CONSTRUCTING EXCELLENCE
South West

Guide to appointing an **Architect**

Innovation Best Practice Productivity

Contents

Cover image: SRA Architects

Introduction – Guide to appointing an Architect

Stephen Homer
Ashfords LLP

Constructing Excellence South West has identified that construction clients often seek the assistance of an architect prior to that of any other construction professional and yet, particularly (but not exclusively) those carrying out their first construction project, may not fully understand the process and implications of appointing a firm of architects in relation to their construction project. The purpose of this Guide is to assist construction clients and to familiarise them with the issues surrounding the appointment of an architect in order that they can do so from a position of knowledge and so as to promote best practice.

This Guide covers subjects such as:

- an explanation of the different stages of a construction project and the input to be expected from the architect at each stage;
- a comparison between RIBA forms of architect appointment and bespoke forms of architect appointment not published by the RIBA;
- an explanation of what you might expect if you appoint your architect as lead consultant on the one hand and lead designer on the other;
- a commentary on the architect's role in relation to the CDM Regulations relating to health and safety;
- a summary of the client's rights in relation to copyright in designs and the building information model;
- a consideration of the different ways in which architects charge for their services;
- a brief explanation about professional indemnity insurance and limits on liability which an architect might look for;
- an explanation of collateral warranties and novations; and
- a summary of different methods of dispute resolution whether by mediation, adjudication, arbitration or litigation.

It is hoped that any construction client who reads this Guide will have a much greater understanding of such issues and will be able to make informed choices when appointing their architect which should lead to best practice and increase the prospects of a successful construction project finishing on budget and on time.

Of course, if there are any specific points you would like to discuss then please contact Constructing Excellence South West or any of the authors.

Constructing Excellence South West would like to thank everyone who has made this Guide possible.

The RIBA Work Stages and what the architect is being appointed to do

1

The RIBA Plan of Work 2013 sets out and describes the various stages of a construction project. Whilst the Plan of Work is a holistic framework (encompassing the entire project lifecycle, and wider than the architect's role alone), it is often used as the basis for structuring an architect's services and fees. An architect can be appointed to provide a full service across all or most of the stages, or a more tailored service for a lower fee, usually where the client is more experienced and does not need a full service.

The earlier (2007) version of the Plan of Work was overhauled in 2013, and an overview document was published giving guidance on each stage. The documents, and useful toolkits, are readily accessible from the RIBA website.

RIBA has since published the RIBA Small Project Plan of Work in 2016 to cover small projects for new clients. The 2016 Small Project Plan of Work adopts the same stages as the 2013 Plan for larger projects, but as one might expect the tasks aligned to those stages in the Small Project Plan are tailored to suit a smaller scale project.

Use of the Plan of Work is not obligatory but it is widely adopted. It can be used across all sectors and a range of project sizes. Aligned to each stage are task bars, outlining the typical tasks you might expect to be carried out in the various stages. Whilst the RIBA Plan of Work itself is not a contract document, it is often the case that the architect's specific services (commonly set out in a schedule of services forming part of the architect's appointment) are based on, and refer back to, the RIBA stages.

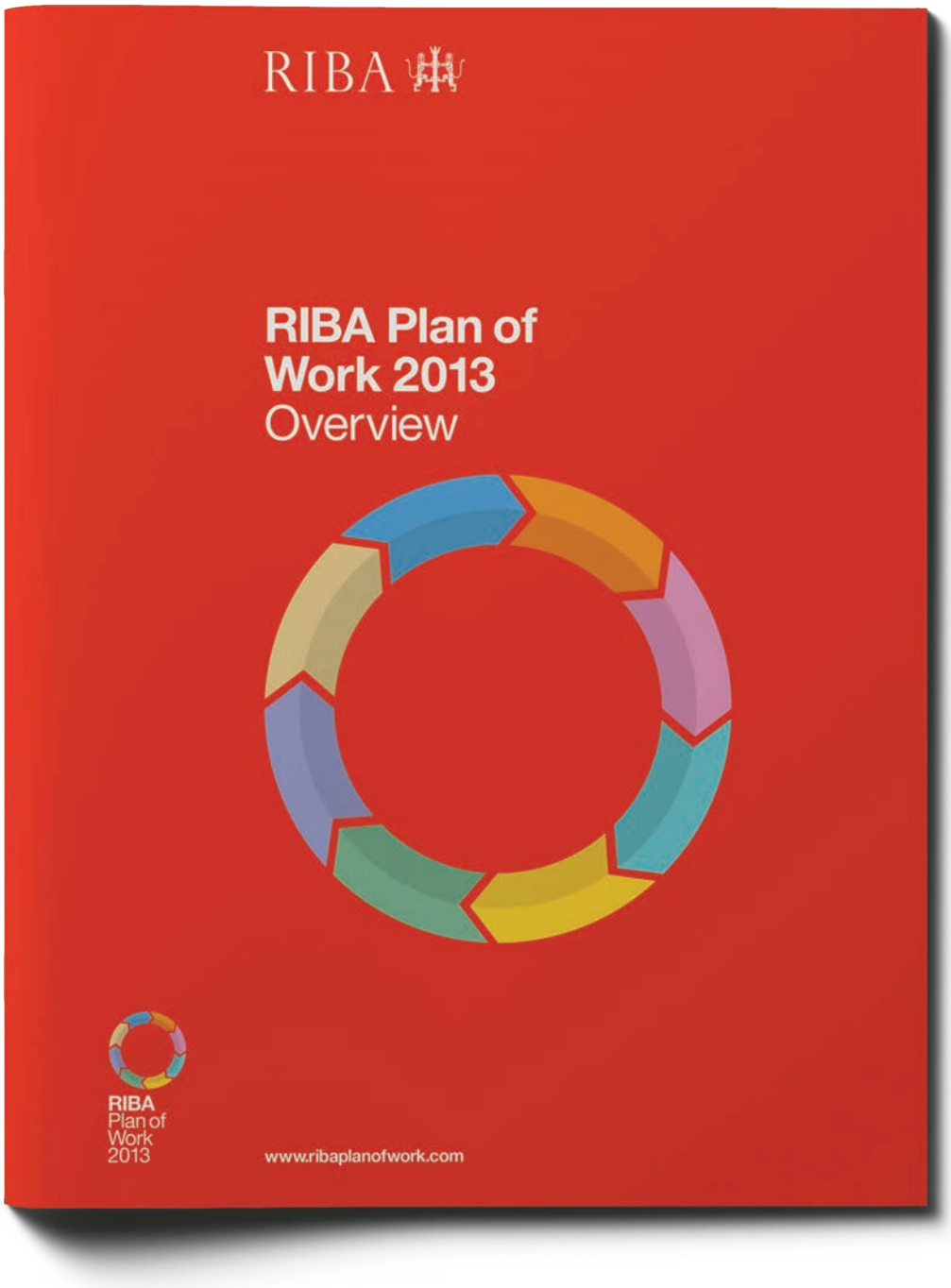
RIBA also publishes the RIBA Job Book (the latest being the 2013 edition) which acts as a standard reference for running projects, providing an operational framework and examining the step by step obligations of an architect in line with each of the RIBA work stages. It is accompanied by checklists and templates many of which can be freely downloaded from the RIBA Bookshop website.

So, what are the stages?

Clarity of the scope of a professional's services is essential. The role of an architect often goes far beyond designing the building. It is crucial for the smooth running of any construction project, that everyone is clear on who is responsible for what.

Stephen Homer, Lianne Edwards
Ashfords LLP

RIBA Plan of Work © Royal Institute of British Architects



The RIBA Work Stages and what the architect is being appointed to do (continued)

RIBA Stages

Strategic Definition
This stage involves defining the project, before the initial project brief is prepared. This is the stage at which the client's priorities and design ambition are communicated to and considered by the architect. It may involve a consideration of the site (and/or whether another site might be preferable) and take a high level view of the approach to the project (for example, is a refurbishment, extension or new build the most appropriate solution?). A client will need to consider its funding options and the client's project outcomes (what is it that the client is seeking to achieve?) will be discussed at this stage.

This stage is a fundamental stage to project development. It is at this stage that the key requirements and constraints are identified. As considered in the case of Riva Properties et al v Foster and Partners [2017] EWHC 2574 (TCC) this includes not only physical constraints but also financial constraints such as budget. Stage 0 requires an architect to obtain from the client the project requirements, budget and desired timetable.

Preparation and Brief
The initial project brief is prepared using the information gathered at stage 0. This sets out the project objectives (the client's key objectives in carrying out the project) and the client's business case (the client's rationale behind the project, possibly including financial appraisals and other background information). Feasibility studies may well be carried out at this stage to test the feasibility of the project being carried out on a specific site or in specific context.

During this stage, the project team is assembled and roles and responsibilities allocated. Pre-application discussions with the planning authority might take place.

This stage requires an architect to review the client's requirements, budget and timetable. In particular, the architect must "*Check these carefully, question incompatibilities and agree priorities*".[1]

Concept Design
This is when the design team prepares its response to the initial project brief and when the client will probably receive the first drawings and design ideas. Meetings and workshops are likely to take place to discuss the design. The project brief will continue to develop during this stage, with a view to the final project brief being issued by the end of this stage. A sustainability strategy may be prepared and the construction strategy and programme will be considered. Preliminary cost information should also be prepared.

Developed Design
This is the detailed design stage, during which proposals for structural design, building services systems and so on should be prepared, collated and co-ordinated. A developed design and updated cost information are produced at the end of stage 3 and the RIBA Plan of Work 2013 Overview recommends that planning applications are normally submitted at the end of this stage.

[1] RIBA Job Book 9th edition (2013)

Stage 4

Technical Design
This stage is when the architectural, building services and structural engineering designs are further developed and refined to provide detailed technical information for the project to take the design to the point of construction issue drawings. Some drawings may be further refined during the latter part of this phase and into stage 5 by specialist subcontractors but by and large, by the end of this stage the designs should be fully developed save for queries that might arise on site during construction.

By the end of stage 4 any negotiation or tendering process with contractors is also complete. Throughout stages 2 – 4, depending on the procurement route, a negotiation or tender process will have taken place such that by the end of stage 4, in a traditional procurement scenario, the building contract is ready to be executed.

Stage 5

Construction
As the name suggests, this stage comprises all construction works including mobilisation through to practical completion. The principal output for this stage, in terms of design work, is the 'as-constructed' information. During this stage the architect may also undertake a contract administration role which usually includes regular site inspections and reviewing progress of the construction works.

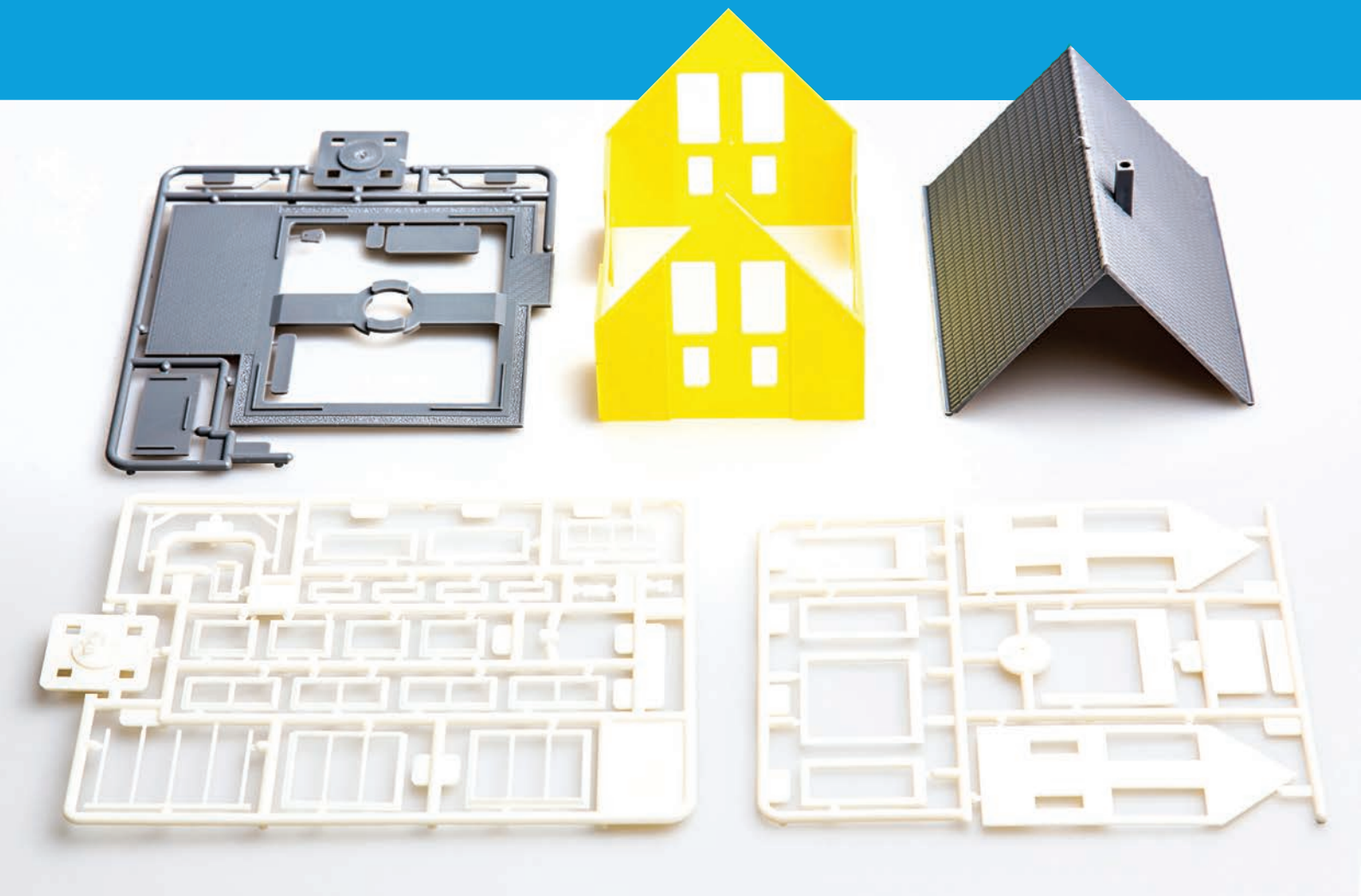
Stage 6

Handover and Close Out
This stage includes the conclusion of the construction works and handover of the building. The stage will include the final inspections post practical completion of the works and, subject to the schedule of services, may also require the architect and other consultants to attend a feedback session and input into a review of the project as a whole.

Stage 7

In Use
This stage, which may not always involve the architect, focusses on using the project design information to assist with the 'successful operation and use of the building'. This is effectively a review stage and looks to evaluate the design in practice. For some repeat clients, this stage may be part of stage 0 for the next development.

Where does Offsite manufacturing fit into this?
In 2016, RIBA published the Design for Manufacture and Assembly (DfMA) overlay to the RIBA Plan of Work. This was sponsored by leading contractors and clients through the Offsite Management School which was created to help projects make better use of offsite manufacturing. This overlay sets out key considerations at each of the RIBA stages:



Stage 0 and 1 – this might include additional considerations of modular construction and further appraisals of the site to consider the suitability of modular construction. This will be incorporated as part of the feasibility study. The design team appointed at stage 1 should then be mandated to consider all options to utilise off-site manufacturing if this is required by the client.

Stage 2 and 3 – given the design development at stage 2, this is where DfMA really comes through as the design will either follow the path of modular components or turn to a traditional build. If DfMA is adopted, the design team will need to focus on coordinating the different elements of design with pre-fabrication in mind. There may also be early procurement of prototypes to assist the design team in developing the design.

Stage 4 – the design for DfMA sets out the design-intent information with follow on development of fabrication information to allow pre-fabrication to commence in line with the construction phase.

Stage 5 – this includes the installation of pre-fabricated components with delivery of pre-packed 'fit-out kits' including mechanical and electrical works and services.

Stage 6 and 7 – the 'as-constructed' information may also include details as to how the building might be disassembled at a later date.

What might you expect to see in the architect's Schedule of Services?

As explained above, the schedule of services in the architect's appointment will often be set out by reference to the RIBA work stages. The schedule will set out in more detail the tasks which the architect is expected to undertake during each of the stages and the schedule is key in establishing the architect's obligations. Careful consideration should be given to its content. The types of tasks you might expect to see listed are things such as 'provide detailed design drawings', 'consult statutory authorities', 'provide production information', 'attend site meetings' and so on. It is important that the client is satisfied that the scope of the architect's services is sufficient and appropriate for its particular project.

Form of Appointment – RIBA standard form or bespoke – a brief comparison

2

Anna Wood
BPE Solicitors LLP

Why does the form of appointment matter?

Having considered the extent of the architectural services you require (see Chapter 1) and invited a number of practices to submit fee proposals, you will move to formally appoint your architect.

Upon closer inspection of each tender, you may notice that the architect expects the form of appointment to be either the RIBA Standard Form of Agreement 99 ('SFA 99') or the more recent RIBA Professional Services Contract 2018 ('PSC 2018'). Before agreeing to this contract, you should consider:

1) What is my procurement structure?
2) Who is funding my project?
3) What is my 'exit plan'?

Your source of funding and intentions for disposal are also highly relevant to the drafting of your architect appointment: high street and other institutional lenders will expect to see certain terms in the contract that will make the project bankable, either for you or your prospective purchaser.

RIBA vs bespoke

Broadly speaking, for self-funded projects procured via a traditional route, a RIBA standard form may suit the parties adequately. However, funders generally perceive the RIBA standard forms to be too 'pro-architect'. Further, the SFA 99 was not drafted to novate comfortably to a design and build contract such as the JCT Design and Build 2016 and although some tweaks have been made, the PSC 2018 does not align perfectly with the standard form and by its very nature cannot align perfectly with any bespoke amendments to a standard building contract that you may be using for your project.

The remainder of this chapter considers some of the key issues covered by an architect appointment and compares and contrasts the wording of the RIBA standard forms with a 'typical' bespoke architect appointment document. Unless specified, the observations relate to both the SFA99 and the PSC 2018.

Duty of care

Contractual obligations can be 'absolute' (e.g., must be done) or subject to a duty of care (e.g., must use reasonable skill and care to do something). The terms of the appointment can make specific points regarding what that duty of care relates to.

RIBA	Typical Bespoke
SFA99 – "exercise reasonable skill and care in conformity with the normal standards of the Architect's profession" PSC 2018 – more prescriptive and links to the specifics of the project	More prescriptive and links the duty to the specifics of the project
SFA99 – Expressly excludes any commitment to see that the works are completed on time or on budget PSC 2018 does the same but does require the architect to inform the client of issues which may materially affect the 'Construction Cost'	Whilst the architect is not liable for delay or cost overrun, they are required to be mindful of the client's programme and budget and work within it and alert the client when issues arise
Absolute obligation to comply with health and safety obligations set down in the CDM Regulations	Absolute obligation to comply with health and safety obligations set down in the CDM Regulations
No express mention of deleterious materials	Express obligation to use the duty of care to see that no deleterious materials are specified or approved for the works

Copyright

How the client is legally entitled to use the design produced by the architect under the appointment is critical: this is, after all, what the client is paying for. For more information on copyright, see Chapter 5.

RIBA	Typical Bespoke
Architect owns the copyright and grants a licence to client	Architect owns the copyright and grants a licence to client
Licence excludes the reproduction of the designs for extension of the project unless a licence fee is paid	Allows use but not reproduction for extension of the property
Architect asserts his moral rights	Usually moral rights are waived
Architect not liable for use other than intended use	Architect not liable for use other than intended use
SFA 99 – A licence fee may be payable for continued use (including prior to practical completion)	Licence is always 'royalty free'
SFA 99 – If the client is late paying an instalment of the fee, the Architect can suspend the licence PSC 2018 – The copyright licence referred to above is subject to fees having been paid (i.e., subtle difference in wording between the two)	Licence is always 'irrevocable' (the architect has other rights in respect of late payment)

Limitation of liability and net contribution

Liability can be limited by scope, time and value.

RIBA	Typical Bespoke
Option for 6 or 12 years from completion of the services or, if earlier, the date of practical completion of the works	Usually 12 years from the later of completion of the services or practical completion. Remember that the architect's services may continue past practical completion.
Financial liability is limited to a cap or the 'net contribution' (for more on net contribution see Chapter 7)	May allow a cap on liability linked to professional indemnity insurance. Usually no net contribution clause.
Specific limitations relating to programme, budget, solvency of others, performance of others	Confirms that the architect remains responsible for sub-contracted services

Collateral Warranties

For more information on collateral warranties please see Chapter 8.

RIBA	Typical Bespoke
SFA 99 – No express obligation to procure collateral warranties from sub-consultants PSC 2018 – Allows parties to specify requirements	Express obligation to procure collateral warranties from sub-consultants
Only to be provided within a reasonable period once fees have been paid	Gives time limit for returning warranties (usually 14 days) and can make this a condition precedent to further payment

Dispute resolution

For more information on dispute resolution please see Chapters 9 and 10.

RIBA	Typical Bespoke
Parties may use RIBA mediation service	May include a tiered dispute resolution clause requiring the parties to go through certain steps before instigating formal proceedings
Sets out rules for adjudication	Sets out rules of adjudication
The SFA 99 sets out rules for arbitration The PSA 2018 allows the parties to select litigation or arbitration	Parties can choose whether the appointment will use litigation OR arbitration for dispute resolution

Amending a RIBA standard form vs using a bespoke document

Having reviewed a RIBA standard form and considered the notes above, you may decide that a RIBA standard form is close to what you require for your project but subject to a few amendments. We recommend that you exercise caution before attempting to make amendments to standard documents without taking legal advice as amendments to one clause may have unintended consequences in relation to other clauses.

‘Designer’, ‘lead designer’ and ‘lead consultant’ – what’s the difference?

3

SRA Architects

Every successful project needs someone with a vision and the grit and determination to see it delivered – and that’s no easy task! It needs a designer and leader. An architect’s appointment might state that the architect is to act as lead designer or lead consultant but what do these terms mean?

Whether it’s a building, a product or a service, a ‘project’ involves many parties all of whom will be a specialist in their ‘part’. Then someone needs to assemble those ‘parts’ and make them fit together carefully and beautifully. And someone needs to make sure there is a good end-to-end responsibility trail with no gaps.

On a building, there are many designers: architects, different kinds of engineers, trade contractors and others. One of these designers needs to be the lead designer. On a building it is usually the architect; on a civils or complex M&E project, it is usually the engineer. Someone needs to make sure the client’s needs are communicated to the team and that the designers’ questions are answered by the client. This is one of the management roles of the lead consultant. On smaller projects, the client might do away with the lead consultant and communicate directly with the designers. On larger projects, there might instead be a ‘project manager’ or ‘employer’s agent’ undertaking the role.

For a building, who’s best placed to do these roles?

John Rich RIBA
SRA Architects

SRA | ARCHITECTS

The role of the designer

Clearly, the architect is perfectly placed to design the architectural elements of the building. This is so at every RIBA Stage: feasibility, concept, developed design and technical design.

The role of the lead designer

On a building this is usually the architect.

Architects are trained to be 'synthesizers' not specialists. We know a bit, hopefully more than enough, about what all the other specialist designers are doing, enough to challenge their proposals. The lead designer needs to spot where there are gaps and get them filled, and to negotiate good solutions when clashes occur. The definition the RIBA uses is to 'integrate and coordinate the designs of others'.

The lead designer is the visionary with grit and determination, coordinating and integrating the designs of the specialists, spotting gaps and negotiating successful outcomes where there are clashes.

The days of master craftsmen being able to fashion anything out of stone, iron and timber are gone. Nowadays, as designers, we need at our fingertips an understanding of the broad capabilities of cladding and curtain walling systems; and precast, factory made and modular components. We need an intuitive understanding of how far these systems and components – all engineered by specialists – can be stretched without breaking. This is what is meant by 'integrating and coordinating'. Negotiating a successful and beautiful compromise is a core skill.

The role of the lead consultant

The lead consultant, or 'project lead' as the RIBA now terms the role, is akin to a project manager. Tasks include: establishing the project programme; helping to appoint the consultants; issuing instructions on behalf of the client; establishing change control procedures; reporting to the client; liaising with the client in preparation for the handover. Even when there is a lead consultant, all the design consultants have direct appointments, or contracts, with the employer.

It is possible to appoint a 'sole consultant'. This is one consultant, perhaps the architect, perhaps a multi-disciplinary practice. If it is the architect then they will need sub-consultants. From experience, this is an administrative burden: appointments, warranties, insurance, invoicing, payment etc.; and also a risk in the event of a sub-consultant ceasing to trade or an invoice to the employer being paid late. While it may make life simpler for the employer, it does mean they lose their ability to choose all their designers.

What about architectural fees for the different roles?

It is very rare for an architect to be appointed just as designer. Designer and lead designer are the normal services for an architect. Indeed, before 1999, the RIBA did not even suggest that the role of lead designer could be separate.

Acting as lead consultant is a management role beyond the normal architectural service. The fee will be in addition to the normal architectural fee.

In summary

Creative architects are unsurpassed at design and also being the lead designer integrating and coordinating the work of the other designers. Lead consultant is a management role and could be undertaken by an architect but perhaps a project manager would be better placed.

Architects and the CDM Regulations

4

In any construction project, an architect, as designer, plays one of the most fundamental roles.

The Construction (Design and Management) Regulations 2015 (the CDM Regulations) manage the health, safety and welfare of construction projects from start to finish and define the responsibilities according to specific roles. Architects fall within the category of designers. Indeed, the lead architect will often be appointed as the principal designer.

The CDM regulations

Regulations 9 and 10 of the CDM Regulations set out the duties placed upon designers. Such duties include the responsibility to eliminate, reduce or control foreseeable health and safety risks through the design process including those that may arise during construction work or in maintaining and using the building once it is built.

Who is a designer?

Under the CDM Regulations a designer is an organisation or individual who prepares or modifies a design for a construction project (including the design of temporary works) or arranges for or instructs third parties to do so. Design includes drawings, design details, specifications, bills of quantity and calculations prepared for the purpose of a design. Designers include architects, architectural technologists, consulting engineers, quantity surveyors, interior designers, temporary work engineers, chartered surveyors, technicians or anyone who specifies or alters a design.

When do a designer's duties apply?

The designer's duties apply as soon as designs are started which includes concept design, competitions, bids for grants, modification of existing designs and relevant work carried out as part of feasibility studies. A designer must not start any work until they are satisfied that the client knows their obligations under the CDM Regulations. Holding meetings or liaising with the client to discuss the project can fulfil this obligation. When designing, a designer must consider the health and safety risks people may be exposed to through the course of construction and its use thereafter. Designers should liaise with contractors, the principal contractor and with any other designers, including the principal designer, so that work can be coordinated to establish how different aspects of design interact and influence health and safety.

The role of a Principal Designer

A principal designer is defined in Regulation 2(1) as the designer with control over the pre-construction phase of the project, being the earliest stage of a project from concept design through to planning the delivery of the construction work. The principal designer must be appointed in writing by the client.

The principal designer can be an organisation or an individual that has:

Lydia Stuart-Banks
Trowers & Hamlins LLP

Architect fined £180,000 after breaches of CDM led to death of maintenance worker

Timber frame designer found guilty and fined £1500 even though no incident occurred

1) The technical knowledge of the construction industry relevant to the project;

2) The skills, knowledge and experience to understand, manage and coordinate the pre-construction phase, including any design work carried out after construction begins.

The principal designer in liaising with the client and principal contractor has an important role in influencing how health and safety should be managed and incorporated into the wider project. The principal designer's role involves coordinating the work of the project team to ensure that significant and foreseeable risks are managed throughout the design process.

What must a principal designer do?

Principal designers have separate duties to designers. Principal designers are duty bound to plan, manage, monitor and co-ordinate the pre-construction phase. This continues into the construction phase when a designer's work is carried out and when preparing the health and safety file. The principal designer's work should ensure that design work in the pre-construction phase contributes to the delivery of positive health and safety outcomes. The principal designer should try to bring together designers as early as possible in a project and then recurrently to ensure all parties carry out their duties. An effective way to do this is through meetings chaired by the principal designer.

If the principal designer appoints any designers they must check they have sufficient skills, knowledge and experience to carry out the work.

Principal designers must ensure that foreseeable risks are identified and if they are, ensure risks are eliminated with design elements. If this is not possible then they should mitigate or control risk to an acceptable level.

Principal designers should also ensure as far as reasonably practicable that everyone working on the pre-construction phase cooperates with each other, that designers comply with their duties and provide information about design elements presenting significant risks that cannot be eliminated.

Liaising with the principal contractor

The principal designer must liaise with the principal contractor for the duration of their appointment. If the principal designer's appointment ends before the project does, they must ensure the principal contractor has all relevant information with regard to known risks and they must also arrange a handover of the health and safety file.

Copyright – the client's rights including copyright in the BIM model

5

Copyright – the general rules

In the UK, copyright is governed by a set of general rules which apply to the ownership of materials (under the Copyright, Designs and Patents Act 1988).

Put simply, these rules state that unless it has been agreed otherwise, copyright belongs to the author who produced the original material. In the context of a construction or development project this original material is likely to include written reports, photographs, surveys, architectural models, drawings and plans. Nobody other than the author of those materials is entitled to copy, issue or adapt them without the author's permission and should they do so, the author has the right to claim for infringement of their copyright.

Architects even own copyright in the actual buildings they have designed, so simply copying the design of a building can be an infringement of copyright, even if the plans for the building haven't actually been copied.

As a client engaging an architect it's important to have a clear understanding of what rights (if any) you have over the materials the architect produces. It's highly likely that the architect's drawings, plans and designs will be needed to support a planning application and be utilised throughout the entire life cycle of your site/development, for various purposes and by various different parties (e.g. other consultants, contractors, future purchasers). Any party using those materials without the architect's permission will find themselves infringing the architect's copyright and at risk of a claim for damages.

Obtaining rights over copyright material

Whilst the statutory position (discussed above) gives an architect (or the architect's employer, if the material was produced in the course of the architect's employment) the copyright over his/her original materials by default, parties are free to reach an agreement which adapts or changes the standard copyright rules. In practice, this is often the intention for construction and development projects, with an author commonly granting a licence to a third party to allow the use of its copyright material.

A copyright licence is a flexible way of granting rights over copyright materials, the extent and scope of the licence being open for negotiation (i.e. do the rights within the licence extend to copying, reproduction and/or any future extension of the site? Can sub-licences be granted to third parties?). To avoid any future disputes on these points the licence should, as best practice, be recorded in an express written form.

Whilst the licence can be prepared as a standalone agreement, you may find that the architect's professional appointment already contains a copyright licence clause. Indeed, copyright licences are dealt with in various industry standard form contracts including the NEC3 and NEC4 Professional Service Contracts (see clause 7: rights to material). Where utilising a copyright licence clause within an architect's professional appointment it is important to consider the document as a whole and to be aware of any clauses which place restrictions on the licence being granted. Provisions making a copyright licence dependent on the payment of all of the consultant's fees appear in several standard forms of appointment produced by the professional bodies, including for example, the RIBA Standard Professional Services Contract 2018 (clauses 6.3 and 6.8).

Copyright licence clauses are also a common feature of collateral warranties and deeds of reliance granted to third parties, such as funders and purchasers.

Alan Tate, Jo Morris
Michelmores LLP

Michelmores

Key points in a copyright licence

In any copyright licence (whether a standalone form or a clause within an appointment, warranty etc.) there are certain key points which should be included for a client's benefit:

- A warranty (and indemnity) from the architect confirming that they own the copyright and/or have the necessary authorisation from third parties to grant the licence
- That the licence is:
  - irrevocable – it cannot be withdrawn and cannot be terminated; and
  - royalty free – no additional payment is required from the client
- The permitted uses of the copyright material should be specified
- Clarification as to whether the copyright material can be used for other projects
- Confirmation of whether the licensee may grant sub-licences
- Confirmation that neither party will be liable for use of the material for anything other than its original purpose

Copyright in a BIM model

The increasing use of Building Information Modelling (BIM) in the construction industry throws up an array of additional considerations in the context of copyright. BIM sees various different designers feeding their individual work into a single, continuously updated 'federated model' produced by the BIM manager. So, does the creation of a single BIM model produce a separate copyright and what rights does the client have in relation to that model?

Standard consultants' appointments don't address these issues. However, the Construction Industry Council (CIC) has sought to provide some clarification with the introduction of its latest BIM Protocol (Second Edition, 2018)[2].

The CIC BIM Protocol is intended to be incorporated into contract documents (such as architects' appointments), varying and overriding the original contract's copyright provisions and giving effect to its own terms instead, which state that each individual contributing consultant (referred to as 'Project Team Members') gives a copyright licence to the other project team members. Most importantly, the BIM manager who produced the federated model grants a copyright licence to the client.

Without the use of the CIC BIM Protocol or an alternative form of bespoke drafting dealing with BIM, clients may find themselves at risk of breach of copyright or even party to a dispute with the various designers as to who owns what within the BIM model.

[2] http://cic.org.uk/admin/resources/bim-protocol-2nd-edition-2.pdf

Agreeing the fee and paying your architect

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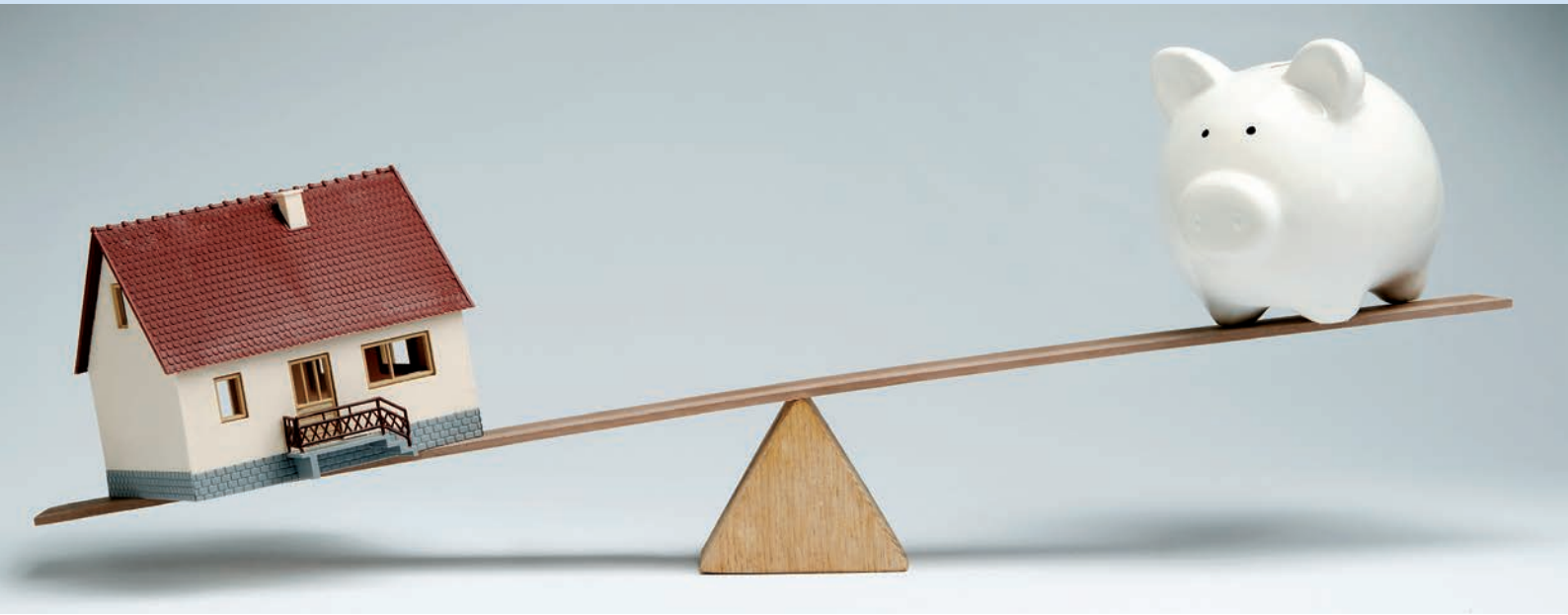
When appointing your architect (whether under a standard or bespoke form of appointment) you will need to negotiate and agree both (i) your architect's fee; and (ii) when your architect will be paid its fee.



More and more, we are seeing architects being engaged on the basis of new and creative fee structures. So, don't be afraid to suggest some of the below options when negotiating fees with your architect to best suit the needs of your project.

Architect's fee
The fee could be calculated on a time-charge basis; as a percentage of construction cost; as a fixed fee / lump sum basis; or the fee could be linked to value added.

Time-charge basis
This fee mechanism allows your architect to be paid by reference to the amount of time spent carrying out the services. It is simply calculated at an agreed daily / hourly rate. It is rare that we see an architect being paid on a time-charge basis, the simple reason being that every project is different, you will not always know how much time your architect will need to spend on the project and there is no certainty as to the amount of fee.

Percentage of construction cost
This fee mechanism allows your architect to be paid a percentage of the overall build costs that are estimated at the start of the project and crystallised at the end of the project when final construction costs are known. Whilst this is a common mechanism for an architect to calculate its fee it is often resisted by clients, again for cost uncertainty and the risk that escalating construction costs mean an increase in your architect's fees.

Lump Sum
This fee mechanism allows your architect to be paid a fixed lump sum that is agreed / set at the outset of the project. Your architect will usually take into account the estimated overall construction cost, calculate a percentage and then fix the fee. This is favourable to the client because of cost certainty and is by far the most popular fee option.

Key to this fee option is accurately scoping out the architect's services (see further below). For example, some thought about what services are to be covered in the event of a dispute with your contractor could be an easy way to avoid additional unforeseen costs outside of the fixed fee arrangement further on in the project's life span.

Oliver Williams
Trowers & Hamlins LLP

Richard Francis, Director of AJ100 Architecture Practice AWW comments, "By far the most popular fee option with Clients is for us to be engaged on a fixed fee, paid in tranches; this seems to be the trend for most commercial projects, especially in the South West. We are, of course, always open to consider alternative fee structures".

Value Added Arrangement
This fee mechanism allows your architect to be paid by reference to value added by its services. Examples include fees for the obtaining of planning consent or fees linked to the increased value of a site or building or even its ultimate sale.

This is an easy win-win situation for both client and architect and could be structured to include clear incentives to deliver the project within certain timescales or within a certain budget.

Additional fees
Your architect may become entitled to additional fees over and above the agreed fee in the appointment. Whichever fee mechanism is agreed it is vital that you check the services to be performed by your architect under the appointment. In both standard and bespoke forms of appointment this can often be found in a schedule of services. In particular, you will need to check which services will be deemed additional and therefore attract additional fees.

Also, your architect may become entitled to additional fees as a result of delay to the project. Say, for example, you instruct your architect to put a hold on the project (due to planning or funding issues) your architect may suffer additional cost that can justify its fee being increased. Most standard forms allow an additional fee to be charged by an architect in respect of delays.

Payment Terms
The appointment of your architect is likely to fall within the definition of a construction contract under the Housing Grants, Construction and Regeneration Act 1996 (the Construction Act) and whilst industry standard forms of appointment comply with the provisions of the Construction Act it is important that any bespoke appointment (or amendments made to an industry standard form) contain:-

(i) an entitlement to payment by instalments, stage payments or other periodic payments;

(ii) intervals at which, or circumstances in which such payments become due;

(iii) an adequate mechanism for determining what payments become due and when;

(iv) a final date for payment in relation to any sum that becomes due;

(v) provisions for the issuing of a payment notice; and

(vi) time period or prescribed period for serving a pay less notice.

Unless you are operating under some form of value-added fee option it is common for architects to be paid in stages linked to the project milestones. Your architect will usually issue its payment notice by way of invoices for payment. It is important that you understand the payment provisions within the appointment (such as due dates and final dates for payment) as a failure to pay could result in the dispute resolution provisions being invoked, in the suspension of services and / or interest being applied to outstanding sums.

The ball is really in your court to be creative in suggesting a fee structure with your architect and other professional advisors to suit the needs of your project. Whichever fee option is negotiated and agreed make sure that the provisions of the appointment relating to (i) additional services (ii) the right to additional payment and (iii) the payment terms themselves are all understood and agreed.

Professional Indemnity Insurance and Contractual Limitation of Liability

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When mistakes are made on construction sites things can quickly become heated and expensive. Clients facing costly remedial works and reduced profit margins will be anxious to claw back whatever they can from contractors or consultants. How will the architect (or other consultant) be able to meet such claims?

Professional indemnity insurance

Clients should ensure that their architect holds and maintains an appropriate level of Professional Indemnity insurance (often abbreviated to PI insurance) to cover any claims which the client may have against the consultant for negligence or breach of contract.

Professional indemnity insurance generally works on a 'claims made' basis meaning that the insurance has to be in place at the time a claim is made, rather than at the time of the breach or negligence. For this reason, architects (and other consultants) will normally be obliged not only to take out PI insurance, but to maintain such insurance for a period of 6 or 12 years (depending on whether the appointment is a simple contract, or a deed with a resulting 6 or 12 year liability period).

The insurance will have a set limit of indemnity (for example £1m, £5m or £10m), together with an excess or deductible, and will be on either an 'any one claim' or 'aggregate' basis. 'Any one claim' means that the insured sum is available repeatedly to satisfy each claim which might be brought (sometimes this might be limited though, for example, it may only be available once for a series of claims arising out of the same originating event). 'In the aggregate' means that the limit of indemnity is the total amount which the insurer will pay out for claims notified in the relevant period, irrespective of the number of claims, so if the insured amount has already been paid out on one claim, there may not be any funds left to pay out on subsequent claims.

To minimise their liabilities, architects (and other consultants) will often seek to limit their liability in their appointment document. You may hear reference to net contribution clauses and caps on liability. A client will need to have a basic understanding of the effect of these limits so that it can make an informed decision as to whether to accept them.

Marcus Saunders
Stackhouse Poland

Net contribution clauses

What happens when more than one party is to blame for a design defect? Take, for example, a developer commissioning a new block of flats. The engineer could have been negligent in designing part of the structure. However, an architect responsible for the overall design may have negligently incorporated the engineer's mistakes into its plans.

The basic legal position is that, where two or more parties are jointly responsible for the same loss, the client can choose to sue any of the parties at fault for 100% of its losses.

If this happens, the paying consultant may try and recover a share of those losses from other consultants who are at fault under the Civil Liability (Contribution) Act 1978.

The effect of a net contribution clause is that each individual consultant would only be held responsible for their own 'fair and reasonable' or 'just and equitable' share of the loss. So, in the scenario outlined above, both the engineer and the architect have caused the loss. If a just and equitable apportionment of the liability for that loss, is, say 80% to the engineer and 20% to the architect, and both have the benefit of a net contribution clause, each consultant would only be liable for their proportion. In order for the client to recover all of its losses in full, the client or the beneficiary of any applicable warranty would need to sue all parties.

The effect of accepting such a clause, is that a client may find it is unable to recover all of its loss, if any of the consultants responsible for the loss have gone into liquidation or is otherwise unable to satisfy its proportion of the claim, as each consultant will only be responsible for its own 'just and equitable' share of the loss. The client therefore takes on the 'insolvency risk' itself.

Funders, in particular, are reluctant to accept the inclusion of net contribution clauses on projects they are funding, and where they have the benefit of collateral warranties.

Other limits on liability

The architect may instead (or, indeed, in addition) seek a liability cap so that it is not on the hook for unlimited losses. The architect may seek to limit its overall liability to a fixed amount, or commonly will seek to link this to the professional indemnity insurance limit of indemnity. The client and architect will need to agree to an amount that the client is satisfied provides reasonable protection. What is reasonable protection will depend on the nature of the project, the architect's responsibilities and scope of work and the potential losses which could be incurred if the architect does not perform as expected.

Some consultants, instead of limiting the liability to the level of professional indemnity insurance, link their liability to the total fee earned on the project. A client will need to give this careful consideration, as the potential losses which a client could suffer in the event of negligent design may bear no correlation to the architect's fee.

The architect may also seek to exclude liability for things such as misrepresentation or for consequential losses. Consequential losses are losses which do not arise directly from the breach of contract or negligence and can include things such as loss of profits, loss of use, loss of business etc. (depending on the circumstances of the project). Excluding consequential losses from agreements will leave the consultant liable only for losses directly caused by the architect's breach. Such clauses, and their precise wording, need careful consideration.

Collateral Warranties and Novations

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Privity of contract

Due to the English law concept of 'privity of contract' only the parties to a contract can enforce its terms. This means that the contractual duties owed to you by your architect are owed to you alone. For many projects this will not be an issue but for some developments, third parties may want a right of recourse against the architect and ask that you procure a collateral warranty from the architect for their benefit.

What is a collateral warranty?

A collateral warranty is a separate document which creates a contractual relationship between, in this case, the architect and a third party. Usually this is a short document (typically around 10-15 pages) executed under hand or as a deed depending on how the appointment itself was signed.

Who would want a collateral warranty and when?

Third parties who require warranties are usually: funders, purchasers and tenants. Funders often require a warranty to be in place before they allow you to draw funds under the lending facility. Purchasers may prefer to take an assignment of the appointment but the option to have a collateral warranty should be available. Tenants who are taking a Fully Repairing and Insuring Lease will usually request collateral warranties so that if they find there are defects in the building that they are required to remedy under their lease, they are able to recover some of those costs from the party responsible for the defects, which may include the architect.

Anna Wood
BPE Solicitors LLP

What are the key terms of a collateral warranty?

The language of the collateral warranty should reflect the language of the appointment (i.e., definitions should match). Under the collateral warranty, the architect gives undertakings to have exercised a certain standard of care in designing the works and specifying materials, grants a copyright licence to the beneficiary in respect of the drawings, and undertakes to maintain professional indemnity insurance. A collateral warranty does not put any obligations on the beneficiary (e.g., the architect cannot demand payment from the beneficiary) except in relation to Step In Rights. These are rights which only bite in specific circumstances and which allow the beneficiary to step in to your shoes and directly engage with the architect if you are no longer involved in the development. Until Step in Rights are active, the beneficiary cannot give instructions to the architect – that remains solely your right.

Will the architect charge for providing collateral warranties?

It is important to be up front with the architect from early on as to whether or not you may require collateral warranties so that they can factor this into their fees. If you later request additional warranties the architect may seek to charge additional fees, which is a commercial matter between you and your architect.

Novations

For most construction projects, there are two main procurement routes: traditional (where the contractor is given the architect's drawings, which he then follows) or design and build (where the contractor takes responsibility for both the design and the construction of the building). Developers using the design and build route usually engage an architect from an early stage to carry out feasibility studies and to prepare drawings for use in planning applications and tender packs. Once a design and build contractor is engaged, it is common for the architect to then work directly for the contractor for the remainder of the project. The process of transferring the architect from you to the contractor is called novation.

Why novate?

Under design and build, as noted above, preliminary designs are procured by the client before the contractor is selected. It is then the contractor's job to finalise the designs and bring them to life in the construction. The key advantage for the client during the works is that once the architect becomes a consultant to the contractor, the task of co-ordinating the design with the construction is solely the responsibility of the contractor. Once the works are complete, in the event of any defects, the client can turn to the contractor as he has 'single point design liability': it matters not whether the problem is one of design or of construction, ultimately the contractor is responsible.

How do you do this?

The process of novation is simple and involves a short Deed of Novation which needs to be signed by you, the architect and the contractor. It has the effect of ending the contractual relationship between you and the architect and creating a new contractual relationship between the contractor and the architect. All the terms of the architect's appointment are transferred across to the contractor meaning that he is responsible for paying the architect going forward. It is important that the parties are all clear on how much the architect has been paid to date and how much more he expects to be paid for the remainder of the project.

Post-novation collateral warranties

As discussed at the start of this chapter, the doctrine of privity of contract means that following novation, you no longer have a contractual relationship with the architect. Ordinarily this is fine: if there are any problems with the development you would pursue the main contractor. However, if the main contractor were to cease trading you would want the option to bring a claim against the architect. In order to do this you would need a collateral warranty from the architect. This should be signed at the same time as the deed of novation.

Dispute resolution – Mediation and ADR

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Key Information:
- Introduction
- What is mediation?
- When to mediate?
- The process
- CESW Mediation Guide and Protocol and Resources

Introduction
The Sixth Annual Arcadis Global Construction Disputes Report 2016 identifies the top 3 causes of a dispute as:

1) Failure to properly administer the contract.

2) Incomplete design information or employer requirements (for Design and Build).

3) Employer/contractor/subcontractor failing to understand and/or comply with its contractual obligations.

The RIBA 'Feedback from the 'Working with Architects' Client Survey 2016' found that architects' design skills are highly rated but consistent with the Arcadis report revealed that managing the process (including contract administration) is less well rated.

Whilst disputes are perceived to mainly concern the employer and contractor relationship, architects are not immune from the knock on effects from such disputes. Disputes also arise with the employer that might not concern the contractor.

When disputes occur, the appointment document becomes key. A robust appointment document will contain provisions on dispute resolution.

The three most common methods of alternative dispute resolution used in the UK were ranked by Arcadis as:

1) Party to party negotiation

2) Adjudication

3) Mediation

The RIBA suite of professional services contracts 2018 includes references to mediation as well adjudication and a final dispute resolution process of either arbitration or court proceedings.

We take a closer look at adjudication, arbitration and court proceedings in Chapter 10. They are adversarial processes. A recent study into the use of adjudication in the construction sector revealed a growing dissatisfaction with the process; experience of adjudication significantly reduces the desire to use the process again.

It has been suggested that parties to adjudication are unlikely to work together again.

This section of the Guide therefore promotes a reversal in the culture of adversarial forms of dispute resolution by considering mediating before the more confrontational approaches.

What is mediation?
Mediation is a voluntary and confidential process of alternative dispute resolution (ADR), in which a neutral independent person assists the parties to negotiate a settlement of a dispute. The parties retain control of whether or not to settle and on what terms.

The most common style of mediation is facilitative mediation in which the mediator will facilitate agreement between the parties. Unlike a judge, arbitrator or adjudicator the mediator will not be required to make a decision. Instead the parties will need to persuade each other of their positions, facilitated by the mediator. Sometimes, mediators may be asked to adopt a more evaluative style of mediation and evaluate the strengths and weaknesses of a particular case to encourage settlement. This approach is gaining in popularity.

Christopher Reeves
Mediation for Construction

Benefits

By comparison to more adversarial methods of dispute resolution such as litigation, arbitration or adjudication mediation is:

- Quick
- Low cost
- Collaborative
- Less risky

Recent statistics produced by the Centre for Effective Dispute Resolution show that 67% of mediations settle on the day of the mediation and a further 19% settle shortly afterwards. Put another way, 86 out of 100 mediations will result in a settlement because of the mediation process.

Encouragement of the Courts

The courts actively support mediation. The Pre-Action Protocol for Construction and Engineering Disputes 2nd edition published under the Civil Procedure Rules, requires that the parties to a dispute should normally meet in order to agree what are the main issues in the case, to identify the root cause of disagreement, and to consider whether the case might be resolved without recourse to litigation. The meeting can itself take the form of an ADR process such as mediation. The Courts however cannot order parties to participate in mediation but have held that a party to a dispute who unreasonably refuses to mediate could be liable to cost sanctions.

Dispute resolution – Mediation and ADR
(continued)

Mediation in contracts
From an employer's point of view there are therefore clear benefits in promoting mediation in not only the architect appointment documents but also the contract with the contractor. Employers ought to consider taking this up with the architect in the early stages of preparing contract packages.

Contract publishers such as the JCT also include provisions within its contracts which encourage the use of mediation. Given its opening emphasis on "a spirit of mutual trust and co-operation" it is perhaps surprising that the NEC suite of contracts has not built in any forms of alternative dispute resolution, however parties may consider provision for mediation by the addition of a mediation incorporation clause as an amendment to contract documents from the architect's appointment to the contract with the contractor. A model form of clause is at item A in the section on resources below.

When to mediate?
Mediation can take place at any time but generally mediation should be used when the parties to the dispute recognise that they have an incentive to settle. This usually occurs once the issues are properly defined and there has been a proper exchange of information and documents. If the parties need further information to properly understand the nature of each other's cases, then it is possible to agree provision of information as part of the mediation process.

If the benefits of mediation are to be realised it is wise to engage in mediation at the earliest possible stage.

The Process

There are 7 stages in a typical mediation:

- Referral: The parties identify the dispute and agree to mediate. A model form of letter proposing mediation is at Resource Item B.
- Agreement to mediate and terms: Identify the mediator and agree terms. A model form of contact for the appointment of a mediator is at Resource Item C and mediation agreement is at Item D.
- Briefing the mediator: Provide the mediator with enough information to understand the dispute to be mediated.
- Setting of the procedure: Establishing the best approach and set the date for the mediation meeting.
- Exchange of Information: Identify and exchange documents subject to any reasonable objection.
- The mediation meeting: The conduct of meeting sessions with the mediator in private.
- The outcome: Record the terms of settlement. An example of a form of settlement agreement is at item E.

If settlement is not reached the parties may use the discussions at the mediation to identify reasons for settlement not being reached and agree further settlement talks will take place after the mediation.

CESW Construction Mediation Guide and Protocol

Constructing Excellence South West, in collaboration with Mediation for Construction and Insurance (M4CI), has identified the need to highlight how mediation can and should be used to resolve disputes and in order to promote the greater use of mediation have produced the Construction Mediation Guide and Protocol:

https://www.constructingexcellencesw.org.uk/assets/Downloads/Mediation_Protocol_EMAIL.pdf

The Guide provides a set of guidance rules, called the 'Protocol' at each stage of the process, and a number of model documents and clauses which can be used or adapted for mediation.

Resources

Adopting the Guide the following resources are available to download here:

A Incorporation Clause (set out on page 17 of the Guide at https://www.constructingexcellencesw.org.uk/assets/Downloads/Mediation_Protocol_EMAIL.pdf)

B Referral Letter (https://goo.gl/ICGX54)

C Contract for the Appointment of a Mediator (https://goo.gl/pbN330)

D Mediation Agreement (https://goo.gl/lY0qiz)

E Settlement Agreement (https://goo.gl/bEBTkN)

Dispute resolution – adjudication, arbitration or litigation – understanding the differences

10

One element of the appointment of your architect will be the dispute resolution provisions. Whilst parties would no doubt hope to have a smooth running project, disputes are a fact of life. If mediation and other ADR methods (see Chapter 9) have not resulted in a resolution of a dispute, which of the formal procedures (litigation, arbitration or adjudication) is right for your dispute?

Parties to a construction contract (including most architects' appointments) have a statutory right to refer disputes to adjudication (see more on this below), but when it comes to arbitration or litigation, the parties can, if they wish, select at the outset their preferred mechanism. Unlike litigation, if a party wishes to arbitrate a dispute, there must be an agreement to do so in writing between the parties (either in their contract or subsequently).

Litigation and arbitration are alternatives and are processes leading to a final determination of a dispute by a judge or arbitrator. Adjudication is a separate fast track process whereby the adjudicator (usually a construction professional) can decide a dispute within 28 days with the decision having to be honoured and being binding (subject to any later different final award by a judge or arbitrator should this be pursued by one of the parties to the dispute).

Adjudication

Adjudication is a relatively quick dispute resolution method (the process can take as little as 28 calendar days). It is often described as a 'pay first, argue later' mechanism for resolving disputes. Whilst initially envisaged for disputes concerning interim payments, delay and disruption and defects claims, adjudication can be used to resolve a whole range of disputes including breach of contract, termination disputes and professional negligence.

Parties to a 'construction contract' (as defined by the Housing Grants Construction and Regeneration Act 1996 as amended) have the statutory right to refer a dispute to adjudication at any time (unless the contract is with a residential occupier). Appointments of architects fall into the definition of a 'construction contract' and as such, save where there is a residential occupier, adjudication

Stephen Homer, Lianne Edwards
Ashfords LLP

is usually available to the parties to resolve a dispute. In these circumstances, even if the contract does not specify adjudication as a possible dispute resolution option, the right is conferred by statute. If the client is a residential occupier (someone who lives in, or is going to live in, the property as their main home) then the right to adjudicate isn't implied by statute, but can still be expressly included in the contract.

The process of adjudication is generally a very speedy process involving the appointment of an adjudicator and written submissions and responses from each of the parties.

Once the written submissions are considered (and in rare cases a site visit or meeting undertaken) the adjudicator issues his or her decision. The decision is binding until finally determined by court proceedings, arbitration or by agreement.

In the event the losing party doesn't honour an adjudication decision it is readily enforced by the courts through a short procedure in the Technology and Construction Court and adjudication is a useful procedure for a quick resolution of a dispute. However, there are substantial time constraints on the process and limited evidence can be prepared compared to that which would be prepared in arbitration or litigation. Adjudication is therefore considered to be 'rough justice' in some cases.

It is also worth bearing in mind that advisers' costs incurred in adjudication are generally not recoverable as part of the adjudication process or in subsequent litigation or arbitration.

Litigation or arbitration?

The default position is that unless the parties have agreed otherwise in writing the courts will finally determine any claim between the parties. However, either at the outset or later, the parties can agree to any future dispute being decided by an arbitrator (essentially a private judge) instead and one reason cited for doing this is to appoint an arbitrator with technical expertise, for example, an architect arbitrator.

The perceived advantages of arbitration

Flexibility – Just as the parties must agree to arbitrate, they can also agree which procedural rules apply, and the identity of the arbitrator. This allows the parties to tailor the arbitration to their particular dispute.

Confidentiality and Finality – A key consideration is the confidential and final nature of the arbitration process. Litigation is rarely private, with court proceedings usually open to the public and court documents relating to the dispute often publicly available (even to non-parties). Conversely, arbitration hearings are usually held in private and there is no public record of the dispute. Arbitration also arguably offers greater finality with only very limited scope for challenging an arbitral award in the courts.

Arbitration Pitfalls

Arbitrator's Lien – An arbitrator's lien allows the arbitrator to refuse to release his decision until any outstanding fees have been paid. If the other party refuses to pay, one party can be left to pay all the outstanding fees to obtain the decision leaving the paying party with the issue of trying to recover from the non-paying party.

Arbitrator's fees and venue costs – Whilst the parties' legal fees are likely to be similar in litigation and arbitration, in arbitration the parties must also pay the arbitrator's fees plus administrative costs (such as room hire for hearings and travel expenses of the arbitrator). This can be a relatively substantial outlay compared to the cost of court proceedings.

What dispute resolution method should you use?

Simply put, this is dependent on the dispute at hand and the parties involved. Adjudication is popular because of its speed and relative cost effectiveness. The main downside is the element of 'rough justice' inherent in a fast track process and the fact that the other party can still take the original dispute to litigation or arbitration should they choose to do so. The choice between litigation or arbitration in respect of a final determination of any dispute is finely balanced and you may want to take advice before agreeing to an arbitration clause in any appointment document.

CONSTRUCTING EXCELLENCE South West

This *Guide to appointing an Architect* has been produced by Constructing Excellence South West's drafting team:

ashfords

Stephen Homer
s.homer@ashfords.co.uk
Lianne Edwards
li.edwards@ashfords.co.uk

bpe SOLICITORS

Anna Wood
anna.wood@bpe.co.uk

SRA | ARCHITECTS

John Rich
John.Rich@sra-architects.co.uk

th trowers & hamlins

Lydia Stuart-Banks
LStuart-Banks@trowers.com
Oliver Williams
owilliams@trowers.com

Michelmores

Alan Tate
alan.tate@michelmores.com
Jo Morris
jo.morris@michelmores.com

SP Stackhouse Poland
A Gallagher Company

Marcus Saunders
MarcusSaunders@stackhouse.co.uk

MEDIATION FOR CONSTRUCTION AND INSURANCE

Chris Reeves
chris@m4c.org.uk

For more information contact us at:

info@cesw.org.uk
www.cesw.org.uk

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