



Contract Administration Session

Claims Disputes – Lessons Learned Panel

August 13, 2019



The Project

- Project had been in development for many years.
- The design was governed by environmental constraints due to the wild and scenic river.
- Design-Bid-Build, not Design-Build.
- Foundations let separately from the bridge.
- Three bidders; lowest bid was approximately \$330M; highest bid was approximately \$410M.
- The contract duration was 956 days, with one time extension of 124 days. The dispute was based on a project substantial completion delay of 198 days.

The Project



- The main spans were precast, post-tensioned, and extradosed (with cable stays). Piers were cast-in-place.
- Some of the approach spans were also precast, but the largest approach spans were cast-in-place.

The Parties

- The project was jointly funded by two state DOTs.
- The design team was not a joint venture, but consisted of two large engineering firms, with one as the lead and another as a subcontractor.
- The contractor was a joint venture of two, large construction firms, one of which was a subsidiary of an even larger firm.
- Two firms split the task of construction engineering tasks.
- Two firms split the design and fabrication of the forms for the precast segments.
- The rebar subcontractor was not able to complete the project and had to be replaced by the general contractor.

The Project was Partnered

- There was a large change order agreed to approximately 18 months into the project.
- The issues in dispute arose primarily after this change was executed, but the issue of waiver was important.
- The initial dispute was essentially presented as a total cost claim.
- Ultimately, the dispute was composed of 11 major components; delay and acceleration were each separate components.
- The owner attempted to resolve the dispute with a significant initial offer, which was rejected by the contractor with no counter.
- A certified claim was not filed.

Basic Partnering Requirement

Partnering will be required on this Contract.....

The primary objective is to open the lines of communication with the stakeholders to include effective and efficient Project performance and completion on schedule, within budget and in accordance with the Contract Documents.

Escalation of Issues

To resolve issues in a timely and effective manner, representatives of the parties shall meet regularly and explore resolution for each issue at the lowest level possible (i.e., Project Task Force Team first, Project Management Team next, and Executive Management Team last). If both parties determine, in good faith, that effective resolution is not possible at the current level, then the issue will be elevated to the next level in the partnering process. If both parties make such a determination during partnering at the Executive Management Team level, then the dispute will be elevated in accordance with Section S-32.2 (CLAIMS FOR COMPENSATION ADJUSTMENT) of these Special Provisions.

Costs of Facilitation

Costs

All Partnering costs shared equally between MnDOT and the Contractor.

Claims for Compensation Adjustment and Disputes

If issue resolution efforts through Partnering are not successful, disputes shall be resolved through Section S-32 (CLAIMS FOR COMPENSATION ADJUSTMENT) of these Special Provisions and MnDOT 1517.

S-32(1517) CLAIMS FOR COMPENSATION ADJUSTMENT

S-32.1 NOTICE OF CLAIM:

At the time the Contractor gives written notice of the claim, the Contractor and the Department shall immediately begin to keep and maintain complete and specific records to the extent possible. The records shall consist of, but are not limited to, cost and schedule records concerning the details of the perceived claim. Unless otherwise agreed to in writing, the Contractor shall continue with and carry on the work and progress during the pendency of any claim, dispute, decision or determination by the Engineer, and any arbitration proceedings.

S-32 Was Not Used

- A number of Notices of Potential Claim(s) were submitted.
- A formal claim was not submitted or certified.
- The mediation process provided for in S-32 was not used.

Dispute

- The number of days of delay in dispute was 198 for the project substantial completion date and more days that related to the acceleration effort.
- There were at least 11 separate components to the dispute; each component of the dispute consisted of several issues.
- 2 of the 11 issues were settled early in the process.
- Many of the issues were allegedly design related and the remaining related to project administration.

Participants and Presenters

- For the contracting team – Senior managers from the parent contracting firm, senior managers from the JV partners, a scheduling expert, a design expert, and the principals of each of the construction engineering firms.
- For the owner's team – Senior managers from Minnesota and Wisconsin DOTs, FHWA Assistant Division Administrator, CE&I consultant, a claims consultant, and an accountant.
- For the design consultant's team – Senior members of both firms involved in the design, a construction expert, a rebar installation expert, and a claims consultant.

The Process

- There were 25 multi-day meetings with a duration of 2 to 5 days over a period of 2 years.
- There were 60 facilitation sessions.
- There were dozens of Power Point slide presentations and thousands of slides prepared.

The Process

- No talking heads or 5 minute sound bites.



The Process

- Process development: Parties' prior participation in similar process on other major projects.
- No canned formula.
- Cute won't cut it.
- Complex claims require a proper dialogue, involving
 - Thoughtful discussion
 - Active listening
 - Digestion of information
 - Continued discussion

The Process

- A Prolonged facilitation – free dialogue, breaks, and response opportunities – allowed Parties to:
 - Find common ground
 - Hold the Parties accountable
 - Eliminate false disagreements
- Does not exist in arbitration or litigation and very rarely seen in mediation.

The Process

- No talking heads or 5-minute sound bites.



Approach to Preparing Presentations

Every claim has three parts:

- Entitlement
- Impact
- Cost

Every presentation has to address all of these parts.

Entitlement

Clearly and completely summarize the issue.

The background of the slide features a white sky with several grey, stylized clouds of varying sizes. Below the sky is a blue gradient representing a landscape with rolling hills. The hills are depicted with darker blue outlines and a lighter blue fill, creating a sense of depth and perspective.

Entitlement

- Develop a full understanding of the contractor's position and arguments regarding the issue.
- What does the contract say regarding the contractor's position?
- What are the facts that support or undermine the contractor's position?
- Based on the contractor's position, the contract, and the facts, was there a change?



Impact

How did the issue impact the project?

- Added work?
- Delay?
- Inefficiency?
- Mitigation?

Delay

The business of analyzing delays was like the wild west; there were no laws.



Delay

It's important to agree on how to measure delay.



This can be challenging.

- An audit is an extremely useful tool.
- Make sure you understand exactly how your contract works, especially as it relates to actual costs versus force account costs.
- When claims have many parts, look closely for potential overlap or double-dipping; particularly with regard to overhead.