

# CHANGES ORDERS & CLAIMS

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SWCA CONSTRUCTION EXECUTIVE SUMMIT – FEBRUARY 15, 2018

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LANDERHOLM

Legal advisors. Trusted advocates.

# INTRODUCTIONS

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- Bryce Sinner – Attorney – Landerholm, P.S.
  - Practice Areas
    - Construction
    - Real Estate
    - Litigation
  - Experience
    - Landerholm, P.S. – Attorney – 2017-Present
    - Stellar J Corporation – General Counsel, Corporate Secretary – 2012-2017
    - Duggan Schlotfeldt & Welch – Attorney – 2009-2012
    - Turner Construction – Field Engineer, Project Engineer, Assistant Superintendent, Cost Engineer – 2003-2008



# GETTING PAID FOR CHANGE ORDERS AND CLAIMS

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- Identifying Changes
- Providing Proper Notice
- Tracking Changes
- Tracking Costs
- Tracking Schedule Impacts



# AUDIENCE

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- General Contractors
- Subcontractors
- Suppliers
- Owners
- Designers





# HOW MANY OF YOU HAVE RECEIVED A LETTER LIKE THIS?

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- “Notice was not timely in compliance with Contract Specifications. In accordance with Contract Section \_\_\_\_\_, notice should have been issued by the Contractor no later than seven (7) days after this issue arose. Contractor waives recovery of costs associated with this change order request.”



# EXCERPTS FROM CLIENT LETTERS

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- “Section 00700 D.2.1.2 b states that the Contractor shall notify the Owner immediately in writing of differing site conditions before the area has been disturbed and that the Contractor waives any claim to additional compensation or time if notification is not received in a timely manner.”
- “Contractor failed to comply with the time requirements listed in Section 00700 D.3.1. The initial notice was received on \_\_\_\_\_, our contract requires that a detailed claim be received by \_\_\_\_\_ within 30 days or the Contractor waives the claim.”
- “As far as your request to address change order request number \_\_\_\_\_, per section I-04.5, paragraph 4, ‘The Engineer will evaluate all protests **provided the procedures in this section are followed.**’ As the emphasized portion has not been met by you, these items will not be reviewed or processed as section I-04.5 further states, ‘by failing to follow the procedures of this Section I-04.5 and Section I-09.11, the Contractor completely waives any claims for the protested work.”
- “These notifications, whether intended to be a ‘Protest’ under I-04.5 or an actual ‘Claim’ under I-09.11, have not followed the procedures outlined in the Contract.”
- “(N)otice was not timely or compliant with Contract specifications. ... Timely notice should have been issued by the Contractor no later than \_\_\_\_\_, seven (7) days after receiving this initial direction per Contract Section(s) 00700.5.0.D.1.c, and 5.1.A.1 and G...”
- “The Contractor/Subcontractor failed to make a timely discovery and/or make an immediate report of same and thus waived recovery of costs in accordance with Section 00700.3.2 of the Contract.”



# MOMENT OF PANIC

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- Is the Owner right?
- It Depends.



# BACK UP

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- Three Main Types
  - Constructive Change
  - Design Change
  - Differing Site Condition





# CONSTRUCTIVE CHANGE

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- Owner (or Authorized Representative) conduct which is not a formal change order but which has the effect of requiring the Contractor to perform work additional to or different from that prescribed by the original contract.
  - Examples
    - RFI responses
    - Submittal responses
    - Verbal Direction
    - AHJ Direction
- These are not always clean and often trigger your obligation to notify the Owner of a change.



# DESIGN OR OTHER OWNER DIRECTED CHANGE

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- Owner requested changes
- Construction Change Directive
- Architects Supplemental Instructions
- These are your textbook change orders where the owner acknowledges the change, asks for pricing and approves the pricing prior to you performing the work, or directs you to proceed on a T&M basis.



# DIFFERING SITE CONDITION

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- Type 1
  - Subsurface or latent physical site conditions that differ materially from those indicated in the contract
- Type 2
  - Unknown physical conditions of an unusual nature that differ materially from those ordinarily encountered and recognized as inherent to the type of work provided for in the contract
- Generally covered under a separate provision of the contract
- Typically you are required to stop work and notify the owner prior to disturbing the condition.



# BACK TO THE QUESTION

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- Notice was not timely in compliance with Contract Specifications. In accordance with Contract Section \_\_\_\_\_, notice should have been issued by the Contractor no later than seven (7) days after this issue arose. Contractor waives recovery of costs associated with this change order request.
- Is the Owner right?
- If so how do you avoid receiving this letter?
- To answer the question, we have to look at Mike M. Johnson, Inc. v. Spokane County





# MIKE M. JOHNSON, INC. V. SPOKANE COUNTY

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- Summary:
  - Public works sewer project in Spokane County
  - Contractor encountered buried phone lines
  - 6 week suspension
  - Contractor advised Owner it was entitled to additional compensation and
  - Owner revised the design
  - Owner's revised design grades were incorrect
  - Work suspended
  - Parties met regularly to resolve the issue
  - The Contractor sought compensation
  - The Owner refused
  - The Washington Supreme Court ruled in favor of the Owner



# MIKE M. JOHNSON, INC. V. SPOKANE COUNTY

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- What Happened?
- Mike M. Johnson failed to comply with the notice and protest procedures in the specifications
- WSDOT Standard Specifications
  - § 1-04.5 requires written notice of protest
  - Supplemental information within 15 calendar days



# MIKE M. JOHNSON, INC. V. SPOKANE COUNTY

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- Where did Mike M. Johnson, Inc. go wrong?
  - Owner had repeatedly advised Mike M. Johnson it was not waiving strict compliance with the contractual notice and protest provisions.
  - Mike M. Johnson had given actual notice, but did not comply with the contractual notice provisions.



# MIKE M. JOHNSON, INC. V. SPOKANE COUNTY

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- What did the Court Hold?
  - Actual notice is not an exception to compliance with mandatory contractual protest and claim provisions.
  - A party may waive such provisions for its benefit, but waiver by its conduct requires unequivocal acts or conduct evidencing an intent to waive.





# HOW DO YOU AVOID THE PITFALLS OF MIKE M. JOHNSON?

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- Understand contractual notice requirements
- How to comply
- How to make sure your Subs and Suppliers comply
- What to do if you fail to comply?



# TYPES OF NOTICE

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- Actual Notice – Notice delivered in such a way as to give legally sufficient assurance that actual knowledge of the matter has been conveyed to the recipient.
  - Email, letter, meeting minutes, RFI, etc.
- Constructive Notice – Legal fiction that signifies that a person or entity should have known, as a reasonable person would have, of a legal action taken or to be taken, even if they have no actual knowledge of it.
- Neither actual nor constructive notice will satisfy the obligation for strict compliance with contractual notice requirements.



# WHAT ARE NOTICE PROVISIONS?

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- Legally binding condition in the contract
  - Requiring notice
  - Upon the occurrence of an **event** giving rise to a cost or time impact
    - “Event” is often defined very broadly (common examples)
      - Conflict in the Specifications and/or Drawings
      - Submittal response
      - RFI response
      - Weather condition
      - Differing Site Condition
      - Verbal direction



# WHAT ARE NOTICE PROVISIONS?

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- Typical requirements
  - Specific information
    - Narrative, dates, people involved, cost/time impact
  - Specific documentation
    - Invoices, timesheets, correspondence, schedule analysis
  - Compliance with strict deadlines
    - Triggered on the occurrence of an event
    - Throughout the claims process
    - **Failure to comply = waiver of the claim**





# WHAT ARE NOTICE PROVISIONS?

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- Examples:
  - WSDOT Standard Specifications
  - ODOT Standard Specifications
  - Associated General Contractors – Document No. 200
  - American Institute of Architects – A201-1997
  - National Society of Professional Engineers – EJCDC C-700



WSDOT  
Standard  
Specifications –  
Notice Provision

### 1-04.5 Procedure and Protest by the Contractor

The Contractor accepts all requirements of a change order by: (1) endorsing it, (2) writing a separate acceptance, (3) not responding within the allotted time as outlined in [Section 1-04.4](#), or (4) not protesting in the way this section provides. A change order that is not protested as provided in this section shall be full payment and final settlement of all claims for Contract time and for all costs of any kind, including costs of delays, related to any Work either covered or affected by the change. By not protesting as this section provides, the Contractor also waives any additional entitlement and accepts from the Engineer any written or oral order (including directions, instructions, interpretations, and determinations).

If in disagreement with anything required in a change order, another written order, or an oral order from the Engineer, including any direction, instruction, interpretation, or determination by the Engineer, the Contractor shall:

1. Immediately give a signed written notice of protest to the Engineer or the Engineer's field Inspectors before doing the Work;
2. Supplement the written protest within 14 calendar days with a written statement and supporting documents providing the following:
  - a. The date and nature of the protested order, direction, instruction, interpretation or determination;
  - b. A full discussion of the circumstances which caused the protest, including names of persons involved, time, duration and nature of the Work involved, and a review of the Plans and Contract Provisions referenced to support the protest;
  - c. The estimated dollar cost, if any, of the protested Work and a detailed breakdown showing how that estimate was determined;
  - d. An analysis of the progress schedule showing the schedule change or disruption if the Contractor is asserting a schedule change or disruption; and
  - e. If the protest is continuing, the information required above shall be supplemented upon request by the Engineer until the protest is resolved.



## ODOT Standard Specifications – Notice Provision

**00199.20 Protest Procedure** - If the Contractor disagrees with anything required in a Change Order or other written or oral order from the Engineer, including any direction, instruction, interpretation, or determination, or if the Contractor asserts a disagreement or dispute on any other basis, except 0195.95, that, in the Contractor's opinion, entitles or would entitle the Contractor to additional compensation or a combination of compensation and Contract Time, the Contractor shall do all of the following in order to pursue a protest and preserve its claim:

**(a) Oral Notice** - Give oral notice of protest to the Engineer and outline the areas of disagreement before starting or continuing the protested Work.

**(b) Written Notice** - File a proper written notice of protest on form 734-2887 with the Engineer within 7 Calendar Days after receiving the protested order. In the notice the Contractor shall:

- Describe the acts or omissions of the Agency or its agents that allegedly caused or may cause damage to the Contractor, citing specific facts, persons, dates and Work involved;
- Describe the nature of the damages;
- Cite the specific Contract provision(s) that support the protest;
- Include the estimated dollar cost, if any, of the protested Work, and furnish a list of estimated Materials, Equipment and labor for which the Contractor might request additional compensation; and
- If additional compensation is estimated to be due, include the estimated amount of additional time required, if any.

Failure to comply with these notice requirements renders the notice improper.

# ASSOCIATED GENERAL CONTRACTORS – DOCUMENT NO. 200 – NOTICE PROVISION

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- 8.4 CLAIMS FOR ADDITIONAL COST OR TIME Except as provided in subsection 6.3.2 and section 6.4 for any claim for an increase in the Contract Price or the Contract Time, the Constructor shall give the Owner written notice of the claim within fourteen (14) Days after the occurrence giving rise to the claim or within fourteen (14) Days after the Constructor first recognizes the condition giving rise to the claim, whichever is later. Except in an emergency, notice shall be given before proceeding with the Work. Thereafter, the Constructor shall submit written documentation of its claim, including appropriate supporting documentation, within twenty-one (21) Days after giving notice, unless the Parties mutually agree upon a longer period of time. The Owner shall respond in writing denying or approving the Constructor's claim no later than fourteen (14) Days after receipt of the Constructor's claim. Owner's failure to so respond shall be deemed a denial of the claim. Any change in the Contract Price or the Contract Time resulting from such claim shall be authorized by Change Order.





# AMERICAN INSTITUTE OF ARCHITECTS – A201-1997 – NOTICE PROVISION

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- 4.3.2 Time Limits on Claims. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.



# NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS – EJCDC C-700 – NOTICE PROVISION

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- 10.05 B. Notice: Written notice stating the general nature of each Claim, shall be delivered by the claimant to Engineer and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. The responsibility to substantiate a Claim shall rest with the party making the Claim. Notice of the amount or extent of the Claim, with supporting data shall be delivered to the Engineer and the other party to the Contract within 60 days after the start of such event...
- 10.05 E. Engineer's written action under Paragraph 10.05.C or denial pursuant to Paragraphs 10.05.C.3 or 10.05.D will be final and binding upon Owner and Contractor, unless Owner or Contractor invoke the dispute resolution procedure set forth in Article 16 within 30 days of such action or denial.



# CASE STUDY

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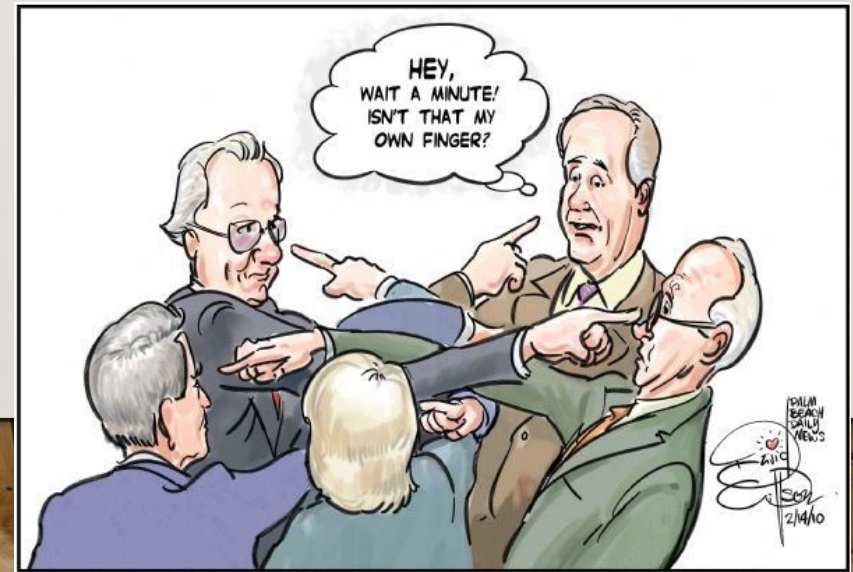
- Landerholm represented a Subcontractor who performed steel fabrication and erection on a project.
- The Subcontractor's Sub-tier Subcontractor alleged damages, delays and disruptions to its work throughout the project.
- The General Contractor insisted upon the contractually required documentation, i.e. time cards, material tickets, rental tickets, expense reports, tracking gantt chart, etc.
- The Sub-tier Subcontractor never properly documented its claim.
- Following completion, the Sub-tier Subcontractor filed a demand for arbitration against the Subcontractor and General Contractor for \$450K.



# CASE STUDY

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- What happened next?
  - The lawsuit from the Sub-tier Subcontractor jogged the General Contractor's memory of the \$800K in damages the Sub-tier Subcontractor owed the General Contractor, so the General Contractor sued the Subcontractor.
  - None of the General Contractor's claims were raised until after the project was over and the Sub-Tier Subcontractor had asserted its claims.





# CASE STUDY

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- Notice was required within 10 days. None of the parties complied.

## Article 13

### Contract Adjustments and Disputes

#### 13.1 Requests for Contract Adjustments and Relief.

**13.1.1** If either Subcontractor or Design-Builder believes that it is entitled to relief against the other for any event arising out of or related to the Work or the Project, such party shall provide written notice to the other party of the basis for its claim for relief. Such notice shall be in accordance with specific notice requirements contained in applicable sections of the Contract Documents and, if possible, be made prior to incurring any cost or expense. Subcontractor shall provide Design-Builder written notice of claims for which Owner may be responsible in sufficient time for Design-Builder to meet its notice requirements to Owner set forth in the Contract Documents. In the absence of any specific notice requirement, written notice shall be given within a reasonable time, not to exceed ten (10) days, after the occurrence giving rise to the claim for relief or after the claiming party reasonably should have recognized the event or condition giving rise to the request, whichever is later. Such notice shall be in accordance with the Contract Documents and shall include sufficient information to advise the other party of the circumstances giving rise to the claim for relief, the specific contractual adjustment or relief requested and the basis of such request. Subcontractor shall comply with all documentation requirements set forth in the Design-Build Agreement when submitting its claim to

# CASE STUDY

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- Deposition of the General Contractor's Project Manager
- Excerpt
  - Q. Is that a prerequisite for a claim? And by that I mean if Subcontractor wanted to claim additional compensation, would they have had to have given you, General Contractor, ten days' notice of their claim, pursuant to 13.1.1?
  - A. Yes.
- While the General Contractor sought to bar the Sub-Tier Subcontractor's claims, they too failed to comply with the notice requirements.

# CASE STUDY

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hy·poc·ri·sy

/hə'pɑkrəsē/ 

*noun*

the practice of claiming to have moral standards or beliefs to which one's own behavior does not conform; pretense.

*synonyms:* [dissimulation](#), false virtue, [cant](#), [posturing](#), [affectation](#), [speciousness](#), [empty talk](#), [insincerity](#), [falseness](#), [deceit](#), [dishonesty](#), [mendacity](#), [pretense](#), [duplicity](#); [More](#)



# CASE STUDY

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- Case went to arbitration.
- Sub-tier Subcontractor's claim against Subcontractor was dismissed on directed verdict (not because of the notice provision, because of a no damages for delay provision).
- General Contractor settled its claims at a significant discount.



# RECAP – WHY IS NOTICE IMPORTANT?

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- Owners' first line of defense
- Owners can deny your claims based on notice without even considering the merits



# WHY IS NOTICE IMPORTANT?

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- Prevents the opportunity to get to the merits of contractors' claims
- Creates work and costs money
- Strengthens the owner's negotiating position
- Exposes contractor to liability to our subs and suppliers



# HOW DO YOU COMPLY?

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# HOW DO YOU COMPLY?

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- Understand the contract at the outset and establish a game-plan for compliance
- Put a process in place
  - Notice of Potential Change Order
  - Notice of Intent to Request a Change Order
  - Notice of Change
  - Change Order Request
- Modify your change order log so that it incorporates the contractual deadlines into the tracking process





# HOW DO YOU COMPLY?

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- Rules of Thumb
  - **Do Not Do Extra Work** without written direction from the owner
  - If an event occurs that may give rise to a claim, notify the owner immediately
    - **Do not wait** until pricing or schedule analysis is complete
    - It does not need to be perfect
  - If the owner refuses to pay, but demands the work be completed, in most cases you must follow the contract and proceed under protest



# HOW DO YOU MAKE YOUR SUBCONTRACTORS AND SUPPLIERS COMPLY?

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- Don't make your Subcontractor or Supplier's problem your problem.



# HOW DO YOU MAKE YOUR SUBCONTRACTORS AND SUPPLIERS COMPLY?

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- Don't make your Subcontractor or Supplier's problem your problem.
  - The Sub owns the scope and must make the case for the change
  - Make sure you have flow through provisions in the subcontract
  - Make sure you have notice provisions in the subcontract that obligate the subcontractor to prosecute their own claims



# HOW DO YOU MAKE YOUR SUBCONTRACTORS AND SUPPLIERS COMPLY?

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- Make them provide notice
  - In your Submittal and RFI transmittal templates request timely notice of cost or time impacts
- If you receive notice from a Sub, timely provide it to the owner
  - If a sub is timely with their notice and you are not, you could end up on the hook
- Make them file a claim in accordance with the notice provisions of the prime contract
  - You can guide them, but don't make their argument your argument
  - Consider a joint defense/prosecution agreement





# WHAT DO YOU DO IF YOU FAIL TO COMPLY?

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- Call your attorney immediately



# TRACKING CHANGE EVENTS

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- Keep a Change Order Log that tracks all potential change orders and tailor it to the notice provisions in the contract
- Document changes in your Daily Site Reports
- Document changes in your Schedule of Values (in pay applications)
- Document changes in your meeting minutes (review meeting minutes prepared by the owner and correct them if necessary)
- Get executed Change Orders
- Does email count?



# WHAT ARE YOUR DAMAGES?

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- Identify all costs
  - Engineering (temporary structure, D/B contract)
  - Labor
  - Material
  - Equipment (standby?)
  - Subcontractors
- Identify all delays
  - Delay to critical path
  - Acceleration Costs
  - Disruption by Owner



# COST TRACKING FOR CLAIMS

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- Establish a separate cost code
  - Ideally, you should be able to;
    - Run a cost report sorted for a specific cost code, and
    - Trace every single line item to an invoice or a timesheet
    - Don't procrastinate!
      - Don't rely on moving costs around after the fact.
      - It looks bad to an owner, vendor, mediator, arbiter, judge, jury, etc.
  - Cost reports must be accurate and trustworthy





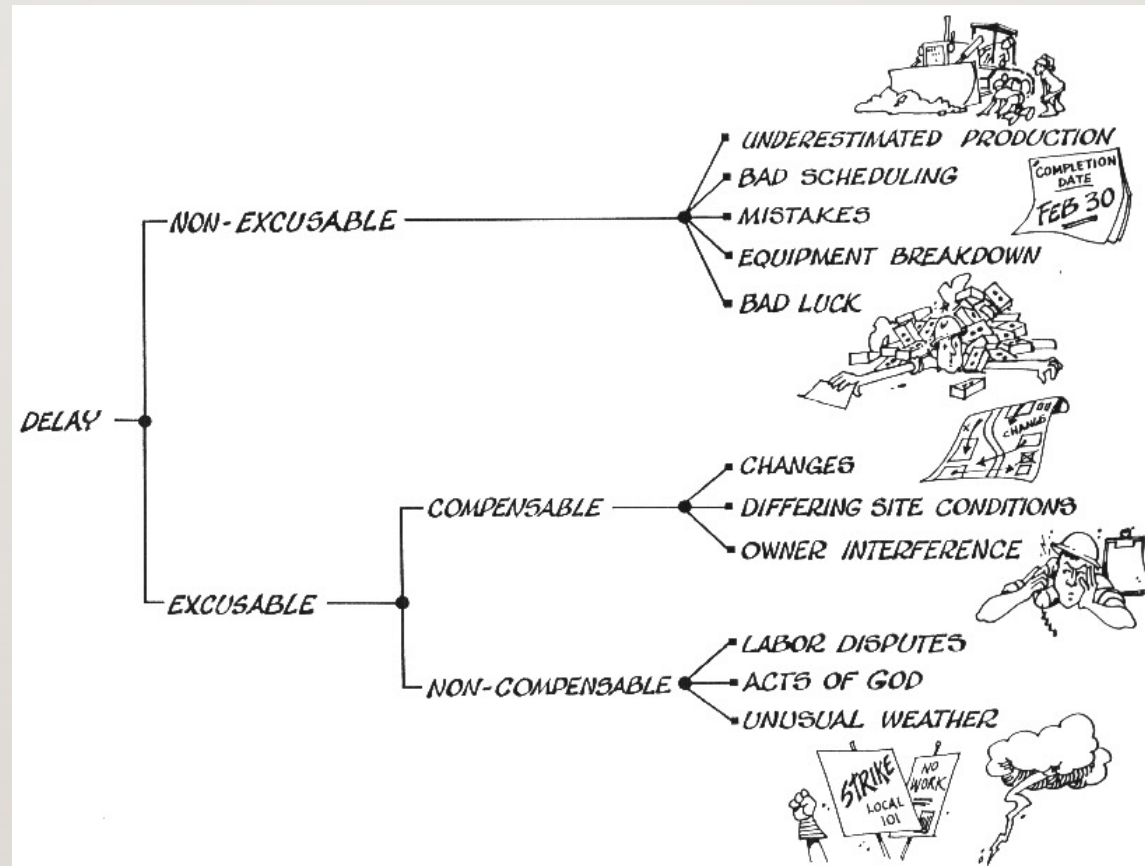
# COST TRACKING FOR CLAIMS

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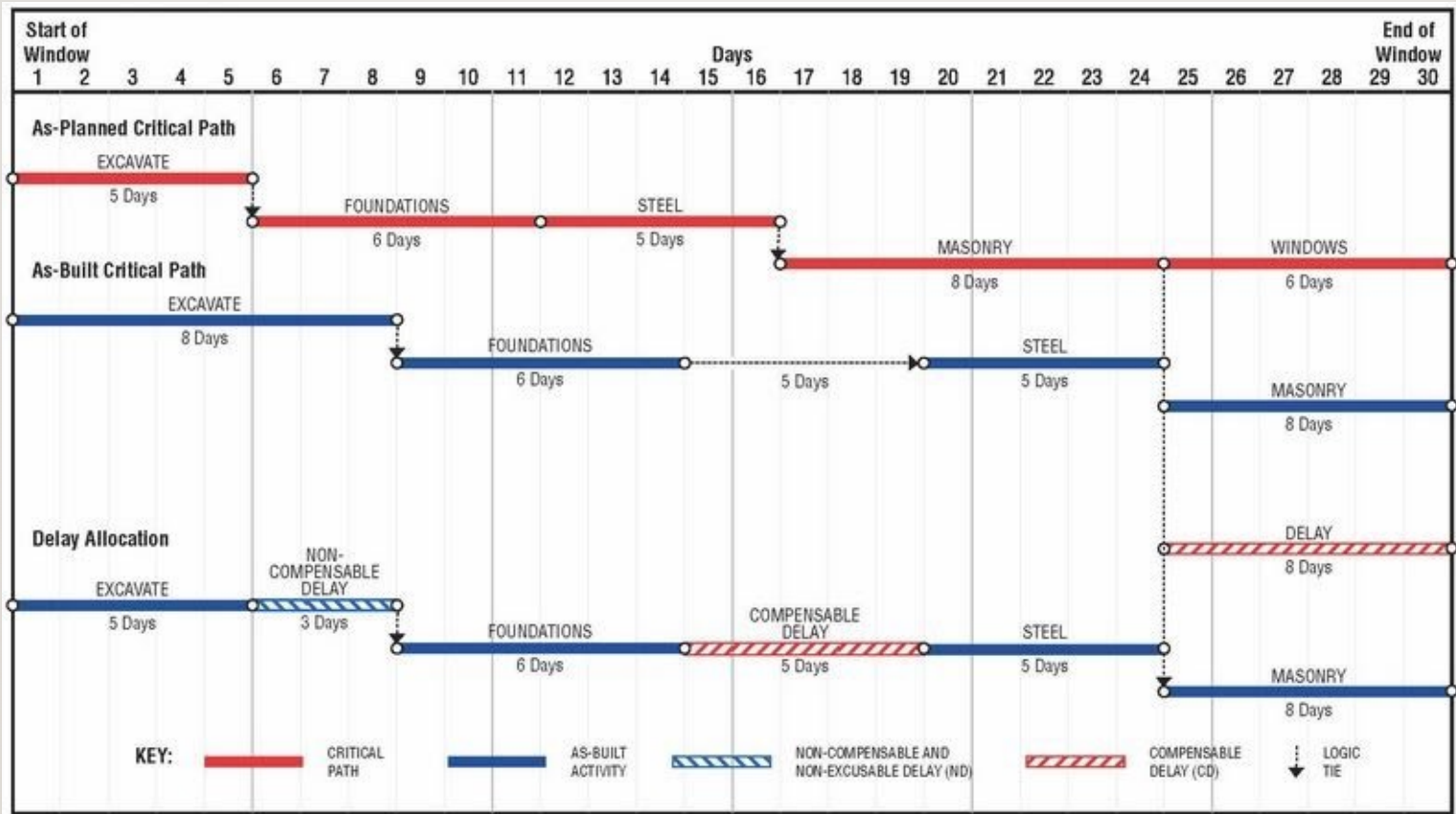
- Do not treat a claim as a blank check
  - Duty to mitigate
  - Likelihood of recovery?



# DELAY CLAIMS



# EXCUSABLE DELAYS







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