

Why do Contractors Rarely Recover Real Success or Benefits from Claims?

A SHORT SUMMARY

Claims are regularly made by contractors on most international construction projects. Some of those claims are successful – many are not.

A construction claim is often defined as a formal request (usually by the owner or the contractor) for some form of compensation or other relief. A claim invariably arises during construction out of circumstances which are perceived as different to those upon which the construction contract was entered into.

There are many different types of construction claims. The most common claims made by contractors are those for:

- *extensions of time (requesting an amendment to the scheduled completion date for the project)*
- *additional prolongation costs arising out of delays to completion of the project*
- *the effects of disruption to the planned programme of the construction work and the additional costs arising out of that disruption*
- *whether something is, or is not, a "variation" or "change order" and the costs of it.*

A recent report of projects around the world identified that over a recent six-year period:

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| • <i>successful delivery of projects</i> | <i>reduced from 48% to 17%</i> |
| • <i>'mega-projects' experiencing cost overruns of 30% to 75%</i> | <i>was between 80% and 98%</i> |
| • <i>'mega-projects' experiencing significant delays</i> | <i>was 40%</i> |
| • <i>cost overruns of 50%</i> | <i>were common</i> |
| • <i>cost overruns of greater than 50%</i> | <i>were not uncommon</i> |
| ▪ <i>infrastructure projects such as highways and bridges</i> | <i>typically showed cost overruns of 30 to 35%</i> |
| • <i>more complex projects (such as airports, railways and power stations)</i> | <i>typically showed cost overruns of at least 40%</i> |
| • <i>nuclear power stations</i> | <i>cost overruns of 100% were not uncommon</i> |

it is hardly surprising, therefore, that invariably projects have been the subject of many different types of claims and sometimes very expensive and lengthy formal dispute resolution (such as arbitration or litigation).

But how many of these claims are settled or resolved satisfactorily? Do settlements or resolutions meet expectations? Feedback suggests not very often.

Whilst the quality of contractual or legal arguments to support such claims often varies the factual basis and evidence for the claims is invariably insufficient or inadequate.

**WITHOUT HIGH QUALITY ACCURATE CONTEMPORARY EVIDENCE MOST CLAIMS ARE
DOOMED TO FAIL OR TO DELIVER LITTLE AGAINST EXPECTATIONS IRRESPECTIVE OF THE
QUALITY OF THE CONTRACTUAL OR LEGAL ARGUMENT
BUT
CONTRACTORS CONTINUE TO FAIL TO FULLY UNDERSTAND THE RISKS THEY HAVE
UNDERTAKEN AND TO ENSURE THEIR RECORD KEEPING IS
FOCUSED, ACCURATE AND COMPLETE**

Common Construction Claims

The most common construction claims made by contractors may be described as those for:

- *extra time to allow the contractor to complete the project later than the time specified in the agreement between the owner and the contractor because excusable delays to critical work activities have occurred [commonly referred to as 'extension of time claims']*
- *additional costs incurred by the contractor because of excusable delays to completion of the project [commonly referred to as 'extension of time compensation claims']*
- *additional costs incurred by the contractor because of delays to the scheduled progress of work (as shown on the latest contractor's accepted programme) and which delays affect non-critical work activities but do not delay completion of the project [commonly referred to as 'disruption claims']*
- *additional compensation for instructed changes to the work [commonly referred to as 'Variations' or 'Change Orders']*



There are, of course, many other different types of claims. But one or more of the foregoing appear regularly on many projects.

And most importantly each of those claims have very common evidentiary requirements to ensure satisfactory financial recovery for the contractor – but many contractors consistently are unable to fully respond to these requirements (and consequently, these types of claims, notwithstanding their contractual and/or technical merit, fail to deliver the proper financial recompense).



The Root Causes of Many Constructions Claims

There are many causes of construction claims but in the experience of High-Point the most common root causes (in no particular order) are:

- *unnecessary and overly complex requirements for such things as programme submissions*
- *incompleteness of, and inconsistencies and/or incompatibility between contract documents*
- *tender errors by bidding contractors*
- *lack of true understanding of the full work scope to complete the project*
- *errors in risk assumption by contractor*
- *errors in risk assumption by subcontractors*
- *errors in risk assumption by owners*
- *insufficiently developed design (either by contractor or employer's representative)*
- *lack of impartiality (and unjustified emotion) at project/site level by the owner's representative*
- *lack of impartiality (and unjustified emotion) at site level by the contractor's project team.*

Forecast of Increased Global Construction Output 2020 to 2030

A previous report predicted that the construction market in 2030 (compared to a global construction output of US\$10.7 trillion in 2020) would amount to:

- US\$7.4 trillion in Asia Pacific
- US\$2.4 trillion in North America
- US\$2.5 trillion in Western Europe

It must now be expected, with the current economic and other challenges around the world, these growth figures have been delayed and, accordingly, reduced somewhat.



Nonetheless any growth in these circumstances will likely come with increased pressure on tender pricing and a commensurate increase in claims.

And claims are, therefore, likely to become even more important in delivering reasonable financial returns for contractors.

IF THIS IS CORRECT CONTRACTORS HAVE TO RECONSIDER THEIR APPROACH TO:

- **THE ASSESSMENT OF TECHNICAL, DELIVERY AND CONTRACTING RISKS**
- **HOW CLAIMS ARE TO BE EVIDENCED, JUSTIFIED, AND PRESENTED**
- **HOW LAWYERS, CLAIMS CONSULTANTS AND/OR EXPERTS ARE TO BE BEST USED**

Some Common Issues Most Often Affecting the Success of Construction Claims

Success with construction claims is impacted by many issues but the most common are:

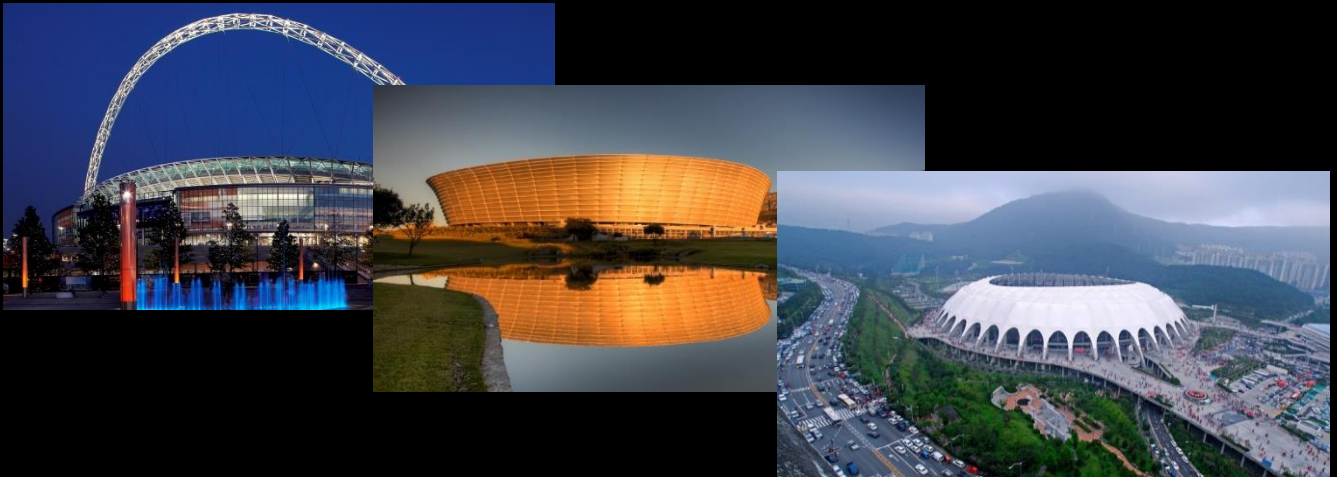
- *the failure of contractors to provide accurate and complete contemporary evidence of progress including failing to:*
 - *prepare and present programmes which properly and fully reflect actual progress*
 - *prepare and present programmes which do not show inexcusable delays (and, therefore, show only those delays allegedly entitling the contractor to extensions of time)*
 - *prepare and present monthly progress reports which fully and accurately describes the progress of key and critical work activities*
 - *prepare and present monthly progress reports which are consistent with the progress shown on the latest submitted programme*
 - *prepare and present monthly progress reports which are consistent with the actual progress of work.*
- *the failure of contractors to provide accurate and complete contemporary evidence of work activities including failures to provide:*
 - *early notification of potential or likely delays (whether these be excusable or inexcusable delays)*
 - *complete and accurate labour returns (and particularly accurate records of labour usage against individual work activities)*
 - *complete and accurate construction plant returns (and particularly accurate records of plant usage against individual work activities)*



- complete and accurate records of labour and construction plant downtime, or reduced productivity (when delays or disruption occurs)
- complete and accurate records of progress (and delays) of subcontractors and suppliers.
[And often this is because subcontractors and suppliers do not have the necessary capacity or skills to provide the information to satisfy the often-detailed programme submission requirements under the contract between the owner and the contractor.]
- the failure of contractors to provide accurate forecasts of future progress and completions including:
 - the earliest notification of excusable events or circumstances which are likely to cause delay to completion of the project and/or additional costs in executing the work (and hence potentially denying the employer the ability to reduce or avoid that delay)
 - notification of likely future inexcusable delays (those for which the contractor or a subcontractor is responsible) which would potentially expose the contractor to delay damages
[And construction contracts, unfortunately, focus little upon forecasting but rather generally upon records of historical events.]
- the failure of employers (and their representatives) to provide earliest notification of such things as:
 - identified necessary or desired changes required to the design or the works (which would ultimately properly be issued as variations or change orders)
 - identified inconsistencies between the contract documents (and which would properly necessitate the issue of variations or change orders)
 - identified issues with third parties (such as utility companies or government departments) for which the employer is responsible, and which would properly entitle the contractor to extensions of time and/or additional payment
[And these types of delays often cause future predicted progress on submitted construction programmes to be unrealistic, and invariably lead to disputes regarding responsibility for delays to progress or completion, particularly where these delays are concurrent with inexcusable delays of the contractor or subcontractors.]
- the emotion of the contractor's project team and the employer's representative's team in maintaining unrealistic or unjustified positions on alleged or potential claims leading to:
 - inaccurate representation of the facts and the truth to key decision makers
 - poor, wrong or non-optimum decision making at site and corporate levels
 - unsustainable contractual and/or technical arguments for the claim
 - unsustainable contractual and/or technical arguments for any defence of the claim
 - often significant wasted time of both site management and executive management
 - excessive costs in the engagement of lawyers and other consultants.



THE TRADITIONAL MANNER OF APPOINTMENT OF CLAIMS CONSULTANTS AND/OR LAWYERS WILL RARELY SUFFICIENTLY IMPROVE THE FOREGOING ISSUES



What Improvements Can Be Readily Made in the Presentation and Pursuit of Construction Claims

Without accurate and complete contemporary records of activities on-site and off-site many claims are bound to fail. Accordingly, there are several fundamental improvements and changes required to current practices often observed on projects today. These might be defined under the following headings:

- *Improvements by Contractors in Recording Contemporary Facts and Progress Reporting*
 - *appoint a designated specialist contemporary facts recorder (in a similar way to how a contractor appoints a quantity surveyor or a scheduler)*
 - *hold monthly workshops with all key subcontractors, suppliers, and personnel to challenge the present contemporary records and identify omissions, or those which are inadequate*
 - *prepare monthly reports through the relevant month and complete immediately after the month end*
 - *hold monthly (or more regular as necessary) workshops with all key subcontractors, suppliers, and personnel to challenge and verify latest programme against what is being reported in monthly progress reports*
- *Improvements in Capability and Training of Subcontractors During the Tender Process*
 - *ensure key subcontractors and suppliers are made fully aware of the contract requirements for contemporary records (and ensure these subcontractors and suppliers fully understand them)*
 - *ensure key subcontractors and suppliers are made fully aware of the contract requirements for programmes, and updating programmes, (and ensure these subcontractors and suppliers fully understand them)*
 - *fully interrogate the capacity and capability of each key subcontractor and supplier for complying with the contract requirements for contemporary records*
 - *fully interrogate the capacity and capability of each key subcontractor and supplier for complying with the contract requirements for programmes and updating programmes*
 - *compile detailed risk matrix (and agree this with subcontractors and suppliers)*



- *Immediately After Contract Award*

- *ensure key subcontractors and suppliers remain fully aware of the contract requirements for contemporary records (and ensure these subcontractors and suppliers fully explain how they will meet those requirements)*
- *ensure key subcontractors and suppliers remain fully aware of the contract requirements for the initial programme (and ensure these subcontractors and suppliers fully explain how they will meet those requirements)*
- *conduct regular risk workshops using the agreed risk matrix to ensure all known and known-unknown risks are fully understood and appropriate processes are in place to manage them*



- *Regularly Through the Contract [Using Workshops]*

- *ensure key subcontractors and suppliers are collecting and maintaining all necessary contemporary records and interrogate whether these are consistent and compatible with all others*
- *ensure key subcontractors and suppliers are preparing fully compliant updated programmes and interrogate whether these are consistent and compatible with all others*
- *ensure the impact (or potential impact) of all known and known-unknown risks are being appropriately managed and forecasts reflect this*

COLLECTING AND MAINTAINING CONTEMPORARY RECORDS REQUIRES SPECIAL SKILLS BUT WITHOUT ACCURATE AND COMPLETE CONTEMPORARY RECORDS MOST CLAIMS WILL FAIL AND ISSUING INCORRECT PROGRAMMES AND/OR MONTHLY PROGRESS REPORTS SIMPLY WASTES VALUABLE MANAGEMENT TIME, AND PROVIDES INAPPROPRIATE INFORMATION FOR DECISION MAKING]



The High-Point Experience

POWER GENERATION

350+

POWER GENERATION PROJECTS



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Hydroelectric
Nuclear
Renewable
Thermal

TRANSPORTATION

250+

TRANSPORTATION PROJECTS



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Bridges
Highways
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Rail Systems
Tunnels

OIL, GAS AND INDUSTRIAL

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OIL, GAS AND INDUSTRIAL PROJECTS



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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.

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