

Is the Contractor liable for the Employer's design being incomplete and/or incorrect?

1 Introduction

- 1.1 The Construction & Engineering (**C&E**) industry will be at the forefront of the global economic recovery as the vaccines are supplied across the globe to protect individuals against COVID-19. Specifically, countries including those in the Middle East (**ME**) and the United Kingdom (**UK**) will continue to procure a significant volume of C&E projects to fulfil both event specific milestones and long term objectives to facilitates their economies “bounce back” to pre-COVID-19 levels.
- 1.2 The key to success for entities within the C&E supply chain is to identify, understand and manage the legal risk, in the context of the law governing the C&E contracts being used to procure their projects.
- 1.3 Generally, ME countries adopt contracts based loosely on the FIDIC standard form contracts and the UK favours JCT standard form contracts, many are heavily amended, non-negotiable and allocate significant legal risk to the supply chain.
- 1.4 Consequently, if you fail to identify, understand and manage the legal risk in your C&E contract you may discover, at a later stage, that you have assumed a legal risk which leads to the project very quickly becomes distressed.
- 1.5 In this context, recent reports indicate that the project's design being (1) incomplete, and/or (2) incorrect, were two of the top fives causes of claims and disputes in the global C&E industry.
- 1.6 We discuss the above in detail below referring to the FIDIC's Design and Build Contract 2017 (**FIDIC/17**) and the JCT's Design and Build Contract 2016 (**JCT/16**) together with some key articles within the laws of the Middle East (**ME**) countries and helpful case law in the United Kingdom (**UK**).

2 FIDIC/17 & JCT/16: Employer' Design Incomplete and/or Incorrect

- 2.1 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/17

- 2.2 FIDIC/17 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.
- 2.3 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).
- 2.4 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)).
- 2.5 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)).

JCT/16

- 2.6 JCT/16, similar to FIDIC/17 above, uses the term "*Employer's Requirements*" (1st Recital) and the Contractor is required to design and build the Works to meet the same (SC/2.1 & 2.17).
- 2.7 Specifically, the Contractor provides its design within the "*Contractor's Proposal*" (2nd Recital) and/or the "*Contractor's Design Documents*" (SC/1.1), however, the Contractor is not required to review and "...*verify the adequacy of any design contained...*" within the "*Employer's Requirements*" nor is it "...*responsible for the contents...*" of the same (SC/2.11).
- 2.8 In this context, if the Employer's Requirements, including its "...*design...*", contain an "...*inadequacy...*" and the Contractor subsequently corrects the same (SC/2.11) then it constitutes a "*Change*" under SC/5.1 i.e. variation.
- 2.9 Further, if a "*Change*" causes the Contractor to incur additional time and costs it has a right to claim the same as a "*Relevant Event*" and a "*Relevant Matter*" under SC/2.26 and SC/4.21 respectively.

3 ME & UK Contracts

- 3.1 In practice, however, both the FIDIC/17 and JCT/16 contracts are amended to attempt to allocate the risk for the Employer's design being incomplete and/or including errors to the Contractor. We have experience of several approaches including the examples below.

FIDIC/17

- 3.2 The Employer may amend FIDIC/17 to require the Contractor to review the "*Employer's Requirements*" 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 Requirements*" in order to complete the Contractor's Design.

- 3.3 Further, the Employer once notified will review the "...error, fault or other defect...", within the "Employer's Requirements" 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.
- 3.4 In many instances, if the Contractor fails to notify the Employer of any "...error, fault or other defect..." in the "Employer's Requirements" and incorporates the same in the Contractor's Design the Employer argues that the Contractor is not entitled to claim a "Variation" or any additional time and/or costs for completing the same.

JCT/16

- 3.5 Similarly, JCT/2016 may be amended to require the Contractor to review and "... verify the adequacy of the design..." within the "Employer's Requirements" and assume responsibility "...for the contents..." of the same together with amending the remaining relevant clauses.
- 3.6 Consequently, if the Contractor subsequently identifies an "...inadequacy..." in the Employer's "...design within the Employer's Requirements..." it will not constitute a "Change" i.e. variation, and in turn is neither a "Relevant Event" nor a "Relevant Matter" and the Contractor does not have a right to claim its additional time and cost for correcting the same.

4 Summary and Observations

- 4.1 In summary, under an un-amended FIDIC/17 and JCT/16 contract the Contractor does not assume the risk for the Employer's design being incomplete and/or incorrect and has a right to claim both additional time and costs for completing and/or correcting the same.
- 4.2 In practice, however, the contracts are amended and attempt to allocate the above risk to the Contractor. The Employer will, regardless of the contract's wording and meaning as a matter of law, adopt a subjective approach and reject the Contractor's requests for additional time and cost to complete and/or correct the Employer's design.
- 4.3 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.

5 Conclusion

- 5.1 In conclusion, Contractors working under amended C&E contracts will be able to rely on the law of the country governing their contract to identify the contract's meaning as a whole and challenge the Employer's position, mentioned above, and thereby enhance their prospects of recovery. For instance:

Middle East Laws

- (a) Under the laws of the Middle East the Contractor's contentions for a "Variation" 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 position is wrong and that the Contractor has a right, as a matter of law and fact, to recover additional time and costs for the completing the same; and

UK Law

- (b) Within the UK the Contractor's arguments for a "Change" i.e. variation, could rely on the following principles:
- (i) The C&E contract must be construed as a whole to identifying its meaning, as a matter of law, objectively i.e. reasonable Employer/Contractor, at the time of executing the contract (*Investors Compensation Scheme Ltd v West Bromwich Building Society (No. 1) [1997] UKHL 28*);
 - (ii) The Employer's Requirements are incorrect, and the Contractor is entitled to be paid for the works it completed in addition to that set out in the same (*Patman and Fotheringham v Pilditch (1904) Hudson's BC (4th ed) vol 2*); and
 - (iii) The Employer's representative (architect etc) instructed the Contractor to "perform its obligations in a different manner" and this constituted a variation, on the facts, for which the Contractor was entitled to be paid its additional costs i.e. "extra expense" (*Simplex Concrete Piles v St Pancras MBC 14 BLR 80*).

5.2 Given the above, it is highly likely that an Initial Case Assessment (legal analysis) of an amended C&E contract, together with the material facts, will indicate that the Contractor has not assumed the legal risk the Employer argues and is entitled to its additional time and costs for completing and/or correcting the Employer's design.

