



## CONSTRUCTION CONTRACTS

# Construction claims: no records, more disputes?

**Contract administration is an essential part of every construction project. Not only is this a requirement of every construction contract but it is essential to allow analysts to prepare and defend detailed claims for time and money.**

It will also give experts and tribunals an appreciation of what was happening on a project at any point in time if the claim were to proceed to a formal dispute. In this article we outline why records are crucial for the successful administration of construction contracts and claims, and how they can help mitigate unnecessary costs.

### **Time claims – the importance of records**

The skill of compiling a successful time claim is to recreate the event that caused the delay and apply the details of that particular event to the construction programme relevant at the date of the delay. These events have usually occurred in the relatively distant past and only through the use of records collected at the time of the event can the details be extracted.

The absence of records generally leads to more assumptions being made and increases the likelihood that the claim will escalate into a dispute. It is also worth noting that the cost of producing the claim will be reduced significantly when the necessary records are in place and are easily accessible.

The claim for additional time is generally dovetailed with a claim for additional cost and the same principles regarding records apply.

Records, without exception, are a contractual obligation for all standard forms of construction contract. FIDIC 1999, for example, requires records to be kept for health and safety (Sub-Clause 6.7), the contractor’s personnel and equipment (Sub-Clause 6.10), measurement and evaluation (Sub-Clause 12.1), payments (Clause 14), and more relevantly, for the contractor’s claims (Sub-Clause 20.1). Additionally, all instructions, notices, approvals, certificates, consents, determinations and requests form part of the records that must be maintained.

Other bespoke forms of contract that we encounter in the Middle East are particularly rigorous on the level of detail to be included in monthly reports, and non-compliance can produce onerous consequences, including loss of all entitlement for extra time and/or costs.

Although the contract will be the starting point for the collection of records for claims, it is imperative that all parties have robust procedures in place to document, maintain and store records, outside of those required by the contract.

## Delay and Disruption Protocol – producing successful claims

The Society of Construction Law (SCL) issued the 2nd edition of its Delay and Disruption Protocol in February 2017 and one of the significant updates from the 1st edition is an extensive section on project records. The 2nd edition provides a very useful guide for the level and extent of records that need to be maintained to produce successful claims.

The SCL splits the records into 6 sections:

- 1) Programme;
- 2) Progress;
- 3) Resource;
- 4) Costs;
- 5) Correspondence and administration; and
- 6) Contract and tender documents.

The protocol provides guidance notes under each heading and these are supplemented by an extensive list of the potential documents required under each heading that should be kept and archived.

The main principles accentuated through the document are that records should be maintained by all parties, they should be thorough and extensive and most importantly they should be contemporaneous. The burden of proof for any claim is on the claimant, whether that is the employer, contractor, or subcontractor and proof of a claim is near impossible without sufficient contemporary records.

In recent times, the Middle East has seen an increase in the requirement for records to be kept on projects. Many contracts now include provisions that require a contractor to maintain specific information for inspection by the employer. These same contemporaneous records are an essential component of a claim and seldom will a contractor's claim succeed without them.

From an employer's perspective, disproving the veracity of such records after the event can be difficult. It is therefore imperative that an employer carefully reviews all project correspondence and progress records during the course of the project and, when necessary, highlight any inaccuracies along the way. By doing so, an employer will be properly equipped to successfully defend a claim from a contractor.

Systems for archiving documents and the formatting of file names are also crucial for ease of access at a later date. Dedicated project cloud-based software systems are now regularly specified on the bigger projects, but a common fault we encounter is a lack of organisation in the filing system or file formatting. Thousands of PDF copies are often dumped into folders with little consistency and with random and varied systems of file names. This generally results in inefficient reviews of the project documentation and additional costs to the party preparing the claim.

## Independent project reviews – avoiding unnecessary costs

The system of record keeping must be set up and implemented from the start of a project. FTI Consulting can advise clients on such matters and we regularly offer this support from a budgeting point of view - we consider that it is useful for parties to conduct independent project reviews. Depending on the size and complexity of a project, these should be done monthly or quarterly and will identify potential claims, determine liability and assess the records that are being maintained. This process will allow for the early adjustment of project budgets.

These measures will guarantee that all the necessary records are in place to substantiate the usual time and cost claims. This small investment, at the outset and throughout the project, will pay dividends by avoiding unnecessary costs to produce the claims with it being shown that the cost of producing a claim is considerably less when the necessary records are in place. More importantly, there will be a greater chance of substantiating and agreeing the claim at an early stage thus avoiding the exorbitant cost of settling the claim through the formal dispute resolution process.

**For further information or to discuss how we can help you please contact Simon Chandler, Senior Director, Construction Solutions - Dubai, on [simon.chandler@fticonsulting.com](mailto:simon.chandler@fticonsulting.com)**



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