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Construction Law Training – Session 1

Procurement, Contractual Relationships and Design

These slides are provided for information only and are not a substitute for legal advice

Presenter

Andrew Rush

Senior Partner

Andrew used to be an engineer. After requalifying as a lawyer he spent time at a leading City firm before establishing an industry-leading construction team at large regional firm and becoming a member of the Legal 500 'Hall of Fame' in the process. His background allows him to get to the root of the issue and provide pragmatic commercial advice alongside specialist construction legal advice.

andrew.rush@anchor.co.uk



Hanna McNab

Partner

Most of Hanna's work involves disputes, but she is equally adept working on contract documents, giving ad hoc advice, and providing training. Hanna is queen of the escrow agreement, is involved with all sorts of industry bodies and committees, and, most importantly, is our Social Secretary (an honour she prizes above all others). Legal 500 has said Hanna is "on course for a very successful career". Hopefully that career is in law.

hanna.mcnab@anchor.co.uk



Partners



Andrew Rush

Senior Partner



Ruth Kavanagh

Managing Partner



Carolyn Porter

Partner



Hanna McNab

Partner



Oli Worth

Partner



Rory Abel

Partner

The Team



Adam Brown
Legal Director



Simon Franklin
Legal Director



Sarah Lester
Legal Director



Dan Leno
Consultant



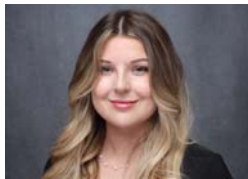
Hayley Morgan
Senior Associate



Liam Hendry
Senior Associate



Lucy Day
Associate



Jessica Garrod
Associate



Shahbaz Mohammed
Associate



Molly Lockerbie
Associate



Connor McNicholl
Associate



Abby Blake
Paralegal



Amy Martyn
Paralegal



Megan Green
Trainee Solicitor



Amelia Formoy
Trainee Solicitor

Session 1 – Procurement, Contractual Relationships and Design

- Types of procurement
- The inter-relationship of documents
- Design



Part 1 - Procurement

The background image is a silhouette of a construction site at sunset. A large crane is on the left, and several tall structures under construction are in the center and right, surrounded by scaffolding. The sky is a mix of orange and blue. The title 'Procurement Options' is written in white on the left side.

Procurement Options

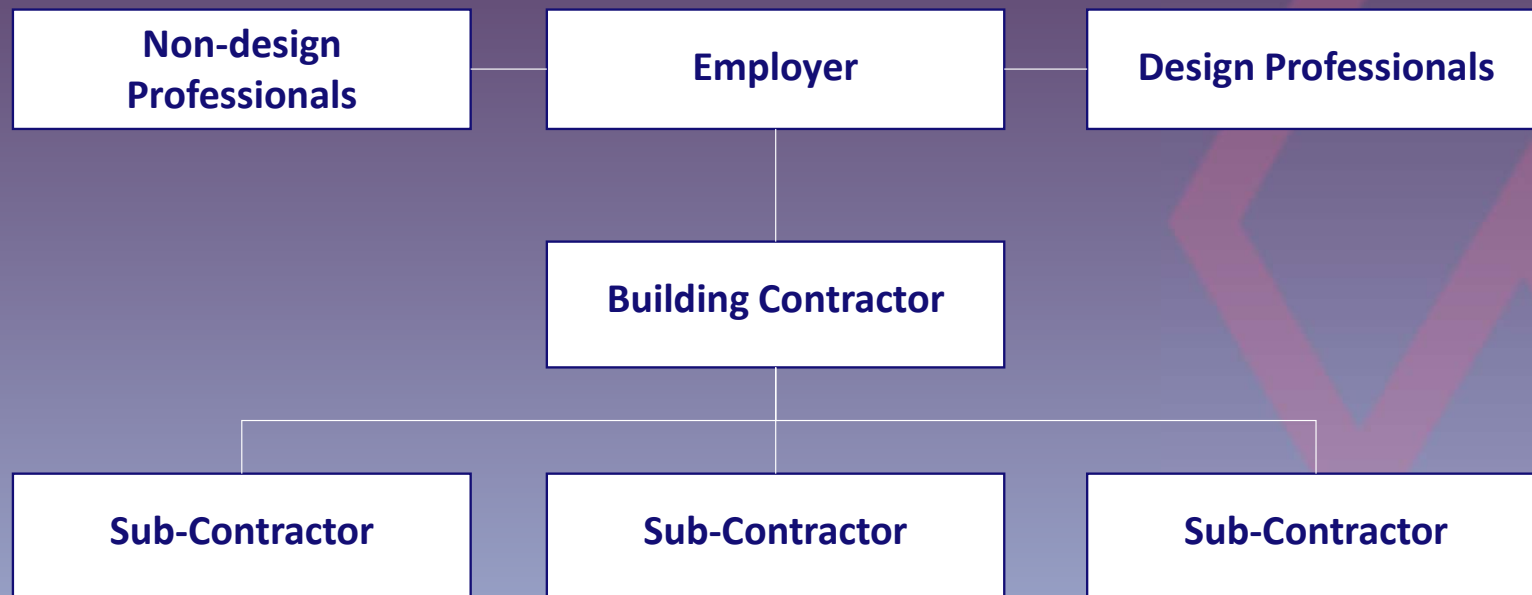
- Traditional
- Design and Build
- Contractor's Designed Portion
- Construction Management
- Management Contracting
- PFI/PPP
- Partnering
- Frameworks



Forms of Construction Contract

- JCT – which option
- NEC – which option
- ACA PPC 2000
- Bespoke
- Amendment to the above?



Traditional



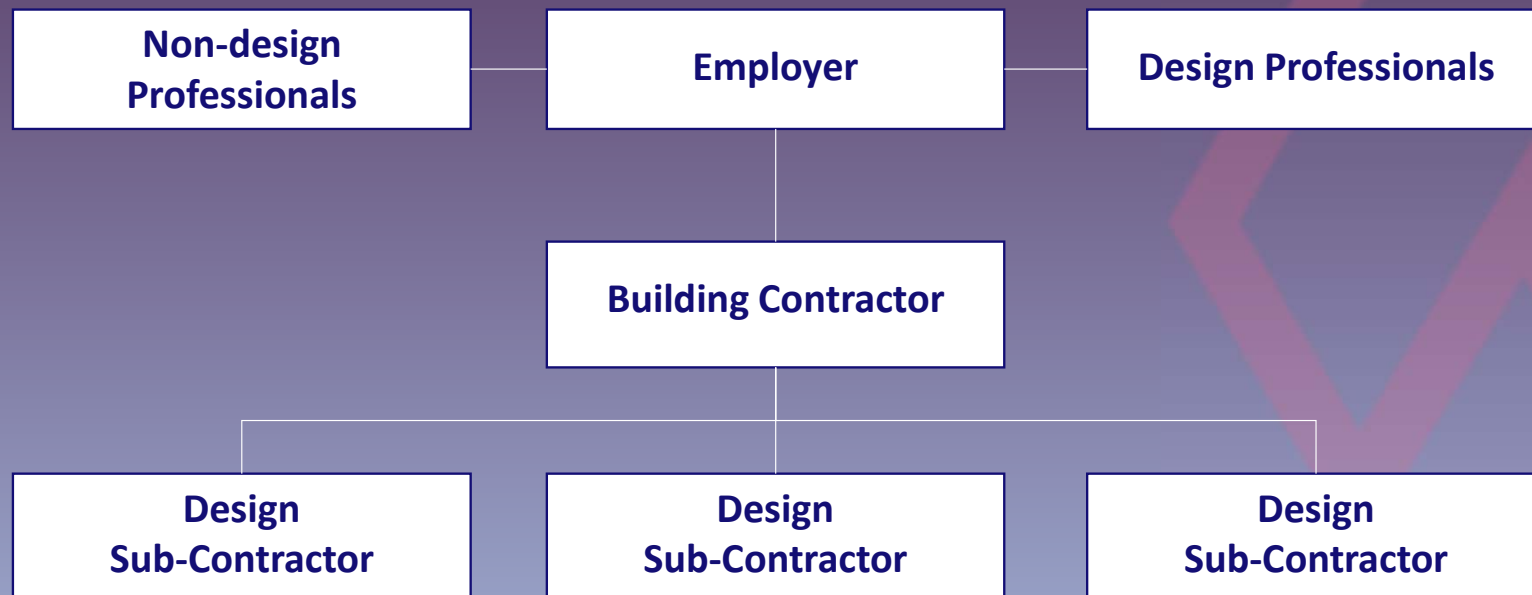
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|--|---|--|---|
|  <p>1% OFF!</p> <p>JCT Standard Building Contract Without Quantities 2024 (SBC/XQ)</p> <p>£114.00 £113.94</p> <p>Excl. Tax: £94.95</p> <p>ADD TO BASKET</p> |  <p>1% OFF!</p> <p>JCT Standard Building Sub-Contract Conditions 2024 (SBSub/C)</p> <p>£105.60 £105.58</p> <p>Excl. Tax: £87.98</p> <p>ADD TO BASKET</p> |  <p>9% OFF!</p> <p>JCT Standard Building Contract Without Quantities 2016 (SBC/XQ)</p> <p>£114.00 £104.86</p> <p>Excl. Tax: £87.38</p> <p>ADD TO BASKET</p> |  <p>1% OFF!</p> <p>JCT Standard Building Sub-Contract with sub-contractor's design Agreement 2024 (SBSub/D/A)</p> <p>£91.20 £91.18</p> <p>Excl. Tax: £75.98</p> <p>ADD TO BASKET</p> |
|  <p>1% OFF!</p> <p>JCT Standard Building Sub-Contract with sub-contractor's design Conditions 2016</p> |  <p>1% OFF!</p> <p>JCT Standard Building Contract With Quantities 2024 (SBC/Q)</p> |  <p>1% OFF!</p> <p>JCT Standard Building Contract Guide 2024 (SBC/G)</p> |  <p>1% OFF!</p> <p>JCT Standard Building Sub-Contract Agreement 2024 (SBSub/A)</p> |

Traditional

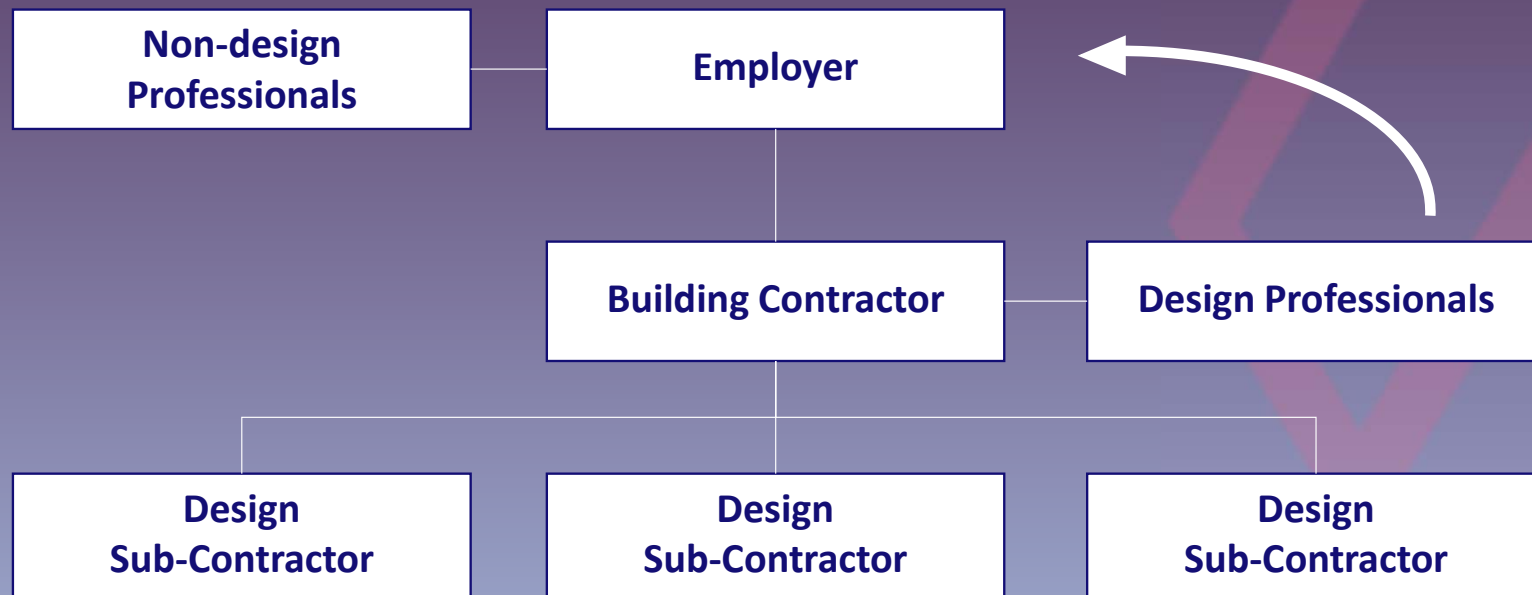
Up to 1% off!



Design and Build - Novation



Design and Build - Novation



| | | | |
|--|--|--|--|
| <p>1% OFF!</p>  <p>JCT Design and Build Contract 2024 (DB)</p> <p>£114.00 £113.99</p> <p>Excl. Tax: £94.99</p> <p>ADD TO BASKET</p> | <p>15% OFF!</p>  <p>JCT Design and Build Contract 2016 (DB)</p> <p>£114.00 £97.14</p> <p>Excl. Tax: £80.95</p> <p>ADD TO BASKET</p> | <p>UP TO 14% OFF!</p>  <p>JCT Design & Build Contract Guidance Extra Value Pack</p> <p>£172.00 £148.99</p> <p>Excl. Tax: £132.96</p> <p>ADD TO BASKET</p> | <p>1% OFF!</p>  <p>JCT Design and Build Sub-Contract Conditions 2024 (DBSub/C)</p> <p>£105.60 £105.59</p> <p>Excl. Tax: £87.99</p> <p>ADD TO BASKET</p> |
| <p>1% OFF!</p>  <p>JCT Design and Build Sub-Contract Agreement 2024 (DBSub/A)</p> <p>£114.00 £113.99</p> <p>Excl. Tax: £94.99</p> <p>ADD TO BASKET</p> | <p>1% OFF!</p>  <p>JCT Design and Build Sub-Contract Conditions 2016 (DBSub/C)</p> <p>£114.00 £97.14</p> <p>Excl. Tax: £80.95</p> <p>ADD TO BASKET</p> | <p>1% OFF!</p>  <p>JCT Design and Build Contract Guide 2024 (DB/G)</p> <p>£114.00 £113.99</p> <p>Excl. Tax: £94.99</p> <p>ADD TO BASKET</p> | <p>1% OFF!</p>  <p>JCT Design and Build Sub-Contract Guide 2016 (DBSub/G)</p> <p>£114.00 £97.14</p> <p>Excl. Tax: £80.95</p> <p>ADD TO BASKET</p> |

Design & Build

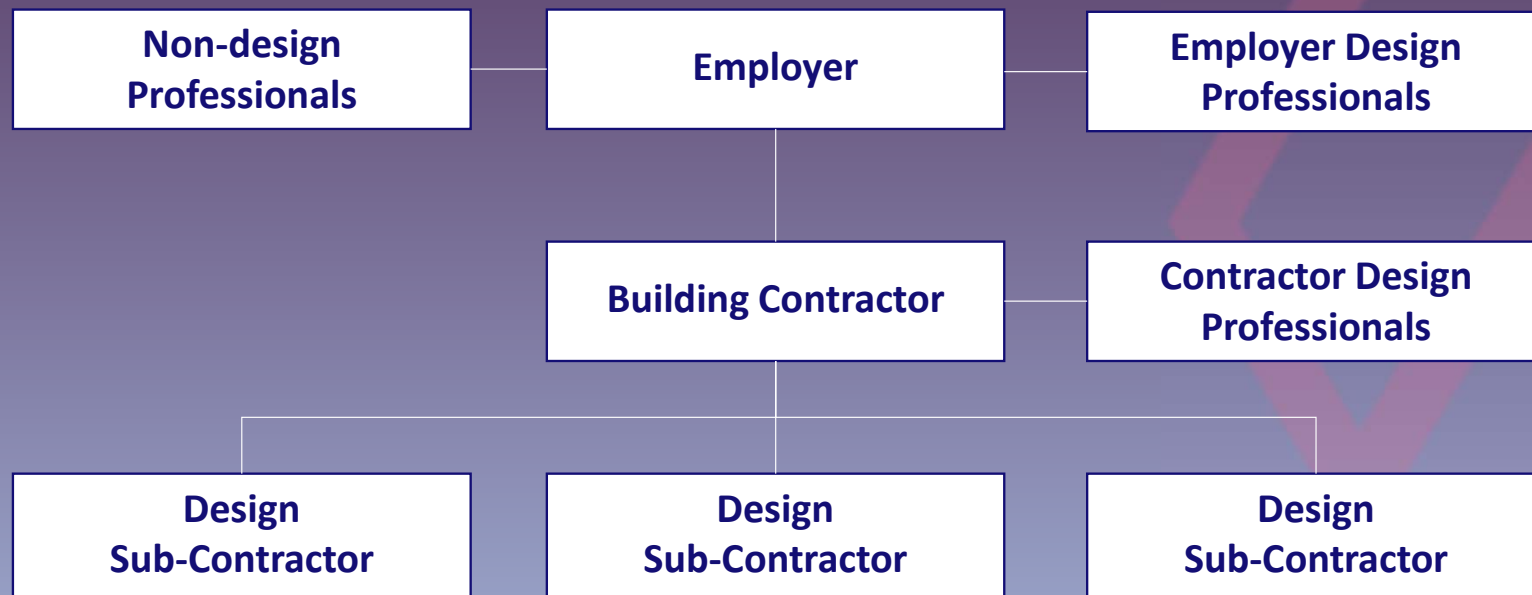
Up to 14% off!

Design and build?

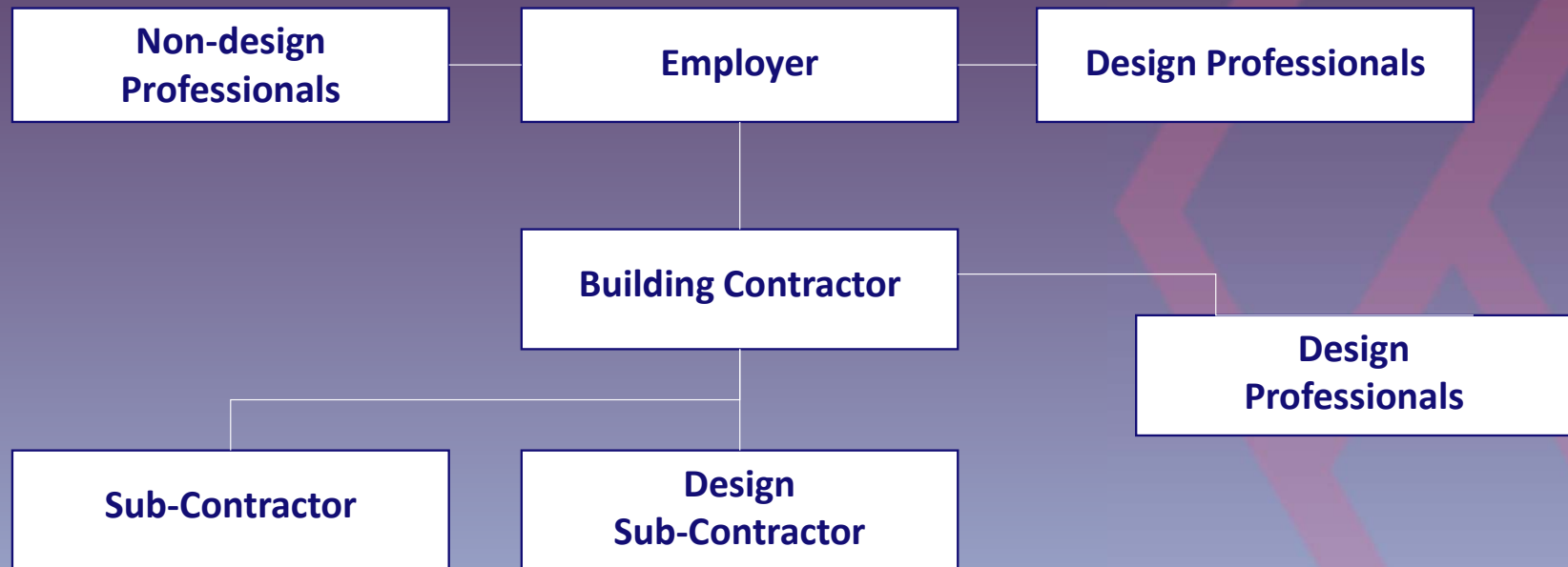
- Client passes all design responsibility – fair?
- Client team – who is left?
- Who have you taken on?
- What is the form of appointment?
- Novation? – direct appointment?



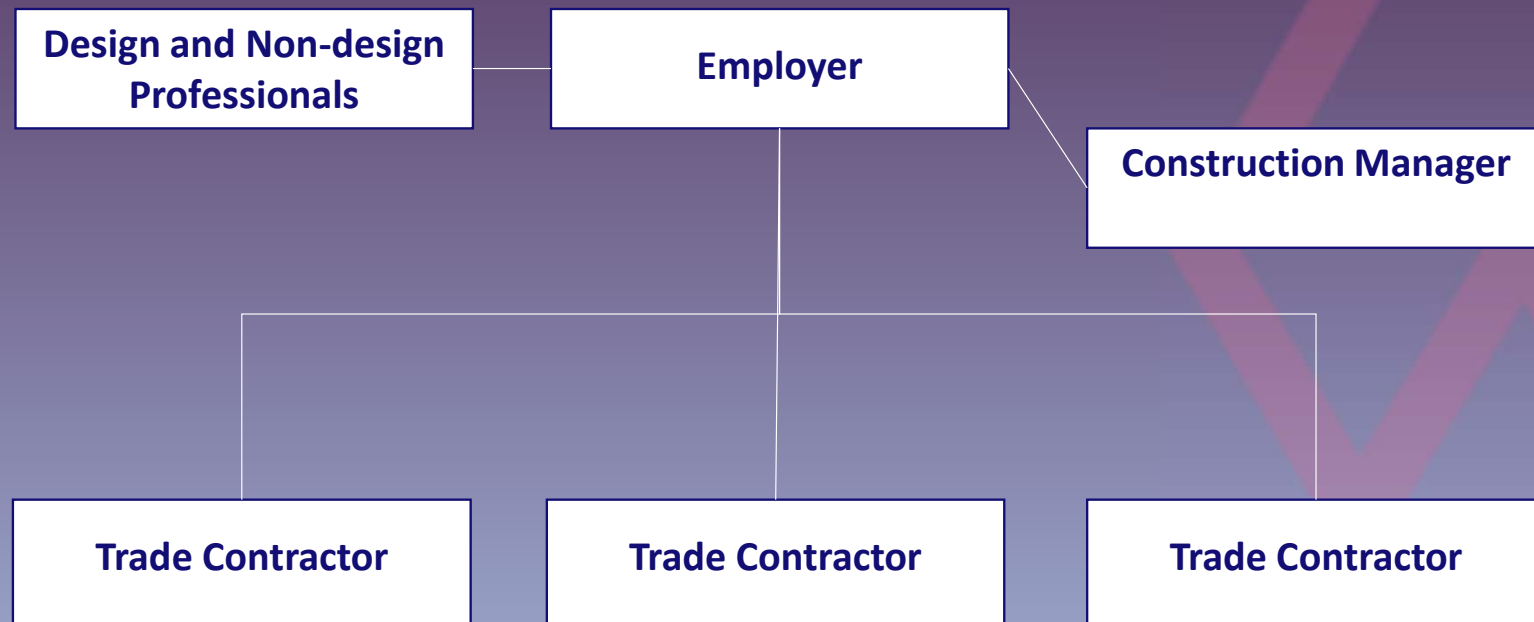
Design and Build – No Novation (hybrid)



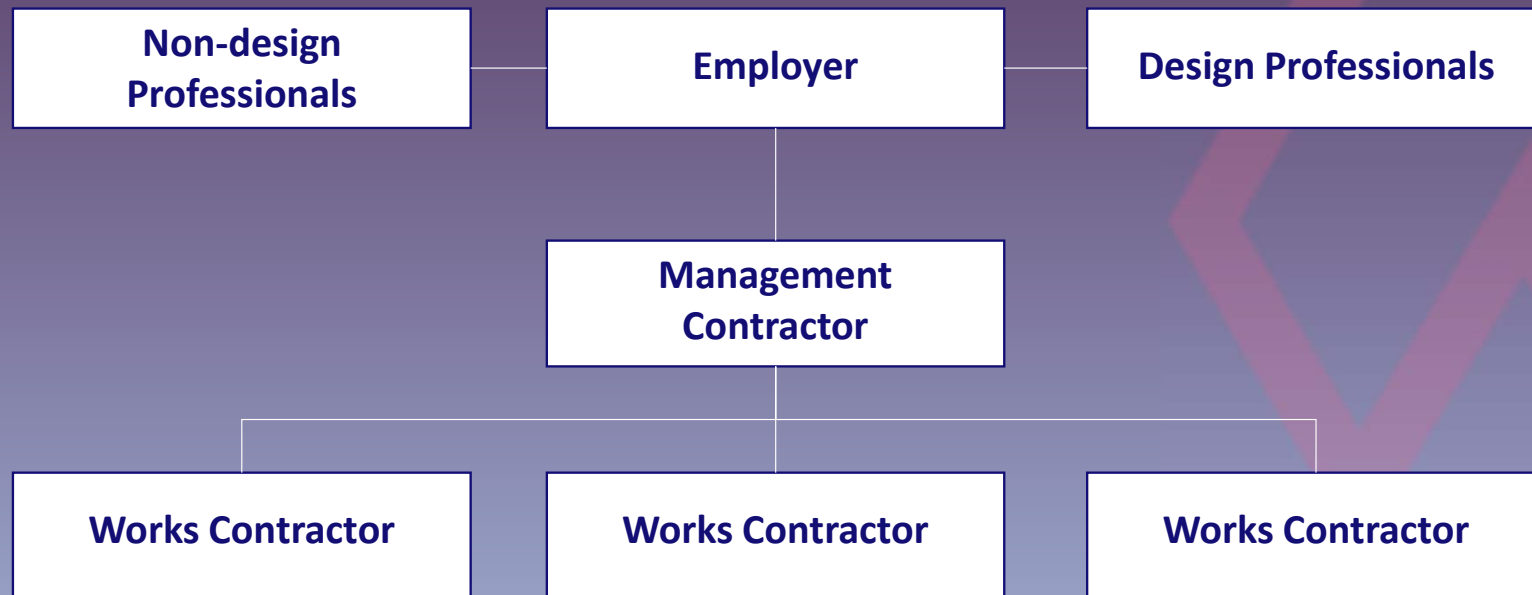
Contractor's Designed Portion



Construction Management



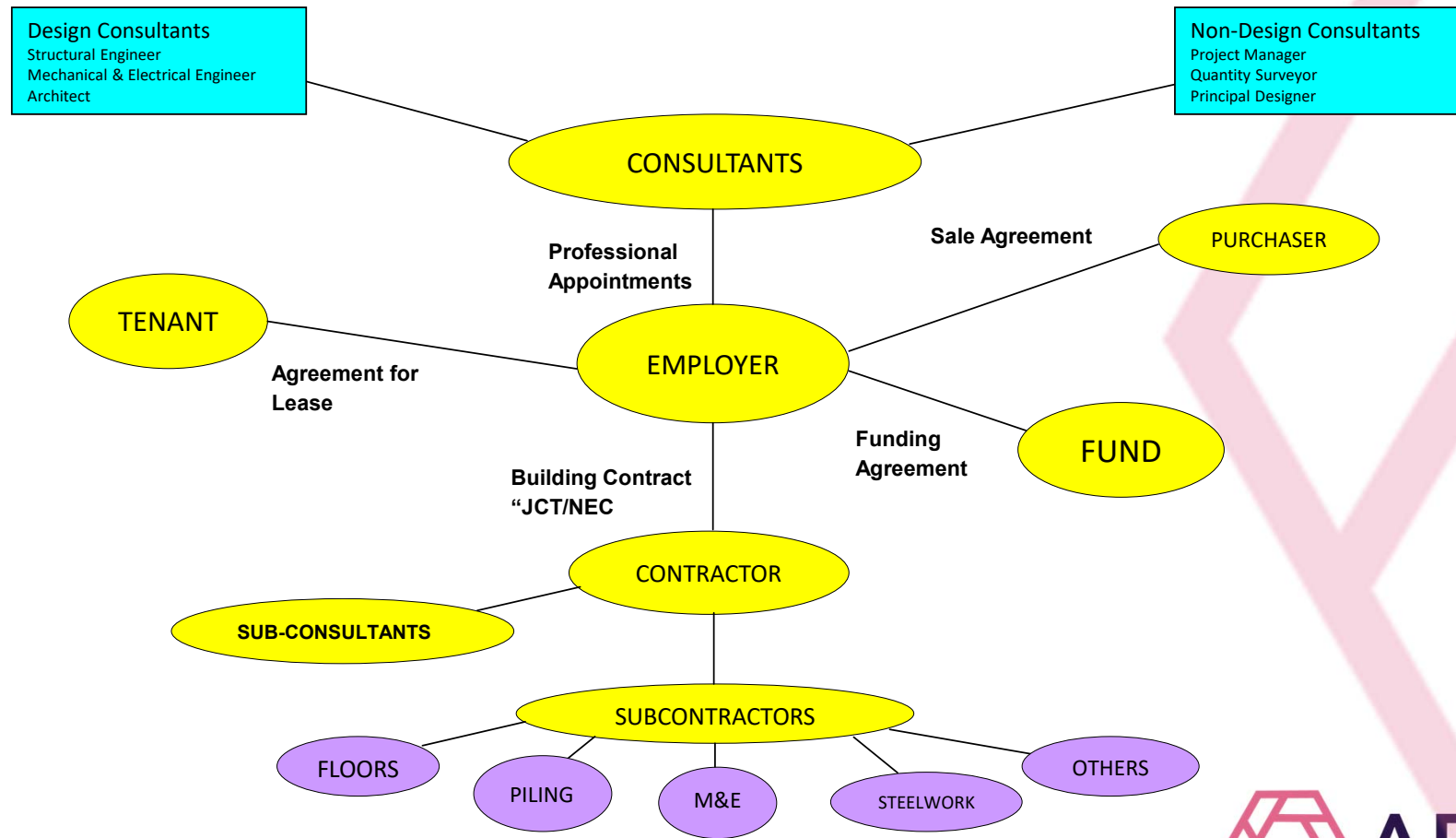
Management Contracting





Part 2 – The Inter-relationship of documents

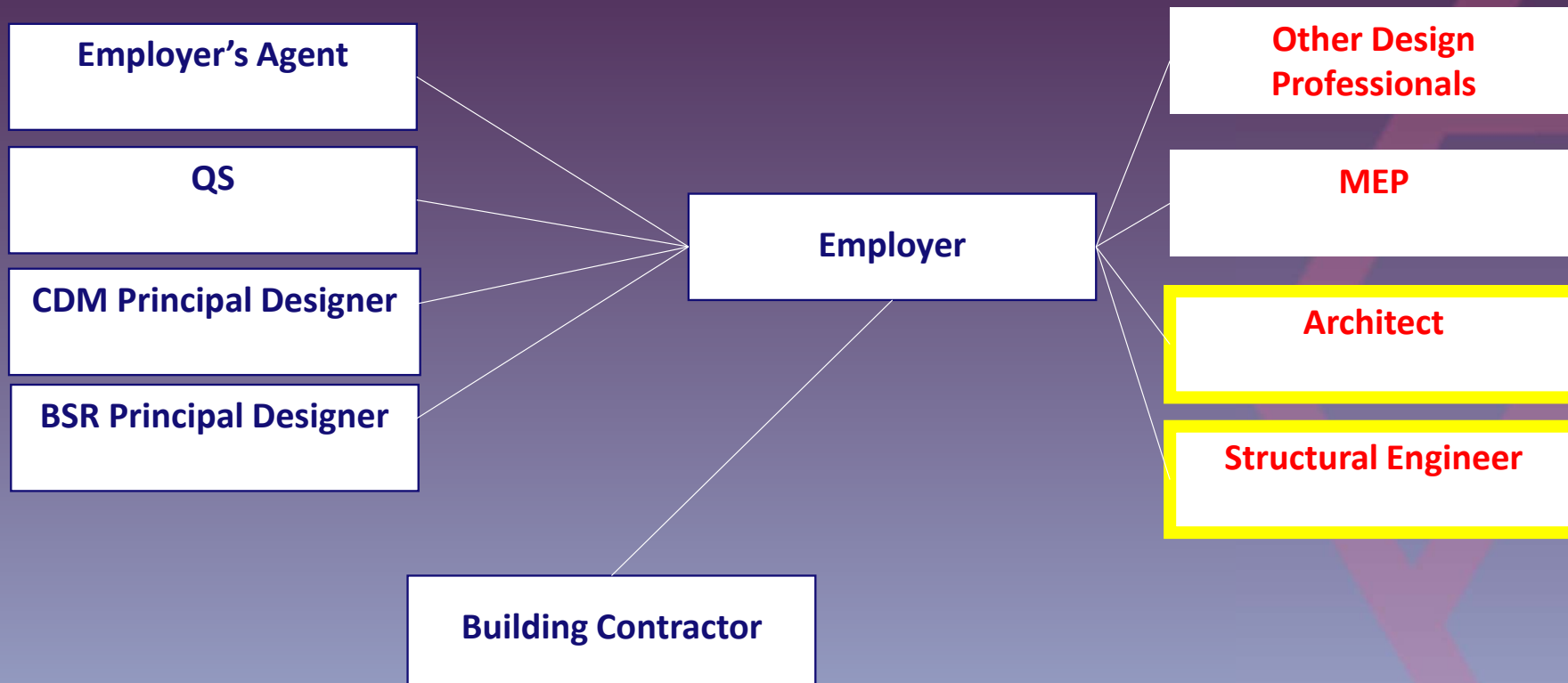
The Normal Set-Up



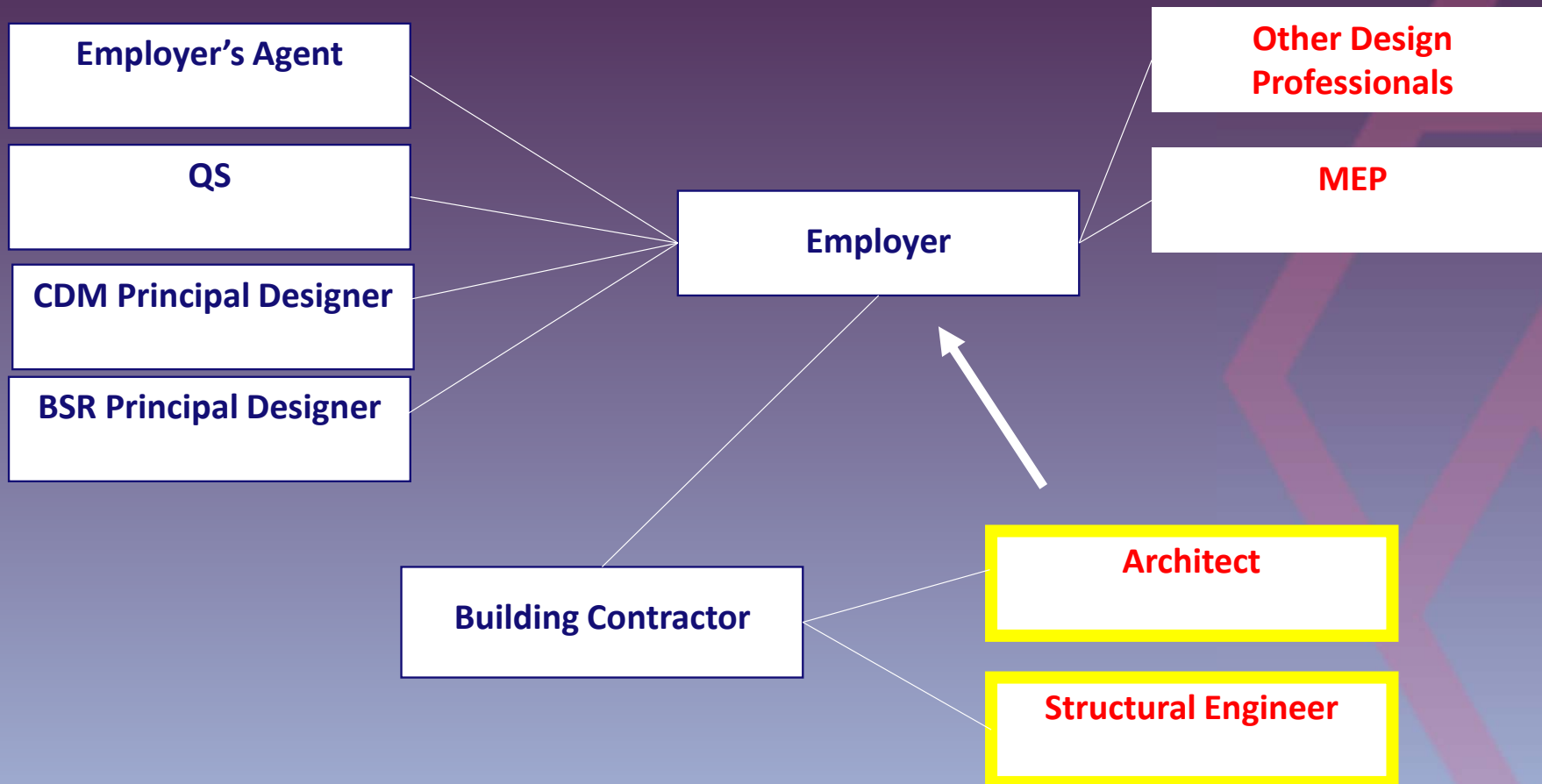


Professional Appointments

Appointments

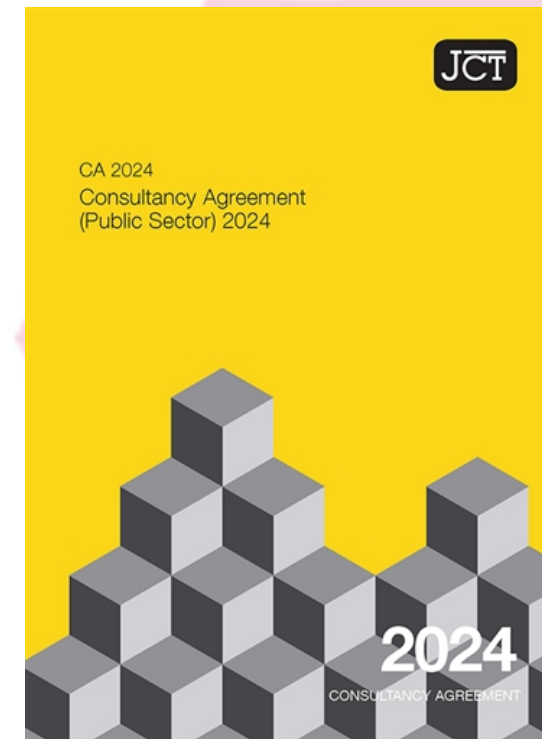
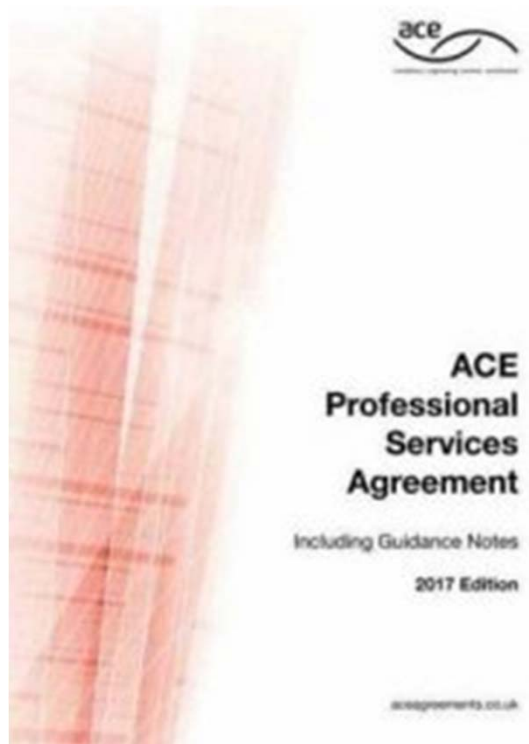


Appointments



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ACE Agreement or NEC PSC



Bespoke Form

- Lawyer drafted
- Favourable to client
- Institutionally acceptable
- No limits on liability (or high cap if agreed)
- Standard for bank funded schemes





Collateral Warranties

What is a collateral warranty

- A document creating a “mini-contract” between the warrantor and the beneficiary.
- Judicial Definition:

Firstly, the purpose of the Collateral Warranty was to provide a direct right of action by the Claimant against the Second Defendant in respect of its obligations under the Building Contract to which the Claimant was not a party. Such purpose was served by a warranty that gave the Claimant the same rights against the Second Defendant that it would have had if there had been privity of contract but did not require any extension of those rights.

- *Swansea Stadium Management Company Ltd v City & County of Swansea & Anor* [2018] EWHC 2192 (TCC)

The basic law

- Privity of Contract

“only a person who is a party to a contract can sue upon it”

- Negligence

“When a party who owes a duty of care, is in breach of such duty and such breach causes the other party a loss which was reasonably foreseeable”



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Why do I not owe a duty of care?

- Average car accident
- Is there a contract?
- Do you owe the other road user a duty of care?
- Can they bring a claim?
- Dealt with by insurers
- So why is construction different?

It's basically a fudge

- *Anns v Merton LBC*
- *Murphy v Brentwood DC*

It was decided that to allow the claimant to recover damages for the money which he had lost on the sale of the property, or for the cost of repairing it, would result in an unacceptably wide liability which would effectively amount to judicial legislation introducing product liability and transmissible warranties for defective buildings.

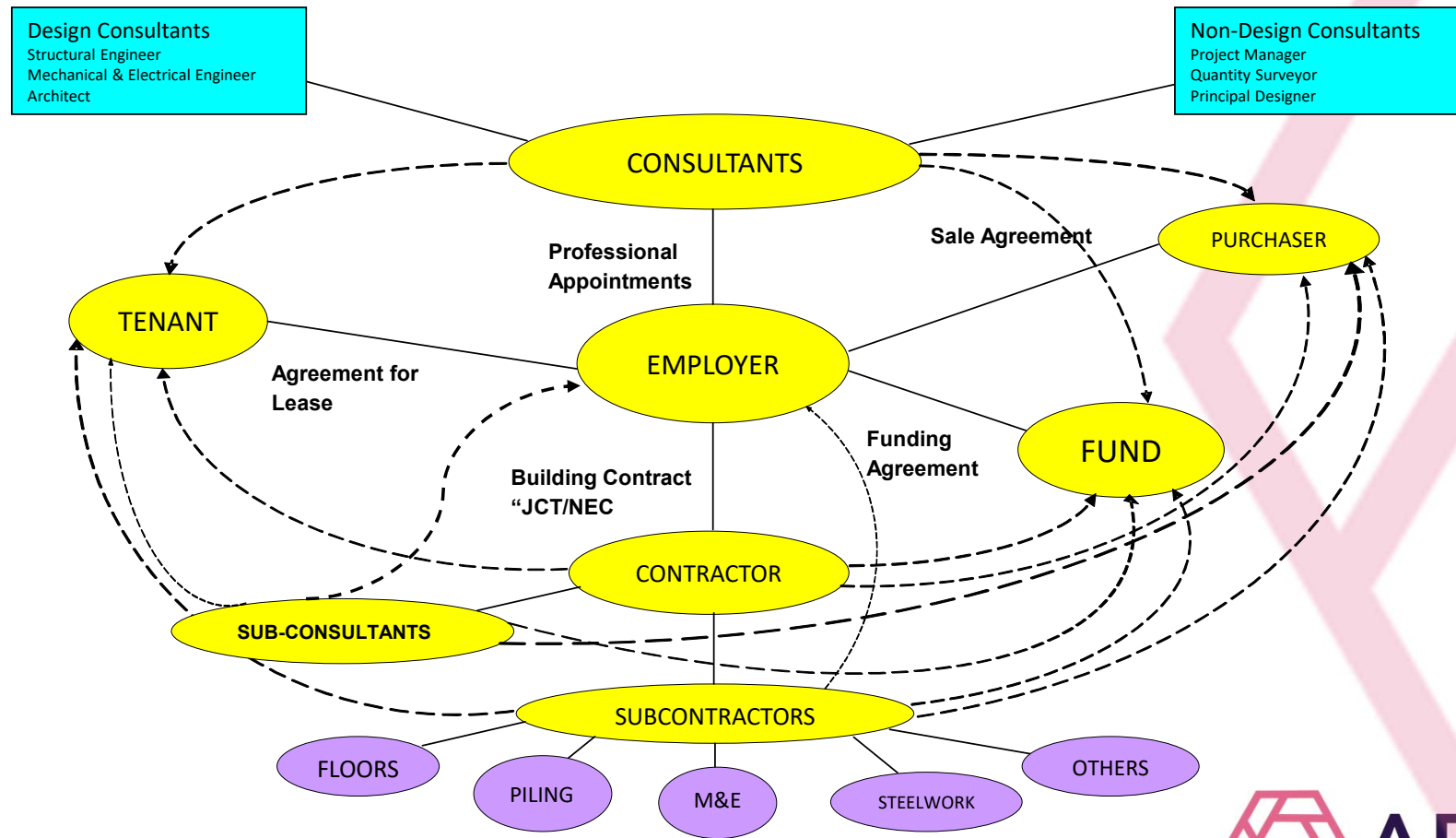


How do all the “mini-contracts” fit together

- Employer
- Design Team
- Funder
- Tenant
- Contractor
- Sub-Contractors
- Purchasers



The Normal Set-Up



A word of warning

- Only as good as the underlying contract / appointment / sub-contract
- It is collateral to the main document – equivalence?
- Need therefore to see the “other” document



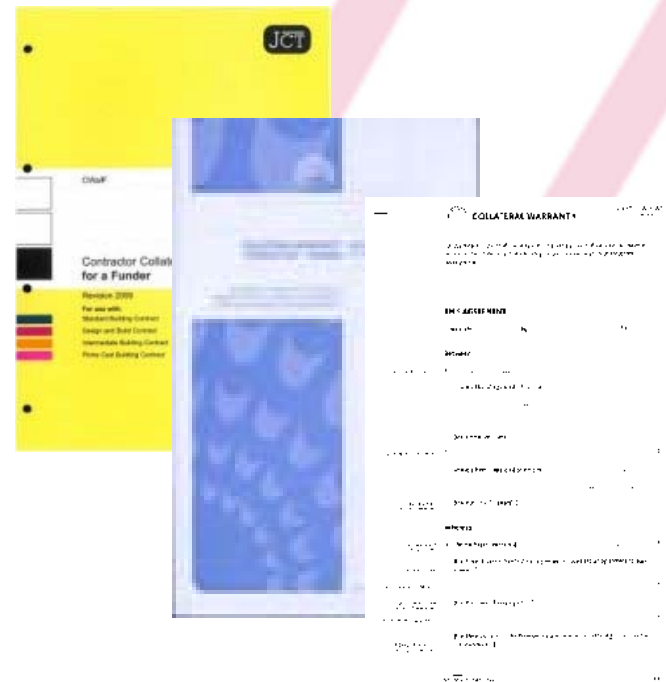
Industry forms of collateral warranties?

Standard forms of collateral warranty

- Various types:

- JCT
- CIC
- BPF (2005)
- Others?

- Bespoke (more typical)



Standard form v Bespoke?

- Standard form not acceptable to the contractual circle:
 - Funder
 - Purchaser
 - Tenant
 - Employer
 - Other Interested Parties?
- Why:
 - Drafted by industry body
 - Too many limitations
 - No consistency – JCT does not provide a consultant version?



BANK OF ENGLAND



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Novations

The Judges view?

- LJ Staughton (Linden Gardens v Lenesta Sludge (CA))
 - Novation – *"This is the process by which a contract between A and B is transformed into a contract between A and C."*
- Lord Browne Wilkinson (Linden Gardens v Lenesta Sludge (HL))
 - Novation – *"The burden of a contract can never be assigned without the consent of the other party to the contract, in which event such consent will give rise to a novation."*

What is novation?

- Novation is the transfer of an interest from one party to another. However, unlike assignment, novation transfers both the **benefit** and the **burden** of a contract and requires the consent of **all** the parties.
- It is best practice to carry out a formal novation by entering into a tripartite novation agreement (between X, Y and Z).
- The effect of a tripartite novation agreement (ab initio) is to extinguish an existing contract (between X and Y), and replace it with a new contract, on the same terms, between different parties (Y and Z).

The Types of Novation

- Ab Initio = From the beginning - The effect of the tripartite novation contract is to extinguish an existing contract between party A and party B, and replace it with a new contract, on the same terms, between party B and party C. Novation requires the agreement or consent of all three parties, A, B and C.
- Switch = The parties sometimes operate a "switch" arrangement, where the third party's relationship with the novated party relates only to the period after the "switch" (in contrast with a traditional **novation** where liability is transferred "ab initio", as if the third party had been a party from the outset of the appointment).
- By Conduct = ? If silent a contract can be novated by conduct of the parties

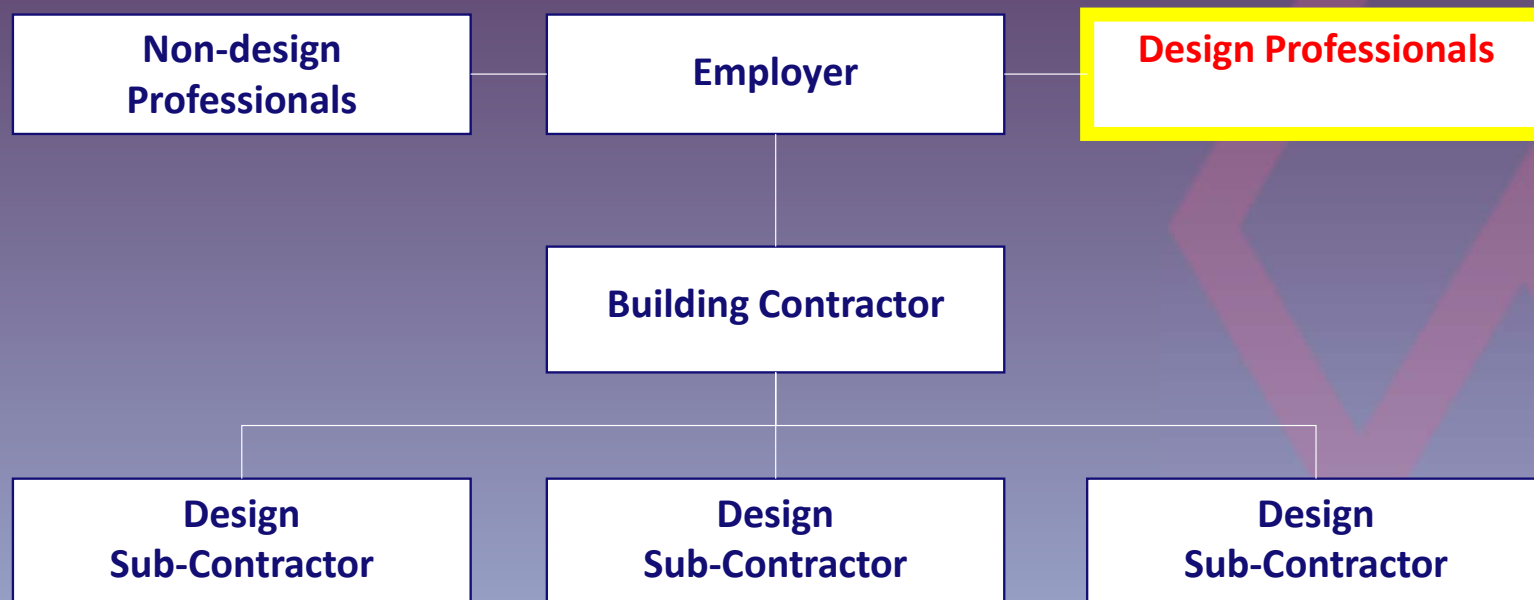


Novation Situations

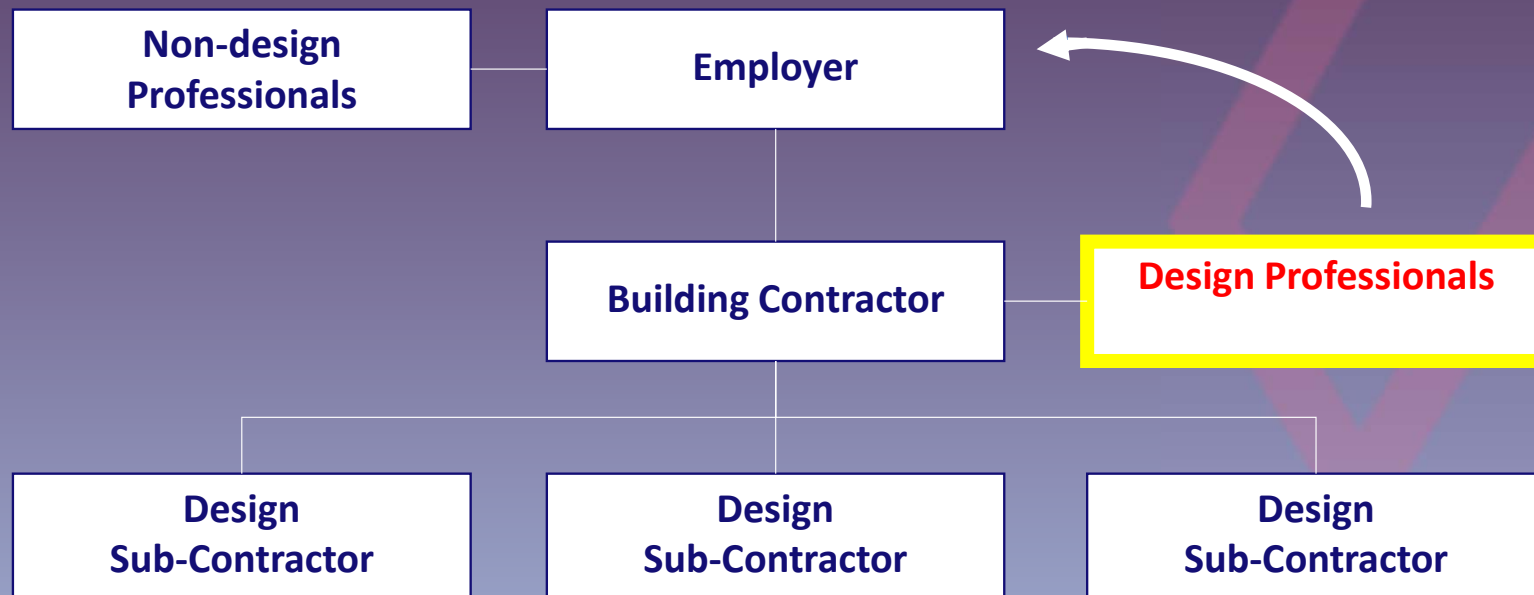
Most common - Professional appointment transfer

- Full Design and Build Contract – full risk transfer
- Professional team appointed to carry out design for ER's
- Contractor required to take risk for ER's
- Contractor wants right to pursue consultants
- Also contractor often wants to retain consultant for next stages
- Solution = novation

Design and Build - Novation



Design and Build – Novation



Design and Build - Novation

- Has to be “proper” ab initio otherwise contractor not protected if contractor is taking full design risk
- So what do you need to do:
 - What is the form of novation?
 - Have you read the appointment
 - Beware limitations
 - Review Services
- Don't forget collateral warranty back to Employer



Enabling Works - Novation

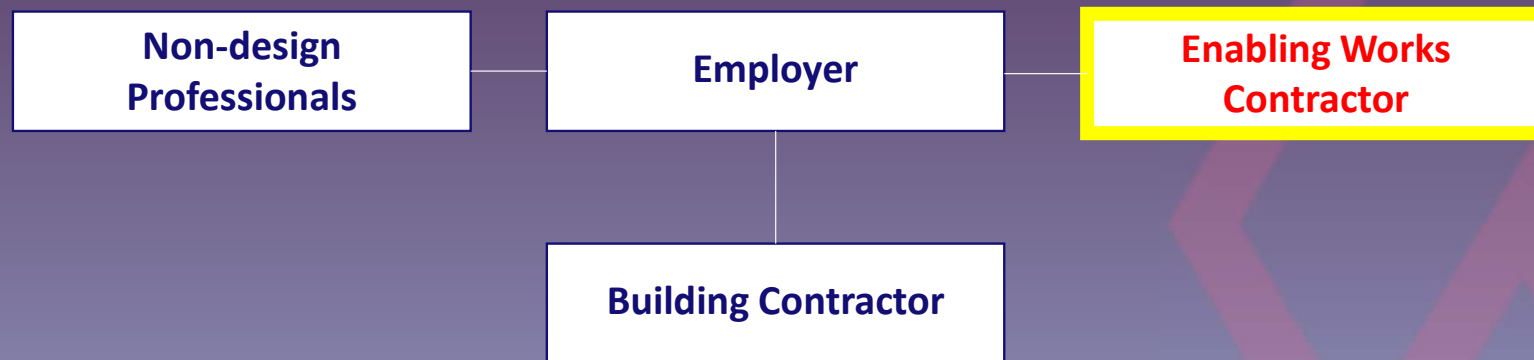
- Initial early phases of enabling works – often placed by employer
- What is the form of contract – Employer to Trade Contractor
- Employer ultimately wants one party responsible
- Novate the enabling works contract



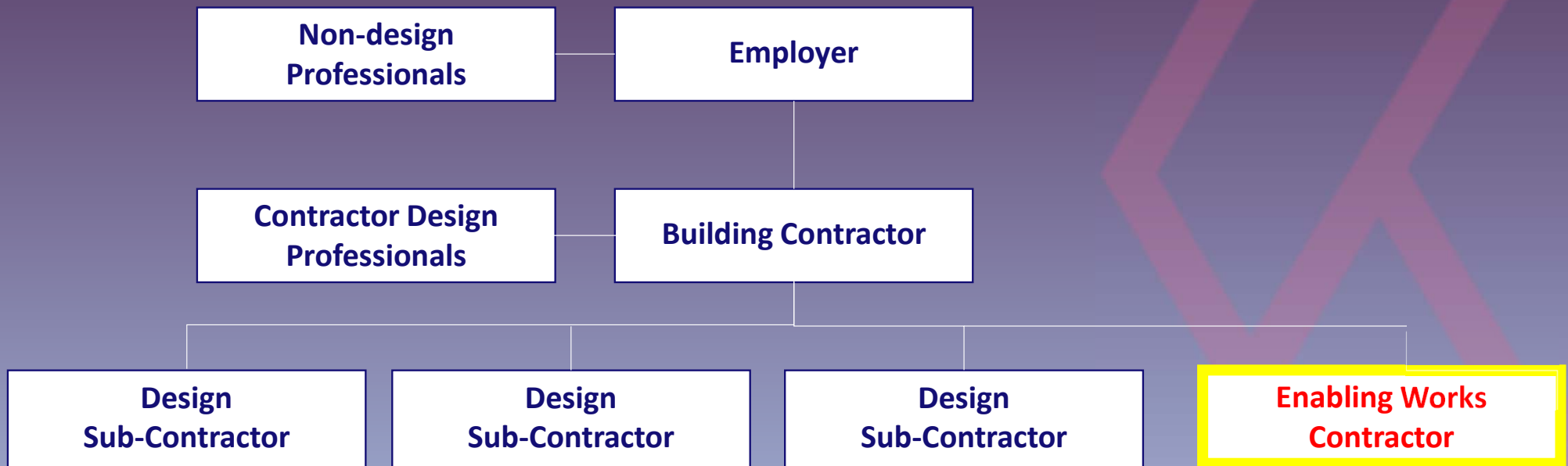
Enabling Works - Novation



Enabling Works - Novation



Enabling Works - Novation



Enabling Works - Novation

- When is this taking place?
 - Before enabling works are finished?
 - After?
- Does the terminology work?
 - What is the enabling contract?
 - What is the sub-contract (with the enabling works contractor going to be)?



Part 3 – Design



Scope of Duty
Fitness for Purpose v Duty of Care
Design Responsibility

Basics

- Workmanship – good and workmanlike manner
- Materials – fit for purpose
- Design – reasonable skill and care of a designer



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Reasonable Skill & Care – 2.17.1.1

- No change to the applicable standard of care
- Clearer
- Reflects market standard drafting

2.17.1.1 Insofar as its design of the Works is comprised in the Contractor's Proposals and in what it is to complete in accordance with the Employer's Requirements and these Conditions (including any further design that it is required to carry out as a result of a Change), the Contractor warrants, subject to clause 2.17.1.2, that it shall use the reasonable skill and care in such design to be expected of a qualified and experienced architect (or other appropriate professional designer) undertaking the design of works similar in scope and character to such design of the Works.

The Case Law

- *IBA v EMI and BICC* [1980] 14 BLR 1
- *“We see no good reason... for not importing an obligation as to reasonable fitness for purpose into these contracts or for importing a different obligation in relation to design from the obligation which plainly exists in relation to materials.”*



The [recent] example

- *MT Hojgaard a/s v E.ON Climate Renewables UK* [2014] EWHC 1088 (TCC)
- Two different standards:
 - Obligation to use reasonable skill and care
 - Foundations would have a lifetime of 20 years
- Said higher standard applied?



Why does it matter?

- Professional Indemnity Insurance policies do not cover fitness for purpose obligations
- Typical wording:

"Your agreement to take on any legal liability under any express agreement, warranty, indemnity, waiver or guarantee unless:

- (a) You would be liable even if you had not given any such agreement, warranty, waiver of guarantee; or*
- (b) The liability arises from a collateral warranty or duty of care agreement.*

In either case, we will not indemnify you for any liability arising from:

- (a) Any fitness for purpose guarantee;*
- (b) Any greater or longer lasting benefit than that given to the party with whom you originally contracted;*
- (c) Any express guarantee, contractual penalty or liquidated damages; and*
- (d) Your agreement to exercise a standard of care greater than would normally be expected in your profession."*

What to watch out for?

- Beware of reasonable skill and care being set to that of a contractor not a designer – see NEC – refers to designer? FIDIC – Needs amending
- Express wording – "Works will be fit for purpose"
- Performance wording – "will comply with the performance specification"
- In particular beware of collateral warranties

Standard wording?

- Not uncommon to now insert the following to avoid Hojgaard issue:

Notwithstanding any other term of this Contract, the Contractor's liability for design shall in not in any circumstances extend to one of fitness for purpose

Fitness for Purpose – 2.17.1.2

“To the extent permitted by the Statutory Requirements, the Contractor shall have no greater duty, obligation or liability than to exercise reasonable skill and care as provided in clause 2.17.1.1. in respect of design and under no circumstances shall the Contractor be subject to any duty, obligation or liability which requires that any such design shall be fit for its purpose.”

- Significant change
- Reflects decision in *MT Hojgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Limited & another* [2017]



Discrepancies and Design Responsibility

Discrepancies

- JCT D&B position (unamended)

| | Risk | Clause |
|--------------------------------------|--|--------------------------------|
| ER's v Site Boundary | Employer | 2.10 |
| ER's | Employer | |
| CP's v Contractor's Design Documents | Contractor | 2.14.1 |
| ER's v CP's | Employer | 2.14.2 CP's prevail, or Change |
| ER's v Statutory Requirements | Contractor Employer (if post Base Date) | 2.15.1 2.15.2 |

Amendments

- Clause 2.9 - amended to place boundary risk on Contractor?
- Clause 2.10 – divergences between site boundary and ER's – risk placed on Contractor?
- Clause 2.11 – responsible for the ER's – placed on Contractor.
- Clause 2.12 – inadequacy in ER's – risk placed on Contractor.
- Clause 2.13/2.14 – divergencies and discrepancies in Contract Documents:
 - Risk between ER's and CP's placed on Contractor
 - Risk within ER's placed on Contractor
 - Risk of any discrepancies among any documents placed on Contractor





Full Design Responsibility

Design Responsibility

- Design and Build

Third the Employer has examined the Contractor's Proposals and, subject to the Conditions, is satisfied that they appear to meet the Employer's Requirements^[3];

- Standard (with CDP)

Twelfth the Employer has examined the Contractor's Proposals and, subject to the Conditions, is satisfied that they appear to meet the Employer's Requirements.^[8] The Employer's Requirements, the Contractor's Proposals and the CDP Analysis have each for identification been signed or initialled by or on behalf of each Party and particulars of each are given in the Contract Particulars;

Design Amendments

Overall shift of Risk to contractor

- Third recital
- Clause 2.1.1
- Clauses 2.11 – 2.14
- Clause 2.17
- Fitness for purpose obligations
- Transfer of discrepancy risk

WHY TAKE RISKS



Workman Properties Ltd v ADI Building and Refurbishment Ltd

- ADI appointed under amended JCT D&B.
- ADI said design was not to RIBA Stage 4 – agreed.
- Question is did ADI take on risk:
- In the ER's it said:

"The Contractor will enter into a contract under the JCT Design and Build 2016 (DB2016) as amended by Schedule of Amendments contained within this Employer's Requirements document and will be fully responsible for the complete design, construction, completion, commissioning and defects rectification of the works.

Significant design has been developed to date which has been taken to end of RIBA Stage 4 with some parts of contractor specialist design elements together with Services design to Stage 4 (i) with generic design and performance requirements in order to deliver what the Employer is requiring within their controlled budget."

- The Contract included:
 - Third Recital amended
 - Clause 2.1 – amended
 - Clause 2.13/14 – amended
 - Clause 2.17 – amended



Any questions