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BIM (Building Information Modeling) contracts: what to look out for?

BIM (Business Information Modeling) is a tool increasingly used by construction departments and public owners. In a few words, the BIM method is a digital method used during the planning and execution phases of a construction project, which allows the participants (such as architects, engineers, project owner, etc.) to use virtual building models to allow a better cooperation and a simplified coordination between these different actors. The BIM method not only allows to visualize the detailed project in 3D, but it also allows to identify potential inconsistencies between the different parts of the same project.

However, the growing interest in this new tool raises complex legal issues, in particular in relation to the contracts to be concluded which provide for its use. To this end, several institutions have issued guidelines and recommendations for handling this tool.

These include various texts from the SIA (Swiss Society of Engineers and Architects), in particular their [Technical Booklet No. 2051](#), the Technical Booklet of the association Bâtir Digital Suisse, or the Recommendations of the KBOB concerning the use of BIM.

Even though these texts contain a whole series of indispensable information, the fact remains that the drafting of contracts that provide for the use of BIM deserves to be carefully examined.

a) Defining Planning Goals:

In the first phase, called the “pre-contractual” phase, it is essential that the various parties involved define the **functional specifications** - i.e. that the client formulates the objectives or specific applications of BIM for his project - as well as the **technical requirements** - i.e. how and with which applications he wishes to achieve his objectives. These two elements should then be included in the BIM contract to be concluded.

At this stage, it is therefore important to define the objectives and phases of the project, the desired finished digital “product”, the roles and responsibilities in the BIM process, the working and communication methods, the technical and data processing aspects, as well as the guarantees given. Once these parameters have been defined, it will be easier to draw up a well-crafted BIM contract.

b) Drafting the contract:

The drafting of BIM contracts can be facilitated by the use of templates or model contracts, but there are many ways to construct the architecture of such a contract. As the uses of BIM are diverse and varied, so are the contracts that provide for such use.

For example, **individual contracts** with each company involved, in which an additional BIM clause is integrated, can be envisaged. For this purpose, the Supplementary Agreement BIM SIA 1001/11:2018 is often used as a basis. However, it is not suitable for all types of projects and must often be adapted.

It is also possible to conclude a **single contract** with all the companies involved in the project, in which the rights and obligations of the various parties would be set out. Such a single contract will necessarily be more complex to draft, which increases the risk of contractual incidents. On the other hand, the grouping of these different contracting parties could constitute a simple company within the meaning of the Code of Obligations; in such a case, the joint and several liability of all the partners would be engaged.

In all cases, the contract must be adapted to the scope of the project, the number of actors involved, their experience in BIM and the objectives of each party.

c) Responsibility:

BIM contracts raise an important issue of liability. The first question is whether the parties involved are in fact concluding a contract for services or a contract for work. In this case, the project work on the BIM model is in principle equivalent to a contract for work and services (Art. 363 ff. CO), because a real digital project is created. The organizational aspects of a construction project, and thus the tasks of the BIM coordinator, could only be covered by the contract for services (Art. 394 ff CO). The scope of liability will not be the same.

Since one of the main purposes of using BIM is to identify problems or conflicts in a construction project, the responsibility of the BIM coordinator is even more important. It will be the responsibility of this person or company to provide the necessary defect notices and to coordinate the trades involved.

In addition, the use of BIM inevitably raises IT issues: specific clauses should be included regarding the IT infrastructure used and liability in the event of IT problems, breakdowns or intrusion by third parties. The rights granted to the various users, the means of backup, as well as data protection issues will also have to be carefully examined.

d) In public procurement:

The use of BIM also applies to projects that have been put out to tender in accordance with the Public Procurement Act. The use of BIM can then become a suitability or award criterion, announced in the tender.

In this context, it is recommended to present the BIM guidelines in a transparent and clear manner in the tender documents. This way, bidders can find out in advance what planning services are expected and whether the proposed working method is suitable for them and, above all, whether they have the necessary internal resources.

Depending on the size of the project and the need to use BIM, it is also possible to plan a tender for the BIM services themselves.

e) What about intellectual property?

Finally, stakeholders in a project that uses the BIM model would be wise to make intellectual property provisions in advance. The various stakeholders may want to reuse certain elements created for a particular project. The question will inevitably arise as to the extent to which certain IP rights will be transferred to the project owner. Even if the contractor agrees to assign its rights, it should carefully consider whether it is in a position to do so or whether it is infringing the rights of third parties (particularly subcontractors).

In the age of digitalization, the use of BIM and digital construction will certainly continue to grow. In this context, however, it is important to keep in mind that the contractual framework must also be constantly changing and must always be adapted to the needs

of a particular project.

The team of Wilhelm Gilliéron Avocats SA can assist you in this area.

Source :

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