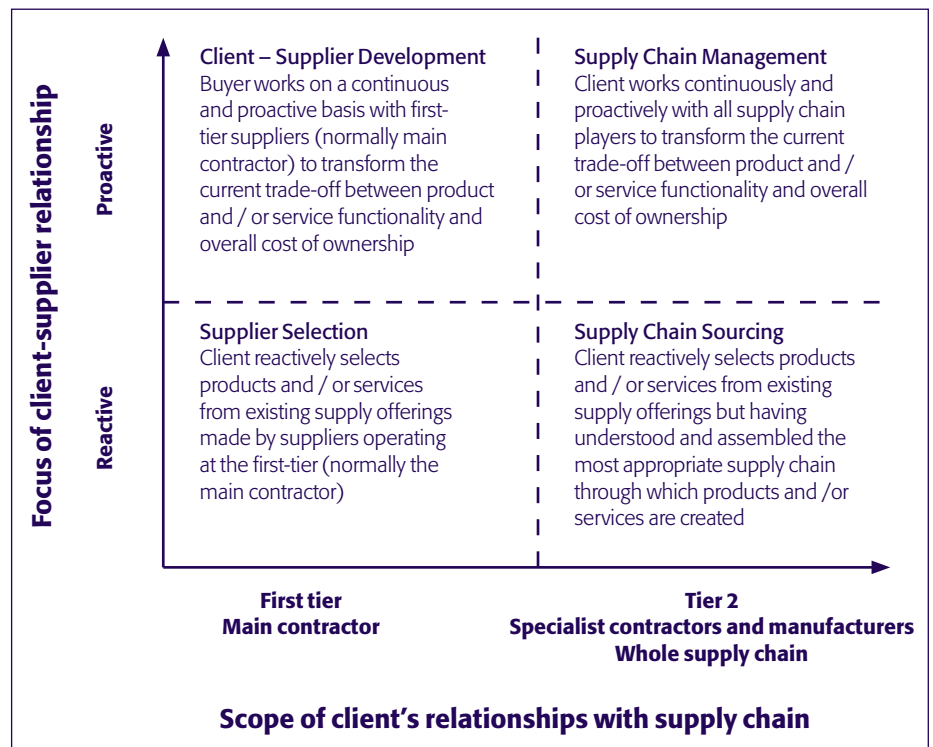




Enlightened Client's Journey to Project Quality and Compliance Detailed Notes

Procurement of contractors – forms of contract

These more detailed notes provide an overview of the main forms of construction contracts, their appropriateness for supporting our four main procurement strategies as set out in our Procurement Positioning Tool, and their suitability for delivering quality outcomes.



There have been many standard forms published over the years to define legal relationships and responsibilities in construction projects. Here is a summary of the contents page of the JCT– Constructing Excellence Contract:

JCT–Constructing Excellence Contract

Conditions: definitions and interpretations, working together, primary obligations of the purchaser, primary obligations of the supplier

Allocation of risks: risk register, risk allocation schedule, ownership of and risk in materials, relief events

Measurement of performance: monitoring, review records

Payment: target cost or contract sum, payment milestones

Insurance: duty to insure, evidence and approval

Termination: by purchaser or supplier

Dispute resolution: notification, negotiation

Supplementary conditions: safety, sustainable development



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These forms of contract and individual clauses have evolved over time to suit particular types of projects, procurement approaches and changes in the ways of working. But, do bear in mind as a client, that while the form of contract is a significant factor in achieving quality it is the behaviour, conduct and the commitment of the parties to achieving your desired project outcomes that makes for a real difference.

As we have seen earlier in this guide, procurement is about choosing the people that are best suited to undertake your project. Your procurement approach will also determine the organisational structure or operating system in which the people you select will be placed and operate. The contractual arrangements you choose will define and formally recognise the responsibilities and the risks the parties to the contract carry and how they are to be bound together.

Joint Contracts Tribunal (JCT)

Let's start our review of forms of contract with those developed by the Joint Contracts Tribunal (JCT).

The JCT offers a well-known, wide-ranging, and generally well-understood suite of standard main and subcontracts suitable for different construction projects and different approaches to procurement. This broad portfolio ensures that their contracts support a wide range of construction activity, including individual home owners carrying out alterations right through to complex, large-scale projects. The types of contracts within the JCT Suite include the Standard Building Contract, Minor Works, Minor Works with Design, and various sub-contracts.

These contracts are most suitable for the Traditional or Design-Bid-Build, Design and Build and the Management Approaches: Construction Management and Management Contracting, which sit in the Supplier Selection Box of our 4-Box Positioning Tool.

More recently they have offered contracts that reflect more proactive and collaborative procurement approaches such as Negotiation, Two-Stage Tendering and Partnering. And their standard forms do allow some flexibility for parties to adopt their basic terms whilst making some amendments to suit the needs of one or more of the parties or for the benefit of the whole project. This trend can be seen as supporting clients in moving into the more proactive, collaborative and inclusive boxes of our 4-Box Positioning Tool, namely Client –Supplier Development, Supply Chain Sourcing and Supply Chain Management.

But beware of amending contracts for the wrong reasons. As CESW argues in their Top 10 Principles of Procurement, it is better not to amend standard forms of contract unless it is necessary and in the best interests of the project. In practice, however, standard forms are often amended, and bespoke forms of contracts drafted, to the benefit of one party over another. These amendments for opportunistic reasons can lead to the unequal and unfair reallocation of risk and responsibilities. This in turn can foster claims and disputes which can impact negatively on the quality of project outcomes.

If, however, you feel that amendments to standard contracts are necessary there are a few principles to consider. Only propose amendments that are driven by the best interests of the project and explain to the other parties why they have been included and the intention behind them, and what they are aiming to achieve. Include provisions that encourage - or in the case of proactive approaches, even prescribe – a degree of collaboration, integration and information sharing where they do not exist in the standard form of contract.

Consider what is reasonable to ask of the other parties to the contract and avoid trying to inappropriately reallocate risk, responsibilities, and costs to those less able to manage them. Another important factor to bear in mind is that conducting contract negotiations takes time. Last minute preparation and drafting of amendments can inadvertently lead to the parties agreeing to terms under time pressure without a proper understanding of the risks and responsibilities involved. And, do recognise that the design and construction process is often complex and challenging so issues do arise even in the best managed projects so try to include dispute escalation provisions in your form of contract to resolve disputes quickly, without damaging relationships and morale, avoiding legal proceedings, and excessive cost.

If you are looking to adopt a more proactive and collaborative approach to procurement the JCT has collaborated with Constructing Excellence to develop the JCT - Constructing Excellence Contract. This can be used to procure a range of construction services and is specifically tailored for use in Partnering, located in our Client-Supplier Development box, and where participants wish to engender collaborative and integrated working practices. It also fits the Supply Chain Sourcing approach and where the flow of work justifies its adoption, Supply Chain Management.

Although in general the most often used JCT contracts do not directly lend themselves to collaborative working and information sharing – factors seen as vital in delivering quality outcomes – their Constructing Excellence Contract or indeed their other standard contracts with constructive and mutually beneficial amendments can help construction teams to work collaboratively to ensure compliance and quality and the achievement of desired project outcomes.



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The New Engineering Contract (NEC)

As an alternative to the JCT suite of contracts, the NEC has a well-established and now widely-used family of contracts. As well as defining legal relationships and responsibilities, they facilitate the implementation of sound project management and procurement principles and practices. For these reasons they can be seen as supporting construction teams to deliver quality and compliant outcomes. Indeed, a key obligation under this form of contract is 'to act in a spirit of mutual trust and co-operation'.

With their emphasis on transparency, risk management and the role of the project manager helping to ensure that the parties do not unfairly shoulder responsibilities and risks, they can be seen as supporting collaborative and inclusive working associated with our Supplier – Client Development, Supply Chain Sourcing and Supply Chain Management approaches. The NEC contracts are also in keeping with the spirit of collaboration as they promote accountability for all building professionals to avoid unfair biases that can see some stakeholders not taking on their fair share of responsibility. This approach promotes fairness and trust between parties, major determinants of collaborative working and quality project outcomes.

NEC contracts are suitable for purchases such as the design, construction, refurbishment and decommissioning of buildings, structures, process plants and infrastructure – including everything from houses, schools, hospitals, and leisure facilities to infrastructure for water, energy, transport, industry, and waste.

As we have already argued, disputes between the parties to a contract can have an adverse effect on the quality of project outcomes and even compliance, and the design of NEC contracts helps to manage a project to avoid or minimise the effects of such disputes.

In addition, for more proactive clients, the NEC4 Alliance Contract (ALC) is designed for integrated delivery teams. It is a multiparty contract for the appointment of a number of partners to create an alliance to deliver a major project or programme of work. This makes it particularly suitable in the context of our Supply Chain Sourcing approach.

If as a client you wish to extend your relationship with your main contractor beyond the works stage into the operational phase then the NEC4 Design Build Operate (DBO) contract is an option.

The Project Partnering Contract (PPC 2000)

PPC 2000 provides a pathway for the Partnering approach. It creates a single contractual hub that allows all team members to contract on the same terms. It aligns project management processes, methods and behaviour covering all project stages from design to completion. It promotes trust and cooperation.

You the client, consultants and contractor and specialists are brought together under a single multi-party contract eliminating the need for you to sign different bilateral contracts. A joining agreement is signed by additional team members that join the project, with specialist subcontractors signing an SPC agreement. This contract recognises the value that can be brought and contributions that can be made by appointing specialist sub-contractors early in the process and integrating them into the project partnering team during the initial design and risk management stages.

The contract encourages open book pricing and collaborative working. The progress of the project is monitored and reviewed by a core group which reaches decisions by consensus. Early warning of potential problems can be given to the core group to minimise and avoid disputes. Like all the contracts that promote early involvement, planning, clear pricing, and collaborative working this form of working can achieve higher quality more predictable project outcomes.

The PPC encourages greater partnership working between parties, clear pricing, and early planning. Within this framework, parties can achieve a more coordinated project. The PPC suite comprises multi-party forms of contract that allow consultants, main contractor, and key sub-contractors to integrate into the team as parties to the same contract. These features suggest that it is appropriate for the Client-Supplier Development, Supply Chain Sourcing approaches, and where work flows justify its adoption, Supply Chain Management.





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The Term Alliancing Contract (TAC)

This contract helps to promote alliances within teams, which helps parties to achieve the best possible outcomes for projects or programmes of work. The TAC contract creates multi-party alliances by adopting a collective approach to working. This brings increased focus on time certainty and satisfying stakeholders and, as a result, parties can improve savings and value.

It emphasises the importance of supply chain collaboration and the greater involvement of the parties from the start to the end of the project thus increasing the incentives and opportunities for the parties to add value to the desired project outcomes. This involvement from the start through to the end of a project can play a key role in helping projects comply with building safety legislation including the Building Safety Act, which requires this 'start to end' partnering and monitoring of performance throughout the life of a project. The Duty holder regime contributes too because it involves greater cohesion and responsibility from the parties working on the construction project.

An Alliancing Contract is at the heart of the Integrated Project Insurance (IPI) approach. It unlocks the potential of integrated collaborative working by aligning the interests of all team members with the desired outcomes of you the client. Solutions are assured as being achievable, affordable, and delivered in a culture of full collaboration, insuring the outcomes including cost overrun, and establishing a pre-determined maximum financial exposure for all parties.

Central to the IPI model is the Integrated Project Insurance product from which it gets its name. Whilst the insurance provisions are novel the approach is founded on the proven methods of key exemplar projects, and is only available to integrated teams which are genuinely collaborative. An Alliance Contract empowers the 'flat' inclusive team to create and deliver solutions fit for the purpose set out in a strategic brief in a 'no blame / no claim' environment, supporting innovation and incentivising successful outcomes.

The FAC-1 Framework Alliance Contract

As its title suggests, the FAC-1 contract contains processes drawn from a range of successful bespoke Frameworks, and combines these with the collaborative features of an Alliance Contract. It is designed to integrate any number of related two-party contracts or related projects for works or services or supplies.

FAC-1 has been endorsed by the UK Construction Industry Council and by Constructing Excellence. Its principal features include a multi-party structure connecting alliance members that include you the client, an in-house or external alliance manager, and any combination of selected consultants, contractors, suppliers, and providers, with a facility to add additional alliance members by agreement at any time.

It emphasises the need for clarity as to the reasons why the Framework Alliance is being created, stating its agreed objectives, success measures, targets, and incentives together with agreed exit routes if agreed targets are not fulfilled. The procedures by which work will be awarded to alliance members, whether under a direct award procedure or a competitive award procedure, and under early standard form orders.

It makes provision for the ways in which the alliance members agree to seek improved value, working together through agreed alliance activities in accordance with an agreed timetable. It advocates systems for alliance members to manage risks and avoid disputes using a shared risk register, governance by a core group of agreed individuals, early warning and options for an independent adviser and alternative dispute resolution.

Under its multi-party structure, the alliance members have a shared system of open performance measurement and rewards by reference to the agreed objectives, success measures, targets, and incentives. An early warning system enables notification to the core group of the reasons behind any issues or obstacles that are encountered along the way. All of this means it is particularly suitable for our Client-Supplier Development, Supply Chain Sourcing approaches, and where the flow of work justifies its adoption, Supply Chain Management.

