

Avoid a Forest of Confusion



From a recent report on construction disputes², the top five causes of disputes around the globe were published and made for interesting reading. From a Middle East perspective the top five causes of disputes were:

- 1: *'A failure to properly administer the contract'*
- 2: *'Poorly drafted or incomplete and unsubstantiated claims'*
- 3: *'A biased Project Manager or Engineer'*
- 4: *'Failure to make interim awards on extension of time and compensation'* and,
- 5: *'An unrealistic contract completion date being defined at tender stage'*.

From experience, a growing trend in this region are three of the top five causes of disputes listed below:

- 2: *'Poorly drafted or incomplete and unsubstantiated claims'*
- 3: *'A biased -Project Manager or Engineer'*
- 4: *'Failure to make interim awards on extensions of time and compensation'*

These are common issues that Engineer's³ face and in my experience, Engineer's often prevaricate on these matters and become microscopic requesting endless amounts of documents, that in the end, do not help resolve the issues.

Once the contractual "love affair" is over and the volume of claims increase, time passes and those claims remain unresolved and as a consequence, the project becomes a forest of confusion.

Nearing the end of construction projects, Consultants like me are often invited to review unresolved claims for additional time and payment that have been administered poorly and the forest of confusion is deeply rooted.

A theory on why projects become fragmented and are common claim responses:

1. The notices are late and as a result the claims are time barred,
2. A lack of detailed particulars means a proper assessment cannot be undertaken, and
3. The Engineer's duties are limited under their agreement with the Employer.

Below, I match the three selected causes of disputes to what I see as the responses to those causes:

Cause 1: Poorly drafted or incomplete and unsubstantiated claims.

¹ Image from www.pexels.com

² ARCADIS, Global Construction Disputes Report 2015, the Higher the Stakes, the Bigger the Risk, 2015.

³ These could generally be Architectural, Engineering or Project Management consulting firms who take on - duty to administer and determine claims for additional time and payment.

Reason for cause 1: A lack of detailed particulars means a proper assessment cannot be undertaken.

Cause 2: A biased Project Manager or Engineer.

Reason for cause 2: The Engineer's duties are limited under their agreement with the Employer.

Cause 3: Failure to make interim awards on extension of time and compensation.

Reason for cause 3: The notices are late and as a result the claims are time barred.

The intention of this article is to highlight the growing issue of poor administration and late determinations by Engineer's, and illustrate reasonable steps that can be taken to help Engineer's issue timely determinations.

As this article is Middle East based, FIDIC⁴ is the main body of contracts used in the region and Sub-Clause 3.5⁵ states the following:

"Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration]."

On closer review, the Engineer in the process of determining must do the following:

- Consult with the parties in order to reach agreement, and
- If no agreement can be reached between the parties, the Engineer then, must provide a 'fair determination in accordance with the contract and having regard to all the circumstances'.⁶

This is as far as FIDIC goes in setting out a determination process for the Engineer. It is left to the Engineer to decide how to consult, how many consultations are required, how to determine and how long this process takes. But, the determination must be in writing and more importantly, it must be fair and not be unreasonably withheld or delayed.⁷

According to the FIDIC this process has been added to 'discourage procrastination'⁸. Unfortunately that is flourishing in this region. Further, what a 'fair determination' is remains to be clearly defined. What is fair to one person is likely in certain circumstances to be unfair to another.

⁴ International Federation of Consulting Engineers.

⁵ Sub-Clause 3.5 [Determinations] within the FIDIC Silver book is slightly different to the above extract and therefore, the extract above only refers to the FIDIC Red and Yellow books.

⁶ Jeremy Glover and Simon Hughes *Understanding the New FIDIC Red Book* (1st edn, 2006, Sweet & Maxwell, p65).

⁷ FIDIC Conditions of Contract for Construction (the Red and Yellow Books) 1999, Sub-Clause 1.3 [Communications].

⁸ www.fidic.org/node/915, Advanced Questions General Questions/Answers.

The FIDIC Guide states that the consultation step of the determination process is to ‘maintain a co-operative approach and enhance the likelihood of having a successful outcome.’

Back to the purpose of this article, how can the contracting parties *help* the Engineer with timely determinations and dare to say it, make a change to the subsequent report.

Here are five points to consider:

1. **Interfere:** do not interfere or try to influence the Engineer but rather offer help and assistance. Providing help could be; clarifying the relevant points of your claim or providing further particulars that allow your claim to be understood better by the reader.
2. **Honesty:** there is a stigma attached to claims. This stigma is the element of ‘trust’ when claims are received. Engineer’s automatically think that Contractors are ‘trying it on’ and their claims are inflated or exaggerated and that they hide their own problems.

So just be honest with your claim and avoid the element of trust being brought into the circumstances.
3. **Relevant Facts:** understanding what relevant facts are and not what you ‘think’ they are is something worth reading up on. You may not have many facts at your disposal if you are conducting a prospective assessment, however, relevant facts are so important and will help with the forest of confusion.

4. **Marshal records:** that old saying of ‘records, records, records’. The construction industry should know by now the importance of good record keeping. Having good records is just the start. Once you have a record keeping system in place, marshaling those records in order of importance and categorising them to be relevant with a degree of 1 – 3. All irrelevant documents should be set aside.
5. **Demonstrate cause and effect:** This is similar to the importance of good records. Demonstrating cause and effect is a strict requirement in claims – in addition it is likely to be a legal requirement. Without a clear and obvious cause and effect analysis, most claims will fail. Tracking the cause(s) of delay and their effects could easily be based on a simple table format and be traced from something as basic as a letter from the Engineer through several iterations into a change in scope of works and illustrated in a revised programme.

If parties who are submitting claims implement these five points it will certainly help with timely determinations and hopefully make a change to the top five causes of disputes in future reports.

Disclaimer: This article does not constitute advice, legal or otherwise, and is provided to Dispute Boards MENA only as general commentary. Appropriate professional advice should always be obtained before taking or refraining from taking any action in relation to such information and/or the application of applicable law. This article is provided on the basis that all liability for any loss or damage, whether direct or indirect, arising out of or in connection with any use or reliance upon this article is excluded to the fullest extent permitted by law.