



ARTICLE

# Global Claims – Are They Worth the Paper They are Written on?

This article considers the following questions: What is a global claim? How and why do global claims arise? What are the strengths and weaknesses of a global claim? In what situations are global claims appropriate? and can global claims succeed?

## What Is a Global Claim?

As an accomplished construction professional expert with over 45 years of experience, who has worked exclusively in the field of planning and programming, and in the analysis of delay, and in dealing with time related issues on construction projects, it is the author's understanding that global claims arise where contractors do not attempt to establish and link the cause and effect of the delay for each specific event that has occurred on the construction project. Instead, contractors group together all of the delay events and present the claim as a 'total cost claim' or 'global claim' typically where the actual costs that are alleged to have been incurred are claimed in total, less tender budget costs. And, by submitting 'total cost claims' or 'global claims', contractors are effectively attempting to convert Lump-Sum Fixed Price Contracts into Cost-Plus Contracts, usually without any valid contractual basis for doing so.

In the author's experience, typically the starting point for the preparation of a claim by contractors is to collate it globally in the first instance, then to subsequently particularise it with details as the claim is developed. However, all too often contractors do not seek to further particularise claims with details, and so they remain global in nature.

## How And Why Do The Global Claims Arise?

As noted above, all too often contractors stop at the global stage of the development of a claim and so present claims to employers in a global format. This is sometimes done so as not to draw attention to the contractor's own default and culpable delay, in an attempt to recover all of the contractor's costs and losses resulting from all of the delay (and disruption) events, regardless of whether such events are excusable and/or compensable.

Contractors might do this in order to attempt to conceal inherent shortcomings and insufficiencies with their tender programme and/or bid price. For example, inadequate tender allowances, or overly competitive rates in the Bills of Quantities (BoQ) resulting from intrinsic deficiencies in the tender and general 'under-bidding' of the project from the outset.

Contractors are tempted to take advantage of the claims process, by seeking to recover the shortfall in their tender bid pricing, by submitting global claims, which are poorly particularised and often inflated or exaggerated, and so have little chance of success when subjected to scrutiny.

This global approach is often presented by merely claiming the difference between the planned and actual man-hours, resources, costs and the like, which does

not take account of, nor make any adjustment for, any culpability on the part of the contractor.

Global claims are often premised on unparticularised assertions, and in the author's experience, in the review of many global claims submitted by contractors, examples typically include:

- The need to re-rate the items in the BoQ on the pretext that the work carried out has changed dramatically from what was measured and priced at tender stage;
- That the design of the works was incomplete, inaccurate and contained errors which had to be corrected;
- That the work scope significantly changed, varied, increased, and that the additional works were substantial;
- That there was negligible ability to mitigate the delay; and
- That the actual site conditions encountered were worse than expected.

The above list is by no means exhaustive, but illustrates the common, generalised, and often un-substantiated assertions that are made against the employer and its consultants.

### **What Are The Strengths And Weaknesses of a Global Claim?**

A global claim is usually advanced on the pretext that each and every event collectively caused all of the delay and/or disruption that was experienced on the project, and that all such delay events are both excusable and compensable.

Such an approach infers that the contractor 'has done nothing wrong' and therein is the underlying and fundamental weakness of the typical global claim.

In the author's experience, it is usual for contractors to argue that the global costs and losses incurred by the contractor (and often also its sub-contractors), predominantly relate to the alleged disruption and the resulting loss of productivity.

In other words, that the execution of the works required significantly more labour resources than was planned or priced in the tender bid.

In this respect, contractors often assert that the planned output rates on which the tender bid was priced, were not achievable due to various unparticularised reasons and

generalised complaints set out in the contractor's claim submission.

This 'broad-brush' approach is usually adopted because otherwise it would take considerable time and effort on the part of the contractor to fully establish causation and the resulting impact of each and every event on the contractor's programme and costs.

Contractors are invariably reluctant to attempt to distinguish how much of the reduced productivity was caused by employer responsible events (excusable) and how much was due to contractor responsible events (inexcusable), such as tender inefficiencies, optimistic or aggressive planned activity durations, inadequate resource allocation, poor workmanship, use of unskilled resources, and the like.

If these contractor-responsible events (inexcusable), which might have occurred concurrently with the legitimate excusable events, are taken into account, then this would be likely to significantly reduce the quantum of the contractor's global claim.

Given the above, it is perhaps not surprising that contractors are reluctant to properly separate or apportion costs and losses between excusable events and inexcusable events.

In the author's experience, global claims are usually prepared retrospectively after the works are complete by external claims consultants who will not have any first-hand knowledge of the events, but instead rely on historical site records, to the extent that such records exist and can be retrieved.

This often means that the consultants, when preparing the claim, have no real idea of what actually transpired, why events occurred, when or where the events took place, or which events were responsible for causing the delay and/or disruption. Therefore, the consultants merely collate and list as many general and unspecific complaints as possible with the objective of globally claiming that the contractor spent more time and money to complete the work than had been originally allowed in its tender. This is the typical 'total cost' claim.

In the author's experience, the failure by the contractor to raise complaints contemporaneously is usually indicative that the global claim is an afterthought, sometimes raised years after the events occurred, and so will lack the required supporting evidence, and is unlikely to be credible. The advancement of such global claims is invariably an indication of a weak, exaggerated, or a non-existent case.

Whilst it is acknowledged that the validity of claims has to be considered based on the specific contract conditions, for the most part, global claims are unlikely to be contractually compliant and therefore are more likely to be rejected by both contract administrators and arbitral tribunals for want of particularisation.

In summary, the principal failing of the 'actual less planned' global approach is that contractors are inclined to ignore the many reasons why the works took longer and cost more to complete, and so do not account for their own culpability for delay, disruption and the resulting additional costs.

Global claims are often prone to fail as soon as they are issued, and the author understands that, some may consider that global claims should not be allowed, whereas others consider they might be allowed, if certain conditions are met, as explained further below.

### **In What Situations Are Global Claims Appropriate?**

As a pre-requisite for a global claim to succeed, the author understands that the contractor must eliminate from the causes of the costs and losses, all matters that are not the responsibility of the employer. However, that position might be mitigated by three key considerations:<sup>1</sup>

- It may be possible to identify a causal link between specific events for which the employer is responsible, together with particular items of a related delay, cost or loss. By such an approach, parts of the claim can be extracted from the overall global claim and separately allocated to specific individual events.
- If an event, or events, for which the employer is responsible are considered as the dominant or primary cause of the delay, cost or loss, that would be sufficient to establish liability, notwithstanding the existence of other causes that are, to some extent concurrent, or secondary events.
- Even if events for which the employer is not responsible are the dominant cause of the delay, cost or loss, it may be possible to apportion the delay, cost or loss between the causes for which the employer is responsible and the other causes. This apportionment is likely to be more readily achieved where the delay, cost or loss was being calculated by reference to delay in the works, as the cost and loss could be apportioned on the basis of the time during which each of the causes was operative, or the responsibility could be divided on an equal basis.

However, it must be noted that where a concurrent cause of delay is the contractor's responsibility, it is usually appropriate to deny the contractor any cost recovery for such period of default.

This undoubtedly places greater incentive on contractors to avoid apportionment where they can, and instead aim to demonstrate that the employer events upon which they rely, are the dominant causes of the delay, cost or loss.

It is recognised that delay and disruption to the contractor's works, can be considerably complex, however, dependant on the circumstances, apportionment might still be possible, albeit this would probably be carried out in a somewhat 'rough and ready' manner.

### **What Does The Contract Say?**

In the Author's experience, it is understood that, under most construction contracts the contractor has the burden of proving that the relevant delay events actually occurred, that they are the responsibility of the employer, and that the cost and loss that was suffered, was in the amount claimed.

The contractor must also establish and demonstrate the causal linkage between the relevant delay events and the costs and losses claimed.

Typically, in accordance with the terms of the contract, the contractor has the obligation to prove that the costs and losses flowed from the delay and/or disruption.

However, global claims, by their very nature do not adhere to this process, as they do not adduce sufficiently particularised evidence to prove the essential elements required of the claim, to satisfy the contract.

In other words, the connections between the matters that contractors complain of, and the consequences, in terms of time and money, are not fully particularised, or are often not particularised at all.

In general terms, there is limited opportunity to submit global claims under most forms of contract, which restrict the submission of global or total time and cost claims on the basis that there is usually a requirement for contractors to link the relevant events giving rise to the alleged delay and/or disruption to the resultant time and cost effects, with the further requirement for contractors to properly address and particularise their claims accordingly.

Despite this, contractors will often aver that it is impossible and/or impracticable to sub-divide the effects

<sup>1</sup> Ref. Case Law: John Doyle Construction Limited v Laing Management (Scotland) Limited, Inner House Court of Session, 11 June 2004, Lord Drummond Young

of each of the individual excusable events that they allege caused delay and/or disruption, for which they claim recompense.

Invariably, contractors do not attempt to identify and isolate individual elements of the delay caused by excusable events so that the associated costs and losses can be assessed accordingly.

It is appreciated that on more complex projects, delay and/or disruption may occur continuously and concurrently, whereby the works are impacted and affected by a combination of both excusable and inexcusable events, the consequences of which are subject to a complicated interaction, which results in a cumulative and combined delaying effect.

As such, understandably, it is difficult to assess and evaluate the costs and losses caused by any of the individual delay and/or disruption events in isolation.

Since, by their nature, global claims do not articulate the precise case to be met, it can be particularly difficult, or in some cases impossible, for an employer to unravel the issues and their impacts in order to properly evaluate the claim.

Contractors often do not set out their claims clearly with the requisite level of particularisation, despite it usually being a stipulated requirement of the contract for the contractor to keep sufficiently detailed records of the causal events and the resulting delay and/or disruption suffered.

The issuance of a global claim is not in itself proof and/or evidence of a contractual entitlement, and so contractors will still have to convince employers that the costs and losses claimed were entirely caused by events for which the employer is contractually liable. Based on the author's experience there are usually many other inexcusable (or neutral) reasons that explain why, the works took longer than planned and why the contractor's costs exceed its tender price.

### Can a Global Claim Succeed?

The author understands that global claims can legitimately be put forward by contractors where it is impossible and/or impracticable to breakdown and/or sub-divide the loss claimed between the various relevant delay and/or disruption events.

A global claim is also likely to be permissible when there is no material causative factor for which the contractor

is liable, that is, if there are no contractor defaults or culpable delay events that need to be considered and the delay is entirely due to excusable and compensable events, the liability for which rests with the employer.

However, where it is evident that a global claim incorporates both contractor and employer events, the author understands that it will be necessary to identify, separate, remove and account for each of the events, in order for the claim to succeed.

It is suggested by the author that the advancing of claims in a global format is a high-risk strategy, however the author, based on his experience, is of the opinion that, the following criteria (as a minimum) for the consideration of global claims should be met:

- The nature of the delay and disruption/disturbance to the works should mean that there is no viable alternative method of analysis/presentation;
- The original planned programme must be demonstrably feasible; and
- There should be no concurrent contractor culpable causes of delay.

For a global claim to be credible, the author, based on his experience, is of the opinion that, the following conditions need to be satisfied:

- The contractor should not be responsible for the losses, the increased costs, or the delay claimed;
- The employer should be responsible for all of the losses, the increased costs and the delays; and
- It should be impossible to identify positive links between the causes of delay and disruption, and loss and/or expense claimed.

## In Summary

It seems that global claims are not completely 'out-lawed' as there may be certain situations, albeit limited, where global claims can be satisfactorily compiled and presented to enable their success, at least in part.

However, there are strict rules that should be followed when embarking on this risky approach and care must be taken in their preparation and quantification to ensure the right steps are adopted, so as to ensure that such an approach is acceptable.

With respect to the over-arching question posed by this article-whether global claims are worth the paper they are written on-it seems that under certain circumstances, where it is particularly difficult to unravel the complex interaction of numerous delay and disruption events, it is recognised that there may be situations where global claims might have a degree of success, one being the application of apportionment of the claimed costs to employer and contractor causal events, even where this is only a 'rough and ready' exercise.

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