

Master of Science in Construction Law and Dispute Resolution
Dissertation Survey Results Presentation

Commercial and Contractual Issues in Piling Subcontracts

23rd March 2017

Joanna Mikoda

Contest

- 1) Introduction
- 2) Background Information
- 3) Survey Results
- 4) Questions

Introduction

Employer

- Cementation Skanska Ltd
- 5 years
- Senior Quantity Surveyor for Major Projects and London

Course

- The University of Central Lancashire
- Master of Science in Construction Law and Dispute Resolution
- 3 years distance learning course
- Dissertation

Professional Body

- Federation of Piling Specialist



Cementation
SKANSKA



Background Information

In 2016, the Geotechnical Services File analysis reported that the UK geotechnical industry turnover is over £1.2bn (Smith, 2016). To put this figure into perspective, the total output in the construction industry was reported by the Office for National Statistics (2016) at £134bn.

While there is substantial literature available regarding the main contract practice, there is very little that explores the problems particular to the relationship between the contractor and its subcontractors.

Office for National Statistics, 2016. *Output in the construction industry*. [xls] Available at:

<<https://www.ons.gov.uk/businessindustryandtrade/constructionindustry/datasets/outputoutputintheconstructionin>>

Smith, C., 2016. Geotech Services File, Strengthening market. *Ground Engineering*, August/September 2016.

Survey Results

The total number of responses received was 74no. These were divided into two categories:

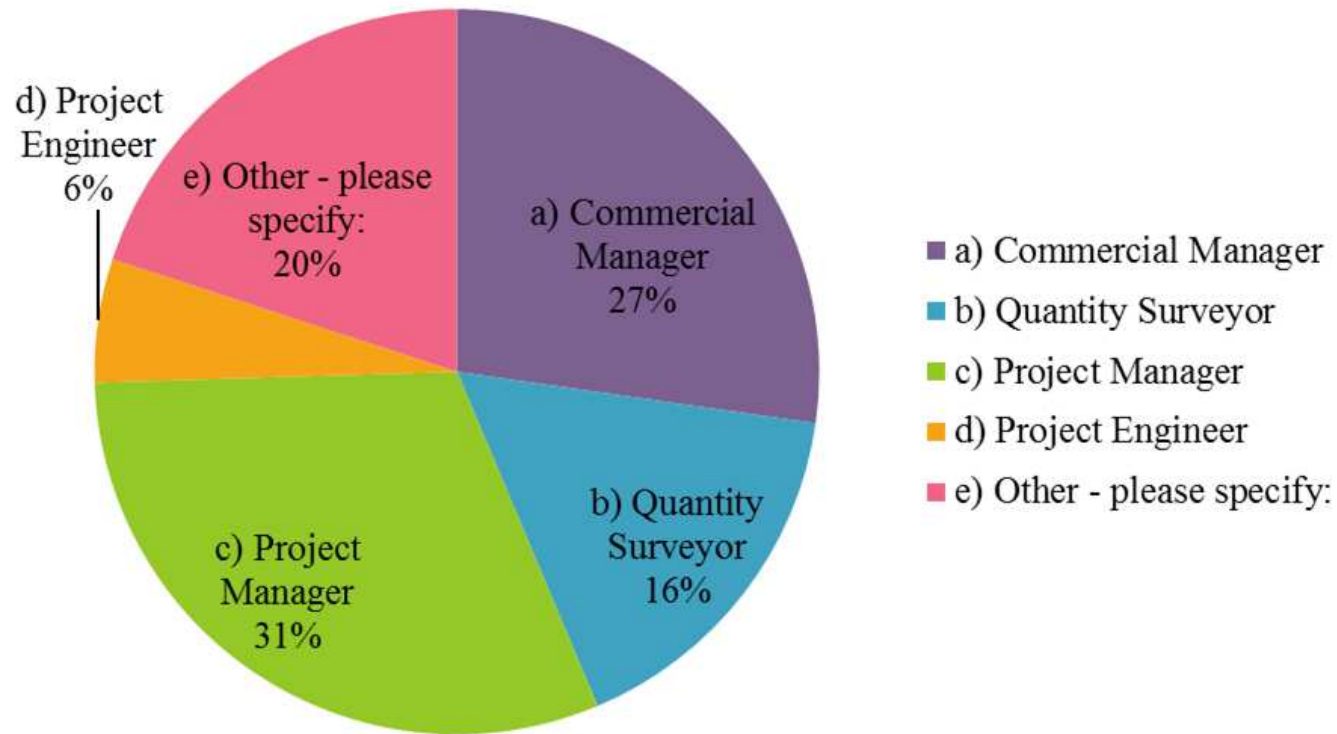
- 55no 'Complete' – this was the number of people who completed the questionnaire i.e. responses were marked as 'Complete' when respondents reached 'Thank You' page;
- 19no 'Partial' – this was the number of people who entered the questionnaire but did not complete it i.e. only one or two questions were answered and respondents did not reach the 'Than You' page.

The estimated response rate was 37%.

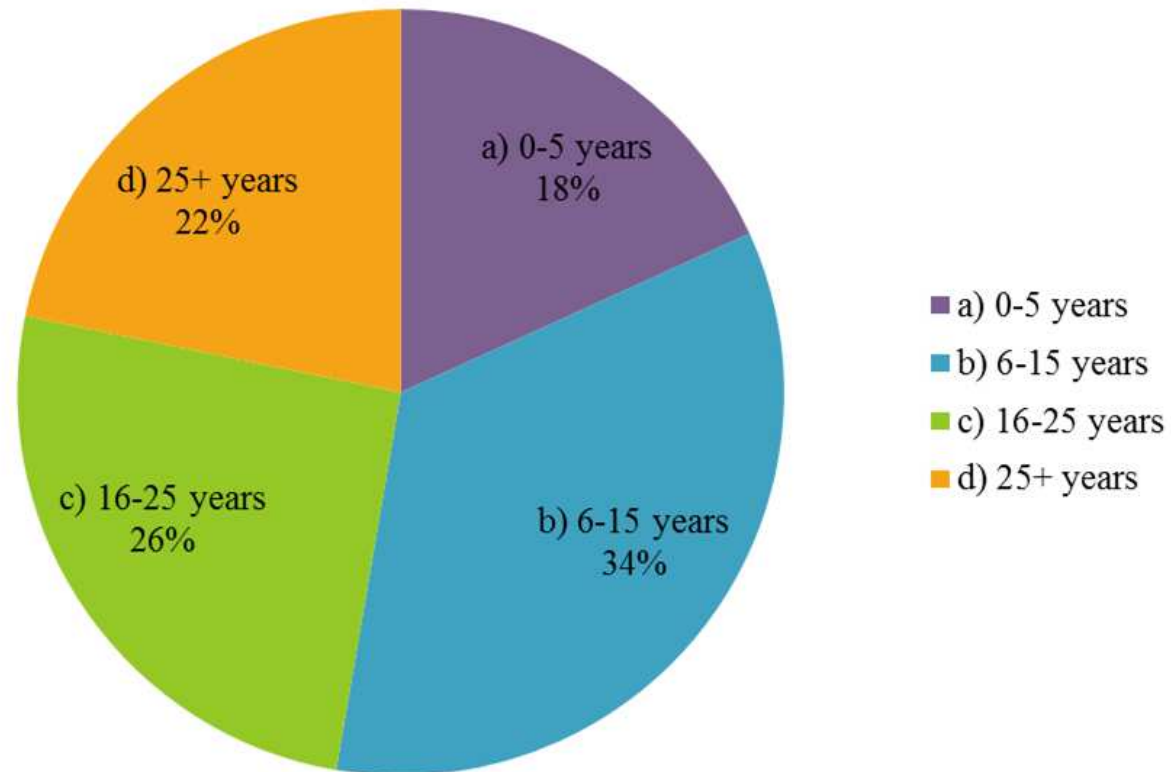
The survey was undertaken during 4 weeks in August 2016.

Q1: All 55no respondents agreed that their answers can be used for the purpose of this research.

Q2: Which profession best describes your occupation?



Q3: How many years of experience in the piling industry do you have?

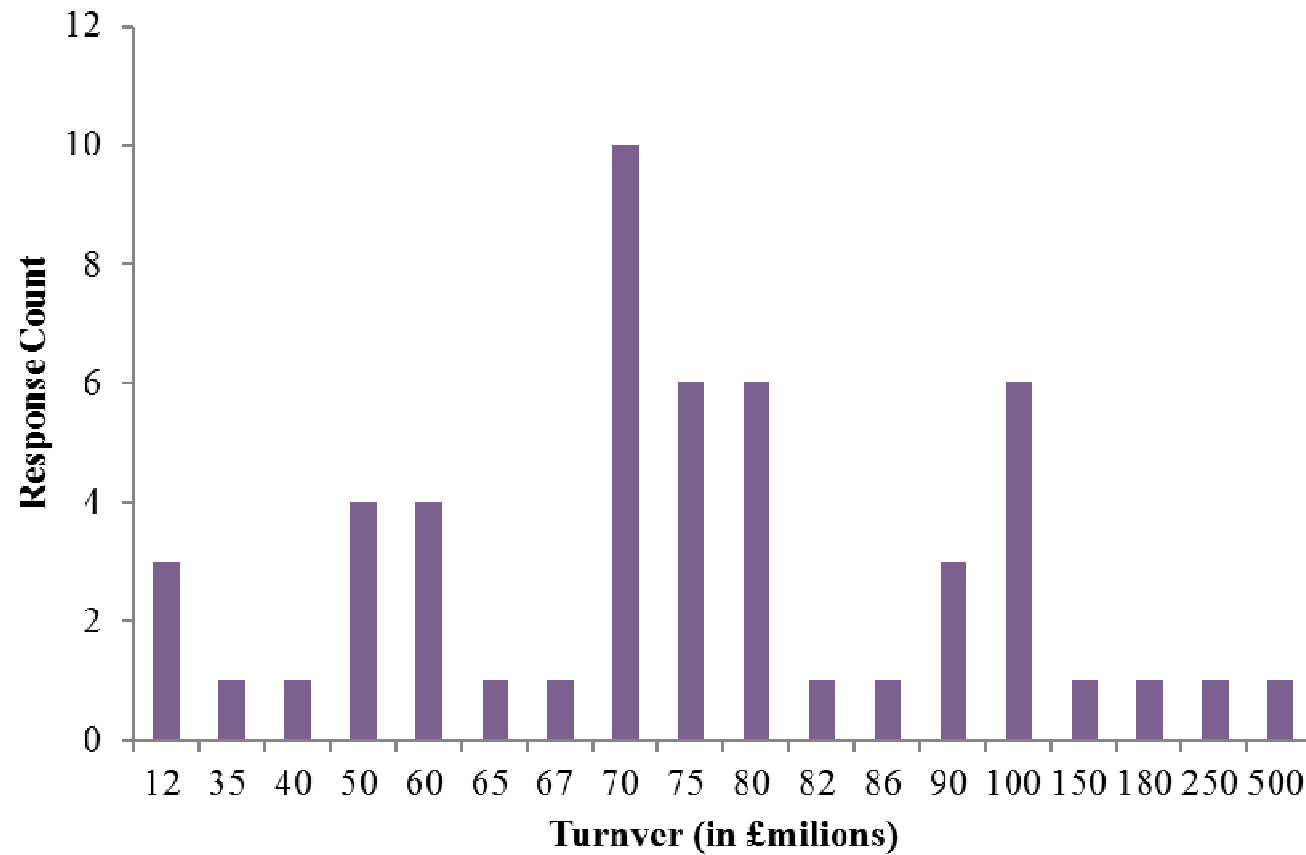


Q3&4: Matrix

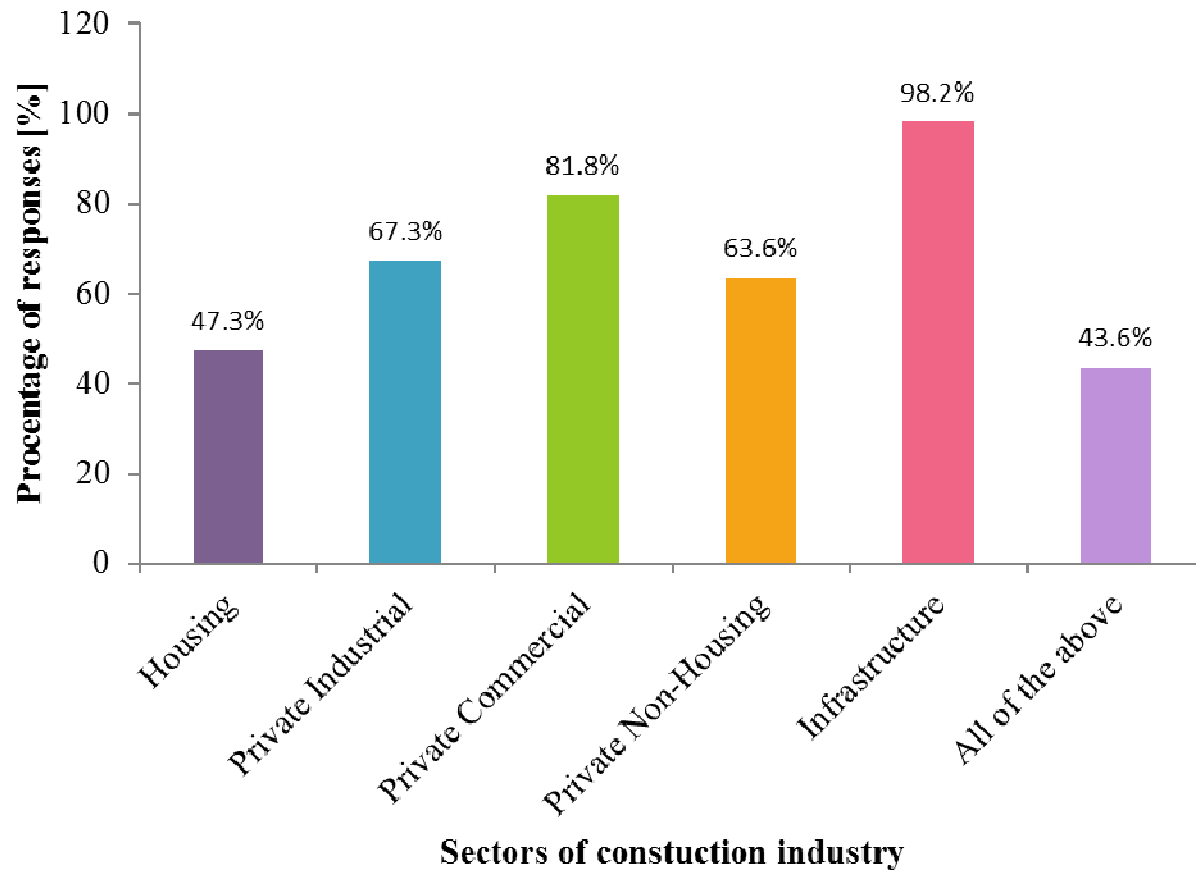
	a) Commercial Manager	b) Quantity Surveyor	c) Project Manager	d) Project Engineer	e) Other	TOTAL
a) 0-5 years	1	4		3	2	10
b) 6-15 years	5	5	7		2	19
c) 16-25 years	5		8		1	14
d) 25+ years	4		2		6	12
TOTAL	15	9	17	3	11	55

Other – please specify' included: 2no Operations Manager, 1no Chartered Civil Engineer, 1no Commercial Director, 1no Commercial Graduate, 1no Company Director, 1no Contracts Consultant, 1no Director, 1no Operations Director, 1no Risk & Legal Manager, 1no Section Engineer

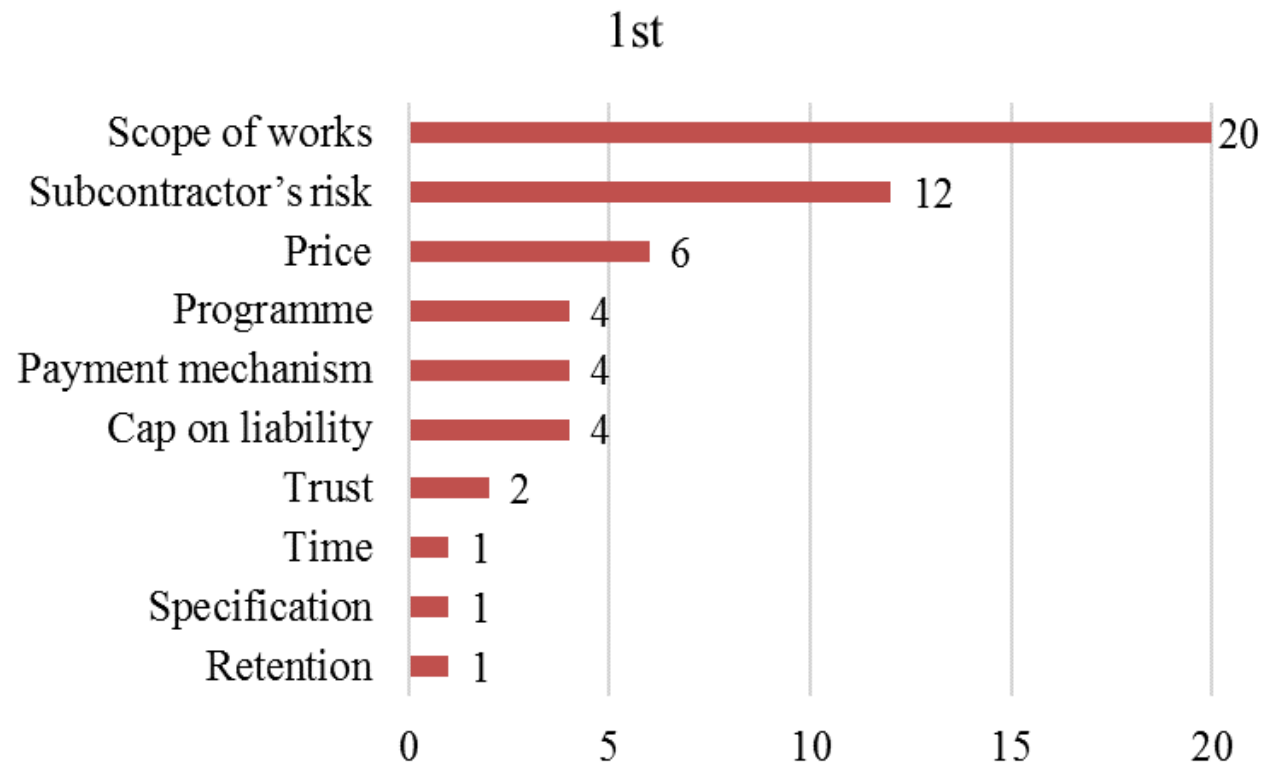
Q4: What is the annual turnover of the organisation that you currently work for (in £millions)?



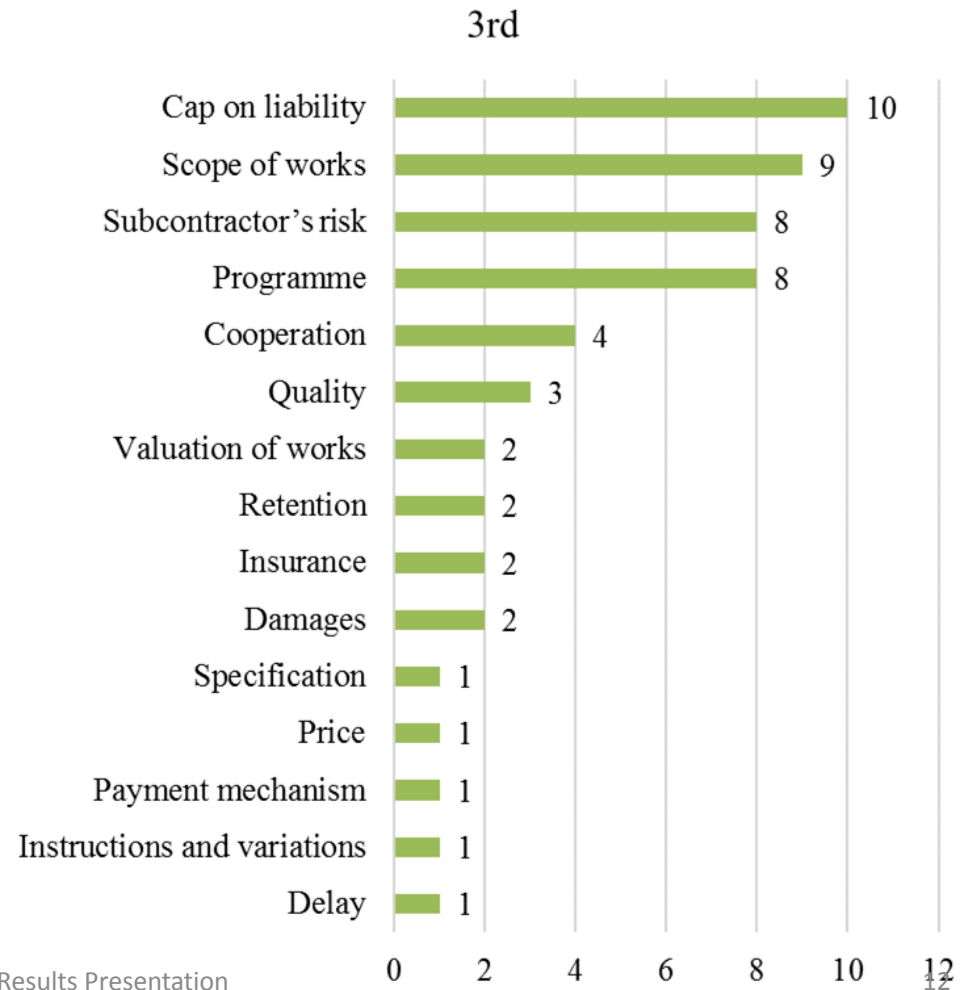
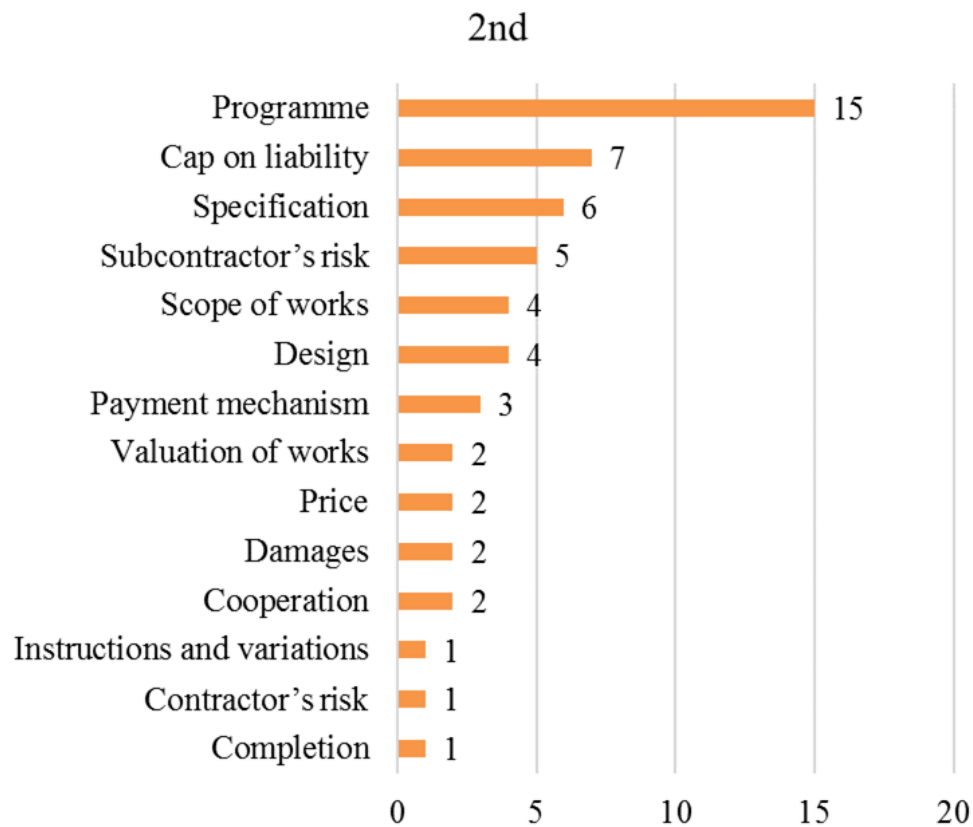
Q5: Which sector of the construction industry best describes the nature of work that you have carried out the most in your career?



Q6: What are the three most important issues when negotiating piling subcontract terms and conditions?



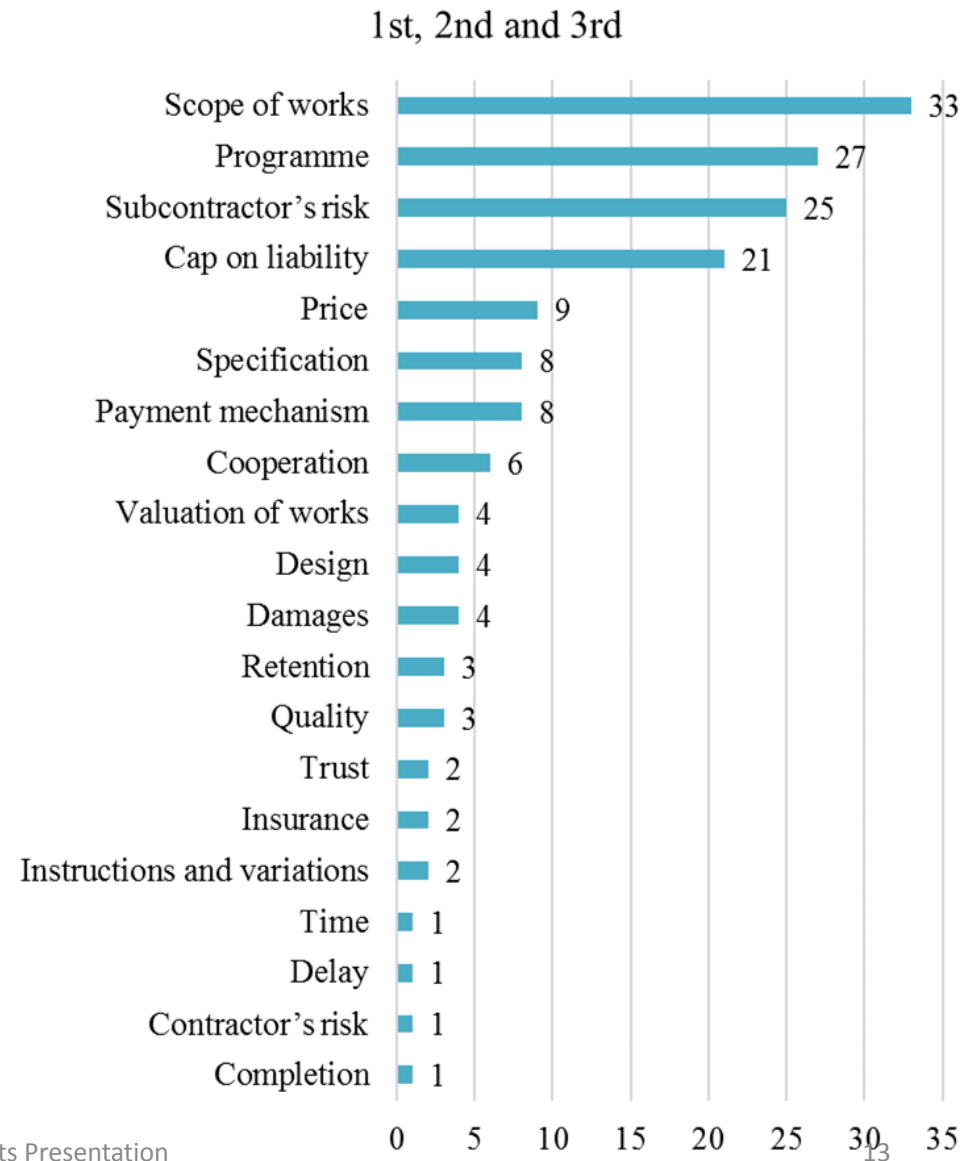
Q6: What are the three most important issues when negotiating piling subcontract terms and conditions?



Q6: What are the three most important issues when negotiating piling subcontract terms and conditions?

Combined four most important issues when negotiating piling subcontracts are:

- 1) Scope of works
- 2) Programme
- 3) Subcontractor's risk
- 4) Cap on liability



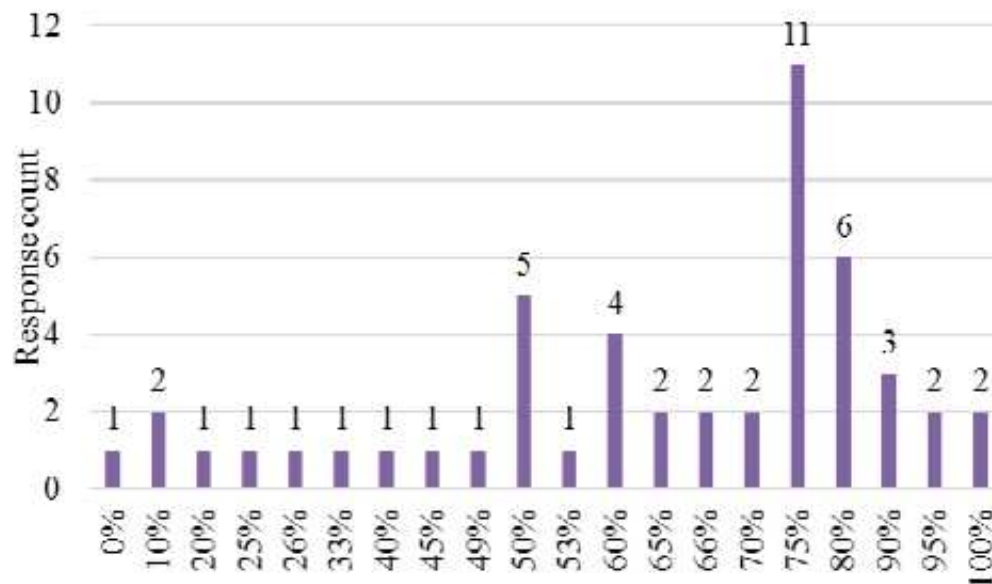
Q7: From your experience, how often do the piling works commence on site with the subcontract agreement concluded by one of the following options:

Responses	Never	Rarely	Some-times	Often	Always
Verbal agreement	51%	20%	16%	13%	0%
Acceptance by signature	13%	18%	36%	26%	7%
Acceptance by conduct (subcontractor started work before an agreement was concluded e.g. so-called 'battle of the forms' scenario)	22%	15%	35%	27%	2%
Letter of intent	2%	7%	38%	49%	4%

Q8: The following are the typical forms of construction subcontracts, please arrange the items below in the order for which you have the most experience of. Please add only the subcontracts that you have experience with.

Survey Rank	Form of subcontract	Total respondents
1	NEC	50
2	JCT	46
3	Bespoke	45
4	CECA for use in conjunction with the ICE/ICC/GC Works	33
5	FIDIC	29
6	IChemE	22
7	ACA	20

Q9: Please estimate the percentage of subcontracts that you have been involved with, which had the main contract obligations reflected in or stepped down as "back to back" to the subcontract.



Average 64% subcontracts had the main contract obligations passed down.

Q10: Few construction projects go from start to finish without a change. Where there has been a departure from the work specified in the subcontract, it is necessary to decide whether there is a variation under the subcontract. From your experience, please rate how difficult it is to answer the following questions:

Questions	Easy	Medium	Hard	Don't know
1. Is there a variation?	44%	53%	4%	0%
2. Is the subcontractor entitled to additional payment?	22%	62%	16%	0%
3. And if so, determining the value of the additional work/entitlement?	15%	49%	35%	2%

Q11: Which of the following items are issued/made on time and in accordance with the subcontract payment mechanism?

Responses	Never	Rarely	Some-times	Often	Always	Don't know
Application for Payment (issued by Subcontractor)	0%	2%	0%	33%	64%	2%
Payment Notice (issued by Contractor)	0%	2%	33%	51%	13%	2%
Payless Notice (issued by Contractor)	4%	13%	44%	31%	6%	4%
Default Payment Notice (issued by Subcontractor)	7%	43%	24%	13%	2%	11%
Interim Payment (made by Contractor)	2%	13%	33%	42%	6%	6%
Final Payment (made by Contractor)	0%	26%	35%	26%	9%	6%

Q12: In your opinion, how the piling subcontractor should deal with the issue of under certification?

Category/Theme	Response Count	Brief Description
Dialogue, meeting, communication	24	Dialogue / discussion / meeting with client / QS / Commercial manager; <i>“open and honest dialogue”</i> , <i>“face to face meeting”</i> ; discuss applications prior to submission and/or certification; agree value early; build relationship with the client; <i>“always write, stating dissatisfaction”</i> .
Substantiation, detailed submissions, records, variations	8	Provide substantiation; <i>“make sure the forecast in application is adequate”</i> ; <i>“agree change as it happens”</i> ; keep good records; provide detailed submissions for change.
Dispute Resolution/Adjudication	8	Adjudicate; adjudicate <i>“in extreme situations”</i> or in case of large differences and when the case is clear; <i>“worst case adjudicate”</i> ; <i>“threaten adjudication”</i> ; <i>“threaten legal action”</i> .
Subcontract T&Cs i.e. payment mechanism in the subcontract	7	Submit applications / notices in accordance with contract requirements; charge interest.
Escalation	4	Raise with line manager and peers; escalate above site level.
Other	4	E.g. contractually no mechanism; independent certification; no problem as projects are <i>“short enough to be captured in one valuation period”</i> ; <i>“Inform Credit Insurers”</i>
Pre-contract negotiations	3	<i>“Front loading of costs”</i> ; <i>“Define scope of works, rights of off set, and agree attendances at prestart meeting”</i> ; <i>“agree a mechanism for recording / agreement / valuation”</i> in the prestart meeting.

Q13: The Government has introduced the following payment related

schemes:

- Prompt Payment Code and
- Construction Supply Chain Payment Charter.

Please answer the following:

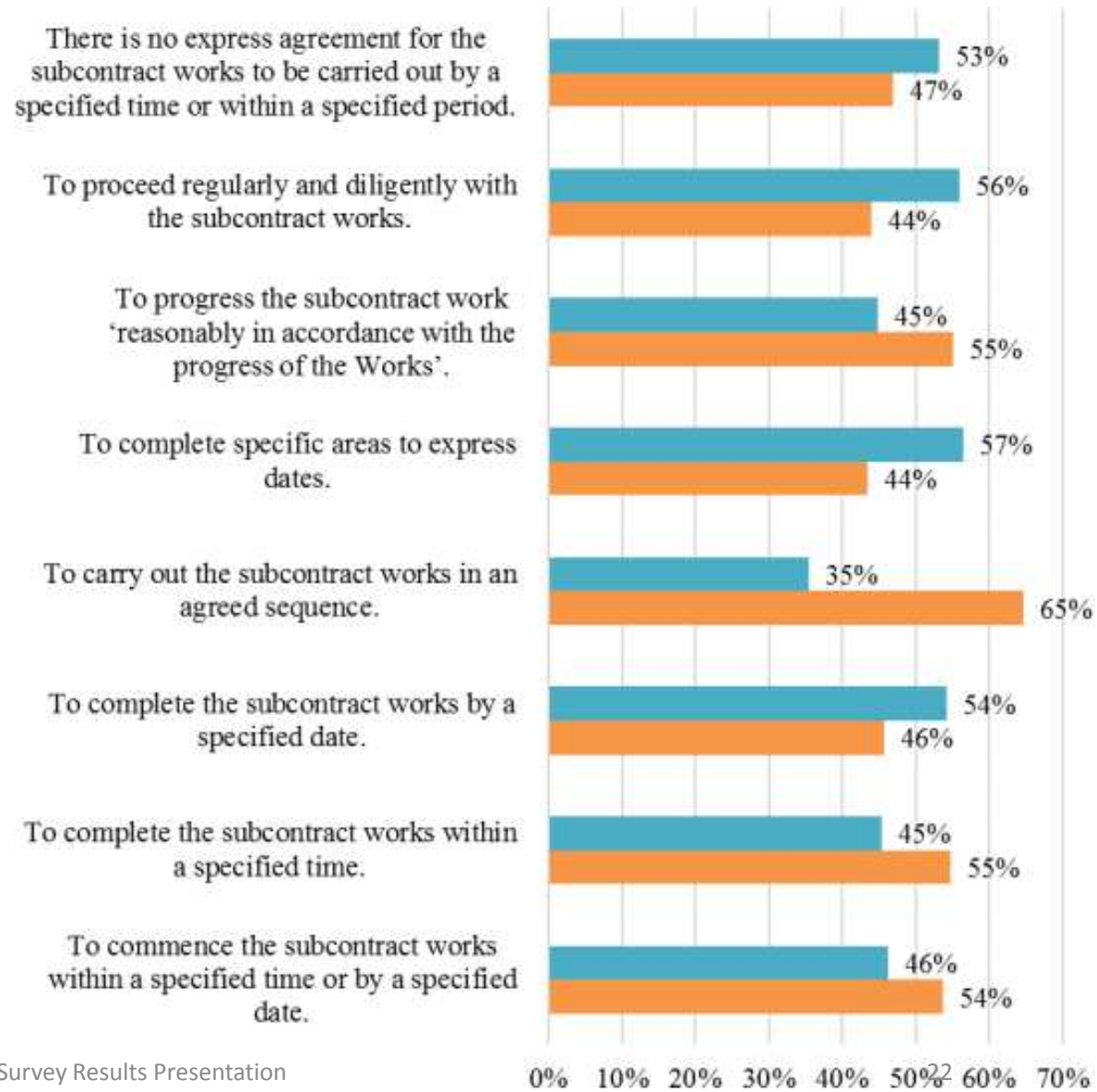
	Prompt Payment Code		Supply Chain Payment Charter	
	Percentage	Response Count	Percentage	Response Count
Does your company support?				
Yes	77%	41	72%	38
No	2%	1	6%	3
Don't know	21%	11	23%	12
Has your company signed up to?				
Yes	56%	29	50%	26
No	12%	6	15%	8
Don't know	33%	17	35%	18
Do you believe that the Code/Charter will improve payment practices in the construction industry?				
Yes	50%	26	52%	27
No	33%	17	29%	15
Don't know	17%	9	19%	10

Q14: From your experience, please select the following options regarding the subcontractor's programme:

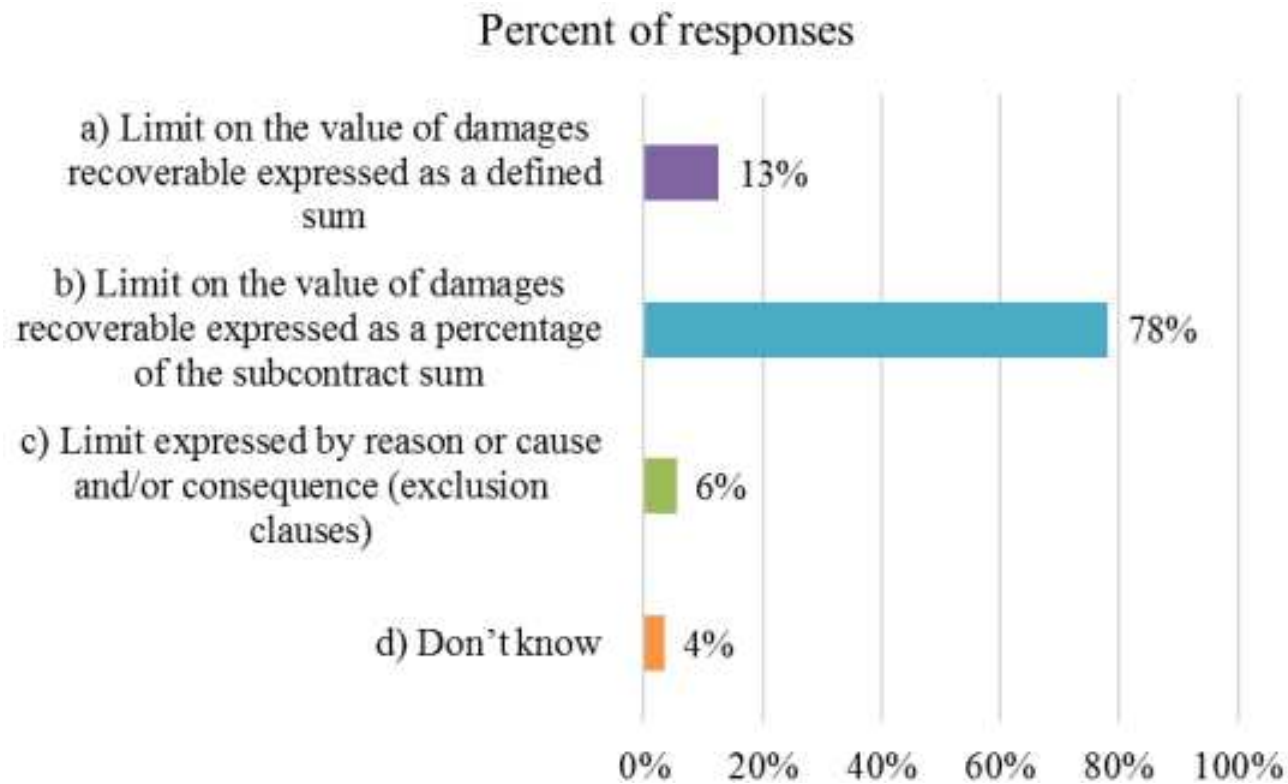
Reponses	All	Most	Some	Few	None
The programmes of works are incorporated within ... piling subcontracts.	24%	43%	24%	9%	0%
The subcontractor programmes included in the subcontracts are updated regularly on ... piling subcontracts.	7%	24%	39%	30%	0%
There is no requirement to include programmes in ... piling subcontracts.	0%	7%	28%	33%	32%

Q15: As a piling subcontractor, select which of the following obligations you believe should be included in the subcontract agreement and which obligations typically you end up signing up to?

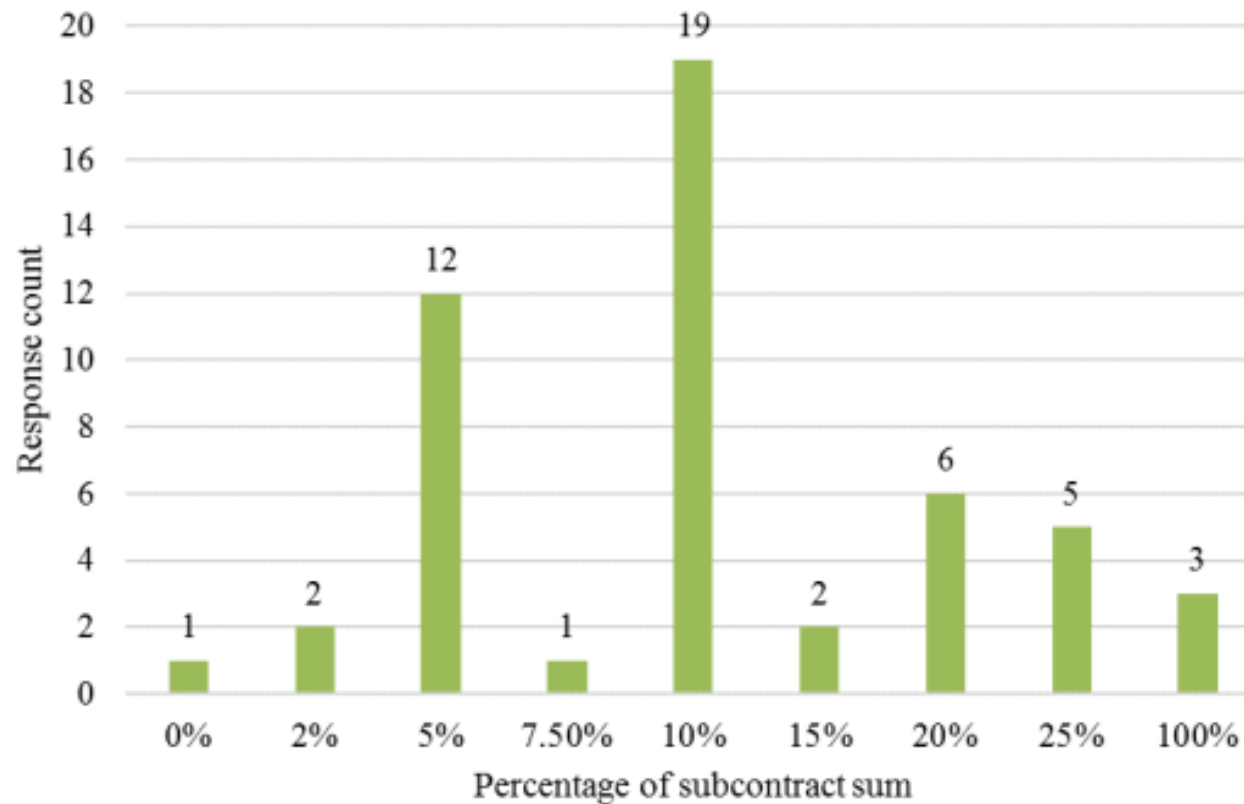
- Obligations you end up signing up to
- Obligations you believe should be included



Q16: It is not uncommon for a subcontractor to seek to limit its exposure to damages and this can be done in a number of ways. In your experience, what is the most typical way that this applied in piling subcontracts?



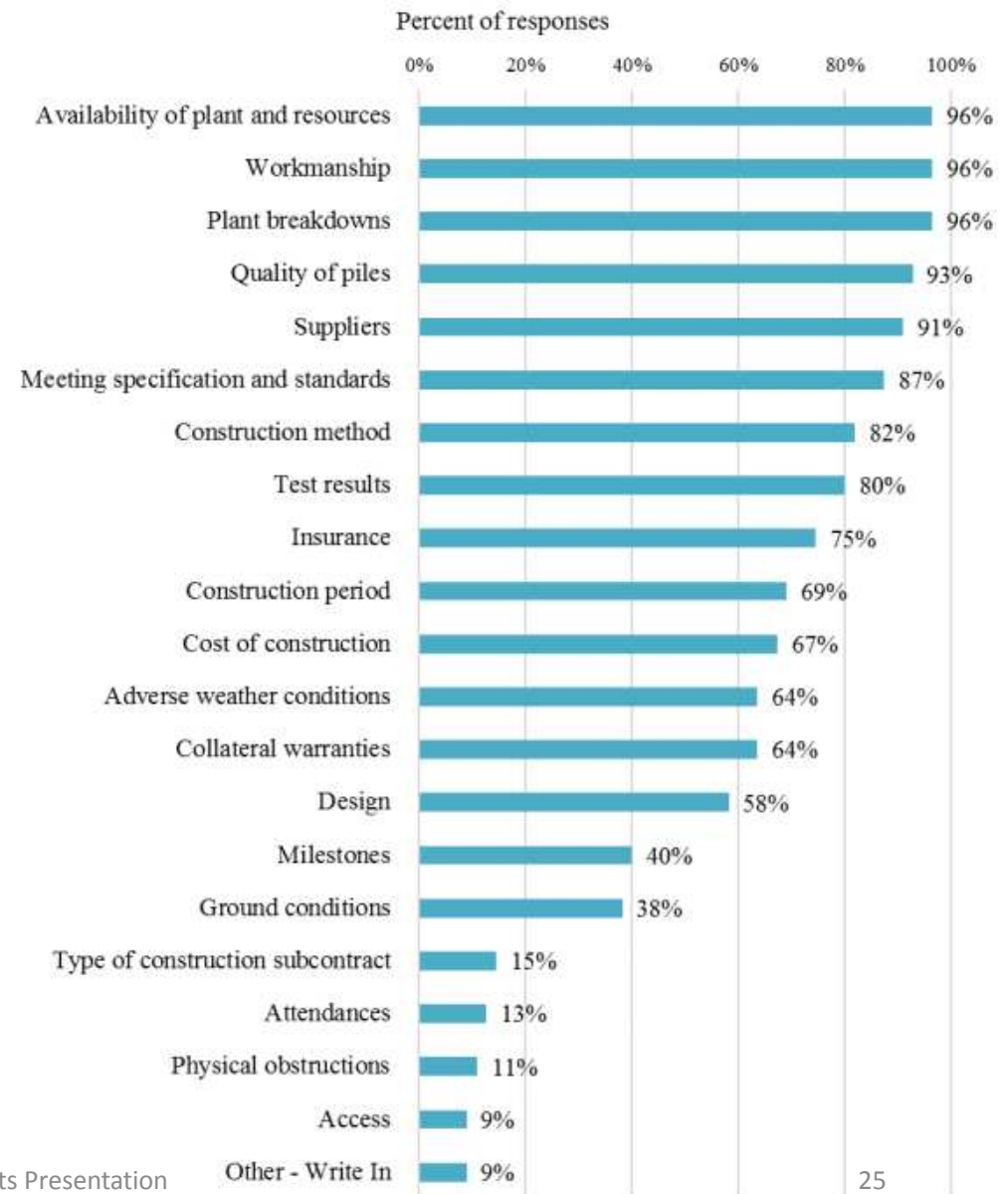
Q17: What percentage of the subcontract sum you consider acceptable to the piling subcontractor as a limit on the value of damages recoverable by the contractor?



Q18: Which of the following risks are typically considered to be retained by the piling subcontractor?

The top five subcontractor's risks are:

- 1) Availability of plant and resources
- 2) Workmanship
- 3) Plant breakdowns
- 4) Quality of piles
- 5) Suppliers



Q19: From your experience, please rank the list below in order of most common causes of disputes in piling subcontracts.

Survey Rank	Cause	2014 UK Rank
1	Failure to understand and/or comply with its contractual obligations by the contractor/subcontractor	2
2	Failure to properly administer the contract	1
3	Failure to make interim awards on extension of time and compensation	-
4	Errors and/or omissions in the contract document	-
5	Poorly drafted or incomplete and unsubstantiated claims	3

2014 UK Rank is from *Global Construction Disputes 2015* at www.arcadis.com

Other examples of surveys related to construction disputes are reported in:

- *Adjudication Society Reports no 14 and 15* at www.cdr.uk.com
- *National Construction Contracts and Law Survey 2015* at www.thenbs.com

Q20: From your experience, what is the most common form of Alternative Dispute Resolution used in piling disputes? Please rank the list below in order from 1 to 4 (1 = most common).

Survey Rank	Method of Alternative Dispute Resolution	2014 UK Rank
1	Party to party negotiation	2
2	Mediation	3
3	Adjudication	1
4	Arbitration	-

Thank you for taking part in my survey!

Questions???