

MT Hojgaard A/S v E. On Climate [2017] UKSC 59

Relevant Contractual Provisions

Agreement to design, fabricate and install the foundations of the wind turbines.

Fit for Purpose” was defined as “fitness for purpose in accordance with, and as can properly be inferred from, the Employer’s Requirements (which included the Technical Requirements)

“Good Industry Practice” meant “those standards, practices, methods and procedures conforming to all Legal Requirements to be performed with the exercise of skill, diligence, prudence and foresight that can ordinarily and reasonably be expected from a fully skilled contractor who is engaged in a similar type of undertaking or task in similar circumstances in a manner consistent with recognised international standards”.

Contract Conditions

Clause 2.1 of Part D of the Contract provided that any failure by the Engineer or his Representative to spot defects or mistakes by the contractor would not exempt the contractor from liability.

Clause 5.3 of Part D stated that in the event of inconsistencies, the order of precedence of the contractual documents should be the form of the agreement first with the Employer’s Requirements

Clause 8.1 of Part D required the Contractor “in accordance with this Agreement, [to] design, manufacture, test, deliver and install and complete the Works” in accordance with a number of requirements, including

“(iv) in a professional manner in accordance with modern commercial and engineering, design, project management and supervisory principles and practices and in accordance with internationally recognised standards and Good Industry Practice; ...

(viii) so that the Works, when completed, comply with the requirements of this Agreement ...;

(ix) so that the Contractor shall comply at all times with all Legal Requirements and the standards of Good Industry Practice;

(x) so that each item of Plant and the Works as a whole shall be free from defective workmanship and materials and fit for its purpose as determined in accordance with the Specification using Good Industry Practice; ...

(xv) so that the design of the Works and the Works when Completed by the Contractor shall be wholly in accordance with this Agreement and shall satisfy any performance specifications or requirements of the Employer as set out in this Agreement. ...”

Clause 30 of Part D of the Contract was headed “Defects after taking over”. Clause 30.2 provided that the Contractor “shall be responsible for making good any defect ... or damage” arising from “defective materials, workmanship or design”, “any breach by the Contractor of his obligations under this Agreement” or “Works not being Fit for Purpose”, “which may appear or occur before or during the Defects Liability Period”. That period was defined in clause 30.1 as being a period of 24 months from the date E.ON takes over the Works from the Contractor. Clause 30.3 required E.ON to give notice “forthwith” of any such defects to MTH. Clause 30.4 extended that Period in certain limited circumstances. Clause 30.10 required E.ON to produce a Defects Liability Certificate once the Defects Liability Period has expired and the Contractor has satisfied all its obligations under clause 30.

Clause 33.9 of Part D of the Contract entitled the Contractor to apply, within 28 days of the issue of a Defects Liability Certificate, for a Final Certificate of Payment, and to accompany the application with a final account; clause 33.10 provided for the consequential issue of a Final Certificate of Payment; and clause 33.11 provided the Final Certificate of Payment is conclusive.

Clause 42.3 of Part D of the Contract was an exclusive remedies clause.

The Technical Requirements (Part 1 of the Employer’s Requirements)

Section 1

“The Works, together with the interfaces detailed in Section 8, shall be designed to withstand the full range of operational and environmental conditions with minimal maintenance.

The Works elements shall be designed for a minimum site specific ‘design life’ of twenty (20) years without major retrofits or refurbishments; all elements shall be designed to operate safely and reliably in the environmental conditions that exist on the site for at least this lifetime.”

Section 3.1 – entitled Introduction

“(i) It is stressed that the requirements contained in this section and the environmental conditions given are the MINIMUM requirements of [E.ON] to be taken into account in the design.

(ii) It shall be the responsibility of [the Contractor] to identify any areas where the works need to be designed to any additional or more rigorous requirements or parameters.”

Section 3.2.2.2

- (i) Required the Contractor to prepare the detailed design of the foundations in accordance with J101 using the “integrated analysis” method
- (ii) The design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement. The choice of structure, materials, corrosion protection system operation and inspection programme shall be made accordingly.”

Section 3.2.3.2

Required the Contractor’s design to accord with “international and national rules, circulars, EU directives executive orders and standards applying to the Site” with a hierarchy of standards of which the first was J101

Section 3b

“The design of the structures addressed by this Design Basis shall ensure a lifetime of 20 years in every aspect without planned replacement. The choice of structure, materials, corrosion protection system operation and inspection programme shall be made accordingly”

Para 3b.5.6 provided that “[a]ll parts of the Works, except wear parts and consumables shall be designed for a minimum service life 20 years.”

Section 4 of the TR dealt with “Approvals and Certification”. Para 4.4.3 provided that MTH should obtain a Foundation Design Evaluation Conformity Statement from the Certifying Authority within six months of the commencement date.

Section 10 of the TR covered “Structural Design and Fabrication” (Wind Turbine Foundations), and para 10.1.1 required MTH to appoint “an accredited Certifying Authority ... to independently evaluate the adequacy of his foundation design.” Para 10.5.1 was in these terms:

“The Contractor shall determine whether to employ shear keys within the grouted connection. If shear keys are used, the design and detailing shall take due account of their presence for both strength and fatigue design to the satisfaction of the Certifying Authority and the Engineer. If shear keys are to be omitted then the Contractor shall demonstrate with test data that the grouted connection is capable of transmitting axial loads at the grout/steel

interface without dependence upon flexural (normal) contact pressures, which may not always be present, to the satisfaction of the Certifying Authority and the Engineer. Such demonstration shall also account for joint performance under different temperature conditions.”

Para 10.24.9 stated that the “recorded potential difference exceedance” was not so great as to “cause accelerated anode depletion to such extent that the anode material provided is fully utilised before the end of the structure operational 20 year life”.