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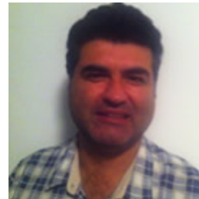
Is your Contract Management Plan (CMP) a checklist or a real contract management tool?



Posted by Jason B Lal. Jason B. Lal, Contract Management Consultant | Feb 12, 2018 1:38:50 PM

Let's say a costly and lengthy dispute hits your organization with high court costs and settlement fees!

And too late you realize you signed the contract agreements before performing a "gap analysis" that would scrutinize the contract for silent obligations (gaps) that are known to lead to disputes.

As a result, the contract language and ambiguities have gone unnoticed and your CMP was simply a checklist of actions derived directly from the contract provisions. This left you with no real contract management tool to identify strong dispute potential.

Now you realize too that your task goes beyond reviewing a flimsy checklist that simply restates what has already been spelled out in the contract. A realistic CMP expands contract language to identify the details needed to reduce the buyer's risk for dispute.

If only you had answered before you signed the contract:

- Did you ensure that the contract language was clearly stated, accurate and thorough so as to avoid misinterpreting its provisions?
- Did you identify the hidden obligations that are implied by the law as applicable to your particular type of contract or transaction?

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- Did you ensure that the contract reflected the processes and policies adopted by your business related to managing the contract?

Preventing disputes is much easier than fixing one after it happens. Disputes hurt all parties. They're costly and threaten business relationships. This article describes two recent disputes, how a CMP could have prevented both, and what implications might exist for anyone who has not checked their organization's CMP lately.

First dispute

1. *Contractor denies site access to the buyer*

When the contractor claimed that the buyer interfered with the work, the first dispute arose over site access. The contractor requested a time extension based on actions of the buyer. This was denied.

An ambiguous contract provision pertained to the contractor's and client's (buyer's) *right to site access* which stated only the following but left contract gaps undisclosed and interpretations of the contract conflicting:

"The Client shall give the Contractor access to the site or parts thereof on which the works shall be performed by no later than the commencement date or alternatively by the date required by the Contractor as stipulated in the contract. Any delay by the Client in furnishing the sites or parts of the site to the Contractor shall entitle the Contractor to an equitable adjustment to the contract price and/or extension of time award. Right of access may not be exclusively granted to the contractor and access may be withheld until the performance bond is provided to the Client from an appropriately reputable surety or insurance company".

As a result, the buyer's road maintenance crew temporarily blocked the contractor's access to the site and the buyer denied committing any breach of contract that would entitle the contractor to an extension of time for two reasons:

- Rights were clearly provided for the buyer to access the site during the performance of the work and the contractor did not have 'exclusive access to the site'.
- Road maintenance work had been mandated (inferred) by the provisions of the contract, because the contractor knew the buyer was responsible for providing the all-risk and public liability insurances on the property (including the site). And because it was general knowledge that insurance policies required that the insured '*take all and any reasonable actions to not be found negligent*' under those policies, road maintenance was presumably one such action.

The buyer provided photos showing a sufficient deterioration of the road conditions on the property just prior to the maintenance work to be performed. But, in the end, the contractor won! The arbitrator awarded extension of time and costs to the contractor. Judgment read in part: "*[The] 'silent' obligation exists for the buyer to not hinder the contractor in its performance of its works and to do all that it can to demonstrate compliance with this…"*

Had the silent obligation been spelled out clearly in a CMP to specifically not apply to the buyers right to perform roadworks (carry out its own obligations), the dispute would likely have been avoided and the buyer's position upheld.

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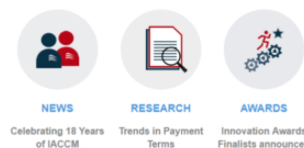

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Instead, the contractor got away with not re-scheduling its deliveries, or opening alternative access routes for the deliveries, which could quite easily have been done. A well drafted and implemented CMP would have left no stone unturned. It would contain, among other things, a communication matrix detailing what needs to be communicated by both parties and when. This directive would have been based on the obligations of each party rather than what they thought the contract had said.

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Events like these happen frequently even though it is well known that best practice when drafting boilerplate provisions should require that both parties notify each other within a specific time before taking any action that may affect the other party.[1]

Second dispute

2. *Buyer stops steelwork delivery to the contractor*

A similar dispute resulted when the buyer denied access to the contractor's delivery of steelwork to build the main manufacturing building, because the contractor failed to provide appropriate test certificates for the steel structures.

The buyer *assumed* that test certificates would have to be provided prior to bringing the structural steelwork onto the site, because no provision existed in the contract to stipulate when these test certificates were to be provided, or when inspections were to be carried out.

Nevertheless, the arbitrator ruled against the buyer based on the provision (cited above) that specifically provided for contractors' access to the site (in this case for contractors' materials), which can only be denied if the performance bond had not been provided.

In addition, the supplemental Article for *Inspection of the Works* did not say when an inspection was to be done but merely stated that: *"In respect of any of the work that the Client is entitled to inspect, test or monitor, notice shall be given by the contractor of when such work is ready for inspection or to be covered up"* (It did not say what work the buyer was entitled to inspect).[2]

The dispute would almost certainly have been avoided had a CMP been drafted and implemented, because a CMP contains (among other things) a Testing/Inspection Schedule of what work needs to be inspected/ tested and when.

Best practice in contract drafting is to draft a standard provision into the contract detailing that any materials requiring testing and approval by authorities shall be communicated to the client before making any deliveries to the site. The standard forms of contract published by the *Association of General Contractors of America (AGCA)* covers this, but still fails to clarify what work requires testing and when; thus, the absence of a complete provision like this creates a gap in that provision.

What research shows – put it in writing!

Recent research[3] of the risks within contractual provisions shows that only those obligations expressly written into a contract can truly be understood by the parties – unless the parties have "special" knowledge – like an awareness of silent obligations ("gaps") that arise during performance of the stated

obligations.

The research was conducted on standard forms of construction and engineering contracts. Buyers who were primarily one-time users of these contracts and also of the services offered by a particular vendor or service provider were unaware of the hidden obligations of the contract.

Research additionally shows that those buyers were most at risk of claims or disputes during the performance of those contracts. Buyers had incorrectly assumed that their contract had been well constructed without the need for a gap analysis but were unaware they would need a CMP to redress those gaps. Most did not know that the provisions of a contract largely focus on setting out what has to be achieved by the end of a transaction. As a result they did not pay attention to the process required to achieve those objectives. This is of course the function of a CMP, which most contract managers should be able to provide to their clients or employers.

In contrast, the research also showed that contractors (service providers/vendors) displayed a greater awareness of the inherent gaps in the contract language and used it to their benefit. These gaps, depending on the particular contract analyzed, amounted to nearly 40% of the total obligations owed by each party toward the other. It was found that buyers therefore were faced with many types of claims stemming from breach of these obligations, which inevitably, culminated in failure to achieve the maximum value anticipated from that particular contract.

Building dispute prevention into your CMP

Buyers can protect themselves from claims and disputes by:

- First - assuming that the provisions of their contract have not been well constructed for dispute prevention. Unfortunately most commercial contracts are still drafted today as documents to record the intention of the parties, in terms of what the parties wish to receive, rather than how they go about it. Remember dispute prevention is yet to become a primary objective for those who draft contracts. Perhaps that is because the same group of professionals who often draft contracts are also those who benefit from resolving disputes caused by poorly drafted contracts.

- Second - ensuring that the contract drafting is made more robust by adopting clear and concise wording together with a completeness of detail sufficient to implement that particular provision of the contract. Unfortunately procurement and legal professionals are likely to not have the required appreciation of the issues faced during implementation phase; therefore, a professional contract manager is the best position to carry out the contract review before signing the agreement.

- Third - analyzing the contract drafting – by doing a gap analysis for hidden obligations before signing contracts (or soon after), and by again engaging a professional contract manager who understands the issues around implementing that particular contract and the hidden obligations found within that contract. This method is becoming more widely recognized by large corporate buyers, where mandatory expertise for stronger up-front initiatives in dispute prevention is the focus, as opposed to hoping that it all works out for the best

Buyers who experience a difference between the benefit intended and the value received under their contract have likely created that situation (directly or indirectly) without realizing it. And although many buyers do intend to manage their contracts, the task goes beyond a flimsy checklist that simply restates what has already been spelled out in the contract. A CMP by contrast identifies the details needed to reduce the buyer's risk for dispute under any given contract by not only stating what has been spelled out in the contract, but also detailing all provisions that should have been included in the contract.

Few can argue with a thorough and clear contract containing provisions that clearly describe specific expectations (rights and obligations) of all parties. Proper documentation like robustly drafted contracts or CMPs (to supplement poorly drafted contracts) - go a long way toward preventing disputes and closing the agreement as intended.

END NOTES

1. The "Early Warning" Provisions of the UK ECC (Engineering Construction Contract)
2. Observation added by the author
3. LLM (Construction Law & Practice) Dissertation examined leading standards forms of construction contracts in use today to validate usefulness of a CMP as a dispute prevention tool [August 2014, 'CMP-Useful or Not', Jason B. Lal, University of Salford (United Kingdom)]

ABOUT THE AUTHOR

Jason B. Lal is a Contract Management Consultant specializing on implementing construction and engineering contracts representing client organizations. His expertise is to ensure that contracts are correctly constructed or if not, then sufficiently supplemented by an engineered contract management plan (CMP) in order to implement the contract to prevent the common causes of disputes on construction and engineering projects.

With an overall 25 years of experience in contracts and commercial management on large construction and engineering projects around the world, he concentrates on providing clients with services of dispute prevention/avoidance, either at contract formation or during early implementation phase.

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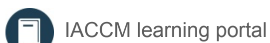

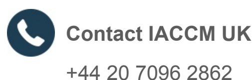

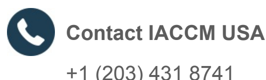

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