

AQUENTA  
A Jacobs Company

# AVOIDING CONTRACT DISPUTES

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## AQUENTA INTRODUCTION

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### AQUENTA CONSULTING

Aquenta (a Jacobs Company) is a leading provider of integrated project services, helping owners, operators and investors in building and infrastructure assets achieve their objectives at a strategic, portfolio, program and project level.

Deliver services across 6 service lines, including Contract, Commercial & Dispute services.

Operate across 11 markets.

Offices in Perth, Brisbane, Sydney, Melbourne Adelaide and Darwin.

Recently been acquired by Jacobs Engineering Group.



## AQUENTA INTRODUCTION

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WHO ARE WE? WHAT WE DO?

### **Joel Glover**

Manager – Contract, Commercial and Dispute Services

Dispute resolution services direct to contracts, sub-contractors or clients and through instruction from legal representation. With a focus on the provision of independent quantum reports, contract change review and assessments and claims support and preparation.

### **Paul Naughton**

Senior Consultant – M&E Services

Cost and commercial advice to clients, main contractors and sub-contractors on M&E services.



## AQUENTA INTRODUCTION

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### TOPICS TO COVER TODAY

1. Main causes of dispute in the current market
2. How to prepare for potential disputes
3. Dispute resolution options available
4. Construction Contracts Act 2004



# 1. MAIN CAUSES OF DISPUTES IN THE CURRENT MARKET

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## DESIGN DOCUMENTATION

- Common mistake of rush to construction with poor design documentation.
- Tender design v Actual client requirements.
- Limited or obviously lacking document will generally result in tenderers pricing at risk.
- Lack of control on design development and co-ordination.



# 1. MAIN CAUSES OF DISPUTES IN THE CURRENT MARKET

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## SCOPE / SPECIFICATION

- One of the most significant areas of dispute.
- Interpretation of documents.
- Misunderstanding of design responsibilities.
- Scope or specifications contradictory to drawings.
- Scope growth – impact on changes to plant & equipment sizes.



# 1. MAIN CAUSES OF DISPUTES IN THE CURRENT MARKET

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## PRICING

*What are the risks in a low bid market?*

- Where is the cloth being cut? Margin? Manpower? Procurement?
- Site team – pressure to streamline the team, need a team that is still able to maintain records, satisfy contract admin requirements.
- Procurement decisions.
- What is the potential impact of other trades performance and potential low pricing?



# 1. MAIN CAUSES OF DISPUTES IN THE CURRENT MARKET

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## UNREALISTIC PROGRAMMING

- What are you signing up to? What are your milestones?
- Procurement times / lead in times.
- Actual commissioning times v Proposed commissioning times.
- Approval process?
- Witness testing requirements?
- Building surveyor and DFES sign off.
- Challenge the programme before the contract is signed, raise the question, document the concern.





# 1. MAIN CAUSES OF DISPUTES IN THE CURRENT MARKET

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## BIM REQUIREMENTS

- Technology differences – single platform for project.
- Skills gap & developing technology = differing levels of expertise across WA and companies.
- What are the BIM requirements within the contract documentation? Does the client know what they want? What level of detail? Serial numbers for every device?
- If it is to be used for asset control and maintenance, pay consideration to how devices are procured. Procurement dates, warranty dates, install dates, test dates, serial numbers.
- All may need to be populated into the model – significant burden if done after the fact.



# 1. MAIN CAUSES OF DISPUTES IN THE CURRENT MARKET

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## CASHFLOW

- Life bloody of the industry.
- High profile issue currently and probably the reason for some of the recent CCA changes.
- Almost daily articles.
- Sound contract administration and commercial awareness is the first step.



## 2. HOW TO PREPARE FOR POTENTIAL DISPUTES

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### RECORDS, RECORDS, RECORDS.....

Contemporaneous records – made at the time or just after an event.

- Daily site diaries.
- Supervisor records – work, plant, people.
- Minutes of meeting.
- File notes.
- Who was there? What plant & equipment was used?  
What was instructed?
- Weather records.
- Photos.
- Make them usable

Project related documentation.

- Tender docs / Contract docs.
- Variations.
- Invoices.
- RFIs.
- Drawings
- Drawings registers.
- Directions.
- Programme updates.



## 2. HOW TO PREPARE FOR POTENTIAL DISPUTES

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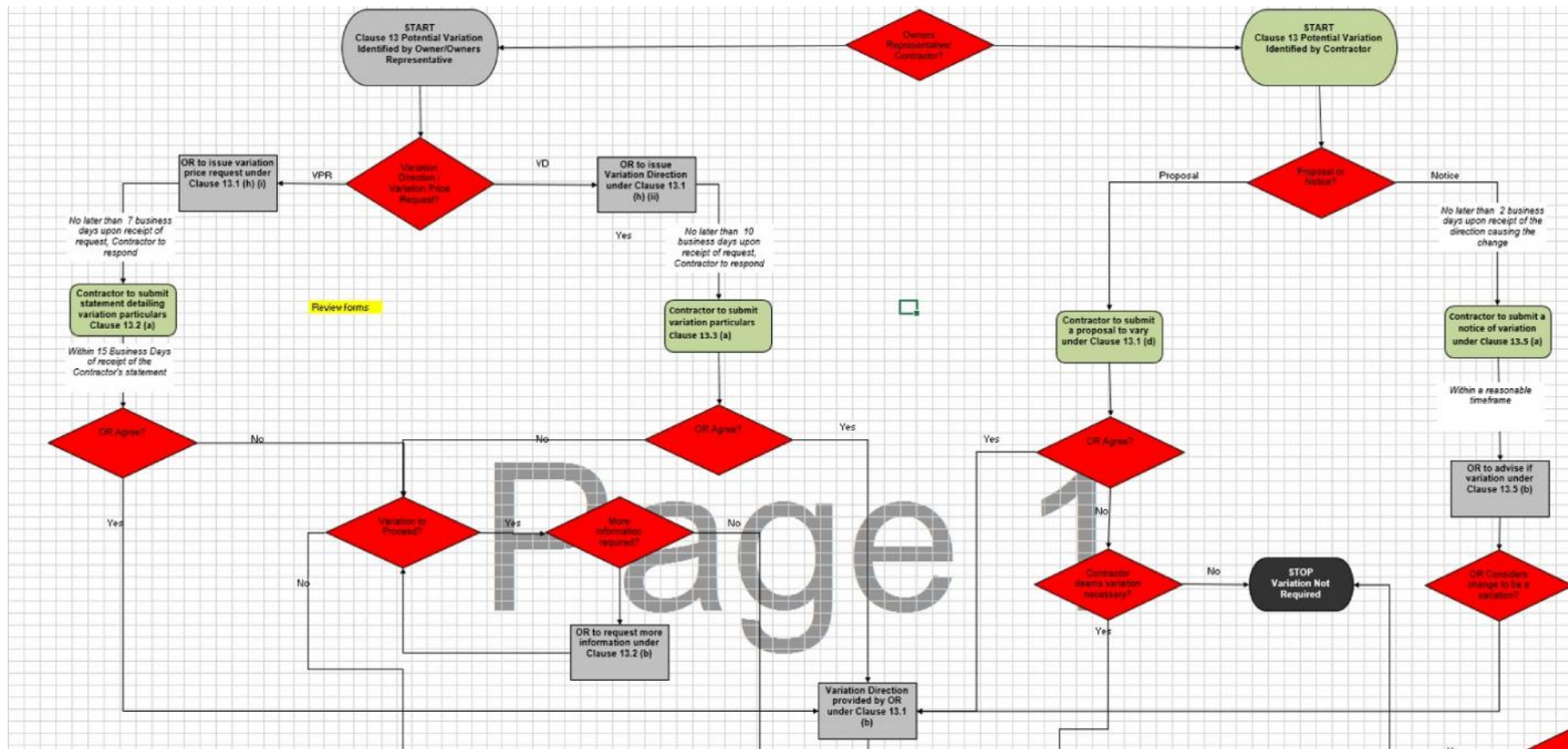
### CONTRACTUAL AWARENESS

- Read the contract – have it at hand, don't sign and file it.
- Know exactly what you are signing up to – have you a clear understanding of the scope, programme and payment.
- Payment clauses.
- Variation clauses.
- Notice period and time bars.
- RFI process.
- Set up processes and flowcharts that clearly show your obligations. Be on the front foot. It is your commercial risk to ensure dully aware of your obligations.



## 2. HOW TO PREPARE FOR POTENTIAL DISPUTES

### CONTRACTUAL AWARENESS



## 2. HOW TO PREPARE FOR POTENTIAL DISPUTES

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### RISK AWARENESS

- Early assessment of potential risk.
- Identify and mitigate.
- Provisions for inclement weather.
- Provisions for industrial disruption.
- Design and documentation responsibilities – client document deficiencies, have you accepted risk.



### 3. DISPUTE RESOLUTION OPTIONS AVAILABLE

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#### EXPERT WITNESS

- Individual engaged to give an opinion based on experience, knowledge and expertise.
- The overriding duty of an expert witness is to provide *independent, impartial* and *unbiased* evidence.
- The expert has a duty to the court and not individual parties.
- Wide range of potential uses of expert witness reports, Adjudications, Litigations, Arbitrations and even variation or EOT submissions.



### 3. DISPUTE RESOLUTION OPTIONS AVAILABLE

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#### MEDIATION

- Assistance to disputing parties to reach settlement without the need to progress further to court proceedings.
- Neutral appointment, structured, interactive, confidential and faster than more formal processes such as arbitration or litigation.





### 3. DISPUTE RESOLUTION OPTIONS AVAILABLE

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#### ADJUDICATION

- Rapid process for resolving payment disputes under construction contracts. Rough and ready justice.
- Intent being to promote the flow of money within the construction industry and protect the interests of all levels of the construction industry.
- Construction Contracts Act 2004. Recent amendments made to the Act which came into effect on 15 December 2016.



### 3. DISPUTE RESOLUTION OPTIONS AVAILABLE

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#### ARBITRATION

- Formal dispute resolution process in which two or more participants refer their dispute to an independent third person (the arbitrator) for determination.
- The result of the arbitration, know as the Award, is enforceable in the same manner as a Court judgement.
- When using arbitration as the process for resolving a dispute, participants are able to select an arbitrator with particular expertise and commercial experience in the subject matter of the dispute.
- Generally faster and cheaper than litigation.



### 3. DISPUTE RESOLUTION OPTIONS AVAILABLE

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#### LITIGATION

- Litigation refers to an action brought before the court to enforce a particular right.
- Under the various rules of Civil Procedure that govern actions in state and federal courts, litigation involves a series of steps that may lead to court trial and ultimately a resolution of the matter.
- Lengthy process involving multiple steps in procedure.
- High costs.



## 4. CONSTRUCT CONTRACTS ACT

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### USE OF CCA

- Who has been involved in adjudication proceeding? Applicant? Respondent?
- Who has an outstanding or disputed invoice for works complete?
- Opinion on the use of CCA? Too expensive to prepare applications? Too much risk and exposure to the decision by unknown party?
- Is there a threshold that parties use?
- Recent developments being made to streamline application process for simple payment dispute:
  - Online applications.
  - Single fee – including application, submissions and fees.



## 4. CONSTRUCT CONTRACTS ACT

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### SUMMARY OF KEY CHANGES

Changes to the Construction Contracts Act 2004 (WA) came into force on 15 December 2016, the amended act has been passed through legislation and is force.

- Main changes
  - Application timescales.
  - Recycling of claims.
  - Public holiday amendments.
  - Substance over form.



## 4. CONSTRUCT CONTRACTS ACT

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### TIMESCALES

#### Adjudication Applications

- Time limit for applications extended from 28 days to 90 business days
- Ability for applicants to 'look back' to 11 August 2016 for disputes that would have previously been outside the 28 days time limit.

#### Business Days

- Time limits now refer to business days (excluding references to payment terms).
- Defined as excluding weekends, public holidays and days between 25 December to 7 January.

#### Adjudication Responses

- Remain unchanged except now 10 business days

#### Adjudication Determinations

- Remain unchanged except now 10 business days



## 4. CONSTRUCT CONTRACTS ACT

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### RECYCLING OF CLAIMS

- Major change to the definition of “payment claim” within the Act (s3) to include “a payment claim that includes matters covered by a previous payment claim.”
- Permitting recycled claims will allow an applicant whose initial payment claim was rejected or disputed to be included in a subsequent payment claim and that a new payment dispute will form.
- Act specifically excludes matters that have been previously adjudicated upon and a determination issued.
- Probably the change with the greatest potential impact as applications will no longer be restricted to the previous 28 day window.
- No absolute time limit due to ability to recycle claims and the increased time scales.



## 4. CONSTRUCT CONTRACTS ACT

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### SUBSTANCE OVER FORM

- Strict compliance with section 26 of the Act no longer required.
- Adjudicator required to dismiss an application if not prepared in accordance with the Act unless the application complies sufficiently to allow the adjudicator to commence the decision.
- Ensure that the substance of the application will prevail over the form.







## CONTACT DETAILS

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