

On the side of the agents

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With the role of employer's agent still seen as ambiguous, Kelvin Hughes introduces a new RICS guidance note designed to clarify matters

From the Standard Form of Building Contract with Contractor's Design 1981 to the current JCT Design and Build Contract 2016, the role of the employer's agent has been seen by many practitioners as, at best, confusing.

The recently published [Employer's agent: design and build](#) RICS guidance note is the result of a long development process involving a working group chaired by Andrew Smith, comprising quantity surveyors and project managers, with additional support from the RICS Professional Group.

Contractual clarity

The purpose of the note is to prevent any confusion by providing clear and comprehensive professional guidance and recommendations to anyone who acts as an employer's agent on a JCT Design and Build Contract, or in Scotland, on an SBCC Design and Build Contract.

While it is not mandatory for RICS practitioners to comply with the guidance note, the publication identifies what is seen as best practice and what in RICS' opinion constitutes a high standard of professional competence in that role. As such, the note relates to the latest version of the JCT Design and Build Contract and the Scottish equivalent, as well as current legislation and any relevant case law.

Probably the main reason for the apparent confusion regarding the role of the employer's agent is that there are only six references to it in the whole contract, the primary reference being to the 'employer' rather than their agent. The agent's role is relatively straightforward, however: they act on behalf of the employer in all matters, unless the employer states expressly in writing to the contractor that they would like to act for themselves, or to appoint others to act for them on certain aspects of the contract.

Having said that, there are certain actions that will always remain the responsibility of the employer:

1. providing possession of the site, as this belongs to the employer
2. making payment to the contractor in compliance with payment notices; the employer and the contractor are the contracting parties, so no one else can pay the contractor
3. issuing a notice to the contractor following a non-completion notice, stating that the employer may require payment of, or may withhold or deduct, liquidated damages. The role of the employer's agent is to issue payment notices without deduction for liquidated damages, although the employer's agent must advise the employer of their rights and responsibilities in this respect.

The guidance note also compares the seemingly similar but in reality very different roles of the architect or contract administrator under other JCT contracts, as well as the project manager under the NEC contracts, thus identifying the unique role the employer's agent plays.

APC alignment

The note covers the various issues at three levels. These align with those of the APC, and will therefore be familiar to RICS practitioners and other readers:

- general principles (Level 1: Knowing)
- practical application (Level 2: Doing)
- practical considerations (Level 3: Doing/Advising).

Although the guidance note refers to best practice in the post-contract stage, Level 3 also includes reference to pre-contract activities such as tendering and contractor selection, which are seen as quasi-project-management duties under the contract, rather than those of an employer's agent.

Level 1 examines the background to design and build contracts as a procurement method, and the general principles of the employer's agent role.

Level 2 then considers in some detail the timing of the employer's agent's involvement, their relationship with the employer and their powers under the JCT Design and Build Contract. In doing so, it establishes a parallel with the architect's or contract administrator's role under the other JCT contracts, and with the project manager's under the NEC contracts.

This section goes on to consider the specific duties of the employer's agent under the JCT Design and Build Contract, such as giving instructions, dealing with quality issues and instructing and evaluating changes.

As previously mentioned, references in the contract are to the 'employer', so the guidance note clarifies the role that the agent plays in acting on their behalf. Payment processes and procedures under the contract also refer to the [Housing Grants, Construction and Regeneration Act 1996](#), supplemented by the [Local Democracy, Economic Development and Construction Act 2009](#).

Level 2 then concludes with reference to the employer's agent's role in terms of claims, termination, practical completion and disputes. In addition to the specific duties under the contract, Level 2 also considers the general management duties of the employer's agent in terms of project control documentation, meetings and project status reporting mechanisms.

Level 3 in turn considers the role and responsibilities of the employer's agent and their relationship with the employer in the context of the law of agency, as well as the relationship with the contractor. It also looks at pre-contract activities such as tendering and contractor selection.

While it is not uncommon for the same person to advise the employer at the pre-contract stage, this is seen as a project management function rather than the true role of an employer's agent under the JCT Design and Build Contract.

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Further information

- Download the guidance note: [Employer's agent: design and build, 1st edition](#)
- Related competencies include [Contract practice](#) , [Procurement and tendering](#)
- This feature is taken from the [RICS Construction journal](#) (February/March 2018)
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