

Turkish Construction Companies: Considerations for International Projects and Regional Dispute Resolution Trends

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Introduction

The Turkish construction sector has experienced significant growth in recent years, achieving prominence in the international arena. The sector has developed into one of the most well regarded forces in the field. It has also become a crucial element of Turkey's economy, despite the most valuable segment of the sector actually being international construction projects, rather than domestic operations.

Turkish construction contractors have proved to be skillful in creatively using alternative dispute resolution methods to avoid and resolve disputes, as well as mitigate future consequences. The real possibility of a contractor damaging its chances of receiving future work often casts a long shadow over dispute resolution in the construction sector. Accordingly, a pragmatic approach to dispute resolution will continue to be necessary for Turkish construction contractors, which face regional unrest and an increasingly uncertain future in Russia, one of the local sector's most important foreign markets.

The Turkish Construction Sector by Numbers

The construction sector is an important element of the Turkish economy, forming a key part of Turkey's wider role in the international business community:

- During 2015, Turkish contractors undertook 7,735 projects in 104 countries, valued at a total of \$304.5 billion.
- According to the Engineering News Record, Turkey represented the second highest country of origin for contractors in the 2015 "World's Greatest 250 International Contractor", with 43 companies, second only to China.¹
- Construction work in Turkey generates employment to 1.8 million people and comprises 5.9% of the country's GDP.

Considering the direct and indirect effects which the sector has on other markets, the Turkish construction sector is estimated to directly or indirectly contribute to 30% of the Turkish economy and 10% of national employment.

Common Sources of Construction Disputes

Successful project completion relies on harmonious cooperation between project participants. However, the nature of construction projects inherently create a high risk of disputes arising. A single project will likely involve several horizontal and vertical layers of work, carried out by professionals from a range of countries. At times, the commercial interests and incentives of project participants can diverge. Also, professionals' expertise and education levels can be dramatically different between those layers. Projects can also be tied to each other, multiplying the number of parties involved, along with the associated potential for disputes.

Contractors generally submit their bids to and ultimately work for sovereign project sponsors. Therefore, contractors are forced to consider their likely future project prospects with the counterparty when deciding whether or not to pursue a dispute. When wider commercial factors are considered, contractors can discover that simply holding a legal right or strong argument does not necessarily mean that pursuing a dispute will be in their long-term best interests. The risks of damaging the relationship with the counterparty may be outweighed by the simple fact that the contractor's next project bid will likely involve the same project sponsor.

Given these factors, construction disputes are inevitable unless proper preventive mechanisms are included in contracts and subcontracts. These mechanisms must also be understood by all parties and implemented in a timely and efficient manner as disputes evolve.

Pre-Bid Considerations for Foreign Projects

Contractors must do their homework before bidding on foreign construction projects. In this manner, they can avoid or reduce negative consequences of a possible dispute or breach of etiquette. All efforts should be made to understand the country's local dynamics, mechanisms, as well as other parties involved in the project. Such due diligence allows contractors to determine and consider the systemic, political or regulatory risks involved, ultimately making an informed decision about whether it is in the contractor's best interests to operate in this particular country. The exercise allows contractors to fully understand a project and mitigate risk margins well in advance.

Specific factors to consider before bidding on a foreign project include:

- **Local Fund Transfer Regulations:** At times, restrictions can apply to transferring currencies and amounts across national borders. Therefore, contractors should investigate and understand the project's method of payment (cash or otherwise), as well as which currency payments will be made in.
- **Tax Arrangements:** Taxation can directly affect the total income which a contractor receives. Therefore, corporate tax rates, stamp duties and withholding taxes for the relevant country should be considered, along with the existence of any reciprocal taxation treaties between the relevant countries.
- **Employment Restraints:** The status of foreign employees can be complex and should be carefully considered when the contractor is determining whether the contractor's own (foreign) personnel will be involved in the project. Some countries apply thresholds for the number or qualifications of foreign workers permitted to work on state funded projects.
- **Differences Between Legal Systems:** Contractors should consider the potentially different approaches between their home legal system and target country's system. While complex and large-scale international projects use internationally accepted standards, local variations or interpretations can surprise contractors.

Dispute Resolution Methods for the Construction Sector

The complex nature of large-scale international construction projects means that construction contracts have developed different features from regular commercial contracts, as well as dispute resolution methods tailored to suit the sector's unique characteristics.

International contractors, including Turkish contractors, widely accept arbitration as an important dispute resolution method. However, Turkish contractors tend to view arbitration as a method of last resort, particularly when involved in constructions projects for sovereign project sponsors. The risk of potentially losing future business from a sovereign tends to prevent Turkish contractors from arbitrating disputes, even if a case looks strongly in the contractor's favor. Contractors tend to attempt other alternative dispute resolution approaches, such as negotiation and mediation.

Generally, contractors attempt negotiation first, since it can resolve disputes quickly and involves the least procedural formality. If negotiations fail, mediation can pose a more attractive alternative than arbitration due to its easier formation, comparatively reduced effort required and faster resolution process. These factors can be persuasive, since an arbitrated outcome can take years.

The success of negotiation and mediation can depend on the accuracy and completeness of project records. Each stage of the project should be properly documented and if problems arise, these should be raised in a timely manner to avoid a domino effect, or irreversible problems.

Turkish contractors have shown a preference for using standing dispute boards, particularly for projects involving a sovereign. This runs against a common perception in Turkey that dispute adjudication boards or dispute resolution boards are redundant due to their non-binding resolutions. However, findings given by such boards can support a contractor's position during later negotiations and meditations. Involving a neutral third-party, such as a mediator or dispute resolution board, can help to eliminate differences more objectively, save face, as well as help avoid other negative implications of the dispute for the parties.

The experience, expertise, neutrality and professionalism of appointed experts is significant, regardless of whether the parties choose a dispute resolution board, mediation, arbitration, or some other method. Turkish contractors have shown a clear preference for using internationally well-known expert individuals and firms to add objective credibility to their position, claims and perceptions.

Regional Developments

Historically, Russia has been an important market for Turkish contractors. Some local names have directly built their global recognition and reputation on the back of major projects completed in Russia. Turkish contractors have benefitted from experience obtained in Russia, spreading operations throughout neighboring countries. Turkish construction companies are involved in more projects in the EMEA region than any other national group.

However, recent Russian sanctions on Turkey threaten future prospects for Turkish construction companies in Russia. Russia has announced that projects which have already been granted to Turkish construction companies will not be affected by the sanctions. However, this is a temporary respite and means that no cases or arbitrations will arise from those contracts due to the recent sanctions. Future relations between Russia and Turkey will determine how Turkish contractors position themselves for business ventures.

The tension between Russia and Turkey will harm Turkish construction business on a global scale, beyond projects simply located in Russia. Turkish construction businesses tend to bear the financial risks of difficulties themselves, without a third party insurance safeguard. It is common for construction contractors around the world to engage insurance companies to secure against regional risks and possible problems. For example, French contractors have Coface available in this respect, whereas Germans have Hermes. Eximbank was established in Turkey to support Turkish firms on the global scene. However, Eximbank is essentially simply a commercial bank at the moment, involved in pre-financing for Turkish firms. It is critical that the Turkish construction sector is supported by an insurance institution in the near future to cover regional risks.

The recent political turmoil in Syria and Iraq and heightening tensions in the Middle East generally continue to cause increased difficulties for Turkish contractors. At the least the future does not look promising for any construction company in the region. However, for the disputes already arisen, the fact that the region is also full of claims experts, mediators and arbitrators who are well aware of the circumstances and projects and familiar with the parties is a relief in that they can help parties reach a quick and effective resolution considering all of the surrounding circumstances.

Conclusion

The volatile nature of the region means Turkish contractors have developed the necessary skills to efficiently handle complex and multi-layered disputes. Turkish construction contractors have proved to be proficient at creatively using a range of alternative dispute resolution methods to avoid and resolve disputes, as well as mitigate negative consequences and protect commercial interests. While use of such methods have not developed in other Turkish

industries to the same extent, Turkish construction companies exemplify that alternative dispute resolution methods can be quite efficient if industries use them in a way suitable to their businesses, regions, future interests and counterparties.

1. http://www.enr.com/toplists/2015_Top_250_International_Contractors1

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