



Developing an Effective Procurement Strategy

Tim Richards
+
Campbell Wilson

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Holiday Inn, Rugby



Introduction

1. Construction procurement
2. Impact of sustainable procurement on construction contracts
3. Carillion: lessons learned and its impact on the procurement process



Hewitsons LLP

1. Multi-disciplinary legal practice
2. Offices in Northampton, Milton Keynes, Cambridge and London
3. 45 partners, 145 lawyers and legal managers (258 staff in total).
4. c.£18m turnover
5. Construction Team of 5 undertaking exclusively contentious and non-contentious construction work.



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Construction Procurement



Construction Procurement

1. Methods of procurement
2. Contract documents
3. Brexit – what effect on procurement?
4. Collaborative contracts and partnering

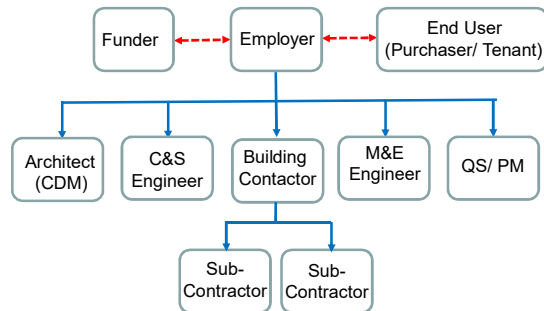


Methods of procurement

- Traditional
- Design and Build
- Other
 - Construction Management
 - Management Contracting
 - Bespoke and Hybrid Forms

Methods of procurement (1)

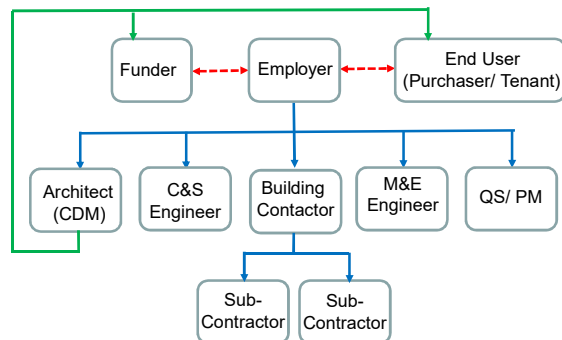
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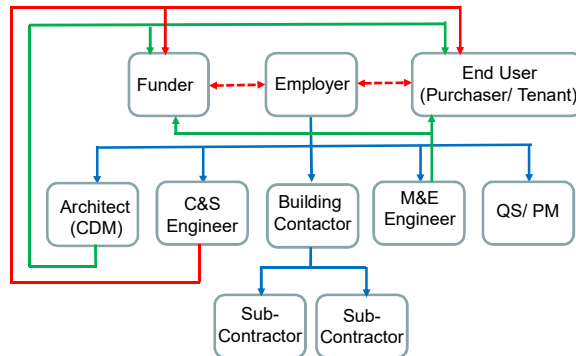
Collateral
Warranties/ Third
Party Rights



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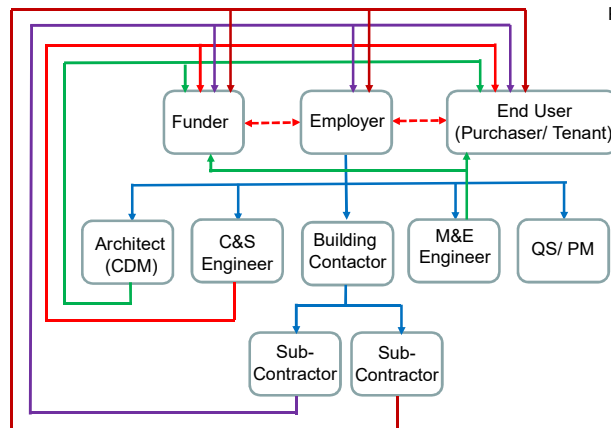
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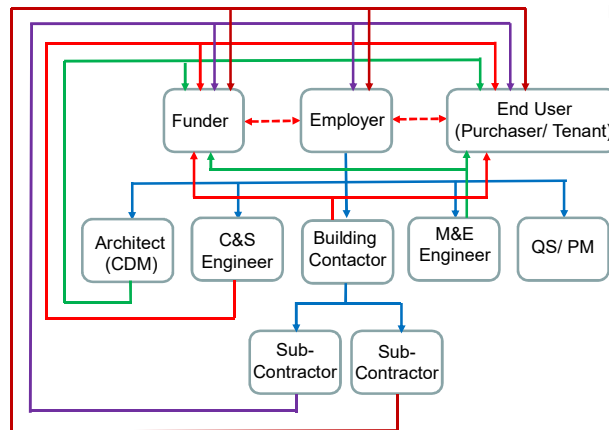
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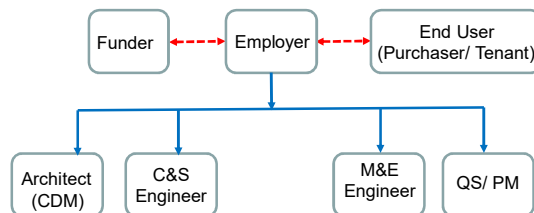
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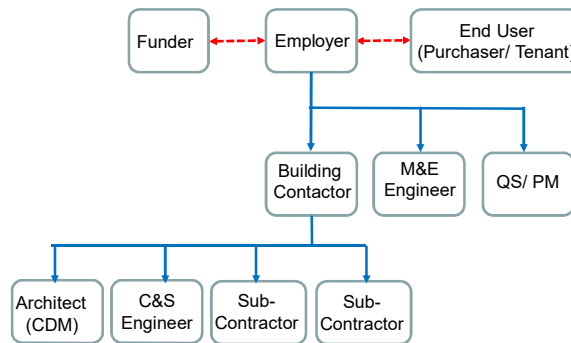
Methods of procurement (2a)

- Design and Build (pre-novation)



Methods of procurement (2b)

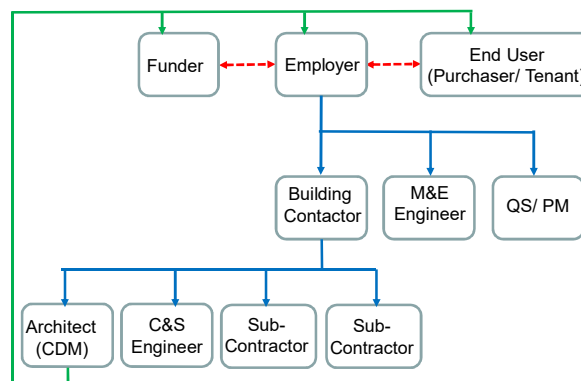
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Methods of procurement (2b)

- Design and Build (post-novation)

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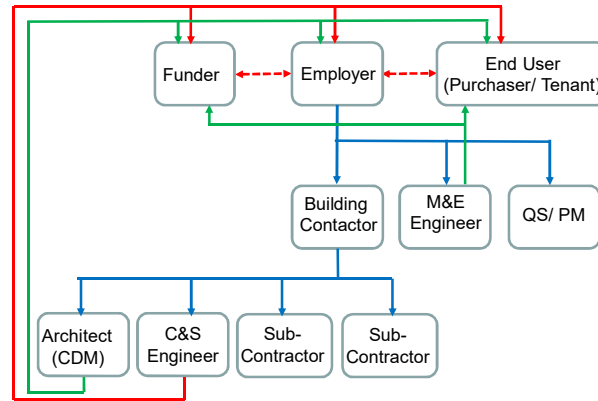




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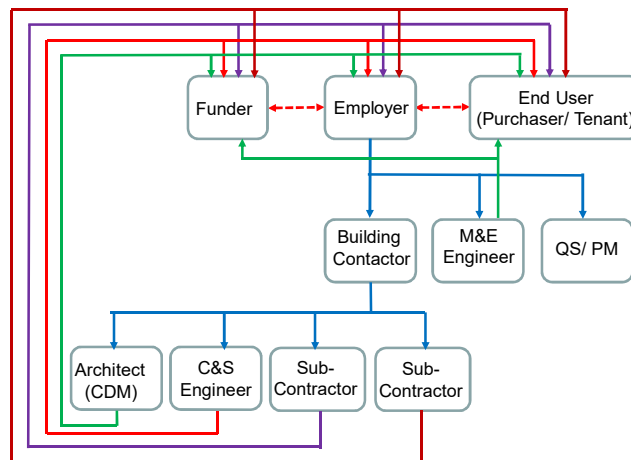
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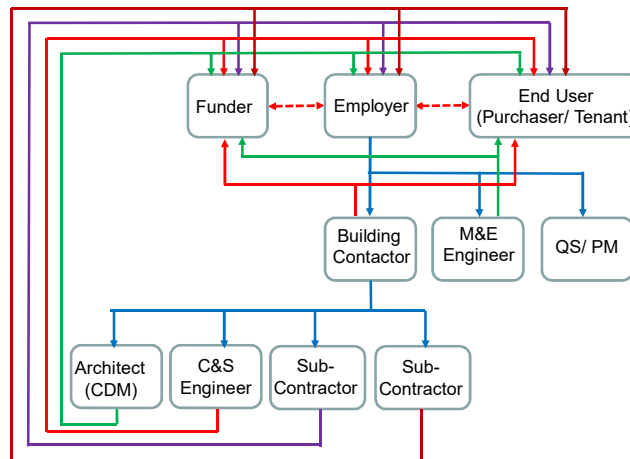
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Methods of procurement (2b)

- Design and Build (post-novation)

Collateral
Warranties/ Third
Party Rights



Methods of procurement (3)

- Bespoke/ Hybrid Forms

1. Construction Management
2. Management Contracting
3. Build and Operate
 - a. EPC – Engineering, Procurement and Construction
 - b. LSTK – Lump Sum Turn Key
 - c. EPIC – Engineering, Procurement, Installation & Commissioning
 - d. EPCC – Engineering, Procurement, Construction and Commissioning
 - e. EPCM – Engineering, Procurement and Construction Management

Contract documents



Standard Form Building Contracts

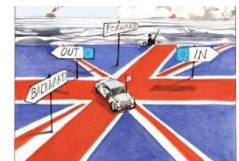
- a. JCT (The Joint Contracts Tribunal)
 - a. Standard Building Contract
 - b. DB: Design and Build
 - c. MW: Agreement for Minor Work
- b. NEC (The New Engineering Contract)
 - a. ECC: Engineering and Construction Contract
 - b. ECSC: Engineering and Construction Short Contract
 - c. ECS: Engineering and Construction Subcontract
- c. Others
 - a. FIDIC (Federation Internationale des Ingenieurs-Conseils)
 - b. ACA (Association of Consultant Architects)
 - c. CIOB (Chartered Institute of Building)



Brexit: what effect on procurement?



1. Current Position
 - a. Procurement Regulations introduced as a result of EU Directives
 - b. Protect against risk of corruption; promotes choice; supports local and central government achieving VfM.
2. Post Brexit
 - a. Procurement Regulations will remain in force unless and until the UK Government decides to amend or repeal them.
 - b. Court of Justice of the European Union (CJEU) will no longer have jurisdiction to decide procurement disputes.
 - c. Unlikely UK government will abolish the domestic procurement legislation.





Brexit: what effect on procurement?

UK Government: Repeal or Ignore?

- Thresholds: European Commission sets thresholds
 - UK government may change the thresholds
- Reporting
 - procurement regulations envisage reporting to the European Commission
- CJEU Jurisprudence
 - Greater scope for UK courts to develop domestic principles
 - UK courts to consider “persuasive” force of CJEU

Procurement Post-Brexit

- Remain compliant with EU procurement legislation
- EU legislation based on Government Procurement Agreement of WTO
- EU sanctions under the International Procurement Instrument



Collaborative contracts and partnering

- Sir Michael Latham – “Constructing the Team” (1994)
- Sir John Egan – “Rethinking Construction” (1998)
 - Committed leadership
 - A focus on the customer
 - Integration of teams and processes
 - Quality-driven agenda
 - Commitment to people
- Constructing Excellence – “Never Waste a Good Crisis” (2009)
- British government – “Construction 2025” (2013)



Collaborative contracts and partnering

- CIB Working Group 12, Bennett and Jayes (1998)
“Partnering is the structured management approach to facilitate team-working across contractual boundaries.”
- Thomas and Thomas (2005)
“An integrated team-working approach to achieve **better value** for all partners by **reducing duplication and waste** of resources, based on **mutual objectives**, a **robust approach to issue resolution** and a proactive approach to **measurable continuous improvement**.”
- Key aspects
 - Joint working
 - Trust
 - Common Objectives
 - Proactive focus on continuous measurable improvements
 - Effective communications
 - Openness
 - Agreed problem resolution



Collaborative contracts and partnering

- Barriers
 - **Fragmentation** – fragmented and diverse construction industry
 - **Inertia** - familiarity of construction industry and insurance industry
 - **Perception of collaboration** – more costly, time consuming and resource hungry
 - **Client Drivers** – most have relatively short term goals / insufficient commercial incentives/ reluctance to lose control
 - **Academia and the Professions** – lack of training and promotion of collaboration
 - **Leadership and following** – calibre of leadership
 - **Increasing Bid Costs** – collaboration is only for well financed participants
 - **Standard Forms of Contract** - an absence of construction contracts and professional appointments

Collaborative contracts and partnering



Contractual Perspective

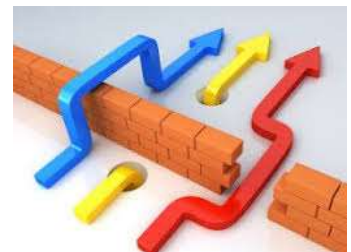
- National Engineering and Construction Contract (NEC4)
- Standard Form of Contract for Project Partnering (PPC2000)
- JCT Constructing Excellence Contract
- Cabinet Office (2014) – new procurement models
 1. Cost Led Procurement
 2. Integrated Project Insurance
 3. Two Stage Open Book

Collaborative contracts and partnering



What needs to happen?

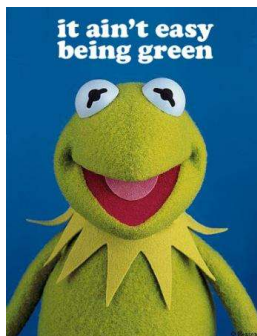
- BIM
- Leadership
- Effective Team Working
- Academia and the Professions
- Contractors and Supply Chains



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**Impact of sustainable procurement on
construction contracts**

**Impact of sustainable procurement
on construction contracts**



- Introduction
- Impact of Construction
- Contractual approach
- JCT approach to sustainability
 - JCT clauses
 - enforcement



Impact of Construction

- Built Environment
 - 47% of country's carbon emissions
 - 50% of water consumption
 - 33% of landfill waste
 - 25% of raw materials used in the economy
- Government Construction Strategy (23 March 2016) to deliver efficiencies through "Minimum Standards" including:
 - Minimise waste and use of water
 - Energy efficiency
 - Value for money



Some recent initiatives

- Building Regulations: Part L 2013
- Energy Performance of Buildings (Certificates & Inspections) (England & Wales) (Amendment) Regulations 2012
- BREEAM
- BRE Home Quality Mark
- BIM





Contractual approach

- Projects - whether new build or refurbishment - are delivered through contractual mechanisms
- As a construction lawyer look to see how parties are to be compelled to meet sustainability targets through contractual terms
- Detailed in Contract Documents (ERs, Specifications, Works information etc.)
- What sanctions are imposed for failure to meet these terms - damages



JCT approach

- Estimated that 70% of all projects use JCT contracts
- JCT has adapted in recent years
 - 2009: one of the first contract drafting bodies to seek to incorporate specific sustainability clause.
- News release “JCT puts sustainability into every contract” (18 May 2009)
- *“With half of all CO₂ emissions coming from buildings, and the construction process itself being particularly wasteful, JCT recognised a need, and an opportunity, to help improve the performance of the construction and property industries”* (Peter Hibberd, JCT Chairman)
- But added: *“JCT is not attempting to be prescriptive”*

JCT approach

- What is included in the JCT 2016 contracts?
- Refers to a “BIM Protocol” which is made a “Contract Document”
- “Supplemental Provisions” Schedule (Schedule 2 ‘Design & Build’ and Schedule 8 ‘Standard Building Contract’)
- Default position: “Each provision applies unless otherwise stated in the Contract Particulars”
- Contract Particulars: ability to disapply Supplemental Provisions (i.e. supports default position)



JCT Supplemental Clauses

1. Cost savings and value improvements
 - “Contractor is *encouraged* to propose changes to designs and specifications ... that may benefit the Employer, whether in the form of a reduction in the cost of the Works or their associated life cycle costs ...”
2. Sustainable development and environmental consideration
 - “Contractor is *encouraged* to suggest economically viable amendments to the Works which ... may result in an improvement in environmental performance in the carrying out of the Works or of the completed Works”
 - “Encouraged”:
 - Value Improvements: contractor rewarded for agreed share of the Employer’s financial benefit of cost reductions
 - Environmental Considerations: contractor only entitled to the cost of the variation



JCT Supplemental Clauses (cont'd)

3. Performance indicators and monitoring

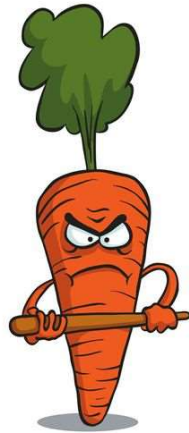
- “Employer shall monitor and assess the Contractor’s performance by reference to any performance indicators stated or identified in the Contract Documents”
- Suggested performance indicators:
 - waste (minimise waste and diversion from landfill)
 - energy consumption (during construction and completed works)
 - water consumption (during construction and completed works)
 - CO₂ emissions
 - use of materials from renewable sources (e.g. timber)
- Contractor must provide all information required to monitor and assess performance against the KPIs
- KPIs need to be defined pre-tender so pricing can reflect them
- **JCT Guidance Notes: “Building a sustainable future together”** - KPIs will be “challenging to operate ... particularly on a one off project”



Enforcement

- How are these provisions enforced through the contract?
 - they do not **require** the Contractor to make proposals/suggestions; he is only **encouraged**
 - so no breach of contract unless and until instructed
 - is a failure to meet a KPI a breach of contract?
 - construction phase waste target?
 - energy performance target for the building?
 - if so, how do you assess damages?
 - cost of remedial works to deliver target/KPI?
- Ideally identify all matters pre-contract and impose specific requirements (engage contractor through two stage process)
- JCT Pre-Construction Services Agreement

Incentivisation



- Rewards
 - incentivisation mechanism
- But for best returns – should the whole project team be incentivised?

Conclusion

- Contracts have traditionally contained obligations:
 - Building Regulations: Part L (2013)
 - BREEAM “outstanding”, “excellent”, “very good” specified.
 - prohibited materials clauses (can be adapted/ extended)
- BUT for JCT has taken further steps:
 - Supplemental Clauses and Sustainable Future Guide
 - BIM Protocol incorporation
 - Recognition of Whole Life Costing



"We need the windmills to power the government offices that file for federal grants that fund the windmills!"

Carillion: lessons learned and its impact on the procurement process

- Overview
- Forms of insolvency
- How standard building contracts deal with insolvency
- Mitigating the risks by the employer
- How contractors protect against employer insolvency
- The warning signs



Overview – Construction industry + insolvency

- Carillion – a big and timely reminder
- Construction industry has disproportionate number of insolvencies
- Dept Business, Energy & Industrial Strategy – Construction accounted for 25% of all insolvencies in England & Wales and 30% in Scotland (2017)
- Low levels of profitability a factor (competitive procurement), long payment periods (120 days), increasing wage and material costs.
- Perennial problems over retention recovery
- 20% increase in construction insolvencies in Q1 2018 (Moore Stephens)
- Even without insolvencies - disruption to employers, risks to supply chain and employees



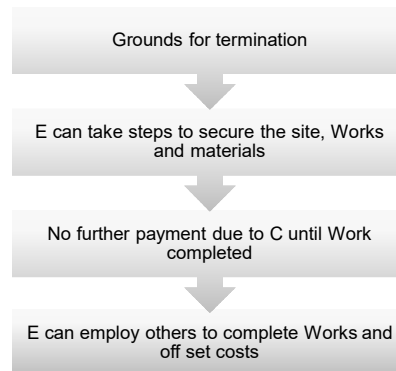
Forms of Insolvency

- Company Voluntary Arrangement
- Administration
- Liquidation
 - Member voluntary liquidation
 - Creditors' voluntary liquidation
 - Compulsory liquidation
- Carillion – compulsory liquidation



JCT & Insolvency

CI 8.1 – Insolvency: contractor enters administration, appointment of receiver, passing of resolution for winding up, making of a winding up order



NEC and insolvency

- CI 91.1 Contractor Insolvency events are termination reasons R5-R10

R5 – C has a winding up order made against it

R6 – C has a provisional liquidator appointed

R7 – Resolution for winding up made

R8 – Administration order made or Administrator appointed

R9 – Receiver, Manager, Administrative Receiver appointed

R10 – Arrangements with Creditors



NEC and insolvency

E may complete the Works, use Plant and Materials, instruct C to leave site



Amount due on termination includes normal payment, less "Defined Costs" reasonably incurred by E



No further payment due to C until Work completed



E can employ others to complete Works and off set costs



Mitigating Risk for Employers

- Obtain performance bond – on demand or default, duration
- Parent company guarantee - duration
- Pay when paid arrangements – but s.113 of the HGCRA
- Collateral warranties (or TPRs) with step in rights, copyright licenses, no limitations on liability
- Rights over off site materials
- Right to take possession of plant, equipment and unfixed materials



Mitigating Risk for Contractors

- Payment provisions, escrow accounts, advance payments
- Retention bond or retention trust account
- Statutory right to suspend work for non-payment
- Right to terminate in event of employer insolvency
- Monitor Employer for signs of insolvency - e.g. late payments, market intelligence
- September 2009: project bank account amendments to JCT contracts to secure payments to sub-contractors - no doubt partly driven by economic situation



Warning Signs

- Contractor's employees not turning up or decreasing, on site materials decreasing
- Slow down
- Materials disappearing
- Increase in defects
- Contractor seeking to negotiate further payments
- Spurious claims and contra charges
- Contract being assigned to a bank or creditor
- Late filing of accounts
- Unsatisfied court judgements
- Sub-contractors not being paid
- Persistent financial rumours
- Aggressive behaviours



Steps to Take

- Employer to take a view that there is always a risk of failure
- Keep own detailed records, e.g. site meetings
- Check contractor record keeping
- Pay attention to where key supplies are located
- Monitor financial performance of contractor