

Ascertaining Loss and/or Expense Claim

Some Practical Tips

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Topics to be discussed

1. **Ascertaining Loss/Expense claim, contemporary records to be kept and Personal Data Privacy protection**
2. **Would an accidental arithmetical error in the ascertained Loss/Expense claim become final and binding? If yes, when?**
3. **QS's liability for such error.**

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1.1 Ascertaining Loss/Expense claim – Contractual Basis

- Express terms of various Standard Form of Contracts forms confer on the Contractor contractual entitlement to additional payment for "direct loss and/or expense" or "costs" incurred due to delay or disruption to the progress of the Works caused by certain events
 - Standard Form of Building Contract (2005) published by the HKIA, HKICM and HKIS (Private Sector)
 - HKSAR Government GCC for Building Works
 - HK Housing Authority GCC for Building Works (2013)

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1.1 Ascertaining Loss/Expense claim - Contractual Basis

Clause 27.2 of the HKIA/HKICM/HKIS Form 2005 states that:

- (1) Upon receipt of the Contractor's claim under clause 27, the Architect shall instruct the Q.S. to ascertain the amount of any additional payment for direct loss and/or expense incurred by the Contractor if the Architect is satisfied that:
- Direct loss/expense was incurred due to delay/disruption to progress of the Works caused by one of the qualifying events;
 - Not be reimbursed by a payment under any other provisions; and
 - The Contractor complied with clause 28 (Notice of Claims) (Note: this requirement is new compared with 1999 edition)

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1.1 Ascertaining Loss/Expense claim - Contractual Basis

Clause 63 of the Government Form provides that:

" If upon written application by the C to the S, the S is of the opinion that the Contractor has been or is likely to be involved in expenditure for which the C would not be reimbursed by a payment made under any other provision of the Contract by reason of the progress of the Works or any part thereof having been materially by [certain specified events]...

then the S shall ascertain the Cost incurred and shall certify in accordance with Clause 79."

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1.1 Ascertaining Loss/Expense claim - Contractual Basis

HK Housing Authority GCC :-

- Clauses 11.5(1)(b)(i) and (c)(iii) provides that the CM upon receipt of the C's notice of claim shall instruct the S to ascertain the expenditure to be incurred or likely to be incurred by the C for which C would not be reimbursed by a payment made under any other provision in the Contract [if he decides C has incurred such expenditure].
- By Clause 11.5(3), the S may require the C to submit further information reasonably require for the purpose of his ascertainment of the Cost.
- By Clause 11.5(4), if the A instructs or S is of the opinion that the C is entitled to additional payment, the S shall ascertain the Cost with 60 days after receipt of the information submitted by the C

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1.1 Ascertaining Loss/Expense claim - Definition

- "Ascertain" – literally it means to "find out or learn for a certainty".
- Meaning of "direct loss and/or expense" is defined in Clause 1 – Interpretation and definitions of the HKIA/HKICM/HKIS 2005 Form.

"The monetary consequences that flow naturally without other intervening cause and independently of special circumstances because of the direct consequences of a qualifying event and which are not otherwise reimbursed to the Contractor."

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1.1 Ascertaining Loss/Expense claim - Definition

- As defined in the definition clause of the Government GCC, "Cost" means
 "expenditure reasonably incurred including overheads whether on or off the Site and depreciation in value of Constructional Plant owned by the Contractor but excluding profit."
- Thus, it appears that the "loss/expense" claim as defined in the private building form has a wider scope of compensation than those in the Government form as it does not exclude expressly "profit"

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1.1 Ascertaining Loss/Expense claim - Definition

Definition from Textbook (Construction Law and Practice in Hong Kong, 3rd Edition, Teresa Cheng SC & Gary Soo, Sweet & Maxwell)

- The dual phrase "loss and expense" give two separate heads of claims. Loss may arise where the main contractor will not recover what he or she could have expected to recover as a result of disruption (disturbance of regular progress), e.g. variation or late possession of site.
- Expense will be involved when the main contractor has had to increase his expenditure on an item of work to produce the same result, also as a direct result of disruption.
- The word 'direct' is used in order to make it clear that such claims are directly related to the cause, and are not incidental losses or expenses.

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1.1 Ascertaining Loss/Expense Claim - Types

In practice, it is commonly divided to two heads: Disruption Claim and Prolongation Claim

Disruption claim

- Change in sequence and pattern of works; additional or variation works.
- the smooth running or normal progress of the Works is hindered / interrupted.
- Disruption may or may not extend the overall completion date (i.e. affecting those works which may or may not be falling on the critical path).
- There may be subsidiary prolongation of a non-critical activity without extension of the overall programme.
- Examples : labour or material costs inflation, loss productivity, idling of construction plant & equipment etc.

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1.1 Ascertaining Loss/Expense Claim

Prolongation claim

- Normal progress of the Works on the critical path is hindered by qualifying events and thus the time for completion is inevitably extended.
- Examples: time-related costs such as site overheads, site running costs (additional site expenditure to be incurred in the extended contract period), extended head office overheads, loss of interest due to late received of retention money & financial charges etc).

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1.1 Ascertaining Loss/Expense Claim – Common Heads

Common Heads of Loss and/or Expense Claim

1. Head office overheads;
2. Site overheads and running cost;
3. Extended Preliminaries;
4. Additional insurance cost (CAR + EC insurance policies);
5. Additional financing cost;
6. Loss of opportunity cost (profit);
7. Extra depreciation for plant & equipment;
8. Sub-Contractor's claims;
9. Loss of productivity, idling of labour, plant and equipment etc.

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1.2 Ascertaining Loss/Expense Claim – Records to be kept

- Clause 28.2 requires the Contractor to keep such records as may be reasonably be necessary to support the claim. The burden of proof squarely rests on the Contractor to prove its claim.
- In addition to the contractor's daily reports which will conventionally be kept by almost all contractors, specific contemporary records should also be maintained for disruption claim such as labour or plant idling, loss and productivity & etc.

Head office overheads

- Modified Emden's formula (i.e. actual head office overheads % x contract sum x period of delay ÷ contract period) has received judicial endorsement in Northwest Holst Construction Ltd v Co-operative Wholesale Society [1997] EWHC Technology 356 [see para 177]

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1.3 Ascertaining Loss/Expense Claim – Head Office Overheads

- "The arbitrator accepted that the "time-slice" method of assessment was the appropriate method to adopt. This involved a finding that certain periods of delay were caused by the relevant event or specific cause of delay. He also found that Head Office costs were expended. There had also been an under-recovery of income to pay for Head Office overheads in the relevant financial year. This was because an additional contribution towards general Head Office expenditure in the relevant financial year would have been obtained by CWS, but was not obtained, had its' personnel been able to devote their time to other contracting activities in the relevant over-run periods. The additional expenditure and under-recovery that he found had occurred was a sum which was about 20%, or one-fifth, of that produced by Emden's formula. The formula method of calculation was one adopted by NHC in its' main contract claim and was one sanctioned by reported decisions cited to the arbitrator in argument."

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1.3 Ascertaining Loss/Expense Claim – Head Office Overheads

- The comment given by the learned authors of Keating on Construction Contracts' in para 8-051 of the 8th Edition is a very useful and practical guideline:
- "[It] is suggested that, in order to succeed, a contractor has in principle to prove that there was other work available which, but for the delay, he would have secured but which in fact because of the delay he did not secure. He might do this by producing invitations to tender which he declined with evidence that the reason for declining was that the delay in question left him insufficient capacity to undertake other work. He might alternatively show from his accounts a drop in turnover and establish that this resulted from the particular delay rather than from extraneous causes. If loss of turnover resulting from delay is not established, the effect of the delay is only that receipt of the money is delayed. It is not lost."

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1.4 Ascertaining Loss/Expense Claim – Site Office Overheads

- Due to the prolongation of the project caused by the qualifying delays, the Contractor was required to retain its key managerial and supervisory staff and key resources on site. Certain project-assigned staff allocated specifically to the project are unable to be deployed on productive work elsewhere and need to be retained until the completion of the Works.
- The site staff cost should include:
 - 1.) basic salary, bonus, rent allowance & etc;
 - 2.) overtime payments;
 - 3.) MPF contributions;
 - 4.) Holidays with pay;
 - 5.) travelling expenses; and
 - 6.) allowance for provisions of vehicle, mobile phone etc.
- These particulars of site staff costs cause concerns as to whether disclosure of these information would contravene to the personal data privacy law.

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1.5 Personal Data (Privacy) Ordinance, Cap. 486

- This Ordinance has come into force since 20 December 1996
- Its purpose is to protect the privacy of individuals in relation to personal data, and to provide for matters incidental thereto or connected therewith.
- According to section 2 of the Ordinance, 'personal data' means any data –
 - (a) relating directly or indirectly to a living individual;
 - (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
 - (c) in a form in which access to processing of the data is practicable.

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1.5 Personal Data (Privacy) Ordinance, Cap. 486

- 'Data' means "any representation of information (including an expression of opinion) in any document, and includes a personal identifier".
- Section 4 (Data Protection principles) provides that:

"A data user shall not do an act, or engage in a practice, that contravenes a data protection principle unless the act or practice, as the case may be, is required or permitted under this Ordinance."
- What these Data Protection principles are?

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1.5 Personal Data (Privacy) Ordinance, Cap. 486

The data protection principles are set out in Schedule 1 of the Ordinance, namely:

- Principle 1 - purpose and manner of collection of personal data.
- Principle 2 - accuracy and duration of retention of personal data
- Principle 3 - use of personal data
- Principle 4 - security of personal data
- Principle 5 - information to be generally available
- Principle 6 - access to personal data

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1.5 Personal Data (Privacy) Ordinance, Cap. 486

Principle 3 - use of personal data

In a nutshell, this principle prohibit a data user to use the personal data, without the prescribed consent of the data subject, for a new purpose.

- 'new purpose' means any purpose other than
 - (a) the purpose for which the data was to be used at the time of the collection of the data; or
 - (b) a purpose directly related to the purpose referred to in paragraph (a)
- The definition of 'use' includes the transfer and disclosure of personal data

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1.5 Personal Data (Privacy) Ordinance, Cap. 486

- These principles restrict data users in their collection, processing and use of personal data and confer on the data subject the right to access and correct such data.
- The overall effect of these data protection principles is to confer on the individual a degree of control over personal data relating to him.
- A consequence of this statutory assertion of control by the individual over his data is that the data user becomes accountable for their accuracy and use.

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1.5 Personal Data (Privacy) Ordinance, Cap. 486

- Whilst the present Ordinance provides the individual with some control over his personal data, such control is relative and not absolute
- The data subject is not conferred general veto rights on the collection or use of data that is relevant to the functions of the organisation in question.
- The rights of the individual are balanced against the demands of both government and business, the functioning of which is dependent on the processing of personal data.

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1.5 Personal Data (Privacy) Ordinance, Cap. 486

In Wong Kar Gee Mimi v Hung Kin Sang Raymond [2011] 5 HKLRD 202 at 268

- The court held that the disclosure by a company to its members (under s 152FA of the Companies Ordinance (Cap 32)) of the names of the company's employees and their salaries as contained in the company's payroll records and employer's tax returns would not violate principle 3 where the disclosure was for the purpose of verifying the proper administration of the company, since proper administration of the company would be a principal purpose for the collection of the data. However, disclosure was only permitted by the court with the following personal data blanked out: addresses, phone numbers, identity card numbers, email details and bank account details.

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Conclusion

- According to Wong Kar Gee's decision, it seems that it would be legitimate for the contractor to disclose names and payrolls records to the employer to support its claim for site office overheads cost, which could be seen as an legitimate course of action and for proper administration of the company in order to prove its claim.
- And the quantity surveyor could only 'use' such information for purpose of assessing and evaluating the contractor's loss and expense claim, but not for any other purpose.
- In Government's form of contract (e.g. GCC for Civil Engineering Works 1999 edition), clause 8(2) stipulates that the employer/engineer shall not divulge any information provided by the contractor except for the purpose of the contract.

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2. Accidental arithmetical error – final and binding?

- Clause 32.2(3)(k) of the HKIA Form (2005) provides that the amount ascertained as additional payment for direct loss and/or expense under clause 27 shall be included in the gross estimated valuation of the work in progress in the Interim Certificate(s). Therefore, it will not be final and binding before it is included in the Final Certificate.
- Clause 32.9(1) provides that:
 "Subject to clauses 32.10 and 32.11 (dispute settlement procedure) and except any defect in or omission from the Works was not reasonably discoverable at the time of the issue of the Defects Rectification Certificate, the Final Certificate shall be conclusive evidence in any proceedings arising out of the Contract whether by arbitration or otherwise that: -
 ...
 (d) Any additional payment for direct loss and/or expense under clause 27 arising out of the occurrence of any of the qualifying events referred to in that clause is in full and final settlement of all claims for breach of contract, duty of care, statutory duty or otherwise."

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2. Accidental arithmetical error – final and binding?

- Clause 32.8(3) of the HKIA Form 2005 (equivalent to clause 30(6) of the 1999 edition) provides that the Final Certificate shall include:
 - (a) The final contract sum;
 - (b) The sum of all amounts previously certified;
 - (c) The balance stated therein shall be either a debt payable by the Employer to the Main Contractor or as the case may be a debt payable by the Main Contractor to the Employer.
- The Final Certificate shall be conclusive evidence in any proceedings arising out of the Contract (whether by arbitration or otherwise) except:
 1. Notice of arbitration is given within 14 days (clause 30(7) of the 1999 edition)
 2. the sum stated in the certificate is erroneous by reason of fraud, dishonestly or fraudulent concealment

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2. Accidental arithmetical error – final and binding?

3. Any defect in the Works which could not be reasonably discovered.
 4. Any accidental inclusion or exclusion of any work, materials, goods or figure in any computation of any arithmetical error in any computation.
 (Note: this exception is omitted in the alternative Clause 32.9 of the HKIA Form, 2005 Edition)
- The final certificate fulfills two functions:
 1. Specify the final contract sum as adjusted in accordance with the contract, the amounts previously certified and the balance either a sum due to the Employer or a sum due to the Contractor.
 2. Certify the approval of the works which have been completed to the satisfaction of the Employer.

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2. Accidental arithmetical error – final and binding?

- The HKSAR Government Dispute Resolution Clause adopted in its Special Conditions of Contract provides that if either the E or the C disputes, *inter alia*, any certificate, valuation, determination, ascertainment or measurement of the S given, certified, issued or provided in accordance with the provisions of the Contract, either of them shall within 28 days following the date of the matter is raised by one party with the other, give a notice in writing to the CM defining the dispute and requesting CM's decision on it.
- Within 14 days, the CM shall either give his decision in writing on the dispute or state that his inability to make a decision on the dispute to the E and C. Then, the E and C are obliged to attempt in good faith to resolve within 28 days of CM's decision or indecision. If the dispute can not be settled, then the aggrieved party shall issue a Notice of Dispute to other party at the end of the said 28 days.
- If no Notice of Dispute is served by either party, then the S's certificate, valuation, determination, ascertainment or measurement shall become final and binding on both the E and the C.

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2. Accidental arithmetical error – final and binding?

- The relevant HKHA GCC dispute resolution clause provides that if a difference arises over, *inter alia*, (iv) a determination or ascertainment issued by the S under the Contract, the E and C shall attempt good faith to resolve the difference within 28 days from the date of the S's determination or ascertainment.
- In the event that the E and C have failed to resolve the difference and if either the E or C wishes to pursue the resolution of the difference, he shall before expiry of the said 28 days serve on the other party a Notice of Dispute.
- Provided that if no Notice of Dispute is served by either party within the said 28 days, then the difference shall be deemed to have been resolved and settled (i.e. S's determination or ascertainment shall become final and binding on both the E and C in such circumstances) subject to Clause 11.7(1)(a) which provides the S shall be allowed to make corrections of arithmetical errors in his determination or ascertainment issued in accordance with the provisions of the Contract (within such time as provided in the Contract).

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3. QS's liability for such error

- Sutcliffe v Thackrah [1974] AC 727

It was held by the H.L. that an architect in issuing interim certificates did not, apart from specific agreement, act as a quasi-arbitrator between the employer and the contractor, and that he was under a duty to act fairly in making his valuation and was liable to an action in negligence at the suit of the building owner.

Lord Reid held at p.737C-D that:

"The building owner and the contractor make their contract on the understanding that in all such matters the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor."

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3. QS's liability for such error

- Pacific Associates Inc v Baxter [1990] 1 QB 993

It was held by the C.A. that

(a) the engineer employed to supervise the work, which the contractor had contracted with the employer to do, was by agreement to act solely for the employer and was not, under the terms of the contract, required to exercise due care to the contractor; and

(b) the engineer had not voluntarily accepted having any responsibility to the contractor in the way that he performed his contractual obligations, and accordingly the engineer could not by implication be assumed to owe a duty of care to cause economic loss to the contractor.

- Pacific Associates Inc v Baxter was applied in Leon Eng. & Const. Co Ltd v Ka Duk [1989] 2 HKLR 537

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3. QS's liability for such error

- Bokhary J. (as he then was) summarised the principle from Pacific Associates Inc v Baxter as follows:

1. First, there is adequate machinery under the contract between the employer and a contractor to enforce the contractor's rights thereunder; and
2. Secondly, there is no good reason at tender stage to suppose that such rights and machinery would not together provide the contractor with an adequate remedy, then, in general, a certifying architect or engineer does not owe to the contractor a duty in tort coterminous with the obligation in contract owed to the contractor by the employer.

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3. QS's liability for such error

- The quantity surveyor, akin to the position of architect/engineer, owes a duty of care to the employer to carry out his work with proper care.
- In general, the test is whether he has failed to take the care of an ordinarily competent quantity surveyor in the circumstances.
- In London School of Board v Northcroft (1889) H.B.C. (4th Edition), Vol. 2 p. 147, the employer overpaid £118 in a £ 12,000 contract due to arithmetical error in the surveyor's accounts, it was held that not to be negligence, for the error was due to the slip of a competent clerk who normally carried out his duties properly. (Note: in this case the contractor acknowledged such arithmetical error and had agreed to refund to the employer).

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3. QS's liability for such error - Conclusion

- Q.S. in ascertaining Loss/Expense is only liable to the employer for negligence, he or she owes no duty to the contractor.
- According to London School of Board v Northcroft, the Q.S. would not be liable for genuine arithmetical error if he or she has performed as an ordinarily competent quantity surveyor would have done in the circumstances.
- Under the 2005 Form, the Final Certificate could still be conclusive evidence even if existence of a genuine arithmetical error.

- End -

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