

- Select the team ● Appropriate contract ● Contract strategy ● Partnering
- Do you have a contract? ● Battle of the forms ● Letter of intent
- Subject to contract ● Collateral warranties ● The Brief ● Time v cost v quality
- Site related information ● Brief increasing liability ● Need for site survey
- Merchantable quality v satisfactory quality ● Team problems
- Indecisive employer ● Unreasonable employer ● Inexperienced consultant

RISK AVOIDANCE FOR THE BUILDING TEAM

BASIL SAWCZUK

- Ineffective contractor ● Problem employee ● Distress ● Stress ● What will it cost?
- Degrees of accuracy ● Incorrect estimate ● Cutting costs ● Non-payment by employer ● Receivership ● Qualify financial estimate ● Programmes
- Recording information flow ● Late information ● Document discovery
- Conflicting records ● Defective information ● Missing information ● Variations
- Test of reasonableness ● Action under tort ● Protective clauses ● Apportionment of fault ● Specialist work ● Bad workmanship ● Notification to insurers ● Working with loss adjusters ● Expert witness ● Preparation for trial ● Mediation
- Arbitration ● High Court ● Court structure ● Global claims ● Managing the risk
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To my wife Sonia and my son Luke

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FOREWORD

When Basil approached me with his idea of writing this book, my first reaction was one of admiration; the thought that someone was willing to undertake such an enormous task.

Having dealt with Professional Indemnity for over fifteen years, many ideas and thoughts come to mind. Architecture in particular appears to be in a continual and tumultuous process of change. A by-product of this is that projects must be undertaken with careful preparation and recording. This is essential and I suggest you would do well to make this book a constant aid. One that you dip into when necessary and use as a reminder of the pitfalls that can easily be overlooked in the heat of the moment.

This book sets itself many goals, seeking as it does to encapsulate the total process from start to finish. Along the way, though clearly hazardous, the road is well signposted, highlighting potential danger areas and identifying how to reduce or avoid them altogether.

This book takes the only approach—a common sense one—and weaves in examples and lessons that others have learned. I know it is Basil's wish that mistakes may be prevented or reduced by the guidance contained within the pages of this book. Having purchased it, use it!

Mario Asciak
Executive Director
Minet Professions

INTRODUCTION

The construction industry is one of the biggest industries worldwide. Being such a large industry there are contracts signed every day for some building work, be it new build, refurbishment or maintenance. Some projects may involve a few thousand pounds while others cost hundreds of millions. Some projects are simple, others complex; some may involve just two organizations, others may involve hundreds of suppliers, subcontractors and consultants. No matter how small or simple a project may be it still has something in common with the larger complex projects—It still can go wrong.

As soon as two parties, the employer and the contractor, have signed a contract they have taken on board risks. Their awareness of the risk, and the steps they have taken to minimize their share of the risk, will determine the likelihood of a problem occurring. Having been involved in construction projects in the United Kingdom and overseas I have observed that these basic problems are similar throughout the world.

Employers do not spend sufficient time selecting their building team, which includes the consultants and the contractor. Equally some employers need to be avoided as they haven't sufficient resources to fulfil their declared requirements. Much time is wasted in the construction industry with schemes and budgets being prepared only to be abandoned, or worse still implemented in the hope that drastic cuts can be made along the way. Some, less than honourable, consultants may entice the employer to enter into a building contract without pre-warning of all the potential problems and responsibilities that come with the contract.

In recent years the disillusionment of the traditional form of contract has led to the upsurge in the number of design and build contracts. This definitely satisfied the market, but on some projects the design and build route was an inappropriate choice. But who advises the employer? Regarding the choice of contract it seems that who gets to the employer first may influence the outcome. A contractor would prefer a negotiated situation rather than a tender. The consultant would prefer a full design appointment rather than be retained as the client's representative in a design and build project. Of course, there are many contractors and

2 Introduction

consultants who would advise the employer impartially on the correct procurement route. But how does the employer know if these advisers are advising without bias towards a favoured procurement route?

Another area of risk are the changes in the law and how it relates to the construction industry. This has generated work in the industry with solicitors being kept busy drafting and evaluating collateral warranties and specialist contracts. Their aim, on behalf of their clients, has been to shift responsibility to other parties and to form links of responsibility that previously did not exist.

As employers and their organizations become more sophisticated their building needs become more complex. This requires more and more emphasis being placed on the briefing of the building team. Unfortunately the briefing stage is either rushed, carried out by inexperienced people or left to others to guess the requirements and level of specification in the hope that it will coincide with the budget and be suitable for its application.

With the pressures of getting the project built on time, often within a tight time frame, tensions build up within the building team. In many projects the full team have not worked together before and there may be some weaknesses or clashes of personality or just an inability to perform. These problems are often left to fester and are only brought to the employer's attention when the damage is done. Had the correct monitoring and reporting procedures been in place then perhaps an early intervention by the employer may have reduced the impact of the team's shortcomings.

Most projects are finance driven and most disagreements arise due to one party fearing that they may suffer a loss due to another party's actions. Predicted costs are exceeded and cost-cutting exercises are put in place. It is hard for a project to recover from a cost-cutting exercise. The employer has had to accept less for the money, the consultant is blamed for misleading the employer and the contractor has to build to a cheaper specification. There are always more disputes in a recession than in a boom period. If a contractor has made a profit they may think twice about spending key management time to recover additional sums. In a recession, however, there is pressure on the contractor to recover as much as possible to limit the potential loss. This also has an impact on consultants, as they have to lower their fees in a recession and the quality of their service is bound to reduce. However, if the contractor seeks to recover from a low tender by submitting claims, that places more pressure on the consultants. With limited resources the consultant with a reduced overworked staff may not spend sufficient time in monitoring the project.

Possibly the simplest way to monitor the contractor's performance is to compare actual progress on site against a target programme. The

approach to pre-planning and recording progress has several problems. The contractor is not inclined to make known delays caused by themselves in the hope that delays caused by the employer, or the consultants, may be used to recover the situation. Some contractors and consultants prefer to use complex computer software to generate programmes which can respond quickly to changed circumstances and are able to reprogramme remaining events. This is fine if all parties have access to the programme and can understand how to use it as a tool. However, on some occasions these programmes become too complex to be workable and if not updated regularly become out of date. The other danger is that the programmer needs to be briefed by the participants and if not properly handled the programme can become a historical record rather than a planning tool. Unfortunately the other extreme is that the programme can be a very simplistic bar chart against which the contractor records status. This overlooks critical aspects and can divert the monitoring team's attention from the forthcoming risk areas.

The construction industry is very reliant on information transfer, from illustrating the designs to the employer, to obtaining employer's approval, advising the contractor, placing orders, deliveries to site and how to construct. Probably the biggest risk to the contractor is the potential for a breakdown in communication, either receiving information too late, or it being incorrect. Also the many parties involved with the project need to be aware of information by which they may or may not be affected, but nevertheless need to be aware of, just in case there is some knock-on effect.

No matter how good the information flow is if the team have not had sufficient time or lack understanding about the project this may increase the risk of variations being required. A variation can be originated by the employer, consultant or contractor and each can have financial and legal repercussions. In an ideal world there would be no variations but in a dynamic industry where most projects are prototypes there is bound to be a degree of change required. The important point for the building team is to be prepared for change, know how to handle it and to minimize its impact.

The construction industry is fundamentally a people industry where the project is designed by people, built by people and in the majority of cases built to accommodate people. The human input can not only create masterpieces but also make mistakes. The consultant can make design mistakes which may lead to design failures but may not become apparent until many years later. The contractor may employ operators who are unable to produce the appropriate quality and the resultant poor workmanship may need to be condemned. Sometimes due to pressure of time and money design defects or poor workmanship go unconnected and lead to legal disputes.

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The parties to the contract can always refer disputes to the courts or arbitration but it is more beneficial for all parties to resolve the problems before positions get entrenched and the risk of paying more costs in legal fees than will be recovered under the claim. Therefore the art of negotiation and mediation needs to be developed in the construction industry.

I have outlined above several areas within the construction industry that could lead to conflicts. It is the intention of this book to look at these aspects and see how the risk of conflict can be reduced. Even when a problem has occurred it is possible by risk management to reduce the impact of the problem. Risk avoidance is not only to be considered at the commencement of the project but throughout its life span and by all the parties involved in the contract.

This book is targeted at the three main parties involved in the building contract the employer, his consultants and the contractor. Therefore each potential problem area is viewed from these three viewpoints. This gives the added benefit of showing the potential position of the other members of the building team. The book is written for the inexperienced building team member and the experienced needing to revise and update their skills. Students about to enter the construction industry may also find this book useful especially as it has been written from first-hand experience. After the first read through keep the book at your place of work and dip into it as and when required. Use it as just a gentle reminder of the potential risks that surround the construction industry. Along the way it provides advice that can help steer you away from risk.

One word of caution. The book should be treated as a guide and as each project is different it cannot take the place of expert advice. Therefore do not hesitate to take on board expert advice, at the appropriate time, and do not allow risks to become burdens which in turn end up in litigation. The inclusion in the book of legal issues will hopefully reinforce this point of view. It should be noted that the law is always under review and being tested with new cases. Therefore although legal cases are quoted and interpretations given it is important always to seek proper legal advice on specific problems. The purpose of this book is to raise awareness within the building team of the risks that lay in wait during the course of the project and what steps can be taken in an attempt to avoid those risks. Some risks, however, will always be present and are part of the commercial environment. In these cases the trick is to be aware of these risks in advance and manage them so that they are contained and do not damage the commercial viability of the project.

I should also mention that this book is not targeting academics and researchers. It is not the purpose of this book to debate in-depth construction issues, but to put before the practitioner and students the

variety of risks that they may come across and what steps to take to avoid or manage those risks. The absence of footnotes is to make the book more readable and not to suggest that all the work is original thought. There are many good books which have tackled specific aspects of the construction industry and some of those dealing with topics covered in this book are listed in the Bibliography.

Basil Sawczuk
North Littleton, Evesham, November 1995

SECTION ONE

THE SELECTION OF THE BUILDING TEAM

When an individual or an organization want to put in hand some building work they have many decisions to make. Perhaps the most important decision is one of selecting people to assist in that building project. The employer, as termed in construction contracts, may well have friends in the construction industry and may therefore seek their advice. However, advice and opinions received by a building contractor may differ from that received by a consultant. Often advice is given with self-interest in mind, which is not surprising in the competitive world in which we live today. Irrespective of ‘friends’ in the construction industry, the employer should have some knowledge of the various factors which may influence the selection of the building team. Even if only to reinforce their adviser’s advice.

Many traditionalists believe that the employer should first appoint a consultant to prepare a brief then have that consultant advise on contractor selection. The counter argument is that the employer might just as well approach a contractor direct and let them appoint the designers, thereby providing the employer with one point of contact and responsibility. Both alternatives have their place, but how does the employer decide? Perhaps the first task is for the employer to consider the project against various criteria and determine how much risk to retain or pass onto the contractor. Bearing in mind of course that the contractor will often compensate the extra burden of risk with an additional cost within the tender.

It would be wrong to consider the employer as the only member of the building team who needs to consider their position and exposure to risk. The other members, being consultants and contractors, will also need to make commercial evaluations. Consultants, for example, may not wish to work for a contractor in a design and build contract. Contractors may equally not be prepared to take on board the employer’s consultants. Even in the more traditional contracts the consultants and contractors may have reservations about each other. Alternatively where a building

team has no experience of working together there may be a need for some pre-contract investigation. The employer will not be beyond investigation. The consultant and contractor will need to be satisfied that the employer has sufficient funds to go through with the project.

One of the first and key issues to address is the method of procurement which is the most desirable for the employer's project. Arising from this evaluation will be the selection of the appropriate building contract.

1.1 THE APPROPRIATE CONTRACT

The procedure for the selection of the building team can be influenced by the proposed procurement method. Therefore it is important to consider in broad terms the various options available. It cannot be over emphasized that the procurement of a building can be a very complex matter with so many organizations coming together, often for the first time. There will be the employer who might be a developer, an end user or a purchasing department within a large organization. There will be the building contractor who might be a main contractor with a series of subcontractors, or acting as a managing contractor. Alternatively the employer might decide to deal direct with subcontractors and omit the main contractor. There will also be consultants which may include architects, quantity surveyors, civil, structural and services engineers. These consultants may be individual consultancies, single multiprofessional organizations or they may be part of the employer's or contractor's organization.

With so many participants and inter-relationships it is important to choose the appropriate contract to suit the project and the employer's objectives. The choice of contract is for the client to decide, although if they are not experienced or expert in contract selection they should seek advice. One of the main considerations in selecting the contract is the employer's preferred role for the contractor. The decision is not simple and there should be an evaluation of the options available.

One of the fundamental aspects in contract selection is the apportionment of risk between the employer and the contractor and this is influenced by a number of factors.

(a) The complexity and uniqueness of the project

Different employers will have different perceptions of project complexity and uniqueness. The inexperienced employer may perhaps think the project is more complex and unique than it really is. Complexity is often linked to the building function. For example a process plant might have specific environmental requirements where a small divergence from specification may make the whole process inoperable. A unique design feature may therefore require research and development time with no guarantees of meeting programme dates. Alternatively the feature may be so specialist that there is a need for specialist subcontractors to be introduced early into the team so that they can be involved in the design and installation of their specialist work. These specialist subcontractors can also advise in good time of the impact of their installation on the building fabric and internal environment.

(b) The employer's involvement with the design process

The employer may wish to appoint and retain their own designers. In this case the employer will take on board the responsibility for their consultants as far as the main building contract is concerned. Within this relationship the employer will look to reduce the risk under the building contract by having a separate contract with the consultants. This consultancy contract will incorporate provisions to protect the employer's exposure as far as design and contract administration is concerned. Alternatively the employer may pick consultants to design the building concept and put in place quality standards. Thereafter the consultants are retained as advisers or handed over (novated or switched) to the contractor. The employer must also consider the possibility of a change to the requirements during the building process—some contracts create more vulnerability than others in this respect.

(c) The client's involvement with the construction process

Some experienced employers may wish to manage the construction process and dispense with the role of the managing contractor. Alternatively once the consultants have produced their designs and specifications the employer will terminate their involvement and use their own skill to manage the project. Other clients who are not so experienced or do not have the internal resources may decide to select a contract which demands minimal input from themselves and thereby reduces their exposure to risk.

(d) The required speed from inception to completion

Quite often the employer's internal decision-making process or allocation of funding within financial years, results in the need for a building to be designed and built in the shortest time possible. The requirement for speed often results in having to pay a cost premium and introduces an added risk of mistakes occurring. Speed may result in a poorly defined employer's brief, mistakes in the design or a greater knock-on effect due to mishaps on site during construction. The availability of time is one of the key factors to consider when selecting a contract. Because the building procurement process is essentially a linear process going through the stages of briefing, design and specification writing, tendering, manufacture and finally construction, the obvious method to save time is to overlap the various procurement stages. There are standard procurement methods which enable this overlap but the

employer must also be aware of the potential disadvantages that this process may bring. Therefore the employer and their advisers must evaluate the benefits against the potential added risks that these procurement methods bring.

(e) The required degree of price certainty

A large proportion of employers need to have a degree of certainty about their financial exposure when procuring a building. Some clients however may value other factors such as speed more than price certainty especially if making a large investment in equipment and plant. Sometimes the building enclosure may be only a small proportion of the total package. In these circumstances the employer is able to accommodate a degree of price uncertainty in return for an earlier completion date. It should be noted that certainty on price should not be confused with total cost. Total cost is concerned more with having a choice from a range of priced options whereas certainty on price is concerned about when the final cost is known.

There are many standard building contracts available but generally they can be grouped together under four main procurement methods which are outlined below.

1.1.1 The traditional contract

One of the aims of the traditional contract is to spread the risks equally between the employer and the contractor. Under this contract the employer will select a team of consultants (which will usually include the architect) to prepare the designs and specifications based on the client's brief. The architect will later go on to administer the building contract on behalf of the employer and inspect the works during the contract period to make sure that the project is being built in accordance with the designs and specifications. Depending on the size and complexity of the project the architect may be assisted by civil, structural and services engineers. In addition on larger projects the employer may appoint a quantity surveyor to examine the drawings and specifications and prepare bills of quantities, carry out valuations and give the employer financial advice relating to the project.

Based on the documentation prepared by the employer's team a main building contractor is appointed either by competition on a tender basis or by negotiation. Once appointed the building contractor constructs the building in accordance with the contract documents, these being the