

“CLAIMS CONSCIOUS” CONTRACTORS A DOUBLE-EDGED SWORD

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Your company's reputation is crucial.

This is particularly true in the built environment industry, where a contractor's reputation is just as important as his track record.

Contractors hesitate to enforce their contractual rights, fearing the stigma of being labelled 'claims conscious', but their very job is to ensure a company makes a profit and as such it is imperative. Instead, more often than not, contractors are so concerned about this label that rather than enter a 'paper war' or take a chance at upsetting the client, they opt to discuss claims 'informally' rather than officially delivering them.

The reality is that claims not delivered timeously may see these 'informal discussions' collapse, which in turn often leads to severe financial hardship.

In fact, being 'claims conscious' is a good thing as it ensures contractors get everything that they are rightly entitled to. That being said, it is crucial that claim situations are handled in a non-adversarial manner.

Whilst delivering formal notices and claims may notionally muddy a contractor's good rapport with the client, the entitlement to deliver such notices and claims is an intrinsic term of the contract.

On the flip side, the client's ability to impose penalties on the contractor who fails to complete work timeously is also typically part of that agreement. Despite this, employers are not labelled as 'penalty conscious'.

So why is there stigma attached to contractors who deliver contractual notices and claims in order to claim what they are contractually entitled to?

The reason appears to be two-fold.

Firstly, the word 'claim' in itself captures the adversarial nature of the construction industry.

Claims arise due to the very nature of construction

works. Employers typically want construction projects to be completed in the shortest possible period and at the least possible cost.

Contractors, in turn, aim to construct at the minimum cost, and where a project is delayed or disrupted by the employer, they then seek fair and reasonable compensation for the additional costs and time incurred.

Government is typically constrained to award contracts to the bidder that delivered the lowest priced compliant bid along with the highest B-BBEE score. This is referenced as the 'lowest bid scenario'.

It cannot be denied that contractors must be 'claims conscious' to survive in circumstances where the winning bid is based on the lowest tendered price.

Any contractor who is not claims conscious in the lowest bid scenario is a contractor who will go out of business very quickly. This is inevitable as the margins in this scenario are incredibly tight due to the extent of competition. Any delays or mistakes will result in the job running at a loss, a patently non-sustainable model.

The failure to deliver reasonable claims timeously, or indeed at all, is later interpreted as inattention or negligence on the part of the contractor. Regardless, if properly drafted and considered, contractual claims can be delivered in a persuasive manner, as opposed to a confrontational or adversarial manner – and no negative inferences should be drawn.

Secondly, given the lowest bid scenario discussed above, contractors may deliver spurious or opportunistic claims to make up for lost profits. The lower the offer made, the harder it will fight to make a profit. Every mistake, clash or opportunity to claim delays and seek additional compensation will be made.

This can lead to a legitimately acrimonious relationship between the contractor, consultant and client.

The underlying issue is in reality the procurement model used. Is the employer to blame for accepting a low or reasonable bid? Or should the contractor take the blame for deliberately delivering a low tender in the hope that they can recoup costs by issuing a constant stream of claims?

Either way, delivering claims for every imaginable delay or disruption will naturally result in distrust and stigma.

Being labelled as 'claims conscious' can also result in developers in the private sector seeking to steer clear from engaging with such contractors for fear that their budgets may be unduly exceeded.

A developer is trying to maximise his return and achieve the best value for money, and generally speaking, they will not – or should not – take issue with paying for services that are properly due.

In conclusion, the issue is not whether the contractor has properly documented the reasons for delays and variations ('claims conscious'), it is the fact that low profit margin situations often result in claims that cannot always be fully substantiated by the contractor.

If the claims can, however, be fully and legitimately substantiated, they should be delivered, and they should be awarded, regardless of whether or not there will be a label of 'claims conscious' attached to the contractor.

If contractual notices and claims are not delivered timeously, the contractor forfeits those claims. It is patently better to be labelled 'claims conscious' than to suffer a loss. Ultimately, the decision lies with the contractor. ■

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