# TRANSNATIONAL CONSULTANCY CONTRACTS IN THE OFFSHORE INDUSTRY

## TIPS & TRICKS

A White Paper
with
Contract Terms Glossary

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## 1 Focus: Offshore consultancy

This paper focuses on the legal aspects of consultancy in a marine offshore environment. Typically, this involves a trans-national dimension. Parties have different nationalities, or the object of their collaboration is located in whole or in part outside territorial boundaries.

The international feature of their relationship causes clients and consultants to feel uneasy about the rules that govern or should govern their relationship. The purpose of this paper is to provide some tips and tricks for that purpose.

# 2 Offshore consultancy business features

## 2.1 Offshore is predominantly private business

The development of offshore resources may well be the subject of public policy - more precisely of international/transnational public policy, as these resources are predominantly located outside territorial waters. Still ultimately, the exploitation of offshore marine resources is almost always realized by private businesses (who operate in the frame of concessions or other such kind of public-private partnership arrangements).

It follows that offshore consultancy is mostly about business to business (B2B). It is rare that rules pertaining to public procurement or execution of public contract rules apply.

## 2.2 Offshore is big and small business

Of the one hand in the offshore maritime industry, one finds major project developers and major contractors that operate worldwide. These market players show a tendency to (try) impose upon their contract partners. Particularly they seek to transfer as much as possible risks unto their co-contractors.
Of the other hand, there are many specialized service providers. The more specialized and the more unique their proposed solutions, the better they can resist the majors.

*Advice*

Consultants who seek to survive in the marine offshore industry will usefully argue the so-called Abrahamson[1] principles. That author argued that, in order to achieve a fair and equitable allocation of the risks inherent in construction projects, i.a. the following comments apply:

- A risk should be allocated to a party if the risk is within the party's control.
- To place the risk upon that party is in the interests of efficiency, including planning, incentive and innovation.
- If the risk eventuates, the loss falls on that party unless insured.

[1] Abrahamson, M., Contractual risks in tunneling – how they should be shared, *Journal of the British Tunnelling Society*, Vols 5 and 6, November 1973 and March 1974.

So, if it is not practicable, there is no reason under the above principles to cause expense and uncertainty by attempting to transfer the loss to another party.
During consultancy ea. contract negotiations, the Abrahamson principles can easily be summarized by the following questions[2] – the answer to which shall show the direction to be followed in order to arrive at a suitable agreement:

- Which party can best control the risk and/or its associated consequences?
- Which party can best foresee the risk?
- Which party can best bear the risk?
- Which party ultimately most benefits or suffers when the risk eventuates?

*Case study*
*Decommissioning tool service provider*

A small offshore service provider has developed a small prototype decommissioning tool. This equipment saves money as no longer major floating equipment is required. Furthermore, it may realize important time savings.
Main Contractors seeking to employ the commissioning tool propose their standard subcontracts to the service provider. These texts impose upon the subcontractor performance guarantees. They set interim milestones that are sanctioned by delay damages. They seek to transfer in respect of intellectual property on further developments of the decommissioning tool. Etc.
These contracts do not give consideration to the fact that the tool and its operators are rather hired. First, the tool is temporarily installed on board of the principal contractor's main floating items. The service provider must completely rely on the main contractor for (timely) mobilization and demobilization. Next, in view of its ultimate use, the equipment is lifted out of board at the offshore decommissioning sites. It is put to works during time slots determined of the one hand by the main contractor, and of the other hand by prevailing wave and weather conditions. Ultimately such lifting operations are carried out by crane operators appointed by main contractor. The subcontractor has no control over this crew. When during lifting any of the vessel, the crane or the decommissioning tool is damaged, that is by the act or negligence of the main contractor's personnel and/or climatic conditions.
This services provider consistently resists subcontracts. He pushes through a lease formula for his business. That is most correct, considering the Abrahamson principles. Indeed, in that

[2] Bunni, N., The Four Criteria of Risk Allocation in Construction Contracts, *International Construction Law Review*, 2009, Vol 20, Part 1, p. 6.

formula it is the (necessary time for the completion of the) project that objectively determines the ultimate (rental) price for the use of the decommissioning tool and its operators.
When time is mostly under the control of the main contractor, it is logical that it is him who undertakes the risk of that factor running out. Also, the principal and not the service provider must bear the cost when either his operations cause damage, either climatic conditions the impact of which he is best placed to prevent, manage and control.

## 2.3 Offshore consultancy is contracting

In the offshore industry consultants provide engineering services, assist at procurement, carry out investigations (of soil, sub-soil,[3] hydrographical, pollution ea. conditions), perform feasibility studies, provide project management, secure quality assurance, etc. Their scope of work may also cover composite services such as asset/facilities management, data processing, etc.

In any event these activities involve mostly intellectual service; and they are about contracting. Thus, the relationship between the parties is not one of employment.

The distinction between personnel and consultants is often hard to make.
Project developer personnel perform tasks pursuant to the directives of the employer. They are - fully - their employer's subordinate.
Consultants are contractors to the client. They (are supposed to) operate independently from the principal.
Still, consultants may for some time: work full time on the developer's project, operate under some kind of control by the principal, work in the client's offices, use his equipment and business cards, etc.
Accordingly, there may arise and develop confusion or even discussion on the validity of the contract[4] and the status of the service provider. What is his/her social security status[5] or tax status, are professional deontology rules applicable,[6] etc.?

[3] Ove Arup & Partners International Ltd. & Anor v. Mirant Asia-Pacific Construction (Hong Kong) Ltd. & Anor, 2004 [BLR] 49, 92 Con LR 1, [2003] EWCA Civ 1729
[4] Brussels Labour Court, 30 June 2006, https://juportal.be/content/ECLI:BE:CTBRL:2006:ARR.20060630.9?HiLi=eNpLtDK2qs60MrAutjI0tFJKzs8rLs0pScxLrlSyzrQyhAo7+/sFh/qEOPo5R4KEjWDCyKprAV+sFx8=
[5] Antwerp Labour Court, 22 March 2006, https://juportal.be/content/ECLI:BE:AHANT:2006:ARR.20060322.4?HiLi=eNpLtDK2qs60MrAutjI0tFJKzs8rLs0pScxLrlSyzrQyhAo7+/sFh/qEOPo5R4KEjWDCyKprAV+sFx8=
[6] Cass. B., 4 November 2011, D.10.0007.F, https://juportal.be/content/ECLI:BE:CASS:2011:ARR.20111104.3?HiLi=eNpLtDK2qs60MrAutjI0tFJKzs8rLs0pScxLrlSyzrQyhAo7+/sFh/qEOPo5R4KEjWDCyKprAV+sFx8=

*Advice*

To make clear no employment but service contracting is at stake, the client and the consultant shall expressly put on record – in their written contract and other communications[7]:

- The intended relationship is (service) contracting/consultancy.[8]
- The consultant is registered as a business.
- The consultant is registered with independent status and not as personnel for social security purposes.
- The consultant is VAT registered.
- The consultant freely determines his work schedule.[9]
- The consultant is free to provide services to third parties (no exclusivity).
- The client is entitled to terminate the contract for convenience.

*Case study*
*ZZP*

A Belgian consultant who becomes involved on a project in the Netherlands will soon be assimilated to a "ZZP" (Zelfstandige zonder Personeel; in English: Standalone without personnel). Over 250.000 people have the ZZP status and accordingly enjoy certain privileges under Dutch tax law.
From discussions and newspaper articles, the Belgian colleague will soon find out that the tax authorities on both sides of the borders struggle with the same questions. Are these consultants rather fake independent business?? Or are they in fact employees who unjustly seek to optimize their tax position?
It is useful to retain the following lessons from the Dutch practice.
A consultant is independent ZZP in the Netherlands when:

- He/she has at least 3 different clients.
- His/her income is not sourced for more than 70% from 1 client.
- He/she may delegate a substitute, and this causes no issues.

[7] Brussels Labour Court, 4 January 2013, https://juportal.be/content/ECLI:BE:CTBRL:2013:ARR.20130104.1?HiLi=eNpLtDK2qs60MrAutjI0tFJKzs8rLs0pScxLrlSyzrQyhAo7+/sFh/qEOPo5R4KEjWDCyKprAV+sFx8=
[8] Antwerp Labour court, 22 March 2006, https://juportal.be/content/ECLI:BE:AHANT:2006:ARR.20060322.4?HiLi=eNpLtDK2qs60MrAutjI0tFJKzs8rLs0pScxLrlSyzrQyhAo7+/sFh/qEOPo5R4KEjWDCyKprAV+sFx8=
[9] Brussels Labour Court, 24 June 2011, https://juportal.be/content/ECLI:BE:CTBRL:2011:ARR.20110624.2?HiLi=eNpLtDK2qs60MrAutjI0tFJKzs8rLs0pScxLrlSyzrQyhAo7+/sFh/qEOPo5R4KEjWDCyKprAV+sFx8=

- He/she does not consider the client is the boss.
- He/she does not get paid when the service is not satisfactory.
- He/she does not get paid when he is ill;
- He/she separately advertises his business (business cards, advertisements, website, etc.)

## 2.4 Offshore consultancy means English language use

The offshore industry was as from the outset English-speaking and English writing. That was for reason of its embedment in the merchant shipping and oil & gas industries.

As the offshore industry expands worldwide, the working language remains English. In this way, no matter where people originate from, as they all understand English, e.g. communications and safety can best be secured.

In the offshore industry not only technicians communicate in the English language. Other stakeholders as well so do: the project developers, banks, insurers, contractors, etc. Consequently, all construction, financing, insurance, ea. contracts are drafted in English. The situation is no different for consulting contracts.

# 3 Offshore consultancy contract features

## 3.1 Contracts rather than regulations

In most, if not all countries worldwide, private contracting is the object of a rather limited number of regulations (compared to other subjects). As also the object of offshore projects is located outside territorial waters, the number of relevant regulations reduces even further. By opposition, the contents of the contract provisions then become more important. Definitely the expression “contracts are concluded to be stored in the archives and remain there” is not applicable to the offshore maritime industry.

## 3.2 English contractual language

As contracts in the offshore industry are made out in English, it is important to understand English contractual language. There is e.g., a substantial difference between “shall and “will” and “may”. To use one’s reasonable endeavours has different implication by comparison to doing its best. Etc.
Parties discussing co-operation arrangements shall take great caution when employing this kind of terminology.
Likewise, they shall be aware about the common law culture that lies under neath. Good faith, the contractual balance, force majeure ea. are reasonably defined terms in civil law. They are not in common law. That explains how the afore stated terms are not used in English contracts. Or if they do, that pages and pages of text are devoted to defining these words; or how alternative terms such as “spirit of mutual trust” are being introduced, without clear understanding of the meaning or the difference with elsewhere established terms.

## 3.3 Model contracts

In order to facilitate contract (formation) discussions, different organizations have developed standard contracts for the performance of consultancy in a transnational environment.

Offshore industry specific is the Leading Oil and Gas Industry Competitiveness (LOGIC) Standard Contract for the U.K. Offshore Oil and Gas Industry. The 2014 edition of its General Conditions of Contract for Services (On – and Offshore) is already the third.[10]

[10] Order throughhttps://www.logic-oil.com/content/standard-contracts0

Not sector specific is the World Bank 2017 Harmonized Standard Form of Contract for Consultant's Services. Two editions have been published in 2017: the lump-sum and the time-based versions. These texts tend to defend better the position of the client and its funders.
Also, for generalized application are the NEC3 or NEC4 Professional Services Model Contract and the so-called FIDIC White Book. The Institution of Civil Engineers of the UK published the fourth edition of its NEC3 text in 2013. The Fédération Internationale des Ingénieurs-Conseils (FIDIC) in 2017 published the fifth edition of its Client Consultant Model Services Agreement. Both these models tend to favour the position of the consultant. That is not such a surprise considering the editors are associations set up by engineering firms.

Obviously, any of these model texts has been well written. Furthermore, they touch upon all important themes and are complete.

*Advice*

Clients and consultants clearly have an interest to adopt any of the established standard forms of contract as are available in the market. This will reflect positively on mutual confidence. Furthermore, it will contribute to efficiency and reduce the duration of agreement negotiations.

*Case study*
*NDAs*

Systematically, from before a consultant is employed on a project, he/she is requested to sign a non-disclosure agreement – short "NDA". This is a written document establishing a legally-binding, confidential relationship between parties. It describes what information parties consider confidential; and it prohibits the other party from revealing such information to others.
There are no traditional (FIDIC, LOGIC, or other) models for this kind of secrecy agreement. They contain mostly the same text. But then it happens that principals slip in certain variations that don't sit comfortably:

- Broad and vague language.
- Scope unclear: limitation as to scope and/or timewise not defined.

- Traditional 3 carve outs not (each) included: (i) Publicly available information; (ii) Information that is already in consultant's possession or that he may acquire by his own; and (iii) Information obtained/learned of from third parties
- One-way obligations.
- Disproportionately extreme or unfair punishments.

At the start of a new job a consultant shall not refuse signature of an NDA. But still, he shall resist unfair and certainly pointless provisions. Recently we read: *The Contractor acknowledges that the Confidential Information is commercially and competitively valuable, the unauthorized use of which would cause irreparable harm to the owner of such information and that monetary damages are unlikely to be an adequate remedy.* What is the use of this text? An undertaking to pay an indemnity that by far exceeds one's financial capacity and causes him to go bankrupt has no added value (literally)

## 3.4 Frame agreements

The disadvantage of the model contracts is that they cater for unique projects. They are not written to provide a general frame for the performance of different missions (at different times, on call, on different projects, with differing scopes of works, etc.) in the frame of a long-term relationship.

This type of collaboration is often preferred by major offshore players. Therefor they have developed their proper frame agreement. Remarkably, these texts often resemble each other. As they seek to favour long term collaboration, contractual terms and conditions are negotiable on the occasion of the first job together. But all in all, the proposed allocation of risks is generally fair.

*Advice*

Each Party shall secure that frame agreements reflect neutral text from model contracts. Different missions shall be considered stand-alone. Misfortune on one does not necessarily justify withholdings, setting off of payments or termination on another job.

## 3.5 Standardized terminology

Offshore consultancy is about specialist services. Indeed, it relates to projects that sometimes may appear to be very simple (install a cable, decommission a drilling platform, etc.). But that impression is ill founded. The preparation and execution of this kind of projects requires intensive calculations, complex plannings, ea. intellectual services. Furthermore, these activities are subject to strict technical standards.[11] Accordingly also, they are governed by very strict quality assurance and quality control regulations.

The use of the standard texts mentioned above and generally of FIDIC and NEC3 model contracts all over the world, has brought along a generalized use of their concepts and terminology in the consultancy business.
Quite remarkably, that terminology is not inspired by NEN16310.[12]

In order to quickly assist parties that venture in the offshore market, we append a practical glossary of terms in annex to this white paper. That is inspired by actual practice i.e., the Fidic, Logic and NEC3 model contracts.

## 3.6 The due diligence standard

Model contracts that originate from engineering societies logically seek not to unnecessarily expose their members to dangers – or at least to risks that insurers resist. Therefore, these standard texts will generally indicate that the duty of the consultant is limited to the provision of services by reference to the common law standards of reasonable skill and due care and diligence.[13] In all objectivity, these standards must be assessed as rather bottom. The civil law measure of the *bonus pater familias / locator operis* imposes a greater and more suitable degree of devotion. Also, there is nothing wrong to set the quality level at that which may be expected from a consultant that is experienced in the provision of the services at stake, for projects of similar size, nature and complexity.[14]

[11] E.g., ISO TC 67, World Bank Group EHS guidelines, ea.
[12] European standard glossary that was elaborated in 2013 to describe engineering services for buildings, infrastructure and industrial facilities.
[13] See e.g. FIDIC, Client Consultant Model Services Agreement, 5th ed., 2017, general conditions sub-cl. 3.3.1
[14] Ref. text added in the FIDIC, Client Consultant Model Services Agreement, 5th ed., 2017 by comparison the to 4th edition, 2006.

*Case study*
*The spur groyne*

In the sixties of the preceding century, a port authority had construed a spur groyne at the marine side entrance of its premises. The device functioned as it was intended to. It collected sand. Over tens of years the onshore surface of the port considerably increased. In the early years 2000, the port decided to set up a public-private partnership for these grounds. The private partner became entitled to develop and operate a new maritime terminal there. However, one of the conditions was for that partner to construe a next generation spur groyne at the new port outskirts.

The private developer contacted the consultant who supervised construction several decennia before. He instructed the engineering firm to design the new edition using stone materials recovered *in situ* from the old spur groyne. By that method, considerable savings could be achieved. Unfortunately, the as-built drawings produced several decennia before proved incorrect. Consequently, the volume of stone materials that could be reused was overestimated. After all, additional materials had still to be quarried and supplied. But for these expenses there was no provision in the budget.

The private client entered a claim against the engineer. At first the consultant tried to argue that the port authority should pick up the bill. It had acted as agent of the port when it supervised construction works several decennia before. Accordingly, if a defect in its certified as-built drawings was proven, that was for risk and account of the principal. The authority could hardly appreciate that reasoning. It inspired the consultant to adopt a collaborative posture in dispute adjudication. Ultimately, an amicable settlement agreement was reached. This is confidential. But one may assume that, as always, the settlement text will not have contained an admission of liability; but surely a heavy debate has preceded on the theme of the consultant's service standards.

## 3.7 Offshore technical standards (norms)

Offshore design and construction activities are very much governed by technical norms. These standards, stem from the (originally onshore) oil and gas industry. As the offshore industry is expanding into alternative energy (wind and waves), grid installation, marine farming, ea. these standards are being maintained. That is logical since marine climate conditions, environmental concerns, traffic regulations, etc. continue to apply.

Admittedly, the offshore standards are not expressly incorporated in any national codes. But these norms emanate from international or European standardization organizations.[15] Therefore they constitute good/best practice/rules of good workmanship. Accordingly, they have clear authority.[16] They may be put into doubt, but only "up" to impose a higher standard. Deviations downwards will be seen as not professional.

*Advice*

Consultants who desire to be(come) active in the offshore industry shall unconditionally adopt and act according to its standards.

[15] Cf. article I.9 of the Belgian Code of Economic law defining a technical standard as: *a technical specification approved by a recognized standardization body, for repeated or continuous application, …*

[16] E.g. pursuant to article VIII.1 of the Belgian Code of Economic Law: *Standards reflect the good practice (rules of good workmanship) which, at the time they are adopted, apply to a particular product, a particular process or a particular service. Compliance with the standards is voluntary, unless its observance is imposed by a legal, regulatory or contractual provision.*

# 4 Offshore consultancy contracts must haves

## 4.1 Deliverables

Too often consultancy contracts remain vague as to the expected output. Still, it is in the interest of both parties to enumerate, define and describe the deliverables in as much detail as possible.

That exercise shall be performed prior to contract conclusion. At the kick-off meeting or thereafter is too late.
That is because the Consultant may then find that the scope of work is being expanded and one or more extra works/services are being introduced. In case payment is on an hourly rate basis that is fine. However, in the event payment is on a lump sum or milestone basis, that will give rise to discussion. That unpleasant situation could have been prevented if mutual expectations had been discussed and written down in detail prior to start.

*Advice*

Parties shall provide answers to the following questions in their contracts:

- Which deliverables (e.g. reports: which table of contents or answers to which questions)? According to which kind of procedures? Using what type of software? Etc.
- How many editions?
- What format (pdf., etc)?
- Scope of services' sections, phases?
- Key performance indicators, guaranteed values and acceptable deviation limits?

Of particular importance is the definition of the purpose that the deliverables must be able to serve. A stability study for a wind turbine is of little use if no information is provided on the chosen plant, on complementary use of the tower for installation of solar panels, of communication antennas ea. wind catching devices.

Furthermore, it must be noted that insurance companies resist consultants undertaking "fit for purpose" undertakings. No doubt in certain scenarios insurers correctly estimate that the risk thereof – particularly in an offshore environment - is excessive (to such point that damage is almost a certainty).

Still, the client as well has his rights. When he clearly defines the objectives of his project, of the plant to be produced, etc. requesting fitness cannot be wrong.
But again, the Abrahamson principles discussed here above shall be respected. Clients, shall not unduly seek to transfer risk.

## 4.2 Term and programme

Many misunderstandings can be avoided between client and consultant when on beforehand they agree on timing and programme. This exercise will allow them to – jointly - identify different activities to be performed, the critical path thereof and resources and facilities required. On that occasion they may agree as well working methods and set agendas when tests are performed (with the other party's representatives in attendance), etc.

*Case study*
*Engineering and procurement mismatches causing project delays*

Design & build (also called EPC) contracts often suffer delays. One of the reasons is insufficient coordination between the designers of the main contractor, his subcontractors and suppliers. On investigation, one finds that it has to do with the date certain equipment should have been ordered and the actual date on which they are ordered. Equipment referred to here are not only long lead items such as - in the offshore industry – OHVS stations, export and inter-array power cables, piles, pipes, etc. It is also is about columns, anchoring systems, fenders, backfill materials, ea.
In the traditional understanding designers are the first players in a project's duration. They must as early as possible and on an exhaustive basis deliver all drawings, specifications and bills of materials to permit the procurement division to proceed and purchase. Only after engineering has reached progress (generally stated as 80%), procurement and ultimately construction can be unlocked.
This traditional view does not take into account that works design to a considerable extent derives from that of the equipment described here above. A facility – onshore and offshore alike – depends on equipment sizes, required free spaces, access for operation and maintenance. E.g. power supply and utilities are sized according to the size of the equipment. Thus, in order to proceed, a considerable part of the engineering discipline depends on the equipment information.
When this information is not in-house produced by the D&B/EPC contractor but originates from the equipment vendors, the delay risk is apparent. The designers of the principal cannot proceed and must wait until they know the footprint of the equipment, the space occupied by

the auxiliaries, the position of cable connections, etc. If the equipment orders are placed too late, obviously that information comes late, and the project incurs delay.
When clients and design consultants discuss planning, they should discuss this feature in detail. What input is required from third parties such as equipment suppliers? When will the corresponding orders be placed and may the consultant expect his required information? It is then brought in the clear: should procurement of equipment be delayed e.g. by 3 months, design shall likewise be delayed by 3 months. Ultimately the project will be completed with at least the same delay.

Often consultant's deliverables concern reports, drawings, calculation notes and other documents produced by the consultant and to be reviewed by the client. It is useful then to plan review periods and additional terms for resubmission and re-review. Considering the volumes at stake and the difficulty of certain subjects, it is wiser to provide for e.g. 3 weeks review + 2 weeks resubmission + 3 weeks re-review than to assume matters will be cleared within just a couple of days.

*Advice*

The Parties shall agree on:

- The time for completion of the full mission, its different sections and different activities.
- The nature of the different timing arrangements. Is it fixed, indicative, binding or essential?

Disruption and delay commonly affect plannings. Sometimes claims ensue. Parties shall professionally deal with such claims. That starts with the contract where they can provide mechanisms to prevent discussions. E.g., the agreement can impose weekly meetings closely followed up by minutes and progress reports. They can provide for an early warning duty that is triggered whenever any of the parties becomes aware of any circumstance that may delay the project. Following warning notice the other party then can take the corrective measures in its power and this at the earliest occasion. If not, such party anyhow cannot blame its contract partner for having failed any information duty. Furthermore, by inserting unit rates in the contract the cost of standby time etc. is fixed on beforehand. Only the relevant overtime needs to be determined anymore.

*Advice*

In order to ascertain a professional follow up of the programme and events or evolutions (potentially) affecting compliance therewith, the Parties shall provide for regular communications through meetings and reports. They will provide that claims for delay and disruption may occur; and shall be dealt with in a professional manner.

Generally, time and timely performance is not overly important in consultancy or other contracting contracts. However, when in English or other common law governed contracts it is stated (in one or another way) that "time is of the essence", that means that failure to comply with the timing arrangement constitutes a material breach of the contract.[17] That implies that the other party is entitled to terminate the contract upon expiry of any time period covered by such statement. That may be timely completion of a deliverable. But vice versa it may as well cover timely payment. Since the general provision thus constitutes a double-edged sword, it is wise not to incorporate it into the contract except where absolutely required.

*Advice*

Parties shall expressly identify circumstances and activities where timely performance is of the essence; and expressly advise each other in the contract when the sanction of non-compliance may be termination of the contract.

[17] Mount Charlotte Investments Ltd v. Westbourne Building Society [1976] 1 All ER 890.

## 4.3 Financial conditions

### 4.3.1 Prices

Consultants ordinarily operate on an hourly or daily rate basis. Clients for budgetary reasons like them to proceed on a lump sum basis. In each instance, parties shall take care to define what is in- and what is excluded.

*Advice*

The Parties have an interest to expressly allocate cost of:

- Visa and transport from place of residence to place of work (class?).
- Postage and carrier/courier bills.
- Photocopy and printing costs, pictures and videos.
- Translations.
- Investigations and (in situ, lab, ea.) tests of soil and subsoils, other materials, fluids, and gases; topographic, acoustic and energy savings' investigations, models, mock-ups, prototypes, etc.

### 4.3.2 Payment terms

Payment terms shall be made clear.

Likewise, there must be a good understanding of the nature of advance payments. Are they subject to submission of a bank guarantee? Are they reimbursable?

In general, is any payment on account provisional or definitive? And what about retention?

Particular attention may need be paid to the IT program that is in use with the customer. Sometimes this was procured because subcontractors and suppliers share the cost thereof. They must register in order to get paid by the client but then immediately transfer on a commission to the developer of the accountancy program. Clearly, this reflects badly on employers who failed to advice their co-contractor on beforehand.

*Case Study*
*SAP Ariba*

"*We use SAP. If you want to get paid, register as supplier on Ariba*." It is the kind of message small consultants hear for the first time when they start providing services for a major new customer. And so they register on the website https://www.ariba.com/. It proves a hard and time-consuming exercise. But, at such time, it is free. So, the applicant does not bother to read all FAQ. There it is indicated that as from the (master?) anniversary date registration and transaction fees may apply and be reviewed. We quote: *Why might a supplier have to pay now when previously they were transacting for free? Suppliers who receive their first invoice from SAP Ariba have reached an import e-commerce milestone: they've crossed the chargeability thresholds with at least one customer annually via Ariba Network. To maintain their momentum – and Ariba Network relationships their customers have come to rely on – it's critical they renew their membership and remit payment before the due date on their invoice to avoid service interruption. Only then can they continue to enjoy the measurable benefits of being an Ariba Network supplier.*
Hard working service providers who not budgeted for the Ariba fees hardly will agree with that ultimate sentence.

### 4.3.3 Taxes

Typically in offshore works and service contracts, the tax and customs themes keep coming back. Often none of the parties has a good understanding of the applicable tax, customs and/or VAT regime at the different locations of the project where activities proceed. The high sea, the continental plat of the surrounding countries, territorial waters, husbanding ports with their particular free zones, etc. each have their own rules for local and foreign businesses and are subject to different (double) tax treaties. Perhaps, at the phase where only initial budget prices are being exchanged, taxes need not be addressed in detail yet. But by the time of contract conclusion this matter must have been cleared out. Otherwise, unpleasant surprises may succeed. And one or the other may regret not to have chosen for an alternative setup (including a charter party, employment contract, etc.)

*Advice*

Parties have a common interest in good tax advice. They have an interest to consider this a proper investment before effectively embarking upon a consultancy arrangement.

### 4.3.4 Price revision

Contracts that are concluded for the longer term or that are being extended (otherwise than for circumstances that are consultant's risk) deserve price revision clauses. Usually this is not done by way of an indexation clause but rather through an anniversary update of the unit rates.

### 4.3.5 Currency risk

It is logical for the client to pay consultants in the currency in which it makes its income. But that may not also be the currency in which the service provider (for the most) pays its cost and expenses. The risk of the mismatch shall be shouldered by one of the parties and have been translated in the price.

### 4.3.6 Payment securities

Employers on marine offshore projects are often special purpose companies. As long as their project is not operational, their financial condition may not to be very sound. It will be wise for the consultant in that kind of scenario to demand for a payment guarantee. Such is not necessarily a letter of credit whereby the issuing bank instead of the client shall be assessed when evaluating the payment risk. The issue may as well be covered through a parent company guarantee, a direct claim arrangement, or other arrangement.

*Case study*
*DAB agreement*

In 2017, in complement to its contract model texts, FIDIC edited its so-called Golden Principle. The fifth such principles states: *Unless there is a conflict with the governing law of the Contract, all formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration.*

FIDIC preaches this principle should as well apply to consultancy contracts. In fact the engineering association has facilitated DAB by also preparing a model general conditions of dispute adjudication agreement between employer, contractor and adjudicator(s). Since often disputes between client and consultant are on the theme of payment, one may consider useful to copy the payment provisions from the dispute adjudication agreement (DAA). Particularly, the edition as amended by three very distinguished English attorneys offers some interesting lessons. We cite hereafter some excerpts.

*The Member shall be paid as follows, in the currency named in the DAA:*

*(a) a retainer fee per calendar month, which shall be considered as payment in full for;*

*(i) being available on 28 days' notice for all site visits and hearings;*

*(ii) becoming and remaining conversant with all project developments and maintaining relevant files;*

*(iii) all office and overhead expenses including secretarial services, photocopying and office supplies incurred in connection with his duties;*

*(iv) all services performed hereunder except those referred to in sub-paragraphs (b) and (c) of this Clause; and*

*(v) the first (2) two full days chargeable in accordance with paragraph (b) of this Clause.*

*The retainer fee shall be paid with effect from the last day of the calendar month in which the DAA becomes effective; until the last day of the calendar month in which the Taking-Over Certificate is issued for the whole of the Works.*

*With effect from the first day of the calendar month following the month in which Taking-Over Certificate is issued for the whole of the Works, the retainer fee shall be reduced by 50%. This reduced fee shall be paid until the first day of the calendar month in which the Member resigns or the Dispute Adjudication Agreement is otherwise terminated.*

*(b) a daily fee which shall be considered as payment in full for:*

*(i) 24 (twenty-four) hours of travelling up to a maximum of two days' travel time in each direction for the journey between the Member's home and the site, or another location of a meeting with the Other Members (if any);*

*(ii) each working day on site visits, hearings or preparing decisions; and*

*(iii) each day spent reading submissions in preparation for a hearing;*

*(c) all reasonable expenses incurred in connection with the Member's duties, including the cost of telephone calls, courier charges, faxes and telexes, travel expenses (business class travel shall be considered reasonable on transcontinental flights only), hotel and subsistence costs: a receipt shall be required for each item in excess of five percent of the daily fee referred to in sub-paragraph (b) of this Clause;*

*(d) any taxes properly levied in the Country on payments made to the Member (unless a national or permanent resident of the Country) under this Clause.*

*All partial days shall be paid pro-rata to the daily fee.*

*As set out in paragraph (a) of this Clause, the first 2 (two) full days chargeable in accordance with paragraph (b) of this Clause, are deemed included in the retainer and shall not be subject to payment of daily fees. DAA. Unless it specifies otherwise, these fees shall remain fixed for the first 24 calendar months and shall thereafter be adjusted by agreement between the Employer, the Contractor and the Member, at each anniversary of the date on which the DAA became effective.*

*The Member shall submit invoices for payment of the monthly retainer, chargeable daily fees and expenses, following the end of the month to which they refer. All invoices shall be accompanied by a brief description of activities performed during the relevant period and shall be addressed to the Contractor.*

*… If the Member does not receive payment of the amount due within 70 days after submitting a valid invoice, the Member may (i) suspend his/her services (without notice) until the payment is received, and/or (ii) resign his/her appointment by giving notice...*

## 4.4 Liability

### 4.4.1 Limitations of liability

Offshore projects represent a substantial investment. When they run bad, damages and losses may be very important. Accordingly, mistakes by the consultant may cut deep. The cost risks to show a serious disproportion with his income. This risk must be covered by insurance. If and to the extent that is not possible, the liability of the consultant must be limited. The client then undertakes the remainder of the risk in accordance with the Abrahamson principles discussed above.

*Advice*

Parties can limit the liability of the consultant in different ways.

- Cap of liability for delays: by setting penalties up to a maximum that is proportional to the value of the consultancy contract.
- Cap of liability timewise: by excluding liability beyond ordinary product warranty terms (e.g. 1 year)[18] – unless not permitted by mandatory law (ref. decennial liability provisions in different civil law jurisdictions).
- Exclude liability for certain defects – including perhaps also hidden defects.[19]

### 4.4.2 Exoneration of liability

Inspired by Anglo-Saxon law, marine offshore contracts including consultancy agreements usually contain an exoneration of each Party's liability for indirect or consequential damages and losses, including loss of revenue, loss of profit, loss of production, loss of contracts, loss of use, loss of business, third-party punitive damages or loss of business opportunity.
That impressive enumeration of legal terminology means e.g. that the developer of an offshore wind farm could not claim against his consultant for power breakdowns, etc.
Still, when operations of this type of installation are needlessly suspended for maintenance, such was not considered a valid approach in a case heard in Australia.[20]

[18] Validated with respect to a FIDIC White Book contract governed by German law in ICC, final arbitration award in case 11.039.
[19] Compare Cass. B., 15 September 1994, *Pas.,* 1994, p. 748
[20] Lal Lal Wind Farms Nom Co Pty Ltd v Vestas – Australian Wind Technology Pty Ltd [2020] VSC 875

# 5 Offshore consultancy contracts nice to haves

## 5.1 Inputs

The output of any consultancy can only be as good as the input that is being provided. Client and consultant have an interest to identify that input and in mutual agreement make an assessment thereof.

*Advice*

Parties shall usefully check following issues:

- Overview of the information (to be) provided by the client.
- Quality warranty with respect to the information provided by the employer.
- Extent of control/verification duty of the consultant.
- Background intellectual property of the consultant.
- Foreground intellectual property/license aspirations of each party.

*Case study*
*Engineering and procurement mismatches causing project delays*

See above

## 5.2 Conflict of interests

### 5.2.1 Delegation of Powers

Consultants may receive power of attorney for the performance of certain acts for account and risk of the employer. E.g. in the frame of public contracts they may act as “fonctionnaire dirigeant” and perform construction administration services. In the frame of a private Fidic contract that role is called engineer or employer representative.

Exercise of the delegated authority may be limited or unlimited. If it is subject to prior approval of the client, restrictions shall either be indicated in the contract providing for the intervention of the consultant, either be otherwise communicated to the third party(ies) involved.

*Advice*

As regards his delegated power of authority, the consultant shall be identified as agent for the employer. That implies that the principal on an exclusive basis is responsible for the acts, negligence(s), decisions, determinations, etc. of the delegate. Vice versa he is not liable for the performance of the third-party co-contractor of the client.
The previous conclusion does not apply in case of manifest and reckless default, fraud, fraudulent misrepresentation and reckless misconduct.

### 5.2.2 Limitation of resources

Sometimes even when formally a consultancy contract is made out in the name of e.g. a (major) engineering firm, it is entered into in consideration of the special qualifications of certain specialists (physical persons); or of the capacity to perform services on a flexible basis – as regards time or location.

*Advice*

There is much added value, in the event of a consultancy contract that is entered into on a so-called *intuitu personae* basis:

- To expressly state so in the contract.
- To require such physical persons to continue to be employed on the project until completion; and not to allow them to be moved away except with the approval of the client or at their proper initiative for reason of termination of their former employment.

The limitation of resources has a side effect. The Employer is subjected to the so-called what you see is what you get (WYSIWYG) rule. He gets the people that are identified in the consultancy contract to provide the agreed services; or substitute persons with equivalent qualifications and experience. He cannot expect for anybody more experienced, better qualified or more dedicated.

## 5.3 Changes / Variations

### 5.3.1 Changes / variations originating from the parties

The contract defines the services to be provided by the consultant for the benefit of the employer. During execution each of the parties may want to amend certain aspects of the contract. In the majority of the cases these will pertain to an increase or decrease of the scope of the services; or to the applicable requirements as regards quality, applicable standards, presentations, methods of execution, IT programs to be used, etc. Also seen are changes in the sequence of performance and/or execution period. Possibly as well the substitution of one by another subcontractor[21] or payment conditions[22] (currency, payment term, ea.) could be imagined.

Ordinarily in contracts, changes/variations are introduced in common agreement between the parties.
A typical feature of contracting is that clients desire unilateral power to make such changes. In most legal systems it is understood that the employer can validly claim that power. However, there would appear to be notable exceptions such as Poland[23] and - since the introduction of new legislation in 2020 - Belgium[24] which tend to declare the unilateral amendment prerogative illegal.

One can predict that in some instances the consultant may not very much like a change order from the client. He has no capacity, the change is outside his/her field of competence, he/she loses income, compensation is not fair, time for implementation is too short, the quality of the services' product or the project and/or its fitness for purpose suffers, etc.

*Advice*

It is not in the interest of the parties to allow any of them to unilaterally instruct a change order. The consultant must have power for well-motivated reasons to resist variations.

[21] CJE, 19 June 2008, C-454/06, Pressetext, para 54.
[22] Contra CJE., 29 April 2004, C-496/99, CAS Succhi di Frutta, para. 117.
[23] Resolution Poland Supreme Court, 22 May 1991 (III CZP 15/91).
[24] Business Law Code, article VI. 91/5

### 5.3.2 Changes of law

Changes/variations may also be required for reason of new laws, regulations, ea. being introduced. Unless these have been anticipated upon contract conclusion, since the studies prepared by the consultant and the project need to comply with the new regulations, these changes must be accepted by the parties. If the new requirements impact on the value of the mission but have not been budgeted for, they must reflect in an amendment of the consultancy contract.

*Case study*
*Change of national construction standards re earthquakes*

Different countries suffer earthquakes. In most instances these are caused by forces of the earth. But sometimes earthquakes are induced by men e.g. for reason of onshore mining operations. International construction standards take into consideration the impact of natural earthquakes. In certain countries these rules are complemented by special rules focusing on local conditions in mining areas. These particular rules evolve as new mines open and others close.
So it happened that a designer submitted a bid for the performance of certain studies by reference to an established set of earthquake standards. However, by the time he received the purchase order the rules had been changed. The consultant claimed additional compensation and extension of time for reason of change of law. Upon investigation it came to light the construction standards had been relaxed. The client actually did not like his "Seveso" labelled installation being founded on less solid foundations etc. Therefore, he instructed the old standards to be respected. By the same token he rejected the designer's claim. Remarkably that consultant then claimed extra-ordinary service because he needed to deviate from the new current standards…

## 5.4 Termination

### 5.4.1 Procedure

The sudden termination of a contractual relationship is suspicious. Regardless how much it may be justified by a default (of production of deliverables, of payments, ea.) termination always is associated with abuse of power by one against the other party.

*Advice*

Parties have an interest to provide in the consultancy contract for a termination procedure. They shall inform the other of their dissatisfaction and allow a term to correct the situation. Only after expiry of such term without serious attempts to cure, will termination be allowed.

In case of bankruptcy and such circumstances, the rectification period make no sense. On the contrary it must be prevented that the other party still spends efforts for the benefit of the defaulting party after it is declared bankrupt. In that scenario the making good term has no merit.

### 5.4.2 Termination for convenience

Contracting provisions in the civil codes of the countries on the European continent provide for the client's entitlement to unilaterally terminate agreements without a need for justification. This scenario is also provided in most Anglo-Saxon contracts. It is called there "termination for convenience".
This is not at hand in the event that a main contractor terminates a subcontract for reason that the main contract was terminated by the client of the main contractor.[25]

*Advice*

Parties will usefully introduce in their consultancy contract provisions pertaining to termination for convenience.

## 5.5 Dispute resolution

Disputes happen. Parties in most cases will attempt to resolve their disputes by amicable settlement. If this does not succeed, they can choose between ordinary courts and arbitration.

[25] Brussels Court of Appeals, 21 June 2013 https://juportal.be/content/ECLI:BE:CABRL:2013:ARR.20130621.3?HiLi=eNpLtDK2qs60MrAutjI0sFJKzs8rLs0pScwrUbLOtDKEijr7+wWH+oQ4+oWARI1gokhqawEWRhYE

Often the latter solution is chosen because it is advertised as being confidential, more speedy and no party benefits a home advantage if international arbitration managed is selected. In practice none of the advantages of arbitration mentioned here before may turn out to be true. Regardless it must be noted that ICC i.e. the most popular international arbitration institute proceedings are expensive. This can be checked by running the ICC cost calculator[26] and adding attorney expenses. Ultimately therefor, choosing ordinary tribunal proceedings may constitute a sound decision.

*Advice*

At the start of their relationship, parties may not like to discuss much the procedures to be followed in the event of a dispute. Still, they shall do so when drawing up their agreement, giving due consideration to the costs to be advanced in that respect.

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[26] https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/

| *Defined term* | *Meaning* | *NEC/FIDIC additional comments* |
|---|---|---|
| (Accepted) Programme | Schedule/planning for the performance of the Services. | [NEC] The Accepted Programme is identified within the Contract Data. During performance it will be superseded by a later programme. There is a process for submission and this must be accepted by the project manager. The programme is to be practicable and realistic, showing when the contractor intends to carry out each part of the works identifying the resource he intends to use. |
| Applicable law | Law applicable to the services provided under the Contract. | |
| Assignment | Transfer of rights and benefits (only) but not obligations, responsibilities or liabilities (unless otherwise written) | |
| Background Intellectual Property | Intellectual property owned by or otherwise in the possession of a Party prior to commencement of the Services | |
| Claim | A request or assertion by one Party to the other Party for an entitlement or relief under any provision of the Contract or otherwise in connection with, or arising out of, the Contract or the execution of the works/services. | |
| Client<br>Employer | The client. | |

| | | |
|---|---|---|
| Confidential Information | All information specifically identified by the disclosing Party as confidential at the time of disclosure, or information that a reasonable person would consider from the nature of the said information and circumstances to be confidential, including without limitation confidential or proprietary information, trade secrets, data, documents, communications, plans, know-how, formulas, designs, calculations, test results, specimens, drawings, studies, specifications, surveys, photographs, software, processes, programmes, reports, maps, models, agreements, ideas, methods, discoveries, inventions, patents, concepts, research, development, and business and financial information. | |
| Commercial risk | A risk which results in financial loss and/or time loss for either of the Parties, where insurance is not generally or commercially available. | |
| Compensation Event<br>Exceptional Event | An event at Employer's risk | [NEC] Compensation events entitle a contractor to be compensated for any impact the event has on the prices, completion or key dates in the contract. |
| Completion | This is when all work is done that the Consultant/contractor must do by the Completion Date, including correcting any notified Defects. | |
| Consultant | The Service Provider. | |
| Contract | The bundle of Contract documents | |

| | | |
|---|---|---|
| Contract Data Appendix | This information needs to be completed as part of the necessary contract documents. | |
| Cost | All expenditure reasonably/properly incurred (or to be incurred) by the Contractor/Consultant in performing the Contract, whether on or off the Site, including taxes, overheads and similar charges, but does not include profit. | [FIDIC] Where the Contractor is entitled under the Contract to payment of Cost, it shall be added to the Contract Price. |
| Cost plus Profit | Cost plus the applicable percentage for profit stated in the Contract Data. | [FIDIC] Such percentage shall only be added to Cost, and Cost Plus Profit shall only be added to the Contract Price, where the<br>Contractor is entitled under a Sub-Clause of these Conditions to payment of Cost Plus Profit. |
| Country | The country where the (main) Project/Site is located. | |
| DAB | The Dispute Adjudication Board | |
| Day / year | A calendar day / year. | |
| Decision, approval consent | A position that implies to a certain extent the adoption of the proposal | |
| Defect | Part of the works which is not as stated in the Works Information or not in accordance with applicable law or the accepted design. | [NEC] There is a reciprocal obligation on both the supervisor and contractor to notify each other as soon as they are aware of a Defect. At an agreed date, the project supervisor will list any uncorrected defects or certify that there are no defects (defects certificate). |

| | | |
|---|---|---|
| Delay Damages | Pre-agreed sum which can be applied if completion by the Contractor is later than the Completion Date. They must be a genuine estimate of likely loss to the employer at the time of entering the contract. | |
| Foreground Intellectual Property | All intellectual property created as a result of the services performed by the Consultant. | |
| Governing Law | The law governing the Contract. | |
| Key Date | Date by which the services/work is to meet the condition stated in the Contract. | |
| Language of the Contract | The language in which the agreement is written. | |
| Language for communications | The language for service of Notices etc. | |
| Limitation of Liability | A Party's liability under the Contract for all matters arising under or in connection with the Contract other than excluded matters (delay damages ea.) is limited to the amount stated in the contract Data. | |
| may | The person referred to has the choice of whether to act or not in the matter referred to | |
| NoNo | Notice of no objection that does not imply the adoption of a proposal. | |

| | | |
|---|---|---|
| Notice | A written communication. | |
| Parties | The Employer and the Consultant. | |
| Site<br>Working Areas | Areas which are necessary for, and only used to deliver, the required services/works. | |
| shall | The person referred to has the obligation to perform the duty referred to. He/she must. | |
| Subconsultant | Person who has a contract with the Consultant to provide part of the services. | |
| Variation | Any change to the services /scope | Not a change to the contract or sequence of execution |
| will | The person referred to has the obligation to perform the duty referred to. He/she must. | |
| Works Information<br>Scope<br>Specifications | The specification and description of services/works the consultant/contractor is to provide; it also might include a series of constraints to which the consultant/contractor must adhere to. | |
| | | |