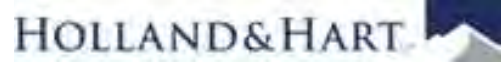


PROJECT DOCUMENTATION CAN MAKE OR BREAK YOUR CLAIM *by Kevin Bridston and Sean M. Hanlon*



As project and trial lawyers specializing in construction, we see a consistent pattern: weak project documentation impairing a claimant's ability to resolve claims, whether by settlement, arbitration, or trial. The weaknesses generally are: (1) failure to follow contractual requirements for notice; (2) failure to completely document daily events, impacts, and costs on the project; and (3) failure to timely raise critical issues. Favorable and timely resolution of claims often depends on adequately addressing these issues.

Read and Follow the Contract Requirements for Notice

"I did not read the contract." "It's just boilerplate." "The other party will do the right thing, regardless what the contract says." Unsurprisingly, none of these statements provides any relief whatsoever in a dispute. Contracts should be read and followed. If it is truly impracticable to do so, the reasons must be well documented. Whether "boilerplate" or not, contractual provisions are enforceable, period. Relying on the other party to do the right thing is ill-advised.

The solution? Whoever is responsible for managing and administering the project must read the contract and comply with the notice provisions. Most construction contracts require notice if the contractor encounters something likely to increase schedule or cost. Before work begins, a project manager should understand the notice and claim provisions under the contract. When any issue arises, the project manager should reference the notice and claim provisions and notify the owner in accordance with those terms. This active contract administration will pay dividends in resolving claims at the end of the job.

Document Daily Events, Impacts, and Costs

A daily log is good. But too often they only reflect weather, crews on the job, and work performed that day. Logs often fail to reflect various impacts on the work, such as weather, equipment breakdowns, regulatory issues, other contractors, the owner, etc. The best daily logs reflect project impacts without regard to whether they might later form the basis for a change order, schedule extension, or claim. Those impacts should be noted

objectively, not just with a view to setting up a claim. Such logs greatly enhance a request for additional compensation or time, or a claim.

Daily logs should be supplemented by internal and external e-mails, notes, and reports made in the ordinary course of the project. But too often, daily logs and notes say little about project impacts. That supports an argument in court or arbitration that whatever impact is now being claimed was not important because no one raised it at the time. Cumulative impacts, i.e. "death by a thousand cuts," are hard to fully document, but every effort should be made to do so.

Cost records are similarly problematic. Little or no effort is often made to segregate the costs caused by some compensable impact – perhaps interference by another contractor – as distinguished from normal and expected costs of the work. Segregating such costs may sometimes be impossible, but best efforts must be made. That effort goes beyond simply dumping every cost outside the budget into an "extra bucket." Project managers must give careful thought to how extra costs are allocated. If segregating such extra costs is unworkable, then the responsible employees should at least document why that is true, and what efforts were made to do so. If the potential claim is substantial, engaging an outside consultant to assist in tracking and segregating costs is wise.

Raise Issues Early and Often

A big problem in project documentation is the failure to raise issues and provide notice early in the project. At the outset of the project, everyone is optimistic that whatever hiccups are encountered early on the project, big or small, will be overcome. That is not true on projects that end up in dispute. Instead, problems build and compound as the project goes on. When it is obvious that the project will end in dispute, the parties then become very good at notifying each other of deficiencies or impacts or interferences. But the parties are unable to rewrite a history that was never documented to begin with.


For example, a project may start late because the owner did not have financing in place as expected, hasn't signed the contract, or hasn't authorized the work to begin. This could cause multiple headaches for the contractor. For weather sensitive work, it might force the contractor to miss a good seasonal window to perform and push some of the work into an adverse seasonal window. For work with a fixed completion date, the period for performing the work might be shortened. Work to be performed in a specific sequence might be disrupted or various trades might have to be stacked, creating obvious but sometimes difficult to prove inefficiencies. For almost any project, a critical labor or supply window might be missed, forcing the contractor to procure labor or materials in a tighter and pricier market. All of these impacts and others like them potentially affect the cost of the work.

What should a contractor do under these circumstances? Speak up – now – in writing! Contractors cannot afford to assume things will work out. If so, you face the risk of eating extra costs caused by early project impacts. Even if the lack of early notice can be overcome, the claim is more difficult to prove than if the contractor had been proactive. Contractors need to pay attention to early project impacts,

notify the owner of the cause of the impacts, and whether they increase time and cost. Not every impact can be perfectly predicted, but the contractor should be as accurate as possible, noting any necessary caveats.

Conclusion

Project documentation can make or break a claim. For that reason, it is imperative that the parties consistently and accurately document what is happening on the project, including the impacts on the cost and schedule, with an eye to what is required to preserve rights under the contract. If not, contractors are likely to experience a costly, and perhaps unhappy, result in dispute resolution.

Contractors who regularly and proactively provide written notice are much less likely to wind up in disputes. And when disputes cannot be avoided, contractors who establish a regular pattern of providing notice and keeping good documentation are likely to fair better in settlement, trial, or arbitration. 



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Contact: Kevin Bridston
303.295.8104 kbridston@hollandhart.com
555 17th Street, Suite 3200
Denver, CO 80202

HOLLAND & HART LLP
www.hollandhart.com 