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MARITIME & COMMERCIAL LAWYERS

Negotiating lump sum contracts in
challenging jurisdictions

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Parameters of my talk

My talk is based on the following parameters:

- 1) My perspective is that of an EPCI / installation offshore contractor with a valuable marine spread;
- 2) The project will be carried out in a challenging jurisdiction (“X”). X has the following characteristics:
 - i) It is the first time the Contractor is working in X;
 - ii) There is a lot of corruption in X;
 - iii) In case of a contractual dispute with the client it may not be possible to enforce an arbitration award or court judgment against the client;
- 3) The contract is a Lump Sum (“LS”) Contract;



Three categories of risk

When carrying out a lump sum contract in jurisdiction X three categories of risk can be identified.

- Risks that are typical to all Lump Sum contracts;
- Risks that are typical of all Lump Sum contracts but are vastly greater in jurisdiction X as opposed to a known jurisdiction;
- Risks that are typical / specific of the specific jurisdiction X (e.g. Ebola, piracy, danger of confiscation of property by the state etc.)



The four basic principles of LS contracting in jurisdiction X

Before discussing specific risks I will discuss four basic principles of Lump Sum contracting in an unknown jurisdiction that I apply as a **starting point** of negotiations.

The principles are crude but clear and effective.



Basic principle 1

If we don't understand it we don't do it

Principle 1

If we do not know the jurisdiction, we do not take responsibility for anything we do not understand, such as: tax, duties, permits, approvals, local law etc..



Basic principle 2

Delay = Pay

Principle 2

The price is based on **uninterrupted and continuous** execution of the scope of Work. The Contractor is entitled to a Variation for any costs incurred and / or time lost due to delay in the execution of the Work not solely attributable to the Contractor. E.g.

- i) Access to the site is delayed or restricted, e.g. because of customs or other contractors;
- ii) Delay in delivery of Company provided items / documents;
- iii) etc.



Basic principle 3

Fixed price = fixed work scope

Principle 3

The Lump Sum price only includes what is explicitly described in the Scope of Work (“SoW”). The **precise and specific** definition of “Work” is the very essence of Lump Sum contracting.

Anything **extra** (i.e. not defined in the definition of “Work”) must be paid for. Anything **different** than advised by company (e.g. geophysical data) that causes delay / costs must entitle the Contractor to a Variation

Negotiating the description of the SoW is as time consuming as negotiating the contractual T&C’s



Basic principle 4

I do not want to go bust on this contract

Principle 4

I do not want to go bust on this contract. This principle includes:

- The maximum financial exposure of the Contractor under the Contract.
- The fact that the Contractor must be paid in full and on time and that cash flow must be at least neutral but not negative. I.e., the Contractor is not the financier of the Contract.



Conclusion regarding the four basic principles

During contract negotiations the basic principles I mentioned will help the Contractor to stay focused to identify lot of the specific risks that it will encounter on a LS offshore project in jurisdiction X.

I have summarized the specific risks of LS contracts in jurisdiction X in the table on the next slide.



no	SPECIFIC RISKS OF CARRYING OUT A LS CONTRACT IN JURISDICTION X (Reminder of the four basic principles): 1: Don't do what you don't understand 2: delay is pay 3: Fixed price = fixed work scope 4: I do not want to go bust	Typical LS Contract risk	Increased X risk	Principle
1	Payment terms (Milestones) and securities	x	x	4
2	Global Limitation of liability	x	x	4
3	Limitation of liability for delay	x	x	4
4	Retention of / confiscation of / liens on the Contractor's marine spread	x	x	4
5	Suspension / termination by Company	x		4
6	Company provided information / Endorsement of Company provided info.	x		1
7	Taxes and Customs	x		1
8	Governing law and compliance with local law (incl. local content)	x	x	1
9	Changes of (tax) laws	x	x	1 / 3
10	Arbitration / jurisdiction	x	x	
11	Review and approval of engineering	x	x	2
12	Indemnities, liabilities and insurances	x		4
13	Weather down time	x	x	2
14	Acceptance of Marine Spread	x	x	2
15	Permits, licences and authorisations	x	x	2
16	Access to Work Site	x		2
17	Warranty	x		4
18	Anti bribery and corruption	x	x	
19	Sanctions and export restrictions		x	
20	Changes of laws	x	x	2, 3
21	Force Majeure / hostilities / epidemics	x	x	2

Conclusions (1/2)

The following risks have not been given a principle:

Law and jurisdiction:

If you get the law and jurisdiction wrong, you will not know what you have agreed. Law and jurisdiction are therefore the basis of everything:

- Are the clauses of the contract valid under the applicable law?
- Will it be possible to obtain an award or judgment against the Company?
- Will I be able to enforce the arbitration award or judgment against the Company?

Anti bribery and corruption (“ABC”) / Sanction and export restrictions

You must always comply with the laws of your own country. Also think about FPCA / OFAC etc. Non-compliance is not an option.



Conclusion (2/2)

Commercial reality is that during the contract negotiations you will have to make concessions. Contracting is not a risk free ride and the client will also want to see some commitment from the Contractor! The one principle you cannot make concessions on is principle 4: “I do not want to go bust”. The main points of concern are:

- Limitation of liability and LD clauses – **Are they valid under the applicable law?**
- Payment at termination
- Financial securities (Parent Company Guarantees and Performance Bonds)



The end - Contact details

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Please feel free to contact me with any questions
or comments.

Kind regards

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