

2024 EXPERT WITNESS GUIDE

Increasing the Certainty of Damages in Construction Disputes

In early 2021, outside counsel requested my firm to assemble a detailed, turnkey claims package for a subcontractor client. The subcontractor completed approximately 65 percent of its scope of work and faced the reality that the project would potentially be a financial loss. The subcontractor wasn't ready for litigation and wanted one last opportunity to settle at the project level. The subcontractor provided a draft change request listing \$5.5 million in costs caused by various design changes and other impacts. Our analysis established that the subcontractor was entitled to a four-month time extension and costs of \$8 million. The subcontractor reached a settlement for 90 cents on the dollar and the full-time extension.

By JOHN ARMSTRONG

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The reality is that many clients incorrectly calculate damages and delays, and the uncertainty and inaccuracies grow as the claim or the project becomes more complex. Had the client limited its recovery to the original request, it would have left approximately \$1.7 million on the table, and the delay question would not have been resolved. Alternatively, had the client requested an amount greater than it was entitled to, it would have lost credibility, prolonged the resolution process, and potentially submitted a false claim.

Identifying, calculating and appropriating damages is a difficult task. This article provides practical steps to help construction professionals improve the certainty of calculated damages and the likelihood of fair, timely resolution for all parties. These recommendations come from the perspective of a construction expert witness who has provided services for owners, contractors, subcontractors and other common industry partners. This is not intended to provide legal advice.

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improving timely resolution, and avoiding unrelated or unjustified damages. Identifying and quantifying often-missed damage types, and making the work products compelling

and better understood. These factors are universal because they apply to all typical parties involved in construction disputes.

Identify Often-Missed Damage Types

Identifying all applicable damages is the first step to improving certainty and fostering time resolution. Construction professionals may know the total loss or budget overruns on a project. Still, without breaking down the costs, it can be difficult to understand or establish a cause-and-effect relationship between a delay or impact and the associated added costs. Most professionals are familiar with calculating direct cost damages, like the cost to place additional concrete, and extended general conditions, but costs associated with other damage types require further analysis. These other damage types include the following:

- **Productivity loss:** Impacts and disruptions to productivity are often the “silent killer” on many projects. These costs result from construction resources, like craft labor and construction equipment, and not being as productive and efficient as initially planned due to reasons beyond the contractor’s control. These damages are often the “ripple effect” of an impact and result in crew stacking, performing work during unfavorable seasons, increased standby and idle time, and interruptions to planned workflow. These damages are also incurred due to constructive acceleration and contractors mitigating unacknowledged owner delays. Hence, even if the project is not delayed, a contractor can substantially increase the cost to complete the work.
- **Escalation:** The last few years have been an excellent but unfortunate demonstration of construction cost escalation. Contractors typically plan and include escalation in their bids. However, the amount of escalation is predicated and determined by their anticipated time on the project, as shown in its baseline CPM schedule. A contractor’s profit margin will shrink as work and scope are pushed into later contract duration periods. The difference between the actual versus planned escalation amounts may be recovered if the slippages were beyond the contractor’s control.

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stormwater pollution prevention plan monitoring, storage costs, extended crane

and other sizeable hoisting equipment rental, and additional costs to operate and maintain batch plants.

- **Betterments:** In construction defect matters, the subject of betterments is overlooked, which can result in inflated damages calculations. It is essential to determine what portion of the cost of repair is genuinely betterments that the project owner would have otherwise been responsible for paying for had the remedial scope been part of the original scope of work, as opposed to just the cost of repair that would be the responsibility of the at-fault party.
- **Economic waste:** Most parties know the concept of loss or diminution of value in defect matters, but some forget the economic waste doctrine. Simply using the repair cost to calculate total damages may be inequitable when the repair costs are not commensurate with the property's market value after the repairs are made. When those are not fully considered, contractors or subcontractors may be unjustly obliged to pay greater damages than the project owner is reasonably entitled to recover.



Making Work Products Better Understood

Accurately quantifying the damages is only half the battle. A request for an equitable adjustment and a defense against one must tell the whole story of what happened and the cause-and-effect to make it compelling. Many change order requests, defenses and expert reports fall short in this category. They are often a calculation of related costs that fail to capture the context and nuance of project events. They also fail to demonstrate the relationship between those events, damages and delays, if any.

Here are practical steps to help make work products more compelling and better

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- **Know your audience:** Unless you are in front of a neutral evaluator on the project, the decider of the dispute is likely unfamiliar with the details of the project and may have limited knowledge of construction. Writing an expert report that anyone can understand and that is backed up with concise summaries of supporting technical facts provides an opinion that can stand up to the review of other experts and still provide context and understanding for the mediator, arbitrator, judge or jury. Avoiding acronyms when possible and briefly explaining uncommon or technical terms in footnotes can make the report easier to read.
- **Leave obvious breadcrumb trail:** This is especially effective for demonstrating cause-and-effect where the contractor suffered a “death by thousand paper cuts.” The residual effects of seemingly innocuous impacts may not be apparent. Leaving obvious breadcrumb trails helps the reader understand the compounding and consequential effect of multiple changes and their impacts on adjacent or downstream construction operations.
- **Judicious use of graphics:** Using graphics like pictures, diagrams, timelines and snippets of documents helps establish the breadcrumb trail and speaks to a wider audience. Graphics also can be an excellent tool to summarize key and important findings. For example, an organization chart can help clearly and succinctly show relevant parties, their roles in the project, and contractual relationships.
- **Utilize executive summaries:** I never assume the jury, judge or arbitrator will read my entire report, and I want to make it easy for my audience to know my conclusions and findings. That is why I include an executive summary right after the cover that summarizes my entire report into one or two pages.
- **Make references to industry papers:** I encourage practitioners to demonstrate how their damage quantifications meet relevant recommended practices, like those from AACE International (Association for the Advancement of Cost Engineering) or the American Society of Civil Engineers. This builds confidence that the calculations were correctly done and helps demystify the process. That extra step mitigates much of the battle in demonstrating and proving damages.

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Conclusion

Bringing in a construction expert can provide clarification of the impacts caused by project events and the costs resulting from those impacts. An expert can identify often-overlooked costs and clarify the costs related to specific events. Working with an expert early in a dispute can improve your client's opportunity for a timely and equitable resolution or help set clear litigation expectations. An expert report that is well written, organized, supported by data, and showing cause and effect related to the project

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Civic CM is comprised of construction experts who have testified in mediation, arbitration and litigation at the state and federal levels. Its experts also regularly provide claims, scheduling, and advisory services for all types of stakeholders, during all construction phases, and for varied markets and sectors. The company has offices in Phoenix. San Diego. Los Angeles. San Francisco. Denver. Austin and Boise.

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