



ARTICLE

Contract Management – Some Reflections on the Basics

As construction projects become more ambitious, there is usually a concomitant increase in complexity and associated buildability issues. Despite this, projects are required to be constructed to increasingly aggressive programmes. Equally complex procurement routes and onerous contractual arrangements, often with an imbalance in risk apportionment, mean that modern construction projects have a predisposition to the occurrence of disputes.

Whilst not a panacea, proactive Contract Management can go a long way in helping parties avoid disputes or manage any disputes which do occur. This article takes a look at three important elements that form the backbone of a successful Contract Management strategy and how the parties to a construction contract can benefit from them.

FTI Consulting is regularly involved in construction projects at the dispute resolution stage, when the grievances of the parties have been escalated to a formal dispute resolution process (such as arbitration or litigation), and relationships on the project have deteriorated to the extent that the behaviour of the parties has become emotive and they are ‘baying for blood.’

A dramatic metaphor you might think, but frequently, by the time the parties reach this stage they have become firmly entrenched in their respective positions and a ‘won’t give an inch’ or a ‘must win at all costs’ mentality has usually consumed them.

So, can things be done differently during the course of the project to reduce the likelihood of a dispute developing or to enable the project team to more effectively manage any dispute that does arise?

As part of its service platform, FTI Consulting offers its clients full Contract Management support on ‘live’ construction projects, often working on site alongside the incumbent project management teams to strengthen the contract management/administration capabilities, identify potential disputes at an early stage, facilitate the introduction of appropriate avoidance measures, and to prepare in advance for any disputes that do arise.

In FTI Consulting’s experience three key elements stand out as forming the foundation for an effective Contract Management strategy. These are discussed below:



A solid understanding of the contract provisions

Effective contract management starts and ends with being familiar with the contract itself. Often key members of the project team responsible for the management and administration of the contract are not sufficiently familiar with the contract provisions and other documents forming the contract to ensure compliance, preserve contractual entitlement and safeguard a party's position.

The contract provisions set out the parameters by which the parties to the contract are required to conduct themselves and identify the things that the parties 'must do,' the things that the parties 'may do' and the things that the parties 'must not do.' It is therefore imperative that the parties' site representatives are familiar with the contract provisions and requirements to be able to proactively and efficiently administer and manage the contract.

The rules relating to the making of claims, the documents to be submitted and the timing of such submissions are usually set out in express terms in the conditions of contract.

Often, the most administratively complex and prescriptive parts of the contract relate to notice requirements, claims for extensions of time and/or additional payment, and the submission of the requisite supporting particulars.

The notice provisions in the contract govern the conduct of both parties. The contractor is required to observe and comply with the notice provisions and submit timely notices to preserve contractual rights or entitlements, make claims for time and money and to pursue additional payments. The employer, on the other hand, will need to consider the validity of any notices submitted by the contractor and make appropriate decisions to deal with the issues raised in notices, such as considering the potential for the introduction of mitigation measures.

Being familiar with the operation of notice provisions is therefore essential for both the contractor's and employer's project management teams. Key considerations are likely to be:

- Which events require the contractor to issue a written notice;
- Is the giving of notice a condition precedent to entitlement and what are the implications of not complying with a condition precedent;
- When should the relevant notice be issued;
- To whom should the notice be sent, and are there any specific requirements relating to the serving of the notice;
- Is there a prescribed form of notice;
- What information should the notice include;
- What do I do if I receive a notice; and
- Is there a time-period for responding to a notice.

The answer to the preceding questions will, more often than not, be found in the contract provisions.

Accordingly, for contractors, the giving of a notice in compliance with the requirements of the contract to preserve their contractual rights is an important step in the implementation of effective Contract Management. Conversely, employers may be able to rely on condition precedent provisions to rebut claims from contractors or reject a notice on the basis that it does not comply with a condition precedent as to the timing, form or content of the notice.

In FTI Consulting's experience it is common for contractors to refrain from issuing notices under the contract because they do not want to be seen by an employer as 'claims orientated' or 'confrontational' or do not want to do anything that might upset the employer, particularly when a project is in its infancy. Similarly, employers often frown on the issuing of notices by the contractor and will even actively discourage such behaviour. In extreme cases, employers have been known to request the removal from site of a contract manager who is perceived as being 'claims driven' or for 'issuing too many notices.' Faced with such circumstances, the parties should be reminded that they have entered into a contract that contains express notice provisions. Accordingly, in order to protect or preserve their respective contractual rights, the parties are obligated to follow these provisions and are at risk of waiving or foregoing such rights or entitlements for non-compliance.

Failure to comply with conditions precedent for the giving of notices is likely to have significantly more far-reaching implications for a contractor than running the risk of ‘ruffling a few feathers’ at the commencement of a contract by issuing notices. Non-compliance with conditions precedent can lead to contractors waiving entitlement to claim for want of a timely and compliant notice. Despite potential protestations from employers, contractors are advised to ensure that they strictly comply with the express notice provisions in the contract to preserve their entitlements, particularly where such provisions are conditions precedent to making a claim. Similarly, employers are advised not to discourage the giving of notice and to properly consider all such notices and respond appropriately as required by the contract.

Other than notice requirements, there are of course many other areas of a contract where the parties’ familiarity with the contract provisions (and any action contingent thereon) will ensure compliance, and thus avoid allegations from the other party of failure to fulfil express contractual obligations.



Communications between the parties

Construction contracts envisage the exchange of information between the parties and hence effective communications can facilitate the effective management of a project. Types of communications between the parties commonly extend to:

- Letters/correspondence;
- Meetings;
- Instructions;
- Construction drawing issues;
- Contractor’s submissions (including design, materials, equipment and the like);
- Method statements;
- Reports;
- Payment applications;
- Notices;
- Claims submissions;
- Telephone calls, faxes and e-mails; and
- SMS and WhatsApp messages.

The above list is not exhaustive, and it should be recognised by the parties to a contract that all forms of communication may be referred to later in the project, or at the time a dispute materialises. It is therefore essential for the parties to know and understand what the contract requires in respect of communications and any contractual protocols that are to be observed.

It is common under most construction contracts that certain communications are to be in writing or in a particular format, otherwise they are deemed to be of no effect. Such communications would, for example, extend to employers’ instructions, contractors’ notices, payment applications/payment certificates and claims submissions. Again, reference should be made to the individual contract specifics to ensure that any prescribed communication protocols are strictly observed.

As a minimum, all communications should be written concisely and focused on the particular points in issue. The parties should particularly avoid language that could be subject to interpretation, or which is subjective or exaggerated. Potentially inflammatory remarks or comments related to individuals should also be avoided to ensure that all communications are factual and objective. This will reduce the risk of communications being challenged at some later point in the project.

This is particularly relevant given the rapid increase in the use of SMS and WhatsApp messaging to communicate on live construction projects, which can be difficult to monitor and control.

Effective communication is integral to the successful completion of any construction project and is a fundamental requirement of a robust Contract Management strategy and is likely to bring benefits to the parties by promoting the efficient exchange of information, clearly setting out the parties’ respective positions on particular issues, reducing the need for further iterative clarifications and generally reducing the ever-increasing burden of information exchange on live projects.

Conversely, poor or ineffective communications are likely to lead to protracted information exchange, an increased risk of misunderstanding/misinterpretation, and potentially result in an archive of historical data that may well be detrimental to the parties in the event that any disputes that arise are referred to resolution by a tribunal or a court.



Preparing and maintaining accurate project records

Having access to accurate contemporaneous project records and data is essential for effective Contract Management, particularly where an issue escalates, and can make the difference between a robust and convincing claim, or one that is easily dismissed or rebutted for lack of particularisation and want of credible records.

Good record keeping requires an appropriate system to be established at the outset of the project and for the system to be diligently maintained and developed as the project progresses. All project personnel responsible for contract management and administration need to be familiar with the record keeping system and ensure that any records for which they are responsible are regularly identified, compiled, catalogued and filed.

Once records have been compiled, knowing where they are filed and kept, and how to retrieve them is also an essential element of maintaining a practical and effective record keeping system. There is little point in preparing detailed and comprehensive records if project personnel cannot easily access or retrieve them when they need to be reviewed or relied upon. On larger projects, which are likely have many thousands of records, a dedicated and experienced document controller is essential, together with an electronic project document control system which can be adapted to suit the particular needs of the project.

At the outset, the project management team will need to establish, as a minimum:

- The type of data/records that need to be compiled;
- The responsibility for preparing, collating and cataloguing relevant records;
- A repository where records are to be organised and filed;
- Access protocols;
- An archiving system for any records that need to be retained once the project has been completed (and the duration for which such records need to be retained).

Reliable records and data prepared contemporaneously, accurately collated and systematically organised will prove to be an invaluable asset in supporting claims which are referred to dispute resolution, sometimes many years after the project has commenced and the memories of those involved have become jaded.

Examples of commonly prepared site records include:

- Site daily diaries;
- Regular site progress records;
- Instructions to carry out varied or additional work;
- Labour and plant allocation records;
- Site attendance records;
- Written confirmation of instructions given verbally;
- Minutes of meetings;
- Daily correspondence;
- Photographs and videos; and
- Time-lapse camera footage;

Records should be factual and accurate. In the event that a party receives records that it considers are inaccurate, it should identify and report such inaccuracies and, where possible, correct and agree the records so as to avoid the possibility of conflicting records arising at a later date.

Construction contracts may prescribe the types of records that need to be kept and in what format. Failure to comply with any contract record keeping obligations will almost certainly result in rejection of a claim which lacks such records. The best advice therefore is to strictly follow the contract with regards to record keeping protocols.

Often, however, it is the events themselves that dictate the type of records that need to be prepared and retained. For example, accurate survey records of rock head levels to support a claim for additional rock excavation/disposal and detailed labour and plant deployment records to support a claim for accelerated working.

The task of compiling and maintaining comprehensive records as the project progresses can be time consuming and labour intensive but, will ultimately “bear fruit” if the project ends up in dispute and will significantly enhance the chances of a successful outcome in the long run.

A well-organised, properly maintained and archived record system will also ensure that the common 'scramble' to locate records to support or defend a particular claim after the project is complete, can, for the most part, be avoided.

It is worth reiterating that factual records which are prepared contemporaneously as an event develops will carry significantly more weight with a tribunal or a court than records which have been compiled retrospectively, often well after the conclusion of the event. The latter are likely to be inaccurate, unreliable and lacking in credibility and will be at risk of being rejected or dismissed.

Construction disputes can be won or lost on the strength of the evidence presented. Given that all records are potential evidence, accurate contemporaneous records will go a long way to improving a party's chances of success before a tribunal or a court.

Summary

No two construction projects or construction contracts are alike and hence the adoption of appropriate Contract Management strategies will have to be considered on a contract specific basis.

The effective Contract Management of construction projects is a progressive and dynamic process which should be developed based on the nature of the project and the contract employed. The process will need to be adapted or modified as the project progresses, to react to specific events as they occur.

A robust and effective Contract Management strategy is likely to be of significant benefit to parties that find themselves in dispute at some point in a construction project. The considerations addressed in this article are likely to be common to most construction contracts and it would be prudent for project management teams to embrace such procedures as a matter of good practice, where possible.

The matters discussed in this article are however not intended to be an exhaustive or prescriptive guide to effective Contract Management. It is recognised that there are likely to be many other facets of managing a live construction project that will need to be considered, both at the outset of the project and as it progresses.

The views expressed herein are those of the author(s) and not necessarily the views of FTI Consulting, Inc., its management, its subsidiaries, its affiliates, or its other professionals.

FTI Consulting, Inc., including its subsidiaries and affiliates, is a consulting firm and is not a certified public accounting firm or a law firm.

NICK ADAMS

Senior Managing Director
Construction Solutions
+852 3768 4673
nick.adams@fticonsulting.com