6.0 PROVING THE CLAIM

6.1 INTRODUCTION:

Most construction cases that end up in court or before Boards of Contract Appeals do so because contractors are unable to prove each of the elements of its claim. Additionally, the value of many out of court settlements is also reduced because the contractor is unable to prove each of the elements of this claim. Theoretically, if you have accomplished all of the tasks discussed earlier in this seminar then you should have little difficulty proving your claim.

This section highlights what is necessary to prove claims and cites examples where contractors have fallen short and examples where contractors have met the challenge. Every construction litigation attorney approaches the proof of claims differently, but almost all of them begin by deciding what conclusions they want the judge or jury to reach and then work back to the basic facts necessary to prove those conclusions.

6.2 PROVING A CHANGES/ALTERATIONS/EXTRA WORK CLAIM

In court, changes, alterations and extra work claims typically involve construction changes where the owner refuses to acknowledge that the work has changed.
CONSTRUCTIVE CHANGES/ALTERATIONS/EXTRA WORK

- There is a Changes/Alterations/Extra Work Clause?

- Does the clause permit the owner to order the change requested?

- Was the work we were requested to perform necessary to perform or was it a result of design deficiency.

- Does the changes clause require that we have a written change order prior to commencing work?

- Have we complied with the notice provision in the contract?

- Have we given the owner/architect/engineer the opportunity to keep track of the extra costs we will be claiming?
CARDINAL CHANGES/QUANTUM MERUIT

- The changes clause limits the owner’s right to make changes to those within the general scope of the contract.
- The changes we are requested to perform, or were required to perform were not within the general scope of the original contract and were not contemplated by the parties.

6.3 PROVING A DIFFERING SITE CONDITIONS CLAIM

DIFFERING SITE CONDITIONS

- There is a Differing Site Conditions Clause in the contract.
- Includes the type of condition we encountered? (Type I: Subsurface or latent physical conditions differing materially from those indicated in the contract.) (Type II: Unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered.)
- The conditions differ materially from those indicated or those ordinarily encountered.
- We made a reasonable site investigation as required by the contract.
- We notified the owner/architect/engineer prior to disturbing the conditions.
- The conditions we encountered increased our cost of, or time required for, performance of the work?
- We can prove the amount of our increased cost both to deal with the differing site condition and its impact on the other work.
6.4 Proving a Delay/Disruption Claim

DELAYS, DISRUPTIONS, AND OTHER TIME RELATED PROBLEMS

• There is a Suspension of Work Clause in the contract, or we can show the delay or disruption we encountered was a breach of contract

• The Suspension of Work Clause covers both owner directed suspensions and constructive suspensions of work we can encounter was a breach of contract

• There is not a “No Damages For Delay” Clause in the contract or we can show the delay we encountered falls within an exception to the clause

• The delay/disruption we encountered was not foreseeable

• The delay/disruption we encountered was unreasonable

• There is no concurrent delay for which we are responsible (applies to claims for additional compensation)

• The delay/disruption increased the cost of performing the work and/or

• The delay/disruption increased the time necessary to perform the work

• We complied with the notice requirements of the contract

• We complied with the schedule update requirements of the contract.
6.5 Proving and Acceleration Claim

**ACCELERATION**

- We are entitled to a time extension for excusable delays
- We notified the owner and requested the time extension
- The owner directed us to accelerate our work; or, refused to extend the contract time
- We notified the owner that we intended to make a claim for acceleration
- Our costs increased as a result of accelerating the work

6.6 How the Courts/Boards Look at Schedules to Prove Delay/Disruption Claims

6.6.1 The As-Planned Schedule

1. Contract Requirements Often Include Planning And Scheduling Clauses:

   Most contracts include planning and scheduling clauses. Some clauses are very general in nature, leaving the technique and other considerations to the discretion of the contractor. Other clauses are very specific and typically designate the scheduling technique as well as requirements for updating the schedule.

2. The Importance of the Original Schedule in Proving a Delay, Disruption or Other Time Related Problem:

   Many delay, disruption, and loss of productivity claims are lost or substantially reduced in value because mistakes, errors and carelessness are reflected in the original schedule and plan of operations. That original
schedule is the first paper the owner receives demonstrating the contractor’s professionalism in planning and management. As such, it sets the tone for the job. In court, it is the document that establishes the benchmark of all time related claims. As such, it has a tremendous impact on the judge and jury and influences the credibility they will attach to the evidence that follows.

A schedule is not a fact. Instead, it is an opinion. Thus, it is subject to the same attack as other opinion evidence. Specifically, the qualifications of the person who prepared the schedule are called into question as well as the quality of the information he/she relied on in preparing the schedule.

In the past, schedules have been submitted to owners, particularly state DOTs, that were purposely ambiguous and designed to show one thing: that the contractor would never be more than 10% behind the anticipated progress so as to risk being taken off the bidders’ list. There was usually little or no communication with subcontractors and suppliers. Those schedules were rarely used to actually build the projects.

More recently, a greater amount of attention has been given to the scheduling process. Yet, there are many mistakes made that cause the contractor to lose credibility right from the start.
It is impossible to list all of the possible initial scheduling mistakes. The following is a list of defects in the initial schedule that courts and Boards of Contract Appeals have noted:

- No proof of the information used to prepare schedule.
- Errors in technical logic.
- Incomplete schedules.
- Overlooking procurement of critical materials.
- Failure to consider physical restraints.
- Failure to consider weather restraints.
- Failure to consider resources.
- Failure to consider the economics of the sequencing.
- Failure to consider uncertainty and risk in establishing durations.
- Schedule does not “tie in” to the anticipated means and methods and/or estimate.
- Logic intentionally deviates from the manner in which the contractor intends to build the project.
- Elimination of float by increasing durations.
- Unrealistic productivity or durations.
- The schedule submitted to the owner was not used to build the project.
In **Lane-Verdugo, ASBCA 16,327, 73-2 BCA Section 10,271 (1973)**, the contractor sought an equitable adjustment on a building contract for delays caused by the government. The contractor offered several CPM networks into evidence in order to establish delay, but offered no testimony or other evidence to show what information was input into the scheduling process or the accuracy of such information. Indeed, the contractor’s own scheduling consultant testified that he could only rely on information given to him from the contractor and, if the contractor is incorrect, then the schedule will be incorrect. Since no evidence was introduced to show how the schedule was prepared and whether the data were accurate, the Board ruled against the contractor.

Likewise, in **Chaney & James Construction Co., 66-2 BCA Section 6066 (1966)**, the contractor attempted to introduce into evidence a CPM schedule to help it prove its claim. However, in court, the contractor could not show the adequacy of the data that were used to prepare the chart or even why the CPM schedule was prepared in the first place. For example, the contractor’s president testified that the CPM schedule was not utilized by the contractor for either the bidding or construction phases. The Board had little trouble in denying the contractor’s claim.

In **Edwin J. Dobson, Jr., Inc. v. Rutgers, 384 A.2d 1121 (1978)**, the owner contracted for the services of a CPM consultant to aid the contractor in scheduling the work. After award, the contractor was to incorporate the schedule jointly determined as his own. The court noted that the CPM schedule used to build the project was inadequate as evidence because there was insufficient data for a plan for the project to exist. Procurement activities which were specifically called for by the contract were not included as part of the CPM schedule. Since the procurement information was incomplete, the CPM schedule was also incomplete. Therefore, the contractor had no basis for relying upon the CPM schedule to prove its delay claim. The court did not suggest that its ruling was limited only to cases where procurement activities were left out of the schedule. Therefore, this case also stands for the proposition that any failure to complete a schedule renders such schedule worthless for use at trial.
Courts and Boards will also not rely upon schedules which are not properly thought out and which do not consider problems relating to the performance of the work pursuant to the schedule. For example, in *Joseph E. Bennett Co.*, GSBCA No. 2362, 72-1 BCA Section 9364 (1972), the contractor was to do certain excavation and compact fill work in New England. The scheduled indicated that fill would be placed from December through March of the following year. The contractor had not bothered to consider the practical – if not insurmountable – difficulty of compacting fill on frozen ground. Because the schedule had no practical basis, it was considered by the Board to not be fully reliable as evidence.

In *E. C. Ernst, Inc. v. Manhattan Construction Co. of Texas*, 387 F.Supp. 1001 (S.D. Ala. 1974), the general contractor prepared a bar chart schedule for the project, which reflected start and stop dates. However, the contractor actually intended to take an additional one year beyond the required completion date to do the work. The contract provided that the one year penalty could be had without penalty. The schedule which was submitted to the owner and subcontractors did not reflect the contractor’s intention to use the additional year. Because the contractor had no faith in its prepared schedule, neither did the court. Conversely, contractors seem to have the greatest success in establishing the benchmark when they can prove that their initial schedule was realistic and accurate and that it was based on consideration of all relevant factors affecting the work.

Recently, in *Titan Pacific Constr. Corp. v. United States*, 17 Ct. Cl. 630 (1989), the Claims Court rejected a revised “as planned” schedule that Titan’s scheduling expert had adjusted for seasonal considerations. The Court noted: “The approved CPM network diagram is an administrative tool that is useful in organizing and directing work, reporting progress, and requesting progress payments for work accomplished. Analyses made after project completion, however, that make adjustments to attain new and revised projected scheduling depend on theoretical contingencies. They are of limited value.”

### 6.6.2. The As-Built Schedule
1. **Contract Requirements**

Recently, owners have included in their contracts the requirement that schedules be updated during construction to reflect the impact of delays. Many contracts, including the Rio Costilla contract, contain provisions requiring schedule updates using the Time Impact Analysis (TIA) technique. The goal of the TIA is to develop a “stop action” picture of the project each time it experiences a major impact to the schedule. These impact points are known as status dates. The actual project history is determined up to the status date; then the planned duration and sequences are used to forecast the work remaining to be completed following a status date.

2. **Recognition of Delays, Disruptions and Time Related Problems**

One of the greatest problems faced by contractors is the recognition of delays, disruptions, and time related problems. This is particularly true on linear type projects where the contractor is able to change the location of its crews when obstacles are encountered. If the delays are not recognized, it is difficult to meet the TIA requirements in the contract.

3. **Evidentiary Issues**
Case Example on:  
**Fortec Constructors v. United States**

Fortec, which built an aircraft fuel maintenance facility, brought suit against the United States, seeking extensions of time for work performed beyond the contract requirements, seeking additional compensation, and seeking remission of liquidated damages assessed by the Government. The contract required a Critical Path Method (CPM) network analysis system. During construction, both parties failed to use the CPM for scheduling purposes. Despite that fact, the Government claimed at the trial that the additional work Fortec was required to perform does not justify any contract time extensions, since the CPM does not show that any of the additional work was on the project’s critical path. In support of its position, the Government relied entirely upon the one and only revision that was made to the CPM. That revision did not show the critical path actually followed during construction. In fact, it showed “removal of telephone poles” to be on the critical path, when in fact, the removal of telephone poles was deleted from the work.

The evidentiary value of the “as-built” schedule is only as good as the documentation which establishes the basis for the data in the schedule. The same rules of evidence apply to as-built schedules that apply to as-built contract proof.

There are many court and Board of Contract Appeals cases where the evidentiary value of the “as-built” schedule was discounted because of the failure of the contractor to update the schedule during construction. In *Natkine v. Fuller*, 347 F.Supp. 17 (W.D. Mo. 1972), the court stated “the critical path plan may become obsolete unless it is kept current.” In *Continental Consolidated Corp.*, ENGBCA 2,743 67-2 BCA Section 6642 (1967), the Board of Contract Appeals noted that the failure to incorporate changes in the work and time extensions will not reflect the current status of the work. As a result, it cannot represent the actual manner in which the project was constructed.

In *Lane-Verdugo*, ASBCA 16,327, 16,328, 73-2 BCA Section 10,271 (1973), the Board of Contract Appeals rejected the CPM analysis because updates made no change in the initial estimates of time actually required to accomplish the work. Also, logic changes made to reflect field conditions were made without changing the initial estimates of activity durations. In *E. C. Ernst, Inc. v. Koppers Co.*, 476 F.Supp. 729 (W.D. Pa. 1979), the court rejected Koppers’ schedule analysis because neither restraints nor durations were updated.

In *Fortec Construction v. United States*, 8 Ct. Cl. 490 (1985), the court recognized that control of the project, as well as the time extension process, is lost if the parties do not properly update the critical path diagram to reflect delays and time extensions. Because changes in contract performance were not integrated into the CPM, it was impossible to determine which activities were on the critical path. As a result, the court refused to permit the Government to use the CPM to assert that a particular activity was critical or non-critical, on schedule or behind.

As seen from the cases discussed above, the reason the courts and Boards of Contract Appeals discount the evidentiary value of the “as-built” schedule when there have been no
updates during construction is the feeling that the “as-built” prepared after the fact is inherently less reliable than updates during construction. The courts and Boards of Contract Appeals realize that “judgments” will have to be made in determining the sequence and start and finish dates of various activities in the after the fact “as-built” schedules.
6.6.3 The But-For Schedule

In proving both the schedule and plan differences and the estimated and actual cost differences, it is essential to be able to prove the cause of the problem and the effect (impact) of the problem on the construction of the project with as much certainty as possible. Many contractors point to one or more changes, differing site conditions and/or delays and ask for the “total time” difference between the “as-planned” and the “as-built” schedules and the “total cost” difference between the estimated and actual costs. The “total time” and “total cost” approaches are the least favored by the courts and Boards of Contract Appeals.

In connection with the schedule and plan differences, the contractor must be able to prove the impact of the delaying event. This is not particularly difficult where there is only one delaying event or when delaying events and their impact are sequential. The problem arises where there are several concurrent delays, some of which the owner bears responsibility and some of which the owner does not bear responsibility. The problem is also acute where the contractor must prove a loss of productivity or inefficiency.

If the schedule has been updated during construction using a Time Impact Analysis (TIA) technique, the job is significantly less difficult. That is because the TIA has developed a “stop action” picture of the project each time a major impact to the schedule was experienced.

If the TIA technique has not been employed, then at the end of the project, an “as-built, but-for” analysis must be done. The first step in this process is to identify all the delays on the project and connect them to the work activities affected. The effectiveness of this effort once again depends on the quality of the project documentation.

In Titan Mountain States Constr. Corp., ASBCA Nos. 22,617, et al. 85-1 BCA Section 17,931, the contractor submitted a delay and impact claim. In support of its claim, Titan presented the testimony of Mr. Webb, who had been Titan’s executive vice president in 1975 and had prepared Titan’s original CPM network for the project and Mr. H. Murray Hohns of Wagner-Hohns-Inglis, Inc., an
expert in construction scheduling and delay analysis reports. Messrs. Webb and Hohns concluded as follows:

(a) Mod. 8 (mechanical, electrical and architectural changes) delayed contract completion by 201 calendar days.

(b) Mod. 13 (kitchen equipment changes) delayed contract completion by 159 calendar days.

(c) Mod. 14 (precast fascia anchor connection changes) delayed contract completion by 69 calendar days.

(d) Mod. 22 (acoustical lay-in ceiling in Area 2) delayed contract completion by 28 calendar days.

(e) The veneer plaster and ceramic tile cracking delayed contract completion by 218 calendar days.

Mr. Webb further testified that the delays to contract completion from the above changes, after adjustment for both concurrency of delays and time extensions previously granted by the Government for those changes, amounted to an additional 141 calendar days beyond June 10, 1977; and that appellant effected a 57 calendar day saving of time as a result of the constructive acceleration occurring in May 1976, so as to allow appellant to achieve substantial completion on September 2, 1977.

Mr. Hohns did not personally examine any CPM printouts, quality control reports, or payrolls; only cursorily reviewed project correspondence or other documents; had no contact, orally or in writing, with any of the subcontractors on the project; and met with Mr. Webb only three or four times in connection with their report. The said report, according to Mr. Hohns, was based principally on the computer updates made during the performance of contract work. Mr. Webb performed no work on the project and had no connection therewith from late 1975 or early 1976 until 1982 when he was consulted to analyze the alleged delays. In preparing his analysis of the effects of
the various modifications, he did not compare many of the CPM updates with Titan’s quality control reports even though some comparisons which he had made showed discrepancies between them. He admitted that without additional reliable information, a comparison of CPM updates with the original CPM schedule discloses only the differences between them, but not the causes of those differences and that contractor errors and inefficiencies were not always reflected in his analysis.

The CPM analysis presented by Titan in connection with this claim does not, in our view, fill the evidentiary voids concerning those modifications since those who prepared it had no knowledge of how the work was performed and how the job progressed other than from somewhat questionable computer updates prepared by others. We agree with Mr. Webb’s testimony that a comparison of CPM updates with the original CPM schedule discloses only the differences between them, but not the causes of those differences. Since Titan has failed to prove that its progress was delayed by Modifications Nos. P00013, P00014, and P00022, time extensions therefore cannot be granted.

In **Titan Pacific Construction Corp. v. United States**, 17 Ct. Cl. 630 (1989), the Board of Contract Appeals and the Claims Court rejected analyses prepared by Titan’s “delay/impact claims expert.” The expert furnished a revised projected schedule he had prepared after contract completion and presented analyses of how owner-caused delays and weather related days affected the revised as-planned schedule. In doing so, he reached a conclusion that a CPM schedule as so adjusted would have a projected completion date of October 29, 1980. The analyses were rejected because the Court and Board found little value in projected schedules prepared after the fact and because the expert never compared either the actual “as-planned” schedule or his revised “as-planned” schedule with the actual activities on the project. The Court stated: “The ‘as-planned’ CPM schedule as adjusted in plaintiff’s (Titan’s) argument has little resemblance to the facts of plaintiff’s actual earth work and road-work operations.”

Once the “as-built” schedule has been prepared and all the delays identified and connected to the work
activities affected, the “as-built” schedule is adjusted to remove all compensable delays. Unfortunately, this approach will not always give a true “but-for” analysis because the compensable delays may have completely changed the sequence of construction or caused work to be done in winter that would have been done in summer. As a result, consideration should be given to adjusting both the activity durations and the sequences to determine how the project would have been built absent the compensable delays.

6.7 HOW THE COURTS/BOARDS LOOK AT NOTICE REQUIREMENTS

Almost all construction contracts require that notice be given as a prerequisite to recovering claimed additional costs. In connection with changed or extra work, typically the contracts require that notice be given before beginning such work. In connection with differing site conditions, typically, the contracts require that the contractor give notice before such conditions are disturbed. In connection with delays and suspensions of work, typically, notice must be given within a certain time period of the act or failure to act by the government that is causing the delay. Owners typically argue that without such notice, they are not in a position to take action to avoid the claim and they are not in a position to keep track of the contractor’s costs that will later be claimed. The courts, particularly state courts, have been sympathetic to owners using the lack of notice as a defense to a claim.

Many valid claims are lost or not settled because of the failure to give notice and document the claim. The following are example cases on notice:

1. **State v. Omega Painting, Inc.**, 463 N.E.2d 287 (Ind. App. 1984). Omega’s contract called for sandblasting and painting several bridge spans in southern Indiana. Omega claimed the inspector required it to blast to a finish higher than the number 6 commercial blast required by the contract. As a consequence of the continuing dispute, the work lasted longer than the contract time and resulted in increased costs for Omega. The road and bridge specifications required the contractor to notify the Engineer in writing if he deemed that
additional compensation was due for work or material not covered by the contract. Omega failed to give written notice, but argued that the state had actual notice by the inspector’s own conduct.

The Court held that Omega’s failure to give written notice barred its claim. The Court stated:

“That section (requiring notice) is clear and unambiguous, absent the requisite written notification, the contractor is without recourse...Absent a showing of waiver, the parties must be deemed to be bound by the plain terms of the contract.”
Case Example on:

NOTICE

Blankenship Construction Company v. North Carolina State Highway Commission,
225 S.E.2d 452 (N.C. App. 1970):

On or about 20 April 1966, Blankenship received an invitation to submit a bid for the Project described above. The Contractor promptly requested plans for the Project. The Contractor had three weeks to prepare its bid. After receiving plans and cross-sections for the Project, the Contractor spent one full day inspecting the site of the Project. They encountered no evidence of rock or other unusual conditions.

The earth work summaries in the surface report disclosed approximately 27,000 cubic yards of rock throughout the Project. An amended earth work summary mailed to the Contractor a few days before the bid was due reflected 135,000 cubic yards of rock. This discrepancy did not pose a serious problem, for the Contractor “did not feel this was inconsistent with the profile sheets [they] already had because by taking the profile sheets and a planimeter [they] came up with approximately 129,000 or 130,000 cubic yards...” The testimony of F. C. Seckler, the employee of the Commission who conducted the subsurface investigation, suggests that the subsurface report mailed to the Contractor did not contain the full extent of his findings; specifically, the report did not indicate the discovery of rock at several drilling stations used for the subsurface investigation.

The proposed contract called for approximately 2,076,000 cubic yards of unclassified excavation, and the Contractor bid $612,420.00 for this item. The bid for unclassified excavation was based on two major cost considerations: first, the estimated quantity of solid rock (130,000 cubic yards) was multiplied by the rate of $1.50 per cubic yard; and the remaining amount of excavation, the so-called “rough excavation,” was calculated at a rate of about $.22 per cubic yard.

As work progressed, the Contractor encountered more rock than originally anticipated. The first cut on the Project was made at Station 180 in July of 1966, and it was mostly rock. Likewise, the next cut consisted of a large quantity of rock. None of this rock appeared in the subsurface information supplied by the Commission. Rather than the original estimate of 130,000 cubic yards, the Contractor’s evidence reveals that between 750,000 and 800,000 cubic yards of rock were encountered on the job.

“Should the Contractor encounter or the Commission discover during the progress of the work conditions at the time differing materially from those indicated in the contract, which conditions could not have been discovered by reasonable examination of the site, the Engineer shall be promptly notified in writing of such condition before they are disturbed. The Engineer will thereupon promptly investigate the conditions and if he finds they do so materially differ and
cause a material increase or decrease in the cost of performance of the contract, an equitable adjustment will be made and a supplemental agreement entered into accordingly.

In the event that the Commission and the Contractor are unable to reach an agreement concerning the alleged changed conditions, the Contractor will be required to keep an accurate and detailed cost record which will indicate not only the cost of the work done under the alleged changed conditions, but the cost of any remaining unaffected quantity of any bid item which has had some of its quantities affected by the alleged changed conditions, and failure to keep such a record shall be a bar to any recovery by reason of such alleged changed conditions. Such cost records will be kept with the same particularity as force account records and the Commission shall be given the same opportunity to supervise and check the keeping of such records as is done in force account work.”

Due to the unexpected quantities of rock, the Contractor fell behind schedule. The construction engineer’s report dated 18 January 1967 contained the following reference to the large quantities of rock:

“Unclassified material has high percentage rock making it ideal for working this time of year. Contractor has placed another culvert crew on project in an attempt to increase culvert construction which is falling behind.”

In April 1967, Malcolm Blankenship called John Davis, the Commission’s Chief Engineer, to discuss the unexpected quantities of rock.

“...I told Mr. Davis this was Malcolm Blankenship, and I would like to come up and discuss the amount of rock on the project with him. He told me that we had bid the job unclassified. I was trying to talk to him about the difference in the amount of rock that we incurred from that shown in the subsurface information and that we were encountering rock throughout the job. He asked me if we received a letter. I told him we did. Then he confirmed that we have received the subsurface information, then he asked me what was on the subsurface information and I told him, but there was a big difference between it and what we found, and I would like to come up to see him. He said it wouldn’t be necessary for me to come up and see him. I would just be wasting my time and his time, too...”

Malcolm Blankenship kept a regular record of significant occurrences on the job by making notations almost daily on his personal set of plans. Approximately one year after the completion of the Project, Blankenship filed a claim for additional compensation in the amount of $4,167,276.30.

The North Carolina Court of Appeals ruled against Blankenship. It stated: “Strict compliance with the contract provisions is a vital prerequisite for recovery of additional
compensation based on altered work, changed conditions or extra work.... While the form of the notice--or oral--may not be critical, the content of the notice must satisfy the underlying purpose of the notice requirement.
6.8 **How the Courts/Boards Look at Documentation of the Variance**

As stated previously, the contractor has the burden of proving he is performing changed or additional work, is encountering a differing site condition or is being delayed. This burden of proof requires documentation in the field that will meet the evidentiary standards in court. Documentation is a procedure for recording and authenticating real-world events for a selective retrieval at a later date. To understand the importance of documentation, one must understand the rules of evidence. These rules are what a court follows in deciding what evidence may be seen or heard (and therefore considered) by juries or judges. The limits on admissibility of evidence have an important underlying purpose assurance of trustworthiness and credibility.

One perpetually troublesome area of evidence admissibility for contractors has been hearsay. Hearsay is defined in the Federal Rules of Evidence as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” As a general rule, hearsay is not admissible as evidence in court. However, there are exceptions to the hearsay rule. Three important exceptions for contractors are (1) the recorded recollection exception, (2) the records of a regularly conducted activity exception, and (3) the absence of entry of records of a regularly conducted activity. The Federal Rules of Evidence defining these terms are:

(1) **Recorded Recollection:** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly.

(2) **Records of Regularly Conducted Activity:** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the
course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless circumstances indicate lack of trustworthiness.

(3) **ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY:**
Evidence that a matter is not included in the memoranda, reports, records, or data compilation, in any form, of a regularly conducted activity, to prove the non-occurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

Many recent court decisions describe the importance of documentation of evidence. These decisions make the following important points:

- The most important documents the contractor can prepare and keep are the daily reports and diaries.
- Daily reports and diaries cannot be prepared after the fact.
- Daily reports can be admitted into evidence because they are not prepared especially for litigation but for the efficient and effective running of a business.
- When daily reports satisfy the rule of evidence requirements, they can be used as evidence, even if the person who prepared them is not present or available.

One example of the importance of daily records and of a subcontractor’s loss of a claim for labor and materials furnished to a prime contractor is **Hallmark Builders, Inc.**
v. L. L. Anthony, 547 S.W.2d 681 (Texas App. 1977).
At the trial, the court learned that the subcontractor kept records of material used each day in a notebook that he kept in his truck. The subcontractor testified that when he completed a job he or his secretary would prepare invoices and destroy his notebook. These invoices did not list dates that certain items had been furnished. The court would not admit the invoices as evidence because they were summaries, not actual records, and because they were prepared several months after a completed job.
Ray D. Lowder, Inc. submitted the low bid of $1,040,418.21 to construct a portion of Interstate 95 located in Nash County, North Carolina.

This litigation arises out of an overrun of the contract estimate of roadbed undercut requirements. Item 22B of the itemized proposals, a part of the contract, called for the removal of 12,000 cubic yards of undercut excavation. Lowder submitted a unit price bid of fifty cents ($.50) per cubic yard for this excavation. By the time the project was accepted by the Commission on 28 March 1967, some six months behind schedule, Lowder had removed 259,729 cubic yards of undercut excavation. This amounted to a 2,064.58 percent overrun in the amount of undercut excavation and a 29.7 percent overrun of the entire contract.

The Court found Lowder had encountered a differing site condition. The Court then turned to whether Lowder’s compilation of damages report qualified as a record made in the regular course of business so as to permit its admission into evidence as an exception to the hearsay rule. The compilation of damages report, which the Commission argued was improperly admitted, was divided into three parts. Part A was a claim for additional compensation by reason of rental of extra equipment for undercut excavation in the amount of $94,310.14. Part B was a claim for additional compensation for labor in the amount of $24,343.67. Part C was a claim for additional compensation for expenses incurred between 1 October 1966, the original deadline, and 30 March 1967, two days after the project was accepted by the Commission. The Part C total was $362,597.92. The aggregate total, less the $129,874.64 paid at the unit bid price by the Commission to Lowder for the overrun was $251,377.09.

The compilation of damages summary was taken from an analysis of daily reports prepared by Grady Meisenheimer, Lowder’s superintendent during most of the construction of Project 8.11618. Meisenheimer testified that he kept daily records of “laborers, machinery, and the type of work that we were doing on the job...” These reports were filled out each day after work had stopped, and were mailed each night to the Lowder home office in Albemarle. After lying “fallow” for several years in Lowder’s files, the reports were used to prepare the compilation of the damages report. Mrs. Nell Poplin, secretary-treasurer of Lowder and “custodian of the financial records,” stated that Lowder compiled its information from the daily reports and from an analysis of the reports which had been prepared by Meisenheimer. Poplin testified that “[w]e would take the equipment that was used on the undercut excavation, the men who were the operators of that equipment, and the number of hours each worked, equipment and men. We took off the equipment, the materials that he received, the number of people on the payroll, the total of skilled, total of unskilled, all the information he had .... We have carefully examined the daily reports prepared by Lowder’s superintendents during construction of Project 8.1161. Each report is made on a loose leaf, printed form. On the front side of the form, there are spaces for reporting weather conditions, the work day, and the number of skilled and unskilled laborers present. The majority of space is allocated to three headings: ‘Road Way,’ ‘
Pipe Lines,’ and ‘Clearing.’ Some space is reserved for Remarks.’ On the back side of the form there are two spaces: one is reserved for the listing of ‘Material Received, Borrowed Or Rented,’ the other is reserved for ‘List Of Equipment Nos.’”

During Grady Meisenheimer’s tenure as superintendent, the reports were filled out in some detail. Ample remarks are set out, progress of work is recorded, and equipment on the job site is listed. However, there is, in the majority of the reports, no indication of equipment actually in operation or broken down except as may be reported in “Remarks.” The hours of operation are not set out, and there is no way to tell what equipment was in operation. When equipment appears as “broken down” in the “Remarks,” it also appears in the list of equipment on the job site on the reverse side of the form. The reports filed after Meisenheimer’s departure are practically devoid of information. Little is reported about the nature of work done, and no equipment is listed as being on the job site.

Clyde Huneycutt, Lowder’s president, maintained that “it would be very hard to look at the daily reports and tell who was doing what other than Mr. Grady Meisenheimer.” Similar testimony was elicited from Mrs. Poplin, custodian of the financial records and the official in charge of preparation of the claim for additional compensation: “From the daily reports, I could tell what equipment was on the job. I could not tell what type of work that equipment was being used for. I could tell how many persons were on the job by looking at the daily report. I could not tell what those persons were doing .... I could not tell what equipment was in operation.”

Ray D. Lowder - Court Decision:

The court took great pains to explain the prerequisites for implementing the “business entries” exception to the hearsay rule:

“Had the daily reports not been incomplete, we might not express reservation about the finalized report... It is not our intention to require copious entries in business records. But we are of the opinion that entries should be so complete and in such detail as to indicate that they are reliable and accurate. To report that 36 machines are on a job site on a given day is unsatisfactory. It would be better practice to report not only the number of machines on the job but also the number of machines operating, the task each performs, and the length of time each operates. The product of that kind of record keeping” is more likely to bear the earmark of reliability...

The court found that entries must be original, made in the regular course of business, made contemporaneously with the events recorded, and must be the personal knowledge of the person making them. The court went on to state that systematic checking by businesses along with regular and continuous record keeping as well as the experience of business in relying on their entries are reasons why such entries have traditionally been recognized as being usually reliable. In this case, however, the court felt that the original daily reports were incomplete and that the contractor prepared a report for use only in litigation -- four years after the fact. “It
simply is not the product of an efficient clerical system that has been made in the regular course of business.” When the documents were prepared is also significant to the court.

Harper, Drake & Associates - Court Decision

The Wisconsin Supreme Court denied an architectural firm recovery for services allegedly performed due to inadequate records in the case of Harper, Drake & Associates, Inc. v. Jewett & Sherman, 49 Wis.2d 330, 182 N.W.2d 551 (1971). The firm sued the owner for services rendered. For a variety of reasons, the owner had asked the firm to stop work on the project after it was about one-third complete. The firm had done that portion of the work under oral agreement. The Supreme Court of Wisconsin affirmed the trial court’s rejection of a written summary of hours allegedly spent on the project. The summary had been compiled about a year after the firm had stopped working on the project. The summary was supposedly based on project hours compiled from appointment calendars. While the testifying principal has his appointment book two months before the trial, he did not produce it at the trial. He stated that it had been lost and that he presumed it had been destroyed. The mysterious disappearance of the appointment book and the fact that the compilation summary showed two hours work on the first two days and four hours on the other forty-seven days raised serious questions about the accuracy of the exhibit. Like the Hallmark Builders case, this one emphasizes that records should not be prepared after the fact.

6.8 How Groves Proved Its Claim

The S.J. Groves case was used under 4.0 as a Case Study for Writing a Claim. Here, we will discuss how Groves proved their claim in court.

Entitlement:

Presented contract and subsurface investigative report in evidence, proving representation that “soils should pose no great problems”, groundwater could be drained and any wet materials dried in a balanced grading operation. In summary, the report and plans and specifications presented in evidence showed that NCDOT positively represented that all soils would be suitable for use in embankment fills except for approximately 2,100 cubic yards.

Showed through daily reports that it encountered excessively wet and unsuitable materials and that it was impossible to dry the material sufficiently so that it could be stabilized, sloped and compacted in the fills according to the contract requirements and within the contract time.
NCDOT’s recognition in October of 1973 that if the western two mile portion of Phase I of the Project was ever to be completed, then the unsuitable materials in Black Gap would have to be wasted and the underlying foundation material undercut.

Groves presented three (3) experts in soils mechanics who concluded that slides were caused by excessively wet and unstable materials as contained in the cut areas in their natural and undisturbed state being incompatible with the slope designs in the plans.

NCDOT redesigned the Project and when the remainder was re-bid, the unclassified excavation price was more than double Groves’ price.

Groves presented evidence showing that the materials had excessive natural moisture content in their undisturbed state and that this condition could not be determined by any reasonable examination. Instead, it was necessary to do a lengthy and costly subsurface exploratory program. However, NCDOT and its consultants could have determined the moisture content from the subsurface borings with very little added expense.

Groves’ superintendent testified at length about the actual conditions being too muddy, requiring days of drying and when attempts were made to compact the materials, it was more often than not unsuccessful. Tilling and rolling the material made it even more unstable. Groves’ superintendent presented photograph after photograph of the wet material, deep ruts in the fill area and massive drainage ditches constructed by Groves.

Quantification:

Groves presented evidence showing that the Project as represented was a balanced cut to fill operation. It presented a list of the equipment it had mobilized and its plan of operations, including a plan to work at night.

Groves presented detailed daily reports and cost records showing on an hourly and daily basis: (1) what equipment was being operated; (2) by whom it was being
operated; (3) what aspect of the unclassified excavation work was being performed; and, (4) at what locations.

The hours for labor were matched and cross-referenced from the weekly payrolls and daily reports. Equipment and labor time used and charged to rock borrow were kept separately and not included in the unclassified work account.

Groves deducted from its costs plus markup, the amount it had been paid by NCDOT. Groves accounted for and presented one other method of computing additional unclassified excavation costs. First, it had its superintendent and foreman estimate on a daily basis how much work should have been performed versus how much was actually performed. From this, it estimated “extra effort” costs, which compared very closely with its actual costs.