



QUAYSTONE

Further information

For further details on the issues raised in this bulletin or generally on the services we offer please email marcus.harling@burges-salmon.com or william.gard@burges-salmon.com or your usual Construction and Engineering Group contact.

STOP PRESS!

We are pleased to announce that Burges Salmon won the Infrastructure/Energy Team of the Year Award at the recent Lawyer Awards.



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Welcome to the latest edition of Quaystone, the quarterly legal update from Burges Salmon's Construction and Engineering Group. Nuclear energy, waste management and employment issues are the focus this time.

The regulatory framework and the latest construction news, in the reactivated nuclear new build sector are highlighted. Waste management is an increasingly urgent consideration throughout the UK, driven particularly by mandatory EU

targets. We look at recent moves by the Welsh Assembly to meet those targets. The construction industry is caught by recent changes to employment rules on discipline and grievance procedures. The new regime is introduced and the fallout from the recent revelations on blacklisting in the industry are discussed.

The usual round up of other significant developments in contracts and legislation are also here.

Nuclear New Build



Burges Salmon has advised the nuclear sector for the last decade on all aspects of national and international nuclear law, including the legal issues associated with the operation and decommissioning of the UK's ageing fleet of nuclear power plants (NPPs). As one of the leading law firms in the sector, we are now focusing on the next phase - nuclear new build.

In a series of articles, we will use our experience of major energy projects and our leading nuclear practice to explain the key steps towards the delivery of the new fleet of NPPs. We'll explain the legal and regulatory framework, the contracting models that are likely to be used and identify the key commercial risks that stakeholders will need to be aware of when negotiating contracts.

The key questions are gradually being answered.

Energy giants EDF, RWE/E.ON and Iberdrola/Centrica are the likely developers; the reactors currently under consideration are Areva's EPR and Westinghouse's AP1000; likely sites have been identified with the target for first power generation being 2017.

A number of key sites have already been secured (e.g. Wylfa, Oldbury, Hinckley) and the consortia have begun implementing their procurement strategies. The civils works are receiving close attention at the moment. Both EDF and E.ON/RWE are engaging with the supply chain with a view to letting major civils works packages during the course of the next year (both enabling works and the main new build works). To give you a sense of the scale of the packages, the value of the enabling and main civils

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The new AcAS Code of Practice on discipline and grievance

On 6 April 2009 the new Acas Code of Practice on discipline and grievance (the Code) came into effect replacing the well intended, but unsuccessful, statutory dispute resolution procedures (the Statutory Procedures).

Although the Code has a less formal approach than the Statutory Procedures to the resolution of issues between employer and employee it does set out recommended procedures for handling disciplinary and grievance matters and it places obligations on both employers and employees alike. Whilst the Code is not legally binding on employers or employees an unreasonable failure by either to comply with the Code could lead to an increase or decrease in any compensatory award made by an employment tribunal of up to 25%.

Further points to note include:

- Unlike the Statutory Procedures the Code does not

cover redundancies or dismissals associated with the expiry of fixed-term contracts;

- A failure by employers to comply with the Code will not render a dismissal automatically unfair, although employment tribunals will have to take the Code in to account when considering relevant cases; and
- An employee who fails to submit a written grievance to his employer will no longer be barred from bringing an employment tribunal claim.

Whilst the Code is potentially good news for employers the Statutory Procedures will continue to apply for a further limited period where a “trigger event” takes place before 6 April 2009. Consequently, transitional arrangements have been put in place to deal with such cases. This means that employers may be obliged to run parallel discipline and grievance procedures for a period of time.

“A failure by employers to comply with the Code will not render a dismissal automatically unfair...”

New health and safety posters

Employers have a legal duty to display the HSE’s approved poster (outlining health and safety laws) in a prominent position in every workplace, or to provide employees with the equivalent leaflet. The HSE has now brought out new versions, which aim to bring about an increased awareness and a clearer understanding of key health and safety messages.

But there’s no need to rush to the shops yet: as long as they are readable and the addresses of the enforcing authority and the Employment Medical Advisory Service remain up to date, older versions can still be used until 5 April 2014.



Blacklisting: The fallout

The use of blacklisting recently revealed in the construction industry breaches existing law, potentially exposes those involved to criminal prosecution and has prompted the Government to seek to introduce tougher protections.

In February this year the Information Commissioner’s Office (ICO) raided a company known as The Consulting Association (TCA) which was run by a private investigator called Ian Kerr. The ICO uncovered a database containing the details of over 3,200 construction workers and evidence that details had been regularly sold to over 40 construction companies. This “blacklist” was used by construction firms to vet workers and job applicants. It included information on trade union activities, employment history and derogatory comments such as “lazy and a trouble-stirrer”.

TCA charged firms to use the blacklist with some firms reported to have paid as much as £28,000 in search fees in a single year. This equates to approximately 50 searches per day.

The blacklist infringes the Data Protection Act 1998 which regulates how information on individuals is kept and used. The basic principles of the Act include requirements that data must:

- only be used for the purposes for which it was collected;
- not be shared without the consent of the individual whom it is about; and
- must not be kept for longer than is necessary.

Mr Kerr recently pleaded guilty to breaching the Act and now faces a potentially unlimited fine. In

addition, the ICO has not ruled out taking regulatory action against the firms that used the blacklist. This is particularly likely to concern any firms that supplied TCA with information on workers enabling it to populate the blacklist. An MP has also called for a ban on the contractors involved from tendering for public contracts, although in view of the number of major contractors apparently involved this seems unlikely.

In addition, the Government is proposing to introduce new legislation, in the form of regulations under the

Employer Relations Act 1999, to outlaw the blacklisting of workers for their trade union membership or activities. This proposal resurrects an earlier Government initiative which was dropped in 2003 after it was assumed that the practice of blacklisting had died out. The new legislation is expected to be introduced in autumn 2009.

Look out for further details on the new rules in future issues of this newsletter.

Welsh Waste Management: A model for UK wide solutions?



“These Welsh developments reflect the increasing focus on waste management throughout the UK.”

Following the Welsh Assembly Government’s (WAG) launch of the National Waste Strategy for Wales in June 2002, WAG have now published a new consultation paper entitled “Waste Strategy 2009-2010: Towards Zero Waste”. The paper sets out how WAG will produce a waste strategy in accordance with the requirements of the EU Waste Framework Directive 2008. Responses are invited by 22 July 2009.

The consultation paper sets out WAG’s commitment to meeting two ambitious targets:

- all sectors in Wales to recycle 70% of waste by 2025; and
- all waste to be eliminated entirely by 2050.

The success of the WAG policy is to be measured through “ecological foot-printing” which will measure the impact of how we consume things. WAG estimates waste as contributing to 15% of Wales’ ecological footprint. Identifying waste as a key area, the paper focuses on 4 key sectors for reduction: municipal

waste; the waste industry infrastructure and markets for recyclates; construction and demolition; and retail.

A series of challenging targets for construction and demolition waste up to 2010 are set out with wood, plastics, metals, insulation and gypsum and hazardous waste identified as priority materials to be minimised. The paper identifies where waste can be minimised at various stages in the construction process with plans to introduce a mandatory requirement for the production of specific waste management plans.

These Welsh developments reflect the increasing focus on waste management throughout the UK, prompted by increasingly onerous mandatory EU targets. Significant recent schemes include the Greater Manchester Waste PFI, a £3.8 billion design and build municipal waste treatment project, and numerous anaerobic digestion schemes, all of which the Burges Salmon Construction and Engineering Group has advised on.

Nuclear New Build continued from page 1

works for Hinckley Point (anticipated to be the first site developed by EDF) have been estimated as £100 million and £500 million respectively.

However, before the main civil works can begin, the developers will need to obtain all necessary consents including the nuclear site license itself. These consents are not likely to be obtained before 2013, which is why the developers are using the intervening period to embark on major preparatory works and establish their supply chains.

Given the scale of the work packages, and the associated risks, some of the major civil engineering contractors have been teaming up to provide joint offerings. It is interesting to see how foreign

contractors with experience of constructing and decommissioning NPPs abroad are aligning themselves with established domestic contractors (e.g. it has been reported that German engineering giant Hochtief is teaming up with Costain and Sir Robert McAlpine). Having sufficient finance, expertise and resources to manage these demanding projects will be key to their successful delivery. The quality issues being reported in relation to the NPPs currently under construction in France and Finland illustrate the much higher level of regulatory oversight of NPPs compared with some other major projects. We will be discussing these regulatory risks and how they may be allocated commercially in future articles.

Construction Bill

In our Autumn 2008 edition of *Quaystone*, we provided an overview of the consultation on the Construction Bill highlighting the key changes to scope, adjudication, costs and payment. The Construction Bill has now been placed before Parliament in the form of the Local Democracy, Economic Development and Construction Bill (LDEDC Bill).

There are three main differences between the Construction Bill and the LDEDC Bill. Firstly, the LDEDC Bill now includes a slip rule that gives the adjudicator the statutory power to correct clerical and typographical errors. Secondly, in an attempt to bring an end to contract terms that require a referring party to pay all of the costs of the adjudication, the Construction Bill provided that

any agreement with respect to who will pay the adjudicator's costs made before the adjudicator is appointed is ineffective. The LDEDC Bill maintains this provision but changes the date from which the agreement is ineffective to any date before a referral notice is issued not the date of the adjudicator's appointment. Finally LDEDC Bill prohibits 'pay when certified' provisions which has resulted in speculation as to the impact this will have when applied to PFI projects.

The LDEDC Bill is now at the Committee Stage in the House of Commons for detailed consideration having already passed through the House of Lords. There are likely to be further developments and we will be sure to keep you posted in future articles.

JCT Contract Update

The JCT contracts drafting committee has been busy in recent months. Revision 2 of the 2005 suite have been produced which introduce sustainability provisions for the first time. In addition the construction management forms have been updated:

■ **JCT 2005 Revision 2** – The forms include new clauses dealing with sustainability in the revamped and expanded Supplemental Provisions. They cover not only the specification of the finished building but also the construction process itself. Some clauses introduce additional obligations on the contractor while others merely encourage him to act in a particular way. They will be deemed to be incorporated in the contract unless specifically

excluded in the Contract Particulars. Revision 2 of the Standard Building Contract, the Design and Build Contract and Minor Works Forms are available now. The Intermediate and other contract forms will follow in the next few months. Revision 2 also introduces significant tweaks to the payment provisions.

■ **Construction Management** – The 2002 form has now been fully revised to bring it in line with the format of the other JCT 2005 contracts. Revised Construction Management Appointment and Construction Management Trade Contract are now available.

Narrow Quay House
Narrow Quay
Bristol BS1 4AH
Tel: +44 (0) 117 939 2000
Fax: +44 (0) 117 902 4400

Chancery Exchange
10 Furnival Street
London EC4A 1AB
Tel: +44 (0)20 7685 1200
Fax: +44 (0)20 7685 1266

www.burges-salmon.com

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A list of members, all of whom are solicitors, may be inspected at our registered office: Narrow Quay House, Narrow Quay, Bristol BS1 4AH.

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