

Further information

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Welcome to the February 2015 edition of Quaystone, the newsletter from the Construction and Engineering Team at Burgess Salmon. This month we reflect on some of the major milestones reached by unconventional energy projects during 2014, and the lessons that they could have for the successful delivery of infrastructure projects in all sectors.

Joined Up Thinking: The Right Contract Terms and Good Contract Management



The construction industry attracted all the wrong headlines at the end of 2014 when major engineering works at King's Cross station overran. Many in the industry will have sympathy with Network Rail's chief executive who pointed out that "in very complex projects sometimes simple things go wrong and these can snowball in short periods of time to become major issues". However, for members of the public stranded in the wrong place at Christmas this will come as little consolation.

Network Rail's contracts with its supply chain would almost certainly have contained robust provisions to discourage late delivery. However, in situations such as this the reputational and financial damage caused by delay cannot be completely compensated by delay damages levied against a contractor. Put simply, the best contract terms will not rectify the mistakes of poor contract management (and the best contract management will be hamstrung by poor or incomplete contracts – see following article).

One area where well established sectors of infrastructure can look to for examples of innovative contract drafting and management is in the delivery of unconventional

energy projects. These technologies must "thrive to survive". They need to avoid problems like those recently experienced by Network Rail in order to gain the support required to reach critical mass or gain regulatory approval. 2014 was a landmark year for unconventional energy projects with major milestones reached in nuclear new build, the first tidal energy schemes securing funding and major rethinks on the procurement of nuclear decommissioning works.

Some in the wider construction industry may question the relevance of lessons learned in unconventional sectors but the reality is that steps into the unknown always create a number of unexpected issues which require innovative solutions. On projects of this nature it is usually not possible to find a single contractor who is willing or able to take on the risk of delivering the whole project. By splitting the project into sections, each package can be delivered by a contractor confident and experienced in that element of the works. It also means that the risk of overall delivery is spread more widely.

However, the multi-package approach creates hundreds of interactions between the package contractors during the design and delivery phases. A small design change (or delay) by one contractor can lead to major redesigns (or delays) by the other contractors. For this reason it is often difficult to secure funding for projects with multiple packages. Funders are, rightly, concerned that without one contractor taking responsibility for overall delivery there is a risk the project may spiral out of control.

Part of the answer is to get the project management and contractor coordination provisions of the contract spot on. This issue is identified in part in the most commonly used standard form contracts in the area, NEC and FIDIC. With its opening obligation that the parties must act "in a spirit of mutual trust and co-operation" NEC acknowledges

The dangers of an incomplete contract



It goes without saying that effective project management is made doubly hard if the contract is ambiguous or incomplete. Discrepancies between the contract terms and the commercial and technical schedules (eg programme, payment schedule, specification) are an area where complex disputes tend to arise. Missing information is another. Often when negotiating a contract there will be some parties that “win” by gaining more advantageous terms and some that “lose” by signing up to terms that are too onerous. However, in either situation certainty should be the key aim of both parties. As long as they know where they stand, most parties are generally able to work within the constraints of a complete contract.

We are frequently asked to advise on disputes arising from incomplete contracts, for example where the executed document is missing key information or schedules. This is particularly the case with contracts in complex projects which are often put together by large, disparate teams – lawyers drafting the contract terms, the technical team putting together the spec and commercial contributing the pricing details. Omissions or discrepancies are perhaps inevitable, especially when there is often considerable time pressure to get a contract signed, such as in the current rush to finalise deals to take advantage of the RoC regime.

The disputes that have landed on our desks in the last few months highlight some common pitfalls to be avoided:

- **Coordination:** the employer should appoint someone to have overall responsibility for making sure that all of the different documents that go to make up the contract are ready and that they align. It could be a lawyer, a project manager or someone in

the employer’s own management team. On complex projects this is no small task and that person should then be given adequate time and resources to do the job properly.

- **Payment:** ensure that the contract explains how costs are to be substantiated and presented to the employer. Depending on the pricing mechanism in the contract this may include the need to provide detailed substantiation of cost, open book pricing or progress reports to back-up each invoice. This may result in substantial volumes of paperwork that need to be analysed for each payment cycle – something that the contractor needs to be geared up to provide and something that the employer needs to consider when deciding how to resource his project management or QS team.
- **Programme:** programming information is critical to delivery for the reasons discussed above. This is doubly so when multiple packages need to be coordinated. The contract terms should cover how the programmes are intended to work (and how they are to be varied during delivery) but these only work if a starting point is included in the contract schedules on day one.
- **Subordinate Documents:** contracts often refer to other related agreements that are to be entered into on, or perhaps after, the date of the contract. These are likely to include security documents, such as bonds, and collateral warranties. To avoid ambiguity about what it is that is to be provided it is conventional to include agreed forms of these documents in schedules to the contract. But if they are missing there are fertile grounds for disagreement and dispute.

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that the collaboration of all parties is likely to be critical to a project's success. Similarly, FIDIC provides that "the Contractor shall...allow appropriate opportunities for carrying out work to any other contractors employed by the Employer". However, such broadly drafted provisions only go so far when it comes to enforcing contractual rights and obligations. Neither form of contract expressly deals with a package contract situation where the inputs of numerous contractors are required. The options left to an employer and its advisers are to either adopt a bespoke interface agreement that all parties sign or to incorporate bespoke interface provisions into each of the package contracts.

Whichever route is taken it is crucial that those terms provide a robust but workable framework to give the project manager a fighting chance of coordinating the contractors' inputs. Diligently following the procedures set out in the contract is a good start but the following tactics come up time and again in examples of successful project delivery:

Planning

Early planning sessions with contractor involvement, such as arranging pre-contract kick-off meetings, help to ensure that all parties understand how interfaces between contractors and the employer's team will be efficiently managed. These sessions should include workshops on how the contract documents are intended to be used which will highlight differing levels of understanding or expectation at an early stage.

Engagement in the spirit of the project

Explaining the strategic objectives to all participants helps to get their buy in to the spirit of the project and foster a collaborative approach. Everybody realises that the success of the project as a whole will be of great benefit to all parties – especially in an emerging sector. The aim is to spend time and resources on finishing the project rather than fighting disputes.

Programme control

Carefully crafted contract provisions dealing with programmes and how they are to be aligned – that all parties understand - help immeasurably. One

solution is to provide for an overall project programme, containing key milestones and the critical activities of each of the packages to be "owned" and maintained by the project manager. Then each of the package contractors creates and maintains its own, more detailed, package programme for its scope of works. All of these programmes must be kept aligned throughout the works but, due to the inevitability of change, the contracts must contain a mechanism which allows the project programme and the package programmes to be modified and re-aligned as required.

Following these provisions whilst listening to the concerns of contractors allow for alternative plans to be put in place early. This is particularly important if the project includes critical dates – such as limited tide conditions suitable for offshore construction works or the timely reopening of a main line rail terminal.

Design coordination

Where there is to be a physical interface between the work of two or more contractors (eg a turbine and its support structure) there must be a timely exchange of design information allowing for periods of review and/or comment to align the designs. Detailed information release schedules and design interface protocols are likely to be required. How this will work in practice is something to be discussed and agreed at the kick-off meetings, perhaps aided by the use of information exchange proformas.

Early engagement on substantive issues

All complex projects inevitably run into difficulties that no one could foresee. Acknowledging and addressing problems early is critical to maintain not only programme but also the confidence of all parties. The aim is to encourage collaborative problem solving rather than finger pointing and disputes.

Ultimately, all major projects, whether in mature or emerging sectors, will live or die by the contract terms that underpin them and the quality of the people tasked with their delivery. Allowing the delivery team the time and resources to get familiar with the contract and adequately plan for the works is critical.

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Team news

We are pleased to welcome Sonia Lopez and Karen Paley to the team. Sonia joins us from an in-house role at SSE plc (Scottish and Southern Energy) and brings a wealth of energy infrastructure and M&E experience. Karen trained at another Bristol law firm and joined us on qualification. She specialises in contentious and non-contentious construction law.



Sonia Lopez and Karen Paley

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