



Claims and Dispute Resolution in Construction Industry

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ABSTRACT

Construction industry is one of the major contributors to the development of a nation. The recent developments and trends in construction industry have marked the beginning of a new phase. Traditional methods are being transformed and developed to make them more efficient and effective. Similar transformations have been introduced into construction contracts to achieve better and faster rate of construction. The growing demands of construction industry have given rise to more disputes, delays and consequently more claims. This paper addresses the claims in the construction industry from the view point of types of claims and their statistical patterns. The paper also highlights guidelines to avoid claims and methods of dispute resolution in construction industry.

KEYWORDS : Construction Claims, Types of Claims, Claims Avoidance, Dispute Resolution.

Introduction

Claims are a common occurrence in construction industry [1]. All of the participants in different construction processes have now become increasingly concerned with construction claims. Due to the growing demand of the construction work like residential, non-residential and heavy construction project worldwide as well as risk and complexities associated with work, the number of claims is no-doubt increasing. Construction claims are considered by many of the project participants to be one of the knock-down –drag-out event of a project; however, it is an indispensable part of the modern contract system. Modern contracts are used in a commercial environment which has encouraged the development of claims in construction contracts in recent years [2].

Construction claims dealing with delays are the most complicated and difficult to analyze. Determination of the origin of delay and impact on the job and the responsibilities for the delay can easily lead to conflict. Claim should be a neutral term, however, those request rarely end up in neutral situation rather than often go to the court. This only happens due to the misunderstanding and misinterpretation of the contract terms, nonexistence of non-adversarial relationship and ignorance of the causes of claims

Classification of Claims

1. Classification by Type

(a) Contractual claims: which have a basis in the contract where particular provision can be quoted as giving rise to entitlement.

(b) Extra-contractual claims: also called Common law claims which have no basis in the contract. These are claims for damages for breach of contract at common law and /or legally enforceable claims for breach of some other aspect of the law.

(c) Quantum Meruit claims: provides a remedy for a person who has carried out work where no price has been agreed or where the original contract has been replaced by a new one and payment is claimed for work done under the substituted contract.

(d) Ex-gratia claims: is one in which the employer is under no legal obligation to meet. This is where a contractor is seeking something more tangible than sympathy but where he has no contractual provision to rely upon, where there has been no breach or tort by the employer and the contractor is seeking, as the term suggests, some payment as an act of grace.

2. Classification by Cause of Claim

Poor Planning:

Planning in organizations is both the organizational process of creating and maintaining a plan and the process of thinking about the activities required to create a desired goal on some scale. The project work plan should clearly define the project objectives, scope, assump-

tions, risks, budget, timeline, organization, and overall approach [3]. Some of the examples of poor planning are:

- Planning Errors
- Improper Communication between Parties
- Delay Caused by the Owner
- Change Orders
- Decreased Capital Availability
- Delay in Payment

Scheduling and Estimating Discrepancies:

In simple words, scheduling can be defined as assigning intended start and finish dates to different activities of a project. For proper scheduling to be done, project activities should be well defined under work breakdown structure, an estimate about the expected duration, start and finish dates of activities should be made. Estimating involves calculating cost of the project as a whole and making an estimate about the amount of resources required and that available for different activities. Errors in scheduling and estimating can result in claims.

Incomplete Documentation:

Documentation refers to collection of various documents related to the concerned project. Smooth and uninterrupted progress of project requires complete and proper documentation at each step. Various documents that are of great importance include general and specific conditions, desired standards of materials and quality, detailed plans and drawings and test methods involved. Absence of any of the above written can greatly affect the quality and performance of the project. Some of the circumstances where such situations can erupt are:

- Poorly Written Contract
- Lack of Detailed Drawings and Specifications
- Design Errors and Omissions
- Variation in Quantities and Measurements
- Oral Change Orders

d) Execution Deficiencies:

Execution refers to the stage or time during the life of project when construction of project is carried out. It is stage when the plans and drawings are converted into a real structure. Things differ on paper and in reality and, thus project is likely to face problems during its execution. Some of commonly faced problems are

- Execution Errors and Construction Methods
- Change of Construction Technique by Contractor
- Change in Type of Materials used
- Delay on Part of Contractor
- Sub-Contracting Conflicts
- Site Accidents.
- Termination and/or Suspension of Work

3. Classification by Type of Resulting Delay

A delay is the time during which some part of the construction project has extended or not performed due to an unanticipated event. There are different types of delays [1]:

Excusable Delay: these are all delays for which the contractor is entitled to an extension of time under the contract e.g. failure of owner to provide access to the site, a change in design by the owner, delay caused by unusual weather, strike, acts of God over which contractor has no control etc. Delay must be on the critical path for completion of the project i.e. must directly affect the ultimate completion of the job, in order to warrant a time extension or other recovery.

Non-excusable Delay: these are delays caused by the contractor e.g. failure to coordinate the work, too few men on the job, equipment furnished by the contractor that is delivered too late, low productivity, and defective work that must be removed and replaced and so on. Such delay could be compensable to the owner in the form of liquidated or actual damages paid by the contractor for late completion or could be the basis for termination or for an order to accelerate the work.

Compensable Delay: this entitles a contractor to both an extension of time and additional compensation e.g. scope changes, late supply of owner materials or information, impede site access, out of sequence work requested by the owner and differing site condition. On the other hand, non-compensable delay resulting from the shortcomings of the contractor or its subcontractors and the contractor is not entitled to some extension and may have to accelerate at his own cost.

Concurrent delays: two or more delays occur at the same time, each of which is the responsibility of different party and would have affected ultimate completion date. A critical path method chart or other visual representation of job progress is almost essential in order to analyze overlapping delays.

Parallel delays: this is when two or more delays occurs at the same time, and are the responsibility of same party.

Claims Patterns

As Claims are currently a constant part of every construction project, various stakeholders might turn to statistical data to get a peak view on how much claims are expected to take place in a specific project. In literature a lot of statistics have been made to show claims patterns and frequencies in different sizes and type of projects. A study conducted in 2005 in United Arab Emirates [4] on construction claims documented the major occurrences of type and causes of claims. The study unveiled that change claims, extra-work claims and delay claims are more frequent than other types of claims. The study also unveiled that change orders, delay caused by owner and oral change order by owner are the most frequent causes than other type of causes. Table 1 and 2 show the frequencies of types and causes of claims that take place.

Types of Claims	Importance Index (%)	Rank
Changes claims	60.5	1
Extra-work claims	60.2	2
Delay claims	51.1	3
Different site conditions claims	40.5	4
Acceleration claims	39.1	5
Contract ambiguity claims	32.7	6

Table 1: Ranking of each type of claims based on their frequencies [4]

Causes of Claims	Importance Index (%)	Rank
Change or variation orders	55.0	1
Delay caused by owner	52.5	2
Oral change orders by owner	51.4	3
Delay in payment by owner	48.9	4
Low price of contract due to high competition	48.6	5
Changes in material and labor costs	46.1	6

Owner personality	45.1	7
Variations in quantities	44.7	8
Subcontracting problems	44.0	9
Delay caused by contractor	43.7	10

Table 2: Ranking of each cause of claims based on their frequencies [4]

Claims Avoidance Guidelines

As preparing and presenting claims always turns out to be time consuming and costly process, usually all parties seek avoiding claims. Listed below are the main guidelines that are found essential for avoiding claims.

- Careful preparation of contract documents is required to avoid disputes. The contract document should clearly and concisely mention the scope of the work. A well drafted contract helps in avoiding disputes and misunderstandings.
- It is recommended to have a contract, which is flexible. The contract should clearly define the duties and responsibilities of contractor and owner as well. Proper coordination should be there between architectural and engineering drawings to avoid confusions.
- In order to avoid disputes and claims related to payment, the contract must essentially contain a well defined payment clause. It will reduce the disagreements between the parties and ensure timely payments to the contractor.
- The owner must review the contract carefully and if required, take the services of a consultant and attorney before signing the contract.
- The owner must deal with reputable firms to ensure good quality of construction work. On the other hand, contractor should employ his best men for the job to deliver quality work on time.
- Documentation of day-to-day work is recommended to avoid any disputes or lawsuits.
- Change orders are as important as the original drawings and documents. The owner and the contractor should avoid oral change orders. In order to avoid any confusion and disputes, change orders must be made with proper supporting documents in writing.
- The best way to avoid claims lies in the establishment of healthy relationship between two parties. Disputes should be resolved from the moment they arise.

Dispute Resolution

Dispute resolution in construction industry can be defined as the process of settling disputes between two parties involved in carrying out the project. The nature of projects undertaken in construction industry is very unique for the fact that most of them are one time affairs. A project involves a large number of stakeholders in its execution which can lead to disputes because individuals can differ in their opinions while thinking of an aspect related to the project. A project team can be broadly divided into two groups. They are owner and contractors. The presence of two parties is likely to invite disputes. Disputes arise when the wordings or conditions of contract are unclear. Claims are the major cause of disputes between the two teams [5]. Reasons for claims have been discussed in detail in the previous section. Dispute resolution techniques can be broadly classified as:

Unusual Techniques

These techniques are mainly divided into two methods:

Mediation: in this process of dispute resolution, an impartial person called "mediator" is appointed to help the parties in reaching a mutually acceptable resolution of the dispute. The mediator does not decide about the final result of the dispute. His duty is to help the parties communicate in a better way so that they can try to settle the disputes themselves. Though, in some cases, the mediator may express his views on what might be a fair and reasonable way to reach an agreement.

Negotiations: is a process which tries to settle disputes between the parties involved. This process is different from mediation in the way that, here both parties try to resolve the dispute themselves, whereas, mediator involves the services of a neutral person. In this method, both parties try to understand each other's opinion and work for a fair decision, agreeable to both parties.

Adjudicative Techniques

Adjudicative techniques involve legal action and a judge, jury or an arbitrator determines the result or outcome of the dispute.

Arbitration: a process of resolving disputes in which a neutral person called "arbitrator" is appointed. He hears the arguments and evidences from both parties and then decides the result of the dispute. Arbitration process can further be classified as "BINDING" and "NON BINDING". The difference lies in the fact that in binding arbitration, both parties agree to accept the decision as final, whereas, in non binding arbitration, parties are free to request for a trial, if they feel unsatisfied by the arbitrator's decision [6].

Litigation: is a complete legal progress in which a lawsuit is brought a court, in which one party, who claims to have received damages or losses from other party, seeks an equitable remedy. The court listens to the evidences and arguments from both parties and then gives its decision. The decision given by the court stands final for both parties. This method of dispute resolution is adopted when situation becomes worse or none of the above discussed processes end up in giving a result.

In usual practice, adopting consensual techniques is suggested because of the following advantages:

1. Saves time.
2. Saves money.
3. Preserves relationships between parties
4. Greater involvement of parties in reaching a decision.
5. More satisfactory decision for both the parties.

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