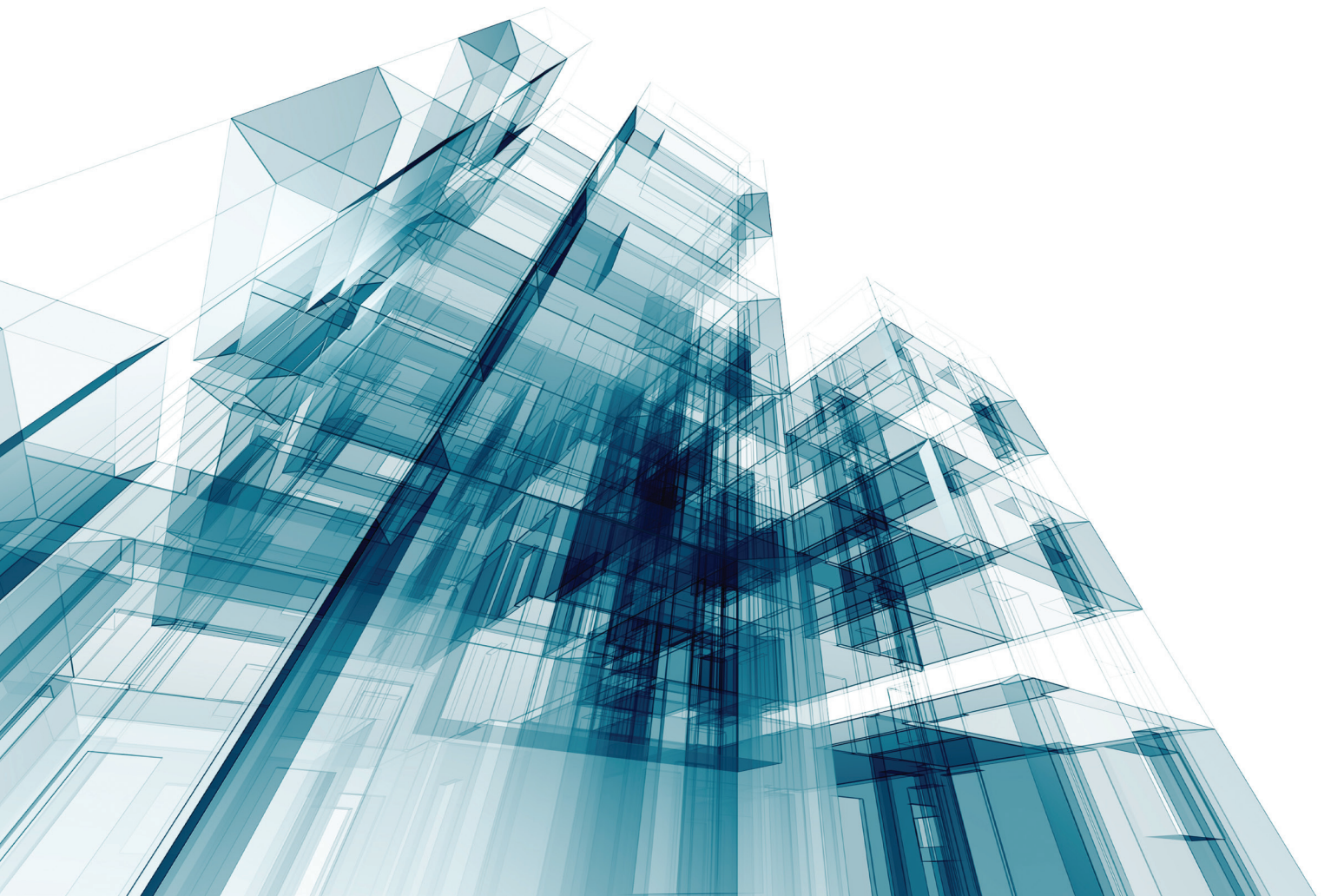




RICS professional standards and guidance, UK

# Employer's agent: design and build

1st edition, October 2017



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# RICS professional standards and guidance

## RICS guidance notes

This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations that in the opinion of RICS meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the guidance note, they should take into account the following points.

When an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of the contents of any relevant guidance notes published by RICS in deciding whether or not the member acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this guidance note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

It is for each member to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this guidance note, they should do so only for good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice.

Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the Panel.

In some cases there may be existing national standards that may take precedence over this guidance note. National standards can be defined as professional standards that are either prescribed in law or federal/local legislation, or developed in collaboration with other relevant bodies.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and should have knowledge of guidance notes within a reasonable time of their coming into effect.

This guidance note is believed to reflect case law and legislation applicable at its date of publication. It is the member's responsibility to establish if any changes in case law or legislation after the publication date have an impact on the guidance or information in this document.

## Document status defined

RICS produces a range of professional standards, guidance and information documents. These have been defined in the table below. This document is a guidance note.

### Publications status

| Type of document                 | Definition   | Status  |
|----------------------------------|--|---|
| <b>Standard</b>                  |  |   |
| International standard           | An international high-level principle-based standard developed in collaboration with other relevant bodies.  | <b>Mandatory.</b>   |
| <b>Professional statement</b>    |  |   |
| RICS professional statement (PS) | A document that provides members with mandatory requirements or a rule that a member or firm is expected to adhere to.<br><br>This term also encompasses practice statements, Red Book professional standards, global valuation practice statements, regulatory rules, RICS Rules of Conduct and government codes of practice. | <b>Mandatory.</b>   |
| <b>Guidance and information</b>  |  |   |
| RICS code of practice            | Document approved by RICS, and endorsed by another professional body/stakeholder, that provides users with recommendations for accepted good practice as followed by conscientious practitioners.  | Mandatory or recommended good practice [will be confirmed in the document itself].<br><br>Usual principles apply in cases of negligence if best practice is not followed. |
| RICS guidance note (GN)          | Document that provides users with recommendations or approach for accepted good practice as followed by competent and conscientious practitioners.   | Recommended best practice.<br><br>Usual principles apply in cases of negligence if best practice is not followed.   |
| RICS information paper (IP)      | Practice-based information that provides users with the latest technical information, knowledge or common findings from regulatory reviews.  | Information and/or recommended best practice.<br><br>Usual principles apply in cases of negligence if technical information is known in the market.                       |
| RICS insight                     | Issues-based input that provides users with the latest information. This term encompasses thought leadership papers, market updates, topical items of interest, white papers, futures, reports and news alerts.  | Information only.   |
| RICS economic/market report      | A document usually based on a survey of members, or a document highlighting economic trends.   | Information only.   |
| RICS consumer guide              | A document designed solely for use by consumers, providing some limited technical advice.  | Information only.   |
| Research                         | An independent peer-reviewed arm's-length research document designed to inform members, market professionals, end users and other stakeholders.  | Information only.   |

# 1 Introduction

This guidance note is intended for use in conjunction with the JCT Design and Build Contract where an agent will be appointed by the employer to represent him or her. It is not intended that the guidance note be applied to other forms of contracts, whether or not the employer has appointed an agent. An employer's agent may be an individual or organisation in which the employer has vested their authority, but the employer's agent cannot be a grouping or consortium of individuals or companies.

All references to the JCT Design and Build Contract also include the Scottish Building Contract Committee (SBCC) Design and Build Contract, for works under Scottish law, and shall be construed accordingly.

This guidance note covers the role of the employer's agent under the JCT Design and Build Contract and also the JCT Major Project Construction Contract. Other JCT forms of contract have the role of a contract administrator, and the NEC contracts have the role of a project manager, which may be perceived as a similar role, but in essence the roles are different to that of an employer's agent, this will be explored in more detail later in this guidance note.

Guidance is given in relation to the main forms of contract and main procurement routes, under the following headings, which map to the Assessment of Professional Competence (APC):

- General principles (Level 1: knowing)
- Practical application (Level 2: doing)
- Practical considerations (Level 3: doing/advising).

Note: Levels 1 and 2 of this guidance note only consider the role and responsibilities of the employer's agent within the JCT Design and Build Contract, i.e. post-contract.

Within Level 3 there is reference to other 'non-core' pre-contract activities such as tendering, selection of contractors, etc. These activities are normally considered as a 'quasi project management' role rather than that of an employer's agent, and will be subject to parties having the necessary experience and competencies to carry out those activities.

Readers are advised to refer to the latest edition of any publication mentioned in this guidance note.

This guidance note is effective from 1 January 2018.

## 2 General principles (Level 1: knowing)

### 2.1 Re-emergence of design and build as a procurement method

While many believe design and build to be a recent innovation, it is a procurement method that has been in use for a long time. Before the emergence of architecture as a profession, employers used to procure buildings by a process of design and build. It was the separation of responsibility for construction from responsibility for design that led to the emergence of so called 'traditional contracting' in the 19th century.

This separation of design from construction in the building industry has, for a long time, been the source of many problems, and remains so, despite the efforts of Latham and Egan and their predecessors to combine the two disciplines.

During the 1980s it became increasingly apparent to employers that the traditional construction process, where the design team was managed by the architect and remained in the employer's team for the duration of the project, did not fulfill their needs.

In response to this, many employers who undertook construction work regularly began to look to contracts that reduced their risk, and more specifically in this case transferred design responsibility to the contractor. This was done by either providing employer's requirements, which specified what was required so that the contractor carried out the design from the start, or as is more regularly used now, the employer's existing design team who had taken the design to a certain stage was novated to the contractor, who was then responsible for completing the design and construction of the project using that design team.

The design and build process increases the opportunities for harnessing the benefit of the contractor's experience during the design stages of the project. Many of the developments in procurement processes, and much of the work in the fields of study known as 'value engineering' and 'buildability', have had this purpose in mind. The benefits of the integration of designers and builders are buildings that are more economic to construct, as well as providing a more economic and effective production process.

Other positive aspects of the design and build process include the employer having less interfaces to deal with, not only in terms of consultants on the project, but also external third parties. Price certainty is gained as the employer only has one party to deal with (and pay for) once the contractor is appointed, for the design and construction stages of the project.

The emergence of a standard form of contract for design and build took a long time, but eventually arrived as the JCT Standard Form of Contract with Contractor's Design 1981, which was subsequently replaced by the 1998 edition, then the restructured Design and Build Contract 2005, followed by the 2011 edition, and the current version which launched in 2016, and on which this guidance note is based, where it refers to the contract.

The JCT Design and Build Contract is appropriate where:

- detailed contract provisions are necessary and employer's requirements have been prepared and provided to the contractor
- the contractor is not only to carry out and complete the works, but also to complete the design and
- the employer appoints an employer's agent (who may be an external consultant or employee) to administer the conditions.

The JCT Design and Build Contract only has six references to the employer's agent in the whole contract.

Firstly, the employer's agent is named in the contract 'or such other person as the Employer shall nominate in his place'.

Also,

'Save to the extent that the Employer may otherwise specify by notice to the Contractor, the Employer's Agent shall have full authority to receive and issue applications, consents, instructions, notices, requests or statements and otherwise to act for the Employer under any of the Conditions.'

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The role of the employer's agent is relatively simple. He or she acts on behalf of the employer on **all** matters, unless the employer expressly states (in writing to the contractor) that he or she wishes to act him or herself, or to appoint others to act for him or her on certain aspects of the contract. It is important that the employer allows the employer's agent to carry out the duties on the employer's behalf, and does not 'interfere' with those duties.

The employer's agent's duties are summarised within the contract, i.e. to receive and issue:

- applications
- consents
- instructions
- notices
- requests or
- statements

and otherwise to act for the employer under any of the conditions.



However, the employer will always retain the following responsibilities:

- providing possession of the site – as the site belongs to the employer
- making payment to the contractor in compliance with payment notices – as the employer and the contractor are the contracting parties – no-one else can pay the contractor and
- issuing a notice to the contractor following the issue of a non-completion notice stating that the employer may require payment of, or may withhold or deduct liquidated damages. The role of the employer's agent is to issue payment notices without deduction for liquidated damages, though the employer's agent must advise the employer of his or her rights and responsibilities in this respect.

There are five further clauses in the contract that refer specifically to the employer's agent:

- any notice or other communication between the employer (or employer's agent) and the contractor that is expressly referred to in the agreement or the conditions shall be in writing
- the contractor is required to keep on-site and available to the employer's agent at all reasonable times a copy of the employer's requirements, the contract sum analysis, the contractor's proposals and various other referenced drawings and other documents
- the employer's agent and any person authorised by him or her or the employer shall at all reasonable times have access to the works and to the workshops or other premises of the contractor where work is being prepared for the contract
- a payment notice or a pay less notice to be given by the employer may be given in his or her behalf by the employer's agent or by any other person who the employer notifies the contractor as being authorised to do so
- the (site) manager shall keep complete and accurate records in accordance with any provisions relating thereto in the employer's requirements and shall make the same available for inspection by the employer and/or the employer's agent at all reasonable times.

Although the JCT Design and Build Contract does not refer to the appointment of a quantity surveyor (or even mention the role), it is common for such an appointment to be made separately to the employer's agent, or prior to his or her appointment, to assist with preparation of the employer's requirements, cost planning, tenders, and other valuation-related issues. This may also, by agreement, form part of the employer's agent's responsibilities.

Note that where the contractor is restricted to design discrete parts of the works and not made responsible for completing the design for the whole of the works, the JCT Design and Build Contract should not be used. Other members of the JCT suite of contracts provide for such limited design input (contractor's designed portion) by the

contractor, and the employment of a contract administrator, rather than an employer's agent.

The JCT suite of contracts also include standard forms of subcontract conditions, which dovetail the main contracts.

## 2.2 Definition of employer's agent

The definition of the employer's agent is fundamental to being able to manage and complete his or her obligations under the contract, and for the contractor to establish correct authorities and instruction. The employer's agent should be an individual named in the contract, together with his or her employer.

The employer's agent for the purpose of any contract must be one individual within whom the employer has entrusted his or her authority to manage the project. The contract provides for the employer to change this named party should that become necessary.

Other parties may also be appointed by the employer but only one party acts as the employer's agent under the Design and Build Contract, and therefore these other parties will have no authority to issue instructions, statements, notices etc. The same would apply with regards to a business being appointed, the individual carrying this authority should be specifically identified to avoid any potential misunderstandings.

## 3 Practical application (Level 2: doing)

### 3.1 Commencement of the employer's agent role

Some clients decide to appoint the employer's agent at project inception stage, who will then advise on pre-tender planning, finance, contractual and other issues, then prepare the tender documentation thereafter acting as the employer's agent under the contract once the contractor is appointed. However, this is more of a project management and/or quantity surveying role and should not be seen as the role of an employer's agent who ideally should be introduced to the project at tender stage, or later, but always prior to the appointment of the contractor.

The specific point at which the employer's agent appointment commences will be derived from the contractual agreement between the employer and the employer's agent. It is important that any appointment document includes for, and establishes, the full description of roles and responsibilities, which will then avoid later ambiguity in respect of what is expected by all parties.

The commencement and phases of the employer's agent role may be linked to the stages of the RIBA Plan of Work.

Where a two-stage tender process has been employed, a pre-construction service agreement may be entered into between the employer and the contractor (or other parties). The employer's agent should be identified in this document and the extent of his or her role and authorities should be appended.

### 3.2 Employer's agent appointment documents/service agreement

This document is of the utmost importance and should cover the role of the employer's agent, specifying the following in detail:

#### The project brief

The project brief should stipulate in broad terms the project or projects to which the employer's agent will be appointed, a description of the employer's objectives, any programme and budget information.

#### The service

A detailed breakdown of what activities the employer's agent will be required to carry out, split into three sections as appropriate, pre-construction, construction and post-construction.

This section should also include responsibilities for inspection and testing of compliance, specific employers may wish checks to be made by third parties reporting

to the employer's agent, or may wish for him or her to organise and manage these themselves.

#### Fiduciary

The document should also identify what authorities the employer is passing to the employer's agent. Such as whether the employer's agent is responsible for the:

- agreement of fees such as other consultants, and third parties such as inspection and planning fees, etc., appointments, charges and the like
- agreement of costs (including any limits)
- agreement of claims (including any limits)
- agreement to change instruction resulting in a financial change (with or without financial approvals and set caps if applicable)
- agreement to change instruction resulting in a programme change (with or without financial approvals and set caps if applicable)
- agreement to change instruction resulting in a specification change (no financial implications, level of compliance check expected)
- agreement to change instruction resulting in a design change (no financial implications, level of compliance check expected)
- authority to act on behalf of the employer to avoid a contractual breach by the employer (yes/no) and
- stated authority should be provided to all parties involved in the project in order that there is no ambiguity.

As employer's agent, any action taken on behalf of the employer must be to the employer's benefit, and must not make the employer's position worse without direct approval, but recognising the need to remain impartial in respect of certification and payments. Therefore, it is possible to assume that the employer's agent, while acting within the appointment brief can act with the full authority of the employer where no specific statement to the contrary applies.

While approval limits may be set on specific activities such as the appointment of a professional team, the employer's agent may therefore be empowered to issue appointment letters on behalf of the employer, or place orders for work which the employer may be paying directly.

### 3.3 Appointment

As already stated, the employer's agent can be appointed at any point prior to the execution of the contract. If a design team is selected and appointed by the employer before the contractor is appointed, and if it is provided as such within the employer's agent's appointment, they

should report through and act on instruction from the employer's agent, as if the agent was the employer.

There are three points during the pre-construction phase when the employer's agent may be appointed:

### Concept/design stage

This is not strictly the stage at which an employer's agent is expected to be appointed, it is more often the role of quantity surveyors, but if it is the case, it may require the employer's agent to be involved in the design process and various decisions related to it. The employer's agent would be appointed in advance of the design team in most instances, and he or she will assist the employer in the selection and appointment of the design team, the principal designer and the principal contractor.

### Tender stage

The employer's agent may be appointed at tender stage when the employer may have developed the design, or at least the requirements, and wishes the agent to manage the tender process and following appointment of the contractor into the construction phase, though often a quantity surveyor is appointed to support the employer and the employer's agent. The employer's agent would provide assistance in selection of the contractor and continue with the contract role of the employer's agent for the remainder of the contract.

### Contract stage

In some instances, the employer will progress the design, or at least the requirements, and appoint a contractor, but require an employer's agent to undertake the contract role of the employer's agent for the remainder of the contract and in accordance with the JCT Design and Build Contract.

The procurement process itself should follow the RICS guidance note *Tendering strategies*, 1st edition and advice on methodologies and routes should follow those practices and procedures referred to.

Note: As stated in the introduction to this guidance note, Levels 1 and 2 only consider the employer's agent's role strictly within the JCT Design and Build Contract, i.e. at post-contract stage.

Within Level 3 there is reference to other 'non-core' pre-contract activities such as tendering, selection of contractors, etc.

## 3.4 Differences between contract administrator, project manager and employer's agent

It is important to understand the differences that create the legal definition of the role. It is also true that it is not the contractual title of the role that defines the position but the relationship between the employer, the employer's agent and the contractor as defined within the employer's agent's appointment. It may be the case that even under contract

administration roles or project management roles the relationship at times may be that of agent.

### Contract administrator

This is a party who is specifically identified within the contract and is solely responsible for administering the contract for the employer. It is an impartial role and only exists at the point the contract is entered into, i.e. when a contract exists. See the RICS guidance note *Contract administration*, 1st edition.

### Project manager

This is again a party who is specifically identified within the contract and manages a team to develop and deliver a project for an employer, often from the project inception stage, making decisions on behalf of the employer and giving instructions to the contractor. The project manager provides information, controls and manages communications from the team to the employer so that the employer can act as required. The project manager is impartial in respect of the contract. If one considers the role of the project manager for an NEC contract he or she is actively managing the contract on behalf of the employer, dealing with early warnings, acceptance/non-acceptance of design, subcontractors, programmes, and also managing compensation events, etc.

### Employer's agent

This is a party who is identified within the contract and who acts on behalf of the employer in all matters, effectively as if the employer's agent was the employer. In carrying out its certification and decision-making functions under the contract, however, the employer's agent should act impartially. The employer's agent's brief will establish the levels and extent of those authorities and the objectives and outcomes of the appointment.

## 3.5 Design

Within the JCT Design and Build Contract, the fundamental obligations on the part of the contractor are:

- to carry out and complete the works, including the design
- in compliance with the contract documents, the construction phase plan and the statutory requirements and
- where applicable, using materials and workmanship of the quality and standards therein specified.

Post-contract, the design team is the responsibility of the contractor and is either selected by the contractor, often providing advice and support during the tender stage, or novated to the contractor upon his or her appointment or sometime soon after. Once novated, the design team will become the sole responsibility of the contractor to manage. Occasionally, particularly for a large or complex project, the employer may also retain a 'shadow' design team, for example, an architect, engineer or other discipline to provide support to him or her throughout the project.

Note that it is not the responsibility of the employer's agent to tell the contractor what to design or how to design it, but he or she has to check that the contractor complies with his or her contractual obligations.

### 3.6 Construction

Once the Design and Build Contract is in place, any employer authority over the contractor may only come through the employer's agent. In some circumstances the employer may wish for other parties, for example, quantity surveyors to be able to have contractual powers. In these instances they will normally be appointed to act either directly on behalf of the employer, in which case the contract would have to be amended to provide for that, or through the employer's agent under the contract. Note that there can only be one employer's agent under the contract.

Under the contract, the contractor is responsible for management and control of the design team. The employer's agent could possibly be an architect by profession, but it is critical to state that he or she is not acting in that capacity under the contract. Nor should the employer's agent attempt to exercise his or her expertise as a designer in that respect and must not interfere with the contractor's responsibilities under the contract.

### 3.7 Insurance

The employer's agent must check that the relevant insurances to be provided by the contractor are in place in terms of coverage, indemnity limits and timescales in accordance with the contract.

As insurance is a specialist element of construction contracts, the role of the employer's agent is to check, when assessing the tenders and recommending the appointment of the contractor, that the contractor is able to provide the required policies, certificates and premium receipts for inspection by the employer and his or her insurance advisors.

Briefly, the JCT Design and Build Contract provides for the following insurances to be provided by the parties:

- **Employer's liability:** employers, in this case the contractor, have a statutory obligation to provide insurance cover for their employees in the event of death, injury or damage caused during the course of their employment.
- **Public liability:** this is to cover the insured, again in this case the contractor, against any death, injury or damage claims from members of the public, other than their own employees.
- **Insurance of the contract works:** this covers loss or damage to the work itself and any unfixed materials on-site, and may be provided by the contractor or the employer, dependent on the option chosen (option A, B or C) under the contract.
- **Professional indemnity (PI) insurance:** the contractor may be required to take out professional indemnity (PI) insurance on an amount not less than that stated in the contract particulars. Note that this is

a requirement introduced within the JCT Design and Build Contract 2005.

The employer's agent must also check that, for example, collateral warranties and product guarantees are properly executed as required. As stated in section 3.18.1, these may be a pre-condition to a practical completion statement being issued at the end of the project.

### 3.8 Project control documents

Unlike other projects, design and build does in fact have two management structures:

- employer and contractor and
- contractor and design team.

These management process documents are commonplace. PRINCE2, as an example of a project management system, refers to project initiation documents (PID) and RICS and CIOB refer to project execution plans (PEP) and other documents use similar products. Any of these can be used. Design and build does benefit from the use of similar documents. However, it is important that unlike a PID/PEP a document is required to identify to the employer and the team how the project is to be controlled and how the compliance of the contractor's works has joined up to their obligations under the contract.

The project control documents, therefore, should identify:

- key parties
- roles and responsibilities
- project/contract details
- communication process
- meeting schedule
- request for information processes
- change/variation process
- payment process
- samples required
- quality process and
- standard documents.

Note that there are no approval processes included, the employer's agent is not responsible for and not required to approve drawings or design development. In order that the contractor is unhindered in the delivery of the project, the agent should not include processes that are specifically within the realm of the contractor's management.

The contractor is obliged to notify the employer and/or the employer's agent of any potential or actual change to the contract. It is therefore incumbent on the contractor to make all reasonable efforts that his or her design and production teams are fully aware of the term 'change' and its implication.

Confusion is common from all parties to what constitutes change, it is critical to provide clarity and any avoidance of doubt for each project, how that is being interpreted and the change control process required.

## 3.9 Meetings

### 3.9.1 Progress meetings

Progress meetings are necessary to allow the contractor to report to the employer's agent, who in turn reports to the employer on the project progress. Attendance of any specialists or interested parties should be by the agreement of the employer's agent. It is critical that the employer's agent verifies that the progress, and any other matters reported by the contractor are true and accurate statements, the employer's agent could be held liable to the employer if he or she passed the reports to the employer without checking them.

### 3.9.2 Progress

The contractor is obliged to complete on or before the completion date (or sectional completion date).

The contractor is required to proceed 'regularly and diligently' with the completion of the works or with particular sections of the works, but this phrase is not defined. Various sources, including the courts have sought to define the phrase, so there is a significant level of ambiguity, but the words should be construed together and mean the contractor must carry out the work in a way which will achieve their contractual obligations.

To do this it will be necessary to plan the work, lead and manage the workforce, provide sufficient materials of the proper sort, and to employ competent tradespeople so the works are carried out to contractual standards and to time.

It is critical that the employer's agent monitors progress and identifies if lack of progress by the contractor could put the completion date in jeopardy. The circumstances would need to be extreme before a party could be sure that the conditions had been breached, but breach of the obligation to proceed regularly and diligently is a ground for termination by the employer. So, an employer's agent could be held liable by the employer if he or she did not advise the employer of his or her rights and responsibilities in this respect in a timely manner.

### 3.9.3 Employer meetings

It is important that the employer's agent has regular meetings with the employer so as to be afforded the opportunity to report against the contract deliverables, discuss issues and take instructions. The employer's agent and the employer have a confidential relationship and therefore these meetings should also reflect that.

The employer's agent should record the meetings and a summary of discussions, outcomes and actions. The minutes of this meeting should be issued confidentially to the employer, and referenced within any project status reports.

## 3.10 Project status reports

Project status reports are a confidential document between the employer's agent and the employer, and serve two purposes. Firstly, they provide a regular report to the

employer and show progress both against programme and cost. Secondly, the report provides a record of communication points between the employer and the employer's agent. This is a key tool for the employer's agent as often verbal and email communication becomes lost or forgotten over time, this report gives both parties the opportunity to check and confirm their actions and statements.

It is important that each report follows on from the previous reports and cover the following points:

- contract progress
- financial position
- employer's agent's statement on the project
- instructions issued
- project requests for information
- project responses to requests
- requested instruction
- employer's agent's queries
- employer's responses and
- employer's agent's fiduciary actions.

Trackers can be used for many of these points and also collate start and close dates, which will be useful for demonstrating effective communication should a challenge be raised by the contractor during the contract.

It is critical that in preparing project status reports, particularly regarding progress, that the employer's agent carries out his or her own analysis and challenges the contractor, rather than merely repeating what the contractor is reporting. For example, if the contractor is late but reports that he or she is not, then the employer's agent may be liable to the employer if he or she does not recognise and inform the employer of the true progress.

## 3.11 Issuing instructions

The contractor must comply with instructions properly issued by the employer (or alternatively the employer's agent if he or she has that authority) and for which he or she is empowered by the conditions to give under the contract. The contractor must comply within seven days or others may be employed at the contractor's expense. The contractor has no right to refuse to comply with an instruction until a price is agreed. The contract already provides a mechanism for valuation, which is usually the issue in contention, rather than the instruction itself.

All instructions issued by the employer (or the employer's agent) must be in writing. There are several interpretations of what constitutes a written instruction, for example, is an emailed instruction 'in writing'? For the employer's agent, the pro-forma of an authorised written instruction should be included in the project control document to avoid arguments at a later date.

If the employer issues an instruction that is not in writing, it shall be of no immediate effect, but the contractor shall confirm it in writing within seven days and if not

dissented from in writing within seven days it is deemed an instruction.

The instruction document must make clear reference to the contract and the date on which it was executed, the parties, i.e. from the employer to the contractor, including their correct legal addresses, reference to the site and the date issued. The instruction must also refer to the contract clause it has been issued under, a change, extension of time, change due to statutory authority or rejection/acceptance of non-compliant work all require different clause references. The instruction should then provide a written statement covering the change and reference to any necessary inclusions. In the case of a pre-construction service agreement a similar document would be required.

It is good practice to avoid confusion by ensuring that instructions under the same clause are kept together and separate from other instructions under other clauses. The employer's agent should attempt when issuing the instructions to provide full details within that instruction so that the communication is clear and without ambiguity.

### 3.11.1 Instruction to open up work

Instructions may be issued requiring the contractor to open up for inspection any covered-up work.

The cost of the opening up is added to the contract sum unless the employer's requirements/contractor's proposals provided for it, or if the opening up showed the work to be defective.

## 3.12 Quality inspections

Quality inspections are important to establish the contractor's compliance with their contractual obligations. The employer's agent should be carrying out regular inspections of the work as much of the construction project is covered up by the finishes and on issuing the practical completion statement the employer's agent is confirming that the contractor has complied with the contract.

In some cases, the employer may appoint a separate and specialist consultant to carry out inspections on his or her behalf.

A major challenge that the employer's agent has in a Design and Build Contract is establishing that what the contractor has designed and built is in accordance with the employer's requirements. It is not as straightforward as checking a drawing or a specification to determine if the work is correct, especially where there is any fit-for-purpose requirement. There is no true objective test to prove compliance.

In many cases, particularly with a complex project, for example, with a high level of mechanical and electrical installations designed and constructed by the contractor, work would probably be performance specified so compliance is extremely difficult to judge. The function of certifying compliance to quality standards should only be performed by an employer's agent who has the necessary skills and experience. An employer's agent, for example from a quantity surveying background, would probably not

be qualified to carry out quality inspections for this type of work, and it may also invalidate his or her professional indemnity (PI) insurance, so the employer may, as stated above, have to consider employing a separate specialist, or a sub-consultant to the employer's agent, for example, a mechanical and electrical consultant to carry out inspections and advise on quality, defects, etc.

In some cases, the designers who were originally appointed by the employer, but who have since been novated to the contractor have been called on to carry out quality inspections. However, while the designer may well be considered by the employer and the contractor to be the best party to carry out these inspections, caution must be exercised with this approach as there will be a conflict of interest if the designer is required to carry out inspections for the employer, and as the designer is now employed by the contractor, there may be a vested interest for the designer to act in his or her favour. In addition, and compounded by this approach, there could be an issue with errors in the novated design itself which can create problems and liabilities post novation, in addition to the vested interest aspect. The contract and the novation agreement will normally make the contractor liable for any defects in the design that he or she has 'inherited' from the employer.

Before entering into the contract, the documentation should refer to any standards or examples of quality that are expected by the employer over and above what would be considered 'industry norms'. Any additional samples or mock-ups may also be used to establish acceptable quality levels. It is important that the quality level of the output project is made clear in the documents at the point of tender so that the contractor can include in the programme for the cost and impact of those expectations.

The contract does not establish specific requirements to the level of quality expected other than those specified within the documented employer's requirements, the implementation and interpretation of these being solely at the discretion of the employer's agent or employer. There is also no fixed contractual period for the inspection period to take place in advance of the practical completion inspection.

The contractor may, therefore, not wish to provide the project for quality inspection/snagging until the date for practical completion (the contractor is stating by offering the building that they have complied with their contractual obligations with the exception of any minor works which would not affect practical completion). However, if the employer's agent cannot inspect all of the works as required by the contract, then they also cannot issue the practical completion statement.

The employer's agent could not, therefore, make the employer liable for any cost to the contractor in the delay to completion by the completion date due to inadequate provision of time by the contractor, and the contractor would not be able to argue that the employer's agent was unfairly withholding the notice, as the employer's agent would be in breach of contract if they signed it without a full inspection.

### 3.13 Patent and latent defects

Under the contract a defect is any work not compliant with the contract documents.

If any work, materials or goods are not in accordance with the contract the employer's agent has three possible courses of action:

- (i) issue instructions in regard to the removal from the site of such work, materials or goods
- (ii) after consultation with the contractor, issue change instructions as are reasonably necessary to accept the defect, with no addition to the contract sum and no extension of time and/or
- (iii) having due regard to the Code of Practice in Schedule 4 in the contract, issue such instructions as are reasonable to open-up for inspection or to test to establish to his or her reasonable satisfaction the likelihood of any further non-compliance, with no addition to the contract price whatever the results of the opening-up.

Note that the notice of completion of making good is not conclusive in that if it states that there are no defects it does not prevent the employer's agent from exercising the employer's rights should a defect arise later or the employer's agent did not find or notify it.

The employer's agent will only list what are usually defined as patent defects, i.e. those that are observable from reasonable inspection at the time, examples being a defective concrete finish or an incorrect paint colour, and will not include what are usually defined as latent defects, which may be hidden from reasonable inspection and may come to light at a much later date, examples being some structural defects.

The contractor's and others' liability for correction of latent defects and other costs associated with them will depend on the applicable law, and liability is likely to remain despite the issue of the notice of completion of making good.

Latent defects, i.e. those that are not observable from reasonable inspection at the time, for example, structural defects, are likely to arise many years later, after the appointment of the employer's agent's appointment has ended. The employer's agent may therefore be called on to provide information pertaining to any claim against the contractor relating to a latent defect after the employer's agent's appointment has ended.

#### 3.13.1 Instructions regarding defects

Any instruction should include sufficient information to allow the change to be accepted, any further consequential changes to the employer's requirements must also be specifically included within the instruction so that no ambiguities remain. Any remaining items not changed will still stand as a requirement of the employer.

#### 3.13.2 Removal of defective work

The employer's agent can insist that the contractor removes the defective works and replaces it in accordance

with the employer's requirements. Any works necessary to return the works to a compliant state will be at the cost of the contractor.

### 3.14 Changes

The employer (or the employer's agent) has power only to vary the work as set out expressly within the contract, nothing else will constitute a 'change' under the contract.

The premise behind a change, under any contract, is that obligations on which each party originally entered the contract are changed.

The Design and Build Contract does not use the term 'variations' but there is a standard definition of the term 'change', which is a change in the employer's requirements which makes necessary the alteration or modification of the design, quality or quantity of the works or the imposition, addition, alteration or omission by the employer of any obligations or restrictions in respect of access to the site, limitations of working specifications or working hours, or execution or completion of any works in any specific order.

Note that the contractor developing his or her design in order to construct the works or to meet statutory requirements is not a 'change'.

The contractor is to proceed with the change and express valuation rules are included.

#### 3.14.1 Adjustments of the contract sum

The items to be included in the adjusted contract sum (and thus for which adjustment may be made) are set out in the contract.

Refer to the RICS guidance notes on *Cost reporting*, 1st edition and *Interim valuations and payments*, 1st edition, which set out the matters to be considered in adjusting the contract sum.

### 3.15 Payment

The contractor is required to make detailed applications for interim payment dependent on which alternative applies:

- **Alternative A (stage payments):** Applications are made on completion of each stage as set out in the contract particulars, and also at the later date of the expiry of the rectification period or the issue of the notice of completion of making good.
- **Alternative B (periodic payments):** Applications are made on the dates provided in the contract particulars and also at the later date of the expiry of the rectification period or the issue of the notice of completion of making good.

Not later than five days after the due date (the date when payments under the contract become due), the employer's agent issues a 'payment notice' to the contractor. The employer is required to make payment within 14 days (or such other timescale as amended within the contract) of the due date. If the employer's agent does not agree with the contractor's application for interim payment, he or she

must inform the contractor in writing via the payment notice within five days of the due date.

The contract provides for the relevant time scales (originated within the *Housing Grants, Construction and Regeneration Act 1996* and as amended by the *Local Democracy, Economic Development and Construction Act 2009*) for any withholding or deduction of monies from the contractor, for example the employer exercising his or her right to withhold liquidated damages through a pay less notice issued by the employer.

Note that if the employer does not issue a 'pay less notice' no later than five days before the final date for payment then it is ineffective and the amount due to the contractor must be paid.

The remaining sentences of this clause (which again broadly arise from the Act) set out the terms of the obligation on the employer to pay simple interest on amounts unpaid for the period during which they remain unpaid.

If the employer fails properly to pay the amount, or any part, due to the contractor under the conditions by the final date for its payment the employer shall pay to the contractor, in addition to the amount not properly paid, simple interest based on the interest rate within the contract particulars.

### 3.15.1 Right of suspension

This clause is included so that the contract complies with the *Housing Grants, Construction and Regeneration Act 1996*, supplemented by the *Local Democracy, Economic Development and Construction Act 2009*. It should be noted that the right of suspension extends to all or any of the contractor's obligations under his or her contract with the employer and not just the obligation to carry out and complete the works. It will therefore extend, for example, to obligations under the insurance and indemnity provisions.

A relevant event is also provided if the contractor suspends all or part of the works.

### 3.15.2 Materials off-site

If the employer is prepared to pay for any of the materials or goods or pre-fabricated items that are needed for inclusion in the works, before their delivery to or adjacent to the works, they must be listed items in the contract.

The contractor at tender stage can therefore take into account in submitting his or her price for the works that for the materials and goods in the list (the listed items) he or she will, subject to fulfilment of the conditions set out in the clause, be paid for such listed items earlier than would otherwise be the case.

The contract specifies the pre-conditions to payment, including reasonable proof that the property has vested in the contractor, the listed items are insured against loss or damage, and other requirements in accordance with the contract. The employer's agent must rigorously check these pre-conditions are being complied with before

issuing the payment notice, which includes materials off-site.

Timings in response to payment applications will be part of the contract. The agent should, however, establish a set of dates on which valuations and payments can be carried out to allow all parties to be available to review and sign off any application in time to meet the payment date. The employer's agent is to remain impartial with regards to the aspect of valuation and payment of works completed.

### 3.15.3 Pay less notices

Historically, withholding notices needed to be issued by the employer and had limitations on what could be withheld. Since the introduction of the *Local Democracy, Economic Development and Construction Act 2009*, it is now the power of the employer (or the employer's agent) to issue a pay less notice reducing the amount to be paid against the payment notice.

The timing for issue of this notice will be covered in the contract. However, it is important to make clear the reason for and the value of any reduction in the payment. The employer (or the employer's agent) may only make decisions on reductions in payments that are impartial and within the authority of the contract; they should not be swayed or influenced by others.

The notices should state the reasons for the deduction and the calculation used to arrive at the specified sum.

## 3.16 Claims

See the related RICS guidance notes:

- *Acceleration*, 1st edition and
- *Extensions of time*, 1st edition.

This section provides an overview of where design and build may vary from more traditional contracts.

### 3.16.1 Delay and adjustment of completion date

The JCT Design and Build Contract provides for the completion date to be adjusted due to the occurrence of relevant events listed in the contract.

The requirement is that 'if and whenever it becomes reasonably apparent that the progress of the Works or any Section is or is likely to be delayed' the contractor gives notice to the employer, which normally means the employer's agent. The contractor should also identify the appropriate relevant event from the list and give an estimate of the delay.

It is critical that the contractor gives notice at the appropriate time and that the employer's agent responds as required by the contract and makes an award if he or she considers it is due.

### 3.16.2 Loss and expense

The JCT Design and Build Contract provides for the contractor to recover direct loss and expense in respect of



any of the listed relevant matters, for which the contractor would not be reimbursed by a payment under any other provision. This may be in the form of, for example, prolongation costs or the cost of disruption.

The requirement is that the contractor makes an application to the employer (or employer's agent) and the employer ascertains to loss and expense.

It is critical that the contractor gives notice at the appropriate time and that the employer's agent responds as required by the contract and makes an award if he or she considers it is due.

### 3.16.3 Liquidated damages

As with all contracts liquidated damages are calculated and set before the contract is executed. The amount of the liquidated damages should be a reasonable estimate of the employer's likely losses should the contractor fail to complete the works by the completion date. If they are in excess of that, they may be considered as a penalty and non-enforceable.

If the contractor fails to complete the works by the completion date, the employer's agent will issue a non-completion notice to that effect. The employer's agent is therefore under a duty to issue the notice at the appropriate time.

If the non-completion notice is issued, then the contractor becomes liable for liquidated damages if the employer or the employer's agent has also notified the contractor in writing to that effect. The issue of that written notice, which should be by the employer, not the employer's agent, as it is the employer who makes the deduction.

The employer's written notice is a condition precedent (in addition to the non-completion notice) to the deduction of liquidated damages and in that case must be issued prior to the deduction. The employer is under no obligation to issue the notice if he or she does not wish to deduct the liquidated damages.

The process for deduction of liquidated damages is entitlement for these costs to be deducted from the contractor's payment is triggered when a non-completion notice is issued by the employer's agent, the losses being deducted for each week, or part thereof (if stated as such within the contract particulars) between the non-completion notice and the issue of the practical completion statement.

Note that if the monies are to be deducted then they must be withheld from the monies due not from the payment notice issued by the employer's agent. It is inappropriate to reduce the value of the payment notice monies due to take into account the amount of liquidated damages owed to the employer.

## 3.17 Termination

The parties have a common law right to bring the contract to an end in certain circumstances, but most standard forms give the parties additional and express rights to terminate on specified events happening. Note that in

some instances the giving of notice is required, while in others termination is automatic (e.g. bankruptcy).

### 3.17.1 Termination by the employer

The JCT Design and Build Contract lists the reasons for which the employment of the contractor under the contract may be ended, and the ensuing consequences.

The reasons are, the contractor:

- without reasonable cause wholly or substantially suspends the carrying out of the works
- fails to process regularly and diligently with the performance of his or her obligations
- refuses or neglects to comply with a notice or instruction from the employer (or the employer's agent) to remove any work, materials or goods not in accordance with the contract
- fails to comply with the consent to subcontracting or assignment provisions within the contract or
- fails to comply with the contractual requirements in respect of the CDM Regulations.

If the contractor is said to be in default in one or more of these ways the procedure is for the employer to give notice specifying each default.

If the contractor continues with the specified default for 14 days after receipt of the notice the employer may, on or within 21 days of the expiry of that period by a further notice, terminate the employment of the contractor under the contract. Note that it is the employer who terminates, not the employer's agent.

There is also provision for termination on bankruptcy, liquidation or other events that signify insolvency. In respect of the latter event, however, the employer has the option to reinstate or let the contractor continue.

Following termination:

- no further sums shall become due to the contractor other than strictly in accordance with the termination provisions
- the contractor is obliged to clear the site of temporary buildings, plant, tools, equipment, goods and materials
- the contractor provides the contractor's design documents to the employer
- the contractor is to prepare and submit the (final) account.

Further guidance can be found in the RICS guidance note *Termination of contract, corporate recovery and insolvency*, 1st edition.

### 3.17.2 Termination by contractor

If the employer is in default of any of the following, the contractor is to give notice(s) to the employer:

- does not pay by the final date of payment the amount due to the contractor and/or any VAT properly chargeable on that amount

- fails to comply with the requirement to get the consent of the contractor to assign the contract or any rights thereunder or
- fails to comply with the contractual requirements in respect of the CDM Regulations.

If the employer is said to be in default in one or more of these ways, the procedure is for the contractor to give notice specifying each default.

If the employer continues with the specified default for 14 days after receipt of the notice the contractor may, on or within 21 days of the expiry of that period by a further notice, terminate his or her employment under the contract.

Following termination:

- the contractor is obliged to clear the site of temporary buildings, plant, tools, equipment, goods and materials
- the contractor provides the contractor's design documents to the employer
- the contractor is to prepare and submit the (final) account
- the employer shall pay the contractor the amount properly due, without reduction for retention.

### 3.17.3 Termination by either party

If, prior to practical completion, the whole of the uncompleted works is suspended for the period inserted in the contract particulars in respect of:

- force majeure
- employer's instructions issued as a result of the negligence or default of any statutory undertaker
- loss or damage to the works occasioned by any of the specified perils
- civil commotion or the use or threat of terrorism and/or the activities of the relevant authorities in dealing with such event or threat
- the exercise by the UK government of any statutory power that directly affects the execution of the works, or
- delay in receipt of any permission or approval for the purposes of development control requirements necessary for the works to be carried out or proceed, which delay the contractor who has taken all practicable steps to avoid or reduce.

On expiry of the period of suspension stated in the contract particulars, a default notice may be issued within seven days of the date of expiry. If the suspension continues for seven days after receipt of the notice termination of employment will occur.

There are procedures for clearing the site, releasing retention and preparing the accounts.

## 3.18 Practical completion

Establishing whether the works are practically complete is one of the most critical duties that the employer's agent carries out.

Practical completion requires more than just the physical completion of the project. It may include the submission of 'as built' drawings, all the information for the preparation of the health and safety file concerning the maintenance and operation of the works, in addition to other contractual and statutory documentation, operation and maintenance manuals, software and associated licences, training of staff, and also for all collateral warranties, product guarantees, etc. to be executed, all as a pre-condition to practical completion taking place and the practical completion statement being issued.

The employer's agent must inspect all of the works in order to issue the practical completion statement. It is important that the contractor provides an inspection process and time that will allow the employer's agent to carry out these inspections.

The employer's agent is unable to sign the notice unless only minimal defects remain, which would not prevent the employer from safely and effectively using the building. This is also true of health and safety/operation and maintenance manuals, these too should be complete lacking only the final copies of test certificates which may have been carried out on the day of handover.

Once the employer's agent has inspected the works, verified any documents required in order that the project can be operated by the employer safely and in the manner for which it has been intended. The employer's agent is satisfied that the contractor has completed the works in accordance with his or her obligations; the employer's agent may sign and issue the practical completion statement.

If the employer's agent has decided that the contractor has not achieved the necessary criteria to allow the employer's agent to issue a practical completion statement, the employer's agent must issue a non-completion notice.

Where the project is not complete, the employer's agent may wish to discuss with the employer and contractor the option of taking beneficial access of the building. This should be done using the partial possession provisions within the contract (see 3.18.1).

Refer to the RICS guidance note *Defining completion of construction works*, 1st edition for further information.

### 3.18.1 Sectional completion v partial possession

#### Sectional completion

Generally, the employer will insert one date for completion into the contract particulars, and if the contractor fails to complete by that date and he or she has not been awarded any adjustment of completion date, then the employer will issue a non-completion notice and the contractor will be liable for payment of liquidated damages. (Note that the employer **cannot** deduct liquidated damages for the delayed part **unless** it had previously been identified in the contract particulars.)

On some projects, the employer may wish the work to be completed in pre-defined sections, he or she will then

identify **separate** dates for completion, this is called sectional completion and liquidated damages will apply to each section not completed on time.

On the completion of each section, a practical completion statement will be issued, the rectification period will start, retention will be released and the contractor's obligation to insure will cease for that section.

### Partial possession

The employer can, at any time before practical completion, take possession of the works (or a part) subject to the consent of the contractor. The contractor issues to the employer (or the employer's agent) a written statement identifying the part taken into possession and the date when the employer took possession (called the relevant part and the relevant date).

Practical completion of the relevant part will be assumed as having taken place, the rectification period commences and half of the retention is released. The contractor's obligation to insure the relevant part will also cease from that time.

In addition, the amount of liquidated damages applicable in the event of a later delay to the remainder of the works will be reduced to allow for the completed part.

With sectional completion and partial possession, the employer's agent must check that the works are complete in accordance with the contract.

#### 3.18.2 Early use

There is also provision within the contract for the employer, with the consent of the contractor to have early use of the site or the works for the purpose of storage or otherwise. Before the contractor gives consent, the employer or contractor must obtain confirmation from the insurers that such use or occupation will not prejudice the insurance.

### 3.19 End of defects

The end of the rectification period indicates the final completion of the project. It therefore follows that it should be the resolution of all outstanding defects including those that have arisen during the rectification period, it is important that the contractor only offers the project up as complete when it truly is. The employer's agent will be required to inspect the project again, but on this occasion may only issue the notice of completion of making good if all outstanding non-compliant works have been remedied and the contractor has completed the works fully in accordance with their obligations under the contract.

### 3.20 Final account

The contractor is required to submit a final account and final statement with full supporting detail within three months of practical completion. The final statement details the contract sum and the various adjustments and also the amounts previously paid by the employer.

The balance due is conclusive unless the employer disputes the amounts within one month of whichever is latest of:

- the end of the rectification period
- the date named in the notice of completion of making good or
- the date of submission of the final account and final statement to the employer.

If the contractor does not submit the final account and final statement within the three-month period, the employer may give notice to the contractor that if they are not submitted within two months of the notice, the employer may prepare it.

Any agreed final payment will be on the basis of being both the full and final payment of works for the project, and with the exception of latent defects or legal claims, there will be no ability of either party to approach the other for additional monies.

Refer to the RICS guidance note *Final account procedures*, 1st edition for more information.

## 3.21 Settlement of disputes

Disputes should be avoided or reduced but where they occur they should, whenever possible, be resolved at the earliest available opportunity and it is critical that the employer's agent provides full support to the employer should a dispute arise.

Note that, despite the employer's agent's role and responsibilities, the dispute is between the two contracting parties, the employer and the contractor, but the employer's agent is required to assist the employer in fulfilling the employer's responsibilities under the contract. The employer's agent will need to collate all the relevant correspondence and records on behalf of the employer and maybe participate in the legal process.

Resolution of disputes is an additional duty of the employer's agent and therefore if he or she is required to do so, it should be subject to additional fees.

#### 3.21.1 Mediation

The parties may by agreement seek to resolve any dispute by mediation (this is a provision not previously included prior to the JCT Design and Build Contract 2005).

#### 3.21.2 Adjudication

The Scheme for Construction Contracts applies with the adjudicator named in the contract particulars.

## 4 Practical considerations (Level 3: doing/ advising)

### 4.1 Law of agency

When considering the role and responsibilities of the employer's agent, consider in addition to the provisions of the contract, the law of agency. This law has a long-standing legal acceptance, which has implications in carrying out the service of an employer's agent that must be addressed:

- **Confidentiality:** similar to a solicitor or a doctor, the employer's agent must hold any information received from the employer as confidential, and may only divulge this information with the express permission of the employer.
- **Duty of care:** unlike a normal commission where the duty of care falls to the company first and the employer second, the role of employer's agent in effect is the same as a director of the employer. The employer's agent, therefore, has an obligation that may exceed or conflict with their employment duties. In summary, the employer's agent has a duty not to allow the employer to fail in their contractual obligations, not to cause damage or loss to the employer, and to act in the employer's best interests.

The law of agency means that an employer can pursue the employer's agent directly. While this route would provide no limitation on a legal judgement, the courts have been reluctant to exceed any agreed limitations stipulated for professional indemnity.

### 4.2 Competence, technical ability and experience

Any party or parties being appointed as an employer's agent should be able to demonstrate that they have the experience and technical ability to carry out the employer's brief.

### 4.3 Conflicts of interest

The employer's agent cannot act in any role where it could be seen that confidential information or communication between the employer's agent and the employer could be provided to the contractor. Larger organisations may be able to do work for both parties, but a strict 'conflict of interest management plan' must be put in place and a suitable written acceptance from both contracted parties be received. This is similar to the duty of confidentiality provided by solicitors to their clients.

See the RICS global professional statement *Conflicts of interest*, 1st edition.

### 4.4 Contractor's responsibility to the agent

The contractor must check that all information and works carried out under the contract are compliant with the contractor's obligations and employer's requirements, and that any requested changes identify all changes required to the employer's requirements and the contractor's proposals.

The contractor is obliged, therefore, to inform the employer's agent as soon as he or she becomes aware of any work that has been carried out in contradiction to the employer's requirements or contractor's proposals. This is also the case when issuing information, drawings or change requests to the employer's agent; the contractor must issue all information so as to be compliant with the employer's requirements and the contractor's proposals. When submitting a change request, the contractor must identify any and all elements of the employer's requirements and contractor's proposals which require change, any change submitted must remain compliant with the remaining unchanged employer's requirements and contractor's proposals.

The contractor should not act in a manner that would create a breach in the contract by either the employer or the employer's agent. All requests for change, information issue, inspections of work, requests for information etc. should be provided in sufficient time to act within the contract or programme timescale.

### 4.5 Employer's agent's responsibility to the contractor

The employer's agent is obligated not to hinder or obstruct the contractor in the execution of his or her contractual obligations.

The employer's agent is only responsible for checking or testing that the contractor has complied with the contractor's obligations, that is to complete the contract in accordance with the employer's requirements, contractor's proposals and any instructions. Therefore, any action must not be construed as managing the contractor's team, or interfering in the contractor's attempts to act diligently in carrying out the works.

The employer's agent has a duty to warn the contractor of any non-compliance observed as soon as it is noticed. The contractor, however, cannot imply any approval has been provided if the employer's agent passes no comment on a non-compliance known by the contractor, the contractor should notify the employer's agent of this non-compliance.

The employer's agent is only required to acknowledge that the contractor has complied with his or her obligations when issuing the practical completion statement.

While the employer's agent is bound to the employer in his or her actions, the employer's agent is required by the law to remain impartial with regard to the valuation of the works, processing of claims, and duties relating to certification.

The employer's agent should not act in a manner that would create a breach of the contract by the contractor.

## 4.6 Employer's agent's responsibility to the employer

The employer's agent is bound by the appointment to act as if he or she were one and the same as the employer. As a result, the employer's agent has the following obligations to the employer:

- Not to divulge any information of a confidential or private nature given by the employer where the employer has specifically requested.
- Warn the employer of any potential breaches in the contract, and endeavour to enable the employer to fulfil their contractual obligations in a timely fashion.
- Provide advice based on his or her knowledge and experience to assist the employer in making informed decisions (unless expressly stated, the employer has appointed a qualified construction professional).

## 4.7 Employer's responsibility to the employer's agent

The employer is required to make timely decisions and payments in compliance with the contract, and therefore should check that he or she has the means to do this.

The employer is required to provide the employer's agent with suitable authority and power as required to fulfil the role and responsibilities identified in the employer's agent's appointment.

It is important to note that the employer, in vesting the employer's agent the authority to act for him or her, must not impede or interfere with the work of the employer's agent once that authority is given.

The employer must provide the employer's agent with all information relevant to the project so as to allow the employer's agent the ability to offer good advice.

## 4.8 The timing of the appointment of the employer's agent

As stated previously, the design and build process does not define when the employer's agent should be introduced, but does leave it open for the employer's agent to be appointed at any point from project inception to appointment of contractor under the contract.

Many assume that the employer's agent role is solely linked to the contract and the employer follows a traditional process up to the point at which they feel confident to tender and enter into contract, at which point the employer's agent is appointed.

This is a sensible and logical conclusion for those employers who fully understand tendering and have a robust knowledge of the design and build process and the various issues, however, in practice, while the contract itself only deals with the construction phase it has become common for employers to appoint an employer's agent during the tender stage.

In many cases both the employer and the contractor may wish to engage in the design process at the earliest stages, possibly in an early contractor involvement and/or a two-stage tender arrangement, developing the design collaboratively to achieve the employer's requirements, which would at this point resemble an output specification.

Prior to appointment of the contractor, the services of an employer's agent can include:

- establishing reporting and recording procedures
- establishing procedure for convening, chairing, attendance, function, frequency and responsibility for recording of meetings and circulation of information
- liaise with the employer and employer's legal advisors on form of contract, performance bonds, parent company guarantees and collateral warranties and check that the contract documents are completed accordingly
- preparing a preliminary list of prospective tenderers
- preparing tender documentation in conjunction with the employer, the consultants, (e.g. quantity surveyor) and the employer's legal advisors
- in conjunction with the employer and the consultants, coordinating and monitoring the preparation of the employer's requirements, the form and content required for the contractor's proposals and the contract sum analysis and other tender documents
- arranging and attending tender interviews
- arranging delivery of tender documents to tenderers
- assessing tender submissions for compliance with the employer's requirements level of pricing and pricing policy
- advising on discrepancies found within the employer's requirements or the contractor's proposals
- advising on tenderers' programmes of work and method statements
- preparing a report on tenders with recommendation
- receiving final copies of the contractor's proposals and completed contract sum analysis for incorporation in contract documents
- in conjunction with the employer's legal advisors, preparing a form of contract and other documents for inclusion as contract documents, arranging for signatures of parties to the contract and

- requesting from the contractor the relevant insurance policy or policies and premium receipts and details of the level of any uninsured excess, for inspection by the employer and his or her insurance advisors.

In most projects the pre-construction works will fall into two likely scenarios:

- Firstly, that the employer is paying for a design team, and the contractor is being engaged to assist in material selection, buildability and specialist subcontractor involvement.
- Secondly, the contractor is managing the design team and the employer's agent is managing the delivery of the employer's requirements. In the first instance, the roles and responsibilities will follow a more traditional construction process. The employer's agent role can be defined in their appointment document and the introduction of a PID (project initiation document) or a PEP (project execution plan) will define all parties' roles and responsibilities.

The second can be dealt with in a similar manner to the first, or a pre-commencement services agreement can be entered into, which in effect extends the contract role to the pre-contract design development stage.

## 4.9 Procurement – single-stage tender process

Refer to the RICS guidance note *Tendering strategies*, 1st edition.

### 4.9.1 Design stage

Design stage follows on from establishing the employer's brief, which the employer may have already developed in conjunction with the employer's agent, or may develop with the designers before the appointment of the agent.

Once appointed, however, it will be the employer's agent's or quantity surveyor's role (dependent on their terms of appointment) to collate and compile a definitive set of documents that can be approved by the employer as the employer's requirements.

The employer's agent will be responsible for the implementation of the contract in accordance with the employer's requirements. It is, therefore, necessary that the design team provide all of the relevant information to the employer's agent so that the project can be delivered as required. The agent will be responsible for advising the employer on any necessary changes to the project, and the associated impacts.

Design teams may wish to discuss aspects of design and design changes with the employer, these meetings should be facilitated and recorded by the agent. Unlike the project management and contract administrator's role, the employer's agent may be asked by the employer to report and/or advise on cost, programme, suitability or other impacts that may occur.

The employer may have employed the agent as a construction professional, and therefore the level of

comment or response necessary will be related to the appointed agent.

The employer will be expecting that the agent provides suitable response for the employer to understand the agent's position or for the employer to make a decision. The employer's agent, however, must act in accordance with the employer's instruction to them.

The lead designer should establish a design programme and regular design team meetings should be arranged to capture design coordination.

In most instances the level of design for a single stage will need to be such that the employer can understand what is likely to be provided. The contractor must also have either sufficient time to complete a design proposal (when responding to an output specification) and price the project. The complexity and size of the scheme will therefore determine tender timescales.

### Drawings

All drawings should be coordinated between the design team members to prevent any ambiguities. Some elements will not be designed at the time of tender therefore the design ethos and any performance or specification criteria must be made clear both on the drawings and within the employer's requirements.

### Novation of designers

It is common for employers to appoint consultants to obtain planning permission, prepare feasibility proposals, and to prepare initial design proposals.

The contractor then tenders on the basis that the consultant's team will be novated to the successful contractor who will then be responsible for appointing the team under a new agreement.

It is critical that the employer's agent checks that the wording of all novation agreements is established and agreed with consultants before going out to tender, so that the contractor, the employer and the designers who are to be novated, are fully aware of the requirements, and in particular the contractor is able to fully allow in his or her price and programme for that novation.

### 4.9.2 Employer's requirements

The employer sets out his or her needs in whatever degree of detail is deemed appropriate within the 'employer's requirements'. This can be anything from a performance-related statement of objectives to a detailed and prescriptive statement of what the contractor is to provide. The contractor responds with the 'contractor's proposals', which set out the way he or she proposes to design and construct the works.

The first of the essential features of a Design and Build Contract is that the employer approaches a contractor with a set of requirements defining what the employer wants (employer's requirements). The contractor then responds to the employer's requirements within his or her tender, with

the contractor's proposals, which will include his or her proposals for design as well as construction.

The scale of design work required from the contractor depends on the extent to which the employer has already commissioned such work from others. The contractor's design input varies from one contract to another, ranging from the development of a schematic design provided by others into a workable final design for construction, to a full design process including proposals, sketch schemes and production information based on a schedule of requirements and/or performance criteria. There will usually be some negotiation between the employer and the contractor, with the aim being to settle on an agreed set of contractor's proposals. These proposals will include the contract price, as well as the way it has been calculated.

The relationships between the consultants can be of several types, for example, an architect may be employed (or other designer) to put together some initial proposals. These would form the basis of the employer's requirements, and the employer could subsequently assign or novate the architect's contract to the contractor.

Alternatively, the employer may approach directly a design and build contractor who employs in-house consultants. It is this inherent flexibility that is one of the strengths of design and build as a method of procurement. This flexibility happens not just between projects, but also within projects. For example, a commercial employer with a prestigious office building may have some detailed requirements, comprehensively designed by an architectural team, concerning the facade and the entrance lobby to the building. Once the employer's requirements and the contractor's proposals are consistent, the contract can be executed and the contractor can implement the work.

It is important to note that, under an unamended JCT Design and Build Contract, if the contractor's proposals are, at a later date, to fall short, or are in any way inconsistent with the employer's requirements then the contractor's proposals will prevail, as under the JCT Design and Build Contract, the employer is deemed to have satisfied him or herself (at the time of appointing the contractor) that the contractor's proposals meet with his or her requirements. In that case, if the employer still required something that the contractor's proposals do not provide for, then it may be deemed as a 'change'. However, the conditions are often amended to make the employers requirements take priority, which then aligns the contract to most other design and build contracts.

The contractor will be responsible for undertaking the design work in the contractor's proposals including the appointment of consultants if the contractor does not have the necessary skills in-house. As stated already, the employer may also choose to appoint consultants to monitor the various aspects of the work, essentially as a 'shadow' design team, but this is not always the case.

Some practitioners state that the disadvantage of design and build is where there is a conflict between aesthetic quality and ease of fabrication, the latter will take precedence. A further criticism has been that a design

and build contractor will put in the minimum design effort required to win the contract. These two criticisms suggest strongly that quality, particularly architectural quality, will suffer under this procurement process. However, this is not a valid criticism of the process itself, but rather the quality of employer's requirements and of some of the people who may exercise it.

As the employer's requirements will be the primary document of reference it is important that this document is as complete as possible at the point of tender.

It is the responsibility of the employer's agent to check that the employer's requirements typically cover the following:

- details of the site, its boundaries, and any site surveys or reports
- project description including any drawings/specifications already prepared
- purpose for which the building is to be used
- statements of functional requirements, e.g. kind and number of buildings, density and mix of accommodation, schematic layouts and/or drawings
- specific requirements as to finishes and any other elements
- bills of quantities (if supplemental provisions apply)
- requirements regarding submission of the contractor's drawings (if supplemental provisions apply)
- requirements regarding records the site manager is to keep (if supplemental provisions apply)
- requirements for 'as-built' drawings
- functions to be carried out by the employer's agent and any other members of the employer team
- confirmation of whether Alternative A (stage payments) or Alternative B (periodic payments) will be used
- details of any provisional sums
- statement of any planning restraints, e.g. restrictive covenants, and any permissions already granted
- access restrictions
- availability of public utilities
- form of contract and any amendments, and any legal documents
- method of presentation of the contractor's proposals
- various other information to be included in the contract, e.g. project control requirements and templates and
- any other matters likely to affect the preparation of the contractor's proposals.

#### 4.9.3 Contractor's proposals

In simple terms, the contractor's proposals should reflect and directly respond to the employer's requirements.

The employer's agent must check that the employer's requirements clearly, concisely and correctly interpret the employer's brief. If the employer's requirements are detailed, the contractor's proposals will be detailed, if

they are vague then the contractor's proposals will also be vague, so the employer may not get what he or she expected.

If the employer's requirements are prepared by the employer's agent and they do not correctly reflect what the employer requires, then the liability for any errors or omissions in that respect will fall on the employer's agent.

Once the employer's requirements and the contractor's proposals are consistent, the contract can be executed and the contractor can implement the work.

#### 4.9.4 Contract sum analysis

The price, and any change to the price, in JCT Design and Build contracts is governed by means of a contract sum analysis.

There are no traditional bills of quantities in this contract, the nature and function of a contract sum analysis being different to that of traditional bills of quantities, though in some cases an abridged form of a bill of quantities may be provided by the employer, for example with approximate, or even no quantities, its form not being prescribed by the contract.

In some cases, the contractor may be required to provide the bills of quantities that he or she used to price his or her tender, but again it must not be treated as traditional bills of quantities as this is a lump sum contract. Requiring the contractor to submit his or her bills of quantities could also assure the employer that the contractor's tender is based on the employer's requirements.

The key is that the contract sum analysis is used for:

- assessment of tenders
- calculating payments and
- pricing changes to the employer's requirements (the contract requires that the pricing of changes is consistent with the contract sum analysis).

It can be presented in any form appropriate to the circumstances of the project and may be a simple summary or a very comprehensive document, but it must be in sufficient detail so that the price can be understood and in a format that provides the employer with the cost detail/breakdown that they require for their own reporting purposes.

#### 4.9.5 Tender stage

The employer's agent may (dependent on the terms of the appointment) be responsible for establishing with the employer an approved list of tenderers. The employer's agent will then be responsible for collating all the tender information and issuing all invitations to tender.

Tender packs should include the following items:

- invitation to tender letter – stating the nature of the project, key point of contacts, tender return date, required documents for tender return, required documents for presentation if different from the return documents

- employer's requirements – employer's requirement document marked 'tender revision', and all identified drawings marked 'tender drawing'.
- draft contract sum analysis – with sufficient detail for the employer's agent to be satisfied that valuation and payment certifications can be done
- (note that the contract sum analysis should not include for quantities as this may render the contract re-measurable (it can be argued even if the quantities are the responsibility of the contractor that they are a tender qualification of what was included))
- tender return form
- tender return label and
- timescales/programme, qualitative deliverables.

Once issued, the employer's agent, subject to his or her appointment, or a quantity surveyor, will be the primary point of contact for the tenderers receiving all questions and issuing responses. The employer's agent should also issue all addendums, amendments and responses to queries as formal tender bulletins, keeping a log of issue dates and times. It will also be necessary to retain copies of these for inclusion in the final contract documentation.

The employer's agent should request a schedule of divergence from the contractor for any and all aspects of the employer's requirements, which would be changed by the contractor's proposals. This simplifies the approval and acceptance process prior to formalising the contract while removing any ambiguity over conflicts in information.

### 4.10 Procurement – two-stage tender process

Refer to the RICS guidance note *Tendering strategies*, 1st edition.

Two-stage tendering is commonplace in the construction industry, it allows to some extent the employer to benefit from the experience and expertise of the contractor in establishing buildability, and often the integration of specialist design.

There is no definitive procedure for two-stage tendering for design and build to adhere to as it can be introduced at any design stage. The employer's agent's role, however, is to facilitate the contractor and design team to produce the detailed design such that an agreed price can be reached, which provides the employer with the output required by the employer's requirements.

It is likely therefore that the design may only be partially complete at the time of tender. The tender process itself will therefore be similar to a single-stage tender but will be primarily to establish prelims, overheads and profits. The process will also establish proposed teams and experience for selection.

Once selected, the contractor will be expected to join the team in developing the design and price to a point at which all parties are willing to formalise the contract. Again, the nature of this position varies greatly.



The employer's agent, therefore, will take a managing role over the contractor and design team in establishing the final tender documentation. The employer's agent will play a role, alongside the designers, in providing guidance to the employer in selection of design options and suitability based on the information provided by the design team.

It is essential that all parties inform the employer's agent of any recommendations and designs that are not compliant with the employer's requirements, or request a change to be made in the requirements prior to the formal contract.

## 4.11 Entering into the contract

Any amendments to the contract should have been done prior to inviting tenders but the employer's agent should advise the employer to have his or her legal representative review and make any necessary amendments to the contract prior to execution. The employer's agent or the quantity surveyor will be responsible, however, for collating and recording all of the contract documents for inclusion, and also preparing two copies of the documents for use during the contract by each party.

Before starting on-site the employer's agent should convene a start-up meeting. This will allow for final clarification of key contract conditions, roles are in place and valid for the duration of the scheme, and responsibilities, expectations, programme performance, monthly meetings, site visits, and inspections that all collateral warranties have been completed where applicable, and copies of insurances provided.

The employer's agent should provide special attention to the authority passed to him or her by the employer and any timescales necessary to obtain responses to communications should the employer's agent not hold the requisite powers.

Once the contract is compiled, the employer's agent should issue both copies to the contractor of the complete document identifying all sections requiring signature, requesting the completed document is provided back to the employer's agent for checking. Once returned and checked the employer's agent should issue the document to the employer for execution, completing the process by providing each party with their original contract.

This document will form that basis on which any change or acceptance is based.

One fundamental point to note is that the contract assumes that the contractor will carry out the whole of the works him or herself; the contractor has no unilateral right to subcontract either the whole or part of the design or the construction.

However, the contract provides for the contractor with the employer's consent (normally given by the employer's agent) to do so. Notwithstanding that part of the works may be sublet, the contractor remains wholly responsible for carrying out and completing the whole of the works. Subcontracting does not change the contractor's obligations under the contract.

There are certain conditions attached to subcontracting regarding unfixed materials on-site, rights of access, prompt payment and collateral warranties where applicable.

# Appendix A: Further information

## Related RICS professional standards and guidance

*Acceleration*, 1st edition, RICS guidance note, UK (2011)

*Conflicts of interest*, 1st edition, RICS professional statement, global (2017)

*Cost reporting*, 1st edition, RICS guidance note, UK (2015)

*Defining completion of construction works*, 1st edition, RICS guidance note, UK (2011)

*Extensions of time*, 1st edition, RICS guidance note, UK (2015)

*Final account procedures*, 1st edition, RICS guidance note, UK (2015)

*Interim valuations and payments*, 1st edition, RICS guidance note, UK (2015)

*Tendering strategies*, 1st edition, RICS guidance note, UK (2014)

*Termination of contract, corporate recovery and insolvency*, 1st edition, RICS guidance note, UK (2013)

**Note:** Readers are advised to refer to the latest edition of any publication mentioned in this guidance note.



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