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Insights

BSA 2022: RECOMMENDED CHANGES TO CONSTRUCTION CONTRACTS

Mar 21, 2024

SUMMARY

In this Insight, first published in PLC, Kim Roberts, Katharine Tulloch and Corinna Whittle consider the key changes that parties may want to make to their construction contracts to take account of the new regulatory regime introduced by the Building Safety Act 2022 (BSA 2022).

This article contains links which are only accessible by PLC subscribers.

UK construction standard form contracts tend to be robust enough to deal with most external events without requiring amendment, although parties may of course choose to amend them to reflect party and project specific matters.

Building safety reform is different. The new regulatory regime for higher-risk buildings (HRBs) introduces new concepts and processes, some with related time and money implications. Unamended standard forms simply do not have the machinery to deal with these because the new regime bears little resemblance to what has gone before. Some amendment, even if confined in the main to the Employer's Requirements (ERs), is prudent. To ignore such changes, is to leave all parties to the contract exposed.

This article takes a look at the key changes that prudent parties may wish to address in their contracts.

For more information generally about building safety and the Building Safety Act 2022 (BSA 2022), see Toolkit, Building safety toolkit and Practice note, Building Safety Act 2022.

KEY CHANGES

STATUTORY REQUIREMENTS (HRBS/NON-HRBS)

One issue with building safety reform is that it is being introduced through a variety of routes, not only by legislation (and that itself is both primary and secondary). While the new regime beds in, government, the Building Safety Regulator (BSR), the HSE and various industry bodies are regularly issuing various types of guidance, the legal status of which is not always clear.

Therefore, until it becomes clear what is law and what is merely guidance, a sensible approach is to include a definition of Building Safety Laws in the contract for both HRBs and non-HRBs that is drafted widely enough to capture all the routes through which the new regime is being introduced. For an example of drafting to reflect this, see Standard document, Schedule of amendments to JCT Design and Build Contract, 2016 Edition: Drafting note: BSA 2022: Building Safety Laws and Drafting note: BSA 2022: New clause 2.41: Compliance with Building Safety Laws.

This new definition should link to the existing definition of statutory requirements to ensure that all parties are clear on the rules and regulations that they need to comply with when carrying out the project. Once the regime is fully established, it may be that this separate, wider definition can be dispensed with.

BUILDING REGULATIONS DUTYHOLDER REGIME (HRBS/NON-HRBS)

Building regulations dutyholders must be appointed for works on every building subject to the Building Regulations 2010.

Legislation requires the employer to appoint a principal contractor (PC) and principal designer (PD). At the very least, the relevant contract of appointment should contain a sentence doing this (unless the employer intends to instruct the PC and PD separately).

For both non-HRBs and HRBs, the employer must satisfy itself as to the competence of the dutyholders. For HRBs, record keeping of evidence to establish competence is required.

While a contract could remain silent on these points, prudent employers may wish to include something in the contract (be it the main body or the ERs) requiring the contractor or consultant, as the case may be, to warrant its competence, and that of those they appoint, and to also confirm that it will comply with its statutory duties.

For HRBs, given the employer must keep records as to the competence of those it appoints, it is logical to include a provision requiring the contractor and consultant to provide documentary evidence to the employer, when requested, on the steps taken to appoint sub-contractors and sub-consultants. In addition, for gateway 3, while there is a statutory requirement that the PC and PD submit a compliance declaration as part of the gateway 3 application, there is no statutory **obligation** on the PC or PD to do so. Therefore, it makes sense to include a contractual obligation on the PC and PD to do this.

For an example of a provision that parties may want to include in a design and build contract to address the new dutyholder roles, see Standard document, Schedule of amendments to JCT Design and Build Contract, 2016 Edition: Drafting note: BSA 2022: New clause 3.18: Building Regulations. This includes the additional protections referred to above but whether the parties chose to adopt these will depend on the parties and the project.

For more information about dutyholders generally, see Practice note, BSA 2022: dutyholder regime.

GOLDEN THREAD (HRBS)

Required for HRBs only, the golden thread is essentially a digital store of maintained key information that ensures that accurate building information is securely created, maintained and remains accessible throughout an HRB's lifetime.

The obligation to create and maintain this facility could arguably sit outside the contract or certainly within the ERs. However, the parties will need to include something that sets out the rules for storing and sharing relevant information on this electronic facility.

For an example of a drafting solution to address the golden thread requirements in the contract, see Standard document, Schedule of additional amendments to JCT Design and Build Contract, 2016 Edition for a higher-risk building: Drafting note: Clause 2.8A: golden thread of information. However, there are many different ways of doing this, which will depend on party and project preference and circumstance.

For more information about the golden thread, see Practice note, BSA 2022: golden thread of information for higher-risk buildings.

BSR ENGAGEMENT: ACCESS, OPENING UP REQUESTS, COMPLIANCE NOTICES (HRBS)

Under the new HRB regime, the BSR is entitled and empowered to:

- Inspect the progress of the works at agreed intervals.
- Request that the works are opened up.
- Issue compliance and stop notices.

As regards access and inspection, UK standard forms tend to make provision for such activities by third parties so minimal amendment needs to be made to such terms assuming they are agreeable, subject to ensuring the third party reference is wide enough to include the BSR.

However, the standard forms do not make provision for the impact of compliance and stop notices, so it is sensible to include provision to deal with these matters covering, for example, when the

contractor is entitled to claim additional time or money, who should liaise with the BSR to resolve the matter and how the employer is kept informed.

For an example of drafting that addresses these issues, see Standard document, Schedule of additional amendments to JCT Design and Build Contract, 2016 Edition for a higher-risk building: Drafting note: Clause 3.1: access for Building Safety Regulator to inspect, Drafting note: Clause 3.12: instructions to open up and Drafting note: Clause 3.13A: compliance with Building Safety Regulator notices.

BSR CHARGES (HRBS)

The BSR will charge an hourly rate when carrying out any work in connection with a project including, carrying out inspections and reviewing and processing gateway 2 and 3 applications. The BSR has said it will not provide quotes nor agree fixed fees.

In the absence of clarity as to how much these charges will be at the start of the new HRB regime, it is prudent to include drafting to address how such charges are paid. As familiarity with the BSR approach to charging grows it may be that such drafting will no longer be required.

Under JCT, one way of approaching the charges is to provide that the Contractor will pay the charges and then recover these costs in the same way as a Provisional Sum. This means that all charges properly payable to the BSR are paid by the employer and are a cost of the project. The exception to this is where an act, omission or default of the contractor has caused the "BSR charge" to be incurred, for example, if the contractor submits an invalid gateway 2 or 3 application or covers work in contravention of a BSR notice that it is then instructed to uncover.

For an example of drafting that reflects this, see Standard document, Schedule of additional amendments to JCT Design and Build Contract, 2016 Edition for a higher-risk building: Drafting note: Clause 2.18: fees and charges of the Building Safety Regulator and Drafting note: Sub-clause 4.2.7: payment of the Building Safety Regulator's fees and charges.

Some employers may prefer the contractor to price for the BSR charges at the outset of the project. However, in reality this is such an "unknown" that it is almost impossible for a contractor to predict with any certainty, with the likely result that the employer will overpay.

CO-OPERATION (HRBS/NON-HRBS)

Although the new regime presumes co-operation and information sharing between the parties to a construction project, related parties (such as Accountable Persons responsible for neighbouring "sections" who may require information concerning the works to comply with their statutory duties) and the BSR, there is no express statutory obligation requiring such behaviour. Therefore, it is sensible to include a general obligation of co-operation in relevant contracts. This should be uncontroversial.

For an example of "co-operation" drafting, see:

- Standard document, Schedule of amendments to JCT Design and Build Contract, 2016 Edition: Drafting note: BSA 2022: general duty to co-operate with the BSR and other parties.
- Standard document, Schedule of additional amendments to JCT Design and Build Contract, 2016 Edition for a higher-risk building: Drafting note: Clause 2.8B: sharing relevant building safety information.

GATEWAYS 2 AND 3 AND NEW DOCUMENTS AND SYSTEMS (HRBS)

Various documents need to be created and maintained during the HRB design and construction phase and be submitted as part of the gateway 2 and 3 applications. Apart from the mandatory occurrence reporting (MOR) system, the statutory obligation to create and maintain these documents and make these applications sits with the employer.

If the employer intends to create and maintain these documents itself and make such applications then it will still require input from the contractor and consultants, as the case may be. It therefore makes sense to expressly provide for this in the contract.

In the more likely scenario that the employer will want the contractor to create and maintain these documents and systems and also make the gateway 2 and 3 applications, then this must be expressly stated in the contract, as well as an obligation to provide copies of these documents to the employer on request. In addition, the consequences of delay when making these applications must be addressed.

For example drafting that addresses this issue, see Standard document, Schedule of additional amendments to JCT Design and Build Contract, 2016 Edition for a higher-risk building: Drafting note: Sub-clause 2.1.7: application for gateway two and gateway three approval, Drafting note: Sub-clauses 2.7.6 and 2.7.7: documents required for gateway two and gateway three and Drafting note: Clause 2.27: completion certificate is a condition precedent to practical completion.

This seeks to preserve as far as possible the existing risk allocation under JCT contracts, namely that the contractor deals with building control as part of carrying out and completing the works. We anticipate that the contract programme will take account of the BSR approval periods at gateways 2 and 3. In other words, this is a project risk that is programmed and priced at the outset. While this drafting proposes that gateway 3 approval is a condition precedent to achieving practical completion, the contractor is entitled to relief under the contract if any delay in obtaining such approval is caused by the employer or the BSR does not give its approval within the statutory period through no fault of either party.

For more information about the gateways regime, see Practice note, BSA 2022: higher-risk buildings and the gateways regime.

MANDATORY OCCURRENCE REPORTING (HRBS)

Before construction starts, the PC and PD have a statutory obligation to establish a MOR system to enable those undertaking work to report safety occurrences to the PC and PD, which must then be reported to the BSR. The system must be maintained throughout the design and construction phase.

The employer has a statutory duty to take all reasonable steps to satisfy itself that the person appointed is able to fulfil these statutory requirements.

While the PC and PD have a statutory duty to set up and run such a system, given the new regime is in its infancy, it would seem sensible to include (brief) contractual provisions that track the statutory obligations to make sure the PC and PD are clear what they need to do.

For an example of drafting that addresses this, see Standard document, Schedule of additional amendments to JCT Design and Build Contract, 2016 Edition for a higher-risk building: Drafting note: New clause 2.42: mandatory occurrence reporting.

For more information about the duty to establish and maintain the MOR system, see Practice note, BSA 2022: dutyholder regime: What additional responsibilities do dutyholders have in relation to higher-risk buildings?.

CONTROLLED CHANGES (HRBS)

After the gateway 2 application has been approved, any changes made to the application must be addressed in a specific way depending on the type of change. These changes are defined in the legislation as "controlled changes" and are further broken down into major changes, notifiable changes and recordable changes. If a major change is made, the change cannot be implemented until the BSR has approved it. The timeframe for approval is six weeks from the date the application was received. If a notifiable change is made, the BSR must be informed of the change but work can proceed at risk. All other changes (recordable changes) simply need to be logged in a change control log.

Some may take the view that the procedure for controlled changes is set out in statute and therefore the parties simply need to comply with statutory requirements with no amendments to the contract required. But this does not take account of the potential time and cost impact where the BSR rejects a change control application.

While most UK standard forms address delay caused by statutory authority rejection of applications, none of them directly get to grips with the various delay scenarios that arise in the context of controlled change applications.

For example, the current position under JCT Design and Build Contract, 2016 Edition (DB 2016) is that if a major change application was made by the contractor and the application was defective

due to contractor fault and so rejected, the contractor is entitled to claim time and money. This may of course be what the parties intend, but care should be taken when using such standard forms to examine the various scenarios to check that the time and money consequences match what the parties intend.

For an example of drafting that addresses the controlled changes regime, see Standard document, Schedule of additional amendments to JCT Design and Build Contract, 2016 Edition for a higher-risk building: Drafting note: Clause 5.1.3: Major Change and Notifiable Change and Drafting note: Clause 5.8: change control process for Major Change and Notifiable Change.

OTHER ASPECTS OF THE BUILDING SAFETY REGIME THAT PARTIES MAY WISH TO ADDRESS IN THEIR CONTRACTS

The new building control regime is not the only regime that UK standard forms need to take into account. The BSA 2022 introduces other changes that parties may choose to legislate for in their contracts. These include:

BUILDING LIABILITY ORDERS (BLO) AND REMEDIATION CONTRIBUTION ORDERS (RCO)

The BSA 2022 introduces new ways in which the cost of defective work can be recovered. BLOs and RCOs allow parties seeking to recover such costs to pierce the corporate veil and pursue the original developer and their "associated person" or "associate" as defined by the BSA 2022 where the relevant current developer and/or landlord cannot be pursued for whatever reason.

Original developers and associates faced with such an order may find themselves out of pocket and unable to recover such costs from the contractors or consultants because they have disposed of their interests in the project. Therefore, employers (and their "associates") may wish to include provisions in their contracts to allow them recourse against third parties in this scenario.

For more information, about BLOs and RCOs, see Practice notes:

- BSA 2022: building liability orders and information orders.
- Building Safety Act 2022: implied lease terms and recovery of costs relating to building safety: Remediation contribution orders.

EXTENSION OF LIMITATION PERIOD UNDER THE DEFECTIVE PREMISES ACT 1972 AND SECTION 38, BUILDING ACT 1984

The BSA 2022 extends the limitation periods under the Defective Premises Act 1972 (DPA 1972) and section 38 of the Building Act 1984 (BA 1984) (not yet in force) to 15 years.

To allow recourse against the relevant contractor or consultant, should an employer face such an action, prudent employers may wish to amend their contracts to provide them with contractual

recourse, synonymous with the statutory liability period, against the contractor or consultant for breach of their obligations to carry out the works or services that results in a claim under the DPA 1972 or section 38 of BA 1984. The terms of the PI insurance cover should likewise be extended and amendments made in all related contracts.

For further information, see Practice note, BSA 2022: drafting issues for construction contracts: Limitation periods.

FINAL THOUGHTS

As the new building safety regime beds in and industry becomes familiar with what it is required to do, and as standard forms are updated to take account of its key elements, then it is likely that there will be no need for such extensive bespoke amendments to be added to contracts. It may be that in 10 years' time, building safety requirements are relegated to one line in the contract with the detail set out in the ERs. However, for now, at the start of the new regime, it is prudent to include these.

A version of this article was published in PLC Construction on 18 March 2024

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