

### CLIENT PRACTICE NOTE

## CLAIMS – THE KEY ESSENTIALS [ PART 2 ]

*A Client Practice Note by Eugenie Lip, Director and Head of KPK Contracts Support Group*

### INTRODUCTION

*“Life is really simple, but we insist on making it complicated” – Confucius*

Records! Records! Records! – a typical mantra repeatedly heard when parties to a construction contract assert their rights to or, in other words, claim what they perceive to be their rightful contractual entitlements on time or additional payment or compensation. Dissatisfaction with the determination or rejection of the claim becomes in the absence of any consensus or a settlement the subject of arbitral or court proceedings.

Continuing the article on key essentials of claims, the first part<sup>1</sup> had examined the types of claims, the contractual arena for their origins and bases and the procedures which must be complied with under the commonly used standard forms published by the Singapore Institute of Architects (SIA Form), Real Estate Developers’ Association of Singapore (REDAS Design and Build Conditions or REDAS D&B) and the Building and Construction Authority (Public Sector Standard Conditions of Contract for Construction Works or PSSCOC).

In this second part, the practice note discusses the importance and type of supporting documents necessary for an effective document and record management protocol for evidential purposes, the common heads of claims and the approach in ascertaining the amount of such loss and expense. Claims, in this context, refer to the assertion by the Contractor of his contractual entitlement to an extension of the contract period and/or additional payment, and must be distinguished from variation claims which are assessed under the contractual valuation rules.

### IMPORTANCE OF RECORDS

*‘A party to a dispute, particularly if there is arbitration, will learn three lessons (often too late): the importance of records, the importance of records and the importance of records’<sup>2</sup> – wise words from a respected author which underscore the criticality of proper maintenance of records. That claims are simple to originate but not always easy to substantiate is good reason for the Employer to be astute in ensuring sufficient evidence is presented when a Contractor advances a claim for time and cost.*

What are the records the Employer should expect a Contractor to keep for satisfactory demonstration of his entitlement? Most contract forms set out specific procedural requirements on the essentiality for contemporary records that should be maintained and the consequence if the Contractor fails to do so.

In the PSSCOC, Clause 23 provides that *‘the Contractor shall keep such contemporary records as may reasonably be necessary’* if he intends to claim any payment (which includes loss and expense incurred under Clause 22) but excepting payments in connection with variations under Clause 20. The REDAS D&B has a similar provision in Clause 29 where contemporary records must be kept by the Contractor to support any claims which he wishes to make for additional payment. There is no equivalent provision in the SIA Form for claiming loss and expense arising from any breach of contract by the Employer. In the absence of any express provision, the Contractor has to pursue an action for general damages under common law<sup>3</sup>.

More often than not, the failure to maintain or the lack of contemporary records can adversely affect or even extinguish the Contractor’s entitlement to claim for extension of time or recover loss and expense. Retrospective creation of contemporary records long after the

<sup>1</sup> Eugenie Lip, Claims – The Key Essentials [ Part 1 ], KPK Research Digest Client Practice Note, January 2011 Issue.

<sup>2</sup> Max W Abrahamson, Engineering Law and the I.C.E. Contracts, Fourth Edition (1979).

<sup>3</sup> See Guidance Notes on SIA Articles and Conditions of Building Contract, Third Edition (2011) at 2, for the draftsman’s rationale behind the limitation on the Architect’s powers.

event giving rise to the claim has happened or from witness statements in contemplation of arbitration or litigation based on pure recollections of individuals who may no longer be with the organisation or are not directly involved in the events in question to fill the gaps or piece together the causal connection risks having the claim being dismissed or abated.

The term 'contemporary records' and what it constitutes was considered in *Attorney General for the Falkland Islands v Gordon Forbes Construction (Falklands) Limited [2003] BLR 280*. Contemporary records mean 'original or primary documents, or copies thereof, produced or prepared at or about the time giving rise to the claim, whether by or for the contractor or employer'. The Court made it clear that contemporary records were not 'witness statements produced after the time giving rise to the claim'. Thus, documents or records prepared in an attempt to reconstruct the historical event or chain of events pertinent to the claim from memory or statements on what had happened or did not happen in the past do not fall as contemporary evidence. The emphasis is on immediate record-keeping of the events or circumstances at, or very close to, the time the claim arose.

### WHAT DOCUMENTS ARE NECESSARY?

The lack of supporting evidence has caused many a claim submitted by Contractors to fail. Broad and sweeping statements that the Employer and/or his consultants have attributed to the loss suffered without establishing the link between cause of the delay and effect would not sustain a claim. Others sometimes use averages or figures derived from formula methods. It is therefore important for the Employer to be cognisant of the fact that what is required from the Contractor is the actual loss and/or actual expense – not some notional figures which bear no resemblance to the claim.

The Employer should be mindful of short cuts taken by Contractors to link the cause (viz, the particular breach or claim event) with the effect (viz, cost or time incurred or loss suffered) which have led to global or rolled-up claims where all causes of delay are lumped together and an overall delay was given. Claims made on a global basis have been cautiously allowed by the Courts but only provided it can be shown there is an extremely complex interaction of events which made it difficult or even impossible to separate and prove each individual item, and as much detail as possible has been given.

The type and level of particularity of contemporary records which the Employer should look to receive from the Contractor will of course depend on the nature of the claim – invariably, they comprise some or all of the following documentation:

<b>Cost Records</b>	<ul style="list-style-type: none"><li>Manpower field records on number of people, hours worked, overtime and rates.</li><li>Records of operating plant and equipment on days and hours worked, idle or down time, hire charges, mobilisation and demobilisation costs.</li><li>Purchase orders and material delivery orders.</li></ul>
<b>Programme</b>	<ul style="list-style-type: none"><li>Baseline construction programme, rolling programme and monthly programme updates.</li><li>Programmes showing progress that could have been achieved had the particular delaying event or disruption not occur, compared against actual output and productivity.</li></ul>
<b>Correspondence</b>	<ul style="list-style-type: none"><li>Correspondence including from head office and site office and regulatory bodies.</li><li>Relevant instructions, approvals, applications, requests, confirmation of oral orders, certificates and notices as required by the terms of the contract.</li></ul>
<b>Meeting Minutes</b>	<ul style="list-style-type: none"><li>Progress or site meetings minuting matters and progress reports not recorded elsewhere.</li><li>Monthly progress reports on site progress, photographs of progress, delays encountered, interruptions, safety statistics and comparisons of actual and planned progress.</li></ul>
<b>Site Diaries</b>	<ul style="list-style-type: none"><li>Daily records on manpower, materials and plant delivered or removed, visitors to the site and purpose, weather conditions and delays or stoppages (including causes).</li><li>Instructions and drawings received and dates of receipt of information and approvals.</li><li>Site activities of the contractor, sub-contractors and any direct contractors.</li></ul>

### TYPICAL HEADS OF CLAIM

The potential heads of claim discussed below are not exhaustive but intended to serve as an aide-memoire for the Employer on the basic principles to be borne in mind when ascertaining the amount of loss and expense.

#### On-site overheads

Sometimes called extended preliminaries or prolongation costs, the item is generally accepted on evidence. Components of such preliminaries can be time-related or value-based and include items like site administration and management, security, health and

safety and protection, insurances, temporary works and utility services, temporary site accommodation and buildings, plant, tools and scaffolding.

As recovery of loss and expense is based on actual costs rather than the pricing assumptions made by the Contractor in his contract price, records must be provided to establish and secure contractual entitlements. When examining the Contractor's manpower records, it is essential to verify that the site staff are working exclusively on the project which is the subject of the claim and not 'helping out' with work or assigned part-time to unrelated tasks or on other projects.

### Off-site or head-office overheads

Whether or not a Contractor is entitled to head-office recovery depends on his ability to demonstrate that he has suffered a loss opportunity on other work which he would have carried out during the delay period, and therefore earned a contribution to head-office costs. The construction industry must be buoyant at that time, and that work is readily available. In a downturn period or where the workload of the Contractor is not heavy, such argument may be questionable. Further, if expenditure on additional time and resources by head-office staff to deal with the claim is to be recovered, the extra time on the particular project must be proven to be necessary because the problems were of such magnitude as to warrant it which would not be the case had there been no delay or disruption.

The use of formulae to ascertain a Contractor's entitlement should only be considered as a last resort where no evidence can be provided albeit some loss has been involved – but not as a short cut method to establish the claim. Even if the formula approach is to be applied, it must be supported by evidence. The three common formulae are the *Hudson* formula, *Emden* formula and the *Eichleay* formula<sup>4</sup>. However, their applicability, appropriateness and use as a fair quantification of the actual loss and expense incurred have been criticised by legal commentators and the Courts. As the judge said in *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd (1995) 76 BLR 65*, the formulae are 'dependent on various assumptions which are not always present and which, if not present, will not justify the use of a formula'.

### Loss of profit

Loss of profit is an allowable head of claim if the Contractor can prove that he was prevented from earning profit elsewhere or taking on alternative profitable work as a result of the circumstances giving rise to the claim. The loss of profit-earning capacity must be demonstrated – this is the difficulty faced by Contractors in advancing such claims. Establishing a successful claim for loss of profit is not a straightforward exercise where the Contractor can simply show the profit he has included in his tender.

Exceptionally high profit expected from another contract is not reimbursable unless the Employer had known about it at the time of contracting. Importantly, in considering a claim for loss of profit, it is not sufficient to include the amount even if it can be proven without taking into consideration possible double-recovery since this item may have been allowed under head-office overheads and/or under the normal valuation rules for variations.

The SIA Form expressly excludes any loss of profit on omitted work or on other business or contracts as a result of prolongation of the contract period from the decision-making and certification powers of the Architect. The Contractor has to pursue such recovery as general damages. Under the PSSCOC, by definition of the term 'loss and expense' in Clause 1.1(q), profit is one of the recoverable elements deemed to be included in the 15% mark-up on the direct costs of labour, plant, materials or goods and overheads incurred. In the REDAS D&B, there is no equivalent of the provisions found in the SIA Form or the PSSCOC dealing with loss of profit. Provided detailed particulars and substantiation are presented as evidence, loss of profit can fall as one of the heads of claims for additional payment under Clause 29.

### Plant

Plant standing idle at the site in a delay situation is an admissible head of claim. For hired-in plant, the sum paid to the plant company under the hire contract represents the loss actually incurred by the Contractor. Where there is prolonged delay and disruption, the Contractor is under a duty to mitigate the loss and to make reasonable endeavours to use the plant productively elsewhere or to terminate the plant hire contract and return the plant to the company earlier, whichever proves more economical. Where the plant is owned by the Contractor, the actual loss should be based on the detailed calculations, failing which a nominal amount limited to depreciation can only be considered.

### Loss of productivity

Loss of productivity means that existing labour and plant are standing idle or under-employed because of the delay and disruption.

---

<sup>4</sup> The *Hudson* formula is based on the allowance made by the Contractor for overheads and profit over the contract period which is expressed as a percentage of the contract sum and applied to the delay period. In the *Emden* formula, the quantum of overheads and profit is calculated from the overall overheads and profit extracted from the Contractor's annual turnover accounts while the *Eichleay* formula uses the shortfall in contribution to the total overheads for the whole company as a result of the delay in completing the project as a reflection of the loss and expense incurred.

## CLAIMS – THE KEY ESSENTIALS [ PART 2 ]

A Client Practice Note by Eugenie Lip, Director and Head of KPK Contracts Support Group

Actual expenditure under this head of claim, albeit allowable, is not easily established by Contractors. While Contractors can generally substantiate actual costs incurred, it would be difficult if not impossible to prove what the costs would be had there been no delay and disruption. This is made worse where there are concurrent causes of delay. However, a reasonable assessment has still to be made on the evidence particularised by the Contractor in support of his claim.

### Increased costs

Unless it is a fixed-price contract where the risk ownership of fluctuations lies with the Contractor, additional expenditure arising from increased costs on labour, materials and plant is an allowable head of claim.

The fluctuations clause in the SIA Form, REDAS D&B and the PSSCOC limits output price changes to specific materials only. Thus, when assessing claims for price increases other than for the specified materials, it is not the period of delay that should be looked at only but the difference between what the Contractor would spend (had there been no delay or disruption) and what was actually spent over the whole of the contract period, taking into consideration the delay and disruption.

### Financing charges

Claims for loss and expense invariably include financing charges on the capital borrowed and compensation for the loss of interest on deposits which could otherwise be earned. Assessment of financing charges for inclusion in a loss and expense claim is based on the rate applicable in general to the cost of borrowing or upon documentary evidence from the lending bank. Any special position of the Contractor in obtaining favourable or high rates is to be disregarded.

Under the PSSCOC, as in the case with loss of profit, financing charges are treated as one of the items covered by the 15% mark-up on the relevant direct costs.

### Costs of claim preparation

The cost of preparing a claim document is generally denied. The Contractor when preparing and submitting a claim is merely responding to the requirements of the contract which does not call for a voluminous and impressive document prepared by claims experts to be presented. It only requires the Contractor to comply with the notice and procedural requirements supported by evidential records.

Contract forms typically provide for the possibility of contractual claims and an experienced Contractor cannot avoid providing for this eventuality invariably as part of his overheads, and allow for the costs of preparation and settlement of claims in his tender.

## CONCLUSION

The principle of claiming damages is to put the aggrieved party in the same position – no better and no worse – it would have been in had there been no delay or disruption. Whilst this may be the basic tenet of a claim, a Contractor will not be allowed to recover more than he can prove. Claims must be based on detailed back-up evidence, not some commercial assumptions or broad assertions.

For the Employer, the moral here therefore is to record what happened, how, when and where it happened as soon as the event or circumstance arose so that an actual representation of the factual environment can be produced to counter and discredit any claim from the Contractor submitted without any proper contemporary documents and wanting in evidence and substantiation. A diligent record-keeping and document management policy is especially critical and cannot be overemphasised.

## CONTACTS



### Ms Eugenie Lip

Director  
Head of KPK Contracts Support Group  
Direct line: +65-6508 3317  
Email: eugenielip@kpkqs.com.sg



### Ms Lilin Quek

Associate Director  
KPK Contracts Support Group  
Direct line: +65-6305 3144  
Email: lilinquek@kpkqs.com.sg

Published by KPK Research. © All rights reserved.

Disclaimer: The information presented in this publication is intended as a general guide only and is current at the time of publication. Whilst every effort has been made to ensure accuracy, KPK shall not, in any way, accept liability for any loss resulting from its use.

KPK Research Pte Ltd undertakes research on a myriad of topics ranging from construction costs, procurement strategy to contract forms and conditions, hybrid procurement approaches, professional practice and contract administration essentials. Some of the research findings are reflected and consolidated in various publications, conference papers and published articles.

KPK GROUP: SINGAPORE | CHINA | INDIA | INDONESIA | MACAU | THAILAND | VIETNAM | UNITED ARAB EMIRATES | MALAYSIA (Kuala Lumpur Johor Bahru Pulau Pinang Sarawak Sabah)  
KPK website: [www.kpkqs.com](http://www.kpkqs.com)

Value-added Solutions through Quality, Integrity and Professionalism – this is our Vision to be the most preferred Quantity Surveyor of Choice!