

3. NATURE AND PURPOSE OF THE CLAIMS AND DISPUTES RESEARCH PROJECT

Due to widespread concerns over the claims/disputes problem, meetings were held between public and private sector client organisations, consultants and contractors to determine appropriate action to address the problem.

It was decided to undertake a research project to establish the extent to which claims and disputes are a problem in the construction industry in other countries and the extent to which the problem is peculiarly Australian in nature. Most importantly, it was decided to research what action is being taken in other countries to address the problem; the intention being to identify changes which might be introduced into Australia to increase the efficiency of the industry and to address the problem.

The following organisations participated in the research project:

- Australian Construction Services, Department of Administrative Services
- Australian Federation of Construction Contractors
- Australian Institute of Quantity Surveyors
- Department of Main Roads, New South Wales
- Ministry of Housing and Construction, Victoria
- National Capital Development Commission, Construction Division
- Public Works Department of New South Wales

The research project involved a study tour of the following countries:

- Italy
- Switzerland
- France
- Belgium
- Germany
- Holland
- Denmark
- Sweden
- The United Kingdom
- Canada
- The United States

Not all participants in the research project went to all countries.

The Australian Federation of Construction Contractors carried out a separate study tour of Singapore, the Philippines, Hong Kong, Taiwan and Japan.

Written enquiries were made in other countries.

Enquiries were made of public and private sector clients, client associations, contractors, contractors associations, architects, engineers, quantity surveyors, professional associations, construction industry lawyers, claims consultants and the Asian Development Bank and the World Bank.

The enquiries briefly were as to the claims and disputes experience in the particular country and actions taken to address the problem. The enquiries included:

- the experience and current trends in claims and disputes;
- alternatives to the low bid tendering system;
- changes in methods of contracting to address claims and disputes in areas such as:
 - risk allocation;
 - change in or removal of the role of the architect/engineer;
 - contract documentation;
 - use/avoidance of Bills of Quantities;
 - avoidance of the Nominated Subcontract System;
 - combined construction and maintenance contracts;
 - detail and construct contracts;

- design and construct contracts;
- project management;
- construction management;
- forms of dispute resolution.

The content of this Report is based upon experience, knowledge, judgement and perceptions, supported by research in Australia and the overseas research described above.

4. THE EXPERIENCE IN OTHER COUNTRIES

General Comments

The problems of claims and disputes in the construction industry is a world-wide phenomenon. The development of a significant claims and disputes environment in the industry in Australia has lagged behind a similar development in a number of other countries.

To an extent the problem would seem to have come to be regarded in some countries as business as usual. There are other countries which claim not to have anything like the level of claims and disputation which occurs in Australia. In some instances, research project participants were sceptical of this advice and considered that an element of nationalism may have been involved.

Nowhere were there any indications given that the incidence of claims and disputes was decreasing. In the U.S.A., litigation has reached alarming proportions. In Australia, the industry must strive to prevent a similar development.

Action has been taken in several countries to address particular problems, in advance of what has occurred in Australia.

Some approaches to contracting were impressive, e.g. the French system of detail and construct described towards the end of the Report.

There is a world-wide trend to "transparency" (ensuring that actions and decisions are able to withstand public scrutiny) in the public sector and some concern, if not paranoia, which has led to the development of corruption commissions. This development has placed greater restrictions on tendering, claims settlement and dispute resolution in the public sector.

Advice was provided in several locations that many of the problems experienced in Australia arise from the traditional English system of contracting, which can lead to adversarial relationships. Whether this is so or not, there are certainly some practices in the industry which are historical and cultural, rather than based on the most efficient method of dealing with the particular issue.

Generally the sources of claims and disputes were found to be:

- lack of coordination and quality of contract documents;
- adversarial relationships;
- going to tender with inadequate documentation for a traditional lump sum fixed price contract;
- attempting to fast track construction on a traditional lump sum, fixed price contract;
- problems in contract formation;
- problems arising from late supply or errors, omissions and ambiguities in contract documentation;
- delays by the client or those for whom the client is responsible;
- variations;
- Bills of Quantities;
- Nominated Subcontracts;
- latent conditions;
- the role of the architect/engineer in contract administration;
- the role of the architect/engineer in dispute resolution;