

Quystone

November 2013

Further information

For further details on the issues raised in this bulletin or generally on the services we offer please email marcus.harling@burges-salmon.com, william.gard@burges-salmon.com or steven.james@burges-salmon.com or your usual Construction and Engineering Group contact.

Welcome to the November edition of Quystone, the newsletter from the Burges Salmon Construction and Engineering team. This month we focus on the thorny issue of fitness for purpose obligations. Do they apply to your contract? We also welcome Katie Taylor to our team.

Is your design fit for purpose?

Is a design carried out by a design and build contractor required to be "fit for purpose"? It is a perennial issue arising both in disputes and in contract negotiations. A Court of Appeal case¹ this year highlighted the difficulty in answering this question. The issue is also critical when determining what the contractor is required to deliver, particularly in contracts relating to process plant and power generation.

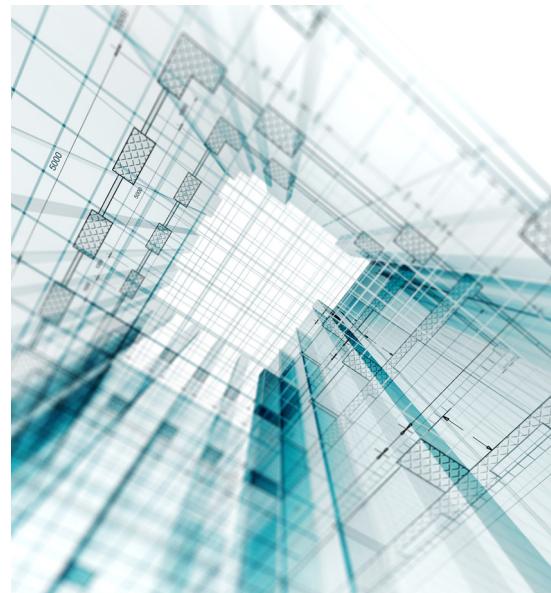
Why should an Employer want a fitness for purpose obligation at all? In essence a fitness for purpose obligation means that, when completed, the works will be fit for their intended purpose. This means that the Contractor has to achieve the purpose regardless of whether his design was prepared negligently or not.

Such an 'absolute' obligation is attractive to funders/purchasers. It may be essential if project finance is sought where the funder's only recourse is the borrower's rights under the project agreements.

Employers should note, however, that many contractors find 'fitness for purpose' obligations deeply unattractive. The key reasons for this are that:

- fitness for purpose obligations may not be covered by a contractor's usual PI cover. An extended policy may be expensive or even impossible to obtain;
- where the design has already been carried out by an architect appointed by the Employer, the Contractor may not be able to pass on his 'fitness for purpose' obligation to the architect. This gap arises as the architect's design obligation is likely to be limited to exercising "reasonable care and skill".

Some contracts will place an express obligation on the Contractor to deliver works that are fit for purpose. This may be in broad terms or by reference to a more narrow purpose, sometimes set out in the Employer's Requirements. Determining what "fit for purpose" means in such contracts should, in principle, be relatively straightforward. However, how simple this is depends



on the accuracy and completeness of the Employer's Requirements. Where these lack detail, the potential for dispute can be significant.

Where a contract is silent on the requirement for fitness for purpose, common law or statute may step in to imply one. The Supply of Goods and Services Act 1982, unless displaced, implies a term that the Contractor shall exercise reasonable care and skill in the provision of services. This includes design. The Act further requires that 'goods' will be reasonably fit for their intended purpose where a particular purpose has been expressly or impliedly made known, except where the Employer did not rely on, or it was unreasonable for him to rely on, the Contractor, although beware the distinction between 'goods' and 'systems' (see overleaf). A common law obligation may also exist in relation to package (design and build) contracts². As ever, whether such terms are implied will depend on the facts of each individual case but these implied terms should not be overlooked.

Continued

¹ *Trebor Bassett Holdings Limited v ADT Fire and Security Plc [2012] EWCA Civ 1158*

² *IBA v EMI Electronics Ltd and BICC Construction Ltd* 14 B.L.R 1

So what does this mean to you? Contractor and Employer alike should be alive to the importance of this issue and ensure that any contract entered into adequately addresses this point.

Contractors will want to:

- ensure they fully understand the extent of any fitness for purpose obligations they are being asked to enter into; and
- understand the extent of their PI insurance's cover for fitness for purpose obligations.

Conversely Employers need to:

- ensure that the Employer's Requirements and any technical schedules fully and accurately set out what the Contractor is being expected to deliver and the purposes of the Works;
- consider the requirements of funder/purchasers; and
- understand the Contractor's concerns.

Quality not Quantity

Many a frustrated Employer will complain that what a Contractor has provided under the contract is not up to the high standard he expected. It is often difficult for an Employer to know if he can do anything about it.

As is often the case, the starting point is what is expressly set out in the contract. Requirements for goods to be of "good quality" or "satisfactory quality" are common. Where no such term is included, terms may be implied under statute and common law.

The Supply of Goods and Services Act 1982 applies to a wide variety of contracts under which "goods" are provided including construction contracts. The Act implies a term that goods provided under the contract will be of "satisfactory quality". Furthermore, under common law a person

contracting to do work and supply materials warrants that the materials he uses will be of good quality and reasonably fit for the purpose for which they are to be used³.

So where does this leave the frustrated Employer? What amounts to "satisfactory" or "good" quality is fertile ground for dispute. All parties to a contract benefit from the Employer setting out in detail the quality requirements that the Contractor must meet. The more complex the subject matter of the contract, the more detailed this should be. Suitable technical advice should be sought at an early stage if the Employer does not have the required expertise himself. If both parties' expectations are aligned, disputes and costly litigation can be avoided.

³ *Young & Marten Ltd v McManus Childs Ltd [1969] 1 A.C. 454*

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able to use Trebor's contributory negligence as a partial defence resulting in a 75% reduction in the damages awarded to Trebor.

We are pleased to welcome **Katie Taylor** to our team. Katie joins us from Freshfields in London and specialises in contentious and non-contentious construction law. Katie brings the number of specialist construction lawyers in the Burges Salmon Construction and Engineering team to 16.

