



## A Crystal Ball – Early Warning Signs of Construction Claims & Disputes

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BIOGRAPHIES

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*“The construction industry’s premier resource for thought leadership & best practices on avoidance & resolution of construction project disputes globally”*

- 47 years experience in construction management & dispute analysis & resolution
- Involved in more than 5,000 claims throughout U.S., Bahamas, Brazil, Canada, Chile, China, Dubai, Egypt, Guatemala, Germany, India, Jamaica, Kazakhstan, Mexico, Netherlands, Peru, Saudi Arabia, Slovenia, South Africa, Sri Lanka, Tatarstan (Russian Federation), Trinidad & Tobago, UK & Venezuela
- Fellow of AACE International, Royal Institution of Chartered Surveyors & Guild of Project Controls
- Former President, AACE International; author RP 25R-03 – Lost Productivity & co-author RP 29R-03 (Forensic Schedule Analysis)
- CCM, CFCC & PMP

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# INTRODUCTION

## INTRODUCTION

### Introduction

- **Construction projects have grown in cost & complexity**
  - Claims have grown likewise
  - Average legal dispute in U.S. = **\$34.3 million**
  - 2009 – 2011 – 65 international arbitrations over **US\$1 billion**
    - Average dispute in study was **US\$2.73 billion**
- **Claims & disputes do **not** appear out of nowhere**
  - There is always a history of events, decisions, etc.
  - Past events are often “**early warning signs**” – but **not** recognized at the time

## Introduction

- Too few recognize early warning signs
- Experience shows that successful projects generally
  - Recognize early warning signs when they arise
  - Take appropriate action to resolve issue
- *“Hoping that the dispute will go away on its own rarely, if ever succeeds”*
- Presentation looks at early warning signs in
  - Bid or proposal phase
  - Initial contract phase
  - Construction phase

## EARLY WARNING SIGNS

### Bid & Proposal Phase

## Early Warning Signs For Owners

- First time experience with project delivery method
  - CII identified this as a strong indicator of future disputes
  - **Recommendation:**
    - Invest heavily in training staff
    - Retain consultant or key personnel with experience
- Lack of biddability & constructability review
  - Design professionals rarely have experience to perform these reviews
  - **Recommendation:**
    - Retain outside CMs or contractors to perform reviews
    - Review from perspective of contractor, user of CDs

## Early Warning Signs For Owners

- Project constraints **not** identified in CDs
  - Designers know design, but little about operating facilities
    - Result, **not** include constraints in CDs
    - Contractor **unaware** of constraints **not** included in CDs
  - **Recommendation:**
    - Operating staff review CDs to identify constraints & include in CDs
- Lack of operability review
  - Designers are **not** operators
    - Often fail to consider operability issues in design
  - **Recommendation:**
    - Include senior operating staff in design reviews

## Early Warning Signs For Owners

- Rushed design
  - Public owners driven by fiscal year goals, political demands
    - Rushed design = **incomplete** design, changes & claims
  - **Recommendation:**
    - Allow sufficient time for design
    - If cannot do this, consider an alternative project delivery method
- Poor estimating during design/bid process
  - **“Owner estimates”** often incomplete or understated
    - Results in unrealistic project budgets
  - **Recommendation:**
    - Use external estimators to provide sanity check of estimate
    - Establish appropriate budget & contingency for project

## Early Warning Signs For Owners

- Bidders request longer project duration
  - Owners & designers often do little pre-bid scheduling
    - If duration too short, bidders may ask for time extension
    - If **not** extended, bids higher & delay claims more likely
  - **Recommendation:**
    - Prepare pre-bid schedule based on bid documents to establish realistic project duration in CDs
- Ineffective project controls
  - Owners need to assess internal systems & staff capabilities
  - **Recommendation:**
    - If **not** adequate to handle project obtain added staff or retain project controls through a CM

## Early Warning Signs For Owners

- Inadequate change management system

- All projects **will** have change orders
  - Owners need to assess procedures to determine adequacy
- **Recommendation:**
  - If assessment indicates system inadequate
  - Hire experienced staff or retain services of external consultant

- Low bid substantially below other bids

- If good design & design review, indicates potential problem
- **Recommendation:**
  - Written notice bidder asking they review bid for error(s)
  - Low bid confirmed, protected from "**mistaken bid**" claim

## Early Warning Signs For Contractors

- Onerous contract language

- Look for inappropriate risk transfer or exculpatory clauses
  - Clauses may or may **not** be enforceable
- **Recommendation:**
  - If contractor cannot review on own, get experienced legal advice
  - See if clauses enforceable, weigh risk of taking contract
  - **Two options:** **Not** bid or **add** contingency

- Apparent lack of pre-bid scheduling

- Review time of performance clause, realistic?
  - Too short or too long indicates no realistic time estimate
- **Recommendation:**
  - Prepare own schedule to assess time of performance, revise bid?

## Early Warning Signs For Contractors

- Insufficient Disputes clause
  - Good indicator of potential disputes, poor Disputes clause
    - Disputes go from negotiations straight to arbitration or litigation
  - **Recommendation:**
    - Nothing contractor can do but include in risk analysis
    - Decide to bid & add contingency or **not** bid
- Poor definition of scope of work
  - If scope of work poorly defined, early warning sign of claims
    - **Indicator** – excessively high number of submittals required
  - **Recommendation:**
    - Consider **not** bidding project
    - **Alternative:** prepare detailed questions & submit during bidding

## Early Warning Signs For Contractors

- Defective design
  - Perform own constructability review to determine quality of design
    - Numerous design deficiencies indicate claims & disputes
  - **Recommendation:**
    - **Alternatives:** Not bid or prepare detailed list of questions to submit to owner during bidding period

## EARLY WARNING SIGNS

### Early Construction Phase

#### EARLY CONSTRUCTION PHASE

### Early Warning Signs For Owners

- Problems with baseline schedule
  - Typically require submittal within short time after NTP
    - Leads to inadequately planned or late schedules
    - Schedules often **not** accepted but work gets underway
  - **Recommendation:**
    - Tie mobilization payments to schedule submittal & acceptance
    - Require scheduling start at Notice of Award, **not** NTP
    - Use Two Step NTP process
- Early need to tap contingency funds
  - If contingency nearly exhausted early, disputes coming
  - **Recommendation:**
    - T for C, redesign & rebid **or** obtain additional contingency \$\$

## Early Warning Signs For Owners

- Bid breakdown excessively front loaded
  - On LS projects, owner & contractor negotiate bid breakdown
    - Accepting unbalanced breakdown high risk for owner
    - Imperils performance bond & CO pricing more difficult
  - **Recommendation:**
    - Review proposed breakdown carefully, correct unbalanced items
- Changes in major subcontractors
  - Many owners require subcontractor listing in bids
  - Requires owner approval to substitute listed subs
  - **Recommendation:**
    - Include well thought out subcontractor substitution clause in CDs
    - Follow procedure strictly if such request is made

## Early Warning Signs For Owners

- Contractor unable to ramp up needed craft labor
  - Scheduling specification should require labor resources
    - If required labor **not** ramping up to plan, problem!
  - **Recommendation:**
    - Calculate impact of lack of labor on schedule
    - Meet with contractor, work together to resolve issue
- D/B or EPC contractor going to field too early
  - Must complete enough design to go to field productively
    - Owners often complain about “**lack of progress**”
    - Push contractor to go to field sooner, leading to productivity loss
  - **Recommendation:**
    - Create & follow plan so contractor can work efficiently

## Early Warning Signs For Contractors

- Owner says “There will be no COs on this job!”
  - Unrealistic expectation on part of owner
    - Likely breaches terms & conditions of the contract
  - Recommendation:
    - Review CDs carefully, follow procedures strictly
    - Pay careful attention to notice & claim filing requirements
- Multiple prime contractors on site
  - No **privity** between contractors, **all** have privity with owner
    - **More** claims likely as **no** mandatory coordination
  - Recommendation:
    - Insist that **all** baseline & update schedules shared with **all** primes
    - Insist that owners hold frequent coordination meetings

## Early Warning Signs For Contractors

- Lack of site access, ROW & easements
  - Owners may bid work before property acquisition complete
    - Leads to delay claims &/or productivity loss due to “**work arounds**”
  - Recommendation:
    - Inquire if **all** property acquisition complete
    - If **not**, request formal schedule for remainder of acquisition & include information in baseline schedule
- Lack of necessary permits
  - Owners may bid project before **all** permits obtained
    - Leads to delay claims &/or productivity loss due to “**work arounds**”
  - Recommendation:
    - Inquire about permits & insist on schedule to be used in baseline

## Early Warning Signs For Contractors

- Unknown work hour restrictions/limited work areas

- If **not** in CDs, contractors **cannot** anticipate in bid
  - Leads to constructive change, delay & lost productivity claims
- **Recommendation:**
  - As soon as new restrictions or limits identified, file written notice
  - Analyze current schedule & modify to incorporate restrictions
  - File notice of constructive change, estimate time & cost impacts & file claim

## EARLY WARNING SIGNS

### Construction Phase

## Early Warning Signs For Owners – Scheduling

- Contractors not submit monthly schedule updates
  - Typically, CDs require routine schedule updates
    - If contractors **not** submit updates, work proceeding without plan
  - **Recommendation:**
    - Adopt appropriate defenses in CDs – submittals a pay item; Pay Off the Schedule; LDs for late submittals; etc.
- Key milestones missed, project completion on time
  - Numerous dates missed but still on time, an issue
    - “**Scheduling away**” delay, updates unreliable
  - **Recommendation:**
    - Require Schedule Change Report with every update, review closely
    - Share schedule updates with all subcontractors in joint meeting
    - Advise contractor cannot issue time extensions as result

## Early Warning Signs For Owners – Scheduling

- Updates focus primarily on owner delays & impacts
  - Obviously early warning sign of delay & impact claims
    - Especially true if starts very early in project
  - **Recommendation:**
    - Include strict written notice of delay requirement & timeframe for filing delay claims including well crafted TIA requirement
- Need to rebaseline the schedule
  - Well planned schedules rarely need to be rebaselined
    - Unless there are numerous changes & delays
  - **Recommendation:**
    - Include requirement that rebaselining requires justification, participation & approval of major subcontractors & owner

## Early Warning Signs For Owners – Scheduling

- Constant resequencing of work
  - If every update shows activity resequencing without justification, early warning sign of claims & disputes
  - **Recommendation:**
    - Review each update carefully
    - Meet with contractor & major subs to determine need for resequencing – If **not** justified **disapprove** update
- Continual schedule slippage & float consumption
  - If all updates show schedule slippage & float consumption
    - Early warning sign of potential delay claims
  - **Recommendation:**
    - Include well thought out TIA requirement in CDs & enforce it

## Early Warning Signs For Owners – Change Issues

- Excessive number of notices of change &/or delay
  - If numerous spurious notices filed, an early warning sign
  - **Recommendation:**
    - Require claim submittal within 30 days after notice
    - If event still ongoing, must still file claim + continuing notice & file final claim within 30 days after event complete
- COs **not** address time & impact costs, contractor will only perform changed work on T&M basis
  - Contractors often loathe to provide full time, costs, impacts
    - Unwilling to take risk of prospectively priced CO
  - **Recommendation:**
    - Owner prepare own estimate & delay analysis, negotiate from this

## Early Warning Signs For Owners – **Change Issues**

- Contractor **not** submit daily T&M records
  - If T&M records **not** submitted owner at serious risk
  - **Recommendation:**
    - Require submittal of daily/shift submittals & include detailed requirements for what must be reported
    - Train owner staff to observe & create own daily T&M reports
- Excessively high CO cost & time proposals or LS CO proposals with **no** supporting documentation
  - Makes it difficult to negotiate COs & forces T&M changes
  - **Recommendation:**
    - Include strict contract requirement on detailed CO proposals
    - If **not** have, owner prepare own estimate & negotiate from this

## Early Warning Signs For Owners – **PM Issues**

- Excessive, frivolous RFIs
  - RFI process routine communication tool on projects
    - Some contractors used RFIs to prove claims of change, delay, etc.
  - **Recommendation:**
    - Incorporate well thought out RFI clause giving owner right to reject documents that **not** legitimate RFIs
    - Implement strong RFI management process & procedure
- Massive letter writing campaign
  - Contractor may be “**papering the job**”
    - **Object** – establish basis for claims & put owner on defensive
  - **Recommendation:**
    - Owner **must** respond promptly & objectively to every letter even if have to employ additional staff

## Early Warning Signs For Owners – PM Issues

- Change in character, content of progress meetings & meeting minutes
  - If tenor & content of progress meetings change radically
    - Early warning sign of simmering claims & disputes
  - **Recommendation:**
    - Meet directly with contractor to determine cause
    - If partnered project, use facilitator to learn unresolved issues
    - If **not**, employ a turn around partnering facilitator
- Inflated payment applications
  - Typically some disagreements on % completion of pay items
  - **Recommendation:**
    - Confer with legal counsel & consider renegotiating pay breakdown

## Early Warning Signs For Owners – PM Issues

- Complaints from subs & suppliers over late payments
  - If owner receives complaints, warning sign of disputes
  - **Recommendation:**
    - Examine payment process to see if too lengthy, harming project
    - If so, modify process to remedy situation
    - Confer with legal counsel & consider advising contractor's surety
- Attorney or claim consultant attending meetings
  - Obvious warning sign of simmering claims & disputes
    - Owner probably cannot prohibit contractor from bring them
  - **Recommendation:**
    - Run progress meetings in normal professional fashion
    - Focus discussion on project status & maintain thorough minutes

## Early Warning Signs For Owners – Field Issues

- Late delivery of materials & equipment

- If deliveries late & crews & equipment idle, early warning sign of delay, etc.
- **Recommendation:**
  - Require procurement schedule & track progress so no surprises
  - If **not** have this, focus on procurement at every progress meeting

- Lower than expected manpower or labor force ramps down prior to substantial completion

- If owner observes lower than planned/needed, warning sign
- **Recommendation:**
  - If labor lower than needed, adjust schedule to determine impact
  - Meet with contractor or address in progress meetings to find fix

## Early Warning Signs For Owners – Field Issues

- Turnover in contractor project management staff

- Highly unusual to change PM staff in middle of job
  - Especially if project progressing well & on plan
- **Recommendation:**
  - Include clause in CDs listing “**key personnel**” who cannot be removed from project **without** owner approval
  - Meet with contractor’s management to determine reason

- Decline in labor productivity

- If labor productivity declining, an early warning sign
- **Recommendation:**
  - Use manpower loading or earned value to track productivity
  - Discuss productivity loss with contractor & craft a fix if possible

## Early Warning Signs For Owners – Field Issues

- Excessive work quality disputes
  - Some quality disputes are normal
    - If contractor refuses to correct deficiencies, an early warning sign
  - **Recommendation:**
    - Review all non-conformance reports to see if valid
    - If legitimate, meet with contractor PM & executive to correct issue

## Early Warning Signs For Contractors – Schedules

- Request for recovery schedule
  - If contractor has filed multiple time extension requests
    - But owner has **denied** requests & **demand**ed recovery schedule
  - **Recommendation:**
    - Assuming delay notices & time extension requests filed
    - File notice of constructive acceleration, prepare & implement acceleration plan keeping close track of costs & impacts
- No responses to notices of delay
  - When delay notices filed but **no** owner acknowledgement
  - **Recommendation:**
    - Meet with owner, explain constructive acceleration claim
    - If approach ineffective, confer with legal counsel

## Early Warning Signs For Contractors – Schedules

- Multiple suspensions of work directives
  - If contractor encounters multiple SOW orders
  - **Recommendation:**
    - When SOW issued, meet with owner to determine length & whether contractor is to remain on “**hot standby**”
    - Document meeting & proceed accordingly
- Late, incomplete delivery of OFCI items
  - Many owners pre-purchase material or equipment
    - Should include delivery dates or windows in CDs
  - **Recommendation:**
    - Include all information on OFCI in baseline schedule
    - If deliveries late, incomplete, file notice of delay & follow up with delay claim, if necessary

## Early Warning Signs For Contractors – Changes

- Excessive number of changes
  - Changes on projects are typical & to be expected
    - But, “**excessive changes**” a warning sign of claims & disputes
  - **Recommendation:**
    - Be alert to changes, file notices of change promptly, every time
    - Tighten up change management - prepare & submit change cost/time proposals for **every** potential change
- Owner refusal to negotiate time, impact cost of COs
  - Owners often refuse to deal with time & impact damages
    - Despite language in contract, owners often “**afraid**” to do so timely
  - **Recommendation:**
    - Open discussion with owner, discuss downside risk of approach
    - If **not** work, reserve rights on all CO’s

## Early Warning Signs For Contractors – PM Issues

- Disagreement over work scope, contract interpretations, etc.
  - Often **not** discovered until well into project, **not** anticipated
  - **Recommendation:**
    - When submittals rejected & instructions given, send notice, reserve rights & file claims timely!
- Turnover in owner project management staff
  - Highly unusual in mid-project – a red flag
  - **Recommendation:**
    - Meet with outgoing project team & owner executives to learn why
    - Work to resolve “**issues**” and/or confer with legal counsel

## Early Warning Signs For Contractors – PM Issues

- Payment problems
  - Slow or late payments, early warning of forthcoming dispute
  - **Recommendation:**
    - If stem from disagreement over progress, meet with owner staff to review payment applications & resolve issues
    - May need to renegotiate Schedule of Values
    - **No** reason for payment issue, confer with legal counsel & surety
- Change in style of owner’s project correspondence
  - May indicate owner has attorney or claim consultant writing letters, meeting minutes, etc.
  - **Recommendation:**
    - Notify legal counsel & surety, seek advice
    - Meet with owner, identify “**issues**” & try to work out solution

## Early Warning Signs For Contractors – PM Issues

- Delayed submittal reviews & responses
  - Delayed submittal responses **may** lead to project delay
    - Especially if CDs require approval of submittals before materials / equipment on site or installed
  - **Recommendation:**
    - Include submittals in A-P schedule, track closely, send notice if late
    - File delay claims promptly & as required by contract
- Owner correcting design defects through RFIs
  - RFI process typical project communication process
    - Sometimes used to correct defects or impose small owner changes
  - **Recommendation:**
    - Review responses closely, if a change, give notice & file claim

## Early Warning Signs For Contractors – PM Issues

- Design professional advises “*coordination of details will be done through submittal process*”
  - Coordination of design details between trades should be done during design
  - **Recommendation:**
    - Review responses closely, if a change, give notice & file claim timely
- Exclusion of designers from project meetings
  - Designers should be in most project meetings
    - When excluded, **cannot** respond to questions, assist contractor
  - **Recommendation:**
    - When need designers in meeting, advise owner in writing
    - If owner refuses, file notice of delay for unanswered questions

## Early Warning Signs For Contractors – PM Issues

- Attorney, claim consultants attending meetings
  - Obviously, early warning sign of claims & disputes
  - **Recommendation:**
    - Meet with owner to find out why & work to resolve issues
    - Review meeting minutes & correspondence closely
    - Seek advice from own legal counsel
- Contractors told not to “*put things in writing*”
  - Unusual & big red flag
  - **Recommendation:**
    - Request “**directive**” from owner in **writing**
    - If owner refuses, send letter to owner “**confirming**” directive
    - Regardless, continue contemporaneous written documentation

## Early Warning Signs For Contractors – PM Issues

- Owner advises “*We’ll take care of this at the end of the job*”
  - Typical with some owners but how long can contractor wait?
  - **Recommendation:**
    - Continue to provide written notice & file required claims
    - Meet with owner to advise of constructive acceleration claim
- Negative cost trends
  - Contractors must track & trend cost routinely
  - **Recommendation:**
    - If find account with negative trend, analyze for causation
    - If owner caused, send notice & follow up with appropriate claim

## Early Warning Signs For Contractors – PM Issues

- Lack of reasonable evidence of financial arrangements
  - If under FIDIC contract have right to demand proof of financial arrangements
  - **Recommendation:**
    - If not receive a satisfactory response, follow procedure of Sub-Clause 2.4, **Employers Financial Arrangements**, carefully
    - Seek advise from legal counsel
- Owner unreasonably withholding certificate of substantial completion
  - Certificate stops LDs under most contracts but S/C not defined
  - **Recommendation:**
    - Arrange S/C inspections early on system basis to get early punchlists

## Early Warning Signs For Contractors – PM Issues

- Receipt of cure or default notice from owner
  - Prelude to **Termination for Default**
  - **Recommendation:**
    - Contact legal counsel **IMMEDIATELY!**

## Early Warning Signs For Contractors – Field Issues

- Multiple “holds” on drawings or work
  - An indication of incomplete design or need for changes
  - **Recommendation:**
    - Upon receipt of hold directive, file notice of potential delay
    - Track costs & delay impacts separately due to holds
- Lack of responses to RFIs
  - Longer it takes to respond, greater the likelihood of delays or constructive suspensions
  - **Recommendation:**
    - If contract has timeframe for response, send notice of delay next day
    - Track schedule impact of each late response & submit delay claims as appropriate

## Early Warning Signs For Contractors – Field Issues

- Owner refusal to acknowledge DSCs
  - If DSC notice & owner investigates, owner **owes** a decision
    - If **not** issue decision, warning sign of potential dispute
  - **Recommendation:**
    - Send letter requesting final decision on DSC
    - If **not** issued, file request with DRB/DAB or mediation
- Unreasonable disapproval of contractor’s ordinary means & methods
  - If contractor employing methods used on previous projects contractor may have “**right of reliance**”
  - **Recommendation:**
    - File notice of constructive change & appropriate claim as needed

## Early Warning Signs For Contractors – Field Issues

- Over inspection, criteria changed after award
  - Situation recognized as constructive change by courts
  - **Recommendation:**
    - File notice of constructive change, track time & cost impacts separately & submit appropriate claim
- Excessive quantity variations
  - If working on unit price contract or LS contract with some units & units vary excessively, warning of potential dispute
  - **Recommendation:**
    - Review Quantity Variation clause & file repricing request as needed
    - If **no** Quantity Variation clause, seek legal advice on whether can use DSC clause in absence of Quantity Variation clause

## EARLY WARNING SIGNS

### Conclusion

CONCLUSION

## Conclusion

- **Presentation identified 75 early warning signs**
  - Some for owners & others for contractors
  - There are probably many more!
- **Experience shows all too often owner & contractor teams **overlook** or **miss** early warning signs**
  - Too wrapped up in myriad other details necessary to deliver a project
- **Result:** Claims & disputes grow before team even knows they have a claim or dispute

CONCLUSION

## Conclusion

- **Real key to dispute avoidance**
  - Early recognition of potential claims
  - Prompt action on part of owner & contractor to identify each issue in dispute
  - Agreement between owner & contractor to work together to craft acceptable resolution based on terms & conditions of contract
- **If both parties focus on claim or dispute resolution (**not** positioning or CYA), likelihood of delivering project on time & in budget substantially increases**

QUESTIONS

## Questions?

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