Key Mistakes Contractors should avoid and the Best Solutions to Ensure they Identify and Manage the Correct Design Risk on their Projects and Avoid Disputes under FIDIC, English Law and Middle East Laws

Introduction

If you fail to understand the correct Design Risk in your Construction and Engineering (**C&E**) Contract, from the start of your C&E Project, you will not be able to manage the risk throughout the project's lifecycle. This will cause an increase in your scope of works, which in turn will significantly delay the project and cause you to incur substantial additional cost and will most likely lead to a costly formal dispute. We discuss the *Key Mistakes* Contractors should avoid below together with the *Optimal Solutions* to assist Contractors to both identify and manage the correct Design Risk in their Contracts to avoid disputes.

Key Mistake 1: Fail to Identify the Correct Design Risk

Contractor fails to identify the correct Design Risk in its C&E Contract and the obligations it imposes on the Contractor's performance in relation to the Works.

Optimal Solution: Identify the Correct Design Risk

Generally, an Employer procuring a Project under a FIDIC Design & Build Contract 1999 (**Yellow Book**), will instruct a Designer to convert its initial concept into a Project's preliminary design. The Employer will award the Contract to its preferred Contractor and the Contractor will be required to complete the Project's Design, based on the Employer's preliminary design, and Build the Works to meet the purpose set out in the Employer's Requirements.

Specifically, the Contract will include the Contractor's Design Risk which consists of two separate legal risks/obligations:

1. **Party Responsible:** The Contract should indicate which party is obliged to complete the Project's Design i.e., responsible for producing the Design.
    a. Under the Yellow Book the Contractor *"…**shall** carry out, and be responsible for, the design of the Works…"* (SC:5.1/Para.1) to achieve the project's purpose as set out in the Employer's Requirements (SC:1.1.1.5).
2. **Applicable Standard of Care:** The Contact should indicate which standard of care (**SOC**) applies to the Project's Design and completion of the Works.
    a. Under the Yellow Book the *Contractor "…shall design…the Works in accordance with the Contract…When completed the Works shall be fit for the purpose as defined in the Contract…"* (SC:4.1/Para. 1).

Contractors should note that the above "*fitness for purpose"* obligation constitutes an *absolute obligation,* and the Contractor is effectively *guaranteeing* that its design and the completed Works will be "*fit for the purpose*" set out in the Contract.

A "*fitness for purpose"* obligation is incredibly onerous when compared with the lower SOC known as "*reasonable skill and care*", which is assessed with reference to an "*ordinary competent*" Designer's performance and is *not an absolute obligation/guarantee* that the design and the completed Works will meet a specific result – far easier to comply with this SOC/obligation than the "*fitness for purpose"* obligation. Contractors should be mindful, however, that their Contract may include the two different SOCs mentioned above, as these can exist, using vague ambiguous wording, in any Contract Document including the Schedules.

In addition, Contractors should be mindful that under their Contract they may be liable for the Employer's Design e.g., Preliminary Design, although they were not obliged/responsible to complete the same.

In our experience, therefore, it is vitally important that Contractors review their Contracts and identify the aspects of the Project's Design the Contractor is required/obliged to complete and the applicable SOC. It's rarely straightforward and, if Contractors have any doubt, they should obtain detailed legal advice from an experienced C&E Solicitor to advise on the same.

Key Mistake 2: Fail to Manage the Correct Design Risk

Contractor fails to manage the correct Design Risk throughout the Project's lifecycle.

Optimal Solution: Understand & Manage the Design Risk

Once a Contactor has identified the correct Design Risk in its Contract it should ensure that it manages the same throughout the Project's lifecycle to protect its rights and position. Specifically, Contractors should ensure they understand fully how their Contract operates including its dispute resolution procedure (**DRP**).

Clause 20 of the Yellow Book sets out its DRP and is titled "*Claims, Disputes and Arbitration*". Under SC/20.1 of the Yellow Book, the Contractor has a right to raise a "*Contractor's Claim*" if it considers that it is entitled to additional time and costs for a variety of reason including if the Engineer instructs (SC/3.3) the Contractor to complete a Variation (SC/13.3) to the Works including the Project's Design. If the Variation, however, causes critical delay to the Project, the Contractor has a right to an extension of time (SC/8.4(a)) and an adjustment to the Contract Price (SC/13.3).

The Contractor should of course be mindful that it is required to notify the Engineer no later than 28 days from the date it became aware or should have become aware of any events e.g., informal variation to the Project's Design, causing critical delay to the Works and/or additional costs, failing which the Contractor loses its right to claim for the same (Cl./20.1).

The DRP is incredibly important, and Contractors should follow the DRP strictly, including submitting the correct Notices, to ensure that they are not "*time barred*" from raising a claim for any changes/variations, formal or otherwise, to the Works including the Project's Design.

If Contractors are unsure of how to manage the Design Risk in accordance with their Contract's terms, including whether they have submitted the relevant Notices, formal or informal, to protect their position, they should obtain detailed legal advice from an experienced C&E Solicitor to advise on the same.

Key Mistake 3: Fail to Particularise and Substantiate Claims

Contractor fails to particularise and substantiate its claims.

Optimal Solution: Particularise and Substantiate Your Claims

The Yellow Book, similar to other FIDIC contracts, places the Contractor under an obligation to particularise and substantiate its "*Contractors Claims*" (SC/20.1), which is identical to its obligation to satisfy the "*burden of proof*" in a formal dispute i.e., Arbitration (SC/20.6).

The Contractor, therefore, should ensure that it sets out the "…*full particulars*…" of the legal basis of its claims together with the *"…contemporary records as may be necessary to substantiate any claim…"* (SC/20.1).

Contemporary records constitute contemporaneous evidence of the progress of the Works as a matter of fact and carry the most "legal weight" to substantiate a Contractor's Claim under SC/20.1 and/or a formal *"…dispute…"* under the Yellow Book's tiered dispute resolution mechanism, which concludes with "*Arbitration*" (Cl/20.6).

To be clear, the importance of a Contractor particularising and substantiating its claim using *"…contemporary records…"* cannot be overstated – if the Contractor fails to particularise and substantiate its *Contractor's Claim* or any other claim in a formal dispute, including Arbitration, it will lose the claim!

In this context, if Contractors are unsure as to whether their claims are fully particularised and adequately substantiated, with contemporaneous evidence, to prove their claim they should obtain detailed legal advice from an experienced C&E Solicitorto advise on the same.

Conclusion

We hope highlighting the Contractor's Key Mistakes and the Contractor's Optimal Solutions it should adopt in relation to Design Risk enhances your understanding of Design Risk and provides a good introduction as to how to manage the risk in your C&E Contract throughout the Project's lifecycle.

There is of course a myriad of additional points which require careful consideration, and these will differ in each C&E Contract, which are generally large complex documents, and may well use vague and ambiguous language to allocate Design Risk in any Contract Document e.g., Schedules.

We advise Clients in relation to all C&E Legal Issues on projects across the globe, in both Common Law and Civil Law jurisdictions. Specifically, we recently advised an Engineer on Design Risk in relation to an amended NEC contract on a complex project in *England* (see the Supreme Court's decision in "*MT Hojgaard A/S (Respondent)* (**MTH**) v *E.ON Climate & Renewables UK Robin Rigg Limited…* (**EON**)" ([2017] UKSC 59).

Further, we recently advised a contractor on Design Risk in relation to a heavily amended FIDIC contract on a high value complex claim in the *Middle East* (**ME**). Generally, ME Laws are silent regarding Design Risk, however, Contractors operating in ME Countries where Design Risk becomes a formal

"Issue in Dispute", may rely on several legal principles under ME Laws including: **(1)** *Contract Formation* **(2)** *Freedom of Contract* **(3)** *Contract Interpretation* **(4)** *Good Faith,* to run robust successful arguments.

To assist Contractors, therefore, we have designed a complimentary webinar titled: ***Understanding and Managing Design Risk is the Key to Success & Avoiding Disputes on your Project***, which will:

- Enhance your understanding of the Obligations relating to Design and your Duty to Notify;
- Increase your knowledge of the two Standards of Care i.e., Reasonable Skill & Care and Fitness for Purpose;
- Highlight and discuss the relevant Laws: **A.** English Law; and **B.** Middle East Laws / Mandatory Laws (UAE, Qatar, Bahrain, Kuwait, and Oman).
- Improve your ability to assess and manage Design Risk throughout a project's lifecycle.

Please email us directly on info@cels.global using **DESIGN RISK** in the subject heading to book your complimentary Design Risk Webinar.

We look forward to hearing from you.

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