Contracts Management and Administration
(Based on FIDIC Standard)
SCENARIO: “WHAT CONSTITUTES A VARIATION?”

• Contractor begins trenching pipeline for 2 meters depth – per his understanding of the contract instructions.

• Site Engineer makes a verbal “site correction/instruction” and tells the on-site contractor crew that they need to be digging down to 3 meters depth – not 2 meters.

• Site Engineer follow’s up verbal site instruction with email in the same day – to the contractor – “citing the contractor’s error and requesting immediate correction”.
SCENARIO: “WHAT CONSTITUTES A VARIATION?”

• Contractor sees the email instruction from the earlier verbal site instruction – and immediately complies with the “variation” order.

• Contractor also begins assessing and accounting for costs due to the variation order – and instructs his contracts administrator to draft up an official claims notification to be given to the Engineer upon finish.

• Engineer does not consider his site instruction any more than a correction – as he believes he did not issue a variation since the contract calls for a 3 meter depth, not a 2 meter depth.
SCENARIO: “WHAT CONSTITUTES A VARIATION?”

Question:

• Is there a “variation” in this scenario?
• If so, is the contractor entitled to any extension of time and cost?
• If not, how to prevent this type of scenario in the future?
• Is it possible for an “impasse” to take place in this scenario, and if so, would an Extension of Time and/or Costs be granted by the client?
AN INTRODUCTION TO CONSTRUCTION CLAIMS IN THE UNITED ARAB EMIRATES
UNDERSTANDING CONSTRUCTION CLAIMS - UAE

• Construction claims in the UAE are common in almost every construction project and are direct results of the rapid growth in the construction industry (Zaneldin, 2005).

• Therefore, the occurrence of claims is a commonality perceived in many construction projects and can be attributed to a set of factors which can cause considerable delays in a project and consequently result in a rapid increase in that project costs.
UNDERSTANDING CONSTRUCTION CLAIMS - UAE

• Claims seem to be almost inevitable in mega construction projects executed within short durations. **Almost all construction projects are either cost or time overrun** due to many factors which can either be a breach resulting of the Employer or the Contractor or both.

• **Claims therefore may occur as the result of:**
  – Cost Overruns,
  – Design Errors and Omissions,
  – Delay Damages,
  – Numerous Change Orders,
  – Construction Rework and Modifications,
  – and overlooked work assigned to no party (Moazzami et al., 2011).
DOCUMENING “THE WORKS”

• Management and *substantiation* of claims is considered as very essential and *fundamental in the construction industry*.  
  – The more convincing the claim, the closer the Contractor is to achieving his target by being guaranteed additional monies or time to cover losses  
  – and moreover providing a shield against counter claims or penalties imposed by the Employer.

With the frequent occurrence of claims, it becomes prudent to study **Claims Management and Substantiation** as a daily practice in the life cycle of projects.
In the UAE, construction projects are frequently faced by delays and obstacles which tend to be very similar to the ones perceived in global construction projects. These delays usually result in unsoughtafter results such as claims, disruption and disputes which tend to be time exhausting and of considerable costs which may be solved only through litigation (Chen, 2008).
TYPES OF CLAIMS

• Claims tendered by contractors (versus employers) usually fall under four different categories which are:
  – Contractual Claims,
  – Common-Law Claims,
  – Quantum Merit Claims
  – and Ex-Gratia Claims (Chappell, 2011).

• In construction projects, the tendency for the occurrence of claims in construction projects is high, given the fact that most projects are shifted towards the fast track approach (Faridi and El-Sayegh, 2006).
“DELAY” CLAIMS
primarily in use in the UAE
CONTRACTUAL CLAIMS ANALYSIS

• “Contractual Claims” can be further divided, to include:
  – Extension of Time (EOT),
  – Prolongation
  – and Acceleration Claims.

• These three (3) types of contractual claims are the most common in occurrence in the United Arab Emirates.
EXTENSION OF TIME (EOT) CLAIMS

• The *Extension of Time* (EOT) claims occurs in projects where *time risk* is passed on to the contractor executing the project.

• **Meaning:** “...delays beyond the speculated time of completion in the contract may result in the contractor having to bear liquidated damages (LD) as a penalty of the delay...”
EXPLANATION OF “EXTENSION OF TIME” (EOT) - TYPE CLAIMS
DEFINITION OF “EOT”

Construction Contracts generally allow the construction period to be extended where there is a delay that is not the contractor’s fault. This is described as an extension of time (EOT).

• That said – the Contractor is required to prevent or mitigate the delay and any resulting loss, even where the fault is not their own.

• Crucial in assessing applications for EOT is the quality of the information provided and records available.
RELEVANT EVENTS CAUSING DELAY CLAIMS (EOT)

VARIATIONS;
EXCEPTIONALLY ADVERSE WEATHER;
CIVIL COMMOTION OR TERRORISM;
FAILURE TO PROVIDE INFORMATION;
STRIKES;
DELAY ON THE PART OF A NOMINATED SUBCONTRACTOR;
STATUTORY UNDERTAKER’S WORK;
A DELAY IN GIVING THE CONTRACTOR POSSESSION OF THE SITE;
FORCE MAJEURE;
THE SUPPLY OF MATERIALS AND GOODS BY THE CLIENT;
OTHERS....
DEFINITION OF “EOT”

• When delays are caused by the client, it is important for the contractor to assure he claims for adequate additional time beyond the date of the contract expiry (Williams, 2003).

• Moreover, extension of time claims help reduce or mitigate liquidated damages and establishment of the contractor’s right to additional cost for the period granted post contract expiry (Yogeswaran et al., 1998)
DELAY DAMAGES AND EOT

• Where liquidated damages (LD) – (now called “DELAY DAMAGES” in FIDIC 1999) - are concerned, note that if the extension of time (EOT) granted by the Employer covers the entirety of the delay period, then the contractor is no more liable for this delay.

• Important to note also: Delay type claims should be judged against the actual progress of the works – not the programme – and must demonstrate the link between the breach (cause) and the delay.
• On the other hand, if the extension of time granted by the Engineer and Employer compensates a period less than the full period of the delay or reasonable time required for completion, then the period difference remains the liability of the contractor (Ribeiro, 1996).
DELAY DAMAGES AND EOT

In other words, it is imperative for the contractor to demonstrate his full entitlement of a delay breach in the contract by employing the proper methods of:

“SUBSTANTIATION”

- for any additional time(s) - in order to rightfully transfer all liabilities to the Employer or other parties responsible for the occurrence of delays.
PRE-CLAIMS ANALYSIS

• When the Contractor has to submit his EOT claim to the Employer and Engineer, certain factors must be taken into examination.
  – The status of the material if extension of time arises.
  – The source of causation or event which calls for EOT.
  – The relevancy and of the cause of claim in the contract documents.
  – The potential effect of the delay on the overall work progress.
  – Likelihood of the event having impact on the specified date of completion or various dates of completion if the contract implies more than delivery date.
DEVELOPING A DELAY CLAIMS CASE
BUILD A “CLAIM STRUCTURE” PROCESS

Elements or claim structures as stipulated by (Thomas, 2001) as follows:

• **CONSTRUCT** a detailed description of the cause of delay with supporting contractual provisions in contract which are being relied upon for the request for EOT

• **BUILD** a cause and effect study of the delays.

• **RECORD** Calendar dates of when the delay occurred and the total time interval of delay.
DEVELOPING A “CLAIM STRUCTURE” PROCESS

• **RECORD** calendar date (and time) of the formal notification of delay to the Engineer/ Employer and the supporting document of notification.

• **INCLUDE** appendices to the EOT claim which include all the backup documents and records.

• **DRAW** a “diagrammatic exemplification” demonstrating the position of the baseline program, with respect to the new dates of completion taking into consideration the arising delays.
DEVELOPING A “CLAIM STRUCTURE” PROCESS

• **CONSTRUCT** a “Delay analysis” model showing the effects of the delay on the critical path and effects on the float per activity and total float.

• **BUILD** a formal statement requesting an EOT, providing client with full substantiation and supporting documents.
UNDERSTANDING PROLONGATION CLAIMS
The term ‘PROLONGATION’ refers to the extra costs that a contractor may incur as a result of the completion of the works being delayed by an event that is the responsibility of the client.
EXTENSION OF TIME (EOT) TIED TO PROLONGATION CLAIMS

• The **contractor** may incur additional costs as a result of having to remain on site for longer than anticipated, for example,
  – additional labor costs,
  – plant costs,
  – off-site overheads (Preliminaries) and so on

• The concept of EOT and prolongation cost are strongly linked with each other.
EXTENSION OF TIME (EOT) TIED TO PROLONGATION CLAIMS

• Prolongation claims are usually formulated towards the end of the project (Ingram, 2004).

• After the EOT claim is submitted by the contractor and then approved by the Engineer expressing his consent and granting the Contractor additional time for completing the project, prolongation claims are developed.
TECHNIQUES FOR DETERMINING DELAY AND DISRUPTION “COSTS”
FOUR (4) RETROSPECTIVE DELAY ANALYSIS TECHNIQUES

1. AS-PLANNED vs. AS BUILT
2. IMPACTED AS-PLANNED
3. COLLASPED AS-BUILT
4. TIME IMPACT ANALYSIS
AS-PLANNED vs. AS BUILT

• The difference in time between the duration on the As-built Programme and the duration on the As-planned Programme is taken as the period of delay to which a Contractor is entitled to an Extension of Time as a result of an excusable delay event (or delayed events).
IMPACTED AS-PLANNED

- The As-planned Programme with the delay event (or events) incorporated is then re-run, to show a resultant revised Completion Date on what is then called the “Impacted As-Planned” Programme.

- The period between the Completion Date shown on the As-Planned Programme and that shown on the Impacted As-Planned Programme, is taken as being the period of delay to which a Contractor is entitled to an Extension of Time as a result of an excusable delay event (or events).
COLLAPSING AS-BUILT

• The period between the Completion Date on the As-Built Programme and the Completion Date on the Collapsed As-Built Programme, is taken as being the period to which a Contractor is entitled to an Extension of Time as a result of an excusable delay event (or event).
TIME IMPACT ANALYSIS

• (Also known as “Window Analysis”) – is based on the analysis of the effects of delay events over the entire length of a project by looking at the events which have affected progress within “windows” of the contract period sequentially.

• The duration of each ‘window’ is not pre-determined, but is frequently taken as begin one month.

• At the end of each ‘window’ the As-Planned Programme is updated to take account of any delaying inefficiency which is the Contractor’s risk, any necessary logic or duration revisions because of mitigation measures undertaken, together with all excusable and/or compensable events during the period since the last update.
CALCULATING PROLONGATION CLAIMS

A principal element of a claim for loss and expense - or “costs” - *(due to the prolongation of the Works)* is a claim for the:

“cost of the head office overheads”

• Such claims are made under two (2) distinctly different bases:
  1. Actual Cost approach
  2. Lost Opportunity approach.
The “Actual Cost Approach” is the identification of cost of the head office overheads, which may be affected by the delay.
The “Lost Opportunity Approach” is calculated on the premise that due to a delay (by the client), the contractor’s organization is unable to:

- Move to another project and earn the combined profit and head office overheads of which it is reasonably capable;
- Hence – “The opportunity” to earn elsewhere is lost.
CALCULATE OVERHEAD'S IN A CLAIM

- There are **two (2) formulas** commonly used for calculating **LOST OPPORTUNITY cost approach**;
  - the Hudson's formula
    \[
    \text{Off-Site Head Office (OSHO) } \% \times \frac{\text{Contract Sum}}{100} \times \frac{\text{Period of Delay}}{\text{Contract Period}}
    \]
  - and the **Emden formula**.

**OSHO O/H due delay in project =** \[
\frac{\text{Total O/H cost (profit)}}{\text{Total Turnover}} \times 100
\]
CALCULATE OVERHEAD’S IN A CLAIM (Actual Costs)

• Where head office overheads (Preliminaries) must be proven with actual costs incurred rather than hypothetical loss of opportunity approach, an organization should use the Eichleay Formula.

\[
\text{Allowable OS Overhead Rate} = \frac{\text{Daily Allocable O/H}}{\text{Number of days of contract}}
\]

\[
\text{Performance including delay days}
\]
CALCULATE OVERHEAD’S IN A CLAIM

• SPECIAL NOTE:

• “ONUS IS ON A CONTRACTOR (NOT THE EMPLOYER) TO DEMONSTRATE (i.e., prove) ITS ENTITLEMENT TO THE RELIEF BEING CLAIMED”.....

Further -

• “...it is not for an employer to disprove a contractor’s claim; rather, it is for a contractor to prove its claim, both in terms of liability and quantum...or “he who asserts must prove....”
CONCURRENT DELAYS
DEFINITION OF “CONCURRENT DELAY”

“...Concurrent delays are when two or more independent critical delays, [one by the employer and one by the contractor,] occur at the same time period, each having the ability to delay the time completion...”
DEFINITION OF “CONCURRENT DELAY”

Three (3) factors vital for a “CONCURRENT DELAY”:

1. They should critically impact the time for completion – and not simply absorb “float”;

2. They should be independent and not caused indirectly by the other parties delay; and

3. They should occur approximately at the same time period and their impact should be concurrent but not necessary identical.
TWO (2) SCENARIOS TYPICAL OF CONCURRENT DELAY CLAIMS

1. Impacts to the same critical path, at least one of which is attributable to each party.
   – Example: Commencement of works is delayed by the late completion of design, which under the contract is a contract’s responsibility, and late access to site, which is the employer’s responsibility.

2. Impacts to more than one critical path, in which one path is affected by an employer delay, and the other being affected by a contractor delay.
CONTRACTOR’S ENTITLEMENT TO A CONCURRENT DELAY CLAIM

1. If the effect of an employer delay on the completion date is longer than that of the contractor’s, then the contractor would potentially be entitled to recover damage for a period equivalent to the difference between the effects of the two delayed periods;

2. If the effect of the employer’s and contractor’s delay on the completion date are felt concurrently, the contractor may recover additional costs only if it was able to separate its incurred additional costs from those of the employer.
CLAIMS ANALYSIS (HILL INTERNATIONAL)

HILL INTERNATIONAL has established predefined steps which, in addition to providing total auditability, enhances the objectivity of the results, thereby assisting the parties in resolving disputes in relation to concurrent delays.

Following these steps systematically allows the identification of delay events, assessment of delay responsibility and determination of their impact within the defined windows of time, while taking into consideration any mitigation measures taken to reduce the delays.
CLAIMS ANALYSIS
PREDEFINE STEPS

1. Thoroughly review the claim submittal made by the contractor to understand the factual and legal basis for the claim, the extent of the delay, if any, and the nature of the additional compensation sought;

2. Identify the elements of proof required, and compare them with those submitted by the Contractor. Know your possible defences in delay situation, which are presented at the end of this section.
## CLAIMS ANALYSIS

### PREDEFINE STEPS (2)

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
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<tbody>
<tr>
<td>3.</td>
<td>Document the specifications notice and claims filing requirements and determine compliance by the Contractor;</td>
</tr>
<tr>
<td>4.</td>
<td>Identify and review available correspondence, reports, memo’s, and similar documents, to obtain a detailed understanding of the facts.</td>
</tr>
<tr>
<td>5.</td>
<td>Construct a chronology of relevant events.</td>
</tr>
</tbody>
</table>
CLAIMS ANALYSIS
PREDEFINE STEPS (3)

6. Obtain current schedule information relative to the issue claimed. Compare and analyze planned versus actual performance by the Contractor. Identify any variances and probable cause therefor.

7. Conduct interviews with knowledgeable Owner and Contractor personnel. Obtain and/or prepare written statements where necessary to support factual analyses and conclusions.
CLAIMS ANALYSIS
PREDEFINE STEPS (4)

8. **Review and analyze performance records** such as current schedules, daily reports, photographs, diaries, inspection reports, pay records and comparable documents.

9. **Conduct productivity analysis.** If the Contractor alleges that the work was performed in a manner, or at a time, or under circumstances, or at a rate, at variance with the contract, conduct an analysis of the Contractor’s supporting documentation and verify or refute such claims by collecting and analyzing factual performance records maintained by the Owner.
CLIENT/EMPLOYER DEFENSES TO DELAY CLAIMS
CLIENT/EMPLOYER
DEFENSE DELAY CLAIMS

• CONTRACTOR has not proven delay:
  – Delay justification (substantiation) submitted by the Contractor is incomplete or incorrect
  – Claim does not factually support responsibility and cause of claim.

• CONTRACTOR was delayed, but not damaged
  – Delay is absorbed by available float
  – Concurrent Delay
  – Offsetting delay
  – Contractor did not incur additional costs
CLIENT/EMPLOYER
DEFENSE DELAY CLAIMS

• CONTRACTOR was damaged, but cannot recover any cost:
  – Delay was foreseeable;
  – “No damage for delay clause” in the contents of the contract;
  – Waiver of right, sign off of changes, failure to give notice;
  – Contractor was inefficient;
  – Non-compensable delay (weather, accidents, Force Majeure);
  – Contractor failed to mitigate;
  – Contractor failed to coordinate;
  – Contractor failed to submit claim and/or supporting data
CLIENT/EMPLOYER
DEFENSE DELAY CLAIMS

• CONTRACTOR was damaged, but compensated (partially or totally):
  – Overhead absorbed by lump sum work;
  – Overhead absorbed by T&M work;
  – Bid Contingencies;

• CONTRACTOR was damaged, but there are offsets:
  – Backcharges;
  – Credits
  – Allowances
CLIENT/EMPLOYER
DEFENSE DELAY CLAIMS

• CONTRACTOR was damaged, but others are responsible:
  – Contractor’s vendors
  – Contractor’s suppliers
  – Contractor’s subcontractors
DEFENDING AGAINST CLIENT/EMPLOYER DENIAL OF DELAY CLAIMS
DEFENDING DELAY CLAIMS USING DISCIPLINED PROCEDURAL MEASURES

• **ENSURE** – in your initial bid to determine what is included and what is excluded. Lay the foundation for establishing a schedule of values, timely payments and the necessary elements of a good budget and cost control system.

• **RECOMMEND and ENCOURAGE** – **EMPLOYER / ENGINEER**, to jointly update each parties schedule – at least monthly. Schedule specification should include clear procedures for periodic updating process. Each update should reflect “as-built” conditions just as a set of plans and specifications are supposed to be kept up to date to reflect “as-built” conditions in the field.
DEFENDING DELAY CLAIMS USING DISCIPLINED PROCEDURAL MEASURES

• **REQUIRE** contractor field supervisors to maintain a personal diary and to prepare or have prepared daily records. Reports should accurately document actual performance, problems encountered, written and/or oral directives received, field conditions encountered, visitors, etc. Facts only – avoid editorial comments and self criticism(s).

• **REQUIRE** contractor’s field staff to record at least one or two weather observations each day covering the amount of rain or snow, temperature extremes, any significant wind conditions, and the effect weather conditions had on job progress and cost.
DEFENDING DELAY CLAIMS USING DISCIPLINED PROCEDURAL MEASURES

• WHEN A SPECIFIC DELAY occurs, initiate accounting procedures which require the identification, isolation and recording of delay generated costs involved. Particular attention should be given to documenting standby or idle labor and equipment. In addition, document what instructions were given or actions taken or not taken, to mitigate the situation.

• ESTABLISH procedures for control of requests for information (RFI’s).
DEFENDING DELAY CLAIMS USING DISCIPLINED PROCEDURAL MEASURES

• **PREPARE** time impact analyses for all change orders suspected of involving delay and/or impact. Each impact analysis should describe the delay and present the facts related to it, determine liability, the net time impact and the relationship of the delay to any other delays, particularly those that are concurrent or off-setting. Keep a master ledger of time impacts reflecting the chronological influences of delays encountered to date.
DEFENDING DELAY CLAIMS USING DISCIPLINED PROCEDURAL MEASURES

• **KEEP** a log of all change orders from initiation to final settlement.

• **REQUIRE** all supporting suppliers and subcontractors to support and justify time extension requests in their change order cost proposals, if applicable.

• **CORRELATE** all impacts with the base schedule and adjustments thereof. Make sure that the issue of time is addressed in all change orders.
DEFENDING DELAY CLAIMS USING DISCIPLINED PROCEDURAL MEASURES

• **LABOR AND EQUIPMENT RECORDS** should be kept daily showing labor by craft, type and number; the construction equipment being used at the site, hours operated, hours idle, work performed, and any repairs waiting to be made.

• **KEEP A TRANSACTION REGISTER** for all shop drawings and material samples showing scheduled dates for submission, actual submission, time allowed for approval, actual duration of approval, and the dates of any resubmissions or rejections involved.
ACCERLATION CLAIMS
WHAT IS “ACCELERATION”

• “ACCELERATION” in construction projects – is usually driven by the clients needs or desire to complete works faster than previously agreed.

• A client/employer might be anxious that its building is handed over earlier than is set out in the contract or, where the contractor has been allowed an extension of time (EOT), earlier than the revised completion date.

• IN THESE CASES – an Acceleration Agreement can be used to “wrap up”. or expunge all outstanding claims for EOT and loss and expense.
USING AN ACCERLATION AGREEMENT

- If used – and ACCERLATION AGREEMENT must include details of the following:
  - What happens if the contractor fails to implement some or all of the measures in its proposal?
  - What happens if the contractor fails to intermediate targets and/or the completion date?
  - The points at which each payment is due?
  - Changes required to the existing contract documents to accommodate the acceleration agreement including any changes to design or specification?
  - The treatment of retention in respect of acceleration, claims and bonus payments.
THINGS TO WATCH OUT FOR IN AN ACCELERATION AGREEMENT

• Always better to develop Acceleration Agreements prior to the implementation of acceleration measures;

• Generally speaking – the parties often have widely different thoughts as to costs, benefits and liability;

• Contractors may be willing to implement acceleration measures at the clients instruction, but with no warranty of the effectiveness of the measures in recovering the delay.
“Constructive Acceleration” occurs in the absence of owner-directed acceleration. The employer’s refusal to grant an acceleration order or extension of time (EOT) for excusable delay(s) will result in an acceleration effort by the Contractor in order to complete the project on the contractual completion data.

• **NOTE:** If no “expressed authority” in the contract to accelerate, then **no entitlement arises** to claim extra costs for acceleration [English Law, O’Reilly (2007)]
BEWARE OF “MEANING” OF ACCELERATION

• The meaning of acceleration as used by the NEC (New Engineering Contract Form of Contract) – **is to bring the completion date forward**;

• Whereas the meaning of acceleration under FIDIC is defined to mean “speeding the works up” to ensure that the original completion date is achieved.
THANK YOU FOR ATTENDING!!!!

- PLEASE BE SURE TO LEAVE YOUR EMAIL ADDRESS ON THE LEDGER LOCATED AT THE FRONT DESK AREA.

- RECOMMENDATIONS ON YOUR YELLOW SHEET TO 3FOLD MANAGEMENT – FOR THE PRESENTATION OF A “WORKSHOP” OR FULL COURSE STRICKLY ON CLAIMS AND/OR CLAIMS MANAGEMENT IS SUGGESTED – IF YOU OR YOUR COMPANY FEEL IT WARRANTED.