

CONSTRUCTION : BULLETIN

JCT Design & Build 2016 – What Has Changed? Part Two

JCT has now published the Design and Build Contract 2016 and the Design and Build Sub-Contract 2016. In the second of our bulletins on these new editions, we take a look at more of the key changes that have been made.

Design and Build Contract

Existing Structures and insurance

Insurance Option C is often unsuitable for Works in Existing Structures (note 'Existing Structures' is now a defined term) if the Employer is unable to insure the Existing Structures himself (e.g. where the Employer is a tenant in a property insured by the landlord).

JCT have now recognised the need for flexibility in how Existing Structures are insured by allowing a 'C.1 Replacement Schedule' to be incorporated into the Contract in place of paragraph C.1 of Insurance Option C. This allows the parties to set out their own bespoke insurance arrangements. The Design and Build Contract Guide 2016 gives examples of possible alternative arrangements, such as asking the Contractor to bear the risk of damage to the Existing Structures under his public liability insurance or arranging for the Employer to take out special structures insurance.

It will be crucial for C.1 Replacement Schedules to describe the alternative insurance arrangements in proper detail to avoid gaps in insurance coverage. Employers should take specialist insurance advice and work with Contractors to find a solution.

Consolidation of insurance provisions

The provisions relating to evidence of insurance, failure to insure and loss of or damage to the Works have been

moved from Insurance Options A, B and C into clauses 6.7.2, 6.12, 6.13 and 6.14. This has made the Insurance Options much shorter and simpler and avoids unnecessary repetition.

Public Contracts Regulations 2015

The Contract now complies with regulation 73(1) of the Public Contracts Regulations 2015 (the 'PC Regulations'), which requires a contracting authority to be able to terminate a public contract in certain circumstances. As a result, where the Employer is a Local or Public Authority (as newly defined in clause 1.1), it has three new rights of termination:

- under clause 8.6 where the Contractor should have been excluded from the procurement procedure due to corruption or similar offences;
- under clause 8.11.3 where the Contract has been subject to a substantial modification which requires a new procurement procedure; and
- under clause 8.11.3 where the European Court of Justice has decided that the Contract should not have been awarded due to a serious infringement of the PC Regulations.

There are also two new Supplemental Provisions. Supplemental Provision 11 relates to the Freedom of Information Act 2000. Supplemental Provision 12 requires the Contractor to ensure his sub-contracts contain certain provisions in order to comply with the PC Regulations.

Net contribution clause

The Third Party Rights in Schedule 5 now include a net contribution clause



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because the JCT believe there are circumstances where the Employer's consultants could be jointly liable with the Contractor for design defects. However, in many cases the Contract is amended to give the Contractor total design responsibility, so a net contribution clause will not be appropriate in those circumstances and will need to be deleted (if the Employer chooses to use the JCT Third Party Rights schedules).

Sub-contracting arrangements

Where the Rights Particulars require sub-contractor third party rights and/or collateral warranties to be provided, clause 3.4 requires sub-contracts to contain additional provisions in order to give effect to the third party rights and warranties.

Copyright licence

Clause 2.38 now permits the Employer's licence to use the Contractor's Design Documents to be assigned to the owner of the Works or any part of them and sub-licensed to any owner or tenant of the Works or any part of them. However, this wording may not be wide enough for Employers who require total freedom to assign and sub-licence.

Giving of consent or approval

New clause 1.10 provides that where the consent or approval of either party is expressly required under the Contract, such consent or approval must not be unreasonably delayed or withheld, except in the case of consent to assignment under clause 7.1. Employers will need to consider whether there are any other provisions of the Contract in relation to which they would like to withhold consent or approval at their discretion and make appropriate amendments to clause 1.10 to stop the exercise of discretion being overridden by the duty not to act unreasonably.

Site Manager

Clause 3.2 has been re-named 'Site Manager' so that the Contractor is required to appoint a full-time Site Manager rather than a person-in-charge. The obligation to appoint a Site Manager was previously a Supplemental Provision. The new clause is similar to the old clause, but

now requires the Employer to approve the identity of the Site Manager and any replacement.

Design and Build Sub-Contract

The changes to the Design and Build Sub-Contract generally reflect those in the Main Contract. They include:

Payment

- The payment provisions have been generally streamlined and simplified.
- There is a new Interim Valuation Date ('IVD') which should be the same as the Main Contract IVD.
- There is an option to specify an IVD prior to the commencement of work on site if the Contractor wishes to pay early for the Sub-Contractor's pre-site activities.
- The monthly payment cycle continues until the due date for the final payment, rather than switching to a two-monthly cycle after practical completion of the Main Contract Works.
- The due date for payment is 12 days after the IVD, unless the Sub-Contractor is entitled to submit a Payment Application and does so later than 4 days prior to the IVD, in which case the due date is 16 days after the Contractor's receipt of the Payment Application.
- The final date for payment has been reduced from 21 days to 14 days after the due date to take account of the longer period between the IVD and the due date.

New loss and expense ascertainment procedure

- Clause 4.15 sets out new requirements for the prompt notification of loss and expense claims and submission of supporting information by Sub-Contractors.
- The Contractor has 42 days to carry out an initial assessment of the loss and expense incurred and 28 days to carry out further assessments following the submission of any new supporting information by the Sub-Contractor.

Warranties and third party rights

- There is a new option for Sub-Contractors to grant third party rights.
- The Sub-Contract Particulars must identify the 'Sub-Contract Rights Particulars' document, which sets out the Contractor's requirements for Sub-Contractor warranties and/or third party rights.
- There is a new Schedule 6 setting out third party rights wording. It is worth noting that these third party rights include a net contribution clause, which is often unacceptable to Employers.
- Clause 2.26 assumes the JCT forms of warranty and third party rights schedule will be used, so it will need to be amended if the Employer requires bespoke warranties and third party rights (which is often the case).
- A new clause 2.27 explains the parties' rights to terminate and vary the Sub-Contract where third party rights have been granted.

Product liability insurance

- Clause 6.10 gives the option of requiring product liability insurance instead of professional indemnity insurance.
- The required type of insurance is to be specified in the Sub-Contract Particulars.

Consent

- Clause 1.9 requires that no consent or approval is to be unreasonably delayed or withheld, except consent to assignment under clause 3.1.

Public Contracts Regulations 2015

- New Supplemental Provision 7 caters for termination under regulation 73(1) of the PC Regulations and links to the similar rights of termination in the Main Contract.

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