

# UNITED KINGDOM

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## CONSTRUCTION CLAIMS MANAGEMENT: A DEFENSIVE, RISK-MANAGED, APPROACH

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### INTRODUCTION

*A construction claim is a high-probability risk; it is a process, not an event.* A construction claim (or claims) can be anticipated, planned for and managed.

In common with all other risks, the higher the degree of anticipation, forethought and pre-planning the greater the likelihood of minimising the impact of the risk and, therefore, the greater the likelihood of achieving the best outcome for the project.

It helps me to think of best-practice claims management as being akin to defensive driving. Defensive driving goes beyond mastery of the rules of the road and the basic mechanics of the vehicle, but rather it seeks to reduce the risk of collision by anticipating dangerous situations despite adverse conditions and the actions of others.

Similarly, best-practice claims management seeks to go beyond the simple understanding of the contract and the basic mechanics of construction. Rather, it can be (and should be) anticipated that the mix of human relationships and the actions of others, conflicting objectives, complex construction processes and unforeseeable adverse conditions can and will conspire to bring the stakeholders in a project, into a collision.

In common with a standard risk-management approach, the process may be divided into three stages:

- Claims avoidance (avoid the risk)
- Reduce or mitigate the impact of claims (risk reduction)
- Deal with the claims (risk acceptance)

The key point is that, at every stage of a risk-managed process, nothing is left to random

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chance. To do so is gambling. A risk-managed process focusses upon the key risks, treating them as an inevitability not as 'black-swan' events. A risk-managed process is an antidote to the optimism-bias that often leads to hope replacing analysis and preparation. Some may say, rather uncharitably, that optimism-bias is simply a euphemism for ignorance, arrogance and complacency; I would prefer to stick to calling it optimism-bias.

Either way, one should always remember; *hope is not a strategy*.

The purpose of this article, therefore, is to provide a framework that will help overcome the optimism-bias that could lead to project failure and to identify how, by taking a defensive risk-managed approach to claims, a collision may be avoided, and/or the consequences minimised. This framework should help preserve the main objectives, which are to secure the best outcome for the project and for all stakeholders to take their share of the value stream.

## CLAIMS AVOIDANCE

This is the first, and least-cost, stage of the risk-managed process. This stage can be sub-divided into two sections:

- Procurement strategy and the contract terms
- Skills and training

### PROCUREMENT STRATEGY AND THE CONTRACT TERMS

Time spent devising an appropriate procurement strategy and carefully crafting the contract terms is a wise investment. The procurement strategy should be firmly grounded in the project objectives which, in turn, are derived from the business case.

The business case, or the substantive elements of it, should always be consulted when devising a procurement strategy. The business case describes the reasons for, and the objective of, the project. It will describe the primary risks, and which risks are to be retained or transferred through the contract. Unless these basic elements are known to the procurement team, it will be unable to satisfactorily devise an effective procurement strategy.

Along with deciding upon where the key risks are retained, such as design, ground conditions and change management, another key consideration is how, if at all, the contractor is incentivised and what behaviours are considered important to the successful conclusion of the project.

So, for example, a 'pain-gain' mechanism which shares cost savings against a target cost may drive behaviours that are not consistent with delivering a project where the emphasis is based upon very high quality.

As a principle of general application, I would advise following the principle laid down in Occam's Razor or the 'law of parsimony', which provides that the simplest solutions tends to be the best solution. In other words, try to avoid over-complicating a contract, either by extensive alterations to standard forms or by making incentive schemes overly complex.

#### SKILLS AND TRAINING

It is axiomatic that suitably qualified and experienced people (SQEP) should be deployed to the project. Far too often have I seen people working on a project, who clearly do not have the right skill-set, simply there because they are available. Remember; *availability is not a qualification.*

In its Global Construction Disputes Report 2018, Arcadis lists the three most common causes of disputes, in priority order, as:



- Failure to properly administer the contract;
- Poorly drafted, or incomplete / unsubstantiated claims; and
- The parties to a contract failing to understand and/or comply with its contractual obligations.

It seems to me that the three common causes of disputes have a clear relationship and may be grouped together under a summary heading of 'lack of appropriate expertise'.

Training is an obvious solution to filling the expertise gap, however, more than just the training of the mechanical process of understanding the contract terms and the respective obligations, I would argue that instilling the right behaviours is equally important if not more so when it comes to implementing the required contract processes.

There is no simpler expression of this principle than the NEC form of contract which, in its latest version NEC4, states at clause 10.1 *“the Parties, the Project Manager, and the Supervisor shall act as stated in the Contract.”* At 10.2 it states; *“The Parties, the Project Manager and the Supervisor act in a spirit of mutual trust and cooperation.”*

These two sub-clauses grouped together in Clause 10 are notable because, uniquely they are more a statement of behavioural expectation rather than an enforceable condition.

I would further argue that behavioural change and, more importantly behavioural alignment, is achieved if the stakeholders to a project can agree upon and remain faithful to a common purpose through the lifetime of the project. From an agreed common purpose will naturally flow sustainable solutions from which all parties benefit.

It is notable that many of the major client organisation, particularly within the water industry, use collaborative behaviours as a key measure of their suppliers as part of the procurement process.

An effective way to achieve both objectives, of increasing technical knowledge and aligning behaviours is to use training sessions at the outset of a project as a team building exercise with all stakeholders to the project as participants.

#### SUMMARY

- Follow a procurement strategy that aligns with the project objectives as defined by the business case;
- Ensure the contract terms encourage the right behaviours in the project stakeholders to drive the project towards its objectives;
- Encourage the alignment of behaviours through joint training sessions at the outset of a project and, where possible, use the training sessions as a team-building event; and,

- Avoid over-complicating the contract terms, particularly any incentivisation scheme, and avoid extensive alterations to standard forms of contract.

## REDUCE OR MITIGATE THE IMPACT OF CLAIMS

There are two broad approaches that can be adopted when trying to mitigate the effect of disputes:

- Project Recovery; and,
- Claims management.

### PROJECT RECOVERY

This a collaborative approach that relies upon the parties understanding that if the project fails then they all fail. The parties put the project first and they seek practical solutions to putting the project back to, or as close as is possible to, where it should be according to the business case.



At its heart is the realisation that seeking ‘winners and losers’ does not produce a solution that satisfies the overall objectives of the project.

This approach is usually at its most effective if the project stakeholders have built a strong collaborative relationship during the earlier stages of the project, and are still fully committed to a strategy of avoiding claims.

Collaborative behaviours alone, however, will not make a project recovery strategy successful. Sound project management and commercial management skills need to be deployed. Setting aside the terms of the contract and associated risk allocation, in the name of collaboration, is almost certainly guaranteed to introduce more problems rather than solving them.

## CLAIMS MANAGEMENT

Arcadis, in its report, has identified poor claims production as the second most common barrier to the early settlement of claims. If the parties do not clearly express their position in their written submissions, it should come as no surprise that claims are not settled quickly.

One of the reasons why claims (and claims defence) are unclear is that the authors, in their desire to advocate their party's best position, often do not clarify their thinking, or ground their stated position in the key facts and the prevailing evidence.

When claims are written (or defended) 'in-house' the main danger that can arise is confirmation bias, or cognitive, bias. Confirmation bias is a tendency to selectively search for, and interpret, information in a way that favours one's pre-existing beliefs, hypotheses or desired outcomes. The more emotionally charged the situation the stronger the likelihood that confirmation bias will be displayed. Claims, because they generally point to the shortcomings of participants in the project, are almost always emotionally charged. For this reason, the probability that confirmation bias will influence the assessment of the parties' relative positions is extremely high.

The way to avoid this is to engage a person, or team of people, who are external to, and independent of, the project who can provide an un-biased assessment of the relative strengths and weaknesses of the parties' positions, based upon the available evidence. To be at its most effective, the assessment of the relative merits, or otherwise, of the claim should be written as if it were an expert's report that would be submitted to a court or tribunal.

The party that invests in this step of having a truly independent assessment of a contractual position, is much better placed to make the correct decision as to the next steps. Furthermore, the next steps are much more likely to achieve a better outcome. For example; based on the independent report it is likely that greater clarity will be achieved in the final claim document, or alternatively it may lead to a party adopting a negotiating strategy to avoid the time and expense of formal documentary submissions.

If the decision is taken to make formal documentary submissions, then clarity is the key. If the evidence has already been independently sifted and assessed, and the principles identified, then it makes for a much easier process for the subsequent quantum assessment and the compilation of the claim (or claim defence) document.

## SUMMARY

- Project recovery relies upon the injection of specific project management skills and the continuation of a collaborative approach that, together, will get the project back on track thus minimising any financial impact;
- Claim management; the key is to avoid confirmation bias. This is best achieved through an independent assessment of the relative position of the parties, upon which the strategy for taking the next steps to settling the claims;
- Take advice from the legal team to ensure the independent consultant maintains its independence and avoids conflict of interest; and,
- Clarity of documentary submissions at this stage will often lead to an earlier settlement.

## DEAL WITH THE CLAIMS

It must be recognised that there are times when even if investment has been made in the first two stages described above, some claims simply do not go away. There are many reasons why this is so, too numerous for this paper. However, if the parties have invested in stages 1 and 2 above, then the reason why formal proceedings may be entered is generally because the parties maintain a genuinely held position. In other words, it is unlikely the parties will be treating this stage as a tactical ploy.

The tendency may be to think that if a claim has gone as far as formal dispute resolution then the investment in the previous two stages has been wasted. On the contrary, if the necessary steps have been taken to avoid or reduce the claims, to have managed the project to bring about the best outcome, and to have taken the time and effort to fully define the respective positions and the documentary submissions have been clear and succinct, then this final stage will benefit from that investment.



For example, if an independent assessment has been carried out, and that person or organisation has properly maintained privilege and avoided conflict of interests, then it will be a relatively simple and inexpensive step to produce a CPR Part 35-compliant expert report that may be submitted into litigation or dispute resolution proceedings.

#### SUMMARY

- Engaging in formal proceedings should not be treated as the start of a new process. Rather it should be viewed as an extension of the same process; and,
- The independent assessment commissioned in the previous stage may be brought forward and used as the basis for experts' reports in this final stage.

#### CONCLUSIONS

This 3-stage, risk-manged approach, applied to construction disputes, provides a client with: -

- A structured approach that seeks to remove disputes, at an early stage and at least cost;
- The tools for better decision making;
- The mindset that 'the project comes first', avoiding the mindset of 'winners and losers';
- Continuity of knowledge through the three stages;
- The right expertise applied at the appropriate time, in a proportionate manner



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## MORE INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at [DGAGroup@dga-group.com](mailto:DGAGroup@dga-group.com)

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