

LEGAL ASPECTS OF BUILDING PROJECTS

A guide for charity trustees



Introduction

A substantial new build or property renovation is one of the biggest projects many charities will enter into. These projects offer the chance to expand services, to ensure a strong future and to put beneficiaries at the heart of an organisation. However, they also come with a number of decisions to be made and risks to be guarded against. As trustees, it is important that you understand how these might impact you and your organisation.

Procuring building works

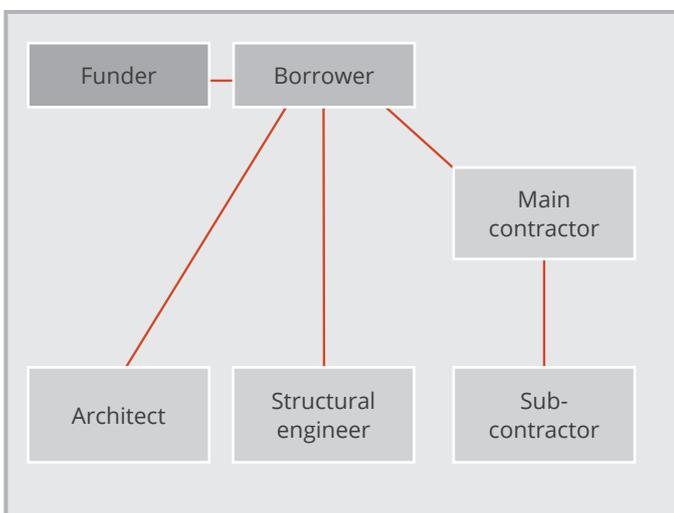
There are two main ways to procure building works:

1 Traditional procurement

The 'traditional' procurement route remains the most commonly used method of procuring small building works.

You will need to appoint an architect and a structural engineer to provide the design. You will also need to engage a main contractor to carry out the construction.

All these parties will owe a duty of care to you under their respective contracts. You should ensure that you have the right people for the job. If the contractor builds to the architect's drawings but those aren't right, then responsibility sits with the architect. You should ensure that all professionals responsible for the design elements of the build have proper forms of appointment and appropriate [Professional Indemnity Insurance](#).



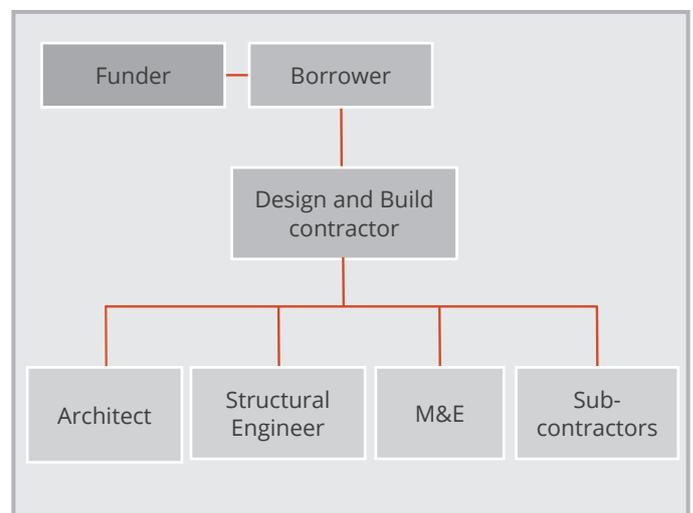
The role of the funder

For many charities, a bank loan or other repayable finance will be an important part of getting your new building completed. Your funder will have requirements to be met during the build phase. These will vary depending on the details of your proposition. Keep in mind that the funder's aim is the same as yours – to see the building successfully completed with no defects in the design and construction.

2 Design and build procurement

Under this route, the design and construction services are ultimately contracted to a single contractor, who you will appoint. There is therefore only one contract between you and your chosen Design and Build contractor. In turn, the contractor appoints all of the professional parties. This might include re-appointing the architect that prepared your planning drawings. You will agree your requirements with the Design and Build contractor and there will be one single point of contact for delivering the project.

Do make sure that the design brief is correct as this will govern the building delivered. If in any doubt, consult an architect or project manager to advise you on procurement.



Types of build contracts

It is important that the contract between yourself and the contractor is appropriate. A number of 'off-the-shelf' versions are available including the JCT series from the Joint Contracts Tribunal, available at www.jctltd.co.uk.

Different contracts are available for minor works, intermediate and major works as well as for Design and Build contracts. Discuss the choice of contract with your solicitor or project manager to make sure it is appropriate for the level of works envisaged.

You should also ensure that proper professional appointments are in place, setting out the terms of engagement of the relevant professionals in full.

The building contract and professional appointments should provide for a collateral warranty in favour of the funder.

Collateral warranties

A collateral warranty is a contract under which a professional consultant, building contractor or sub-contractor warrants to a third party that it will comply with its professional appointment or building contract.

Defective workmanship or design could cause the parties with different interests in a construction project to incur different losses. While the party procuring the construction project is likely to have a contract with the party responsible for the defect, other affected parties may not. If an architect, contractor or other professional makes a mistake resulting in a project design or construction defect, a buyer, tenant or funder may suffer a loss. As only the person procuring the project has a contractual relationship, a buyer, tenant or funder would not be able to claim under the contract.

A funder providing finance to a development may want construction security to protect its loan. Through a collateral warranty, should anything go wrong, a funder can claim any losses directly from the party responsible for the defect.

Collateral warranties may also include '[step-in' rights](#) which are particularly important for any funder of a development project. If the developer or borrower commits a breach of the building contract or becomes insolvent halfway through a project, the funder may want to step in. The funder adopts the role of a developer, paying any sums due to the building contractor and professional consultants and completing the project. Upon reaching build completion, the property has a value and can then be sold to pay off any debt owed by the borrower.

Monitoring the project

It is really important that the charity has appropriate processes in place to [monitor the build process](#), and certify the invoices it is asked to pay. An Employer's Agent or Contract Administrator is a key figure in making sure that the contractor is delivering what is to be paid for. A Quantity Surveyor or your Architect can assess the work done in relation to invoices presented.



Other things to consider

- **Is the Contract signed as a 'deed'?**
If not, the contractual liability of the party under that contract will only remain for six years from the date of the contract, whilst contracts executed as deeds will cover 12 years from [Practical Completion](#).
- **Who is actually doing the work?**
It is important to understand whether it is a main contractor or a subsidiary that is doing the work on the project. Make sure you know who is liable for the work and with whom you have a contract and/or collateral warranty.
- **What contingency costs are included?**
You will need to ensure that these are adequate.
- **Are there any conflicts of interest?**
While using firms associated with you can often feel appropriate, this can lead to conflicts of interest, which need to be properly managed. This enables you to benefit from the experience of individuals in a safe manner. The Charity Commission publishes guidance ([CC29](#)) on the management of these.
- **Do the professionals involved have sufficient experience?**
Funders will want to be confident in the ability of the parties involved to deliver and monitor the build and the ability of the trustees to manage the project and provide oversight.

In conclusion

It is important that as well as the benefits of the new building, trustees give time to consider the risks and work to mitigate them. Trustees should talk to funders and understand the information and assurances they will ask of you.

Some useful terminology

- **Bank Project Monitor or Project Monitoring Surveyor (PMS)**

This is a quantity surveyor appointed to act on behalf of the funder at your cost. They will advise on the risks of acquiring an interest in development, monitoring the build and approving drawdowns of funds from the loan.

- **Feasibility study**

This is a report on the proposition by a professional valuer to establish whether a project is viable and ensure that the costs and end value are realistic.

- **Step-in rights**

A 'step-in' clause gives the funder or beneficiary of the collateral warranty the right to take over the employer's contract to ensure that the construction team delivers the build.

- **Evidence of spend**

Funders may provide funding in stage payments for all or a proportion of invoices submitted.

- **Practical Completion**

Generally, this is the point at which a building project is complete, except for minor defects which can be put right without disturbing an occupier. It is the point where an architect or contract administrator confirms that the building has achieved 'Practical Completion' under the building contract.

- **Rectification / Defects Liability Period**

This is the period following Practical Completion (usually 6 or 12 months) during which a contractor retains liability under the building contract for dealing with any defects which materialise throughout that period.

- **Professional Indemnity Insurance**

This is an insurance policy which gives protection against legal liability for damage or compensation arising out of any neglect, error or omission committed by or on behalf of the insured party. The insurer will pay out monies to cover the costs of rectifying any negligence. All parties involved in the project should have Professional Indemnity Insurance. The funder will need to see evidence of this.

Consideration will need to be given to:

- Whether the amount of indemnity cover is sufficient;

- Whether the indemnity amount is paid per claim or paid in respect of all claims. Ideally the insurance should be payable in respect to each and every claim and not written so as to limit recovery to a total fixed sum.

If the policy is 'aggregate', the insurer will only pay on claims up to the indemnity limit and will accumulate claims together in a policy year up to the indemnity limit. If the policy is 'any one claim', the indemnity limit will be the maximum to be paid for each claim in one policy year and there is no limit to the number of claims which can be made in any single year.

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The team combines lawyers from a range of disciplines including construction, planning, agriculture, environmental and property litigation. Their reputation is built upon the wide range of work they do with a varied range of land owners, investors, developers, occupiers and lenders.

Sarah Gaines is Head of the Commercial Property team at Brachers. Please contact the team to discuss any issues raised in this factsheet on [01622 690691](tel:01622690691) or Sarah at sarahgaines@brachers.co.uk

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CAF Bank is owned by a charity, Charities Aid Foundation, and is committed to building long-term partnerships with charities, based on a deep-rooted understanding of each organisation's business model, financial position and vision for the future. We personally meet with every borrower.

Our charitable purpose means that charities and other not-for-profits know we're a viable alternative for loan finance tailored to what they're trying to achieve. CAF Bank helps charitable organisations make a positive difference by offering financial services with a strong ethical approach.

As a trusted and reliable lending partner committed to the sector, we can provide flexible finance to help you build a brighter future.

Call our team of charity loan experts today on [03000 123 444](tel:03000123444) to discuss your options or, for more information, visit www.cafonline.org/loans

Loan applications subject to credit assessment. Security will be required.

Charity assets may be at risk if you do not keep up with the repayments for a mortgage, loan or any other debt secured on them.

If you're thinking of consolidating existing borrowing, you should be aware that you may be extending the term of the debt and increasing the total amount you pay.

This document is intended to give you an overview of areas to be considered, but does not replace independent legal advice.

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