



## Legal guidance to off-site manufacturing

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#### Forms of Contract - Introduction

- The guide
- The scenario
  - The client wishes to procure a building
  - The preferred solution is off-site
  - The method to be adopted is modular
  - The modular building is pre-designed and assembly starts upon commitment and payment
  - The principal contractor is appointed after the modular building is ordered



#### Questions to be considered

- Is Design and Build contract with a letter of intent the way the industry should respond?
- How should the industry respond to the need for the design to be completed before the works start on site?
- Should the principal contractor be liable for defects in the modular building?
- Should the construction industry be looking at a different contractual arrangement?
- Should the construction industry seek to avoid the use of bespoke terms and conditions?

## Forms of Contract (1)

#### Just some suggestions

- Pre-construction Agreement
  - Early contractor involvement
  - Ability to instruct works and services
- Construction Management
  - Appointment of a construction manager
  - Appointment of Trade Contractors by the client

## Forms of Contract (2)

- JCT Intermediate Contract Named Subcontractor
  - Client invites tenders for off-site works
  - Tender states the terms of the main contract and the list of attendances
  - Sub-contractor and client enter into a Named Subcontractor/Employer Agreement
  - Agreement allows design and fabrication and payment
  - Design responsibility remains with the Named Subcontractor
  - Named Subcontractor becomes under the control of the main contractor

## Forms of Contract (3)

- NEC3 or 4
  - If the Contractor appoints the manufacturer
  - To avoid the manufacturer's own terms and conditions
  - NEC Supply Contract and NEC Supply Short Contract
  - Look at the option X25 warranties
  - Add a test regime

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## Ownership and Security over payment of monies

- Large sums of money paid in advance
- Questions arise:
  - What happens if the Contractor becomes insolvent?
  - Who actually owns the goods and materials before they're brought to site?
  - Who's responsible if those goods and materials get damaged?

## Option 1

- Establishing ownership under the sale/supply contract
  - Contract should deal clearly with:
    - When ownership of the goods will be transferred i.e. upon payment
    - How will the goods be stored?
    - Where will the goods be stored?
    - How will the goods be marked?
    - Any insurance arrangements to be put in place and by who
  - Detail is key

#### Option 2

- Vesting Certificates
  - Valid option for off-site manufacturing
  - Will include
    - When ownership of the goods will be transferred usually upon payment
    - How/where will the goods be stored
    - How will the goods be marked
    - Any insurance arrangements
  - Check for any conflict with the sale/supply contract



#### Options 1 & 2: Limitations

- Ownership limitations to bear in mind:
  - Employer's exact goods must be identifiable
  - Of little use if goods have been removed or damaged
  - The Contractor must have the title to give

# Option 3: Advance payment/offsite materials guarantees/bonds

- Most parties comfortable with the concept
- OSM guarantees/bonds specific type
  - Connected to the off-site materials
  - Reducing form of bond
  - Protects monies paid out rather than goods
- Cost considerations
- Not as widely available as standard variety

#### Off-site, on-site – Pop-ups (1)

- What is a 'pop-up'?
  - Temporary facility
  - Can be substantial in size
  - Intended solely to facilitate the OSM process

## Off-site, on-site – Pop-ups (2)

- Why use a 'pop-up'?
  - Process/product manufactured under a controlled environment
  - Reduced transportation costs
  - Closer relationship between manufacturing and works on site
  - Better, cleaner working environment; not subject to British weather!
  - Controlled health and safety

## Off-site, on-site – Pop-ups (3)

- Considerations when using a 'pop-up'
  - Planning permission do you need it?
  - Lease/licence should there be one solely for the facility?



#### Planning permission

- General Permitted Development Order 2015
  - Class A, Part 4 of Schedule 2
  - Allow development consisting of:

"provision on land of buildings, moveable structures, works, plant or machinery required temporarily in connection with and for the duration of operation, being or to be carried out on, in, under or over the land or on land adjoining that land"



#### Planning permission

- Do 'pop-ups' fall under GDPO, Class A?
  - Local Planning Authority (LPA) decides
  - Courts have held that all relevant factors must be taken in account
    - Size of structure
    - Length of time it will stand
- Conservation areas and AONB excluded from GDPO
- Lawful Development Certificate

## Lease or Licence (1)

- Do you need a lease or licence for the facility?
  - In all likelihood, yes!
  - The 'pop-up' is a facility in its own right
  - Licence or lease should cover specific key points

## Lease or Licence (2)

- Key points to cover
  - Erection, maintenance and removal of facility
  - Working hours
  - Details relating to delivery of materials or product
  - Permitted noise levels
  - Arrangements if contractor or manufacturer cease work
  - Can facility be used for other projects
  - If/how the licence or lease can be extended
  - Arrangements if project doesn't proceed
  - Transfer of ownership of goods/materials

#### Off-site, on-site – Pop-ups (4)

- Viability of 'pop-ups' is project specific
- Should be considered at the outset
- Planning permission likely to be required
- Suitable lease or licence should be drafted



#### http://constructingexcellencesw.org.uk/downloads/



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