

# Design Liability under standard form construction contracts

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# Introduction

- Implied terms
- NEC4 provisions
- FIDIC 2017 provisions
- JCT/SBCC provisions
- Some conclusions

# Implied Terms related to design liability

- Consultants – common law duty of care is to exercise “reasonable skill and care” of the ordinary competent design consultant.
- Contractors – finished project will be reasonably fit for its intended purpose.
- Absolute obligation that fit for purpose versus reasonable skill and care without warranty for a particular result.
- Liability gap/price of risk.
- Hidden obligations – MT Hojgaard A/S v E.On Climate & Renewables UK Robin Rigg East Ltd.

# NEC Contracts - Design

- No separate design and build contract.
- Requirements as to design to be set out in the Works Information (NEC3) or Scope (NEC4).
- Contractor to provide the works in accordance with Works Information/Scope (clause 20.1).
- Contractor to design the part of the works which Works Information/Scope states it is to design (clause 21.1).
- Design submission procedure – works to be constructed in accordance with the accepted design (clause 21.2) – to be submitted to project manager in accordance with the manner required by the Works Information/Scope.

# NEC Contracts - Design

- Acceptance of the design by the project manager does not affect the contractor's liability for that design (clause 14.1).
- Standard of care – no express provision unless Option X15 selected – so that contractor is under an implied fitness for purpose of obligation.
- Option X15 (NEC3) - contractor not liable for defects due to its design so far as it proves that it used reasonable skill and care to ensure that its design complied with the Works Information (SSE v Hochtief).

# NEC Contracts - Design

- Option X15 (NEC4) – contractor not liable for a defect arising from its design unless it failed to carry out the design using the skill and care normally used by professionals designing works similar to the works under the contract.
- Option X18 – limitation of contractor’s liability for design to the amount stated in Contract Data.
- Z clauses – standard of care – responsibility for design prepared by client – copyright – professional indemnity insurance – deleterious materials.

# FIDIC Contracts 2017 – Design

## Red Book

- Traditional contract – design prepared by or on behalf of employer.
- Clause 1.8 mutual obligation on employer, contractor and engineer to notify others if they become aware of an error in any document prepared for the execution of the works.
- Clause 4.1 – contractor “to execute the works” which includes design to the extent specified in the contract.
- Clause 4.1(e) – where contractor required to design part of the permanent works it must be fit for purpose for which it is intended as specified in the contract or if no purpose specified must be fit for its ordinary purpose.

# FIDIC Contracts 2017 – Design

## Yellow and Silver Books

- Design and build contracts.
- Clause 4.1 – contractor to execute the works which includes responsibility for design.
- Clause 5.1 – express obligation on the contractor to carry out and be responsible for the design of the works.
- Clause 4.1 – works to be fit for intended purpose as set out in the employer’s requirements or if not set out fit for their ordinary purpose.
- Clause 5.3(b) – contractor undertaking that design in accordance with the contract documents.

# FIDIC Contracts 2017 – Design

- Clause 5.1 – design must be prepared by designers who are engineers or other competent professionals experienced in their particular design discipline and suitably qualified in the relevant jurisdiction – yellow book warranty by contractor that he and designers have necessary experience, capability and competence.
- Responsibility for errors in the employer’s requirements - Yellow Book – requirement to scrutinise and give notice of any error, fault or defect within (42 days) of commencement date. Silver book – contractor is responsible for all errors, inaccuracies or omissions in the employer’s requirements (limited exceptions).

# JCT/SBCC Contracts - Design

- JCT/SBCC design and build contract – contractor is responsible for completing the design of the whole of the works.
- Employer (usually with its own design team) prepares Employer's Requirements and contractor responds with its proposals to complete the design and the works (Contractor's Proposals) – the contractor is not responsible for the content of the Employer's Requirements.
- Standard of Care – the same liability as an architect or other professional designer who holds himself as competent to take on work for such design (2.17.1).
- Liability for loss of use, loss of profit or other consequential losses – limited to amount stated in Contract Particulars.

# JCT/SBCC Contracts - Design

- Contractor has no responsibility for adequacy of Employer's Requirements (2.11) – normally amended (with novation of client's design team).
- Copyright licence (2.38); Professional Indemnity Insurance (6.15); BIM Protocol (2.7).

# Conclusions

- Clients, contractors and consultants need to understand by consideration of contract terms and documents as a whole their liabilities/recourse in respect of the design involved in any project.
- The design risk should be allocated to those best placed to manage the risk.
- Risk of liability should be limited/insured/priced as appropriate.

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