

DEVELOPMENTS IN THE BIM CONTRACTUAL LANDSCAPE

- ▶ Update on developments in the contractual documentation relating to BIM.
- ▶ The use of BIM is increasing, and with the Government BIM Mandate and the opportunities presented by increased digitisation this trend seems likely to continue apace.
- ▶ There is still a way to go before the contract documents for BIM enabled projects consistently deal with BIM with sufficient clarity and detail and the apparent divide between technical and legal people is bridged.

What's it about?

The most recent development in BIM contract documentation was the issue of the Second Edition of the BIM Protocol by the CIC in April this year. A number of changes have been made to the Protocol with the intention of reflecting current practices and standards and making it more flexible and easier to use (eg editable appendices). The Second Edition is now more closely aligned with PAS 1192-2 and some of the terminology has been changed to match that used in the PAS 1192 suite.

Key changes include a change in the position in relation to intellectual property, with the provisions of the Protocol only applying if the underlying contract contains no provisions relating to copyright; rather than giving no warranty in relation to integrity of information provided the project team member now gives no warranty that its software is compatible with that of any other team member; there are changes to the provisions relating to precedence of the Protocol and a new process for co-ordinating information and removing inconsistencies. There are also additional optional provisions in relation to security to reflect PAS 1192-5.

The PAS suite itself continues to be developed: PAS 1192:6 (a specification for the use and sharing of health and safety information using BIM) was issued in February; PAS 1192-2 and -3 are currently being updated and a new specification for defining and sharing structured digital product information (-7) is being prepared.

February 2018 saw the publication of the Winfield Rock Report (**WR Report**) entitled "Overcoming the Legal and Contractual Barriers of BIM". Based on a survey and interviews with a number of leading figures in the world of BIM, both legal and technical, this report considers the present understanding of BIM legal and contractual issues among the legal community and those who instruct them and makes a number of recommendations as to how lawyers can work with their clients to understand and document relevant issues.

The latest suites of the JCT and NEC Contracts also include new provisions relating to BIM. In the JCT Contracts provision is made to include a BIM Protocol. Note that the provisions relating to priority need to be reviewed if the CIC BIM Protocol is used. The JCT have also amended the definition of 'Contractor's Design Documents' to include documents or information to be provided under the BIM Protocol and the Design Submission Procedure is now that set out in the BIM Protocol (if there is one). There is also a requirement for the CIC BIM Protocol to be replicated in any sub-contracts as necessary.

The NEC has included BIM specific provisions in the NEC4 suite in option X10 (although using some different terminology from that commonly seen). The suite does not, however, include provision for the use of a BIM Protocol, with the intention being that the legal contractual issues are covered in X10 and that there is a separate technical scope. The WR Report suggests that it may be worthwhile considering whether any additions should be made to the brief X10 provisions.

Why it matters

Following the introduction of the UK Government BIM Mandate in 2016 the NBS National BIM Report 2017 concluded that the 12 months preceding the Report "have seen the most rapid BIM growth since 2014".

With the continued growth of BIM it is increasingly important that construction contracts contain clear and detailed provisions and obligations in relation to BIM and that the approach to BIM on the ground and in the contract are consistent. However the WR Report indicates a lack of knowledge about BIM among construction lawyers, and, in some cases, a lack of understanding from their clients as to what BIM entails and how to specify what they want from the BIM process.

What now?

The Second Edition of the CIC BIM Protocol is likely to be a useful tool in improving the consideration and documentation of BIM related issues and risks, although it may require amendment on a project specific basis. It is important to note that for the Protocol to work properly the Appendices must be completed carefully and other documents are required. These include the Employer's Information Requirements (which set out the Employer's requirements in relation to BIM and are accordingly a key document), the BIM Execution Plan (a plan as to how the information modelling will be carried out, to be developed as the project progresses) and the Responsibility Matrix.

It is not enough for a client simply to say "achieve BIM Level 2" (as reported in the WR Report): they need to specify what this means on a project specific basis - not least because there does not seem to be a commonly accepted definition of BIM Level 2 means. Unfortunately there are no accepted standard precedents for the EIR and BEP and the respondents to the WR Report interviews complained that commonly there was a lack of information in the EIR or no EIR at all.

The authors of the WR Report are of the view that lawyers should not see the BIM provisions as technical provisions which fall outside their remit and the WR Report helpfully attaches a checklist to assist lawyers in obtaining instructions from their clients. There is clearly a role for lawyers to play in ensuring consistency of obligations across the contract documents and dealing with the provisions relating to issues such as incorporation of any Protocol, intellectual property, priority of obligations and interface between the contract terms and the BIM documents. Some clients may require further assistance, for example in reviewing the level of detail in the EIR and considering whether any of the obligations in the BEP should be contractual obligations.

Generally, it seems that there is more work for all sectors of the construction industry (and those who advise it) to do to enable the full benefits of BIM to be unlocked.

Who to contact?



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