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A Study of Claims Analysis Methodology in Brazil

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Abstract- Contracts are complex, involve risks, unpredictable factors, pressure of time to prepare the documents and to accomplish a project. Significant number of claims submitted indicates the necessity to understand causes and failures in order to improve contract management. Contractors should submit claims following the terms described in contracts and provide all necessary details about time and the additional costs that could have brought financial prejudices. Furthermore, projects owners must follow a step-by-step methodology for tracking and analyzing claims. This paper presents a research developed to understand how the Construction Industry deals with claims in Brazil in order to collaborate for better contract managements and to mitigate mistakes committed. In consequence, the construction industry must have projects concluded in time and costs are prone to reduce. The main topics presented in this paper approach the practices adopted in claims analysis in Brazil, a methodology for claims analysis adopted in an important company located in the country and its major weaknesses resulted from management failures during the contract development, execution and negotiation. The study concluded that difficulty in accessing contract documents and the non-formalization of changes during the execution are the main obstacles faced in a claim analysis. In addition, problems with the project (details absence, review necessity), delay in answering correspondences, in emitting service orders and in formalizing additives are the main contract management failures found.

Keywords- *Claims, Contract Management, Contract, Project*

I. INTRODUCTION

It is commonly recognized by the Construction Industry its necessity to face many unknown situations involving unexpected, undesirable and often unpredictable factors [6]. It is a challenge to complete a project on schedule and to understand the complex, multiparty, uncertain and dynamic environment of construction projects [10]. Also, to develop a contract and to execute it are difficult tasks. Every unpredicted situation might become a claim that will look for balancing its contract conditions possibly impaired by actions not agreed in contract. According to [2], claim is a demand which one of the parties seeks, as a matter of right, a payment, changes in contract or other relief with respect to the contract terms.

In [4], it is defended that projects are supposed to be completed on time, however delay situations can arise normally because of a not anticipated condition. In addition, to assess a delay impact is a puzzling issue normally [3]. Delays in construction can cause many changes in a project: late conclusion, productivity lost, increasing costs, contract changes [3]. In this way, it is important to solve these delay issues promptly to continue a harmonious execution of the project. To have an accurately methodology for solving claims means an early and successful resolution for the delay questions. In addition, it is important to clarify that claims management is the process of employing and coordinating resources for claims identification and analysis development through preparation, presentation, negotiation and settlement steps [7]. It aims to solve problems effectively and efficiently avoiding litigations processes.

Researches have been made to comprehend construction claims and their main causes in order to avoid their submission. Reference [5] studied the main types, causes and frequency of construction claims in the United Arab Emirates. It was found the relevance of changes orders, extra-work and contract ambiguity as causes of claims. Reference [9] conducted a survey in Malaysia to conclude the main construction problems in the country. It studied the claims stages of identification, claim notifications, examination, documentation, presentation and negotiation in the country and it was possible to conclude the necessity for a good documentation archiving and to maintain a competent site staff that can recognize during execution a threat that could become a future claim. It is also necessary to keep appropriate project information as part of project monitoring and reporting. Reference [1] evaluated the Claims Management in the Egyptian Sector according to a contractor's perspective. It was found change orders and delay caused by the owner as the most common type of claims. In addition, it was common that change orders had not been recorded due to poor documentation practices. Reference [8] sought to understand the differences and similarities between conflicts, claims and disputes in construction. Figure 1 is adapted from this paper and shows a basic relation between these three concepts in the construction scenarios. A dispute is taken to conclude a prolonged disagreement: unsettled and unsolved claims or conflicts. It might arise from different interpretations of legitimacy, tendencies to exaggerate claims or an over-protective rejectionnof claims submitted. In addition, conflicts can lead extras claims and disputes.

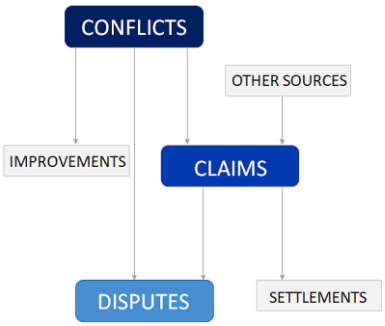

Figure 1. Representantion of conflicts, claims and disputes basic relation

In Brazil, claims are ordinary situations once it does not have, in general, a sufficiently effective contract management. Though, it does not mean that it has efficient methodology to solve them. Claims processes and Contract Management should be improved to ensure better executions and projects concluded in the established contract time and cost.

In this way, the present work demonstrates which practices are implemented in claims analysis in Brazil. It is defended a methodology for claims analysis adopted in one important company located in this country and it is appointed its major weaknesses that reflects management failures during the contract execution, its negotiation or development. Therefore, this study intends to share experiences to mitigate mistakes and to collaborate for better contract managements. In consequence, the construction industry must have projects concluded in time and reduced costs.

II. Claims Analysis

A. *Main Practices*

When the relevance of a specialized area for claims analysis is not understood, the own management area is responsible for solving these issues. However, this kind of analysis generates a conflict: the responsible for analyzing possible disadvantages that happened to a hired company is the same person responsible for executing the contract and consequently creating an undesired situation. In this way, this kind of analysis is normally characterized by fast, unfair and untrusted solutions. It is faster because the main objective of the manager is to finish the contract in time and not to analyze all the documents to understand what happened to give the fairest solution. To be fair and trusted the claim answer should be based on detailed analysis of all documents, data and facts related to the contract and its executions. It is also important to highlight that once the solution is untrusted, the injured party can start a judicial process to try to receive the amount of money related to the instability produced/generated. These processes can last years to be concluded.

Another practice present in the market refers to an arbitration agreement. When it is foreseen in the contract, the parties have their issues analyzed and solved by an arbitration court, normally composed by three people that sentence a solution that should be followed by both parties. It is a nonjudicial alternative for solving disputes.

The third nonjudicial practice is the Dispute Board. It is a committee formed by experienced and neutral professionals, normally a lawyer and two engineers, hired before the beginning of the contract to follow the project progress in order to prevent future claims and to assist in every conflict that could not be avoided. The Dispute Board advantages towards judicial processes and arbitration agreements are its capacity of preventing conflicts, the development of a positive environment between the hired and the contractor teams, the lower cost, less time is necessary for analyzing and the solutions are generally more fair than other ways of judgement.

It is important to highlight that destructive are different from constructive conflicts and from avoidable claims and that is necessary to minimize disputes arising from unresolved conflicts and claims in construction projects [8].

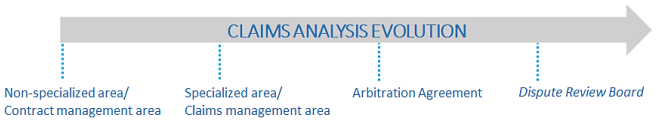

Figure 2. Claims Analysis Evolution Synthesis

B. *Successful Methodology*

For analyzing and solving a claim, it is defended in this study the development and the performance of a specialized area based in tree fundamental steps:

1. Claim diagnosis: the first step consists in understanding and identifying a claim inside the company structure (claims are different from contractual additives). It is necessary to collect all the documents related to the contract and to analyze the key points to solve the issue (there are in these documents the answers, the proofs or contestations for the items asked in the claim). With the contraposition between the documented facts and the facts exposed in the letter presented by the contracted company it is possible to identify if, in fact, there is a financial prejudice caused by the contractor company because of changes in the contractual conditions caused by facts unpredictable to both parties. So that the merit is recognized it is necessary to prove a relation of responsibility, cause and impact by interferences of the company to the contract execution that caused any prejudice to the hired company. If it is not identified the company responsibility, a cause and a negative impact to the contract fulfillment, it is not possible to recognize the contracted company merit for receiving a requested amount. In the other hand, if the documents prove a financial imbalance of the hired company, the contractor should pay a calculated value that can or cannot converge with the value presented in the claim. In opposite, if the analyzed documents do not show any irregularity, it should be formalized a negative answer for the hired company explaining the reasons why the contractor do not deserve the refund. It is important that the conclusion be

substantiated in documents that can protect the decision in case of a judicial process.

2. Claim negotiation: since proved the obligation of a refund claimed by the hired company and after calculating the correct value based in the contractual regulations and in data collected in the documents, it is necessary to present to the contracted company the justification of the calculated value and the calculus methodology to convince it that the value is fair enough to cover the prejudices caused. In the end, both parties should find a consensus of the final value to be paid.

3. Proactive acting: simultaneously to the previous steps, it is advisable that the specialized area responsible for analyzing claims develops actions with all the company's areas in order to avoid future claims (training, giving support during the contract development, helping solving issues related to the contract execution, helping to implement efficient documents standards that should have complete and correct data).

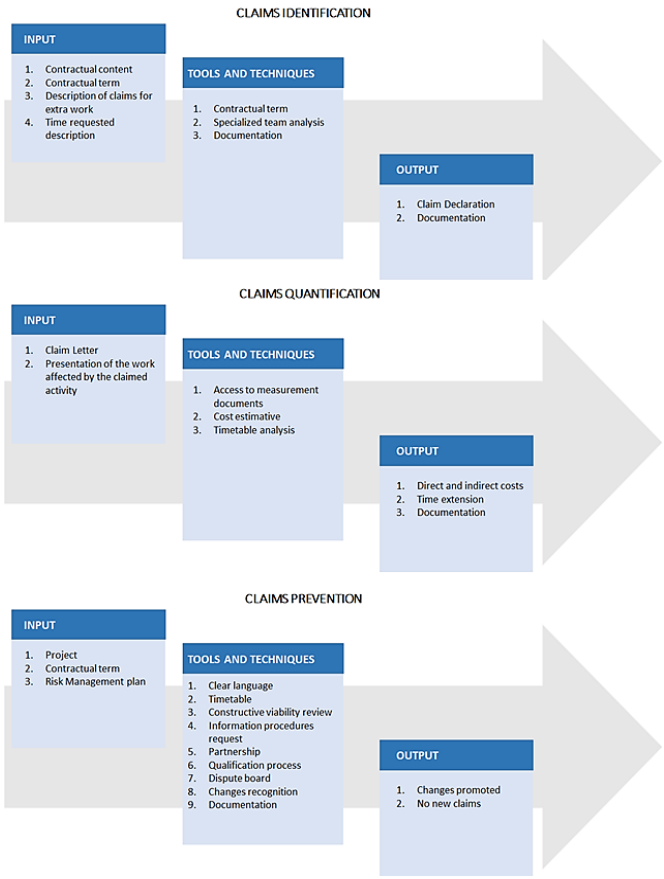

Figure 3. Input, Tools, Techniques and Output for Claims Analysis, Quantification and Prevention.

For an efficient acting, it is defended that the specialized area needs to have two types of employees. The first type is a technical team specialized in contract management, claims, arbitration agreement, judicial processes. It should be capable to understand, identify and analyze all the technical problems faced in a contract. This team also is going to be responsible for developing the better calculus methodology to refund a hired company and for negotiating, discussing and defending the fairest agreement for both parties. In the other hand, it is also necessary a team capable of analyzing the judicial fragilities of a Technical Report sent to the hired company which can become into a judicial process later.

In general, the area would work, in a first moment, with the technical team receiving the claim, verifying if it is really a claim or if it is an additive that should be solved by the supply chain team. Then this team would analyze all the documents related to the contract (Correspondences, the Contract and its attached parts, the daily reports filled in site to describe the construction development) and to find the contracts fragilities. Then, it is concluded if the hired company was impaired during the contract execution and should receive a refund or not. If there is loss, it is calculated the amount that the hired company should receive.

In a second moment, it would happen the technical-legal analysis which would evaluate judicially the contract and would compare the claim items to identify extra fragilities that could not be found by the technical team. After both events, it is possible to conclude the analysis and so, to negotiate with the hired company the amount to be paid or, if it is a claim that do not have enough evidence and documental proofs, it should be sent to the hired company a letter explaining the negative of the claim.

Figure 4. Claims Analysis Processes

III. CONTRACT MANAGEMENT WEAKNESSES

As part of an area responsible for receiving and analyzing claims, it is possible to point many fragilities in the structure of the company since these weaknesses bring as consequence problems during the execution of the contract what could become a claim in the future. Claims are reflections of contract management, negotiation and contract development failures. In addition, a technical team who changes the contractual content inadequately and who do not follow the deadlines for sending or reviewing the projects developed are extra causes of claims. A list of the main problems identified during the claims analysis is followed:

- Absence of fundamental documents that compose the contract: technical specification, measurement criteria, composition of unit prices of items, detailed budget difference income (BDI), specific attached parts of the contract that detail what was contracted.
- Inconsistent or overly simple projects that are going to need future reviews and possibly require items additions.

- When it is necessary a Conduct Adjustment Agreement (TAC) the negotiated items are not updated in the documents (Timetable, histograms, milestones).
- Measurement in items not predicted in the contract.
- Contract content change without updating the baseline.
- When it is elaborated the TAC, it is not documented the justifications and the reasons that enabled deadlines postponement.
- Absence of register that formalized the hired company noncompliance: meeting minutes, diary reports, e-mails, and notifications.
- Absence of notifications and action plans requests asking for the contract fulfillment in the right time and quality.
- Penalties for not following the contract requirements are not applied.
- Content changes requested by the hired company are not formalized in an additive.
- Managers do not answer the hired company requisitions in the right term.
- Managers require changes in the constructive methods after the contract signature which brings negative impacts and the necessity to reset the contract items.
- Delay in emitting service orders in the date stablished in contract.
- Delay in releasing the work front.
- Contract Managers are not aware of the contract content since they do not receive the contractual documents.
- The ground physical conditions differ from the description in contract.

In this way, it is understood that for a constantly improvement of the services provided and of the company structure it is important to consider the weaknesses found by the claims management area and to study action plans to solve the main causes of claims and contract management failures.

Figure 5. Structure Improvement Cycle

Furthermore, for an efficient and effective acting of a claims management area it is important to measure periodically its results (tangible and intangible ones). These results collaborate to point the possible fragilities and improvements in the area and, consequently, to keep it in constantly development.

In case of tangible results, it is necessary to adopt control tools and indicators, organize all the claims relevant data and to keep an analysis history. Therefore, it is possible to measure the benefits generated by the claims management area acting, it is possible to prove the seriousness of the analysis for an auditing procedure and it is possible to consult them in order to solve claims that were submitted before.

For intangible results it is necessary to evaluate all the areas indirectly and directly involved in a claim. Since identified these areas it is possible to act in order to solve their fragilities and to improve their activities. Trainings should be prepared to all involved teams to make them aware of the problems faced in the analysis and to correct them. To support the supply chain teams in the most critical purchases and in the most critical contracts negotiations it is important to make the right decisions and to avoid claims in the future. In consequence, the claims quantity must decrease.

IV. Conclusions

In this way, it is concluded that claims are a natural situation when talking about contracts and construction projects executions. However, there are many mistakes that can increase and aggravate the quantity of claims submitted. The main fragilities found in contract management that collaborate for claims rising are problems with the project (details absence, review necessity), delay in answering correspondences, in emitting service orders and in formalizing additives. In addition, the difficulty in accessing contract documents and the non-formalization of changes during the execution are the main obstacles faced in a claim analysis.

It is also defended in this study the importance of an specialized area for claims analysis since, in this way, fair amounts are paid to the hired company (normally less amount when compared to companies that do not include this area). The claims number that become a litigation is mitigated and it is possible to identify processes failures in a company structure enabling to improve the areas weaknesses.

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