



performance of the contract [4].

VI. Title / Risk of Loss / Builders All-Risk Insurance

When negotiating an EPC contract there are certain factors to have in mind to balance risks regarding: Title / Risk of Loss /and Builders All-Risk Insurance:

(1) at Contractor warrants and guarantees to the Owner that legal title to and ownership of the Work, including Equipment, Project (Drawings, Reports, Data, Specifications), and Real Estate shall be free and clear of any and all liens, claims, security interest or other encumbrances. On the other hand, the Contractor must make sure that exceptions are made by defining certain Permitted Encumbrances.

(2) at title to all Work or portions thereof pass to Owner upon payment by Owner or delivery of item to the Project site.

(3) Notwithstanding the acquisition of title of the Work by Owner, Contractor shall bear the risk of loss and damage at least until Substantial Completion and regarding Equipment until it has been properly installed and tested. On the other hand, Contractor must include a carve out that such obligation of Contractor to bear the risk of loss and damage of the Work is conditioned on procuring and maintaining by Owner at all times during the term of the agreement a Builders All-Risk Insurance.

(4) The Builders All-Risk Insurance procured by Owner must be for the benefit of both Contractor and Owner and must be in effect until Final Completion. Notwithstanding Owners obligation to obtain this insurance, any deductible from this insurance before Substantial Completion shall be paid by the Contractor and Contractor will have the primary responsibility for managing any claim but in all cases, shall include Owner on all communications with insurers and shall provide to Owner sufficient notice of, and shall provide Owner the opportunity to participate in all meetings with insurers.

VII. Requirements Definition

Contracting strategy is crucial to any business / project / company, and it must be seen as a transversal and interdisciplinary process where all interested areas and disciplines of such business / project / company

committee who shall among other duties keep during construction of the project authority to approve decisions that might create material changes to the project and/or change the ordinary course of business of the project [8].

XIII. Clarity and Exhaustiveness in Assignment Agreements is something important

It is common practice to assign contracts by very simple notice procedures; many contracts have provisions that allow this. Let's say an Owner terminates an EPC contract due to a delay in achieving completion by the EPC contractor. Also pursuant to a term in the EPC contract Owner demands that the contractor assigns a supply sub-contract to the Owner. The delay in the supply of the key elements for the works is the main reason why the contractor was on delay. Due to the termination of the EPC the contractor is obliged to compensate the Owner. The contractor later seeks to obtain compensation from the supplier sub-contractor but the sub-contractor denies responsibility to compensate the contractor since his subcontract had been assigned to the Owner. This situation could have been prevented and avoided if the assignment agreement had been clear and exhaustive regarding the right of the contractor to keep the right to sue the supply subcontractor.

XIV. When Drafting Services contracts distinguish between Obligations of Results and Obligations of Means

(1) The debtor of an obligation of result is obliged to provide a promised result [9].

(2) The debtor of an obligation of means is required to perform his services with the prudence and diligence expected from a person of the same quality, placed in the same situation. When entering a services contract, make sure your requirements definition considers and points out clear and exhaustively a distinction between the obligations of results and the obligations of means expected to be supplied by the services provider. Obligations of means and obligations of results can coexist in the same contract. For example, a company that sells equipment also provides certain warranties and/or maintenance services and can be considered as having an obligation of means concerning the quality of the repair in general, and an obligation of result concerning the replacement of certain spare parts.

XV. RFI's, RFP's, RFQ's

Contracting International Best Practices have developed a common flexible business process where its correct implementation, coordination, and documentation has also become international best practice and standard for different commercial documents intended to record the formation of a contract. Request For Information, Request For Proposal, and Request for Quote are all parts of a flexible documented business process intended to achieve the formation of a contract. Implementing the correct coordination and flexible use of this documented process in any contract management strategy is crucial for any business to be successful.

One legal issue regarding the risks involving starting the formation of a contract within a procurement focused contractual strategy, is that

all RFI, RFP, and/or RFQ (Request for Information, Proposal or Quote) leave no room to interpretation that the offer-acceptance process for the formation of the contract will start to form, from the offers issued by the suppliers invited to participate and that all expenses made by the participants with the purpose for preparing their offer are at their own risk and expense [10].

XVI. Change in Law as a Defined Term in a contract

"Change in Law" shall mean any of the following events that occur and take effect during the term of this Agreement and that demonstrably and adversely affect either Party's rights, the performance of the obligations hereunder, the Scope of Work, the Project Schedule or the Contract Price:

- (a) Any issuance or promulgation of a new Applicable Law;
- (b) The alteration, modification, abrogation, or derogation of any Applicable Law

Conclusion

Any new interpretation of any Applicable Law with mandatory effect given by a Governmental Authority which is contrary to the interpretation in effect prior to the Execution Date.

Acknowledgement

None (TJ@tfs)