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Insights

THE CONSTRUCTION CONTRACT CANNOT BE AN AFTERTHOUGHT

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In the second BCLP Insight in our Direct Procurement for Customers (DPC) series, we considered different categories of standardisation in the Competitively Appointed Provider (CAP) Agreement (CAPA), now that Ofwat has published its Template CAP Agreement (Baseline CAPA). This BCLP Insight asks whether a similar approach extends to the construction contract and examines the alignment between the CAPA and the construction contract and the role of the Independent Technical Adviser (ITA). These are areas where the published Baseline CAPA already offers some answers, alongside questions it leaves open.

Should the construction contract sit within the standardisation programme?

These are not secondary questions. Construction is likely to be the CAP's largest risk before revenue begins. The Baseline CAPA does not include a standard form construction contract. If the interface is not addressed more fully as the standardisation programme develops, there is a risk that much of the benefit of a standard CAPA could be lost.

Its treatment affects pricing, completion, liquidity and lender confidence. Ofwat has not mandated a standard-form construction contract, consistent with the expectation that different CAPs and contractors may prefer different forms and delivery models. Instead, the published Baseline CAPA controls the interface indirectly: the CAP cannot appoint any contractor without the Appointee first approving the terms of the proposed construction contract. Further, it prevents the CAP from terminating, materially varying or departing from its obligations under the construction contract without the proposal first being submitted to the Appointee's Representative for review. That still leaves open how far this interface should be standardised, rather than addressed only through consent rights over an underlying contract chosen project by project.

One possibility would be a standard interface framework, sitting alongside the CAPA.

Such a framework might set out common principles for mapping the risks allocated under the CAPA into the construction contract. It could, for example, identify mandatory flow-down

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obligations, completion principles, minimum programme requirements and the treatment of compensation events. The question is whether the existing consent-based mechanism could be developed into a more structured, purpose-built interface.

Perhaps most usefully, it could require, or at least encourage, the CAP to identify material mismatches between the two agreements.

The objective would not be to make the CAPA and construction contract identical but to make their differences visible.

Is “back-to-back” sufficient?

Describing a construction contract as back-to-back says little about whether it is truly aligned.

A proper alignment exercise might start with scope: does the contractor deliver everything the CAP needs from the construction package? It would then need to examine the applicable performance standard: do the contractor’s obligations support the outputs promised by the CAP? Ofwat’s guidance already envisages certain output requirements. Might these be extended into a more structured alignment test?

Relief is another area worth testing, and the published Baseline CAPA gives a starting point: a compensation event claim requires the CAP to serve a Compensation Event Notification on the Appointee's Representative with a copy to the ITA, so the ITA already sits inside the CAPA's own relief mechanism. If the CAP receives time relief for an event, should the contractor receive compatible relief under the construction contract? If the contractor is entitled to additional cost, can the CAP recover that cost under the CAPA? Are the notice periods and evidence requirements capable of being satisfied in both directions, given the CAPA's own fixed timetable for notification and claims? These are questions the standard framework might usefully address in the construction contract itself, since the published template does not extend its notification and evidence requirements beyond the CAPA relationship.

The liability structure is a further area where an integrated view could help. Might caps on liability, exclusions, insurance and security be more effectively assessed together rather than negotiated as separate provisions?

Some differences will inevitably be deliberate. The CAP may retain integration, financing and regulatory risks that cannot sensibly be passed to the contractor. The question is whether the framework could include a structured process for identifying, understanding and pricing each material mismatch.

What role should the ITA play?

The Baseline CAPA also provides a clearer starting point for the ITA’s role.

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The Baseline CAPA confirms that the ITA's core role is to audit, verify and challenge matters under the CAPA, owing a duty of care to Ofwat in all cases. Subject to retaining that core, the role can be expanded, including to cover assessing delays, compensation events and CAP charges, and, where the parties agree the ITA should determine matters, that decision is expected to bind both the Appointee and the CAP, with the ITA in that case also owing a duty of care to the CAP.

The scope of the ITA's role affects the procedure it must follow, the status of its conclusions and the parties' ability to challenge them. The Baseline CAPA provides some guidance: where the ITA's role is expanded to include binding determinations, the drafting is expected to mirror the principles used for the Completion Certifier's appointment, and the template flags the option of combining the ITA and Completion Certifier roles, at least for the Works Period.

On appointment and fees, the Baseline CAPA envisages joint appointment of the ITA by the Appointee and the CAP, with the CAP paying its fees by default, while noting that Appointees may instead prefer to appoint the ITA themselves and meet the costs directly. It is less prescriptive on independence, requirements relating to conflicts of interest, information rights and liability, and on which decisions beyond expert determination are binding, advisory or reserved to Ofwat or the dispute-resolution process.

While the technical scope may vary between projects, could a central framework make the legal status of the ITA's role more consistent across the programme?

Can the interface be made to work within Ofwat's programme?

Now that a standard Baseline CAPA has been published as one part of Ofwat's DPC programme, might a standard construction contract interface be the natural companion?

Experience from other large infrastructure projects suggests that the construction contract shapes bankability as much as the CAPA itself. Design maturity, consenting, interfaces, site information, financing and operating requirements all need to be reflected in the allocation between the two agreements. Is Ofwat drawing on this experience in shaping the next phase of the programme?

Getting the CAPA right is necessary. But is getting the construction interface right what will ultimately make DPC financeable and repeatable? If so, the standardisation programme may need to extend further than the CAPA alone.

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