



Presentation ———September 2018

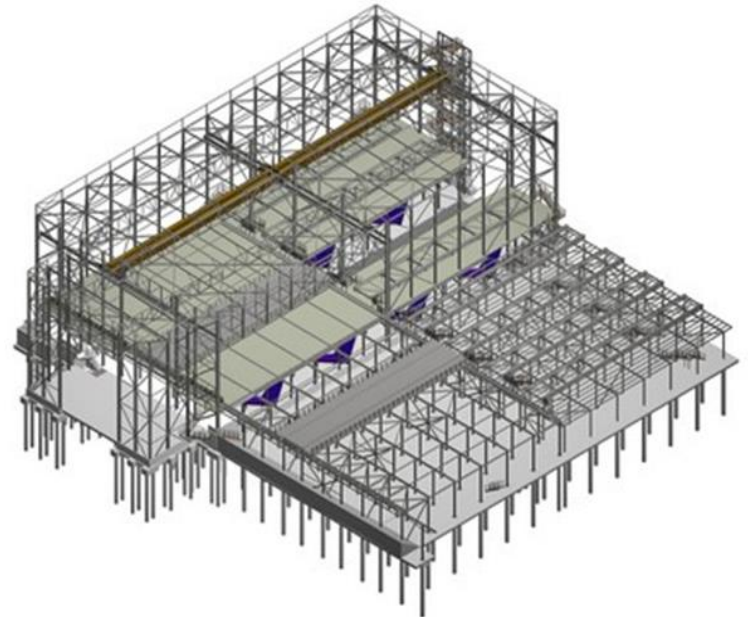
BIM – the legal perspective

Lydia Stuart-Banks

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BIM – the legal perspective

- Background and current trends
- Standard forms of building contract
- CIC BIM Protocol (2nd Edition)
- Trant Engineering Limited v Mott MacDonald Ltd



Background and current trends

- Many contracts are still not fully BIM enabled
- Some frameworks have included BIM but:
 - the BIM process is developed as part of the framework and the participants are repeat players
 - Information management issues are already part of the contracts in a framework context
 - Developing these systems and the expense of procuring them are spread across the cost of a large number of projects
- Diversity of approach among the existing standard forms of contract about how BIM is documented

JCT 2016 Design & Build

- Drafting refers to BIM Protocol
- Contractor's Design Documents include any other design documents or other information to be provided by the contractor under the BIM protocol
- The Design Submission Procedure is as specified in the BIM protocol, or where that is not applicable as set out in Schedule 1
- The intellectual property licence is limited
- Transfer of information to the Employer – “As Built Drawings” definition now includes “design documents or information to be provided by the Contractor under the BIM protocol”
- No drafting about access and use of data and no express reference to models

NEC

- NEC3 April 2013 editions include a document, *NEC3: how to use BIM with NEC3 Contracts*
 - Includes suggested “Z” clauses for incorporating the CIC BIM protocol
- NEC4 – BIM introduced as a secondary option (Option X10)
 - Information Model Requirements
 - Clauses dealing with
 - Collaboration
 - Early warning
 - Information Execution Plan
 - Risk allocation
 - Use of the Model
 - Liability

Standard Building Contracts

- *PPC2000* contract has been used in one of the government's trial projects at Cookham Wood prison in Kent, where BIM level 2 was implemented.
 - According to press reports, the government was able to implement BIM level 2 without making any amendments to the contract
- The Chartered Institute of Building's (CIOB) Time and Cost Management Contract, 2015 edition (TCM15) is intended to function in a BIM-enabled environment.

Standard Building Contracts

- FAC 1 does not contain any specific BIM drafting
- TAC 1 does not contain any specific BIM drafting but defines BIM “ building information modelling”
 - guidance notes set out where BIM should be addressed
 - Agreed software
 - Integration of BIM documents into term documents and orders
 - Timetabling BIM gateways and deadlines
 - Flexibility of BIM contributors
 - Direct mutual IP licensing

CIC BIM Protocol (Second Edition: April 2018)

(<http://www.CIC.org.uk/publications>)

- Supports working for BIM Level 2 and a range of different contracts
- Format of the second edition BIM Protocol:
 - Incorporated by reference – draft suggested text provided
 - Takes precedence over other terms only where those terms are inconsistent
- Employer completes the Protocol in connection with all direct appointments and contracts to be entered into with Project Team Members
- The Protocol is incorporated into the appointment documents and building contract
- Project Team Members required to incorporate the Protocol in contracts further down the supply chain
- The Protocol addresses specific obligations associated with the production of the 'information' and 'models' and their use
- Obligations associated with design deliverables will remain in the wider agreement
- Employer to ensure that there is always an Information Manager appointed

Trant Engineering Limited v Mott MacDonald Ltd [2017] EWHC 2061

- Trant Engineering Limited (“Trant”) employed by the Ministry of Defence as main contractor on the Mid Atlantic Power Project in the Falkland Islands
- Mott MacDonald Ltd (“MML”) engaged by Trant
 - To provide design services
 - To act as the BIM Co-ordinator, controlling access to the Common Data Environment
- Payment dispute arose
- MML suspended its services and revoked Trant’s access codes to the Common Data Environment



Trant Engineering Limited v Mott MacDonald Ltd [2017] EWHC 2061

- Trant terminated the (alleged) contract and sought an interim (mandatory) injunction from the TCC requiring MML to provide:
 - Trant
 - others involved in the project

access to the design data and design materials stored in the Common Data Environment

- Interim injunction granted

Trant Engineering Limited v Mott MacDonald Ltd [2017] EWHC 2061

- TCC held
 - Damages would not provide an adequate remedy for Trant because the likely losses on the GBP 55 million project would far exceed the GBP 1 million cap on damages recoverable from MML under the alleged contract:
 - Trant's potential losses would not be purely financial since the works were part of "a wider project to benefit the Falkland Islands"
 - Balance of convenience favoured granting the injunction.
 - Even if a contract had not been formed, there was a "high degree of assurance" that Trant was entitled to access the design data in the Common Data Environment
 - Without access, Trant would lose a year's progress on its works, so the injunction would preserve the status quo

Trant Engineering Limited v Mott MacDonald Ltd [2017] EWHC 2061

- Lessons?

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