

Chapter 1

Introduction

Why is it Necessary to Produce a Fully Detailed and Professionally Presented Claim or Response?

Imagine that you have been invited to an interview for a new job. This job is a real step up the career ladder and could enable you to move to a better house in a new area where your children would be able to attend a really good school. The job would be stimulating and interesting, and this is the chance that you have been waiting for to prove yourself professionally. When the time comes for the interview, you would undoubtedly take care of your appearance – wear a good suit and ensure that your shoes were polished. You would also probably have spent time thinking of how best to convince the interviewers that you are the ideal person for the job and would have rehearsed answers to the questions that you expect to be asked. If you thought that there may be some negative aspects to your qualifications or experience, lack of specialised experience for part of the job for example, you would probably have thought about how you could put a positive perspective to the interviewers, maybe by stressing some other aspect of your experience which could be easily drawn upon to overcome the perceived disadvantage. In short, given the rewards for success arising from the results of the interview, any person in this position would do their very best to sell themselves to the people making the decision.

Why then, do many of those people or companies responsible for presenting or reviewing claims, which often equate to considerable sums of money, not take similar pains to ensure that their submissions are presented in a professional and thorough manner; that they contain all the relevant and necessary information; and that they answer questions that will probably be asked by the reviewer of the claim? During the past several years, I have spent a considerable proportion of my time reviewing claims, and I can honestly say that during this time I have received very few submissions for which I have not had to raise queries or request additional particulars to be submitted. In some cases

I have simply rejected the claims as presented because they do not fulfil the basic requirements to prove that, on the balance of probabilities, the claim has any merit. Many of the submissions have consisted of a two-page or three-page letter enclosing a haphazard, dog-eared collection of documents which leave the reviewer to try to follow the logic of the claim and make his own conclusions. Well, I am sorry, but my job in such circumstances is to produce a determination, and however impartial I try to be, it is human nature that if my life is made difficult or if I am expected to do the claimant's work for them, I am hardly likely to be predisposed to giving the benefit of the doubt to the person who has brought about this state of mind. I probably would not offer a job to someone who turned up for an interview in a pair of scruffy old jeans with no real idea of how they could make a success of the position either.

Taking the point of view from the other side of the fence (and I am blowing my own trumpet a little here), I have also put together sound claim documents with reasoned and substantiated arguments to demonstrate clear entitlement and quantum, only to have them rejected out of hand by way of a few sentences with no real reasons being given for the rejection. Such responses are, if anything, even less professional than producing a bad claim document, because they are likely to lead to a costly dispute.

The aim of a claim is to persuade the respondent that, on the balance of probabilities, the claimant has entitlement under the contract and/or at law, and to succeed in this, the facts of the events on which the claim is based need to be presented in a logical manner and they need to be substantiated. The contract and, if necessary, the law should be examined to demonstrate that the events give cause to entitlement. If the claimant has been at fault in any way or if there are weaknesses in the claimant's case, then these should be considered and arguments made as to why such things should not affect the case. The same considerations should be taken into account when reviewing a claim. Has the claimant reasonably proved each element of his case and is he entitled to an award of all, or possibly part, of the claim and if not, why not? Such determinations should be clearly written in the response and the reasons for the conclusions should be adequately demonstrated and substantiated. The respondent needs to be equally persuasive that his arguments are well founded if he is to convince not only the claimant, but also the project owner of his findings, which he will need to do if the situation is to be settled and a dispute avoided.

Salespeople are taught that the first rule in selling is to get the customer to like them – the phrase used is 'selling yourself' and the principle here is that people do not want to buy from people that they don't like. We have all been in a situation whereby we grudgingly buy

something from an obnoxious salesperson because we have no other choice and also in situations where we walk away as satisfied customers when we have been treated well by a friendly, helpful and likeable salesperson who is knowledgeable about their product. Presenting a claim or a response to a claim is exactly the same because the goal is to 'sell' it to the other party. The major difference, however, is that we have to initially promote our arguments by means of the printed word, so anything we can do to help 'sell' the claim by obtaining sympathy from the reviewer and by making it easier to agree has direct benefits on the likely outcome.

The Purpose of the Book

This book presents a guide to preparing claims in order to ensure that a claim submission contains all the relevant and necessary information to prove the case and that the document is set out in an easily understood manner, which leads the reviewer to a logical conclusion to demonstrate the claimant's entitlement. It also deals with the preparation and presentation of responses and determinations in a similar manner in order to resolve matters rather than prolong them. In addition to ensuring that the claim or response document contains all the necessary information, the following chapters also contain guidelines for making such documents user-friendly so as not to alienate the reviewer and thus make him less predisposed to disagree with your point of view.

In my experience, many problems surrounding claim and response writing arise from the fact that, in many cases, the people tasked with writing the claim or the response have little or no specific experience in the subject and tend to have to make things up as they go along. On a typical project the number of claims presented may be small and infrequent, so the persons responsible for producing the claim or response do not get the opportunity to practise the art on a regular basis. Adding the considerable requirements in terms of time and effort necessary to prepare a successful claim or a professional response to the pressure of their day-to-day tasks, there is little wonder why the result is often less than perfect.

A mechanical engineer is able to calculate the cooling requirements of an air-conditioning system through a proven and established set of rules to take into account the local climatic conditions, the thermal characteristics of the structure and the building's usage. Quantity surveyors use established and prescribed ways of calculating quantities so that any other person with the required level of experience can

understand the methodology and verify the calculations. These tasks are possible because established procedures are taught either at learning institutions or on the job and are often recorded in industry publications. I believe that the writing of claims can be approached in the same way and this book attempts to set out a framework – a workshop manual, if you like – to assist claim writers and claims' reviewers in these tasks.

We usually think of claims in terms of a submission by a main contractor to the party responsible for administering the contract or by a subcontractor to a main contractor. While this is inevitably the first step, it is possible, however, that the situation may develop into a long and drawn-out affair involving many people and parties with varying degrees of skill and experience in such matters. While this book is primarily aimed at the project personnel responsible for writing or responding to claims, it is also hoped that the principles discussed and the examples worked through will be of use to those who deal with such matters on a more regular basis – dispute-review board members, mediators, adjudicators, arbitrators and the like.

In subsequent chapters, we will discuss the various types of claim and how they should be presented. We will consider what information should be included in claim documents and why. We will examine how to set out and present a claim in various sections so as to bring clarity to the presentation. Finally, we will discuss how to present the actual document in terms of a list of contents, page layout, appendices, exhibits and the like within the submission.

Chapter 2 contains some advice on contract administration for claims and claim avoidance. Chapters 3–5 are included to discuss claims in general terms and the key elements that are required to produce a successful claim submission together with examples of how various claims could be presented. We then move on to Chapters 6–9 in which we will discuss the claim document itself in detail and examine it section by section to discuss the purpose of each section, its content and the conclusions we are trying to reach. In these chapters, we will use a fictitious project in which an event has occurred which gives rise to a claim for an extension of time and additional costs and we will gradually build up a full example claim submission in order to provide examples of the wording, language and content.

Every claim will at some time require a response or determination and Chapter 10 provides guidance and an example of a response to a claim, in order to demonstrate how a professional and comprehensive response document should be produced. Finally, Chapter 11 provides some background and advice on dispute boards.

Although some basic legal precedents are relied upon in the example claim, it is not the purpose of this book to attempt to examine case

studies, legal precedents or the like. In my experience the average claim at project level can get along quite nicely without resorting to complicated legal arguments and such matters generally only need to be brought into play in order to reinforce an area of the claim where there may otherwise be doubts as to entitlement, or if the claim evolves into a dispute. Having said that, there are some basic legal principles that often give strength to certain assertions and it is an advantage to have knowledge of such. It is therefore a good idea to have at hand legal references that have been applied to the construction industry and there are many excellent publications available for this purpose.

Things to be Considered Before Writing the Claim

When an event or events have occurred that the project team consider give rise to the need to submit a claim – typically an act of prevention by the Employer or his agents, or an event outside the control of the Contractor – it is sensible to consider certain matters before proceeding. Things to be considered in the early stages are the following:

1. The likely outcome and seriousness of the event. Will it have a serious enough impact on the claimant to justify the submission of a claim?
2. The value of the claim. Obviously the ends must justify the means here and if it will cost a significant amount to prepare a claim for a small return, it may make little economic sense to pursue the action. Similarly, if a claim is likely to attract a high return, it is probably worth providing the necessary resources to ensure a high-quality effort is made.
3. The strength of the claim and its chances of success. Are the odds of success great enough to justify the effort and expense?
4. The strategy should also consider how the claim is to be pitched. In general terms it is extremely unlikely that the claimant will receive the full value of his claim submission, so it is wise to include a negotiation margin. Is it therefore considered that the best result would be obtained by maximising all issues leaving a large amount for negotiation, or would it be better to ensure that all arguments are absolutely sound and the case is as bulletproof as possible? The latter usually results in a submission with a lesser value, but is often harder to defend against or to refute. It is also true to say that while an inflated claim strategy may have a chance of success if reviewed by inexperienced parties, if the matter subsequently proceeds to a dispute, such a claim is unlikely to succeed when the experts get involved.

5. Some claims are complicated in their very nature and if this is the case, they require a certain amount of knowledge and experience to prepare. Do in-house resources contain adequate experience and knowledge to produce the desired result, or should additional resources be brought in?
6. Client relationships should be considered. Claims are inevitably viewed negatively by the respondent. At best, the person responsible for reviewing the claim and making a determination will consider another task to include in his already busy working schedule as an inconvenience and at worst, the claim will be viewed as an attempt by the 'greedy and unscrupulous' contractor to maximise his returns by any means from the 'poor, hard-done-by and totally innocent' client. While the reality will most likely fall somewhere between these extremes, existing and future client relationships should be considered, maybe at executive level, before embarking on a course of action that could possibly end in contention.
7. The parties who are likely to make the determination should also be considered. Will they be difficult to persuade? Do they have a responsibility to protect the Employer's interests or to be impartial? If it is the latter, are they actually likely to act impartially? The actual personnel should also be considered. Has animosity crept into the relationship? Is the person likely to have sufficient knowledge to understand the matter in question and the contractual principles relied upon? Is the Employer likely to engage the services of an expert?

It is a good idea to develop a claim strategy in the very early stages of a project. The strategy should take into account the above considerations and decide upon what the claimant really wishes to achieve from the situation.

A good illustration of such considerations is that on a particular occasion I was engaged as a consultant to prepare an extension-of-time claim for the Contractor. The project was almost at an end when I was consulted and I was asked to compile a claim based on approximately twelve events that had delayed the Contractor. The claim was duly prepared and submitted to the Resident Engineer who was the party responsible for issuing extensions of time. After about a month, the Contractor and I were asked to attend a meeting with the Resident Engineer to discuss the matter. The person responsible went through each delay event in turn and gave his comments and I was pleasantly surprised that he was in agreement with most of the claim as submitted. I was even more surprised when, in a couple of instances, he even pointed out that we could have actually claimed more time. In two instances, however, he put up a vigorous argument as to why the Contractor was not entitled to anything at all for the events claimed.

The penny eventually dropped when I realised that all the events with the exception of the two that were being disputed could be laid fairly and squarely at the door of the Employer or on other external circumstances and that the two that were being vigorously defended were the fault of the Resident Engineer. The message was simple. Go away, revise your claim to make sure that the Resident Engineer appears blameless, resubmit it and I will then issue your extension of time. Professional? Not really, but we got the result we were looking for and that is what counts.

The contract administration procedures prior to submitting a claim should take into account that early communication is an important factor in influencing how a claim will be received. If the receiving party is taken by surprise when the claim lands on his desk, he is likely to feel 'ambushed' or even consider himself as being professionally inadequate because he failed to see it coming and probably did not report it to his client or superiors. It is consequently quite natural for a person in such a situation to offer up a rigorous defence. On the other hand, if the party has been forewarned through formal and informal communications that the claimant considers that he has an entitlement to a claim and that a submission will be forthcoming, then the recipient will not only be mentally prepared for its arrival, but he should have made adequate provisions for it in his reports, budgets and the like. It is more likely that a reviewer will adopt a more impartial position if financial provisions have already been made against a possible claim, than if he has to go cap in hand, bearing bad news to those further up the tree who could possibly adopt a 'shoot the messenger' mentality in such a situation.

When considering the matter of the person or persons responsible for preparing the claim, it is definitely worth thinking about consulting with an expert if one does not exist on the project. In an earlier life I worked as the project manager for a subcontractor who was delayed significantly on the project by the main contractor and this brought about my first experience at claim writing. I had no one to help or to advise me and, try as I might, I could not find a 'Claims Writing for Dummies' type of book to give me any guidance, which of course is something that I am attempting to rectify by this publication. I struggled on through and ended up with what I considered at the time to be a decent submission. Looking back nowadays, however, I realise that it was not a very professional effort and I really could have benefited from some advice from someone who had been there, done it and got the T-shirt. Similarly, having worked in various positions on projects on which I have had the responsibility of dealing with claims and where there are never enough hours in the day, I know from personal experience that day-to-day life on site leaves little time to sit down and put in

the necessary concentrated effort to produce a robust claim submission or response. In a later part of my somewhat varied career, I had the good fortune to work for the Knowles Group as a consultant, and in those days, the main purpose of my life was to either prepare claims on behalf of contractors and subcontractors, or to review claims and advise on determinations on behalf of employers. I have to say that because I was doing this type of work on a day-in, day-out basis, I developed efficient ways of doing things due entirely to constant practice and the consequent economies of scale. I would not say that it became a production line exactly, but repetition certainly improved my ability to produce the work efficiently and effectively. Having come to this job from various project-management or commercial-management roles, I also found that it was a luxury to be able to sit down without the phone ringing every five minutes or people constantly popping into my office needing something attending to yesterday. In short, in those days I was able to concentrate fully on the task in hand, which is often not something that most project personnel are able to do.

One other advantage of bringing in an 'outsider', whether from company resources or through the services of a consultant, is that because the project personnel live and breathe the project on a day-to-day basis, it becomes very personal to them. Personalities consequently tend to come into play and emotions tend to surface, and it is sometimes therefore difficult to view a situation in a detached and objective manner. In my experience the 'outsider' will often be able to take a few steps back when examining a situation and he will consequently be able to give a more dispassionate opinion on the merits of the claim and possibly cut right to the bare bones of the matter to produce a more balanced and less emotive submission than might otherwise have been the case.

The form of Contract used in the Examples

As we progress through the book and discuss the process of building up and writing claims, it will be necessary to refer to various conditions of contract. There are many standard forms of contract in use internationally and it is not the purpose of this book to examine such contracts, but rather to explain how to use *a typical* contract in the context of claims. Consequently, it will become necessary to refer to the contract conditions and in some cases to include quotations to illustrate examples of wording and how this may be effectively incorporated within the submission. Rather than confuse the issue by using different examples from different forms of contract, I have made reference throughout the

book to the *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, First Edition 1999*, published by the Fédération Internationale des Ingénieurs-Conseils (more commonly known as FIDIC), who have kindly given me permission to quote from their publication. I feel that this publication is suitable firstly, because this book is aimed at the international market in which this form of contract is widely used and secondly, because it contains most of the principles included in other forms of contract in one form or another, and the examples used may therefore be easily adapted to suit alternative forms of contract.

It is anticipated that readers will use this book as a guide and as reference material, and thus pick and choose the sections and references appropriate to their particular requirements. It is with this in mind that in some cases, in order to avoid the reader having to refer to other sections to obtain the relevant references, I have repeated the same contract conditions under different subjects.

Definitions

It is necessary throughout the book to refer to various parties, and to describe various actions, events or things. Different forms of contract in widespread use often employ different terminology and, in order to maintain consistency, I have used the same definitions throughout. Most of the terms and/or definitions are consistent with the FIDIC form of contract detailed above but for the sake of clarity they are defined as follows:

- ‘The Employer’: The party who has ordered the work to be done. In other forms of contract, this party may be referred to as ‘the Client’ or ‘the Owner’.
- ‘The Contractor’: The party who is responsible for completing the work.
- ‘The Engineer’: The party responsible for administering the Contract. In other forms of contract, this party may be referred to as ‘the Architect’, ‘the Supervising Officer’ or ‘the Project Manager’.
- ‘The Reviewer’: The person responsible for reviewing a claim or response and producing a determination, defence or response to the submitted document.
- ‘The Contract’: The various documents including the letter of award, the agreement, contract conditions, the

- specifications, the drawings and any further document listed in the agreement or letter of award which together form the contract between the parties.
- 'Programme':** Programme means a breakdown of the work required into a list of planned activities showing the times and dates when they are intended to happen or be done, in the form of a bar chart. In some parts of the world, this is customarily referred to as a 'schedule'.
- 'Delay Damages':** A sum of money, which shall be paid by the Contractor to the Employer in the case of failure to complete the Project by the Time for Completion. Some contracts deduct such monies under provisions of 'liquidated damages' or 'penalties'.
- Currency:** Despite the international target market of this publication, where it is necessary to refer to monetary values, I have used Pounds Sterling (£) as the currency. While attempts have been made to make the values fairly realistic, particularly in relationship to each other, any monetary values are purely used for illustrative purposes and make no attempt to reflect true or actual values.

The Example Projects

In order to attempt to bring about a realistic treatment of the example claim and response documents discussed in the forthcoming chapters, I have created a couple of fictional projects and used events which could have conceivably occurred on such projects to demonstrate how a typical claim or response could be written. The examples used are based upon actual situations for which I have prepared either the claim or the determination.