NBS

National Construction Contracts and Law Report 2018

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We would like to thank the following organisations for supporting this report by circulating the survey on our behalf:

Introduction

Richard Waterhouse
CEO, NBS

Welcome to our fourth NBS National Construction Contracts and Law survey report. In it you'll find not only a detailed analysis of the results of our survey, but also a series of pieces by experts covering central issues in the legal framing of construction projects. These expert opinion pieces cover topics as broad as: the role of trust, contractual risk and the supply chain, the views of those creating standard contracts, the effects of the availability of dispute resolution, as well as a comparison between our industry and the banking sector. There is much to be gathered form these articles, and time spent reading them is time well spent.

As I have written these introductions over the years, I've often noted that we are in a period of rapid and unpredictable change. Since our first report, we have seen recovery from the recession of 2008 / 2009 and the widespread adoption of BIM, twinned with the introduction of the UK Government's BIM mandate. This rate of change looks more likely to increase than abate. Since our last report, we have seen the Brexit decision, the Grenfell tragedy and heightened concerns about and the viability of some Tier 1 contractors. BIM is becoming business as usual for some practices, and they are already turning to future innovation, whether generative design, off-site modular construction, AI, robotics or the Internet of Things. The UK construction sector, particularly the design community, looks well-placed to lead and capitalise on these changes.

Given this pace of change, we might ask whether current legal and contracting practice is exposing members of the construction industry, whether clients, consultants or contractors, to unacceptable risk? Indeed, is the legal framework within which we currently work going to facilitate or impede change?

There is good reason for legal practice and agreements to be risk averse. The findings of our survey reveal an industry frequently in dispute. A third of those who responded to our survey experienced at least one dispute in the preceding twelve months. The prognosis for the industry is not great, with nearly two in five telling us that the number of disputes is increasing.

The way out of a dispute ridden, adversarial approach to work has been long identified; a collaborative approach to construction. The industry is open to collaborative working, which can reduce the number of disputes, increase productivity, efficiency and improve client outcomes. Too often, however, the form of collaboration is poorly defined, perhaps as little as a contractual clause specifying a "spirit of mutual trust and co-operation". This is not enough. For collaboration to be successful, the nature of collaboration needs to be agreed between parties and made legally explicit; who is responsible for what, when, who collaborates and on what terms. The NBS BIM Toolkit can help here, specifying roles and responsibilities, as well as the Level of Information and Level of Detail needed at each stage of the RIBA Plan of Work.

Collaboration is a cornerstone of BIM, and as BIM increasingly becomes standard practice, its legal significance will become clearer. Already we have people telling us that use or ownership of the Building Information Model has been an issue in dispute.

The legal and construction industries are already responding to the importance of BIM, with BIM becoming included in some standard contracts, along with definition BIM of terms. When a project is being carried out using BIM, it pays to make sure the following are contractually described: the ownership of the model, including the intellectual property held within it; responsibility for populating and updating the model; and the status of the model as a binding description of what is to be built. Not getting these right may expose any party to unnecessary risk.

Getting the legal framework for BIM right may pay long-term dividends. BIM is an example of collaborative, information rich, design practice. Future technologies are likely to be even more collaborative, even more information rich. We are moving to the yet-to-be-defined BIM level 3 and the implementation of future technology. As we do, creating a legal framework that describes BIM is likely to be, if not extendable, then at least foundational.

As ever, at NBS, we are committed to gathering, structuring, standardising and making available the highest quality building and product information required for successful design and construction. Getting the information right not only improves client outcomes and increases the efficiency of projects, it also reduces professional risk, allowing a tight description of what is to be built, so reducing the scope for dispute.

If banking can do it, why not construction?

Sarah Fox
Contract strategist, speaker and Author at 500 Words Ltd

Last spring, in a speech to Russian delegates, I contrasted the construction industry with the financial services industry. You might think our transactions have little in common on the face of it, but their industry deals with single one-off transactions to support single one-off buying and selling of goods, as well as long-term investment in longer projects, like mortgages and loans.

If they can do it, why can't construction?

Wet signing and hard copies

In 2500 BC, we know that the Persians used clay tablets to record agreements between employers and contractors. At best, these would have been marked with the fingerprint or stamp of the slave: an early form of wet signing. Of course, like today, those with the most financial clout would have simply imposed their contracts on their supply chain, which in those days was mostly slave labour.

At the same time, most financial exchanges were based on individual deals, and there was no standardised money. Other methods of exchanging value were equally welcome. Perhaps that's why a construction contract in the British Museum adopts payment in beer!

Towards standardisation

In 500 BC, King Croesus of Babylon introduced standard coins. His coins were made of gold, so had intrinsic value and worth, and they also bore his mark. Each coin was standardised so that it could be trusted to be the correct weight. This standardisation encouraged trade, improved trust and helped his country become rich – immortalising the King in our reference to people being as rich as Croesus.

Although we have evidence of written contracts being used by the Romans in 100 BC, we have few records of what those terms were. In common law countries such as England, freedom to contract meant people could, and did, make contracts on any terms they liked!

If Building Information Modelling can capture, revise and share the specifications for major projects, surely the 'what we are building' element of a construction contract is just one step further?

NBS

When Paper Ruled the World

Money moved to paper in the 7th century, by which time there was no longer any intrinsic value in the form of money itself. Contracts were still being written on paper, as mentioned by Machiavelli in the 16th century.

By the mid-19th century, paper money was becoming standardised, and in the UK individual notes used to have to be signed in ink (wet signed), stating that the Bank 'promises to pay the bearer the sum of five pounds on demand'.

At roughly the same time, large corporations were introducing their own 'standard' forms of construction contract, encouraging the London Builder's Society and RIBA to launch the 'Heads of Conditions of Builder's Contract' in 1870.

By the turn of the 20th century, we had pre-printed bank notes, and standard form construction and engineering contracts. So far, so good.

Still innovating?

During the 20th and 21st centuries, the paths of construction and finance diverge.

Debit and credit cards slowly gained popularity over hard money, and our finances are now represented electronically and digitally. Methods of payment change rapidly, with the emergence of smart banking and even Blockchain technology, with the introduction of bitcoin in 2008.

In construction, meanwhile, our standard contracts have been regularly reissued and updated, but have fundamentally just got longer, more complex and more full of jargon. JCT 1963 was a quarter of the size of JCT 2016. Contracts tend still to be wet signed in duplicate, if they're signed at all! As the 2018 Survey shows, one third of projects start without a contract being signed, which equates to £4bn of construction work each month (based on UK Government figures for November 2017). But 2% are never signed; that's a whopping £3bn annually of construction work completed without any wet signed contract at all.

It's not that contracts themselves are inherently tricky to reduce to a wholly digital transaction. If Uber and AirBnB can introduce services contracts based on your smartphone, surely the 'how we work together' element of a construction contract can be created digitally?

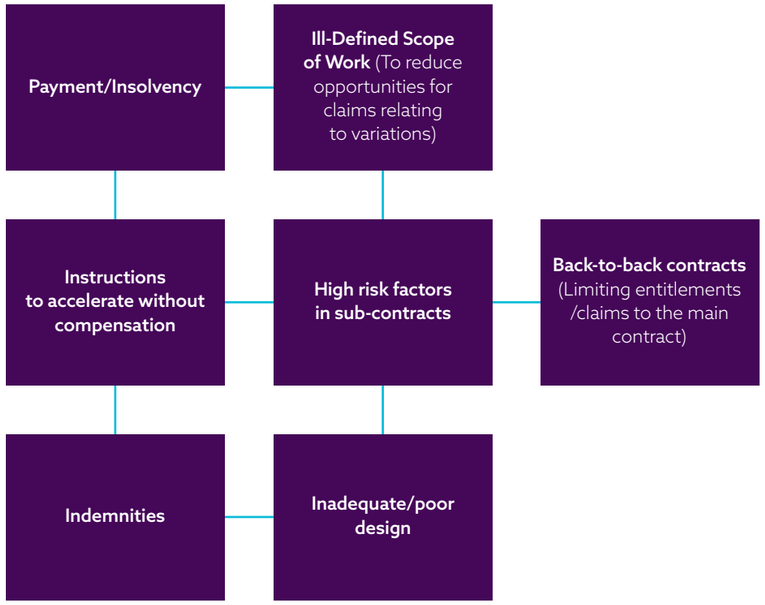
It's not that construction specifications are impossible to reduce to a shareable digital format. If Building Information Modelling can capture, revise and share the specifications for major projects, surely the 'what we are building' element of a construction contract is just one step further? The 2018 Survey shows that the majority of contracts refer to BIM or BIM outputs, with a fifth fully integrating the process.

So what is the missing element? Perhaps it is the element of trust, without which the global banking industry comes crashing to a halt. A mere 16% of 2017 projects adopted any form of collaboration techniques, despite clear communication and working together being essential for project success. Over one third adopted no formal techniques for working together.

Before we can create the next generation of construction contracts, we need to focus on building trust. Without trust, contracts will stay mired in 19th century processes and archaic formats.

Dealing with contractual risk within the supply chain

Professor Rudi Klein
Barrister and CEO of the Specialist Engineering Contractors' Group and President of the NEC Users' Group



For all the years I can remember, the mantra has been: USE UNAMENDED STANDARD FORMS OF CONTRACT. But, by and large, this has fallen on deaf ears, especially as you proceed along the supply chain

In my experience, over 95% of sub-contracts and sub-sub-contracts are amended standard contracts or bespoke contracts. In 30 years of dealing with contractual and legal issues in the industry, I can only recall one example of the use of an unamended sub-contract.

Risk

Over 85% of the value of construction works is delivered by the supply chain. But the inappropriate allocation of risk generated by amended standard contracts/bespoke contracts (particularly the consequences of this) contributes to the uncompetitiveness of UK construction: UK construction costs are amongst the highest in the EU.

In most sub-contracts, the word 'risk' hardly ever appears. It tends to be hidden behind the language of obligations expressed in the use of the verbs 'shall' and 'must'. A good example are provisions on 'indemnities' which often create unlimited liability to meet any claims made against the other party 'howsoever arising'.

Role of Clients

It is often said that clients have little or no interest in sub-contracting arrangements. Having been a client, I've always found this difficult to understand. If your project outcomes are dependent on how well your main contractor's supply chain performs – as they usually are – why wouldn't you be interested in the composition of the supply chain and their contract terms?

Over 23 years ago, Sir Michael Lathan recommended (in 'Constructing the Team') that only suites of contracts be used – rather than having differing sets of contractual arrangements used at all levels of the supply chain.

Influencing Sub-Contracts Terms

The NEC 4 Engineering and Construction Contract gives the Project Manager some control over the use by the main contractor of non-NEC contracts. The Project Manager can object to the use of a bespoke contract if he/she doesn't think it will enable the main contractor to deliver the works in accordance with the NEC main contract, or doesn't contain a statement that the parties will act in a spirit of mutual trust and cooperation.

The latter is interesting; I have seen bespoke contracts that transfer all risk to the other party (after all, that is the reason for the contract being bespoke) and yet still manage to have a clause which requires both parties to act in a spirit of mutual trust and cooperation.

The JCT standard building contract has a rather weak provision:

"Where considered appropriate, the Contractor shall engage the sub-contractor using the relevant version of the JCT standard Building Sub-Contract' (emphasis added)."

Public Sector Clients

Last year, the Specialist Engineering Contractors' Group carried out a survey of local authorities in England and Wales to establish the extent that they insist on the use of standard sub-contracts.

In Wales, 31% of local authorities insist on the use of the relevant standard sub-contract; in England, the figure is greater at 39%. Many councils not mandating the relevant sub-contract felt that they should be doing so, but the reasons for holding back were not clear. Some felt that they did not have the right to insist on the use of the standard sub-contract; this was primarily a decision for the main contractor.

Where to now?

It's very difficult to police the private sector, but we can address the public sector, which should be adopting best practice. The easiest way to do this is to amend the Public Contracts Regulations 2015. The amendment should require all contracting authorities to use industry standard contracts unamended, and insist on the use of the equivalent sub-contract in the suite of contracts being used.

In the overwhelming majority of cases, the 'suites' will either be the NEC or the JCT family of contracts. At least, when it comes to the use of taxpayers' monies, we can avoid the costs associated with the inappropriate transfers of risk and transfers in use of amended standard sub-contracts and bespoke sub-contracts.

In 30 years of dealing with contractual and legal issues in the industry, I can only recall one example of the use of an unamended sub-contract.

National Construction Contracts and Law Survey: summary of findings

Adrian Malleson
Head of Research, Analysis and Forecasting, NBS

Welcome to the fourth NBS Construction Contracts and Law Survey Report.

The legal side of construction seldom gets the attention given to, for example, innovative design or new technology. But a well-structured legal and contractual framework is a necessary pre-condition of the creation of buildings that meet the needs of clients. Indeed, only where risk is accurately described and appropriately owned can risk be taken: innovation is risky.

Given the centrality of contractual arrangements to a successful construction industry, we hope to provide a much-needed description of where we are now, and where we might be.

This report covers the main topics of the survey itself. These are:

- Procurement Methods and Tendering.
- Collaboration (including BIM).
- Contracts and Forms of Appointment.
- Legal Issues, Disputes, and Dispute resolution.

These topics can be read independently, but together they form an overview of construction contracts and law in the UK.

We have carried out this research so that the industry can get a view of legal and contractual practice, as it happens on the ground, within the UK construction industry.

The findings are timely, both as the industry moves through the UK BIM mandate, and as industry practice is assessed in light of the Grenfell tragedy.

During the survey, we asked participants to describe and reflect on their legal and contractual practice during the twelve months prior to them completing the survey. We carried out the survey in 2017; it was live from August to November. The results therefore cover any twelve month period before these dates.

NBS Research, Analysis and Forecasting has carried out this survey, but its success, as in previous years, has been a result of the support of a cross-industry group of institutes and organisations that have supported us. This allows the findings to be independent and to reflect the views of a broad range of professionals. We are very grateful to the organisations, listed at the start of this report, for their help in publicising the survey and encouraging professionals to take part.

We are also grateful to those taking part in the survey. Around 360 people responded to the survey: fewer than in 2015. The survey requires a high level of thought and knowledge to complete, and we appreciate the detailed information that respondents took the time to provide. Thank you.

It is a biennial survey, providing the opportunity to make, where helpful, comparisons to previous years. The first survey was in 2012, and you can see comparisons throughout this report.

Respondents

We received responses from clients, contractors and consultants/advisors, such as architects. This means that we have findings for the industry as a whole, and can see areas where there is significant difference between the groups.

How would you best describe your role/the role of your organisation in the construction industry?

At 72%, consultants are the largest group. Among consultants, we include the design team, surveyors and specialist consultants. Contractors made up 16% of respondents and clients 12%. Clients were, largely, those involved in larger scale projects, such as those involved in significant public sector work, or those commissioning larger (and therefore more complex) projects.

In your project work, in the past 12 months, what sector were you or your organisation most involved in?

We asked those taking part in the survey to tell us which sector they or their organisation were most involved in (whether public or private). Sixty percent were mostly involved in privately funded work, and 38% in publicly funded work. Two percent said 'other', perhaps indicating that the line between what is public and what is private is not as clear as it once was.

A well-structured legal and contractual framework is a necessary pre-condition of the creation of buildings that meet the needs of clients.

Selecting the procurement method sets the tone for the whole construction process.

Procurement Methods and Tendering

Procurement

Procurement is the process of buying a building. The factors to consider during procurement can be multiple, complex and conflicting, including, for example: time, cost (and when that cost is incurred), quality, ownership and risk allocation.

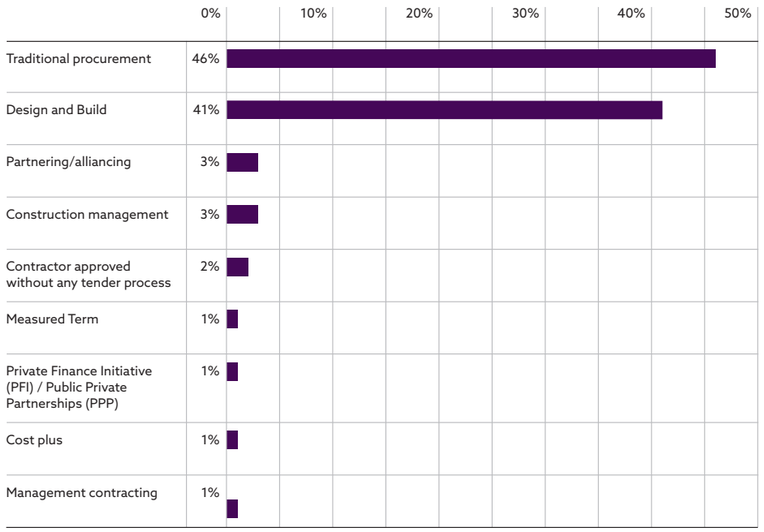
Selecting the procurement method sets the tone for the whole construction process. There is a range of procurement methods available, the choice of which sets out how the client, the contractor and the designer are to work together. The procurement method gives the framework within which legal and contractual arrangements are made.

Getting the procurement method wrong can be to the detriment of any or all of the parties involved. For example, a method may be used as a vehicle for one party to tip the balance of risk and reward in their favour. Some procurement methods are better at supporting collaboration than others, with some procurement methods frustrating collaboration.

There are two main procurement methods: traditional, and design and build.

Traditional procurement is the most common; 46% told us that it was their most used method, barely a change from the 47% in 2015. Traditional procurement methods are generally less suitable for projects where high levels of collaboration are needed. Instead, traditional procurement clearly sets out distinct roles for the designer and for the Contractor, with the designer usually answerable directly to the client.

Which procurement method was most frequently used in projects you were involved in?



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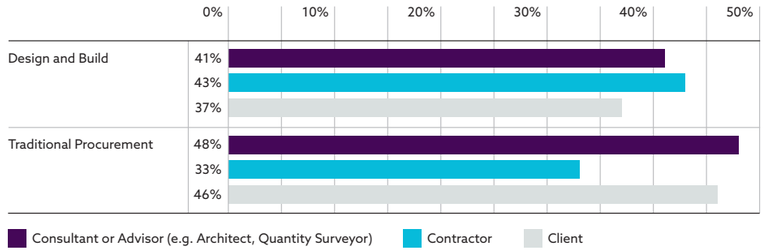
Which procurement method was most frequently used in projects you were involved in, during the past 12 months?



Design and build (at 41%, marginally up from 39% in 2015) is the procurement method that people are next most frequently to use. In design and build procurement, the Contractor, through undertaking both design and build, becomes the single point of responsibility. It allows for the formation of a collaborative, cross-discipline team, under the umbrella of a contractor.

Other procurement types are relatively niche. These include partnering/alliancing, construction management, measured term, cost plus, PFI or PPP.

PFI in particular seems to have had its time in the sun, and attention is increasingly turning to the cost of maintaining PFI buildings, often through highly prescriptive, long-term contracts.

"There are currently over 700 operational PFI and PF2 deals, with a capital value of around £60 billion and annual charges for these deals amounted to £10.3 billion in 2016-17. Even if no new deals are entered into, future charges which continue until the 2040s amount to £199 billion."

National Audit Office

As in previous years, traditional procurement is used by clients and consultants, and design and build by contractors. However, the difference is narrowing, and has done so each time that we have carried out the survey.

Traditional procurement looks to be in decline (albeit a decline with a slowing rate). When we first ran the survey in 2011, 72% of consultants used it most often; in 2012, this declined to 61%; then 52% in 2015; and now 48%. Similarly, for clients, the figures have moved from 59% to 57%, 53% and now 46%.

Design and build (at 41%, marginally up from 39% in 2015) is the procurement method that people are next most frequently to use.

Tendering

In the survey, we asked which tendering methods were used on projects. Respondents frequently did not just use one method, with many using more than one.

Single-stage tendering remains the most frequently used, with 82% using it at least once.

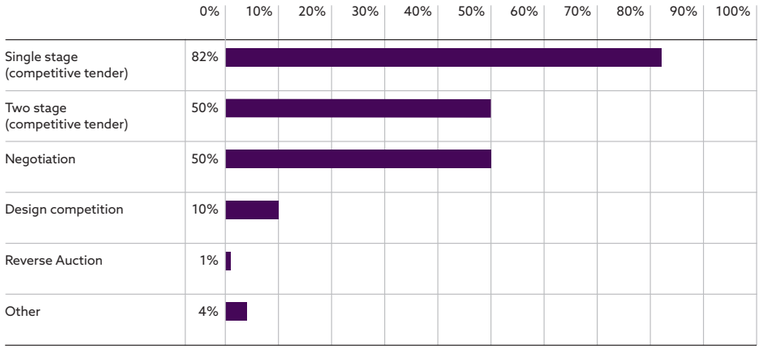
Half of the respondents have used two-stage tendering.

Half used negotiation, where typically a client negotiates with a single supplier for the delivery of a project. This marks an increase on previous years. It may suggest an increase in project complexity, along with an increasing emphasis on prior experience of working together.

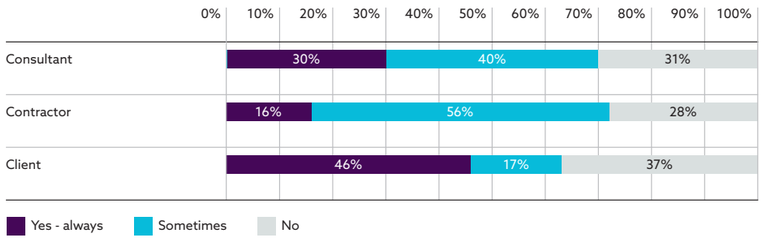
The digitisation of the construction industry is burgeoning, but we are not there just yet. Electronic tendering (not the most eye-catching of digital innovations) sets the tone for the whole project. In our latest set of findings, we can see that the use of electronic tendering is increasing. Just less than half (46%) of clients always use it, compared to 34% in 2015. Thirty percent of consultants always tender electronically (23% previously). Seventy-two percent of contractors use it at least sometimes, but they are least likely to use it always (16%).

We also asked about the pricing mechanism that people employ during the procurement process. As in previous years, people are most likely to use the 'fixed price or lump sum' mechanism, with 81% using it most often. Re-measurement is used 'most often' by 7%.

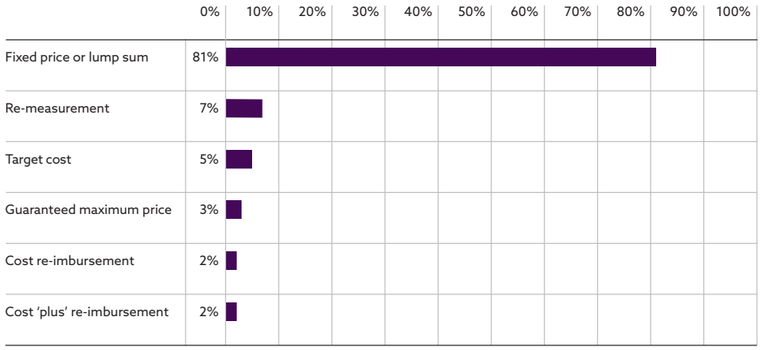
Thinking about projects you were involved in during the past 12 months, which of these tendering methods were used?



For the projects you were involved in during the past 12 months, was electronic tendering used...?



Which pricing mechanism was most often used for your contracts?



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Did you adopt any collaboration techniques in projects that started in the past 12 months?

Collaboration

Collaboration has long been a goal for the construction industry. From Latham to Egan, and then on to the current 'Government Construction Strategy: 2016-2020', the need for greater collaboration throughout the construction timeline has been well identified and described. Greater collaboration brings with it greater efficiency and the opportunity to create groups of trusted parties who can deliver together to quality, on time and on budget. In contrast, contractual arrangements are often about reducing risk, and increasing reward, for one's own party above others. Legal disputes are, by their nature, often antagonistic.

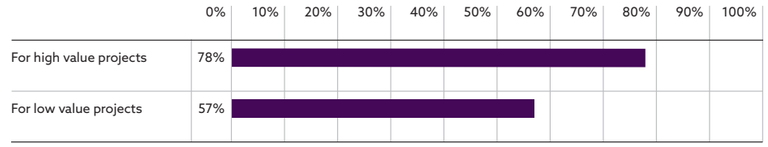
Building Information Modelling (BIM) and the Government's Construction Strategy have given a renewed focus on collaboration. Through digitisation, we increasingly have the tools to work together across disciplines and locations. BIM is supported by freely available structured information (like the NBS National BIM Library), as well as a range of publicly available standards (such as the PAS 1192 series) to give a common framework for collaborative working.

There is a risk of collaboration falling apart at the first hurdle if that collaboration is not clearly described in contracts. Who is responsible for what and when, and with whom do they collaborate? Without this, a collaborative relationship can quickly become an adversarial one, so it seems right for collaborative practices to be contractually enforced.

Firstly, we asked if collaborative techniques were being used. Only a minority (16%) adopt collaboration techniques on all projects, though a clear majority do so on all or some of the projects that they are involved in (63%). Over a third (37%) do not adopt any collaboration techniques on any of their projects.

Among those who collaborated, collaboration was more likely to happen within high value projects (78%). That said, among those who collaborate, a majority did so on low value projects (57%), suggesting that collaboration can be as much about the ethos of an organisation as the value of a project: a low value project does not preclude a collaborative approach.

Was collaboration used...



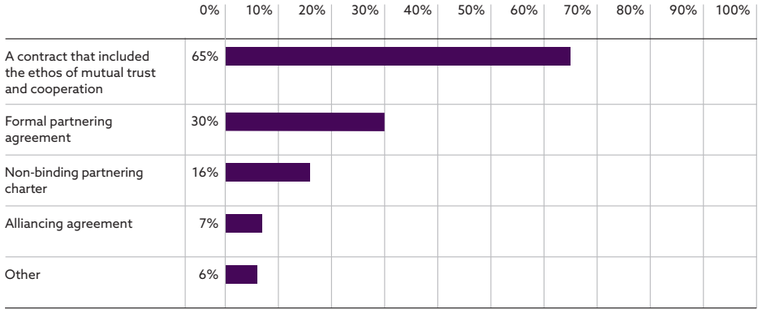
Greater collaboration brings with it greater efficiency and the opportunity to create groups of trusted parties who can deliver together to quality, on time and on budget.

The survey also asked people to give an indication of the form in which their collaboration took place. Again, and by far, the most common form is a contract that includes an ethos of 'mutual trust and cooperation'; at 65%, it's close to the 67% we saw in the previous report. We do continue to wonder whether an 'ethos' is sufficiently robust to maintain collaboration, should significant difference between parties emerge. Thirty percent have adopted a more structured approach, adopting a 'formal partnering agreement'.

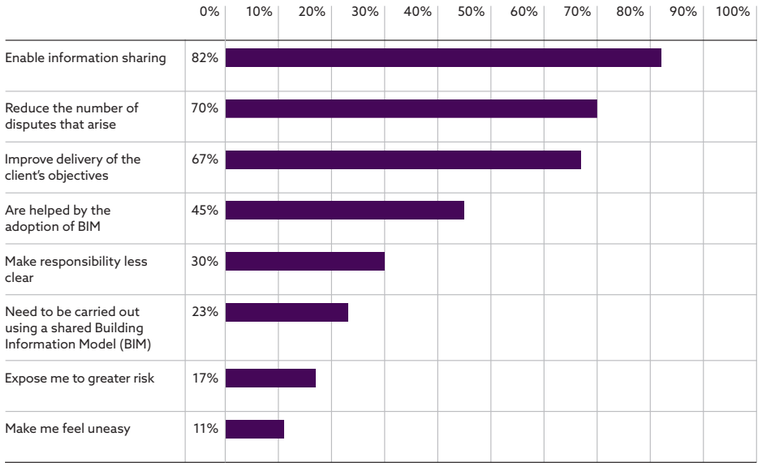
"It is foolish not to accept that, in a system where one party pays another for the delivery of a project, both parties will be primarily driven by self-interest and seek their own best advantage. Such situations are best served by firstly sharing risk and/or fairly reimbursing any acceptance of risk. Secondly, it requires that risk is effectively managed within the contracting arrangement. Overall, this requires a high degree of clarity in the contracting arrangement."

The sense we get from the response to our survey is that the industry sees the advantages of collaboration. Collaborative projects, as the graph below suggests, 'enable information sharing', 'reduce the number of disputes that arise', and 'improve the delivery of the client's objectives'. This is a strong set of benefits. On the other hand, fewer are likely to agree with negative statements about collaboration. Only a minority agree that collaborative projects 'make responsibility less clear', 'expose them to greater risk' or 'make me feel uneasy'.

Did you adopt any collaboration techniques in projects that started in the past 12 months?



Agreement that collaborative projects (% agree)



Less clear, however, is the importance of BIM to collaboration. Whilst BIM, by definition, is there to facilitate collaboration through standardised information and processes, only 45% tell us that collaborative projects are helped by the adoption of BIM, and fewer than a quarter feel that collaborative projects 'need to be carried out using a shared model'.

There may be a couple of things going on here: firstly, that BIM needs to be embedded in collaborative contracts, and secondly that BIM needs to be embraced by the entire project team, for the whole of the construction life cycle.

"A lot of people talk the talk but do not follow through when it comes to using BIM in projects."

Collaboration, most agree, offers a clear set of advantages. Over a third do not use collaboration. Why isn't collaboration universal?

The most cited reason (43%) for people not using collaboration is that the client did not want to use collaboration. This looks like an opportunity for clients to develop a better understanding of the benefits that collaboration offers them. Not all clients would agree, however.

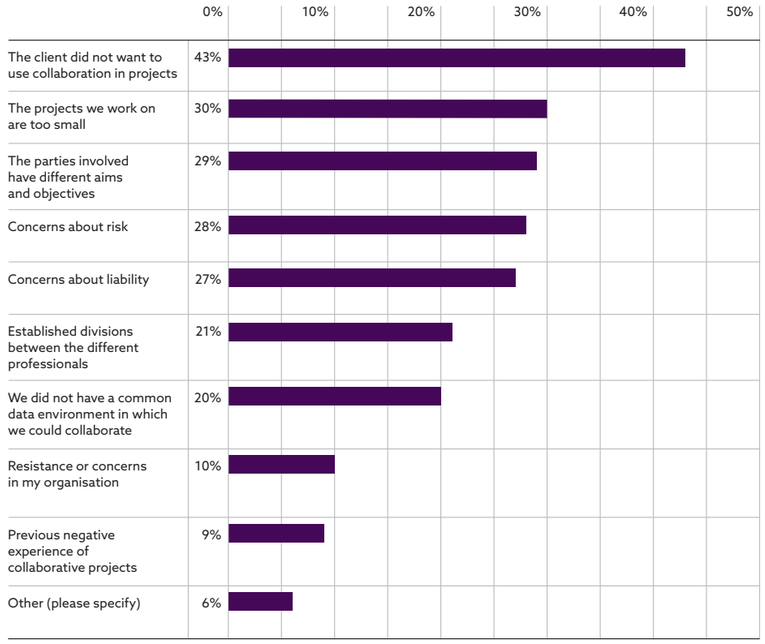
Other reasons cited for not collaborating include projects being too small (30%), and the parties having different aims and objectives (29%).

Over a quarter cite concerns about risk (28%) and liability (27%). Risk and liability are best described and allocated through contractual arrangements. This is a clear invitation to the drafters of contracts to come up with a mechanism that describes collaborative arrangements in detail, including the ownership of risk and liability.

Resistance within organisations (10%) or divisions between the professions (21%) are less likely to be cited as reasons for a lack of collaboration. Clients, consultants and contractors all say they are open to working collaboratively.

Only 9% cite a previous negative experience of collaborative projects as a reason for not collaborating again, suggesting that for most, working collaboratively is positive.

What prevented you from becoming involved in, or using, (more) collaboration in projects during the past 12 months?



Only a minority agree that collaborative projects 'make responsibility less clear', 'expose them to greater risk' or 'make me feel uneasy'.

BIM and contracts

Since 2016, the UK Government has mandated the use of 'Level 2' BIM on government construction contracts that are centrally funded. The NBS National BIM report has charted the rise of BIM; a majority of design practices now use BIM, and adoption is growing year on year.

Information about what is to be created, by whom, and when is decreasingly held in disparate, static documents. Instead, information about a project is increasingly held centrally within a BIM that is collaboratively created and developed, and evolves through the design, build (and maintain) life cycle. BIM provides a 'Common Data Environment'.

This has legal implications:

- Firstly, ownership of the BIM, including the intellectual property held within it, needs to be described.
- Secondly, responsibility for populating and updating the model needs to be clearly allocated.
- Thirdly, the model may form a part of the description of what is to be built, so may be referenced in any future dispute.

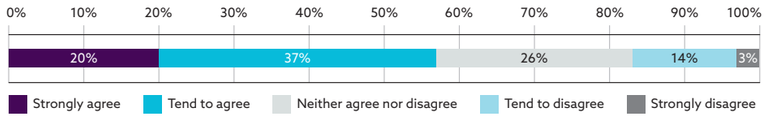
A majority (57%) agree that their organisation sees a BIM as contractually binding in the same way as specifications or drawings.

As BIM usage increases, so too does the need for BIM to be contractually described.

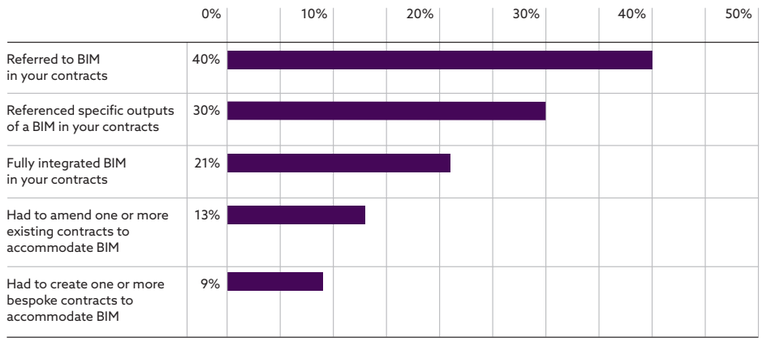
Forty percent reference BIM within their contracts, up from 33% two years ago. Thirty percent reference specific outputs of a BIM in their contracts, up from 23%. An increasing minority (21%, up from 14%) tell us that BIM is fully integrated in their contracts. For some, this has meant amending or creating bespoke contracts, although increasingly standard forms of contracts (or the CIC BIM Protocol) mean that *ad hoc* solutions are less often required.

"Collaboration will come with more transparency in information systems, where all involved have the opportunity to see their role and their obligations in more or less real time. A good tool for this is BIM."

In my organisation we recognise a BIM as contractually binding in the same way as specifications or drawings'



In the past 12 months, have you?



An increasing minority (21%, up from 14%) tell us that BIM is fully integrated in their contracts

NBS

Contracts and Forms of Appointment

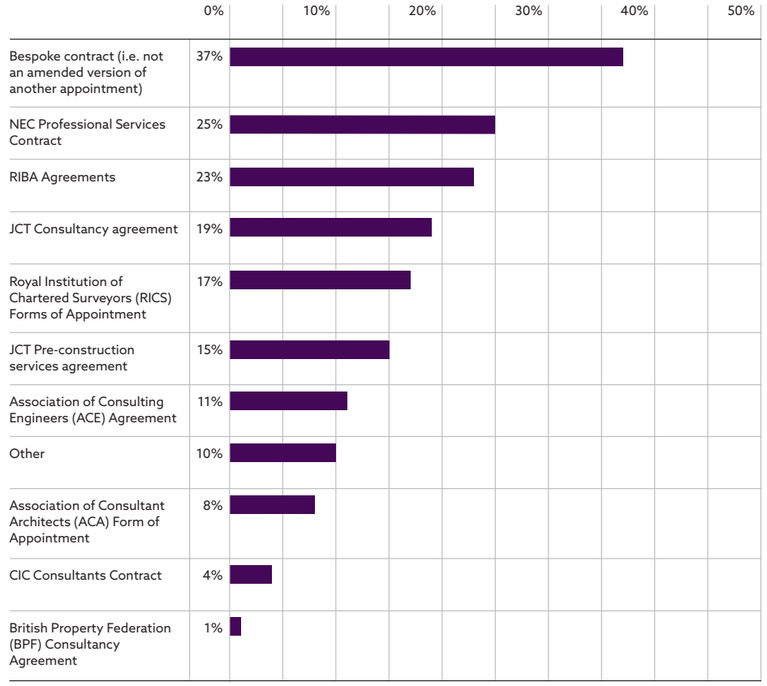
We have run this survey four times, and each time we have monitored the use of the various contracts and forms of appointment.

Forms of Appointment

A form of appointment is there to describe which professional services will be provided by whom, and for how much. There are a number of different standard forms, although bespoke forms are often created.

A 'bespoke' contract is the form of contract used by the widest range of people, with 37% of respondents using them. The NEC Professional Services Contract is the most-used standard form, with 25% using it; this is the same figure that we saw in 2012, but is a drop-off from the peak of 37% that we saw in 2015. RIBA Agreements follow, with 23% of respondents using them. This is a very small decline from the 25% that we saw in 2015, and 30% in 2012. The JCT Consultancy Agreement remains steady at 19%, and the JCT Pre-construction Services Agreement is at 15%.

Which forms of professional appointment were used in your projects in the past 12 months?



A form of appointment is there to describe what professional services will be provided by whom and for how much.

Contracts

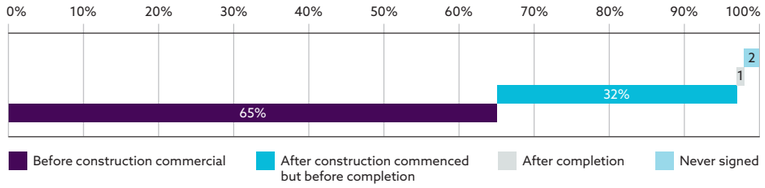
It should go without saying that a contract needs to be signed by the contracting parties. However, a third of respondents typically sign contracts after construction has commenced. Occasionally contracts are not signed at all, or only signed after completion. This broadly mirrors our findings in 2015; two thirds typically sign contracts before commencement. This remains a significant concern for the construction industry: without a signed contract, legal protection is weak for all involved.

We asked respondents which contracts they had used at all, and also which one they used most often. In both questions, JCT featured strongly, followed by NEC. This year JCT has shown a marked growth, and is now at levels that we have not seen since 2011. NEC, which had been growing year on year, has contracted and has returned to the levels that we saw in 2011. Use of bespoke contracts has fallen from 11% to 5%.

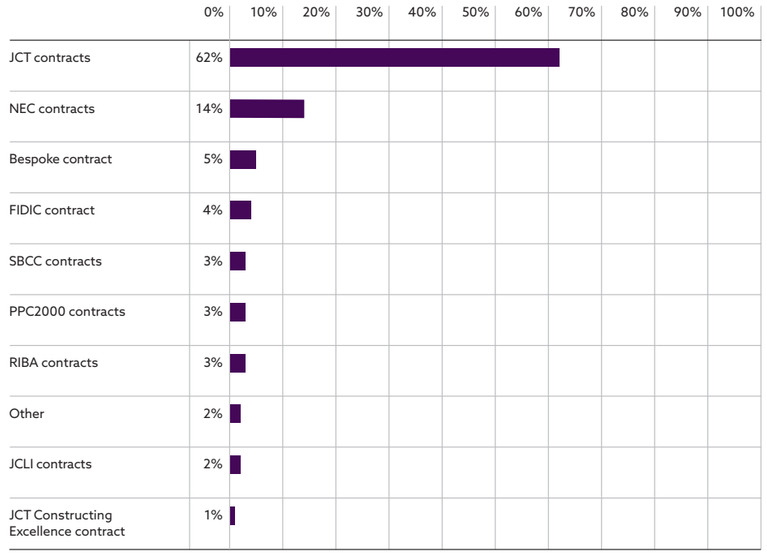
Of course, any client, consultant or contractor may use more than one form of contract in any year. We also looked at the range of contracts that people used. The graph below shows the numbers who have used a particular contract at least once. We can see that many use a range of contracts throughout a year.

The graph to the right shows the top five contract families.

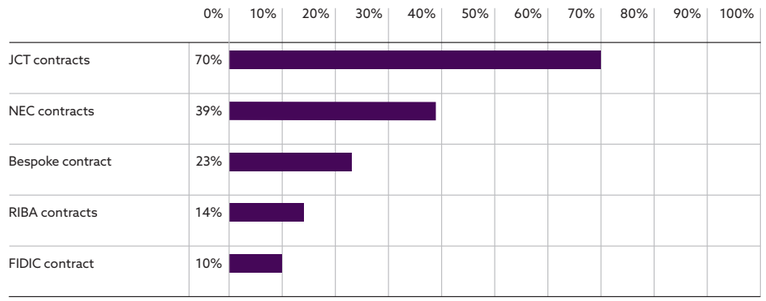
What is the typical stage at which most of your contracts are signed?



Which contracts have you/your organisation used most often?



Which of the following contracts have you/your organisation used during the past 12 months?



Seventy percent of respondents have used JCT contracts, up from 57%. Thirty-nine percent have used NEC contracts, down from 53%. Bespoke contracts have fallen from 35% to 23%. FIDIC has dropped from 18% to 10%. We can also see that the newly released RIBA contract shows healthy levels of early adoption, with 14% using it at least once, and some (3%) having it as their most-used contract.

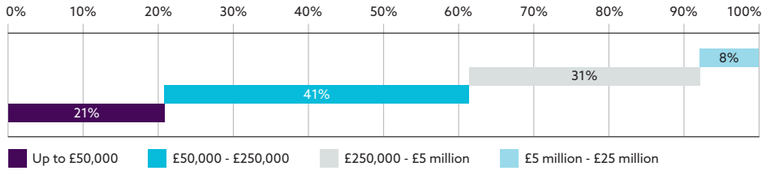
The choice of contract is closely linked to the value of the work to be undertaken.

RIBA contracts have their place in small value works, typically under £250K, such as residential and small commercial projects. This is what they were written for.

JCT contracts are also selected for smaller projects, but with a broader value range, typically up to £5 million, but much less for the very small, sub-£50,000 project. Twenty four percent of JCT contracts are used for projects with a value of between £50,000 and £250,000, with 47% being for projects of £250,000 to £5 million.

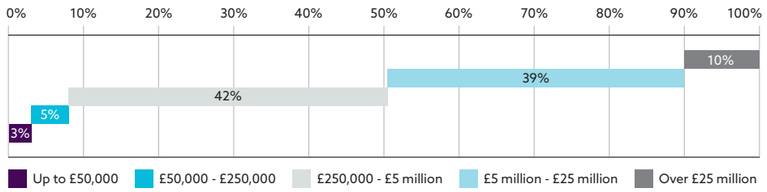
The NEC suite serves the middle to larger project, with 42% projects being valued at £250,000 to £5 million, and a further 39% for projects between £5 million and £215 million.

RIBA Contracts

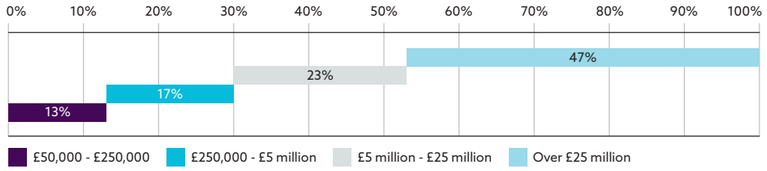


JCT Contracts

NEC Contracts



FIDIC Contracts

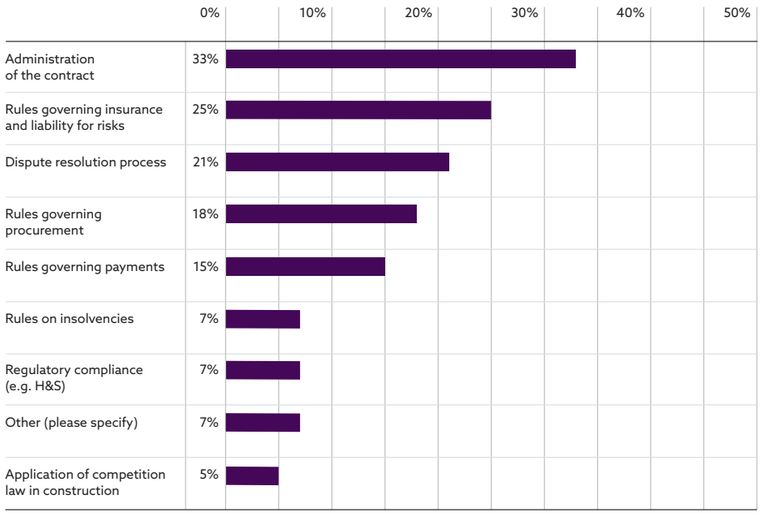


Legal Issues

As well as the contracts and forms of appointment that people use, we also examined the legal issues that people face. We began by asking which issues people found 'most challenging'.

The legal issues people found to be 'challenging' include: 'Administration of the contract' (33%), 'rules governing insurance and liability for risks' (25%), 'dispute resolution process' (21%), 'rules governing procurement' (18%) and 'rules governing payments' (15%). Broadly speaking these are in line with previous findings, but might suggest that recent developments in legislation and contract forms have not had much immediate effect.

What legal issues did you find to be challenging during the past 12 months?



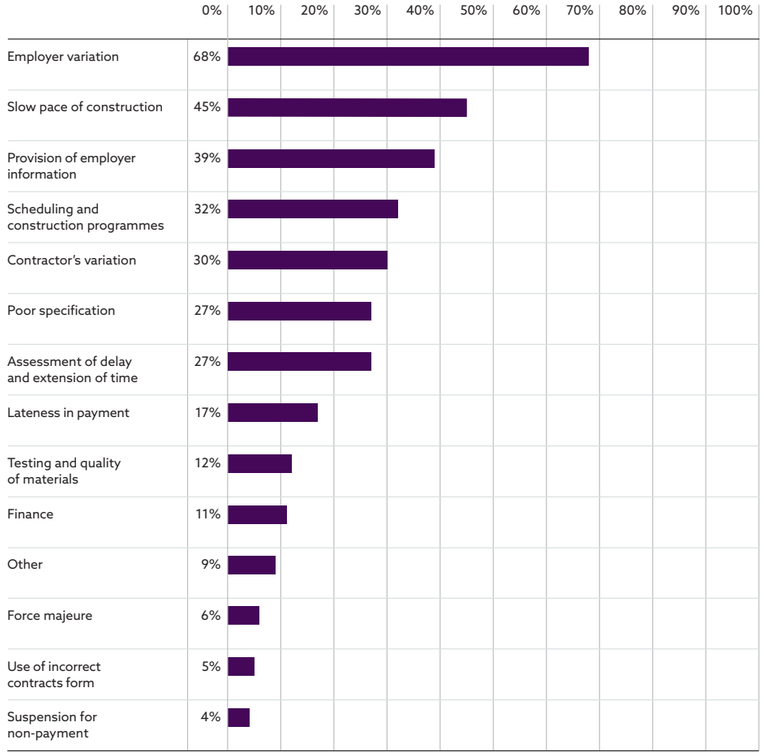
Sixty-eight percent tell us that 'employer variation' has impeded progress, and 39% that it is the 'provision of employer information'.

We also wanted to understand what got in the way of a construction project running smoothly: which 'matters impeded project progress'. Of the top three matters, clients account for two. Sixty-eight percent tell us that 'employer variation' has impeded progress, and 39% that it is the 'provision of employer information'.

Other significant matters are shown in the graph to the right and include: 'slow pace of construction', 'scheduling and construction programmes', 'contractor's variation' and 'poor specification'.

The graph on the right gives aggregate figures from among clients, consultants and contractors. However, when we separate the figures by respondent type, we see that people are likely to identify areas that impede progress as those which others have responsibility for.

During the construction phase of the project, which of the following matters impeded project progress, during the past 12 months?

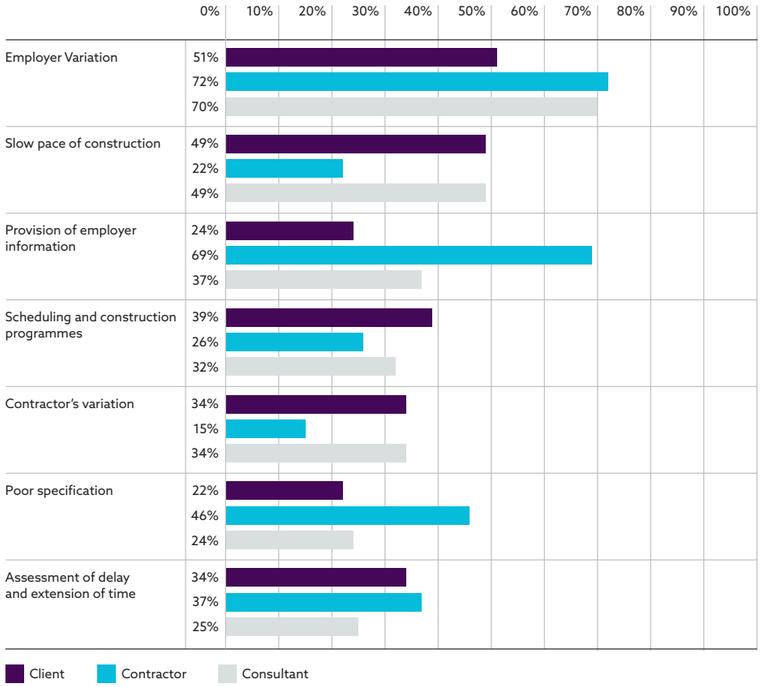


When we separate the figures by respondent type, we see that people are likely to identify areas that impede progress as those which others have responsibility for.

Clients are significantly less likely than contractors and consultants to see either the provision of employer information or employer variation as impeding progress. **Contractors** are the least likely to see the either the slow pace of construction or contractor's variation as an issue. Both **clients and consultants** are less likely than contractors to say that poor specification is a reason for progress being impeded.

These findings may support a more collaborative approach: identify potential issues among the team early on and together seek ways to predict, avoid and mitigate them.

During the construction phase of the project, which of the following matters impeded project progress, during the past 12 months?



Clients are significantly less likely than contractors and consultants to see either the provision of employer information or employer variation as impeding progress.

Did any of your UK-managed contracts involve International projects (outside the UK) in the past 12 months?

International Projects

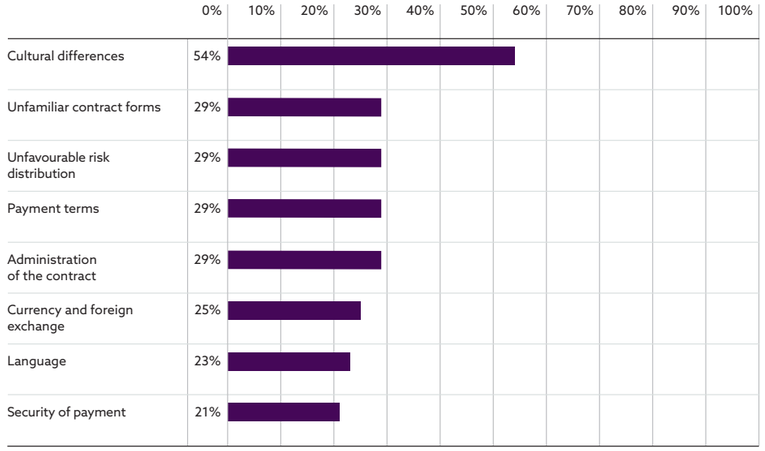
The ONS trade in services data tell us that in 2015 (the last year for which data is available), the UK exported £435 million in architectural services but imported only £25 million. The overseas market is central to the UK's architectural industry, and may increasingly become so.

In light of this, we wanted to understand the proportion of respondents who were working overseas; 15% of respondents had UK-managed contracts that involved international projects.

We also wanted to understand the challenges that this overseas working presented. Fifty-four percent cite 'cultural difference' as the most challenging legal issue, virtually unchanged from the 56% of 2015.

There are other legal issues. These include 'unfamiliar contract forms', 'unfavourable risk distribution', 'payment terms', 'administration of the contract', 'currency and foreign exchange', 'language' and 'security of payment'.

What did you find to be the most challenging legal issues in completing these international contracts?



The overseas market is central to the UK's architectural industry, and may increasingly become so.

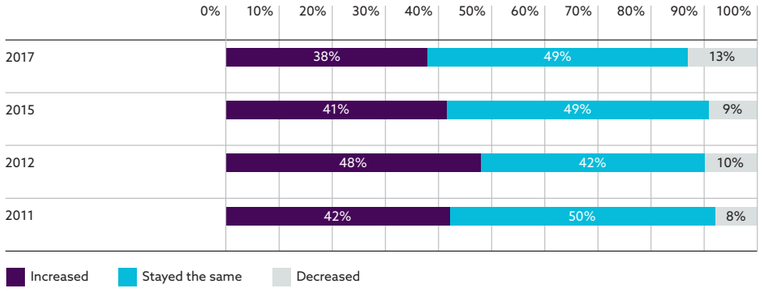
Disputes

People still feel that disputes are increasing in the construction industry: Thirty-eight percent feel disputes are increasing, and 18% that they are decreasing. On balance, 20% more people feel disputes are on the rise. However, that is the lowest figure we've had since we first ran this survey in 2011.

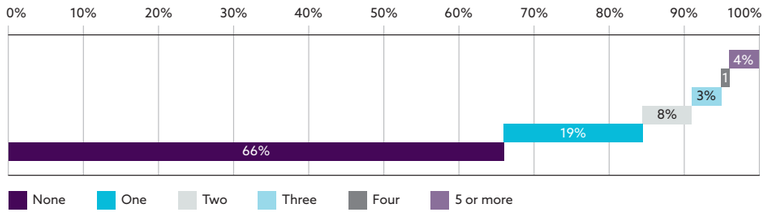
Aligned to this, two thirds of respondents reported no disputes in the past year, compared to 56% in 2015. A third have had one or more disputes, 4% had five or more. Disputes are still very common: they are a part of doing business in the UK construction sector.

However, fewer people told us that the number of disputes is increasing, and fewer people told us that they were involved in disputes. Taken together, these figures suggest that the direction of travel is good. Whether this reflects only the current state of the industry, the broader economic background, or whether we are beginning to see a shift, it is too early to tell.

Thinking about the construction sector generally, during the past 12 months, would you say that disputes in the sector have?



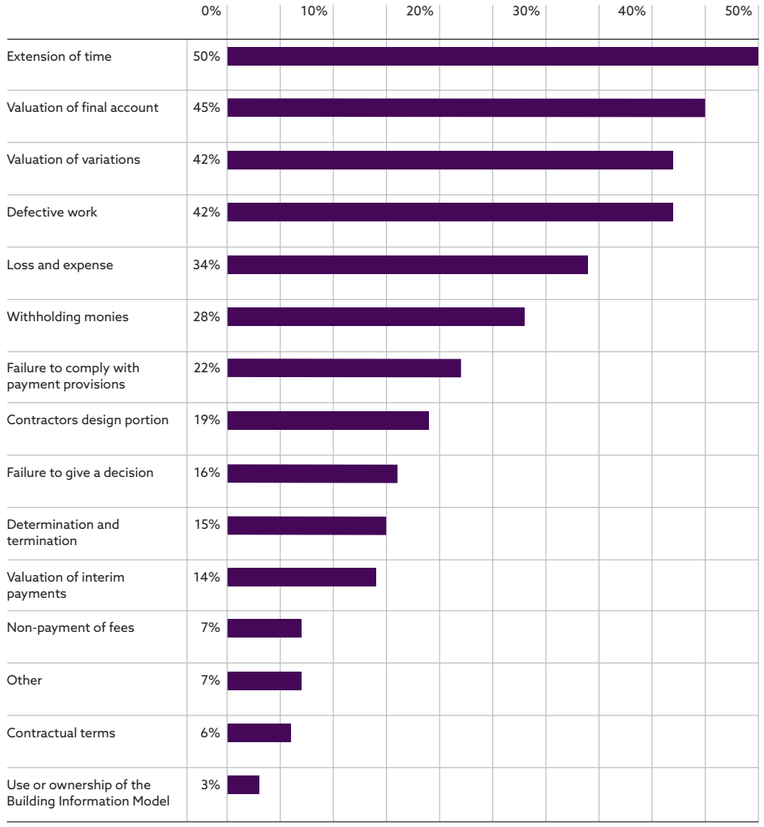
Thinking about the contracts you were involved in, approximately how many of these went into dispute during the past 12 months?



Disputes are still very common: they are a part of doing business in the UK construction sector.

Turning to the main issues in dispute during the past 12 months, extension of time was the most common issue (50%) among those who had been in dispute, followed by valuations of the final account (45%), valuation of variations (42%) and defective work (42%). This is broadly consistent with our previous findings. Whilst the lowest issue in dispute, it is significant that 'use or ownership of the Building Information Model' makes an appearance, with 3% of those who have been in dispute reporting this. It is a small number, but one to watch as BIM projects become the norm.

What were the main issues in dispute during the past 12 months?



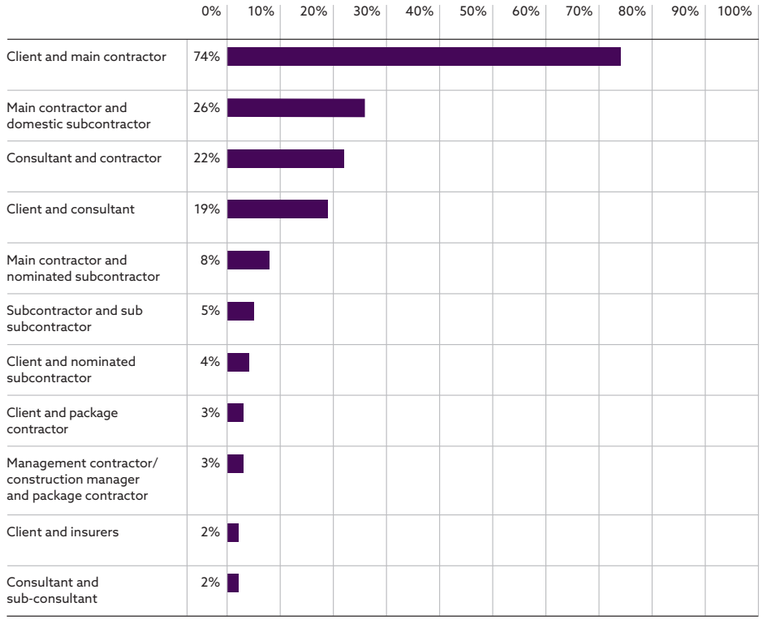
Fewer people told us that the number of disputes is increasing, and fewer people told us that they were involved in disputes.

Who are these disputes between? They most frequently occur between the client and the main contractor (74%). But there are many combinations of parties in dispute with one another. Twenty six percent reported disputes between the main contractor and a domestic sub-contractor, 22% between the consultant and contractor, and 19% between client and consultant.

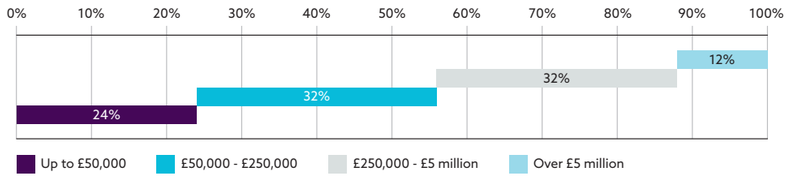
These are the causes of, and parties to, the disputes. Let us now look at their value, their timing and their effects.

A majority of disputes (56%) have a value of less than £250,000, and nearly one quarter are of less than £50,000. However, 44% are over £250,000, 12% have a value of more than £5 million.

Who were these disputes between?



Approximate value of disputes that started in the past 12 months



Disputes can take a significant time to resolve. Of the disputes that respondents reported, fewer than half were settled.

Disputes are more likely to occur during construction, 64% being initiated during the currency of the works, whilst the remainder, 36%, were initiated after practical completion. This is virtually the same as in our last survey.

For most, the dispute did not result in construction activity coming to a halt, but this was the end result for one in five (20%).

Disputes can take a significant time to resolve. Of the disputes that respondents reported, fewer than half were settled at the time of the survey; Forty-five per cent were ongoing. For 5% it meant that the construction team dissolved or changed, with the process being abandoned and one or more parties leaving the project.

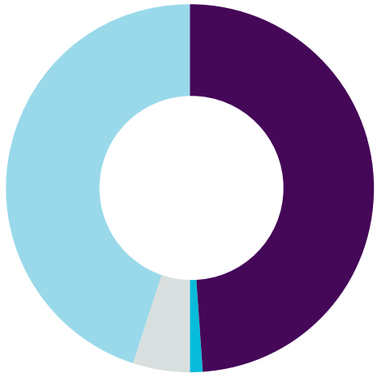
These findings show the damaging effects that disputes can have to the disputing parties and beyond. They frequently mean that work is stopped, are often worth very significant sums, and can be expensive and disruptive to pursue or defend.

Where possible, disputes should be avoided. We look at ways of doing so next.

The stage at which it occurred?

During the currency of the works	64%
After practical completion	36%

The current status of the dispute?



Dispute settled	49%
Process abandoned and disputing parties remained on project	1%
Process abandoned and one or more disputing parties left the project	5%
Process on-going	45%

Whether construction works continued during the dispute

Continued	80%
Stopped / suspended	20%

For projects going into dispute, what process is usually followed in appointing someone to help resolve the dispute, such as an adjudicator, arbitrator or mediator?

Nominating body	34%
By agreement of the parties	29%
Named in the contract	37%

Dispute Resolution

Well-formed contracts offer the opportunity for a dispute avoidance procedure to be described and agreed; it is better to agree the route to resolution before a dispute arises. The most common procedure included in contracts is negotiation at board/company level (50%), followed by negotiation at site level (44%). Other procedures included in contracts are arbitration (35%), mediation before adjudication (33%), expert advice (20%) and using the services of the Dispute Adjudication Board (18%).

Where parties have failed to avoid a dispute, they may appoint someone to help resolve it.

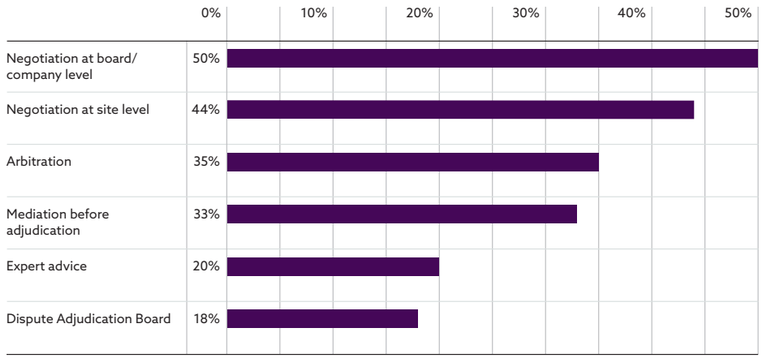
There are three processes for doing this they are:

- Named in the contract (37%).
- Nominated body (34%).
- By agreement of the parties (29%).

In this year's findings, we again see people more likely to refer to someone named in the contract to help resolve the dispute process, and are less likely to rely on a non-contractual agreement between the parties.

Where both dispute avoidance and resolution have failed, the final tribunal of choice is court for a third, and two thirds use arbitration. This has remained the same since 2012.

Which, if any, of the following dispute avoidance procedures were included in the contracts/projects in dispute?



Where parties have failed to avoid a dispute, they may appoint someone to help resolve it.

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What was the final tribunal of choice in most cases?

Arbitration	63%
Court	37%

Closing Remarks

The findings of this survey were written up at a significant point for the construction industry. There are a number of catalysts for change. These include Brexit, the digital transformation that BIM brought us (but which continues through AI), offsite construction and design by algorithm. BIM is increasingly a routine way of carrying out design work. Carillion shows us the fragility of some business models in the construction sector. The work being carried out by Dame Judith Hackitt will point to a new model for the construction industry where safety relies, in part, on the transparency and accuracy of the information created and developed through the design and construction process.

All these factors highlight the importance of work only being carried out on the firm footing of a tight contractual and dispute resolution process.

This background and the findings suggest that some fundamentals are not always in place, but need to be.

Things go wrong in the design and construction process, and contracts are there for when they do. So it pays to:

- Understand and formally agree the terms of your appointment.
- Make sure that contracts are signed before parties are exposed to risk.
- Be aware that while bespoke contracts may be necessary, they can bring additional complexity and risk.
- Agree in advance how disputes are to be resolved.
- Be aware that collaboration is beneficial, but it needs to be clearly described: who is responsible for what, and when?
- Make sure that there's nothing in the contracts which brings unacceptable risk, particularly clauses that assign liability beyond the limitations of indemnity insurance.
- Make sure that contracts set out clear descriptions and procedures for obligations, risk, liability, payment and dispute resolution - and that each party understands them before signing.
- Take professional advice if there's doubt.

There are a number of catalysts for change. These include Brexit, the digital transformation that BIM brought us (but which continues through AI), offsite construction and design by algorithm.

JCT 2016 Edition – best practice informed by collaboration and user relationships

Neil Gower
Chief Executive, JCT

Whilst the majority of data concerning JCT in this publication of the NBS Construction Contracts and Law Survey will be reflective of projects using contracts from the JCT 2011 Edition, perhaps the biggest news over the past year for JCT contract users, and those in the wider industry, has been the publication of our JCT 2016 Edition of Contracts.

The launch of each new edition of our contracts is an important time for JCT, and we take our commitment and responsibilities to the industry seriously. On the one hand, updating each edition is our core business, and the publication of JCT 2016 continues our focus on providing users within the construction industry with a suite of standard form contracts that is reliable, fair to contracting parties, and reflects both up-to-date legislation and best practice. On the other hand, it also allows us to reflect on our achievements, and how the principles established over our more than 80-year history provide a solid platform and a legacy of excellence which each new edition is built upon.

We are proud of the JCT 2016 Edition; it is the culmination of years of hard work on the part of JCT and its members from across the built environment. Perhaps more importantly (or at least more broadly), the publication of each edition of JCT contracts emphatically contradicts two widely held stereotypes within the industry: that we cannot work together, and that we cannot embrace change. JCT contracts could not continue to be produced and remain relevant without the collaboration of the entire industry – through the work of our members – or reflect the changes in procurement, practice and legislation that are continually refined and developed. These values of collaboration and being responsibly adaptable to changes are central to our work, and inform all areas of our business, not just the production of the contract suite.

We are proud of the JCT 2016 Edition; it is the culmination of years of hard work on the part of JCT and its members from across the built environment.

Whilst legislative changes are often one of the most important drivers in the publication of a new edition, the relationship with contract users, and listening to and reflecting their feedback, is equally important. On the 2016 Edition in particular, reflecting the feedback of practitioners has been key in many of our efforts to streamline and simplify. The following list outlines just some of the main improvements that we've made:

- Incorporating into the 2016 Edition the provisions in the JCT Public Sector Supplement 2011 that relate to Fair Payment, Transparency and BIM, as well as reflecting the requirements of the Public Contracts Regulations 2015, where relevant.
- Adjustments to reflect the Construction (Design and Management) Regulations 2015.
- Incorporating the provisions of the JCT 2012 Named Specialist Update.
- Providing an extension of (Works) Insurance Option C to allow alternative solutions for contractors, as well as consolidating within the main text general provisions relating to evidence of insurance, insurance claims and reinstatement work that were previously in each of insurance options A, B and C.
- Revising and simplifying the Section 4 Payment provisions, including:
  - Introducing a procedure for prompt assessment of Loss and Expense claims.
  - Establishing, for Fair Payment purposes, Interim Valuation Dates that apply to main contract, sub-contract and sub-subcontract levels.
  - Increasing flexibility in relation to fluctuation provisions.
  - Introducing a sub-section to consolidate the notice requirements of the Housing Grants, Construction and Regeneration Act 1996.
  - Including provisions for the grant of Performance Bonds and Parent Company Guarantees.
  - Extending the optional provisions for Collateral Warranties from sub-contractors to include Third Party Rights.
  - Changing the way that the requirements for Collateral Warranties and/ or Third Party Rights are set out – removing Part 2 of the contract particulars and replacing it with a separate document: the Rights Particulars.

Coinciding with the launch of the 2016 Edition, and reinforcing our focus on communication with users, we have also launched the JCT Network. The JCT Network provides a range of exclusive content, useful information, updates about our products and services, and opportunities for networking and events. The long-term aim of the JCT Network is to provide a much more integrated two-way communication system between JCT and its users within the industry so that, with the publication of each edition, users have an opportunity to provide valuable feedback about their experiences, and our contracts will be even more robustly informed by the experiences of users throughout the industry.

Collaborative working and building on relationships with our users will continue to play a major role in the development of our future contracts, products, and services. It is only by listening to and engaging with professionals across all sectors of the built environment that we can continue to effectively meet the requirements of the industry through our contracts. I encourage you to play your part in this process by joining the **JCT Network at https://corporate.jctltd.co.uk/jct-network**

The JCT Network provides a range of exclusive content, useful information, updates about our products and services, and opportunities for networking and events.

RIBA Professional Services Contracts 2018

Ian Davies
MA (Arch.Man)
DipArch RIBA MFPWS
Consultant Architect

A good working relationship between an Architect (or indeed any Consultant) and their Client is crucial to the success of any project. Before the project begins, the Architect needs to agree the scope, the timescale, the fees and the payment details with their Client, and ensure that a formal agreement is set out in writing as soon as practically possible. The ARB and RIBA codes of professional conduct require Architects to record the terms of their appointment before starting any work, so some form of written agreement is essential.

Standard forms of appointment, such as the 'RIBA Professional Services Contracts 2018', follow one of the recommendations from the Latham Report (1994), which stated that all parties in the construction process should be encouraged to use standard forms without amendment.

Standard forms are fair and balanced in the interests of both parties, and have the benefit that they are less expensive and more convenient than bespoke contracts with detailed and comprehensive guidance based on legal opinion, which has often been tested in the Courts. Bespoke contracts, or bespoke amendments to standard contracts, may, on the other hand, impair the balance and precise meaning of clauses, or impose obligations which may have insurance implications. However, it is more likely that bespoke contracts or contract amendments would occur on larger projects with commercial clients, rather than small commercial or domestic projects.

Notwithstanding this, the 'NBS National Construction Contracts and Law Survey 2018' found that most professional appointments in the last 12 months were bespoke (i.e. not an amended version of another appointment), rather than standard appointments.

Usage of the RIBA Agreements over the last decade has been pretty static, but the 2018 Survey showed that 23% of respondents to the survey used an RIBA Agreement which was two percentage points down from 2015. This was third behind bespoke contracts (37%) and the 'NEC Professional Services Contract' (25%), although it should be noted that drop was much less than with the bespoke and NEC versions

Usage of the RIBA Agreements over the last decade has been pretty static, but the 2018 Survey showed that 23% of respondents to the survey used an RIBA Agreement.

NBS

RIBA Professional Services Contracts

The RIBA has been publishing Conditions of Engagement and Scales of Professional Fees since 1861. The last substantial review in 2010 resulted in the 'Standard Conditions of Appointment for an Architect 2010'. These Agreements were far more comprehensive and flexible than their predecessors, and as well as being available in hard copy, the basic documents were made available online. Although they were updated in 2012, by 2016 it was considered that a further review was due to cover further legal changes, to take the opportunity to reformat the manuscripts so that they corresponded to the 'RIBA Concise and Domestic Building Contracts', and to ensure that the documents were compatible with each other. This exercise has generated the 'RIBA Professional Services Contracts 2018' suite, concurrent with the 'RIBA Concise and Domestic Building Contracts 2018'.

The new RIBA Professional Services Contracts 2018

Following a review of the content and format, the 'RIBA Agreements 2010 (2012 revision)' have been completely updated and revised by:

- bringing the content in line with best practice;
- checking for any necessary changes to the legal content;
- updating the Schedule of Services to map accurately to the framework now provided by the RIBA Plan of Work;
- changing the format of the printed forms to make them easier to use by reducing the number of separate components and inserts; and
- enhancing and improving the digital delivery.

At the time of publication in April 2018, the suite will comprise the following forms:

- 'RIBA Standard PSC for Architectural Services' (with Design and Build online option) for the larger, more complex commercial projects commissions procured on the basis of a traditional form of building contract where tendering occurs at the end of Stage 4 (Technical Design).
- 'RIBA Concise PSC for Architectural Services' for smaller, less complex commercial projects, and which has a 'light' version of the contract terms for commissions procured on the basis of a traditional form of building contract.
- 'RIBA Domestic PSC for Architectural Services' is based on the RIBA Concise PSC, but is suitable for simple domestic projects of any value.
- 'RIBA Principal Designer PSC' for the appointment of a Principal Designer under the CDM Regulations 2015 for commissions procured on any form of building contract, and for simple, non-complex projects of any value. However, it is not suitable for non-commercial work for a consumer Client (as domestic projects are subject to the 'Consumer Rights Act 2015') and where an RIBA Domestic PSC for Architectural services should be used.
- 'RIBA Sub-consultant PSC' for when an Architect wishes, or is required by the Client, to appoint a Sub-Consultant to carry out part of the Architect's services.

It is envisaged that further variations will be made available over time. Later in 2018, an 'RIBA Standard Multi-disciplinary PSC' (with Design and Build option) will be launched as an online option only. This will be suitable for when an Architect or Consultant undertakes a multi-role commission, including the tasks of Building Services Engineer, the Civil and/ or Structural Engineer, and Cost Consultant.

Key changes to the RIBA Agreements 2010 (2012 revision)

In addition to the format being changed, there have been a number of key changes from the 2010/12 versions. These include:

One single document

Each of the 'RIBA Professional Services Contracts 2018' have been updated into a single document divided into four main parts, incorporating the Contract Details, a Schedule of Services, and the Agreement and the Contract Conditions, together with a Contract Checklist to consider before signing the Contract. Digital delivery of the RIBA PSCs has been significantly improved, and they will now form part of www.ribacontracts.com

Design and Build

The Standard Form, to be available in Architectural Services and Multi-Disciplinary formats, will have an option to convert to a Design and Build procurement in the online option.

The Consumer Rights Act 2015

The 'RIBA Domestic Professional Services Contract 2018' continues to be for use wholly as an agreement with a consumer client, whereas the Standard and Concise Agreements would not be fully compliant with the Act without amendments to the terms and conditions.

Reasonable skill and care

The obligation for the Architect/ Consultant to exercise 'reasonable skill and care' has been amended as follows: 'reasonable skill, care and diligence to be expected from an Architect/Consultant experienced in the provision of such services for projects of similar size, nature and complexity to the Services', to accord with the standard expected from Common Law and Section 13 of the 'Supply of Goods and Services Act 1982'.

Fully compliant with the CDM Regulations 2015

The Contracts have been fully updated to comply with the 'CDM Regulations 2015'. For legal reasons, the Principal Designer should be appointed under a separate distinct PSC, for which the 'RIBA Principal Designers Professional Services Contract 2018' has been produced.

Other client appointments

Clarification of the need for the Client to appoint other consultants, in addition to the services provided under this Contract, has been improved and simplified to give the Client a better understanding of the requirement.

Fees and charges

The 'Fees' section has been simplified by the removal of the boxes that aligned fees to stages of the Plan of Work. This is now a 'freehand' text box so that users can simply set out their fees as the Architect/Consultant prefers.

Fee payments

The payment frequency options have been expanded, as well as now having the additional option of using a draw-down schedule. The payment provisions in the Standard and Concise versions already comply with the 'Housing Grants, Construction and Regeneration Act 1996' (as amended) and, although the Act does not apply to residential occupiers/ domestic projects, similar provisions have now been included in the Domestic version for ease of use.

Meetings and site visits

Options for the frequency or number of design meetings have been added to supplement the frequency or number of site visits previously available.

Insurance

The Contract Details have been revised so that they clearly set out the main insurance policies that should be in place.

Architects' liability

Liability and insurances have been split into two distinct sections. The Architect's/ Consultant's liability has been amended so that liability is now limited to the project in question. Net Contribution clauses have been re-introduced into the RIBA 'Domestic PSC' due to recent developments in case law.

Dispute resolution process

The guidance on dispute resolution has been expanded, but the process of completing the documents has also been simplified and made easier to understand.

Information requirements

There is an expanded 'Electronic Data Transfer Protocol' to give greater clarity on Building Information Modelling (BIM). The default is to provide documents to the Client in PDF format, unless an alternative format is agreed. An 'interoperability clause' has been added to the Conditions to cover any future software compatibility issues, 'interoperability' being the capacity for different computer systems to 'talk to each other'.

Assignment

In addition to standard assignment clauses, the Standard version now includes provision for the Architect to be Novated to a contractor in the event that it is decided that the project, which starts off as a traditional contract, should become a Design and Build Contract. As well as suitable clauses for the Novation Agreement, the Contract allows for the Architect to be novated or to terminate his contract with the Client, should he not wish to be novated for whatever reason.

Schedules of Services

The Schedules of Services have been redrafted to suit the specific form of contract for all stages of the Plan of Work 2013.

Contract Checklist

The Contracts now include a Contract Checklist which both parties should review before signing the Contract. This is to ensure that the Client, in particular, is fully aware of what they are agreeing to, that all of the appropriate documents and information have been provided and that all of the provisions have been adequately considered.

Unused optional items removed from the Contracts

Optional electronic items such as the Public Authority Supplement, the Third Party Schedule and Specialist Schedules of Work have been removed from the Contracts as these items were hardly ever selected by users of the Contract.

Summary

The publishing of the new 'RIBA Professional Services Contracts 2018' gives Architects the opportunity to propose to their Clients a standard PSC, wholly appropriate for the size and type, to suit their specific project, which is in line with current best practice that is fair and equitable to both parties, as well as easy to use.

The 'Fees' section has been simplified by the removal of the boxes that aligned fees to stages of the Plan of Work.

Does the availability of dispute resolution attract more disputes?

Roland Finch
Technical Coordinator – Preliminaries, NBS

Part of the economic philosophy of supply and demand states, among other things, that increased supply of something can actually stimulate increased demand.

On the face of it, that particular principle seems to hold true: especially in the world of commerce or politics, where the received wisdom is that businesses (and governments) need to invest in order to increase output and drive 'growth'.

In the 1930s, the model was investigated with regard to transport, when it was casually observed that the construction of new roads appeared to attract more traffic.

In recent years, studies have shown that, for example, the introduction of major schemes aimed at reducing traffic flow, such as the M25 in England, have actually resulted in increases over and above that which might be expected as a result of a simple rise in the level of car ownership or increased economic activity.

This phenomenon is now recognised and described as 'induced traffic'. It is said to be mostly psychological, and results from the human tendency to choose a route which ought to have less congestion, rather than one which is naturally considered to be more difficult.

But can the same theory be applied to dispute resolution?

One of the criticisms aimed at the legal system is the time that it takes for disputes to be resolved by conventional means. It is not unusual for a major dispute to take months, if not years, to get to court.

Obviously some of this is a direct result of the inherent complexity of the cases involved: the need to gather and prepare data, evidence, witnesses and so forth, but it has been argued that a significant delay was attributable to the legal processes which the parties were obliged to follow.

In an attempt to alleviate the congestion in the court system, a number of other solutions have been proposed, including various types of what is collectively known as 'Alternative Dispute Resolution' (ADR): Arbitration, Adjudication, Conciliation, Dispute Resolution Boards, Early Neutral Evaluation, Mediation, 'Med-Arb', Negotiation, Trial by Combat (for Game of Thrones aficionados) and so on.

It is true that the advent of these new methods has eased the pressure on the courts, although some of that easing is also due to the introduction of additional criteria which are now required to be met before a case may be referred to court.

Principal among these are the Civil Procedure Rules and Pre-Action Protocols, introduced as a result of Lord Woolf's 1996 report 'Access to Justice'.

The general effect of this was to reduce the number of cases ending up in court, and to simplify and crystallize the actual disputes brought before the courts. A further development was the creation of the Technology and Construction Court (TCC), which evolved in 1998 from the Official Referees Court and, as the name suggests, has a list of 'specialist' judges skilled in dealing with factually and technically complex matters in those subject areas.

In addition, the processes of Adjudication and Arbitration became more attractive as alternatives to litigation following the Housing Grants, Construction and Regeneration Act and the Arbitration Act (both in 1996). These meant that the TCC caseload was further reduced, although one perhaps unintended consequence was a reported increase in the number of adjudications referred to that court for final determination.

Scroll forward 20 years and the situation has stabilised a little. We are now much more familiar with adjudication as a means of 'settling' disputes – albeit temporarily, pending a binding decision in the courts or by arbitration.

The general trend, however, suggests that the overall number of disputes is holding steady or increasing slightly – and this is despite the contract publishers supposedly making their forms clearer and more user-friendly, or the introduction of partnering, alliancing and collaborative working as 'modern' methods of working.

Of course, there may be a number of reasons for this: increases in economic activity and diversification of work streams, meaning that contractors are less dependent on a single client – and therefore less reluctant to enter into disputes with them – all play their part, as do the increasing complexity of projects, and therefore the potential for disagreement.

But it is still difficult to avoid the conclusion that it is the sheer availability and number of different ways to register a formal dispute that has led to more people pressing the metaphorical 'start' button, whereas previously they may have been deterred by the potential cost and complexity with the result that ultimately, therefore, they resolved it between themselves.

It is an enduring feature of human nature that leads us to attempt to follow the path of least resistance or the route of minimal effort.

As a consequence, there is certainly some attraction in a greater number and choice of methods of dispute resolution, but with a warning: evidence has shown that when faced with a hazard such as a fire, people can often decide to try to jump through the flames to what they perceive as a shorter escape route, rather than attempt a longer (but safer) one.

In the cold light of day, that strategy seems foolish at best, but (if you will pardon the expression) there are lots of ways to burn your fingers.

One of the criticisms aimed at the legal system is the time that it takes for disputes to be resolved by conventional means.

The business of trust and confidence in uncertain times

Amanda Clack
Head of Strategic Consulting at CBRE, and the immediate Past President of RICS

The last year has shown us, if anything, that the political, economic, social and technological environments are anything but stable. The only certain prediction is that of uncertainty and the need to be agile when reacting to change. The construction sector soldiers on valiantly regardless; the pipeline from politicians to the private sector talks of infrastructure, construction and housing commitments to stabilise and energise the UK economy and beyond, globally. Even Mother Nature has had a hand, with horrific earthquakes, volcanic eruptions and hurricanes impacting the built environment, but more importantly people's lives.

So, in these uncertain times, it is even more important to ensure trust in our profession, and us as professionals within it. For construction, our clients are looking even more closely at risk and value across the whole asset life cycle (be that avoidance or acceptance) in an attempt to get the commercial balance right.

The publication of the National Construction Contracts and Law Survey is always a timely reminder of the importance of the construction sector to the national economy. With a combined employment of over 330,000 people over 22,000 companies, -and an annual turnover of more than £55 billion, no wonder the combined manufacturing/ distribution of construction products has finally got the UK Government's attention (through the recently published Construction Sector Deal, as part of the Industrial Strategy). With the White Paper announcement including £170 million to help transform the sector to create places to live, work and play, which are safer, healthier, use less energy and are affordable, this all provides some good news.

However, in addition, the provision of trust, stability and growth has to ultimately be truly synonymous with the Government's ambition to develop our pipeline of city devolution and development, underpinned by modern, efficient and effective infrastructure.

Standards for consistency

That is why, for professional bodies, the charter to act in the public interest, upheld by independent arm's length regulation and standards, remains so important in maintaining that public trust in turbulent and unpredictable times.

Developing standards globally is key to engendering consistency and trust: not just for investors and clients but also for professionals. That is why standards such as the International Land Measurement Standard (ILMS), International Construction Measurement Standard (ICMS), International Property Measurement Standard (IPMS) and International Ethics Standard (IES) are so important, and provide a collaborative and consistent approach to standards provision globally. They give that confidence back to the market, so that our clients as investors or developers, wherever they choose to build or invest, can be confident of a consistent baseline for measuring and considering value. In my mind, having Standards such as ILMS, ICMS, IPMS and IES form an important suite of standards that will undoubtedly underpin the profession for years to come – even more so, as they themselves were achieved in collaboration with other leading bodies from around the world.

NBS

Cities for economic growth and people

Cities are gaining ever-increasing importance, with global cities taking on national economies. Growth is not an option, but a necessity, in order to remain competitive on a global platform. Our cities provide and drive the economic bedrock of countries, and increasingly so.

In 1960, the world population was around three billion. It is now over seven billion, and it's estimated that it will be nine billion by 2050. Now, for the first time, over half of the world's population lives in cities. There were only two megacities in 1970: Tokyo and New York. Today there are 23, and it's predicted that there will be 37 by 2025.

Urbanisation is fundamental to future growth, but urbanity is essential in providing places where people want to live. Cities are taking on ever-greater importance. They are our most enduring and stable social structures. They have become the world's dominant demographic and economic groupings. Today, the population of the greater Mexico City region is larger than that of Australia at 24 million, while China's urban Chongqing region is an area the size of Austria. The megacities of the future will be larger than many of the nations we know today.

13 out of 14 of the world's new megacities will be in China. However, as the competition for foreign capital investment into cities grows, success is no longer purely about size. Aspects such as innovation, liveability, and an ability to transform and adapt to a changing socio-economic landscape are becoming increasingly important.

We need cities for citizens – urbanity – where urbanisation and humanity combine. We need cities that are resilient – in terms of future growth, economic impact and ability to withstand unforeseen impacts of weather or attack. City resilience in the increasing urban context is paramount. But cities also need to create a sense of community and wellbeing for citizens, otherwise rapid urbanisation is not sustainable, particularly as heights rise and densification increases as the clamour for our cities continues to grow rapidly.

In the UK, we need to devolve city strategy, develop opportunity and ensure visibility for our cities for us to remain competitive on the global stage. To do so, we need to densify and build out both our primary and secondary cities with an eye to the future, with people and business at the core.

Underpinning core infrastructure

In this environment, the role of real estate is vital. It can boost cities by providing the infrastructure and environment to facilitate creativity and innovation. Infrastructure is essential to support city growth – renewals, new and innovative infrastructures. Currently, the world is facing an infrastructure funding gap of $57 trillion. Resilient and effective infrastructure is central to supporting rapid urbanisation.

1. The infrastructure pipeline is strong, but public funding is under pressure. Around the world, we need to attract greater private sector financing to support these economically advantageous projects.
2. Improving commercial excellence through improved capability, and capability in the sector, is essential to securing that required private finance – projects need to be delivered on time and to budget: a big problem in the industry around the world, but this needs to start with effective value and risk-based procurement decisions.

Against the backdrop of trust, stability and growth, commercial excellence for cities and infrastructure is key to improving asset whole life commercial capability and delivering value to clients and the public. This must be underpinned by true and effective commerciality, underpinned through construction excellence. This fundamentally means Procuring for Value, through performance outcomes – and not lowest capital cost.

One of the criticisms aimed at the legal system is the time that it takes for disputes to be resolved by conventional means.

More needs to be done to bring talent into the sector, through improving the attractiveness for all, and through diversity and inclusion that looks at exciting the next or the current generation.

Skills to deliver the ambition

There is a well-publicised skills gap emerging for construction as aging demographics, retention issues and attractiveness for entrants could potentially stall or halt programmes. It is clear that there is a widening sector skills gap in terms of both capacity and capability – as well as embracing innovative technologies and thinking. Industry-led innovation, combined with skills for the future, will help drive up productivity and ensure that we have the right capacity and capability to deliver the UK's ambition for our cities through infrastructure. A handshake between governments and the private sector is required to ensure the pipeline of investment.

Government needs to give construction market confidence that the pipeline is there, plus critical skills need to be recognised and encouraged. More needs to be done to bring talent into the sector, through improving the attractiveness for all, and through diversity and inclusion that looks at exciting the next or the current generation, about coming into the sector that delivers the built environment for today and tomorrow. The private sector of construction will then have the confidence to invest, and is more than capable of looking at adopting new techniques from manufacturing or beyond to take on-board and develop BIM to new levels. 3D printing, off-site manufacturing and innovation through AI and virtual reality will also provide a golden thread to the construction life cycle from inception to development, through to operation and maintenance, thereby improving productivity and providing a new environment for the construction workers of tomorrow.

Delivering the future

This is a time of profound change across the industry. It is a time of opportunity. We can look forward to a world that is increasingly fast-paced, increasingly international and has many future jobs that we have yet to imagine. We in the construction profession and sector need to be ready to rise to these challenges, and we are more than capable of doing so, given the right environment.

What is fundamental, though, is that we have a construction sector that has a commercial framework that encourages investors to provide the critical financing to support public sector funding. This requires the Government to give market confidence and for clients to procure intelligently, working with the supply chain: starting with tier one, but recognising the importance of the whole supply chain.

Together, we can change the dial and construct the future that the citizens of tomorrow will look back on with pride.

Notes

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