Your Contractual Questions Answered

What Is Loss and/or Expense?

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 the series, the Entrusty Group will provide the answer to the frequently asked question above.

There are many misconceptions about what is Loss and/or Expense under construction contracts. These misconceptions arise mainly due to lack of understanding or misunderstanding that the various parties to the construction contracts, namely the Contractor, the Employer / Client and the Contract Administrator / Supervision Officer (SO) have on this topic, which has led to many problems and disputes in the construction industry.

Many standard forms of contract allow for Loss and/or Expense to be claimed by the Contractor, with the SO ascertaining/ assessing the Contractor's application for Loss and /or Expense payment and finally payment by the Employer. Although this is the case, due to this apparent lack of understanding or misunderstanding, Loss and/or Expense applications lack either proper documentation or the application being rejected.

First, let us define what is this Loss and/or Expense. The term can be found in a very old but still valid English case of Hadley v Baxendale (1854) 9 Ex341, in which Loss and/or Expense was defined as "the damages or Loss and Expense that which has arisen naturally and in the ordinary course of things". This is the definition and position that has been adopted by many courts until today including the ones in Malaysia (see Relevant Case Law and Contracts Act 1950 section below).

In the construction industry, the Royal Institution of Chartered Surveyors, UK (1987) had defined Loss as "Any monies that the contractor should have received, but which he did not receive, because of one or more of those events listed in the conditions of the relevant contract, which entitle him to reimbursement of direct loss and/or expense" and Expense as "Any cost to the contractor which is more than it would otherwise have been, because of the events referred to above".

The word "direct" loss and expense, means "the direct consequence of the act giving rise to the claim" (A & B Taxis Ltd v The Secretary of State for Air – 1922) or "...that which flows naturally from the breach, without other intervening cause and independently of special circumstances" (Saintline Ltd v Richardsons, Westgarth & Co Ltd – 25 BLR140, 1940). In essence, for loss and expense to be admissible, it cannot be costs arising from indirect, remote, consequential or contributory causes.

The Contractor can claim for Loss and/or Expense suffered if the work is disrupted or delayed due to certain specific causes or events, which are of no fault of their own.

A Contractor may choose to claim under such provisions in the contract or bring legal action for damages resulting from the breach of contract.

In simple terms, Loss and /or Expense items may include the following:

- Prolongation costs;
- Disruption costs;
- Additional Preliminaries;
- Overheads;
- Profit;
- Finance charges;
- Other additional costs not reimbursable under the contract.

In the Malaysia Construction industry, loss and/or expense has been dealt with under the following relevant provisions in the standard forms of contract.

STANDARD FORMS OF CONTRACT (RELEVANT CLAUSES)

PAM Form of Building Contract

PAM 98 is more detailed and procedural when compared to its predecessor, PAM 69 in relation to Clause 24 - Loss and/or Expense, its application and ascertainment.

There is no definition provided for Loss and/or Expense under PAM.

Clause 24.1 is a notification requirement that will be discussed in the next issue of the MBAM Journal.

Clause 24.2 states that the Contractor is not entitled to Loss and/or Expense except in accordance with the express provisions of the Contract.

The circumstances materially affecting the regular progress of the Works referred to in Clause 24.1 and Loss and Expense ascertainment under Clause 24.3 will also be dealt with in the next issue of the MBAM journal.

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

Clause 44.1 deals with Loss and Expense, its notification, ascertainment and specific events entitlement, which will be discussed in the next issue of the MBAM Journal.

Again, there is no definition provided for Loss and/or Expense under JKR.

IEM Conditions of Contract

EM Clause 43 is similar to JKR Clause 43, except IEM has an additional clause,

Clause 43 (g) to cover for reason of delay in giving possession of the Site as provided under Clause 38 (b) (i).

There is also no definition provided for Loss and/or Expense under IEM.

CIDB Form of Contract for Building Works

Unlike the above standard forms, CIDB Form actually defines Loss and Expense.

In Clause 1.1 Definitions, Loss and Expense has been defined as:

(a) the direct relevant costs of labour, Equipment, materials, or goods actually incurred on the Site in so far they would not otherwise have been incurred and which were not and should not have been provided for by the Contractor; and

(b) costs of an overhead nature actually and necessarily incurred on the Site but in either case only in so far they would not otherwise have been incurred and which were not and should not have been provided for by the Contractor; and

(c) the amount equivalent to the percentage named in the Appendix of such cost referred to in (a) and (b) above, such amount shall be deemed to be inclusive of any profits, head office or other administrative overheads, financing charges (including foreign exchange Losses) and any other costs, Loss or Expense of whatsoever nature and howsoever arising. This percentage shall exclude interest payable pursuant to sub-clause 42.9(b).

Clause 31.1 provides the Reasons for Loss and Expense Claim. It states that,

The Contractor is entitled to recover Loss and Expense sustained/incurred, which will not be reimbursed by any other Contract provision, howsoever arising resulting from the Works regular progress and/or completion or any of its section having been disrupted, prolonged or otherwise materially affected by any of the following event (10 items (a-j):

(a) One or more of the Excepted Risks;
(b) The Contractor not received from the SO within a reasonable time necessary Drawings, instructions or other information for the Works, which Contractor has given written notice according to Cl. 4.6 or the supplementary or revised drawing, specifications, or instruction required by Cl 4.7;
(c) SO instruction to resolve a Discrepancy in or between any of the Contract Documents according to Cl. 7.4;
d) SO ordering of test not provided by the Contract under Cl. 15.4 and the uncovering/making openings for inspection of any work under Cl.15.6, unless the test/inspection showed that the Equipment, materials, goods or workmanship not complied with Contract provisions;
(e) Employer's failure to give possession of Site or any of its part to the Contractor under Cl.17.2;
(f) Acts or omissions of other persons and contractors engaged by the Employer in executing work not forming part of the Contract;
(g) SO instruction to suspend any work, subject to sub-clause 19.1(b):
(h) A Variation;
(i) SO instruction in respect of antiquities and fossils under Cl. 39;
(j) Any other ground for Loss and Expense expressly stated in the Contract but under in this Cl. 31.1.

The Contractor is obviously not entitled to any such Loss and Expense where the event is due to or is intended to cure any default/breach of contract by him.

Other clauses which relate to Loss and Expense are discussed in the next issue of the MBAM Journal, namely Notice of Claim (Clause 32.1), Contemporary Records (Clause 32.2), Substantiation of Claims (Clause 32.3), Access to Contractor's Books and Documents (Clause 32.4), Payment of Claims (Clause 32.5) and Failure to Comply (Clause 32.6).

Relevant Case Law and Contracts Act 1950

In the case of Hadley v Baxendale (1854) 9 Ex341, it was held that,

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as probable result of the breach of it";

In the English case of FG Minter Ltd v Welsh Health Technical Services