



AVOIDING AN ARBITRATION DISPUTE

Manish Gandhi, Arindam Dey

Civil Engineering, NMIMS University, India

gandhimanish92@gmail.com, arindam.dey977@gmail.com

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Abstract: It is a well-known fact that disputes have become an endemic feature of the Indian contract system particularly in departments handling construction activities dealing with large number of contracts to get the various work done in open Line and Construction organizations, if they are not resolved promptly they can escalate causing schedule delays, lead to claims that require litigation proceedings for resolution and destroy business relationships. The competitive nature and contractual complexity inherent within contract system can aggravate the incidence of disputes. Research over the length of time has revealed that factors such as scope changes, poor contract documentation, restricted access, unforeseen ground conditions, and contractual ambiguities are contributors of disputes. While this is widely known, disputes still prevail over such issues. Before disputes can be avoided an understanding of what the underlying conditions that contributes to their occurrence needs to be determined so that mechanisms can be put in place to prevent them from arising. In this paper it is tried to demonstrate the interdependency between key variables that contribute to disputes and to identify a number of strategies that can be adopted to reduce the immediate incidence of disputes in contract system.

Keywords: arbitration, dispute, project, cost, description, specification

I. INTRODUCTION

Significant factors that have been identified as contributing to time and cost overruns in Indian construction projects are rework, variations, incorrect design and incomplete documentation, and late authority approvals. As a result of such issues arising in projects, conflict and disputes may occur, which can lead to the disruption of construction schedules, increased project costs, and even adversely influence relationships between project participants. If a dispute is not resolved promptly, then it may escalate, and ultimately require litigation proceedings, which can be extremely costly for the parties concerned. Lot of research into determining the causes of disputes has been done wherein consistently the same variables are identified and continue to manifest in projects but the factors identified lack contextual meaning. For example, poor communication has been identified as a cause of disputes. Simply improving communication practices by improving information flow with technology or using Computer-Aided-Design will not reduce per se the incidence of disputes in construction. Fundamentally, work processes, policies, and procedures as well behaviours need to change in concert if disputes are to be reduced in Railway contracts system.

II. CONFLICT, CLAIM AND DISPUTE

The terms conflict, claim and dispute are often used interchangeably, but their meanings are very different:

Conflict – “serious disagreement and agreement about something important”. The other detailed definition of conflict as “an expressed struggle between at least two independent parties who perceive incompatible goals, scarce resources, and interference from other achieving those goals”.

Claim – “for the assertion of a right to money, property or remedy. It can also be defined as “a request for compensation for damages incurred by any party to a contract”.

Dispute – “any contract question or controversy that must be settled beyond the jobsite management” i.e. by the higher management or through third party (Arbitral Tribunal).

In an attempt to reduce the incidence of conflicts and disputes; strategies to build trust between parties and improve teamwork, communication, joint problem solving and inter-organizational relationships in projects have been utilized including; alliancing, and partnering arrangements. The use of alliancing and partnering arrangements can enable conflict between parties to be managed to the point of preventing a dispute from emerging. Yet claims are unavoidable and necessary to accommodate unforeseen changes in project conditions in a contractual sense. Essentially, claims in this context are the administrative processes required to handle construction events that take place where the contract “leaves off”– changed conditions, design changes, defective specifications, quantity variations, delays, disruptions and accelerations. While many claims can be resolved harmoniously, the prior presence of conflict between parties may initiate an unnecessary dispute. Disputes should not be demonized, as resolution mechanisms have their place in the construction process. This is especially the case when one-sided amendments to standard forms, often drafted by experts with the objective of improving position of the organization at the exception of fairness; or when the only way in which a party can actually protect their position because the contract conditions promote conflict. Inappropriate risk allocation through disclaimer clauses in contracts is a significant reason for increasing total construction costs. The most common exculpatory clauses used in Railway contractual system are uncertainty of work conditions, delaying events, indemnification, liquidated damages, sufficiency in contract documents due to reason one or so.

III. DISPUTE CAUSATION

In an attempt to examine the causality of disputes the proximate causes identified included: inadequate brief, slow client responses, inaccurate design information, inaccurate design documentation, inappropriate contract form, inadequate contract administration, and inappropriate contractor selection. It is also noticed that a combination of factors of uncertainty, contractual problems and opportunistic behaviour can lead to disputes. The inherent degree of uncertainty that prevails within construction projects can result in planning being a problematic issue, especially when information is not available. When uncertainty is high, initial drawings and specifications will invariably change, and the project team will have to solve problems as they arise during construction. When parties enter into a contract and a specific clause fails to account for an unforeseen event or it is interpreted to suit the particular circumstances that have arisen, then there is a potential for opportunism. In this instance there is likelihood for a party to exploit or delay another to maximize their own gain.

IV. SYSTEMATIC VIEW OF DISPUTES

To understand the mechanisms that contribute to the underlying problems that arise in projects, such as delays, rework, and scope change, a systems perspective can be used. Such a perspective provides a fundamental shift in thinking and can encourage the “dispute problem to be visualized in a holistic manner. The environment within which construction projects are procured can be categorized as being comprised of the following systems:

Project management, which includes the procurement strategy (design and production management), contract arrangement, selection processes and technology implemented to deliver a project.

Organizational, which includes the practices, policies, procedures, culture and social responsibility of the firm;

People, includes the underlying values, attitudes, personality, education, training, experience and motivation of individuals that can influence organizational and project outcomes. Change of Scope Additions, deletions, omissions, or changes in the nature of the work arises because of client inexperience, their requirements, stakeholder needs, physical location and the prevailing economic environment.

A. CONTRACT DOCUMENTATION:

Now a day’s most of design and drawing works are being out sourced. Design consultants (such as architects and engineers) are expected to use reasonable and ordinary care in the practice of their profession. Architects and engineers cannot guarantee the results of their service. Their liability for errors and omissions, however, can be determined by whether they have performed their services with the standard of care consistent with other professional designers within their community.

Even when a standard of care is agreed upon pre-contract, any financial recovery may hinge on whether the mistake was an error (mistakes made by the designer) or omission (omitted from the contract). As a result, design related documentation produced often contains errors and omissions and often leads to contractual claims and disputes. Errors can arise because of poor knowledge, carelessness and negligence, and intent. Poor knowledge is often a result of insufficient education, training, and experience. Carelessness and negligence include errors in calculations and detailing and incorrect reading of drawings and specifications. Regardless of the skill level, experience or training that individual's possess, errors may be made at any time during a project's life cycle. The later design errors are identified in the project cycle the costlier they are to rectify, especially once construction has commenced. Many design firms, however, fail to undertake design audits, verifications and reviews of the documents that they produce prior to tendering. To overcome this problem proof checking of the design and drawings through a well experienced and reputed firm (can be departmental also if proper in house facilities are available) should be done.

B. BEHAVIOURAL ADAPTATION OF INDIVIDUALS:

It is noticed that the personality differences between architects or design consultants and construction managers as well as between Construction managers and contractors can lead to conflict as they may have diametrically opposed goals, objectives and values. When an issue arises power struggles can emerge between different groups who seek to offload responsibility for its occurrence. Such power struggles are often exasperated in times of recession when margins are particularly tight. When a power struggle does emerge there is a reluctance to accept responsibility, contractual clauses may be interpreted differently or the contract may fail to cover an unexpected event. The way that individuals interact with one another is fundamental to resolving issues. Aggressive and passive forms of communication between individuals can trigger conflict and thus discourage open, frank or democratic discussion, which is needed when addressing issues that have arisen. An individual's emotional intelligence is also integral to the problem solving process. Being emotionally intelligent involves being actively able to identify, understand, process and influence one's own emotions and those of others to guide feeling, thinking and action. Individuals who possess a high degree of emotional intelligence are able to make informed decisions, better cope with environmental demands and pressures, handle conflict in an effective manner, communicate in interesting and assertive ways and make others feel better in their work environment.

V. DISPUTE MITIGATION

No single variable can be considered to the sole cause of a dispute. Considering the nature of dispute, the probable causes of dispute that has arisen can be identified. After identify the cause some key strategies can be used to reduce their occurrence: project management, organizational and people perspective. These are detailed as below:

A. PROJECT MANAGEMENT:

The minimization of scope changes is fundamental to dispute mitigation. Initially focusing on obtaining scope certainty and providing adequate time to plan and develop the contract documentation can reduce the probability of scope changes. Clients and stakeholders (e.g., end-users) need to be kept constantly informed and integrated within the design process. Design by its very nature is an iterative process and as the design evolves and materializes through various developmental phases then the client should be required to "sign-off" after each phase is completed so as to acknowledge their requirements are being met and translated into a workable solution. Tools such as quality function deployment can be used to extract detailed requirements during the scope development process, though their use in practice has been limited. The procurement strategy and the selection of contractors and consultants is an area that requires attention. The identification, allocation and proactive management of risk are central to dispute mitigation. Standard forms of contract should be used, as both parties are generally familiar with the obligations assumed by each party. The use of competitive tendering often results in the lowest "price being accepted by a client. Lowest price does not necessarily result in best value for money. Often the contractor with the lowest bid will have the smallest margin. If this margin is depleted, then there is a possibility they may adopt opportunistic practices to recover any losses that may have been made. The use of selective tendering (Special Limited Tender/ Limited tender) or with a policy (Pre-bid meetings/ Turnkey projects) whereby contractors openly present their margins and how they priced the project could potentially breakdown any "them and us barrier that is perceived to prevail. In addition, the sharing of knowledge, through the establishment of inter-organizational communities, of practice would encourage joint problem solving and possibly reduce the incidence of conflict between parties.

B. ORGANIZATION:

From an organizational perspective, the key issue contributing to disputes relates to the production of contract documentation. Research suggests that a major factor contributing to poor contract documentation is the level of fees paid to consultancy firms and the resultant managerial practices that are implemented.



Tendering for consultancy services has typically resulted in sub-optimal design solutions and contract documentation being produced. In addition, the business environment within which clients operate has resulted in increasing demands being placed on consultants to design and document within tight and often unrealistic timeframes. To improve the quality of documentation that is produced, we must initially adhere to policies and procedures, especially those embedded within quality assurance (Various code and manuals or any special specification prepared based on research and field experience). Consultants should be paid a realistic level of fees for the work they undertake to realized them that they have an obligation and a responsibility to produce documentation that can be used effectively to construct a building that is required by the client. Undertaking design verifications, reviews and audits is a necessity. In fact, in large complex projects the use of a third party auditor (Proof check) to review the design and documentation could prevent scope changes, omissions errors, and design errors manifesting downstream on-site thereby reducing the likelihood of rework and a dispute. People Firms need to make conscious decisions about the people they use to procure their projects. Differing personality types are needed for specific types of project because of the client's nature and the team they are working with. Firms need to select personnel who have the emotional intelligence to deal with the challenges that are imposed upon them. Thus, it is imperative that firms have a sound understanding of their staff's personality type, their emotional intelligence and how they are able to cope with the pressures associated with their role in the specific project. Personality tests should be undertaken, as part of the recruitment process to determine how individuals fit with the affective context of the organization and the projects they will be involved with. For complex projects, for example, consideration should be given to the composition of the project team in terms of their personalities and how they could potentially solve problems that may arise rather than deputing the staff in a arbitral manner. The envelopments of an emotionally intelligent team that is able to stimulate creativity and solve problems that arise during design and construction will be able to manage conflict more effectively and resolve issues through negotiation as a project progresses.

VI. CONCLUSION

A considerable amount of research has been undertaken by various organizations/individuals with regard to the dispute causation within construction and noticed that despite calls for improving the contract system through the adoption of principles and techniques associated with contract management; poor contract documentation, scope changes and adverse behavioural adaptations of individual still prevail. A client who understands their scope should be able to select a procurement option that best meets their needs. The requirement of contractor involvement during the design process can improve constructability and reduce the probability of design changes. When there is scope uncertainty and no contractor involvement during design then the likelihood of scope changes increases, which may increase project costs and time and lead to claims and disputes. Issues associated with uncertainty may not have been identified during the planning, omission errors arise within Dispute Causation in contract documentation, which may not be identified until construction is well underway. The time to rectify the error may affect the progress of the work or even require a design change and thus lead to a claim being made for additional payment or an extension of time. The organizational system is the interface between the individual and the project. Here practices, policies and procedures are put into place and tasks are performed in accordance to the organization's role in the project. Project scope, contractual conditions, particularly the allocation of risk and responsibility and procurement strategy are key elements to be considered by the organization as this will influence their planning and resourcing and their ability to achieve project outcomes. The organization needs to examine how the project can be executed through outside agencies (Tenderers) as per its requirements with the resources available and within the parameters specified. Changes in an individual's attitudes and disposition and changes in an individual's behaviour can adversely influence their decision-making capacity, relationships, and their ability to solve problems and negotiate, especially over contractual claims. Thus, it would appear that there is a lack of understanding about the dynamics of disputes. With this in mind, this paper has attempted to identify the underlying influencing disputes and suggest some key prevention strategies.

REFERENCES

1. Patricia C. Galloway and Kris R. Nielsen, Engineers Study Notes for Understanding Arbitration Process, Journal of Legal Affairs and Dispute Resolution in Engineering and Construction, Volume 3, Issue 2 - May 2011
2. Howard KLEIN, Alternative Dispute Resolution Procedures used to Resolve Construction Disputes in the UK
3. Joseph C. Lavigne, Construction Contract Claims and Methods of Avoiding Contract Litigation Through Dispute Resolution Mechanisms, University of Florida, Summer 1993
4. Arbitration and Conciliation Act, 1996 as amended by Arbitration and Conciliation (Amendment) Ordinance, 2015,