

**CLIENT PRACTICE NOTE**

## **CLAIMS – THE KEY ESSENTIALS [ PART 1 ]**

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

### **INTRODUCTION**

*“It is possible to fail in many ways ... while to succeed is possible only in one way” – Aristotle*

‘Claims’ – a word which means different things to different people and can cause emotional flare-ups, strained relations, endless exchanges of correspondence and considerable resources.

Unsurprisingly, contract forms recognise and provide procedures to deal with claims by specifying the particular events upon which the adjustment to the completion time or additional payment can be sought, notices to be served and the evidential requirements so as to reduce them festering into disputes. 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) are no different. The word ‘claim’ or ‘claims’ appears almost 35 times in the SIA Form, about 70 times in the REDAS D&B and over 100 times in the PSSCOC, albeit mostly in the context of claims for monthly payments under the Building and Construction Industry Security of Payment Act (Cap. 30B).

It has been said that claims are unavoidable and as ubiquitous as the hard hat in any construction project. What causes them? Are they unavoidable? If claims are unavoidable, we should at least be in a position to deal with them effectively and expeditiously in a professional and disciplined manner.

This practice note, the first of a two-part article, discusses the types of claims, their origins and bases and the procedures for claims within the contractual environment as set out in the SIA Form, REDAS D&B and PSSCOC. The second part of this article will examine the documentary evidence required and the approach in ascertaining a claim for loss and expense.

### **TERMINOLOGY**

A claim has been defined as the assertion of a right to something. That ‘something’ in the context of a building contract can be an extension of the contract period or the time for completion and/or additional payment or compensation arising under the express or implied provisions of the contract. Claims are commonly linked to or take the form of notices or applications for an extension of time or loss and expense which are given in compliance with the procedural requirements in the contract and must be observed if they are characterised by the words ‘condition precedent’.

Claims must be distinguished from disputes and variations. When the Contractor makes a claim, he is simply putting forward a statement on his contractual entitlement and does not mean that a dispute has crystallised. However, if the claim is not accepted or there is failure to reach consensus on the entitlement, it may become a dispute.

Variations or scope changes are necessary to respond to unforeseen circumstances, new or revised requirements, changes in quantity, quality and character or compliance with amended or the latest regulations, bye-laws or legislation. Variations can manifest into claims when the Contractor believes he has a contractual entitlement to an extension of time and/or additional payment which he could not be sufficiently compensated under the contractual machinery for valuing variations.

### CATEGORIES OF CLAIMS

#### Contractual claims

These are claims arising under the express provisions of the contract and the precise wording of the respective clauses governs the protocol for such claims. For example, in the SIA Form, Clause 23 sets out the delaying events and the procedure and time limits for notices and assessment of the amount of extension of time. Claims for extension of time and additional payment under REDAS D&B are respectively dealt with in Clauses 16, 17 and 18 and Clause 29. In PSSCOC, time extension claims and claims for loss and expense can be found in Clause 14 and Clauses 22 and 23 respectively.

#### Common law claims

Sometimes called 'ex contractual' or 'extra contractual' claims, they arise outside the express provisions of the contract. Common law claims are claims for breach of contract at common law or some other aspect of the law, for example in tort or breach of copyright.

#### Quantum meruit claims

The expression *quantum meruit* means 'what one has earned' or 'amount he deserves'. A *quantum meruit* claim arises when work has been carried out but no price has been agreed either in the contract or due to failed negotiations and an agreement was not reached.

In *British Steel Corporation v Cleveland Bridge & Engineering Co Ltd* (1983) 24 BLR 94, the plaintiff sub-contractor succeeded in their *quantum meruit* claim for work done on a letter of intent. No contract existed between the parties although some £230,000 worth of work had been carried out.

#### Ex gratia claims

These claims are those which the Contractor has no legal entitlement but made on hardship grounds. They are sometimes called 'sympathetic' claims. Such claims are put forward by a Contractor as a last resort when he has suffered a significant loss through no fault of the Employer. Ex gratia claims are seldom met by the Employer unless some benefit or advantage accrues for him to accede to payment.

A case in point was the sharp surge in the price of sand in 2007 consequent on the export ban by Indonesia which caught many by surprise. With most projects being fixed-price contracts where the risk ownership of fluctuations in the prices of materials lies with the Contractor who assumes full responsibility for all input price changes and for inflation, developers were encouraged to accept an ex gratia cost-sharing regime with contractors to alleviate the burden in the increase of the price of sand.

### WHAT DO THE CONTRACT FORMS SAY?

Most contract forms set out the procedural requirements for the notices to be given, specific time limits to make a claim and the evidential records to substantiate it.

#### SIA Form

In respect of breach of contract by the Employer, the Contractor has two possible heads of claim – a claim for extension of time and a claim for damages or loss and expense.

Decisions on time claims fall within the power of the Architect under Clause 23 and in particular, Clause 23.(1)(p) where the Contractor can apply for an extension of time as a result of '*any act of prevention or breach of contract by the Employer*'.

With regard to claims for loss and expense suffered by the Contractor including any loss of profit on other business or contracts from breach of contract by the Employer, in the absence of any express provision, the Architect has no power to decide or certify through the contractual process as provided under Clause 31.(14). The Contractor has to pursue an action for general damages under common law. Examples of 'breach of contract' by the Employer under Clause 31.(14) are for illustrative purposes and should not be read as exhaustive as to what acts or omissions amounts to breach of contract and can be construed to include the breach of any provision in the contract by the Employer. The rationale behind the limitation on the Architect's powers can be gleaned from the Guidance Notes on the SIA Form where the draftsman of the contract form articulated that it was not '*thought desirable to make the Architect judge, even temporarily, in what will usually be his own cause*'<sup>1</sup>. Under such circumstances, it would not be appropriate for the Architect to decide or certify any such claims.

<sup>1</sup> I. N. Duncan Wallace, *Construction Contracts: Principles and Policies in Tort and Contract*, First Edition (1986).

## REDAS Design and Build Form

The grounds upon which the Contractor can apply for an extension of time are set out in Clause 16.1. Procedural requirements on the condition precedent notice, whether the delaying event notified qualifies for an extension of time and the decision-making on the amount of time within a reasonable time from the receipt of sufficient information must be observed.

Claims for additional payment are dealt with under Clause 29. It requires the Contractor to notify the Employer's Representative of his intention to make a claim for additional payment within 28 days after the happening of the event justifying the claim to be made. Detailed particulars of the amount claimed and the grounds for the claim must be provided within 28 days from the notice of intention.

The scope of events or matters entitling the Contractor to make a claim for additional payment (usually loss and expense) is not particularised – in contrast to the PSSCOC. Hence, so long as the Contractor considers he is entitled to additional payment, he must observe the contractual mechanism set out in Clause 29 by keeping contemporary records and providing sufficient substantiation of his claim. If he fails to do so, the Employer's Representative must make such assessment based on whatever information available to him.

## PSSCOC Form

The Contractor is entitled to an extension of time for completion based on the relevant events described in Clauses 14.2(a) to (q). A mandatory condition precedent notice must be given within the 60-day time limit, failing which the Contractor's entitlement to a time extension would be lost or becomes time-barred.

Clauses 22 and 23 set out the contractual mechanism which the Contractor must comply if he intends to make a claim for loss and expense (a term defined in Clause 1.1(q) to mean the direct costs of labour, plant, materials or goods and overheads incurred plus 15% of such costs to cover profits, head office overheads, financing charges and any other costs, loss or expense).

The notice of intention must be made within 60 days after the event giving rise to the claim. It has to specify the reasons relied upon as listed in Clause 22.1 which cause progress and/or completion of the works to be disrupted, prolonged or materially affected and that he has incurred loss and expense and would not be reimbursed under any other provision of the contract (to prevent double payment by the Employer). The expression 'materially affected' means trivial delays and disruptions must be absorbed by the Contractor and only circumstances which substantially affect progress and/or completion of the works are recognised.

If the Contractor fails to keep contemporary records in support of his claim for payment or substantiate it by way of detailed particulars or does not permit access to his books, documents and the like records for auditing and examination purposes of the amount claimed and the grounds for the claim, the Superintending Officer must make such assessment, valuation or opinion based on the information before him.

A snapshot of the contractual environment is illustrated in Figure 1.

	SIA Form		REDAS D&B		PSSCOC	
	Time Claim	L&E	Time Claim	L&E	Time Claim	L&E
Relevant events	<ul style="list-style-type: none"> <li>Clause 23.(1)</li> </ul>	<ul style="list-style-type: none"> <li>Architect has no power to decide or certify claims for breach of contract by Employer</li> <li>Contractor pursues action for general damages under common law</li> </ul>	<ul style="list-style-type: none"> <li>Clause 16.1</li> </ul>	<ul style="list-style-type: none"> <li>Clause 29.1, but events are not listed</li> </ul>	<ul style="list-style-type: none"> <li>Clause 14.2</li> </ul>	<ul style="list-style-type: none"> <li>Clause 22.1</li> </ul>
Condition precedent notice	<ul style="list-style-type: none"> <li>Within 28 days</li> </ul>		<ul style="list-style-type: none"> <li>Within 28 days</li> </ul>	<ul style="list-style-type: none"> <li>Within 28 days, but notice is not condition precedent</li> </ul>	<ul style="list-style-type: none"> <li>Within 60 days</li> </ul>	<ul style="list-style-type: none"> <li>Within 60 days</li> </ul>
Decision-making	<ul style="list-style-type: none"> <li>Anytime up to and including Final Certificate issuance</li> </ul>		<ul style="list-style-type: none"> <li>Within reasonable time</li> </ul>	<ul style="list-style-type: none"> <li>E Rep assesses and certifies entitlement subject to compliance with notice and procedural requirements</li> </ul>	<ul style="list-style-type: none"> <li>Within reasonable time</li> </ul>	<ul style="list-style-type: none"> <li>SO assesses and certifies entitlement subject to compliance with notice and procedural requirements</li> </ul>

Figure 1

L&E: Loss and expense; E Rep: Employer's Representative; SO: Superintending Officer

## CLAIMS – THEIR ORIGINS AND BASES

Contractual claims must originate from particular clauses in the contract. It must be noted that a grant or refusal of extension of time does not necessarily entitle the Contractor to a claim for loss and expense – it is not a condition precedent. Neither is it necessary for the contract period to be extended before the Contractor can make a claim for loss and expense.

The apparent confusion arises because in some contract forms, the grounds for loss and expense echo those which the Contractor is entitled to a grant of extension of time. The fact that regular progress or completion of the works has been disrupted, prolonged and/or materially affected is what forms the basis of the Contractor's entitlement.

Taking the PSSCOC (as there is no equivalent provision in the SIA Form on claims for loss and expense as the Architect has no power to decide or certify under the contract and in the absence of any listing of the grounds for claiming additional payment under the REDAS D&B), the table below sets out the relevant events and matters under Clauses 14.2 and 22.1 which entitle the Contractor to time and loss and expense claims respectively.

Relevant Events and Matters	Clause 14.2 [ Time Claims ]		Clause 22.1 [ Loss and Expense Claims ]	
	Yes	No	Yes	No
Force majeure	✓	-	-	✓
Exceptionally adverse weather conditions	✓	-	-	✓
Industrial action, etc	✓	-	-	✓
Excepted risks	✓	-	✓	-
Compliance with requirements of law, etc or public authority	✓	-	-	✓
Fire, storm, lightning, etc	✓	-	-	✓
Testing and uncovering and making openings for inspection	✓	-	✓	-
Variation instructions	✓	-	✓	-
Provisional sum item instructions	✓	-	✓	-
Failure to give possession	✓	-	✓	-
Suspension of work	✓	-	✓	-
Late drawings, instructions and information	✓	-	✓	-
Acts or omissions of other contractors engaged by Employer	✓	-	✓	-
Act of prevention or breach of contract by Employer	✓	-	✓	-
Search for cause of defect	✓	-	✓	-
Adverse physical conditions	✓	-	✓	-
Any other ground mentioned elsewhere in the contract	✓	-	✓	-

## CONCLUSION

Claims are simple to originate – but not always easy to substantiate. When a Contractor struggles to complete work against a backcloth of continuously changing constraints on his time programme and sequence of activities, and incurs overhead costs far in excess of what he can accommodate and has assumed within his tender price, the need to claim (or defend against counterclaims) becomes the norm rather than the exception.

It is therefore essential that any grant of an extension of time or payment of loss and expense must be carefully and responsibly assessed by the contract administrator within the contractual framework based on facts which can be substantiated so that in the final reckoning, the Employer pays no more in time and cost, and the Contractor recovers no less.

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