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"END OF THE CONTRACT" CLAIMS: TIPS FOR HANDLING COMPLEX CLAIMS BEFORE DRBs

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DRBs generally are set up to handle "typical" construction disputes that arise during the course of a project. Less typically, DRBs are asked to decide complex "end of the contract" delay, impact and inefficiency claims. In these claims the stakes are higher, the parties are more polarized in their positions, and the DRB's case management and decisional challenges are more difficult. This article explores some of the considerations that DRBs need to take into account in handling these complex claims.

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Complex Claims

DRBs are established for, and are well-equipped to handle, stand alone construction disputes over discrete issues or claims. These "typical" claims include whether certain work is an extra, whether a particular delay event is the responsibility of the owner or the contractor, and whether particular directed work fully compensates the contractor. Sometimes, however, contractors bring claims at the end of the contract involving literally hundreds of claims and issues, hundreds of delay days, and tens of millions of dollars in claimed cost overruns. Such claims usually include all of the following elements:

- delay (extended field and general conditions)
- constructive acceleration
- impact/inefficiency
- material (vs. incidental) owner directed work
- design related issues
- cardinal change claims

Contractors may claim, for example, that the cumulative impact of small changes (the "death by a thousand cuts" claim) delayed the work or made the contractor less efficient than planned. Such claims often involve hundreds of issues and events that give rise to an overall impact claim. Contractors also may claim delays arising from multiple critical and subcritical paths that shifted numerous times during the course of the project. Finally, there may be significant (and equally complex) subcontractor claims that are embedded in a contractor's overall claim.

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Considerations for the DRB

There are a number of factors that the DRB must take into account in handling such complex disputes. The stakes are much higher for both parties--the dollars involved, as well as the transactional costs of the process itself, will cause the parties to approach the DRB process differently than in the "typical" dispute.

The parties likely will default to their "official positions" because they may perceive that the DRB will "end up somewhere in the middle." In this "positional" approach the contractor typically will assert that the owner owes all the money claimed, and the owner will assert that the contractor is owed very little, if anything. If there is a large delta between the amounts claimed (or defended against) and the DRB recommendation, it is more likely that the "losing" party will give close scrutiny to the process and outcome.

Complex disputes by their nature involve more issues, more parties/stakeholders, more facts, more documents, and more witnesses. For this reason, process becomes an important issue. For example, the DRB will need to consider the logistics and timing of the preparation of position papers, the handling of the DRB hearings to ensure a fair (but efficient) process for all parties, and the preparation of what will be complex findings and recommendations.

Given these considerations, parties also are likely to involve their legal counsel (and may even ask that legal counsel present and defend against the claims), and parties will pay more attention to contractual/legal defenses and expert opinions. For example, there likely will be issues of contract interpretation and application, as well as general legal principles, such as who has the burden of proof and what needs to be shown to establish causation. Finally, the parties likely will hire experts in the area of engineering or schedule analysis to bolster their positions on issues such as delay and impact responsibility.

The greater complexity of "end of the contract" disputes makes it incumbent on the DRB to fashion and implement a process consistent with the stakes involved, the heightened sensitivities of the parties, and the greater involvement of legal counsel and experts.

Techniques The DRB Can Use To Handle Complex Disputes

Because complex disputes present both logistical and "fairness" challenges, the DRB will have to closely and proactively manage the process, using some of the approaches suggested below.

First, if a complex claim is going to be presented, the DRB should meet with the parties before the claim is submitted to establish ground rules on how the claim (and defenses) will be submitted to the parties and the DRB. Topics can include the basic theory, elements, and organization of the merits of the claim, as well as the time/damages sought; the level of detail that will be expected to support the parties' positions; the type and level of documentation that will be submitted; the schedule for the submission and exchange of papers; the role of lawyers and experts; and the manner in which the hearing will be conducted.

By way of illustration, if the claim involves delay or impact, a key topic is the methodology the contractor will use to demonstrate the delay and cause/effect the delay had on its schedule and costs. The DRB should consider (and discuss with the parties before preparation of position papers and expert reports) what type of schedule analysis will be done to support the delay claim, and what type of analysis will be done to support the impact/inefficiency claim (for example, windows analysis, measured mile analysis). There likely will be disagreements between the parties on schedule analysis methodologies—but to the extent the DRB can at least define the issues, the dispute will be more focused by the time it gets to the

DRB, and the work product of the parties will be more germane to the issues presented. This principle can carry over to any aspect of the claim, including the nature and extent of expert opinions.

Second, the DRB also should encourage the parties to agree on the exchange of information prior to the DRB hearing. The objective of the DRB should be to encourage full disclosure by both sides because, if the matter eventually gets to litigation, all facts and documents (except those legally protected) will be revealed in the discovery process anyway. Moreover, exchanges of information and documents before the DRB hearing will minimize "surprises" that could slow down the process or undermine its legitimacy and acceptability by the parties.

This is not to say that there should be "litigation type" exchange information and documents. Rather, the DRB should consider "refereeing" the exchange of information to ensure that relevant information, witnesses and documents will be made available to the parties and the DRB. This will avoid the process being delayed by needless skirmishing between the parties and cries of foul at the hearing because of "surprise."

Third, the DRB will need to grapple with the conduct of the DRB hearing itself. As with the preparation and submission of the position papers, the DRB should give careful consideration to the process that will be used. For example, the DRB should get agreement in advance of the hearing on the order of the presentation, the type and number of witnesses, and the amount of time presentations will take. The DRB should also consider in advance (and so communicate to the parties) the information that it believes it will need given the nature and substance of the claims (both merit and quantum). The DRB will need to make sure all stakeholders have sufficient opportunity to present their positions, without slowing or encumbering the overall process with unnecessary and confusing witnesses, documents and information.

Fourth, the DRB will need to address the role of legal counsel and expert witnesses. If there are legal disputes, the DRB should work out in advance what those disputes are and then define the role of the lawyers in presenting/defending those positions. Likewise, the DRB should work out early in the process what expert opinions are going to be provided and how those opinions will be presented at the hearing. One approach could be to ask the parties to file expert reports with the position papers; require the experts at the hearing to present a summary PowerPoint of their investigation, findings, and expert opinion(s); and require that the experts be available at the hearing to answer questions.

Fifth, the final challenge—and in some respects one of the most important—is the form and content of the DRB's findings and recommendations. In high stakes claims the parties will very closely scrutinize every element of the DRB's findings and recommendations. The thoroughness and rationale of the DRB's findings and recommendations will influence whether the parties accept them. The DRB should assume that the parties' legal counsel will read the findings and recommendations—and will have a "weighted vote" on whether to accept them.

Taking this into account, the DRB should write its findings and recommendations in a manner that convinces the parties of its thoroughness, professionalism, logic, and clarity. It is suggested that it should, first, set out the parties' positions on each issues; second, address the outcome of each issue through findings of fact, expert opinion (if applicable), and legal conclusions (if applicable); and third, clearly articulate the recommended outcome. It is important that the DRB shows the parties that all issues (including contractual and legal ones) were given due consideration, that the DRB clearly articulates the rationale of how and why it came to its conclusions, and that the DRB states the recommended outcome with clarity.

Conclusion

The DRB needs to take a more proactive role when presented with complex "end of the contract" claims. The author suggests that the DRB meet with the parties even before the claim is formally submitted to establish protocols for the presentation of the claim, the exchange of information, the process for the hearing, the role of lawyers and experts, and the groundwork that needs to be laid for the findings and recommendations that will be scrutinized closely by the parties. Thereafter, the DRB will need to "chaperone" the process to ensure that it moves forward efficiently, while giving the parties a fair opportunity to present their claims and defenses. Finally, the DRB will need to produce findings and recommendations that are reasoned, logical and clear.

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