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FIRST AID FOR CONTRACTS



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THE BASIS OF ANY SUCCESSFUL CONSTRUCTION CLAIM LIES IN A SOLID FOUNDATION

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A successful construction contract starts with good communication. One often neglected aspect of communication, is Record Keeping.

Records and documentation serve as a contemporaneous permanent repository of all that transpired on site during the project and are a contractual obligation in all standard form construction contracts.

Records to support a claim include, *inter alia*, notices issued under the contract, minutes of meetings, daily diaries, programmes, photographs, subcontractor records, labour time sheets, correspondence (letters and emails), drawings and risk registers. Where such records are absent and a claim is not properly substantiated, the claim will escalate into a dispute.

Documentation is therefore the foundation for all claims and disputes. Without contemporaneous records, a claimant is unable to present a detailed reconstruction of the events on which the claim is based, and this negatively impacts its chances of success. The civil standard of “balance of probabilities” applies. Where the claimant fails to make a persuasive case, its chances of success may be compromised. Likewise, where a claimant has kept impeccable records and advances a properly substantiated claim the opposing party will need to produce solid records in defence of the claimant’s assertion. The party who has the best records to support its assertions will win the dispute.

Records must be maintained by all parties - employer, contractor and subcontractor. The various standard form contracts contain clauses which provide for the retention of records.

FIDIC 1999 at paragraphs 4 and 5 of Clause 20.1 provides as follows:

Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the site or at another location acceptable to the engineer. Without admitting the employer's liability, the engineer may, after receiving any notice under this sub-clause, monitor the record-keeping and/or instruct the contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect records, and shall (if instructed) submit copies to the Engineer.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and the extension of time and/or additional payment claimed.

In addition, it prescribes records to be kept for health and safety (Sub-Clause 6.7), the contractor's personnel and equipment (Sub-Clause 6.10) measurement and evaluation (Sub-Clause 12.1) and payments (Clause 14). Instructions, records, approvals, consents, determinations and requests also form a part of records that are to be retained.

FIDIC 2017, 2nd edition, at Sub-Clause 20.2.3 calls for the keeping of contemporaneous records and at Sub-Clause 20.2.4 requires a fully detailed claim to be

submitted within 42 days (or such other period as agreed) of becoming aware (or should have become aware) of the event.

NEC requires the contractor to advise by way of early warning (Clause 16.1) of any compensation events so that the project manager can evaluate such events timeously as he is required to do by the clauses 62, 63 and 64. Clause 62 sets out that the contractor is obliged to submit quotations to the project manager for dealing with the compensation event. The quotations comprise proposed changes to prices and the delay to completion date. It is thus important that contemporary records of delays and prices changes are kept to substantiate such quotations. Otherwise there are no express requirements.

GCC prescribes that facts and circumstances relating to the claim must be investigated when they arise and the contractor is obliged to timeously deliver to the engineer records of all such facts and circumstances. GCC differs from other forms of contract in that it requires the immediate submission of the claim and not only the notification of a claim. It goes on to provide that the parties are to agree

- *"their respective agreement, or disagreement, with regard to the correctness of the matters recorded" (clause 10.1.3.3); and*
- *"Each record of an agreed fact in terms of Clause 10.1.3.3 shall in any dispute be conclusive evidence of the fact concerned" (clause 10.1.3.4).*

The above may be regarded as the best records clause as it creates, by agreement between the parties, a closed evidentiary record between them. This may then be relied upon in the event of any dispute proceedings ensuing.

Parties will be guided by the contract in collating records but should in addition, refer to identified risks in the project when deciding on the type of records to be kept. The different categories below can be utilised to create order in retention of records:

TENDER	Invitation to tender, tender, clarifications, estimates and calculations relating to time and cost, internal documents
CONTRACT	general and particular conditions, drawings and specifications, employer requirements, subcontractor and supplier contracts
PROGRAMMES	Initial and revised programmes, post contract programme and all time and productivity calculations
CORRESPONDENCE	contract notices, letters, RFI's, instructions, emails, text and voice messages;
CONTRACTURAL REPORTING	progress reports, minutes of meetings, site diaries, photographs, productivity reports timesheets for labour, plant hire, material requisitions, drone recordings

Clear communication is essential to the success of any project and all communication must be in writing, by letters or e mails, and care must be taken that these are clear and concise. There should be no misunderstanding when these communications are being relied upon in the case of a claim or a dispute.

Parties to a contract should therefore establish and maintain a project document retention system. The best tool to manage contemporaneous records is to have an electronic document management system (EDMS) on a cloud-based software system which acts as a hub through which the documents are circulated, their passage and receipt recorded and copies safely stored.

A standard referencing system should be created to ensure that different documentation is easily identified by a prefix (for example). Referencing lists should be made available to project participants.

Naturally, the value of content is dependant entirely on the skill and diligence of the information capturer whose attention to detail is of paramount importance.

The records need to be in respect of the risks that have been identified at the inception of the contract as requiring managing plus any other risks that may have been unforeseen but which arise during the contract.

A good communication and document distribution protocol should therefore be established at the outset and this is then aligned to the risk identification process, usually carried out during the planning / programming of the work.

All communication should be shared with the document controller / capturer and the person identified as being responsible for that aspect of the work. So technical issues will be shared with engineers and commercial issues will be shared with quantity surveyors (for example). One on one communication should be avoided, for the obvious reason that this will not satisfy the requirement of adequate record keeping and records can be lost owing to laptop theft or people leaving the project.

A case in point on the value of proper record keeping is the recent judgment in *Whites Constructions (Pty) Ltd v PBS Holdings (Pty) Ltd 2019 Nswsc 1166* which relates to a damages claim by the developer *Whites Constructions (Pty) Ltd*. Here the Court discarded the complex delay analysis reports advanced by both parties and instead relied on the true position as evidenced from the daily diaries in finding that the plaintiff had not proven breach of contract by the defendants. Accurate record keeping on the project served to dispose of an otherwise complex matter in a simple and straightforward manner.

In closing, establishing on-going and accurate record keeping tools on a project cannot be over emphasised as even the best of memories are fallible. Human tendency is to reconstruct what they would like to have happened rather than recounting what did actually happen. Written records provide solid and irrefutable proof.

“He who has the records wins!”