

## Experiences of FPSO Construction/Conversion Disputes: Learning the Lessons to Protect Budgets

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# COMMON THEMES

- CONTRACT
  - Terms and conditions lack clarity
  - Scope lacks clarity
    - Interface between contractors
    - Design development/additional engineering scope
  - Dispute resolution escalation mechanism – fit for purpose?
  
- OPERATION OF CONTRACT
  - Incorrect operation of contract mechanisms
  - Variations in particular
  
- MANAGING CLAIMS FOR TIME AND MONEY
  - Record-keeping
  - CTR – especially in a lump sum contract
  - Level 3 baseline v re-based v as built

# LESSONS LEARNED - THE CONTRACT

- Keep it simple, and if you want it, write it clearly when you are drafting or qualifying - don't kid yourself that it says what you want it to say – argue against yourself
- Take a hard look at where time and money are at risk – are these areas adequately covered e.g. changes of scope, FEED/design responsibility, interface between contractors
  - Potential schedule risks – turn-around time for drawings etc – critical path?
  - Have Company requirements been properly understood and allowances made in the budget and schedule – especially important for subcontractors to EPC?
- Test the mechanisms – do they work e.g. dispute escalation
  - Time limits/triggers
  - Involvement of other interested parties?

# LESSONS LEARNED - OPERATION OF THE CONTRACT

## ■ VARIATIONS

- Beware of standard forms: a traditional shipbuilding contract does not contain a unilateral right to vary although that is common in EPC forms that have originated from land based projects
- In either case an instruction is required
  - client must be given the opportunity to consider and reject the changed work
- An instruction is not the same as permission to do something
- An instruction which does not fulfil the contract formalities is not a contractual instruction

# LESSONS LEARNED - OPERATION OF THE CONTRACT

- Refusing an instruction
  - Under a standard form engineering/construction contract refusing an instruction can lead to termination e.g. *Bluewater v Mercon* [2013] EWHC 2132 (TCC)
  - Under a standard shipbuilding contract, the builder is not obliged to proceed until the parties have agreed the terms, unless the change is compulsory
  - Tension between the builder's likely contractual obligation to deliver a vessel which complies with Class and Regulatory requirements and its right not to make compulsory changes without the consequences being first agreed – contractual "limbo"

# OPERATION OF THE CONTRACT

- Resolving the contractual “limbo”
  - *Adyard Abu Dhabi v S D Marine Services* [2011] EWHC 848 (Comm)
    - Rescission of contract by buyer pursuant to an express right due to failure to achieve sea trials by contractually specified date
    - Compulsory changes under the UK Maritime Coastguard Agency
    - Builder’s argument, that buyer was not entitled to rescind because time was at large due to the operation of the prevention principle as there was no mechanism to resolve the limbo, failed thanks to a broader interpretation of the contract as a whole
    - *“It is inherently unlikely that the parties would have intended there to be such a limbo, particularly in an obviously foreseeable situation such as the failure to agree adjustment”*

# LESSONS LEARNED - OPERATION OF THE CONTRACT

- RIGHT TO OMIT WORK
- Contractor has not only the duty to carry out the work but also the corresponding right to be allowed to complete the work which it has contracted to perform
- So provisions depriving the contractor of that right must be construed carefully
  - The correctness of the exercise of the right to instruct the omission of work will be determined objectively by reference to whether the work is used for a purpose envisaged by the contract (*Abbey Development Limited v PP Brickwork Limited* [2003] EWHC 1987)
  - Reasonably clear words are required if the work is to be removed in order to have it performed by someone else – not a route to get out of a bad bargain by having the work done by someone at lower cost



# LESSONS LEARNED - OPERATION OF THE CONTRACT

- IMPLIED PROMISE TO PAY FOR EXTRA WORK
- Work done which falls outside the defined work in the contract
  - Separate contract for the additional work (*Blue Circle Industries v Holland Dredging Co* [1987] 37 B.L.R. 40)
  - Payment on a quantum meruit basis in restitution
- Not available to a contractor who has failed to comply with contractual change order mechanism (*S&W Process Engineering v Cauldron Foods Limited* [2005] EWHC 153 (TCC))

# LESSONS LEARNED - OPERATION OF THE CONTRACT

- TIMING AND ESCALATION
- Timing matters – failure to follow contract procedure and obey contract time limits can lose the contractor the right to be paid
- If there are requirements for meetings with contract reps and senior management then document any meetings as part of formal project correspondence with reference to the particular provisions and ensure all formalities are complied with. Failure to do so can delay the right to go to arbitration and might mean a time limit is missed.
  - English law will enforce the strict letter of such provisions (e.g. *Gard Shipping v Clearlake Shipping* [2017] EWHC 1091 (Comm))
  - Compliance with each stage of a mandatory dispute escalation process will act as a condition precedent to the next stage and all the stages must have been completed before the dispute can be referred to arbitration or the court (see e.g. *Channel Tunnel Group v Balfour Beatty Construction* [1993] AC 334)

# LESSONS LEARNED - OPERATION OF CONTRACT

- EXERCISE OF DISCRETION
- E.g. Mercon must “immediately commence and thereafter continuously proceed with action *satisfactory to Bluewater* to remedy such default”
- Held not to be construed by reference to an objective standard
- But, there are limitations on the ability of a company to come to a decision as a decision-maker, as a matter of necessary implication by concepts of:
  - Honesty, good faith and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality (*Socimer International Bank Limited (in liquidation) v Standard Bank London Limited* [2008] EWCA Civ 116)
- Bluewater’s exercise of its discretion was proper

# LESSONS LEARNED - EVIDENCING TIME AND MONEY CLAIMS

- The man-hours expended and the cost of those man-hours claimed through a disputed VOR have to be proven
  - Causation
  - Actual cost
  - Do project processes capture this information adequately? Cost codes/time sheets?
- The schedule impact for which an extension of time or relief from LDs is sought has to be proven
  - Extra man hours to meet a schedule – acceleration?
  - Disruption?
  - Critical path delay?

# LESSONS LEARNED - EVIDENCING TIME AND MONEY CLAIMS

- GLOBAL CLAIMS
  - There will be situations where the claim depends on a complex interaction between the consequences of a number of variations or breaches and it may be difficult or impossible to make an accurate apportionment of the total extra costs between the several causative events
  - Provided there is no duplication, individual awards can be made in respect of those parts of individual items of the claim which can be dealt with in isolation and a supplementary award in respect of the remainder of those claims as a composite whole
  - The obligation is simply to prove the case on a balance of probabilities
    - establish on the balance of probabilities that the loss incurred would not have been incurred in any event
    - demonstrate that the proposal was sufficiently well priced that it would have made some net return
    - demonstrate that there were no other causes of loss and expense
  - There is no rule that a global award should not be allowed where the contractor has itself created the impossibility of disentanglement.

# LESSONS LEARNED - FINALLY

- At each stage, have some regard to what can go wrong and plan accordingly
- Record-keeping is essential – will you be able to prove or challenge cause and effect
- Create the right paper trail
- Don't create the wrong one - disclosure obligations in a dispute may be onerous – yes, those 'private' texts and messages which express frustration or comment unfavourably about other people WILL be embarrassing at the least – and might have to be disclosed so set some rules and enforce them
- Lessons learned and similar documents can be unintentionally damaging when disclosed in disputes, so be careful how you put things
- **Learn from other projects and people**

## LESSONS LEARNED - FINALLY

Insanity:  
doing the same thing  
over and over again  
and expecting  
different results.

*- Albert Einstein*

