Benchmarking the Final Payment Terms and Conditions of FIDIC, AIA, EJCDC and Consensus Docs Contracts

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ABSTRACT

Architects professional service in a construction project usually takes a long period, it may contain several months or even several years. During such long term, the project may occur a lot of changes which may influence the final payment. However, there are few terms of final payment in the construction contract. Therefore, this paper is developed to analyze the issue and use Dominance method to compare different standard forms such as the American Institute of Architects (AIA), the Construction Specifications Institute (CSI), International Federation of Consulting Engineers (FIDIC), Engineers Joint Contract Documents Committee (EJCDC) and Consensus Docs. Based on the analysis, the author suggests use final payment certificate and set a deadline to guarantee the payment. In addition, the owner and contractor shall constitute a waiver of claims after made the final payment.

KEY WORDS: construction contract, architect professional service, final payment, owner and contractor, Dominance method, payment certificate

INTRODUCTION

With the rapid development of globalization, more and more construction companies and architects start to work in an international environment with people from different countries and cultures. As we all know, contract as the basis and of a project or program, plays a very important role from beginning to end, especially for an international construction, because it is more multiple and complicated to control the whole duration. Therefore, this paper is developed to analyze an important part of the architect professional services contract, final payment, with different organization standards such as AIA, CSI, FIDIC, EJCDC and Consensus Docs.

In this paper, the author uses Dominance method as a tool to compare the different statement about final payment between the contract “Architectural and Engineering Services Agreement” and the other organizations’ standard form which showed above. Then, this paper will analyze the problems and opportunities what this construction contract has in the final payment part.
and try to find out a perfect solution and give several suggestions in order to make the contract more comprehensive and practical.

When should the final payment due by the owner and contractor? Is there something they must double confirm before the final payment? Do they need a deadline or time limitation for the final payment even some changes happened? All these kinds of questions should be thought in more details and well listed in the construction contract. However, in the contract we chose for analysis, it just stated that all stage’s final payment need an acceptance written by the owner. Obviously, this contract missed a lot of important statement about the final payment such as the questions list above. It is too vague to clearly articulate the responsibilities, rights and interests for both owner and contractor. Therefore, this paper is developed to analyze the statement of final payment in FIDIC, AIA, EJCDC and Consensus Docs and find a better one which could suit more for the construction contract we were chosen.

METHODOLOGY

In the analysis of this paper, the author uses Dominance method as the main methodology. Dominance method as one of the Multi-Attribute Decision Making (MADM) methods, is more useful and practical especially when there are subjective attributes. As mentioned before, we planned to compare the final payment terms in different standard forms such as CSI, AIA, EJCDC and so on. By using Dominance method, we could easily find out a better or the best term in their statement, and clearly know how to consummate the construction contract we were chosen.

FINDINGS

1. Compare with the baseline: CSI

In this paper, we use CSI as the baseline for the construction contract. There are many clear terms in CSI’s statement. And it could be very helpful to consummate the final payment part in the construction contract if we refer the terms in CSI. There are three terms talking about final payment.

1) “Final payment is recommended by the (Architect / Engineer) A/E only after all project closeout procedures have been completed.”

2) “Upon acceptance of final payment, the contractor waives all claims except those previously made in writing and according to the contract conditions against either the owner or the A/E.”

3) “The owner, in making final payment, also waives all claims except claims arising from unsettled liens and defective work appearing after final inspection.”

As we can see, it gives a recommendation for when to make the final payment. In addition, it has independent clauses for both the owner and the contractor parties’ claim right after final payment. These terms in CSI give a clear and accurate statement about final payment.
It could be helpful if we add these terms in the construction contract we were chosen to make it more comprehensive.

2. Compare with FIDIC

FIDIC as an international consulting engineers’ organization, publishes a lot of international standard forms of contracts for works, clients and consultants. It provides a professional contract form which can be a powerful reference for us to consummate the construction contract. There are two terms in FIDIC talking about the final payment:

1) “Payments shall be certified in Interim Payment Certificates and a Final Payment Certificate.”

2) “The Employer shall pay to the Contractor the amount certified in the Final Payment Certificate within 56 days after the Employer has received this Payment Certificate.”

In these terms, FIDIC suggests a certificate before making the final payment. What’s more, the second term sets a deadline in the project duration for the final payment. In other words, it asks the owner to make the final payment in a determined period after received the certificate. These two terms bring a good protection for the contractor to get the payment they earned from the owner.

3. Compare with Consensus Docs

Consensus Docs are “the only standard contracts development by a diverse coalition of 40 leading associations with members from all stakeholders in the design and the construction industry” as they introduced themselves in their official website. Therefore, it will be quite helpful to see what terms of final payment they have in the contract standard form.

1) “Final payment of the balance of the trade contract price shall be made to trade contractor within 30 days after trade contractor has submitted a complete and accurate application for final payment.”

2) “Unless construction manager provides written identification of unsettled claims with an application for final payment, its acceptance of final payment constitutes a waiver of claims.”

It shows that Consensus Docs set a deadline for the owner to pay after the contractor submit the application. This term is similar with the FIDIC but FIDIC’s statement is more clear and easier to understand. In their statement, Consensus Docs also talk about the waiver of claims after final payment, which is parallel with AIA’s term we could see in next section.

4. Compare with AIA

AIA as one of the most professional organizations for architects in the world, provides plenty of standard forms of the construction contract. It is extremely helpful to consummate the
contract we were chosen as the analytical sample. There are four terms in AIA contract concentrate on the final payment as below.

1) “The Architect’s final Certificate for Payment will constitute a further representation as precedent to the Contractor’s being entitled to final payment have been fulfilled.”

2) “Acceptance of final payment by the Contractor, a Subcontractor, or a supplier, shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.”

3) “The making of final payment shall constitute a waiver of Claims by the Owner.”

4) “The contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment.”

As we can see, the first term also recommends a certificate for the final payment, as well as the FIDIC’s contract form. What’s more, the second and third terms from AIA are similar to the CSI and Consensus Docs’ statement. They all clearly stated the waiver of claim rights after final payment for owner and contractor parties. It means all these terms are pretty useful and important, which should be added into the construction contract we analyzed to make it more thorough.

5. Compare with EJCDC

EJCDC is an organization from US which developed a large amount of construction contracts. In the standard form they provided, there are three terms talking about the final payment issues.

1) “Contractor shall submit to Owner and Engineer an initial draft of punch list items to be completed or corrected before final payment.”

2) “Engineer shall attach to the certificate a punch list of items to be completed or corrected before final payment.”

3) “The acceptance of final payment by Contractor will constitute a waiver by Contractor of all claims and rights against Owner”

In EJCDC’s statement, they suggest the contractor prepare a punch list which needs to be completed before the final payment. This is similar with the last term of AIA in the last section. And it shows us another particular perspective of the final payment, it makes the contractor’s responsibility more clearly and protects the owner’s interests.

6. DOMINANCE analysis and Solutions

During the comparison and analysis with CSI, FIDIC, Consensus Docs, EJCDC and AIA, we gathered much helpful and important information about the final payment in different organizations’ standard. Due to the very few term of final payment in the construction contract
we were chosen, we do not need to compare it with those standard forms above. It is better to make comparison between FIDIC, Consensus Docs, EJCDC and AIA by using the Dominance method, and the chart 5.1 shows clearly the consequence.

<table>
<thead>
<tr>
<th>Selection attributes</th>
<th>AIA vs EJCDC</th>
<th>AIA vs FIDIC</th>
<th>FIDIC vs EJCDC</th>
<th>AIA vs Consensus Docs</th>
<th>FIDIC vs Consensus Docs</th>
<th>EJCDC vs Consensus Docs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clear statement</td>
<td>Better</td>
<td>Better</td>
<td>Equal</td>
<td>Worse</td>
<td>Better</td>
<td>Equal</td>
</tr>
<tr>
<td>Easy to understand</td>
<td>Worse</td>
<td>Equal</td>
<td>Equal</td>
<td>Worse</td>
<td>Better</td>
<td>Better</td>
</tr>
<tr>
<td>Payment certificate</td>
<td>Better</td>
<td>Better</td>
<td>Better</td>
<td>Better</td>
<td>Better</td>
<td>Better</td>
</tr>
<tr>
<td>Ask for punch list</td>
<td>Equal</td>
<td>Better</td>
<td>Worse</td>
<td>Better</td>
<td>Better</td>
<td>Better</td>
</tr>
<tr>
<td>Set a deadline</td>
<td>Equal</td>
<td>Worse</td>
<td>Better</td>
<td>Worse</td>
<td>Equal</td>
<td>Worse</td>
</tr>
<tr>
<td>DOMINANCE?</td>
<td>MAYBE</td>
<td>YES</td>
<td>MAYBE</td>
<td>NO</td>
<td>YES</td>
<td>YES</td>
</tr>
</tbody>
</table>

Based on all the terms we discussed and the Dominance analysis, here are several suggestions for the construction contract we were chosen to consummate its final payment part.

1) Add new terms about the final payment certificate for contractor and owner to reach agreement before making the final payment. The certificate could help both parties avoid dispute and make sure everything goes well before the final payment.

2) Clearly state that both owner and contractor shall constitute a waiver of claims after made the final payment. By this term, both parties’ responsibility, right and interest are specified and could reduce dispute.

3) Set a specific deadline for owner party to make final payment after they receive the final payment certificate from the contractor, for instance, 50 days. This term can help to protect the contractor’s rights and interests, and make sure the contractor party could gain what they deserved.

4) Ask the contractor to prepare an item list which needs to be completed or corrected before the final payment. This term protects the owner’s rights and interests, and clearly states the contractor’s responsibilities.

CONCLUSIONS

To summarize, this paper wants to answer the following questions:

1) What problems the construction contract has in the final payment part?
2) What are the differences of final payment term between the construction contract and the CSI, FIDIC, Consensus Docs, AIA and EJCDC forms?
3) Which terms of final payment are better stated and more helpful to consummate the construction contract?
During the analysis, we could found that the final payment of construction contract is inadequate, especially when we compare it with the CSI, FIDIC, Consensus Docs, AIA and EJCDC forms. Therefore, this paper provides four solutions for the final payment part based on the comparison. Such as using final payment certificate in the project duration, constitute a waiver of claims after made the final payment and ask for item list.

All these suggestions are helpful to clearly state and specify the responsibilities, rights and interests for both owner and contractor parties. In a word, the construction contract could be more thorough by adding these terms to the final payment part.

FOLLOW ON RESEARCH

During the analysis of this paper, we found that the statement of claim is also unclear. There is no term talking about the owner and contractor’s rights in the different period of the project. For instance, is there any change of claim right before or after the final payment? What’s the difference right between the owner party and the contractor party? These questions do need to make more research to find out solutions and suggestions, and the author will follow on them in the next period study and research.

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APPENDICES

Here is the form which allowed me to analyze the differences between those standard forms and the construction contract. [https://docs.google.com/spreadsheets/d/11UdDYDLncUMFZycGcNSwe7x-FAN9FLRHsALWSev9dQ/edit?usp=sharing](https://docs.google.com/spreadsheets/d/11UdDYDLncUMFZycGcNSwe7x-FAN9FLRHsALWSev9dQ/edit?usp=sharing)
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