Prolongation and Loss and Expense Claims

For the

Hong Kong Institute of Surveyors

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- Prolongation cost
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Introduction

- In common practice an extension of time is usually awarded before a prolongation or a loss and expense, claim is submitted (terms are interchangeable);

- The intention of the contract is to allow the Contractor to recover monetary compensation if there is a compensable delay that prevents the Contractor completing the contract work;

- Generally express or implied in most construction contracts:
  - The client or its representatives shall not hinder or prevent the Contractor from performing his contract obligations;
  - Acts by a client (e.g. instruction, variation order, open-up inspection, etc.) which cause delay to a contract may cause prolonged maintenance of resources by the contractor;
Introduction (cont’d)

- Therefore prolongation or loss and expense can be simply described as

“The reimbursement of costs (or rates) which are incurred as a result of delayed work activities. This generally relates to time related costs, such as supervisory staff and the associated support to maintain that supervision”.
Introduction (cont’d)

- Prolongation is found in most construction contracts, which describe it as a reimbursement to which the Contractor is entitled under the provisions of the Contract in respect of prolongation and/or delay;

- Prolongation cost is not a disruption cost;

- Prolongation costs consist of the costs of on-site overheads and off-site overheads – time related cost;
The Contract Price Structure

- Direct Labour: 70%
- Direct Plant: 40%
- Materials: 60%
- O/H, Profit Risk: 30%
- General Items, Prelims: 35%
- Supervisory Staff: 65%
Prolongation Cost

- Check the terms of the Contract (what and how);

- So what is exactly a prolongation cost?
  - Prolongation cost is generally the time (& not fixed) related cost;
  - Time related costs normally represent the costs of the Contractor's site establishment, site overheads, general plant, etc. that are typically affected by a delay to the critical path of the construction work;

- So when can we claim prolongation cost?
  - The entitlement to prolongation costs incurred as consequence of the delay greatly depends on the contract (variations and neutral events etc).
Prolongation Cost (cont’d)

- To put it into a simple case study:

  *Party (A) suffers a loss which he is entitled to compensation from party (B) causing the 'injury' (for example a delay), the damages are to put (A) back into the position he was nominally in before the event.*

  - The prolongation costs shall be the costs that are actually incurred at the time the delaying events impacted the progress of the Works, instead of the period of extension;

  - What must be priced is the effect of the delay, and it boils down to a clear analysis of the effects of the delay to ascertain the additional supervisory resources which are linked to the delayed events.
Prolongation Cost (cont’d)

■ The SCL protocol says, with regards to this matter:

“the recoverable prolongation compensation is to be assessed by reference to the period in which the effect of the Employer Event Risk was felt”

■ It is clearly intended that, once it is established that additional payment is due for prolongation resulting from Client’s delays, the evaluation should relate to the period when the effect of the delay occurs and not to the overrun period at the end of the contract.
Prolongation Cost Summary

- What should surveyors look for:
  - Check the contract;
  - Be clear on the body of cost you are valuing;
  - Be clear on what you are considering (prelims and resources affected by the events, that are time related);
  - Value the actual period of delay (not the overrun period);
  - Be guided by a general principle of reimbursement as a result of an event or “but for”.
How to analyse such a claim

Before the prolongation analysis is being considered, the maintenance of adequate records is an essential ingredient for supporting the prolongation claim;

Some of the essential records that are required:
- Programme (initial plan working sequence and the subsequent changes due to the delaying event);
- Records of resources (dual if possible);
- Labour & Plant Schedules;
- Subcontract daily allocations;
- Site diary;
- Records to show any additional supervision mobilisation.
How to analyse such a claim (cont’d)

The Contract

- FIDIC (1999 Edition)
- Time
  - Extension of Time (GCC 8.4)
    “The Contractor shall be entitled to an EoT if and to the extent that completion…is or will be delayed”
- Money
  - Variations (GCC 12 and 13)
  - Claims (GCC 20.1)
    - Refers back to the body of the Contract
How to analyse such a claim (cont’d)

The Contract

– Hong Kong Standard Form (Private Edition With Quantities – 2005)
– Time
  • Extension of Time (GCC 25)
    • “…an event likely to cause delay to the completion of the Works…”
    • “Fixing new completion “is being or is likely to be delayed…”
– Money
  • Direct loss and/or expense (GCC27)
    • GCC 27.1 “If in the Contractor’s opinion, he has incurred or likely to incur direct loss and/or expense…”
    • GCC 27.2 “Quantity Surveyor to ascertain the amount of any direct loss/and expense…”
How to analyse such a claim (cont’d)
How to analyse such a claim (cont’d)

- Identify & categorise the delaying event:
  - Compensable delay – events that entitle the contractor to an extension of time and to prolongation costs flowing from that event;
  - Excusable delay – events that entitle the contractor to an extension of time but where the contractor bears the risk of additional costs that may flow from that event; and
  - Culpable delay – events that do not entitle the contractor to either time or money
How to analyse such a claim

Three problems that concern our clients; how to …

1. Apportion and demonstrate responsibility for disturbance;
2. and link money with time;
3. and maximise certainty of outcome at proportionate cost.
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**Issues to consider (cont’d)**

- **Linked Time Related Costs**
- **Site Records**
- **Audited Cost Data**
- **Variations (Overheads)**

**ISSUE**

Delay 2 and relationship with Delay 3

- **CONCURRENCY**
- **DOMINANT CAUSE**
- **PROXIMATE CAUSE**
- **APPORTIONMENT**

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**EC HARRIS**

**BUILT ASSET CONSULTANCY**

**SITE WIDE STAFF**

**ACTIVITY RELATED STAFF**

**SUPPORT AND WELFARE**

Mike Allen | 13th February 2012 | 17

**CONTRACT Solutions**
Summary

Before valuing the reimbursable cost, how do we determine the level of recovery?

- The level of recovery of damages for breach of contract is intended, so far as is possible, to put the Contractor in the same position he would have been if he had not sustained the delay for which he is now seeking compensation;

- When a claim is made under the contract, the specific entitlement that the parties have agreed needs to considered in order to establish the level of costs to which the Contractor will be entitled if he can prove his losses (cost or rates);
Summary (cont’d)

What needs to be extracted when preparing a prolongation claim?

- Identify costs which are recurring and can be identified as being related to ongoing activities or commitments which are, or have been, prolonged as a consequence of the delaying event;
- What are recurring Site Costs? – site staff, site offices, maintenance of site office, utilities, equipment, plants, insurance, etc;
- Some quarterly/annual costs sensibly should be averaged;
- Contractor’s own & hired plant needs careful consideration;
- Head office overhead claims (typically formula calculated);
- Overhead duplication reviews (Variations).
How to present a Prolongation claim

General considerations

- What the contract says;
- Objective and audience;
- Use graphics to assist the explanation;
- Type of disturbance;
- Forum for debate;
- Information available;
- Timing – before or after completion;
- Proportionality;
- Clear, simple and substantiated.
Further suggested reading

- Prolongation claims and issues related thereto:
  - Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [1999] 70 Con LR 32
  - Royal Brompton Hospital NHS Trust v Hammond and Ors (No.7) [2001] 76 ConLR 148
  - Laing Management (Scotland) Ltd v John Doyle Construction Ltd [2004] BLR 295
  - City Inn v Shepherd Construction Ltd [2007] CSOH 190
Thank you