TeCSA

TECHNOLOGY AND CONSTRUCTION SOLICITORS ASSOCIATION

www.tecsa.org.uk

CONSULTATION PAPER

COSTS BUDGETING AND COSTS MANAGEMENT

TeCSA's RESPONSE

This note provides the Technology and Construction Solicitors' Association (TeCSA) feedback on specific points arising from the main issues raised in the Civil Procedure Rules Committee sub-committee's consultation paper on costs budgeting and costs management dated 14 June 2013. This note forms TeCSA's case against mandatory costs budgeting by the CPRC.

TeCSA's response to the specific questions raised at paragraph 1.1 of the Consultation Paper can be found at the end of this document. By way of introduction, TeCSA's general position concerning (i) the introduction of mandatory costs budgeting by the Civil Procedure and Rules Committee and (ii) those specific questions, can be summarised in the following terms:-

1. The Rolls Building is a centre of excellence – it is the largest specialist centre for the resolution of financial, business and construction/IT and property litigation anywhere in the world. TeCSA was a sponsor of *Unlocking Disputes* – the industry led campaign to support this Court and the International Construction Law Conference last September at the Institute of Engineering Technology.

2. As the www.gov.uk[1] tells us, The Rolls Building is: "A *centre of excellence* for high value dispute resolution". We are fine with that notion.

3. The opening of the Rolls Building was said to form part of the UK government's commitment to strengthen the UK's reputation as a world leader in legal services. The Ministry of Justice declared it was working closely with TheCityUK, UK Trade & Investment, the Bar Council and the Law Society to promote the UK as the global centre of legal dispute resolution, and as a provider of high quality commercial and financial legal services.

4. TeCSA considers that the entire Rolls Building should be exempt of mandatory costs management and that the divisions in the High Court should be consistent throughout to avoid forum shopping. The TCC in the Rolls Building is a legal centre of excellence, with its highly professional judges, bar and solicitors servicing it. It works.

5. However, if the costs exemption were to remain it would make sense that the same exception be applied to the Admiralty, Mercantile, Chancery and Commercial Court.

[1] http://www.justice.gov.uk/courts/rcj-rolls-building/rolls-building

6. Parity between the Admiralty, Commercial Court, TCC, Chancery Division and the Mercantile Court is very important to avoid forum shopping.

7. TeCSA does not see a case for the Commercial Court sitting out there on its own with a blanket exemption. If costs budgeting is seen as positive overall[2] it is unclear why Commercial Court users should not also benefit from it, but they do not want it at all? That is we hear, subject to the international cases issue - although that is an issue also of equal importance to the TCC as clearly though there is a concern about changing a system that is already popular internationally - if it does not need changing. TeCSA *inter alia* sponsored the International Conference to coincide with the anniversary opening of - and promote - the new Rolls Building and the TCC's place within it; also international funders and contractors have a growing role within the UK construction sector - one only has to look at the JVs in London on which many TeCSA solicitors are actively advising. We cannot see the draw mandatory costs management/budgeting will bring those international litigants.

8. London provides a major concentration of specialist expertise from solicitors, counsel, arbitrators, experts and other support services, all with international links. It acts as a magnet because it is good at what it does, so we say do not mess with it.

9. The TCC Users already have the unique and near ubiquitous benefit of statutory and contractual adjudication of their construction disputes and a fast effective Part 8 enforcement/jurisprudential challenge forum. We have for 15 years had a fast track private sector system supported by the Courts since the off with Dyson in *Macob*.

10. In TCC business, the parties also have PAP which when followed sensibly, promotes early settlements and leads to saving of costs, which is very proportionate. That is TeCSA's view.

11. When Adjudication, the PAP and pre action ADR fail the TCC is very much the last door but a specialist court with specialist players and refined processes, if the TCC restored docketing it would be even better as changing judges during interlocutory stages up to the PTR is bad for legal business and costs.

12. For the most part the notion one hears (mostly from claims consultants and those that seek to get a share of the action without the graft, know-how and regulatory pressure) namely that solicitors require a cultural shift in focus and the lash of a birch is to not understand the degree of sophistication major litigation requires in the TCC and the attention to detail that goes on in solicitors' offices.

13. TeCSA supports the policy of preparing/lodging with the Court costs budgets and updating the same through the course of an action. It is helpful to see what one's opponent thinks it might cost and how it gets to its number. More certainty as to the other side's costs and as to the likely overall costs at the beginning of the litigation seems widely to be regarded as a positive factor of costs management. We agree costs information must be updated regularly, but that is very different to imposing a Costs Management Order (CMO).

[2] The King's College Final Report dated 1 May 2013 on Costs Management Pilot which TeCSA co-sponsored was inconclusive as to mandatory cost budgeting/ imposition of CMOs.

14. As an example of a response (unattributed for these purposes) received from a TeCSA Member is this:

> *"… We are involved in two very large TCC cases both for the same client. In one case, the amount in issue exceeds £20m and the other over £60m. However, we have different experiences despite it being the same client! Both were under the pilot period and were thus in place before the £2m exception came in. On one case, the parties have kept costs management and budgets. Our client finds it a helpful management tool for costs and budget purposes and maybe it helps with Part 36 offers. The parties budgets were similar in ballpark at the first CMC and the court approved just the first stages. We have just had a review CMC and had to revisit the budgets. They have now been approved through to trial. However surprisingly the Judge easily allowed revisions to the already approved parts despite Elvanite. So our submissions on this were a waste of time.*
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> *On the other case the parties recently agreed (with the Review CMC coming up) to seek permission to abandon costs management (on the basis it would not apply automatically had we not been in the pilot period), and this has recently been granted. On that case there was a surprising difference in the level of the budgets and considerable debate between the parties. We had agreed the Defendant's budget and that had been approved. There was a lot still to be argued at the Review CMC on our budget which was still not agreed/approved. Several points were still in contention.*
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> *I think this just shows that it too early to seek a pattern from the large value budgets going through the TCC at present. Within our client, there was a strong feeling that the detail of the budget was a useful monitoring tool but overall I think they were not convinced of its value as an accurate tool and one that comes with an onerous risk of getting capped.*
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> *What I would say about budgets on cases of this scale is that they are time-consuming and expensive to compile. Getting the assumptions right needs high level input, from someone with a good knowledge and overview of the case. Experts need a huge amount of guidance as to what they need to allow for, and because of the risk of the cap, one has to consider the worst case scenarios, as well as including contingencies. We have changed our time recording system and the layout of invoices so as to use the Activity headings from Precedent H as the client needs its invoices to line up with the Activities. It isn't always easy to align incurred time against the headings, or for the client to monitor expenditure unless you use the same headings.*
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> *In conclusion, I think that they are a useful tool to concentrate both parties minds at an early stage on the cost risks but that £2m is an arbitrary cut off point…*
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> *One problem that arose with partially approved budgets, either where we were due to come back in 6 months for a Review CMC or where the judge directed the parties to re-visit the budgets with a view to agreeing them 2 or 3 months after the CMC was whether to set them in stone as a budget/estimate as at the date of the first CMC, or to update them which means moving incurred cost out of the estimate column and into the incurred column, which increases the workload on doing the budget, and reduces the amount which the court is able to approve. The latter approach means that the court has less control over the amount of costs already incurred.*
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> *However, I am not convinced that costs budgets themselves help keep costs within reasonable bounds. The risk of creep into the figures must be considered because no-one wants to get capped too low. My understanding was that we would have to be accurate with our assumptions and contingencies but I am not sure how this is being matched in practice. If the courts are not consistent in dealing with*

budgets, parties will not want to use budgets….

15. What TeCSA does not support is in effect Courts directing how cases are to be in fact resourced/gunned up and prospectively capping costs on set deliverables on the assumption that there is something deeply wrong with how TCC cases are planned and run by specialist solicitors and barristers in this Court - supported by on the whole many excellent experts. The fact this is to now happen at the front end is like to use the analogy of fixing the price of dinner on a set menu when guests prefer à la carte or may choose the cheese board instead of baked jam roll after the main course - and try to hold the restaurant to the set price.

16. One of the main fears is that the costs are assessed by Judges who, through no fault of their own, have no real experience[3] of the costs of litigation (without training and keeping up to date with the legal and expert market etc) and indeed the tasks associated with trial preparation and the interface issues between solicitor, the client, in house counsel etc. As barristers, they will not have had direct experience of disclosure exercises, preparing witness statements or overseeing experts reports to the same degree as solicitors do and even LESS prepare budgets for trial unless they are trained Costs Judges[4].

17. It is frustrating when we continually work hard to give clients the best possible service, particularly with regard to estimates of costs and possible outcomes and scenarios to then have a prospective exercise (which may well turn out to be redundant) scrutinised and potentially criticised by someone who really is not qualified to say that it is right or wrong or that it should be fixed or capped. This is a real problem. With the greatest respect, many senior solicitors currently have a lack of confidence in the Judiciary approving the budget – and we mean that without in any way intending to criticise the great work the judiciary perform in otherwise managing and judging cases. We want Judges to judge cases and continue to produce first class judgments - this is what wins international recognition.

18. Another problem is the complete uncertainty as to how the imposed budgets will be dealt with after the event. Most cost consultants are completely in the dark too. If a budget is approved and capped is there still scope to argue on detailed assessment about points of principle or not? This uncertainty does not help us to be able to explain to clients possible outcomes.

[3] It is of note Mrs Justice Gloster, speaking at the Bar Conference 2012, said that the new CPR3.12 to 3.18 dealing with Costs Management may lead to "ill-informed" decisions on costs and that judges must be realistic about legal fees and what it costs to bring a case and that there was a tendency for judges who had made a good living as barristers to become "kind of mean" when it comes to the assessment of costs. Mrs Justice Gloster also said that she had "won the battle" to ensure that the Commercial Court was exempt from costs management.

[4] We would remark that Costs Judges are drawn from the rank of solicitors and barristers in England and Wales with at least five years' post qualification experience (PQE). Knowledge of the law of costs and its application is required and this will be assessed as part of the selection process for these roles: http://jac.judiciary.gov.uk/selection-process/selection-exercises/past/1860.htm

19. In addition, there is concern over the scope for appealing a Costs Management Order[5] either because the judge has cut the budget or has not done so. With regard to the former, there is a concern about a judge deciding at the first CMC that - for example - no partner time should be spent on witness statements. Given the limited scope for revising such a nil allowance (by appeal or later revision) there is a concern about the impact on how cases are run (given that if the partner went ahead and did any work on that party's witness statements none of the costs of doing so would be recoverable even if that party went on to win the litigation and even if it were awarded costs on the indemnity basis). The concern is that how a case is run can be materially affected at the first CMC stage (which is of course the generic point) but based on second-guessing. It is suggested that the parties (who should have approved their costs budgets) and their advisors should be given a margin of appreciation in predicting and deciding how their case will and should be run (with the fall back from costs budgeting being the assessment of costs at the end of the case).

20. In TeCSA's view mandated costs budgeting by the Court opting in is we think a mistake. If both parties want it fine (consultation paper, para 4.2, but query if there is scope for this without amending the present rules?) but it should not be imposed at least not now and given the lack of enthusiasm for costs management orders during the pilot anyway in large cases. The ability to comment on the budget, and make submissions and reservations as to recoverable costs and on particular applications and orders is protection enough.

21. Most solicitors even with 20 plus years' experience have only ever done one or two detailed assessments/taxations in their careers, Parts 36 and 44 have worked well.

22. If costs are to be recoverable, our commercial clients can live with a new 50% instead of the 70% broad rule on recoverables (or no costs recovery at all) but greatly depreciate being in effect told they cannot or should not run cases with their specialist lawyers the way they wish (not recklessly or capriciously of course) - to win. There is a feeling at the moment (and Members have had some experience of this) that if you have to increase the budget because things have changed that could not have been predicted, you get "told off" and one is told off by someone who knows very little about predicting and estimating costs.

23. TeCSA would remark that the rules of international arbitral institutions show no interest in costs budgeting. Is that neutral or does it imply that despite all the concern over the cost of international arbitration no one has seen fit to introduce costs budgeting (suggesting it is not seen as positive and may be seen as negative)? In domestic arbitration the Arbitration Act 1996 lays down certain principles most of which are non-mandatory in the sense that the parties may contract out of them. The most important of these is that, unless the parties otherwise agree, the tribunal must "award costs on the general principle that costs should follow the event" (Section 61(2)).

24. Proportionality and the Overriding Objective are well understood by TeCSA solicitors. Small cases of less that £250k can be hard to run proportionately, and they should be litigated if at all given ADR in the CC as TCC business. No one sane litigates cases in the fast track of <£25k using lawyers.

[5] It may make sense if the partner and/or costs draftsman who led on the production of the costs budget should make representations to the court as appropriate before a CMO is made.

25. The Jackson Report supported the TCC and did not advocate mandatory costs budgeting. The Executive Summary of the *Final Report* at page xxi said this:

> *"Litigation in the Technology and Construction Court (the "TCC") is often conducted in a proportionate manner, and I make only modest recommendations concerning the operation of that court…"*

Chapter 29, p294:

> *"…It is not the function of this Costs Review to tinker with parts of the civil justice system which are thought to be working well and where costs are usually proportionate. I should, therefore, record that respondents during Phase 2 expressed a high degree of satisfaction with the service provided by the TCC to court users. The Bar Council states that in the TCC case management "is thought to be satisfactory".*

26. The Jackson Report focussed on the sins of AEI, trips slips, whip lash personal injury and clinical negligence claims cases where ambulance chasers and gutter-snips were wagging the dog, here in the Rolls Building and St Dunstan's before, those are and were very rare issues[6] (in what is a very competitive market for legal services in relation to, at least, construction disputes). We think LJ Jackson rightly identified many things that work wrong with civil procedure like success fees, CFAs and AEI and the funding of cases. TeCSA appreciates that the proper administration of justice goes beyond the immediate parties to litigation. It requires the court to consider the needs of all litigants, all court-users.

27. We agree litigation must nearly always be managed "at proportionate cost" (CPR 44.3 (5)) but not always in every instance is this 'right'. To that end, as between the parties [not solicitor and own client], generally (but not always) only proportionate costs will be recoverable (even if more expensive work was "necessary" to conduct the litigation). What is proportionate in a £300k case is not the same as £150m one. If the courts manage cases more robustly to ensure that costs are kept in check they have to be mindful of the repercussions where this is done without a full appreciation of the work necessary to fight cases to win (or defend). For now we live in a world where the new rules provide for a 'long stop' test, and expressly state that costs which are disproportionate may be disallowed or reduced even if they were reasonably or necessarily incurred.

28. It is often suggested that costs budgeting causes solicitors and parties no extra trouble and cost than is required anyway by the SRA requirements etc. However, that is not the case given that (1) parties are often only interested in the total estimated costs outlay; and (2) costs budgeting entails far more than providing a total. In particular, the requirement to provide a full breakdown, each line of which a party is then held to, creates far greater pressures (and tactical opportunities for opponents), which require more partner input given the risk of a professional negligence claim if any line item proves inadequate. These risks are highest on cases where the costs are greatest with the scope for errors (e.g. in estimating how much the parties' electronic disclosure will cost) and the consequences of such errors both greater.

[6] P 289 of FR at 3.3: *The Bar Council. The Bar Council, like the Law Society, believes that the best way to control costs is by the court engaging in more effective case management. The Bar Council considers that case management is satisfactory in the Commercial Court, the Technology and Construction Court (the "TCC") and some patent cases, but that it is inadequate in other areas of practice.*

29. The steps we go through in litigation cannot be neatly put in a box on a form. There is no box for general faffing about which inevitably happens on complex cases, dealing with administration, reassuring clients, finding files and documents, playing telephone tennis, endless discussions and thoughts about strategy, permutation analyses, sophisticated risk analysis approaches to litigation decision-making for use in determining optimal settlement, pre-trial, trial and appeal strategies, Monte Carlo simulations, musing things over with counsel and just the general but non specific work that is needed. Hard to describe but solicitors know what it means and it does not fit in a neat box.

30. TeCSA has consulted with its member firms and estimated the extra cost of costs budgeting 'the delta' (i.e. the sum in addition to costs that would be incurred anyway in apprising a client as to costs). It has done so by reference to a typical, hypothetical construction dispute between two parties worth about £5 million[7] for which the litigation lasts about 18 months and includes electronic disclosure, two or three experts per party, both parties instructing leading and junior counsel, a couple of CMCs and a PTR. For such cases it is estimated that costs budgeting adds about £35k-50k or circa 2% roughly to costs for cases that go to trial before any saving is obtained from costs budgeting in those few cases where the costs of the action are seriously contested. This figure derives from the following stages of costs budgeting:

    1. Creating the budget originally (with greater partner input than would be given to a budget that is provided to a client in the usual way).

    2. Monitoring costs against the budget and its "buckets" (the extra cost of this which is not passed on to the client and not included in the £35k-50k estimate given above should not be under-estimated; some firms create 10 separate time recording codes for each of the "buckets"; furthermore, when a solicitor – say – discusses an issue with an expert it is not always obvious whether her time should be go into the "issue/pleadings" or "expert reports" bucket).

    3. Seeking to revise one's own budget (with one's opponent and the court). As one must review and update the costs budget before each CMC/PTR there is a cost in the ordinary run of cases (not to mention the need to revise given that costs budgets are set pre-1st CMC which means a lot of assumptions especially for defendants).

    4. Dealing with revisions to the budget/s of one's opponent/s.

    5. Dealing with any departures from costs budgets.

    6. Attending upon clients, expert witnesses, e-disclosure providers and counsel, the Clerks too at all material times in relation to 1, 2, 3 and 5 above.

31. As already indicated, the above does not allow for the anticipated savings from those few cases where the costs of the action are seriously contested. However, the savings from

such rare cases would plainly not outweigh the extra costs of costs budgeting for all cases. Furthermore, the above does not allow for costs budgeting applications that do not "piggy back" on hearings that would be required anyway (i.e. standalone applications), tactical moves that defendants in particular might be expected to make to gain advantages from the costs budgeting process or claimants front loading costs before the first CMC. Nor does the above allow for the extra cost of judicial training and court time in dealing with costs budgets.

32. If, contrary to the views advanced by TeCSA set out above, the Sub-Committee's recommendation is that mandatory costs budgeting should continue in The TCC subject to a value-based exception, TeCSA would argue that the current value-based exception is not the appropriate line to be drawn for those purposes.

33. The TCC last year in *West Country Renovations v. McDowell & McDowell,* made it clear that the TCC is generally only to be used for cases over a quarter of a million sterling. Mr Justice Akenhead directed that claims for less than £250,000 should be commenced in the County Courts or other High Court centres outside London that have TCC designated judges.

34. If the TCC must require a line to be drawn where automatic costs management applies, TeCSA submits that it should be for those cases involving claims of less than £250,000. Picking other watersheds, such as the £2million one, is to miss the point that margins are arbitrary. It will also inevitably result in pumping up pleaded general damages claims in PoC to overreach the cap.

The current value-based exemption for the TCC, the Chancery division and the Mercantile courts

35. The above response is repeated.

36. Whilst the level of any value based exemption is always going to be at best arbitrary, the framing of an exemption by reference to financial value of a claim (say £250k) can provide certainty and clarity, particularly to demark cases that should best not be prosecuted through the TCC in the Rolls Building but in the County Court or District Registries as TCC business. It is the smaller cases where costs can run away and tends to be zone litigants in person are most commonly encountered and a place where active cost management may be best applied.

Whether, or to what extent, Part 8 claims (including judicial review) should be excluded from the mandatory costs budgeting regime

37. The current rules and how they are being applied in respect of Part 8 claims, and Judicial Review (JR) proceedings has given rise to uncertainty and requires further consideration.

[7] The extra cost of costs budgeting for construction disputes, at least, would seem to have a correlation to the value in dispute primarily insofar as it affects the number of people involved for whom one must budget (i.e. the solicitors' team, counsel and experts) and the number of pre-trial hearings.

38. On the basis that Part 8 claims (including JR) are designed to be relatively quick and inexpensive, any mandatory costs management regime for such proceedings is unnecessary and only generates an additional burden and additional cost.

39. TeCSA considers that in all cases it should be open to the Court to in any event exempt a specific case if there is a good reason to do so, and submits that cases involving the following features are examples of cases where exemption would invariably be appropriate:-

    1. Cases involving adjudications, including enforcements and arbitrations;
    2. International cases of any value (i.e. cases between non-UK resident parties or involving foreign projects or developments);
    3. Cases involving new or difficult points of law in TCC business or which have issues of technical complexity suitable for a High Court judge;
    4. Any test case, or case which will be joined with others and treated as a test case;
    5. Public procurement cases;
    6. Part 8 and other claims for declarations;
    7. Claims which cannot readily be dealt with effectively in a County Court or Civil Justice centre by a designated TCC judge;
    8. Complex nuisance claims brought by a number of parties, even where the sums claimed are small; and
    9. Claims for injunctions.

40. Returning to the specific questions raised in the Consultation Paper which are helpfully summarised in paragraph 1.1, based on the above considerations, TeCSA's position is as follows:-

    (a) Is it desirable to retain the Admiralty and Commercial Courts' blanket exception to the mandatory requirement to produce costs budgets at CPR 3.12(1) (b) ?

41. TeCSA's view is that the specialist courts, and that includes the Mercantile, Admiralty and Commercial Court for these purposes, should not be subject to mandatory cost budgeting. There is a case for introducing discretionary cost budgeting but the crucial cost benefit case has not been made out for automatic cost budgeting. TeCSA considers that the introduction would be likely to add considerably to the cost of litigation which is likely to make such courts less attractive, rather than more attractive, to users.

    (b) Should the current value-based exception for the TCC, the Chancery Division and the Mercantile Courts be retained?

42. TeCSA's primary position is that the blanket exception currently enjoyed by the Admiralty and Commercial Court should apply equally to the three specialist courts identified above. If, however, there is to be mandatory costs budgeting in the TCC it is TeCSA's view that the appropriate figure for the purposes of drawing a value-related exception would be £250,000 and not £2 million which is a figure which appears to have no basis in analysis or logic but has instead simply been plucked out of the air. Conversely, the £250,000 figure makes perfect sense in the light of recent developments in TCC practice.

(c) Should or to what extent should Part 8 claims be excluded from the mandatory costs regime?

43. TeCSA's position is that Part 8 claims should in any event be excluded from any mandatory costs regime that might apply.

Unforeseen difficulties:

44. Irrecoverable cost. It is felt the cost of dealing with insurers and their lawyers should be excluded from the costs budget. Part 20 costs may need to be added as a contingency. Mediation etc. may or may not be recoverable. Large disbursements such as transcripts, DMS etc. need to be shown separately on the form. The cost of the budget has to go in as part of the CMC cost. Should closing submissions be shown separate from trial costs?

45. Questions remain like what happens if the budget is approved in increments, activity by activity. Can you borrow from another activity e.g. if you are under approved budget on Pleadings but over on Disclosure, whilst overall within budget do you need to seek permission to increase the discrete Disclosure budget? Some solicitors we know within the contingency section of Form H add a section for non-specific tasks such as Conferences and meetings that do not fall neatly into one of the cost activities, as large chunks of time are often incurred that cannot not split down easily.

Other matters that affect cost and efficiency in the Rolls Building

46. TeCSA would welcome the MoJ investing in technology that permits Wi-Fi to work in the Rolls Building, as it is embarrassing that in 2013 one can get far better Wi-Fi in Victoria Station that in this legal centre of excellence. It is things such as poor ICT provision in the Court that inhibits proper mobile telephony that is shielded from any signal, power sockets that do not work and poor air conditioning in summer that indirectly cost money, waste time and cause inefficiency. We appreciate the Judges and the Bar share these same concerns.

The views expressed in this document are those of the TeCSA Committee and not necessarily representative of TeCSA Membership as a whole. Please note no discourtesy is intended by the expression of the frank views herein expressed.

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