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A CFM's SURVIVAL GUIDE to Project Documentation & Claims



All contractors understand that when a project goes south, comprehensive project documentation is the key to recovering costs.

Maintaining proper documentation is simply the best way to protect your company's investment in a project. With diligent project documentation, contractors can facilitate payment and minimize the possibility of costly litigation.

The ROI

The paper trail and the money trail cross the same terrain. Lose sight of one and you might miss the other.

Whether you are a GC, subcontractor, or supplier, documentation can support your assertions that another party is unreasonable or has "fallen down" on the job. And, if claims are made against your company by another contractor, it will be much easier, and less expensive, to establish a sound position.

The Reality of Documentation

As a CFM, your work encompasses a diverse set of responsibilities. And, when it comes to the finances, it's not enough to simply report the results.

Rather, you are often expected to track finances and identify problem projects early. As a result, you have a vested interest in project documentation, and have the opportunity to ensure that necessary documents are created before a project heads for trouble.

As the old saying goes, "If it was not confirmed in writing, it did not happen!" With this in mind, it's important to recognize which projects should be monitored closely – particularly when any of these factors apply:

- Your company was the only bidder for the work.
- The project owner has a questionable reputation.
- A questionable subcontractor is working in the critical path.

- The project is complex.
- The project is fast-paced or accelerated.
- The schedule is inadequate or ignored.
- There are excessive requests for information (RFIs).
- There are excessive change orders.
- There is a pattern of slow decision making by the project owner and/or design professionals.
- Payments fall behind schedule.

This list is certainly not exhaustive, but it does provide important warning signals. If these factors exist on a project, pay particular attention to documentation.

The Anatomy of Good Documentation

Contractors generate mounds of documents per project. Your company should have documentation policies for all of the following categories that apply to your business.

Bid Information

Preserve original estimates and any take-offs for many years. Arguably, contractors should maintain all project records until the expiration of the statute of limitations for breach of contract (typically 4-6 years) and/or statute of repose (typically 10-12 years).

Most contractors, however, find it too costly to maintain records for that long. But, in the age of document scanning and digital storage, it will become more common to retain records for longer periods of time.

Insist on detailed estimates that list all costs incurred during the execution of the work, including the man-hours and dollars for each cost item. Also, avoid lump sum allowances for items; they are ambiguous in the event of a scope dispute.

To identify overruns and problems while there is still time to take corrective action, track actual project costs against estimated costs on a task-by-task basis. In a claims situation, the bid may be the only available evidence to prove the damages suffered (typically, the increased costs incurred).

In a recent claim by an electrical contractor to recover profit lost due to an alleged labor overrun, the misplaced estimate prevented any recovery because there was no other viable evidence to prove the contractor's damages. The contractor attempted to prove its estimated cost by recreating the estimate, but the arbitrator ruled that the recreated estimate was not sufficient to establish the value of the original bid with reasonable certainty.

Logs, Logs, Logs

We all know that something as simple as a delayed response to an RFI can stop a project dead in its tracks – and cost serious money. Has your company ever tried to sort out a delay caused by the late approval of a submittal or created a log after a project is underway? If so, then you know from your own experience, how difficult – if not impossible – it is to recreate logs after the fact.

Logs are an invaluable way to quickly identify the cause of a delay. Maintain separate logs for change order requests, shop drawings, submittals, RFIs, and payment requisitions. The logs should reference the item and version, date of request, and date of response.

Owner's Daily Logs

Often, an owner's representative, such as an architect or construction manager, will compile daily logs. The reports usually include information on weather conditions, equipment onsite, trades onsite, number of workers for each trade, and the work performed.

Make certain your company's onsite representative communicates with the owner's agent regarding interference by other trades. Clear communication helps ensure that the agent's logs accurately reflect your company's daily efforts on the project, including any delays that affect your company's work.

Superintendent's Log Book

In claims situations, the superintendent log book is often the most important evidence your company can maintain. Why? Because the information is recorded at the time of the event and carries great weight.

One arbitration case involved a 167-day delay. The damages claimed by a mechanical contractor were proven almost exclusively by the testimony of the superintendent. Relying on his log book, the superintendent stated the exact room numbers where his men could not work, either because the rooms were not yet complete or due to the work of another trade.

Daily superintendent reports are very similar to the daily project reports. Kept by your onsite representative, the reports should record site conversations, problems, field directives, delays, and any other information relevant to the job, such as the precise date and time that important materials and subcontractors arrive at the project site.

Transmittal Letters

Does it matter when you made a submittal? Not unless it is approved late and delays the work. Transmittal letters are

extremely important to show when submittals were sent and to whom.

A transmittal letter should describe: **1)** exactly what is being sent, **2)** to whom it is being sent, **3)** when it is being sent, and **4)** if a response is required. A one-sentence letter often shows when a contractor completed a task, and shifts blame from the contractor to either another contractor or owner's agent.

Correspondence

Correspondence notifies the other party of a situation so they can resolve the issue. The key to correspondence is to simply state your position and describe your concerns. Remember to be an effective advocate without being adversarial.

For example, an electrical subcontractor should write, "As you know, we continue to be delayed in the southwest corner by foundation problems. As required by our subcontract, paragraph five, we must advise you that ABC Electric reserves its right to make a claim for any additional time and costs we incur as a result of this delay. We will advise you of the extent of any claim after the foundation problems are resolved ..."

When receiving correspondence, respond to every letter in writing and defend your position with facts. Also, date stamp all incoming documents and keep fax confirmation sheets.

E-mails

E-mails have become a significant source of communication in construction. Train employees to treat e-mail with the same formality as a letter; it is of equal value in a dispute. I have seen several cases in the last two years where admissions in e-mails made by an employee essentially carried the day in the dispute and forced a settlement.

In one case, a bonding company investigator advised a manager that the bonding company would eventually have to pay the amount claimed by the contractor. For the nine months preceding the production of the e-mail, the bonding company had refused payment of the amount in dispute. It settled the case after the e-mail was used as leverage.

Meeting Minutes

Meeting minutes should describe all of the material issues discussed at regular project meetings, including any issues that

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impact the schedule. A staff member should review meeting minutes on a weekly basis for accuracy.

If something inaccurate appears in the meeting minutes, immediately advise the keeper of the minutes in writing of the error. Also, if important information is missing, identify these omissions. The meeting minutes are typically circulated among the attendees for this purpose.

This prevents the all-too-familiar situation, "I know the architect said our steel shop drawings were finally approved at the weekly job meeting, but I don't remember when."

And, meeting minutes can prove that an owner was aware of a problem, even when the contractor fails to provide the owner with notice of the problem in the exact manner described in the contract. This strategy avoids the defense that the absence of notice should bar recovery.

Project Photos

Finally, take project photos on a monthly basis, unless they are needed more often to document a specific event. Imagine a project with a tight deadline, substantial liquidated damages for late completion, and significant delays due to unusually heavy snow in the area. What could be more convincing than a daily photo of the site covered with three feet of snow for each day of delay?

In summary, there is no way to anticipate what documents your company will need to establish, prove, and/or defend a claim. So, contractors must maintain complete documentation on each and every project. This will go a long way toward minimizing exposure to claims and maximizing any claims potential your company may have.

The Unavoidable: Construction Claims

CFMs need to understand a variety of claim types in order to establish cost tracking systems that calculate and support different types of claims. However, even more importantly, contractors must preserve their rights with notice and avoid releasing valid claims.

Notice

Almost all construction contracts, including the standard AIA form contract, contain notice provisions. Generally,

these provisions require a contractor to provide written notice before additional costs are incurred or when delays are encountered.

Within a few days of the event, the contractor must advise the project owner or owner's agent of the event's impact to the schedule. A contractor's failure to provide timely notice may bar a claim for additional time and/or money.

While these provisions often seem unfair, contractors must take the steps necessary to protect their rights. Form notice letters provide a description of the delaying event and reserve the right to claim cost and schedule impacts after they have been determined.

Partial & Final Releases

Many contractors learn the hard way that signing partial releases in exchange for progress payments can actually bar a claim over disputed work or delay damages. More frequently, owners and contractors use partial release forms that may bar claims up to the date of the release in exchange for payment.

The language need not be specific, and may simply state that the contractor "waives any and all claims, rights or causes of action whatsoever arising out of or in the course of the work performed on the project . . . prior to the date of this release." Courts reviewing this language, despite a party's knowledge of a claim, have enforced the release and barred all claims for additional compensation.

In *G.R. Sponaugle & Sons, Inc. v. Hunt Construction Group, Inc.*, 366 F.Supp.2d 236 (M.D.Pa. 2004), the GC successfully defended a \$1.25 million delay claim because the subcontractor executed partial releases during the project that contained the above language. The court, unmoved by the fact that the subcontractor gave the GC timely written notice of its claim for delay, dismissed the action.

Every month, ask your project teams if there are any pending claims. If there are claims, modify the release form to exclude the claim. Changes in the work, delay, and inefficiency and acceleration are the three basic types of claims.

Changes in the Work Claims

Most contractors have been involved in a dispute over payment for changed or additional work on a project. Often, these disputes arise because the work proceeded without the necessary written approvals. How can you ensure your company gets paid for all of the added work? Unfortunately, there is no simple answer.

Clearly, every situation must be analyzed on a case-by-case basis. In construction, minor changes occur and the paper trail is expected to catch up. Ensure all potentially significant changes are carefully dealt with – in writing – and strictly adhere to the requirement that changes be approved in writing before proceeding with the changed work.

In *Cameo Homes v. Kraus-Anderson Construction Company and City of East Grant Forks*, (No. 04-1200, U.S. 8th Circuit), the court barred a contractor's claim for additional compensation. The court strictly enforced the contract, which required the contractor to submit all claims to the architect for review within 21 days of the event, giving rise to the claim before filing claims in court. Because the contractor failed to comply with this process, the claims were barred.

On a monthly basis, ask if crews have performed additional work, if the work has been approved, and then bill for the work sooner rather than later. Finally, always remember to request additional time for all changes in the work.

Constructive Change Claims

Constructive changes occur when something beyond a contractor's control changes on a project. In theory, the owner, through some act or omission, required the additional work without issuing a change order and, therefore, cannot deprive the contractor of compensation for that work.

However, to recover under this theory, strict proof of a constructive change is required. Facts that show the owner requested, authorized, or consented to the change are key to establishing a constructive change.

If a person other than the owner is responsible for requesting or consenting to the change, the owner may not have liability for the resulting damages. On public projects, the rules are typically more stringent in terms of requiring the proper approval.

A constructive change can also occur where the owner or contractor is aware of the change and the additional work required, but does not object. In addition, work can qualify as a construction change if the work is unforeseen but necessary to the project or if the change is so large that the work could not have proceeded without the owner's knowledge.

For example, the design of a steel floor truss system is inadequate for the required loads to be placed in the building. The owner claims that the necessary redesign is incidental and within the scope of the work required by the contractor.

The contractor claims that the redesign was so significant that it could not have anticipated the additional work required and that changes are compensable as a constructive change. In this situation, the contractor must prove the work was excluded from the contract and that a reasonable contractor would not have contemplated the added work.

Design Defects

A similar situation arises when there is a design defect in the plans and specifications provided by the owner of the project. Undoubtedly, design defects require additional work, and the contractor may assert a constructive change.

The law supports the conclusion that a contractor can rely on the plans and specifications provided by an owner in contracting for work, under the theory that the owner gives an implied warranty that its design is correct. This principle is generally known as the Spearin doctrine from *Spearin v. United States*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918).

In addition, several states (including GA, MT, SC, and PA) permit contractors to assert claims against design professionals, even when there is no contract between the contractor and the professional. These claims are typically based on the professional's negligent misrepresentation that the plans are acceptable for the work.

Delay Claims

As all contractors know, such factors as poor coordination of the work, design errors, or bad weather can cause delays. Generally, there are three types of delays in construction: non-excusable, excusable but not compensable, and excusable/compensable.

- *Non-excusable delays* afford no remedy from the owner. The fault lies with the contractor and no compensation will follow. For example, a delay caused by a contractor's vendor is non-excusable.
- *Excusable but non-compensable delays* provide the contractor with more time, but no additional money, because neither party is at fault. For example, a delay caused by unusually heavy rain is excusable but non-compensable.
- *Excusable/compensable delays* allow the contractor both more time and the possibility of additional compensation. This occurs when a contractor proves that fault lies with another party. For example, a delay caused by the owner's design change during construction is excusable/compensable.

Whatever the case, your company may need a time extension to complete its work. If an extension is given, it is important to reserve your right to payment of any additional costs incurred as a result of the delay. Most owners and contractors will attempt to get a waiver of claims in exchange for granting an extension of time.

This is consistent with the "no damage for delay" provision present in most construction contracts. Some states strictly enforce these provisions, while others have exceptions, such as delay caused by active owner interference.

In any event, costs for delay include extended job supervision, field overhead, extended equipment costs, wage escalation, taxes, insurance, and finance costs. These costs are typically claimed when they are significant and justify a review.

Inefficiency & Acceleration Claims

When delays prevent contractors from performing work in the manner anticipated at the time of contract, inefficiency and acceleration claims inevitably follow. These kinds of claims typically arise from a delay caused by another party, followed by the project owner's refusal to grant an extension of time.

Because the owner attempts to hold to the original completion date, contractors must make up the time by working in more congested areas over shorter durations. This increases labor costs due to the inefficiencies imposed on the construction, and results in a claim for constructive acceleration.

A partial list of different conditions that can affect construction labor costs includes: stacking of trades, changes in work sequence, piecemeal work, starting and stopping, inadequate access, forced acceleration, and winter work.

Conclusion

In essence, good documentation gives contractors some protection from claims against their companies and, ultimately, improves their bottom line.

Every business has different needs and risks, so it's important to emphasize the type of documentation that provides the most value to your company, and to document consistently.

Your company should also implement policies and training that will lead to consistent, quality documentation. 

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