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A Guide to Standard forms of Construction Contract

Outlining Key Characteristics and Components



Introduction

The most brilliant design remains just that, a design, unless turned into reality by building operations. Those operations generally, and always in the public sector context, require a formal agreement which sets out who does what for how much, how it should be done, and allocates the risk – a contract. The transition from a successful design to a successful building requires the selection of a contract which reflects the aspirations of the Parties and meets the demands of the project.

An essential skill of a Contract Administrator is the selection and management of the building contract. For each project, key criteria must be considered and risks allocated, before the form of contract is selected. That selection can be made from a range of standard forms of contract.

This guide presents a list of the principal standard forms of building contract, highlighting significant features. It is presented in a “ready reckoner” format as a primer for the contract selection process. As such it is not exhaustive and is not intended to be a sole source of reference when selecting a contract. It is a quick reference, a memory jogger, which suggests key criteria and risks for consideration, with a broad comparative analysis as a start to the selection process.

The guide is presented in the form of a matrix. The centre section of the matrix sets out, in bar chart format, the allocation of risk and the weight ascribed to key criteria for each contract form.

This guide is not exhaustive and is not intended to be a sole source of reference when selecting a contract. It is a quick reference providing a broad comparative analysis as a way in to the selection process. Project managers must make their own assessment of each form, particularly in the context of each specific project. SCALA disclaims responsibility for decisions made on the basis of this guide.

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Procurement

In providing a concise primer for contract selection, is not appropriate for this guide to address the broader issue of procurement. It assumes an understanding of procurement and the routes available.

However, the choice of contract flows from the procurement route chosen for the project. The choice of procurement route depends on the Client's required balance of time/cost/quality and an analysis of how that can be achieved. This is in the context of the Client's other requirements, not least being his required level of involvement in the design and construction process and the extent to which he may change his mind or wish to alter the specification during construction.

Those considerations promote a useful set of criteria for selection of the form of contract. In this guide each contract form is summarised in terms of the following key criteria:

- Speed - design and construction
- Cost certainty
- Dealing with complexity
- Client's involvement
- Capacity for variations
- Clarity of remedies
- Separation of design and management

The contracts included in this guide cover the principal procurement methods:

- General contracting
- Design and build
- Construction management
- Partnering
- Management contracting

Risk

The formation of a contract involves acceptance of an offer, an intention to have a legally binding agreement, performance and payment. “Transfer of risk” is often referred to but, in reality, the allocation of risk, not its transfer, is a major element in any contract.

The offer includes a proposed allocation of risk, which is agreed in making the contract, and the agreed payment includes consideration for the risk taken in performance of the contract. For example, “price certainty” is bought, by paying the contractor to accept the risk of fixing a price in a commercial, changing market.

The degree of risk involved in certain key aspects of the project must, therefore, be assessed in respect of whether it is more economic for the Employer to take a risk or for him to pay the Contractor to take it for him. This is an essential consideration in selecting a contract form in support of a procurement route which achieves “best value”.

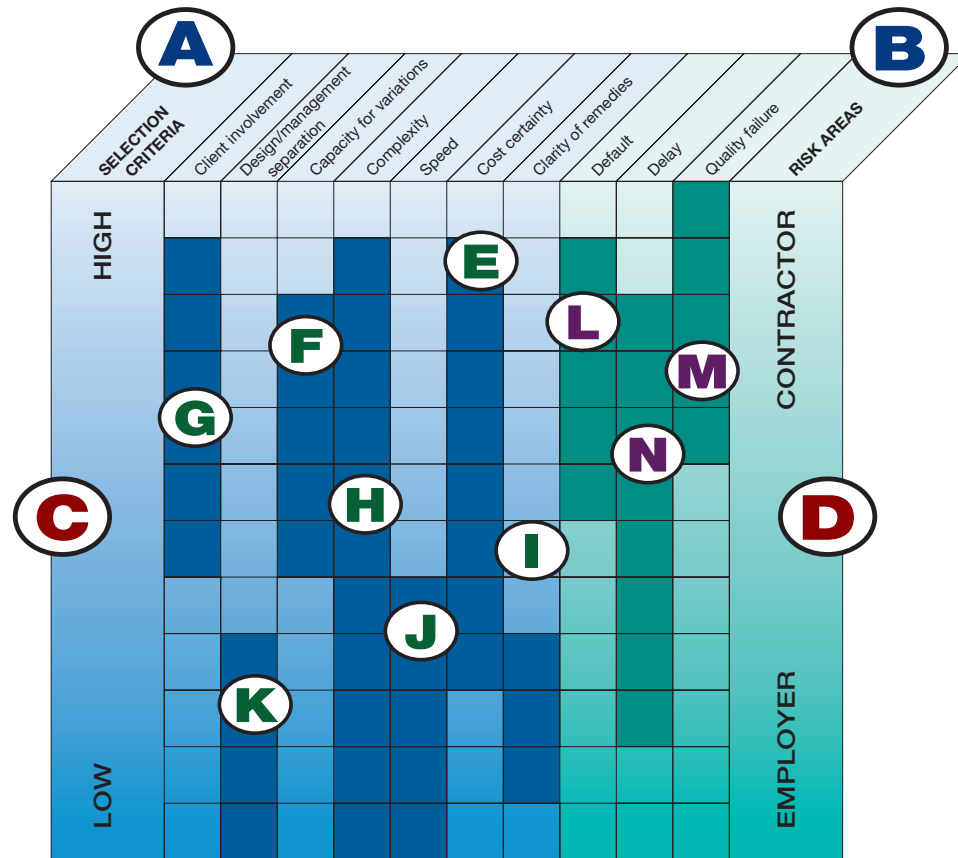
The key risk areas identified in this guide for consideration when selecting a contract form are:

- Default
- Delay
- Quality

In the matrix each contract form is summarised in terms of those principal risk areas.

Key to reading the guide

JCT 98: Standard Form Building Contract



A Selection Criteria (blue)

The blue area of the matrix covers six key criteria to consider when selecting a contract form.

B Risk Areas (green)

The green area of the matrix covers three key risk areas to consider when selecting a contract form.

C High/Low

The scale for reading the “characteristics” bars for each key criterion.

Indicates high/low capacity for accommodating each criterion. The bars indicate the range which can be achieved and within which a level can be selected for a specific contract.

D Contractor/Employer

The scale for reading the “allocation” bars for each key risk area.

Indicates where each risk is allocated. The bars indicate the range over which the risk can be allocated for a specific contract.

In this example :-

E Cost certainty

This can be used to achieve moderate to reasonably high price certainty.

F Capacity for variations

This enables a moderately high capacity for managing variations.

G Client involvement

That it can enable a moderate to high level of Client involvement in the management of the project.

H Speed

Low to moderate speed of implementation from design to completion.

I Clarity of remedies

Low clarity = relatively difficult to trace contractual remedies.

J Complexity

Ability to be applied to projects covering a wide range of complexity.

K Design/management separation

That the project designers and the managers of the contract are the same or very closely related. There is low separation of design and management.

L Default

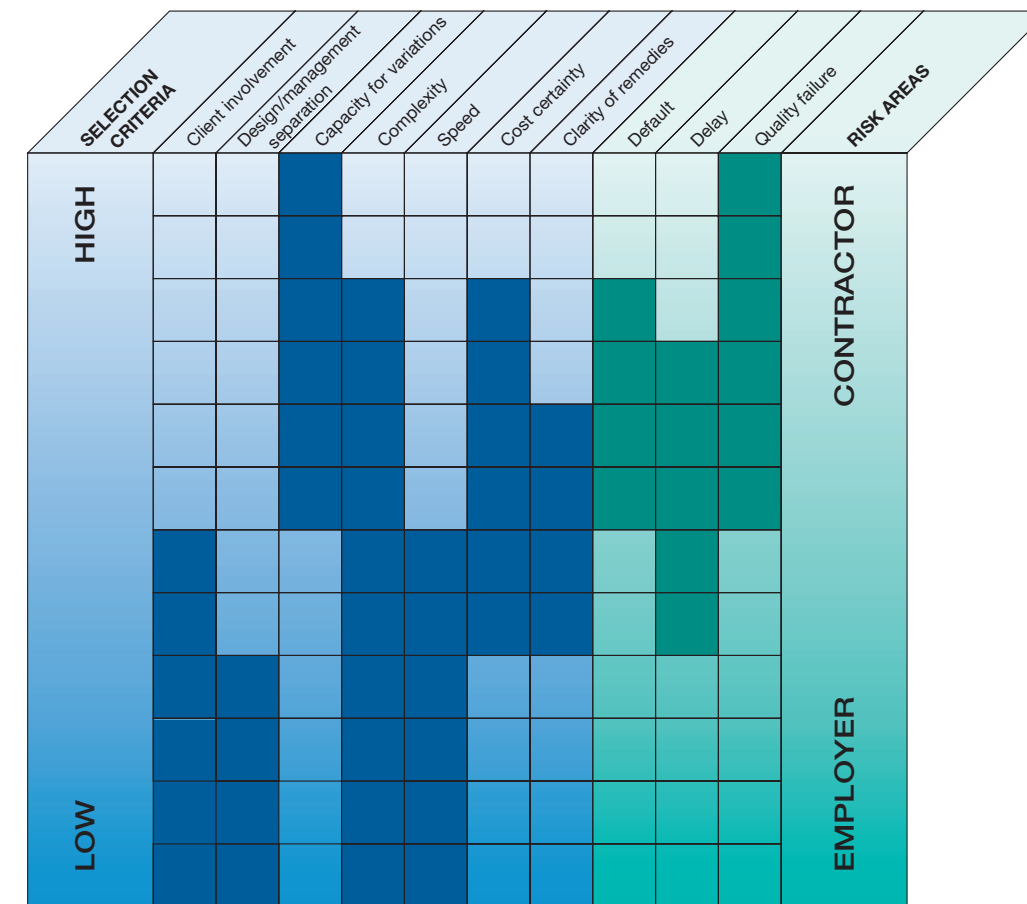
The Contractor bears the main risk for default under the Contract .

M Quality failure

The Contractor bears the main risk for failure of construction quality.

N Delay

The Contractor bears the main risk for delay under the Contract.



It is published in six versions – private and local authority versions with and without quantities and with approximate quantities.

It is published with supplements, for the private and local authority versions, covering fluctuations, sectional completion and contractor’s design.

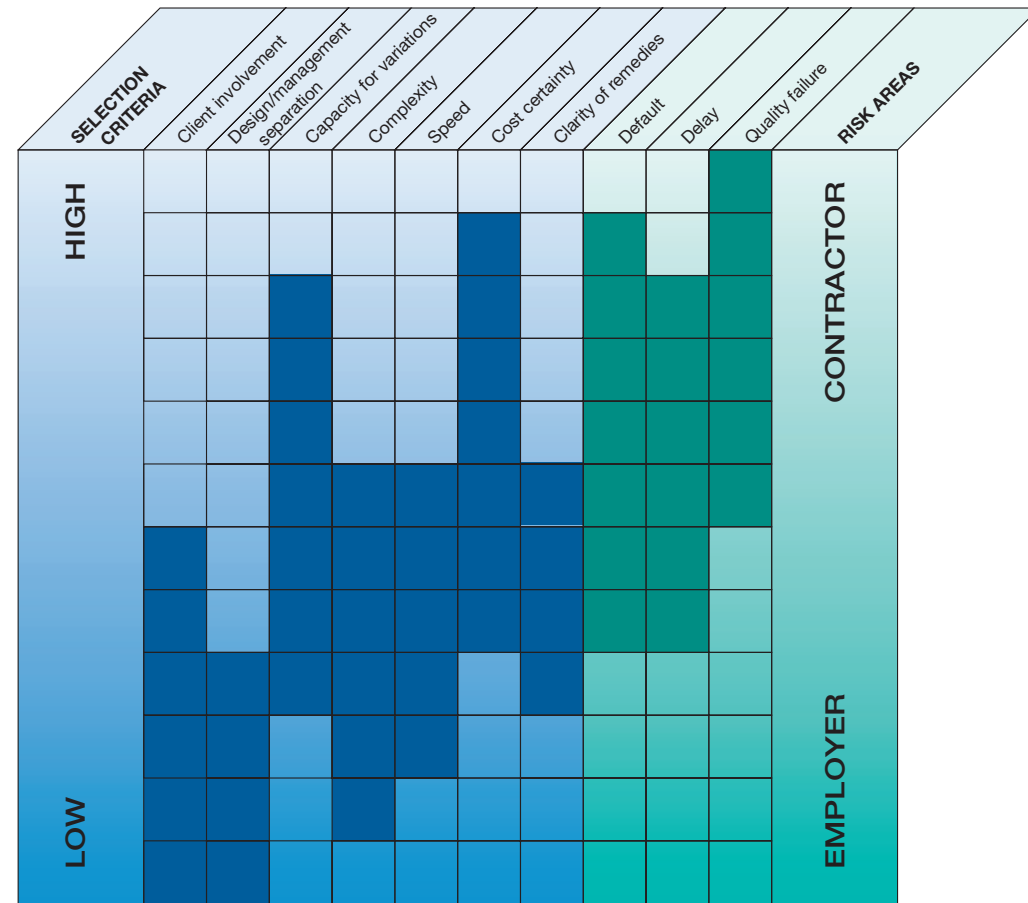
There are nine sub – contract forms designed for use with JCT 98.

In addition to the forms produced by the JCT, there are forms for domestic sub – contracts, including a domestic sub – contractor’s designed portion supplement.

notes

A much used standard form which, for many, is an automatic choice and a benchmark. Developed over a long period to respond to the needs of general contracting, it is necessarily a complex document. It enables a high level of Employer involvement, through the role of Architect/Contract Administrator and Quantity Surveyor together with the provisions for variations and nomination of sub-contractors by the Employer.

JCT: IFC
Intermediate Form of Building Contract



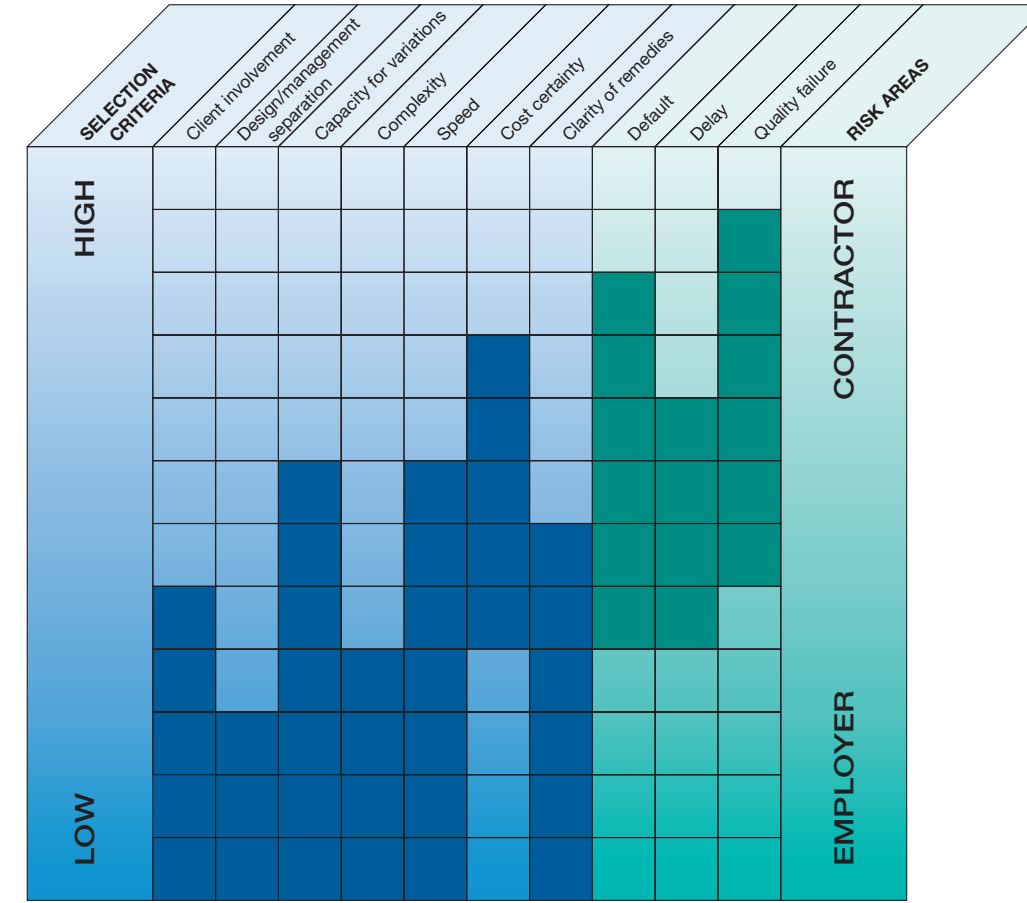
This general contract form is published with the following associated documents:

- IFC/FS Fluctuations supplement and formula rules.
- IFC/SCS Sectional completion supplement.
- NAM/T 98 Tender and agreement for named sub – contractors.
- NAM/SC 98 sub – contract conditions for named sub – contractors.
- ESA/1 RIBA/CASEC Employer/Specialist agreement.
- IN/SC Articles of agreement for domestic sub – contracts.(cic)
- IN/SC Conditions for domestic sub – Contracts.(cic)

notes

Bridges the gap between JCT 98 and MW 98, this is a fairly complex form. Intended for well specified traditional building work without complex services packages. For specialist work it utilises "naming" rather than "nomination". It is flexible and can be used with or without bills of quantities.

JCT: MW 98
Agreement for minor work



This form is published with a single associated document, the Minor Works supplement, which covers contributions, levy and tax changes and statutory deduction.

notes

This contract is designed for use only on small and simple works. The conditions give a bare outline of the parties' duties and responsibilities, and risk allocation is too simple for more complex situations. It is very useful for such projects domestic extensions, but generally should not be used on contracts exceeding £70,000 (at 1992 prices). Its principal feature is simplicity, but this is a disbenefit when exposed to many different kinds of risk.

JCT: PCC 98
Prime cost contract

		SELECTION CRITERIA										RISK AREAS		
		Client involvement	Design/management separation	Capacity for variations	Complexity	Speed	Cost certainty	Clarity of remedies	Default	Delay	Quality failure			
HIGH													CONTRACTOR	
LOW														
												EMPLOYER		

There is a suite of associated documentation, mirroring those produced for nomination under JCT 98.

notes

Intended for situations where it is not possible to obtain a precise definition of the works prior to their commencement or, consequently, to obtain a firm price for work in advance. The practice note accompanying the contract (Joint Contracts Tribunal 1992) gives various examples of appropriate situations, including repairs, refurbishment or alterations. It assumes design/specification work by the Architect and Quantity Surveyor in requiring an outline description of the works and an estimate of the prime cost. The contractor quotes a fixed fee or percentage fee for carrying out the work and, in addition, is paid the full cost of all resources validly used in the discharge of the contract. Since a precise definition of the work is not available, the contractor does not carry out any work at all without an instruction from the architect.

JCT: CD 98
Standard form with contractors design

		SELECTION CRITERIA										RISK AREAS		
		Client involvement	Design/management separation	Capacity for variations	Complexity	Speed	Cost certainty	Clarity of remedies	Default	Delay	Quality failure			
HIGH													CONTRACTOR	
LOW														
												EMPLOYER		

notes

Design and build. An "Employer's Agent" acts on behalf of the employer. The contract is let on the basis of "Employer's Requirements", often in the form of a performance specification, and "Contractors Proposals" to comply with those requirements. The level of specification covered by this approach is potentially wide ranging from a prescriptive design with planning permission to simply a written Brief. Naming of sub-contractors for specialist work, if necessary, can be achieved by careful wording of these requirements and is also catered for in Supplemental Conditions. Suitable for "design and build" and "detailed design and construct" procurement routes.

JCT: MC 98
Management contract

		SELECTION CRITERIA											RISK AREAS	
		Client involvement	Design/management separation	Capacity for variations	Complexity	Speed	Cost certainty	Clarity of remedies	Default	Delay	Quality failure			
HIGH	CONTRACTOR	Dark Blue	Dark Blue	Dark Blue	Dark Blue	Dark Blue	Light Blue	Light Blue	Dark Green	Light Green	Light Green			
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This form of contract has the following associated documents:

- WKS/1: Section 1: Invitation to tender.
- WKS/2: Section 2: Tender by works contractor.
- WKS/1: Section 3: Agreement.
- WKS/2: Work Contract 2: Conditions of contract.
- Wks/3: Works Contract 3: Employer/works contractor agreement.
- Phased completion supplement for management contract.
- Phased completion supplement for works contract.
- Formula rules for the works contract.

notes

All work is sub-contracted and the main contractor acts in a managing and co-coordinating role. The conditions of contract WKS/2 are based on the NSC conditions prepared by JCT for use with nominated sub-contractors under JCT 98.

JCT: MTC 98
Measured term contract

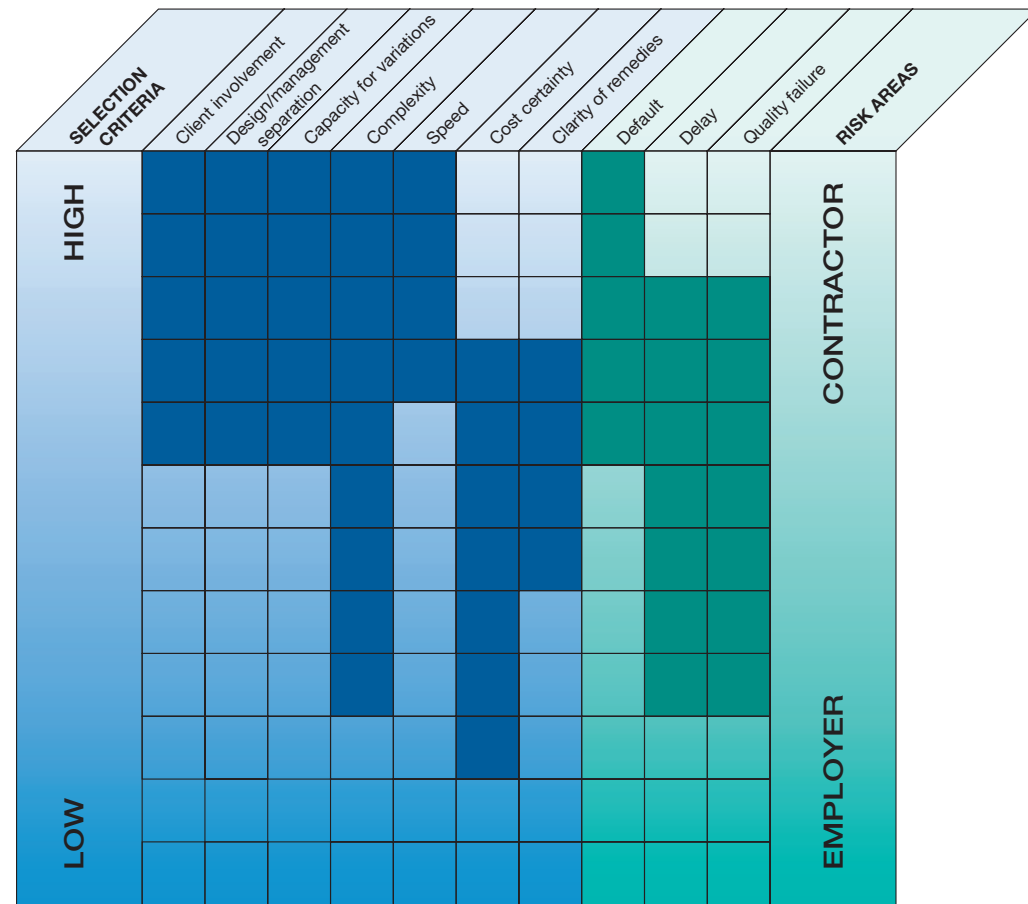
		SELECTION CRITERIA											RISK AREAS	
		Client involvement	Design/management separation	Capacity for variations	Complexity	Speed	Cost certainty	Clarity of remedies	Default	Delay	Quality failure			
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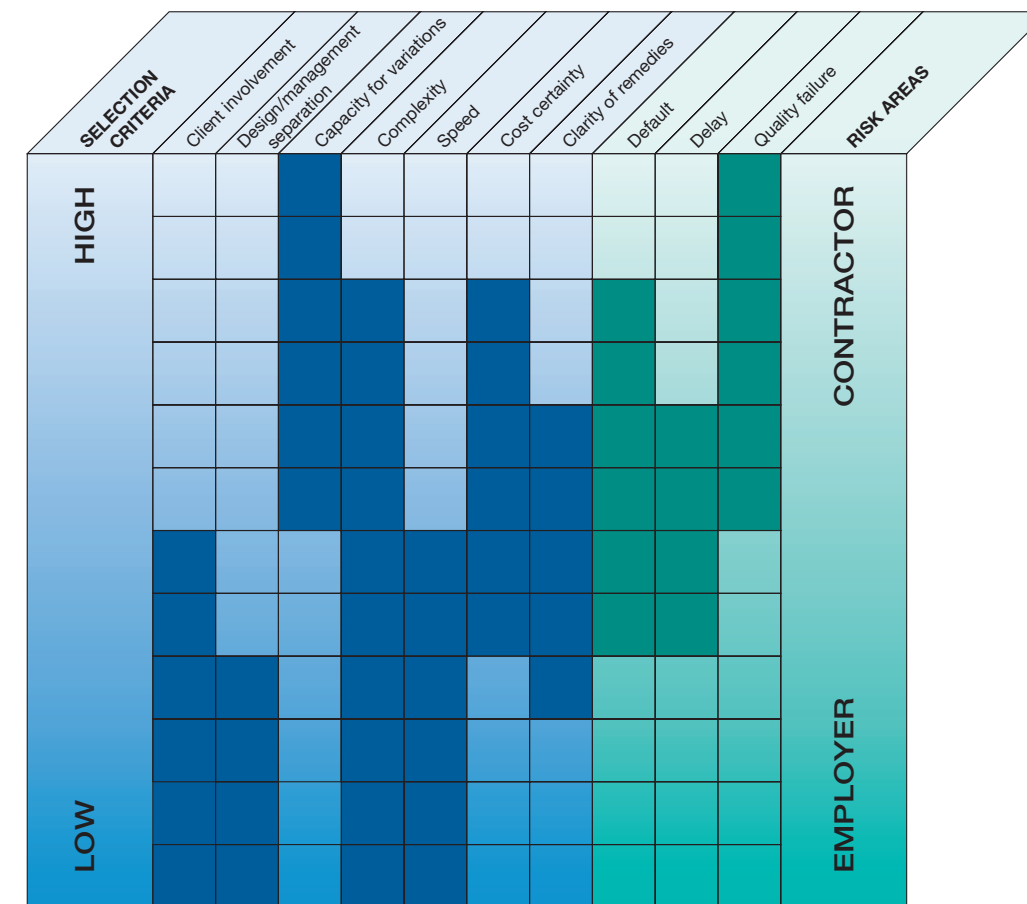
This form is designed for the situation where an employer requires regular maintenance or some other kind of minor works to be carried out, and wishes to engage only one contractor for a specific period. The single contract will then cover a number of separate jobs, since the contractor carries out work from time to time on receipt of instructions from the employer.

JCT Construction management contract

ICE Conditions of Contract



notes
 The form is intended to reflect current good practice in construction management. It utilises alternative clauses to achieve flexibility and to tailor the contract to the requirements of each specific project.



notes
 One version, for use with public or private clients, intended for major civil engineering projects. The engineer's position is analogous to the position of the architect in other forms. Work is to be carried out to the satisfaction of the engineer, whose powers of control and direction are extensive. The contractor is paid at the contracts rate (which may be subject to variation) for the actual quantities of work carried out. Rather than a "Contract Sum", the conditions refer to a "tender total" and to a "control price", which is ascertained in accordance with the conditions.

ICE Minor Works Contract

SELECTION CRITERIA		Client involvement	Design/management separation	Capacity for variations	Complexity	Speed	Cost certainty	Clarity of remedies	Default	Delay	Quality failure	RISK AREAS
HIGH												
LOW												
											CONTRACTOR	
											EMPLOYER	

notes

A simpler version of the main ICE form. The method of payment can be calculated by remeasurement, lump sum, day works, cost plus fee or any combination of these. There are no provisions for nomination of sub – contractors. Provisions for extensions of time, liquidated damages, valuation of variations etc are simplified, but limited in their application, although more detailed than JCT MW 80. It is intended for use on contracts of less than £100,000, and six months duration, but could be considered for larger jobs.

SELECTION CRITERIA		Client involvement	Design/management separation	Capacity for variations	Complexity	Speed	Price certainty	Clarity of remedies	Default	Delay	Quality failure	RISK AREAS
HIGH												
LOW												
											CONTRACTOR	
											EMPLOYER	

notes

This form attempts to provide a less complex alternative to some other forms. In the opinion of the ACA it is more concise, and lacks amendments which are difficult to manage. It can be adapted for Design and Build projects. It is another example of a flexible approach. It features standard alternative clauses, which can thus be styled to suit the Parties and their specific project.

		SELECTION CRITERIA										RISK AREAS	
		Client involvement	Design/management separation	Capacity for variations	Complexity	Speed	Price certainty	Clarity of remedies	Default	Delay	Quality failure		
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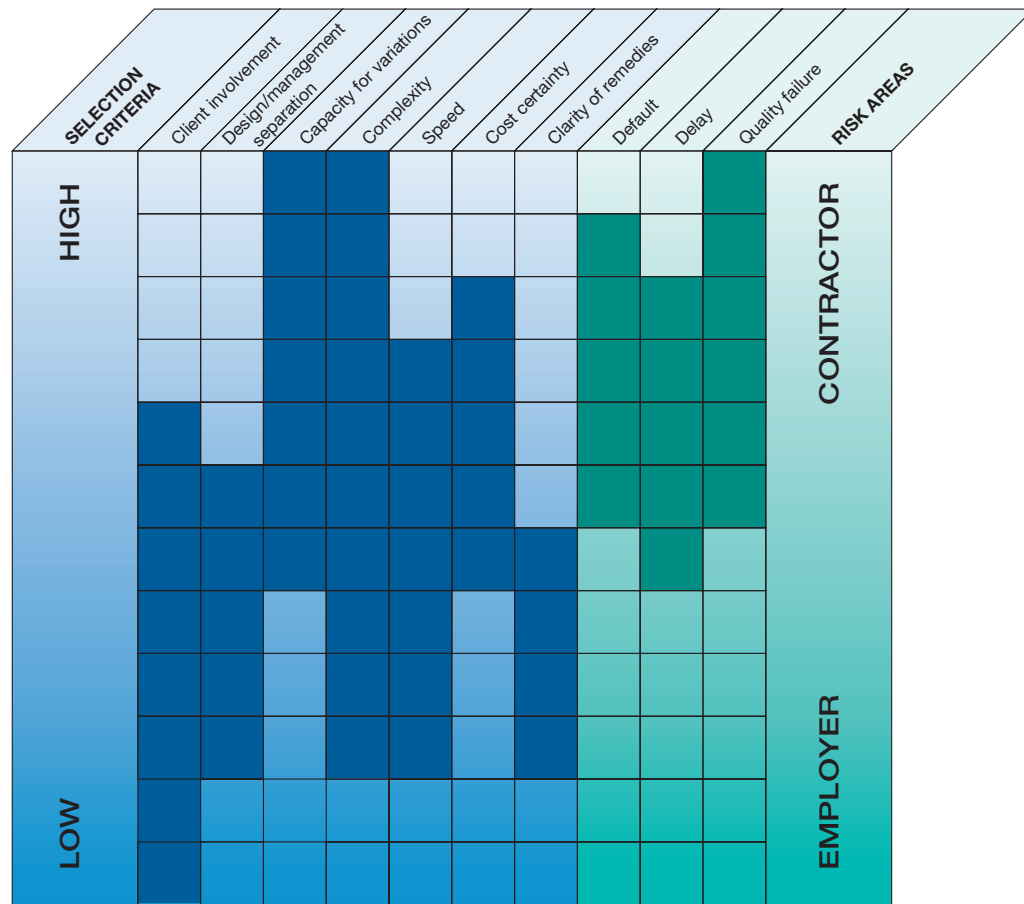
notes
The first standard form for partnering to be published. A direct result of "Rethinking Construction". Client, Contractor, Consultants and key specialists all sign up to a single partnering contract. The Contract promotes early appointment of the partnering team and encourages an integrated approach to project delivery. A key aspect is the "Project Partnering Agreement" which sets out roles and responsibilities, design development processes, project timescales, price frameworks etc, and is a pre-requisite to entering into the "Commencement Agreement" required before starting on site. Specialists are selected and the "Agreed Maximum Price" finalised, therefore, before start on site, which detracts from fast-tracking design and limits the Contractor's opportunity to realise post-contract savings. Profit and overheads are ring-fenced. Incentives are built in to promote savings and value engineering. Overheads extend to site specific overheads and the Project Brief will need to provide clear guidance as to what items the Contractor is to allow for. Payments can be linked to pre-agreed Key Performance Indicators. A joint problem solving procedure is set out in detail within the contract.

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Published by the International Federation of Consulting Engineers (FIDIC) in association with the European International Federation of Construction (FEIC).

notes
An engineer is employed as the client's agent with certification powers. Legally this role is similar to that of a Contract Administrator under JCT 98. There are provisions for nomination of sub-contractors, extensions of contract period, liquidated damages etc. An important feature of FIDIC is its flexible approach -- it is split into two parts: Part 1 of the Conditions is of general applicability and Part II contains optional clauses specific to each project.

NEC
Engineering and Construction Contract, 2nd Edition



NEC is published as a set of core clauses common to all projects along with a variety of other clauses, enabling its use under a variety of procurement methods. To enable this to happen easily, there is a set of pre – configured (merged) versions:

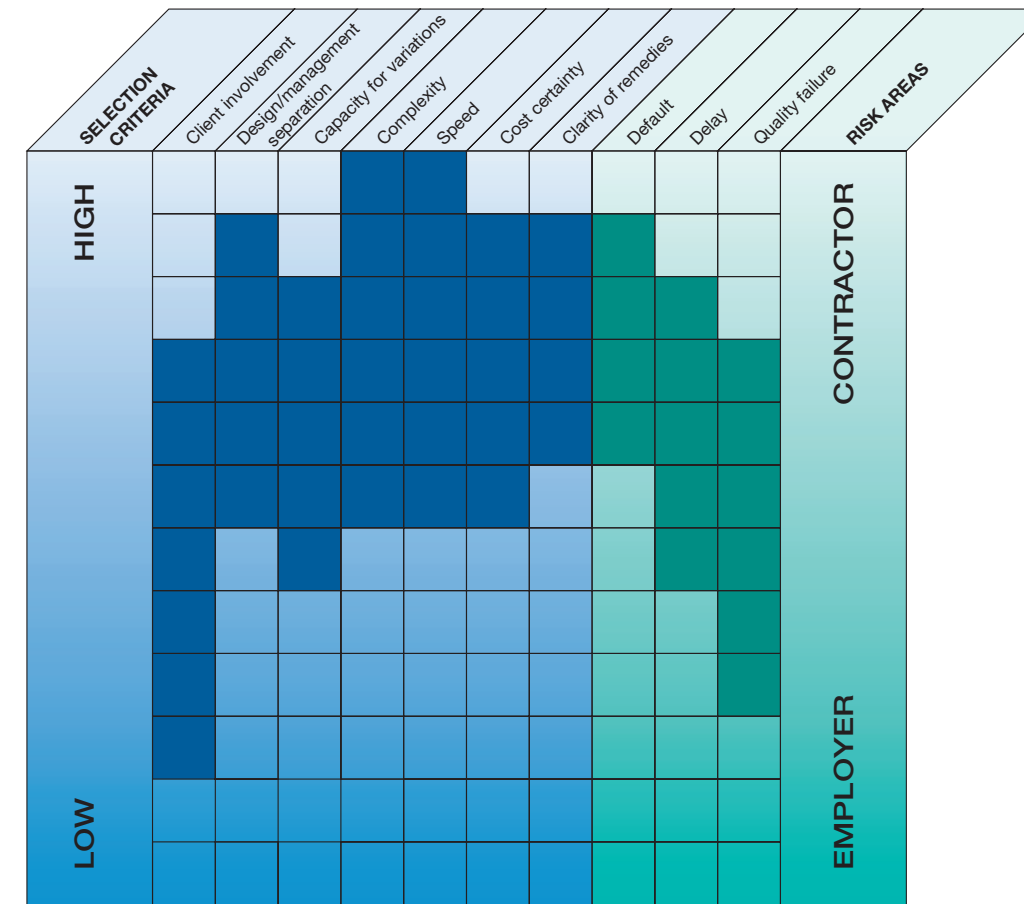
- Priced contracts with activity schedule.
- Priced contract will bill of quantities.
- Target contract with activity schedule.
- Target contract with bill of quantities.
- Cost reimbursable contract.
- Management contract.

The contract is also published in its basic form with all of the core clauses. There is also a professional services contract, engineering and construction sub – contract, adjudicator’s contract as well as guidance notes and flowcharts. The suite of documents as a whole has retained the title of New Engineering Contract.

notes

It is applicable to all types of projects. It has various optional clauses so that it can be used in a range of procurement routes. It is written in “plain English” and is intended to be a management tool for running a project, whose procedures promote a team approach. Used by many in partnering agreements.

GC/Works/1 (1998):
Contract for building and civil engineering major works



The documentation comes in four volumes:

- With quantities general conditions.
- Without quantities general conditions.
- Single stage design and build general conditions.
- Model forms and commentary.

notes

The documentation is intended primarily for government contracts, but has been designed to be equally suitable for private sector. The volume of model forms (Property Advisors to the Civil Estate 1998c) contains a wide range of associated forms, for example, performance bond, parent company guarantee and retention bond, as well as administrative documents such as notices and certificates. Contract – specific forms, such as invitations to tender, forms of tender and abstracts of particulars are contained within the three main contracts, as they vary slightly. A significant characteristic is that many of the contract conditions give binding force to decisions of the employer. The contract has some unusual aspects, such as payment provisions related to cash flow “S-curves” , instead of measured work done, and acceleration provisions.