

Common Mistakes Employers Make That Cause Disputes

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It is commonplace for employers to make numerous mistakes on projects that can often lead to unnecessary disputes.

Proceeding with variations before time and cost are agreed upon

It is not unusual for variations to occur on projects, which may be due to additional or changed requirements by the employer and/or contractor, or due to external factors which were unforeseeable by the parties prior to formalisation of the contract.

When the need for a variation arises, decisions are often required to be made by the parties as quickly as possible, in order to minimise or negate potential impact(s) to the progress of the project. This in turn can lead to a scenario where the varied works are carried out prior to the parties negotiating and/or agreeing any time and/or cost implications.

Proceeding with varied work prior to formal agreement between the parties may lead to a scenario where the time/cost implications of a variation may be higher than the employer had anticipated. As such, had the parties negotiated prior to commencement of the variation, the employer may have reached an alternative business decision on whether the variation was worth the impact had it been aware of the cost and/or time implications at the outset.

Using Requests for Information and contract interpretations to correct errors or redesign the project

Contract drawings and/or specifications can often contain errors, and required details/information may be missing which, depending on the responsibility under the particular conditions of contract adopted by the parties, are commonly resolved by the issuance of a variation by the employer, which in turn may lead to time and/or cost implications to the project.

Upon discovering errors or missing information within the contract drawings and/or specifications a contractor is often required to issue the employer with a 'Request for Information'. This in turn can lead to a scenario where employers or design professionals use interpretations or responses to a 'Request for Information' without considering the consequences, and which may inadvertently cause additional expense to the contractor that should actually be borne by the employer.

In order to avoid later disputes between the parties due to such a scenario, the employer should proactively issue variations to the contractor, within which the employer should acknowledge their responsibility under the conditions of contract and instruct, or preferably agree upon a variation order with the contractor.



Objecting to written notices

Many of the commonly adopted standard forms of construction contract contain provisions which stipulate the procedures required for contractors to timeously submit notices if events and/or actions arise that have or may have time and/or cost impacts to the project.

The submission of adequate and timely notices to an employer provides an opportunity for the employer to assess potential risks as they become evident to the contractor. This in turn enables potential time and/or cost impacts to the project to be assessed as they occur, which theoretically at least should be of benefit to both parties by reducing/avoiding disputes at a later date.

Notwithstanding the apparent benefits to both parties in submitting timeous notices, such submissions by contractors are often met with discontent by employers. In fact, some employers will actively attempt to discourage the contractor from fulfilling its obligations under the contract to submit written notices, often on the misunderstanding that the receipt of such a notice may become the catalyst to a dispute between the parties.

To avoid disputes concerning the lack of timely written notices, employers should discuss notice requirements with the contractor and encourage them to submit written notices whenever called for in the contract. This in turn furnishes the employer with an opportunity to consider alternative actions or solutions if required.

Requiring contractors to finance project variations

Construction is commonly undertaken on the basis that the contractor finances the work as the project progresses. As the contractor completes elements of the works, the progress is valued and the contractor is paid for the works it has undertaken.

Instructed variations are sometimes not paid until work is measured by the employer's Quantity Surveyor, and this has the effect of requiring the contractor to finance the employer's variations. As such, employers may unintentionally (or intentionally!) take advantage of the contractor when instructing large value variations, which will take the contractor a considerable time to complete and to recoup its initial outlay. This in turn can lead to potential cash-flow issues for the contractor, which in turn may impact the contractor's ability to finance the remaining works.

In order to avoid a potential dispute when an employer requires a large value variation, the parties should try to negotiate and execute a prospectively priced variation order. Once executed, the variation order can be added as a pay item to the schedule of values and the contractor can seek payment routinely as the variation work is installed.

Refusing to deal with extensions of time in a timely manner

The majority of variations are incorporated by contractors without causing an impact to the project schedule, however some will. The timing of a variation in relation to the stage of the project may lead to some employers holding off from issuing an extension of time. For example, if a variation is issued in the second week of an eighty week project, the employer may try and delay the issuance of an extension of time on the basis that the variation may ultimately have a lessened impact than that claimed by the contractor.



Such inaction by the employer may lead to the contractor inadvertently accelerating the works to minimise its potential exposure, even though the delay was not due to its own actions. This in turn may lead to further complications that could lead to an unnecessarily complex (and often expensive) dispute developing between the parties – which would have been avoided if the employer had adhered to the conditions of contract and granted an extension of time when the impact occurred/became apparent.

Refusing to deal with indirect costs when variation orders are issued

As with the extension of time issue, many employers refuse to deal with the indirect impact of variations that effect matters which are often difficult for a contractor to accurately quantify such as lost productivity, extended site costs, etc.

It is well documented that multiple variations can cause indirect costs that are far in excess of the direct costs. Indirect cost claims often arise at the end of a project as a consequence of the employer refusing to deal with them as they occur throughout the progress of the project. A way to avoid end of project claims is for the employer to work with the contractor when a variation order is being negotiated in order to pre-agree set rates for potential indirect costs that may become a consequence. As such, reasonable indirect costs should, where possible, be included in the variation order.

Summary

Construction projects are a fertile field of endeavor, ripe for disputes. There are many parties involved in a construction project and the opportunity for things to go awry is significant. However, many disputes are self-inflicted. Employers who make one or more of the mistakes above invite such disputes. Each is avoidable if the employer adheres to the terms of their contract, deals with the contractor fairly, and proactively addresses issues as they arise.

Furthermore, it is of the utmost importance that all parties involved in construction projects should ensure that adequate, accurate and where possible agreed records are maintained throughout the progress of the project, thus ensuring that contemporaneous evidence is readily available should a dispute arise between the parties.

It is also important to highlight that the most successful projects (for all parties) are those where communication and relationships, however strained, are managed and maintained throughout the duration of the project. Try and form open and honest relationships from the outset, after all, the parties both have vested interests in the project being a success. The employer wants its project to be completed on time and as specified, therefore enabling it to use the project and commence a revenue stream for its investment. In turn the contractor needs to complete the project as quickly as possible and within specification, which ultimately should enable the contractor to actualise a well-deserved profit!





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Garry Crossley is a Managing Director in the Global Construction Practice of Navigant in Asia and currently based in Singapore. He advises clients internationally on project and programme delivery, strategic issues, contractual risks, contract strategy and due diligence and has over 27 years' experience in Utilities, Oil & Gas, Petrochemicals, Building and Construction, Infrastructure, Transportation, and Aerospace sectors throughout Asia, the Middle East, Eastern and Western Europe, and Africa. Garry has also acted as expert advisor and Expert Witness on delay disputes in arbitration and litigation.

