Claims Avoidance Plan and the “GRAP”

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Will Willson FRICS AVS

Director of Risk Management

Gardiner & Theobald Inc NY

Topic Overview

- A claim in the context of this presentation is the assertion of entitlement for compensation from one party of a Owners design or construction contract that the **Owner disputes**.

- It is important for an Owner to establish a policy for avoiding Claims closely aligned to their risk retention capacity and **transfer policy** and **appetite**.

- The impact of any particular claim is different on all projects therefore a **specific claims avoidance plan** for each project is believed essential.

- The Claims Avoidance Plan (or CAP) sets down the Owners strategy for avoiding claims between contractors, the Owner, and other third parties during the development, design, procurement, and construction of a Project or program of projects. The plan includes a strategy for mitigating impacts where claims may occur.

Topic Overview

The CAP is the top level claims avoidance strategy. Geotechnical risks, or risks occurring as a consequence of differing site conditions, unforeseen sub-surface conditions and the like are typically the most damaging in terms of delay and cost impact to a project. The presentation will review the progression of further detail into the GRAP, the Geotechnical Risk Allocation Plan, and how that then rolls down and then back up from the GBR, the Geotechnical Baseline Report. The presentation will include typical outlines of both the CAP and GRAP

Insurance Strategy

Partnering

DRB

Claims Avoidance

CAP

GRAP

GDR / GBR

Excess Profit Avoidance Strategy

Incorrect Risk Transfer

Examples from the Floor ?

Topic Overview

1. *Thinking about how claims might arise is useful*
2. *The practice of transferring low probability high impact risks is fairly common*
3. *Dispute avoidance is a lot easier if you know why disputes may occur*
4. *If you write a RFP pushing all the risks onto a bidder and you know some are unreasonable it's pretty likely a dispute will arise if the risk happen*

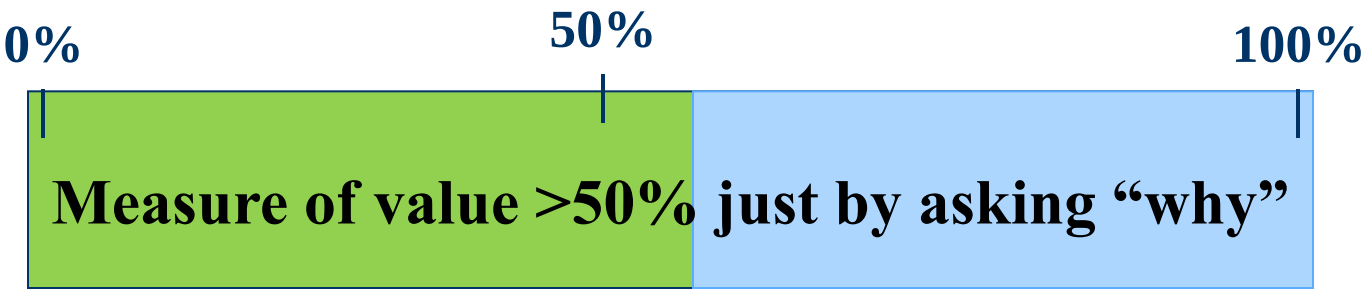
This presentation presents a process for trying to anticipate claims and avoid them when ever possible

You said you wanted a wheel ….

The Claims Avoidance Plan Structure

- *Purpose*
- *Project*
  - *Project description*
  - *Project status*
- *Related documents*
- *Lessons learned*
  - *Owners past projects*
  - *Consultant team past projects*
  - *Industry lessons*
  - *Anticipated relevance to current project / program*

The Claims Avoidance Plan Structure



Purpose ….

- Why do we need a plan
- Why might we have claims
- Why might our strategy give us higher likelihood of claims

The plan should include a strategy for mitigating impacts where claims may occur.

The Claims Avoidance Plan Structure

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The Claims Avoidance Plan Structure

- *Policy*
  - *Roles and responsibilities*
  - *Claims avoidance strategy*
  - *Training and awareness*
- *Risk Allocation*
  - *List …Owner risks*
  - *List …Consultant team risks [each]*
  - *List …Contractor risks*

  - *Note "shared risks"*

Claims

- *what the problem is…*
  - *Definition*
  - *Dependencies*
  - *Ambiguities*
  - *Expectations*
  - *Deliberate [attempt at] avoidance*
  - *Clarity [or lack of]*
  - *Optimism [eg time to review]*
  - *Unknowns [lack of risk identification]*
  - *Rushed documentation*
  - *Inadequate resources*

Audience ….other ?

Claims avoidance strategies

1. *The issue*
2. *Reasons for potential claim*
   - *Interactive ..*
3. *Claims avoidance strategy*
   - *Interactive*

Reasons for claims

1. *Timely access to information*
2. *Document management*
3. *Review and / or Approval of Submittals*
4. *Access to physical property*
5. *Access to project work area from others*
6. *Assumptions made with respect to pricing*
7. *Unbalanced Bids*
8. *Lay down and storage areas*
9. *Future Inflation*
10. *Treatment of Unforeseen Conditions*
11. *Commitments from Third Parties to Provide Information and/or Services*
12. *Owner-Directed Changes*
13. *Realistic and Validated Master Project Schedule (MPS)*

Claims avoidance strategies

1. *The issue : Timely access to information*
2. *Reasons for potential claim :*
   - Claims may arise where information arrives late, is out of date, inconsistent with other information, incorrect, ambiguous or misleading. While it is impractical to check all information provided by others, it is probable to anticipate that not all information will be correct.

3. *Claims avoidance strategy :*

Claims avoidance strategies

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3. *Claims avoidance strategy :*
   - *Robust QA / QC plan, document management system and tracking log*
   - *Structured and comprehensive MPS / IPS [deliverables, delivery dates, constraints / interfaces]*
   - *On site Architectural / Engineering team presence to deal with RFI's*
   - *Simplification of document transmittal between owner / design / construction*
   - *Mitigation ....Identify what information is most likely to be late, ambiguous, misleading and why*

Claims avoidance strategies

1. *The issue : Document management*
2. *Reasons for potential claim :*
   - No records to counter
   - No retrieval system
   - Email makes tracking difficult [when not cc]
   - Paperless environment is not solving the problem [multiple revisions, non-official drafts]
   - Inadvertent cc's, loss of 'without prejudice', "send" without proper reading over, lack of reviews and consequences, loss of control in communications
3. *Claims avoidance strategy :*

Claims avoidance strategies

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3. *Claims avoidance strategy :*
   - *Configuration management [through proprietary systems]*
   - *Control 'email'*
   - *Mitigation .....Recognize 'potential size' of problem as project expands from design to construction ; plan early [many leave document management systems too late in the delivery process]*

Claims avoidance strategies

1. *The issue : Review and / or Approval of Submittals*
2. *Reasons for potential claim :*
   - Failure by Owner, consultants and/or agents, or public or private entities to respond in a timely manner to Requests for Information (RFI), design drawing reviews, shop drawing reviews and material submittals could lead to construction claims.
3. *Claims avoidance strategy :*

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3. *Claims avoidance strategy :*
   - *10%, 30%, 65%, 85%, 90% / 100% design review submittals / 3rd party checks*
   - *Quantify scope ….List all plans / documents that will require review*
   - *Set realistic periods for reviews mindful of resource limitations – scope what is important to review accordingly and what can await future review*
   - *Establish guidelines to avoid unnecessary minutia by reviewers*
   - *Assign submittal co-ordinator*

Claims avoidance strategies

1. *The issue : Access to physical property*
2. *Reasons for potential claim :*
   - Lack of access to property for construction or project requirements can result in claims for compensation and delay.
3. *Claims avoidance strategy :*

Claims avoidance strategies

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2. *Reasons for potential claim :*
   - Lack of access to property for construction or project requirements can result in claims for compensation and delay.
3. *Claims avoidance strategy :*
   - *All ROW available on advertize*
   - *All ROW available on NTP*
   - *Date certain access for other critical ROW with Owner 'float buffer' and 'Access Restraint' in bid document*

Claims avoidance strategies

1. *The issue : Access to project work area from others*
2. *Reasons for potential claim :*
   - Multiple contractors working on various projects and operations in the same area may cause access and interface issues that result in delays and claims by the contractor.
3. *Claims avoidance strategy :*

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3. *Claims avoidance strategy :*
   - *Develop a construction staging and access plan [detail shared access / constraints]*
   - *Incorporate access plan in all trade contracts [from outset – claims common where interfaces and shared access after thought]*
   - *Standard Milestone and AR schedule / numbering [embedded into MPS / IPS]*
   - *Review need / advantages for common access platforms*

Review need for use of permanent Elevators for construction

Review "likely" means and methods / validate and refine as actual means and methods gradually get bid for subsequent packages

Claims avoidance strategies

1. *The issue : Assumptions made with respect to pricing*
2. *Reasons for potential claim :*
   - Wide variations in bid prices typically are attributable to:
     - Poorly defined Project scope of work;
     - Incomplete design information where bidders are forced to make assumptions with respect to missing design detail;
     - Failure to adequately quantify and define risk transfer;
     - Lack of details with respect to access;
     - Ill-defined construction contractor temporary works and facilities, design detail, and requirements;
     - General construction contract specification ambiguities;
     - Performance specification scope left open to interpretation due to unclear Owner bid and contract requirements; and
     - Poor contract package definition and demarcation.
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     - Poor contract package definition and demarcation.
3. *Claims avoidance strategy :*
   - *Challenge interpretation of draft contract specifications at 85% review [for P-DB]*
   - *Develop matrix for quantifying uncertain scope / specification requirements:*
     - *Police attendance*
     - *HAZMAT removal*
     - *Obstructions removal*
     - *Standing time for special equipment [eg TBM's]*
   - *Using Provisional Suns, Provisional Quantities, Schedule of unit rates*

Claims avoidance strategies

1. *The issue : Unbalanced bids*
2. *Reasons for potential claim :*
   - Claims may arise when bid documents are accepted with unbalanced and inflated unit prices that do not represent the true scope of the work. When this scope of work is potentially subject to future changes and the unit prices are unrepresentative of the true value of the work, a claim may result. There is also a risk that a contractor may be over paid for work completed in the event of a default, where the value of work actually completed is significantly less than the price paid through the contract payment schedule.
3. *Claims avoidance strategy :*

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3. *Claims avoidance strategy :*
   - *Awarded contracts require a contract payment schedule and bid item price breakdowns to be submitted within 30 days of NTP.*
   - *Owner will review payment schedules and bid items price breakdowns.*
   - *Owner will require the contractor to substantiate price breakdowns that are unrepresentative of the work.*
   - *Owner will retain the right to replace the submitted payment schedule and bid item price breakdown with its own version supported by its own increase in the event agreement cannot be reached.*

Claims avoidance strategies

1. *The issue : Lay Down and Storage Areas*
2. *Reasons for potential claim :*
   - Claims and/or inflated pricing may occur where a bidder cannot obtain sufficient space to construct their work. This eventuality may occur where the sharing of congested lay-down areas has been left to the coordination between individual contractors or where no available space local to the Project sites is available.
3. *Claims avoidance strategy :*

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3. *Claims avoidance strategy :.*
   - *Develop staging plan areas in detail early in process [by 30% design] to 'prove site layout adequate'*
   - *Procure / reserve / set aside adequate lay down areas if risk that Contractor will not be able to acquire / obtain himself*
   - *Procure additional construction temporary ROW if required*
   - *Include adequate allowance for potential means and methods in estimate*

Claims avoidance strategies

1. *The issue : Future inflation*
2. *Reasons for potential claim :*
   - Claims may arise where the inflation of materials, labor, plant or fuel are significantly greater than contemplated at the time of bid.
3. *Claims avoidance strategy :*

Claims avoidance strategies

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2. *Reasons for potential claim :*
   - Claims may arise where the inflation of materials, labor, plant or fuel are significantly greater than contemplated at the time of bid.
3. *Claims avoidance strategy :*
   - *Traditional ..*
     - *continuously review the option to incorporate price fluctuation clauses in contracts*
     - *Price fluctuation clauses may be incorporated as an option in bid documents to gauge the bidding climate and premium for risk transfer of inflation.*
     - *Inclusion of a price fluctuation option maintains a balanced bid environment*
   - *But ….*
     - *Heated Market > Labor, Plant, Material demand / supply*
     - *Skills shortages / Labor wage increases*
     - *Margin growth*
     - *Quality issues*
     - *Insurance costs*

Claims avoidance strategies

1. *The issue : Treatment of Unforeseen Conditions*

2. *Reasons for potential claim :*
   - Claims and/or inflated bid prices may arise where limitations to rights under a contract are ambiguous.

3. *Claims avoidance strategy :*

Claims avoidance strategies

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2. *Reasons for potential claim :*
   - Claims and/or inflated bid prices may arise where limitations to rights under a contract are ambiguous.

3. *Claims avoidance strategy :*
   - *Baseline – GBR*
   - *Clear and deliberate compensation events*
   - *Minimum contingency levels at specific milestones maintained to ensure unforeseen events are not forgotten [RCMP]*
   - *Avoid drafting contracts with incentive clauses assuming everything goes to plan – e.g. unforeseen market inflation may undermine management incentive clauses for VE / efficiencies*

Claims avoidance strategies

1. *The issue : Commitments from Third Parties to Provide Information and/or Services*
2. *Reasons for potential claim :*
   - Claims may arise when bid documents include the timely provision of utilities or other public agency's/private firm's information, work, and/or resources to undertake work in connection with the project and those provisions are not met.
3. *Claims avoidance strategy :*

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   - Claims may arise when bid documents include the timely provision of utilities or other public agency's/private firm's information, work, and/or resources to undertake work in connection with the project and those provisions are not met.
3. *Claims avoidance strategy :*
   - *Employing third-party coordination managers for utilities and regulatory agencies*
   - *Agreement/MOU summaries*
   - *Master utility coordination plans*

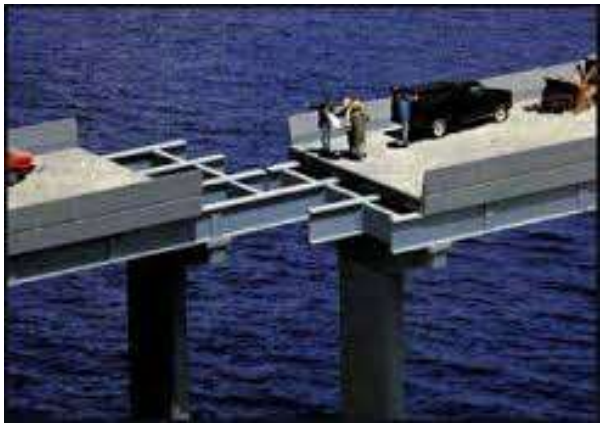
- Coordination incentive/bonus clauses

- Realistic float and lead-in time between Utility relocation and main works

- Common treatment of 3rd Parties under Agreements

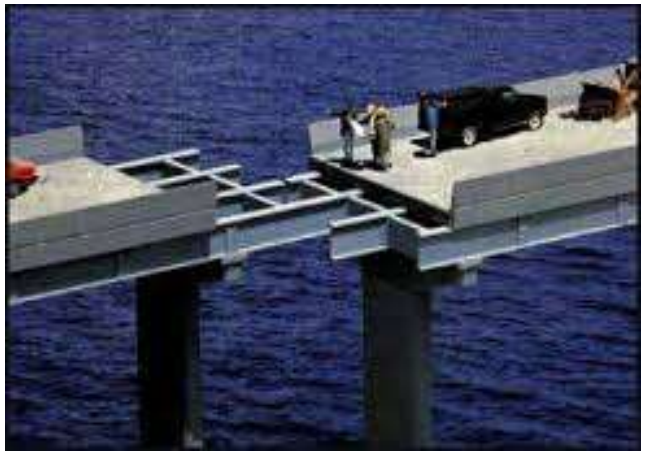
Claims avoidance strategies

1. *The issue : Owner-Directed Changes*
2. *Reasons for potential claim :*
   - Claims may arise when the Owner instructs changes to be made without the consequences of those changes having been fully identified and addressed.
3. *Claims avoidance strategy :*



Claims avoidance strategies

1. *The issue : Owner-Directed Changes*
2. *Reasons for potential claim :*
   - Claims may arise when the Owner instructs changes to be made without the consequences of those changes having been fully identified and addressed.
3. *Claims avoidance strategy :*
   - *Obtain built-up estimates of time and schedule implications to any change order prior to approval. This will include design, management and construction costs of the proposed change. Only in emergency situations will a change order be instructed prior to obtaining cost and schedule implications.*



Claims avoidance strategies

1. *The issue : Realistic and Validated Master Project Schedule (MPS)*
2. *Reasons for potential claim :*
   - Claims may arise due to disputes on the responsibility for and time impact of events that delay the completion of contract work.
3. *Claims avoidance strategy :*

Claims avoidance strategies

1. *The issue : Realistic and Validated Master Project Schedule (MPS)*
2. *Reasons for potential claim :*
   - Claims may arise due to disputes on the responsibility for and time impact of events that delay the completion of contract work.
3. *Claims avoidance strategy :*
   - *Don't back fit schedule without mitigation plan / change in normal policy / practice*
   - *Incorporate 'Owner float / Contingency' – avoid awarding 'trade contracts' with no Owner float at end*
   - *Don't assume Owner relinquishes exposure to delays once contractor appointed [a Red Light does not mean traffic will stop !]*
   - *Don't plan to fail*

Claims avoidance actions PE / FD

- Establishment of design criteria,
  - Coordination with utility companies,
  - Coordination with third parties,
  - Coordination with Local and Provincial authorities
  - Establishment of geotechnical and geotechnical basis,
  - Preparation, review, and acceptance of design submittals, and
  - Constructability reviews.
- Establish schedule requirements
  - Identify design interfaces and dependences
  - Establish Milestones and Access Restraints matrix
- Design progress measurement
  - Develop deliverables list
  - Weight deliverables
  - Establish Earned Value progress measurement

Claims avoidance actions Procurement

1. *Predetermined 'amounts' in price breakdowns for un-quantified scope*
2. *Unit Price Items for Historically Difficult Scope of Work to Quantify*
3. *Provide Well-Defined Schedule Milestones and Access Requirements*
4. *Prepare and Institute a Pre-qualification Process and/or Experience Qualification Requirement for Specialty Construction*
5. *Incentive Payments for Safety and Schedule Related to Contractor Performance*
6. *Use Agency / State Standard Change Clauses in Contracts*
7. *Establish Extended Field Overhead Rate for Use on Changes and Delays as a Separate Bid Item*
8. *Incorporate VE Change Process Clause in Contracts*
9. *Incorporate "Partnering" Guidelines into Contracts*

Geotechnical Risk Allocation Plan

1. *Soil / Rock*
2. *Muck / Surplus excavated material*
3. *Ground Water Control*
4. *Obstructions*
5. *HAZMAT*
6. *Settlement control*
7. *Noise and vibration*
8. *Special equipment [eg TBM's]*

1. What is risk
2. Who owns risk
3. What is mitigation
4. Proposal for base lining
5. Insurance coverage
6. Owner residual risk

Insurance Strategy

GBR

Geotechnical Risk Allocation Plan – Risk Matrix

STEP 1

Identification + Quantification

Summary Risk Description or BRL Risk Description 'Level 1'				Assessment of Inherent Risk (without mitigation) [see note 1]		
GRAP Matrix ID	BRL Risk ID	Risk Description	CONTRACT PACKAGE(S)	Probability (P)	Consequence (C)	Risk Level (R = P X C)
GRAP Section 4.1 - Soil / Rock Conditions						

Geotechnical Risk Allocation Plan – Risk Matrix

STEP 2

Design Mitigation

Mitigation during Design Stage [see note 2]				Reassessment of Risk (assuming mitigation is implemented)		
Mitigation measure:	Action by:	Status:	Estimated Cost of Mitigation	Probability (P)	Consequence (C)	Risk Level (R = P X C)

Geotechnical Risk Allocation Plan – Risk Matrix

STEP 3

Allocation of Residual Risk [Construction Stage]			Cost to Retain		Cost to Transfer		Notes on Strategy	Insured Risk			Coverage Limit / Deductable / Cap
Assigned to	Assigned Via contractual Mechanism	Action [Status]	Min	Max	Min	,Max		Owner	3rd Party	Gen Cont [GC]	Residual Liability to Owner
Owner where above GBR	GBR	Clause 15.3	N/A	N/A	N/A	N/A	Maximise Bidder pool through even bidding baseline	no	no	no	$3-5M

Claims Avoidance

Questions ?

Last Slide

Contact info

Will Willson FRICS AVS

Director of Risk Management

Cost Consultants and Project Managers

Chartered Quantity Surveyors

Gardiner & Theobald Inc

317 Madison Avenue

19th Floor

New York

NY 10017

001 – 212 – 661 – 6624 (Office)

646 - 344 - 0816(Cel)

267 - 909 - 0001 (Alternate Cel)

w.willson@gardinerusa.com

www.gardinerusa.com