

# Focusing on CLAIMS AND RECORD MANAGEMENT

Illustration by **Dale Edwin Murray**



Records! Records! Records! This typical mantra can be heard when parties to a construction contract assert their rights to, or in other words, claim, what they perceive to be their rightful contractual entitlements on time or additional payment or compensation. Dissatisfaction with the determination or rejection of the claim becomes, in the absence of any consensus or a settlement, the subject of arbitral or court proceedings.

## IMPORTANCE OF RECORDS

That claims are simple to originate but not always easy to substantiate is a good reason for the employer to be astute in ensuring that sufficient evidence is presented when a contractor advances a claim for time and cost. What are the records the employer should expect a contractor to keep for satisfactory demonstration of his entitlement? Most contract forms set out specific procedural requirements for contemporary records that should be maintained, and the consequences if the contractor fails to do so.

*The International Federation of Consulting Engineers (FIDIC) Forms of Contract* sub-clause 20.1 notes that the ‘Contractor shall keep such contemporary records as may be necessary’ if he intends to claim an extension of

the time for completion and/ or any additional payment. The records must be kept on the site or, with the approval of the engineer, at another location. The engineer may monitor the status of recordkeeping and order the contractor to keep further contemporary records. The contractor must make

records available for inspection, and provide copies to the engineer if requested. More often than not, the failure to maintain or the lack of contemporary records can adversely affect or even extinguish the contractor’s entitlement to claim an extension of the time for completion or recover loss and expense.

The term ‘contemporary records’, and what it constitutes, was considered in *Attorney General for the Falkland Islands v Gordon Forbes Construction (Falklands) Limited* [2003] BLR 280. Here, contemporary records are defined as ‘original or primary documents, or copies thereof, produced or prepared at or about the time giving rise to the claim, whether by or for the contractor or employer’. The court made it clear that contemporary records were not ‘witness statements produced after the time giving rise to the claim’. Thus, documents or records prepared in an

attempt to reconstruct the historical event, or chain of events, from memory or statements on what had happened or did not happen in the past do not constitute contemporary evidence. The emphasis is on immediate recordkeeping at, or very close to, the time the claim arose.

## WHAT DOCUMENTS ARE NECESSARY?

Broad and sweeping statements that the employer and/ or his consultants have attributed to the loss suffered without establishing the link between cause of the delay and effect would not sustain a claim. What is required from the contractor is the actual loss and/ or actual expense – not some notional figures that bear no resemblance to the claim. The employer should be mindful of contractors taking shortcuts to link the cause (the particular breach or claim event) with the effect (cost or time incurred or loss suffered), leading to global or rolled-up claims where all causes of delay are lumped together. Claims made on a global basis have been cautiously allowed by the courts, but only where it can be shown there is an extremely complex interaction of events that made it difficult, or even impossible, to separate and prove each individual item, and where as much detail as possible was given.

Record what happened – and how, when and where it happened – as soon as the event or circumstance arises. This ensures that an actual representation of the factual environment can be produced to counter and discredit any claim submitted without any proper contemporary documents, or wanting in evidence and substantiation. A diligent recordkeeping and document management policy is critical, and this cannot be overemphasised.

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