



Is Your Design-Build Fit for Purpose

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It is quite usual to find a construction contract having different obligations regarding design and workmanship. One question that is mostly asked in all construction projects is who bears the risks. In most cases, the design responsibilities and risks are a source of conflict between the owner and the contractor. A contract may, for instance, contain reasonable skill and care obligations in relation to design. It may also contain the fitness for purpose obligations. Such obligations require strict compliance with certain performance specifications in the workmanship. In this article, we will explore some of the difference between the design-build and fit for purpose on construction contracts.

Design-build refers to a situation where a design-builder enters into a contract as a single entity to offer both the design and construction aspects. Most construction contracts tend to separate the two aspects expect the design-build option. This option is mostly preferred in large-scale engineering and construction projects. The contractor is usually given both the design and construction responsibilities in this arrangement. It is based on an international standardised document. In this arrangement, the general contractor is usually referred to as the design-builder. The project is usually spearheaded by a design professional like an engineer, architect, or architectural technologist. Most design-build firms have professionals from both the construction and the design sector. There may also be a partnership between a design firm and a construction firm in order to undertake a particular project. Most architects aspire to provide the integrated design-build services.

Every construction contract has design obligations that must be met by the contractor. One such obligation is the fit for purpose. This obligation simply requires the contractor to ensure that the design of the structure meets the demands of the owner. These demands may be set out in details or may be intentional. The owner can, therefore, prove a breach of contract if they can show that

something is not working as intended. It doesn't require fault-based tests or proof of negligence in order to show a breach of this obligation. Meeting this obligation is one of the toughest things for the contractors as compared to the design-build obligation. A duty to design will basically require you to use reasonable skill and care. In fact, a breach of design obligation only arises if the designer didn't follow the laid down professional standards. The owner will therefore in most cases check whether the building fits its intended purpose.

Design Build vs Fitness for Purpose

A design-build is critical to the success of a project. Its influence occurs in reliability, safety, and functionality. A right layout should be able to meet the intended purpose of the building. Fit for purpose is a perennial issue in both disputes and contract negotiations. An employer does not only want a task to be completed, but it also should work for the intended purpose. It is an obligation that contractors should meet. Besides all, it is essential for a contractor to achieve the objective regardless of whether there is negligence in design preparation or not.

A design-build contract can have serious implications as far as professional indemnity and liabilities are concerned. It is therefore important that a contractor is able to understand their design duty and level of responsibility from the project onset. The contractor needs to carefully consider both the design obligations and the terms of contract that are implied by the law. There are basically two general obligations that the contractor needs to observe. These are:

- a) Use of reasonable skill and care in design
- b) Designing a product that is fit for purpose

The two are mutually compatible and should comfortably coexist. Most modern construction projects are shunning away from the typical procurement route where design is done by professional consultants and construction is done by contractors. The trend is to have the contractor play the dual role of designing and constructing. This means that the contractor becomes responsible for the entire design of the structure. They are therefore expected to do the work according to certain specifications and standards. The three main ways through which the contractor becomes liable for the design of the structure are:

- i.) Under express terms of the entered contract
- ii.) By imposition of the common law term
- iii.) By imposition of a statutory term

The recent case of *MT Højgaard v E.ON Climate & Renewables UK* [2017] UKSC 59 (UKSC 2015/0115) provides a perfect example of the complex nature of expectations that a construction contract presents. Under this case, on 3 August 2017, the Supreme Court has upheld an appeal in the MT Højgaard litigation restoring the Technology and Construction Court's (TCC) original decision and finding the contractor liable to comply with a fitness for purpose type obligation contained in a technical schedule despite obligations elsewhere in the contract to exercise reasonable skill and care and to comply with an international standard. The decision will have significant ramifications for the interpretation of construction contracts, which commonly incorporate technical schedules and other specification documents within their terms.

Under the design-build obligations, the contractor is required by law to use reasonable skill and care even when there is no written express terms and conditions. The Supply of Goods and Services Act 1982 requires the service supplier to provide the service with care and reasonable skill. The common law also requires a profes-

sional person to carry out their work to reasonable standards that could have been met by any other competent member of their profession. This means that there is no place for professional negligence in the law. The 'Bolam Test' is used in testing whether the contractor has met their design-build obligations. In this test, the contractor needs to prove that they acted in a manner that conforms to the normal practice and professional standards existing at the time of the design in order to escape liability.

The fitness for purpose obligations places a higher duty on the part of the contractor. It is an absolute responsibility to achieve a particular result in the construction process. Its breach is self-evident and doesn't require any proof of negligence. Its obligations can be traced to the Sale of Goods Act 1979. The act places implied terms on the seller to ensure that the supplied goods are of satisfactory quality and are reasonably fit for a particular purpose the purchaser made known to the seller. In the construction sphere, the contractor is required to guarantee the owner that the finished product will be fit for its intended purpose.

It is always important for the contractor to distinguish between the two levels of responsibility. This is because many PII (professional indemnity insurance) policies only cover for professional negligence. This means that they will only cover for claims arising from the holder's failure to apply reasonable skill and care during the project. The designer is therefore not insured in case there are contractual claims relating to the contravention of the fitness for purpose obligation. The reason insurers refuse to cover the fitness for purpose risk is because it is not easily quantifiable. This is in respect to the magnitude of loss and also the probability of occurrence. The fitness for purpose obligation, therefore, affects both the contractor and the owner. The contractor may suffer uninsured losses on their part while the owner's potential for financial recuperation may be seriously constrained.

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To have a building that is not only satisfying by design but also fit for purpose, a clear understanding between the contractor and the employer should exist. Both of them ought to ensure that their terms of work available in the contract address this issue adequately. They both have a task of ensuring that the building gives the employer the benefit of having a structure worth meeting its original intent. In this case, the contractor needs to be made aware of the level of fitness for the purpose of obligation which the employer requires them to enter.

Therefore, there should be clear measurement criteria for the fitness of the building. They also have to be sure of the PI insurance's cover regarding the fitness for the purpose obligation. On the other hand, the principal has to understand the concerns of the contractor clearly. They also have to ensure accurate statement of the requirements. They ought to ensure that the contractor knows the purpose of his work and the expectations.

Factors to Consider in Meeting Fitness for Purpose

1. Objectives of the Facility

An excellent way to judge fitness for purpose is by assessing the standard objective achievement. The building design can be worth staring at, but the extent to which it meets the set objectives can be disappointing. Placing the design against the standard goals will determine how well the model is fit for the purpose. Therefore, knowing the intentions should be a reliever to the contractors to enable them to come up with what benefits the employer to the maximum. No one would be happy paying for what is not useful or does not help them regardless of how beautiful it could be. Beauty lasts in

satisfaction. Therefore, contractors ought to be sure of the set objectives and give the best that makes the building fit for purpose.

2. Requirements

Understanding the requirements of the facility is essential for both the employer and the contractor. The contractor has to be aware of what the employer wants to suit his purpose. It might involve materials and also interior furnishings. Besides, the purpose of the facility should be set clear for the contractor to evaluate different alternatives to identify the needed equipment. The parties have to be keen to ensure that they meet the terms of the contract.

3. Budget

Budget is essential, if not the most essential, in determining how well a project meets its purpose. In construction, it is vital to consider the budget for a start to ensure that the project goes to the completion stage. The contractor needs to compare his budget with that of the employer and ensure that they agree. Proper considerations need to put in order not only to make the project fit in the budget but also to provide the essential processes are part of the budget.

Implications of the design-build contracts on the fitness for purpose obligations

The dual nature of the design-build contracts presents a unique challenge to the contractors. This is especially the case when determining the level of responsibility for the parties involved. On one hand, there are two distinct functions within the same contract while on the other hand the contractor is presented with conflicting obliga-

tions. Over the years, courts have determined that where there is no existing express contractual rebuttal, the contractor needs to ensure that finished product meets the fitness standards for the intended purpose. The design-build contract, therefore, presents different levels of responsibility to the contractor.

In the typical design and construction contracts, both the consultant and the contractor enjoy a lesser level of responsibility. In such contracts, the (design and build) contractors are treated as professional advisers. On the contrary, a contractor playing both the design and construction roles is treated as a seller of goods. Such a contractor is therefore judged based on the finished product. Some doubt has however been thrown in this position when a judgment relating to the failure of the specialist fire suppression system in popcorn factory was delivered. This ruling seemed to draw a clear distinction between the bespoke product (regarded as services) and standard kit (regarded as goods). Since this area of law is not yet fully developed, contractors have to live with the fact that a design-build contract imposes an implied obligation for fitness of purpose.

A number of design and build contracts now have an express provision to absolve the contractor from the obligations of fitness for purpose. This is necessitated by the potential lack of insurance coverage for such risks. These contracts limit the liability of the contractor in designing the structure to meet the required professional standards. They, therefore, impose a sensible skill and care obligation and override the implied fitness for purpose requirement. Some contracts are silent on this subject and can be easily interpreted to mean implied fitness obligations. The general trend for most contracts is to put the basic level of responsibility, which is reasonable skill and care, and then sneak in the fitness for purpose responsibil-

ity through the back door.

If you are a contractor, you need to know how the law will apply depending on the role you play in the project. A design-build contractor will be treated as a provider of materials and services. You will be subjected to the express terms contained in the contractual agreement and in the absence of one you will be obligated to apply reasonable skill and care. Such an obligation is taken from the designer's warranty that he/she is competent enough to carry out the agreed tasks. In the case of providing materials and services, the contractor is obligated to do the work to suit the intended purpose.

Conclusion

The recent case laws have enlightened the different players within the building industry. It is now important for all the parties in a construction contract to understand the aspects of risks and responsibilities.

The design-build contracts come with either an express or implied obligation to ensure that the structure is good enough for the intended purpose. These contracts carry a higher responsibility especially on the part of the contractor.

One aspect that needs to be closely monitored is the absolute obligation of fitness for purpose. As much as this obligation is good, it tends to offer much protection to the owner and passes a higher risk to the contractor. The contractor should, therefore, seek a counterbalance with the owner in order to reduce the overall liability of the project.