

Construction contracts and disputes survey reveals “traditional” industry

SEPTEMBER 06, 2022



Have you had chance to read RIBA’s *Construction Contracts and Law Report 2022*, which was published at the end of July? If not, I’d recommend taking a peek. It contains some interesting stuff, a snapshot of the state of our industry as we emerged from a post-Brexit, post-COVID world. It also has a great cover (I’ve always been rather fond of Selfridges’ “bubble wrap” flagship store in Birmingham).

The survey was completed during the early months of 2022 by over 950 respondents, looking back over 2021. Those respondents were drawn from clients, contractors and professionals. Not only does the survey look at the most frequently used procurement methods, it looks at the types of tendering and most common pricing mechanisms, which contracts and professional appointments people are opting for, and whether they are collaborating (and if not, why not). It also covers what it describes as legal issues, such as when the contract is signed, what issues have been challenging and what factors have slowed down progress on a project. There is also a section on disputes, covering the main causes and the main ways parties resolve those disputes.

RIBA Construction Contracts and Law Report 2022

Although the report had *over 950 respondents*, 86% identified as *consultants*, which undoubtedly influences some of the outcomes in the report (like which contracts they use). In my view, it also makes the results less reflective of the experiences of the industry as a whole. For example, only 5% of respondents came from contractors and 5% from clients, and only 1% from sub-contractors.

Procurement, tendering, pricing

In terms of the common *types of procurement*, *traditional procurement* still wins the day, with over 56% (40% with a design element, 16% without) contracting that way in the last year. *Design and build* was a steady second with 34%. *Construction management* managed 2% of the vote and both *management contracting* and *alliancing/partnering* 1% each.

I’m not sure what this says about the industry, other than it remains “traditional” in more than one sense of the word!

This “traditional” approach is also reflected in tendering, with 72% involved in single-stage,

competitive tendering and 38% in negotiation. I was surprised to see 37% involved in *two-stage competitive tendering*, which suggests a rise in contractor's providing *pre-construction services* (and which I've seen suggested is one way for the industry to deal with some of the Building Safety Act 2022 developments going forwards).

Pricing also remains steadfastly in the "traditional" box, with over 77% involved in fixed-price or lump sum contracts. As the survey notes, a fixed price works well when inflation is steady at 2%. However, with the current inflation level of 10% and rising, a fixed-price contract is a risky one:

"... inflation can erode margins and turn a project that looked profitable into a loss-maker."

The survey suggests the industry "may be rapidly turning to other pricing mechanisms". It will be interesting to see which of those other mechanisms (like target cost, guaranteed maximum price, cost plus, re-measurement and cost reimbursement) pushes ahead over the coming months and years.

Contracts and professional appointments

In terms of which contracts people are using, it is also unsurprising to see *JCT standard form contracts* leading the field with 59% using them in the last year. I was more surprised to see the *RIBA building contracts* in second place (with 15%), and *NEC contracts* in third place (with 13%). I assume this is because the majority of respondents were professionals (probably architects) who are more likely to suggest RIBA to their clients and who may not be so involved with project management in the NEC world. I was also surprised to see bespoke contracts at 7%. With the number of standard forms available, in my experience, it is rare to see a bespoke building contract in a domestic setting. I wonder who or what this 7% represents and whether it captures those situations where the parties never got past the *letter of intent* stage or failed to sign any contract, so proceeded on some form of oral arrangement.

The report includes a number of unsurprising reasons for a particular contract choice. For example, people choose JCT because they are still considered the industry standard, well understood and tested in the courts. Clearly people have stuck with a traditional approach because they like familiarity. Equally, NEC was chosen in part because it is mandated on government contracts, but also because people like its "language, clarity, discipline and equitable simplicity" and the requirement to work in a "*spirit of mutual trust and cooperation*".

I think the results for professional appointments also reflects the number of architect respondents, with the RIBA professional services contracts the most widely used (43%). NEC's Professional Services Contract came second here (23%), followed by 14% for the JCT Consultancy Agreement, 12% for the JCT Pre-construction Services Agreement and 9% for the RICS forms of appointment.

Collaboration

Although, in the procurement section, only 1% identified alliancing/partnering as a procurement method, when it comes to the day-to-day of a project, 57% of respondents said they adopt collaboration techniques on some or all projects, with 22% adopting them on all projects. That leaves 43% who do not adopt collaboration techniques on any of their projects.

Why people didn't collaborate is also revealing, with 42% saying it was because the client did not want to or because the projects worked on were too small (34%). Other reasons included concerns about risk, parties having different aims and objectives, concerns about liability and established divisions between the different professionals.

When it came to the form of collaboration, 74% identified the ethos of mutual trust and cooperation, which is an NEC concept. Others entered into *some form of agreement*, whether a formal partnering agreement, a non-binding partnering charter and or an alliancing agreement. Interestingly, over 60%

thought that collaborative projects had less disputes and improved the delivery of the client's objectives. Equally interesting, 12% disagreed! I'm not sure how you square that with the idea that 42% of clients don't want to do something that will improve the outcome for them. It suggests to me that some people may misunderstand what working collaboratively means in practice and it is just another sign of our "traditional" industry being stuck in its ways.

Legal issues and disputes

As the report notes, "contracts are put in place to prevent legal issues emerging later in the project", but that doesn't stop issues emerging. I should know. It is what my business relies on!

Here it seems the issues people found the most challenging included contract administration (39%), insurance and liability for risks (25%) and dispute resolution (18%). COVID-19 also featured as an issue, although that is largely in the past now. Almost 60% had also experienced COVID-related disruption to a project's progress, along with Brexit-related matters, like a lack of construction products (50%) and a lack of construction workers (33%). However, the single biggest cause of disruption was caused by employer variations (60%), more than double the disruption caused by contractor variations (29%). Other "common" issues cited included poorly coordinated project information (25%), the provision of design information (21%) and the provision of employer information (18%). Interestingly, 10% cited late payment as a reason, and 4% had experienced suspension for non-payment.

Given the nature of the issues experienced, I'm surprised that the number of people who said they'd been involved in a dispute is falling: 73% said they had not been involved in a dispute in the last 12 months. It seems that reality and perception differ on this, with 48% of respondents thinking that disputes are on the rise and only 4% saying they felt the number had decreased.

The list of the main issues that people have experienced in the last year reads like a "who's who" of *construction claims*, with *extensions of time* (50%), *defects* (41%), *loss and expense* (31%), final account valuation (30%) and valuation of *variations* (26%). *Payment issues*, in the shape of complying with the contract's payment provisions (21%), withholding money (20%) and value of interim applications (20%) also featured. The survey also acknowledges the new challenges the industry faces, whether that is because of Brexit, COVID-19 or supply chain issues. There is also the on-going cost of *professional indemnity insurance* (PII) and the spectre of inflation, which is likely to impact on the results of the next survey more than this one.

None of this will come as a surprise to those working in the construction industry, nor will it surprise people to see that disputes are more likely to occur during construction (63%) than after practical completion (37%). This is precisely why the industry needs *adjudication* and why it is the most common avoidance procedure included in the parties' contracts (50%), followed by negotiation at board level (34%), *arbitration* (30%), *mediation* (27%), negotiation at site level (25%), expert advice (15%) and using a *Dispute Adjudication Board* (4%). In most cases, adjudication also allows work on site to continue. With 73% saying that was their experience of a dispute, perhaps adjudication is really delivering what it promised to.

Based on the survey participants (i.e. consultants), I wasn't surprised to see who is falling out either, with 76% of disputes between the contractor and client and just 26% between the consultant and client. Although the survey results indicate that contractors and sub-contractors also fall out less often (13% with domestic sub-contractors and 10% with selected sub-contractors), I suspect this is as much a reflection of the survey's respondents as the industry as a whole. Certainly, I see my fair share of disputes further down the contractual chain, less so those involving consultants.

I've never been really sure that it is true to say that the higher the value of a project, the more likely

it is to end up in a dispute. I've experienced plenty of disputes at the lower end of the scale, and they are just as "contentious" as those involving higher value projects. That said, it probably is true to say that the bigger the project, the more potential there is for disputes, simply because there are (potentially) more parties involved in delivering it.

Therefore, I'm not sure what the correlation is (if any) between the value of a project and the size of disputes but the survey reports that 62% of disputes had a value of £250,000 or more (disputes over £5 million accounts for 17% of that figure). This compares to 44% in 2018. That suggests the value of disputes has increased. At the bottom end of the scale, 13% of disputes were under £50,000. I wonder how many of those were resolved using one of the low-value adjudication schemes on offer?

We often say that adjudication is *interim-binding*, that it only has temporary effect because the parties are free to refer the dispute for a final determination by the *courts* or arbitration (depending on what their contract says) or can negotiate a settlement. We also know that more often than not, parties comply with an adjudicator's decision and move on. While adjudication enforcement proceedings may feel commonplace, I don't believe they are, and it is really rare to see matters opened up again, whatever the tribunal. Consequently, I was surprised to see that it was only in 42% of cases that adjudication was the final tribunal of choice. That suggests that a dispute started and ended in an adjudication less often than I imagined (unless I'm misreading the survey).

The construction industry has had a tough few years and there are more challenges facing it, given rising costs and on-going supply chain issues and worker shortages. The next survey is likely to reflect these factors more. I suspect people's perception that disputes are on the increase is more likely to be a reality next time. It certainly is my current experience.



JONATHAN COPE