

Insights

JCT 2024 EDITIONS: KEY CHANGES IN THE JCT'S NEW SUITE OF CONTRACTS

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SUMMARY

An article, first published in PLC which analyses the key changes introduced by the JCT in its Design and Build Contract, 2024 Edition, the first of the JCT's 2024 contract families to be published.

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

OVERVIEW

Standard forms tend to be drafted generically; to stand the test of time; to not require amendment at the first sign of change.

Since its introduction seven years ago, the JCT 2016 suite of contracts has been the prevalent form for UK development projects and it has been tested to its limits by one of the most turbulent times for the industry in the UK.

In the last few years, the construction industry has been forced to navigate a global pandemic, industry-wide shortages and supply chain issues, market shifts in relation to how notices are served and contracts executed. Added to this, we have seen fundamental changes to regulation: for example, the new building safety regime, protections for insolvent companies and the introduction of new tax regulation. This is not to mention important developments in case law such as Triple Point and cultural changes driven by the Construction Playbook and its private sector counterpart, Trust and Productivity with its focus on collaboration.

For more information about these issues and their impact, see:

- *Insight: [Supply shortages and the impact on construction projects](#).*

- *Insight: [Electronic execution: Another "new normal"?](#).*
- *Insight: [BSA 2022: recommended changes to construction contracts](#).*
- *Insight: [Supplier beware: the CIGA 2020](#).*
- *Insight: [The VAT reverse charge is coming soon. So what else is new?](#)*
- *Insight: [Third time lucky: Supreme Court allows recovery of liquidated damages in Triple Point v PTT](#).*

Legal updates:

- [Government publishes updated Construction Playbook](#); and
- [Private sector construction playbook published](#).

The 2016 suite has in the main part proved to be robust against the scale of change and while parties might have chosen to amend it to reflect their bargaining positions, the form itself, for the most part, did not require amendment to work legally (although it does require revision to fully reflect the changing legislative landscape (for example, building safety and the Corporate Insolvency and Governance Act 2020 (CIGA 2020)).

Having said all this, it was undoubtedly time for the JCT to produce an updated suite to more accurately align with recent changes to market positions. On 17 April 2024, the JCT published the first of its 2024 Contract families: the design and build family comprising the Design and Build Contract (DB 2024), the Design and Build sub-contract Agreement and Conditions and accompanying guides for each form.

This article considers some of the key changes from the Design and Build Contract, 2016 Edition (DB 2016). It does not discuss every single change as that would be to replicate Practical Law's excellent summary of the changes. For more information, see *Practice note, [JCT 2024 Editions: key changes](#)*.

For specimen, read-only copies of JCT's 2024 Edition contracts, see *Practice note, [JCT forms of building contract, 2024 Editions](#)*.

BUILDING SAFETY

Minimal drafting updates have been included to take account of the recent building safety legislation with a focus on duties under Part 2A of the Building Regulations 2010 (BR 2010). Other small changes:

- Clarify that the Contractor should serve the BR 2010 notices.

- Introduce an obligation on the Employer to provide the Contractor with any information required by the BR 2010
- Clarify that the BR 2010 notification and inspection fees are to be paid by the Contractor and are its responsibility.
- Introduce a new provision that subcontracts must comply with the BR 2010.

In its separate note on building safety, the JCT explains this approach on the basis that such reforms are not relevant to all projects that may use the JCT forms. It recognises in certain circumstances namely, higher-risk building (HRB) projects, that additional building safety drafting may be required.

This approach is understandable – the nature of a standard form is that it needs to be generic. However, the building safety changes for non-HRBs do not cater for matters such as the declarations required from the Part 2A dutyholders (Building Regulations Principal Contractor (BR PC) and Building Regulations Principal Designer (BR PD) when applying for the Building Regulations final certificate (without an express contractual obligation, there is no statutory obligation on these entities to provide such declarations), building liability orders, remediation contribution orders or extended limitation periods introduced by the Defective Premises Act 1972 (DPA 1972) and the (yet to come into force) section 38 of the Building Act 1984 (BA 1984).

There is also the problematic conflation of the roles of the PC and PD under the Construction (Design and Management) Regulations 2015 (CDM PC and CDM PD) with the BR PC and BR PD with one definition of "Principal Contractor" and "Principal Designer" and the merging of the duties for each role in clause 3.16. The JCT looks to assume that the same entities will carry out these roles.

This assumption is probably based on regulation 11D(2), BR 2010. This provides that the client can certify that the person who is the CDM PD or CDM PC is also the BR PD and BR PC, respectively. The presumption must be that the JCT finalised this drafting approach prior to the HRB regime coming into force, because this is not what is happening in market now that the HRB regime is in operation: it is rare to see a CDM PD agreeing to carry out the role of BR PD primarily because of concerns over competence levels and procuring insurance.

As the regime beds in, perhaps the CDM PD will start performing the role of the BR PD but, in the meantime, some surgery is required to the JCT 2024 contract drafting to split out the roles of CDM PC/PD and BR PC/PD. Well-advised parties should make further amendment if using these forms to ensure they are adequately protected.

For more information, see Insight: [*BSA 2022: recommended changes to construction contracts \(Building regulations dutyholder regime \(HRBs/non-HRBs\)\)*](#).

For more information about the dutyholder roles under CDM 2015 and Part 2A of BR 2010, see Practice notes:

- [CDM 2015: Construction \(Design and Management\) Regulations 2015](#).
- [BSA 2022: dutyholder regime](#).

COLLABORATION

The JCT has included an express obligation to collaborate in good faith (*Article 3*). While such an obligation existed in the DB 2016 as a supplemental provision, the decision to make it mandatory is a major change. For a detailed exploration of what this change may mean in practice, see [Insight, NEC and JCT good faith compared](#).

ESG

As with the collaborative provisions, another future proofing move by the JCT is to move the supplemental provision on sustainable development and environmental considerations into the main body of the contract with the Contractor now "encouraged" to suggest economically viable amendments to the Works which may result in an improvement in environmental performance and sustainability (*clause 2.1.5*). Provision is also made for the supply of environmental impact information in relation to materials and goods by the Contractor (*clause 2.2.2*).

The JCT is right to recognise the move in some quarters of the market towards the inclusion of express ESG drafting since 2016. However, the provisions it has included are unlikely to be sufficient for most parties keen to build in adherence to environmental standards. NEC Option X29 gives a good sense of the level of detail required. The proposed clause also does not make any reference to the "S" or the "G" aspects of ESG.

However, it is worth noting that the JCT has promised more model clauses on environmental performance and sustainability in the PCSA guidance (yet to be published). It will be interesting to see exactly what they propose.

For information on climate change clauses generally, see *Practice note, [Climate change clauses for construction contracts](#)*, and on NEC Option X29, see [NEC secondary options](#).

RELEVANT EVENTS AND MATTERS

A new "epidemic" Relevant Event has been included and the "statutory powers" Relevant Event has been expanded. Both of these Relevant Events are listed as "optional" Relevant Matters in the Contract Particulars and as grounds for termination by either party in Section 8. While a welcome addition, the inclusion of these provisions merely represents what well-advised parties have been negotiating for some time.

It is slightly surprising so much attention has been spent on epidemics given the height of COVID-19 was four years ago and the last time there was a global epidemic was in 1919, although the JCT's view, outlined in its on-line launch event on 1 May 2024, is that more epidemics are likely in the future. Whether that proves to be the case remains to be seen, but, putting that conundrum aside, failure to define "epidemic" or even prescribe where the "epidemic" may take place or that it must have a "direct" effect on the execution of the Works means that some amendment may be prudent for well-advised parties. If only the same amount of attention had been accorded to building safety.

Having said that, the changes to statutory powers will be useful for building safety although the expansion to include guidance from the Construction Leadership Council (CLC) is too narrow for these purposes. The CLC doesn't tend to issue building safety guidance; this tends to be from the BSR, HSE or the Construction Industry Council (CIC). Here as well, bespoke amendments may well be required.

ASBESTOS – WIDENING THE PROVISIONS

The JCT has widened clause 3.15, which deals with the discovery of antiquities to include UXO, asbestos and contaminated land.

While the inclusion of UXO makes sense, the inclusion of asbestos and contaminated land undermines existing site conditions clauses that are commonly included in building contracts for UK projects.

Asbestos and contaminated land are not something that are typically discovered during excavations but rather before; the parties should be aware of them (or at least the risk of them) before the excavation and have agreed how the time and costs associated with their removal are to be dealt with. Their presence should not necessarily give rise to an automatic Relevant Event and Relevant Matter.

EXCLUSION OF FITNESS FOR PURPOSE AND MODEL OVERALL LIABILITY CAP

JCT contracts state that the level of design liability is reasonable skill and care. DB 2024 includes a new clause that excludes fitness for purpose in respect of design (*clause 2.17.1*). It retains the optional provision in the Contract Particulars for an overall cap on the Contractor's liability for loss of use, loss of profits and other consequential loss arising from any inadequacy in the Contractor's design work (*clause 2.17.3*).

The inclusion of these provisions appears to be driven by the contractor market, possibly as a reaction to the Supreme Court decision in *MT Højgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd [2017] UKSC 59*, offering contractors a greater degree of certainty over potential risk exposure. It is likely these additions may not be as well received by employers who, particularly

in design and build contracts, are paying a premium for a full wrap of design and construction liability and responsibility.

For more information, see *Legal update, [Liability when international standard is incorrect \(Supreme Court\)](#)* and *Blog post: [Losing the sympathy vote: Robin Rigg revisited](#)*.

EXTENSIONS OF TIME – STREAMLINING PROCEDURES

The JCT has introduced amendments to the procedure for advancing and determining Contractor claims for extensions of time (*clauses 2.24.4 and 2.25.2*). This includes express provision for the Employer to request (within 14 days of the initial notice of delay or receipt of particulars) further information from the Contractor in support of a claim to which the Contractor must respond. Following receipt of the particulars (or further information), the Employer now has up to eight weeks to notify the Contractor of its decision (down from the 12 weeks previously provided for).

It will be interesting to see how parties administer extension of time claims with these changes. If they promote contemporaneous and early assessment of Contractor claims, that is to be welcomed.

NOTIFICATION OF DISPUTES

A new clause 9.1 introduces what was previously found in the supplemental provisions of the DB 2016: a requirement for the parties to notify each other of matters that are likely to give rise to a dispute; and a requirement for the parties' senior executives to meet as soon as practicable for "direct, good faith negotiations" to resolve the matter. This is in line with the other changes promoting collaboration amongst the parties. Although such a provision cannot serve as a precondition to referral of a dispute to adjudication, the spirit of the clause is to be welcomed.

TERMINATION ACCOUNTING

Section 8 has been amended to make express provision for the service of the payment notices required by the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996). This does not change the basic principles for determination of the final account following termination but introduces into the procedure and timescales for the termination account, express provision for a due date, final date for payment and pay less notices in respect of the final payment. Amendments introduced to clauses 8.7, 8.8 and 8.12 introduce different due dates depending on the basis of termination and whether or not the Employer procures completion of the works after termination.

CONCLUSIVENESS OF FINAL ACCOUNT

DB 2016 provided that the effects of the Final Statement could be suspended "in relation to the subject matter of any adjudication, arbitration or other proceedings". JCT has concluded that this

wording might lead to disputes about the degree of suspension. DB 2024 has been amended to take out the reference to the subject matter of any proceedings. This allows for a full suspension of conclusivity and seems to be in line with the trend of decisions from the courts that have been slow to shut out challenges to the Final Statement over jurisdictional or procedural technicalities.

TRIPLE POINT

Confirming the approach in *Triple Point Technology Inc v PTT Public Company Ltd* [2021] UKSC 29, DB 2024 has been updated to include a new clause to clarify the position in relation to liquidated damages where the Contractor's employment is terminated when the Contractor is in culpable delay.

If the termination occurs before practical completion, liquidated damages will apply from the Completion Date up to the time of termination with accrued liability surviving termination. After termination, damages incurred by the Employer due to further delay should be claimed as general damages. Although this reflects the Supreme Court's decision on the matter, express provision to that effect in the JCT form is welcome.

For more information, see:

- *Legal update, Supreme Court adopts commercial interpretation of liquidated damages clause.*
- *Insight: Third time lucky: Supreme Court allows recovery of liquidated damages in Triple Point v PTT.*

INSURANCE

Following the approach already taken in relation to Insurance Options B and C, where JCT Insurance Option A applies (Contractor takes out all-risks insurance), reinstatement work shall be treated as a Change but (and this differs from the position that applies where Options B or C are used) the Contractor is only entitled to an extension of time, not additional loss/expense. As long as the insurance has responded this seems a reasonable position and it is open to the Employer to take out its own insurance for "lost" liquidated damages that it would no longer be entitled to.

FINAL THOUGHTS

There is not much by way of substantive or revolutionary change in DB 2024 and pleasingly the JCT has not played around with numbering/structure of the contract, which means it will be easier for industry to build familiarity with and adopt the new form.

Interestingly, many of the changes that industry speculated might be included for example, changes to the retention provisions or inclusion of drafting to address the VAT reverse charge, were not included.

The new 2024 suite does not look to present significant areas in respect of which contractors may seek to engage in protracted negotiations. For example, the changes relating to design responsibility or the new Relevant Events/Matters for epidemics and change in law, reflect points that well-advised parties have been negotiating for some time.

While much of the rest of the 2024 suite is yet to be released, we think it likely that these other forms will follow a similar approach to the changes in the design and build family to ensure consistency.

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