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Strategies for Resolving Legal Matters on Civil Engineering Contracts in Nigeria

Oyebode Oluwadare Joshua

Civil Engineering Department, Afe Babalola University, Ado-Ekiti, Nigeria

Abstract Construction disputes, when not resolved in a timely manner, become very expensive in terms of finances, personnel, time, and opportunity costs. Over the past two decades the construction industry has made tremendous progress in developing more efficient methods of dispute prevention and resolution. In fact, experts frequently refer to the construction industry as being on the innovative edge regarding dispute resolution. Despite the progress, there remains much room for improvement. Current practice in construction dispute resolution generally reflects one of two perspectives: that one size (or resolution method) fits all disputes, and that dispute resolution is a menu of independent stand-alone choices. It is more effective to approach dispute resolution in a manner similar to medical treatment – diagnose the problem first, and then select the least invasive procedure that will correct it. Because the cost-effectiveness and timeliness of dispute resolution are critical factors, this paper proposes a flexible framework – a strategic approach to dispute prevention and resolution that employs a neutral advisor, early intervention, and the ability to tailor the resolution method to the particular nature of the dispute.

Keywords Construction, Cost-Effectiveness, Resolution, Industry, Contract

1. Introduction

Managerial economics for engineers is concern with the systematic evaluation of the costs and benefits of proposed technical and business projects.

The word contract can be defined in short as an agreement between the parties enforceable under the law. A contract is a legally binding agreement between the parties identified in the agreement to fulfill all the terms and conditions outlined in the agreement. A prerequisite requirement for the enforcement of a contract, amongst other things, is the condition that all the parties to the contract accept the terms of the claimed contract. One who is in charge of the project is known as the Employer. One who agrees to execute or perform is known as the Contractor. Contracts can be further classified as Service Contracts, Management Contract, Lease Contract, Divestiture, Sales Contracts (including leases), Purchasing Contracts, Partnership Agreements, Trade Agreements, and Intellectual Property Agreements etc.

The visible expenses (e.g. attorneys, expert witnesses, the dispute resolution process itself) alone are significant. The less visible costs (e.g. company resources assigned to the dispute, lost business opportunities) and the intangible costs (e.g. damage to business relationships, potential value lost due to inefficient dispute resolution) are also considerable, although difficult or impossible to quantify. When a legal dispute arises on a construction project, contractors should take immediate, proactive steps to help resolve the claim.

Service contract could be an agreement to provide agreed kind of services to the customer. Service delivery management ensures that the service is being delivered as agreed, to the required level of performance and quality. In civil engineering a routine maintenance contract for sweeping cleaning of Roads, Flyovers, security at site etc. are relative examples of the service contractor

Sales Contract is a contract between a company (the Seller) and a Customer that you are promising to sell products and/or services. The customer in return is obligated to pay for the product/services bought.

Purchasing Contract is a contract between your company (the Buyer) and a Supplier who is promising to sell you products and/or services.

Partnership Agreement may be a contract, which formally establishes the terms of a partnership between two legal entities such that they regard each other as „partners" in a commercial arrangement.

Lease Agreement is generally an agreement related to rights to enjoy property for certain period as per the terms and conditions of the agreement. A standard consideration is the agreed Lease rent. Typical example will be renting a flat, Advertisement permits etc.

2. What is Contract Management?

The central aim of contract management is to obtain the

* Corresponding author:
oyebodedare@yahoo.com (Oyebode Oluwadare Joshua)
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product as agreed in the contract and achieve value for money. Contract management may also involve aiming for continuous improvement in performance over the life of the contract. A key point is that the foundations for contract management are laid before contract award, in the procurement process and DPR stage. The terms and conditions of the contract should include specifications, bill of quantities, contractor bonus, liquidated damages, time period, means to measure items executed, price adjustment procedures, variation/change control procedures, foreclosure, termination, and all the other formal mechanisms that enable a contract to be implemented.

It is vital to build a contract that identifies clearly the obligations of the contractor and the employer. The contract must be built on a firm formal and legal foundation, it should be flexible, to accommodate changes, variations etc.

Good contract management goes much further than ensuring that the agreed terms of the contract are being met. There will always be some friction between the different perspectives and approach of employer and contractor. Contract management is about resolving or reducing such friction and achieving the completion of the project as envisaged. Increasingly, many organizations are departing from traditional methods of contract management and moving towards building constructive relationships with contractors. The following factors are essential for good contract management:

Good preparation of bid document: A detailed estimate, project report of the work helps create a clear output-based specification. Proper eligibility criterion effective evaluation procedures and selection will ensure that the contract is awarded to the right person.

The right contract form: The contract is the foundation for the project implementation. It should include aspects such as obligations of the parties, the quality assurance of items required, and defect liability period, as well as procedures for variations and dispute resolution.

Good contract management is proactive; it should aim to anticipate and respond to project needs. If contracts are not well managed from the employer side, any or all of the following may happen:

The contractor is likely to neglect the quality, resulting in substandard product that is not durable and structurally unsafe.

Decisions are not taken at the right time or not taken at all.

Time and cost overrun

2.1. What can Go Wrong, and Why?

One of the chief reasons for project delays is poor contract management and any or all of the following may happen:

- Parties fail to understand their obligations and responsibilities.
- There is inaction, misinterpretation at the implementing level, with too many issues being escalated to top management for decisions.
- Progress is slow and the inability to proceed forward gets compounded.
- The expected product specifications are not realized.

Ultimately, the contract becomes unworkable. There are several reasons why organizations fail to manage contracts successfully. Some possible reasons include:

- Poorly drafted contracts
- Inadequate resources assigned to contract management
- Project team and the contractor team lacking skills or experience (or both)
- Inexperienced people being put in place, also leading to ego clashes
- Contents, responsibilities and obligations of the contract are not well appreciated
- Inadequate delegation of authority and /or responsibility, resulting in financial decisions not being taken in time
- Failure to monitor and manage retained responsibilities due to external interference and pressures from stakeholders.

Contract management consists of the full and proper fulfillment of roles and responsibilities. The main task areas are site management, adherence to specifications, and contract administration. The additional resources required to manage the contract depends on its scale, complexity and importance. For smaller contracts, the same individual may cover two or more areas: like, the contract manager takes on responsibility for administering the contract and supervision. Alternatively, a proper contract management team may be created in the employer organization.

3. Dispute Resolution

Handling problems:

Whatever the nature of the problem, it is vital that:

- Problems are recorded as they occur, in order to highlight any trends and to help in assessing overall performance and value for money.
- The contractor is notified of problems by an appropriate route and at an appropriate level.
- Approaches to resolving problems are clear and documented.
- Escalation procedures are followed.

If a dispute cannot be resolved at the level where it arises, it will be necessary to involve a higher level of authority. This escalation process needs to be managed. Escalation procedures should allow for successive levels of response depending on the nature of the problem and the outcome of action taken at lower levels. The levels for escalation should match those of the interfaces established between contractor and customer. Every effort should be made to resolve the problem at the lowest practicable level. For more serious problems, the contract should specify the circumstances under which the organization would have the right to terminate the contract. The contract manager must consult senior management and contractual advisors as soon as this possibility arises. The contract manager should collate

information on the number and severity of problems, as well as the way they were resolved, during the life of the contract. This information will provide useful input to reviews. The contract manager should periodically arrange for a check on the financial viability of the contractor, as well as continually monitoring any changes in ownership of the contractor. Where potential problems are identified the contract manager should seek specialist advice as soon as possible. Normally, most problems should be resolved before they become major issues; contract managers on both sides should meet regularly to raise any issues promptly as they occur. In extreme cases, where agreement cannot be reached, the Employer and contractor should seek the assistance of mediators before resorting to legal action.

3.1. Handling Problems/ Settlement of Disputes

Every standard contract document provides for the settlement of dispute between the parties to the contract. A provision comprises reference to the Engineer within a stipulated period. The Engineer has to give his decision within the prescribed period. On failure or dissatisfaction of the either party with the decision of the Engineer the dispute can be taken further or referred to the Appellate authorities stipulated in the contract. Where notice of dissatisfaction has been given under the contract, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration.

3.2. Multilevel Settlement of Dispute

Settlement of dispute should be the responsibility of the Advisory /steering committees, if provided for. If either party is not satisfied, the dispute could be further referred to an Arbitrator to be nominated by the designated party. The Arbitrator so appointed then deals the dispute as per the Arbitration act. In some Government contracts, the provision of Arbitration is replaced by a hierarchical clause. The dispute is first referred to the Engineer and if the contractor is not satisfied by the decision of the Engineer the dispute is further referred to the Appellate Authorities/higher ups in the organization. The Arbitrator is supposed to give reasoned award within the stipulated time. The expenses towards arbitration are to be shared by the parties to the contract. The contractor has to continue to work during pending disputes.

3.3. Arbitration

However, unless both Parties agree otherwise, arbitration may be commenced on or after the day on which a notice of dissatisfaction and intention to commence arbitration was given, even if no attempt at amicable settlement has been made. Unless indicated otherwise in the Particular Conditions of contract, any dispute not settled amicably and in respect of which the Dispute Board decision (if any) has not become final and binding shall be finally settled by arbitration. Unless otherwise agreed by both Parties.

Some standard provisions of the Arbitration clause are reproduced for guidance

(a) The place of arbitration shall be the city where the headquarters of the appointed arbitration institution is located.
(b) The arbitration shall be conducted in the language for communications defined in the contract [Law and Language] and
(c) For contracts with domestic contractors, arbitration with proceedings conducted in accordance with the laws of the Employer's country. The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DB, relevant to the dispute. Nothing shall disqualify representatives of the Parties and the Engineer from being called as a witness and giving evidence before the arbitrators on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrators to the evidence, nor arguments previously put before the dispute board, to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the dispute board shall be admissible in evidence in the arbitration. Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the dispute board shall not be altered by reason of any arbitration being conducted during the progress of the Works. In the event that a Party fails to comply with a final and binding dispute board decision, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration.

If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no dispute board in place, whether by reason of the expiry of the dispute board's appointment or otherwise: provisions of Obtaining Dispute Board's Decision and Amicable Settlement shall not apply, and the dispute may be referred directly to arbitration.

4. Strategies for Resolving Legal and Managerial Matters on Engineering Contracts

If negotiation doesn't work and a problem turns into a dispute, you may decide to get help or take action to resolve it. This section looks at what you can do to take action and who can help you. This may be either an organization or a person who is not directly involved in the dispute.

Depending on the outcome you want, your options may include:

- ADR (alternative dispute resolution)
- Consulting an expert
- Sending a letter of demand
- Hiring a debt collector
- Going to court.

An important thing to remember is to choose a dispute resolution method based on the outcome you want. If you

want to preserve your business relationship and secure future work with the hirer, it is worth considering ADR. If you just want to get your money or finish the contract and move on, it may be better to use a debt collection service, a lawyer or, if necessary, take the matter to court. Often ADR is a wise approach because you may find that, in the long term, you will want to do business with that hirer again.

4.1. Alternative Dispute Resolution (ADR)

ADR is a term that describes a range of ways to settle disputes without going to court. It usually involves an impartial person, such as a mediator, who will help you and the hirer to discuss and resolve the issues between you. ADR may help you resolve your dispute before it becomes so big that a court or tribunal becomes involved. ADR can be used before, during and even after a court process. It can also help you and the hirer to maintain a working relationship so you can contract again in the future. Courts and tribunals also provide more formal ADR with qualified practitioners. In most cases, you and the hirer will be able to bring a support person or an adviser to your ADR session. The most common types of ADR are:

Mediation: A qualified person designs and manages a fair process and you and the hirer are the experts on the dispute.

Conciliation: A qualified person designs and manages a fair process and they, you and the hirer are the experts on the dispute – the conciliator may play an advisory role

Arbitration: A qualified person designs and manages a fair process and the arbitrator is the expert on the dispute – the arbitrator makes a decision (which can be binding) on the information presented by you and the hirer.

NB: ADR is for people who are ready to accept that they have different points of view and that it is worthwhile overcoming their differences so that they can keep their working relationship.

4.1.1. Benefits of ADR

- Can save time and money
- Can be flexible and informal
- Gives you and the hirer more control
- Is confidential
- Lets you and the hirer deal with emotions
- Can narrow the scope of a dispute to the issues that matter to you and the hirer
- Offers broader and more creative solutions
- Helps you and the hirer preserve your business relationship

Mediation

Mediation is the most common form of ADR. It is a confidential, informal process in which you and the hirer, with the assistance of an independent mediator:

- listen to each other and are heard by each other.
- Identify the disputed issues.
- Develop options.
- Consider alternatives.
- Aim to reach an agreement if an agreement is appropriate.

It begins with the mediator listening to each person separately to decide whether mediation will be suitable. Throughout the mediation you, the hirer and the mediator continue to check for suitability. During mediation, the aim is for you and the hirer to work together to reach an agreement or a solution to the problem that you can each live with.

Conciliation

Conciliation is similar to mediation except that the conciliator has an advisory role. The conciliator may be legally qualified or have experience with, or professional or technical qualifications in, the subject area of the dispute. The participants in conciliation will often be accompanied by lawyers or other advisors.

Arbitration

In arbitration, you and the hirer present your arguments and evidence to an arbitrator, who may have a legal background or qualifications or expertise in the subject of your dispute.

Arbitration is a more formal type of ADR and the arbitrator's decision can be binding.

Arbitration can be particularly useful where the subject matter of the dispute is highly technical. It can also help when a more formal, court-like procedure with greater confidentiality is required. In such cases, a person with expertise in the subject field may act as arbitrator.

4.2. Intensive Negotiation

Negotiations need to be carried out in a spirit of respect for each party's point of view. The Principal's representatives should be receptive to argument by the Contractor but rigorous in expecting validation of that argument, and vice versa. It is through the exploration and discussion of the facts that arguments are usually won or lost. Negotiation involves each party working to convince the other of their position. Typically each party moves towards a compromise position both can accept. Typically, a successful negotiation process usually results in the Contractor offering to settle the dispute for an amount that the Principal's negotiators consider to be fair and reasonable and able to be justified to the Agency, but are always subject to final approval by the Agency. To avoid misunderstandings, a list of matters agreed, including payment and related issues, should be prepared at the time of negotiation and then formalized.

4.3. Expert Determination

In Expert Determination an independent industry Expert makes a decision about the dispute. The contract prescribes the Expert Determination process, however it is recommended that fresh negotiations be implemented in parallel with Expert Determination. Expert Determination was introduced into NSW Government contracts in the early 1990s. The NSW Government has found that Expert Determination generally results in satisfactory outcomes and

is significantly cheaper and quicker than litigation. The standard forms of contract in the NSW Government Procurement System for Construction require the parties to refer unresolved disputes to Expert Determination. In other contracts, parties to the dispute can, at any stage, agree to have their dispute resolved through Expert Determination. Experience has shown that Experts focus on common sense, logic and facts, and do not require voluminous legal submissions (which do not necessarily correlate to improved outcomes and are frequently expensive). Whilst Expert Determination is generally far less expensive than litigation, the costs can still be significant and include:

Costs of an industry professional with experience in preparing Expert Determinations, to manage the process and prepare submissions (this will usually be the Dispute Manager).

Costs of legal advisers with experience in construction contract disputes to assist in preparation of submissions and possibly to prepare sections of the submissions.

Costs of technical experts such as quantity surveyors and programmers to prepare expert reports to support submissions.

Costs of project personnel, who may have to prepare statements, assist in preparing submissions and/or review submissions.

Costs of the Expert. Given the unrecoverable costs involved in Expert Determination, well-informed, serious attempts at negotiation generally should be undertaken in parallel with the beginning stages of the Expert Determination process.

4.4. Litigation

Litigation is an expensive and time-consuming process. Careful consideration is required before initiating litigation. When litigation is contemplated or appears likely, the Dispute Manager is to provide an updated position paper to the Project Director.

New negotiations, directed by the Project Director with advice from the litigation overview team, should commence as soon as practicable to attempt to resolve the dispute and curb accruing costs associated with the litigation process. The Project Director is ultimately responsible for engaging, briefing and giving instructions to the legal team as directed by the Agency, after input from the litigation overview team. Monthly, or quarterly reports as appropriate, are to be prepared on behalf of the Agency.

4.5. Accommodating

The accommodating strategy essentially entails giving the opposing side what it wants. The use of accommodation often occurs when one of the parties wishes to keep the peace or perceives the issue as minor. For example, a business that requires formal dress may institute a “casual Friday” policy as a low-stakes means of keeping the peace with the rank and file. Employees who use accommodation as a primary conflict management strategy, however, may keep track and develop resentment.

4.6. Avoiding

The avoiding strategy seeks to put off conflict indefinitely. By delaying or ignoring the conflict, the avoider hopes the problem resolves itself without a confrontation. Those who actively avoid conflict frequently have low esteem or hold a position of low power. In some circumstances, avoiding can serve as a profitable conflict management strategy, such as after the dismissal of a popular but unproductive employee. The hiring of a more productive replacement for the position soothes much of the conflict.

4.7. Collaborating

Collaboration works by integrating ideas set out by multiple people. The object is to find a creative solution acceptable to everyone. Collaboration, though useful, calls for a significant time commitment not appropriate to all conflicts. For example, a business owner should work collaboratively with the manager to establish policies, but collaborative decision-making regarding office supplies wastes time better spent on other activities.

4.8. Compromising

The compromising strategy typically calls for both sides of a conflict to give up elements of their position in order to establish an acceptable, if not agreeable, solution. This strategy prevails most often in conflicts where the parties hold approximately equivalent power. Business owners frequently employ compromise during contract negotiations with other businesses when each party stands to lose something valuable, such as a customer or necessary service.

4.9. Competing

Competition operates as a zero-sum game, in which one side wins and other loses. Highly assertive personalities often fall back on competition as a conflict management strategy. The competitive strategy works best in a limited number of conflicts, such as emergency situations. In general, business owners benefit from holding the competitive strategy in reserve for crisis situations and decisions that generate ill-will, such as pay cuts or layoffs.

4.10. Going to Court

For most people, going to court over a dispute is the least preferred way to resolve a dispute. The court experience can be costly, stressful and time-consuming for you and the hirer, so it’s often best to try other dispute resolution options first. However, if ADR does not work or is inappropriate for your circumstances, a court or tribunal decision may provide you and the hirer with a definite outcome. Some states and territories have civil and administrative tribunals, which are similar to local or magistrates courts. Most courts and tribunals will encourage you and the hirer to try to reach an agreement yourselves. In the Federal Court, this can be a requirement. After you

apply or file a claim in a court or civil and administrative tribunal, you and the hirer may be expected to participate in mediation or a pre-trial conference as part of the process. A court or tribunal will need to see evidence. Before going to court, you should make a record of your efforts to resolve the problem. Make notes of conversations and copies of emails, faxes and letters. It is best if you make the record on the same day that the action occurs. These documents will form part of your evidence in court.

5. Conclusions

Contract is a legally bound agreement between parties to fulfill all the terms and conditions contained in the agreement Contract management may also involve aiming for continuous improvement in performance over the life of the contract. The terms and conditions of the contract include specifications such as bill of quantities, contractor bonus, liquidated damages, time period, means to measure items executed, price adjustment procedures, variation/change control procedures, foreclosure, termination, and all the other formal mechanisms that enable a contract to be implemented. When contracts are not well managed from the employer side, the contractor is likely to neglect the quality resulting in substandard product that is not durable and structurally unsafe; decisions are not taken at the right time or not taken at all and there might be time and cost overrun, dispute among employees. Dispute among employees leads to problems in terms of finances, personnel, time, and opportunity costs. Therefore efficient strategies to curb legal and managerial matters involving contracts in Nigeria have to be put in place. Some of which include:

- ADR (Alternative dispute resolution): The most common types of ADR include Mediation, conciliation and arbitration.
- Intensive negotiation
- Expert determination
- Litigation
- Accommodating the other party
- Avoiding the other party
- Collaborating
- Compromising
- Competing and
- Going to Court.

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