

# Here's proof: documented cases win in court

A respected treatise on construction claims warns: "If it can't be proved—forget it!"

Very often, that proof will be found among a project's well-kept files. But a trial's outcome isn't the only thing affected by the extent and use of project documents. A subcontractor's lawyer will frequently base his or her prosecution or defense strategy on an analysis of a project's files.

To quote another handbook:

During the development of [a] case, project documentation plays an important role establishing the facts, and is an important part of the evidence to be presented. [For example,] proper notice of delays and other problems presented in a timely fashion is one of the prime categories to be drawn from the mass of project documentation. Payroll records and purchase orders provide a base for demonstration of escalation, actual overhead staff and other costs of delay.

Construction documents can be divided into six general groups: contract documents, secondary contract documents, course of construction and progress documents, correspondence and other documents.

Primary contract documents include plans and specifications, bid documents, contracts and subcontracts, shop drawings, manufacturers' recommendations, building codes and regulations, building permits, change proposals and change orders, and invoices from suppliers.

Secondary documents are documents that the primary contract refers to or that the contract requires to be prepared. Among these are purchase orders, bills of lading, receipts, and equipment rental agreements.

Secondary documents help prove such matters as delay damages. These documents can be useful to a contractor who must prove that materials were unavailable or that a delay was caused by the untimely ordering of materials. They can also show the court the type and quantity of products installed, an important issue in failure cases.

Construction progress documents are often omitted, carelessly kept or lost. They are vital evidence, however, and must be maintained.

There are many different kinds of progress documents. Some of these documents can be used to demonstrate both delays and failures and if kept as regular business records with appropriate safeguards, can be admissible by either side. These include:

- the construction schedule, which may be part of the original contract, updated as problems create delays;
- progress reports based on a foreman's records of work accomplished;
- daily work sheets that record the names of employees working each day, the hours they work and the tasks they perform;
- foremen's diaries that list site visitors, deliveries, shortages, stoppages, accidents, and any other events beyond the normal routine; and
- properly marked and identified photographs of the construction, usually taken by a contractor's employee, that show that work was progressing and may contain some evidence that work was being done in a proper manner.

**Correspondence records can contain items that document progress and problems.**

Some progress documents are normally kept by the architect, whose obligation to inspect or supervise will be spelled out in the contract. The architect's liability for construction problems varies. If the architect fails to note problems on the site inspection report, it will undermine any future claim of notice to the subcontractor or may be some evidence that the work was done properly.

The architect may order various tests, and may have contractual authority to stop the construction if the test results are not within certain limits. As evidence, the tests serve two purposes. They can demonstrate the quality of a subcontractor's performance by proving or challenging conformance with plans and specifications or workmanlike construction, or they can contest or justify delays.

If a contractor is terminated or defaults, both the architect and the contractor will usually make an immediate inspection of the work and issue a report. Such inspections will be very comprehensive and precise. Prior reports may be used to impeach the findings of these final reports.

Minutes from job or safety meetings can also document a project's course. Minutes should be kept by both sides to minimize claims of bias, and these minutes filed with other project documents.

Some job-progress documents are circulated among the parties. It is recommended that all these documents be obtained and reviewed by the subcontractor. Because the contractor is usually remiss in noting objections to other parties' statements, circulation of the documents to all parties would probably be beneficial to the owner and architect as well.

Among the documents that are passed around are punch lists, which cite items that require attention before the architect can certify project completion. This list is usually prepared by the owner with the assistance of the architect, and the items are commonly disputed. The list becomes useful as evidence when claims are made for delay damages caused by the architect's refusal to issue certificates for payment or completion.

Other progress documents received by all parties include applications for payment, which are the basis for progress payments; certificates for substantial compliance, which are usually issued by the architects only if the owner is amenable; and certificates of acceptance, which are issued by the owner at the recommendation of the architect.

Written records of correspondence are invaluable in a construction dispute. A contractor should try to leave a complete paper trail so that when a claim arises all correspondence, including letters, transmittal forms, internal memoranda, memoranda to file and records of telephone conversations, can be reviewed for relevant information.

This large pile of correspondence records can contain items that document progress and problems. Questions or complaints raised in the documents about plans, specifications, shop drawings, work, field conditions, delays and changes can be used to substantiate or oppose claims. For example, a letter of transmittal may well substantiate or destroy claims for delay in processing change orders or approval of shop drawings.

Other documents a contractor should also have available include the reports or opinions of experts and material and equipment manufacturers. Documentation of similar projects performed by the same architect or contractor or by others under similar circumstances at the same time can also be useful. Weather records of the period and promotional materials issued by the owner, architect or manufacturer should also be on file.

A file of project documents should also include records of discussions about the project with subcontractors, suppliers, the owner and third parties. Anyone who has had a case where a foreman kept such records will recognize their value in negotiating, preparing for arbitration or litigation, discussing settlements or presenting evidence.

### **Handle with care**

All of this documentation can be very useful if it is handled properly and can be easily retrieved for future reference. Documentation can open channels of communication between parties, reduce the need for lengthy orientation of personnel moving between various projects, help plan similar projects in the future and resolve construction claims and disputes.

A properly kept daily foreman's report can be a project's most important document. A daily report can become evidence if it is kept in a complete, detailed and trustworthy fashion for the purpose of running a business and not for litigation. The daily report, if it complies with the business record statutes of the jurisdiction involved, can become evidence even without the author's testimony.

The information contained in a daily report has both internal and external uses. Internally, office and job supervisory personnel are kept up-to-date on job progress and made aware of job problems. Externally, written records can be used to evaluate and process claims that may arise.

As a general rule, daily job reports or diaries should contain the following information:

- daily crew size;
- each day's major job activities;
- problems as they occur;
- delays of any kind;
- areas not available for work;
- difficulties in getting material to work area;
- delayed material delivery;
- discrepancies in drawings and specifications;
- interference with job progress by other trades;
- prints and drawings not available when area is ready for work;
- informal job meeting notes;
- changes to the work as they occur;
- weather conditions; and
- damages by others to the contractor's work.

Business record statutes and the court's interpretations of them can differ between jurisdictions. Therefore, the contractor should try to adhere to the most stringent rules for the daily report to be admissible evidence.

The strictest rules state that a handwritten daily report or diary must be prepared at the time events occur from the author's personal knowledge of the events, the doc-

ument be created in the regular course of the contractor's business and the original be kept as the official office record. Preparing the report must be a part of the author's business function.

A field order status chart should also be maintained for every project where the owner or contractor issues field orders. This provides a complete and up-to-date record of every field order received during the life of the project, including oral directives to change the work or schedule.

Some of the other commonly used documents that should be maintained include contract drawing revision charts, material and equipment status charts and change order status charts.

Every change, correction, explanation or rebuttal of a problem area should be documented, particularly where the topic of deficiencies has been raised. Punchlists, for instance, should include a close-out corrective-action list, or a sign-off to show what actions were taken on the items mentioned.

Whatever records are kept, there are certain guidelines that should be followed to insure the documents' usefulness. Written project documents should be factual and to the point. They should not include speculation or unsupported allegations, and all statements in the document should be responsible and justified. Unnecessary or unjustified remarks about the competence or motives of others should be avoided. Adjectives that exaggerate the gravity of a problem also should not be used.

Letters, memos and reports should be precise enough to prevent a third party, reviewing the document without the benefit of substantial factual background, from misinterpreting their intent.

### Filling the gaps

While reviewing a subcontractor's documents for a claim, a lawyer may discover gaps in the available information. One way to fill these gaps after a claim arises is to obtain the opposing party's documentation.

When the other party's material is received, it is of utmost importance that the subcontractor rebut in writing any untrue statements that appear in the documents. Ideally, the subcontractor does this promptly during the project. Even after a claim arises, however, a challenge to an untrue statement may make it into the record and to some extent, mitigate the harm of not challenging similar statements that were made before the claim arose.

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If documents are not managed properly, they will be useless to the attorney.

When information is undocumented by either side, notarized statements of key employees and third-party witnesses should be obtained while memories are fresh. If this information is not promptly recorded, it could be lost should the person die, go to work for a competitor or move far away. The statements may not be admissible in court (although they could be admitted in arbitration proceedings), but they do bring needed information to light. Also, the statements tend to freeze testimony so it can be evaluated and relied upon.

### Mastering the filing system

Construction cases involve a large number of documents. If these documents are not managed properly they will be useless to the attorney.

To avoid chaos, one person who is capable of determining each document's usefulness, should be assigned to receive and handle the original record copies of the documents. This person should keep a master document file where one copy of each document (the original if possible) is kept. This master file should be off-limits to anyone other than the person maintaining the documents, and this person should go into the files only to make copies.

The goal of the master file is to create a system that cross-references a project's issues, events, persons and other relevant relationships. The master file should be organized and indexed chronologically. Working files for claims, depositions or trial preparation can be created by preparing lists keyed to the master index and drawing copies from the master file, or by creating working files from record copies.

Working files are organized by topic. A typical working file will include contract documents; pay requests; specifications; change orders; drawings; supplier invoices; periodic documents, including minutes of meetings, daily progress reports and inspection reports; correspondence between the architect, contractor and suppliers; acceptance documents, including punch lists, certificates of payment and approval of changes; and communications organized according to writer, subject and date.

An index of all plans and drawings should be kept with their modification dates. This index should list preliminary architectural drawings, layout plans, bid sets, initial plans and drawings, modified drawings, working drawings and end or as-built drawings. It is convenient to include shop drawings in this index as well.

### Files may be subpoenaed

A project's documentation can sometimes disclose problems encountered by the organization preparing the claim. Normally, under the rules of discovery these damaging records and memoranda must be turned over to the opposition—a situation that can be quite embarrassing. For a case in progress, there is no remedy. The documents may not be withheld when subpoenaed, even though they have been labeled confidential or private. Even the personal diaries and similar records of individuals involved in the design or construction may be subpoenaed.

Documents can usually be obtained from the owner, architect/engineer, contractor, subcontractor, consultant, regulatory agency and suppliers in federal or state court litigation. Although some discovery is possible in arbitration proceedings, the party that requires other parties' documents to prove or defend a claim is best served in court. There, broad requests for production can be served on each of the sources and can often produce any documents the client needs. The documents requested need not be admissible as evidence as long as they are likely to lead to admissible evidence.

### Changes should be documented

A subcontractor is entitled to reasonable compensation for the cost of performing changes unless the contract specifies limitations on what is collectible. (For instance, the contract may limit compensation to the unit price of labor and materials costs or a percent markup for profit and overhead.)



However, an architect, engineer, contractor, or owner may not believe an order or directive will cause extra work or require additional unanticipated expenses. For this reason, the order will not be issued as a formal change order. For the subcontractor's own protection, he or she must notify the person issuing the order that the change will cost more money. With this written notice in hand, the owner can no longer claim surprise at the additional expense.

Most construction contracts prescribe a detailed set of procedures and time limitations for submitting notices and cost proposals when changes are directed. These procedures must be followed. It is a good idea to place an outline of these procedures in the file before beginning work.

Under certain circumstances, notice requirements can be waived. Notices are unnecessary when the general contractor or owner orally agrees to pay for the work or assures payment for the extra work during the course of performance. A written notice is also unnecessary when the owner or general contractor is on the jobsite almost daily and is aware that extras are being performed as the work progresses.

The most reliable way to prove that costs were incurred is the "direct damages" approach. This requires the subcontractor to maintain separate records of the actual direct and indirect costs of a particular change. Daily diaries or supervisor's reports should contain summaries of change work performed, work impacted, milestones reached, and labor and materials consumed. The dates of various events and the identities of people who know about those events should also be recorded. Any job meeting minutes that represent the history of the project, show that changes were made or identify when a change order was issued or a changed condition was first discovered should also be kept.

When using the direct-damages method, the subcontractor should set up and use a separate cost code or work-order account for the direct costs of any extra or changed work. Labor charges, material invoices and equipment rental charges incurred because of the change should be allocated to this account.

A separate file should also be established for critical change-related correspondence, memoranda and substantiating documentation. This file will also include all critical conversations and notes in memorandum form. Progress payment requisitions and data supporting the request, copies of approved or rejected shop drawings, shop drawing logs and photographs that effectively show the problem or change and its impact on the progress of other work should also be kept in this file. The submission of invoices, proposals and other paperwork concerning the change should be tracked with a milestone schedule.

Another way to document additional costs is the total cost theory. This method compares the costs of performing the contract to the actual costs incurred. To use this method, the contractor must show that the original estimated cost and the actual costs incurred were reasonable. It must also be shown that none of the added actual costs are attributable to the claimant or else it must be shown that the claimant's portion of the responsibility was identified and removed from the claim. Finally it must be proved that all of the increase is legally and contractually attributable to the party against whom the claim is lodged.

### Proper procedure

Whenever possible, a subcontractor should try to perform changes according to the "change-order" procedure. A change order should be requested or a change order proposal, including all direct and indirect costs, should be submitted. Appropriate time extensions should be requested and any impact costs or time not included in the change proposal should be expressly reserved.

The subcontractor should make sure the contract modification is not broader in scope than the change order that was priced. Broad release or waiver language in the change order should be avoided.

If the subcontractor cannot obtain a formal change order, he or she should at least seek a written directive to perform the extra work. In the absence of a formal change order or a written directive, the subcontractor should give prompt written notice to the other party that the directive or condition encountered is considered a change to the contract. This notice should include a full description of the directive or condition.

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Should plans or specifications cause additional work or costs, the subcontractor should be entitled to extra compensation.

The subcontractor should follow this notice up with a detailed and fully substantiated claim at a specified time or when practical. This claim should be submitted before receipt of the final payment.

### **Some changes go beyond contract's scope**

Some changes represent a material departure from the scope of work defined in the plans and specifications. The contract, which is based on the original plans, will not cover changes that result in a substantially new and different undertaking. Such a change is considered beyond the range of the contract's "changes" clause or other contractual adjustment measures.

Several different factors are used to establish a significant departure from the original contract. The amount and total cost of the change are considered as well as how the change will affect the schedule and the character of the work.

### **Costly changes may not affect whole project**

At times, circumstances will entail additional direct and indirect costs even though the entire project is not affected. Generally, the same procedures already discussed apply here, but sometimes "suspension of work," "delay" and "extensions of time" provisions in the subcontract will outline additional or different procedures. For these procedures the subcontractor should always give prompt written notice to the owner, general and architect.

The notice should say that unless the subcontractor receives further direction, the contract work will proceed notwithstanding this condition, and compensation and time extensions will be exacted as required.

As with other changes, the subcontractor should use daily reports to carefully document the additional time and money spent on the project. Project files should also record changes in anticipated manpower loading, sequencing, efficiency, productivity or cost; wage, material or equipment price changes; and equipment and facilities employed. All correspondence and supporting documents related to the delay or change as well as progress photographs should also be kept on file.

Both as-planned and as-built progress schedules that realistically reflect project circumstances and relate the delays and disruptions to their causes should be maintained.

If the subcontractor must borrow money to cover the costs of these delays, he or she should procure a separate loan to fund the troubled project.

### **Documenting defective plans**

An owner has a duty to provide workable and adequate plans and specifications. Should these plans prove defective or cause additional work or costs, the subcontractor should be entitled to extra compensation, assuming the contract does not limit or exclude that entitlement.

As an extension of this principle, if the contract documents are ambiguous enough for the subcontractor, acting reasonably, to construe them in a manner requiring less work or less expense, the subcontractor should be entitled to additional compensation if the owner ultimately requires a more expensive interpretation of the ambiguous plans. Problems that the contractor should have discovered before submitting a bid, what the court calls "patent problems," are an exception to this principle. For patent problems, the subcontractor has a duty to find out the true meaning of the documents before submitting a bid and contracting for the work. Any such ambiguities must be resolved before work begins.

If a patent defect is not noticed or called to the owner's attention before the contract price is established, the subcontractor will be bound to the owner's requirements even if they are more expensive than the contractor's alternative interpretation.

To be safe, a subcontractor should give written notice to the other party as soon as contract ambiguities or defects are found.

On the other hand, "latent problems," which are not noticeable during the pre-bid estimation process, are construed against the drafter. The subcontractor need only show that his or her interpretation was a reasonable one. It is not necessary to show that the best or most reasonable interpretation was used. Written notice is normally not legally required, but is always advisable when the latent defect is discovered.

Specifications and plans should be read as narrowly as reason permits in defining the scope of the work. Anything done beyond such a narrow reading will cost the contractor money and is a "freebie" for the owner.