

Project Progress Strategies: Avoidance of Claims Project Closeout

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THE CURIOUS CASE OF BUCKING FOR BENJAMINS*



Yes, "Claim Dog Millionaire" Was Just Too Obvious!

Agenda

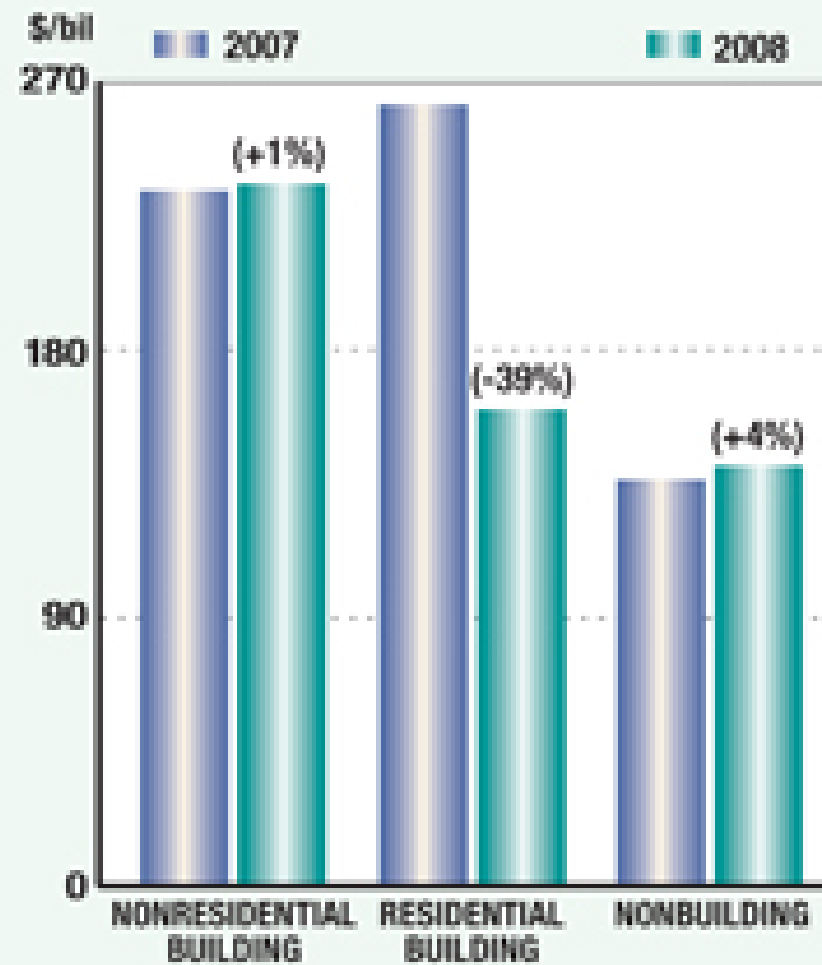
- “The Curious Case...” a play in one act by The Not-Ready for Closed Session Players.
- Seriously though...
 - Where do claims come from
 - 2009 Edition & always classic “origins of claims”
 - Project claims: Extra cost, delay/inefficiency, construction deficiency/defect
 - Avoiding claims
 - Responding to, analyzing, & resolving claims
 - Pursuing claims
 - Project Closeout Strategies
 - The DSA Closeout and Certification issues



WHERE DO CLAIMS COME FROM?

[2009 ed.]

MCGRAW-HILL CONSTRUCTION STARTS



The Construction Market As Of Now

- Collapse of private-side construction market has increased competition on public side of the market, to benefit of public owners
 - Lots of bidders
 - Better prices
- But, the market also has increased pressure for bidders to get the work to keep the cash flowing
 - More bid protests
 - Potential bidding below cost to get the work

And, On The Public Side:

- Any state funding after December 17, 2008, is in limbo
- Many projects were mid-construction at that point, and depending on funding for completion
- Other districts are seeing ability to sell approved bonds reduced with drastic reductions in assessed valuations to support bond sales

Claims Pressures Created By These Market Forces

- Less private side and less public side work means more competition to get projects, at lower cost to the owner
- Less profit created by more competition means more incentive to make up the difference with claims and change orders

Claims Pressures Created By Subcontractor Market changes

- Increasing consolidation in major sub trades
 - Mechanical and electrical
- Firms with national ownership
 - Your local electrician is now a national firm
- Aggressive, claims-oriented management
 - Is now the rule, with profit-center pressures
 - Firms with in-house claims teams
- More “pass-through” claims a result
 - Subcontractor claims of all kinds are simply passed along by the General Contractor



In Summary:

- The tight market means more incentive on contractors to pursue claims
- The tight money for owners means more incentive to skimp on prevention
- Subcontractor consolidation, national ownership creating more claims pressure on projects
- And, what that means is...more and more claims

- Bad Drawings
- Bad Contractors
- Bad CM's
- Bad Owners
- Tired, old delivery methods (!)

Elementary Renovation + Addition

This modernization project resulted in Contractor claims for project delay and inefficiency. Passed along by the District to the Architect.

Where Claims Come From

Modernization projects with additions to existing buildings are fertile ground for claims.

- Poor District documentation
- Design teams that don't visit the site
- Contractors, subs guessed the real scope



- Bad Drawings
- Bad Contractors
- Bad CM's
- Bad Owners
- Tired, old delivery methods (!)

Replacement Middle School

This New Construction project had a series of Contractor errors which took over a year to correct.

Starting with anchor bolts set wrong, leading to structural steel impacts and eventual reconstruction of part of an entire wing of the school.

Where Claims Come From

New Construction projects

- Complex coordination demands of major new school projects
- Contractors, subs not always up to task
- One early error in work, compounds to put project progress at risk



- Bad Drawings
- Bad Contractors
- Bad CM's
- Bad Owners
- Tired, old delivery methods (!)

Where Claims Come From

New Construction—Completed projects

- Unusual systems, complex designs
- Completed new schools with ongoing problems
- Very tight budget, cost reductions
- Issues with plans, compounded by issues with trades execution

Late 90's New High School

This project had serious, ongoing water intrusion issues.

District successfully pressed its Construction Defects claim against the General Contractor, who brought subs to the table.



PROJECT CLAIMS

- Extra Cost Claims
 - Change Order requests not approved during the course of the project
 - Pursued by the Contractor, despite rejection
 - Or end of job Change Order requests never reviewed
 - These are usually easier to resolve...
 - Than other more complex time-related claims
 - But the fundamental issue goes back to the drawings and interpretation of the work
 - This can be a painful process for the District's team

PROJECT CLAIMS

- Delay/Inefficiency Claims
 - Contractor/Sub claims for costs of extra time to complete the work
 - Extended overhead and general conditions
 - Manpower cost claims—wage increases due to project time extensions
 - Inefficiency for workforce—stop/start pace
 - These Claims typically blame the Architect's team
 - Large numbers of RFI's
 - Significant design changes
 - Most common claims on Design-Bid-Build School Construction projects
 - Proving once again that it's not the work, it's the time!

PROJECT CLAIMS

- Construction Deficiency/Defect Claims
 - Beginning with the Punchlist...
 - Often stretching years beyond occupancy
 - Beyond warranty claims
 - These claims are made by the District
 - Against the Contractor (or the Design team)
 - Who brings in his subs...
 - Typical defect claims
 - Leaking roofs and walls—windows!
 - The “M” word
 - Mechanical systems
 - Specialty installations

Project Claims

Dear Bill,

While the occupancy of your new buildings is complete, there is still a substantial amount of work to do to successfully close out the project. As discussed in our informal conversations, there are three (3) major outstanding categories that need to be resolved:

1. Outstanding Unapproved Change Order Requests,
2. Previously Rejected Change Order Request, and
3. Project Delay Compensation Change Order Requests

- And so it begins...
 - Just when you thought the job was going to close out quietly

AVOIDING CLAIMS

- Experienced school Architect teams
 - With adequate fee and time to deliver project
 - Construction Administration phase fee
- Pre-construction document coordination
 - Constructability Reviews
 - Full process to include Backcheck
 - Review meetings to ensure comments picked-up
 - Peer reviews
 - Roofing and waterproofing

Avoiding Claims

- Contractor Pre-Qualification
 - Schools experience requirements
 - Financial record and default history
 - Project team experience
 - Claims experience
 - District-specific
 - Self-perform
 - Project Labor
 - Local Hire
 - Safety record

WCCUSD Pre-Qual “Essential Criteria”

As detailed herein, each potential Contractor must provide specific information that will be reviewed and scaled by the District. Certain qualifications are essential. Any potential Contractor who cannot satisfy all of the following requirements (“Essential Criteria”), regardless of the ranking or ability to meet other criteria, will not be prequalified:

1. School Projects. The Contractor shall have contracted for and completed construction of a minimum of three (3) California public school district construction projects, each with a Contract value of at least \$1,000,000 within the past five (5) years.
2. Self-Perform Work. Demonstrated ability to self-perform 5% of the work.
3. Default or Bankruptcy. The Contractor, either performing work under its current license or under other licenses through other entities, including a joint venture, shall not have defaulted on a Contract within the past five (5) years or declared bankruptcy or been placed in receivership within the past five (5) years.

AVOIDING CLAIMS

- Set up Construction Documents for success
 - Limited number of Deferred Approvals
- Bid Phase
 - Limited, clear Alternates
 - Few Addenda issued
- Conformed document set prior to NTP
 - Make this a part of Basic Services for Architect
- Clearly defined timelines for award & NTP
 - Don't **start** the delay at the **start** of the project!

AVOIDING CLAIMS

- Danger signals during construction
 - Large numbers of RFI's
 - This is the clearest indication of the need to act
 - RFI's with "Circular motion"
 - RFI #757a, b, c, d, e, f, g...
 - Indicates intractable issues
 - "The wrong answer"
 - Not answering the question...
 - Stop Notices at every turn
 - Subcontractors not being paid
 - Subs using Stop Notices to press extra cost claims

AVOIDING CLAIMS

- Danger signals during construction
 - Project team issues
 - Your own people...
 - Design team non-responsiveness
 - Fee issues, internal team issues
 - Deteriorating relationships on the project team
 - Hostile correspondence between the parties
 - Blind copying

Builders has failed to cooperate with _____ on the referenced project, despite many emails and telephone conversations. After frittering away 8 months of contract time you finally supplied the necessary documents to _____ in December 2008, just prior to the holidays. Your delaying tactic has impacted the schedule for the project. Builders has exhibited a cavalier attitude throughout the many months.

AVOIDING CLAIMS

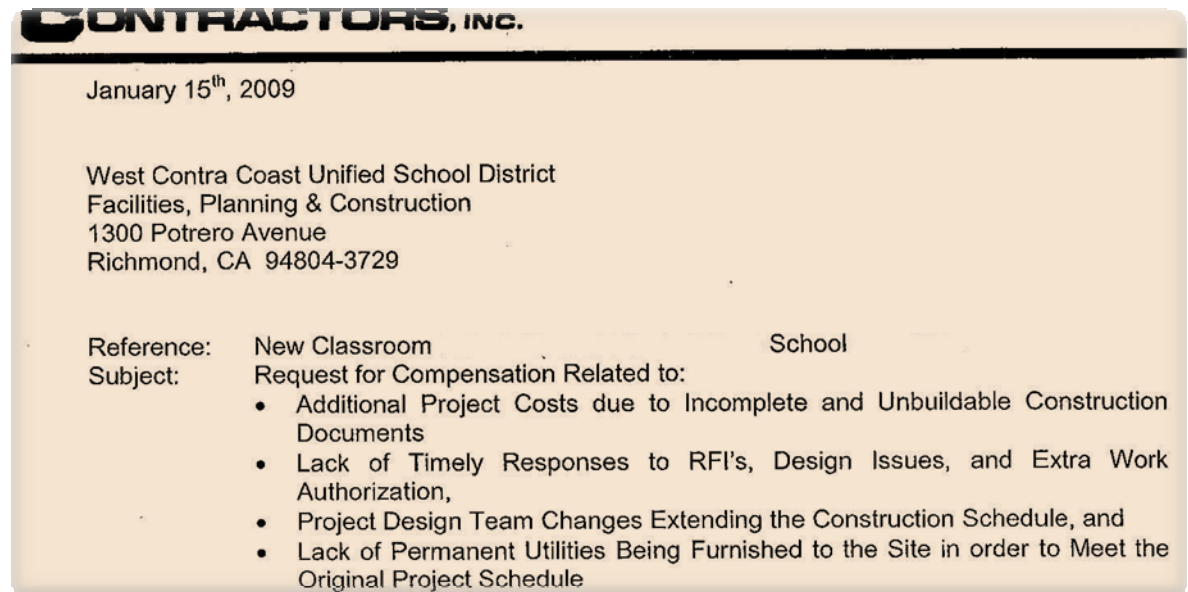
- District teams—CM, Architect strategies
- Key players in preventing claims
 - Responsiveness of the design team
 - Primary element in reducing delay/inefficiency risk
 - The Proactive CM
 - Going to structural steel fabricators...
 - Going to the union...
 - Going to the subconsultants...
 - Going to DSA...
 - Monitoring Certified Payroll—track claimed extras...
 - Owners that make timely, appropriate decisions
 - Understand risks of approval delays

Avoiding Claims

- Communication is the key, but --
- Documentation runs a close second
 - If there will be a claim later, the documents (not the witnesses!) will carry the day
 - The most clear and honest documents are the most convincing
- Construction manager and architect are key
 - Response to Contractor documentation/positions
 - Electronic document management

Responding to claims

- When you get the binder
 - Is it really a “Claim”
 - Or just a “Request for Compensation”
 - Copies for the project team
 - Confirm GC’s review Sub’s claims
 - Maintain the procedural upper hand
 - Limits on filing claims—Is
 - Recent legal changes



Responding to Claims

- Requests for documents
 - Always accompany the claims
 - Responding and managing document requests
- What documents does the District need?
 - Response to Contractor claims
 - “Just say no.”
 - Then put the burden back on them...
 - Job cost reports
 - Sub correspondence
 - Electronic schedules
 - False claims...

Responding to claims

- With Extra Cost claims and Delay claims
 - Districts may look to project team members
 - Exposure related to documents
 - Design team in the loop during process
- Consider strategies—based upon preliminary claims review
 - Settle with Contractor
 - Press claim against project team--Architect
 - Settle with project team
 - Force Contractor action

Analyzing claims

- The “Expert”
 - Typically an Architect, providing independent review of the project documents
 - Will analyze project Change Orders
 - Review, confirm responsibility
 - Assign cost impact, beyond value-added
- Schedule analysis
 - Will review project schedules from baseline
 - All updates and recovery schedules
 - Review, confirm critical path impacts, responsibility

Analyzing claims

- Expert review and schedule analysis will provide cost basis of a District claim
 - Where District presses claim against project team
- Or will provide District an outline of the validity of a Contractor claim
 - Where District is fighting Contractor claim(s)
- Claims basics
 - Confirm insurance and limits from project team
 - Notification letters

Working with your attorney

- Keep them in the loop from the earliest “Change Order Request” that may rise to level of a claim
 - Hire experts under them—delay analysis, design
 - Ensures privilege on all communication
- Request scenarios and costs
 - From early settlement
 - Through mediation
 - Through litigation
- Costs & benefits of proceeding with each step
- Cost-avoidance and early settlement
 - Nuisance cost

Pursuing claims

- District initiated claims for professional liability
 - Based upon extra cost and delay/inefficiency cost claims from the Contractor
 - Against Architect and subconsultants
 - Remember the “Standard of Care” for professional services
 - Place the insurance carrier on notice
 - Watch the proceeds in protracted process (!)
- Legal action by the District
 - Filing suit against the design team
 - Path forward...mediation and beyond

Pursuing claims

- District initiated claims for construction defects
 - Against Contractor
 - Not without finger-pointing at the documents
- Typically will involve independent testing
 - Water intrusion tests using ASTM Standards on windows and wall systems
- Clear identification of all costs associated
 - Loss of use, testing, repairs
- Contractor will bring subs to the table
 - Look for subcontractor insurance proceeds

Resolving Claims—You see it coming, how to keep it from getting worse...

- The “Mid-course Correction”
 - Agree to reset the clock
 - Settle the time impact
 - Settle the cost impact
 - Sign a change order with settlement language
- Referral to mediator or facilitator while project still underway
- Exercise suspension or termination options?
 - Realistic assessment of bonding company takeover

Resolving claims—the basics

- Always best to try and resolve claims early!
 - Exception—early in project—extended time compensation requests may go away...
- Keep talking with everyone
 - Claims discussions prior to legal action
- Understand where you can give, where you can't
 - Claims may seem larger than they really are...
 - Settle the easy stuff, release as much \$ as you can
- Settlement prior to attorney involvement!
- Mediation
 - Structured setting, multiple parties

CLOSEOUT STRATEGIES

- Tools for navigating the end of the project
 - Punchlist and warranty process
 - Develop matrix of issues, responsibility
 - Commissioning
 - Best new process for ensuring project quality
 - Mechanical and electrical systems
- Set up and manage Closeout teams
 - Develop and encourage cooperation through close
 - District, Architect, CM, Inspector, Contractor
 - Ensures best approach to final DSA Closeout hurdles

CLOSEOUT STRATEGIES

- Closing out with the Project Team
 - Extra cost claims from the Architect's side
 - Contracts without automatic fee increase for Change Orders
 - Negotiate with the Architect on Add Services for Change Orders
 - Negotiate for any Architect credits related to serious design issues
 - Consider—work installed, then removed, reinstalled due to design problems(!)
 - Extra cost claims from the CM side
 - Related to extended contract time
 - Negotiable...



DSA Closeout and Certification Issues

DSA Closeout and Certification

- DSA Closeout should be routine.
 - Certification is purely a paperwork process for DSA.
 - Yet, estimates suggest over **7,000** school district projects throughout the state have been closed without certification.
 - How does this happen?
 - Project teams are complex with overlapping responsibilities for Closeout paperwork
 - Teams are at the end of the project and just want out!
 - DSA procedures, until recently, didn't focus on or support effective Closeout
 - Districts didn't understand process or consequences(!)

DSA Closeout & Certification



State of California • Arnold Schwarzenegger, Governor
State and Consumer Services Agency
DEPARTMENT OF GENERAL SERVICES
Division of the State Architect
Headquarters • 1102 Q Street, Suite 5100 • Sacramento, CA 95811
(916) 448-8100 • Fax (916) 445-3521 • www.dsa.dgs.ca.gov

Project Certification

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October 31, 2008

October 31, 2008

Superintendent

Dear Superintendent

The Division of the State Architect (DSA) requests that you inform your governing board members that they may be held personally liable for the failure of educational buildings not certified by DSA. Please have your staff contact DSA to determine which, if any, buildings are not currently certified.

Project certification is evidenced by a letter DSA issues certifying that the building project has been completed in accordance with requirements as to the safety of design and construction pursuant to Education Code §§ 17280-17316 and 81130-81147 (The Field Act).

California Education Code §§ 17315 and 81147 provide that when an educational building is constructed in accordance with approved plans and specifications, and all the proper documents have been filed, and all fees have been paid, then the building will be granted certification that it complies with the requirements of the Field Act.

Project certification is important because it provides a method of documenting that all efforts have been made to ensure the safety of educational building construction. Additionally, failure to obtain project certification can result in some serious and negative consequences: DSA will be unable to approve future proposed construction affecting or utilizing the uncertified construction and, more importantly, governing board members may be held personally liable for projects until certified. The California Education Code (§§ 17371 and 81177) shields members of a school or community college district governing board from personal liability for injury to persons or damages to property resulting from the failure of an educational building as long as the requirements of the Field Act are met (i.e., the building is certified).

In an effort to aid school and community college districts in closing all projects with certification, DSA has prepared and published on our website a project certification guide. The guide can be found at:

http://www.documents.dgs.ca.gov/dsa/plan_review_process/Project-Certification-Guide_10-22-08.pdf

This guide explains methods to determine the certification status of your facilities outlines the certification process suggests potential resolutions to circumstances preventing certification and provides DSA contact information. To further assist school and community college districts DSA has developed a presentation covering the information contained in the guideline. The attached flyer provides the dates and locations of four scheduled presentations. If you cannot send a representative to one of these presentations contact your local DSA Office about scheduling a presentation.

The answers to most general questions and the contact information for particular individuals working on specific parts of the closeout process will be included in the guidelines posted on our website. However if you or your governing board members have particular questions regarding the information contained in this letter please contact the Regional Manager of your local DSA Regional Office. The Regional Managers are

Nat Chauhan San Francisco Bay Area	(510) 622 3109
Dan Levernier Sacramento	(916) 323 3013
Shaf Ullah Los Angeles	(213) 897 4092
Craig Rush San Diego	(858) 674 5413

Sincerely

A handwritten signature in black ink, appearing to read 'David F. Thorman'.

David F. Thorman AIA
State Architect

Enclosure

Certification Process

- DSA approves plans and specifications for life safety items.
- During the construction, the Inspector of Record is responsible to verify that the project is constructed in accordance with DSA-approved plans and specifications
- Closeout documents are required by DSA from Inspector, Architect, Engineers, Contractor, District

DSA Closeout and Certification

- Project closeout process reviewed at DSA to confirm that all necessary documents have been received.
 - If they are all in order, DSA issues Certification (Ed Code 17315)
 - If not all documents have been received:
 - In appropriate cases, DSA will still issue Certification.
 - In others, no Certification.

If No Certification

- Board members may be personally liable for a project until it is certified (Ed. Code 17370, 17371; Gov. Code 840.2)
 - Board liability is only for injury caused by dangerous conditions due to building not being constructed in accordance with DSA-approved plans and specs.
 - District liability insurance typically covers the District and Board members' liability.
 - Missing certification is not deemed negligence or an exclusion in coverage.
- No follow-on work on that project will be approved.

Action Plan

- “Safe harbor” provision
 - Board liability will not be imposed if the Board has initiated compliance with Field Act
 - In this case, obtaining certification from DSA (Ed. Code 17371)
 - A District may request that DSA re-open projects that were not certified.
 - A DSA closeout process can be complied with after the fact and certifications obtained.

Action Plan


- Certification can still be obtained even if all documents cannot be located.
 - When all efforts to collect the required documents have failed, District may request that DSA review the project.
 - Review may include re-inspection of work (exposed and concealed), performance testing.
 - All costs borne by District.
 - All deficiencies must be corrected before certificate of compliance will be issued.

Challenges

- Project Architect should be the close-out agent.
- Post-construction, DSA will only accept complete packages of documentation
 - After DSA closes its file, documents are sent to State Archives.
 - Effort is time consuming and detail intensive – difficult to maintain momentum on a “as time allows basis”.

Preventative Measures

- Include in agreement with Architect a requirement for DSA closeout.
 - Two percent of contract price paid when all DSA required documentation submitted;
 - Final two percent paid when DSA issues certificate of compliance.
- Include similar Closeout Retention clauses in Construction Management, Inspector contracts
 - These team members often have paperwork responsibility
 - Make them “co-responsible” with the Architect



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