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The construction & energy law specialists

#FEwebinar

Recognising your BIM Obligations

David Bebb, Partner

October 2016





Introduction

Topics to be covered:

- BIM Level 2 - JCT and NEC approach
- CIC BIM Protocol
- Government Soft Landings



BIM and JCT



- JCT 2011
 - Dealt with in Public Sector Supplement 2011
 - Any BIM Protocol can be incorporated as a ‘contract document’
 - Contractor required to carry out work *‘in compliance with the Contract Documents’*
- JCT 2016
 - Contract Particulars (clause 1.1) - allows BIM Protocol to be identified
 - Definition of “Contract Documents” includes the BIM Protocol
 - Clause 1.3 *“Nothing contained in any other Contract Document ...irrespective of [its] terms shall override or modify ...these Conditions”*



BIM and NEC3



- NEC 3: how to use BIM with NEC 3 Contracts (April 2013)
- Suggests that (a) technical requirements are dealt with in the Works Information or Scope and (b) anything affecting rights and liabilities is dealt with in the conditions by way of Z clauses
- Why? Works Information can be varied by the PM whereas the conditions cannot



CIC BIM Protocol

- The ‘rules of the game’ for BIM Level 2
- CIC BIM Protocol (February 2013) is the most common
- Recent King’s College BIM Report (2016) found that very few interviewees mentioned the adoption of the CIC Protocol
- How does it sit with other contract documents?



CIC BIM Protocol continued...

- CIC BIM Protocol takes priority over other contract documents (clause 2.2)
- Limitations on liability:
 - Clause 4.1.2: the obligation on a project team member to deliver models and comply with Information Requirement is limited to “reasonable endeavours” (rather than the higher “reasonable skill and care”)
 - Clause 5: the project team member does not warrant the integrity of electric data transmission
 - Clause 6.4: provides the right for a project team member to revoke or suspend a licence to use their model in the event of non-payment



Government Soft Landings

- Government's approach to long term building performance
- 3 year post occupancy period
- Maintenance and operational requirements and standards
- Has your standard form contract been amended to account for this?



Conclusions

- Understand what your obligations are
- Do your obligations all sit well alongside each other or are there conflicts?
- Does your building contract or appointment deal with these additional obligations?
- No problems in BIM Level 2 that cannot be overcome



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Brexit - Disaster or Opportunity for the UK Construction Industry?

Jatinder Garcha, Partner





Introduction

Topics to be covered:

- Briefly highlight commercial implications for UK Construction Industry
- Potential legal & contractual implications for UK Construction Industry:
 - Public Procurement Regulations
 - Change in Law provisions
- Potential Opportunities



Commercial Implications for UK Construction Industry

- Immediate impact included projects being put on hold or abandoned
- Since initial impact, it has largely been “business as usual” - but Article 50 has yet to be invoked
- Potential long term implications may include:
 - a shortage of skilled labour
 - Contractor’s margins squeezed as input costs (material costs & labour costs) rise
 - fall in demand - growing competition among Contractors for work?



Legal & Contractual Implications

- What will Brexit mean for UK public procurement?
- Whether changes are required/can be made to existing UK Regulations will depend on the type of relationship that UK negotiates with EU
- Full access to the Single Market:
 - becoming part of the European Economic Area (“EEA”) (“Norwegian Model”)
 - requires full compliance with all EU Legislation - but without any rights to negotiate or shape such legislation
 - no procurement legislation amendments necessary or possible



Legal & Contractual Implications continued...

- Forgoing access to the Single Market but remaining a party to WTO's Agreement on Government Procurement ("GPA"):
 - GPA is a multi-lateral agreement signed by WTO's members allowing access to a Country's public procurement market to foreign suppliers - which sets out rigorous rules on how procurement must be carried out
 - Important as allows access to markets such as USA, and Japan, as well as the EU
 - GPA narrower in scope than EU procurement legislation but in all material respects is substantially the same



Legal & Contractual Implications continued...

- Replace or dispense with all procurement rules:
 - New procurement philosophy - whether more or less relaxed
 - Streamline the process but stay within the GPA parameters
 - Degree of changes may be restricted by international trading agreements
- Given the need for “best value” and transparency in public projects, dispensing with all procurement rules is unlikely



Legal & Contractual Implications continued...

- Contractors should consider the following contractual provisions:
 - Allocation of risk for changes in law occasioned by Brexit
 - Implications of increases in the cost of materials, shortage or unavailability of labour, and/or import duties



Potential Opportunities

- Government schemes and incentives to plug the skills gap domestically
- Encourage Contractors to directly employ and train their own skilled workforce
- Greater opportunities for skilled labour from outside the EU
- Cheaper sites as a result of investors taking money out of the UK property market



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Conclusion

Comments and views welcome



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The Tender Process - Beware of the Pitfalls

David Bebb, Partner

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Introduction

Topics to be covered:

- Reminder of the law governing a typical private sector tender
- Risk of claims for wasted tender costs and loss of profit
- Potential claims: contractor v employer, subcontractor v contractor, employer v architect
- Tips to avoid claims
- Excludes public sector (whole different ball game)



The Rules of the Game

- Two sources: (1) the general law (2) the tender documents themselves
- Key cases: *Blackpool and Flyde Aero Club v Blackpool Borough Council* (1990), *J&A Developments v Edina* (2006).
- Tender documents themselves - JCT Practice Note Tendering 2012, NBS Guide to Tendering



Typical Tender Documents

- “TENDERING PROCEDURE

General: in accordance with the principles of: JCT Practice Note Tendering 2012”

- “ACCEPTANCE OF TENDER

Acceptance: No guarantee is offered that any tender will be recommended for acceptance or be accepted, or that reasons for non-acceptance will be given”

- “Costs: No liability is accepted for any cost incurred in the preparation of any tender”



Typical Tender Documents continued...

- *“Where criteria have been established, the Employer must abide by them ... “to do otherwise would leave the Employer and his advisers open to challenge by unsuccessful tenderers” (JCT, para 59)*
- *“Good practice demands that a contractor’s tendered prices should not be altered without justification” (JCT, para 61)*



J&A Developments v (1) Edina Manufacturing and (2) ADP Architects (2006)

- J&A (contractor), Edina (employer), ADP (employer's architect)
- *“Contractor's price should not be altered without justification”*
- *“NIJCC strongly deplores any practice which seeks to reduce any tender arbitrarily where the tender has been submitted in free competition ...or to reduce tenders other than the lowest to a figure below the lowest.*
- Tender process very tight (only 10% between the highest and lowest bids on contract sum of approximately £1.1m).



J&A Developments v (1) Edina Manufacturing and (2) ADP Architects (2006)

- Employer called in the 3 lowest tenderers and asked for a further discount. J&A refused and were not awarded the contract
- J&A sued and won wasted tender costs (£6500) and loss of profit (£128,000)
- Edina then sued the architect and lost



Tips

- Remember that a ‘tender contract’ may apply
- Breach of that contract can trigger a right to damages so consider very carefully what the terms of that contract are.

Employers:

- Review ‘cut and pasted’ prelims and tender rules. Do you know what they say? Do you want them to say something different?



Tips continued...

- The more 'ruthless' your tender process, the more likely you are to require very clear wording in the tender documents allowing this. Tenderers can then decide whether or not to bid in full knowledge of how the process is going to be conducted.



Tips continued...

Contractors:

- Consider how subcontract tenders are run. What are the rules of that game? Are you conducting the subcontract procedure in the same way as a typical main contract tender?

Professional Team:

- Is the employer relying on your advice as to how the tender process is run?
- Advise the employer of potential liability if the tender process departs from the rule of the game set out in the tender documents.



Tips continued...

- Finally, consider professional conduct rules (RIBA, RICS etc).
Should you be involved in the process that departs significantly from the rules of the game? Would involvement in the likes of a Dutch auction bring the profession into disrepute?