

## Learning from experience: Delivering a successful Expo



**By Mark Blanksby and Bevan Farmer**

The construction sector within Dubai has been steadily on the rise since the beginning of 2012, and industry sentiment prior to the Expo 2020 announcement has been steadily improving over this 18 month period. The construction work anticipated to follow the award of Expo 2020 will be a further welcome shot in the arm for the regional construction industry, but it is important that lessons are learned from the recent past, and are not simply repeated.

It is not known which form of standard contract the government projects will use to deliver Expo 2020 and related infrastructure. Dubai Law No. 6 of 1997 prohibits the use of FIDIC contracts when contracting with Dubai Government entities. Nevertheless, the FIDIC 1987 Red Book (and to a lesser extent, the 1999 version) remain the cornerstone of the construction sector in Dubai in one form or other. Consultants' appointments based broadly around the FIDIC white book also predominate.

A good contract does not make a well run project – that is in the hands of the project and consultant team - but it does go a long way to safeguarding each party's commercial interests and, if properly drafted, provides clarity in relation to the obligations expected of them. A well drafted contract will also assist in avoiding disputes in the long term.

Experience has shown that construction disputes typically arise where there is:

- a mismatch between obligations in one part of the contract (e.g. the conditions) with another (e.g. the specification);
- a lack of clarity in relation to what is intended by a provision (e.g. a design obligation, responsibility for obtaining approvals or the allocation of a specific risk);
- a misunderstanding of what a particular obligation entails (e.g. an obligation to "co-ordinate", whether liquidated damages apply to interim milestones or an obligation to follow instructions perhaps); or
- an imbalance in the allocation of risk (and resulting one-sided bargain) when a more even handed risk allocation is appropriate. This simply serves to encourage a creative analysis of the contract to avoid such risks or to claim in respect of them.

Many of these issues can be avoided; adopting even simple measures will go a long way. For example:

- avoid commencing work pursuant to "Letters of Intent" or

"Letters of Award" wherever possible – or at least understand their limitations as to scope and enforceability;

- do not over engineer the contract. A contract that consists of a consolidated set of documents is more likely to be read and properly administered than one that consists of multiple lever arch files, containing layers of conditions, specifications, attachments and correspondence each amending the other;
- establish a standing "check list" against which to undertake a contract review, capturing issues such as: consistent rights and obligations between Employer and Contractor in relation to payment, suspension, termination and other similar clauses;
- aim for consistency in defined terms and between the terms used in different documents forming the contract;
- ensure that the scope of work that is described by the contract and specification is clear, unambiguous and explained in simple, straightforward terms;
- pay particular attention to design responsibility;
- ensure there are clear obligations regarding deliverables on all sides – Contractor, Employer and Engineer / Architect;
- be alert to the implications of lengthy notice and cure periods as a prerequisite to the operation of suspension or termination. It is not unusual to see considerable work values build during these periods, the payment of which may potentially then be in jeopardy;
- make sure you have signed up to realistic delivery periods;
- pay particular attention to liability caps and any consequential loss provisions;
- understand the implications of the Bonds and Guarantees that are required pursuant to the Contract. "On demand" bonds mean just that. Ensure that Advance Payment Bonds contain effective provisions that allow for their value to decrease in line with the advance payment recovery through Interim Payments; and
- ensure that the person who signs the contract is properly authorised to commit each party to it and the arbitration agreement within the contract!

Time invested at the outset of a project in thoroughly drafting or reviewing the terms of a contract and getting it right is time well spent.

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