ICCP

WEBINAR SERIES

Claim Preparation Costs - can they ever be recovered?

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INTRODUCTION – CRAIG SMITH

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- What does he do?
- Who does he work for?
- What experience has he got?
- What projects has he worked on?
- What are his interests?

INTRODUCTION – AIM OF WEBINAR

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- To consider those specific circumstances where claim preparation costs might be recovered

THE BAD NEWS

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- The general position is that claim preparation costs are not recoverable as the contractor is:
    - Complying with an obligation under the contract to provide particulars of the claim

      or

    - Claims are not addressed in the contract
- The contractor is therefore either complying with his obligation, or no obligation existed, so no need to incur costs
- Either way, generally, recovery is not allowed

BETTER NEWS

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- There are three specific circumstances when the cost of preparing claims can be recovered:
  - A head of claim
  - As preparation costs for the dispute resolution process
  - Damages for breach of contract

A QUICK POLL

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CLAIMS PRACTITIONERS

HEAD OF CLAIM

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Walter Lily v Mackay (2012)

- A consultant had been used to prepare claims and costs were claimed under ‘prelim thickening’

- Mr. Justice Akenhead stated that the professional fees incurred whilst preparing claims ‘could be a valid head of a loss and expense claim’

- It should be noted that this was specific to a clause under JCT and may not be applicable to other contract provisions

PREPARATION FOR DISPUTE RESOLUTION

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- Costs of preparing for an Arbitration may, depending upon the rules of the arbitral institution, include for the preparation of claim costs

James Longley v South West Regional Health Authority (1983)

- The claim should be substantially the same as the submission used in the arbitration

DAMAGES FOR BREACH OF CONTRACT

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- If the Engineer or Contract Administrator fails to carry out his duties such as:
  - Granting an extension of time
  - Issuing or confirming instructions
  - Reviewing claims
  - Preparing payment certificate

DAMAGES FOR BREACH OF CONTRACT

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James Longley v South West Regional Health Authority (1983)

- Established that if the contractor complies with his obligations but the Contract Administrator, Engineer or Employer does not, then the contractor can claim for the additional cost arising from this secondary breach

PREPARATION COSTS FOR DISPUTE RESOLUTION PROCESS

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- If the grounds exist, what can you claim?

- The expenses incurred in preparation for the claim

CONSULTANTS VS. STAFF

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- Can either and/or both be claimed?
- Staff costs are often rejected as the cost would have been incurred anyway
- Is this correct?

RECOVERY OF STAFF COSTS

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- Costs incurred anyway, therefore, no additional costs?

  Tate & Lyle v GLC (1983)

- Established that damages for managerial and supervisory expenses directly attributable to the breach could be recovered

- Need to show that claims caused staff to be moved from normal duties

- Need to show that dealing with the claims caused disruption to the business

- But what about record keeping?

  Liverpool Museums (2013)

- Case re-affirmed that it is possible to recover staff costs without records

RECOVERY OF CONSULTANTS COSTS

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- Generally easier as duties and records of costs incurred can be more readily documented

CONCLUSION AND SUMMARY

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- Generally, claim preparation costs are not recoverable
- Unless the claim is in preparation for formal dispute resolution and where costs may be awarded as part of that dispute process
- Or, if the claimant can justify the inclusion by citing, say, *Walter Lilly v Mackay*
- Or, if costs were incurred because the Contract Administrator failed to fulfil his obligations

QUESTIONS

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CONTACT DETAILS

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