

TREAD CAREFULLY - JCT 2016 CONTRACTS

The JCT has started publishing its 2016 updates. So far the Minor Works Building Contracts (both with and without design) and the Design and Build Contract have been updated, in each case with related sub-contract documentation. Updates to the rest of the suite are anticipated over the next few months. Care needs to be taken with the new suite, particularly with the revised loss and expense provisions in the Design and Build Contract 2016.

The main thrust of the changes, particularly in the Design and Build form, is to bring the contracts closer to market practice. In terms of the Design and Build Contract, market practice updates include:

- ◆ The addition of an option for a bond and/or parent company guarantee - the parties will need to agree the form of bond/PCG as the JCT has not published its own forms.
- ◆ The addition of sub-contractor third party rights – this is particularly welcomed as the accompanying changes to the JCT forms of sub-contract should reduce the risk of third party rights not being properly incorporated into sub-contracts. Care will still however need to be taken to ensure that sub-contracts do meet the requirements of the employer in terms of classes of beneficiary, the form of sub-contractor third party rights and the mechanism for these to be granted.
- ◆ Recognition that the contractor may be obliged to comply with a BIM Protocol – the BIM protocol itself will need to be prepared by the project team and included in the contract documents.

The most significant change in the updated Design and Build form comes however in the loss and expense provisions, with the inclusion of a specific timeframe for the ascertainment of loss and expense claims.

The 2016 edition requires the contractor to submit its initial assessment of the likely effect of the relevant matter as soon as reasonably practicable and then provide a monthly updated assessment. The employer (usually through the employer's agent) then has 28 days (in respect of the contractor's initial assessment) and 14 day in respect of subsequent assessments to ascertain the loss and expense claim. The contract provides that the amount ascertained by the employer (on the basis of its monthly assessment) is added to the contract sum. It appears

that the determination of the loss and expense claim cannot be deferred until there is a clear picture as to whether the contractor has been delayed or disrupted by the relevant matter and, if it has, the final effect of that delay or disruption. It is not expressly stated whether the employer can challenge the amount of any loss and expense awarded at a later date.

The drafting also leaves open the question of whether the obligation for the contractor to promptly notify its loss and expense claim and to provide monthly updates is a condition precedent to its entitlement to loss and expense. The drafting suggests this is the case as it states that the contractor's entitlement to loss and expense is subject to compliance with the notification provisions in clause 4.20 of the contract. It is not however clear if this is the intention of the JCT - it is certainly not mentioned in the accompanying JCT guidance note.

In both the Design and Build and the Minor Works forms, changes have been made to the insurance arrangements, including an option for the parties to agree their own insurance arrangements where works are being carried out in an existing structure. Whilst the new drafting recognises the complications tenants may experience when carrying out fit out works, resolving insurance arrangements in these circumstances will still require careful thought and negotiation.

Further changes in the revised forms include consolidated drafting dealing with payment notices, pay less notices and final dates for payment which apply to both interim and final account payments and changes which affect when the due date will occur. As well as incorporating the CDM 2015 amendments published in 2015, the revised forms incorporate provisions (mainly relevant to public sector employers or employers caught by the Public Contracts Regulations) from the JCT Public Sector Supplement 2011 relating to fair payment and transparency and relevant aspects of the Public Contracts Regulations 2015.

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This note is intended to provide general information about some recent and anticipated developments which may be of interest.

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