



Minutes Matter when EPC Contracts Scatter

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Introduction:

Engineering, Procurement, and Construction (EPC) Contracts have become a cornerstone in project development across various industries, especially in energy, power, infrastructure, construction, thermal power and mining etc.

The acronym “EPC” involves the following:

- **Engineering:** Designing the project to meet specific technical and operational requirements.
- **Procurement:** Sourcing materials, equipment, and subcontractors.
- **Construction:** Building, implementation of equipment, and commissioning the project, ensuring it meets agreed specifications.

The Nature of EPC Contracts

EPC contracts are complex and detailed agreements that govern significant infrastructure, industrial, and construction projects. Under the EPC Contract, the contractor undertakes entire responsibility of project execution, right from commencement to final completion, hence it is also alternatively referred to as “Turnkey Contract” ready to operate at the Turn of a Key. These contracts outline the obligations, rights, and responsibilities of the parties, including project timelines, deliverables, milestones, cost structures, risk allocations, defect liability period, performance guarantee, subcontracting provisions, warranties, delay provisions etc. While these super comprehensive contracts strive to account for all foreseeable scenarios, the dynamic nature of such projects often necessitates on-the-ground adjustments.

Deviation from Original terms

In EPC contracts, formal EPC agreement/Works Contract between the parties often sets the foundation for project execution. However, as projects progress, it is common that certain on the ground situations require new decisions and practical deviations to be made. Meetings during the project lifecycle serve as a platform to address unforeseen challenges, discuss changes in scope, and make critical decisions that may not have been anticipated in the original contract. These deviations naturally lead to additional costs and extended timelines. Deviations, if left undocumented i.e. not converted into written records in form of minutes can lead to confusion, misunderstandings, and eventually lead to disputes. This is where the importance of properly recorded and maintained minutes of meetings becomes paramount.

[1] The article reflects the general work of the authors and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.



What are the Minutes of Meeting?

In simple words, a written representation of the proceedings of the meeting or written records of the meeting in a summary format is called as Minutes. Secretarial standard – 1[2] defines ‘Minutes’ as a formal written record, in physical or electronic form, of the proceedings of a Meeting.

Examples:

Case Study 1: In a large-scale power plant construction project, client requested additional safety features which were not included in the original contract. During a series of meetings, the contractor agreed to incorporate these changes, but failed to formally document it in a written format. When the client refused to pay the additional costs after completion of the milestone the contractor had no clear evidence to support its claims but vague one-sided emails. This resulted in dispute.

Case Study 2: A warehouse construction project faced delays due to unforeseen requirement of additional solar lamps and consequently additional solar panels. In furtherance of this, the stakeholders, during multiple meetings, agreed to extend the timeline and waive liquidated damages for delays. The Minutes of Meeting for this waiver were recorded and duly signed by both the parties, and later served as a crucial piece of evidence when the client’s finance department attempted to impose penalties contrary to the earlier decisions in the meetings.

Importance of recording Minutes in EPC Contracts:

1. Minutes of the meeting act as a transparent record of what was discussed and agreed to during a meeting. By capturing key points of discussion, decisions made, and agreed-upon actions, they eliminate ambiguity. This ensures that all stakeholders, including those who were not present, have a clear understanding of the project's direction.
2. In situations where contractual obligations evolve, deviations from the original contract may cause conflicts. For example, if a particular milestone date is extended during a meeting but is not documented, the contractor may proceed based on the verbal agreement, only to face penalties later for delay. **Minutes of Meeting serve as written evidence of such deviations, which can be invaluable during dispute resolution processes such as arbitration or litigation.**

[2] https://www.icsi.edu/media/webmodules/Final_SS-1.pdf



3. EPC projects often span several years, during which project managers and key personnel may change and some oral agreements made by them cannot be verified or remembered. When a new manager takes over, the absence of documented Minutes of Meeting can result in confusion about past decisions. For example, a new project manager might strictly adhere to the original contract, unaware of modifications agreed upon during prior meetings. This gap in knowledge can disrupt project execution and strain relationships between parties.

4. Disputes in EPC contracts often escalate to arbitration or other formal dispute resolution mechanisms. In such cases, minutes of meeting can serve as crucial evidence.

5. Regularly maintained minutes of meetings provide a linear chain of project decisions, which can simplify internal and external audits. This documentation helps auditors understand the rationale behind specific actions or changes in the project scope.

JUDGEMENT: National Thermal Power Corporation v/s. Siemens Atiengesellschaft (SAG) on 24 May, 2005 [3]

Let us understand the importance of minutes through a Supreme Court judgement wherein NTPC indulged in longstanding litigation for its counterclaims, unsuccessfully, as such claims were waived by NTPC in its meeting which were duly recorded.

In this case, a Contract dated December 6, 1989, was executed between NTPC and Siemens (SAG) involving a Rs. 2,190 million (two thousand one hundred ninety million rupees) gas-based combined cycle power project at Dadri, Uttar Pradesh.

Delays in the execution of the contract were attributed to NTPC, primarily due to delays in opening letters of credit in favour of SAG and obtaining the requisite import licenses from statutory authorities. SAG raised multiple claims for losses caused by these delays.

A high-powered meeting on April 6–7, 2000, was convened to address disputes. In this meeting, it was agreed that SAG would supply critical components and spare parts, and in return, NTPC would settle SAG's claims arising from the delays.

While SAG's adhered to this agreement, NTPC did not comply, prompting SAG to approach the ICC Court of Arbitration as agreed between the parties to the contract. SAG reasserted its claims in ICC Tribunal.

[3] <https://indiankanoon.org/doc/719729/>

The ICC Tribunal, composed of three arbitrators, including two former judges of the Supreme Court of India, ruled in SAG's favor, finding its claims substantiated and supported by the minutes of meeting dated 6-7 April 2000 meeting. NTPC's counterclaims, however, were dismissed as inadmissible since, they had been already settled in the minutes of meeting of 6th/7th April, 2000.

Dissatisfied with this outcome, NTPC filed an appeal under section 37 of the Act, which was held to non-maintainable.

NTPC pursued further litigation before High Court and Supreme Court but the same were dismissed on the account of settled counter claims of NTPC in minutes of the meeting dated 6th-7th April, 2000.

The Supreme Court held that^[4] ***“it was not in the context of the fact that the Tribunal had no jurisdiction, it was in the context that this question of counterclaim was no more open to be decided for the simple reason that all the issues which had been raised in counterclaim Nos. 1 to 10 had already been settled in the minutes of meeting dated 6th/7th April, 2000 and it was recorded that no other issues to be resolved in the contract”.***



[4] <https://main.sci.gov.in/jonew/judis/31138.pdf>

Quick Do's and Don'ts while noting the Minutes of Meeting:

Sr. no.	Do's	Don'ts
1	Make sure all major points, decisions, and action items are recorded clearly and concisely.	Don't record personal observations or judgmental comments. All statements should be as neutral as possible.
2	Have the minutes reviewed and approved by the chairperson or meeting organizer. Always revise and update minutes of meeting as needed before finalizing.	Don't Circulate them until the meeting chairman/ authorized signatory has a chance to review and sign them (physical or digital signatures) to validate authenticity.
3	Circulate the minutes to all participants and other relevant stakeholders within a reasonable time (ideally within 1-3 business days).	Avoid sharing sensitive or confidential minutes of meeting with unauthorized personnel.

Conclusion:

Minutes of Meetings serve as crucial records in EPC agreements. Considering the dynamic nature of such contracts and several deviations during the course, minutes ensure transparency and effective communication.

From an evidentiary perspective, minutes can influence dispute resolution by capturing the intent and commitments of parties during project stages. Courts and tribunals often rely on them as evidence, making their recording and timely circulation vital. The quoted case law underscores, the evidentiary value of the minutes in the event of ambiguity/disputes arise between Parties to the contract.

For any feedback or response on this article, the authors can be reached on kedar.gurjar@ynzgroup.co.in and ankita.doke@ynzgroup.co.in

Author: Kedar Gurjar

Kedar is an Associate at YNZ Legal.
By qualification he is Bachelor of Commerce and Bachelor of Law from G.J. Advani Law college, Bandra, Mumbai University.



Co-author: Ankita Doke

Ankita is an Associate at YNZ Legal.
By qualification she is Bachelor of Law from Pune University.