DRI Construction Law Seminar, January 26-28, 2022

Stacy Moon, Author
Gordon & Rees
420 North 20th Street, Suite 2200
Birmingham, AL 35203
smoon@grsm.com

Session Title: Hot Topics Potpourri
Presented by Stacy Moon

GETTING PAID AND GETTING CREDIT FOR PAYING

At the heart of every construction project is a simple premise. An owner wants a building built. The owner hires someone to either build the building or hires someone to manage and handle the construction (and *that* person hires a general contractor). In general, the contractor hires subcontractors; the building gets built; the owner makes periodic payments; and voila! The owner has the new building it wanted; everyone is paid; and the world is a happy place.

Rumor is that the vast majority of projects actually work like the project above. Obviously, lawyers rarely get to deal with those projects. Instead, lawyers get brought into a project when the building is not what the owner believed it would receive or when someone has not been paid. Project files that the client believes are comprehensive generally are missing necessary documents. And, usually, the lawyer is only brought into the matter after relationships have totally devolved into hostility.

Problems can arise when payments go astray. How does an owner get proper credit for making a payment when a general contractor uses the funds to pay *other* invoices, all of which are associated with the same project, but fails to give credit to the proper party? What recourse does the party that was not paid have against the owner or the general contractor, and what recourse does the owner have against the general contractor when the party that did not get paid pursues a lien against the project?

Each state's lien laws and prompt payment acts are unique, but they tend to follow similar patterns.

I. Start the Analysis with the Contract.

As basic as that starting point sounds, many clients want to jump straight to the result (lack of payment, failure to complete a job) without looking at the terms of the contract (or general conditions). In a recent case, the owner relied upon an independent contractor to manage the construction and ensure documentation was complete. When the matter (predictably) went to litigation, the general contractor had issued letters of intent to various architectural and engineering firms, but it never issued a final contract.

Assuming the parties have a contract, the scope of work for each party to perform should determine what, and when, payments are due. For example, if the contract scopes relates to architectural and structural drawings, and adds a reference to construction administration services, a payment for those construction administration services may not be due at the same time as an invoice or pay application related to the drawings.

For those cases in which a signed contract does not exist, many states' prompt payment act supplies a deadline for payment. Nevertheless, starting with the signed contract or subcontract to determine specific pay obligations is an important first step.

II. Read the Invoices.

If the parties do not have a fully-executed contract (or even just a simple, one page description), payment obligations and credits may be controlled by the terms of an invoice from which a party pays. The terms and conditions of an invoice may control if payment is sent pursuant to that invoice. For example, a general contractor may believe it is paying a specific invoice while it challenges other invoices, but if the terms and conditions state how payments will be credited, those terms and conditions may be controlling.

III. When is the Contract Not "the" Contract?

At times, the parties to a construction project choose not to wait for signed, executed contracts to begin work, particularly when the schedule is particularly tight. In those circumstances, the parties may issue and sign a letter of intent or some other document indicating the general terms of what is anticipated to be a final contract. When the parties shortcut the system in that way, though, they are in danger of having an incomplete document serve as a contract, whether the agreement to agree contains all of the terms the parties anticipated.

In general, if a letter of intent leaves substantial and necessary terms left open, it is an unenforceable agreement to agree. However, in many jurisdictions, the primary test as to whether a letter of intent is enforceable as a contract will be "gathered from the whole scope and effect of the language used." If a letter of intent refers to the amount of a contract, but adds that the payment schedule and method will be outlined in a subcontract to be completed later, that letter of intent might not be sufficient to create a contractual duty of the general contractor to pay the materialman for the work performed.

IV. **Pay Issues from Different Standpoints**

A. The Owner

An owner has a number of methods to avoid issues regarding proper credit of pay applications, but most have negative aspects.

The most obvious method is to require a conditional lien waiver for each payment it issues. Doing so requires each subcontractor or materialman to waive any lien each has up to that point of payment once payment is made. Requiring a conditional lien waiver before payment is the most effective way to track payments and receipt of those payments. The primary disadvantage (and, frankly, the only disadvantage) is that the owner bears a burden to maintain the records and review the pay applications. If the owner wants to rely on a manager or other independent contractor to run the project, review of the conditional lien waiver is a burden on the owner it has expressly tried to avoid.

Second, depending on contract language, the owner might issue joint checks to the general contractor and any subcontractor or other materialman. Generally, the ability to issue a joint check is covered in the General Conditions of the Contract (if the contract is an AIA form) or other provision governing the project. However, issuing joint checks tends to create resentment and can be interpreted as an indication the owner does not trust the general contractor (which may be true).

Third, the owner might include a specific notation in the memo of a payment if it is made by check regarding what the payment is for. This method has three disadvantages. First, relying on the UCC to enforce the terms included in the memorandum is hazardous, as best, and likely to make an already-complicated litigation more complicated. Second, the owner must trust that the terms of the memorandum will be honored. Third, the instructions in the memo might be vague enough that they are not sufficient to require the funds to be applied as instructed.

The risk of a disconnect is greater in those cases in which the owner relies on an outside party for contract management and fails to oversee or monitor that outside party. Of course, the point of using an outside party is to allow the Owner to do its business, rather than construction management, which usually is NOT the Owner's business. However, if the Owner does not maintain some oversight or regular communication, if a contractor or materialman alleges it has not been paid, the time involved in trying to recreate a payment history may far exceed the time the Owner would have spent on the front end monitoring the project.

B. The General Contractor

A general contractor has pay issues in two directions. First, it must ensure it is paid by the owner. Second, it must ensure the payments it makes to subcontractors are properly credited.

With respect to receiving payment, the general contractor generally has control regarding submitting pay applications. However, if the owner is utilizing an agent or architect, the general contractor may have pay applications reduced with (or without) explanation, which, in turn, can create pay issues with subcontractors, materialman, or other project professionals.

To maximize the possibility of payment by the Owner, a general contractor should be aware of all deadlines regarding claims and challenges to reductions in pay applications. If the reduction is due to a disagreement over the percentage complete, the Owner should have documentation to provide in a claim explaining the alleged difference or disputing the reduction.

If the reduction is the result of a subcontractor's work, the general contractor can reduce the subcontractor's pay accordingly. However, if the subcontractor can substantiate his percentage of the work complete, the general contractor should incorporate that information into the claim.

Additionally, the general contractor should keep in mind its deadline to file a lien for unpaid work. In the majority of states, the right to a lien on property on which a general contractor has worked is statutory and strictly enforced. Frequently, the last date to file a lien is the last date on which work was done. Whether "work" includes punch list items varies, but it is wise for a general contractor to consider the last date work was done before a certificate of occupancy is issued or a certificate of substantial completion is issued, even if punch list items remain to be complete. Ordinarily, states do not impose a penalty for filing a lien early, so long as money remains unpaid. But a late filing results in total loss of the lien.

In addition to the deadline to file a lien, many states require suit to enforce the lien be filed within a certain period. The difficulty with these deadlines is that the parties may still be engaged in construction, and without litigation, the parties might have time to resolve the issues. However, once a lien is filed and litigation ensues, lawyers get involved, and parties tend to stop working to resolve the issue.

C. The Materialman/Engineer/Other Suppliers.

The materialmen, professionals and other suppliers are the most vulnerable, yet, in some ways, the most powerful when it comes to pay disputes. They have a shorter period of time to file a lien. Their remedies are limited by actions they take at the beginning of the project, as opposed to later.

In many states, a materialman is only entitled to a full contract recovery with a lien if, at the beginning of a project, they provide a specific, statutory notice to the owner, copying the general contractor. In some states, materialmen issue that notice as a matter of course. In others, doing so implies to the Owner that the materialman believes the general contractor will not pay it, and the general contractor considers the notice an insult. In response to such a notice, an owner may pay as usual – sending the check to the general contractor, relying on the general contractor's certification in the pay application that it will pay the materialmen. Alternatively, if the contract permits, the Owner may issue joint checks that require the general contractor and the materialman to both sign the check, acknowledging full payment. That solution is cumbersome and almost certain to create hostility.

If the notice is not issued at the beginning of the project, generally, the materialman is only entitled to a remaining price lien, based on the amount of the project value remaining when the materialman issues a notice to the Owner that it has not been paid. If the project is close to complete, of course, the project may not have enough of a balance left to cover the materialman's balance owed, leaving the possibility of an incomplete recovery.

Moreover, a materialman has the least amount of time to file a lien and pursue a claim for lack of payment. As with liens and suits between the general contractor and the owner, the filing of a lien and the filing of a suit are controlled and strictly interpreted, which limits the opportunity for parties to resolve matters cooperatively.

D. Other Complications

A lien is only as good as the property on which a lien is placed. Prior encumbrances, such as mortgages, may have priority. If the "owner" of the construction project does not actually "own" the property (for example, if one entity owns the property but another the building), establishing the right to a lien may be difficult.

Finally, from the owner's standpoint, if the owner legitimately paid the general contractor to pay a materialman, it may be a rude awakening to learn that its payment was not distributed as intended, resulting in a potential obligation to pay twice and pursue remedies against the construction manager, the general contractor, or both.

V. **CONCLUSION**

Nothing is as easy as it seems. Even when the parties try to work together, the deadlines imposed by strictly enforced lien statutes tend to create conflict and legal issues. The best practice is to never turn everything over to someone else – a contract manager, a general contractor, a materialman. All parties should stay informed and advise as soon as an issue develops. More importantly, open communication – from the owner to the general contractors, from the general contractor to its subcontractors, from the subcontractors to their suppliers – is the best way to avoid the nightmare of never-ending litigation.

Schedule and Productivity Analysis Protocols, Standards and Recommended Practices

John M. Sier, Author
Kitch Drutchas Wagner Valitutti & Sherbrook PC
One Woodward Avenue, Suite 2400
Detroit, MI 48226
(313) 965-2915
John.sier@kitch.com

Session Title: Hot Topics Potpourri - Schedule and Productivity Analysis Protocols, Standards and Recommended Practices

Presented by John M. Sier, Kitch Drutchas Wagner Valitutti & Sherbrook PC

Author Biographical Information:

John is the head of the Commercial and Construction Practice Group at the Kitch firm headquartered in Detroit, Michigan, where he has been practicing for over thirty years. In addition to serving as counsel to Construction Owners Association of America, John is on the American Arbitration Association panel of neutrals, and serves as a mediator in construction and commercial matters in various industries including health care and higher education. He is the editor of the State-by-State Guide to Architect, Engineer, and Contractor Licensing, published by Wolters Kluwer. He is also active with the Construction Specifications Institute, the National Association of Construction Auditors, Building Owners and Managers Association, in addition to the Defense Research Institute.

DRI Construction Law Committee

Austin Hot Topic Potpourri

John M. Sier
Kitch Drutchas Wagner Valitutti & Sherbrook PC

Schedule and Productivity Analysis Protocols, Standards and Recommended Practices

AACE Recommended Practice RP29R-03, Forensic Schedule Analysis (3d ed. 2011)
https://online.aacei.org/aacessa/ecssashop.show_product_detail?p_product_serno=1048&p_mode=detail

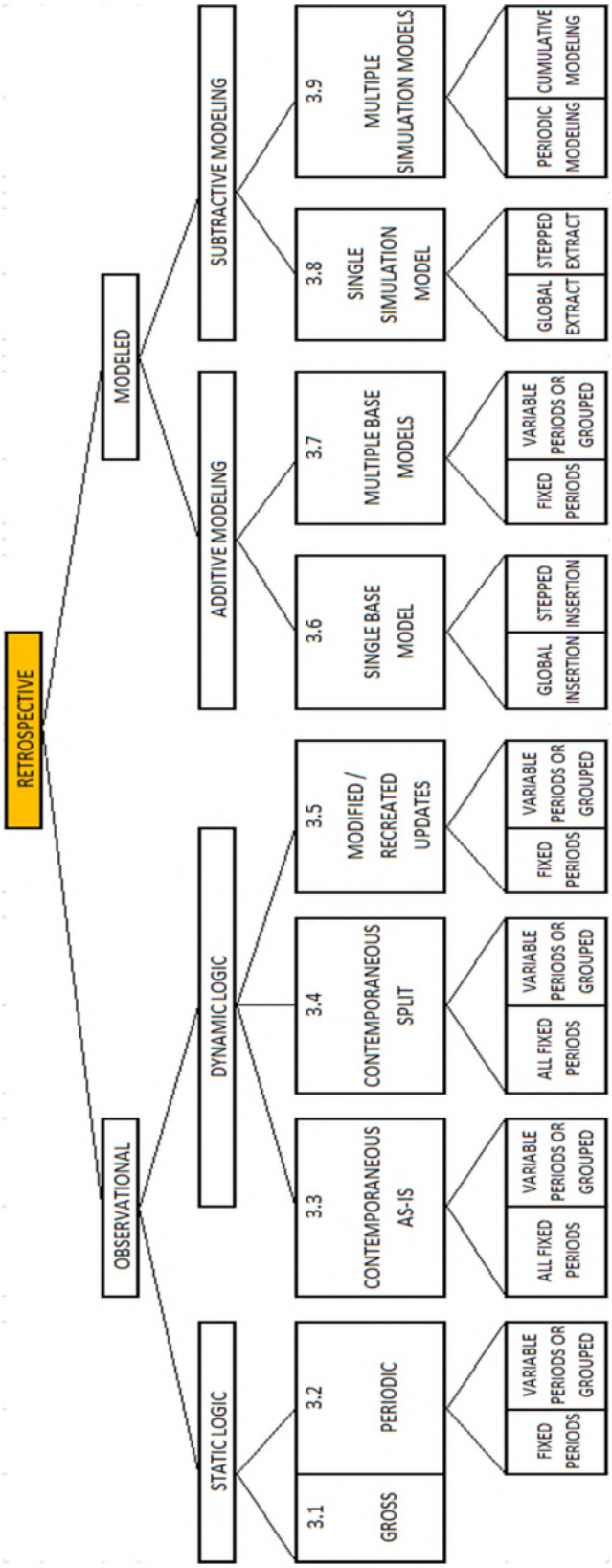
RP29R-03 Page 12 excerpt:

> By using taxonomic classifications, the RP allows the discussion of the various forensic analysis methods to become more specific and objective. Thus, the RP will not provide a uniform definition for the common names of the various methods, but it will instead describe in detail the taxonomic classification in which they belong. Figure 1 — *Nomenclature Correspondence* shows the commonly associated names for each of the taxonomic classifications.
>
> The RP's taxonomy is a hierarchical classification system of known methods of schedule impact analysis techniques and methods used to analyze how delays and disruptions affect entire CPM networks. For example, methods like the window analysis and collapsed as-built are included in the taxonomy, while procedures such as fragnet modeling, bar charting, and linear graphing are not included. Procedures are tools, not methods, and therefore are not classified under this taxonomy.
>
> The taxonomy is comprised of five layers: timing, basic and specific methods, and the basic and specific implementation of each method. Please refer to Figure 2 — *Taxonomy of Forensic Schedule Analysis* for a graphic representation of the taxonomy. The elements of the diagrams are explained below.

Figure 1 – Nomenclature Correspondence Figure

Taxonomy	1	RETROSPECTIVE																				
	2	OBSERVATIONAL								MODELED												
	3	Static Logic			Dynamic Logic					Additive						Subtractive						
	4	3.1 Gross	3.2 Periodic		Contemporaneous Updates (3.3 As-Is or 3.4 Split)		3.5 Modified / Reconstructed Updates			3.6 Single Base[2]			3.7 Multi Base[1]			3.8 Single Simulation			3.9 Multi Simulation[1]		
	5		Fixed Periods	Variable windows	All Periods	Grouped Periods	Fixed Periods	Variable Windows		Gobal Insertion	Stepped Insertion	Fixed Periods	Varibale Windows or Grouped	Global Extraction	Stepped Extraction	Fixed Periods	Global Extraction	Stepped Extraction	Fixed Periods	Stepped Extraction		
Common Names		As-Planned vs As-Built	Window Analysis		Contemporaneous Period Analysis, Time Impact Analysis, Window	Contemporaneous Period Analysis, Time Impact Analysis, Window Analysis	Contemporaneous Period Analysis, Time Impact Analysis	Window Analysis, Time Impact Analysis		Impacted As Planned, What-If	Time Impact Analysis, Impacted As-Planned	Time Impact Analysis	Window Analysis, Impacted As-Planned	Collapsed As-Built	Time Impact Analysis, Collapsed As-Built	Time Impact Analysis, Collapsed As-Built	Collapsed As-Built	Time Impact Analysis, Collapsed As-Built	Time Impact Analysis, Collapsed As-Built	Time Impact Analysis, Window Analysis, Collapsed As-Built		

Figure 2 – Taxonomy of Forensic Schedule Analysis



Society of Construction Law (UK) Delay and Disruption Protocol (2d ed. 2017)
https://www.scl.org.uk/sites/default/files/documents/SCL_Delay_Protocol_2nd_Edition_Final.pdf

Method of Analysis	Analysis Type	Critical Path Determined	Delay Impact Determined	Requires
Impacted As-Planned Analysis	Cause & Effect	Prospectively	Prospectively	• Logic linked baseline programme. • A selection of delay events to be modelled.
Time Impact Analysis	Cause & Effect	Contemporaneously	Prospectively	• Logic linked baseline programme. • Update programmes or progress information with which to update the baseline programme. • A selection of delay events to be modelled.
Time Slice Windows Analysis	Effect & Cause	Contemporaneously	Retrospectively	• Logic linked baseline programme. • Update programmes or progress information with which to update the baseline programme.
As-Planned versus As-Built Windows Analysis	Effect & Cause	Contemporaneously	Retrospectively	• Baseline programme. • As-built data.
Retrospective Longest Path Analysis	Effect & Cause	Retrospectively	Retrospectively	• Baseline Programme. • As-built programme.
Collapsed As-Built Analysis	Cause & Effect	Retrospectively	Retrospectively	• Logic linked as-built programme. • A selection of delay events to be modelled.

ANSI/ASCE/CI Standard 67-17, Schedule Delay Analysis (2017)
https://ascelibrary.org/doi/book/10.1061/9780784414361

ANSI/ASCE/CI Standard 71-21, Identifying, Quantifying, and Proving Loss of Productivity (2021)
https://ascelibrary.org/doi/book/10.1061/9780784415429

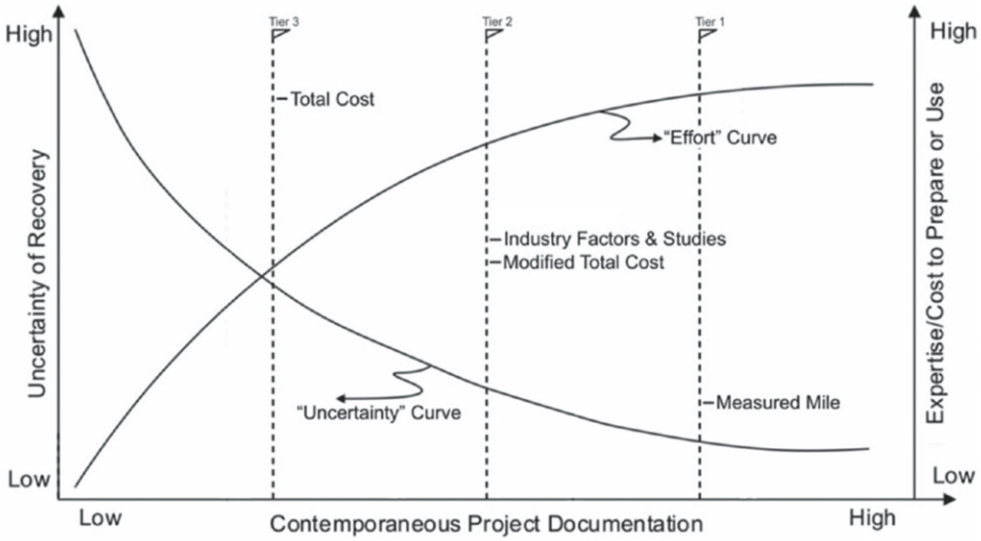


Figure 5-2. Effort and reliability of loss-of-productivity quantification methods.

Peter DeMasters, Author
FLAHERTY SENSABAUGH BONASSO PLLC
pdemasters@flahertylegal.com

Session Title: Hot Topics Potpourri
Presented by Peter DeMasters

Standard General Conditions in Utility Contracts

I. The EJCDC General Conditions Overview

Throughout America, political subdivisions are seeking to improve their infrastructure in some form or fashion. This could mean replacing a sewer system, or a water system. These projects are typically expensive, complicated, and are paid for with taxpayer dollars. Now, with money supplied by from Covid relief funds and the Infrastructure bill, more money should be available to fund more projects. As always, because of the use of public money, it is important that these large utility projects are done correctly and in accordance with plans and specifications.

In the tripartite relationship between owners, contractors, and engineers, where the engineer plays the role of both design professional and construction manager, there are normally a set of general conditions that control the course of the project. These conditions are part of the contract between the owner and contractor but administered by the engineer as the project manager. In the 1970s the Engineers Joint Contact Documents Committee (EJCDC) promulgated its first set of The Standard General Conditions of the Construction Contract. These conditions are published jointly by the American Council of Engineering Companies, the Associated General Contractors of America, the American Society of Civil Engineers, and the National Society of Professional Engineers. The purpose of the EJCDC General Conditions is to provide a uniform agreement which establishes the basic contractual relationship between the project's owner and the contractor completing the project. It was developed as the best way to have fair, objective

contractual relations and to reduce conflict among all parties involved in a construction project. These documents have been tested over decades of use and have been interpreted by Courts of various jurisdictions.

The EJCDC General Conditions are a document that is signed by the contractor and the project owner and integrated into the construction contract, but provides a role for the project engineer to impartially administer the contract documents between the parties to the contract. A copy of the EJCDC General Conditions is traditionally included in the bid documents for a project but an experienced public utility contractor should be familiar with its requirements. In other words, the terms, provisions, definitions, and requirements of the EJCDC General Conditions are known to the project owner, the contractor, and the project engineer well in advance of the contractor bidding on the project.

At the heart of the EJCDC General Conditions is the concept that the project owner, the project engineer, and the contractor have distinct but equally important roles in the construction process even though the engineer is not a party to the contract. Each role has authority and limitations on said authority, with the engineer acting as the adjudicator of disputes between the other two. Under Article 6 of the EJCDC General Conditions, it is the role of the contractor to supervise, inspect, and direct the work competently and efficiently. This includes removing debris from the site and cleaning the site after work to be in compliance with all environmental regulations. Importantly, the contractor is the sole entity responsible for the means, methods, techniques, sequences, and procedures of the construction. Furthermore, the contractor is responsible for the scheduling and coordinating of the work performed by all subcontractors and material suppliers.

Conversely, Article 8 outlines the responsibilities of the project owner. It is the project owner's responsibility to pay the contractor when due, execute change orders as needed, and furnish the site to the contractor with all easements required to complete the work. Importantly, the project owner must not control or seek to control the means and methods of the contractor in performing the work. In the normal relationship, the owner's communication with the contractor flows through the engineer.

Finally, the project engineer's responsibilities are laid out in Article 9. The project engineer's chief responsibility is to be the project owner's representative during the construction period and make visits to the site to observe the quality of the contractor's work and, depending on the scope of the engineer's contract with the owner, verify the quantities for payment. Again, however, the project engineer is not permitted to control, have authority over, or be responsible for the contractor's means, methods, techniques, sequences, or procedures. Rather, it is the project engineer's general responsibility to ensure that the contractor is performing work in accordance with contract plans and specifications and to authorize minor variations in the work that do not involve an adjustment in the Contract Price or the Contract Times. In that same vein, the project engineer has the authority to reject work which it believes in good faith to be defective, or that it believes will not produce a completed project that conforms with the contract documents.

Perhaps the more important aspect of the project engineer's role, and the aspect that often leads to conflict, is its role in decisions of the requirements of contract documents and the acceptability of the contractor's work as outlined in Article 9.08. As will be explained below, all matters between the project owner and the contractor arising prior to the date of final payment relating to the acceptability of the work, the interpretation of the requirements for the work, and disputes as to extensions in the Contract Price and/or Contract Times are to be adjudicated by the

project engineer. Importantly, the project engineer is not to show any partiality to the project owner or the contractor in acting as an interpreter or judge.

II. Course Of Construction as Contemplated in The EJCDC General Conditions.

The EJCDC General Conditions seek to outline the responsibilities of the project owner and the contractor in terms of events that may occur during the course of the project that are difficult or outright impossible to predict beforehand. For example, it is the owner's responsibility to furnish the project site to the contractor and obtain the necessary easements for the completion of the project under Article 4.01. Conversely, under Article 4.03, if the contractor believes that any subsurface or physical condition that is uncovered is of such as nature as to rise to an unforeseen site condition so as to require a change in the Contract Time or Contract Price, then it is the contractor's responsibility to notify the project owner and the project engineer in writing of such condition for review by both. Upon receipt of the project engineer's findings and conclusions as to the unforeseen site conditions, the project owner and the contractor must attempt to agree upon an acceptable extension in the Contract Time and/or Contract Price. If no agreement can be reached as to the entitlement or amount of adjustment, then either party may file a Claim with the project engineer for resolution in the process outlined below in Article 10. Further, if either the contractor or the owner believe that there should be a change in Contract Time or Price either because of extra work that was required and not contemplated in the contract, or work that is removed from the contract as unnecessary to the project, the parties should attempt to negotiate a change to the Contract Time or Price to have a change order executed. If there is no agreement, then either party may file a claim with the engineer as outlined in Article 10.

III. The Claims Process

Generally, if one of the parties to the contract sees an event or something that would require a change in the Contract Time or Price, that party can discuss with the other party, and they can agree to a change in the Contract Time or Price. This could be extra depth or change in alignment of a line causing extra work for the contractor to the elimination of an item from the contract by the owner. When the parties agree, the project engineer drafts a change order to reflect the parties' agreement of the change. If no agreement can be reached, then either party to the contract can make a claim under Article 10 of the contract and submit it to the engineer. Article 10 provides a clear process for the resolution of disputes where either the project owner or the contractor requests a modification in the Contract Price or Contract Time. This is done by submitting a "Claim" which the EJCDC General Conditions defines as a demand or assertion by owner or contractor seeking an adjustment of Contract Price or Contract Times, or both, or other relief with respect to the terms of the Contract.

The claims process itself is simple, the party seeing the change makes a claim, in writing, which outlines the change and reason for the change and provides it to the project engineer, who is tasked with acting as an impartial third-party in adjudicating the claim. The party making the claim must also substantiate that claim and the price or time, in writing, to the project engineer. A decision by the project engineer is required for the claim to be resolved and is a condition precedent to any exercise by the owner or contractor of any rights or remedies either may otherwise have under the contract documents or by laws and Regulations. To begin the claims process, Paragraph 10.05(B) of the EJCDC General Conditions mandates that claims must be submitted, in writing, to the project engineer within thirty (30) days of the event giving rise to the claims. After the notice of claim has been provided to the project engineer, the party initiating the claim then has thirty (30) days from the date that the notice was submitted to provide substantiation for its

claim. The party making the claim is tasked with initiating the claims process in writing and submitting written substantiation of that claim. Importantly, the EJCDC General Conditions clearly states that no claim for an adjustment in Contract Price or Contract Times will be valid if not substantiated in accordance with this Paragraph 10.05.

Put simply, the process to file a claim for the modification of Contract Time and Contract Price is as follows: (1) an event occurs that necessitates a party needing to file a claim to modify the Contract Time or Contract Price to address said event; (2) within thirty (30) days of this event, the party needs to file its written notice of its claim to the project engineer; and (3) within thirty (30) days of filing this written notice of its claim, the party making the claim must provide substantiation for its claim. The process does allow for extensions of time in that the party making the claim can ask for an extension of time to submit the claim or substantiation.

IV. Practical Application

Of course, it is one thing to write requirements for parties in a construction agreement and it is another thing to apply them in the field. The process of construction rarely goes as planned and it is not uncommon for unplanned events to increase the Contract Price and/or extend the Contract Time. If a change order is not agreed to ideally, the party seeking more money or time will comply with the claims process by submitting its notice of claim and then its substantiation in a timely fashion. In all circumstances, the burden rests with the party making the claim to follow the procedures set forth in the EJCDC General Conditions. It is not the responsibility of the project engineer to notice events on the project that may cause a claim and then file a claim on behalf of the appropriate party as this would take the engineer out of its role as a neutral adjudicator of a claim.

However, while parties are typically held to the terms of claims process, it is still expected the parties be reasonable in their decision making. Put simply, if a party caused an issue, then a party should be expected to remedy that issue. While a contractor is not entitled to an adjustment in Contract Price or Contract Times for delays within control of the contractor, a contractor may be entitled to such adjustments if a delay in the performance or progress of the work is caused by the project owner, the project engineer, or anyone for whom the project owner or project engineer is responsible. If it can be shown that either the project owner or project engineer controlled the means and methods of the contractor in a way that caused delay or an increase in expense for the contractor, it is possible that the project engineer or project owner could be liable for that amount of expense.

A party seeking to recover costs on the project that did not follow the claims process provisions may try to rely on a waiver or abrogation argument where the party seeking adjustment argues that the formal requirements of the provisions have been waived by the course of conduct of the parties. Some courts have held that the formal claims procedure may not be necessary if it can be shown that the party not making the claim or the project engineer has actual knowledge of the event giving rise to the claim. While this argument may take many forms, the most common is that the party seeking a change in Contract Time and/or Contract Price is entitled to such adjustment even if it did not follow the EJCDC General Conditions because the other party or the project engineer was made aware of the events necessitating the adjustment through informal means, either orally, or by witnessing the event.

However, this waiver and abrogation argument is more difficult to make in practice than in theory. An informal, oral agreement that changes the terms of a written contract must be so specific and direct that it leaves no doubt that the parties intended to change what they previously

agreed to in the EJCDC General Conditions. An express oral agreement is needed to deviate from the terms of the EJCDC General Conditions, not simply "constructive notice" of events that could possibly give rise to a claim. Furthermore, when such an express oral agreement has been proven, all other provisions of the EJCDC General Conditions are to remain intact. For example, a contractor cannot prevail on an argument that a project engineer waived the requirement that the notice of claim be submitted in writing because the project engineer entered into an express oral agreement extending the timeframe for a contractor to report unmarked underground facilities. A party cannot orally waive all of the requirements of the EJCDC General Conditions simply by waiving a specific requirement.

In sum, most jurisdiction hold as a tenant of contract law that a party that signs a written contract is presumed to have knowledge of the contents of the documents that they signed. The EJCDC General Conditions are provided to each party during the bidding process and their execution is required for the project to proceed. At the outset of the construction project, the contractor, project owner, and project engineer should all be aware of their roles under the EJCDC General Conditions are provided with ample opportunity to effectuate any change in writing beforehand. While it is possible to show that parties to the EJCDC General Conditions have waived the more formal requirements of the claims process, for example, that can only come with an express, provable oral agreement that deals with the specific provision sought to be waived. That is a heavy burden for the parking seeking to buck the formal requirements of the EJCDC General Conditions.

V. Advising Clients on Minimizing Liability Under the EJCDC General Conditions

The best way to minimize liability under the EJCDC General Conditions is to require all parties to comply with them. It must be kept in mind that these documents were drafted with each

party to the construction contract working together. It is meant to provide for industry acceptable risk distribution among project participants. In theory, if each party reads, understands, and follows the EJCDC General Conditions, then there is no cause for concern.

However, in reality, not all parties to a construction contract follow the agreements that they sign or are intimately familiar with the claims process. In order to protect itself from liability, a party should keep meticulous documentation on every aspect of the construction process. During project meetings, there should be time set aside to discuss if any party has a potential claim that it would like to submit. Further, in the field if the contractor has an issue that he believes should give rise to a change in the Contract Time or Price, and the engineer either witnesses the event or is notified orally, that engineer should document the issue and that he informed the contractor that if the contractor felt it gave rise to a claim, he should initiate the claims process. Each party should constantly be reminded in writing as to the requirements of the EJCDC General Conditions in requesting an adjustment in Contract Time or Contract Price.

Additionally, while waiver is typically an argument under the EJCDC General Conditions, a party should head off potential liability by not engaging in any conduct that could be construed as waiver in subsequent litigation. A party should not deviate from the provisions of the EJCDC General Conditions because that sets an expectation that could be argued to have waived or otherwise ratified later behavior that is in contravention to the General Conditions.

Another way to head off any potential "waiver or abrogation" argument is to ensure that any oral conversations with other parties to the project be followed up with or documented in writing either by letter or email confirming the conversation's content. A party looking to shed the formal requirements of the EJCDC General Conditions will use any grey area of ambiguity in the conversations between parties to make the argument that an express oral agreement to waive

formal provisions took place. It is imperative that each conversation is documented so no party can point to informal meetings as evidence of an express oral agreement to waive the requirements of the EJCDC General Conditions.