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Optimizing Construction Outcomes: Contract Execution Strategies in Kuwait

SHUBHAM SINGH¹

ABSTRACT

The construction industry is a driving force in Kuwait's economy, with a broad spectrum of projects that are crucial to both urban development and the oil sector. The foundation of these projects lies in the construction contracts that govern their execution. This paper examines the legal and technical aspects of construction contracts in Kuwait, emphasizing the importance of a comprehensive techno-legal framework for successful project completion.

We will explore the contract lifecycle, highlighting opportunities at each stage to mitigate risks and ensure project success. A focus on the pre-contract phase reveals the necessity for clear, mutual agreement on terms that align with Kuwait's legal requirements. The use of standard contract conditions, such as FIDIC, alongside tailored provisions, ensures that contracts are well-defined and understood by all parties.

The paper discusses the role of contract administration in monitoring compliance, managing budgets and schedules, and facilitating decision-making processes. We address the significance of industry best practices in dispute resolution, particularly in a legal environment like Kuwait's, where ADR mechanisms are less recognized, and litigation remains a common recourse.

Through this exploration, we aim to provide insights into effective contract management and dispute resolution strategies that can lead to the seamless execution of construction projects in Kuwait, minimizing disputes and avoiding cost or time overruns. The findings underscore the importance of meticulous documentation, adherence to best practices, and the application of key learnings to future projects, contributing to the continuous improvement of the construction industry in Kuwait.

Keywords: *Construction Law, Contract Execution, Kuwait, Legal Framework, Dispute Resolution, Construction Contracts in Kuwait.*

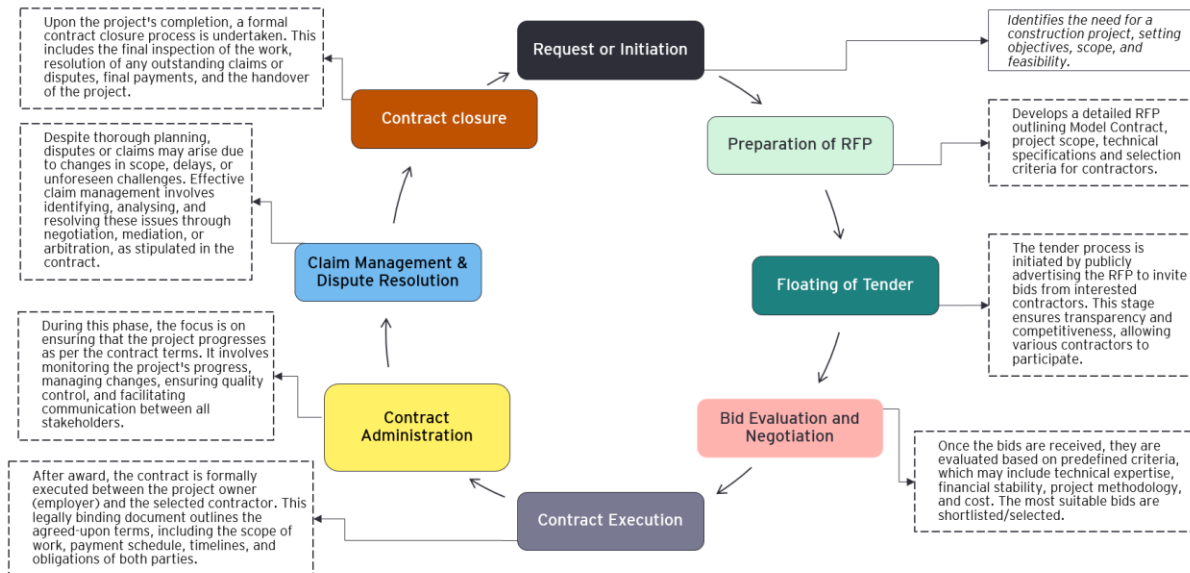
I. INTRODUCTION

The construction industry plays a significant role in Kuwait's economy, involving a wide range of projects from residential and commercial buildings to large-scale infrastructure developments, and is fundamental to the oil sector. The success of these projects relies on the

¹ Author is a Senior at EY, India.

strength of construction contracts, which are a blend of technical specifications and legal frameworks, reinforced by precise contract administration.

The Contract lifecycle of a typical project is illustrated below:



In this paper, we will explore the opportunities available at different stages of the contract lifecycle to mitigate risks and achieve successful outcomes. By utilizing these opportunities, the goal is to complete projects smoothly with minimal disputes and without exceeding the budget or timeline.

II. ENSURING PROJECT SUCCESS: WHAT TO DO BEFORE SIGNING A CONTRACT

Entering into a contract involves mutual agreement on terms typically prepared by the Employer, with the Contractor having the opportunity to negotiate these terms. To understand the project scope and requirements, the Contractor needs a complete set of details, which the Employer provides during the tendering process. Following the instructions provided to bidders, Contractors submit their bids/proposals. The Employer then evaluates the bids, considering the eligibility criteria. Upon finding a proposal that meets the project's needs, the Employer will accept it and proceed to formalize the contract with the chosen Contractor.

An agreement turns into a contract when it includes terms that both parties have agreed to, and these terms must follow the country's laws to be enforceable. This means the terms need to be written with the law in mind, and they should be fair, clear, and unbiased. While the law makes the contract enforceable, the construction work itself is guided by the technical details, which need to be clearly written. A well-written contract is a balance of both legal and technical aspects – a true techno-legal blend.

In Kuwait, the use of standard contract conditions, such as FIDIC Conditions of Contract², New Engineering Contract (NEC), the Joint Contracts Tribunal (JCT), Infrastructure Conditions of Contract (ICC), and others, is common. Additionally, there are instances where contracts are tailored with self-prepared conditions to meet specific project requirements.

The key components of construction contracts are centered on well-defined responsibilities related to Engineering, Procurement, & Construction, alongside payment terms, completion milestones, and supporting obligations. These elements are essential to guarantee that all involved parties share a common understanding of their duties, the financial agreements, and the schedule for project execution. This comprehensive approach ensures clarity and alignment, facilitating a smooth progression from project inception through to completion.



The engineering team often believes that the technical aspects of a contract are sufficient, as engineering terms and their interpretations are standard and universally understood among engineers. However, when ambiguities arise, these same engineering terms can take on different meanings in legal contexts. Conversely, the legal team typically views the legal aspects of a contract as important, but primarily as a framework to support and enable the technical requirements set out by the engineering team.

Therefore, a seamless integration and balance between the technical and legal components of a contract are crucial for the successful delivery of a project. The interplay between these elements ensures that all project requirements are met while being supported by a solid legal foundation that addresses any potential issues or disputes that may arise.

The contract should be drafted with care to ensure transparency and impartiality, and it must align with these applicable laws to be considered valid.

- i. **Social Security Law No. 61 of 1976:** This law mandates social security contributions for Kuwaiti workers and provides benefits such as pensions, disability, and death benefits. Contractors must ensure compliance with contribution requirements and understand the benefits applicable to their workforce.
- ii. **Cabinet Resolution No. 1179 of 2023:** on National Manpower Employment

² Conditions of Contract for Plant & Design-Build (Second Ed, 2017) by Fédération Internationale des Ingénieurs-Conseils (FIDIC)

Regulations on Government Contracts applies to government contracts tendered by public bodies and excludes oil business sector contracts. It introduced a comprehensive framework for the recruitment, employment, and benefits of Kuwaiti workers in government contracts, as well as penalties for contractors' non-compliance. Each public body that offers government contracts must have a Kuwaitisation Unit, responsible for determining the proportions and numbers of Kuwaiti workers for each contract, announcing job vacancies, conducting recruitment procedures, overseeing the implementation of Resolution No. 1179 of 2023, and imposing penalties for non-compliance by contractors.

- iii. **Work Permits for Non-Kuwaiti/Kuwaiti Workers:** The issuance of work permits is regulated to control the employment of non-Kuwaiti workers. Contractors must obtain the necessary permits for their non-Kuwaiti employees and comply with any restrictions or quotas for foreign workers.
- iv. **Public Tender Law No. 49 of 2016:** This law, along with its amendments (Law no. 74 of 2019), regulates the tendering process for public projects, ensuring transparency and competitiveness. Contractors engaging in public projects must understand the tendering procedures and comply with the requirements for bidding and contract awarding.
- v. **Protection of Kuwaiti Industrial Products:** This set of laws encourages the use of Kuwaiti-made products and supports the local industry. Contracts may include clauses favouring or requiring the use of domestic materials when available.
- vi. **Labor Law No. 6 of 2010:** This comprehensive labor law covers all aspects of employment, including working hours (also Ministerial Order 535/2015 related to summer working hours), overtime, rest days, and employee rights. Contractors must adhere to these regulations and ensure that their employment practices are in line with the law.
- vii. **Council of Ministers Resolution No. 1028 of 2014:** This resolution focuses on increasing the employment of Kuwaiti nationals in the private sector. Contractors should be aware of any requirements to hire Kuwaiti workers and incorporate these into their staffing plans.
- viii. **Law No. 25 of 1996:** This law requires contractors to declare any commissions paid in connection with state contracts. Transparency in such declarations is crucial to avoid legal issues related to bribery or corruption.
- ix. **Kuwait Environment Public Authority:** This body oversees environmental

regulations, including impact assessments and compliance with environmental standards. Contractors must ensure that their projects meet environmental protection requirements specified in Law No. 42 of 2014 and its amendments through Law No. 99 of 2015.

- x. **Civil Code Law No. 67 of 1980:** The Civil Code governs all civil transactions, including contracts. It provides the general principles for contract formation, execution, and dispute resolution.
- xi. **Kuwait Commercial Code (KCC) Law No. 68 of 1980:** The KCC addresses commercial transactions and includes provisions relevant to commercial contracts, business practices, and company operations.
- xii. **Kuwait Municipal Council's Orders:** These orders may include specific local regulations related to construction, such as building codes, land use, and zoning. Compliance with municipal regulations is essential for project approval and completion.
- xiii. **Law No. 2 of 2008:** This tax law amendment outlines the income tax obligations for companies operating in Kuwait. Contractors must account for any tax liabilities and ensure proper tax compliance.
- xiv. **Time-to-Time Ministerial Orders:** The dynamic nature of legal regulations means that contractors must stay informed about and comply with any new ministerial orders that could affect their projects.
- xv. **Kuwaiti Customs and Import Regulations:** These regulations govern the importation of construction materials and equipment. Contractors must navigate customs procedures to avoid delays and additional costs.
- xvi. **Kuwait Public Private Partnership Law, Law No. 11 of 2014:** This law provides the framework for PPPs, detailing the process for establishing partnerships, risk allocation, and project management. Understanding this law is crucial for contractors involved in PPP projects.
- xvii. **Kuwait Law No. 11 of 1995 on Judicial Arbitration for Civil and Commercial Matters:** This law establishes the legal basis for arbitration as a dispute resolution mechanism. Contractors should include arbitration clauses in their contracts and be familiar with the arbitration process.

It is imperative that the scope of work to be undertaken under the Contract is defined with

utmost clarity to avoid any ambiguity that could lead to disputes or misunderstandings. Payment terms must be equitable and synchronized with the progress of the work, as delayed payments typically do not accrue interest, which can be detrimental to the Contractor. Therefore, the payment schedule should be explicitly outlined, ensuring fairness to both the Contractor and the Employer.

Additionally, the contract should clearly specify the procedures for handling changes in scope, additional work, and the implications of changes in law or the introduction of new legislation. These provisions should detail how such circumstances will affect the contract terms, including adjustments to the scope of work, project timelines, and compensation.

The rights of suspension and termination should be transparent and impartial, safeguarding the interests of both parties. The terms for suspension and termination must be fair and commonly accepted, as biased or unclear terms can frequently lead to the failure of projects. Both parties should commit to these terms, which should be designed to prevent disputes and facilitate the successful completion of the project.

Incorporating these principles into the contract will contribute to a more robust and equitable agreement, reducing the risk of conflict and ensuring that both parties are protected and incentivized to achieve the project's objectives.

III. POST-CONTRACT SIGNING: STEPS TO SECURE PROJECT SUCCESS PROJECT SUCCESS

Contract administration plays a pivotal role in the post-contract signing phase of a construction project, suggesting a collection of benefits that are helpful for a successful project completion. The core of contract administration is the strict monitoring of compliance with the contract provisions by both the Company and the Contractor. This level of scrutiny is essential to ensure that all parties fulfil their contractual obligations, thereby maintaining the project's integrity and preventing any deviations from the agreed-upon terms.

One of the key advantages of careful contract administration is the ability to control the project budget and schedule effectively. Continuous monitoring of the project's progress, coupled with timely interventions, is crucial in preventing cost overruns and delays. This proactive management approach allows for the anticipation and mitigation of potential issues before they escalate, ensuring that the project remains on its intended course.

Applying industry best practices and leveraging the team's collective expertise ensures that any adjustments to the contract are made carefully and with the project's best interests in mind. This

collaborative approach not only promotes better decision-making but also significantly lowers the risk of disputes, providing a solid foundation for negotiation discussions in case any disagreements arise.

Effective vendor performance is also heavily reliant on diligent contract administration. By verifying compliance and monitoring progress at regular intervals, the project management team can ensure that vendors and subcontractors are meeting their contractual obligations, which is often a determinant of the project's overall success.

Both parties shall be obliged to promptly communicate any issues, concerns, or instances of non-fulfilment of obligations by either side as they occur. This practice of timely and transparent communication is essential for mitigating miscommunication and pre-emptively addressing disputes. Furthermore, maintaining a contemporaneous record of such communications can serve as critical evidence in the event of dispute resolution, facilitating a clearer understanding of the events and helping to establish the facts should any disagreements escalate to formal proceedings.

Lastly, adherence to the principles of contract administration enables the identification of key learnings from each project. These insights are invaluable for refining project management processes and enhancing the quality of future projects. By building a comprehensive repository of knowledge, teams can benefit from past experiences, applying lessons learned to new projects and facilitating a smoother project lifecycle for all involved.

In essence, contract administration is the backbone of effective project management in the construction industry. It ensures that the project remains aligned with its objectives, within budget, and on schedule. Moreover, it contributes to the continuous improvement of project management practices, paving the way for the successful delivery of future projects.

IV. STRATEGIES FOR RESOLVING CONSTRUCTION DISPUTES

The most effective approach to resolving construction disputes is to adhere to the best industry practices that are widely recognized. For instance, when raising claims for Extension of Time³ (EOT) or additional costs, reference can be made to established protocols such as the Society of Construction Law's Delay and Disruption Protocol⁴ or the AACE International's

³ Shubham Singh, 'Time in Focus: The Strategic Application of Impacted As-Planned Method of Delay Analysis in Construction Dispute Resolution', (2024), 90, *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Issue 2, pp. 180-196, DOI- <https://doi.org/10.54648/amdm2024020>

⁴ See Society of Construction Law Delay and Disruption Protocol, Feb. 2017 Society of Construction Law – United Kingdom.

Recommended Practice 29R-03⁵. These protocols offer guidance on best practices to mitigate disputes by providing clear frameworks for claim presentation and evaluation.

It is necessary for parties to maintain proper and detailed documentation of any non-compliance by the other party with their contractual obligations and the impact of this non-adherence. Comprehensive documentation acts as critical evidence during dispute resolution processes, supporting claims and enabling equitable resolutions. In Kuwait, where Alternative Dispute Resolution (ADR) mechanisms such as conciliation, mediation, Dispute Adjudication Boards (DAB), or arbitration are not commonly practised, the importance of adhering to best practices and generating contemporaneous records becomes even more pronounced⁶.

The Kuwaiti dispute resolution system primarily relies on direct negotiation between parties, often referred to as 'friendly negotiation,' and ultimately, court litigation is the final stage for resolving disputes. Given this context, the emphasis on maintaining meticulous records and following best practices is not only a strategic approach to dispute avoidance but also a necessary preparation for potential litigation.

⁵ AACE International, International Recommended Practice No. 29R-03 - Forensic Schedule Analysis - TCM Framework: 6.4 – Forensic Performance Assessment, (2011).

⁶ Shubham Singh (2023). Guidance on Extension of Time in Construction Contracts. *International Journal of Scientific Research in Engineering and Management*, 07(04). doi: <https://doi.org/10.55041/ijsem19431>.