Consultants' Roundtable - Opportunities and Challenges for Consultants in the UAE

In March 2017, Beale & Company (Middle East) hosted its first in a series of industry focused roundtables for our consultant clients and friends. The roundtable was held under the Chatham House Rule and provided an opportunity for consultants to share opportunities in the UAE and wider region and to debate the challenges they face now and in the future.

The roundtable covered a range of topics including:

- Opportunities;
- The contractual landscape in the UAE and wider region;
- Obtaining payment; and
- The dispute culture in the region.

It is clear that whilst there are some significant opportunities including mega projects for those active in the construction, engineering and infrastructure sectors, there are a number of real challenges including risks which are inherent and need to be managed in the UAE. The market in the UAE is a huge contrast to that, for example, in the UK, Europe and USA.

This note summarises some of the key items discussed at the roundtable: as a note for the attendees but also for wider circulation to other consultants in the region to raise awareness, amongst other things.

A further roundtable and other meetings of consultants active in the UAE will be arranged by Beale & Company for later in 2017 to build on the discussions at March 2017’s roundtable.
Opportunities and funding?

The general consensus was that there are significant opportunities in the region arising out of various mega projects including Expo 2020, the Dubai Metro extension and others.

However, opportunities were not always coming to fruition. In relation to Expo 2020, all the significant number of projects which were publicised as being required for Expo 2020 have not materialised. There is still a lot of bidding for work and competition, all of which is taking up significant cost and time for consultants. Generally, things are quiet but the overall feeling is that the bigger projects need to and will come through.

There is concern as to what is next after Expo 2020 as little beyond this seems to be happening aside from the major infrastructure projects. Perhaps there are opportunities in the education and health sectors, and a significant need for maintenance and lifecycle, but these will not mirror the opportunities proposed prior to Expo 2020.

Some consultants are seeing a lot of upfront design being required, both concept design and also in relation to RFPs, even pre-concept design, but nothing following this. There was a large amount of master planning workarounds but, again, these materialising into actual projects was simply not happening. This is sometimes carried out for free or as a loss leader with a view to winning the future work, which is obviously frustrating and challenging.

There is probably “less cash in the system” than there has been in recent years because of market conditions and therefore financing construction projects is becoming an increasing issue. There seems to be a lot of discussion with regard to funding even so much as asking the consultants whether or not they can organise export credit finance for the job!

There was scepticism as to whether PPP could take off in the region for various reasons. There is a cultural issue of not wanting to let go which is required for a successful PPP project where you really need to give it over to an expert who hands it back. Also with the longer term projects, there are issues in relation to the significant turnover in client staff which can affect the success of a PPP project. There was also speculation that given the ability of the Government to easily change laws, this may be hindering PPP where parties are uncertain about participating due to the risk in the law changes to suit government clients.

In relation to planning policy, there was a feeling that employers are taking a more longer term planning policy perspective, rather than simply getting the building up with little thought about the planning approach. Thought is needed to be given by the government in relation to the significant number of expensive apartments but also to the large section...
of the population who cannot afford to live in those buildings. There is a need in relation to housing which is simply not being addressed.

The use of BIM and other innovations

The consensus was that there is a lack of understanding about BIM in the region especially amongst clients. This must present an opportunity for consultants – educating employers at the outset of the project.

There was general positivity around Beale & Company's role in educating employers in relation to BIM. There was hope that this would spread amongst other employers once it is known that certain are doing things correctly. However, part of the issue is the employer's lawyers not understanding BIM and therefore drafting appointments which simply do not make sense.

It was felt that given the lack of progress in relation to Expo 2020 as it nears, there is likely to be a need to innovate in order to get things delivered in time. There was a feeling that there may be innovation in order to rush towards Expo 2020. This could be exciting for consultants although it will bring its own challenges.

Contractual landscape in the UAE including sub-consultancy agreements

There is still with some developer clients a 'take it or leave it' approach. However, with others it was felt that there is an ability to negotiate, although consultants generally feel that they have little leverage in relation to negotiations due to the threat of blacklisting, amongst other things.

It was acknowledged that the contractual terms in the UAE are generally onerous and at times unclear, and negotiations are unpredictable. In particular, onerous terms are being required by employers without a real understanding as to the needs or purpose for them. The contractual framework is very different to that in the UK, USA or Europe and parent companies outside the UAE need to understand this.

There is a general feeling that overall the contractual landscape was improving with better understanding and with technology making things simpler, it is an improved marketplace in this respect. It was noted, however, that as consultants were hungry for the work, the businesses are softening in relation to contracts. This is always a sign of a market slowing.

Tender bonds are a challenge but overall there was consensus that they seldom get pulled, although one attendee has very recent experience of the issues arising out of a called tender bond. In relation to the issue of submitting qualified
bids and the risk of a bid becoming unqualified, one consultant’s approach was always to submit two bids, one compliant bid and one non-compliant bid: an interesting approach.

There was a feeling that consultants should band together and make sure they do not inflict the same harm on each other in relation to sub-consultancy arrangements. There was talk of some consultants operating automatic back-to-back provisions where it was illogical to have those and also sub-bonds! There was a call for consultants to work together and have sensible engagement in relation to sub-consultancy agreements so that something positive could come out of the forum/roundtable - there is demand it was felt for a well-drafted standard form sub-consultancy agreement. Beale & Company are looking at this.

In addition to the “bucket list” of terms that consultants always seek to incorporate such as limits of liabilities, there was an appreciation that there was also a need to focus on how the contract worked, so that on a project the delivery team dealt with, for example, variations properly. Clauses which govern the working relationship need to be given attention to. One consultant uses pro formas which they set-up early in order that the project team talk the same language as the contract in their project documentation. Also, others have summary documents that sit alongside the contract to highlight key terms (e.g. deadlines for notices) in relation to the operation of the contract. These are all good risk management approaches.

Consultants said that generally they try to tailor-make sub-consultancy agreements but there is laziness which creeps in where standard sub-consultancy agreements are sent out and if there is kickback on this, then a short form may be provided. This approach is simply due to lack of time and there was general agreement that a proportionate approach on all projects should be endorsed.

JVs are not overly fashionable in the region albeit there is a lot of work which is done as part of consortiums.

It was discussed that difficulties arise on projects when there are different design standards, given the make-up of the consortia, such as the EuroCodes and US standards as well. This can cause complications in terms of delivery of services. There needs to be absolute clarity on what design standard applied or took precedence.

There is a feeling that little attention is given to the scope of services and that quite often our consultant clients see fitness for purpose type provisions being incorporated into the services or real ambiguity in wording and, for example, a lack of clarity as to what international standards and best practice means.

Decennial liability is a risk in the UAE market which is spoken a lot about, but is it really a concern? There was a mixed view. Whilst the consultants could see sense in taking on supervision obligations in order to check on the quality of the construction given the potential for decennial liability, the difficulty was that whilst due diligence could be carried out on the contractual team, there was no control over the process and quite often there was a feeling that the lowest bid was
accepted and therefore the poorest quality contractor. In those circumstances, the consultants did not want to be supervising.

Payment and getting paid

Consultants have very little leverage where there is non-payment. Possibilities are the threat of suspension and holding back on deliverables, but suspension rarely carries through because of the relationship issues, but also costs involved in re-mobilisation. One consultant has recently suspended and was very careful to do so in accordance with the contract and with the awareness of the client.

It was felt that holding back on deliverables was a sensible threat but quite often not acted upon. No-one felt the ‘good faith’ obligation enshrined in the Civil Code assisted in relation to poor payment practices.

It was felt that the suspension clause was a key one to get into a contract as if nothing else, the threat to suspend could be good leverage. Unfortunately, it is not often that the suspension rights are included in a consultancy agreement. However, a right to suspend for non-payment can arise out of the Civil Code.

Parent company guarantees are often requested but clients have now tuned onto the need for an ultimate parent company guarantee rather than a company which was not “worth the paper it was written on”. A few consultants had a corporate policy never to give a parent company guarantee and never provide insurance policy documentation. There was a real sense that ultimate parent company guarantees were being requested especially in Qatar.

Dispute resolution and the local courts

None of the group had actually been on the receiving end of decennial liability claims, albeit they had been threatened on a few occasions, but usually in circumstances which were not a decennial liability situation, i.e. the defect did not threaten the stability of the structure. There was a feeling that fire was a significant risk area in relation to decennial liability as there were a lot of buildings that are still at risk in relation to fire.

There was a general consensus that consultants needed to avoid getting into the courts albeit few had actual experience in relation to the local court process. There was a general feeling that the quality of the court-appointed expert was an issue and not something that the parties have any control over. There was some horror stories as to experts in different disciplines being appointed by the court and coming up with bizarre opinions even when matters were clear-cut. If possible, arbitration was sought as a more beneficial tribunal.
Conclusion and future events

In conclusion, it was felt that those projects where there are good relationships, low staff turnover on all sides and also excellent communication within the various parties, are the ones that succeed, but these are rare. It was also felt that consultants that make a nuisance of themselves to clients and contractors, do far better than those that simply roll-over and capitulate.

Overall, there is a feeling that the understanding of the “UK head office” had improved in relation to the Middle East market, but some still struggle to understand the market. One consultant commented that Middle East expectations were quite a common discussion point with head office.

It was agreed by all that the roundtable was an excellent forum for consultants to come together and share their own experiences including lessons learned. Beale & Company were encouraged to arrange a further consultant focused roundtable or informal gathering for later in 2017.

In order to preserve the discussion led nature of the roundtable format, numbers for future roundtables will continue to be strictly limited, However, if you would like to express your interest in contributing to further discussions, we would be very pleased to hear from you.

In the first instance, please direct any expressions of interest to marketing@beale-law.com or call +971 (0) 4 356 3900.

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