



*The success of a project can be attributed to well-managed project plans and procedures as well as implementing proactive controls and measures. This article looks at the importance of proactive project management and the importance of contract documentation as well as the consequences you could be faced with if you embark on a project based on 'good spirit'.*

The topic of dispute resolution is often discussed, either in the context of traditional litigation through the courts, or in terms of alternative dispute resolution (ADR). The latter includes procedures such as adjudication, mediation, conciliation and arbitration. These are all mechanisms and procedures that can be followed to try and resolve disputes which have arisen during, for example, a project. These procedures all have, to varying degrees, a significant time and cost implication on the various parties involved, not to mention the potential implications of the outcome or award.

Staying out of trouble in the first place seems like a good option. Dispute avoidance should be the first prize, rather than dispute resolution.

### Proactive approach

Dispute avoidance requires a proactive approach to implement, and requires a mindset that must be implemented from day one of any project - indeed, from before day one!!

Dispute avoidance in a project context is all about appropriate actions, behaviour and mindsets. One often hears about clients or contractors talking about "signing the contract and putting it in the drawer". Whilst one can understand the intended sentiment – "let's put that pedantic and confrontational legalese behind us and get on with the project in good spirit" – this is the wrong way of approaching the issue.

Why is this? The contract document(s) define the business and project relationship and the project requirements, and they also define the required behaviour of the various parties in terms of the legal and project procedures to be followed. They therefore impact directly on the project plan and programme, the project implementation and the project administration on a daily basis. Not only must the contractual requirements be continuously harmonised with the project plan and implementation—initially and then on an ongoing basis—but the correct contract and project administration procedures must also be continuously observed.

# Staying out PROACTIVE

### Avoiding disputes

So what are some of the important issues around project dispute avoidance? In this article we will identify and discuss some of these, including understanding contractual requirements and procedures and their implications, implementing matched project plans and procedures, and ensuring that these are understood and complied with by the project team—all of which takes a proactive approach to successfully implement.

Whether the project contract is based around a standardised document (such as a FIDIC or NEC document) or is a bespoke document, it includes similar elements. These include, amongst others, elements dealing with the project scope, specifications and deliverables, the implementation requirements and constraints (including programming and time constraints), risk allocation, procedures, dispute resolution (and in many cases requirements in respect of early warning and/or notification), variances and claims formulations and procedures.

It is important that the contractual requirements be correctly factored into the project planning and procedures.

The project scope, specifications, deliverables, programming, milestone requirements, review requirements and other implementation requirements must be matched in detail to the project plan and any inconsistencies addressed upfront. Appropriate procedures must be established to ensure that the contract administrative requirements are complied with. For example, if particular notice periods are contractually required for anything (be it warnings of problems, time bars for submission of claims or variances, for approval of designs, for pre-submission of information prior to reviews, etc) these must be complied with or the consequences endured. It seems basic, but for example non-compliance with time bars has caused many a problem on a project.

The allocation of risk is a critical issue that must be well understood so that the appropriate risk management measures and controls can be put in place. In any project contract, certain risks will be allocated to the client/employer and other risks allocated to the contractor. These risks should be well understood by all parties before the contract is signed, so that they can be appropriately allocated and costed (including contingency costs). Risk allocation is

- Disputes have significant time and cost implications.
- Dispute avoidance requires a proactive approach to implement.
- Contract documents impact directly on the project plan and programme and are a critical success factor to a project.
- Contracts contribute to risk management for the client and the contractor.

Take note

# of trouble = first prize

## PROJECT PLANNING

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also an exercise that must be intelligently approached in a carefully considered manner, so that for example risks are allocated to the parties best able to manage and contain the applicable risks, and in a way that sensibly manages the potential cost implications. Once the risk allocation and implications are understood, it is then critical to draw up and implement an effective risk management plan as part of the overall project plan. In this respect risks include contractual, financial, environmental and technical/engineering risks.

Sensible risk allocation between parties is key to reducing the potential for disputes and claims, and for promoting a successful project. This includes selecting an appropriate contracting model. As a simplistic example, forcing a fixed price contract when the project is ill-defined up front (for whatever reason) results in a substantial transfer of risk to the contractor. This will (hopefully for the contractor) be priced for accordingly to allow for all sorts of contingencies, some of which may never arise but will be paid for nevertheless, potentially resulting in an unnecessarily increased project cost. The client may argue that the increased price is acceptable for the benefit of the transferred risk, but this may be a false security as unforeseen issues may yet give rise to future claims and disputes, and resultant possible project delays and additional costs, and possibly even eventualities such as contractor liquidation and resultant negative consequences for the project, thereby negating the perceived benefit of the original risk transfer. A rational and sensible approach to risk allocation will reduce the probability of project disputes and the overall risk associated with the project, and is in the best interests of all parties.

In order to achieve the goal of dispute avoidance, the project team must be proactively involved. The first requirement is to prepare and implement an effective project plan. A project time line or programme is not a project plan!! The project plan must comprehensively address

all the relevant issues required to successfully implement the project. These include issues such as the programme, resourcing, responsibilities, technical requirements and constraints, risk management (technical and broader project related), project and contractual procedures (to the client and to sub-contractors), communication requirements (site books, minutes, communications between parties, meetings, documentation and configuration management etc), sub-contracting provisions etc. Obviously the scope and extent of these plans will vary depending on the project complexity and size, but these are some of the important elements that must be included.

Communication is critical, and it is therefore important that the project team is brought up to speed on the project plan at the beginning of the project. Alignment of teams and personnel, including sub-contractors, with the project plan is critical for project success. Kick-off meetings, structured and regular project reports, communication and meetings are all important factors that ensure that the project is kept on track and the potential for disputes minimised. Once again, a proactive approach is key to success.

### Conclusion

Successful projects don't just happen. They are the result of a well orchestrated management plan and implementation, executed in a proactive manner and where the contractual and project requirements are harmonised with the aim of, inter alia, avoiding disputes.

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### Get your paperwork in order

*Internationally used and standardised forms of contract have been prepared by various bodies. Examples include those prepared by FIDIC (Federation Internationale des Ingenieurs-Conseils – the international federation of national associations of independent consulting engineers, of which the South African Association of Consulting Engineers (SAACE) is a member), and the New Engineering Contract (NEC) that originated in the UK under the auspices of the Institution of Civil Engineers. These are commonly used for engineering project contracts in Southern Africa, often with customisation or tailoring to specific project circumstances. Other common forms of contract in use in South Africa for projects include the JBCC (Joint Building Contracts Committee) and GCC 2004 (The General Conditions of Contract for Construction Works) forms.*

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