **silence** in **differing site conditions**
  - When **"silence"** in soils reports
  - When **fail to obtain & review** "…further information available upon request"

*In many cases contractors have **no way to assess** the risk other than through **increased bid contingency***

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Site conditions

- **Contractor's risk of recovering for latent site conditions substantially increases**
  - **Most vulnerability** a contractor will experience in **claiming extra costs** and **additional time** as a result of **differing site condition**

    *is when he or she **failed to conduct** a **diligent and reasonable investigation** of construction site **before submitting a bid**.*

What does reasonable investigation mean?

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Site conditions

- **Contractor's risk of recovering for latent site conditions substantially increases**

What does reasonable investigation mean?

- In general, site investigations are based on **observance** of the **apparent surface conditions, however**

*Bidders do **not usually have access** to the project site*

1. **Bidder's duty** is to investigate the site to **become familiar** with local conditions.
2. **Owner** is responsible for **allowing appropriate time** and **access** so that the bidders can conduct a reasonable investigation.

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Site conditions

- **Contractor's risk of recovering for latent site conditions substantially increases**

What does reasonable investigation mean?

- Under the term of **"site investigation,"**

  the **contractor** is obligated to **review**

  1. **Any and all documentation**
  2. **Other material** that the **owner has provided** to the contractor,

     *either in the **contract documents** or as a **part of the bid process**.*

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Site conditions

- **Contractor's risk of recovering for latent site conditions substantially increases**

In preparing a bid, the contractor assumes responsibility for adequately investigating the site and materials made available. Failure to do so will not excuse extra costs incurred in overcoming the adverse conditions encountered.

Let's see some examples of inadequate investigation

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Site conditions

- **Contractor's risk of recovering for latent site conditions substantially increases**

Let's see some examples of inadequate investigation

- A **contractor** did **not notice** that the **existing paint undermines** the paint surface was peeling when it entered into a contract to **repaint existing bridges**.
  - When the **contractor sued for the additional cost**, the **court rejected** its claim because of the **failure to notice** the paint condition **even though** the contract did **not specifically address** removal of peeling paint. The court held that

*"[t]he company here **explicitly assumed the responsibility** for examining the bridge and determining the **subsurface [beneath the paint surface] conditions.** This duty **cannot be excused** simply because the company's **visual inspection proved to be inadequate**."*

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Site conditions

- **Contractor's risk of recovering for latent site conditions substantially increases**

Let's see some examples of inadequate investigation

- A **highway contractor** asserted a claim for **extra compensation and time** based on the **type of excavation material** it encountered.
  - In **rejecting** the contractor's claim, the Board of Claims found that

*Although the contractor's personnel **inspected the project site**, they **took no soil borings**, **conducted no subsurface investigation**, and **reviewed no government's engineering consultant's report**.*

  - **No moisture content of materials** in **formulating the bid considered** and the contractor's estimate did not account for any **equipment, trucks, or loaders** for rock excavation.

*Essentially, the **contractor's inadequate pre-bid site inspection** caused it to underestimate the difficulty of the work*

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Risks transferred

- **Be careful about risks that are transferred**
  - Clauses declaring **concurrent delays** are **non-excusable**
  - Expanded exclusions from **Force Majeure clauses**
  - Contractor **not entitled** to **rely** on **design/build documents** when bidding
  - **Bidders** required to bid **using a pricing book** but **no guarantee of accuracy** of prices included
  - **Contractor** remains **solely responsible** and liable for **design sufficiency** and should **not depend on reports** provided by the **government** as part of the contractor documents
  - **Offerors** shall **not rely** on any **information provided** by the **government concerning the host country**, such as climatology data at the site, local laws, customs, currency restrictions, taxes or the availability of local labor.

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Damages recovery

- **To recover damages, the contractor must**
  - Prove they encountered **compensable delay**
  - Provided **notice** of delay as required
  - Submitted **time extension request** as required
  - Demonstrate **event caused** delay to **end date** of project
  - Document there was **no concurrent** delay
  - Document daily **field office** overhead costs as required

➢If meet requirements, contractor entitled to time extension & extended FOOH costs

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Damages recovery

- **To recover home office overhead (HOOH), the formula in delay analysis course can be used only if**

1. **Like all claims** for delay damages, to recover **home office overhead costs**, the Contractor must first establish that the **delay was indeed compensable**.
   - This typically entails establishing that the delay was the **Owner's fault** or **responsibility** and could **not have been** reasonably **anticipated** or otherwise **mitigated** by the **Contractor**.
2. Contractor must also **demonstrate** that there was **other revenue available** which, in the **absence of the employer delay**, would have been **secured by the contractor**.

In addition, many courts that have accepted the Eichleay Formula have attached other prerequisites to its application.

What prerequisite?

Delay Analysis Course!

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Acceptance of final payment

- **Be careful about a provision of acceptance of final payment**
  - **Construction contracts** frequently contain a provision that

    acceptance of final payment *by the contractor shall be considered as a* ***general release in full****, of all* ***unsettled claims*** *against the owner arising out of, or in consequence of, the work.*

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Acceptance of final payment

- **Be careful about a provision of acceptance of final payment**
  - ✓ *The **AIA General Conditions** of the Contract for Construction provides that the **acceptance of final payment** shall constitute a **waiver of all claims** by the contractor **except** those **previously made in writing and still unsettled.***
    - ✓ *This can be an **important point** because, where such contract provisions appear, they are given effect and **enforced by the courts.***

§ 9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from

.1 liens, Claims, security interests, or encumbrances arising out of the Contract and unsettled;
.2 failure of the Work to comply with the requirements of the Contract Documents;
.3 terms of special warranties required by the Contract Documents; or
.4 audits performed by the Owner, if permitted by the Contract Documents, after final payment.

§ 9.10.5 Acceptance of final payment by the Contractor, a Subcontractor, or a supplier, shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

Alternative dispute resolution (ADR)

1. **Check alternative dispute resolution (ADR) clause in your contract before a dispute arises**

- **Cannot mediate** successfully **without all parties** being a willing participant
- **Cannot arbitrate without an agreement** / contract selecting arbitration
- Generally **cannot litigate** first **if contract requires** mediation or arbitration first
- **AIA (American Institute of Architects)** contract forms – sample clause:
  - **Mediation** is a **condition precedent** to arbitration or litigation.

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Alternative dispute resolution (ADR)

2. **Negotiate the ADR clause before signing your contracts**

3. **Suggest an ADR clause to your owner / customer before construction contracts are executed**

   - **Sample term:**

     sole and exclusive option to elect mediation or arbitration or litigation proceedings

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Alternative dispute resolution (ADR)

4. Familiarize yourself with…

- Construction industry **mediation** rules of American Arbitration Association **(AAA)**
- Construction industry **arbitration** rules of American Arbitration Association **(AAA)**

Note "compulsory arbitration"

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Lessons Learned from Case Studies

(Examples)

Example of EOT

- *In the Matter of Phillips National, Inc.*
- ASBCA held Phillips responsible for delay because
  - ✓ Phillips did not submit schedule delay analysis separating owner from contractor delays
  - ✓ "Without a CPM schedule, there was nothing to approve"
- Board denied claim solely on basis of non-compliance with contract's schedule requirements

Example of EOT – Gantt Chart

Minmar Builders, Inc.'s claim against the government (72-2 BCA [P9599] GSBCA No. 3430. July 28, 1972. Contract No. GS-03B-15477).

In this case, the two construction schedules submitted for the addition of a classroom and laboratory at Gallaudet College were nothing more "than a bar chart showing the duration and projected calendar dates for the performance of the various contractual tasks."

The fact that bar charts are not acceptable as evidence to show the cause of project delays is clearly stated in this decision:

"Since no interrelationship was shown as between the tasks, the charts cannot show what project activities were dependent on the prior performance of the [activities], much less whether overall project completion was thereby affected. In short, the schedules were not prepared by the Critical Path Method (CPM) and hence are not probative as to whether any particular activity or group of activities was on the critical path or constituted the pacing element for the project."

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Example of EOT – Impacted as planned with only EDE

❑ Example: Court decision

"We have found that [his] analysis systematically excluded all delays and disruptions except those allegedly caused by the Government … We conclude that his analysis was inherently biased, and could lead to but one predictable outcome … To be credible, a contractor's CPM analysis ought to take into account, and give appropriate credit for all of the delays which were alleged to have occurred."

Haney v. United States 30 CCF ¶ 70, 1891], 676 F.2d 584 (Ct. Cl. 1982); Pathman Construction Co. , ASBCA No. 23392, 85-2 BCA ¶ 18,906

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Example of EOT – Contemporaneous analysis

❑ Example: Court decision

Mr. Maurer, appellant's expert, testified about the critical delays to the Project.... The analysis about the critical delays was based on appellant's original schedule, the schedule updates, the daily reports, Project correspondence, and the contract documents. Mr. Maurer described his analysis as a step-by-step process, beginning with the original schedule and proceeding chronologically through the Project, updating the sequence at intervals to see what happens as the Project progressed [(tr. 262) ASBCA No. 34, 645, 90–3 BCA ¶ 12, 173 (1990)].

A second judge's decision is also relevant to this discussion.

In the absence of compelling evidence of actual errors in the CPMs, we will let the parties "live or die" by the CPM applicable to the relevant time frames [Santa Fe, Inc. VABCA No. 2168, 87–3 BCA ¶ 20677].

Example of compensation

- *Jackson Construction Co., Inc. v. U.S.*
- Court's decision provides checklist of what not to do when presenting a delay claim
- Jackson
  - ✓ Improperly calculated HOOH amount claimed
  - ✓ Unable to prove "intended early completion"
  - ✓ Failed to support contention of cumulative impact of multiple changes beyond merely pointing to a large number of change orders
  - ✓ Signed all government issued change orders with no reservation of rights

Example of differing site conditions

- *Appeal of Bean Stuyvesant LLC*
- Board looked at what conditions were "indicated" in contract documents
  - ✓ Contractor relied on documents provided at bidding
  - ✓ But did not request information "…available upon request" which indicated conditions encountered
  - ✓ Contractor "has a duty" to review available information
- Board ruled against contractor as condition encountered not differ materially from indications in "available" document

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Example of inspection

- *Appeal of Tawazuh Commercial & Constr. Co. Ltd*
- "Underinspection" claimed to recover additional costs to pay for completion of punchlist work
- Tawazuh contracted to build 40 km of road in Afghanistan – terminated for default for failure
  - ✓ To perform contract obligations
  - ✓ To provide remediation plan required by cure notice
  - ✓ To perform as per contract requirements
- Tawazuh argued government owed cost of repair & replacement as USACOE not inspected properly throughout project

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Example of inspection

- Court ruled
  - ✓ "…well established that the government's right to inspect work generally does not relieve contractor of its obligations to perform, nor can the contractor properly rely on government inspection for the discovery & correction of any errors"
  - ✓ "…[contractor's] legal responsibility to maintain an adequate inspection system to ensure that its work conformed to the contract requirements"
- Tawazuh lost claim but less experienced contractors likely submit similar claims

Example of equipment productivity loss

- Contractors starting to assert "equipment inefficiency claims" using following formula –

$$\frac{\text{Actual Equipment Cost}}{\text{Total Labor Cost}} = \text{Equipment Cost Adder}$$

- But equipment cost generally increases only when idled or extended

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Example of home office overhead rejection

- Acme Contracting, Ltd. v. TolTest, Inc. 2010 WL 1140997 (6th Cir. Mich.)- Contractor must prove it can immediately restart the work under Ohio law, or else no stand by
- 2006 Alaska case- recovery denied because although contractor could not perform planned work, it could do major portions of other work

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Final Recommendations

Recommendations for owners

- **Maintain** focus on **project success**, not party interests
- **Allocate risk fairly** in contract documents
- **Avoid unrealistic schedules** at time of bidding
- **Coordinate changes** in design phase
- **Requirements for schedule management** should be specified and maintained by CM
- Make sure **delivery method** is appropriate
- Issue **time extensions** in a timely fashion
- **Track costs** during construction for **disputed issues**.
- **Approve schedule** on time
- **Do not pay schedule** line item/bid item if **not submitted**
- **Issue change orders** for legitimate changes as soon as **practicable**
- **Investigate DSC** in a timely fashion

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Recommendations for owners

- Ensure **baseline** is **accepted** by all parties
- **TIA** should be performed **during the project** to forecast impacts.
- **Time extension** should be granted **on time**.
- You should always **control** the project **completion time**.
- Have **change provisions**
- Have **scheduling specifications**
- Contractually **mandate forms and documentation**
- Have **audit provisions**
- Have **alternative dispute resolution** clauses
- Ask for **contemporaneous data**
- Generate **reliable meeting minutes**
- Record complete **daily reports**

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Recommendations for contractors

- **Strictly comply** with **notice**, **scheduling** and **claim filing requirements**
- Understand **risks**
- **Learn new rulings** concerning **different site condition claims**
  - Apply rulings both during **bidding** and when making **DSC claims**
- **Understand** there is **no right to rely** on **owner inspections**
- **Contractors seeking** to be **"creative"** with **new forms of claims**
  - **Need to seek competent legal advice** to avoid false claim counterclaims and to avoid **spending money** on **unrecoverable claims**
- Address **deficiencies** during construction, **not after construction** is complete and/or building is occupied.
- Submit **schedule on time**
- **Abide** with **contract terms** and **notices**

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موسسه مهندسی و مدیریت ساخت علوی پور (ACEMI)

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