SECTION 6

CONSTRUCTION CLAIMS AND LITIGATION

This Section focuses on construction claims brought by contractors against state transportation agencies. The Section is arranged into four subsections. The first subsection deals with contract claims procedures. The next two subsections discuss the major liability and damage issues that are usually presented in a large construction claim. The last subsection concludes with a discussion of the trial strategies and considerations that may be used in preparing and defending a construction claim in a typical litigation setting.

A. CLAIM PROCEDURES

1. Introduction

In deciding whether a claim brought by a contractor should be settled administratively or litigated, the agency must be able to evaluate the claim. Is it likely that the contractor will be successful if the case is tried? If so, what kind of monetary exposure is the agency facing? What will it cost to defend the case in terms of money and agency resources? Will an adverse result create a bad precedent, or conversely, will an unwarranted settlement just encourage more claims?[1]

To assess these concerns, an agency must have information about the claim. The agency must understand the contractor's theory on entitlement or liability, the provisions in the contract on which the contractor relies, and what the contractor has in the way of documentation supporting its position. The owner must know how much is sought, how that amount was calculated, and the facts that support those calculations.

Claim procedures allow an owner to investigate the claim and document the facts while they are still fresh. Early notice of a potential claim also allows an owner to evaluate the impact that the claim could have on the owner's construction program. This can have real significance to a public agency that is operating under tight budgetary constraints.

Generally, it is also in the contractor's interest to submit a well-documented claim. A poorly documented claim, in all likelihood, will be rejected, leaving litigation or arbitration as the only means available to the contractor for resolving the dispute.

Contract claims that are not settled by the parties must be referred to a neutral third party for resolution. In the case of state transportation agencies, the "final remedy" for resolving claims can vary widely. They can range from litigation to arbitration conducted by the American Arbitration Association. Some states have created boards and commissions to decide claims, subject to some judicial review. Several states use a mix of litigation and arbitration, specifying arbitration as the sole remedy for claims under a specific dollar amount and providing for litigation for claims over that amount. The administrative procedures used by the states to review claims, and the final remedies available to the contractor if the claims are not settled, are listed in a Table in Part 3 of this Subsection.

The variations in the methods used by the states as final remedies stem from their policy on sovereign immunity as a bar to contract claims. Many states have judicially recognized that immunity from suit is waived through contracting. Other states have statutorily waived or abolished sovereign immunity for breach of contract claims. The Table in Part 3 of this Subsection contains a summary showing how each state has dealt with sovereign immunity as a defense against parties seeking redress from a state for breach of contract.

2. Immunities from Suit

a. Sovereign Immunity

Sovereign immunity, unless waived, protects a state, its agencies, and officers from lawsuits,[2] and applies to contract claims against a state.[3] The doctrine of sovereign immunity is based on the ancient common law maxim that, "the King can do no wrong," and therefore, he cannot be held liable for his acts or omissions.[4] The modern justification for the doctrine has been characterized as a means of protecting the public purse: "Sovereign immunity protects the public fisc, and therefore, the public welfare by limiting assaults on the public fisc."[5]

Generally, sovereign immunity can be impliedly waived by conduct, or expressly by legislation.[6] A number of states have judicially recognized that a state waives its immunity from suit for breach of contract by contracting for goods and services.[7] The rationale supporting this view was explained by the Delaware Supreme Court.

> It must be assumed that the General Assembly, in granting the State Highway Department the power to contract intended that it should have the power to enter into only valid contracts. A valid contract is one which has mutuality of obligation and remedy between the parties to it (citations omitted). It follows therefore, that in

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[1] While an early resolution of the claim is usually in the owner's best interest, claims that lack merit should not be settled simply to make them go away. A policy of settling everything and litigating nothing often encourages more claims.

[2] S.J. Groves & Sons v. State, 93 Ill. 2d 397, 444 N.E.2d 131, 67 Ill. Dec. 92 (Iowa 1982); 72 AM. JUR. 2D, *States, Territories and Dependencies*, §§ 92 & 93 (2d ed. 2001), Stone v. Ariz. Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (Ariz. 1963).

[3] Federal Sign v. Tex. So. Univ., 951 S.W.2d 401, 412 (Tex. 1997) (dismissing claim for breach of contract based on sovereign immunity).

[4] Stone v. Highway Comm'n, *supra* note 2, at 109; Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

[5] Hocking, *Federal Facility Violations of the Resource Conservation and Recovery Act and the Questionable Role of Sovereign Immunity*, 5 ADMIN. L. J. 203 (1991).

[6] Stone v. Highway Comm'n, *supra* note 2, at 111.

[7] The Table in Part 3.b *infra* lists those states that have taken that position, including case citations.

> authorizing the State Highway Department to enter into valid contracts the General Assembly has necessarily waived the State's to suit immunity for breach by the State of that contract.[8]

Other states have enacted legislation that waives or abolishes sovereign immunity as a defense to lawsuits for breach of contract.[9] Not all states, however, permit private parties to litigate their contract claims in courts of general jurisdiction. Some states, for example, have a state claims board or Court of Claims to determine claims against the state that arose from contracts entered into by the state.[10] And in Texas, sovereign immunity for breach of contract is not waived by the act of contracting.[11] The court, however, noted that, "There may be other circumstances where the State may waive its immunity *by conduct* other than simply executing a contract so that it is not always immune from suit when it contracts," (emphasis added).[12]

In *Aer-Aerotron v. Texas Department of Transportation,*[13] the court held that the Department's immunity from suit was waived by conduct that went beyond the mere act of contracting. In that case, the Department contracted with Aerotron to supply radios for a total contract amount of $468,550. In the first year of the contract, the Department increased the number of radios from 125 to 300, raising the total contract price to $993,900. Aerotron alleged, in its complaint, that it had shipped the radios and the Department had accepted them, but failed to pay, forcing Aerotron into bankruptcy. Aerotron further alleged that the State, by accepting goods and services, increasing its order, requesting and receiving technical assistance, and by twice promising to pay the balance due, waived its immunity from suit for breach of contract. The court held that the State waived its immunity from suit by engaging in actions that "fully implicated it in the performance of the contract."[14]

In *Texas Department of Transportation v. Jones Bros. Dirt & Paving Contrs.*,[15] the court held that the contractor's petition for breach of contract must allege facts showing that immunity from suit was waived by conduct that goes beyond the act of contracting. The contractor's failure to make this showing deprived the trial court of jurisdiction over the contractor's breach of contract claim.

b. Eleventh Amendment Immunity

The Eleventh Amendment to the United States Constitution provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

While the Amendment, by its terms, does not bar suits against a state by its own citizens, the Supreme Court has consistently held that an unconsenting state is immune from suits brought in federal courts by the state's own citizens, as well as citizens of another state.[16]

Eleventh Amendment immunity applies even though a state is not named as a party to the lawsuit, when it is clear that the state is the real party in interest and the state officials are only nominal defendants.[17]

Abrogation of Eleventh Amendment immunity can occur in two ways. First, a state may expressly waive its immunity.[18] Second, Congress may abrogate the immunity, but only if Congress expresses an intent to do so and the legislation is pursuant to a valid exercise of Congressional power.[19]

Unless Congress abrogates a state's immunity, any suit by private parties in federal court seeking to impose a liability that must be paid from public funds in the state treasury is barred by the Eleventh Amendment.[20]

3. Administrative Claim Procedures and Remedies

The administrative procedures used by state transportation agencies to resolve claims are governed by the standard specifications in the agencies' construction contracts. This subpart examines the claims specifications used by several state transportation agencies,[21] and the AASHTO Guide Specifications. These specifications illustrate the elements that a claims specification should contain. In this regard, much of the discussion focuses on the Florida Department of Transportation,[22]

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[8] George & Lynch Co. v. State, 57 Del. 158, 197 A.2d 734, 736 (Del. 1964).

[9] The Table in Part 3.b *infra* lists those states that have enacted legislation waiving sovereign immunity.

[10] New York, for example, has a State Court of Claims to determine contract claims, N.Y. Court of Claims Law § 9. Pennsylvania has similar legislation creating a Board of Claims to determine breach of contract claims against the Commonwealth, 62 PA. CONS. STAT. § 1724. Other states that have adopted similar approaches are listed in the Table in Part 3 of this Subsection.

[11] Federal Sign Co. v. Tex. So. Univ., 951 S.W.2d at 408–09.

[12] *Id.* at 408 n.1.

[13] 997 S.W.2d 687 (Tex. App. 1999).

[14] *Id.* at 691.

[15] 24 S.W.3d 893, 901 (Tex. App. 2000).

[16] Hans v. La., 134 U.S. 1, 16, 10 S. Ct. 504, 33 L. Ed. 842 (1890); Duhne v. N.J., 251 U.S. 311, 40 S. Ct. 154, 64 L. Ed. 280 (1920); Employees v. Department of Public Health and Welfare, 411 U.S. 279, 93 S. Ct. 1614, 36 L. Ed. 2d 251 (1973); Edelman v. Jordan, 415 U.S. 651, 663, 94 S. Ct. 1344, 39 L. Ed. 2d 662 (1974).

[17] Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 65 S. Ct. 347, 89 L. Ed. 389 (1945). Edelman v. Jordan, 415 U. S. at 663.

[18] Edelman v. Jordan, *id*. at 673.

[19] Green v. Mansouer, 474 U.S. 64, 68, 88 L. Ed. 2d 371, 106 S. Ct. 423 (1985).

[20] Edelman v. Jordan, 415 U.S. at 674.

[21] Arizona, California, Florida, New York, Oregon, Pennsylvania, South Dakota, and Washington.

[22] Florida Department of Transportation Standard Specifications for Road and Bridge Construction (2000).

although elements from other state specifications are also examined as part of this discussion.

This subpart also summarizes the internal administrative review practices employed by the states in dealing with contract disputes and the final remedies available to contractors who are dissatisfied with the agencies' decisions.

a. Claims Specifications

A typical claims specification contains the following elements: (1) notice of the claim, and waiver of the claim if notice is not provided; (2) furnishing of sufficient information to enable the agency to evaluate the claim; (3) an internal administrative process; and (4) a certification stating that the claim is made in good faith and reflects what the contractor believes it is owed. Each of those elements are discussed below.

The first element requires notice of a potential claim. Failure to provide such notice waives the claim. For example, the AASHTO Guide Specification provides in part that the contractor must "[n]otify the Engineer in writing of any intent to file a claim."[23] This specification also provides that "the Contractor waives any claim for additional compensation if the Engineer is not notified or is not afforded proper facilities for strict accounting of actual costs."

Prompt notice of a potential claim before any disputed work is performed serves several public purposes. Prompt notice allows the agency to take early steps to change the work, as necessary, to mitigate damages and avoid extra or unnecessary expenses.[24] It also allows the agency to keep track of the costs associated with the disputed extra work.[25] Notice provisions for failure to comply with claim filing procedures are judicially enforced.[26]

The second function of a claims specification is to allow the owner to obtain sufficient information about the claim so that it can determine whether to settle or reject the claim. This function requires the contractor to explain the basis of its claim and the amount of additional compensation sought, including time extensions, if any. The specification also requires the contractor to submit documentation supporting the claim. The language used in the specification to implement this function can be specific or generalized.

The Florida claims specification[27] is a good example of a specification that is very specific in enumerating what the claim must contain. This specification requires that the claim contain the following information:

- A detailed factual statement of the claim, including the items of work affected and pertinent dates.
- An identification of all pertinent documents and the substance of any material oral communications relating to the claim, and the identity of the persons involved in the communications.
- An identification of the provisions of the contract that support the claim, and the reasons why such provisions support the claim, including the provisions of the contract that allegedly have been breached and the actions constituting such breach.
- The amount of additional compensation sought, with a breakdown of the amount showing: (1) job site labor expenses; (2) additional materials and supplies together with invoices and receipts establishing such costs; (3) a list of additional equipment costs claims, including each piece of equipment and the rental rate claimed for each—owner-owned in-house rate, rented, or Blue Book; (4) any other additional direct costs or damages, and all documentation in support thereof; (5) any direct costs or damages and all documentation in support thereof; and (6) a list of the specific dates and the exact number of days sought for a time extension and the basis for entitlement to time for each day for which a time extension is sought, including a detailed description of the events or circumstances that caused the delay.

Submittal of a written claim containing this type of information is a condition precedent to entitlement for additional compensation or time.[28] The Florida Standard Specification also requires that the contractor must submit its claim within 90 calendar days after the affected work is completed for projects with an original contract amount of $3 million and within 180 calendar days for projects greater than $3 million, thus allowing the contractor sufficient time to document its claim.[29]

To guard against the contractor revising its claim after the claim has been submitted, the Specification prohibits the contractor from increasing the amount of the claim or the basis for entitlement. The Specification provides that:

> The Contractor shall be prohibited from amending either the basis of entitlement or the amount of any compensation or time stated for any and all issues claimed in the contractor's written claim submitted hereunder, any circuit court, arbitration or other formal claims resolution proceeding should be limited solely to the basis of enti-

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[23] AASHTO Guide Specification § 105.18 (1998); *see also* California Specification 9-1.04; Pennsylvania Specification 9.105-14; South Dakota Specification 5.17.

[24] A.H.A. Gen. Constr., Inc. v. N.Y. City Housing Auth., 92 N.Y.2d 2D, 699 N.E.2d 368, 376, 677 N.Y.S.2d 9 (N.Y. 1998).

[25] *Id*.

[26] Blankinship Constr. Co. v. State Highway Comm'n, 222 S.E.2d 442 (N.C. 1976); Main v. Department of Highways, 206 Va. 143, 142 S.E.2d 524, 530 (Va. 1965); Absher Constr. Co. v. Kent Sch. Dist., 78 Wash. App. 137, 890 P.2d 1071, 1073 (1995); Ritangela Constr. Corp. v. State, 183 A.D. 2d 817, 584 N.Y.S.2d 108, 110 (1992); Glynn v. Gloucester, 21 Mass. App. Ct. 390, 487 N.E.2d 230, 233 (1986); PYCA Indus. v. Harrison County, 177 F.3d 351 (5th Cir. 1999).

[27] Specification 5-12 (2000). The California Standard Claims Specification is more generalized. Section 9-1.04 (1999) requires the contractor to submit notice of a potential claim on a standard form (CEM-680). When the affected work is completed, the contractor must submit substantiation of its actual costs. Failure to do so waives the claim.

[28] Florida Standard Specification 5-12 (2000).

[29] *Id*., 5-12.2.1.

> tlement and the amount of any compensation or time stated for any and all issues claimed in the Contractor's written claim submitted hereunder. This shall not, however, preclude a contractor from withdrawing or reducing any of the basis of entitlement and the amount of any compensation or time stated for any and all issues claimed in the contractor's written claim submitted hereunder at any time.[30]

The audit provisions of the Florida Standard Specifications are also specific.[31] They enumerate in detail the types of records that may be audited. These include, but are not limited to, daily time sheets, foreman's daily reports, diaries, payroll records, material invoices and purchase orders, lists of company owned equipment, subcontractor payroll certificates, job cost reports, general and subsidiary ledgers used to record costs, and cash disbursement journal and financial statements for all years reflecting the operations on the project, including income tax returns for those years.[32]

Also subject to audit are all documents reflecting the contractor's actual profit and overhead during the years the contract was being performed, and for each of the 5 years prior to the commencement of the contract. Aside from defending against a total cost claim,[33] the question of whether a contractor makes or loses money on a fixed-price, competitively bid contract is ordinarily not legally relevant. An exception may apply where there are large profits and defective work.[34] But beyond legal relevance is practical relevancy. Did the contractor or subcontractor make or lose money? This type of information can be useful in formulating negotiation strategies, particularly when the contractor has pass-through claims from subcontractors who have suffered large losses and may be on the verge of bankruptcy.[35]

The Florida Specification also requires the contractor to make its bid documents available for audit[36] and all worksheets used to evaluate the cost components of the claim, including all documents that establish the specific time periods and individuals involved and the hours and wage rates for such individuals.

In addition, a specification should permit the owner to audit depreciation records on all company equipment irrespective of whether those records are maintained by the contractor, its accountant, or others. This should include any other source documents used by the contractor for internal purposes in establishing the actual cost of owning and operating its equipment.[37] Computer software used to prepare the claim should also be subject to audit.[38]

The audit specifications should provide that, as a condition precedent to recovery on any claim, the contractor, subcontractors, and suppliers must keep sufficient records to support and document their claims. The specification should also provide full access to such records to allow the auditors to verify the claim and make copies of such records, as determined necessary by the auditors. Finally, the specification should provide that failure to retain sufficient records to verify the claim, and failure to provide full and reasonable access to such records, waives the claim or any portion of the claim that cannot be verified.[39]

One final consideration: Care should be taken in selecting the auditor. The auditor may be called upon to testify to his or her findings if the claim is not settled. Thus, consideration should be given not only for the auditor's professional competence, but also for his or her ability as an expert witness.

The third element of a typical claims specification is the administrative process that the agency will follow in reviewing the claim. In general, the initial review is made by the resident engineer. If the claim is not resolved at this level, it will be reviewed at a higher level. For example, Arizona follows a three-step process: (1) review by the resident engineer, (2) review by the district engineer, and (3) review by the state engineer.[40] Oregon has a four-step process with the stated purpose of resolving claims at the lowest possible level in the agency.[41] The administrative review process used by the states is illustrated in the Table shown later in this subpart.

The agency is required to act in good faith in evaluating the claim,[42] and moreover, the law presumes that public officials act in good faith in carrying out their duties.[43] Thus, a claim should not be rejected for minor defects. But what should the agency do when the claim is materially defective? This question can be important because failure to comply with claim procedures may waive the claim. Sending the claim back for more information, however, may waive any defense that the claim is barred because of the contractor's failure to comply with the claim procedures specified in the contract.

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[30] *Id*., 5-12.3.

[31] *Id.*, 5.12.14.

[32] The Specification used by the Washington State Department of Transportation allows the agency to audit financial statements for 3 years preceding execution of the contract and 3 years following final acceptance of the contract, in addition to auditing financial statements for all years reflecting operations relating to the contract. Standard Specification 1-09.12 (2000).

[33] Claims based on the total cost method are discussed in Subsection C.4 of this Section.

[34] Defective work may explain why the profits are so large. The counter argument is that admission of large profits may be too prejudicial. *See* Federal Evidence Rule 403.

[35] Pass-through claims are discussed in Subsection C.4 of this Section.

[36] Escrow bid documentation specifications are discussed later in this Subsection.

[37] WSDOT Standard Specification C1-09.12(3)(20) (2000).

[38] *Id*., 1-09.12(3)(22) (2000).

[39] Florida Standard Specification, *supra* note 28.

[40] Arizona Standard Specification 105.21 (2000).

[41] Oregon Standard Specification 00199.40 (1996).

[42] Sutton Corp. v. Metro. Dist. Comm'n, 423 Mass. 200, 667 N.E.2d 838 (1996).

[43] D.C. v. Organization for Envtl. Growth, Inc., 700 A.2d 185, 201 (D.C. App. 1997).

To preserve this defense, the letter should specify why the claim is deficient, and that the claim is waived. However, if the agency is willing to leave the door open for future negotiations, the letter may state that the agency is willing to engage in further negotiations, but only with the understanding that to do so will not prejudice the agency's waiver defense, and that the defense will be asserted if the claim is litigated or arbitrated.[44]

The administrative review aspect of a claims specification specifies when the agency will respond to the claim.[45] Failure to respond constitutes a denial of the claim.[46] If the claim is not resolved at the project level, the contractor may request further review of the claim until the internal administrative process is exhausted.[47]

The fourth and final element is the format for certifying the claim. While there is no standardized format, the contractor is generally required to certify that the claim is true and fully documented.[48] The California specifications require that the claim must be accompanied by a notarized certificate certifying, under penalty of perjury and with specific reference to the California False Claims Act,[49] that the claim for additional compensation and time, if any, is a, "true statement of the actual costs incurred and time sought, and is fully documented and supported under the contract between the parties."[50]

The California Claims Specification[51] requires that any claim for overhead costs must be supported by an audit report of an independent certified public accountant. But the state may, at its discretion, conduct its own audit of overhead costs. The specification further provides that any costs or expenses incurred by the State in reviewing any claim not supported by the contractor's cost accounting or other records shall be deemed to be damages incurred by the state within the meaning of the California False Claims Act.

The claims specifications may contain other features that protect the owner's interests. For example, the Florida Specification enumerates the types of consequential damages that are not recoverable.[52] These include, but are not limited to, such damages as loss of bonding capacity, loss of bidding opportunities, interest paid on money borrowed to finance the work, and loss of financing. Claim preparation expenses, attorney fees, expert witness fees, and the cost of litigation are also not recoverable. Acceleration costs are also not allowed, except where the contractor was directed by the agency to accelerate the work at the agency's expense.

The Florida Specification[53] contains two other interesting features. It makes settlement discussions between the contractor and the agency inadmissible in court proceedings or arbitration brought by the contractor. The Specification also provides that no claim can be filed in court or no demand can be made for arbitration until after final acceptance of the contract.[54]

b. State Dispute Resolution Procedures and Remedies

The most common method for resolving state highway construction claims is litigation. Arbitration is a distant second, followed by special courts and boards. These methods vary because of the manner and extent in which the states have waived sovereign immunity. The following Table lists each state, summarizes how sovereign immunity was waived, and generally describes the internal administrative processes used by each state in reaching a decision on whether to settle or deny a contractor's claim. The Table also summarizes the final remedy available to a contractor who is unwilling to accept the agency's decision.

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[44] Whether the claim will be deemed as waived may depend upon whether the owner can show that it was prejudiced by the contractor's failure to comply fully with the notice of claim requirements. A.H.A. General Constr. Co. v. N.Y. Housing Auth., 92 N.Y.2d, 20, 699 N.E.2d 368, 374, 677 N.Y.S.2d 9 (1998) (strict compliance with notice requirements required); Absher Constr. Co. v. Kent Sch. Dist., 77 Wash. App 137, 890 P.2d 1071, 1095 (showing of prejudice not required to enforce notice provision); New Pueblo Constructors, Inc. v. State, 144 Ariz. 95, 696 P.2d 185, 188 (1985) (showing of prejudice required—applying federal contract law).

[45] Section 5-12.4 of the Florida Standard Specifications provides for a response within 90 days for claims on contracts having an original amount of $3 million or less and 120 days for contracts having an original amount greater than $3 million. The WSDOT Specification provides for a response based on the size of the claim: 45 calendar days for claims under $100,000 and 90 calendar days for claims of $100,000 or more. The time may be extended if necessary. Standard Specification 1-09.11(2) (2000).

[46] Florida Specification, *supra* note 45.

[47] The Arizona specification, for example, uses a three-step hearing process. If the contractor does not accept the project engineer decision, the contractor may request a review by the district engineer and then the State Engineer. Standard Specification 105.21 (2000).

[48] South Dakota Standard Specification 5.17 (1998); New York Standard Specification 109.05F (1995). Both specifications require that certifications be made under oath before a notary public.

[49] The California False Claims Act is discussed in Subpart 4 of this Subsection.

[50] Standard Specification 9-1.04 (1999).

[51] *Id.*

[52] Standard Specification 5-12.10.

[53] Standard Specification 5-12.12.

[54] Standard Specification 5-12.4. Metropolitan Dade County v. Recchi America, Inc., 734 So. 2d 1123 (Fla. App. 1999) (contractor must follow contract claim procedures prior to commencement of suit).

STATE	ADMINISTRATIVE PROCEDURES	FINAL REMEDY
Alabama sovereign immunity judicially waived. *State Highway Dept. v. Milton Constr. Co.,* 586 So. 2d 872 (Ala. 1991).	Agency decision may be appealed to a Claims Committee composed of agency personnel not involved in the project. The Claims Committee decision may be accepted or rejected by the agency head. Contractor may request a hearing by a Claims Appeal Board. The Board is a standing committee composed of three members, one of whom is appointed by the state, one by a contractor's association, and the third jointly by the state and association. The Board's decision is not binding on the state.	Litigation.
Alaska sovereign immunity waived by statute. Statute 09.50.250 (express authority to contract waived immunity).	Resident Engineer's decision may be appealed to the Contracting Officer, which in turn may be appealed to the Commissioner of Transportation for a final agency decision.	Litigation. Statute 36.30.685. (Trial *de novo* if Commissioner's final decision made without a hearing).
Arizona sovereign immunity judicially waived. *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107, 109 (Ariz. 1963).	Initial decision by the Project Engineer with final review by the State Engineer or his or her representative.	For claims of $200,000 or less—arbitration pursuant to AAA Construction Industry Rules. Over $200,000—litigation in Maricopa County Superior Court.
Arkansas retains sovereign immunity, but allows claims to be heard by administrative claims commission, Ark. Code § 19-10-201 *et. seq*.	Initial decision by the Resident Engineer, with successive appeals to the Chief Engineer.	Appeal to the State Claims Commission, which is composed of five members appointed by the Governor, two of whom must be attorneys. Decisions of the Commission may be reviewed by the Legislature.
California sovereign immunity judicially waived. *Souza & McCue Constr. Co. v. The Superior Court*, 57 Cal. 2d 508, 370 P.2d 338, 20 Cal. Rptr. 634 (1962).	Initial decision by the Project Engineer. Review by District Highway Director. Settlements at the District level may be subject to approval by the Headquarters Construction Department.	Statute makes arbitration the sole remedy. Sections 10240–10240.13, Ch. 1, Div. 2, Public Contract Code. Arbitrator's decision is subject to judicial review for findings of fact not supported by substantial evidence and errors of law.
Colorado sovereign immunity judicially waived. *Ace Flying Service, Inc. v. Colorado Dept. of Agriculture*, 136 Colo. 19, 314 P.2d 278 (Colo. 1957).	Initial decision by Project Engineer, with appeal to the District Engineer and then to the Chief Engineer, who refers the claim to a review board composed of three members: one appointed by the State, one appointed by the contractor, and the third by the two members. Board's recommendation referred to Chief Engineer, who makes the final decision.	Litigation.
Connecticut sovereign immunity waived by statute, Conn. Gen. Stats. § 4-160.	Claim may be submitted to claims commissioner, who may authorize suit against state on claim that presents issue of law or fact under which state would be liable if it were private person.	Action must be brought within 1 year of commissioner's ruling in judicial district in which claimant resides, or in Hartford or

STATE	ADMINISTRATIVE PROCEDURES	FINAL REMEDY
		district in which claim arose if non-resident.
Delaware sovereign immunity judicially waived. *George & Lynch, Inc. v. State*, 57 Del. 158, 197 A.2d 734, 736 (1964).	Initial decision by the Division Engineer, with an appeal to the Contract Claims Committee and a further appeal to the Secretary of Transportation.	Arbitration by the AAA under the Construction Industry Arbitration Rules.
Florida sovereign immunity waived by statute (FLA. STAT. ANN. § 337.19) (2002).	Initial decision at the District level, with appeal to the Claims Review Committee, which is composed of three agency members. Final decision may be made by the Secretary of Transportation.	Litigation claims under $50,000.00 may be arbitrated.
Georgia State Constitution, Art. 1, Sec. II, Paragraph IX (c) waives sovereign immunity for breach of contract actions.	Initial review by the Project Engineer, with successive appeals to the State Highway Engineer, who has final administrative authority to settle contract claims.	Litigation.
Hawaii sovereign immunity waived by statute. HAW. REV. STAT. § 661.	Initial review by the Resident Engineer, and if not settled, then to the District Engineer. If not settled at that level, then to the Chief Engineer, who has final administrative authority to settle claims.	Litigation.
Idaho sovereign immunity judicially waived. *Grant Constr. Co. v. Burns*, 92 Idaho 408, 443 P.2d 1005, 1009 (Idaho 1968).	Claim filed with the Resident Engineer for determination by the District Engineer. Decision may be appealed to the State Highway Administrator and thereafter to the Transportation Board for a *de novo* hearing. The Board's decision is not binding.	Litigation.
Illinois State Constitution, Art. XIII, Sec. 4, abolished sovereign immunity except as provided by the Legislature.	Claim filed with the Project Engineer for referral to the Engineer of Construction. Claim may be referred to a three-member claims board. The Board makes a recommendation to the Director of Highways, who has final administrative authority.	Three-Judge Court of Claims established by statute (I.R.S. c37 § 439.24 *et. Seq.*). No appeal from the court's decision.
Indiana sovereign immunity waived by statute. Code § 34-4-16-1.1.	Claim filed with District. Decision may be appealed to Commissioner.	Litigation.
Iowa Code § 613.11 waived immunity to suits against the Department of Transportation for construction contract claims. Judicial waiver. *See Kersten Co. v. Dept. of Social Services*, 207 N.W.2d 117, 120 (Iowa 1973).	Claim filed with Project Engineer. Contractor may request meeting with the agency for review and final agency decision.	Contractor may elect with agency approval to submit the claim to nonbinding arbitration by three-member panel: one member chosen by contractor, one by agency, and the third by the other two arbitrators. Litigation if nonbinding arbitration fails to settle the claim.
Kansas sovereign immunity judicially waived. *Parker v. Hufty Rock Asphalt Co.*, 136 Kan. 834, 18 P.2d 568, 569 (1933).	Claim filed with Area Engineer, with appeal to the Secretary of Transportation, who may either authorize an administrative hearing before a hearing officer or appoint a three-member claims panel. The Secretary may accept or reject the recommendations made by the hearings officer or the panel.	Litigation.
Kentucky sovereign immunity waived by statute. KY. REV. STAT. § 45A 245.	Claim filed with the Project Engineer. Successive appeals to the Commissioner of Highways, who may authorize an administrative hearing for a nonbinding recommendation. The Commissioner has final admin-	Litigation. Case tried to the court sitting without a jury.

STATE	ADMINISTRATIVE PROCEDURES	FINAL REMEDY
	istrative authority to settle the claim.	
Louisiana State Constitution, Art. 12, Sec. 10(A), waived sovereign immunity.	Claim may be filed with the Project Engineer. Successive appeals to the Chief Engineer, who has the final administrative authority to settle claims.	Litigation.
Maine statute waived sovereign immunity. ME. REV. STAT. tit. 5, § 1510-A.	Claim filed with Project Engineer. Appeal to the Commissioner of Transportation, who has the final administrative authority to settle claims.	Appeal to State Claims Commissioner. Claims heard *de novo*. Appeal to Superior Court hearing *de novo* without a jury.
Maryland sovereign immunity waived by statute. MD. STATE GOV'T CODE § 12-201(a).	Claim filed with District Engineer, with final decision by the Procurement Officer.	State Board of Contract Appeals. Board decisions, other than those decided under the small claims expedited process, are subject to judicial review. A contractor also has the option of bypassing the Board and going directly to state court.
Massachusetts, *M. De Matteo Constr. Co. v. Commonwealth*, 156 N.E.2d 659 (1959) (Interpreting general law giving superior courts jurisdiction for contract claims against state agencies.).	Agency Claims Committee, which makes recommendation to the Chief Engineer, who submits decisions to the Public Works Commission for approval. The contractor can request the Commission to hold a hearing before an administrative law judge.	Litigation. A contractor may bypass the Commission and go directly to court from an unfavorable decision by the Chief Engineer.
Michigan sovereign immunity judicially waived. *Hersey Gravel Co. v. State Highway Dept*., 305 Mich. 333 9 N.W.2d 567, 569 (Mich. 1943).	Claim filed with the District Office. The claim, if not settled, is referred to the Central Office for review and decision. The Chief Engineer/Deputy Director of Highways has final administrative authority to settle the claim.	Court of Claims—One judge sitting without a jury. Court of Claims decisions may be appealed in the same manner as other trial court decisions.
Minnesota sovereign immunity waived by statute. MINN. STAT. §§ 3.751, 161.24.	Claim filed with the Project Engineer. If not settled at that level, it is referred to the Assistant District Engineer–Construction. The Claims Engineer has final administrative authority to settle the claim.	Litigation.
Mississippi sovereign immunity waived by statute. MISS. CODE ANN. § 11-45-1.	Claim filed with Project Engineer, who refers the claim to the District Engineer for review and recommendation and then further referral to the agency Director, who has final administrative authority to settle the claim.	Litigation. Claims of $25,000.00 or less may be submitted to the State Arbitration Board composed of three members: one selected by the State, one selected by a contractor's association, and the third by the other two members. Claims over $25,000.00 may be arbitrated by agreement of the parties.
Missouri judicial recognition that sovereign immunity waived by contracting. *V.S. D'Carlo Constr. Co. v. State*, 485 S.W.2d 52, 56 (Mo. 1972).	Claims filed with the Transportation Commission Secretary and referred to a Claims Committee. The Committee makes a recommendation to the Chief Engineer for determination. The contractor may appeal the Chief Engineer's decision to the Commission or go directly to court.	Litigation. Arbitration may be used under the Uniform Arbitration Act, if the parties agree.
Montana judicial recognition	Agency determination following review by	Litigation.

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that sovereign immunity waived. *Meens v. State Bd of Educ.*, 127 Mont. 515, 267 P.2d 981, 984 (Mont. 1954).	the agency Legal Division and audit of the claim.	
Nebraska sovereign immunity waived by statute. NEB. REV. STAT. § 25-21, 201.	Claim filed with Project Manager, who refers the claim to the District Engineer. The Director–State Engineer has final administrative authority to settle the claim.	Litigation.
Nevada sovereign immunity waived by statute. NEV. REV. STAT. § 41.031.	Claim filed with Resident Engineer, who forwards the claim to the Highway Claims Review Board, which is composed of an agency member, a Nevada contractor, and a registered professional engineer from the private sector. Board's recommendation submitted to the Agency Director, who has final administrative authority to resolve the claim.	Litigation.
New Hampshire sovereign immunity waived by statute. N.H. REV. STAT. ANN. § 491.8.	Claim filed with the Engineer, whose determination may be appealed by the contractor to the Transportation Commissioner, who has final administrative authority to resolve the claim.	The contractor has a choice: (1) litigation (court hears case sitting without a jury), or (2) an appeal to the Transportation Appeals Board—a three-member board appointed by the Governor. Board decisions may be appealed directly to the State Supreme Court.
New Jersey sovereign immunity waived by statute. N.J. STAT. ANN. § 59.13-1 to .10.	Claim filed with Regional Director, who may submit claim to the Claims Committee composed of four agency members and a Deputy Attorney General. The Committee submits its recommendation to the Deputy Commissioner for a final determination.	Litigation. A contractor may file suit at any stage in the agency's administrative proceedings. Claims may be submitted to arbitration if the parties agree.
New Mexico sovereign immunity waived by statute. N.M. STAT. ANN. § 57-1-23.	Claim filed with the Project Manager, who refers the claim to the District Engineer. The contractor may appeal to the Secretary, who may assign the claim to the agency's Claims Board, which is composed of retired engineers and consultants. The Board makes a recommendation to the Secretary, who has final administrative authority to settle the claim.	Litigation. Claims of $150,000.00 or less may be arbitrated if the parties agree. Each party appoints an arbitrator and the two choose the third member. The arbitration proceedings are conducted in accordance with the Uniform Arbitration Act.
New York Statute (Ct. Cl. Act., § 8) establishes a Court of Claims to hear claims against the State.	Claim submitted to the Regional Director. The Commissioner of Transportation has final administrative authority to resolve the claim.	16-member Court of Claims. Claims heard by one judge sitting without a jury.
Oklahoma judicial recognition that sovereign immunity waived. *State Board of Public Affairs v. Principal Funding Corp.*, 1975 OK 144, 542 P.2d 503, 505–6 (1975).	Claim filed with Resident Engineer. Appeal to Division Engineer for a hearing if claim is not resolved. Appeal to a three-member Board of Claims appointed by Director and contractor. Board makes recommendation to Highway Commission, which has final administrative authority to resolve the claim.	Litigation.
Oregon sovereign immunity	Claim filed with Project Manager, with	For claims under

STATE	ADMINISTRATIVE PROCEDURES	FINAL REMEDY
waived by statute. OR. REV. STAT. § 30.320.	successive appeals to the State Region Engineer and the State Contract Administration Engineer. If not resolved at those levels, claims between $25,000 to $250,000 must be submitted to a three-member Claims Review Board for nonbinding arbitration. Board members are selected by the State and the contractor from a panel previously developed by the State and the construction industry. Claims over $250,000 may also be submitted to the Board if the parties agree.	$25,000, there is mandatory arbitration by a single arbitrator, pursuant to AAA Construction Industry Arbitration Rules. Contractor may also demand arbitration if the claim is $250,000 or less. Litigation for claims over $250,000, unless the parties agree to arbitration.
Pennsylvania sovereign immunity waived by statute. 62 PA. CONS. STAT. § 1711.1.	Claim filed with District Engineer. Appeals to the Construction Claims Review Committee.	Three-member Board of Claims appointed by the Governor. The Board's decision may be appealed by the State or the contractor to the Commonwealth Court of Pennsylvania.
Rhode Island sovereign immunity waived by statute. R.I. GEN. LAWS § 37-13.1-1.	Claim filed with agency's construction office. Review by Claims Unit and Claims Board, which submits its recommendation to the Director, who has final administrative authority to settle the claim.	Litigation. Case tried to the court sitting without a jury.
South Carolina sovereign immunity waived by statute. S.C. CODE ANN. § 57-3-620.	Claim must be made on form provided by the agency and filed with the Resident Construction Engineer. Claim may be supplemented as required by the agency. If the claim is not resolved, it is referred to the Claims Committee appointed by the State Highway Engineer. The Committee makes its recommendation to the State Highway Engineer, who has final authority to resolve the claim.	Litigation.
South Dakota sovereign immunity waived by statute. S.D. CODIFIED LAWS ANN., § 31-3-24.	Claim must be filed on an agency form with the Project Engineer. The form requires the contractor to furnish additional information as required by the agency. Claim, if not resolved, may be referred to the agency's Claim Committee, which makes its recommendation to the State Highway Engineer, who has final administrative authority to settle the claim.	Litigation.
Tennessee sovereign immunity waived by statute. TENN. CODE ANN. § 9-8-101 *et. seq.*	Claim filed with the Project Engineer, with appeals to the Transportation Commissioner, who has final administrative authority to settle the claim.	Three-member Claims Commission appointed by the Governor. The Commission's decision can be appealed in the same manner as any trial court decision.
Virginia sovereign immunity waived by statute. VA. CODE ANN. § 8.01-192, *et. seq*; Specific authorization for suits on highway contract claims. VA. CODE ANN., § 33-1.382, *et. seq.*	Claim filed with Resident Engineer. Review and approval by Chief Engineer. Appeal to Commissioner of Highways. A settlement by the Commissioner is subject to approval by the Attorney General and the Governor.	Litigation. Case tried to the court sitting without a jury.
Washington sovereign immunity	Claim filed with Project Engineer. Review	Arbitration is the sole

STATE	ADMINISTRATIVE PROCEDURES	FINAL REMEDY
waived by statute. WASH. REV. CODE ch. 4.92.010. Specific authorization for suits and highway contracts. WASH. REV. CODE ch. 47.28.120.	and approval by Construction Engineer. If claim denied, an appeal may be made to the Secretary of Transportation.	remedy for claims under $250,000 under AAA rules. Litigation for claims over $250,000 in the Thurston County Superior Court, unless the parties agree to arbitration.
West Virginia sovereign immunity waived by statute. W. VA. CODE § 14-2-1 through 29.	Claim filed with Project Engineer. Successive appeals to Highway Commissioner, who has final administrative authority to settle claims.	Litigation. Three-judge Court of Claims.
Wisconsin sovereign immunity waived by statute. WIS. STAT. ANN. § 775.01 (statute allows suit if claim denied by Legislature).	Claim filed with the Project Engineer. Successive appeals to the Secretary of Transportation.	Five-member Claims Board. The Board's recommendation is submitted to the Legislature. If the Legislature denies the claim, the contractor may sue.
Wyoming sovereign immunity waived by statute. WYO. STAT. § 24-2-101.	Claim filed with Resident Engineer. Appeal to the Superintendent and Chief Engineer, who has final administrative authority.	Litigation.

Generally, the states have a similar administrative approach to the resolution of construction claims: A claim is filed with the engineer in charge of the project, usually the project or resident engineer. If the claim is not resolved at that level, the contractor may appeal to higher administrative authority. If the claim is not resolved by the agency through its internal review process, the contractor may pursue its final remedy. At this point, the types of remedies available to the contractor vary.

The most common final remedy for resolving highway construction claims is litigation.[55] A few states use a mix of litigation and arbitration.[56] Several states specify arbitration as the final remedy for resolving construction claims.[57] Some states provide for boards or commissions with some judicial review.[58] This divergence in remedies is due largely to the extent and manner in which sovereign immunity was waived by the state legislatures.

4. The Federal and California False Claims Acts—An Overview

The Federal Government and the State of California have enacted legislation dealing with fraudulent claims. The Federal False Claims Act was enacted in 1863, shortly after the Civil War.[59] The Act was aimed at preventing fraud in federal procurement, a practice that was prevalent during the Civil War. The Act was later split into civil[60] and criminal statutes.[61] In 1986, the Act was amended[62] to allow employees to bring *qui tam*[63] actions against their employers, as well as other reforms prompted by abuses in military procurement. The Act provides for civil penalties up to $10,000 for each false claim[64] and criminal sanctions of fines and imprisonment of up to 5 years.[65] The main thrust of the Act is to provide a civil remedy in cases of fraud against the Government. It accomplishes this purpose, in part, by authorizing private parties to bring suit against persons who have defrauded the Government.[66] It encourages such person to bring *qui tam* actions by providing financial incentives and protection from retaliation by employers.[67]

The Act authorizes a cause of action against a person who knowingly presents a false claim.[68] A claim includes any request or demand for money or property from the Government or from a contractor, grantee, or other recipient when the Government provides any portion of the money or property that is requested. This provision of the Act casts a wide net, extending coverage to state agencies and other government recipients that receive federal funds.[69] Thus, a contractor who submits a false claim to a state agency that pays the claim, in whole or in part, with federal aid, will be deemed to have submitted a claim to the Federal Government and may be subject to prosecution under the Act.

The Act provides "standing" to a private person to sue in the name of the Government. The Act outlines the procedure to be followed. The *qui tam* complaint is filed under seal in the Federal District Court where the action is brought. A copy of the complaint is served on the United States Attorney General and the local United States Attorney. The United States Attorney has 60 days to decide whether to intervene and take over the lawsuit or let the *qui tam* plaintiff proceed with the suit. This procedure encourages private actions to vindicate the public interest, but it also gives the Government the opportunity to protect other interests by giving it time to decide whether it should intervene.[70]

An important decision involving the False Claims Act, from a state's perspective, is *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.[71] In that case, the relator, Jonathan Stevens, brought a *qui tam* action against a state agency in the United States District Court for the District of Vermont alleging that the agency had submitted false claims to the EDA in

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[55] Thirty-one states provide for some form of litigation. *See* Table, *supra*.

[56] Arizona, Oregon, and Washington. *See* Table, *supra*.

[57] California, Delaware, and North Dakota. *See* Table, *supra*.

[58] Idaho, Maryland, Ohio, Pennsylvania, and Tennessee are examples. *See* Table. Decisions of the Maryland State Board of Contract Appeals are subject to judicial review, as with other civil cases.

[59] 12 Statute 696 (1863); United States v. Bornstein, 423 U.S. 303, 309–10, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976); see Comment, The Constitutionality of Qui Tam Actions, 99 YALE L.J. 341 (1989).

[60] 31 U.S.C. § 3729.

[61] 18 U.S.C. § 287.

[62] 31 U.S.C. § 3729 (1986).

[63] *Qui tam* is an abbreviated Latin phrase meaning one who sues for the King and for himself. *See* Comment, *supra* note 59, at 341 n.1. A *qui tam* action is one brought by an informer pursuant to a statute to recover damages for the government and for himself. Erickson v. American Institute of Bio-Sciences, 716 F. Supp. 908 (E.D. Va. 1989).

[64] 18 U.S.C. § 287.

[65] 18 U.S.C. § 287.

[66] The *qui tam* plaintiff can receive as his or her share of the damages between 25 percent and 30 percent of the recovery for proceeding with the suit, and between 15 percent and 25 percent of the recovery if the government proceeds with the suit. Employees are entitled to protection from their employers and may sue them for damages and other relief if the employees are fired, harassed, or otherwise harmed because of their actions in furtherance of bringing or providing information concerning false claims. 31 U.S.C. § 3730.

[67] 31 U.S.C. § 3730(h).

[68] *Id.* However, a state is not a "person" for purposes of *qui tam* liability under the False Claims Act. Vt. Agency of Natural Resources v. United States Ex Rel-Stevens, 529 U.S. 765, 780, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000).

[69] United States ex rel. Davis v. Long's Drugs, Inc., 411 F. Supp. 1144, 1147 (S.D. Cal. 1976).

[70] United States ex rel. Lujan v. Hughes Aircraft Co., 67 F.3d 242 (9th Cir. 1995).

[71] 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000).

connection with federal grant programs that it had administered. The agency moved to dismiss, arguing: (1) that a State (or state agency) is not a person subject to the Act; and (2) that a *qui tam* action in federal court is barred by the Eleventh Amendment.[72] The District Court denied the motion, the Second Circuit affirmed,[73] and the Supreme Court granted certiorari.[74]

The Court by a 7 to 2 decision reversed.[75] The Court held that a State or a state agency is not a person within the meaning of the False Claims Act and therefore, not subject to the liabilities imposed by the Act. However, Justice Breyer, in his concurring opinion at page 1871, said that, "I read the Court's decision to leave open the question whether the word 'person' encompasses States when the United States itself sues under the False Claims Act."

The California False Claims Act[76] was closely modeled after the Federal Act. There are, however, some differences. The Federal Act provides whistle blower protection on an *ad hoc* basis.[77] The California Act, on the other hand, prohibits an employer from making any policy to prevent employees from disclosing information to a government agency.[78] The California Act imposes joint and several liability for acts committed by two or more persons.[79] The California Act imposes liability on the beneficiary of the false claim when the beneficiary subsequently discovers that the claim was false and fails to disclose this to the Government.[80] The California Act also allows a larger recovery for *qui tam* plaintiffs.[81] As noted earlier, the California Department of Transportation incorporates the sanctions imposed by the California Act in its Standard Specifications governing contract claims.

Both Acts are based on the principle that those who contract with the Government must act with scrupulous regard for the requirements of the law and their contractual obligations.[82] Those who contract with the Government "must turn square corners."[83] A contractor's failure to be scrupulous in its dealings with the Federal Government and the State of California can result in serious financial consequences, including the loss of bidding privileges[84] and forfeiture of claims for additional compensation.[85]

5. Escrow Arrangements To Preserve Bid Documents

As discussed earlier, the right to audit is an important tool for resolving claims. One area that should be subject to audit is the contractor's bid documents.[86] Such documents, for example, may be relevant in a total cost claim involving the reasonableness of the contractor's estimated costs, or time for performing the work, as reflected in the bid,[87] or as a baseline to measure the cost of changes to the work that occur during contract performance. The right to audit, however, has little value if there is nothing to audit. Recognizing this, some states have included an escrow bid documentation specification in their construction contracts.[88] This type of specification requires the contractor to place its bid documents with an escrow agent, usually a bank, to ensure that the documents will be available for use by the owner in the event of a claim.[89]

The term "bid documentation" should be broadly defined. The term should include all quantity take-offs, crew size, equipment, and calculations showing estimated rates of production. The bid documents should include quotations from subcontractors and suppliers whose quotations were used to arrive at the prices con-

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[72] 162 F.3d 195, 199 (2d Cir. 1998).

[73] *Id.* at 208.

[74] 527 U.S. 1034, 119 S. Ct. 2391 (1999).

[75] 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000). Justice Scalia delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, Thomas, and Breyer joined. Justice Breyer filed a concurring statement, in which Justice Ginsburg joined. Justice Stevens dissented, joined by Justice Souter.

[76] CAL. GOV'T CODE § 12650 *et. seq.*

[77] 31 U.S.C. § 3730.

[78] CAL. GOV'T CODE § 12653.

[79] CAL. GOV'T CODE § 12651(c).

[80] CAL. GOV'T CODE § 12651(a)(8).

[81] CAL. GOV'T CODE § 12652(g) (33 percent of the recovery if the State proceeds with the suit and 50 percent if the action is prosecuted by the *qui tam* plaintiff); 28 U.S.C. § 3730(d) (25 percent if the Government prosecutes and 30 percent if the *qui tam* plaintiff prosecutes the action).

[82] United States v. Aerodex, Inc., 469 F.2d 1003 (5th Cir. 1972).

[83] Digioia Bros. Excavating, Inc. v. City of Cleveland, 135 Ohio App. 3d 436, 734 N.E.2d 438 (Ohio App. 1999); United States v. ex. rel. Compton v. Midwest Specialties, Inc., 142 F.3d 296, 302 (6th Cir. 1998).

[84] Stacy & Witbeck, Inc. v. City and County of S.F., 36 Cal. App. 4th 1074, 1094, 44 Cal. Rptr. 2d 472 (Cal. App. 1995).

[85] Contractor who attempted to bribe government contracting officer forfeited all claims, including a subcontractor's "pass-through" claim and was assessed treble the amount of the bribe. Supermix, Inc. v. United States, 35 Fed. Cl. 29 (1996).

[86] The contract specifications may specifically enumerate "bid documents" as documents that the owner may audit in evaluating the contractor's claim. Florida Standard Specification 5-12.14 and Washington Standard Specification 1-09.12(3)23 are examples.

[87] S. Le Roland Constr. Co. v. Beall Pipe Tank Co., 14 Wash. App. 297, 540 P.2d 912, 917 (1975). Calculating the contractor's damages is discussed in Subpart C of Section 6.

[88] Montana, New Jersey, Oregon, South Carolina, and Washington. *See* DARRELL W. HARP, *Preventing and Defending Against Highway Construction Contract Claims: The Use of Changed or Differing Site Conditions Clauses and New York State's Use of Exculpatory Contract Provisions and No Claims Clauses* (National Cooperative Highway Research Program Legal Research Digest No. 28); Arizona Standard Specification 103.11.

[89] The specification may provide that failure to provide the bid documentation as specified will render the bid nonresponsive. Arizona Standard Specification 103.11(E).

tained in the bid proposal. The contractor's allocation of equipment costs, indirect costs, contingencies, markup, and any other costs allocated to and included in bid items should also be included. If the bid documents were developed using computer generated software, the specification should require that the information be furnished in hard copy, and that the contractor identify the name and version of the computer software that was used.[90]

The specification should contain safeguards to assure that the information is complete and legible. The specification should require the contractor to submit an affidavit with the bid documents listing all of the documents in the escrow container. The affidavit should be signed by the person authorized to execute bid proposals, attesting that the affiant has personally examined the bid documentation, that the affidavit lists all of the documents used in preparing the bid, and that all of the documentation is included in the container placed in escrow.[91]

After the documents are placed in escrow, the agency can verify the documents to ensure completeness and legibility. Completeness is assured by comparing the documents to those listed in the affidavit. Incomplete submittals or illegible documents may be corrected by a supplemental submittal. The verification process is a practical requirement. To learn after the project is over that the bid documents in the escrow container are incomplete or illegible may be too late. By then, the original documents may be lost or discarded. If the documents are illegible because of poor copying, they would be of little value. Illegible documents rarely refresh memories in depositions.

The bid documents remain in escrow during the life of the contract or until the contractor submits a claim, at which time the documents may be obtained by the owner for its use in evaluating the claim. The owner will instruct the escrow agent to release the bid document container to the contractor after the project is completed and the contractor has signed a release of all claims.[92]

The WSDOT's escrow bid documentation specification was challenged by the Associated General Contractors of Washington in a lawsuit.[93] Because of Washington's liberal public disclosure laws,[94] contractors voiced concern about the confidentiality of bid information. They claimed that the information contained trade secrets, the disclosure of which could undermine their competitive positions.[95] The court upheld the specification.[96]

[90] Arizona Standard Specification 103.11(D) (2000).

[91] Arizona Standard Specification 103.11(B).

[92] Arizona Standard Specification 103.11(C).

[93] Associated Gen. Contractors of Wash. v. State, Thurston County Cause No. 86-2-01972-1 (1986).

[94] Ch. 42.17, WASH. REV. CODE.

[95] *Contractors Challenge Bidding Rule*, ENGINEERING NEWS RECORD (Oct. 23, 1986), at 40.

B. CONTRACTORS' CLAIMS AGAINST OWNERS AND DESIGN PROFESSIONALS

1. Introduction

Contracts are based on expectations. The law protects those expectations by providing a remedy when they are not fulfilled, due to some default by the other contracting party. "The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for."[97] The expectations that the contractor has bargained for are to complete the project on time and make a profit. Usually, it's when these expectations are not fulfilled that claims arise.

Generally, claims by contractors against owners may be grouped into categories. This Subsection discusses those categories.[98] Before discussing the various theories of liability, mention should be made about some of the differences between public and private construction contracts. In addition to the procedural limitations imposed by sovereign immunity,[99] government contracts may also implement social and economic policies as part of the public works contracting process. Minority and Disadvantaged Business Enterprise Requirements[100] and labor and wage standards[101] are some examples.

Although public and private contracts differ in many respects, generally speaking a state, by entering into a contract with a private party for goods and services, absent a statute or contractual provision to the contrary, waives its sovereign immunity and impliedly consents to the same liabilities as a private party.[102] This Subsection discusses those liabilities.

2. Contract Interpretation

Disputes about what the contract requires are a fertile source for claims by contractors. The contracting parties may disagree about how certain work should be paid for,[103] the scope of the work called for by the con-

[96] The contractor may, however, seek a protective order to protect information that, if disclosed, could harm its competitive position.

[97] Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 236 Va. 419, 374 S.E.2d 55, 58 (1988).

[98] The law dealing with damages, discussed in Subsection C *infra*, measures how those unfilled expectations may be compensated.

[99] *See generally* Subsection A, *supra* of this Section.

[100] *See generally* Subsection A, of Section 4.

[101] *See generally* Subsection B, of Section 4; *see also* 3 SANDS & LIBONATI, LOCAL GOVERNMENT LAW § 22.05.50 (2000).

[102] Clark County Constr. Co. v. State Highway Comm'n, 248 Ky. 158, 58 S.W.2d 388 (Ky. 1933); Architectural Woods, Inc. v. State, 598 P.2d 1372 (Wash. 1979).

[103] Dick Enterprises, Inc. v. Department of Transp., 746 A.2d 1164, 1168 (Pa. Commw. 2000); (dispute over the rate of pay for certain excavation that the contract required); R.W. Duntleman Co. v. Village of Lombard, 281 Ill. App. 3d 929, 666 N.E.2d 762, 217 Ill. Dec. 93 (1996) (dispute over whether pay-

tract,[104] and the responsibility for events occurring during contract performance that affect the work.[105] When the parties disagree about the contractual rights and duties, they may resort to litigation asking the court to interpret their contract.[106]

a. Principles of Contract Interpretation

When parties to a contract dispute the meaning of their agreement and resort to litigation, the court will examine the contract language to determine whether it is ambiguous.[107] The court's basic purpose in interpreting the contract is to give effect to the intention of the parties as it existed when they entered into their contract.[108] Only the objective intentions of the parties, as expressed in their contract, is relevant.

> If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake or something else of the sort. Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent.[109]

Contract interpretation begins with the plain language of the contract to determine whether the language is ambiguous.[110] In analyzing the language, the court will prefer an interpretation that gives a reasonable and consistent meaning to all parts of the contract, avoiding, if possible, an interpretation that leaves a portion of the contract meaningless, superfluous, or achieves an unreasonable or absurd meaning.[111]

The interpretation of a contract is a matter of law.[112] Only when a contract is ambiguous will extrinsic evidence be considered in interpreting the contract.[113] Usually when the contract language is clear and unambiguous, the court will not consider extraneous circumstances, such as prior negotiations or trade practices for its interpretation.[114] This is generally referred to as the "plain meaning" rule and is applied in most states.[115]

A few states follow the "context" rule of contract interpretation rather than the "plain meaning" rule.[116] Under the "context" rule, an ambiguity in the meaning of the contract need not exist before evidence of the circumstances surrounding the making of the contract is admissible to ascertain the parties' intent. The Parol Evidence rule is not violated because the evidence is not offered to contradict or vary the meaning of the agreement. To the contrary, it is being offered to explain what the parties may have intended.

The "context" rule is based on the premise that the uncertainties of language in clearly expressing intent make ambiguity an unreliable test for determining what the parties actually intended. The Arizona Supreme Court in commenting on the "context" rule said:

> Under the view embraced by Professor Corbin and the Second Restatement, there is no need to make a preliminary finding of ambiguity before the judge considers extrinsic evidence. Instead, the court considers all the proffered evidence to determine its relevance to the parties' intent and then applies the parol evidence rule to exclude from the fact finder's consideration only the evidence that contradicts or varies the meaning of the agreement.…[117]

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ment should be made under "pavement removal" or "special excavation").

[104] Earth Movers v. State, Dep't of Transp., 824 P.2d 715 (Alaska 1992) (dispute over whether the contract gave the contractor the right to erect temporary road closure signs or whether the State could erect them); Western States Constr. v. United States, 26 Cl. Ct. 818 (1992).

[105] DiGioia Bros. Excavating v. City of Cleveland, 135 Ohio App. 3d 436, 734 N.E.2d 438 (1999) (dispute over whether the contract was ambiguous in designating responsibility for coping with underground utilities); Central Ohio Vocational Bd. of Educ. v. Peterson Constr. Co., 129 Ohio App. 3d 58, 716 N.E.2d 1210, 1213 (1998) (dispute over the meaning of the term, "Full Depth," in the contract, as it related to the depth of removal of unsuitable material).

[106] In some states, the determination as to what the contract requires may be made by a board of claims or by an arbitrator depending on what the law provides as the contractor's "final remedy." *See* Subsection A.3.b of this Section listing by state the final remedy available to contractors.

[107] Metric Constructors, Inc. v. United States, 44 Fed. Cl. 513, 520 (1999).

[108] RESTATEMENT OF CONTRACTS § 201 (2d); 11 WILLISTON ON CONTRACTS, § 32:2 (4th ed. 1999) Kass v. Kass, 91 N.Y.2d, 554, 696 N.E.2d 174, 673 N.Y.S.2d 350 (N.Y. 1998); 5 CORBIN ON CONTRACTS, § 24 (rev. ed. 1993); Leo F. Piazza Paving Co. v. Foundation Contractors, Inc., 128 Cal. App. 3d 583, 591, 177 Cal. Rptr. 268 (1981).

[109] Hotchkiss v. National City Bank of N.Y., 200 Fed. 287, 293 (S.D. N.Y. 1911), *aff'd*, 231 U.S. 50 (1913).

[110] Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

[111] Patterson, The Interpretation and Construction of Contracts, 64 COLUM. L. REV. 833 (listing the maxims of contract interpretation); RESTATEMENT OF CONTRACTS § 203 (2d 1981). Dick Enterprises v. Department of Transp., *supra* note 103.

[112] Hol-Gar Mfg. Corp. v. United States, 169 Ct. Cl. 384, 51 F.2d 972, 974 (Ct. Cl. 1965); RESTATEMENT OF CONTRACTS § 212(2) (2d 1979).

[113] Sylvania Elec. Products, Inc. v. United States, 198 Ct. Cl. 1061, 458 F.2d 994, 1005 (Ct. Cl. 1972); E. Posner, *The Parol Evidence Rule, The Plain Meaning Rule and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533 (1998).

[114] R. B. Wright Constr. Co. v. United States, 919 F.2d 1569, 1572–73 (Fed. Cir. 1990) (specification requiring three coats of paints clear and unambiguous; trade practice of applying one coat not relevant).

[115] *See* the Table in this part of the Subsection listing the states that follow the "plain meaning" rule.

[116] *See* the Table referred to in note 116 for the states that follow the "context" rule.

[117] Taylor v. State Farm Mut. Auto Ins. Co., 175 Ariz. 148, 854 P.2d 1134, 1138–39 (1993) (citations omitted); *see also* 3 CORBIN ON CONTRACTS, § 542 (1992 supp.); RESTATEMENT OF CONTRACTS § 212 (2d 1981).

The "context" rule should not apply where one of the parties did not participate in the drafting of the contract.[118] Likewise, the "context" rule should not apply to public works that are competitively bid based on contract documents furnished by the owner.[119]

States that follow the "plain meaning" rule and the "context" rule are shown in the following Table.

[118] Morton Inter. v. Aetna Cas. & Sur. Co., 106 Ohio App. 3d 653, 666 N.E.2d 1163, 1170 (Ohio App. 1995) (insured did not participate in drafting endorsement, hence there was no evidence of mutual intent other than the language of the contract).

[119] An exception would be technical terms that have a special meaning in the construction trade. *See* Western States Constr. Co. v. United States, 26 Ct. Cl. 818, 824 (1992).

STATE	"PLAIN MEANING" RULE	"CONTEXT" RULE	CITATION
Alabama	X		*Pacific Enterprises Oil Co. v. Howell Petroleum Corp*., 614 So. 2d 409, 414 (1993)
Alaska		X	*Stepanav v. Homer Elec. Ass'n*, 814 P.2d 731, 734 (1991)
Arizona		X	*Taylor v. State Farm Mut. Auto Ins. Co*., 854 P.2d 1134, 1140 (1993)
Arkansas	X		*City of Lamar v. City of Clarksville*, 863 S.W.2d 805, 810 (1993)
California	X		*Brookwood v. Bank of America*., 53 Cal. Rptr. 2d 515, 517 (1996)
Colorado	X		*Peters v. Smuggler-Durant Min. Corp*., 910 P.2d 34, 41–42 (1995)
Connecticut	X		*Herbert S. Newman & Partners v. CFC Constr. Ltd.,* 674 A.2d 1313, 1317–18 (1996)
Florida	X		*Emergency. Assocs. v. Sassano*, 664 So. 2d 1000, 1002 (Fla. App. 1995)
Georgia	X		*Hartley- Selvey v. Hartley*, 410 S.E.2d 118, 120 (1991)
Idaho	X		*City of Idaho Falls v. Home Indem. Co*., 888 P.2d 383, 386 (1995)
Illinois	X		*Klemp v. Hergott Group*, 641 N.E.2d 957, 962 (Ill. App. 1994)
Indiana	X		*In re. of Forum Group, Inc*., 82 F.3d 159, 163 (7th Cir. 1996) (Applying Indiana Law)
Iowa	X		*Howard v. Schildberg Constr. Co*., 528 N.W.2d 550, 554 (1995)
Kansas	X		*D.R. Lauck Oil Co. v. Breitenback*, 893 P.2d 286, 288 (Kan. App. 1995)
Louisiana	X		*Lewis v. Hamilton*, 652 So. 2d 1327, 1329 (1995)
Maryland	X		*Taylor v. Feissner*, 653 A.2d 947, 955 (Md. App. 1995)
Massachusetts	X		*J.F. White Contracting Co. v. Mass. Bay Transp. Auth*., 666 N.E.2d 518 (Mass. App. 1996)
Michigan	X		*Pierson Sand & Gravel Inc*., 851 F. Supp. 850, 858 (W.D. Mich. 1994) (Applying Michigan Law)
Minnesota	X		*Michalski v. Bank of Am.*, 66 F.3d 993, 996 (8th Cir. 1995) (Applying Minnesota Law)
Mississippi	X		*Century 21 Deep S. Properties, v. Keys,* 652 So. 2d 707, 716 (1995)
Missouri	X		*Lake Cable Inc. v. Trittler*, 914 S.W.2d 431, 435–6 (Mo. App. 1996)
Montana	X		*Carbon County v. Dain Bosworth Inc*., 874 P.2d 718, 722 (1994)
Nebraska	X		*C.S.B. Co. v. Isham*, 541 N.W.2d 392, 396 (1996)
New Jersey	X		*Sons of Thunder Inc. v. Borden Inc*., 666 A.2d 549, 559 (N.J. Super. A.D. 1995)
New Mexico		X	*C.R. Anthony Co. v. Loretto Mall*

STATE	"PLAIN MEANING" RULE	"CONTEXT" RULE	CITATION
			Partners, 817 P.2d 238, 242 (1991)
New York	X		*Cook v. David Rozenholc & Associates*, 642 N.Y.S.2d 230, 232 (App. Div. 1996)
North Carolina	X		*Estate of Waters v. C.I.R.*, 48 F.3d 838, 844 (4th Cir. 1995) (Applying North Carolina Law)
North Dakota	X		*Jones v. Pringle & Herigstad*, 546 N.W.2d 837, 842 (1996)
Ohio	X		*Stone v. Nat. City Bank*, 665 N.E.2d 746, 752 (Ohio App. 1995)
Oregon	X		*Housing Auth. of Portland v. Martini*, 917 P.2d 53, 54 (Or. App. 1996)
Pennsylvania	X		*Holt v. Dept. of Pub. Welfare*, 678 A.2d 421, 423 (Pa. Commw. 1996)
Rhode Island	X		*Clark-Fitzpatrick, Inc. v. Franki Foundation Co.*, 652 A.2d 440, 443 (1994)
South Carolina	X		*Friarsgate, Inc. v. First Fed. Sav. & Loan Ass'n.*, 454 S.E.2d 901, 905 (1995)
Tennessee	X		*Cummin's v. Vaughn*, 911 S.W.2d 739, 742 (Tenn. App. 1995)
Texas	X		*Gen. Devices Inc. v. Bacon*, 888 S.W.2d 497, 502 (Tex. App. 1994)
Vermont		X	*Isbrandsen v. North Branch Corp.*, 556 A.2d 81, 84 (1988)
Virginia	X		*Capitol Commercial Properties, Inc. v. Vina Enterprises, Inc.*, 462 S.E.2d 74, 77 (1995)
Washington		X	*Berg v Hudesman*, 801 P.2d 222, 228 (Wash. 1990)
Wyoming	X		*Treemont, Inc. v. Hawley*, 886 P.2d 589, 592–3 (1994)

If the meaning of the contract is unclear, the court may employ certain general rules in interpreting what it means.[120] The rules are only aids to assist the court in determining what the parties intended when they entered into their contract.[121] When a contract is subject to two or more possible interpretations, one of which is reasonable and the other or others are not, the court will adopt the interpretation that gives a reasonable and effective meaning to all of the contract provisions.[122] An interpretation that is unreasonable will be rejected.[123]

Another standard rule is that words will be given their plain and ordinary meaning, unless the context in which they are used makes it clear that they have a special or technical meaning.[124] The court may apply its own understanding of what the words mean,[125] or it may use a dictionary to define the meaning of the words.[126] Another standard rule is that specific provisions will govern or qualify general provisions.[127] But this rule will not apply where other provisions of the contract clearly resolve any conflict between a specific provision and a general provision.[128] Applying these rules and other maxims of interpretation,[129] it is the court's function to ascertain and give effect to the parties' intent. It is not the court's function "to re-write the provisions of the contract when the terms of the contract, taken as a whole, are clear."[130]

b. Order of Precedence Clauses

Government construction contracts often consist of a number of documents, such as standard specifications, special provisions, amendments to the standard specifications, plans, and cross-sections.[131] Some of these documents may conflict with each other. To resolve inconsistencies between the documents, the contract may contain an Order of Precedence clause that specifies which of the conflicting documents takes precedence over the other, thus resolving the conflict.[132] For example, the clause may provide that the contract plans take precedence over the special provisions, so that if there is a conflict between the two, the plans will govern.[133] The clause is a practical way of resolving conflicting provisions that would otherwise make the contract ambiguous. The clause has been consistently recognized as a valid and effective agreement by the parties as to how such conflicts are to be resolved.[134]

c. Resolving Contractual Ambiguities

When the court is unable to determine the meaning of the disputed language using the rules of contract interpretation, the court may admit parol evidence to resolve the ambiguity.[135] The evidence may consist of a course of dealings between the parties, or trade practices that are relevant to the dispute.[136] How the parties act during contract performance "before the advent of controversy, is often more revealing than the dry language of the written agreement by itself."[137] When parol evidence is admitted to explain the parties' intent, their intent is no longer a question of law but is a question of fact for the trier of fact to determine.[138]

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[120] *See* Patterson, The Interpretation and Construction of Contracts, 64 COLUM. L. REV. 833 (1964) (listing the maxims of contract interpretation); RESTATEMENT OF CONTRACTS § 202 (2d 1981).

[121] Eurick v. Pemco Ins. Co., 108 Wash. 2d 338, 738 P.2d 251, 252 (1987).

[122] Dick Enters. v. Commw., Dep't of Transp., 746 A.2d 1164, 1170 (Pa. Commw. 2000) (court accepted State's interpretation as to the appropriate payment rate for certain excavation materials).

[123] Metric Contractors, Inc. v. United States, 44 Fed. Cl. 513, 521 (1999) (court found, as a matter of law, that the contractor's interpretation that it was not required by the contract to install certain equipment was unreasonable).

[124] Western States Constr. Co. v. United States, 26 Ct. Cl. 818 (1992).

[125] A-Transport Northwest Co. v. United States, 36 F.3d 1576, 1583–84 (Fed. Cir. 1994).

[126] Akron Pest Control v. Radar Exterminating Co., 216 Ga. App. 495, 455 S.E.2d 601, 602–03 (1995).

[127] Dick Enters. v. Department of Transp., *supra* note 122, at 1169.

[128] *Id*. (information on the contract plans resolved apparent conflict between the special provisions and other provisions of the contract relating the types of excavation).

[129] *See generally* E. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964) and Posner, *The Parol Evidence Rule, The Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533 (1997), relating to contract interpretation.

[130] Dick Enters. v. Dep't of Transp., *supra* note 122, at 1168. When a contract term is unambiguous, the court cannot give the language another meaning regardless of how reasonable it might be to do so. Triax. Pacific v. West, 130 F.3d 1469 (Fed. Cir. 1997).

[131] Dick Enters., *Id* at 1165, n.1.

[132] For an example of an Order of Precedence clause, *see* 48 C.F.R. § 52.214-29.

[133] Pennsylvania DOT Standard Specification § 105.04, referred to in *Dick Enters*., *supra* note 122, at 1169.

[134] John A. Volpe Constr. Co. VACAB, 638-68-1 BCA 6857, 31, 705–06 (1968); Scherrer Constr. Co. v. Burlington Memorial Hosp., 64 Wis. 2d 720, 221 N.W.2d 855 (Wis. 1974).

[135] Central Ohio Joint Vocational Sch. Dist. v. Peterson Constr., 129 Ohio App. 3d 58, 716 N.E.2d 1210, 1213 (Ohio App. 1998). RESTATEMENT OF CONTRACTS § 213 (2d 1979), 6 CORBIN ON CONTRACTS, § 583 (1993) (int. ed.); 1 WILLISTON ON CONTRACTS, § 33:1 (4th ed. 1999).

[136] Sea-Land Service, Inc. v. United States, 213 Ct. Cl. 555, 553 Fed. 651, 658 (1977); Max M. Stoeckert, d/b/a Univ. Brick & Tile Co. v. United States, 183 Ct. Cl. 152, 391 F.2d 639, 645 (Ct. Cl. 1968); RESTATEMENT OF CONTRACTS §§ 222-23 (2d 1979).

[137] Macke Co. v. United States, 199 Ct. Cl. 552, 556, 467 F.2d 1323, 1325 (1972).

[138] Hillis Motors, Inc. v. Haw. Auto. Dealers Ass'n, 997 F.2d 581, 588 (9th Cir. 1993).

When a contract is susceptible to more than one reasonable interpretation, it is ambiguous.[139] If the ambiguity is not resolved, the language will be construed against the party that drafted the language.[140] This is the rule of *Contra Proferentem*. Its purpose is to protect the party who did not create the ambiguity by construing the ambiguity against the party who wrote it.[141] Ordinarily, the public agency drafts the contract documents. Thus, the ambiguity is usually construed against the agency and the contractor's interpretation is controlling. The rule of *Contra Proferentem* has its limits. A bidder cannot take advantage of a patent ambiguity. The bidder has a legal duty to inform the owner about the error. Failure to do so bars any claim for extra compensation that could have been avoided had the error been disclosed to the owner.[142] This duty exists regardless of the reasonableness of the contractor's interpretation so long as the ambiguity is obvious.[143] In *J.H. Berra Constr. v. Missouri Hwy. & Transp. Comm'n*, the court said:

> Case law has held that this type of policy, known as the patent ambiguity doctrine, "was established to prevent contractors from taking advantage of the government, protect other bidders by assuring that all bidders bid on the same specifications, and materially aid the administration of government contracts by requiring that ambiguities be raised before the contract is bid, thus avoiding costly litigation after the fact…."[144]

The duty to seek clarification of a patent ambiguity may also be imposed by an express contract provision. The following is an example of this type of clause:

> The contractor shall take no advantage of any apparent error or omission in the plans or specifications. If the contractor discovers such an error or omission, he shall immediately notify the engineer. The engineer will then make such corrections and interpretations as may be deemed necessary for fulfilling the intent of the plans and specifications.[145]

In determining whether the ambiguity is patent, the court views the language from the position of a reasonably prudent contractor.[146] However, a contractor is entitled to rely on an Order of Precedence clause in the contract and need not seek clarification if the ambiguity is resolved by that clause.[147]

3. Breach of Contract Claims and Equitable Adjustments Under Specific Contract Clauses

As a general rule, a contractor cannot sue for breach of contract when the claim arose under a specific contract clause providing for a price adjustment.[148] Often, damages for breach of contract and an equitable adjustment under the contract are priced in the same manner. This is consistent with the purpose in awarding compensatory damages for breach of contract and compensation based on an equitable adjustment. Both are designed to put the contractor in the same economic position it would have been in if the breach,[149] or the change,[150] had not occurred. There are instances, however, where the amount of compensation will vary depending on the legal theory upon which the claim is based. For example, a claim based on breach of contract for adverse site conditions may include compensatory damages for the affect of the condition upon unchanged work. Under many DSC clauses, the equitable adjustment provisions of the clause prohibit recovery for impact costs. Thus, in defending claims, care should be taken to assure that the claim is based on the appropriate legal theory.

Aside from considerations about damages,[151] claims based on breach of contract and contact price adjustment clauses have two things in common: a contractual basis for the claim and the requirement of causation. The contractual basis for breach may be the owner's failure to perform an express or implied promise in the contract.[152] The contractual basis for an equitable ad-

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[139] R.W. Dunteman Co. v. Village of Lombard, 281 Ill. App. 3d 929, 666 N.E.2d 762 (1996); Metric Contractors, Inc. v. NASA, 169 F.3d 747, 751 (Fed. Cir. 1999); Dick Enters. v. Department of Transp., 746 A.2d 1164, 1170 (Pa. Commw. 2000); Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1579 (Fed. Cir. 1993); Mayer v. Pierce County Medical Bureau, 80 Wash. App. 416, 909 P.2d 1323, 1326 (1995).

[140] 5 CORBIN ON CONTRACTS, § 24.27 (rev. ed. 2001).

[141] Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 63, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995); Metric Contractors, Inc. v. United States, 44 Fed. Cl. 513, 523 (1999), United States v. Seckinger, 397 U.S. 203, 216, 905 S. Ct. 880, 25 L. Ed. 2d 224 (1970).

[142] D'Annunzi Bros. v. N.J. Transit Corp., 245 N.J. Super 527, 586 A.2d 302, 304 (1991); Sipco Services & Marine, Inc., v. United States, 41 Fed. Cl. 176, 215 (1998). Blount Bros. Constr. Co. v. United States, 171 Ct. Cl. 478, 346 F.2d 962, 971–72 (Ct. Cl. 1965); *see also* Section 5, Subsection B(6), "Nondisclosure," *supra.*

[143] Fortec Constructors v. United States, 760 F.2d 1288, 1291 (Fed. Cir. 1985).

[144] 14 S.W.3d 276, 281 (Mo. App. 2000) (quoting Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1580 (Fed. Cir. 1993)) (citations omitted).

[145] Missouri Standard Specification, § 105.4.1.

[146] Delcon Constr. Corp. v. United States, 27 Fed. Cl. 634, 637 (1993).

[147] Hensel Phelps v. United States, 888 F.3d 1296 (Fed. Cl. 1989).

[148] J.F. White v. Mass. Bay Transp. Auth., 40 Mass. App. Ct. 937, 666 N.E.2d 518, 519 (1996); Wildner Contracting v. Ohio Turnpike Comm'n, 913 F. Supp. 1031 (N.D. Ohio 1996); Hensel Phelps Constr. Co. v. King County, 57 Wash. App. 170, 787 P.2d 58, 61 (1990); Hoel-Steffen Constr. Co. v. United States, 197 Ct. Cl. 561, 456 F.2d 760 (Ct. Cl. 1972).

[149] 11 CORBIN ON CONTRACTS § 992 (1993 int. ed); 24 WILLISTON ON CONTRACTS § 64:1 (4th ed. 1999).

[150] Bruce Constr. Corp. v. United States, 163 Ct. Cl. 97, 324 F.2d 516, 518 (Ct. Cl. 1963); Pacific Architects & Engineers v. United States, 203 Ct. Cl. 499, 491 F.2d 734, 739 (Ct. Cl. 1974).

[151] Damages are discussed in Subsection C of this Section.

[152] State v. Eastwind, Inc., 851 P.2d 1348, 1350 (Alaska 1993) (requiring the contractor to perform work in a manner

justment is a specific contract clause that provides for price adjustment in the contract amount and/or an extension of contract time if certain events covered by the clause occur during contract performance. The DSC clause, the Changes clause, and the Suspension of Work clause are some examples.[153]

Once the contractual basis for the claim is established, the contractor must prove that there is a causal link or nexus between the contractual right asserted and the event that caused the injury. Suppose, for example, that the contract provided that the project site would be available to the contractor when the contract was signed by the owner. The contract is signed, but the site is not available, causing the contractor to stand by until the site is available. There is a causal link between the right asserted (the contractual right to begin work when the contract was executed) and the event (site not available) that caused the contractor to incur additional expense. The additional costs are factually tied to the event—the non-availability of the site as promised in the contract. The next step in the process is for the contractor to prove damages, which is discussed in the next subsection.

4. Subcontractor Pass-Through Claims

There is no contractual privity of contract between the project owner and a subcontractor.[154] In the absence of privity, a subcontractor has no standing to sue the owner contractually, either directly or as a third beneficiary of the contract between the owner and the prime contractor.[155] But the owner may be liable to a subcontractor on a pass-through basis.

> When a public agency breaches a construction contract with a contractor, damage often ensues to a subcontractor. In such a situation, the subcontractor may not have legal standing to assert a claim directly against the public agency due to a lack of privity of contract, but may assert a claim against the general contractor. In such a case, a general contractor is permitted to present a pass-through claim on behalf of the subcontractor against the public agency….[156]

Although the subcontractor has no standing to sue the owner, it can sue the prime with whom it has privity. The prime in turn can sue the owner "passing-through" the subcontractor's claim. Usually the prime and the subcontractor will enter into an agreement in which the prime agrees to pursue the sub's claim against the owner and pay any recovery to the sub. In exchange, the sub waives its claims against the prime. The agreement will contain language that it is not a release of the subcontractor's claim. This is to avoid any argument that the claim is waived under the *Severin* doctrine.

Under the *Severin* doctrine, a prime contractor may sue an owner for damages that the owner caused the subcontractor only when the prime contractor seeks reimbursement for damages it paid the subcontractor, or when the prime contractor remains liable to the subcontractor for damages.[157] In *Severin*, both the prime contractor and the subcontractor incurred damages because of owner delay. The prime was allowed to recover its damages, but it was not allowed to recover on behalf of its subcontractor. The prime contractor was not liable to its subcontractor because the subcontract contained a clause waiving delay damages. Since the prime contractor was not liable to the subcontractor, the owner was not liable for the subcontractor's damages. The rule has been stated as follows:

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different than called for in the contract); Hubbard Constr. Co. v. Orlando/Orange County Expressway Auth., 633 So. 2d 1154 (App. Div. 5 Dist. 1994) (imposing a stricter standard to test the density of a highway embankment than required by the contract); APAC Georgia, Inc. v. Department of Transp., 221 Ga. App. 601, 472 S.E.2d 97, 100–01 (1996) (failure to coordinate design changes between prime contractors as required by an express provision in the contract); D.H. Blattner & Sons v. Fireman's Ins. Co., 535 N.W.2d 671, 675–77 (Minn. App. 1995) (breach of implied warranty as to the correctness of the plans and specifications—following United States v. Spearin, 248 U.S. 132 (1918)); Beltrone Constr. Co. v. State, 256 A.D. 2d 992, 682 N.Y.S.2d 299 (1998) (failure to coordinate concurrent prime contractors); Chantilly Constr. Corp. v. Department of Highways, 6 Va. App. 282, 369 S.E.2d 438, 444 (1988) (defective specifications); Zook Bros. Constr. Co. v. State, 171 Mont. 64, 556 P.2d 911, 915 (1976) (failure to provide right-of-way); Gilbert Pacific Corp.v. State Dep't of Transp., 110 Or. App. 171, 822 P.2d 729, 732 (1991) (defective plans and specifications); Procon Corp. v. Utah Dep't of Transp., 876 P.2d 890 (Utah App. 1994) (changing the angle of a cut in a highway embankment from that shown in the plans was a breach); John W. Goodwin, Inc. v. Fox, 1994 Me. 33, 725 A.2d 541 (1999) (failure to make timely progress payments).

[153] *See generally* Section 5, Subsections A (The Changes Clause) and B (Differing Site Conditions).

[154] Jensen Constr. Co. v. Dallas County, 920 S.W.2d 761, 772 (Tex. App. 1996).

[155] Del Guzzi Constr. Co. v. Global Northwest, Ltd. 105 Wash. 2d 878, 719 P.2d 120, 125 (1986); Tarin v. Tinley, 3 P.2d 680 (N.M. App. 1999); Linde Enters., Inc. v. Hazelton City Auth., 412 Pa. Super. 67, 602 A.2d 897, 899 (1992); Lundeen Coatings Corp. v. Department of Water & Power, 232 Cal. App. 3d 816, 833, 283 Cal. Rptr. 551 (Cal. App. 1991).

[156] Howard Contracting, Inc. v. G.A. MacDonald Constr. Co., 71 Cal. App. 4th 38, 60, 83 Cal. Rptr. 2d 590 (1998). *See also* Buckley & Co. v. State, 140 N.J. Super. 289, 356 A.2d 56, 73 (1975), for cases from other jurisdictions holding that lack of privity between the subcontractor and the owner does not bar a pass-through claim. A pass-through claim was not allowed, however, where sovereign immunity was only waived with respect to parties who had contracted directly with the state. APAC-Carolina v. Greensboro-High Point Airport Auth., 110 N.C. App. 664, 431 S.E.2d 508, 511 (1993).

[157] Severin v. United States, 99 Cl. Ct. 435, 443 (1943); *cert. denied*, 322 U.S. 733, 645 Ct. 1045 (1944); *see also* Department of Transp. v. Claussen Paving Co., 346 Ga. 807, 273 S.E.2d 161, 164 (Ga. 1980); Kensington Corp. v. Department of State Highways, 74 Mich. App. 417, 253 N.W.2d 781, 783 (1977); John B. Pike & Son, Inc. v. State, 169 Misc. 2d 1037, 647 N.Y.S.2d 654 (N.Y. Ct. Cl. 1996).

> Since our decision in the *Severin* case, *supra*, this court has repeatedly delineated the only ground's upon which a prime contractor may sue the government for damages incurred by one of its subcontractors through the fault of Government. The decided cases make it abundantly clear that a suit of this nature may be maintained only when the prime contractor has reimbursed its subcontractors for the latter's damages or remains liable for such reimbursement in the future.…[158]

The burden, however, is on the owner to show that the prime contractor has no legal obligation to share any recovery with the subcontractor. In *Blount Bros. Constr. Co. v. United States*, the court said: "To come under the '*Severin*' Doctrine the defendant must show, through some contractual terms or a *release*, that the plaintiff-prime is not liable to the subcontractor."[159] This is consistent with the rule that standing to sue is an affirmative defense for the owner to raise and prove.[160]

The *Severin* doctrine does not apply to a subcontractor claim for an equitable adjustment when the equitable adjustment clause in the prime contract is included in the subcontract, either directly or by incorporation through a flow-down clause unless the owner can prove that the subcontractor has released or waived its claim.[161]

A typical flow-down clause provides that the subcontractor is obligated to the prime contractor to the same extent as the prime contractor is obligated to the owner and that the subcontractor is entitled to the same rights granted the prime contractor by the owner under the main contract.[162] For example, the DSC clause in the prime contract may be incorporated into the subcontract by the flow-down clause and a DSC claim may be asserted by a prime contractor against the owner on behalf of the subcontractor.[163] Where, however, the DSC clause is not incorporated into the subcontract, there is no contractual basis for a DSC claim.[164]

The prime contractor's pass-through claim against the owner cannot exceed the amount of the prime contractor's liability to the subcontractor.[165] The prime contractor, however, is entitled to a markup on the amount it recovers on behalf of its subcontractors.[166]

5. Other Theories of Recovery

a. Unjust Enrichment

Unjust enrichment is a theory imposed by operation of law. The theory is based on the principle that a person unjustly enriched should be legally required to make restitution for the benefits received, if doing so does not violate any law, or conflict with an express provision in the parties' contract.[167] The theory usually arises in situations where there is no express contractual basis for recovery.[168] Recovery based on unjust enrichment is not permitted where it is barred by sovereign immunity,[169] violates a statute,[170] or conflicts with an express contract provision that covers the subject matter of the claim.[171]

To recover for unjust enrichment, a contractor must prove: (1) that a benefit was conferred; (2) that the

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[158] J. L. Simmons v. United States, 304 F.2d 886, 888 (Ct. Cl. 1962).

[159] 171 Ct. Cl. 478, 346 F.2d 962, 965 (Ct. Cl. 1965).

[160] The majority view is that the Severin defense is an affirmative defense and as such the owner has the burden of proof, not the contractor. Frank Coluccio Constr. v. City of Springfield, 779 S.W.2d 550, 552 (Mo. 1989); Gilbert Pacific Corp. v. State Dep't of Transp., 110 Ore. App. 171, 822 P.2d 729 (1991). But in Department of Transp. v. Claussen Paving Co., 246 Ga. 807, 273 S.E.2d 161 (1980), the court held that the prime contractor has the burden of proving that it is liable to the subcontractor.

[161] Owens-Corning Fiberglass Corp. v. United States, 190 Ct. Cl. 211, 419 F.2d 439, 457 (Ct. Cl. 1969), University of Alaska v. Modern Constr., Inc., 522 P.2d 1132, 1139 (Alaska 1974); Buckley & Co. v. State, Dep't of Transp., 140 N.J. Super. 289, 356 A.2d 56, 73 (1975).

[162] Form No. 5, Associated General Contractors of America (AGC).

[163] Umpqua River Nav. Co. v. Cresent City Harbor Dist., 618 F.2d 588, 594 (9th Cir. 1980).

[164] Keith A. Nelson Co. v. R.L. Jones, Inc., 604 S.W.2d 351, 354 (Texas 1980) (no changed conditions clause in subcontract; subcontractor could not recover for changed conditions).

[165] John B. Pike & Son, Inc. v. State, 169 Misc. 2d 1034, 647 N.Y.S.2d 654, 656 (1996).

[166] Pa. Dep't of Transp. v. James D. Morrissey, Inc., 682 A.2d 9, 16 (Pa. 1996) (8 percent markup allowed).

[167] Aloe Coal Co. v. Department of Transp., 164 Pa. Commw. 453, 643 A.2d 757 (1994); 230 Park Ave. Assocs. v. State, 165 Misc. 2d 920, 630 N.Y.S.2d 855 (1995); J.A. Sullivan Corp. v. Commw., 397 Mass. 789, 494 N.E.2d 374, 377 (1986); 5 WILLISTON CONTRACTS, § 805 (1970).

[168] Leroy Callender, P.C. v. Fieldman, 252 A.D. 2d 468, 676 N.Y.S.2d 152, 153 (1998). Subcontractors may try to assert this type of claim when they have not been paid by the prime contractor for their work, but there is no unjust enrichment when the owner has paid the prime contractor, since equity will not require the owner to pay twice. International Paper Co. v. Futhey, 788 S.W.2d 303, 306 (Mo. App. 1990).

[169] Gregory v. Hunt, 24 Fed. 3d 781(6th Cir. 1994) (court applied Tennessee law holding that sovereign immunity was waived only with respect to breach of an express, written contract and that sovereign immunity barred a claim based on an implied contractual obligation); Cleansoils Wisconsin, Inc. v. State Dep't of Transp., 229 N.W.2d 903, 910 (Wis. App. 1999) (State did not consent to be sued for unjust enrichment); *But see* J. A. Sullivan Corp. v. Commonwealth, 397 Mass. 789, 494 N.E.2d 374, 377 (1986) (State could not avoid claim for unjust enrichment based on sovereign immunity).

[170] Parsa v. State, 64 N.Y.2d 143, 474 N.E.2d 235, 237, 485 N.Y.S.2d 27 (1984) (New York statute required contracts in excess of $15,000 to be in writing and approved by the comptroller); Seneca Nursing Home v. Kan. State Bd. of Social Welfare, 490 F.2d 1324, 1332 (10th Cir. 1974) (statute made state immune from liability for implied contracts although a unilateral contract was found to exist).

[171] P.J. Wildner Contracting Co. v. Ohio Turnpike Comm'n, 913 F. Supp. 1031, 1043 (N.D. Ohio 1996); Jensen Constr. Co. v. Dallas County, 920 S.W.2d 761, 774 (Tex. App. 1996); Mountain Pacific Chapter A.G.C. of America v. State of Wash., 10 Wash. App. 406, 518 P.2d 212, 214 (1974).

owner knew that it was being conferred; and (3) that it would be inequitable for the owner to retain the benefit without paying for its value.[172] There cannot be any recovery where the contractor had no reasonable expectation of being paid for its services.[173]

The value of the benefit is determined on a *quantum meruit* basis.[174] The value of the benefit is measured by the actual costs the contractor incurred in performing the work.[175] But those costs will be disallowed to the extent they are shown to be excessive or unreasonable.[176]

b. Mutual Mistake of Fact

Another possible theory of recovery is mutual mistake. A mutual mistake occurs when contracting parties erroneously believe that some basic fact that affects contract performance is true. One party may seek to reform the contract so that it reflects what the parties actually intended.[177] The common law doctrine of mutual mistake has been applied by the Court of Claims to allow a contractor to recover additional performance costs caused by a mutual mistake about the necessity for an additional step in a manufacturing process. The court held that neither party bore the burden caused by the mistake, and reasoned that the equitable resolution to the dispute was to reform the contract and split the additional costs equally between the parties.[178]

The doctrine applies only to mutual mistakes about existing facts at the time of contracting. The doctrine does not apply to mistakes about future events,"[179] or to risks that the contractor has assumed.[180]

c. Failure to Require a Statutorily Mandated Payment Bond

Public property is not subject to mechanics' liens. Subcontractors[181] on public work projects who are not paid for their work have no lien rights against the public improvement.[182] The rule is based on public policy. "It requires very little imagination to realize how disruptive the attachment and attempted foreclosure of such liens might be to the orderly operation of state and local government."[183] Subcontractors who are not paid for their work may not have any recourse against the prime contractor because of the latter's insolvency. The subcontractor's only recourse may be the payment bond and the retainage withheld by the public owner from progress payments.[184]

A public agency may be liable to unpaid subcontractors if it fails to require the prime contractor to obtain a payment bond from a surety. Some public bond statutes impose liability on the agency when it fails to require a bond.[185] Other bond statutes do not expressly impose liability on the agency for its failure to obtain a bond.[186] Courts have reached mixed results where a bond statute does not expressly impose liability. Some courts have held that a subcontractor had a direct right of action against the agency for its failure to require a bond.[187] Other courts have found no right of action, declining to create a cause of action where none had been created by statute.[188]

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[172] Concrete Products Co. v. Salt Lake County, 734 P.2d 910, 911 (Utah 1987); Black Lake Pipe Line Co. v. Union Constr. Co., 538 S.W.2d 80, 86 (Tex. 1976); McDonald v. Hayner, 43 Wash. App. 81, 715 P.2d 519, 522 (1986).

[173] Aloe Coal Co. v. Department of Transp., *supra* note 168, at 767–68.

[174] J.A. Sullivan Corp. v. Commonwealth, *supra* note 168, at 378–79; 1 CORBIN ON CONTRACTS § 1.20 (rev. ed. 2001); 26 WILLISTON ON CONTRACTS § 68:1 (4th ed. 2003).

[175] United States ex rel. Susi Contracting Co. v. Zara Contracting Co., 146 F.2d 606, 611 (2nd Cir. 1944); RESTATEMENT OF CONTRACTS § 347-48 (2d).

[176] Acme Process Equip. Co. v. United States, 171 Ct. Cl. 324, 347 F.2d 509, 530 (Ct. Cl. 1965), *rev'd. on other grounds*, 385 U.S. 138, 87 S. Ct. 350.

[177] RESTATEMENT OF CONTRACTS § 155 (2d 1979).

[178] National Presto Indus. v. United States, 167 Ct. Cl. 749 338 F.2d 99, 111–12 (Ct. Cl. 1964); *see also* Atlas Corp. v. United States, 895 F.2d 745, 750 (Fed. Cir. 1990) (court denied contractor's claim based on mutual mistake).

[179] Westinghouse Elec. Corp. v. United States, 41 Fed. Cl. 229, 238 (1998); RESTATEMENT OF CONTRACTS § 151 (2d).

[180] Knieper v. United States, 38 Fed. Cl. 128, 139–40 (1997); RESTATEMENT OF CONTRACTS § 152 (2d).

[181] The term subcontractors as used in this Subsection *also* refers to materialmen.

[182] Wells-Stewart Constr. Co. v. Martin Marrietta Corp., 103 Ariz. 375, 442 P.2d 119, 124 (Ariz. 1968); J.S. Sweet Co. v. White County Bridge, 714 N.E.2d 219, 222 (Ind. App. 1999).

[183] City of Evansville v. Verplank Concrete & Supply, 400 N.E.2d 812, 816 (Ind. Ct. App. 1980).

[184] Payment bond provides protection to those who furnish materials and services for public improvements. Davidson Pipe Supply v. Wyoming County Inds. Dev. Agency, 85 N.Y.2d 281, 648 N.E.2d 468, 469–70, 624 N.Y.S.2d 92 (1995); Retainage: city not liable to unpaid subcontractor for failure to withhold retainage from prime contractor's progress payments. Murname Assocs. v. Harrison Garage Parking Corp., 239 A.D. 2d 882, 659 N.Y.S.2d 665, 667 (N.Y. A.D. 1997).

[185] OR. REV. STAT. § 279.542.

[186] WASH. REV. CODE § 39.08.010 does not impose liability on state agencies, but rather only on counties, cities, and towns.

[187] Northwest Steel Co. v. School Dist. No. 16, 76 Or. 321, 148 Pac. 1134, 1135 (1915); City of Atlanta v. United Elec. Co., 202 Ga. App. 239, 414 S.E.2d 251, 253 (1991); Dekalb County v. J.A. Pipeline, 437 S.E.2d 327 (Ga. 1993).

[188] Accent Store Designs, Inc. v. Marathon House, Inc., 647 A.2d 1223 (R.I. 1996); *See also* Ihr v. City of Duluth, 56 Minn. 182, 59 N.W. 960 (Minn. 1894); Freeman v. City of Chanute, 63 Kan. 573, 66 Pac. 647, 649 (Kan. 1901); ABC Supply Co. v. City of River Rouge, 216 Mich. App. 396, 549 N.W.2d 73, 76 (1996).

d. Inapplicability of Tort Law

The remedy for breach of contract is designed to put the nonbreaching party in the same position it would have been in had the breach not occurred. It is designed to protect the intentions of the parties, but it has been held that tort law was designed to protect social policies.[189] Claims for nonperformance of contractual obligations are based on breach of contract, not tort.[190]

Tort damages are not permitted in a breach of contract action unless the event constituting the breach was accompanied by conduct that amounts to a traditional common law tort.[191] In the absence of such conduct, courts will generally enforce the breach of a contractual obligation through contract law.[192] The policies underlying tort and contract remedies were stated by the Virginia Supreme Court.[193]

> The controlling policy consideration underlying tort law is the safety of persons and property—the protection of persons and property from losses resulting from injury. The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for. If that distinction is kept in mind, the damages claimed in a particular case may more readily be classified between claims for injuries to persons or property on the one hand and economic losses on the other.

6. Claims Against the Owner's Design Professional and the Economic Loss Limitation on Liability

At common law, design professionals (typically architects and engineers) were not liable for the contractor's economic losses caused by defective plans and specifications. Design professionals could be legally responsible for personal injury and physical property damage caused by defective design, but not for economic damage suffered by third parties.[194] Traditionally, design professionals were retained by project owners. They owed their allegiance to the owners with whom they had contracted, not to the contractors with whom they had no contractual relationship.[195] The lack of contractual privity as a bar to suits by contractors against design professionals for economic damages begin to erode with the advent of products liability law.

> The law imposes upon every person who enters upon an active course of conduct the positive duty to use ordinary care so as to protect others from harm. A violation of that duty is negligence. It is immaterial whether the person acts in his own behalf or under contract with another. *** We cannot ignore the half century of development in negligence law originating in *MacPherson [MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916)] and are impelled to conclude that the position and authority of a supervising architect are such that he ought to labor under a duty to the prime contractor to supervise the project with due care under the circumstances, even though his sole contractual relationship is with the owner....[196]

The rule has evolved in some jurisdictions that a contractor can sue a design professional in negligence for economic loss despite lack of privity between them.[197] The standard of care owed by the design professional and the failure to meet that standard requires expert testimony, unless the error is so obvious that expert testimony is not necessary.[198] The same rules apply to construction managers, who, as the name implies, are employed by owners to manage their construction projects.[199]

Under the economic loss rule, design professionals are not liable, either in tort or contract law, for economic losses suffered by contractors with whom they have no contractual privity.[200] The economic loss rule is based on the policy that a contractor's remedy for economic losses lies in the area of contract law, not tort law.[201] Courts that follow the economic loss rule often note that the rule provides predictability in allocating risk in the construction industry.[202] The fee for design services, for example, does not have to include premiums for errors and omissions coverage for economic loss due to construction delays caused by defective plans

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[189] Sensebrenner v. Rust et al., 236 Va. 419, 374 S.E.2d 55, 58 (1988); Erlich v. Menezes, 21 Cal. 4th 543, 981 P.2d 978, 982, 87 Cal. Rptr. 2d 886 (Cal. 1999).

[190] State v. Transamerica Premier Ins. Co., 856 P.2d 766, 772 (Alaska 1993).

[191] Erlich v. Menezes, 981 P.2d at 983 (tortious conduct would include fraud, deceit, or an intent to cause severe harm to the non-breaching party). In addition, sovereign immunity, unless waived, would bar tort claims against state agencies.

[192] State v. Trans America Premier Ins. Co., *supra* note 191; *see also*, Foreman & Mills, Inc. v. Belcher Oil Co., 11 Cal. 4th 85, 900 P.2d 669, 682, 44 Cal. Rptr. 420 (Cal. 1995) (Mosk, J., concurring and dissenting).

[193] Sensenbrenner v. Rust et al., 374 S.E.2d at 58.

[194] The term "economic loss" includes increased costs of contract performance and consequent loss of profits. See, Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L. REV. 891, 892 (1989).

[195] Annotation, *Tort Liability of Project Architect for Economic Damages Suffered by Contractor*, 65 A.L. R. 3d 249, 252 (1975).

[196] Shoffner Indus. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 257 S.E.2d 50, 55 (1979).

[197] *See* states listed in Table later in this subpart; *see also* RESTATEMENT OF TORTS § 552 (2d).

[198] Garaman, Inc. v. Williams, 912 P.2d 1121, 1123 (Wyo. 1996).

[199] James McKinney & Son, Inc. v. Lake Placid 1980 Olympic Games, Inc., 92 A.D. 2d 991, 461 N.Y.S.2d 483, 486 (A.D. 1983); John E. Green Plumb. & Heating Co. v. Turner Constr. Co., 500 F. Supp. 910, 912–13 (E.D. Mich. 1980).

[200] Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp., 54 Ohio St. 3d 1, 560 N.E.2d 206, 208 (Ohio 1990); Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist., 124 Wash. 2d 816, 881 P.2d 986, 989–90 (1994).

[201] Sensenbrenner v. Rust/Orling & Neale, 374 S.E.2d at 58; Berschauer/Phillips Constr. Co., *id*.

[202] *Id.*

and specifications. "The fees charged by architects, …are founded on their expected liability exposure as bargained and provided in the contracts."[203]

A number of jurisdictions have concluded that lack of contractual privity will not bar a tort action by a contractor against a design professional for economic damages.[204] Other jurisdictions have reached an opposite conclusion, holding that a party cannot sue for economic loss in the absence of privity. The following Table lists many of the states that follow the economic loss rule and many that do not follow that rule.

[203] Berschauer-Phillips Constr. Co., 881 P.2d at 992.

[204] Insurance Co. of North America v. Town of Manchester, 17 F. Supp. 2d 81, 86 (D. Conn. 1998).

State	Economic Loss Rule Followed	Economic Loss Rule Not Followed	Citation
Alabama		X	*E.C. Ernest Inc. v. Manhattan Const. Co.*, 531 F.2d 1026 (5th Cir. 1979) (applying Alabama law).
Alaska		X	*Mattingly v. Sheldon Jackson College*, 743 P.2d 356, 360 (Ak. 1987).
Arizona		X	*Donnelly Constr. Co. v. Osberg/Hunt/Gilleland*, 677 P.2d 1292, 1294 (Ariz. 1984).
California		X	*J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 598 P.2d 60, 64 (1979). *See also Dept. of Water and Power v. City of Los Angeles v. ABB Power T&D Co.*, 902 F. Supp. 1178, 1188 (1995).
Connecticut		X	*Insurance Co. of N.A. v. Town of Manchester*, 17 F. Supp. 2d 81, 85 (D. Conn. 1998) (applying Connecticut Law).
Delaware	X		*Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1196 (1992).
Florida		X	*Morgansais v. Heathman*, 744 So. 2d 973, 978 (Fla. 1999).
Hawaii	X		*City Express Inc. v. Express Partners*, 959 P.2d 836, 840 (1998).
Illinois	X		*Anderson Elec. Inc. v. Ledbetter Erection Corp.*, 503 N.E.2d 246, 247 (Ill. 1986).
Louisiana		X	*Gurtler, Hebert & Co. v. Weyland Mach. Shop Inc.*, 405 So. 2d 660, 662 (La. App. 1981).
Massachusetts	X		*Priority Finishing Corp. v. LAL Constr. Co.*, 667 N.E.2d 290 (Mass. App. 1996).
Michigan		X	*Bacco Constr. Co. v. American Colloid Co.*, 384 N.W.2d 427, 434 (Mich. App. 1986).
Minnesota		X	*Prichard Bros., Inc. v. Grady Co.*, 428 N.W.2d 391 (Minn. 1988).
Mississippi		X	*City Council of Columbus v. Clark-Dietz & Associates-Engineers, Inc.*,

State	Economic Loss Rule Followed	Economic Loss Rule Not Followed	Citation
			550 F. Supp. 610, 624 (N.D. Miss. 1980) (applying a Mississippi law).
Montana		X	*Jim's Excavating Services v. HKM Assocs*., 878 P.2d 248, 254 (Mont. 1994).
Nebraska		X	*John Day Co. v Alvine & Associates, Inc.*, 510 N.W.2d 462, 466 (Neb. App. 1993).
New Jersey		X	*New MEA Constr. Corp. v. Harper*, 497 A.2d 534, 540 (N.J. Super. 1985).
New York		Suit allowed if functional privity is established.	*Port Auth. of N.Y. v. Rachel Bridge Corp*., 597 N.Y.S.2d 35 (A.D. 1993) (functioning privity established); *Pile Foundation Constr. Co. v. Berger-Lehman Assocs.*, 676 N.Y.S.2d 664 (A.D. 1998).
North Carolina		X	*APAC-Carolina v. Greensboro High Point*, 431 S.E.2d 508, 517 (N.C. App. 1993).
Ohio	X		*Floor Craft v. Parma Com. Gen. Hosp*., 560 N.E.2d 206, 208 (Ohio 1990).
Rhode Island	X		*Forte Bros Inc. v. Nat. Amusements Inc*., 525 A.2d, 1301, 1303 (1987).
South Carolina	X		*Cullom Mech. Constr. Inc. v. S.C. Baptist Hospital*, 520 S.E.2d 809, 813 (S.C. App. 1999).
Tennessee		X	*John Martin Co. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 431 (Tenn. 1991) (adopting Section 552, Restatement (2d)).
Utah	X		*Anderson Towers Owners Ass'n v. CCI Mech., Inc*., 930 P.2d 1182, 1189 (Utah 1996).
Virginia	X		*Blake Constr. Co. v. Alley*, 353 S.E.2d 724, 726 (Va. 1987).
Washington	X		*Berschauer/Phillips Constr. v. Seattle Sch. Dist*., 881 P.2d 986, 990 (Wash. 1994).
Wisconsin		X	*A.E. Inv. Corp. v. Link Builders*, 214 N.W.2d 764, 768 (1974).

State	Economic Loss Rule Followed	Economic Loss Rule Not Followed	Citation
Wyoming	X		*Rissler & McMurray Co. v. Sheridan Area Water Supply Dist.*, 929 P.2d 1228, 1234–35 (Wyo. 1996).

C. CONTRACTORS' CLAIMS—DAMAGES

1. Introduction

After entitlement is established, the contractor must prove damages.[205] Generally speaking, damages for breach and an equitable adjustment under the contract are measured in the same way. The general measure of damages for breach of contract is to put the nondefaulting party in as good a position, pecuniarily, as it would have been if the breach had not occurred.[206] Similarly, an equitable adjustment is designed to keep a contractor whole when the government modifies the contract.[207] The operative word is "equitable." The adjustment in the contract price should not give either party an advantage that it would not have had had there been no change. The measure of an equitable adjustment is "the difference between what it would have reasonably cost to perform the work as originally required and what it would reasonably cost to perform the work as changed.'"[208] A contractor who has underestimated his bid or incurred unanticipated costs may not use a change order as an excuse or opportunity to shift its own losses or risks to the owner.[209]

The kinds of damages sought by a contractor may vary. They may include the cost of added labor, additional equipment costs, unabsorbed home office overhead expense, and delay and impact costs. These costs may be presented in different ways. They may be based on actual costs or estimates. They may be priced as discrete claim items, or they may be based on an approximation, using a jury verdict approach. [210] This subsection discusses the types of damages and costs that a contractor may seek, and the traditional methods that may be used to prove damages.

2. Contract Clauses Limiting Recovery

The amount of an equitable adjustment may be limited by the specific provisions of the contract. The DSC clause used by most states is one example. That clause does not allow additional compensation for any effects of the condition on unchanged work.[211] Another example is the suspension of work clause, which does not allow profit on delay costs.[212] Generally, clauses imposing limits on the amount that can be recovered under the contract are enforceable.[213]

A contractor may attempt to avoid the effect of those kinds of limiting clauses by claiming damages based on breach of contract. Whether such efforts are successful depends upon whether the contractor can prove that the changes were so substantial that they were beyond the general scope of the work specified in the contract. Changes of that magnitude may be a breach of contract.[214] If the change is within the general scope of the contract, the limitations on recovery apply.[215] The question of whether the change is within the general scope of the contract may be a question of fact,[216] of law,[217] or a mixed question of fact and law.[218]

Most construction contracts contain clauses that limit an owner's exposure for damages for breach of contract. No-damage-for delay clauses are a common example of this type of clause.[219] Another example is clauses excluding liability for consequential damages.[220] A con-

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[205] Entitlement may be based upon breach of contract or upon some remedy granting provision of the contract. *See generally*, subsection B, *supra*.

[206] Al and Zack Brown, Inc. v. Bullock, 238 Ga. App. 246, 518 S.E.2d 458, 461 (1999); 11 CORBIN ON CONTRACTS, § 992 (1993 int. ed.). 24 WILLISTON ON CONTRACTS § 64:1 (4th ed. 1999).

[207] Bruce Constr. Corp. v. United States, 163 Ct. Cl. 97, 324 F.2d 516, 518 (Ct. Cl. 1963); Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1234 n.8 (10th Cir. 1999).

[208] D.C. v. Organization for Envtl. Growth, 700 A.2d 185, 203 (D.C. App. 1997) (quoting Modern Foods, Inc., ASBCA No. 2090, 57-1 BCA ¶ 1229, 1957 WL 4960).

[209] Pacific Architects and Eng'rs Inc. v. United States, 203 Ct. Cl. 499, 491 F.2d 734, 739 (Ct. Cl. 1974); Nager Elec. Co. v. United States, 194 Ct. Cl. 835, 442 F.2d 936, 946 (Ct. Cl. 1971).

[210] *See* Joseph Pickark's Sons Co. v. United States, 209 Ct. Cl. 643, 532 F.2d 739, 742–44 (1976).

[211] The DSC clause mandated by FHWA for use on federally-aided state highway projects contains the same limitation. 23 C.F.R. § 635.109(a)(1)(iv).

[212] 23 C.F.R. § 635.109(a)(2)(ii).

[213] J.F. White v. Mass. Bay Transp. Auth., 40 Mass. App. Ct. 937, 666 N.E.2d 518 (1996); Hensel Phelps Constr. Co. v. King County, 57 Wash. App. 170, 787 P.2d 58, 65 (1990).

[214] V.C. Edwards Contracting Co. v. Port of Tacoma, 83 Wash. 2d 7, 514 P.2d 1381, 1383 (1973); Triple Cities Constr. Co. v. State, 194 A.D. 2d 1037, 599 N.Y.S.2d 874, 876 (1993). *See also* § 5.A.5, "Cardinal Changes," *supra*.

[215] *See* cases cited in note 213 *supra*.

[216] V.C. Edwards, *supra* note 215, 514 P.2d at 1383–84.

[217] Foster Constr. C.A. Co. and Williams Bros. v. United States, 193 Ct. Cl. 587, 435 F.2d 873, 880 (Ct. Cl. 1970).

[218] Hensel Phelps Constr. Co., *supra* note 214, 787 P.2d at 61–62.

[219] *See* § 5.C.4., *supra*.

[220] *See, e.g.*, Washington Standard Specification 1-09.4 (no claim for consequential damages of any kind will be allowed).

tracting party may validly waive its remedies for breach of contract by assenting to a clause limiting damages for breach of contract. Such clauses are enforceable unless they violate some specific public policy defined in a statute or legal precedent.[221]

3. Damage Principles

Certain principles apply in determining damages. The most basic principle is the purpose for awarding damages. Damages are awarded by courts, boards, and arbitrators in an attempt to put the nonbreaching party in the same position that it would have occupied had the breach not occurred.[222] Another principle is that damages will not be awarded based on speculation or conjecture.[223] But damages need not be proven with exact certainty, if the claimant clearly proves that it has suffered damages caused by the defaulting party.[224] It is sufficient if the evidence allows a judge or jury to make a reasonable approximation of the amount of damages without resorting to conjecture or speculation.[225] However, leniency in allowing an approximation of the amount of damages does not relieve the contractor of its burden of proving liability, causation, and resultant injury.[226]

A party seeking damages for breach of contract has a duty to take reasonable steps to avoid or mitigate losses resulting from the breach.[227] The burden of proving that the claimant failed to mitigate damages rests with the nondefaulting party.[228] The party seeking damages must also show that the costs claimed are reasonable and were caused by the event or default on which the claim is based.[229] Under federal construction law, prior to 1987, a contractor's actual costs were presumed reasonable. The Government had the burden of proving that the contractor's actual costs were unreasonable.[230] In 1987, there was an amendment to the FAR eliminating that presumption and shifting the burden from the Government to the contractor to show that its actual costs were reasonable.[231] The presumption that a contractor's actual costs are reasonable may also be negated by evidentiary rules.[232] This is consistent with the general rule that the burden is on the contractor to prove that its claimed costs are reasonable.[233]

Quantum meruit is a term that relates to how damages are measured; it is not a theory of recovery although it may be used to avoid unjust enrichment.[234] Literally, it means, "As much as he has deserved."[235] It is used to measure damages where extra work was performed that was not covered by the contract,[236] or where work was performed and accepted without the presence of an authorized contract.[237] The value of the benefit conformed is usually measured by the actual reasonable costs incurred by the contractor in performing the work, plus markup for overhead and profit.[238]

Quantum meruit recovery is not allowed where the work is covered by a specific contractual remedy,[239] or where the circumstances are such that the contractor could not reasonably expect to be paid for the work.[240]

4. Methods of Calculating Damages

There is no single method for calculating damages. If the contract does not establish a method for calculating damages, the contractor may try to prove damages using various methods. This subpart discusses the traditional methods that may be used to prove damages resulting from changes or delays caused by the owner.

a. Discrete Cost Method

The discrete cost method calculates the increased costs of changes or delays to the work on an item-by-item basis. The actual costs incurred because of changes or delays are segregated, assigned to each item, and documented in the contractor's cost account-

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[221] Canal Elec. Co. v. Westinghouse Elec. Co., 406 Mass. 369, 548 N.E.2d 182, 187 (Mass. 1990); Solar Turbines, Inc. v. United States, 23 Ct. Cl. 142, 157 (1991). *See also* the limitations on the use of no-pay-for-delay clauses discussed in Section 5.C, *supra*.

[222] 11 CORBIN ON CONTRACTS, § 992; 24 WILLISTON ON CONTRACTS, § 64:1 (4th ed. 1999), 1353 (3d ed. 1968).

[223] Berley Indus. v. City of N.Y., 45 N.Y.2d 683, 688, 385 N.E.2d 281, 283, 412 N.Y.S.2d 589 (1978).

[224] Wunderlich Contracting Co. v. United States, 173 Ct. Cl. 180, 351 F.2d 956, 968–69 (Ct. Cl. 1965).

[225] Daly Constr. v. Garrett, 5 F.3d 520, 522 (Fed. Cir. 1993).

[226] Wunderlich Contracting Co., *supra*, note 225, 351 F.2d at 968–69.

[227] P.T. & L. Constr. Co. v. State Dep't of Transp., 108 N.J. 539, 531 A.2d 1330, 1335 (1987) (contractor must absorb expenses that would have been avoided if it had been conscientious in its investigation).

[228] Hardwick v. Dravo Equip. Co., 279 Or. 619, 569 P.2d 588, 591 (1977).

[229] Wunderlich Contracting Co., *supra* note 225, at 969; Berley Indus., 385 N.E.2d at 282–83.

[230] Bruce Constr. Corp. v. United States, 163 Ct. Cl. 97, 324 F.2d 516, 519 (Ct. Cl. 1963).

[231] 48 C.F.R. § 31.201.3 (1987). *See* Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1244, n. 30 (10th Cir. 1999).

[232] Pa. Dep't of Transp. v. United States, 226 Ct. Cl. 444, 643 F.2d 758, 763 (1981).

[233] 13 AM. JUR. *Building and Construction Contracts* § 122 (2d ed. 2000).

[234] *See* Subsection B.5.a, *supra*.

[235] BLACK'S LAW DICTIONARY (7th ed. 1999).

[236] V.C. Edwards Contracting Co. v. Port of Tacoma, 7 Wash. App. 883, 503 P.2d 1133, 1136 (1972).

[237] Ridley v. Pipe Maintenance Services, 83 Pa. Commw. 425, 477 A.2d 610, 612 (1984) (invalid contract).

[238] Cities Serv. Gas Co. v. United States, 205 Ct. Cl. 16, 500 F.2d 448, 457 (Ct. Cl. 1974); Port Chester Elec. Constr. Corp. v. HBE Corp., 782 F. Supp. 837, 845 (S.D. N.Y. 1991).

[239] Hensel Phelps Constr. Co. v. King County, 57 Wash. App. 170, 787 P.2d 58, 61 (1990).

[240] *Id.*

ing records.[241] This method is preferred by the courts because it is considered to be the best evidence of actual damages.[242]

Estimated costs may be permitted if actual costs are unavailable, and the contractor has a valid reason for not having actual cost information. But the claim may be denied if the contractor could easily have kept records of its actual costs caused by owner action or fault, but did not, and has no valid excuse for not keeping records.[243]

The discrete method of calculating damages for breach of contract or an equitable adjustment under a remedy granting clause provides the owner with documented, actual costs tied directly to items of work that have been changed or delayed.

b. Total Cost Method

Under the total cost method, the contractor recovers the difference between the total cost of performing the work and the bid price, plus a reasonable profit.[244] This method is disfavored by the courts and can only be used where there is no other means of determining damages.[245] It is disfavored because it suffers from the following defects. First, it presumes that the bid was reasonable. If the bid is unreasonably low, the difference between the contractor's total costs to perform the contract and its bid is increased, thereby increasing the contractor's damages solely by underbidding the project and not by incurring additional costs caused by the owner.[246] Second, this method assumes that the owner, not the contractor, is responsible for all of the increased costs. This defect further assumes that the contractor was not responsible for any increase in the cost of the work, passing along to the owner increased costs that may have resulted from the contractor's inefficiency, or from events for which the owner was not responsible.[247]

While courts disfavor the total cost method, they do not prohibit its use. Its use is based on the principle that, "Where a contractor is entitled to an adjustment, the contracting entity should not be relieved of its liability for the same merely because the contractor is unable to prove its increased costs within a mathematical certainty."[248] Essentially, the courts will allow this method to be used if there is no better method for proving damages, and the following safeguards can be established:

- The bid was reasonable and properly prepared. This may be determined by comparing the bids submitted by the other bidders with the contractor's bid.[249]
- The total costs expended were reasonable.[250]
- The contractor is not responsible for the additional costs.[251]

These safeguards or prerequisites to the use of this method must be proved by a preponderance of the evidence.[252] Failure to prove them requires that the total cost claim be dismissed.[253] If a jury is allowed to hear evidence of damages calculated on a total cost method, the jury must be instructed by the court not to allow damages based on total costs unless these safeguards are established.[254] The owner should consider presenting evidence challenging the contractor's total cost figures rather than counting on the jury, or a judge in a bench trial, to deny the claim in its entirety because the contractor failed to establish the foundational prerequisites for use of the total cost method.[255]

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[241] American Line Builders v. United States, 26 Cl. Ct. 1155, 1193 (1992) ("Plaintiff's calculation of the additional work required by reference to time and labor records from the project is far more helpful to this court than the defendant's unsupported assertions, because plaintiff's calculations reflect work actually performed, not hypothetical labor time projects.").

[242] Dawco Constr. Co. v. United States, 930 F.2d 872, 882 (Fed. Cir. 1991); American Line Builders Inc., *id.*; Con-Vi-Rio of Texas v. United States, 538 F.2d 348 (Cl. Ct. 1976); D.C. v. Organization for Envtl. Growth, 700 A.2d 185, 203 (D.C. App. 1997); New Pueblo Constructors, Inc. v. State, 144 Ariz. 95, 696 P.2d 185, 194 (1985).

[243] Dawco Constr. Co. v. United States, 930 F.2d at 882.

[244] New Pueblo Constructors, Inc. v. Department of Transp., 696 P.2d at 194; Neal & Co. v. United States, 36 Fed. Cl. 600, 638 (Ct. Cl. 1996); Servidone Constr. Corp. v. United States, 931 F.2d 860, 861–62 (Fed. Cir. 1991).

[245] New Pueblo Constructors, *id.*; Green Constr. Co. v. Department of Transp., 164 Pa. Commw. 566, 643 A.2d 1129, 1136 (1994); Servidone Constr. Corp., *id.*; Modern Builders, Inc. v. Manke, 29 Wash. App. 86, 615 P.2d 1332, 1337–38 (1980), Huber, Hunt Nichols v. Moore, 67 Cal. App. 278, 136 Cal. Rptr. 603, 621–22 (1977).

[246] Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. 516, 541 (1993); Servidone Constr. Corp., 931 F.2d at 861.

[247] *See* cases cited in note 245, supra. *See also* MCBRIDE & TOUHEY, GOVERNMENT CONTRACTS, § 23.40[2].

[248] AMP-Rite Elec. Co. v. Wheaton Sanitary Dist., 220 Ill. App. 3d 130, 580 N.E.2d 622, 640, 162 Ill. Dec. 659 (1991).

[249] Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. 542-43.

[250] Servidone Constr. Corp., 931 F.2d at 861–62.

[251] AMP-Rite Elec. Co., 580 N.E.2d at 641 (citing J.D. Hedin Constr. Co. v. United States, 347 F.2d 235, 346–47 (Ct. Cl. 1965); Neal & Co. v. United States, 36 Fed. Cl. at 638. The contractor does not have the burden, however, to show that it mitigated its damages; the burden of proving that the contractor failed to mitigate its damages rests with the owner. Hardwick v. Dravo, 279 Or. 619, 569 P.2d 588, 591 (1977).

[252] John F. Harkins Co. v. School Dist. of Phila., 313 Pa., *supra* 425, 460 A.2d 260, 265 (1983).

[253] Neal & Co. v. United States, 36 Fed. Cl. at 638.

[254] Geolar, Inc. v. Gilbert/Commwealth, Inc., 874 P.2d 937, 945 (Alaska 1994); Anchorage v. Frank Coluccio Constr. Corp., 826 P.2d 316, 328 (Alaska 1992).

[255] *See* Pa. Dep't of Transp. v. James D. Morrissey, 682 A.2d 9, 14 (Pa. 1996). (The court noted that the agency did not present any evidence to contradict the contractor's testimony concerning liability for damages). The total cost method may be used to calculate damages for a major contract item. *See* S.J. Groves & Sons & Co. v. State, 50 N.C. App. 1, 77-79, 273 S.E.2d 465 (1980) (contractor used total cost method to calculate damages for unclassified excavation work after encountering a changed condition. Court applied same foundational

The total cost method is a simple way of calculating damages. Essentially, it converts a fixed-price contract into a cost-plus contract. This method assumes that the bid for performing the work was reasonable and accurately computed. It assumes the contractor's increased costs were reasonable and that the owner, not the contractor, or factors for which the owner was not reasonable, caused the costs to increase. It is disfavored as a matter of law because it piles assumption upon assumption, and as such becomes speculative. The assertion that it is too difficult to segregate impact and delay costs and allocate them to specific work items is not enough to justify the total cost method. The contractor should be required to prove that its accounting system and its use of cost codes do not permit allocation of specific costs to discrete events, where the effects of impacts and disruptions on unchanged work are so intertwined that allocation of those costs are highly impracticable.[256]

c. Modified Total Cost Method

The modified total cost method is simply the total method adjusted to satisfy two of the prerequisites for the use of the total cost method.[257] Under the modified total cost approach, deductions are actually made for costs attributable to the contractor,[258] and for underbidding where the evidence indicates that the contractor's bid was too low.[259] This approach is designed to eliminate two of the deficiencies inherent in the total cost method: the assumption that the bid was realistic and the assumption that all of the excess costs were the responsibility of the owner.[260]

The problem with this approach is that it shifts the burden of proof. It is a fundamental rule of law that a claimant has the burden of proving its damages.[261] In contrast with the discrete method of proving damages, a contractor using the modified total method can, if it chooses, allocate some of its increased costs to obvious self-inflicted wounds, leaving it to the owner to prove that there are other costs that should also be the contractor's responsibility.[262] The following factors should be considered in defending claims based on a total or modified total cost method.[263]

- The contractor's bid work-up sheets should be examined to determine how the contractor put the bid together. The examination should be made to determine whether the contractor bid too low on some aspects of the work or made assumptions in bidding that were unrealistic or unfounded. The analysis may also consider whether the bid was unbalanced with respect to items that seriously overran or underran.
- Nonimpacted items of work should be compared with similar impacted items of work. This is referred to as the "measured mile" analysis.
- Financial records obtained through an audit should be analyzed by experts.
- An engineering and schedule analysis should be performed to identify concurrent delays.[264]

This type of analysis allows the owner to determine when the contractor is attempting to obtain additional compensation for mistakes that the contractor made in its bid and during contract performance. Considerable lay and expert testimony may be required to prove these factors and may likewise be rebutted by similar evidence presented by the contractor. This type of analysis is also of major import, because the total or modified total cost methods will not be permitted if the prerequisites to their use are not established by the contractor,[265] or at least one of the prerequisites to their use are disproved by the owner.[266]

d. Jury Verdict

The "jury verdict" method is used by courts to determine (much like a jury would) a fair and reasonable amount that should be awarded as an equitable adjustment, or as damages for breach of contract. It is used by courts to reconcile conflicting testimony, and not as a method of proving damages.[267] The prerequisites for using this method are: (1) clear proof that the contractor is entitled to damages for breach of contract or an equitable adjustment; (2) sufficient evidence to allow the court to make a reasonable estimation as to the amount of damages; and (3) proof that there was no

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prerequisites for repricing the entire contract on a total cost basis in repricing major contract item).

[256] Neal & Co. v. United States, 36 Fed. Cl. 600, 641 (Fed. Cl. 1996).

[257] Servidone Constr. Co. v. United States, 931 F.2d at 862; Youngdale Constr. Co. v. United States, 27 Fed. Cl. at 541; Seattle Western Indus. v. David Mowat Co., 750 P.2d 245 (Wash. 1988); Nebr. Pub. Power Dist. v. Austin Power, Inc., 773 F.2d 960, 968 (8th Cir. 1985).

[258] For example, in State Highway Comm'n v. Brasel & Sims Constr. Co., 688 P.2d 871 (Wyo. 1984), damages were reduced by a deduction for increased labor costs due to "overmanning."

[259] Servidone Constr. Co. v. United States, 931 F.2d at 862.

[260] Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. at 541.

[261] *See* Subpart C.3, "Damage Principles," this Section, *supra*.

[262] D. HARP, *Preventing and Defending Against Highway Construction Contract Claims: The Use of Changes or Differing Site Conditions Clauses and New York State's Use of Exculpatory Contract Provisions and Contract Clauses, in* SELECTED STUDIES IN HIGHWAY LAW (National Cooperative Highway Research Program Legal Research Digest No. 28, 1993).

[263] *Id.* at 29.

[264] *See* § 5.C.4.b, *supra*.

[265] Neal & Co. v. United States, 36 Fed. Cl. at 638.

[266] Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. at 541.

[267] District of Columbia v. OFERGO, 700 A.2d at 204; Delco Elec. Corp. v. United States, 17 Ct. Cl. 302, 323–24 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990).

more reliable method of computing damages.[268] The jury verdict method may not be used, and the claim may be dismissed, where the contractor could have kept records of its actual increased costs, but did not, and has no justifiable excuse for not doing so.[269]

e. Force Account

Specifications used by state transportation agencies in their construction contracts usually contain force account provisions.[270] Force account provisions allow the agency to pay for contract changes on a time and material basis when the contractor and the agency cannot agree on a price for the change.[271] Occasionally, force account has been used by contractors to price equipment for large claims. This occurs when the specifications provide that the price adjustment for a change, a DSC, or a contract termination for convenience will be determined by agreement of the parties, or if they cannot agree, by force account. This type of pricing can result in a real advantage to a contractor by using rates from a manual to price its equipment rather than its actual equipment costs.[272] Generally, force account should not be used to price large claims. To prevent this, the contract should provide that no claim for force account shall be allowed unless ordered in writing by the engineer prior to the performance of the work.

5. Cost Categories

Aside from miscellaneous and subcontractor expenses, a contractor's cost in performing work may be grouped into four general categories: labor, materials, equipment, and overhead. These costs can be further classified as either direct or indirect. Direct costs are those tied to a specific construction activity, while indirect costs that cannot be tied to specific work items are treated as part of overhead.

Most contractors keep detailed cost records for their projects. This allows them to account for the cost of labor, materials, and equipment used for a particular construction activity. When new or extra work is undertaken, a cost code can be established for that activity. However, the determination of extra labor hours resulting from labor inefficiency may be impossible to identify and segregate from the man-hours expended to perform the original contract work.[273]

a. Increased Labor Costs

Direct labor costs consist of the base wages and fringe benefits that are paid to personnel who perform a specific segment of construction. The wages of an ironworker, for example, can be determined from payroll records and allocated to steel erection work. Accounting for added labor costs caused by extra work is easy if those costs are clearly allocated to a new cost code established for that purpose. Where the difficulty occurs is when the original contract work is impacted by the contract change, reducing the efficiency of the contractor's labor force. This may be due to delay causing work to be performed during adverse weather, or causing work to be performed out of sequence, or from trade stacking and over-manning to meet an accelerated completion schedule.

One method for proving inefficiency is to compare specific units of work performed under normal circumstances with the same kind of work affected by the change. This is usually referred to as the "measured mile" approach.[274] Another method is to estimate an inefficiency percentage and apply that percentage to labor costs. For instance, in one case, the court allowed a 10 percent increase for labor inefficiency caused by work being performed out-of-sequence.[275] An analysis of this kind requires expert testimony,[276] and may rely on industry studies.[277] However, a comparison of actual labor costs to the amount estimated in the original bid has been rejected. The court said that this approach has the same shortcomings inherent in the total cost

[268] WRB Corp. v. United States, 183 Ct. Cl. 409, 425.

[269] Dawco Constr., Inc. v. United States, 930 F.2d 872, 881 (Fed. Cir. 1991); *see* D.C. v. OFERGO, 700 A.2d at 204 (for additional citations).

[270] Colorado DOT Standard Specification 109.4 (1999) and Washington DOT Standard Specification 1-09.6 (2000) are examples.

[271] I.A. Constr. Corp. v. Department of Transp., 139 Pa. Commw. 509, 591 A.2d 1146, 1149–50 (1991); Department of Transp. v. Anjo Constr. Co., 666 A.2d 753, 760 (Pa. Commw. 1995).

[272] Pricing equipment is discussed in the next subpart C.

[273] "Construction Claims and Damages, Entitlement Analysis," J. Hainline, AASHTO Annual Meeting (Oct. 1991); TRB Legal Workshop (July 1992).

[274] Gen. Ins. Co. v. Hercules Constr. Co., 385 F.2d 13, 20–21 (8th Cir. 1967). *See* Clark Concrete Contractors v. Gen. Services Admin., GSBCA No. 14340 99-1 BCA § 30280 (1999) (Board allowed contractor to use the "measured mile" approach to several different categories of work affected by design changes made during construction).

[275] Youngdale & Sons Constr. Co. v. United States, 27 Fed. Ct. at 558.

[276] Luria Bros. & Co. v. United States, 177 Ct. Cl. 676, 369 F.2d 701, 712 (Ct. Cl. 1967).

[277] J.A. HANERS & R.M. MORGAN, COLD REGIONS RESEARCH AND ENGINEERING LABORATORY SPECIAL REPORT 172 (May 1972) discusses the effect of cold weather on human performance and capabilities; *Work Efficiency Decreases at Abnormal Temperatures*, CONSTRUCTOR MAGAZINE, Associated General Contractors of America (May 1972). This issue also lists a number of conditions that affect productivity and characterize the percent of loss if the condition is minor, average, or severe. Some examples: very hot or very cold weather, minor (10 percent), average (20 percent), severe (30 percent). Learning curve, minor (5 percent), average (15 percent), severe (25 percent). The publication notes that these factors are for reference only and may vary from contractor to contractor, crew to crew, and job to job.

method: the labor estimate may be too low and the cost overrun may be due, at least in part, to problems that are not the owner's fault.[278] Inefficient labor claims are frequently found in acceleration claims.[279] Excessive overtime can affect work output and lower efficiency through physical fatigue. Stacking of trades within limited work areas causes congestion, affecting efficiency. There are also indirect labor costs. Field supervision costs may be increased when a delay or a change extends the project. Field supervisions costs for extended project durations should be documented as to the additional time spent on the project, rather than using an inefficiency factor as a markup on the total supervisory costs. A contractor may also recover premium pay for overtime work and for second and third shift work, where work is accelerated due to owner-caused delay. There is no recovery, however, where premium time was not due to an owner-caused breach.[280] But wage increases for work performed in a later time period than planned, due to owner delay, may be recovered.[281]

b. Increased Cost of Materials

An increase in the cost of materials due to owner-caused delay is compensable. The claim should not include shipping charges, since the contractor would bear those costs irrespective of when the materials were delivered, unless the shipping costs also increased.

Some contracts include an escalation clause allowing a price adjustment for certain products that increase in price during contract performance. Petroleum products are an example of materials where the price may rise suddenly.[282]

c. Increased Equipment Costs

Most contracts establish how equipment should be priced and refer to equipment costing guide manuals.[283] These manuals are published by a number of organizations.[284] In general, equipment costs are broken down into two categories: rented and owned. Payment for rented equipment is based on paid invoices. When equipment is rented from rental companies or other contractors, the amount paid will be allowed, if it is reasonable and the rental was an arms-length transaction. However, in federal procurement where the equipment is rented from a division, subsidiary, or organization under the common control of the contractor, the allowability of the rental charges is determined by regulation.[285] In addition, under federal regulations, certain costs, such as maintenance and minor repairs necessary to keep the equipment operational, may be allowed.[286]

The contract specifications may control the costs allowed for owned equipment. For example, recovery for owned equipment may be limited to rates established by an equipment rental agreement with the AGC, or the contractor's actual ownership and operating costs, whichever is less.[287] Some contractors who own equipment do not keep sufficient records to establish their actual equipment costs.[288] In the absence of a regulation or directive that allows or requires the use of published rates, contractors must prove that their records are inadequate to establish their actual ownership rates before they can use published rates.[289] When the actual cost of equipment ownership can be determined, those costs must be used.[290]

Contractors are generally entitled to compensation to cover their equipment costs during a period where work is suspended or delayed.[291] Recovery for idle equipment is denied, however, where the contractor could have used the equipment elsewhere.[292] This is consistent with the contractor's common law duty to mitigate its damages.[293] Standby rates for idle equipment are usu-

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[278] Manshul Constr. Corp. v. Domitory Auth. of N.Y., 79 A.D. 2d 383 436 N.Y.S.2d 724, 729 (N.Y. App. 1981); Joseph Pickard's Sons & Co. v. United States, 209 Ct. Cl. 643, 532 F.2d 739, 449 (Ct. Cl. 1976).

[279] Hensel Phelps Constr. Co. v. King County, 57 Wash. App. 170, 787 P.2d 58, 60 (1990).

[280] Public Constructors v. State, 55 A.D. 2d 368, 390 N.Y.S.2d 481, 487 (1977).

[281] Gardner Displays Co. v. United States, 346 F.2d 585, 589 (Ct. Cl. 1965).

[282] *Id*.

[283] Quality Asphalt Paring, Inc. v. State of Alaska, Dep't of Transp. & Public Facilities, 71 P.3d 865, 873–74 (Alaska 2003).

[284] Rental Rate Blue Book for Construction Equipment. Rates can be weekly or monthly. The latter has lower rates than the former. Rental Rates Compilation, Associated Equipment Distributors; Construction Equipment Ownership and Operating Expense Schedule, U.S. Army Corps of Engineers; Contractor's Equipment Cost Guide, The Associated General Contractors; Labor Surcharge and Equipment Rental Rates, The California Dep't of Transportation; Tool and Equipment Rental Schedule, National Electrical Contractor's Association.

[285] 48 C.F.R. ch. 1 §§ 31.105(d)(2)(c); 31.205.36(b)(3).

[286] 48 C.F.R. § 31.105(d)(2)(c)(ii)(A).

[287] For example, Colorado specifies the Dataquest Blue Book for establishing equipment rental. The hourly rental rate is based on the Blue Book Monthly Rate published by Dataquest times a rate adjustment factor times the regional adjustment average divided by 176 (working hours in a month). Colorado Standard Specifications § 109.04(c) (1999).

[288] These costs include: equipment depreciation, taxes and insurance, capital investment, *i.e.,* return on money spent on equipment.

[289] Meva Corp. v. United States, 206 Ct. Cl. 203, 511 F.2d 548, 559 (Ct. Cl. 1975), Nolan Bros. v. United States, 194 Ct. Cl. 1, 437 F.2d 1371, 1379–80 (Ct. Cl. 1971) (regulations allowed use of published notes).

[290] Meva Corp., *id*.

[291] Zook Bros. Constr. Co. v. State, 171 Mont. 64, 556 P.2d 911, 917 (1976); Peter Salucci & Sons, Inc. v. State, 110 N.H. 136, 268 A.2d 899, 910 (1970).

[292] Excavation-Constr., Inc., ENG BCA No. 3858, 82-1 BCA ¶ 15,770, at 78, 058 (1982).

[293] *See* Subpart 3, *supra*.

ally priced at actual ownership rates or 50 percent of equipment manual rates.[294] The standby reduction reflects the cost of owning the equipment, but not the wear and tear on the equipment and "FOG" (fuel, oil, and grease costs), since the equipment is not operating during the suspension or delay period.

d. Home Office Overhead

Home office overhead represents those costs necessary to conduct business. It includes salaries, rent, depreciation, taxes, insurance, utilities, office equipment, data processing costs, legal and accounting expenses, office supplies, and other miscellaneous general and administrative expenses.[295] Because of their nature, these expenses are indirect and cannot be directly traced to any particular contract.[296]

When a contract is delayed, home office expenses may accrue beyond the amount allocated by the contractor in its bid. Since there is little or no work, there is little or no income from contract progress payments to absorb those costs.[297] Those costs become "unabsorbed."[298] Thus, contractors who have incurred unabsorbed or extended home office expenses during a period of owner-caused delay have been permitted to recover those costs as part of their damages for compensable delay.[299] The costs are compensable because they were incurred due to owner- caused delay, but not reimbursed as part of the contract price.[300]

i. The Eichleay Formula.—The Eichleay formula is a method of approximating home office overhead expenses caused by delay. It computes home office overhead expenses on the basis of a pro rata amount per day and then multiplies that amount times the number of days that the project was delayed. The result is the amount of home office overhead damages.[301] Its use as a method of calculating home office overhead damages for federal construction contracts spans over 40 years.[302] The basic formula consists of the following steps:

[294] L. L. Hall Contr. Co. v. United States, 177 Ct. Cl. 870, 379 F.2d 559, 568 (1967); Zook Bros. Constr. Co. v. State, 556 F.2d at 917 (standby rate was 50 percent of hourly rate established by the Montana State Highway Dep't).

[295] Contractors include some amount in their bids to cover home office expenses incurred during the duration of the contract. Aetna Casualty & Sur. v. Chapel Hill Indep. Sch. Dist., 860 S.W.2d 67,672 (Tex. 1993).

[296] Wickham Contracting Co. v. Fischer, 12 F.3d 1574, 1578 (Fed. Cir. 1994).

[297] West v. All State Boiler, Inc., 146 F.3d 1368, 1372 (Fed. Cir. 1998).

[298] In Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688 (1960).

[299] *Id.*

[300] Wickham Contracting Co. v. Fischer, 12 F.3d at 1577.

[301] Eichleay Corp., *supra* note 298; Melka Marine, Inc. v. United States, 187 F.3d 1370, 1374–75 (Fed. Cir. 1999). It is the accepted method for calculating home office overhead damages in federal construction contracts. Wickham Contracting Co. v. Fischer, 12 F.3d at 1577.

[302] From 1960 to the present. *Id.*

STEP 1	Delayed contract billings Total billings during contract period.	X	Total home office overhead incurred during contract period.	=	Overhead allocable to the contract.
STEP 2	Allocable overhead Total number of days of contract performance	=	Overhead per day allocable to delayed contract.		
STEP 3	Daily overhead rate	X	Number of days of delay.	=	Unabsorbed overhead damages.

The formula has undergone certain modifications. For example, it is important that the actual period of contract performance be used, not the number of days planned or scheduled for contract performance.

> Because the formula attempts to determine the amount of overhead attributable to the *actual period of performance* of the delayed contract, the per diem rate is necessarily obtained by dividing this figure by the number of days of *actual performance*. Dividing by the number of days of the original contract period distorts the formula.[303]

Another modification is that the actual delay beyond the scheduled completion date must be used, not the suspension period. The Federal Circuit has stated, "We clarify that it is the delay at the end of performance resulting from the suspension that results in unabsorbed overhead expenses which a contractor may recover under *Eichleay*."[304]

To use *Eichleay,* the contractor must also show that it was on standby and that it was unable to take on replacement work during the suspension: work that provides the "same amount of money for the same period toward overhead costs as the government contract."[305] The standby test requires that the contractor remain ready to perform and that it was impractical for the contractor to obtain other work to which it could reallocate its home office overhead expenses.[306] In addition, *Eichleay* should not apply where the original contract duration is extended by change order work, when the added work provides sufficient income to absorb the contractor's proportionate share of home office expenses.[307]

One state has rejected the *Eichleay* formula as too speculative,[308] while other states have permitted its use in calculating delay damages.[309] *Eichleay* has been criticized for allowing damages without first determining whether additional overhead costs were actually incurred. It may also include damages for construction shut-down periods, such as weather or other non-owner-caused events, when the contractor would normally be idle. The formula also assumes that the daily overhead cost is a fixed cost, when in fact the costs are an approximation based on costs that are variable.[310]

Another criticism is that the daily rate of overhead expense may be disproportionate when there is a small amount of work remaining. In *Berley Industries v. City of New York*, the court said; "The damages computed under the *Eichleay* formula would be the same in this case whether the plaintiff had completed only 1% or 99% of the job on the scheduled completion date of May 7, 1971."[311] But despite criticism, acceptance of the *Eichleay* formula seems to be growing.[312]

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[303] Golf Landscaping, Inc. v. Century Constr. Co., 39 Wash. App. 895, 696 P.2d 590, 593–94 (1984) (emphasis in original, citation omitted) (using the actual period of performance instead of the original contract period changed the *per diem* rate from $209.88 to $109.98).

[304] West v. All State Boiler, 146 F.3 at 1368, 1381 (Fed. Cir. 1998) (changed the period for computing damages from 58 days—the suspension period—to 22 days, the extension period beyond the scheduled completion date).

[305] Mecka Marine, Inc. v. United States, 187 F.3d at 1379.

[306] *See* West v. All State Boiler, 146 F.3d at 1373. However, a contractor's inability to take on replacement work because of bonding limitations would not be an excuse for not obtaining replacement work. *See* Satellite Elec. Co. v. Dalton, 105 F.3d 1418, 1420 (Fed. Cir. 1997).

[307] Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1580–81 (Fed. Cir. 1993); Almayer v. Johnson, 79 F.3d 1129, 1133 (Fed. Cir. 1996).

[308] Berley Indus. v. City of N.Y., 45 N.Y.2d 683, 385 N.E.2d 281, 283, 412 N.Y.S.2d 589 (1978).

[309] California: Howard Contracting, Inc. v. McDonald Constr. Co., 71 Cal. App. 4th 38, 54–55, 83 Cal. Rptr. 2d 590 (1998) (City of Los Angeles conceded that Eichleay was the proper industry standard for analyzing construction delay claims); Connecticut: Southern New England Contracting Co. v. State, 165 Con. 644, 345 A.2d 550, 559–60 (Conn. 1974); Florida: Broward County v. Russell, Inc., 589 So. 2d 983 (Fla. App. 1991); Massachusetts: PDM Plumbing & Heating, Inc. v. Findlen, 13 Mass. App. Ct. 950, 431 N.E.2d 594, 595 (1982); Ohio: Conti Corp. v. Ohio Dep't of Adm. Servs., 629 N.E.2d 1073, 1077 (1993); Washington: Golf Landscaping v. Century Constr. Co., 39 Wash. App. 395, 696 P.2d 590, 592–93 (1984). Virginia: Fairfax County Redevelopment and Housing Auth. v. Worchester Bros. Co., 257 Va. 382, 514 S.E.2d 147, 150–51 (1999).

[310] Berley Indus. v. City of N.Y., 385 N.E. at 284; D. Harp, *Preventing and Defending Against Highway Construction Claims* (National Cooperative Highway Research Program Legal Research Digest No. 28, 1993); R.A. Maus, *Assessing Damages on Construction Claims*, paper presented at AASHTO annual meeting (1991); M.K. Love, *Theoretical Delay and Overhead Damages*, 30 PUB. CONT. L.J. 33 (Fall 2000); Watson, *Unabsorbed Overhead Costs and the Eichleay Formula*, 147 MIL. L. REV. 262 (1995); P.A. McGeehan and C.O. Strouss, *Learning from Eichleay: Unabsorbed Overhead Claims in State and Local Jurisdictions*, 25 PUB. CONT. L.J. (Winter 1996).

[311] Berley, 385 N.E.2d at 284. Under federal construction law, the amount of work remaining when work is suspended is only relevant to show whether the contractor could have taken on replacement work during the delay period. Satellite Elec.

ii. Other Methods of Determining Home Office Overhead Expenses.—Methods other than the Eichleay formula may be used to calculate home office overhead expenses. Using a contractor's usual markup rate in preparing bids is one such method for determining home office costs during an extended contract period. Under this method, the direct cost incurred during the extended period is multiplied by the percentage markup. The result is the home office overhead damages for the extended contract.[313] A similar method is the use of a fixed markup rate specified in the contract. For example, the FDOT has a standard clause that contains the following formula:[314]

$$D = \frac{A \times C}{B}$$

Where: A = original contract amount
B = original contract time
C = 8%
D = Average overhead per day.[315]

The Colorado Department of Transportation has a standard clause that determines home office overhead for the extended contract period by adding 10 percent of the total cost of additional wages for nonsalaried labor as a result of the delay and the cost of additional bond, insurance, tax, equipment costs, and extended job site overhead. No additional home office overhead expenses are allowed.[316] Instead of a fixed percentage rate, the overhead clause may contain a declining scale. As the value of the direct costs increase, the allowance markup percentages on direct costs decrease.[317]

Home office overhead claims usually arise because work is suspended or delayed, not because the duration of the contract is extended by added work. Contractually-fixed markups do not address home office expenses where work is suspended because no work is performed during the suspension period, and the only direct costs that are being incurred are idle equipment on standby, field facilities, and perhaps field supervision. Those costs may form an inadequate base for determining home office overhead costs during the suspension period. In this situation, some other method must be used to calculate unabsorbed overhead, if the *Eichleay* formula is not used. Most methods require assistance from accountants or other financial experts in analyzing the contractor's books and records.[318]

Judicial tuning of the *Eichleay* formula may make it more palatable to owners. Limiting use of the formula to situations where the contractor cannot take on replacement work,[319] but must "standby" still gives the owner some options. If the delay could be extensive, the owner can tell the contractor to seek other work until the problem causing the delay can be resolved. The owner may also have the option of terminating the contract for convenience, where the contract contains a termination for convenience clause. This option allows the owner to avoid further delay damages, which may be cheaper than allowing the damages to continue.

6. Delay and Disruption Damages

Delay and disruption are events occurring during contract performance that affect the work.[320] Although not synonymous, a delay may disrupt work and a disruption may delay contract performance. But the damages that flow from delay and disruption are different. Delay damages typically include extended overhead, both in the home office and field; idle equipment during standby; and escalated labor and material costs due to inflation. The damages that flow from disruption are loss of productivity and usually increased labor costs due to inefficiency. To recover delay damages, the contractor must show that the delay extended the project beyond the scheduled completion date or an earlier completion date, if the contractor can prove that it intended to finish early and was prevented from doing so.[321] It is not necessary to show that project completion was delayed to establish damages for disruption. The "ripple" effect refers to the impact that one contract has on other contracts and is considered as consequential damages and not recoverable in a suit for breach of contract.[322]

Co. v. Dalton, 105 F.3d at 1420 (96.7 percent of the work had been completed when the contract was suspended; the value of the remaining work was less than $30,000).

[312] *See supra* note 316, for states where Eichleay has been used to compute delay damages. *See also* note, *Home Office Overhead as Damages for Construction Delays*, 7 GA. L. REV. (1983).

[313] A.T. Kelmens & Sons v. Reber Plumbing & Heating Co., 139 Mont. 115, 360 P.2d 1005, 1011 (1961).

[314] Standard Specification 5.12.6.2 (2000).

[315] The amount calculated by this formula includes job site overhead as well as extended home office overhead. Standard Specification 5.12.6.2 (2000).

[316] Standard Specification 109.10 (1999).

[317] *See* Reliance Ins. Co. v. United States, 931 F.2d 863, 865 (Fed. Cir. 1991) (10 percent overhead on first $20,000, 7 ½ percent overhead on next $30,000, and 5 percent overhead on balance over $50,000).

[318] *See e.g.*, Manshul Constr. Corp. v. Dormitory Auth. of New York, 79 A.D. 2d 383, 436 N.Y.S. 724, 730 (1981). Based on proof, the following formula was used: (1) total home office overhead, (2) minus the amount of home office overhead allocated to other contracts, and (3) multiplied by the percentage of the owner's liability as determined by the jury (hence 75 percent) for delaying completion beyond the contract completion date.

[319] Melka Marine, Inc. v. United States, 187 F.3d 1370, 1376–77 (Fed. Cir. 1999).

[320] A changes clause may entitle a contractor to an equitable adjustment for the effect that a change has upon unchanged work. However, under most DSC clauses—an exception is the standard federal construction clause—impact costs are not allowed. *See* Subsections A and B of § 5, *supra*.

[321] *See* Subsection 5.C.3, *supra*.

[322] Smith v. United States, 34 Fed. Cl. 313, 326 (1995). The only federal construction case where "ripple" damages were

The nexus between entitlement and damages is causation. It ties entitlement to damages and establishes the effect that the event had upon contract performance. For example, assume that a highway construction contract provided that a bridge, to be constructed under another contract, would be available to the contractor on September 1. The bridge provides access for grading equipment to the western portion of the project site. The bridge is not available until October 1. The project completion date is extended 1 month. The contractor is on standby during September and has a claim for idle equipment and extended overhead. The three elements of a claim have been established: breach or entitlement (bridge not available on September 1 as promised); damages (extended overhead and idle equipment); and causation (unavailability of the bridge caused the damages. If the bridge had been available, the equipment would have been working, not idle, and the project would not have been delayed).

Now assume that the contractor was tied up on another, separate project and even if the bridge had been available, the project would still be delayed. In short, a concurrent delay[323] has occurred. The owner delayed the contractor and the contractor delayed itself. Neither party can recover damages from the other for the delay. Assume now that the equipment is on-site on September 1 and goes on standby, but because of heavy rain, part of September is too wet to perform earthwork. Thus, there are some days in September when the equipment would have been idle. Also, the project completion date would have been extended by those days in September that were unworkable. Under this scenario, the owner would only be partially responsible for the delay. A simple case. The only thing that might be in dispute, other than equipment standby rates and overhead damages, is whether certain days were or were not workable. No scheduling analysis is needed to identify concurrent delays and other events that could affect causation.

Now assume that a project involves over 3000 construction activities performed by the general contractor and nine subcontractors. Assume further that the project was scheduled for completion in 2 years but took 3. Assume that the contractor claims: (1) that the project was mismanaged by the owner's construction manager, (2) that the plans contained numerous errors, (3) that DSCs were encountered, (4) that numerous unilateral change orders were issued that remain in dispute, (5) that the owner's representatives were unreasonably slow or missed turn-around dates in reviewing shop drawings and other submittals, (6) that the owner's representatives were unreasonably slow in responding to the contractor's requests for information about plan clarifications, and (7) that there was over-inspection and other owner interferences with the work. Assume the owner's construction manager denies the contractor's allegations and claims that the contractor's wounds and problems were self-inflicted, (8) assume the owner's architect/engineer (designer) denies that the plans are defective and claims that the requests for information were submitted only to further a claim that the contractor intended to make from the outset of the project, and (9) assume the subcontractors, several of whom have filed bankruptcy, have submitted claims to the general contractor, who has passed them on to the owner.

The claim is for breach of contract, delay, disruption and other impacts on the work, extra work caused by defective plans, DSCs, and remission of liquidated damages. There are also claims for lost opportunities, business destruction, and consultant and attorneys' fees. The contract and the law recognize concurrent delay as a defense to delay claims. The DSCs clause in the contract does not allow impact damages for the effects of the condition upon unchanged work, but changes clauses may allow such damages unless the contract contains a "no-pay-for-delay" clause. This is a large, complex claim and will require a detailed causation analysis using a CPM to assign responsibility for delay, and determine which clause will be enforceable.

7. CPM Schedules

a. CPM Scheduling

A CPM schedule graphically depicts the sequence and duration in which certain work activities must be performed to complete the project within the time specified in the contract. The contractor estimates the order and duration of each important work activity. This estimate is then programed by a computer, which produces a schedule showing each critical work item. The line on the schedule depicting those activities, their durations, and their interdependencies is the critical path.[324] The critical path is not rigid. It may change as conditions change during contract performance. For example, noncritical items of work may become critical if they are unduly delayed, affecting the critical path.

Originally, CPM scheduling was developed as a management tool to assist both owners and contractors. CPM scheduling allowed contractors to plan and control

allowed is Ingalls Shipbuilding Div., ASBCA No.17579, 78-1 BCA ¶ 13,038 (1978). Recovery was permitted only because of the specific language contained in the Suspension of Work clause. Smith v. United States, 34 Fed. Cl. at 326.

[323] *See* Subsection 5.C.2.C, *supra*.

[324] Haney v. United States, 230 Ct. Cl. 148, 676 F.2d 584, 595 (Ct. Cl. 1982) (describing the critical path method). The durations shown in the schedule to perform critical activities shows early and late starts and early and late finishes for those activities. Any additional or spare time between the time necessary to complete the activity on schedule is usually referred to as float time, but using up the float will not delay the scheduled completion of that activity. One view is that neither the contractor nor the owner own float; it exists for the benefit of the project and is available to either party. The owner can issue a change order, but does not need to grant a time extension if the duration of the float is adequate to cover the change. The contractor can use the float as needed to reallocate resources.

their work with more precision and reliability than they could using a bar chart.[325] CPM scheduling allowed an owner to determine whether the contractor's plan for performing the work would allow the project to be completed within the time specified in the contract. It also allowed both the contractor and the owner to monitor the work as construction progressed to determine if the work was on schedule and identify potential problems that could delay completion of the project.[326]

b. The Use of Scheduling Analysis for Delay and Disruption Claims

CPM scheduling has been used to analyze delay and disruption claims. For delay claims, the contractor has to show that the event causing the delay actually delayed work on the critical path.[327] The schedule analysis focuses on comparing two project schedules: The "as-planned" schedule (the schedule the contractor intended to follow in constructing the project), and the "as-built" schedule, which shows how the project was actually constructed. The comparison identifies project delays. Once delays are identified, the cause of the delay can be analyzed and responsibility for the delay determined. This is the "but-for" schedule, which shows how the project would have progressed had the events causing the delay not occurred.[328] In preparing this schedule, it is necessary to determine what activities have been delayed and the extent of the delays. The analysis should address any concurrent delay.[329] This can be done by identifying delays that are not the owner's fault. The "but-for" schedule must be accurate.[330] Disruption may be proved by a similar analysis. The "as-planned" and "as-built" schedules can be compared to show the difference between how the work should have been performed and how it was actually performed. This allows the analyst to focus on the events that caused the disruption and the extent or duration of the disruption. Scheduling analysis requires the use of experts.

The contract should require the contractor to furnish the owner a complete scheduling and plotting software package used by the contractor in preparing the claim. The contract should provide that the software package is licensable by the owner to avoid copyright disputes. The contract should also require a copy of a floppy disk containing the contractor's progress schedule data files as part of its original schedule submittal. The data files contained in the floppy disk should be sufficiently complete to allow an independent analysis of the schedule using the scheduling software package. A contractor who claims delay damages should be required to show how and the extent to which the critical path was delayed. The owner should be in the position of reviewing whether the claim is supported, and not in the position of trying to determine how the various claim events impacted the critical path. Justifying the claim is the contractor's responsibility, not the owner's. Failure to provide this information should be reason for rejecting the delay claim.

> In light of the massive effort of appellant's delay expert (findings 147), appellant clearly could have reconstructed and inputted the change order information at the proper times into the CPM schedule had appellant prepared and maintained proper records as to when the change order and constructive change work had been performed, (finding 167). Appellant's failure to prepare and maintain these records is clearly inexcusable in light of the clear contract requirements that this type of information be provided to maintain the accuracy of the CPM schedule (finding 16 ¶ 1.4 & ¶ 15). Accordingly, appellant's delay claims cannot be granted.[331]

8. Consequential Damages, Other Costs, and Profit

a. Consequential Damages

When a project is delayed by the owner, the contractor may make a claim for lost profits on other projects that the contractor was unable to bid because of the delay. The contractor may assert that the delayed project tied up its bonding capacity, preventing it from bidding other projects where bonding was required. To support its claim, the contractor may submit a list of projects that it intended to bid, its success rate in submitting winning bids, and its profit history. Generally, such claims are denied as too speculative because they are based on assumptions or possibilities, not probabilities.[332]

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[325] Bar charts do not depict the interdependencies between critical activities, a feature necessary in scheduling work in large, complex projects involving numerous activities.

[326] Harp, *supra* note 263, at 35–36.

[327] Neal & Co. v. United States, 36 Fed. Cl. 600, 643–44 (1996).

[328] The as-built schedule is a historical fact. It shows how the project was actually constructed and is prepared from project records and interviews with project personnel. The as-planned schedule is a projection of what the contractor thought would occur with respect to construction of the project, and not a historical fact like the as-built schedule. The but-for schedule depicts how the project would have been constructed but for the owner's delays. *See* Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. 516, 550–51 (1993).

[329] Concurrent delay is discussed in § 5.C.2.d.

[330] Edwin J. Dobson, Jr. v. Rutgers, State Univ., 157 N.J. Super, 357, 384 A.2d 1121 (1978).

[331] Santa Fe Eng'rs, ASBCA Nos. 24578, 25838, and 28687, 94-2 BCA ¶ 26,872, at 133, 753 (1994).

[332] Manshul Constr. Corp. v. Dormitory Auth., 111 Misc. 2d 209, 444 N.Y.S.2d 792, 803 (1981) (a case of first impression in New York). *See also* Golf Landscaping, Inc. v. Century Constr. Co., 39 Wash. App. 895, 696 P.2d 590 (1984); United States v. Merritt Meridian Constr. Corp., 95 F.3d 153, 161 (2d Cir. 1996). In Manshul Constructions, the court characterized the contractor's assumptions that it would obtain other contracts and make a profit as wishful and too speculative to stand as a matter of law, 444 N.Y.S.2d at 803–04. *See also* Land Movers, Inc. and O.S. Johnson-Dirt Contractors (JV), ENGBCA No. 5656, 91-1BCA ¶ 23,317, at 14–15 (1990), (Board said that it was unaware of any Board or federal court decision where

Recovery for lost profits due to lost business opportunities, however, has been allowed when such damages were reasonably foreseen and contemplated by the parties when the contract was made, are a probable consequence of a breach, and can be proven with reasonable certainty.[333] An owner seeking an order from a court summarily dismissing a lost profits or lost opportunities claim should focus on the remote and speculative nature of such damages, forcing the contractor to show that they were contemplated by the parties when the contract was let, that they are a probable consequence of the breach, and that they can be proven with reasonable certainty. If the contractor cannot make that showing, the claim should be dismissed as a matter of law.[334]

Contracts may contain clauses barring consequential damages.[335] Inclusion of this type of clause serves two purposes: First, it bars lost profit claims and other consequential damage.[336] Second, inclusion of the clause clearly establishes that consequential damages were eliminated by the parties as a probable consequence of a breach when the contract was signed. As noted earlier, this is an element (among others) that the contractor must prove to recover lost profits.

b. Financing Costs

In the absence of a clause in the contract or a statute barring recovery, interest paid on money borrowed to finance the work may be recovered, if the contractor can prove that the money was borrowed solely because of owner-caused delays and extra work.[337] To recover, the contractor must show that interest was paid to an independent entity, such as a bank. In other words, the contractor cannot recover interest on funds that it furnished to itself to finance the extra work or delay costs.[338] The contractor must be able to trace the interest paid for the borrowings,[339] and prove that the borrowed funds were actually used to finance the extra work or delay costs caused by the owner.[340] Recovery will be denied if the contractor cannot segregate the interest paid on the borrowings from the interest paid on its general line of credit.[341]

c. Prejudgment Interest

Recovery of prejudgment interest may be allowed when the claim is liquidated[342] or sovereign immunity does not apply.[343] Damages are not liquidated where the amount owed requires determination by a jury.[344]

Prejudgment interest, when owed, runs from the date on which payment is due until it is paid.[345] Under the Contract Disputes Act,[346] federal agencies are required to pay interest on contract claim settlements or awards from the date the contracting officer receives a properly certified claim until the claim is paid.[347] Some states have adopted "prompt payment" acts. Under these acts, a state agency is liable for interest, at a specified rate, if it fails to make a payment due the contractor within 30 days after receiving the contractor's invoice.[348]

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consequential damages were allowed); Zook Bros. Constr. Co. v. State, 171 Mont. 64, 556 P.2d 911, 918 (Mont. 1976) (loss due to contractor having to sell its equipment not allowed).

[333] Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 151 (1854); Lass v. Mont. State Highway Comm'n, 483 P.2d 699, 704 (Mont. 1971); Larsen v. Walton Plywood Co., 65 Wash. 2d l, 390 P.2d 677, 687 (1964); Gouger & Veno, Inc. v. Diamondhead Corp., 29 N.C. App. 366, 224 S.E.2d 278, 279 (1976).

[334] Manshul Constr. Corp. v. Dormitory Auth*;* 444 N.Y.S.2d at 802–04; Golf Landscaping, Inc. v. Century Constr. Co., 696 P.2d at 594–95.

[335] The Standard Specifications used by Colorado (Spec. 109.10 (1999)), Florida (Spec. 5-12.10 (2000)) and Washington (Spec. 1-09.4.4 (2000)) are examples of this type of clause.

[336] The clause may enumerate the kinds of consequential damages that are barred. For example, the Florida Standard Specification (5-12.9) provides that there is no liability for consequential damages including, but not limited to: loss of bonding capacity, loss of bidding opportunities, loss of credit standing, loss of financing, insolvency, loss of other work, cost of financing, and interest paid on money borrowed to finance the job.

[337] Gevyn Constr. Corp. v. United States, 827 F.2d 752, 754 (Fed. Cir. 1987); Bell v. United States, 186 Ct. Cl. 189, 404 F.2d 975, 984 (Ct. Cl. 1968); Drano Corp. v. United States, 594 F.2d 842, 847 (Ct. Cl. 1979); Westland Constr. Co v. Chris Berg, Inc., 35 Wash. 2d 284, 215 P.2d 683, 690 (1950). *But see* 48 C.F.R. § 102.

[338] Gevyn Constr. Corp. v. United States, 827 F.2d at 753–54.

[339] Neb. Public Power Dist. v. Austin Power, Inc., 773 F.2d 960, 973 (8th Cir. 1985).

[340] Neb. Public Power, *id.*; Cal-Val Constr. Co. v. Mazur, 636 S.W.2d 391, 392 (Mo. App. 1982).

[341] State Highway Comm'n v. Brasel & Sims Constr. Co., 688 P.2d 871 (Wyo. 1984).

[342] A claim is liquidated when the amount of the claim can be determined without reliance on opinion or discretion, Simes Constr. Co. v. Wash. Public Power Supply System, 28 Wash. App. 10, 621 P.2d 1299, 1304 (1980), or by reference to a fixed standard in the contract such as Force Account provisions, Fiorito Bros. v. Department of Transp., 53 Wash. App. 876, 771 P.2d 1166, 1167 (1989).

[343] Architectural Woods, Inc. v. State, 92 Wash. 2d 521, 598 P.2d 1372, 1375 (1979). (Sovereign immunity waived by entering into the construction contract). But a state may expressly preclude liability for prejudgment interest. P.T. & L. Constr. v. State Dep't of Transp., 108 N.J. 539, 531 A.2d 1330, 1344 (1987).

[344] Green Constr. Co. v. Kan. Power & Light Co., 1 F.3d 1005, 1010 (10th Cir. 1993).

[345] Paliotta v. Department of Transp., 750 A.2d 388, 394 (Pa. Commw. 1999); Department of Transp. v. Anjo Constr. Co., 666 A.2d 753, 760 (Pa. Commw. 1995).

[346] 41 U.S.C. § 611.

[347] Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. 516, 562 (1993).

[348] For example, *see* Alaska Statute § 36.90.200.

d. Bond and Insurance Costs

Increased bond and insurance costs caused by owner delay are compensable[349] unless recovery is precluded by a "no-pay-for-delay" clause in the contract.[350] Increased bond and insurance costs may be included as part of an equitable adjustment under a changes clause where added work or compensable delay extends the contract's duration.[351]

e. Attorney Fees

Under the "American Rule," each litigant bears its own attorneys' fees.[352] However, there are exceptions to the rule. One exception is where the contract allows fees to the prevailing party.[353] Another exception is where fees are allowed by statute.[354] In addition to contractual provisions and statutes as grounds for awarding fees, courts have awarded fees based on equity,[355] or for federal construction where legal fees are incurred by the contractor as costs of performing the contract, as opposed to costs associated with prosecuting a claim.[356] This rule has been applied in state public works disputes.[357]

f. Claim Preparation Costs

The rule that attorneys' fees are not allowed in claims against the Government applies to claim preparation costs.[358] Legal, accounting, or consulting costs incurred in connection with the prosecuting of a Contract Disputes Act claim are unallowable because they were not incurred to benefit contract performance. However, like attorneys' fees, consulting costs incurred during contract performance that result from changes ordered by the Government may be recoverable.[359] Alaska follows this view.[360]

g. Profit and Markup

A contractor is entitled to a reasonable profit on the cost of performing extra work,[361] even if the original contract price (bid) did not contain any profit.[362] The rate of profit allowed may consider the risks and difficulties involved in performing changed or extra work.[363] The contract may specify the profit rate or specifically preclude profit on certain costs, such as delay costs incurred under a Suspension of Work clause.[364]

A contractor may also recover overhead allocable to direct costs incurred due to owner-caused delays or extra work. Overhead is usually calculated as a percentage of the direct costs, but does not include any recovery for unabsorbed or extended home office overhead. Those costs are calculated separately as discussed earlier.[365] A contractor may also be entitled to a markup on the award of extra costs to its subcontractor on a pass-through claim.[366]

D. CONSTRUCTION CONTRACT LITIGATION: TRIAL PREPARATION AND STRATEGIES

1. Introduction

Construction claims seem inevitable.[367] Virtually every construction project has disputes over money, time extensions, or both. The disputes are usually resolved by the parties through negotiations. When they

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[349] Luria Bros. & Co. v. United States, 177 Ct. Cl. 646, 369 F.2d 701 (Ct. Cl. 1966).

[350] *See* § 5.C.

[351] Harp, *supra* note 262, at 32.

[352] Urban Masonary Corp. v. N&N Contractors, 676 A.2d 26, 33 (D.C. App. 1996). Alaska follows the "English Rule," which allows the prevailing party to recover attorneys' fees from the losing party. Ryan v. Sea Air, Inc., 902 F. Supp. 1064, 1070 (D.C. Alaska 1995) (applying Alaska law).

[353] Urban Masonary Corp. v. N&N Contractors, *id.*

[354] Equal Access to Justice Act, 28 U.S.C. § 2412; *see* Mega Constr. Co. v. United States, 29 Fed. Cl. 396, 479 (1993); *See also* WASH. REV. CODE § 39.04.240 (allows the prevailing party (either the contractor or the agency) to recover reasonable attorneys' fees in a public works construction contract dispute).

[355] Public Utility Dist. No. 1 v. Kottsick, 86 Wash. 2d 388, 545 P.2d 1, 3 (1976) (bad faith or wantonness).

[356] Appeal of S & E Contractors, AEC BCA No. 97-12-72, 74-2 BCA ¶ 10, 676 (1974) at 50,695 (fees allowed when they are a necessary expense in carrying out changes to the contract ordered by the Government). But if the fees are not performance related, they are not recoverable. Singer Co. v. United States, 568 F.2d 695, 720–21 (Ct. Cl. 1977).

[357] Anchorage v. Frank Coluccio Constr. Co., 826 P.2d 316 (Alaska 1992).

[358] Singer Co. v. United States, 568 F.2d 695, 720–21 (Ct. Cl. 1977).

[359] Bill Strong Enters. v. Shannon, 49 F.3d 1541, 1549 (Fed. Cir. 1995). This case traces the history of decisions and regulations addressing the allowability of legal and consulting costs related to federal construction contracts.

[360] *See* Anchorage v. Frank Coluccio Constr. Co., 826 P.2d at 330 (applying the rule in Singer that fees incurred in prosecuting a claim that is not associated with contract performance are not recoverable; citing and quoting from a federal Board of Contract Appeals decision); Fiorito v. Goerig, 27 Wash. 2d 615, 179 P.2d 316, 319 (1947) (consultant fees not recoverable in the absence of express contractual or statutory provisions permitting recovery).

[361] United States v. Callahan Walker Constr. Co., 317 U.S. 56, 61, 63 S. Ct. 113, 87 L. Ed. 49 (1942).

[362] Keco Indus., ASBCA 15184, 72-2 BCA ¶ 9576, at 44, 733-4 (1972) (5 percent profit allowed).

[363] American Pipe & Steel Corp., ASBCA 7899, 64 BCA ¶ 4058, at 19,904 (1964).

[364] *See* 48 C.F.R. § 52.242-14(b).

[365] *See* § 6.C.5.d., *supra*.

[366] Pa. Dep't of Transp. v. James D. Morrison, Inc., 682 A.2d 9, 16 (Pa. Commw. 1996). Subcontractor pass-through claims are discussed in § 6 B.4., *supra*.

[367] This chapter incorporates *Trial Strategy and Techniques in Contract Litigation*, by K.T. Hoegestedt and Orrin F. Finch, published in SELECTED STUDIES IN HIGHWAY LAW (Transportation Research Board 1979).

are not settled, the next step may be litigation or arbitration.[371]

While the rules for trying cases may vary from jurisdiction to jurisdiction, the litigation process is generally the same in most jurisdictions. The contractor, who is typically the plaintiff, files a complaint in court against the owner for damages.[369] The owner files a response in the form of an answer denying the claim.[370] The answer may assert affirmative defenses,[371] which if proven would bar or limit the claim. The answer may also include a counterclaim.[372]

Once the case is at issue and the parties have formally stated their positions, pretrial discovery takes place, usually through interrogatories, document production requests, and depositions.[373] In addition, either party may try to narrow the case and define the issues that will be tried through requests for admissions and pretrial orders.[374] Pretrial motions may be made to dismiss claims or even to dismiss the lawsuit in its entirety.[375] Motions in limine may be made to exclude evidence and prevent witnesses from testifying about matters that are not admissible.[376]

Consideration should be given to requesting the court to preassign a large, complex construction case to one judge for all pretrial motions and the trial. In some jurisdictions this may be automatic, but in others it may require a motion by the party to have the case preassigned. Consideration should also be given to bifurcating the case into a liability phase and then a damage phase, if liability is found.[377] Counsel should consider the use of summaries where the documents are too voluminous to be conveniently examined in court.[378] In complex or extended cases, a trial judge may permit the jurors to take notes. If the jurors are permitted to take notes, the jurors should be instructed by the court to be guided by their own individual recollections of the evidence and not be swayed by one juror who took copious notes. Finally, care should be taken in drafting jury instructions. Jury instructions must do more that just accurately state the law; they must also be understandable. "A charge ought not only be correct, but it should also be adapted to the case and so explicit as not to be misunderstood or misconstrued by the jury."[379]

When discovery is completed, the case is ready for trial and a trial date is set.[380] The keys to success in litigation are often expressed in two words: preparation and credibility. These keys are interrelated. A solid strategy is also important in trying the case. Construction litigation often involves a mass of details and acts that may impact numerous construction activities. It is therefore essential that the case be simplified and presented in a way that will persuade a judge, jury, or an arbitrator that the agency's position is fair and legally correct.

Careful preparation is also important to avoid overpreparing the case, which can waste time and money, and under-preparation, which can be disastrous. The construction trial lawyer should develop a plan at the outset of the case to guide case preparation between these two extremes. The purpose of this subsection is to suggest ways that will assist the trial lawyer in preparing and trying the case. While the focus of this subsection is on defending claims against public owners, much that is said here may also be used by owners in prosecuting claims against contractors.

2. Trial Preparation—Organizing the Case

There are several preliminary steps in organizing the case. The first step is understanding the claim. A good place to start is with the claim that the contractor filed with the agency as part of the administrative claim process.[381] This is especially true when the contract requires that the claim contain sufficient information to ascertain the basis and the amount of the claim.[382] If the claim lacks the required detail, it may be subject to dismissal where compliance with the claims specification is a contractual condition precedent to judicial re-

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[371] *See* Subsection 6.A, listing the "Final Remedy" established for state transportation agencies.

[369] A similar process is used to initiate arbitration. For example, if the contract specifies arbitration by the American Arbitration Association (AAA), arbitration is initiated by filing a demand for arbitration with the AAA.

[370] A party may file an answer in response to a demand for arbitration. *See* Construction Industry Arbitration Rules and Mediation Procedures, Rule R-4(b) (American Arbitration Association 2003) [AAA Constr. Rules]. The Rules may be obtained from the AAA Customer Service Department, 140 W. 51st Street, New York, N.Y. 10020-1203, telephone: (212) 484-4000, fax no: (212) 765-4874. AAA rules are also available on AAA's Web site at www.adr.org.

[371] Subpart 6.D.6.b *infra* discusses affirmative defenses. The appendix to this Subsection lists affirmative defenses that may apply.

[372] *See, e.g.,* FED. R. CIV. P. 13; AAA Constr. Rule R-4(b).

[373] Discovery methods are discussed in Subsection 6.A.4.a.

[374] Requests for admission and pretrial motions are discussed in Subsections 6.D.4.a and 6.D.6.c respectively *infra*.

[375] *See* FED. R. CIV. P. 56.

[376] *See* G.O. Kornblum, *The Voir Dire, Opening Statement, and Closing Argument*, 23 PRAC. LAW. No. 7 at 1, 21 (1977).

[377] FED. R. CIV. P. 42 and advisory committee note to 1966 amendment.

[378] *See* FED. R. EVID. 1006.

[379] DiGioia Bros. Excavating Co. v. Cleveland Dep't of Pub. Util., 135 Ohio App. 3d 436, 734 N.E.2d 438, 453 (1999) (citing Aetna Ins. Co. v. Reed, 33 Ohio St. 283, 395 (1878)).

[380] In some jurisdictions, a trial date is not set until the parties certify that the case is ready for trial. If the case has been preassigned, a trial date is usually set before discovery is completed. Usually, the court will set a discovery cut-off date some time in advance of the trial date. All discovery must be completed by that date, and extension of the discovery period requires court approval.

[381] *See* § 6.A.3., Administrative Claims Procedures and Remedies, *supra*.

[382] *See* generally the discussion of the Florida claims specifications in Subpart 6.A.3.a *supra*.

lief.[383] Another source of information is the complaint, although most complaints contain broad allegations and few specifics. The attorney should also review the final acceptance papers, where the contract requires the contractor to reserve its claims and to release those claims that are not reserved.[384]

After reviewing the claim documents, the next step is usually a meeting with agency personnel to discuss the claim.[385] The meeting has several purposes. The primary purposes are to obtain more information about the claim, help develop the agency's position in the lawsuit, answer questions, explain legal procedures, and explain what will be expected of those involved. A secondary purpose is to refresh and reinforce the knowledge and memories of others through a group discussion. The meeting is also an opportunity for the attorney to make preliminary judgments about whom he or she could call as witnesses in the case.

The meeting should be orderly, but also uninhibited. Project personnel should be encouraged to speak freely, or even refute what others have said when they disagree. This too serves several purposes. First, it provides an opportunity to resolve differing recollections or interpretations of events that occurred during construction. Second, it is also an opportunity to assess the relative merits of the agency's position with respect to the claim. It is far better to learn about problems with the agency's position in a meeting like this than in a deposition or, even worse, at trial.

Consideration should be given to recording the meeting. If the meeting is recorded, the attorney can listen later to the recording with a greater understanding of what was said. Often statements made during a meeting become more meaningful after the attorney has become more familiar with the facts of the case. Normally, conversations between agency personnel and the agency's attorney, in preparation for litigation, should be privileged under both the attorney-client privilege and the attorney work-product privilege. But as a practical matter, the attorney should not automatically assume that such conversations are privileged and therefore immune from discovery. Instead, the attorney should carefully review the precedents of his or her jurisdiction before deciding whether to memorialize conversations in recordings.[386]

a. The Claims Summary

Following the meeting, the attorney should have enough information to develop a "claim summary" for the attorney's trial notebook. The summary should contain the following information and be inserted looseleaf in the notebook to allow pages to be added or replaced as the attorney becomes more familiar with the facts. The summary may contain:

- A brief description of the project, together with a simple drawing or sketch illustrating the construction features involved in the claim.
- A chronology of the project showing: (1) when the contract was executed, (2) when the contractor was given notice to proceed, (3) when the contractor began work, (4) when substantial completion occurred, and (5) when final acceptance occurred.
- The number of days that the contract overran, if applicable.
- The bid price.
- Significant change orders.
- Time extensions.
- Edition of the Standard Specifications that applies to the contract.
- Significant plan sheets from the contract plans and why they are significant.
- Any amendments to the Standard Specifications.
- Any permits issued by governmental agencies that affect construction.
- Pertinent special provisions.
- A reference to pertinent photos and videos, what they show, and who has custody.
- Significant diary entries, inspector's daily reports, memoranda, and letters identified during the meeting with project personnel.
- List of significant subcontractors and material suppliers who may have information pertinent to the claim, but do not have pass-through claims.
- Job site arrangements, such as material storage areas, haul roads, and access restrictions that may affect construction.
- List of contractor personnel whom agency personnel believe may have information pertinent to the claim and a brief description of what that information entails.
- Significant weather days by date that affected construction.
- Consultants who participated in the preparation or review of the contract plans and specifications, soils reports, and shop drawings, as they pertain to the claim.
- Brief statement of the contractor's position regarding each claim.
- Brief statement of the owner's position regarding each claim.
- Pertinent case law and statutes (citations).

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[383] Metropolitan Dade County v. Recchi Amer., Inc., 734 So. 2d 1123 (Fla. App. 1999) (contractor must follow contract claim procedures prior to commencement of suit). The contract should also preclude the contractor from increasing the amount of the claim or the basis for entitlement after the claim has been filed. *See* Florida Standard Specification 5-12.3 (contractor claim is limited to amount and basis for entitlement that is stated in written claim, and may not be amended in court proceeding or arbitration).

[384] California Department of Transportation Standard Specification 9-1.07B (2002) and New York Standard Specification 109-14 (2002) are examples.

[385] The meeting often includes a visit to the project site, which is usually helpful in understanding the claim.

[386] The subject of attorney-client and work-product privileges is discussed in Subsection 6.D.2.e. *infra*.

• Project personnel and their connection with the claim, general observations about them from the meeting, and their phone numbers and fax number.

Typically, the next step in the process is to file an answer to the complaint. This pleading is the principal vehicle for stating the owner's position in the case. Under most court rules, it must be a section by section response admitting or denying each numbered paragraph of the complaint. The answer may also contain affirmative defenses and counterclaims. Affirmative defenses may include any factual or legal defense that is appropriate.[387] Failure to assert a mandatory counterclaim (one involving the same contract that gives rise to the claim) in the answer may waive the counterclaim.[388]

b. The Litigation Team

There are some initial considerations in organizing the litigation team and developing a litigation plan. Construction litigation can be very expensive. Because it can be so expensive, an owner should consider whether the case can be resolved short of trial through further negotiations or mediation.[389] If so, the initial preparation of the case should be limited to those steps necessary for effective mediation. Experts should be retained early, but given limited assignments necessary for the mediation process. Discovery should be limited to a few key depositions, or there even should be a moratorium on depositions, except perhaps for record depositions for subcontractors, suppliers, or other nonparties.[390] These steps are important in achieving a cost-effective resolution of the case. If mediation is not successful, then the more expensive and laborious discovery and case preparation can begin. Typically, in a large construction case, the litigation team will be composed of a lead trial counsel, other attorneys as necessary, paralegals, support staff, and experts who can either be in-house experts, retained experts, or both.

c. Locating and Retaining Experts

Most complex construction cases will require the use of expert testimony. Claims consultants are usually retained at an early stage to assist the litigation team in developing an overall trial strategy, as well as assist in more discrete tasks such as developing issues for document coding and assisting in the preparation of discovery requests. The claims consultant can also assist in the selection of other experts needed to cover gaps in the case.

In selecting an expert witness, it is important, even critical, to keep in mind that the expert will probably testify if the case goes to trial. Therefore, the person selected must not only be an expert and qualified to testify, but the expert must be a good witness, someone who will impress the judge or jury. In addition to being credible, the expert should be experienced in litigation and be able to think and handle himself or herself under cross-examination. The expert should be able to present ideas clearly and persuasively in plain language. Ideally, the expert should be able to make the complex simple and readily understandable by a judge or jury. Above all, the expert should be able to present opinions in a comprehensible, convincing, and understandable manner on direct examination and defend them in the same way under hostile cross-examination.

Where do you find a claims consultant to help defend the claim? One source is to ask other lawyers whom they have retained in similar cases. Another source is a national list of construction experts published by the American Bar Association. The list will usually include several attorneys as references. In checking with the references, you should ask each attorney whether the expert testified for that attorney. If not, obtain from the expert the names of attorneys for whom the expert has testified.[391]

Some considerations in retaining an expert include the following. First, always retain the individual who will testify, not a firm that will select the witness. The agreement for consultant services can be with the firm, but the agreement should specify the person that will testify, if requested by the attorney.[392] For example, the standard agreement used by the Washington State Department of Transportation provides that, "the Consultant shall designate (*name of expert*) to provide factual and expert consultation to owner and testify as an expert witness, if so designated by owner's counsel." Second, the agreement should also provide that work and work product produced by the consultant shall be deemed confidential until the owner desires to designate the consultant as an expert witness: All information developed by the consultant should be confidential and should not be revealed by the consultant to any other person or organization without the express consent of the owner or by court order.

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[387] The Appendix to this Subsection contains a list of affirmative defenses.

[388] *See* FED. R. CIV. P. 13.

[389] Mediation is discussed in § 7.

[390] Records can be obtained from nonparties voluntarily or by subpoena duces tecum at a records deposition. Federal Rule of Civil Procedure 45 protects nonparties by requiring them to attend a deposition not more than 100 miles from where they reside, are employed, or transact business in person.

[391] M. Beisman, *How To Choose a Construction Expert*, 37 PRACT. LAW. No. 7, at 19 (1991).

[392] The agreement for the consultant's services should not state that the consultant will testify as an expert witness, but only that the consultant may be asked to testify if requested by the defendant. To designate the expert as a witness in the agreement, instead of as a possible witness, raises several problems. First, it exposes the expert to being deposed because the expert is not a consulting expert who cannot be deposed until designated as a testifying expert. Second, it provides ammunition for cross-examination: Why did the unbiased expert agree to testify to his or her opinions before the expert even investigated the claim?

d. The Litigation Plan

The litigation plan is an outline identifying the key issues in the case. The issues in the outline are given numbers for use in coding and indexing documents, and form the basis for establishing a method of retrieval. The better and more complete the outline, the more efficient retrieval will be. This portion of the outline should be done by someone who has a good understanding of the case and is thoroughly familiar with a computerized litigation support system. Usually, that person is the claims consultant. At this point in the litigation, a decision should be made whether to retain an outside litigation support firm or use an in-house computer and in-house staff for coding documents with issue numbers. This presupposes that a decision has been made to use a computerized system instead of a manual index and retrieval system. An outside support firm should be used if the agency does not have experience using an in-house computer for litigation support.

The plan should also designate the attorneys and paralegals who will have primary responsibility for certain issues and for gathering and controlling documents. The plan should provide for the development of a standard form for coding and indexing the categories of information that will be stored in the computer. The form should contain a line for a Bates number[393] that has been stamped on each page of each document. The coder reviews a document and fills out the form for entry in the computer. An alternative is use of an imaging system in which documents are electronically scanned and stored on disks for later retrieval.

The plan should also provide for a chart showing various tasks that have to be performed, who is responsible for performing them, and the time allotted for performing each task. The chart can be a simple bar chart, or for the more technically inclined, a CPM chart. But whatever its form, its purpose is to provide direction for the overall team effort in preparing the case. The plan should also contain a budget estimating the cost of case preparation up to the time of trial.

e. Attorney-Client and Work-Product Privileges

The attorney-client privilege is recognized in every state.[394] Generally, the privilege applies to conversations between a government entity to the same extent that privilege would apply between a private entity and its attorney.[395] The cases recognize "the need of the government client for assurance of confidentiality equivalent to a corporation's need for confidential advice."[396] However, scholarly opinion is divided with respect to whether government entities should have the privilege.[397]

The work-product privilege protects an attorney's efforts in preparing a case for litigation.[398] The privilege extends to confidential communications between the employees of a corporation and the corporation's attorneys, where such communications are necessary in enabling the corporation to obtain legal advice and prepare for litigation.[399] The work-product privilege, like the attorney-client privilege, has been extended to government entities.[400] The privilege protects communications between an attorney and a consulting expert who will not be called to testify at trial.[401] But the privilege is waived when the expert is identified as a witness who will be called to testify,[402] or when the consulting expert's report is provided to a testifying expert.[403]

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[393] Each category in the database is represented by an eight digit number that is consecutively numbered. These numbers, which identify all documents in the computer by category, are commonly known as Bates numbers. The numbers can be coded to identify the type of document, the source from which it was obtained, the importance of the document, and whether the document is privileged. For example, all documents in the 10000000 series may be coded as contractor's documents, all documents in the 20000000 series as owner's documents, and all documents in the 30000000 series as designer (A/E) documents.

[394] Ford Motor Co. v. Leggat, 904 S.W.2d 643, 647 (Tex. 1995).

[395] California: People ex rel. Dep't of Public Works v. Glen Arms Estate, Inc., 230 Cal. App. 2d 841, 854, 41 Cal. Rptr. 303 (1964); New Jersey: Matter of Grand Jury Subpoenas Duces Tecum, 241 N.J. Super. 18, 574 A.2d 449, 454 (1989); New York: Mahoney v. Staffa, 184 A.D.2d 886, 585 N.Y.S.2d 543, 544 (1992); Ohio: State ex. rel. Thomas v. Ohio State Univ., 71 Ohio St. 2d 245, 643 N.E.2d 126, 131 (1994); Washington: Amoss v. University of Wash., 40 Wash. App. 666, 700 P.2d 350, 362 (1985); *see also* Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980); Roberts v. City of Palmdale, 5 Cal. 4th 363, 20 Cal. Rptr. 330, 853 P.2d 496 (1993) (privilege extended by statute to public entity).

[396] Matter of Grand Jury Subpoenas, *id*. at 455.

[397] *See* L.A. Barsdate, *Attorney-Client Privilege for the Government Entity*, 97 YALE L. J. 1725 (1988); Note, *The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government*, 63 B.U.L. REV. 1003 (1982).

[398] Hickman v. Taylor, 329 U.S. 495 (1947); FED. R. CIV. P. 26(b).

[399] Upjohn Co. v. United States, 449 U.S. 383 (1981); STRONG, MCCORMICK ON EVIDENCE, 87-1, at 320 (4th ed. 1992).

[400] L.M. Cohen, *Expert Witness Discovery Versus the Work Product Doctrine: Choosing a Winner in Government Contracts Litigation*, 27 PUB. CONT. L.J. 719 (1998); *see also* State ex rel. State Bd. of Pharmacy v. Otto, 866 S.W.2d 480 (Mo. App. W.D. 1993).

[401] Crenna v. Ford Motor Co., 12 Wash. App. 824, 532 P.2d 290 (1975) (non-testifying expert's opinion not discoverable based on superior court rule that mirrors FED. R. CIV. P. 26(b)(4)(A)); Morrow v. Stivers, 836 S.W.2d 424 (Ky. App. 1992).

[402] Karn v. Ingersoll-Rand, 168 F.R.D. 633, 635 (N.D. Ind. 1996) (information given by an attorney to an expert witness had to be disclosed; disclosure could not be avoided by claiming that the information was work product).

[403] Heitmann v. Concrete Pumping Machinery, 98 F.R.D. 740,742 (E.D. Mo. 1983).

3. Gathering and Managing Documents

There are several keys to the successful preparation of a large construction case. You must understand the claim, you must have a theory as to why the claim is not valid, you must have the facts to support your theory, and you must have the resources to prove those facts. This subsection focuses on obtaining documents and then organizing them so that they can be retrieved from storage, as needed, in an orderly and efficient manner for use in defending the claim.

Generally, the facts about what occurred during a construction project are found in two places: the recollections of personnel associated with the project and the project documents. Organizing and managing documents is often the most time consuming and laborious task in case preparation. This subsection offers some suggestions about where to obtain project documents and what to do with them once they are obtained.

a. Gathering Documents

Where do we get documents? The answer seems obvious: from the contractor, first, and lower tier subcontractors and materialmen that have pass-through claims or whom we suspect may have useful information. Other obvious sources are the agency's own records and those of its design consultant, if the claim is based on defective plans and specifications. Obtaining records from this latter source may require a decision by the agency as to whether it intends to make a claim against the designer for indemnification. Designers are usually reluctant to open their records to inspection by someone who intends to sue them. Often, the designer will want to know, early in the case, what the agency's position is on that issue.

Another obvious source is the records of the contractor's claim consultant, especially the software used by the consultant to generate "as-built," "as-planned," and "but-for" schedules to support delay and impact claims. The contract should require the submission of this type of information as part of the administrative claims process. If not, then this information probably cannot be obtained until the consultant is designated as an expert witness. When that designation is made, the consultant's work product is discoverable.

There are, however, some less obvious sources of information. For example, ask the project office if the contractor obtained any documents from the agency before the lawsuit or even the claim was filed. The agency should have a policy of making a copy of or keeping a record of every document furnished to the contractor after a claim has been made or a dispute has arisen. If the agency did not keep a record or copies, the information will have to be obtained through discovery, usually through an interrogatory. Counsel for the agency should contact FHWA to see if the contractor has obtained any documents from that agency through the Freedom of Information Act (FOIA).[404] Counsel should also contact other federal regulatory agencies such as the Coast Guard, the Army Corps of Engineers, or the Department of Labor about documents obtained from them under FOIA requests, when the claim involves actions by these agencies or involves matters within their jurisdiction.

Another source of information is the performance bond surety. The surety may require a contractor to make a report to the surety about the project and the contractor's basis and evaluation for claims that it has against the owner. Counsel should request the surety to furnish the information without having to resort to a subpoena duces tecum. Counsel should also check with local regulatory agencies about any documents that the contractor may have obtained from them. Counsel should also contact other bidders to see how they bid the work and if they are willing to help.

Usually other bidders or contractors on the project are reluctant to get involved, but not always. For example, in one case the second bidder testified for the State of Washington that in making its bid it included the cost of reinforcing steel bars in certain precast concrete members, even though steel bars were not shown in the plans. The contractor, who was the low bidder, claimed that it did not include the cost of steel bars in its bid because they were not shown on the plans, and that bars had to be used to prevent the concrete members from cracking when they were removed from the concrete forms. The contractor claimed additional compensation for the steel and other damages. The representative of the second low bidder was a powerful witness. His testimony helped persuade the judge that the cost of steel was incidental and should have been included in the bid price because the members could not be made without steel, and that the contractor, as an experienced concrete fabricator, should have known this.

b. Organizing the Documents

Once the documents are gathered, they can be photocopied, microfilmed, or imaged. Under this latter process, each document page is placed on a scanner, which takes an image of the document, similar to a photocopier, and stores the image on a disk. Documents that have been microfilmed can be reproduced as hard copies.

There are, however, certain steps that should be taken before the documents are stored and organized for later use. The first step is to stamp an identifying eight-digit number on the lower right hand corner of each page of each document.[405] After the documents

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[404] 5 U.S.C. § 552; *see also* O.F. FINCH and G. A. GREEN, FREEDOM OF INFORMATION ACTS, FEDERAL DATA COLLECTIONS AND DISCLOSURE STATUTES APPLICABLE TO HIGHWAY PROJECTS AND THE DISCOVERY PROCESS (National Cooperative Highway Research Program Legal Research Digest No. 33, 1995).

[405] *See* note 393 *supra* describing the Bates numbering system.

have been stamped, they should be put in chronological order. Once documents are arranged in chronological order, the next step is to develop a working set that can be used for coding the documents. This involves two more steps. The first task is to cull duplicate copies. Care must be taken in performing this task. Only duplicate copies that are identical are removed. If one copy of a memorandum is clean and the other copy has marginalia, they are not duplicates, they are separate documents. Once duplicate material is culled from the working set, the next step is to eliminate documents that clearly have nothing to do with the lawsuit. Irrelevant documents, however, should not be discarded. They should be kept in separate, chronological files in case they become relevant.

The next step in the development of a database is the method used to store and retrieve the documents in the working set. The traditional way is to store hardcopies in notebooks in numerical order and put the notebooks on shelves in the document repository. The latest method of storing and retrieving documents is imaging, or scanning the documents onto disks. The image produced by the computer on a screen or by a printer is an exact reproduction of the original document, including all notations or other marginalia. Imaging eliminates storage problems. Its disadvantage is that it is more expensive than photocopying. Its advantage is decreased storage space and greater efficiency. As technology improves, the cost of imaging should become cheaper.

The final step is to index the documents for later retrieval. Indexing can be done either by computer or manually.[406] The index should contain fields that identify the issues, the individuals, and the events and transactions that are important to the case. Indexing involves objective and subjective coding. The coding sheet used by the coder for objective coding typically contains the following fields of information.[407]

- Document Number. These are the Bates numbers stamped on the first and last page of the document. If the document is one page, only one number is used.
- Date of the document.
- Author.
- Recipient.
- Persons mentioned in the document text.
- Carbon copy recipients.
- Document type (letter, memo, diary, etc.).
- Coder.

The coding sheet may also contain fields that relate to the interpretation of a document and its relevance to the case. This involves subjective coding and may include the following fields:

- Issue(s).
- Priority (routine; hot, i.e., extremely important to the case).
- Privileged. This should identify the type of privilege involved, attorney-client, and work-product. This is useful in responding to an interrogatory asking about documents that have been withheld from production to opposing counsel and the basis for the privilege.
- Summary. This section allows the reviewer to make an abstract or summary of the document. Generally, use of this field is discouraged since the attorney will read the document. Thus, a summary in view of the time and expense to make it is usually not worthwhile.

Caution should be taken not to use too many codes, particularly issue codes. If the database becomes too complicated, it will be difficult to work with and may even fail. Access to the computer should be limited to only those who have been given passwords. Subjective coding should be done by personnel who are knowledgeable about the case and the issues.

Optical Character Recognition (OCR) is another technological feature that can be used for document control. This process can be used with documents that contain a substantial number of pages. Although each page is imaged, OCR reviews only those pages that relate to a certain subject or a particular item. OCR allows the computer to locate the specific information within the document and make it readily available for review. Once the information is coded and stored in a computer database, the system will search, sort, and provide specific information. The system can search large volumes of information in a very short period of time. It can list all documents a particular person authorized or received regarding a certain topic during a particular time frame. This is very helpful in preparing a person for his or her deposition. The computer has a perfect memory. It can access any information stored in the system. If used properly, the computer can be a great tool; if used improperly, it can be a disaster. Thus, certain things should be carefully considered before creating a litigation support system. They include:

- What information will you want from the computer system? The information the computer provides is only as good as the information given it.
- How much will the system cost? Is the cost justified in light of what is involved in the case?
- Should the claims consultant manage the documents? If not, is the agency's system compatible with any system that the consultant may be using?

Control and management of the opponent's documents involves the same process used to manage your own documents. However, there are some things that should be kept in mind. If your opponent will be numbering its documents, try to agree on a numbering sequence that does not conflict with your numbering system. If your opponent does not intend to number its documents, request permission to number them when they are reviewed. Numbering the documents is a good way of keeping track of whether all documents are produced. Review the production of the opponent's docu-

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[406] If a manual system is used, issue books can be prepared that contain all documents that pertain to each issue or to a particular witness. Documents pertaining to more than one issue or witness can be cross-referenced in the issue book.

[407] The information is objective because it can be gleaned from the document by the coder without interpretation or analysis.

ments carefully to determine whether any documents are withheld. If you are not permitted to number the documents, make an inventory of what was reviewed. This can be done with a dictating machine. If the agency and the contractor have the same document in their files, do not treat them as duplicates. Both should be put in the database. The Bates number will identify the source of the document.[408] Fields can be added to the database that relate specifically to the opponent's documents, such as the date it was produced, and whether it was part of an original production or identified in an interrogatory answer and then later produced.

The time, effort, and money spent in developing the database is wasted if the information contained in the database cannot be retrieved quickly. It is important to design the system correctly. Redesigning the system or trying to patch it up later with bandaids can be expensive and delay trial preparation.

When the records of the contractor or any adverse party are made available for inspection, they should be copied rather than simply inspected. It is often difficult to determine, in a quick inspection, the significance of a particular document. Documents that may have appeared insignificant earlier may become significant as more information is developed about the case. Technical assistance may be obtained from consultants about the types of documents that should be inspected. This information should be included in the litigation plan. This plan should list each claim, the information needed from the contractor to analyze the claim, the methodology that will be used to analyze the claim, the estimated number of hours that are needed to perform the analysis, the priority given to the task, and whether the documents have been produced. The information can be shown in a spread sheet format as follows:

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[408] *See supra* note 393.

Claim	Analysis	Estimate of Hours	Priority	Documents Required	Documents Produced
Home Office Overhead	1. Analyze General Ledger Cost Data	100	High	1. General Ledger	1. Yes
	2. Analyze Home Office Overhead Costs and Make Adjustments for Costs That are Not Time Related or Do Not Correspond to the Claimed Delay Period			2. Contractor's Explanation of Corporate Overhead Allocations in Claimed Overhead Pool	2. No
	3. Prepare a Revised Home Office Overhead Rate Per Calendar Day to be Applied to Allowable Delay Days			3. Inquiries to Contractor about Certain Costs.	3. No

Counsel should try to obtain documents from the opposing party and from third parties by agreement. Counsel should seek advice from the retained consultants in identifying documents that should be sought. The experts will use the right nomenclature in identifying documents, avoiding disputes over what is being requested. Counsel should insist that all documents withheld under a claim of privilege be identified together with the basis for the privilege. If opposing counsel refuses, this information can be obtained by interrogatories. Whether the privilege is valid or not can be tested by a motion to compel production of the document and, if necessary, by an in camera inspection of the document by the court.[409] Counsel for the owner should also arrange, if possible, for the financial experts to review the contractor's cost records. Similar arrangements should be made with subcontractors who have pass-through claims. Once informal discovery is exhausted, formal discovery should begin.

4. Formal Discovery

Aside from depositions, discussed later, the principal discovery methods are interrogatories (written questions to your opponent) and requests for production of documents. Also, requests for admission may be used to narrow issues, eliminate having to offer evidence to prove certain facts, authenticate documents, and establish a foundation for dispositive motions.

a. Interrogatories

Interrogatories should be carefully drafted. Routine use of form or boilerplate interrogatories should be discouraged. Form interrogatories should be used mainly as a guide in organizing and drafting interrogatories that are tailored to the case. The interrogatories or questions should be simple, easily understood, and in plain English. Technical terms used in the questions should be defined in the definitional section of the preface or introduction to the interrogatories. Compound questions and questions with qualifying subordinate clauses should be avoided. Simple, declaratory sentences should be used. This avoids objections and makes the use of the interrogatories at trial more effective. Each question should be followed by an appropriate space for the answer.

Using numerous subparts for the answers can be confusing. The better practice is to have individual questions and individual spaces for each answer.

The interrogatory set should contain a preface. The preface should provide definitions and instructions that are to be used in answering the questions. Careful preparation of the preface helps reduce objections and may be useful at trial in excluding documents that were not identified in the answers. Thus, a broad, all encompassing definition of the terms "documents" and "identify" will help eliminate an argument about whether an interrogatory called for identification of a particular document or a particular person.[410]

Interrogatories can be used to obtain information about the allegations in a complaint. Each allegation in the complaint can be broken down into a series of questions asking about the facts upon which the allegation is based, the events relating to the allegation, the identity of persons who have knowledge of those facts, the identity of documents containing information about those facts, and the identity of persons who have custody of those documents.[411]

Interrogatories can be used to explore a party's opinions or contentions that relate to facts or the application of law to fact.[412] Contention interrogatories can be written in different ways. These include: (1) asking the opposing party to state all facts upon which it bases some contention; (2) asking the opposing party to ex-

[409] 8 WIGMORE, EVIDENCE § 2322 (rev. ed. 1961).

[410] R.M. Gelb, *Standard Paragraphs in Interrogatories*, 28 PRAC. LAW. No. 4, at 51 (1982). This article contains suggestions on how to draft interrogatories, regardless of the subject matter of the litigation. It also offers examples of introductory language and definitional sections that can be used in drafting interrogatories.

[411] FED. R. CIV. P. 26(b)(1).

[412] FED. R. CIV. P. 33 advisory committee note.

plain how the law applies to the facts; or (3) even asking the opposing party to state the legal basis for its contentions.[413] A party, however, may be able to defer answering contention interrogatories if the party can show that such interrogatories are more properly answered at or near the end of the pretrial phase of the litigation.[414] Thus, under some liberal discovery rules, an opponent may be compelled to disclose the legal as well as factual basis for its claims.[415]

Interrogatories can be used to require the opposing party to identify expert witnesses whom it intends to call at trial and the subject matter on which the expert is expected to testify.[416] This information, provided in the answer to the expert witness interrogatory, can be explored in detail when the expert is deposed.

The basic function of interrogatories is to provide facts, identify persons who have knowledge concerning those facts, and identify documents containing information about those facts. They can be used for specific purposes, such as inquiring about whether certain documents have been lost or destroyed and how damages were calculated. But beyond these uses, the effectiveness of interrogatories is limited. This is so for one basic reason: lawyers write the answers to interrogatories, not witnesses. Keeping this limitation in mind, the number of interrogatories that a party can serve is limited by the federal rules and may be similarly limited by state or local court rules as well.[417] Ordinarily, the limitation on the number of interrogatories that is permitted by rule cannot be avoided through the use of numerous subparts.[418]

When interrogatories are received, they should be promptly reviewed to determine if any are objectionable. In most jurisdictions, failure to serve objections within a specified time period waives the objection.[419] In addition to specific objections to specific interrogatories, counsel should consider making general objections, as appropriate. The following are some examples of general objections.

- Defendant objects to these Discovery Requests to the extent that they may be construed as calling for information or documents subject to a claim of privilege or otherwise immune from discovery, including, without limitation, information protected by the attorney-client or work-product doctrine.
- Defendant objects to these Discovery Requests to the extent that they seek facts, documents, and/or information already known to plaintiff.
- Defendant objects to providing confidential or proprietary information or producing documents that contain such information until a properly framed protection order is entered.
- Defendant objects to the "Definitions and Instructions" to the extent that they call for information from individuals or entities over whom the defendant has no control. Defendant further objects to the discovery requests as oppressive, unduly burdensome, and not reasonably calculated to the discovery of admissible evidence.

A common practice for answering questions that are marginally objectionable is to couple the answer with an objection. This does two things: First, it preserves the objection for trial. If the objection is sustained, the answer cannot be used in the trial.[420] Second, it avoids raising the ire of the court in having to rule before trial on an objection that is marginal.

Federal Rule of Civil Procedure 33(d) allows a party to produce its business records in response to an interrogatory when the answer to the interrogatory may be found in the records and "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served." To avoid Rule 33(d) and obtain complete answers, the party serving the interrogatory must show that the burden of deriving the information from the records is heavier on it than on the other party.[421]

b. Request for Production of Documents

When documents cannot be obtained on a voluntary basis, they may be obtained from a party to the lawsuit through a request for production of documents,[422] and from nonparties by a subpoena duces tecum.[423] In re-

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[413] McCormick-Morgan, Inc. v. Teledyne Indus., 134 F.R.D. 275, 286, *rev'd in part on other grounds*, 765 F. Supp. 611 (N.D. Cal. 1991).

[414] *Id*.

[415] FED. R. CIV. P. 33(b) advisory committee note; McCaugherty v. Sifferman, 132 F.R.D. 234, 249 (N.D. Cal. 1990).

[416] FED. R. CIV. P. 33(c); *see also* FED. R. CIV. P. 26(b)(4)(A).

[417] FED. R. CIV. P. 33(a) (limiting number of interrogatories to 25); Clark v. Burlington Northern R.R., 112 F.R.D. 117, 119 (N.D. Miss. 1986) (rule is designed to eliminate the previously common practice of serving sets of interrogatories consisting of hundreds of unrelated and mostly irrelevant boiler plate or form interrogatories).

[418] Some local rules specify that "subparts" are to be counted. *See, e.g.,* Armstrong v. Snyder, 103 F.R.D. 96, 103 (E.D. Wis. 1984). *But see* Clark, *id*. at 118 (court considered subparts to be so integrally related as to make up single question); Myers v. U.S. Paint Co., 116 F.R.D. 165 (D. Mass. 1987) (court declined to mechanically count each subparagraph as a separate interrogatory). Whether the subparts count as individual interrogatories will generally depend on whether the subparts bear any relationship to the primary question or to each other. Myers, 116 F.R.D. at 165. Also, local rules may provide for counsel to stipulate to a greater number of allowable interrogatories. Armstrong, 103 F.R.D., at 104 (citing E.D. Wis. L.R. 7.03).

[419] FED. R. CIV. P. 33(b)(4).

[420] Interrogatories may be used as evidence at trial. FED. R. CIV. P. 33(c). They can be read to the jury or read by the judge in a bench trial.

[421] P.R. Aqueduct & Sewer Auth. v. Clow Corp., 108 F.R.D. 304, 307 (D.P.R. 1985) (citing former FED. R. CIV. P. 33(c)); *see also* Daiflon, Inc. v. Allied Chemical Corp., 534 F.2d 221 (10th Cir. 1976).

[422] FED. R. CIV. P. 34.

[423] FED. R. CIV. P. 45(a).

questing documents, a party should try to specify particular categories of documents, rather than a broad request for all documents. Usually, this type of request will be met with a response that documents not privileged will be available for inspection and copying on a certain date and at a certain place during normal business hours.

The request should specify that the documents are to be produced in their original files in the manner in which they are kept. The request should require identification of all documents that are not produced. The request can be accompanied by an interrogatory requiring that for each document not produced, the party must identify: (1) the type of document withheld; (2) the date, author, and addressee of the document; (3) the general subject matter of the document; (4) the identity of any persons copied;[424] and (5) the type of privilege asserted. The privilege can be tested by a motion to compel production of the document.

Information about what to ask for can be obtained from the consultants. In addition, the litigation plan should list the documents that should be obtained. The plan can be updated as documents are obtained, allowing counsel to keep a running record of what has been produced and what still has to be obtained.

c. Requests for Admission

Requests for admission require an opponent to admit or deny a particular fact or contention.[425] Like interrogatories, requests for admission should be simple, straightforward, and clear. Each request should deal with a single fact or contention and be worded so that the response must either admit or deny the fact or contention.[426] Requests for admission can be used to establish a foundation for a dispositive motion[427] or a partial summary judgment.[428] Requests for admission can be used to authenticate documents attached to the request and to establish documents as business records. The contents of writings and photographs may also be proved by written admissions.[429]

Under the Federal Rules of Civil Procedure, requests for admission can be used as a discovery device concerning the opposing party's theories. Requests for admission concerning contentions that relate to fact or the application of law to fact are permitted.[430] Requests that are denied should be followed up with interrogatories asking for the basis of the denial.[431]

d. Depositions

Depositions are important in case preparation and trial strategy. Counsel can learn from the witness (lay or expert) what the witness's testimony will be at trial. If the witness changes the testimony at trial from what was said in the deposition, the inconsistent statements can be used to impeach the witness. Depositions are also an opportunity to try and elicit admissions from the opposing party or its managing agents, which can be used at trial as substantive evidence. Preparing for and defending the deposition are equally important. Inadequate witness preparation or failure to protect the witness from unfair or abusive questioning can have serious consequences. Depositions, like most things, have two sides: one side is taking the deposition, the other is defending it.

i. Taking the Deposition.—Depositions can be expensive. The party taking the deposition (the interrogator) usually pays an hourly attendance fee for the court reporter, and if the deposition is ordered, pays in addition a set amount per page for the original and for a copy.[432] Any party may order the deposition or a copy.[433] If an expert is being deposed, the party taking the deposition customarily pays for the expert's time at the deposition and the time spent that was reasonably necessary in preparing for the deposition. Travel expenses may be involved if the expert has to travel to the place where the deposition is taken.[434] Because depositions can be expensive, the first considerations should be: "Why am I taking this deposition?" and "What do I hope to ac-

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[424] Disseminating the document to someone outside the scope of the privilege may waive the privilege. Ulibarri v. Superior Court, 184 Ariz. 382, 909 P.2d 449, 452 (1995).

[425] FED. R. CIV. P. 36.

[426] *Id.* A party may recover its costs in proving a fact or contention that was denied. FED. R. CIV. P. 37(c)(2).

[427] For example, a request for admission could be used to establish as a fact that the contractor failed to provide written notice of its intention to file a claim before proceeding with what it claims was extra work. That failure can then be the basis for dismissal of the claim. A.H.A. Gen. Constr., Inc. v. N.Y. City Housing Auth., 92 N.Y.2d 20, 677 N.Y.S.2d 9, 699 N.E.2d 368 (1998); Absher Constr. Co. v. Kent Sch. Dist., 77 Wash. App. 137, 890 P.2d 1071 (1995) (summary judgment granted dismissing claim).

[428] Kiewit-Grice v. Wash. State Dep't of Transp., Thurston County Superior Court No. 89-2-02756-6 (1989) (partial summary judgment granted limiting damages claimed in the lawsuit to the amount reserved in the final contract estimate, even after contractor denied in its response to a request for admission that its claim was so limited).

[429] FED. R. EVID. 1007.

[430] FED. R. CIV. P. 36(a).

[431] *Id*. At one time, a common practice was to combine requests for admission with interrogatories. The interrogatory following each request asked why the request was denied. Some jurisdictions prohibit combining requests for admission and interrogatories in a single pleading, because if admissions are not denied within the 30 days allowed for response, they are deemed admitted. *See, e.g.*, FED. R. CIV. P. 36(a). Where the practice of combining them is prohibited, denials can be followed up in a separate set of interrogatories.

[432] Some reporters may waive the appearance fee if the deposition transcript is ordered.

[433] Usually, the party defending the deposition does not order the deposition, but will order a copy of the deposition if it is ordered by the opposing party.

[434] Where both sides have the same number of experts, the parties may agree to pay for their own expert's time and travel costs.

complish?" The usual answer is knowledge about what the witness will say at trial and the ability to pin down the witness to a particular story, so that if the testimony at trial varies from that story, the deposition can be used to impeach the witness. But depositions can also be used to learn about potential witnesses, about documents that have not been produced, and about events that may bear on liability or damages. Depositions may be used to perpetuate testimony for use at trial for a witness who will not be able to testify in person. Depositions, under rules similar to Federal Rule of Civil Procedure 30(b)(6), also allow a party to obtain information from a representative of an organization concerning particular matters.[435] Depositions are the only method of obtaining information from a nonparty who is unwilling to cooperate.

Once the decision to take the deposition is made, the next step is to develop a deposition outline. The outline should focus on the objectives in taking the deposition and be divided into topics, in order of importance. Each topic should identify the points that the interrogator wishes to establish with the witness. Evidentiary gaps that need to be filled in should be highlighted in the outline. Avoid an outline that always proceeds in chronological fashion or that always begins with the witness's educational background and work experience. Consider varying the approach to catch the witness off guard. Avoid questions about facts that have been clearly established in interrogatory answers, unless there is something to be gained by asking about them. Interrogatory sets verified by the deponent should be used to develop facts further, as appropriate. This is especially true in depositions of expert witnesses. The standard interrogatories dealing with the expert's opinions and the facts upon which those opinions are based provide a good segue for detailed questioning about the expert's opinions.

Few depositions in construction cases are conducted without the use of documents. The documents that will be used in a deposition should be arranged to avoid having to shuffle through them during the deposition. One method is to keep each exhibit in a separate labeled folder. The documents can be premarked as exhibits by the court reporter in advance of the deposition,[436] and each folder can be numbered with the exhibit number and arranged in chronological order. Each folder should contain the exhibit that will be handed to the witness and retained by the court reporter, a courtesy copy for opposing counsel, and a working copy for the interrogator. The exhibit number can be keyed into the deposition outline under the appropriate topic. The interrogator's working copy can contain notes and questions about the document. This allows counsel to focus entirely on the working copy in asking questions, avoiding having to skip back and forth between the outline and the document. This makes the examination smoother and more effective and helps reduce mistakes and confusion.

Another cost saving device, for out-of-state witnesses or witnesses in other cities, is the use of telephone depositions. Telephone depositions are cost-effective when it is not important to observe the witness's demeanor or to confront the witness face-to-face. Videotaped depositions should be considered when the witness will not be available to testify at trial, and the witness's appearance and demeanor will be impressive.[437]

Usually, the depositions of persons who will be called to testify at trial as experts are deferred until all other discovery has been completed. Scheduling depositions can be done either informally by agreement of counsel, or by an order establishing a discovery schedule. If an order is entered, it should require that the depositions of expert witnesses will be completed by a specific date, and further provide that all experts must formulate the opinions, to which they will testify, prior to the date of their depositions.

The order should also address the situation where the expert changes his or her opinion after having been deposed. The order can provide that if that occurs, the opposing party must be notified of the change, and be allowed to take a supplemental deposition with respect to the changes. The order should also prohibit any further changes in the opinion after a specified date, unless the party can show good cause as to why the change should be allowed.

The attorney should prepare for the expert's deposition by educating himself or herself about the subject matter. Consult your own expert who can educate you in the "basics" of the subject and provide you with questions to ask and why they should be asked. This will prepare you to ask follow-up questions. Talk to other lawyers about their experiences with the witness. Review any articles or other written materials authored by the expert. Review any depositions and trial testimony transcripts that other attorneys have and are willing to share.

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[435] FED. R. CIV. P. 30(b)(6) requires the entity to designate one or more persons to testify about the matters listed in the subpoena.

[436] Numbering of deposition exhibits should be consecutive throughout all depositions by all parties. Counsel should stipulate to this procedure at the first deposition. For example, the exhibits used in the deposition of Ms. X taken by the contractor should be marked No. 1 through No. 20. The exhibits taken in the next deposition taken by the owner would be marked beginning as No. 21 through 40. The first exhibit in the third deposition would be marked No. 41 and so on. Consider using one court reporter or court reporter service for all depositions. This allows the court reporter to have a master deposition list that can be brought to every deposition allowing the witness to be shown a document marked as an exhibit in an earlier deposition. By agreeing on one reporter for all depositions, the parties can obtain competitive bids from court reporters and save money.

[437] See generally D.R. SUPLEE & D.S. DONALDSON, THE DEPOSITION HANDBOOK (3d ed. 1999).

Consider the place where the deposition should be held. Usually, the best place to take the expert's deposition is at the expert's office. This allows greater access to the expert's work file and eliminates any excuse by the expert for inadvertently leaving part of the expert's work file back at the office. If the deposition is not held at the expert's office, consider serving a subpoena duces tecum upon the expert to bring the case file to the deposition, including all written instructions, information, and requests that he or she was given relating to the case.[438] The subpoena duces tecum should also require the expert to bring materials of any kind used by the expert, or by anyone who assisted the expert.

The primary purpose in taking the expert's deposition is discovery. A secondary purpose is to impeach the witness when his or her testimony during the trial differs from what was said in the deposition. The statements in the deposition that the expert later contradicts are usually in response to questions furnished by the interrogator's expert. Therefore, it is important to write down questions given to you by your expert and ask them exactly as they are written. Aside from potential impeachment questions, and other questions given to you by your expert, you should ask broad, open-ended questions that are designed to obtain information. The attorney should not worry that the answers may hurt.[439] It is better to know what the expert will say and address it at trial than to be ambushed. Ask the expert to explain his or her answers as appropriate. Make sure that you have obtained everything that the expert has to say about a particular topic. Leave nothing undiscovered. Keep asking questions until you have exhausted everything connected with the expert's opinion and there is nothing further to discover. Insist on answers. If the expert refuses to answer, call the judge for a ruling by telephone, if possible, or make a record for a motion to compel an answer and for sanctions.[440] Above all, listen to the answer. Some attorneys, in thinking about the next question, fail to listen carefully to what the expert has said. Failure to listen prevents follow-up questions. Before concluding the deposition, check your outline again to make sure that you covered everything. Bring your expert to the deposition. Check with your expert to see if anything else should be asked.

The deposition of the opposing expert typically includes certain topics. They are:

- Qualifications and resume.
- Prior testimony in other cases and details.
- When was the expert retained and by whom.
- What was the expert asked to do.
- What facts did the expert rely upon.
- Who or what was the source(s) for those facts.
- What documents did the expert review and why.
- Who furnished those documents to the expert.
- What information did the expert obtain from those documents and how did the expert use that information in formulating opinions.
- Did the expert verify information provided by others and if so, how.
- What is the expert being paid for the work and what has the expert been paid to date (ask to see the expert's invoices for work performed).
- Whether compensation is contingent upon the outcome of the case (the answer is almost always no, but the question should be asked).
- If there is no discovery cutoff order, whether the opinions are final, or what further work the expert plans on doing and why. There should be a follow-up deposition if the opinions are revised.
- Whether assumptions were made in forming opinions and what those assumptions were, why they were made, and how the opinion would be affected if the assumptions were incorrect.[441]
- Whether the expert knows your expert and the opposing expert's opinion of your expert.
- When appropriate, try to narrow the differences between your expert and the opposing expert.
- Ask what the witness did to prepare for the deposition, what materials he or she reviewed, and whom he or she consulted.[442]

The deposition of an opposing expert is an opportunity to learn what the expert will testify to at trial. If the attorney properly takes advantage of the opportunity, the attorney should be prepared for cross-examination and should not be surprised by the testimony.

All depositions should be indexed so that essential points for cross-examination are not overlooked. Usually, indexing is done by a paralegal. However, the attorney who will conduct the cross-examination should

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[438] This may raise questions about work product and protection of an attorney's mental impressions and theories. *See* Karn v. Ingersoll Rand, 168 F.R.D. 633 (N.D. Ind. 1996) (generally, whatever the expert has considered in formulating the opinion is discoverable); *see also* L.M. Cohen, *Expert Witness Discovery Versus the Work Product Doctrine: Choosing a Winner in Government Contracts Litigation*, 27 PUB. CONT. L.J. 719 (1998); L. Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 CREIGHTON L. REV. 773 (1994); Comment, *Discoverability of Attorney Work Product Reviewed by Expert Witnesses: Have the 1993 Revisions to the Federal Rules of Civil Procedure Changed Anything?* 69 TEMP. L. REV. 451 (1996).

[439] An exception is where the deposition can be used by the opponent because the witness is not available for trial, and the court allows the deposition to be read to the jury or read by the judge in a bench trial.

[440] *See* FED. R. CIV. P. 37(a).

[441] A good expert's logic in formulating opinions is often unassailable, assuming that the premises are correct. Where the expert may be vulnerable is in the assumptions that the expert makes, or the facts upon which the expert relies.

[442] Material used in preparation for a deposition may be discoverable. Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co., 92 F.R.D. 779, 780 (S.D. N.Y. 1982); FED. R. EVID. 612 (writings used to refresh recollection while testifying or before testifying discoverable).

review the deposition transcript rather than simply rely on the index.

ii. Defending the Deposition.—The first phase in defending a deposition is to prepare the witness to testify. The level of detail that is necessary depends upon the witness. Expert witnesses who are old hands at testifying need little preparation other than to discuss potential problem areas in their analysis and conclusions and to review any documents that they may be questioned about and any conflicting testimony from other witnesses.

Witnesses who have little or no experience should be thoroughly prepared. Begin by finding out if they have ever had their deposition taken. If they have not been deposed before, explain to them what a deposition is, why it is important, and how it can be used at trial. Also review the mechanics of a deposition, including the seating arrangements, the oath taken by the witness, and the role of the court reporter.[443] Certain rules or guidelines should also be discussed. These include the following:

• Listen carefully to the question. Make sure you understand the question before you answer. If you do not know the answer, say so. Never guess unless you make it clear that your answer is an estimate or approximation.

• Never interpret the question. It is the examiner's job to ask clear and understandable questions. It is not the witness's responsibility to try to figure out what is being asked. If the question is unclear, ask that it be rephrased.

• Answer only the question that is asked. Do not volunteer information not called for by the question. For example, if you are asked how long have you lived at your current address, say "10 years" and stop. The answer "10 years" is responsive to the question. Adding, "and before that I lived in New York for 5 years," is not responsive; it volunteers information not called for by the question.

• Never get angry or argue. Take your time and think before you answer.

• Stop when you have finished your answer and wait for the next question. Some examiners will stare at the witness, creating a pregnant pause that suggests to the witness that the answer is incomplete, as if to say, "well go on, there must be more." This is nothing more than a tactic; don't fall for it.

• Do not make facetious remarks. The transcript will not reflect the irony.

• Always tell the truth. You can never be tripped up by truthful answers. Stick to your answers. An examiner may try to shake your testimony by creating doubt in your own mind about the accuracy or completeness of your answers. Tell your story truthfully and stick to it. Do not concede that you could be wrong or equivocate about your answer.

• Do not try to sell your story to the interrogator, no matter how fair or charming he or she may appear.

• Do not talk to your lawyer unless it is critical, except to ask for a break.

• Witnesses must be able to respond to questions in their areas of responsibility. If such a witness says, "I do not know," or "I do not recall," this can hurt your case.

• The witness may be asked whether his or her testimony was discussed with the attorney defending the deposition. The question is legitimate; however, any inquiry about what was discussed is not, if the witness is the client and discussions are privileged. If the discussions are privileged, the attorney should instruct the witness not to answer. If the interrogator persists, the attorney should stop the deposition and seek a protective order and sanctions.

• Advise the witness that you will tell him or her not to answer only when the question invades a privilege, is harassing, or is clearly not relevant.

An attorney defending a deposition should not be a "potted plant," nor should he or she be an active participant. The attorney defending the deposition should protect the witness from harassment and abuse by the interrogator and protect the record by objecting to improper questions. The defending attorney should not coach the witness or inject himself or herself into the proceedings by making comments to the witness such as, "If you recall," after a question is asked. Someone once said that when a defending attorney speaks, the words should start with, "I object." While this is too restrictive, it does suggest limits to the role of the attorney in defending a deposition.

The following are excerpts from a general federal court order governing depositions in the Western District of Washington. The order exemplifies how depositions should be conducted.

> (a) *Examination*. If there are multiple parties, each side should ordinarily designate one attorney to conduct the main examination of the deponent, and any questioning by other counsel on that side should be limited to matters not previously covered.
>
> (b) *Objections*. The only objections that should be raised at the deposition are those involving a privilege against disclosure, or some matter that may be remedied if presented at the time (such as the form of the question or the responsiveness of the answer), or that the question seeks information beyond the scope of discovery. Objections on other grounds are unnecessary and should generally be avoided. All objections should be concise and must not suggest answers to, or otherwise coach, the deponent. Argumentative interruptions will not be permitted.
>
> (c) *Directions Not to Answer*. Directions to the deponent not to answer are improper, except on the ground of privilege or to enable a party or deponent to present a motion to the court or special master for termination of the deposition on the ground that it is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass or oppress the party or the deponent, or for appropriate limitations upon the scope of the deposition (e.g., on the ground that the line of inquiry is not relevant nor reasonably calculated to lead to the discovery of

[443] SUPLEE & DONALDSON, *supra* note 437, § 10.13.

admissible evidence). When a privilege is claimed, the witness should nevertheless answer questions relevant to the existence, extent or waiver of the privilege, such as the date of the communication, who made the statement in question, to whom and in whose presence the statement was made, other persons to whom the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement.

(d) *Responsiveness*. Witnesses will be expected to answer all questions directly and without evasion, to the extent of their testimonial knowledge, unless directed by counsel not to answer.

(e) *Private Consultation*. Private conferences between deponents and their attorneys during the actual taking of the deposition are improper, except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the court for good cause shown, such conferences may, however, be held during normal recesses and adjournments.

(f) *Conduct of Examining Counsel*. Examining counsel will refrain from asking questions he or she knows to be beyond the legitimate scope of discovery, and from undue repetition.

(g) *Courtroom Standard*. All counsel and parties should conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial.

e. Discovery Problems

Discovery is the most abused phase of the litigation process. Responses to discovery requests are, on occasion, used as tactical weapons to delay and even to mislead the opponent. Stonewalling document productions is not unusual. Some say that this type of conduct is endemic to an adversary system that requires lawyers to zealously represent their clients. Others say that such conduct violates the Rules of Professional Conduct and is unethical. It is not the purpose of this section to debate either side. The topic is raised merely to suggest some techniques that may be used to deal with such conduct. If your opponent makes frivolous objections to interrogatories or refuses to produce documents, file a motion to compel answers to the interrogatories and compel production of documents. Ask the court to impose appropriate sanctions, including attorneys' fees caused by your opponent's action or foot dragging.[444] Judges have no patience for responses that are misleading and contrary to the purposes of discovery. Such conduct "is most damaging to the fairness of the litigation process."[445]

Another abuse is the tactics of the "Rambo" type lawyer. Counsel should conduct themselves in depositions with the same courtesy and respect for the rules required in the courtroom during trial.[446] In this sense, the deposition room is an extension of the courtroom. If the rules are not followed and the attorney becomes abusive, adjourn the deposition and seek a protective order and attorney fees. Ask the court to make the attorney personally responsible to pay the fee, not the attorney's client. For significant depositions that could be troublesome, ask the court to appoint a discovery master to preside over the deposition. Schedule a discovery motion before the court for entry of a discovery order like the one discussed earlier. During the motion, ask the court for permission to send to the judge a copy of any deposition in which there is improper conduct by your opponent. Tell the judge that such conduct will be highlighted in the deposition and will be sent to the judge to allow the court to monitor discovery. This only works if the case is preassigned to one judge. The potential for sanctions that this poses will usually prevent or discourage improper or abusive deposition tactics.

There is a natural reluctance to run to the court for help in discovery disputes. Instead, trial lawyers, who are naturally aggressive, have a tendency to slug it out, to fight fire with fire. Unfortunately for the client, this type of response does not work well. It does not produce the information or documents needed to prepare the case. The tendency to respond in kind should be resisted. Help should be sought from the court to resolve serious discovery problems. That is the court's job, and involving the court is the best way to protect your client's interests.

5. Preparing the Engineering Witness To Testify

Generally, witnesses in a construction case consist of project personnel and experts. For the owner, the principal employee witness is usually the project engineer or chief inspector. Occasionally, in cases involving technical engineering issues, the owner may call staff engineers who are experts in a particular field of engineering or call outside technical experts as witnesses.

Often, engineers who are called to testify have little or no experience as witnesses in a trial. In preparing the engineer to testify, it is important to emphasize that a trial is an adversary proceeding. The engineer must realize that the basic principles and facts that the engineer has regarded as true may be questioned. Engineers inexperienced in the courtroom arena often assume that their role is to dispense the facts to the court, which then will automatically result in a decision. This somewhat naive assumption misperceives the nature of the adversary system of justice.

The attorney should tell the engineer that the outcome of the case may depend upon the credibility of the

[444] FED. R. CIV. P. 11 and 37.

[445] Wash. State Physicians Insurance Exchange & Ass'n v. Fisons Corp., 122 Wash. 2d 299, 858 P.2d 1054, 1080 (1993); *see also* Dondi Prop. Corp. v. Commerce Savings and Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988); Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619 (1977); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978).

[446] M. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (attorney's ethical duty to seek the truth even when it does not advance his or her client's interests).

engineer's testimony. The attorney must convince the engineer of the importance of his or her role as a credible witness. The attorney should emphasize that the engineer knows more about engineering than the attorney does, or more about what happened on the project than the attorney, since the engineer was there and the attorney was not. The witness must understand that the credibility of his or her testimony may depend more on the witness's demeanor than what the witness says. In answering questions, the witness should talk to the jury and make eye contact with them. Although the answer is important, it is not always the answer itself that determines the outcome of the case. Other factors may influence a jury more, including factors such as the engineer's experience, courtroom demeanor, and overall credibility.

An attorney who has an articulate and perceptive witness has an advantageous position. While these qualities are to some degree individual characteristics, an attorney can help cultivate those qualities in a witness through effective trial preparation. One technique is to have another attorney cross-examine the witness to sharpen those qualities. Another technique is to put the witness through a mock direct and cross-examination that is videotaped. The witness can later view the videotape as part of further trial preparation. Also, a witness will occasionally ask the attorney to furnish the witness with a written list of the questions that will be asked. Whether either of these practices is followed depends upon whether there is an attorney-client privilege prohibiting the cross-examiner from exploring what was said and done by the attorney and the witness during trial preparation. The better practice is to put the questions to the witness orally, and not have the witness answer from a written list. Written answers to the questions should never be furnished by the attorney to the witness for obvious practical and ethical reasons. Most of us have heard the horror story of the witness who, while on the witness stand, pulls out a list of questions and answers that were given to the witness by the attorney.

The task of the engineering witness is to persuade the court and jury that the witness's opinions are reasonable and result in the correct solution to the problem, and to do so in plain, nontechnical terms. The engineering expert witness should not rest his or her testimony on harsh technical specifications or strict contract provisions. The witness should understand the underlying policies that the contract provisions serve. Judges and juries will consider and be influenced by those policies in enforcing those provisions, without feeling that the result is harsh or unfair. If the engineer understands the policy behind the technical provision, the witness will be less likely to rely on a mere recital of the provision itself, and will be able to explain it in more understandable terms. Moreover, in most instances there is a valid and salutary purpose to be served by each contract provision, harsh as it may seem. This is particularly true in the case of contracts subject to competitive bidding requirements.[447] The attorney should ensure that in answering questions, the engineer should consider, as appropriate, the purpose of a particular contract provision and not merely rely on the literal wording of the provision itself.

6. Pretrial Strategies and Considerations

a. Judge or Jury

If the contractor did not file a jury demand, should the agency demand a jury? Often, this may be a difficult question. The decision of whether to try the case to a judge or to a jury may depend upon a variety of considerations. How will the parties be perceived by the jury? Will the owner be regarded as fair and even-handed in the way it managed the project? Will the contractor appear to be fair in its demands, or opportunistic and overreaching? Who has the equities—Or as one lawyer once put it: who will be perceived as the "bad guy"? Who will the judge be? Is judicial bias a concern? If so, can the agency seek recusal? Is the case more legal than factual? Is the case too complex for a jury?[448]

These considerations (among others) lead to the ultimate question: From the public owner's standpoint, is it better to try the case to a judge or to a jury?

b. The Answer and Affirmative Defenses

Traditionally, the answer to the complaint in a construction case will deny the essential allegations in the complaint, placing the dispute at issue. In addition, most answers will contain affirmative defenses. An exhaustive list of potential affirmative defenses is included in the Appendix to this subsection. Failure to plead an affirmative defense may result in a waiver of the defense.[449] However, wholesale inclusion of affirmative defenses without any factual or legal basis is unwise and may, in some jurisdictions, result in sanctions.[450] Counsel should thoroughly review and investigate the case to be certain that all appropriate affirmative defenses are included in the answer. If new affirmative defenses are discovered after the answer

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[447] For example, the New York Court of Appeals has articulated the public policy considerations that underlie notice requirements in public works contracts. A.H.A. General Constr., Inc. v. N.Y. City Housing Auth., 92 N.Y.2d 20, 677 N.Y.S.2d 9, 699 N.E.2d 368, 376 (1998) (timely notice of claim or extra work allows a public agency to make necessary adjustments in the work, mitigate damages, document costs, and maintain the integrity of the public bidding process).

[448] Green Constr. Co. v. Kan. Power & Light Co., 1 F.3d 1005, 1011 (10th Cir. 1993) (motion to strike the jury, on the ground that the case was too complex to be generally comprehensible, was denied); R.O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981); Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979).

[449] 71 C.J.S. *Pleading* § 199-200; FED. R. CIV. P. 12.

[450] FED. R. CIV. P. 11.

has been filed, counsel should promptly file a motion to amend the answer to include the new defense or defenses.[451] Several affirmative defenses often available to the owner in a construction case are failure to file timely notice of the contractor's claim,[452] finality of the engineer's decision on some aspect of the claim,[453] and failure to reserve claims in the acceptance document as required by the contract.[454]

Construction contracts customarily contain provisions that require contractors to provide formal written notice of claims whenever the contractor believes that it is being required to perform extra work beyond the requirements of the contract. The purpose of the notice provision is to alert the agency, at an early date, that the contractor has a claim. Early notice allows the agency to take appropriate action to protect itself.

Where the only issue is the legal effect of the contract language, summary judgment dismissing the claim is appropriate.[455] Where the claim is limited to the amount reserved in the final contract estimate, an order in limine limiting the claim to the amount reserved is also appropriate.[456]

c. Pretrial Motions

Pretrial motions may be classified generally as dispositive, partially dispositive, and procedural. A dispositive motion, if granted, disposes of the case. Dispositive motions usually take the form of a motion for summary judgment and are granted only when disposition of the case is not dependent upon any factual determination, and the moving party (the party filing the motion) is entitled to judgment in its favor as a matter of law.[457] An example is dismissal of a case barred by a statute of limitations. Partial disposition of the case may be made by a partial summary judgment using the same criteria—the facts of a particular issue are not in dispute and the law is in the favor of the moving party. If material facts are in dispute, the court will not grant summary judgment. Judges are reluctant to dispose summarily of a case where the facts are not clear. When the facts are not clear, the nonmoving party is entitled to a presumption that the facts are in its favor, although it cannot rely on this presumption alone, but must present evidence demonstrating that there is a factual dispute. Moreover, judges are often reluctant to summarily dismiss claims that arise from a contractual relationship, preferring to give the party its day in court where it can develop its contentions further and tell the judge or jury the entire story.

Because of a court's general reluctance to grant summary dismissal of the case, some see a tactical disadvantage in moving for summary judgment, unless there is a good chance that it will be granted. An unsuccessful motion for summary judgment alerts the nonmoving party to what it can expect at trial, giving it an opportunity to prepare its defense. However, the motion, even though unsuccessful, can also operate as a discovery tool since it can force the nonmoving party to present its evidence in affidavits in order to establish a

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[451] Another device is a "Notice of Trial Amendment." The notice tells opposing counsel that the attorney for the defendant will move at trial to amend the answer to include the defenses set forth in the notice in the same detail as they would be in the answer. This puts opposing counsel on notice and gives counsel an opportunity to conduct discovery about the defenses before the trial.

[452] A.H.A. Gen. Constr., Inc. v. N.Y. City Housing Auth., *supra* note 447; *see supra* § 5.A.7 and 5.B.4.

[453] Where the engineer has authority to render final decisions regarding contract interpretations, courts will uphold the decision unless it was: (1) arbitrary or capricious; (2) based on clear mistake; (3) unsupported by substantial evidence; or (4) based on an error of law. J. J. Finn Elec. Service, Inc. v. P&H Gen. Contractors, Inc., 13 Mass. App. Ct. 973, 432 N.E.2d 116, 117 (1982); R.W. Dunteman Co. v. Village of Lombard, 281 Ill. App. 3d 929, 666 N.E.2d 762, 765 (Ill. App. 1996); Main v. Dep't of Highways, 206 Va. 143, 142 S.E.2d 524, 529 (1965); State Highway Dep't v. W. L. Cobb Constr. Co., 111 Ga. App. 822, 143 S.E.2d 500, 504–05 (1965); Ardsley Constr. Co. v. Port Auth. of N.Y. & N.J., 75 A.D. 2d 760, 427 N.Y.S.2d 814, 815 (1980). The rule is based on the principle that the parties anticipate that differences may arise, and to avoid further disputes agree to make the engineer the arbitrator of such differences. State_Highway Dep't v. MacDougald Constr. Co., 189 Ga. 490, 6 S.E.2d 570, 575 (1939); State v. Martin Bros., 138 Tex. 505, 160 S.W.2d 58, 60 (Tex. 1942). The finality of the engineer's decision has been held to be final and binding only where the contract expressly conferred authority upon the engineer to make the decision. C.B.I. Na-Con, Inc. v. Macon-Bibb County Water & Sewerage Auth., 205 Ga. App. 82, 421 S.E.2d 111, 112 (1992) (contract did not give engineer express authority to decide claims for time extensions and extra compensation).

[454] Failure to reserve claim on contract acceptance document as required by the contract waived claim. DiGioia Bros. Excavating v. Cleveland Dep't of Pub. Utils., 135 Ohio App. 3d 436, 734 N.E.2d 438, 453 (1999); United States v. William Cramp & Sons, 206 U.S. 118 (1907) (contractor who executes a general release cannot later sue for damages or additional compensation in excess of the amount reserved or raise new claims that were not specifically exempted from the releases). The rule extends to subcontractor pass-through claims. Once the subcontractor releases its claim against the prime contractor, the prime contractor cannot revive the claim by attempting to pass it on to the owner. George Hyman Constr. Co. v. United States, 30 Fed. Cl. 170, 177–78 (1993); Miss. State Highway Comm'n v. Patterson Enters. Ltd., 627 So. 2d 261, 263 (Miss. 1993). Also, contract standard specifications may specify that failure to reserve the claim in accordance with the contract claim procedures waives the claim. California Standard Specifications 9-1.07B (2002); New York Standard Specifications 109-14 (2002); Washington State Standard Specifications 1-09.9 (2004).

[455] Absher Constr. Co. v. Kent School Dist., 77 Wash. App. 137, 890 P.2d 1071 (1995).

[456] A motion in limine precludes counsel and witnesses from mentioning or referring to matters that the court has excluded. *See* G.O. Kornblum, *The Voir Dire, Opening Statement, and Closing Argument*, 23 PRAC. LAW. No. 7 at 1, 21 (1977).

[457] FED. R. CIV. P. 56.

factual dispute, thus alerting the moving party to what it can expect at trial. It may also help convince the opposition to adopt a more conciliatory attitude toward settlement.

Procedural motions may involve numerous procedural and housekeeping items. Motions may be made: (1) to allocate time between the parties at trial for the presentation of their respective cases; (2) to publish depositions, interrogatories, and requests for admission; (3) to exclude or obtain an advance ruling on the admissibility of evidence; (4) to determine whether the jury should be able to take notes during the testimony of witnesses; and (5) to determine whether to realign co-defendants and change their order of proof.[458]

Another type of procedural motion that may be used, before and during trial, is a motion in limine to exclude evidence and witnesses.[459] This type of motion may be used to exclude evidence that is legally inadmissible or overly prejudicial.[460] The motion may also be used to prevent experts, who were never identified in answers to interrogatories, from testifying. This type of motion can be a powerful tool and should be used whenever improper evidence is anticipated.

d. Trial Briefs and Premarked Exhibits

i. Trial Briefs.—It is usually advisable to file a trial brief in a construction case.[461] The length and details of the brief should be governed by common sense, and to the extent known, the personal preferences of the trial judge.[462] In addition to suiting the judge's preferences, the length and details of the brief will also depend upon whether the case is jury or nonjury and the extent of the judge's familiarity with the case from pretrial proceedings.

In general, a trial brief serves several purposes. First, it allows counsel to argue the case in advance of trial.[463] A popular method of brief writing is to divide the brief into sections: introduction, statement of the case, argument, and conclusion. The argument section is further divided into subsections that argue each point that counsel wishes to make. Each subsection should have a heading summarizing the argument. The headings should be indented and italicized or underscored for emphasis.[464] The trial brief is also an outline of a party's case. In addition to educating and persuading the court, the brief allows the judge to follow the testimony. If the judge is unfamiliar with construction jargon and clauses unique to construction contracts, the brief should contain a glossary explaining technical terms and a section quoting pertinent contract clauses, a brief description of how they work, and their significance to the case. If the brief is extensive, there should be a detailed table of contents to make it easier for the judge to locate issues and statements of law.

The benefits of an extensive brief, where one is warranted, are not as valuable if a jury is involved. With a jury, the education process is limited to testimony, exhibits, instructions, and oral argument. However, the advantage of a knowledgeable judge presiding over the trial should not be overlooked. The judge has the power to veto the verdict, if the judge believes that the jury decided the case incorrectly. Also, the brief may help convince the court that, as a matter of law, the issues must be determined by the plain language of the contract, thus avoiding issues of fact for the jury. In jury cases, the brief should also contain a section that supports the jury instructions requested by the party.

ii. Pre-marked Exhibits.—Trials should be efficient. Efficient trials save money and improve the quality of justice. One way to improve efficiency is to pre-mark exhibits in advance of trial. Each side meets and presents the exhibits that they intend to use at trial. Attorneys should not be overly concerned that disclosing proposed exhibits will reveal trial strategy. By the time of trial, the attorneys will usually be aware of the documents that will be offered as exhibits. After documents are pre-marked, counsel should stipulate to the admissibility of as many documents as possible. Pre-marked exhibits that have been stipulated to may be put in notebooks in numerical order. The exhibits are removed from the book(s) and used with the witnesses, without having to take the time to mark them and lay a foundation. This makes the trial go smoother and faster. Exhibits that are pre-marked but not admitted by stipulation can be handled in the normal manner and their admissibility determined by the court when they are offered.

e. Visual Aids

As trial preparation proceeds, the attorney should consider the use of visual aids to illustrate graphically the party's contentions. Most attorneys are familiar with the value of a chart or diagram of an accident

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[458] Traditionally, the order of proof is determined by how the defendants are named in the caption of the complaint filed by the plaintiff. They are named in that order simply because the plaintiff chose to list them that way. The issue may arise, for example, in a case where the agency is named as a co-defendant with its consulting engineer. Arguably, it may be more logical for the party who prepared the plans to present its defense first when the adequacy of those plans is in dispute. *See* Green Constr. Co. v. Kansas Power & Light Co., 1 F.3d 1005 (10th Cir. Kan. 1993); *see also* FED. R. EVID. 611(a).

[459] *See supra* note 456.

[460] FED. R. EVID. 403.

[461] Some local court rules require all parties to file trial briefs.

[462] For example, string-citing cases from other jurisdictions is usually not helpful, unless the issue before the court is one of first impression. Some judges are impressed by policy arguments and how the position urged by counsel comports with that policy.

[463] State or local court rules may require a working copy of the brief to be provided to the judge before trial, and it should be provided even in the absence of a requirement.

[464] *See generally* F.T. Vom Baur, *The Art of Brief Writing*, 22 PRAC. LAW. No. 1, at 81 (1976).

scene in a tort case, or a map indicating the location of comparables in an eminent domain case. Often, just the mention of the type of case suggests the form of the visual aid needed to assist in the presentation of the case. This is not necessarily true in a construction case. The kinds of visual aids that will be helpful will depend upon the complexity of the issues presented and whether they can be better explained by the use of a diagram, chart, model, or computer animation.

i. Charts.—Many of the claims in construction litigation involve delay in completing work. The owner may seek to assess liquidated damages because the work is not completed within the contract time. The contractor may seek damages for owner-caused delays. Charts showing the planned work schedule and the events that transpired affecting the schedule are necessary aids in explaining to the court why the delay occurred and assigning responsibility for the delay.

These charts may take various forms. The most common and accepted method of proving delay, and showing the causal relationship between culpable acts and actual work progress, is CPM scheduling. Another is a chart plotting the contractor's progress against the time it took to complete the project. For example, in a typical highway construction project, this chart will show when the contractor began grading and the amount of grading performed each day. Witnesses can use this chart to show delay and then explain why the delay occurred. Other major construction activities that are in controversy can be depicted in the same manner. The use of a simple bar chart presentation is easily understood.[465] A bar chart, however, does not illustrate the interrelationships between various work items or demonstrate how a delay of one work item affects other items of work. The CPM chart, if properly used, shows those interrelationships.[466] This type of schedule analysis is necessary to show the overall effect of concurrent delay on separate items of work.

Some claims or defenses can be better presented by a model or tridimensional chart. For example, in a DSC case, a model or tridimensional chart can illustrate, through color coding in cross-sections, the type of material encountered in the highway prism or borrow site. This allows the viewer to see the type of material that was encountered at various locations throughout the cross-sections.

ii. Photographs.—Photographs taken during various stages of a construction project can be very helpful. Aerial photos taken on a regular basis can be important evidence in showing lack of progress on a project. Photos showing equipment breakdowns can also be significant in explaining lack of progress. Videos should be taken when the video will document particular problems. Photos and videos should always be dated.

iii. Models.—One of the most dramatic visual aids that an attorney can use in presenting the case is a model. A model can provide a view of the site, depict terrain, or show relationships and concepts that can be illustrated in no other way. Because a model is dramatic, its use requires special consideration.

The first consideration is how will the model be used: Will it be offered in evidence as a reproduction of what it purports to copy, or will it be used as demonstrative evidence to illustrate testimony? If it is offered in evidence as a reproduction, it must be to scale and its accuracy established by testimony, usually by an engineer and the model maker. If it is used for illustrative purposes, it need not be to scale, but it cannot be misleading and must assist the witness in explaining the testimony.[467]

Another consideration is cost. Models are expensive to construct, particularly when they are built to scale. The attorney should weigh the cost of the model against its prospective benefits. The attorney should anticipate how the judge will react to an elaborate and obviously costly model.[468] If the model does not illustrate an important point in the case, the court may feel that its use is not justified and exclude the model on the ground that its introduction was calculated to impress rather than enlighten.[469] This is especially relevant where the model is presented by a public agency. Care should be taken so that it does not appear that the agency, with its vast resources, is trying to overwhelm the contractor.

Highway construction cases lend themselves particularly well to the use of models to explain or illustrate testimony. A three-dimensional visual aid, like a picture, can be worth a thousand words. Models make it easier to understand testimony about cuts and fills, super-elevations, embankment compaction, bridges, and other three-dimensional features that are more easily shown by a visual presentation than by oral testimony.

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[465] Charts can be reduced to notebook size, annotated, and included in the trial notebook for use in cross-examination. For example, if the contractor has claimed that it was unable to place concrete because there were no inspectors on hand, the use of the chart can show that even if there were no inspectors on hand, concrete could not have been placed because of a breakdown in the batch plant. This may establish concurrent delay, preventing delay damages.

[466] CPM charts simplify complex problems. However, they should not be accepted by courts simply because they have been prepared using a computer. "As-planned" and "but for" schedules contain assumptions, not facts. The court should require the party introducing a CPM schedule to prove that it is accurate and that its assumptions have a factual basis.

[467] 29A AM. JUR. 2D *Evidence* § 993 (1994); *Propriety, in Trial of Civil Action, of Use of Model of Object or Instrumentality, or of Site or Premises, Involved in the Accident or Incident*, 69 A.L.R. 2d 424 (1960; supp. 2003); 7 AM. JUR. *Proof of Facts* § 601, "Maps, Diagrams, and Models" (1960).

[468] If the model maker testifies, he or she will probably be asked how much the model cost. The cost can run into thousands of dollars.

[469] *See generally* 3 AM. JUR. 2D *Trials* at 377 (1965).

iv. Overhead Projectors.—Because construction cases rely heavily on documentary evidence, it may be hard for a jury to understand the significance of a document unless they can see the document along with the witness. The use of an overhead projector can solve this problem.[470] Through its use, the jurors can see the document during the examination of the witness. Projectors can also be used during final argument or even opening statement with respect to documents that have been previously admitted by stipulation. Care should be taken in the type of projector used. Projectors that can be used without having to dim the courtroom lights and that are not noisy should be used. The presentation, to be effective, should be smooth. The attorney should consider having a legal assistant or paralegal operate the projector and handle the transparencies or the original documents if they are placed on the projector.

v. Other Considerations.—Effective demonstrative exhibits illustrate a point clearly and quickly. Juries pay attention to what they understand and reject or ignore what they do not understand. Thus, exhibits should not attempt to convey too much information. They should be limited to one key message that is readily understood.[471] Once the attorney has made the point with the exhibit, the attorney should stop and not be redundant. Juries and judges quickly become tired of hearing the same point over and over.

There are companies that specialize in creating visual aids for use in litigation. They are experts in how to present graphic information. There are also companies that specialize in building scale models. Both types of companies should be consulted in appropriate cases, where the use of a model or innovative graphics will be helpful or necessary. Companies that offer these kinds of services usually advertise in the yellow pages and bar journals. Claims consultants, particularly financial consultants, have computer programs that will produce graphic information in a variety of formats. Consultants are usually the best source of ideas on how to create visual aids for effective presentation of their testimony.

7. The Trial

The presentation, argument, and examination techniques of a construction contract trial are not dissimilar to other types of trials.[472] There are, however, certain unique aspects that should be considered in the presentation of the case.

a. The Opening Statement

No single guideline governs how opening statements should be made. Their use is governed by a variety of considerations that depend upon the nature and complexity of the case and whether the case is tried to a judge or jury. There are, however, some guidelines that usually apply.

As a general rule, an opening statement should be presented at the commencement of the trial and not deferred until defense counsel commences his or her case-in-chief. If the opening statement is reserved, there should be a good reason for doing so.[473] The opening statement should be a road map of what your case will be and have an overall theme or theory that pieces the case together.[474] Outline the segments of the trial and their function to allow the jury to have a better understanding of how the trial will proceed. Do not read an opening statement. Counsel should talk directly to the judge or jury and maintain eye contact with them. The use of notes should be minimized. Visual aids, such as photographs, maps, aerials, and models, should be used to explain and illustrate what the evidence will show. Pre-mark the exhibit and obtain permission from the court to use it in the opening statement, if opposing counsel refuses to stipulate to its use. This practice avoids an objection that could harm the effectiveness of the opening statement.

The opening statement should not be argumentative. Opening statements that are argumentative will usually draw an objection, which is likely to be sustained. Although argument must be avoided, counsel should make a strong statement of what he or she intends to prove, remembering that your opponent is entitled to comment in final argument on what you failed to prove. The opening statement should be phrased in simple terms with an explanation of the technical terms that may be used during the trial. However, counsel should never talk down to the jury or appear condescending. Witnesses should be introduced by occupation, not by name. For example, refer to the project engineer as the project engineer, not Mr. James.[475] The jury should be told how the witnesses fit into the case, and what they will say when they testify.

An opening statement should be comprehensive. As a general rule, an attorney will gain more in educating and conditioning the trier of fact than the attorney will lose in exposing his or her case in advance.[476] While the opening statement should be comprehensive, it should

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[470] The use of Microsoft Power Point© is another option for presenting documentary evidence.

[471] Billboard advertising and roadside signs are an example. Television commercials are another. They are designed to convey a message.

[472] *See* D. Schwartz, *Going to Trial in The United States Claims Court*, 32 PRAC. LAW. No. 1, at 35 (1986). Although the article discusses trying cases in the United States Claims Court, it offers suggestions that the reader may find useful in any bench trial regardless of the forum.

[473] An exception may be a bench trial where the trial judge is familiar with the case from pretrial proceedings or where counsel can gain a clear tactical advantage by deferring the opening statement. *See also* Schwartz, *id*.

[474] M. Mitchell, *A Method for Evolving a Trial Strategy*, 27 PRAC. LAW. No. 4, at 82 (1981). The article offers suggestions for developing a theme.

[475] Consider personalizing the case by having the project engineer sit with you at counsel table throughout the trial.

[476] *See* possible exceptions to this view noted *supra* note 473.

not be redundant. Counsel should avoid covering the same ground over and over. The trier of fact should be favorably impressed by an opening statement that is logical and comprehensive, yet succinct. This type of presentation will enhance the attorney's credibility and the credibility of his or her client's case. In the final analysis, the most important attribute that a trial attorney has is credibility.

b. Direct Examination

Typically, the most important part of any trial is direct examination. More cases are won by direct testimony than by cross-examination or final argument. Because of its importance, counsel should ensure that direct testimony is presented in a way that is easily understood by a judge or jury.

Direct examination should be business-like, not spectacular or dramatic. It should be brief and to the point. Once a point is made, stop. Go on to the next point. Covering the same ground again may do more harm than good. It may weaken the impact of what has been established and irritate the judge and the jury. It may even draw an objection from the court on its own volition, if not from opposing counsel.

The focus should be on the witness, not on the attorney, during the direct examination. A case is won by what the witnesses say. Counsel should not draw attention to himself or herself by pacing back and forth or by engaging in other distracting mannerisms. Questions should be short, clear, and whenever possible phrased in plain, simple English. Construction jargon and technical terms should be used only when necessary, and the witness should be asked to explain them and give examples to illustrate their meaning. Visual aids should be used to explain and illustrate the witness's testimony.[477]

Leading questions should be avoided, not only because they are objectionable, but more importantly because the witness should be testifying, not the lawyer.[478] A witness who is nothing more than a sounding board for the attorney has little credibility. Some lawyers write out their questions, others do not. Attorneys write down their questions in case they have problems formulating them and as a safeguard when direct examination is interrupted by an objection. Whatever one's preference, it is a good practice to have an outline listing point by point each topic that will be covered with the witness. An outline of this kind should be part of every trial notebook.[479] The outline should be reviewed with the witness before trial. Psychologically, this is helpful to the witness since the witness knows, when taking the stand, what the questions will be. Ideally, the direct examination should be like a friendly chat about some aspect of the case. Transitional questions such as "turning now to…" should be used to make the direct smoother and easier to follow. Avoid leading questions by using the "who," "how," "where," and "why" approach in formulating questions.

In preparing witnesses to testify, counsel should discuss certain guidelines with the witness. The witness should be told to listen to the question and answer the question as asked. The witness should be told not to volunteer or elaborate and that you will develop the witness's testimony.[480]

The order in which witnesses are called should be logical, and should allow you to lay out the case the way you want it presented. The conventional trial wisdom that you should begin and end with strong, substantive testimony is not always true. While you should end with a strong witness,[481] you may wish to begin with a minor witness, when that witness's testimony is the starting point for your case. For example, calling the office engineer from a project office to show in a DSC claim that the agency provided the boring logs to the contractor during the bidding phase. This testimony is necessary to establish a foundation that the contractor actually knew or should have known about the soil conditions.[482] Contractor personnel who are managing agents (superintendents, foremen, project managers) should be subpoenaed and called as adverse witnesses. This permits counsel to ask leading questions and in effect cross-examine them.[483] The trial notebook should contain a list of questions that must be asked to lay a foundation for the admission of a document, photograph, or chart. Use of the outline allows counsel to lay a foundation crisply and smoothly, thus enhancing counsel's credibility with the court and the jury.

Sometimes owners feel so strongly about their lack of liability for a construction claim that they ignore damages. Owners should keep in mind that when liability and damages are tried together, large losses by the contractor may influence the trier of fact in making a determination about liability. Moreover, plaintiff's damages may be so poorly presented that doubt is cast on the overall merits of the claim. The dilemma for the defense is whether to offer testimony on damages, or stand on the contractor's failure to meet its burden of proof on damages. There are no rules concerning this dilemma. The strategy in dealing with this problem must be carefully considered and will vary depending

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[477] Witnesses should be asked if the use of a picture or model, or some other visual aid, will assist them in explaining their testimony. This makes it difficult for opposing counsel to object to its use.

[478] *See* J. Weinstein, *Examination of Witnesses*, 23 PRAC. LAW. No. 2, at 39 (1977).

[479] *See generally* L. Packel and D. Spina, *A Systematic Approach to Pretrial Preparation*, 30 PRAC. LAW. No. 3, at 23, 33 (1984).

[480] A witness who volunteers information may appear to be biased.

[481] Expert witnesses on liability and damages ordinarily should be called last because they can summarize the case and handle any loose ends.

[482] The contractor may be charged with knowledge of what the borings show even if the contractor did not examine them. *See* § 5.B, Differing Site Conditions, *supra*.

[483] FED. R. EVID. 611(c).

upon the case. However, conventional wisdom tells us that it is probably better to put on some evidence refuting damages as part of the owner's case-in-chief, unless the defense has successfully refuted the damage calculations.

c. Cross-Examination

More books and articles have probably been written about cross-examination than any other phase of a trial. The most dramatic part of any movie or television show featuring a trial is the cross-examination of a key witness. Invariably, writings about cross-examination point out what the cross-examiner should not do—the so-called "don'ts" of cross-examination.[484] For example, avoid asking open-ended questions such as "why" or "how" of an articulate and knowledgeable hostile witness. Instead ask leading questions that call for a "yes" or "no" answer, or questions to which the witness will give only the answer you anticipate. If you gamble—because you do not know for sure what the witness will say—do so only when the answer cannot hurt your case. Be fair to the witness, do not embarrass the witness, and do not get angry at the witness. The cross-examination should be business-like and have a purpose. Generally, cross-examination can be designed to discredit the witness, or to solicit facts or admissions that can support your case. It should not be used to discover information about the case unless the witness is friendly and cannot possibly say anything that will hurt your case, but even then be cautious. Be thorough, but be brief and do not cover the same points over and over. Make your point and stop.

Should you always cross-examine every witness simply because the witness testified? Conventional trial wisdom says no, if the testimony has not hurt your case.[485] But if the testimony is damaging, it should not stand unchallenged. Find something you can attack, particularly if the witness is a retained expert. For example, if the witness is a retained expert, explore bias. Through discovery, you should have obtained what the witness's fee arrangement is, how much the witness has been paid, when, by whom he or she was retained, and any other cases in which the opposing attorney or party has engaged the witness.

Counsel should be thoroughly familiar with the deposition testimony of the witness he or she is interrogating. Statements in the deposition transcript that are inconsistent with the witness's testimony at the trial can be used for impeachment, but counsel should avoid the appearance of nitpicking by using a minor or trivial inconsistency to impeach.[486] Also, counsel should consult his own expert for areas of cross-examination. This is particularly important in preparing for cross-examination of the opposing party's expert. Your expert can review the deposition transcript of the opposing expert and can suggest questions that should be asked on cross-examination.[487] But counsel should be careful about asking questions on cross-examination suggested by others (including your own experts) when you do not understand the question. The opposing expert will usually have an answer, and if you do not understand the question you asked you probably will not understand the answer, leaving counsel with the choice of letting the answer stand or asking another question and maybe getting into even more trouble.

One of the problems of cross-examination in a construction case is keeping track of what occurred on the project and how those facts bear on the witness's testimony. This is often true in cross-examining a claims expert or project superintendent or manager who has overall knowledge of the project. One technique is a chart that diagrams the various construction phases of the project, including significant construction activities. This chart allows counsel to keep track of all aspects of the project as they occurred. The chart should be keyed to counsel's trial notebook.[488] The notebook can contain a section on each phase of the project, including areas to inquire about on cross-examination and documents by exhibit number (if pre-marked), that can be used during the cross-examination.

There are other ways, of course, of preparing for cross-examination. Often, how one prepares is a matter of personal choice. However, prepare for cross-examination before the trial begins. Counsel should know from pretrial discovery what the witness will say and be prepared to deal with it.

d. Presentation of Multiple Claims

Rarely will a construction contract case be limited to a single claim. Once a contractor decides to file suit on one claim, all disputes that have been preserved can be expected to be litigated. Where the lawsuit consists of several claims, the contractor has several methods it can use in presenting its claim. One method is to present each claim separately. The difficulty with this method is that some aspects of the project will be repeated as the facts are developed for each of the claims. The contractor will usually begin with the dominant

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[484] A.S. CUTLER, SUCCESSFUL TRIAL TACTICS 123–30 (4th ed. 1950), "Some Don'ts in Cross Examination." Irving Younger referred to them as the "Ten Commandments of Cross-Examination" in his evidence seminars (reprinted at www.nebarfnd.org/10commandments.pdf, Nebraska State Bar Foundation Web site).

[485] *See, e.g.*, CUTLER, *id*.

[486] A number of inconsistencies, even though minor, may help convince the trier of fact that the witness is mistaken or lying.

[487] Usually, an expert's opinion is a logical extension of the premises upon which the opinion is based. Where the expert may be vulnerable is in the premises used to form that opinion, particularly if a premise is an assumption that is not supported by the evidence.

[488] The trial notebook is usually a three-ring notebook that allows issues and facts to be organized alphabetically or chronologically. *See* Packel and Spina, *supra* note 479.

claim and then proceed to the more minor claims. Another method is to present each claim as it arose in chronological order during the course of the project. This method avoids redundancy by allowing the project facts to be presented in an orderly and sequential manner from the commencement of the project to its completion.

Rather than anticipate which method the contractor will use in presenting its case, the owner may ask the court to rule in advance of trial as to which method must be used.[489] Knowing in advance how the contractor's case-in-chief will be presented helps the owner organize its cross-examination. Establishing the order in which the claims will be presented makes the trial more efficient and saves the court time.[490]

e. Closing Argument

Some lawyers have a section in their trial notebook to jot down ideas for final argument. Some attorneys review their trial notes and from them develop an outline of their final argument. Others prepare an outline of their final argument before the trial even starts on the assumption that the case is sufficiently well prepared to prevent any surprises.

Whatever technique is used, the final argument should be just that—an argument. Someone once observed that more cases are lost by a poor argument than won by a good one. That is a good admonition for lawyers to follow even if it is not precisely true. The final argument should be carefully prepared. Many who write about trial practice say that the closing argument must tell a story. The lawyer should paint a picture that is so compelling that the judge or jury must find in his or her client's favor. This, of course, is the ideal presentation. Attaining this ideal is even more difficult when the case is complex and involves a multitude of issues.

The closing argument, like other phases of a trial, has certain recognized guidelines that counsel should consider. These guidelines are often referred to as "do's" and "don'ts." For instance, it is improper to refer to matters that are not in evidence.[491] Another "don't" is never read a closing argument to a jury. To be effective and creditable, counsel must talk to the jury. Reading a speech to the jury is not talking to them. If permitted by the court rules, relate and argue how the jury instructions apply to the issues and the conclusions that the jury should reach in deciding the case. Relate the evidence in a way that shows that you proved what you said you would prove in your opening statement. This ties the opening statement to the closing argument, giving your case continuity and credibility.

Organize documentary evidence in a way that is keyed into your argument. Use enlargements of important documents that the jury can easily read as you argue their significance.[492]

Some lawyers make very little, if any, preparation for closing argument. They jot down a few notes on a yellow tablet sheet and then speak extemporaneously. Unless you have a natural talent for arguing cases, you should avoid this practice. Take the time to organize the argument in outline form. In concluding your argument, tell the jury that your opponent now has the opportunity to rebut what you have said. Point out that your opponent has this opportunity because plaintiff has the burden of proof. Tell the jury that you will not have an opportunity to respond to your opponent's remarks, but that you do not need that opportunity. Why? Because the evidence itself serves as rebuttal to what he or she may say.

The closing argument is an important part of the trial. Your argument may not win the case, but you should avoid a hastily prepared argument that could lose it.

f. Other Trial Considerations

i. Taking Notes During Trial.—Conventional trial wisdom suggests that the attorney divide each page of a legal tablet down the middle with a vertical line. Notes are placed on one side of the line and comments, questions, or reminders on the other. One problem with this method is that it is an invitation to try to write down everything the witness says. If you accept this invitation, you may miss the jury's reaction to the witness, any nuances in the testimony, objections that should be made, and more important, what the witness is really saying.

In the first place, the attorney does not need to take notes during the direct examination of his or her witness. Second, note taking should be selective. It should be limited to the points that will be covered in cross-examination, and not a re-hash of the direct examination. Points developed through pre-trial discovery, and questions suggested by your experts can be prepared in advance for cross-examination and added to the notes on separate sheets of paper.

Good, complete note taking should not be performed by the trial lawyer. That task should be done by someone else sitting at counsel table.

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[489] FED. R. EVID. 611(a).

[490] *Id*. Under this rule, the court has the power to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time…."

[491] It is proper to draw reasonable inferences from the evidence. But counsel should avoid overstating what the evidence actually proves.

[492] A common practice is to enlarge the document on a poster board that is light and easy to handle.

ii. Housekeeping.—Good housekeeping techniques are important. A chart should be kept of each document that is marked as an exhibit. The chart should identify the document, show whether it was admitted, and show whether it was admitted only for illustrative purposes.[493] The chart should list the exhibits in numerical order. Pre-marked exhibits can be listed in advance. The task of keeping track of exhibits should be assigned to the paralegal sitting at counsel table with the trial lawyer.

iii. Jury Instructions.—In preparing jury instructions, considerations should be given to the verdict form. A special verdict form submitting questions to the jury may help in focusing the case. For example, the verdict form in a case involving the assessment of liquidated damages could provide as follows:

> We, the jury, make the following answers to the questions submitted by the court:
> Question No. 1: Should liquidated damages be assessed against the plaintiff?
> Answer: (Yes or No) _____.
>
> Question No. 2: If your answer to Question No. 1 is "yes," then answer the following question: The number of days that should be charged for liquidated damages are _____.

The questions may also ask the jury to focus on the State's liability. For example:

> Question No. 1: Did the State breach its contract with plaintiff by withholding information about the pit site, which was vital for the preparation of plaintiff's bid?
> Answer: (Yes or No) _____.
>
> Question No. 2: Did a differing site condition occur in the pit site as alleged by plaintiff?
> Answer: (Yes or No) _____.
> If your answer is "no" to all of the above, do not answer any further questions. If your answer is "yes" to any of the above, then answer the following questions:
>
> Question No. 3: Did the breach cause damage to plaintiff's subcontractor?
> Answer: (Yes or No) _____.
>
> Question No. 4: If the answer to Question No. 3 is "yes," what is the amount of those damages?
> Answer: _____.
>
> Question No. 5: If you award damages to plaintiff's subcontractor, what percentage is plaintiff entitled to as markup for overhead and profit on the amount of those damages?
> Answer: _____ percentage.

iv. Excluding Evidence.—Counsel should consider whether evidence proffered by opposing counsel may be excluded by the court as a matter of law. For example, there is some authority, although slight, that expert testimony as to the cause and effect of construction delays is not admissible, because the subject matter is not beyond the common knowledge of the jury.[494] Defense counsel should also consider excluding the contractor's employees as experts on delay claims.[495] Reports prepared for settlement discussions should not be admissible.[496] Efforts to exclude testimony should be raised by motions in limine.[497]

v. Summaries.—Counsel should consider using summaries of records where the underlying records are so voluminous that it would be impractical to admit them in evidence. To be admissible in summary form, the underlying records themselves must be admissible, and they must be made available to the opposing party for inspection.[498] Trial courts have wide discretion in determining whether summaries are necessary to expedite the trial, and whether the opposing party had a reasonable opportunity to examine the records.[499]

vi. Trial Preparation for Witnesses.—Witnesses should be provided with general instructions that serve as a guide when they testify.[500] Witnesses must be warned that they must fully understand each question before they answer. The witnesses should be told that they can have a question repeated or rephrased if they do not understand it.

Witnesses should be reminded that they do not have to answer a question "yes" or "no" during cross-examination if they cannot do so. Even if the witness does answer "yes" or "no," he or she may explain the answer. If the examining attorney prevents the witness from explaining the answer, the defending attorney can have the witness explain the answer during the redirect examination.

Witnesses should be advised not to take notes or documents to the witness stand when they testify, or review them in the courtroom before they testify, because the questioning attorney will be entitled to re-

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[493] Ordinarily, exhibits admitted for illustrative purposes are not substantive evidence and do not go to the jury room. *See* Arnold v. Riddell, Inc., 882 F. Supp. 979, 995 (D. Kan. 1995).

[494] Jurgens Real Estate Co. v. R.E.D. Constr. Corp., 103 Ohio App. 3d 292, 659 N.E.2d 353, 356–57 (1995).

[495] FED. R. EVID. 701.

[496] FED. R. EVID. 408; *but see* Scott Co. of Calif. v. MK-Ferguson, 832 P.2d 1000 (Colo. App. 1991) (employee's analysis of claim's worth entitled "Settlement Detail" was not an offer of settlement within scope of Rule 408 but was a report prepared in ordinary course of business, and was admissible).

[497] *See* "Pre-Trial Motions," subsection 6.D.6.c, *supra*.

[498] FED. R. EVID. 1006.

[499] C.L. Maddox, Inc. v. The Benham Group, Inc., 88 F.3d 592, 601 (8th Cir. 1996) (admission of summaries of business records was within trial court's discretion; all underlying information was available to opposing party as required by rule).

[500] *See generally* 5 AM. JUR. *Trials* § 888-906 (1965).

view those materials.[501] Any documents they need should be supplied by their attorney. Finally, the witnesses must be aware that they are expected to be knowledgeable in the areas of the construction project in which they were directly concerned. They do not have to be experts in those areas of responsibility where they rely on the expertise of others, such as a project engineer relying on the expertise of a soils engineer or geologist. But the witness must be able to respond to questions in his or her area of responsibility. Witnesses who have been deposed should carefully review their deposition transcripts before testifying.

vii. Present the Case in Plain English.—Counsel and their witnesses must keep in mind that judges and juries base decisions on their understanding of the relevant facts. Because construction cases are often complex, it is essential that the trier of fact does not become lost in technological details. Present the case in plain English and have the witnesses explain technical terms, using examples as appropriate to illustrate their meaning. But never talk down to the trier of fact. The attorney or witness who speaks in a condescending or oversimplified fashion may alienate the judge or jury and harm his or her case.

[501] FED. R. EVID. 612.

APPENDIX[502]

List of Affirmative Defenses

Denial of liability on the merits
Engineer's determination of claims final
Waiver or release of claim rights
No notice of potential claim
Failure to give proper, detailed, and timely notice required by contract
Extra work not ordered in writing
Work performed was beyond the scope or requirements of the contract
Failure to protest written change order
Subject matter of claim covered by an executed change order
Claim compromised and released
An election to perform work knowing it was misrepresented by the contract
Negotiation of final pay warrant releasing any and all claims without reservation
Payment
Bid submitted without seeking clarification or interpretation of contract provisions
Estimated quantities approximate only
Failure to cooperate with other forces
Assumption of the risk of unforeseen difficulties
Superior knowledge and expertise
Duty to examine plans, specifications, and work site and satisfy himself as to conditions
Voluntary selection of the method of performance
Statute of limitations
Statute of frauds
Failure to mitigate damages
Failure to comply with claims statute
Failure to exhaust contractual remedies
Unjust enrichment
No damage
No damages for delay clause (time extension only)
Subcontractor's damage without liability (*Severin* Doctrine)
Collateral source rule
Damages consequential in nature
Damages as a result of inefficiencies and matter of the contractor's control and responsibility
Failure to mitigate damages
Damage or delay caused by the contractor
Acts of the engineer beyond scope of authority
Oral modifications of the contract
Oral promises or representations
Acts beyond delegated responsibilities
Violations of law or contract
No contractor's license
Subcontracting in violation of the contract or law
Violation of prequalification statutes or regulations
Claim sounds in tort
Failure to comply with public tort claims statutes
Sovereign immunity
Failure to state a cause of action or claims

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[502] Affirmative defenses reproduced from *Trial Strategy and Techniques in Highway Contract Litigation, NCHRP Research Results Digest No. 108*, by Orwin F. Finch and Kingsley T. Hoegstedt (1979).