

Quigg Golden

Construction Law | Dispute Resolution | Procurement | Training

Making Claims under PWC and RIAI Contracts: What does a Contractor need to do?

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Here Today



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Agenda

- Introduction
- Identifying Entitlement
 - Time and Money claims under PWC Contract
 - Time and Money claims under RIAI Contract
- Notifying in accordance with the Contract
- The Burden of Proof
- Records

What do we mean by a “claim”?

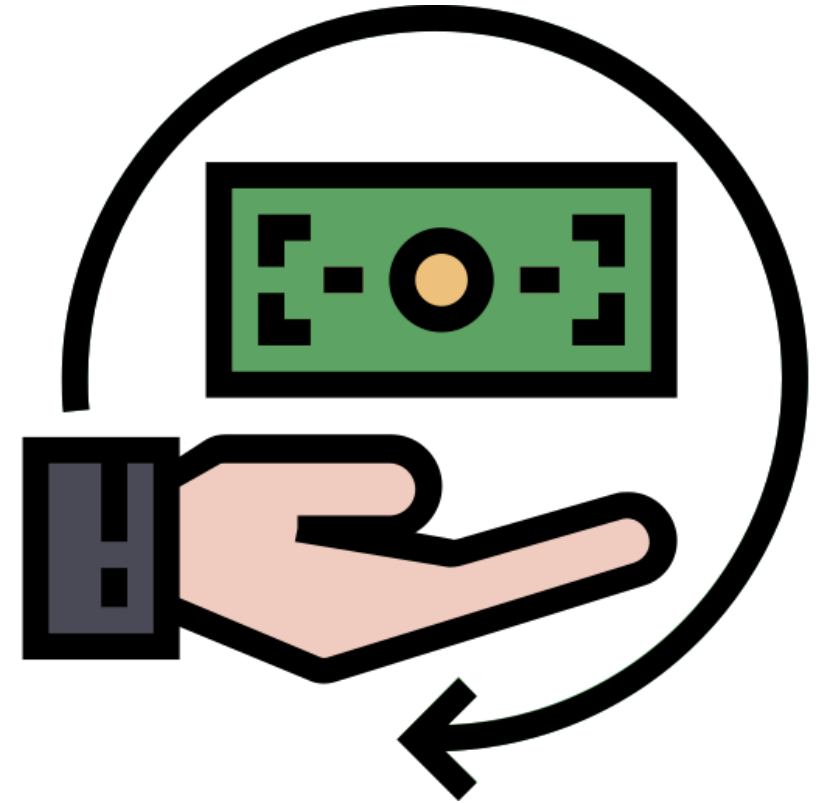
Claim;

*“a demand for something as due;
an assertion of a right or an
alleged right”*



What do we mean by a “claim”?

- A request for additional money and/or time
- Typical reasons for claims include:
 - Variations / scope changes
 - Late provision of design information
 - Lack of access
 - Increased quantities of work
 - Incorrect descriptions of work
 - Changes in law (Covid / Brexit)
 - Termination
 - Delay of the Works
 - Frustration



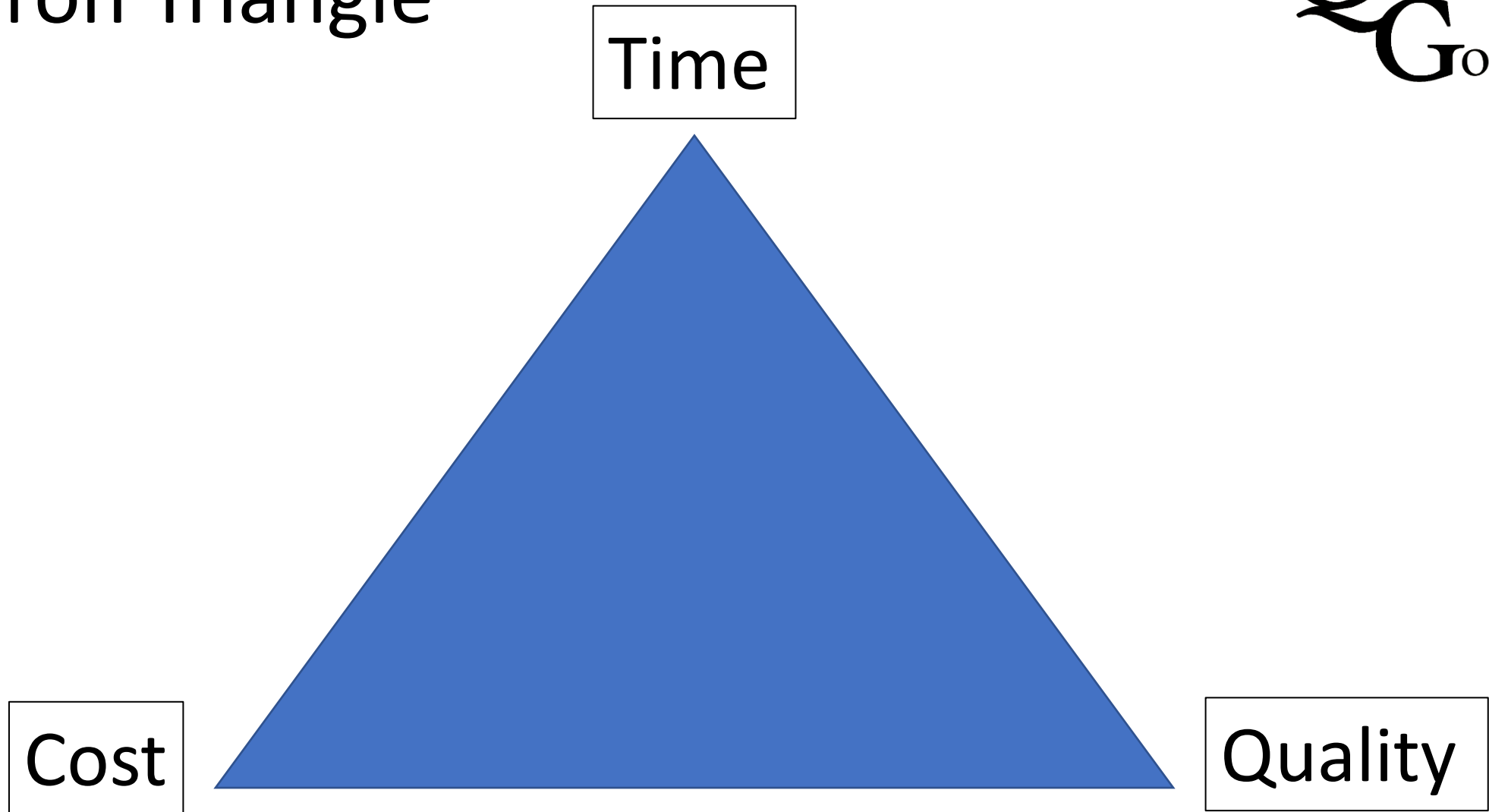
What is the difference between a *claim* and a *dispute*?

Dispute;

“to argue against; call into question”



The Iron Triangle



What do we mean by a “claim”?



Overall dispute cause		
2021 Rank		2020 Rank
1	Poorly drafted or incomplete and unsubstantiated claims	NA
2	Errors and/or omissions in the contract document	NA
3 (tie)	Owner/Contractor/Subcontractor failing to understand and/or comply with its contractual obligations	1
	Owner-directed changes	2

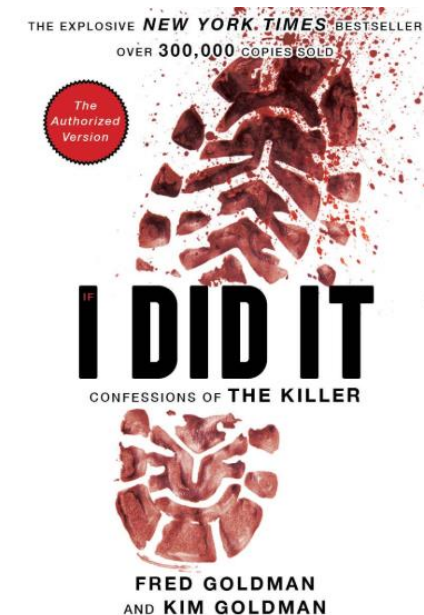
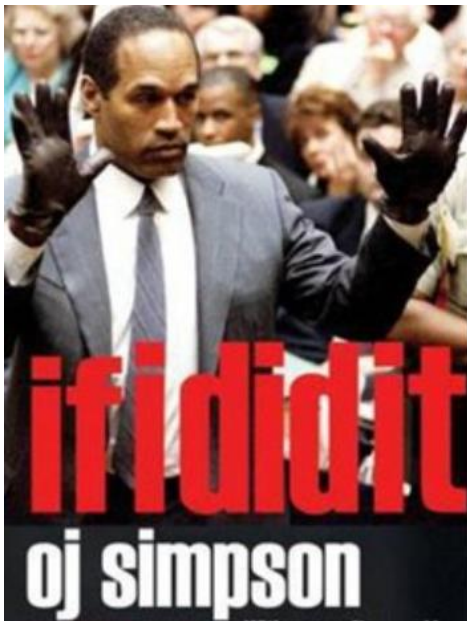
Poorly drafted or incomplete and unsubstantiated claims became the top cause of construction disputes for 2021.

Errors and/or omissions in the contract documents also appeared on the list this year as a top cause. Neither of these appeared in the top three in 2020.



Proving your Claim: Balance of Probabilities

*"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of **the event was more likely than not**".*



Ask yourself... who, what, when, where and why?

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Three simple steps to a successful claim



Identify entitlement

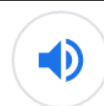


Notify in accordance with
contract



Prove the effects

Step 1: Entitlement



en·ti·tle·ment

/in 'tīdlmənt, en 'tīdlmənt/

noun

the fact of having a right to something.

"full **entitlement** to fees and maintenance should be offered"

synonyms: [right](#), [prerogative](#), [claim](#), [title](#), [license](#); [More](#)

- the amount to which a person has a right.

"annual leave entitlement"

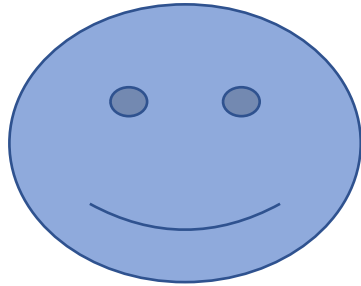
synonyms: [allowance](#), [allocation](#), [allotment](#), [quota](#), [ration](#), [grant](#), [limit](#)

"your annual holiday entitlement"

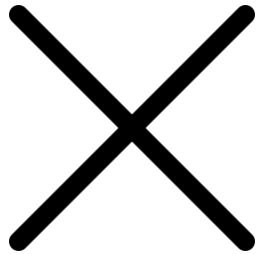
- the belief that one is inherently deserving of privileges or special treatment.

"no wonder your kids have a **sense of entitlement**"

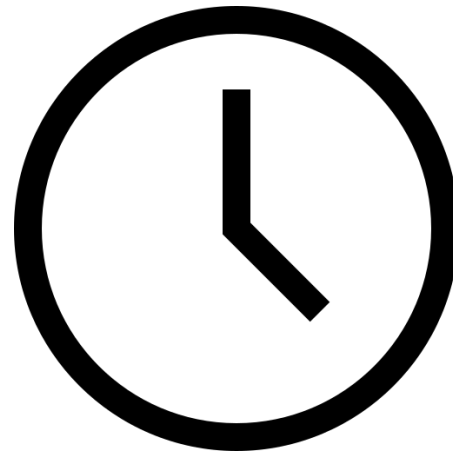
Always remember the key things to look for



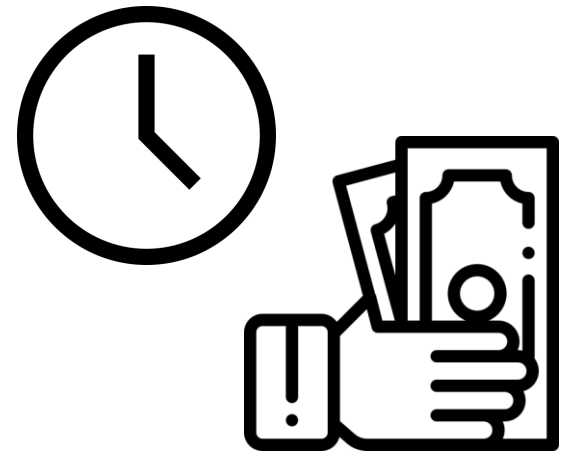
OR



Entitlement



Time only



Time & Money



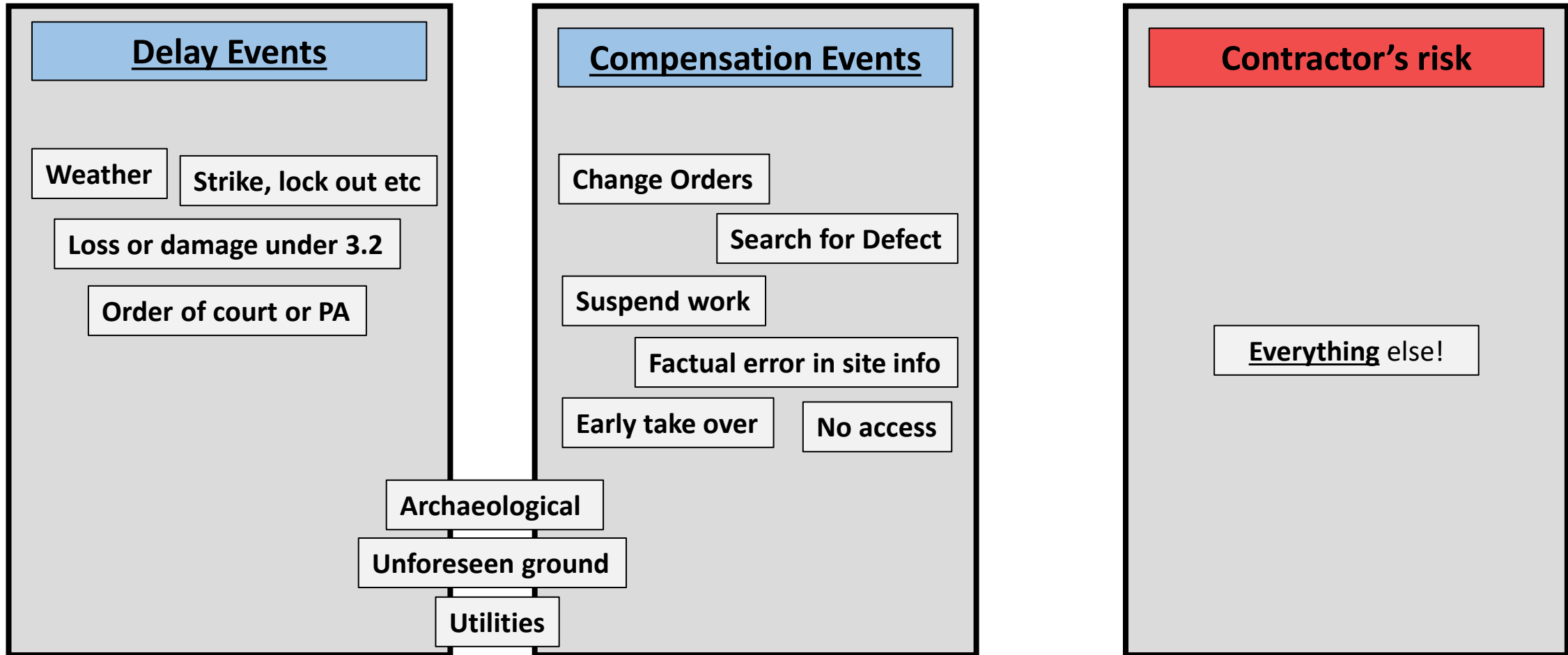
Make sure you know
how to (and DO)
IDENTIFY Entitlement



Risk Allocation in PWC - Schedule 1K

Time only

Time & money



Risks Register

Client Risks	Neutral Risks	Contractor
Granting Access	Ground Conditions	Quality of Materials
Providing Information or Materials	Fluctuation of costs	Sub-contractor Insolvency
Interference with Contractor	Weather	Defects
Defects in Design Drawings (if providing design)	Force Majeure	Defects in Design Drawings (if providing design)
Competent Administrator	Consents	Acts or Defaults by subcontractors



Make sure you know
how to (and DO)
IDENTIFY



K Delay Events, Compensation Events, Programme Contingency, Delay Costs, Adjustments
(Sub-clauses 9.3, 9.4, 10.1, 10.6, 10.7, clause 14)

Delay Events and Compensation Events are as follows:

Event		Delay Event	Compensation Event
1	The Employer's Representative gives the Contractor a Change Order	Yes	Yes
2	The Employer's Representative directs the Contractor to search for Defects or their cause and no Defect is found, and the search was not required because of a failure of the Contractor to comply with the Contract	Yes	Yes
3	The Employer's Representative directs the Contractor to suspend work under sub-clause 9.2	Yes	Yes
4	The Contractor suspends work in accordance with sub-clause 12.3	Yes	Yes
5	There is a factual error in information about the Site or setting out information in the Works Requirements. [This does not include an error of interpretation.]	Yes	Yes
6	The Employer takes over part of the Works before Substantial Completion of the Works and any relevant Section	Yes	Yes
7	The Employer's Representative does not give the Contractor an instruction required under sub-clause 4.5.4 within the time required under sub-clause 4.11.2 when the Contractor has asked for the instruction in accordance with sub-clause 4.11.1	Yes	Yes
8	The Employer does not allow the Contractor to occupy and use a part of the Site in accordance with sub-clause 7.1	Yes	Yes
9	The Employer does not give the Contractor a Works Item or other thing as required by the Contract when the Contractor has asked for it in accordance with sub-clause 4.11.1	Yes	Yes

10	Employer's Personnel working on the Site under clause 7.6 interfere with the execution of the Works on the Site, and the interference is unforeseeable and not in accordance with the Contract
11	The Employer instructs the Contractor under sub-clause 3.2.3 to rectify loss of or damage to Risk Items for which the Contractor is not responsible
12	Loss of or damage to the Works that is at the Contractor's risk in accordance with sub-clause 3.2
13	A weather event as described below

Yes
Yes
Yes
Yes

Yes
Yes
No
No

14	A strike or lockout affecting the construction industry generally or a significant part of it, and not confined to employees of the Contractor or any Contractor's Personnel
15	Delay to the Works caused by the order or other act of a court or other public authority exercising authority under Law, that did not arise as a result of or in connection with an act, omission or breach of Legal Requirements of the Contractor or the Contractor's Personnel or a breach of the Contract by the Contractor
16	A breach by the Employer of the Contract delaying the Works that is not listed elsewhere in this table.

Yes
Yes
Yes

No
No
Yes

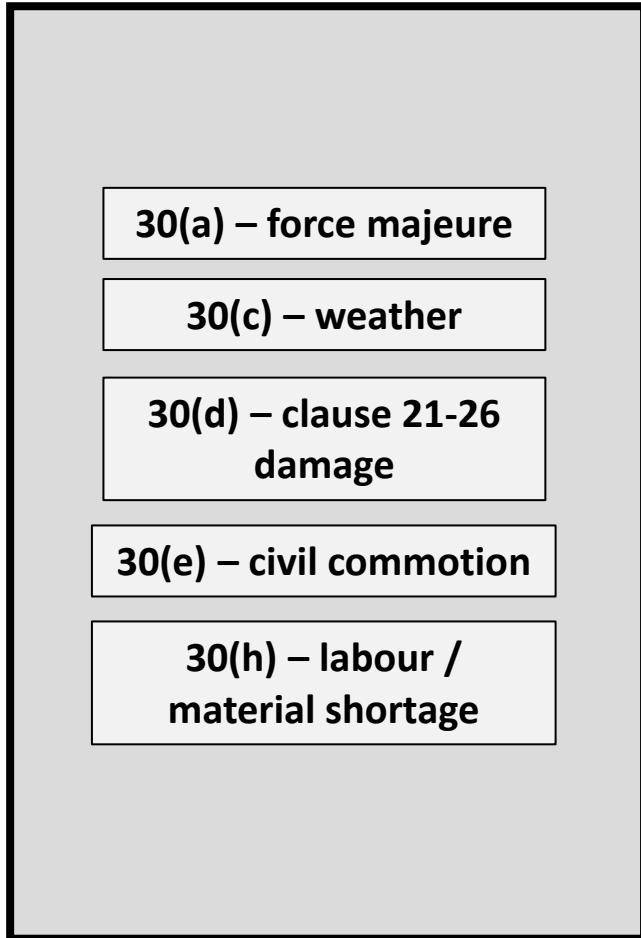
17	<p>A difference between the Contract value of the Works according to the quantities and descriptions in the Pricing Document and the Contract value of the Works described in the Works Requirements, because the Pricing Document, when compared with the Works Requirements</p> <ul style="list-style-type: none"> ■ includes an incorrect quantity or ■ includes an item that is not included in the Works Requirements or ■ excludes an item that is included in the Works Requirements or ■ gives an incorrect item description <p>and the difference for an item in, or that should have been in, the Pricing Document is more than €500.</p>
18	An item of archaeological interest or human remains is found on the Site, and it was unforeseeable
19	The Contractor encounters on the Site unforeseeable ground conditions (not resulting from weather) or unforeseeable human-made obstructions in the ground, other than Utilities
20	The Contractor encounters unforeseeable Utilities in the ground on the Site
21	Owners of Utilities on the Site do not relocate or disconnect Utilities as stated in the Works Requirements, when the Contractor has complied with their procedures and the procedures in the Contract, and the failure is unforeseeable

No
Yes
Yes
Yes
Yes

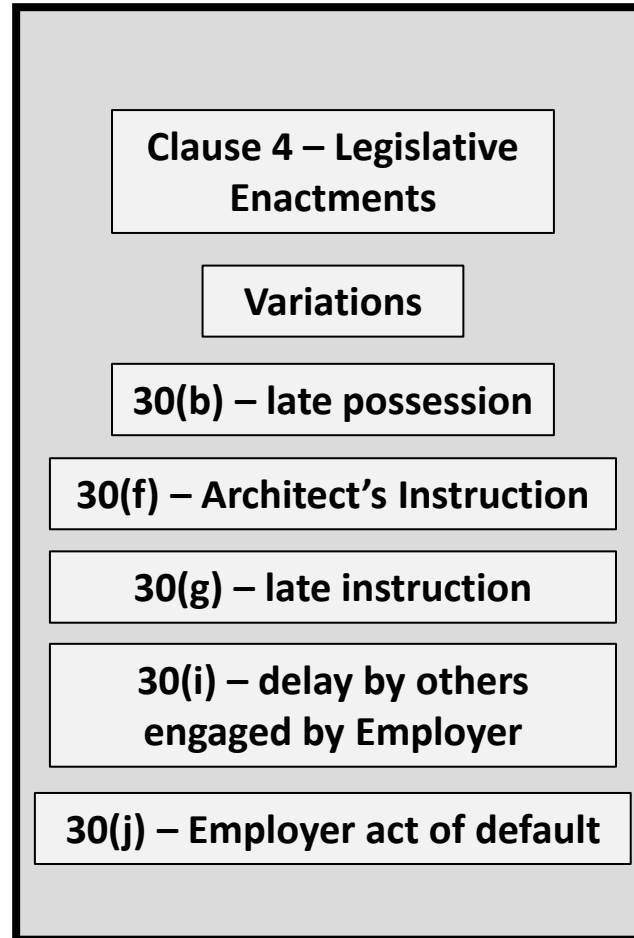
Yes
No
No
No
No

Risk Allocation in RIAI

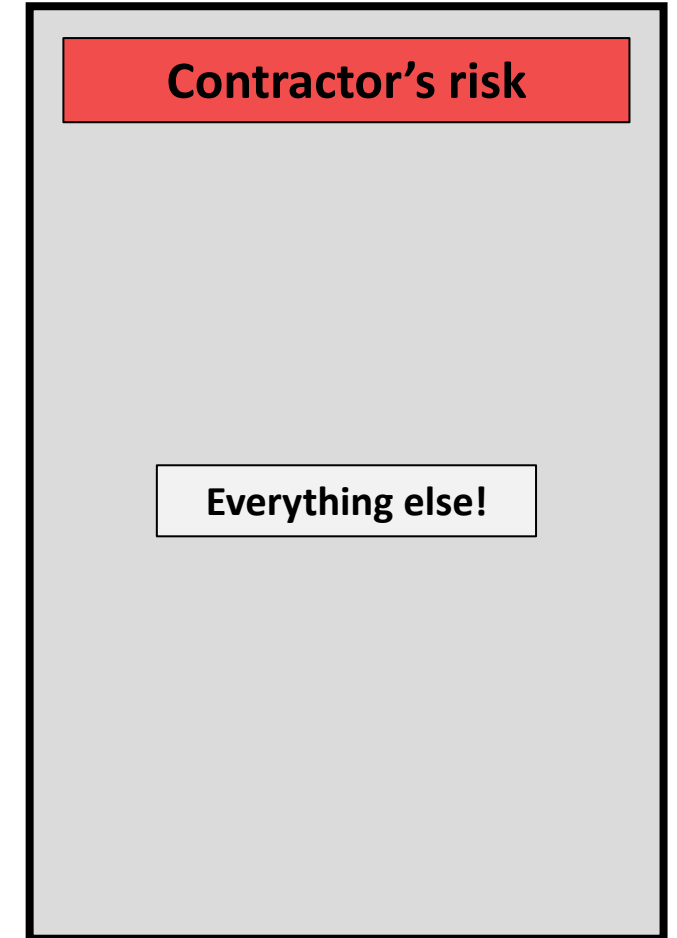
Time only



Time & money



Contractor's risk

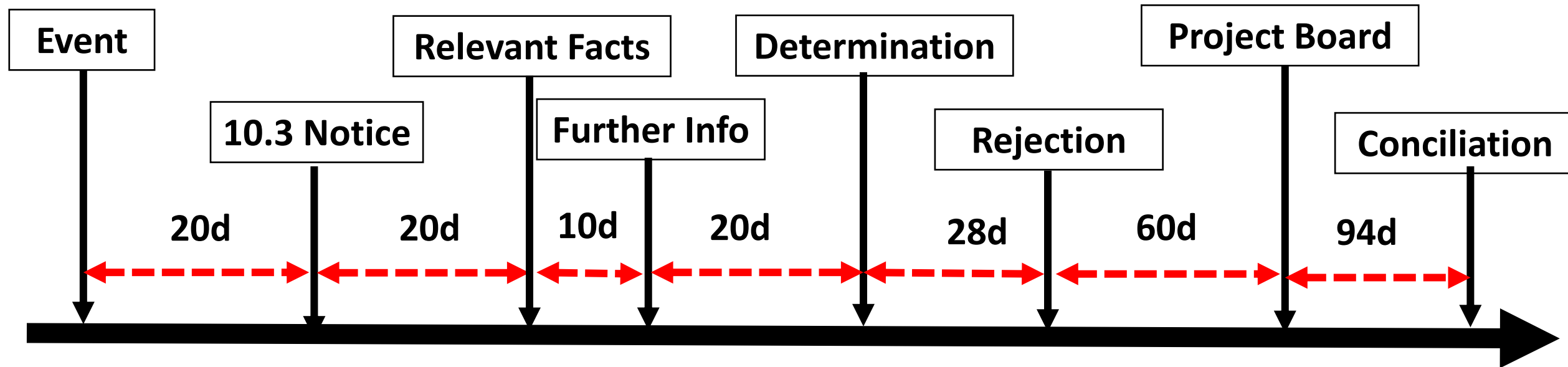


Step 2: Notification





Timeline



PW-CF1 Building Works Designed by the Employer

Notification Requirements

“If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been”

Manni Investment v Eagle Star Life (1997)
UKHL



Condition Precedent

Something to be done ← → Before another thing happens

Think of it as a “*hurdle*” that must be got over



Condition Precedents in RIAI Contracts



Harsh condition precedents are rarely seen in unamended versions of this contract family

However, it is very common for them to be amended in by parties.

Examples are usually taken from the notoriously strict PWC family of contracts

Notification Requirements

10.3 Contractor Claims

10.3.1 If the Contractor considers that under the Contract there should be an extension of time or an adjustment to the Contract Sum, or that it has any other entitlement under or in connection with the Contract, the Contractor shall, as soon as practicable and in any event within 20 working days after it became aware, or should have become aware, of something that could result in such an entitlement, give notice of this to the Employer's Representative. The notice must be given according to sub-clause 4.14 and prominently state that it is being given under sub-clause 10.3 of the Contract. Within a further 20 working days after giving the notice, the Contractor shall give the Employer's Representative details of all of the following:

- (1) all relevant facts about the claim
- (2) a detailed calculation and, so far as practicable, a proposal, based on that calculation, of any adjustment to be made to the Contract Sum and of the amount of any other entitlement claimed by the Contractor
- (3) if the Contractor considers that the programme contingency referred to in sub-clause 9.4 should be used or that there should be an extension of time, the information required under sub-clause 9.3, and, so far as practicable, a proposal, based on that information for any use of the programme contingency or any extension to the Date for Substantial Completion of the Works and any affected Section.

The Contractor shall give any further information about the event or circumstance requested by the Employer's Representative.

Public Works Contract for Building Works Clause 10.3

Notifying under PWC - **First Notice**

- When:
 - As soon as practicable
 - In any event, within 20 working days
 - When Contractor knew or ought to have known
 - Contractor assumed to know everything sub-contractor knows
 - Something that *could* become an issue

Notifying under PWC - **First Notice**

- Form
 - Must state clearly it is a formal Notice under **Clause 10.3**
 - Must be in writing to pre-agreed address (email will suffice) (4.14.2 (2))
 - Initial warning only



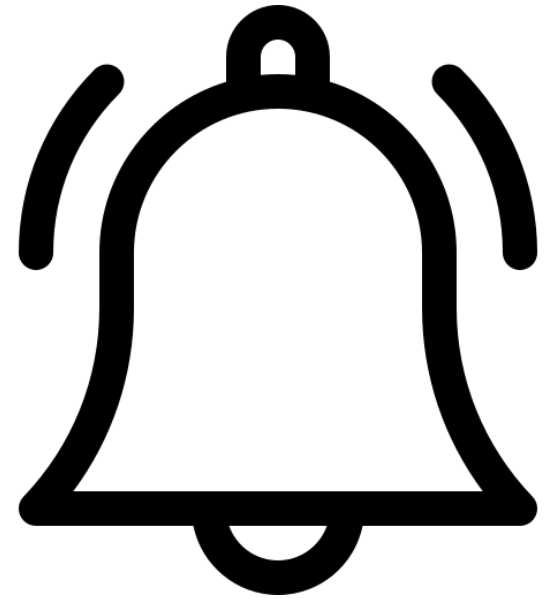
Notifying under PWC: Details of the Claim (second notice)

- Within 20 working days of **first** notice
- Contents (10.3.1):
 - All relevant facts about the claim
 - A detailed calculation and proposal of any adjustment to the Contract Sum
 - Proposal for any use of Programme Contingency or extension of time

Condition Precedent

- Notice provisions can be condition precedents
- Clause must:
 - State the precise time within which the notice is to be served; and
 - Use express language that the party making the claim will lose its rights if the notice is not given.

Bremer Handelgesellschaft mbH v Vanden
Avenne Izegem PVBA



Missed Notice – What next?

- Example – Clause 10.3 of Public Works Contract
- *“...the Contractor shall, as soon as practicable and in any event within 20 working days after it became aware, or should have become aware, of something that could result in such entitlement, give notice of this to the Employer’s Representative.”*
- 21 days have past from the occurrence of a “delay event” – no notice – what next?



Caselaw Stance

Maloney -v- Danske Bank A/S [2014] IEHC 441 (06 October 2014)

Justice Cregan:

"In my view, the essence of a condition precedent is that it is a condition which precedes other conditions or contractual obligations contained in the contract

(i.e. a hurdle)

By calling it a condition precedent the parties intend to mean that if this condition is NOT fulfilled then the other conditions of the contract are unenforceable." (e.g. EOT)



Step 3: Proof

How claims are valued
and how to prove them



QG's Drafting Tips

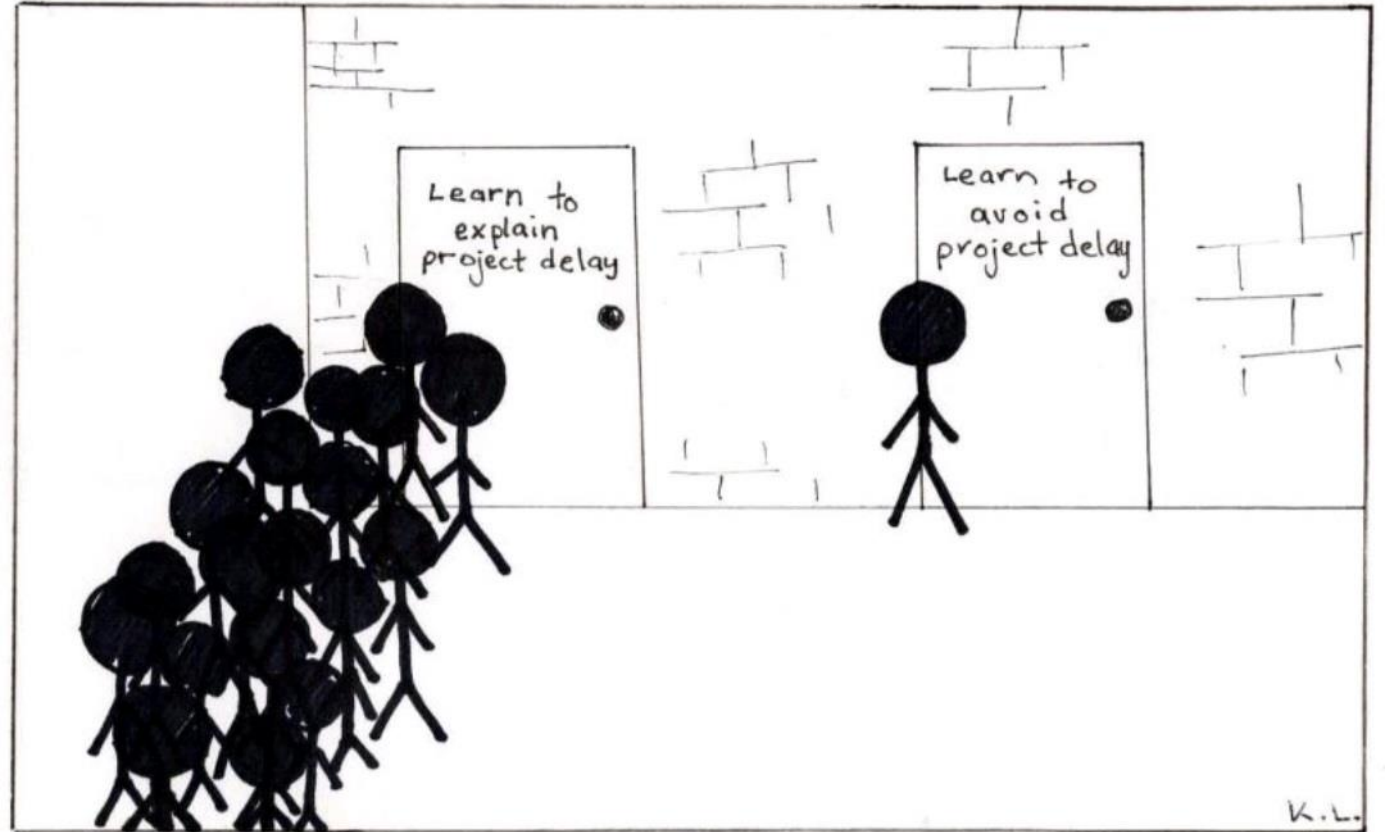
- Could you explain it to your mum/dad?
- Skeleton first, meat later
- Drop the flowery language
- If it is not relevant, why say it?
- Quality > Quantity



Always remember the key things to look for

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If you are explaining you are losing



Establishing a Claim in the Irish Court



In the case of *Dunne and Lucas v Dun Laoghaire-Rathdown County Council* (2003)



Judge Hardiman commented:

“The purported damage and expense must...be established not simply invoked”

“The mere mention of an enormous sum of money as the total cost of the scheme does not in any way constitute evidence”

Time – Setting the Target

“Planning is an unnatural process – it’s much more fun to get on with it. The real benefit of not planning is that failure comes as a surprise and is not preceded by months of worry.”

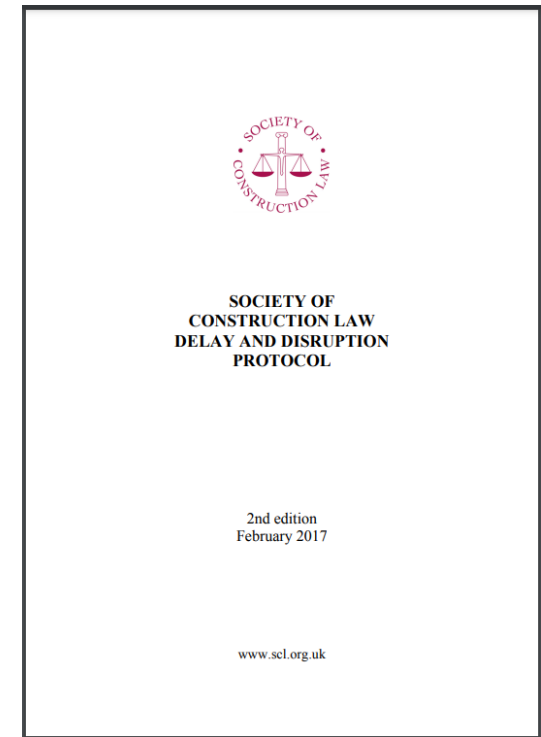
Sir John Harvey Jones



Delay Analysis

The Delay and Disruption Protocol of The Society of Construction Law sets out six methods of delay analysis:

1. Impacted As-Planned Analysis.
2. Time Impact Analysis.
3. Time Slice Windows Analysis.
4. As-Planned versus As-Built Windows Analysis.
5. Retrospective Longest Path Analysis.
6. Collapsed As-Built Analysis.



Delay Analysis

Method of Analysis	Analysis Type	Critical Path Determined	Delay Impact Determined	Requires
Impacted As-Planned Analysis	Cause & Effect	Prospectively	Prospectively	<ul style="list-style-type: none"> Logic linked baseline programme. A selection of delay events to be modelled.
Time Impact Analysis	Cause & Effect	Contemporaneously	Prospectively	<ul style="list-style-type: none"> Logic linked baseline programme. Update programmes or progress information with which to update the baseline programme. A selection of delay events to be modelled.
Time Slice Windows Analysis	Effect & Cause	Contemporaneously	Retrospectively	<ul style="list-style-type: none"> Logic linked baseline programme. Update programmes or progress information with which to update the baseline programme.
As-Planned versus As-Built Windows Analysis	Effect & Cause	Contemporaneously	Retrospectively	<ul style="list-style-type: none"> Baseline programme. As-built data.
Retrospective Longest Path Analysis	Effect & Cause	Retrospectively	Retrospectively	<ul style="list-style-type: none"> Baseline Programme. As-built programme.
Collapsed As-Built Analysis	Cause & Effect	Retrospectively	Retrospectively	<ul style="list-style-type: none"> Logic linked as-built programme. A selection of delay events to be modelled.

A Broken record...

*“A party to a dispute... will learn three lessons (often too late): the importance of **records**, the importance of **records** and the importance of **records**.”*

It is impossible to exaggerate the extent to which lawyers can find unexpected grounds, often quite real, on which to cast doubt on evidence if it is not backed up by meticulously established records”

Max Abrahamson



A Mantra to Remember...

*“A party to a dispute... will learn three lessons (often too late): the importance of **accurate records**, the importance of **reliable records** and the importance of **being able to find records**.”*

It is impossible to exaggerate the extent to which lawyers can find unexpected grounds, often quite real, on which to cast doubt on evidence if it is not backed up by meticulously established records”.



Client Risk Assessment Process



Liability/Cause:

Have you proved this? Contractual
Entitlement? Condition Precedent?

Do you have evidence?

Do you *actually* have evidence?

Quantum/Effect:

Impact on Project (programme,
funding)

How much is this going to cost?

Implementation:

Is there a deal to be made?

Impact moving forward

Records – Example

- Termination scenario
 - You are terminating a sub-contractor for failing to return to the site

Exhibit 1

Evidence to demonstrate that the subbie failed to return...

Emails, letters, photos, texts, calls...

Exhibit 2

Copy of the correct contractual notices...

Proof that those notices were issued in accordance with the contract...

Exhibit 3

Proof of how much the subbie has been paid to date [€90k]...

Proof of how much you expected to pay the subbie in total [€150k]...

[€150k] less [€90k] = the position you would have been in *but for* the termination i.e. paying out €60k to have the works complete...

Exhibit 4

Proof of how much you had to pay others to complete the works [€80k]

Invoices, timesheets, site diaries, defect correction reports, material dockets...

Proof you asked around to get the best price...

Exhibit 5

Claim against subbie is [€80k] less [€60k] i.e. the additional amount it cost you to have the works completed, less what you would have paid the original subbie...

Proof that you have issued the [€20k] claim to the subbie...

Records – What?

- The most useful records are sometimes the hardest to find:
 - Payment records (applications, invoices, certs etc.)
 - Labour allocation sheets
 - Payments to suppliers, subbies, consultants etc.
 - PMI's, RFI's, VO's, CAI's, notices
 - Meeting minutes
 - Site diaries, photographs
 - Emails, letters, telephone notes
 - Programmes



Records – When?

- Pre-Contract:
 - Pre-contract meetings
 - Tender + Assumptions + Build up
 - How you priced risk
- Contract:
 - Whilst the delay is happening!
 - Whilst the disruption is happening!
 - As the instructions are being delivered!
- Post-Contract

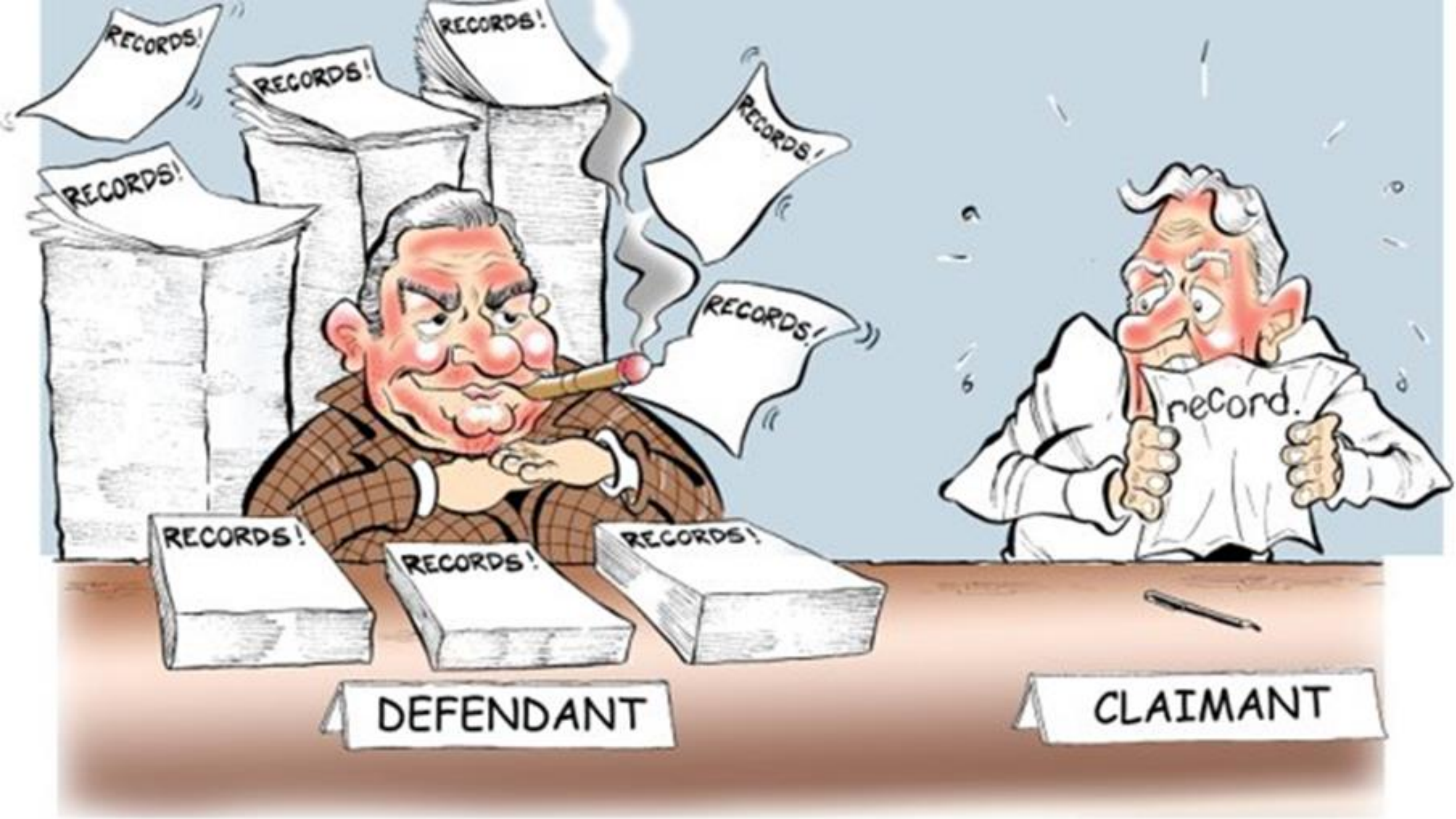


Cause and Effect

To present a successful claim a contractor must:

- Prove an event happened for which the other party is contractually liable
- Show the effects of said event on the Contractor's works
- Show how the said event caused a delay to the site e.g impact on critical path
- Show how the event had a financial impact on the Contractor
- Prove the quantum of said financial impact

How is this achieved? – Clear and substantiated records!

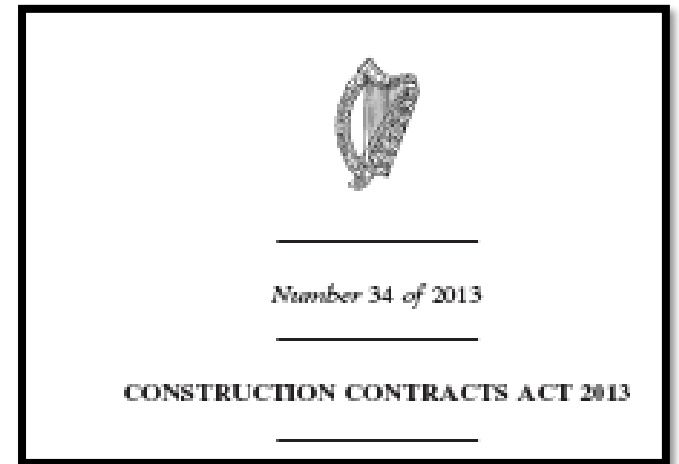


Remember!

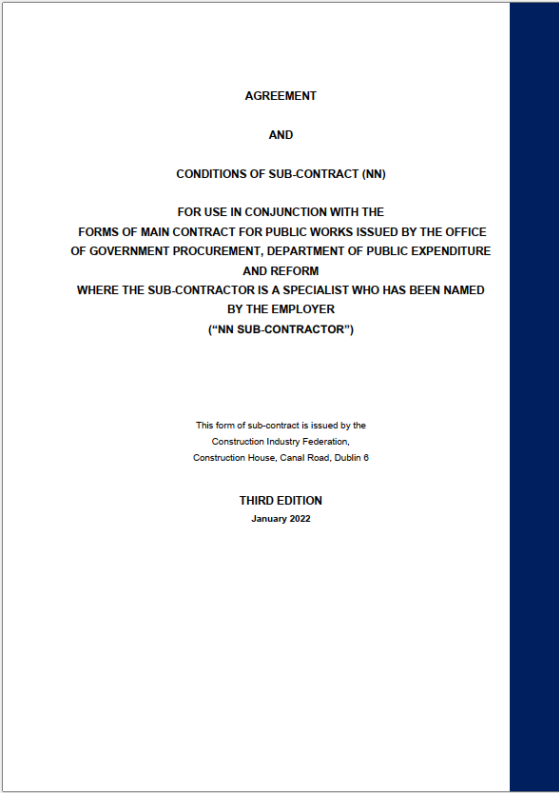
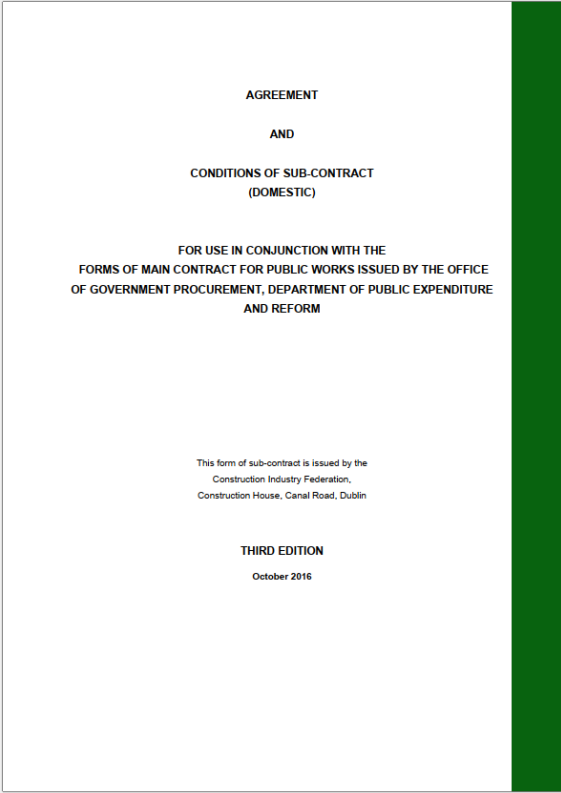
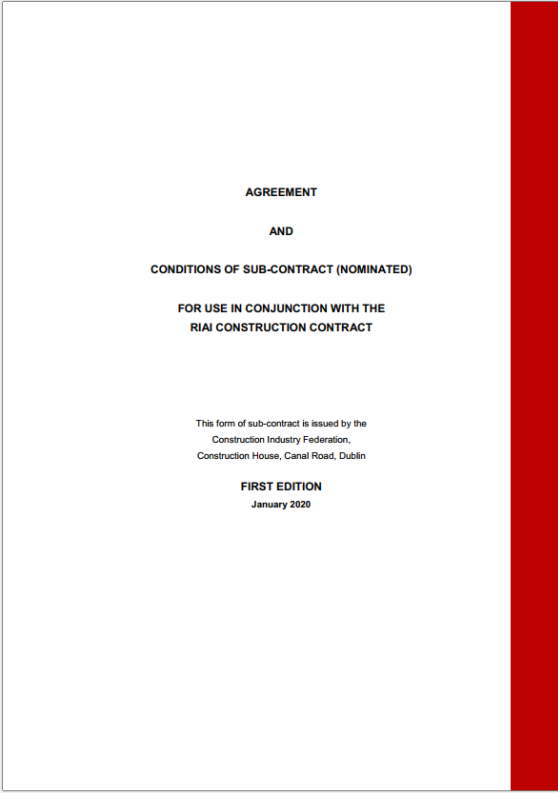
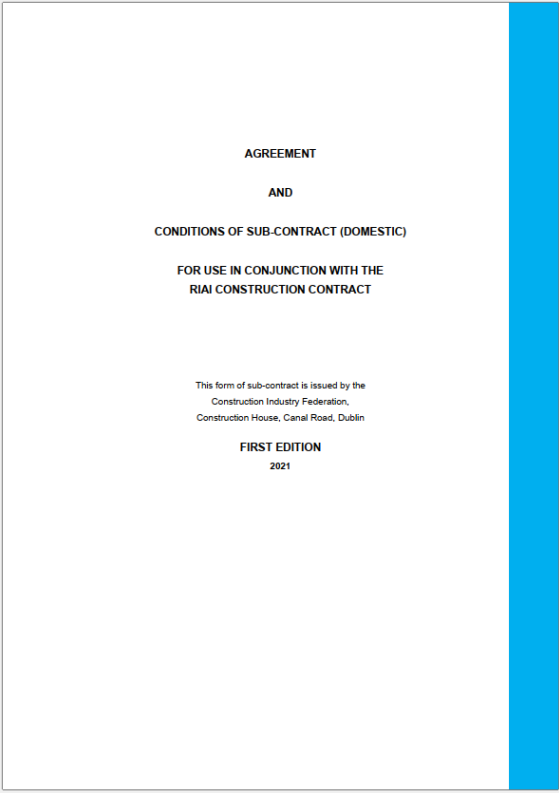
Sub-section 6(1):

“A party to a construction contract has the right to refer for adjudication in accordance with this section any dispute relating to payment arising under the construction contract (in this Act referred to as a ‘payment dispute’).”

- Adjudication is a right not a necessity
- What are the parameters of “*related to payment*”?
- What is meant by “*under the construction contract*”?



Sub-contracts (CIF)



Further reading



Overall dispute cause

2022 Rank		2021 Rank
1	Errors and/or omissions in the contract document	2
2	Owner/Contractor/Subcontractor failing to understand and/or comply with its contractual obligations	5
3	Poorly drafted or incomplete and unsubstantiated claims	1

Most effective claims avoidance techniques

2022 Rank		2021 Rank
1	Risk management	2
2	Contract and specification reviews	1
3	Constructability reviews	3

Most important factors in the mitigation/early resolution of disputes

2022 Rank		2021 Rank
1	Owner/contractor willingness to compromise	1
2	Accurate and timely schedules and reviews by project staff or third parties	3
3	Contractor transparency of cost data in support of claimed damages	2

Introduction to Public Works Contracts



📅 25 April 2024

📍 Zoom Webinar

🕒 1pm - 5pm

💰 €199

Event Host

Stephen McKenna

Senior Associate



Email

View Profile

The Public Works Contracts are used by various agencies in projects, large and small in the Irish public sector.

This interactive webinar is designed to provide delegates with an overview of contracting under Public Works Contracts, with specific emphasis on the CF1 form (works designed by the Employer).

Details of what will be covered in this webinar are listed below:

- Overview of the PWC suite of contracts, and the differences between each
- Structure of the PWC-CF1 contract
- Review of the Contractor's main responsibilities
- Review of the Employer's main responsibilities
- Understanding Delay Events and Compensation Events
- Claiming additional time and money
- Review of the payment mechanism

Discount Code

SCSIPWC10

Booking Link

<https://www.quigggolden.com/training/introduction-to-pwc-contracts/>

Recap

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- Identifying Entitlement
 - Time and Money claims under PWC Contract
 - Time and Money claims under RIAI Contract
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- Records

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Thank you
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