

DESIGN LIABILITY UNDER NEC3

- ▶ NEC3's flexibility as to design responsibility
- ▶ How this differs to other standard form construction contracts
- ▶ Affects whether design liability is covered by professional indemnity insurance

What is it about?

A key issue, where the contractor is to design all or any parts of the works, is to define the extent of its responsibility, should such design go wrong.

NEC3 is unusual in offering a choice between (i) a duty of reasonable skill and care: ie the standard expected of suitably experienced design professionals (Secondary Option X15); and (ii) fitness for purpose: a duty to achieve an absolute performance standard (Core clause 20.1). Clause 20.1 requires the works to be provided in accordance with the Works Information, negligence being irrelevant to liability.

Why does it matter?

The normal design duty under building and civil engineering contracts intended for the UK market is reasonable skill and care. Process plant and chemical and engineering contracts, and international contracts, more often apply an absolute fitness for purpose standard, normally tempering strict design liability with short liability periods, consequential loss exclusions, liability caps and/or the stepping down of liability once any performance tests are met.

NEC3 is unusual in being meant for all types of project, anywhere in the world. It does therefore need to be used with discrimination, and calls for more bespoke drafting than is normal with other contracts.

While strict liability might seem better for employers and funders, they need to consider that most PI insurance policies do not cover no fault guarantees. The claimant might still need to prove negligence, to bring the claim within the contractor's insurance, even if that is not required under the construction contract, or the claim will only be as good as the ability of the contractor to meet it uninsured.

While contractors often look to their consultants to cover their design liability, most consultants fiercely resist strict liability: they can't insure for it and might be ruined by large uninsured liabilities.

Under Option X15 a contractor will not be liable if it can show that reasonable skill and care to comply with the Works Information was used in its design. That is unusual: normally the burden of proof rests with the claimant. Under Option X15 the contractor is guilty until it proves its innocence. The contractor is faced with denying negligence in the claim while trying to prove it to its insurer or against its consultant.

Now what?

With NEC3 the omission to adopt Option X15 creates a fitness for purpose obligation, where the Works Information specifies required design performance outcomes. This may be appropriate for certain projects, but not for others. The key is to understand the issues involved and to decide which category is appropriate, on a case by case basis.

The team at Addleshaw Goddard LLP will be happy to discuss the above with you. Please contact Luke Baines or Keith Browne.

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