
INTRODUCTION TO CONSTRUCTION CONTRACTS (JCT 2016 & NEC4)

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Introductions



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What we'll look at

- Choosing the right contract
- JCT 2016 suite of contracts
- NEC4 suite of contracts
- Practical tips on contract management
- Post-Grenfell issues to consider

Types of construction contracts



Types of works contracts

Fit contract to need

Understand the work, the risks and then the strategy

THEN

Choose the Contract!



Which contract to use?

Things to consider

- What is needed?
- For how long/what frequency?
- A single project/a series of tasks?
- What is the anticipated spend?
- What resources are available to administer the contract?



Consider characteristics of the work

- Is there a very fixed budget?
- Is time essential? (For example, Christmas completions, factory shutdowns, funding demands)
- Or must it be perfect, regardless of time or cost?
- Is the scope well known/likely to change? (Does the client know what it wants?)
- Can the design be completed before the construction starts?
- Can the client manage a number of different groups?

Need a project manager/contract administrator?

The Contract Administrator/Client Representative will be:

- defined in the contract – exercises all the rights of Employer unless Contract Details state otherwise
- instructs and gives approvals to Provider
- may not be “the Employer” (can be an employee but there must be some independence)
- acts on behalf of Employer, but in decision making must also act fairly and independently between Contractor and Employer.

Types of contract

“Term”

“Project”

Responsive repairs

Voids

Servicing

Cyclical decoration

Planned maintenance

Major improvements

New build

What types of construction contract

- Price Based
 - Lump Sum
 - Measured
- Cost Based
 - Target cost
 - Cost reimbursable (Fee contracting)
- Decision should be based on:
 - Risk/Certainty of design and construction
 - Co-operation/Partnering attitude
 - Attitude towards cost and quality
 - Experience and resources?

Price – Lump Sum

- Cost certainty?
- Fixed price?



Price – Measured

- Work situation can be described
... but quality can't.
- Can allow for early start on site
... but unknown costs



Price – Target cost

- Target cost set
- Savings/overruns shared by contractual formula
- Can link saving share to performance
- Can be set for whole contract/part



Price – Cost Reimbursable

- ... or “cost plus” contract
- Paid actual cost plus set fee
- Knock down contractor’s profit at tendering
- Can link fee to performance
- ... but no cost certainty

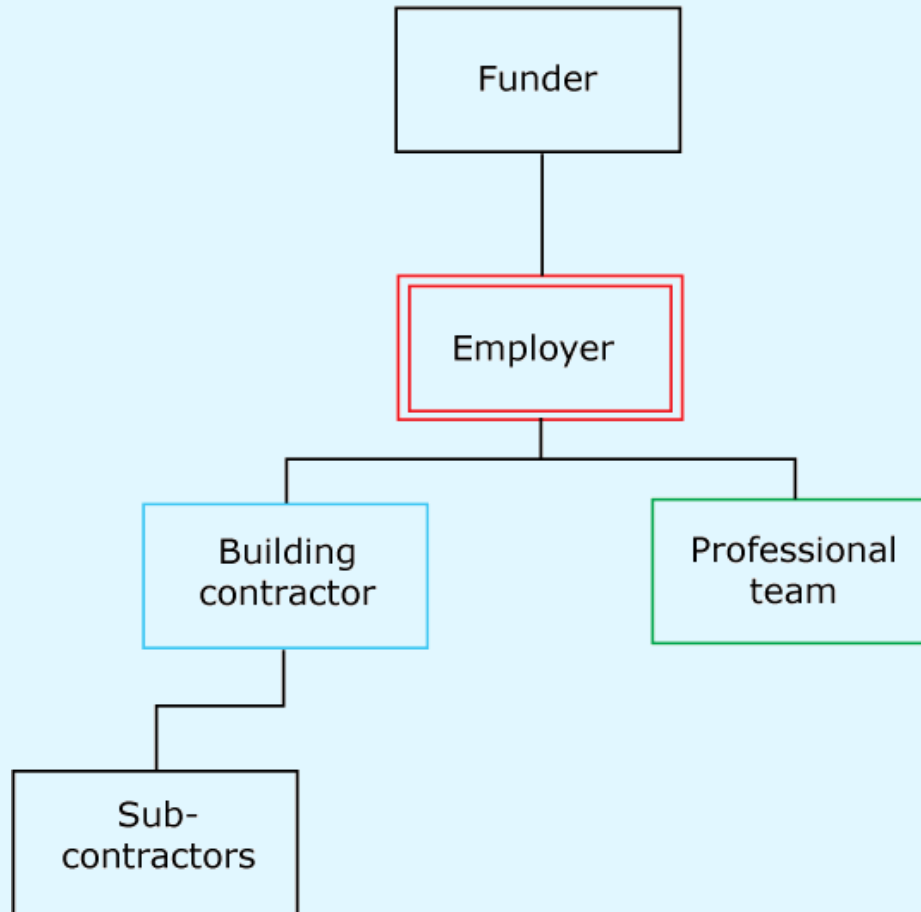


Price – Price List/Schedule of Rates

- List of prices
- Price could be based on any of above
- Most often lump sum
- Could be industry standard less tendered percentage

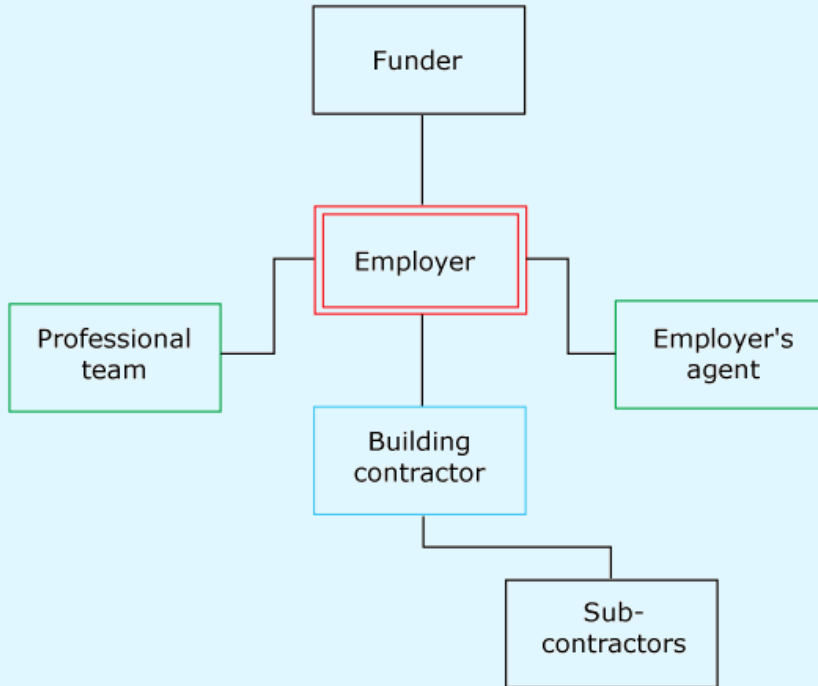


Traditional Procurement

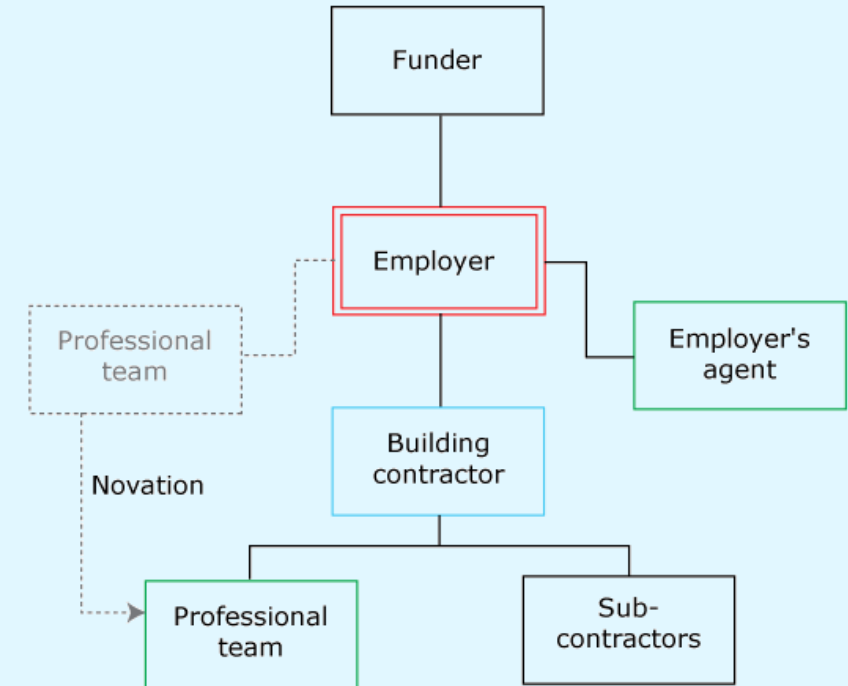


Design and Build Procurement

Pre-novation (prior to construction)



Post-novation (during construction)



JCT Minor Works 2016

Contract “Family”

Minor Works

Building Contract MW 2016



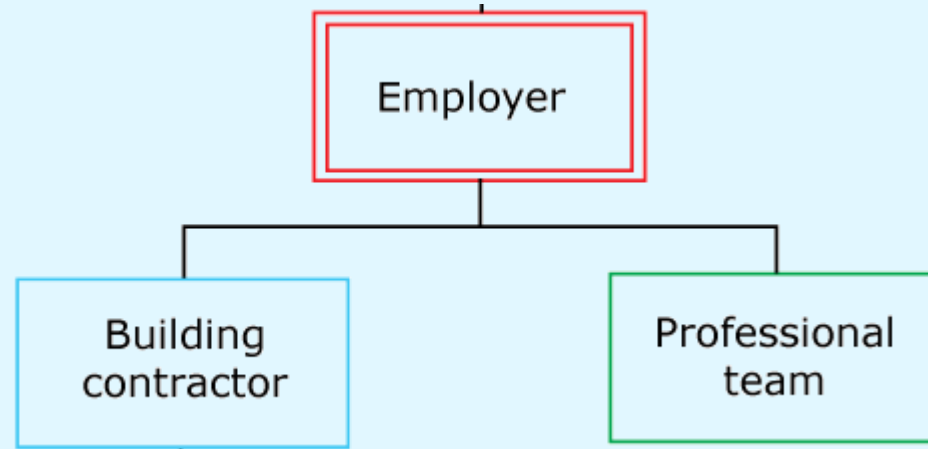
Building Contract with Contractor’s Design (MWD 2016)

Sub-Contract (MW/Sub/D 2016)

When to use Minor Works Building Contract

- Simple works contract (JCT indicative value up to £100k)
- Design element (if any) completed by party other than contractor (except CDP)
- Need sufficiently detailed drawings and specifications to be incorporated to define the works
- Architect/Contract Administrator to administer the contract

Minor Works – “traditional” contract



Employer separately employs Building Contractor to undertake the Works and Professional Consultants to design and/or manage (eg. Architect).

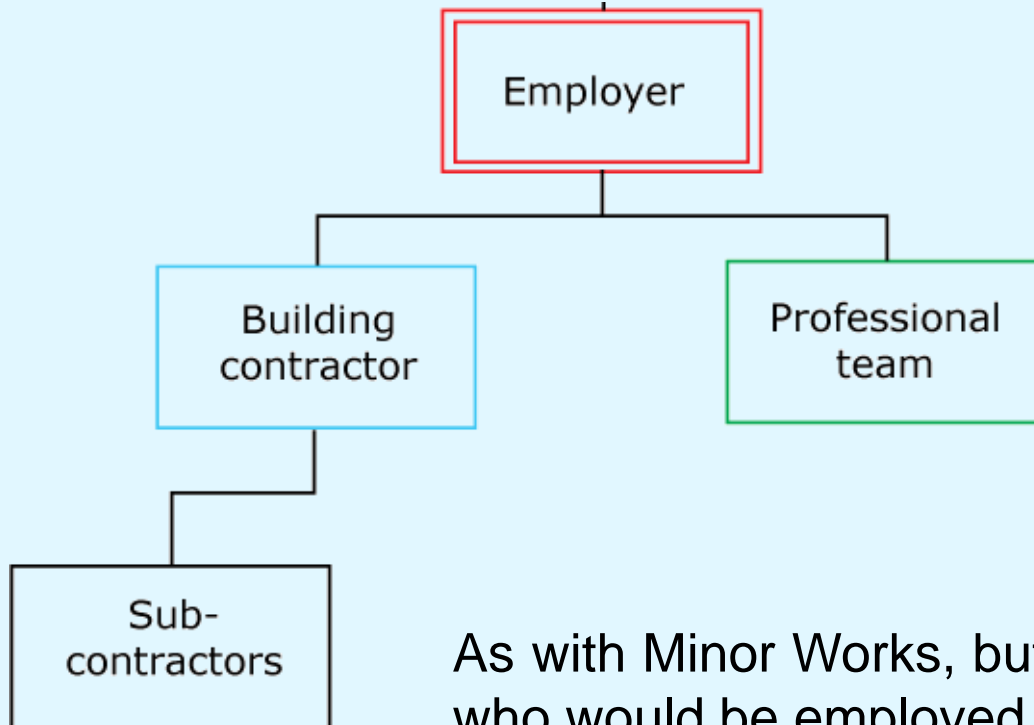
JCT Intermediate Contract 2016

| Contract “Family” | |
|------------------------------------------------------------------------------------|----------------------------------------------------------------------|
| Intermediate | Building Contract IC 2016 |
| | Building Contract With Contractor’s Design (ICD 2016) |
|  | Sub-Contract Agreement (ICSub/A 2016) |
| | Sub-Contract with sub-contractor’s design Agreement (ICSub/D/A 2016) |
| | Sub-Contractor/Employer Agreement (ICSub/NAM/E 2016) |
| | Sub-Contract Conditions (ICSub/C 2016) |

When to use Intermediate Building Contract

- “Traditional” medium works project (JCT indicative, up to £500k)
 - Works designed by person other than Contractor
 - Must provide Contractor with detailed drawings, bills of quantities, specification of work schedules to define the work
 - Allows for Contractor’s Designed Portion
 - Architect/Contract Administrator and Quantity Surveyor will administer the contract
 - Can be used where work to be carried out in sections
- ✓ **Small additional building on existing site**
 - ✓ **One-off refurbishment of common parts of blocks of flats**

Intermediate Contract – a “traditional contract”



As with Minor Works, but Sub-Contractors may be used who would be employed directly by the Contractor.

JCT Standard Building Contract 2016

Contract “Family”

Standard Building Contract

With Quantities (SBC/Q 2016)

Without Quantities (SBC/XQ 2016)

With Approximate Quantities (SBC/AQ 2016)

Sub-Contract Agreement (SBCSub/C 2016)

Sub-Contract Conditions (SBCSub/C 2016)

Sub-Contract with sub-contractor’s design Agreement (SBCSub/D/A 2016)

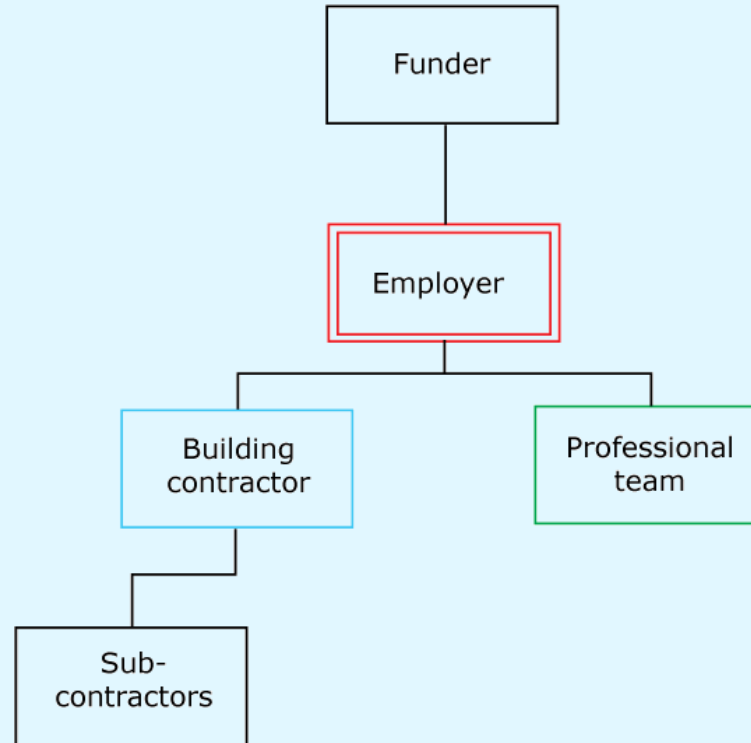
Sub-Contract with sub-contractor’s design Conditions (SBCSub/D/C 2016)



When to use Standard Building Contract

- “Traditional” and high value (e.g. above £500k/complex)
- Works can be delivered in sections
- Employer has detailed control over design
- “High maintenance” for Employer (e.g. needs sufficiently detailed drawings and specifications/bills of quantities to be incorporated to define the works; or Architect/Contract Administrator and Quality Surveyor to administer project)
- Allows for Contractor’s Designed Portion
- Can be used where known specialists are to be used (Named Specialists)

Standard Building Contract – a “traditional” contract



As with Intermediate, but as the value of the Contracts gets higher the more funders will want some control of the arrangements through their agreement with the Employer.

JCT Design and Build Contract 2016

Contract “Family”



Contract (DB 2016)

Sub-Contract Agreement (DBSub/A
2016)

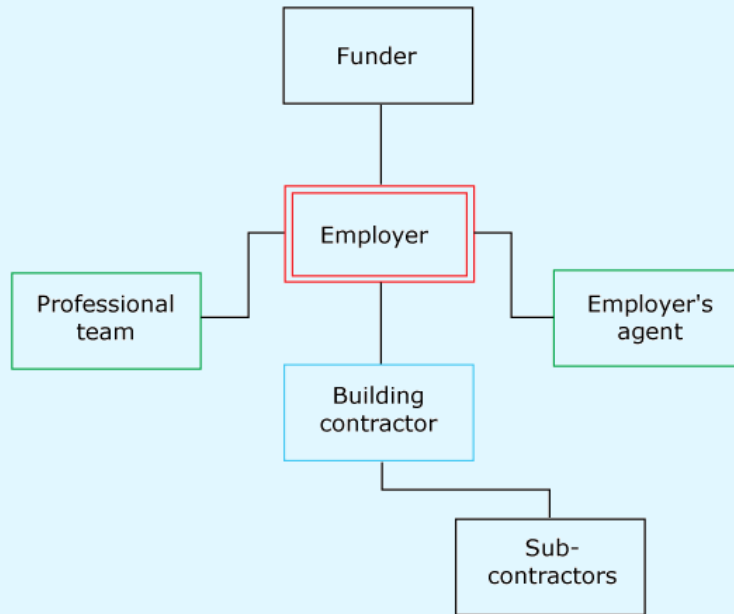
Sub-Contract Conditions (DBSub/C
2016)

When to use Design and Build

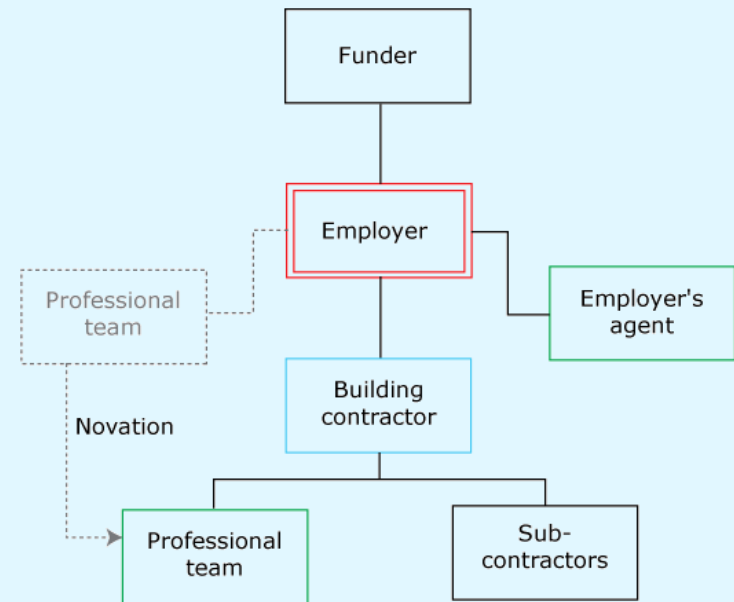
- Alternative “high value” contract delivery (e.g. above £500k/complex/low management)
- Project contract
- Works can be delivered in sections
- Allows for less expertise resources of Employer (e.g. Contractor to deliver works and complete the design, Employer’s Requirements/Contractor’s Proposals to be incorporated setting out extent of works and to what standards they are to be designed/completed)
- Architect “switches” to being employed by the Contractor
- Employer’s Agent to administer the Contract

Design and Build arrangement

Pre-novation (prior to construction)



Post-novation (during construction)



Contract arrangement changes as construction starts, with the employment of the professional consultants “switching” from the Employer to the Contractor so that the Contractor is responsible to the Employer for the “whole package”.

JCT Measured Term Contract 2016

Contract “Family”

Measured Term



Building Contract MTC 2016

When to use a Measured Term Contract

- Appropriate for use
 - by Employers who have a regular flow of maintenance and minor work, including improvements to be carried out by a single contractor over a specified period of time under a single contract
 - where the work is to be instructed from time to time and measured and valued on the basis of an agreed schedule of rates
 - where a Contract Administrator is to administer the conditions

Others in the JCT 2016 suite

- Collateral Warranties
- Framework Agreement
- Pre-Construction Services Agreement
- Major Project Construction Contract
- Repair and Maintenance Contract
- Prime Cost Building Contract
- Management Building Contract
- Construction Management Trade Contract
- Constructing Excellence Contract
- Consultancy Agreement
- Partnering Charter
- Adjudication Agreement

Contracts and sub-contracts: Differences to 2011 suite.

- Public sector clients
- Regulatory change
- BIM
- Payment
- Insurance
- Third party rights
- Other



“Local or Public Authority”

- Fair Payment Charter principles
Fair payment down the supply chain
- Transparency and FOIA
Disclosure of the Contract in the event of FOIA request
- Building Information Modelling (BIM) Protocol
Integration of BIM protocols and harmonisation with design submission/information release etc



[Applies to MW; IC; SB; DB, MTC and associated Sub-Contracts]

Reflecting Regulatory Change

CDM Regulations 2015

- Incorporating JCT 2011 Amendment 1
- Contractor warrants to comply with duties with no entitlement to additional time/price

Public Contracts Regulations 2015

- 30-day payment provisions required by Reg 113
- Termination in situations described in Reg 73(1):
 - Substantial modification leading to need to re-procure
 - Contractor should have been excluded at tender stage for a mandatory exclusion ground
 - Contract award seriously infringed EU Procurement Law
- Continuation down the supply chain
- Contractor to supply names, contact details and legal reps of Sub-Contractors (Reg 71)



[Applies to MW; IC; SB; DB, MTC and associated Sub-Contracts]

Payment Provisions – Section 4

Simplified and consolidated drafting – interim payments and final payment:

- Consolidating clauses on notices for final payments and interim payments
- Final date for payment of final payment now 14 days from due date (matching period for final date for payment of interim payments)
- Minor Works brought in line: Contractor can make application for payment.



[Applies to MW; MTC; IC; SB; DB and associated Sub-Contracts]

Payment Provisions – Section 4

Fluctuations

- Wider choice of fluctuations in Contract Particulars
- Removal of Fluctuations Options B and C (although available from JCT website)



[Applies to SB; DB and associated Sub-Contracts]

Payment Provisions – Section 4

New prompt procedure for loss and expense assessment

- Contractor's duty to notify is triggered at earlier point than under 2011
- New drafting aimed at ensuring:
 - Contractor provides necessary information to Employer to assess loss and expense
 - Employer carries out assessment and ascertains amounts promptly



[Applies to MW; MTC; IC; SB; DB and associated Sub-Contracts]

Insurance – Section 5/6 and Schedule 3

- Simplifying and consolidating – Section 5/6 (not insurance Schedule)
- More flexibility on Existing Structures

[Applies to MW; MTC; IC; SB and DB]

Termination

- Expanded right to terminate following suspension.
- Either party can terminate where loss or damage arises from any risk covered by the works insurance policy / an excepted risk
- Termination under PCR 2015
- Either party can terminate if material loss or damage to an Existing Structure



Third Party Rights/ Rights Particulars

Collateral warranties/third party rights

- What for?
- When required?
- In what form?



[Applies to IC; MTC; SB; DB and associated Sub-Contracts]

Third Parties and Rights Particulars

“Rights Particulars”

- Replaces Part 2 of Contract Particulars in JCT 2011
- Separate document to set out:
 - details of rights the Contractor and/or Sub-Contractors are to grant the Employer; Funders; Purchasers or Tenants (collateral warranties / 3rd party rights?)
 - Sub-Contractors’ insurance requirements
- Model Rights Particulars document available at:
<https://www.jctltd.co.uk/useful-documents/rights-particulars>

[Applies to IC; MTC; SB; DB and associated Sub-Contracts]

JCT Collateral Warranties – Key Issues

What is needed by way of collateral warranty?

- Which third parties will / may need one?
- What are they asking for?
- Are these requirements detailed in the Rights Particulars?

Net contribution clauses

Contractor Collateral Warranty for a Funder 2016: Clause 1.1

“the Contractor’s liability to the Funder for costs under this Agreement shall be limited to the proportion of the Funder’s losses which it would be just and equitable to require the Contractor to pay having regard to the Contractor’s responsibility for the same ...”

Parent Company Guarantee/Performance Bond

- Can require Contractor to provide Parent Company Guarantee / Performance Bond
- Specify requirements in Contract Particulars



[Applies to IC; MTC; SB and DB]

Parent Company Guarantee/Performance Bond

- What for?
- When required?
- In what form?



A Schedule of Amendments will still be necessary

Amendments to JCT drafting will be needed to:

- reflect Employer's obligations/objectives (eg. to Residents / sector specific)
- “beef up” JCT terms in certain areas of weakness
- shift the balance of risk balance (2016 updates have not altered the balance of the JCT suite)



Careful re-drafting of “standard” Schedules

If amending JCT 2011 Schedule of Amendments to be used with JCT 2016:

- don't just change “2011” to read “2016”
- remove amendments that are no longer required
- add amendments as required to new clauses
- update clause cross referencing
- seek legal advice



Amendments to reflect Employer's obligations/objectives

- Equality and diversity
- Modern Slavery
- “Prevent” principles
- Social value requirements (eg. apprenticeships)
- Building Warranties
- CDM 2015
- Duties to Residents:
 - Enhanced obligations if Works in occupied properties (DBS; Code of Conduct etc)
 - Contractor to liaise with Resident on access to remedy defects
 - Data Protection

“Beef up” terms where JCT has weaknesses

- Design liability
- Discrepancies between documents
- Programming
- Annual “final” certificate
- Site security
- Health and safety
- Environmental protection (deleterious materials and hazardous substances)
- TUPE



Shift the balance of risk

- Effect of Employer's Inspections
- Change in law risk
- Concurrent delay
- Scope of copyright licence for designs
- Definition of practical completion (handover requirements)
- Effect of Final Statement



Avoiding the JCT “trap”

Clause 1.3 JCT DB

“Nothing contained in any other Contract Document or any Framework Agreement, irrespective of their terms, shall override or modify the Agreement or these Conditions”




NEC Contracts



NEC approach

- Project management solutions
- Entire life cycle
- Down whole supply chain
- Spirit of partnering
- Main contracts; short form; subcontracts; supply

Engineering and Construction contracts

| Contract “Family” | |
|-----------------------------------------------------------------------------------|------------------------------------------------------------|
| Engineering and Construction | NEC4 Engineering and Construction Contract (ECC) |
|  | NEC4 Engineering and Construction Subcontract (ECS) |
| | NEC4 Engineering and Construction Short Contract (ECSC) |
| | NEC4 Engineering and Construction Short Subcontract (ECSS) |

When to use EEC

- Project contract
- Works/engineering
- Includes any level of design responsibility
- Sophisticated management techniques
- Project Manager administers
- Less complex works, use short form
- Price Based / Cost Based / Management Contract

Term Service Contracts

| Contract Family | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------|
| Term Service | NEC4 Term Service Contract (TSC) |
|  A silhouette photograph of a family at sunset. On the left, a child is riding a bicycle. In the center, a woman and a man are standing; the man is lifting a baby into the air. On the right, a baby stroller is visible. The background shows a bright sunset over a horizon. | NEC4 Term Service Short Contract (TSSC) |

Term Service Contracts

- Term contract
- Suitable for any manual activity over period (Works; engineering; repairs & maintenance; facilities maintenance; cleaning; decorating; gas servicing etc.)
- Includes any level of design responsibility
- Sophisticated management techniques
- Service Manager administers
- Less complex works, use short form

Other NEC4 Contracts

- The Professional Services Contract (PSC)
The Professional Services Short Contract
- The Supply Contract (SC)
The Supply Short Contract
- The Framework Contract
- Design, Build and Operate Contract
- Alliance Contract

NEC drafting conventions



Drafting style

- Simple language
- Simple structure and clause numbering
- Present tense
- No cross referencing
- Subjective decisions minimised (avoiding, for example, “fair” and “reasonable”)
- Defined terms in capitals
- Terms described in Contract Data in *italics*

Contract structure

- Core Clauses
- Main Option Clauses (including pricing options)
- Resolving and Avoiding Disputes
- Secondary Option Clauses
- Schedule of Cost Components
- Short Schedule of Cost Components
- Contract Data
- Index

Main Options

- A: Priced Contract with Activity Schedule
- B: Priced Contract with Bill of Quantities
- C: Target Contract with Activity Schedule
- D: Target Contract with Bill of Quantities
- E: Cost Reimbursable Contract
- F: Management Contract



[No more Option G, Term Contract, for PSC]

DIFFERENCES BETWEEN NEC3 AND NEC4

New Contracts

Four new contracts:

- TSC Subcontract
- PSC Subcontract
- Design, Build and Operate Contract
- Alliancing Contract

General changes to all contracts

- Gender neutral
- Terminology changes, including:
 - *Client* not *Employer*
 - *Scope* not *Works/Service Information*
 - *Early Warning Register* not *Risk Register*, *early warning meeting* not *risk reduction meeting*
 - *Ultimate holding company* not *parent company*
 - *Undertakings* not *collateral warranties*

General changes to all contracts

- Payment changes
 - application for payment required
 - final account
 - termination payment timetable brought into payment regime
 - single *fee percentage*, not two
- Risk management
 - Early Warning Register and early warning meetings, with timetable
 - “liabilities” not “risks”, and *Contractor* liability stated
- *Senior representatives* as a dispute escalation procedure
- Programme and/or plan now deemed accepted if *Project/Service Manager* delays

Specific changes to ECC

- 9 new or amended Options, including
 - X8 undertakings (collateral warranties)
 - X10 information modelling (BIM)
 - X21 whole life costing
- Changes to Schedule of Cost Components

Amendments will still be necessary

Amendments to NEC drafting will be needed through **z clauses** to:

- reflect Employer's obligations/objectives (e.g. to Residents / sector specific)
- “beef up” NEC terms in certain areas of weakness
- shift the balance of risk balance

Z clauses need careful redrafting

If amending NEC contracts:

- Follow NEC drafting conventions
- Don't just copy in standard Ts&Cs
- Ensure properly incorporated
- Consider seeking specialist legal advice

Execution

- No execution block
- Offer and acceptance?
- Contract or deed?
- Need incorporating agreement



Words of advice

- Do not consider NEC just like any other contract but in different language
- Do use correct terminology
- Do resource NEC contracts adequately
- Do remember the Scope/Works Information and other documents need to be comprehensively written. Documents include
 - ordering process (TSC)
 - dispute process to go with *senior representatives*
 - Key Performance Indicators in *incentive schedule*

TOP TIPS ON CONTRACT MANAGEMENT

Top tips on contract management

Scenario 1

- A major Decent Homes Contract was let to a contractor to carry out refurbishment works to 9,000 properties under a TPC 2005 form of contract.
- Contract length 4 years.
- Final account value in dispute. Contractor claims £20m more than the Client Representative's (CR's) valuation.

Scenario 1 continued ...

- On an interim basis £14m was over paid compared to the final account valuation
- It became clear that those payments had been approved by the CR without sufficient evidence of work done.
- The documents on the project data base were inadequate and it is a nightmare to evidence work/quantities at this late stage.

Scenario 2

- Waste management contract
- Price framework incorrect in contract documents
- Local authority may lose £2m+ over life of contract
- Contractor refuses to amend the contract
- They are hotly contesting a claim to rectify the contract even though poor defence
- What is going on and how best to manage?
- See *Borough of Milton Keynes v Viridor* [2017] EWHC 239 (TCC)

Scenario 3

- NEC 3 contract to carry out improvement works to a central government building
- No previous experience by employer of using NEC contracts and limited experience by Project Manager (PM) under the contract
- Compensation Events (CEs) issued by PM with cost impact to be valued at a later date
- Final assessment dispute over how to value CEs

Some top contract management tips arising from these scenarios

- Consider potential disputes and appropriate dispute resolution clauses pre-contract
- Know how your contract operates and consistently apply the procedures – this may require refresher workshops
- Chose your consultants carefully and manage them well
- Know your contract pricing mechanisms and ensure they are applied

Some top contract management tips (2)

- Choose and manage your Contract Administrator/Project Manager well
- Record in writing any variations to the contract and any changes in value in accordance with the contract
- Ensure minutes accurately reflect discussions at meetings
- Ensure that project documentation is kept up to date and your own records are well maintained

Some top contract management tips (3)

- Don't let problems/disputes drag
- Get advice as soon as possible if you hit problems
- If you do not, you may get caught out
 - adjudication has very tight timescales!
- Where possible, it is better to be a steam roller than a mat



It is better because ...

- This is usually the best approach for resolving disputes sooner rather than later and on terms that protect the public purse
- Contractors are rarely able to respond to just reasonable talking when their bottom line is at stake
- Most disputes settle before legal proceedings are issued, as envisaged by the court's pre-action protocol.

To be a steamroller you need to know how to roll ...

- Understand when payment/withholding notices are necessary
- Termination is always an option but it is the nuclear one; so be prepared!
- Do you know your dispute resolution options?
 - Dispute resolution hierarchies, adjudication, expert determination, arbitration, litigation and mediation

Know the warning signs

- Unfulfilled promises and delays
- Rumours of other work going wrong
- Complaints from subcontractors and suppliers
- Aggressive or delayed invoicing
- Business expanding too fast
- Staff turnover
- Quality deterioration and customer complaints

Post Grenfell issues

Three key areas:

- Flammable cladding materials
- Fire door concerns
- What next?



Cladding Materials

- Use of aluminium composite material (“ACM”) cladding a key contributing factor to the Grenfell fire
- *Building (Amendment) Regulations 2018* came into force on 21 December 2018, banning use of combustible materials in the external walls of buildings of 18m height.



Cladding Materials continued

- 17 October 2018, MHCLG informed 12 local authorities, and 31 housing providers, that they would receive central government funding (approx. £400m) towards the cost of removing all ACM cladding.



Fire door concerns

- Composite flat entrance doors are now known to inconsistently meet the FD30s standard.
- What does this mean in practice?



What should social housing providers be considering?

- Identify the door types installed.
- Where does responsibility for selection of goods and materials fall?
- Approach the suppliers and contractors responsible.



This is an extremely fluid situation

- Tenant safety and an effective remedial solution – competing or complementary goals?
- What doors should be replaced?
- What comes first – the remedial works or an argument about liability?
- Risk of supplier/ contractor insolvency?



What does the future hold?



Uncertain what will happen next:

- Central government has not yet responded to the Hackitt Report;
- Grenfell inquiry still ongoing – could further issues come to light?

The key is to stay agile in order to be able to respond to further challenges as they arise, including putting in place management structures with clear lines of responsibility for fire safety or Grenfell-related issues.

Any questions?

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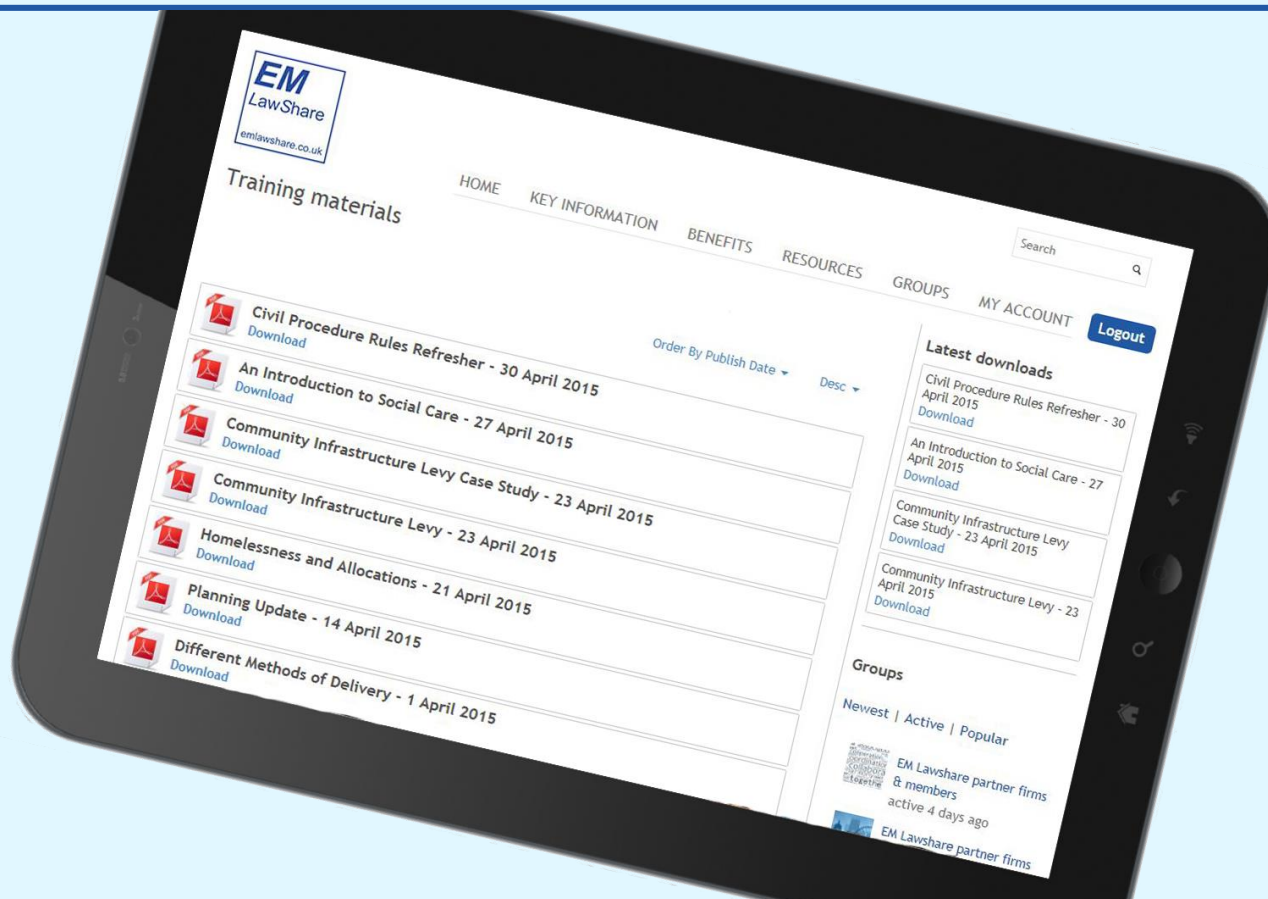
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