

Living in a Ghost Town? Dubai's unfinished projects

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Dubai's Marina 101 has again featured in the news in recent weeks. Advertised to be Dubai Marina's tallest skyscraper, the project, launched in 2005, has limped towards completion for well over a decade. Recent reports put the structural works at more than 95% complete although significant fitting out work is still to be undertaken.

In recent months, efforts have been made to auction the 31-storey hotel portion of the building in an effort to raise funds to complete the project. There were no takers prepared to pay the reported AED 361 million reserve price. Following decades of an ever-expanding construction sector and numerous similar stories, is now the time to tackle the ghost buildings left behind in an ever-tougher market for new developments?

The Issues

No doubt part of the reluctance to take on a project such as Marina 101, or any of the numerous partially completed projects to be found in Dubai and the region, is the liability risk involved in taking on partially completed construction works.

Many contractors will be reluctant to pick up where the last contractor left off and potentially take a large part of the risk in the whole structure.

Of course, for some projects, the structural elements of the works have been left unprotected from climactic and subsurface conditions for so long that the structural integrity has been compromised and, realistically, they will never see completion.

For other projects where the works have been adequately protected or where the building was weather-tight before works stalled. This article considers the remaining risks in looking to restart stalled works and what can be done to manage those risks.

Possible Next Steps

In simple terms there are only two scenarios which need to be considered. First, the Employer re-engages the original contractors. Second, the Employer replaces the original contractor(s) to complete the Works.

Reinstating the Contractor

The first scenario is, from a legal perspective, relatively straightforward as the same parties are involved and there is no splitting up of liability for the Works between multiple contractors. Either the contracts are still in place and works can be re-commenced (with appropriate changes to the Contract Price and Time for Completion as may be the case); or if the original contracts have ended, it may be possible to re-engage the same team on similar terms.

Having said that, even in this simple scenario there can be issues as to responsibility for the period in which the project has stalled. For example, if activities such as dewatering and maintenance of the permanent and temporary works had ceased, particularly if payment did not continue, risks may have been created in this period which the contractors did not price for and will not be prepared to take responsibility for or will only do so for a premium.

A potential solution to these issues is to undertake surveys prior to restarting the works, but a contractor is still likely to want to price any increased risk. Surveys will at least mean that risk is (better) understood and can inform the parties' negotiations. Depending on the extent of the risk, the employer may find it more cost effective to take for the risk in the intervening period. In those circumstances' surveys are key to defending claims from the contractor.

Reinstating selected Subcontractors

Depending on how advanced a project is, it may be tempting to reengage only a limited number of necessary subcontractors when restarting a project. This may be tempting where the works are well advanced and the main contractor's direct works are largely complete. This approach may help offset the additional cost of restarting a project by stripping out the overheads added by main contractors. However, there are other issues to consider, including:

- If it is still in place, possible termination of the main contract, but it is critical to take into account the consequences of this. It may be that in a termination for convenience the main contractor is entitled to payment in respect of loss of profit on the outstanding works;
- Can any remaining sub-contracts be novated? If so, that novation should be 'ab initio' i.e. the novated contract should operate as if it was always a direct relationship between employer and subcontractor. If this is not the case, there is a risk that liability will still be split between the main contractor and subcontractor as far as the employer is concerned;
- Sub-contractors may not be prepared to continue or to enter into new contracts where they have to accept the risk for the 'stalled' period for the same reasons as above. A premium may be required or an altered risk profile negotiated leaving the employer with more risk to shoulder; and
- Even with the above matters resolved, the employer would need to take on or redistribute amongst its consultants, the coordination of the works and management of the site facilities and permits etc., usually undertaken by the main contractor.

Replacing the Contractor

Alternately, and more likely following a lengthy suspension, a new project team may be engaged by the old or a new employer. The risks here are distinct from those above.

The principal issue is how to resolve liability for the existing works.

From an employer's perspective there is significant risk in splitting liability between 'old' and 'new' contractor. Doing so not only means that, in order to recover losses in the event of a defect in the works, the employer must try to determine liability as between the two contractors, but also creates an effective line of defence for both contractors. The old contractor claims its works were not defective and the defect has only occurred in or because of the interface with the new works; and, conversely, the new contractor blames the pre-existing works. In this scenario, the employer must try to evidence, perhaps through costly technical analysis, which contractor is liable for each part of the problem. The 'old' contractor will also have the advantage of claiming that its works were damaged or have deteriorated after it ceased working and that the employer is responsible for defects occurring in that period.

Plainly an employer will want to avoid this situation and seek to have an incoming main contractor take on responsibility for all pre-existing works. This can be negotiated, although contractors will, if they are prepared to take the risk at all, expect a considerable premium for taking on that risk. Of course, the longer a project has been stalled, the more difficult it will become to convince a new contractor to take on the risk, not only of defective works carried out by the previous contractor, but also the risk of damage or deterioration of exposed works in the period during which the project was stalled.

As with the first scenario, detailed surveys can help inform the parties' negotiations, but a premium is still likely. Where a new main contractor is being engaged it may be possible to reduce risk, and so premiums, by reengaging key members of the original sub-contract team.

MEP is a particular issue in stalled projects. These systems are particularly impacted by exposure to the elements and will require testing and cleaning as a minimum. Where projects have been stalled for any length of time, it is also necessary to consider whether systems (e.g. fire safety systems) still meet the required regulations and whether manufacturer warranties will need to be extended.

Decennial Liability

A further issue which needs to be considered in the UAE and other jurisdictions in the region is decennial liability.

A contractor and architect are jointly liable on a strict-liability basis for 10 years from the date of delivery for the total or partial collapse of a building, according to Article 880 of the UAE Civil Code.

However, where a building is incomplete when the original contractor or architect leave the project they may not be liable for its structural integrity (as regards decennial liability at least). In fact, it is the new contractor and architect that will take the risk regarding decennial liability as they are responsible for completion of the project. Depending on how advanced the works are when the new contractor takes over, this is a considerable risk for replacement contractors.

In these circumstances it may be possible for the old and new contractors to seek an apportionment of liability under articles 209 to 292 of the UAE Civil Code. However, from the Employer's perspective it is far better for all liability to sit with the new contractor and to allow the contractors to fight out the apportionment between themselves.

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