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WHO TAKES THE RISK ON PERFORMANCE? DOES IT MATTER ANYWAY?

- A fitness for purpose warranty must be set out in clear, unambiguous terms to avoid the contractor merely being required to exercise the lesser obligation of reasonable skill and care in the design and construction of works;
- Consistency between contract documents is key to ensure that that employer's rights are protected;
- If the employer requires a fitness for purpose warranty, professional indemnity insurance cover and the solvency of the contractor must be rigorously considered prior to contracting.

What's it about?

The case of *MT Højgaard A/S v E.On Climate and Renewables UK Robin Rigg East Ltd and another* [2015] EWCA Civ 407 (in which a Supreme Court decision is eagerly awaited) concerned the design, fabrication and installation of foundations for 60 wind turbines for an offshore wind-farm. The foundations were to be constructed in accordance with an industry standard that turned out to contain a miscalculation; subsequent to construction, the foundations failed.

The question was whether MT Højgaard was required to design foundations that were fit for purpose (**FFP**) and that had an operational life of 20 years.

Despite various iterations in the contractual documents that would suggest, when read in isolation, that the foundations were supposed to achieve a service life of 20 years, the Court of Appeal held that, due to inconsistences between the various contractual documents, there was no clear FFP warranty given by MT Højgaard. As there were no findings of negligence against MT Højgaard, E.On was left to bear the risk of failure and thus the €26.25 million cost of the remedial works.

Why does it matter?

Employers need to be mindful that when it is their intention for a construction to perform a certain operation and/or to have a minimum operational life span, a FFP obligation must be set out in the clearest of terms within the contractual documentation. The warranty must be consistent as between the various contractual documents (the employer's requirements, the technical specifications, and conditions) to eliminate the risk of any uncertainty and this means that drafters must be provided with all documentation, including the technical requirements, for cross referencing.

However, it should be borne in mind that where there is a FFP warranty that has been breached and there are no allegations of negligence, the professional indemnity insurer of the contractor is unlikely to indemnify for the breach. In that instance, the solvency of the contractor is vital.

Accordingly, if it is intended that a fitness for purpose warranty should apply, the wording of the obligation must be checked against the contractor's insurance policy and directly with the insurer if there is any doubt.

It goes without saying that due diligence in respect of the solvency position of the contractor is also fundamental. There is little benefit to being able to prove the existence and subsequent breach of a FFP obligation if ultimately the employer ends up bearing the cost of the remedial works in any event.

Now what?

The Supreme Court granted E.On's request for permission to appeal in November 2016. The case is due to be heard this year and will hopefully provide guidance upon the drafting required to ensure a FFP obligation is imposed upon the contractor. Once this judgment has been handed down an updated article shall follow.

Who to contact

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