A GUIDE TO NEW COMMERCIAL & RESIDENTIAL CONSTRUCTION PROJECTS

CONSTRUCTION & ENGINEERING TEAM

WOMBLE BOND DICKINSON

ABOUT THIS GUIDE

Welcome to our new commercial and residential construction projects guide. This will give you a high-level overview of what you can generally expect to see in a construction project for a new commercial or residential development, including:

- The main parties involved and their interests
- What agreements are typically required
- How the process usually unfolds

Understanding this can help with early planning, appropriate allocation of responsibilities, and avoidance of common pitfalls.

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KEY PLAYERS AND THEIR ROLES

Construction projects typically involve a wide range of stakeholders, each with their own distinct perspectives, responsibilities, and interests. Understanding their specific roles and priorities is crucial for ensuring effective collaboration and successful project delivery. Parties can include:

Developer / Employer

The developer / employer is usually the party that wants the project to be carried out. They often also have a wider interest in the project, like being the landowner or the ultimate user of the completed project.

They may arrange financing with a funder, so that the project can be built.

They also arrange for the design and construction of the project, including through appointing contractors and consultants. Their requirements will determine important factors for the project such as management of the project, the project team, the budget and programme, and the risk allocation between parties depending on the project structure.

Contractors

On most projects, one main contractor is responsible for the construction of the development and for co-ordinating the sub-contractors that they have engaged. They must also work with other parties, such as the developer's consultants.

The contract between the developer and contractor (often referred to as a building contract) sets the price, duration, quality, specification and liability for defects.

For larger construction projects, a two stage tender or a design and build model is common to determine price and transfer design responsibility:

- **Two-stage tender** - the first stage is about initially selecting a contractor based on preliminary proposals and costs, allowing for collaboration on the early design and planning. In the second stage, the contractor provides a detailed price and programme, offering flexibility and early contractor involvement to refine the project scope and manage risks effectively.
- **Design and build** - a single contractor is responsible for both the design and construction, streamlining communication and reducing the need for multiple contracts. This approach often leads to faster project completion and cost savings, with all the design and construction being more efficiently carried out by the contractor and their integrated team.

KEY PLAYERS AND THEIR ROLES

Consultants

In addition to the contractor, there will be designers (such as architects, engineers, acousticians, fire safety etc). Depending on how the project is structured, these parties might be appointed by the employer or the contractor.

In the case of design and build, key designers may move from being appointed by the employer to being appointed by the contractor, so that all design responsibility and control sits with the contractor.

There will also be non-designer consultants (such as contract administrators and quantity surveyors etc). They are usually appointed by the employer to assist the employer with the administration of the building contract, for example by undertaking valuations, inspections and determining whether or not the works have been completed to the correct standard.

Funders

Funding may come from multiple sources - such as banks, public bodies, philanthropic trusts, or community finance providers. These funders will:

- set conditions on how funds are used;
- require security (for example, a legal charge over the site and a suite of collateral warranties relating to the construction); and
- monitor progress through milestones before releasing money.

Even if funding is not required initially, developers / owners will often re-finance developments once the development is completed, and the funders at this stage will often still require the types of securities mentioned above.

Interested Third Parties

In addition to a funder, there may be other parties with an interest in knowing the development has been properly undertaken, such as tenants and purchasers or other landowners.

THE CONTRACTS

There are many different types of contract used in construction projects, depending on the project structure and the parties. Important ones to know about are:

Construction contracts / building contracts

For the building contract between the employer and the contractor, there are different types of standard contract forms published by various industry bodies (for example, JCT or NEC).

These published forms are used but are often amended by lawyers to reflect commercial terms agreed between the parties, to address recent developments in law, to tailor the contract to the specifics of the project itself, and to provide additional protections for the party which has instructed them.

Key provisions include:

- scope and specifications;
- price and payment;
- programme and extensions of time;
- compliance with laws (such as the building safety regime);
- change control (variations);
- design responsibility and intellectual property licences;
- defects and warranties;
- liquidated damages for delay;
- insurance; and
- collateral warranties and third party rights for funders and future operators.

Performance bonds and parent company guarantees may also be required to further protect the employer's position in case claims need to be made.

Professional appointments

These are used to appoint design and non-design consultants, such as the architect, engineer, cost consultant, and project manager.

While there are different types of standard appointment forms published by various industry bodies, professional appointments drafted by lawyers are usually "bespoke" (ie individually written, rather than using a standard industry template).

Key provisions include:

- scope;
- fees and payment;
- duty of care;
- compliance with laws (such as the building safety regime);
- deliverables;
- design responsibility and intellectual property licences (where relevant); and
- insurance levels.

Collateral warranties or third party rights are commonly required in favour of interested parties, like funders, purchasers and tenants.

THE CONTRACTS

Collateral warranties and third party rights

Collateral warranties or third party rights in construction are a legal agreement that extends the contractor's or consultant's duty of care to third parties (such as funders, purchasers or tenants). This ensures that these third parties now have a direct claim against that contractor or consultant for any defects or issues that arise due to their breach.

To ensure that a development is both "marketable" and "fundable", contractors and consultants are obliged under the terms of their building contract or professional appointment to provide collateral warranties or third party rights to these other interested parties.

In practice, collateral warranties (which take the form of a separate legal document) are far more commonly preferred and used. Third party rights (rights bestowed upon a party through the terms of the original building contract or professional appointment) are only occasionally used.

Key provisions include:

- a promise that the contractor or consultant has complied with the terms of the underlying building contract or professional appointment that they were appointed under;
- intellectual property licences; and
- insurance levels.

For certain parties who receive a collateral warranty or third party rights, there may also be "step-in" rights. These allow them to step into and take over the employer's role in the underlying building contract or consultant appointment, if the employer defaults or becomes insolvent. While this is not a step to be taken lightly, it does allow them to protect and complete the development.

Funding agreements

These set out how the funder's money is provided, when it is drawn down, and on what conditions.

Key provisions include:

- conditions precedent (such as obtaining planning permission, a signed building contract, and a verified budget);
- security (such as a legal charge), together with contractual protections (like step-in rights);
- covenants (for example use restrictions and reporting); and
- events of default.

PROCESSES AND STAGES

Broadly speaking, these are the typical steps involved in a new construction project (although the exact process will naturally vary according to the specific requirements and circumstances of each individual scheme):

1. Initial planning

- **Scoping** - define the need, structure, (resident) capacity, and location criteria.
- **Feasibility** - commission feasibility studies covering site constraints, planning prospects, buildability, and cost.
- **Business case** - prepare a business case with capital and operating budgets and governance approvals. Engage early with the local planning authority.

2. Secure funding (if required)

- **Scoping** - identify the funding mix (grants, loans, reserves, fundraising).
- **Timing** - align programme milestones with drawdown conditions.
- **Funder protections** - agree security and terms acceptable to the funder.
- **Modelling** - ensure financial modelling covers build costs, contingencies, inflation, interest, operating sustainability, and other reasonably foreseeable risks.

3. Design and consents

- **Design** - appoint the design team on appropriate terms of appointment. Progress concept and develop design to meet regulatory requirements and standards.
- **Consents** - submit planning application and address other relevant matters (like any section 106 obligations). Plan for building regulations approvals and other building safety regime requirements where applicable.
- **Requirements** - determine the employer's requirements for tender.

4. Procurement / selection of contractor

- **Procurement strategy** - choose a procurement route that suits the developer's risk appetite and capacity, for example, design and build, two stage tender, or construction management.
- **Tender** - tender the works, and evaluate quality and price.
- **Contracts** - select the contractor, and agree the contract terms and warranties. Put in place bonds and guarantees, and acquire evidence of insurance. The contractor appoints its subcontractors, agreeing sub-contract terms directly with them.

5. Construction

- **Build** - the contractor mobilises, establishes site controls, and delivers works in accordance with the contract terms and programme.
- **Oversight** - the contract administrator or project manager certifies payments, monitors progress, manages changes, and enforces quality standards. The funder is kept updated with reports and certifications (other interested parties may also require updating).
- **Compliance** - laws must be complied with throughout, including the CDM Regulations, health and safety laws, and the building safety regime.

6. Completion and handover

- **Practical completion** – this is certified when the building is fit for occupation subject to minor defects. There may also be conditions precedent to practical completion, ie steps that the building contract says must be completed before practical completion can be achieved, such as:
  - **documents** - collation and handover of documents, such as testing certificates, performance guarantees, warranties, as-built drawings, the health and safety file, and any documents required in relation to the building safety regime;
  - **approvals** - obtaining final building control sign off and any other necessary approvals.
- **Defects** - address snagging or defects arising during the defects rectification period, which is a period of time agreed and set out in the building contract (often 12 months).
- **Making good** - after the defects rectification period ends, there is a process that is followed to rectify any outstanding defects, after which the contractor obtains a "notice of completion of making good" (or equivalent), and a final payment to them is triggered.

It is worth noting that for certain buildings ("higher-risk" buildings) there are far more stringent requirements, including building control approvals under the Building Safety Regulator, and registering the building with that Regulator before residents can take occupation.

Furthermore, the process for fit-out, refurbishment, or retrofit works are somewhat (although not entirely) different to the process set out above.