

## **Dispute Avoidance and Resolution in Construction Projects: On Paper or in the Minds of People?**

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### **Abstract**

Under a construction contract, responsibilities and liabilities of the parties are defined, or should be defined. Within the context of a contract, each party knows or should know his/her roles and duties in order to fulfill the obligations as set out under the contract terms and conditions. In a perfectly drafted contract, errors, omissions or ambiguities in or misinterpretations of the terms and conditions of the contract are minimized, if not entirely eliminated. Based on Author's experience in the construction industry, there has been no such contract that could be deemed to be completely free of errors, omissions and ambiguities or be immune to any misinterpretation. It is therefore almost inevitable that the parties to a contract will end up with disputes. It should also be kept in mind that the contracts are written, signed and administered by the people. Therefore, common sense dictates that the reasons for disputes cannot solely be attributable to the contract terms and conditions not least because there is the human factor involved. This paper first focuses on some major steps that need to be taken in order to help avoid and resolve disputes between employers and contractors in two stages in echelon: the tender stage and the construction stage. The paper then provides a discussion on the subject of human factor as it relates to the ability and willingness of the parties towards achievement of dispute avoidance and resolution.

### **Keywords**

Construction contracts, Dispute avoidance resolution, DRB/DAB, Negotiation, FIDIC

### **1. Introduction**

For those who are involved in the management of construction projects, it is a common understanding that it is highly likely that there will be disagreements between the parties involved. For the purpose of discussion in this paper, the Author emphasizes on the aspect of disagreements and disputes between the employers and the contractors. Before further getting into the issue of disagreements, one should first understand that a contract is a legally binding and enforceable agreement which lays down the duties and obligations for the parties involved. In simple terms, a contract can be described as an agreement between two parties to do a particular thing in return for something of value. In terms of construction contracts, a contractor promises to design and or execute and complete the works and in return the employer promises to pay the contractor an amount as prescribed in the contract. In often cases, construction contracts can lead the parties in to situations where one party says he is not obliged to do certain work or not responsible for certain conditions whereas the other party says the opposite. Therefore, such differences in opinions have a high tendency to turn into disputes unless the parties' commitment to amicably resolve such situations at earlier stages exists. During the execution and administration of a project, the parties should always maintain clear lines of communication between them. It is no doubt that opinions, arguments and beliefs may be different from one party to another. Communicating these differences is an essential and vital part of an effective cooperation towards a successful completion of a project. But it is

also without dispute that such communication may come to a deadlock. Parties having given all their reasons for their opinions, arguments and beliefs may no longer be able to convince one another, thus further communication will be of no avail. At this junction, the Author provides opinions as to what an employer and a contractor can do to help avoid and or resolve their differences before and after the contract is awarded. As the onus for the most part is on the employer during the tender stage to take steps to avoid potential disputes, the onus should be equally shared by the employer and the contractor to take steps to avoid and or resolve disputes after the contract is awarded. The author also provides a discussion on the basis that dispute avoidance can be achieved on paper, but how successful can it be? The other and the most important aspect is the human factor as it is the human beings who make, sign and administer the contracts. The parties to a contract, the employer and the contractor, should encourage their personnel who are or will be in charge of preparation and administration of contracts to take certain steps to improve their awareness and knowledge towards avoidance and resolution of disputes.

## **2. Progressive Steps toward Dispute Avoidance and Resolution**

Disputes arise out of or result from different reasons, one of which that has been most commonly encountered is the differences in understanding and interpretation of a contract's terms and conditions. Any effective study, analysis and understanding of tender documents are certainly proactive steps toward avoiding potential disputes that may arise after the award of a contract. Under this heading, opinions shall be provided in general terms without referring to a particular type of contract. The progressive steps toward dispute avoidance and resolution can be divided into two main stages: (1) Tendering Stage, (2) Construction Stage (after the award of a contract).

### **2.1 Tendering Stage: From the Perspective of an Employer**

The state organizations are the major employers in the construction industry due to their capability to secure large capital funds from or with the backing of their governments. As a public authority, a state employer's main duty is to provide (procure) goods and services for the benefit of the public at the lowest reasonable price and with as satisfactory quality in materials and workmanship as possible and within the time specified; not least because it is the tax money of the citizens that is spent under scrutiny. There are also large private employers, mostly in the energy, utility, petroleum and real estate sectors. The private employers can be rather more flexible in terms of spending, while their main concern is the turnover on their investment.

As the contracts are mostly drafted by the employers, the onus is on the employers to make sure that the tender documents are prepared with utmost attention so that the tender documents are clear, complete and without any ambiguity. A possible mistake that employers can make is when they put a new project out for bid; they take an old contract that was used on a previous project and then make it a part of the tender documents of a new project without thoroughly reviewing and making appropriate changes to it. The nature of work and conditions and circumstances may well be so different from the previous project that those terms and conditions of the old contract can no longer satisfy the needs of the new project.

Employers' organizations' technical and administrative capacity and experience on a particular type of project that will be bid has utmost importance in avoiding and resolving future disputes. Some of the major drawbacks on the employers' side during the tendering stage are the lack of or insufficient technical and contractual knowledge and experience of staff, improper planning and organization. Among the consequences of these drawbacks are the incompatible and incomplete terms and conditions, errors, omissions and ambiguities in the terms and conditions, unclear definition of work in terms of scope and quality, excessive change orders, delay in financial arrangements, delay in pre-award arrangements such as expropriation, securing land, buildings, permits, etc.

The sharing of risks and liabilities arising out of or resulting from unforeseen conditions is one of the mostly encountered dispute areas in the construction industry. These conditions are such that, as the word “unforeseeable” suggests, they can not be predicted, assessed and priced with certainty at the time of bidding. It is thus for this reason that the employers should attempt to balance such risks within the contract based on the parties’ ability to deal with them. In allocating risks, such circumstances should be well defined and classified so that both the employer and the contractor are aware of their risks and circumstances for which they are responsible.

The prevailing sentiment in the construction industry, i.e. as in a design-build contract, is two-folded, on the one hand, contractors think that employers want them to build a palace where the contract calls for a two-bedroom dwelling, and on the other hand, employers think that contractors want to build a two-bedroom dwelling where the contract calls for a palace. This is a big dilemma in the construction industry that, unfortunately, can prejudice the parties’ sentiments about each other even in the very early stages of a project. If the contract terms and conditions are prepared by the employer, it is the employer’s duty to eliminate such potential misunderstandings and misinterpretations. Also, the bidders should request for clarifications from the employer during the tender stage should he feel that the defined scope of work is not clear, complete or contains ambiguity. Failing to do such is the first step toward disputes later in the construction stage.

## **2.2 Tendering Stage: From the Perspective of a Contractor**

The contracts are mostly drafted by the employers and added to the tender documents. Thus, it is the employer who picks and chooses his favorite terms and conditions and retains the leverage over the bidders and eventually over the contractor. From this perspective, one can see the employer as an advantaged party and the contractor as a disadvantaged party. But this can only be valid if the contractor did not voluntarily submit his offer to the employer. During the bidding process, the employer specifies the terms and conditions of the contract and the bidders examine the bid documents and if they consider those terms and conditions to be acceptable, then they submit their offers. This is done in a completely voluntary basis. By submitting his offer, a bidder acknowledges the terms and conditions and is considered to be ready, willing and able to perform the works and to fulfill the obligations as set forth in the contract documents. Having this in mind, the most important thing that contractors can or should do is to let the most experienced people handle the bidding process. Those people who have spent their careers in running projects and or administering contracts are the best resources of a company with their vast experience not only on technical but also on contractual issues. The lack of or insufficient technical and contractual knowledge and experience, lack of knowledge on local laws and regulations are some of the major drawbacks on the contractors’ side. Among the consequences of these drawbacks are the lack of or improper site investigation, lack of or insufficient risk identification and assessment, lack of thorough review and understanding of tender documents and finally the most important one, insufficient bid estimate. During the bid preparation, proposed terms and conditions of a contract may seem to be innocuous to some people in charge of bidding, thus they do not pay enough attention to them. Or some people may think or be of the opinion that contract terms and conditions are usually the same, therefore what they did at the last job are probably the same as that of the new job. Or there may be a lack of information exchange between the estimators for the work and the ones within the company who would eventually run the project. The common sense dictates that an imprudent contractor will end up with two choices; the first choice is to accept the consequences and lose money and the second choice is to pick a battle with the employer to recover losses. The latter choice will be inimical to the spirit of a contract and it paves the way for disputes.

If there is any lack of clarity or any ambiguity in the tender documents, it should be conveyed by the bidders to the bidding authority for clarification. Being silent on such ambiguities for future claim

opportunities should not be the way to go. First, it may prevent the company from making a correct estimate, and secondly, there is no certainty to later recover any cost resulting from it.

### **2.3 Construction Stage: From the Perspective of an Employer**

Once the contract is signed and the notice to proceed is given, the contractor begins the work. The first few months are usually the best time period for the contractor as well as the employer. People are excited about a new project, stress level is not yet high and pressure has not yet set in among people. The more the contractor is involved with the works, the more problems surface, and the atmosphere starts to change. This change, by and large, is the direct result of an agglomeration of problems, some of which are attributable to the employer, some of them to the contractor.

Experience reveals that one of the root causes of disputes lies in the details of contract documents. It could be an error or omission in the design drawings, an ambiguity within or between contract clauses, missing site data, unclear scope of work or unclear separation of responsibilities and liabilities between the parties and many to name. If adequate preliminary study has not been done during the pre-tender and tender periods, it is most likely that the parties will face with disputes during the construction stage. If such reasons for disputes are caused by the employer, then it should be the way for the employer to amicably settle such disputes with the contractors. There will be no benefit to the employer in denying such responsibility as it will only deteriorate his relations with the contractor and will build mistrust.

Experience also reveals that employers' organizations' technical and administrative capacity and experience have utmost importance in avoiding and resolving disputes as encountered during the construction period. Some of the major drawbacks on the employers' side during the construction stage are the lack of or insufficient technical and contractual knowledge and experience of staff, lack of awareness for priorities, lack of authority or reluctance to make a decision and characters of personnel. Among the consequences of these drawbacks are the delays in decision-making, i.e. causing delay in review, approval or rejection of contractor's submissions, delays in handing over land/buildings and obtaining permits, interferences to contractor's work, delays caused by third parties, i.e. due to employer's lack of coordination with third parties, insufficient financial arrangements, acting unreasonably and unfairly against the contractor, intentional or unintentional non-compliance with the terms and conditions, etc.

During the tender stage, there is no direct day-to-day interaction between an employer and a contractor simply because the contract is not yet awarded. Once the contract is awarded and signed, the employer and the contractor engage in direct communications with each other on a daily basis. This communication takes place between the personnel of both parties. Consequently, what is important is not only how the contract is written, but also how the people will act. So the characters of people, their personal skills, attitudes and desires will become important and will have influential effect on the avoidance and resolution of disputes.

There are people who administer projects. No matter how the project management team is set up, it is up to those people to pick and implement their own style in resolving disputes. Each individual's observation and comprehension can be different than the others; so the actions, approaches, attitudes and skills will also be different from one person to another. While one person may elect to take a tough stance against the contractor, another may elect to take more political approach. Whatever the case may be, a true dispute resolution environment can only be created when there is a trust between the parties. In this regard, a portion of the responsibility to build such trust belongs to the employer. This responsibility necessitates even more credence on the employer's side when the employer is the party, per the contract stipulation, to make a decision or a determination on a claim issue.

During construction, it is inevitable that changes occur due to differing circumstances and conditions, thus requiring the employer to issue change order. When it becomes necessary to change a portion of the works, it is essential to assess possible impacts of the change so that potential risks of making such change can be identified. For a prudent employer, assessment of risks should be the first thing to do before issuing (or instructing) a change order work to the contractor, and if possible, the employer should seek to make an agreement with the contractor as to who bears what risk. Absent such an assessment and agreement, the employer is likely to run into disputes later with the contractor.

In situations where an employer is to give an acceptance, approval or disapproval, consent and or an instruction, the employer should act with care and diligence. Inaction or any unreasonable delay in action by an employer is his prerogative, but such circumstances may exacerbate the impact of an on-going event and are likely to lead the parties in to disputes.

The decision-makers in state organizations are usually under strict scrutiny as they are subject to relevant rules and regulations pertaining to their own administrative laws. Spending tax money in construction projects by the state employees, particularly where large amounts are involved, always draws attention of the public. There are certain departments within the government organizations whose duty is to control and audit such projects in terms of money spent. People working at these departments usually have the authority to question relevant employees who are in charge of the project as to how and why they made certain decisions as well as payments to a contractor, This is a fact and a critical point where, in state employers' organizations, decision-makers may be reluctant to make decisions where the intention is to avoid or resolve a dispute with concession. This becomes more evident when the contract terms and conditions are not sufficiently clear in terms of scope of work and separation of obligations.

In general, most state projects are or have to be awarded based on competitive bidding in order to get the lowest price. The inevitable result of this is that on the one hand, the employer awards the contract to the lowest bidder, on the other hand, the lowest bidder, the contractor, attempts to recover loses or the profit gave up at the bidding by filing numerous claims at every opportunity he gets.

Under such circumstances, the state employers have some limitations in avoiding or resolving disputes; such as limited or no flexibility in contract procurement processes, no flexibility in choosing a contractor of their choice, and limited ability in negotiations to make concessions in order to avoid or resolve disputes. Amid these limitations, the state employers will only have the following options:

- i) Empowering decision-makers in their organizations with sufficient and privileged authority to make decisions in avoiding and resolving disputes,
- ii) Seeking (and relying upon) third party advice and or decisions, e.g. DRB, DAB, Expert Witness, or Arbitrator.

#### **2.4 Construction Stage: From the Perspective of a Contractor**

The contractor's personnel's technical and administrative capacity and experience also have great importance in avoiding and resolving disputes during the construction period. Some of the major drawbacks on the contractors' side during the construction stage are the lack of or insufficient technical and contractual knowledge and experience of staff, improper planning and organization, lack of awareness for priorities, lack of coordination among personnel. Among the consequences of these drawbacks are the delays in submissions, delays in obtaining permits and approvals, delays in progress, low or lack of quality in work, delays caused by third parties, i.e. due to contractor's lack of coordination with third parties, acting unreasonably and unfairly against the employer, intentional or unintentional non-compliance with the terms and conditions, e.g. non-compliance with notice provisions.

The site staffs need to be in close coordination with those who prepared the bid so that what was envisaged and included in the bid by those who prepared it will be the same as what the site staff will build on the site. This may help obviate situations that can cause a dispute with the employer where the site staff may think certain portion of work is not included in their scope while the estimators had already envisaged for it and included in their estimate. Another potential cause for disputes is the quality of work. Those who are in charge of managing projects should be familiar with the specifications and contract drawings in order to make sure that what they build are in conformance with the contract.

For the sake of saving money or the urgency of a tender, contractors may not be willing to spend money or time in doing site investigations. Some contracts may require the contractor to do a site investigation after the award of contract and or to scrutinize the contract documents<sup>1</sup> to identify any errors, omissions or inconsistencies and to inform the employer of such within a certain period of time. Most contracts also contain notice provisions under which the contractor is obliged to notify the employer of an event or circumstance giving rise to a claim within a certain number of days. Failing to comply with such provisions may cause the contractor to forfeit his right to recover any cost and time. Experience shows hitherto that an absence of or limited site investigation will most likely lead the parties into disputes as it results in unforeseen expenditure. The notice provisions are also the leading causes of disputes between the employers and the contractors. Therefore, the contractors should pay utmost attention to such provisions and encourage their staff to be prudent in managing their contracts.

Usually, a contractor, once awarded a contract, hastens to find subcontractors to give out portions of the works for the reasons that they get those portions of the work done cheaper and that they allocate the risks. However, imprudent, inexperienced and unqualified subcontractors represent high risk for the general contractors and are likely to cause disputes between the general contractors and the employers. Therefore, contractors should be highly careful and vigilant when seeking a subcontractor.

In a contractor's organization, the project manager is the key person. He/she is the person who can drive a project to success or to quagmire. He/she is the person who provides guidance to his/her staff in their daily doings and their dealings with the employer. In some contractor organizations, project managers assign an individual(s) to administer contractual issues, i.e. for managing claims and change orders, in order to focus on constructing the works. These individuals deal with contractual issues on a daily basis and are sometimes given the authority to negotiate with employers. It is therefore up to these individuals' capabilities, experience and skills to help build and maintain trust with the employer. The project manager should not distant himself/herself from the contractual issues and should keep close attention to his/her own staffs' attitudes and actions against the employer. Unreasonable and unfair demands, dubious and or instigating statements, untoward behavior, grumpy attitudes towards the employer will result in distrust in reciprocation and even unnecessary confrontational situations, and will no doubt pave the way for disputes. It is also often encountered when the relations go sour that the parties start to act on a "tit for tat" basis. This is certainly unproductive and even dangerous for the course of the project and this will in no way be conducive to resolving disputes and only help in exacerbating the relationship between the employer and the contractor.

### **3. Dispute Avoidance and Resolution: On paper or in the minds of people?**

One might have already realized that all said above concerning how and why disputes emerge boil down to two facts: (1) How the contracts are written, (2) Human factor in interactions between the parties

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<sup>1</sup> e.g. FIDIC Silver Book, Sub-Clause 5.1

### **3.1 Dispute Avoidance during the Tender Stage**

It is mentioned above that in the tender stage, only the avoidance of disputes is of relevance for the parties absent a signed contract. As the old saying goes: “the Devil is in the details”, so the parties can do certain things to avoid disputes in the tender stage, some that attributable to the employers are:

- i) the language of the tender documents is clear and understandable by all parties and the contract documents are free of errors, omissions and ambiguities
- ii) the terms and conditions, specifications, plans and drawings are complete and accurate so that the scope of work can be easily and clearly identified,
- iii) certain provisions that are the common causes of disputes are carefully and properly drafted, e.g. variation and pricing procedures, allowable costs, time extension procedures, claims procedures, work defects and remedial work procedures, payment procedures, etc.
- iv) risks are properly identified, balanced and allocated while the roles, responsibilities and liabilities are discretely separated between the employer and the contractor,
- v) pre-bid arrangements are properly planned, organized and made so that the works can start without any delay and or interruption, i.e. site data, permits obtained, expropriations completed, design completed, access to site ready, etc.
- vi) the financing for the works are sufficiently and promptly arranged,
- vii) the means and methods for resolving disputes are defined and procedure is provided in the contract conditions,
- viii) the employer to seek advice from and consult with people whose have vast experience and knowledge in technical and contractual issues.

On the other hand, there are certain things that the bidders can do, some of which are:

- i) to read and understand the tender documents thoroughly and clearly, inspect the site thoroughly, identify risks, understand the scope of work, responsibilities and liabilities,
- ii) to pay attention to details, identify any error, omission or ambiguity in the tender documents and communicate them with the bidding authority,
- iii) to properly coordinate efforts among personnel and encourage communication between the estimating department and the project team,
- iv) to engage most experienced staffs who are well versed in technical and contractual issues in tender preparation.

Once such actions are faithfully taken by the parties, discernable improvements in the avoidance of disputes can be observed, albeit in the construction stage.

### **3.2 Dispute Avoidance and Resolution during the Construction Stage**

In general, the contractor notifies the employer of a claim issue, and then the employer reviews the contractor’s claim submission and disapproves it. The parties hold negotiations in order to reach an amicable settlement by exchanging their opinions as to why they think they are right. Up to the point where the employer disapproves the claim or where the negotiations fail to produce a settlement, there is no dispute, so there still exists a chance to avoid a potential dispute. During this period, the parties can do certain things to avoid disputes, some of which are attributable to employers as follows:

- i) if the claim event is arising out of or resulting from an error, omission or an ambiguity in the contract, the employer should approve the claim without unnecessarily rejecting it as a first stage,

- ii) the employer should be diligent in reviewing, approving or rejecting the contractor's submissions within the time stipulated in the contract so that the contractor does not incur any unnecessary delay and cost,
- iii) if the employer is required to obtain any permits, licenses and or approvals from third parties in order to allow the contractor to start or continue the works, the employer should act diligently in obtaining such,
- iv) the employer should arrange the financing for the project in a timely manner so that the employer does not fall behind in payments to the contractor,
- v) the employer should act proactively and in good-faith in his dealings with the contractor without a hidden agenda,
- vi) the employer should not interfere with the contractor's work unless it is absolutely necessary, i.e. for safety reasons, and unless the work performed by the contractor is in compliance with the contract,
- vii) the employer should always keep the communication lines open with the contractor, should act proactively and in good-faith in all dealings with the contractor,
- viii) the employer should make sure all its personnel in charge of the project has sufficient knowledge and experience in managing the contract and all staff should be properly trained and encouraged to understand the value of dispute avoidance and resolution,

From the contractors' perspective, the following can be done to avoid disputes:

- i) contractual submissions should be made, permits and approvals should be obtained within the time stipulated in the contract and effectively coordinate issues with third parties in order to prevent delays in the progress of the works,
- ii) in order to achieve the required quality, the contract specifications, plans and drawings should be thoroughly reviewed and well understood,
- iii) in pricing of change orders and claims, the staff should follow the contractual procedures correctly and should stay away from any suspicious acts in calculations of cost and time,
- iv) the contractor should act in compliance with the terms and conditions of the contract, i.e. a proper site investigation made, notice provisions complied with,
- v) the contractor should always keep the communication lines open and should be in close coordination with the employer,
- vi) the contractor should act proactively and in good-faith in all dealings with the employer without a hidden agenda,
- vii) in selecting subcontractors, the contractor should make sure that he selects reliable, experienced and competent subcontractors,
- viii) the contractor's personnel should not make unreasonable and unfair demands to the employers, should not behave untowardly and show grumpy attitudes towards the employer.

It should not be taken as if all disputes can be avoided. After certain time has passed, the parties tried their best in avoiding disputes, but the situation has come to a point where the parties can not reach an amicable solution for their differences. Then, what will happen? If a contract does not provide for a dispute resolution mechanism, the only remedy for the parties is to go to courts, which is a costly and lengthy process. Indeed, this is why alternative dispute resolution techniques and methods are developed over years in an attempt to resolve disputes cheaper and faster between the parties. Today, there are commonly used techniques and methods in the construction industry to resolve disputes, some of which are Mediation, Dispute Review Boards (DRB), Adjudication and Arbitration. Having known these facts and the benefits of new techniques and methods, there is an increasing trend among employers in the construction industry to incorporate such dispute resolution clauses in the contracts.



By inference, by adapting a dispute resolution technique in a contract, the parties acknowledge the fact that in case they can not resolve their differences themselves, they would need someone outside the contract to help them in doing so. The critical point here is that the person from whom help is sought should be independent of and impartial to the parties and be competent. The provenance of disputes is the differences in opinions. The differences in opinions can occur subject to each party's own interests, needs, aims and beliefs. But the crux of the issue is that when someone makes a decision whether all things are considered objectively or in prejudice. Having someone independent and impartial involved in the process, the parties will have a chance to have the issue in dispute be seen by a second pair of eyes and to obtain a presumably objective opinion. By having an objective opinion, the parties can better re-evaluate their thoughts, beliefs and opinions, thus giving the parties another chance to come to a resolution. Amid some commonly used dispute resolution techniques, in mediation and dispute review boards (DRB) processes, an independent and impartial third party provides an objective opinion or recommendations to the parties, which help create an environment to resolve disputes by the parties' own wills, whereas in adjudication and arbitration processes, a decision is made by an independent and impartial person and the parties are bound by that decision. So it is up to the drafting authority (the employer) or to both the employer and the contractor if mutually agreed to, as to how they wish to resolve disputes; by mutual consent and own-will or by enforcement. As a good example of this, based on the data provided by the Dispute Resolution Board Foundation (DRBF)<sup>2</sup>, out of 1860 disputes referred to Dispute Review Boards worldwide, 1718 disputes were settled amicably between the employers and the contractors. This reveals a success rate of 92 percent.

### **3.3 Dispute Avoidance and Resolution in the Minds of People**

As indicated above, the success in avoidance of disputes on paper, i.e. on the contract documents, for the most part depends on the employer's ability and willingness. Let us imagine that an employer prepares such a perfect contract that is complete, accurate and free of any errors, omissions and ambiguities. Can we draw a conclusion that under such circumstances the parties will never go into disputes? The author is of the opinion that no matter how perfect the contract is written, disputes will emerge.

The actions, intentions, interests and needs of the people involved in the management of a project may be different from one to another. Particularly, those involved in contractual issues on both sides have critical roles in this respect. Some examples of such situations are:

- ◆ The people in the contractor's management team realize that the actual cost of work is running over what was planned for because of the contractor's own delays, inefficiencies, rework, and cost overruns, thus causing a negative cash-flow. The people may think that they can recover such costs by making claims while blaming the employer or others despite the fact that the contract does not provide entitlement for such claims. In this situation, the contractor will be gambling where the chances are slim for him to recover, but chances are great to ruin the relationship with the employer. The consequential effect of contractor's such actions will be for the employer to lose trust against the contractor, cause the employer to be more suspicious about the contractor's other claims and perhaps lead the employer to react in retaliation.
- ◆ The people in the employer's management team were not able to secure enough financing or did not want to spend more money for unexpected situations. The people may think that by including a "catch all clause" in the contract while not clearly defining the work, they would get away from extra expenses and hold the contractor responsible for such unexpected situations. By not paying the contractor, the employer will cause the contractor to lose trust and make the contractor think that the employer is taking advantage of him.

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<sup>2</sup> The Dispute Resolution Board Foundation (DRBF) is a non-profit organization dedicated to promoting the avoidance and resolution of disputes worldwide using the DRB method. Their website is [www.drb.org](http://www.drb.org).

- ◆ The contractor's strategy can be such that numerous claims are made against the employer depending on the creative minds of the persons who administer the contract, in order to keep the employer busy and under pressure and create stress in an effort to obtain leverage in negotiations. The employer then loses trust and confidence in the contractor and reacts in retaliation.
- ◆ A person in one of the parties' organizations may have had a bad experience with another person in the other party's organization and have a grudge against him/her. Consequently, these people might try to put a spoke in each other's wheels. The corollary is that the relationship between the employer and the contractor gets sour and tense, thus pave the way for disputes.
- ◆ A person in the employer's organization unnecessarily and unreasonably rejects a contractor's submission to cause him to delay the works in an effort to cover up delays caused by the employer. On the contrary, the contractor delays the works (particularly change order works) by intentionally creating artificial excuses, in an aim to cover up delays caused by the contractor.
- ◆ On the contractor's side, the more claims the person files with an anticipation to recover more money from the employer, the better the image of that person within the company. On the employer's side, the more claims the person rejects with an anticipation to keep the cost down, the better the image of that person within his organization. Such personal aims and interests, encouragement of such behavior by the management or making such behavior a part of company culture will diminish trust between the parties.

Such behaviors are the stumbling blocks for avoiding and resolving disputes solely attributable to human behaviors. The mutual trust is based on reciprocity and sooner or later the pervasive repercussions of conceived intentions of the parties will be seen throughout the course of the project. This has been and will represent a danger for the successful completion of a project and should certainly be eliminated. The notion of dispute avoidance and resolution should not only be a matter for people at the project level, but it should also be grasped by the top management as a fundamental element of their company culture. Trying to make a change in a company's business culture is not so easy by starting the change only at the project level unless the top management is ready and willing to accept that change.

It was mentioned above that there is a prevailing sentiment in the construction industry between the employers and the contractors. Because of this prevalent sentiment, both parties start the project with mistrust *ab initio* and any invidious action by either party will exacerbate the situation. For this reason, the author suggests that the parties always act in good-faith and show their sincerity all along, not just in the kick-off meeting. Only then, the mistrust will begin to fade.

Obviously it is almost impossible for one party to know the other party's true intention per se unless it is expressly disclosed. But the actions of the parties will no doubt mirror such intentions.

#### **4. Conclusion**

The contracts are prepared and managed by the people. It is; therefore, appropriate to conclude that everything boils down to one factor, the human factor. The overall success in avoidance and resolution of disputes in the construction industry depends on the abilities and willingness of the people and it is perfectly the prerogative of the responsible staff within the organizations of both employer and contractor.