

THE PRACTICALITIES OF CLAIMING FOR STAFF COSTS CAUSED BY DELAY. WHO, WHEN AND HOW?

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Often the costliest element of any claim associated with an employer/ contractor culpable delay event is the cost incurred for employing staff during the delay period. This article provides guidance in respect of claims for staff associated with delays to the works including the practicalities and the obstacles faced by the claimant.

Providing an evidenced loss, expense or damages claim can be expensive and time consuming. Concentrating on a claimant's strongest position can be the most beneficial and effective way to resolving any dispute in respect of entitlement.

Short of express contractual wording to the contrary, a claiming contractor or sub-Contractor (the 'contractor' or 'payee') is free to claim for anything it wants from the employing party (usually the 'payer') in its monthly application for payment. Having those claims certified/paid is the tricky part. Wasting time and resources claiming and arguing over staff for which there is little chance of recovery can be costly.

There are certain staff to which entitlement should be easy to prove (in principle and evidentially), likewise, there are staff which are more tenuous and therefore demonstrating entitlement can be more difficult. Every situation is different. Be it a main contractor on a power station or a labour only sub-contractor on student accommodation. There are no set rules, just guidance on whom and what to allocate resources such that no time is wasted and the strongest entitlement demonstrated.

GENERAL RULES FOR DAMAGES

The general principle of damages is to put the claimant contractor in the position they would have enjoyed if the contract had been performed as intended (i.e. the contractor had not been delayed by the payer). Consequently, the contractor should not be put in a better position than they would have had the contract been performed. Damages available for breach of contract include those that may reasonably be considered arising naturally from the

breach of contract at the time the contract was formed. Losses which arise due to special/more obscure circumstances are only recoverable where the circumstances were communicated to the employing party/ payer at the time the contract was entered into/known by the parties.

Additionally, it is unlikely that savvy payers are going to pay any time related costs without the contractor first providing evidence of the delay and/or the award of an extension of time under the relevant contract clause (e.g. a Relevant Event and Relevant Matter under a JCT).

WHO

What staff do I have a strong case for?

The key word in respect of claiming staff costs is "causation". Are the costs I am claiming caused by the delay event? Where the consequence of that delay event is that the claimant will be on site for longer, then there is strong entitlement to staff who are typically on site for the duration of the works (i.e. not specific to certain activities or trades). For a main contractor or a large sub-contractor then Project Directors, Project Managers, Construction Managers, QS, Foremen, Health and Safety Managers, Planners, Security, Office Manager, Traffic Managers, cleaners, general labour and handymen are all strong.

In respect of the tender/contract allowance for staff, the payer or tribunal may find the contractor's anticipated staff allowance/preliminaries for the project helpful when reviewing staff costs associated with delay. It can be a useful guide in understanding the reasonableness of the claim for staff. If the number



of Project Managers claimed is two and there was one in the contract allowance, then the payer will argue that the second manager was not on site as a consequence of the delay, they will say they were there for other reasons such as inadequacy of the contract allowance or a default of the contractor. Either way it is much harder to demonstrate entitlement.

On costs

In respect of staff on costs such as travel, phone, laptop etc. Typically, if you are entitled to the staff member then recovery of certain on costs is achievable. A mobile phone is reasonable but evidence for corporate phone costs can be difficult to gather. Travel can be tricky, train tickets are relatively simple, company car and petrol costs are harder and often included in the monthly salary.

Entitlement to information technology (e.g. laptop computer) costs is difficult both in principle and evidentially. Of course there will be depreciation over a period of time but linking such costs to a period of delay will be difficult. Unless the scale of loss is significant, its often not worth the bother.

Attention should be paid to assignment. Some staff are assigned to several projects and therefore their "on costs" must be split as appropriate and this can be very hard to demonstrate and details records of the assignment is essential.



What staff are tricky?

Of course, the critical path is relevant, if the delay happens to an element of the works not on the critical path (e.g. bathroom fit out) and distant from the delay then any staff linked to this item will be questioned. For large projects things maybe more complicated with multiple work faces and critical paths under the same contract.

Any staff brought to the site for specific tasks or specific items of work will be more difficult to evidence entitlement. Design Managers, Setting Out Engineers, Hoist Operators all have set tasks which are not necessarily time related and their cost is distant from the cause of the delay. Other roles such as commissioning managers can also be difficult. If the delay occurs early in the job then it is likely that they won't be affected. However, if the mechanical and electrical element is impacted once commissioning has started then one has a strong claim as the commissioning activities are often on the critical path.

Recruitment costs can potentially be recovered but the burden linking the cost to the breach will be very high and recovery highly unlikely.

What staff shouldn't I bother with?

Some staff on site won't be linked to the delay at all and therefore entitlement will be very hard to show. Examples of these are Lawyers and Claim Consultants. Likewise, evidence linking certain senior staff such as Managing Directors to the delay will need to be exceptional in order for them to be considered. The payer will argue that senior staff are an overhead cost and assigned working on many projects at the same time. Without accurate contemporaneous records of time spent by these staff claims will almost always be fruitless.

WHEN

Providing the payer with a period of time when the delay started and stopped is crucial to linking the cost/staff member to the delay/breach. This is often not an exact science but can be key to linking certain staff to certain causes of delay. Simply claiming for staff during the period from the contract completion date and the actual completion date (the extended period) will be criticised. Furthermore, such claims will be lower than the actual entitlement as staff levels on projects typically decrease as the works reach completion, calculating the period of delay is always recommended and the evidence being provided should show the costs being incurred during this period.

There are many issues which arise when linking the costs of staff to the delay period and it can make the preparation of evidence much harder. Costs claimed under an accounting ledger

can be moved in and out by project controls and a detailed explanation setting out when the costs were incurred would be required. Likewise, invoices can be issued weekly for some staff and monthly for others. When a delay starts and stops in the middle of the week, things get even more complicated and costs should be split to show that only costs incurred during the period of delay are being claimed.

The key point to remember is that the costs need to be linked to the breach/delay or it will face criticism and may fail.

HOW

What evidence do I need to provide?

The general rule in respect of claims for staff associated with delay is that a contractor has to evidence that the costs claimed have been incurred. This is not always the case, I have seen claimants successfully claim for staff costs based on a contract allowance (less overhead and profit) and simply provide evidence that the staff member was working full time on the project with no evidence of the cost being incurred at all. However, in an ideal world, costs should be evidenced.

Evidence of staff costs can be difficult. There are the obvious internal privacy issues associated with PAYE staff as well as breaking down salaries to show the components. Contract staff are easier and you can present their invoices demonstrating their attendance on site. However, if the claim is being made months or years after the delay then invoices may have been archived long ago. For agency staff, there is a risk that invoices do not provide sufficient information (site address for example) so it is important to ensure these are included.

Timesheets and Sign in records are very helpful, especially automatic sign in systems for certain site based staff are very useful although these have issues with reliability so a manual sign book can be very helpful.

Often for larger claims, contractor rely on the presentation of costs by way of an extract from its cost ledger which is then formatted into a presentable document. The payer can then be invited to attend the Contractor's offices to carry out an audit of the costs to ensure that the extract is a true reflection of what has been incurred. Typically, accounting software such as COINs, EVision and Sage should be accepted in lieu of hard copies of invoices but again every payer and/or Adjudicator is different. Of course, this relies on staff being assigned to the contract project (at the correct percentage allocation), which therefore can carry its own issues and disagreements.

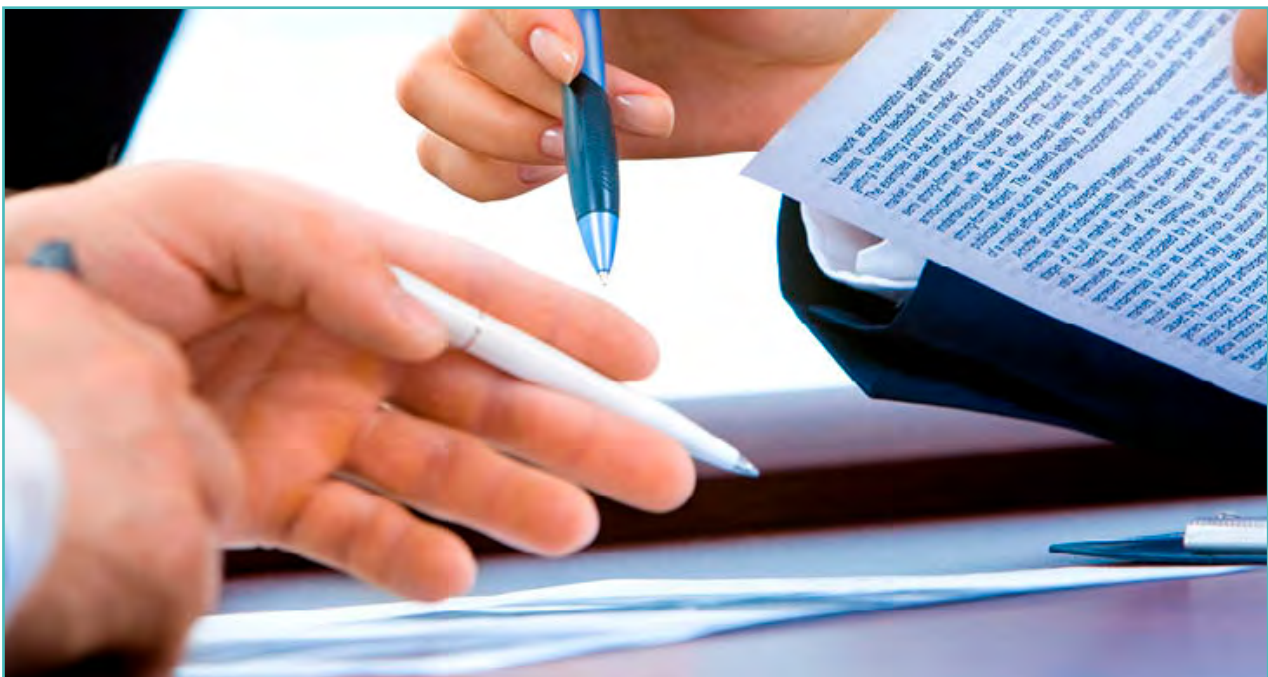
MITIGATION

The claiming contractor has a duty to mitigate loss to the payer - and a payer will often argue that sufficient mitigatory measures were not taken and as such the claim should be reduced. A payer responding to a claim might argue that contract or agency staff should be terminated in the event of critical delay and the costs, therefore, mitigated. (However, there be a justified reason for maintaining these contract or agency staff). If all staff are employed on a PAYE basis then this argument is more difficult due to notice periods etc. The payer might argue that for longer periods of delay such staff should have been reassigned to another project. This could be the case for some events (site closures for example). Contractors employ staff in many different ways. Through PAYE, contract day rate or through agencies and various factors are affected by this. The way in which staff are employed affects how they are evidenced and the other factors such as mitigation of costs.

WHAT IF THE PAYER DOESN'T PAY WHAT I THINK I AM DUE?

Of course, these things often happen in stages and often claims for staff during periods of delay are resolved quickly and without fuss. If there are complications, then it can be important to give the payer all the evidence for review before the next steps are taken. If the payer has not paid the correct sum, then the recourse is going to be either a management meeting or straight into adjudication proceedings.

The key task is to focus resources on demonstrating sums with the higher chance of recovery.



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If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

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