

Is Your Project's Documentation Ready to Face the COVID-19 Financial Crunch?

By Eric Teo - Head of International Practice & Special Projects

Perhaps the current slow-down in the construction industry (whether in the UAE or internationally) brought on by the COVID-19 pandemic allows industry players some breather to focus their attention to the state of their project's documents management and records keeping systems.

Why is this important?

It is important so that parties do not succumb to the harsh reality of their claims (or rebuttal) getting substantially reduced or rejected either during negotiations or in legal proceedings due to the lack of substantiating documents or records. More so during these difficult times in the Middle East in light of the COVID-19 outbreak and low oil price environment.

As I consider the ongoing issues in the construction market, I think it is pertinent that employers, design and supervision consultants, project management consultants, contractors and sub-contractors alike should take stock of their finances and their respective positions in terms of pending claims, certifications and payments in each project. To improve their positions, they would need to have the appropriate supporting documents and records.

What kind of documents and records to keep?

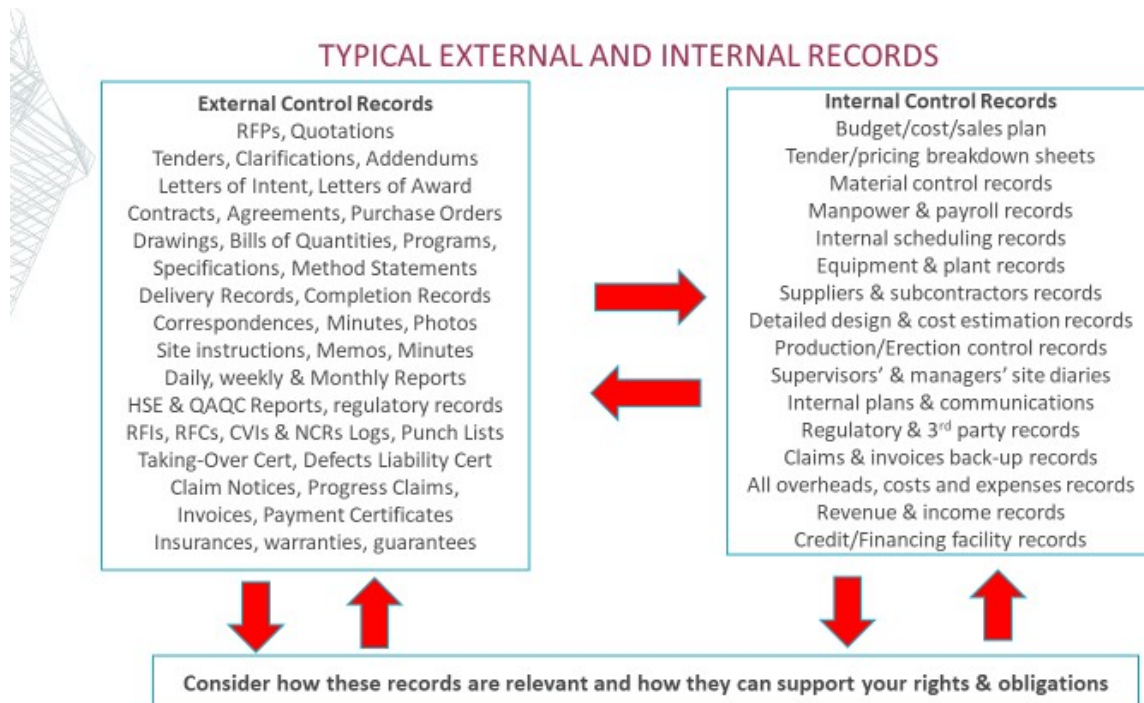
Article 26 of the UAE Law of Commercial Transactions¹ requires all commercial entities to keep "*commercial books as may be required by the nature and importance of his trade, in such manner as to show his financial position with accuracy as well as any rights and liabilities related to his trade*". Under Article 36 of the same law, "*commercial books*" can be used as evidence concerning the entities' commercial activities. These "*commercial books*" are not limited to only accounting books or ledgers, in the construction industry they encompass a very wide range of documents and records.

In the following part of this article, I will use the term "records" to refer to the wide range of documents and records that can be used to support or rebut a claim under a construction contract which include any information or data recorded or generated electronically².

The diagram below provides a list of common records that a construction project can generate. The records are broken into "External Control Records" and "Internal Control Records" - the first category contains records that are typically shared between the relevant parties and the latter category are internal records that may or may not be shared depending on the situation.

¹ UAE Federal Law No.18 of 1993

² Subject to certain conditions, the UAE Law of Proof in Civil and Commercial Transactions (Federal Law No.10 of 1992 as amended in 2006) accepts electronic writing, instruments, registers and documents as documentary evidence.



The type of records will vary according to the project and contract. For instance, under the 1999 FIDIC Red Book contract, the contractor is obliged to keep and submit a specific range of records, in particular:

- Sub-Clause 1.8 requires:
"...The Contractor shall keep, on the Site, a copy of the Contract, publications named in the Specification, the Contractor's Documents (if any), the Drawings and variations and other communications given under the Contract. The Employer's Personnel shall have the right of access to all these documents at all reasonable times..."

- Sub-Clause 4.21 requires:
"...monthly progress reports shall be prepared by the Contractor and submitted to the Engineer..."
"...Each report shall include... charts and detailed descriptions of progress...procurement, manufacture, delivery to Site, construction, erection and testing... photographs showing the status of manufacture and of progress on the Site... copies of quality assurance documents, test results and certificates of Materials... list of notices...safety statistics... comparisons of actual and planned progress... the measures being (or to be) adopted to overcome delays."

- Sub-Clause 6.10 requires:
"The Contractor shall submit, to the Engineer, details showing the number of each class of Contractor's Personnel and of each type of Contractor's Equipment on the Site..."

In dealing with the adverse impact of the COVID-19 outbreak, a dedicated folder of records should be kept to evidence the extent of the impact and its

consequences on each project. These records will certainly help if a claim needs to be made in connection with the outbreak³. In general, the folder should at least contain records of:

- the relevant laws including the government's directives and circulars instigated by the outbreak;
- the impact of mandatory quarantine, stay-home order, social distancing, border closure and movement restrictions requirements on the execution of the project including head-office operations;
- written notifications of the impact to the relevant parties (including insurers if there may be claimable event under any insurance policy);
- how the impact might have affected the deployment of equipment, materials and man-power resources, supply chains and deliveries (including any *Force Majeure* certificate granted to the concerned manufacturers, suppliers or shippers), required time to obtain regulatory permits and approvals, scheduling or sequencing of work, methods of working, HSE requirements, costs of materials, equipment, manpower and execution;
- steps taken or to be taken to mitigate the impact and the costs of doing so.

How records can be used to support or rebut a claim?

The basic rule to note is that the party who makes an assertion bears the burden to prove the assertion. This rule or legal principle applies to both the Civil Law and Common Law systems around the world. As far as UAE law is concerned, this principle can be found in the various provisions within the Law of Proof in Civil and Commercial Transactions⁴, the Law of Civil Procedures⁵, the Law of Civil Transactions⁶ and the Law of Commercial Transactions⁷.

Records can be used as direct evidence to prove a particular fact or circumstance, that in turn supports an assertion, or they can be the indirect evidence of a particular fact or circumstance. For example, a signed and dated "Request for Inspection" (RFI) form issued by a contractor to the supervising engineer requesting the latter to inspect a specific work that was completed can be the direct evidence to prove that the request for inspection was made on the date of the RFI. On the other hand, if there was no record to prove the completion date of the work, the RFI can be the indirect evidence to suggest that the work was already completed by the time the RFI was issued.

No volume of record-keeping will inevitably be able to document all issues and facts that could arise in a project. Very often, complex issues such as the examples listed below would require the combination of factual and expert

³ Please see my previous article concerning potential claims arising from the COVID-19 outbreak https://www.linkedin.com/pulse/force-majeure-claims-construction-contracts-uae-eric-teo-%E5%BC%A0%E5%AE%8F%E5%8D%97?trk=d_public_post_promoted_post.

⁴ UAE Federal Law No.10 of 1992.

⁵ UAE Federal Law No.11 of 1992.

⁶ UAE Federal Law No.5 of 1985.

⁷ UAE Federal Law No.18 of 1993.

witnesses to explain the relevant records and test the respective parties' assertions:

- what is the underlying cause of a structural crack on a constructed column?
- how has the critical path changed or affected by a series of delaying events?
- how to correctly quantify the loss of productivity due to a host of disrupting events?

In legal proceedings, documentary evidence should be corroborated or explained by witnesses who either have the factual or expert knowledge about the evidence⁸. For construction matters, factual witnesses are typically the supervisors, engineers, construction managers or project managers who have direct knowledge of the records in question by having worked on the project. As to expert witnesses, they are persons who have the expertise and experience to analyse and interpret relevant records to give opinions. They could be experts in the fields of engineering, architecture, accounting, planning or quantity surveying.

When parties do not have the required records that can be the direct evidence to resolve complex technical issues, then the assistance of an independent expert witness is best used. An expert witness will need to rely on the project's records to investigate and analyse the issues before giving her or his opinion. Therefore, the more comprehensive and accurate the records are, the more persuasive the expert's opinion will be.

There are other legal aspects about using records as evidence that are not covered by this article - they include questions relating to the disclosure, admissibility and weight of the records as documentary evidence. These are questions that will arise in situations such as when the records relied upon are not original or, the contents of the records adduced as evidence was made by a person who is not available to explain the contents. They entail complex issues of law and practice, and perhaps the topic for another article.

Construction claims

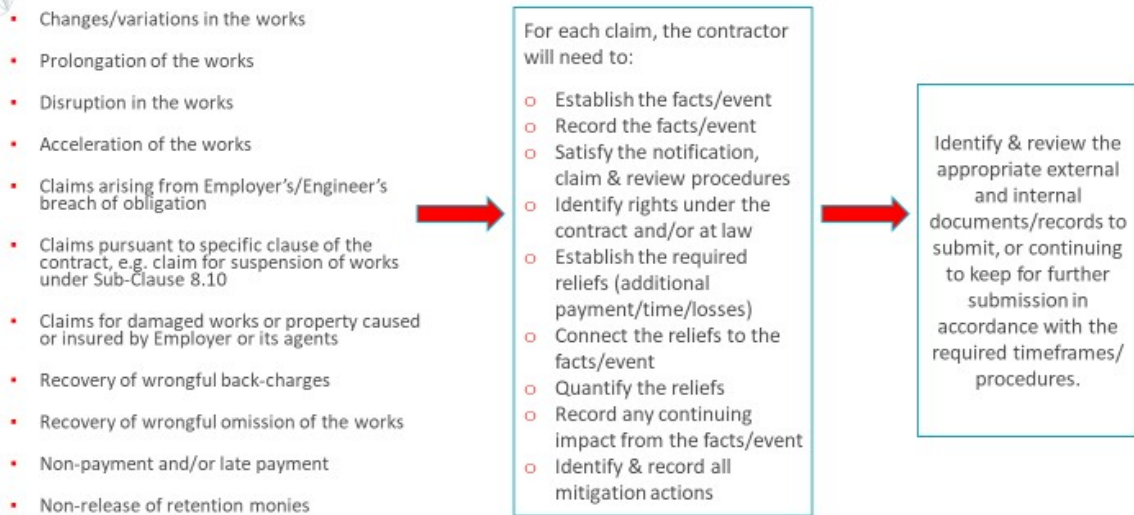
When pursuing a construction claim, the claimant will need to prove the "liability" and "quantum" aspects of the claim. The first aspect requires the claimant to identify the facts/event and legal right that entitle it to make its claim, and the second aspect calls for the claimant to quantify the amount and/or other relief it is entitled to receive by establishing how the relevant event has given rise to the amount and/or other relief.

There are a variety of claims that can be pursued under a construction contract and the "liability" and "quantum" aspects of each type of claim may differ. The diagram below shows a list of typical claims that a contractor might pursue - each claim will need different records to satisfy the respective "liability" and "quantum" aspects.

⁸ However, in onshore UAE court proceedings witness evidence (either oral or written statement) is not often adduced to the judicial panel for consideration because a lot of the factual and technical investigations are done by the court-appointed expert(s). These experts would hold meetings with the parties' representatives to receive evidence that includes oral explanations from the representatives.



TYPICAL CLAIMS BY A CONTRACTOR & REQUIRED ACTIONS



Matters can get more complicated when we are dealing with claims under sophisticated construction contracts as there will be a multitude of conditions to satisfy before a claim can be successful. The conditions may include the need for specific records to be kept and submitted within a particular timeframe or manner, such as when an employer makes a claim under Sub-Clause 2.5 of the 1999 FIDIC Red Book and a contractor claims for extension of time and/or additional payment under Sub-Clause 20.1 whereby the following requirements will come into play:

- Claims requirements under Sub-Clause 2.5:

"If the Employer considers himself to be entitled to any payment... and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor ... "

"... The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim... "

"... The particulars shall specify the Clause or other basis of claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled..."

- Claims requirements under Sub-Clause 20.1:

"... the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim... The notice shall be given as soon as possible, and not later than 28 days after the Contractor became aware, or should become aware, of the event or circumstance..."

"... the Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance... "

"... the Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on Site or at another location acceptable to the Engineer... "

"... Within 42 days after... the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim... "

If claims requirements are not fully complied with, it opens up arguments for the responding party to deny or discount the other party's claim. Although the claiming party may argue that non-compliance due to the lack of certain records is not necessarily fatal, this sort of argument is best left with the lawyers as it can get complicated depending on the wordings of the contract and the circumstances. As always, the best policy to adopt is to ensure that no records are missing in the first place.

Closing thoughts

Most construction projects are long-term undertakings and involve multiple parties. Hence, the volume of records generated before, during and after a project's lifetime can be substantial. Therefore, managing project records can be very laborious unless some form of an electronic Documentation Management System (EDMS) is used to organise and archive the records. For projects that use Building Information Modelling (BIM) and planning software, it will greatly enhance the effectiveness of record-keeping if the EDMS, BIM and planning software can be integrated (even better if it includes a site based time-lapse photography).

Investing in a good EDMS not only helps to increase the efficiency or productivity of executing large projects, but it could also reduce the time and costs for lawyers and consultants to investigate the relevant records in case parties get embroiled in legal proceedings down the road. In large construction arbitrations and litigations, it is not uncommon to find lawyers sifting through tens to hundreds of thousand pages of records.

Finally, to further emphasise the importance of records, I leave you with the often-quoted words of the late construction lawyer, Max W Abrahamson (author of "Engineering Law and the I.C.E. Contract"): *"A party to a dispute, particularly if there is arbitration, will learn three lessons (often too late): the importance of records, the importance of records and the importance of records."*
