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Procurement Employer's agents

Many cost consultants and project managers have extended their involvement on projects by acting as the employer's agent – a job that introduces a wide range of responsibilities.

Simon Rawlinson of Davis Langdon examines the role

01 Introduction

The evolution of design-and-build procurement illustrates how much the UK construction industry has transformed in the past decade or more.

Originally intended for simple buildings, design and build is now routinely used to deliver complex, high-quality

projects, sometimes designed by signature architects.

The latest figures from the RICS' Contracts In Use survey confirmed the widespread use of design and build, which accounts for 43% of contracts by value and 13% by number.

The growth of the employer's agent (EA) role – part project manager, part contract administrator and part cost manager – means an increasing workload for cost and project managers, but also higher risk and responsibility. The role of the EA is not one that should be taken on by a novice.

02 The differing roles of cost consultants and project managers as employer's agents

Expectations of EAs vary between clients. Some expect a simple contract administration service, whereas others require full project management.

The differing skills of cost and project managers can lead to a different emphasis in delivering the EA's role. When cost consultants act as EAs, the client's other

consultants might not consider them to have authority over their work, whereas project managers would not typically experience this problem.

Project managers could bring further dimensions to the role, including establishing the project team and directing the process and deliverables.

Where cost and project managers are carrying out separate duties as EAs on a single project, it is important that these roles are defined and that clearly different administrative processes are in place, such as the use of separate payment certificates, so that the status of work delivered by each party is clearly understood.

03 The role of the employer's agent

Under a typical design-and-build contract, the EA undertakes all duties on the employer's behalf. If the employer wants to retain direct involvement, it is essential that the allocation of actions is documented in the contract.

Should an omission or error occur in the delivery of the EA's service, the employer could be held responsible, potentially leading to loss of contractual rights or compensation claims by the contractor. For example, under JCT98 with Contractor's Design, a loss of rights has been triggered by delays in payment, obliging the employer to pay a contractor's application for interim payment in full. While the defective wording that led to this problem has been updated in the JCT05

DB edition, it illustrates the importance of the EA's detailed understanding of and compliance with the contract.

Beyond specific contractual duties, EAs can have much wider roles as lead consultants, managing projects day-to-day. The client should communicate the EA's status and extent of authority to other members of the team. Other areas of project management to which the EA can contribute are:

- Drafting the project execution plan
- Managing the briefing and scope definition process
- Appointing design consultants, on a basis that facilitates the effective transfer of design responsibility
- Managing clients and third-party liaison

- Preparing employer's requirements and other tender documentation

- Implementing change control
- Supporting use of warranties to meet the requirements of third parties.

These services are not described in the building contract and the mandate for their delivery should come from the EA's schedule of services.

In conclusion, the employer and the EA's roles are indivisible, but still need to be clearly defined. While employers may retain some areas of responsibility, possibly relating to insurance, planning and negotiations, it is essential that the role of the EA is respected, and that all communications and instructions are channelled through them.

04 Setting the foundations: drafting the employer's requirements

As the use of design-and-build procurement has increased, so have the range of approaches to defining the contract deliverables. The employer's requirements document must clearly communicate performance standards, aesthetic intent and functional requirements.

The EA needs to be responsive to this approach to describing the project, the designer's role and risk transfer to the contractor. For simple buildings requiring little aesthetic consideration, the emphasis of the employer's requirements is on bidders delivering the project at a competitive cost.

Where the design is more developed, the emphasis is on transferring design, cost and programme risk to the contractor. Here, the contractor may have little opportunity to change the design.

The requirements must also describe the process of delivery so they may need to go beyond a typical preliminaries document.

Two contrasting approaches to contract strategy and drafting employer's requirements, applicable to high-quality commercial schemes and buildings with a lower technical content, illustrate the options available to the employer:

- Employer's requirements drafted for projects where the employer has limited influence over design development.
- Concise, functional requirements, with an indication of only critical areas of design. If designed, a scheme is typically developed as far as outline planning, though the contractor might also be required to comply with an employer's design and specification standards
- The contractor's proposals can be developed in partnership with the employer as part of a second-stage tender
- The employer has the opportunity to novate its concept design team to the contractor to complete the design
- Successful two-stage procurement depends on proactive project management, focusing particularly on active control of change, timely decision-making and tight control of the second-stage tendering process.
- Detailed employer's requirements giving the employer full control over design. Under this approach, more typically associated with complex, one-off projects, the design is completed to a high level of detail by the employer before tender. The contractor's contribution is generally limited to working drawings and coordination and completion of the design of some specialist packages.

- Comprehensive requirements that define which elements of design are prescriptive and which require completion by the contractor
- Consideration of amendments that achieve the desired transfer of design risk to the contractor. It is common to amend the contract so the contractor accepts responsibility for employer's requirements and their development into contractor's proposals
- The best combination of price competition and design contribution is typically secured using single-stage tenders. However, in the current market, particularly for large schemes, it is difficult to let projects on this basis and two-stage tendering or negotiation is more typically adopted.

Regardless of the level of detail in the employer's requirements, there are aspects of contract documentation to which the EA can make a significant contribution. These include:

- Establishing mechanisms for transferring design responsibility. Where the employer's designers are novated, it is important that the contractor is able to establish a duty of care from the design team. This is done by including appropriate provisions in the designer's terms of engagement, securing the client's objective

of a comprehensive transfer of design responsibility through the contract

- Drafting contract amendments. The EA can assist in the drafting of amendments, along with the client's lawyers, encouraging those that are practical, proportionate and focused on likely eventualities

- Collating a comprehensive and consistent set of documentation. The EA should only permit information relevant to the contractor to be included in the requirements, rather than all associated project documentation, which can create ambiguity.

Drafting the employer's requirements is an opportunity for the employer to package a project in a way that optimises its attraction to tenderers. When markets are buoyant, as they are in 2007, EAs should consider how a project can best be presented to secure a competitive bid.

Furthermore, preparing employer's requirements that meet the demands of project monitors, funders, future tenants and purchasers with regard to audit trails and availability of warranties, saves time and effort further down the line.

Design and build is now used on complex projects, such as Foster's Bishop's Square



05 Assessing the bid and appointing the contractor

Many issues associated with evaluation of design-and-build bids are common to those on two-stage tenders (12 May 2006, page 62). With design and build, there are further assessment requirements:

- Confirming compliance with the employer's requirements. Under a typical contract, the employer is required to accept the contractor's proposals as meeting its requirements. Typically, the EA would not undertake this, so the review is carried out through retained designers

- Evaluating the merits of competitive bids. As the competition between tenderers in two-stage bids often concerns on-costs and profit, this evaluation is typically only required on single-stage tenders. Generally,

tenderers will seek to identify opportunities for competitive advantage, such as reduced programme durations or alternative construction solutions

- Evaluating the capability of the contractor's team. In addition to the project and site management team, an area of performance is the quality of the contractor's design management resource. The ability to drive the design team to hit the programme is critical – in particular where new working relationships need to be developed with a novated design team.

The design management challenge affects all projects, as the same issues of design standards, coordination and compliance occur. On small to medium-sized schemes,

which may not be large enough to support a dedicated design manager, resourcing proposals should be carefully reviewed as part of the tender appraisal.

In completing pre-contract activities, it is essential that the contract is signed, as precedent suggests letters of intent cannot be relied on to establish the contractor's responsibility for design.

In addition, an essential aspect of the appointment process relates to the securing, via the contractor, of all relevant warranties. While EAs may not be directly involved in drafting warranties, they can assist the employer's legal team in tailoring them to match the scope of each specialist contractor's work.

06 Post-contract administration – the formal role of the employer's agent

Once a contractor is appointed, the EA's extent of delegation is formally set out. The areas requiring attention are payment (see flow chart, right), the issue of instructions and contract notices.

However, beyond their strictly defined duties, EAs need to adopt a wider approach to management, focusing particularly on sources of change. Areas they can contribute to are:

- Overseeing the review process. Helping employers and their advisers contribute to the design without compromising the contractual transfer of design responsibility, for example, through loosely communicated "approvals".

- Administrating a robust change management system that deals with:

- Considering the implications of change through the agreed funding of design development and the assessment of potential benefits before formal instruction
- Agreement of cost and programme implications before instruction, including considering whether an instruction represents a variation or design development within the scope of the employer's requirements
- Agreement over funding the change – either by contingency or additional project funding.
- Rigorous management of contract provisions, including:
 - Meeting time-frames for issuing payment notices and awards of extensions of time
 - Consistent adoption of terminology and formal processes to distinguish contractual actions from other services and advice.
 - Regular review of progress against programme, including design development and specialist trade procurement.

In delivering services that expose the EA to heightened risk, issues to consider are:

- Payment:

- Defining requirements for the documentation of the payment application in the employer's requirements
- Meeting timescales set out in the contract, particularly if the contractor's application for payment is independently reviewed by a cost consultant.
- Identification of works not executed in accordance with the contract. This is the responsibility of the contractor, but it is advisable for the EA to obtain independent input from a shadow design team as to whether the contractor's duties have been fully discharged.

- Issue of instructions:

- Exercising control over the issue of all instructions to the contractor so that change is managed effectively
- Drafting instructions and issue of information by the employer so as to respect the contractor's continuing responsibility for design
- Agreeing contractual implications of instructions at the time of issue, particularly with regard to programme and extensions.
- Completion. Under the contract, the EA is required to issue a statement of completion agreeing that the works have been completed in accordance with the contract. Many EAs are not technically qualified to judge this and will rely on the advice of consultants, either separately appointed or appointed to provide advice to the employer under a warranty. Issues associated with completion are:
 - Although meeting the contractual standards is the contractor's responsibility, the EA may share some liability in the event of a future workmanship dispute. Tight change

control that focuses all design decisions on the contractor will help to manage the employer's risk.

- The narrow definition of completion under design and build. Works need to be totally complete, with no patent defects and only the minimal amount of snagging works
- The risk of mis-statement. The EA must resist pressures to issue a statement ahead of actual completion as its issue could affect the value of warranties and so on.

Thorough management processes and an in-depth understanding of a design-and-build contract and its amendments are vital to the post-contract service delivered by the EA. Although it is outside of the written scope of the EA's role, providing effective management that maintains discipline on the employer's side, retaining risk transfer and cost certainty, is among one of the most positive contributions an EA can make to a project.

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07 Case study

The case study concerns a commercial office development initiated by an experienced client. The project was let on the basis of a concept design completed before the appointment of the contractor to stage C+, with detailed planning permission in place.

The design team was always going to be novated to the contractor. Their terms of engagement reflected this, with separate duties to the employer and contractor, including a post-contract monitoring role on behalf of the employer.

Contractor appointment was based on a two-stage tender, let in the first stage on the

basis of programme, preliminaries, overheads and profit. During the second stage, a "not to exceed" price was agreed before the completion of all package procurement.

In order to accelerate the programme, the client directly procured demolition and piling works, later novating them to the successful D&B contractor.

The project was let on the basis of an amended JCT98 With Contractor's Design. In addition to the standard EA duties required under the contract, the EA took a broader project management role – for example, managing the compliance team, liaising with

tenants and managing the design changes and enhancements they introduced.

The development secured many tenants before construction so managing the tenants' input while protecting the programme and the contractor's resources was a priority. This became complex as differences emerged in what changes were permitted by the contract and tenant agreement, requiring negotiation to protect the client's interests.

The project was delivered on time and rated highly successful by the developer and tenants. The contractor's team was retained intact and given the opportunity to negotiate other projects with the employer.

08 Payment flow chart for design and build

The management of payments to the contractor under design and build illustrates how cost management and employer's agent roles need to be compartmentalised, and how the contractual process must be complied with. This flow chart summarises the key points:

