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Construction Contracts Checklist

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The purpose of this checklist is not to replace a review of the construction contract, but is intended to be used following such a review in order to check that all the key areas of the contract have been addressed.

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Checklist

Introduction

It is not essential to obtain positive answers to all the questions below in order to be able to give a contract a positive review, but hopefully the checklist will be useful in identifying areas of the contract which require further attention.

General points

- Has a full set of the contractual documents been provided for review?
- Does there appear to be any inconsistencies or any potential for inconsistencies between any of the contractual documents, e.g., two documents may cover the same area?
- Have all areas of the contract which need to be checked by a technical adviser been identified in the review, e.g.:
    - technical aspects;
    - employer obligations;
    - rely on information;
    - performance tests;
    - all limits on liabilities; and
    - levels of liquidated damages?
    - Has the contract been entered into? [If so, has it been executed as a deed?]
    - Is the contract unconditional?
    - Is there or has there previously been any interim arrangement in place between the employer and the contractor, e.g., work may have commenced under a letter of intent? If so, what are the implications of this ongoing or previous arrangement?
    - What law governs the contract? Has advice been taken on the implications of this choice of law?
    - Is the contract based on one of the well known standard forms of contract e.g. I Mech E or FIDIC?

Design responsibility

- What is the level of duty of care assumed by the contractor in respect of design? Is it an absolute obligation or only an obligation to use reasonable skill and care?
- Does the contract identify "performance criteria" which the plant when completed is required to meet? Is the contractor's obligation to meet these criteria an overriding obligation or is it subject to a contractor's duty only to use reasonable skill and care if such a duty of care is specified in the contract?

- What responsibility does the employer assume in respect of any designs, plans or technical information provided by him to the contractor?
- As regards any design/information provided by the employer, does the contract require the contractor to check this information and to assume responsibility for errors which could have been discovered by an experienced contractor?
- Is the contractor entitled to rely on the accuracy of any of this information (normally referred to as rely on information)? If so, does the employer have adequate recourse against the third parties who may have provided this information originally? (NB all rely on information will need to be checked by a technical adviser).
- Does the contract provide a mechanism for the employer to be able to review the detailed design of the contractor as and when it is produced?
- Are there adequate time periods provided for in the contract in order for the employer to carry out such review?
- If the detailed design is to be reviewed by the employer, by reference to what criteria is such approval to be made?
- Does the contract provide in respect of any design review and generally that approval by the employer does not release the contractor from any liability which he might otherwise have in respect of the design?
- If the review is to be carried out by a third party, such as an independent engineer, on behalf of the employer, is there provision elsewhere for a duty of care deed to be executed by that third party in favour of the lenders?
- Does the contract provide for performance tests to be performed to check (inter alia) that the plant is capable of achieving the performance criteria (see above)? These tests will need to be reviewed by a technical adviser.
- When does the contract provide for these tests to be carried out? (This is normally upon mechanical completion.)
- Is the passing of the performance tests a condition precedent to handover?
- What does the contract provide for in the event that there is a failure in the performance tests? Does the contract provide for the employer to choose between the following remedies:
    - unlimited remedying of the defect by the contractor and retesting;
    - termination of the contract and recovery of damages from the contractor;
    - handover of the plant nevertheless to take place and for the contractor to pay "buy down" liquidated damages (see E)?
- What is the effect of the plant passing the performance tests? (e.g., this should not exclude the contractor from any ongoing liability.)

Remedies for delay

- Does the contract provide for the payment of liquidated damages in the event of delay? If so, at what rate and up to what maximum limits? (The level of these damages should impose an adequate incentive on the contractor to complete on time 10-25 per cent. of the contract price as a maximum limit is a reasonable guideline.)
- What is "completion" for the purposes of establishing the payment of liquidated damages? Ideally the performance tests should have been successfully completed before completion can take place.
- Are there any unusual terms contained in the liquidated damages clause, e.g., liquidated damages calculated as being a percentage of the unfinished part of the work or only payable if the other parts of the project are already in place?
- If the contract is governed by English law, does the contract entitle the contractor to claim for extensions of time for employer's default? (If not, the liquidated damages provision may not be enforceable). What other matters entitle the contractor to claim an extension of time?
- Consider the impact of the governing law on liquidated damages.

- Does the contract provide for a clear right of the employer to terminate for prolonged delay (i.e., when the maximum limit of liquidated damages has been reached)?
- If the employer is entitled to terminate the contract for prolonged delay, what damages are recoverable from the contractor following such termination? Is any element of consequential loss recoverable?
- Is there a clause in the contract requiring the contractor to catch up any delay which arises and providing that failure to do so amounts to a breach of the contract?
- Is the payment of the contract price front end loaded? The technical adviser should be asked to comment on this. If the contractor receives the bulk of his payment up front, the incentive on him to complete the works may be significantly reduced.

Defective work

- What is the duty of care imposed by the contract in respect of materials and workmanship?
- Does the contract provide for the employer or engineer to be able to inspect the works as they are performed and to require the contractor to put right any defective work?
- Is there a defects liability period and, if so, for what period? Does the contract draw any distinction between different aspects of the work (e.g., between engineering and civil works)?
- What is the effect of any final certificate issued at the end of the defects liability period? Does the contractor try to exclude his liability in any way for any defects arising after the end of this period (e.g., is there an exclusive remedies clause)?
- What does the local law provide as regards a contractor's residual liability for latent defects?
- If the contractor fails to remedy any work for which he is responsible, does the contract entitle the employer to employ a substitute contractor to do this work and then for the employer to recover his costs from the original contractor?
- Are there any caps on the liability of the contractor to put right any defective work? Does this cap apply to any re performance requirements imposed on the contractor prior to handover?
- What does the contract provide for in respect of defects remedied during the defects liability period, i.e., does a new defects period start to run in respect of the replaced part and/or is the overall defects liability period extended by the period of time during which the works were put out of use due to that particular defect?
- How does the contract deal with the responsibility for costs in the situation where the employer requires the contractor to uncover work on the grounds that he has a reasonable suspicion that there may be a defect, having identified a similar defect elsewhere in the works? It is not necessarily logical simply to allocate the costs of uncovering work by reference to whether or not a defect is discovered.
- Does the contract require the contractor to notify the employer/engineer prior to any work being covered up?
- Is the employer entitled to take over the plant if it is not operating as required by the terms of the contract (e.g., it has failed the performance tests) and recover liquidated damages in respect of the short falls in performance ("buy down" liquidated damages)?
- Does the contract exclude liability for consequential and/or economic loss?
- Is the employer entitled to deduct sums from interim invoices in respect of defective work?

Employer's risks

- Are all of the obligations of the employer under the contract within the employer's control? Refer to technical adviser.
- Have all risks in relation to the site and the locality been passed on to the contractor? (See suggested list of matters in Schedule 1 which the contractor should be deemed to have taken into account.)
- What does the contract provide for regarding the following matters:
    - responsibility for local taxes and in particular changes to local taxes;
    - responsibility for obtaining permits (import, export, foreign exchange, employment etc);
    - change of law (the contractor should possibly be obliged to take into account any laws which are known to be coming into effect or which are notified to the contractor before the entry into the

contract)?
- Are all the risks which are allocated to the employer reasonable? See suggested list set out in Schedule 2.
- Does the contract deal with situations, where although the matter in question is prima facie an employers risk, the contractor is wholly or partly at fault?

Force Majeure

- How widely is force majeure defined? (Consider excluding events reasonably forseeable by an experienced contractor.)
- If a force majeure event arises, is the contractor entitled to any monetary claim or only to extensions of time?
- Do the periods of prolonged force majeure need to be continuous periods or are cumulative periods occurring within a fixed time period also taken into account?
- Does the contract provide for termination for prolonged force majeure? If so, after how long and at whose option? (Consider a provision extending the period of force majeure before termination can take place, but making the employer responsible for the contractor's additional costs as a result of this extension).

Performance security

- Does the contract provide for parent company guarantees? (This will depend on the identity of the contractor and its parent.)
- Is the parent company guarantor the ultimate parent company of the contractor?
- Are the parent company guarantees indemnities or do they impose an obligation on the part of the guarantors to take over and perform the contract should the contractor fail to do so? (If the latter, this is unsatisfactory since it may be necessary to identify the breach of contract and call upon the guarantors to perform.)
- Do the guarantees provide for wording to the effect that the guarantor shall be under no greater liability than under the contract?
- Is the form of the parent company guarantee within the employer's control, i.e., is the form of parent company guarantee annexed to the contract or is it to be approved by the employer?
- Does the contract provide for performance bonds? Are these payable on demand or on proven default?\
- Is the identity of the issuer of the performance bonds to be approved by the employer? Are the terms of the bonds annexed to the contract or subject to the approval of the employer?
- Do the terms of the bonds/parent company guarantees include all the usual protective wording which an employer would look for e.g. confirmation that amendments to the underlying contracts do not relieve the surety of liability?
- When are the bonds to be released? Is part of the bond to be released on handover and the rest at the end of the defects liability period? (Consider the timing of performance tests as regards the release of the bonds.)
- Are the guarantees and bonds assignable to the lenders and to any third party nominated by the lenders?
- Are there provisions for the performance bonds to be adjusted to take account of increases or decreases to the contract price? (It would be normal for the bonds to be increased in value only if the contract price increases by certain amounts.)
- If the contractor fails to issue bonds following an increase in the contract price, is the employer entitled to make retentions of equivalent amounts?
- Does the contract provide for retentions to be made from payments to the contractor?

Suspension/termination

- Does the contract entitle the employer to suspend the contract?

- Is the contractor entitled to terminate the contract following prolonged suspension? If so, after how long?
- What is the cost to the employer of suspending the contract?
- Does the contract provide for rights of the employer to terminate the contract for:
    - convenience;
    - contractor's unremedied breach;
    - prolonged delay;
    - prolonged force majeure; and
    - insolvency of the contractor (check all events of insolvency are covered)?
- Is the contractor entitled to terminate the contract for any reasons in addition to:
    - employer's unremedied breach (check the contract provides for prior service of a notice and for a period within which to remedy the breach);
    - prolonged force majeure;
    - prolonged suspension; and
    - insolvency?
- If the contract is terminated, in what circumstances is the contractor entitled to loss of profits on outstanding work? Are there any limits on the level of lost profits which are recoverable?
- Upon termination, does the contract provide that the employer is entitled to take over any sub contracts it requires and be transferred materials, equipment, plans and construction equipment?

Contract price/payment provisions/tax

- Except for clearly identified additional payments, is the contract price a fixed lump sum? Have all entitlements to additional payments been identified in the review?
- Is the contract price expressed to include all contingencies and not to be subject to revision to take account of any fluctuations?
- How are payments triggered? What is the time for payment? What interest is payable by the employer if there is delay in making payment?
- Does the contract provide for payment by reference to milestones? (If so, they should be reviewed by the technical adviser.)
- If payment is by milestones, does the contract deal with what is to happen where progress is delayed due to the employer's default? (The contractor should not be entitled to a milestone payment in these circumstances simply because the employer's default has prevented this milestone being achieved, since otherwise there is a danger of overpayment.)
- Is payment by reference to a pre agreed payment schedule? If so, in what circumstances is the employer entitled to adjust this schedule?
- Is the employer entitled to deduct sums for defective work or for the cost of repairs carried out by a replacement contractor?
- Does the contract price include any provisional sums? Are these subject to maximum limits?
- What is the size of the "project negative" gap throughout the contract, i.e., the gap between expenditure by the employer and value received by the project either in terms of engineering or on the ground? (This should be reviewed by a technical adviser.)
- Does the contract envisage amendments to take account of the requirements of export credit agencies?
- Does the contract provide for the contractor to supply sufficient evidence of work done with interim invoices in order for the employer to be able to check that payments are due under the contract?
- Does the contract provide for any retentions from payments to be made to the contractor?
- Is the employer responsible for any taxes otherwise payable by the contractor? If the employer is responsible for payment of such taxes, does the contract expressly exclude penalties payable by the contractor and is there provision for the contractor to reimburse to the employer any tax credits subsequently recovered?

Insurance

N.B. This area will require the review of a suitable insurance consultant.

- Does the contract provide for any insurances to be taken out by the contractor to include the employer and the lenders as co insured parties?
- Does the contract provide for a waiver of subrogation in respect of the employer and the lenders?
- Are the limits of the insurance and the limits of any deductibles appropriate?
- Does the contract impose an obligation upon the contractor to comply with the terms of all insurance policies?
- Are there provisions in the contract entitling the employer to inspect the contractor's insurances on an ongoing basis, to receive evidence that premiums have been paid, to approve the identity of the insurers and the terms of the insurance and to take out insurance at the contractor's costs in the event that the contractor is in breach of his insurance obligations?
- Does the contract provide for business interruption insurance covering the loss of production due to delay caused by force majeure or employer's risks, or to top up the liquidated damages payable by the contractor for delay?
- Is there provision in the contract for the contractor to take out defects liability insurance?
- Does the contract provide that insurance shall not operate as an exclusion of liability for the contractor?

Intellectual property/documents

- What licences of intellectual property is the contractor obliged to provide in respect of the development?
- If the contractor is not responsible for all intellectual property licences required to build and operate the development, what other licences are required and are these provided for in other project documents?
- Does the contract provide for the contractor to indemnify the employer against any claims brought by third parties for infringement of intellectual property rights?
- What is the contractor's liability in respect of successful third party claims for infringement of intellectual property? Is it limited to the payment of damages or an obligation to procure the necessary intellectual property rights for the benefit of the employer?
- Does the contract provide for documents supplied by the employer to remain the property of the employer and to be returned on request?
- Does the contract provide for the contractor to supply the employer with complete sets of plans and operating manuals on completion/termination?

Assignability

- Is the contract freely assignable by the employer? If not, is it at least assignable by way of security to lenders and on to purchasers of the development in the event that the lenders exercise their security and wish to dispose of the development?
- Is any assignment of the contract by the contractor subject to the employer's consent?
- Does the contract provide for direct agreements to be issued in favour of the lenders and covering the following areas:
    - any rights of the contractor to terminate the contract or to stop work to be suspended for a fixed period while the banks take a view on the action required;
    - within the suspension period the lenders or their nominee to have the right to step in as an additional obligor for a further period and during which it would be obliged to meet the company's obligations under contract, but would also have the right to step out at any time and would only be liable for obligations incurred up until the step out date;
    - during the step in period the lenders to have the right to arrange a permanent replacement for the employer under the construction contract; and
    - the direct agreement should also limit the ability of the contractor to terminate the contract for prolonged force majeure?

- Does the contract provide that sub contracting of the contractor's obligations may only be done with the consent of the employer?
- Is the identity of all sub contractors subject to the approval of the employer? (Such approval should not release the contractor from any liability)
- Does the contract provide that the contractor is not released of any liability under the contract in the event of any such sub contracting?
- Does the contract require all sub contracts to be freely assignable to the employer, the lenders, or a third party nominated by the lenders?
- Does the contract provide for all sub contracts required by the employer to be assigned to it upon termination of the main contract?
- Does the contract require the contractor to ensure the terms of the sub contracts reflect the terms of the main contract?

Dispute Resolution

- Is any form of dispute resolution specified? If not, will the courts of any country have jurisdiction by default?
- If litigation in the English courts is specified, will those courts have jurisdiction over the issues? Does English law apply to the contract? If so, will the Brussels convention result in the other party having to be sued in his own country rather than in England? If the litigation can take place in England, does the judge need to have the powers of an arbitrator because of "Crouch" problems?
- If arbitration is specified, is there an effective arbitration clause? I.e.,
    - Does the arbitration clause clearly refer disputes to arbitration?
    - Is it clear where the arbitration is going to be held?
    - Does the arbitration clause specify an appointing authority?
    - Is the arbitration to be supervised by an institution or to be ad hoc?
    - How many arbitrators are there to be and what sort of people?
    - Is the language of the proceedings specified?
    - Are there any procedural rules?
    - Is it an international arbitration in which the right of appeal can be excluded?
- If the contract specifies a multi-tier system of dispute resolution, including adjudication, expect determination and ADR, is it clear which sorts of disputes are to be decided by which tier of jurisdiction and at what stage and in what order?
- Can the judgment/arbitration awards be enforced against assets of the other party?
- i.e., does the Brussels Convention apply or is there a reciprocal enforcement of judgments treaty; or is the country where the assets are a signatory to the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards - if arbitration is the chosen form of dispute resolution?

Miscellaneous

- Is the contractor required to ensure that key personnel of the contractor remain available during the course of the contract?
- Is the employer entitled to require the contractor to remove any of its employees?
- Is the contractor obliged to ensure his employees comply with local laws?
- Are there obligations imposed on the contractor to maintain confidentiality?
- Do any confidentiality obligations imposed upon the employer allow for the employer to pass on information to his legal, technical and insurance advisers, to the lenders and to their legal, technical and insurance advisers?
- Is the contractor obliged to keep the site clean at all times and to leave it clean at the end of the contract?
- Is the contractor obliged to comply with all local and international environmental regulations?

- Does the contract provide for the issue of a final certificate? If so, does the issue of the final certificate prevent the employer raising future claims that the works were defective?
- Is the employer entitled to vary the scope or the timing of the work by way of an instruction to the contractor?
- Does the contract provide for resolution of disputes in the pricing of any variations to the work? (e.g. by reference to an expert and pre agreed criteria).
- Does the contract provide for the employer and the contractor to appoint individuals who are authorised to represent them in all contractual matters, receive notices, issue instructions etc.?
- Is the employer entitled to order the replacement of the contractor's representative?
- What is the effect of notices served on the contractor's and the employer's representatives?
- Does the contract provide for when ownership in materials and work is to pass to the employer? Ideally, this should be at the earlier of delivery of the materials to the site or when payment is made in respect of that work and/or materials to the contractor.
- Does the contract oblige the contractor to ensure there are no liens or retention of title claims in respect of materials supplied by him? If there are any such liens, is the employer entitled to withhold payment?
- Does the contract provide for the contractor to supply the employer with weekly, monthly and/or annual reports covering:
    - progress of the works;
    - details of events affecting the progress of the work;
    - accident reports;
    - and security reports?
- In respect of variations, is the contractor obliged to maintain detailed records of work done and to allow the employer to inspect these?
- Is the contractor responsible for site security?
- Does the contract provide that the lenders and representatives of the lenders are to have the same rights of access and the same rights of attendance at all tests and inspections as the employer? In addition, does the contract provide a right of access on the part of the lenders or their advisers to documents and to the site at any time?

Schedule

Schedule 1: Local Conditions Affecting the Work to be Allocated to the Contractor

1. The nature and location of the site including means of access.
2. he atmospheric, meteorological, topographic, hydrological, geological and subsurface conditions.
3. The equipment, facilities and resources needed for the performance of the work.
4. The availability of labour, equipment, parts consumables, procurement items, fuel, water, electric power and other utilities.
5. The applicable laws and regulations, local customs, fiscal and social legislation practices and customs.
6. Generally all and any other local conditions and/or other conditions of the site that affect or may affect the contractor's performance.

Schedule 2: Reasonable Risks to be Assumed by an Employer

1. Any change order issued by the employer or required as a result of deficiencies in the information provided by the employer on which the contractor is entitled to rely, but excluding change orders required as a result of a breach of the contract by the contractor or the contractor's negligence.
2. Any failure of the employer to fulfil its obligations under the contract, e.g., if there are any defects in items to be supplied by the employer or delay in their supply. N.B. The contractor should ideally be responsible for checking items supplied by the employer on their delivery.
3. Delay or default of other contractors employed by the employer.
4. Suspension of the contract, except as a result of a default of the contractor.

5. Force majeure (see Section G). Consider excluding events which were reasonably foreseeable by an experienced contractor, but including reasonably foreseeable events where it is not reasonable for the risk of these events to be taken into account in the contract price.
6. Any re inspection or re testing required by the employer where the work examined was in accordance with the contract terms and there were no other defects elsewhere in the work which suggested this might not be the case.
7. National industrial disputes, but excluding disputes which arise as a result of the act or omission of the contractor or which involve matters specific to the contractor.
8. Any changes in applicable laws and/or rulings given by appropriate regulatory authorities.
9. [The use or occupation of the Site by the works or any part thereof, or for the purposes of the contract; or interference, whether temporary or permanent with any right of way, light, air or water or with any easement, wayleaves or right of a similar nature which is the inevitable result of the construction of the works in accordance with the contract.]
10. [Use or occupation of the works or any part thereof by the employer.]
11. [The right of the employer to construct the works or any part thereof on, over, under, in or through any land.]
12. [Damage (other than resulting from the contractor's method of construction) which is the inevitable result of the construction of the works in accordance with the contract].

N.B. Lenders in project financings often require that the balance of risk is altered in favour of an employer by excluding events which are the risk of an employer and might therefore give rise to claims for additional time and/or money. Where this is not practicable, an alternative is to require shareholders to inject additional equity into the project company in the event that specified events give rise to claims by the contractor.

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