

A/E RISK REVIEW

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For More Information Contact:

Karen Hong

Tel: 522-2095

Fax: 522-2082

email: khong@financeinsurance.com

Delay Claims, RFIs and Change Orders

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

Delay claims are among the most common types of demands made against parties to a construction project. No one is immune; not architects, engineers, contractors or project owners. When a party to the project suffers a loss of time, money and/or materials due to another party not meeting project schedules and delaying work, you can bet that the plaintiff in the case will seek to recover those losses.

There are many reasons for project delays and resulting budget overruns, and not all delays are created equal. Some delays are not directly the fault of any particular party. For instance, inclement weather, labor strife, material shortages, and acts of God such as earthquakes, floods or fires cannot be laid at the feet of anyone involved with the project. Unknown conditions on the project site can also lead to long delays and added costs with no one necessarily at fault.

In other cases, however, blame can be easily laid. Delays and added costs caused by defective construction requiring rework can be directly attributable to the contractor. Project owners are often at fault when they make last-minute changes to their project specifications, or when a lack of finances holds up progress. For design consultants, delay claims are usually the result of the failure to complete design documents on schedule, or alleged design errors that cause suspension or rework of construction.

However, potential liability for design firms does not end here. More and more, we hear of delay claims against designers for two other reasons. One is the failure to respond in a timely manner to requests for information (RFIs) or reviews/approvals of shop drawings; and the other is project delay due to a high number of change orders. In these cases, there are incidences where design firms are at fault; but other times, designers are being used as scapegoats by unscrupulous contractors who are the actual underlying cause of the delays.

Delay claims brought about by contractors have been a growing problem for architects and engineers. Consider this scenario: A contractor is awarded a project because he presented the lowest bid. He put together a trimmed down construction schedule and budget that the owner loved, but, from the designer's perspective, that were highly unrealistic. Not surprisingly, the project is soon over budget and behind schedule, and the owner wants answers. The contractor points to the designer, claiming that design errors and omissions are the cause of the delays and added expenses.

In some cases, the contractor has started to build a case against the designer as soon as the project starts falling behind schedule. He or she does this by submitting an inordinate number of RFIs and change orders. The hope of the contractor is that the designer becomes bogged down with paperwork and design changes. Then he begins to complain to the project owner that he can't proceed with construction because he is waiting on the designer to get him needed information on a timely basis. Suddenly, from both the contractor's and owner's perspective, the designer is the cause of project delays and the added costs associated with it. The resulting claim is soon to come.

Don't get us wrong: Some contractor requests for RFIs and change orders are perfectly valid. No set of plans are perfect and clarifications and refinements may be needed that result in added work for the contractor that is outside the original scope of services. They have a right to be paid for this additional unanticipated work. In some cases, however, a low-bid contractor may intentionally cause delays and added work with the hope of generating income through a string of change orders and added work. The question then becomes: Who gets blamed for these added expenses? You can bet that even if the fault for excessive RFIs and change orders lies with the contractor, the design firm will get dragged into the claim.

Act Now, Don't Delay

How does a design firm help prevent delay claims? It takes diligence, contractual protection and a cautious eye toward shenanigans on the part of unscrupulous contractors. Here are the basics of good risk management practices that can avoid delay claims.

Pick your projects carefully. When considering a project, look for histories of delay claims on the parts of both the project owner and the contractor. Ask for references and talk to other design professionals who have worked with these parties. If you discover a history of delay claims, it's not necessarily a deal breaker. You just have to go into the project with your eyes wide open and ready to nip any delay problems in the bud.

Offer to prequalify contractors. Tell your client you will gladly offer opinions and recommendations regarding contractors and their bids prior to selection.

Use a "Bidder's Representation." This is a written acknowledgement by the contractor that accompanies its bid, verifying that the contractor and all subcontractors have thoroughly reviewed the design drawings, specifications and other construction documents and found them complete and sufficient for their purposes. This Representation may also ask the contractor to acknowledge that it is sufficiently skilled and experienced in this type of construction and that its bid is based solely on the written construction documents.

Check the project schedule. One of the surest ways to get hit with a delay claim is to work with an unrealistic

design and construction schedule. Ensure that both you and the contractor have ample time to carry out your responsibilities in a manner that meets a reasonable standard of care. If you have serious concerns that insufficient time has been given for project completion, make your concerns known to the client and the contractor loud and clear. In extreme cases, you might require an adjustment to what you perceive to be an impossible schedule as a condition to taking on the job.

Include a delay clause in your client contract. Under this clause:

- Have the client agree that you are not responsible for damages arising directly or indirectly from any delays beyond your control.
- Identify specific causes of delays that are outside of your control -- labor disputes, severe weather, natural disasters (such as earthquakes or fires), riots, war, acts of God, differing site conditions (such as the presence of unknown hazardous materials), changes to codes, laws and regulations, and failure of performance of the client or the client's contractors or consultants.
- Specify that if the delays from any such causes outside of your control increase the costs or time needed to perform your services in an orderly and timely manner, you shall be entitled to an equitable adjustment in your schedule and compensation.

Note: Make sure your delay clause is coordinated with other contract language addressing your scope of services, additional services, excluded services, changed conditions, hazardous materials and billing/payment.

Include a separate Request for Information clause in your contract. Under this clause:

- You agree to provide with reasonable promptness written responses to a contractor's RFI as part of your basic services.
- You are entitled to compensation for additional services if, in your professional opinion, the contractor's RFI is for information readily apparent with reasonable observation of field conditions, is readily apparent with a review of contract documents or is reasonably inferable from a review of the contract documents.

To reinforce this clause, you might ask the client to include an RFI clause in its contract with the contractor as well. Under this clause:

- The contractor would be required to exercise due diligence to locate required information before requesting from the designer clarification or interpretation of the requirements of the contract document.
- The design consultant will be required to respond to the contractor's RFI with reasonable promptness.
- If the requested information is deemed to be apparent through field observation or is addressed or reasonably inferable in the contract document, the contractor is responsible to the client for all reasonable costs charged by the consultant for the additional services required to provide such information.

Carefully manage change orders. The project owner has the ultimate authority to approve change orders on a project, unless that duty has been delegated to the lead designer or another owner representative. Regardless, there should have a formal change order request process outlined in the contracts with both the contractor and the design firms. A standard form for requesting change orders should be used and deadlines should be set for submitting them -- e.g., at least 10 days before the scheduled work. (The AIA and other industry associations have sample documents that can be used as a starting point for developing the change order process).

Suggest to the client that before each portion or phase of the construction work, the contractor should review the relevant contract documents and bring up any questions or concerns with the lead designer before work on that phase commences. Any RFIs or change order requests should be raised at that time. This will allow the lead designer to clarify any questions regarding design intent before a construction phase begins.

When a change order request has been submitted by a contractor, evaluate it quickly and thoroughly. Give your opinion to the client as to whether the requested change order is warranted and whether there is a reasonable basis for a time and cost adjustment to the contractor's contract. Does the change order indeed warrant a change in the contractor's scope of services or should this work be considered part of the original scope?

Preach Promptness. One of the best preventatives for delay claims is reasonable promptness. Set -- and meet -- deadlines for responding to RFIs, change orders and other correspondence from clients and contractors. Make sure all of your employees follow these timelines, and ensure the project is properly staffed to meet deadlines. Don't give the client or prospect any excuse for claiming you did not respond to their questions or concerns in a timely and thorough manner.

Document, Document, Document. Every RFI, change order or complaint from a client or contractor regarding your project performance should be documented and tracked. You want to be able to show project participants the day you received an RFI or change order, how quickly you replied, how long you waited for the contractor's next response and when and how the issue was finally resolved. Your records should leave no doubt as to who was the cause of a delay and how you contributed to helping keep the project on time and on budget. This documentation will be very helpful to your cause if the incident turns into a claim.

Watch the Clock

Time is money for your clients, their contractors and you. You'll never be able to avoid all delay claims. But by being diligent with your schedules, keeping a watchful eye on contractors and letting everyone know you are on the lookout for an inordinate number of RFIs, change orders and other causes of delays, you just might put to bed any thoughts by a contractor of trying to profit from project delays.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.