

operate to reimburse the builder for price movements only up to the limits of a predetermined contingency sum for contracts of more than two years duration.

11. The contract should provide that the owner may suspend the contract works, for any reason, for periods of times in aggregate no greater than a predetermined period of time at a predetermined cost to be paid by the owner to the builder to cover wind down and start up costs.
12. The contract should provide that the owner is entitled to deduct liquidated damages from amounts otherwise due to the builder at any time after the date for practical completion (as extended) has been reached.
13. The contract should require the builder to comply with all relevant awards and industrial agreements. Those existing prior to the contract should be at the builder's risk and expense. Those which arise subsequent to the contract with which the owner is not involved shall also be at the builder's risk and expense.
14. The contract should not distinguish between nominated sub-contractors and other sub-contractors. An owner may prefer to be involved in the selection of sub-contractors and this should be provided for in the tendering and tender selection process or in the contract documents as appropriate. Where the owner has a view on the use of a particular sub-contractor before the builder is selected this should be clearly stated in the tender documents. If the builder disagrees with the selection of a particular sub-contractor that will be a matter for negotiation.
15. The contract should contain a range of alternative dispute settling procedures. The traditional methods of arbitration or litigation are not necessarily flexible enough to cope with all disputes which might occur between the proprietor and the builder. So called "fast track" mediation provisions are increasingly being applied and owners should obtain advice on whether they are appropriate to the particular contract or not.

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8. NBCC RESPONSE TO CLAIMS AND DISPUTES REPORT

The National Building And Construction Council has examined the industry report "Strategies For The Reduction Of Claims And Disputes In The Construction Industry" and has prepared the following response, which is divided into five sections:

1. Overview and Introduction
2. Areas of Agreement
3. Underlying Issues
4. Partnership Approach
5. Recommendations

8.1 Overview

Constituent members of NBCC have considered the Report in their own right and NBCC has briefly considered the report in its entirety. NBCC considers the Report to be a valuable contribution to a difficult area. In broad terms, NBCC agrees with the broad thrusts of the Report - considerable effort must be made by the industry to minimise the level of claims and disputes; no single contract approach can be treated as the right approach; the industry must be prepared to modify its behaviour, if the interests of the industry are to be satisfied.

In other words, NBCC agrees there is a major problem. It is a problem which afflicts both the public and private sectors. As mentioned later, the differing interests of all those involved in the industry make it difficult to present a unified opinion on all issues or easy solutions to all problems.

8.2 Areas of Agreement

NBCC in the broad agrees with the following recommendations made in the report:

i. Selection of contractors

NBCC members agree that selection of contractors should not be simply on the basis of lowest price. There is broad but not universal support for the concept of pre-qualification of tenderers.

ii. Quality of Documentation

NBCC members agree that the client's objectives and requirements must be adequately defined in the brief to designers and sufficient time should be allowed to ensure that design and documentation are appropriately carried out. In all other respects, NBCC supports the remaining recommendations under this heading, except that it takes strong exception to the suggestion that design fees be reduced in relation to cost increases during the construction period for which the design consultant is responsible. NBCC believes that is a trite response to a complex problem which needs considerable further debate.

iii. Contingency Allowances

Whilst NBCC can see the sense in contingency allowances being provided, it also has some concern

over advertising the existence of those allowances.

iv. Risk Allocation

NBCC believes that this is at the heart of all our problems. Whilst it is able to agree in the broad to the recommendations made, it again believes that this area needs further debate leading to the development of industry-wide risk/responsibility guidelines.

v. Ground Conditions

Whilst NBCC appreciated that this is an area which in its own right causes serious problems, it believes it is not a subject which needs to be dealt with other than under the heading of risk allocation. In principle, however, NBCC supports the recommendations.

vi. Dispute Resolution

In the broad, in keeping with most progressive business groups, NBCC favours alternative dispute resolution procedures, where they are appropriate. It has difficulty with a number of the other suggestions made in the report. The role of a contract adjudicator, expert appraisal and the use of disputes boards of review need considerable further discussion with all parties involved, before any industry wide and consistent approach might be advocated.

vii. Alternative Contract Strategies

NBCC believes that all of the firms going to make up each of its members, as a matter of practice and good sense, enter each contract in a co-operative and helpful manner, expecting similar consideration from all other members of the team. NBCC agrees that it is indeed vital for the skills and experience of constructors to be a major input into the design phase of major projects.

viii. Quality Assurance

NBCC members have some concern over the way in which AS2990 has so far been introduced to the industry. NBCC for its part proposes to have discussions with the Standards Association and this would be again a fruitful area for discussion and co-operation with members of the NPWC. Indeed, it would be useful if a joint approach could be made.

8.3 Underlying Issues

NBCC believes that the problems raised in the report can be divided into three broad areas:

Risk allocation

Whilst this has not been the subject of detailed discussion as yet by NBCC, it is fair to say that NBCC is in broad agreement with Abrahamson (see BOMA Contract Guidelines above). Underlying those principles are the propositions that the risk of particular events should be borne by those who have control over them and that where it is

difficult to accurately marry risk and responsibility, the person who ultimately takes the risk should have a clear entitlement to be properly reimbursed.

The whole question of risk allocation needs to be addressed by both NPWC and NBCC with the clear aim of adopting industry-wide guidelines in both the public and private sectors.

Documentation

The report deals with the problems of documentation at design stage, during administration of the contract including tendering and during the unhappy phase of dispute resolution.

The question of documentation is a complex one and one not to be dealt with in generalities. Just as a contract for a particular project will differ always from documentation for the last project or the next, it is not appropriate to talk about contract documentation issues in generalities. NBCC would much prefer to deal with those documentation issues raised on the joint agenda in joint working parties, aimed at arriving at a series of possible guidelines, or if that is needed, the development of new contracts.

Communication

Most importantly, NBCC believes that communication issues need to be treated separately, even then they are inextricably interwoven with questions of risk allocation and documentation. The opportunity presented to the industry to meet in these forums should be but one small part of ongoing face-to-face co-operation between the partners in this great industry of ours, aimed at ensuring that the people NBCC represents can do what they are best at - build buildings on time and to budget rather than be involved in disputes.

8.4 Partnership

The issues which this Report addresses are not uniquely public or private sector. They bedevil all. The Report presents the industry with an opportunity, not only to address specific issues, but to continue many years of good work between NBCC and NPWC and indeed to advance the scope and quality of that work. NBCC invites NPWC to work co-operatively as partners with NBCC in attempting to resolve these issues on an ongoing basis. This Report is a fine piece of work but it is no more than that. Its recommendations are guides to us, some of which NBCC can accept, and some of which NBCC ought to reject. In the broad, what has been provided is an extremely useful re-statement of particular problems and suggestions for their solution. We should not, in NBCC's view, rush the process unduly.

8.5 Recommendations

NBCC recommends that the issues on the agenda with which it cannot agree and the development of those with which it is comfortable should, over the next six months, be worked upon by joint working parties of NPWC and NBCC, and that there should be a further NBCC/NPWC Forum towards the end of 1989 devoted to receiving reports from those working parties.