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Errors in construction standards and specifications: who bears the risk?

It has become commonplace for construction contracts to include express undertakings from contractors as to design or suitability. Often, the implications of such undertakings are poorly understood, and can give rise to disputes in circumstances where contracts also contain obligations to perform work in accordance with certain standards and specifications. A recent decision of the English High Court (*MT Højgaard a/s -v- E.ON Climate and Renewables UK Robin Rigg East Limited & Anor* [2014] EWHC (TCC)) has considered in detail the effect of such provisions in circumstances where the relevant standards and specifications contain errors. **Rob Palmer** and **Baldev Bhinder** give an overview of the key issues covered and highlight the important implications for employers and contractors alike.

The issue

An international standard for the design of offshore wind turbines produced by an independent body was found, some five years after publication, to contain a fundamental error affecting the foundations of turbines constructed according to that design standard. In this case, the cost of remedial work to the turbines on the Robin Rigg wind farm in the Solway Firth was £26.25m. Who was liable for this cost: the contractor or employer? Who was to bear the responsibility (as between the two parties) for the error in the standard? That was the decision for the court to make.

The decision

On the terms of the contract, Mr Justice Edwards-Stuart held that the contractor was liable for the costs of rectification. Although the contractor was expressly obliged to design in accordance with the specific international standard (J101), it also expressly assumed full responsibility for design of the turbines and warranted that the foundations would have a service life of 20 years (that is, a life of 20 years without the need for replacement). The judge held that these obligations were not mutually exclusive. Since the relevant connections failed within two or three years, the contractor was in breach of contract.

In reaching this conclusion, the judge referred to two Canadian decisions, including the decision in *The Steel Company of Canada -v- Willard Management Ltd* [1966] SCR 746, which concerned a contractor's claim for the costs of repair work on three roofs. There, the Supreme Court of Canada rejected a contractor's claim for payment on the basis that the contractor had failed to comply with an express contractual obligation to construct work capable of performing the function for which it was intended, and notwithstanding that the contractor **had** carried out work in accordance with plans and specifications provided by the employer.

Mr Justice Edwards-Stuart stated that:

"If, for the purpose of this case, one treats J101 as 'an owner's specification', then these decisions are authority for the proposition that the existence of an express warranty of fitness for purpose by the contractor can trump the obligation to comply with the specification even though that specification may contain an error."

He also stated more generally:

"It is not uncommon for construction and engineering contracts to contain obligations both to exercise reasonable care, or to do the work in a workmanlike manner, and to achieve a particular result. Indeed, where the contractor has a design obligation, terms as to fitness for purpose of the completed work are sometimes implied: such contracts are likely to include also the lesser obligation to carry out the design with reasonable care and skill. The two obligations are not mutually incompatible."

Comment

While the contractor has stated that it will appeal, the decision is consistent with Canadian authority and with the views of commentaries such as *Hudson's Building and Engineering Contracts* (to which the judge referred). The principles underlying the decision are applicable across legal systems and, while it is likely to

be persuasive in common law jurisdictions throughout the region, we expect that the decision will also be used by employers bringing or defending claims arising under contracts governed by civil systems of law.

For contractors, the decision highlights the risks that are associated with warranting a particular design life or "fitness for purpose", and with assuming that a requirement to exercise "reasonable care" will qualify other contractual obligations. If a contractor intends for its obligations to be limited to performing work in accordance with particular standards or specifications or with reasonable care only, the inclusion of undertakings as to design or suitability should be resisted in contract negotiations. If those undertakings are included, the additional risk should be priced accordingly.

On the other hand, employers will no doubt be heartened by the protections afforded by such undertakings. Even where standards or specifications contain errors, provisions of this type may well afford a remedy to an employer. Employers would be advised to include them in construction contracts where the resulting price premium allows.

Further information

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