

MEDITERRANEAN TRANSPORT INFRASTRUCTURE NETWORK PROJECT (MTIN)

Construction Stage – Financial and Claims, Disputes and Arbitration

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MEDA Transport Infrastructure Network Project



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COST CHANGES WITHIN A CONTRACT

- Every construction contract contains risk relating to cost
- Some are borne by the Employer & some by the Contractor & some by both
- The PM should have an effective cost control system to monitor changes and forecast final Contract Price



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MEASUREMENT AND EVALUATION

- The Bill of quantities, BoQ, is used at tender stage to give each tenderer equal opportunity to price the Works
- The quantities in the BoQ are estimates only at the time of tender
- After award of the Contract, the actual quantities for each item of the BoQ are remeasured
- The Engineer is responsible for remeasurement, and revised quantities are to be agreed with Contractor



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MEASUREMENT AND EVALUATION (CONT)

- The BoQ rates are not to be changed unless Contract states otherwise
- The BoQ rates are to include for all the Contractor's costs, together with risk and profit for undertaking the work specified by the BoQ item
- Where work is required for which there is no BoQ item, then a new rate is negotiated by the Engineer & Contractor



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VARIATIONS & ADJUSTMENTS

- Most Contracts allow for the Employer, through his Engineer to vary the quantity & quality of the works
- Such variations are to be given in writing to the Contractor
- The Engineer can ask in advance of giving a variation for the Contractor to price the work and advise of any EoT implication
- Variations will be measured against the BoQ or as agreed in advance



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REASON FOR VARIATION

1. Changes to the project brief
2. Design modifications
3. Employer's additional requirements
4. Architect's instruction
5. Engineer's instruction
6. Work for statutory Authorities



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INSTRUCTIONS

- Confirmation of verbal instruction
- Verbal or written instruction to be followed by Variation Order issued by authorised person
 - No effect on contract price
 - States the cost of the Variation



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VARIATIONS & ADJUSTMENTS (CONT)

- Most Contracts provide for payment to the Contractor for any legal changes after the award of the Contract that change the costs
- Also adjustment provisions may be allowed for cost inflation through a formula or “rise & fall” allowance
- Currency adjustment is not normally allowed and is a Contractor’s risk



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PAYMENTS

- The Contractor under traditional Contracts prepares a Monthly Statement of value of work undertaken in the month and measured via the BoQ
- The Engineer is to assess the Statement and amend or correct if necessary and produce the Certificate for the period of the Work
- The Employer is required to pay the Certificate within the period stated in the Contract



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PAYMENTS (CONT)

- The Employer is not permitted to change a Certificate
- Any errors in Certificates are to be corrected in the next interim Certificate
- Failure by Engineer to certify, or the Employer to pay, permits the Contractor to suspend & eventually terminate the Contract



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CASH FLOW

Generally Employer has considerable Financial controls over the Contractor

Example of typical contract:

Contract Value – US \$20 million

Contract Period – 20 months

Average Monthly Certificate – US \$1 million

Performance Security – 10% Contract Value

Retention – 10% up to limit of 5%

Payment terms – 60 days from Statement



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CASH FLOW (CONT)

Based on the example after 10 months or 50% of the Contract Period the Employer has following financial security:

	<u>US \$</u>
• Performance security	2.0 million
• Retention at 5% limit on \$10 million work completed	0.5 million
• Additional 2 months work completed but not paid for	<u>2.0 million</u>

Total = 4.5 Million or 45% on work of US \$10 million completed



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CLAIMS

- Preferable description is “Entitlements under the Contract”
- These apply both to Employer & Contractor
- Procedures to follow set out in Contract but early notice of claims is essential
- Key issue is contemporary records are to be kept by Contractor to substantiate claims
- Employer / Engineer should have policy of checking contemporary records



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CLAIMS (CONT)

- For Contractor’s claims, once notified & contemporary records kept, then written substantiation required
- Engineer to assess claim & should endeavour to reach agreement between Employer & Contractor
- Failure to reach agreement requires Engineer to make decision on claims with supporting particulars



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DISPUTES

- Required by World Bank & IFI's in Works Contracts, is a Dispute Board, DB
- DB is established to resolve quickly & cost effectively dispute that arise within a Contract between the Parties
- DB has authority to reverse previous decisions by the Engineer



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ARBITRATION

- Under World Bank & IFI Work Contracts:
- The DB decision is binding on the Parties but can be challenged by either
- If challenged, then next procedure is amicable settlement of the dispute
-if this fails then either Party can proceed to international arbitration
- Arbitration is considered very costly, time consuming and generally to be avoided



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