

Clarifying conflicting contract obligations

With contracts getting bigger, they include a longer list of contractor obligations. Hence, it is essential to ensure clarity in drafting these documents to avoid conflicts especially with regard to output and input obligations, says STUART JORDAN*.

LIKE most things, construction contracts just get bigger. The reasons are many: owners and their lenders are always looking for more security, so that means a longer list of contractor obligations. As an example, the FIDIC main contracts increased (by page count) by about 70 per cent between the First and Second Editions – and most of that is added process.

To make the obvious point: the more we add into a contract, the higher our chances of including conflicting obligations. That is especially true when those obligations are set out both as inputs and outputs. In EPC (engineering, procurement and construction) or design-construct contract models, the owner is relying on the contractor's ability (skills, resources, experience) to bring about the required outcomes – but that doesn't stop the owner from also prescribing how the contractor should go about that task.

Typical input obligations include, to:

- Design and construct with the reasonable skill, care and diligence to be expected of a competent and skilled specialist EPC contractor, experienced in performing works of similar size and nature to the works;
- Act in compliance with good engineering practice;
- Comply with applicable law – including national minimum specifications;
- Follow other designated specifications.

Typical output obligations include ensuring that the completed works:

- are fit for their intended purposes as set out in, or can be implied from, the contract;
- shall meet the guaranteed performance levels on testing;
- shall have a minimum stated design life.

We have looked before at the importance

of fitness for purpose and design life obligations because of their wide application. Fitness for purpose, in basic terms, is the concept that goods and services should be capable of being used for the intended purposes for which they were purchased. This comes from English mercantile law but the concept of a provider meeting the customer's stated needs, is universal. And in any event, express fitness for purpose obligations are almost ubiquitous in the Gulf region's contracts. Increasingly, design appointments also include these obligations – and that presents a perceived problem for consultants because their professional indemnity insurance does not cover fitness for purpose liability.

Let's consider this conflict between a contractor's obligations – where the contractor's following of the required input obligations makes it impossible to meet the required outputs for the completed works. What happens here? Is the contractor required to meet the outputs anyway or does the conflict allow reliefs from the output obligations? As always, it depends on the contract; and we have some legal principles from both common law and civil law jurisdictions to assist our drafting.

This question was central to a dispute that we have looked at before, between an offshore windfarm project developer (E.ON Climate and Renewables) and its balance of plant contractor (MT Hojgaard AS), engaged to design and construct tower foundations for wind turbines in the North Sea. In brief, the contract included an obligation to carry out the works so that each item "is fit for its purpose as determined in accordance with the Specification..." and the specification included minimum design requirements:

1. To design in accordance with a published welding specification (DNV-OS-

J101); and

2. To design the foundations in order to achieve a lifetime of 20 years without planned replacement.



The published specification was faulty as it contained a significant load calculation error. The contractor followed it, as required, but the foundations began to fail at the connection to the towers. So the English Supreme Court

eventually had to resolve the question: is the contractor liable when the contractor cannot achieve the required output by following the required input? Their answer was yes, in this case: the contractor took the risk of working to the faulty specification and the 20-year design life obligation remained intact. This decision was assisted by the fact that the contract referred to DNV-OS-J101 as a "minimum design requirement"; the court reasoned that the contractor should have identified the need for better standards, adequate to achieve the output.

Now another case has illustrated the same point, by coming to a different result. We looked at this case recently in relation to the "duty to warn". Here, an engineering consultant (Aecom Ltd) was engaged by a design-build contractor (Lendlease [Europe] Ltd) to perform MEP and fire engineering services. Lendlease relied expressly on the above case in alleging that Aecom was required in its agreement, to achieve certain outcomes including ensuring that a plant room would comply with certain regulations – which, in the end, it did not. However, the contract included a provision stating: "Notwithstanding any other clause in this Agreement ... or term implied by statute or common law, the Consultant shall not be construed to owing (sic) any greater duty in relation to this Agreement than the use of necessary reasonable skill, care and diligence..."

So this contract set the "reasonable skill and care" obligation (an input obligation) above everything else. Clarity! ■

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