

MAKING CLAIM/DISPUTE MANAGEMENT SYSTEM IN JAPANESE PUBLIC WORKS CONSTRUCTION COMPATIBLE WITH INTERNATIONAL CONSTRUCTION MARKET

Rajendra NIRLA*, Shunji KUSAYANAGI*
Kochi University of Technology*

ABSTRACT: A claim in Japanese society is often considered as complain and the construction industry is in no exception. However, unlike in the Japanese construction industry a claim in the international construction market is taken as someone's rightful due. This paper discusses the claim/dispute management systems in Japanese construction industry with comparison to international construction market based on the FIDIC conditions of contract. The existing claim/dispute management system prevailing in the Japanese public works has made the owner dominated construction industry and contractors to depend on the owner's determination. A questionnaire survey regarding the Japanese conditions of contract for public construction work has revealed that: no respondent were confident over the impartial and fair determination of the project manner; nearly 90% of the respondent used to accept the owner's determination over the cost; about 90% of the respondent agreed that the owner directly or indirectly influence contractors to accept the owner's determination; no respondent did have intention to go for arbitration even they could not accept the decision of the owner at first.

KEYWORDS: Claim/dispute, Japanese public works, FIDIC.

1. INTRODUCTION

In construction, a claim may be related to additional cost or extension of time for completion of works or others like release of contractual obligation/liability, etc. or combination of one or more of these. A claim turns into dispute when the defendant does not agree to the assertion made by the claimant. In other words, a construction claim turns into dispute when a party, for instance the Employer, does not agree to the claim made by the other party to the contract the Contractor for such as additional cost and/or extension of time for completion and/or release of contractual obligation/liability incurred due to the event which the contractor assumes is beyond his

control and responsibility. Every party to a contract has a right to depend on the terms, conditions and provisions contained within that contract at the time the parties agreed to and executed the contract. If any of those terms, conditions or provisions are altered by the actions of the other party (or by forces beyond the control of either party) the impacted party has right to recover the impact damages (time and/or money) suffered as a result of those alterations in the contract provisions and stipulations (Nielsen, K.R.).

This paper discusses the claim/dispute management provisions stipulated in contract and practice in Japanese public works and compares the

provisions/system with civil construction project based on FIDIC conditions of contract in international construction market. Since the Owner designs the project in Japanese public works the claim management provisions and systems of Japanese public construction work is compared with the stipulations made in the FIDIC 1999 Redbook which have been using for the project designed by the Owner in international construction market.

2. CLAIM/DISPUTE MANAGEMENT IN JAPANESE PUBLIC WORKS

2.1 Standard Form of Contract for Public Construction Works In Japan

A construction project is executed under the conditions and scopes stipulated in the contract. The special and general conditions of contract stipulates the roles, responsibility and liabilities of the contracting parties and provides the procedures for whole contract execution including payment, inspection, variation, claim/dispute settlement. The major provisions included in the Japanese general conditions of contract for public construction works for the consideration and resolution of claims/disputes are: i) claims on action regarding the Superintendent, Engineer and Project Manager (article 12), ii) Differing Site Conditions (article 18), iii) Changes to drawings and specifications (article 19), iv) Suspension of works (article 20), v) Extension of construction period (article 21), vi) Acceleration of construction period (article 22), vii) Procedures for adjustment of construction period (article 23), viii) Procedures for adjustment of contract price (article 24), ix) Adjustment of contract price due to price level change (article 25), ix) General provision for Damages (article 27), x) Damages upon third party (article 28), xi) Damages from force majeure (article 29), xii) Alternative to adjustment to contract price, xiii) Liquidated

Damages for arrears (article 45).

2.2 Claim Procedure for Adjustment of Construction Period and Contract Price

The conditions of contract for Public construction works allow the contractor to claim for additional time and cost if incurred due to such as inclement weather, cooperating with other contractor working for the Owner, changes/situations which were beyond the Contractor's control and do not fall under the Contractor's liability, etc. Once the Contractor notify the project manager of the changes and situations due to which the contractor deems to be compensated with additional time and/or cost and if the Contractor is unable to complete the works within the stipulated construction period, the contractor may claim specifying the reasons in writing for extension of the construction period and additional cost. However, there is no notifying period stipulated in the contract which allows the contractor to claim until the completion of the project.

The owner's project manager confirms the situations and consultation between the Owner and Contractor starts. The dates of meeting are decided by the owner. The adjustment of the contract price and construction period is determined through consultation between the owner and contractor. However, if an agreement on the adjustment of contract price and/or construction period could not be reached from the consultation, the Owner decides over the adjustment and notifies the same to contractor.

The contractor may request for mediation if the decision by the Owner is not acceptable to the Contractor. The mediation is done by member(s) of Construction Dispute Resolution Committee (Central/Prefectural). If the Contractor still do not

agree with the decision by the mediation the contractor may initiate the final and binding arbitration.

2.3 Role of Project Manager in Japanese Public Works

The Japanese public construction projects are carried out in 2-actor execution system i.e. the Owner and the Contractor are involved in the execution of the project. The project manager, an employee of the Owner, is the Owner's representative for the execution of the Contract. The duties of the Project Manager, according to the article 9.1, are to exercise the power mentioned in the drawings and specification for instructions, approvals and consultation with the Contractor's representative; preparation and delivery of detailed drawings, etc. or approval of drawings, etc. prepared by the Contractor; and management & observation including inspection of the execution of works and testing/inspection of the construction materials. The project manager does not have the authority to independently decide and give his/her opinion on any contractual matter. The contract assumes that the Owner itself assumes all the authority to decide over the contractual issues and notify the contractor.

3. CLAIM/DISPUTE MANAGEMENT IN INTERNATIONAL CONSTRUCTION MARKET

3.1 FIDIC

The FIDIC has been developing standard forms of contract since its establishment in 1913. The FIDIC has currently made available the standard forms of conditions of contract for : i) Construction for Building and Engineering Works designed by the Employer (Red Book 1999), ii) Conditions of Contract for Plant and Design-Build (Yellow Book 1999), iii) EPC/Turnkey Projects (Silver Book 1999),

iv) Minor Works- Short form of Contract (Green Book 1999), v) Consultancy Agreement- (White Book 1999), vi) Dredging Work (Blue Book 2006), Design-Build-Operate (Gold Book 2006). The conditions of contract prepared by the International Federation of Consulting Engineers (FIDIC) are widely used in international construction.

3.1 Conditions of Contract in FIDIC 1999 Redbook applicable to Claim/Dispute management

It is not always practical and possible to stipulate remedies against every possible circumstances to be encountered in the execution of the construction project. FIDIC 1999 Redbook stipulates rules to cope with unforeseeable events and manage claim aroused therefrom in construction project.

The clauses related to the variation (*Clause 13: Variation and adjustment*); claim and dispute resolution procedure (*Clause 20: Claims, Disputes and Arbitration*) and functions of the Engineer (*Clause 3: the Engineer*) are the main clauses which stipulates the claim/dispute management procedures in international construction project.

3.2 Claim Procedure

The contracting party, the Employer or the Contractor, is required to notify the other party of the occurrence of the claim events within the stipulated time, usually within 28 days of occurrence of the events which give rise to claim. If the contractor intends to claim against the employer, the Contractor is required to inform the Engineer within 28 days of the occurrence of the claim event. However, if the contractor fails to notify the Engineer of the claim within 28 days of the occurrence of the event, the time for completion will not be extended, the contractor shall not be entitled to additional payment, and the employer shall be discharged from all

liability in connection with the claim. The Contractor is required to keep all the records required to substantiate the claim, and within 42 days after the contractor became aware (or within such other period as may be proposed by the contractor and approved by the engineer) of the event, the contractor is required to submit the detailed claim which includes full supporting particulars of the basis of claim and of the extension of time and/or additional payment claimed.

The Engineer examines and evaluates the claim and gives his/her decision within 42 days after receiving the claim. The contractor is required to include the amounts for any claim that has been due under the relevant provision of the contract in the monthly payment claim.

If either the Owner or the Contractor is not agreed with the Engineer's decision, then the Owner or the Contractor may refer the claims to Dispute Adjudication Board (DAB). The DAB is comprised of either one or three qualified persons and is established usually within 28 days after commencement of the project. Both the parties are required to make available to the DAB all additional information, access to the site and appropriate facilities for the purpose of making decision on the dispute. The DAB is required to give its decision within 84th day after the reference of the case to DAB. However, the decision of the DAB shall not be binding to the contracting parties.

If either party (Owner or Contractor) is dissatisfied with the DAB's decision, then either party, on or before 28th day after the day on which it received notice of such decision, may notify the other party and the Engineer of its dissatisfaction. The parties then attempt to settle the dispute amicably before the commencement of arbitration. Arbitration may be

commenced on or after the 56th day after the day on which notice of dissatisfaction was given. The decision by the arbitration shall be final and binding to the both parties.

3.3 Role of the Engineer in the FIDIC (Red Book) Contract

The FIDIC conditions of contract (red book) require the owner to employ the Engineer for the execution of the project and the Engineer shall be deemed to act for the Employer. It clearly describes the roles and responsibility of the Engineer such as to give instructions, to issue drawings, to certify the work, to determine fairly and give decision over the contractual issues, etc.

However, the Engineer's decision can be challenged in DAB and in arbitration. The Engineer is required if necessary to give evidences and to act as a witness before the arbitrator(s) of any matter related to the dispute.

4. SURVEY RESULT

A questionnaire survey regarding the Japanese conditions of contract for the public construction work including claim/dispute management system was conducted. A written questionnaire was sent to 20 individuals/organizations who have been involved in construction. 8 filled questionnaires have been received indicating the response rate is 40%. Although the result mentioned below may not represent the whole industry's opinion however it indicates the general views of the construction engineers. Regarding the project manager's role and claim management in public construction project:

- i) No respondent were confident in impartial and fair determination of the project manager: 50% of the respondent told that the project manager does not

act impartially and determine fairly whereas remaining 50% were uncertain about the project manager's impartial act and fair determination.

- ii) All the respondent were used to submit a quantified claim proposal to the owner but no respondent had received the amount equal to what they had actually claimed for.
- iii) Nearly 90% of the respondent used to accept the owner's determination over the additional cost: 50% of the respondent always and nearly 40% often accepted to the owner's determination.
- iv) Nearly 90% of the respondents agreed with that the owner directly or indirectly influence the contractor to accept the owner's determination.
- v) No respondent did have intention to go for arbitration even they could not agree with the decision by the owner; they usually sought the solution from the owner.
- vi) No respondents were aware of the selection process and qualification of the members of the Construction Dispute Resolution Committee.

5. DISCUSSION

A claim is considered to be a rightful due in the international construction market and the party which assumes, because of for instance change in contract conditions, scopes, etc., the other party should compensate him often file a claim to other party. However, a claim in Japanese domestic construction market is treated as complain and is often filed in the form of petition (Kusayanagi, S) which indicates that the contractors in the Japanese construction industry do not assumes a claim be a

rightful due.

The FIDIC conditions of contract provides clear provisions/conditions for the claim/dispute management with deadline of notification, submission and decision making period, however the Japanese conditions of contract for public works do not usually stipulate the time period for notifying and decision making. Although such provisions may allow flexibility to either party in notifying others but the owner without stipulated time period for giving its decision allow the Owner to make decision according to the owner's convenience, and the contractor do not have base to demand timely decision from the Owner.

Although the Engineer in FIDIC conditions of contract is supposed to act for the Employer, the Engineer's decision if found unfair can be challenged in Dispute Adjudication Board and in Arbitration which indirectly prevents the Engineer making the decision against the Contractor and in favor of the Employer. However, there is no third party engineer in the Japanese domestic public works and the Employer's (Owner) employee acts as the project manager of the project. There is no any other stakeholders' involvement which can compel the Engineer to make fair and independent decision. Thus, under the prevailing conditions of contract the fairness and independency in decision making solely depends on the integrity of the personnel employed by the employer.

However, from the questionnaire survey revealed that construction engineers do not have faith in the fairness of the Engineer's decision for which 50% of the respondent answered that the engineer did not act impartially and make decision fairly whereas remaining 50% were uncertain about the fairness and impartial act of the Engineer. Thus there is little prospect of getting independent and fair decision

over any issue in the Japanese domestic construction works.

As such the Japanese conditions of contract give the Employer unilateral authority, if the employer and the contractor could not reach to an agreement, to decide the additional time and cost required for the completion of the project, the contractors do not have other way except accepting the employer's determination. In addition, the Employer has discretionary power in designating the contractors for bidding. If an employer does not like a contractor the employer usually avoid such contractors from participating in the bidding. Thus, such practices and provisions in the conditions of contract for public construction works give the employer huge hidden power to compel the contractor to accept the employer's determination without complaining. 90% respondents' agreement with the employer's direct/indirect influence to make the contractor accept the employer's determination is also the evidence to the huge hidden power of the employer in the Japanese domestic construction project. This is unlikely to happen in international construction project.

The questionnaire survey also revealed that no contractors are willing to go against the employer's decision/determination and intend for arbitration. It infers that the employers have made (or directly/indirectly forced) the Japanese contractor an obedient follower of the employer's decision, and the contractors also do not want to create any situation which make the employer to loose the trust with them. As received in the questionnaire survey, the contractors usually seek the solution from the employer over any issues. However, the case in the international construction market is not similar to the Japanese. The contractor can go for DAB and arbitration whenever the contractor is dissatisfied

with the engineer's determinations. There is no hidden power in the employer which can force the contractor to accept the engineer's determinations. Thus the international construction market provides the engineers opportunity to use full of their knowledge and skills to recover their rightful lost time and money in the execution of the project. However, the Japanese system in public works construction does not provide such opportunity for the contractors and as a result the construction engineers always sought solution from the employer instead of striving for enhancing their knowledge and skills in negotiation and administration. Because of such cultures of the Japanese construction industry Japanese contractors are prone to loose money in international construction project.

The international construction market has recognized the existence of the mutual mistrust in project management whereas mutual trust is the base of the Japanese contracts. Due to the recognition of the mutual mistrust, the FIDIC conditions of contract provide the position for the third party engineer and stipulate clear provisions for claim/dispute management. However, Japanese public works contract has not envisaged the inclusion of the independent engineer's function and gives huge power to the owner (employer) in determining and deciding over the contractual issues in the name of mutual trust. In effect, the Japanese construction industry has been suffering from the unequal recognition of the construction stakeholders at the cost of so called mutual trust.

6. CONCLUSIONS AND RECOMMENDATIONS

The existing claim/dispute management systems prevailing in Japanese public works have made the owner dominated construction industry and the

contractor are dependent to the owner for determination over the contractual issues. Such characteristic of the Japanese construction industry has made the contractors to be the obedient follower of the owner. Such contrasting Japanese construction industry culture inhibits the ability of Japanese engineers to be competent in the international construction project management including contract administration, claim/dispute management, etc.

There should not be punishment in claiming for rightful due and unequal recognition at the cost of so called mutual trust. The authority of the employer to decide unilaterally over the contractual issues and discretionary power in selecting the bidders for bidding should be scraped in order to initiate making the Japanese domestic construction environment compatible with the management practices in the international construction. A third party engineer's functions should be integrated in the conditions of contract for interpreting the contractual issues, evaluation of claim and giving independent decision.

By making the claim/dispute management system in Japanese public works compatible with the international construction market would provide domestic construction market opportunity to acquire enough skills and ability to be competent in the international construction market which ultimately enhances the return from the overseas business of Japanese contractors.

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