



Against All Odds

TE&A's Special Edition Issue

by Clive Horridge



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Clive Horridge has a career in Civil Engineering spanning more than 46 years. Most of his experience in the industry has been gained with Corderoy on numerous major Motorway projects in the United Kingdom under the ICE 4th and 5th Editions and the various CESSM Conditions of Contract, and further experience on major projects in the Middle East while with Parsons Group working in Romania and in Middle East. Since joining Techno Engineering & Associates in 2006, Clive has, over the last 11 years, become specifically involved with Dispute Resolution procedures on Motorway, Road and Rail Rehabilitation projects under the FIDIC Conditions of Contract in its various forms. Over the years, Clive has developed an in-depth knowledge of Construction Contract generally, not only under the Forms of Contract above, but an understanding of working practice, interpretation and of course, project specific application of contract.

As a seasoned “veteran” in the Construction industry, he has played a significant part in Contract Management for many years, founded on “old school” principles and offering unbiased contractual guidance to Project Managers in both the role of the Engineer and the Contractor. Utilizing his professional experience, Clive has contributed vital input into claim assessment both in quantum and more specifically, liability and contractual validity. As Senior Contracts Advisor, Clive will approach each of the challenging and widely varied spectrum of tasks with an open-mind and impartiality, required to achieve Client expectations. Clive is an Expert Witness who has given evidence on Quantum matters in numerous ICC arbitrations and countless Dispute Adjudication procedures.

Not just a Phil Collins song-title depicting a common scenario of despair, it is the case across the board, and in particular on large construction projects in the public sector, that contractors face a multitude of a wide range of difficulties in the process of executing a project.

Do we sympathise with their dilemma? Well, to an extent the answer is often yes, despite that experienced contractors in the field have 'seen it all before' and are, to a great extent, deemed to have made provision in their tenders for the majority of foreseeable hurdles that they may face.

But what is foreseeable? Construction contracts cover a wide array of various forms of contract, and notorious for its contractor-loaded balance of liability, the FIDIC 'Silver Book', for EPC Turn-key projects, provides little scope for contractors to recover losses which are arguably the result of the 'assumed risk' element, to be absorbed by the winning bidders.

Setting aside more run-of-the-mill technical difficulties such construction contracts invariably pose for EPCT contractors, a growing trend in the industry on public sector projects, is the effects of a 'master-servant' approach to what should be a partnership relationship under the contract.

Of course, these words won't be found in the general conditions, nor elsewhere in the contract documents, and it would be foolish to think that they would, yet the package of the contract documents as a whole would indicate that each party has a role to play under an EPCT contract (as with others), and that role should embrace the 'good faith' principles of civil law (or as may be appropriate under common law) and include open dialogue and reciprocal cooperation between the parties, in order to deliver the expectations of the parties, as they had intended.

We all know that it's all smiles when a contract is awarded, and in the public sector a government department will be

A photograph of construction workers at night. In the foreground, two workers in bright orange safety suits and white hard hats are focused on their task. The background is filled with many more workers in similar gear, illuminated by a series of warm, yellow lights that create a bokeh effect. The scene is set on a construction site with visible structural elements like rebar and concrete forms.

One cause of post-contract demise is often an employer's failure to grasp and reap the rewards of the 'partnership' concept under the contract.

looking forward to its shiny new motorway, railway or hospital facility, and the contractor, and let's not forget its eager share and stakeholders, will be looking forward to another five years or so of continuing work, extended business opportunities, and a healthy financial return for its efforts.

Reality, and Construction News® headlines, are stark reminders that wavy lines can soon replace the smiles, on many such projects.

One cause of post-contract demise is often an employer's failure to grasp and reap the rewards of the 'partnership' concept under the contract. It's not surprising really, those in charge of the public purse are often powerful department heads, answering directly to a high ranking official, so it is understandable that their attitude towards the project and the contractor often mirrors their attitude to those that serve under them, which unfortunately is very likely to be a master-servant approach, which is all too familiar to us in the construction industry.

Project goals are usually well defined for both parties, under the terms of a contract. A well-crafted contract will define sectional completions, delivery milestones, constraints and the like, and payment terms which reflect the same, and thus maintain an ordered programme and cash-flow, as anticipated by both contractor and employer alike.

But what of other employer goals, those which are not addressed by contract and tend to fester behind the scenes, manifesting themselves at inopportune times through the course of a project? Their mere mention may raise some eyebrows, yet those who have faced them in the real world, will likely recognise them and be nodding their heads at this juncture, knowing very much first-hand that they can, and do arise, and can have devastating effects on a project.

Ambition can be cruel and those in power have a duty to balance their ambitions

against the effects that implementing them may have on others.

Recently, faced with a scenario where a contractor had undertaken to finish a section of work earlier than the contract had provided for, solely on the oral demands of a high-ranking official, it soon became apparent that there was no contractual provision that would reliably support the contractor's financial claim, which stemmed from the effects of bringing forward such a complex delivery milestone.

"What Claim?" was the employer's position. Its view was that the contractor had, on its own volition, started the section earlier and had finished it earlier, the work had been the same... and to cap it all, there was no such instruction under the contract to bring the section forward and there was no addendum to the contract or written supplementary agreement to that effect.

In reality, and on the oral demands of its employer, the EPCT contractor had indeed started earlier, so much so that there was no time to prepare adequate design. This aspect alone, plus the implementation of all manner of delay mitigation measures (and the disruption that such measures often creates), together with dealing with change orders and a host of other employer delays, as well as those usually considered to be contractor liability had the change not occurred, resulted in a construction delivery cost that well exceeded the contractor's predictions, by almost 100%.

So where was the dividing line between party liability, originally governed by the 'single point of responsibility' that the EPCT contract principles provide, under these changed circumstances?

The employer's view was that there had been no instruction issued under the contract, so the measures taken were considered to be at the contractor's discretion. Does the contractor have a claim, where the circumstances were such that the significant increased costs expended were indeed attributable to actions at the



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discretion of the contractor when working to a revised construction schedule? In the employer's view, and as determined by the employer under the contract, the answer was no.

Consequently, a Dispute Adjudication Board (DAB) decision was sought under the dispute resolution procedures of the contract, and in the circumstances, the complex Statement of Claim which we prepared included a cascade approach, commencing with argumentation of entitlement under the change order/variation clause of the contract, and further cascaded through the wide range of the various legal arguments which were considered appropriate in support of such a case.

The three member DAB's unanimous decision has been recently received, and therein the DAB provided the parties with an extensive and excellently reasoned decision, which although well balanced in its address of the decisions sought by both parties, the decision supported the contractor's entitlement, predominantly under the civil law principle of 'acting without mandate'.

In further detail, yet to maintain anonymity [...] inserts are used, the DAB Decisions within its Bifurcated Decision on Liability, concluded the principle that *"the DAB decides the Contractor has an entitlement to additional payment which arises [under the applicable] Law"*, yet clarified that *"the DAB decides that the Employer has never instructed the Contractor pursuant to the Contract provisions to accelerate progress in [the relevant section] of the Works (and other related parts of the Works) [...]. However, the DAB decides that the Contractor was required by the Employer to accelerate the work of [the relevant section]"*.

Importantly, a distinction was made clear, whereby *"the DAB decides that the Employer's Instructed Variation [releasing to the Contractor access to and possession of part of the Site at an earlier date than*

anticipated], in itself does not instruct the Contractor pursuant to [the Employer Instructions Sub-Clause] to:


(a) *Start [the relevant section] of the Works (and other related parts of the Works) on [Date #1] compared with the access date under the Contract of [Date #2];*

(b) *Achieve an earlier Due Date for Completion for [the relevant section] of the Works (and other related parts of the Works) of [Date #3] compared with the Due Date for Completion under the Contract of [Date #4].*

Instructed Variation [releasing to the Contractor access to and possession of part of the Site at an earlier date than anticipated] together with subsequent further instructions comprised a requirement for an earlier start and completion of [the relevant section]."

The DAB's Decision that the merits of the case centred on the conclusion that *"the DAB decides the Contractor has an entitlement to additional payment which arises out of the [applicable law]"* and that the Variation releasing to the Contractor access to and possession of part of the Site at an earlier date than anticipated, was in itself, not an instruction to start and finish the relevant section of the Works sooner, means that a Variation [and its respective Sub-Clause] could not be the basis for evaluation of the work carried out.

However, the reasoning applied by the DAB is such that the civil law principle of 'acting without mandate' is applicable, and consequently that *"the aforementioned instruction together with subsequent further instructions comprised a requirement for an earlier start of [the relevant section]"* and that *"the aforementioned instruction together with subsequent further instructions comprised a requirement for earlier completion of [the relevant section] of the Works clarified to be [Date #3] subsequent to the above instruction. The DAB understands the date of [Date #3] to be the start of commercial*



This DAB decision should be taken as a warning to employers not to use and abuse your counterpart partners in construction projects, as there is no hiding behind a perceived lack of provisions under respective contracts, and to do so, liability may be decided against an employer.

operations of the [the relevant section]", and that "the aforementioned instruction together with subsequent further instructions comprised a requirement to accelerate progress in [the relevant section] of the Works (but not other parts of the related Works) up to completion and the Employer's Taking Over of the same on [Date #5]".

Therefore, and on the foregoing reasoning, the DAB decided that *"as a consequence of the instruction [releasing to the Contractor access to and possession of part of the Site at an earlier date than anticipated] (and subsequent further instructions received from the Employer over the period of construction of the section) the Employer had assumed liability for the consequences of the Contractor giving effect to such instructions"*.

As a consequence of such Employer liability, *"The DAB considers the Contractor entitled to receive reimbursement of costs excluding profit as a remedy at law, such costs to be consistent with the local market prices at the time of execution. Such costs to be demonstrated as resulting from the alleged causes" and that "The DAB considers the Contractor entitled to receive financing charges on any amounts due, pursuant to, and calculated in accordance with, [the Delayed Payment Sub-Clause]"*.

The above decisions of the DAB all stem from the DAB's reasoning that:

"In the DAB's experience, the requirement to commence and complete work at an earlier stage in an EPC style contract is likely to have had an effect (significant or otherwise) upon the cost of performance. The nature of EPC contracting is such that time is allocated for design followed by procurement, before any physical construction work can commence. The repositioning of a work or Section within a contractor's programme may have time and costs consequences and affect the basis upon which the Contract Price was

agreed. Similarly, any reduction to the periods for the design and procurement may also have time and cost consequences. Execution and procurement strategies upon which a Contract Price was based risk to be knocked off balance with costs consequences.

Likewise, in the event of acceleration and the unilateral demand of one Party for completion by some immutable date, in the DAB's view, fundamentally alters the risk allocation set out in the Contract.

Notably, in this instance, the Parties could not agree there was a contractual remedy. It therefore follows that in those circumstances, absent an agreed price for that change and absent a contractual remedy, a contractor would be entitled to recover payment of what it constructed under the law".

The parties had agreed that the DAB would bifurcate its decision, whereby in the event that employer liability was found, the parties would have an agreed period within which to negotiate a financial settlement. Failing which, the DAB will proceed to decide the quantum stemming from the bifurcated decision on liability.

The moral of this story for employers is don't attempt to use and abuse your counterpart partners in construction projects, because there's no hiding behind a perceived lack of provisions under your respective contracts, and to do so would be at your risk.

And for contractors, when your claim appears to be against all odds, as it was in this case, another song-title comes to mind, Peter Gabriel's "Don't Give Up". Seek the services of a good technical, contractual and legally adept construction claim consultant, who will provide experienced counsel and the added support of sound and reliable legal advice. The law prevails in any event, and good advocacy can win through, as we have proved to be the case, on this and a multitude of occasions.



When contractor's claims appear to be against all odds as in this case, "don't give up", the law prevails in any event, and good advocacy can win through, as we have proved to be the case on this and a multitude of other occasions.

Bucharest/Romania

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