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XVII Contractual Tips for Bringing Sustainable Improvement to Business Performance and Competitiveness

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Abstract

Opting for multi-package contracting instead of a full turnkey EPC brings interface issues and risks. I have seen two contractual ways to deal with this: An interface Coordination Agreement between all package contractors with Owner/Developer, and also if needed with Owner's Engineer; and/or Common interface provisions in all package contracts.

Keywords: Interface & Risks Issues; Sustainability; Business Performance; Agreement; Contractors; Qualifying events; Reinsurance

Introduction

The most important aspect is that the "Coordination Agreement" whereby the scope of work of the packaged agreements are clearly defined and further contractors agree on a critical route to follow during construction while accept that whenever the Owner determine there is a construction issue (claim) the same will be timely and thoroughly tackled at contractors level so you avoid Owner never to be indemnified or exposed to the contractors pointing fingers one to each other without the issue being corrected [1] .

Discussion

The drafting of Force Majeure contractual definitions and clauses is by no means consistent throughout standard and bespoke forms. Besides enlisting a non-exclusive list of qualifying events tailored to the particular needs of the contract that should also match other contractual provisions in connected contracts

I. Force Majeure

Force Majeure events must comprise the following key defining elements:

(1) Renders it impossible for the affected party to comply with its obligations under the contract.

(2) Is beyond the affected party's control.

(3) Is not the result of the fault or negligence of the affected party.

(4) Could not have been prevented avoided by the affected party through the exercise of due diligence.

II. More on Force Majeure

Force Majeure is a widely recognized term and one of the most problematic clauses and defined terms during negotiation and performance of construction contracts. Most contractors see it as a way to obtain some kind of relief and they tend to abuse its claim, this circumstance in many occasions spoils a relationship based on trust. From the Owners perspective, a contractual way to avoid the abusive claiming of Force Majeure events is to establish a Liquidated Damage amount for every claim that ends not been one [2].

III. Collaboration in Infrastructure Construction Projects

Everyone that has been involved in construction of big infrastructure projects has to recognize that one key element for every party involved in the project (Financial Parties, Developers, Owners, Off-takers, Constructors, Subcontractors, Suppliers, Insurance and Reinsurance providers, etc, etc) is collaboration to achieve commercial operation date. This is very clear among investors and most of the time is reflected as a Collaboration Clause or Representation in Associative Agreements such as Operating Agreements, Joint Development Agreements, Joint Venture Agreements, Partners Agreements, etc. Civil Law lawyers might even say that collaboration in good faith it's implied on every contractual relationship. One contractual way to align all parties involved in the project is to include a matching collaboration clause or representation on every agreement of the contractual structure of the project [3].

IV. Owner's Delay as exclusion of liability

Contracts and particularly construction contracts can contain other exclusions of liability besides Force Majeure. For example, Owner's Delay which if included can be generally defined as: "Events of adverse interference or delay in the progress of the Work, to the extent Owner or any other Owner Parties cause the same, including those caused by the failure of Owner to perform its obligations hereunder". This definition must be tailored to the particular contract with its necessary exclusions and carve outs.

V. EPC Lump Sum / Changes and Change Orders that impact Price and/or Schedule

This is a delicate subject where collaborative instead of adversarial attitudes between parties is crucial from negotiating the contract up to Owner Acceptance, Substantial Completion and Final Completion. A contractual way to keep a collaborative attitude among parties depends on planning ahead different factors such as: i) Design Maturity, ii) Establishing Contractual Procedures and Change Order Forms based on costs; and iii) Contractual Appointment of personnel in advance to manage Change Orders negotiations. Having unfair and sometimes voidable risks transfer from Owner to Contractor will only bring uncapped risks that will have to be covered by price. It is better to share risks and collaborate while negotiating the contract by planning ahead possible changes than to have an expensive and adversarial

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performance of the contract [4].

VI. Title / Risk of Loss / Builders All-Risk Insurance

When negotiating an EPC contract there are certain factors to have in mind to balance risks regarding: Title / Risk of Loss /and Builders All-Risk Insurance:

(1) That Contractor warrants and guarantees to the Owner that legal title to and ownership of the Work, including Equipment, Project (Drawings, Reports, Data, Specifications), and Real Estate shall be free and clear of any and all liens, claims, security interest or other encumbrances. On the other hand, the Contractor must make sure that exceptions are made by defining certain Permitted Encumbrances.

(2) That title to all Work or portions thereof pass to Owner upon payment by Owner or delivery of item to the Project site.

(3) Notwithstanding the acquisition of title of the Work by Owner, Contractor shall bear the risk of loss and damage at least until Substantial Completion and regarding Equipment until it has been properly installed and tested. On the other hand, Contractor must include a carve out that such obligation of Contractor to bear the risk of loss and damage of the Work is conditioned on procuring and maintaining by Owner at all times during the term of the agreement a Builders All-Risk Insurance.

(4) The Builders All-Risk Insurance procured by Owner must be for the benefit of both Contractor and Owner and must be in effect until Final Completion. Notwithstanding Owners obligation to obtain this insurance, any deductible from this insurance before Substantial Completion shall be paid by the Contractor and Contractor will have the primary responsibility for managing any claim but in all cases, shall include Owner on all communications with insurers and shall provide to Owner sufficient notice of, and shall provide Owner the opportunity to participate in all meetings with insurers.

VII. Requirements Definition

Contracting strategy is crucial to any business / project / company, and it must be seen as a transversal and interdisciplinary process where all interested areas and disciplines of such business / project / company (identified stakeholders) have to be aligned with the wanted results and their requirements. Any contract must start by defining its exact requirements. The best practices of contract management in this matter are to appoint a specialist to be called the Contract Administrator who is going to work along with the identified stakeholders (management, legal, commercial and financial teams, etc) to determine the contract requirements, this requirements definition will result in a document that is going to be the cornerstone for the design of the contract [5].

VIII. Back to Back. So that the project is considered 'bankable'

Within any infrastructure project Owner/Developer has to consider passing risk through to various contractors and sub-contractors particularly at construction level to ensure that contracts are drafted on a 'back-to-back' basis with the project agreement. This will ensure the allocation of risks that Lenders are going to require so that the project is considered 'bankable'.

IX. Non-Disclosure Agreements

There are certain elements that can be outlined for tailoring an NDA:

(1) One must define the information considered sensible and confidentially shared.

(2) Who are the parties involved and the particular individuals that are going to receive the confidential information so that the receiving party indicates those particular individuals that are going to be in charge of the custody of the confidential information.

(3) Establishing and agreeing on the value of the confidential information.

(4) When and in which cases certain information should stop being considered as confidential.

(5) Permitted and legally required disclosures.

(6) Responsibility regarding the sharing with third parties the information shared as confidential.

(7) Liability in any case of breach, preferably in the form of Liquidated Damages.

(8) Mitigation actions to avoid damages in case of breach, for example, the obligation to promptly notify any leak.

(9) Return and destruction of confidential information.

(10) Term.

(11) Dispute resolution governing law and jurisdiction [7].

X. Project Finance. Common Terms Agreement, Term Facility Agreement and Conditions Precedent to lending

As borrower, you want to make sure that all conditions precedent agreed within the Common Terms Agreement and the Term Facility Agreement are precisely defined so that its satisfaction is as objective as possible. The form of any documentation required should be agreed wherever possible beforehand. Where third party reports are required by the lender, the borrower should ensure that, as far as possible in advance, the third party is aware that it will need to provide these reports to the lender. Many lenders have a preferred form of wording for the addressing of reports. The conditions precedent will usually be required to be "in form and substance satisfactory to the lender". If this wording is included in the Project Finance Agreements the borrower should ensure that it obtains written confirmation from the lender when all the conditions are satisfied so there is no room for argument about whether or not the lender was satisfied with them.

XI. M&As / Asset Purchase Agreement

In a Business acquisition a common agreement to be documented among the Acquirer and the Owner of the Target Company is an Asset Purchase Agreement, this type of agreement in an M&A deal has its pro's and con's in front of a common stock purchase. From the buyers perspective, some of this pros and cons depend on whether the acquisition is friendly or not, if the case is the later to avoid acquiring a poison pill it might be better to do the deal through a debt free Asset Purchase Agreement, establishing a series of Conditions Precedent regarding the status and appraisal of the acquired assets by a third party for full performance of the purchase.

XII. Joint Venture Agreements. Absence of Material Changes and keeping Ordinary Course of Business

Due to some industries and/or sectors of business are parts of a broader investment industry, sometimes investors of projects lose focus of the common purpose of the joint venture and might consider taking their profit margin as soon as possible. One contractual way to keep all ventures on track during crucial moments of a project, for example during construction, is to agree from the negotiation and execution of the Joint Venture Agreement to establish an executive

committee who shall among other duties keep during construction of the project authority to approve decisions that might create material changes to the project and/or change the ordinary course of business of the project [8].

XIII. Clarity and Exhaustiveness in Assignment Agreements is something important

It is common practice to assign contracts by very simple notice procedures; many contracts have provisions that allow this. Let's say an Owner terminates an EPC contract due to a delay in achieving completion by the EPC contractor. Also pursuant to a term in the EPC contract Owner demands that the contractor assigns a supply sub-contract to the Owner. The delay in the supply of the key elements for the works is the main reason why the contractor was on delay. Due to the termination of the EPC the contractor is obliged to compensate the Owner. The contractor later seeks to obtain compensation from the supplier sub-contractor but the sub-contractor denies responsibility to compensate the contractor since his subcontract had been assigned to the Owner. This situation could have been prevented and avoided if the assignment agreement had been clear and exhaustive regarding the right of the contractor to keep the right to sue the supply subcontractor.

XIV. When Drafting Services contracts distinguish between Obligations of Results and Obligations of Means

(1) The debtor of an obligation of result is obliged to provide a promised result [9].

(2) The debtor of an obligation of means is required to perform his services with the prudence and diligence expected from a person of the same quality, placed in the same situation. When entering a services contract, make sure your requirements definition considers and points out clear and exhaustively a distinction between the obligations of results and the obligations of means expected to be supplied by the services provider. Obligations of means and obligations of results can coexist in the same contract. For example, a company that sells equipment also provides certain warranties and/or maintenance services and can be considered as having an obligation of means concerning the quality of the repair in general, and an obligation of result concerning the replacement of certain spare parts.

XV. RFI's, RFP's, RFQ's

Contracting International Best Practices have developed a common flexible business process where its correct implementation, coordination, and documentation has also become international best practice and standard for different commercial documents intended to record the formation of a contract. Request For Information, Request For Proposal, and Request for Quote are all parts of a flexible documented business process intended to achieve the formation of a contract. Implementing the correct coordination and flexible use of this documented process in any contract management strategy is crucial for any business to be successful.

One legal issue regarding the risks involving starting the formation of a contract within a procurement focused contractual strategy, is that all RFI, RFP, and/or RFQ (Request for Information, Proposal or Quote) leave no room to interpretation that the offer-acceptance process for the formation of the contract will start to form, from the offers issued by the suppliers invited to participate and that all expenses made by the participants with the purpose for preparing their offer are at their own risk and expense [10].

XVI. Change in Law as a Defined Term in a contract

"Change in Law" shall mean any of the following events that occur and take effect during the term of this Agreement and that demonstrably and adversely affect either Party's rights, the performance of the obligations hereunder, the Scope of Work, the Project Schedule or the Contract Price:

(a) Any issuance or promulgation of a new Applicable Law;

(b) The alteration, modification, abrogation, or derogation of any Applicable Law

Conclusion

Any new interpretation of any Applicable Law with mandatory effect given by a Governmental Authority which is contrary to the interpretation in effect prior to the Execution Date.

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None

Conflict of Interest

None

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