

Dispute Avoidance: A Risk Management Perspective

Whilst perceived wisdom is “Prevention is better than cure”, the focus of attention within the construction industry appears to be on cure not prevention.

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IN DISPUTES, as with many things, the perceived wisdom is that prevention is better than the cure. However, whilst disputes are recognised as a prevalent feature of construction projects, it is generally only when a dispute has materialised that parties become interested. Consequently, much of the focus of attention in dispute management in the Construction Industry is focused on cure rather than prevention. This approach is a major cause of inefficiency and expense. In the report, “*Constructing the Team*”, instigated as a result of concerns over the huge amounts of time and money spent on litigation by the Construction Industry, Sir Michael Latham diagnosed the Construction Industry’s ills of conflict and inefficiency and proposed a course of treatment. However, whilst Latham was advocating that “*the best solution is to avoid disputes,*” the enacted legislation, the Housing Grants, Construction and Regeneration Act, and the statutory adjudication that the act introduced only heightened the focus of attention on cure rather than prevention.

The Risk of Conflict and dispute is always present

Construction projects are unique, covering a myriad of products and skills, conducted in a profit oriented, commercially aware environment. These projects are executed by organisations with potentially opposing objectives, by individuals with different experiences and backgrounds, carrying out complex operations in difficult environments. Decisions are generally made on forecasts of future expectations, usually when the information needed to make those decisions is

incomplete. The scope for uncertainty and change is high and the risk of conflict and dispute is always present.

Many of the causes of disputes are well known by those working in the Construction Industry. The risk of these causes is present in most construction projects from the outset. If not managed effectively, the risks materialise into problems that become differences, developing into claims and eventually graduating into disputes.

In our experience, many of the causes of disputes begin during the procurement process. Consider the following which may seem familiar: tenders sought on insufficient information, inadequate design, ill defined schedules and unclear and inappropriate documentation. These inadequacies are generally as a result of inadequate time being allowed in the design and procurement process of a project. This results in a lack of definition and the creation of unrealistic expectations, often inappropriate procurement and contract strategies, poor contract terms and documentation, inadequate project and supply chain partners.

An essential feature of successful construction is the selection of the right contract strategy based on a clear understanding of the project objectives and the risk facing the achievement of those objectives. After the decision to build is taken, the selection of the procurement and contract strategy becomes the most important decision in the process. This decision impacts everything that follows. Inappropriate or unclear allocation and ownership of risk is one of the most significant causes of project problems. Inappropriate

transfer of risk to a party who is either incapable of managing the risk or not substantial enough to bear the consequences should it materialise, or both, will impact all parties, not only the party the risk was transferred to.

The natural question that this poses is:

“Why are we hellbent on shifting risk regardless of the potential consequences?”

The selection of appropriate resources, whether these are internal resources or external partners, is equally of vital importance and another key feature in project failure if the wrong decisions are made. This can manifest itself in the selection of inappropriate contract administrators, contractors and sub-contractors for a particular project or contractors failing to employ and maintain appropriate contract and commercial management resources to manage projects. Deployment of resources that lack knowledge of contract, management and commercial issues leads to a failure to manage projects effectively. Inadequate and inexperienced resources fail to anticipate risks or recognise problems and generally compound issues by their inappropriate responses.

The failure of employers to clearly articulate their requirements into clear unambiguous documentation generally results in late and excessive change during the contract period when employers realise that they are not getting what they thought they were going to get. Contractors and sub-contractors are generally expected by employers to accommodate such changes within the construction programme with minimal recompense in return. Consequently this is a major cause of disputes in the construction industry.

Another common problem occurs as a result of contractors wanting to avoid excessive controversy and not appear too ‘claims conscious’. The mould for this is usually set in the honeymoon period at the outset of the project and sets the scene for the remainder of the project. This leads to contractors not asserting their rights at an appropriate time and can lead to major

difficulties if contractors attempt to assert those rights long after the event. As a result, contractors fail to comply with the contractual requirements for notification or substantiation and employers are not informed at an appropriate time to allow them to make necessary decisions to mitigate the impact of issues.

The causes of many disputes can be identified and managed

In our experience, many of the causes of disputes can be identified, quantified and managed to either minimise or avoid entirely. An important first step in the avoidance of disputes is acknowledging that, to some extent, conflict between different groups, in particular, in project environments is inevitable. The opposite, the ostrich approach of “won’t happen”, will, at best, put off the inevitable and, more likely, compound the problem. Most problems arise from simple and avoidable events.

The key is the early identification and appropriate management of the risks that cause problems and disputes to occur. Identified risks then become management issues that can be addressed in the same way as any other management issue. Risk management can be carried out in a variety of different ways, but generally involves the identification, quantification and management of risks and uncertainty. An effective risk management process needs to be planned to ensure that it can be employed throughout the construction process to maximum benefit. This includes planning the appropriate resources to be employed, the methods and techniques to be used and the stages in the project when to deploy these resources. It is essential that all the key project players are engaged and have bought in to the process. It is their skill, knowledge and experience that will be used during the identification stage and they will generally be responsible for ensuring that responses are effectively implemented.

The identification of risk is key to the whole process. Only when risks have been identified can they be quantified and managed.

Quantification can be undertaken in a variety of different ways and is necessary to allow management to focus their activities on those areas requiring the most attention. To ensure that actions and activities are completed at the right time, it is essential to identify those accountable and responsible for carrying out the activities and that clear actions and timescales are effectively communicated.

Effective risk management provides a greater understanding of the project objectives and the risks facing the achievement of those objectives. This means that projects are sanctioned with the knowledge of the risks facing them. The improved definition assists with the selection and development of appropriate procurement and contract strategies based on clear objectives and the known risks. Greater definition also minimises ambiguities in documentation and can remove them entirely. This ensures that parties have a shared understanding of expectations and clear knowledge of their responsibilities. This has the effect of reducing tension and minimising the potential for conflict.

Knowledge of risk facilitates the proper allocation to right contracting party by the selection of appropriate contract conditions based on the risks facing the project and the ability of the parties to manage and absorb the risks. Greater understanding of projects also improves scope definition during the procurement stage. Options are considered and themes developed which in turn reduces the chance of surprises and change that need to be accommodated and managed during the project execution stage. Clear unambiguous documentation and appropriate procurement and contract strategies lead to the selection of appropriate contracting and supply chain partners capable of delivering projects. The improved clarity in the project documentation and the effective use

of risk management assists with the contractor's greater understanding of project, the allocation of risks, roles and responsibilities to enable them to deploy appropriate teams and individuals to deliver projects. Doing this ensures that only those with the requisite skills, knowledge and experience are deployed to projects.

Disputes that could have been avoided will continue to occur

Effective risk management techniques seek to predict possible future events, their probability of occurrence and potential impact together with the development of response strategies and plans. The aim is to manage and control risks to avoid the causes of disputes. Techniques can be employed throughout the project life cycle from the selection of appropriate procurement and contract strategies, the selection of contracting partners and managing project delivery, through to assisting the creation of dispute resolution strategies. Carried out effectively, risk management improves delivery of project objectives and minimises the occurrence of disputes. Successful projects that are free from disputes do not happen by accident, the risk of dispute was present in these projects at the outset, the key is that the risk of dispute was identified, managed and avoided.

Our experience, whether in disputes involving domestic sub-contractors on building refurbishments in Wigan, or a multi million pound off shore development between major international organisations in the Mediterranean, tells us that many of the issues are similar. It is the parties, the scope and extent that vary. The most striking reoccurring theme is that parties only sit up and take notice when a problem occurs. Unfortunately, at this stage the available options become limited and the parties have to spend money to either defend or promote their position. The painful lesson for the parties is that the cost of managing the dispute at this stage is generally much greater than the investment needed at the outset of the project to avoid disputes occurring in the first place. Win-win opportunities at the

outset are replaced with after-the-event situations with no real winners.

A variety of reasons prevail that may explain why this is allowed to happen; ranging from lack of education and training, the focus of attention on resolution promoted by those with vested interests or that fire-fighting activities are more glamorous than proactive methodical management. Whatever the reason, the focus

on cure rather than prevention reinforces the adversarial view of an industry that continues to spend huge amounts of time and money on the resolution of disputes. Until appropriate recognition and resources are deployed to the avoidance of disputes, disputes that could have been avoided will continue to be a significant financial drain on the industry.

In writing this article, I was assisted by my colleague Damian Wilkinson who I thank for his tireless efforts.

Armstrong Davis Associates - a global specialist in dispute avoidance, dispute resolution together with complementary commercial services to the construction, energy, oil, gas and petrochemical industries.



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