
Dispute avoidance: A risk management perspective

Whilst the perceived wisdom is ‘prevention is better than cure’, the focus of attention in the construction industry is on cure, not prevention

IN disputes, as with many things, the perceived wisdom is that prevention is better than 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 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 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. 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, and of, 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 in the construction industry and 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, can develop into claims and eventually graduate into disputes.

In our experience, many of the causes of disputes commence in 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 allowed in the design and procurement process of a project. This results in a lack of definition and unrealistic expectations, often inappropriate procurement and contract strategies, poor contract terms and documentation, and 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 on 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 subcontractors 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 subcontractors 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 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 be avoided entirely or minimised. 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 ostrich approach of 'won't happen' will, at best, put off the inevitable and more likely compound the problem. However, most problems arise from simple and avoidable events.

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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 the 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 to those involved in the construction process. 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 minimises ambiguities in documentation and can, at best, 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 potential conflict. Knowledge of risk facilitates the proper allocation to the 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 improves scope definition during the procurement stage,

options are considered, and themes developed which, in turn, reduces the chance of surprises and change to be 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 the project and 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 with the selection of appropriate contracting partners and procurement and contract strategies, and by managing project delivery through to assisting the creation of dispute resolution strategies. Carried out effectively, risk management improves delivery of project objectives and can minimise 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 subcontractors on building refurbishments in Wigan or a multimillion-pound offshore 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. 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 expenditure to manage 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 are prevalent which 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 simply that firefighting 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.