

The more things change

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The fourth NBS National Construction Contracts and Law Report reaffirms what the construction industry has known for some time: better communication and collaboration are required to prevent disputes arising

In 1998, [France won the FIFA World Cup](#) ; the UK government was wrangling over the [Treaty of Amsterdam](#) , which redefined its relationship with the EU; and the UK Construction Industry Task Force chaired by Sir John Egan published its report [Rethinking Construction](#) , which recommended that the industry look at new methods of improving efficiency and reducing waste and disputes.

Twenty years later it may seem some things haven't changed, as the NBS introduces [National Construction Contracts and Law Report 2018](#) , the fourth such major report. The report suggests that despite great efforts over the years, our sector remains an adversarial one, with one-third of respondents having been involved in a dispute in the previous 12 months, and nearly 40 per cent feeling that the number of disputes is on the increase.

The purpose of the survey is to identify trends under four main headings. These are:

- procurement methods and tendering;
- collaboration, including building information modelling (BIM);
- contracts and forms of appointment; and
- legal issues, disputes, and dispute resolution.

Each topic can be considered in isolation, but looked at together they offer an overview of current feeling on construction contracting practice in the UK.

Respondents were asked to give details of their experiences during the 12-month period immediately before completing the survey; the survey itself ran between August and November 2017, so the figures relate to the greater part of 2017 and the last quarter of 2016.

To consider the first of the categories, the two most popular procurement methods by a substantial margin are traditional, at 46 per cent, and design and build at 41 per cent. Partnering comes in a distant third at three per cent despite calls for improved collaboration, particularly from the government. Single-stage competitive tendering is still the most popular tender method, although two-stage or some form of negotiation are not far behind. Around 70 per cent of consultants and a similar proportion of contractors say they always or sometimes use electronic tendering, representing a steady increase on previous surveys, and the vast majority are still relying on fixed-price lump-sum contracts.

It seems traditional procurement methods are called that for a reason, and until clients in the construction industry begin to take an interest in actively managing their projects, the single-point responsibility of design and build will prove attractive enough to outweigh the

perceived loss of control that such contracts entail. The perhaps unpalatable conclusion is that, with a few notable exceptions, clients don't want to be involved. This is of course at odds with the government vision that the client should take additional responsibility for matters such as health and safety, BIM, sustainability among others. It seems there is still some way to go to establishing an enticing business case to make this a reality.

As for the next heading, collaboration has been a hot topic in the industry for a number of years now. It is perhaps disappointing to note, therefore, that the most popular response to our question on the collaboration techniques used is 'the inclusion of a mutual trust and cooperation clause', at 65 per cent. Even this figure is down on previous surveys – in 2013, it was 81 per cent. Perhaps more discouraging is the reason for not engaging in formal collaboration: 43 per cent said the client is the main obstacle, even though most respondents agree that collaboration could both reduce the number of disputes and help fulfil client objectives. It is sometimes difficult to see how these arguments square in practice, although the results are relatively consistent throughout previous surveys.

BIM appears to be increasingly visible in the industry, though; only one per cent of respondents to the latest NBS [National BIM Report](#) were unaware of it. Interestingly, about half of those who responded to the contracts and law survey agreed that collaboration is helped by BIM, yet around one-third are concerned that it makes responsibility less clear. Definitely some food for thought.

Problems tend to centre on contract administration, variations, and the poor supply of information

Although the section on contracts and forms of appointment is in some ways incidental to the contracts and law survey's main purpose – examining subjects that are exercising the minds of those surveyed – it is always useful to have an overview of which contractual solutions people tend to adopt, particularly for the contract publishers themselves. As might be expected, the UK standard form construction contract market continues to be dominated by the well-established publishers. Our latest survey suggests that on this occasion JCT has extended its lead for contracts in the categories 'used most often' and 'used at all'. It's important to note, however, that this is not an indicator of actual numbers or value of work for any particular contract or form.

One interesting and consistent finding of the four NBS contracts and law surveys is the extent to which bespoke contracting arrangements continue to be used. By bespoke we don't mean amended standard forms, but those that are written from scratch for a specific purpose. The fact that our survey records these as being third in the list, ahead of standard forms produced by several well-known publishers, suggests there must be a significant number of jobs where the participants conclude that a special arrangement is needed to reflect their requirements.

Another finding from our previous three surveys, that a small percentage of respondents never sign their contract documents, remains disappointingly true on this occasion. This may just be down to carelessness, but could also be due to the parties not agreeing the terms, which will inevitably lead to confusion.

Likewise, there are a number of trends that have been identified through this and previous NBS surveys when it comes to legal issues and disputes. Almost irrespective of the form of contract used or the value of the work, problems tend to centre on contract administration, variations, and the poor supply of information. Significantly but perhaps not surprisingly,

each party tends to blame the other for these failings, which is fairly obviously the inevitable source of dispute. It seems a combination of these problems is at the root of all issues in one way or another, but it is probably equally simplistic to suggest they can all be easily resolved.

What can surveyors do to avoid disputes? On the face of it the answer appears straightforward: better communication, collaboration, quality of information and contractual processes. With incremental change, results can be improved. The finding that contract administration represents a problem suggests that existing procedures are not being followed, but there is no clear indication as to whether they are being wilfully ignored, or whether it is simply a result of poor understanding or a need for improved training. One obvious solution is that a better and clearer comprehension is required of the roles and responsibilities of everyone in the team; this should avoid duplication and increase efficiency.

The advent of BIM and similar technologies will certainly mean that information is more structured and easily accessible. It should be more easily transmitted and handled, with some tasks routinely automated, leading to greater accuracy. With better understanding, processes, techniques and clearer information, it can only be hoped that relations between all parties will improve and there will, ultimately, be fewer disagreements. Otherwise, we can always retrain as mediators.

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Further information

- Related competencies include: [Conflict avoidance, management and dispute resolution procedures](#) ; [Procurement and tendering](#)
- This feature is taken from the [RICS Construction Journal](#) (February/March 2019)
- Related categories include: [Contracts](#)