JCT 2016 Design and Build contracts – key points to note

Following on from the publication of the JCT 2016 Minor Works contracts in May 2016, the Joint Contracts Tribunal (“JCT”) has updated the Design and Build contract forms, including the Design and Build Contract (DB), Design and Build Sub-Contract Agreement (DBSub/A) and Design and Build Sub-Contract Conditions (DBSub/C).

Design and build remains one of the most popular forms of procurement in the UK building industry. It is predominantly suitable for use on larger works where the Employer has defined its requirements and where the Contractor is appointed, not only to carry out the works, but also to complete the design for them in accordance with those requirements. The DB Contract must be administered by an Employer’s Agent, which for sophisticated employers might be an employee but is more commonly an independent consultant, quantity surveyor or architect engaged under a suitable form of appointment.

The amendments to the DB Contract include the following key features, as signposted by the JCT in its February 2016 announcement:

+ revised insurance provisions where the works are to be carried out in existing structures, to allow greater flexibility;
+ simplified payment provisions with established Interim Valuation Dates (“IVD”);
+ adjustments to incorporate the changes under the CDM Regulations 2015;
+ amendments to include provisions to reflect aspects of the Public Contract Regulations 2015;
+ the inclusion of provisions for the Contractor to provide security (either by way of performance bonds and/ or parent company guarantees); and
+ the introduction of option clauses in relation to BIM.
Equivalents of the features listed above (other than the requirement to provide security) also appear in the amendments made to the JCT 2016 Minor Works contracts, on which we commented in an earlier briefing note [here](#).

Other detailed changes made to the DB Contract include the simplification of the Contract Particulars; the amendment of the scope of the Employer’s licence to use the Contractor’s intellectual property; and requirements for the prompt initial notification and timely and orderly settlement of any loss and expense claim by the Contractor, including an obligation on both Contractor and Employer to maintain an ongoing dialogue in respect of any changes to those claims.

Significant amendments in respect of third party rights in favour of beneficiaries (most notably funders, purchasers and tenants) have been made, including by way of the removal of the previous Contract Particulars Part 2: Third Party Rights and Collateral Warranties. The Employer is now left to decide the form and content of the third party rights it requires. Unlike previous versions, sub-contractors may be required to provide third party rights to beneficiaries by way of a Third Party Rights Schedule rather than collateral warranty. The JCT has published model forms of third party rights schedules. Unlike in previous versions of the DB contract, these include a net contribution clause in favour of the Contractor.

One amendment that Employers (and particularly Employers’ Agents), must be alive to is the establishment of IVD in order to comply with the Government’s Fair Payment Campaign. Under the Contract Particulars, the IVD moves to the nearest business day if it would otherwise land on a public holiday or weekend. This in turn will impact on the date for issue of payment and pay less notices and on the final date for payment. These dates are of paramount importance in respect of interim payments, particularly in light of recent judgments by the TCC in relation to so-called “smash and grab” adjudications, which largely concern the effectiveness (or otherwise) of the payment notices in issue. Employers must be aware that failure to serve a payment notice in accordance with the contract may mean that the sum notified by the Contractor will become payable even if it might not otherwise have been due.

Design and build procurement is popular largely because Employers (and their funders) like to have a single point of responsibility for both design and construction of the works. However, the standard DB Contract does not create that single point of responsibility. As in the previous editions of the DB

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Contract, there is no provision for novation of the design team to the Contractor and the Contractor is not responsible for any deficiencies in the Employer’s Requirements. This was a deliberate decision by the JCT, and is now evidenced by the new net contribution clause in favour of the Contractor which reflects that the Employer’s consultants may be jointly liable with the Contractor where a design defect emanates from the Employer’s Requirements. This explanation is given in the DB Guide 2016.

It is likely that Employers (and their funders) will continue to insist on bespoke amendments to the standard form with a view to making the Contractor a single point of responsibility. It is here where Contractors may come unstuck, as the risk profile of the Building Contract can alter substantially from the standard form as a result of such bespoke amendments.

The JCT will continue to update its suite of documents throughout 2016 and we shall provide further updates as and when those contracts become available.

Solicitors at Beale & Company have substantial experience of advising Employers, funders and Contractors in respect of both standard form JCT DB contracts and bespoke amendments to the same.

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