

CONSTRUCTION : BULLETIN

Design Responsibility

What Have You Signed Up To?

One of the most important issues for contractors to consider when entering into contracts is the level of responsibility they will assume in relation to design. This is a complex issue which has important implications for professional indemnity insurance cover and requires consideration of both the terms of the contract and the design obligations which are implied by the law.

Background – the responsibility of design consultants

To understand their own responsibilities, contractors must first understand the level of responsibility the law imposes on professional design consultants.

Design consultants are not under a legal obligation to provide a guaranteed result (although they may sign up to a contractual obligation to this effect). For example, an architect designing a school is not under an absolute obligation to ensure that the design he produces is defect-free and suitable for use as a school; he must simply use reasonable care and skill to try to achieve this result.

This duty to use reasonable care and skill comes from:

- section 13 of the Supply of Goods and Services Act 1982, which requires the supplier of a service to provide the service with reasonable care and skill; and
- the common law test for negligence, which is that a professional person is not negligent if he conforms to a practice accepted as proper by some responsible members of his

profession, even if other members take a different view.

In professional appointments, these two duties are usually combined into a single clause requiring the consultant to use the level of reasonable care and skill to be expected of an experienced member of his profession (or similar wording along those lines).

Contractor design responsibility – what the law says

Unless there is an express provision in the contract to the contrary, a contractor with design responsibility is usually subject to an implied legal obligation to provide a design which is fit for purpose. If the design is not fit for purpose, the contractor will be in breach, even though the contractor might have used reasonable care and skill to try to produce a suitable design which is free from defects.

This fitness for purpose duty has arisen because the courts have historically taken the view that a contract for the design and construction of a building (or part of it) is equivalent to a contract for the supply of goods. The Sale of Goods Act 1979 requires goods to be reasonably fit for the purpose made known by the customer, so using the same analysis, a contractor who agrees to design a building for a purpose made known to him undertakes that the design will be reasonably fit for that purpose.

However, following the 2012 case of *Trebor Bassett Holdings & Cadbury UK Partnership v ADT Fire and Security*, it appears fitness for purpose may no longer always be the default position. In that case, the Court of Appeal decided that a fire suppression system



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was not classed as “goods” because the primary purpose of ADT’s contract was the specialist design of the bespoke system. Accordingly, the fitness for purpose requirement imposed by the Sale of Goods Act did not apply, so ADT was only required to use reasonable care and skill in carrying out the design of the system.

This case appeared to draw a distinction between “standard kit” (classed as goods, subject to a fitness for purpose obligation) and “bespoke product” (classed as a service, subject to a reasonable care and skill obligation). This is contradictory to previous case law and suggests that in the future, the designers of bespoke “systems” (such as M&E specialists) may potentially not be subject to fitness for purpose obligations. However, this is a developing area of law, so for the moment it is sensible for contractors to continue to assume they will always be subject to an implied fitness for purpose obligation when carrying out design work.

Fitness for purpose – what’s the big deal?

The implied obligation of fitness for purpose is widely considered to be a big problem for design and build contractors, but why?

The answer is that a fitness for purpose obligation will generally not be covered by a policy of professional indemnity insurance. Professional indemnity insurance provides cover for negligence, which stems from a failure to use reasonable skill and care. A failure to satisfy a fitness for purpose obligation is a failure to satisfy a contractual guarantee and does not necessarily involve negligence, so will not be insured.

The upshot is that if a fitness for purpose obligation is accepted, breach of that obligation is highly likely to be an uninsured risk and any damages arising from a design defect will have to be paid by the contractor. Contractors already accept uninsured risk in relation to workmanship and quality of materials, so they are keen to try to avoid this in relation to design.

Avoiding fitness for purpose

Contractors can avoid an implied fitness for purpose obligation by ensuring that they enter into contracts which expressly only require them to use reasonable care and skill.

Contractors entering into JCT contracts can take comfort from the fact that they limit the contractor’s liability for design to the standard required of an architect or other appropriate professional designer, thereby imposing a reasonable care and skill obligation.

The position under the NEC3 Engineering and Construction Contract is very different. The contractor is simply required to provide the works in accordance with the Works Information. This has the effect of imposing a fitness for purpose obligation. The contractor’s liability will only be reduced to a reasonable care and skill obligation if secondary option clause X15 is selected. Clause X15 provides that the contractor is not liable for design defects if he used reasonable skill and care to ensure that his design complied with the Works Information. Contractors doing any design work under NEC3 should therefore take care to ensure that clause X15 is included in the contract.

Avoiding other “absolute” obligations

Contractors should not only be wary of contractual provisions which use the express words “fit for purpose”. Provisions which impose absolute obligations or guarantees relating to design can also cause problems from a professional indemnity insurance perspective. For example, JCT contracts are often amended to include a clause which provides that:

- (a) the contractor shall exercise the reasonable skill, care and diligence to be expected of a qualified and experienced architect or other relevant professional designer;
- (b) the design of various elements of the works shall be properly co-ordinated and integrated with one another; and
- (c) the works shall comply with any performance specification or requirement included in the contract.

Clause (a) contains the important “skill and care” wording which lulls the contractor into thinking fitness for purpose is not an issue. However, clauses (b) and (c) are both drafted in a way which imposes absolute obligations relating to design. For example, the wording of clause (b) will allow the employer to bring a claim for breach of contract if the design of various elements of the works is not properly integrated, even if the contractor used reasonable skill and care. These obligations are therefore unlikely to be covered by professional indemnity insurance, and will pose a risk to the contractor unless wording can be added to clarify that clauses (b) and (c) do not impose a standard of care relating to the design of the works which is higher than the standard imposed by clause (a).

Summary

The key point for contractors to take away from this is that it can be risky to sign up to any absolute contractual obligation relating to design, regardless of whether that obligation expressly includes the words “fit for purpose”. Contractors should also ensure they understand exactly what their professional indemnity insurance policy does and does not provide cover for, and that they bear this in mind when negotiating contract terms.

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