

CONSTRUCTION AND THE LAW IN TEXAS

Project Management Tools for Contracts

In my last column, I wrote about project management as a tool for claim resolution. The discussion focused largely on best practices for dealing with claims at the project level. In this column, I will provide a discussion about contractual provisions that can be included in standard terms and conditions to bind and facilitate the use of the best practices.

As a reminder, the five tips addressed in last month's column were the following:

- Write everything down
- Present support for entitlement with the claim, and vice versa
- Accurately update and use the project schedule as a forward-looking tool
- Develop and adjust cost-coding as required to accurately capture and identify expenses
- Be careful and self-regulate/filter email communications before hitting "Send"

While one cannot write an effective contractual provision to require people to be careful with email, others can be addressed in your contracts. Memorializing these tips in your contracts will provide the enforcement tools that can provide support for the effective use of these tips once employed as a project management tool.

Looking at the first two bullet-points, one way to memorialize these obligations can be found in the claims presentation provisions of a contract. While "write everything down" falls under a directive to project personnel, presenting support for claims so that the claim has a higher likelihood of being granted can be a contractual directive. Consider the following language that appears in the EJCDC C-700 Standard General Conditions of a contract:

- Submittal of Claim: The party submitting a Claim shall deliver it directly to the other party to the Contract promptly (but in no event later than 30 days) after the start of

the event giving rise thereto; in the case of appeals regarding Change Proposals within 30 days of the decision under appeal. The party submitting the Claim shall also furnish a copy to the Engineer, for its information only. The responsibility to substantiate a Claim shall rest with the party making the Claim. In the case of a Claim by Contractor seeking an increase in the Contract Times or Contract Price, or both, Contractor shall certify that the Claim is made in good faith, that the supporting data are accurate and complete, and that to the best of Contractor's knowledge and belief the amount of time or money requested accurately reflects the full amount to which Contractor is entitled.

This language lacks substance from a claim presentation and evaluation standpoint. The provision requires the presentation of a claim but nothing more. As a more robust alternative to the above, consider the additional language below:

- Submittal of Claim: The party submitting a Claim shall deliver it directly to the other party to the Contract ... In order to be valid, the Claim must be accompanied by substantiating documentation, including correspondence, pricing information, impact analysis, daily reports, or other relevant project records. ... The responsibility to substantiate a Claim shall rest with the party making the Claim.

With this addition to the paragraph, your project managers will know that they must provide as much of the required information as available in order to meet your burden of affirmatively establishing entitlement to an adjustment. On the other hand, if your project managers are reviewing a downstream claim, they will know what they should expect or demand

when reviewing a claim.

Under the unmodified EJCDC provision, a notice letter stating a dollar amount and contract time adjustment, with nothing more, would comply with the provision. Such a letter may not actually help to resolve a Claim. Under the more robust provision, a claim transmittal must contain support and, if the practice tips were followed, one would expect the requisite support to be in the project file.

The other bullet-point from above I want to explore from a contract language perspective concerns the project schedule. The EJCDC handles schedule updates with the following language:

- Contractor shall adhere to the Progress Schedule ... as it may be adjusted from time to time as provided below.
- Contractor shall submit to Engineer for acceptance ... proposed adjustments in the Progress Schedule that will not result in changing the Contract Times.
- Proposed adjustments in the Progress Schedule that will change the Contract Times shall be submitted in accordance with the requirements of Article 11.
- Contractor shall carry on the Work and adhere to the Progress Schedule during all disputes or disagreements with Owner. No Work shall be delayed or postponed pending resolution of any disputes or disagreements, or during any appeal process, except as permitted by Paragraph 16.04, or as Owner and Contractor may otherwise agree in writing.

The intent of this language demonstrates that the overriding concern of its drafters is to prevent time extensions. However, the language is lacking because it fails to set the parties expectations with respect to how often the project schedule should be updated and it does not provide for the use of the schedule as a tool for completion. Rather, it appears to anticipate use of the schedule merely to foreshadow claims.

Consider the following language that addresses both of the concerns mentioned in the preceding paragraph.

- The Contractor shall perform the Work in general accordance with the most recent Project Schedule submitted to the Owner. The Project Schedule shall be updated regularly and in advance of periodic Project meetings with the Owner and the Engineer. At a minimum, the Project



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Schedule shall be updated monthly. Such schedules shall be posted at the Project meetings in a convenient location for review and approval by the Owner. The then approved Project Schedule shall be posted at the jobsite for review by all at the jobsite.

This language requires schedule updates at set times and provides for the use, or at least the reference, of the schedule as a tool to ensure all project participants are informed as to as-built and as-planned activities.

Your contracts should contain language that can a) facilitate a successful project, b) set expectations, and c) plainly express each party's obligations. The two provisions discussed above are help start down the path towards accomplishing that goal.

