Quantification and Substantiation of Contractual Claims

(A short series of articles addressing some difficult and challenging areas.)

3. Additional site set-up costs/preliminaries charges

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This series of articles applies an overview to elements of contractual claims that habitually cause problems to parties and to tribunals alike. The first two articles addressed Head/Home office overheads and disruption claims. The subject of this, third, article is no less challenging than those, in fact, contrary to popular opinion, it can be even more complicated.

As with claims under other heads, it is to be kept in mind that the basis of the claim might be some entitlement under the contract or under the prevailing law. Indeed, claims might be brought by each of those routes though, of course, the claimant could not recover the same sums twice. That possibility underscores one of the most troublesome elements of this present subject, and that will be explored later.

By way of introduction to the topic, it should be explained that this subject relates exclusively to the resources that the claiming party (contractor or sub-contractor) applies to its general management of the work it is contracted to undertake. Those resources (site-based generally) are to be differentiated from Head/Home Office resources which are usually priced into a project by the determination of an appropriate percentage applied to the overall cost or value of the works.

Site-based resources are usually the subject of detailed pricing and reflect the bidding party's decisions as to the level of such resources as are considered necessary to effectively carry out and complete the works. That freedom of the tenderer to include what is considered necessary is, however, often constrained by the stipulated requirements in the contract documents. For example, it is customary for a contractor to be required (or deemed) to include for the services of a full-time project manager for the full contracted duration of the project[1], regardless of whether the contractor considers it necessary. Such contract stipulations can complicate the calculation of additional payments that a claiming party might justifiably be entitled to recover.

The circumstances that give rise to the entitlement to claim are also more all-embracing than is often thought. Claims for additional site management resources (or preliminaries costs, as they are often styled) are most frequently related to circumstances where the claiming party is retained on site beyond the established contract Completion Date and where the extended period entitles recovery either under the contract or by the application of the general law (such as by a breach of contract claim). That is not the end of the matter, however, since additional preliminaries costs (preliminaries "thickening") might well have been (recoverably) incurred even though the works themselves are completed by the contract date.

Thus, though additional preliminaries claims are often pursued in tandem with extension of time claims, this is not the only circumstance that might entitle the claimant to additional financial recovery.

A number of challenges present themselves to claimants, to the recipients of claims and to tribunals formed to decide disputes. These can vary according to whether or not the claim relates to delay to completion or to additional resources applied where the works are completed on time.

Each of these circumstances will now be considered in turn; initially, claims arising from delayed completion and then those where, even though completion is achieved in accordance with the contract, the claimant asserts that it is entitled to recovery of the costs of additional resources used.

Under each of those scenarios, consideration is to be given to:

- determining what is the relevant period(s) over which the claim is to be calculated;
- accounting for what was originally allowed in the contract price and whether it is to be considered reasonable;
- assessing the relevance of the entire period of the works in calculating what can be truly accepted as "additional";
- calculating what may have already been recovered by the application of other provisions of the contract;
- assessing the extent to which the sums expended are attributable to the cause(s) relied upon by the claimant (in other words, making due allowance for circumstances of the claimant's own making, or where the contract or prevailing law does not permit recovery);
- satisfaction that the costs claimed reflect appropriate mitigation by the claimant.

In addition to these issues, regard is to be had to what the terms of the contract or the applicable law permit, demand or prohibit by way of recovery.

Addressing a situation where the claimant has achieved an extension of time, and seeks recovery (as may be permitted) of the costs of additional site-based resources, may be considered both the most usual and the most straightforward scenario. Nonetheless, consideration must still be given to what was the actual period of delay. Naturally, any delay to completion always manifests itself at the end of the project, though the actual delay may have occurred much earlier.

Further, it does not always axiomatically follow that, because a claimant was kept on site beyond the contract Completion Date, and for which it has an entitlement in theory to financial recovery, it can look forward to receiving additional payment. The simplest example of such a scenario is where, for instance, a contractor is prevented from commencing on the due contract date by some circumstance (such as delay in funding, providing access or possession, or design completion) that entitles both extension of time and financial recovery. Such delay obviously occurs at the start of the project, though the extension of time granted will add time at the end.

The claimant will need to show that it incurred unplanned additional costs at the time the works were expected to start but did not. The effect of the delay might well be to push the entire contract period back by the amount of the extension of time achieved, and that might mean that no additional costs at all were suffered (other than possibly recovery of escalation costs).

In a nutshell, the claimant needs to demonstrate what the actual period was where additional resources were demanded by the delay that occurred. It is wholly unacceptable to merely cost out the resources that were present during the period of overrun. Indeed, such a calculation of claim is quite likely to undervalue it.

It scarcely needs saying, that it is to be expected that the claimant will have kept detailed records not only of the site-based resources (staff, plant and equipment and, even, materials) present throughout the period of the Works, but of the reasons that those resources were required when they were.

It is wholly inadequate for the claimant to merely total up the cost of resources actually used and to deduct the cost allowed in the Contract Price. It is also inappropriate (unless the contract terms specifically allow or require it) for the claimant to claim either the average weekly or daily sum priced into the bid, or a figure derived from a contract preliminaries recovery schedule.

That said, the very nature of a claim of this type is one where comparisons are inevitably made between costs actually incurred and those anticipated in the bid. In making such comparisons, regard is to be had to the adequacy of the resources that were allowed in the bid. It is not unknown (especially in circumstances of competitive bidding) that a party underestimates (by accident or design) the level of preliminaries type resources that would be apposite for the project. Making a basic comparison between bid costs and actual costs ignores this possibility and opens up the opportunity for a claimant to rectify shortcomings in its resource assumptions. All claimants should anticipate having to justify the bid assumptions and decisions made.

By focussing upon the actual period of delay and the resources utilised in that period, it is easy to overlook the possibility that the progress of the works and the demand made for site-management resources was not, in the event, what the claimant had planned or projected. In other words, the presence of resources during the period of actual delay might be more related to changes in the claimant's *modus operandi* or sequencing than the fact of delay. A forensic analysis of why each type of resource was present during the relevant period should be undertaken, to ensure that the claimant does not achieve a "windfall" benefit in respect of resources that were merely brought forward or deliberately delayed in their use by management decisions of the claimant.

It is well-known that it is extremely rare for any project to proceed from beginning to end without some variation in work scope or similar changes occurring. In such eventualities, the Contract Price is usually adjusted to reflect the change – and that might mean an addition to or deduction from the Contract Price.

Where work scope is increased, the valuation arising might already have compensated the claimant for either or both of general preliminaries (depending upon how the claimant priced the rates for the work in question) or specific items of a preliminaries nature (such as dedicated plant or equipment needed for the varied work). Care is to be taken to ensure that such recovery is fully accounted for in the claim advanced arising from delay so as to avoid double-counting.

Readers will already be familiar with the obligation upon the claimant to establish the link between cause and effect that is an essential pre-requisite to recovery in respect of any contractual claim advanced. It is no different under this head of claim. The claimant must demonstrate (to the applicable legal or contractual standard of proof) that the costs sought to be recovered were directly attributable to the delay relied upon.

Finally, here, it is to be remembered that, under most contracts in general use, and under most legal systems, the claimant operates under an obligation to do what it can to keep under control the costs that it seeks to recover from its contracting partner. An example here would be to appropriately off-hire such plant and equipment as might otherwise be standing idle.

So, even in the seemingly straightforward example of claims related to delayed completion, there are complications and complexities that need to be kept in mind by those pursuing claims and those receiving them. Tribunals also should fully understand these complexities.

What is also unacceptable (other than where the contract terms actually demand it) is for the claimant to merely calculate some average charge related to the quoted prices in the Contract Sum and apply it to the period of delay. That really will not do. Readers may have come across other examples of “notional” calculations, and it is suggested that they are equally likely to be unacceptable.

So much for delay to completion founding the basis of claim. As stated earlier, however, it is perfectly possible for a claimant to seek recovery of additional preliminaries costs even when completing on time (or even early).

The principles of recovery remain the same as apply to delay claims, though the basis of claim and the difficulties that the claimant has to overcome are even more challenging.

The period over which the claim may be calculated may well be extremely difficult to determine, for the reason that the basis of the claim is likely to be something other than delay to the progress of the works. It is more likely to be related to disruption of them, and of the claimant’s site management. In that event, though there is nothing in principle against a claim for disruption of management resources being advanced, such disruption may be difficult to attach to a particular cause. It is probable that the disrupting event would have to persist for a quite lengthy period before it could be said that management resources were disrupted at all (and meaning that they required supplementing). The distinction between disruption of the labour force and that of management could not be starker, for the reason that it is possible (indeed crucial) in respect of a disrupted labour claim to evidence a reduction in output. The same could never be proved as regards to site management for the reason that its output can never be measured.

If management resources do need to be supplemented (though the reason may be difficult to prove) it is imperative that accurate records are kept of staff numbers and disciplines. It is also a straightforward matter to evidence the additional need for plant and equipment, though, again, cause and effect would need to be established.

Issues of consideration of the entire preliminary resourcing of the project and recovery by virtue of other entitlements under the contract (valuations of variations, for example) are, equally, more complicated than with delay related claims.

All in all, additional preliminaries claims that are not related to delay issues are, though possible to pursue in theory, extremely difficult to quantify. The key for any claimant is to record in detail the work undertaken by site-based staff, such that any decision to supplement site staff numbers can be explained and supported with evidence. As with all claim heads that are evidence dependent, it is highly desirable that facts be agreed between the parties and, here, that can be easily achieved by joint record keeping; such records describing not only levels of resources but what those resources were deployed upon, day by day.

And therein lies the difficulty, most contractors and subcontractors are, these days, well versed in keeping records of the activities of the general labour force, but such detailed records are very rarely seen kept in relation to site-based staff.

The old mantra “*He who asserts must prove*” applies as much to preliminaries claims as to all other financial claims.

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[1] See Glenlion Construction Ltd – v – The Guinness Trust [1987] 30 BLR 89 for an example of how consideration of planned resources, in the context of timely or early completion, can complicate determination of sums due.