

Projects

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Performance Deductions - the latest from the Courts

A recent Scottish Court decision in relation to Aberdeen Schools Phase 2 PFI (19 March and 5 August 2009) looks at the issue of performance deductions and interface agreements for the very first time. (Kent County Council against Robertson Construction Northern Limited).

It has implications for SPVs; FM Sub-contractors, Funders and Building Sub-contractors alike.

The facts:

- It concerned the Furniture and Equipment Sub-Contract which was part of the building works in this PFI Contract.
- A performance failure - failure to maintain items of furniture was claimed. It was based on the furniture supplier's failure to supply certain tables. This failure continued after the issue of the Certificate of Service Availability.
- The missing tables had been on the snagging list.
- Performance Deductions were applied against the SPV which were then passed through to the FM Sub-contractor then to the Building Sub-contractor and so down to the furniture supplier.
- This supplier argued the deductions should not have been applied against the FM sub contractor which meant any "pass through" was flawed. There needed to be a breach by the FM Sub-contractor before it could suffer and pass on deductions.

The outcome of the findings by the Judge in this case (in which D&W acted for one of the parties) can be summarised as follows:

- A failure to supply an item of equipment does not give rise to a failure to "maintain and keep operational" that equipment.
- The SPV and FM Sub-contractor cannot be liable for failure to maintain something which was never there.

Other points that arise from this case are that:

- An Interface Agreement must be carefully worded if the intention is that there will be "pass through" of deductions to the Building Sub-contractor, even if these deductions are incorrectly applied.
- There is a separate contractual regime for dealing with snagging works which are the responsibility of the Building Sub-contractor and a reference to this being without prejudice to the FM Sub-contractor's liability for deductions is not enough for them to be liable for such deductions automatically.

This Bulletin is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

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