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DISPUTE – A NECESSARY INGREDIENT IN A CONTRACTUAL SITUATION

A well-known author on construction disputes has described the inevitability of conflicts and disputes under an engineering contract in the following words:

> "Many involved in the construction industry believe that conflict is inevitable and that this is promoted by the standard forms of contract used. However, it is axiomatic that the potential for conflict is inherent in any contractual situation. This potential for conflicts, disputes and claims always exists and it is beneficial to recognize this from the beginning of any contractual relationship."

It thus being undisputable that disputes are inseparable from engineering contract's administration and implementation, as indeed from any type of contracts, procedures have to be developed and made part(s) of the contracts to deal with these disputes efficiently and without causing undue inconvenience or prejudice to the parties to the contract. A bird-eye view of the current standard engineering contracts formats will bring into focus the multi-dimensional efforts being made by the industry towards the development of a dispute resolution mechanism which will have the obviously desirable attributes of efficiency, neutrality and operational flexibility. We find that well-known formats such as FIDIC, ICE, NEC, JCT all have, over the years, endeavoured to evolve their respective dispute resolution provisions on this basis and these have regularly been amended in successive editions in the light of the experience gained through their use in the earlier editions. The unmistakable direction of this effort has been towards ready availability, neutrality and capacity to provide quick and generally acceptable solutions. The days of keeping dispute resolution clauses away from engineering contracts a popular device to obstruct efficient resolution of the usual issues that invariably crop up during the contract implementation phase, are gone and will hopefully never come back.

WHAT IS A DISPUTE?

As soon as we mention the word dispute we impliedly acknowledge the need for a precise and clear definition of the said term. As is commonly understood, a dispute is taken to be a disagreement or argument between two parties. It emanates from unresolved

issues which, in turn, mean assertion of a material proposition by one party and its denial by the other. In other words,

1. Disputes arise when the issues are not resolved in time;

2. Dispute is a conflict of claims or rights. A dispute implies an assertion of a right or claim by one party and denial or ignorance thereof by another;
3. The repudiation by the other party may be either express (by words) or implied (by conduct);
4. Dispute may include dispute of law as well as of fact;

It may be pointed out that the word *"dispute"* is not to be confused with words like contention, disputation, and default. However, words such as controversy, claim or difference may be used interchangeably for the word dispute. There can be different types of disputes such as major or minor, present and future, simple and complex etc. The author of a dispute resolution provision has to be very clear and precise as to what type or types of disputes will fall within the scope of such dispute resolution provisions of the contract. A careful drafting of this aspect of the scope of dispute resolution provisions can save and spare the parties lot of otherwise wholly unnecessary debate as to whether a particular dispute is or is not amenable to the dispute resolution provision provided in the contract.

RECENT DEVELOPMENTS IN DISPUTE RESOLUTION CLAUSES

The standard dispute resolution clauses in vogue during the last quarter of the last century usually provided for dispute resolution under engineering contracts by requiring reference of disputes to the Engineer in the first place, giving the Engineer certain time to decide such disputes and then either party, being unhappy with such decision of the Engineer, could go to arbitration under the agreed arbitration clause. This option to go to arbitration would also become available to the parties where the Engineer failed to notify his decision within the prescribed period. The important features of this scheme of things was that the recourse to arbitration was possible only after the dispute(s) in question had first been referred to the Engineer for his decision. This procedure attracted several objections over the period of time, the most important being that the requirement of reference to the Engineer was unnecessarily repetitive and devoid of any meaning in as much as the dispute being referred could have only arisen because of a position adopted by the same Engineer thereon earlier. So the reference to the Engineer, at best, was a request for a review of his own earlier decision which put the Engineer in an unenviable position under the dispute resolution mechanism and robbed the provision of all meaning and effect. Add to it the fact that the Engineer was engaged by the employer and served at his pleasure and the said provision became even illusory.

Towards the end of the last century the movement for taking the Engineer's role out of the dispute resolution mechanism gained momentum and various ways and means were developed in this regard. Instead of the requirement of referring the dispute, in the first place, to the Engineer, a pre-agreed Expert Adjudicator was substituted for the Engineer. Similarly, a Dispute Review Board (DRB) comprising of 3 members, one nominated by each party and the third agreed upon by the said two nominees, was introduced as an alternative. Detailed rules and procedures were developed for the appointment of the Expert Adjudicator / DRB as well as for the conduct of proceedings by these bodies. There is yet another option which is being exercised with increasing popularity which is to replace the Expert Adjudicator / DRB with some other well-known Alternate Dispute Resolution (ADR) procedure. This procedure may be Mediation Conciliation, Mini trial, Facilitation, Partnering, Rent a Judge and some other kind of ADR procedure.

It is thus quite clear that the thrust of developments in the field of dispute resolution over the past decade or so has been to make the dispute resolution mechanism more and more independent, neutral and readily accessible. The contractor has been afforded the right to participate in the pre-arbitral process, whether it is Neutral Expert, or DRB or any of the various ADR procedures, as all these appointments are with his consent and participation. Usually, there can be recourse to the agreed mechanism at any time during the currency of the contract and, subject to any time-bar provisions in the contract or under the law, even after the completion, abandonment or termination of the contract.

THE NEED FOR DISPUTE RESOLUTION MECHANISM IN ENGINEERING CONTRACTS

It is well-known that the presence of a balanced and easily accessible dispute resolution mechanism in the contract is taken as acceptable assurance by prospective tenderers that the usual disputes arising during the execution of work shall be fairly settled either by the employer who will be aware of the presence of the dispute resolution provisions or through recourse to such provisions. This welcome assurance also encourages the tenderers to quote more competitive prices for the proposed project. It is, therefore, fair to say that the inclusion of a balanced and user-friendly dispute resolution provision is, in fact, in the interest of an employer. On the contrary, absence of such provisions generates suspicions and apprehensions of all sorts. Most of the professionally desirable tenderers either avoid participation in such cases or add reasonable and at times more than reasonable amount to the intended tender price by way of protection for non-availability of an expeditious dispute resolution arrangement in the contract. No serious employer can possibly like either of these two situations.

THE DOMESTIC SCENE

The domestic scene regarding dispute resolution under engineering contracts regretfully does not offer a very rosy picture. Any dispute resolution mechanism presupposes the willingness and the capacity of the parties to meaningfully participate in such process and to take the required decisions. Given that the government, semi-government and / or government controlled departments, agencies and corporations are by far the busiest employers of engineering contracts in the country, it has to be said that there is a pathetic lack of willingness on their part to effectively participate in any dispute resolution effort. There are several well-known reasons for this unfortunate attitude such as:

i) The word claim or dispute is treated as a dirty word by these employers. It has been assigned a negative connotation and is treated as some kind of a conspiracy by a contractor to extract money or other concessions out of the employer. The immediate response from the employer and / or the Engineer, therefore, is to reject the claim, at times even without entering into any meaningful dialogue with the contractor or having carefully examined it. There are well-known reasons for this undesirable attitude, most importantly being an utter lack of any background or training in contract management and administration and the resultant lack of familiarity with even the basics of dispute management. Serious training of

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project staff within all these employers with a view to expose them to the developments in engineering disputes management is surprisingly unknown. The decision makers within these employers invariably try to cover this lack of experience and exposure with arrogant and professionally unsustainable decision making. It is very rare that where outside independent consultants are acting as the Engineer who are, by virtue of their private sector backgrounds perhaps better placed to objectively advise the employer, will seriously challenge or appose such unprofessional decision making on the part of the employer.

ii) Imbued with this conviction that a claim is a dirty trick which is sought to be played by the contractor at the expense of the employer, the entire process of claim verification and evaluation becomes a futile exercise aimed at finding ways and means to somehow reject the claim. In doing so no respect is shown even for the letter and spirit of the contract between the parties, muchless the practice and usage of the industry or the stated views of well-known experts on such issues. In the exceptional case where the engineer goes out of the usual way and seeks prior consent of the employer for the notification of his determination of any consequence, such consent of the Employer (usually required under the contract before notification of the Engineer determination) is arbitrarily and unreasonably withheld by the employer. The period of such unexplained withholding of

consent can literally be anything and may even extend up to the very end of the project. The permissible requirement of prior consent of the employer for the notification of any substantial decision by the Engineer (now practically all decisions of the Engineer except the dispute resolution clause decision) is thus being abused through such acts of delays and prevention on the part of the employer. The level of interference by the employer in the performance of contractual duties by the Engineer takes care of any prospects of the Engineer making a determination which the employer really does not want him to make.

iii) The reluctance on the part of the employer to take the responsibility for any contractual decision carrying financial consequences (and all contractual decisions under engineering contracts invariably have financial consequences) has its roots in two very well-known reasons. Firstly, the prevailing atmosphere within such employer departments / agencies / corporations is not conducive to the taking of such decisions. Accusing fingers are raised thoughtlessly and almost as a matter of routine even and usually by those who otherwise generally have no clue as to the facts or relevant particulars of the matter in which such decision may have been given by a particular employee. The prospects of inconvenient and unending series of enquiries and investigations with all attending undesirable publicity are daunting enough to persuade the decision maker to avoid the decision.

iv) The other well-known restraining factor in this regard is the role which is being played by the audit departments of these government agencies and

corporations. The usefulness and, therefore, need for regular audit is

apparently undeniable particularly in a socio economic milieu as is ours but the defining parameters for the role of audit, equally importantly, have to be drawn very carefully and precisely. In every case of award and implementation of an engineering contract, it is specifically laid down who will be responsible for the administration / implementation of the contract and what powers will be exercisable by the various dealing functionaries and their authorized representatives. So long as the Contractor can show that there has been no violation or transgression of these parameters while taking decisions on the day-to-day issues no auditing principles should permit any audit officer to second guess the decision making of such authorized personnel in relation to the day-to-day issues, arising during the implementation of the Contract. Merely because some of these decisions were given against the stated position of the department / employer and resulted in some financial consequences should not be a basis, a valid basis in any case, for calling into question the

validity of these decisions. There are examples galore where the dealing staff of the department has been harassed no end for performing their duties and functions under and according to the contract. This cannot encourage decision making within the dealing officials of the department and their representatives.

v) The prevailing attitudes in such departments etc are and this is most unfortunate, that an officer of the department can never be wrong and a contractor can never be right. This approach has grown over the years out of the utter lack of any accountability process for the Employers and their dealing staff which has understandably encouraged them to adopt such eminently unreasonable positions against the contractors. It is very rare that a position once so adopted is ever reviewed and recalled / modified. Lack of knowledge about the principles involved and the latest developments in the usage and practice relevant to engineering contracts add fuel to this fire.

vi) Finally, one finds a very visible distinction in the attitudes of these departments etc towards the performance of their obligations under the engineering contracts. It can very easily be seen that two sets of values are being adopted depending upon whether the Engineer and the Contractor are foreigners or they belong to the domestic industry. It is an unpleasant truth that we tend to be more unreasonable and even harsh when dealing with local consultants / contractors as compared with the same entities from abroad. I cannot help submitting that in this regard part of the blame, and more than a small part must go to some of our local consultants and contractors belonging to the public sector who could have but did not care to make a difference in this regard and make their respect contributions towards the growth and development of healthy and balanced norms.

AGENDA FOR REFORM

In view of the above rather chaotic conditions prevailing in the domestic industry, dispute resolution under engineering contracts needs to be thoroughly reviewed and

improved. The alternative to inclusion of a dispute resolution mechanism before a private forum viz: litigation in courts is so unattractive and de-motivating that its adoption will
invariably drive up the cost of the projects under these contracts. For the same reason, it can so easily lend itself to abuse. Yet another undesirable consequence of absence of an efficient dispute resolution provision will be the pressure for executing poor quality work. An employer will thus end up paying on extra price which may not be negligible and, in any case, wholly unnecessary, not to mention the further loss in the shape of poor quality work.

Presently, different departments / agencies involved in undertaking development projects are using different contract formats for their procurement effort. Some of these formats are the heritage of our colonial past which we have never bothered to review or amend in the light of subsequent developments in the country. These formats are hopelessly one-sided and loaded in favour of the Employer and against the Contractor. Under these formats the Employer can never do any wrong and is invariably the judge in his own cause. The departments using these formats are understandably unduly defensive of these formats and do not want to part with the same. Several studies have revealed that use of such formats is the main reason for the time and cost overruns which afflict the execution and completion of related projects. For the same reason in an over-whelming majority of cases, the quality of executed work is poor and well below the prescribed standards.

Pakistan Engineering Council taking note of the above situation undertook preparation of standard country-specific contract formats for different times of projects. This effort resulted in production of a suite of documents which reflect the prevailing realities / attitudes in the country while addressing the various areas of concern in the said earlier contract formats. While it can not be anybody's case that these documents reflect the ultimate wisdom and experience on the subject, the same are nevertheless a badly needed and necessary first step in the right direction. Adoption of a standard contract format for procurement by different departments and agencies can clearly be helpful in eliminating some, if not most, of the more offensive procurement procedures and practices in these departments. It can at the same time encourage a more enlightened participation by the bidders / contractors in the process of procurement. All this can only be to the ultimate benefit of these departments who can expect more competitive and broad based participation in their procurement process.

There is also an undeniable need to develop and strengthen the capacity of the said employers to manage disputes which can only be achieved through constant education and training of the dealing staff. The culture which encourages fair settlements of disputes and taking of necessary decisions for the same should be introduced and allowed to take roots. It should not be considered sinful to prefer process, negotiate and entertain

claims as the same are unavoidable particularly where a contractor is to perform as per agreed standards. The current audit procedures ought to be reviewed to bring them in line with these imperatives. In some of the countries around us, claims settlements percentage is as high as above 75%-ours is may be around 10%. This gap is indicative of the formidable dimensions of the effort that is required to bring the dispute resolution in engineering contracts at par with the prevailing standards.