

A COMINDIS Feature: Top 10 Project risks in Plant Engineering and Infrastructure Projects

Top 1: Unclear Scope of Works¹

- Top 1 Unclear scope of works.
- Top 2 Miscalculation and cost overrun.
- Top 3 Design problems & defective works.
- Top 4 Extension of time & delay LD's / liability, costs of prolongation and inefficiencies due to disturbances and variations.
- Top 5 Deficiencies in commercial contract implementation (weak contract management, lack of notifications, and lack of collecting evidence).
- Top 6 Lack of experiences and resources (technical and staffing).
- Top 7 Contractual ambiguities (gaps, different interpretation of clauses, new clauses).
- Top 8 Difficulties in enforcing claims (absence of a neutral court, long and costly proceedings).
- Top 9 Relying on co-operation with weak third parties (e.g., planner, sub-contractor, or consortium partner).
- Top10 Compliance, unknown markets, customers & contractors.

Disputes about the scope of works belong to the most "popular" issues in (EPC) plant engineering and arbitration cases. There are several reasons for this. In some projects, the scope description is simply vague or unclear. The parties have a different understanding of certain clauses or they are simply "lost in translation". Translation issues should not be underestimated, especially if the customer requires

¹ Please be aware that this publication shall not be taken as a legal advice. Any project requires intensive legal review and negotiations with the contractual partner.

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that its domestic language shall become the prevailing contractual language. This is rather the regular case.

Concise and clear wording

Uncertainties regarding the scope of works are avoidable: A concise and clear language is necessary. In case, involved persons interpret a clause or an annex during the tender phase differently, this might be a red flag. Consequently, a clarification round with the customer is highly advisable. Do not hesitate to raise scope related questions during the tender proceedings. Most tender proceedings foresee Q&A sessions, which allow to evidence certain mutual understandings.

Catch-All clauses

In other cases, the customer inserts intentionally a “catch all” wording for the scope, such as: *“The Works shall include any work which is necessary to satisfy the Client’s requirements and the requirements as set forth in [Scope of Work] and [Specifications] to the Agreement or is implied by the Agreement, or arises from any obligation of the Agreement, and all works not mentioned in the Contract but which may be inferred or determined to be necessary by the Client or useful in particular for the stability, or the completion, or the safe, reliable and efficient operation of the Works.”* It is self-explaining that such wording is a door-opener for many scope related additional requirements - and therefore disputes.

It might be even the nature of the model contract to guarantee a certain functionality or output of the plant. In such cases the scope description is a purely functional description of the plant, irrespective of its details (e.g. FIDIC Silver Book). One-sided risk shifting is often observed in EPC business, it might be reasonable if the plant is a green-field project with proven technology. However, in brownfield projects (e.g. a complex rehabilitation of a lignite coal power station or works in an existing chemical or nuclear power plant) or new technologies (“first of its kind”) it might be not advisable to accept such “catch all” scope descriptions.

Although the contract describes a pure functional scope, sometimes the customer is not giving the contractor the freedom to carry out the work in his chosen manner but is using unreasonable control and interferes into the details. This might cause claims by the contractor and is another typical case for scope disputes.

Open contradictions

A further issue is a potential (open) contradiction between parts of the scope description, e.g. between technical parts of the plant or applicable technical regulations. In such cases an “order of precedence” might help. Any contract should

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clarify in which sequence certain parts of the contracts and its annexes should apply. Alternatively, the “lex specialis” rule might solve this problem.

For a reliable estimate the technical scope, the schedule (including connected Liquidated Damages (LD’s)) and the guaranteed technical parameter must be crystal-clear drafted in any contracts. The clear delineation of interfaces to the customer and other contractors is highly advisable. It is also advisable to describe the working environment as detailed as possible (e.g. sites for pre-installation or storage) to avoid uncertainties.

Endorsement clauses

It is even important to clarify the responsibility of engineering scope and procurement. A typical pitfall is the customer’s requirement to endorse the previous drawings of another engineering planner as if such drawings were produced by the contractor himself. If the contractor has not enough time to evaluate the correctness and completeness of such drawings, technical assumptions or calculations, the risk might increase significantly. The customer might not accept later that the endorsed drawings or basic design assumptions were wrong or incomplete.

Permitting Services

Another scope issue refers to so called permitting services. In some EPC or (more frequently) EPCM contracts the customer requires the contractor to provide any of the necessary permits independently from responsibilities or failures caused by authorities. If such permits were delayed (e.g. by a failure of an authority) the contractor shall bear the consequences out of and in connection with a delay. Or even worse: the contractor shall also take the responsibility and costs for an additional scope caused by conditions to a permit unforeseeable at the time of submitting the application (e.g. noise or pollution reduction measures, if the permit foresees such additional and unexpected conditions to protect the neighbourhood). From a contractor’s perspective, it is often advisable to reject or modify such clauses and to limit the responsibility for permitting on providing the content of an application (drawings, descriptions etc.) for getting the permit. It is problematic to guarantee a permit as such!

Such duties can also lead to compliance risks, especially in countries with a low Corruption Perception Index (CPI). The contractor might bring itself in a difficult position if promised permits were denied by (foreign) public officers requiring bribes or facilitation payments.

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Customer Duties

Finally, the services and works to be conducted by the customer should be described in the contract with the same care as those of the contractor. It is important to agree upon the mutual expectations, when and what the customer is providing, e.g. in terms of delivery of material, release of drawings, providing access to the site or the take-over procedure.

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