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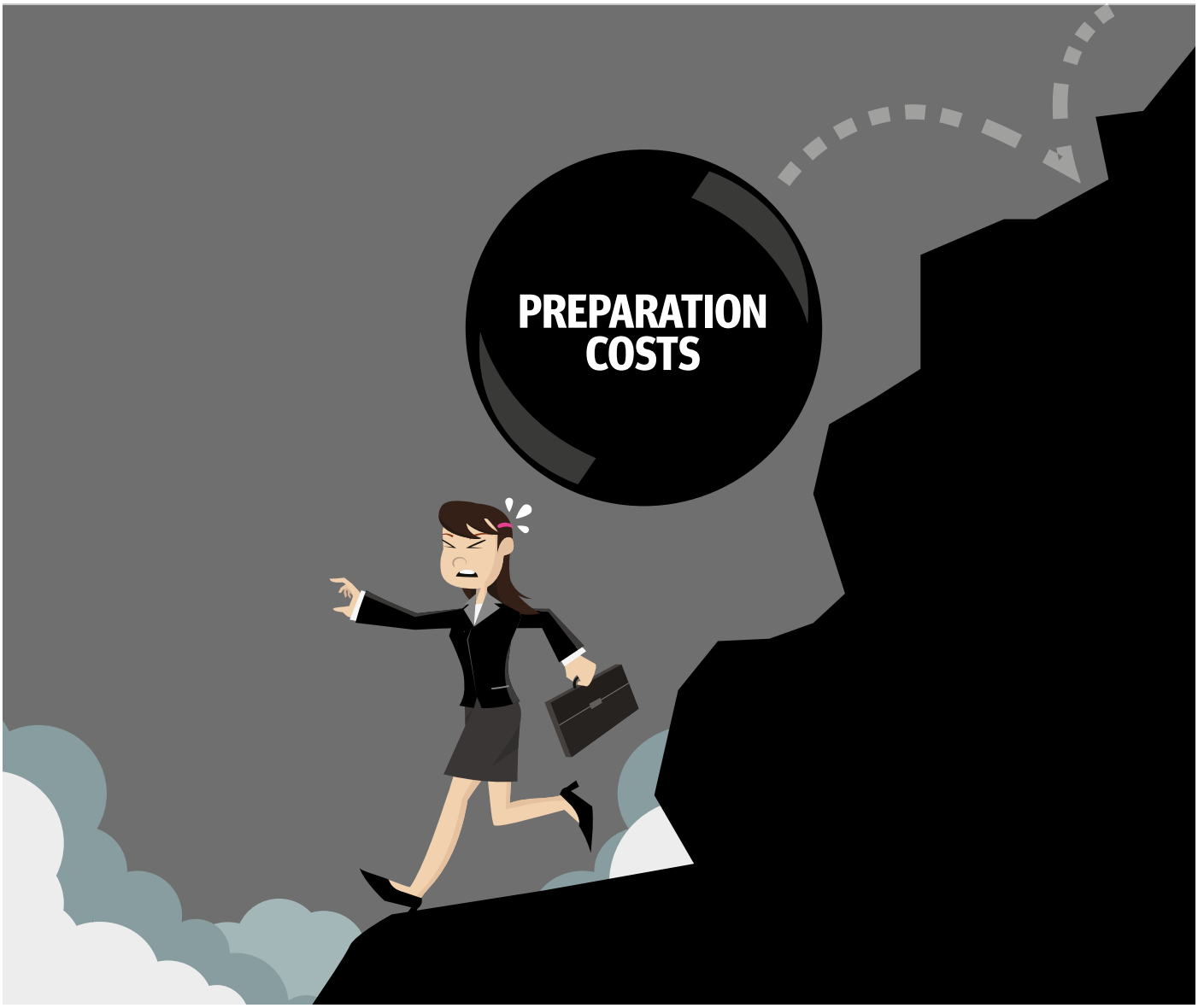
Costs of preparing a claim



JOHN MULLEN – DIALES PRINCIPAL AND QUANTUM EXPERT OUTLINES THE RECOVERABILITY OF THE COSTS OF PREPARING A CLAIM AND THE KEY CONSIDERATIONS FOR SUCCESS.

Claims often include an item for the costs of preparing that claim and for the submissions that preceded it. This might include fees of external consultants along with the costs and expenses of head office staff. However, it is rare that the contractual and factual basis of such an item is considered at anything more than a superficial level. Many claimants include it, either on an assumption of entitlement or for negotiation. Employers and their consultants dismiss it out of hand, often on the assumption that there can be no legal entitlement.

The conventional English law view is that such costs are not recoverable, except in specific circumstances or as 'costs in the action'. This is primarily based on the view that the contractor is only complying with its obligations under the contract. Alternatively, the contract may simply require that the contractor gives notice or makes an application, keeps records, and leaves the architect or engineer to make an ascertainment.

However, in Walter Lilly & Company Limited v Giles Patrick Cyril Mackay and DMW Developments Limited [2012] EWHC 1773 (TCC), Mr Justice Akenhead found that the costs of preparing a claim were admissible under clause 26 of the JCT form of contract, where the claimant succeeded in its liability argument. The factual evidence was such that he was unable to unravel precisely what that consultant actually did, and he could not award any additional fees beyond those

he awarded under the contractor's 'thickening' claim for 'commercial management and extension of time applications'.

The view that, in preparing claims submissions, the contractor is just complying with existing obligations, or doing something it was not obliged to do, depends on the employer or his advisers ensuring that the contractor's entitlements were properly recognised. This gives rise to the possibility of an alternative basis for this item, which relies on a secondary breach by the employer; the contractor's damage being the costs of preparing claims that should not have been required.

A claim on such a basis would depend on establishing:

- A contractual duty on the employer in relation to the claims.
- Failure in relation to those duties.

  And
- That damages resulted.

Also under JCT terms, Croudace -v- London Borough of Lambeth (1986) 33 BLR 20 confirmed that the architect's failure to ascertain, or to instruct the quantity surveyor to ascertain, loss and expense was a breach for which the employer was liable in damages. The judge concluded that, "it necessarily follows that Croudace must have suffered some damage". Croudace's success relied on there being no one to address its claims, but, what if an appointed consultant fails to act reasonably? A further defence to this head of claim is sometimes that the submission was not adequate to enable the consultant to carry out its function. In such circumstances, the following questions might become relevant:

- What does the contract require of the contractor in terms of notice, particulars and/or substantiation?
- Did the contractor comply?
- What does the contract oblige the employer, or contract administrator, to do on receipt?
- Did the contractor put the employer, or contract administrator, in a position to comply?
- If so, did they comply?

Such considerations are often not helped by such as FIDIC Red Book's clause 20.1, setting out the duties of the contractor and engineer in terms that include such subjective terms as:

- "as soon as practicable"
- "should have become aware"
- "as may be necessary"
- "fully detailed claim"
- "full supporting particulars".

Contractors often argue that their submissions were adequate to secure an extension of time, assessment of financial recompense, or even just a payment on account but that they were not given a fair hearing. The potential motives for contractors receiving claims from subcontractors or suppliers for 'domestic' issues to their account are obvious. This may be exacerbated by the quality of many subcontractor and supplier claims. However, for contractors expecting a fair hearing of their claims by the administrator of a main contract, there may be other influences. A common complaint is that engineers considering such as errors, in relation to setting out as a delay event under FIDIC Red Book clause 4.7(a), are in fact being asked to admit their own failures. Internationally, this seems particularly to be made on projects for public sector employers, where the strictures of public finance and audit may mean that engineers fear that any certification of time or money arising from their own failures will have an effect on their fees or even public indemnity (PI) insurance.

In such circumstances, a contractor may have a legitimate complaint that they have been put to unnecessary costs in relation to claims submissions. Since clauses such as FIDIC Red Book 3.1(a) may deem that the engineer is acting for the employer, this may put it in breach of contract. Here, it would be prudent to notify the engineer and the employer of the failure, the actions being taken, the costs arising, and that a claim will follow.

Another popular defence, where the costs of preparing a contractor's claims includes the time and expenses of its own in-house staff, is that their salaries would have been incurred anyway and that no loss of profit or revenue resulted from their being diverted from other activities.

The precedent for the recovery of in-house management time expended in remedying an actionable wrong is Tate & Lyle Food and Distribution Ltd and Another v. Greater London Council and Another 1.W.L.R. Tate & Lyle's management costs were not awarded due to the lack of allocation records, thus emphasising the need to maintain such records. However, since then, several judgments suggest a relaxation of the requirement to prove actual loss.

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These are summarised in Trustees of National Museums and Galleries on Merseyside, AEW Architects and Designers Limited, and PHIL UK Limited and Galliford Try Construction Limited (trading in partnership as a Joint Venture "PIHL Galliford Try JV) [2013] EWHC 3025 (TCC). The museum relied extensively on the witness evidence of its executive director, including how much time was spent by her and other members of staff, their grades, and salary costs. The judgment summarises recent authorities including Aerospace Publishing Ltd v Thames Water Utilities Ltd [2007] EWCA Civ 3, R + V Versicherung AG v Risk Insurance and Reinsurance Solutions SA [2006] EWHC 42, and Mr Justice Ramsey in Bridge UK Com Ltd v Abbey Pynford Plc [2007] EWHC 728 (TCC). The employees' assessments were accepted, but given their, "relatively general retrospective" nature, a reasonably cautious approach was adopted to quantification. The court also found it sufficient to infer that the diverted staff could have applied their time to activities elsewhere, generating revenue at least equal to their employment costs.

In conclusion, it is suggested that:

- Where a claim is made for the costs of preparing a claim(s) more thought should be given to its basis.
- It may be that it can be made as a head of claim under the contract.
- Alternatively, the circumstances might merit a claim for damages for breach [of contract].
- The costs may include those of in-house staff without proof of loss elsewhere on their time, provided that can be inferred from the circumstances.
- If contemporaneous evidence of allocation and time are not kept, a credible witness statement may suffice, but at the cost of a conservative quantification. ■