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- CEO: JBCC

‘ORIGIN’ OF
DISPUTES
IN STANDARD FORM

ANALYSIS OF RECORDS

- ▶ Industry records
- ▶ JBCC FAQ's

ANALYSIS OF RECORDS

2. NATURE OF DISPUTE

What are parties to construction contracts fighting about?



The most common disputes referred to adjudication during the 2016 year were those in respect of a claim for payment of outstanding monies or incorrect certification. Interestingly this is in stark contrast to the 2015 year where the most common disputes were in respect of claims for extensions of time and time related costs.

ISSUES GIVING RISE TO “DISPUTES”

- ▶ Late, partial or non payment
- ▶ Late, partial or incorrect information
- ▶ Poor definition of expected quality > poor workmanship

“DISPUTES”

- ▶ Take time to resolve while the execution of a contract proceeds;
- ▶ Stressful to all concerned;
- ▶ Can be very expensive if legal professional are involved !
- ▶ Guidance from the RSA Department of Justice ...
 - ▶ to use the dispute resolution provisions in standard form contracts before considering litigation



win

win

THE CONSTRUCTION INDUSTRY

- ▶ Numerous stakeholders:
 - ▶ Employer / end users
 - ▶ Statutory bodies
 - ▶ Professional consultants
 - ▶ Contractors - large, small, specialists
-
- ▶ The local community

THE PROJECT TEAM

- ▶ Generally there are few new “original” disputes!
- ▶ Be aware of common problems;
- ▶ Include in the project risk analysis process;
- ▶ Specifically highlight issues likely to occur in THIS PROJECT;
- ▶ Attitude of mind to avoid disputes !!

6 WORK STAGES

- ▶ 1 Initiation and briefing
- ▶ 2 Concept and feasibility
- ▶ 3 Design development
- ▶ 4 Procurement
- ▶ 5 Construction
- ▶ 6 Close-out

1 INITIATION AND CONCEPT

- ▶ A business opportunity has been identified - assume the IDEA FOR A PROJECT has passed the 1st gate >
- ▶ A PROJECT BRIEF has been developed >
- ▶ Potential BUSINESS RISKS have been identified / resolved
- ▶ Realistic criteria defined wrt: Scope - Quality - Time - Costs
- ▶ Communication hierarchy / authority of role players
- ▶ What if escape plan?

D E P A R T M E N T O F P L A N N I N G



1 INITIATION AND CONCEPT

- ▶ “Imagineer” the completed project:
- ▶ Optimum design solution agreed that complies with:
 - ▶ Statutory requirements (time for design and for approvals?)
 - ▶ Appropriate construction technology + materials > buildability?
 - ▶ Quality (standards) ... now > and during the project lifespan;
 - ▶ Appropriate procurement system

1 INITIATION AND CONCEPT

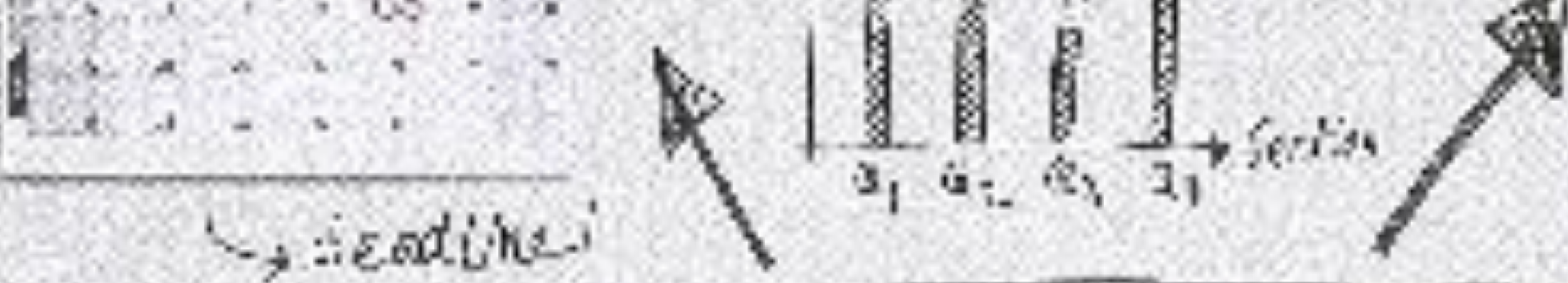
- ▶ NOTE
- ▶ This stage takes time and costs money;
- ▶ Generally performed 'in-house';
- ▶ ... not necessarily involving the 'project consultants';
- ▶ ... may not be included in the 'project budget'

2 CONCEPT AND FEASIBILITY

- ▶ Assume the client has prepared a brief / project charter ...
- ▶ Appoint (core members of) the project team;
- ▶ Translate the brief into a concept;
- ▶ Test assumptions and/or investigate alternative solutions;
 - ▶ location, access, stakeholders, availability of 'local resources';
 - ▶ scope = complete? appropriate systems of construction;
 - ▶ procurement options > standard form contracts?

2 CONCEPT AND FEASIBILITY

- ▶ Review the concept solution:
- ▶ ? use of new materials / novel construction techniques ?
- ▶ Also involve H&S consultant (buildability?) and end users;
- ▶ Confirmation of statutory compliances;
- ▶ Identification of long lead items / specified 'products'
- ▶ Review risk register and assumptions made in stage 1
- ▶ # Consider abortion of the project ??



CREATIVE MOVEMENT

BRAINSTORM

- Analysis
- Vision & Mission
- Make the difference



Handwritten notes on a piece of paper, partially obscured by sticky notes.



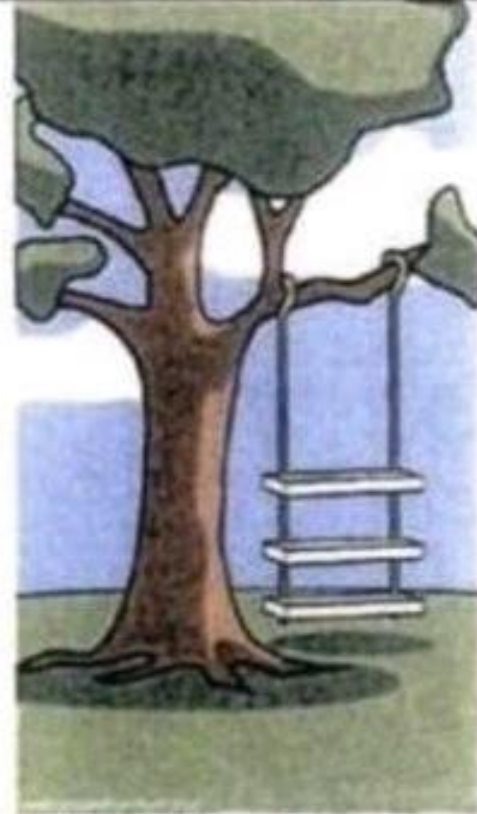
2 CONCEPT AND FEASIBILITY

- ▶ Professional team:
- ▶ For this phase - may not be the 'right' team for the execution;
- ▶ Fees:
- ▶ ... project not feasible, fees too high!
- ▶ * Design and documentation "errors" found by the contractor!
- ▶ * Contractor entitled to time/cost adjustment (client cost!)

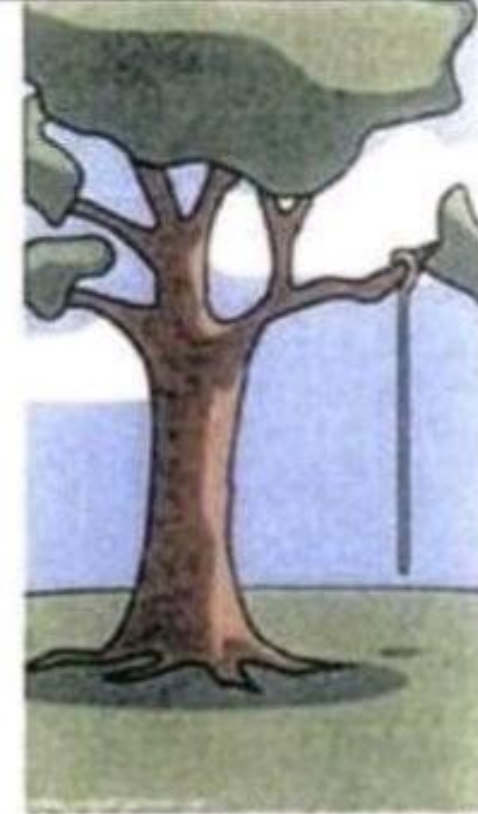


3 DESIGN DEVELOPMENT

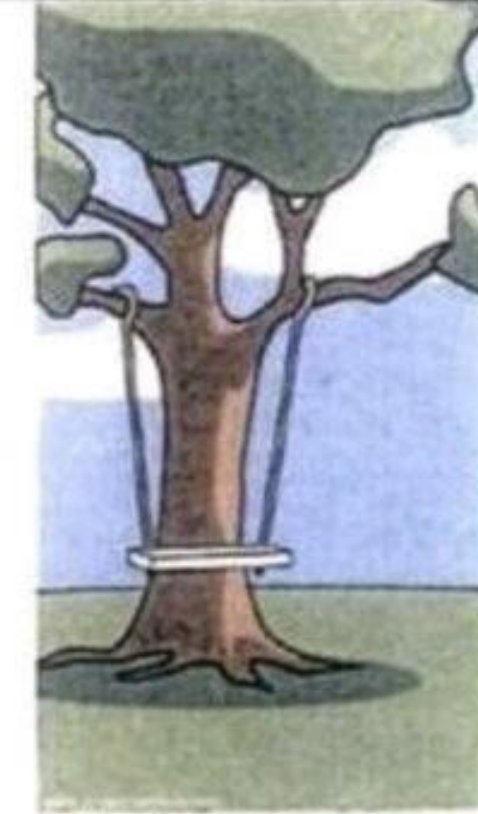
- ▶ Design development by the project professional team
- ▶ * Beware of late appointment of necessary skills
- ▶ Test criteria used in stage 2:
 - ▶ Freeze the scope - changes after this date are expensive !
 - ▶ Possibly involve a 'principal consultant' to "coordinate designs"
 - ▶ Check information (correct/complete) before issue...
 - ▶ # Consider abortion of the project ??



What the Customer Described.



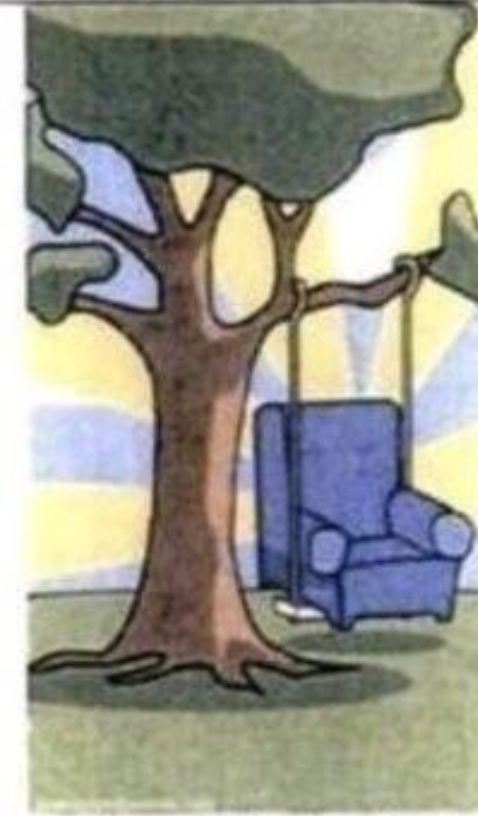
What got budgeted.



What the Engineer Designed.



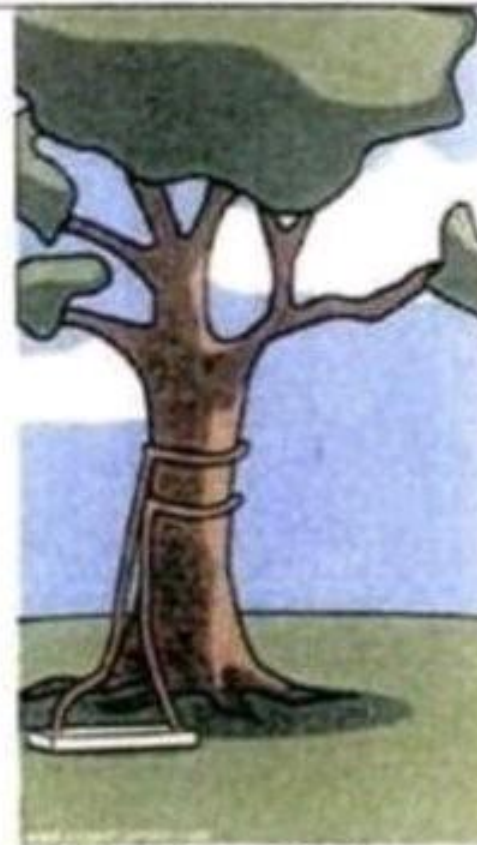
How Manufacturing Installed it.



What Marketing Advertised.



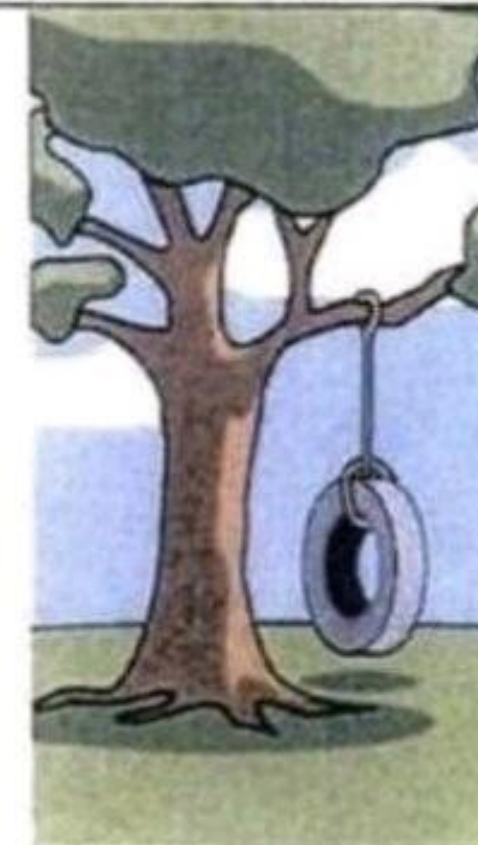
What got documented.



What the Customer finally received.



What the customer was billed for.



What the customer actually wanted.

4 PROCUREMENT

- ▶ Confirm decisions made earlier:
- ▶ ‘Traditional “employer design>tender>contractor to build” ?
- ▶ or “design and build” option?
- ▶ Early involvement of specialist (sub)contractors in design?
Early involvement of “others” in design ?
- ▶ Standard form contracts <> bespoke option ?
- ▶ Changes to ‘standard form contracts’ = project risk !!!

4 PROCUREMENT

- ▶ Procurement method and the form of contract > documentation
 - ▶ may change risk allocation;
 - ▶ may change the quantum and detail of documentation;
 - ▶ may influence professional indemnity insurance exposure;
- ▶ Recourse by client > consultants / specialist contractors ...
EPC contractor ???

5 CONSTRUCTION

- ▶ Varies with 'traditional' or 'early contractor involvement' option
- ▶ Must follow procedures in (standard) form contract used;
- ▶ May require 'different professional skills' for 'execution';
- ▶ Similarly contractor's agents may differ from 'rough construction' to persons dealing with 'finishes'
- ▶ Pedantically manage the issue and retrieval of all 'construction information'



5 CONSTRUCTION

- ▶ Some procurement aspects may only occur during this stage:
 - ▶ Ensure timeous co-ordination of design/other information with existing construction information;
 - ▶ Ensure timeous delivery installation of such items

5 CONSTRUCTION

- ▶ CONTRACT ADMINISTRATION
- ▶ Regular meetings ...
- ▶ Meetings - record of decisions / approved at subsequent meeting;
- ▶ Notice of event/delay/no information / = separate from 'minutes'
- ▶ Contract Instructions = separate from 'minutes'!
- ▶ Potential dispute where information is incomplete / lacking !!
- ▶ # All standard form contracts have a time barred notice provision

5 CONSTRUCTION

- ▶ PAYMENTS
- ▶ Payment claims from all contractors processed by the consultants for payment by the client/employer by the dates in the contract:
 - ▶ Amount due disputed by employer - pay undisputed amount;
 - ▶ Refer disputed amount to adjudication;
 - ▶ Late payment > contractor entitled to default interest;
- ▶ Potential dispute on partial/late payments > adjudication?

5 CONSTRUCTION

- ▶ PAYMENTS
- ▶ Call on guarantee for payment from employer to contractor and/or contractor to subcontractor (seldom provided) ... or
 - ▶ Non payment: (sub)contractor may suspend the works;
 - ▶ Non payment: payment certificate > liquid document > court;
 - ▶ *** must give notice of breach before suspension / court action
- ▶ Potential dispute on partial/late payments > adjudication?

5 CONSTRUCTION

- ▶ PAYMENTS
- ▶ Payment of unfixed materials on site / in transit:
 - ▶ generally if 'protected' by a "guarantee for advance payment";
 - ▶ Itemised in a schedule appended to a payment certificate;
 - ▶ Should be notified to the insurer (contract works insurance);
 - ▶ Potential dispute on partial/late payments > adjudication?

5 CONSTRUCTION

- ▶ PROGRAMME
- ▶ Issued by contractor on appointment into tender documents:
- ▶ ‘base’ programme updated at regular intervals to record progress (or otherwise);
- ▶ ‘Revised programme’ updated at regular intervals where the date for practical completion has been revised;
- ▶ # Potential dispute - where (multiple) delays occur > adjudication?

5 CONSTRUCTION

- ▶ QUALITY
- ▶ ... Not specified properly > impossible to enforce compliance!
- ▶ ... Consultants regularly inspect work on site - to give interpretation to contractors of quality/standard of finish/other compliance required;
- ▶ Potential dispute - about “quality” of workmanship

QUALITY
SERVICE THAT
DOESN'T CUT
CORNERS

5 CONSTRUCTION

- ▶ COMPLETION ... in terms of the standard form contract used:
 - ▶ Commissioning
 - ▶ Practical Completion
 - ▶ Final Completion
-
- ▶ Potential dispute - about 'state' of completion

5 CONSTRUCTION

- ▶ INSURANCES ... in terms of the standard form contract used:
 - ▶ Contract works / contractor's all risk;
 - ▶ Public liability
 - ▶ Support
 - ▶ Strike, riot etc
 - ▶ Professional indemnity
- ▶ Potential dispute who insures? / 'deductibles' adequate?

6 CLOSE-OUT

- ▶ Compliance with applicable statutory requirements;
 - ▶ Completion of 'contractual obligations';
 - ▶ Issue of certificates for 'completion' and 'payment';
 - ▶ Submission of as-built documentation, product warranties, operating instructions, etc
-
- ▶ Potential dispute - about the 'final' (sub)contract value

CONCLUSION

- ▶ All standard form contracts provide a framework to identify, resolve and adjudicate potential disputes
- ▶ Most disputes can be dealt with quickly and often without cost provided all participants act in a spirit of cooperation

LIABILITY FOR DEFECTS AFTER FINAL COMPLETION ?

- ▶ JBCC and PROCSA: 5 years from final completion ...
- ▶ 1st year may be covered by an extension to contractor's all risks
- ▶ Some contractors withhold final tranche of retention to subcontractors in case of a claim ... never paid in practice !!
- ▶ Potential dispute - about 'latent defects'



A dark blue silhouette of a building with a tall tower on the right side, set against a white background. The tower has four horizontal lines representing windows. The building's roofline is jagged and stepped.

THE JOINT BUILDING CONTRACTS COMMITTEE

JBCC

A series of four horizontal white lines of varying lengths, stacked vertically on the right side of the slide.