Is the Cost of Preparing a Claim Recoverable?

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When a claims situation arises, contractors are invariably put to cost in preparing a submission to go to the Architect or Engineer. The question often asked is whether the cost is recoverable as part of the claim ascertainment and payment. This is particularly the case where the contractor has been put to the expense of employing a contracts consultant to prepare the submission on its behalf.

Whilst there is no specific authority on the subject, the generally accepted position seems to be that in the absence of express terms in the contract which give an entitlement to payment (which I have never seen), the cost of producing documents in support of a claim as required by the conditions of contract will not be recovered.

This is because in providing the submission or information the contractor will be merely complying with the requirements of the contract, and on this basis should have allowed for any such costs that he would incur in his tender.

However, there may be specific circumstances where a contractor may be entitled to reimbursement of the costs of preparing a claim.

For example, where the conditions of contract require the Architect or Engineer having received notice and details from the contractor or subcontractor to ascertain loss and expense, any failure to so ascertain will constitute a breach of contract.

This point is made by Mr Vincent Powell-Smith in his book 'Problems in Construction Claims where he states:

"*If the contractor invokes clause 26 [of JCT 1980] and does what is required, the Architect is under a duty to ascertain or instruct the quantity surveyor to ascertain whether loss or expense is being incurred and its amount. This follows from the wording of clause 26.1 which uses the word 'shall' and which thus imposes a duty on the Architect, provided that the Architect has formed a prior opinion that the contractor has been or is likely to be involved in direct loss and/or expense as a result of the specified event(s) and which is not recoverable under any other provisions of the contract*."

And the case of Croudace Ltd -v- London Borough of Lambeth (1986) where it was confirmed that the Architect's failure to ascertain, or instruct the quantity surveyor to ascertain, the amount of direct loss and/or expense suffered or incurred by the contractor is a breach of contract for which the Employer may be liable in damages if the contractor can establish that he has suffered damage as a result of the breach.

The damages, which can be recovered, will be governed by the rules in Hadley -v- Baxendale (1854). Under these rules the damages recoverable are:

- those arising naturally i.e. according to the usual course of things from such breach
- such as may reasonably be supposed to have been in the contemplation of both parties at the time that they made the contract.

It would appear a sound argument that both the employer and the contractor when entering into the contract would contemplate that if the Architect or Engineer fails to ascertain loss and expense and hence is in breach, the parties

should have contemplated that the contractor would be put to expense in preparing a fully documented claim, and on this basis such expense would therefore be recoverable.

From a Hong Kong perspective the Private Form (RICS) of Contract Clauses 11 and 24 provide that the 'Architect shall either himself or shall instruct the Quantity Surveyor to ascertain the amount of such loss and/or expense', and similarly the Government of Hong Kong GCC Clauses 48,54, and 63 provide that 'the Surveyor/Engineer shall ascertain the Costs incurred...'

Therefore under both these local forms of contract should the Architect/ Surveyor/ Engineer fail to ascertain the loss and expense or costs, when it is agreed such loss and expense or Costs have been incurred, the contractor would appear to have a good argument to seek reimbursement of the costs of employing a consultant to prepare a fully documented and detailed claim submission.

A second situation where the costs of preparing a claim may be recoverable is where the matters are referred to arbitration.

In such circumstance an arbitrator has discretion to direct by whom and to whom costs shall be paid. The exercise of the arbitrator's discretion is limited to costs connected with or leading up to the arbitration. Normally the arbitrator will award costs which have been incurred after the service of the arbitration notice in favour of the successful part, but not costs incurred before the notice of arbitration. This was confirmed in the case of James Longley and Co Ltd -v- South West Regional Health Authority (1983) where the claimants' bill of costs contained an item of *16,022 for the fees of Mr Roy K Short, a claims consultant. It was directed that the fees insofar as they related to work done in preparation of the claimants' final account and to work as a general adviser to the claimants were to be disallowed but allowance was made for *6,452 in respect of work done in preparing the claimants' case for arbitration, namely the preparation of three schedules annexed to the Points of Claim.

However, if costs incurred before the service of the notice are in contemplation of the arbitration then the arbitrator may include them in his award of costs. It may be argued that costs of preparing a claim document, which ultimately form part of the pleadings but is prepared before the arbitration notice is served falls into the category of costs in contemplation of arbitration. A note on the file before the claim is prepared to the effect that it is being prepared in contemplation of arbitration may prove helpful.

In summary in the absence of an express entitlement in the contract, the costs of preparing a claim will not be recoverable unless it can be shown that the costs were incurred either because there was a breach of contract by the Architect or Engineer in failing to ascertain the contractor's entitlement or it can be shown that prior to the service of an arbitration notice the preparation of the claim is in contemplation of arbitration.

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