



legally focused, relationship driven

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CPD Seminar

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in association with the RICS

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(A) Procurement (B) Termination (C) Standard Forms

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Procurement

- ▶ What is “procurement”?
- ▶ The process of procurement
 - ▶ Pre-contract
 - ▶ Construction phase
 - ▶ Handover



Procurement

- ▶ Choice of procurement route

Project Management Triangle



Procurement

- ▶ Other influencing factors:
 - ▶ Nature of the project
 - ▶ Risks
 - ▶ Expertise
 - ▶ Funding and pricing options



Procurement

- ▶ Advantages and Disadvantages
 - ▶ Traditional v D&B



Procurement – D&B

	TIME	COST	QUALITY
Advantages	<ul style="list-style-type: none"> Defined construction period Quicker than traditional as client only needs to prepare outline design 	<ul style="list-style-type: none"> Lump sum fixed price (subject to adjustments) 	<ul style="list-style-type: none"> EA monitors contractor's performance Single point responsibility (except any inadequacy in the ERs)
Disadvantages	<ul style="list-style-type: none"> Design changes can result in delays May not offer significant time savings 	<ul style="list-style-type: none"> Client changes may significantly affect the final price paid Contractor prices "risk" 	<ul style="list-style-type: none"> Contractor's margin dependent on completing the Works at the lowest possible cost

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Procurement – Traditional

	TIME	COST	QUALITY
Advantages	<ul style="list-style-type: none"> Certainty of construction period (once the design has been finalised) 	<ul style="list-style-type: none"> Options for lump sum fixed price contract 	<ul style="list-style-type: none"> Specification sets out Client's exact requirements Works monitored by the Architect/Contract Administrator
Disadvantages	<ul style="list-style-type: none"> May take longer due to design period Client changes will delay completion 	<ul style="list-style-type: none"> Design Team paid separately Client changes/vague specification may increase costs Uncertain cost of measurement contracts 	<ul style="list-style-type: none"> Specification must set out Client's exact requirements

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Termination – JCT SBC/DB 2016

- ▶ REMEMBER: termination of the Contractor’s employment under the Contract NOT termination of the Contract
- ▶ Certain rights and liabilities continue
- ▶ Notices cannot be given *unreasonably or vexatiously* [clause 8.2.1] Reinwood Ltd v L Brown & Sons Ltd (2007)

Termination – JCT SBC/DB 2016

- ▶ 2 notices (“Default” and “Termination”):
 - ▶ Contractor Default
 - ▶ Employer Default

- ▶ 1 notice (“Termination”):
 - ▶ Contractor Insolvency
 - ▶ Employer Insolvency
 - ▶ Corruption / PCR 2015 reg 73(1)(b)

Termination – JCT SBC/JCT 2016

- ▶ Notice to be given in accordance with clause 1.7.4 [cl. 8.2.3]:
 - ▶ By hand
 - ▶ Recorded Signed For or Special Delivery
 - ▶ Deemed service 2nd Business Day after posting (subject to proof to the contrary)
- ▶ Reservation of *other rights and remedies* [cl. 8.3.1]
- ▶ Get it wrong = repudiatory breach
- ▶ Reinstatement [cl. 8.3.1]

Termination – JCT SBC/JCT 2016

- ▶ Who serves the Notices?
 - ▶ Default Notice
 - SBC 2016 = Architect/Contract Administrator
 - DB 2016 = the Employer
 - ▶ Termination Notice
 - SBC and JCT 2016 = the Employer
- ▶ Effect of Article 3 (DB 2016)?
- ▶ What if Contractor repeats a *specified default*? [cl. 8.4.3 and Robin Ellis Ltd v Vinexsa International Ltd (2003)]

Termination – SBC/JCT 2016

- ▶ Termination for Insolvency *at any time* [cl. 8.5]
- ▶ From the date the Contractor becomes Insolvent clauses 8.7.3 to 8.7.5 shall apply whether or not a Termination Notice has been given [cl. 8.5.3]
- ▶ Wilson and Sharp Investments Ltd v Harbour View Developments Ltd (2015) and Ziggurat (Cleremont Place) LLP v HCC International Insurance Co plc (2017)
 - ▶ These provisions apply even if the Contractor's employment had been terminated on other grounds prior to the Contractor's insolvency

Termination – JCT SBC/DB 2016

- ▶ Consequences of Termination for Contractor Default [cl. 8.7]:
 - ▶ Appoint replacement Contractor
 - ▶ Require Contractor to:
 - remove tools etc.
 - provide design documents
 - assign supply contracts
 - ▶ No further payments
 - ▶ Final account following completion and MGD

Termination – JCT SBC/JCT 2016

- ▶ “Final Account” following termination for Employer Default or by either party under clause 8.11 [cl.8.12]
 - ▶ Contractor to prepare a final account
 - ▶ Employer to pay “*the amount properly due in respect of the account*”
 - ▶ Harding (t/a MJ Harding Contractors) v Paice (2014)

Termination - Considerations

- ▶ Can a replacement Contractor be appointed quickly?
- ▶ Effect on delay to completion
- ▶ Additional cost (and risk of non-recovery)
- ▶ Effect on ownership/maintenance of plant and machinery (ROT)
- ▶ Warranties for the works (both before and after termination)
- ▶ Alternatives? Renegotiate terms? ADR?

Standard Forms - Update

- ▶ RIBA Building Contracts (2nd Ed – February 2018)
 - ▶ Concise – for simple commercial building work
 - ▶ Domestic – new build/renovations/extensions/maintenance
 - ▶ To be administered by Architect/Contract Administrator
 - ▶ Contractor design optional
 - ▶ Practical completion is defined (no “outstanding” works)
 - ▶ Encourages collaborative working (e.g. pre-start meeting, risk register, advance warning)
 - ▶ Various optional clauses (e.g. specialist sub-contractors, performance guarantee, new building warranty, evidence of Client’s ability to pay, collateral warranties)

Standard Forms - Update

- ▶ RIBA Building Contracts (2nd Ed – February 2018)
 - ▶ Key changes:
 - CDM Regs 2015
 - Consents etc. (who to obtain and pay)
 - PII (where contractor undertaking design)
 - Removal of strict deadlines for Contractor claiming relief

Standard Forms – Update

▶ NEC4 (“evolution not revolution”)

▶ Key changes:

- Consistent Terminology (e.g. “Client” and “Scope”)
- Contractor now required to submit application for payment
- Core clause 16 (value engineering)
- Secondary Option X10 (BIM)
- Secondary Option X11 (termination at will)
- Secondary Option X15 (design and build)
- Clearer Contract Data
- Gender neutral

Standard Forms – Update

▶ NEC4 (“evolution not revolution”)

▶ Key changes:

- Core clause 28 (assignment)
- Core clause 29 (confidentiality)
- Core clause 31.2 (deemed acceptance of programme)
- Core clause 53 (final account process)
- Section 8 (risks and insurance)
- Secondary Option X8 (collateral warranties)
- Secondary Option X21 (operation and maintenance costs)
- Options W1 and W2 (escalation and negotiation)
- Option W3 (DAB where Construction Act does not apply)

Standard Forms - Update

- ▶ NEC4 New Contracts:
 - ▶ Professional Service Sub-contract
 - ▶ Term Service Sub-contract
 - ▶ Design Build Operate (DBO)
 - ▶ Alliance Contract (ALC) – multi-party risk and reward

Standard Forms - Update

- ▶ ICC revised June 2018:
 - ▶ Design and Construct (full design and construction responsibility, lump sum, no re-measurement)
 - ▶ Target Cost (agreed target cost + fee with pain/gain sharing)
- ▶ Coming Soon:
 - ▶ FIDIC Emerald Book (tunnelling projects)
 - ▶ RICS Consultant Appointment 2018 (Draft published May 2018)
 - ▶ Impact of the “B” word?

Thank you

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