

Getting a fix on costs

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Who pays for materials offsite, asks Merrick Rimmer

Provisions in standard building contracts are made to cover payment for 'materials offsite' or 'unfixed materials', by the use of vesting certificates and payment bonds (including for advanced payment). With modular offsite construction this is a pertinent aspect, given that it can form a significant proportion of the contract sum. So who pays ? main contractor, developer or funder? It is particularly unlikely in the current climate that any standard loan facility will provide for payment offsite. Building surveyors need to consider this because in the terms of their appointment specific obligations may include releasing of funds/sanctioning drawdowns with the proviso that no allowance for payment for unfixed material or materials offsite is included.

Payment provisions

Any funded development with a significant modular element therefore requires an understanding from the outset of both the developers and funders position; and whether there is scope to incorporate provisions for payment of materials offsite. I know a recent example of a newbuild hotel, which used a modular building system of shipping containers fully fitted out as en-suite bedrooms in China, where the bulk of the construction was undertaken. In such a case, payments typically will be in stages with an upfront deposit.

The developer (as employer under the contract) then pays and seeks release of funds from the bank. What happens if the fund's absolute position is no payment for materials offsite? The developer is left having to fund this element. Who pays the import duty when the goods arrive at the UK port, an associated cost of this form of construction (for non EU manufactured goods); at what stage will the fund release monies to cover this element?

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These are considerations that should be established at the initial stages with the funder and their monitoring building surveyor. All the contract documentation needs to be 'back to back' with the loan facility, which should incorporate specific provisions (vesting certificates or payment bonds) if there is to be any variance of the 'no payment for materials offsite' standard position. Any developer considering modular construction should engage with the funder and establish this prior to finalising the development agreements or building contracts.

I have experienced a project incorporating modular construction with the funder coming in at a late stage. The loan facility was signed (being silent on the provision of payment for offsite

materials) but the monitoring surveyors terms of appointment precluded inclusion of any payment for unfixed materials as part of any drawdown. The outcome was the modular elements sat in a port for three months until the import duties could be paid by the developer. The benefit of speed of construction was lost.

The use of modular bathroom pods has been commonplace in the hotel sector for a number of years; with the pods often manufactured in eastern Europe and delivered by road. The factors to consider include: are all the necessary provisions in place for insurance and are there any additional risks for the funder? The monitoring surveyor should establish this at the appraisal stage. Refusing to sanction release of funds for material offsite once the developer's interim drawdown application is in will only lead to challenge and potential for dispute under the respective development and facility agreements.

Quality issues

A monitoring building surveyor also needs to consider quality issues. The shipping process can damage the goods, so are appropriate allowances being made by the developer's professional team, are retention allowances sufficient, and with whom does the risk lie?

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Appointing the monitoring building surveyor at an early stage will enable the practical (and contractual) issues to be flagged up and appropriate provisions made in the documentation. As building surveyors act as monitoring surveyors they will recognise the additional issues that modular construction brings and will be able to engage with the developer and their professional team, and also assist their understanding of funders payment requirements.

If the use of modular construction is to grow it will have to work for all parties involved in the funding processes as well as the developer or end user. With lending requirements more stringent in the current economic climate, any developer will need to protect their own contractual position for materials offsite. They will also need to engage with the monitoring building surveyor and understand the terms of their appointment at an early stage.

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Further information

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