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Lump Sum Contracts: Not always certain?

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"Lump sum fixed price" is a well-established method of construction contracting in the Middle East and many other regions of the world. Its selling point is price certainty. However, as two recent cases highlight, defining a lump sum contract may not always be as straightforward as might be supposed.

Lump sum contracts

Lump sum contracts are a familiar feature of the construction industry throughout the Gulf. This is to some extent a result of the dominant influence of FIDIC, especially in public sector work. In Abu Dhabi, the Government Standard Form contracts include a version of the Yellow Book, and FIDIC's most widely used lump sum contract is also routinely used or adapted on Government projects in Qatar, Oman and other countries. The EPC Turnkey Silver Book is another widely used standard form of this type.

Problems of definition of lump sum contracts

Many projects conducted under well-known standard forms are clearly on a lump sum basis. But the position will not always be clear. Uncertainty can occur principally from the use of inadequate bespoke contracts or from inappropriate amendment of a standard form. There is nothing intrinsically wrong with changing the payment provisions of a contract. The Red Book, FIDIC's Employer Design Construction Contract, is drafted as a remeasurement contract but it can be adopted as a lump sum contract.

Uncertainty arises: two recent examples

Recently, two very different decisions provided a salutary reminder that these issues are not confined to one jurisdiction or one construction industry.

On 2nd June 2016, the High Court of Singapore gave judgment in *Goh Eng Lee Andy v Yeo Jin Kow* ([2016] SGHC 110).

- The case concerned a residential project, where the basis of the contract was no more than a combination of a schematic design, a final quotation and the Construction Drawings.
- The court had to decide whether this constituted a design-and-build lump sum contract because it would give the owner "the advantage of price certainty" in circumstances where the contractor was claiming entitlement to additional payments.
- It was held that "by entering into a 'design and build' contract without more, the owner and the contractor have agreed on a lump sum payment by the former in return for the construction and delivery of a project by the latter that is in accordance with an agreed design". So it was concluded that a design-and-build contract, unless there are express terms to the contrary, will necessarily incorporate a lump sum price component, which in principle must be correct, though it was hardly desirable that it should have taken a visit to the High Court to establish that this was what the parties had agreed.

In London, the Privy Council gave judgment on 19 July 2016 in an appeal from the Supreme Court of Mauritius.

- The project was a thirteen-storey office building in the capital city, Port Louis.
- The main argument between the parties was whether the contracting method chosen was properly regarded as lump sum or measurement. One of the difficulties was created by the choice of an outdated English form of contract (JCT 80) of which, as the court noted, “developers and contractors in Mauritius have little experience”.
- A final account dispute under the contract was referred to arbitration. The arbitrator decided that it was a measure and value contract, or alternatively that if it had been agreed as a lump sum contract it had been varied by the parties so that payment was due on a measurement and value basis.
- The Privy Council found that the terms of the contract, as amended, indicated that a lump sum payment was intended. However, they observed that there is some scope for flexibility in the valuation of additional or substituted work, even in a lump sum contract. Here the lump sum nature of the contract had been maintained by preserving the preliminaries unchanged, but the use of measurement and valuation to ascertain the sums payable for additional work need not be inconsistent with a lump sum contract. The challenge to the arbitrator’s decision failed.

Conclusion

It is ironic that a contracting model intended to achieve certainty of financial outturn can itself give rise to doubts as to its identity. This need not be so if appropriate arrangements are made for the contract form, whether FIDIC’s Yellow or Silver Books or bespoke alternatives. Problems occur, as the recent examples show, with bad choices and inadequate adaptations. It should not take the decision of an arbitrator or a judge to confirm the nature of the pricing model which the parties agreed.

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