

A PRACTICAL GUIDE TO PREPARING VARIATION CLAIMS

Important issues to consider when submitting variation claims for construction projects

All too often, the day-to-day reality of workload pressures for managers on a construction project means that variation claims do not always receive the required attention to detail - at least during the critical preparation phase. Practical experience tells us that good research and preparation are the keys to success in variation claims and there is no shortcut. Indeed, close attention to certain key issues can help avoid a badly structured and poorly substantiated submission, and therefore significantly improve a contractor's chances of securing a positive outcome.

ADHERING TO CONTRACT PROVISIONS

Adherence to provisions within the contract conditions is of vital importance. Failure to do so can severely prejudice a contractor's chances of securing a favourable outcome. Occasionally, compliance with certain contractual stipulations is a "condition precedent" to the recovery of additional time and/or money, and noncompliance can result in a contractor being prevented from recovery. Certain contract conditions

provide for extremely short notification periods and may be regarded as punitive and unfair. However, whilst some judges and arbitrators may view such provisions quite narrowly, they do take the view that the contractor was, or should have been, aware of such conditions at bid stage and therefore to have priced for sufficient resources to comply with them.¹

Occasionally, the contract conditions do not provide an express route for the contractor to recover compensation for certain events, in which case it may be possible to pursue a claim based on terms implied through common or civil law. It is advisable in such instances for a contractor to seek professional advice from a construction lawyer who is fully conversant with the local law.

VARIATIONS SUBMISSION DOCUMENT

Typically, standard contract conditions will require the contractor to submit a variation application in a timely manner, while not necessarily specifying a particular submission format. However, in certain instances the contract conditions require the contractor to submit its claim using a standard format. It is advisable, when dealing with significant variations and where the standard template does not sufficiently articulate the contractor's position, for a supplementary variation document to be submitted alongside the standard format.

Like any business document, a variation submission must not only provide all necessary information, but it should be presented in a professional and logical format. It should ideally be a stand-alone document that contains all information required to verify the liability and valuation issues identified, and is reader-friendly, clearly set out, and referenced. It should guide the reader through the claim in a coherent manner, leading to a logical conclusion.

The following is a typical structure of a well-prepared variation claim:

¹ The UK "Multiplex" case discusses this issue: *The Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd.*, 2007, EWHC 236 (TCC).

1. Introduction and Background
2. Cause and Effect
3. Entitlement
4. Valuation
5. Substantiation (Appendices)

INTRODUCTION AND BACKGROUND

This section sets the scene and summarises the issue at hand, how it arose, and the remedy sought by the claimant.

CAUSE AND EFFECT

Cause and effect relates to how a variation has originated. It is fundamental to a variation claim and should be set out clearly, providing all necessary corroborating evidence.

Cause:

The cause is act of omission or occurrence of an event for which the employer is responsible and gives rise to a variation order under the contract or alternatively a claim for breach of an implied term. The cause can be a letter, an instruction, drawing revision, change in legislation, or act of prevention by the employer or agent, etc. Always ensure that if the document is from the employer or agent that the person issuing it has the necessary authority to require the identified change. The contractor should then provide a short narrative setting out the relevant circumstances and referring to the specific clause/breach giving rise to the claim.

Effect:

Contractors often consider that the valuation part of the submission deals with effect by identifying and valuing the changes arising from the varied works. However, unless the route or link between the cause and the alleged effect is identified and explained, the contractor will not have established that it is in fact a bona fide variation to the original contract requirements. Employers will often successfully refute a contractor's claim on the basis that it has not distinguished changes specific to the alleged change in the works requirements. A simple example of establishing the link between cause and effect can be demonstrated as follows:

There has been a change in government legislation regulating firefighting installations in residential high-rise construction. The following steps are required to demonstrate the link between the cause (change in legislation) and the effect (additional works):

1. Identify the original contract drawings
2. Demonstrate the design development required to bring the contract drawings to "Issued for Construction" standard (this establishes the full extent of the contract requirements)
3. Explain in general how the changes in legislation will affect the fully developed (original) contract design
4. Identify the individual affected component parts of the contract specification, explaining exactly why these changes are required
5. Provide all calculations substantiating the changes (e.g., changes to pipe sizes, pumps, insulation, sprinkler spacing, etc.)
6. The valuation process should then measure and value the original (fully developed) contract requirements and the revised requirements, the difference being the value of the varied works.

ENTITLEMENT

A contractor's entitlement to additional time and/or money will be derived from either the contract conditions or as a consequence of the employer's breach. A contractor must clearly state the specific clause within the contract upon which it relies or alternatively what principle it alleges the employer has breached. This identifies the link between the cause and effect to the employer's liability/contractor's entitlement.

VALUATION

The contract conditions usually prescribe the manner in which variations should be valued. The methodologies typically include the following:

1. Contract rates and prices
2. Rates and prices analogous to contract rates and prices
3. New rates and prices established from analysing component parts of contract rates and prices
4. New rates and prices (commonly referred to as Star Rates)
5. Time and materials (retrospective valuation)
6. Dayworks (retrospective valuation)
7. Actual cost (damages for breach)

In the first instance, contract rates should be used either directly or indirectly to value the varied works. In the absence of such rates, valuation typically involves establishing actual cost and applying a reasonable profit and overhead allowance. Daywork rates included in the contract will only be used to value varied

works if explicitly instructed by the employer's agent. Damages awarded will be based on actual cost and should not generally include any allowance for profit.

It is important to allow for the full extent of the variation, including any additional indirect costs such as management time, engineering time, design time, temporary works, specialist plant and equipment, and the like. Finally, insurances and bond costs may be volume- or turnover-related and should, if applicable, be included as additions to the overall cost of the variation.

SUBSTANTIATION

Under the principle, "What is asserted without evidence can be dismissed without evidence," every aspect of a contractor's variation claim, including cause, effect, entitlement, and valuation must be adequately supported with documentary evidence. The following are examples of typical sources of evidence required to substantiate a variation:

1. Instructions from employer's agents
2. Correspondence
3. Minutes of meetings
4. Extracts from contract documents

5. Contract drawings
6. Register of revisions issued by date
7. As-built drawings
8. Remeasured quantities with guidance as to source material used
9. Photographs
10. Daily site reports
11. Time sheets and/or allocation sheets
12. Cost data for incurred expenditure
13. Subcontractors' accounts
14. Invoices
15. Programme updates

Record-keeping is at the core of successful variation claims. Measures should be put in place early in a construction contract to ensure that all documentary evidence that will be required for substantiating potential variation claims is consistent and being properly collected and filed. It is worth noting that whilst the collation of records should generally be a matter of course for all contractors, photographic evidence and officially circulated daily site reports can be particularly persuasive sources of contemporaneous data, to be drawn upon in a retrospective scenario.

“A party to a dispute, particularly if there is an arbitration, will learn three lessons (often too late): the importance of records, the importance of records, and the importance of records.”

Max Abrahamson, author, Engineering Law and the I.C.E. Contract

CONCLUSION

A well-prepared and properly substantiated claim submission will be considered seriously by employers and their agents, and can be an effective tool in expediting agreement and avoiding conflict. Conversely, poorly drafted variation claims can lead to frustration and conflict between the parties. Notwithstanding the political and administrative challenges that a contractor potentially faces on a construction contract, investing time and resources to deliver complete and robust submissions for variation claims will invariably lead to a better business outcome for the contractor.

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