

WASTED TENDERING COSTS: RECOVERABLE?

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Why are tendering costs an issue?

- Put simply, time and money.
- In the event that the tenderer is unsuccessful, the general rule is that costs incurred in preparing the tender, including any amended tender required by bona fide changes, are irrecoverable.
- The result is a disgruntled contractor may seek to recover its wasted costs.

Are tendering costs ever recoverable?

- Despite the general rule, the courts have conceded that an implied promise to pay for work may arise in certain circumstances. Factors to note are:
 - Was the work carried out of a kind usually given for free?
 - Did the instructions to carry out the services indicate the extent of the contractor's risk and that the services were to be carried out for free?
 - What was benefit of the services carried out to the employer?
 - What were the circumstances for not selecting the tenderer? (i.e. was there any 'fault' by the employer or was that risk accepted by the contractor?)
- Depending on the factual answers to the above, the disgruntled tenderer *may* be entitled to payment on a *quantum meruit* basis.

Practical Tips

- Ensure that all tender documents state expressly that all fees and expenses howsoever incurred during the tendering process are irrecoverable from the employer.
- State expressly in each and every Employer's Instruction given during the tender period that such services are to be carried out at the contractor's costs and risk.

These top tips are correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

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