It's no breeze designing wind turbines

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Be aware of fitness for purpose obligations

In August this year, the UK Supreme Court decided that an obligation placed on the Contractor in the **technical documents** held contractual effect. Despite a Contractor designing the works in accordance with Good Industry Practice, due care and diligence, as specified in the contract, the Supreme Court held that the Contractor was liable for defective foundations due to a clause placed in the Technical Requirements that stated the works shall be designed for a minimum design life of 20 years.

Quite simply put, this judgment sets a precedent with regards to *"fitness for purpose"* obligations. Be aware, if you have designed the works with skill and care and as specified in the contract, you may still be held liable if for instance, the Works Information or Employer's Requirements state an additional requirement which states that the works shall be designed to have a lifetime of 'x' years.

Background

In 2006, E.ON Climate and Renewables ("*E.ON*") engaged MT Højgaard A/S ("*Højgaard*") to design, fabricate and install 60 off shore wind turbines at Robin Rigg Off Shore Wind Farm in the Solway Firth ("*Contract*"). The foundations were designed according to J101 standards, an internationally recognised design standard which was commonly used in the industry at that time. It was subsequently found that one of the equations within J101 contained a significant error which resulted in defective foundations in the project.

Although Højgaard complied with J101 as specified within the terms of the Contract, E.ON considered Højgaard to be liable for the required remedial work. Højgaard denied liability for the defect and maintained that it was not in breach of the Contract as it had exercised reasonable skill and care and complied with the specified J101 standards.

A technical document in the Employer's Requirements in the Contract however, noted that the turbine foundation should have a service life of 20 years. E.ON argued that upon signing the Contract, Højgaard had warranted that the works would be **fit for purpose** and thus would have a service life of 20 years.

Decision in the High Court (TCC)

Højgaard stated that it had exercised reasonable skill and care and complied with its contractual obligations. In other words, it had designed the works in accordance with the aforementioned internationally recognised design standard.

E.ON argued that Højgaard had warranted that the foundations would have a service life of 20 years. That had not been achieved and therefore Højgaard was liable to correct the failure as a result.

The Judge held that whilst Højgaard **was not negligent in the design** of the works, it was nonetheless liable to carry out the necessary rectification work due to the breach of the 'fitness for purpose' obligation in the technical documents i.e. the foundation should have a service life of 20 years.

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Decision in the Court of Appeal

Højgaard appealed the decision made by the TCC on the basis that it had observed the applicable international standards as required in the Contract. The appeal was allowed by the Court of Appeal.

The Court of Appeal decided that there was no "*fitness for purpose*" obligation within the Contract and so reversed the ruling in favour of Højgaard. The Court of Appeal held that the two paragraphs within the technical documents pertaining to the service life of the turbine foundations were "*too slender a thread*" for Højgaard to be liable for the service life of the foundations. It held that since Højgaard agreed to comply with J101 and had in fact complied with J101 and exercised reasonable skill and care, Højgaard was not in breach of its obligations under the Contract.

But of course, it didn't end there….

Decision in the Supreme Court

E.ON appealed the decision made by the Court of Appeal, claiming that the contract imposed a "*fitness for purpose*" obligation on Højgaard that said foundations would have a service life of 20 years.

The Supreme Court upheld the TCC's decision and held that Højgaard was liable to satisfy the fitness for purpose obligation in relation to the service life of the foundations.

The Supreme Court held that it was possible to have a "*double obligation*" which meant that the Contractor would be required to comply with specifications and standards that would achieve a specific outcome.

The Supreme Court held that compliance with J101 was a '**minimum requirement'** and concluded that where inconsistent standards were imposed, the more demanding of the two standards would be expected to be carried out and the less onerous standard would be treated as a minimum requirement.

The Supreme Court further emphasised that the location of the "*fitness for* purpose" obligation would not negate the duty of the court to interpret the Contract any differently to how it was naturally meant to mean at the time the Contract was drafted. The Supreme Court found that the definition of "fit for purpose" captured requirements that were set out in the "Employer's Requirements", thereby making Højgaard liable to ensure that the fitness for purpose obligation was satisfied.

Conclusion

This case is a strong reminder for contractors and subcontractors to pay close attention to obligations that are set out in the NEC Works Information and JCT Employer's Requirements.

The contract you currently have in place may have an onerous fitness for purpose obligation placed in the Works Information or Employer's Requirements that you may not be aware of. If in doubt, please do not hesitate to contact us to see if this recent decision would impact your contractual obligations under the contract.