

Is correcting the Employer's errors in its design "*design development*" or a "*Variation*"?

Introduction

Reports indicate that countries within the Middle East (**ME**) will continue to procure a significant volume of construction and engineering projects to fulfil both event specific milestones, such as Expo2020 in Dubai and the FIFA World Cup 2022 in Qatar, and the long term objectives, generally including transforming the country's economy to become less reliant on fossil fuels, set out within each country's development plan.

The key to success, for those entities involved in the ME construction and engineering supply chain and those wishing to enter the market, is to identify, understand and manage the legal risk, in the context of the law governing the construction and engineering contracts being used to procure their projects.

Generally, the ME Countries use construction and engineering contracts based loosely on the FIDIC standard form contracts (**ME Contracts**) and many are non-negotiable while allocating significant legal risk to the supply chain.

Consequently, if you fail to identify, understand and manage the legal risk in the ME Contracts you may discover, at a later stage, that you have assumed a legal risk which becomes unmanageable and the project, very quickly becomes distressed.

In this context, a "hot topic" for discussion in the ME's construction and engineering supply chain is the use of the term "*design development*", which is not defined, within many of the ME Contracts.

The term, in short, constitutes the Employer's attempt to transfer the legal risk for the "*error, fault or other defect*" within its initial design to the Contractor. In turn, the Employer subsequently uses the term "*design development*" as a ground to reject the Contractor's application for a variation to its initial scope of works.

We discuss the above in detail below and highlight some key articles, within the law of the ME Countries, which we have used successfully to undermine and rebut an Employer's argument using "*design development*" as mentioned above.

Design Development or a Variation?

Generally, at a project's procurement stage an Employer will invite several Contractors to tender to complete the project. The Employer provides the Contractors with a variety of documents which set out the project's purpose and, depending on the project and the level of detail the Employer wishes to provide, may include the (1) scope of works, (2) preliminary design, (3) specification and (3) performance and evaluation criteria. The Employer awards the contract to the preferred Contractor and these documents are incorporated into the final contract.

FIDIC 2017

FIDIC's 2017 Yellow Book categorises the Employer's documents, as discussed above, which set out the project's purpose as the "*Employer's Requirements*", and the Contractor bases its "*design*" (SC:5.1) and subsequent "*Works*" (SC:4.1) on the same to achieve the project's purpose.

The Contractor, following receipt of a "*Notice to Commence*" (SC:8.1), is required to "*promptly scrutinise Employer's Requirements*" (SC:5.1) and if it discovers an "*error, fault or other defect*" within the "*Employer's Requirements*" it is required to notify the Engineer of the same (SC:1.9).

If the Engineer, acting "*neutrally*" (SC:3.7), determines, that "*...an experienced Contractor exercising due care...*" would not have discovered the "*...error, fault or other defect...*", when it reviewed the "*Employer's Requirements*", either prior to submitting its tender or after the "*Commencement Date*", then the work the Contractor completes to rectify the "*...error, fault or other defect...*" constitutes a "*Variation*" under SC:13.3.1 (SC:1.9(c)(i)).

In addition, if the "*Variation*" causes the Contractor to incur additional time and costs it has a right to claim an "*Extension of Time*" and/or additional "*Costs*" for the same under SC:20.2 (SC:1.9(c)(ii)).

ME Contracts

Generally, ME Contracts, similar to FIDIC, include several documents which set out the project's purpose, however, they categorise the same as the "*Employer's Documents*". The Contractor bases its "*Design*" (**Contractor's Design**) and subsequent "*Works*" on the same to achieve the project's purpose.

The Contractor, following commencing the "*Works*", is required to review the "*Employer's Documents*" and notify the Employer of any "*...error, fault or other defect...*", or words to that effect, in the same. In addition, the Contractor may be obliged to complete "*design development*", which is not a defined term, and rectify the Employer's "*...error, fault or other defect...*" in the "*Employer's Documents*" in order to complete the Contractor's Design.

Further, the Employer will review the "*...error, fault or other defect...*", within the "*Employer's Documents*" and will determine whether the same requires a change to the "*Works*" and if the Employer considers it necessary it will provide the Contractor with a "*Variation*" under the contract.

In many instances, if the Contractor fails to notify the Employer of any "*...error, fault or other defect...*" in the "*Employer's Documents*" and incorporates the same in the Contractor's Design, which sits within the "*Contractor's Documents*", the Employer contests that the Contractor is not entitled to claim a "*Variation*" or any additional time and/or costs for completing the same.

Summary and Observations

In summary, under FIDIC the Contractor is obliged to "*notify*" the Engineer of any "*...error, fault or other defect...*" within the "*Employer's Requirements*" and provides the Contractor with an express right, at any time throughout the project's lifecycle, to claim that its work rectifying the same constitutes a "*Variation*".

In addition, FIDIC provides the Contractor with an express right to claim an “*Extension of Time*” and/or additional “*Costs*” for completing the rectification works. The Engineer is contractual obliged to assess the claim acting “*neutrally*” and, in this context, does not act for the Employer.

ME Contracts, similar to FIDIC, may require the Contractor to “*notify*” the Employer of any “*...error, fault or other defect...*” within the “*Employer’s Documents*”.

In stark contrast to FIDIC, however, ME Contracts may require the Contractor to “*correct*” the “*...error, fault or other defect...*” within the “*Employer’s Documents*” but do not provide the Contractor with an express right to claim a “*Variation*” and/or additional time and/or costs for completing the rectification works. The Employer may be obliged to review the Contractor’s notification of a “*...error, fault or other defect...*” in the “*Employer’s Documents*”, however, unlike FIDIC the Employer is not obliged to assess the position “*neutrally*” i.e. objective analysis.

In practice, the Employer may well adopt a subjective approach and will inform the Contractor that its work rectifying the “*...error, fault or other defect...*” within the “*Employer’s Documents*” constitutes “*design development*” which it is required to complete under then ME Contract and does not constitute a “*Variation*”.

Consequently, the Contractor may find it designs and builds a project significantly different to the project for which it tendered - commonly known as “scope creep”. This causes significant delay to the project’s completion and an increase in costs.

Conclusion

In conclusion, Contractors working under ME Contracts may well be able to rely on the law of the ME Country governing their contract to identify the contract’s meaning as a whole and challenge the Employer’s position, as mentioned above, and thereby enhance their prospects of recovery.

Specifically, it is a matter of high probability that an Initial Case Assessment (legal analysis) of the ME Contract, together with the material facts, will indicate that the Contractor has not assumed the legal risk the Employer argues. Further, it will indicate that the Employer is deliberately misconstruing the ME Contract and mischaracterising the facts to categorise the Contractor’s works to rectify the “*Employer’s Documents*” as no more than “*design development*”.

In this context, the Contractor’s contentions could rely on and apply several legal principles including: **(1)** Contract Interpretation (Qatar: Arts. 169 & 170, Bahrain: Art. 125, Kuwait: Art. 193, Oman: Art. 165 and UAE: Art. 258), **(2)** Good Faith (Qatar: Art. 172, Bahrain: Art. 129, Kuwait: Art 197, Oman: n/a, and UAE: Art. 246) and **(3)** Variations (Qatar: 709 , Bahrain: n/a, Kuwait: Art. 690, Oman: Art. 641 and UAE: Art. 887), to formulate a robust argument that the Employer’s so called “*design development*” is, as a matter of law and fact, a “*Variation*” for which the Contractor is entitled to recover its costs/losses.

