



# Construction: Non-Bid Pay Items, Force Accounts, & Field Documentation That May Go to Claims

Presented by Scott Lowe, PE, Trauner Consulting Services, Inc.



Direction: North  
Precipitation: 3.00  
Weather Entry Number: 18:00 CLEAR/SUNNY  
Time: 18:00  
Sky Cover: CLEAR/SUNNY  
Wind Direction: North  
Precipitation:  
Engineering Staff: Day Shift: Jon B  
Work in Progress: Day Shift: JBC: 1  
removal of form  
Removing form  
Labor Force: Day Shift: Johnson  
carpenters, 2 we  
laborers/can-



# Meet Your Speaker, **Scott Lowe, P.E.**

- Principal with Trauner Consulting Services, Inc.
- 42 years of experience; working with DeIDOT since the 1990's
- Professional Engineer in Delaware
- Expert Witness, Author, Instructor, Analyst, Scheduler



# Introduction

The addition of pay items to the contract (non-bid pay items) and the use of the contract's force account provision are often indicative of the existence of differing site conditions or deficiencies in the plans and specifications.

The **key to containing the costs** associated with the discovery of potentially disruptive issues on the project is **good field documentation**.

# Why?

Because field  
documentation is  
“contemporaneous.”

# What Does “Contemporaneous” Mean?

Occurring at the same time or during the same period of time.





# Contemporaneous vs. After-the-Fact

***It's easier to***  
“build the project on paper” by  
contemporaneously describing what  
is happening on site as they happen.



***It's much more difficult,***  
and not nearly as effective,  
to document events long after  
they've happened.



# Why is Contemporaneous Better?

- Because it's more likely to be accurate.
- Because it's less likely to be biased to a particular argument.
- Because it's more difficult to manipulate.

**It's more believable**



# DeIDOT's Force Account Documentation

## 11. Daily Records

- a. Use the Department's Daily Force Account form to document daily the labor, equipment, and materials used to perform the changed work.
- b. Complete the Daily Force Account form to provide a clear distinction between the changed work and all other work.

# DeIDOT's Force Account Documentation

- c. Provide all information required by the Daily Force Account form, including:
- i. The name, classification, date, daily hours, total hours, rate, and extension for each laborer and foreman.
  - ii. The designation, number, date, daily hours, total hours, rental rate, including a copy of the Blue Book pages used, and extension for each piece of equipment and associated attachments.
  - iii. The quantities of materials, prices, and extensions. Substantiate material costs with copies of vendor's invoices. Submit vendor invoices with the Daily Force Account forms...
  - iv. The cost of material transportation.
  - v. The cost of insurance premiums for property damage, liability, and workers compensation insurances; unemployment insurance contributions; bonds; and social security taxes.

# DeIDOT's Force Account Documentation

- d. At the end of each workday:
  - i. The engineer will compare the records the engineer kept with the completed Daily Force Account form the contractor submitted.
  - ii. The engineer and the contractor will review and attempt to reconcile differences with the Daily Force Account form record.
  - iii. After the engineer and the contractor agree on the content of the Daily Force Account form submitted at the end of the workday, both parties will sign the form.

# DeIDOT's Force Account Documentation

e. The Department will use the completed and signed Daily Force Account form as the basis for determining the amount due the contractor. However, the Department may subsequently increase or decrease the compensation paid based on an audit of the contractor's records. Allow the Department access to force account compensation cost records for inspection or audit in accordance with Section 107.15, Audits.

# Questions

- Does it make sense to keep force account records even if DeIDOT doesn't think there is a change?

YES, mock force accounts make sense because force account records are contemporaneous and agreed to. If there really is a change, the impacts and costs are documented.

- What if the contractor refuses to sign?

This is unacceptable and should be pursued through the contractor's management structure until it's resolved.

# Keep in Mind...

- That actions of the parties can give new meaning to the contract.
- Failing to execute the contract as it's written may constitute a waiver of the contractor's obligation to comply with the contract.
- This may be true despite the language of the contract that says it can only be modified in writing.

# Why Document?

**One reason:** Because it is an unfortunate fact that some construction projects end up in some form of dispute that leads to mediation, arbitration, or litigation.

Where someone who was not there and who does not understand construction or the project will decide what happened and why!





# Why Document?

**Another reason:** Many disputes can be resolved when we know the answer to two simple questions:

1. Who knew what?
2. When did they know it?



# Why Document?

**But perhaps most importantly:** Effective communication and documentation techniques increase the likelihood of avoiding issues (or resolving in a timely manner) without resorting to the claims and litigation route.

Good and timely communication can:

- Mitigate...
- Eliminate...

...Surprises.



# Why Document?

**When it comes to settling disputes:** The best offense AND the best defense are a well-organized, well-documented project file that contemporaneously records the FACTS.

Most often:

- The FACTS will determine the outcome.



# Why Document?

***“Everyone is entitled to his own opinion, but not his own facts.”***

Daniel Patrick Moynihan

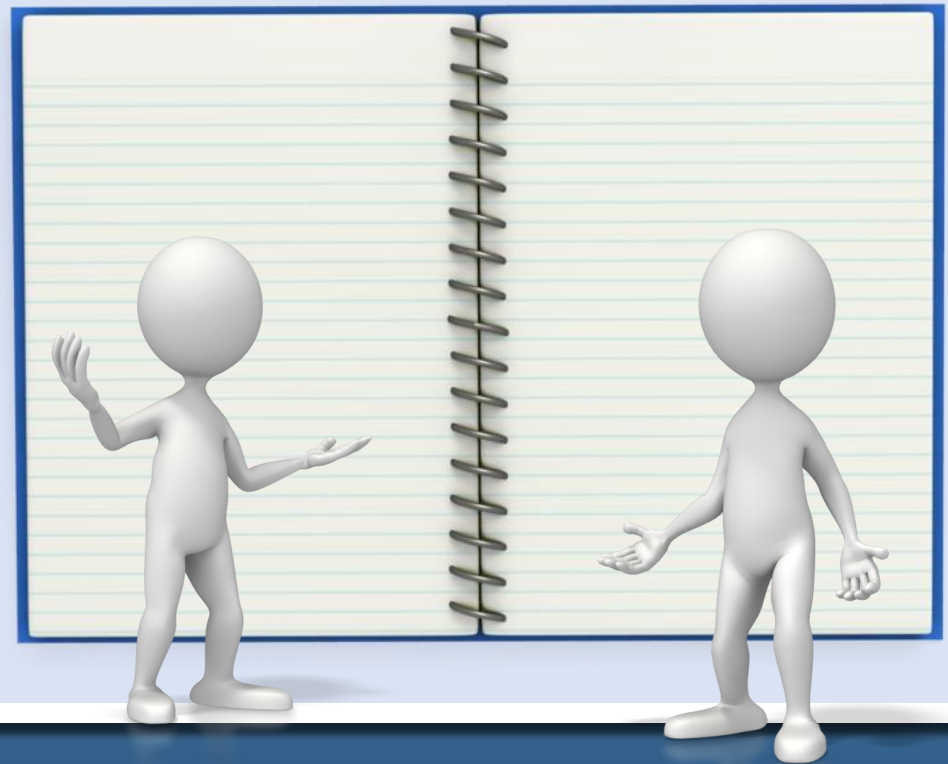


# Why Document?

***And finally,***

(as an experienced construction litigator once put it):

***If it's not in writing, it didn't happen!***



# Standard Project Documentation

- ***Meeting Minutes***
- ***Daily Reports and logs***
- ***Notes to File***
- ***E-mails***
- ***RFI and Submittal Logs***
- ***Digital Photos***
- ***Videos***
- ***Schedules***



# Standard Project Documentation

**Daily Reports:** Are most useful when they *dovetail with activities as identified in the schedule* and meeting minutes to document the project for posterity and should follow the same rules as meeting minutes.

- Complete
- Inclusive
- Accurate
- Factual





# Standard Project Documentation

***Some things that should be in the Daily Report:***



# Standard Project Documentation

## ***Every Daily Report should include:***

1. The work being performed
2. The work accomplished
3. The location of the work being performed
4. Quantities



# Standard Project Documentation

## ***Every Daily Report should include:***

5. Workforce by trade and number of workers
6. Hours worked
7. Equipment in use
8. Idle equipment



# Standard Project Documentation

## ***Every Daily Report should include:***

9. Weather throughout the day.
10. Potential delaying events
11. Significant events
12. Safety issues and safety/tool box talks
13. Meetings held on site



# Standard Project Documentation

## ***Every Daily Report should include:***

13. Direction provided to the contractor
14. Deliveries
15. Record of visitors
16. MOT/phasing conditions
17. Author's signature and date



# Standard Project Documentation

**Daily Reports:** Managers understand that:

- There is an art to creating good daily reports. Don't assume that it comes naturally.
- Field personnel must be trained to write accurate and acceptable daily reports.

# Standard Project Documentation

## Notes to File:

- Document an unusual occurrence
- Document a telephone conversation
- Document the status of something at a particular point in time
- But Notes to File are incomplete communications





# Standard Project Documentation

## Digital Photos and Videos Are:

- Contemporaneous documents, especially if the date is recorded on the photo
- Precise records that capture an exact moment in time
- An inexpensive and very effective documentation method
- But have to be dated and the location noted
- Think about how photos can help you tell your side of the story



# Communications

- Emails
- Texts
- Schedules
- Letters
- Oral Communication

***Anything shared***



# Communications

## Emails:

- Considered contemporaneous documentation
- Every bit as important as hard copy correspondence
- Admissible in legal proceedings
- Discoverable

## Texts:

- More and more, texts carry the same weight as more formal communication.

**Both are incomplete communications.**



# Communications

## Schedules:

- Are a contemporaneous communication by the contractor to the owner of the contractor's current plan for performing the work.
- Each Schedule and Update needs to be preserved in its original form (its "native" file). The electronic Schedule file contains a lot more information than is shown on a paper print-out (a PDF of the schedule).
- Are the preferred source of information when analyzing delay claims.

# Communications

## Letters:

- A good construction letter should:
  - Have an introduction, a body, and a summary.
  - Be limited to one and only one subject.
  - State the facts or questions clearly. (State why the letter is being written).
  - Discuss the subject in as few words as possible.
  - Employ your best technical writing skills (omit the prose).
  - Exclude emotion, sarcasm, threats, and profanity.

# Communications

## A Real Example of a Claim Letter:

Per Special Provision Sections 9-1.04 Notice of Potential Claim, Acme protests the welding inspection requirements for splicing steel pipe piles as interpreted by the Agency. The Agency notified Acme on May 8, 1997 that inspection is required on all field welding performed. Special Provisions Section 10-1.22 Piling states that piling shall conform to the provisions in Section 49, "Piling," of the Standard Specifications, and the Special Provisions. Special Provisions Section 10-1.22 reads that unfilled pipe piles shall be full penetration welded. Partial welds may be restored to full penetration welds in the field in conformance with AWS D1.1. Also Standard Specification Section 49-5.02 Splicing states that splices for steel piles shall be made by full penetration butt welding the entire cross section in conformance with the requirements in AWS D1.1. The welding procedure required is D1.1, but no inspection is required per 49-5.02 of the Standard Specifications.

In the past, previous projects interpretations of this specification has not required welding inspection per Section 6 of AWS D1.1 to be performed by the Contractor. Contracts following our current project have revised this specification section to require that the Contractor performs welding inspection. Acme is supplying a CWI certified inspector per Section 6 of AWS D1.1 for this project and requests additional compensation for all expenses incurred for this inspection.

Acme has attached partial Agency specification sections from other projects for your information regarding welding procedures. Attachment 1, Agency Contract #11-050024 was bid prior to our current project which reflects our current specifications. Attachment 2, Agency Contract #05-453404 was bid after our current project which includes additional field welding quality control requirements...

# Communications

## The Actual Response to the Claim Letter:

The Agency acknowledges the receipt of the contractor's notice of potential claim regarding the welding specification. The Agency takes exception to the implication that the contractor was not informed as to what welding specification was applicable. The contract clearly defines which elements of the welding specifications were important to our application. The contractor's failure to provide the specified welding submittal prior to welding work for the project is the sole cause for any delays or loss of efficiencies the contractor might be experiencing.

The contractor's request for additional compensation for "scheduling delays" and "resource delays" has no factual basis. The Agency takes exception that this request for additional compensation was made in the name of a contractual non-persona "Joe Welder." Mr. Welder's statement that he prepared the notice of potential claim without review of the correspondence file and with little or no personal involvement in this issue is disturbing.

Review of alien contract documents submitted by the contractor reveals only that they are welding specifications applicable to other projects. Mr. Welder's observation that the cast-in-steel shell concrete pile specification on another project "reflects our current specifications" is baffling.

The applicable provision for splicing of the "open ended pipe piles" on the Big River Bridge is found in the Standard Specifications, Section 49-5.02 "Splicing.", "Splices for Steel Piles shall be made by full penetration butt welding the entire cross section in conformance with the requirements in AWS D1.1."

Quoting from the AWS D1.1 Section 1.1 "Scope", "This code contains the requirements of fabricating welded steel structures. When conformance to the Code is stipulated in the contract documents, all provisions of the code shall be complied with, except for those provisions that the Engineer or contract documents specifically exempt." In the contract 03-362404 no provisions have been exempted.

Your request for additional compensation is without merit.



# Communications

## The Actual Response to the Claim Letter:

The Agency acknowledges the receipt of the contractor's notice of potential claim regarding the welding specification. The Agency **takes exception to the implication that the contractor was not informed** as to what welding specification was applicable. The contract clearly defines which elements of the welding specifications were important to our application. The contractor's failure to provide the specified welding submittal prior to welding work for the project is the sole cause for any delays or loss of efficiencies the contractor might be experiencing.

The contractor's request for additional compensation for "scheduling delays" and "resource delays" has no factual basis. **The Agency takes exception that this request for additional compensation was made in the name of a contractual non-persona "Joe Welder."** Mr. Welder's statement that he prepared the notice of potential claim without review of the correspondence file and with little or no personal involvement in this issue is **disturbing**.

Review of **alien contract documents** submitted by the contractor reveals only that they are welding specifications applicable to other projects. Mr. Welder's observation that the cast-in-steel shell concrete pile specification on another project "reflects our current specifications" is **baffling**.

The applicable provision for splicing of the "open ended pipe piles" on the Big River Bridge is found in the Standard Specifications, Section 49-5.02 "Splicing.", "Splices for Steel Piles shall be made by full penetration butt welding the entire cross section in conformance with the requirements in AWS D1.1."

Quoting from the AWS D1.1 Section 1.1 "Scope", "This code contains the requirements of fabricating welded steel structures. When conformance to the Code is stipulated in the contract documents, all provisions of the code shall be complied with, except for those provisions that the Engineer or contract documents specifically exempt." In the contract 03-362404 no provisions have been exempted.

Your request for additional compensation **is without merit**.

# Communications

## A Better Response to the Claim Letter:

The Agency acknowledges receipt of Acme's Notice of Potential Claim, dated May 22, 1997, regarding the enforcement of specified welding requirements. We have reviewed the letter of May 22 forwarding the Notice and its attachments. We disagree with the conclusion that our direction to Acme to inspect all field welds is a change to the contract requirements based on the following:

1. Standard Specification Section 49-5.02 governs the splicing of the "open-ended pipe piles" on this project, as Acme acknowledged in its letter.
2. Section 49-5.02 requires that "Splices for steel piles shall be made by full penetration butt welding the entire cross section in conformance with the requirements in AWS D1.1." Acme acknowledges the applicability of AWS D 1.1 in its letter.
3. Section 1.1 of AWS D1.1 "Scope" states that "This code contains the requirements of fabricating welded steel structures. When conformance to the code is stipulated in the contract documents, all provisions of the code shall be complied with, except for those provisions that the Engineer or contract documents specifically exempt."
4. AWS D1.1 requires inspection of all field welds. Neither the Engineer, nor the contract documents relaxed this requirement. Acme is still required to provide for inspection of all field welds.
5. The fact that the contract language related to the inspection of field welds was modified in subsequent Agency contracts, does not change the requirements of Acme's contract.

For these reasons, Acme is required to provide inspection of all field welds. The cost of field inspection is incidental to the unit price paid to furnish and install the steel pipe piles. Acme is not entitled to reimbursement for inspection costs beyond the reimbursement already provided by the unit price for pipe pile.

# Communications

## Why was the second response better?

- It stuck to the facts. (The deficiencies in Mr. Welder's preparation are irrelevant if he's right!)
- It answered the Contractor's claim, which was about the inspection of all field welds. The first response did not specifically address that allegation.
- It stayed away from emotional words like "disturbed" and "baffled."
- Does referring to "alien contract documents" really help?
- The text was impersonal.

# Summary

- Be judicious in your choice of words.
- Ground your conclusions in the facts and the contract. Your feelings and opinions are irrelevant.
- As you write and review your correspondence, imagine yourself explaining it to a mediator, in a deposition, or at trial.
- In certain instances, a hot letter or email should be allowed to cool off overnight before sending.



# Questions?



Direction: North  
Precipitation: 3.00  
Weather Entry Number: 18:00 CLEAR/SUNNY  
Time: 18:00  
Sky Cover: North  
Wind Direction: North  
Precipitation:  
Engineering Staff: Day Shift: Jon B  
Work in Progress: Day Shift: JBC: 1  
removal of form  
Removing form  
Labor Force: Day Shift: Johnson  
carpenters, 2 we  
laborers/cam-



# For more information, contact **Scott**

E-mail :

[scott.lowe@traunerconsulting.com](mailto:scott.lowe@traunerconsulting.com)

Phone:

215-814-6400

Or write him:

Trauner Consulting Services, Inc.  
1617 JFK Blvd., Ste. 475  
Philadelphia, PA 19103

