

Improving construction claim management in Malaysian construction industry

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Abstract. The construction industry in Malaysia is large and it involves multidisciplinary participants. There is high frequency of disputes arising from construction contract claims. Even with the most expert understanding of construction contract clauses and the most equitable risk-allocation management, claims will continue to present problems if they are poorly managed in practice. The significantly increasing number of construction claims indicates the need for the implementation of an effective construction claim management. This research aims to improve the process of claim in construction industry. This research explores the problems related to the process of claim from contractors' and consultants' point of view by studying common procedure of claim management. The findings highlight on the three key issues. There are claim identification, claim notification and claim documentation. These issues are the most troublesome and contribute to the significant problems in construction claim process. It also appears that a standard and transparent procedure should be put in place whereby contractors would be able to follow to properly prepare the claim. In addition, staff awareness, training in how to document and submit a well-supported claim, and negotiations with clients are becoming a necessity.

Introduction

The construction sector is one of the main economic engine sectors supporting the Malaysian economy. The expansion of this sector has led to the revival of the construction profession, and the promotion and encouragement of new investments. The sector has played a crucial role in extending job opportunities for the Malaysian labour force. Its expansion has generated many jobs for skilled, semiskilled and unskilled workers (Fadhlin, 2004). It is central as being the catalyst for development and a major indicator and determinant of domestic performance in the economy. Construction claims are considered by many project participants to be one of the most troublesome and unpleasant events of a project [1]. The high competition coupled with the sluggish global economy has forced contractors to bid projects with minimum profits to stay in business. In addition to their multiparty nature, projects are becoming more complex and risky. This has placed an added burden on contractors to construct increasingly sophisticated and risky projects with less resources and profits. Under these circumstances, it is not surprising that the number of claims within the construction industry continues to increase [2].

Construction projects can be described as temporary multi-organisations, made up of a large number of different people from different backgrounds, based on different geographical

locations making their contributions at a different time [3]. These people are interdependent but unfortunately, because of their conflicting interests, are often highly insensitive to the needs of others around them. Moreover, construction is not a single, vertically or horizontally organised industry dominated by a small number of national or multinational corporations. It is a large, fragmented, decentralised industry characterised by thousands of small and medium sized companies and material suppliers. In addition to that, thousands of architects, engineers, bankers, insurance brokers, lawyers, accountants, public administrators, government inspectors, and contracting personnel play a key role [4].

Construction activity is a complex process involving many disciplines with differing skills. Therefore, problems are bound to arise in undertaking complex projects, such as a construction project, due to the widely differing values and goals among the project participants [5]. Some of these problems have the potential to escalate to become significant disputes. In addition, construction, like many other industries in a free-enterprise system, has sizeable risk built into its profit structure [6]. Although all the parties in a construction contract start with the best of intentions to get the work both complete satisfactorily in the agreed time and at the least expense to owner, whilst ensuring that the general contractor and all other specialist contractors and suppliers make a reasonable profit. Somewhere between the beginning and the end, disagreement, disputes, disruption and delay arise which can destroy the best of intentions. Therefore, the construction industry has a poor reputation for coping with risks, failing to meet deadlines and cost targets. Hence, the clients, the contractors, the public and others have suffered as a result. Construction claims have such high impact on construction project's cost and time that an effective claim management system in any construction organisation deserves serious attention [7].

Claim

A claim as a right given to the party who deserves a request for compensation for damages incurred by the other party. Claim is a request by a construction contractor for compensation over and above the agreed-upon contract amount for additional work or damages supposedly resulting from events that were not included in the initial contract [8]. In any construction project, significant additional costs can be experienced by the contractor, the owner, or both, due to the actions of the other party or parties involved. Disputes over the right to a compensation as well as over the amount of time and/or money to be given often necessitate a resort to litigation, arbitration, or other forms of dispute resolution methods for settlement [9].

A construction claim arises when a party to a construction contract believes that in some way, by act or omission, the other party has not fulfilled its part of the bargain [6]. To put it in other words, a claim arises when one party to the contract has suffered a detriment for which that party should be compensated by the other party. Therefore, a construction claim is an assertion of and a demand for compensation by way of evidence produced and arguments advanced by a party in support of its case [10].

Many public agencies have the perception that "claims" are attempts by contractors to pursue exaggerated demands for payments, compelling the government agency to defend itself accordingly [4]. To most contractors, the term "claim" evokes a negative reaction because it signifies the necessity to participate in a frustrating process in order to gain the relief to which one is contractually and equitably entitled usually after suffering an economic loss [11]. Although public and private entities arrive at their negative view of claims from entirely different perspectives, those perceptions are intensified by an ever-increasing resentment of the consistency of the process of dispute resolution which is customarily utilized in public contract claim resolution [8].

Result

Claim Identification

It is best to avoid construction claims from the beginning of a project and resolve claims quickly and efficiently once they arise. Identification of any changes needs to be carried out early and distribution of the information to all stakeholders is a necessity. This will help any decision-making process by all parties. Early identification of potential claims is necessary to successfully prevail on claim disputes arising during construction, particularly those involving additional work and compensation. Proper claim management begins with identification of a claim. The contractor must be able to recognise and identify a claim situation goes together with notification. Most public and private contracts contain clauses requiring notification of differing site condition, changes and delay within a stated period before equitable adjustment can be pursued. It is very important to identify the source of claim. Typical sources of disputes and claims are worth noting.

A successful claim process needs people with “claims consciousness,” familiarity and awareness of potential claim situations. Although the identification of claim is automatic with the direction of change orders from the client, the contractor must be able to recognize and identify a claim situation when it first develops, not after it has become a controversy. Prompt identification and notification are very important to fulfil the contractual requirements. The contractor cannot wait too long to take actions. All rights of the contractors to claim can be lost. It may also be practical to look for assistance from expert consultants at an early stage of the claims process. A project manager must take a proactive role in the early identification of potential claims and disputes. He is the best person to evaluate the progress of the work and identify any developing problems on the project. Besides that, management personnel need to have a basic understanding of the terms and conditions of the contract documents. The failure to identify a claim until the end of the project may expose the contractor to contractual defenses. Therefore, project managers must be vigilant in identifying potential claims during construction.

The project staff also must have a good working knowledge of the contract documents. Familiarity with relevant technical and general terms is essential for project personnel to recognise their contract rights and duties. Communication ideas and problems is essential for efficient and effective claim management. The project staff must be knowledgeable and aware of actual conditions that differ from those expected such as soil types, interference of structures, other contractors, traffic, weather and labour are likely to be sources of changed condition. Project staffs also need to have a working familiarity with the legal concepts and right that will affect the outcome of potential claim situation.

Claim Notification

Identification of claim must be followed by notification. It is frequent for construction contracts to require a party to give timely notice of claims to the other. Most standard form contracts provide some mechanism and contain clauses explaining the process of giving such notices and the likely consequences that will arise if notices are not given as specific in the contract. The obvious purpose of notification clauses in a contract is to ensure that both parties have on record the dates and facts that initiate a claims situation, and to protect their respective rights. Notice clauses are useful because they allow the owner of the construction project more time to react to claim problems.

The procedures and reporting systems adopted by any contractors to notify claims need to be systematic. The system should ensure that all claims are notified to owner as soon as possible after the project manager become aware of any complaint or dispute, written or oral, alleging or suggesting any deficiency in the provision of the services. On the other hand, the owner

need to make it clear what the contractor has to do if it hits problems such as delay and needs to extend the completion date or claim additional money. Most of the construction contracts require written notice for changes, differing site condition, extra work or other events which may affect the contractor's time and cost performance. A notice clause should be precise and unambiguous about what is necessary and the contractors should fulfil the conditions of the notice clause.

Prompt notification is very important to avoid the possibility of breaching contract policy conditions by late notification. Late notification is always arising from misconceived view that problem will eventually resolve itself, embarrassment of the individual and/or the contractor concerned, concern for the personal consequences of the individual involved and fear that the facts will be made public with the attendant risk to the contractor's reputation.

Claim Documentation

A complete and strong claim document is important in presenting a claim and to resolve any disputes. Contractors must comply with the contract requirements such as the notice and deadlines for submitting any documentation supporting the claim. To have the strongest documentation, the information should be contemporaneously, documenting and closing out the work as it is performed. Information should be consistent and understood. The process of preparing and presenting the claim document is very important because it requires the contractor to refine and produce the claim from beginning to end. The claim must be supported with all the required documents to explain the dispute in a simple, complete and comprehensive approach. This documentation should include the method and date of correction, with approval by the involved parties. The writing style should be clear, precise and easy to be understood. Detail pricing the claim and supporting the damage calculations is very important. Charts, graphs, drawings, and photographs are very helpful and should be included into the claim document. Systematic photos or video of completed work, testing conducted or other quality control activities provide unquestionable visual evidence of the actual conditions.

Documents also should include specifications, special condition, specific instruction as well as the contractor's calculation and bid preparation documents are generally acceptable evidence as to what was intended by a construction contract. Make sure a project diary is kept along with diaries for key personnel and should record the weather, manpower, visitors and contractors on site, key deliveries and any notable event such as problematic or hidden site conditions or events that may cause delay or affect productivity. Well maintain an as-planned schedule and regularly update it with an as-built schedule are vital. Record all key events, especially ones that may lead to a claim, and specifically record when the event occurred, what it was, who noticed it, the projected impact it may have on cost and time, whether notice was given and to whom and response to notice. Contractor should ensure that a fully signed written agreement is in place before commencing work on a project. While oral agreements are generally enforceable, written ones are easier to prove.

The contractor should regularly update the record set with the goal of capturing all changes as they are approved and with sufficient detail so that there is less remembering necessary when the final record set is compiled. Even before a claim is identified, it is important that the contractor keep good records of its activities on the project. Most documentation problems stem from, three basic conditions:

- Getting the proper amount and type of information.
- Getting this information to the appropriate individual.
- Delivering it while it is timely.

When these considerations are addressed properly, those responsible for problem resolution will be able to respond more effectively as project challenges arise. Beyond maintaining good records of daily activities and of the project in general, the contractor must be both proactive and reactive in developing claim documentation. With respect to proactive documentation, the contractor should take immediate steps to create a record of potential claims as they arise. It is essential that the contractor respond promptly in writing to any communication concerning alleged facts or positions that may impact the viability of its claim. Where the owner, general contractor, construction manager or other relevant project participant disputes the claim or indicates that the problem has been addressed, the contractor must respond in a timely manner.

Conclusion

It was found that by having a proper claim management system, contractors can utilize it to improve their claim management process. This is to guarantee that they will have proper management setup to justify, quantify, and present claims for events under the control of the owner or his agents then chances of prolonged disputes are reduced. The results in this study also can be used to assist contractors in adjusting to a business environment that demands measuring business processes to form a basis for continuous improvement. A need for an overall step-by-step procedure for claims analysis and administration is very crucial for achieving proper resolutions and for preventing claims from developing into disputes.

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