



Best Practices for Documenting Construction Claims

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**BUT FIRST . . .
FACT OR FANTASY?**

But First: Fact or Fantasy:



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Fact

- Burj Khalifa
- Dubai
- 160 stories; 2,717 feet
- Opened in January 2010
- Taller than the Chrysler Building stacked on top of the Empire State Building
- Skidmore, Owings & Merrill



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Fact

- Aqua—Chicago, Illinois
- 82 stories, apartment tower
- Tallest building in the world designed by a woman—
Jeanne Gang
- Curved concrete balconies provide shade, and . . .
- Dissipate wind (no tuned mass damper required for this
building)



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Fiction

- From the Star Wars universe:





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FACT



- Shanghai Tower
- Topped out last month
- Designed by Gensler
- Notch interrupts wind
 - Saved \$58M
- Gold LEED
- Rainwater collection system
- And . . .

- 270 wind turbines
- Powers nighttime lighting
- 350K kWh / year



Take away:

- 1. Provide proper NOTICE in a TIMELY MANNER.
- 2. RECORD as many facts as you can AT THE TIME.

Why Document?

- To support a liability claim;
- To support a claim for reasonable damages; and
- To support causation—that specific impacts have resulted in certain damages.
- To defend against a claim.

THE FIRST BEST PRACTICE RE: A CLAIM (AND AN INCREASINGLY IMPORTANT ONE)

Follow the Notice of Claims Provision in Your Contract.

- Most contracts have one.
- Must give written notice
 - Of any issue giving rise to a “claim”
 - Within a given time.

Follow the Notice of Claims Provision in Your Contract

- Example: AIA A201-2007:
- “Claim” = demand or assertion seeking as matter of right payment of money or other relief with respect to the terms of the Contract.
- “Claim” includes other disputes and matters in question between Owner and Contractor arising out of or relating to the Contract.

Follow Your Contract Notice Clause:

- Claims must be made by providing WRITTEN NOTICE to the architect and the other party WITHIN 21 DAYS AFTER THE OCCURRENCE OR EVENT GIVING RISE TO SUCH CLAIM, or
- WITHIN 21 DAYS AFTER THE CLAIMANT FIRST RECOGNIZES THE CONDITION GIVING RISE TO THE CLAIM, WHICHEVER IS LATER.

Follow the Notice of Claims Provision in Your Contract

- NB: may have to provide back up documentation.
- Notice may need to go to a third party (design professional).
- Why do people often ignore this provision?
- Why is it bad to ignore this provision?

Ignore the Contract At Your Own Peril:

- **BECAUSE BY IGNORING THE NOTICE PROVISION YOU MAY BE WAIVING YOUR RIGHT TO MAKE A CLAIM.**
- **RECENT DECISIONS REFLECT WHY IT IS BAD TO IGNORE THE NOTICE PROVISION.**

Village of Greenport

v.

Manning Plumbing & Heating Corp.

- Village sued Manning for negligent design and construction at a marina in the Village;
- Contract was for fire suppression system;
- Piping and connections ruptured during use, and the system failed tests conducted by Manning after the failure.

Village of Greenport

- Manning sent the Village a letter informing the Village of the failure TWO DAYS after the failure occurred.
- The Court said this did not constitute “a Claim” under the contract because it was not a letter from the Village demanding relief against Manning.
- The Village lawsuit was dismissed based on the Village’s failure to comply with the contractual notice of claim provision.

Central States Mech., Inc.

v.

Agra Indus.

- \$1.1M claim for delays, extra work, and acceleration costs against the GC;
- CO to be submitted within 21 days of event causing the claim;
- Delay Notice, 7 days, Delay Claim, 14 days.

Central States

- Central claimed failure to follow CO procedure was merely a “technical breach,” that timing requirements were unenforceable, and that attempts to comply would have been futile.
- Court rejected this argument:
 - Parties are sophisticated;
 - Contract was for millions of dollars of work;
 - This was Central’s bargained for contract.

Cajun Constructors, Inc.

v.

Velasco Drainage Dist.

- Owner and Contractor have disputes over delays and claims for COs.
- Contractor sues Owner, but did not give required notice to Owner and Engineer of intent to file suit.
- Owner files MSJ seeking dismissal of the claims.
- Contractor says notice provision not condition precedent to suit for breach of contract, therefore no bar.

Cajun Constructors

- Trial court grants Owner's motion based on Contractor's failure to abide by the notice provision.
- Texas Court of Appeals AFFIRMS, finding that the Contractor failed to satisfy a condition precedent to filing suit; therefore, the lawsuit was barred.

Southwest Eng. Co. v. Reorg. Sch. Dist. R-9

- Missouri, 1968
- Plaintiff constructed a school; when finished, Owner withheld money as LD for a delay in completion;
- Plaintiff won at trial; on appeal Owner argued that Plaintiff did not make a timely request for an extension of time.

Southwest Eng. Co.

- Court found that contract allowed 48 hours after the delay period ended to provide notice of the claim.
- A letter to the architect was sufficient in this case.
- Contract allowed for notice of claim directly to the architect.
- NOTE: the court looked at the contract.

Other Cases

- ***A. Hedenberg & Co. v. St. Luke's Hospital*** (Mn. Ct. App. 1996):
 - Claim for LD was a “claim” under the contract, and the notice provisions applied.

- ***RCR Bldg. Corp. v. Pinnacle Hospitality Partners*** (Tenn. Ct. App. 2012):
 - Owner cannot recover LD because it failed to comply with the notice provisions of the contract. Claim for LD is a “claim” under the contract.