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Let's pick a
TE&A news

Issue 3, April 2015

Happy Easter!

In this issue...

Change of Legislation

- Razvan Rugina - Senior Lawyer

I. INTRODUCTION

One of the most common issues affecting public procurement contracts in recent years concerns the necessity for additional works which, due to unforeseen circumstances, may become necessary for the fulfilment of a contract, and whose value exceeds the thresholds set by national legislation and by the applicable provisions of specific contracts.

As a matter of principle, the tender cannot be altered after the conclusion of the public procurement contract. Thus, a contract can be changed/modified during its execution only if such change/modification does not alter the tender, i.e. if the change is not substantial enough to be considered a change in the scope of the Works, reflected in the pricing or other essential elements and aspects of the contract.

Additional works can be awarded without a new public tender even if they would entail a substantial change to the value of a contract, under the exceptional conditions of Article 122 (i) of Emergency Government Ordinance No 34/2006 regarding the award of public procurement contracts, public works concession contracts and services concession contracts ("GEO 34"), if the aggregate value of the contracts awarded and the addenda to be concluded for such additional/supplementary works does not exceed 20% of the initial contract value.

By public procurement contracts concluded for execution of infrastructure works, usually based on FIDIC Yellow Book conditions, the threshold regarding the value of additional works has been lowered from 20% as is stipulated in GEO 34 to only 10%.

II. THE FACTS

In 2013, a contractor and a Romanian public authority entered into a contract for the construction of a section of motorway. The contract concluded by parties incorporated the Yellow Book conditions and it was subordinate to Romanian legislation.

Sub-Clause 14.1 [*The Contract Price*] of the contract, as modified by the particular conditions stipulated that: "*In any case, the Price of the Contract shall not exceed the Accepted Contract Amount by more than 10%, except the provisions under Sub-Clauses 13.7 and 13.8 of the Contract.*"

In accordance with Sub-Clause 13.7 [*Adjustments for Changes in Legislation*]

of the contract: "*The Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a change in the Laws of the Country (including the introduction of new Laws and the repeal or modification of existing Laws) or the judicial or official governmental interpretation of such Laws, made after the Base Date, which affect the Contractor in the performance of obligations under the Contract.*"

After the conclusion of the contract, the environmental protection authority decided to revisit the initial environmental approval that had been issued at tender so as to establish additional environmental protection measures for the project and hence to be observed by the contractor during the project execution.

The value of the additional works required as a consequence of compliance with the revised environmental approval exceeded the 10% threshold set by Sub-Clause 14.1 of the contract.

Under these circumstances, it was important to consider whether the revision of environmental approval made after the award of the public procurement contract represented a "change in legislation" in the meaning of Sub-Clause 13 . 7, and whether a call for a public tender for the assignment of the additional works determined by the more stringent conditions of the new environmental approval was required.

III. REVISION OF THE ENVIRONMENTAL APPROVAL IS A "CHANGE IN LEGISLATION"

The environmental approval is the administrative deed issued by the relevant environmental protection authority which establishes the conditions, and if necessary, the environmental protection measures to be observed during the construction of the project.

To obtain the environmental approval, public or private projects that may have significant environmental impact by their nature, size or location, are subject to environmental impact assessment.

Art. 2(31) of GEO no. 195/2005 regarding environment protection, defines the environmental impact assessment as "*the process aimed to identify, describe and determine, according to each case and* ***the applicable laws****, the direct and indirect, synergic, cumulative, main and secondary effects of a project on the health of people and environment*".

Therefore, both the environmental impact assessment and the environmental approval may be construed as official interpretation of the applicable Romanian laws given by the environmental protection authority.

In view of the aforementioned, the revision of environmental approval, so as to establish additional environmental protection measures to be observed during the execution of the project, representing a change in the official governmental interpretation of the relevant environmental laws entitles the contractor to obtain, by virtue of Sub-Clause 13.7, payment of the additionally incurred costs of compliance with revised environmental requirements.

IV. ASSIGNMENT OF THE ADDITIONAL WORKS DETERMINED BY THE REVISION OF THE ENVIRONMENTAL APPROVAL

The additional works required as a consequence of unforeseeable circumstances can be awarded to the initial contractor without a new public tender, by way of a negotiated procedure without prior publication of a contract notice, if the strict conditions provided by article 122 (i) of GEO 34 are cumulatively met.

However, even if the costs of the additional works determined by the revision of the environmental approval represents "adjustments for changes in legislation" for which the 10% threshold provided by Sub-Clause 14.1 is not applicable, the value of the addendum that will be concluded for these additional works shall not exceed 20% of the value of the initial contract (according to article 122 (i) of GEO 34).

Any increase of the Accepted Contract Amount of more than 20% by negotiated procedure without prior publication of a contract notice would be a breach of law and as such disallowed. Thus, there is little doubt that in such a case at law, an increase of the contract price would not be possible without the process of a public competitive tender.

Whether you need to recover losses and/or damages following construction controversies, or whether you are being sued or called to defend yourselves in adjudication and/or arbitration, or whether you find that your company has become embroiled in virtually any kind of dispute within your industry, we at Techno Engineering & Associates offer the precise help that you have been seeking.

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Bucharest, Romania
22 Muzelor Street, Sector 4
Tel: +40 21 336 30 76/77
Fax: +40 21 336 30 78

Sofia, Bulgaria
1517, "Haji Dimitar" Residential Area 2J
"Vitinya" Street, BENI Building, Entrance C, Floor 2
Tel: + 359 2 421 92 92 (3)
Fax: + 359 2 421 92 94

Doha, Qatar
Grand Hamad Street, Al Badiya Building
6th floor, Office no.3, P.O. Box 205103
Tel: +974 4465 3649
Fax: +974 4465 4958

techno.engineering@technoeng.com
www.technoeng.com

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Quantum Training Session with George Taft
A QS's point of view about a Quantum Expert

- Razvan Dobre -
Quantity Engineer

Introduction

Shortly after my arrival at Techno Engineering & Associates as a Quantity Surveyor, I attended the next of a continuing series of internal seminars and workshops which aimed to bring together the various departments of the company to better coordinate the internal interfaces to elevate the quality of the services TE&A provides. As a new addition to the company, the technical aspects of these workshops made for a more rapid and smoother transition for me personally assisted greatly my understanding of the services TE&A provide and the importance of inter-departmental continuity.

The highlight of these seminars was a 3 day quantum training session hosted by George Taft, our invited guest from E.C. Harris, being a chartered quantity surveyor with 20 years of experience in construction, including forensic quantity surveying skills, claims evaluation and an accomplished expert witness.

The preferred approach of the lecturer was to go through the points of TE&A's proposed agenda, in order to browse the principles used as a basis for evaluations, respond to attendees' queries, listen to proposed workshop examples and debate possible alternative approaches to overcome certain contentious points raised in past cases, highlight weaker aspects and to conclude more robust methods of substantiation of our quantum assessments.

Day 1. First thoughts

In order for our lecturer to become acquainted with the heads of recent claims and overcome areas of concern which had arisen, the head of the Technical Department presented a brief introduction which was debated, to assist the group's understanding of the principles involved and to highlight the preferred methodology used in our assessments. The main goal of this introduction was to simulate various scenarios and to hear the likely outcome from George Taft's arbitral viewpoint.

The positive outcome of this session stemmed from the lecturer's extensive experience in arbitral proceedings, specifically the hearings and his experience in quantum advisory roles gained from a variety of construction project disputes. Our guest was able to rapidly identify and explain in detail the theory behind "correct" methods of quantum assessment. Queries from attendees soon followed, how to overcome the shortcomings of contractor's contemporary records, a commonly addressed problem in reality and during this training session. In the course of the next couple of days, examples of contemporaneous records were presented and in cases of the lack of such records, the alternative approaches that may be available, in order to overcome them.

Day 2. Point of view

After identifying and highlighting the shortcomings, the need to advise our clients of these shortcomings was obvious, but where current claims relied upon past events the effect of which had most likely ended prior to the date of the analysis, however perfect they may be, contemporary records after that would be useless for that particular element of the claim. This highlighted the importance for projects that are due to commence, to seize the opportunity to offer early advice and training to our clients. Contractors should be encouraged to develop their own internal "Early warning" systems to identify construction activities that may be considered to be beginning to experience delay – and then ensure that the supervisors of the relevant activities of the Project, diligently record the day-by-day impact of disruption, progress/productivity of the activities and the labour and equipment resources engaged in affected activities.

It is vital to the claim for contractors to record those days when physical work was actually undertaken on disrupted tasks and whether there were days when work had been prevented due to the severity of the event causing the disruption, which should also be noted in order to demonstrate and prove causation. Presenting a claim for disruption based only on start and finish dates of activities (with no reference to whether the activity was continuous) is unlikely to be convincing.

Other points highlighted by our guest included:

- The necessity for early quantum strategy;
- The practical elimination of circumstances in which claims could not be supported;
- Consideration of the tender as a useful tool in the build-up of gang rates;
- In the absence of good Site records, the use of photographs, witness statements, or any other means to support a case;
- Challenge the Responding party for a reasonable approach in order to overcome criticism of the Claimant's

methods and its lack of certain particulars;
- Separately identify time sensitive resources within the Site Overheads (such as dedicated teams of engineers and other personnel for specific technical activities or groups of activities within a Site Section);
- Practice the application of a percentage uplift for Overheads and Profit in respect of additional direct cost claims;
- Consider claiming for "thickening" of Preliminaries, yet differentiating between unabsorbed OH and additional OH;
- Be aware of aspects of "float" on critical activities to Completion and the compensable delay stemming from the exhaustion of float, as an addition to EOT quantum claims;
- Tabulate all notified events and record the delay caused by each event, whether critical or not, then link the affected activities, and the corresponding cost of resources, including indirect costs;
- Segregation of affected activities by the events and the necessity for a reasonable amount of traceable evidence as a basic principle within a quantum calculation;
- Predefine the scope of the claim (i.e. those claims prepared for a commercial settlement, while others will be groomed for arbitral proceedings);
- "Top-down" claims (global or total-cost) vs."Bottom-up" claims (reliant on causation), the latter being the preferred and by far the more robust approach;
- Earned Value Approach – which identifies where the losses are, but rarely evidences that there had been disruption. However, it serves as a useful tool to guide direction of a claim.

All aspects of the foregoing would be useful in the construction of a robust and well thought out claim, further proving entitlement. More importantly, none of which contradict methods that we have adopted in our own quantum assessments. Hence it was acknowledged that the quality of our approaches to claims is not directly related to any unsuccessful outcomes.

Another interesting aspect that became prominent from the discussions with our guest, was the difference in experience, precedents from former cases and the understanding of what constitutes reasonable substantiation, from a tribunal's view, comparing his background experience in countries that have recently adopted FIDIC forms of Contract.

Day 3. Debates

In order for us to experience new perspectives and suggestions, the last day of this training session was dedicated to explicit detailed examples of cases where the simple text book approach would not be applicable, due to the events or circumstances and complexity of the claim, or the lack of detailed contemporary records, in order to improve certain aspects and avoid reliance on global evaluations and estimations within our quantum assessments. Discussions orbited mainly around disruption and prolongation claims or combinations of both.

By the combining of the two different claims, the end result may become distorted due to its complexity and thus, likely denied at arbitration as an invalid claim. Thus, our guest proposed a checklist consisting of primary claims and one or more secondary claims, in order for a tribunal or adjudicator to assess them separately. By this approach, even in the event that some elements of the claim may fail, others may succeed as they would no longer be "spoiled" by the unsuccessful claims.

Other aspects that had been discussed in the previous days of the seminar, became apparent and useful, such as the build-up gang costs in order to prove the productivity that had been envisioned at tender, the tabulation of notified events in order to highlight the critical and non-critical delays and form the link between them and the activities affected, liaising with the client to provide a reasonable level of traceable evidence.

Conclusions

After three full days of debate and brainstorming, we found that we had been exposed to the expert's technical views, his culture in terms of cost engineering and we noted several aspects where improvements could be implemented in future claim preparation, such as the better segregation of risk events and their linkage to affected Sections of the project, the provision of further substantiation of our own techniques by comparing the result with various industry standards or similar projects, using primary and secondary claims in favor of the compendium of claims, and liaising with the contractor in the early stages of the project to enable the preparation of better Site records for future probable claims.

The positive aspects of this training were, amongst others, the common ground we concluded upon in respect of the techniques we use, the knowledge we have absorbed from the Quantum Expert´s 20 years of experience and his endorsement of our detailed and exhaustive manner of addressing a technical subject.

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Techno Engineering & Associates is pleased with its involvement to the first FIDIC/ARIC/EFCA Regional Infrastructure Conference that was held in Bucharest, Romania between 12th and 13th of March 2015

Techno Engineering & Associates is pleased with its involvement to the first FIDIC/ARIC/EFCA Regional Infrastructure Conference that was held in Bucharest, Romania between 12th and 13th of March 2015.

Eastern and Central Europe have been a crucible for FIDIC Dispute Boards for many years now. Several government agencies in the region adopted modified forms of FIDIC for their construction projects and many more use FIDIC contracts on projects where European funding is involved. This has meant the use of Dispute Boards is relatively high in the region which has brought implementation challenges on the leading edge of jurisprudence on many burning issues.

Some of the topics that were discussed during the conference include:

- EU funding for Infrastructure;
- The evolution of FIDIC contracts and Particular Conditions of Contract in the region;
- Modifying FIDIC Conditions - Pros and Cons;
- Licensing of FIDIC Conditions in National Situations - translations, adaptation and harmonization with National Legislation;
- EU Procurement Rules and their impact on FIDIC contracts; Experience from other EU States on Existing Legislation;
- Avoiding and Pursuing Claims under FIDIC;
- FIDIC contracts - Civil and Common Law Perspectives;
- Dispute Boards in Action;
- Arbitration & Alternative Dispute Resolution;
- Capacity Building - Accredited Training;
- Integrity in Procurement and Contracts.

Several key Dispute Resolution Board Foundation (DRBF) members gave papers at the conference including our President & Senior Partner, Mr. Giovanni di Folco, Mr. Chris Miers (DRBF President Region 2), Mr. Lukas Klee (Country Representative for Czech Republic), Mr. David Brown (France) and Leo Grutters (Germany).

Techno Engineering & Associates was very delighted to have the opportunity to promote and to be involved in this event that looked closely at the implementation of FIDIC contracts in a market mainly regulated by public law and through this conference we believe we shared some of the experiences learnt, and compared them with other EU member states and non-member states interested in international construction best practices. After the Conference, Mr. Di Folco declared: *"It was my pleasure as always to have been part of another successful FIDIC Conference. I was indeed impressed with the quality of the speakers from many different countries and I was pleased with overall management of the conference.*

For more details on this topic, you can read the article *"Limitations and Constraints Imposed by Romanian Law on FIDIC Conditions of Contract - A Contractor's Dilemma while Performing Public Works in Romania"* published on Techno Engineering & Associates' website and Mr. Di Folco's blog.


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Happy
Easter!
Techno Engineering & Associates is wishing you
a blessed and wonderful Easter Season!
Techno Engineering & Associates vă urează Sărbători Pascale cu liniște și armonie!