

## Further information

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Welcome to the June 2013 edition of Quaystone, the newsletter from the Construction and Engineering team at Burgess Salmon. This month we focus on offshore renewable projects and introduce the latest version of NEC3 contracts.

## Round 3 Delivery

Optimists in the industry are predicting the imminent delivery of Round 3 offshore wind projects. It will place unprecedented demands on technology and funding and will present a huge range of challenges to the supply chain: some old and some new.

Ground conditions are a familiar issue for contractors to grapple with, less so when the ground in question is many meters below sea level. Similarly contractors are well used to programming contingency for adverse weather but offshore conditions will be significantly more hostile and will need to allow for extreme wave heights and currents.

Allied to that is the need to use specialist installation vessels, often at huge risk and cost (see case below). Such vessels are scarce so an early procurement decision is whether they are to be sourced by the developer or the supply chain. Some contractors have dealt with this risk by acquiring their own vessels rather than chartering them. This bold strategy gives them an advantage over their competitors but the cost of doing so limits this approach to only the largest players.

Developers will be keen to obtain robust warranties on plant and materials (as well as very high limits of liability). This is likely to be a concern for contractors being asked to deliver "first of a kind" infrastructure on a massive scale and cost. Crucial also to such large projects are fluctuations in commodity prices and the availability of port facilities.

Developers and contractors will need to find a way to allocate and manage these risks in a suitable form of contract. There are a number of options on the table. Given its use on current offshore wind developments and its acceptance by the international supply chain, FIDIC is likely to be a leading candidate. Lessons can also be learned from the oil and gas industry's Logic suite of contracts. This is currently undergoing a review and may play a key role in Round 3's contractual mix. A key difficulty at present is that Logic was developed for use by cash rich developers (oil companies) where a risk sharing approach was appropriate. That risk allocation



will not work with the expected funding model for Round 3. NEC3 may also have some part to play but developers will undoubtedly require robust amendments to modify risk allocation.

All parties will be keen to test the new technology before full scale rollout can take place. Despite testing facilities being made available, such as Aberdeen Bay and the Crown Estate's recent tender of testing sites, the mood within the supply chain is underwhelming. Contractors' main complaint is that government is doing little (despite the Scottish government's financial incentives to make testing grounds more attractive) to encourage Round 3 research and development. Testing will have a huge cost and many contractors question why they should take the risk in developing new technologies that the industry as a whole (and the government) will benefit from without some kind of financial support during the design development phase.

Undoubtedly, Round 3 presents challenges of a type and on a scale that have not been encountered on any renewable energy projects to date. Those within the supply chain are ready to move forward but clear policy and government support is required to make that happen.

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# Problems with Installation Vessels

*MT Højgaard v E.ON Climate and Renewables* involved the installation of 62 offshore wind turbine foundations. The vessel chartered by Højgaard to carry out the work proved inadequate. Although it was the Højgaard's responsibility to provide a vessel, E.ON decided to issue a variation, charter a replacement vessel itself and allow Højgaard to use it. The replacement vessel did the work much quicker. The parties had to decide on an appropriate reduction to the contract price. Højgaard argued that the reduction should be the element of the original contract price allocated to the provision of the original vessel. E.ON contended that the reduction should be based on how long Højgaard would have taken if it had continued to use the original vessel. The court preferred Højgaard's interpretation. The judge

decided that E.ON's valuation assumed that Højgaard was in breach of contract. Whether or not that was the case, that was not the way E.ON had chosen to deal with the issue when the problem arose. E.ON may legitimately have required Højgaard to provide a replacement vessel and, if that had caused delay, impose delay damages. E.ON chose to issue a variation instead so was not entitled to claim damages for breach of contract.

The message is, make sure that your contract provides clear mechanisms to deal with most eventualities – particularly obvious ones like problems with key elements of marine spread in the case of offshore wind projects. And if problems do occur follow the most appropriate mechanism in the contract to deal with it.

## Offshore CDM

The CDM Regulations are currently being reviewed by the HSE with the aim of bringing a revised set of regulations into force in late 2014. Until that happens, the existing 2007 regulations still apply. However, it has never been completely obvious, without trawling through the regulations with a fine toothcomb, as to whether they apply to all offshore projects.

Under the Application Outside Great Britain Order 2001, the application of CDM was extended to cover UK territorial waters. However, the 2001 Order has now been revoked by a new 2013 Order and, although HSE guidance states that references in regulations to the 2001 Order will be construed as referring to "appropriate" parts of the 2013 Order, it is now unclear to what extent CDM applies offshore as the CDM relevant parts of the 2001 Order are not replicated in the 2013 Order. It is likely that offshore projects situated in a REZ which lies beyond the UK's

territorial waters are not, technically, subject to CDM.

This is, however, probably no more than a legal technicality. As RenewableUK's recent Offshore Wind and Marine Energy Health and Safety Guidelines point out, the usual general duty to reduce risk ALARP (as low as reasonably practicable) applies throughout the REZ by virtue of the application of the Health and Safety at Work Act. If those involved in offshore projects were to adopt an approach that differed from CDM, then any such approach would have to provide an equivalent level of safety.

Therefore, until the new version of the CDM Regulations comes into force next year, it will remain unclear as to the extent of the regulations' application to all offshore projects. From a practical point of view however, compliance with CDM would seem to remain the safest and most straight forward way of proceeding.

## Round 3 Planning Consent

DECC recently gave development consent to the £1.8bn 504MW Galloper offshore wind farm. It is due to be built 27km off the Suffolk coast coming ashore at Sizewell and comprise up to 140 turbines. The UK offshore wind industry has been watching this process with close interest as it falls under the new planning regime brought in by the

Planning Act 2008. The decision has been followed closely by four other similar development applications to date.

This is the second offshore wind farm consent granted under the new planning regime (the other being Kentish Flats Extension, granted in February 2013). Burges Salmon lawyers advised the developers on both projects.

## New NEC3

Revised versions of the NEC3 forms of contract have recently been published. The new forms, dated April 2013, are not significantly different to the previous iterations and largely focus on tidying up the following:

- Tweaks to the adjudication and payment provisions to make them compatible with the latest Construction Act.
- Refinements to elements of the compensation event mechanism.

In addition the new suite provides the option to

incorporate clauses dealing with:

- Project bank accounts
- BIM

Finally a number of new documents have been introduced:

- "How to" guides which include help with completing the Works Information and using the forms of communication.
- A short form of professional appointment.

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