

Duty of care and contractual agreements in architecture



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Section 1

1. Clearly explain what particular requirements must be in place for a Contract to exist between two parties?

For a contract to exist between two parties there must be evidence of three key principles.

- An intention between all involved parties to form a legally binding relationship.
- A consideration (usually monetary) for the agreement.
- The offer and acceptance of the stated agreement.

The intention of a legally binding relationship from each party must be formal; a moral obligation alone is insufficient. As such, articles such ' The Memorandum of Agreement' outline the requirements of parties when intending to enter a contract.

For a contract to exist the promise must be enforceable with a consideration. It is the party who provides this bargain who enforces the contract. Once a consideration is provided, all parties are drawn into privity of contract. The consideration is decided by the parties involved and the level of adequacy is irrelevant, it must be offered and accepted for the agreement to mature into a contract. As such, an offer without an acceptance is merely a pre-contractual agreement, not binding in law. In any case, for a contract to exist all terms of the offer must be accepted and a consideration provided.

However, there is no requirement for a written document for most types of contract. An oral contract is legally binding providing there has been

acceptance of an offer. From a legal stand-point, difficulty can be avoided if documentary evidence is provided of an agreement. The 'four corners' rule allows a contract to be recorded and subsequently is easier to enforce in law.

2. Explain what is meant by the term 'Duty of Care' and what are the implications upon the architect?

A duty of care is a legal obligation in tort law imposed on the Architect requiring they exercise a standard of reasonable care and diligence whilst carrying out professional work that could foreseeably harm others. Any failure in an Architect's duty of care can result in an action in negligence where they become liable in tort law. Furthermore, a duty of care is also applicable in agency outside of any contractual arrangement.

It is not required that a duty of care be defined by law, however, it often develops through the jurisprudence of common law. In this respect, a duty of care can be interpreted as a formalisation of the social contract and implicit responsibilities of the individual towards others in society.

It is an ARB requirement that Architects adhere to the established standards of the profession and 'exercise due skill, care and diligence,' whilst carrying out professional work within agreed time-frames and without unnecessary delay.

For a duty of care to be breached, the following must be true:

- Harm must be 'reasonably foreseeable' of the defendant's conduct.
- A relationship of 'proximity' between the defendant and the claimant.
- It must be 'fair, just and reasonable' to impose liability.

3. Explain the term ' Joint and Several Liability' and how does it impact upon particular forms of architectural Practice?

Under Joint and Several Liability, a client may pursue an obligation against any single party as if they were jointly liable. The responsibility then passes to the defendants who must establish their respective percentages of liability and monetary payment.

Therefore, if a claimant pursues a single defendant and receives all the damages, that defendant must then pursue the other libelous parties to obtain contributions proportionate to their share of liability. Joint and Several liability is most relevant in tort claims and most often invoked in cases of negligence.

Architects seek to establish a clear and properly defined agreement with specific reference to the understanding and expectations of the client. These agreements provide an assured basis on which the commission can be undertaken. Furthermore, the chosen form of appointment will determine the limit of the Architect's liability and accountability.

Architects also seek to limit their risk and liability through their chosen form of architectural practice. For Example, Limited Liability Partnerships and Companies cannot be jointly or several liable with its members liability determined by their stakehold in the partnership or shareholding in the company.

4. Explain what is meant by the term ' Lean Construction'.

Lean construction is a method of designing production systems to minimize the time, effort and material waste of a project to generate the maximum amount of value. The process itself is derived from the 'lean production system' within the manufacturing industry. It is fundamental that the production system is designed through a collaboration of project participants (Client, Architect, Engineer, Contractor, Building Owner) at the earliest stages of the project. It is based on the premise 'that desired ends affect the means to achieve these ends, and that available means will affect realized ends.'

The principles of Lean Construction are as follows:

- Allow value to flow by systematically removing obstacles to value creation and dispensable processes that create no value.
- Optimisation of the system through collaboration and systematic learning.
- Priority on delivering the Client/End-user/Building Owner's expected value.
- Creating Pull Production.
- The pursuit of perfection/continual improvement, involving everyone in the system.

Lean construction supplements traditional construction management by considering material and information flow, focusing on the enhancement of the production system's value generation. Therefore, a project using the Lean Construction method should:

- Deliver maximum functionality.

- Benefit end-users with the lowest optimum cost of ownership.
- Eliminate the inefficiency and waste in the use of labour and materials.
- Involve specialist suppliers in design from the beginning to achieve integration and buildability.
- Establish performance and improvement achievements by measurement.
- Use a single point of contact for effective co-ordination and clear responsibility.

5. Explain and define what is meant by a Letter of Intent. What are the circumstances under which it may be issued, what may be its objectives and what are the principal matters that it should contain?

A Letter of Intent is a document that outlines an agreement between two or more parties before the agreement is finalised. They resemble written contracts but are not legally binding for the parties involved. However, letters of intent can contain provisions that are legal binding such as a covenant to negotiate in good faith, non-disclosure agreements and stand-still provisions that promise exclusive negotiation rights. It can also be interpreted as binding if it resembles a formal contract too closely.

Therefore, the letter of intent is enforceable by the courts both in terms of the remuneration and the act.

However, the letter of intent is not a contract; instead it is a unilateral agreement in which one party confirms an intention to enter a contract with another party. Most importantly, it must contain an instruction to act and confirmation of a consideration as payment.

Letters of intent are usually issued to:

- Clarify the nature of complex transactions for the convenience of the parties involved.
- Provide safeguards in case of collapsed negotiations.
- Officially declare interest or intent.
- Allow work to continue quickly based on trust.

Architects mainly use letters of intent for the purpose of negotiation. For example, following the first stage of tender, a letter of intent may be issued to inform a contractor of their approval based on their proposal. The contractor can then contribute to the design before the second stage of tendering by providing detailed pricings and an overall building cost. Once the second stage of tendering is complete, a formal contract can be established between the parties.

6. What are the principal factors that determine the choice of a particular contract form?

To determine the most appropriate contract form, the Architect and client must first consider the priorities of the project in terms of time, cost and quality. These three factors are linked through a trade-off paradigm:

- Time results in increased cost and decreased quality.
- Cost results in increased time and decreased quality.
- Quality results in increased cost and increased time.
- They are all related and inter-dependant.

If time is the priority, then the procurement method must allow sufficient time to consider all of the design issues properly at the pre-contract stage.

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The client is afforded predictability and additional time can be saved by allowing the contractor to resource their own materials, effective management, real-time planning and overlapping detailed design phases with actual construction.

If cost is the priority, then a financial limit must be established that a contract sum cannot exceed. Certainty of cost is dependant upon comprehensive design, drawings and specification that accurately assesses cost at the tender stage.

If quality is the priority, the issue and degree of quality in the finished building must be clearly defined and established from the outset through a specification. Also, the measure of quality must also be defined.

The choice of contract type is also directly related to the chosen type of procurement. Each type of procurement type uses standard contract forms that are known and accepted by the industry. Most architects choose to use these standard forms as they are comprehensive, address common construction situations and take account of current legal decisions. Factors such as the complexity, size and overall value of the project may also inform the procurement route or contract type.

In all situations the Architect as the lead consultant has the duty to advise the client of the long-term implications of their decisions.

Section 2

The Design and Build process of procurement has been endorsed by the Public Sector as the preferred procurement option, on the basis that it is

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claimed that it offers certainty of contract sum and brings certain cost benefits. Consider and discuss the merits or otherwise of this approach in comparison with the Traditional method of procurement with particular reference to the role of the architect. (70 marks).

Design and Build is a procurement method for project delivery whereby an individual contractor is contractually responsible for both the design and construction of a project. In recent years, the public-sector has moved towards Design and Build as the chosen procurement path as opposed to the traditional, three-party arrangement where design and construction are separately contracted. The public-sector's interest in Design and Build can be attributed to several potential benefits that are not always obtainable through alternative procurement methods. The following points outline the advantages.

The Design and Build procurement route provides a single source of responsibility as the contractor is singularly responsible for any defect in both the construction and design of the project. This is of particular benefit to the building owner or client, who does not have to define whether such defects are brought about by a deficiency in design or construction. Instead, the contractor is jointly and severally liable for the complete works. In a traditional contract, it is the client who must first determine the nature and cause of a problem, before deciding whether it is the designer or contractor who is at fault.

Design and Build is also a popular route for the public-sector client as the contractor is obliged to bear any additional cost that results from inadequate

or defective plans provided by the design team. In a traditional contract, the client warrants the sufficiency of the plans and as such is liable for any increased cost because of inadequate design. In the Design and Build contract, it is the contractor who is responsible for the project's design as well as the construction. They are hired to meet the client's specific performance specifications rather than merely construct the building as in the traditional contract procurement. Hence, if the plans are inadequately drafted or designed, the contractor is unable to seek compensation from the client.

It is widely recognised that Design and Build contracts enable a project to be completed within a shorter time-period than the traditional three-party arrangement. The interface between the designer and contractor, often adversarial in the traditional method, can become more open and hence foster a more co-operative arrangement and exchange of ideas that can make the project a faster process. Time savings are also made by 'fast-tracking' construction of known elements before the specifications and drawings of unknown elements are complete. The phased-nature of the design essentially allows work to commence on site whilst the later phases of the project are still being designed. The same time-savings are unable to be made within a traditional contract as the contractor does not usually even submit a tender, let alone start work on-site, before the design and drawings of the Architect are finalised. The responsibility for meeting local controls such as planning, bylaws and legislation is placed with the contractor, which usually results in increased efficiency.

The phased nature of the Design and Build method also allows the contractor to have increased control of the project and can result in lower costs for the client. The specific control of detailed design enables the contractor to use familiar construction methods and materials which increase the efficiency of the build process. By staggering the construction process, the contractor is able to order materials for upcoming phases, ahead of time and at a lower cost. The savings made on labour, materials and time are all passed on to the benefit of the client.

It is considered that the Design and Build method reduces the requirement for independent professional representation. Public sector clients often prefer to limit the number of ' points of contact' to restrict the amount of time, effort and in-house staff it requires to undertake a project. Often it will use Design and Build in conjunction with privatisation, whereby it contracts an independent party to undertake responsibilities previously held by the Government, such as land acquisition, project finance, design, construction, operation and ownership. This method, in its most complete form is represented by the turnkey and package deal options, whereby the client is uninvolved for the majority of the project and presented with the completed building.

However, it is desirable to have an independent third party (usually an Architect) for the purpose of quality control. Without a third party, the contractor, who is hired to complete the project promptly and economically, also has the task of assessing the quality and quantity of its own work.

Hence, the contractor has a potential conflict of interest and is likely to reduce quality in order to satisfy the client's other requirements. With the <https://assignbuster.com/duty-of-care-and-contractual-agreements-in-architecture/>

presence of a third-party, the client/owner's interests are represented during the design and construction.

Clients choose Design and Build contracts as usually a fixed price and contract sum can be negotiated. The client specifies the maximum price it is willing to pay for the project before it solicits a proposal from the Design and Build contractor for its specifications, configuration and materials. However, difficulty can arise when there is an increase in the cost of work and construction. The contractor can sometimes abuse the situation by recouping costs in other areas of the project and without a third party, the client finds it far more difficult to detect and control such situations than in a traditional contract form. Therefore, most Design and Build contracts are lump-sum and fixed price, but payments are completed on a cost-plus basis to facilitate potential increases in cost. Also, payments tend to be dependant on the achievement of project milestones. This allows the contractor's progress to be measured and assessed by the client, allowing easier negotiation in terms of compensation where costs have significantly increased under a fixed-price contract.

However, the Design and Build route is not without potential problems. Many architects, clients, building owners and contractors have varying opinions about the successes of this procurement type. The following points are amongst the potential disadvantages to using Design and Build in the public-sector.

If a public-sector client chooses the Design and Build procurement path it is difficult to actively compare preliminary proposals from multiple contractors.

The contractor is only responsible for satisfying the client's performance specification; therefore the designs may be wide-ranging in aesthetic and prioritise different issues depending on the contractor's individual stand-point. As in the turnkey approach, the client or eventual building owner has little input into the design and final appearance of the building and as such, may be unsatisfied with the result. Also, as the contract is entered into by negotiation rather than competitive tendering, the client may not always achieve the lowest cost for the building. Therefore, unlike the traditional route, if a client wants to attract multiple preliminary proposals, they must provide an individual consideration for each contractor that submits a design package. This is a cost often overlooked in debating the value of Traditional vs. Design and Build procurement, as these fees are separated from the contract sum in the case of Design and Build.

Another problem with tendering a Design and Build contract is the potential for the building to become a competition in under-design. Contractors will seek to meet the client's outline requirements whilst sacrificing quality, life-span, ease of maintenance, and value in a bid to offer the minimum price. In placing responsibility for both the design and construction in the contractor's hands, the client forfeits control. Therefore the client has little input in assessing sub-standard work, claiming for variations, debating extensions of time or even using a termination clause due to excessive delay.

To combat against this, it is again advisable to use a third-party design professional who can check the value and realism of the tendered bid.

However, the monetary and time savings inherent to Design and Build contracts then become nominal as the time-period and expertise needed by <https://assignbuster.com/duty-of-care-and-contractual-agreements-in-architecture/>

the third-party to check the work of the contractor is both expensive and time-consuming. Such a third party can be appointed independently by the client, or be appointed through consultant switch or novation if they are the original designer/design team. Also, contractors seek to recoup the outlay of unsuccessful tenders with their successful tender's; therefore, the client will always pay a small premium for the work of their chosen contractor.

Another disadvantage to the Design and Build arrangement is the difficulty of obtaining long-term contractual protection in terms of the suitability of the work. Many contractors use contracts where such insurance is prohibitively expensive and resultantly, commercially unviable for the client. Therefore, it is the client's responsibility to be aware of the extent of coverage of the contractor's liability insurance. In the event of a defect in the design or construction of the project, the client may be unable to recuperate anything if the contractor's insurance coverage or assets are insufficient to pay compensation, regardless of whether liability can be determined. Public sector clients often choose the Design and Build procurement route as the available financial resources of a contractor are normally greater than that of the professional individual or architectural practice, in the event of a post-completion failure.

A potential problem with liability can arise when the Design and Build contractor hires an Architect as a sub-consultant. Most contractors' professional indemnity insurance does not cover damages caused by defective design or specifications prepared by the Architect. Conversely, the Architect's professional indemnity insurance does not cover damages caused by defective labour, materials or operations during the contractor's

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construction process. Therefore, the contractor offers a warranty for an agreed (but usually limited) time-period based on the notion of negligence.

However, the commercial and financial pressures of the Design and Build contract compel the contractor to essentially under-design the building as far as possible making failures within the building an increased likelihood. As a result, there is often a need for litigation to define whether the economy of the project surpasses the expected level of professional responsibility at the time of design and construction. Therefore in order to protect their building, the client should seek to obtain a warranty that guarantees the completed building is suitable for its intended purpose, regardless of defects incurred by the contractor.

In the public sector, Design and Build contracts are usually awarded on subjective criteria such as value, experience and qualification. The public sector in particular has developed contractor evaluation and selection policies that try to mitigate against the risk of such subjective judgments. In many cases this is achieved by awarding contracts based on a point-scoring system with the highest scorer being appointed. However, this discretionary points system implemented by public managers offers little objectivity in determining the adequate point allocation for individual elements of the proposed scheme. For instance, there is hardly any way to decide whether one contractor's foundation system warrants 20 points or a different contractor's warrants 22, it is completely subjective. Also the criteria used for marking generally do not relate to the specific building type, therefore analysing a contractor's qualifications and experience presents a measure of competence but does not guarantee a successful project outcome. There is <https://assignbuster.com/duty-of-care-and-contractual-agreements-in-architecture/>

also difficulty in reasonably comparing alternative design proposals in an effort to determine which represents the best value. For example, some contractors may offer higher quality plumbing whilst others offer better electrical systems. Therefore it is impossible to draw reasonable conclusions from dissimilar bids in terms of which proposal offers best value. Often, value can only be determined after the building has been completed.

In conclusion, public owners look for procurement systems that meet the needs of the public whilst mitigating against legal problems and reducing administrative burden. The public-sector has favoured the Design and Build approach as the client can guarantee a total fixed project cost early in the process and the building can be constructed in a shorter time-period with more efficiency than other procurement systems. The contract type also allows an exploration of new solutions through an open dialogue between architect and contractor, in which the public benefit from the innovation and lower costs. As a result, the public-sector's involvement with Design and Build has increased over recent years.

Fundamentally, the public requires its construction projects to be durable, environmental, functional and most importantly, fit for purpose. At the same time, it expects the government funded projects to represent good value and be economic in nature. Therefore, the public itself has little involvement or interest in which procurement system is utilised, however, they expect each project to fulfill its stated requirements within its allocated budget. It is the view of the public-sector, that Design and Build is the system best equipped to meet the public's expectations and provide the most transparent value for projects that are ultimately funded by the tax-payer.

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