

# MASONS THELEN REID LLP

OCAJI Construction Seminar

## CONTRACTOR DOCUMENTATION TO SUPPORT CLAIMS



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# Overview of Presentation

- Documentation is important
  - Contractually (required and can cause waiver)
  - Factually (time extensions/lost productivity)
- We will discuss common deficiencies in documentation and how to avoid them
- We will provide tips for improving documentation



# **The Tools for Documentation Are Well Known**

- Letters, e-mails, memo's
- Notices/forms (e.g., RFI's)
- Photographs/videos
- Meeting minutes
- Periodic schedule updates
- Job cost records and reports
- Logs/notes/daily reports
- Anything else which makes sense



# Why Is Documentation Important?

- Good documentation improves credibility in negotiations and litigation
- Good documentation is necessary to comply with contractual notice provisions
- Good documentation provides proof of facts
- Bad documentation or no documentation hurts the contractor's position



# What Needs to be Documented?

- General rule: Document all deviations from the plan
- Increased costs
- Delays
- Unforeseen conditions
- Oral directions
- Number and location of the work force



# Four Common Deficiencies in Contractor Documentation

1. No documentation, especially during the “honeymoon” period
2. Failure to give notice of claims
3. Establishing cost accounts, but not using them consistently or fully
4. Failure to recognize full cost and schedule impact of changes followed by a waiver of rights by signing change orders



# Reasons *Why* Documentation Is Inadequate

- Honeymoon period
- Fear of upsetting the client
- Project management too busy with other tasks
- Desire to be perceived as getting the job done, not preparing claims
- The cost and schedule impact of the problem can't be determined



# Importance of Notice

- Credibility: You don't want to hear, "If it was so important, why didn't you write a letter?"
- Prevents Employer or Architect from arguing, "If we had only known that you would claim an impact, we would have done it a different way."
- Need to comply with contractual notice provisions





# **Sample Notice Provision**

## **(FIDIC Red Book 4<sup>th</sup> Edition)**

53.1 [I]f the Contractor intends to claim additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention ... within 28 days after the event giving rise to the claim has first arisen.. ”

53.2 ... Contractor shall keep such contemporary records as may reasonable necessary to support any claim he may subsequently wish to make. ...

53.3 Within 28 days ... of giving notice ... the Contractor shall [submit] detailed particulars of the amount claimed and the ground upon which the claim is based. ...

53.4 If the Contractor fails to comply with any of the provisions of this Clause ... his entitlement to payment ... shall not exceed [the amount assessed by the Engineer]...



# Schedule Documentation

- Need for As-Built Schedule Information
- As-planned vs. As-built with impacts
- Lost Productivity (Measured Mile; Other)
- Impossible to accurately compile without accurate daily information
  - Manpower
  - Equipment (deliveries, mobilization and movement)
  - Materials (deliveries)
  - Activities (commencement and completion of own activities and activities of others)
  - Delaying events
  - Resolution of delaying events



## **Features of a Good Notice Letter**

- The purpose of the letter is to provide notice of a certain problem and its impact on the contractor
- Describes the problem (dates, location, status)
- States that as a result of the problem, the contractor is being impacted and how (cost, schedule or both)



## Features of a Good Notice Letter *(continued)*

- Complies with the contract to the maximum extent possible
  - Method of delivery (e.g., certified mail)
  - Time deadline (e.g., within 10 days)
  - Estimates cost and schedule impact
- Quantifies the problem or states that the problem cannot be quantified at this time (e.g., because the work is on going)

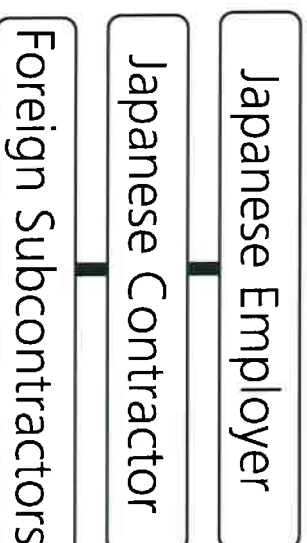


# Documentation Based on the Type of Project

- While the level of documentation should be consistent from project to project, because of commercial realities and human nature, it will differ.
- For the Japanese contractor building an international project, there are several different contracting scenarios, and the level of documentation will likely vary based on the different scenarios.



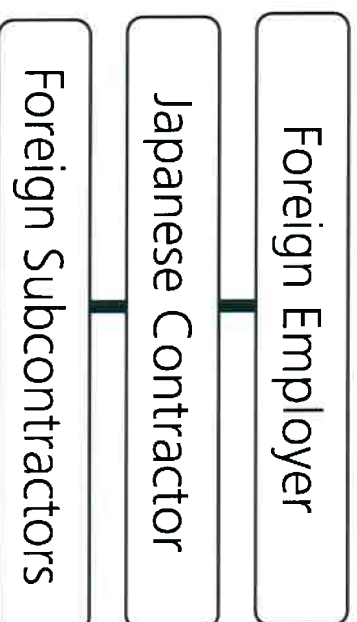
# Contracting Scenario No. 1



- The documentation at the Employer/Contractor level will almost certainly not be strong.
- At the Employer/Contractor level, the project will be handled “Japanese style” and disputes will be negotiated and resolved
- But strong documentation is still needed at the Contractor/subcontractor level
  - To defend against subcontractor claims
  - To support back charges and delay claims against the subs



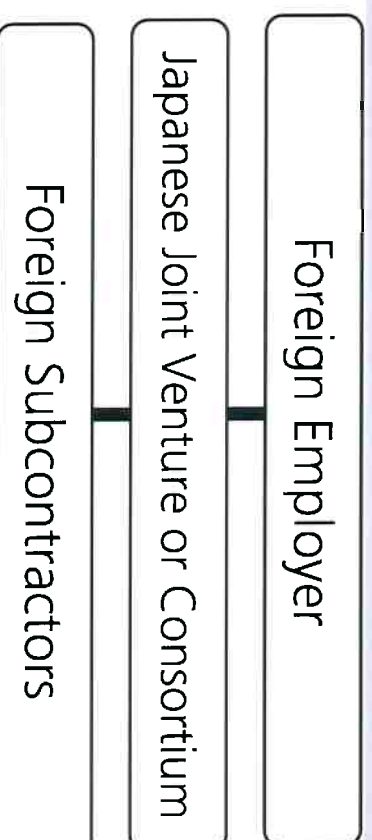
## Contracting Scenario No. 2



- Obviously strong documentation is needed at all levels.
- For the Japanese Contractor, this contracting model presents the highest risk.



# Contracting Scenario No. 3



- Again, strong documentation is needed at all levels.
- Frequently, we see that the Japanese members of a joint venture, or a consortium, do not maintain good records regarding the conduct of the fellow Japanese joint venture or consortium member.
- This is important because it allows the Contractor to:
  - Allocate liquidated damages assessed by the Employer, if any;
  - Assign responsibility for subcontractor claims;
  - Allocate delay damages suffered by members of the JV





## **Case Study – Power Plant Sub-contract**

- The necessary level of documentation may also vary based on the type of project.
- We are familiar with a large sub-contract on a power plant project in Singapore where the subcontractor undertook to construct the civil substructures.
- The piling subcontractor's work needed to be completed prior to the civil substructure work, and the mechanical erection subcontractor's work followed the civil substructure work.



## **Case Study – Power Plant Sub-contract (continued)**

- The civil substructures sub-contract called for 22 different phases with 22 different commencement and completion dates and 22 separate liquidated damages provisions.
- The sub-contracts for the piling subcontractor and the erection subcontractor also had 22 phases and completion dates.
- Thus, it was clear from the outset that the civil substructures sub-contract had substantial commercial risks.



## **Case Study – Power Plant Sub-contract (continued)**

- The need for good documentation was clear from the outset, because it was likely that:
  - (1) the civil substructures subcontractor would assert delay/acceleration claims against the piling subcontractor (leading to the Main Contractor assessing liquidated damages against the piling subcontractor); and
  - (2) the erection subcontractor would assert delay/acceleration claims against the civil substructures subcontractor (leading to the Main Contractor assessing liquidated damages against the civil substructures subcontractor).



## **Case Study – Power Plant Sub-Contract (continued)**

- In fact, that is exactly what happened. The Main Contractor asserted liquidated damages against all 3 subcontractors for many of the 22 different phases.
- The civil substructures subcontractor also asserted its own claim for delay and acceleration damages.
- One of the most important factors in the subsequent negotiations was the fact that the civil substructures subcontractor had compiled excellent documentation.



## Case Study – Power Plant Sub-contract, (continued)

- Delay notices were submitted by the civil substructures subcontractor before it even mobilized on the site to commence work.
- The civil subcontractor took advantage of the fact that the sub-contract provided dates for the handover of the site for each of the 22 phases and the dates for issuance of the released for construction drawings for each phase.
- The subcontractor generated the following forms, which it issued in the first month of the project, and updated in every subsequent month.



# Case Study – Power Plant Sub-contract (continued)

COMBINED CYCLE PLANT  
SCHEDULE OF EFFECTIVE RELEASE DATES (CONTRACTOR TAKE POSSESSION OF EACH AREA OF WORKS)  
Date: 30th September 2000

Phase	Work Areas	Effective Release Date	Actual Site Possession	Deviation	Remarks
1	Block 1 Turbine Building including CW duct Area 1: Area 2: Area 3: Area 4: Area 5:	14-Feb-00 21-Feb-00 1-Mar-00 14-Feb-00 21-Feb-00	24-Feb-00 29-Feb-00 7-Mar-00 29-Feb-00 29-Feb-00	11 9 7 16 9	Part released on 24/2/2000   Part released on 24/2/2000
2	Control Building South half: North half:	1-May-00 15-May-00	8-May-00 11-May-00	8 -3	
3	Air Compressor Building	1-May-00	31-Jul-00	92	Econ clear area after spun piling
4	Block 1 HRSG Support Structure	1-Mar-00	7-Mar-00	7	
5	Block 1 Deaerator Support	1-Apr-00	12-Apr-00	12	
6	HRSG Elevator and Walkway	1-Apr-00			
7	Hydrogen Building / Block 1 UAT Transformers	1-Nov-00			
8	Block 2 Turbine Building	1-Apr-00	13-Apr-00	13	Handover 2.00pm
9	Diesel Oil Treatment / Forwarding Shelter	15-May-00	28-Aug-00	106	Econ piling on 21/8 SCC can't take over
10	Gas Receiving Shelter	15-Jul-00			

# Case Study - Power Plant Sub-contract (continued)

COMBINED CYCLE PLANT  
SCHEDULE FOR COMPANY DELIVERABLES: DRAWINGS FOR PERMANENT WORKS - RELEASED FOR CONSTRUCTION  
Date: 30th September 2000

Phase	Work Areas	Effective Release Date	Duration to Issue	Date to Issue - RFC DRW	Actual receipt Date	Deviation	Remarks
1	Block 1 Turbine Building including CW duct Area 1 & 4; Area 2: Area 3: Area 5:	14-Feb-00 21-Feb-00 1-Mar-00 21-Feb-00	7 7 7 7	7-Feb-00 14-Feb-00 23-Feb-00 14-Feb-00	26-Feb-00 28-Feb-00 28-Feb-00 26-Feb-00	20 13 4 13	} Box up - hold and } anchor bolts drawings } issued on 30/5/00 & 5/9/00
2	Control Building South half: North half:	1-May-00 15-May-00	7 7	24-Apr-00 8-May-00	8-May-00 8-May-00	15 1	} part pilecaps & Ground } beams - CIR 119
3	Air Compressor Building	1-May-00	7	24-Apr-00	12-Jul-00	80	
4	Block 1 HRSG Support Structure	1-Mar-00	7	23-Feb-00	26-Feb-00	4	Anchor bolt AFC-8/5/00
5	Block 1 Deaerator Support	1-Apr-00	7	25-Mar-00	15-Feb-00	-38	Box up/eqpt bases-hold AFC - 15/5/2000
6	HRSG Elevator and Walkway	1-Apr-00	7	25-Mar-00			
7	Hydrogen Building / Block 1 UAT Transformers	1-Nov-00	7	25-Oct-00	5-Sep-00	-49	Part 10/5 & 5/9/00
8	Block 2 Turbine Building	1-Apr-00	7	25-Mar-00	10-May-00	47	
9	Diesel Oil Treatment / Forwarding Shelter	15-May-00	7	8-May-00	12-Jul-00	66	
10	Gas Receiving Shelter	15-Jul-00	7	8-Jul-00	23-Sep-00	78	
11	Block 2 HRSG Support Structure	1-May-00	7	24-Apr-00	15-May-00	22	



## **Case Study – Power Plant Sub-contract, continued**

- So, not surprisingly, at the end of the project the Main Contractor had a multi-million dollar liquidated damages claim, and the civil and erection subcontractors had multi-million dollar delay damages claims.
- After extensive negotiations, the civil subcontractor and Main Contractor parties settled the delay claim and the liquidated damages claim.
- The parties agreed that the two claims would essentially offset and cancel each other out.
- This allowed the subcontractor to recover a reasonable amount of its change order claims.





## **Case Study – Power Plant Sub-contract, continued**

- The subcontractor documentation and delay claim in the Singapore Power Plant case was asserted to allow the subcontractor to:
  1. Recover delay damages,
  2. Defend what was, given the dynamics of the project, the inevitable liquidated damages claim from the Main Contractor
- In order to do this, the subcontractor needed thorough documentation to show:
  1. The delays caused by the piling sub-contractor; and
  2. The delays caused by the Main Contractor



# Use of the Job Cost System

- Typical coding of direct costs is by location and activity
- Accurate coding to location and activity is extremely useful in supporting claims
- If new cost codes are established, they must be used properly
- It is better not to establish a new cost code than to establish one and use it improperly



## **Watch Out for Waiver Language in Change Orders**

- A typical change order will recite that the compensation includes all impacts for the subject change, including cost and schedule impacts
- The problem is that the contractor may not be in a position to know the full impact, or the contractor may underestimate the full impact



# Sample Change Order Waiver

THIS REVISION INCLUDES THE ENTIRE COMPENSATION FOR THE CHANGE SET FORTH ABOVE. It includes, but is not limited to, compensation for engineering, material, equipment, sub-subcontracts, labor, overhead, profit, loss, costs, changes in scope and/or sequencing and/or scheduling, additions, deletions, effects on productivity, delays, disruptions, ripple effects, impacts, extra work, quantum meruit, and/or equitable adjustments(s), as well as for further claims for compensation for any of them, resulting directly or indirectly from the Change. ALL PRESENT AND FUTURE CLAIMS AGAINST COMPANY THAT ARE INCIDENTAL TO OR AS A CONSEQUENCE OF THE AFORESAID CHANGE(S) ARE SATISFIED BY THIS REVISION.



# Options in Dealing with Waiver

## Language in Change Orders

- Sign
  - But, Contractor should sign only if it is very comfortable with the pricing and the waiver
  - In our experience, Contractors frequently underestimate the impact of changes



## Options in Dealing with Waiver Language in Change Orders (*continued*)

- Add cost and schedule impacts to the change and sign
  - But the Employer or Architect may not permit such impacts to be included
- Cross out waiver language and sign



## **Options in Dealing with Waiver**

### **Language in Change Orders (*continued*)**

- Sign, but send a “reservation of rights” letter (risky)
  - “We have signed this change order under duress. We have not been permitted to price the full cost impact of this change and we reserve our rights to seek additional compensation as a result of this change for costs we have not included in our pricing.”
  - But, may not be sufficient



# Options in Dealing with Waiver

## Language in Change Orders (*continued*)

- Don't sign, leaving the issue open and pending (what the claims lawyers prefer)
  - The benefit of "putting issues behind you" can be overstated
  - Balance the need for cash flow against the negative aspects of a waiver
  - In some cases, the benefit of the additional cash flow is not worth the price (a waiver of the right)





# What Makes for Good Documentation?

- Contemporaneous
- Factual
- Prepared by a person with knowledge
- Consistent
- Stored securely



## **Additional tips: Overuse of the term "Delay"**

- The term "delay" is often used when the impact is to both cost and schedule.
- Better to specify "delay" and increased cost. "



# Additional Tips *(continued)*

- Record Fact, Avoid Opinion
  - Today's problem subcontractor is tomorrow's bankrupt subcontractor
  - Disparaging comments about your subcontractor will haunt you in your claim against the Employer or Main Contractor
- Respond to Everything



## **Additional tips: E-mail**

- It is best to print out e-mails if you want to refer to them later
- Those with access to e-mail need to know whether they are being saved
- If e-mails are being deleted automatically, printing is all the more important
- If e-mails are being saved, they should be written like letters and memoranda



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