



Tips on design liability obligations in construction contracts

By Geoffrey E. Odongo



The standard of care that a contractor ordinarily exercises in respect of its design in a construction project and its services generally is one of reasonable skill and care. This means that where the employer claims that the consultant or contractor has been negligent in producing its design, the test will be whether the consultant acted in accordance with the standards of reasonably competent members of its profession at that time. However, in some instances there may be an absolute obligation to ensure the completed design is fit for purpose. This is the case where the contractor has warranted that the design, once constructed, will be fit for a purpose, which is known to the contractor as it prepares its design.

For complex projects comprising numerous parties with diverse design responsibility, determining responsibility for design deficiency can be difficult making it necessary for the use of tools such as a tabular design responsibility matrix. Such a matrix assists in determining which party is responsible for each part of the design and should be included in the building contract. Moreover, the contract requires careful review to ensure that legal terms and technical documentation relating to a construction project are consistent. In addition, the employer should ensure that it has a direct contractual relationship with all parties involved in preparing the design so that it has a contractual right to pursue legal recourse against any party responsible for a design deficiency.

In conclusion, it is also worth noting that not all forms of procurement present the contractor with the responsibility of both the design preparation and construction of the works. A case in point being the traditional procurement route where the employer's design team prepares the design and specification and passes this on to the contractor whose responsibility is solely for provision of workmanship and materials for construction with the contractor having no design liability obligations. The design consultants are therefore liable to the employer for any deficiencies in the design.

At AIP Advocates, we have lawyers who will guide you on legal matters arising from construction contracts while ensuring your interests are protected.

Do reach out to us on the contacts below for assistance:

Nairobi Office: +254 722 367 647

Mombasa Office: +254 708 158 832

Kisumu Office: +254 776 401 133