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Commercial Property Guide

Different Types of Building Contract



Different Types of Building Contract

There are many different ways of arranging for carrying out a development project, and of the types of contract which can be used. The two most common types of contract are “**build only**” (sometimes referred to as procurement), and “**design and build**”.

Build only

This traditional form of procurement involves the developer (usually referred to in any contract documentation as the “employer” or “client”) appointing design consultants to prepare the detailed design for the project, in line with the developer’s essential wishes. That team (which is generally referred to as the developer’s “professional team”) will normally (but not necessarily) be led by an architect, and each member of the team will be appointed under an appropriate form of professional appointment document.

Once the detailed design is complete, and the quantity surveyor (who will be a member of the professional team) has prepared a “bill of quantities” (setting out a detailed breakdown of the equipment, materials, plant and labour required for the project), the developer will invite tenders from selected building contractors. Each contractor will estimate how much it would cost to build to the design that has been prepared, and on the basis of those estimates, the developer will choose one of the contractors, and appoint that contractor to carry out the construction works under an appropriate form of “build only” building contract.

The contractor will then, in turn, normally appoint its own sub-contractors, each under a form of sub-contract agreement, to carry out various elements of the works, particularly those parts of the works which are specialist

(examples may include steelwork, roofing, flooring and lifts).

Because the scope and quality of the work to be carried out will already have been determined (by the detailed design), and the contractor will be pricing the work by reference to that design already in place, the contractor can give a firm price at the time of appointment and, perhaps more importantly, be held to it. However, not every aspect of the design can be settled in advance, and accordingly provisional sums are often included within the contract sum.

During their carrying out, the works will be supervised by a member of the developer’s team (normally the architect), who will monitor progress and issue variation instructions as necessary. The architect will certify payment on the recommendation of the quantity surveyor, and will also be the person responsible for certifying the ultimate practical completion of the building works.

The documentary “structure” to this “build only” arrangement is relatively straightforward, with the developer entering into direct contracts with each member of the developer’s professional team, and also with the main building contractor. However, one drawback to this approach is that there is no one person to whom the developer can look to should there be a defect in the completed building work, and the developer will need to identify the person responsible for any problem, and then pursue that person individually, having established whether the problem lies with a design defect, a building defect, or what (sometimes a combination of factors, of course).

Design and Build

Under the design and build arrangement, the main contractor is given total responsibility for the design of the project from the outset,

subject to the obligation to comply with the "Employer's Requirements" (which is a defined expression within the building contract) as to design, which Requirements will be a detailed attachment to the building contract. The degree of control which the developer exercises over the design will depend upon the detail of the performance specifications within the Employer's Requirements.

Often, the developer initially employs its own design team to prepare a concept design and to draw up detailed Employer's Requirements, which are then passed to the contractor, to further develop by submitting "Contractor's Proposals", another defined expression. The key members of the professional team who are responsible for design (usually the architect and the structural engineer) will then be novated to the main contractor at the time when the contractor is appointed, so that these members of the professional team begin by having a contractual arrangement with the developer, but following novation their instructing party becomes the contractor.

The developer will appoint an "Employer's Agent" who will act on the developer's behalf throughout the carrying out of the building contract, and it is the Employer's Agent who will in the case of a design and build scenario be responsible for certifying the ultimate practical completion of the building works.

One of the perceived advantages to the "design and build" approach, is the fact that the developer will have a contractual remedy against the main contractor if anything goes wrong, whether this be in relation to defective design, building defects or whatever. However, the developer would normally look to retain a direct contractual link with the members of the design team, through taking collateral warranties from the

design team at the time of novation, in case the contractor should become insolvent.

Standard Forms of Building Contract

The construction industry is dominated by standard form contracts, of which there are many variants, although possibly the best known are those produced by the Joint Contracts Tribunal (JCT). The majority of construction projects use one of the forms of JCT contract.

However, most developers will want to amend the standard form of contract, and will have their own quite extensive forms of standard amendments. Therefore, the final form of appointment document will often be the subject of careful negotiation, even though based around a standard form.

The better-known standard forms of JCT contract are the SBC11 (standard form of building contract for a build only appointment) and DB11 (standard form design and build contract).

Letters of Intent

No review of building contracts, however much a brief overview, would perhaps be complete without mentioning letters of intent. It is quite common for a contractor to be allowed to start work on site before a formal building contract has been entered into. Where this occurs, the situation is usually governed by a letter of intent, which specifies the preliminary work to be done and how it is to be paid for, but expressly states that there is no binding agreement in place between the parties to enter into the formal building contract for the carrying out of the remainder of the project.

Sadly, it is not entirely unknown for the entire project to be completed under a series of letters of intent, with no building contract

signed. Clearly this is not satisfactory for either party, particularly if subsequent disputes arise.

The point of letters of intent, is to allow the contractor to commence works early but they are inherently dangerous because they do not map out the full contractual relationship between the parties, and their use should be the subject of very careful and cautious advice!

We hope that the above brief overview of building contracts is of assistance in understanding some of the differences between key types of building contracts. Many other issues need to be considered, when considering what form of contract to be used, including the requirement for the

contractor and members of the professional team to provide collateral warranties in the event of the development subsequently being sold or let, adequate dispute resolution procedures, copyright protection and a number of other issues.

For further information, and for advice on any aspect of the documentary requirements of a building project, please contact any member of our **Construction Team**, or click on **Contact Us** on our website and submit a contact request.

Philip Costigan

Partner

Commercial Property

Direct Tel: +44(0)24 7649 3101

Email: PDC@bandhattonbutton.com

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