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Risk and opportunity for construction

A survey of major construction industry participants finds there are likely to be an increasing number of disputes in the next couple of years. It suggests it will take time for the Construction Sector Accord to effect real change in the disputes landscape.

THE LATEST Russell McVeagh construction industry report provides insight into the most pressing current issues in New Zealand's construction industry as we look to 2021.

The report follows a survey conducted by Russell McVeagh of construction sector participants - including principals, contractors, engineers, project managers and other specialists - and enables comparisons to be drawn with the earlier industry survey conducted 2 years ago.

Industry seen to rise to challenges

Interestingly, despite dramatic shifts in the industry's operating environment - including the launch of the Construction Sector Accord and the impact of COVID-19 - little appears to have changed in terms of the key drivers of project delays and construction disputes. Employer variations remain the most common perceived cause



of delay, and poor-quality documentation is a recurring cause of disputes.

Survey participants considered that disputes had increased over the past 2 years and anticipate that they will continue to do so. However, while the challenges presented by

2020 were clear, survey participants generally believed that the industry had risen to those challenges.

Project delays

As at the time of the 2018 survey, respondents overall considered the most common

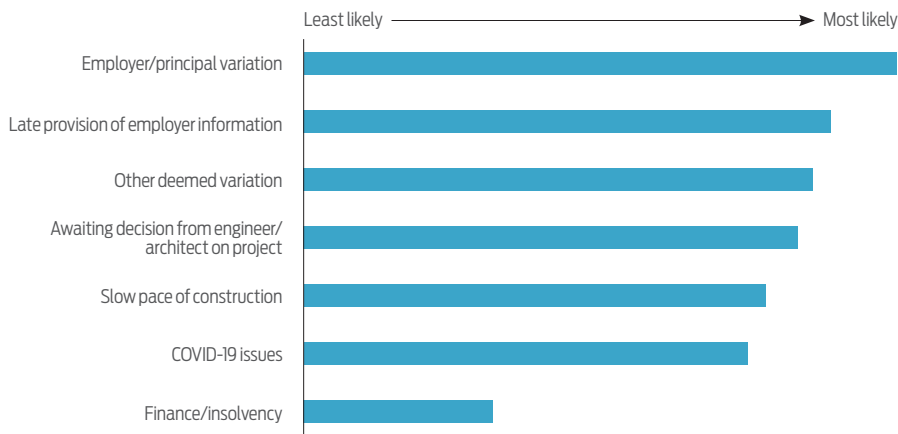


Figure 1: Tendency to cause delays in construction projects.

cause of delay to construction projects to be employer variations, followed by the late provision of information by employers (see Figure 1).

Few respondents identified insolvency as a key cause of delay. This may well reflect the fact that, despite the impact of COVID-19 to date, formal insolvency appointments in New Zealand have so far been at relatively low levels.

Construction disputes

The main drivers of disputes changed little over the past 2 years. Issues with the standard form contracts in use in the industry and complications caused by using multiple tailored or bespoke contractual clauses were seen as creating unwarranted complexity and increasing the risk of parties not understanding what they were agreeing to.

Almost 61% of respondents considered that disputes in the construction sector are likely to increase over the next 2 years. When asked to identify the likely causes of those disputes, respondents suggested poor-quality documentation, delays in work and extensions of time, poor-quality work and the inexperience of some industry participants as key problem areas. The perception of unfair risk allocation under construction contracts continued to be of concern for many contractor respondents.

Construction Sector Accord

The jury is still out as to whether the Accord is likely to change the disputes landscape. Only around half of the respondents considered the Accord and the behaviours it promotes are likely to reduce the number of construction disputes in future.

While most respondents agreed that the principles underpinning the Accord are admirable, many doubted the degree of commitment within the industry to turning those words into action. The Accord, however, is an attempt at culture change, and respondents acknowledged that this takes time.

COVID-19

At the time of the survey, the fallout from COVID-19 and the restrictions imposed under different alert levels had not yet been as severe as expected. Many respondents had experienced a willingness within the industry to solve the problems posed by lockdowns and associated measures collaboratively.

However, there is concern about the coming months and an expectation that ongoing COVID-19 issues are likely to reduce the amount of work on offer, disrupt the supply of materials, squeeze profit margins and potentially increase disputes.

Options for dispute resolution

Major construction projects are typically highly pressured and often high risk. They frequently involve work of sizeable value

undertaken over a long term and within environments where multiple unforeseen events may arise. It is essential that anyone who may need to rely on the construction contract understands it.

Where issues do arise, there are several options available for their resolution.

Mediation remains one of the fastest, cheapest and most flexible means of resolving construction disputes. As part of the 2020 survey, Russell McVeagh also sought the opinions of leading commercial mediators as well as construction industry members on their experiences of construction mediation in particular.

The success rate of mediation in securing settlements is very high. The majority of respondents reported that, in their experience, construction mediations result in settlement most of the time. Where they don't, respondents considered it was often simply the result of a belief of one or both parties that they could get a better outcome elsewhere - for example, via adjudication, arbitration or litigation.

Other key causes identified were unreasonable intransigence and a lack of adequate preparation from one or more parties. To address the latter, mediators advise those in dispute to dedicate far more time to the preparation phase of the mediation.

Importantly, this includes working with the mediator or lawyers to identify what information needs to be exchanged, by whom and when in order to ensure all parties have exactly what they need to complete realistic assessments of the merits of their own, and the other parties' cases.

Understand areas of risk

The more construction sector participants arm themselves with knowledge of risk points and how to resolve issues when they do arise, the better prepared the sector will be to face the challenges that lie ahead. ■

Note Russell McVeagh understands the concerns of industry participants and can use the construction survey results and insights to help the industry face those challenges.