A CRYSTAL BALL - EARLY WARNING SIGNS OF CONSTRUCTION CLAIMS & DISPUTES

A RESEARCH PERSPECTIVE ISSUED BY THE
NAVIGANT CONSTRUCTION FORUM’
JUNE 2015

GLOBAL CONSTRUCTION

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NOTICE

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PURPOSE OF RESEARCH PERSPECTIVE

It is axiomatic that claims and disputes on a project do not simply appear out of nowhere. Experience indicates that when a dispute occurs, there is normally a back story or history of events, decisions, lack of decisions, etc. that can be traced back from
a few weeks to several years that gave rise to the dispute. It is typically these past events or decisions that are identi“ed as •early warning signsŽ of claims and disputes. Typically it is only when claims are “led at the end of a project that attorneys and claims

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Known Internal or External Constraints Not Identi“ed in Contract Documents … Design professionals generally know a great deal about architecture or engineering but often know little about the details concerning operating facilities. It is not uncommon that when construction is being performed in an operating facility there are operational needs that must be met
but which a contractor is unaware because the constraints are not
included in the bidding documents. One of the participants in this
report related a story of a hospital expansion project that involved
constructing a mirror image mid-rise building immediately
adjacent to the existing facility. The drawings called for sky
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€ Recommended Claims and Dispute Avoidance Actions: If the project owner is faced with internal or external time constraints (i.e., court ordered deadlines; contractual timeframes; time to market considerations; etc.) the
owner may want to consider alternative project delivery methodologies in order to speed up the design and construction process. If the owner is unable to extend the program schedule, then they should at least alert bidders to the shortened timeframe to help them prepare and submit realistic bids. If internal and external constraints are not project drivers, when an owner reaches a decision to construct a new project they should consult with designers and experienced construction oriented professionals to determine the reasonable amount of time needed to properly design and construct the project. Planning for the project should include the information obtained from this consultation plus a contingency. If necessary, the owner should extend
the overall project or program plan for design completion,
bidding, contract award and project completion. Owners need
to remember the old adage that, •No one ever remembers whether the project was bid on time, but everyone always remembers whether it was completed on time!Ž

Poor Estimate During Bid Process … Owners should review the cost estimate prepared by the design professionals to determine that it is complete, thorough, realistic and takes into account
all known factors concerning the project and its surrounding circumstances. Design professionals undoubtedly do their best
to prepare good estimates for bidding purposes. However, as noted previously, they may not have construction experience and tend to look at drawings and speci“cations dierently than potential bidders. Initially, this type of situation is likely to lead
to bids coming in higher than the approved budget. Should this happen, the owner may have to revise the approved budget
by reallocating project contingency funds and/or management reserve funds. If this action is taken, the funds initially planned for handling changes during the work may well be exhausted before construction even commences. The alternative to this would be for the owner to reject all bids, have the project redesigned and then rebid the work. This, of course, results in additional design and bidding costs as well as delay to the entire project.

€ Recommended Claims and Dispute Avoidance Actions: If the owner does not have experienced internal resources to review
the design professional•s project cost estimate they would be
well advised to retain such service either from a construction management “rm or an estimating consultant. While this
action will add to the project costs somewhat, it may more
than repay the owner by helping set a realistic estimate of the work prior to bidding.

Bidders Requesting an Extended Project Duration … If, during the bidding period, potential bidders complain that the time of performance of the work is too short and ask that it be extended, owners need to pay close attention. Such situations arise generally when the owner has not performed any pre-bid scheduling or
when the project•s schedule is driven by some outside force (i.e.,
a court order, time to market concerns, commercial agreements,
etc.). In the latter event, there may be nothing the owner can do
to revise the time of performance duration. H owever, in the former event, the owner may want to take appropriate action to prevent potential delay claims from arising during the performance of the
work. Owners should realize that if contractors believe the time
of performance is unreasonable they will (1) prepare higher bids
based on overtime work, added labor and/or added construction equipment and/or (2) be on constant look out for potential owner caused delays or delays caused by situations for which is owner
is contractually liable (i.e., diering site conditions). Some years
back, one of the contributors to this research perspective was
involved in a project to upgrade a large wastewater treatment
facility. Bidders requested that the project duration time be
extended during the bidding period. The owner did not do so. The contractor who ultimately won the project mobilized to the site
and prepared and submitted a baseline schedule. The schedule showed the contractor initiating underground work at a speci“c
location of the plant site. When excavation commenced the
contractor encountered uncharted utilities and had to stop work
and demobilize from that area of the site to another area. Much to the owner•s surprise, the contractor again encountered uncharted utilities and had to remobilize to yet another area where they, again, encountered uncharted utilities. By the time the time extensions for these three diering site condition claims were resolved, the time of performance was substantially extended … even beyond what bidders had initially requested. In hindsight, it would have been less expensive to extend the project duration by bid addendum than it was to negotiate the three claim settlements.

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€ Recommended Claims and Dispute Avoidance Actions: Owners should prepare, or have prepared for them, a pre-
bid schedule that allows the owner and design professional
to establish a reasonable time of performance for the work about to be bid. Experience shows that design professionals typically establish the project duration without such pre-

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No Well Thought Out Disputes Clause … Another indicator of a good potential for disputes is a contract that does not have a well thought out Disputes clause. This type of Disputes clause typically calls for project level negotiations which, should they
fail to reach resolution, takes the project participants directly to binding arbitration or litigation in a court of competent jurisdiction.
A well crafted Dispute clause should probably include a two
step negotiation process (with the “rst step being project level negotiations and the second being executive level negotiations).
The clause ought to stipulate one or more alternative dispute
resolution (•ADRŽ) methods such as mediation or a Dispute Resolution Board (•DRBŽ) prior to arbitration or litigation. 12 The lack of a well thought out Disputes clause is an obvious early
warning sign of potential disputes, as the contract does not provide for more than one opportunity to resolve an issue if it cannot be negotiated on the project site.

€ Recommended Claims and Dispute Avoidance Actions:
If the contractor•s review shows this to be the case, there
is little the contractor can do to change the situation. The
contactor•s project risk analysis review needs to take this into consideration when deciding whether to bid the project or not.

Poor De“nition of Scope of Work … If the contractor•s review of the bidding documents shows that the project•s scope of work
is poorly de“ned, this too is an early warning sign of claims and disputes. Indicators of an inadequate scope of work may include
an excessively high number of submittals required; language in
the quality control portions of speci“cations indicating that, •ƒ
work must be accomplished to the satisfaction of the engineer
or the architectŽ; the bidding documents do not contain any subsurface conditions report where one typically would be required for a project of this type; the invitation to bid contains wording similar to, •ƒneither the Owner nor the Architect assumes responsibility for errors or misunderstandings resulting from the use of incomplete informationŽ; or includes language such as, •The work includes any other items necessary to provide a complete, useable building even if not shown or speci“ed in the bid documents.Ž A poor de“nition of the project scope of work is likely to result in an abnormally high number of change orders and constructive changes claims as well as the resulting delay and disruption.

€ Recommended Claims and Dispute Avoidance Actions: If

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EARLY WARNING SIGNS …
EARLY CONSTRUCTION PHASE

At times, there are no early warning signs during the bidding period. However, once the contract is awarded and the NTP issued early warning signs start popping up. Among them are the following.

Early Warning Signs for Owners

Problems Concerning the Baseline Schedule … Typically contracts call for submittal of a project schedule within a short time after issuance of the project•s NTP (e.g., 30 or 45 days). Most owners believe this is adequate time to prepare a schedule and most contractors attempt to submit their as-planned or baseline
schedule within the mandated timeframe. H owever, some contractors play games with the baseline schedules for a variety of reasons. 13 Inadequately planned schedules, late schedule submittals, poor level of details, lack of procurement information, etc. are often found within the initial baseline schedule submittals. It is not uncommon to “nd that the baseline schedule is not accepted or approved by the owner for several months after issuance of the project•s NTP. Should this happen it may lead to disputes over project delays, especially for those events that occurred prior to acceptance of the baseline schedule.

€ Recommended Claims and Dispute Avoidance Actions:
In order to obtain timely submittal of a good baseline
schedule, owners may modify their contract documents in the

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Changes in Major Subcontractors … It is not uncommon, especially on public works projects, that bidders are required to list all or
almost all subcontractors in the bid. Almost all contracts that
require subcontractor listing also set forth a formal procedure
for subcontractor substitutions. Such requirements are intended
to prevent potential bid shopping and/or bid peddling. If, after
contract award and NTP an owner “nds that the contractor is requesting substitution of one or more major subcontractors then this may be an early warning sign of claims and disputes. Experience indicates that substitutions after award frequently stem from contractor/subcontractor disputes over the subcontractor•s scope of work or the terms and conditions of the subcontract.
In either event, such disputes will disrupt the project and lead to disputes concerning work scope issues and change orders.

€ Recommended Claims and Dispute Avoidance Actions: There probably are times when subcontractor substitutions are clearly warranted and entirely justi“ed. However, owners are well advised to make certain that the subcontractor
substitution procedure contained in the contract documents
is well de“ned and thorough. In the event that such a
substitution is requested, owners need to make certain that
both the contractor and the owner themselves follow the
contract procedure exactly.

Inability to Ramp Up Planned/Needed Craft Levels … One key to a successful project is labor productivity and labor productivity depends entirely upon the contractor•s ability to provide the right number of quali“ed craft labor to the project. Many Scheduling speci“cations require that the contractor resource load their
baseline or as-planned schedule. Resource loading often is
de“ned to include cost and labor by trade and craft. If the contractor•s baseline schedule is labor loaded, the owner has the ability to analyze the labor needed to complete the project on time and track the labor actually on the project site. If the owner reviews a labor loaded baseline schedule and calculates what labor is needed on site over time, the owner can review certi“ed payrolls or obtain site labor data from the contractor or their construction management sta to determine if the contractor
has the planned labor on site. If the owner determines that the contractor has not ramped up to the needed level of labor, this is an early warning sign of claims and disputes. Claims and disputes concerning delay and lost labor productivity are likely to result.

€ Recommended Claims and Dispute Avoidance Actions: As soon as an owner determines that the actual labor on site has
fallen below the planned level the owner should meet with the contractor and discuss the issue and inquire how the contractor intends to rectify the situation. The owner may also want to
calculate the actual labor productivity achieved and extrapolate
actual labor productivity into the schedule for the remaining
work to determine what project delay is likely. If this is done,
then this to should be brought to the contractor•s attention to demonstrate their potential exposure to liquidated damages.

D/B or EPC Contractor •Going to Field Too EarlyŽ … A common issue with D/B or EPC contracts is the need to complete sucient design work to allow the contractor to move to the “eld and
progress their construction eorts eciently and eectively. All
too often owners fail to understand the value of the contractor
waiting until there is enough approved design to allow them
work eectively. When owners get impatient with waiting to move to the “eld, they start complaining to the contractor about the perceived •lack of real progressŽ. If the contractor moves
to the “eld at the owner•s request and the owner “nds that the contractor is working haphazardly and ineectively then this may be an early warning sign of claims and disputes. Claims of project delay, lost productivity and attendant impact damages are likely to arise from this type of situation.

€ Recommended Claims and Dispute Avoidance Actions: The situation is avoidable if the owner and contractor work together in accordance with the project plan and schedule.
If, however, the owner convinces the contractor to move to the “eld earlier than planned and then observes inecient work in the “eld, the owner and the contractor need to meet and discuss the situation and work out a plan to allow the contractor to proceed eciently or, potentially, suspend the work in the “eld until the design eort catches up.

Early Warning Signs for Contractors

At Pre-Construction Meeting the Owner Announces •There Will Be No Change Orders on this ProjectŽ … For the contractor this is clearly an early warning sign of potential claims and disputes as it is an indicator that the owner has unrealistic expectations concerning design and construction and/or has not read
their own contract. The type of claims and disputes likely to grow from this attitude include constructive changes, delays and constructive suspensions of work, disputed diering site condition claims and constructive acceleration.

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€ Recommended Claims and Dispute Avoidance Actions: Contractors dealing with an owner with this attitude must
review their contract very carefully to determine what clauses provide the right of recovery and what the required procedure
is. Paying very careful attention to notice requirements is
critical as is documentation of all events leading to a request
for change order or “ling a claim. The communications
procedure on the project must also be well documented as the attitude on the part of the owner is unlikely to be swayed by
verbal commitments and handshake deals in the “eld.

Multiple Prime Contractors on Site … Several States (approximately ten) require that all or some contracts be bid as multiple prime contracts. Under this project delivery method, the project is
bid in several dierent packages such as civil and architectural; electrical; plumbing and heating; and ventilating and cooling. Other States allow public works owners to bid multiple prime contracts (California, for example) 15. It is also the authors• experience that some State agencies and municipalities opt to bid work using multiple primes in order to •keep the work localŽ and some major oil, gas and chemical project owners utilize this project delivery method to complete projects faster and, perhaps, decrease their own risk exposure. Contractors bidding on a multiple prime contract should view this delivery method as an early warning sign of potential claims and disputes. Since there is no privity of contract (contractual relationship) between the independent prime contractors when one prime contractor delays or impacts another, the only option the impacted contractor has is to “le a request
for change order or a claim against the project owner. Experience indicates that owners in situations such as this frequently resist issuing such change orders on the basis that •We didn•t impact you, the electrical prime did!Ž Such refusal to deal with claims of this nature often lead to larger claims concerning lost productivity and/or constructive acceleration.

€ Recommended Claims and Dispute Avoidance Actions: There is not a lot a contractor can do to insulate themselves from potential claims or disputes on multiple prime contract projects. Since the situation arises from a well known
pre-bid condition, the contractor•s opportunity to claim unrevealed superior knowledge on the part of the owner (a classic starting point for many claims) is not available. The contractor•s best defense is to insist that all baseline schedules and schedule updates be circulated to all multiple prime contractors and that the owner hold frequent coordination meetings with all prime contractors in an eort to identify potential problems early and come to a coordinated agreement on how to avoid such problems or mitigate them.

Lack of Site Access, Property, Easements or Rights of Way … Owners should not bid projects until all property, easements and rights of way (•ROWŽ) are acquired and all site access issues clearly resolved. Having said this, the authors• experience is that owners frequently bid a project prior to resolution of site access
and other property issues. This is not uncommon in Public Private Partnership (•P3Ž) highway projects which are typically bid on
a D/B basis prior to the “nal vertical and horizontal alignment
being fully established. Contractors bidding on projects where property acquisition issues are not fully resolved are typically advised of this in the bidding documents. An early warning sign
of potential claims and disputes would be if the needed property
acquisitions, easements or ROW do not become available in
accordance with the property acquisition schedule contained in
the bid document. The types of claims and disputes are likely to
be delay, suspension of work and/or constructive suspension of
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Lack of Necessary Permits … As with the property issue above, owners should not put projects out for bids until they have received all necessary permits that the owner is obligated to obtain. Some owners, h owever, acting on the belief that the permits will be issued quickly and wanting work on their project to start sooner, may bid the project without the required permits. It is the authors• experience that when this occurs, owners often
do not tell the bidders on the presumption that all permits will
be available prior to NTP. It is also the authors• experience that frequently this is not the case. Thus, there is a potential for project delays, suspensions of work and/or constructive acceleration. But,
how can contractors learn about this during the bid phase?

€ Recommended Claims and Dispute Avoidance Actions: As a matter of routine, bidders ought to submit a written question
to the project owner prior to the pre-bid conference asking if
all owner furnished permits were already in hand. A follow on
written question should be, •If the answer is no, when does
the owner believe the permits will be issued?Ž If the response
is •noŽ the permits are not yet issued, refuses to provide a response, or cannot tell bidder when the permits are likely to be issued, then any of these of early warning signs of potential claims and disputes. Such claims as delay, constructive suspension, constructive acceleration and the impacts of these claims are likely. Similar to the lack of site access and property availability discussed above, the contractor would be well advised to obtain information concerning the permits from the owner and include it in the baseline schedule. In the absence
of any owner furnished information concerning permit
issuance, the contractor should create a baseline schedule and include receiving the permits by dates certain. If the permits
are not available by those dates, a written notice of potential
delay should be provided to the owner on that day.

Unanticipated Work Hour Restrictions or Limits on Work Areas … If, after contract award and/or NTP the owner advises the contractor
of work hour restrictions or limitations on work areas that were not identi“ed in the bidding documents, this is an early warning sign of potential claims and disputes. The most likely claims arising from
this situation are constructive changes, delays, suspensions of work, constructive suspensions and constructive acceleration.

€ Recommended Claims and Dispute Avoidance Actions:
As soon as these new work restrictions are identi“ed, the contractor needs to provide written notice of potential delay. The contractor should then analyze their baseline schedule
and plan and modify it accordingly to accounati
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Key Milestone Dates Missed But Project Completion Still on Time … When the project records show that the contractor has missed one
or more milestones, or when analysis indicates that a large number
of planned activity start dates have not been achieved on time but
the project completion date has not moved, this is an early warning
sign of claims and disputes. •Scheduling away delayŽ typically

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€ Recommended Claims and Dispute Avoidance Actions: Owners should review every schedule update carefully. Whenever resequencing of a number of activities is encountered the owner needs to meet with the contractor
and any aected subcontractors to question the need for resequencing of each activity resequenced. If the answers are

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Change Orders Not Address Time and Impact Costs or Contractor Will Perform Changed Work Only on Time and Material Basis … Both situations discussed here are common in construction and either one is an early warning sign of future claims and disputes. Many contractors are loathe to provide a complete change order proposal which includes all hard dollar costs, the projected time extension and delay costs and any related impact damages. While they are willing to propose, negotiate and settle the hard dollars costs they either do not know how to estimate time and impact or are unwilling to take on the risk of doing so and signing a change order with no reservation of rights. This type of contractor is likely to only be willing to perform changed work under a change order with
a reservation of rights or, if the owner is not willing to allow
this, perform changed work on a time and material (•T&MŽ) or

cost reimbursable basis. This latter scenario is tantamount to
a complete reservation if rights to hard dollar costs, delay and impact costs. Situations such as this are likely to lead to claims concerning the cost of directed changes, delay and delay impact.
Of course, this situation is exacerbated in many instances by an owner who refuses to deal with requested time extensions and/or impact damages. Owners who want to deal with hard dollar costs only open themselves up to such claims every time they take this course of action.

€ Recommended Claims and Dispute Avoidance Actions: One preventive measure that can be included in the Changes
clause is a requirement de“ning what must be included in all
change order proposals … scope of work, hard dollar costs,
time extension request and impact costs … all of which must be justi“ed by a complete breakdown of the requested costs and
a TIA demonstrating the need for a time extension. Absent such a contractual requirement, the owner and the contractor should “rst negotiate the scope of the change order work in detail, to make certain both parties are preparing estimates
on the same work. The owner may then prepare their own cost estimate including impact damages and their own TIA. Once this is completed, the owner and contractor should meet to compare estimates and TIAs. If agreement cannot be reached through reconciliation of the two estimates and TIAs, the owner should challenge the contractor to •correctŽ their estimate on a line by line basis and do the same concerning the owner•s TIA. If this is done, rather than the traditional method of •attackingŽ the contractor•s estimate, it is more likely that the owner and contractor can reach a mutual satisfactory resolution of the scope, time and cost of a change before work proceeds in the “eld.

Contractor Working on T&M Changes Does Not Submit Daily T&M Records … Should the owner decide to issue T&M change orders, they are at risk for all time, all costs and all impacts as this is an open ended work order. 17 The only way the owner can exercise some degree of control over the time and cost
of such changes is to obtain contemporaneous information
on the time and cost of the change. When contractors do not submit daily T&M records the owner is at increased risk. This lack of information should serve as an early warning sign of a forthcoming claim or dispute. The nature of this claim would be a claim for disputed change order costs.

€ Recommended Claims and Dispute Avoidance Actions: The best defensive measure against this sort of situation
is to include clear language in the Changes clause of the contract requiring a contractor to submit daily T&M records
for each T&M change separately, at the end of each shift
of work, to the owner•s representative. Such a requirement should also mandate the information that must be submitted daily (i.e., labor forces by trade for both the contractor and any subcontractor working on the T&M change, equipment, materials, etc.). Owner representatives must be trained
to observe T&M work closely and compare their daily observations to the daily T&M submittals from the contractor. Should the owner•s representative disagree with some portions of the daily T&M submittals, they should mark up the contractor•s submittal in a dierent color ink and attach a record of their own observations. Such submittals, reviewed and marked up documents and owner•s records should be “led daily and used to reconcile the “nal cost when the T&M work is completed. If the contract does not contain such
a requirement, then the owner should assign one or more inspectors to the T&M work with the direction to record
everything concerning the T&M work from start to “nish. While
this may require the employment of more inspectors on site, it
will likely cost far less than not having any contemporaneous documentation of the actual cost of the T&M work.

Excessively High Change Order Cost Proposals and/or Lump
Sum Cost Proposals with No Supporting Documentation … Often times contractors, when the opportunity presents itself, will
submit one line lump sum proposals in response to an owner•s
request for a change order cost proposal. When the owner
receives such a proposed lump sum cost, it may signi“cantly
exceed the cost the owner anticipated and/or have no supporting
documentation which would aord the owner the opportunity

17. While some owners attempt to limit their risk by issuing T&M changes with a Not to Exceed (•NTEŽ) cost this does not totall y resolve the issue as contractors are not required to perform all the changed work for the NTE cost but, rather, they are only required to perform the changed work up to the NTE cos t and •drop toolsŽ. Should the owner want to complete the changed work they will be required to change the NTE cost. Thus, the owner is not really protected in this situati on.

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to analyze the proposed cost. Contractors may do this because they perceive themselves to be in the driver•s seat. That is, they may believe the owner needs this change made and feel that they are the only one on site who can perform the changed work.

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Change in Character and Content of Progress Meetings and Meeting Minutes … Another early warning sign of potential claims and disputes is if there is a radical change in the character or content of routine progress meetings or meeting minutes (if the contractor kept them) or in objections to draft meeting minutes
(if the owner kept them). This may be an early warning sign of simmering claims and disputes … even though the contractor may not have provided written notice. When this occurs, it is nearly impossible to predict what sort of claims may be lurking in the background but there is a near certainty some problem(s) is causing the change of attitude.

€ Recommended Claims and Dispute Avoidance Actions: The challenge for the owner in a situation like this is to get the
contractor to open up so the owner can ascertain what the
problem(s) are. If this is a Partnered Project then the owner
may be able to use the partnering facilitator to learn about
the unresolved issues. 20 If partnering is not part of the project management process the owner may want to recommend bringing in a turnaround partnering facilitator to initiate
a partnering process on the project and improve project communications. 21 If this is done the owner should be able to determine the underlying unresolved issues. Once the issues are identi“ed, perhaps the owner can work with the contractor to resolve the issues.

In”ated Payment Applications … It is not uncommon on lump sum projects with a negotiated list of pay items to encounter disagreements on monthly payment applications between
the owner and the contractor. Typical disagreements tend
to center on the contractor•s estimate of the percentage of
work completed on various pay items. For example, where the contractor may estimate that Pay Item No. 13 is 55% complete, the owner•s representatives may assert that it is only 52% complete. This type of dispute is more or less common and
can be worked out on the site. H owever, when the owner starts seeing monthly payment applications or loan draws that are substantially in”ated, or that include disputed pay items, this
may be an early warning sign of a pending claim or dispute. This may indicate a serious cash ”ow problem for the contractor. If there are a number of ongoing disputes over ambiguities in the contract where the owner directed the contractor to proceed with the work in accordance with the owner•s interpretation this may, in part, explain the contractor•s cash ”ow problems. The type of claim growing out of this situation is likely to be a series of constructive change claims.

€ Recommended Claims and Dispute Avoidance Actions: If there
are a number of ambiguous speci“cation claims on the project,
the owner should re-examine their previous determinations
to make certain their earlier decisions were correct. If the
owner determines some decisions were incorrect, issuance of a
change order may help alleviate the cash ”ow problem. If this is
not the case owners ought to confer with their legal counsel to determine if the owner should notify the contractor•s surety to
get them involved in trying to resolve or mitigate the situation.

Complaints from Subcontractors and Suppliers Concerning Slow or Late Payments … Similar to the above situation, if the owner starts to receive complaints from subcontractors and/or suppliers about slow or late payments from the contractor, this too is an
early warning sign of claims and disputes. Like the above, the
typical claim arising from this scenario is one of constructive changes to the work.

€ Recommended Claims and Dispute Avoidance Actions: The
owner should examine their payment process to see that it
is not extremely slow thus exacerbating the situation. If it
is, the owner needs to quickly modify the payment system appropriately. And, like the above situation, the owner should
confer with their legal counsel and consider notifying the
contractor•s surety.

Attorney or Claim Consultant Attending Project Meetings … Obviously this is an early warning sign of pending claims and disputes. Owners probably cannot prohibit the contractor from
bringing their legal counsel and/or claims consultant to progress meetings. So, the challenge for the owner is to ascertain what are
the simmering claims and disputes. The type of claims arising from
this situation need to be discovered and addressed as quickly as possible so as to avoid a dispute at the end of the project.

€ Recommended Claims and Dispute Avoidance Actions: While
the owner cannot prevent this action, they should not be
intimidated. The owner should still run the progress meeting in
the normal fashion, using their standard meeting format. The
owner should still focus the discussion on the contractor and
the subcontractors are typically included in the meeting and
maintain thorough meeting minutes. In the meeting the owner
should ascertain what issues are unresolved and work on a
plan to resolve these issues.

20. Sue Dyer, Partner Your Project, Pendulum Publishing, Livermore, CA, 1997. Ralph J. Stephenson, Project Partnering for the D esign and Construction Industry, John Wiley & Sons, Inc., New York, 1996.
21. International Partnering Institute, Collaborative Construction … Lessons Learned for Creating a Culture of Partnership, Liv ermore, CA, June, 2008.

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Early Warning Signs for Owners … Field Issues

Late Delivery of Materials & Equipment … It is axiomatic that construction cannot proceed eectively or eciently unless materials and equipment are on site when and as planned. This

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Decline in Labor Productivity … Again, like the two indicators above, if labor productivity has dropped o or is declining slightly month after month, this is an early warning sign of potential claims and disputes. Obviously, the type of claim likely to be generated is one of productivity loss.

€ Recommended Claims and Dispute Avoidance Actions: If

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€ Recommended Claims and Dispute Avoidance Actions: When a situation such as this arises, the contractor needs to meet
with the owner and explain the potential of a constructive
acceleration claim. The contractor needs to convince the
owner to deal with the notices of delay in a timely manner in
order to avoid a later dispute. If this approach is ineective the contractor should confer with their legal counsel.

Multiple Suspension of Work Directives … Virtually all construction contracts contain a Suspension of Work clause. This clause gives owners the right to direct a work stoppage, of all,
or a portion of the work, at any time. Owners are not required to justify the issuance of such stop work orders and contractors are required to comply with such orders. It is the author•s experience that stop work orders are not common on the typical project. Therefore, if the contractor encounters multiple suspension of
work orders on a project this is an early warning sign of potential claims and disputes. The type of claim would likely center on the stop work orders and project delay.

€ Recommended Claims and Dispute Avoidance Actions: Whenever a stop work order is issued (especially if the order it
to •stop all workŽ on the project) the contractor needs to meet
with the owner to discuss how long the suspension is likely to
last and whether the owner wants the contractor Ž on the prorain on

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Owner Refusal Negotiate Time or Impact Costs with Change Orders … Despite the fact that almost all owners say they want to settle all change orders full and “nal and with no reservation of rights on change orders, all too often owners refuse to deal with delay arising from changes or impact costs such as changes
to unchanged work. If an owner takes this approach to change orders, this is a clear warning sign of forthcoming changes
and claims. Obviously, the resulting type of claim will involve
the cost of changes, time and other cost impacts and perhaps constructive acceleration.

€ Recommended Claims and Dispute Avoidance Actions: When an owner starts to take this position, the contractor needs to
open a discussion of what the downside risk of this approach
is. The contractor needs to advise the owner that this position
will result in all change orders having a reservation of rights and
if this is the case then there will be a major claim at the end of
the project for all delay and all impact costs. Should the owner persist in this approach the contractor needs to be vigilant in recording all costs and all time impacts arising from each change order. If the owner refuses to allow reservation of rights language on the face of each change order, the contractor should confer with their legal counsel concerning the viability of including reservation language in the cover letter when returning the change order to the owner. If this technique is not acceptable,
the contractor may want to adopt the position that they will not
sign any change order and if the owner wants work changed
they will have to issue a unilateral change on a T&M basis.
Finally, if the owner refuses to deal with the potential delay of
each change the contractor should make certain that the time
extension section on the face of the change order does not state •0 daysŽ. It should be annotated •To Be DeterminedŽ or •TBDŽ.

Disagreements Over •Scope of WorkŽ Items and/or Contract Interpretation Disputes … This type of disagreement is typically unpredictable at the outset of the project and generally does
not manifest itself until a submittal of some sort is provided for

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€ Recommended Claims and Dispute Avoidance Actions: The
most obvious way to “nd out what caused the change out of
project personnel is to meet with the outgoing project team
and ask the question •Why is this happening?Ž This should
be done before they depart the project if at all possible.
Depending on the information received, the contractor ought thivs
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Owners Correcting Design De“ciencies Through the RFI Process … The RFI process is used widely in construction as
a communications tool. The intended use of an RFI is for the contractor to ask a question of the owner, construction manager and/or design professional concerning some requirement of
the contract. The response should not be a change to the requirements of the contract, but rather, a clari“cation. The
exception to this statement is when the RFI has identi“ed an issue
that requires a change to the work and then the response should indicate that a change order is forthcoming. It is the authors• experience that all too often owners and the representatives
attempt to use RFI responses to correct errors or de“ciencies in
the contract documents without issuing a change order. 24 Should the contractor encounter situations such as this, this is a clear early warning sign of potential claims and disputes. The type of claim resulting from this sort of action is a constructive change claim.

€ Recommended Claims and Dispute Avoidance Actions: Contractors must review each RFI response to determine
whether it is simply a clari“cation or a change to the work.
Any time a response appears to cause changed work, written notice to the owner must be “led in strict accordance with requirements of the contract. If the owner persists with their interpretation and directs the contractor to proceed, the
contractor should do so under protest, tracking all time and
cost impacts separately from base scope work so as to be able
to “le and document a claim for damages when the changed
work is completed.

Design Professional Advises •Coordination of Details Will
Be Done through the Shop Drawing ProcessŽ … Coordination of trade subcontractors in the “eld is typically the role of the general contractor. H owever, coor dination of design details between trades (especially mechanical, electrical, plumbing and control systems) should be performed by the design professional and/or construction manager prior to the project being bid. This type of coordination should be included in the drawings such as one line electrical conduit runs; plumbing and HVAC runs; wall penetrations; etc. When a designer advises the contractor that coordination of these details will be accomplished through the submittal process, this is an early warning sign of claims and disputes as it indicates that the project design is not complete. The typical claim growing out of this situation is a constructive change claim.

€ Recommended Claims and Dispute Avoidance Actions: Given this attitude by the design professional the contractor must review each submittal and/or RFI response thoroughly and cautiously. The review should be oriented at whether
the response will cause a change to the work. If it appears
to do so, the contractor should provide timely written notice
of change to the owner. If the owner directs contractor
compliance with the response from the design professional
without a change order, the contractor should comply, under
protest, carefully documenting all time and cost impacts in
order to be able to compile a well documented claim at some
later point in time.

Exclusion of Design Professional from Project Meetings … Design professionals should be included all project update meetings as contractors frequently have questions concerning the project design which can be addressed in the meeting by the design team. When
the design team is excluded from the project site meetings by the
owner, even when design input is needed, this should be taken as an early warning sign of claims and disputes. The types of claims likely
to result include constructive changes, delays and/or constructive suspensions of work.

€ Recommended Claims and Dispute Avoidance Actions: The contractor probably will not be advised why the owner has
excluded the design professional from project meetings.
And, the reason may not matter. In a situation such as this,
a contractor in need of an opportunity to meet with and
discuss issues with the design professional, should speci“cally
notify the owner in writing that they need to have the design professional present at the next project meeting to discuss certain issues that require resolution. The written request should brie”y identify each issue and the contractor should request that each issue be speci“cally included in the meeting agenda. If the owner continues to exclude the designer the contractor should pose their inquiries as best they can through the RFI process but each should be accompanied by a written notice of potential delay on the basis that •ƒthe issue could have been resolved at this week•s project meeting rather than awaiting a response to RFI #35.Ž

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Attorney or Claim Consultant Attending Project Meetings … It is quite apparent that having the owner•s legal counsel and/
or claims consultant attend routine project meeting is an early warning sign of claims and disputes. What sort of claim is likely
to be raised is, however, unknown to the contractor. It is up to the contractor to ascertain this information.

€ Recommended Claims and Dispute Avoidance Actions: If the contractor has “led several claims, none of which are yet resolved, the owner may have these additional individuals
at project meeting to discuss the claims. This is logical and understandable. H

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€ Recommended Claims and Dispute Avoidance Actions: In order to avoid such last minute project disruption, a contractor should start working with the owner sta sometime prior
to substantial completion to have them perform preliminary substantial completion inspections on a ”oor by ”oor or
system by system basis. If this can be arranged and punchlists provided after each preliminary inspection, legitimately incomplete work can be completed before the “nal inspection. This will help avoid major project delay and disruption. In any event, whenever the owner provides the contractor with a punchlist, it must be carefully examined to determine that all allegedly •incomplete workŽ items are truly within the scope of work. If some are not, the contractor should provide prompt written notice of change. Should the owner demand the contractor complete the disputed work items, the contractor should perform with work under written protest, keep track of all time and cost impacts, and “le a claim when the disputed

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€ Recommended Claims and Dispute Avoidance Actions: If the contract stipulates a turnaround time for RFI responses
then on the day this time has expired the contractor should
provide written notice of potential delay. If no such time is
contained in the contract and the owner and contractor did
not negotiate a turnaround time for RFIs at the outset of the
project or during an early partnering meeting, the contractor should provide written notice of potential delay after a
reasonable period of time for a response has expired. 35 A new project cost account code should be opened to capture the
impact costs (such as demobilizing crew(s) from this area of
work to another and remobilizing them back to this area once
the response is received). And, a new schedule activity should
be included in the current schedule starting the date the RFI
was submitted and continuing to the date when the response
is received. When all is said and done, these actions will serve
as the basis of the damages in the claim to the owner.

Owner Refusal to Acknowledge Diering Site Conditions … Most construction contracts contain a Diering Site Condition (•DSCŽ)
clause 36 under which the owner assumes liability for latent site conditions in order to reduce contractor contingencies at the
time of bidding. All such clauses require a written notice of DSC
as soon as a materially dierent condition is encountered and
direct the contractor to cease work in the area of the alleged DSC until the owner has the opportunity to investigate.ed thsdbr

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Overinspection or Changes to Inspection Criteria after Contract Award … Most technical speci“cations are based on building codes or on recognized and published industry practices. And, many technical speci“cations contain detailed inspection criteria so the contractor understands the standard their work will have to meet
in order to get paid. H owever, at times the owner•s inspection team may decide to use a dierent inspection technique or procedure after the project is awarded. For example, the welding

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CONCLUSION

This research perspective highlights a large number of early warning signs concerning potential claims and disputes. This is not an exhaustive list, certainly, but the reports lists many of the most common early warning signs. Having said this the Forum wants to reiterate a point made earlier in this research perspective. That is, the real key to dispute avoidance is (1) early recognition of potential claims and (2) prompt action on the part of both the owner and the contractor to identify the issue and work together to craft an acceptable resolution based upon the terms and conditions of the contract. If both parties focus on achieving project success rather that positioning, then the likelihood of delivering a project on time and in budget substantially increases.

NAVIGANT CONSTRUCTION FORUM’

Navigant (NYSE: NCI) established the Navigant Construction Forum’ in September 2010. The mission of the Navigant Construction Forum’ is to be the industry•s resource for thought leadership and best practices on avoidance and resolution
of construction project disputes globally. Building on lessons learned in global construction dispute avoidance and resolution, the Navigant Construction Forum’ issues papers and research perspectives; publishes a quarterly e-journal (Insight from Hindsight); makes presentations globally; and oers in-house seminars on the most critical issues related to avoidance, mitigation and resolution of construction disputes.

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