

Claims Avoidance – New Trend

Sudhir Agrawal, MSME, MBA, PE, CCM, LEED GA
AECOM
Los Angeles, CA

ABSTRACT

There have been constant changes in the era of claims. With the advancement in the technology, availability of new tools and contract documents upgrades, the volume of the claims has taken a down trend (gone down). Contractors have been trying to find new ways to claim extra dollars from the Owner. The schemes of delays in responses, design deficiencies, RFI response delays, change order processing and many others claims areas have taken a down turn with the advancement of computer, automation and technology.

In this paper the author will address:

1. Old Trend and past history – few typical claims type/areas.
2. New Trend – Claim reduction.
3. Advancement in technology – factors contributing to the reduction in past claims types
4. Contract documents updates – Well defined requirements in the General Conditions (GC).
5. Claims tracking, documentation and timely resolution.
6. Independent audits and technical evaluations.
7. Partnering and Team work.
8. Potential debarment of the contractor from future work due to continued false claims.
9. Smart Owner and Owner's staff.
10. Comparative analysis of old and new claims and contributing factors.

Note: Owner implies Owner, Designer and CM team.

The author has been constantly monitoring the trend in the claims area for over 25 years. He has noticed that the contractor who has been finding deficiencies in the contract documents and management processes, and was able to easily convince the Owner's staff in variety of known claims areas, for significant size claims, is now finding great difficulty. He/she is unable to take advantage of the Owner weaknesses. The Owner's challenge and recent won of few large claims has created negative publicity of few contractors.

The Contractor is now unable to take advantage of Owner's past fear of extra litigations costs. By defining the claim's clause and adding new process requirements in a new fresh way, the justification, documentation and the burden of proof has significantly increased on the part of the contractor. It has also added a third party assessment as an option. The contractor audit and potential debarment clause has made the contractor to think twice and submit only the valid claims without any grey area.

The author has found that the contractor is now breaking down the claims into smaller sizes and large quantities. The contractor has been successful with this approach, as most claims are for deferring site conditions and scope change.

GENERAL:

Claims should be avoided on all projects/contracts. Having claim on any project/contract is perceived by the Owner as someone has not performed his/her job correctly so it resulted in the claim. Only item which Owner would like to willingly pay extra, is the new and additional scope which he created. It may be true

in the ideal world. However in the real world, there are always some design and process deficiencies which should be minimized. These deficiencies were not paid for earlier, in the contract scope. So to include them as valid extra (change in scope), is warranted.

PROJECT DEVELOPMENT PHASE – OWNER’S INPUT:

At the original development stage of the project, the Owner provides certain conceptual input. The designer puts this concept in the form of drawings and specifications. There are several iterations and updates of the concept take place. There is never a complete and full understanding of the concept/ scope. These documents (drawings and specification) get reviewed by various staff on the project team, including the end user. These concepts become a formal contract documents and issued for bid. Necessary budget adjustments are made, after the bid opening. CM performs constructability review and manages the construction.

OWNER’S EXPECTATIONS IN THE IDEAL SITUATION:

The Owner expects that various qualified and experienced staff, he/she has engaged in the project design, is capable of doing a perfect job and there should be no extra budget required, unless extra scope is added to the project. The Owner penalizes the designer for errors and omissions for less than fully coordinated design and penalizes the construction manager for less than perfect constructability review and delays in the implementation of the project. The reality is that there are few items always missed in the design, design coordination and constructability review. Deferring site conditions, equipment manufacturer, installation methods, implementation tolerances etc require some adjustment/change in the scope, thus resulting in additional cost. So far as there is no intentional negligence in the design and construction management, the designer and the CM should not be penalized. Negligence in design or CM work is uncommon and seldom/rarely found in the industry.

OLD TREND/ PAST HISTORY:

In the past, the contractor was diligently searching for conflicts, ambiguity and interference related items in the contract design documents and was able to find and claim those high cost items, schedule delays, higher overhead costs, weather delays, communication slow down, longer time in RFI and shop drawings responses etc. Some of which were due to available technology limitations. The Owner was paying most of those claims due to potential grey areas and fear of losing in the litigation process and eventually paying. The contractor as well Owner, both were parking (setting aside) unresolved issues till the end of the contract. They were waiting and brewing till the end. They were becoming the claims. No response or untimely response from the Owner, resulted into automatic merit of the claim. The Owner was setting aside about 10% of the construction cost to deal with the potential issues and claims. Quite often, that was not enough, to fund the claims and change orders. The accounting and auditing option were there but rarely exercised.

NEW TREND- CLAIMS REDUCTION:

The new trend shows significant reduction in large claims. Many large reputed contractors consider future business potential from the clients, hence making business decisions and forgoing some potential claims and absorbing the costs. There has been early recognition of the issues. Issues are discussed, analyzed and resolved without brewing into claims. Due to the addition of several specific clauses in the contract (resulted from the lessons learned), it is becoming harder for the contractor to find claims items and file claims. Issues are becoming self diagnosing for the claims. There has been increased accountability (checks and balances), independent auditing, and independent technical evaluation.

ADVANCEMENT IN TECHNOLOGY, NEW TOOLS AVAILABILITY AND USE:

With the advancement in the technology, several new tools have become available to design, manage the design and construction, more effectively, thus reducing the claims. These tools have shifted the claims trend in a downward direction. Some of these tools are as follows:

1. Design Software: There have been several design calculations software available and used effectively in the industry. Some of the upgrades have resulted in precise calculations, better layout, equipment selection and cost estimates. In the past, the design documents were prepared in two dimensional (2-d) drawings at the Microsoft station using AutoCAD, Intergraph or other software. The recent development of the BIM and Rabbits software has provided a new third dimension to the design, reducing several interference issues of the past. Most new designs are now being performed using three dimensional (3-d) Rabbits and BIM software. The design efficiency has improved. However, the Owner has put a squeeze on the designer and reduced their design fee. This has created imbalance since there has not been enough time for the designer to learn and use the new tool, effectively.
2. Construction Management Software: The software used in the past for the construction management are still current and widely used. They are Prolog, Expedition, project quest, Microsoft PM, etc. There has been no major changes in this area. The scheduling software Primavera has been upgraded and widely used. Work Breakdown Structure (WBS) coding has helped tracking the cost and scope items, effectively. Progen is a recent software in the development stage. This has helped in getting the small task order proposals on-line from the contractors, quicker and faster. With the use of scanner and its reliability, the invoice pre-processing has become quicker, subject to receiving wet signature approval. The contractor receives their payments of the billed items within 30 days and they don't have to shed out much of their own money for a longer period, waiting for payment.
3. Communication Software: The software used in the past for communication have been the same. However, with the scanner, photo shop, videos, drop folders gaining popularity, communication has been quicker and faster. The information has become instantaneously available. It has been easier to send the video of the site conditions for the designer to review and respond the Request for Information (RFI). Large documents can be sent back and forth thru the drop folders and PDF files. The need for the experts to travel across the country has reduced. The information dissemination has become easier and faster. The quality and clarity of transferred data is good, without any distortion.
4. Staff Role Changes: In the past there was a clear distinction of Who is Who role of individuals. Who is on designer's side, CM side or the contractor's side. People normally stayed on the side they started their career. There has been very little movement in the role change. Now, the trend has changed. The people are constantly changing the roles and moving from contractor's side to designer's side or CM side and vice versa. This role change has helped the Owner in a positive way. The person who was on the contractor side before and was trying to find loose ends and ambiguity in the design, is now tasked by the Owner to perform constructability review before the bid and avoid/ minimize these loose ends, conflicts and ambiguity. This has helped the design and CM team. The quality of the design (details, notes, references and other instructions in the contract documents) has improved significantly.
5. Professional Growth and New Skill Set: Professional Engineer (P.E.) is still the major credential required for the design professionally. However, there are

- several specialized sub categories which have come up to improve the design quality. Additionally, there are other highly recognized management credentials available, which require formal training, competition and exams. Some of these credentials are Certified Construction managers (CCM), Project Management Professionals (PMP), Leadership in Environmental and Energy Design (LEED) etc. The Owner now hires several people with CCM, PMP and LEED credentials, in addition to P.E. With all these trained professionals in the industry, the skill set on all sides - Owner, Designer, CM and Contractor has improved. The professionalism in dealing with each other and dealing with the issues objectively, has increased. With the common higher skill set, the communication quality has also improved.
6. Design Built: There has been trend shift in this area. There are more and more Design-Built type approach considered now, in the industry versus the past trend of Design- Bid- Built. Now, (except for some complex projects), the conceptual design is carried out to the developed design stage. Then the contractor is asked to carry and coordinate the final design further. This trend and liability shift has decreased the claims. The litigation and claims potential has also reduced.
 7. Multiple Reviews: With the increased trend of entire construction industry involvement in the LEED program, the incentives provided by the utility companies, the preference in plan check review process, multiple reviews by the Architects and Engineers at various stages of design, to achieve the Certified, Silver, Gold or Platinum LEED certified building, review by the Commissioning agent etc, the design is checked and back checked, several times by the experts. Thus, several interference issues which could have surfaced later, are corrected earlier in a timely manner. The design quality has improved.
 8. Defining & streamlining the process and Standardizing the Documents submission format: The Owner has taken several steps to streamline the process and added forms to better define the requirements and the submission format. The subjectivity and ambiguity has been reduced, clarity has increased, the ground rules are easier to understand and follow. The Owner has defined profit/ mark up levels for the contractor and the subcontractor. The Owner has defined deliverable and its specific timeline of submission. The weather related inclement delays, its qualifying requirements, its pre-requisite critical path time impact analysis (TIA) approval has been clarified in the General Conditions GC), daily staffing and work progress report, safety report, minority use report, material receipt reports and other common reports requirements, have been clarified, timely Non Conformance Report (NCR) resolution has been clarified in GC. The requirement for detailed itemized bid costs breakdown by specification section, through schedule of values, people hour loaded and cost loaded schedule and schedule updates on primavera format has been well defined in the GC, field office and home office applicability has been defined. In brief, the project has been divided into several small activities and the fragment of the activity has been so small that it has become easier to define and understand the cause and responsibility party for the claim and scope change. The competition has increased and bidding has become very competitive.
 9. Barred from Bidding on the Project: The new trend is that the Owner is willing to take an aggressive approach and challenge the contractor for non-merited items, to the extent of keeping the option open, of barring the contractor from future bidding if there are frequent erroneous change orders or false claims found. Some of these options were there in the past but the Owner was reluctant to exercise due to unsurity.
 10. Auditing: Increased accountability and documentation of expenditure of the public funds has been imposed by the

- funding agency. The Owner has added Audit staff on the team. The requirement for the contractor to reveal the information, provide documentation and fully cooperate during audit has been added in the contract. Note that the audit plan is prepared and audits are conducted in accordance with Generally Acceptable Accounting Principles (GAAP). An element of independent technical evaluation is a new upcoming item to compliment the audit. The requirement was there but was exercised less frequently. Now it has been mandated by the funding agency to support and justify the accountability of public funds.
11. Increase in Dispute Resolution Cost: The litigation process is time consuming and its cost has gone up significantly. The Owner has been utilizing alternate, less expensive means to deal with these differences. arbitration, senior management review, business decisions, independent dispute resolution board (DRB) are other common items in the industry. Both the Owner as well the Contractor are taking fair and reasonable analysis settlement approach, instead of nickling and diming each and every item.
 12. Increased Competition during Tight Economy and poor Market Condition: The competition has increased due to the tight economy and slow down in the construction industry. There have been increased number of bidders on small projects. However, for the larger projects, the joint venture and subcontracting is popular.
 13. Two Step Bid Process: The Owner has chosen two step bid process on many large contracts, first the qualification proposal and then the cost proposal. This has helped the bidders to understand their bid status from the first step and act accordingly, for the next step. Sometimes, they can join venture or become subcontractors to other prime contractors and save few marketing dollars.
 14. Partnering and Team Building: The Owner has included a requirement of partnering and team building, in most contracts. This requires extra commitment by the principals of the project stakeholders (Owner, Contractor, Designer, CM, third party etc). This helps in expediting the process, improving the communication and understanding the issues, to make better business decisions, beyond the contractor. This thinking beyond the box, helps in making early decisions by the stakeholders and avoids claims. This area has gained popularity.
 15. Pre-survey and Contract Document review submittal: The Owner has added requirements for a walk through with the CM, survey the site and document the pre-construction status. Also, the Owner has added a requirement for the contract design documents assessment and submission of the red marked comments from their coordinated efforts from various trades, at an early stage of the construction. This helps identifying the discrepancies so that they can be corrected and design be updated at an early stage.
 16. Other Miscellaneous Requirements: There are many other miscellaneous requirements such as regular prevailing wage on-line submission, local union worker use, as-built, operation & maintenance manual, testing, commissioning, permit requirements, environmental remediation, community outreach, liquidated damage, punch list resolution, warranty etc which have been clarified in the contract documents.

ITEMS STILL OF CONCERN:

There are few items which still remain of concern. They are dealt with, on case by case basis. Some of these items are: differing site conditions, quantity verification, code change, reduction in staff and fees by the Owner for design and CM consultants, delay in project start by the Owner, Owner decision for limited geo technical analysis by the designer before the

bid due to limited funds, Owner’s willingness to take risk and deal with few specific issues at the site, contamination and hazardous material removal, lead and asbestos removal, real estate acquisition, homeland security, site security, emergency task order authorization, quality of project due to low bid, central processing of data, processing time due to increased volume and reduced size change orders, few specialty items, accessibility, fire alarm systems, change in codes, plan check approval etc.

CONCLUSION & RECOMMENDAION:

There has been significant progress in the claims area. The trend has been positive in favor of the Owner (scope change set aside). The technology has advanced and provided tools for better management of the contracts, avoided design discrepancy and ambiguity. The requirements and formats of the deliverable have been spelled out in the contract documents. The communication amongst the project team has improved. The transfer of data has become quicker and faster. The project has been fragmented to several small activities, which are easier to manage. It has become easier to identify the issues, their cause and responsible party and avoid claims.

The table below shows old trends, new trends, and the tools which helped in the claims reduction.

Table: Comparative Analysis of old and New Trend – Major Items

Description	Old Trend	New Trend	Helping Tools/ Factor
Design	Interference issues, ambiguity, 2-d design drawings. Calculation software.	Reduction in Claims. Issues significantly reduced, 3-d design drawings, improved calculation software.	New tools, Design Software – Rabbits, BIM, 3-d design, advanced design calculation software for HVAC, electric, structural etc calculations

Construction Management	CM software available - less effective, prolog, expedition, primavera, Microsoft PM etc	Reduction in Claims. Same CM software available, slightly advanced, more effective. New procurement software for task orders- progen.	New improved tools, Advanced primavera – small fragnet of activities, progen for task order procurement.
Communication	Long process, time consuming, long mail in time	Reduction in Claims. Quicker, faster, on line with proper security access. Reduced travel time.	New improved tools, scanning, video of site conditions, drop folders.
Staff Skill set – training	Old fashion, mainly PE for design.	Reduction in Claims. Advanced skills, improved professionalism on Owner, designer, CM and Contractor.	Advanced training- CCM, PMP, LEED, in addition to PE. Cross training of staff- contractor’s view point.
RFI response	Insufficient information, partial response, designer to guess and make judgment.	Reduction in Claims. Quicker, faster and complete response on-line communication high.	On-Line, information sharing, back and forth, e-mails, video of site conditions, drop folders.
Submittal response	Incomplete information, partial response, designer to guess and make judgment	Reduction in Claims. Quicker, faster and complete response on-line info available of the product, communication high.	On-Line, information sharing, back and forth, e-mails, video of product data, drop folders.
Plan Check	Slower	Reduction in Claims. Quicker, faster if LEED certification pursued for the building.	Priority if LEED certification pursued

Reviews	Coordination review, slow and incomplete due to lack of time	Reduction in Claims. Many reviews – Design reviewed for coordination, plan check, constructability, LEED, Commissioning	LEED and commissioning requires thorough and multiple reviews and monitoring, improved design.
Process	Not well defined, contractor to guess	Reduction in Claims. Better and detailed information in General Conditions. Deliverables and format defined.	Provided Form to make it specific and clearer, improved definitive information and format in GC
Documents clarity	Not very clear, interference, conflicts existed	Reduction in Claims. Clearer documents, ambiguity reduced, expectation defined.	Lot of reviews, additional clarity provided, improved contract documents.
Litigation and Disputes.	Was in place, rarely used by the Owner, due to fear of results in favor of contractor, realized conflicts and ambiguity in the documents.	Reduction in Claims. Owner gained confidence and willing to challenge the Contractor. Alternate issued resolution preferred.	Interference, ambiguity reduction, perception of 3-d design through new software provided confidence to the Owner.
Audits	Less audit, less requirements, few basic items checked.	Reduction in Claims. Audits mandated by the funding agency, also required for accountability, GC incorporated audit requirements, independent technical evaluation requirement also added.	Contractor on alert, careful in submitting claims, undefined fear on the part of the contractor.

Accountability	Existed, Owner’s justification was not questioned by the public.	Reduction in Claims. Increased accountability, Owner careful in approving claims	Public and funding agency (FTA, PMOC) demanded accountability.
Market Conditions	Contractor’s market, constant flow of work, many jobs available for everyone. Bids higher than Engineer’s estimate.	Reduction in Claims. Buyer’s market, increase in competition, bids typically lower than Engineer’s estimate	Scarce funding, less jobs available. Business decisions by the contractor to absorb some cost for potential work and customer relations.
Delay costs	Significant, high.	Reduction in Claims. Small level fragment of activities, delays, issues and responsible party realized early and resolved.	Controlled at the source, better design, better response time due to software availability and small fragment of activities monitored easily.
Partnering/Team work	Some existed, not very common.	Reduction in Claims. Partnering very common, company principal’s involved, decisions quicker.	Partnering/ team work a common feature on most projects, Business decisions by principals.
Differing site conditions	Existed, less surveys.	Still exists, slightly improved.	More geotechnical survey needed. Owner will to take risk.
Inclement weather delays	Existed, enforcement clause was not well defined.	Reduction in Claims. Requirements and rules defined in GC. enforcement clause better defined.	Better defined documents, require time impact analysis and impact on critical path to honor it.
Others	Clear separation of contractor type people, design type people and CM type people. People stayed on that side of the industry.	Reduction in Claims. People switched sides and moved from contractor’s side to Owner’s side.	People who were trying to find ambiguity in the design were asked by the Owner to avoid ambiguity in the design.