

<u>Claims</u>	Amounts in excess of the agreed upon price that the contractor attempts to collect from owner, customer or others due to errors, delays, unforeseen costs If written notice is given but the other party refuses to issue a change order then a claim can arise If an agreement is reached, then the issue becomes a change order or extra instead of a claim Contractor is normally not entitled to profit on the claim cost unless it's gov't work
Variations/Changes clause	in contracts which recognizes that changes are inevitable claim has to be based on the contract terms and not on what's equitable
Implied Contract conditions	
By Owner	cooperate, not interfere, drawings and specs are complete, supervise and coordinate other workers on the job, materials that owner is responsible for are delivered timely
By Contactor	good quality workmanship and materials
<u>Delay Claim</u>	
Cost and Time are the basic components	
Completion date has been affected	
No damage for delay clause	Contractor may be entitled to time but no compensation for these two clauses
Hold Harmless clause	These clauses should only apply to areas that the contractor can control
Excusable Delay (Force Majeure)	Time but no money, time extension is important if LD's are involved Strikes, labor disputes, unusual weather, acts of God
Compensable Delay	Time and money, owner, architect or engineer caused delays differing site conditions, owner interference, late delivery of materials or drawings, numerous changes to contract, lack of access or right of way.
Nonexcusable, noncompensable	no time or money, caused by the contractor, poor productivity, bad scheduling, equipment failures, mistakes, poor supervision
Concurrent Delay	Two delays that occur at once attributable to both the contractor and the owner and maybe other parties damages are apportioned among the parties
Time-In-Kind	Extension of time. Ex: if job was supposed to be built in spring but owner delayed til winter. get extra time due to maintain an equivalent amount of time
<u>Disruption</u>	
Cost is the basic component	Caused by the owner, engineer, architect that prevent the contractor from performing according to the planned schedule. Change in conditions than were not anticipated during bid resulting in loss of efficiency
Planned schedule has been altered resulting in lost efficiency and addl costs	Major revisions of plans/specs, numerous project changes, interference by owner or other contractors (stacking of trades), failure of owner supplied matls to arrive on time or in the appropriate sequence
Completion date is not necessarily affected	Disruption claim can lead to a delay claim and an acceleration claim if owner wants original completion date Contractor not entitled to time if schedule is based on unreasonable assumptions or on a poor plan
<u>Acceleration</u>	
Directed Acceleration	If owner requests completion date be the same or earlier even if there's been a delay
Constructive Acceleration	If owner does not grant enough time for a compensable or excusable delay, then contractor can assert a constructive acceleration claim If contractor accelerates on their own to get a bonus, then no acceleration claim

Changed conditions

Differing site conditions clause
Changed conditions clause

If data furnished by the owner is different than actual conditions or if the constructed project is substantially different than the planned project due to change orders
some owners try to employ contract language disallowing this claim
recovery depends on how dif. The conditions are, did contractor notify owner, did owner have superior knowledge of the difference, could contractor have mitigated it

Scope Changes

Most common type of change

usually settled via CO, disagreement is usually re cost of the scope change
undetected design error, owner value engineering due to financial constraints,
must be limited to the ORIGINAL scope of project to avoid breach of contract which would allow contractor to terminate performance, a cardinal change is when the changes are so extensive that the nature of the contract is changed which allows contractor to terminate the contract without penalty

Termination

For Convenience
For Default

either contractor or owner can initiate. Doesn't terminate the contract, just the other party's performance in it
convenience-project is no longer needed, environmental problems
default-contractor or owner has failed to perform, cardinal change may have occurred, difficult to resolve, litigation almost always
default or convenience-owner doesn't have the funding

Claim costs

Total cost approach-comparing actual costs to bid
job cost-difference is claim cost

Actual cost approach-actual costs or estimates
for claim costs

Can be recognized if recovery is probable
and estimable

Lmtd to the lesser of amount of the claim
or costs incurred regarding the claim

Labor and equipment productivity losses are the most difficult to quantify and must be estimated

must be a legal basis for it, caused by unforeseen circumstances, identifiable and determinable

claim evidence must be objective and verifiable

legal opinion is important

unforeseen circumstances: customer caused delays, scope changes or errors in designs and specs,
changed conditions, terminations, directed or constructive acceleration, interference or disruption
claims costs should only include valid project costs and should not include legal and claims prep costs,
g&a costs, or interest costs

Disclosure

2 methods

Claims are not recognizable until claims are received

Claims are recognizable when recovery is
probable and estimable

apply disclosures consistently, any change is a change in accounting,

disclose amount of claims recognized in the f/s, disclose gain contingency amounts for claims not
recognized in the f/s

dr a/r, cr contract revenues or defer costs on the b/s and reduce costs of construction, dr defer costs and cr cost of construction

Legal

Contract Types

Fixed Price	single price for the amount of work, most risky to contractor
Cost plus Fee	reimbursement of allowable costs plus a fee, low risk to contractor
Cost plus Fee with GMP	once a cost type contract hits a GMP, it affectively becomes a fixed price contract
Unit Price	single price per unit, risk of unbalanced units, if productivity goes down then less profit per unit and vice versa
Time and Materials	similar to cost plus, based on direct labor hours at fixed hourly rates plus materials costs

Contract Documents

Contract	Article 9-dispute resolution, Article 10 termination/suspension
General Conditions-AIA 201	
Plans & Specifications	owner warrants the fitness of the plans & specs. 2 exceptions (1) patent defects-if it's obvious that performance would be impossible, the contractor has to tell the owner at the bidding stage
Drawings	(2) contractor has assumed the risk for the design (performance specs-contractor determines the method and design specs-contractor follows architect's design)

Remedy Clauses-2 types

(1) Compensation for extra work	remedies available if another's actions causes additional cost or damages
(a) Increased scope	there are usually limits on recovering OH and profit
(b) Differing site conditions	different from plans and specs
(2) Limits/prohibits normal legal remedies	Worksite conditions are not as anticipated-contractor is entitled to an adjustment
Notice Provisions	ex: requiring arbitration and time period limitations require written notice be given before work is performed

Scheduling Provisions

(1) Liquidated Damages	assessed if time requirements are not met
(2) No damage for delay	if the project starts later than planned, the contract completion dates should be renegotiated
(3) Notice	required to give the owner timely notice of any delay

Exculpatory Provisions

excuse the owner and architect for increased costs, even from their acts and omissions
inspection, familiarity with work, no damage for delay-gives owners unfair adv

Indemnification Clauses

hold the owner and architect harmless from 3rd party claims such as property damage and personal injury
shift the risk to the contractor, can obtain insurance rider to Bldrs Risk or Genl Liab ins

Contract Interpretation

(1) Course of performance	In the order of priority- c of perf: interpretation of contract before a controversy arises
(2) Course of dealing	course of dealing: how the same parties handled the issue in the past
(3) Usage of trade	how a particular trade or industry usually deals with the issue

Dispute Resolution

best to resolve the dispute in the field, if possible
architect is the initial judge of disputes
if a co is in dispute, the owner must pay the contractor at least the amount that the architect certifies as the value of the work
if no disputes clause in the contract, contractor may still sue for breach of contract

Payment Terms

Determined by contract and SOV

Failure to make payment without a good reason is a material breach per AIA 201 Article 5.4.1

Subcontracts

Governed by the General Contract
Pay when Paid Clause

must be consistent with prime contract re disputes, if owner terminates GC, sub is assigned to owner
sub is paid when owner pays gc

Warranties

Express Warranty

in writing-included in the contract or actions or words by the parties
under the UCC, which applies to the sale of materials and equipment, express warranties cannot be disclaimed by "as is" wording

Implied Warranty

Warranty of Fitness

inferred and imposed as a matter of law, do not arise from negotiations or from contract terms
fit for a PARTICULAR purpose, seller knows that buyer needs it for a particular purpose, like shoes will be for hiking
buyer is relying on the seller's knowledge, NA if the buyer does not rely on the seller's knowledge, "cover" right to purchase substitute goods
applies to all sellers, UCC allows implied warranties to be excluded by using "as is"

Warranty of Merchantability

goods will be salable if the seller is a merchant of the same kind of goods
fit for ORDINARY purpose, usually bulk items like bricks, paint, easier to prove than warr of fitness
applies only to sellers who are merchants

Owner's Warranty of Specifications

owner implies that plans and specs are accurate and suitable for project
3 exceptions: if contractor knew of defect when s/ contract, if proceeds anyway, or fails to follow plans & specs

Gov't Contracts

Miller Act

Subs, suppliers and materialmen can recover on the pmt bond. Lien does not attach to the property but to the gov'ts funds
Bonds are usually required

Sovereign Immunity

Sovereign Act

Proprietary Act

Implied warranty of specifications

Implied warranty of good faith and fair dealing

Implied duty to not hinder or delay

gov't can't be sued unless it consents to be sued
if for public health and safety, the gov't let water escape from a dam which delayed work on another gov't project, gov't is not responsible for damages
but if gov't let water escape on the dam to help another project and repair work was delayed on the dam, compensable delay
most important implied obligation of the gov't

Gov't Clauses

Performance requirements

Material and workmanship be new, skillful and acceptable, inspection and acceptance by gov't
conditions affecting the work-contractor's responsible for determining the conditions that can affect the work
gov't can use and possess the work prior to completion, warranty of construction-work conforms to specs and no defects
generally monthly pmts and may retain 10%

Payment

Adjustment

Socioeconomic

Delay

Disputes procedure

Termination

adjustment-change orders
Davis Bacon act, affirmative action
Suspension of work-gov't can suspend, delay or interrupt work for its own convenience
written

Alternative Dispute Resolution (ADR)

Negotiation	preserve relationship, low costs, fast results, usually results in lower claim recoveries
Mediation	Nonbinding efforts of an impartial person or team, not interested in making a judgement, instead try to encourage a compromise
Arbitration	A legally binding, less formal alternative to litigation. May be less costly and faster than litigation but not always
Mini Trial	A shortened proceeding in the presence of both CFO's and their attorneys, reason will prevail and settlement
Litigation	Court of Law, unpredictable results
Dispute Resolution Board	Group of people, such as Engineer, Architect, Contractor and Owner, that would resolve the dispute between two subs, for example. No external people are involved.