

4-6 October, Nationals Park, Washington DC

# OVERVIEW OF CONSTRUCTION CLAIMS & DISPUTES

(Session W1.1)

“Project controls are all about collaboration  
and teamwork”



 **Project Controls**  
**EXPO**  
Washington, DC - USA

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- Senior Advisor, Ankura Construction Forum™
- 50 years experience in construction management, construction claims analysis & dispute resolution
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- CCM, CFCC, ECCCS, ECCDA & PMP

# INTRODUCTION

# Introduction

- Purpose of session to discuss changes & claims
- Changes & claims inevitable, cannot be avoided
  - ❖ But can be managed & resolved on site
- Therefore, owners, contractors, designers & CMs **must** learn fundamentals of contracts & claims
  - ❖ **Rule No. 1** – Claimant **must** prove entitlement, causation & damages in order to recover
  - ❖ **Rule No. 2** – Study & read the contract, **many times**
  - ❖ **Rule No. 3** – Changes & claims **must** be dealt with promptly, on the project – **not** left to lawyers at end of job

# Introduction

- **Changes & claims a fact of life in construction**
  - ❖ Engineering & construction an art, **not** science
  - ❖ Full of human judgement
- **Claims a safety relief valve –**
  - ❖ Needed to allow equitable adjustment clauses of contracts to operate
- **Contractors – Must learn how to pursue changes & claims properly**
- **Owners, designers & CMs – Must know how to analyze & resolve changes & claims**

# Introduction

## ➤ Session outlines:

- ❖ Why & how claims develop
- ❖ What needed to make persuasive claim
- ❖ How to successfully defend against claims
- ❖ Offers ideas to help avoid, minimize & resolve claims in order to deter disputes

# CHANGE ORDERS

# Change Orders

## ➤ Definition of Change Order

❖ *“Action by owner or authorized representative directing contractor to construct some portion of the work in a manner different from that described in the plans & specifications for which the contractor or owner may be entitled to an adjustment in contract price &/or time”*

## ➤ Change orders occur on all projects, needed to –

❖ Accommodate changing owner needs, deal with unforeseen issues, etc.

## ➤ Contracts anticipate changes

❖ Almost all contracts have Changes clause



# Change Orders

- Why need a Changes Clause?
  - ❖ Under Common Law one party had **no** right to demand anything other than that which was contracted for, **without mutual agreement**
- Changes clause allows owner to order changes **without** contractor agreement
  - ❖ Cannot afford to have changes “***held hostage***” until agreement reached with contractor
- If projects teams **not** resolve changes promptly more likely to end up with claims & disputes

# Change Orders

## ➤ Project changes –

- ❖ Almost always (95%+) involve cost (additive or deductive)
- ❖ Frequently involve delay & time related damages
- ❖ Often involve impact damages – lost productivity, idle labor & equipment, overtime work, disruption, etc.

## ➤ Owners, contractors, designers & CMs must learn how to handle all elements of change

# CONTRACTOR CLAIMS vs. OWNERS

# Contractor Claims

## ➤ Basic definition –

- ❖ Claim – Written demand by one of contracting parties seeking, as a matter of legal right, additional cost &/or time arising under or related to contract

## ➤ Fundamental rule of claims

- ❖ Standard 3 part test
- ❖ Claimant (whether contractor or owner) must prove
  - ✓ Entitlement
  - ✓ Causation
  - ✓ Damages

## ➤ Must prove all 3 to recover first \$\$ &/or day!

# Common Causes of Claims

- Differing Site Conditions
- Failure to promptly address problems & time extension requests
- Failure to negotiate time extensions & delay, impact costs with changes
- Defective plans & specifications
- Inability to mitigate effects of delay
- Unusually severe weather
- Acts of government in sovereign capacity
- Labor strikes
- Acts of God (Force Majeure events)

**Analysis shows inadequate design & improper contract administration leading causes**

# BURDEN OF PROOF

# Burden of Proof

- Claimant (owner or contractor) must prove –
- Entitlement / Liability
  - ❖ Event or circumstance occurred which gives rise to contractual right to adjustment of time &/or money
    - ✓ Examples: Owner caused delay, differing site condition, changes to work, etc.
- Causation
  - ❖ Event caused contractor to do something would not have done if event not occurred
    - ✓ Example: Encounter with unexpected groundwater caused contractor to install & operate a dewatering system on project for 6 months

# Burden of Proof

## ➤ Damages / Quantum

- ❖ Additional cost &/or time + impact damages & appropriate mark up under contract

## ➤ Burden of proof falls on shoulders of party making claim

- ❖ Responding party not have to disprove

## ➤ To recover on claim claimant has obligation to prove all 3 elements

- ❖ If cannot prove all 3, that party will not prevail on claim



# UNIVERSE OF CONTRACTOR CLAIMS

# Universe of Contractor Claims

- Directed Changes
- Constructive Changes
- Differing Site Conditions
- Directed Suspensions of Work
- Constructive Suspensions of Work
- Force Majeure
- Delay
- Directed Acceleration
- Constructive Acceleration
- Termination for Convenience
- Termination for Default

**1,000s of causes, only 11 types of claims**

# Directed Change Claims

- **Claims arising from owner directed changes –**
  - ❖ Entitlement & causation already established
  - ❖ Claim over damages only – cost &/or time + impacts
- **Elements of claim**
  - ❖ Owner directed change
  - ❖ Work added, deleted, changed &/or modified
  - ❖ Discrete cost records to document direct costs claimed
  - ❖ Impact analysis to document soft costs claimed
  - ❖ Schedule delay analysis to document delay & disruption
- **If proven, contractor entitled to recover damages**

# Directed Change Claims

- Most often arise when –
  - ❖ Contractors reserve rights on change orders
  - ❖ When changes performed on time & material basis
  - ❖ When unilateral changes issued
- If owners want to mitigate such claims –
  - ❖ Negotiate complete scope of work, all costs, all impacts & all delay issues related to change
  - ❖ Add waiver of claim language to each change order
- Consult with legal counsel on waiver clause language for change orders

# Constructive Change Claims

## ➤ Constructive Changes –

- ❖ Result from owner actions that have unintentional effect of requiring contractor to do more than required by contract & results in added cost &/or time

## ➤ “Constructive” means –

- ❖ *“...a change implied in law by the conduct of the parties rather than their words ... a change order that arises from the operation of law to avoid an injustice...”*

## ➤ Unintended or accidental change

- ❖ Not result of owner issued change order

# Constructive Change Claims

## ➤ Causes of constructive changes

- ❖ Contract language interpretation

- ❖ Owner inspection actions

  - ✓ Overinspection

  - ✓ Underinspection (??)

- ❖ Non-disclosure of information –

  - ✓ “*Superior Knowledge*” of owner, not revealed to bidders

- ❖ Constructive acceleration

# Constructive Change Claims

## ➤ Defective Specifications

- ❖ Errors = specified, drawn incorrectly
- ❖ Omissions = not specified, not drawn
- ❖ Ambiguous Specifications =
  - ✓ Can be read differently by different people
  - ✓ Contractor relied on own interpretation when bidding
  - ✓ If do what owner insists, cost more \$\$ &/or time
- ❖ Conflicts = drawn, specified differently
- ❖ Impossibility = physically impossible
- ❖ Impracticability = financially unreasonable

# Constructive Change Claims

## ➤ Elements of claim

- ❖ Issue not foreseeable at time of bidding
- ❖ Work exceeded contract requirements
- ❖ Notice of change provided to owner
- ❖ Change actually required by owner
- ❖ Additional cost or time actually incurred
- ❖ Claim damages mitigated

➤ If proven, contractor entitled to recover damages



# Differing Site Condition Claims

➤ **Differing Site Conditions – Latent (hidden)** physical conditions encountered at site materially different from conditions indicated in contract documents or conditions normally encountered in work of this type in this area

❖ Most often classified as –

- ✓ **Type 1** – Materially different than indicated in bid documents
- ✓ **Type 2** – Unknown physical conditions, of unusual nature
- ✓ **Type 3 (?)** – Encounters with hazardous &/or toxic waste

# Differing Site Condition Claims

## ➤ Entitlement Basics

- ❖ Condition unforeseeable
- ❖ After reasonable “*sight*” investigation
- ❖ Physical condition
- ❖ At site
- ❖ Differing materially
- ❖ Notice provided in timely manner
- ❖ Owner has duty to investigate promptly
- ❖ Owner may/may not be obligated to give direction

➤ If condition **materially different** & resulted in additional time &/or costs, contractor entitled to **recover**

# Differing Site Condition Claims

- Conditions generally not included under DSC clause
  - ❖ Severe weather
  - ❖ Flooding
  - ❖ Business, labor conditions
  - ❖ Not “*physical*” conditions existing at time of bidding
  
- Conditions sometimes included under DSC clause
  - ❖ Variations in quantity
  - ❖ Conditions arising after contract award
    - ✓ If owner had duty or ability to prevent & failed to do so

# Directed Suspension of Work Claims

- **Directed Suspension of Work** – Owner direction to stop all or some of work for limited period of time
  - ❖ May suspend work for own convenience
    - ✓ Not required to “*justify*” directive
- **Why need Suspension clause?**
  - ❖ Under common law one party had no ability to stop work of other party without breaching contract
  - ❖ But owner may need to stop work for variety of reasons

# Directed Suspension of Work Claims

- Owner required to give directive in writing
  - ❖ If give verbal directive, confirm in writing!
- Owner also required to direct “*return to work*” in writing
  - ❖ If give verbal directive, confirm in writing!
- If work suspended & contractor can prove time & cost impacts, contractor entitled to recover damages
  - ❖ But contractor must prove “*root cause*” of suspension directive not something contractor responsible for!

# Constructive Suspension of Work Claims

- **Constructive Suspension of Work** – Action or inaction on part of owner that prevents contractor from proceeding with all or some of work
  - ❖ Not directed or intended suspension of work
    - ✓ Accidental, unintended work stoppage
  - ❖ Examples –
    - ✓ Delayed approval of submittals
    - ✓ Delayed issuance of change orders
    - ✓ Delays in investigation of DSC
    - ✓ Site or ROW unavailability
    - ✓ Delayed delivery of OFCI items

# Constructive Suspension of Work Claims

- **To recover, constructive suspension must be**
  - ❖ Unforeseeable & unreasonable
  - ❖ Reasonably under control of owner or someone for whom owner is responsible
  - ❖ Timely written notice provided to owner
  - ❖ Suspension must result in impact to contractor's time &/or cost
- **If proven, contractor entitled to recover of damages**

# Force Majeure Claims

➤ **Force Majeure** – Unforeseeable events caused by third party or act of God that neither owner nor contractor could avoid or control & causes project delay

➤ May be natural or manmade – Examples

Tornadoes

Acts of war or terrorism

Earthquakes

Acts of government as sovereign

Tsunamis

Civil strife

Floods

Labor actions

Wildfires

Changes in law



# Force Majeure Claims

- Contracts typically provide list of events
  - ❖ *“Force majeure includes, but is not limited to ...”*
  - ❖ Examples, **not** all inclusive lists **unless** contract states
- To recover, contractor must
  - ❖ Provide prompt written notice
  - ❖ Demonstrate
    - ✓ Event unforeseeable
    - ✓ Beyond their control
    - ✓ Caused time impact to work
- Contracts typically provide for excusable, non-compensable delay – time, **no** money

# Delay Claims

- **Delay** – Impact to project's critical path resulting in work completing later than contract completion or adjusted contract completion date
  - ❖ Delay clauses typically include
    - ✓ Inexcusable Delay – Contractor caused delay – No time, no money
    - ✓ Excusable / Non-Compensable Delay – Third party or force majeure caused delay – Time & no money

# Delay Claims

- ✓ Excusable / Compensable Delay – Owner caused delay – Time & money
- ✓ Concurrent Delay – Two or more delays occurring at same time either of which would have caused project delay on its own – overlapping delays – Time, no money

# Delay Claims

- To recover time & money contractor must prove
  - ❖ Prompt written notice provided to owner
  - ❖ Project delay **not** caused by contractor
    - ✓ **Unless** asserting concurrent delay
  - ❖ Delay event will / has caused impact to project end date
    - ✓ Document through schedule delay analysis
  - ❖ Document delay (**number of days**) & **cost per day** + **impact costs**
- Contract provides for recovery of time &/or costs
  - ❖ Exculpatory clauses such as **No Damages for Delay** or **Concurrent Delay is Contractor Delay** may **prevent** recovery

# Delay Claims

**Event(s) occur**  
-- delay or will  
delay the project

Provide written,  
timely notice of  
delay

Document delay  
unforeseeable **not**  
caused by contractor  
or subs

**Contemporaneously document all time,  
all costs & all impacts separately**

Time extension  
request properly filed

Demonstrate  
delay event sole  
cause of damages  
claimed

Choose appropriate  
schedule delay analysis  
technique to **quantify** delay

Capture contemporaneous  
costs to **document** delay cost

So, what's an  
"appropriate" delay  
analysis technique?



See [AACE Recommended Practice 29R-03 - Forensic Schedule Analysis](#)  
James Zack Consulting, LLC

# Delay Claims

- To perform schedule delay analysis
  - ❖ General starting point – examine
    - ✓ Baseline schedule
    - ✓ All schedule updates
    - ✓ As Built Schedule
  - ❖ Determine which activities caused project delay
    - ✓ Analyze for causation
    - ✓ Review for notice of delay
    - ✓ Document cause & effect of delay
- If can prove delay not caused by contractor, contractor entitled to recover delay & delay damages per terms of contract – time &/or money

# Delay Claims

- Four basic types of retrospective schedule delay analysis
  - ❖ As Planned vs. As Built
  - ❖ Impacted As Planned
  - ❖ Collapsed As Built
  - ❖ Schedule Windows (slice in time analysis)
- All technique works, but
  - ❖ Some “*frowned on*” in litigation
  - ❖ Some better suited for different purposes
- Contractor must select most effective technique based on documentation & forum
  - ❖ Unless contract specifies methodology

# Directed Acceleration Claims

- **Directed acceleration** – Owner direction to complete work earlier than required under contract **or** earlier than scheduled
  - ❖ Entitlement & causation shown – damages must be proven
- **Owner's authority**
  - ❖ Typically found in Changes clause provided clause allows owner to change "***time of performance***"



# Directed Acceleration Claims

## ➤ If directed to accelerate work

- ❖ Treat directive as Change Order
- ❖ Make certain directive in writing
- ❖ Prepare acceleration plan & submit to owner
- ❖ Track all time & cost impacts discretely to prove damages

# Constructive Acceleration Claims

- **Constructive Acceleration** – Owner action or failure to act that inadvertently causes contractor to complete work earlier than required or should have been required
- **Examples**
  - ❖ Change orders issued without time extensions
  - ❖ Failure to grant time extensions until end of project
  - ❖ Refusal to grant time extensions until contractor *“needs more time”*

# Constructive Acceleration Claims

- Owners frequently reluctant to grant time extensions early in project
  - ❖ *“What if contractor makes up the time later?”*
- To recover contractor must prove –
  - ❖ Excusable delay occurred – not need to be compensable
  - ❖ Notice of delay & time extension request filed
  - ❖ No time granted or only partial time extension granted
    - ✓ Or silence after reasonable time a deemed denial
  - ❖ Owner directs on time completion or threatens action
  - ❖ Notice of constructive acceleration filed
  - ❖ Contractor accelerates & documents all costs & impacts

# Termination for Convenience Claims

- **Termination for Convenience (T4C)** – Action by owner to end, in whole or in part, work of project due to **no fault** of contractor
- **Reasons for T4C**
  - ❖ Owner needs change
  - ❖ Project financing no longer available
  - ❖ Project no longer needed
- Owner **not** required to justify T4C
- Contractor must stop work **as directed** & prepare T4C **proposal** for submittal to owner

# Termination for Convenience Claims

- T4C clauses typically provide payment for
  - ❖ Work done to date
  - ❖ Materials delivered & stored on or near site
  - ❖ Restocking charges
  - ❖ Labor & severance pay
  - ❖ Shutdown & demobilization costs
  - ❖ Profit on work completed to date
  - ❖ May also include legal & claim preparation costs
  - ❖ But, generally no unabsorbed overhead, anticipated profit
- Read T4C clause carefully, follow requirements carefully

+ mark up

# Termination for Default Claims

- **Termination for Default (T4D)** – Action by owner to “*fire contractor*” due to “*material breach of contract*” by contractor
  - ❖ Examples –
    - ✓ Failure to mobilize to site & start work
    - ✓ Failure to man project to complete work on time
    - ✓ Consistent quality of work disputes
    - ✓ Substantial failure to follow safety rules
- **Owner must provide “*cure notice*” in writing**
  - ❖ Detailed list of material breaches
  - ❖ Allow contractor specified time to cure or propose plan to cure breaches

# Termination for Default Claims

- Owner **must** have “*clean hands*” to sustain T4D
- Owner should also notify contractor’s surety
- If owner calls on surety to complete work
  - ❖ Surety entitled to all of contractor’s defenses
  - ❖ Surety most often selects follow on contractor
- Both owner & contractor **must** follow all provisions of T4D clause

**Consult with legal counsel before sending cure notice & before deciding to default contractor**

# OWNER CLAIMS vs. CONTRACTORS



# Owner Claims

- **Late Completion Damages** – Damages allowed under contract should contractor complete work late without contractual excuse
  - ❖ **Actual Damages** – Documented damages actually incurred by owner due to project late completion as listed in contract
    - ✓ **Examples** –
      - ❖ Continued project management & financing costs
      - ❖ Lost revenue
  - ❖ **Liquidated Damages** – Stipulated amount on daily basis agreed to in contract
    - ✓ Estimate of damages owner likely to incur if work completed late as estimated by owner at time of bidding

# Owner Claims

- **False or Fraudulent Claims** – Claims based on known misrepresentations or falsified records
  - ❖ U.S. Federal government & 25 States & some municipalities have False Claims Statutes
  - ❖ California False Claims Act – **Cal. Gov't Code §§12650**
- **Design Deficiency or Standard of Care Claims** – Claims arising from “*negligent*” design or failure of designer to meet standard of care for professionals performing design work on this type of project, in this area & time

# Owner Claims

- **Consequential Damages** – Indirect or unforeseeable damages resulting from action or lack of action & **not** in contemplation of parties at time of contract award
  - ❖ **Typically**, contracts have a **Consequential Damages** clause **prohibiting** recovery of such damages, but some may be allowed if provided for in contract
- Other damages **may** be recoverable **if** set forth in contract documents

# DAMAGES

# Damages - General

- Damages must be proven with “*reasonable degree of specificity*”
  - ❖ Pure estimates unlikely to prevail
- Delay damages typically require
  - ❖ Proof of critical path impact & cost of day of delay
- Impact damages usually require
  - ❖ Productivity loss study
- Damages generally fall into –

Direct Cost	Impact Costs
Indirect Costs	Other Damages - Contractor
Delay Costs	Other Damages - Owner

# Direct Costs

➤ Costs incurred as direct result of claim

❖ Generally, “*hard dollar costs*” or “*costs of performing extra work*”

➤ Examples

❖ Labor including fringes & taxes

❖ Material

❖ Equipment

❖ Subcontractor costs

❖ Storage & laydown area costs

# Indirect Costs

- Costs **not** allocable to specific items of direct work
  - ❖ May or may **not** be time related
- **Examples**
  - ❖ Field office overhead (**FOOH**)
    - ✓ Project management staff
    - ✓ Superintendents
    - ✓ Site office & equipment
    - ✓ Temporary utilities & security
    - ✓ Maintenance & clean up
    - ✓ Project vehicles
    - ✓ Laydown & maintenance area
    - ✓ Mobilization & demobilization

# Indirect Costs

- ❖ Home Office Overhead (**HOOH**)
  - ✓ Corporate management
  - ✓ Accounting, HR & other home office staff
  - ✓ Engineering
  - ✓ Estimating
  - ✓ Home office & equipment
  - ✓ Corporate insurance
  - ✓ Central equipment yard
- ❖ HOOH (**Eichleay Formula**) controversial on public projects
  - ✓ **May/may not** be accepted in court
  - ✓ Consult with legal counsel



# Other Delay / Impact Costs

- Examples of other contractor delay costs
  - ❖ Idle equipment
  - ❖ Idle labor
  - ❖ Additional or extended storage costs
  - ❖ Escalation costs of labor, materials & equipment attributable solely to compensable delay
  - ❖ Labor impact costs
    - ✓ Added cost of work in winter period or work after increased labor rate changes if work would have been completed prior to events but for the owner caused delay

# Impact Costs

- Costs associated with non-critical path delays that cause productivity loss, impact unchanged work &/or cumulative impact
- Productivity loss may be claimed using –
  - ❖ Activity total costs (planned vs. actual costs)
  - ❖ Measured Mile Analysis (unimpacted productivity vs. impacted productivity)
  - ❖ Industry standards (actual vs. industry standard)
    - ✓ See *AACE Recommended Practice 25R-03 - Estimating Lost Labor Productivity in Construction Claims*

# Other Contractor Damages

- Assuming costs not excluded in **Consequential Damages** or other contract clauses, other contractor damages may include
  - ❖ Bond & insurance costs
  - ❖ Loss of contract bonus
  - ❖ Lost profits due to restricted bonding capacity
  - ❖ Interest costs
  - ❖ Legal fees
  - ❖ Claim preparation costs
  - ❖ Currency conversion losses

# Owner Delay Costs

## ➤ Examples of owner delay costs

- ❖ Loss of use
- ❖ Lost rental income
- ❖ Lost profits
- ❖ Delay in proceeds of sale
- ❖ Increased, extended financing costs
- ❖ Extended general conditions &/or other personnel costs
- ❖ Increased storage costs
- ❖ Extended professional fees

# Other Owner Damages

- May also include
  - ❖ Repair or replacement cost of defective work
  - ❖ Costs to complete project
  - ❖ Re-procurement costs in event of Default Termination
  - ❖ Extended warranty costs
  - ❖ Third party claim costs
- Owner should list costs in **Actual Damages clause** or include in **Liquidated Damages calculation**

# CLAIMS & PROJECT DELIVERY METHODS

# General

- Claims may arise on any project delivery method
  - ❖ No such thing as “*bullet proof*” contract
  - ❖ Only way to avoid all claims –
    - Do not build the project!
- Some delivery methods reduce likelihood of claims
  - ❖ But claims possible whenever risk allocation in contract inconsistent with parties' abilities to control & manage such risks
- Some currently used alternative project delivery methods include –

# Project Delivery Methods

## ➤ Unit Price –

- ❖ Owner provides detailed list of units to be installed, bidders provide cost/unit
- ❖ Summed costs = Lump Sum Contract price
- ❖ **Quantity Variation** clauses provide for changed costs & all other form of claims available

## ➤ Design – Bid – Build –

- ❖ Owner issues fully designed plans & specifications & bidders provide hard dollar, low bids
- ❖ Firm Fixed Price or Lump Sum contract results
- ❖ Contractors entitled to all types of claims



# Project Delivery Methods

## ➤ Design – Build –

- ❖ Design-Build contractor completes design based on owner's design program & constructs project
- ❖ Most claims other than defective design still exist in contract
- ❖ However, owner still responsible for front end information

## ➤ Fast Track Construction –

- ❖ Construction starts on early portions of work prior to design completion
- ❖ Owner's risk is coordination of interfaces between design packages

# Project Delivery Methods

## ➤ Multiple Prime Construction –

- ❖ Owner contracts with independent prime contractors (by trade or project phase) to speed up project delivery & save cost
- ❖ Since no Privity of Contract between independent primes, whenever one prime impacts another prime, they pursue recovery from owner – changes & delays

## ➤ Construction Management at Risk (CM@R) –

- ❖ CM@R retained early to provide input to design
- ❖ As design nears completion CM@R provides Guaranteed Maximum Price (GMP) to complete all work
- ❖ Once GMP signed, contractor entitled to all claim types

# Project Delivery Methods

## ➤ Integrated Project Delivery (IPD) –

- ❖ Three party contract between owner, designer & contractor
- ❖ Typically works through **Limited Liability Corporation**
- ❖ Establishes risks & responsibilities for each with gain & pain sharing clause & “**waiver**” of claims between parties
  - ✓ Except for claims arising from “**gross negligence**” or “**willful misconduct**”
  - ✓ If allegation proven, all types of claims available

# Project Delivery Methods

## ➤ Public Private Partnerships (P3) –

- ❖ Typically design-build approach with developer (contractor) team financing project rather than owner under financing & operating agreement
- ❖ All types of claims available under delivery method

# CLAIM PREPARATION & ANALYSIS

# Phase 1 – Entitlement & Causation Analysis

- Each issue identified separately?
- Identify & evaluate applicable contract language
- Determine contractual entitlement & causation
- Establish issue files of all related documents
- Analyze each issue separately
- Allocate summary level or ROM costs to each specific issue, if possible, to prioritize further analysis
- Request / locate additional information, if necessary

## Phase 2 – Delay Analysis

- Examine baseline & all schedule updates in native format
- Compare as planned, updates & as built schedules to determine which activities were delayed & whether concurrent delays occurred
- Identify periods of delay, disruption &/or acceleration – delay notices provided?
- Associate claim issues with identified delay periods
- Perform detailed schedule analysis of each
- Identify party / parties responsible for each delay

# Phase 3 – Damage Analysis

- Determine direct costs associated with each claim that has entitlement
- Determine potential indirect & impact costs associated with each issue
- Determine overhead costs for each issue
- Prepare damage calculations for each issue



## Phase 4 – Settlement

- Complete analysis of each issue before starting negotiations
- Meet with other party to negotiate settlement
- Use independent mediator or 3<sup>rd</sup> party neutral to facilitate negotiations, if needed
- Once settlement achieved, draft & execute settlement documents with full waiver of further claims language concerning each issue settled

**Involve legal counsel in drafting such language**

# DISPUTE RESOLUTION METHODS

# Typical Dispute Resolution Methods

## ➤ Negotiation

- ❖ Project level
- ❖ Executive level

## ➤ Mediation

- ❖ Facilitated negotiation with neutral mediator

## ➤ Arbitration

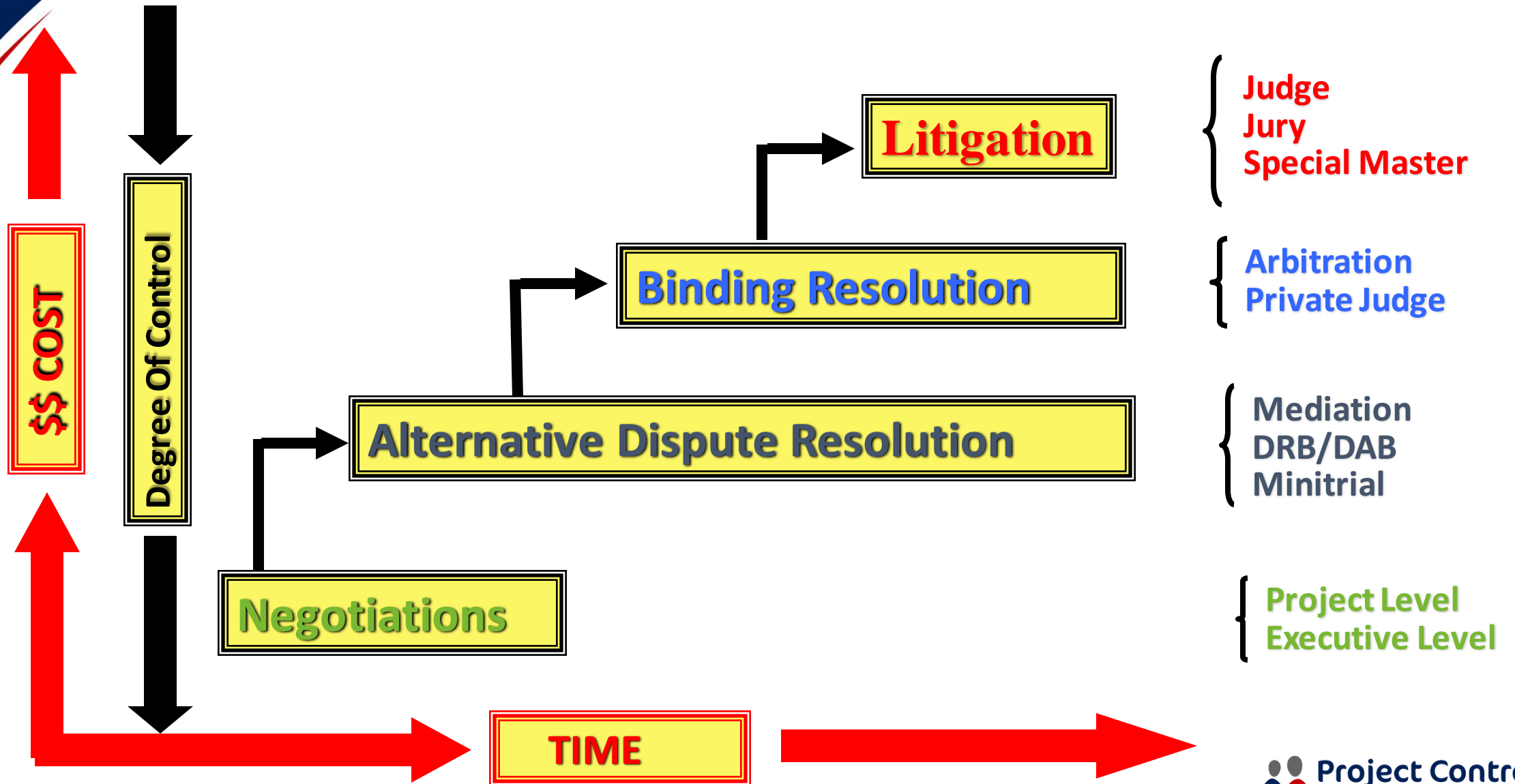
- ❖ Formal process with 3 person panel
- ❖ Decision final & binding
- ❖ Generally, **not** subject to appeal

## ➤ Litigation

- ❖ Formal lawsuit in court of competent jurisdiction

## ➤ Other ADR Methods

# Dispute Resolution Staircase



# CONCLUSION

# Conclusion

- Claims inevitable
- Need **not** end up in arbitration or litigation
- Good claims management on part of owners & contractors **should** result in claim resolution on project
- Provided that –
  - ❖ Claims well prepared & documented per contract
  - ❖ Claims properly analyzed & negotiated
- Owners & contractors need to know how to do both

# Questions & Discussion

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# THANK YOU