



Welcome to the October 2016 edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

**This issue highlights the importance of understanding your BIM obligations and ensuring they are recorded appropriately and clearly in all contract documentation.**

As technology and innovation in the construction industry are developing exponentially, it is therefore essential to understand the responsibilities which you sign up to. Using embryonic or novel technologies does not excuse or diminish your legal obligations and it is imperative to document all expectations and obligations clearly, taking care to ensure there are no discrepancies in contract documentation.

This article considers two examples where discrepancies and misalignment of obligations can emerge in contract documentation if parties are not careful when assembling their contracts: the CIC BIM Protocol and Government Soft Landings.

#### The BIM Basics

First, we must not forget the definition and purpose of BIM. As the NBS states:

*"BIM is an acronym for Building Information Modelling. It describes the means by which everyone can understand a building through the use of a digital model. Modelling an asset in digital form enables those who interact with the building to optimize their actions, resulting in a greater whole life value for the asset ... BIM is a way of working..."<sup>1</sup>*

Fundamentally, BIM is a digital tool or "way of working" to optimise output, both in terms of working practices as well as the whole life value of the building or asset. As the NBS International BIM Survey 2016 found, 77% of the respondents (in the UK) agreed that "BIM is the future of project information".<sup>2</sup>

To assist with project information and collaboration, the following set of core documents are now available:

- 1 **CIC BIM Protocol PAS 1192-2 : 2013**  
(Specification for Information Management – capital/delivery phase of projects)
- 2 **PAS 1192-3 : 2014**  
(Specification for Information Management – operational phase of projects)
- 3 **BS 1192-4 : 2014**  
(Collaborative Production of Information – COBie, Code of Practice)

- 4 **PAS 1192-5 : 2015**  
(Specification for Security-minded BIM)
- 5 **Government Soft Landings Policy**
- 6 **The BIM Toolkit**  
(The Digital Plan of Work and Uniclass 2015 Classification Tables)

To what extent these documents are used on all BIM projects is a separate discussion, but nevertheless, when they are utilised, parties must be aware of the legal issues and liabilities which arise therein. By way of example, the following briefly looks at the CIC BIM Protocol and the Government Soft Landings Policy.

#### CIC BIM Protocol ("Protocol")

The purpose of the Protocol is to integrate BIM Level 2 with standard form contracts and it has played an important role in advancing the use and awareness of BIM in the UK. Whilst the Protocol is well known in the UK, it is arguable to what extent the Protocol is used. Interestingly, in recent research carried out by King's College London, "Enabling BIM Through Procurement and Contracts"<sup>3</sup> "very few interviewees mentioned adoption of the CIC BIM Protocol". Nevertheless, if using the Protocol (or any other bespoke document which attempts to provide a similar role), it is important to understand what the Protocol attempts to do in terms of each party's contractual obligations, liabilities and associated limitations.

First, the Protocol is designed to take precedence in the event of conflict or discrepancy with any contract (clause 2.2). As such, there is a real risk that interpreting the wording of the Protocol alongside the contract provisions, in particular standard form contracts which are not amended, will be problematic. For example, JCT2011 suggests that a protocol (not necessarily the CIC Protocol) should be a Contract Document or included as part of the Employer's Requirements. If the CIC Protocol is employed, without amendment, clearly ambiguity immediately exists.

The recently released JCTDB 2016 provides a new entry for the identification of a BIM Protocol, if any are applicable, at clause 1.1 and the

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## BIM: recognising your obligations and limitations

We were all waiting for 2016: the year the UK government implemented and required BIM Level 2 on all of its projects. What a monumental step for technology and the future of construction. Whilst there are of course still sceptics amongst us and it is arguable whether all areas of the industry truly welcome it, there nevertheless continues to be an energetic and vibrant interest in both the use of BIM Level 2 and the development and implementation of BIM Level 3. In a world which now is starting to embrace artificial intelligence and machine learning, there is no doubt that use of BIM, automation and big data will only increase.



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BIM Protocol is included within the definition of a Contract Document. Clause 1.3 states that the Conditions shall override any other Contract Document (i.e., the BIM Protocol) and clause 1.4.6 incorporates the BIM Protocol's information (in a form or medium conforming to that protocol) where "documents" are referred to throughout the contract. The JCTDB 2016 then integrates this defined term, BIM Protocol, throughout the contract. In terms of any discrepancies, the JCTDB 2016 Guide states that the "JCT considers that its contracts give sufficient latitude to BIM Protocols so that a conflict should not arise; in any event, it also considers that unqualified overriding provisions of this type are not appropriate in such protocols".<sup>4</sup> To what extent this standard form has eliminated ambiguities, only time will tell.

Secondly, parties should be aware that the Protocol includes limitations on a project team member's liability. Clause 5 provides that the project team member does not warrant the integrity of electronic data transmission, and clause 6.4 provides the right for a project team member to revoke or suspend a licence to use their models in the event of non-payment. Furthermore, clause 4.1.2 provides that the obligation on project team members to deliver models and comply with Information Requirements is limited to "reasonable endeavours". This duty of care is lower than the more typically accepted "reasonable skill and care".

Furthermore, clients/employers should note clause 3 of the Protocol which bestows the absolute obligation on them to secure protocols in substantially the same form from all project team members and to update the Information Requirements and the Model Production and Delivery Table.

Regardless of whether the Protocol or your own bespoke protocol is used, all parties need to understand where obligations and duties of care are either heightened or diluted from the industry norm. In addition, with numerous documents setting out the BIM procedures and standards for the project, parties need to ensure they are

aware of their obligations within each document and understand how they all fit together, in terms of both priority as well as process. For example, time and deadlines in terms of model production and otherwise are not dealt with in the CIC BIM Protocol, but are left to the BIM Execution Plans.

### Government Soft Landings ("GSL")

The GSL is the government's management approach to the specification and measurement of building performance and is based on the government's philosophy that the ongoing maintenance and operational cost of a building during its life cycle far outweighs the original capital construction cost: if this can be recognised during the design process, there will be greater scope to achieve cost savings and improved functionality.

The GSL's primary focus therefore is on functionality and effectiveness (buildings should be designed to meet the needs of their occupiers with effective, productive working environments); environmental factors (buildings should meet government performance targets in energy efficiency, water usage and waste production); facilities management (there should be a clear, cost-efficient strategy for managing the operations of buildings); and finally, commissioning, training and handover (projects should be delivered, handed over and supported such that they meet the needs of end-users).

From a legal perspective, the GSL is likely to create contractual issues since it raises a brand new concept of responsibility for the whole life cycle of buildings which involves the setting of targets and measuring performance against those targets in a new post-occupancy period. The post-occupancy period is intended to last for three years post-completion. In other words, the post-occupancy period is two years in excess of the traditional defects liability period and therefore amendments to the standard forms will be necessary to provide for the associated extended monitoring on site (which may or may not overlap with the defects liability period). Amendments will also be necessary to provide for the precise maintenance and operational requirements and standard that need to be met during the life cycle of a building. This may lead to a shift towards routine fitness for purpose obligations and absolute warranties - which are currently

construed very narrowly by the courts in the absence of very clear words to the contrary.

### Conclusion

No matter what contracts, protocols, guidance notes, or otherwise are required on a particular project, it is important to understand your obligations, liabilities and limitations within each document. Unfortunately it is all too often the case that contract documents do not align with each other and/or are not considered sufficiently in detail, which can lead to ambiguity and problems of interpretation. With regard to BIM, the devil is in the detail with these documents. All contract documents need to align obligations clearly. Introducing protocols which muddy the water should be avoided. In addition, any Levels of Detail, Execution Plans and Model Production and Delivery Tables should be well vetted and considered before agreement as, depending on the terms of your contract, these could be binding documents with obligations contained therein which you need to understand and be alert to.

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### Footnotes

1. <https://www.thenbs.com/knowledge/what-is-building-information-modelling-bim>
2. <https://www.thenbs.com/knowledge/nbs-international-bim-report-2016>
3. <https://www.kcl.ac.uk/law/research/centres/construction/enabling-bim/ebimtpac-form.aspx>
4. Paragraph 20 of JCT DB/G 2016.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Claire King. [cking@fenwickelliott.com](mailto:cking@fenwickelliott.com). Tel +44 (0) 207 421 1986

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