

CASE STUDY: CONSTRUCTION & ENGINEERING

CLIENT	International Energy Contractor
PROJECT	Energy from Waste Plant
CONTRACT	Bespoke contract
CONTRACT VALUE	£105m
WORK SCOPE	Engineering, Procurement and Construction Contract (EPC)
BLAKE NEWPORT SERVICES PROVIDED	Negotiation of EPC Contract.



SITUATION

The client had been awarded preferred bidder status following a series of competitive tenders. Their prospective client was a Special Purpose Vehicle (SPV) company that was in the final stages of negotiation of a Project Agreement on a PFI basis.

The client had tendered against an Employer's Requirement document and a set of Key Terms and Conditions. A draft set of contract conditions had been proposed by the SPV, and Employer's Requirements were continuously updated by way of an extranet document control system. One unusual scenario was that commencement of the project could be deferred at SPV option for up to four years.

The general approach taken by the SPV was that all risks should be passed down from the employer under the Project Agreement to the EPC contractor via the EPC contract. It was evident that the draft of the EPC contract proposed by the SPV was based on the Project Agreement which had been reinforced and expanded by inserting certain standard clauses from the FIDIC Silver book.

OBJECTIVE

Our client's objective was to minimise those risks that were unusual or very onerous. Blake Newport was engaged to provide guidance and interpretation of contract terms and to appraise the client of differences from the original concept and the risk balance of the proposed contract. Ground conditions and diversion of existing services and the responsibility for access roads and the like were immediately identified as volatile areas. Additionally it was necessary to introduce an indexation mechanism that protected the client from inflationary increases in cost over a potentially extended period prior to a deferred commencement.

Blake Newport's role included a practical appraisal of the proposed terms and assisting the client's lawyers in proposing changes to the draft contract. Blake Newport also provided support to the client in their negotiations with the SPV.

IMPLICATIONS

The SPV were developing the project on the basis of limited resource financing and therefore were very keen to transfer risks to our client. The final determination of the contract price, timing and schedule for completion of the works were dependent on our client obtaining a clear understanding of any change in the balance of risk.

The continual updating of Employer's Requirements, constant changes to the proposed contract terms and the uncertainty surrounding planning permission and the probable commencement date of the project represented a substantial challenge to ensure that the project would remain financially viable to our client and that time and cost contingencies were not eroded before commencement.

The provision for the effective start of the contract to be deferred for up to four years during a period where construction costs in the UK were likely to be subject to high increases, had to be addressed. Inflationary factors were likely to be different within the various sectors of procurement and were unpredictable. Procurement by our client was expected to be throughout Europe and the Far East and in differing currencies. The SPV were not prepared to reimburse on the basis of UK inflation when it was probable that procurement would be effected on a world-wide basis.

CASE STUDY: CONSTRUCTION & ENGINEERING

BLAKE NEWPORT SOLUTIONS

Blake Newport worked with the client's legal team to ensure that the Employer's Requirements and contractor's proposals were sufficiently aligned to give certainty to the scope of obligations. Particular emphasis was given to design development issues arising during the planning application phase to ensure that these were identified as Employer Changes. The proposed contract terms and schedules were checked for practical application and scenarios were produced to illustrate the extent of risk inherent within the time and performance damages provisions.

The general approach taken in responding to the SPV was to assert that the allocation of risk should be fair based on the usual treatment of risk under the FIDIC Silver book. Blake Newport devised an Indexation Mechanism to allow the adjustment of the contract price during the probable lengthy period from contract signing to commencement of the contract works. This escalation formula established a protocol of work groups and work categories, split the contract price into currency categories and identified indices from various international and UK sources relevant to the work group content

OUTCOME

Following extensive negotiations with the SPV the EPC contract was signed simultaneously with the Project Agreement. The price was increased beyond that previously tendered. The client was satisfied with the final allocation of risks and that such risks were either reasonable, had been taken into account in their contract price or were risks that they were familiar with.

Blake Newport has continued to provide support to this client during the Planning Application phase and has assisted in applications for additional cost associated with employer design development.