

Getting Infrastructure Projects Right from a Contractual Perspective

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Many producers/traders harbour ambitious plans to acquire, expand or build larger and better networked infrastructure for the production, transportation, storage and processing of their commodities and products. Successful delivery of infrastructure begins with the correct choice of contract. How can that be achieved?

This is the first in a series of Alerts on the contractual issues which can pose a threat to the cost-effective and timely completion of such infrastructure. This first Alert focuses on the critical area of contract selection. The series will go on to address each project phase and suggest best practice to avoid the potential pitfalls and risks associated with the implementation of infrastructure projects.

Selecting the Right Construction Contract for Your Project

Successful delivery of infrastructure begins with the correct choice of contract.

The perfect "watertight" contract does not exist, but as someone once said, "If you chase perfection, you often catch excellence". How can a producer/trader navigate through what might seem a bewildering array of contracting options for his infrastructure project, and in doing so select a form of construction contract which suits the characteristics of a specific project or series of projects which form part of his capital works programme?

How hard can it be?

Choosing a construction contract is not an easy process, and construction projects tend to result in contracts and contracting structures of some considerable complexity and length. The principal reasons for this are that projects often involve huge sums, a number of diverse elements, and a range of parties each with a different role to play in ensuring a successful completion.

Construction contracts also reflect the technical complexity of the works themselves and the evolutionary nature and length of the project process. In a real sense, construction projects are prototypical, each is one-of-a-kind involving a different (or at least varied) combination of parties, design, site, location, capacity, value and timing. Construction contracts therefore have to grapple with the daunting challenge of trying to provide for every risk and eventuality that may arise during the project, but yet retain the required element of flexibility to ensure they remain practical enough to deal with issues and uncertainties as they arise.

Off-the-Peg or Bespoke?

This challenge is one that the industry has fought for many years, with various bodies, institutions and governments having developed and promoted the use of standard form ("off-the-peg") construction contracts. Perhaps the best known and most widely used international standard form construction contracts are those published by the Fédération Internationale Des Ingénieurs-Conseils ("FIDIC").

The use of standard form contracts is heavily promoted because they are seen as a way to reduce the costs and time needed to conclude contracts, to better reflect an acceptable and known approach to construction contracting, and to apportion the risks that are

involved. It is hoped that as a consequence, the implementation of the project will proceed efficiently from a legal and contractual perspective, and disputes between the contracting parties will be avoided or resolved quickly.

Unfortunately, the different standard forms available tend to reflect the interests of and input from the particular range of industry participants involved in their preparation. As such, standard form contracts often favour a particular party to a construction contract, even if their promoters claim to have adopted a "balanced" position on the important contractual risks and issues. Caution therefore needs to be exercised when considering the use of a particular standard form of construction contract; it may not be wholly appropriate for a client or the specific project.

Nonetheless, the choice between the use of a standard form contract and a bespoke contract might not be as real or as stark as imagined. While there is a real push for the use of standard form construction contracts for the reasons given above, the fact is that even these standard forms will often require substantial project-specific information and data incorporated into their terms in order to create a final contract. Also, there is widespread recognition that the amendment and supplementation of standard terms is required in any event to address jurisdictional, local law and project-specific requirements.

How and the extent to which this process of incorporating additional information and the amendment of terms is undertaken, can quickly render what is advertised as a standard form contract to be no such thing. The "black art" of seeking to convince the other party that the terms of the contract are the same as the standard form of a particular institution is alive and well in the murky world of construction and engineering. Caution is required: do not rely upon or accept such statements. There is no substitute for reading and understanding the terms as they are written, rather than what you might assume based on prior knowledge of the particular standard form it is advertised to comprise.

Tailor Off-the-Peg to Suit

So what is the best approach to answering the question of whether to go off-the-peg or bespoke when selecting a construction contract?

For most projects it will be sensible to recognise the important work that has gone into the creation of standard form contracts, yet also acknowledge their inevitable inability to address, in advance, all of the parties' and the project's specific requirements. And in doing so, therefore prepare a bespoke construction contract based on or influenced by a specific standard form that is judged to provide the best starting point for capturing the parties' and the project's specific requirements.

This approach is adopted by many, but mastered by few. There are countless reasons as to why clients struggle with ensuring that they do arrive at a form which captures and incorporates the sensible, tried and tested, terms of the standard forms, while at the same time adding and supplementing those terms in a way that is suitable and sensible for a specific project. The most obvious and frequent failing on the part of a client preparing a contract in this way is to cut corners and not recognise the fact that amendments, whether by deletion or addition, need to be considered in the context of the entire contract; so often amendments are made to clauses without addressing or understanding how those changes affect the parties' rights and obligations contained elsewhere in the contract.

Without adopting a holistic approach to this process, contracts become disjointed, ambiguous, impractical and inconsistent, with potentially disastrous consequences - the contractual equivalent of Frankenstein's monster, something which superficially looks like it could work as intended but which in practice struggles because of the way it was welded together, and falls apart when seriously tested.

Another main reason as to why the process of adapting a standard form contract fails is because frequently parties cannot resist the temptation to shift risk, often in an inappropriate manner. What started as a standard form construction contract premised on a relatively balanced or nuanced approach to sharing project risk can, by a few injudicious changes to key clauses, create a very different contract to the one intended by the institution or industry body that published it. Again, this approach can undermine and affect how such a

contract is designed to work. To be successful in adapting a standard form to suit, contract drafters also need to know and understand the background to that standard form and its basic compatibility with the client's requirements (especially attitude to risk) and the project, and how, based on that knowledge and understanding, the standard form can indeed be adapted to suit.

Conclusions and Best Practice in Contract Selection...if the Suit Fits

Clients should recognise the importance of selecting the right form of construction contract for their project, and the real challenge this can pose.

The following should be considered by any client when decisions are being made on whether to use and/or adapt an industry standard form of construction contract for its project:

- In many cases it will be advisable to prepare a bespoke construction contract based on or influenced by a specific standard form that is judged to provide the best starting point for capturing the parties' and the project's specific requirements.
- Gain a good knowledge and understanding of the standard forms of construction contract that are available. Who drafted them? What approach do they take? Are they tried and tested? Which (what type and value of) projects are they said to be aimed at?
- Exercise caution when selecting a particular standard form of construction contract; ensure it is appropriate for the specific project, if only after adaptation and amendment.
- Do not accept, but test, any statements made as to how a contract has been based on a particular standard form contract. Avoid assumed knowledge, read and understand the terms as written.
- Recognise and address the challenges that arise out of the adaptation of a standard form construction contract; take a holistic approach and take care to ensure the contract will work as amended.

Next time, a look at the procurement strategies available to a producer/trader for his impending project...

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