

# Avoiding problems through construction documentation (part two)

The Construction Specifier Home > Features | Horizons

By Norman F. Jacobs Jr., CSI, CPE on November 16, 2015

There are many types of records that should be maintained by the project manager during a construction contract period. The following guidelines, building from the information provided in [part one of this article](#), are intended to serve as a checklist of the types of construction project data. They help establish both entitlement and any damages due in the event there are any disruptions, impacts, or delays.

## Pre-contract documents

Documents included in the owner's bid package, which typically are drawings, specifications, soil data, asbestos data, General Conditions, special conditions, and specific instructions, as well as the contractor's calculations and bid preparation documents, are generally admissible evidence as to what was intended by a construction contract.

A prudent contractor will seek clarification to ambiguities in the bid documents, particularly if they have any cost impact or risk. Forensic investigation into the reason for ambiguities may reveal some architect or owner action (or inaction, such as defective design) for which a contractor may be entitled to recover any related addition cost and time.

## Contract documents

Only those 'documents' in existence at the time the contract is awarded are part of the contract. There may, however, be one exception. The "Special Conditions" may state the critical path method (CPM) schedule prepared by the contractor (and approved by the owner and architect after the issuance of the contract) will be an integral part of the contract documents. Anything else prepared at a later date, except for formal change orders, is not part of the contract. It is essential a clean, unchanged set of the original drawings and specifications be kept for future reference to prove any changes that may occur during the project.

The notice to proceed is also a significant contract-related item in that its date may unexpectedly follow contract award by several weeks due to the time it takes to obtain all required permits; and could delay the project from beginning. Therefore, the contract document file should include:

- original signed contract;
- approved CPM Schedule;
- minutes of contract negotiation meetings;
- drawings and specifications issued for construction;
- owner-, architect-, and contractor-required insurance policies;
- notice to proceed;
- coordination meeting minutes; and
- permits.

Retrieval systems for documents should be evaluated for organizational effectiveness. There is always a risk of lost documents. Project managers must know how to balance contingencies in all contract documents and keep their risk management game plan updated. This entails identifying construction risk and exposures, and formulating an effective management strategy to mitigate the potential for loss.

At any point, the project manager could find himself or herself needing to locate certain documents to understand a problem. Ask yourself how many hours have you wasted looking for paper documents when you had no system to find them? At times, we all need to retrieve information from the tons of documents we have created during a project.

All contract parties involved in the construction process should be aware of the need for accurate and complete project records to help maintain effective control of a construction project. Such records are the principal source of evidence for timely negotiation of change orders, resolution of disputes, and proof of time delays and damages.

When a contract party has to file a claim because of a breach or dispute with another party, the burden of proof is on the claimant. Proof can be substantiated through the accurate and factual documentation of performance and the maintenance of project record-keeping systems covering transactions, correspondence, inspections, submittals, schedules, and various reports. Courts and boards require disciplined standards of 'documentation' and proof be followed.

In order to retrieve records, the project manager must preserve daily every element of project administration, and actual performance should be recorded daily to a standard that enables a third party to reconstruct the project from the files. Project documentation should not be vague.

Records useful in supporting or defending against time extension request and delay damages claims include:

- cost estimates;
- schedules and updates;
- daily reports;
- insurance policies;
- architect's site visits reports;
- correspondence;
- memoranda for record;
- job diaries;
- photos;
- test reports;
- delivery receipts;
- payroll records;
- e-mails and faxes;
- submittal logs;
- updated file with approved submittals;
- Requests for Information (RFIs);
- change order requests and approved change orders;
- monthly billings and cash flow projections;
- meeting minutes;
- narrative schedule reports; and
- time impact analysis (TIA) reports with forensic schedule analysis (FSA).

It is important to critique your informational retrieval system as to project documentation and review the categories in which files are kept. How do you find paper work that covers project questions? Where is the file copy of all owner-signed contracts?

Good documentation does not happen by accident. Left to our own devices, many of us probably think we have better things to do than write down what the weather was that day, fill out the shop drawing log, or even update the CPM schedule. After all, there is a project to be built. However, it only takes one time in litigation to change that mindset— additionally, the reality of a dispute resolution form is who is right and who is wrong may not determine who wins the case. It can come down to who can present the best documents to support the case.

Documentation is required at every project level. Here is a typical claim scenario: An issue arises on a project, and a couple of meetings take place with positions laid out. Resolution does not occur and tempers may flare. So what happens next? Usually, a letter-writing campaign ensues. The architect and engineers and the contractor start carefully crafting correspondence, with every word painstakingly reviewed (sometimes by counsel). These documents are a vital part of the project record, especially during litigation. However, consider for a moment the project participants who wrote them and for what purpose. Then ask, will claims notice and response letters be taken as sole-source gospel or as an accurate portrayal of the events of the project? Or will they be viewed as each side posturing in anticipation of litigation?

In litigation, every document could be read—not only the letters, but also the meeting minutes, foreman’s reports, inspection reports, shop drawing logs, equipment logs, CPM schedule reports, delay notices, change orders, monthly billings, payrolls, photos, telephone calls, insurance certificates, daily reports, and e-mails. A review of meeting minutes, e-mails, and daily reports prior to dispute reveals how the parties were interacting with each other before tensions rose.

Regular project documentation, such as meeting minutes and daily reports also generally contain the thoughts and mental impressions of the parties as they were coming to their minds. The thoughts of the inspectors and foreman in the field may play just as important a role in a dispute as the carefully crafted letters by the project manager. Consequently, every form of project documentation, from high-level letters to daily updates, should be drafted by project participants trained to create factually correct and professional reports.

### **Improving documentation**

Good documentation practice is not rocket science. However, if you ever get into litigation, you will understand its importance. Here are some practical things to consider when striving to improve your documentation.

#### *Weigh the risks of poor documentation*

In my career, I’ve read thousands of daily reports, meeting minutes, letters, and CPM schedule documentation—some have been pretty comical. Also, I’ve seen some pretty creative analogies and insults hurled. These types of documents may be fun to read, and may even make the authors feel better because they’ve gotten something off their mind. However, it is important to remember every project document may be read by someone. In other words, project documentation should provide facts and not opinions about someone’s mother.

#### *Timing is everything*

The old cliché about timing is true in the case of project documentation. It is important project participants be timely with all forms of correspondence. One must read the contract and abide by what it says regarding issuance of minutes, RFIs, shop drawing approvals, notices of claims, and associated responses.

#### *Keep e-mails professional*

For some reason, people will put something in an e-mail they would never say to someone’s face or put in a letter. The truth is you should be just as careful with what you say in e-mail as you would in any other type of documentation. It is, after all, just as admissible in court, and has a way of showing up in the strangest places. The landscape of litigation and electronic document discovery is constantly changing.

#### *Understand what you get*

We all can’t know everything. Construction projects, and especially their disputed issues, are dynamic and can be complicated. This author has seen plenty of cases where byzantine CPM schedules were submitted by a contractor and the owner did not review and comment simply because there was no understanding of what was submitted. This obviously creates all kinds of problems during the project and all the way through litigation.

## Conclusion

Hopefully, these two articles have provided a taste of the importance of good documentation. The good thing about what has been explored in terms of documentation practices is that they are relatively easy to improve. It just requires self-discipline.

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