Dutch Construction Contracts

Views from abroad

Conference, Amsterdam

15. October 2010

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Dutch Construction Contracts
Views from abroad
The Danish view

THEME 5: PUBLIC LAW RISKS

(PERMITS, CHANGE IN LEGISLATION, ETC.)

Relevant Clauses

UAV-GC 2005: Article 6 (Model Agreement), clause 9, 10.

DFBM, clause 9.2, 9.3, 10.5, Schedule 4, Clause 3.

ProRail supplements and/or amendments to the UAV-GC 2005, Clause 01 and 02

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The “listed risks procedure”

Responsibility for the subjects listed are defined and attributed.

What about unforeseen, necessary permission.

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Is it reasonable to transfer such risk to the Contractor?

After all the ownership of the site and the final construction still remains with the Employer.

Is this factor relevant/important when discussing "attempts" to transfer risks to the Contractor?

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The outset:

With the wording of the clauses the (heavy) burden of proof lies with the Contractor.

It is the Contractor, who shall obtain all permits for the performance of the work and all cost related thereto.

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This also includes additional cost, because the authorities request more expensive solutions during the performance than foreseen in the Contractors design.

But does this always constitute a “fair result”?

Is it fair if the Employer transfers risks that are unforeseeable for as well the Employer as the Contractor?

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Example from Denmark

The fire authorities in Denmark will only discuss fire subjects and solutions with the Employer during the bidding period.

Therefore, the Employer had listed in the tender documents, which technical solution he - on basis on the discussions he had with the fire authorities - will accept.

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The Contractor enters the costs for this solution, since it is the best at the time of preparing the bid and he has no possibility to obtain better information from the authorities.

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A Danish example

When the Contractor – often more than one year after the calculation of his bid – sends this design with his application to the fire authorities a new and much more safe technical solution has been invented and is required as a condition for permitting the construction.

Of course it is also much more expensive than the foreseen solution.

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My opinion:

What should be transferable is only the risk for cost for work the Contractor had a reasonable possibility to foresee at the time of the bid.

Not for new law or other unforeseeable requirements concerning the construction as such, unless it has been specifically dealt with in the contract.

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THEME 6: SUBSOIL CONDITIONS.

The Case

A Roman stronghold found more than 100 kilometres north of the site.

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THEME 6: SUBSOIL CONDITIONS.

Relevant clauses

UAV-GC 2005: Clause 13, 44

DBFM: Same as Theme 5, clause 9.2, 9.3, 10.5, Schedule 4, Clause 3

ProRail supplements and/or amendments to the UAV-GC 2005 Clause 17 Site

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THEME 6: SUBSOIL CONDITIONS.

Here we revert to one of the main issues already dealt with in Theme 1.

Which investigations should the Employer perform?

Which should every bidder carry out?

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THEME 6: SUBSOIL CONDITIONS.

The outset is,

- the Employer wishes to know the exact price of the construction he is about to build.
- he will exclude any unforeseen risk and transfer it to the Contractor.

What should be foreseen and is it reasonable to transfer the risk to the contractor seen in the light that the Employer expects competitive bids?

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THEME 6: SUBSOIL CONDITIONS.

When would it be fair for an Employer to transfer the risk and to ask for a “guaranty” that no extra cost shall be paid by the Employer?

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THEME 6: SUBSOIL CONDITIONS.

My opinion

It must be dealt with in details and it must be specified, that no matter the reason for the unforeseen cost it must be born by the Contractor.

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THEME 6: SUBSOIL CONDITIONS.

Argument for justification of such clause:

Any additional costs will lead to bankruptcy for the Employer or some similar situation.

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THEME 6: SUBSOIL CONDITIONS.

My recommendation:

A special "risk" sum shall be allocated to all such clauses.

It should reflect what a prudent Employer would set aside.

If nothing occurs the Contractor will have the benefit of the amount set aside.

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THEME 6: SUBSOIL CONDITIONS.

An other reason to justify this clause could be

- It prevents litigation concerning the justification of the work being additional, the technical solution and maybe more often seen, the price to be paid.

- Furthermore, the parties would save cost for lawyers, experts and arbitrators.

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The case

What is the answer?

"Is it reasonable for a bidder to foresee an old Roman military stronghold, that was expected to be 100 kilometers away."

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THEME 6: SUBSOIL CONDITIONS.

The answer can be found in

The UAV Clause 13 and 44 reflects my opinion.

The Pro Rail amendments do not cover this special situation, and make no difference to the answer.

DBFM would neither change the result.

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THEME 6: SUBSOIL CONDITIONS.

THE DANISH CONTRIBUTION

ANSWER:

The Employer must pay the additional cost to remove the stronghold and the cost for the delay incurred.

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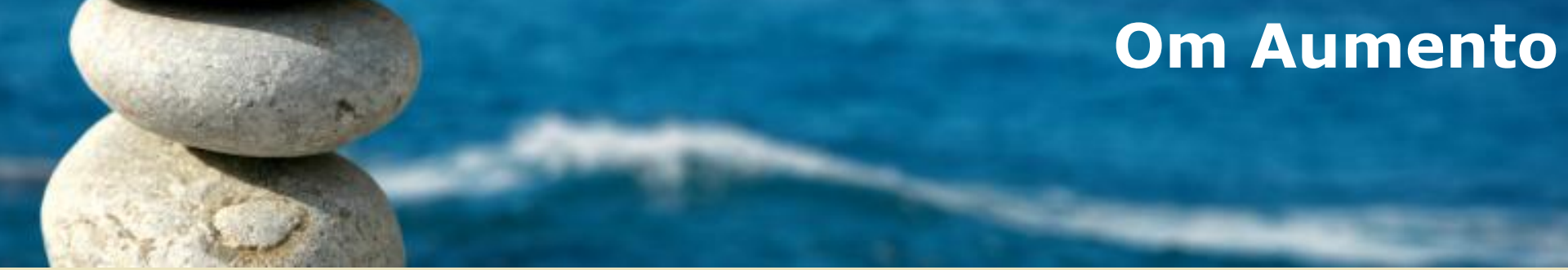

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