

Is single point design responsibility under JCT 2005 illusory?

Professor Peter Hibberd

Introduction

In endeavouring to answer the question as to whether single point design responsibility under JCT 2005 is illusory, it is first necessary to establish what it is, why it is pursued (is its pursuit worthwhile), and how it is has been and is being sought. Once this background has been set out one can then look at the way contractual arrangements have developed, the wording that has been used and the extent to which the contract forms have been successful in achieving their objectives in regard to liability for design.

What is single point design responsibility?

In order to address this question one must define both *single point* and *design* responsibility. In this context *single point* is fairly straightforward in that it refers to a single entity (individual or organisation) that is responsible for all design necessary to construct the project. This could be any individual or organisation but the most likely candidates are the client's independent designer or a *design and build* contractor. It could equally be a construction manager but this is seldom the case.¹

The definition of *design* is a somewhat more difficult proposition and has been referred to as:

“A rather vague term denoting a scheme or plan of action. In the construction industry, it may be applied to the work of the architect in formulating the function, structure and appearance of a building or to a structural engineer in determining the sizes of structural members”².

The second part of this definition is far from comprehensive and probably is a natural consequence of the looseness with which the term *design* is used.

A question frequently asked is where does design start and finish. For instance, the architect may, (and frequently does) consider his design input to be complete but the reality is often quite different. Whether the design process is actually complete is dependent upon the level of detail necessary to fulfil this function and whether it has been provided to the contractor. In theory, under a traditional contractual arrangement it should be everything necessary to enable the contractor to construct the works but in practice this seldom occurs and the contractor makes many design decisions. The last level of design is generally of a low order but not necessarily unimportant and it may determine the success or otherwise of a component. This last level of design by the contractor may be a conscious decision, for example the choice of nail or other

¹ Usually the design responsibility is provided by a designer and the various trade contractors – see the Auditor General for Scotland's comment on construction management to the Audit Committee of the Scottish Parliament in his report Managing of the Holyrood building project 29/6/04.

² Building Contract Dictionary, 3rd Edition, Blackwell Science

fixing, the precise position of the vertical damp proof course at the jambs of an opening or possibly even what block or rooflight is used. This is because these matters are not always fully detailed or specified. Strictly, the contractor should ask for instructions but even where he does the decision is often still left for him. By contrast, this last level of design may be involuntary and determined by the expertise of the operatives employed, with the end product not necessarily achieving an absolute standard but nevertheless falling within an acceptable tolerance.

Why is single point design responsibility pursued?

If it were absolutely clear who was responsible for a building defect, it would, in the ordinary course of events, matter little who it was so long as they were good for the claim: a remedy would be available but more importantly, potentially at least, more easily achievable. However, this is not the position because there is difficulty in defining design and consequently who is responsible: this is one of the reasons why single point design responsibility is sought through the procurement route of *design and build*. *Design and build* attempts to side step the need for a definition and to avoid any arguments as to who is responsible for a design defect.

How can single point design responsibility be achieved?

The idea of the single point of design responsibility resting with the client's independent designer is one that theoretically can exist both in law and in practice. The basic position in law is that the architect has no authority apart from the express approval of the client to delegate any part of the design³, however it should be noted, in some instances that approval may be implied⁴. Therefore, where the client appoints a designer for the whole works he has theoretically achieved single point design responsibility unless or until he permits such delegation, which almost inevitably will arise on larger projects simply because of the width of expertise required. Even where there is delegation single point design responsibility can, in some instances, still be achieved in practice through the vehicle of a multi-disciplinary practice, thus providing a single entity.

Where single point design responsibility rests with the client's independent designer the contractor is not responsible for any design but because this single point is seldom clearly defined, cases have arisen where the boundaries have been crossed. Nevertheless, the traditional method of construction procurement proceeds on the basis that the contractor is free of any design responsibility and even where a bill of quantities tries to impose a measure of design responsibility through a performance specification the court has held this to be ineffective.⁵ Therefore, under the traditional method the contractor probably avoids any design responsibility unless it is expressly provided for in the contract conditions.

As referred to earlier, *design and build* is another method by which single point design responsibility is sought. It has the added advantage that as it provides for construction as well as design any distinction as to whether a matter is one of design

³ Moresk Cleaners v Thomas Hicks (1966) 4 BLR

⁴ Merton LBC v Lowe (1981) 18 BLR130

⁵ Mowlem v British Insulated Callenders Pension Trust (1977) 3 Con LR

or one of goods and or workmanship is of less relevance when seeking a remedy for a building defect. *Design and build* is an attempt to avoid this distinction. However, the organisation accepting single point responsibility for design and construction will still look down the supply chain for a possible remedy to alleviate its own position. Hence, the problem is moved, not avoided. Metter is reported⁶ as saying:

“For risk transfer to work efficiently over the long term, the contractor must take the design risk. This means that the designer must work for the contractor where this does not happen, interface issues and design liability issues arise.”

The real question that emerges is not so much how single point design responsibility is achieved but rather how is the separation of design and construction overcome. There is also the question of whether the employer’s requirements should be considered as part of design. These are design requirements, not design, but frequently they are not treated this way.⁷

Changes in procurement

In the 1960’s most buildings were procured by what is described as the traditional method. A unique characteristic of this approach is the separation of the responsibility for design of the project from that of its construction. According to Masterman⁸ this approach:

“has the advantage of having stood the test of time over many years and being understood by many clients and by all participants from the construction industry itself. The client is able to select the most appropriate design team ... and can also delay a commitment to a building contract until a later stage in the development of his/her requirements.”

From early days until the present JCT provided standard forms to meet this procurement approach. The basic principle being that the client’s independent designer is responsible for design, whereas the contractor simply builds it to the designer’s requirements. But with many processes there are complications and methods of procurement in the construction industry are no exception. Designers wanted to nominate sub-contractors and suppliers and consequently JCT98 and its predecessors contained provisions to cover for these. Notwithstanding that the contractor has no responsibility for design, design may be done by a nominated sub-contractor. As a result, a warranty should be given by that sub-contractor to the client for the design carried out but whether this relieves the client’s independent designer of liability is another matter.⁹ In any event, there is the situation where the contractor is not liable for design but employs a sub-contractor who is and there is an independent designer who is responsible for the design of the project and may to some extent be relieved of the design carried out by the nominated sub-contractor. These less than straightforward lines of responsibility arose because of what was required by users but

⁶ Building, 23rd September 2005, page 50

⁷ See Overview for reference to this point.

⁸ Introduction to Building Procurement Systems 2nd Edition, Masterman, Spon, page 49

⁹ See footnote 3 above.

this complexity eventually gave impetus to pursuing the question of single point responsibility and to whether there are better ways of procuring buildings.

During the 1960's other procurement paths were sought largely because this separation of design from construction was seen as problematic. It meant that if something were to go wrong with the building there inevitably was an argument as to whether it was a design or construction defect. It also meant that as the design and construction were separated the contractor's involvement could have little impact on design and consequently it was argued that the issue of buildability was not adequately considered when using traditional procurement. *Design and build* was developed to address these issues and started to develop as a procurement path but was held back by the perceived quality of design under such arrangements. Almost certainly the architectural profession saw the development of *design and build* as undermining its influence and a threat to its independence. It resisted its development for some time and it was not until 1981 that JCT published the JCT With Contractor's Design standard form of contract. At this time *design and build* still represented a very small percentage of contracts and by 1984 it was still less than 3% (by number) and just over 5% (by value) of contracts¹⁰. The publication of a JCT contract providing for *design and build* facilitated a growth in this type of contractual arrangement and according to figures published in the RICS survey had grown to 14% and 43% respectively by 2001.

It is quite clear that users believe that *design and build* has something to offer. Not surprisingly, Masterman¹¹ classified it as an integrated procurement system, which brought together all the supply side players under the *design and build* contractor. Integrated teams are a part of integrated procurement systems and have been developing seriously in this context for well over twenty-five years; the concept of an integrated team is not, as some would have it, a recent event.

Notwithstanding the complexity of design responsibility in the traditional method this approach still developed alongside that of *design and build*. There emerged within the traditional approach the idea that part of the work could be reserved for the contractor to design (contractor's designed portion). This shifted some of the design responsibility to the contractor but the responsibility for the overall design remained with the client's independent designer. This modification to the basic position under the traditional method obviously brings with it further grey areas. In 1981 the JCT issued a Contractor's Designed Portion Supplement (CDPS) in an effort to bring some clarity to the situation.

Interestingly, although performance specified work, which by its nature has a design element, could be incorporated into a CDPS it was thought appropriate to provide for this separately, especially as it had become fairly common practice to specify such work. In 1993, by way of amendment 12 to the JCT Standard Form of Building Contract, express provisions for Performance Specified Work were included, thus also providing a solution to the problem previously referred to.¹² Practice Note 25 (Series 1) sets out the circumstances in which such work was to be specified, paragraph 2.8 states:

¹⁰ Contracts in use – A survey of building contracts in use during 2001, RICS

¹¹ Introduction to Building Procurement Systems 2nd Edition, Masterman, Spon, Chapter 5

¹² See footnote 5 above.

- “2.8 The provisions for Performance Specified Work should not be used for items which will materially affect the appearance of the building, or may result in changes in the design of other work (otherwise than that at the interface with the Performance Specified Work), or will affect the use of the finished building, so that it would be essential to examine and accept the Contractor’s proposals for the work before acceptance of the tender.”

Despite the advance of *design and build* as a procurement method the traditional method continued and there seemed to be no stopping the number of innovations to the traditional process. Do clients really want single point design responsibility let alone single point design and construction responsibility?

Many clients stress that the concept of single point design responsibility is of high importance. If this is so, and that for most the concept of single point design responsibility is synonymous with *design and build*, why is it that the traditional systems are still in use? Could it be that the concept of single point design responsibility is not as important as we think, could it be that it is, in any event, illusory and consequently cannot deliver the advantages it promises, or is it neither of these. It may be inertia or it may be that traditional processes still have much to offer. The continuing search for other procurement models shows that for some neither *design and build* nor the traditional method may satisfy their needs but this pursuit of alternative procurement strategies may be by a small minority, albeit with some influence.

Taking the first of these points; it may be single point responsibility, although very important in itself, when seen against a background of other matters loses some of its importance. An answer may be found in the quotation from Masterman that is stated above¹³, the reference to one advantage of the traditional method being that the client is able to select the most appropriate design team. It is the fact that the client often wishes to appoint his own designer that goes to the root of the issue. One cannot be certain why this is so but it may be about the quality of design and the original perception that *design and build* produces mediocre design still persists. It may be that patronage is still a significant factor. Whatever the reason, it is still prevalent.

Therefore, it is perhaps not so surprising that the traditional method continues. The client keeping his own designer but at the same time shifting more responsibility to the contractor – contractor’s designed portion, performance specified work. In parallel to these developments the *design and build* method has also been influenced by the desire of the client to retain his own designer, at least until the aesthetics of the building have been determined. Here we see the emergence of novation of the design team; the client novating his design team to the contractor.

Design and build as a procurement route has therefore changed over time to encompass the ‘package deal’, the bespoke contractor’s designed project and client’s partially designed project, which the contractor completes. The last of these is more akin to the concept of ‘develop and construct’. Its rise in popularity has also arisen from the perceived higher standard of design liability that applies to *design and build* contractors.

¹³ See page 3.

The question here concerns whether the designer is under a duty of reasonable skill and care or one of fitness for purpose. Although the common law duty of reasonable skill and care applies to an independent designer it can be modified but there is reluctance on the part of such consultants to take on a duty higher than that of reasonable skill and care. The argument being that there will be little benefit to the client if the standard offered is not supported by professional indemnity insurance. By comparison the *design and build* contractor is often exposed to a strict liability as to fitness for purpose.¹⁴ However, this difference is not as great as it sometimes appears; see for example the case of *Greaves v Baynham Meikle*¹⁵ where the failure to provide a solution that was fit for the stated purpose was on the facts a failure to exercise reasonable skill and care.

What JCT98 forms of contract provide for design?

In the JCT98 suite of standard contracts Contractor's Design is provided for in the following:

1. Standard Form of Building Contract With Contractor's Design (WCD) – here the contractor takes overall responsibility for design.
2. Standard Form of Building Contract (this also includes for Performance Specified Work) incorporating the Contractor's Designed Portion Supplement (CDPS) – the client's independent designer takes overall responsibility for design but the contractor will have a design responsibility for an identified portion of the works and for meeting any performance specified standards that are identified or referred to in the Appendix to the contract. This overall design responsibility of the independent designer remains even where the use of the CDPS is abused by endeavouring to place in one or a number of portions most of or all of the design work. As mentioned earlier a nominated sub-contractor may have a design responsibility for his sub-contract work even though the contractor carries no design risk.
3. The Intermediate Form of Building Contract provides expressly for named persons as sub-contractors who may design part of the Works. IFC makes clear the contractor's position on design liability in respect of named sub-contractor's work and sets this out in clauses 3.3.7 and 3.3.9.

“3.3.7 Whether or not a person who has been named as a sub-contractor under any of clauses **3.3.1** to **3.3.5** is responsible to the Employer for exercising reasonable care and skill in:

- the design of the sub-contract works insofar as the sub-contract works have been or will be designed by the named person;
- the selection of the kinds of materials and goods for the sub-contract works insofar as such materials and goods have been or will be selected by the named person; or

¹⁴ *Viking Grain Storage v TH White Installations Ltd.* (1985) 33 BLR 103

¹⁵ *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* (1975) 3 All ER 99

- the satisfaction of any performance specification or requirement relating to the sub-contract works,

the Contractor shall not be responsible to the Employer under this Contract for anything to which the above terms relate, nor, through the Contractor, shall the person so named or any other sub-contractor be so responsible; provided that this shall not be construed so as to affect the obligations of the Contractor or any sub-contractor in regard to the supply of goods and materials and workmanship.

The provisions of this clause **3-3-7** shall apply notwithstanding that the Sub-Contract Sum stated in article 2 of Section III of the Tender and Agreement NAM/T referred to in clause **3-3-1** or **3-3-2** included for the supply of any design, selection or satisfaction as referred to herein, and that such Sub-Contract Sum is included for within the Contract Sum or the Contract Sum as finally adjusted.”

“3-3-9 Save as otherwise expressed in the Conditions the Contractor shall remain wholly responsible for carrying out and completing the Works in all respects in accordance with clause **1-1-1** notwithstanding the naming of a sub-contractor for the execution of work described in the Specification/Schedules of Work/Contract Bills.”

These clauses are similar but not identical to those contained in JCT 98 in respect of nominated sub-contractors (clause 35-21).

4. Nominated Sub-Contract (NSC/C) – although the sub-contractor may be carrying out the design of the sub-contract works under this contract the sub-contractor is not responsible to the contractor. Clause 1-4D includes the following exclusion:

“1-4D The Sub-Contractor shall not be responsible to the Contractor for:

- 1 the design of the Sub-Contract Works insofar as such works have been designed by the Sub-Contractor;
- 2 the selection of the kinds of materials and goods for the Sub-Contract Works insofar as such kinds of materials and goods have been selected by the Sub-Contractor;
- 3 the satisfaction of any performance specification or requirement insofar as such performance specification or requirement is included or referred to in the description of the Sub-Contract Works included in or annexed to the numbered tender documents enclosed with NSC/T Part 1;
- 4 the provision of any information required to be provided pursuant to Agreement NSC/W (*Employer/Nominated Sub-Contractor Agreement*) in reasonable time so that the Architect can comply with the provisions of clauses 5-4-1 and 5-4-2 of the Main Contract Conditions.

Nothing in this clause 1-4D shall affect the obligations of the Sub-Contractor under this Sub-Contract in regard to the supply of workmanship, materials and goods.”

5. Standard Form of Employer/Nominated Sub-Contractor Agreement (NSC/W) – this provides a sub-contractor’s warranty to the employer in respect of design of the nominated sub-contract works.
6. NAM/SC Sub-Contract Conditions for Sub-Contractors named under the Intermediate Form of Building Contract – although the sub-contractor may be carrying out the design of the sub-contract works under this contract there is no similar exclusion to 1.4D of NSC/C. The warranty to be given by the sub-contractor to the employer is in the form ESA1 and is not produced by JCT.

WCD98

From first glance it is clear that only WCD is likely to offer single point design responsibility. Let us look at what the contract says so as to establish if this is the case.

“Article 1

Upon and subject to the Conditions and, where so stated in Appendix 1, upon and subject to the Supplementary Provisions which modify the aforesaid Conditions, the Contractor will, for the consideration mentioned in article 2, both complete the design for the Works and carry out and complete the construction of the Works.”

As can be seen this Article states that the Contractor will both complete the design for the Works and carry out and complete the construction. The reference to complete the design indicates that some design will already have been done. The extent of this design by others is variable but immediately one can see that it is not the intention of WCD98 to provide for single point design responsibility. Clause 2.1 states:

“The Contractor shall upon and subject to the Conditions carry out and complete by Sections the Works referred to in the Employer’s Requirements, the Contractor’s Proposals (to which the Contract Sum Analysis is annexed), the Articles of Agreement, these Conditions and the Appendices in accordance with the aforementioned documents and for that purpose shall complete the design for the Works including the selection of any specifications for any kinds and standards of the materials and goods and workmanship to be used in the construction of the Works so far as not described or stated in the Employer’s Requirements or Contractor’s Proposals.”

The significance of this clause in regard to design is that the contractor shall complete the design for the Works so far as not described or stated in the Employer’s Requirements or Contractor’s Proposals. These two documents will set out any design that has already been done and clearly shows again that the contractor is not taking a single point design responsibility. However, the contractor may have an implied duty to warn about defects that should be apparent to a competent contractor.¹⁶

It was shown in the *Boot* case¹⁷ that a *design and build* contractor could not simply take for granted details that had been given to him by the client (or his consultants) in order to fulfil his obligations. This surprised many users and JCT was asked to address this situation.

¹⁶ Equitable Debenture Assets Corporation v Moss (1983) 2 Con LR 1

¹⁷ Co-operative Insurance Society Ltd v Henry Boot Scotland Ltd (2002) EWHC 1270 (TCC)

The contractor's design warranty is set out in clause 2.5 as follows:

- “2.5** -1 Insofar as the design of the Works is comprised in the Contractor's Proposals and in what the Contractor is to complete under clause 2 and in accordance with the Employer's Requirements and the Conditions (including any further design which the Contractor is to carry out as a result of a Change in the Employer's Requirements), the Contractor shall have in respect of any defect or insufficiency in such design the like liability to the Employer, whether under statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design who, acting independently under a separate contract with the Employer, had supplied such design for or in connection with works to be carried out and completed by a building contractor not being the supplier of the design.
- 2.5** -2 Where and to the extent that this Contract involves the Contractor in taking on work for or in connection with the provision of a dwelling or dwellings the reference in clause 2.5.1 to the Contractor's liability includes liability under the Defective Premises Act 1972 and where the application of S.2(1) of the Act is included in the Employer's Requirements the Contractor and the Employer respectively shall do all such things as are necessary for a document or documents to be duly issued for the purpose of that section and the scheme approved thereunder which is referred to in Appendix 1.
- 2.5** -3 Where and to the extent that this Contract does not involve the Contractor in taking on work for or in connection with the provision of a dwelling or dwellings to which the Defective Premises Act 1972 applies, the Contractor's liability for loss of use, loss of profit or other consequential loss arising in respect of the liability of the Contractor referred to in clause 2.5.1 shall be limited to the amount, if any, named in Appendix 1: provided that such limitation of amount shall not apply to or be affected by any damages which under clause 24.2 the Contractor could be required to pay or allow at the rate stated in Appendix 1 as liquidated and ascertained damages in the event of failure to complete the construction of the Works by the Completion Date.
- 2.5** -4 Any references to the design which the Contractor has prepared or shall prepare or issue for the Works shall include a reference to any design which the Contractor has caused or shall cause to be prepared or issued by others.”

The position in respect of the contractor's designed works under the CDPS follows a similar approach but additionally refers to the integration of this work with that of the works as a whole under the directions of the architect.

In both cases the contractor's liability is the same as an architect or other professional designer would have to an employer and this generally is taken to be no more than reasonable skill and care. Although as has been seen earlier from the Greaves case this may go some way to fitness for purpose, it is unlikely to extend to a full fitness for purpose obligation notwithstanding the findings in that case. However, what the difference is between a designer acting for a contractor where the purpose is known and that of a designer acting for an employer in similar circumstances is a moot point.

Under clause 6.1 the contractor has to comply with statutory requirements regardless of what is said in the Employer's Requirements – the only saving for the contractor where something is stated in the Employer's Requirements to comply with the statutory requirements is that he will be able to recover the cost of subsequent compliance with the law.

What JCT2005 forms of contract provide for design?

The contracts in the JCT98 suite that provide for a design input by contractors are limited and only the larger end of the market is catered for, unless the user wishes to use a contract that contains procedures that often would not be considered relevant for the size of project involved. The Agreement for Minor Building Works and the Intermediate Form of Building Contract do not provide for a contractor's input. The rationale behind this is that at the smaller end of projects the architect would not need to involve the contractor in design but this view has changed.

In the JCT 2005 suite of standard contracts contractor's design is provided for in the following:

1. Minor Building Works Contract with contractor's design (MWD)

Appropriate:

- where the work involved is simple in character;
- where the work is designed and the requirements for the contractor's design of discrete part(s) are detailed by or on behalf of the Employer, and where the Contractor is required to design those part(s) of the work (contractor's designed portion);
- where the Employer is to provide drawings and/or a specification and/or work schedules to define adequately the quantity and quality of the work; and
- where a Contract Administrator is to administer the conditions.

Can be used:

- by both private and local authority employers.

Not suitable:

- as a design and build contract;
- where bills of quantities are required;
- where provisions are required to govern work carried out by named specialists;
- where detailed control procedures are needed.

2. Intermediate Building Contract with contractor's design (ICD)

Appropriate:

- where the proposed building works are of simple content involving the normal, recognised basic trades and skills of the industry, without building service installations of a complex nature or other complex specialist work;
- where the works are designed, the requirements for the contractor's design of discrete part(s) are detailed by or on behalf of the Employer, and the Contractor is required to design those part(s) of the work (Contractor's Designed Portion);
- where fairly detailed contract provisions are necessary and the Employer is to provide drawings and bills of quantities, a specification or work schedules to define adequately the quantity and quality of the work; and
- where a Contract Administrator and Quantity Surveyor are to administer the conditions.

This contract provides more detailed provisions and more extensive control procedures than the Minor Works Building Contract with contractor's design (MWD) but is less detailed than the Standard Building Contract (SBC).

Can be used:

- where the works are to be carried out in sections;
- by both private and local authority employers;
- where provisions are required to cover named specialists.

Not suitable:

- as a design and build contract.

3. Standard Building Contract (SBC) (replaces JCT98) – this includes a contractor's designed portion

Appropriate:

- for larger works designed and/or detailed by or on behalf of the Employer, where detailed contract provisions are necessary and the Employer is to provide the Contractor with drawings; and with bills of quantities to define the quantity and quality of the work; and
- where a Contract Administrator and Quantity Surveyor are to administer the conditions.

Can be used:

- where the Contractor is to design discrete part(s) of the works (contractor's designed portion);
- where the works are to be carried out in sections;
- by both private and local authority employers.

4. Design and Build Contract (DB) (replaces WCD98)

Appropriate:

- where detailed contract provisions are necessary and Employer's Requirements have been prepared and provided to the Contractor;
- where the Contractor is not only to carry out and complete the works, but also to complete the design; and
- where the Employer employs an agent (who may be an external consultant or employee) to administer the conditions.

Can be used:

- where the works are to be carried out in sections;
- by both private and local authority employers.

Where the Contractor is restricted to design small discrete parts of the works and not made responsible for completing the design for the whole works, consideration should be given to using one of the JCT contracts that provide for such limited design input by the Contractor and the employment of a Contract Administrator.

5. Major Project Construction Contract (MP) (replaces Major Project Form)

Appropriate:

- for major works where the Employer regularly procures large-scale construction work and where the Contractor to be appointed is experienced and able to take greater risk than would arise under other JCT contracts;
- where the parties have their own detailed procedures and where limited procedures only need to be set out in the contract conditions;
- where the Employer has prepared his requirements and provided these to the Contractor;
- where the Contractor is not only to carry out and complete the works, but also to complete the design; and
- the Employer employs a representative to exercise the powers and functions of the Employer under the Contract.

Can be used:

- where the works are to be carried out in sections.

6. Intermediate Named Sub-Contract (ICSub/NAM)

Appropriate:

- for use where the main contract is the Intermediate Building Contract or Intermediate Building Contract with contractor's design; and
- where the Sub-Contractor is 'Named' to carry out sub-contract works,

whether or not they include design.

Can be used:

- where the sub-contract works and/or main contract works are to be carried out in sections; and
- for sub-contract works that are to be carried out on the basis of an adjusted sub-contract sum (adjustment for variations etc.) or by complete re-measurement.

Not suitable:

- unless the Sub-Contractor is 'Named' in the main contract or under its provisions;
- for any sub-contract work that forms a part of the contractor's designed portion.

Consider:

using an Intermediate Named Sub-Contractor/Employer Agreement (ICSub/NAM/E) in conjunction with the Intermediate Named Sub-Contract (see the Intermediate Building Contract Guide (IC/G)) where:

- the Named Sub-Contractor is to carry out design work or to procure or fabricate materials or goods prior to letting of the main contract; and/or
- the Employer:
 - requires undertakings from the Named Sub-Contractor in respect of the sub-contract works and any related design work which he is to carry out; and/or
 - requires the Named Sub-Contractor to give Collateral Warranties to purchasers/tenants and/or any funder of the main contract works or relevant part(s) of them.

7. Intermediate Named Sub-Contractor/Employer Agreement (ICSub/NAM/E)

Appropriate:

- for use between a Named Sub-Contractor and an Employer;
- where the main contract is or will be the Intermediate Building Contract or Intermediate Building Contract with contractor's design; and
- where the Sub-Contractor is to be Named in the main contract or under its provisions to carry out the design and execution of sub-contract works.

Not suitable:

- for any sub-contract work that forms a part of the contractor's designed portion.

JCT contracts no longer include provisions for nominated sub-contractors or nominated suppliers. This reflects the shift away from these procedures which in part

has arisen from the desire of the industry to simplify the lines of design responsibility. Nor do they include express provisions for performance specified work.

It should be emphasised that the two new design contracts i.e. MWD and ICD provide only for a contractor's designed portion and should not be treated as though they were *design and build* contracts. JCT recognises that independent designers do, from time to time, need contractors to provide a design input but it was thought that to extend this to complete *design and build* at this end of the market could be dangerous for both contractors and for clients.

After a review of the JCT 2005 suite it will be seen that many are providing for part design by the contractor and with the client's independent design team maintaining overall control. Many clients still wish to maintain their own independent designer and do not seek single point design responsibility; nor do they wish to combine the responsibility for design and construction. There are two contracts in this suite that offer the possibility of single point design responsibility, namely the Design and Build Contract and the Major Project Construction Contract.

Design and Build Contract (DB05)

This contract replaces WCD98 and the principal changes in respect of design concern the inclusion of a design submission procedure and changed wording to reflect the 2002 case of *Co-operative Insurance Society Ltd v. Henry Boot Scotland Ltd* previously referred to¹⁸. The design submission procedure is similar to that previously included in the Major Project Form.

The inclusion of a design submission procedure allows the client to monitor the design documents prepared by the contractor. The responsibility for any such design documents remains with the contractor regardless of the review undertaken by the client.

In the review process the only responses the client may make to a submittal is to place it in one of the following categories:

- 'A Action' – meaning that the Contractor is to execute the Project in accordance with the Design Document.
- 'B Action' – meaning that the Contractor is to execute the Project in accordance with the Design Document, provided that the Employer's comments are incorporated and a revised copy of the Design Document submitted to the Employer.
- 'C Action' – meaning that the Project is not to be executed in accordance with the Design Document and that a revised Design Document should be submitted to the Employer incorporating the comments made by the Employer to obtain 'A Action' or 'B Action' prior to usage.

¹⁸ See footnote 17.

The Contract provides that the only reason a Design Document may be marked 'B Action' or 'C Action' is where the Employer considers it not to be in accordance with the Contract. The only purpose of the comments made upon such Design Documents is to identify why the Employer considers them not to be in accordance with the Contract.

Although the purpose is clear, this process, which reflects common practice and one required by most employers, again illustrates how the position in respect of design responsibility could easily become confused.

The review of the Boot case has resulted in the inclusion of the following clause:

- 2-11** Subject to clause 2-15, the Contractor shall not be responsible for the contents of the Employer's Requirements or for verifying the adequacy of any design contained within them.

because of an unease as to its possible effect in terms of JCT contracts. JCT decided to make clear its intention that the contractor should not be required to check preliminary design work of the client's advisers included in the Employer's Requirements. A provision to similar effect is contained in the other contracts where there is a contractor's design input and first appeared in the Major Project Form 2003.

Some clients will find this situation unacceptable because it erodes the concept of the single point of responsibility for design. This point was considered in the Brit Oval project (which used the Major Project Form) where in a recent article¹⁹ it was said:

"Strictly speaking under the MPF the contractor is responsible only for any additional design work that is required beyond that contained in the requirements prepared by the employer, and not for the contents of those requirements or the adequacy of the design contained within them. This did not reflect Surrey's wish that there should be single point design responsibility"

The contractor has always been responsible for the compliance of his design work with the statutory requirements and for the cost of rectifying divergences from pre-existing statutory requirements and this position is maintained.

Major Project Construction Contract (MP05)

The 2005 edition is a reformatted version of the Major Project Form 2003 and contains no material changes. In contrast to the Design and Build Contract the Major Project Construction Contract goes a little further on a number of matters.

Firstly, the standard of care in clause 11-3 (2005) states:

"... skill and care to be expected of a professional designer appropriately qualified and competent in the discipline to which such design relates and experienced in carrying out work of a similar scope, nature and size to the Project."

¹⁹ Building, 23rd September 2005, page 75

It does add, however, that:

“the Contractor does not warrant that the Project, when constructed in accordance with his designs, will be suitable for any particular purpose.”

JCT considers that a ‘fitness for purpose’ provision should not be a standard provision, primarily because of the problem with insurance. It does however recognise that with some projects the contracting organisation may be prepared to carry such a responsibility and the Major Project Construction Contract outlines when a ‘fitness for purpose’ obligation may be considered appropriate. Paragraph 27 of the Guide states as follows:

“A ‘fit for purpose’ obligation may be considered where:

- The Employer’s purpose can be clearly defined and is for a well-established type of use.
- The construction process utilises tried and tested methods of construction and the Project is of a non-complex nature, limited to technical knowledge known or capable of being known by a competent designer at the time of design.
- The Contractor has addressed the availability of Professional Indemnity insurance with both his broker and the Employer. It would also be appropriate for the Parties to discuss the possibility of Project based insurance at the same time.
- The Contractor has been given control of the design process, but ‘fit for purpose’ obligations are not appropriate where the Employer is considering novating the original design contracts as these will almost always contain a reasonable skill and care type obligation.”

It also provides an alternative sentence to be substituted for the final sentence of clause 11.3 (2005).

In terms of ground conditions (not expressly covered in DB05) the default position under the Major Project Construction Contract is that the Contractor takes the risk and any necessary changes do not give rise to a Change i.e. there is no additional cost recovery or an extension of time. This position can be altered by the application of clause 14.2 (2005). By contrast, the Major Project Sub-Contract adopts the converse in terms of the default position but the Major Project Sub-Contract Guide at paragraphs 105 to 108 gives information relevant to changing this default position and how this might be done through the Sub-Contract Particulars.

MP05 also provides for the novation of consultants, although JCT has not published a form of novation. MP05 provides for the contractor to take over the responsibility for the consultants that had originally prepared the design. This is a means of streamlining the design responsibility but much may still depend upon the nature of the novation agreement. See for example, the ‘ab initio’ approach adopted in the Novation Agreement prepared by the City of London Law Society and the somewhat different approach adopted by the CICs Novation Agreement.

The Major Project Construction Contract has provisions in relation to Named Specialists. Named Specialists are those required by the client to carry out particular

work of design and/or construction but the Contactor remains responsible for their performance.

Overview

Many clients desire single point responsibility but often quickly compromise this by their approach to procurement or their acquiescence to procurement routes proposed by their consultants. Some will argue the failure to secure single point design responsibility is not a problem in that it is a desire, not an absolute objective. It will be sought in so far as it can be achieved without losing their freedom to act. Some will argue that single point design responsibility is not the real issue but it is the separation of design from construction. If one accepts that it is virtually impossible to achieve single point design responsibility without combining it with the responsibility for construction, logic tells us the second of these arguments is correct. However, it is clear that notwithstanding this benefit when using *design and build*, many clients prefer the traditional route because it allows their designers to maintain control.

Other construction clients enter into *design and build* contracts to secure the benefit of the *design and build* contractor being a single point of responsibility. This can be achieved but frequently it is not because the contractual arrangements do not reflect this as an absolute requirement. This sometimes arises because of sloppiness in putting together the contract documents but perhaps more frequently arises because the client still wants to maintain an involvement with the development of the design. Such involvement is incompatible with the concept of *design and build* and although it can be accommodated it will come at a high price. It could be simply because it is unreasonable to expect it.

The last point is pertinent to the exclusion now included in 2005 editions that means the contractor is not responsible for the Employer's Requirements or for verifying the adequacy of any design contained within them. This exclusion will no doubt cause concern to some clients. However, before deleting or amending this provision one should question whether it is really unreasonable to have such an exclusion. The client is in control of the Employer's Requirements and therefore can prepare them in such a way as to provide functional and performance requirements only – it would not normally be for the contractor to have any input on such matters and should only arise where specifically required (where this is required an amendment may be justified). If the client includes designs in the Employer's Requirements, should the contractor not be able to rely on them? If he cannot then the cost and time implications of checking someone else's designs need to be taken account of. Is the client prepared to pay the additional cost of such duplication?

The other view of this exclusion is that it only provides the contractor with a limited amount of protection. This is because he has a contractual obligation to give notice if he finds an error, omission or inadequacy in, amongst other things, the Employer's Requirements, which taken together with an implied duty to warn of defects that should be apparent to a competent contractor and an obligation to comply with statutory requirements means a significant level of responsibility is still with the contractor.

JCT contracts provide benchmarks and their provisions are intended to be fair to both parties and designed to keep costs down by not expecting contractors to price those risks that are more appropriate for the client to bear. As and when the market changes in terms of practice and in its approach to risk, JCT will respond accordingly.

Conclusion

There are different views as to what is appropriate in terms of procurement and this is a matter of judgement for clients and consultants. JCT contracts meet these differing requirements by reflecting the current needs of the market place by providing for complete design by an independent designer, part design by a contractor with overall control provided by an independent designer and for *design and build*. JCT also provides for named specialists in the very different contexts of the Intermediate Building Contract and the Major Project Construction Contract. The success of these contracts depends upon their proper use.

Theoretically, single point design responsibility need not be illusory but frequently it is because of a lack of a desire to achieve it, through perceived necessity or simply because there is no agreement as to what it constitutes.