Chapter 12

Claims, Disputes, Arbitration, and Mediation

At one time or another, chances are that a project manager will have to deal with a dispute that results in a claim. The problem may arise at any point during the construction process—before the process even begins or after it has been completed. Although it may be the general contractor’s intent to avoid it at all costs, it may happen that litigation is forced upon them. A project manager who is doing a proper job of documentation and who is somewhat familiar with legal terminology, previous court decisions, and past industry practices will be better prepared to deal with that inevitable dispute.

The practice of law is best left to the lawyers, but as the name “contractor” implies, we deal with contracts (legal papers), and therefore need to become familiar with the legal implications and responsibilities that go hand-in-hand with the administration of all of these documents.

What Triggers Claims and Disputes?

The principal reasons for misunderstandings leading to disputes and claims are as follows:

- Plans and specifications containing errors, omissions, and ambiguities, or which lack the proper degree of coordination
- Incomplete or inaccurate responses or nonresponses to questions—or resolutions of problems—presented by one party in the contract to another party in the contract
- The inadequate administration of responsibilities by the owner, architect/engineer, contractor, subcontractors, or vendors
An unwillingness or inability to comply with the intent of the contract or to adhere to industry standards in the performance of work

- Site conditions which differ materially from those described in the contract documents
- Unforeseen subsurface conditions
- The uncovering of existing building conditions which differ materially from those indicated in the contract drawings—situations that occur primarily during rehabilitation or renovation work
- Extra work or change-order work
- Breaches of contract by either party in the contract
- Disruptions, delays, or acceleration to the work that creates any deviation from the initial baseline schedule
- Inadequate financial strength on the part of the owner, contractor, or subcontractor

The key to dispute resolution is promptness in addressing the issue(s) and conducting negotiations with the goal of early settlement. Experience has shown that the longer a dispute lingers, the more entrenched each party’s position becomes, and the more difficult it is to resolve. Rapid resolution can be achieved if there is complete, accurate, and indisputable documentation regarding the events surrounding the disagreement. Only when efforts at resolution fail is there a need to consult a claims consultant and/or the company attorney, and again, if this is done at an early stage, the strengths and weaknesses in both party’s claim may become apparent and the decision to pursue or dismiss the claim made somewhat easier.

The Bid Proposal Process and the Potential for Disputes

Disputes often arise even before a contract is awarded. In fact, a dispute can occur even before a sealed bid proposal is submitted at a formal bid opening. In public sector work, and frequently in private industry, a formal bid procedure is established: bids are submitted on a preissued bid proposal form, the form is completed and signed by an officer of the construction company, sealed in an envelope, and presented to the owner’s representative at a predetermined place, time, and date. If bid bonds are required, a certified check or letter of credit may also be acceptable.

The bid bond offers assurance to the owner that if the contractor’s bid is accepted, the owner will be protected if that low bidder is unable or unwilling to accept a contract when offered. Other requirements may
also accompany the bid proposal and, per the bid instructions, any deviations may be cause for rejection.

In the public sector, strict compliance with all aspects of the bid proposal must be adhered to, otherwise formal protests may be lodged by other bidders protesting acceptance of a bid that fails to meet all the required criteria.

In the private sector, compliance is not so strict, and the owner may waive any or all requirements in their selection of an acceptable bidder if it appears to be in their best interest. In a way, so can public officials.

**Do late bids count?**

What’s described next is very familiar to project managers as they dash from their office with an incomplete bid form, several pens, and a cell phone on their way to the bid opening. The scenario generally is as follows: the project manager arrives at the bid opening, looks for a spot away from the crowd and calls the office for final instructions and late-breaking price adjustments. With only a few minutes to bid closing, they find themselves looking at a blank bid form that must be filled in with a page or two of alternates, allowances, unit prices, and who knows what. Time is running out and only a minute or two is left, but many blanks remain to be filled in before that mad dash to the bid office. A cold sweat begins to form on the project manager’s brow: “What will happen if I make a mistake on this form or enter the wrong number in the wrong place—or worse yet, if the battery in my cell phone dies before I’m finished consulting with the office?”

Don’t despair! Complete the form as quickly and as accurately as possible and proceed, posthaste, to the office where the bids are to be submitted. Turn the bid into the clerk and have it date/time stamped. Just because a bid is received after the exact specified time on a public work project, does not mean it will automatically be disqualified.

In private bid situations, the owner is free to waive any prebid qualifications, but in public bid openings, the courts have ruled that the public bidding requirements are there for the public’s benefit. If a bid is received a few minutes late and there is no evidence of fraud, collusion, or intent to deceive, all is not lost. If the local authority *refuses* to accept the late bid, an immediate protest must be filed and can be voiced in the presence of the official refusing to accept the bid, as well as in the presence of witnesses.

In the meantime, the project manager should remain during the entire bid opening process and keep detailed notes of the other bidders’ proposals, noting their competitive bids and any exceptions that they may have taken to the bidding instructions. As quickly as possible, upon return to the office, a written protest should be filed citing the circumstances
involved in the late submission (all other portions of the bid having been met with strict compliance) and stating that the bid was delivered at, say, 2:05 P.M. instead of 2:00 P.M. as required.

If your late bid happens to be the low bid, but could be rejected because it was submitted five minutes after the deadline, it may well be worthwhile to lodge a formal, legal protest and challenge. It is possible that the public officials—or the court, if it gets that far (which it probably won’t)—will rule that it is in the public interest to accept the low bid even though the late submission must be considered a violation of the bidding procedure. In fact, if other “minor” deviations are noted during the bid opening process and another contractor requests that your bid be disqualified, or the public official opening the bids indicates your bid may be disqualified, continue to take notes relating to all other bids being opened, then return to the office and discuss lodging a protest.

When a “nonconforming” bid is significantly lower than the second bid, the public agency may well decide to interview your firm to ascertain that all other aspects of the bidding procedure have been met, that your company fully understands the scope of the work, has included costs for the full scope of work, is a reputable builder, and is ready, willing, and able to enter into a contract. The agency may then rule that it is in the best interests of the public to accept this bid even though there was a “minor” discrepancy in the bidding process. Emphasis must be placed on the word “minor.”

**Who is the low bidder?** Unless the bid documents state otherwise, the low bidder on a lump-sum contract is the “apparent” low bidder, subject to a review of compliance with all other provisions of the bidding instructions. When a bid contains not only a lump-sum price but several alternates, as additions or deletions to the base bid, the determination of who is actually the “low” bidder becomes less clear. In the absence of any language to the contrary, usually the owner may select the alternates that will be accepted. Therefore, the low bidder may not be apparent until all accepted alternates are included with the lump-sum bid. It is also possible that the “apparent low bidder” wishes they were not the lowest bidder, which brings up another point.

**Withdrawing a bid.** In the rush to assemble a competitive bid, it is not unheard of to make a mistake, either in the extension of unit prices, the omission of a few cost items, or to just plain make a mathematical error. If these items are minor and if the general contractor has been designated “apparent low bidder,” they will usually accept the contract and chalk up the mistakes to experience—afterward having a few words with the person that put the bid together.
However, the situation might take on a different twist if a bid bond or bid deposit check was required and, upon the opening of the sealed bids, the contractor finds to their dismay that they were low bidder by such a substantial margin that their bid must have been defective in some way. If a contractor discovers that their bid was, say, $400,000 lower than the next bidder’s price of $2 million, and the third and fourth bidders’ quotes were 5- to 10-percent higher than the second bidder, there may be reason for alarm. The contractor’s thoughts immediately go to the bid bond submitted with their bid. If they would elect not to accept a contract if offered, the likelihood of having to forfeit their bid bond is real, but the other option is to accept a contract and, more than likely, anticipate a substantial loss in the process. Neither choice is very palatable, but does the contractor have any other?

In the case of *M. F. Kemper Construction Co. v. City of Los Angeles*, 376 Cal.2d 696, 235 P.2d 7 (1951), the contractor inadvertently omitted a $300,000 item from their estimate, causing them to be $250,000 lower than the second bidder. The contractor contacted the Public Works Department a few hours after discovering their mistake and requested that their bid be withdrawn and their bid bond returned. The City of Los Angeles decided to award the contract to the second bidder and directed the “low” bidder to forfeit their bid bond. A lawsuit followed. The court made a distinction between errors in judgement and mathematical or clerical errors. On the basis of the evidence submitted, the court judged the $300,000 error to be a justifiable one and allowed the contractor to withdraw their bid and not forfeit their bid bond. It was the contractor’s responsibility, however, to prove that a clerical error had, in fact, been made that accounted for the erroneously low bid.

Based upon this decision, it becomes critically important that all adding machine tapes, scrap paper with notes, calculations, bid tabulation sheets, confirmation of telephone bids, and other related matter be kept until well after a contract award has been made and accepted by the contractor. A contractor should not assume that they only have two choices upon discovery of a defective bid: forfeit the bid bond or accept the unwanted contract. It may be possible to withdraw the bid with no penalties.

**Verbal subcontractor quotations.** During the preparation of a hard bid, several subcontractor proposals may be submitted over the telephone and recorded by the general contractor on a telephone bid form. This form may include the subcontractor’s name, address, date, the project name, the sub’s phone and fax number, and the name of the person phoning in the bid. As these telephone bids are received, occasionally the full scope of work being quoted is not reviewed or recorded, because bids are coming in fast and furious and the estimate must be completed
quickly. But when the bidding process is over, these telephone bids will be reviewed for completeness and any missing information filled in by contacting the subcontractor. Each subcontractor or vendor should then be requested to submit a written confirmation of their verbal bid.

A general contractor who receives a verbal bid from a subcontractor and incorporates it in their “winning” proposal may subsequently be awarded a contract, at which time that competitive subcontractor will be requested to submit their formal, written quotation if they have not already done so. But suppose one of these subcontractors with that competitive bid responds that, due to an error in their bid or because they have been awarded another big job in the interim, they wish to withdraw their previous quotation and will not agree to enter into a contract with the general contractor. Without a written proposal from that subcontractor, can anything be done? In some cases, yes, most assuredly.

The principle of promissory estoppel may apply and render the oral contract enforceable. The word estoppel is defined in the dictionary as “an impediment that prevents a person from doing something contrary to his own previous assertion to do so.” This appears to be a long-winded definition of “to stop.”

Under this doctrine, the offerer (subcontractor) may be held liable for any damages incurred by the general contractor. In other words, the subcontractor may be required to pay the general contractor the difference between their price and the next lowest quote. In the case of Bridgeport Pipe Engineering v. DeMatteo Construction Company, 159 Conn. 242, 244 (1970), the subcontractor submitted a verbal bid by telephone to furnish labor and materials for plumbing, heating, and ventilating work for a housing project, but later declined to enter into a contract. The Connecticut Supreme Court ruled that the telephone bid was an oral offer and the general contractor accepted the offer when it became the successful bidder on the housing project.

Although this Connecticut case involved a subcontractor supplying both labor and materials, several other state courts have ruled that bids received representing the sale of goods only also constitute a contract, and the acceptance of that contract is complete when the general contractor receives a contract from the client. Even if the subcontractor attempts to withdraw the bid before the general contractor is notified of an award by the owner, the principle of promissory estoppel may apply to prevent the subcontractor from withdrawing their bid without incurring a penalty.

In another court case, H. W. Stanfield Construction Corp v. Robert McMuller and Son, Inc., App.92 Cal.Rptr.669 (1971), the court ruled that the subcontractor was liable for the bid submitted to the general contractor assembling a bid for the U.S. Navy. The general contractor had obtained prices from a number of painting contractors and the low bid
was submitted by a company whose first bid was 50-percent below the next highest one. After being advised of this low bid, the subcontractor resubmitted their proposal which H. W. Stanfield used in their bid. The general contractor advised the painting contractor that they had incorporated their bid, and after receiving the Navy contract, the painting contractor would be awarded a contract for their portion of the work. As a result, the subcontractor refused to sign the subcontract agreement when it was offered. The court held that the general contractor had relied on the promise of the subcontractor to do the work for the stipulated sum and would be damaged by the refusal of the painting contractor to do that work. The decision was upheld by the California Supreme Court.

In the practical world of contracting, however, working with a subcontractor who has been directed to accept a subcontract agreement or face litigation might present such hurdles and problems that this arrangement would, in most cases, not be worth the savings in costs. But being aware of one’s rights under the law may be used to advantage if the situation permits.

**Other Potentials for Disputes**

**Oral contracts**

Oral contracts are often recognized as creating the same obligation between two parties as a written contract. A case tried in a North Carolina court was based upon an architect performing work for an owner without benefit of a written contract. The owner, a developer, requested the architect to complete some preliminary design work on a condominium project. The architect, according to the owner, had prepared such a complex contract for the design work that it was rejected. The owner indicated that they would be willing to sign a simpler contract if presented. The architect’s fees, at that time, were not a subject of disagreement, and the owner directed the architect to proceed with the design work. Months later, the owner advised the architect that another designer had been hired to work on the project, but by that time the original architect had completed a major portion of the work and so submitted an invoice for it. The owner refused to pay the invoice and the architect filed suit, claiming breach of contract.

The North Carolina trial court dismissed the case due to the absence of a written contract between the owner and architect, but the North Carolina Court of Appeals disagreed with this decision. The appeals court ruled that even though a written contract did not exist, the architect had an enforceable oral agreement. Therefore, the court determined that a jury trial was in order and went further in stating that if the jury
were to agree that an oral contract did not exist, the architect could still pursue the recovery of actual value of the services performed in connection with the project design [Willis v. Russell, 315 S.S. 2nd 91 (North Carolina Appellate Court, 1984)].

**Disputes regarding contract interpretation**

Ambiguities in the contract documents are usually resolved by reasonable parties taking a reasonable approach. When reasonableness does not prevail and one party pursues a hard line, what to do? There are no tried and true procedures for contract interpretation and each case seems to stand on its own. What documents have priority over others? Do the plans or specifications take precedence? Will the specifications take precedence over full-scale drawings? Some contract requirements specifically establish an order of the precedence such as: contract requirements—first precedence; schedules—second; drawings—third; and so forth. Typical contract language, when there is a conflict between the plans and specifications, will be similar to the following clause:

In the event of conflicts or discrepancies among contract documents, interpretations will be based on the following priorities:

1. Contract
2. Addenda, with those of a later date having precedence over those of an earlier date
3. Supplementary conditions
4. General conditions of the contract for construction
5. Drawings and specifications with schedules and large-scale details having precedence over small details
6. If drawings and specifications are not in concurrence regarding quality or quantity, the contractor shall request interpretation from the architect.

Another standard contract phrase regarding this same topic is

In a case of conflict between drawings and specifications as to the extent of work, or location of materials and/or work, the following order of precedence will govern:

1. Large-scale drawings
2. Small-scale drawings
3. Schedules (door, finish, equipment, and so on)
4. Technical specifications

In case of conflict regarding the quality of materials, the specifications will govern. However, the courts are not consistent in their interpretations. Regarding a specific statement taking precedence over a general statement, the court may look for the purpose intended by a specification section relating to the drawing requirements before
arriving at a decision. The point is that there are no hard-and-fast rules that apply to the interpretation of which document has priority over another, unless, as previously stated, a contract Order of Precedence prevails.

**Errors and omissions concerns.** Another provision that architects often include in the contract requires the contractor to advise the architect of a discrepancy, error, or omission before submitting a change order relating to that error or omission. This provision may appear in the bid documents or most certainly in the contract for construction.

Article 3.2 of the A201 General Conditions document requires the contractor to notify the architect *at once* of any errors, inconsistencies, or omissions discovered. If the contractor recognized such an error, inconsistency, or omission and *knowingly* fails to report it to the architect, the contractor may be held liable for any damages resulting from them.

This unilateral edict by the design consultants can be frustrating to the contractor who rarely has sufficient time to thoroughly scrutinize all of the bid documents during that hectic process known as “bidding.” In most cases, a contractor may uncover only the most glaring drawing mistakes at bid time and won’t find any minor discrepancies—or major discrepancies—until construction is underway. Upon discovery and notification of the architect, the response might be, “Well, the bid documents required that you notify us, in writing, when these errors were discovered prior to submitting your bid, otherwise you are considered fully responsible,” which is a response that will raise the hackles on most project managers. Is there any way to deal with these kinds of situations? I think so.

**Dealing with problem drawings.** With barely enough time to completely scrutinize the drawings and specifications before and during the hectic competitive bidding process, some things will undoubtedly slip through the cracks. Last-minute calls from subcontractors, and suppliers e-mailing their bids along with estimate adjustments by the boss as the clock ticks away, leave little time to concentrate on potential drawing errors and omissions. Doesn’t the contractor have a right to assume that the plans and specifications submitted by the owner’s architect/engineer are reasonably complete for bidding purposes? If there are any major discrepancies, shouldn’t they be able to rely on everyone’s good faith to find an equitable solution to correct major errors?

In a court case identified as *John McShain v. United States*, 412F.2d 1218 (1969), the contractor stated that the true condition of the drawings was not known at the time of bidding and that, after being awarded the contract for construction, they found that several drawings which
were illegible at bid time had not been replaced with legible ones. The addenda drawings, furthermore, did not correct many of the coordination errors in the bid documents. The general contractor instituted legal action to recover damages incurred by their company and their subcontractors because of the inadequate drawings. The U.S. Court of Claims said that although the plans furnished by the owner need not be perfect, they must be adequate for the purpose for which they were intended. The court went on to state that the contractor was under no legal or contractual obligation to inspect the drawings to determine their adequacy for construction prior to a contract award. Furthermore, the court ruled that the documents were to be used for estimating purposes only, and it had not been proven that McShain knew or should have known how defective the drawings were.

Owners have a responsibility to present the general contractor with drawings and specifications that are adequate and reasonably accurate, and the GC has a right to expect that. If there are considerable problems relating to deficiencies in the documents, the general contractor should be afforded consideration in their request for additional compensation for any delays the substandard or deficient drawings might have caused them.

In the case of J. D. Construction Co., Inc. v. United States, 171 Ct., Cl.70 (1965), the court ruled that if faulty specifications prevent or delay completion of the contract, the contractor is entitled to recover delay damages from the defendant’s breach of implied warranty. This breach cannot be cured, said the court, by the simple expedient of merely extending the contract time and performance.

**The contractor’s guarantee regarding design.** When an architect specifies a certain component design and the installation results in poor performance, who is responsible? In a case brought before the courts in the State of Washington, an architect had modified a curtain wall design. The contract specifications contained a standard clause requiring the general contractor (GC) to notify the architect if any materials, methods of construction, or workmanship changes were needed to ensure compliance with the contract documents. The GC did not notify the architect of any changes they felt were necessary relating to this curtain wall design and installation.

When the curtain wall was installed and the building completed and signed off by the design consultants, a series of leaks appeared in the system. The GC denied any responsibility to correct the leaks and the owner sued. In this case, **Teufel v. Wiener**, 68 Wash.2d 31,411 P.2d 151 (1966), the court concluded that the leaks were caused by design error. The owner had claimed that the specifications called for the curtain walls to be fabricated and installed by a manufacturer regularly engaged
in the manufacture of this type of system and that the work be first-class and performed in a manner that did not allow any weather infiltration. However, the court’s ruling was that the curtain wall was modified by the architect and was not suited to its use, and that the leaks were not caused by faulty materials or poor workmanship but were the result of a design defect.

**The Spearin doctrine.** A landmark court decision rendered in 1918 is still applicable today: the Spearin case—sometimes known as the Spearin Doctrine.

Spearin, a contractor, bid on a U.S. Navy drydock project that included replacing a 6-foot section of storm sewer pipe, which they did. The replacement sewer line proved to be inadequate to carry the volume of water run-off and it broke due to internal pressure. The Navy held Spearin responsible and told them to replace it. Spearin refused and the lawsuit progressed all the way to the Supreme Court.

The resulting “Spearin Doctrine” stated that:

If the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of the defects in the plans and specifications.

The court continued, saying:

The responsibility of the owner is not overcome by the usual clauses requiring bidders to visit the site, to check the plans, and to inform themselves of the requirements of the work.

Although today, the 1997 edition of the AIA Document A201-General Conditions in their Article 3 recognizes that the “contractor’s review (of the plans and specifications) is made in the contractor’s capacity as a contractor and not as a licensed design professional.” Knowledge of the provisions of the Spearin Doctrine may come in handy when a situation involving defects in the plans and specifications is being reviewed.

**Subsurface, changed, and differing conditions**

A significant number of disputes involve the sitework phase of a project. Even with numerous test borings and other geotechnical site investigations, conditions uncovered during excavation may be at variance with the conditions assumed by the information in the geotechnical survey. Test borings accurately display the subsurface soil strata in the exact location where they have been taken, but another boring drilled just yards away may reflect totally different subsurface conditions. In fact, a standard clause in most geotechnical reports recognizes this condition and state.
Regardless of the thoroughness of a geotechnical engineering exploration, there is always the possibility that conditions will vary from those encountered in the test borings, or that conditions are not as anticipated by the designers.

Another disclaimer often included in the geotechnical report reads as follows:

The analyses and recommendations submitted in this report are based upon information revealed by this exploration. This report does not reflect any variations which may occur beyond the locations of the test borings and test pits. Since the nature and extent of variations may not become evident until during the course of construction, an allowance should be established to account for possible additional costs that may be required to construct the foundations as recommended herein.

Using geotechnical disclaimers to advantage

Although geotechnical disclaimers may be considered by contractors as limiting their claim for additional costs incurred during excavation work, they can also be used to advantage.

Even the geotech recognizes that actual conditions will not be known until mass excavation or trench excavation is underway. If the contractor uncovers conditions that are materially different from those reflected in the geotechnical documents, wouldn’t that substantiate the contractor’s claim for added costs due to these variations?

Furthermore, the geotechnical report is generally prepared at the owner’s request and paid for by the owner, thus it can be stated that the reference in the disclaimer to an allowance—a contingency—was actually inserted for the owner’s benefit, not the contractor’s.

The contractor must thoroughly document their claim of encountering conditions that differ materially from those anticipated by the information available in the geotechnical site investigation report.

The court and differing site conditions

The case Randa/Madison Joint Venture III v. Dahlberg [239 F.3d 1264, 2000 U.S. App/(U.S. Fed. Cir. Feb 7, 2001)] dealt with differing site conditions in another way. Randa/Madison, the contractor, had a contract to dewater the excavation for a pump-house foundation, but found that it had grossly underestimated the extent of dewatering and so filed a claim with the government to recover these additional costs. The government contract contained two clauses: that the contractor satisfied itself to the character and quantity of work and that the bid documents addressed the physical data. The contract documents also stated that soil test results and soil and rock samples were available for inspection but that these tests results were not included in the documents.
In their appeal, the contractor argued that they had no duty to review this information and that the government had an affirmative duty to disclose the additional information beyond just making it available. The review court disagreed and said that the government placed the contractor on notice that this added information existed and the contractor was presumed to have reviewed it.

**Rock excavation.** Suppose that in the course of excavating, rock was uncovered where no rock was indicated in the borings because those borings happened to straddle the rock formation. Does the contractor have a legitimate claim for an extra? One answer to that question relates to whether or not the site is denoted to be “Unclassified” or “Classified.” A “classified” site includes the specific subsurface conditions to which a contractor is bound. An “unclassified” site is one in which the contractor “owns,” or is responsible for, costs relating to all subsurface conditions necessary to complete the sitework. If unsuitable soils, rock, debris, underground structures, and so on are encountered, the contractor is obliged to remove them and replace them with suitable materials at no cost to the owner. A typical unclassified site section in the specifications will state the following:

> Excavation shall be unclassified and shall comprise and include the satisfactory removal and disposal of all materials encountered regardless of the nature of the materials and shall be understood to include rock, shale, earth, hardpan, fill, foundations, pavements, curbs, piping, and debris.

But is that position of denying responsibility for all such costs defendable in all cases? The answer is No!

The author’s company entered into a contract with an owner to build two office buildings in a campus setting with a total square footage of approximately 500,000 ft². The site was deemed “unclassified.” Accompanying the plans and specifications were a series of test borings, and the isometrics of various soil and rock strata along with a test boring location plan superimposed over an outline of the building footprint (see Figs. 12.1 through 12.3) Excavation proceeded in the area of test boring B-23, and rock was discovered at Elevation 162.8. Both the isometric and the test boring log clearly indicated the presence of rock at Elevation 152. Continued excavation in areas represented by other test boring data uncovered rock in areas at lower and higher elevations than those indicated by the borings. The architect and owner were made aware of these disparities and even though the contractor prepared a written request for an extra, excavation continued, uncovering more rock requiring blasting. When the site work was complete and the contractor submitted a bill for $288,000 it was dismissed out of hand by the
architect and owner claiming that the site was unclassified and the contractor “owned” all conditions, most notably, rock. The contractor was of the opinion that the owner/architect decision was grossly unfair. The architect and owner stood by their interpretation of the contract obligation relating to the unclassified nature of the site after weeks of
FIGURE 12.2  Isometric of rock elevation at test boring B-23.
FIGURE 12.3 Test boring data relating to test boring B-23.
discussion, some very heated. There seemed to be a wide disparity between the geotechnical report and the actual field conditions.

The author then made a transparent overlay of the test boring location plan and began to shift it, first to the east and then to the west of the building footprint outline. Suddenly it became evident what had occurred. The geotechnical engineer had inadvertently shifted the entire test boring location plan approximately 50 ft to the west of where it should have been in relation to the building’s footprint. When the overlay was shifted 50 feet to the east, all test boring data matched the conditions actually encountered.

When presented to the owner, they paid the $288,000.

Another site war story. On a different occasion, the author of this book, while administering another contract with an “unclassified” site encountered considerable unsuitable soils below the footing and foundation “payline” (the design level for those footings and foundations). A proposed change order was presented to the owner who dismissed it, claiming that the contractor was responsible for all unsuitable soils, no matter where uncovered, because, again, the site was unclassified. As the contractor, we argued that we “owned” all soils above the payline in an unclassified site, but that did not mean that the contractor “owns” all unsuitable soils under the payline. This argument was again dismissed by the owner. At the next meeting to review this issue, I drew a round circle meant to represent the earth and placed the project in question on top, drawing a deep “V” meant to represent excavation to the bottom of the circle (China) and said, “So you’re telling me that we are obligated to dig all the way to China if necessary?” The owner’s representative said, “Well, no that’s unreasonable.” The concept of degree of “ownership” of responsibility to remove unsuitable soils was thereby established and the claim was settled by agreeing to limit the amount of soil the contractor was contractually responsible to remove, at no cost, to a depth somewhere between the payline and China.

This was a compromise, but one that settled a contentious matter, and it established an atmosphere of “reasonableness” that pervaded the relationship between owner and contractor during the balance of the project.

Two important points illustrated in the preceding experiences are the following:

- The project manager should not give up their claim for compensation for unforeseen subsurface conditions, *even in the face of restrictive language in the contract*. If something appears to be unfair, it probably is and the project manager just needs to continue to investigate the situation until they can develop enough information and documentation to refute the unfairness of the architect/owner’s ruling.
Equally as important: Attack any dispute early on and persist in its resolution promptly and fairly.

**Dealing with the exculpatory language in the contract.** Most contracts include statements to defuse claims by a contractor for unforeseen site conditions. Look for the following types of clauses.

1. The contractor may be required to visit the site prior to submitting their bid and any condition visually observed or reasonably assumed by this prebid visit will be interpreted by the owner as being “disclosed.”
   
   This means that a close and careful inspection of a site is necessary to document not only that all existing conditions were observed, but the extent to which other conditions were not apparent, or hidden, and therefore could not have been anticipated.

2. A “no damages for delay” clause prevents the contractor from claiming additional costs beyond direct costs if unforeseen conditions are encountered, resulting in excusable delays to the project’s completion. If this clause cannot be stricken from the contract, it must be passed through to all subcontractors, thereby reducing the exposure for subcontractor delay claims if the project is delayed after unforeseen subsurface conditions are encountered.

3. A clause that requires the contractor to examine the contract documents and report, in writing, any obvious errors, omissions, and ambiguities within a specific time period, otherwise a claim will not be considered. Re-read Article 3 of AIA Document A201 which provides a clear presentation of the contractor’s responsibility with respect to the review of contract documents.

4. Geotechnical reports included in the bid documents often state that they “are not to be relied on” since the contractor must make their own conclusions as to the representation of the information contained in these geotechnical reports.

   The general contractor must rely on the information presented by the geotech in order to prepare their sitework estimate which will include a contingency of some sort for unknown or unanticipated conditions. As discussed earlier in this chapter, if the contractor can demonstrate that this information was misleading or insufficient, and that it affected the amount of a reasonably assumed contingency, the contractor may be able to overcome this exculpatory contract statement.

   If there are sufficient concerns about the validity of the geotech, the contractor can also request permission to perform additional site exploration. (This is plausible in a negotiated contract scenario, but what about a hard-bid situation? Will further exploration once disseminated to other bidders reduce the competitive edge or is the contractor
willing to forego that advantage to ensure that their own bid will be more responsible?)

**Differing or changed conditions**

Article 4.3.4 of the 1997 edition of AIA Document A201 includes the definition of changed or differing conditions, and the procedure to follow when presenting a claim. In order to prepare a viable change order for additional costs utilizing “differing conditions” as the basis for that claim, a contractor must show that:

- The contract documents reflect certain conditions that formed the basis for the contractor’s estimate.
- The contractor’s interpretation of the documents was reasonable and based upon previous experience in such matters.
- The subsurface conditions actually encountered differed “materially” from those represented in the documents.
- The actual conditions encountered could not have been “reasonably” anticipated.
- The costs claimed must be solely attributable to the materially differing conditions—for instance, the difference in cost between the assumed material or condition and the cost of the actual material or condition.

If a claim is to be prepared, the contractor should include the following:

- A clear statement as to the usual conditions a contractor would have expected to encounter on that site.
- What conditions were actually encountered.
- How these conditions differed “materially” from the known and usual.
- What costs and delays were incurred because of the encountered conditions.

These types of situations often result in delays to the construction process and the impact of these delays, in most cases, are much the same as other significant interruptions to the planned sequence of work.

The impact of differing or changed conditions resulting in delays will incorporate the following costs:

- **Direct costs**: Labor, materials, and equipment employed in dealing with the work.
- **Weather-related costs**: Weather-sensitive work tasks established in the baseline schedule may become shifted to another part of the year
where, for example, concrete foundation work initially scheduled to be completed in mild weather now must be completed in cold weather. Winter conditions, in those parts of the country where cold weather occurs, will add considerable costs to labor, materials, and equipment such as curing blankets, temporary heat, and enclosure materials.

- **Acceleration costs:** Costs required to accelerate the progress of work, as directed by the owner may entail shift work, extended work hours, additional materials and more equipment. Studies have proven that extended periods of overtime reduce worker productivity and this reduction in productivity needs to be taken into account when submitting an estimate to accelerate the pace of the job.

- **Idle equipment:** Rental equipment on the project remaining idle during the delay period will continue to generate costs whether it is company owned or leased. When a backhoe is rented on a weekly basis, the contractor must pay the weekly rate whether the equipment is active or idle; only fuel and operator costs are eliminated. The type of equipment, its idle and active periods during the delay must be documented so that all related costs can be isolated for reimbursement.

- **Field office expenses:** Some field expenses are time related. Since the project will be delayed, added costs for field office rentals and associated utility costs, temporary toilets, and field supervision will certainly accrue.

- **Indirect costs:** Costs incurred but not allocated to any specific item of work.

- **Home office expenses:** Expenses at the home office assigned to administer the project currently being delayed will still accrue.

- **Loss of productivity:** This cost is a difficult one to quantify, but the interruption of a continuous sequence of work results in a loss of productivity. Also, extended periods of overtime work causes worker productivity to drop drastically and it basically takes more man hours to complete the work.

**Differing conditions when unit price contracts apply.** In public works projects, where unit prices apply, the general contractor is provided with approximate quantities upon which to base their unit price(s). If sitework is involved, the agency may advise the contractor to base their unit price on a quantity of, say, 10,000 cubic yards of structural fill borrow, 3500 cubic yards of unsuitable materials to be hauled offsite, and so forth. If actual quantities either exceed these thresholds, or are less than these stated requirements, a differing condition may have occurred and the contractor may be permitted to review and adjust their unit price(s). If, as an example, only 3000 cubic yards of structural borrow
are required and only 1000 cubic yards of unsuitable soils are to be hauled offsite, the contractor’s initial bid anticipated higher quantities and therefore actual conditions differ materially from those estimated. Although many public agencies may have different threshold criteria, a standard yardstick allows the differing conditions concept to be employed if actual quantities exceed bid quantities by 20 percent or more. In dealing with private owners, the same criteria can be used, citing acceptable public sector principles as the basis for requesting the differing conditions change order.

Claims due to scheduling problems. The AIA’s General Conditions document, relating to the contractor’s schedule has changed over the years. The 1970 edition required the contractor to submit their schedule for the architect’s approval; the 1976 version required submission for the architect’s information, while the 1987 edition of A201 required the contractor to prepare and submit the schedule promptly. The current 1997 version of A201 requires the contractor to submit a schedule that “complies with the contract completion date.”

Construction schedules are dynamic and subject to change, and with the latest AIA General Conditions requirement, the general contractor has more flexibility in modifying the baseline schedule as long as the completion date is not extended by a change order. The use of the critical path method (CPM) schedule with its ability to display the relationship of one work task to another has come to occupy a key role in any potential delay claim being considered by a contractor. The baseline schedule—the initial schedule formulated at the beginning of the project—would have been prepared with input from subcontractors and vendors, the project manager acting as coordinator for this critical task.

Be wary of subcontractor input

The invitation to subcontractors to participate in the preparation of a CPM schedule is proper, but must be monitored closely. A subcontractor may not be accurate in determining the length or duration of an operation due to inexperience or not spending sufficient time to properly estimate durations. A subcontractor may have more than enough “float” time to cover any potential contingencies to insure that they can absorb some glitches that will occur and still maintain their schedule. By not advising the project manager of the added days, this subcontractor will have significantly overstated the duration of their task(s) and, as a result, impact subsequent trades. So subcontractor input, while valuable, should be carefully reviewed and not just accepted at face value.

Once published, a baseline schedule becomes the “official” project roadmap, and any changes to the sequence or time allotment for selected
activities should be noted to determine their impact. Conditions that are cause for an extension of a baseline completion date must be promptly communicated to the architect and owner—either through a Request for Time extension, or in the case of a nonexcusable delay, with a recovery schedule.

Remember that change orders are issued to affect a change on contract sum or contract time, requests for time extensions will actually take the form of a Proposed Change Order (PCO) where the facts documenting the delay and related costs are included.

The CPM schedule, accepted by all parties, turns into a two-edged sword. It becomes the official time frame for the completion of the entire project. This baseline “accepted” schedule can now (1) document deviations in that schedule due to owner directed changes and (2) document delays created by the general contractor. A subcontractor can also point its finger at the general contractor who has delayed the start or completion of their work.

**Beware of subcontractor claims for delay.** General contractors need to be especially sensitive to delays that may impact subcontractors who have not contributed to that delay. A delay early in the project, say, in the erection of the structural system may push the start of drywall and drywall taping operations into winter months where work may be less productive, and thus require added costs for temporary heat. When delays early in the project occur, the general contractor would be wise to get all subcontractors to agree, in writing, that the delay upfront, will or will not impact their operations.

Delays created by one subcontractor may affect other subcontractors who will certainly look to the general contractor for assistance, and possibly additional compensation, in order to accelerate their work or be compensated for lost productivity. If the project manager is planning to prepare a delay claim for submission to the owner, a well-documented series of CPM schedules graphically displaying how one delay or a series of delays, has impacted the overall completion date, will be strong evidence to support such a claim.

**A word about lost productivity**

Added costs due to lost productivity are probably one of the more difficult claims to present or dispute. The contractor, or subcontractor, is basically stating that interruption to their normal daily operation, created by work stoppage because of others, or significant changes in the sequencing of work, has caused them to be less productive. They state that in order to recapture this loss of productivity, they must work longer hours, which generally equates to overtime. These interruptions
may result in trade stacking, where, say, MEP subcontractors are working in such close proximity to metal framing and drywall subcontractors that each trade’s ability to work productively is denied. Working out of sequence, having to go back and complete one section of wall left open for another trade certainly deprives a subcontractor of the ability to work productively. Claims for loss of efficiency employ a simple calculation, but the basis for establishing an inefficiency factor does not.

Total labor incurred during the period in question $1,000,000
Inefficiency % (whatever has been established, say, 7.5%) 7.5%
Inefficiency loss $75,000

Both premises, the value of lost time and the cost to recoup these losses are, in the main, subjective evaluations, not objective ones—even though studies by various groups have been published.

Even the concrete subcontractor’s use of the “measured mile,” a standard cost to form and place a cubic yard of concrete under normal conditions, is not purely objective. Although this measured mile cost of, say, $400 per yard, is culled from thousands of yards placed in the past year, and even adjusted for inflation, can it be applied as a standard when so many variables have gone into this averaging of work?

Similarly, productivity itself is a subjective term. Does each worker produce the same amount of work as their co-crew members? Although an average of all worker productivity may serve as some form of measured mile, suppose one crew is exceptionally productive while another isn’t. If so, which one is used to support the claim, and which one can be used to deny the claim? Thus, loss of productivity is also a subjective matter.

Numerous studies have been made to try and quantify loss of productivity due to overtime, such as the following.

**Bureau of Labor Statistics.** The oldest study dating back to 1940. Based on a study of 2455 men and 1060 women working in a variety of manufacturing industries, the BLS found that productivity for a 50-hour week was 92 percent, and for a 60-hour week it was 82 percent compared to a 40-hour work week.

**The Business Roundtable.** In 1980, the Business Roundtable issued a task-force report after studying working conditions at the Proctor & Gamble factory over a 10-year period. It was discovered that prolonged periods of extended work days like 50-hour weeks, dramatically reduced productivity, but just one 50-hour week reduced productivity from a baseline of 1.0 to 0.7; two 50-hour weeks, back to back, reduced productivity to nearly half.
The Construction Institute (CII). In 1988, CII collected data from seven heavy industry projects over a four-year period. They had some difficulty defining overtime in efficiency, but reached the following conclusions:

- Previous studies by BLS and the Business Roundtable were not consistent predictors of productivity losses during overtime time.
- Even on the same project, individual crew productivity rates were not consistent when working in an overtime environment.
- Productivity does not necessarily decrease with an overtime schedule.
- Absenteeism and accidents do not necessarily increase under overtime conditions.

Construction Industry Institute source document 98—effects of scheduled overtime. Labor Productivity—based on 151 weeks of data collected from 1989 to 1992 from four industrial construction projects—focused on piping and electrical crews only.

Conclusions:

- Short-term overtime can cause a loss of productivity in the 15-percent range; however, they can vary from 0 to 25 percent.
- As overtime efficiency decreases, resource availability (the inability to provide materials) was the root cause for loss of efficiency.

Although CII stated that the data collection and analysis methodologies were sound, the variation of efficient losses from 0 to 25 percent hardly make this a landmark study.

The National Electrical Contractors Association. The NECA published results of a 1962 study based on a small survey of their members and concluded that:

- Five 9-hour days did not affect productivity.
- Five 10-hour days decreased productivity to 98 percent.
- Five 11-hour days reduced productivity to 95 percent.
- Five 12-hour days reduced productivity to 92 percent.

This issue of productivity is further complicated by a U.S. Bureau of Labor Statistics study published in February 2006 which shows that worker productivity, in general, fell by 0.6 percent during the last quarter of 2005, the first decline since 2001.

The results of all of these studies don’t appear to help the case for or against loss of productivity, but there is no tried-and-true method to accurately determine the actual cost of lost productivity and it appears...
that the choice of which study to use depends upon whether one is the claimant or claimee!

The courts and lost productivity issues
In the Appeal of Clark Construction Group Inc. (2000 WL 37542) VABCA No. 5674, 00-1 BCA para 30,870, the Board of Contract Appeals stated that “Quantification of loss of efficiency or impact claims is a particularly vexing and complete problem. We have recognized that maintaining cost records identifying and separating inefficiency costs to be both impractical and essentially impossible.”

The Mechanical Contractors Association of America (MCAA) publishes Change Orders, Productivity, Overtime—A Primer for the Construction Industry available to members and nonmembers alike. The factors contained in this manual have been supported by several court decisions.

In Appeal of P.J. Dick, Inc. (2001 WL 1219552) VABCA No. 5597, 01-2 BCA, para 31,647, the contractor’s expert stated that their client’s labor productivity was impacted because of continuous revisions to design. This same expert said that while the “measured mile” is the generally preferred method of dealing with these costs, there was no period during which the work was not affected by design problems or acceleration and that damages should be based upon the MCAA manual on change orders, productivity, and overtime. The board found the contractor’s quantification of loss based upon this method as reasonable.

In Hensel Phelps Construction Company v. General Services Administration (2001 WL 43961) GSBCA 01-1 BCA Par 31,249, the board accepted the claimant’s use of the factors affecting labor productivity as set forth in the MCAA manual. Although the “measured mile” approach is often used to assess labor productivity issues, the MCAA analysis produced a more accurate valuation of the claim. It should be noted, however, that this claim was made by a mechanical contractor.

In S. Leo Harmonay, Inc. v. Binks Mfg. Co (S.D.N.Y.1984) 97 Supp.1014 (Harmonay), the U.S. District Court upheld the MCAA manual labor inefficiency factors in dealing with a loss of productivity claim. The measured mile approach was used by the claimant, but it was backed up by testimony prepared from factors gleaned from the MCAA manual. The court awarded damages based upon Harmonay’s claim that they had incurred a 30-percent loss in productivity due to: (1) excessive work hours; (2) overly crowded conditions; (3) the unavailability of tools, materials, and storage; (4) the defendant’s delay in supplying drawings and equipment; and (5) the constant revision of the contract drawings—all of which combined to create confusion and frequent interruptions in the progression of work.
Claims against professionals

Because a contractor usually does not have a direct contractual relationship with an architect, it has been difficult for a contractor to make a claim against them for increased costs or loss of profit resulting from errors and omissions in the project documents. A January 19, 2005 decision by the Pennsylvania Supreme Court changed that concept by adopting the legal principal that by negligently supplying information for the guidance of others, a party may be held responsible for the results of their negligence. This case may open the floodgates for similar actions. It deals with *Bilt-Rite Contractors Inc v. The Architectural Studio* case. Bilt-Rite, the contractor, submitted a bid based upon the plans and specifications prepared by The Architectural Studio. The design of an aluminum curtain wall system on the project would not work as designed, so the builder had to incur substantial increased costs to make it work. As a result, they sued the architect, intending to recover their damages. Initially Bilt-Rite’s claim was dismissed by the trial court and the Superior Court, both of which were overturned by the state’s Supreme Court. This decision thus paves the way for other contractors to recover damages from design professionals who heretofore may have been protected from such claims.

**Delay in processing shop drawings.** One lawsuit that comes to mind arose when the architect failed to process shop drawings within a reasonable period of time.

In *Peter Kiewits Sons Co. v. Iowa Utility Co* [355 f.Supp.376,392, S.S.Iowa (1973)], a claim was made to collect damages because the contractor suffered losses due to an unjustified delay in the architect’s processing of shop drawings.

**Errors and omissions.** The standard professional liability for malpractice insurance refers to “errors of commission” and “errors of omission.” Employing the old expression “nobody’s perfect,” it is certainly understandable that final construction documents may be lacking somewhat in minor details, a few dimensions, or 100-percent coordination.

Most of the problems that involve disputes between architects, engineers, and contractors seem to be due to the following drawing deficiencies:

- Drawings that are not coordinated properly among the mechanical, electrical, fire protection, structural, and architectural trades.
- Conflicts between small and large details, and between written specifications and graphic drawings.
- The failure to apply project-specific requirements in the drawings or in the specifications. These statements or details are often “boilerplate.”
plate” lifted from other projects and don’t apply to the project at hand (like the TV bracket spec for a K–12 school, requiring the TV to be turned to be viewed by the patient).

- Lack of communication between the various design consultants so that a change made by one designer is not relayed to the others to determine whether it has any impact on their design.
- Insufficient consultation with owners to afford them the opportunity to participate in decisions that ultimately affect the way in which the design will be finalized.
- Insufficient time for proper and thorough review of all contract documents by design consultants when an owner demands an unrealistically compressed time frame for drawing production and submission for bidding purposes.

Incidentally, this list was excised from one prepared by a design professional who was expressing concern over the growing cost of malpractice insurance. The professional was making the point: problems are not being created by what the professionals are doing; they are being created by what professionals are not doing.

Contractors working in a limited geographic area may be reluctant to file suit against a design professional they are likely to be working with in the future, but if the stakes are high, there may be no alternative.

**Acceleration: what it is and how it is used**

We previously discussed various costs associated with a claim for differing or changed conditions. One of these costs related to acceleration.

The legal term *acceleration* should be a part of every project manager’s vocabulary. When an owner recognizes that there have been delays incurred by a construction project, but directs the project manager to maintain the original project completion schedule, these instructions are known as a *demand for acceleration*.

There are two types of acceleration: actual and constructive. Actual acceleration occurs when the owner directs the contractor to complete the project ahead of the date contained in the Baseline or “accepted schedule.” Constructive acceleration, on the other hand, occurs when the contractor is delayed by some owner/architect action or inaction, but is requested to maintain the original completion date.

By claiming the condition of constructive acceleration, a contractor can pursue monetary relief from the owner. The legal elements required to establish acceleration in such a case are

- An *excusable delay* has been established that entitles the contractor to a time extension.
The contractor submits a written request to the owner for the time extension.

The request for the time extension is denied.

The owner issues a directive to accelerate performance to complete the project within the original time frame.

The contractor proceeds with the work at an accelerated pace and documents costs involved with this speed-up process.

The contractor then notifies the owner of the intent to submit a change order for the added costs or to file a claim to recover costs if the owner refuses to recognize the change order.

The project manager should be aware of the steps necessary to document and claim reimbursement of costs created by undue demands on the part of the owner, if the occasion presents itself.

**Mechanic’s liens.** A mechanic’s lien is a charge against the owner’s property serving notice that some portion of the labor and/or materials/equipment incorporated into their building has not been paid. It can be filed only against work in connection with a private sector project; the filing of a mechanic’s lien against unpaid goods and services on a public project is not allowed by law, which is a law known as the Miller Act.

The Miller Act, passed by the federal government, does not permit liens to be placed against property of the U.S. government. Similar acts have been legislated by most state governments (known as “little Miller Acts”) and prevent liens from being placed against state and local government property. In such cases, a general contractor must pursue arbitration (if included in the contract) or litigation to collect a claim.

The bond provided by the general contractor on public works projects protects the owner from claims submitted by subcontractors or vendors who are due monies owed but unpaid. These subcontractors or vendors can file a claim with the appropriate federal/state/local agency and request that the agency “call the bond.”

When a mechanic’s lien is filed, the title to the property is “clouded” and can’t be sold or have its title transferred until the lien is “satisfied.” The lien can be “removed” by either paying the disputed sum or bonding the lien, which in effect states that the insurance company will guarantee payment of the claim if it is not resolved between the parties.

The normal expiration date of a lien may vary from state to state, and if the lien remains unsatisfied and no bond has been obtained at the time of expiration, the issuer of the lien can initiate foreclosure proceedings. These proceedings commence after the company attorney files a claim stating that a valid lien has been placed upon the property and that a
certain sum is due toward their client. Proof of the amount owed is required, as is proof that the lien was properly filed against the correct owner of the property, the correctly identified property was included and the lien was filed within the time frame established by law.

In theory, when foreclosure takes place, the property is sold and the lien holder gets paid from the proceeds of the sale. In practice, the sale of the property rarely occurs and the lien is usually satisfied. The rules and regulations governing the filing of liens vary with the state, but generally a lien must be filed within 90 or 120 days of the last date on which work was performed on the jobsite in question.

**Liens filed by general contractors.** When invoices and requisitions are ignored by private clients and all attempts at collection fail, the general contractor is left with little choice but to file a lien against the owner's property.

When the filing of a lien is being considered, watch for certain pitfalls to avoid:

1. *Make certain the lien is filed within the filing limit time.* If the filing time is 90 days after the last date that work was performed on the job, make sure the filing is made before the deadline. If it isn't, the right to file a lien is lost. However, the court is aware of various tricks used to comply with the 90-day requirement. The date of last work must be the last date of meaningful work. If a contractor, realizing that their lien rights will expire, say, tomorrow, sends a mechanic back to the site to replace a filter in HVAC equipment, or adjust a door or replace a broken light fixture lens, the courts will interpret this as a means to circumvent the intent of the lien rights and thus the lien will probably be declared invalid.

2. *Make certain the lien is filed against the right property.* Although this might seem rather simple, when urban property is involved, it can get complicated, particularly in subdivisions or projects composed of a number of different parcels. If the wrong property is described, the lien will be invalid.

The author of this book had been involved with a large senior living community and the concrete subcontractor had not paid their ready-mix concrete supplier (although they signed monthly lien waivers indicating that the supplier had been paid!). The irate owner of the property notified the author's company that the current requisition would not be honored until “the enclosed lien is satisfied and proof of removal of the lien is furnished.” The only problem was that the lien was filed improperly against another project also owned by that owner for which the author’s company was not involved. Therefore, payment of the requisition could not be denied.
3. *Is the lien filed against the proper owner?* The proper owner is usually included on the land records in the tax assessor’s office, but quite often defining legal ownership is difficult. When a project involves a limited partnership, a joint venture between corporations or individuals, or a syndication or shell corporation such as a Limited Liability Corporation (LLC), it may be difficult to identify the proper owner of record.

**A word about lien waivers submitted by subcontractors.** Not all subcontractors will faithfully and honestly complete their lien waivers. On more than one occasion a subcontractor has been known to falsify a lien waiver. Although the subcontractor may sign the lien waiver indicating payment for all labor and materials placed in the building during the period covered by the waiver, either knowingly or unknowingly the information may not be true. Some subcontractors may not be aware that their lower-tier subs have paid their bills—for example, the mechanical subcontractor who engages an insulation contractor and never requests a lien waiver from that company or never questions whether they have paid their suppliers. There are other subcontractors who just plain lie because they need the money to pay for other nonproject materials and equipment.

So don’t assume that the submission of a lien waiver from a subcontractor insures that no liens will be filed in the future. Instead, take steps to lessen the chance that this may occur.

Require each subcontractor to furnish the names of all lower-tier subcontractors, the project manager can request lien waivers from those subcontractors as well.

The project superintendent should maintain a list of all subcontractors working on the project so the project manager is alerted to the need to obtain lien waivers from those companies. Lastly, when a false lien waiver is discovered, along with a threat of legal action, the subcontractor should be advised that from that time on, joint checks will be issued to all of their suppliers and subcontractors.

**Arbitration and Mediation**

Referring once again to that key document, AIA A201—General Conditions, the Article 4.6, 1997 edition requires mediation and arbitration to resolve disputes prior to resorting to litigation. This clause is actually helpful to the general contractor since it provides alternatives to the costly process of litigation.

A $15,000 claim denied by an architect or owner cannot be realistically pursued by litigation because the costs to do so may exceed the amount claimed. The recent notoriety of a lawyer charging $1000 per
hour is testament to the high cost of litigation. Conversely, the low cost to pursue mediation and the somewhat higher costs to arbitrate offer other alternatives.

Article 4.6 of AIA A201 establishes the procedure for commencement of the dispute resolution process and requires mediation (Article 4.6.1) as the first step in that process.

Mediation

Mediation is a nonbinding procedure which means that if initiated as a first step in dispute resolution, either party to the process may decide to withdraw from the proceedings at any time. When the mediation session(s) has been concluded, the parties are under no legal obligation to accept or abide by its conclusions.

This process involves engaging a professional mediator to review the facts of the dispute and attempt to get each party to give a little, or sometimes more than a little, to resolve a dispute. Typically, the mediator will start the proceeding by announcing the steps they plan to take to bring about resolution—discussing the strong and weak points of each party’s claim and establishing the fact that there is a genuine desire by both parties to negotiate a settlement. The mediator will act as the go-between to affect that resolution, will separate each party, physically, assigning one group to one room and the other group to a second room. By shuttling back and forth and presenting the mediator’s opinion of the strong and weak points of each party, a negotiated settlement will be attempted.

As another old saying goes, “a successful negotiation session is one in which neither party is satisfied with the result,” resolving a dispute may mean giving up something. If mediation fails, then each party must ratchet the dispute up one further notch and request arbitration.

The arbitration process

The next step in the dispute resolution process is arbitration. The contract documents will include the proper notification required to demand arbitration and the American Arbitration Association (AAA) can provide all of the details and fees regarding the arbitration process.

Although the arbitration process was initially established to reduce or eliminate the participation by lawyers, nowadays many law firms have developed specific departments specializing in arbitration hearings and, in most cases, attorneys will not only assist in the development of the facts and accumulate the documentation required for the arbitration process but will present the claimant’s case at the hearing.

The American Arbitration Association, generally referred to as the Triple A, publishes standard procedures to be followed in requesting and participating in the arbitration process. A list of arbitrators will be
submitted to both parties with a request to select a panel that could consist of one or more arbitrators. Each person on the list will have been screened so as to have experience in the field or area to be arbitrated.

Both sides present their case, submit documentation to support their position and all such evidence is accepted and evaluated by the panel. Questions are asked by the panel, but unlike court proceedings, the rules of evidence don’t apply. Hearsay evidence is permitted and other legalistic requirements are waived. Depending upon the nature and complexity of the case, these proceedings can be concluded in a day, or can stretch out for a year or more.

When the hearings are completed, the panel will retire, review the evidence, and prepare a written “finding” in which they will determine responsibility and establish a monetary award. In binding arbitration, the predominant form of arbitration, the panel’s findings are final and if an award is not forthcoming, the injured party may file a claim in court which will automatically be upheld.

**Electronic records as evidence.** The general rule is that computer records are admissible just like any other form of business record. The company attorney can provide the definition of “business record,” but the generally accepted meaning is records that are created and maintained in the company’s ordinary course of business. But with any record—written or otherwise—the manner in which the records were created and maintained is essential. Documents stored in a computer are not regularly or necessarily printed out in hard-copy format since this is one advantage of electronic storage. However, when a stored document is printed in preparation for submission at a trial, the opposing party may object to their admissibility based upon the fact that they were not printed out concurrently with the events stored electronically. The courts may require the original source of the computer program to be delineated (procedures used in inputting the document), to ensure the accuracy and reliability of the material.

Rule 1001(3) of the Federal Rules of Evidence defines an original as:

An “original” of a writing or recording is the writing or recording itself, or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print there from. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is “an original.”

Since most e-mails contain certain identifying material such as the sender’s address, the name of the sender, the company name, and the presentation of this information may be enough to satisfy any authentication requirements. Because more and more electronic documents are created, stored, and exchanged and because the courts are still
refining their views on acceptability of electronically stored materials, a short session with the company attorney may be in order to avoid any future problems with the legal acceptability of those documents.

**In Summation**

Just remember that the construction industry is an industry of contracts, and in order to deal with the inevitable conflicts that occur due to misunderstandings of the contract obligations, first and foremost, a thorough understanding of one’s rights and obligations under the contract is essential. So, Mr. or Ms. Project Manager, carefully read the contract, the specifications, and review the drawings in detail.

Second, it is important to pay prompt attention to an impending dispute and affect a resolution quickly before positions harden.

Third, not all disagreements can be resolved quickly, but attempts to do so are greatly enhanced when complete and accurate documentation relating to the dispute has been prepared and assembled along the way.

Last, and most importantly, many disputes can be resolved by viewing them from the other party’s perspective and approaching resolution with an open mind and an attitude of reasonableness.
Claims, Disputes, Arbitration, and Mediation