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Planning for the Worst to Manage the Best : a Proactive Approach to Managing Construction Disputes



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It has come to be accepted that modern large-scale construction projects are prone to disputes. As a consequence, preventing and managing disputes has become essential to good project management – for owners and contractors alike. Below, we consider some techniques for proactive dispute management throughout the various stages of a project.

It is tempting to think of dispute management as a process that begins only when actual disputes arise. This is a mistake. Indeed, the first step is to prevent the dispute from arising in the first place. Dispute avoidance strategies should be adopted at every stage of the project, beginning with contract negotiation. When negotiating a contract, it is important to consider how disputes typically come about and, to the extent possible, pre-empt them with effective contract terms. For example:

- **Clarity of contract terms.**

Terms should be defined clearly; particularly those key terms that concern payment, risk allocation and scope of work. One way to avoid ambiguity is through the use of standard industry terms or standard form contracts (e.g. FIDIC or ICE), and to resist the temptation to create bespoke provisions.

- **Risk identification and allocation.**

It is good practice to conduct a thorough risk assessment of the proposed contract terms. Where specific risks are identified, they should be allocated to the party who is best placed to control them and bear their costs. General, “catch-all” language can also be used to allocate risks that are not specifically identified (e.g. force majeure).

- **Scope of work.** The scope of work should be defined clearly, with consistent wording and in detail, with additional “catch-all” language used to cover any residual works. The contract also should establish clear policies for handling scope changes that set out, at a minimum: (i) what constitutes a scope change, (ii) how to implement it, and (iii) the rights and liabilities inuring to each party as a result. Good dispute management should continue throughout the execution stages of the project. Broadly, there are three main components to dispute management during execution: communication, monitoring and recordkeeping.

Communication – both internal and inter-party – is essential for dispute avoidance and management. Effective internal communication can limit the risk of different project disciplines acting inconsistently with one another or, worse, with the contract. It also facilitates the early identification of “red flags”. In particular, the design and execution disciplines should interface regularly with the legal and commercial teams to ensure that the works are progressing in accordance with the contract and that any deviations are being identified, thought about and addressed proactively.

Inter-party communication is also fundamentally important, as it helps keep all stakeholders informed of project progress, thus avoiding the unpleasant surprises that often cause parties to escalate their disagreements. Where disagreements do arise, inter-party communication can also be used to ventilate and resolve them early, before they become full-fledged disputes. Such communications should be handled pursuant to an established

protocol that sets, among other things, their timing (e.g. notice requirements), the necessary participants and any formal requirements (e.g. that written minutes be kept).

A formal monitoring framework should also be established to promptly identify and, if need be, escalate problems – especially those concerning schedule slippage, often a catalyst for arbitration. Such a framework should be managed by individuals (e.g. contract managers) with a good understanding of the relevant project disciplines, schedules and contracts. This will help ensure that each identified problem is understood and evaluated to the fullest extent possible, and will facilitate its escalation through the appropriate channels.

Recordkeeping is another essential element of good dispute management. Preparing for a dispute should not be an archaeological exercise; the information needed to support or defend against a claim should be documented in the normal course of business in a form that is easily accessible in case a dispute arises. Project communications, events and transactions should be memorialised in documents that are well-organised (e.g. in a searchable electronic database). This is especially important where the project has suffered from delay or disruption, the causes and effects of which are notoriously difficult to prove retrospectively in the absence of good quality, contemporaneous documents. Finally, yet perhaps most obviously, good dispute management is vital in the case of a live dispute. There are, however, some not-so-obvious considerations that should be kept in mind for when actual disputes arise. These include the following:

- **Prudent communication.** Once a dispute crystallises, special efforts should be made to ensure that communications with the counterparty are clear, in writing and legally and

factually sound. This applies with particular force to formal notices, which should be scrutinised to ensure that they comply with the contractual requirements. Project personnel also should be acutely aware that what they put in writing might be used against their employer in a dispute. This is true even for internal documents, such as emails, which can be subject to mandatory document production in legal proceedings.

- **Deciding whether to file a claim.**

The fact that a dispute has arisen does not necessarily mean a formal claim should be filed. Claims can have serious cost implications – not only in monetary terms, but also in terms of disruption to project management. However, allowing disputes to fester can be equally damaging. These risks should be weighed carefully when deciding whether to file a claim.

- **Mitigating losses.**

In case of a breach, many legal systems require the injured party to take all reasonable steps to minimise its loss. Failure to do so can limit any compensation that is ultimately awarded or, in some jurisdictions, can bar any award of compensation at all. It is important to keep this principle in mind whenever a breach occurs: injured parties should take active steps to mitigate their losses and document those steps, while breaching parties should pay close attention to how their breaches are being addressed by the counterparty.

- **Effective use of external counsel.**

Disputing parties are often reluctant to incur the costs of instructing external counsel until their dispute ends up in litigation or arbitration. However, there are benefits to involving external counsel early on which, in some cases, can be worth the up-front cost. For example, through robust assessment of and advice on the merits of the claims, external counsel can often

help bring about a rapid de-escalation of the dispute, before the need for costly legal proceedings ever arises. And where arbitration or litigation results in any event, external counsel's early involvement will ensure that the written record is developed in a way which best positions the party in that dispute.

The above considerations are presented only as examples of, and not as an exhaustive guide to good dispute management. The real takeaway is that good dispute management should be practiced on every project, from start to finish, and whether or not actual disputes have arisen. Unfortunately, disputes have become a fact of life in the construction industry and a cost of doing business; they therefore represent a key area of risk which deserves constant attention. This will only become truer as projects increase in size and complexity in the future. ■