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Construction Management Perspective:

Claims Avoidance as Means and Methods
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The most effective contractors are the ones who look at the means and methods for a project to identify ways they can build the job more efficiently. A creative or innovative plan for delivering the project can mean success in landing the job and it certainly can improve a project's profitability.

In a competitive construction environment, contractors and owners will do better if they also make handling claims situations a part of their means and methods.

Let's be clear. The subject here isn't making claims a part of means and methods but rather managing situations at the earliest stages of the project to keep them from devolving into claims later. Experienced contractors and for that matter, experienced owners understand where the weak spots are in a project before it gets underway. By the time the project is 30 percent completed it is clear where any problem areas are headed. That means that the most critical time for claims avoidance is during the early stages, between scope review and the first few months of construction.

Claims for compensation, whether they are for delays or change orders, arise from misunderstandings or misinterpretations (unintentional or otherwise) of the project scope. Most often this results from construction documents that are unclear or don't completely represent the owner's intention for the project. Blame for this can be shared among all parties to a design. While there are many roads that lead to poor documentation of the project intent but they all lead to the same place: a project with conflicts waiting to happen.

The byproduct of a robust bidding period and scope review is the identification of areas of project scope that could be disputed during construction. Estimators learn where the contradictory plan and spec instructions are. Scope reviews yield a sense of which subcontractor may be planning to execute differently than the design seems to intend. And the early submittals reveal clear differences in interpretation. Once these issues come to light, each day that passes without resolution increases the potential cost.

Owners, designers and contractors would be well-served to resist the human impulse to avoid confrontation in the hope that the problem won't materialize. Each party needs to recognize his or her stake in seeing that potential disputes are resolved systematically in advance of construction.

A generation ago the market dynamics were very different. Competitive pressures were less and contractors and subcontractors generally priced a project with allowances for the uncertainties built into the bid. When construction documents were unclear or contradictory, experienced estimators could figure the project based on what they knew was the proper or accepted method of construction. For the most

part, contractors could count on the same being true of their competitors. Contractors viewed the risk of losing the job as being less than that of getting a project that had problems going in.

As an example, a contractor pricing the construction of a canopy that wasn't properly detailed felt an obligation to estimate that portion of the work by anticipating the costs of correctly building that portion of the project, or at least felt obliged to request more information about how the canopy was to be built. If the assembly method estimated by the contractor wasn't one that could be approved by the architect or owner, there was enough relationship capital between the parties to allow for 'horse trading' so that no one lost any money solving the problem.

The competitiveness of the market means that it's tougher to horse trade than it used to be. Owners often want the lowest price possible and in a low bid environment unclear details will often get priced with the cheapest solutions instead of the best.

Another reality is that a new generation of project managers for owners, contractors and designers is now taking charge, and it's a generation that hasn't experienced the benefits of solutions that start with "I know what the specs say but..."

Even in hypercompetitive environments, however, a construction project is still like a marriage in that the negotiation of differences is easiest during the honeymoon period. Early in the project all parties still have relationships from which to draw capital and disputes can be corrected before they are put in place.

A current private-sector project is a great example of how to use the 'honeymoon' to manage a potential claim. The project involves the use of micro-piles in new construction and as part of the submittal process the contractor was obliged to verify the actual location of the piles in comparison to the theoretical locations shown on the foundation plan. The specs called for a report of any micro-piles which varied from the plan by more than a specific tolerance. The project manager for the engineer demonstrated some belligerence early in construction and demanded a schedule of the precise location of all micro-piles. The owner of the project had favorable past experience with the contractor and the owner of the contracting company felt the engineer was overreaching, particularly since this was one of several information requests that had slowed accelerated progress by the contractor. The contractor believed the engineer was simply behind on his submittal review and was creating distractions to slow construction.

How the next step unfolded could determine the course of the project. Acceding to the engineer's demand would have further eroded progress (which at one point was 30 days ahead of schedule), and may have cemented unreasonable expectations in his mind. Simply ignoring or refusing to honor the request would lead to denial of progress approvals and likely to a series of delay claims as the project proceeded. The contractor chose to use his relationship capital with the client, especially while he was performing ahead of expectations, to confront the engineer's expectations.

That strategy led to an uncomfortable meeting, but one in which the expectations of all parties were brought back in line with the construction documents and the

owner's needs. Two hours of discomfort averted dozens of hours of claims examinations and potentially, thousands in legal fees.

While the contractor in this example chose to nip the problem in the bud, he also demonstrated a willingness to risk his relationship with the client to confront the client's engineer. That is one of two somewhat contradictory trends that have developed during the recent recession.

Contractors and architects who had a significant share of their workload in private projects have always understood that they would have to be flexible with their interpretation of the scope of work to keep the client happy. In good times, firms can price a certain amount of that expectation into their bidding. The return on that flexibility was some level of additional business advantage. Part and parcel to that understanding of flexibility was an equality of value in what was given and taken. You were asked to fix small oversights or omissions. That was how relationship capital was accumulated.

The new generation of owners has less experience with both sides of the give and take equation, and the severity of the recession removed the flexibility from contractors and designers. Owners who have had little or no experience with changes and claims are finding they are dealing with them regularly of late.

Another trend that is a departure from the norm is that the number of disputes going to litigation has declined during this recession. Tougher economic times yield more disputes because the tolerance for give-and-take goes away, as described above. There is less profit on a given project to cover little extras so disputes arise. To be sure the number of disputes has risen as expected, but it is the share of those disputes going to litigation that has not.

One of the aims of the claims consulting industry is to educate all parties to construction projects about the benefits of managing problems to avoid claims. While that may seem counter to the claims industry's health, the truth is that an industry tuned in to the advantages of avoiding costly claims will spend more on consultants, but less overall if the investment in consulting services results in less costly resolutions. The skill sets of the professionals in the construction industry don't lend themselves first and foremost to dispute identification and resolution, so paying an expert a little to avoid paying a lot later also allows the professional to get paid for what he or she does best: finish the project.

More time will need to pass before we can judge whether this latter trend is the residue of the claims industry's education or just a different response to a severe recession. Given that the claims consulting business is relatively young, there is hope that contractors and owners have begun to understand the value of early action. Regardless of the reason for the trend towards less litigation, it is a trend that needs to accelerate rather than revert (with apologies to our friends in the legal professions).

Good times will return to the construction industry – probably sooner than we think – and the good habits developed during lean times should remain in place.