

# RIBA Construction Contracts and Law Report 2022



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We would like to thank the following organisations for supporting this report by circulating the survey on our behalf:



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The content of articles contributed by external authors and published in this report are the views of those authors and do not represent the position of the Royal Institute of British Architects (RIBA).

Front Cover image: *Bullring, Birmingham*

We would also like to thank NBS for their support in the research and report.



# Foreword

The RIBA is pleased to present the findings of the 2022 RIBA Construction Contracts and Law Report. The last report was published in 2018 and it's probably fair to say that, back then, none of us had an inkling about what was ahead of us. It's been a rollercoaster ride for the past few years.

Nevertheless, the design community and, indeed, the wider construction industry can take some credit for responding quickly and effectively to the challenges that the pandemic threw at us. Together, we kept going to deliver the built environment people need. The survey findings suggest that despite all the difficulties, the proportion of those pursuing a dispute has fallen. Navigating the pandemic has, at times, shown collaborative working across the industry at its best.

During this period, the RIBA also made a significant investment to provide an enhanced suite of RIBA contracts, and made them available via an online service ([www.ribacontracts.com](http://www.ribacontracts.com)). The results of the survey suggest that this investment has helped to meet a need among architects, consultants, contractors and clients for a suite of contracts that are digitally delivered, affordable, simple and written in plain English.

I'd like to draw attention to changes that are coming our way which will fundamentally alter the buildings of the future and the contractual arrangements through which they are delivered.

The first is our striving for a sustainable future. The carbon emissions of our buildings (whether 'embodied' or 'in use' carbon) cannot stay at current levels. The RIBA 2030 Climate Challenge<sup>1</sup> is an incremental route to sustainable building design, and we encourage all architects to sign up. However, sustainable buildings cannot be delivered by architects alone, and committed clients, contractors and fellow consultants are also leading the way.

In the coming years, we can expect increasing demands for sustainable outcomes from government departments and agencies, from project funders and financiers, and through tighter legislation and standards. We all, across the industry, now need to design, specify, procure, manage and measure sustainable buildings. The survey indicates these sustainable requirements are already being expressed contractually. Sustainability isn't just aspiration and altruism. It's increasingly the bottom line.

The second is change brought about by the Building Safety Act,<sup>2</sup> particularly the framework of responsibilities set out for 'dutyholders', i.e. for clients, designers, principal designers, contractors and principal contractors. This change is aimed at ensuring safety and compliance with the Building Regulations. It will be achieved through effective communication and collaboration, the clear demarcation of responsibilities and enforceable standards of competence. The Act will help foster individual and collective responsibility. We can expect the role of 'dutyholders' to be part of future contracts. Responsibilities, and so also contractual risk, will need to be correctly allocated to those with the competence and authority to manage them.

We hope you find this report helpful; it includes an outline of the survey findings, complemented by a series of articles from cross-sector experts, adding depth and nuance.

I would like to thank the numerous institutions and associations that have very kindly supported the dissemination of the survey and publication of this report and to NBS who initiated the Contracts and Law Survey in 2012 and who have worked with us on this report.



**Adrian Dobson**

Executive Director,  
Professional Services,  
Royal Institute of British Architects

<sup>1</sup> <https://www.architecture.com/about/policy/climate-action/2030-climate-challenge>

<sup>2</sup> <https://www.gov.uk/government/publications/building-safety-bill-factsheets/dutyholders-factsheet>

# RIBA Construction Contracts and Law Report: Survey Findings

## Introduction

Welcome to the Royal Institute of British Architects' first *Construction Contracts and Law Report*. This report continues the work carried out by the NBS between 2012 and 2018 and can be read as an update to the NBS 2018 *National Construction Contracts and Law Report*.<sup>1</sup>

The past three years have been exceptional. Built environment professionals have navigated Brexit and the COVID-19 pandemic, grappling with unprecedented levels of uncertainty. Project delivery has been particularly difficult and risky; it has only been through collaborative working and mutual support that the construction industry has continued to deliver.

The unprecedented challenges and risks we continue to see cannot be managed by goodwill alone, however. The bedrock of a successful project is a clear, well understood, proportionate, timely and agreed contractual framework. Indeed, it is only through accurate quantification, description and allocation of cost and responsibility that expected outcomes can be realised by and for all parties.

**This report covers the main topics of the RIBA Construction Contracts and Law Survey 2022. These are:**

- procurement methods and tendering

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- collaboration

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- sustainability

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- contracts and forms of appointment

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- legal issues

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- disputes and dispute resolution.

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The survey was available for completion between January and April 2022, and it asked participants to tell us about their legal and contractual practice in the preceding 12 months. The results, therefore, describe recent practice in construction contracts and law, covering the period during which COVID measures were eased and the post-restriction recovery (but not the time of the nationwide lockdowns).

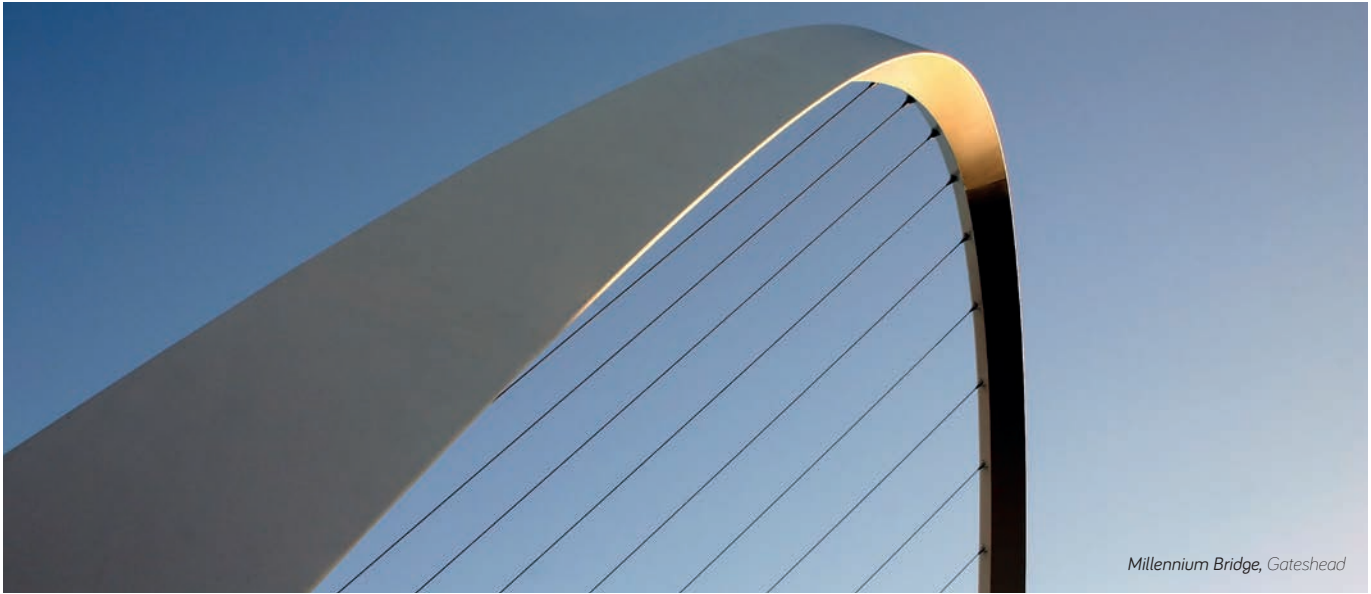
The RIBA is grateful for the cross-industry support given by a wide range of professional institutes and organisations in encouraging professionals to take part in the survey. This means that the findings are independent of any single organisation and so reflect the views of a broad range of professionals.

We are also very grateful to those who took part in the survey. The survey itself was detailed and required considerable expertise and thought to complete. We do appreciate the time that respondents gave. Many respondents offered their observations as free text and some of these comments are included by way of illustration in italics.



**Adrian Malleson**  
Head of Economic  
Research and Analysis  
Royal Institute of British  
Architects

<sup>1</sup> NBS, *National Construction Contracts and Law Report*, 2018, <https://www.thenbs.com/knowledge/nbs-national-construction-contracts-and-law-survey>



Millennium Bridge, Gateshead

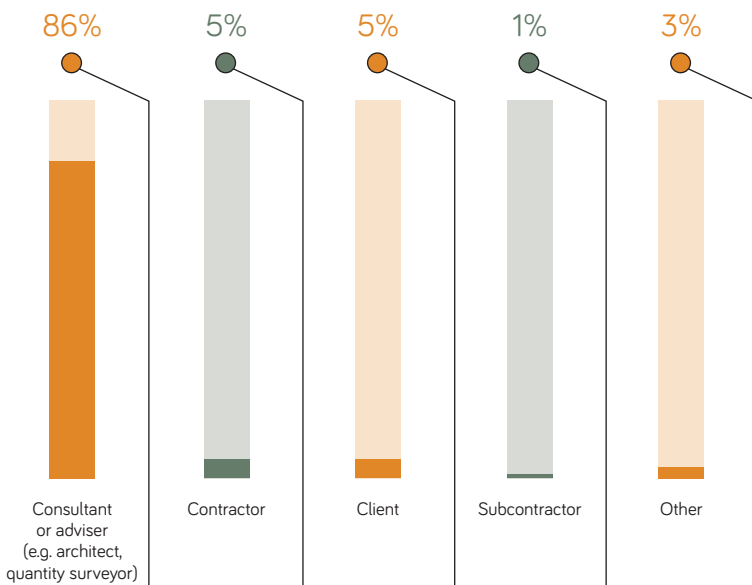
## Respondents

Over 950 people responded to the survey. Not all respondents answered every question, so the analysis of findings is based on completions for each question.

We received responses from clients, contractors and consultants/advisers, such as architects. This gives an industry-wide view of the issues at hand, allowing areas where there are significant differences between the groups to be identified.

With 86% of responses coming from consultants, they represent the largest group of respondents. Among consultants, we include the design team, surveyors and specialist consultants. Contractors, typically Tier 1, make up 5% of the response base. Clients also account for 5% of respondents, and these were typically those commissioning large-scale, complex projects in the public or commercial sectors (and typically not those commissioning small-scale domestic work, for example). For the latter two groups there were too few respondents to reliably drill down into the findings.

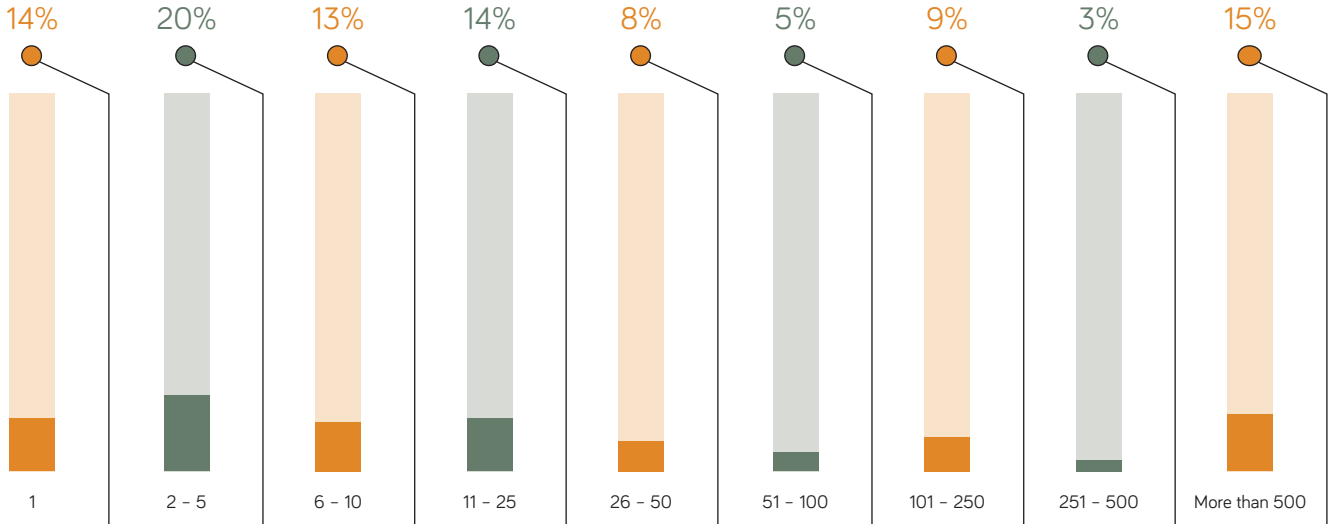
### How would you best describe your role/the role of your organisation in the construction industry?



Note: Totals in the figures may not equal 100% due to rounding.

The respondents also came from a wide range of organisation sizes. Over a third (34%) came from organisations with five or fewer people, while a quarter (27%) came from organisations with more than 100 employees.

**Including yourself, approximately how many people are employed in your organisation?**

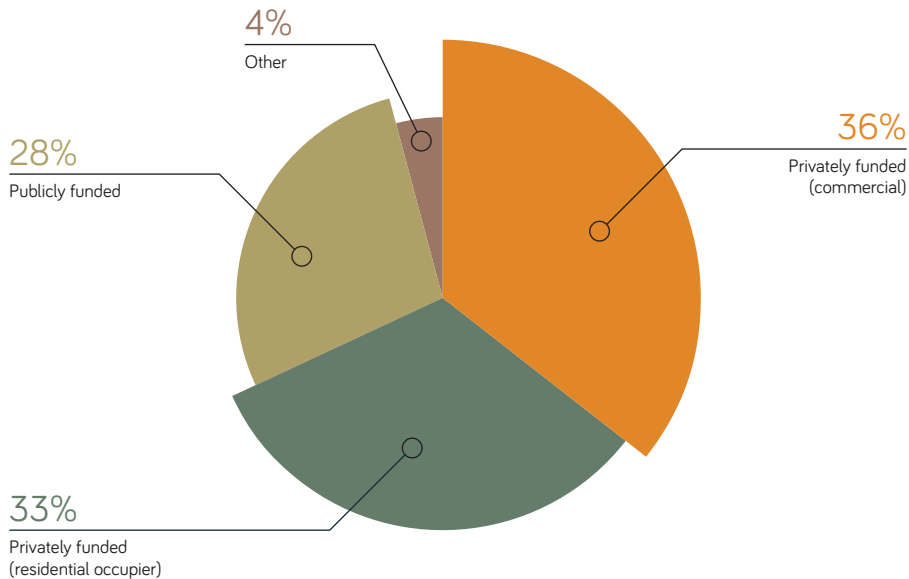


## Types of work

The survey also asked about the sector of work in which the respondents or their organisations were most involved. A total of 28% worked mostly in publicly funded projects, while 69% worked mostly in privately funded projects, with 36% of these working mostly

in 'commercial' projects and 33% in 'residential occupier' projects. A further 4% described their main sector as 'other', and this included ecclesiastical, conservation, charitable and housing association work.

**Which sector were you/your organisation most involved in?**



# Procurement methods and tendering

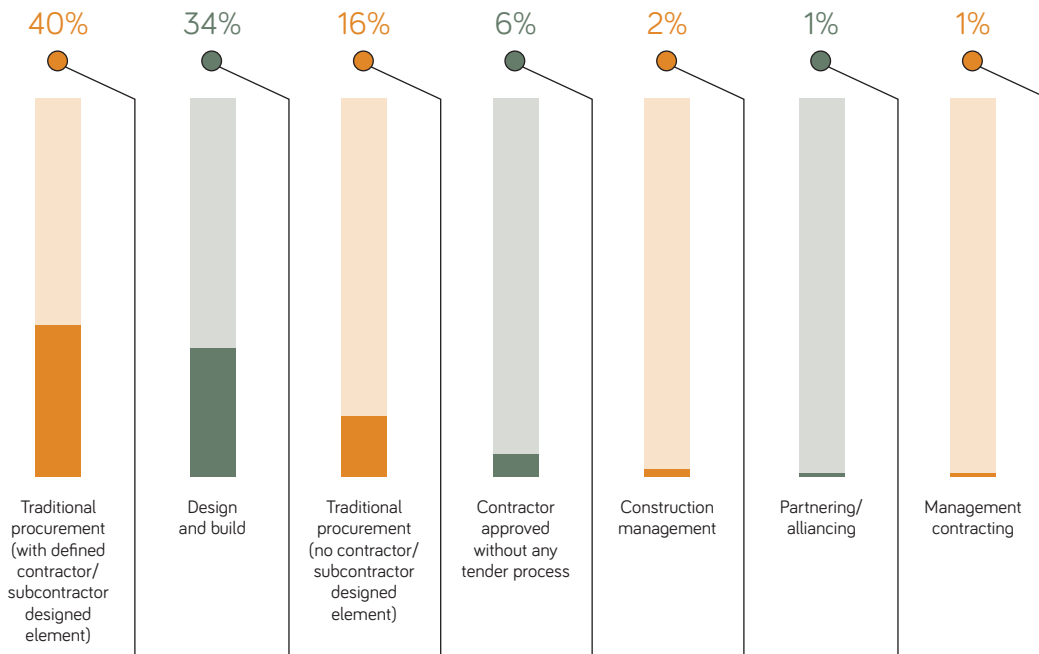
## Procurement

The process of procurement, of buying a building, involves sourcing and planning the land, materials, professionals and tradespeople needed for delivery. Procurement is not simple and can involve balancing multiple elements, including time, cost, payment, quality, ownership and risk allocation.

*'Too many clients and contractors don't properly understand how to develop a procurement and contract strategy aligned to their real aims and objectives'*

Procurement has long been seen as an area ready for improvement, not least by the UK government.<sup>2,3</sup> Poor procurement can lead to poor quality buildings, delivered late, at excessive cost and by an antagonistic delivery team. At its worst, poor and unchecked procurement can provide an open door to modern slavery,<sup>4</sup> whether in the UK or overseas (most often via construction products and materials production). Getting procurement right is the first step towards making a project both ethical and successful.

### Which procurement method was most frequently used in projects you were involved in?



<sup>2</sup> UK Parliament, Procurement Bill 2022, <https://bills.parliament.uk/bills/3159>

<sup>3</sup> Cabinet Office, 'New Models of Construction Procurement', 2014, <https://www.gov.uk/government/collections/new-models-of-construction-procurement>

<sup>4</sup> Chartered Institute of Building, *Construction and the Modern Slavery Act: Tackling Exploitation in the UK, 2018*, <https://www.gov.uk/government/publications/construction-and-the-modern-slavery-act-tackling-exploitation-in-the-uk>



Maxxi Art Museum, Rome (Architectural Press Archive/RIBA) Collections

There is a range of procurement processes available, but the two used most frequently are traditional procurement and design and build.

A majority (56%) of respondents most often use a 'traditional' form of procurement, where the designer is directly engaged by the client, with contractors separately appointed for construction. These traditionally procured projects fall into two categories: those that have a defined contractor/subcontractor designed element (40% of the total) and those that don't (16%).

Over a third of respondents most often use the 'design and build' procurement method, where a contractor serves as a single point of responsibility for the project's design and construction. The contractors who responded to the survey use design and build most often, with 53% describing it as the procurement method they most frequently use.

Other procurement methods are less common and include 'contractor being approved without a tender process' (6%), construction management (2%), partnering/alliancing (1%) and management contracting (1%).

Public sector procurement has its own regulations and processes.<sup>5</sup> Of the 45% of respondents who do some work in public sector projects, there is a split between the four procurement methods most often used:

• open method	31%
• restricted method	29%
• competitive dialogue method	24%
• negotiated method	17%

<sup>5</sup> RIBA, 'Demystifying Public Procurement Processes', 2 September 2021, <https://www.architecture.com/knowledge-and-resources/knowledge-landing-page/demystifying-public-procurement-processes>



## Tendering

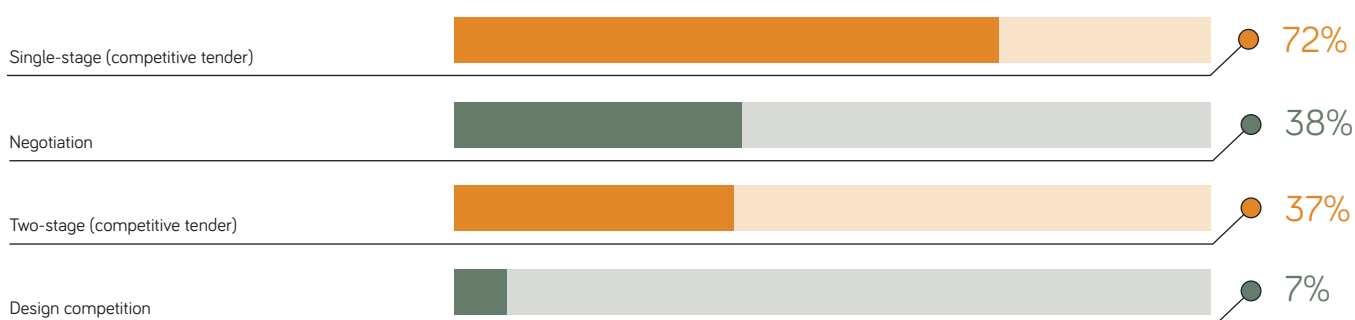
Tendering typically happens at Stage 4 of the RIBA Plan of Work.<sup>6</sup> Successful tendering relies on the detailed design being thorough and well documented, so that prospective contractors have sufficient information to develop accurate bids.

The survey asked participants to describe the tendering methods used. Respondents frequently used a range of methods and the survey allowed more than one option to be selected. Single-stage competitive tendering is most often used, with 72% using it at least once in the past 12 months.

Over a third (38%) use negotiation (where, typically, a client negotiates with a single supplier for the delivery of a project). A similar number (37%) use the two-stage competitive tender method (where a contractor is initially appointed to provide pre-construction services).

Some 7% of respondents took part in one or more design competitions during the past 12 months. Typically, a design competition involves a client making a call for design solutions, which are assessed by an independent, expert panel.<sup>7</sup>

### Thinking about all projects you were involved in during the past 12 months, which of these tendering methods were used?



<sup>6</sup> RIBA, 'RIBA Plan of Work', 2020, <https://www.architecture.com/knowledge-and-resources/resources-landing-page/riba-plan-of-work>

<sup>7</sup> RIBA, 'Architectural Competitions', <https://www.architecture.com/awards-and-competitions-landing-page/competitions-landing-page>

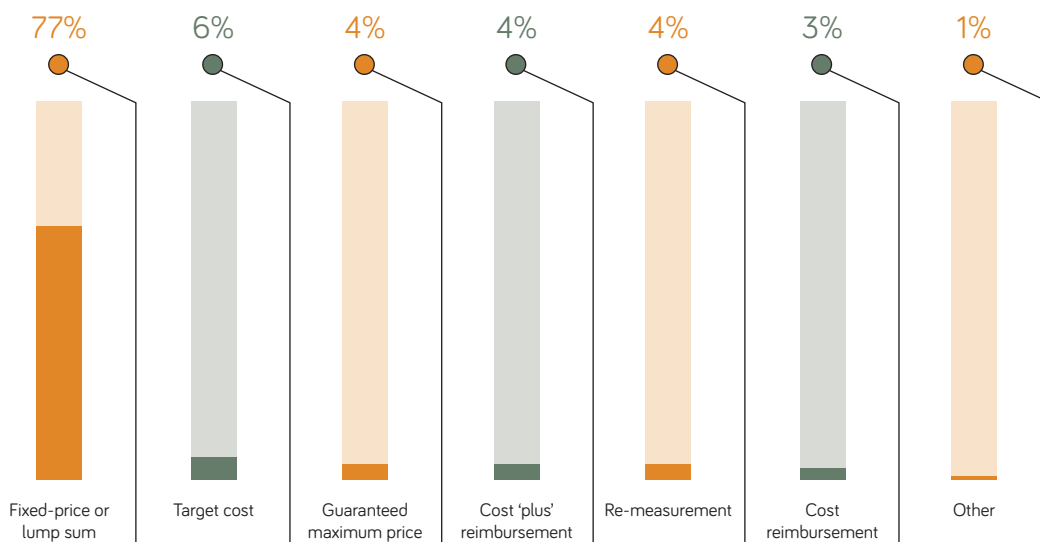


30 St Mary Axe, London

Contracts include prices, and prices are derived from pricing mechanisms. A range of mechanisms is available, but 'fixed-price or lump sum' is the mechanism most frequently used by respondents (77%). When inflation predictably hovered at or around 2%, this mechanism served all parties well, giving cost certainty.

However, general UK inflation is on the rise, currently over 8%.<sup>8</sup> Construction product inflation is even higher.<sup>9</sup> Fixed-price contracts are now looking increasingly risky, particularly for longer-term projects. Inflation can erode margins and turn a project that looked profitable into a loss-maker. The industry may be rapidly turning to other pricing mechanisms.

**Which pricing mechanism was most often used for your contracts?**



<sup>8</sup> Office for National Statistics, 'Consumer Price Inflation, UK: April 2022', <https://www.ons.gov.uk/economy/inflationandpriceindices/bulletins/consumerpriceinflation/june2022>

<sup>9</sup> Office for National Statistics, 'Price Movements in Construction Materials and Plant Hire, 2019 to 2021', October 2021, <https://www.ons.gov.uk/economy/inflationandpriceindices/articles/pricemovementsinconstructionmaterialsandplanthireuk/2019to2021>

# Collaboration

*'Negotiation and collaboration are the way forward'*

The arguments for greater collaboration within the construction sector are well-rehearsed and have been made for many years.<sup>10</sup> Particularly in larger projects, contractually described and delimited areas of collaboration between trusted parties can reduce risk, increase reward and improve client outcomes.

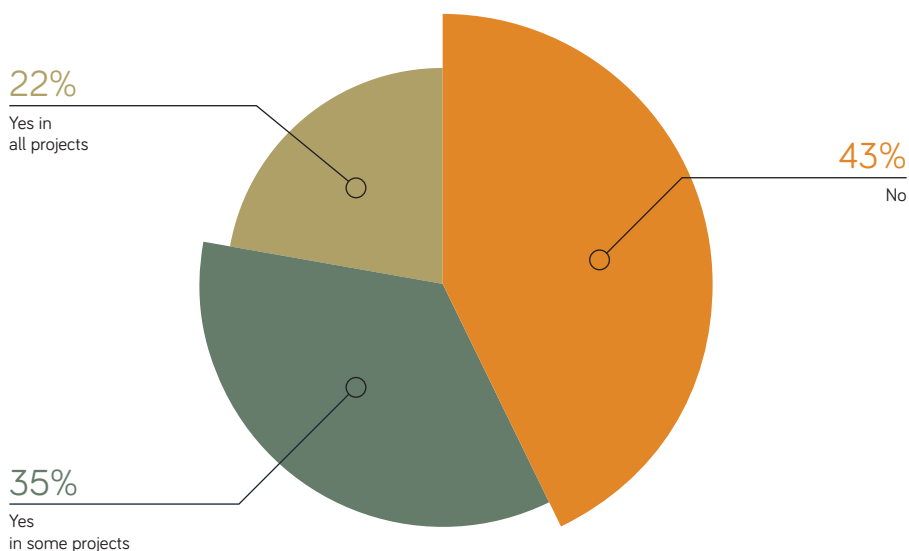
*'Only work with clients and contractors who are committed to collaboration'*

A majority (57%) of respondents adopt collaboration techniques on some or all projects, with almost a quarter (22%) adopting collaboration techniques on all projects.

A total of 43% do not adopt collaboration techniques on any of their projects. In part, this is because a collaborative approach is not always suitable. For example, traditionally procured, small-scale domestic projects do not lend themselves to a fully collaborative approach.

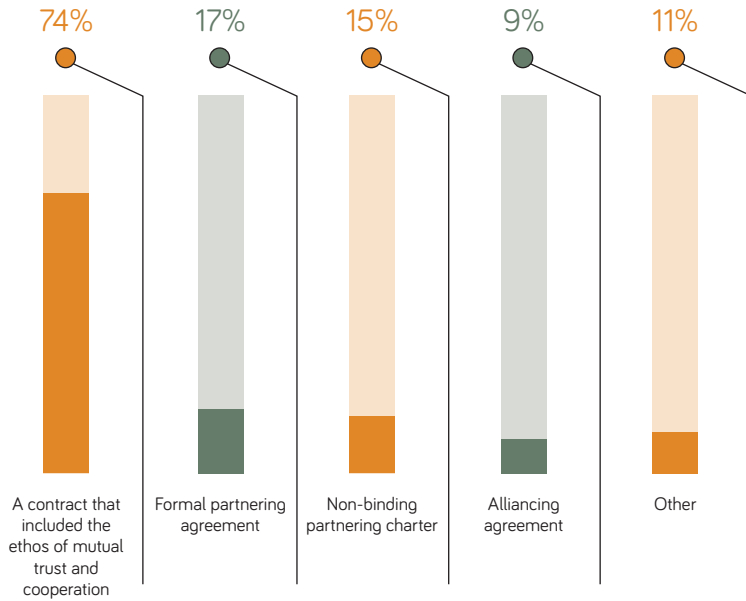
*'Formal collaborative working contracts are too complicated for small builders'*

## Did you adopt any collaboration techniques in projects that started in the past 12 months?



<sup>10</sup> Constructing Excellence, 'Integration and Collaborative Working', <https://constructingexcellence.org.uk/integration-and-collaborative-working/>

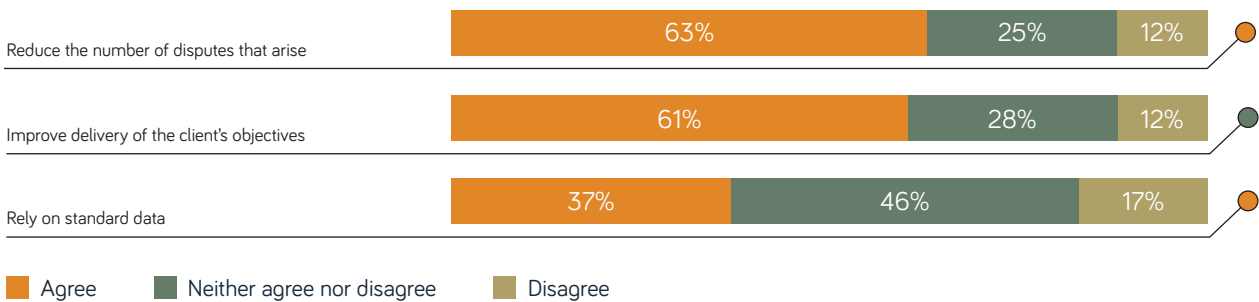
**What form did your collaboration take?**

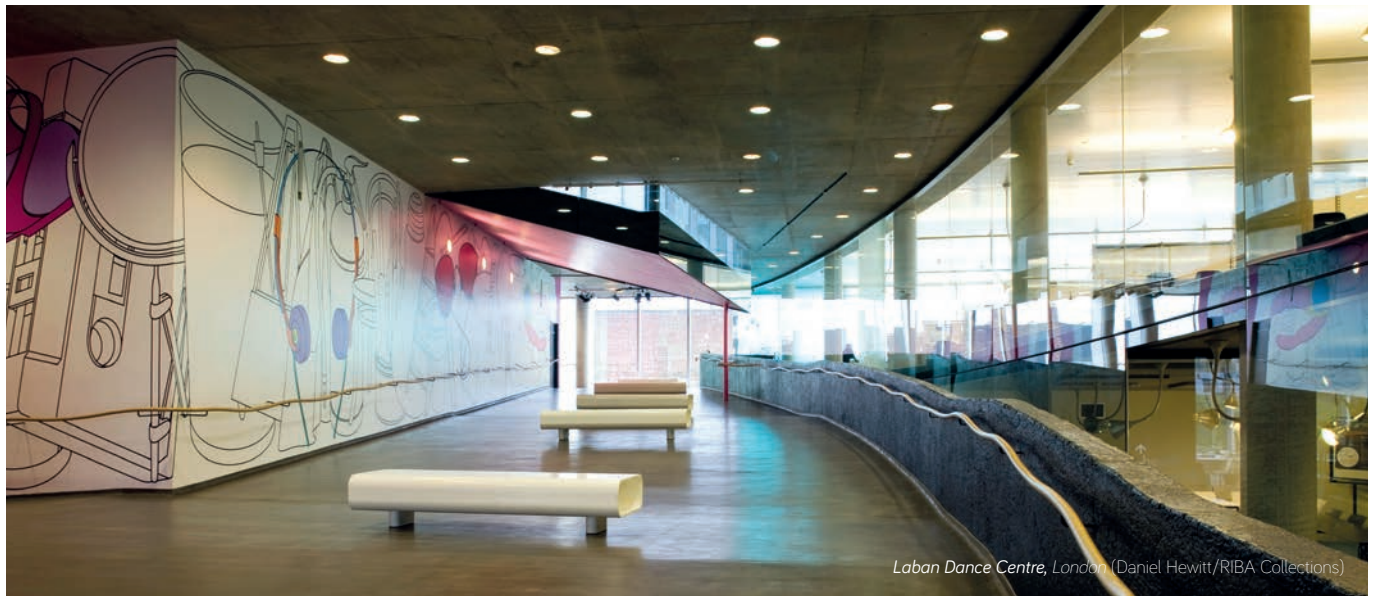


The survey also asked people to describe the form their collaboration took (more than one form of collaboration might be used). The most common (74%) is a contract that includes an ethos of 'mutual trust and cooperation'. Some 17% entered a formal partnering agreement, 15% a non-binding partnering charter and 9% an alliancing agreement.

Among those who have adopted collaboration techniques, a clear majority see those techniques as beneficial; they reduce the number of disputes (63%) and improve the delivery of the client's objectives (61%). Through the widespread adoption of Building Information Modelling (BIM), and the associated standardisation of data and data environments, creating and sharing standardised data is easier than ever before. Nevertheless, it is a minority (of just over a third - 37%) who agree that collaborative projects *rely* on standardised data.

**In your opinion, do collaborative projects...?**





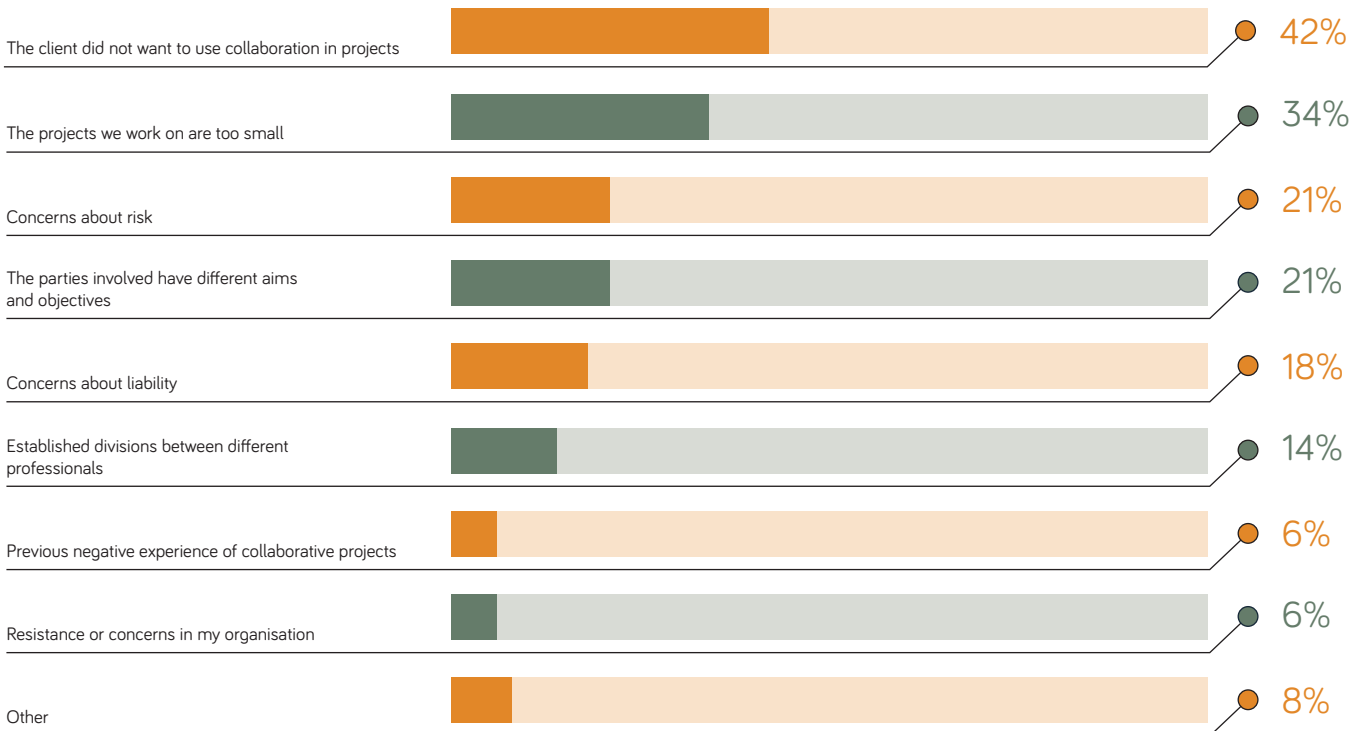
Laban Dance Centre, London (Daniel Hewitt/RIBA Collections)

Collaboration offers clear benefits, but it is not always adopted. Why not?

*'Offloading risk and complex contractual arrangements make it nearly impossible to set up a collaborative or fair relationship'*

Respondents gave a range of reasons, and some gave more than one. The most frequently cited (42%) being that the client did not want to use collaboration, followed by collaboration not being appropriate because the projects worked on are too small (34%). Other reasons include 'concerns about risk' (21%), 'parties having different aims and objectives' (21%), 'concerns about liability' (18%) and, sadly, 'established divisions between the different professionals' (14%).

**What prevented you from becoming involved in, or using, (more) collaboration in projects during the past 12 months?**



# Contracts and sustainability

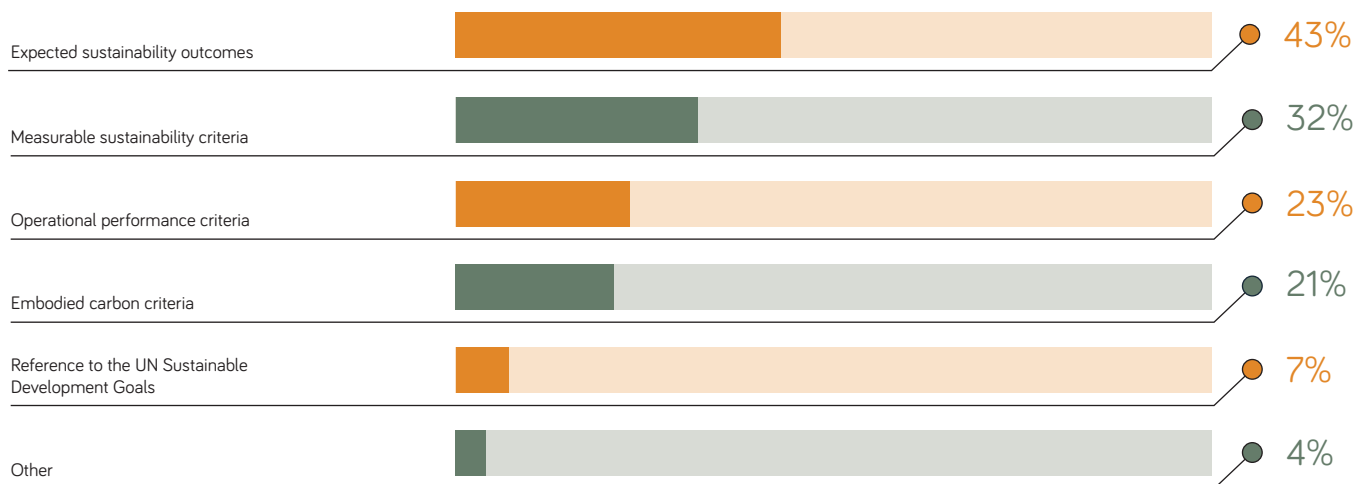
The UK is committed to achieving net zero by 2050.<sup>11</sup> Buildings represent 39% of global greenhouse gas emissions.<sup>12</sup> Obtaining project financing is increasingly contingent on demonstrating sustainable outcomes.<sup>13</sup>

The survey asked whether sustainable outcomes are finding their way into contractual requirements. They are. Some 43% of respondents were involved in one or more contracts that included 'expected sustainable outcomes' and 32% in contracts that included 'measurable sustainability criteria'. The 'operational performance criteria' (23%) and 'embodied carbon criteria' (21%) that form part of the RIBA 2030 Climate Challenge<sup>14</sup> are also becoming contractual requirements.

*'Contracts need to be improved, particularly in respect of sustainable construction'*

The UN Sustainable Development Goals (SDGs)<sup>15</sup> are an internationally agreed description of what sustainability means and they encompass the social, economic and environmental dimensions of sustainable development. Reaching the Global Goals is starting to move from aspiration to contractual requirement, with 7% of respondents being involved in a contract that included the SDGs.

## In the past 12 months, has your organisation been involved with contracts that have included any of the following?



<sup>11</sup> Department for Business, Energy and Industrial Strategy, *Net Zero Strategy: Build Back Greener*, 2021, <https://www.gov.uk/government/publications/net-zero-strategy>  
<sup>12</sup> World Economic Forum, 'How to Build Smart, Zero Carbon Buildings: And Why it Matters', 2021, <https://www.weforum.org/agenda/2021/09/how-to-build-zero-carbon-buildings/>  
<sup>13</sup> HM Treasury and United Kingdom Debt Management Office, *UK Government Green Financing Framework*, 2021, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1002578/20210630\\_UK\\_Government\\_Green\\_Financing\\_Framework.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002578/20210630_UK_Government_Green_Financing_Framework.pdf)  
<sup>14</sup> RIBA, '2030 Climate Challenge', <https://www.architecture.com/about/policy/climate-action/2030-climate-challenge>  
<sup>15</sup> United Nations, Department of Economic and Social Affairs, 'Do You Know All 17 SDGs?', <https://sdgsun.org/goals>

# Forms of appointment and contracts

*'It's very important to give more attention to preparing the project documents, including both technical and contractual terms and conditions in a clear way to prevent any ambiguity in understanding and interpretation of them'*

The *Construction Contracts and Law Report* has monitored the use of the various forms of appointment and contracts used within the construction industry. Across the sector, work is being done to increase contract options and to address any unmet demand for standardisation. Suites of contracts are refined and expanded; new contracts are developed. A shared aim is to reduce the use of bespoke contracts, which may increase contractual ambiguity and so unintentionally lead to disputes.

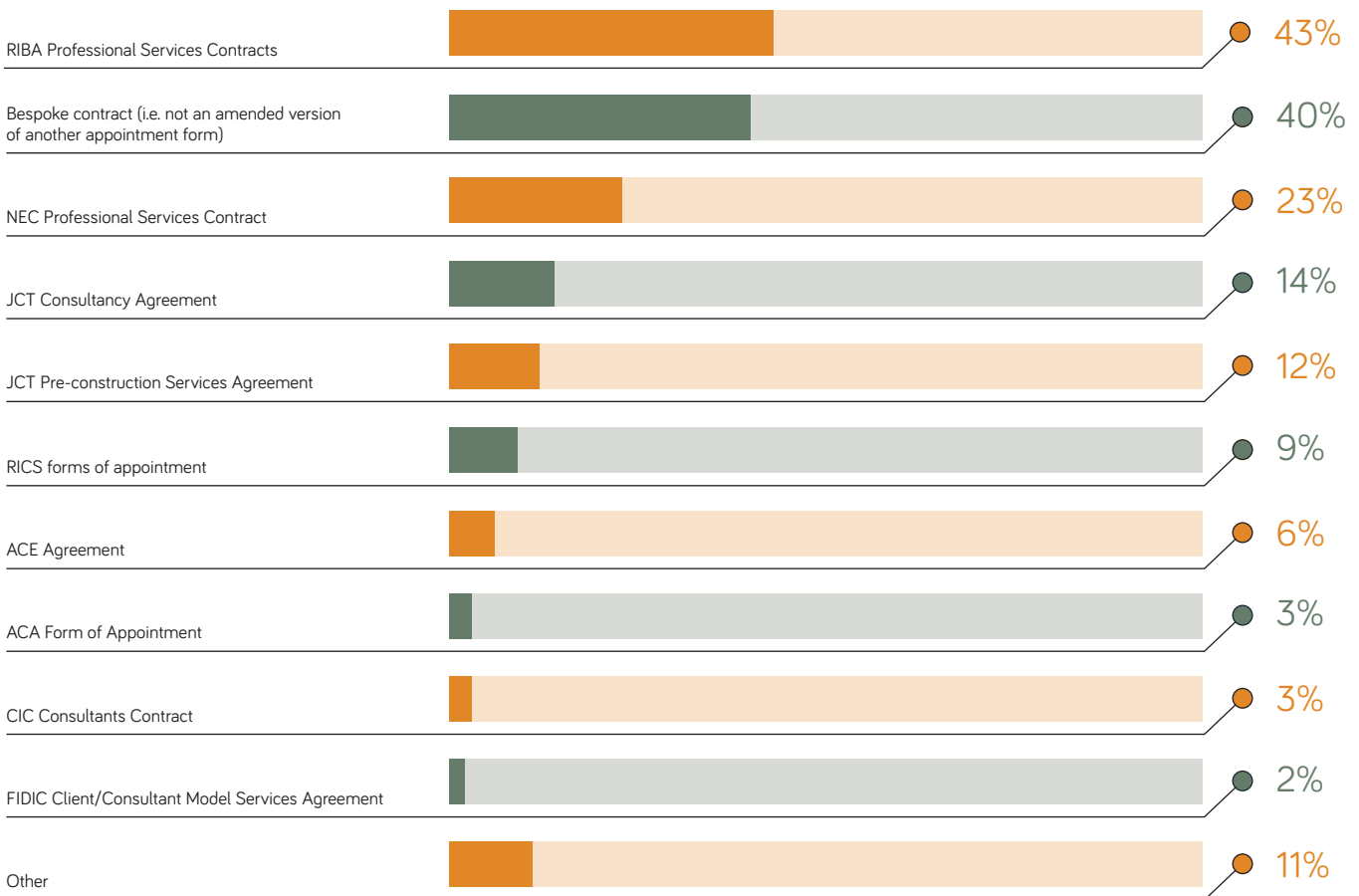
## Forms of appointment

Forms of appointment are the legal vehicle by which consultants are appointed to a project. They describe the services to be provided, their cost and who will provide them. There is a range of forms of appointment available but bespoke forms are often created.

The RIBA Professional Services Contracts are the most widely used, with 43% of respondents having used them in the past year. This figure compares to the 23% who used the previous 'RIBA Agreements' in the NBS National Construction Contracts and Law Survey of 2018.

At 40%, the next most frequently used form of appointment is a 'bespoke' appointment contract. After that comes the NEC Professional Services Contract, with 23% of respondents using it. This is very similar to the figure that we saw in the 2018 NBS report (25%). Other notable forms of appointment include the JCT Consultancy Agreement (14% have used it), the JCT Pre-construction Services Agreement (12%) and the RICS forms of appointment (9%).

### Which forms of professional appointment were used in your projects in the past 12 months?

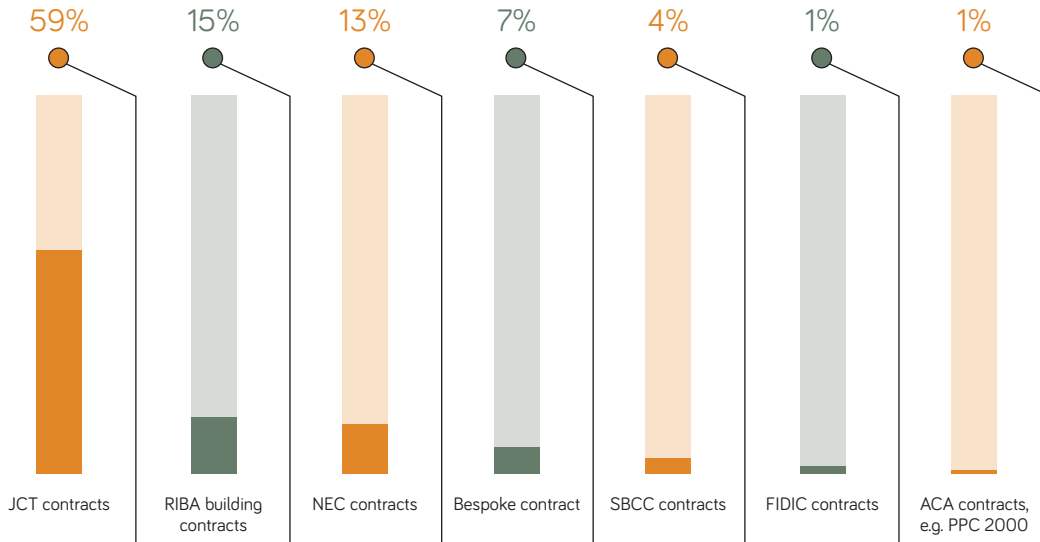


### Contracts

When it comes to the contracts that people use most often, the most popular is the JCT contract suite (59%), followed by the RIBA building contracts (15%), then the NEC contracts (13%) and bespoke contracts (7%).

When compared to previous reports, the RIBA contracts have seen strong growth in their use.

#### Which contracts have you/your organisation used most often?



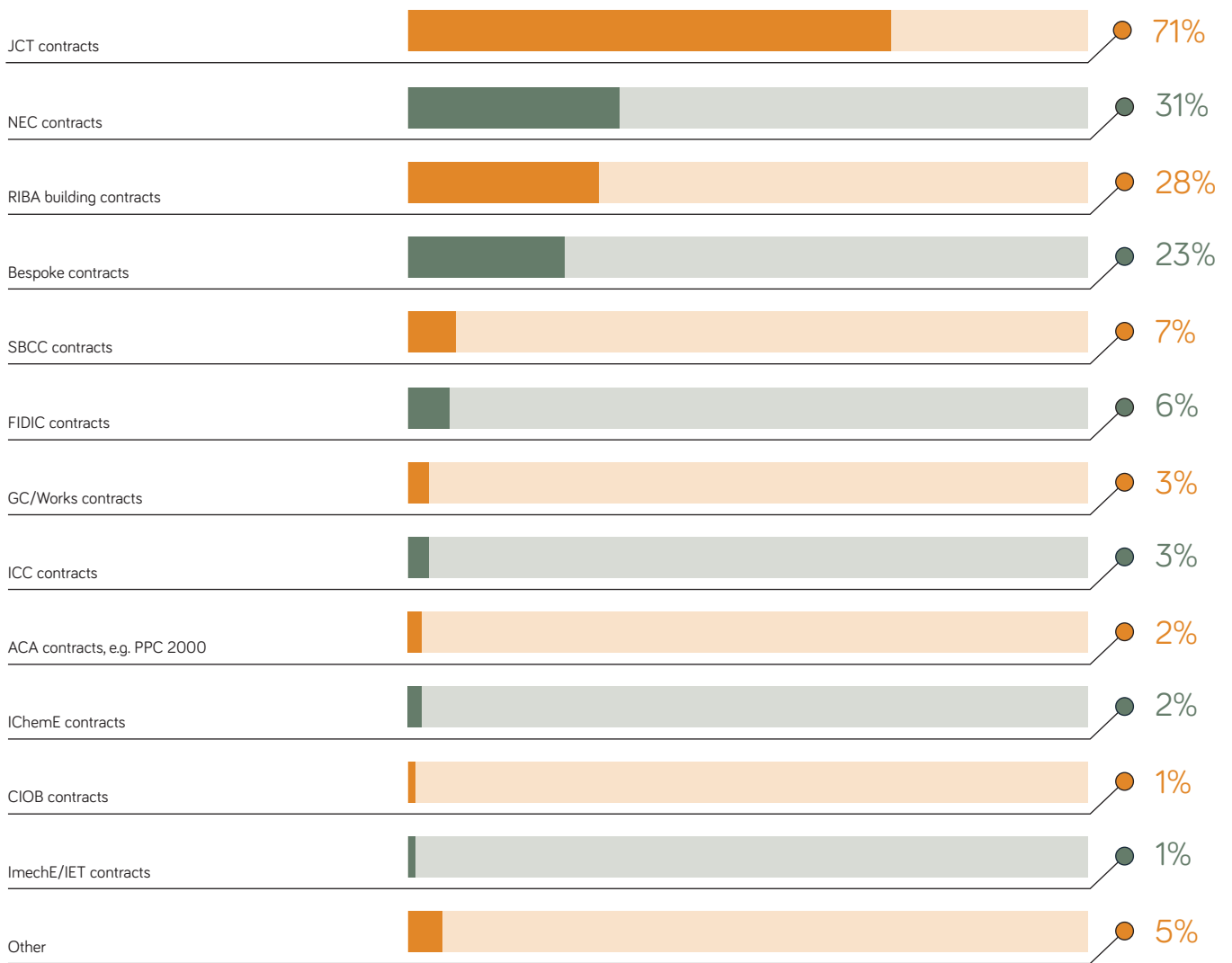
Across the sector, work is being done to increase contract options and to address any unmet demand for standardisation.



Many respondents use a range of contracts. The percentage of respondents who used a particular type of contract in the previous year is shown in the graph below. As in the 2018 report, the JCT suite of contracts has been used by the highest percentage of respondents (71%) followed by NEC contracts (31%). The same percentage of people have used a bespoke contract as in the 2018 report (23%). The use of the RIBA building contracts has grown, from 14% in 2018 to 28% in 2022.

The Scottish Building Contracts Committee (SBCC) suite of contracts is designed for the Scottish construction industry and so is based on Scottish law. With 7% adoption overall, they appear to be widely used for Scottish projects.

**Which of the following contracts have you/your organisation used during the past 12 months?**





Respondents were asked to give their reasons for their primary choice of contract and illustrative comments about the three most widely used contracts are provided below:

**For RIBA building contracts:**

- 'Compact, clear, concise'*
- 'Written in plain English. Flexibility of use'*
- 'Simple, easy to use, digital and reasonably priced. Doesn't scare smaller builders'*
- 'It is recognised by most contractors and easily understood. There is a body of cases in case of a dispute'*
- 'Ease of completion and simplicity in wording for residential clients'*

**For JCT contracts:**

- 'Industry standard and tested in the courts'*
- 'Fair, equitable and well understood'*
- 'Well tried and tested'*
- 'Standard lump sum contract understood by the industry'*
- 'Simple and familiar'*

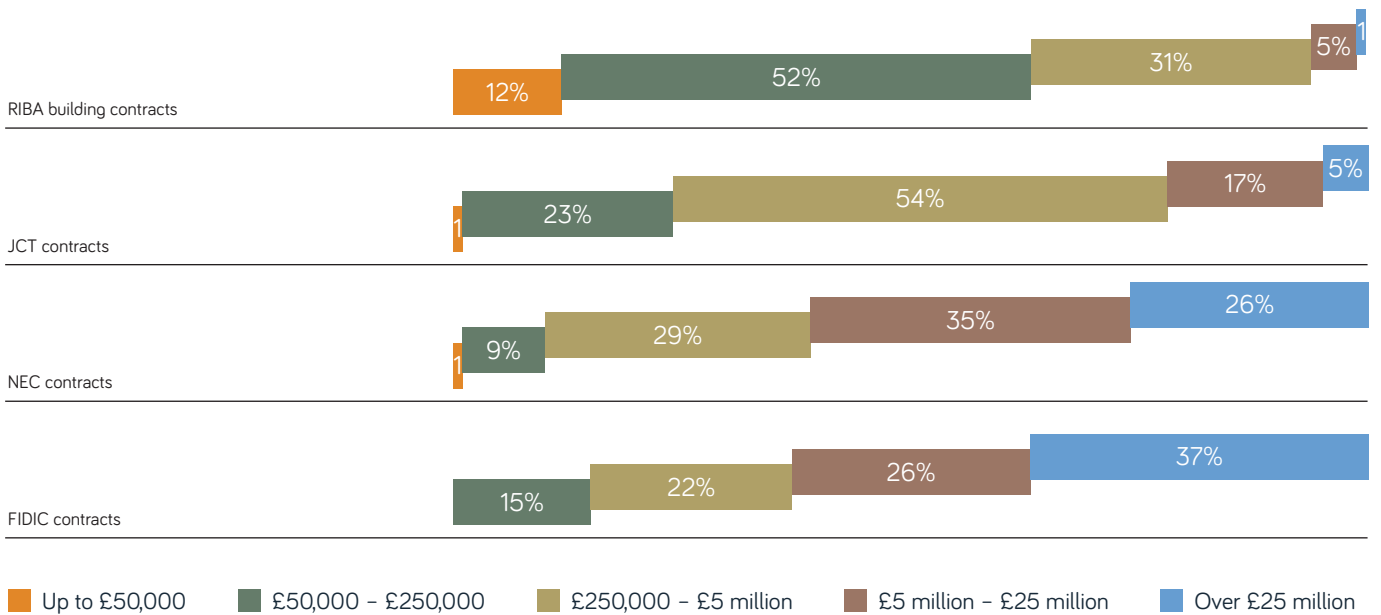
**For NEC contracts:**

- 'Mandated by public procurement regulations'*
- 'Use of NEC is recommended by bodies such as the Cabinet Office, our frameworks are set up for NEC3, and our staff are generally experienced and trained in NEC'*
- 'NEC language, clarity, discipline and equitable simplicity'*
- 'The spirit of mutual trust and cooperation. Fairer risk sharing'*
- 'Client decision – set in frameworks'*

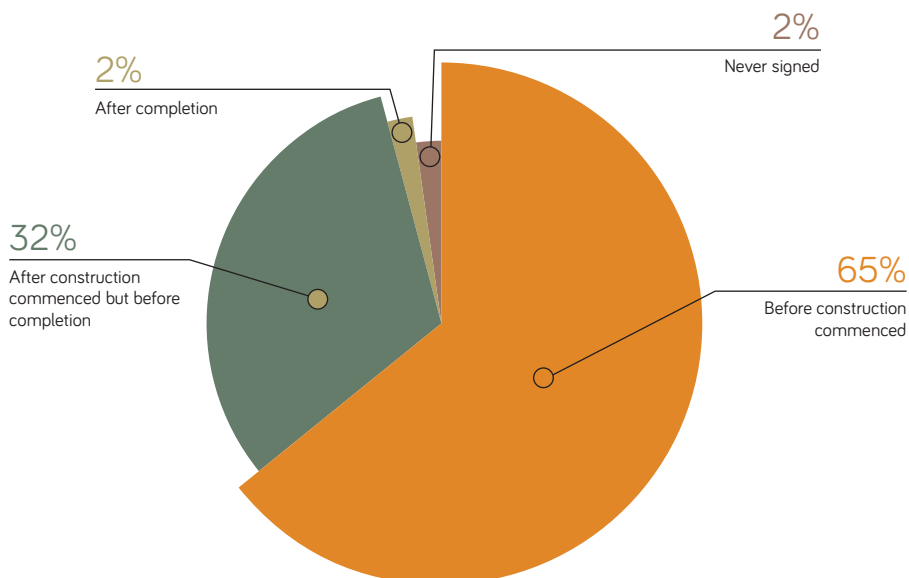
Contract choice is linked to project value. RIBA contracts are typically used for smaller projects with a value of less than £250,000, such as residential and small commercial projects. JCT contracts are typically of higher value, with 54% of those who use them using them for projects with a value between £250,000 and £5 million. NEC and International Federation of Consulting Engineers (FIDIC) contracts tend to be used for large projects. A total of 61% of respondents using NEC contracts use them for projects with an average value of over £5 million. For the internationally focused FIDIC contracts, 37% use them for very large projects (those with an average value of over £25 million).

Contracts need to be signed. Carrying out work before a contract is signed is working at risk. More than a third of respondents typically carry out work before contract signature. These figures are stubborn. In 2018, the NBS reported that, while 65% of respondents typically sign construction contracts before construction has commenced, 32% typically sign after construction has commenced. In 2022, the figures are the same.

**For the contracts you have selected, what is the average value of the projects that you use that type of contract for?**



**During the past 12 months, what is the typical stage at which your construction contracts were signed?**

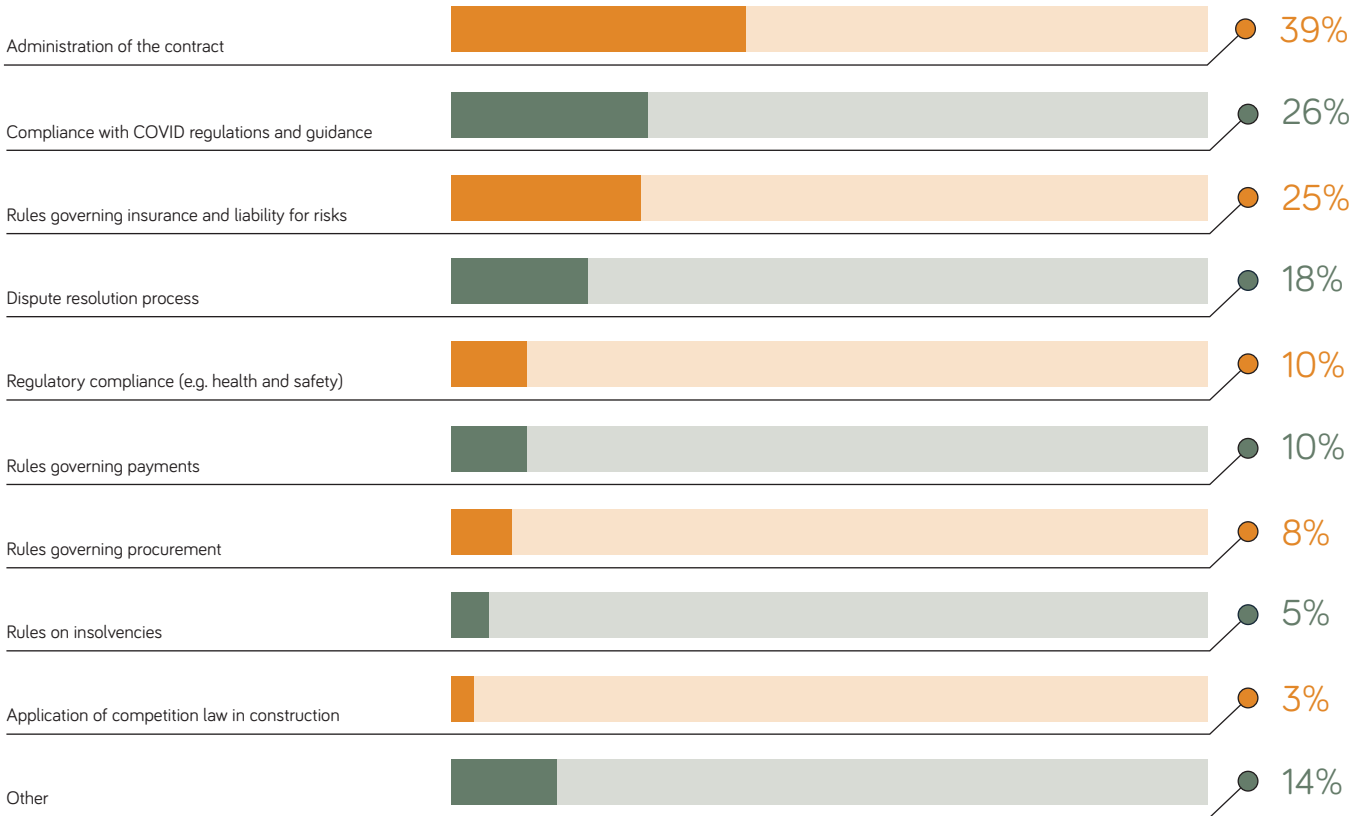


# Legal issues

In part, contracts are put in place to prevent legal issues emerging later in the project. Nevertheless, legal issues do emerge. As a part of the survey, we asked which legal issues people found to be most challenging. Responses included 'administration of the contract'

(39%), 'rules governing insurance and liability for risks' (25%) and 'dispute resolution process' (18%). A quarter (26%) cited 'compliance with COVID regulations and guidance', an issue that has now largely passed.

## What legal issues did you find to be challenging during the past 12 months?



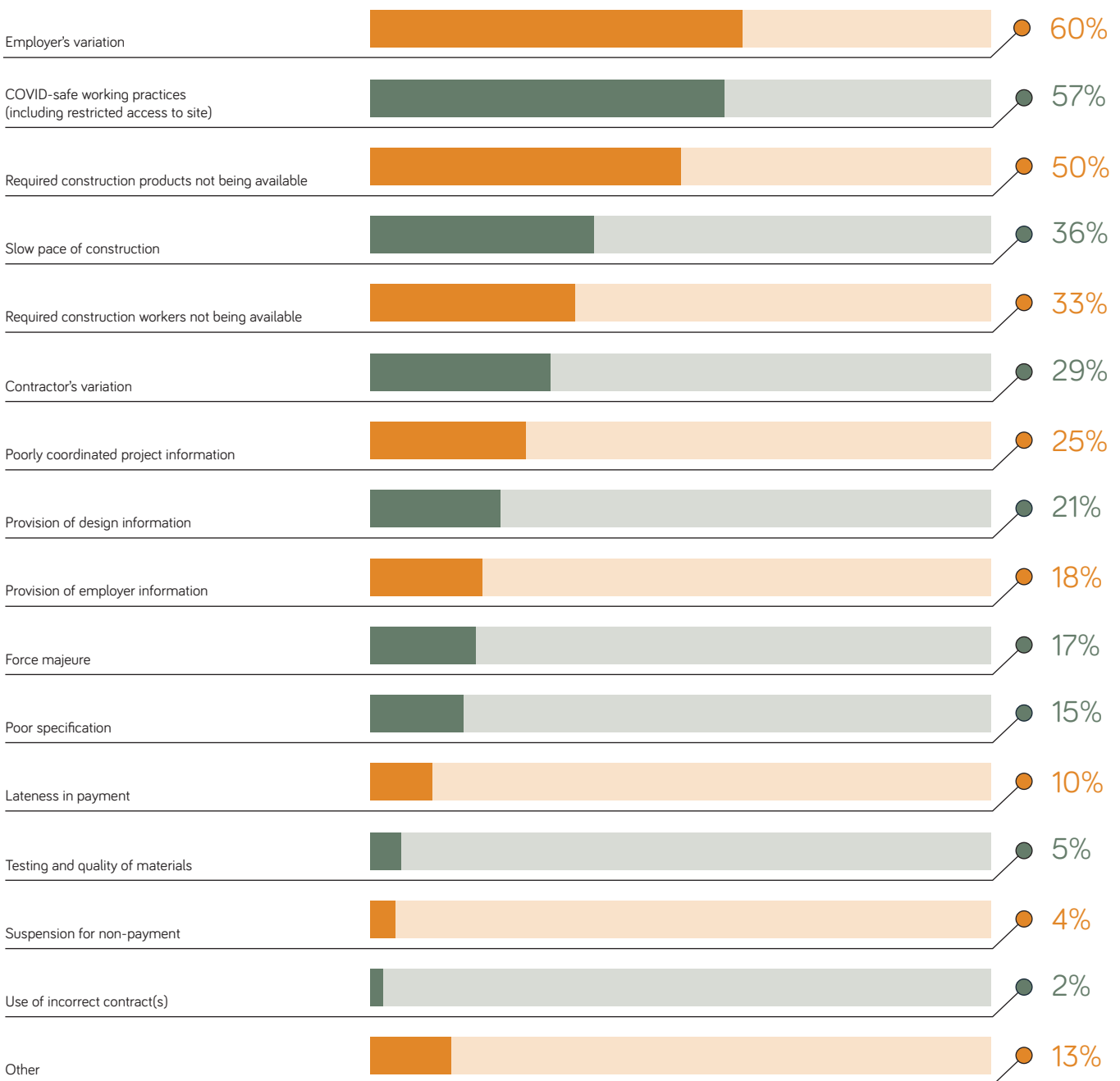
The survey also asked what impeded project progress. Again, there was a range of responses.

The issues of 'required construction products not being available' (with 50% describing this as impeding project progress) and 'required construction workers not being available' (33%) are both new and arise from the combined pressures of COVID-19 disruption and the new trading arrangements with the European Union (EU). A hopefully transient impediment is 'COVID-safe working practices', with a majority (57%) of respondents reporting this as having impeded project progress.

We also see some long-standing matters. Top of the list comes 'employer's variation' (60%). Further matters that have impeded progress include: 'contractor's variation' (29%), 'poorly coordinated project information' (25%) and 'provision of design information' (21%).

Among 'other' matters cited were the adverse effects of Brexit (and our current trading arrangements with the EU), construction product cost inflation, the cost and difficulty of obtaining affordable professional indemnity insurance (PII), planning delays, contractor insolvency and poor workmanship.

**During the construction phase of the project, which (if any) of the following matters impeded project progress, during the past 12 months?**

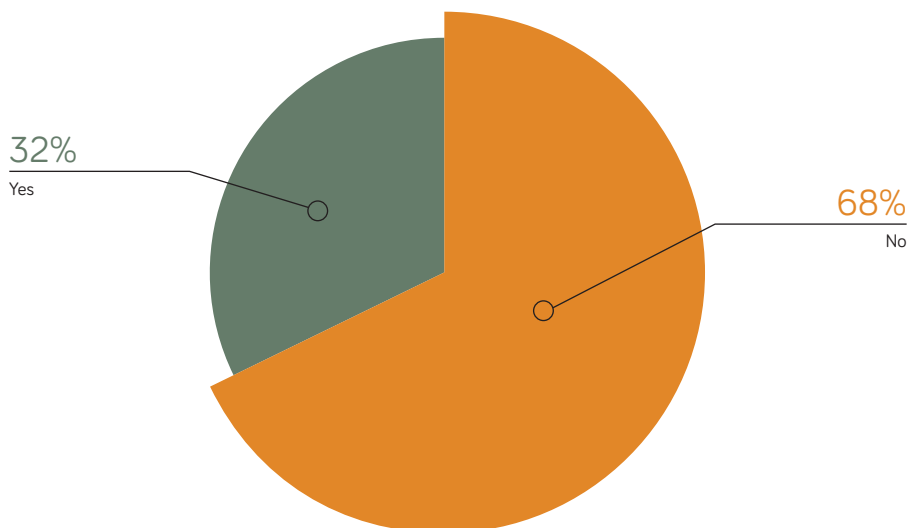




An approach to reduce the risk of project delay through unsatisfactory performance is to use a formal method to guarantee performance, and almost a third of respondents (32%) did so in the past year.

This may be through methods such as a performance or payment bond, a warranty for a funder, purchaser or tenant, a third-party rights schedule or a parent company guarantee.

**In the past 12 months, have you used any formal methods of guaranteeing performance?**



# Disputes

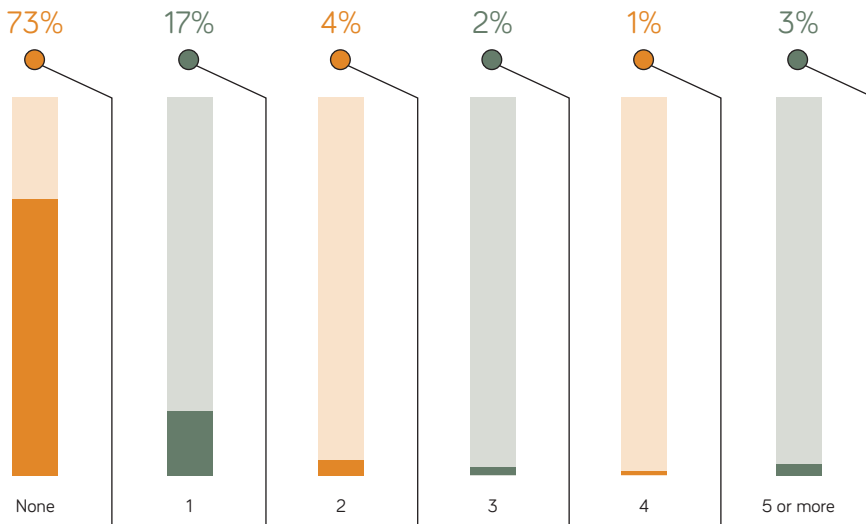
Disputes are common and affect a significant proportion of the industry. Over a quarter (27%) of respondents reported being involved in one or more disputes in the past 12 months and 3% have been involved in five or more.

The past three years have been exceptionally difficult, yet when we compare this year's data to figures from previous years' reports, the proportion of respondents engaging in contractual dispute has fallen; from 44% in 2015 to 33% in 2018 and 27% this year. Disputes are still too often a part of UK construction, but this falling proportion is encouraging.

Turning to the main issues in dispute during the past 12 months, 'extension of time' was the most common issue (reported by 50% of respondents) among those who had been in dispute, followed by 'defective work' (41%), 'loss and expense' (31%), 'valuation of the final account' (30%) and 'valuation of variations' (26%).

While we have seen a fall in reported disputes, respondents were far more likely to think that disputes are on the rise. Some 48% of respondents felt that the number of disputes had increased in the past 12 months and just 4% that they had decreased.

## Thinking about the contracts you were involved in, approximately how many of these went into dispute during the past 12 months?



## Thinking about the construction sector generally, during the past 12 months would you say that disputes in the sector have decreased, stayed the same or increased?



We invited participants to give their reasons for feeling that the number of disputes had increased.

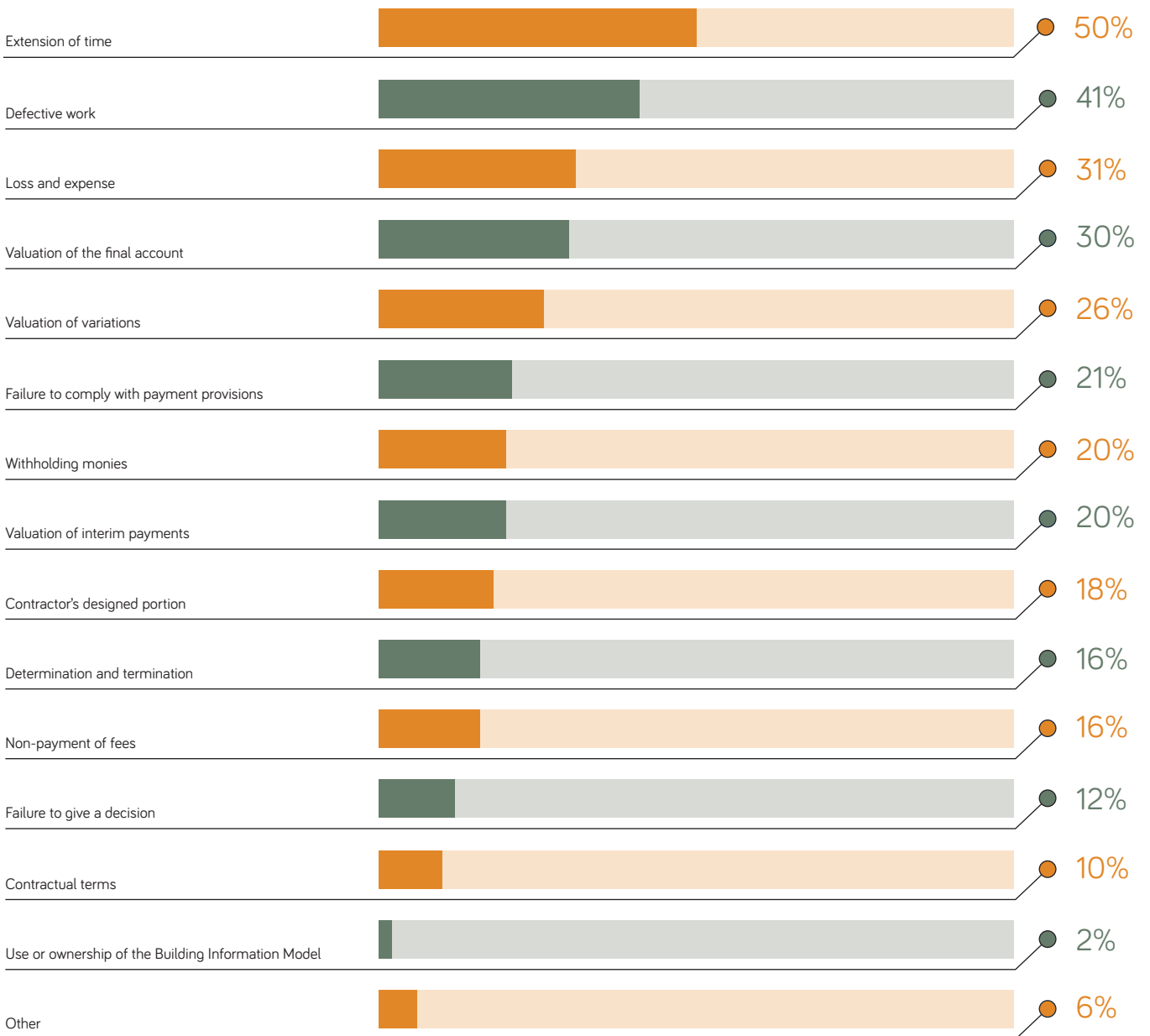
Many respondents referenced issues that featured in previous surveys, such as contractors using disputes as a mechanism to preserve or increase their margins, late payments, risks being inappropriately transferred, an adversarial approach to projects among project partners, and the complexity of procurement and contracting processes.

*'Employers passing too much risk and margins being low'*

*'Parties are much more aggressive and confrontational'*

*'Increasingly complex procurement arrangements and unnecessarily complex contract terms'*

**What were the main issues in dispute during the past 12 months?**





This year we have also seen new, interrelated challenges emerging. These include:

- the effects of the pandemic, including altered working practices and temporary restrictions
- the effects of the UK leaving the EU
- supply chain issues
- construction product cost inflation and availability disruption
- labour and tradesperson availability shortages
- PII cost and availability issues.

*'Impact of COVID, Brexit, material price increases, labour shortages causing delays to programmes and additional costs'*

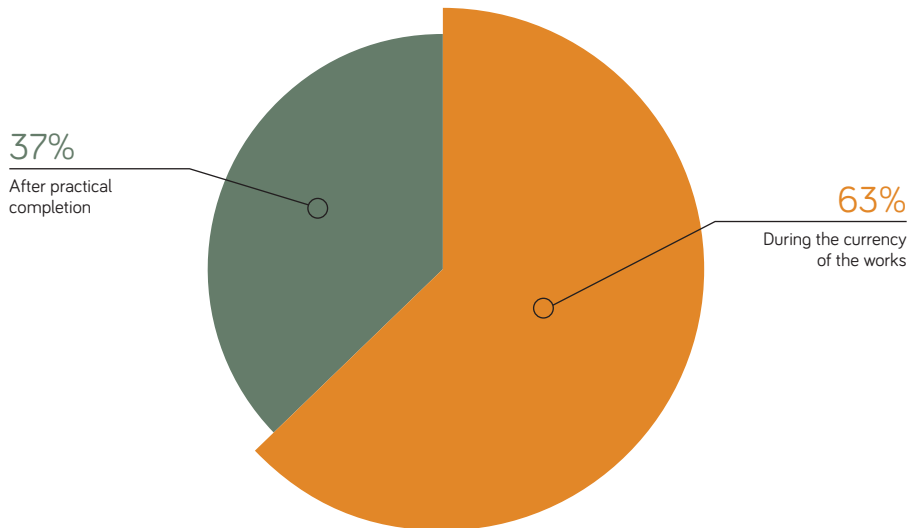
*'Clients have not fully appreciated the impact that COVID has had on the supply chain and availability of resources'*

*'Contractors are under increasing pressure from material and labour shortages and increased cost to complete'*

*'Perfect storm of increased costs and lack of materials and labour at various times'*

Disputes are more likely to occur during construction, 63% being initiated during the currency of the works, while the remainder (37%) were initiated after practical completion. These figures remain very similar to those of previous years.

### The stages at which the disputes occurred

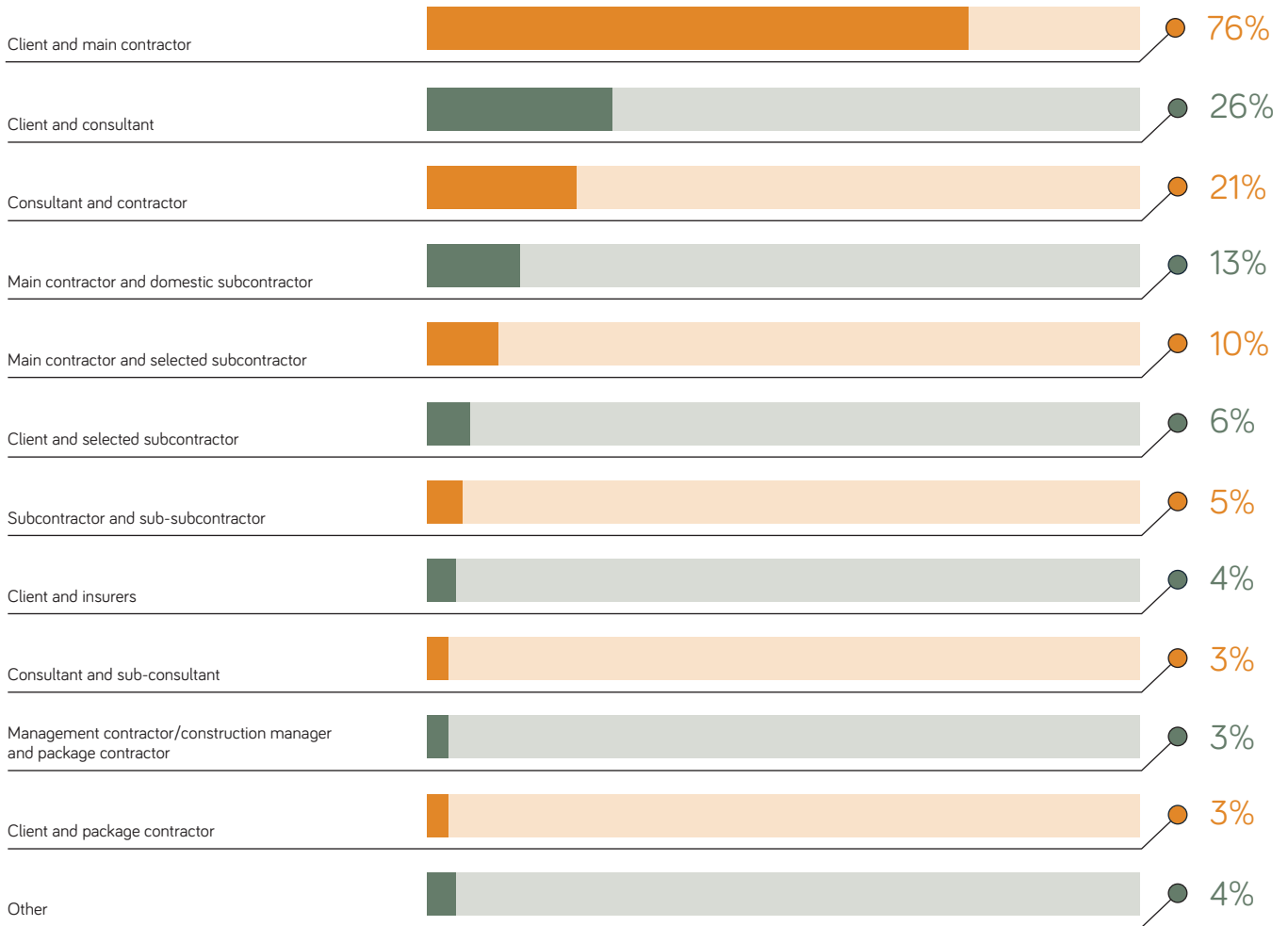


While we have seen a fall in reported disputes, respondents were far more likely to think that disputes are on the rise.

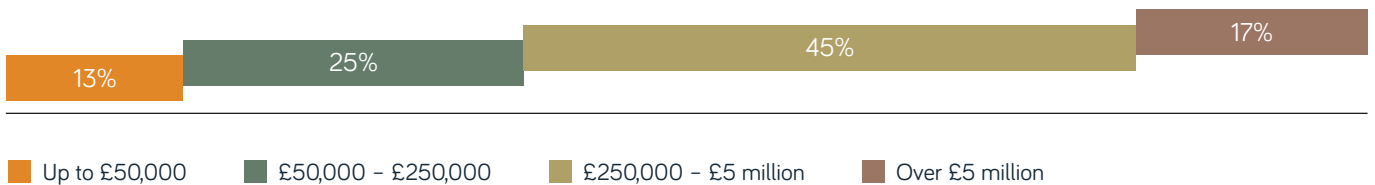
Disputes can arise between any of the contracting parties, but they most frequently occur between the client and the main contractor; in 76% of cases these were the parties in dispute. Other parties enter disputes, but less commonly. A total of 26% of respondents reported disputes between the client and the consultant, 21% between the consultant and the contractor and 13% between the main contractor and the domestic subcontractor.

Disputes are increasingly likely in higher-value projects. In 2018, a majority (56%) of disputes occurred in projects with a value of less than £250,000. In 2022, that proportion has flipped. Now a majority (62%) occur in projects with a value greater than £250,000 and 17% occur in projects with a value of £5 million or more.

**Who were these disputes between?**



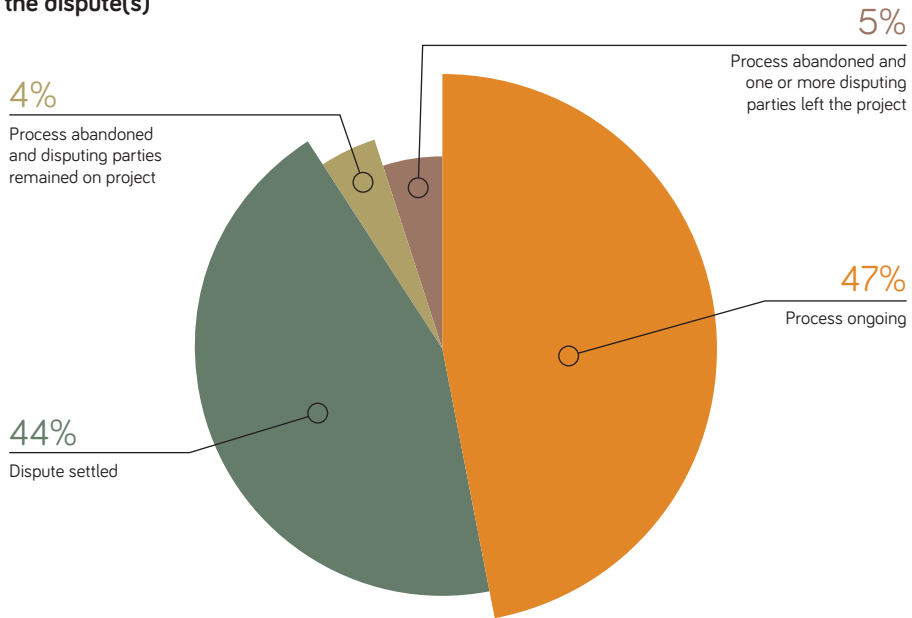
**Approximate value of disputes**



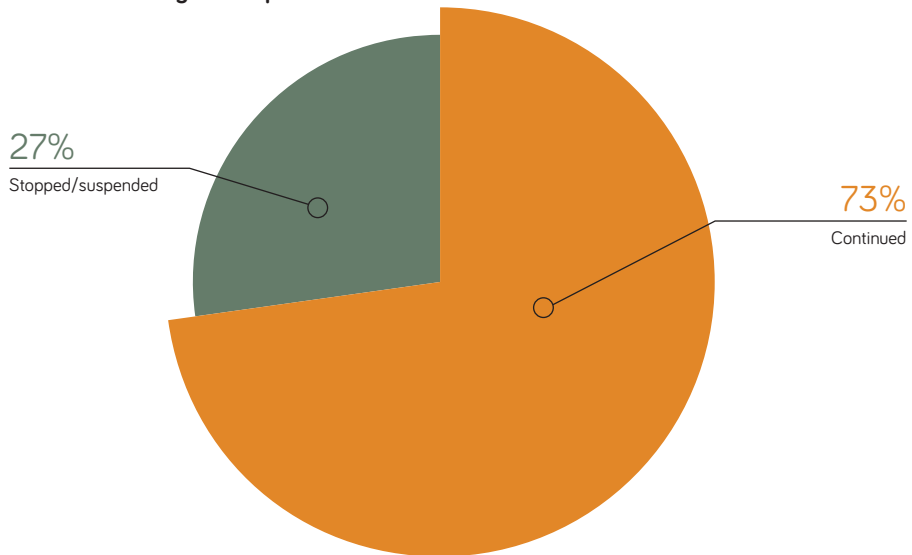
Disputes can also take time to resolve. Those with experience of disputes in the past 12 months reported that, 47% of those disputes were ongoing and 44% were settled. A total of 9% of disputes were abandoned and, of those, 5% saw one or more of the disputing parties leave the project.

Disputes often have a real effect on the ground; construction work was either stopped or suspended in just over a quarter (27%) of projects in dispute.

**The current status of the dispute(s)**



**Did construction works continue during the dispute?**



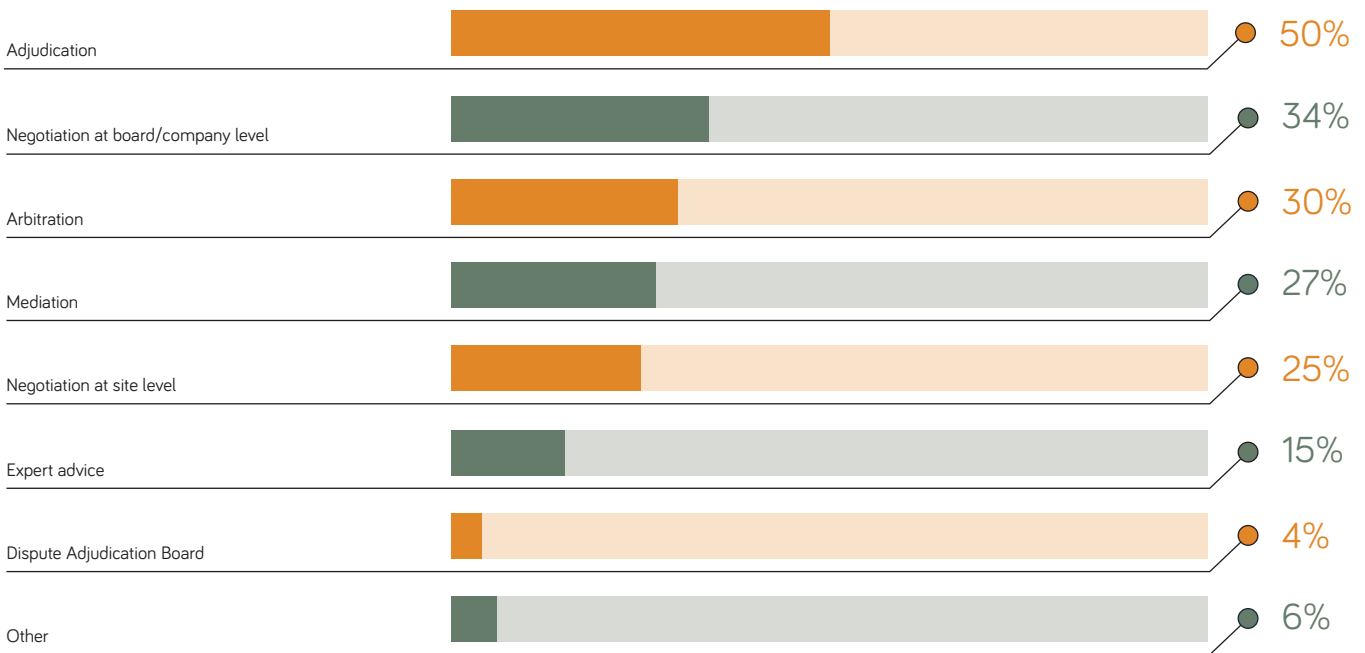
### Dispute resolution and avoidance

Knowing the risk and potential effects of formal disputes, an early-stage contractual agreement on the dispute resolution/avoidance procedure can be invaluable.

*'The construction contracts we are involved in have not formally gone into dispute; we have managed to avoid this by careful mediation between clients and contractors'*

The most common avoidance procedure included in contracts is adjudication (50%), followed by 'negotiation at board/company level' (34%), arbitration (30%), mediation (27%), 'negotiation at site level' (25%), expert advice (15%) and using the services of the Dispute Adjudication Board (4%).

Which, if any, of the following dispute resolution procedures were included in the contracts/projects in dispute?

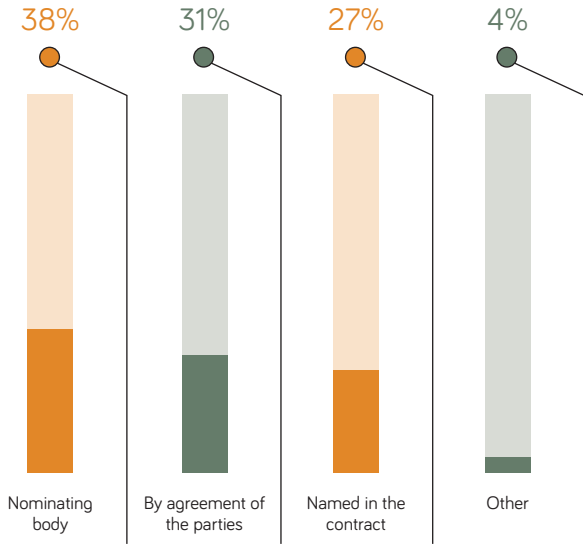


Disputes can arise between any of the contracting parties, but they most frequently occur between the client and the main contractor; in 76% of cases.

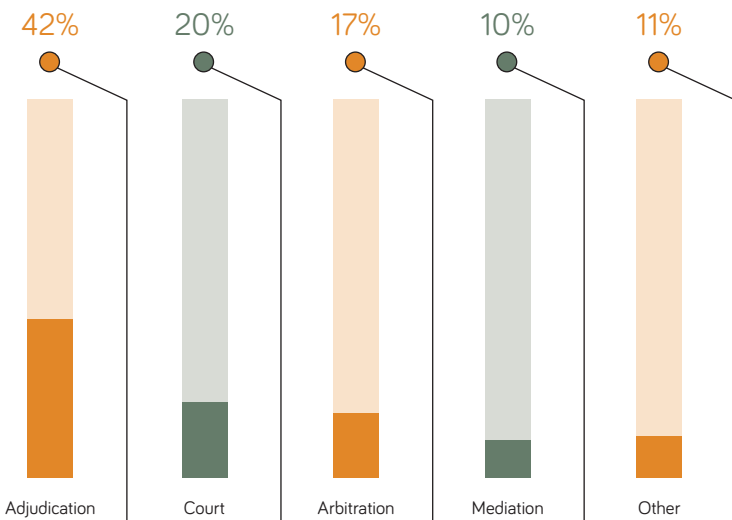
Where efforts to avoid dispute fail, those in dispute may appoint a disinterested person to help resolve it. There are three main processes for doing this and all are well used. The person can be appointed by a nominating body (38%), by agreement of the parties (31%) or by being named in the contract (27%).

Where both dispute avoidance and resolution have failed, the final tribunal of choice is adjudication for 42%, court for 20%, arbitration for 17% and mediation for 10%.

**For projects/contracts in dispute, what process is usually followed in appointing someone to help resolve the dispute, such as an adjudicator, arbitrator or mediator?**



**What was the final tribunal of choice in most cases?**





## Closing remarks

The findings of this year's survey came as we moved out of the immediate effects of the pandemic restrictions. For an industry too often characterised as one of poor productivity, digital immaturity and being adversarial, it rapidly and (mostly) successfully adapted to the shifting realities of COVID.

A standout finding from the survey has been that, even while navigating the COVID storm and its aftermath, the proportion of projects and contracts falling into dispute continues to decline. Better contracts, better project information, more collaboration and the use of dispute avoidance procedures may together be having the effect that all parties are seeking.

That said, the industry looks to the future with trepidation. There are new challenges: the war in Ukraine, Brexit, high inflation, labour shortages and supply chain failures among them. These are already creating project delays and project cost increases. Good and improving contractual arrangements won't make these issues go away, but they can help to describe, allocate and so mitigate the rising risks. Where contracts fall into dispute, a clear and effective resolution process remains paramount.

A final note – the RIBA is pleased to see sustainability criteria featuring in contracts. If we don't collaboratively reduce and mitigate the effects of climate degradation, further risks to the industry will accumulate dramatically. Sustainability and carbon reduction must and will increasingly become a part of client requirements and a condition of project funding.

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# Shifting sands and fuzzy boundaries: evolving procurement options

In tracking the deployment of standard form contracts over the past few years, it is possible to identify an increasingly innovative approach to procurement, to the extent that it is often difficult to place many projects wholly within one of the classic procurement categories.

This innovation is very likely in response to a changing landscape, including government policy and legislative developments, coupled with the impact of major events, such as Brexit, the COVID-19 pandemic and the war in Ukraine, which have led to shortages, delays and rapid inflation.

Navigating this landscape requires careful decisions over the allocation and management of risk with due regard to quality, cost and time.

## Quality – landscape and response

Design is taking place throughout the whole procurement process, due no doubt to various factors competing to determine where the optimum position for design fixity may be.

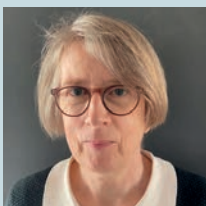
Government policy has for some time advocated an outcome-based approach to specification,<sup>1</sup> encouraging the supply chain to generate more sustainable design solutions. This approach is a key theme in the *Construction Playbook*<sup>2</sup> and reflected in the specification requirements of the Public Contracts Regulations 2015 (maintained in the 2022 Procurement Bill).

Running counter to this, and creating a degree of tension, the Building Safety Act 2022 and related legislation are setting higher, more prescriptive standards and moving away from a performance-based approach. The introduction of new approval gateways, requiring demonstrably safe solutions, necessitates certainty on detailed design aspects at an earlier point in the process. The growth of Building Information Modelling (BIM) and modern methods of construction (MMC) also encourages this trend.

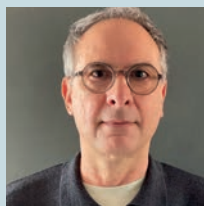
Fortunately, current standard forms offer a wide range of options for allocating design responsibility. Many design-bid-build (traditional) (DBB) contracts provide for demarking a ‘contractor’s designed portion’, enabling innovation for targeted elements. Conversely, with design and build (DB) contracts, large elements of the design are often fixed within the employer’s requirements/scope, leaving only detailed aspects to be completed by the supply chain. Coupled with the growing tendency for employers to retain specific members of the novated teams as their ‘design champions’, this means that, in practice, these two procurement routes have converged.

Government policy is also adding a new focus on early integration of all tiers of the supply chain (including product manufacturers; small and medium-sized enterprises; voluntary, community and social enterprises; and operators), all of whom may contribute valuable input into developing the employer’s requirements and design solutions across a range of different procurement options.

The appropriate stage and degree of design fixity need to be considered alongside issues of cost and time.



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Lupton Stellakis



<sup>1</sup> See, for example, Cabinet Office, *Government Construction Strategy*, Cabinet Office, London, 2011, p 3

<sup>2</sup> HM Government, *The Construction Playbook*, Cabinet Office, London, 2020



### Cost and time – landscape and response

The rapid increase in construction costs over the past year has meant that returned tenders are frequently far higher than predicted. Given this uncertainty, contractors are unwilling to tender fixed prices or agree firm completion dates. Many project teams are therefore reviewing ways in which the risks of cost increases and delays can be shared and managed.

Exploration of devices already available within standard forms has been evident. For lump-sum forms (such as JCT Standard Building Contract (SBC) and NEC4 Engineering and Construction Contract Options A and B), the risk of material price increases, normally borne by the contractor, can be shifted to the employer by the inclusion of fluctuations provisions, a measure recommended by the Construction Leadership Council (CLC)<sup>3</sup> (e.g. JCT SBC Options A, B and C, and NEC4 secondary Option X1). At the opposite extreme, under a cost reimbursable contract, where all risk of increases normally lies with the client (e.g. the JCT Prime Cost Contract and NEC4 Option C), the introduction of a Target Cost with incentives allows sharing risk.

Although standard form building contracts do not generally provide for an extension to the programme when difficulties with the supply chain are experienced, these risks may be rebalanced in advance by negotiating bespoke amendments to the Relevant Events/Matters clauses (JCT) or the addition of extra compensation events to the Contract Data (NEC). Examples include the CLC's published model clauses relating to COVID-19. The strategic use of provisional sums to cover items with known supply problems can also help with cost and time risk, as instructions confirming the use of such items may entail compensation to the contractor.

### A package-based approach?

Rather than adjusting the balance in a single contract arrangement (whether DBB or DB) another strategy is to break the project down into smaller chunks. This disaggregation avoids a single firm taking full responsibility and potentially charging the client an inflated premium to cover this risk.

As a result of a slow but steady increase in self-build housing projects, both policy-driven (for example, the 2021 'Help to Build' scheme<sup>4</sup>) and progressively as a personal preference, there has been a marked rise in the use of management arrangements, which often do not directly correlate with the classic procurement routes that particular contracts are meant to sit within.

Examples of such arrangements include the use of the JCT Intermediate Building Contract with contractor's design with numerous named subconsultants brought in throughout the course of the project, an arrangement that blurs the boundary between DBB and management contracting, or using shorter forms, designed as DBB contracts, for separate trades, as a form of construction management.

Multiple trade contractor packages are possible but simpler splits between, for example, enabling works, shell and core, and fit out are often used and can be more manageable for less experienced clients. For smaller, domestic projects, a general contractor may be engaged to undertake the building work, with separate direct contracts for the mechanical, electrical and plumbing work and/or a specific pre-designed element, such as the kitchen. Each of these separate packages could be let on an appropriate standard form, for example the RIBA Domestic Building Contract, and each could be either construct only or include some contractor design. Furthermore, within any of these packages it is also possible to name client-selected specialists to carry out specific items of work.

Direct contracts not only allow for the balance of risk to be individually negotiated on each package, but also enable a close, ongoing link between the client and the firm – often a priority for clients who may need to go back to a specific firm for future work.

In addition to careful pre-start risk allocation, managing risk during the project is key to ensuring productive efficiency and dispute avoidance. As soon as design is split across the supply chain, careful management is required to ensure that the original design intent is realised, including detailed design submission and approval processes. Risk registers and early warning systems are now a common feature in standard forms for all scales of project (e.g. NEC4's early warning register, JCT Constructing Excellence contract's risk allocation tables and RIBA Concise Building Contract's risk register). These are indispensable tools for alerting the parties to unexpected price rises or delays and making adjustments to minimise their impact, which may necessitate revisions to the design.

### In summary

Managing risk in this shifting landscape is challenging parties to make a balanced choice from an infinite array of nuanced procurement options.

<sup>3</sup> Andy Mitchell, 'A Message to the Construction Industry', CLC, 7 July 2021, <https://www.constructionleadershipcouncil.co.uk/news/andy-mitchell-writes-to-the-construction-industry-2/>

<sup>4</sup> Homes England, *Help to Build: Making Building Your Own Home More Affordable*, 2021, <https://www.gov.uk/government/publications/help-to-build-making-building-your-own-home-more-affordable>

# Build Back Better – is it an opportunity or a threat for construction?

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**In April 2020, the UK Office for National Statistics reported a 40% fall in construction output. This was unprecedented; even the financial crash of 2008 didn't have any sort of comparable impact. At a local level, the result seems to be that people fell into two distinct camps; those who urged calmness and collaboration, and those who reached for their contracts and called their lawyers. It is probably one of the best examples of the way different parts of our industry look at things, and perhaps an illustration of why it has a reputation for conflict.**

The Royal Institution of Chartered Surveyors (RICS), not surprisingly, was among those who advocated the former approach; pragmatism and leniency by clients in particular was the advice given by government bodies and industry experts alike, although it is interesting to look back and see some of the other insights put forward at the time.

Of course, nobody knew then how long the pandemic would last, but some commentators observed that it might be 2022 before the industry returned to normal.

The RICS publishes quarterly statistics on workload and future expectations for the industry. Currently, these are showing positive sentiment, particularly in the infrastructure sector, despite ongoing issues with supply chains. The situation in Ukraine and the legacy of Brexit are also concerns, but the general outlook remains cautiously upbeat, with a few regional variations.

However, we should always be aware that often, as situations appear to improve, there may be a legacy of unresolved disputes that come to the surface. And compared to the position we were in two years ago, most things will be seen as an improvement.

Nevertheless, as we emerge from the pandemic, there is a huge opportunity for the construction sector to renew and reposition itself as a modern, innovative industry, and finally shake off its image as a dangerous, backward and adversarial place to work.

One phrase which has been used recently is 'Build Back Better'.

Build Back Better is not a new concept. The term was first recorded at a conference of the United Nations Economic and Social Council in 2005 and was developed originally as a policy to mitigate risk and provide resilience in the face of natural disasters, such as tsunamis and earthquakes, especially in places like India and Japan.

Across the world, many governments, as well as institutions such as the Organisation for Economic Co-operation and Development (OECD) and the UN, have adopted their own versions of Build Back Better, sometimes referred to as BBB. More recently, these have been developed in recognition of the need to make improvements in the areas of land use, spatial planning and construction standards, and to develop infrastructure and address sustainability issues, such as climate change, equality, diversity and social responsibility. The World Built Environment Forum, an RICS initiative, organised 'Build Back Better Month' in July 2020 to discuss the implications and to gather opinion on the subject. The general consensus was that change was inevitable.

In March 2021, the UK government published a policy paper setting out what it called 'three pillars of investment to act as the foundation on which to build the economic recovery, uniting and levelling up the country'.<sup>1</sup> These are:

- investment in high-quality infrastructure
- innovation to drive and create jobs
- skills – through a focus on further education, encouraging lifelong learning and apprenticeships.

So how does that affect our construction industry? Well, put simply, by investing in innovation and skills, we can be better placed to deal with the challenges of improving the infrastructure to achieve the development aims.

In terms of innovation, there are many post-pandemic opportunities to review the way things are done. These can be something as simple as reviewing basic processes or introducing new technologies.



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<sup>1</sup> HM Treasury, *Build Back Better: Our Plan for Growth*, HMSO, London, 2021, p 8.

There are many examples of the use of technologies such as augmented reality, virtual reality or mixed reality in the workplace. They have applications in training, site activities or 'smart' personal protective equipment, which have transformed some construction operations, with a particular focus on site health and safety, and their development will continue as we find different ways of working to deal with restrictions imposed by the pandemic.

Some 'innovations' will undoubtedly be continuations of actions that began before the pandemic hit; for example, several years have passed since the government mandated the use of 'Level 2' Building Information Modelling (BIM) on centrally funded public projects, although there is still little sign of a mandate for 'Level 3', fully integrated BIM.

Similarly, the drive for 'modern methods of construction' seems to be focusing on 'off site' manufacture, while still avoiding the use of the term 'prefabrication'. In addition, the use of things like 3D printing, new building products and increased digitalisation have led to innovative manufacturing techniques, which in turn have simplified construction processes.

There has been significant progress, too, in the field of 'modular' construction, although there is also a move towards retrofit and refurbishment as part of the sustainability agenda, so the extent to which the processes are ultimately compatible remains to be seen.

With innovation comes a need for new skills. The RICS always recommends the use of professionals when it comes to new (and existing) processes and technologies but, as these emerge, there is a need for training and improvement of those skills. Although not strictly COVID-related, the introduction of the Building Safety Act 2022 and associated legislation will bring new procedures, such as the 'gateways' for building consent, and professional guidance will be needed to navigate the inevitable minefield.

Infrastructure comes in many guises. The government's plans seem to be focusing on 'physical' infrastructure – typically, publicly financed projects which increase connectivity, and, in their terms, 'levelling up' communities.

But to build one kind of infrastructure, we still need to fine-tune the industry's own infrastructure – building more resilient supply chains by changing some customs and practice. Fair payment, collaboration, investing in technology and training – especially digital – are all part of this process. The UK government has set a number of targets in these areas, such as the elimination of retentions by 2025, but there are still operational challenges to be met.

Add to this the need to expand sustainability, not just in terms of the drive to 'net zero', but also looking at equality, diversity and the industry's own image.

Culture is also important. It is incumbent on successful organisations to find ways of working that optimise the benefits of innovations, while reducing the risks associated with the use of new tools and procedures.

However, this can only be done in partnership with the workforce, especially where it might affect individuals' perceptions of job security or obsolescence. As ever, an appropriately skilled and motivated workforce will result in improved productivity and capability.

Progress is also needed in customer relations. Our industry has a range of stakeholders, perhaps more extensive than any other, by virtue of the fact that it represents a large part of the country's GDP, but also because everyone has a day-to-day interaction with the built environment. The industry's image can always do with enhancement as it affects the attractiveness of a job in construction in an increasingly challenging labour market.

Any business has scope for continuous improvement at any level, perhaps none more so than construction. Mark Farmer's *Review of the UK Construction Labour Model: Modernise or Die*,<sup>2</sup> is as relevant now as it was when it was first published in 2016. We are struggling with materials and labour shortages, and associated fuel and transport cost increases, as well as dealing with new legislation and the fallout from Brexit.

Nearly 30 years have passed since the publication of *Constructing the Team*<sup>3</sup> (officially the *Final Report of the Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry*, chaired by Sir Michael Latham). This proposed a 'better way', including collaboration, a move away from lowest price procurement and the delivery of added value for all stakeholders. Readers may judge for themselves how much progress has been made on these points.

However, for all its devastation, the pandemic offers us an opportunity to pause and review, and with a bit of application, and the development of initiatives like the *Construction Playbook*<sup>4</sup> and the Construction Innovation Hub's Value Toolkit, we have the chance to make substantial progress.

The Japanese have the business concept of 'sanpō yoshi', which translates literally as 'three-way good' and is founded on the principle that satisfaction between the seller, buyer and society as a whole is a practice to be commended. Let's see if it can underpin a revival for our industry.

**Further information and guidance is available from [www.rics.org](http://www.rics.org)**

<sup>2</sup> Mark Farmer, *The Farmer Review of the UK Construction Labour Model: Modernise or Die*, London, Construction Leadership Council, 2016

<sup>3</sup> Sir Michael Latham, *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry*, London, HMSO, 1994

<sup>4</sup> HM Government, *The Construction Playbook*, Cabinet Office, London, 2020

# Contracting post pandemic: inflation and collaboration

**The COVID-19 pandemic has both directly and indirectly, via increased inflation, profoundly changed the contracting landscape and has accelerated a move towards more collaborative contract terms.**

As the pandemic was completely unexpected, contract terms did not specifically cater for the disruption experienced to the supply of labour and domestic and international materials caused by repeated lockdowns, nor the restricted working practices required by regulations relating to social distancing. While, in England, construction sites were not instructed to shut by the government, more extensive restrictions were put in place by the devolved administrations. Often, parties to construction contracts were required or chose to share the risks of the disruption caused. Where there was delay to construction works, 'force majeure' or 'exercise of statutory powers' provisions in contracts offered liquidated damages relief to contractors but required them to bear their own increased costs in relation to such delay. Government guidance strongly 'encouraged' public bodies to collaborate with contractors in a fair and responsible way to ensure that construction work continued. It also encouraged public bodies not only to provide extensions of time to contractors facing delays due to the pandemic but also to compensate them for such delays and increased costs of working, irrespective of whether the contract being used would ordinarily require the payment of such costs. Many private sector clients took a similar view and offered financial support to their contractors to help with the increased cost of working even where they had no legal obligation to do so.

The largely collaborative way in which the industry navigated its way through the pandemic was at odds with the common perception of construction being an industry at war with itself. Indeed, the relative lack of disputes stemming from disruption caused by the pandemic is noticeable. Reflecting that collaborative approach, parties to contracts let during the pandemic amended their contracts to share the risk of tightening restrictions as the pandemic ebbed and flowed. As we 'learn to live with the virus', we expect contracts (including the industry standard forms) to specifically address the risk of future pandemics.



The injection of billions of pounds into the UK economy during the pandemic, supply chain disruption caused by continuing lockdowns in China, resurgent demand as the economy opened up again and war in Ukraine have led to UK inflation reaching levels not seen since the 1970s. The price of building materials – in particular those that are energy-intensive to produce (i.e. bricks, concrete, steel) – has been subject to double-digit inflation. The Bank of England predicts that inflation will peak at 11% by the end of the year and then gradually decline. It is, however, possible that inflation will remain stubbornly high for a considerable period.

Inflation at the levels currently being experienced makes it difficult for contractors to price work accurately. Employers wishing to procure construction work in the current inflationary environment are therefore finding that they need to move away from simple single-stage lump sum contracting if they want to receive tender returns in line with their budgets.

Two-stage contracting has become the procurement route of choice for major building projects. It is seen to deliver the advantages of early contractor involvement and transparency when it comes to pricing subcontract work. A main contractor does not need to commit to a price without first having tendered the subcontract works. It does not, however, avoid the risks of rapidly rising inflation impacting on subcontract prices in excess of the cost plan.



**Marc Hanson**

Partner, Bryan Cave Leighton Paisner LLP and Member of the Construction Committee of the British Property Federation





In some cases it can be advisable for employers to appoint subcontractors directly on a pre-construction services agreement (PCSA) or letter of limited authority (LOLA), before the main contractor is selected, to try to lock in the subcontractor's commitment and price at the earliest possible date. The aim is to try to moderate the inflation risk to the main contractor (who will, on appointment, take a novation of the PCSA or LOLA) for the package in question. Alternatively, the employer might agree to make an advance payment or payment for off-site materials to the main contractor to allow orders for materials to be placed earlier in the programme than the stage when those materials are required, thereby avoiding at least some of the inflation risk on the relevant materials. Any such payments need to be carefully bonded to protect the employer should the contractor become insolvent.

To manage inflation risks, some contractors are asking for certain high-risk subcontract packages to be included as provisional sums (either defined or undefined) in contracts so that the contractor does not need to give a firm price for these on entering into the contract. Employers might agree to this approach if the proportion of provisional packages to lump sum packages is relatively low. Alternatively, they could agree capped provisional sum packages or agree that the provisional sum be converted to a lump sum when the subcontract package is let.

Broader remedies being sought by contractors include requiring provisions within the contract that allow them to claim time and money should the works be delayed by their being unable to obtain labour or materials. Such broad provisions are unlikely to be acceptable to well-advised employers. If the contractor has specific concerns around particular materials then such concerns can be addressed by other strategies, such as those set out above.

Similarly, some contractors are seeking to include blanket fluctuations provisions in their contracts to protect against inflation. For example, contractors being appointed on JCT contracts might seek to include one or other of the JCT optional provisions relating to fluctuations that have sat on the proverbial shelf, largely unread, since the 1970s. Again, well-advised employers will resist the inclusion of blanket fluctuations provisions and will instead utilise specific strategies to deal with specific materials where it is known that there may be a particular inflation risk.

Prior to the pandemic, the government and the construction industry had already begun to look at enhancing collaboration and improving productivity. The government worked with industry representatives to produce the *Construction Playbook* in December 2020.<sup>1</sup> This promoted reform of the way the public sector procures construction work to help deliver the increased productivity that it saw as the outcome of enhanced collaborative working. The *Construction Playbook* suggested that contracts be written to ensure, among other things, that risk is allocated to the party best able to bear it, to remove uncapped liability and to embrace modern methods of construction, including early contractor involvement and off-site fabrication. It is expected that the coming years will, given the increased collaboration experienced during the pandemic, see the adoption of the core principles of the *Playbook* on many public sector contracts.

Major employer clients in the private sector are working with major contractors and consultants to produce a private sector playbook that picks up on many of the initiatives set out in the *Construction Playbook*. The intention is that leading companies in the private sector will adopt the same principles of collaborative working and fair risk allocation. Already, bespoke and standard form contracts are beginning to be amended to reflect the requirements of the *Playbook*.

The *Playbook* places an emphasis on the advantages of long-term relationships in building collaboration and avoiding disputes. This is likely to lead to more public and private sector employers using framework contracts in the future to procure their construction work. The Framework Alliance Contract (FAC-1), endorsed by Constructing Excellence and the Construction Industry Council, is increasingly being used and combines typical framework provisions with provisions supporting collaborative relationships to create an alliance contract between all the members of the construction team to help deliver improved value.

The industry adapted commendably well to the challenges of the pandemic by displaying an increasing willingness to work collaboratively. Post-pandemic inflation presents new problems but there appears to be a willingness to harness the lessons learnt during the pandemic to try to resolve these challenges by utilising collaborative solutions.

<sup>1</sup> HM Government, *The Construction Playbook*, Cabinet Office, London, 2020

# How the contracting landscape has changed post-pandemic

## The design and construction of 80 Charlotte Street and the project management approach taken during the pandemic.

It is difficult and still too early to conclude whether the contracting landscape has been radically impacted by the COVID-19 pandemic as we are just starting to crawl slowly out of that phase but certainly positive lessons have been learned.

Generally, the UK construction industry is known to be quite adversarial in nature and so are client-contractor relationships. This is largely due to fragmentation of the design and construction stages and the fact that risks and liabilities tend to sit with contractors rather than clients. Some of the fragmentation issues are addressed through the selection of appropriate procurement strategies; however, as many surveys have shown, the key issues leading to programme delay, scope creep, increased costs and, ultimately, failed projects are lack of or extremely poor communication, no transparency and the absence of trust between key project stakeholders.

During the pandemic, ISG and Arup partnered to deliver the fit out for Arup's new London office in Fitzrovia – 80 Charlotte Street. We explore this as a case study, sharing our knowledge on the successful procurement approach taken during the pandemic.

## Choosing the right partner

Formulating client requirements and designing an office of the future is only half of the recipe for success. Having an experienced partner that will advise on the overall deliverability of the project and the vision, providing 'boots on the ground' to ensure that it is all coming together as intended, is the other half. It is also very important to look ahead and consider organisational image and reputation post project delivery for all parties in the relationship. There are, of course, processes and procedures in place, such as pre-qualification questionnaires, formal competitive tenders and interviews, that enable one to make the right selection. However, I think, as with any relationship, it takes time and a project or two to connect and build mutual understanding and trust. Sometimes it is necessary to take a leap of faith to test the partnership.

Arup is an organisation that has people, communication and relationships at the heart of its business. But this ethos transcends Arup to include external alliances as well. Therefore, one of the top client priorities on the 80 Charlotte Street project was to choose the right partner, who would share the same values and be equally passionate about the vision for the project. It was also important to select a contractor with extensive experience of implementing bespoke smart solutions and maximising the use of the building's smart enablement. ISG was appointed as the management contractor to help Arup deliver what is a sustainable, accessible, all-electric, smart and agile space that enables hybrid activity-based working and is a source of pride for the people at Arup. A collaborative approach and behaviours were established from the beginning and a project charter was introduced as a joint effort to maintain that collaborative attitude.

*'Arup and ISG working together was always going to be an exciting and rewarding experience. We both share the same values and care deeply about the footprints that we leave behind. We are both passionate that there is legacy in our industry for future generations. From the start it was essential that we were open and honest with each other, and that trust was nurtured and developed as the project progressed. If there was a problem, we shared it until we came up with a solution and way forward.'*

**John Penny**, 80 Charlotte Street Lead Project Manager, ISG



**Inkar Tebenova**  
Senior Project Manager, Arup





### Why management contracting?

The management contract route is not as widely used in fit-out projects as design and build and traditional approaches.

Some of the key considerations when selecting the management route for this project were:

- the contractor being responsible for identifying changes required to the RIBA Plan of Work Stage 4, Technical Design through integration of the contractor's designed portion
- client involvement in an open and transparent competitive tendering process for trade contractors
- the contractor working towards achieving construction costs within the agreed cost plan
- the contractor managing IT/AV and FFE installations, i.e. programming of interfaces between these and the main works, managing accesses, providing necessary temporary facilities and undertaking the Principal Contractor role for these elements
- the contractor being responsible for establishing and managing the project processes and procedures, including risk management, value management, change control management, issue management, early warning, security management, communication management, etc.

Arup was prepared to take more risk until the design was fully integrated and not rely on the guaranteed maximum price, which does not exist in reality.

ISG was appointed under the JCT Management Building Contract 2016. Bespoke amendments to the contract requirements were made to ensure that the management contractor had oversight of the design coordination of all installation drawings and details as design progressed from Stage 3 through to the construction phase. Arup introduced some commercial reliefs that helped to foster trust and commitment on the part of ISG and the works contractors, with whom ISG had a long-standing working relationship. From the outset, ISG was regarded as a consultant that was part of the client team rather than an external contractor operating on the opposing side. This encouraged mutual understanding of the project priorities throughout the life cycle and the project success criteria and drivers, with less focus on profit ambitions.

### Measurable benefits of the management contract route

There were also more measurable benefits of forming this alliance under the management contract route, although these only came about because of those 'softer', intangible but crucially important achievements mentioned above.

Some examples of how the use of the management contract proved to be the most appropriate route on this project are given below:

- extremely capable and experienced works contractors, who have previously worked well with the management contractor, were appointed for the execution of the works
- the management contractor accommodated many minor changes and one larger change with limited additional cost beyond the cost of the actual work
- all costs have been accounted for on an open-book basis and any negotiations with works contractors regarding payment applications and final accounts were carried out with the direct involvement of the client's cost managers
- the tracking of the costs of changes against the project cost plan has also been undertaken on an open-book basis, with reports reviewed by the client's cost management team prior to formal issue.

Appointing ISG early and working closely with the supply chain allowed the 80 Charlotte Street project team to understand potential materials and equipment supply risks at an early stage in the programme, which allowed advanced ordering of items with long lead times. While certain delays could not be avoided, due to a shortage of light fittings and lighting control components, the project was delivered on time, under budget and at the highest quality.



**The best value for money comes from understanding procurement**

Surveys show that most clients have little or no understanding of procurement in the construction industry. In addition to that, client requirements are generally limited to the infamous ‘cost–time–quality’ triangle, with no extensive consideration of other performance and value criteria. It is then often the duty of a project manager to ensure that clients are sufficiently well informed and even educated on various value management methodologies, procurement options and possible outcomes.

The importance of dedicating enough time to early client requirements formulation and project definition stages is widely accepted in the industry and carrying out a thorough feasibility study is key.

Inexperienced clients may often underestimate the value of this process and rush into later stages. But, too often, ambiguity in their briefs and requirements result in false economies as changes are introduced during the design and construction stages, extending project durations and inflating costs. Educating clients is absolutely vital to achieving better outcomes and delivering the best value for money.

An experience indicator on the 80 Charlotte Street project was the introduction of only one client change request, which was accommodated in a revised programme of works by ISG requiring a two-week extension of time. This, in the end, did not have an impact on the overall project programme.

**What does the post-pandemic world hold for us?**

The modern office needs to be more future-proof, flexible and adaptable as we continue to observe how post-pandemic ways of working evolve. There is an element of the unknown that we are yet to discover in terms of how offices of the future will be used, but what is abundantly clear is that people need a sense of belonging to a team, communication and collaboration, and a degree of segregation between their personal and professional lives. Providing people with the right space and environment to accommodate all these needs, old and new, is becoming more important than ever.

The 80 Charlotte Street project had commenced long before the COVID-19 outbreak but ISG’s appointment coincided with the beginning of the pandemic in the UK, which ultimately put the project on hold. A new challenge for Arup was not only to restart the project under changed circumstances but to revise the overall London office occupancy strategy and redesign the whole project.

As the COVID-19 situation continued to unfold, Arup undertook a feasibility study of several occupancy options and amended their requirements for fit out based on the selected option. Design works were carried out for the changed requirements and ISG, having been successful in the previous tender process, was directly asked to update their pricing and reprocure the same works contractors but for the revised requirements. At project restart, some changes to the contract were introduced to take into account the ongoing epidemiological situation and shared site lockdown risks.

Arup’s revised design, while different in terms of space planning, ratios of various work settings and the total space utilised, still responded to the original vision of the project:

- People – the way we treat and value our people

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- Ways of working – how we work and operate our estate

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- Space – the physical environment and building

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- Technology – digitally enabling our building and people.

Finally, looking back at the design and construction of 80 Charlotte Street and the procurement strategy that Arup chose, it appears that the things that were always considered critical for success in construction projects have not changed during the pandemic. It may be a new world from the epidemiological perspective but transparency, openness and communication between key project stakeholders are still the essential drivers of success that will remain long after COVID-19.

**The difference in the number of workstations in the original design vs revised design**

Original design	Revised design
764	218

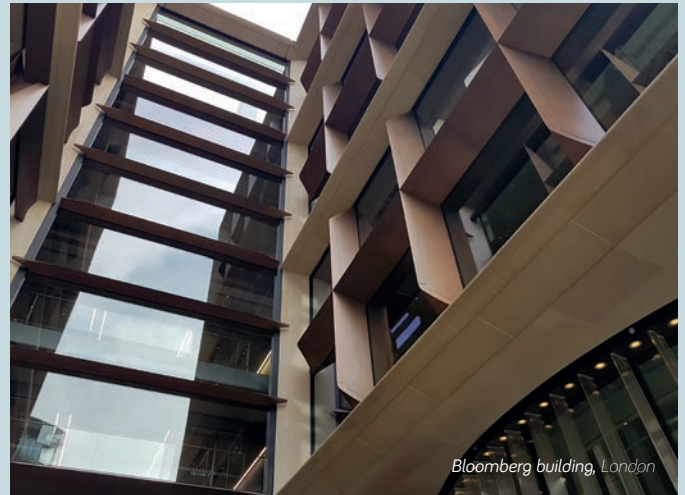
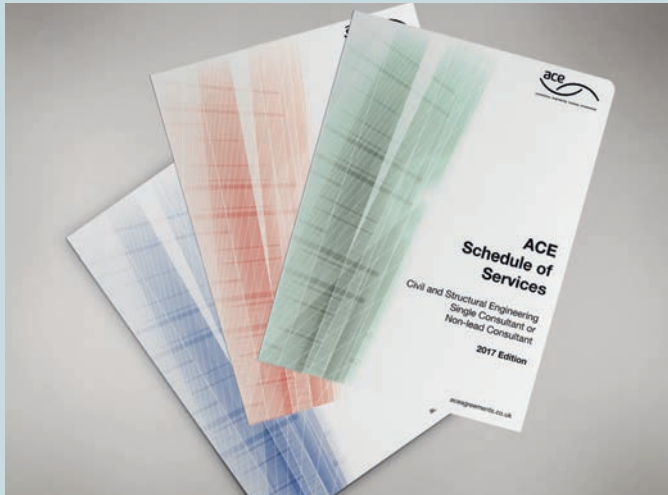
**Workstations vs individual focus vs collaboration areas (approximate ratios)**

Original design	Revised design
Workstations – 70%	Workstations – 44%
Individual focus areas – 5%	Individual focus areas – 24%
Collaboration areas – 25%	Collaboration areas – 32%

*‘How people will use space in the future is unknowable, Arup chose to be radical as the least risky strategy.’*

**Tim Chapman**, Director at Arup and the 80 Charlotte Street project client

# Building trust has never been more important



## How standard agreements can help you be prepared for the unexpected.

It is fair to say that the business environment we all work in has delivered its fair share of uncertainty recently. The COVID-19 pandemic has obviously been a huge factor but broader issues around risk and pressures on the supply chain have been building up over the past few years too.

Needless to say, in the face of such an almost continually challenging and changing business environment, ensuring your project is working to a clear legal framework is vital to achieve a positive outcome for all. In many instances, standard forms of contract can provide the cost-effective, transparent and accountable agreement required for both the end-client and consultant, especially important in a world where risk factors and material costs are constantly changing.

More than this, however, standard agreements and contracts provide the legal 'backbone' for collaborative approaches. These can sometimes become strained owing to this challenging business environment where all parties are under increased pressure.

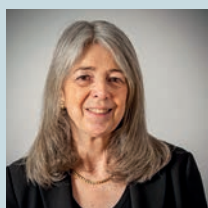
The ACE Professional Services Agreement 2017 provides not only the standardised approach necessary to build trust, but has flexibility 'built in' to ensure a positive outcome – no matter how challenging the project or circumstances in which it is being delivered.

## Communication is key

Clearly setting out the rights and obligations of both client and consultant – including joint obligations – the Professional Services Agreement 2017 clarifies the legal position of all parties. With this in mind, and in the face of ongoing business uncertainty, it is important to discuss issues which can materially affect the performance or delivery of services at the earliest possible stage.

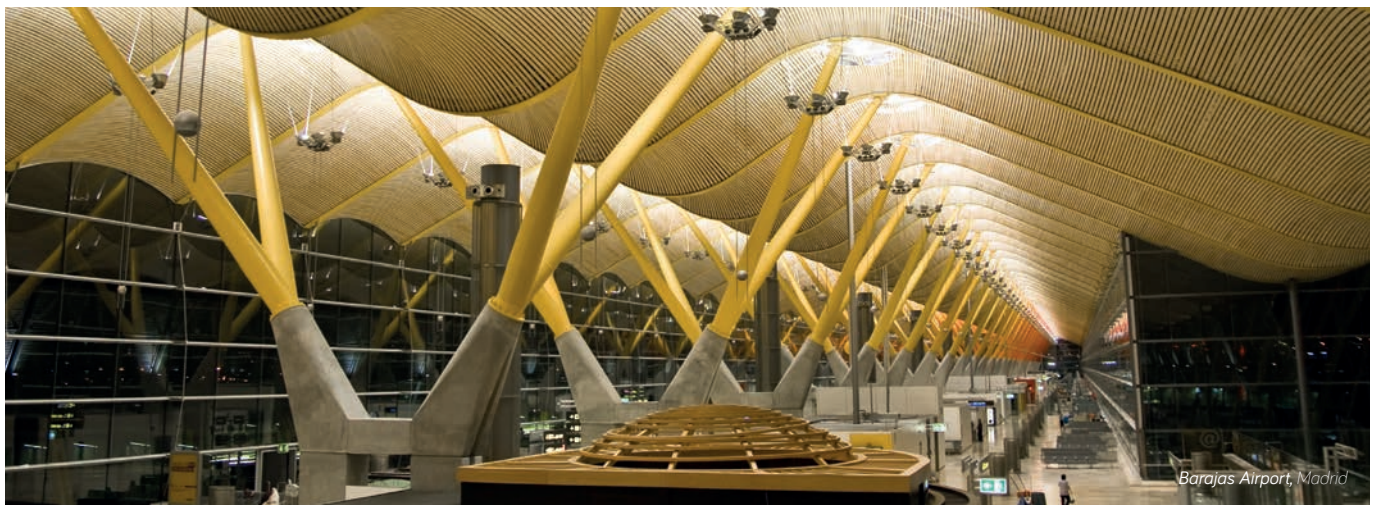
With dedicated clauses outlining approaches to these issues and other matters, including payment practices and risk management, the Agreement provides a clear structure to allow all parties to be prepared for the unexpected. However, ensuring an ongoing conversation around any concerns that arise is also vital.

The uncertainty of the pandemic forced many projects to address this issue head-on, increasing conversations and communication between all parties in a world that was changing on an almost daily basis. This is something we should not be afraid to continue post-pandemic, where the challenges might not be as fundamental but can still cause rising tensions between the client and consultant.



**Rosemary Beales**  
Contracts Adviser,  
the Association for Consultancy  
and Engineering (ACE)





### Ensuring a truly collaborative approach

It seems hardly possible that it is over 25 years since Sir Michael Latham, in *Constructing the Team*,<sup>1</sup> emphasised the key role that teams working together collaboratively could play in the delivery of projects, thereby helping to avoid the disputes that plagued the construction industry at that time. The report highlighted the growing recognition that working together and identifying and managing potential risk was beneficial to all parties involved in the delivery of a project. It kick-started a change in attitudes across the industry as well as recognition of the importance of collaboration within the terms of standard forms of contractual agreement.

In 2017, ACE concluded its fundamental review of its main Agreements, embedding the principle of collaboration and early warning of potential problems within the text of the ACE Professional Services Agreement 2017.

The Agreement now states that the parties 'shall in the performance of their obligations under this Agreement collaborate in a spirit of trust and mutual support', the objective being the successful completion of the project. Early warning of issues likely to affect the provision of the services is also a requirement with a clear mechanism to underpin this.

The benefits of collaboration need to be embedded in the delivery of the services/project at the earliest possible stage. ACE's Schedules of Services, published to complement the new Agreement, play a vital role in underpinning this collaborative approach by encouraging discussion of the prospective project's strategic goals, the role of the consultant and potential risk. The implementation of BIM is also provided for.

It is viewed as essential that the client is made fully aware of the risks that might arise during the course of the project and, should they do so, how they can best be managed.

### Managing an ever-changing risk environment

Within the insurance industry there is an increased focus on risk management and the professional indemnity market's capacity has shrunk significantly in recent years. As yet, an increase in capacity is not on the horizon. The frequency of high-value claims is increasing and global issues also play a part in this decline. Some of the issues are almost impossible to manage at a project level and it is therefore imperative that those that can be dealt with are effectively managed – which means not passing the risk to the consultant but working with them to define a way forward that positively acknowledges the challenge.

Some brokers will work to assist consultants to manage their exposure to risk and improve their risk profile. Entering into an agreement using a standard form can be a positive step in demonstrating effective management of liability and contractual risk. This should not be underestimated when considering the availability, cost and extent of cover. It is regrettable that some clients seek to impose disproportionate risk on consultants in the misguided belief that this saves costs and is beneficial. This approach needs to be rigorously challenged – not only by the consultants but by the industry as a whole.

It unfortunately remains the case that 'ad hoc' terms and conditions are offered by consultants or required by clients which either deliberately seek to place undue risk on one party or fail to recognise what the content of the proposed agreement actually means. There are also occasions where amendments are made to standard forms, distorting the balance of risk, which can remain unrecognised or misunderstood.

All too often the focus is on the pricing of services rather than reading the agreement. Incorporation of terms and conditions by reference – where these are not set out, not clearly identified or merely referred to as being 'available to view' – often leads to unnecessary risks being undertaken. Unfortunately, this approach is often accepted and not questioned.

A transparent approach to risk and clearly laid out terms and conditions using standard forms can go a long way towards mitigating the many negative impacts of a challenging insurance market.

**Find out more about ACE standard agreements and contracts:**

[www.acenet.co.uk/agreements](http://www.acenet.co.uk/agreements)

<sup>1</sup> Sir Michael Latham, *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry*, HMSO, London, 1996.

# When uncertainty persists, be sure about specification



**Well-managed project information and a robust specification are key to the success of construction projects. Kate Foster explains why, in the context of the current legal and contractual landscape.**

## A changing world

As the COVID-19 pandemic was starting to become endemic, the industry began to return to normal working practices last autumn, closely followed by the rescinding of self-isolation requirements this spring. With the industry seemingly running at full tilt once again, the effects of lost productivity over the last two years may well be mitigated for the foreseeable future, with many contractors searching for contract provisions that will protect them from potential delay damages, as well as any loss and expense accrued.

The sector is also grappling with escalating material prices that initially began with the monolithic jolt to the supply chain caused by the pandemic – the aftermath of which persists to the present day. Now add to this the ongoing conflict in Ukraine, which has further compounded the challenges presented by COVID-19: so much so that the Construction Leadership Council recently announced the formation of a board of industry experts to provide advice on how to navigate the current situation.

It is difficult to know how all these factors will ultimately culminate and when the pressures may subside, but a return to normality is not currently forecast until the end of next year.

Meanwhile, there are three things that we can be sure of, namely:

- the Building Safety Act 2022 is now an Act of Parliament, after the Bill received royal assent in April. There is now a transition period, currently expected to last 12–18 months, before the full regime, including the 'golden thread' requirement, comes into force
- the Procurement Bill 2022 was introduced into the House of Lords in May with the intention of reforming existing procurement practices that were originally based on European Directives
- the net zero target was enshrined in law back in 2019 in an amendment to the Climate Change Act 2008.



**Kate Foster**  
Technical Author, NBS





### Implications for the production of specification documents

With the upcoming introduction of the digital golden thread requirement, as well as the push towards net zero, it is now more important than ever to collaborate effectively to produce high-quality specifications that take all project needs and outcomes into consideration. The specification should accurately reflect the client's requirements and be kept up to date as required; it is a crucial piece of contract documentation and will constantly be referred to throughout the course of any project.

The results of this year's RIBA Construction Contracts and Law Survey highlight that poorly coordinated project information can impede project progress, and that collaborative projects are more likely to lead to positive outcomes. Five practical tips on coordinating project information and specifications for project teams are provided below.

#### 1 Use a single classification system for all information management on a project

Committing to a single classification system, such as Uniclass, makes it possible for information to be organised in a logical structure that can be more effectively disseminated by the receiving parties. This is true for all information, whether it is shown on drawings, schedules or specifications, or included within models.

Whatever may be specified on a given project, a common classification system should be agreed by the design team at the outset and maintained throughout the project stages for consistency. This is particularly useful across schemes where similar specifications will be required for multiple projects, such as hospitals, care homes, schools and retail chain shops.

#### 2 Coordinate project information

Specifications frequently make reference to relevant supporting documents: typically, consultant drawings, as well as various schedules, reports, room data sheets and a myriad of other potential sources of information, depending on the nature of the project. Effective cross-referencing between these documents should be utilised so that it is clear to the reader which aspects of the specification should be read in conjunction with other documents.

Drawings containing overly descriptive annotations can create clashes in information that may result in a 'drawings over specification' rule of thumb being applied on projects, which diminishes the value of the specification documentation. To avoid these discrepancies, it is important to take full advantage of the tools that the digital era provides (for example, by using hyperlinks to tie cross-referenced documents together seamlessly and utilising collaborative software packages to regularly share and update project information).

A quarter of respondents to this year's survey stated that poorly coordinated project information stymied project progress, reiterating the need to capture and present project information in a logical and meaningful way. Most respondents also agreed that collaborative working on projects improves the delivery of client project objectives and reduces the number of disputes that arise.

Now that the industry is further along in the process of adopting software solutions such as cloud computing, the need for the seemingly endless shuffling, searching and dog-earing of hard copy documents can be eliminated by directing the reader to exactly what they need to see.

### 3. Determine the extent of design responsibilities

All projects should begin with an outline performance specification; whether each aspect of design becomes prescriptive or descriptive will largely depend on the chosen procurement method and the form of contract on which a given project is let. The roles of design team members should be agreed and clearly stated within the project preliminaries and general conditions, and each member should fully understand what part they are obliged to play in taking a project to completion.

According to the recent survey, over three-quarters of projects had an element of contractor's design. This allows client design teams to apportion design responsibility to suitably qualified specialists, where appropriate, while maintaining a greater degree of control when setting out or amending specifications for the remaining elements of the project. These days, there are likely to be multiple parties contributing to the design of various trade packages; therefore, a clear onus exists for the initial outline specification to be tailored into a fully comprehensive specification before it is put out to tender on this basis.

Any vagaries left unaddressed by the specification will have to be accounted for by those bidding for the work, and any control over this resolution will be lost when the design responsibility shifts to the contractor. It is for this reason that any critical requirements or constraints are stated in the relevant specification, at the earliest opportunity, so that they may be adequately considered as part of the whole building solution.

Where there is a novation agreement in place, it is imperative for the design team to clearly state which design responsibilities will remain with them and which will be passed down the supply chain. Collaboration with any specialist subcontractors undertaking design should take place during RIBA Plan of Work Stage 4, Technical Design, so that they can be included as responsible parties in the Stage 4 Design Programme. With professional indemnity insurance (PII) challenges currently facing the industry, designers must be vigilant and steadfast about which aspects of design they are covered to take on, in order not to commit to work beyond their actual capabilities.

### 4. Use the specification to describe what cannot be seen on a drawing

This is, after all, the purpose of a specification! There is a multitude of intangible items that must be considered while undertaking the preparation of project documents, including quality of workmanship and materials, how works are to be executed, checking and inspection procedures and subsequent covering up of completed work, and procedures for testing, commissioning and completion of the project.

If the above factors are clearly identified and described within a set of well-written project preliminaries and trade specifications, this should go a long way towards quelling any disagreements about these aspects further down the line, when resources to address the concern efficiently may be limited due to competing workload priorities.

This year's survey has shown that defective work was the second most common cause of dispute, slightly behind extension of time claims, demonstrating that there is significant room for improvement when specifying these conditions on a project. Poor specification also played a part in impeding the progress of projects, further highlighting the importance of having the required information ready at the right time.

### 5. Avoid unwanted substitutions

Attitudes towards possible product alternatives and preferred subcontractors should be decided in conjunction with client requirements and reflected within the project documentation. The preliminaries document can be used to strictly prohibit any deviation from any proprietary products already specified, or to prescribe the procedure that is required by the contractor to propose alternative or 'equal approved' products. This is of particular importance where there may be sustainability outcomes on a given project – as was the case for nearly half of this year's survey respondents – therefore, any accepted alternative products or methods of working must comply with these predetermined goals. Furthermore, any deviations from working methodologies that are required for health and safety reasons must be carefully and comprehensively assessed before approval.

There is also the option to compile a shortlist of preferred subcontractors or suppliers, which may be drawn from a trade or supplier-specific framework agreement, or to implement other periodic quality submission procedures. Similarly, the design team may choose to name a specific supplier or subcontractor, where their participation is considered integral to the project.

No stranger to change, the industry must continue to capitalise on the new technologies brought about by the information age. Industry surveys, such as the RIBAs, provide invaluable insight into what is happening on the ground in the sector. Not everything can be foreseen, but a company-wide strategy for specification and information management has the best chance of capturing what is known on any project.

**NBS provides cloud-based software to help designers produce accurate, up-to-date specifications collaboratively with other members of the project team. Find out more at [www.thenbs.com](http://www.thenbs.com)**



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