



Defects and Liabilities in Public Construction Contracts

Lausanne, 8 April 2017

Edward Banyard Smith – Farrer & Co

Introduction

- What do we mean by "defective"?
- Different types of defect
 - Design
 - Selection of goods and materials
 - Workmanship
- What sorts of defect are typical?

Special rules for construction in the public sector

- Procedural laws
 - Public procurement rules
 - Transparency
- Policy and funding rules
 - Government Construction Strategy
 - Sector specific rules

Allocation of risks for defects – what is normal in public contracts

- Uncertain management from central government
 - Legacy of inefficient procurement
 - Shifting government guidance
- Inconsistent contract management

Allocation of risks for defects – what is normal in public contracts (2)

- Government Construction Strategy
 - Alternative procurement models
 - Emphasis on Building Information Modelling

How can you manage the risk of defects?

- Adoption of BIM?
- Insurance
- Back-to-back contracts
- Limitation of liability

How are claims for defects managed?

- Different dispute resolution models
- Early involvement of insurers
- Issues with disputes with government bodies

Thank you

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Defects and Liability in (Danish) Public Construction Contracts

8-9 April 2017, Lausanne, Switzerland

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Public Construction Contracts

- There are no specific rules under Danish law concerning defects and liability in public construction contracts i.e. the same rules apply as if the Employer was a private entity and as set out in the contract between the contractor and the employer.
- A Danish public employer is however (as a starting point) obliged to make use of the agreed standard contract: General Conditions for the provision of works and supplies within building and engineering (AB 92)

Risk allocation in AB 92

Note that under an AB 92 contract:

- The employer carries the risk for the clarity of the employer's requirements including the design
- The employer carries the soil risk
- **The employer carries the “development risk”**
- No fitness-for-purpose guarantee

However the risk allocation is “subject” to a good-faith obligation of each party to take due account of the other party's interest.

Construction Contracts

Defects

According to danish construction law there is a defect when the *work does not conform with the requirements of the contract*

Problem/challenge: regardless of the wording of the contract the courts are reluctant to change the “**usual**” risk and liability set-up developed in practice over the years.

Construction Contracts

Remedies for Defects

- In case of a defect for which the contractor is responsible the employer has the following remedies
 - Remedial work performed by the contractor
 - Remedial work on the contractor's expense
 - Reduction of the contract price
 - Claim for damages
 - Termination

Expiry of defects liability: 5 years in AB contracts, however the liability is also subject to the statute of limitation (3 years/10 years)

Considerations in public construction contracts

- Interface between the role as employer and as public entity (both concerning requirements to behaviour and decision processes).
- As a starting point the employer must pursue what he considers a valid claim due to his obligations towards the tax payers (similar considerations when dealing with a claim from the contractor)
- In the other hand it is doubtful (or at least subject to debate in theory) whether the Employer can keep delay damages in a case where no corresponding loss has been suffered
- Sometimes money is not what is really important

Limitations of liability under AB 92

- In accordance with AB 92 § 35, sec 2 the Contractor is not liable for operational losses, loss of profit or other indirect losses.
- If AB 92 is not agreed the Contractor would be liable for such losses only subject to the general rules of liability i.e. causality, predictability and a basis of liability e.g. negligence .

Extent of the Contractor's liability, cont.

- Not usual to include limitation of liability e.g. a limitation to the contract price in public construction contracts.
- Such reservation would be deemed a material reservation in the tender process.
- However the reluctant and conservative approach taken by the courts does to a certain extent protect the contractors; although it does not provide the certainty that many foreign contractors would wish

Thank you

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Defects and Liabilities in Public Construction Contracts

Lausanne, 8 April 2017

Paul Bassett, Mason Hayes & Curran

Introduction

- Approach to public construction contracts in Ireland
- Defects
- Liability

Approach to public sector construction contracts

- Background
- Risk allocation
- Employer design v design build approach
- Good faith requirement?

Defects

- What is a “**defect**” under the PWC contracts
- Standard for material and items forming part of the works
- Managing defects throughout the contract

Liability

- Employer risks
- Contractor risks
- Liability and indemnities under the PWC

Conclusion

- Traditional approach to risk allocation by the employer
- Onerous defects provisions from a contractor perspective

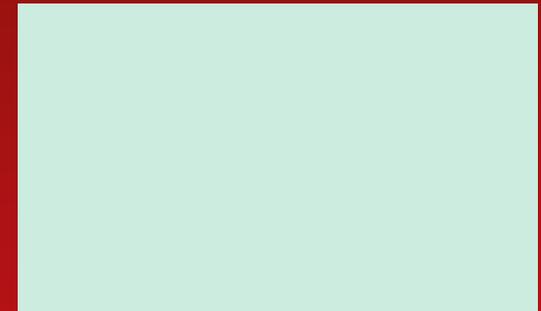
Thank you

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