

Case Study

Case Studies

Resolving a Construction Dispute Using the RICS Conflict Avoidance Process



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Public Future Project

The parties were involved in delivering a high profile, publicly funded project. There had been lots of adverse publicity around the project, which was the consequence of longstanding disagreements between the employer and the main project partner. In the two years leading up to the appointment of a CAP Dispute Panel, the parties were embroiled in prolonged and challenging negotiations over several disputed compensation events and the project's completion date. The potential amount in dispute was over £9 million.

The issues first began to develop during the Covid-19 emergency. To the credit of both parties, they actively sought to resolve matters in a spirit of collaboration and without recourse to litigation, or other adversarial measures such as adjudication or arbitration, which could have been costly and may have damaged their long-term relationship.

An independent Dispute Panel was appointed by RICS at the request of the parties in January 2023. The CAP process took four months to complete, which is the longest duration between an RICS appointment and the publication of the resulting CAP Report, since the process was launched in 2017. But it appears to have been time well spent; the CAP Report and recommendations has enabled the parties to achieve an agreed outcome, which they are currently implementing.

It seems that key factors, which motivated the parties to use CAP included:

1. It is immensely cheaper than going to court, and it gets results in a fraction of the time
2. Unlike litigation, CAP is a private and confidential process. This is particularly attractive to parties who wish to avoid damaging their brands. It is particularly attractive to employers who are funded by the public purse and wish to avoid costs escalating as a result of legal spend dealing with disputes.
3. The CAP process involves an experienced and credible subject matter expert providing both parties with impartial answers to questions they are grappling with, and this is used to inform their negotiations and help them achieve an agreed solution.
4. CAP is non-adversarial. It helps maintain good commercial relationships between parties. Which is often desirable when they are engaged in a long-term project.
5. It provides both parties with an indication of the potential outcome of litigation if the parties were to maintain their positions and pursue matters through lengthy and costly litigation.

In this case, the parties appear to be well-satisfied that the CAP process provided them with impartial and informed assessments of each side's position. It has given them a solid platform on which to resolve their differences quickly and cost-effectively and has enabled the project to move forward.

Government entity

Background

CAP has been used to settle a disagreement between a UK government entity and large contractor, which the parties had been trying to resolve through negotiations for several months, without success. The disagreement involved a potential claim valued at around £10 million.

A new rail tunnel and line extension was being constructed in the London conurbation, close to the River Thames. The total contract price was £200 million. Shortly after contracts had been signed and works had started, the contractor discovered that ground conditions on site were adversely affected by water penetration due to the proximity of the river. The contractor's position was that the ground conditions were unforeseen and argued that the employer should pay extra to cover additional costs to make good.

The employer's position was that the contractor had entered into the contract after undertaking due diligence which included a geotechnical survey. That the contractor's geotechnical survey had failed to identify the water penetration on the site was, in the employer's view, a problem that the contractor must deal with and that they, the employer, were not liable to pay additional sums claimed by the contractor.

Both parties had engaged in discussions on the matter, but had struggled to find a compromise. The parties were nevertheless keen to maintain the project timeline, and both wanted to resolve their disagreement swiftly and collaboratively without resorting to costly adjudication, arbitration or litigation.

The contract governing the project was a standard NEC3 form, which contained an additional clause to the effect that any disagreement between the parties arising from the contract and works, which was capable of being referred to adjudication, arbitration or litigation, would first be referred to the RICS Conflict Avoidance Process (CAP).

Referral to CAP

RICS had worked with the parties at the outset of the project to identify a Project Panel of over 20 specialists with the skills and expertise necessary to deal with any anticipated areas of disagreement that could arise during the course of the project. It was from this Project Panel that a Dispute Panel or 1 or 3 professionals would be appointed to help parties resolve an emerging dispute or issue should it arise.

In due course, the Employer and Contractor jointly submitted an appointment request to the RICS Dispute Resolution Service (DRS). They agreed on the following:

1. Questions on which they wanted the DisputeDispute Panel to answer in a written Report, with the key issue being: *"who is liable for the cost of making good the ground conditions"?*
2. Recommendations from the Dispute Panel on how the disagreement should be resolved.

The parties agreed that the CAP Dispute Panel would be comprised of one person, who would be a lawyer experienced in contract interpretation and dispute resolution. The parties also agrees that the Dispute Panel could call on a geotechnical expert whose knowledge and experience could be used by the Dispute Panel to inform their Report and Recommendations.

The parties could not reach agreement on who should act as the Dispute Panel, so they asked RICS to work with them to select and appoint an appropriately qualified Dispute Panel. RICS undertook research to identify and select a suitable person to appoint, and conducted thorough due diligence checks which reassured the parties that the person selected:

- Had relevant and up to date knowledge and expertise in the subject matter in dispute and the NEC contract.
- Was free from conflicts of interest and was seen to be independent of both parties because they have been sourced by RICS, which is impartial.
- Was available to act as the Dispute Panel.
- Agreed to adhere to a timetable and scale of fees that had been agreed by the parties
- Was fully up to speed on RICS guidance and procedures relating CAP.

RICS subsequently appointed an experienced Barrister, who was also a chartered quantity surveyor with expertise in the NEC contract used by the parties.

Initial Joint Meeting

An initial joint meeting was held virtually, involving representatives from both parties and the Dispute Panel. During the meeting:

1. The issues on which the parties required an impartial analysis and Recommendations were clearly defined

2. Parties agreed on a timetable for the Dispute Panel to undertake its investigations and issue its Report and Recommendations.
3. The agreed timetable and procedure included the date for a site visit, list of relevant people who the Dispute Panel would interview, the submission of written statements and supporting documentation, and the process for including a neutral geotechnical engineer's submission which would inform the Dispute Panel's Report.

CAP Dispute Panel Investigation

The Dispute Panel conducted a comprehensive investigation which included:

Documents Review: The Dispute Panel examined the contract terms, design submission timelines, delay analysis, and financial claims and other relevant documents.

Site Visit: Accompanied by representatives of both parties, the Dispute Panel attended the site and briefly spoke to the project director, managers and other individuals on site to gather information about the project and to understand the construction progress and the extent of water penetration.

Interviews: The Dispute Panel, assisted by the parties, drew up a list of individuals to speak to more comprehensively as part of the process. The Dispute Panel met key stakeholders, including the Employer's design team and the Contractor's project manager to ascertain where the root of the disagreement lay.

Using their expertise and findings, the Dispute Panel evaluated the contractual obligations of both parties and standards for pre-contractual due diligence relating to ground condition surveys.

CAP Report and Recommendations

Within two months, the Dispute Panel prepared a CAP Report with Recommendations for resolution of the issue. The Dispute Panel met with the parties to discuss their recommendations and the practical implementation of them.

The parties were advised that the CAP Report and Recommendations would not be binding, but if one party decided not to accept them, that party should set out its reasoning for not doing so in writing.

The Report set out the following:

1. **Findings:**

The CAP Dispute Panel concluded that the Contractor was, as asserted by the Employer, obliged to undertake a geo-technical survey as part of due diligence prior to signing off on the contract. However, drawing on the geotechnical engineer's report, the Dispute Panel found that the contract specified a standard of survey that would not have picked up the ground conditions the contractor subsequently found when they dug to a depth beyond 15 metres.

2. Recommendations:

- a. The CAP Dispute Panel recommended that the Employer compensated the Contractor for additional costs of making good ground that had been affected by water ingress.
- b. Both parties collaborated on an updated project schedule to mitigate future delays.

3. Reasoning:

The CAP Dispute Panel highlighted specific contractual clauses and industry standards which underpinned their recommendations. The Dispute Panel supported their conclusions with reference to the independent geotechnical engineer's findings, which were included in the Dispute Panel's main report, and by reference to similar cases which had been decided in courts of law.

Outcome

Both parties reviewed the CAP Report and accepted the recommendations. The Employer was, understandably disappointed, but recognised that the same, or very similar, conclusion would have been reached had the matter gone to lengthy and costly litigation.

Following the CAP procedure, the parties agreed a level of compensation to be paid to the Contractor, and the updated project schedule was implemented successfully.

The CAP Process took just over eight weeks to complete. The CAP Dispute Panel's fees and expenses amounted to a total of just over £40,000. The process successfully resolved the issue between the parties and was significantly quicker and cheaper than had the matter been referred to litigation. Each party paid half of the Dispute Panel's fees.

Reasons CAP was Successful

Early Intervention: Addressed the disagreement before it escalated into a formal dispute.

Expertise: The Dispute Panel's technical and contractual knowledge provided credible, impartial recommendations for settlement. The Dispute Panel met with the parties to deliver the CAP Report and Recommendations and was able to directly address questions put by both parties.

Cost-Effective: The process was exceedingly quicker and more cost-effective than litigation (or arbitration).

Collaboration: The process and outcome helped to maintain a positive working relationship between the parties, and ensured the project was completed in good time.

Conclusion

This case study demonstrates how the RICS Conflict Avoidance Process (CAP) enabled the employer and contractor to resolve an outstanding issue quickly and cost-effectively, while maintaining a constructive commercial relationship between them.

For more information on CAP or to include a CAP clause in your contracts, visit RICS the [website](https://www.rics.org/website).

The Westward Bay Airport construction project

Background

The Westward Bay Airport construction project, a high-profile infrastructure initiative, faced delays due to significant design submission issues. Under the terms of the contract, design submission was the responsibility of the Employer. The Main Contractor claimed that the delays disrupted the construction schedule, leading to them incurring additional costs. A disagreement arose on whether these costs should be considered a variation under the contract or an additional claim requiring separate compensation.

The contract governing the project contained a clause to the effect that any disagreement between the parties arising from the contract and works which could give rise to a formal dispute capable of being referred to adjudication, arbitration, other alternate dispute resolution process or litigation, would first be referred to the RICS Conflict Avoidance Process (CAP).

With the project timeline and budget under strain, both parties agreed to refer the matter to CAP, seeking to resolve the disagreement swiftly and collaboratively without resorting to costly adjudication, arbitration or litigation.

Referral to CAP

The Employer and Contractor jointly submitted an appointment request to the RICS Dispute Resolution Service (DRS). They agreed on the following:

1. Question or issue on which they wanted the Dispute Panel to assist:
Whether the costs incurred by the Contractor due to design delays constitute a variation or require additional payment.
2. Dispute Panel composition - whether it should consist of one or three persons:
Would be a single impartial expert with considerable knowledge and experience of construction contracts, delay analysis, and cost impact assessments.

The parties could not reach agreement on who should act as the Dispute Panel, so they asked RICS to work with them to select and appoint an appropriately qualified Dispute

Panel. RICS identified and select a suitable person to appoint, and conducted thorough due diligence checks which reassured the parties that the person selected:

- Had relevant and up to date knowledge and expertise in the subject matter in dispute
- Was free from conflicts of interest and was seen to be independent of both parties because they have been sourced by RICS, which is impartial.
- Was available to act as the Dispute Panel as and when required by the parties.
- Agreed to adhere to a timetable and scale of fees that had been agreed by the parties
- Was fully up to speed on RICS guidance and procedures relating CAP.

RICS subsequently appointed an experienced professional, who was both a chartered quantity surveyor and delay expert, to act as the Dispute Panel.

Initial Joint Meeting

An initial joint meeting was held virtually, involving representatives from both parties and the Dispute Panel. During the meeting:

1. The issues on which the parties required an impartial analysis and Recommendations were discussed and clearly defined.
2. Parties agreed on a timetable for the Dispute Panel to undertake its investigations and issue its Report and Recommendations.
3. Procedural directions were issued, which were to include the submission of written statements and supporting documentation, plus arranging a site visit by the Dispute Panel.

Dispute Panel's Investigation

The Dispute Panel conducted a comprehensive investigation which included:

Documents Review: The Dispute Panel examined the contract terms, design submission timelines, delay analysis, and financial claims and other relevant documents.

Site Visit: Accompanied by representatives of both parties, the Dispute Panel attended the site and briefly spoke to the project director, managers and other individuals on site to gather information about the project and to understand the construction progress and impact of delays.

Interviews: The Dispute Panel, assisted by the parties, drew up a list of individuals to speak to more comprehensively as part of the process. The Dispute Panel met key stakeholders, including the Employer's design team and the Contractor's project manager to ascertain where the root of the disagreement lay.

Using their expertise and findings, the Dispute Panel evaluated the contractual obligations, design delay implications, and cost impacts.

Dispute Panel Report and Recommendations

The Dispute Panel prepared a CAP Report with recommendations for resolution of the issue. The Dispute Panel met with the parties to present its recommendations and the practical implementation of them. In this case, the parties agreed that the CAP Report and recommendations would not be binding for 10 working days, after which time they would become binding unless one of the parties communicated their dissatisfaction.

The Report set out the following:

1. Findings:

The Dispute Panel could see that the delay in design submissions had significantly impacted the construction schedule.

2. Recommendations:

- a. The Dispute Panel recommended that the Employer compensated the Contractor for additional costs caused by design delays.
- b. Both parties collaborate on an updated project schedule to mitigate future delays.

3. Reasoning:

The Dispute Panel highlighted specific contractual clauses and industry standards supporting the recommendations. They supported their position with their own experience of a similar case which went to court.

Outcome

Both parties reviewed the CAP Report and accepted the recommendations. The Employer agreed to compensate the Contractor, and the updated project schedule was implemented successfully.

The CAP process preserved the working relationship between the Employer and Contractor, avoided costly arbitration (or litigation), which would likely have achieved the same outcome, and ensured the project remained on track.

Why CAP Was Successful

Early Intervention: Addressed the disagreement before it escalated into a formal dispute.

Expertise: The Dispute Panel's technical and contractual knowledge provided credible, impartial recommendations.

Cost-Effective: Avoided the expenses associated with adjudication, arbitration or litigation.

Collaboration: Maintained a positive working relationship between parties, crucial for project completion.

Conclusion

This case study demonstrates how the RICS Conflict Avoidance Process (CAP) effectively resolves construction disputes while saving time and costs. As a globally endorsed mechanism, CAP promotes collaboration and safeguards project outcomes, proving its value in complex infrastructure projects like Westward Bay Airport.

For more information on CAP or to include a CAP clause in your contracts, visit RICS Conflict Avoidance Process: rics.org/dispute-resolution-service/conflict-avoidance

Big Picture Public Services

Big Picture Public Services were a major national services contractor and were involved with subcontractor - MacDonald Mechanical & Engineering, LLC. They had been in discussions for a considerable period in trying to agree the final costs of the sub-contract.

In 2022, the MacDonald Mechanical & Engineering, LLC's adviser recommended that matters could be resolved using CAP as a means to help both sides. The parties subsequently agreed to use the process, and an independent CAP professional was nominated by RICS. This was a person selected by RICS who had previous experience acting as a CAP professional on other projects. The parties were happy with the nomination, and they jointly instructed the CAP professional to act in the matter.

Within a few days of the appointment, the CAP professional met the parties online and a timetable was agreed. The parties wanted certainty and finality, and they agreed at that point that they would accept the CAP's recommendations as binding. Neither party wanted to pursue matters through further, adversarial procedures, which they believed would be considerably costly and slow.

A structured timetable set by the Dispute Panel, and agreed by both sides, allowed simultaneous submissions and provided an opportunity for additional, shorter submissions by each side. The CAP acted inquisitorially and asked questions to better understand each side's position and elicit their responses to statements made by the other side. The Dispute Panel then published a reasoned report which included recommendations for settlement, which the parties implemented. The Dispute Panel's fees were split 50-50 as previously agreed with the parties.

Key benefits of the CAP process were:

- A speedy and final solution was achieved on matters that had previously been the subject of lengthy debate.
- Both sides avoided having to invest significant time, money and resources, had matters not been resolved and had been referred to adjudication, arbitration or litigation.
- The outcome was one which both parties were able to accept, and trust and good relationships were maintained between them.

The process was conducted with efficiency and without acrimony. The process involved commercial directors/managers from both sides and legal advisers were not involved.