

The JCT Design & Build Contract 2024

fieldfisher

The eagerly awaited JCT Design & Build Contract 2024 ('DB2024'), the first contract in the JCT's 2024 suite (alongside the respective subcontract), was published on 17th April 2024 together with the updated Design and Build Guide and we set out below some of the key changes introduced.

Part 2A of the Building Regulations

DB2024 includes, in a new Article 7 and in clause 3.16, drafting in respect of Part 2A of the Building Regulations 2010 (Part 2A), as introduced by the Building Regulations etc. (Amendment) (England) Regulations 2023. Part 2A sets out a framework of safety duties and competence requirements for persons involved in the procurement, design and undertaking of building work to which Building Regulations apply. Specifically, Article 7 identifies the Building Regulations Principal Designer and Principal Contractor and, more generally, DB2024 requires each of the contracting parties to comply with the applicable provisions of Part 2A, which came into force on 1st October 2023. This would include, for example, the requirement on

the client to appoint competent designers and contractors along with specific requirements on the parties, including as contractor and principal contractor, in respect of their roles and responsibilities for the planning, managing and monitoring of construction projects. The parties' obligations under Part 2A are in addition to their obligations in relation to the CDM Regulations 2015.

Notices and electronic signing

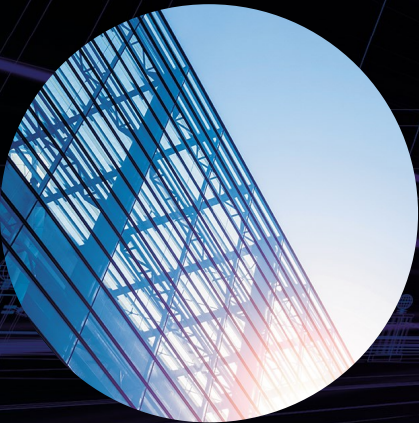
DB2024 has expanded the notice provision in section 1, clauses 1.7.3 and 1.7.4.2, by providing for the service by email of notices to the recipient's address as stated in the

corresponding clause in the Contract Particulars, or to such other email address as the recipient may from time to time notify to the sender. This change is also reflected in the third party rights schedules. It is perhaps also fitting that DB2024, as part of this modernising process, now also references the work of the Law Commission and specifically its report: "Electronic execution of documents" which seeks to clarify the legal status of electronic signatures and the Law Commission's conclusion that such signatures are valid for both simple contracts and deeds with certain provisos. The JCT acknowledge the use of electronic signing including by E-signature platforms, but does not endorse any platform.



Design Work – liabilities and limitation

Clause 2.17.1 has been deleted and replaced with two provisions, 2.17.1.1 and 2.17.1.2. The former now contains a warranty from the Contractor that (subject to clause 2.17.1.2) it shall carry out and complete the design of the Works using the reasonable skill and care of a qualified and experienced architect or other appropriate professional designer. Clause 2.17.1.2 states that the Contractor shall have no greater duty, obligation or liability other than to exercise the reasonable skill and care provided for in clause 2.17.1 in respect of the design. Any fitness for purpose obligation on the Contractor's part is expressly excluded.



Extension of time provisions and relevant matters

Changes to the extension of time provisions have been introduced in DB2024. First, with amendments to alter the timetable and procedures for extensions of time in new clause 2.24.4 and amended clause 2.25.2 (the Employer is now required to notify its decision on any EOT entitlement within 8 weeks (rather than the 12 under the 2016 form), with the stated intention of streamlining and expediting the process for dealing with extensions of time and, second, by the expansion of the list of relevant events leading to an extension of time. The list now includes:

- epidemics, in the new clause 2.26.7; and
- an expanded provision for the exercise of statutory powers, in the new clause 2.26.8.

Relevant matters now also include these two relevant events as options which may be selected by the parties in the Contract Particulars by indicating that clause 4.21.6 (epidemic) or 4.21.7 (exercise of statutory power) apply, as required.



Payment or allowance of liquidated damages

In response to the Supreme Court's decision in *Triple Point Technology Inc v PTT Public Company Ltd [2021] UKSC 29*, relating to recovery of liquidated damages and general damages in the event of termination of the contractor's employment; if the Contractor's employment is terminated before practical completion, clauses 2.28 and 2.29 will apply in respect of the period between the Completion Date and the date of termination. Accordingly, subject to the service of the required notice, the Employer may require payment of or withhold or deduct liquidated damages in respect of the period between the

Completion Date and the date of termination. In respect of the period after the date of termination, no liquidated damages can be required or withheld, but the Employer may exercise any other rights it may have.

Sub-contracting

Under the amended clause 3.4 a sub-contractor's employment under a sub-contract will now not terminate immediately the Contractor's employment terminates, if the sub-contractor has conferred third party rights on a funder or the Employer, or has provided collateral warranties in their favour, with step-in rights. The sub-contractor may however suspend performance of the sub-contract from the date of termination of the Contractor's employment until the date of receipt of the step-in notice.

Termination: relating to the new and expanded relevant events

There are bi-lateral termination grounds in section 8 relating to the two relevant events referenced above. Section 8 now provides that if, before practical completion, the carrying out of the whole or substantially the whole of

the uncompleted Works is suspended for the relevant continuous period stated in the Contract Particulars, including by reason of an epidemic (clause 8.11.1.5) or by the exercise of statutory powers (clause 8.11.1.6), either party may upon expiry of the relevant period of suspension notify the other that, unless the suspension ceases within seven days of receipt of the notice, it may terminate the contractor's employment. The consequences of termination as amended include a that the Contractor provide to the Employer all documents necessary for calculating the amount due on termination.



Termination: accounting and payment

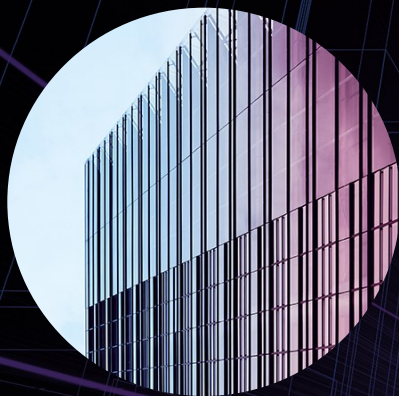
DB2024 includes a new definition of 'Termination Payment'.

Under amended clause 8.7.4, if the Contractor's employment is terminated, upon completion of the Works and making good of defects, the Employer is required to notify the Contractor of the date of completion and the date so notified is the deemed date of completion. The due date for the Termination Payment under clause 8.7.6 is two months after the date of completion; and the amended clause 8.7.6 sets out how the Termination Payment is calculated.

In circumstances where the Employer chooses not to complete the Works (or is deemed to have chosen not to complete the Works), the due date for the Termination Payment is two months after the last day that the Employer should have given the Contractor notice of his decision not to complete the Works. The Termination Payment is calculated in accordance with the clause

8.8.3.

In addition, new clause 8.13 sets out the final date for payment of the Termination Payment (in clause 8.13.1), the requirement on the Employer to give to the Contractor the Employer's Termination Payment Notice (8.13.2) and the rights and obligations in relation to the service of a pay less notice (8.13.3 and 8.14.4). The consequences of a failure to give an Employer's Termination Payment Notice in accordance with clause 8.13.2 are set out in clause 8.13.5, and the consequences of a failure to make the Termination Payment is set out in clause 8.13.6.



Termination: meaning of insolvency

The definition of insolvency under clause 8.1.4 has been

expanded (reflecting some provisions of the Corporate Insolvency and Governance Act 2020) to include a moratorium under Part A1 of the Insolvency Act 1986 (clause 8.1.4.3) and an order sanctioning a compromise or arrangement under Part 26A of the Companies Act with respect to it (clause 8.1.4.4).

Notification and negotiation of disputes, nominating body and appointors

There is included a new clause 9.1, which is designed to facilitate the avoidance of and early resolution of disputes or differences by providing for dispute resolution by senior executives of the parties. The senior executives are those nominated in the Contract Particulars or such replacement as each party may notify to the other from time to time. According to clause 9.1, the nominees are required to conduct 'direct, good faith negotiations to resolve the matter'.

The parties can now specify a nominating body or an appointor of their choosing, instead of merely selecting from the bodies listed in the contract.

This is effected by amending the Contract Particulars at clause 9.3.1 (adjudication) or clause 9.5.1 (arbitration) as required.



Asbestos, contaminated material and unexploded ordnance

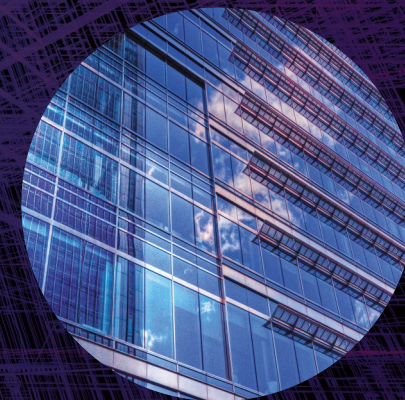
Under new clauses 15.3 and 15.4, in the event Asbestos, contaminated material or unexploded ordnance is discovered on the site, the Contractor must not disturb it, but may cease work if there is a danger to health and safety and/or life and property; and must report the discovery to the Employer who must issue instructions to the Contractor.

Statutory Provider

'Statutory Provider' replaces 'Statutory Undertaker' in DB2024 contract generally and there is also an amendment to the definition of Statutory Requirements. In both cases, where the 2016 form referred to "a local authority or statutory undertaker", DB2024 refers to "a person", which appears more widely worded.

Gender neutrality

In order to achieve gender neutrality throughout the form, a handful of otherwise non-consequential amendments have been made, such as replacing 'him' with 'the Employer' or 'the Contractor' where applicable.



PI Insurance

The Contract Particulars now provide for sub-limits within the overall level of professional indemnity cover to be stated as well as specific exclusions listed in the relevant schedule(s) (or other policy document(s)) to the relevant policy. The reference to pollution and contamination claims has been deleted from the Contract Particulars altogether.

Fluctuations

The fluctuations provisions have also been deleted altogether from schedule 7 as the printed text of the JCT fluctuations options are no longer included in the JCT contract documents. They will, however, continue to be available on-line. Accordingly, where any of the fluctuations options apply the parties should select them in the Contract Particulars in the normal way. Where bespoke fluctuation or cost adjustment formula is to be used, the document in which it is contained should be identified in the Contract Particulars.

Collaborative working, sustainable development and environmental considerations

Collaborative working, sustainable development and environmental considerations are no longer optional in the JCT Design and Build contract as DB2024 has deleted these provisions from the supplemental provisions and has instead provided for:

- collaborative working in a new article 3; and
- sustainable development and environmental considerations, in a new clause 2.1.5. I
- In addition DB2024 includes a new clause 2.2.2 which seeks to address the environmental impact of the supply and use of materials and goods which the contractor selects.

Commentary

As is perhaps the expectation, whilst some of the changes will reflect amendments that users have been including in their schedules of amendments for some time, users of DB2024 will no doubt continue as they have always done, that is to say that they will negotiate and provide for bespoke amendments to suit their projects as required. Perhaps what is equally telling is the changes that have not been made but which were perhaps anticipated – including wider Building Safety related amendments (such as provisions for the higher risk buildings regime) and the construction VAT reverse charge.

Key contacts



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