

## Offshore contracts – the most fundamental problem

### 1. The most fundamental problem

There is a fundamental problem in all contracts. Some actually believe that this is the only problem in contracts, and that if you manage to solve this conundrum then 99% of your contract problems will evaporate and your life will be pure bliss and rainbows.

It's not that simple, I know, but I must admit that it is true at least to a large extent. One of the most persistent challenges in offshore contracts – as in all other contracts as well - arises when the parties disagree on what has been agreed as the scope of work for the supplier. When the parties are not clear as to what responsibility the supplier holds for a specific activity, who shall bear the risk of the activity and whether the employer company shall pay for the work performed and if so how much.

An example could be the very practical issue of transportation, e.g. transporting a component or a module on a barge, sea-fastening on the barge, towing the barge by a separate towing vessel, and insurance of the whole transport operation.

If you have a contract for work-over of the module, who is then responsible for these transportation activities? You might answer that this should be agreed and described in the contract, but the contract is not a transportation agreement, but a service contract. And it is a fact that many contract negotiators do not address these related or “ancillary” types of works or services, when they have the “core” duties firmly on the frontal laps.

### 2. One possible solution

We have developed a kind of “matrix”, which we hope is sufficiently simple that everyone can understand it, yet at the same time practical and useful in helping to solve the above described fundamental problem. Below you can see the matrix. Under the matrix it is explained in a slight more detail.

Activity → Responsibility → Risk + Payment

Activity	Responsibility/Risk	Payment
1. Modifications 2. Maintenance 3. Service 4. Operations 5. Commissioning, start-up 6. Installation 7. Transportation 8. Insurance 9. QA/QC 10. Fabrication 11. Secondment of staff 12. Documentation 13. Certification of design 14. Detailed design 15. Conceptual design	Responsibility for <u>producing</u> ? Responsibility for <u>approving</u> ? <u>Other</u> responsibility?	<u>Which</u> price? <u>How</u> to make/receive payment? <u>When</u> to make/receive payment?

For each activity assess your own responsibility and how payment shall be made.

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The matrix is intended to work this way:

1. First, in the left column, go through all the activities that can possibly arise in the lifetime (“lifecycle”) of the contract you are negotiating. You start from the bottom (in this case it is No. 15). Everything starts with an “idea” – where does this project come from, what is this about – the conceptual idea or design, and somewhere out in the future (at the top of the column) all projects or contracts end, some with a delivery + a guarantee or service period, and some include maintenance, even operations.
2. Then you work your way upwards from the bottom. Here the numbers 1-15 are used as examples, they are generic descriptions of ordinary activities – your individual project may have more or less activities, and new ones may be added and those that are totally irrelevant can be deleted – but be careful: you may be surprised when you really think about what the project entails. So perhaps you should rather add to, than subtract from, the list.
3. For each activity you ask yourself two questions: one, do I have any responsibility for this activity under the contract (in the legal wording of the contract, or in any of the appendices to the contract, or elsewhere) – this is the middle column, and second, if I do have some kind of responsibility for this activity, how will I get paid or compensated for the additional responsibility, risk and workload? – this is the right-hand column.
4. As you go through this matrix exercise, you will understand better what the project actually contains and you might have a better chance to catch the unforeseen activities, challenges, scope-of-work, points of contention and hiccups that a project can present.

### 3. Lessons Learned

Often, your intuitive understanding of what you have agreed to is correct. You are fully on top of things and there are no surprises.

Sometimes, however, the matrix helps you to understand that there have been holes in your mutual understanding with your counterpart, that your customer or your supplier had a different understanding. There the matrix can help you.

It may also give you some aid in costing an offer when you prepare a tender as a supplier or contractor, or conversely valuing an offer according to your actual needs as a customer. And if you use the matrix wisely before you sign the contract there is a good that you can avoid the most costly misunderstandings.

What do you think? Could this possibly help you when negotiating offshore contracts?

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For questions or comments to this newsletter or energy and offshore in general, please contact Bo Sandroos on +45 4088 5422 or [bos@wsco.dk](mailto:bos@wsco.dk).

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