

'Fit for Purpose' or 'Reasonable Care'?

Dealing with Design Liability in the New FIDIC Yellow Book

Scott Lambert

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Often, a contract may contain an obligation of reasonable skill and care in relation to design and stricter 'fitness for purpose' obligations regarding compliance with performance specifications or the Employer's Requirements in relation to workmanship.

The distinction between these two types of obligations may give rise to a number of difficulties for both the Employer and the Contractor or Consultant.

So what is the difference between the two obligations? In simple terms, a *'fitness for purpose'* obligation is an obligation to achieve a result. If the result is not achieved, regardless of any other circumstances, the Contractor will be in breach and liable to compensate the Employer in damages. A *'duty of reasonable skill and care'* measures the performance of the Contractor, usually in comparison to other professional persons of the same standard carrying out similar work.

Sub-Clause 4.1 [*Contractor's General Obligations*] of the FIDIC Yellow Book contains a fitness for purpose obligation:

'The Contractor shall execute the Works in accordance with the Contract. When completed, the Works (or Section or Part or major item of Plant, if any) shall be fit for the purpose(s) for which they are intended as defined and described in the Employer's Requirements.'

The proposed Yellow Book Second Edition 2017 ("Second Edition") also includes a number of new references from the 1999 Edition that are related to fitness for purpose, including:

- Sub-Clause 4.9.2 – Compliance Verification System
- Sub-Clause 4.11 – Sufficiency of the Accepted Contract Amount
- Sub-Clause 8.13 – Resumption of Work
- Sub-Clause 13.1 – Right to Vary
- Sub-Clause 17.7 – Indemnities by Contractor
- Sub-Clause 19.2.3 – Liability for breach of professional duty

It may be assumed that a stricter fitness for purpose obligation is preferable for the Employer; however this may not always be the case.

Fitness for Purpose

The Contractor will be in breach of Sub-Clause 4.1 of the Second Edition if any part of the works is not fit for the purposes defined in the Employer's Requirements, without the Employer having to prove negligence.

This is especially dangerous for the Contractor, who may exercise all reasonable skill and care when

carrying out the design for the works and constructing the works, and comply with all other Contractual obligations but still remain liable for breach.

By way of an example, in a recent UK case the Contractor entered into an agreement with the Employer for the design, fabrication and installation of the foundations for 60 wind turbine generators. The contract provided that the design must comply with an international standard known as J101 for the design of offshore wind turbines. However, unbeknown to the Contractor and everyone else at the time, J101 contained an error which resulted in the foundations being defective.

The Contract contained a fit for purpose clause, although this was qualified and not found to be an absolute warranty of quality. Had the contract contained an absolute warranty of quality, as is found in Sub-Clause 4.1 of the Second Edition, however, the Contractor would arguably have been liable for the defects. This is despite the fact that it exercised all reasonable skill and care and produced a design that was compliant with the Employer's Requirements and international standards.

Fitness for Purpose and Insurance

Whilst a stricter performance obligation may appear to benefit the Employer, it would be prudent to exercise caution. Though a fitness for purpose obligation may be easier to prove in a dispute, it may have adverse effects on the Employer's ability to recover damages from the Contractor. Most professional indemnity policies will only cover the Contractor in the event that the Contractor has failed to exercise reasonable skill and care – i.e. has committed professional negligence.

Sub-Clause 19.2.3 [*Liability for breach of professional duty*] of the Second Edition provides that the Contractor shall obtain professional indemnity insurance:

'indemnifying the Contractor for his liability arising out of negligent fault, defect, error or omission in the carrying out his professional duties which result in the Works not being fit for purpose(s)... and resulting in any loss and/or damage to the Employer.'

The Second Edition only states that the Contractor must be insured for *negligent* breaches that result in the Works not being fit for their purpose, though it is arguably liable whether negligence occurred or not. In such cases, it may not be impossible for the Employer to fully recover its losses if the Contractor does not have the funds to cover the uninsured claim.

Duty of Reasonable Skill and Care

On the other hand, it is possible for a Contractor or Consultant to limit its liability so that it has no other responsibility than to exercise reasonable skill and care in the performance of his obligations. This is the standard in the FIDIC Model Services Agreement (the "White Book").

Obviously this standard is preferable for a Contractor, as it is more difficult for the Employer to prove breach, insurance policies are more readily available and it easier to agree pass-through obligations with any Subcontractors.

UAE Law

Unlike in the UK and other common law jurisdictions, there are no implied terms which dictate that all *muqawala* contracts must be carried out with reasonable skill and care. However, there is a statutory source for such an approach. Article 383(1) of the UAE Civil Code does provide that:

'If that which is required of an obligor is the preservation of a thing, or the management thereof, or the exercise of care in the performance of his obligation, he shall have discharged that obligation if, in the performance thereof, he exercises all such care as the reasonable man would exercise, notwithstanding that the intended object is not achieved, unless there is an agreement or a provision of law to the

contrary.'

Therefore, under UAE law it is possible that the Contractor may have fulfilled his obligations if the work or services are performed with reasonable skill and care, even though the intended 'object' – or purpose – is not achieved. This is subject to there not being a strict fitness for purpose obligation within the agreement.

It is important to note that under UAE law, where a contract is silent as to a consultant's obligation to perform the services will often be viewed as an obligation to achieve a result, and will be treated as a fitness for purpose obligation. This applies not only to the design, but to the supervision of the construction.

Furthermore, Article 880 of the UAE Civil Codes provides that the Contractor and Consultant shall always be jointly liable to compensate the Employer for a period of ten years from the date of delivery of the work, if the building suffers (a) total, or (b) partial collapse, or (c) there is a defect that threatens the stability and safety of the building.

Conclusion

A 'fitness for purpose' clause which at first glance may seem beneficial to Employers, may lead to potential problems for both Employers and Contractors, implicating overall liability and potential loss recovery. Careful drafting is needed in order to manage these risks and clearly allocate liability.

Al Tamimi & Company's Construction & Infrastructure team regularly advises on contract drafting and the use of the FIDIC suite of contracts. For further information please contact Scott Lambert (S.Lambert@tamimi.com).