CONSTRUCTION CLAIM PROBLEMS IN MALAYSIA

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Abstract- The construction industry in Malaysia is large and it involves multidisciplinary participants. There is high frequency of disputes arising from construction contract claims. Even with the most expert understanding of construction contract clauses and the most equitable risk-allocation management, claims will continue to present problems if they are poorly managed in practice. This research presents the results of interview with 25 contractors and 19 consultants on the claim issues and problems in Malaysia construction industry. The main findings which indicate that the lack of site staff awareness to proactively detect claims, inaccessibility or unavailability of relevant documents, and conflicts arising during owner/contractor negotiation are all critical problems associated with the process of claim management. The problems observed from this research could be used to solve or improve the contractors' claim management system.

Keywords- Construction Claims, Claims Introduction

I. INTRODUCTION

Construction claims are considered by many project participants to be one of the most disruptive and unpleasant events of a project (Ho, 2004). Considering the giant size of construction projects, it is not surprising that the number of claims continues to increase. According to Vidogah and Ndekugri (1997), however, claims are becoming a way of life and, indeed, an indispensable part of modern contract systems. Claims are common in construction projects and can happen as a result of several reasons that can contribute to delaying a project and/or increasing its costs. Finishing a project on schedule is a difficult task to accomplish in the uncertain, complex, multiparty, and dynamic environment of construction projects (Issaka, 2006).

To enhance the chances of success, contractors submitting claims must closely follow the steps stipulated in the contract conditions, provide a breakdown of alleged additional costs and time, and present sufficient documentation. On the other hand, project owners need to follow an overall comprehensive step-by-step procedure for tracking and managing the claims submitted by contractors (Peter, 2010). Even though construction claims have considerable effects on the projects, they are not always given adequate considerations. From the project employers' point of views, one of the problems is that they do not realize the required data in managing their claims and how important such data are (Tochaiwat, 2006). Construction claims and disputes can occur in both publicly and privately funded projects, and in projects with small, as well as large funding. In fact, no project can be considered protected from a potential claim. Such claims can lead to significant financial damages. Therefore, all parties including the owner, designer and contractor should fully understand the ***claim process (Enshassi, 2009).*** Construction claim management is the process to control the claims, defined as the seeking of consideration or change by one party in the construction project against another party. Because of the substantially increasing number of construction claims nowadays, the implementation of the effective construction claim management is needed (Tochaiwat, 2004)

II. CURRENT ISSUES IN CLAIM MANAGEMENT IN MALAYSIA

Claims are numerous and different. Claims can happen due to delays in construction or materials delivery, weather, owner changes, poor site management, differing site conditions, insufficient plans and specification, failure to disclose important information in the construction phase, work acceleration, schedule issues and weather. Perceptions of how claims arise may vary according to the views of owners, contractors, and consultants.

i. Design.

Defective design and/or specification was highlighted by many respondents as one of the most frequently reason for claims. Design defects include errors and omissions, as well as lack of coordination between the various aspects of design. These problems affect contractors directly, who normally may not have the legal right to file a claim directly with the designer.

ii. Change order.

Change order for extra work is one of the popular reasons for claim. The owner is responsible for the impact of a change order upon the contractor's time and cost performance. However, not all changes in the work will affect the contract duration. The contractor is responsible for proving that the time impact is attributable to a change order issued by the owner. Proving the impact of changes is often difficult. Even though entitlement to compensation may be justified, the owner and contractor may not be able to settle a time adjustment. In another scenario, a new design is developed after part of the design has already been implemented. The design change would result in multiple change orders from the contractor. The change orders would include additional material, labour, supervision, and equipment costs. These changes may have led to damages on other activities

because the contractor was forced out of his plan and needed to learn the rework as the job moved along.

iii. Inclement weather

Even though a contractor is required to assume the risk of severe weather conditions during the project season and at the project location, delay caused by unusually severe weather is excusable under the standard construction contract. To be allowed an extension of time, the contractor is required to establish evidence that the severe weather deviated from the local climate significantly and that it caused delay in specific parts of the work. Disputable situations can arise when interpreting the days of unusually severe weather. In some cases, a consequence of bad weather, such as flood, could hinder the performance of work and the contractor may need time recovery from that delay, but negotiation at that time is always difficult.

iv. Conflict/dispute.

Claim can also arise as a matter of conflict between two parties, in most circumstances the contractor and the owner that is disputed and materialized as a claim after it originated as a request for change and/or an assertion of variation in contract conditions. Fundamental problem with claims is that they involve a high degree of "cognitive conflict" and strong underlying "conflicts of interest." Cognitive conflict occurs when people interpret data relating to issues of facts differently.

Cognitive conflicts arise from inadequate information, misinformation, different views on what is relevant, and differences in the approach and procedures used to assess claims and conflict. When parties use different information and assumptions to assess claims, or interpret information differently, they arrive at different results. Conflict of interest occurs where the respective interests of the parties are perfectly opposed and divergent because a particular decision may maximize the outcome and favour the interest of one of the parties while reducing the outcome for the other party.

v. Documentation

Poor documentation always contributes to the problems in claim process. The contractors need to have a good documentation and filing system. The use of daily records from the site team is very important, especially if these documents are signed by the consultant. These records are the "diary" of the project and that they would have made all the difference if they had been properly filled out. The absence of these records have been stated by many to have caused the head office team to lose contact with the events that happen on site and, therefore, have left the office team paralyzed in some claim situations that required support from daily events on site such as equipment present, number of labours, quantities of concrete poured for a certain structure, and so on.

vi. Contract Awareness

The site team in general lacks contractual awareness. It is not enough that the site managers would become contractually aware of their scope of work. Rather, the root of the problem lies in the site engineer who deals directly with the consultant. Numerous cases had been reported about site engineers who receive instructions from consultants and would not think twice about the contractual stance of these instructions. The result is significant loss of time and money.

vii. Relationship

The contractors at many times would rather waive his contractual rights and suffer from losses than to risk losing relations with the consultant in times of conflict. The explanation for this phenomenon is that it is a common trait in the Malaysian culture to fear losing relations with the client, even if financial and time burdens are the price. There is a distinct difference between dealing with a Malaysian client and a foreign client in the sense that Malaysian clients are actually offended from contractual written notifications which involves more correspondences and minutes of meeting. The manager of that project relented to a great number of claims issues because he feared to lose relations with the consultant, who was very upset whenever a notification or reservation of rights was made.

viii. Late Payment

Late or non-payment of interim payment to contractors has been a major issue in the Malaysian construction industry. Late payment is the failure by the employer to pay the contractor within the time stated in the contract. It has affected the performance of contractors and has caused several of them not being able to complete the work on time thus causing delay in the completion of the project.

In the worse scenario, they are forced to abandon their projects for lack of fund and some were on the brink of bankruptcy. In the PWD203A Form of Contract, it is stipulated that the period for honouring the certificate is 30 days from the date of the issuance of the certificate. Clause 30.1 of the PAM Form of Contract stated that the period of honouring certificate is within 21 days after the issuance of the certificate. Any payment made later than the stipulated time frame can be considered as late or delayed payment. Clients usually delayed or failed to pay the contractor when the latter does not receive his payment after 3 to 5 consecutive periods of interim certificate (3-5 months).

III. PROBLEMS IN CLAIM MANAGEMENT IN MALAYSIA

Problems in claim process are divided into 6 stages: identification, notification, examination, documentation, presentation and negotiation.

i. Identification Stage

Construction claim identification is ‘‘timely’’ and ‘‘accurate’’ detection of a construction claim. Identification of construction claims mainly affected by two things: recognition of the possible categories of claims causes, and direct actions on site that initiate the claim. Awareness on the part of the contractor of work aspects that are susceptible to claims shall first exist, while the claim is only initiated when it is perceived by the contractor that a triggering action on the part of the owner or engineer has taken place. Project team should alert on the changes of work, claims and variation order instructions. They need to have knowledge and skills to assist with determining the appropriate actions to take. The earlier a claim is identified the more options are available to mitigate potential risk associated with it. Early detection and acknowledgement of problems is an important step in tracking changes. Unresolved change orders typically become claims. The sooner changes are resolved, the less they impact the project’s schedule or budget. A contractor's key project personnel must take a proactive role in the early recognition of potential claims and disputes. They should be in the best position to evaluate the progress of the work and identify any developing problems on the project. Failure to recognize a claim until the end of the project may expose the contractor to contractual defences, such as untimely notice. Beyond contractual issues, it may be extremely difficult to reconstruct the facts to support a claim at the end of the project. Consequently, project managers must be vigilant in identifying potential claims during the course of construction.

ii. Notification Stage

Construction claim notification involves alerting the other party of a potential problem in a manner that is non-adversarial. Time limit requirements are very crucial and critical. An initial letter of a claim notice to the other party should be short, clear, simple, conciliatory, and cooperative. It should indicate the problem and alert the other party of the potential increase in time or cost. It is very hard to argue with someone who appears polite and sincere, helpful, and cooperative.

The parties involved in the construction project usually insert notice requirements in their contracts so that they are informed of any impending claims that may be made against them. This enables them to keep track of the various issues that arise under the contract, consider their financial implications and issue instructions. Timely notification of claims also gives the parties the greatest time possible to deal with these issues.

Potential claims are most effectively tackled quickly, when the facts are still fresh in the minds of the parties and before positions have hardened. At the beginning of the project, if contractors find any ambiguities in the drawings, contract or specification, they should send a notice to the client. If contractors can claim for extension of time or variation order, then they can plan it earlier. On behalf of the client, they should aware of work changes and progress during the project. It is check and balance process and this process should be looked in a positive way.

Claim notification need to be done as detail as possible. It should include the amount of work, the estimate cost and who should take the responsibility. Client should come out with formal notification and must be understood by all parties involved. A claim notification should be made only after careful consideration, in a formal and objective manner, on precisely what contractual grounds, how much money is being sought and how that sum is arrived at, and the corresponding time extension to the contract, if appropriate.

iii. Examination Stage

Claim examination involves establishing the legal and factual grounds on which the claim is to be based. This should also involve the estimate of the potential recovery. The contractor has a key task of substantiating each of the claims delivered to the client that is, defending it and proving the validity of its content.

The items claimed by the contractor should fall under two major categories which is time and cost. In the first category, the contractor requests a modification of contract delivery dates and milestones to offset the delays that it did not cause. In the second category, the contractor asks for reimbursement to cover the following items: premium time, increased equipment cost which includes rental or ownership, increased financing costs, increased site overhead, increased home office overhead, and decreased labour productivity.

In assessing the documentation presented by the contractor, the engineer need to know how to judge whether established methods of analysis have been used in substantiating the contractor's claim. During examination of claim, the claim entitlement must be established. This, in turn, requires a comprehensive description of the actions or inactions of the project owner or others controlled by the project owner and proof the impact of those actions or inactions actually negatively impacted the project schedule. In quantifying the claim, contractors need to include both the direct costs and delays caused by the unanticipated events, and the cumulative impacts of such events.

Quantification of damages associated with construction claims is a diligent effort, as they are often intertwined between various aspects of the project, such as cost estimating, scheduling, sequencing and project management. The quantification, presentation and evaluation of construction damages should include the damage causes and effect, direct damages (labour / material / equipment / subcontract), extended project costs

(general conditions / general requirements), expanded project costs, labour productivity loss and disruption, cost escalation and office overhead costs.

iv. Documentation Stage

Claim documentation is the collection of the hard facts that give the actual history of a construction claim. A well prepared defendant quickly demolishes evidence and claim costs that are not supported by accurate records. The documented facts are the glue that holds the legal framework together. If these are insufficient the claim will not succeed.

The contractors should implement an organized program of documentation which permits them and the client or owner, to establish a baseline against which progress can be measured and the construction process controlled. Contractors must extensively document, on a continuing daily basis, all events relative to interferences, instructions to the contractors, changes to the work, impact by others and all issues which have an effect on the contractors no matter how minor. The objective here is to provide all the necessary documentation for developing a position both as the project unfolds as well as upon the completion of the work.

The contractors' most favourable approach to preserving its' rights is by giving the owner appropriate notice to be followed up with details when the effect of potential impact events can be evaluated. Beyond maintaining good records of daily activities and of the project in general, the contractor must be both proactive and reactive in developing claim documentation. With respect to proactive documentation, the contractor should take immediate steps to create a record of potential claims as they arise. Where the contractor determines that it will be subject to unforeseen expense, delay, acceleration or disruption due to the fault of another, such concerns should be placed in writing and provided to all proper parties. If feasible, the contractor should also photograph and/or videotape problems on site, identify potential witnesses, and summarize the activities of other trades affecting its work. Strong documentation is one of the best defences for or against construction defect claims/expenses. It can support that contractors built a structure right in the first place, or sufficiently corrected an issue, and it can make physically proving this easier if necessary by allowing the contractors to access accurate information in the event something needs to be uncovered.

v. Presentation Stage

A claim presentation should be logically built up, well organized, and factually convincing. Thus, a claim should be written in a format that emphasizes the fact that a contract requirement was breached. A contractor must then demonstrate the resulting harm was caused by the owner's acts. The contractor is then to submit the final amount of time and/or money claimed within a period specified in the contract from the end of the effects resulting from the occurrence of the cause for the claim.

The claim should be presented in a clear and a logical manner, preferably including an introduction providing details of the parties involved in the claim and all relevant dates and information such as summary of claim, underlying facts, entitlement analysis, quantum calculation analysis, factual support for claim and any other relevant information. A review of project records and documents, as well as the definition of scope outlined in the contract, is necessary to establish the facts surrounding the claim and to develop strategy for preparation as well as resolution.

It is very important for the contractors to have an experience person in presenting the claim to the client. Site staff must be aware of the claim process. They should know how to present the claim and defend it. Presentation skills are critical to the speedy and efficient resolution of construction disputes.

vi. Negotiation Stage

Negotiation involves the two parties who agree to communicate with each other and make decisions. The claim negotiation plays an important role in resolving claims, preventing disputes, and keeping a harmonious relationship among project participants. A structured and proper negotiation preparation includes ascertaining that all information is current and complete, minimizing the scope of negotiation earlier so that insignificant points should not precipitate a violent argument and disrupt progress, knowing one's weaknesses and trying to utilize weak points by conceding them in return from the other party, foreseeing problems and anticipating the opposition's next move.

To benefit from this stage, a construction contractor needs experts that have skills for negotiation. When confronted with construction claims, negotiation is always the preferred method for owners and contractors. The growing scale and complexity of the building process increase the number of construction claims. Therefore, negotiation plays an important role in resolving claims, preventing disputes, and keeping an amicable relationship between owners and contractors. However, not every negotiation can achieve the expected outcome.

Certainly, almost all negotiations provide participants with opportunities either to take risks or to behave conservatively. Risks refer to the positive or negative influence of individual. During construction claim negotiations, negotiators adopt different negotiating behaviours, which may have favourable or unfavourable negotiation outcomes.

CONCLUSION

This paper is meant to gather detailed information on construction claim related to the contractors. To

ensure the replies come from reliable sources and viable information were collected, only experienced respondents were selected, namely those with 10 years experience and more. The in-depth interview questions were drafted with the purpose of getting detail information on various aspects relevant to the research. The data gathered exposes the understanding of respondents over construction claim related to the contractors. Understanding of construction claim process will lead to a less problematic claim process. Apart from this, the interview replies show the respondents' level of knowledge on various issues of construction claims. In addition to this, certain aspect related to construction claims was also identified.

The findings highlight on the need for a good documentation and record keeping system with a competent site staff that can recognize a claim during project execution. Keeping appropriate project information is an essential part of project monitoring and reporting. It also appears that a standard and transparent procedure should be put in place whereby contractors would be able to follow to properly prepare the claim. In addition, the staff awareness, training in how to document and submit a well-supported claim, and negotiations with clients are becoming a necessity.

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