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PERSPECTIVES

Strategic Management of Builder's Risk Claims in Infrastructure Projects: A Comprehensive Guide

Our perspectives feature the viewpoints of our subject matter experts on current topics and emerging trends.

This article is a tool for stakeholders involved in infrastructure projects. It conveys knowledge about the complexities of builder's risk claims, offering insights into risk management strategies, good practices, and the claims process. By presenting fictionalized real-life case studies, the article enhances understanding and collaboration among project owners, contractors, insurers, and legal professionals, enabling informed decision-making and effective management of risks and claims throughout the construction phase of infrastructure projects.

INTRODUCTION

The concept of builder's risk insurance revolves around providing coverage for potential losses that occur during the construction or renovation of a building or infrastructure project. Builder's risk insurance can also cover losses caused by delays in construction projects due to covered perils, which makes it especially significant in infrastructure projects.

This type of coverage offers comprehensive protection against unforeseen and accidental damages, subject to policy exclusions and limitations. Here are the key aspects of builder's risk insurance and its significance in infrastructure projects:

- The builder's risk insurance policy coverage can be tailored to the specific needs of a project, typically covering property damage or losses resulting from specified exposures such as fire, flooding, certain natural disasters, or errors during construction. The policy duration typically aligns with the construction timeline of the project.
- Builder's risk insurance policies can be obtained by various parties involved in the construction project, including the property owner, general contractor, subcontractors, or other parties with insurable interests. In most cases, however, the building owner or the general contractor (on behalf of the owner) purchases it, as they are usually the most financially invested in a project and would face the greatest loss should something go wrong.
- Builder's risk policies have deductibles, which are the amounts the policyholder is responsible for paying before insurance coverage applies. The policy also has coverage limits, which represent the maximum amount the insurance company will pay for covered losses.
- Builder's risk insurance helps maintain project continuity by providing funds for repairs or replacement of damaged property. It minimizes financial burdens and delays, allowing construction to proceed as planned. It also supports cost control by mitigating unexpected expenses arising from unforeseen events.
- Some builder's risk policies include coverage for certain delay-related losses, soft costs, or delay in start-up (DSU), which are additional expenses incurred due to project delays. Soft costs may include expenses related to extended labor costs, equipment rentals, and increased overhead expenses, project management, financing, design changes, or additional fees resulting from construction delays covered by the policy.

Overall, builder's risk insurance plays a vital role in infrastructure projects by providing financial protection, ensuring project continuity, and minimizing potential losses and liabilities associated with construction-related damages or delays. Its significance lies in safeguarding the interests of the parties involved and supporting the successful completion of construction projects.

J.S. Held does not interpret policies or adjust claims, and the intent of the descriptions above regarding coverage and claims is general industry information.

KEY PLAYERS IN BUILDER'S RISK CLAIMS

In a builder's risk claim, several key players are typically involved, each with their specific roles and responsibilities.

Navigating Through the Roles of Policyholders and Insurers

It's important to note that the specific players and their roles may vary depending on the circumstances of the claim and the policies and procedures of the insurance company. The roles described below provide a general overview of the typical players involved in a builder's risk claim. The main players in a builder's risk claim can include:

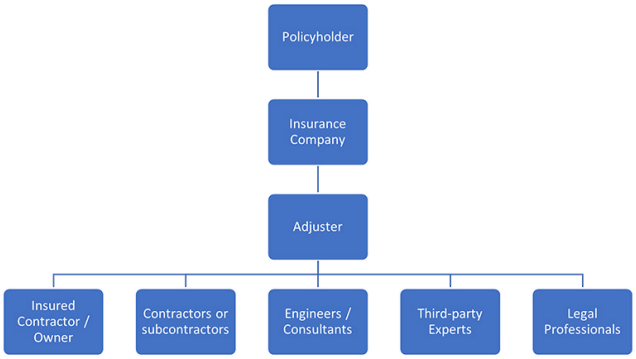

Figure 1 *- Parties typically included in a builder's risk claim.*

The following is a generic description of the roles and responsibilities of the involved parties in a typical builder's risk claim to create a common knowledge base for readers to follow this paper. They, in no way and shape, can be considered a legal definition of the role of the parties.

Policyholder

The policyholder is the entity that purchased the builder's risk insurance policy and has the primary responsibility of notifying the insurance company about the claim, providing relevant documentation, and cooperating throughout the claims process. The policyholder is typically the owner or the main general contractor of the infrastructure project (insured).

Insurance Company

The insurance company underwrites the builder's risk insurance policy. They assess and process the claim filed by the policyholder. The insurance company's role includes investigating the claim, determining coverage, evaluating the damages or losses, and negotiating a settlement. In larger infrastructure projects, typically more than one insurance companies are involved (insurer(s)).

Owner / Insured Contractor

In some cases, the insured contractor or project owner may be directly involved in the claims process. They provide relevant information, documentation, and assistance to the insurance company or claims person during the investigation and evaluation of the claim. Their role may also involve collaborating with the claims person to resolve issues or disputes related to the claim.

Adjuster

The construction claims person or adjuster represents the insurance company and is responsible for handling the builder's risk claim. Their role includes assessing the claim, investigating the damages, determining liability, quantifying losses, negotiating settlements, and ensuring adherence to the policy terms and conditions. They typically retain other professionals on behalf of the insurer(s) to assist them in the loss adjustment.

Contractors or Subcontractors

Contractors or subcontractors who are involved in the construction project may play a role in the claims process. They may provide information, documentation, or expert opinions related to the damages, repairs, or delays. They may also be responsible for carrying out repairs or restoration work as part of the loss remediation.

Engineers / Consultants

Depending on the nature and complexity of the loss/claim, engineers or other specialized consultants may be engaged to assess the damages, evaluate the structural integrity, provide expert opinions, or assist in the quantification of losses. Their role is to provide technical expertise and support in the claims evaluation process.

Third Party Experts

In certain situations, third-party experts may be involved, such as forensic accountants, loss adjusters, and specialists in specific fields related to the claim. They assist in assessing the damages, determining the cause of the loss, or providing expert opinions to support the claim evaluation process.

Legal Professionals

In cases where there are disputes involved in the claim, legal professionals may be engaged to provide legal advice, negotiate settlements, or represent the parties involved in legal proceedings related to the claim.

THE ANATOMY OF A BUILDER'S RISK CLAIM

A builder's risk claim refers to an insurance claim made to cover damages or losses that occur during the construction or renovation of a building. The anatomy of a builder's risk claim typically involves several key components:

- **Notification.** The claim process begins with the policyholder/insured notifies the insurance company promptly about the incident to ensure timely assessment and inspection.
- **Policy documentation.** The insurer, in the case of more than one insurer, the lead insurer and adjuster review the builder's risk insurance policy, including coverage, policy limits, deductibles, and policy period.
- **Investigation.** Once the insurance company receives the claim notification, they investigate. This typically involves sending an adjuster to assess the damage, determine the cause, and evaluate the extent of the loss. Forensics engineers may get retained to assist the adjuster for more complex cases.
- **Causation.** As the first step, the adjuster needs to establish the cause of the loss with assistance from forensics engineers or other experts. Knowing the cause of the loss is critical for insurers to decide whether the policy responds to the loss. The insurer may engage coverage lawyers in more complex cases to assist the insurers in that decision.
- **Damage assessment.** The adjuster or insurer representative evaluates the damage to determine the cost of repairs or replacement. They may work with claims consultant experts or forensic engineers to estimate the necessary expenses, including labor, materials, and any additional costs associated with the restoration process.
- **Claim assessment.** The claims consultant expert will assess the financial impact of the delays on the construction project. This may involve evaluating additional construction costs, extended overhead expenses, delay costs (utilizing delay analysis techniques), increased interest on loans, lost revenue, and any other relevant financial losses. Based on the investigation, delay analysis, and loss quantification, the claims consultant will determine whether the delay claim is valid.
- **Insurer's position.** After assessing the damage, the insurance company calculates the amount to be paid following recommendations from the adjuster and experts based on the policy's coverage and conditions of the policy.
- **Claim settlement.** Damages are finally agreed upon between insurers and the policyholder to cover the loss.
- **Litigation.** In a minority of cases, when a settlement cannot be reached, the insured may start a lawsuit against the insurers.

THE FOCUS ON INFRASTRUCTURE PROJECTS

Builder's risk claims in infrastructure projects present unique considerations and challenges compared to other types of construction projects due to their scale and complexity. Here are some factors to consider:

- **Scale and complexity.** Infrastructure projects, such as bridges, tunnels, railways, hospitals, power plants, or airports, are often large-scale endeavors spanning extended periods—sometimes several years—involving complex designs, systems, and multiple stakeholders. The scale and complexity of these projects increase the potential for unforeseen risks and challenges during construction, making it crucial to have continuous insurance coverage throughout the project and making builder's risk claims more difficult to assess. Identifying the exact causes of delays amidst this complexity poses various challenges.
- **Weather and environmental factors.** Infrastructure projects are often conducted outdoors, making them highly susceptible to weather-related damage. Severe weather events such as storms, floods, and earthquakes can cause significant harm to the construction site and materials, often leading to disputes about the extent of coverage.
- **Unforeseen site conditions.** Infrastructure projects may encounter unexpected ground conditions, such as encountering unstable soil or groundwater during excavation. These conditions can lead to delays and increased costs, which may result in disputes over whether these additional costs may be covered by the builder's risk insurance policy.

- **Multiple stakeholders.** Infrastructure projects involve various stakeholders, including the owner, contractors, subcontractors, engineers, and architects. Disagreements and conflicts among these stakeholders can complicate the claims process, particularly when assigning responsibility for the damage. Pinpointing responsibility for a delay among these parties can be challenging, leading to potential disputes over liability.
- **Design changes.** Infrastructure projects often undergo design changes during construction due to unforeseen challenges or evolving requirements. These changes can impact insurance coverage if they are not adequately communicated to the insurer and updates are not made to the policy.
- **Causation analysis.** Determining whether a delay was caused by a covered liability or by other factors like design changes, scope modifications, or unforeseen ground conditions requires a thorough analysis. When an expert is needed to perform analyses to determine the exact cause of the delay, the process can be difficult.
- **Documentation and record-keeping.** Accurate and comprehensive documentation is essential for successful builder's risk claims. Infrastructure projects generate a vast amount of paperwork/data, and failure to maintain proper records can complicate the claims process and potentially lead to settlement disputes.

Obtaining appropriate builder's risk insurance coverage for infrastructure projects is crucial when considering these unique factors and increased risk factors. Adequate coverage should address the specific risks associated with the project, including the scale, complexity, duration, and environmental factors to mitigate potential financial and operational impacts.

CASE STUDY

We will now look at a fictionalized case study where a major loss event occurred on an infrastructure project triggering an assessment by a forensic engineer and a delay expert to assess the claim and resultant damages.

Project Background and Overview of "Northeast Big Move"

- The "Northeast Big Move" spent six years in development, with a five-year project schedule. The project delivery utilized a public, private partnership contract involving two U.S. states with an Owner Controlled Insurance Program (P3 OCIP).
- This was a $5.2B infrastructure project including nine bridges, a six lane below grade freeway, cut and cover tunnels, interchanges, parklands, and recreational trails.
- The design strives to utilize tunnels to minimize the environmental impact on surroundings and ensure easy access for wildlife.

Figure 2 *- Concept for the "Northeast Big Move."*

INCIDENT ANALYSIS AND IMMEDIATE RESPONSE STRATEGIES

Claim Incident

- During the bridge construction, a few days of heavy rain and a high wind event hit the project site, resulting in significant damage to a partially constructed bridge.
- The storm caused structural failures, including collapsed scaffolding, damage to the bridge deck, and displacement of materials and equipment.
- The insurance policy covered damages caused by severe weather events, including storms, and provided coverage for repair costs and schedule delays.

- One of the girders fell off the abutment and collapsed. Upon further investigation, some cracks were also discovered in the bridge deck.
- Investigations revealed similar cracks on another bridge and another tunnel.
- The project was approximately 60% complete, but behind schedule by two months prior to the incident.

ASSESSMENT PROCESS

Immediate Response

- The insured's project team, including the forensic engineer, in collaboration with the adjuster, conducted an initial inspection of the damage immediately following the storm to assess the extent of the loss.
- Safety precautions were taken in coordination with authorities having jurisdictions (AHJs) to secure the construction site and prevent further damage.

FACTS BEFORE THE INCIDENT

Expert Evaluation

- Expert forensic engineers specializing in bridge construction and structural integrity were engaged to assess the damage.
- The engineer of record (EOR) discovered that the European subcontractor responsible for supplying the project concrete girders had been using "tack weld" to hold rebar cages in place. The girder supplier had used this type of welding on numerous projects in Europe without any problem.
- The EOR believed such welds did not comply with the US national codes and standards, so instructed the use of alternative techniques.
- The subcontractor declined "change of methods" due to significant additional cost and time implications.
- The EOR had elevated the issue to the Department of Transportation (DOT). An intense negotiation was ongoing between the DOT and the subcontractor when the event occurred.

KEY FINDINGS

Cause of the Loss

- A multidisciplinary approach was adopted with a forensic structural engineer, a forensic material engineer, and a delay & impact expert.

- Based on the investigations, it was established that:
  - Tack welds were not in compliance with the applicable codes.
  - Tack welding had no material effect in the crack development.
  - Cracks were developed because of inadequate concrete curing during cold winter nights.
  - Cracks only developed in three structures because they were exposed to the extreme cold period; the other eight condemned structures were in good structural condition.

Damages and Schedule Impact

- The storm caused significant structural damage to the bridge, resulting in a delay of six months in the construction schedule.
- A claims consultant and schedule expert evaluated the impact on the project schedule and cost.
- Repair costs were estimated at $25 million, including the replacement of damaged materials, rebuilding collapsed structures, and ensuring structural stability.

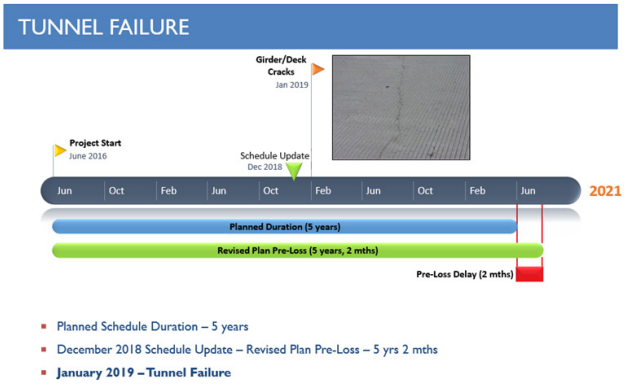

Figure 3 *- Project schedule at the time of tunnel failure.*

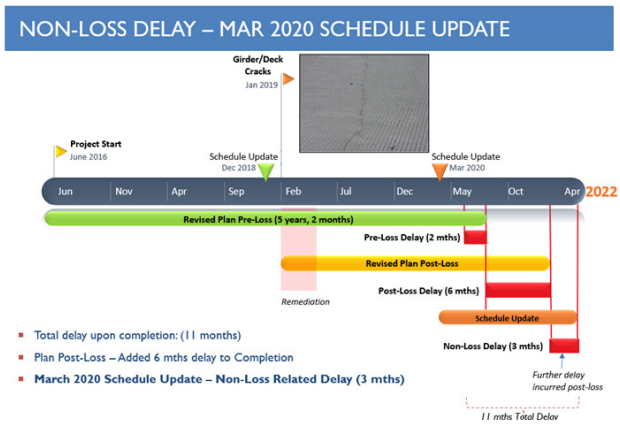

Figure 4 *- Updated project schedule.*

CLAIM RESOLUTION, SETTLEMENT, AND LESSONS LEARNED

Claims Negotiation

- The insured project team, together with the insurance company's claims adjuster, engaged in negotiations to settle the claim.
- The expert claims consultant, in conjunction with the adjuster, assessed the scope of damages and evaluated repair costs and delay costs to determine a fair settlement amount.

Settlement

- After thorough discussions and analysis, a settlement amount of approximately $90 million was agreed upon.
- The insurers disbursed the settlement funds to the insured.

Challenges and Lessons Learned

- The case study demonstrates the significance of engaging experts with specialized knowledge to ensure accurate evaluation of damages and repair costs.
- In complex infrastructure projects, involving expert engineers and consultants to assess damages and provide professional opinions is vital in supporting claim assessment and negotiation.
- By analyzing this case study, infrastructure project stakeholders can gain insights into the claim assessment process, understand challenges associated with builder's risk claims, and apply the lessons learned to enhance risk management and claim handling practices in similar projects.

CONCLUSION: HOW FORENSIC EXPERTS AND DELAY EXPERTS CAN HELP

Builder's risk insurance is essential in infrastructure projects to ensure continuity of the project in case of an incident. This article reinforces the importance of understanding the anatomy of builder's risk claims in infrastructure projects and emphasizes that a comprehensive understanding of the process, key players, and unique challenges enables stakeholders to navigate claims effectively and protect their interests. It is important to work with experienced claims professionals who have expertise in infrastructure projects and who understand the unique challenges and requirements, such as:

Forensic Engineering Experts

- In builder's risk claims, forensic experts can determine the cause of property damage and identify potential fraudulent claims.
- Forensic experts are trained to investigate and analyze the cause of incidents, making the collapse site safe for further investigations.
- They can provide or evaluate repair methodology and scope. Identifying any upgrade in the repair design after the incident.
- They provide objective and unbiased assessments, helping insurance companies in accurate claim evaluations.

Delay Experts

- In builder's risk claims involving delay-related losses, delay experts can quantify the duration and cost of delays, attributing responsibility to relevant parties.
- Delay experts specialize in analyzing construction project schedules and assessing the root cause of delays, reviewing the critical path, evaluating concurrency, considering mitigation efforts, and quantifying the impact of delays on project timelines.
- Their expertise aids in determining the coverage of delay-related losses under the builder's risk insurance policy.

By implementing these practical tips and good practices, policyholders, contractors, and insurance companies can streamline the claims process and avoid common pitfalls in builder's risk claims for infrastructure projects.

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Martin Hoey is an Assistant Managing Director in J.S. Held's Builder's Risk practice. Martin brings over 15 years of experience in construction, insurance, and cost consulting environments to the Builder's Risk team at J.S. Held. His expertise includes project management, project controls, project administration, contract negotiation, and commercial management of construction projects through the project life cycle stages, from pre- to post-construction. Martin possesses a comprehensive understanding of construction scope, time, and cost, supporting his ability to clarify and resolve complex issues and manage the construction claims process. Martin is a leader and independent thinker who understands the impact of unforeseen circumstances and events on the course of construction, as well as the importance of establishing "cause and effect" relationships to substantiate entitlement and liability.

Martin can be reached at martin.hoey@jsheld.com or +1 226 779 2495.

Dr. Farhood Nowzartash is a Senior Vice President and Canada Lead in J.S. Held's Forensic Architecture & Engineering practice. He is a qualified expert witness in Civil/Structural Engineering with a specialty in the forensic investigation of complex construction claims/litigation matters, the standard of care assessment and root cause analysis. He has over 25 years of experience in structural design and construction, including reinforced and pre-stressed concrete, structural steel, formworks, and wood structures. He has been an active member in the design process of multi-story and high-rise buildings, low-rise commercial buildings, bridges, oil and gas pipelines, sports complexes, stadiums, earth shoring, and concrete shoring. In addition, he has extensive experience with forensic investigations, large-scale commercial losses, industrial losses, building systems, surface water management, structural failure analysis, seismic hazard assessment, building rehabilitation, and stress analysis of component failures using Finite Element Modeling.

Dr. Nowzartash can be reached at f.nowzartash@jsheld.com or +1 416 458 2496.