

Establishing the Entitlement to Variations, Change Orders and Claims

A SHORT SUMMARY

Many projects suffer cost overruns and completion delays. There are many causes of these cost overruns and delays.

Contracts often provide for the contractor to be compensated for some cost overruns and delays. This compensation is usually addressed through 'variations' or 'change orders' and 'claims for additional payment and extensions of time'.

If the contractor wishes to be compensated with some additional payment or some additional time to complete the project the contract will invariably require a written notice to be given to the owner. The contractor will also be required to maintain and provide contemporary site records to demonstrate how circumstances have caused additional costs to be incurred and/or delays to be suffered. Additionally, the contractor will be required to provide 'further and better particulars' (essentially details of the amounts of additional payment or extensions of time claimed).

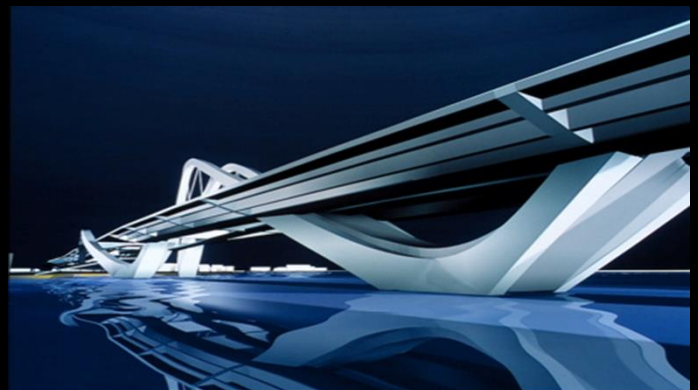
And the means by which contractors generally prepare and present these site records and further and better particulars is often inadequate and leads to the failure of many claims for additional payment and extensions of time

BUT THERE IS A MORE EFFECTIVE, CHEAPER AND DIFFERENT APPROACH WHICH WOULD SIGNIFICANTLY IMPROVE RETURNS FOR CONTRACTORS

Changes in Major Complex Projects

Almost all projects are subject to changes. Those changes can impact project participants in different ways, and invariably cause additional costs to one or more of those participants. On major projects these changes can substantially impact the cost incurred by some, or all, those involved.

Changes can arise out of many different circumstances or events including *more or less work quantity, changed requirements of the owner, changes to the order in which the work was programmed to be delivered, reduction in the speed by which the work is progressed, delays to the commencement or completion of work, remedial work because work was not built to the specified requirements, or reworking because the completed work fails to operate in accordance with specified performance criteria.*



A very important element in project changes is the timing of the change, the time when the contractor knew of the required change, and the ability to incorporate the changed work without disrupting progress of the 'Works'.

Additional Costs in Major Complex Projects

Some additional costs incurred might arise out of such things as errors in preparation and budgeting by the owner, and in tender pricing by the contractor. Or they might arise from a misunderstanding of what the contract required, or an underestimation of the risks in delivering the work.



However, where changes give rise to additional costs under a contract these might often be caused by such things as:

- *increases or decreases to work scope – this includes measured quantities of work exceeding (or being less than) those quantities contained in some pricing document such as a bill of quantities; or contractor tender quantities being over-estimated or under-estimated*
- *instructed change orders or variations – this includes changes to quantities and quality of the specified works*
- *change in the sequence of the work – this includes changing the time for commencement and completion of elements of work, and to the order in which work is carried out*
- *delays to the progress of the work – this includes delays to commencement and/or completion of work activities, and extensions to durations of work activities (and which do not necessarily cause delays to any specified milestone dates or completion dates)*
- *delays to completion of the work – this includes delays to work activities which cause the ‘Works’ to be completed later than the specified milestone dates or completion dates*
- *the completed works failing to meet the requirements of the contract specification or fail to operate at the specified performance levels – this includes works completed but which is of some different quality to that prescribed by the contract.*

Many cost overruns and completion delays can be caused by incorrect budgeting and assessments by the owner (some of which are partially or fully understood by the owner when tender documents are prepared) and by errors by the contractor in evaluating project risks (or deliberately pricing to secure award of the contract).

Establishing Liability for the Changes and Additional Costs

Liability for any additional costs suffered must be resolved by reference to the terms of the particular contract (for example, the prime contract between the client and the contractor; or the subcontract between the prime contractor and a subcontractor). There might be additional requirements under other agreements such as insurance policies and loan arrangements.

Usually under prime contracts and subcontracts there are three very basic compliance requirements which must be met:

- *clear identification of the nature of the change, and what has caused the change*
- *establishment of any notices required to alert others of the change, and the any information required to accompany the notification*
- *provision of all necessary evidence to fully demonstrate the impact of the change.*



Very few contracts, however, detail the information and evidence required to be prepared and submitted by the contractor. Invariably, therefore, many information and evidential submissions are considered by owners as inadequate. Sometimes such a response from the owner is entirely justified, other times it is not.

Contractors spend far too long seeking to justify why it is entitled to some additional payment or extension of time under the terms of the contract, and far too little time preparing and collecting contemporary site records. This is, perhaps, the largest cause of failure by contractors to fully recover its proper entitlements.

Typical Prime Contract Compliance Requirements

In any of the various forms of prime contract it is most likely the following will be required:

- *some form of written notification contemporary with the events giving rise to the to the additional costs or extension of time, and that notice to provide the basis under the contract for any entitlement claimed*
- *a description of the events and the impact they have had, or are likely to have*
- *further notifications if the event and/or impacts are continuing*
- *a response (or responses) which sets out the further information required to be submitted*
- *submission of detailed particulars of the impact within some prescribed time frame (usually no more than 28 days); these are usually to include such things as: daily labour and plant records, daily subcontractor and supplier resource utilisation records, material purchases, storage and transportation records, and records of management expenditures*
- *the submission, or submissions, are subsequently required to be agreed (in whole or in part) or rejected*
- *reference of any differences in assessment of entitlement to be made to some formal third-party dispute forum – this might be a dispute avoidance board, a dispute resolution board, or arbitration.*



Typical Historical Approach to Establishing Entitlement

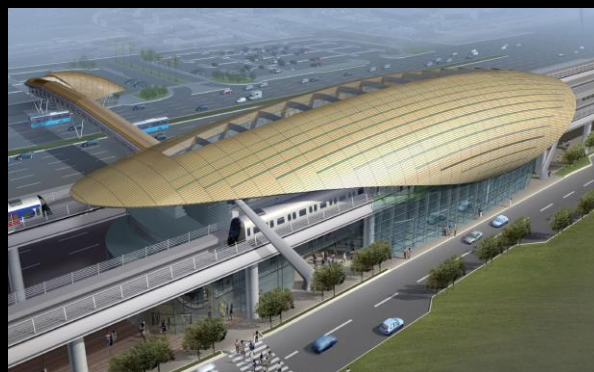
On many projects the typical approach has been to establish entitlement with site-based resources, and in particular:



- *notifications are compiled by the site commercial team of the prime contractor*
- *contemporary evidence is collected by non-dedicated site personnel*
- *supporting information and further particulars are obtained directly from subcontractors and suppliers*
- *submissions are made by the contractor after review by the project director (and potentially others)*
- *inspection of these submissions is then carried out by the owner's representative*
- *the submissions and the inspections are usually the subject of lengthy written correspondence over a considerable period of time*
- *if necessary, reference is made to the prescribed formal dispute resolution process*

There are three common features of this historical approach:

- a lack of preciseness and relevance of much of the information and evidence provided by the contractor
- criticism of the quality of contemporary evidence provided
- an inordinate amount of time taken to finalise any liability and entitlement



Challenges in Meeting Compliance Requirements

The most common challenges in meeting the common compliance requirements are:

- *identifying the nature of the change (and particularly whether the change is a variation/change order, or requires to be dealt with as a claim)*
- *ensuring the correct notification is provided within the time required by the contract*
- *collecting all necessary contemporary evidence to fully establish the financial effects of the change*
- *submitting this evidence (often referred to as “further and better particulars”) in a form which satisfies the requirements of the contract.*

And at the root of everything is the lack of impartiality in the submissions made by the contractor and the responses of the owner’s representative.

Examination of many projects clearly indicates applications for additional payment and/or extensions of time invariably lack sufficient factual evidence (and many contractors do not have the necessary systems or resources in place to collect that evidence.

Being ‘Part of the Solution’ Rather than ‘Part of the Problem’

The experience of High-Point over many years has shown that often:

- *there is insufficient understanding at site level of what constitutes a “variation” or “change”*
- *there is insufficient site resource, time, and management focus devoted to maintaining accurate and complete contemporary records*
- *there is too much site and other external resource devoted to producing contractual arguments*
- *on many occasions those individuals seeking to resolve issues are emotionally attached to their positions and accordingly become “part of the problem rather than the solution”*

IS THERE A BETTER ALTERNATIVE?

A Very Effective and Cost-Efficient Alternative Approach to Substantiating Claims for Additional Payment and Extensions of Time

In the view of High-Point there is a fundamental need for contractors to have:

- *a well-structured and project specific site information and evidence collection system managed by a dedicated site team*

- *subcontracts and supply agreements setting out clear requirements for site information and evidence (and prime contractor support to produce this when necessary)*
- *an off-site expert contract and commercial team to prepare notifications and submissions of all details of claims and any required ‘further and better particulars’*
- *a senior support team to assist in all presentations and negotiations*



The significant benefits of this alternative approach include:

- *the contractor will have high quality site information (a fundamental requirement for any claims for additional payment and extensions of time)*
- *the site contemporary evidence team which is completely focused on ensuring all site information fully responds to the requirements of the contract*
- *the site team supported by a highly experienced and better external contracts team*
- *an overall cost significantly lower, and the value delivered significantly higher*

There is nothing more important than the quality of contemporary site records in determining the entitlement to extensions of time and/or additional payment, or other relief.



The High-Point Experience

POWER GENERATION

350+

POWER GENERATION PROJECTS



Combined-Cycle
Hydroelectric
Nuclear
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TRANSPORTATION

250+

TRANSPORTATION PROJECTS



Airports
Bridges
Highways
Maritime Facilities
Rail Systems
Tunnels

OIL, GAS AND INDUSTRIAL

450+

OIL, GAS AND INDUSTRIAL PROJECTS



Manufacturing
Mining
Oil & Gas Processing
Pipelines
Utilities

COMMERCIAL AND PUBLIC BUILDINGS

300+

BUILDING PROJECTS



Hotels & Resorts
Institutional Facilities
Offices & Retail
Sports & Leisure

PROCUREMENT TYPE

PPP, PFI, IPP, IWPP and PROJECT PARTNERING, EPC, EPCM, DESIGN AND BUILD, DESIGN, BUILD and OPERATE, EARLY CONTRACTOR INVOLVEMENT and many HYBRID FORMS

TYPICAL CLIENTS

INSTITUTIONAL and PRIVATE FUNDERS, GOVERNMENT AGENCIES, PRIVATE SPONSORS, INVESTORS and DEVELOPERS, INSURERS, MAJOR INTERNATIONAL CONTRACTORS, EQUIPMENT VENDORS/SUPPLIERS and OPERATORS

If you require any further discussion or explanation of the matters described above, then please let us know.

Kelvin Hingley
Managing Partner
High-Point Partnership LLP
E: kelvin.hingley@highpointpartnership.com

Nigel Bell
Managing Partner
High-Point Partnership LLP
E: nigel.bell@highpointpartnership.com

London Office

E: valerie.howell@highpointpartnership.com
M: +44 7827 927 795
O: +44 203 019 3830

www.highpointpartnership.com