

QUAYSTONE

Further information

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Introduction

Welcome to the first Quaystone of 2010. We continue our focus on the increasing engagement of the supply chain in the nuclear new build programme. This follows on from our overview of the nuclear sector in Quaystone July 2009. In the light of recent press reports on a spike in construction accidents we look at a number of health and safety related issues that are likely to feature heavily in 2010. There are also a lot of recent cases to catch up on. Finally we have a quick look at some new additions to the NEC suite of contracts. We hope there is something here for everyone.

Nuclear New Build: Procurement Strategy



This year will see EDF submit its planning application for a new nuclear power station at Hinckley, North Somerset to the Infrastructure Planning Commission.

The proposed site is already a hive of activity with investigative works (both offshore and onshore) already underway and major 'preliminary works' planned to be carried out later in the year. This article considers the characteristics of the procurement strategy adopted by EDF and speculates about the forms of contract that may be used in its implementation.

The procurement strategy - EDF appears settled on the 'multi-package' procurement strategy it used for the Flamanville 3 nuclear power station project in France. This requires the project to be divided up into many work packages with the plant owner assuming overall responsibility for managing the interfaces between each package and the overall delivery of the power plant.

This strategy does have a number of potential advantages for EDF with its vast in-house experience of developing nuclear power plants. It affords EDF far greater influence over the management of the project compared with a 'turnkey' arrangement, a greater opportunity for EDF's in-house expertise to be deployed in the delivery of the project and avoids payment of a hefty risk premium for a turnkey contractor to take on whole-project risk.

There are disadvantages, however.

A failure to properly co-ordinate the various package contractors or ensure effective communication between them could lead to significant delays, cost overruns and possibly performance issues. With such a disparate group of suppliers there is also a real risk of 'finger pointing' if things go wrong as well as major difficulties in disentangling

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and attributing the causes of delays and cost overruns.

The form of contract - There appear to be two front runners. FIDIC (either the Silver or Yellow Book) international engineering contracts and the NEC3 Engineering and Construction Contract. Given the international nature of the supply chain, FIDIC has to be the front runner. Suppliers will be far more familiar with its terms compared with the NEC3, which in terms of its language, structure and philosophy, will appear alien to many likely members of the supply chain.

From a risk management point of view, it is important for EDF to secure consistency across its package contracts and there is a real risk of it encountering difficulties in achieving that if the NEC form is adopted for the main work packages.

Of course, whichever contract is chosen will be heavily amended to incorporate provisions specific to EPC contracts for nuclear new build. We shall be exploring these issues in the next edition of Quaystone.

Enforcement of Adjudicators' Decisions: the Latest Cases

In January we co-sponsored the Institute of Civil Engineer's Alternative Dispute Resolution Conference. The controversial topics of adjudicator's jurisdiction and the enforcement of adjudicators' decisions proved to be a major area of discussion. The law in this area is continually developing and the last few months have yielded some interesting new decisions.

In *Rok Building v Celtic Composting Systems*, Rok were acting as sub-contractor and sought enforcement of an adjudicator's decision in their favour. Celtic Composting, the main contractor, disputed the decision's enforceability. They argued that the adjudicator had failed to apply the rules of natural justice; the weight of evidence was so overwhelming, that no adjudicator acting fairly could have reached such a decision.

The Technology and Construction Court decided that even if the adjudicator had made an error, it would not affect the enforceability of his decision, provided the adjudicator was acting within his jurisdiction. It was not the function of the court to review the correctness of an adjudicator's decision and not appropriate for the court to decide whether the adjudicator had made a mistake.

Furthermore the courts would be slow to characterise an adjudicator's error as a breach of the rules of natural justice. On the facts of this case it was not seriously arguable that the adjudicator had acted contrary to these rules.

Just as it is clear that an adjudicator's error will not affect the enforceability of his decision, it is also well established that an adjudicator will not have jurisdiction to deal with issues arising under more than one contract unless the parties agree. In *Supablast (Nationwide) v Story Rail*, Story Rail argued that an adjudication decision in favour of its sub-contractor, Supablast, was not enforceable, as it involved findings under two sub-contracts.

Supablast argued there was only one sub-contract and that later works were carried out under a variation, rather than a new sub-contract. The Court held that although an



adjudicator did not have authority to decide his own jurisdiction unless the parties agreed, he could decide whether work constituted a variation under a contract. The adjudicator had ruled correctly that later work had been carried out under a variation and his decision was enforceable.

In some instances there will be issues that are outside of the scope of an adjudicator's jurisdiction. In *SG South v King's Head Cirencester*, the defendants, King's Head Cirencester, argued that the Court should not enforce the adjudicator's decision as the claimant had allegedly been guilty of fraud. The adjudicator had refused to consider the fraud in the adjudication itself, stating it was a matter for the police and the courts.

The Court decided however that fraud can be raised as a defence in an adjudication if it is a real defence to the claim made. However the allegation of fraud "must be supported by clear and unambiguous evidence and argument". In this instance the evidence failed to convince the Court that the claimant had been guilty of fraud and the adjudicator's decision was enforceable.

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Construction Health and Safety Outlook for 2010

2010 looks set to provide the construction industry with some health and safety challenges.

The first prosecution of a company under the Corporate Manslaughter & Corporate Homicide Act 2007 was due to start at Bristol Crown Court on 23 February 2010. The case has now been adjourned until October 2010, due to the ill-health of Peter Eaton, the director of the company being prosecuted under the Act. Mr Eaton is also being prosecuted in his own right for manslaughter. The Sentencing Guidelines Council has recently published its final guidelines which set out key principles the Court should consider when sentencing companies found guilty of Corporate Manslaughter. These will include the Court taking into account any "aggravating" features, such as a failure to heed warnings and cost-cutting at the expense of safety. The Court should also look at any "mitigating" factors, which could include a previously good health and safety record and a prompt acceptance of responsibility. The SGC did not adopt earlier proposals that fines should be tied to a percentage of the guilty company's turnover - clearly an approach which could have hit contractors hard - but the final guidelines are still likely to result in fines of potentially millions of pounds for companies guilty of Corporate Manslaughter. The Court will also have the power to make a "publicity order", which will force a company found guilty of Corporate Manslaughter to "publicise" its conviction, including the level of fine levied.

The last few years have seen several tower crane related incidents. These resulted in widespread discussion within the industry as to what action needed to be taken. The HSE has responded by bringing in the Notification of Conventional Tower Cranes Regulations 2010. The regulations come into force on 6 April 2010 although



guidance has already been published. The Regulations will require certain information about cranes being used on site and the results of its "thorough examination", which is already required by the Lifting Operations and Lifting Equipment Regulations (LOLER), to be provided to the HSE. Crane oversailing licences may need to be amended to take this regulatory change into account.

Lastly, the use of contractual health and safety provisions or KPIs could become more widespread following the Olympic Delivery Authority's ("ODA") lead: tender evaluation for ODA projects will include looking at a tenderer's ability to satisfy health and safety related key performance indicators (KPIs), which include a "zero fatalities" target. If selected, contractors will have to report on a regular basis against contractual KPIs. Contractors working in the UK are, mostly, already used to complying with health and safety legislation but employers may in future start to look to increase levels of compliance and impose contractual sanctions if contractors fall short, using health and safety failings as a ground on which to withhold payment.

Burges Salmon's dedicated health and safety team can advise you on all of the above stories, or any other health and safety questions which you might have.

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Contract Update: NEC Supply Contracts

NEC has introduced a new Supply Contract ("SC") and Supply Short Contract ("SSC"). Published in February 2010, these new contracts plug a gap in the current NEC suite and deal with the provision of goods rather than works or services:

- The SC is intended for the supply of high risk or high value goods, such as transformers, turbine rotors or rolling stock.
- The SSC is intended for the supply of low risk items, such as building materials, personal protective equipment or simple plant.

As with existing NEC forms, the new contracts have their own guidance notes and flow charts explaining how they are intended to operate.



Construction Act: Applicable or Not?



A recent judgment from the Technology and Construction Court means that the Housing Grants, Construction and Regeneration Act (the Construction Act) may apply to more construction contracts than first thought.

If the work being done is not a "construction operation" then the Construction Act does not apply. Section 105(2)(c)(i) says that the following are not construction operations:

(c) *assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is:*

- (i) *nuclear processing, power generation, or water or effluent treatment, or*
- (ii) *the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;*

Until recently it had been believed that this exclusion should be interpreted widely. However, in the case of *North Midland Construction plc v AE&E Lentjes UK Ltd* it was decided that s105(2)(c)(i) should be construed narrowly. It was the judge's view that the intention of the Construction Act was for it to apply to most construction contracts, and to interpret the exclusion widely would be contrary to that intention.

To be excluded, the works under the contract in question must be as specifically described in the subsection. But what happens when some of the works under a contract fall within the exclusion and some do not? To illustrate the point it is worth considering a couple of examples:

1. In a contract for the construction of a petrochemicals processing facility it is likely that most of the work (particularly in terms of value) will be for the erection of supporting steel work and the supply and installation of items of plant. All of this work will fall within the exclusion but the contract will almost certainly also include the construction of access roads, perimeter fencing and so on. These items will not fall within the exclusion.
2. In a contract for the construction of a small water treatment facility in a remote location, much of the work

will be for traditional construction operations (digging foundations, provisions of access roads, a small blockwork or concrete building) to which the exclusion will not apply. However, the building is likely to contain some large items of plant to which the exclusion will apply.

That such situations may arise is envisaged by s104(5) of the Construction Act, so that where a contract relates to construction operations and other matters, the Construction Act will only apply so far as it relates to construction operations. This solution is likely to introduce considerable administrative complexity and in many cases be practically unworkable. To alleviate this the practice to date has often been to adopt a pragmatic approach. For example in 1 above, where the overwhelming majority of the works falls within the exclusion, the Construction Act would not apply to any work under the contract. In example 2, where arguably most of the works are "construction operations" the Construction Act would apply. The *North Midland* case calls this approach into question.

A further complication is the status of sub-contractors. In example 1 if, where the main contract is likely to be excluded from the Construction Act, a subcontractor is appointed to only carry out the access road works that subcontract will almost certainly not be excluded from the Construction Act. The result will be that the main contract need not be Construction Act compliant but the subcontract must be. Conversely if, in example 2, a subcontractor is appointed to only carry out the supply and installation of the treatment plant then the subcontract works are likely to fall within the exclusion but the main contract will not.

The result in both situations will be practical difficulties such as the payment and dispute resolution provisions in the contracts failing to align. The practical solution to the ambiguity, and a way of avoiding the difficulty of having discrepancies between dispute resolution and payment terms at different tiers of the supply chain, is to make sure that all contracts are Construction Act compliant. While this approach will foist "unnecessary" provisions on some contracts, the approach taken by the Construction Act is increasingly becoming accepted as best practice so not much is being lost.

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