2. THE CLAIMS AND DISPUTES PROBLEM

2.1 From The Client's Point Of View

It is difficult to budget for projects, given the likelihood that claims will occur.

Cost overruns through claims, whether justified or not, constitute a serious managerial and funding problem. In the public sector, claims at times involve political problems.

Contractors fail to give warning of claims and comply with notification and time requirements for claims, which makes it difficult for clients to check the facts, to decide upon expedient solutions to problems and to keep records to verify claims.

It is a fairly common practice for contractors to lodge large claims at the end of projects when it is difficult for the client to verify the facts, due to the elapse of time. Clients sometimes respond to this situation by invoking time barring provisions such as those contained in Clause 48 of NPWC3.

Contractors often fail to present claims in a fashion which:

- clearly reveal the facts upon which the claim is based;
- clearly reveal the contractual or legal basis of liability which gives rise to the contractor's entitlement in relation to the claim; and
- provide a proper explanation and justification of the quantum claimed.

Contractors frequently submit ambit claims which factor the contractor's real claim by somewhere between 2 and 10. This is either done:

- in the hope that the contractor may recover its losses, i.e. the claim is based on the contractor's loss situation, rather than on the basis of the client's liability;
- because the contractor fails to appreciate the real extent of the client's liability and/or the real quantum of the contractor's entitlement; or
- because the contractor perceives the need for or wants the room to bargain.

Contractors fail to appreciate that clients are not in a position to settle claims which fail to establish the facts, the contractor's contractual or legal basis of entitlement and justify the quantum claimed.

Contractors expect claims to be settled, notwithstanding their failure, refusal or inability to do the work necessary to establish that the claim is valid.

Contractors fail to keep adequate records to justify claims; contractors allege costs but have no time sheets, receipts, etc. to enable verification.

Contractors fail to assess their overheads in relation to claims and tend to rely on general methods of calculation, e.g. overhead calculations based on the Hudson or Eichlay formulae, which are not readily accepted by many clients as a basis upon which settlement should be made.

At times, tenderers fail to properly assess and come to grips with the work to be performed.

There are instances where, despite an invitation or tendering obligation to do so, tenderers fail to obtain or inspect relevant documents, fail to inspect borelogs and fail to visit the site.

At times, tenderers fail to properly assess and come to grips with the contractual risk allocation.

At times, despite the intention of clients that they should do so, tenderers fail to price the risk allocation in contract documents.

There are occasional instances of "loophole engineering", with concentration by tenderers on taking advantage of anomalies, errors or contradictions in documents, rather than bringing such problems to the attention of the client.

Contractors place too much emphasis on pushing their contractual position, rather than getting on with the project.

Contractors fail to control, absorb and solve problems, without resort to claims.

Contractor's claims occasionally push "cute" points, which are of questionable validity or merit.

Contractors claim to obscure or recover for matters which are really their own fault.

Contractors fail to distinguish their own separate liability to subcontractors from the client's liability; contractors often assert that all liability rests with the client when it is (for example) 50/50. This makes it difficult for the parties to agree upon settlement of the claim.

Contractors refuse to settle claims for the amount which they are properly worth. At times, contractors have internal reasons for such refusal.

Contractors refuse to drop claims which have no justification, in the expectation that they may ultimately receive something for them in the wash up at the end of the job. Contractors also refuse to drop claims which have no justification, in order that they may have something to bargain off in negotiations over all the contractor's claims in the wash up at the end of the job.

Operational staff are permitted to claim, without internal review by management. At times, claims by operational staff are:

- pursued to cover or recover for their own errors in construction, management or contract administration;
- fuelled if not caused by emotion;
- due to a lack of appreciation of the proper contractual/ legal position.

Contractors expect that clients' experience with them in relation to claims will have no marketing implications with respect to future projects.

2.2 From The Contractor's Point Of View

Clients often fail to carry out adequate site investigations.

Clients often fail or refuse to provide contractors with relevant site information.

Clients often fail or refuse to provide contractors with relevant tender information.

There is a negative attitude by clients and consultants to justified tender qualifications; such qualifications should be carefully assessed to see what problems and claims are likely to arise, if ignored.

Clients and consultants fail to appreciate the vulnerability of contractors to:

- contractual risk allocation for matters over which the contractor has no control;
- delay;
- disruption;
- inadequate contractual provision for recovery for the costs of delay;
- poor contract administration;
- delays in processing matters such as the valuation of variations;
- delays in payment;
- refusal to deal with valid claims;
- prolonged and costly disputes over matters which could and should be settled.

Clients often attempt to contractually allocate risk to contractors for matters over which they have no control.

The vulnerability of efficient contractors which are resourced up and working at a good pace is greater than that of contractors which are not working so efficiently.

With contractors realised profits on turnover generally in the range of 3 - 5%, contractors have little or no capacity to absorb problems which occur during construction, such as delays and disruption caused by clients or consultants. Cost overruns in the order of 30 - 40% are not infrequent and cost overruns of or in excess of 100% can occur on badly disrupted projects (such disruption is not always by causes for which the client is responsible, but includes causes for which the contractor is responsible and causes beyond the control of either party).

Rather than ensure that the documentation and contract administration is of an appropriate standard to avoid claims, some clients take the approach of attempting to prevent contractors in contractual provisions from recovering for problems caused by the client or those for whom the client is responsible. This approach increases the adversarial nature of the process and often is only of benefit to lawyers engaged by the parties respectively to develop solutions and defend claims.

Clients fail to distinguish between good and poor claims and respond to both in the same fashion.

There is a tendency by clients to blame contractors for claims, even in relation to justified claims for which the client is responsible.

Clients refuse to negotiate on claims, thus forcing matters into dispute which should really be settled.

Clients attempt to use the legal process to delay or avoid meeting justified claims.

2.3 Subcontractors' Claims

The rather poor quality of subcontract formation in the industry also leads to uncertainty and dispute as to the terms and obligations of subcontractors.

In the past, the majority of claims may have been generated by contractors. However, in recent times, subcontractors have been developing a greater awareness of rights and obligations and an increased "claims consciousness". Recently, subcontractors have also been the recipients of increased services by lawyers and claims consultants.

These developments will lead to a greater incidence of claims from head contractors to their clients, as contractors are forced to "back to back" subcontractors' claims, whether regarded as of merit or otherwise, simply to preserve their own position.

Difficulties can arise in resolving disputes under subcontracts, where the dispute relates back to the head contract. As a consequence of separate arbitration clauses under the head contract and subcontract, with different nomination provisions, the likely scenario is for separate arbitrations, with separate arbitrators, to resolve the same or related disputes. This problem is compounded by inadequate and unworkable provisions in the "uniform" Commercial Arbitration Acts for the joinder of the separate disputes in the one proceedings. There is the potential for the separate dispute proceedings to result in different and even opposite findings. The Australian Federation of Construction Contractors has made submissions to the Attorney Generals for amendment of the Commercial Arbitration Acts to resolve this problem.

The standard industry subcontracts are inadequate in failing to deal with important issues such as subcontractors' safety and industrial relations obligations. Some contractors adequately deal with this problem with additional special conditions, whereas others do not.

The risk exposure of the head contractor is not well understood by all contractors; the process of contracting is not simply one of applying a brokerage fee to subcontract prices in preparing the head contract tender. There is a significant risk exposure on the part of the head contractor to the client and to other subcontractors, in the event of non-performance by particular subcontractors. This exposure is not adequately responded to by contractors in contract administration or in the preparation of contracts which focus on risk allocation, rights, obligations and, particularly, remedies available to the contractor in the event of non-performance by a subcontractor.

There is a need for education and greater awareness on the part of contractors and subcontractors of the issues involved in contract formation.

Clients should understand that contractors may be obliged to claim, in response to claim by subcontractors. Where appropriate, cooperative effort may be required by clients and contractors to efficiently assess and respond to subcontractors' claims; non-cooperative, adversarial relationships between the client and contractor can compound the problem.

The "uniform" Commercial Arbitration Acts require amendment to facilitate the joinder of the same or related disputes under the head contract and subcontracts.

Consideration should be given to the development of appropriate provisions to deal with common industry issues which are not dealt with in the standard industry subcontracts.

Re-consideration should be given to the provisions of the industry subcontracts to ensure that contractors have adequate control over subcontractors' involvement in the construction process, to enhance the efficiency of the construction process and to avoid claims and disputes.

2.4 Observations On Claims And Disputes

There is often an inadequate understanding and identification of risks at tender time and during construction. Frequently, the parties fail to pursue efficient solutions to problems, which then leads to significant claims to recover costs which could have been contained, if not avoided.

Contractors make money out of efficient projects, not claims. Claims usually involve attempts to recover costs incurred and, even if successful, often do not provide full recovery. It is not common for genuine claims to generate profits.

A well presented claim is easy to follow and to check.

Clients can/will not settle claims which fail to adequately address and establish the facts upon which they are based, the bases of entitlement and the quantum claimed.

Both contractors and clients need to lift their game to avoid circumstances that give rise to claims and, respectively, to properly assemble claims and adequately assess and deal with claims.

The industry should make greater use of alternative dispute resolution. The legal process (including formal arbitration) should be regarded as the last resort.

There is a significant problem looming for contractors with respect to claims by subcontractors.

There is a serious problem in the current claims environment to be addressed by the industry.

The basic nature of the traditional building and construction contracts is adversarial; steps should be taken to identify to what extent a team approach is possible - even if this means changing the basic nature of the contracts in common use. For example, removal of the client from responsibility for design by greater use of design and construct and detail and construct contracts to performance specifications and design briefs, subject, if necessary and appropriate, to approvals and quality assurance.

Clients are better placed to initiate change than contractors.