



**UNIVERSITY OF NAIROBI
SCHOOL OF BUILT ENVIRONMENT
DEPARTMENT OF CONSTRUCTION MANAGEMENT**

**CHALLENGES OF EVALUATING
EX-GRATIA CLAIMS BY QUANTITY SURVEYORS IN KENYA**

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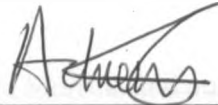
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DECLARATION

This Project work is my original work and has not been presented for a degree in any other university.



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This Project has been submitted for examination with my approval as university supervisors.



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DEDICATION

This work is dedicated to my family, my wife, Morrine and Son, David.

!

ABSTRACT

The common use of lump sum contracts in Kenya, based on Joint Building Council (J.B.C) standard form of contract does not allow for ex-gratia claim since it is not contractual. However, as has been established in a survey done in Thailand, ex-gratia claims does not occur often in a project but when it occurs its impact is significant especially to the execution of the works by the contractor. The challenge therefore is for Quantity Surveyors to respond to ex-gratia claims when submitted. The response would be to evaluate the ex-gratia claim which may result in either its recommendation for an award or its rejection and therefore one would have to decide which method (s) to use, what factors to consider in awarding or rejecting etc.

The objectives for this study were to identify methods used by Quantity Surveyors in evaluating ex-gratia claims, secondly to identify the factors considered by Quantity Surveyors in recommending payment of ex-gratia claims and thirdly identifying the challenges faced by Quantity Surveyors in evaluating ex-gratia claims. The researcher considered that the above objectives would be able to capture the challenges faced by Quantity Surveyors in evaluating ex-gratia claims.

Literature review was done that provided input to the study methodology. The methodology of the study was a combination of both qualitative and quantitative types of research because although our data is historical it was to be presented in pie charts, percentages etc. The population for the study was all practicing Quantity Surveying firms in Kenya, the list was obtained from the Board of Registration of Architects and Quantity Surveyors (BORAQS). The list had an updated number of 152 firms out of which the study randomly sampled and obtained 45 firms. Questionnaire was chosen as a data collection instrument and therefore engaged two research assistants to help in the distribution and collection of questionnaires from the various respondents. Out of the 45 respondents, 30 firms responded to the questionnaires which represented 66.67% which is statistically adequate to represent the entire population. The data obtained was analyzed through Statistical Package for the Social Sciences (SPSS) computer programme and the results presented in terms of tables, figures and percentages.

The findings of the data collected indicated that ex-gratia claims is not a common phenomenon as supported by 93.2% of the respondents having done less than four (4) ex-gratia claims. It was also noted that majority of these claims were for residential construction projects i.e. 46.7% others were

for commercial and institution projects which were at 30.3% and 23.0% respectively. The study findings shows that the main cause of financial type of ex-gratia claim was fluctuations in a non-fluctuating project and this represented 60% of the responses. On the other hand pricing error is also another contributing factor which represented 36.7% of all responses. This means that the two major causes of ex-gratia claims which are financial in nature are fluctuation and pricing errors. The three methods that the study found as being used to evaluate the financial type of ex-gratia claim were use of prevailing financial markets, the use of markets rates and the use of Joint Building Council price indices. On the other hand the major cause of time based ex-gratia claim was late delivery of imported materials and equipments, followed by cash flow problems, delay of works by a subcontractor and unavailability of local construction materials. The commonly used methods to evaluate ex-gratia claim as established by the study were use of scope of works remaining, works programme as well as the target date given by the client beyond which the project should have been handed over and running. The study also found out that the major challenge in evaluating any of the ex-gratia claims is lack of facts, lack of knowledge on ex-gratia claims as well as limited time to carry out the evaluation. Indeed, comprehensiveness and completeness of a claim document based on factual support was established as one of the key factors influencing whether the Quantity Surveyor would award or deny ex-gratia claim.

The study concluded that Quantity Surveyors be allowed to insert an addendum to the standard forms of contract to allow for ex-gratia claim. Secondly, the study also concluded that the methods used to evaluate contractual claims are the same as those ones used to evaluate ex-gratia claims.

Flowing from above, the study recommended several things; first that ex-gratia claims be incorporated as part of cost management strategies by Quantity Surveyors, secondly, that methods used to evaluate contractual claims should also be used to evaluate ex-gratia claims, thirdly that contingency sums for non-fluctuating contracts be more than the ones for fluctuating contracts and lastly that both the contractors and Quantity Surveyors create a culture of building data base for all their projects.

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CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

In construction, the term “claim” is defined as a request by the contractor to be compensated for some loss suffered or expense incurred or an attempt to avoid the requirement to pay liquidated and ascertained damages (Seeley, 1997). An example of a loss suffered could be when there is an increase in the quantity of an item that was priced low. On the other hand an example of expense incurred could be when there is an increase in fuel price that affects transportation of materials to site or operations of site equipments that consume fuel. Contractually, the contractor is required to pay for liquidated and ascertain damages when they are liable for the delay in completion of a project, however, this obligation could be waived by the employer on an ex-gratia claim basis.

There are three types of claims commonly used in construction industry namely; contractual claims, ex-contractual claims (common law claims) and ex-gratia claims. In Kenya, the three types of claims are all in practice. Generally, construction claims have an impact on the success of a project in terms of cost and time, more often resulting in their increment.

The background of this research study is the common use of lump sum contracts involving bills of quantities and the standard form of contract’s inherent short comings in addressing the issue of ex-gratia claims. For instance, under clause 37 of the Joint Building Council, Standard form of Contract, titled Loss and Expense caused by disturbance of regular progress of works, the Joint Building Council (J.B.C) standard form of contract, provides eleven premises upon which a contractor can be compensated for loss and expense suffered caused by disturbance of regular progress of works on site. This clause invites the question of how to manage and compensate for losses and expenses incurred by a contractor in cases where the causes are not amongst the eleven recognized by the above clause i.e. losses caused by factors not covered by clause 37. For instance, despite taking all necessary measures, a contractor may still suffer loss of damage to work done as a result of election violence as happened in Kenya between December 2007 and February 2008 or in

cases where site water supply is unexpectedly affected as a result of water rationing by the supplying authorities and therefore the contractor has to ferry water from a distance.

Further, a study by Abwunza (2006) that evaluated building cost performances and risk factors within building contracts that contributes to variations identified thirty one (31) cost risk factors; claims were not amongst those identified. The study established that these factors are the ones quantity surveyors use to develop cost management strategies before and during project execution. It finally concludes by recommending that the Joint Building Council, standard form of contract conditions be retained and used in their current form (Abwunza, 2006). Retrospectively, it is clear that the study brings to fore the fact that claims are not considered in developing a project cost management strategy yet it has been established that claims contribute to almost twenty percent (20%) of cost overruns in Kenya (Kariuki, 2008). This means that Employers may not be well advised to prepare themselves against the risk of claims and particularly ex-gratia claims and this may explain why Employers view claims with suspicion.

All contractual claims are guided by clause 37 of the Agreement and Condition of Contract for building work, April 1999 Edition. This clause provides eleven basis upon which contractual claims may fall under, it also provides frames for submission of claims by the contractor and its evaluation by the Quantity Surveyor. The time and method of payment is also clarified very well. However, ex-gratia claims have various challenges ranging from lack of a structured way of evaluation to inadequate reference cases of ex-gratia claims already dealt with. The other challenges include lack of awareness of this type of claim, lack of experience in dealing with ex-gratia claim, lack of supporting evidence and inadequate time for evaluation among others.

There is also the challenge of evaluation procedures since unlike contractual claims there is no defined way of evaluation. The contractual claims under clause 37.3 require records supporting the claim and thereafter the Quantity Surveyor will use the records to evaluate. However, ex-gratia claims may or may not be submitted with supporting documents simply because there no demand for such. The ex-gratia claims with supporting evidence are submitted to strengthen the claim rather than a requirement before submission. Even with the records there are no standard ways of evaluation and this is open to the Quantity Surveyor to determined the suitable method to use in the evaluation.

It is to be noted that ex-gratia claims are not common in Kenya as compared to the other types of claims mainly due to its non-contractual nature as well as lack of awareness of its operations. However, this should not underestimate the impact that it may have on a project especially in a situation where completion of the project is dependent on its payment.

It is upon this hindsight, that the challenges facing quantity surveyors specifically with regard to evaluation of ex-gratia claim was identified.

1.2 Problem Statement

Generally the issue of claim is an emotive one to all the parties involved in a construction project simply because there is the issue of liability which no party wants to be responsible. In construction, the project cost is one of the four major parameters that determines the success or failure of any project. Others are time, quality and environment. It has been established that employers are always cost conscious and demand that cost be considered by the design team as an element in design (Wafula, 1997). Consequently, employers would normally require feasibility studies before the project commences and regular financial appraisals as the project progresses. All these are aimed at determining the viability, likely capital expenditure and probable revenue in order to arrive at an anticipated return on the money invested.

In Kenya, lump sum contracts based on the J.B.C standard form of contract or other forms of contract are commonly used (www.lth.se/fileadmin). However as expected such standard forms of contract do not allow for ex-gratia claim as it is not contractual. The challenge therefore to Quantity Surveyors is how to respond to ex-gratia claims when it is submitted by the contractor i.e. what methods to use in evaluating, what records are available to support the claim, is the quantity surveyor conversant with ex-gratia claims in the first place, is it justified, how will it impact on the project finances etc

The nature of ex-gratia claim could be financial or time based each with its own varied methods of evaluating all of which are subjected to the discretion of the Quantity Surveyor. For instance an ex-gratia claim that is financial in nature may be evaluated either using one or a combination of the methods below; using prevailing foreign currency exchange rates, using contract rates or prevailing

market rates to compensate for a pricing error, using market indexes on labour and materials to compensate for fluctuation in a non-fluctuating contract, using contract rates or prevailing market rates to compensate for repetitive work as a result of acts of God say heavy rains filling up already excavated trenches and bases, using preliminary items costed to compensate for unintended “idle” labour and plants on inaccessible site due to security reasons as directed by the government etc. On the other hand for time based ex-gratia claims what method would the quantity surveyor use in evaluating i.e. will the quantity surveyor use the impact of the time requested on the works programme, do the specific works not completed or likely to be delayed and give it a time period to complete it as a basis, does he consider the date that the employer must have the project ready especially if the project was to open in a given holiday season, does the quantity surveyor consider the scope of works remaining etc. All these methods above pose a challenge to the quantity surveyor in evaluating because they are many and varied.

The response from the Quantity Surveyor when faced with an ex-gratia claim is to evaluate it and either to recommend it for payment or not. Even in cases where ex-gratia claims are recommended for payment, the amount paid may or may not be the amount the contractor requested for compensation. Indeed, the Employer will be advised to pay an amount that is deemed reasonable and fair.

Regardless of the Quantity Surveyor’s recommendation after evaluating the ex-gratia claim, the Quantity Surveyor must answer some questions which will affect the future of the project. For instance, in case of a rejection would the contractor be able to complete the works as per the contract terms and specifications. In the event that the contractor fails to complete the works and the contract is terminated by the Employer what is the cost of replacing the contractor, how much delay is anticipated before a replacement contractor commences works on site, is the opportunity cost of paying the ex-gratia claim compared to the cost of replacing the contractor and the lost time caused by the delay acceptable?, will the employer willing to take the additional cost that the new contractor may have quoted for the remaining works, how to handle other parties depending on the affected contractor i.e. nominated subcontractors and suppliers etc?

On the other hand if the Quantity Surveyor recommends for payment of ex-gratia claims the question to ask is whether the Employer is willing to pay the ex-gratia claim and by how much since ex-gratia claims are treated with more scrutiny and suspicion than the other types of claims.

Therefore the research problem is identifying from the quantity surveyors what are the challenges faced in evaluating ex-gratia claims.

1.3 General Objective of the study

The general objective of this study is to identify the challenges that quantity surveyors face in evaluating ex-gratia claims.

1.4 Specific Objectives of this study

The objectives of this study are:-

1. Evaluation Methods: To identify the methods used by Quantity Surveyors in evaluating ex-gratia claims.
2. Evaluation Factors: To identify the factors considered by Quantity Surveyors in recommending payment of ex-gratia claims.
3. Evaluation Challenges: To identify the various challenges faced by Quantity Surveyors in evaluating ex-gratia claims.

1.5 Significance of the Study

This study has been justified by the following reasons; first, the ever-changing internal and external forces facing the construction industry in Kenya (Chege 1990, Mwangi 1989 & Wideman 1990), means that more possibilities of ex-gratia claim will continue to emerge in projects as a result of new factors that may not have been considered previously as risky and therefore there is need to explore the challenges of evaluating ex-gratia claims.

This study would also add to the pool of knowledge on claims and also help in raising ex-gratia claim awareness and therefore open up a possible avenue to which the Kenyan contractors can pursue claims from Employers from losses they would otherwise have suffered in situations where the losses/expenses are not provided for in the contracts they have entered into.

1.6 Scope of the Study

This study covers selected building construction works, done in the private sectors in Kenya. The sample will be selected from Quantity Surveyors based in Nairobi.

1.7 Hypothesis

“Generally, the methods used to evaluate contractual claims are similar to the ones used to evaluate ex-gratia claims”

1.8 Organization of the Study

This study was organized into five chapters namely; the Introduction, Literature Review, Research Methodology, Data Analysis, Presentation and Interpretation and finally Discussion Findings, Conclusion and Recommendations.

The first chapter of Introduction includes a background of the study, problem statement, general objectives of the study, specific objectives of the study, significance of the study, scope of the study, hypothesis as well as definition of terms.

Literature review is the second chapter and this includes brief introduction of construction contracts and parties, claims, ex-gratia claims, ex-gratia claims under different contexts, law of equity, employers' contractual protection and management tools and a brief review of value and risk management.

Research methodology forms the third chapter and it generally outline the kind of research design and methodology that the researcher employed in the data collection.

The fourth chapter of data analysis, presentation and interpretation focuses on how the data was organized, analyzed and presented after collection from the respondents.

The fifth and final chapter includes discussion on the study findings, conclusions and recommendation as well as areas of further research study.

1.9 Definition of Terms

1. The term “employer” means the natural or legal person for whom a structure is constructed/refurbished/renovated or alternatively the person or organization that took the initiative of the construction (www.stats.oecd.org)
2. The term “contractor” means a group or individual that contracts with another organization or individual (the employer) for the construction, renovation or demolition of a building, road or other structure (www.wikipedia.org/wiki/General_contractor)
3. The “project” means the structure being constructed/refurbished/renovated by a contractor.
4. “Lump sum contracts” are contracts where both the quantities and the unit rates in the bills of quantities form part of the contract and secondly, virtual completion of the design precedes the signing of the contract (Ramus, 1996).
5. “Profitability” will be defined in our context to mean yielding a financial gain, or of some use, benefit or advantage to somebody (Encarta dictionary 2006). This therefore means in our context profitability does not necessarily mean financial gain but can be an accruing use, benefit or advantage to the Employer.
6. “J.B.C” Stands for Joint Building Council of Kenya. J.B.C has published a standard form of contract used in Kenya titled “Agreement and Conditions of Contract for Building Works”. In this study any reference to the J.B.C standard form of contract will refer to the April 1999 Edition.
7. Short form of contract will mean a contract which borrows heavily from the J.B.C standard form of contract but which has been customized to an individual project which has opted not to use the J.B.C standard form of contract. This is normally used for small projects.
8. Managing means to deal with something successfully i.e. deal with a situation or process that requires skillful control or handling (Encarta dictionary 2006)

CHAPTER TWO

LITERATURE REVIEW

This chapter consists of discussing and reviewing the existing works by scholars and researchers on this area of challenges of evaluating ex-gratia claims by Quantity Surveyor. The reviews done on the various books, dissertations, discussion papers and websites enabled the researcher to understand and investigate the stated research problem. The chapter is divided into six sub-titles. The first sub-title is on construction contracts and parties to it and this enable the researcher to identify the main parties to a contract, their roles as well as their conflicting motivations. The second sub-title dealt with the general area of claims that would introduce us to the background of claims, the various types of claims, claim analysis as well as general procedure in submitting a claim. After reviewing the general area of claim, the third sub-title focused on our study area and that is ex-gratia claim. In this sub-title the area of ex-gratia claim is further expounded to discussed reasons for contractor claiming ex-gratia payments, the considerations given for an ex-gratia claim, the advantages and disadvantages of ex-gratia claim, the basis of employer honoring ex-gratia claim as well as court decision on the same. The fourth sub-title is on law of equity which enabled the researcher to understand that there are circumstances that common law may not provide adequate relief due to its universality or generality. It was also important to understand the various contractual protections and management tools available to the employer and this is captured in sub-title five. The sixth sub-title on value and risk management allowed the researcher to understand how to manage risks. Lastly, this chapter concludes with a brief conclusion on the said review.

2.1 Construction Contracts and Parties

The construction industry is regulated by contracts and therefore there is need to identify the main parties to that contract. In construction, the main contract is signed between the Employer and the Contractor. The employer is the one who has the natural or legal person for whom the structure is being constructed/refurbished/renovated or the person or organization that took the initiative of the construction (www.stats.oecd.org). The contractor on the other had is the individual or group or organization that contracts with another organization or individual for the construction/renovation/refurbishment of a building, road or other structure. Therefore, it is these two parties that the study refers to as parties to a construction contract (www.wikipedia.org/wiki/general_contractor).

2.1.1 Contractual arrangement between Employer and Contractor

In order to understand the subject of claims there is need to describe the contractual arrangement between the employer and contractor who are the main parties to a building contract, as well as the roles of other parties to a construction project. There are two main types of contractual arrangement between an Employer and a contractor and these are priced based contracts and cost based contracts (Turner, 1997). The following provides an overview of the above contractual arrangements.

Priced based contract may be lump sum contracts or measurements contract. A Lump sum contract is where the contract sum is agreed before construction works commences whereas measurements contract is where the contract sum is only established once the construction is completed and re-measurements of actual quantities carried out and is then valued on agreed rates.

On the other hand cost based contracts have the following types of contracts; first, cost reimbursement contracts where the contract sum is arrived at on the basis of actual costs of labour, plant and materials (prime cost) used for the works plus an agreed allowance for overheads and profits. Secondly, cost plus percentage fee is where the prime costs are reimbursed plus a flat or reducing, sliding-scale percentage fee. Thirdly, cost plus fixed fee which as the name suggests is where the contractor is paid the prime costs plus a fixed fee. Fourthly, cost plus fluctuating fee where the fee paid to the contractor is the difference between the estimated prime cost and the actual prime cost, the fee decreases as the cost increases. Lastly, we have target cost reimbursement where the fee is based on the agreed target estimated for the prime cost of the works and the relationship of the actual with the estimated prime cost affects the fee (Turner, 1997). In Kenya, the lump sum contract is most commonly entered into between Contractor and Employer.

Once the contractual arrangement has been chosen thereafter contracts are drawn between Employer and Contractor either using standard forms of contract or short forms of contracts or any other type of contract that is agreeable to both the employer and contractor. In Kenya, standard forms of contract are entered into for huge projects or ones where the Employer is an institution/organization. On the other hand short form of contract is entered into for small refurbishment works or works where the Employer is an individual.

One report that made fundamental recommendations on contracts between employer and contractor is Latham report, which was done for the United Kingdom construction industry. From this report, some of the principles that part of the stakeholders embraced and which can also be adopted by the Kenyan counterparts include first the commitment to deal fairly with those whom they contract. This means that all issues that may affect the construction project will be handled fairly and not necessarily as per the “letter” of the contract agreement, terms and conditions. From this principle, it is therefore possible to have ex-gratia claims evaluated rather than dismissing them from the onset. Secondly, the commitment to further work together and seek a “win – win ” situation to problems as they arise. This implies that issues which are outside the scope of the contract can still be solved in a manner that ensures that the contractor and the employer are satisfied and will continue to work together i.e. the issue of ex-gratia claim which often is dismissed by the employer and therefore resulting in a “win – lose” situation where the employer always wins and the contractor always loses (Turner, 1997).

In other words, what the stakeholders embraced is the willingness to introduce amendments to the standard forms of contract so as to have provisions that caters for issues which were traditionally outside the scope of the contract such as ex-gratia claims.

2.1.2 Roles of parties to a construction project

In order for a construction project to be successful the presence of all relevant parties to it, is important. In addition, to their presence, they must be able to undertake their roles effectively within the terms of the contract: The parties in a construction project are many however for the purpose of this study we shall limit ourselves to the employer, the contractor and the consultants.

The Employer is the most important person because they are the ones who commission the project. An Employer may be a private individual, limited liability companies, partnerships, the local government, the central government, foreign governments etc. (John Uff, 2005). The roles of an Employer include; to clearly identify the site upon which the works will be carried out and the access thereto, also confirm the said site is under their legal possession and that it is void of all material encumbrances, they should also ascertain and confirm to the contractor that the proposed works comply with all statutory requirements, local authority planning and design by-laws or regulations and lastly, make adequate financial arrangements to ensure that all payments to the

contractor under the contract terms and conditions are met as and when required (Agreement and Conditions of Building works, 1999).

The contractor is the other main party to the contract. They are obliged to execute, supervise and complete the works and rectify any defects in accordance to the contract and they should also inform the architect through a notice of any discrepancies, ambiguity or divergence in the conditions, drawings, bills of quantities or specifications etc. (Agreement and Conditions of Building works, 1999). The contractors normally are allowed to work with subcontractors either under nominated or domestic arrangements.

The consultants refer to the various professionals that have been brought on board in the project and they include; the Project Managers, Architects, Quantity Surveyors, Structural Engineer, Civil Engineer, Electrical Engineers, Mechanical Engineers, an Environmentalist, Geologist, Interior Designer, Landscape Architect etc. They are required to offer independent professional services for the benefit of the project such as design the building, issue comprehensive drawings and details, provide necessary instruction, information and interpretations to the contractor, issue all necessary approvals and certificates, prepare interim valuations, final accounts, exercise discretion when required to give an impartial decision, advice on the selection and appointments of sub-contractors, tradesmen and manage the design etc. (Murdoch and Hughes, 1996)

Other parties will include regulatory bodies such as National Environment and Management Authority, County councils, suppliers, transporters, banking industry, insurance industry, security providers etc. whose participation facilitates the execution of the construction project.

2.1.3 The Opposing Motivations of the Main Parties to a Construction project

From above we see that the two main parties to a construction project namely the Employer and Contractor will always have opposing motivations, particularly on the issue of money. Finances are the backbone of any construction project without which no meaningful achievement in the project up to its completion is possible. It is this fundamental factor that sets the Employer and Contractor on opposing sides of the divide and can be avoided if the Latham report recommendation can be adopted. However, this is not the case because Employers would want to have value for their money and therefore in the process be motivated to save as much as possible and one way is

rejecting claims that are not contractual although they could have been evaluated by the relevant consultants. On the other hand, Contractors being in business would want to have as much profit as possible for the risk they have taken in agreeing to undertake the construction work and therefore they are motivated to ensure that they are paid all moneys due as well as cushioning themselves from losses or expenses they would have suffered by making claims. Therefore, this provides a scenario where two parties must work together for the successful completion of the construction project but yet they have opposing motivations.

This therefore implies that decisions made by Employers and Contractors are primarily for their own interest and considerations for other parties follow later and in order to ensure that the decisions made are objective, consultants such as Architects and Quantity Surveyors are obliged to exercise their discretion with impartiality within the terms of the contract when making decisions, opinions etc. on issues brought to their attention by either the Employer or the Contractor.

It is important for Consultants who have the responsibility of making decisions, make decision in an impartial manner especially in matters that are outside the confines of the contract such as ex-gratia claims. Matters arising within the confines of the contract are normally easier to deal with because the terms and conditions of the contract will stipulate the ways of handling the matter. However, when it comes to issues beyond the contract, consultants' will always be required to expressed utmost discretion in making decisions because some of these issues have financial implication which might not be well received by either the Employer or the Contractor. For instance, a decision to advice the Employer to settle an ex-gratia claim so as to prevent the project stalling might not please the Employer who is responsible for paying the consultant's fees and therefore the consultants should not be influence by the relationship they have with either the Employer or the Contractor to affect their judgments.

2.2 Claims

As we shall see in the review below, claim is a wide area of study. This is our general area of interest and therefore it would be important to understand the general issues surrounding the subject of claim. This is in terms of the various types of claims as well as a brief in-depth discussion of the same. Claims is generally an emotive subject between the employer and contractor because it means

paying for more or seeking for more money respectively and therefore it will be interesting to review the subject without emotions i.e. objectively.

2.2.1 General Background to claims

A “claim” is defined as an application by the contractor for recompense for some loss or expense suffered or an attempt to avoid the requirement to pay liquidated and ascertained damages (Seeley, 1997). It is important to note that claims are triggered by the contractor when they make an application for compensation.

The execution of a construction project comprises of a complex variety of activities involving many skills and conditions which vary significantly from one project to another. Internal and external factors to the project may affect the operation of a construction contract and they include; market conditions, soil conditions, labour relations, interest rates, site conditions, climatic conditions, project characteristics, available resources etc. (Seeley, 1997). These factors may trigger a claim.

Most construction contracts make provisions for these complexities and uncertainties by inclusion of clauses permitting the contractor to claim for loss or expense resulting from specific events. In terms of claims, standard forms of contracts have the advantage of clarifying contractual requirements and remove any ambiguities as far as possible and thus provide a way of handling contractual claims, however, in as far as ex-gratia claims are concerned, they have no avenue of addressing it (Seeley, 1997). These “specific” events which may trigger a claim are few and therefore in a way the standard form of contract in this instance does not offer a level playing ground to the Employer and Contractor which a contract is ordinarily expected to offer to both parties in a contract. In other words, so long as application for claims are restricted to specific events then the contractor would always be disadvantaged since they may not be compensated for other events that might have caused them loss or expense.

It is important for the design team to take cognizance of the fact that most contractors will be looking for chances of submitting claims, whether fully justified or otherwise, and should not take offence when a proper notice is given. It is important for the contractor to be encouraged to keep the Architect or the Project Manager informed of the possibility of additional expense and hence

contract for building works provides for loss and expense caused by disturbance of regular progress of work (Agreement and Conditions of Building works, 1999).

Several circumstances give rise to contractual claims. In most standard forms of contract they would have provisions under which such claims can be submitted by a contractor. For instance Clause 37 of the Agreement and Conditions of contract for Building works, April 1999 edition, provides eleven premises as the basis for compensation to the contractor and they are: delay in issuance of instruction, drawings, details or levels to the contractor, opening up of any works for inspection which are later found to be acceptable, delay in appointing a replacement Architect, Quantity Surveyor or Engineer, any discrepancies in the contract documents, delay on the part of persons engaged by the Employer in executing work not forming part of the contract, delay by statutory bodies engaged directly by the Employer, postponement of any work by the Architect, delay arising in the nomination or re-nomination of subcontractors, contractors suspending the works and delay in receiving possession of or access to the site.

In other words, circumstances that give rise to contractual claims must be the ones that have specifically been identified by the contract terms and conditions. This is what earlier on we termed as "restricting" since several other events may lead to a disruption of the works and therefore loss or expense to the contractor. Such events include; heavy rains that return back excavated soil back to the trenches or due to labour unrest works were stopped for a day or two or shortage of local and skilled laborers that required the contractor to import the same from another county etc. Therefore this makes the contractor somewhat disadvantaged.

The second type of claim is ex-contractual claims that refers to a claim which, although not legally due under the original contract or subsequent amendments, appears to be an obligation which the courts might uphold (www.aof.mod.uk). They are also referred to as common law claims, which arise out of any breach of the contract's terms, which may be express or implied (Gichunge, 1989). This claim arises when the contractor takes their case to the courts of law unless there was a clause that directed that any dispute arising in the contract should first be taken to arbitration. This type of claim is mostly occurs between contractor and a public entity such as a parastatal or a county government or even the central government. It is under few instances would a contractor take a private developer to court unless it is a matter they have failed to reach an agreement amicably

amongst themselves. There are few instances where the government or parastatal has taken a contractor to court, normally they prefer to terminate the contract and re-tender the works.

Ex-gratia claims is the third type of construction claim and these are claims that an Employer is under no contractual obligation to meet and therefore this means that they are discretionary. The Employer has no legal obligation to honor such claims however much the contractor considers that they have a moral right for compensation. Whatever the moral rights may be, the contractor's chances with the claim will usually depend on the benefit(s) accruing to the Employer (Chappel 1998). In other words, as we had earlier stated both the contractor and employer enter the contract with predetermined motivations i.e. the contractor wants to make profit while the client wants to make savings. Therefore so long as the Employer feels that if he pays the contractor for ex-gratia claim that further loss will be mitigated then chances are high that they will honor the ex-gratia claim. However, if the Employer feels that honoring the ex-gratia claim would reduce their profit below their acceptable threshold then they would most likely not honor the ex-gratia claim.

The circumstances that give rise to this type of claim are not based on clauses within the terms of the contract, although the basis for such claims may be events that have arisen out of the project and have resulted in loss or expense to the contractor. A construction project is affected by so many internal site factors and external site factors, national as well as global factors and therefore events beyond what the contract envisaged might arise to give rise to a loss or expense.

For instance in a firm price contract, in order to ensure that a shopping mall meets the target opening date say before a long holiday season the Employer might consider to honor ex-gratia claim. Especially if it is apparent that there is risk of delay of the ex-grata claim is not honored (Seeley, 1997).

2.2.3 The structure and sequence of contractor claims

Although contractor claims may vary in formality and content, a typical claim generally follows the following structure. First the claim must have the contract particulars such as the site location, details of the contract as contain in the agreement. This is to ensure that we are dealing with the correct project and distinguishes the project under consideration to others (Seeley, 1997). Secondly, the claim must describe the contractual terms and conditions such as scope of work and pricing

structure etc covering the section of the works in question. This is important as it will allow one to evaluate what are the provision given to the parties as well as any relief offered or not allowed in the contract (Gilbreath 1992). The facts of the claim particulars will be the third item, this is where the events leading to the claim are described. The events are explain under appropriate heads of claim which is presented in a logical and chronological order and other supporting documents such as correspondences, variations orders, meetings etc will also be incorporated (Gilbreath,1992). The fourth item in the claim structure would be results of the claim provoking events which is presented as a narrative description of the increased effort required by the contractor (Gilbreath, 1992). The other portion of the claim would be financial implication of the claim and this be presented as a schedule or detailed list of the increased costs as a result of the event giving rise to the claim (Gilbreath, 1992). Appendixes – a section that collates all the backup information described in the entire claim document will form the last portion of the claim structure (Seeley 1997).

All the above serve the purpose of providing clarity and in-depth understanding of the event causing the claim. The burden to proof that an event giving rise to a claim occurred is with the contractor, it is not the clients' burden to proof why not to pay for a claim. The more articulate and proof laden a claim document is, the better the chances for it to be given favorable consideration by the Employer.

2.2.4 Claim Analysis

In evaluating the merits of a claim and determine what additional compensation, if any, should be allowed, the quantity surveyor on behalf of the Employer, thoroughly analyze the claim in three stages namely the factual analysis, the legal analysis and lastly the cost analysis (Gilbreath 1992). The factual analysis which seek to determine the authenticity of the claim i.e. what happened, what caused what happened, who caused what happened etc (Ivor Seeley, 1997). This applies to all types of claims including ex-gratia claims because without facts there is no justification for compensation. The sources of facts that could be analyzed include; correspondences through letters or email, daily site weather reports, site ground levels, effects of artists and tradesmen as well as statutory bodies involved with the project, material procurement schedule, new government policies recorded in gazette notices etc. Any fact presented as supporting the claim would have to be evaluated by the Quantity Surveyor.

A legal or contractual analysis is done to determine whether the contractor is due for compensation under the terms and provision of the contract (Ivor Seeley, 1997). This applies well for contractual claims rather than ex-gratia claims since it based on the law. The legal or contractual aspects that could be analyzed include; approved minutes of site meetings, architect's instruction, clerk of works direction, contract and working drawings, extension of time claims certified by Architect. programme of works, variation data sheet, Bills of Quantities and variation Orders

A cost analysis i.e. how much additional money or time should the contractor be granted (Ivor Seeley, 1997). Another analysis that applies to any of the types of claims is the cost analysis and examples of such include: labour allocation sheets, build up of tender rates, invoice lists, plant records and profit or loss made by the company for each accounting period.

2.2.5 General Procedure for Submitting a Claim in the Construction Industry

The contractor is required to make a written application to the Architect within a reasonable time of it becoming apparent that he has incurred or is likely to incur loss or expense resulting from specific causes. In case of contractual claims then the relevant clauses will have to be identified, however, if it is ex-gratia claim then the contractor must outline the causes of his claim as the case will be (Chappell & Powell, 2000). The issue of "within a reasonable time" of the event becoming apparent is critical because it would allow the quantity surveyor as well as the Architect to review the event as it occurs. For instance, if the notice is for the introduction of a given tax says mining tax for cement product, the quantity surveyor would be able to observed when the effect of the said tax begun so as to adequately calculate for the compensation.

The contractor's written application need not to be in any set format, however, the following principles hold for a good application and these are; the claim must be realistic, accurate and recognizable. Basically, the claim must be in the form of an account, and the account must give particulars as full and detailed as possible. The sort of information to be included will depend on the circumstances and it is the contractor's duty to provide the Architect (or the Quantity Surveyor) with sufficient documentary evidence to enable a claim to be dealt with (Chappell & Powell, 2000). It would work against the contractor to provide supporting evidence for a claim that is shallow since

it would be easily be refuted by the quantity surveyor. This is because, before analysis of the claim, facts must first be established to be true.

Under contractual claims the Architect (or Quantity Surveyor) must decide whether the contractor has incurred or is likely to incur loss or expense resulting from one or more of the specific causes as allowed for in the contract. If the Architect is so satisfied, then he must ascertain the amount of the loss or expense, or instruct the Quantity Surveyor to do so on his behalf (Chappell & Powell, 2000).

However, under ex-gratia claim the Architect (or Quantity Surveyor) will assess the ex-gratia claim and will advise the Employer to make his own subjective decision as to whether or not he will settle the ex-gratia claim. Regardless of whether the claim is contractual or ex-gratia, the figures to be settle by the Employer must be established definitely and is not a “guess” or “estimate” (Chappell & Powell, 2000).

2.3 Ex-Gratia Claims

Ex-gratia (sometimes *ex-gratia*) is Latin (lit. '*By favour*') and is most often used in a legal context. When something has been done *ex gratia*, it has been done voluntarily, out of kindness or grace or out of mercy. In law, an *ex gratia payment* is a payment made without the giver recognizing any liability or legal obligation (www.wikipedia.org/wiki/Ex_gratia). An Ex gratia (out of kindness) claim is one which the employer is under no legal obligation to meet. It is sometimes called “sympathetic” or “hardship” claim. They are often put forward by the contractor (Chappell, Powell-Smith and Sims, 2004). An ex gratia payment to a contractor is one not legally due under the contract or otherwise, and usually represents compensation on grounds of hardship. Any such payment would have to be fully justified (www.info.doh.gov.uk).

2.3.1 Reasons for Contractor Claiming Ex-gratia Payments

Gichunge's work (1989) on “Contractual claims in the construction industry of the United Kingdom” gave a number of sources of claims such as late and/or inadequate information from employer, variation orders and site instructions from Architect or Engineer, late possession of site, discrepancies in contract documents, late approval by local authorities, misunderstanding or misinterpretation of the conditions of contract and increment weather. However, the study did not consider ex-gratia claims.

Some of the reasons why contractors submit ex-gratia claim include the following; First if there is an error in pricing which consequently result in significant loss to the contractor (Ramus and Birchall, 1996). For instance, if the contractor underestimated the quantity of rock and therefore kept a low rate so as to be competitive and it turns out the quantity of rock is a lot, they would definitely suffer loss which can not be compensated in any other way except through an ex-gratia claim. Secondly, if there is a rapidly increased prices occurring in a fixed price contract (<http://www.arabianbusiness.com>). For example, at the moment in Kenya, the Energy Regulatory Authority regulates on a monthly basis the prices of fuel. However, their regulatory efforts are dependent on what happens in the global fuel market. Therefore they really cannot prevent fuel price increment and therefore should the prices increase significantly during the course of a project this will affect so many items such as transport and cost of certain materials especially the ones which are manufactured. The contractor will therefore suffer loss which can be compensated only through an ex-gratia claim.

The third reason will be late deliveries of materials by a supplier on a firm price contract resulted in substantial price increment for the materials. For instance, due to a rise in international oil prices, air freight charges increased (Ivor Seeley, 1997). The fourth reason will be where there was difficulty experience by the contractor in recruiting adequate labour and he was obliged to pay high additional costs so as to recruit (Ivor Seeley, 1997). For instance, during the 2007 post-election violence in Kenya, a number of sites were closed for a while and when they opened it was difficult to recall back the laborers who were deemed not to be coming from local areas.

The other reason is where the contractor assisted his subcontractors financially so as to speed up the works and hence ensuring that the project is completed on time. In this case the contractor may ask the Employer for ex gratia payment to compensate him for going the extra mile to ensure that the works were completed on time since it was in both their interest that the works are completed (Pickavance, 2000). Other reasons shall be established from the survey to be conducted in the study

2.3.2 Consideration for an Ex-Gratia claim

Any loss or losses by a contractor on a construction contract or series of contracts is not of itself justification for making an ex-gratia claim. The risk of loss is inherent in any commercial

transaction and as such a contractor should expect in the normal course of business to offset loss on one contract against the profit on another (www.aof.mod.uk). In other words, not all loss can be compensated unless it occurred after all necessary efforts to further mitigate the loss had been done.

A situation might arise however, where because of exceptional circumstances, it would seem reasonable to consider a claim from a contractor for an ex-gratia payment where he is able to demonstrate that he has suffered undue hardship through circumstances outside his reasonable control which could not have been foreseen or avoided (www.aof.mod.uk).

Where there appear to be grounds for considering a claim, the details of the claim need to be fully investigated and statements made by the applicant fully checked by a Quantity Surveyor in the project (www.aof.mod.uk).

Generally, consideration to honor claims will not normally be given to contractors from whom the following has been established (www.aof.mod.uk). First, if the contractor who has done or is associated with unsatisfactory work, secondly a contractor who is under threat of imminent bankruptcy, receivership or administration, thirdly if the contractor is suspected of attempted fraud or in liquidation, where the ex-gratia payment would merely result in placing money in the hands of creditors.

A guiding principle in payment of an ex-gratia claim is that it should never exceed the actual amount of loss suffered by the contractor (calculated by taking the unavoidable direct costs incurred plus reasonable overheads and deducting the contractual amount due) and usually something less should be considered. Where the contract was originally awarded after competitive tendering and the loss arises out of circumstances peculiar to the contractor (that are unlikely to have happened to another successful tenderer) it may be appropriate to limit any payment to the difference between the contract price and the value of the next lowest tender in the original competition (www.aof.mod.uk). This is done assuming that the lowest contractor was terminated and the second lowest tenderer was requested to finish the work, assuming there are no adjustments to rates, then the second lowest contractor would have completed the works as per their tender sum. Therefore, instead of bringing on board the second lowest tenderer which might take time and other accompanying costs, the Employer may opt to pay the difference so that the original contractor can finish the work and this may work out for the benefit of the project.

Consideration of ex-gratia claims should normally be deferred until after the contract is complete, because only then can the loss and hardship to the contractor be assessed. If a request for payment is received during the course of the contract that the Architect is prepared to consider on ex-gratia grounds, the contractor should be told without prejudice to the ultimate decision that his request can be considered only in the light of the entirety of the contract, and that meanwhile he is expected to perform the work under the contract in accordance with its terms and conditions ((www.aof.mod.uk). In other words, the total amount of loss or expense suffered can be correctly computed when the project is complete otherwise it does not make sense for the contractor to make several applications for ex-gratia claim.

2.3.3. Advantages and Disadvantages of Ex-gratia Claims

As part of further discussing the subject of ex-gratia claim, it was important to identify the advantages and disadvantages of ex-gratia claim. Just like with all things, knowing the merits and demerits of something allows one to make an informed opinion over it.

Advantages of Ex-gratia Claims

There are three main advantages of ex-gratia claim. First, it enables the completion of construction projects within the contract period or time extended which would otherwise have stalled or abandoned altogether. For instance, in a situation where the cost to be incurred and time spend in terminating and replacing the contractor will be much more than the amount to be paid as ex-gratia especially if the project had a target date whose failure will result in significant loss to the Employer e.g. if the completion date of a supermarket is just before a festive season or completion of a school before an academic year begins. In such circumstances, the Employer will most likely be convinced that honoring the ex-gratia claim is justified on grounds that benefit will accrue to the project.

Secondly, ex-gratia claim when honored may save contractors from cash flow challenges and therefore improve on their site progress. Sometimes, what disrupts the progress of works on site may probably require a boost in the contractor's cash flow. Thirdly, ex-gratia claim when honored may built a good relationship between the Employer and the Contractor. This is because, instead of going through an adversarial method of termination, an agreement by the Employer to honor this

type of claim means that he has prevented such an occurrence. Just like in all relationship, the party whose requested has been granted will always be indebted to the other party.

Disadvantages of Ex-gratia Claims

Likewise, we also noted three disadvantages of ex-gratia claim. One of the disadvantages is that it can easily be abused especially in the public sector. This may occur especially where contractors collude with corrupt consultants and therefore having undeserving ex-claims being paid. Secondly, it can breed financial incompetence on the side of contractors since he knows he will always be helped out in case he suffers loss. Although this may not always happen since contractors are in business, it may however occur in situations where the Employer and the Contractor have a long standing relationship. Lastly, it poses challenges especially in balancing books of accounts for employers who are companies or organizations. This is because ex-gratia claims though it is a cost accruing to the company or organization it cannot be said to rightly fall under expenses.

2.3.4 The basis for Employer honoring Ex-gratia Claims

The Employer is under no obligation to meet such “hardship claims”. However, they may be prepared to do so on certain grounds. First, on the grounds of natural justice (Ramus and Birchall, 1996). This happens in situations where the Employer is aware that the contractor indeed suffered loss that was beyond his control in the process of executing the project to its successful completion and now that the project was successfully completed the Employer may find it fair to compensate for loss the contractor suffered. Secondly, in a situation where without the ex-gratia bailout the contractor would be forced into liquidation or insolvency (Ramus and Birchall, 1996). Insolvency refers to the state of being unable to meet one’s debts when they are due and when creditors are pressing for payments. In our context, it mean where the contractor is unable, because of lack of assets or other resources, to pay debts as and when they fall due for payment. Insolvency of the contractor is a tragedy that can occur in any construction project; and unfortunately, the structure of the construction industry makes it prone to that eventuality (Kwakye, 1997). In construction industry it has been observed that retention for each interim payment and high costs of resources make the contractor susceptible to insolvency and they include (Kwakye, 1997), high retention funds and failure for clients to release them when due can frustrate the contractor’s performance in business. On the other hand, high cost of resources in a firm price contracts where it is assumed that the contractors have allowed all future costs increases of resources resulting from inflationary

pressures. Therefore, they are likely to suffer from any inadequate allowance for these increases in their tenders.

The other basis where a client honors ex-gratia claim is where the cost of employing another contractor would be more than the amount of ex-gratia payment needed (Gichunge, 1989). There are costs associated with terminating a contract and employing another one. The costs associated with terminating a contract include a compensating the contractor for the work done less any liquidated damages if any, this is a cost since payments which were anticipated to be paid later in the project have now been brought forward. Often during the process of termination, the works will be disrupted or altogether stopped so as to allow for re-measurements and negotiations to be done so as to have a final account on the work done by the original contractor. This time delays might push further the original completion date of the project and this is an indirect cost to the Employer. The costs of employing a new contractor might include; coming up with new contract documents for the remaining works, this might mean additional professional fees, there is also the cost of tendering and there is the risk that the figures from the new tenderers might be higher in comparison to the figures from the original contractor over the same scope of works. Therefore, when the above costs are compared with the amount that the contractor is requesting as ex-gratia, and in evaluation the ex-gratia amount is lower than the costs of employing another contractor, then the Employer might pay the ex-gratia claim since it is more economical.

The employer may also honor ex-gratia claim if some benefit accrue to the Employer as a result of paying the ex-gratia claim (Chappel, Powell-Smith and Sims, 2004) i.e. the contractor finished on time but the contractor suffered exceptional misfortune. For instance, if the contractor was diligent and was able to complete the project on time and therefore save the Employer time delays.

However, in the process the contractor incurred loss that is so obvious and in the knowledge of all concerned then the Employer might allow for the honoring of ex-gratia claim. For instance instead of sea freight the contractor air freight the materials to mitigate delays. Another example is where late deliveries of materials by a supplier on a firm price contract resulted in substantial price increases for the materials and this may form a basis for the employer to honor ex-gratia claim (Seeley, 1997). This is especially applies to materials that needs to be imported into a country, where the contractor did all necessary preparations so as to get the materials on time, however, events beyond the control of the supplier results in the delay in delivery of the materials. For instance, where a global financial meltdown as it happen in 2007-2009 results in insolvency of the

company that was to supply the imported materials and therefore forced the contractor to choose another company whose prices were very high and thus suffering loss.

The other basis is if there was difficulties experienced by the contractor in recruiting adequate labour and therefore he was obliged to pay high additional costs to attract them (Seeley, 1997). This happens especially when labour becomes scarce as a result of their high demand or when they might migrate to areas perceived to have better opportunities or when displacement of workers occurs as a result of riots and clashes.

2.3.5 Court decision on Ex-gratia Claims

The courts have recognized the mutual advantage to the parties in maintaining a contractor's (subcontractor's) solvency. In *Lester Williams v. Roffey Bros & Nicholls (Contractors) Ltd*, the plaintiff was a subcontractor to the main contractor defendant. While works were in progress, the subcontractor informed the contractor that if the subcontract price was not increased then they would be unable to complete the subcontract and would become insolvent. The contractor promised to pay additional money for the works, which were then completed. In the end the contractor refused to pay the additional money it had promised on the ground that there was no consideration for the extra payment. However, the court held that there was good consideration, after the subcontracts had been entered into, the materials circumstances had changed. The subcontract could only be completed by payment of additional money. If the main contract were completed late, the contractor would face a heavy claim for liquidated damages from the Employer. Therefore in paying more money and keeping the subcontractor in business, the contractor was obtaining good value. It appears to have been a factor in the court of appeal's decision that there was no element of business duress (Pickavance, 2000). From the above court case it implies that ex gratia claim is sustainable in courts of law.

2.3.6 Ex-Gratia Payments under different Contexts

2.3.6.1 County Councils

This is with respect to the United Kingdom, where an ex-gratia payment in this context is a payment made to an individual in respect of loss or damage to personal property in a situation where the County Council accepts no liability for the loss or damage but is willing to make some

reimbursement without accepting liability. Generally, such payments are made to employees in respect of personal property damaged or lost accidentally. Ex gratia payments are not made in situations where the loss is fully insured, either by the individual or the County Council (www.suffolknut.org.uk/exgratia.htm).

In construction industry, we can borrow from the above context and have the below principles as the guidance to ex-gratia payments. The guidelines would include the fact that the Employer is not liable and accepts no liability but is willing to make some reimbursement without accepting liability. This makes it clear from the onset that the employer has honor the claim not from a contractual obligation position. Secondly, that it is paid for loss suffered by the contractor whose amount is reasonably small when compared to the entire contract sum and it shall not cover fair wear and tear of items. Thirdly, there could be a guideline that ex-gratia claim can not be paid for losses suffered by the Contractor in cases where they did not fully insured the works. Therefore the compensation would only arise when the amount of compensation from the insurance company will not be adequate to cover for all losses.

2.3.6.2 Insurance Industry

Ex Gratia literally means “an act of grace.” When an insurance company receives a claim from an insured person the first thing they will do is to confirm that the event which gave rise to the claim is indeed covered by the insurance policy. If, for example you took out third party only car insurance and your car is written off in an accident, you cannot claim your loss from the insurance company, they will only cover the damage to the third party’s car.

Should an insurance company decide to make a payment towards a claim that is not covered by the policy it is called an Ex Gratia payment. An Ex Gratia payment can either be for the full amount of the claim or, more likely, for part of the claim. The insurance company has no legal liability to make any payment in terms of the policy wording. When an insurance company decides to make an Ex Gratia payment it is done as a favour, the payment is made for “goodwill” purposes. Such payments are made without any admission of liability and without waiver of right by the insurance company (www.carinsurancesa.co.za/glossary/ex-gratia-payment.html). This means that the insurer is not bound to pay in subsequent, similar or even identical circumstances (Birds and Hird, 2004)

From the above two examples, we see that ex-gratia claims and payments are ordinary occurrences in other sectors of the economy and therefore the same can be imported into the construction industry which has fewer experience to build on in matters pertaining to ex-gratia claims.

2.3.7 Difference between Ex-gratia claims and Contractual Claims

In the earlier discussion under claims, the various types of claims were discussed and that is contractual, common law and ex-gratia claims. It would be important to distinguish the various types of claims and in our case we shall distinguish ex-gratia and contractual claims.

There are various differences between ex-gratia and contractual claims based on the following; causes giving rise to the claim, time of submitting the claim, guidance on the evaluation methods, the nature of compensation and the validity of the claim under the contract and these distinct areas of differences will be discussed below in the same order.

There are very many causes that can give rise to claims. The contractual claims only acknowledges for compensation causes of claims as listed under the relevant clauses within the contract while for ex-gratia claim, the cause giving rise to the claim must be one that is not listed in the contract as it is not contractually recognized. After, the causes giving rise to the various claims has been identified, the next step is to submit the claim and this provides the next difference between these two types of claims. Whereas for contractual claims the contract provides specific duration under which the contractual claim ought to have been submitted to the Architect and/or Quantity Surveyor, on the other hand there is no specific demand on the specific time period within which an ex-gratia claim ought to be submitted to the Architect and/or Quantity Surveyor. The third difference is on the method of evaluation where under contractual claims the contract provides specific methods of evaluating a contractual claim but for ex-gratia claim it is upon the Quantity Surveyor to use discretion in evaluating an ex-gratia claim.

The other difference between ex-gratia and contractual claims is on compensation. A justified ex-gratia claim may be compensated in full or partly or the Employer may chose not to pay any amount, however, for contractual claim, the amount agreed must be paid by the Employer.

The other difference is based on the validity of the above two types of claims based on the contract. Contractual claims are valid in any contract since by the time they are submitted by the contractor to its evaluation and even compensation is all based on the contract terms and conditions, however, for the Ex-gratia claims they are not based on the contract and therefore with reference to any contract it is not valid.

2.4 Law Of Equity

One of the important aspects of the law of equity is that it provides relief or compensation to a matter than the general common law would not have otherwise provided. This law operates to provide a softer options which would otherwise be considered harsh under common law.

2.4.1 Definition

"Equity" may generally be defined as the correction of a defect or error in the law. The concept of Equity is apparently of ancient origin, where the mediaeval philosophers defined it as an "exception to the rule" especially where the lawgiver's pronouncement is defective and erroneous and therefore the principles of equity were used to deliver justice in situation where justice would not be given (www.lonang.com).

Equity can also be seen as a system of law supplementing the ordinary rules of law where the application of these would operate harshly in a particular case; and to this extent it is sometimes regarded as an attempt to achieve 'natural justice' or to "mitigate the rigor of common law", and therefore allowing courts to use their discretion and apply justice in accordance with natural law. Therefore, equity appears as an element in most legal systems and indeed in such systems judges are instructed to apply both the rules of strict law and the principles of equity in reaching their judgments (www.talktalk.co.uk).

Equity is thus the name given to the set of legal principles, in jurisdictions following the English common law tradition, which supplement strict rules of law where their application would operate harshly (www.wikipedia.org/wiki/Equity).

The same principle can be imported in the standard forms of contract in the construction industry where the clauses therein are seen as the rule rather than the exception in contract management.

Similarly, we can also state that Employers should be able to use discretion in evaluating cases of *ex-gratia* claims rather than swiftly rejecting them (www.wikipedia.org/wiki/Equity).

2.4.2. Reasons as to why the common law may be deemed as “defective”, “harsh” or erroneous”

There are a number of reasons why a law may be deemed "defective" or "erroneous." The first reason for making an equitable exception to a law was when the law suffered from "universality," that is, the law was stated too broadly or too general without any exceptions (www.lonang.com). This is true of the construction industry where the standard forms of contract have clauses that are general and suffers from universality for instance clause 6.1 of the Agreement and conditions of contract for building works states that the following in relation to the Quantity Surveyor, “expeditiously provide the necessary advice, opinion, assessment, measurements, computations or valuations as the case may be of any matter required of him under these conditions”. The question here is what does the contract intend when they said “...any matter required of him under these conditions”. This assumes universality since there are no listed general obligations of the Quantity Surveyor compared to clause 5 where the obligations of the Architect are listed.

Secondly, equity has also been justified in cases where common law judges refused, for whatever reason, to grant relief to a complainant. In such cases, the complainant would seek relief in another place (historically, in the Court of Chancery or a separate Court of Equity). In such cases, the law was viewed as not providing for a remedy that it ought to have. In our context, when the contractor suffers losses and expenses that the ordinary working of the contract agreement may not permit for compensation then the relief may be sought by submitting an *ex-gratia* claim based on the law of equity (www.lonang.com) rather than the contractual law.

A third justification for equity relates to so-called "hard cases," that is, where a strict application of the rule of law was clear and possible, but would have resulted in a hardship. In such cases, the harshness of the law was essentially viewed as contrary to justice (www.lonang.com)

One of the legal maxims states “*Aequitas est correction legis generaliter latae qua parte deficit*” which means Equity is the correction of some part of the law by reason of its generality (Garner, 2004). Therefore, ex-gratia claim can be considered to provide that alternative relief that the contractor would not have received.

2.4.3 Difference between Common Law and Law of Equity

One important difference between law and equity is that a common law remedy is a right whereas a remedy in equity is discretionary. It is discretionary because it depends on the justice of the cause. The distinction may be illustrated by the consequences of a breach to a contract. The common law remedy is damages, which is awarded however unjustly the plaintiff has acted, and whether or not damages will make good the loss suffered. However, in equity the plaintiff can ask for the remedy of specific performance, that is, the defendant be compelled to fulfill his obligation, however, this is available under certain conditions such as whether the plaintiff has acted fairly, that he has not delayed in seeking his remedy etc (John Uff, 2005)

2.4.4. Legal concepts upon which the Law of Equity of based

The law of equity is based on several legal concepts. They include; the concepts of “quantum meruit” or “quantum valebat” which means as much as has been earned and as much as it is worth respectively. They are used to give restitution in cases where no contract exists especially where we have single issue disputes of short duration i.e. typically contracts commenced against letters of intent and then abandoned when final contract negotiations break down. For longer running contracts, where a disputes breaks out and then the alleged contract terms are found to be so inherently defective as to lead to a “no contract” finding, then the principle of reasonable reimbursement usually applies (Hackett, 2000).

2.4.5 Shortcoming of Law of equity

A historical criticism of equity as it developed was that it had no fixed rules of its own, with the Lord Chancellor from time to time judging according to his own conscience. As time went on the rules of equity did lose much of their flexibility since judgments were subjective. However this was overcome from the 17th century onwards by the use of principle of precedents rapidly consolidated

into a system of precedents much like it is witnessed in common-law (www.wikipedia.org/wiki/Equity)

The principle of judicial precedent refers to the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of *stare decisis*, i.e, to stand by the decided. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides consistency and predictability in the law. (www.luyulei.cn/case_law).

2.5 The Employer's Contractual Protections and Management Tools

"Claim" is almost viewed as a dirty word by the Employer section of the construction industry. This is because it so often results in original budgets being exceeded. Generally, all types of claims are simple to generate but are not always easy to substantiate and there lies the Employer's protection (Chappell, Powell-Smith and Sims, 2004).

Gilbreath (1992) has identified several contractual protections and management tools that the Employer uses to counter commercial and technical risks in a construction project. First, is the partial and final payments. The Employer can only pay for what is done and the contractor is thus obligated to execute work so that he can be paid. In addition, this interim amounts are paid periodically as agreed in the agreement for instance after four weeks. This is a protection to the Employer since he does not need to pay simply because the contractor has asked for payment but payment is as a result of work done.

The second protection is using retention. This is the customary withholding of earned money until the end of the work or reaching the limit of retention as agreed, it is normally at ten percentage (10%). Retention motivates the contractor to complete the works and its release becomes a form of price incentive, it is also used to cover the risk of latent errors or omissions when the contractor left the site before completion and lastly it can be used to encourage the contractor to return to the work after a planned demobilization. Indeed, in some circumstances, a joint account between the Employer and contractor can be open to deposit the retention and the interest earned shared between the two parties.

The third option is using future awards. This applies especially to Employer who constantly constructs facilities such as the government or private employers who have work broken down into phases. Holding out the potential of future contracts is a valuable control tool. It is important to observe that this is not a “real” protection to the Employer since the only protection is on an on-going project.

The fourth option is inspection: Physical evaluation of the work during site inspections and site meetings help track and solve problems before they become uncontrollable. Material testing and testing of in-situ works such concrete is also one way of protecting the Employer from unnecessary loss and expense.

The fifth option is the use of bonds: Examples of bonds are the bid bonds and performance bonds which secures the contractor commitment to his bid and performance of the work if he shall be given the work respectively.

Site reports is also another means that the employer contractual protection and management tools is expressed. Reports either monthly or otherwise helps to keep the Employer apprised as to what has happened or is about to happen. These reports may lead to failure prevention rather than merely documenting how failure occurred.

Other protection includes referrals where recommendations or warnings to other owners regarding the contractor’s performance acts as a protection against fellow employers since they will be aware of the contractor’s performance. The Employer’s right to either add or omit works under the project is also one of their management tools since the employer can omit a portion of work if they think the contractor has not performed well so far.

Approving submittals is also a management tool used by the employers since mostly all approvals would always require the employer’s agreement such as material samples for ironmongery, sanitary fittings, doors electrical fittings etc.

Another management tool available to the employer is requiring insurance for the works and third parties from the contractor, in this case the contractor indemnify the employer against such loss or compensation.

The above controls are not automatic and they must be agreed upon by the Employer and contractor and executed during the performance of the contract. All these Employer's contractual and management tools means that by the time the Employer pays for ex-gratia claims, there is no additional payment paid to the contractor since all payments are done as per the work done on site and secondly that the work has no or few defects.

2.6 Brief look at Value and Risk Management

In discussing the background of the study, we discussed the findings of Abwunza (2006) in which he established that claims are not considered in developing a project cost management strategy. Further, it has also been established that claims contribute to almost twenty percent (20%) of cost overruns in Kenya (Kariuki, 2008). It is with this in mind, that reviewing briefly value and risk management was considered.

2.6.1. Introduction

The iceberg principle teaches us that there is more to what you see, this means that the 10% of the iceberg above the see is supported by an unseen 90% of the size of the iceberg. In the same breath, construction projects are more than just delivering structures. Each project delivered must reflect the long term business needs of those who commissioned the works and deliver the expected benefits. Value in this context will imply the effectiveness with which the benefits are delivered and this requires that the contractor and consultants all understand the client's brief i.e. the buildings must meet the purpose for which it was intended, be easy to maintain and environmentally friendly etc. By contrast, effective risk management ensures that the benefits accrued by effective value management are not eroded by avoiding mishaps and uncertainties such as claims (Hacket, Robinson and Statham, 2007).

2.6.1.1 Value Management

Hacket, Robinson and Statham (2007) defined Value management as comprising of a systematic process to define what value means for clients and end users of a facility, the ability to communicate it clearly to the consultants and contractor and to help them maximize the delivery

benefits while minimizing the use of resources. One of the well known technique used in value management is value engineering, defined as a structured technique applied to a design to deliver the required functionality at lowest cost and hence provide best value for money.

2.6.1.2 Risk Management

A risk is defined as an exposure to the chance of injury or loss, a hazard or dangerous chance. Therefore, risk management can be defined as a systematic process to identify, assess and manage risks in order to enhance the chances of a successful project outcome. It is interesting to note that risk management could also identify opportunities to enhance value, although this may not be its primary function (Hacket, Robinson and Statham, 2007).

The risks are from project inception, to strategy, feasibility, pre-construction/design and construction to the use itself. In all these phases questions must be ask such as are the risks acceptable, are the conditions in place for the project to be initiated, are the risks allocated appropriately, are the risks under control and lastly, what can we learn for the future? (Hacket, Robinson and Statham, 2007).

2.6.1.3 Risks must be managed

There is really no use of thoroughly articulating and maximizing value throughout the pre-construction stages of a project if the risks will run out of control and undermine the successful delivery of the project. It must be understood that no construction project is risk free, however, the risks can be managed or minimized or shared or transferred or accepted but it cannot be ignored. This principle is captured well in the bible in Luke 14:28-30, it says 28 "Suppose one of you wants to build a tower. Will he not first sit down and estimate the cost to see if he has enough money to complete it? 29 For if he lays the foundation and is not able to finish it, everyone who sees it will ridicule him, 30 saying, 'This fellow began to build and was not able to finish.' (New International Version, Bible). The above reference from the bible illustrates we cannot ignore risks it must be "estimated" at least.

Having not ignored the risks that may affect a project, therefore the question to ask is what are strategies in risk management? There are four strategies under risk management namely eliminate, reduce, insure or contain. Under elimination strategy, action is taken against the most severe of

risks whose effect will be to cause project cancellation. Such risks requires that they be totally eliminated or reduced to such levels that the other three strategies can deal with it. This can be done by reviewing the project's objectives or reappraise the whole concept of the project. For instance if one of the project objective was to have a green building yet there is no sewer line within the locality and this would ofcourse not be approved by relevant statutory bodies then they could propose to use a sewerage treatment plant however costly it may be and get their approvals done and project to move on. The reduce approach is less drastic and more common than elimination and it involves undertaking surveys, redesign, use of other materials etc. Reduction of risks is done by the project delivery team i.e. change the design to eliminate the aspect that causes the risk. For instance if a borehole is established to have high concentration of fluoride that causes stains in sanitary ware or stains to teeth then they could redesign the aspect of the water reticulation by including in it a water treatment plant so reduce or eliminate the high levels of fluoride. On the other hand to insure requires that one party pays premium to cover them for a certain risk and should it occur then the insurance company will compensate them. During the construction stage the contractor does take the insurance policies both for the work being done, workers on site including consultants, the materials on site as well as adjacent buildings and third parties. Insure does not mean that the risk is eliminated but that someone else will manage it. Finally, the option of containing the risk means that risk could be paid for within the project contingency fund provision. This normally covers for less costly risks.

2.6.1.4 Research finding on Cost risk factor

In a master's thesis titled "Identification of cost risk factors in building contracts in Kenya" by Abwunza (2006) the study sought to evaluate building cost performance and to establish the risk factors within building contracts contributing to variations in such performance.

In this study done by Abwunza (2006) 31 risks factors were identified and subjected to various tests aimed at establishing their perceived significance and their relative importance measured from their frequency of occurrence and impact on the contract sum. The findings indicated that only twelve (12) factors perceived as significance causes of cost changes actually influence cost performance namely; extra work, design and specification changes, extended or reduced contract period, delays in preparing detailed drawings, delayed payment, late instructions, financial failure of contracting

party, defective material or work, delayed dispute resolution, differing underground conditions, delays arising from client supplied items and inaccurate quantities. It should be noted that amongst the first 31 risk factors none was a claim leave alone ex-gratia claim.

Other factors not perceived to be significant but were important in influencing cost performance included; price fluctuation, nominated subcontractors and suppliers, shortage of materials, third party delays, permits and approvals, inclement weather, labour and equipment availability and productivity of labour and equipment.

These findings demonstrate a clear distinction between factors forming the basis upon which quantity surveyors develop their cost management strategy in other words their cost risk strategies. The last 8 factors which were perceived not to be importance had a dramatic change in the level of risk between contract commencement and completion and therefore it implies that quantity surveyors perception of these 8 factors could be an underestimation of the real importance of the factors on cost performance. Therefore could it be that there are other factors such as claims and particularly ex-gratia claims that quantity surveyors needs to incorporate in their cost management strategies. Since the findings established that the 8 factors initially perceived not to be important were indeed important indicates the uncertainty within which Kenya's building projects are undertaken and therefore pointing out the difficulties experienced in forecasting the potential impact of risk factors on cost performance.

2.7 Conclusion of Literature Review

This review of the existing literature on the subject of ex-gratia claims has provided an in depth understanding of the subject. The literature review noted the various ways in which claims can be analyzed namely factual, legal and cost. It also provided the basis for employer honoring ex-gratia claims, part of these reason would be used in the questionnaire. The literature review also discussed the law of equity which is meant to provide relief in situation where common law would not be able to. The same principles that were used to justify the use of law of equity against common law could also be adopted to justify the use of ex-gratia claims when contractual claim would not suffice. Finally, it has revealed that ex-gratia claim is a common phenomenon in other jurisdictions such as insurance industry and some county councils which make use of ex-gratia claims and a few guidelines were noted that could be adopted for the construction industry.

CHAPTER THREE

RESEARCH METHODOLOGY

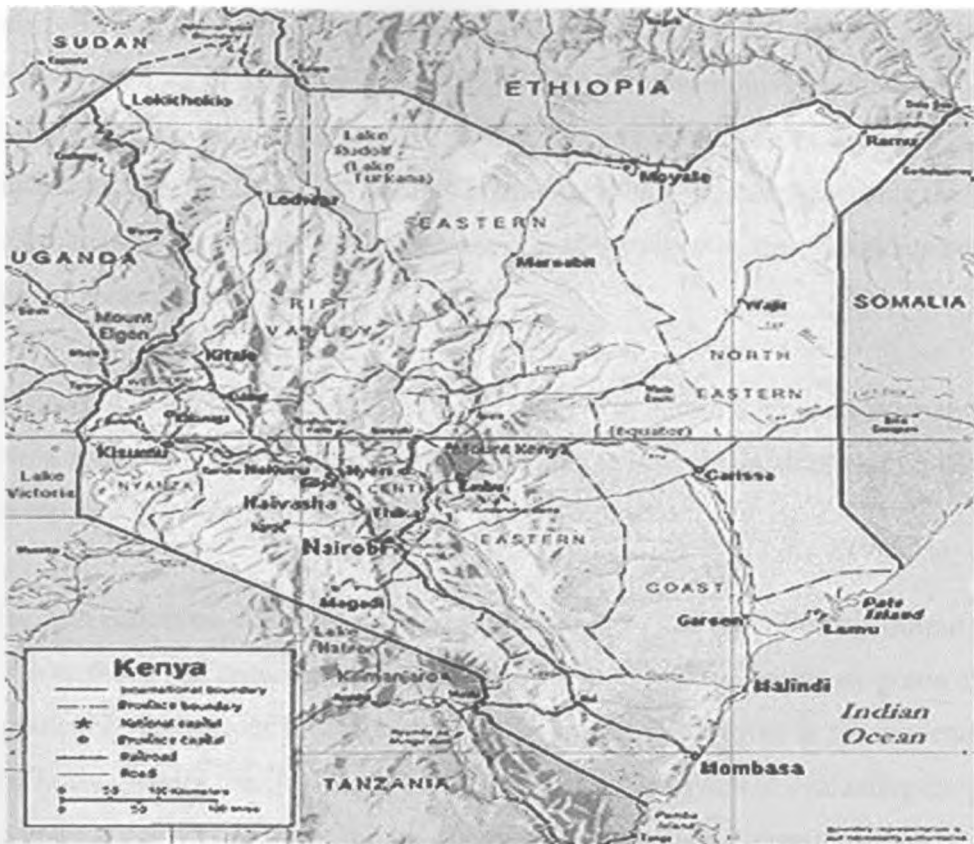
This chapter forms a very crucial part of the study as it provides the road map which the researcher shall use to carry out the data collection. This chapter will discuss the study area, research design, the population, the sample, data collection instrument, data collection procedure and evaluation methods.

3.1 Description of the study area

Kenya is a country located in East Africa which borders five countries namely Somalia to the northeast, Ethiopia to the north, Sudan to the northwest, Uganda to the West and Tanzania to the south, part of the Indian Ocean shores are situated to its southwest. It lies between latitudes 5°N and 5°S, and longitudes 34° and 42°E (www.wikipedia.org/wiki/Kenya).

The capital city is Nairobi. Other cities include Mombasa and Kisumu located amongst the forty seven administrative semi-autonomous units to the central government called counties. It has a land area of about five hundred and eighty thousand square kilometers (580,000 m²), which places it as the forty seventh largest country in the world. It has a population of slightly over forty million representing forty two different tribes and cultures. It is classified as a developing country and has the largest gross domestic product (GDP) in East and Central Africa (www.wikipedia.org/wiki/Kenya).

It currently has forty seven counties each governed by a governor, although we still have the central government led by the president. In terms of the construction industry, the industry has experienced growth since the year 2002 to date, year 2013.



3.2 Research Design

A research design refers to the general strategy for solving a research problem. This strategy provides among others; the general framework for the procedures that a researcher will follow, the data to be collected and analysis that will be suitable for data collected (Leedy & Ormrod, 2005).

There are varied ways of classifying research but two broad types are qualitative and quantitative research. Qualitative research ensures that there is an in-depth understanding of a subject, it comprises of design, techniques and measures that do not produce continuous numerical data. The findings from qualitative research are generally subjective and its conclusion based on interpretations. In some cases, the qualitative method precedes the quantitative approach and in this way the qualitative method provides understanding of the quantitative findings.

A quantitative research includes designs, techniques and measures those results in discreet numerical or quantifiable data. Further, quantitative research has three broad categories, whose

classification is by purpose, methods of analysis or by type of research (Mugenda and Mugenda, 2003). The study shall adopt the usage of both qualitative and quantitative methods in the sense that though the study seeks to establish methods and challenges of evaluating ex-gratia claims which are not numerical data, these findings will be converted into ratios or percentages using the likert scale. This is a scale that uses statements in a questionnaire and is judged by the respondents using interval scale of measurement.

In our case, since we want to collect data that is qualitative in nature but would be analyzed in a way to provide numerical data. Therefore, we shall combine both the qualitative as well as quantitative aspects of both research designs.

At the end of data collection and analyses, this study will have had the following output. First, it is to identify the methods and criteria used by Quantity Surveyors in evaluating ex-gratia claims. Secondly, to identify the various factors considered by quantity surveyors in recommending for payment and lastly identify the challenges faced by quantity surveyors in evaluating ex-gratia claims. The units of analysis to be used in the study will be registered quantity surveyors in the construction project.

3.3 Population, sample and sampling technique

3.3.1 Population

The target population in this study shall be the quantity surveyors who are licensed to practice in Kenya and particularly those based in Nairobi. The county of Nairobi was chosen due to the fact that this is where majority of the quantity surveyors' offices are located with some having branches outside Nairobi. This was established from the list of registered practicing Quantity Surveying firms provided by the Board of Registration of Architects and Quantity Surveyors (BORAQS). A few of the Quantity Surveyors are indeed located outside Nairobi.

The researcher obtained the list of registered and practicing Quantity Surveyors by going to BORAQS's office and requesting for the list. The list was for the year 2012 that showed a total of one hundred and fifty two (152) firms as being registered as of that time.

The rationale of using quantity surveyors is because they are the professionals in the building industry that are experts on contract as well as financial matters and it is their responsibility to evaluate and advice both the client and contractors on these aspects (Hackett, Robinson and Statham, 2007). Therefore quantity surveyors are best placed to provide consultant/professional opinion on evaluation of ex-gratia claims.

3.3.2 Sample size and sampling technique

The sample for the study was established through sampling method from the list of practicing quantity surveyors from Board of Registration of Architects and Quantity Surveyors (BORAQS). The list provided us with the total members within the target population out of which we established a sample to work with.

Being an explorative study it inherently implies that what we are seeking to have is in-depth information of the challenges facing quantity surveyors as they evaluate ex-gratia claims rather than making inferences or generalizations. It is these findings that would broaden the pool of knowledge in this area as well as equip the quantity surveyors with information on evaluating ex-gratia claims.

According to Nassiuma (2000), an appropriate can be given by the formula below:-

$$n = \frac{NC^2}{C^2 + (N-1) e^2}$$

- Where
- n is the sample size being determined
 - N is the total population of the registered Quantity Surveying firms registered by Board of registration of Architects and Quantity Surveyors (BORAQS)
 - C is the coefficient of variation 30% usually acceptable (Nassiuma, 2000)
 - e is the relative standard error, 5% is acceptable

Therefore;

$$n = \frac{NC^2}{C^2 + (N-1) e^2} = \frac{152 \times (0.3^2)}{0.3^2 + (152-1) (0.05^2)}$$

$$= 29.26$$

In order to get more data, the researcher chose to have 45 quantity surveying firms.

In order to get the exact name of the Quantity Surveying firm to submit our questionnaire we took

$$\frac{152}{29.26} = 5.19$$

29.26

Therefore a Quantity Surveying firm was picked after every fifth count or interval in the list.

The sources of data for the three objectives in this study namely to identify the methods used by Quantity Surveyors in evaluating ex-gratia claims, to identify the factors considered by Quantity Surveyors in recommending payment of ex-gratia claims and lastly to identify the various challenges faced by Quantity Surveyors in evaluating ex-gratia claims will be from the sample of Quantity Surveying firms.

3.4 Data Collection Instrument

The type of data determines the method of data collection. In our study, our data is primarily historical data. In our context historical data means data that has been obtained as a result of a past experience and in our study the historical data will be the ex-gratia claims that quantity surveyors have been able to evaluate.

There are various ways of data collection such as questionnaires, interviews schedules, observational forms and standardized tests. In our study, questionnaires were preferred because it has been established that respondents are more willing and open to respond honestly if they are allowed to sit down in complete privacy to record their answers and be completely assured of their privacy. In other words because of anonymity, questionnaires have a high chance to received unbiased data. The use of questionnaires in this study is also supported by the fact that the study sought opinions from the respondents rather than observing their behaviors or testing them. Questionnaires were also chosen because it is cost effective and this will be advantageous given the financial constraint of the researcher.

The above notwithstanding, the researcher was keenly aware of the shortcoming of questionnaires and have therefore ensured that the structure of our questionnaires either eliminates or significantly reduces the shortcomings. Some of the shortcomings include; long questionnaires have a high chance of creating fatigue to the respondents and therefore obtained inaccurate answers. To deal with this shortcoming, we have structured our questionnaires into four main sections; general introduction, methods used to evaluate ex-gratia claims, challenges of such methods and lastly factors used to recommend whether to award or not an ex-gratia claim. Through this structured away each of the four main sections creates a feeling of completion and eagerness to tackle the next section and therefore reducing boredom and fatigue as a result of unending questions. Another shortcoming of using questionnaires as a method of collecting data is that information or answers not known to the respondents cannot be obtained and therefore some questions may not be answered. This shortcoming has been significantly eliminated by providing options whereby the respondents can tick as well as two or three blank lines where the respondents can fill should the options given not capture their answers.

The data collection instrument for our three objectives used questionnaires.

3.5 Data Collection Procedure

Our questionnaires were administered through a letter of introduction from the department of real estate and construction management that also confirmed that the questionnaires are purely for scholarly purpose. Both the letter of introduction as well as the questionnaire were given to the respondent. Thereafter a brief introduction to the respondent by the researcher was done and the respondents briefly taken through the content of the questionnaires in order to provide clarification where necessary. Each quantity surveying firm received one questionnaire.

Each respondent was given two (2) weeks to respond to the questionnaire. However, we envisaged that an additional week could be added to any respondent who for some reasons beyond the researcher's control could not complete the questionnaires. The questionnaires were to be filled with among others, the method used to evaluate questionnaires, the challenges from those methods and factors used to award an ex-gratia claim. The researcher employed two research assistants to help him distribute as well as collect the questionnaires from the sampled offices.

3.6 Data Analyses Procedure

The researcher used common statistical methods to analyze the data. A variety of tools were used to describe and analyze the data namely the measures of variability which is simply the distribution of scores around a particular central score or value and this helps to see how spread out the scores for a given factor are. The types of measures of variability that would be deployed include; range and standard deviation. Percentage will also be used to provide the proportion of the respondents that give a particular response or set of responses. The other tools for analyzing the data used was the mean and mode which indicates the arithmetic average and providing the common response to each question respectively.

The data collected for all the three objectives was analyzed using Statistical Package for the Social Sciences (SPSS) computer programme. The data was thereafter presented in tables and pie charts.

CHAPTER FOUR

DATA ANALYSIS, PRESENTATION AND INTERPRETATION OF FINDINGS

4.1. Introduction

This chapter presents the findings of the study that was carried out to explore the challenges of evaluating ex-gratia claims by Quantity Surveyors in Kenya; A case study of firms in Nairobi. The objectives of the study were threefold and included to identify the methods used by Quantity Surveyors in evaluating ex-gratia claims, to identify the factors considered by quantity surveyors in recommending payment of ex-gratia claims and to identify the various challenges faced by quantity surveyors in evaluating ex-gratia claims.

A sample size of 45 registered Quantity Surveying firms was selected from a target population of approximately 152 firms registered in Nairobi. Questionnaires were used as the main instruments of data collection in the study. In this chapter, the data obtained from the research instruments are examined, analyzed and interpreted in line with the purpose and objectives of the study, with a summary of the findings presented at the end of the chapter.

4.2. The Response Rate

The survey targeted 45 respondents, mainly from registered quantity surveyors and practicing in Nairobi. From the total sample size of 45, 30 respondents (66.67%) positively responded to the survey request. The percentage of those interviewed is statistically adequate to represent the whole. Furthermore, Babbie (2007) suggested that any return rate over 50% can be reported and therefore 66.67% is good as indicated by the survey's response rate. The response rate is further summarized as indicated in Table 4.0 below.

Table 4.0: The Response Rate

Category	Questionnaires Sent	Questionnaires Returned	Response Rate (%)
Quantity Surveyors	45	30	66.67%

Source; Author, December, 2013

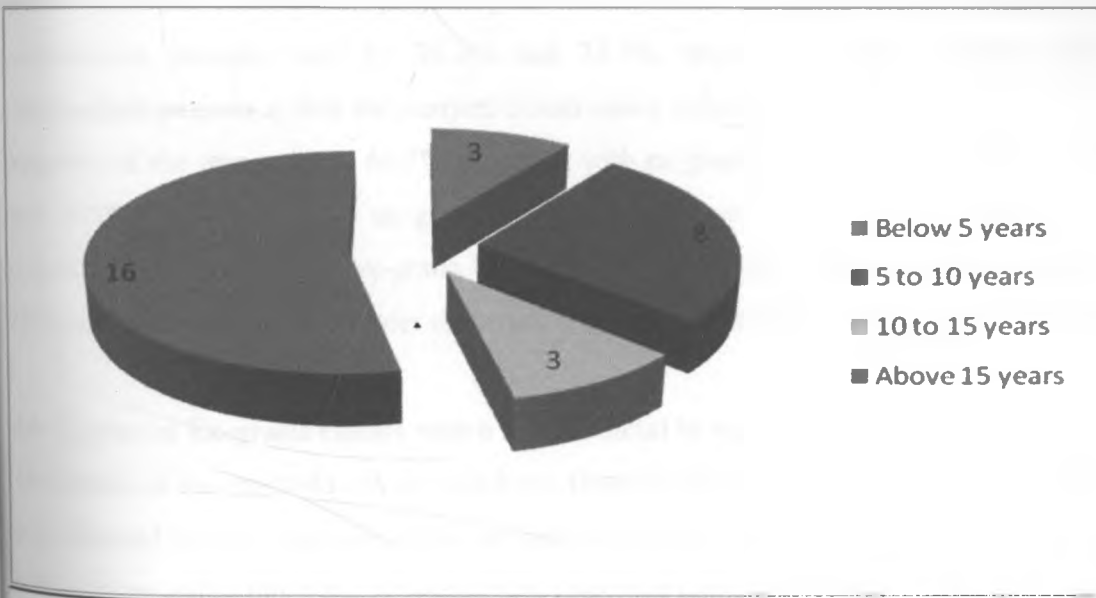
Mugenda and Mugenda (2003) further assert that in questionnaire administration, a response rate of 50% is adequate for analysis and reporting. He further suggests that 60 percent is good response while 70% is very good. The researcher therefore considers that the general response rate of 66.67% is very good and sufficient for data analysis, reporting and drawing conclusions.

The failure for some respondents to respond to the questionnaires may be partly due to the fact that they may not have dealt with ex-gratia claim and therefore saw no need to respond.

4.3. Generalities

From the 30 responses obtained during the survey, 10.0% were firms whose existence was below 5 years, 26.7% had existed between 5 to 10 years, 10.0% of the firms had existed between 10 to 15 years and 53.3% were firms which had been in existence for over 15 years. This indicates a wide experience at the management levels of the firms and wider knowledge on the issues of ex-gratia claim. Figure 4.1 below illustrates these variations.

Figure 4.1 How Long the Firm has been Existence



Source; Author, December, 2013

We also observed that 23.3% of the respondents had dealt with only one (1) ex-gratia claim, 13.3 % of the respondents had dealt with only two (2) claims, 23.3% had dealt with three (3) claims, and 33.3% of the respondents had dealt with four (4) claims. While 3.3% of the respondents has dealt with ten (10) claims as indicated in Table 4.1 below.

Table 4.1 Number of Ex-gratia Claims the Firms Handled

	Frequency	Percent
Valid 1 claim	7	23.3
2 claims	4	13.3
3 claims	7	23.3
4 claims	10	33.3
10 claims	1	3.3
No response	1	3.3
Total	30	100.0

Source; Author, December, 2013

This indicates the level of prevalence of the ex-gratia claims and their extent in the construction industry in Kenya that necessitated the research study. Majority of the claims had been handled under residential construction project by 46.7%, commercial construction projects and institutional construction projects were by 30.3% and 23.3% respectively which depicted the nature of construction projects within the Kenyan Construction Industry.

Majority of the respondents, 66.7% had dealt with ex-gratia claims which were financial in nature and 30.0% had dealt with ex-gratia claims which were time based in nature. 3.3% of the respondents had dealt with ex-gratia claims which were both financial and time period in nature. This means that contractors prefer monetary compensation rather than time period compensation.

4.4. Causes of Ex-gratia claims which are financial in nature and their methods of evaluation

The causes of the ex-gratia claims which are financial based were identified in the literature review and affirmed by the respondents are as indicated in the Table 4.2 below. The main cause of ex-gratia claims under this class is fluctuations done in a non-fluctuating contract. It can be seen that it was the cause that most of the respondents picked and this represented 60% of the total cases of responses. The second highest cause of ex-gratia claim which are financial in nature is pricing error and this was represented by 36.7% of the total cases of responses.

The minor causes of ex-gratia claims of financial nature included acts of terrorism in a case where the site is adjacent to a bombed mall resulting to restriction of access to the site, due to acts of God.

It was interesting to note that the respondents also gave their own causes over and above the ones given in the questionnaires and these were social upheavals such as the post election violence of 2007/2008 in Kenya and secondly stoppage of work by court injunctions each at 3.3%, although their fell under minor causes. The rest of the factors are as given in the table 4.2 below. It therefore can be interpreted that contractors would rather present an ex-gratia claim that the construction fraternity is familiar with and straight forward rather than causes that may seem to be remote.

When it comes to methods used to evaluate the financial type of ex-gratia claims, three methods were noticeable and were at the same frequency as seen under table 4.3 below. The methods were use of prevailing financial markets to establish the different rates for a given currency in order to compensate for the difference, secondly use of market rates to value work and thirdly use of Joint Building Council indexes to determine increment in labour and materials. The three methods all had 43.3% of the total cases of responses. It is also of interest to note that negotiations also play a significant role in settling and evaluating this kind of ex-gratia claims. Negotiation was at 33.3% of the total cases of responses. Lastly, use of dayworks rates and time sheets at 26.7% of the responses was also a good showing that it is a reliable method in evaluating this kind of claim. It therefore can be interpreted that quantity surveyors prefer to use methods that are factual to evaluate financial type of ex-gratia claims. Factual in the sense that the data they use to evaluate are provided for by independent bodies who have carried due diligence before compiling and releasing such data to the public. For instance the Joint Building Council before releasing the price indexes for calculating fluctuation on labour and material costs will have involved professionals to undertake research and thereafter release the indexes.

Table 4.2. Causes of Ex-gratia Claim of Financial Nature

		Responses		Percent of Cases
		N	Percent	N
Cause(a)	Upward change in dollar exchange rate that resulted in high cost of importation	7	6.9%	23.3%
	A negative pricing error	11	10.8%	36.7%
	In a non-fluctuating contract where significant cost of labour and	18	17.6%	60.0%

materials rose

An unforeseen labour scarcity as a result of dynamic social-economic reasons

8

7.8%

26.7%

Damage of work done and stolen materials on site through riots or political violence way beyond the limit under the insu

5

4.9%

16.7%

Due to acts of terrorism in a case where the site is adjacent to a bombed mall resulting in restriction of access to nei

3

2.9%

10.0%

Due to acts of God (force majeure) i.e. soiled damped in your already excavated site due to heavy rains.

1

1.0%

3.3%

2007/2008 post election violence

1

1.0%

3.3%

Delays by contractor that leads to losses

1

1.0%

3.3%

The contractor under priced an item

1

1.0%

3.3%

Stoppage of work by court injuctions

1

1.0%

3.3%

Not applicable

45

44.1%

150.0%

Total

102

100.0%

340.0%

Source; Author, December, 2013

Table 4.3 Methods Used to Evaluate the Financial Type of Ex-gratia Claim

		Responses		Percent of Cases
		N	Percent	N
(a)	Using Joint Building Council labour indexes for unforeseen increment in costs of labour and materials in a non fluctuati	13	13.4%	43.3%
	Using financial markets to established the prevailing exchange rates for the periods in question in order to get the difference incases of importation	13	13.4%	43.3%
	Using day works rates and time sheets for repetitive works outside the control of contractor i.e. due to heavy rains soi	8	8.2%	26.7%
	Using prevailing market rates to establish correct price for an item in case where an item had a negative pricing error	13	13.4%	43.3%
	Negotiating with contractor say to pay a certain percentage of ex-gratia claim without delving to calculations	10	10.3%	33.3%
	Not Applicable	40	41.2%	133.3%
Total		97	100.0%	323.3%

Source; Author, December, 2013

4.5. Causes of Ex-gratia claims which are time in nature and their methods of evaluation

The causes of the time based ex-gratia claims identified in the literature review and affirmed by the respondents were as in the Table 4.4 below; where late delivery of imported materials due to factors beyond the contractor's control was a major cause as indicated by 41.4% of the respondents. The least causes were delays by main contractor due to lack of knowledge over local market, change in specifications by Architect/Engineers, change in site conditions and unforeseen works, each by 3.4%.

Methods used to evaluate time based ex-gratia claims were; referencing the time requested to the target period beyond which the employer would not accept by 44.8%, the quantum or scope of works remaining by 44.4%, using actual procurement schedules and time lines by 41.4%, negotiation due to lack of time to do evaluations by 41.4% and negotiation due to lack of time to do evaluations by 17.2%.

Table 4.4 Causes of Time Based Ex-gratia Claims

	Responses		Percent of Cases	
	N	Percent	N	
(a) Causes	Late delivery of imported material due to factors beyond the contractor's control i.e. unforeseen congestion at the port	12	16.2%	41.4%
	Unavailable local materials that were available at the time of tendering, therefore delays occurred obtaining an accepta	9	12.2%	31.0%
	Cash-flow problems experienced by the contractor hence works could not be financed	11	14.9%	37.9%
	A domestic subcontractor who delayed the works and therefore some period was spend by the contractor recruiting another	10	13.5%	34.5%
	Labour unrest on site that caused the site to be closed temporarily	7	9.5%	24.1%
	Delays by main contractor due to lack of knowledge over local market	1	1.4%	3.4%
	Change in specifications by Architect/Engineers	1	1.4%	3.4%
	Change in site conditions	1	1.4%	3.4%
	Unforseen works i.e., hardrock	1	1.4%	3.4%
	Not Applicable	21	28.4%	72.4%
	Total	74	100.0%	255.2%

Source; Author, December, 2013

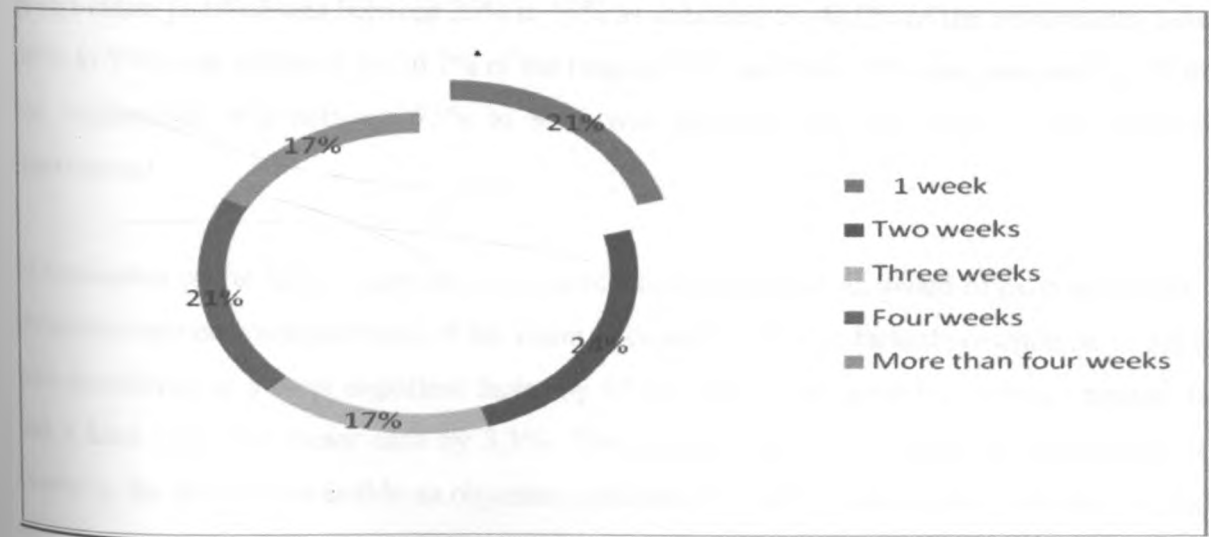
4.6 Challenges in Evaluation of Ex-gratia Claims

The challenges encountered in evaluation of financial based type of ex-gratia claims included the fact that since ex-gratia claims are not contractual it attracted suspicion on its evaluation and outcome and this was a major challenge as indicated by 62.1% of the respondents, lack of past evaluated ex-gratia claims materials to act as reference point as indicated by 44.8% of the respondents, inadequate time for evaluation by 44.4%, lack of awareness on ex-gratia claims indicated by 27.6%, and lack of or inadequate records to established rates used and time consumed. Lack of awareness of ex-gratia claims by the client was noted by only 3.4% of the respondents.

In the evaluation of time based ex-gratia claims, lack of experienced and expertise in dealing with works programme and therefore probably the Architect was best placed accounted for 32.7% of the respondents, lack of awareness on ex-gratia claims was 17.9%, inadequate time for evaluation was by 28.6%, while the main challenge was the fact that ex-gratia claims are not contractual; of which method used would be viewed suspiciously noted by 67.9% of the respondents. Lack of inadequate records to establish time consumed was indicated by 46.4% while the least challenge was pressure to balance client's needs versus contractor's ability to finish the works by 3.6%.

The duration in terms of days taken to evaluate the ex-gratia claims was as indicated in the Figure 4.2 below; where majority of the claims, 24.0% were settled within two weeks and averagely the durations taken was four weeks.

Figure 4.2 Duration Taken to Evaluate Ex-gratia Claims

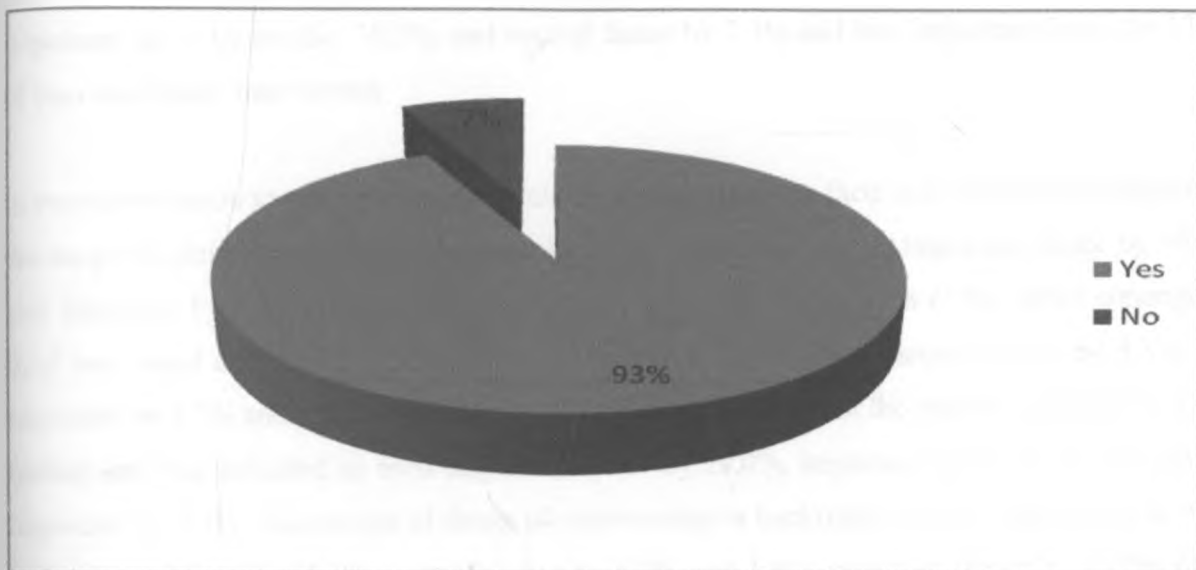


Source; Author, December, 2013

4.7 Factors Considered in Recommending an Award or Rejection of Ex-gratia Claims

After the evaluation of the ex-gratia claims, financial or time based, 93.0% of the respondents interviewed indicated that they recommended for the ex-gratia claim to be awarded/compensated and only 7.0% rejected the evaluated ex-gratia claims. The variations are as indicated in the Figure 4.3 below.

Figure 4.3 Recommendations on Ex-gratia Claims



Source; Author, December, 2013

In recommendation for payment of the ex-gratia claim, the proportion of the contractors original ex-gratia claim justified was between 25% to 50% as indicated by 40.0% of the respondents, between 50% to 75% was indicated by 26.7% of the respondents, less than 25% was indicated by 20.0% of the respondents and between 75% to 99% was indicated by only 3.3% of the respondents interviewed.

In evaluation of the factors considered in the recommendation of an award of ex-gratia claims, the comprehensiveness/completeness of the claim document itself i.e., factual presentation of evidence was considered as a most important factor by 63.3%, important factor by 16.7%, a neutral factor and a least important factor each by 3.3%. The quantity surveyors in depth understanding of the events in the project that enable an objective, informative and knowledgeable evaluation was noted as a most important factor by 43.3%, important factor by 33.3%, a neutral factor and less important by 3.3% and 6.7% respectively. Availability of contingency fund was considered a most important

factor by 50.0% of the respondents, important factor by 6.7%, neutral factor by 6.7% , less important factor by 3.3% and least important by 20.0% of the respondents. Correct timing of submitting the ex-gratia claim was most important factor as indicated by 33.3%, important factor by another 33.3%, neutral factor by 3.3%, less important factor by 10.0% and less important factor by 6.7%. Finally, the fact that from the regular financial appraisals, it is anticipated that the costs will still be within budget i.e, no cost overruns was considered by 30.0% as a most important factor, important factor by another 30.0%, and neutral factor by 3.3% and less important factor by 13.3% of the respondents interviewed.

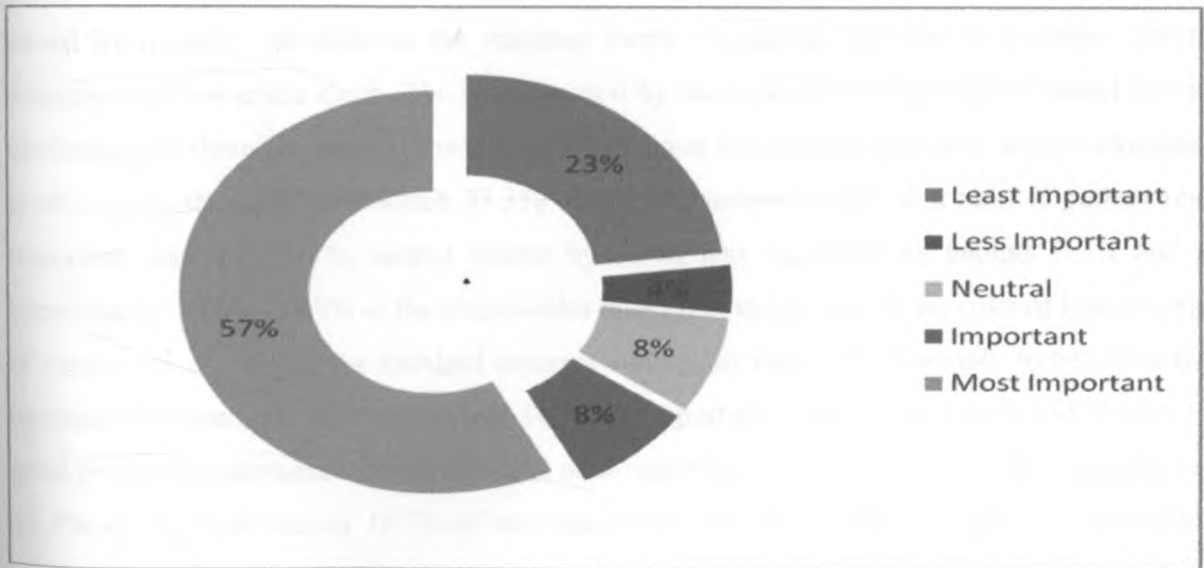
In recommendation to reject the ex-gratia claim, lack of adequate facts and supporting evidences of the ex-gratia claim was considered a most important factor by 26.7%, important factor by 10.0%, less important by 6.7% and least important factor by 3.3%. Exhaustion of the entire contingency fund was noted as most important factor 23.3% of the respondents, neutral factor by 3.3%, less important by 3.3% and least important by 10.0%. Strong evident that the contractor did not mitigate further loss was indicated as most important factor by 20.0%, important factor by 16.7% and less important by 3.3%. Knowledge of threat of receivership or bankruptcy to the contractor was noted as important factor by 3.3%, neutral factor by 6.7% and least important factor by 10.0% of the respondents. Finally, the fact that the contractor executed unsatisfactory works in the project was considered by 16.7% of the respondents as most important factor, 6.7% as important, 3.3% as neutral, 6.7% as less important and another 6.7% as least important factor.

Table 4.5 Comprehensiveness/Completeness of the Claim Document

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Least Important	1	3.3	3.4	3.4
	Neutral	1	3.3	3.4	6.9
	Important	5	16.7	17.2	24.1
	Most Important	19	63.3	65.5	89.7
	No Response	2	6.7	6.9	96.6
	Not Applicable	1	3.3	3.4	100.0
	Total	29	96.7	100.0	
Missing	System	1	3.3		
Total		30	100.0		

Source; Author, December, 2013

Figure 4.4. Availability of Contingency Fund



Source; Author, December, 2013

Table 4.6 Lack of Adequate Facts and Supporting Evidences Under the Ex-gratia Claim

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Least Important	1	3.3	3.4	3.4
	Less Important	2	6.7	6.9	10.3
	Important	3	10.0	10.3	20.7
	Most Important	8	26.7	27.6	48.3
	No Response	1	3.3	3.4	51.7
	Not Applicable	14	46.7	48.3	100.0
	Total	29	96.7	100.0	
Missing	System	1	3.3		
Total		30	100.0		

Source; Author, December, 2013

50.0% of the respondents indicated that they would recommend for an addendum to always be added by quantity surveyors to the standard forms of contract by way of a clause that takes cognizance of ex-gratia claim. The reason noted by the respondents was that it would provide a challenge and therefore quantity surveyors would have to adopt an objective way to evaluate ex-gratia claims should it arise which 23.3% of the respondents noted as a most important reason, important reason by 6.7%, neutral reason by 3.3%, less important by another 3.3% and least important by 10.0%. 30.0% of the respondents noted that spread out of the risks of loss arising out of events not covered in the standard contract documents that was previously to be taken by the contractor as most important reason, and 16.7% as important reason. If well managed, it would be a good project management tool was noted as most important reason by 33.3% of the respondents and 13.3% as important reason. 16.7% of the respondents indicated that it will give legitimacy to ex-gratia claims being most important reason, important reason by 23.3%, neutral reason by 3.3% and less important reason by another 3.3% and finally 23.3% affirmed that it will begin to create interest and awareness on the subject as most important reason, 16.7% as important reason, less important and least important by each 3.3% of the respondents.

The respondents of contrary opinion noted that it can be abused especially when one think of the vigorous process of contractual claim as indicated by 33.3% of the respondents as most important reason, 10.0% as important reason, 3.3% for both neutral and least important reason. 23.3% of the respondents noted that, as most important reason, it may provide an avenue for unnecessary claims, 16.7% important reason, 3.3% for neutral reason, less important and least important reason, 23.3% of the respondent noted as most important reason, it may make contractors become 'claim conscious'. 16.7% noted that this as important reason, 3.3% and 6.7% for neutral and least important reason respectively. The other reason given by the respondents is It may end up being deleted / cancelled as is the normal practice in standard contracts where clauses in the standard agreement are amended so as to suit a particular project and it would end up making the contract agreement more complex since each addendum may be drafted differently as the individual quantity surveyors' wording

CHAPTER FIVE

DISCUSSION OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The purpose of this study was to investigate into the challenges of evaluating ex-gratia claims by Quantity Surveyors in Kenya; A case study of firms in Nairobi. The objectives of the study included; to identify the methods used by Quantity Surveyors in evaluating ex-gratia claims, to identify the factors considered by quantity surveyors in recommending payment of ex-gratia claims and to identify the various challenges faced by quantity surveyors in evaluating ex-gratia claims.. Consequently, research questions were formulated in accordance to the research objectives, which the researcher set out to look for answers.

With a sample of 45 registered Quantity Surveying firms selected randomly, the researcher used questionnaires to gather information related to the study. The study findings were analyzed, presented and interpreted. This chapter therefore presents discussions of the study findings, conclusion and recommendations on important issues that arose from the study and ends by recommending areas for further research work.

5.2 Discussion of Study Findings

From the analysis, 23.3% of the respondents dealt with one (1) ex-gratia claim, 13.3 % had dealt with 2 claims, 23.3% had dealt 3 claims, and 33.3% had dealt with 10 claims as indicated in Table 4.1 above. This indicated the prevalence of the ex-gratia claims and their extent in the construction industry in Kenya which as informed from the literature review is not very common.

A survey done in Western Canada found that in the construction projects, majority of claims had some delay and in many cases delay exceeded the original contract duration by over one hundred percent. On the other hand on the project cost, more than half of the claims were an additional cost of at least 30% of the original contract sums. In other parts of the world such as the United States and Thailand, surveys have shown similar results that the average cost growth causing by claims was about 7% of the original contract value (www.researchgate.net/publication).

A survey of Thai Contractors' Construction Claim Management in 2000, the ex-gratia claim got the lowest Frequency Score (less than 1 from 10) while it got the highest Severity Score, 7.85 from 10 (www.researchgate.net/publication). This implied that even if ex-gratia claims occurred not so often in the project, the contractors felt they have high level of impact to their performances. This is an important observation since it means that as part of project risk management strategy, ex-gratia claims need to be considered. It also shows the impact of ex-gratia claim if not well considered within the risk management, it may occur less frequently than other types of claims but when it occurs the impact is significant.

The first objective of the study was to identify the methods used by Quantity Surveyors in evaluating ex-gratia claims. The main methods used to evaluate financial type of ex-gratia claims and which were at the same frequency are; use of prevailing financial markets to establish the different rates for a given currency in order to compensate for the difference, secondly use of market rates to value work and thirdly use of Joint Building Council indexes to determine increment in labour and materials. This means that when evaluating financial type of ex-gratia claims, use of factual basis is important so as to eliminate any subjective method way of evaluation which might be viewed suspiciously. In other words, even when ex-gratia claims have no standard guidance on its evaluation, the established claim evaluating methods are still the preferred ones in evaluating the same. Further the main cause of ex-gratia claims of financial nature was in a non-fluctuating contract where significant cost of labour and material rose and followed by a negative pricing error. The minor causes of ex-gratia claims of financial nature included acts of terrorism in a case where the site is adjacent to a bombed area resulting to restriction of access to the site, due to acts of God, post election violence like the case of 2007/2008 in Kenya and stoppage of work by court injunctions. These findings means that causes of ex-gratia claim which are financial in nature mostly occur due to factors outside the control of the Contractor or Employer. This means that in order to control the challenge of financial type of ex-gratia claim the contractors need to be clearly advised on the issue of fluctuation and the impact to their rates at the time of tender rather than at the time of drawing up the contract.

On the other hand, the methods used to evaluated time based ex-gratia claims were referencing the time requested to the target period beyond which the employer would not accept, followed by the *quatam* or scope of works remaining and then followed by using actual procurement schedules and

time lines. Similar to the use of established methods in evaluating financial type of ex-gratia claims, the same trend can also be noted in evaluating time based ex-gratia claims. The main cause of time based ex-gratia claims identified were late delivery of imported materials due to factors beyond the contractor's control. The least causes were delays by main contractor due to lack of knowledge over local market, change in specifications by Architect/Engineers, change in site conditions and unforeseen works. These findings show that ex-gratia claims that are time based can be controlled if better project management tools are exercised by both the contractor and the lead consultants. The causes such as late importation of materials could be overcome if they were ordered way earlier by the contractor or the client while on the other hand change in specification could be avoided if the lead consultants had either had detailed design by the time of tender or instituted a freeze on design etc.

The second objective of the study was to identify the factors considered by Quantity Surveyors in recommending payments for ex-gratia claim. In evaluation of the factors considered in the recommending an award for an ex-gratia claim, the study established that the comprehensiveness/completeness of the claim document itself i.e., factual presentation of evidence was considered as a most important factor. Other factors include the quantity surveyors in depth understanding of the events in the project that enable an objective, informative and knowledgeable evaluation, availability of contingency fund, correct timing of submitting the ex-gratia and finally, the fact that from the regular financial appraisals, it is anticipated that the costs will still be within budget i.e., no cost overruns. In recommendation to reject the ex-gratia claim, the factors considered were lack of adequate facts and supporting evidences of the ex-gratia claim, exhaustion of the entire contingency fund, strong evidence that the contractor did not mitigate further loss, knowledge of threat of receivership or bankruptcy to the contractor and the fact that the contractor executed unsatisfactory works in the project. The above findings imply that the most important factor considered in recommendation or not recommending for an award for ex-gratia claim is facts. Facts is the backbone for either recommending for an award or rejection of the same.

The third objective of the study was to identify the various challenges faced by Quantity Surveyors in evaluating ex-gratia claims. The study established that the challenges encountered in evaluation of financial based type of ex-gratia claims were the fact that ex-gratia claims are not contractual therefore causing suspicion was a major challenge, lack of past evaluated ex-gratia claims materials

to act as reference, lack of awareness on ex-gratia claims, inadequate time for evaluation, and the lack of or inadequate records to established rates used and time consumed. This means that in evaluating ex-gratia claims which are financial in nature the Quantity Surveyor would require facts and in order to build relevant and reliable facts it would take more time than probably what is provided for. In addition, the major challenge of lack of awareness can be overcome by sensitizing quantity surveyors either through their regular magazines or through seminars. In the evaluation of time based ex-gratia claims, the challenges were lack of experienced and expertise in dealing with works programme, lack of awareness on ex-gratia claims, inadequate time for evaluation, while the main challenge was the fact that ex-gratia claims are not contractual and therefore any method used would be viewed suspiciously. Lack of inadequate records to establish time consumed while the least challenge was pressure to balance client's needs versus contractor's ability to finish the works. Just the same way facts are required to evaluate financial based ex-gratia claims; the same is also required in evaluating time based ex-gratia claims.

5.3 Conclusions

The quantity surveying firms indicated that they would recommend for an addendum to always be added by Quantity Surveyors to the standard forms of contract by way of a clause that takes cognizance of ex-gratia claim. The reason noted by the respondents was that it would provide an anticipation for its occurrence and therefore quantity surveyors would have to adopt an objective way to evaluate ex-gratia claims should it arise.

The study hypothesis that the methods used to evaluate contractual claims are similar to the ones used to evaluate ex-gratia claims can be proved true based on the data analysis and interpretation. It is evident that the methods used to analyse the financial type of ex-gratia claim were use of joint Building Council labour indices for unseen increment in costs of labour and materials to establish the prevailing exchange rates, using of work rates and time sheets for repetitive works outside the control of contractor, use of prevailing market rates to establish correct price of an item in case where an item had a negative pricing error and finally negotiation with contractor to pay a certain percentage of ex-gratia claim without delving to calculations. While the methods used to evaluate time based ex-gratia claims were; referencing the time requested to the target period beyond which the employer would not accept, the quantum or scope of works remaining, use of actual procurement

schedules and time lines, negotiation due to lack of time to do evaluations and negotiation due to lack of time to do evaluation all which are similar to those use in the evaluation of contractual claims.

It therefore means that the established methods for evaluating the contractual claims are very much applicable in evaluating ex-gratia claims probably due to the fact the issues presented are similar i.e. financial or time based claims although one is based on contract and the other is not. It is just the same way our national examinations in primary or secondary schools are all evaluated and marked by the same teachers although some of the candidates were from public schools while some were from private schools or the same way we have different manufacturers of goods all subjecting themselves to be evaluated by the same regulatory body that oversees the quality and standards of production of goods, in our Kenyan context that would be Kenya Bureau of Standards.

5.4 Recommendations

The background of this study noted that claims are not considered by Quantity Surveyors in developing cost management strategies (Abwunza, 2006). In a separate study done by Kariuki (2008), it was established that claims contribute to about twenty percent (20%) of cost overruns in Kenya. The above two findings shows that claims are not considered in any cost management strategies for a construction project yet they contribute towards cost overruns. It is therefore the recommendation of this study to have ex-gratia claims considered in cost management strategies. This will ensure that claims and particularly ex-gratia claims will be part of the cost management plan in a project so that the Employer will be protected against this risk. If well considered this will enhance the overall project management of a project. Further, it will begin to create more interest and awareness on the subject.

It is also the recommendation of the study to have the same well known and established methods of evaluating contractual claims be the same ones used to evaluate ex-gratia claims. The study hypothesis also confirmed this. These methods can then be tailored depending on the ex-gratia claim at hand.

The main causes of financial and time based ex-gratia claims were fluctuations and late delivery of imported materials. The study therefore recommends that contingency sum for a non-fluctuating contract be higher than for a fluctuating contract and secondly advocating the use of locally available materials as much as possible in order to avoid importation of the same.

Last but not least, the study noted that the major challenge that Quantity Surveyors face in evaluating ex-gratia claims is lack of factual evidence. Therefore, the study recommends that both the contractors as well as Quantity Surveyors create a culture in their office where all projects have a solid factual base through the updated data base, drawings, variations, instructions, works programme etc.

5.5 Areas of Further Study

During the study, the researcher observed from the respondents had undertaken ex-gratia claims on residential (private houses and housing schemes), commercial (office blocks, warehouses,, malls, hotels etc) and institutional construction projects (schools, hospitals, churches etc) were at 46.7%, 30.3% and 23.0% respectively. Therefore a detailed study on the factors contributing to the above variance would provide more understanding i.e. could simplicity of the design, scope of imported items etc be the factors.

The study also established that all methods used to evaluate financial type of ex-gratia claim were statistical in nature i.e. they used prevailing financial markets, current Joint Building Council Indices, prevailing market rates as well the use of day work rates and time sheets. However, of interest is the use of negotiations which accounted for 33.3% of the total cases of responses. The other methods use what may be considered as objective while the negotiation method is rather subjective and therefore it would be important to understand what factors the negotiation method considers.

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APPENDICES

A QUESTIONNAIRE ON EXPLORING THE CHALLENGES OF EVALUATING EX-GRATIA CLAIMS BY QUANTITY SURVEYORS IN KENYA

QUESTIONNAIRE TO QUANTITY SURVEYORS

DECLARATION:

ALL ANSWERS TO THE QUESTIONNAIRES SHALL BE KEPT CONFIDENTIAL AND USED FOR THIS ACADEMIC RESEARCH ONLY

Questionnaire Number:.....

Date:

Brief Introduction

In the construction industry, there are three main types of claims namely contractual, ex-contractual and ex-gratia claims. My research study focuses on ex-gratia claim and therefore this questionnaire would seek your valued opinion and responses on three main areas; methods of evaluating ex-gratia claims, challenges of using such methods and factors considered in awarding or rejecting an ex-gratia claim.

Four short sections are included in this questionnaires i.e. general information and the last three section structured as per the above three areas. This firm has been selected using random sampling from 152 firms registered by BORAQS (Board of Registration of Architects and Quantity surveyors). All effort towards responding to this questionnaire are highly appreciated which **should be completed within two (2) weeks** from the date of receipt.

Section 1: General Information

Please answer the following general questions:

1. For how long has your firm been in existence? *Please tick within one appropriate line.*

- Below 5 years.....
- Between 5 to 10 years.....
- Between 10 to 5 years
- Above 15 years.....

2. How many ex-gratia claims has the firm dealt with? *Please tick on one appropriate box?*

- 1 ex-gratia claim.
- 2 ex-gratia claims.
- 3 ex-gratia claim.
- 4 ex-gratia claims.
- Any other number of ex-gratia claim..... (kindly indicate)

3. Under which type of a construction project did you handle the ex-gratia claim? *Please tick on one appropriate box?*

- Residential project i.e. private houses, housing schemes etc.
- Commercial project i.e. office blocks, warehouses, malls, hotels, etc.
- Institutional project i.e. schools, hospitals, social halls, churches etc
- Any other type(kindly indicate)

Section 2: Identification of the methods used to evaluate ex-gratia claims

1. What type of an ex-gratia claim was dealt with? *(Please tick on one appropriate box).*

It was financial in nature i.e. financial compensation due to unforeseen loss.

It was time period in nature i.e. request for time extension without liquidated damages

2. If the type of ex-gratia claim was financial in nature, what were the causes? (Please tick on the appropriate box(es) since some causes could be a combination of causes)

Upward change in dollar exchange rate that resulted in high cost of importation

A negative pricing error (rate significantly below market rate) on an item in the bill of quantities that significantly had an increased in quantity through a variation order or change in ground conditions i.e. rock.

In a non-fluctuating contract where significant cost of labour and materials rose.

An unforeseen labour scarcity as a result of dynamic social-economic reasons i.e. political tension or high demand of labour due to construction boom and so labour rates goes high which was not expected

Damage of work done and stolen materials on site through riots or political violence way beyond the limit under the insurance cover.

Due to acts of terrorism in a case where the site is adjacent to a bombed mall resulting in restriction of access to neighbouring areas and so equipment laid idle as well as workers who now cannot work until access is granted, say after 3 or 4 days.

Due to acts of God (force majeure) i.e. soiled damped in your already excavated site due to heavy rains.

Any other cause

(1).....

(2).....

(3).....

(4).....

3. Which method was used to analyse the above financial type of ex-gratia claim? *(Please tick where appropriately as some cases might include combining methods)*

Using Joint Building Council labour indexes for unforeseen increment in costs of labour and materials in a non fluctuating contract.

Using financial markets to established the prevailing exchange rates for the periods in question in order to get the different in cases of unforeseen increased cost of importation.

Using day works rates and time sheets for repetitive works outside the control of contractor i.e. due to heavy rains soil filled up excavated areas.

Using prevailing market rates to established correct price for an item in cases where items had a negative pricing error.

Negotiating with the contractor say to pay a certain percentage of the ex-gratia claim without delving to calculations especially where there is no time.

Any other method

(1).....

(2).....

(3).....

(4).....

4. If the ex-gratia claim is time based in nature, what were the causes? *(Please tick on appropriate box(es) since some cases might be a combination of causes)*

Late delivery of imported material due to factors beyond the contractor's control i.e. unforeseen congestion at the port hence works delayed.

Unavailable local materials that were available at the time of tendering, therefore delays occurred obtaining an acceptable substitute.

Cash-flow problems experienced by the contractor hence works could not be financed

A domestic subcontractor who delayed the works and therefore some period was spend by the contractor recruiting another one.

Labour unrest on site that caused the site to be closed temporarily.

Any other cause

- (1).....
- (2).....
- (3).....
- (4).....

5. Which method was used to analyse the above time based type of ex-gratia claim? *(Please tick where appropriately as some cases might include combining methods)*

Referencing the time requested to the target period beyond which the Employer would not accept i.e the time period beyond which a project must end so to have the target customers i.e. schools to be ready before January, hotels may target a given festive seasons etc.

The quantum or scope of works remaining.

Using actual procurement schedules and time lines.

Negotiation due to lack of time to do evaluations

Any other method

- (1).....
- (2).....
- (3).....
- (4).....

Section 3: Identification of the challenges faced by Quantity Surveyors in evaluating ex-gratia claims

1. In your objective opinion what are the challenges encountered in evaluating financial based type of ex-gratia claims *(Please tick in the appropriate box(es))*

- Lack of past evaluated ex-gratia claims materials to act as a reference point
 - Lack of awareness on ex-gratia claims
 - Inadequate time for evaluation
 - The fact that ex-gratia claims are not contractual; whichever method is used will be viewed suspiciously
 - Lack of or inadequate records to established rates used and time consumed
- Any other challenge
- (1).....
- (2).....
- (3).....
- (4).....

2. In case you evaluated a time based type of ex-gratia claims, what are the challenges encountered *(Please tick in the appropriate box(es))*

- Lack of experienced and expertise in dealing with works programme and therefore probabaly the Architect was best placed to evaluate time based ex-gratia claims
 - Lack of awareness on ex-gratia claims
 - Inadequate time for evaluation
 - The fact that ex-gratia claims are not contractual; whichever method is used will be viewed suspiciously
 - Lack of or inadequate records to establish time consumed
- Any other challenge
- (1).....
- (2).....
- (3).....
- (4).....

3. How long, in terms of days did you take to evaluate the ex-gratia claim? *(Please tick in the appropriate box).*

- 1 week
- Two weeks
- Three weeks
- Four weeks
- More than four weeks

Section 4: Identification of the factors considered in recommending an award or rejection of ex-gratia claims

4. After evaluating the ex-gratia claim did you recommend for the ex-gratia claim to be awarded/compensated? *(Please tick one appropriate box)*

Yes

No.

5. In your recommendation for payment of the ex-gratia claim, what proportion of the contractor's original ex-gratia claim was justified? *(Please tick on one appropriate box)*

- Less than 25%
- Between 25% to 50%
- Between 50% to 75%
- Between 75% to 99%
- 100%

6. In making the recommendation for ex-gratia claim payment what factors did you consider? *(Please rank the following reasons by inserting a score to the boxes with 1 being the least score and 5 being the highest score.) It is important to respond to all reasons below. Please note that no score should be repeated.*

1	2	3	4	5
Least Important	Less important	Neutral	Important	Most Important

- The comprehensiveness/completeness of the claim document itself i.e. factual presentation of evidences.
 - The Quantity Surveyor's indepth understanding of the events in the project that enable an objective, informative and knowledgeable evaluation.
 - Availability of contingency fund.
 - Correct timing of submitting the ex-gratia claim i.e. if it was done immediately the event giving rise to the ex-gratia claim occurred or submitted after final account.
 - From the regular financial appraisals it is anticipated that the costs will still be within budget i.e. no cost overruns.
- Any other factor
- (1).....
- (2).....

(3).....

(4).....

7. If your recommendation was to reject the ex-gratia claim, what factors did you consider? (Please rank the following reasons by inserting a score to the boxes with 1 being the least score and 5 being the highest score.) It is important to respond to all reasons below. **Please note that no score should be repeated.**

1	2	3	4	5
Least Important	Less important	Neutral	Important	Most Important

Lack of adequate facts and supporting evidences under the ex-gratia claim.

Exhaustion of the entire contingency fund.

Strong evidence that contractor did not mitigate further loss.

Knowledge of threats of receivership or bankruptcy to the contractor.

A contractor who has executed unsatisfactory work in the project

Any other factor

(1).....

(2).....

(3).....

8. Finally, as a stakeholder in the construction industry, would you recommend for an addendum to always be added by quantity surveyors to the standard forms of contract by way of a clause that takes cognizance of ex-gratia claim? (Please tick in **one** box).

Yes

No

Not sure

9. If yes, what are your reasons (Please rank the following reasons by inserting a score to the boxes with 1 being the least score and 5 being the highest score.) **Please note that no score should be repeated.**

1	2	3	4	5
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Least Important	Less important	Neutral	Important	Most Important
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It will provide a challenge and therefore quantity surveyors would have to adopt an objective way to evaluate ex-gratia claims should it arise.

It will evenly spread out the risks of loss arising out of events not covered in the standard contract documents that was previously to be taken by the contractor.

If well managed, it can be a good project management tool

It will give legitimacy to ex-gratia claims

It will begin to create interest and awareness on the subject

Any other reason(s) (1).....

(2).....

10. If no, what are your reasons (*Please rank the following reasons by inserting a score to the boxes with 1 being the least score and 5 being the highest score.*) **Please note that no score should be repeated.**

1	2	3	4	5
Least Important	Less important	Neutral	Important	Most Important

It can be abused especially when one think of the vigorous process of contractual claims.

It may provide an avenue for unnecessary claims.

It may make contractors become "claim conscious"

It may end up being deleted / cancelled as is the normal practice in standard contracts where clauses in the standard agreement are amended so as to suit a particular project

It would end up making the contract agreement more complex since each addendum may be drafted differently as the individual quantity surveyors' wording

Any other reason(s) (1).....

(2)

-----*End of Questionnaire*-----

Thank you for your participation and time. God bless you.