

# Key Construction Claims: Top 10 Issues for City Attorneys

Jeff Chapman  
FORD NASSEN & BALDWIN P.C.  
111 Congress Avenue  
Suite 1010  
Austin, Texas 78701  
(512) 275-1782  
(512) 236-0682  
[jschapman@fordnassen.com](mailto:jschapman@fordnassen.com)



I'm Here to Help!



## Top Ten List of Contractor Claims

- 1) Adequacy of design documents & unforeseen conflicts
- 2) Increased material and equipment costs
- 3) Changes required because of aesthetic preferences
- 4) Acceleration
- 5) Increased insurance/bonding premiums
- 6) Labor & material costs
- 7) Interruptions affecting means and methods
- 8) Completeness of contract documents
- 9) Late or nonpayment
- 10) Attorney's fees



## Legal Basis for Recovery

### Municipal Project

- Public Bid
  - Project Delivery System is Immaterial
  - Written Contract Document

### Breach of Contract

No Discussion of Tort or Personal Injury or  
Property Damage Claims



## Waiver of Sovereign Immunity

- Immunity from Liability waived by entering into a construction contract
  - *Travis County v. Pelzel & Federal Sign v. Texas Southern Univ.*
- Immunity from suit waived by §271.152
  - Local Government Code



Don't Get Bugged Down in the Mud



## Claims Avoidance

- **Contract Language**
  - Carefully drafted plans and specifications
  - Use plain language to communicate intent and desires for the project
  - Meaningful on-going dispute resolution procedures
- **Not All Claims are Avoidable!**
  - But not all result in litigation



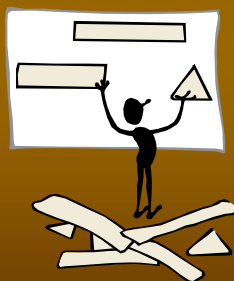
## Extra Work

- **A Common Claim**
- **Contractor Deems work outside scope of original agreement**
- **Change Proposal or Change Order Request**
- **No Work to Proceed Absent Written Authorization**



## Analysis of Extra Work Claim

- Review Documentation
  - Plans and Specifications for scope analysis
  - General conditions for claim presentation
  - Supporting data, if any
    - Costs
    - Time and labor
    - Allowable Profit & Overhead



## Adequacy of Design Documents

### Adequacy of Design Documents

*Lonergan v. San Antonio Loan & Trust (Tex. 1907)*

- Unforeseen Conflicts**
- Differing Site Conditions**
- Underground or Hidden Conditions**

#### Examples:

- Additional Yard Pipe**
- Alteration of service for wastewater line installation**



## Increased Material and Equipment Costs

- Efforts to overcome material shortages or High market demand due to time differential
  - CMU Block
  - Asphalt Paving
- Evaluate original pricing compared with proposed price
  - Evaluate stated cause of different pricing
  - Look for credits available if materials change



## Aesthetic Preferences



- If a chosen finish is unacceptable, and corrections are ordered, who pays?
- CMU Block Example
- Wall-covering or installation
- Investigate both expectations and underlying cause for aesthetically unacceptable finish



## Lost Productivity or Efficiency

- Contractors Plan their Work
- Contracts provide control of Mean and Methods of Construction to the Contractor
- Overcoming interruptions in that plan often costs money or efficiencies that translate into time or money



## Acceleration

- Additional Forces
- Added Mobilization and Equipment Costs
- Owner must evaluate the source of interruption
- If access to areas promised and not given, Owner may be responsible
- If Contractor's plan to use efficiencies interrupted by pace of construction or lack of coordination, Contractor may be responsible



## Delay Claims

- Delay Damages May Be Waived
- Bids and Schedules are like photographs
  - Snap shot of expectations at time made
  - Intervening delays change the subject-matter
  - Claims may follow if the new subject costs more than the old



## Claim Resulting from Dictated Means and Methods

- Concrete – Civil Construction
  - Alternative methods of curing in Specs
  - Contractor chooses one – Engineer demands alternative
  - Alternative takes longer and Contractor does not accelerate by adding additional crews or forms
  - Forms, rebar, allocation of crews, downhill progression interrupted resulting in claims





## Delays for RFIs and Plan Changes

- Incomplete or unclear documentation
  - Often will be responsibility of Design Professional
  - Owner must demand accountability
- Issues may arise relating to control of information
  - Existing As-Builts
  - Expression of intent, etc.



## Delay Damages

(deviation from the paper)

- Extended Jobsite General Conditions
  - Job Trailers
  - Superintendent Salaries
  - Electricity, Water,
  - Office Supplies
    - Anything that makes the job run on the jobsite



## Delay Damages



- Extended Equipment Costs
  - Cranes, Backhoes, Dozers, Scrapers
  - Pick-up Trucks and Fuel Costs
  - Heavy and Civil Construction uses expensive equipment
    - A small bulldozer may run about \$6000/month for rental



## Late or Nonpayment

- Prompt Pay Act
  - Tex. Gov. Code ch. 2251
  - Prime plus 1 – simple interest
  - Date invoice received or services accepted
- Conditions Expressly Precedent
  - Enforceable now... *TA Operating v. Solar Applications* in Supreme Court
  - Good Faith Dispute



## Prompt Pay – Attorney’s Fees

- Section 2251.043 of the Government Code dictates recovery attorney’s fees  
(typo in footnote 15 of paper...cites 2253)
- Section 271.159 of the Local Government Code prohibits recovery of attorney’s fees

