



Welcome to the November 2016 edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

Established in 1931, the JCT has a tried and tested track record of delivering contracts to the construction industry. The great benefit of JCT contracts has traditionally been that parties are familiar with the contractual provisions and how they operate. This can be contrasted with the NEC3 suite of contracts which have attracted far less judicial scrutiny and interpretation. As a result of this, many of the clauses within the NEC3 suite of contracts remain untested by the courts.

role of CDM Coordinator to Principal Designer. The Principal Designer role, to be inserted at Article 5, is likely to entail some careful consideration on design and build projects as to whether this role is to be undertaken by the Contractor, architect or another design team member. Employers should be aware that if a Principal Designer is not appointed in writing the responsibility for discharging its duties will revert to the Employer.

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## 2016 — A change in precedent <sup>1</sup>

The Joint Contracts Tribunal ("JCT") continues to roll out its JCT 2016 precedent forms of contract. Last month saw the release of the Design and Build Contract 2016 which followed closely in the footsteps of the Minor Works Contract 2016.

In this edition of *Insight* we review the key amendments made in the latest JCT Design and Build Contract 2016 and examine their likely impact on those using them going forward.

The JCT Design and Build Contract has become the domestic "off the shelf" contract of choice for both employers and funders, with contractors increasingly comfortable working under it. There has, however, been a perception that the JCT Design and Build Contract 2011 requires certain amendments to bring it in line with standard market requirements and it is often subjected to a series of amendments from employers and funders.

Amending any standard form contract should be undertaken with great care as minor changes can inadvertently alter the risk allocation. As His Honour Humphrey Lloyd QC noted in the case of *Royal Brompton Hospital National Health Trust v Hammond*:

*"A standard form is supposed to be just that. It loses its value if those using it or, at tender stage those intending to use it, have to look outside it for deviations from the standard."*<sup>2</sup>

Due to the number of changes made to the Design and Build Contract 2016 it is clear that any precedent form of amendments to the 2011 versions will need to be carefully reconsidered going forward.

### So what's new?

Although the guide to the JCT Design and Build 2016 states that the new amendments do not "*materially affect risk allocation*", there are a number of notable changes to be aware of which are set out below.

#### Construction (Design and Management) Regulations 2015

The 2016 contract has been updated as a result of last year's change in CDM legislation, including the change in

#### Public Procurement

The 2016 version has been updated to comply with the Public Contracts Regulations 2015 and now contains provisions for use by public bodies on public sector projects. This includes express rights to terminate the contract for breaches of the Regulations and revised obligations to comply with the Freedom of Information Act 2000.

#### Building Information Modelling ("BIM")

From April this year all centrally procured government projects are to be procured with BIM Level 2. The 2016 contract acknowledges this and incorporates BIM within the drafting. Parties are obliged to comply with the BIM Protocol which they are to agree between themselves and which shall be treated as a Contract Document. Employers should be careful in checking whether the BIM Protocol obliges them to provide the Contractor with any information within a set timeframe as complying with such timeframes is now a contractual requirement (see clause 2.7.2). Where BIM is applicable to the project, Contractors must ensure that any subcontract provides for the subcontractor to supply and grant all reasonably necessary information and licences required by the BIM Protocol (see clause 3.4.3).

#### Payment

The Section 4 payment provisions have been overhauled, with the various loopholes and notice provisions of the Construction Act simplified to make the payment mechanism easier to follow.

The provisions for adjusting the Contract Sum have been consolidated to just six scenarios under clause 4.2. In order to promote fair payment, Interim



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Valuation Dates are now standardised and operate across the whole supply chain (see clause 4.7). In addition, the period of time between the due date and the final date for payment for both interim payments and the final payment is now the same, being 14 days from the relevant due date (see clause 4.9.1). Finally, in order to simplify the payment process post-practical completion, monthly payment cycles will now continue to operate until the final certificate is issued — previously the JCT had imposed a two-monthly payment cycle after practical completion.

### Loss and Expense

Arguably the biggest change to the 2016 edition is the procedure for assessing loss and expense claims. Clause 4.20 now requires Employers to assess claims for loss and expense within 28 days from receipt of the Contractor's initial assessment of its entitlement, and within 14 days from any subsequent update to the assessment. This places a clear focus on proactive management of loss and expense claims, with the Employer obliged to make a prompt assessment and the Contractor obliged to give notice of Relevant Matters as soon as the likely effect becomes (or should become) reasonably apparent to him (see clause 4.20.1). The intent is to avoid such claims being thrown in at the end of the project.

### Security Documents — Performance Bond/Parent Company Guarantee

A common amendment made to the 2011 contract was the requirement for the Contractor to provide either a performance bond and/or a parent company guarantee to the Employer. This has now been addressed and clause 7.3 provides for the option of obtaining either or both forms of security from the Contractor on execution of the contract. The form of performance bond and parent company guarantee has not been provided by the JCT, leaving it for the parties to agree the document between themselves. It should be noted that the contract does not provide for a remedy in the event the Contractor fails to procure the relevant security document. Employers have typically looked to secure a right to withhold payments until the security documents are provided.

This is likely to remain a common amendment to the 2016 edition.

As always, any form of security is only as good as the party providing it and the new provisions for obtaining a performance bond and/or a parent company guarantee should not negate the need to undertake checks on the covenant strength of the security provider.

### Third Party Rights

There is now an option for third parties (such as tenants, purchasers or funders) to secure third party rights and bring claims against the subcontractor in the event of a breach of the subcontract. Although not favoured in the market, such third party rights can provide largely the same benefits as collateral warranties and avoid the hassles and paperwork of securing (or failing to secure) executed collateral warranties.

### Insurance

The insurance options have been simplified to avoid unnecessary repetition within Schedule 3. The JCT has also finally acknowledged the need for an alternative insurance solution to the problem frequently encountered by tenants and domestic homeowners undertaking fit-out works who, under Option C (Joint Names Insurance by the Employer of Existing Structures and Works in or Extensions to them), cannot obtain a joint existing structure insurance to cover the Contractor.

### Practical points

The JCT Design and Build 2016 contains some welcome amendments and provides an updated and more simplified contract in a number of areas. Those using or administering the new contract should familiarise themselves with these changes prior to signing up to the contract.

The JCT has not, however, addressed various key amendments employers and funders have routinely made to the 2011 edition to reflect their market requirements. For example, there is still no option for the Contractor to undertake a single point of responsibility for design (including that within the Employer's Requirements), which is an amendment that no doubt will continue to be made to the 2016 edition. Further, what are considered basic market requirements are still missing, such as:

- the Contractor's copyright licence not being linked to payment;
- provisions detailing the novation of the design team;
- enhanced provisions surrounding the Contractor's reasonable skill and care duty;
- more comprehensive confidentiality provisions;
- more robust provisions concerning the specification and use of deleterious materials;
- obligations on the Contractor to comply with relevant third party agreements;
- the ability for works and services carried out prior to the contract (through Pre-Construction Services Agreements and Letters of Intent) to form part of, and be governed by, the contract;
- a mechanism for snagging post-practical completion;
- express obligations on the Contractor to prevent nuisance and trespass in carrying out the works; and
- the ability for the Employer to freely assign the contract without the Contractor's consent.

As a result, the 2016 contract is still likely to be subjected to a good number of amendments. Due to the volume of changes made to the 2016 contract, any precedent forms of amendments to the 2011 JCT Design and Build Contract will no longer be applicable and will need careful reviewing and updating.

### Footnotes

1. With thanks to Edward Colclough for his hard work in preparing this article.
2. See Royal Brompton Hospital National Health Trust v Hammond and Others (No. 9) [2002] EWHC 2037, at paragraph 60.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Claire King. [cking@fenwickelliott.com](mailto:cking@fenwickelliott.com). Tel +44 (0) 207 421 1986

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Fenwick Elliott LLP  
Aldwych House  
71-91 Aldwych  
London WC2B 4HN  
[www.fenwickelliott.com](http://www.fenwickelliott.com)