

Construction Disputes – why do they happen?

Projects, Construction & Engineering Update

Can you avoid them?

It's fair to say that the demand for construction work across the State continues to be patchy. As opportunities dry up and margins tighten, it is inevitable that disagreements, differences, and possibly, disputes will become more frequent.

Disputes are disruptive - not only in terms of submitting and assessing the matters that give rise to the dispute, but also in terms of the time and cost that can be associated with subsequent formal dispute resolution.

From our 90 years experience in helping our clients avoid, manage and resolve their differences on construction and engineering projects, we know that there are a number of key factors that can influence whether or not a "difference" becomes a "dispute", and then whether or not that dispute can be quickly, efficiently and amicably resolved.

We set out below our thoughts on the common major causes of disputes on building, construction and engineering projects that we have seen. We will be following up this note with subsequent notes highlighting some of the simple steps that can be taken to minimise or reduce these "causes", and the methods that can be employed for their resolution..

We appreciate that you may have different experiences – and we want to know you what you think. If you consider other causes are more relevant to you, please let us know by responding to the electronic survey in email.

A failure to properly allocate risks in contracts

Allocating risk to the wrong party makes it difficult to control it. If the event then occurs, the whole project could be affected. If the wrong party has the contractual risk, they may not be equipped to know what to do, or when to manage it effectively. This can lead to ducking for cover (possible concealment

Who does this affect?

- Contractors
- Developers
- Insurers

Article Highlights

- Wrongful allocation of contractual risk commonly leads to disputes where there is little co-operation to solve the dispute quickly and cost effectively by parties.
- Disputes regularly occur when construction designs are not finalised prior to commencement or a change is imposed by owners after design finalisation and commencement.
- Most commonly disputes arise from inappropriately administered contracts and when they contain insufficient cost and delay clauses.

of the problem), finger pointing (blame deflection), claims/counterclaims and little co-operation to find and deal with the problem. Irrespective of who has the contractual risk, delays could occur and this is not good news all round.

Inappropriate transfer of risk from one party to another can occur when:

- Parties select an inappropriate form of contract, or insist upon a bespoke form, or use of lengthy amendments.
- The parties have unbalanced bargaining positions, or when larger Principals dictate “their” terms. This can be difficult for Contractors to challenge, especially when competition for contracting opportunities is tightening.

In determining what is an appropriate risk transfer or risk management structure, it is necessary for parties to engage and consider the specific project risks in the light of:

- the likelihood of occurrence;
- the consequences of occurrence;
- the methods of management;
- responsibility for management;
- the party best able to manage the risk; and
- the Principal’s appetite for risk and risk philosophy.

In some instances, proposed risk transfer may be entirely appropriate, based upon a Principal’s prior project experience, or preferred contracting models. But all stakeholders should reflect upon whether the risk model proposed is the right one for them, and their project.

Incomplete design, and Principal imposed Changes

- Rushing to start work before design is “fixed” is a recipe for increased cost, and delayed completion!
- We know that sometimes external stakeholders (such as tenants, financiers, Government departments, or even the media and general public) can drive commencement dates without regard to whether the works are ready to be commenced. But designing “on the hoof” increases the risk and likelihood of design errors that can be difficult to ascertain and costly to manage later.
- Change (or variations to the scope of Work) imposed after commencement can often lead to disagreement. For some Principals the change may be considered part and parcel of delivering the agreed scope. Contractors on the other hand may consider that the change entitles them to recoup the effects on time, and costs suffered.

Contact



Basil Georgiou
PARTNER

t: +61 8 9426 6688
e: bgeorgiou@jacmac.com.au



Tom Jacobs
SPECIAL COUNSEL

t: +61 8 9426 6698
e: tjacobs@jacmac.com.au



A failure to properly administer contracts

The failure to administer the contract could be caused by a number of reasons, including:

- The selection of an inappropriate contract, whether one used on a previous project and “assumed” to be appropriate subsequent projects or perhaps through the selection of the wrong form, eg an engineering contract for use on a construction project. This could mean the parties involved are unsure as to what has to be done by way of administrative responsibilities, and have not resourced administration resources adequately;
- Use of bespoke contracts, or the introduction of lengthy amendments. We see a lot of this on large scale infrastructure projects. Sometimes, it appears that parties do not fully appreciate the level of administration and involvement that might be required to effectively administer those specialist contracts or amendments;
- “Back to back” contracting for subcontractors where the Head Contract terms are incorporated by reference. Are all the terms incorporated? Or if not, which terms are – and what if there are conflicts as between a subcontract form and the Head Contract terms as to administration?
- The employment of Principal’s employees as contract administrator/engineer can often lead to challenges relating to independence and conflicts of interest.

Failure to make interim awards on claims for costs, extensions of time and associated compensation

For large complex projects in WA, there are numerous factors that might affect progress. Some might be the Contractor’s fault, others might be the Principal’s, and others may be “fault free”.

The prompt assessment of cost claims and delay events (including issues of responsibility, concurrency and critical path impact analysis), together with an assessment of any compensation that might be due, is the preferred approach. This means the assessment is done and awarded whilst the Works are still under way, rather than waiting for practical completion.

Disclaimer: This publication is intended to provide general information only and should not be relied upon as legal advice. If you require legal advice on a matter please contact us.

Contact Us

t +61 8 9426 6611 **f** +61 8 9321 2002 **e** jacmac@jacmac.com.au

a Level 25, 140 St Georges Terrace, Perth, Western Australia 6000
GPO Box M971, Perth, Western Australia 6843

www.jacmac.com.au