



EPC Contracts

Key Issues to Consider

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OVERVIEW

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MODEL DOCUMENTS

- | International engineering, procurement and construction contracts (“**EPC Contracts**”) are generally based upon the FIDIC series
- | FIDIC has a range of off-the-peg standard forms for the construction of major civil engineering projects (the “**Works**”)
- | Red, Silver and Yellow books, depend on the scope of the Works to be carried out by the Contractor
- | In India, there is generally, no accepted standard form contract and the choice of precedent is often determined by the Contractor
- | It is imperative that your construction contract contains provisions which cover
 - design and construction responsibility
 - construction milestones
 - acceptance testing
 - remedies for delay and non performance, suspension, variation and termination
- | It is essential that the technical specifications and performance criteria in the schedules are checked and confirmed by your client’s technical adviser

SCOPE OF WORK & TECHNICAL SPECIFICATIONS

- | Who has design responsibility?
- | Is there a definition of “**Good Industry Practice**” benchmarking the performance of the obligations of the contractor?
- | What responsibility does the Employer assume in relation to the plans, designs or technical information provided to the Contractor?
- | Does the contract require the Contractor to take responsibility for those plans, designs or technical information provided by the Employer?
- | If so, has the Contractor confirmed that those plans, designs and technical information are within its capability?
- | Indemnity in the event that those plans, designs and technical information belong to a third party?
- | Will the Technical Specifications and the Performance Criteria meet third party requirements?

CONSTRUCTION, ACCEPTANCE & TESTING

- | Does the contract contain clear construction milestones, do they make sense?
- | Do timelines for subcontracted portions of the works (for example, civil, electrical, mechanical) dovetail with each other?
- | Sections of the Works and overall completion of the Works?
- | Is there a regime for the acceptance testing process?
- | What happens if the Project fails the performance tests?
 - Unlimited remedy of defects by the Contractor?
 - Termination and recovery of damages?
 - Take over by the Employer and Contractor to pay liquidated damages?
- | Termination options should be controlled under the Finance Documents
- | What is the effect of the Project passing the performance tests?
- | Does passing the performance tests exclude the Contractor from future liability for defects?

PAYMENT & PRICE

- | Is the Contract Price a fixed lump sum amount?
- | Are there clearly identified additional payments and 'hidden costs'?
- | Does the Contract Price include all contingencies or is it subject to revision to account for fluctuations?
- | How are payments to be structured?
- | Is it payable up-front and in advance?
- | If so, there should be an Advance Payment Bond to mitigate the risk of Contractor breach or insolvency
- | What are the penalties for delay in making payments?
- | Does the contract drip feed the payment of the Contract Price in accordance with the achievement of certain Milestones and are they achievable in the opinion of the Technical Advisers?

DELAY & DEFECTS

- | What happens when the Project is delayed?
- | What is the reason for delay?
- | What happens if the Project doesn't meet the Performance Criteria?
- | Are there delay liquidated damages provisions?
- | Are there performance liquidated damages provisions?
- | Are liquidated damages capped?
- | What losses are foreseeable as a result of breach?
- | What about consequential losses? Should they be included?
- | Consider whether recovered sums will meet third party liabilities
- | How long is the defects liability period?

SUSPENSION & TERMINATION

- | In what circumstances can the Works be suspended?
- | Can the Contractor terminate following prolonged suspension?
- | What is the cost to the Employer for suspending the Contractor?
- | Can the Employer terminate for:
 - Convenience
 - Contractor's breach (subject to cure periods)
 - Prolonged delay
 - Prolonged force majeure
 - Contractor Insolvency
- | Can the Employer take over any subcontract to continue execution of the Works?

SUSPENSION & TERMINATION

- | Can the Contractor terminate for:
 - Employer's breach (subject to cure periods)
 - Prolonged force majeure
 - Employer Insolvency

- | Is there a Tripartite or Direct Agreement with the Lenders suspending the ability of the Contractor to terminate while the Lenders consider substitution of the contract?

- | If the contract is terminated, in what circumstances is the Contractor entitled to claim loss of profits on outstanding work?

- | Are there any limits on what the Contractor can claim for termination in these circumstances?

FORCE MAJEURE

- | How broad is the force majeure clause?
- | Does it include events which are within the reasonable control of either party?
- | What is the consequence of an event of force majeure?
- | Is the Contractor entitled to an extension of time?
- | Can the Employer or the Contractor terminate the agreement for pro-longed force majeure?
- | Does prolonged force majeure need to be continuous (or an aggregation of time)?
- | When can a party terminate for prolonged force majeure and what are the consequences?
- | Does the force majeure provision in other related contracts dovetail?
- | Will an event of force majeure under the contract constitute an event of force under any related off-take agreement or supply agreement?

PERFORMANCE SECURITY

- | Is the Employer comfortable with the balance sheet of the Contractor?
- | Does the contract anticipate the provision of a Performance Bond by the Contractor?
- | Is the Performance Bond payable on demand (essentially for Employers and Lenders) or does fault need to be established?
- | Is Performance Bond Issuer acceptable to the Employer and the Lenders?
- | Are the terms of the Performance Bond satisfactory to the Employer and is it assignable to the Lenders?
- | When does the Performance Bond lapse? Does it coincide with the end of the Defects Liability Period?
- | Can the value of the Performance Bond be adjusted in accordance with any change in the Contract Price?
- | Is there an additional Parent Company Guarantee and is it assignable?

OTHER CONSIDERATIONS

| Assignability & Subcontracting

- The rights of the Employer should be assignable as part of the Lender's security package
- Is assignment subject to consent from any third party?
- The Contractor should not be able to subcontract or assign his obligations without the prior written consent of the Employer and then only to a subcontractor that has the particular skill and expertise to execute the Works
- The identity of all subcontractors should be subject to the approval of the Employer (and the Lenders)
- Subcontracting should not release the Contractor from its liabilities under the contract to execute the Works in accordance with the Technical Specifications and the Performance Criteria
- Consider whether sub-contracts should be in place to essentially reflect the obligations to construct the Works that are subcontracted and consider whether Tripartite or Direct Agreements are necessary

OTHER CONSIDERATIONS

| Dispute Resolution

- Consider carefully the dispute resolution clause and consider whether it should mirror the provisions of other related agreements
- If arbitration is specified, consider whether it is effective and consider in the context of cross border Projects
 - whether relevant jurisdictions are New York Convention signatories and
 - the Official Gazette notifying those jurisdictions who's awards that the Government of India recognizes
- Can the award be enforced against the assets of the other party effectively?

| Confidentiality

- Do confidentiality restrictions imposed on the parties enable them to pass on information to legal, technical, financial and insurance advisers?

OTHER CONSIDERATIONS

| Environmental Regulations

- Consider to what environmental regulations are applicable to the Project at a local level, and, to the extent that the Lenders are foreign, to what extent local Contractors must comply with the environmental regulations that foreign Lenders are subject to

| Final Acceptance Certificate

- Consider to what extent the issuance of a Final Acceptance Certificate binds the Employer from bringing future claims against the Contractor?

| Variations

- Does the contract provide a mechanism for variations to the Works (a “**Variation**”)
- If so, consider whether the contract contains provisions providing for cost escalations or cost savings as a result of a Variation

OTHER CONSIDERATIONS

| Variations

- Does the contract provide for an extension of time in the event that a Variation is instructed by the Employer?
- Consider what extent a Variation under the construction contract will impact the obligations of the Employer under other related Project Agreements?
- For example, should a Variation be instructed, it is highly likely that the completion timetable will need to be extended
- Therefore, the obligation to deliver pursuant to any third party off-take agreement will need to be extended to avoid the risk of the Employer being liable for delay liquidated damages thereunder
- A material Variation should require Lender consent under the related Finance Documents

OTHER CONSIDERATIONS

| Reporting

- Does the contract provide obligations on the Contractor to provide regular construction progress reports to the Employer
- Do those reports contain information relating to events which could affect the progress of the Works?
- Can the Employer and the Lenders inspect the Project during construction?
- Do the reporting requirements and the timelines for reporting dovetail with obligations that the Employer has to the Lenders under the Finance Documents?

OTHER CONSIDERATIONS

| Project Specific Risk

- Has the nature of the site of the Project been thoroughly analyzed by the Employer's technical advisers and the Lender's Technical Advisers?
- Are there access issues relating to the Project site which indicate the likelihood of delay?
- Has the land necessary for the construction of the Project been transferred to the Employer? Is compulsory land acquisition necessary? Are there occupants on the land?
- To what extent are atmospheric, meteorological, topographical, hydrological, geological and subsurface conditions relevant to the particular Project?
- If so, have relevant technical advisers been appointed to advise the Employer and the Lenders in relation thereto?
- To what extent has the availability of plant, equipment, natural resources, parts, consumables, fuel, water, power and other utilities been assessed?
- Have local applicable laws and regulations been reviewed in relation to the Project?
- What is the impact of a change in law relating to a cost escalation, a nationalization or an expropriation?

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