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NIGERIA | GHANA

16 November 2026

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TEMPLARS ThoughtLab

Bankable Turnkey EPC Contracts in Nigeria: *Allocating Risk Beyond Single-point Responsibility*

Introduction

Turnkey Engineering, Procurement and Construction (EPC) contracts are widely used for major infrastructure projects where employers seek a single point of responsibility for design, procurement, construction, testing and commissioning, together with greater certainty over price, completion and facility performance. For sponsors and lenders, that certainty is central to bankability, as a properly structured EPC contract gives financiers confidence that a completed and operational asset will be delivered within the agreed cost and schedule.

In Nigeria, however, achieving this certainty requires particular attention to the country's project and regulatory environment. Exchange rate volatility, foreign currency availability, dependence on imported equipment and changes in law can materially affect project costs, procurement obligations and delivery schedules.

Local content requirements, particularly in the oil and gas sector, also influence procurement strategies and subcontracting arrangements. For projects financed by commercial lenders and development finance institutions, these considerations sit alongside expectations around environmental and social compliance, procurement integrity, completion guarantees, performance security and clearly defined remedies for contractor default.

The challenge, therefore, is not simply to transfer project risks to the EPC contractor, but to allocate them in a manner that reflects the realities of delivering and financing infrastructure projects in Nigeria.

However, single-point responsibility is where risk allocation begins, not ends. Although the turnkey model is often described as transferring "all project risks" to the contractor, no contractor can reasonably assume every conceivable risk, and no sophisticated employer or lender should expect such. A bankable EPC contract instead allocates each material risk to the party best placed to manage, mitigate or insure against it.

This article looks beyond single-point responsibility. It examines the commercial rationale for turnkey EPC contracts and the principal legal and commercial issues that parties should address in negotiations to produce a contract that is both deliverable and financeable.

The Turnkey EPC Model

Unlike traditional design-bid-build procurement, which separates design and construction responsibilities, a turnkey EPC contract places primary responsibility for design, procurement, construction, testing and commissioning on a single contractor. The employer specifies the required scope and performance standards, while the contractor determines how they will be achieved, whether directly or through subcontractors. This reduces interface risk and provides a single contractual point of responsibility, although risks may remain where the employer retains design responsibilities, supplies equipment or engages other contractors.

The FIDIC Conditions of Contract for EPC/Turnkey Projects (the **"Silver Book"**) provide a recognised framework for this model. They contemplate substantial contractor responsibility for delivering a completed facility, including significant exposure to price, completion and execution risks. However, the Silver Book may be unsuitable where tenderers lack sufficient time or information to assess project risks, or where the employer intends to exercise extensive control over the works.

Where these constraints arise, parties don't often use standard design-bid-build forms like the Red Book; instead, they typically bridge the gap through one of three commercial pathways:

1. The direct alternative is the FIDIC Yellow Book (Plant and Design-Build), which preserves single-point design and construction responsibility while reallocating unquantifiable physical site risks back to the employer under the administration of an independent Engineer.
2. Parties may retain the Silver Book framework but recalibrate its risk profile via tailored Particular Conditions, carving out unforeseen ground conditions or introducing target-price mechanisms for early scopes.
3. Resolution of information asymmetries through phased front-end engineering design (FEED) or early contractor involvement models, enabling site conditions and interface risks to mature before converting into a fixed-price lump-sum turnkey contract for execution.

Overall, the objective should not be to transfer every conceivable project risk to the contractor. It should be to preserve the advantages of single-point contractual responsibility while ensuring that the risks assumed by the contractor are identifiable, reasonably assessable, appropriately priced and capable of being managed. This is particularly important where the project is financed through limited-recourse or non-recourse project finance, since the allocation of construction risk must be credible not only to the contracting parties but also to lenders and their technical advisers.

Commercial Allocation of Risk

The defining feature of a turnkey EPC contract is the allocation of responsibility for delivering the completed facility. The contractor ordinarily assumes responsibility for design, procurement, construction, subcontractor coordination, testing, commissioning and contractual performance. The employer typically retains risks within its control: land rights, site access and relevant information.

The principal issues requiring attention include:

a. Design Responsibility and Fitness for Purpose

Design responsibility is often contested where the employer seeks to transfer responsibility to the contractor for the overall design, including designs prepared by the employer or its consultants.

It is therefore advisable that the contract distinguishes between an obligation to review and identify defects in an existing design and an obligation to assume responsibility for its adequacy. Where the contractor must adopt or complete an existing design, the extent of its responsibility should be expressly defined. It is also advisable to identify any design elements or proprietary technology for which the employer remains responsible, and allocate the consequences of defects, including correction, additional costs and extensions of time.

A further distinction exists between compliance with prescribed employer's specifications and a fitness-for-purpose obligation. The latter requires the completed facility to achieve the purpose defined or ascertainable from the contract and may impose a more demanding obligation than compliance with technical standards or the exercise of reasonable skill and care. This distinction was considered in *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd* [2017] UKSC 59

In that case, MT Højgaard designed and installed offshore wind turbine foundations in accordance with an incorporated international technical standard, an error in which caused the grouted connections to fail. Although the contractor had complied with the standard and the trial judge rejected the negligence allegations, the contract documents separately required a 20-year design life and imposed fitness-for-purpose and performance obligations. The UK Supreme Court held the contractor liable, confirming that compliance with a prescribed technical standard does not displace an express performance requirement.

Accordingly, bankable turnkey EPC contracts must reconcile the employer's requirements, technical standards, fitness-for-purpose obligations and reasonable-skill-and-care provisions. It is prudent to clearly define the intended purpose, measurable performance requirements and the contractor's responsibility for employer-provided designs.

b. Pricing and Payment

Lump-sum pricing is common in turnkey EPC contracts because it provides upfront cost certainty for the agreed scope and allows the contractor to price the resources and risks required to complete the works.[1] However, the price may remain subject to adjustments for variations, changes in law and other agreed contractual entitlements.

A key negotiation issue is the allocation of cost escalation risks, including increases in taxes, duties, foreign exchange, equipment costs, etc. Although employers may expect contractors to absorb risks they had an opportunity to assess and price, contractors may seek relief for changes in law or the business environment or expressly employer-retained risks. Therefore, the contract should allocate exposures and provide for an adjustment mechanism.

The parties should also distinguish a fixed lump-sum price from a guaranteed maximum price (GMP). While a lump-sum arrangement generally places cost overruns for the agreed scope on the contractor, a GMP establishes a ceiling on specified costs, subject to the agreed treatment of contingencies, allowances, savings and exclusions. Hence, the contract should clarify how these items are valued and whether the employer benefits from savings arising from design optimisation or omitted work.

Foreign exchange risk warrants particular attention in Nigerian projects, especially where equipment costs, debt service and project revenues under the project are denominated in different currencies. To this extent, the parties may agree to an adjustment mechanism, including the applicable exchange rate, adjustment threshold, affected cost components, and stabilisation clauses for changes in law.

c. Site Conditions and Unforeseen Physical Conditions

Site conditions can materially affect the cost and completion of EPC works, particularly where they involve complex ground conditions, contamination, underground utilities or restricted access. An important negotiation issue is the extent the contractor assumes responsibility for investigating and assessing the site before agreeing the price and programme.

It is advisable that the contract identifies the site risks assumed by the contractor and the circumstances in which genuinely unforeseen physical conditions entitle it to additional time or cost. It should also set out notification, investigation and mitigation procedures to avoid disputes over whether a condition was reasonably foreseeable or adequately priced.

d. Time for Completion and Extensions of Time

A defined Time for Completion matters to sponsors and financiers because delay may defer revenue, increase construction-period financing costs and trigger obligations under offtake, concession and other project agreements. Its effectiveness, however, depends on when the

[1] In *Robinet Nigeria Ltd v Shell Nigeria Gas Ltd* (2013) LPELR-22144(CA), the contractor agreed, for a fixed sum payable in two instalments, to supply, install, commission and maintain two generator sets at the employer's sites in Ota and Aba. It later claimed a further sum for 'additional work', including extra doors, valves, cabling and tank treatment. Comparing those items with the detailed scope and schedule of prices in the contract, the Court of Appeal held that, save for one item, they fell within the work the contractor had already agreed to perform for the contract price, and dismissed the claim. ***The decision illustrates that work already covered by an agreed lump-sum scope does not ordinarily attract additional payment.***

completion period begins, the prerequisites for commencement and who is responsible for satisfying them.

Commencement may be conditional on an advance payment, satisfaction of conditions precedent or issuance of a notice to proceed. Prerequisites may include insurance, corporate approvals, performance security, advance payment guarantees, design documentation and a lender direct agreement.

These need to be coordinated to align payment, mobilisation and commencement, with clear consequences if a condition is not satisfied by the agreed date.

The parties must also test the programme against key dependencies, such as site availability, permits, advance payments, security instruments, procurement lead times and interfaces with other contractors, as an agreed completion date offers limited certainty unless these are properly addressed.

Ultimately, the extension-of-time regime must identify qualifying events, notice and substantiation requirements, the method for assessing delay and the procedure for determining entitlement. It must also address concurrent delay, particularly where employer-caused delay coincides with contractor default.

e. Completion, Testing and Performance

A facility may be physically complete but fail to achieve the required output, efficiency or availability. The contract must distinguish physical completion, taking over and satisfaction of performance guarantees, specifying the conditions and consequences of each.

The taking-over procedure typically addresses completion of the works, performance testing and delivery of essential documentation and training. If a facility fails its performance tests, the employer's remedies may include rectification and retesting, taking over subject to a price adjustment, or rejection and termination. The contract should define the applicable tests, measurement criteria, tolerances and consequences of repeated failure.

Performance liquidated damages must reflect the commercial impact of underperformance. Relevant metrics may include output, efficiency and availability for power projects, and throughput, product quality or energy consumption for industrial facilities, alongside specifications on how shortfalls are measured and the applicable damages mechanism.

The contract must also separately address defects discovered after taking over, including the defects notification period, the contractor's obligation to investigate and rectify defects within applicable response and rectification periods, and the consequences of failing to do so. Provisions must be made for recurring and latent defects and how the defects notification period interacts with contractual warranties and the release of retention or related security.

f. Permits and Regulatory Approvals

The contractor would ordinarily obtain permits relating to its construction methods, site operations, personnel and equipment. Approvals dependent on the employer's land rights, corporate status, project ownership or position as sponsor are typically allocated to the employer. Other approvals may require cooperation, including the employer's provision of supporting documents and authorisations.

While the contract is expected to identify the required approvals and allocate responsibility for obtaining each, the obligation to apply for an approval should be distinguished from responsibility for its non-issuance. For critical approvals, it is advisable to agree on the consequences of prolonged delay or refusal, including extension of time, suspension, scope changes or termination if approval remains outstanding beyond an agreed long-stop date

g. Subcontracting

Subcontracting is common in turnkey EPC projects requiring specialist design, equipment, installation or commissioning services. Although the contractor may subcontract substantial parts of the works, it should ordinarily remain responsible to the employer for overall performance and delivery in accordance with the main contract.

The contract must balance the employer's interest in approving appointment and/or replacement of subcontractors, against the contractor's need for procurement flexibility. An example being, that approval rights may be limited to designated or critical subcontractors.

h. Variations

Although turnkey EPC contracts are generally based on a lump-sum price and defined scope, changes may arise during project execution. These may include employer-directed design changes, regulatory requirements or modifications arising from site conditions. However, not every event resulting in additional cost or delay constitutes a variation; some may be addressed under separate contractual relief provisions.

The variation clause is expected to specify who may instruct changes, the required approval procedure, how variations will be valued, and whether they entitle the contractor to additional time. It may also address omissions from the scope and whether the employer may engage another contractor to undertake the omitted work.[2]

Well drafted contracts typically require the contractor to identify the cost and programme implications of a proposed variation within an agreed period. The contract must also establish whether the contractor is required to proceed with an instruction before its financial or time implications are agreed, and how unauthorised instructions or additional work will be treated.[3]

i. Liability Regime

The liability regime is a critical component of risk allocation in a turnkey EPC contract. Although contractors will typically seek to limit their overall exposure, employers will want to ensure that the agreed limitations do not undermine the protection intended to be provided by the contract.

The parties should negotiate the aggregate liability cap, losses excluded from recovery and liabilities carved out from the cap. Particular attention must be given to exclusions for consequential loss, delay and performance liquidated damages, indemnities, etc.

The parties should negotiate the aggregate liability cap, losses excluded from recovery and liabilities carved out from the cap. Particular attention must be given to exclusions for consequential loss, delay and performance liquidated damages, indemnities, third-party claims, fraud and wilful misconduct. The contract should also clarify whether insurance recoveries count towards the liability cap and how the cap interacts with other contractual remedies.

The treatment of delay and performance liquidated damages and the costs of rectifying defects require careful consideration, alongside whether these liabilities count towards the aggregate cap, are subject to separate caps, or are excluded from it. Equally, parties should ensure that limitations on monetary liability do not inadvertently restrict the contractor's underlying obligations to complete the works, rectify defects or achieve the required performance standards, with the contract addressing whether accrued liabilities survive termination.

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[2] In *Abbey Developments Ltd v PP Brickwork Ltd* [2003] EWHC 1987 (TCC), the English court held that a contractor has not only an obligation but also a right to carry out the contract works, and that a general power to vary or omit work does not, without clear words, permit the employer to omit work in order to have it carried out by another contractor, even where the employer is dissatisfied with the contractor's performance; the employer's remedy in such a case lies in the termination provisions. Consistently with this, the 2017 (2nd Edition) Silver Book forms provide that a Variation shall not comprise the omission of work which is to be carried out by the Employer or by others unless otherwise agreed by the parties.

[3] See *Robinet Nigeria Ltd v Shell Nigeria Gas Ltd* (supra, fn 1), where the Court of Appeal affirmed the dismissal of a contractor's claim for payment for additional work undertaken without the employer's approval or written authorisation, in the absence of an agreement governing such work.

The objective is to establish a liability regime that provides the contractor with reasonable limits on exposure without leaving the employer inadequately protected against the principal risks of project delivery.

j. Security, Insurance and Lenders' Rights

Security arrangements protect the employer against contractor default and project-related losses. Typical instruments include performance bonds, advance payment guarantees, parent company guarantees, retention bonds and Construction All Risks (CAR) insurance, whose effectiveness depends on their terms, duration, enforceability and the creditworthiness of the issuer.

The parties must agree each instrument's amount, duration, call conditions and release requirements, and distinguish an on-demand guarantee, payable on a compliant demand without proof of breach, from a conditional bond, which requires the employer to establish default.

Where an on-demand guarantee is intended, the ICC Uniform Rules for Demand Guarantees (URDG 758) provide a recognised framework. Instruments must remain valid for the full period of exposure, extend where completion is delayed and, for advance payment guarantees, reduce as advances are recovered. A retention bond must reflect the underlying retention provisions, including outstanding defects obligations during the defects notification period. Insurance provisions must address scope of cover, insured parties, exclusions, deductibles and the application of proceeds following a loss.

In financed projects, lenders may require access to project information, site inspection rights, notice of contractor default, cure rights and the ability to step in or appoint a replacement contractor. These rights are typically documented in a lender direct agreement aligned with the EPC contract, with clear notice and cure periods.

Effective step-in also requires access to the designs, software, warranties, permits, spare-parts information and subcontracts needed to complete and operate the facility.

The EPC contract must therefore grant lenders or their nominees a licence to use, reproduce and modify contractor documents for completion, operation, maintenance and repair, including following contractor default or termination. The licence should survive termination and be exercisable without further contractor consent.

Conclusion

Turnkey EPC contracts remain an important delivery model for complex infrastructure projects, offering a single point of responsibility and greater certainty over cost, completion and performance. However, single-point responsibility is a starting point, not a complete risk management strategy. Its value to sponsors and lenders depends on a clear, commercially rational and legally enforceable allocation of project risks, supported by effective security, remedies and lender protections.

For infrastructure projects in Nigeria, this requires parties to consider whether their risk allocation reflects the realities of project development, financing and execution within the Nigerian market.

Ultimately, a bankable EPC contract does not seek to transfer every conceivable risk to the contractor. Instead, it allocates each material risk to the party best placed to manage it, preserves the contractor's capacity to perform, and gives sponsors and financiers the certainty of cost, completion and performance on which project finance depends.

Looking beyond single-point responsibility in this way is what helps turns a turnkey contract into a financeable one.

If you require any further clarification, do not hesitate to contact us.