



JCT Design & Build Contract 2024 – Key Updates Summary



JCT has released its 2024 edition of the Design and Build contract (and sub-contract) with updates to the other standard forms to follow in due course. Below sets out an overview of the key changes.

Modernisation of the contract

The JCT Design & Build Contract 2024 has updated practices to incorporate gender-neutral language and acknowledge the validity of electronic execution. This aligns with the increasingly prevalent tendency to use DocuSign and other similar tools. Clause 1.7 introduces email as a valid method for service of notices and communications. In light of this, it is essential for employers and contractors to review and modernise their existing protocols regarding the issuance and service of certificates, notices, etc., to mitigate the risk of documents with contractual ramifications getting lost or marooned in inboxes.

Additionally, in alignment with a commitment to sustainability and the environment, Clause 2.1.5 encourages contractors to propose environmentally beneficial changes to the works. This is however a rather vague and woolly obligation. Clause 2.2.2 requires contractors to provide information on the environmental impact of the goods and materials they select. Article 3 emphasises the importance of cooperative and collaborative working relationships, fostering a spirit of trust and respect among all parties involved.

Collaborative working (Article 3)

Parties are obliged to co-operate and collaborate, in good faith and in a spirit of trust and respect.

Statutory Provider & Requirements

The term "Statutory Provider" (Clause 1.1) replaces "Statutory Undertaker," with "local authority or statutory undertaker" now referred to as "person." Similarly, the definition of Statutory Requirements (Clause 1.1) has been updated to reflect this change. For Building Regulation duty holder roles, the identity of the principal contractor and principal designer for Part 2A of the Building Regulations 2010 (BR2010) must be specified (Article 7). The Employer is required to provide the Contractor with necessary "building information" under Regulation 11(A)4 of BR2010 (Clause 2.7.2).

Additionally, there are new obligations for both the Employer and Contractor regarding duty holder roles under BR2010 (Clause 3.16).

These changes are designed to bring the base drafting of the standard form into alignment with the new Part 2A of BR2010 brought into effect by the Building Regulations etc. (Amendment)(England) Regulations 2023.



Liability and Obligations

For many years, it was established law that a building contractor does not have an implied obligation of fitness for purpose under a building contract. This principle is explicitly upheld in JCT Contracts, where the Contractor's duty is limited to exercising reasonable skill and care, without a fitness for purpose obligation. This common law position is now expressly contained in clause 2.17.2 of the 2024 Design and Build (DB) form which expressly provides that the Contractor is under not duty of care that requires its design to be fit for purpose.

A practical outcome of the explicit exclusion of a fitness for purpose obligation may be increased challenges to provisions in Schedules of Amendments to the 2024 Design and Build (DB) form, which enhance the Contractor's design liability. These provisions are often contested on the grounds that they imply a fitness for purpose liability. In light of the base form now expressly excluding such obligations, Contractors and their professional indemnity brokers are likely to be more assertive in their opposition to any amendments that could dilute this express provision.

Under Clause 2.17.1, the Contractor is committed to a reasonable skill and care obligation for its design. Additionally, in compliance with Statutory Requirements, Clause 2.17.2 states that the Contractor's duty is limited to exercising reasonable skill and care, without a fitness for purpose obligation. This clause also extends the Contractor's liability under the Defective Premises Act 1972 (DPA) for work on existing dwellings.

Furthermore, the Contractor faces new obligations, and the Employer gains additional rights if asbestos, contaminated material, or unexploded ordnance is discovered, similar to the existing provisions for antiquities (Clauses 3.15.3 and 3.15.4). In short, the Contractor is obliged to notify the Contractor of the discovery of any such materials and to comply with the Employer's instructions in this regard.

Extension of time, Loss and Expense & Delay liquidated damages

The Employer now has 14 days to request additional information following a Contractor delay notice, a change from no prior time limit (Clause 2.24.4). The Employer must notify their extension of time decision within 8 weeks of receiving the relevant information, reduced from the previous 12 weeks (Clause 2.25.2).

New Relevant Events have been introduced which include dealing with asbestos, contaminated material, unexploded ordnance, and related Employer instructions (Clause 2.26.4). Following the covid pandemic, a new Relevant Event has been introduced in relation to epidemics affecting labour, services, or materials (Clause 2.26.7). In addition, the Relevant Event concerning changes in law has been broadened (Clause 2.26.8).

The JCT has also included new Relevant Matters for loss and expense which include dealing with asbestos, contaminated material, unexploded ordnance, and related Employer instructions (Clause 4.21.3). Additionally, if specified in the Contract Particulars, epidemics impacting labour, services, or materials (Clause 4.21.6) and changes in law (Clause 4.21.7) are now Relevant Matters.



The general effect of these changes should be to speed up the process of arriving at a decision under the Contract regarding a Contractor's entitlement to Extension of Time and/or Loss and Expense and to widen the scope for contractor's claims. Resistance to provisions in Schedules of Amendments that revert to the previous time scales is likely to be high.

The new 2024 DB expressly provides that if the contract is terminated while the Contractor is in culpable delay, the Contractor is liable for liquidated damages only up to the termination date. General damages must be claimed for any period after the termination date (Clause 2.29.5).

Termination

When the main contract terminates, sub-contracts automatically terminate as well, unless step-in rights are exercised under a sub-contractor collateral warranty or third-party rights. During this period, the Sub-contractor can suspend performance, which is treated as an Employer instruction (Clause 3.4.1).

The definition of insolvency has been updated (Clause 8.1).

Termination payments now include Construction Act-compliant payment terms, such as due date, final date for payment, payment notice, payment counter notice, and pay less notice, along with a contractual right to late payment interest (Clauses 8.7.5, 8.8.2, 8.12.4, and 8.13).

New termination suspension events include epidemics, and the change of law event has been updated, aligning with the new definitions of Relevant Events and Relevant Matters (Clause 8.11).

Notification & Negotiation of Disputes

Parties must now inform each other of any potential disputes and arrange meetings to negotiate a resolution (Clause 9.1). This requirement was formerly an optional provision. This largely mirrors the obligation under the Pre-Action Protocol for Construction & Engineering Disputes for parties to a construction dispute to attend a without prejudice meeting prior to proceedings being issued.

These provisions do not really any contractual teeth, however. Albeit that there is an express obligation to meet "As soon as practicable" for negotiations there is no outright prohibition on issuing proceedings prior to discharging that obligation. Neither do the relevant provisions prevent the parties from exercising their rights to adjudicate "at any time".

At this point it is unclear whether the courts would impose costs sanctions on the offending party if they fail to attend settlement meetings prior to issuing proceedings. At some point we can expect some judicial guidance on this point. It is likely that the parties to the contract may use this obligation to meet as a purely box ticking exercise in any event.



Professional Indemnity Insurance (PI)

Clause 6.15 of the Contract Particulars has been updated to allow parties to detail sub-limits within the total PI coverage and list any policy exclusions.

Clause 6.15 in effect, is just a development and extension of what has been happening for some time, driven by PI insurers. Most Schedules of Amendments which would be regarded as reflecting the “Market Position” will provide for sub-limits, usually in relation to pollution, contamination, and asbestos. This provision widens the potential scope of sub-limits.

Contractors and Employers alike need to examine these issues carefully in relation to each relevant contract when considering appropriate PI levels and when looking at proposals around the limitation of liability. Changes in the nature and extent of PI cover will almost always impact the balance of risk under a Design and Build (D&B) Building Contract.

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