

Insights

THE UPDATED CONSTRUCTION PLAYBOOK: WHAT'S NEW?

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SUMMARY

Less than two years ago, the government published the Construction Playbook, a comprehensive and quite visionary plan for changing the delivery of construction projects in order to “get it right from the start”. If you haven’t looked at it so far, it is worth reading. It sets out what are transformational principles and policies, designed to change how public works projects are procured and managed.

That is a tall order and the Playbook covers a range of areas, from preparation and planning to selection and project delivery. It looks at topics such as commercial pipelines, digital technology, benchmarking and cost models, risk allocation and successful relationships, as well as a whole chapter dedicated to effective contracting. The updated Playbook was published last month, together with a raft of new guidance notes, so now is a good time to remind ourselves what it is all about and what progress has been made since it was first published.

THE KEY POLICIES

The Playbook identifies 14 key policies, set out over 12 chapters that cover five project stages: preparation and planning, publication, selection, evaluation and award, and contract implementation. This obviously places the emphasis on advance planning, and the assumption that if you spend enough time and effort in setting it up properly then the contract implementation should be the easy bit.

Just as an example:

- Key Policy 6 is about early supply chain involvement, to be used in developing the business case for projects and programmes. The aim is to reduce downstream issues and to develop a clear outcome-focused design and specification.
- Key Policy 8 addresses benchmarking and should cost models. The intention is to use data from past projects to develop benchmarking as well as developing a Should Cost Model

(SCM) to better understand whole life costs and value.

- Key Policy 10 is about effective contracting. This is covered in Section 6 of the Playbook, as part of the overall section dealing with preparation and planning. Helpfully, this recognises that contracts need to be set up at an early stage as part of the planning process and not be left to a later stage.
- Key Policy 11 addresses risk allocation and it is good to see that the Playbook identifies the need to avoid inappropriate risk allocation, recognising that this is a concern for the supply chain fair return. This is intended to work together with Key Policy 12, payment mechanism and pricing approach, in order to incentivise desired behaviours or outcomes. The Playbook states that standard contracts should be chosen, identifying JCT, NEC, PPC/TAC-1 and FAC-1 as options.

WHAT IS NEW?

There are a few interesting additions that are worth looking at:

Digitalisation and technology – modern methods of construction (MMC) remain a big part of the government's policy and there is now a requirement to set targets for the use of MMC in the delivery of projects and programmes. In our recent blog post, we highlighted the issues that arise when procuring technology for construction and two further key documents were published last month addressing the same issue:

- The Construction Innovation Hub's Product Platform Rulebook is an open-access guide designed to support industry in building capability and capacity to develop and deploy product platforms. The aim is to put in place manufacturing approaches that will improve productivity and focus on quality, performance and the whole-life value of assets, recognising this will be a change that requires different behaviours from both the client and the supply chain. Lawyers will be interested to note that it recognises that such an approach can result in concerns around intellectual property, risk ownership and liabilities, leading to contract amendments.
- The government published a guidance note on MMC, in order to improve and clarify the considerations needed when contracting for work using MMC. It states that the government will use its position as the single largest construction client to support a more productive and sustainable business model. What does this mean in practice? The note refers to the consensus that new contracting models are required and in section 4 it compares and contrasts traditional contracting with an MMC and platform approach, looking at the differences between a tier 1 contractor led approach as opposed to an integrator led approach, and how to deal with issues such as intellectual property or insurance. There is an emphasis on the integration between design and manufactured elements. This is highly relevant to anyone looking to procure MMC.

Sustainability – the Playbook now refers to the Environment Act 2021, as well as:

- Society of Construction Law's report on "Procuring Net Zero Construction", led by Professor David Mosey on behalf of the King's College Centre of Construction Law & Dispute Resolution.
- Guidance note, Promoting net zero carbon and sustainability in construction. The guidance states that contractual clauses alone will not deliver improved sustainability, carbon or environmental performance outcomes, and that this requires new contractual relationships and processes being aligned with the client's strategy and a collaborative management systems.

In general, there is also a new emphasis on benchmarking (greenhouse gas emissions and social value), requiring a consistent approach to whole life carbon assessment, so that all suppliers use the same tool for assessment. It also recognises that where the project and interface with the supply chain are more complex, the whole life carbon assessment approach should be clearly laid out in the technical specification. The expectation is that whole life carbon assessments will mature over time and become more robust assessments that can then be included in the final tender documentation. The Playbook further establishes sustainability at each stage of the project.

Building safety – the Playbook had previously identified building safety as a cross-cutting priority and it now refers to the Building Safety Act, which became law in April 2022, setting out an aim to deliver an effective and proportionate building safety regime, where risks are tackled swiftly but proportionately and excessive costs are avoided. The Playbook also refers to the guidance document, Collaborative procurement for design and construction to support building safety, published by the Department for Levelling Up, Housing and Communities in January 2022.

Frameworks and contracts – this is another area where there have been some significant developments:

- Last year, the UK government commissioned "Constructing the Gold Standard", a review of public sector frameworks by Professor David Mosey. The review set out 24 recommendations, which mirror the structure and requirements of the Construction Playbook and help clients identify whether their framework strategy complies with the Playbook (all recommendations are endorsed in the Playbook update). The first recommendation is that the Gold Standard features are used on a "comply or explain" basis, but other recommendations address topics such as net zero carbon, using contractually binding action plans, investing in framework management, improving supplier investment in MMC and incentivising innovative solutions. Recommendation 19 calls for transparent pricing mechanisms for frameworks and call-offs that maximise cost certainty and ensure prompt payment.
- Last month the government also published guidance on longer term contracting programmes, projects and portfolios, covering when longer term contracts should and should not be considered. It identifies long term contracts as providing opportunities for MMC and

improving productivity, but also the challenges and risks that such an approach involves and the need for performance management.

Effective contracting – in 2021 the Infrastructure and Projects Authority (IPA) published its guide to completing the project/programme outcome profile (previously referred to as the Project Scorecard and now as POP). This was developed by the IPA as a tool to help develop stronger business cases and the Playbook calls for it to be used when undertaking the strategic assessment at the outset of a project or programme business case and then revisiting it at each iteration of the business case. It also states that it should be referred to within the contracts, forming part of the contractual documentation, so they can be used to inform contractual processes and for post-completion evaluation, as well as to design key performance indicators.

IMPLEMENTING THE PLAYBOOK

The update to the Playbook reinforces and adds some detail to the original policies that were all about improving delivery. The additional guidance notes and reports are especially useful and will allow people to focus on specific areas such as MMC, zero carbon or the use of frameworks.

As with all such policies, the key challenge will be to implement them in practice. It is clear that doing so will require a real change in how construction is procured, and much of this change is reliant on digitisation and better use of technology, which raises its own issues.

Unfortunately, the current government may well have some other more critical priorities to focus on. Nonetheless, there are commercial and contractual aspects that will need to be considered by any legal advisers. In addition, central government departments, as well as other public authorities, should ensure there is awareness of what the Playbook expects. Indeed, as referred to above, the Playbook states that the government has committed to an implementation programme to improve delivery on a “comply or explain” basis. In the current climate and challenging economic situation, it may not be easy to comply and it may be tempting to revert to or maintain old habits. We will need to wait and see to what extent the government makes a real effort to effectively implement the Playbook.

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Shy Jackson

London

shy.jackson@bclplaw.com

+44 (0) 20 3400 4998

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