

Facilities Management from A to Z

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Warranties

Commercial contracts contain a number of major terms referred to as the Conditions. These are the promises made by one party to the other and if one of them fails or is broken, the contract is breached. The other main kind of promise in a contract is a Warranty. These are less important than Conditions and failure to comply usually leads to an adjustment in price or a payment of damages rather than breach of contract.

Facilities and construction contracts often make use of additional Collateral Warranties which protect the client by creating a contractual bridge between a contractor, consultant or subcontractor and an interested third party thus giving the client the right to sue the warrantor where a direct contract does not exist. This helps to provide an additional level of security for other stakeholders in a project who are not directly appointing the parties delivering it. Collateral warranties are given in PPP projects for example by the professional team in favour of the procuring authority, funders and special purpose vehicle.

It is important that a collateral warranty is consistent with the underlying contract it relates to. It should contain a clear commitment that the warrantor will fulfil its obligations under the underlying contract and that it will carry out any design with reasonable skill and care. There are usually clauses relating to the use of information, assignment, step-in rights, exclusions and limitations.

In outsourcing contracts both the service provider and the client protect themselves through the contract by the negotiation of warranties. These may cover questions like who bears the cost of any failures to inform and consult staff as required which could lead to a compensation liability, for dismissals pre-and post transfer, and for any pre-existing claims by employees.

A warranty is used for one party to confirm to the other that they have done something or that certain information is correct. For example, that the information given about the pay and benefits of transferring employees is correct. If it turns out that it was not then there may be a claim for damages, although these are usually subject to an obligation to mitigate the loss suffered.

Warrantors seek to qualify the warranties that they give as far as possible by including phrases like “as far as it is aware” or “as far as reasonably practicable” or by reducing any commitment relating to “best endeavours” to “reasonable endeavours”. Such qualifications should be carefully examined to ensure that the Warranty is still enforceable.

The RICS Bookshop has many useful publications offering detailed advice on the use of warranties and collateral warranties in outsourcing and construction projects www.rics.org