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HOW TO MANAGE REDUCTIONS TO THE SCOPE OF WORKS

Claire Miller, Managing Partner and Jeremy Russell, Senior Associate at Beale & Co, discuss the legal nuances involved in managing reductions to the scope of works in construction contracts

An employer may descope elements of work under a contract for numerous reasons, including financial constraints and incomplete design, which could otherwise expose an employer to prolongation costs or a change to the overall project requirements.

As these issues begin to impact the numerous ambitious projects in the Middle East, we expect to see employers more frequently seeking to remove or omit elements of work from the contractor's or consultant's scope (sometimes referred to as an omission or negative variation).

It is important to manage reductions to the scope of works and the impact omissions may have on contractors and consultants.

CHECK YOUR CONTRACT/APPOINTMENT

How contracts deal with the right to descope works varies across different standard forms. Most contracts address the omission of works within the variation clauses and typically include limitations on the extent to which works may be omitted. These often include express prohibitions against the employer assigning the omitted work to another contractor.

Professional appointments don't typically

include express provisions relating to omissions of services. Consequently, they are usually addressed via the change order process set out within the appointment.

EXPRESS NOTICE AND MANAGEMENT OF OMISSION

As with other variations, when omitting works, the employer must meet basic contractual notice requirements, including the provision for the notice to be in writing.

If the omission impacts the quality or quantity of the work items, the sequence of works, testing and commissioning, coordination, or

other parts of the works, it must be raised with and addressed by the engineer.

Consultants must ensure that change orders are as detailed as possible, including any cost of the omission and re-works to designs already completed, which have been abortive or redundant as a result of the omission.

VALUATION

Commonly, an omission will involve a deduction to the contract price or fee for the relevant omitted works or services. There may also be a mechanism for compensating the contractor or consultant for costs they may have incurred prior to the work being omitted (including overheads).

The Bills of Quantities will be the starting point; however, the direct costs included in the rates may be impacted by reduced buying power, supply contracts already entered into, and costs already incurred. There will be further issues with indirect costs, and a straight pro-rata deduction will not account

HOW TO MANAGE

Descoping is more than a simple adjustment to the contract price or appointment fee.

Where works are omitted, it may lead to—amongst other things—new interfacing works, coordination changes, additional design or re-works, warranties, additional costs, delay, insurance premiums/coverage changes, and handover procedures/deliverable changes.

Each of these issues will need to be thoroughly considered and carefully managed.

LEGAL CONSIDERATIONS

While descoping is not prohibited by law, the manner and circumstances of the reduction in scope must not be in breach of the obligation to exercise contractual rights in a manner consistent with the requirements of good faith (Article 246 of the UAE Civil Code and Article 95 of the KSA Civil Code).

It must also be in a manner that does not constitute an abuse of a party's rights (Article 106 of the UAE Civil Code and Article 29 of the KSA Civil Code).

In the UAE, contractors and consultants may be entitled to compensation from an employer for descoping works, pursuant to Articles 895 and 887 of the UAE Civil Code. Under both the KSA Civil Code (Article 137) and the UAE Civil Code (Article 292), contractors and consultants may, in some circumstances, be entitled to compensation for loss of profits in the event of descoping of works.

KEY TAKEAWAY

As employers exercise their entitlement to descope more frequently, effective management of reductions to the scope of works is paramount to minimising impact and disputes. ☑

for mobilisation or set-up costs. Therefore, the value of a deduction is frequently an area of dispute. As many packages are subcontracted, they will also need to be managed down the supply chain. When not agreed upon, contractors' or consultants' supporting particulars, evidencing the unrecoverable costs incurred due to the omission, will need to include those for which they are liable downstream.

TERMINATION FOR CONVENIENCE

Care should be taken if the entirety of the remaining scope is to be omitted and re-tendered. This practice is generally prohibited but may be allowed under certain bespoke forms of agreement.

Termination for convenience requires an employer to have the right to unilaterally terminate the contract or appointment for convenience without the need for a court order.

Regard must also be given to Article 895 of the UAE Civil Code, which provides that a "party suffering harm by the cancellation may make a claim for compensation against the other party to the extent acknowledged by custom."

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