

CONSTRUCTION : BULLETIN



Design and Build

- A review of some of the principles

INTRODUCTION

Design and build is now one of the most frequently used procurement routes in construction. As there is only one contractor – the design and build contractor – the main advantage is that the employer does not have to claim against different parties if there is a problem.

Under a design and build contract the contractor assumes primary responsibility for the design of the development, in addition to its traditional role to supply work and materials. The contractor engages the design consultants, or more usually, has the appointments of the design consultants novated to him. A popular example of a design and build contract is the JCT 1998 Edition With Contractor's Design (JCT WCD).

ADVANTAGES AND DISADVANTAGES OF DESIGN AND BUILD

ADVANTAGES

• **Single point of Responsibility**

The contractor is responsible for the design and the construction. Subject to the proviso that the contractor is not, under an unamended JCT WCD, responsible for any design provided to him in the Employer's Requirements document, the employer should have a single point of responsibility and liability against the contractor. This is more advantageous than the traditional forms of contract where the employer has entered into separate construction and design agreements. A common problem being that if a claim is made, the contractor, architect or other design consultants may argue over the extent of their responsibility.

• **Price Certainty**

JCT WCD offers greater price certainty than more traditional forms of procurement, as many design and build contracts include a provision for a guaranteed maximum price.

Furthermore, under JCT WCD the contractor cannot make a claim for loss and expense as a result of late receipt of instructions from the architect/contract administrator. Such claims are frequently made under traditional forms

of contract. Professional fees can also be lower under a design and build contract, depending on the monitoring role expected of the professionals.

• **Speed**

In its simplest form, design and build allows work on site to begin earlier (eg before the design is complete) than under traditional forms of contract, due to the level of control given to the contractor. Single point responsibility means that the contractor is not relying on other parties for design or for the supply of information. Experience has shown that this level of contractor control allows programmes and budgets to be more easily met and the actual speed of construction is likely to be quicker.

• **"Buildability"**

As a contractor has responsibility for design and construction, it follows that the building is more likely to be "buildable" than is the case under other procurement methods.

• **Claims**

Claims are also less likely to materialise due to the single point of responsibility.

DISADVANTAGES

• **Design quality**

The perception remains, certainly amongst architects, that design and build is not the appropriate procurement method where design quality is a high priority.

• **Additional design fees.**

If the employer wishes to take independent advice on design issues following the building contract being entered into, or the novation of the design team to the contractor, the employer will have to pay additional fees.

• **Inflexibility**

There is only limited scope for the employer to make changes to his

requirements once the Employer's Requirements and Contractor's Proposals have been agreed otherwise the cost consequences may be prohibitive.

DESIGN OBLIGATIONS UNDER DESIGN AND BUILD

Unless a contract states otherwise, the law implies a duty of fitness for purposes on a design and build contractor. This is more onerous than the normal duty of "reasonable skill and care" imposed on a design consultant.

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If a claim over design or workmanship arises (where a contractor is under an obligation to ensure the works are fit for their intended purpose) all the employer needs to do is to demonstrate that the works are not fit for that purpose. If an employer accepts the lesser standard of reasonable skill and care it must:

- prove there is a defect in the works;
- demonstrate that it is due to the contractor's defective design, materials or workmanship; and
- prove that such design was carried out without reasonable skill and care, ie negligently, if it is shown that the defect is due to the contractor's defective design.

THE POSITION UNDER JCT WCD

JCT WCD is the most common form of design and build contract in the domestic market. This form of contract follows the standard forms produced by the JCT for the more traditional methods of procurement in much of its style and content. However, the focus is very different. For example, as there is no architect/contract administrator or quantity surveyor, the employer's interests are protected by an "employer's agent". The contract itself overrides the strict liability for design normally implied, making the contractor's duty equivalent to that of "an architect or other professional design holding himself out as competent to take on work for such design" (ie to use reasonable skill and care). JCT WCD is let on the basis of a document called the "Employer's Requirements", which specifies what the contractor is being asked to do, often in the form of a performance specification. "Contractor's Proposals" are submitted and the successful proposals are then used as a major control document on the project.

The contractor is obliged to perform and complete the work in accordance with the Employer's Requirements and the Contractor's Proposals, including the completion of the design of the works. Provided the design complies with these requirements and proposals, the contractor is under no further obligation to obtain the employer's approval of the design. Any changes required by the employer to its requirements are subject to the contractor's right of reasonable objection and, if accepted by the contractor, are to be treated as change. Employers often amend JCT WCD in this area.

Sub-Contracting

JCT publishes a form of domestic sub-contract (DOM/2) for use with JCT WCD. However, there is no provision for the nomination of sub-contractors (although this can be effectively achieved with careful wording of the Employer's Requirements).

Novation of Employer's Design Team

One of the most common methods of design and build procurement by property developers is "develop and build", where the initial design is carried out by the employer's design team who are then novated to the contractor prior to completion of the building contract. The employer engages designers to design past the outline design stage, sometimes up to the detailed design stage, before passing control over to the contractor. This is known as "dump and build" and is used particularly where very detailed design has been carried out by the employer's designers and the contractor is obliged by an amendment to a standard form of contract to assume responsibility for design. Novation of the employer's design team's

appointments (and therefore a right of action against such designers) is offered to the contractor as an inducement.

Perceived Advantages of Novation of the Employer's Design Team

- the employer may have used the designers many times previously and will be happy with the quality of their work;
- the design team is likely to be more attuned to the employer's requirements;
- the design team can continue with the contractor where they left off with the employer;
- some employers believe that through novation of their own designers they have a foot in the contractor's camp.

Problems of Novation of Employer's Design Team

- the contractor may have its own preferred designers or in-house designers who may not see eye to eye with the novated consultants.
- novation offers less scope to the contractor to offer a low tender price, particularly where the contractor assumes responsibility for the detailed design carried out by others;
- again, a further design consultant will need to be engaged by the employer where it wishes to monitor post-contract design.
- following the decision in *Blyth & Blyth v Carillion* contractors need to ensure that they are able to pursue claims against the novated consultants for any pre-novation losses they may suffer as a consequence of breaches of duty by the consultants pre-novation. This requires careful wording of the novation agreement itself.

PARTIAL NOVATION

Some tailored contracts allow the employer to use the novated designers to monitor the contractor's performance through partial novation. However this "half-way house" position immediately presents the designers with a conflict of interest. Additionally the contractor does not assume the services of the designers, which are retained by the employer. This may result in separate collateral warranties being required by funders or future occupiers of the development in respect of retained services. Partial novation is a potential recipe for problems.

CONCLUSION

Design and build is now generally recognised as a versatile method for procuring a wide range of buildings. Its popularity has increased steadily over the last 15 years and it is recognised in the construction industry as a strong alternative to general contracting or construction management. It is appropriate for any type or scale of project, largely because it offers single point responsibility and a high degree of cost certainty. As with any method of procurement however, it is the selection and formation of the team, which is a crucial aspect to a successful project. Having put the team together, the choice of the design and build method of procurement should provide a good quality development, which will compete with any other form of procurement.

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