

**MCAA 25**



# How to Fix a Broken Project: Habits and Practices of a Superstar Project Manager Dan Fierstein & Matt Gioffre

**Monday, March 3<sup>rd</sup>  
10:30 a.m. – 12:00 p.m.**

Please let us know what you thought of this session



---

SEMINAR HANDOUTS SPONSORED BY:



**MCAA**25

# How to Fix a Broken Project: Habits and Practices of a Superstar Project Manager



Dan Fierstein



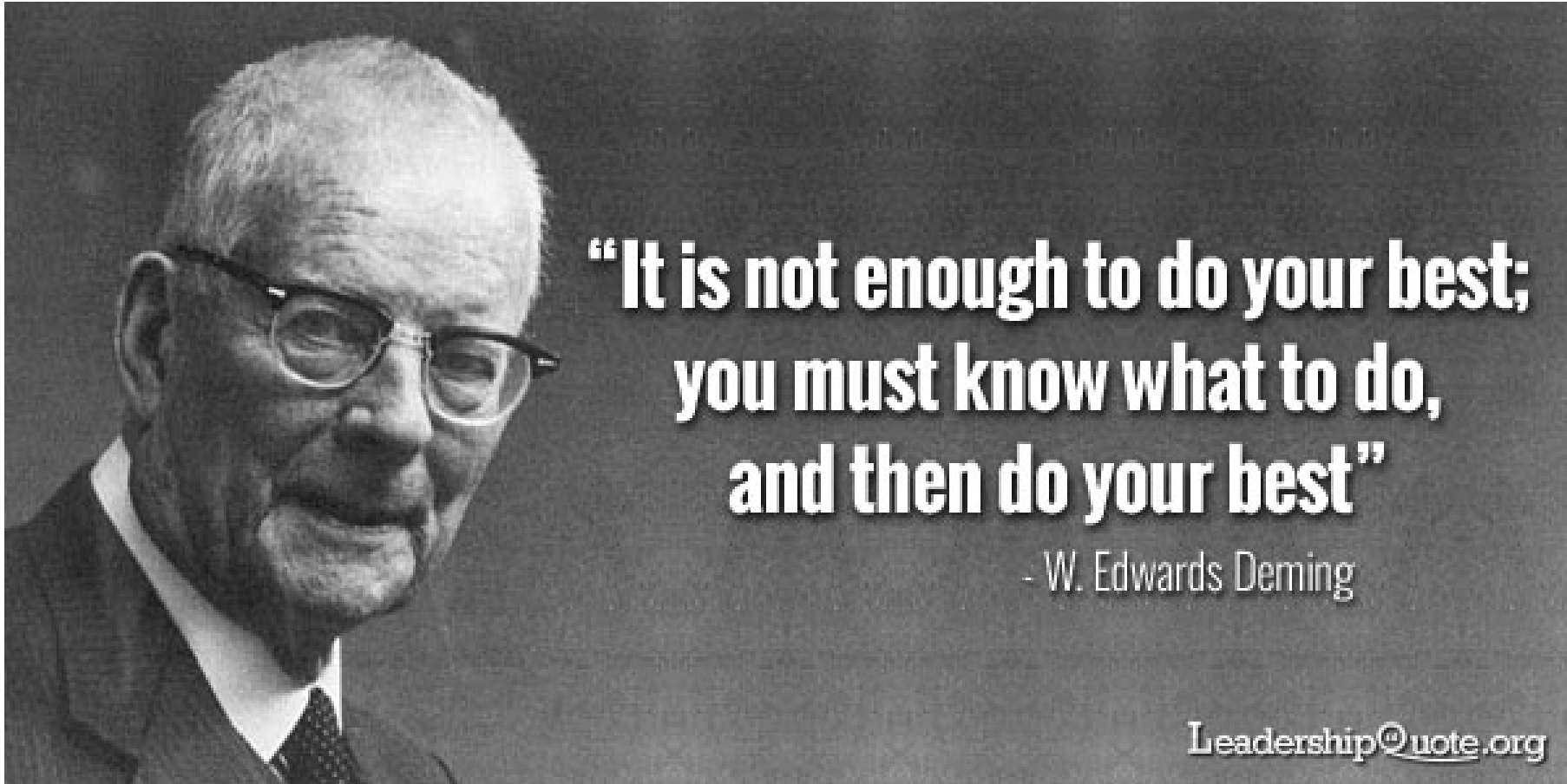
Matt Gioffre

# ABOUT COHEN SEGLIAS

## One of the premier construction law firms in the country

- Our attorneys and construction practice groups are frequently recognized nationally and regionally.
- We represent over 1,300 construction and construction-related companies across the country.
- We have more than 90 attorneys across nine offices in Pennsylvania, New York, New Jersey, Delaware, Kentucky, Florida and Washington, DC.





# PRESENTATION OVERVIEW

- Traits of a superstar project manager
- Key contract provisions
- Preconstruction strategies
- Methods for project monitoring
- Claims and notice: what, when and how



# Traits of a Superstar Project Manager

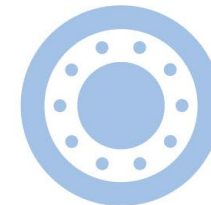


# TRAITS OF A SUPERSTAR PROJECT MANAGER

- Thinks like the company's owner (e.g., increase revenue, reduce costs, increase profit)
- Strong leader – inspires and guides the construction team
- Clear and effective communicator – verbal and written, both internally and externally
- Detail-oriented – efficient planning, budgeting and implementation
- Risk manager – identifies potential risks, remains calm under pressure and proactively mitigates
- Adaptable – navigates challenges (expected and unexpected) and implements creative strategies
- Strategic and forward thinking – always considering ways to improve processes

# Key Contract Provisions

## CONTRACT





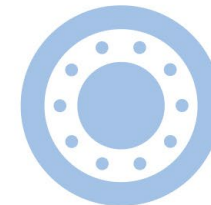
# 6 KEY CONTRACT PROVISIONS TO RECOGNIZE

1. Flow-down provisions
2. Payment
3. Waivers and releases of liens/claims
4. Notice provisions
5. Change provisions
6. No-damages-for-delay / Liquidated Damages

# Key Contract Provisions

## 1. Flow Down Provisions

# CONTRACT



# FLOW DOWN PROVISIONS

- Your subcontract likely **does not** contain all of the terms of your agreement
- Intended to fill gaps between form subcontract and specific terms on a project
- Higher-tiered contractors will typically “flow-down” their obligations to the owner by incorporating the prime contract into the subcontract
  - “The PRIME CONTRACT between Contractor and Owner is attached and **made part of this Subcontract**. Contractor and the Subcontractor agree that the PRIME CONTRACT is a part of this Subcontract to the extent that its terms affect the services to be provided by the Subcontractor. In the event of a conflict between the terms of this Subcontract and the PRIME CONTRACT, **the stricter terms shall control.**”
- In event of a conflict between subcontract and prime contract, which terms govern?

# PROVISIONS IN PRIME CONTRACT THAT ARE OFTEN FLOWED DOWN

- Responsibility for concealed/unknown conditions
- Design review/modifications
- Notice provisions (timing of claims, notices of delay/impacts)
- Payment terms (timing, pre-conditions)
- Waivers of liens/claims requirement
- Liquidated damages

# LIST OF DOCUMENTS

## Do you have all of the referenced documents?

- Drawings;
- Specifications;
- Addenda;
- Other Exhibits
- E204 - Sustainability Plan;
- Supplementary and Other Conditions
- Bid/proposal not included unless the above is modified

§ 9.1 This Agreement is comprised of the following documents:

- .1 AIA Document A101™–2017, Standard Form of Agreement Between Owner and Contractor
- .2 AIA Document A101™–2017, Exhibit A, Insurance and Bonds
- .3 AIA Document A201™–2017, General Conditions of the Contract for Construction
- .4 AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, dated as indicated below:  
*(Insert the date of the E203-2013 incorporated into this Agreement.)*

.9 Other documents, if any, listed below:

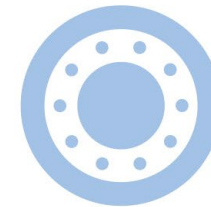
*(List here any additional documents that are intended to form part of the Contract Documents. AIA Document A201™–2017 provides that the advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or proposal, portions of Addenda relating to bidding or proposal requirements, and other information furnished by the Owner in anticipation of receiving bids or proposals, are not part of the Contract Documents unless enumerated in this Agreement. Any such documents should be listed here only if intended to be part of the Contract Documents.)*



# Key Contract Provisions

## 2. Payment

# CONTRACT



# PAY-IF-PAID

- Contingent: **If I don't get paid, You don't get paid**
- Takes the risk of an owner's nonpayment and transfers it down to subcontractors

4.1.2 Subcontractor recognizes that payment from the Owner to the Contractor for the Subcontractor's labor and materials is a condition precedent to payment from the Contractor to the Subcontractor. By entering into the Subcontract, Subcontractor agrees to bear the risk of non-payment by the Owner.

- Applies to change orders, retainage, *etc.*
- **Does not preclude** you from filing a **mechanic's lien** or **payment bond claim**
- Invalid in some jurisdictions

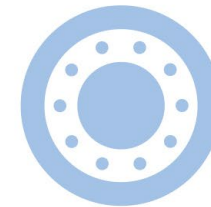
# PAY-WHEN-PAID

- More of a timing provision than a condition precedent.
- **EXAMPLE:** Progress payments to the subcontractor for satisfactory performance of the subcontract work shall be made no later than seven days after receipt by the contractor of payment from the owner for the subcontract work.
- Requires payment within a “reasonable time”

# Key Contract Provisions

## 3. Waivers and Releases

# CONTRACT



# PARTIAL/FINAL RELEASES

- Usually required to be submitted monthly with each payment application
- Partial and final lien waivers are permitted to the extent that payment is received for the work completed
- Form should be attached as part of a contract document
- Read them carefully and keep your accounting department in the loop if there are potential claims
- Once executed, can serve as a **complete waiver of liens and claims up through the date of execution**
- Acceptance of final payment can also serve as a complete release of all claims
- Watch out for waiver/release language on the payment application itself



# THE DREADED MONTHLY RELEASE

RELEASE	
FROM: TO: PROJECT: OWNER:	
1. The undersigned releases all <u>Equitable Liens</u> resulting from labor and/or materials, contract work, equipment or other work, rents, services or supplies heretofore furnished in and for the construction, design, improvement, alteration, additions to or repair of the above described project.	
2. This release is given in consideration of adequate consideration has been paid to the undersigned.	
3. In further consideration, the undersigned agrees to defend and hold harmless the Contractor, Owner and/or surety, if any, from any claim or claims hereinafter made by the undersigned and/or its material suppliers, subcontractors or employees, servants, agents or assigns of such persons against the project. The undersigned agrees to indemnify or reimburse all persons so relying upon this release for any and all sums, including attorney's fees and costs, which may be incurred as the result of any such claims.	
4. It is the intention of the undersigned that this release shall not constitute a release of any claim or claims against the Contractor, Owner and/or surety, if any, for property and improvements.	
5. It is the intention of the undersigned that this release shall not constitute a release of any claim or claims against the Contractor, Owner and/or surety, if any, for obligations for all material and equipment furnished in and for the construction, design, improvement, alteration, additions to or repair of the above described project.	
6. It is the intention of the undersigned that this release shall not constitute a release of any claim or claims against the Contractor, Owner and/or surety, if any, for any and any surety, if any.	
7. In addition to the foregoing, this instrument shall constitute a <u>***final and complete***</u> release of <u>all debts, rights, claims, damages and demands of the undersigned against the Contractor and Owner, in law or in equity, arising out of or pertaining to the above referenced project and whether known or unknown and whether presently ascertainable or not, which the undersigned and/or its successors and/or assignees ever had, now have, or ever will have against the foregoing, by reason of delivery of material and/or the performance of work relating to the Project up to and including the date hereof, including, but not limited to, all claims for damages associated with delay, disruption, acceleration, inefficiency or extra work.</u> If partial, all such rights and claims on the project are released up to and including the ____ day of _____, 20__.	
Dated this _____, 20__.	
TITLE:	
STATE OF _____:SS COUNTY OF _____:	
The foregoing release was subscribed and sworn to before me this ____ day of _____, 20__, by _____ (as _____ of _____)	
My Commission expires: _____	

# THE DREADED MONTHLY RELEASE

- What about a release where the form leaves space for contractors to identify open claims, change orders, etc. that were not resolved at the time of payment?
- If you have an open issue, **do not write “NONE”!**

3. Upon receipt by the undersigned of a check from Contractor in the above amount, or adjusted amount, payable to the undersigned, and when the check has been paid, **this document shall become effective to release and forever discharge Contractor and the Owner and their respective officers, directors, agents, servants and employees, and all lands, improvements, chattels, and other real and personal property connected with or a part of said project from any and all claims, demands, liens and claims of lien whatsoever arising out of the performance of all work for which payment has been made which it now has or hereafter might or could have** **except for the following:**

(If there are no exceptions, write “None” in the following space:

**NONE**

# THE DREADED MONTHLY RELEASE

## What do you do if you have been delayed, impacted or have pending CORs?

- Must provide written notice that you **do not waive, and specifically reserve, all claims for additional compensation and additional time for work performed for [describe the impact]**.
- Include as much **detail** that would be necessary for a third party to understand that you are reserving your rights for money and time with respect to specific work or impact.
- **Must** do this on **each and every** partial waiver/release until all reserved claims have been resolved!

## What if your customer rejects your additional language?

# BEST PRACTICE IF SIGNING PAPER WAIVER/RELEASE

- Include reservation language directly on the waiver/release
- If added language is rejected (and you need to get paid), you may elect to sign the waiver without the additional statement, but you **must** transmit it with a contemporaneous letter that states:
  - The customer rejected your change;
  - You need to be paid, so you have signed the waiver unmodified; and
  - You reserve all of your rights to seek compensation for the delay/impact.
  - Identify all of the claims for which you are reserving your rights.
- The law is not clear whether this procedure will protect your rights to payment, so consult with your attorney before executing the waiver.

# Key Contract Provisions

## 4. Notice

## CONTRACT





# WHAT IS THE PURPOSE OF NOTICE?

- Provide an opportunity to cure
- Mitigate damages
- Document impacts
- Preserve/reserve claims
- Make a record
- Demonstrate knowledge on the part of the recipient

# WHERE DO WE SEE CONTRACTUAL NOTICE PROVISIONS?

- EVERYWHERE!
- The AIA A201-2017 has **68 discrete references** to “notice,” not including “notify,” “alert,” “identify,” “inform,” etc.
- Check the notice provisions in the prime contract if there are **flow-downs**.
  - The flow downs can trump, supplement, or conflict with your contract’s notice provisions.

# CONTRACT NOTICE PROVISIONS

- Notice provisions often apply to **claims, extra work, changed conditions, and delays**
- Be aware of notice provisions that require notice within a short period of time (e.g., 24 hours)
- Be aware of notice provisions that require the full amount and scope of the damages or impact – if do not provide, could result in a waiver of claims
- When in doubt, provide written notice!

# CHANGED CONDITIONS (1 OF 3)

If subcontractor becomes aware of any circumstance which subcontractor believes necessitates a change in the subcontract price, work schedule, or any other provision of the subcontract, subcontractor shall **within three business days** submit a **written request** to contractor for an adjustment to the subcontract price, work schedule, or other provision of the subcontract subcontractor believes is affected thereby.



## CHANGED CONDITIONS (2 OF 3)

Subcontractor's written request **shall include detailed documentation** sufficient to enable contractor to determine the factors necessitating the adjustments and to substantiate the adjustments being requested. Such documentation **shall include a detailed cost breakdown** including manhours by craft or discipline, quantities of material, and any other applicable costs.



# CHANGED CONDITIONS (3 OF 3)

For any ***work schedule impact***, subcontractor **shall provide** the **impact to specific schedule activities**, and subcontractor **shall prepare** an **analysis** identifying the extent of the **delay to the critical path**.

**If subcontractor fails to provide such written request** to contractor **within such three business day** period, subcontractor **shall be deemed to have waived any claim** for an adjustment of the applicable subcontract price work schedule or other provision of the subcontract.



# NOTICE: WAYS TO FAIL

- Timeliness
- Completeness
  - Ongoing claim
  - Unquantifiable claim
- Risk of complete bar/waiver

# DIFFERENT LEGAL STANDARDS

Standards for failure to comply with notice requirements vary by jurisdiction.

## Strict Compliance

- Failure to strictly comply is a complete bar with no exceptions.

## Prejudice

- Failure to strictly comply is a complete bar only if recipient can demonstrate prejudice as a result of the non-compliance.



# DIFFERENT LEGAL STANDARDS

## Basic Scenario:

- The notice provision required delivery by certified mail and you emailed it.

## Strict Compliance

- Too bad – complete bar.

## Prejudice

- Likely not a complete bar, because no prejudice resulted from receipt by email rather than certified mail.

# Key Contract Provisions

## 5. Change Provisions

# CONTRACT



# CHANGE PROVISIONS

A “Change Order” is whatever your contract says it is. Typically, it is a **written** document **signed** by a contractor and its customer in which the parties agree upon:

1. A **change** in the Work;
2. The **amount** of the adjustment, if any, in the contract price; and
3. The extent of the adjustment, if any, in the **contract completion date**

# DISPUTES REGARDING CHANGES/ADDITIONAL WORK

- Is this work within original scope of work?
- Does this additional work require additional time to perform?
- How is the price of the additional work to be determined? (e.g., lump sum, unit price)
- Is the contractor entitled to a markup? How much?
- Does the contractor have to proceed without a change order?

# CHANGE ORDERS BEST PRACTICES

- Immediately notify your customer in writing of changed conditions.
- Send a change order request to the customer.
- Wait for a signed change order.
- Most contracts will expressly state that the contractor is not entitled to compensation for changed conditions **without** an executed change order.

# AUTHORIZATION OF CHANGED WORK

**10. Changes in the Work.** [REDACTED], without invalidating the Subcontract, and without notice to any surety, may order extra work or make changes by altering, adding to or deducting from the Work or accelerating the Work ("Change Order Work"). All Change Order Work shall be executed under the terms and conditions of the Subcontract. Subcontractor shall not proceed with any Change Order Work except upon execution by [REDACTED] of a written Change Order.

---

Any Change Order Work, or any other work which Subcontractor claims is beyond the original scope of the Work of the Subcontract, performed by Subcontractor without a written Change Order shall be considered as having been performed as part of the original scope of the Work of the Subcontract, without additional charge to [REDACTED] or the Owner.

- Is a written directive to proceed with extra work enough?
- What if directive is oral?

# CHANGE DIRECTIVES

If directed to perform additional work without an agreement on price or time, use a construction change directive

9.3

## Change Directive.

- (a) In the event ■■■ requires Subcontractor to proceed with a Change prior to the Parties agreeing upon the related adjustments to the Subcontract Price or Subcontract Schedule, ■■■ may issue a Change Directive. Upon receipt of a Change Directive, Subcontractor shall proceed promptly with performance of the Change.
- (b) The adjustment to the Subcontract Price for a Change pursuant to a Change Directive shall be determined: (i) where unit pricing for the same or similar work or service subject to the Change is set out in Schedule G and or H, then in accordance with the unit pricing set out in Schedule G and or H; (ii) where no unit pricing for the same or similar work or service subject to the Change is set out in Schedule G and or H, then on the basis of the cost of Subcontractor's actual expenditures and savings attributable to the Change Directive. For documented costs outside Scheduled of Values (Schedule H) 10% will be added.
- (c) Subcontractor shall keep full and detailed accounts and records necessary for the documentation of the cost of performing the Change attributable to the Change Directive, including signed timesheets and materials and equipment invoices and shall provide ■■■ with copies thereof when requested. Subcontractor shall provide ■■■ with reasonable access to all of Subcontractor's pertinent documents related to the cost of performing a Change pursuant to a Change Directive, and for this purpose Subcontractor shall preserve such records for a period of one year from the date of Substantial Performance of the Work or as otherwise required in this Subcontract.
- (d) If the Parties do not agree on the proposed adjustment to the Subcontract Price and the Subcontract Schedule attributable to the Change Directive, or the method of determining it, the disagreement shall be referred to dispute resolution as included in Article 16.1.

# CHANGE ORDERS

Before signing change order, you should ask the following questions:

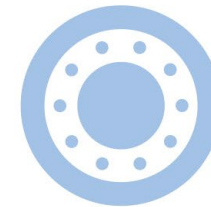
- Does change order **cover all costs** to perform extra work?
- Does change order **provide an extension of time** to perform extra work?
- Does change order **account for any delay, impact or extended general condition costs**?
  - If not, you must either include those costs/time in the CO or reserve your rights to seek down the road



# Key Contract Provisions

## 6. No Damage for Delay Provisions / Liquidated Damages

# CONTRACT



# NO DAMAGE FOR DELAY PROVISION

- What does this mean?
- How enforceable is this provision?

If the Subcontractor shall be delayed in the commencement, prosecution or completion of the work or shall be obstructed or hindered in the orderly progress of the work by any act, neglect or default of the Contractor, the Owner, the Architect, another contractor or subcontractor or by any cause beyond the control of the Subcontractor, then the time fixed for completion of the work shall be extended for a period equivalent to the period of the delay incurred by the Subcontractor as determined by the Contractor; but no extension shall be granted unless a claim in writing therefor is presented to the Contractor within seventy two (72) hours of the start of such delay, obstruction, or hindrance. The Subcontractor expressly agrees not to make, and hereby waives, any claim for damages on account of any delay, obstruction or hindrance for any cause whatsoever, including but not limited to the aforesaid cause, and agrees that its sole right and remedy in the case of any delay, obstruction or hindrance shall be an extension of the time fixed for completion of work unless and to the extent that the Contractor recovers the same from the Owner.

# NO DAMAGE FOR DELAY PROVISION

- Enforceable in most states
- Common exceptions to enforceability:
  - Active owner or GC interference
  - Unreasonable duration of delay
  - Wrongful conduct
  - Type of delay not within contemplation of parties at the time of contracting or subcontracting
- **The best way to neutralize the provision is to request an extension of time [more on that later]**

# LIQUIDATED DAMAGES

- Intended to be a reasonable approximation of actual damages
- Unenforceable if determined to be a penalty
- Cannot recover both actual damages and liquidated damages
- Pass-through of liquidated damages
  - Applied on pro-rata basis
  - Who determines which subcontractors are responsible for delays?

# Preconstruction Strategies



# PRECONSTRUCTION MEETING

The preconstruction turnover/hand-off meeting—understand its importance and use a good checklist!



# BE DILIGENT: PRECONSTRUCTION PROJECT MANAGER CHECKLIST

- List of 32 items (see **Appendix I** for full checklist)
- Can't hit target if you don't know where you are aiming
- Ensure you are prepared for each new project
- Increases organization throughout job
- Sets you on right path for successful project

## PRE CONSTRUCTION PROJECT MANAGER CHECKLIST

1. Have I saved our bid estimate? Yes\_\_ No\_\_
2. Have I broken down our labor, material, subcontractor and profit margins out of the estimate?  
Yes\_\_ No\_\_
3. Have I created a manpower loading chart showing how we plan to ramp up?  
Yes\_\_ No\_\_
4. What is the Notice To Proceed Date? \_\_\_\_\_
5. What is the Substantial Completion Date? \_\_\_\_\_
6. Prior to signing the contract did I check to see if the project is behind schedule?  
Yes\_\_ No\_\_
7. Was the project behind schedule before I signed the Contract?  
Yes\_\_ No\_\_
8. If so, did I qualify my signature by reserving the right to seek extras for delay and acceleration?  
Yes\_\_ No\_\_
9. Did any exceptions in our proposal get incorporated specifically into the contract?  
Yes\_\_ No\_\_
10. Did we increase our profit margin by making savings on "buys"? If so, where and how much?
11. How many days do I have to give notice of impact? \_\_\_\_\_
12. To whom at the CM/ GC/ Owner must notice be sent? \_\_\_\_\_
13. Is email notice acceptable under the contract?  
Yes\_\_ No\_\_
14. Did I get the CM/GC to provide electronic updates of any schedules as a condition of the contract?  
Yes\_\_ No\_\_

# BE DILIGENT: PRECONSTRUCTION PROJECT MANAGER CHECKLIST

## Key Items on Checklist:

- Bid: Comparison of bid and tracking profitability
- Schedule: Know status of project and plan to achieve schedule
- Payment: What needs to be done to keep payments flowing?
- Notice: What triggers the need to send written notices?



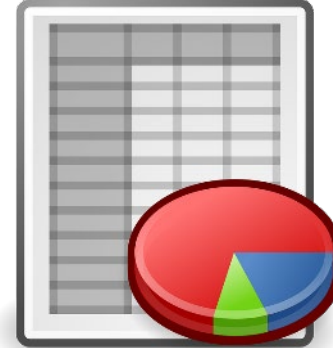
# Monitoring the Project

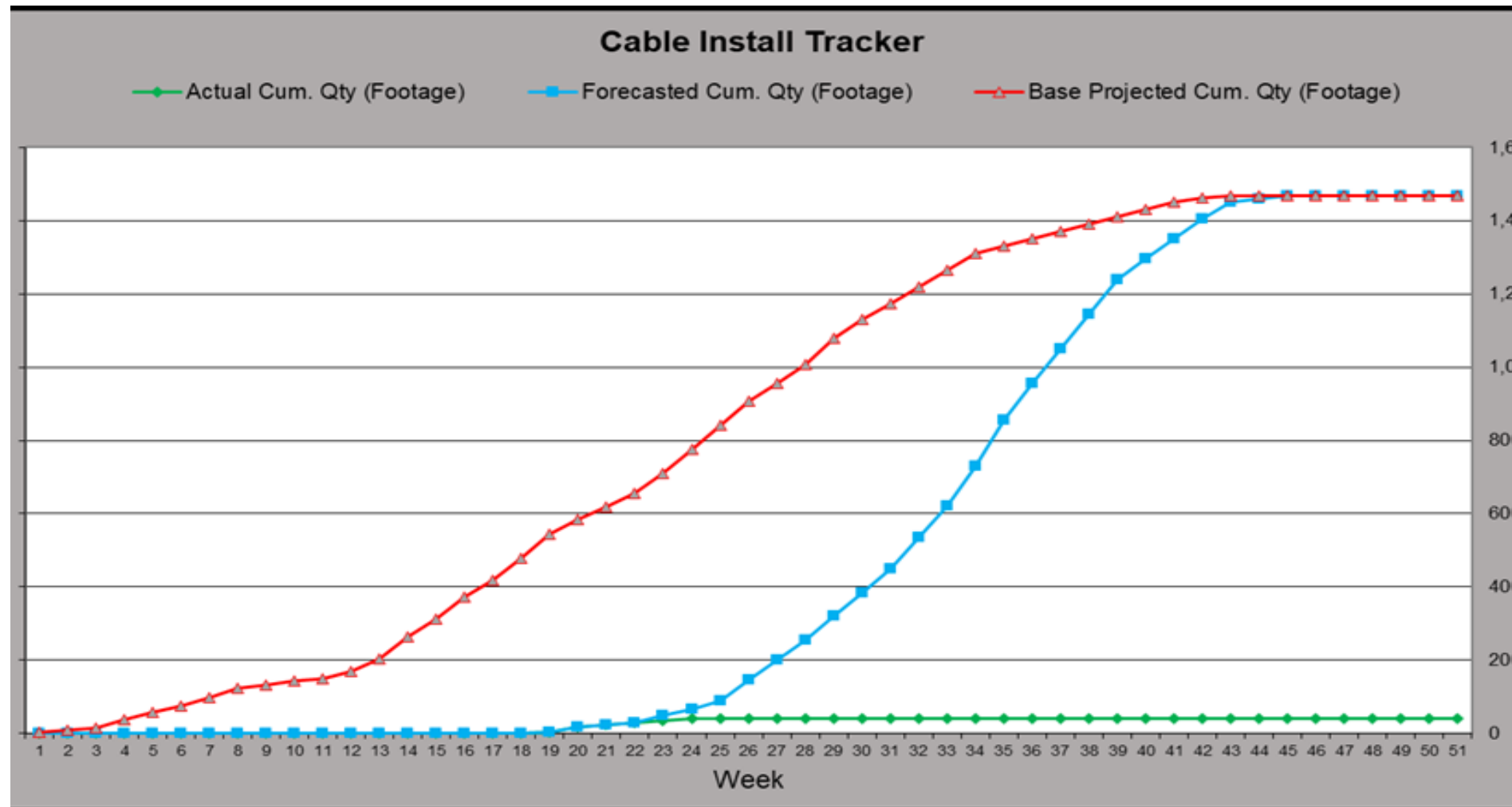


# TRACK PERFORMANCE MONTHLY

## Compare to bid/estimate

- Cost
- Materials
- Manpower





# MONTHLY EVALUATIONS

- At least monthly, the project team needs to discuss and analyze project progress
- If the job is behind schedule, why?
  - Because of something we did → correct it
  - Because of reasons unrelated to our work?
    - Have we put the GC/CM on notice?
    - Have we written the right letters?
    - Have we taken pictures and videos?

# MONTHLY PROJECT MANAGER CHECKLIST

- List of 10 items (see **Appendix II** for full checklist)
- Reflection point for status of project
- Reminder of obligations to preserve your rights
- Protect from monthly waivers
- Keeps you focused on “the big picture”
- Seeing the “forest for the trees”

## MONTHLY PROJECT MANAGER CHECKLIST ONCE JOB HAS BEGUN

1. Are we receiving monthly schedule updates from the CM/GC?  
Yes \_\_\_ No \_\_\_
2. If not, have we requested monthly schedule updates in writing?  
Yes \_\_\_ No \_\_\_
3. Is the overall Project ahead or behind in comparison with the contract or baseline schedule ?  
Ahead \_\_\_ Behind \_\_\_
4. If the project overall is behind schedule, is it because of us?  
Yes \_\_\_ No \_\_\_
5. Have we ordered all materials in a timely fashion?  
Yes \_\_\_ No \_\_\_
6. If not, what materials have not yet been ordered?
7. Are we having problems getting sufficient manpower on the Project? If so, explain.
8. Are our durations for activities being compressed by the owner or CM/GC? If so, which activities?
9. Are we experiencing stacking of trades from other contractors being in the same areas as us? If so, which contractors and where?
10. Is the GC/CM directing other trades to work out of sequence, thereby impacting us? If so, which trades and where?
11. Are we being accelerated by the CM/GC? If so, is it directed acceleration or constructive acceleration?
12. If we are being delayed, compressed, accelerated or forced to work inefficiently, have we put the owner on notice in writing?  
Yes \_\_\_ No \_\_\_

# MONTHLY PROJECT MANAGER CHECKLIST

## Key Items on Checklist:

- Schedule: Getting updates, reviewing key predecessor tasks, identifying impacts
- Waivers: What rights are we signing away? Can we modify to protect rights?
- Changes: Are we asking for time? Are claims preserved?
- Notice: Are we complying with written notice requirements?

# Claims and Notice

---



# WHAT IS A CLAIM?

**Look to your contract! Typically, a claim is . . .**

a demand or assertion by one of the parties seeking an adjustment or interpretation of contract terms, payment of money, extension of time, or other relief with respect to the terms of the contract.



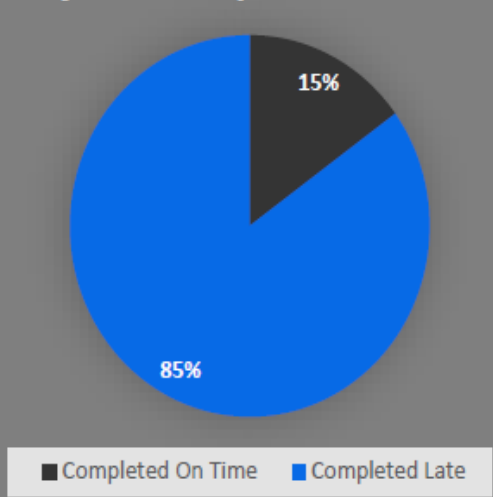


# CLAIMS, IMPACTS, AND NOTICE

- Unfortunately, it is the rare construction project that does not involve issues that ultimately lead to a claim, whether it be for more money, a time extension or both.
- Recovery is dependent on the contractor being able to **substantiate and support the claim**.
- To substantiate and support a claim:
  - Create, locate and maintain all pertinent documents, records, correspondence, photos, *etc.*

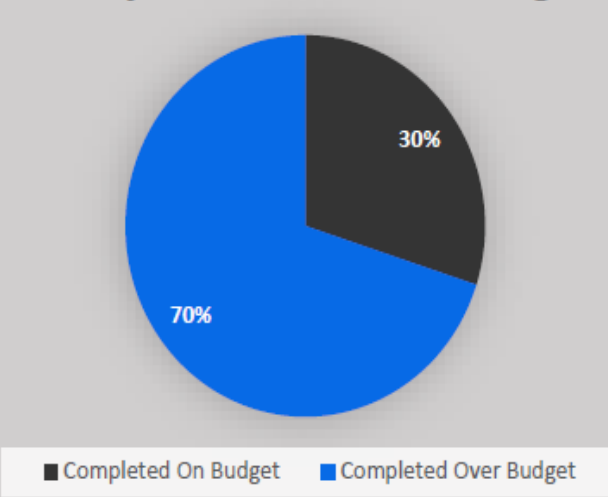
# Workers Spend 80 Minutes per Day Idle on Jobsites

Projects Completed On Time



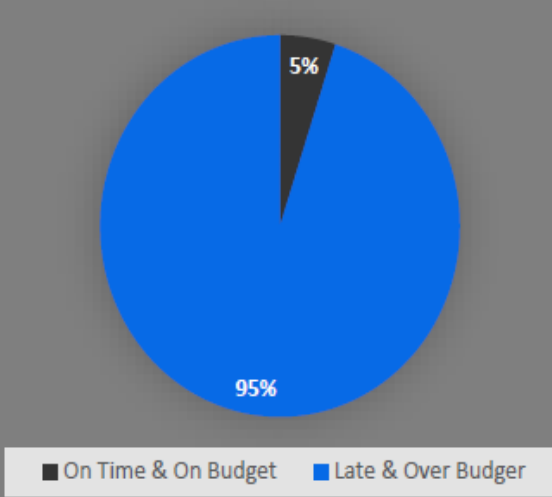
Only 15% of projects are completed on time

Projects Delivered On Budget



Only 30% of projects are delivered on budget

Probability of On Time & On Budget



Chance of On Time & On Budget is less than 10%



# CLAIMS, IMPACTS, AND NOTICE

- Claims are often important not only to **recover money**, but also to **negotiate offsets and defend** against claims asserted by another party.
- When deciding whether or not to pursue a claim:
  1. The decision should be made by senior management **and**
  2. Look to economic and/or political reasons
- Recognize potential claims early in order to take necessary steps to preserve and support them.

# CLAIMS INVOLVING DELAYS

**Q: What is a “DELAY”?**

**A:** A delay is an event that causes an **increased time of performance** and, consequently, **causes the completion** of the contract to be **accomplished later than planned**.

- How do you quantify days of delay?

# CAUSES OF DELAYS

- Failure to provide access or limited access only
- Unforeseen subsurface condition
- Impossible to perform work
- Design changes
- Failure to have shop drawings and samples prepared and approved in a timely manner
- Failure to have material and equipment delivered in a timely manner
- Acts of God – flood, storm, *etc.*
- Weather
- Strikes and labor disputes
- Low productivity
- Cash flow restrictions
- Lack of project coordination
- Labor mobilization
- Delayed by another contractor on the project

# COSTS ASSOCIATED WITH DELAYS

- Extended job supervision and field overhead
- Extended equipment costs
- Wage escalation
- Inefficiency
- Finance costs
- Reduced job opportunities
- Profits



# DELAY CLAIMS

## Nonexcusable Delay

- Fault lies with you and no compensation will follow.

## Excusable but Noncompensable Delay

- No one is at fault. You get more time, but no money.

## Excusable and Compensable Delay

- Fault lies with the other party. You get time and money if you can prove it.

# CLAIMS INVOLVING ACCELERATION

**Q:** What is an “acceleration”?

**A:** An acceleration is a **compression of time to perform work.**



# CAUSES OF ACCELERATION

- Decision by contractor
- Directive by owner to finish all or part of the project early
- Delay or stop by owner with no extension to finish date
- Failure by owner to grant valid time extension
- Directive by owner to man project at certain levels
- Cumulative changes to the contract without additional time

# COSTS OF ACCELERATION

- Overtime
- Inefficiencies of overall operations
- Costs of expedited vendor/material delivery
- Additional supervision and overhead
- Additional equipment rental costs



# TYPES OF ACCELERATION

## Directed

- When confirmed by written change order

## Constructive, implied when:

1. Excusable delays are incurred
2. **Contractor specifically requests time extension**
3. Owner fails to grant time extension
4. Owner expressly orders completion within original performance time
5. Contractor gives notice to owner that its actions constitute constructive acceleration

# ALWAYS ASK FOR TIME!

### FINAL AWARD OF ARBITRATORS

a result of any of the foregoing.” In this case, the Owner refused to allow extensions of time to the schedule, and [REDACTED] repeatedly advised [REDACTED] that no extensions of time would be granted. While [REDACTED] refused to provide any extension of time or other schedule relief to [REDACTED], [REDACTED] directed [REDACTED] to hire more people, work overtime and additional shifts, and do what else was necessary to accelerate its work to meet the schedule deadlines imposed by [REDACTED]. The actions of [REDACTED] directly caused [REDACTED] to accelerate its work to meet [REDACTED] schedule deadlines. Having breached its obligation to compensate Subcontractor with time extension in accordance with Article 13.1, [REDACTED] is liable for the damages caused by that breach of the Subcontract.

# BEST PRACTICES TO GIVE EFFECTIVE NOTICE

- Write clearly and professionally – no slang/profanities
- Make your company look good!
- Give notice via:
  - Daily reports
  - Correspondence – letters and emails (no texts)
  - Meeting minutes



# STRICTLY AND TIMELY COMPLY IF YOU CAN

- Provide the notice within the required time
- Provide all of the information requested
- Provide the notice to all of the right people
- Provide the notice in the right manner

# WHAT IF ....

## 1. You are already late?

- Provide notice anyway!

## 2. You need more time to provide specifics?

- Say so! And then provide specifics when you have them.

## 3. You can't yet quantify the impact?

- Say so! And then provide quantification when you can.

## 4. You are in arbitration vs. court?

- The notice requirements may be viewed less strictly, even if strict compliance is the standard.

# LETTERS

- Be an advocate—support your position
- Notice letters don't need to be adversarial to be effective (consider email)
- Objective is to put other side on notice – make them aware of the problem and give them the opportunity to address
- Answer every letter in writing and defend your position with facts (do not let inaccurate information remain unchallenged, it may come back to haunt you!)
- Keep signed copies and confirmations of receipt
- Date stamp all incoming documents



# SAMPLE LETTER REGARDING DELAY & ACCELERATION

Mr. John Doe  
Doe Building Corporation  
1234 Main Street  
Anytown, P A 19001

RE: XYZ Electric SAP Project

Dear John:

I am writing to advise that XYZ Electric has been and is being delayed on this project by reason of the acts of Doe Building Corporation and/or its other subcontractors. At present, the job is \_\_\_\_ weeks behind schedule. Our price to Doe Building Corporation was predicated upon a \_\_\_\_ week duration. At present, XYZ's work is being accelerated and its durations compressed.

As a consequence, XYZ hereby requests a \_\_\_\_ calendar day extension of time. If Doe Building Corporation fails or refuses to grant this extension of time, XYZ will have no choice but to consider this refusal to be a constructive acceleration. All additional costs incurred by XYZ to achieve this compressed, accelerated schedule will be maintained on a daily basis and will be submitted to Doe Building Corporation daily for signature. At the conclusion of the project, XYZ will present a Change Order Request or claim for the increased cost caused by this constructive acceleration.

I trust you will give this matter your immediate attention and advise XYZ of Doe Building Corporation's decision on its request for an extension of time.

Very truly yours,

James Smith

# EMAILS

Joe,

As we discussed in the 10am meeting today.

- Need dates for scaffold removal and mechanical completion (stg mezz and aux boiler)
- On 7-10-19 Dean [REDACTED] said he was not down with mechanical/scaffold and may be complete by the end of July.
- There was walk down of these areas last week but no notes or dates for resolution were sent out.
- Please provide the dates for these areas.
- [REDACTED] cannot schedule dates without these scaffold removal dates and/or mechanical completion dates. Affect CTO's
  - 00-STL-01
  - 00-STG-01
  - 00-AS-01
  - 00-TGS-01
  - 01-HRH-01
  - 01-CRH-01
  - 01-LP-01
- As of today there are partial delivery of missing GE cables/wire were delivered. There are 17 cables/wire missing and items cannot be completed. Dates cannot be established for completion. Need delivery dates from GE. GE has the list and Andy Smith is aware of the missing GE cables. This was brought up in the CTO meeting and is noted on the schedule.
- [REDACTED] will start sending the exceptions list on 7-17-19.
- [REDACTED] has tracking methods and has been using these tracking methods since this job has started. [REDACTED] knows exactly what is required to finish and what has been completed. These tracking methods are sent daily to [REDACTED]. Please forward on to anyone that needs them.

BR,

# DAILY REPORTS

**Critical to establish what actually took place on the job:**

- Note where crews are working and crew sizes
- Document materials delivered
- Note important conversations
- Document weather

**BUT ALSO...**

# DAILY REPORTS

- Note actual and possible delays and problems by each trade
- Note deviations from schedule, why and who
- Note discrepancies in plans
- Describe out-of-sequence work by each trade
- Remove delay events / hindrances once they have been resolved—accuracy and credibility are important
- Make copies/separately save!

# DAILY REPORTS

**Project Daily Job Journal**

Project Information			
Job Number:	25150083100	Date:	2023-07-11
Job Description:	Simple Cycle	Project Manager:	
Work Order:	25150083100	Sent By:	
Supervisor:		Location:	KY
Customer:		Weather:	Sunny
Mean Temperature:	88F		

Labor Working Hours					
Name	Qty	ST	OT	DT	Comments
Office	12	8.00	2.00	0.00	2-Superintendents, 3- GF's, 2- Field Engineer, 2-QAQC, 1- Field Coordinator, 1- Safety Officer, 1- PM.
Operators	2	8.00	2.00	0.00	
Material Coordinator	1	8.00	2.00	0.00	
Laborer	1	8.00	2.00	0.00	
	9	8.00	2.00	0.00	
	3	8.00	2.00	0.00	
	6	8.00	2.00	0.00	
	6	8.00	2.00	0.00	
(GF)	9	8.00	2.00	0.00	
	7	8.00	2.00	0.00	
	6	8.00	2.00	0.00	
	2	8.00	2.00	0.00	1- , 1-
	6	8.00	2.00	0.00	
Totals:		560.00	140.00	0.00	Hours and counts are estimates, not actuals

# DAILY REPORTS

Hinderance to Job Progress and By Whom:	X# Associated
1.) Hinderance- Continued engineering issues across the whole site are starting to effect work that is already complete.	
2.) Hinderance-Northwest handrail on unit 7 GCB at the top on the breaker is bent towards south. The lighting stantion cant not be installed correctly until the handrail is fixed. The is causing a delay to finish the lighting that needs to be finished for grounding for turnover.	
3.) Hinderance- [REDACTED] is having consistant issues with trying to procure hardware from [REDACTED]. Continue looking into sourcing elsewhere. This will continue to hinder the project.	
4.) Delay- The Generator Exciter Leads Terminal Box must be re-worked at all three units per [REDACTED]. [REDACTED] was informed by [REDACTED] that [REDACTED] wants us to cut our cable tray short and stop it flush to the top of the of the Generator concrete pad, approximately 16-18 inches lower than the Generator Exciter Leads Terminal Box, and free air the all 10 DC 750mcm conductors to the Generator Exciter Leads Terminal Box, and install each conductor in its own 2 inch chase nipple so it will match the install down at [REDACTED]. Since we already have the boxes and tray installed so that all 10 DC conductors would be completely enclosed and sealed, we must now procure a 38.5" X 38.75" stainless steel plate for each Generator Exciter Leads Terminal Box, and a 40" X 20" galvanized steel plate for each pull-box. Also 20-2" chase nipples/lock nuts/grounding bushings will be needed for each unit, 10 at the Generator Exciter Leads Terminal Box, and 10 at the pull-box. The original install method was approved by [REDACTED]. Hinderance will be removed once work is complete. An X number has been set up to track and charge for the change. **This is now delaying [REDACTED] from working on any more MV cables.**	

# PHOTOGRAPHS



Jan. 11, 2019 – CT north elevation. Why are there openings in the high roof?



# LOG OF IMPACTS

Updated Through: 9/12/2019						
	ITEM	DATE OF ISSUE	DESCRIPTION	LOCATION	RESTRAINT	DATE OF CLOSURE
PF	1	4/29/2019	NO WELL	CONDENSER OUTLET TO COOLING TOWER TEMP	CANNOT BE INSTALLED	6/7/2019
PF	2	4/29/2019	NO WELL	CONDENSER OUTLET TO COOLING TOWER TEMP	CANNOT BE INSTALLED	6/7/2019
PF	3	4/29/2019	NO WELL	CW PUMPS DISCHARGE TO CONDENSER TEMP	CANNOT BE INSTALLED	6/13/2019
PF	4	4/29/2019	NO WELL	CW PUMPS DISCHARGE TO CONDENSER TEMP	CANNOT BE INSTALLED	6/13/2019
PF	5	4/29/2019	VALVE NOT INSTALLED	CR LETDOWN WATER BLOCK VALVE SOL	CANNOT BE TUBED	6/4/2019
PF	6	4/29/2019	NEEDS FITTING WELDED	HRSG1 HP STM SUPPLY TO HP DSH PRESSURE	CANNOT BE INSTALLED	5/10/2019
PF	7	4/29/2019	NEEDS FITTING WELDED	HRSG1 HP DSH OUTLET PRESSURE	CANNOT BE INSTALLED	5/10/2019
PF	8	4/29/2019	NEEDS ANUBAR	HRSG1 HP STEAM SUPPLY FLOW RATE	CANNOT BE INSTALLED	5/10/2019
PF	9	4/29/2019	NEEDS ANUBAR	HRSG1 HP STEAM SUPPLY FLOW RATE	CANNOT BE INSTALLED	5/10/2019
PF	10	4/29/2019	POSITION NOT INSTALLED, NO AIR	HRSG 1 HP TURB BYPASS POSITIONER	CANNOT BE TUBED	
PF	11	4/29/2019	SOLENOID NOT INSTALLED, NO AIR	HP DRAIN LEG VALVE SOL	CANNOT BE TUBED	7/27/2019
PF	12	4/29/2019	PIPING NOT COMPLETE	HP INNER INLET DRAIN 1 TO CONDENSER	CANNOT BE INSTALLED	
PF	13	4/29/2019	PIPING NOT COMPLETE	HP INNER INLET DRAIN 1 TO CONDENSER	CANNOT BE INSTALLED	
PF	14	4/29/2019	PIPING NOT COMPLETE	HP INNER INLET DRAIN 1 TO CONDENSER	CANNOT BE INSTALLED	
PF	15	4/29/2019	PIPING NOT COMPLETE	HP TURB SV1 PRESS	CANNOT BE INSTALLED	
PF	16	4/29/2019	PIPING NOT COMPLETE	HP TURB SV2 PRESS	CANNOT BE INSTALLED	
PF	17	4/29/2019	PIPING NOT COMPLETE	HP TURB SV1 TO CV1 PRESS	CANNOT BE INSTALLED	
PF	18	4/29/2019	PIPING NOT COMPLETE	HP TURB SV2 TO CV2 PRESS	CANNOT BE INSTALLED	
PF	19	4/29/2019	PIPING NOT COMPLETE	HP TURB STEAM TEMP	CANNOT BE INSTALLED	



# MEETING MINUTES

- Review immediately for accuracy
- Supplement any minutes **IMMEDIATELY** that do not accurately reflect information exchanged during the meeting
- Be diligent!

# NOTICE: LESSONS LEARNED

- Create a working, cumulative document that you share regularly with the CM/GC (in good times and bad)
- If you do something from the beginning of the project, it is likely perceived as a normal, company practice
- Just because you sent a notice letter, are you done? **Probably not! Check your contract!**
  - Follow through with costs, backup, updates, etc.
  - What does contract say next about claims, disputes, etc.?
  - “Your form of subcontract requires me to \_\_\_\_\_.”

# Questions

---



# Appendix 1 – Preconstruction Checklist

---



# BE DILIGENT: PRECONSTRUCTION PROJECT MANAGER CHECKLIST

## Bid/Proposal

1. Have I saved our bid estimate?

Yes \_\_\_\_\_ No \_\_\_\_\_
2. Have I broken down our labor, material, subcontractor and profit margins out of the estimate?

Yes \_\_\_\_\_ No \_\_\_\_\_
3. Have I created a manpower loading chart showing how we plan to allocate our manpower?

Yes \_\_\_\_\_ No \_\_\_\_\_
4. Did any exceptions in our proposal get incorporated into the contract?

Yes \_\_\_\_\_ No \_\_\_\_\_
5. Did we increase our profit margin by making savings on “buys”?

Yes \_\_\_\_\_ No \_\_\_\_\_

a. If yes, where and how much?

\_\_\_\_\_

# BE DILIGENT: PRECONSTRUCTION PROJECT MANAGER CHECKLIST

## Dates/Schedule

6. What is the notice to proceed date?

---

7. What is the substantial completion date?

---

8. What is the project duration?

---

9. What are the milestone dates in the contract/schedule?

---

# BE DILIGENT: PRECONSTRUCTION PROJECT MANAGER CHECKLIST

## Dates/Schedule

10. Is there a schedule listed as a contract document? Yes \_\_\_\_\_ No \_\_\_\_\_
- a. If yes, is it attached to the contract? Yes \_\_\_\_\_ No \_\_\_\_\_
- b. If no, have I requested, in writing, a copy of the schedule? Yes \_\_\_\_\_ No \_\_\_\_\_
11. Prior to signing the contract, did I confirm whether the project is ahead or behind schedule? Yes \_\_\_\_\_ No \_\_\_\_\_
- a. If yes, did I qualify my signature by reserving the right to seek costs for delay and acceleration? Yes \_\_\_\_\_ No \_\_\_\_\_

# BE DILIGENT: PRECONSTRUCTION PROJECT MANAGER CHECKLIST

## For subcontractors:

- |   |           |          |
|---|-----------|----------|
| 12. Did I request that the CM/GC provide electronic updates of any schedules?                                     | Yes _____ | No _____ |
| 13. Did I request and receive a copy of the Prime Contract with the owner?  | Yes _____ | No _____ |
| 14. Did I request and receive a copy of any performance and/or payment bond that the GC/CM posted on the project? | Yes _____ | No _____ |
| 15. Does the CM/GC have a Subguard program on the project?  | Yes _____ | No _____ |
| 16. Is there a pay-if-paid clause in our subcontract?   | Yes _____ | No _____ |



# BE DILIGENT: PRECONSTRUCTION PROJECT MANAGER CHECKLIST

## Payment

17. When do I need to submit my payment application?

\_\_\_\_\_
18. When is payment due?


\_\_\_\_\_
18. What is the retainage percentage?

\_\_\_\_\_

a. Does the retainage percentage decrease during the Project? Yes \_\_\_\_\_ No \_\_\_\_\_

b. If yes, when and to how much?

\_\_\_\_\_

20. Do I need to sign a waiver or release with every payment application? Yes \_\_\_\_\_ No \_\_\_\_\_
-  **COHEN SEGLIAS**  
PALLAS GREENHALL & FURMAN PC
- How To Fix a Broken Project: Habits and Practices of a Superstar Project Manager | 87

# BE DILIGENT: PRECONSTRUCTION PROJECT MANAGER CHECKLIST

## Notice

21. To whom do I need to send notice of claims/issues?
22. How is notice to be sent? (e.g., email, certified mail)
23. How quickly do I need to give notice?
- a. Changed condition/additional scope?
- b. Delay/labor impact?
24. What information do I need to include with my notice? (i.e., time impact analysis, quantification of costs)
25. Is there a no-damages-for-delay provision or other limitation on the costs that I can recover if impacted?

Yes

No

# BE DILIGENT: PRECONSTRUCTION PROJECT MANAGER CHECKLIST

## Notice

26. Am I entitled to notice and opportunity to cure in the event of a default?

Yes \_\_\_\_\_ No \_\_\_\_\_
- a. If yes, how much time do I have to cure?

\_\_\_\_\_

# BE DILIGENT: PRECONSTRUCTION PROJECT MANAGER CHECKLIST

## Dispute Resolution

27. If I have a claim, to whom do I submit and when?
28. Is mediation a necessary step?

Yes  No
28. Is the dispute to be decided by arbitration or litigation?
29. If arbitration:
- a. Is it governed by AAA or can the parties privately arbitrate?
- b. Where must the arbitration be held?

# BE DILIGENT: PRECONSTRUCTION PROJECT MANAGER CHECKLIST

## Dispute Resolution

29. If litigation:
- a. State or federal court and in which state?
- b. Do I have a right to a jury?

Yes ☐ No ☐
31. Is the prevailing party entitled to recover interest, costs and attorneys' fees?

Yes ☐ No ☐
32. Do I have the right to file a mechanics' lien?

Yes ☐ No ☐

## Appendix 2 – Construction Checklist



# MONTHLY PROJECT MANAGER CHECKLIST

1. Are we receiving monthly schedule updates from the CM/GC/Owner?

Yes \_\_\_\_\_ No \_\_\_\_\_
2. If not, have we requested (in writing) monthly schedule updates (in native .XER format)?

Yes \_\_\_\_\_ No \_\_\_\_\_
3. Is the overall project ahead or behind in comparison with the contract or baseline schedule?

Yes \_\_\_\_\_ No \_\_\_\_\_

a. Why?

\_\_\_\_\_
4. Are our durations for activities being compressed by the CM/GC/Owner?

Yes \_\_\_\_\_ No \_\_\_\_\_

a. If so, which activities?

\_\_\_\_\_

# MONTHLY PROJECT MANAGER CHECKLIST

5. Are we experiencing stacking of trades from other contractors being in the same areas as us? Yes \_\_\_\_\_ No \_\_\_\_\_  
a. If so, which trades and where? \_\_\_\_\_
6. Are there incomplete predecessor tasks that are impacting our ability to perform our work? Yes \_\_\_\_\_ No \_\_\_\_\_  
a. If so, which trades and where? \_\_\_\_\_
7. Are trades working out of sequence and impacting us? Yes \_\_\_\_\_ No \_\_\_\_\_  
a. If so, which trades and where? \_\_\_\_\_
8. Are we being accelerated by the CM/GC/owner? Yes \_\_\_\_\_ No \_\_\_\_\_  
a. If so, is it directed acceleration or constructive acceleration? \_\_\_\_\_



# MONTHLY PROJECT MANAGER CHECKLIST

9. If we are being delayed, impacted or forced to work inefficiently, have we:

- |   |     |       |    |       |
|---|-----|-------|----|-------|
| a. put the CM/GC/Owner on notice <b>in writing</b> ?    | Yes | _____ | No | _____ |
| b. qualified our monthly partial releases of liens?     | Yes | _____ | No | _____ |
| c. qualified our change order forms?                    | Yes | _____ | No | _____ |
| d. raised the issue at job meetings? Appear in minutes? | Yes | _____ | No | _____ |
| e. asked for an extension of time <b>in writing</b> ?   | Yes | _____ | No | _____ |

# MONTHLY PROJECT MANAGER CHECKLIST

10. If we have been directed to perform work outside of our scope, have we:

- |   |           |          |
|---|-----------|----------|
| a. put the CM/GC/Owner on notice <b>in writing</b> ?                | Yes _____ | No _____ |
| b. tracked the labor and materials expected on the additional work? | Yes _____ | No _____ |
| c. submitted T&M tickets?   | Yes _____ | No _____ |
| d. Set up a separate cost code?                                     | Yes _____ | No _____ |