

Some Practical Pointers for Following the Claims Process in Your Contract Documents

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When a problem arises on a project, it can cause significant impact to the schedule, costs, design, and sequence of work. The problem might also require significant technical analysis to determine and ascertain the cause and best cure or remediation. It's therefore no surprise that contractors and subcontractors, in the midst of such situations, sometimes fail to properly focus on the contract process for formally noticing the issue and submitting it as a claim; they are too busy addressing the issue directly. Most contract documents have specific clauses that govern the claims process, and each project might have variations to the process. Regardless, there are certain fundamental steps that tend to be common, and all contractors and subcontractors should consider these steps when evaluating the problem because (a) your contract probably requires it, and (b) these steps tend to facilitate a proper submission, negotiation, and resolution of a claim.

Notice the Issue

The first step when encountering a problem is typically to issue a written notice of the issue. Most contracts require notice of delays, differing site conditions, change orders, or claims within a specified period of time. It is often confusing to initially determine if the issue is a claim or not because a claim usually indicates a dispute; meanwhile, notice of an issue could be as simple as submitting an RFI. It depends on the circumstances.

Nevertheless, the first step is to notify the proper parties of the issue in writing. The contract documents may require that specific issues be noticed as an RFI, change order, or request for adjustment. The contract documents might require that the notice be submitted to the Architect of Record, owner's representative, or a construction manager.

Typically, when initially noticing the issue, the notice will take the form directed by the contract, and it will identify the issue at hand, with any supporting documentation to explain or present the issue. It should also identify whether additional time or costs are likely to result from the issue.

Transitioning the Notice of an Issue to a Formal Claim

Often, a problem on a project will start with notice of the issue, and it will progress and develop into a claim. For example, a sinkhole on a project will typically result first in an RFI, project meeting minute, or change order proposal that identifies the sinkhole and declares it to be a differing site condition or issue needing the attention of the owner or Architect of Record. Thus, the first discussion of the item is typically a notice, not a formal claim.

Typically, in response to the notice of the issue, instruction or direction will be provided by the owner or Architect of Record on the work to be performed. The instruction might be in the form of a change order, change directive, or a response to an RFI. If the directed action is agreeable and provides an acceptable adjustment to the time or price for the work, then the issue is often resolved through this natural course of conduct.

But if the parties disagree on the direction, lack of direction, or the proposed compensation or extension of time, then the matter has developed into a claim/dispute. The cautious and prudent contractor recognizes that if it fails to lodge and preserve its disagreement and instead simply signs a change order, it could potentially waive its rights to additional time or compensation, depending on the circumstances.

Typically, the contract documents will provide a specific process for progressing the claim, and the first step of the claim process is to submit a written claim within a specified time period. Thus, in the hypothetical example at hand, once the issue has been noticed and developed into a disagreement, that is when the notice of claim should be submitted. I often see contractors that initially notice the issue but then fail to submit a formal claim once the issue has reached an impasse.

The submission of the claim might be rather simple, or it might be complex. For example, the AIA A201 requires that claims be submitted to the “Initial Decision Maker,” who is typically the Architect of Record. The Architect of Record then responds to the noticed formal claim, and if the matter is still in dispute, the claim proceeds to either mediation, arbitration, or litigation.

Some contracts have very extensive and complicated processes for submitting the claim, which require specific information or supporting documentation. And some contracts have extensive processes where the initial decisions on the claim, either from the owner or Architect of Record, may take several steps with decisions rendered at each step.

It is important to properly present the claims to the correct persons, with the correct information, and if the claim is denied to promptly notice the appeal of the decision in conformance with the contract.

Proper notice and submission of a claim is important because a failure to do so may result in a waiver of the claim. Thus, it is important to issue both a written formal notice of the issue and an additional notice of claim when the issue has not been resolved to satisfaction. Additionally, a properly developed and presented claim—containing supporting documentation and clear explanation of the issues with legal and expert analysis if necessary—is in a significantly better position for negotiated resolution. The best practice is to consult with trusted, experienced counsel that is knowledgeable on the intricacies of construction law. Offit Kurman construction attorneys are available to advise and counsel contractors, construction managers, design-builders, design professionals, subcontractors, and developers on construction contracts, risk, and project disputes.