FINISHES & INTERIORS SECTOR

Welcome to the FIS Regional Meeting

Angela Mansell
Mansell Building Solutions
FIS Chair North-West Region

Welcome

Programme

- **Welcome: Angela Mansell, Managing Director Mansell Building Solutions**

- **Introduction and FIS Update– Iain McIlwee, FIS CEO**
  A quick update on FIS activities including headline findings from our Procurement Research

- **Better Contracting: Tendering, Bottoming out Risks and Learning when to say no Damian James, Damian James, Delay and Quantum Experts**
  A look at common challenges, how to set yourself up to avoid disputes, when to walk away and how to avoid conflict and disputes

- **Improving the Supply Chains Commercial and Contractual Management of Building Contracts Pat Loftus, Anderson Strathern**
  A look at how to review a contract, a look at design development and how to make best use of new Standard FIS Contracts

- **Open Discussion on Better Contracting**

11% of UK construction spend is on fit-out

Buildings may have 30 fit-outs during their lifecycle

FIS

Representing the finishes & interior sector

Ongoing vetting of contractors

Setting higher standards

Driving quality through a focus on

PRODUCT
PROCESS
PEOPLE

FIS helping deliver compliance and competence…

www.thefis.org

Building Safety Act: A New Compliance Environment

Building Safety Regulator: Implementation and Enforcement

- Building Advisory Committee
- Construction Products Regulator
- Committee on Industry Competence
- Residents Panel

Client | Principal Designer

Principal Contractor

Designer / Contractor

Accountable Person

Gateway 1: Planning

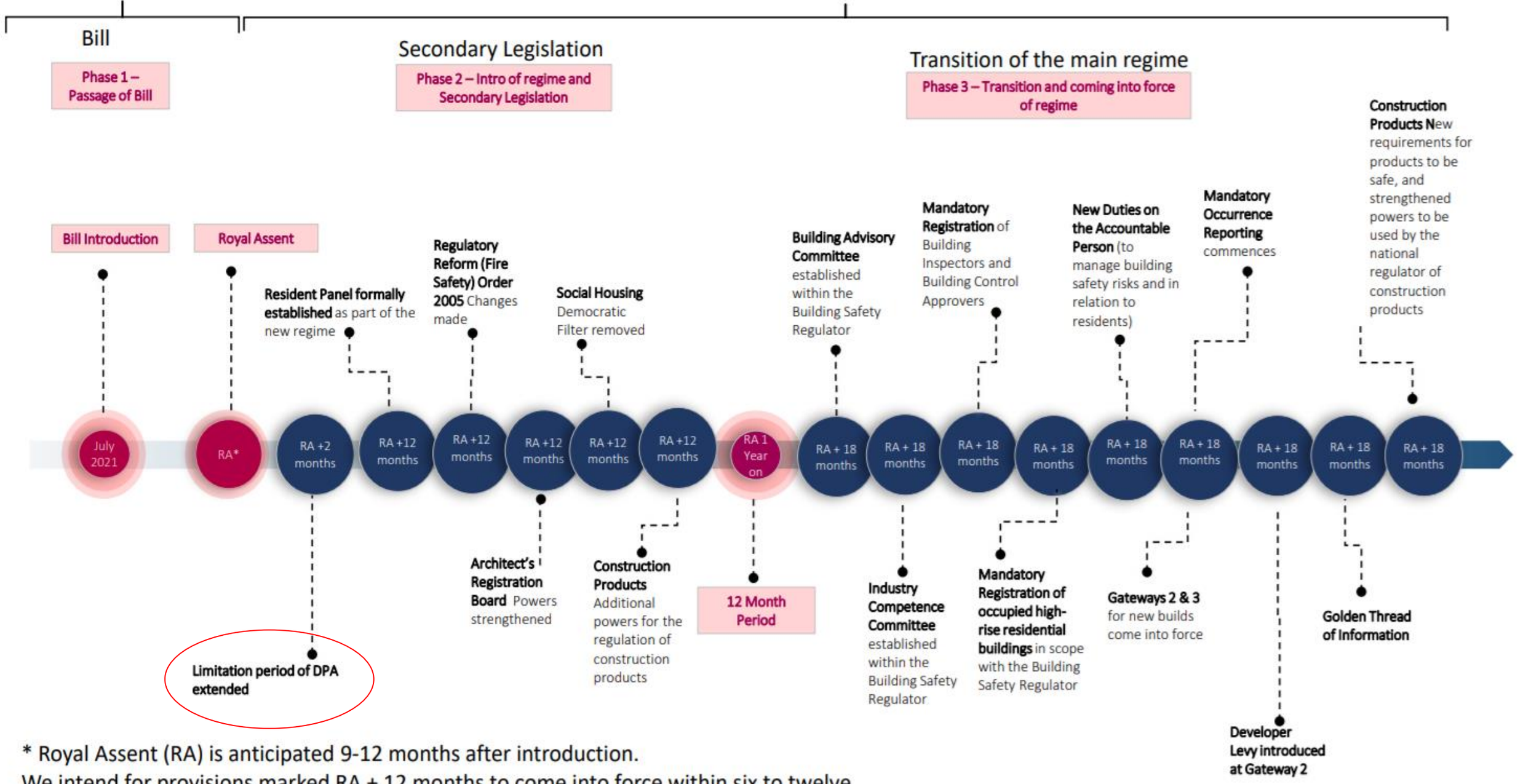
Gateway 2: Pre-Construction

Gateway 3 Pre-Occupation

Occupation Phase

Common data environment

- Planning Permission Application
- Building Control Approval Application
- Completion Certificate Application
- Building Safety Case and Assessment Certificate



* Royal Assent (RA) is anticipated 9-12 months after introduction.
We intend for provisions marked RA + 12 months to come into force within six to twelve months of Royal Assent.
We intend for provisions marked RA + 18 months to come into force within twelve to eighteen months of Royal Assent.

Building Safety Bill & Transition

Best time to ask manufacturer about product options

2

Concept Design

Advantages of drywall systems

Lightweight

Where drywall systems can be used

Performances achieved

Building regulations requirements

Client requirements

3

Spatial Coordination

Understand drywall system types available

Typicall wall zones for drywall systems (taking performances into account)

Simplifying design

Outline specification

Contact manufacturer to ensure specifications meet performances

4

Technical Design

Choosing the right drywall systems

NBS

Level of finishes

Structure, fire, acoustic (reduction, reverberation), mechanical

Design detailing - deflection heads, interfaces, noggin details, building performances to be achieved (HTMs, BB93, building regs etc), environmental considerations

Contact manufacturer for onsite technical support

5

Manufacturing and Construction

Drywall sequencing

Installation work of drywall systems

Consideration of drying times

Manual handling

Development of O&M

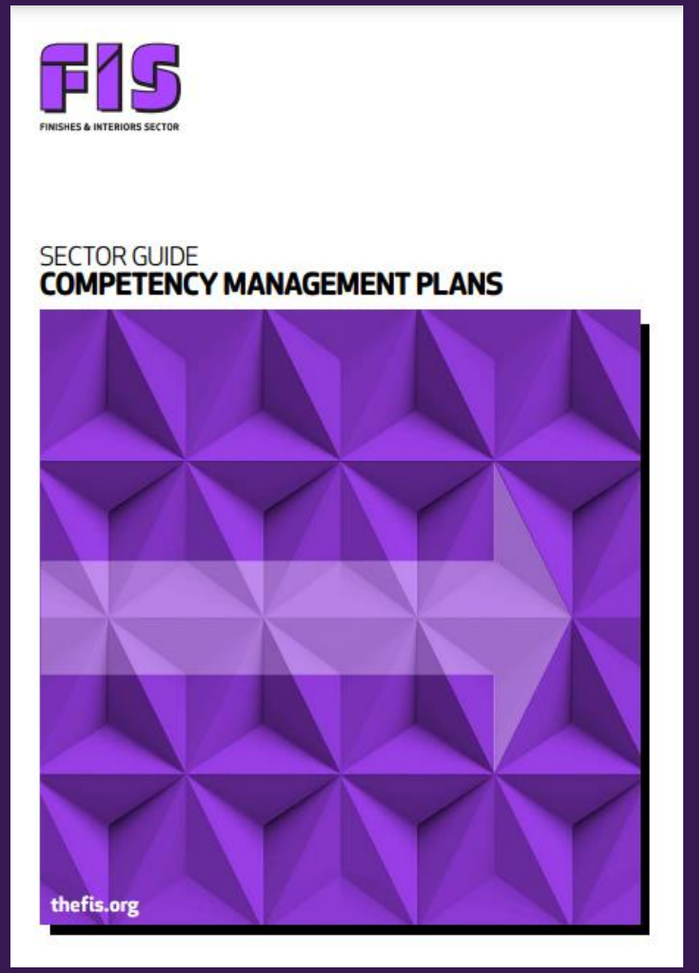
Regulation 38

Three gateways - Building Safety Act

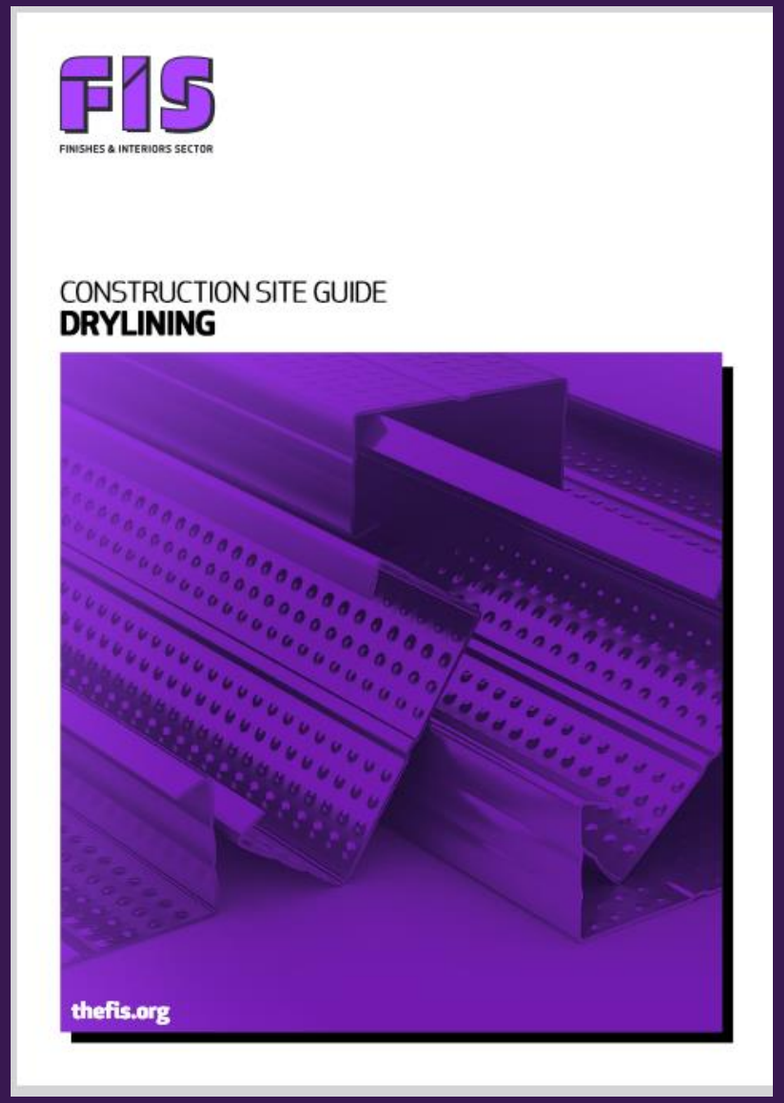
Considering Competence

PEOPLE

Skills | Knowledge | Experience | Behaviours



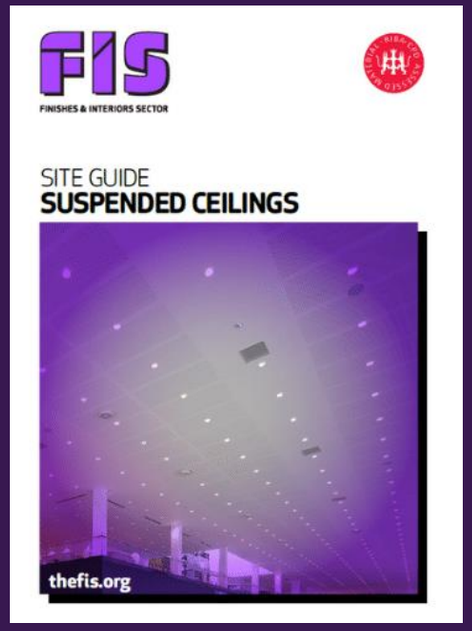
- DRYLINING TYPES AND PERFORMANCE
- DESIGN AND TENDER PACK INFORMATION
- FINDING A SPECIALIST CONTRACTOR
- DESIGN REVIEW
- PROJECT PLANNING



- DESIGN REVIEW
- PROJECT PLANNING
- PREPARATORY
- FIXERS' PACK
- QUALITY MANAGEMENT
- HEALTH AND SAFETY (INCLUDING WORKING AT HEIGHT)
- KEY AREAS OF NOTE

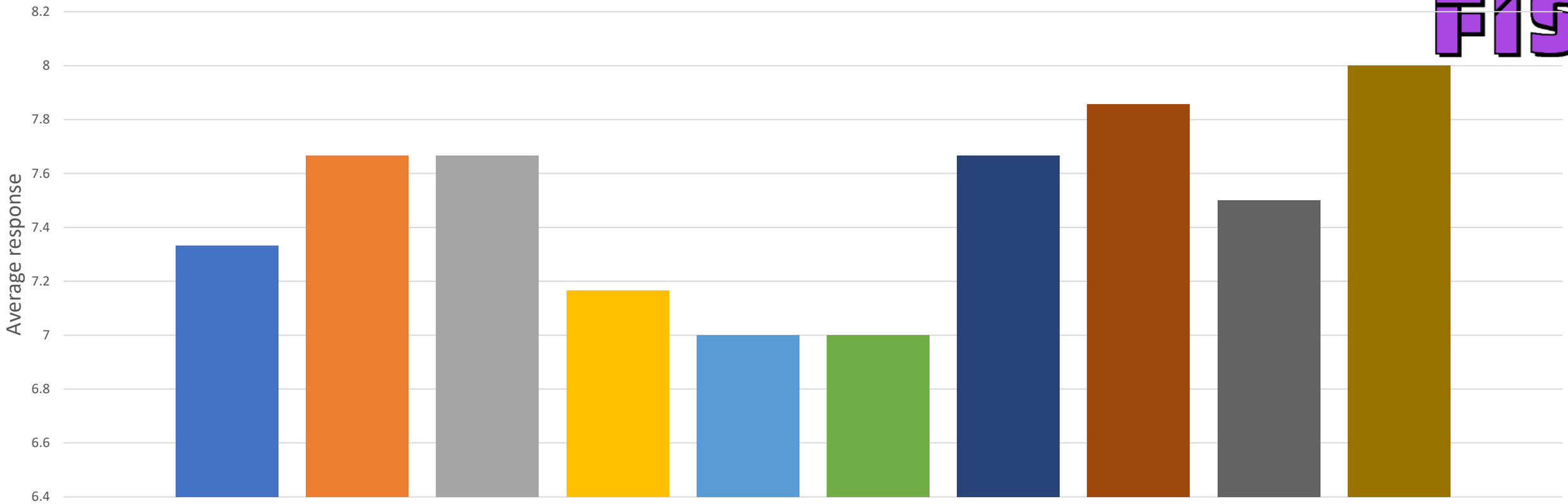
It’s about organisational capability

PRODUCT
PROCESS



A growing and evolving wealth of technical resources for and about our sector

Top 10 Rated Issues Regarding Testing



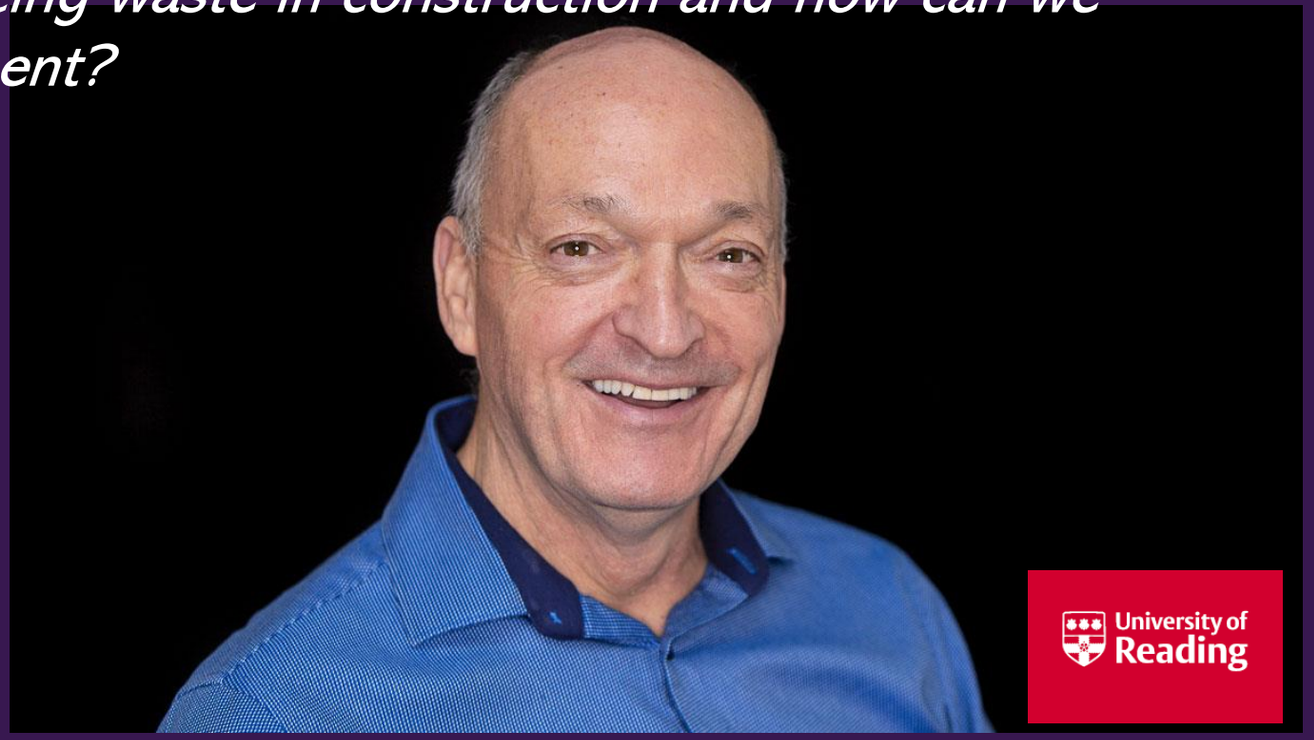
- Lack of data - fire rated duct penetration sealing
- Lack of data - fire damper penetration sealing
- Lack of data - smoke control damper penetration sealing
- Lack of data - flue penetration sealing
- Lack of data - service penetrations in composite/whitewall panels
- Installation access considerations
- Pipe and cable types/sizes beyond the scope of the test standards
- Structural steelwork interfacing with compartmentation
- Use of BS 476 tested supporting constructions with BS EN 1366 tested service penetration seals
- Combined (i.e., ducts or dampers in shared penetration seals with pipes and/or cables) penetrations

FIS

PFKG
Passive Fire Knowledge Group

Modern Methods of Procurement

Are the contractual and procurement processes being adopted across our sector hindering investment, stalling innovation and completely at odds with effective risk management, quality, safety and reducing waste in construction and how can we deliver better value through procurement?



Harnessing the collective voice: Data led change…

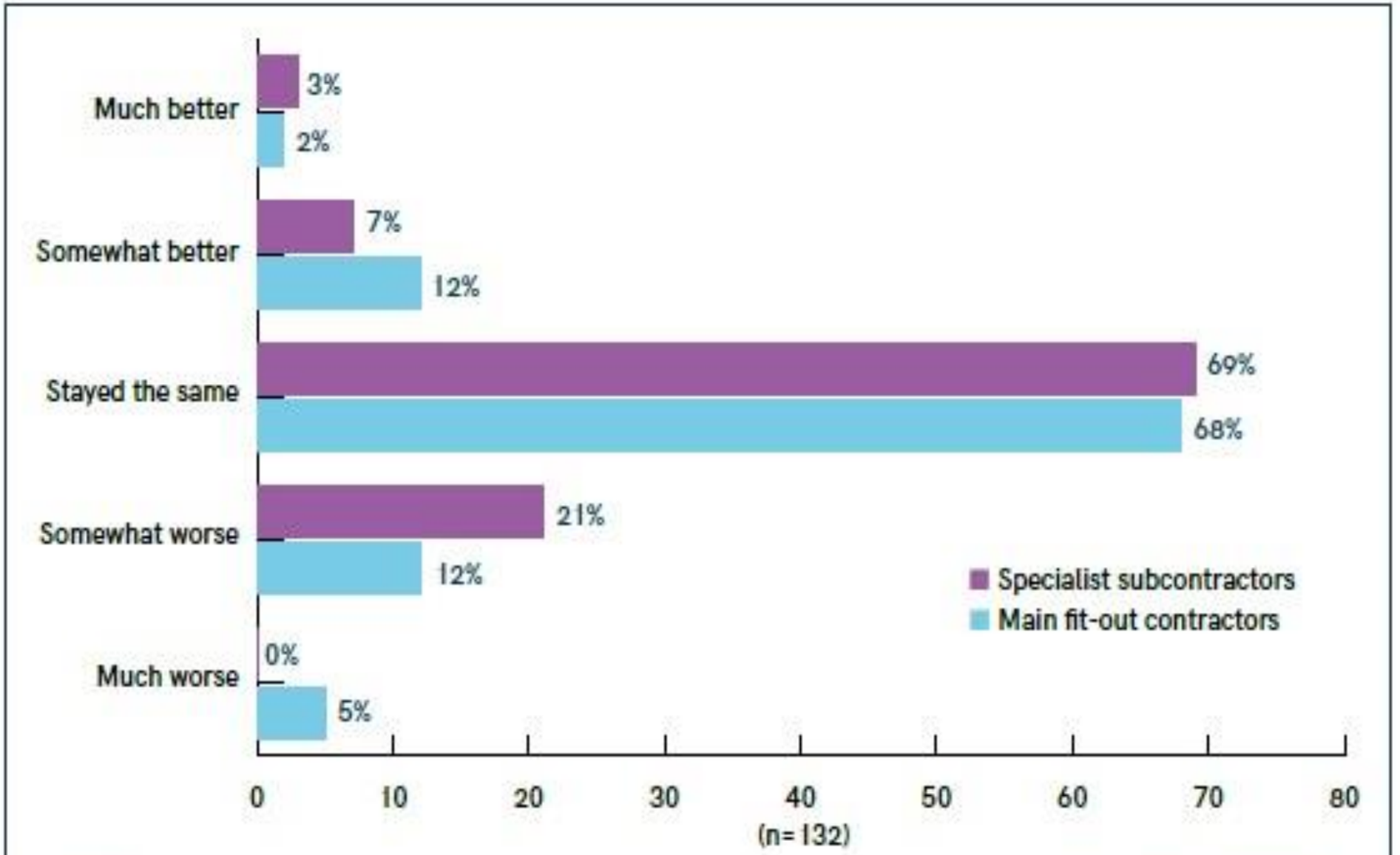


Figure 8.2

Source: University of Reading

Payment practices improving or getting worse?

Thinking about payment promptness, how do you think current payment practices compare to those of 12 months ago?

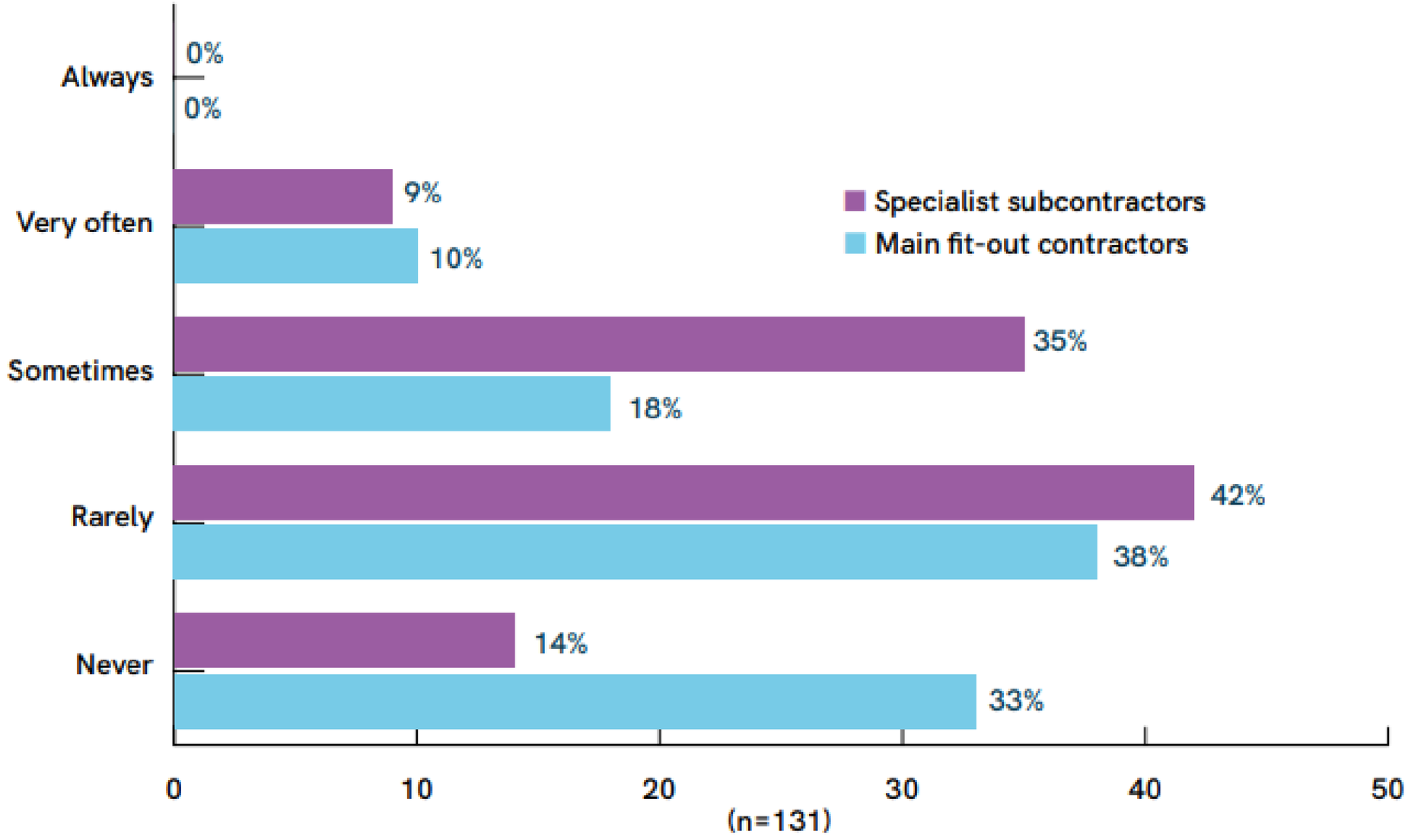


Figure 8.4

Source: University of Reading

Failure to recover retention monies

How often do you fail to recover retention monies to which you are contractually entitled?

Provision of legal advice

How often do you take independent professional legal advice prior to signing the contract?

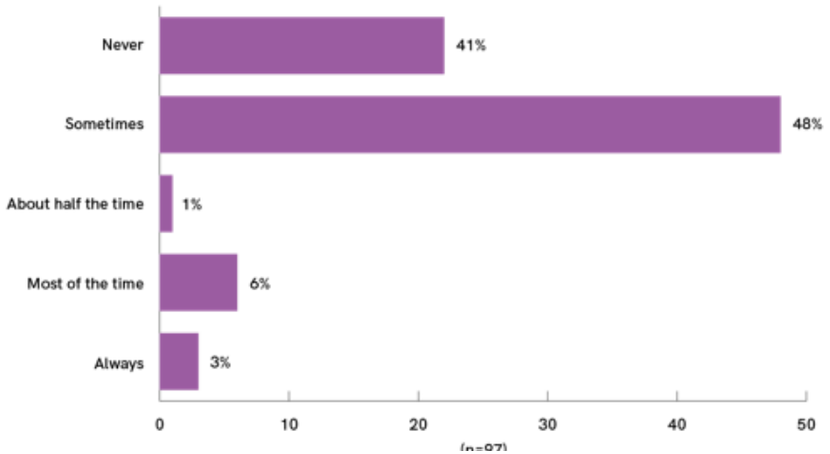


Figure 7.6

Formal signed contract

How often do you commence on site in the absence of a formal signed contract (e.g., on the basis of a letter of intent)?

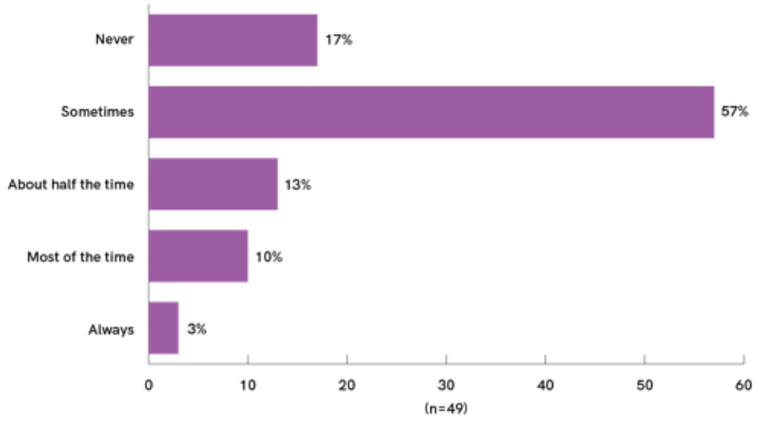
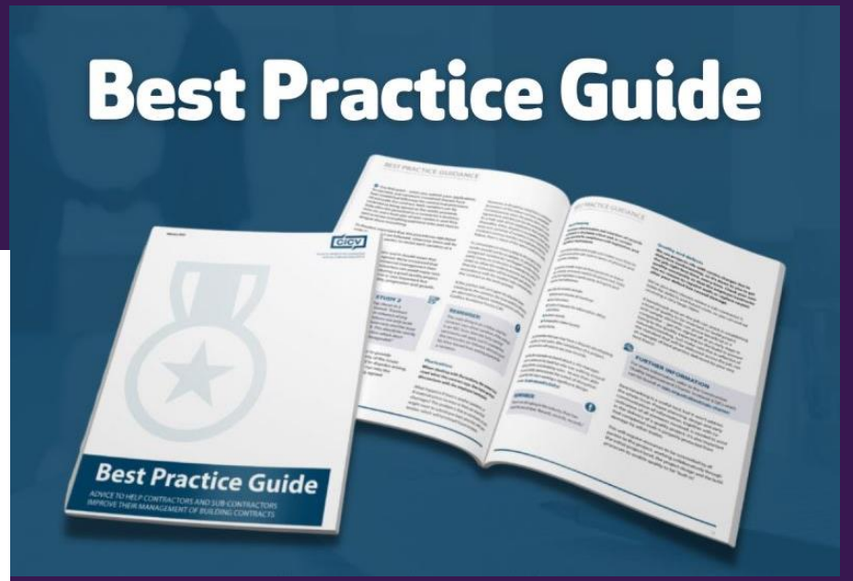


Figure 7.7 Source: University of Reading



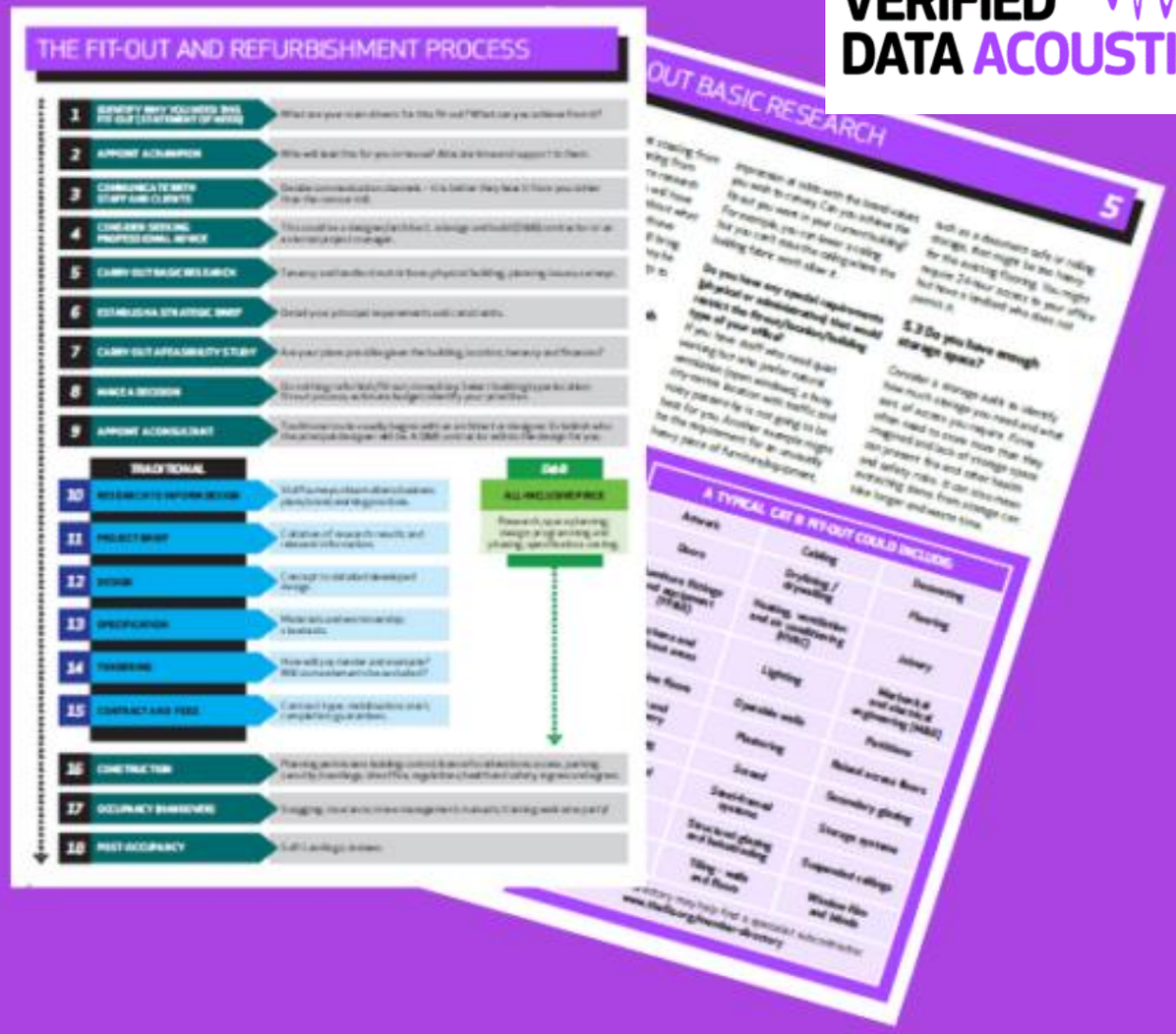
Conflict Avoidance Pledge

FIS

FINISHES & INTERIORS SECTOR

CLIENT GUIDE

OFFICE FIT-OUT AND REFURBISHMENT



FIS VERIFIED DATA ACOUSTIC

Helping our members manage competence and compliance...

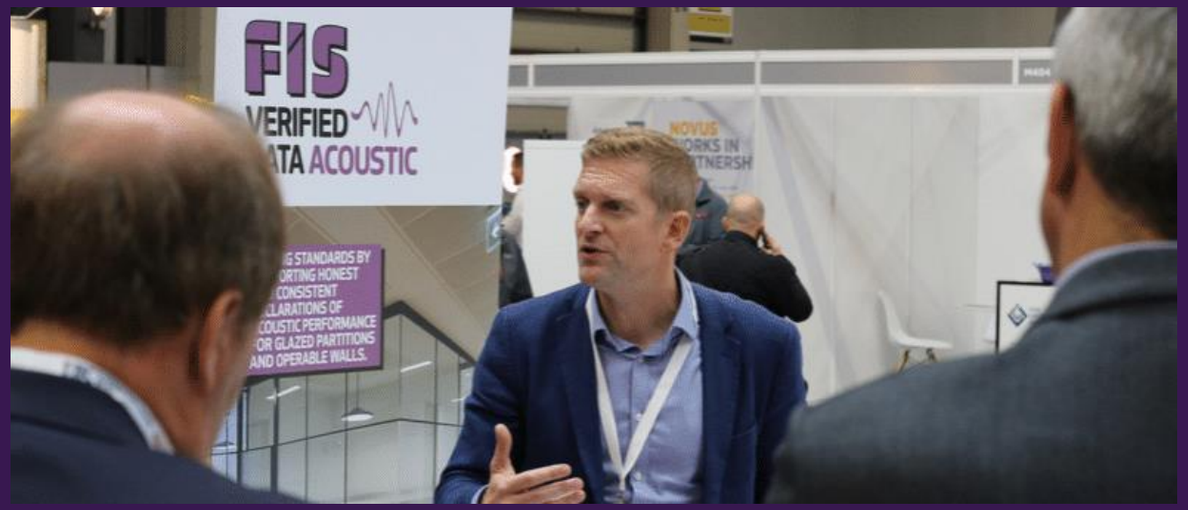
ACCREDITED MEMBER

FIS

Barbour ABI

NBS

A community built on values



Why use an FIS Member on your project

FIS
FINISHES & INTERIORS SECTOR

WHO IS FIS?

FIS is a not-for-profit trade body established to support compliance, improve safety and quality, minimise risk, enhance productivity and sustainability and drive innovation within the £10 billion finishes and interiors sector.

Quality is at the heart of all we do. We actively promote good practice in the sector to enable clients to achieve the high quality projects to which they aspire.

Part of our mission is to raise, maintain and ensure continuity of standards and to be a source of quality membership, giving specifiers peace of mind that the FIS member they engage will provide excellent service and results.

OUR MEMBERS

FIS has a membership approaching 600 contractors, manufacturers and distributors specialising in finishing operations including ceilings, SFS, partitions, plastering, drylining, joinery and complete interior fit-out and refurbishment.

Our members help transform structures into homes, schools, hospitals, care-homes, workplaces, hotels, leisure facilities, retail outlets and functional spaces.

Their work delivers critical fire protection, compartmentation, acoustic and thermal comfort as well as the aesthetic finish of the building works.

Their membership gives them access a comprehensive range of support centred on compliance, competence, technical standards and troubleshooting.

Examples of FIS Members work can be found in our Project Library

Kevin Dundas
MMC & Offsite Manager

WILLMOTT DIXON
SINCE 1852

"The team at FIS are fantastic and passionate about driving improvements within the industry. The closer you work with them the better your business will be."

WHY SPECIFY AN FIS ACCREDITED CONTRACTOR?

Membership is subject to strict vetting procedures built around the FIS PPP Quality Framework.

PRODUCT
PROCESS
PEOPLE

Membership of FIS is not automatic. Accredited members are vetted on application, and then every three years to ensure that they continue to meet the high standards FIS demands.

Ongoing vetting for contractors includes on-site assessment and as well as a range of financial and legal compliance checks.

The physical vetting process is supported by an Annual Declaration, our Disputes Resolution Process and Code of Conduct with sanctions possible in line with the FIS rules of membership.

Search our Membership Directory to find a vetted FIS Member.

0121 707 0077
www.thefis.org

assist. You can email them at info@thefis.org to see what additional support is available.

FIS
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FIS Acoustic Verification Scheme - It's about Integrity

FIS has teamed up with Cundall Acoustics to develop an acoustic test certificate verification scheme. The scheme takes test data and reports and runs a series of checks to verify information is accurate and genuine.

Finds out more

SUGGESTED EXAMPLE SPECIFICATION CLAUSE

The following clauses are recommended for use in appropriate specifications:

"Specialist Contractors selected should be accredited members of the Finishes and Interiors Sector (FIS) to ensure that they have been vetted against core industry standards and have access to the appropriate compliance and best practice guidance"

"Installation of [partitions, SFS, drylining, operable walls, ceilings] should managed in line with FIS Best Practice Guidance".

Martin Adie
Head of Quality

"FIS is a powerful force for change, not just for headline technical guidance (which is excellent), but the team are widely acknowledged to be driven, knowledgeable, keen to make a difference and most importantly get stuff done"

Balfour Beatty

0121 707 0077
www.thefis.org

FINISHES & INTERIORS SECTOR

Damian James

Delay and Quantum Experts

Manchester Event

"Better Contracting: Tendering, Bottoming out Risks and Learning when to say no"

Presented by:

Damian James

Delay & Quantum Expert

Damian James

Delay and Quantum Experts

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Services

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Dispute Resolution

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Arbitrations

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Expertise

Quantum

Forensic Delay Analysis

Claims and Disputes

Commercial

Planning

Sectors

Buildings

Civil Infrastructure

Energy

Process & Industrial

Mining

Marine

Geographical Experience

United Kingdom

Europe

Middle East

Africa

The Presenter

Damian James is widely experienced in engineering and construction claims and dispute resolution with wide experiences of contractors, employers and subcontractors, Damian crosses the divide between legal protocol and construction experience.

As a dispute resolver, Damian is commended on his ability to understand disputes early in the process and is regularly lauded on his clear and erudite discussions and written directions to the parties.

He has also undertaken expert determinations having been appointed in arbitrations and in adjudications. Damian has, on several occasions, given expert opinion evidence in the area of delay and disruption assessment and quantum / cost evaluation.

Qualifications

- BSc (Hons) Quantity Surveying
- LLB,LLM

Professional Membership

- FRICS
- FCIArb
- FAArb
- FPD
- FCABE
- MCIOB
- MCInstCES
- MAE

WIFM?

- What's in this for you? What will you take away from another expert speaking about your business?
- Quite possibly nothing as you already manage risks and have the ability to say no to bad tender conditions.
- Alternatively, a better understanding of what the conditions are saying allowing you to understand the risks you are contracting to or alternatively helping you say no to bad terms.
- Your own personal experiences of this subject can be drawn on and you may now recognise the key triggers to risk awareness that apply uniquely to your business.
- Importantly though what you should recognise is that you are not on your own and that the marketplace is beginning to change and that it is your business, that you want to be at the forefront of those opportunities that arise from change.

What might we see in the future?

Crystal ball approach

- In the last few years price increases have been at the forefront of construction contracts and those who entered into fixed price contracts have suffered the most.
- A future where price fluctuations and escalation ought to become the norm is where your business needs to be.
- Equally the provision of advanced payment is another key development in the world of collaborative risk sharing.
- These changes will only come about by the industry leaders, the subcontract businesses, being able to say not to terms and conditions that cause a risk imbalance.

Examples and narrative

- The tender process and the agreement that culminates with a subcontract includes the original terms and conditions, the agreements in the prestart minute and then the issue of a document that includes a variety of numbered documents imposing the standard terms and conditions of the contractor.

- In the tender process, the contractor sets down his requirements for your offer, at this stage there is no necessity for you to accept any of these terms and you could simply respond by stating that you will contract on the standard terms of the JCT or the NEC.

- The contractor's purpose of changing conditions is twofold, firstly they may need to reflect the specific conditions that have been imposed on them by the employer and secondly, they may want to shift certain of the risks to the subcontractor.

Examples and narrative (Continued)

- There is no reason for the subcontractor to accept either proposition.
- In what is fundamentally a negotiation process both parties are free to contract on whatever terms they wish.

The Risks

- We often talk about the triangle of time, cost and quality and the risks associated with them.
- The general view that I have on risk is that the risk is best addressed by the party who is best able to deal with the risk:
- For example;
  - The installation of statutory works such as electricity and water is employer owned and should not be transferred to the subcontractor.
  - The design of the works in traditional forms of contract should be managed and the risk accepted by the employer.
  - The specification for the works ought to be a risk addressed by the employer in a traditional form of contract.
  - Therefore, the subcontract should start with a balanced approach to risks

- Let's consider a set off clause which may read like this…
- The main contractor may deduct the following amounts form any progress payment or security owing to the Subcontractor under the subcontract

    a. Any debt the subcontractor is to pay under the subcontract;

    b. Any cost, loss or expense the Main Contractor (or its related entities) may become liable for as a result of an act or omission of the subcontractor;

    c. Any amount the subcontractor owes, is likely to owe, or the main contractor (or its related entities) claims against the subcontractor under any other agreement;

    d. Any amount which the main contractor (or its related entities) claims it likely to incur, including without limitation, any claim in damages, restitution, equity or otherwise;

- The contractor at this point tells you that all the other subcontractors have agreed to the set off clause.
- I expect that we would all agree that deciding how much risk your business can accept based on how stupid the other subcontractors are is not a sensible approach to this clause.
- So, if we dilute what the contractor is saying to the subcontractor then this may be a better way of understanding the clause:

- The main contractor will deduct the following amounts from any progress payment or security owing to the Subcontractor under the subcontract

    a. Any amounts that the contractor has incurred due to the subcontractor's default;

    b. Any amounts that the contractor alleges could be owed even if they haven't incurred a cost;

    c. The contractor's related companies can deduct money from the subcontract also;

    d. The contractor can deduct money for any issues on another contract on a different project whether incurred. This would result in deductions on all your subcontracts with the contractor.

The only aspect of this clause that could ever be correct and fair is that the contractor can recover costs that have been incurred due to a default or breach of contract by the subcontractor.

- Another favourite of mine is the young QS or assistant site manager who is compiling the pre-start minutes and states ‘the programme period is 40 weeks because there are 20 floors and it takes 2 weeks per floor’ before inking this into the contract terms.
- I have been that young qs and have seen so many people allow me to ink a guess at duration into the subcontract.
- Today I would be expecting to see a programme with constraints included and dependencies identified.

- But at that point in time it may be a reasonable estimate but without knowing the current design status of the project, the approvals outstanding, the access requirements and other issues it is only an estimate.
- There are so many factors that must be placed into the context of the contract period or duration, and they must be considered with regard to the whole of the circumstances surrounding the works.
- The key issues here are the criticality of preceding trades and design completion, the date of a design freeze ensuring there are no further changes to the works.
- In many subcontracts the design of the works is an ongoing process that takes place during the works installation and often results in the subcontractor not receiving any additional time for their installation.

- Then of course there is the critical path and the entitlement to an extension of time that only arises if the event causing delay sits on the critical path.
- Whose critical path are they talking about? The main contractors? The subcontractors?
- Often there are a whole variety of parallel critical paths taking place in the different elements of the works.
- If you are understanding the critical path as your critical path and the contractor is understanding the critical path as their critical path then there is an immediate conflict which places a risk on the subcontract performance.
- Often trade contracts sit within an IMS (integrated management programme) and it is the critical path of the IMS that must be affected in order for the subcontractor to receive an extension of time, but in the normal course of events the IMS is not shared with the subcontractor.

- But even to get to that point is often by navigating a trip hazard of risks within the subcontract;
- I have taken these clauses from live subcontracts that I am engaged in in dispute proceedings, the big challenge that I am faced with is that my clients accepted and signed these terms leaving me with a high bar to overcome;
- The first issue was coordination of the works which the contractor somehow managed to shift to the subcontractor with the following clause;

"The Sub-Contractor shall provide to the Contractor such information as the Contractor may require to co-ordinate the Sub-Contract Works with the works of other contractors employed under the Main Contract. The Sub-Contractor shall be responsible for co-ordinating the Sub-Contract Works with the works of the Contractor, its agents and sub-contractors and any other parties on the site. Such co-ordination shall include but not necessarily be limited to design (where applicable), programming, sequence of works, checking of levels/setting out/ dimensions/adequacy of preceding works, installation and health and safety. The Sub-Contractor must notify the Contractor immediately if he identifies works being or having been undertaken by others under the Main Contract that may not be in accordance with drawings, specifications or the legislative requirements of the Main Contract works."

"Without prejudice to clause 7.1, the Sub-Contractor shall indemnify the Contractor from and against any and all expenses, liabilities, losses, claims, and proceedings resulting from any failure or default by the Sub-Contractor in performing its obligations under clause 8.1 which results in any delay to the Sub-Contract Works or any element of the Main Contract works."

- In my view, and this contract wasn't limited to who it was issued to, then this clause is not wholly workable as many subcontractors will only know of the immediate constraints caused by the preceding trades not being ready but will not necessarily now why they weren't ready or what caused them too not be.
- The subcontract didn't stop there though it went on to say:

"The Sub-Contractor shall satisfy itself that any work carried out on the site by any party prior to the commencement of the Sub-Contract Works or any parts thereof (the "Preceding Works") are suitable before commencing the Sub-Contract Works or any part thereof and after commencing the Sub-Contract Works or any part thereof the Sub-Contractor shall have no claim against the Contractor whatsoever in respect of the state or suitability of any Preceding Works if using reasonable skill and care a competent contractor ought reasonably to have discovered or noticed the Preceding Works were not in conformance or suitable."

- Rather kindly the contractor even included the words:

> *"the Sub-Contractor shall have no claim against the Contractor whatsoever in respect of the state or suitability of any Preceding Works if using reasonable skill and care a competent contractor ought reasonably to have discovered or noticed the Preceding Works were not in conformance or suitable."*

- When we consider weather and the risk of humidity, water ingress within the finishes sector it often gives rise to the lifting of board to avoid standing water, the building of metal only until the boards can be fixed etc.

- In many subcontracts though the rights for any additional costs arising from such are removed or by clauses such as;

> *"Where the Sub-Contract Works includes the provisions of materials likely to be affected by atmospheric conditions the Sub-Contractor must satisfy itself that the prevailing site conditions are suitable before delivery, application or installation of the material commences. Any non-compliance by the Sub-Contractor with this requirement shall not interfere with any obligation or guarantee given or to be given by the Sub-Contractor."*

- In this subcontract the following clause was included;

> *"The Sub-Contractor's liability to the Contractor in respect of any defect or insufficiency in design shall be the same as would have applied to an experienced design and build specialist contractor or sub-contractor who had held itself out as competent to take on the design having regard to the complexity, size, and requirement of the Sub-Contract Works."*

- Here, the subcontractor carries the same risk as if it had consulted with a team of designers.
- When we consider the risk of completing variations without an agreement or price the subcontractor often finds itself having to proceed without agreement, in this clause the contractor kindly expressed the following:

> *"The Sub-Contractor shall comply with all reasonable Instructions (including those for or in regard to the expenditure of Provisional Sums) issued by the Contractor within the timescale detailed on the Instruction. If the Sub-Contractor fails to comply with the Instruction within the timescale stipulated thereon the Contractor may implement whatever action is necessary to ensure compliance with the Instruction. If no timescale is stipulated thereon the timescale shall be within a reasonable period from the date of issue by the Contractor, the Sub-Contractor shall use their best endeavours to ensure such periods do not delay the Contractor's progress on site."*

"Any costs incurred by the Contractor in ensuring compliance with or execution of the work required by the Instruction, including but not necessarily limited to the employment of additional resources may be set off against any monies due or that may become due to the Sub- Contractor."

- If we look at the issue of time in the subcontract then this clause shifts all the risk to the subcontractor;

"Programme

The Sub-Contractor shall carry out the Sub-Contract Works, in such locations, at such times and at such rates of progress as shall be reasonably required by the Contractor.

The Sub-Contractor shall, within 7 days of a request by the Contractor to do so, prepare and submit to the Contractor for approval a programme which shall:

include the order and timing of the Sub-Contract Works including, where applicable, dates for the submission of the Sub-Contractor's detailed drawings;

include the dates when information is required from the Contractor; and

comply with each Key Date where applicable as set out in the Sub-Contract Particulars."

"The Sub-Contractor shall ensure that its programme is fully coordinated with the Contractor, its agents and sub-contractors and any other party which the Contractor may reasonably request.

The Contractor may, at any time, instruct or direct the Sub-Contractor to change their programme for any reason.

Any approval referred to in clause 23.2 shall not be construed as the Contractor's acceptance of sufficiency or adequacy of the Sub-Contractor's programme.

The Sub-Contractor has allowed for working within the Site opening hours, which may alter from time to time, and will provide all necessary labour and resources to meet the Main Contract completion date."

- The use of the words condition precedent ought to set the alarm bells ringing;

> It shall be a condition precedent to the Sub-Contractor's right to an extension to the Period(s) for Completion under Clause 25.2 that the Sub-Contractor shall have given written notice to the Contractor of the matter which is causing or may cause delay within 5 days of such delay first occurring or the matter becoming reasonably apparent following which full and detailed particulars must submitted within 10 days of the written notice in justification of the period of extension claimed.

- I would propose that the period of 5 days is extended to 14 days to allow the subcontractor to submit its EOT claim rather than the risk of being time barred and for the second submission of detailed particulars changed to 28 days

- This is followed by the events but then qualified by this clause;

> *"If in the opinion of the Contractor, upon receipt of the particulars referred to in Clause 25.3 the Period(s) for Completion is likely to be delayed by matters referred to in Clause 25.4 and provided that:*
>
> > *the Sub-Contractor has taken steps to mitigate delay; and*
> >
> > *any delay caused by matters detailed in Clause 25.4 which is concurrent with another delay for which the Sub-Contractor is responsible shall not be taken into account;*
> >
> > *the Contractor shall notify the Sub-Contractor in writing of any extension to the Period(s) for Completion."*

- The extension of time clause is then accompanied by the loss and expense clause which states:;

If the Sub-Contractor makes a written application to the Contractor stating that he has incurred or is likely to incur direct loss and/or expense in the execution of this Sub-Contract for which he would not be reimbursed by a payment under any other provision of this Sub-Contract due the regular progress of the Sub-Contract Works being or likely to be affected by any circumstances or occurrence stated in Clause 25.4 (other than a breach of this Sub-Contract by the Sub-Contractor and any instruction for the expenditure of a Provisional Sum for defined work), the Contractor shall from time to time ascertain the amount of such loss and/or expense which has been or is being incurred by the Sub-Contractor: Provided always that:

- The clause seems ok provided always that;

> *"It shall be a condition precedent to the Sub-Contractor's right to loss and/or expense that the Sub-Contractor's application shall be submitted within 5 days of it becoming apparent that the regular progress of the Sub-Contract Works has been or is likely to be affected as aforesaid; and*
>
> *the Sub-Contractor shall submit with his application all information as should reasonably be necessary to enable the Contractor to form an opinion and ascertain the amount of loss and/or expense as aforesaid.*

- I would propose that the period of 5 days is extended to 14 days to allow the subcontractor to complete the loss and expense rather than the risk of being time barred.
- If we then consider determination and a few of the headlines that exist in this subcontract;

> *"Without prejudice to any other rights and remedies the Contractor may by 7 days written notice to the Sub-Contractor forthwith determine the Sub-Contractor's employment under the Sub- Contract in the event of any one of the following matters arising:"*

- This clause is not particularly unusual but when coupled with the following clause which says;

> *"The Sub-Contract Works are behind the programme issued under clause 23, or the Sub-Contractor fails to achieve any of the Key Dates, as such dates may be amended by the Contractor from time to time."*

- The issue here is that the dates may be amended from time to time, accepting the risk of a time-to-time amendment would not be advised, an amendment to changes in the key dates ought to be notifiable and allow the subcontractor the benefit of an extension of time possibly with costs.
- Another reason cited for termination in this subcontract was:

> *"The Sub-Contractor fails to provide any performance bond, guarantee or collateral warranty as required by the Sub-Contract."*

- In many instances the reasons for bonds not being provided is that bondmen do not want to provide an open ended bond and often require amendments to wording and completion dates, many bonds remain incomplete due to issues caused by the contractor yet this clause exists to allow a termination of the subcontract in spite of any issues.
- Often overlooked, the dispute provisions do include nomination bodies for dispute resolvers and sometime refer to both TeCSA and TecBar which are nomination bodies where the nomination of solicitors and Barristers are commonly made.
- There may be no issue with the dispute resolver themselves but in my experience this is the common nomination body for highly contractually drafted contracts where strict terms such as condition precedent and time barring appear.
- When I see these nomination bodies in a subcontract I know that my client is entering into a highly litigious environment which is probably weighted in favour of the drafter.

Limitation of liability

- Unless you have a limitation of liability in your subcontracts then the limitation is unlimited, and the risk is that could extend to an amount higher than your subcontract order value.

What Does that Mean?

- It means that in the event of late completion, the liability owed to the Contractor for their incurred costs, is unlimited unless you have a liquidated damages provision written into the subcontract.
- However, an open-ended liability can also include a liability for the contractor's liability for liquidated damages under the main contract.
- The risk of an unlimited liability clause is that the value of the recovery is disproportionate to the value of the subcontract.
- To avoid the risk of this issue then you must include a limitation of liability provisions covering your liability associated with delay and late completion costs.

Where is our risk balance now?

- Perhaps this is the time to say no to the terms of the subcontract or if it is too late then perhaps it is time to understand that margin is now at risk because of the additional risks that you have accepted.
- The effect on gross margin may be to reduce it by 50% thus rendering a 20% gross margin project at around 10%.
- For a £1 million project that was tendered to return 20% gross margin but now returns 10%, it leaves the subcontractor with having to recover £100,000.00 on its other projects.

When is the time to say no?

- In financial terms we all tend to talk when the effect of something hits us in the pocket.

For example

- Currently the train drivers are on strike because they require a wage increase commensurate with the cost of living crisis.
- Other sectors are doing the same.
- Interest rates are steadily gaining an upward momentum.
- The effect of covid and furlough payments and the continued support in Ukraine will in result further tax increases.
- The UK government's balance sheet exist on revenues from taxation to pay its commitments, we are the tax payers.

When is the time to say no? (Continued)

- The exchange rate of the pound to dollar and euros is fluctuating, thus meaning we need more holiday spends.
- The whole economy is in a period of fluctuation and is not steadying itself any time soon.
- So when is it time to say no to the addition risks to your subcontracts?
- It is definitely not after the subcontract has completed and a reduced margin is reported.
- It is definitely not after you have allowed all of the contractor's amendments into the subcontract.
- It is when you have identified and sensibly negotiated onerous terms into a more equitable position than the contractor has requested, it is when you have balanced the risk to a level that does not diminish your margins and that you only carry risks in your subcontract that you can effectively address and attend to.

When is the time to say no? (Continued)

- If that doesn't happen then that is when you say no.
- If you continue with an onerous subcontract then it is too late to say no but at least you know that your margin will be affected.

Top ten identifiers for risk

Time

- include the period in the subcontract that you have calculated for your works, qualify this by including preconstruction periods for the completion of design and the issue of design freeze drawing 2-4 weeks in advance of your works commencing.
- Include any periods required for attendance during commissioning and snagging
- Ensure that your method statement is specific to your works and how you wish to install
- Do not accept the responsibility for preceding trades
- Do not accept responsibility for the verification of other peoples works

Top ten identifiers for risk

Time (continued)

- Do not accept time barring clauses with short time scales, insist on 14 days for notice of an event and 28 days thereafter for the submission of the detailed claims
- Consider including a clause that requires the contractor to respond to your claim submissions within 28 days therefore knowing what is and what isn't in dispute before the final account
- Agree as long a period as you need for the installation of your works do not reduce at your risk

Top ten identifiers for risk

Cost

- Avoid design development and scope creep clauses that place the risk on your subcontract price
- Clearly identify what is not included in your price and include this an appendix or numbered document
- Avoid those contractor scope of works documents which make the subcontractor responsible for any item of drywall that may be required
- Do not accept a set off of costs through the variation clauses
- Include a requirement for variations to be agreed within a specified timescale from the date of detailed submission

Top ten identifiers for risk

Cost (Continued)

- Consider the dispute provisions for allowing the use of adjudication during the project in the event that the contractor does not address variations
- Do not agree to time bar clauses for the submission of loss and expense, include 14 days notice and a further 28 days for cost submission

Top ten identifiers for risk

Quality

- Do not accept responsibility for other trades works
- Do not accept responsibility for poor builds by the contractor be protected in respect of weather and humidity claims
- Do not accept additional risk due to the m and e works requiring metal only without qualifying your costs, include additional costs in the event of a change in planned sequence

Top ten identifiers for risk

Contract review

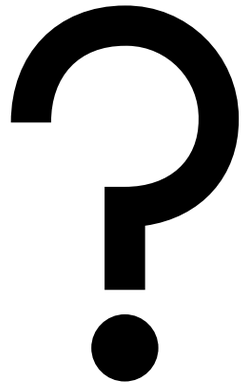
- Undertake contract reviews or ask somebody to do them for you
- A contract review needn't focus on each and every clause and you can apply whichever principle suits your business model e.g 80/20
- Be alive to contract terms and manage them from the start of the subcontract
- Have the knowledge, the control and implement the means to succeed
- Undertake a commercial review that identifies not only the commercial opportunities in the subcontract but also the risks, place a value against these and adjust your internal figures accordingly

Top ten identifiers for risk

The Alternative

- Say no to amended subcontracts
- Say no to subcontracts that also include an abundance of numbered documents which are the contractors standard terms (ISG are a good example of this)
- Say no to subcontracts with legal nomination bodies in the dispute provisions
- Say no to unequitable risk levels and apportionment.
- Say yes to the subcontracts which allow you to equitable include the terms that best suit your business and maintain relationships with your customer base

QUESTIONS?



Pat Loftus
Partner
Anderson Strathern

Improving the Supply Chains Commercial and Contractual Management of Building Contracts

Anderson Strathern

Improving the Supply Chains
Commercial and Contractual
Management of Building Contracts –
Pat Loftus, Anderson Strathern

What we are covering today

Improving the Supply Chains Commercial and Contractual Management of Building Contracts

Section 1: A look at how to review a contract;

Section 2: A look at design development;

Section 3:How to make best use of new Standard FIS Contracts; and

Section 4: Conclusion & Q&A.

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Background & Context

Just by way of introduction

- My firm operates a help line for FIS members re contract queries and looking how we log those queries , it is clear to see that the same issues arise time and time, the key ones being:-

    What are the actual contract terms;

    How do we get paid thereunder; and

    What is our liability?

With these points in mind how best to review a contract?

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Section 1: A look at how to review a contract.

- **You all know how to do this!**
- Fundamental point is what “risk profile” are you accepting for the “contract sum”.
- The client is likely want to “risk dump” as much liability on their contractors as they can.
- Clearly commercial pressures to get the job in the door and so a reluctance acceptance of the “risk dump”.
- But to get comfortable that you have priced the risk profile correctly, you need to understand what the contract says.
- Going to flag some fundamentals of what to look out for.

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Section 1: A look at how to review a contract.

What constitutes the contract?

Several helpline queries we receive are in relation to what constitutes the “contract?”

- Some of you may work by Purchase Order issued by the client;
- Some of you may work by tender & acceptance;
- Some of you may work by entering into bespoke or industry contracts ie JCT/NEC etc;
- Some of you may work by email acceptance including a specification etc;
- Although there is “best practice” here, so long as both parties know the extent of the contract, it really does not matter how that contract has been formed.
- **But what does matter is that you know what the full contract terms are**.

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Section 1: A look at how to review a contract

- **Two pitfalls here which are easy to fall into:-**
- **<u>1. The Battle of the forms</u>**
- A battle of the forms arises when two businesses are negotiating the terms of a contract and each party wants to contract on the basis of its own terms.
- EG when A issues a Purchase Order on its on its **own terms and conditions** ,B **accepts the Purchase Order on the basis of its own standard terms**.
- A 'Battle of the Forms' occurs to establish the relevant T&Cs of the contract.
- The general rule for establishing whose T&Cs will apply is that the "last shot" wins.
- The "last shot" is considered to be the terms which are sent **last** and which are received without objection or rejection from the other contracting party.
- This "last shot" must constitute a **counter-offer,** meaning that the last T&Cs proposed are be substantially different from those provided by the original party.

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Section 1: A look at how to review a contract

- **1 Battle of the Forms**
- Clearly don't want to end up in one, potentially huge waste of time in establishing the terms of the contract;
- If you are in any such battle, clearly don't want to lose and the terms of the contract significantly different to what you first envisaged.
- **Some very easy tips:**
- 1 If you don't like the T&Cs proposed to you make that clear that you don't accept the same ie don't fall victim to a "last shot".
- 2 Try and avoid commencing work until agreement has been reached, actions can be deemed as acceptance;
- 3 If you commence works ensure you are clear that you intend to rely upon your terms and conditions and give reasonable notice of the same;
- 4 Ask for your own T&Cs to be countersigned by the client prior to commencement of works.

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Section 1: A look at how to review a contract

Two pitfalls here which are easy to fall into:-

2 Reference to documentation deemed to be incorporated/annexed to/in the contract.

- If the front end purchase order/letter of award etc refers to "T&Cs" "Special Conditions" etc as being part of the contract, then you need to read them.
- Highly likely that the purchase order/letter of award will say:-
- "T&Cs are annexed hereto at Schedule X", but that Schedule is empty, so you really need to ask the client for them, as if not you will be deemed to accept the same.
- If you are being appointed by way a standard form contract, JCT/NEC most clients with have adopt a "Schedule of Amendments" to JCT/NEC.
- Any "Schedule of Amendments" will change the **risk profile** of the contract. By way of example.

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Section 1: A look at how to review a contract

- JCT D&B 2016 Clause 4.9.1
- *"The final date for payment of each Interim Payment and the final payment shall be **14 days** from its due date."*
- A Schedule of Amendments re Clause 4.9.1 is likely to say here:
- *"The final date for payment of each Interim Payment and the final payment shall be **30 days** from its due date."*
- In effect extending the payment cycle from 21 days to 37 days.
- **Point here being if there are references to T&Cs, additional conditions, schedule of amendments, they are for a reason and need to be reviewed to understand the contract terms**.
- It is surprising how often cross referred annexations/ additional clauses are overlooked.

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Section 1: A look at how to review a contract

- **So if you are comfortable that you know the extent of the contract. Some recurring issues to keep an eye on when reviewing a contract.**
- Third Party Agreement clauses;
- Indemnity provisions;
- Condition precedents to completion;
- Condition precedents to rights of relief;
- Condition precedents to retention release;
- Extended payment cycles any hoops that need to be jumped through;
- Limited rights of contractor rights of relief;
- Limitation of Liability.

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Section 1: A look at how to review a contract

- **Third Party Agreement clauses**.
- These are clauses which introduce **additional obligations and liabilities** onto the contractor from any agreement which the Client has entered into in relation to the completed works or funding of the works.
- So these Third Party Agreements will be such things as
- Funding agreements;
- Lease agreements;
- Purchase agreements;

In relation to the works**.**

These additional obligations and liabilities can be extensive or as extensive as the obligation stated in the contract.

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Section 1: A look at how to review a contract

2.1.7 The Contractor may be supplied with copies of any Third Party Agreements. Subject to the Contractor receiving copies of any Third Party Agreements (or of such parts of the same as shall be material):-

the Contractor shall so perform his duties under this Contract as not by any act, default, error or omission to cause or contribute towards a breach of the duties and obligations of the Employer under any Third Party Agreements. Should there be a conflict of discrepancy as to the terms of this Contract and the terms of a Third Party Agreement in relation to the carrying of the Works, then the relevant terms of the Third Party Agreement shall take precedence.

if any such Third Party Agreements require, the Contractor shall be responsible for the issue of Certificates as to the state of completion or readiness of the Development for completion or for the start of any fitting-out works which may require, or as to similar matters required under any Third Party Agreements;

the Contractor shall comply with the procedures laid down in any Third Party Agreements for the approval of or changes in design, specifications or materials and for the inspection of the Development prior to the issue of the relevant Certificate of Practical Completion or the expiry of the Rectification Period; and

the Contractor shall indemnify and hold harmless the Employer against any loss, costs, expense and damages incurred by the Employer as a result of a breach of this clause 2.1.7 by the Contractor. For the avoidance of doubt, the Contractor shall not be entitled to make any claim, whether for an extension of time, loss and/or expense or any addition to the Contract Sum or otherwise, as a result of compliance with this clause 2.1.7.

Section 1: A look at how to review a contract

- **Third Party Agreements clauses**
- If you are subject to one, make sure you have seen the relative agreement before carrying out the works;
- Make sure you can comply with the relevant construction obligations thereunder;
- Check whether the 3rd party agreement has obligations in relation to how PC/completion occurs;
- and
- Try and remove any "**Indemnity**" wording in relation to Third Party Agreements.

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Section 1: A look at how to review a contract

Indemnity provisions

- An “indemnity”/ “obligation to indemnify” allows the party who has suffered a loss to recover **all losses** from the party in breach, with no requirement to take any steps to mitigate that loss**.**
- **Whereas the common law position re recoverable** losses, are losses (i) that were reasonably contemplated as liable to result from the breach when the contract was made and (ii)flowing directly from the breach of contract.
- Therefore an indemnity provision is a contractual mechanism which extends liability beyond the rules of recovery for losses at common law.
- **Point to note, granting a wide and general indemnity for losses, is opening the door for the claimant to recover further losses than they could at common law.**
- **Ideally seek to remove or limit the remit of an indemnity to such things as personal injury/fatalities.**

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Section 1: A look at how to review a contract

- **Condition Precedent clauses.**
- A condition precedent simply means “A” has to happen before “B” can happen.
- In construction contracts can see “condition precedents” to:-
- **Completion:** “The Employer shall not be required to certify PC until the Contractor has delivered all O&M manuals, all as built drawings etc,” OR “ the Contractor has complied with the handover protocol set out in the Agreement for Lease etc”
- **Retention: “**The Employer shall not be required to release the remainder of the Retention until all collateral warranty agreements have been delivered”.
- **EoTs/L&E claims: “**Unless the Contractor has provided all required documentation in relation to its claim, the Employer shall not be required to consider the Contractor’s claim and any timescales in the contract shall only commence as and when the Contractor has supplied the Employer all the required information.”
- **Point is can you comply with the condition precedent? Is it in your control? If not may struggle, especially relevant where cannot get to PC and a LDs are being applied for delay.**

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Section 1: A look at how to review a contract

- **Extended payment cycles/hoops to jump through.**
- Getting paid on time is key;
- Check timescales for payment cycle;
- Understand the payment notices timescales;
- Understand what constitutes a valid application for payment which will trigger the payment cycle;
- Very easy for a client to say that nothing is due for payment, as there has not been a contractually valid application for payment issued yet.
- Try and remove any extensive requirements as to what constitutes a valid payment application.

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Section 1: A look at how to review a contract

- "4.7.4.1 Each Interim Payment Application may be made before, on or after completion of the relevant stage or the monthly date and shall be accompanied by such details, information, relevant documents, vouchers, receipts and other supporting documentation as may be stated in the Employer's Requirements or as may be reasonably required by the Employer's Agent including–certified true copies of receipted invoices from Sub-Contractors or other evidence that the Contractor has paid the relevant Sub-Contractor for the sub-contract works included in the relevant Interim Payment Application (or, if the sums to be paid to the Sub-Contractor have not yet fallen due, that any sums due to Sub-Contractors under the previous Interim Payment Application have in fact been paid by the Contractor).
- 4.7.4.2 If the Contractor fails to included with such Interim Payment Application(s). the items specified in clause 4.7.4.1, then the monies to which those items relate shall not be due for payment by the Employer and such monies will not be included in any Payment Notice but shall only become due for payment once such necessary details, information, relevant documents, vouchers, receipts and other supporting documentation have been received."

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Section 1: A look at how to review a contract

- **Contractor rights of relief**
- A client /employer led contract is likely to have limited grounds of relief. Are you happy with that?
- You need to understand grounds there are for an extension of time/ loss & expense?
- Going back to an earlier point any Schedule of Amendments to a JCT/NEC will reduce the contractor's rights here?
- Are you signing a contract with an LD provision for delay, with little ability to get an extension of time? **That is really a double whammy!**
- One of the lessons (contractually) from Covid 19, was that several contracts did not include even basic force majeure clauses allowing the contractor additional time.
- Point is no right or wrong here everything is commercial, just that you need to know what rights you have.

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Section 1: A look at how to review a contract

- **Limitations of liability**
- A client led contract is very unlikely to offer a cap on liability, so you will need to raise.
- Seek to include as financial cap;
- Seek to include a limitation of actions cap;
- Seek to remove certain types of losses;
- For example:

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EXTENT OF LIABILITY

The Contractor's liability under this Agreement shall end on the date falling twelve (12) years after the date of issue of the final Certificate of Completion under the Building Contract or, if earlier, end on the date falling twelve (12) years after termination of this Agreement, save in each case, in respect of claims which have been made prior to such date and in respect of which actions or proceedings have been commenced within six (6) months of such date.

Further and notwithstanding anything to the contrary contained in this Agreement and without prejudice to any provision in this Agreement whereby liability is excluded or limited to a lesser amount, the total liability of the Contractor under or in connection with this Agreement whether in contract, in tort, in negligence, for breach of statutory duty or otherwise shall not **exceed £10,000,000 (Ten million pounds**).

Notwithstanding any other provision of this Agreement the parties agree that nothing in this Agreement including the Schedule and/or referred to in this Agreement places or is deemed to place a fitness for purpose obligation on the Contractor relation to the provision of the Services.

Notwithstanding any other provision of this Agreement, neither party shall be entitled to recover compensation or make a claim under this Agreement or any other agreement in relation to the Project in respect of any loss that it has incurred (or any failure of the other party) to the extent that it has already been compensated in respect of that loss or failure pursuant to this Agreement or otherwise.

Section 2: A look at design development

- **Design Development**
- From the client side where there is design of the works across several design disciplines, the client seeks that the design team work together to co-ordinate the whole of the design of the Works;
- Ditto where there are **works only** contracts interfacing with design elements, the client normally want some co-ordination of the works and design.
- This requirement for co-ordination blurs the line as to which party is liable for the actual design, if a works only contractor who tells the designer what is buildable, **does that input place liability for that design on the works only contractor?**
- So need to be careful that you are not being held out as the designer (if you are a works only contractor)
- So what steps to take.

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Section 2: A look at design development

- **Where a works only contractor**:
- If there are obligations on you re design of the works, best to remove the same. It's as simple as that.
- If there are obligations on you re the integration and co-ordination of your works with design etc.
- Seek an express amendment
- *"Notwithstanding any obligation set out herein, in relation to the integration and co-ordination with the [Design Team] of our works with the wider Works, we do not have and shall not be deemed to have any design liability in relation to our works or the wider Works*."

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Section 2: A look at design development

- **Should you have a design liability**
- Make sure the contract provides that design is provided with a level of duty of care such as
- “Contractor shall design the [Contractor Design Element] using Skill and Care. **Skill and Care”** means the level of skill and care reasonably to be expected of a qualified and competent designer experienced in carrying out design on projects of a similar nature to the Works.”
- Where the is an additional obligation re co-ordination, design development etc, make sure that the contract expressly states something a long the lines of
- Notwithstanding any obligation set out herein, in relation to the integration and co-ordination with the [Design Team] of design works with the Design Team’s design we do not have and shall not be deemed to have any design liability for design produced by any other party than ourselves.”
- To note if you have a design liability, you should also maintain professional negligence insurance.

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Section 3 : How to make best use of FIS new standard contract

- Adding Section 1 and Section 2, FIS have produced a template contract and guidance note which deals the issues I have flagged plus others.
- The use of the FIS template contract, I suspect will be more honoured in the breach due to commercial pressures from your clients.
- However even if that view proves correct , the drafting in the contract allows you to cherry pick out certain clauses and send to your clients on specific issues.
- The guidance note explains the background behind the drafting and each issue, so if you are unsure of anything then the Guidance note should be of use.
- If you are able to propose the FIS standard contract as your own T&Cs then so much the better as even if there is some negotiation on the same, the standard contract will still leave you in a better place.

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Section 4 conclusion & questions

- There is no such thing as perfect contract, there are no rights or wrongs here, just what risks have you taken/ have you priced accordingly.
- It is easy to get lost in reviewing construction contracts and see concerns with everything.
- The FIS standard contract and note should allay those concerns to some degree.
- Unfortunately still very easy to inadvertently trip yourself up re fundamentals, so always worth an hour or two checking and double checking.
- Questions.

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Open Discussion
Better Contracting

Is the extent of design development always clear in your contracts?

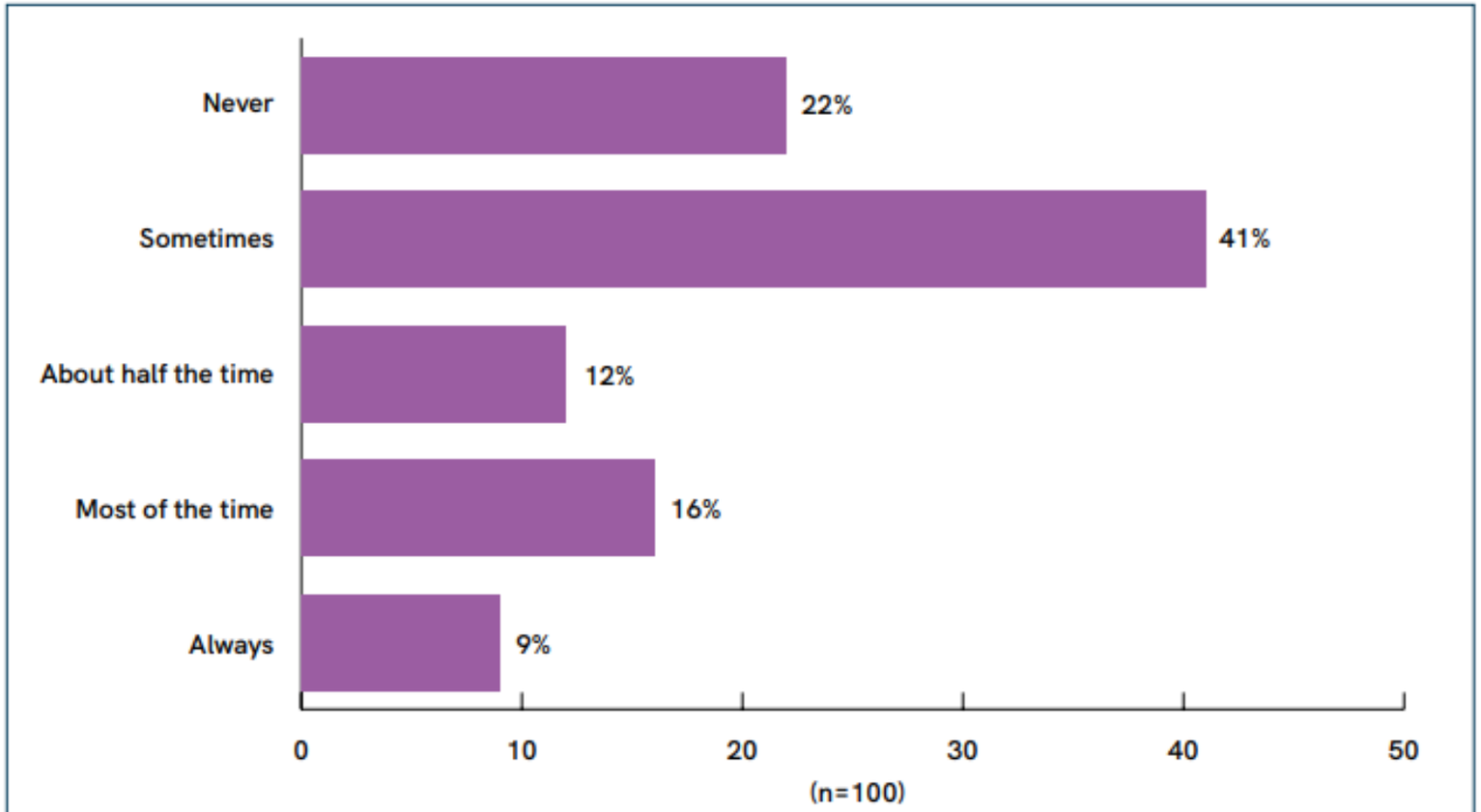

Figure 7.5

Source: University of Reading

Responsibilities for design development

How often does the awarded sub-contract include specific responsibilities for 'design development'?

What would you like to see change to stop it being a race to the bottom on competitive works and actually deliver price certainty?

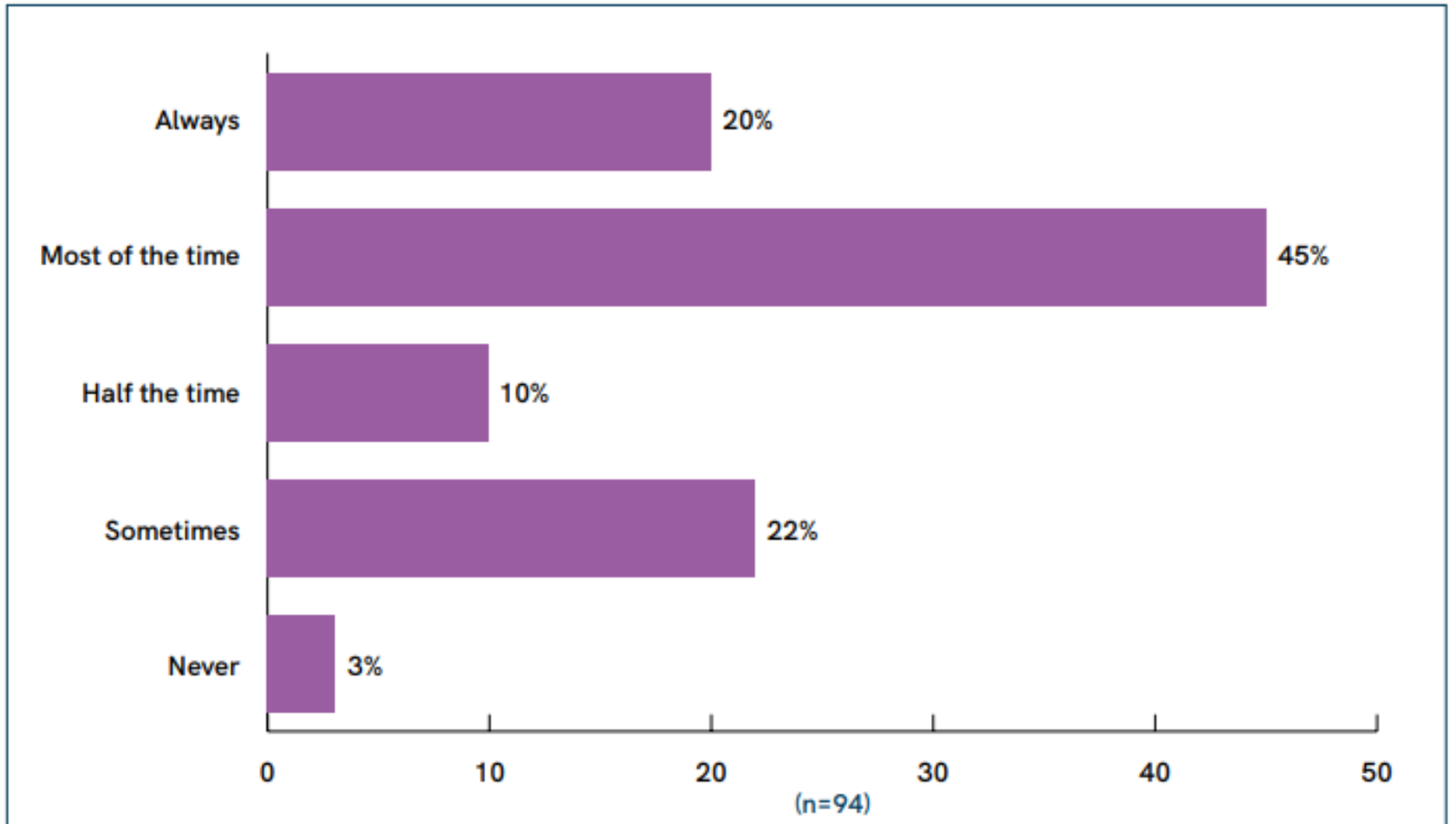

Figure 7.8 Source: University of Reading

Retrospective price changes

Having formally tendered for a work package, how often are you asked to reduce the price retrospectively?

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