

Disputes in the Construction Industry & ADR Process

by

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Construction Industry

- Different Stakeholders Working Together
 - Employer, Consultants, Contractors, Subs, Suppliers etc
- Different Goals
 - Employer : Speed & Cheap & Quality
 - Consultants: Quality & Efficiency & Completion
 - Contractors: Payments & Other Financial Contingencies & Avoiding Liability
 - Subs & Suppliers: Payments

Recipe for Disputes

- Different needs, wants, goals etc
- Foresight of Risk
- Non-exhaustive Risks Possibilities
- Risk Allocations in Contract
- Ambiguity of Language in Contract
- Unfair Allocations of Risk & Contingencies
- 3rd Party & Neutral Impacts

Disputes In Construction Industry

- Murphy's Law
- Specialist Lawyer's : Playground or Minefield
- Common Disputes
 - Variations : Design & Work Scope
 - Delay & Extension of Time & LAD & Prolongation Claims
 - Termination & Performance Bonds
- Dispute Resolution Processes

Variation of Works & Design Obligations

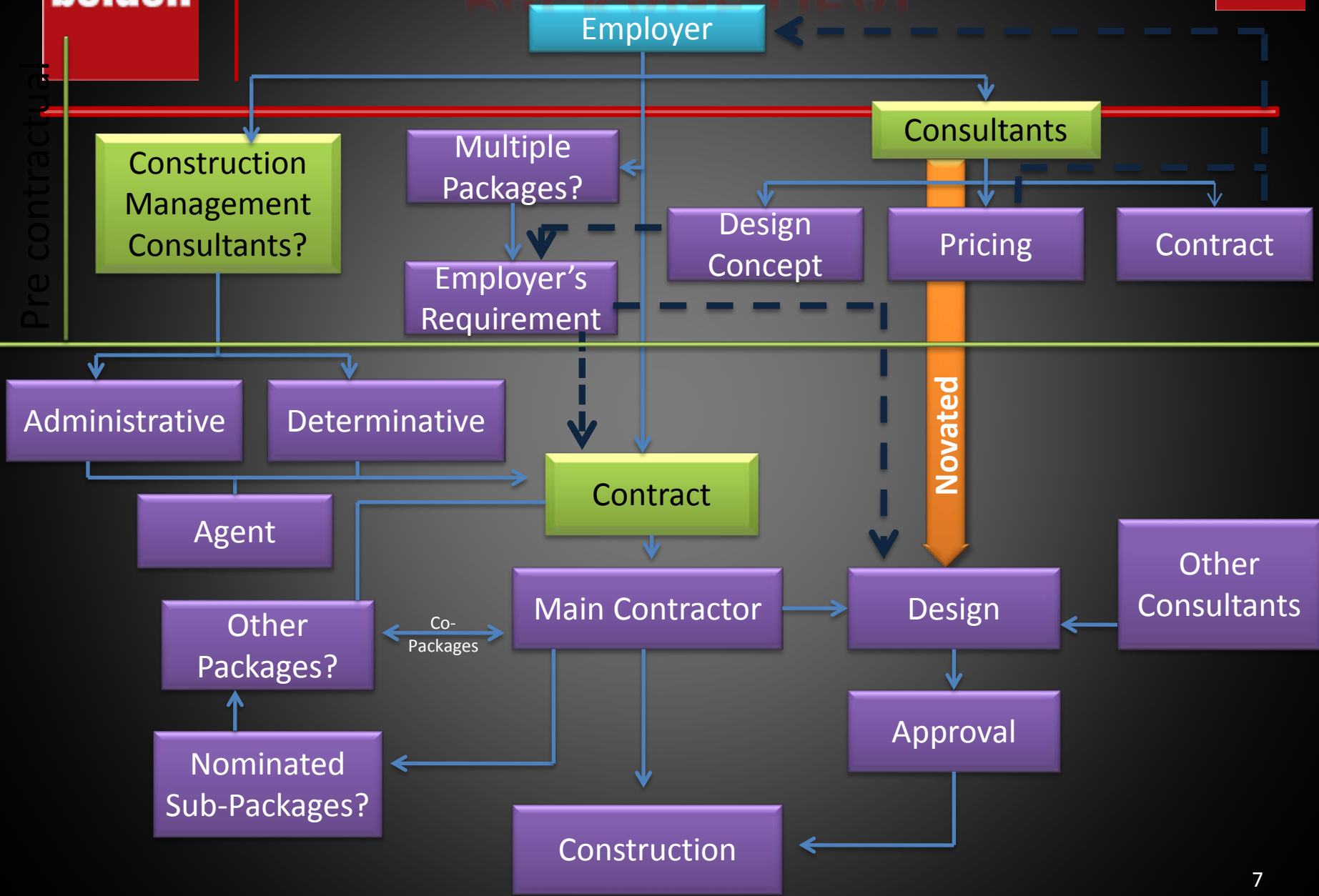
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Design Obligation & Variation

- Developer's Consultants
- Package Deal Contractors
- Specialist Nominated Sub-contractors

Pre contractual



Package Contractor Warranties

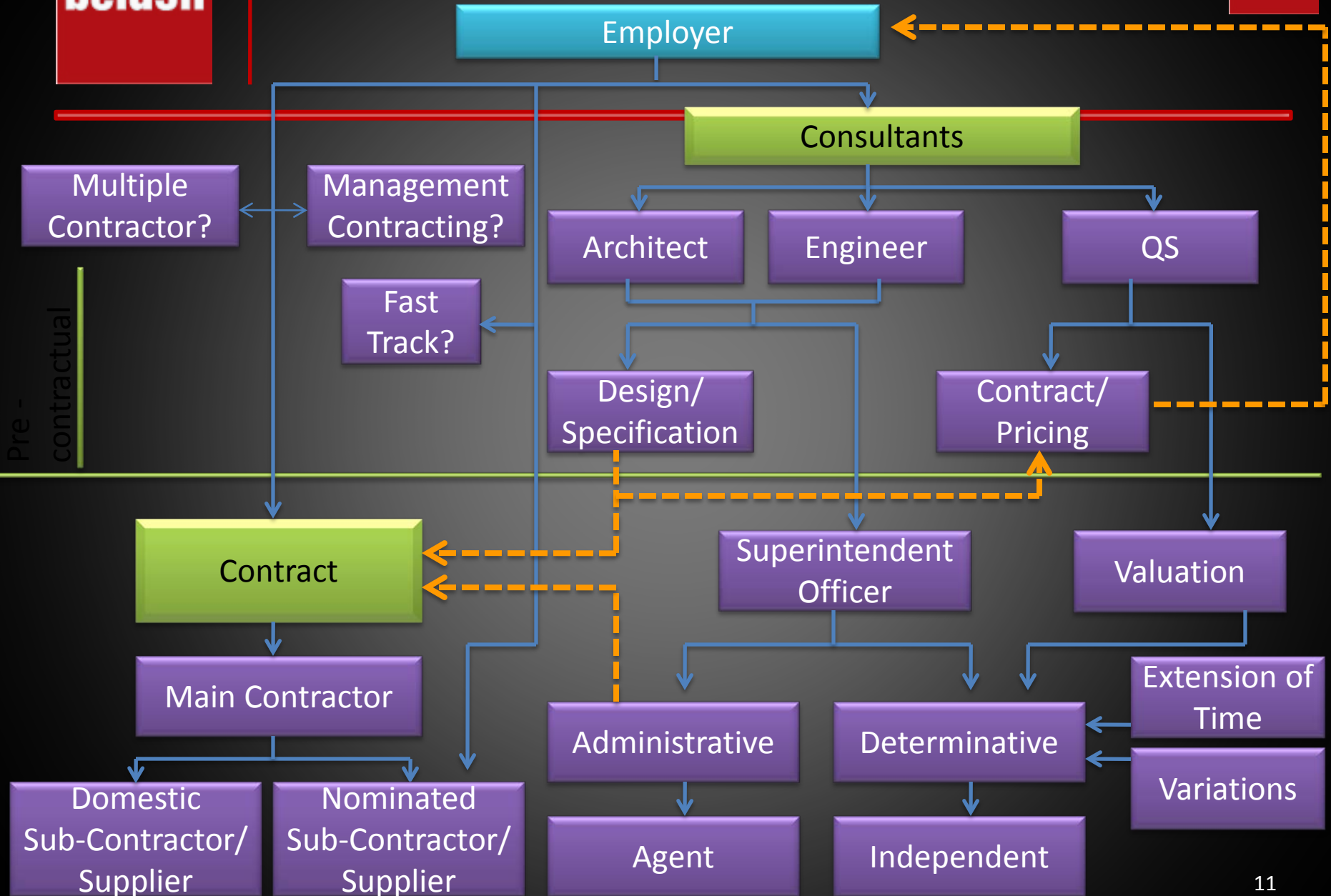
- Fit For Purpose – Implied Warranty of Performance of the Design
- Fitness of Equipment, Physical Element & Workmanship + Purpose
- Design Bond
- All Defects Liability
- Insurance Cover
- Legal Limitation of Liability – Contract & Tort

Package Contractor's Design Variations

- Employer's Requirements & Performance Specs
 - Dictates the Design
- Understanding & Clarifications
- Failure to Comprehend or Ambiguity
- Design Change Instructed – Within/Outside Scope of Employer's Requirement
- Interpretation Stds : Specialist Contractor's Knowledge & Understanding

Prior Approvals & Variations

- Conceptual Design, Schematic Designs, Front End Design Simulations
- Module by module Developed Stage + Buildability & Modular Construction Stage
- Amplified Drawings stage
- Overriding Responsibility Clause – Design Contractor
- Otherwise? No for Overall Performance, Yes for Obvious Design Matters



Causes of Changes to Works

Changes caused by:-

- Unforeseeable Site Conditions
- Changes in Legislation & Environmental Policy
- Changes to the Temporary Works/Method of Works by Owner
- Changes by Request for Value Engineering
- Changes introduced without Formal Procedure
- Omissions & Transfer to 3rd Parties

Unforeseeable Site Condition

- Contractor's Risk = Foreseeable Conditions
- What is the std of foresee-ability?
- Contractor deemed to have satisfied itself or informed itself?
- How can one satisfy or inform oneself? Soil Investigations, hydrological probes, 4D seismic testing etc.
- Are the testing required prescribed by the Contract? Is it financially feasible?

Unforeseeable Site Condition

- When can the Contractor satisfy itself? Before the tender submission?
- Was there relevant information given by Owner to Contractor?
- Was there an exclusion on the veracity and dependence on Owner information?
- Was there enough time pre-tender submission for the Contractor to satisfy itself?
- Attracts high Contingency Pricing

Unforeseeable Site Conditions

- Unforeseeable sub-strata minimized?
- What is a reasonable amount of boreholes or locality of testing?
- A particular locality anomaly could be unforeseeable – seldom the case
- What if permission to enter site to test refused or delayed?
- Changed Design due to Unforeseeable Soil Conditions, is it claimable?

Variation Orders

- Owner's Risk = re-measured price or value engineered alternative sub-structure design
- Contractor's Risk = owner has duty to not conceal any information known
- Owner can protect the lack of accuracy or veracity of information given by disclaimers
- Owner should expressly require contractor to carry out its own soil investigation or be deemed to have done so in order to check veracity / accuracy

Variation Orders

- Owner should insist that the shortlisted tenderers carry out site investigation
- Owner should allow a specialist sub-surface contractor to suggest alternative foundation design within the original pricing structure
- Owner should ensure any soil information not deemed to be a part of Contract Document

Legislation & Policy Changes

- Post Tender + Impact Design & Works
- Environmental
- Safety Requirements
- Import Restrictions
- Development Requirements

Legislation & Policy Changes

- Contractor's risk – on such changes
 - If impact temporary works, like safety – fair
 - If impact financial benefit, like creeping tax, custom duties etc - fair
 - If impact design suitability & scope of works – fair? Designer's Risk?
 - If impact design functionality & scope of works – design requirement changes: unfair

Bespoke v FIDIC

Method of Works

Temporary Works

- Contractor's build-ability responsibility (approved or otherwise)
- Contractor has full control – unless sure to fail
- Min Std : Sound principles/Current Practices in Industry – safety, technology, environmental
- Otherwise Owner's interference or Owner dictating post contract = variation?
- Owner's assistance not on a without prejudice basis = variation?

Value Engineering

- Is there a contractual provision?
- If none, cannot be requested or offered but subject to agreement on changes & impact
- If yes, does it make it a change?
- No, if due to design or build-ability problems
- Yes, if due to improvements on functionality or savings on functionality
- If savings on cost, is there sharing? Additional design preparation cost?

Formal Procedure

- Recognised Variation = Compensable Variation
- Written Variation Order Only?
- Oral but Confirmed in Writing by Contractor?
- No Response Time Limit or Confirmed Response required?

Bespoke Contracts & FIDIC - similar

Disputes

- Not Formally Instructed in Writing but is a change in Owner's Requirement?
- Through other modes when review & liaison on design development and drawings
- Requires Contractor to make decision not to proceed. High Risk. Proceed with Notice.

Formal Procedure

Such Exclusions not effective. Why?

- Bad Faith Conduct
- Project Beneficial Changes
- Owner Encouraged
- Cannot rely on own breach/failure to issue formal written instruction
- Fundamental Breach/Repugnant
- Arbitrator/Court can Review

Omissions of Works

- Bad Faith transfer of scope of works to 3rd parties by way of omissions
- Unless allowed specifically in contract
- Not in the case of Contractor default
- Right to claim loss of profit for such omissions

Design May Fail

- Contractor can refuse to complete = Risk of showing Certainty, otherwise Don't
- Contractor can stop works if design fails while constructing
- Many standard form Contracts do not cover design failure situations
- Duty to warn on part of the Contractor = due to Public Safety Requirements

NSC Design & Warranty Failure

- If owner is to recover from contractor, then the owner must ensure :
 - Contractor is appointed prior to selection of NSC
 - Contractor is give information on NSC and given the right to object
 - Contractor is involved in the decision-making process in the choice of NSC
 - Ensure the NSC does not exclude or limit its liability to the contractor under the NSC sub-contract

Ambiguity/Uncertainty

Contract Documents

- Scope of Work + “reasonably required + indispensably necessary + implied” clause
- Priority clause on Contract Documents
- Duty to study and inspect Contract Documents
- Duty to Raise Discrepancies for Resolution Timeously
- Conflicting Requirements = If One Chosen over the Other = X Variation

Interference with Temporary Works

- Buildability is not warranted by the owner/consultant
- Buildability is deemed warranted by the contractor
- Buildability involves work methods and temporary works
- If contract or consultant dictates the temporary works or work method, then the buildability responsibility can be transferred

Interference with Temporary Works

- Work Method prescribed by the Contract, Contractor responsible only if clause warranting its use-ability
- No duty to assist contractor when work method or temporary works fail
- No duty to prevent contractor from making mistakes even if approval process is required
- Duty to assist the contractor if the design proves impossible to build
- No duty to safeguard contractor from economic loss by making design easy to build or protect
- Proactive consultants attempt to assist = transfer risk

Contractor's Warranties

- If contractor choose quality of a material, the type of material or the performance of an equipment = warranty on merchantability and fitness for purpose
- If contractor recommends materials, NSCs or suppliers and the owner accepts the recommendation, the contractor is still deemed to have warranted the suitability

Variation Orders

- Danger of instructing Variations after the CPC
 - Not Variation under Contract
 - New Contract
 - Contract price/rates for variation will not apply
 - Alternatively, Time will be at large
 - Previous deductions of LAD will be set aside

Variation Orders

- Dispute whether an instruction amounts to variation when the consultants refuse to acknowledge that it is so (constructive variation):-
 - Contractor is best advised to record his objections and proceed with the works
 - Contractor does not face danger of refusing to carry out the works as a repudiation of the contract
 - Contractor to protect its right by risk management
 - Any stipulated Time Frame for Claiming Variation : To be Strictly Followed regardless of refusal to accept : Syarikat Binaan Utara Jaya v Koperasi Serbaguna Sungai Glugor Bhd [2009] 1 CLJ 786

Variation Orders

- Unauthorised variation without complying the formalities and the variation is not in the best interests of the project or the owner, and the owner is oblivious to the instructed variation works, then the owner may avoid liability
- Fast Track Design Development whilst Constructing
 - Normally design changes is variation
 - Contract can stipulate that risk of necessary design development can be passed to Contractor (non-compensable variations) : Auburn Council v Michael Davies Associates Pty Ltd [2008] NSWCA 286

Valuation

- Pre-Contract Agreed Prices or Rates : Schedule of Rates or BQ Rates
- Pre-Performance Agreed Price or Rates : Depends on Contract & Parties – Uncertainty but Applicable if Fallback Mechanism Exist (ie. determined by Arbitrator)
- Prescribed Method of Measurement & Valuation
- Daywork rates – only if instructed, can be used to proof the reasonableness of market rates?
- Valuation by SO : Is it Final? Is it reviewable by Arbitrator? Is it in bad faith?

Valuation

- Similar Nature or Character Done in Similar Conditions – Extrapolation from Existing Rates
- Otherwise Reasonable Rates or Star Rates or Market Rates
- Rationalisation of BOQ rates/Schedule of Rates = indirect cost to cover claims of under recovered loss and expense due to variations
- Extrapolation should be allowed + Extra for different conditions

Excessive Variations

- Cardinal Change Principle
 - not accepted in common law jurisdictions
 - the “non-vitiating” clause
 - may be a repudiation of the contract, or
 - misrepresentation that allows rescission
 - Reasonableness of Using BQ/Schedule of Rates rather than the rate itself – No longer Similar
 - Henry Boot Construction v Alstom Combined Cycles [2000] 69 Con LR 27 : can’t question the rate itself

Documenting the Cause

- 5 stages:
 - Pre-tender
 - Pre-award
 - At contract execution
 - During contract administration
 - Post-completion

Documenting the Cause

- Pre-tender – clarifications, minutes of meetings, design & workmanship brief
- Pre-award – tabulate changes negotiated and agreed, beware rate-loading, check rates, give all necessary information
- Contract execution – capture all changes, use special conditions
- Contract administration – keep good record of obligations and update changes, monitor deadlines
- Post-completion – no more variations!

Protocols on Valuation

- Encourages Pre-Performance Agreement on Price & EOT
- Extrapolation from Contract Rates for similar character and carried out in similar conditions
- Adjustments to the Contract Rates for not of similar character or not carried out in similar conditions
- Extensively dissimilar, then fair and reasonable rates + reasonable direct cost + reasonable allowance for overhead and profit
- Value + prolongation or disruption effect

Pix Protocol

- Project Information Exchange (PIX)
- Electronic Data Interchange Agreement
- Agreeing on a Pix Protocol covering:-
 - Client's Information Needs: Fixed Formats & Timing
 - Electronic Information: Agreed Formats & Rules of Usage
 - Design: drawing origins, coordination formats
 - Document Management : File naming & numbering systems
 - CAD modeling protocols & principles
 - Project Communications: E-Mails Distribution Policies

PIX Protocol?

- The differences that cause the delays, red-tape & disputes:-
 - Information transfer
 - Information handling
 - Chain of scrutiny & approvals
 - Sharing and re-use of information
 - Trust & Reducing Team Conflicts



The End

Thank You

Q & A