

ADMINISTRATING THE CONSTRUCTION CONTRACT “OR” MANAGING THE RELATIONSHIP?

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The construction contract conditions shall ideally be drafted in such a manner that provides for a balanced allocation of risks between the parties to any such contract. The project management teams, inclusive of contract administration professionals forming part of such teams, are then faced with decisions that are to be made on day-to-day basis in respect of observing the called-for contractual requirements. Those decisions pertaining to the initiation of claims and contributing to their progression are of the most difficult to administer and put in place, owing to such actions being at times viewed as detrimental to the relationship between the parties, both at the project operational as well as the corporate levels. This paper discusses the factors that come into play when such critical decisions get to be evaluated. As such, it presents a holistic perspective of the kinds of pressure expected to be prevailing over the involved decision-making process. The argued considerations are informed by a number of practical dispute resolution cases and the scenarios that have emanated under them. The paper concludes by providing guidelines that can help draw the line between the necessity of acting in fulfillment of the concerned contract callings and the process of preserving the relationship between the parties to the contract.

Keywords: Claims progression, Risks, Adversarial relations, Disputes, Resolution.

1 INTRODUCTION

The relationship between the owner of a construction project and the contractor selected to perform the works is legally formalized through the execution of a contract. The signature of such a contract represents the agreement of both parties to a set of respective obligations, rights, responsibilities, duties, and liabilities. Unfortunately, contractors often fail to adequately assess the inherent contractual risks and do not come to realize the undesirability of such risks until during the course of construction. In addition, the participants involved in administering these construction contracts are not only likely to be different from those who contributed to the contract negotiation and signature stage but also less knowledgeable about how the encountered risks have been originally assessed. This is aggravated by claims that are inevitably bound to surface, and their administration and potential progression into disputes can adversely affect the working relationship among the concerned participants, at the operational (project) level, as well as between the parties to the contract, at the management (corporate) level.

Raised claims are not to be expected to diminish with time if left unresolved (DiDonato 1993, Harmon 2001). On the contrary, claims evolve into disputes and could lead to negatively

impacting the progress of the project (Harmon 2003), in addition to adversely affecting the communication and relationship of the contracting parties (Jones 1994, Conlin *et al.* 1996, Mix 1997, Arditi *et al.* 1998, Steen and MacPherson 2000, Harmon 2003, Ng *et al.* 2007, Cheung and Pang 2012, Ofori 2013).

2 SCOPE AND METHODOLOGY

The work in this paper aims at highlighting the kinds of pressure that are likely to act on contract administration professionals who are faced on a day-to-day basis with claims/disputes administration decisions. These involve the initiation or notification of claims, the substantiation of the raised claims, the response regarding determinations or decisions given by third-party professionals, as well as the pursuit of their amicable resolution before their progression into litigation or arbitration (as the case may be) becomes more detrimental to the working relationships, both at the operational and management levels.

The work methodology involves (1) constructing the context under which the contracting business operates, by focusing on the Middle East and North Africa (MENA) region; (2) highlighting the pressures that can act on the various gates of the phases forming the claim/dispute involvement timeline; (3) identifying the resulting potential outcomes of such raised claims being either tabled, grouped at a late stage under a global claim, or intimidatingly closed or dropped; and (4) proposing a set of strategies that can assist in achieving a balance between, on the one hand, the criticality of clearly observing the concerned contract provisions and, on the other, the preservation of a minimum degree of healthy communication and cooperation between concerned participants at both operational and management levels.

3 CONSTRUCTION CONTRACTING BUSINESS CULTURE

The construction business in the MENA region can be characterized as a dynamic environment in which unconventional contracting structures can be expected to incessantly transpire. In such structures, a hybrid mix of participants can turn out to be engaged in contractual settings that impose constraints on how various paired contracting parties pursue their respective interests under the corresponding contracts in place. Project developers, contractors, and subcontractors of various strengths, sizes and territories of operation coexist in this construction-vibrant region, with a sizeable portion of these organizations being from outside the region. This is owed to the continuous interest in the scale of project development activities and associated investments that are planned for this region over the many years to come.

Project development organizations, both public and private ones, range in terms of their level of experience in the market and their preparedness to manage complex construction-related contracts. Yet, any such organization, with or without the help of professional advisors, ends up engaging contracting organizations that range from being of a shallow structure that is in place for the sole purpose of subletting the whole of the contracted work to being of a very sophisticated structure that employs its own construction workforce in addition to relying – in accordance with a contractually-stipulated extent – on subletting practices.

On the other hand, it is not uncommon that medium- to large-scale general contracting organizations accept to act as subcontractors to other similarly-sized local or regional contracting companies and definitely to the larger international ones. These and other engagement scenarios can be inferred from the general contracting and subcontracting links depicted in Figure 1. As it can be seen, matching is possible between a developer of any size and complexity and a general contractor of any size and operation territory, whereas subcontracting can take place within any general contractors' group or to a higher- or a lower-tier group.

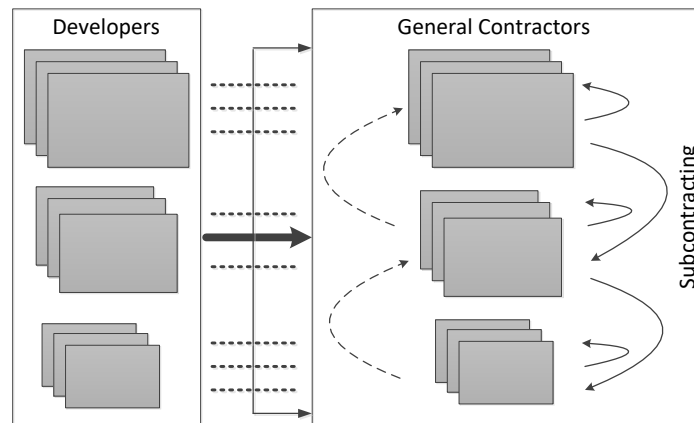


Figure 1. Developers and contractors engagement possibilities.

4 GATE-BASED ADMINISTRATION OF CLAIMS/DISPUTES

Traditionally, contracts incorporated a two-step mechanism for the resolution of disputes (Jessup and Jessup 1963), under which the design professional first determines the eligibility of a contractor's claim before either party making a referral of the dispute to binding adjudication. This approach was adopted based on the fact that the construction industry members believed that the designer is the most suitable party to assess the validity of a proclaimed change based on the intent of his design (Stipanowich 1997). However, in exercising such a quasi-adjudicatory role, the objectivity of the design professional is questioned due to conflict of interest (Cheeks 2003).

The trend in today's complex projects is for the administration of construction claims and disputes to be handled along a multi-step process. Such a process still involves an initial assessment by an engineering professional (but not necessarily the design one), but it also prescribes other alternative methods for approaching the resolution of disputes before finally resorting to litigation or arbitration. Under such mechanisms, contractors' contract administrators are expected to act at various successive gates, in a way that allows for the initiation of claims and for further documentation and debate to take place in respect of the raised claims (Abdul-Malak and Abdulhai 2017). A typical such process for the administration of claims and disputes can be schematically configured, as shown in Figure 2 (FIDIC 1999), in reference to the standard general conditions that are prescribed by the International Federation of Consulting Engineers (FIDIC).

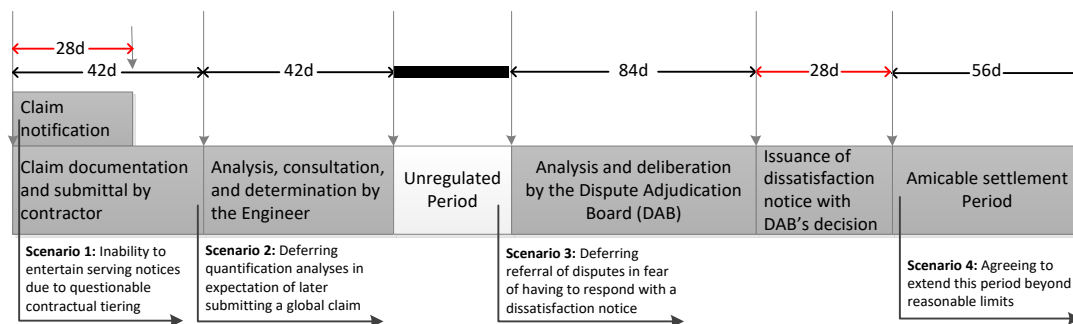


Figure 2. Gated claims/disputes administration stages (Based on FIDIC 1999).

Not only do contractors have to successively act in accordance with such requirements, but their actions are also to be rendered in certain instances within rigid time frames, such as those pertaining to the issuance of a claim notice and a notice of dissatisfaction with an adjudication decision. To this effect, failure to act in a timely fashion on these notices leads to the loss of right for the pursuit of claim and for the referral of dispute to arbitration, respectively. Several reasons have been found to prevail, which can stand in the way of the concerned contractors' contract administrators being able to act in accordance with the contract. To this end, not acting or deferring a warranted action is normally exercised in fear of damaging the relation with the projects' owners. The following scenarios (also laid onto the FIDIC's stages under Figure 1) highlight a number of such instances, to which the author has had firsthand exposure as part of dispute resolution advising roles rendered in connection with the cited cases:

- **Scenario 1.** On a community-type project involving the construction by the government of individual housing units that cater for the needs of early- to middle-career employees, serving a notice for a major claim was hindered by the fact that the general contractor had accepted to enter into a backstage subcontract whose scope was to construct the whole of the works in a shadowing capacity on behalf of the party that secured and signed the general contract with the owner. The claim was concerned with the repercussions of major delays to the works caused by the inability of the government (owner) to timely release to the eligible contracting party the entry visa quota needed for the procurement of construction labor workforce. The conditions that had facilitated arranging for such an engagement structure were behind the contracting contract signatory opting to refrain from raising claims against this governmental client.
- **Scenario 2.** Practices involving the issuance by operational project staff of notices for alleged additional time and/or compensation that were not followed by the submission of supporting particulars in due times have been mistakenly adopted as a way of not escalating the tension with the owner's management level during the course of construction. Such practices were found to be persistently detrimental as they prevented the proper administration of the construction's time schedules and eventually led to the submission of global analyses for requested time extensions, which were more difficult to sell and resolve, given their inherent underlying weaknesses.
- **Scenario 3.** Disagreement discussions concerning the determinations given by the contract engineer have been allowed to drag by deferring the placement of requests for adjudication decisions, in fear that a subsequent notice of dissatisfaction issued in response to any such decision could be highly damaging to the relationship with a high-profile client. This is owed to such a notice being a prerequisite to the establishment of right for referring a dispute in question to arbitration. The ramifications have been in the form of these unresolved claims (whose issued determinations have been disagreed with) becoming more and more complex, particularly when they were time-extension related. Making the referral of those pending claims as disputes to adjudication was acted upon only after the owner had started levying liquidated damages, a quite few months before the then-expected completion date for the works.
- **Scenario 4.** Following the notification of dissatisfaction with the issued adjudication decision, the mutual agreement to extending the amicable settlement period, until either party notifies the other that this stage is considered to have expired, allowed the said period to drag to about ten times the 56-day duration originally assigned to it under the contract. This unreasonably long (on-going) extension has given room for another non-

binding adjudicative process to be initiated, which seems to stand a slim likelihood of being conclusive. Tolerating the length of and the cost associated with such an excessively elongated period for attempting the achievement of an amicable resolution has been in return for deferring the initiation of arbitration, a process the contractor is still adamant not to be wishing to resort to. That is, agreeing to the employment of an alternative dispute resolution process (albeit being non-binding) during the amicable settlement stage is all part of the desire to preserve (or, to say the least, not to cause further damage to) the relationship with this repeat-business client.

The previously mentioned scenarios represent varying forms of claims mishandling through either (a) exercising discretion by not taking an action or deferring a warranted action, as in scenarios 1 and 3 or (b) not satisfying the requirements of submitting detailed particulars in a timely fashion and – instead – speculating on the future success of a global claim, as in scenario 2. While the situation described under scenario 4 cannot be classified as a case of mishandling, together with the situations underlying the first three scenarios have surfaced by way of purportedly aiding the preservation of the relationship with the respective projects' owners.

5 RESPONSIBLE CONTRACT ADMINISTRATION STRATEGIES

The scenarios discussed in the previous section reflect the actions (or the deferral or lack of) that general contractors are found to opt to exercise on construction projects when attempting to weigh in on maintaining a good relation with owners and contract engineers during the course of construction. In this section, strategies that contractors may alternatively embrace in order to more responsibly act or react in accordance with the contract are offered. These can be summarized as follows:

- **Act as being compliant.** The owner is the drafter of the contract; as such, contractors shall assume credit for being compliant with their contracts, and for always acting in accordance with, and within the boundaries of, their contracts' callings.
- **Make explicit reference to contract clauses.** In every instance a written communication is to issued, an explicit reference to the clause requiring the contractor to act or react, as the case may be, shall be made.
- **Pave the way for claim notices.** A close observance of all types of notifications called for under the contract conditions is to be maintained. This can be expected to provide the grounds, and subsequently pave the way, for issuing notices of claims.
- **Do not personalize issued objections.** In expressing objections to determinations, opinions, or decisions given by the contract engineer or adjudicator, contractors shall critique the argument underlying such rendered judgements and not the individual or his/her thinking process. Same as in the case of placing a claim (demand) forward, saying "no" to the engineer's or adjudicator's judgment demands of the contractor to put forward detailed particulars that counter-argue the arguments forming the bases for such judgments.
- **Do not underestimate a claim's lifespan.** By deferring those actions that are otherwise warranted, by way of buying time or postponing the escalation of tension, contractors end up acting at times when many of those staff who have had firsthand knowledge of the claim in question are already away and may not be possible to continue to rely on them in supporting the dispute resolution process. More often than none, contractors come to painfully realize that the lifespan of the claim/dispute outstretches that of the contract's

construction phase if not that of the construction and defects notification phases combined.

6 CONCLUDING REMARKS

It is well established that there is no exact science that underlies the way with which contract administrators approach the administration of construction contracts in practice. A potentially governing factor can be the degree of autonomy operational contract administration staff get to enjoy on one project versus the other. Based on the discussed case-based inferences, it can as such be understood that multiple pressures may overarch the decision-making milestones that spread along the claim/dispute tracking and resolution timeline. To this end, it remains evident that the proper documentation for, and the expeditious tracking of, claims can help better control the length of their lifespan and minimize the chance of their involvement into disputes. By allowing the resolution of claims/disputes to drag can only be expected to contribute to increasing the level of adversarialism of the relationship between the contracting parties.

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