

## **Protocol in Assessing Loss and Expense Claim for Malaysian Public Project**

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### **Abstract**

The majority of Standard forms of building contracts contain loss and expense clauses that enable an equitable contractual remedy for the Employer's contract violations without labelling them as such. There is frequent reluctance to pay such fees, and the burden of proof increases, as actual expenditures associated with the violating event must be established. A claim for breach of contract damages may be brought under common law. While loss and expense claims are frequently made in connection with delays, they can be made for any incident the Contractor suffers damage due to the Employer's failure. It is critical that all contract terms relating to loss and expense, particularly modified terms, are properly understood. Based on the findings, it will also present the achievement of the study's objectives. The first objective is to Describe The clauses which could justify the claim for loss and expense due to time extension. The second objective is to explore the process and procedure of assessing loss and expense claims. The answer is stage 1: identify the occurrence of an event, stage 2: notification of a claim, stage 3: Preparation and submission of the claim, stage 4: assessment of the claim and stage 5: resolution and review. The third objective is to evaluate clauses and claims permitted for the loss and expenses due to extension time for government projects under J.K.R. supervision.

**Keywords:** claim on loss and expense, extension of time, public project

### **Introduction**

It will describe and conclude the extensive investigation into the Contractor's claims for loss and expense in government projects. A synopsis of the research findings will be presented. Based on the findings, this section will also present the achievement of the study's objectives.

**Summary of Research Findings from the research objective:-**

**i) To Describe The Clauses Which Could Justify The Claim For Loss And Expense Due To Time Extension.**

One sort of contractual claim is a claim for loss and expense. This claim is a contractor's entitlement to claim a result of a client or government default. This violation may cause the Contractor's work to be disrupted and prolonged. The right to make this claim is outlined in Section 74 of the Contracts Act (1950), Clause 44 of the P.W.D. (Rev 1/2010) Standard Form of Contract, and various cases of loss claims. To qualify for the Contractor to pass in his claim, the Contractor must follow the claims procedures and contract terms. Furthermore, contractors must take specific measures to file a claim for loss and expense.

The procedure begins with the Contractor's notice of intent to file a claim. Clause 44 P.W.D. (2010) and Clause 49 P.W.D. Form D.B. (Rev 1/2010) require the Contractor to submit the notice within the specified time frame. The claim for losses is mostly due to the Contractor's work being delayed due to the Government's default. As a result, loss claims for Time Extension are only available for the five types of delays listed in clause 44.1 (c), (d), (e), (f) and (h). PWD Form DB (Rev 1/2010) clause 49.2 is (b), (d), (e), (h), and (j).

The Contractor must file a claim with evidence of claim under the procedure outlined below. Evidence-related claims must be presented within three (3) months or 90 days of practical completion, whichever comes first. Even though these claims are explicitly indicated in the contract, the Contractor's claims outnumber the number of claims verified by S.O. After analyzing the situation, and there are some reasons why the Contractor fails to file loss claims.

There are three (3) main reasons for contractors' refusal to declare loss and expense in P.W.D. projects:

1. The Contractor fails to submit a notice of intent to file a claim within the time limit.
2. The Contractor fails to submit claims and supporting documentation or evidence within the specified timeframe.
3. The Contractor's claims for E.O.T. do not meet the contract's E.O.T. clause.

**a) Claimant's Notice of Intent**

The most common reason for a contractor's inability to claim loss and expenditure in P.W.D. Projects is failure to submit a notice of intent to claim within the statutory time frame. Half of the Contractor's claims failed to be certified by S.O. This demonstrates the need of providing notice of intent to claim in government projects.

One of the formal notice requirements in government projects is that it must be submitted within a reasonable time frame. Clause 44 P.W.D. 203A Rev 1/2010 within 30 days of the occurrence of delays. Therefore, clause 50 P.W.D. form DB Rev 1/2010 within 60 days of the incidence of delays, the Contractor must send the notice.

In the case of London Borough of Merton v. Stanley Hugh Leach, the legal case relating to the notice also held that notice requirement was needed in administering claims for losses and expenses is very significant in administering claims. However, notice remains a requirement for Government projects, and failure to comply with this obligation may result in the claim being rejected. Notification is critical in government projects;

- i. To provide the Government with an opportunity to prevent default;
- ii. To ensure that the claimed violation does not persist; and
- iii. To comply with the contract conditions governing claims for loss and expenditure incurred due to the E.O.T allowed under the contract.

#### b) Claims With Supporting Documents Or Evidence

Inability to submit claims with accompanying papers or evidence within the stipulated time frame is the second most common cause of a contractor's failure to claim loss and expense in P.W.D. Projects. According to clause 44.2 of the PWD 203 / 203A (Rev 1/2010) contract terms, the Contractor is expected to produce documentation of the contents of his claim for verification by S.O. Therefore, the Contractor must produce the appropriate evidence within three (3) months after practical completion in this scenario.

According to Clause 44.3 of the terms of the PWD 203 / 203A contract (Rev 1/2010), the failure of the Contractor to produce such documentation renders him ineligible to claim, and the Government is released from all liabilities relating to the claim.

Case law relating to claim requirements and related evidence further demonstrates that these criteria are critical in determining the eligibility of claims for losses and costs to be authorized. Accordingly, the claim should be denied since it failed to prove damages. In *Perbadanan Menteri Besar Kelantan vs. Majubina Syarikat* (2016)

This demonstrates that P.W.D. and the Court are adamant about upholding the burden of evidence principle. As a result, the Contractor must comply with the contract provisions requiring the submission of claim details and related documentation. The Government may reject the Contractor's claim if the Contractor fails to produce evidence.

#### c) Clause Compliance in Standard Form of Contract

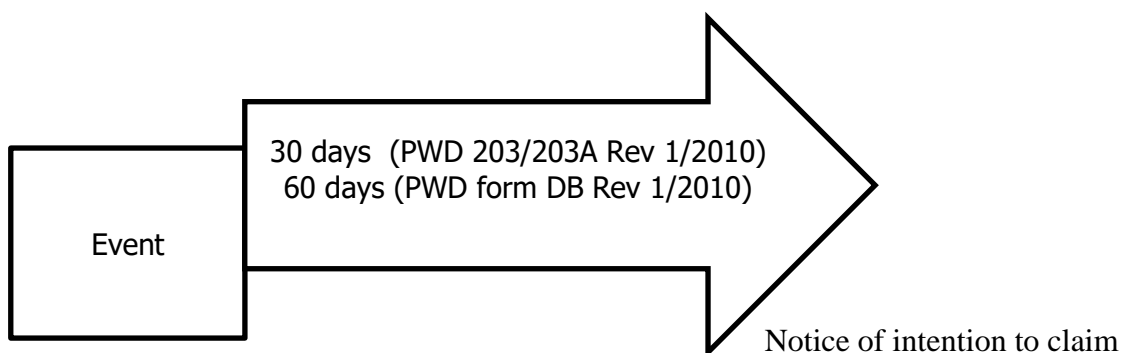
When a contractor is allowed an extension of time due to an excusable reason, the Contractor will attempt to compensate for the delay. However, not all of the excusable reasons are eligible for additional compensation. This contributes to the third failure that the Contractor fails to claim due to the Contractor submitting E.O.T claims that do not meet the contract's terms.

Refer to the usual contract forms to assess whether the delays are compensable. The P.W.D. 203A/203 relates to Clause 43.0 Delays and Extension of Time Clause under clause 44.1, the case of delays. As a result, there are only five grounds for delaying occurrences that allow the Contractor to claim loss and expense due to delays. These are the five grounds:

- i. Suspension of works.

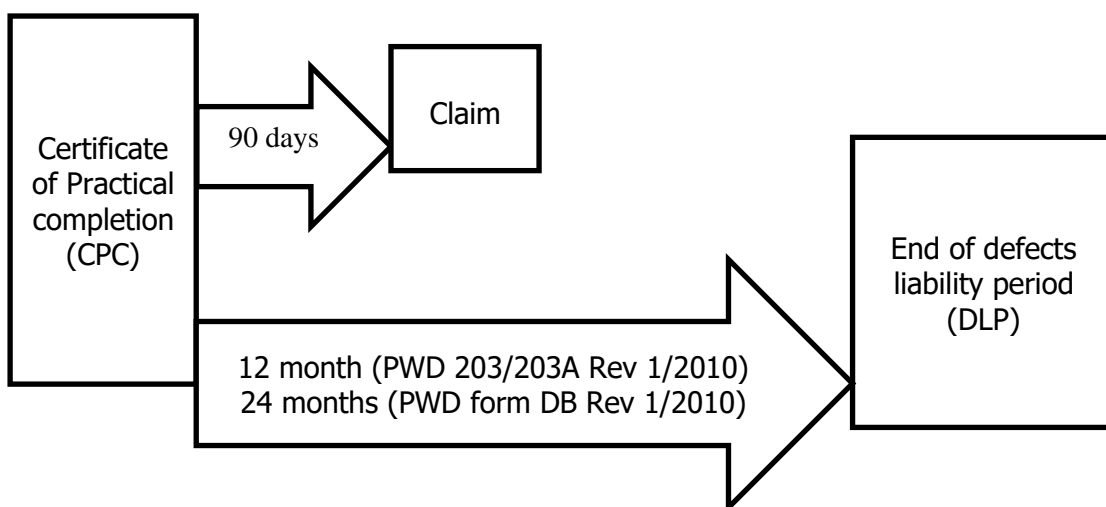
- ii. Directions are given by the S.O. consequential upon disputes with neighbouring owners.
- iii. S.O.'s instructions were issued under clause 5 of P.W.D.
- iv. The Contractor not having received in due time instructions regarding the nomination of sub-contractors and suppliers, necessary instructions, drawings or levels for the execution of the works from the S.O. due to negligence or default of the S.O.
- v. Delay in the part of artists, tradespeople or others engaged by the Government.

**Figure 1.1 :Intention**



- Under clause 44.1 (PWD 203/203A Rev 1/2010)-by reason of delays as stated under clause 43.(c),(d), (e), (f) and (h)
- Under clause 49.2 (PWD form DB Rev 1/2010)- by reason of delays as stated under clause 43.(b),(d), (e), (h) and (j)

**Figure 1.2 : Claims With Supporting Documents Or Evidence**



- *Under clause 44.3 (PWD 203/203A Rev 1/2010)- If the contractor fails to comply with clause 44.1 and 44.2, he shall not be entitled to such claim and the government shall be discharged from all liability in connection with the claim.*
- *Under clause 50.3 (PWD form DB Rev 1/2010)- If the contractor fails to comply with clause 50.1 and clause 50.2, he shall not be entitled to such claim and the government shall be discharged from all liability in connection with the claim.*

## **ii) To Explore The Process And Procedure Involve In Assessing Loss And Expense Claim**

### **Stage 1: Identify the Occurrence of Event**

The first stage is identifying the relevant events that have occurred due to the job being delayed or disrupted. This procedure is crucial since not all events have the right to claim the contract. For example, both standard forms of contract used in public projects state that the Contractor may only make claims due to work suspension, disputes with neighbouring owners, instructions given by the S.O. or P.D., late issuance of instructions, drawings, or levels from the S.O., and delay on the part of the artist, tradesmen, and others carrying out work not forming part of the contract. As a result, the S.O. or P.D. must carefully determine the event's occurrence to ensure that it complies with the contract's terms. If the alleged event is not covered by the contract, the S.O. or P.D. can use this as the primary reason to reject the Contractor's claim. This stage will be critical in determining the need for additional evaluation and the next course of action by the S.O. or P.D.

### **Stage 2: Notification of Claim**

This stage necessitates the S.O. or P.D. determining whether the Contractor has met the contract's specified notification obligations. For example, the traditional contract requires the Contractor to submit his claim intention within 30 days of the event's occurrence. In contrast, the design and built contract need the Contractor to inform the claim within 60 days of the event's occurrence. The Contractor's contractual entitlement to the claim may be jeopardized if he fails to comply with such clear conditions.

### **Stage 3: Preparation and Submission of Claim**

The third stage is crucial because the S.O. or P.D. is not required to evaluate the claim until it has been formally submitted with all details and supporting documentation that allows him to assess it. Therefore, the entire particulars of the claim must be submitted within 90 days after the Certificate of Practical Completion is issued in the standard forms used in public projects. Failure to comply with such requirements may imperil the claim's contractual entitlement and discharge the Government's liability in connection with the claim, in addition to failure to provide notice of intention to claim.

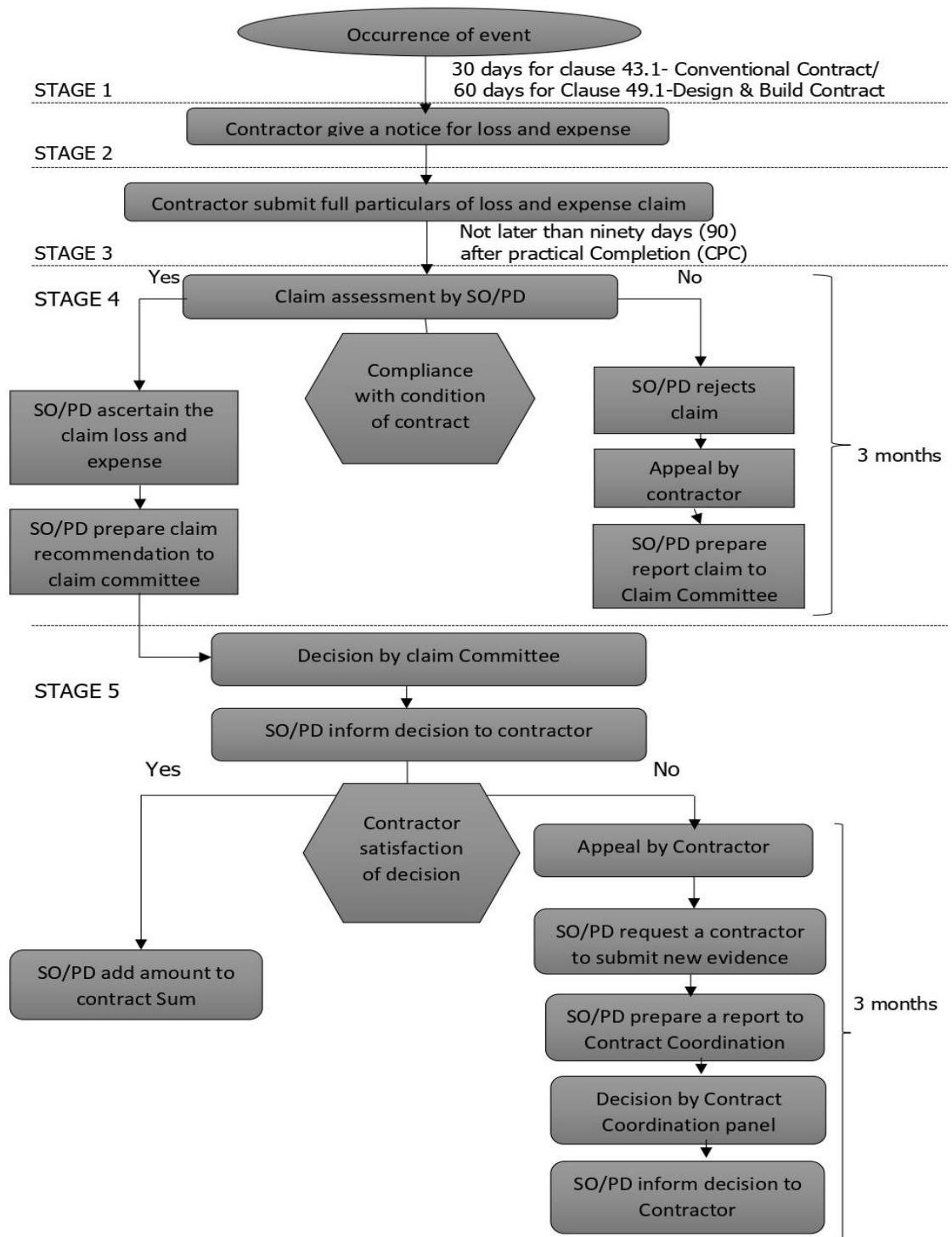
#### **Stage 4: Assessment of Claim**

After obtaining the claim's full particulars from the Contractor, the S.O. or P.D. must analyze the claim and make appropriate decisions on the claim's status. First, the S.O. or P.D. must evaluate the claim in conformity with the contract's terms. Compliance with contractual, procedural requirements will be utilized to determine whether the claim needs to be further reviewed or not at this level. If the response is yes, the S.O. or P.D. must determine the legality of the claim, and the extent of rights claimed from the claim. This will be the most difficult stage of the process, as the S.O. or P.D. must analyze all supporting documentation to determine the amount of claim sought by the Contractor. The S.O. or P.D. must then prepare their claim recommendation for approval by the Claim Committee. Assume the response is negative (Contractor fails to comply with procedural requirements stipulated in the contract). In that instance, the S.O. or P.D. must reject the claim and notify the Contractor of their decision. If the Contractor is dissatisfied with the decision or files an appeal, the S.O. or P.D. must produce a report on the claim and present it to the Claim Committee for decision. The assessment stage, up to and including the determination by the Claim Committee, should be completed within three months after receiving the specific claim from the Contractor.

#### **Stage 5: Resolution and Review**

This stage seeks to determine whether the claim should be approved or rejected. As a result, the outcome of the Contractor's claim will be determined at this stage. Although the S.O. or P.D. can decide on a claim under the contract, the Claim Committee or Contract Coordination Panel has the authority to decide on the claim's status and entitlement in implementing the public project. The Claim Committee will decide based on the reports submitted by S.O. or P.D. at this point. The Claim Committee has the option of accepting or rejecting S.O./P.D.'s recommendations. If a contractor appeals a decision issued by S.O. or P.D., the Claim Committee may consider the claim. The S.O. or P.D. must then advise the Contractor of the Claim Committee's decision. If the Contractor agrees to the decision, the S.O. or P.D. may take the required steps to include the agreed loss and expense amount in the Contract Sum.

Assume the Contractor was dissatisfied with the Claim Committee's judgment and filed an appeal against it. In that scenario, the S.O. or P.D. should request that the Contractor present any additional evidence connected to the claim for the Contract Coordination Panel's consideration. This will also be the claim's second review phase in the framework. The S.O. or P.D. must then submit a report on the claim for the Contract Coordination Panel's ultimate determination. The judgment of the Contract Coordination Panel is final, and any challenge to it must be settled through other channels as permitted by the contract. According to the framework, the review procedure should be completed within three months of the Contractor's submission of an appeal.



**Figure 1.3 : Process And Procedure Involve In Assessing Loss And Expense Claim in Public Project**

**iii) To Evaluate Clauses And Claims That Are Permitted For The Loss And Expenses Due To The Extension Of Time For Government Projects Under Jkr Supervision**

According to the research, the optimum approach for pursuing successful claims for direct loss and expense in government projects overseen by J.K.R. is as follows:

1. The Contractor must meet all three requirements outlined in Clause 44 - Loss and Expense Claims under P.W.D. 203A (Rev. 1/2010). Form and Clause 50 - Procedural Guidelines for P.W.D. D.B. Claims (Rev.1/2010) Three conditions exist:

a) Within thirty (30) days of the occurrence of delay events in P.W.D. Form 203 (Rev.1/2010) or sixty (60) days of the occurrence of such event or situation in P.W.D. Form D.B. (Rev.1/2010), the Contractor must submit a notice of intent to claim.

b) The Contractor must submit claims for both provisions within ninety (90) days of practical completion, accompanied by supporting documentation or evidence.

c) The Contractor may claim only those E.O.T. specified in the contract's stipulations.

2. All payment receipts must be in the Contractor's name. Receipts for payments made in the name of an associate, a subsidiary, or a holding company are inadmissible. If the Contractor does not adhere to this criterion, their claim may be denied.

3. The Contractor must give appropriate evidence of premium payment to the insurance company representative in the Contractor's name and an endorsement regarding the extended insurance coverage period.

4. The Contractor must give appropriate documentation of premium payment to a financial institution in the Contractor's name, as well as an endorsement regarding the bond guarantee duration being extended.

5. The Contractor must submit sufficient documentation on water bills within a certain time to claim under a clause allowing the Contractor to do so.

6. The Contractor must present adequate documentation in the form of electricity bills within a certain time to claim under a clause that permits the Contractor to do so.

7. The Contractor must show sufficient evidence in the form of phone bills within a certain period to claim under a clause allowing the Contractor to do so.

8. The Contractor must present sufficient evidence within a certain time frame if the contract contains a clause allowing the Contractor to claim.

9. The Contractor must submit sufficient documentation in the Contractor's name for project use over an extended period according to a clause allowing the Contractor to make a claim.

10. The Contractor must produce appropriate documentation in the Contractor's name for the



Contractor's on-site employees.

The following is the breakdown of claims for direct loss and expense in government projects, according to the research:

- a) Preliminary Work:
  - 1. Insurance
  - 2. Performance bond
  - 3. Water Bills
  - 4. Electricity Bills
  - 5. Phone Bills
  - 6. Site Office
  - 7. Photostat machine / computer / printer machine / facsimile machine
  - 8. Work Progress Report
  - 9. Worker's Residence
  - 10. Vehicle Services for S.O.
  - 11. Maintenance of Contractor Vehicles On-Site
  - 12. Laboratory Assistant
  - 13. Contractors workers on site
- b) Idling Cost
  - Cost for workers / machine / plant / machinery / equipment

The basis of the assessment made for cost for workers or machines or plant or machinery or equipment in government projects is based on the price for workers or machinery or equipment unable to perform work within the disruption period. This involves additional expenses for workers/machines/plant/ machinery and equipment located at the site but unable to carry out work.

For this type of claim, the evidence or requirements that the Contractor needs to provide in ensuring the Contractor is successful when claiming for loss and expense in government projects is the proof of payment in the Contractor's name for the project.

In this case, references should be made to the organization chart of the site and site diary to determine the number of workers or machines or plant or machinery and equipment within a period of extension of time under a clause that allows the Contractor to make a claim.

Proof of payment receipt shall be in the name of the Contractor himself. Payment receipts in the name of an associate or the name of a subsidiary or in the name of a holding company are not acceptable. If the Contractor fails to comply with this condition, the Contractor's claim may be rejected.

c) Others Claim

- Costs of Management Headquarters Contractors

The basis of the assessment made for costs of management headquarters Contractors in government projects is based on the cost of headquarters management. This is because the employees at the headquarters are directly involved in the implementation of this project.

For this type of claim, the evidence or requirements that the Contractor needs to provide in ensuring the Contractor is successful when claiming for loss and expense in government projects is the proof of payment on behalf of contractors and timesheets involving project implementation and supported by other documents.

These documents must prove the involvement of related employees is for this project. In addition, consideration should consider the participation of employees in other projects implemented by the Contractor during the period for determining the reasonableness of the period required by the Contractor.

**Table 1.1 : Summary of the Composition Of Claims And The Document Evidence Required For Direct Loss and Expense In PWD Projects**

NO	Heads of claims	Assessment	Evidence Document
1.	Preliminary Work / Construction Site Management		
a)	Insurance	Extended period of insurance coverage	Receipt of premium payment to insurance company agent in the name of contractor; and Endorsement about the extension of the insurance coverage period.
b)	Performance bond	An extended period of bond guarantee	Receipt of premium payment to a financial institution in the name of contractor; and The endorsement is about the extension of the bond guarantee period.
c)	Water Bills	Water consumption at construction site	A contractor's proof of payment on water bills within an extended period under a clause allows the contractor to make a claim.

NO	Heads of claims	Assessment	Evidence Document
d)	Electricity Bills	Electricity consumption at construction site	Proof of payment by a contractor on electricity bills within an extended period under a clause that allows contractors to make a claim
e)	Phone Bills	Phone usage at construction site	Proof of payment by a contractor on phone bills within an extended period under a clause allows a contractor to claim.
f)	Site Office	Maintenance costs such as rental and housekeeping	Proof of payment by the contractor within an extended period under a clause allows the contractor to claim.
g)	Photostat machine / computer / printer machine / facsimile machine	Maintenance cost	Proof of payment in the contractor's name for project use within an extended period under a clause allows the contractor to claim.
h).	Work Progress Report	The cost of preparation of the report	Proof of payment by the contractor within an extended period under a clause allows the contractor to claim.
i)	Worker's Residence	Cost of maintenance / rental	Proof of payment in the contractor's name for project use within a period of extension of time under a clause that allows the contractor to make a claim.
j)	Vehicle Services for S.O.	Maintenance costs, such as driver's salary payments, road tax, insurance, oil and others in respect of vehicle services.	Proof of payment in the contractor's name for project use within a period of extension of time under a clause that allows the contractor to make a claim.
k).	Maintenance of Contractor Vehicles On-Site	Maintenance costs, such as driver's salary payments, road tax, insurance, oil and others in respect of vehicle services.	Proof of payment in the name of the Contractor for project use within a period of extension of time under a clause that allows the contractor to make a claim.
l)	Laboratory Assistant	Wages for Laboratory Assistant	Proof of payment in the contractor's name for project use within a period of extension of time under a clause that allows the contractor to make a claim.
l)	Laboratory Assistant	Wages for Laboratory Assistant	Proof of payment in the contractor's name for project use within a period of extension of time under a clause that

NO	Heads of claims	Assessment	Evidence Document
			allows the contractor to make a claim.
m)	Contractors workers on site	Wages for Contractors workers on site	Proof of payment in the contractor's name for project use within a period of extension of time and Contractors workers on site. In this case, references should be made to the organization chart of the site and site diary to determine the number of employees within a period under a clause that allows the contractor to make a claim.
2	Idling Cost		
a)	Cost for workers / machine / plant / machinery / equipment	Cost for workers / machine / plant / machinery and equipment unable to perform work within the disruption period. This involves additional expenses for workers / machines/plant/machinery and equipment located at the site but unable to carry out work.	Proof of payment in the name of the contractor for the project. In this case, references should be made to the organization chart of the site and site diary to determine the number of workers/machine/plant/machinery and equipment within a period of extension of time under a clause that allows the contractor to make a claim.
b)	Other Claim		
	Costs of Management Headquarters Contractors	The cost of headquarters management in which the employees at the headquarters are directly involved in the implementation of this project.	Proof of payment on behalf of contractors and timesheets involving project implementation and supported by other documents proving the involvement of related employees is for this project. Consideration should consider the participation of employees in different projects implemented by the contractor during the period for determining the reasonableness of the period required by the Contractor.

## Conclusion

The study is necessary to ensure that contract management, particularly in the measurement of damages and cost claims, is compatible with the terms of the contracts and is compatible with the terms of the contract and the company's standard operating procedure. In addition, it will enable all parties involved in the public project to address claims properly and, as a

result, multigate any potential conflict in the public project.

Determining the composition of direct loss and cost claims in government projects and the strategy to ensuing effective direct loss and expenditure claims in government projects will hopefully assist Contractors in successfully claiming direct loss and expense in government projects. Even though the S.O. or P.D. is fully competent to determine the claim under the contract, the situation is different when performing public projects. The authority of the S.O. or P.D. to decide on the claim is limited, and the authority rests with the Claim Committee and Contract Coordination Panel. The Claim Committee and Contract Coordination Panel might evaluate the Contractor's previous decision in the appeal case.

The Contractor is given a fair chance to assert his right to lose and incur expenses while carrying out a public project. When the Contractor is dissatisfied with the judgement of the S.O./P.D. or Claim Committee, he has the right to appeal. The Contractor may not have this kind of opportunity to implement a private project.

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