

FROM THE GROUND UP

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Port development projects are fraught with risk. Harsh and unpredictable weather patterns and unstable or unsuitable land conditions can keep developers (and their lawyers) awake at night while project costs spiral out of control.

Australia has a number of major port development and expansion projects in progress including the Gorgon and Gladstone LNG projects and the recently announced A\$1.2 billion expansion of the Port of Melbourne.

These projects have faced numerous well-reported construction challenges. The cost of the Gorgon LNG jetty, for example, is reported to have increased from the initial A\$900m to A\$1.85 billion due, in part, to weather-related delays.

Two sources of major cost blow outs are latent conditions and adverse weather risks.

Unknown risks

It would be rare for any port construction project to proceed without some unforeseen ground conditions becoming apparent. The cost of dredging or land reclamation works can be significantly impacted by what lies beneath the surface of a harbour.

The history of port construction is littered with examples from the discovery of disused infrastructure to unexploded bombs (as Inpex discovered on its Ichthys LNG plant off the coast of Darwin).

To address this, many contracts simply seek to transfer all risk for latent conditions to the contractor by requiring the contractor to have examined the entire site and all available information.

While clearly beneficial for the principal, the general view is that there is little point in casting all responsibility on a contractor who has no means of ever determining the full



extent of the risks - this is simply a recipe for disputes.

A more 'balanced' allocation of responsibility is to transfer risk that any reasonable and competent contractor would have been able to ascertain from the information available.

Early involvement

Another approach is the design, novate and construct model (DNC).

A DNC arrangement involves instructing consultants such as civil or geotechnical engineers to prepare preliminary designs or reports. Once the contract is let, the D&C contractor assumes responsibility for this work product with a potential right of recourse in the event of error by the consultant. The added advantage is that these reports can be provided to parties submitting tenders, so that more accurate tender pricing can be achieved.

Key problem areas with this model include the addition of contingencies by tenderers, to take into account defects in the consultant's design;

longer bid periods to allow tenderers to review the consultant's work; and refusal to tender where there are real doubts over the accuracy of the work product.

Weather delays, ranging from extreme conditions such as cyclones to persistent rain, can have a significant impact on the progress of a project. For example, different methods may be required to cure concrete in rain and flooding can impede access to the site.

Wild winds

Weather related delays are often 'neutral events' which do not give a right to claim for extensions of time (EOT). Some contracts allow only EOTs for 'exceptionally adverse weather conditions'.

Where progress is delayed by the owner (e.g. in not giving access to the site) and the delay results in the work progressing in poor weather, the contractor may be entitled to an EOT regardless of the exceptional nature of the weather.

It may be a false economy to

require a contractor to assume all responsibility for certain weather conditions if the potential cost to the contractor is then passed on to the principal as a tender price contingency.

Many disputes turn on the risk allocation in the agreement. For potential big ticket items like weather delays and latent conditions, the risk allocation agreed during negotiations needs to be reflected in the contract.

Where this does not happen, it can generate a secondary latent condition in the form of a bottomless financial pit for one of the parties.

Trawling through the contract negotiations to establish the risk allocation is, under most common law legal systems, a difficult and fruitless exercise. In a nutshell, it pays to get it right from the outset.

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