

## **Record Keeping – Critical to the Success of your Claim**

Although digital systems may make it appear that record keeping is automatic in the ground engineering industry, are these records sufficiently detailed and accurate? Are they really a substitute for making your own records, which of course requires you to review the data when compiling.

This article takes a look at the definition of records and the obligations on record keeping that is contained within contracts.

### **The Importance of Contemporary Records**

Max Abrahamson, one of the foremost experts on the ICE form of Contract once said *“A party to a dispute, particularly if there is an arbitration will learn three lessons (often too late): the importance of records, the importance of records and the importance of records.”*

It is likely that all parties to a contract are aware that keeping accurate records is essential and that a failure to maintain records can jeopardize potential claims and variations, but then why is it that when a dispute does arise so often contract administrators are scrambling around for records or have to recreate records?

Accurate records serve to create a spectrum of information ranging from baseline and updated programmes, resources on site, costs, timesheets and production activities. When a dispute arises, these pieces of data need to match up with written records, for example minutes of meetings, correspondence (including electronic mails) and the narrative contained within the daily site diary. A failure for these various records to match is often the downfall of a delay and disruption claim. The daily diary is particularly important in tying records together and discrepancies in the site diary have often had a detrimental impact on the claim arguments being put forward, which has then lead to broader concerns over the reliability of testimony. The Minnesota Department of Transportation has put together detailed guidance (<http://www.dot.state.mn.us/const/tools/docs/sec-390.pdf>) on how diaries should be maintained – though from the point of view of a client.

Ground engineering projects are often subject to delay and disruption, which affect the critical path of the foundation works – which is most often (but not always) the excavation of the foundation elements e.g. drilling of bored piles or excavation of diaphragm wall panels. The recording of excavations can, with the latest technology, be recorded automatically by software embedded within the excavation machinery (Bauer’s B-tronic system for example). However, this software makes no attempt to interpret the data recorded and of course the data is only as good as the operator’s input.

Often, the old school method of paper log recording by the operator is still the most accurate and comprehensive method of recording all activities associated with a pile or panel excavation. GeoECS has developed simple, pictorial, forms for just such recording. These can be linked to utilization sheets to provide a full analysis of rig activities, including all productive and non-productive times, which can then be used to inform claims for delay and disruption.

## Contract Requirements for Records

Construction contracts contain detailed prescriptive procedures that a contractor has to comply with when submitting claims. A common contract in use in Australia states that the prescribed notice of claim must:

- (a) be provided not later than 7 Business Days after the later of:*
  - (i) the first occurrence of; or*
  - (ii) when the Contractor first became aware of, or ought reasonably to have first become aware of,*  
*the direction, event, circumstance, act, omission, fact, matter or thing which gave rise to the alleged entitlement; and*
- (b) expressly specify:*
  - (iii) that the Contractor proposes to make a Claim; and*
  - (iv) the direction, event, circumstance, act, omission, fact, matter, or thing, which gave rise to the alleged entitlement in the Claim.*

The contract then proceeds to state that the written claim must:

- (a) be provided not later than 12 Business Days after giving the notice; and*
- (b) include particulars of all of the following:*
  - (i) detailed particulars of the breach, act, omission, direction, consent, approval, event, fact, matter or circumstance on which the claim is or will be based (including the date or dates);*
  - (ii) the provision of this Contract or other basis for the claim;*
  - (iii) the quantum or likely quantum of the claim and details of how it has been calculated, including detailed information supporting the calculation;*
  - (iv) any measures taken by the Contractor to reduce the impact of the breach, act, omission, direction, consent, approval, event, fact, matter or circumstance on which the claim is based; and*
  - (v) the facts relied upon in support of the Claim in sufficient detail to permit verification.*

Failure to fully comply with these requirements can often lead to a claim being rejected or time barred. It is clear that to provide *detailed particulars, quantum of the claim* and the *facts relied upon* means that the contractor is obliged to keep detailed contemporary records.

In the case of *Attorney General for the Falkland Islands v. Gordon Forbes Construction (Falklands) Limited (2003)* contemporary records were deemed inadequate and the claim was lost. The case also emphasized the requirement that records must indeed be contemporary i.e. prepared at the time. This also makes the case for foundation excavation activities to be proactively recorded and interpreted by site personnel at the time and not simply recorded (without any interpretation) by automation software and then not reviewed until a later date when a claim particulars are being prepared. Best practice would be to analyze operator's records and link these to a rig utilization sheet within a few days.

For the quantum of the claim, a detailed resources list on the site diary is essential. Further, these resources need to be linked to the delay or disruption that is being claimed. Too often a failure to establish a link results in a claim for additional personnel costs being rejected, for example there are many cases where it has been successfully argued by the defendant that the personnel would have been on site anyway and therefore the claim for additional costs was unjustified.

If the personnel had been contemporarily recorded as being allocated to the delay and disruption then additional costs could have been reimbursed.

## Conclusions

The most important conclusion is that a party to a construction contract must continually review its record keeping procedures. To maximize the chance of a successful claim, records must:

- Be contemporary records – prepared and analyzed at the time of the events
- State the delay or disruption that is occurring
- Record the party responsible for the delay or disruption
- Allocate the resources impacted by the delay or disruption

In further Knowledge Hub articles we will take a look at how these contemporary records can be interpreted through rig utilization analysis and compared to the planned use of resources at the tender/project planning phase.

For assistance with compiling contemporary records or analyzing production data to inform delay and disruption claims, please email us at [info@geoecs.com.au](mailto:info@geoecs.com.au).