

TROUBLE WITH DEFECTS

**IN THE ENERGY, UTILITIES
& OTHER INDUSTRIES**

**Construction Claims and CIPAA
Conference Malaysia 2023**

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Other Industries



Oil & gas



Energy



Utilities



Rail projects

Generally involves:-

- Complex work
- Interfacing packages
- Huge/spreadout worksite (e.g., pipelines, subsea & electricity cables)
- Sub-soil works
- Sub-sea works

Structure Overview

Employer

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graph TD; Employer[Employer] --- PC1[Package contractor]; Employer --- PC2[Package contractor]; Employer --- PC3[Package contractor];
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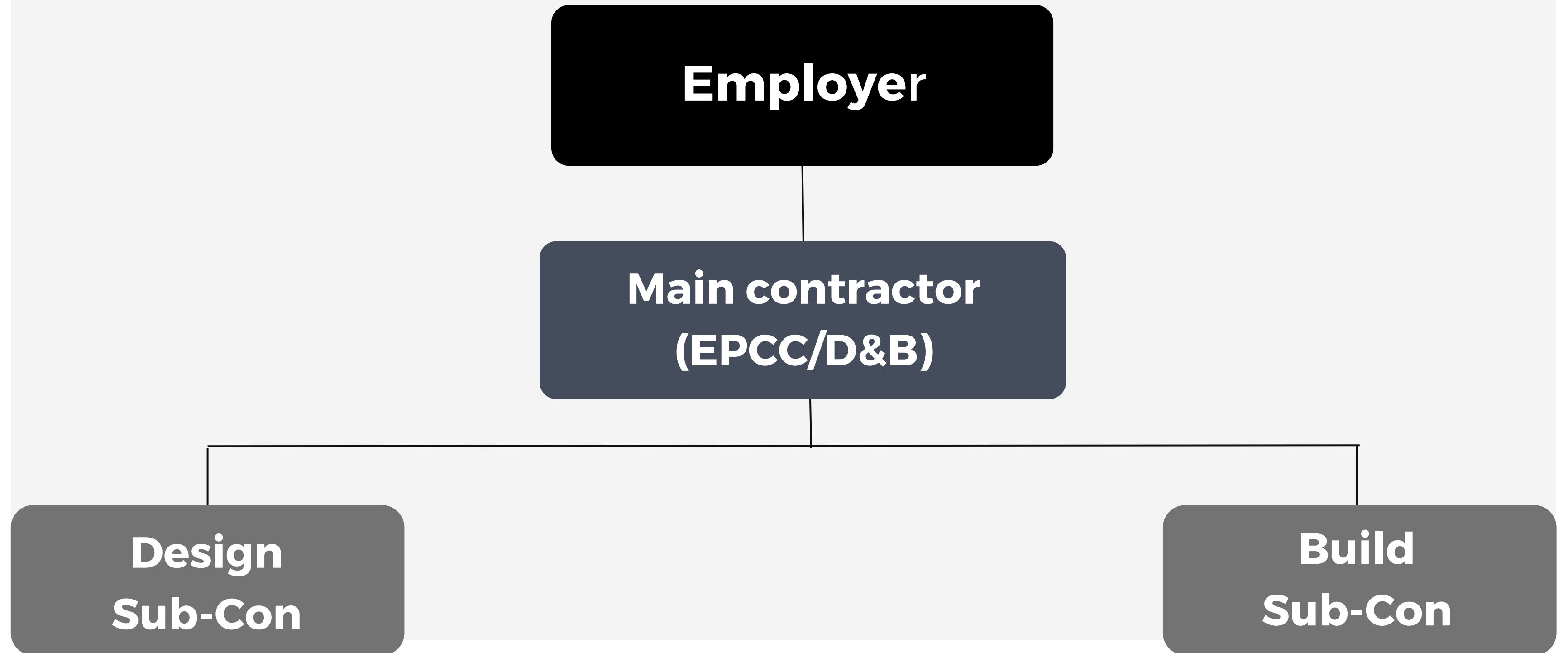
The diagram illustrates a hierarchical structure. At the top level is a dark blue rounded rectangle labeled "Employer". A vertical line descends from the bottom center of this box to a horizontal line. From this horizontal line, three vertical lines descend to three separate dark gray rounded rectangles, each labeled "Package contractor". The three contractor boxes are arranged horizontally below the Employer box.

**Package
contractor**

**Package
contractor**

**Package
contractor**

Structure Overview



DEFECTS

Black's Law Dictionary (9th Edition)

“an imperfection or shortcoming,
especially in a part that is essential to the
operation or safety of a product”



Dua Residence Management Corporation v Edisi Utama Sdn Bhd & Anor [2021] MLJU 140

- No precise definition, in law, of what, constitutes a defect.
- May relate to design, construction, quality. May be patent or latent.
- The determination of whether works are defective is not always a straightforward matter.
- What a builder considers for work done in a “good and workmanlike” manner may not accord with the owner’s expectations.
- The reckoning of whether or not work is “defective” – will involve a mixture of objective and subjective matters.

Dua Residence Management Corporation v Edisi Utama Sdn Bhd & Anor [2021] MLJU 140

- “The requirement that the workmanship should be the best of its kind requires a standard to be achieved. It would not be satisfied by workmanship of average competence, skill or exercise of reasonable care to attain the standard...” Barclays Bank plc v Fairclough Building Ltd (1994) 68 BLR 1
- The work, materials and installation must ultimately be fit for some purpose. A building generally is expected to be watertight. However, it does not follow that the building is guaranteed to be watertight for its expected life, since some maintenance is required on nearly every building. Whether a reduction in standards applies will depend upon factors, like fitness for purpose and knowledge of the parties - Davis & Co (Wines) Ltd v AFA- Minerva (EMI) Ltd 9 BLR 99

ISSUE WITH DEFECTS

**Burden of
proof**

**Not easy to have
defects identified
early**

**Problems with late
detection,
particularly patent
defects**

**Defects are factual
centric
– the earlier the
detection, the better**

**Alleged defects not
specified as part of
the scope of work**

ISSUE WITH DEFECTS

Is the defect
one of design or
construction, or a
combination of both?

Failure cannot be
inspected – lack of
direct evidence

Reliance on technical
expert evidence

Limitation issues





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