

Winter 2012/2013

*Construction and
Engineering*

Winter 2012/2013 In Site

By Kevin Greene, Inga Hall, Nicola Ellis, Lee Forsyth & Jamie Olsen

Welcome to the Winter 2012/2013 edition of In Site. This edition covers the following topics:

- **Game changer? Building Information Modelling.** In this article we look at some of the points made in the Government's "Industrial Strategy" paper on the future of BIM in the UK, and some of the challenges associated with industry-wide adoption of BIM;
- The new **2012 suite of RIBA appointments** have been released and we look at some of the key changes;
- A recent case shows that payments made under a **side agreement** may not discharge a surety's obligations under a **performance bond**;
- The question of what it means for a professional to act "prudently" is examined in a recent **professional negligence** case;
- A summary of the key changes to the **EPC Regulations** which came into effect in January 2013; and
- **On demand?** The risks of using a mixture of "**performance bond**" and "**guarantee**" language in terms of assessing what type of security instrument is actually being entered into was considered in a recent Court of Appeal case.

For more information on any of these articles, or on any other issue relating to construction and engineering law, please contact any of the authors or your usual K&L Gates' contact.

Game changer? Building Information Modelling

As Building Information Modelling (BIM) approaches its second "anniversary" in the UK, the Government has published a BIM capability assessment (HM Government, "Industrial Strategy: government and industry partnership" December 2012).

BIM was first introduced to the UK construction industry in March 2011 with the announcement that all government construction projects should achieve BIM Level 2 or higher by 2016. Although BIM's introduction was initially focussed on the public sector, the Industrial Strategy paper argues that BIM should be seen as an industry-wide "*game-changer*".

The Government, and certain private sector proponents, see BIM as a key agent for domestic and international economic growth, and cite its benefits as including improved access to information throughout a building's life, improved design, greater collaboration throughout the supply chain, reduced costs and shorter construction times.

Whilst the Government continues to "embed" higher-end BIM processes in all centrally procured public construction projects, the Industrial Strategy paper indicates that local government uptake is increasing, and that "...[t]hrough this Government-led impetus, industry has responded rapidly and positively with large scale adoption of BIM. The UK is now recognised by its peers as one of the leading nations in the exploitation of BIM technology and processes with an internationally respected centrally-led programme...".

BIM offers a degree of flexibility with the choice of 4 levels (Levels 0 to 3) to suit the nature of the project (as well as the technological savvy and resources of the participants), with Levels 2 and 3 requiring a fully collaborative 3 dimensional model incorporating time and cost dimensions

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(Level 2) and facility management, whole life-cycle, information held on an integrated, web-based system accessible by all participants (Level 3).

BIM currently remains an optional process (although actively encouraged by the Government it is not presently being legislated for mandatory adoption) and it is probably fair to say there is not yet a market standard in terms of the BIM levels to be expected across all projects. A key reason for this is the differences in industry participants' cultural mind-sets and BIM-supporting software capabilities – larger-scale participants (particularly those engaged in public sector work) may be more willing and able to achieve higher-level BIM processes than smaller-scale participants from whom a BIM Level 0 or 1 may be the norm.

To incorporate BIM into a construction project key requirements will include:

- A collaborative approach to information gathering and sharing across the supply chain;
- The appropriate software to support the chosen BIM level (a key point being that Level 3 software will vary enormously from Level 1 software, and this needs to be an issue addressed at tender stage); and
- The inclusion of BIM protocol drafting into the contract documents which sets out how BIM will be implemented.

On this last point, the Government's BIM Implementation Task Group is expected to publish a BIM protocol in early 2013, and the JCT has also published a Public Sector Supplement which contains recommended amendments to the main standard form contracts whereby any agreed BIM protocol is incorporated into the contract. The JCT's approach is that only limited amendments are necessary. The NEC's current position is that no amendments are required to make NEC3 BIM compliant. Instead, BIM protocols may be included in the Works Information as a constraint on how the works are to be carried out. Nevertheless, parties should carefully consider whether additional amendments are necessary to their contracts.

Revised RIBA appointments

As briefly reported in the Autumn edition of In Site, the Royal Institute of British Architects (RIBA) published revisions to its 2010 suite of appointments in October 2012. Each of the Architect, Consultant, Concise Architect, Sub-Consultant and Domestic Project forms have been updated, and a revised Guide published. The less frequently used 2010 Concise Agreement and Domestic Project Agreement for consultants have not been revised and included in the 2012 set (but are still available electronically). The revised documents are referred to as (for example) the "Standard Agreement 2010 (2012 revision) Architect".

The main changes fall into the following categories:

- amendments to the payment and adjudication provisions to reflect the changes to the Housing Grants, Construction and Regeneration Act introduced by the Local Democracy, Economic Development and Construction Act 2009;
- other changes to the payment, copyright, and net contribution clauses, such as a reduction in the time period in which the Client is required to pay the notified sum from 28 days to 14 days.

Interestingly, although the 2012 revisions do not contain any provisions dealing with Building Information Modelling (BIM), RIBA published a "BIM Overlay" to the RIBA Outline Plan of Work in May 2012, stated as being preparatory to a more fundamental review of the Plan of Work during 2012/2013, after which we can expect to see an integrated provision for use on a BIM-enabled project.

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Performance Bonds

The general rule is that a bondsman's liability will be discharged if there is a change to the underlying contract unless he has agreed to the change or the change does not prejudice him (*Holmes v Brunskill* (1877)). The usual method by which bond beneficiaries avoid this result is by including what are known as "indulgence clauses" in their performance bonds, namely clauses to the effect that no alteration to the contract terms, or the works, or any extension of time would release the surety's liability.

What happens, however, if the parties to a contract agree to an "on-account" payment under a side letter? Can the employer still call on the bond in the event the contractor goes bust?

The Court of Appeal has recently answered 'yes' to this question.

On the particular facts, the employer agreed, via a side letter, to make an on-account payment to the contractor. The Court said this was an additional payment, namely a loan to maintain cash flow and increase the likelihood that the contractor could finish the works. It was not a variation to the terms of the underlying contract, but a sum paid outside the contract, and as such did not alter the bondsman's fundamental liability under the bond. As a consequence, the bondsman was still obliged to reimburse the employer under the bond for the additional costs of completing the works.

In contrast, if the payment had taken the form of a "concession" by the employer, such as the early payment of sums due under the contract, this would be a variation to the underlying contract terms. Such a payment could reduce the contractor's incentive to finish on time and hence arguably prejudice the bondsman. In that scenario, a bondsman may be able to argue that its liability has been discharged – subject however to the existence of an indulgence clause in the bond which may well nevertheless keep the bondman on the hook even where variations have been made without his knowledge or consent.

Professional negligence

The TCC recently considered what is required by a professional's obligation to act "prudently" in the context of a professional negligence claim brought by a mortgage lender against a property valuer.

The common law standard of care required of a surveyor is described in the case law as the "reasonably skilled", "competent" or "prudent" surveyor. The common law standard of care can of course be altered by express contract terms. The terms of the retainer between the mortgage lender and the valuer required the valuer to observe the standard of skill, care, competence and diligence in performing its obligations which a prudent manager and supplier of property valuations and appraisals would observe.

The court rejected the lender's argument that the contractual obligation went further than the common law duty of care and required them to err on the side of caution by adopting very conservative valuation methods. The case law shows that prudence is already one of the tests against which a professional's duty is measured at common law. "Prudence" means wisdom or knowledge in a particular subject or area, but it does not necessarily mean "conservative" or erring on the side of caution. There was nothing else in the retainer indicating that anything more conservative than the usual type of valuation was required, and, in particular, the fact that the valuations were being provided to a specific type of entity (a mortgage company) did not, without more, impose a presumption that the valuations should be carried out on a special or unusual basis.

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The case is a reminder that a contracting party, seeking to impose express obligations which go further than the existing common law standards of care, should first check what the common law standard actually requires, and then ensure that clear wording detailing the additional obligations are included in the contract.

Changes to the EPC Regulations

The Energy Performance of Buildings (England and Wales) Regulations 2012 came into force on 9 January 2013. They implement the changes made to the European EPC Directive in 2010 and replace the raft of previous Energy Performance of Buildings (Certificates and Inspections) Regulations.

Also, the Department of Communities and Local Government has published new guidance on the requirements relating to energy performance certificates for dwellings and non-dwellings, display energy certificates for public buildings and air-conditioning inspections to accompany the 2012 Regulations.

Key changes include:

- a new obligation prominently to display an EPC in non-dwellings which are frequently visited by the public and are bigger than 500 m²;
- a requirement that all commercial advertisements for sales or lettings of both residential and non-residential property state the EPC rating, replacing the previous requirement to attach the first page of the EPC to the particulars;
- the expansion of the category of buildings exempt from certain obligations regarding EPCs. The exemption now extends to protected and listed buildings in certain circumstances, more religious buildings, certain temporary buildings and holiday lets; and
- a change to the date from which the 10 year period of validity of an EPC is calculated. It now runs from the date the EPC was entered on the register (regulation 9(2)), rather than the date it was issued.

For more detail about the changes which have now come into force, and what it means for your business, please contact Steven Cox (steven.cox@klgates.com).

On demand bond or guarantee?

An employer who agrees to assist a contractor by providing advance payments and/or payments for off-site materials will typically require that the contractor procure bonds as security for such payments.

An employer would normally expect advance payment/off-site material bonds to be on-demand bonds with a primary obligation on the bondsman to pay. A recent Court of Appeal case has however queried whether they are actually guarantees and hence a secondary contractual obligation.

The first instance decision in this case (concerning a Chinese shipbuilding contract) had looked at an advance payment security instrument which had a mixture of bond and guarantee wording. The court held that it was a guarantee, but the Court of Appeal has overturned this, stating that there is a presumption that an instrument is an on-demand performance bond where it (i) relates to an underlying transaction between parties in different jurisdictions, (ii) is issued by a bank and (iii) contains an undertaking to pay “on demand”. The inclusion of clauses excluding or limiting the defences available to the surety (such as “indulgence” clauses) will not necessarily be fatal to that

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presumption, but combined with the absence of any of the other factors listed, may increase the chances that the courts will hold the instrument to be a guarantee.

This case illustrates the importance of reviewing the terms of every bond carefully to examine its terms and their effect.

Authors:

Kevin Greene

kevin.greene@klgates.com
+44.(0)20.7360.8188

Inga Hall

inga.hall@klgates.com
+44.(0)20.7360.8137

Nicola Ellis

nicola.ellis@klgates.com
+44.(0)20.7360.8261

Lee Forsyth

lee.forsyth@klgates.com
+44.(0)20.7360.8190

Jamie Olsen

jamie.olsen@klgates.com
+44.(0)20.7360.8132

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