

Can Loss And/Or Expense Form Part Of A Variation Item?

By the Entrusty Group

The Entrusty Group, a multi-disciplinary group of companies, of which, one of their specialisations is in project, commercial and contractual management, has been running a regular contractual question-and-answer section for MBAM members in the Master Builders Journal.

In this instalment of this series, the Entrusty Group will provide the answer to the frequently asked question above.

This question is as perennial as the evergreens and is of interest, especially to Contractors but equally important to the Architect/Engineer/Superintending Officer, as they are the party that will assess a claim for loss and/or expense.

For us to provide an answer to whether loss and/or expense can form part of a variation item, let us first look at what is meant by loss and/or expense. In the English case of *Hadley v Baxendale (1954) 9 Ex 341*, it was held that damages or loss and expense are that which arise naturally and in the ordinary course of things. Another way of looking at it is that the term 'loss and expense' means the sums recoverable are equivalent to damages at common law. This would simply mean that the Contractor can claim for loss and/or expense suffered if the work is disrupted or delayed, except for those caused by the Contractor himself and the specific causes or events as contained in the contract entered into. As it is equivalent to damages at common law, a contractor may choose to claim under the relevant provision in the contract or bring it for legal action for damages resulting from the breach of contract in court. Loss and/or expense head of claims may include the following:

- Additional preliminaries
- Prolongation costs
- Disruption costs
- Overheads (site and head office)
- Loss of profit
- Finance charges
- Other additional costs not reimbursable under the contract

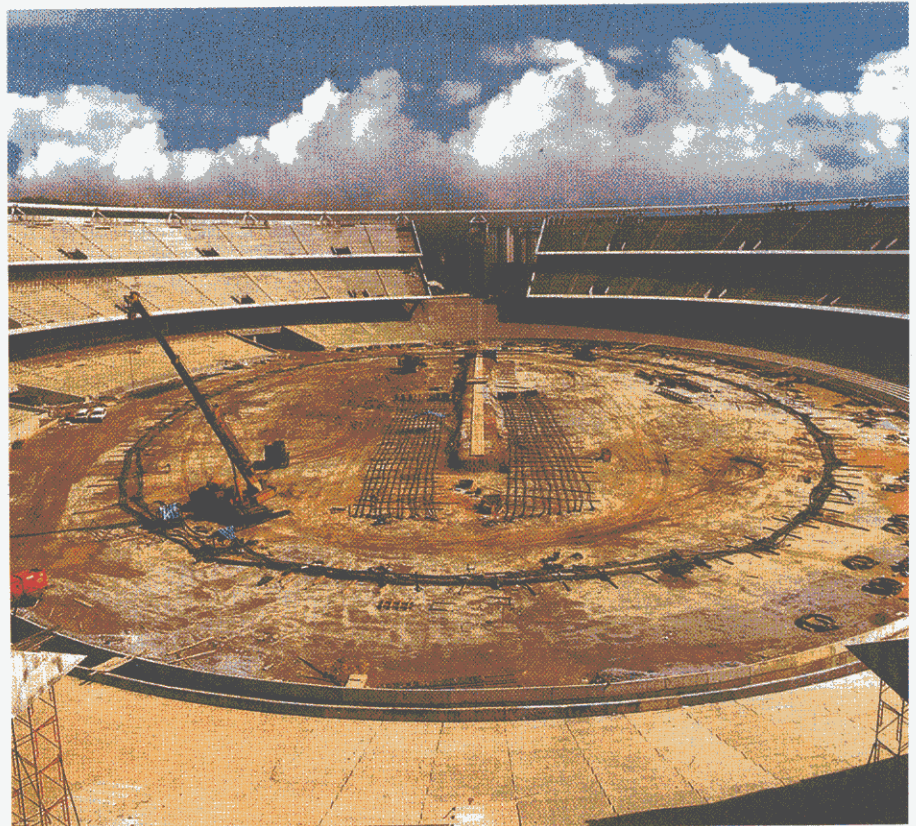
Loss and expense arising from variation works is usually allowed, as many standard forms of contract allow loss and/or expense to be claimed by the Contractor, and the Architect/Engineer/SO is to ascertain them for payment by the Employer. Although this is allowed, the practice in Malaysia is that Contractors often do not claim (usually for commercial reasons) or have these loss and/or expense costs contained within the variation rates.

Now let us look at the relevant clauses under the Malaysian forms of contract on this issue.

STANDARD FORMS OF CONTRACT (RELEVANT CLAUSES)

PAM Form Of Building Contract

The relevant clause under PAM Form of Building Contract is Clause 11 (6). It allows for loss and expense incurred directly resulting from a variation to be considered by the Architect (or QS, if instructed) upon written application by the Contractor within reasonable time of its occurrence. It is applicable when the valuation of variation under Clause 11 (4) does not compensate/reimburse the Contractor for loss/expense



incurred. The loss and expense ascertained shall be included in the next interim certification following the ascertainment, to be paid accordingly.

JKR/PWD Form Of Contract (203A – Rev 10/83)

Similar to PAM Form, JKR Form Clause 5 (d) allows the Contractor to claim for loss and expense arising from his compliance with SO's instruction (which includes variation), provided it is beyond his reasonable contemplation for which he would not be reimbursed by any other provisions in the contract.

The Contractor is required to give written notice of his intention to claim to the SO, together with an estimate of the Loss or Expense amount, within one month of the issuance of the instruction.

IEM Conditions Of Contract

Similar to JKR Form, IEM Form Clause 5 (d) has matching provisions, and claim for loss and/or expense arising from variations is therefore allowed. Instead of SO, the contract uses Engineer as the SO.

CIDB Form Of Contract For Building Works

The relevant clause under the CIDB Form is Clause 31. Clause 31.1 (h) allows the Contractor to claim for loss and expense due to variation. The CIDB Form contains a set of rules for claiming loss and/or expense. This is contained in Clause 32, which sets out the procedure for claiming, which comprises:

- 32.1 Notice of Claims
- 32.2 Contemporary Records
- 32.3 Substantiation of Claims
- 32.4 Access to Contractor's Books and Documents
- 32.5 Payment of Claims

CONCLUSION

Most standard forms of contract commonly used in Malaysia allow for loss and expense claims arising from



variation works. Within each of the forms of contract, specific provisions and rules for claiming are contained. Some of these rules contain timeframes for the Contractor to comply with; failing to comply would mean the Contractor will lose his entitlement to claim for loss and/or expense arising from variation.

Whether the loss and expense forms part of the variation item within its rate or price, or as a separately priced item would depend on the contract provision and other considerations such as the consultant's and/or client's requirements, the contractor's strategy and commercial issues.

The next issue will be providing the answer to the question **Should A Sub-Contractor Sign A Sub-Contract With Pay-When-Paid Clause?**



Entrusty Group includes Entrusty Consultancy Sdn Bhd (formerly known as J.D. Kingsfield (M) Sdn Bhd), BK Burns & Ong Sdn Bhd (a member of the Asiawide group BK Asia Pacific), Pro-Value Management, Proforce Management Services Sdn Bhd/ Agensi Pekerjaan Proforce Sdn Bhd and International Master Trainers Sdn Bhd. Apart from project, commercial and contractual management services, the group also provides risk, resources, quality and value management, recruitment consultancy services and corporate training programmes to various industries, particularly in construction and petrochemical, both locally and internationally.

Entrusty Group will be running a series of seminars and workshops in 2004, which will include the following topics:

- Practical Construction Claims in Malaysia
- Practical Construction Contract Administration/Management – 8 Modules and 4 Modules Options
- International Construction Contracts
- Value Managed Quality Management System
- Accredited Value Management Training Programmes
- Partnering
- Life-Cycle Costing
- Train The Trainer Programme
- Effective Leadership

Those interested can obtain further information via e-mail: enquiry@entrusty.com.my, tel:603-7982 2123 or www.entrusty.com.

Entrusty Group will provide 30 minutes of free consultancy with prior appointment to MBAM members on their contractual questions. Kindly contact HT Ong or Wing Ho at:

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