

CONSTRUCTION DOCUMENTATION PREPARATION – PROTECTING THE EMPLOYER WITHOUT BEING UNFAIR TO THE CONTRACTOR

ACKNOWLEDGEMENT

I acknowledge with sincere appreciation the assistance of Professor Doug Jones AM and John Karantonis of Clayton Utz, Sydney, for reviewing my paper and assisting with the more international references.

DEREK S FIRTH

COMMERCIAL BARRISTER, CHARTERED ARBITRATOR, ADJUDICATOR

ABSTRACT

Many project construction disputes have their origin in:

- **inadequate initial design;**
- **Principals adding Special Conditions which are unnecessarily draconian and grossly unfair to the contractor; or**
- **the contractor, when tendering, introducing clever tags or amendments designed to enable the contractor to:**
 - (a) recover for underbidding;**
 - (b) switch all or part of the works onto a “cost plus” basis in circumstances when that would not normally be permitted to happen;**
 - (c) in other ways, lay the ground for a “claims based” mentality.**

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ABSTRACT

It has become fashionable to endeavour to soften the impact of these tensions through concepts such as partnering, alliancing and sharing in cost savings, whereas a well-drawn contract which correctly and clearly identifies the respective risks taken by the parties may be adequate or even better placed to achieve the same objective.

The thrust of the paper is to identify these common causes of disputes and how to anticipate and address them in the contract in a constructive manner.

The paper includes a number of suggestions and describes the manner in which they have worked in practice and can work alongside the better-known standard forms of contract.

The recommendations in this paper are intended to provide a balanced approach to:

- **secure pricing on a proper basis (not one which is loaded because of unnecessary draconian risks and not one which is light because the Contractor can already see a way of making up the difference!);**
- **provide confidence in the Employer that if there are valid variations, then the resulting extra payment is confined to recognising truly extra work and not work which the Employer thought was going to be covered by the original contract price; and**

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- **put a dampener over the more claims-minded Contractors because they will see that common avenues of claims have been closed off, yet they will be deprived only of the windfall elements.**

Because this paper is addressed to experienced practitioners, it will be sufficient to schedule these causes in summary form. They are not in any particular order of importance.

Common Causes of Disputes:

1. Inadequate or late design for traditional contracts, and an inadequate definition of scope for design build contracts:

- **The rush to get the project started when finance is eventually approved.**

Suggested Solutions:

- **Use the discipline of BIM or a similar approach.**

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Common Causes of Disputes:

- **The tension arising between the designer and the contractor when the designer is also the certifier**
 - ❖ **A temptation to treat what should be variations as “clarifications”.**
 - ❖ **A temptation to resist valid time extension claims when a commercial deadline might be in jeopardy.**

Suggested Solutions:

- **Ensure, where possible, that the certifier is independent – this may result in more variations and time extensions being approved, but this is likely to be more efficient and economical in the long run compared with the agony and predictable adverse results from an arbitration.**

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Common Causes of Disputes:

- **The failure to understand the law relating to “deemed variations”.**
- **Where a variation order is wrongly refused, the Courts have found remedies through recognising deemed variations, or an implied promise to pay, or on the basis that the works ordered are outside the scope of the contract and therefore constitute a separate contract.**

Suggested Solutions:

- **Ensure a more advanced design before pricing.**
- **Ensure for design build that the Employer’s Requirements/Specifications state performance requirements, that is, end results; and not any method.**

Common Causes of Disputes:

2. Inadequate attempts to preserve entitlement to liquidated damages:

- **Under English law, time cannot be extended for prevention or Employer's fault unless this is expressly allowed in a clear contractual provision.**
- **In the absence of a clear contractual provision, prevention or fault by the Employer will result in losing the right to liquidated damages, and time for completion will be set at large.**

Suggested Solutions:

- **It is essential to include an appropriate express provision. Some standard forms do so, others do not, and many bespoke agreements do not.**

Common Causes of Disputes:

3. Inadequate performance specifications:

- **Inadequate performance specifications when the design risk rests with the Contractor.**

Suggested Solutions:

- **Ensure a more advanced design level pricing.**
- **Ensure for design build that the Employer's Requirements/Specifications state end results and not any method.**
- **Ensure that methodology statements are agreed to be provided only for the purpose of demonstrating Contractor capability and that no change to the methodology will, in itself, constitute a variation.**

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Common Causes of Disputes:

Suggested Solutions:

- **With larger projects it can be helpful to have the specifications peer reviewed by independent specialists for the sole purpose of ensuring that the Employer's Requirements are 100% outcomes based.**

Common Causes of Disputes:

4. *The absence of an effective “catch-up” provision:*

- **Inadequacy of old English common law.**
- **Inadequacy of simply requiring expedition.**
- **See the reference to the 2011 UK case (TCC) in which it was held there is no implied term in a construction contract to the effect that a contractor must proceed “regularly and diligently”, even when the contract provides for termination for a failure to proceed regularly and diligently!**

Suggested Solutions:

- **There must be a strong “catch-up” provision requiring additional resources, if necessary, and a deadline by which lost time (for which the Contractor is responsible) must be recovered.**

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Common Causes of Disputes:

- **Inadequacy of some programming requirements.**
- **The temptation for a Contractor to persist with a delay in the hope that there will be a rescuing act of prevention by the Employer.**

Suggested Solutions:

Common Causes of Disputes:

5. The absence of an enforceable acceleration provision

- **Always desirable, but essential if the completion date cannot be deferred; eg to replace a plant which must shut at a certain time, or an hotel opening, or civil works which must be completed before winter.**

Suggested Solutions:

- **A fair acceleration clause will permit the Engineer to require all or part of lost time (for which the Employer is responsible) to be caught up with the additional cost being treated as a variation.**

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Common Causes of Disputes:

- **Compare the cost of catching up one week of lost time near the beginning of the job by meeting the cost of additional pumping to dewater a large site for a plant or a tower building, with the cost of paying to catch up one week during the last month of the project. The difference in cost could be 100 times? 1000 times?**

Suggested Solutions:

- **Surprisingly, very few standard forms permit acceleration as of right – see the Appendix.**

Common Causes of Disputes:

6. The need for an option to accept defective work and receive compensation:

- **The usual contractual rights requiring the remedy of defective work are usually quite adequate if the defective work is to be remedied.**
- **However, having the defective work remedied can sometimes be the worst possible option for an Employer and a Contractor may seek to take advantage of that by avoiding both the remedial work and paying compensation.**

Suggested Solutions:

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Common Causes of Disputes:

- **It is therefore essential for an Employer to have the option to accept defective work and to receive compensation for it.**

Suggested Solutions:

- **Many standard forms do not have such a provision.**
- **However, many contracts in the FIDIC suite do have excellent provisions to this effect.**

Common Causes of Disputes:

7. Difficulties varying a major production run:

- **Suppliers of high value long-lead items (such as trains, aeroplanes and tunnel lining) will often resist a standard variation clause and insist upon their consent.**
- **This is justified (they say) on the basis that subsequent customers and the complexities arising from variations once production has started are such that their agreement must be required.**

Suggested Solutions:

- **A question of negotiation.**
- **Some suppliers will accommodate a reasonably standard variation approach without being able to hold the Purchaser to ransom, but it may mean having separate technical specialists value the cost and appraise any time extension.**

Common Causes of Disputes:

- **The reasoning is quite understandable, but it does mean that in practice the Purchaser can be held to ransom regarding whether or not the work is done, the price to be paid for it, and the amount of any possible delay.**

Suggested Solutions:

- **This may result in the Purchaser withdrawing the request, but at least the Purchaser will not have been held to ransom by the Supplier.**

Common Causes of Disputes:

8. Inadequate attention to limiting ambiguities and discrepancies

- **Sometimes the usual “order of precedence” approach is not adequate and can still leave very difficult issues to be determined in arbitration**

Suggested Solutions:

- **The potential for ambiguities and discrepancies can be further limited by including as a high precedent document a simple statement of the project which I call “Overarching Basis of Agreement”. If such a document states “the deal” in plain language of only a few pages, and is very high in the order of precedence, this can often readily resolve what might otherwise have been an ambiguity or discrepancy.**

Common Causes of Disputes:

9. Inadequate identification of risks

- **Consider the relief with which the “bid team” passes everything over to the “construction team”!**
- **There is a need to identify the risks from a practical construction perspective**
- **This is often easier said than done**

Suggested Solutions:

- **A major Auckland Employer has been experimenting with the inclusion of a “Risk Schedule” – in tabular form – intended to capture all of the significant risks and to summarise the relevant contractual provisions which deal with them.**
- **This approach is not without risk in itself, but it has been helpful so far.**
- **This suggestion is advanced with caution because it might lend itself to some projects but not others.**

Comments on Some Standard Forms

- **The Appendix addresses a number of forms, including:**
 - ❖ **FIDIC Gold Book**
 - ❖ **FIDIC Plant & DB & EPC/T 1999**
 - ❖ **UK, JCT Design-Build Contract Rev 1 2007**
 - ❖ **UK NEC 3**
 - ❖ **Australia – AS 4000 – 1997**
 - ❖ **Australia – AS 4902 – 2000**
 - ❖ **Hong Kong – The Government Conditions of Contract for Building Works 1999**
 - ❖ **Singapore – Building and Construction Authority Public Sector Standard Conditions of Contract for Construction Works 2008**
 - ❖ **New Zealand – NZS 3910:2003**

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Comments on Some Standard Forms

It is recommended that, where appropriate, all of these standard forms, when used, should be amended by Special Condition/Conditions of Particular Application, to adopt the recommended solutions.

It will be seen from the Appendix that most of the standard forms are quite deficient in some particular respects.

Alliancing, Partnering, Target Cost Etc

- A common benefit is a good working relationship.
- But at what cost?
- The latest research in Victoria shows a 50% higher cost than the original business case for the project.
- Compared with an increase of only 20% when traditional forms of contract were used.
- Some New Zealand examples are given showing mixed results.
- There is a need for substantial research into the cost benefit, or just cost of these arrangements.

Concluding Comments

- **Draconian obligations imposed upon a Contractor are generally counter productive and usually do not achieve the desired result.**
- **Equally, Contractors who are obsessed with making claims for every conceivable reason cause enormous damage to the relationship and bring considerable additional expense to both sides.**
- **The popularity of partnering and alliancing and similar arrangements are all born out of the desire to avoid one side or the other from being “stung”.**

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Concluding Comments

- Those arrangements appear to work well in that better relationships develop – but possibly at a high additional cost on some projects.
- It is desirable to identify the recurring causes of disputes and to address them in a fair and balanced manner in the tender documentation.

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