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Contract administration and field review liability

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Agenda

- Contract administration
- Extra work and changes
- Disagreements concerning conditions/extra work
- Limits on claims: notice conditions
- Delay
- Change orders & time extensions
- Payment
- Field review liability
- Coast Hotels v Bruskiwich 2001 BCSC
- Take aways
- Zimpro Inc v Fischbach & Moore of Canada Ltd., Ont HJC

Contract administration



A consultant may be called upon by contract to act as **Consultant** in respect of the project.

This important role requires the Consultant to administer the contract on behalf of the owner and to act as intermediary to the parties.

Several key areas to contract administration.



Changes to the Work



Delays



Payment

Extra work and changes

Most legal disputes concerning extras and/or changes to the work involve:

- Contractual interpretation
- A conflict between the parties concerning compliance with contractual requirements
- A consideration of what can be done to resolve the conflict notwithstanding possible non-compliance

There is no perfect contract for every job. Knowing the contract is essential to ensuring compliance and resolving conflicts.

- Contract typically provides the owner with the authority to order changes.
- Certain contractual terms may restrict the costs that can be claimed: limitations on claims for overhead, profit and/or impacts may have a significant effect on how or if you are paid.
- Certain contractual terms account for the unknown by providing standard formulas to address extra work should it be encountered: unit price work for contaminated soils
- A smart contract provides for equitable adjustment of prices for materially changed conditions. **DO NOT WAIT FOR THE CONDITION TO ARISE**

Disagreements concerning conditions/extra work

Theory

The contract will always provide a means to resolve issues concerning extra work or changed conditions.

Misconception

If the contract does not provide a means to resolve issues concerning extra work or changed conditions, the conflict between the parties will inevitably lead to a delay in further works.

Reality

The Law and Equity Act provides a means to permit progression of the works in the face of a dispute.

Disagreements concerning conditions/extra work

“(2) If a dispute arises between the parties to a contract respecting the obligations of a party under the contract, the party whose obligations are disputed (the contractor) may elect to perform the contract in accordance with the requirements of the other party, and the electing party is then entitled to compensation from the requiring party for any:

- **service performed,**
- **property supplied or transferred,**
- **liability assumed,** and
- **money paid**

by the electing party in the course of that performance beyond that which the contract required the electing party to do.”



Limits on claims: notice conditions

Theory

All changes will be properly documented and all claims will be agreed to and paid.

Misconception

There is no need to document or provide notice in accordance with the contract in respect of extras or changed conditions because the parties are “all on the same page”.

Reality

You are not on the same page...and even if you are now that may not last after you submit your invoice for payment.

Limits on claims: notice conditions



- Most formal contracts require claims to be made or at least identified in writing within **a fixed time**, often a very short time.
- Adhering to the **contractual notice provision** is often a pre-condition to making any claim.
- **Non-compliance** may bar recovery. Know the requirements of the notice provisions or risk having to litigate.
- Developing a “**practice**” is key.

Delay

- Some of the most complex construction disputes involve delay claims.
- A **delay claim** is a claim to recover increased or unanticipated costs that result from an event that disrupted the schedule and pushed construction beyond the planned completion date.
- **Notice** is crucial.



Change orders & time extensions

- In the context of contractual notice requirements, it is typically the **contractor's responsibility** to demonstrate that additional time is due.
- Therefore, when a change directive, change order or extra work order is initiated, the contractor should determine whether or not a time extension is required.
- Must be considered by the Consultant



Payment



- The contract will specify the time in which progress claims must be certified.
- Know the contract requirements.
- Properly consider the claims for payment – also consider schedules.

Field review liability



There is a misperception on behalf of owners and contractors that when a design consultant inspects the work at the site they are “supervising” construction

...an architect or engineer must properly supervise the works and inspect them with sufficient frequency to ensure that the materials and workmanship conform to the contractual requirements.

Hudson’s Building and Engineering Contracts



Cases establish that field review by a consultant involves periodic review of the construction to check whether it is in general conformity with the design.



Letters of Assurance - “substantially comply, in all material respects, with the applicable requirements of the Code and the plans and supporting documents submitted in support of the application for the building permit”.

Coast Hotels v Bruskiwich 2001 BCSC

- P sues contractor and mechanical engineer in respect of plumbing system which failed prematurely.
- Court found that the bulk of liability was the result of the faulty workmanship of the contractor, but did assess the engineer with a portion of liability for failing to conduct adequate field reviews (80/20)
- 14 inspections but stupid timing
- **Two duties owed by consultant:**
 - exercise professional engineering skills in preparing the design;
 - not to supervise but to inspect work performed by the contractor



Take aways



Timing



Manner of review



Follow up



Danger

Zimpro Inc v Fischbach & Moore of Canada Ltd., Ont HJC

- Flood during construction of sewage plant - supply valve was left on and a compressor turned off.
- P sues contractor – who TPs sub. P also sues engineer.
- No duty on contractor to advise sub if within expertise.
- Engineer is not responsible to “teach every trade the knowledge that trade should possess so that hazards that should be known to them are in fact known to them”.
- Engineer entitled to assume that the subcontractor who installed the piping and valves knew how the system operated and the consequences of leaving a valve open when the compressor was off.



480

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