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Documenting, Preparing and Settling Claims Practical Considerations for Contractors

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In a recent Revay Report,[1] *we presented a broad overview of the fundamental principles of damage calculations for construction claims, especially those put forth by contractors. This* Report *addresses the steps leading to the settlement of contractors' claims, starting with the occurrence of an event which could trigger the right of the contractor to additional compensation, followed by the documentation and the preparation of the claim. This paper is intended as a practical guide for contractors.*

The reader is invited to refer to the aforementioned Revay Report *as a complement to the current one.*

The principles presented in this article are based on the author's own commercial experience and should not be interpreted as legal advice. The author recommends consulting legal counsel before applying the principles described below.

TERMS OF THE CONTRACT

The contract constitutes the law between the parties to that contract. It sets out their respective rights and obligations. Too often, contractors and owners focus mainly on the technical specifications, and sometimes on the special conditions, while disregarding the general conditions of the contract. However, the general conditions contain important provisions, more specifically those having regard to the procedures which must be strictly followed with respect to claims, especially by the contractors. Indeed, *"the right to claim* […] *arises out of the contract"*.[2] [Revay's translation]

The courts have stated it over and over again: failure by the contractor to strictly follow the contract provisions can prove fatal to a claim. Although beyond the scope of this article, it is important to note that other recourses by contractors and subcontractors are also subject to compulsory procedures. Such is the case for claims against the surety and for the right to a lien or, in Quebec, a legal hypothec.

We strongly recommend that contractors retain the services of legal counsel familiar with construction law to ensure that their rights are preserved at all times. As described below, timely reservation of rights is of the utmost importance.

Notice Provisions

It is essential that contractors be aware of their contractual obligations related to the notices they must send to the owner in case of an event or a situation that may trigger a claim: unforeseen soil conditions, owner or third party delays, changes and *force majeure* to name a few.

One of the first questions a claim consultant or a legal advisor asks a contractor in a claim situation is: "*Did you comply with the contract notice provisions?*".

The contract generally stipulates the time allotted for the notice, the notice format and the person or persons to whom the notice must be sent. The importance of strict compliance with these procedures cannot be overstated.

As the Supreme Court of Canada stated in 1982, *"once the work is complete, a contractor cannot claim in a court of law benefits similar to*

those which clause 12[3] *would have guaranteed if he has not himself observed that clause and given the notice for which the clause provides".*[4]

Therefore, contractors who are facing an event or a situation which may constitute a change to the contract must make sure to notify the owner in strict adherence to the notice provisions set out in the contract. The notice *"is part of the formation of a contractor's right to claim".*[5] [Revay's translation]

In such circumstances, as will be explained below, contractors must also immediately start to gather all the information pertinent to establishing the facts related to the alleged change to the contract.

Claim Procedure

In most cases, the contract sets out the steps that must be followed for the submittal of the claim, the time allotted for the submittal and the person or persons to whom the claim must be submitted.

Contractors unable to settle disputes during the course of the work must endeavor to submit their claims in strict compliance with the contract provisions, otherwise their claim may be denied solely on the basis of non-compliance, as the Quebec court of Appeal recently reaffirmed:

> [56] It is therefore only when the claim is submitted in the format prescribed and within the 120 days allotted that the contractor's right to a claim materializes. […] The procedures must be followed to make the contractor's right exist. If they are not, one cannot say that the right to a claim is extinguished because it never existed.[6]
>
> [Revay's translation]

The same principle applies to claims from subcontractors that the general contractor intends to pass on to the owner, as is discussed in two recent decisions:

> [29] Bau-Val's argument that it could not submit a claim [from the subcontractor] to the Deputy Minister because it had not received any cannot prevail. Bau-Val knew or should have known that a claim was forthcoming because it had been advised by its subcontractor C.F.G. Construction Inc. that one would be presented. Even if it was not yet quantified precisely, Bau-Val still had to transmit the claim, to preserve its rights.[7]
>
> [Revay's translation]

> [71] […] JVC should have gathered all the claims, i.e. its own and those of its subcontractors, and then submitted them to SEBJ within three months of the date of provisional acceptance.[8]
>
> [Revay's translation]

DOCUMENTING THE FACTS

Documents to Preserve

We are frequently asked the two following questions:

"How can one prepare and successfully defend a claim in the absence of adequate documentation?"

The simple answer is: unfortunately, with great difficulty. Without adequate documentation, it is indeed difficult and sometimes impossible to prove the facts giving rise to the claim and to demonstrate the causal connection between the alleged problems and their impacts, including increased costs or duration. A claim based on incomplete, inaccurate or, even worse, nonexistent documentation has a low probability of being successfully pursued.

Experience has taught us that the party with the best documentation (*i.e.* the most comprehensive, accurate, credible and reliable) is the one most likely to prevail. A single dated photograph can seriously damage the credibility of an as-built schedule and may even contradict testimony:

> [83] […] when asked whether the work was behind schedule as of October 6, [the witness] said that, as far as he was concerned, wall and column footings had already been completed […]. This testimony is contradicted by the pictures […] dated October 8 which instead show workers installing formwork for footings.[9]
>
> [Revay's translation]

"What are the documents required to prepare and defend a claim?"

The simple answer to that second question is: the documents that are required to prepare and defend a claim are the same ones any competent contractor would keep in the normal course of doing business to adequately manage its company and its contracts.

The following is a nonexhaustive list of the documents most useful both for contract management and for preparing and pursuing a claim:

- Tender and bid documents;
- Planned and actual site organizational chart;
- Daily reports (manpower, equipment, material, area and type of work);
- Monthly reports;
- Site diaries;
- Correspondence (letters, emails);
- Date-stamped photographs and videos;
- Cost reports;
- Change order submissions (value, hours);
- Log of submission/receipt of:
  - issued for construction drawings
  - revised drawings
  - change requests and change orders
  - requests for information
  - shop drawings
  - technical notes
  - construction or hoisting methods requested by the owner;
- Baseline schedule and schedule updates;
- Requests for payment and monthly progress payments;
- Production and productivity data (based on monitoring system, earned value).

Contractors should make sure to keep and safely store all the documents upon which they relied to prepare their bids, including a complete set of the call for tender documents (plans, specifications, addenda, etc.), the quotes received from the subcontractors and suppliers, and all the calculations performed for their estimate. Requests from owners to examine these documents in cases of dispute are becoming increasingly frequent.

During the execution of the work, contractors receive documents generally prepared by the owner or its representatives that prove equally important to establishing the facts, such as:

- Inspection reports;
- Minutes of site meetings.

The minutes of meetings can be a valuable source of information when establishing the chronology of the events. Further, when they are prepared by the owner, it is *a priori* presumed that they do not reflect the sole view of the contractor, potentially serving as agreed project records. For this to become the case, the contractor should review the

minutes prior to the next meeting. In the event of a disagreement with the minutes, the contractor must provide written clarifications or modifications in a timely manner. This task should be taken seriously, otherwise the minutes may contain errors or omissions, thereby reflecting an inaccurate account of the project for the record.

For additional information, the reader is invited to peruse other issues of *The Revay Report* on project and documentation management.[10]

Information to Record

Contractors should keep records that allow them to determine both during the work and after the fact:

- What work was being carried out at a given time?
- What resources (direct manpower, supervision and equipment) were being used to carry out that work?
- What was the cost of that work?
- What problems were encountered?

Contractors should, in any case, keep such records, whether they intend to claim or not. Again, this information is highly valuable for both contract management and the preparation and pursuit of a claim.

As soon as an event occurs that could constitute an alleged change to the contract and eventually incur increased costs or duration, contractors should immediately start to obtain and record all information pertinent to establishing the facts. This is of paramount importance because:

1. Contractors have the burden of proving their claims.
2. They can take for granted that, upon receiving notice from the contractor, owners will also undertake to document the facts relative to the alleged change.
3. As previously stated, the party with the best documentation is the one most likely to prevail.

When preparing a claim, establishing the as-built schedule and the cost of the work are often time-consuming and expensive tasks, particularly in the absence of proper records. As it happens, these constitute key elements of most construction claims. Contemporaneous records, such as daily reports, that provide answers to the questions mentioned above are essential to prepare and convincingly defend a claim. This is evidenced by the following excerpts from a recent court decision:

> [56] […] causality must be founded on documents relating to the use of labour, equipment, materials and daily reports. The reason for this is obvious: such documents prove what really happened on a construction site and can therefore disprove any subsequent assertion in this respect.[11]
>
> [Revay's translation]

> [82] […] What is the purpose of such daily reports, if not to constitute proof of what happens on a site?[12]
>
> [Revay's translation]

Having complete and accurate records is certainly preferable to having to rely upon the at-times-failing memory of witnesses, years after the fact:

> [83] […] In fairness to him, the witness states that he has reviewed these documents only a few days prior to his testimony. This indicates that he is testifying based on his memory, nine years after the fact, which is why his testimony is not accurate in several areas.[13]
>
> [Revay's translation]

PREPARING THE CLAIM

As indicated above and as stated in our March 2015 *Revay Report*, the contractor submitting a claim has the burden of demonstrating its validity:

> The dictionary defines a claim as "a demand or request for something considered one's due". When a contractor considers that contract changes caused damages, it will seek adequate compensation either in the form of an extension of time or additional payments, or both. The contractor believes it has a right to such compensation because the contract binding it and the owner provides, in its opinion, for such compensation.
>
> To proceed with a claim, the contractor first needs to provide substantial proof for the following four points:
>
> 1. The existence of a change to the contract;
> 2. The extent of the damages sustained as a result of the change;
> 3. The causal link between the change and the damages claimed; and
> 4. The right to compensation for such damages.[14]

The claim document must present the contractor's case in a clear, credible, convincing, concise and complete manner, otherwise known as the "five Cs" of successful claims.

The Five Cs of the Claim

Clear

As the French poet Boileau wrote: *"Whatever we well understand we express clearly, and words flow with ease."* The quality of its writing is an essential element of the claim document.

The claim must be clear. The person deciding on the merits of the claim – be it owner, mediator, arbitrator or judge – must be able to quickly and easily understand the facts, the allegations, the compensation sought and the causal connection between the two in order to determine the contractor's entitlement to compensation.

Credible

The claim must be credible. Anything that can negatively affect the credibility of the claim – and, incidentally, that of the contractor – such as far-fetched items, unrelated costs, duplication, etc., must be excluded. Contractor-caused delays or increased costs must be acknowledged and not claimed. Failure to comply with these recommendations could harm the entire claim.

Convincing

The person deciding upon the merits of the claim must be convinced of the contractor's right to compensation. In that sense, the decision to grant the contractor the compensation being sought should impose itself to that decider as a logical conclusion.

A claim's strength of conviction rests, among other elements, on the clarity and credibility of the contractor's allegations. The contractor must present an eloquent demonstration of the facts and of their impact on the cost and duration of the work, based on thorough analyses. Finally, the contractor must clearly demonstrate that its right to compensation is in accordance with the contract provisions.

Concise

An unnecessarily long and repetitive claim

document will convince no one and will bore whoever must read it. Redundancies and repetitions may even point to a weakness in the validity of the claim.

On another note, should numerous source documents need to be submitted to justify the claim, it is preferable that they be submitted as a separate document, or at least included as appendices.

The contractor should also prepare an executive summary of the claim for the person who will ultimately approve or authorize payment of the additional compensation. This person will likely rely on others for a detailed analysis of the claim, yet she must nevertheless be in a position to grasp its essence in a few pages.

Complete

During the course of construction, contractors do not often dedicate personnel to the preparation and defence of a claim because these people are already devoting all of their energy to executing the contract work. Additionally, any claim submitted prior to the end of the work may be incomplete and inaccurate if it is meant to represent delays and costs to the end of the project, as neither the completion date nor the total cost are yet known.

Experience has taught us that submitting an incomplete or preliminary claim is often a futile exercise. Moreover, an owner has no interest in advancing additional sums of money to a contractor during the course of the work unless forced to do so. Knowing that the claim will more likely than not be revised, the owner's reaction may often be to wait until the end of the work before conducting a full review of the claim.

Based on this, the best course of action may be to compile information contemporaneously and wait until the end of the project to perform analyses and prepare the claim. Having said that, all contract provisions related to the claim, particularly notice provisions, should be followed to preserve the contractor's rights.

RETAINING A CLAIMS CONSULTANT

The foregoing highlights the importance of assigning the task of preparing the claim to skilled writers who have a capacity for analysing complex issues and presenting them in an easy-to-understand format.

In addition, as indicated in our March 2015 *Revay Report*, *"the calculation of damages, particularly for construction contracts, is as much a matter of know-how as it is of science."* [15]

Considering the large sums of money often at stake in construction disputes, contractors who are struggling to resolve their disputes should consider retaining the services of a consultant for the preparation of their claims.

Having a consultant on board allows the contractor to benefit from the advice of an impartial third party. Evaluating the facts objectively diminishes the potential for inflated or unfounded claims based on personal or emotional bias. The consultant may also be able to provide the contractor and its legal counsel with a reasonable estimate of the merits and value of its claim earlier in the process.

Typically, the role of the consultant takes two forms.

Consultant as advisor to the contractor

Even in the rare case where contractors have developed an in-house expertise and have put together a team dedicated to preparing and defending their claims, occasional or regular help from a consultant can prove beneficial.

Clients can benefit from the experience the claims consultant has acquired from years of preparing claims for clients that have varying contracting methods, involving various trades on a variety of projects including industrial, public works, heavy construction, buildings, etc.

Additionally, because claims consultants are retained by owners as well as contractors, they can easily appreciate both points of view. Because of their experience, they can advise contractors on the presentation of the claim document, the presentation of project history and contentions, delay and other analyses and the choice of quantification methods. Having extensive experience in dispute resolution, consultants can also provide valuable advice to clients with respect to strategies for settling the claim.

Consultant as preparer of the claim

In our experience, very few contractors have developed a real in-house expertise in claims. This is easily understandable as contractors often settle their disputes during the course of the work. First-time Revay clients often say that they have never had to submit a formal claim, even after decades of operating their business.

Consultants who prepare claims for contractors should be afforded leeway in the execution of their mandate. They must present the contractors' position; however, in doing so, they must ensure that the claim will meet the "five Cs" described above. The consultant must prepare a credible claim, even if that entails resisting requests from their client. In that respect, well-advised contractors should rely upon the experience and the judgment of their consultant because these are the very reasons why the consultant has been retained. Additionally, hiring a consultant allows contractors to focus their resources on their core business: executing construction projects and generating profit for their company.

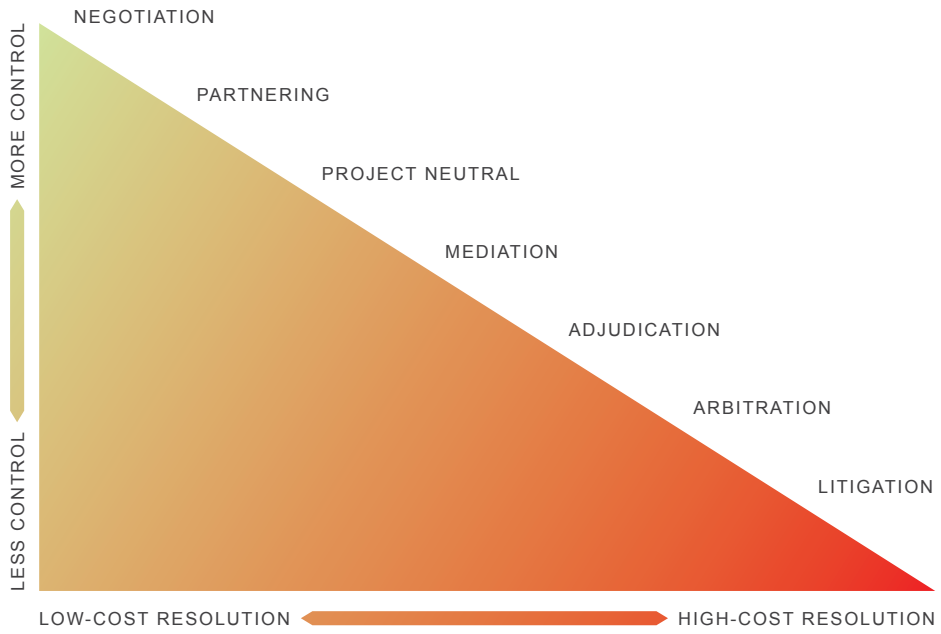
NEGOTIATED SETTLEMENT

As one can see from the figure shown on page 5, negotiation is the resolution method which offers the parties maximum control over the settlement of the dispute, at the lowest cost. This suggests that even a less-than-ideal settlement is still potentially better than the best trial.

Negotiating is always the preferred method of settlement; however, it takes two to negotiate. The inflexibility of either or both parties will inevitably lead to a failure of the negotiations. Faced with such failure, contractors have no choice but to resort to other resolution strategies.[16] In the event that the contract provides for compulsory settlement procedures, contractors must comply with these procedures while making sure that their rights are preserved at all times.

More and more, parties to a dispute are being asked (sometimes forced) to demonstrate that they have taken part, in good faith, in a settlement process prior to initiating legal proceedings.[17] Consequently, negotiation and mediation are obligatory steps on the path to the settlement of a dispute. Even at the judicial

DISPUTE RESOLUTION CONTINUUM



stage, the parties are again often invited to participate in a resolution conference before a Judge.[18] Here as well, the principle is that a deal is generally preferable to a trial.

LEGAL PROCEEDINGS

French philosopher Voltaire is quoted as saying: *"I was ruined only twice in my life; when I lost a court case, and when I won one."*

As the figure above indicates, litigation is the most costly and highest-risk resolution method. Yet sometimes it is unfortunately the only avenue for contractors who want to pursue their claim after negotiation and mediation have failed.

When faced with the absence of an adequate settlement offer, contractors have to make a difficult choice: accept an inadequate offer, throw in the towel absent an offer or initiate legal proceedings.[19] The moment at which legal proceedings are initiated is often determined by legal issues[20] which will not be addressed herein, and by strategic considerations. When evaluating the advisability of initiating legal proceedings, contractors must take into account the time and money involved, as well as the chances of success. Advice from legal counsel and from a claims consultant will be invaluable in that evaluation.

The advisability or even the necessity of submitting an expert report are also elements that legal counsel must consider when advising the contractor about the decision to litigate.

Expert Opinion

Construction disputes often involve complex technical issues. The role of the expert is, among other things, to help the court understand these issues which require special knowledge or competence. As the court stated in *Développement des éclusiers inc. c. Ciment Québec inc.*:

> [52] The Judge is an institutional layman in matters of construction, as in other matters (even in the case of specialized courts). The bases of his decision are built upon the facts submitted to him and the interpretation thereof that [can be] put forward on technical issues by experts, in some instances.[21]
>
> [Revay's translation]

Relative to a construction dispute, contractors may find it advisable to submit expert opinions for the following subjects:

- Soil mechanics and geology;
- Hydrology;
- Civil, mechanical or electrical engineering;
- Concrete and other materials (properties, execution, repairs);
- Construction methods;
- Health and safety;
- Industry standards of practice;
- Delay and acceleration analyses;
- Productivity analyses;
- Quantification of damages.

Selection and Role of the Expert

Some criteria that contractors and their legal counsel should consider when selecting an expert include:

- Expertise in the subject under examination;
- Reputation for integrity;
- Ability to explain complex issues in simple language and with graphics;
- Previous experience with testimony.

It is of the utmost importance to understand that one of the roles of an expert is to enlighten the court and assist it in assessing evidence with objectivity, impartiality and rigour. The expert should present and demonstrate, and not argue, the case of the contractor. Far from being helpful, arguing

the client's case can discredit the expert and his testimony.

It is also important to consider that experts and legal counsel will be called upon to work in close collaboration. In addition to assisting the court, the expert often educates legal counsel in order for them to comprehend all the technical information and identify the various intricacies of the case.

Experts should be retained as early as possible in the legal process. Their early assessment of the case would allow the contractor and legal counsel to understand the merits of the claim and have an estimate of the claim value before spending substantial sums of money in preparation for litigation.

Moreover, involvement of the expert at the early stages of the proceedings will allow the contractor, with the help of legal counsel, to establish the following elements:

- Strengths and weaknesses of the contractor's claim;
- Necessity of submitting additional expert opinions on some issues;
- Identity of other potential expert witnesses, if pertinent;
- Key documents and, by extension, missing documents required;
- Additional research and investigation required;
- Strengths and weaknesses of the opposing party's expert opinion;
- Questions for cross-examination of fact or expert witnesses from the opposing party.

For additional information regarding experts, the reader is invited to peruse two previous issues of *The Revay Report* that deal with the matter.[22]

CONCLUSION

Well-advised contractors should adopt and always implement the following principles:

- Be thoroughly familiar with the contract provisions;
- Strictly adhere to the requirements of the notice provisions;
- Keep thorough records of the work.

These three elements do not by themselves provide a guarantee of success if a claim must be prepared. They do constitute, however, critical and indispensable elements of a successful claim.

1 Jean HUDON. "Quantification of Construction Claims," *The Revay Report*, Vol. 32, No. 1 (March 2015).

2 Stéphane PITRE. "L'importance de la transmission des avis en droit de la construction" in *Service de la formation continue du Barreau du Québec; Développements récents en droit de la construction*, Cowansville, Yvon Blais, 2012, p. 105.

3 "Clause 12" provided for compensation for changed soil conditions.

4 *Corpex (1977) Inc. v. The Queen in right of Canada*, [1982] 2 SCR 643, 1982 CanLII 213 (SCC).

5 Ian GOSSELIN and Pierre CIMON. "La responsabilité du propriétaire" in Olivier F. KOTT, Claudine ROY, *et al.* (dir.). *La construction au Québec: perspectives juridiques*, Montréal, Wilson & Lafleur, 1998, p. 386. See also *Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.*, 1988 CanLII 2844 (B.C.C.A.).

6 *Construction Infrabec inc. c. Paul Savard, Entrepreneur électricien inc.*, 2012 QCCA 2304.

7 *C.F.G. Construction inc. c. Construction Bau-Val inc.*, 2017 QCCS 5119.

8 *Cegerco inc. c. Les Équipements J.V.C. inc. et al.*, 2018 QCCA 28.

9 *Développement des éclusiers inc. c. Ciment Québec inc.*, 2013 QCCS 6307.

10 http://www.revay.com

11 *Développement des éclusiers inc. c. Ciment Québec inc., supra.*

12 *Ibid*.

13 *Ibid*.

14 *Supra*, note 1.

15 *Supra*, note 1.

16 These other methods of settlement are not addressed herein. We invite the reader to peruse other *Revay Reports* on the matter at: http://www.revay.com.

17 E.g.: *Alberta Rules of Court*, section 4.16; *Supreme Court Civil Rules* (B.C.), Rule 5-3; *Rules of Civil Procedure* (Ontario), rule 24.1; *Code of Civil Procedure* (Quebec), section 1.

18 E.g.: *Supreme Court Civil Rules* (B.C.), Rule 9-2; *Code of Civil Procedure* (Quebec), section 161.

19 Or arbitration if provided for by the contract.

20 E.g.: the limitation period.

21 *Supra.*

22 Jean-Pierre DÉPELTEAU. "Expert Evidence", *The Revay Report*, Vol.25, No. 2 (June 2006); Marc PRÉVOST and Jean HUDON. "The Expert's Role in Construction Litigation", *The Revay Report*, Vol. 9, No. 1 (October 1997).

* Any views expressed in this article are those of the author and may not necessarily reflect the views of the company.

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