

PRACTICE NOTES FOR QUANTITY SURVEYORS

Contractual Claims

Preface

A Working Committee with representatives of the Hong Kong Institute of Surveyors, the Association of Consultant Quantity Surveyors and the Hong Kong Construction Association was set up in October 2010 to establish a set of Practice Notes for the benefit of Quantity Surveying professionals in Hong Kong.

The Practice Notes are not intended to promulgate a standard of practice, but rather to produce some basic guidelines for the following core practices :

1. Tendering
2. Cost Control and Financial Statements
3. Valuation for Interim Payment Certificates
4. Valuation of Variations
5. Handling of Contractual Claims
6. Settlement of Final Account

As different client organisations will have their own procedures and requirements, the Practice Notes, which are prepared mainly for private sector projects using the HKIA/HKIS Standard Forms of Building Contract, should be adapted as appropriate.

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Contractual Claims

1. General

These practice notes are merely an outline of the more common approach to assess claims to assist the Quantity Surveyor's line of thought in tackling a claim. The facts of a claim vary widely and its details must be studied and reviewed on a case by case basis.

A clear distinction should be drawn between "direct loss and/or expense" or "costs" ("loss/expense") recoverable in accordance with the provisions of a contract and "damages" recoverable at common law. Whilst the principle of claims assessment for both categories of claims overlap to some extent, these practice notes refer to claims recoverable under the contract provisions. Common law claims which involve legal arguments shall be referred to the Client's solicitor for handling.

These practice notes generally refer to the wording in the HKIA/HKIS Standard Form of Contract. However they can also be regarded as general principles applicable to most common forms of contract. Reference should be made to the specific clauses of the contract being used in order to approach a claim correctly.

Forms of contract in common use in Hong Kong include some provisions for an extension of the time for completion of the Works and reimbursing the Contractor for Loss/Expense, which the Contractor would not otherwise have incurred and which are the result of the relevant events specified in the conditions of contract.

Such relevant events usually arise because:-

- (a) something unexpected has been revealed during the course of construction;

- (b) the right action has not been taken by the right person at the right time;
- (c) the Architect, or the Employer, has varied the works, or
- (d) discrepancies have been discovered in or between the contract documents.

A fundamental principle of any claim for an extension of time and Loss/Expense by a Contractor is that the following should be established:

- (a) Identify the event leading to the claim;
- (b) Understand the facts of the event and verify them with the Architect/Engineer;
- (c) What would have happened had the relevant event not occurred, i.e. whether the event has had an effect on the work progress and is a critical delay event;
- (d) Whether the Contractor has complied with the provisions concerning notices and submission of particulars and whether such provisions are conditions precedent to the Contractor's entitlement to claims;
- (e) Whether the Contractor has proved the quantum of the extension of time and Loss/Expense.

It is important that claims should be notified to the Client as soon as the matters arise such that the Client has the option to take necessary actions to minimise any time and cost effects.

2. Extension of Time

Claims for extensions to the contract time are considered and decided by the Architect. However, it is not uncommon for the Architect to request the Quantity Surveyor to advise on the contractual validity of the claims.

Unless the contract provides otherwise, the following principles should be observed :

- (a) The Contractor should "upon it becoming apparent that the progress of the Works is delayed" give written notice of the cause of delay to the Architect. Unless otherwise stated to the contrary, failure to give notice within a reasonable time should not invalidate a claim. However, untimely notification would have implications on the Architect's reasoning when considering a claim (e.g. when the Architect considers that had a notice been given, he would have acted otherwise to avoid the delay).
- (b) The event delayed must be "critical" (i.e. the activity in question must lie on the project's critical path). Whether an event in issue is critical is to be decided by the Architect. Delay to non-critical events would not entitle the Contractor to an extension of time.
- (c) Whether an event caused a delay or not should be decided by reference to the actual progress on Site, not to the original programme at commencement of work e.g. if a Contractor was already late on the structural works (due to his own fault), a "late" instruction to change the finishes detail might not be considered late if works on such trade had not yet been commenced.

It should be noted that the issue of concurrent delay is always in debate and the case laws on concurrent delay vary from time to time. Legal advice on complicated concurrent delay issues should be obtained.

- (d) Whether or not a Contractor is entitled to an extension of time is to be decided by the Architect. The Quantity Surveyor should only provide comments on contractual matters for consideration if requested by the Architect to do so.

3. Loss/Expense Claims

There are two basic claims situations – “prolongation” and “disruption”.

A typical example of a disruption claim would be where a delay has been caused to a project activity and which may or may not affect the overall contract completion date depending on its criticality. Where a delay event does not fall on the critical path, it should not attract an extension of time award. Whilst the loss/expense associated with such disruption is allowable under most contract types, it is usually difficult for a Contractor to isolate and prove said costs. Such claims should, therefore, be treated with caution by the Quantity Surveyor.

Prolongation claims are generally thought of as the costs associated with an extension of time as granted by the Architect or contract administrator. However, taking clause 27 of the HKIS Conditions (2005 Edition) as an example, there are events (commonly known as neutral events) for which the Contractor may be entitled to an extension of time, but not prolongation costs, such as the following:

- force majeure;
- inclement weather;
- the Excepted Risks

As a general rule the Employer will only be liable for loss/expense incurred by the Contractor which is caused by acts for which the Employer or his agents are responsible. Also, the recoverable costs incurred must be “direct” (ie. not consequential).

(a) Heads of Claim

Claims for loss/expense normally fall under the following headings:

- (i) Additional expenses that can be easily identified and substantiated.
- (ii) Increased Preliminaries due to prolongation of the Contract period.
- (iii) Disruption claims.
- (iv) Non-recoverable fluctuations.
- (v) Head office overheads and profit.
- (vi) Finance charges

(b) Additional Expenses

All such expenses should be checked separately to ensure that they do not over-lap expenses claimed under other headings e.g. extra plant hire time that might be covered under for a prolonged contract period.

An addition in the range of 15% of the net cost as overheads and profit is widely adopted as the market norm for sake of convenience. That assumption, however, may be subject to challenge if it has not been adequately substantiated.

(c) Increased Preliminaries

Contractually speaking, increased Preliminaries should be the actual increase and might or might not relate to the priced Preliminaries in the Bills of Quantities, which may have been priced high or low due to pricing tactics.

The stage of the works when the delay occurred should also be considered, e.g. if the delay occurred right at the beginning of the Contract before any major work trade is involved, it can be assumed that the full management team had not yet been deployed and the monthly site overheads would be substantially less than average.

(d) Disruption

“Disruption” normally relates to a delay to the regular progress of the works or any part thereof, claims for which could include:-

- Loss of productivity in work;
- Standing time or idling of labour/plant resources;
- Overtime working (labour/plant);
- Abortive works or materials.

The above list is not exhaustive and there may be other events that fall under the heading of disruption claims.

The Contractor should provide substantiation to prove its entitlement and the method of assessment is normally to compare productivity of undisrupted activity with that of the disrupted activity, where they are similar in nature.

Any assessment of disruption should be verified with the Architect/Engineer as to the facts and the actual effects on the progress.

(e) Non-recoverable Inflation

Inflation resulting from admissible causes of loss/expense and related to items which the Contractor had not managed to secure a fixed price, should be allowed if such falls outside the scope of the Contract Fluctuations Clause, where applicable.

(f) Head-Office Overheads and Profit

Loss/expense under this particular heading is not usually sufficiently "direct" to be acceptable without specific proof and agreement. No extra is payable if it is an indirect cost e.g. possible loss of new contracts. There are a number of formulae which are available in the industry which, subject to reasonable proof of loss, may be considered as acceptable assessment methods for use in calculating head office overheads and profit (e.g. Hudson's, Emden, Eichleay etc.). However, the formula must be used with extra caution as their applicability is subject to certain conditions being satisfied.

In any event, the onus of proof and substantiation rests with the Contractor.

(g) Finance Charges

The question of finance charges is very complicated and is dependent on legal interpretation. Claims under this category must be handled with utmost care. The following should be considered when dealing with such claims :

- (i) Interest rates should be calculated at actual and realistic rates.
- (ii) Interest on alleged under-certification would only be allowed if the under-certification is a result of gross error or negligence.

- (iii) Finance charges in order to finance the project in terms of larger contract values (due to loss/expense) and contract prolongation might be allowable if the Contractor eventually succeeds in his claim for loss/expense or contract prolongation and such interest is not already covered elsewhere.
- (iv) The claimed interest shall be subject to proof of the actual costs incurred.

4. **Ascertainment and Payment**

The task of ascertaining the amount of a Contractor's loss/expense normally rests with the Architect unless he specifically instructs the Quantity Surveyor in writing to do this on his behalf.

Any amounts of a Contractor's loss/expense, which are ascertained from time to time, may be included in any interim certificate that is issued after the date of such ascertainment and it should be noted that payment of any ascertained amounts for claims shall not be subject to retention. Early ascertainment (and certification by the Architect) has the effect of reducing the amount of any finance charges that may be payable by the Employer. The payment of any amounts that have not been "ascertained", when considered necessary in order to achieve a settlement, should only be made if authorised by the Employer.

Claims are sensitive issues and it is advisable to keep the Architect/Employer notified of every step in the claim assessment and negotiation process and to obtain the Architect/Employer's acknowledgement before agreeing with the Contractor.



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