

# NPWC/NBCC "No Dispute" Paper 9 - Claims Administration

## 1. Preamble

1.1 When inevitable shortfalls occur in performance of the strategies outlined elsewhere in this report, contractual claims are likely; and when claims resolution is imperfect, disputes arise. This paper lists guidelines aimed at minimising the impact and facilitating the resolution of claims and disputes.

1.2 Improvement requires changes to customary practices of both Contractor and Principal sides of the industry. The consequences of not managing the claims/disputes process properly are that relationships deteriorate and cause increasing demands upon the senior management personnel of both parties, in addition to unnecessary cost impacts.

## 2. Objectives

2.1 Objectives in claims administration are different for the parties. These include:

### 2.2 For the Principal:

- no claims;
- early warning of any likely claims;
- realistic levels of cost or potential cost, based on contractual obligations;
- clear, concise evidence of circumstances and justification;
- "once only" submission, consideration and handling;
- early and timely resolution upon occurrence;
- no third party involvement, the two contracting parties only.

### 2.3 For the Contractor:

- contractually simple situations;
- minimal diversion from construction tasks;
- recognition of valid claims;
- realistic cost assessments by Principals;
- early and timely resolution after occurrence;
- timely payment.

### 2.4 For the Industry:

- minimisation of claims;
- payment of valid entitlements;
- low administrative costs;
- avoidance of disputes;
- avoidance of litigation and third party involvements.

### 2.5 Any mechanism for claims administration needs to:

- identify the issues early for consideration and easy resolution;
- promote objectivity in both parties' assessments.

### 2.6. Successful claims administration therefore requires:

- Contractors refraining from submitting ambit/obscure/frivolous and spurious claims;
- Principals and clients not requiring highly detailed claims;

- appropriate resources, by both parties, on claims administration, especially staff knowledgeable of the specific issues;
- Contractor and Principal emphasis on claims administration concurrently with construction administration;
- cooperative attitudes between the parties based in mutual regard, even where issues generate stress;
- maintenance of a clear contractual situation by early resolution of any claims (as they evolve).

## 3. Summary/Guidelines For Claims Administration

3.1 A realistic construction program, monitored and updated progressively is required for both parties to manage their contractual time obligations.

3.2 Delay cost implications should be identified before any circumstances occur which attract those cost figures.

3.3 Delay cost implications should be identified by:

- pre-statement by tenderers of known costs in tenders including, where applicable, a resources schedule;
- negotiations between tenderer and Principal prior to acceptance of known costs where not tendered.

3.4 Decisions by Principal on extension of time claims within 14 days of submission.

3.5 Notification of contractual claims should occur within 7 days of knowledge of the existence of a reason for claim.

3.6 Claim notification should identify broad reasons (including contractual) for claim, so that other party has opportunity to mitigate any unnecessary effects.

3.7 The detail and consequences of the basis for claim should be submitted within 28 days of initial broad notification, qualified as follows.

3.8 Components of claim unable to be addressed initially, or by pre-statement/pre-agreement, should be submitted as soon as possible.

3.9 An objective is immediate agreement of those components of claim that are not disagreed, whether liability, quantification, or time extensions.

3.10 Indirect components of claims such as major time-dependant costs, should be identified separately from associated physical work costs.

3.11 Principal should give a decision within 28 days of submission of the detailed claim, or earlier where broad claim reasons are sufficient for that purpose.

3.12 Prompt payment of claims should occur for both the agreed part of progressive claim components and for the claim as a whole when agreed.

3.13 Blatant expansion of previously submitted claims should be barred.

3.14 Notification of claims after "practical completion" should be barred after specific periods, dependant upon

value of project.

#### 4. General Overview Of Claims Administration

4.1 Other papers in this JWP report address risk allocation, time management, variations, etc., and those issues are inter-related with claims administration. This paper should be read in conjunction with those papers.

4.2 Principals entering contracts need some degree of confidence as to financial outcome, and unexpected claims induce friction and dispute. Pre-identification or pre-agreement of costs, and processing as much of a legitimate claim as possible using those pre-agreements reduces the potential for claims and disputation, associated deterioration in relationships, and subsequent claims.

4.3 Claims can arise from any or a combination of (but not necessarily limited to) the following factors:

- documentation (inefficiency in design and performance)
- aberrations in tendering, i.e.:
  - underbidding,
  - failure to cost known risks,
  - obscure contractual obligations;
- nomination;
- site possession and approvals;
- site conditions;
- job instructions;
- variations;
- Principal's or Principal's agent's acts, defaults or omissions;
- interdependencies;
- delay and disruption;
- acceleration;
- breach of contract;
- financial pressures;
- insolvencies.

4.4 A widely held, but not unanimous, JWP view is that pre-statement of at least part of the costs associated with delays is appropriate. Most Principals accept costs that are known, and therefore a strategy which identifies as many areas of such costs claim as possible will be to the mutual benefit of the parties to the contract.

4.5 This can be achieved by incorporating in the bid documents provision for tender submission of known costs associated with delays, for both on and off-site costs. An acceptable alternative is pre-agreement of those costs with the preferred tenderer prior to tender acceptance.

4.6 Where such pre-stated costs are lodged with a tender they should not be used in the tender evaluation, as disadvantage to rapid construction methods (with higher costs) can occur. It should be recognised that "human nature" will not always allow this to be the case. By using either method of pre-agreement, tender acceptance automatically signifies approval of the pre-stated cost rates.

4.7 Cost of the following items are known at tender stage and should pose no problems in pre-statement or pre-agreement, although specific categories of personnel and

plant rates may be warranted:

- Site Supervision
- Site Staff
- Insurance
- Security
- Safety Precaution
- Major Plant
- Operators
- Scaffolding
- Sanitation
- Work Sheds
- Offices
- Telephones
- Temporary Power
- Small Tools
- Other (specify)
- Off-site Overheads
- Profit

4.8 If any of these delay cost items are not applicable during a period of delay, then no item amount would be payable for such items. However, certain other costs may not be known at tendering time (refer "Time Management" paper).

4.9 If a project has a nature and complexity that is likely to have Subcontractor claim components, then similar provisions should be included in contracts between Head and Subcontractors. Provisions linking Subcontractor cost entitlements to Principal payment to Head Contractor are necessary and should be dependent on demonstrated Contractor/Subcontractor control of exposure and minimisation of delays and delay costs occurring, in accordance with the relevant contract terms.

4.10 Principals should not pre-determine or pre-state Contractor's delay costs, as different tenderers can have significantly differing time related costs, depending upon their work method and planned construction period.

4.11 Delays originating from one or several of the causes listed are a major component of most claims and without a realistic construction program, regularly monitored/upgraded, it is unlikely delays will be recognised in sufficient time to provide alternative effective solutions. Regular program meetings should be held to facilitate constructive criticism and early identification of problems and design/documentation authorised by the Principal must be compatible with that construction program.

4.12 Program problems require clear statement of cause, identification of the party responsible and re-programming necessary to ensure time and cost over-runs are minimised to the mutual benefit of those concerned.

4.13 Contractors should constantly identify and incorporate lead time in programming, monitor material supplies, place orders in sufficient time and regularly confirm such status. Nominated Subcontractors and suppliers should be avoided unless full information is available to the Contractor to incorporate the appropriate lead times and interdependencies into the construction programme, thereby

assisting the Contractor in carrying his full responsibility for performance. Any provisional sums or documented items of Principal responsibility require timely sourcing details for the necessary lead times to be incorporated in the program.

4.14 Nomination of a list of preferred Subcontractors and suppliers is a useful technique and it reduces the Principal's responsibilities in programming and performance by placing responsibility appropriately with the Contractor.

4.15 Claims can include costs associated with:-

- escalation in costs;
- profit or loss of profit;
- financing costs;
- loss of productivity;
- loss of opportunity.

## 5. The Claim Process

5.1 A step-by-step process to achieve agreement in the event of claims could be:

- Identification of the circumstances giving rise to the claim and the contractual basis of the claim.
- Notification of the claim, the facts surrounding it and its contractual basis.
- Assessment of effect on associated works.
- Quantification of the total cost and/or time extension categorised into readily measurable and identifiable costs and other costs not so readily identifiable.
- Submission of supporting documentation including the quantum or likely quantum of the claim.
- Payment.

5.2 Identification of the Factors Affecting Project Performance:

- Construction contracts are based on identifying and/or eliminating risk. Principals need sufficient warning to mitigate their costs and to have confidence that the claimant is using his best endeavours to also mitigate costs.
- Contractors must realise the negative impact of large claims and of poorly presented claims tabled late and/or without proper notice.
- All parties to the contract should be fully aware of progress and their individual obligations, to enable identification of problem areas as early as possible.

5.3 Notification of Problems/Claims:

- Notification of a problem arising should be made in writing within 7 days of identification of the problem, stating the broad contractual basis of claim.
- In the event that either of the contracting parties fail to notify a claim within that period, then its entitlement to recover costs in respect of that claim should be reduced by the amount of costs which the other party can demonstrate would not have been incurred had the required

notice been given and they had been able to take action to overcome the problem or reduce the delay.

- Counter-claims for this denied opportunity to mitigate or record costs can be as difficult to handle as the more common forms of claim.
- Major sources of claim include ground conditions and Principal-caused variations to the work. Abnormal ground conditions need early warning to Principals, even if only a warning advice is possible when problems are first encountered.
- Principal-caused variations need to be notified to the Contractor in sufficient time to allow full agreement and full coordination of trades and disciplines affected, and to enable re-programming if necessary.

5.4 Assessment of Affects of Associated Work

- As soon as the existence of a problem is known, identification of the impact on other areas of work, trade sections, sourcing and the like should commence and a cost mitigation plan proposed which should also be notified to the other party.
- Concurrently, the possible cost implications on other areas should be identified to enable warning of those possible areas of claim even though it may not be possible to provide those costs at that time.

5.5 Quantification

- Identification of costs against various affected elements should commence immediately after notification and establishment of the basis of a claim.
- The affect on time and the appropriate extension thereof should be addressed, quantified and submitted in writing, and within 14 days of receipt of claim for extension of time, the Principal should respond. Where agreement exists in full or for part of the extensions sought, this should be documented at the date of response. This full or partial commitment will preclude subsequent associated claims for coerced prolongation, unnecessary compression and disruption.
- Quantified cost claims are preferably submitted in full on a once only basis but practicalities of total cost impact identification make this difficult.
- The monetary side of the claim may sometimes need to be addressed in two stages. Firstly, the readily identifiable costs should be submitted (those listed early in this paper under pre-statement or pre-agreement of cost) as soon as possible but not later than 28 days after notification of the problem and claim.
- Other costs not easily identifiable such as escalation, loss of profit, financing costs, loss of productivity or opportunity, should be addressed progressively after identification

and submitted progressively, again as soon as possible. These are often described as "intangible areas of cost". Costs of additional time to perform varied work should be included with variation costs, but separately identified to ensure the parties are fully aware of what may amount to significant costs to incorporate seemingly minor works.

- It is in the Contractor's interest to deal with these aspects expeditiously for, as time passes, staff movement and attrition obscures the facts and removes the proof. It is virtually impossible and certainly impracticable to accurately structure a claim which has not been originated by the personnel having a thorough project working knowledge.
- Claims notified subsequent to Practical Completion or a specified period after practical completion should be barred. A suggested time scale for barring could be as follows, and is based on the original contract value:
 

- up to \$5m	28 days
- \$5m-\$10m	35 days
- \$10m-\$20m	45 days
- \$20m-\$50m	60 days
- Over \$50m	90 days
- Incorrect, incomplete or otherwise misleading notification may give rise to counter-claims.
- The Principal should give a decision 28 days after the submission of each stage of claim by the Contractor.
- All time limits need to be realistic, and achievable by competent, and not legally qualified contract administrators as part of ordinary day to day business. Complex claims and issues demand a more intense preparation than normal, within this time limit.
- The time limits of 28 days and "as soon as possible" have been identified with these practicalities in mind, and recognise that both Contractors and Principals need to improve their current practices from the present generally unsatisfactory submission and decision performance. The clarity of the contractual and financial relationships can only be preserved by such expeditious handling of claims.

#### 5.6 Submission of Supporting Documentation

- Principals are entitled to all reasonable documentation to establish an entitlement, amplified and supported as requested.
- A poorly presented claim, lacking supporting evidence, will be viewed suspiciously and most likely lead to dispute.
- Claims should be submitted and considered on a once-only basis, and should relate to the event or circumstance identified in the notice of claim. Expansions to the scope or extent of claim within that submission should be barred, however, expansions of supporting informa-

tion forming part of the submission should be allowable.

- Time limits for submission and response, and barring of claims, forces the parties to focus on the total issue by a deadline.
- As most contracts differ from one to another it is necessary to refer to the particular contract for guidance on the terms and conditions that will apply to breach of contract and which may ultimately lead to claims embracing intangible areas of cost.
- There are the intangible areas of costs which most Contractors recognise as difficult to substantiate by supporting documentary evidence, yet Principals seek full substantiation. Those costs include:
  - coordination of interdependencies
  - frustration (sic)
  - loss of profit
  - consequential loss
  - loss of or reduction in productivity
  - compression/acceleration
- Head Contractor's costs associated with delay are equally applicable to Subcontracting costs given the inter-dependencies with major and specialist Subcontractors where running costs are frequently higher than normal trade Subcontractors.
- Whilst interest charges and finance costs may be relatively easy to ascertain, loss of profit is more complex. Public building companies regularly report annual profits on turnover up to 3% but it would not necessarily be prudent to accept past performance as a proper reflection on current performance. To remove this as a contentious issue it is recommended that profit, should it be claimable (refer specific contract conditions), be pre-stated or pre-agreed as to its application to all claims.
- Claims for acceleration should, if possible, be pre-agreed and should in themselves carry their own liquidated damages, bonus reduction, or programmed cost reduction for non-conformance, with due regard to proper extensions of time which may occur after agreement has been reached to proceed on an accelerated program.

#### 5.7 Payment

- Payment of agreed costs associated with claims should be promptly incorporated in the contractual progress payment framework. In the event that final agreement cannot be reached provisional payment should be made covering the acceptable part of the costs.
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