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Analysis of Technical Flaws in the Existing Contract System and Proposing Effective Module to Reduce Flaws Including Quality Practices in Construction Projects

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ABSTRACT: This paper examines the issues or flaws in the contracting system. The flaws may be arise either by contractor mistake or the client mistake. But in this paper it overviews all the possible flaws which leads to inefficiency in contract system and postponing completion time of a project. After analysing the flaws in the contract system appropriate recommendations are proposed to reduce flaws and even proposing flawless model in contract system. Most importantly, in the case of a construction contract, it requires the contractor to build the works and requires the employer to pay for them. The analysis have identified several factors responsible for excess time and cost overruns some within the control of the management and some beyond their control. This paper aims to identify key problems in certain critical areas of a construction project.

KEYWORDS: Construction contract flaws, causes for flaws, contract management, critical clauses.

I. INTRODUCTION

A major goal of contract law is to facilitate the power of self-governing parties to further their shared objectives through contracting. Contracts are formed by expressions, that is, by manifestations consisting of words, acts, or both, communicated by an addressor to an addressee. Accordingly, many contract-law problems concern the interpretation of an expression that was used by an addressor, or of an expression that was mutually used by two parties each of whom was both addressor and addressee. A contract is simply an agreement which obliges the parties to do specified things. Most importantly, in the case of a construction contract, it requires the contractor to build the works and requires the employer to pay for them.

A contract provides a self-contained statement of obligations as between its own parties. Contracts are vital to the success of a project. It is important to think ahead and limit your exposure to difficult, costly and lengthy. The analysis has also identified several factors responsible for time and cost overruns - some within the control of the enterprises and some beyond their control.

II. PILOT STUDY

The vast majority of civil engineering work is performed under contract. A contract is simply an agreement which obliges the parties to do specified things. Most importantly, in the case of a construction contract, it requires the contractor to build the works and requires the employer to pay for them. A contract provides a self-contained statement of obligations as between its own parties. It emerges from the analysis of the Central Sector Projects by the Ministry of Statistics & Programme Implementation, Government of India that many of the projects suffer from inadequacies in

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project formulation and implementation, resulting in large time and cost overruns, affecting the very viability of the projects and acting as drag on the economy. The analysis has also identified several factors responsible for time and cost overruns - some within the control of the enterprises and some beyond their control. Contracts are vital to the success of a project. It is important to think ahead and limit your exposure to difficult, costly and lengthy proceedings. As with most agreements, a disagreement about matters, in the future, cannot be ruled out. In the construction industry, these disagreements on previously agreed matters could prove costly not just in monetary terms but also in terms of the social impact of these projects. In a fast developing country like India, where provision of infrastructure and construction activities in general, have not just a direct impact but also a huge ancillary function to perform it is important for professionals in the construction industry and contract drafters in particular to be aware of how the construction agreements can help facilitate projects in their objective achievement.

This paper deals with the 'Factors Affecting the Critical Clauses of a Construction Contract' aims to identify key problems in certain critical areas of a construction contract, which if not attended to properly have the potential to become major roadblocks in the progress of the project. Problems have been identified in the areas of

- Variation
- Contract price and payment
- Commencement, delays and suspensions
- Nominated sub-contractor
- Insurance
- Takeover/Handover after completion of works
- Suspension and termination by the employer, and
- Suspension and termination by the contractor

The thesis work also comments on the provisions in the above identified areas in two contracts viz. 'The Conditions of Contract for Construction – For Building and Engineering Works Designed by the Employer (the FIDIC Red Book) First Edition 1999' and 'IITM (Indian Institute of Tropical Meteorology), Invitation for Bids'. These two particular contracts were chosen as the former is a standard form of contract which is being widely used in India and which covers the basic concepts for all contracts and the latter, as it a contract which is being executed currently and thus has been modified to suit the specific need of the owner. The findings of this thesis work can be utilised in the project strategy formulation stage with each party deciding the implications of retaining/passing on risks to another party and the advantages of fair and reasonable administration of the contract. With the increasing nature of litigation in the construction industry shifting to roles and responsibilities in the project rather than mere monetary issues it becomes imperative to leave very little ambiguity while drafting clauses and more importantly when interpreting and administering them.

III. PROBLEM STATEMENT

Construction projects have faced various problems in contract and time is one of the major factor. The delay in dispute settlement has adverse effects such as it will be prejudicial to the relationship between contractor and employee. Moreover, it may also lead to the increase in cost and time. The major issue is that it sends bad signs to foreign investors thereby delay national growth. It is generally said that the contract language is considered difficult to get the clear picture and they are therefore a major source of challenge.

IV. NEED FOR STUDY

This study doesn't aim to compare or comment upon the adequacies or inadequacies of construction contracts, but tries to identify the factors which influence greatly the critical clauses in a construction contract. The study maybe further continued to include all the construction clauses especially ones that are most catered to in standard forms of contract.

An investigation may also be carried out to determine the extent to which the standard forms of contract should be modified to cater to an individual project need. Issues those are most likely to crop up when dealing with contractors at the international level may also be investigated. This is even more significant in the Indian context since the government is shifting towards the policy of inviting foreign participants in major construction activities.

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V. METHODOLOGY

- To list the issues that are faced in the construction contract, in eight critical clauses identified, by way of study of observations and awards by dispute resolution forums, judicial powers, research papers and commentary on construction contracts.
- To study these clauses in 'The Conditions of Contract for Construction – For Building and Engineering Works Designed by the Employer (hereafter referred to as the FIDIC Red Book) First Edition 1999' and Indian Institute of Tropical Meteorology (IITM), Invitation for Bids.

These two particular contracts were chosen as the former is a standard form of contract which is being widely used in India and which covers the basic concepts for all contracts and the latter, as it a contract which is being executed currently and thus has been modified to suit the specific need of the owner

VI. CAUSES OF CONTRACTUAL PROBLEMS& ISSUES

- Problems have been identified in the areas of
- Variation
- Contract price and payment
- Commencement, delays and suspensions
- Nominated sub-contractor
- Insurance
- Takeover/Handover after completion of works
- Suspension and termination by the employer, and
- Suspension and termination by the contractor

The following major construction related contractual issues be taken into account, within the context of the construction related contractual obligations of the Employer and the Contractor in the Yellow Book:

- Risk related contractual issues;
- Time related contractual issues;
- Claim related contractual issues

The construction related contractual issues will be discussed within the context of arguably the two main construction related contractual obligations of the Contractor and Employer respectively, namely The Contractor's obligation to complete the Works (within the Time for Completion);

The Employer's obligation to co-operate with and not to prevent the Contractor from completing the Works (within the Time for Completion) arguably the most important procedural obligations of the Contractor, namely The Contractor's claim procedural obligations in terms of clause 20.1.

VII. CONCLUSIONS

Construction projects are the cutting edge of development of any nation. However, the temporary nature of the project organisation often results in each party trying to promote their long term objectives over and above the interests of the project itself. This inter-organizational conflict is always inversely proportional to the performance of the project.

Successful implementation depends on carrying out the activities in a proper sequence, deploying the resources to the best advantage. Inadequacies in project formulation and implementation, results in excess time and cost overruns, affecting the very viability of the projects and act as drag on the economy. Contracts are vital to the success of a project. While any one of the hundreds of clauses in a large contract can be crucial, certain issues are important on almost every job. Although the study has already provided many suggestions for contract improvement, it is important to note that it was in the eight specific clauses which were identified as being most troublesome and as having a significant impact on project performance. Hence ensuring that these clauses are perfectly drafted could result in the smooth progress and effective completion of the project.

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VIII. RECOMMENDATION

Recommendations pertaining to contract strategy preparation and individual clause drafting

- The contract should be clear about the project objectives. This will ensure that both parties identify their respective interests and responsibilities in the project.
- Clear communication should be enhanced by minimizing generalizations when wording contractual clauses. Lack of details or specifics will commonly result in differing interpretations and, at the least, require time-consuming clarifications.
- Risks should be allocated equitably and drafted into the contract in such a way that they are allocated to those who are best able to control them. Shifting of risks inequitably will result in project cost escalation and may pose a serious question on the feasibility of the project itself.
- The key points in a project should be discussed, agreed upon and negotiated in advance of construction.
- Company standard clauses can be cost effective when they are tailored to the particular project and are viewed as part of a whole.

It was observed from the study that the standard forms of contract, for e.g. FIDIC, have many advantages some of which are:

- The standard form is usually discussed between the different parties in construction industry. As a result the risks are spread equitably.
- Using a standard form avoids the cost and time of individually negotiated contracts.
- Contracting parties are assumed to understand that risk allocation and their prices can be accurately compared.

Simply drafting the best contract clauses is no solution. Intelligent and fair administration of the clauses is just as crucial. The contract should be performed and the commitment of both parties should be in the spirit of the letter and not necessarily in the literal interpretation of the words. This dissertation argues that the solution to the problem is the following: that the Yellow Book be treated as a specialized contracts - implying that the contractual issues, within the context of the Contractor's and the Employer's contractual obligations, be assessed by way of perusal, analysis and interpretation of the clauses in the Yellow Book from a general Jaw of contract point of view but also from a construction law point of view. In other words these clauses should be interpreted from a construction related contractual point of view, also taking into account relevant case law, commentaries and abstracts dealing with these issues.

The risks involved with construction should not prevent anyone from doing business. It is only necessary to account for the risks. An owner must realize that most readily enforceable contract is that which is beneficial to both parties. Steps to factor in this most important principle of a contract will ensure that the project achieves its objectives.

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