Lessons Learned in Delaware

Resolving Construction Disputes in a Small State
My Perspective

- From the perspective of the District
- Deal with a lot of small to medium disputes
- Don’t have the overhead to deal with them
- Talk about managing day to day issues in conflict resolution
Manage your effort

- Disputes are marathons, not sprints
- Have a plan and don’t let people obsess
- As a Construction District, your biggest opponent may not be the contractor.
- Once a dispute grows large, everyone wants a say. Be ready to heard the cats, it’s crucial.
Build a Narrative

- Letters to contractors should contain a common theme, tell a story.
- The more the decision maker hears and reads your narrative, the better.
- Contractors make the issues seem complicated, owners need to make the issues seem simple.
- Take time early in the dispute to start crafting the narrative. Contractors do this all the time, but we as owners seem more reluctant.
Writing Letters

- Take the time to prove facts carefully, but make your story the centerpiece.
- Make long letters easy to read with summaries and topic sentences
- Repeat your theme
- Don’t “Strenuously Object!”
Focus

- (1) Entitlement, (2) Impact or Causation, (3) Damages
- We’re taught to argue about entitlement and look at IDRs to calculate damages.
- Frequently, the real issue is causation and we don’t see it, especially in smaller disputes.
- Even though it seems wrong to admit you are wrong, that’s often the correct action.
Negotiating

- Know your reservation point
- If you hear something new and don’t know what to do, STOP!
- If you don’t know, audit!!!
- Write everything down when you negotiate, they do.
Settling

- When exchanging writings, make sure both sides acknowledge.
- If you change the contract, make sure to consider all of the consequences.
- If you settle now, will they want more later?
- Consider worst case scenarios. Your slam-dunk argument could fail.
Delays

- Capturing all sources of delays is difficult
- Can’t rely solely on forensic schedule analysis, the staff needs to see the issues and act on them
- TIA’s are for prospective delays
- Don’t fall into the trap of letting the contractor bundle delays
Day to Day Practices

- Be consistent and don’t ruin your narrative
- Follow up all meetings with an email or minutes
  - This is hard when you are busy, but it’s very important
  - Things that seem very obvious today will be quickly forgotten tomorrow
- Keep issue logs to help organize and apply the narrative
Manage the Field Staff

- Don’t let field staff argue with the contractor’s office
- You have to build the job, so try to build it
- Follow the contract, even when it isn’t convenient
- Desire to reward good behavior and punish bad is human nature, but don’t fall in that trap
- Be careful with electronic communications
Fighting Back

- Being patient is not the same as being passive
- Think about ways to fight back - Counterclaims
- Was the work substandard? If so, can I prove it? How do I valuate it?
- Did the contractor follow the contract? If not, did the contractor wrongfully benefit? If so, prove it.
Resist the temptation to think you know best

Try to find people to proofread your letters

Don’t “pile on” arguments, get clearer heads to help you pick and choose

Construction claims are not the forum to deal with bad egg contractors
Final Thought

How do you recover after losing a big claim?
Lost Once? SO WHAT!!!

- You could be a Phillies Fan.
- Lost 10,232 games as of 2010. After that, we stopped counting.
- In 1961, had a 23 game losing streak
- Lost 100 games in a season 14 times
- 92 year span between championships