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# *Sponsor checklist*



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## *Introduction*

This paper provides a general checklist of issues to be considered by project Sponsors during the development of a facility in order to protect their position. It focuses on construction and commissioning issues.

The checklist identifies specific risk areas and suggests strategies which may be taken to alleviate those potential risks. It is intended as a general guide only and would need to be considered in light of the specific circumstances of each project including the project agreements.

## *Protection of completion date*

### *General Issues*

- Ensure correspondence on any extension of time claims comply with the notice requirements under the EPC Contract.
- Carefully consider the wording of the extension of time clause in order to reject claims that do not comply with threshold requirements.
- Ensure any requirements for the Lenders' engineer approval of extension of time claims are complied with under the EPC Contract and the tripartite or direct agreement.
- Continually monitor possibility of reaching commercial positions with the Contractor regarding extensions of time if they are in the best interests of the project and can assist in accelerating completion. Any agreements must be documented effectively.

### *Implementation of delay claim process*

- Implement a comprehensive delay claim process which must include:
  - Reviewing compliance by the Contractor with any conditions precedent in the extension of time clause.
  - Maintaining an extension of time register which allows for effective logging by the Sponsors' representative of the respective claims and the documentation supporting those claims.
  - Ongoing analysis by the Sponsors' representative of specific delay claims and gathering of information to rebut claims. This information should be gathered as close to the time of the claim as possible.
- Implementation of a comprehensive and vigilant delay claim process will assist the Sponsors' representative in protecting the rights of the Sponsors. For example, if a claim is made for failure to provide sufficient consumables, a review at the time of the delay event may allow the Sponsors' representative to refute the claim by showing that the Contractor's use of previous supplies was wasteful and, as a result, no extension is warranted. Leaving this review to three months after the event may make it more difficult to make that argument effectively as the people and/or documentation may not be accessible.

## *Protection of delay liquidated damages*

### *General Issues*

- Ensure close monitoring of extension of time claims and their impact on the position with respect to delay liquidated damages.

- Demands for payment of delay liquidated damages should be issued in a timely manner.
- Monitor status of progress payments and ability to set off progress payments in lieu of the payment of delay liquidated damages. The last thing Sponsors want is to make progress payments (or any other payments that might otherwise become due to the Contractor) in circumstances where the Sponsors have a right to withhold or deduct payment in lieu of the payment of delay liquidated damages.

### *Interface Issues*

- Review and understand interface issues with respect to the recovery of delay liquidated damages under the EPC Contract and any obligations under the offtake agreement.
- Understand the Lenders' rights regarding the allocation or entitlement to delay liquidated damages and the flow of these funds under the relevant financing agreements.

### *Commercial Position*

- Consider possible acceleration strategies which reduce delay liquidated damages recovery but accelerate construction. Any agreements must be documented effectively.

## ***Protection of Sponsors' interests – Testing, performance and commercial operation***

### *General Issues*

- Undertake a review of the testing requirements under the EPC Contract and the offtake agreement and protocols developed to satisfy the respective testing requirements.
- Resolve uncertainties in the testing measurement methodology as early as possible to avoid delay and confusion.

### *Performance liquidated damages*

- Review timing and measurement of performance testing, including any testing fuel specification issues.
- Develop procedures for repeat tests with the Contractor. For example, if a specific test is required to be repeated, any related test must also be repeated.

### *Consumables*

- Discuss consumable requirements for commissioning and testing with the Contractor including quality issues, quantity and timing for provision.

### *Commercial operation*

- Review the requirements for commercial operation under the offtake agreement to ensure a smooth interface with completion under the EPC Contract.
- Seek prior agreement from the offtaker for the requirements for declaring commercial operation and the necessary formal documents that need to be submitted.

### *O&M manuals*

- Ensure adequate review has been conducted of the O&M manuals

- Spare parts
- Ensure ongoing monitoring of spare parts inventory, especially long lead time items

## ***Protection of Sponsors' interests under the financing documents***

### ***Rights of Lenders***

- Ensure understanding of the rights of Lenders under any direct or tripartite agreement with the Sponsors and Contractor.

### ***Rights of Lenders' engineer***

- Determine if the financing documents require various testing/certificates/extensions of time to be approved by an engineer appointed by the Lenders? If so, ensure the Lenders' engineer is consulted as early as possible.

### ***Drop dead dates for completion/funding***

- Monitor drop dead dates for project funding/completion and ensure that the various requirements are met.

### ***Lenders rights claims and waivers***

- Review the rights of the Lenders with respect to claims and the ability of the Sponsors and Employer's Representative to compromise claims without Lender approval.

## ***Protection of security***

### ***Withholding progress payments***

- Review contractual (or merely commercial) ability to set off progress payments in lieu of the payment of liquidated damages.

### ***Release of retention monies***

- Review contractual (or merely commercial) ability to withhold the release of retention monies in lieu of the payment of liquidated damages.

### ***Worst case scenarios – Calling the bond***

- Although in practice, the calling of a bond or a guarantee is an infrequent option, the threat or prospect of making a call can prove to be a very important commercial bargaining device.
- Calling the performance bond. Review nature of the performance bond. Is it a conditional or unconditional bond and what notification procedures are required?
- Enforcing parent company guarantees. Monitor any ongoing rights of the Sponsors under the relevant parent company guarantees. Ensure compliance with all relevant notice requirements eg, notification of any claims against the Contractor.

## ***General administration issues***

### ***Contract administration procedures***

- Ensure appropriate contract administration procedures are in place. This will enable the Sponsors to quickly identify and react to issues as they arise rather than simply responding to issues raised by the Contractor.
- Ensure all correspondence is answered in a timely manner.
- Ensure all correspondence is drawn up with care and an understanding of its possible implications. For example, correspondence may be interpreted as the Sponsors' assuming a risk for which they are not responsible under the project agreements. This may result in the Sponsors being estopped from denying responsibility for that risk.
- Best for project must be the catchcry for all discussions and correspondence. Despite the need to protect the Sponsors' commercial position, our experience from involvement in the construction phase of a number of projects has taught us that dealing with the Contractor is not only about maximising commercial positions but also about fostering relationships for mutual gain.

### ***Communication process***

- Implement a communication process which allows all parties to identify risks and take appropriate actions. Ideally, the Sponsors' representative under the EPC Contract should:
  - Meet with the construction manager at the start and end of each day
  - Organise a formal weekly meeting with the Contractor.
- Flowing from those meetings, action items and deliverables, which may include programme amendments, defect reports and environmental and safety issues should be documented and distributed. These action lists should be reported against at subsequent meetings and escalated as necessary.

### ***Claim/event documentation system***

- Implement a system which documents all correspondence and claims, including the establishment of a formal register of claims, variations, back charges, insurance issues and warranty compliance.
- Document major events immediately following their occurrence in order to protect the Sponsors' position in the event the Contractor makes a claim. Detailed records must be maintained for daily events and programme issues.
- Use of technology in contract administration must be considered to allow for the efficient and effective management of the project. For further information look at the following website: [www.affinitext.com](http://www.affinitext.com)

## ***Conclusion***

Apart from the specific issues raised in the above checklist, it is clear the most effective way to protect the position of the Sponsors during the construction and commissioning phases of a project is to ensure effective administration and review procedures are established and maintained during the life of the project.

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