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Dispute Avoidance in the Decommissioning Sector

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Nuclear Decommissioning is huge with a spend of circa £3.2bn per annum. By way of comparison, the UK Construction output in 2021 is projected to be £4bn according to the Office of National Statistics. In terms of that Nuclear Decommissioning spend, it is clear that the safe and secure storing, handling, and decommissioning of our nuclear waste is critical and certainly not something I grudge some of my hard-earned taxes being spent on!

However, the complex nature of decommissioning works can lead to inadvertently adversarial commercial arrangements. To address this, is there more we can do as an industry to ensure greater value for money by avoiding unnecessary disputes?

As an experienced quantum expert and commercial advisor, I believe there are many areas open to significant improvement. Claims and disputes in the construction sector are prevalent, and the nuclear decommissioning sector, in my experience, is no different. We waste public money on disputes where I think there are measures we can take to mitigate these risks. Primarily this means getting things right at the inception of a project as well as using fair and transparent commercial management across its lifecycle.

Procurement

The first line of defence in resolving disputes is to get the procurement strategy and implementation right from the early stages of project delivery. I have great empathy with procurement teams that are put under pressures to 'get projects moving' by letting contracts. However, this can lead to contractors being appointed at a stage where there is little more than a "concept" design with inadequate supporting detail to ensure accurate delivery. By expediting progress, but leaving specification ambiguous or incomplete, this has the potential to brew up commercial problems that will return downstream. This is particularly true where margins for error in design are so small in order to meet stringent safety standards.

Budgets and programmes (with some degree of risk) are then aligned to the "concept" to form the contract price and contract programme. The inevitable then happens: the concept is then developed via a series of iterations into a final design which is then built. Despite having to make substantial changes to the "concept" to arrive at a final design, the contractor can sometimes tend to give insufficient consideration to associated commercial changes. That is, the scope of the final design may have a very different risk profile, cost and programme to that for the "concept" design as originally agreed in the contract with the end employer. Desperate to maintain a good business relationship with the employer, yet already operating with tight profit margins, contractors may not seek entitlement to change under the contract, thereby brewing up further commercial issues.

So how can such hypothetical scenarios be addressed?

Early Contractors Involvement ("ECI") is being used more frequently and would, in my view, be an effective means of making sure that there are

proper discussions regarding the outputs and outcomes to be delivered from projects. This would help flush out a far greater mutual understanding of design, commercial and delivery risk, and agreement as to how such risk may be mitigated. Critically, it would also help establish agreement over who is best placed to own and manage the risks. This sort of transparency, though giving rise to a greater amount of planning time to get design agreed between all parties, would help ensure such programmes are properly thought out and reconciled with the real scope and associated risks. In addition, up-front agreement on the contractual mechanisms that can be used to align changes in “concept” design to risk, programme, and cost need to be in place, so that uncertainty can be dealt with in an equitable way. The days of passing risk on in ‘stealth mode’ from employer to contractor and then down to subcontractors should be a thing of the past. But such improvements require a shift in ways of working to proactively deal with such problems.

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Productivity and Incentivisation

In my experience, the decommissioning sector commonly sets damages clauses for delays and penalties for poor performance on schemes. Is this the right way to do it? Does this ensure productivity?

Delay damages clauses have a tendency, from what I have witnessed, to have an adverse effect on productivity. When there are changes, the focus ought to be on resolution and ensuring Employers, Contractors and Subcontractors are working towards ways of mitigating the risk. However, what tends to happen is that parties dig their heels in and resort to a ‘contractual’ mindset and positions become entrenched; when there is a threat of a financial penalty, productivity is diminished, as all eyes are on the commercial position, as opposed to the delivery of works. Additionally, where main contractors are faced with harsh delay damages clauses, they may seek to extend liability for these down to subcontractors and suppliers. It is extremely difficult to pass these clauses fairly from a large main contractor to a subcontractor of a substantially smaller size. Whether fair or equitable, such damages are often passed downstream to businesses ill-equipped to understand and deal with what they have signed up to. In addition, if there are also delays, the compound effect is that the main contractor may even benefit financially from recouping these delay costs from their subcontractors. Ultimately, such actions and behaviour do nothing to serve the employer’s needs. To address this, employers, main contractors, and their supply chains would benefit from learning and applying lessons from past projects to avoid the escalation of costs, the occurrence of disputes and associated reductions in project productivity.

To assist such change and boost productivity, maybe the industry needs to focus more on incentivisation rather than penalty. For instance, contractors could reduce margins at the outset but have the opportunity to generate more profits when programme risks are resolved by the party best placed to do so. Incentivisation to focus on innovative value engineering is also crucial to improvements in the sector. Advances could be achieved by letting those parties capable of bringing innovation

do what they are best at. By turn, contracts could reward these businesses instead of generating contracts and subcontracts containing onerous penalties encouraging the need for more unnecessary claims.

If Disputes Happen

As stakes are often high in decommissioning, disagreement over costs can be inevitable. What happens next? NEC3 and 4 and some other forms of contract aim for disputes to be resolved at the lowest level. In my experience a lot of these issues can still lead to costly adjudication, which itself can be a gamble in terms of the outcome. Litigation and arbitration are yet more costly but perhaps provide a more certain and concise process, especially with higher value and complex disputes.

Could expert determination be considered as an alternative? Here, both parties agree for an expert to review the facts of the matter and provide an independent assessment of Quantum, Engineering liability, Delay and Damages or 'QED+' as we call it in HKA.

Please note that this article provides opinion only and does not constitute advice. We would, however, be delighted to discuss any of its content or discuss issues requiring advice in dispute avoidance, delay, engineering expertise, quantum and damages capabilities, as provided by HKA.

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