



Construction Breakfast Briefing Series

# Design and workmanship defects – whose problem is it anyway?

Key takeaways



## Contents

Introduction	03
Key themes	04
Defining responsibilities	05
Coordination	06
Allocation of risk	07
Design changes	08
Environmental challenges	09
Legal framework	10
Closing remarks	11
About Reed Smith	12
Middle East Construction team	13



# Introduction

As part of Reed Smith's Construction Breakfast Briefing series, on 22 March 2022 we organised a seminar entitled "Design and workmanship defects – whose problem is it anyway?" where we invited industry experts to join a panel alongside members of our Construction team. The briefing was very engaging and informative, as we heard some first-hand and often entertaining stories of our panellists' experience.

As we consolidate and summarize their remarks, we have endeavoured to retain the authenticity of their thoughts and opinions while preserving individual anonymity.

**Please note:** Throughout this briefing quotes in "*blue italics*" are direct quotes from the session.

# Key themes

# 1

## Defining Responsibility

Our panellists often brought up the theme of 'responsibility' as a key factor leading to defects. In particular, determining which party is responsible for the design at the outset of a project was considered crucial. Our panellists agreed that it is very important that the contractor is aware of its own design responsibilities under the contract.

# 4

## Design changes

The panel considered the importance of a finalised design and the employer's role in minimising design changes. Where design changes are required, the panel agreed that the contractor should be given additional time and costs to carry out the changes and minimise the risk of any defects arising.

# 2

## Coordination

A lack of coordination between parties was identified as another key factor leading to disputes, particularly where language and cultural barriers exist. BIM has the potential to be a useful tool to address this issue but only if it is used effectively and the relevant parties have the required experience and competencies.

# 5

## Environmental challenges

Our panellists shared their experience of common defects in the region caused or contributed to by the challenging environment here in the UAE. These included, for example, issues with concrete, waterproofing and steel works.

# 3

## Allocation of risk

Inappropriate allocation of risk was also raised by the panel. It was noted that an unfair risk distribution or lack of visibility might attract less experienced contractors whilst higher skilled contractors might shy away from such projects.

# 6

## Legal framework

The panel also discussed the role of decennial liability under UAE law in respect of more serious defects that threaten the stability of a building and other provisions/regulations regarding more minor defects.

# 1 Defining responsibilities

At the outset of a project, it is crucial that all parties are aware of their own responsibilities. This sounds obvious, but is often overlooked particularly in fast-tracked projects. “*The earlier the roles and responsibilities are defined the better*”. Once this has occurred, meaningful collaboration can begin.

One particular issue noted by our panel was the “*bad faith use of specifications to sneak design responsibility into contracts*”. It was agreed that this was “*not a sensible way to build a project*”.

Another issue identified by the panel was the role of the facilities manager. It was noted that “*the facilities manager has a key role to play*” in preventing and managing defects following handover of the works.

A “*comprehensive responsibility matrix*” forming part of the contract was noted as one way in which the roles and responsibilities of parties could be better identified. Moreover, it was agreed that the works must be properly maintained by a competent and experienced facilities manager post completion, as well as by any tenants/occupants.





# 2 Coordination

It was noted that “*a large number of disputes arise from a lack of coordination*”. Our panellists agreed that defects often arose where a breakdown in coordination occurred between consultants, architects, contractors and/or subcontractors.

The panel noted that “*coordination is hard to define*” and the issue can manifest itself more in the UAE as a result of the “*melting pot*” of different cultures, languages and approaches.

There was a lively discussion on the benefits of the role of BIM in addressing the issues with coordination on a project. BIM “*represents the full life cycle of a project in one model*” and is designed to make coordination easier.

However, it was noted that “*different countries have adopted BIM at different speeds*” and “*not every contractor or subcontractor has the skills to access and use BIM effectively*”. BIM is “not a magic solution” but, used effectively, can certainly add benefit to a project.



# 3 Allocation of risk

The role of the employer was also addressed. Employers sometimes “*include an unreasonable allocation of risk*” in their contracts to the employer’s benefit, which can amount to “*contractual vandalism*”.

As a result, it is often “*inexperienced contractors without the necessary competencies*” who enter into contracts on such terms. These contractors are often unaware of their risk exposure under the contract. They also do not have the required skill sets and experience to carry out the works to the standard required, which can result in more defects.

A fairer and more visible distribution of risk would attract more experienced and skilled contractors and result in a more open dialogue on the project. A ‘them and us’ approach is not conducive to producing quality work on a project.



# 4 Design changes

It is important that a sufficiently developed design is provided to the contractor at the outset and that this design remains largely unchanged for the duration of the works.

A significant contributor to defects is the “*fast track of projects*”, which results in an incomplete design being issued and/or substantial changes being made on an ongoing basis throughout the duration of the project. This is not an effective way to manage a project and can lead to coordination issues and defects. The design should not be issued to the contractor until it is ready.

If an employer wishes to change the design, “*the*

*contractor must be given sufficient time and money*” to allow for the changes to be implemented correctly. If the changes are required by the authorities, the employer should still be liable for these as the “*contractor priced the project on the basis of approved drawings*”.





# 5 Environmental challenges

Our panellists shared their experience of common defects in the region caused or contributed to by the challenging environment.

The weather in this region poses significant challenges, particularly in respect of the pouring of concrete. If concrete is poured in the summer when temperatures can be extreme, mitigation measures need to be undertaken, such as only pouring at night or using ice. If appropriate measures are not taken, *“the concrete will start to crack 5 to 10 years later”*.

The stop/start nature of projects in the region can lead to waterproofing being left exposed to high temperatures and sunlight. Moreover, work on adjacent sites may temporarily drain ground water from a completed project, which allows the waterproofing to dry out. These issues can be very serious and affect other parts of the works.

In addition, onshore winds have a corrosive effect on steel works, particularly *“where projects are left exposed and half built”*. Again, this can lead to very serious issues affecting other parts of the project.



# 6 Legal framework

Our panellists considered the role of decennial liability under articles 880 – 883 of the UAE Civil Code. This provides that the contractors and architect (this can include the engineer) are jointly liable for a period of 10 years following the completion of a project and covers any total or partial collapse of a building, or any defect which threatens a building’s stability or safety. It was noted that parties “*cannot contract out of this liability*” for such defects.

In addition, the panellists noted that article 878 of the UAE Civil Code provides for the liability of a contractor in respect of other defects and that there are extensive building regulations under the DCD. Contracts usually explicitly require that a building completion certificate is obtained from the DCD prior to formal taking over of the works under the contract.

This can of itself impact the works as a result of changes necessitated/required by the DCD, multiple inspections of the works and the like, and can cause disputes as to who is responsible for the time or cost impact of the DCD imposed requirements.





# Closing remarks

It was agreed that “*better coordination and communication*” were required from all parties, who must “*work together*”. This may include a “*duty to inform and point out mistakes*” in order for such defects to be rectified as efficiently as possible.

One panellist suggested that “*systemic solutions*” were required, such as “*incorporating a responsibility matrix into building permits*” in order for the roles and responsibilities of parties to be clearly defined.

Another important point raised was to “*manage expectations*”. There are risks to fast-tracking a project. The employer should be made aware of these risks and how they can be mitigated, for example, “*by providing a skilled, dedicated BIM team*”.

Finally during the execution of a project, “*clients need to be fair*”. Cash flow is hugely important to a contractor, particularly where margins are low. If certification of interim payment applications and/or change orders are delayed, this will impact the quality of the work on the project.



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