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Prevention of Disputes from the Outset

Presented by Andy Hewitt, FICCP. FCIOB, FCICES, FQSi

The Cost of Disputes

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- The cost of arbitration (Dr. Nael Bunni)
  - Between $150,000 and $200,000 per day
  - Between 12.5% and 38% of the claim value

- The Cost of Arbitration (DRBF statistics)
  - Costs may be 10-15% of project value

The Hidden Cost of Disputes

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- Employee time and effort
- Consultants' time and effort
- Loss of goodwill
- Loss of reputation

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How can we help to prevent disputes from occurring at the outset of our projects?

Select the most appropriate form of contract

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- Many organisations have produced robust forms of contract for different contracting strategies
  - Design provided by the Employer
  - Design and build
  - Turnkey
  - Design, build, operate
  - More certainty of time and budget
  - Remeasurable or lump sum
  - Complicated project or small works

- Bespoke or heavily modified conditions tend not to work well

At the outset …

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- The difference in the cost of employing good consultants and poor consultants is minimal in terms of the project budget, but can be huge in terms of the final cost to complete

- When compiling contract conditions, or changing standard forms of contract, use a person who is appropriately qualified and experienced

Contract Documents

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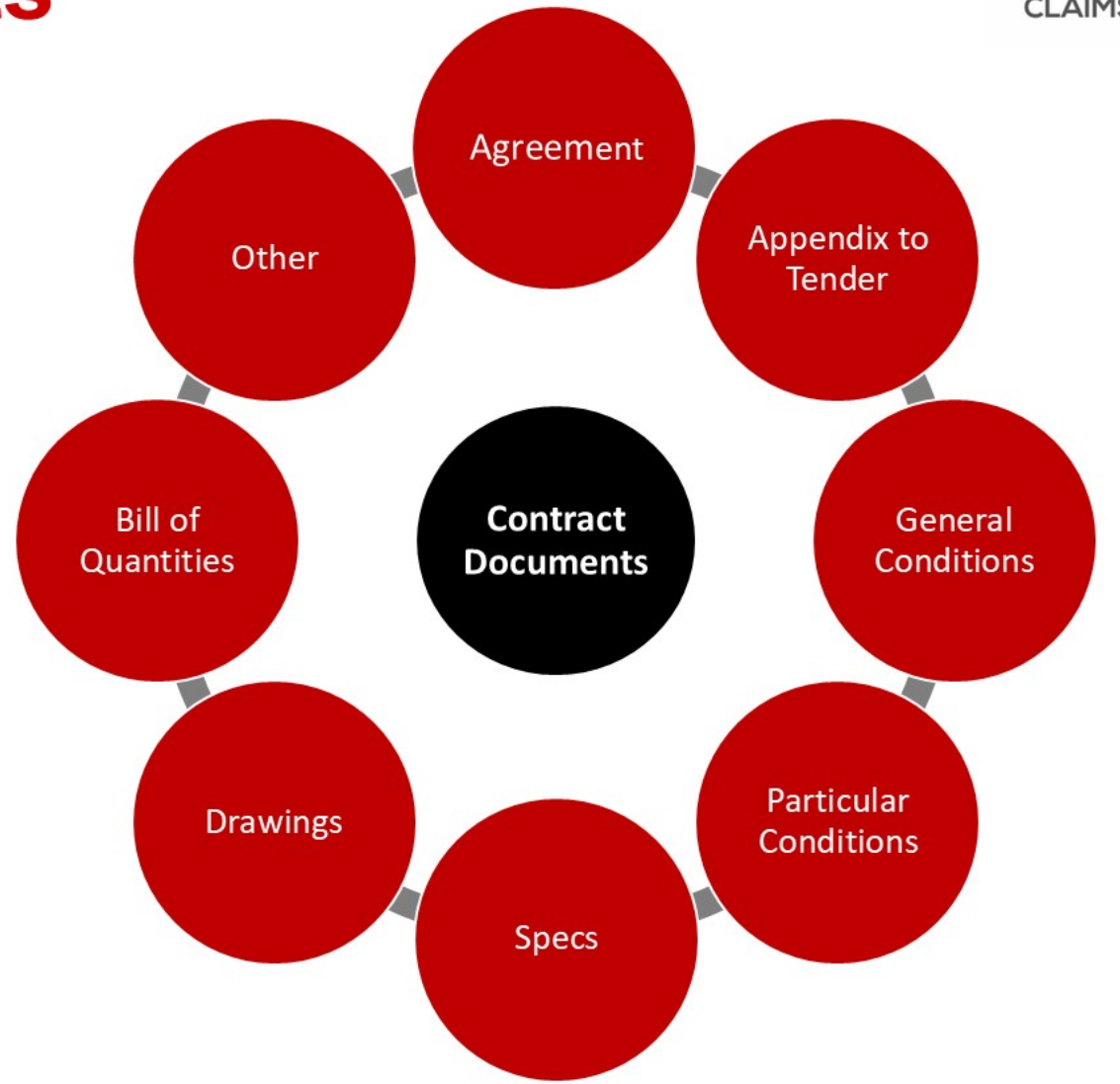

Contract Documents

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- Should be compiled and signed as soon as possible after the agreement has been reached
- Should reflect any changes that have been introduced to the tender documents as a result of tender clarifications and negotiations between the parties
- The practice of including volumes of ‘other documents’ as appendices to the contract should be avoided

Contract Documents

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- A controlled set of contract documents should be maintained on site

- If appropriate, the controlled set of documents should be annotated with cross-references to other parts of the documents where necessary, to provide clarity

Programmes and Planning

The Contractor's Programme or 'Baseline' Programme

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- Most forms of contract require the contractor to submit a programme within a stipulated time frame *(FIDIC 1999, 28 days)*
- Engineers should be realistic about the level of detail expected from the contractor relative to the time frame allowed
- As well as being the contractor's plan to complete the project, the programme will become a 'yardstick', or 'baseline', against which to measure delays
- The programme should reflect the intentions of the parties at the time of contract
- Engineers should not attempt to pressure the contractor into including post contract events into the programme and contractors should resist such requests

Programmes and Planning
Revised Programmes

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- Should circumstances affect the programme – additional work, re-sequencing of the work, delays, etc. – then the programme should be revised accordingly

- The programme should also be revised to take into account extensions of time

Programmes and Planning
Updated Programmes

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- Updated programmes should be produced and submitted to the Engineer on a regular (monthly) basis

- An updated programme, or as-built programme, will record the progress up to the data-date of the update and predict the events after the data-date of the update

- Updated programmes should be accurate and tell the truth because this will:
  - Identify delays
  - Identify the cause of delays
  - Enable mitigating action to be taken and identify the party responsible
  - Enable accurate delay analyses to be undertaken if necessary
  - Enable arrangements to be made for late completion if appropriate

Records

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- The three most important things in preparing a claim or response are:

  Good records,

  Good records and

  Good records

Records

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- Types of records:
  - Correspondence
  - Meeting minutes
  - Submittals
  - Method statements
  - Daily, weekly, monthly site reports
  - Material deliveries
  - Plant returns
  - Labour returns
  - Progress photographs
  - Programme updates

Notices

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- Failure to submit notices of claims on time and in the correct from is one of the most frequent mistakes made by contractors and one of the easiest defences to a claim

- Good practice dictates that notices comply with the following:
  - Submitted in the format of a letter or other formal document
  - Clearly state that the communication is a notice
  - Contain reference to the contractual clause or clauses under which the notice is submitted
  - Clearly describe the events or circumstances giving rise to the notice
  - Record the date of the event

Notices

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- Notices should be submitted to the address and via the method of communication stated in the contract and copied to all parties

- A register of notices of claim should be maintained, included with monthly reports and used as a project management tool

Claim Submissions

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- Claims should be submitted within the time-frames required by the contract
- Claims should not be deferred until the end of the project
- Separate claims should be submitted for each event
- Claims should include an adequate examination of cause, effect and entitlement and be adequately substantiated to enable the respondent to come to a decision
- A register of claims should be maintained, included with monthly reports and used as a project management tool

Claim Responses

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- Claims should be responded to within the timeframes included in the contract
- Responses should be fully detailed
- The purpose of a response is to convince both parties that the findings are fair in accordance with the contract and that if either party raises a dispute it will fail.

Don’t be afraid to ask for help

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- If things start going wrong, some expert advice at an early stage can often help to resolve contentions before they become disputes

- If disputes do crystalize, experts should be consulted as soon as possible.

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Q&A Session

Q&A Note: Time ran short, so Andy has provided Q&A answers below.

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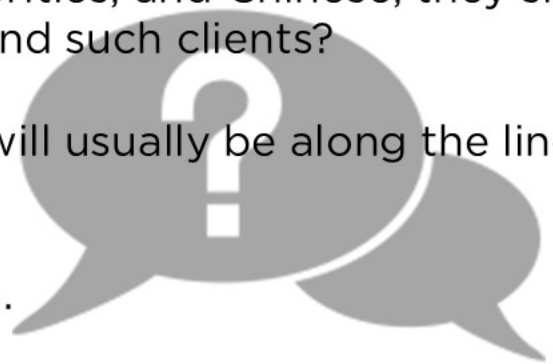
1. If the Employer rejected the high-level baseline schedule, what should the Contractor do?

It depends on the reasons for rejection. If the programme does not comply with the contract, the Contractor should revise it. If the Engineer is rejecting it for reasons that are non-contractual, the Contractor should ask the Engineer what contractual basis he has for rejection.

2. When dealing with government authorities, and Chinese, they simply state we will not pay any claims, how do we get around such clients?



Follow the contract procedures, which will usually be along the lines of:

1. Submit a notice of claim.
2. Submit the claim.
3. Request a response to the claim.
4. Elevate the matter to a dispute.

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Thank you

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